

CHAPTER III

Superior Court Compliance with the Pilot Sentencing Guidelines and Acceptance by the Criminal Justice Community

The sentencing guidelines were introduced as a pilot program to apply to all felony guilty pleas and guilty verdicts entered on or after June 14, 2004. They were to be descriptive rather than prescriptive. That is, they were based on historical sentencing data from Superior Court from January of 1996 through June of 2003. The intent of the guidelines was not to incarcerate more or fewer people than in the past or to increase or decrease the average length of prison sentences imposed. Rather, the primary purpose was to make sentencing more uniform – and hence more fair – by pulling outlying sentences in typical cases into the middle range and thereby reducing any unwarranted disparity. Two questions were presented: (1) to what extent would judges and criminal justice practitioners accept voluntary guidelines and agree to follow them; and (2) to what extent, if at all, would the guidelines alter sentencing patterns. These questions are not unrelated. Given their design, if compliance with the guidelines were high, one would expect more sentences to be pulled toward the mean. Conversely, if compliance were low, one would not expect to see much change in the substantial unexplained variation in sentencing the guidelines were intended to address. As we discuss in this Chapter, the evidence continues to show an exceptionally high rate of compliance and acceptance of the guidelines by judges, prosecutors, defense attorneys, and

the broader criminal justice community. In *Chapter IV* we demonstrate that the high rate of compliance does appear to be pulling outlying sentences toward the middle and reducing unexplained variation.

Compliance with the Guideline Recommendation

The pilot sentencing guidelines are voluntary. A judge may elect not to follow the guidelines in a particular case. In the Commission's 2005 Report, we were able to document a high degree of compliance with the guidelines in the first year of the pilot project. With additional cases completed under the guidelines in the second year, we can explore judicial compliance with the pilot guidelines more comprehensively, although more data is still needed in some areas. Before discussing the results, the following sections recap the guideline structure and data collection.



The Sentencing Grids and Compliance Terminology

As explained in our previous reports, the Master and Drug Grids were designed with a recommended sentencing range for each of sixty boxes corresponding to a particular offense severity level and criminal history score. In some boxes, a prison sentence is the only option consistent with the guideline recommendation. In some boxes, either a prison sentence or a short split sentence -- defined as a sentence in which the defendant serves a sentence of six months or less and is then released to a period of probation -- is an option. In the remaining boxes, a prison sentence, a short split sentence or probation are all options permitted by the guideline recommendation. Statutory enhancements are accommodated by raising the upper limit of prison range within the box without changing other options. Because there are extraordinary cases, where a sentence within the box would not serve the ends of justice, the guidelines contain a non-exclusive list of aggravating and mitigating factors, which permit sentencing above or below the

prison range in a given box or the imposition of probation or a split sentence in a prison-only box. In order to rely on an aggravating or mitigating factor, the judge must find it to be substantial and compelling on the facts of the particular case. In other words, it cannot be a factor that is included in the elements of the offense itself or typically is present in cases resulting in a conviction for that offense. The judge must state on the record the aggravating or mitigating factor(s) on which he or she relied in sentencing "outside the box."¹ A judge may also opt not to follow the guidelines in a case, but when this occurs the judge is encouraged to explain his or her reasons to the Commission.

The available options and relatively broad prison ranges, which preserve the judge's discretion to take into account factors other than the offense of conviction and the criminal history of the offender to fashion a fair and appropriate sentence in individual cases, are among the reasons why the Commission anticipated a high rate of compliance.² In order to be considered "compliant," as we use the term, a sentence

¹As noted, because the system is voluntary and the lists of aggravating and mitigating factors are non-exclusive, a judge may sentence outside the box based on a factor that is not one of the listed aggravating and mitigating factors. If the judge finds a comparable, non-listed, aggravating or mitigating factor substantial and compelling in a given case and says so, the sentence is deemed to be outside the box but compliant with the guideline. Over time, a recurrence of these cases may cause the Commission to add to the lists of aggravating or mitigating factors. Even if the judge finds no compelling reason to depart and simply elects not to follow the guideline in a particular case, the judge is encouraged to state why he or she departed; and if similar departures happen with some frequency in the same category of cases, the Commission may reexamine the appropriateness of the guideline recommendations for that category.

²One respected commentator has made this point succinctly: "Like all calls for just the right amount of anything, not too much and not too little, a proposal for sentencing standards that are constraining enough to assure that like cases are treated alike and flexible enough to assure that different cases are treated differently is a counsel of unattainable perfection. Nonetheless, that is probably what most people would want to see in a just system of sentencing." **TONRY, MICHAEL, SENTENCING MATTERS**, pp. 185-86 (1996).

must be consistent with the applicable guideline in all respects. Thus, in making the prison vs. probation decision (sometimes referred to as the in/out decision), a sentence to probation complies with the guidelines only if (1) the sentence falls within a box for which probation is one of the recommended options and the suspended prison sentence also falls within the range or (2) the judge expressly relies on one of the mitigating factors to depart. Similarly, a prison sentence is compliant only if it is within the prison range set forth in the applicable box or the judge expressly relies on one of the mitigating or aggravating factors to depart. For a split sentence to be guideline compliant absent a mitigating factor, the length of the imposed prison term before any time is suspended must fall within the guideline range and the portion to be served must either be within the prison range or be six months or less in a box providing the option of a short split sentence. For example, Box 6A on the Master Grid allows for a prison sentence in the range between 18 and 60 months and also allows for a short split sentence. Thus, a sentence of 36 months in prison is within the box, as is a sentence of 36 months, with all but six months suspended, followed by a period of probation; but a sentence of 12 months is not within the

box, nor is a sentence of 36 months, with all but 12 months suspended, followed by a period of probation. A so-called “long split sentence” would also be within the box, as long as the time to be served on the split sentence is at least 18 months. Thus, a sentence of 60 months with all but 18 months suspended, followed by a period of probation, is within the box because both the 60-month term and the 18 months to serve on the split are within the guideline range for that box. Finally, a sentence of 36 months, all suspended, followed by a period of probation would not be compliant with the guidelines, because probation without a split sentence is not a permissible option in Box 6A unless the judge expressly relies on one of the mitigating factors.

To summarize, the following sentences are compliant:

- a) A sentence within the appropriate box;
- b) A sentence within the appropriate box as expanded by a statutory enhancement;
- c) A sentence outside the box where there is an enumerated aggravating or mitigating reason or another substantial and compelling reason of like gravity; and
- d) A sentence agreed to and accepted under Rule 11(e)(1)(C).³

³Criminal Rule 11(e)(1)(C) permits the parties to agree upon the terms of a sentence and provides that the judge may agree to be bound to those terms once the plea is accepted. Criminal Rule 11(e)(1) states that “The prosecutor and the attorney for the defendant ... may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the prosecutor will ... (C) Agree that a specific sentence or sentencing range is the appropriate disposition of the case. Such a plea agreement is binding on the Court once it is accepted by the Court.”

Sentencing Guideline Forms

The analyses in this Chapter are based on data collected since the inception of the guideline system, the Sentencing Guideline database.⁴ During the period from June 2004 through June 2006, the Commission collected 5,454 Sentencing Guideline Forms (SGF) representing guideline recommendations and actual sentences in felony cases. A separate form is prepared for each felony count in a multi-count case. The SGF provides the offense severity group and the criminal history score, the guideline options and prison range, the actual sentence and whether or not it complied with the recommendation, the reason for departure if applicable, and certain other information about the offender and the offense.

Sentencing Guideline Forms representing counts that fell in probation-eligible boxes on both grids accounted for 65.1% (3,552 SGF) of the total number, and short-split-eligible SGF accounted for an additional 12.7% percent (695 SGF). Conversely, 22.1% (1,207 SGF) of the total fell in prison-only boxes, which typically represent more serious crimes and/or offenders with

more serious prior criminal records.⁵ Because of the relatively small number of cases in the database falling in the prison-only boxes of the Master Grid, more time is needed before we will be in a position to draw reliable conclusions about compliance with the guidelines in these cases.

2,531 SGF, or 46% of the total, represented sentences on the Drug Grid. Of those, 87% fell in probation-eligible boxes, meaning that judges had the discretion to impose probation, a short split sentence, or a prison sentence in the vast majority of drug cases. Conversely, only 46% of SGF on the Master Grid are in probation-eligible boxes.



⁴The Sentencing Guideline database is not identical to the Court Information System discussed in Chapter II, and the proportions and numbers referenced here apply only to the Guidelines database, not the entire universe of cases that the CIS contains. Unlike the CIS database, which ends in December of 2005, the Guidelines database includes sentences imposed through June 30, 2006.

⁵It is not unusual for one count in a multi-count case to fall in a prison-only box while another falls in a probation-eligible or short-split-eligible box. In such a case, the judge can impose a compliant sentence only by imposing a prison sentence within the range on the count that falls in the prison-only box (absent a departure based on an aggravating or mitigating factor), although the judge could suspend all or part of the sentence on any count that falls in a box permitting probation or a short-split sentence.

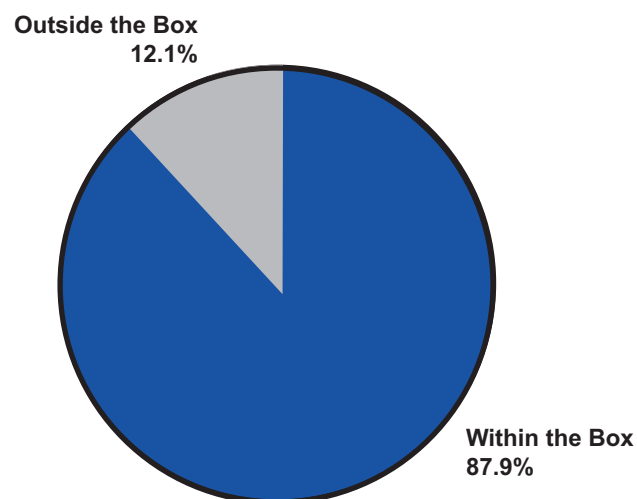
Sentences “Within the Box” and Sentences “Outside the Box”

As shown in Figure 3-1, of the 5,454 SGF collected since the inception of the guidelines, 87.9% (4,794 SGF) of all sentences are sentenced “within the box.” The remaining 12.1% (660 SGF) are “outside the box.” It is important to note that “outside the box” is not synonymous with non-compliant. Some “outside the box” sentences are compliant with the guidelines because the judge has articulated aggravating or mitigating reasons for departing or the sentence was imposed pursuant to a Rule 11(e)(1)(C) plea. When these are added to the “within the box” sentences, the overall compliance rate increases to 88.8%.⁶

The Commission’s guideline rules recognize three types of sentencing dispositions, prison sentences (including “long split

sentences”),⁷ short split sentences, and probation sentences.⁸ While most sentences of each type are “within the box” and compliant with the guidelines, a clearer picture of guideline compliance requires a review of sentences broken down by type of sentence.

Figure 3-1: Percentage of All Sentences that are “Within the Box” and “Outside the Box” (N=5454)



⁶As discussed later in this Chapter, there are a number of SGF that appear to represent sentences outside the box, but for which the Commission was unable to obtain an explanation from the sentencing judge. Based on the explanations the Commission obtained in other cases, it is probable that some of these unexplained cases are cases in which a correction to the SGF was made in court but not communicated to the Commission, bringing the sentence within the box, and others are cases in which the judge had a substantial and compelling reason to depart but the reason got lost in the transmission between the Court and the Commission. The exact number of compliant sentences that are missing is unknown, but the addition of even a small number would boost the overall compliance rate above 90%.

⁷For guideline purposes, “long split sentences” are considered prison sentences. A long split sentence is one where the court imposes a sentence within the applicable prison range, suspends execution of all but a term that also falls within the applicable prison range, requires the defendant to serve the initial prison term, and places the defendant on probation thereafter for a period up to five years. When both the sentence imposed and the term to be served initially fall within the applicable prison range, the sentence is compliant with the guidelines. As each box on the Master Grid and the Drug Grid has a prison range recommendation, a long split can be a compliant sentence in any box. If either the number of months that the judge imposes or the number of months the judge orders the defendant to serve before being placed on probation does not fall within the applicable prison range for that box, such a sentence would not be compliant absent an authorized departure.

⁸In the unshaded boxes on the Master Grid and the Drug Grid, prison is the only permissible and compliant option, absent a mitigating factor. Altogether there are 35 unshaded boxes on the Master Grid and 5 unshaded boxes on the Drug Grid. Dark-shaded boxes on the Master Grid and the Drug Grid permit a short split sentence or a prison sentence within the indicated range, but an entirely suspended sentence with probation would not be compliant, absent a departure. There are four dark-shaded boxes on the Master Grid and three dark-shaded boxes on the Drug Grid. Light-shaded boxes on the Master Grid and the Drug Grid permit probation, a short split sentence, or a prison sentence. There are five light-shaded boxes on the Master Grid and seven light-shaded boxes on the Drug Grid.

Within the Box Sentences in Prison Cases.

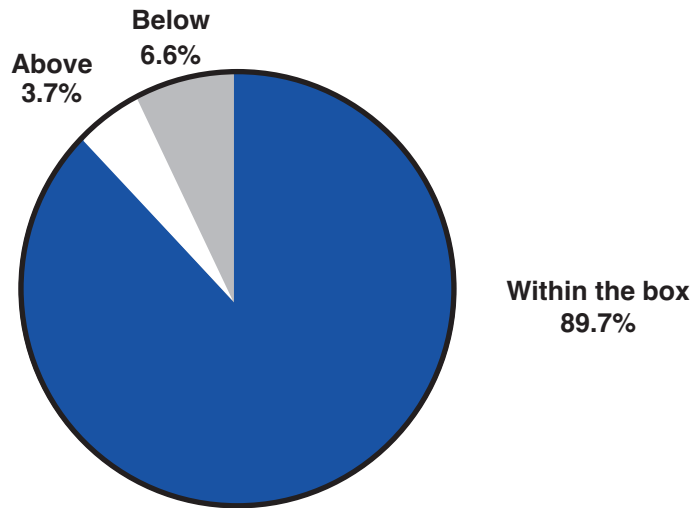
The analysis in this section focuses on prison sentences, and the next section focuses on probation and short split sentences.

Figure 3-2 shows the breakdown of prison sentences within the box and outside the box.⁹ Prison sentences were imposed in 65% of the SGF collected since the inception of the guidelines (3,544 out of 5,454). Of these, 89.7% (3,180 SGF) of all prison sentences are sentenced within the box.¹⁰ The remaining 10.3% (364 SGF) are outside the box (3.7% above the range; and 6.6% below the range).

A Closer Look at Within the Box Prison Sentences

Among the 89.7% of prison sentences that are within the box -- that is, compliant with the sentencing options and within the guideline range for that crime and criminal history score -- a more detailed breakdown is informative. Even if judges rarely depart, if judges are consistently sentencing at the top or bottom of the range overall -- or for certain rows, columns or boxes within the grid -- then one might reasonably conclude that judges view some parts of the grid as unduly harsh or lenient, but nonetheless feel constrained to sentence within the box.¹¹

Figure 3-2: Percentage of Prison Sentences that are “Within the Box” and “Outside the Box” (N=3544)



⁹40 prison counts have been removed from the database for this analysis because some information was missing.

¹⁰The meaning of “within the box” is unambiguous for prison sentences; either the imposed sentence is within the guideline range or it is not. For long split sentences, it can become slightly less intuitive. For purposes of this analysis, a long split sentence is considered within the box if the sentence imposed, before part of it is suspended, is within the range for that box. This has the virtue of simplicity. But if the judge suspends enough of the sentence so that the time the defendant is required to serve before being placed on probation is shorter than the minimum prison term in the range for that box, the sentence is technically noncompliant. Similarly, if the entire sentence before suspension of part of it exceeds the maximum that can be imposed in that box, but the time the defendant is required to serve before going on probation is within the range allowed by that box, the sentence is counted as outside the box even though the defendant will serve a prison term that is within the box. The “within the box” figures vary only slightly no matter how one cuts it. For example, the “within the box” percentage drops by 1.8% to 87.9% when considering both the imposed full term and the part of the term that is not suspended.

¹¹Regarding the placement within the guideline range, the focus here is on prison sentences. Although the same ranges also govern the probation sentences and short split sentences, it seems unlikely that judges would be uncomfortable with the prison range in cases where they suspend all or part of the prison sentence and place the defendant on probation.

Overall, there is no evidence that judges see any particular segments of either Grid as unduly harsh or lenient. Instead, the sentencing pattern within each range seems to indicate that judges are using all parts of the range in most boxes. It remains to be seen whether this pattern will hold true when the Commission has data on more cases in the top third of the Master Grid, representing more serious crimes and more complex cases.

Overall, 12% of all prison sentences are sentenced at the minimum end of the prison range, while almost 7% are sentenced at the maximum of the range. For offense severity groups on both grids (*Figure 3-3*), most are within a few percentage points of the 12% overall average distribution of sentences at the minimum of the range, including the most common offenses – the Drug Groups 2 and 3 and Master Groups 6, 7, and 8. Among the most common offenses, only Master Group 9 is substantially below the overall average. Master 1, 2, and 3 deviate from the overall pattern, but there are too few cases in these groups for reliable analysis. Master 1 is also heavily influenced by the mandatory minimum sentence of 360 months for first degree murder, which is also the minimum of the guideline range. Drug Group 1 is slightly higher than the average of sentences at the minimum of the range, but in that Group there are also too few cases for reliable analysis. The only other notable exception to the pattern is Master 5, with approximately 22% at the minimum of the range.

Figure 3-3: Percent at Range Minimum by Offense Severity Group for Incarceration Sentences

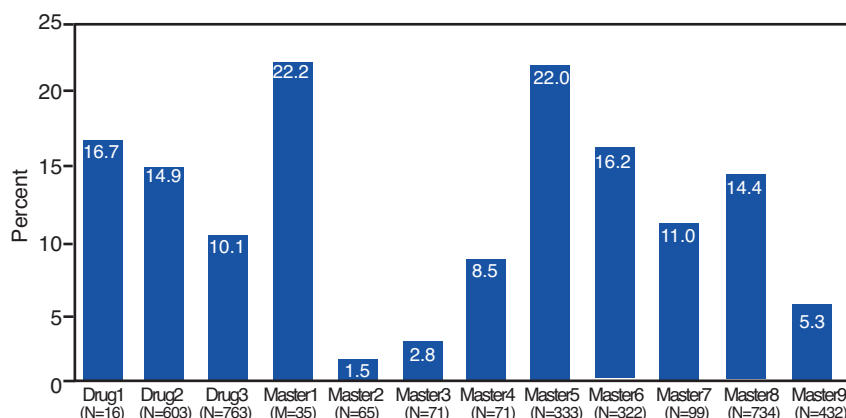
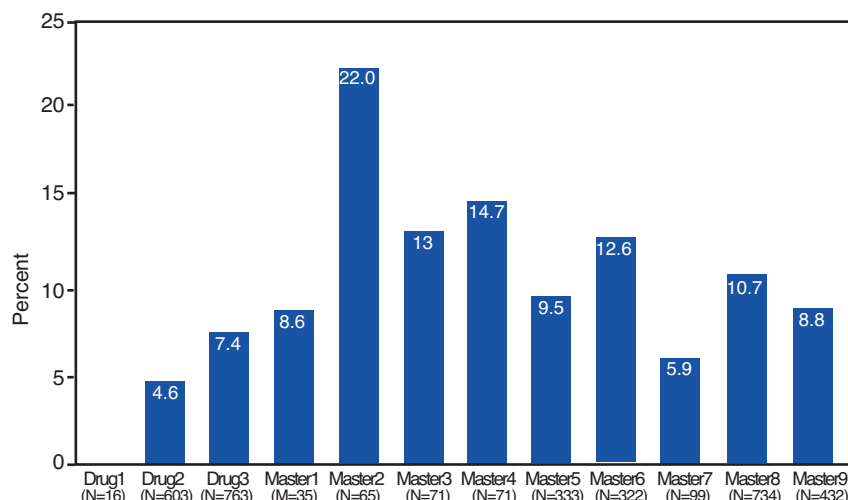


Figure 3-4: Percent at Range Maximum by Offense Severity Group for Incarceration Sentences



As shown in *Figure 3-4*, the largest group of sentences at the maximum of the range is 22% in Master 2. The maximum of Master group 2 range is 288 months or more, depending on the criminal history category. However, there are not yet a sufficient number of cases in Master 2 from which to

Figure 3-5: Percent at Range Minimum Criminal History Category for Incarceration Sentences

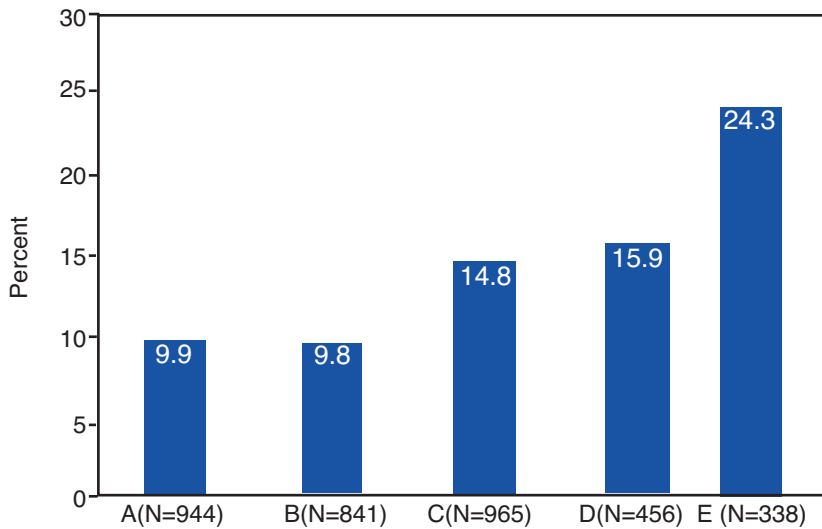
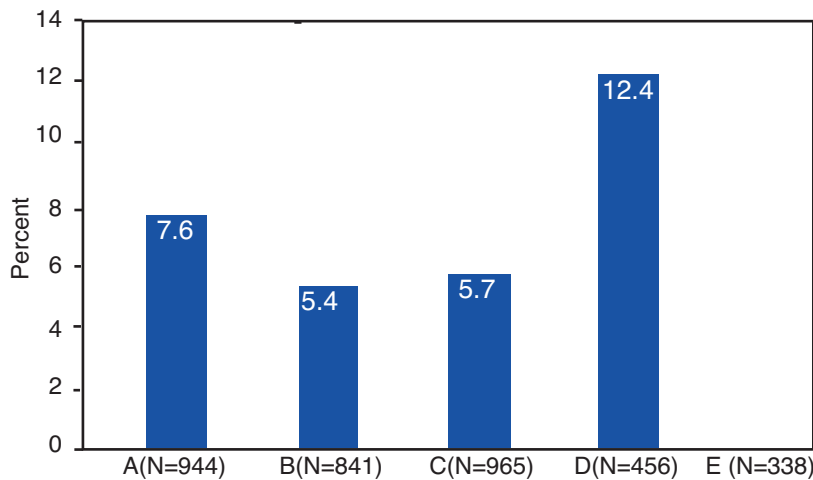


Figure 3-6: Percent at Range Maximum Criminal History Category for Incarceration Sentences



draw reliable conclusions. Similarly, Drug Group 1 has no cases at the maximum of the range, but there are only 24 cases in the entire Group, too few for reliable analysis. The remaining boxes are all relatively close to the overall 7% rate of sentences at the maximum of the range, from a low of 4.6% in Drug 2 to a high of 14.7% in Master 4.

Breaking out the prison sentences by criminal history category also suggests little clustering around the minimum and maximum sentences, as shown in *Figures 3-5* and *3-6*. For criminal history categories A through E, all categories except one are close to the overall average of 12% of sentences at the minimum of the range and 7% at the maximum. The exception is category E, which has 24% of sentences at the minimum of the range and, by design, no maximum around which sentences could cluster. However, less than 25% of all category E sentences exceed the maximum of the adjoining range for category D, suggesting that judges sentence proportionately in category E cases and rarely impose sentences that approach the statutory maximum. Criminal history category D also shows a somewhat higher than average percentage of sentences at the maximum of the range (12.4%), but that would be expected given the relatively high criminal history scores falling in category D (4 to 5.75 points).

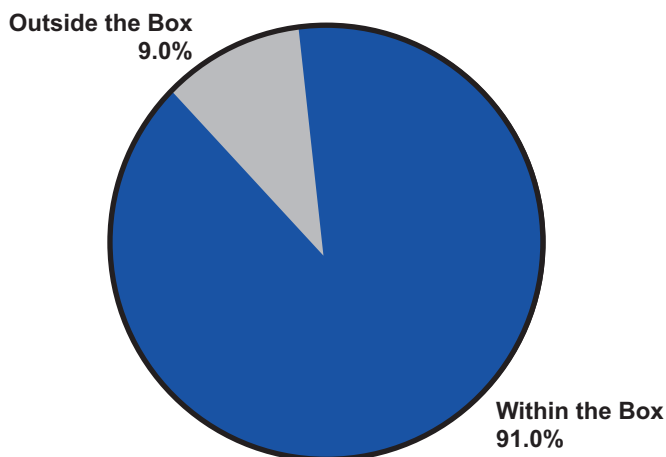
Outside the Box Sentences in Prison Cases

Of the 364 SGF (10.3% of prison sentences) that are outside the box, 35 are compliant with the guidelines because the judge provided a mitigating or aggravating reason for departing in an exceptional case or the sentence was dictated by a Rule 11 (e)(1)(C) plea. This small number of outside the box compliant sentences raises the compliance rate from 89.7% to 90.7%. Another small percentage of outside the box prison cases (39 SGF) are confirmed as sentenced outside the guidelines, either inadvertently or intentionally. As discussed at the end of this Chapter, pending an explanation to the contrary or a correction to the SGF to bring the sentence into compliance, we must assume that the remaining outside the box prison sentences are not compliant.

Compliance in Probation and Short Split Sentence Cases¹²

A probation sentence is one where the judge imposes a prison sentence within the applicable range, suspends execution of all of it, and places the defendant on probation for any period up to five years. There were

Figure 3-7: Percentage of Probation Sentences that are “Within the Box” and “Outside the Box” (N=1346)



1,346 SGF with probation sentences, 24.7% of the total. Under guideline rules, a short split sentence is one where the judge imposes a prison sentence within the applicable range, suspends execution of all but six months or less (but not all) of it, requires the defendant to serve the part of the sentence that is not suspended, and places the defendant on probation up to five years. Absent a departure, it can be used only in the shaded boxes. There were 564 SGF with short split sentences, 10.3% of the total.

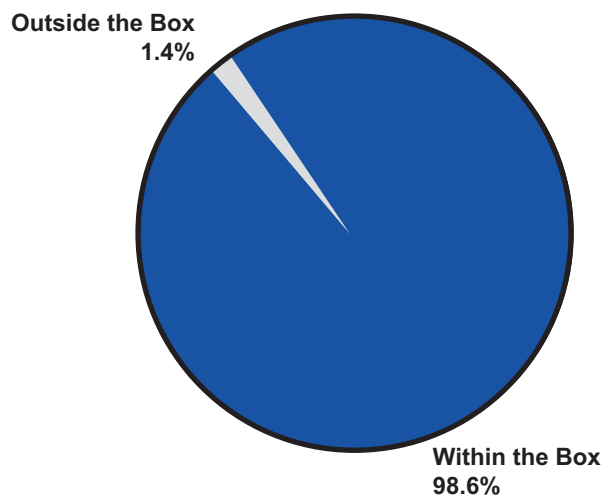
Figure 3-7 shows that 91% (1,225 SGF) of all probation sentences are sentenced

¹²For probation and short split sentences, “within the box” means that probation or a short split sentence was a permitted option in the particular box. However, there are some technically noncompliant sentences counted as “within the box” in probation-eligible and short-split-eligible boxes. For example, if the suspended prison sentence in a probation-eligible box is above or below the guideline range, then the sentence is technically noncompliant, although probation was a permissible sentence. Using the sentence after suspension has little impact on compliance results, is simpler, and makes discussion of “outside the box” sentences more straightforward. The “within the box” percentage for probation cases drops by 4.4% to 86.6% when considering the imposed, but suspended, prison sentence, and the “within the box” percentage for short split sentences drops from 98.6% to 94%.

within the box. The remaining 9% (121 SGF) of probation sentences that are outside the box are sentences to probation in a non-probation-eligible box.

Figure 3-8 shows that 98.6% (556 SGF) of short split sentences were in boxes that permitted short splits. The remaining 1.4% (8 SGF) are short split sentences in a non-short-split eligible box.

Figure 3-8: Percentage of Short Split Sentences that are “Within the Box” and “Outside the Box” (N=564)



Outside The Box Sentences in Probation and Short Split Sentence Cases

Of the 121 SGF (9%) of probation sentences that are outside the box, seven are compliant with the guidelines because the sentence involves an exceptional case with a departure reason or an 11(e)(1)(C) plea. This small number of outside the box compliant sentences raises the compliance rate from 91 to 91.5%. As small portion of outside the box cases (8 SGF) are confirmed as sentenced outside the guidelines, either inadvertently or intentionally.

Of the 8 SGF (1.4%) of short split sentences that are outside the box, one SGF is compliant with the guidelines because the sentence was imposed pursuant to a Rule 11(e)(1)(C) plea. This single outside the box case, being compliant, raises the compliance rate 0.2% to 98.8%. None of the other outside the box cases is confirmed as sentenced outside the guidelines, either inadvertently or intentionally.¹³

Overall, 12% of all prison sentences are sentenced at the minimum end of the prison range, while almost 7% are sentenced at the maximum of the range.



¹³As discussed at the end of this Chapter, pending an explanation to the contrary or a correction to the SGF that places the sentence within the box, we assume that the unexplained 106 outside the box probation sentences and 7 outside the box split sentences are not compliant with the guidelines.

Closer Focus on Probation-Eligible Boxes

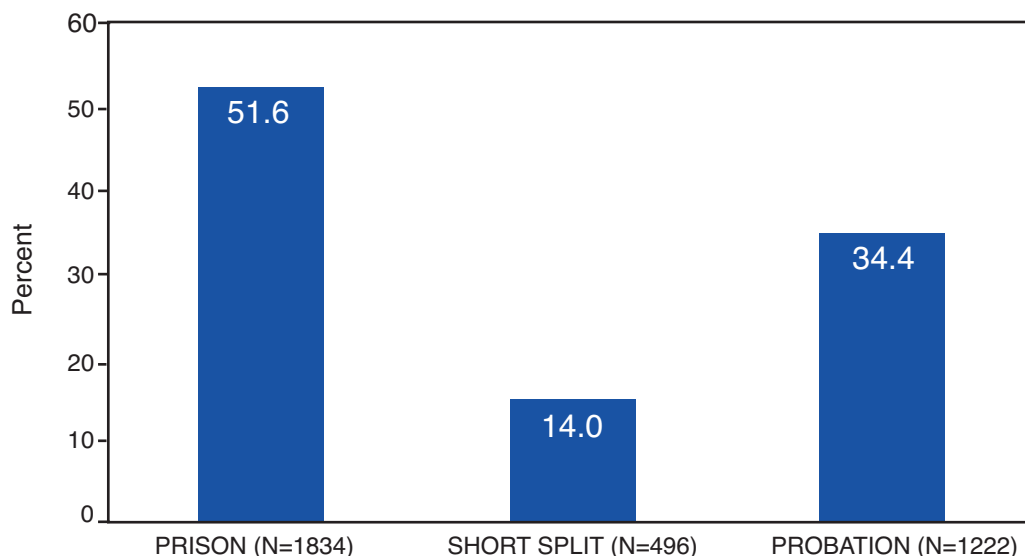
In this section, we turn our attention to the 13 probation-eligible boxes on the Master and Drug Grids, where we have enough cases to date for a more refined analysis.¹⁴ Many prison-only boxes will not have enough cases for comprehensive analysis for at least another year.

Light-shaded boxes on both grids allow the court to impose a prison sentence within the range that may then be suspended in whole or in part.¹⁵ The analysis of suspended sentences that are compliant with the guideline rules for

probation-eligible boxes indicates that judges are taking advantage of this option primarily when the offense is less serious and/or the offender has a relatively minor criminal record.

As shown in *Figure 3-9*, of the 3,552 SGF in the sentencing guidelines database representing probation-eligible boxes, 1,222 (34.4%) received a probation sentence, 496 (14%) received a short split sentence, and 1,834 (51.6%) received a sentence to prison. In short, in probation-eligible boxes, the sentences are about evenly split between prison sentences and sentences that are either entirely or partially suspended with probation.

Figure 3-9: Disposition within Probation-Eligible Boxes



¹⁴The probation-eligible boxes are Boxes 7A, 8 A and B, and 9 A, B, and C on the Master Grid, and Boxes 1 A, 2 A, B, and C and 3 A, B, and C on the Drug Grid.

¹⁵In the dark-shaded boxes, only part of the prison sentence may be suspended – i.e., a short split sentence; the offender must serve at least some part of the prison sentence up to six months. In the light-shaded boxes, the entire prison sentence may be suspended and the defendant may be placed on probation immediately.

As shown in *Figure 3-10*, the rate of probation in probation-eligible boxes decreases as criminal history score increases across both Grids. Of the 1,688 SGF in criminal history category A¹⁶ on the Drug and Master Grids, 841 (49.8%) received a probation sentence in a probation-eligible box. In criminal history category B, 254 of 1,074 (23.6%) received a sentence to probation. In criminal history category C, 127 of 775 (16.4%) received a sentence to probation. Criminal history categories D and E have no probation-eligible boxes. In summary, while probation was an option in many cases involving repeat offenders, as one would expect, judges were far more likely to use probation when the defendant fell in a probation-eligible box and had little or no prior record.

Figure 3-10: Percent of Probation Sentences within Probation-Eligible Boxes by Criminal History Score

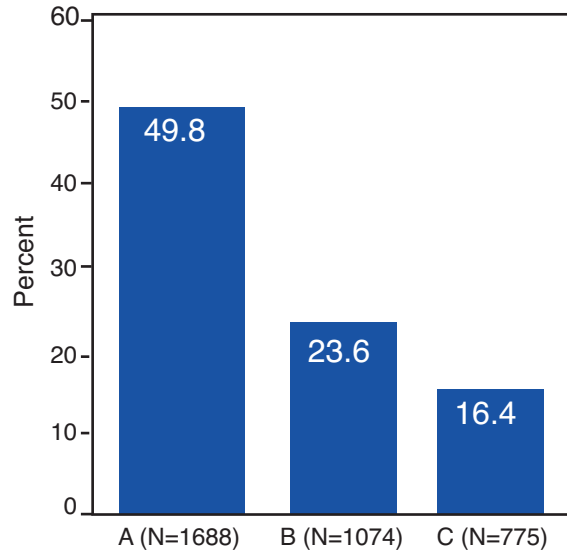
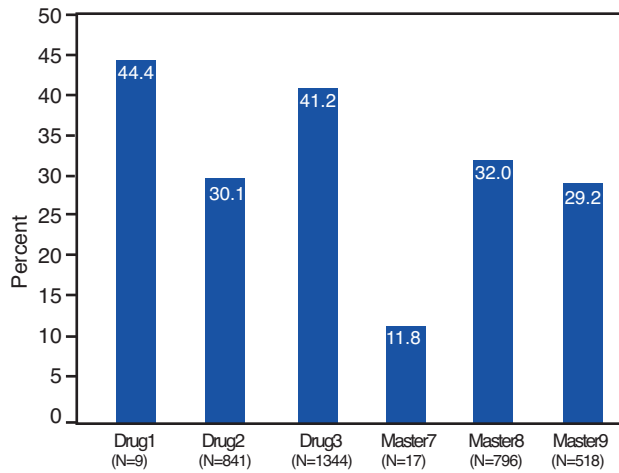


Figure 3-11: Percent of Probation Sentences within Probation-Eligible Boxes by Offense Severity Group



As shown in *Figure 3-11*, the rate of probation in probation-eligible boxes also generally decreases as offense severity increases. Of the 17 SGF in Master Group 7, the most serious Master Grid offense category with a probation-eligible box, two counts (11.8%) received a sentence to probation. In contrast, in Master Groups 8 and 9, probation in a probation-eligible box was more frequent, being given in 255 out of 796 counts (32.0%) in Group 8 and in 151 out of 518 counts (29.2%) in Group 9. On the Drug Grid, probation sentences are generally more common, but retained the same pattern of more probation sentences for less serious crimes. In Drug Group 1, with

¹⁶Criminal History Categories are: Category A, first offenders and those with .5 points or less; Category B, .75 to 1.75 points; Category C, 2 to 3.75 points; Category D, 4 to 5.75 points; Category E, 6 or more points.

one probation-eligible box for criminal history category A, four of nine sentences were sentences to probation. In Drug Group 2, with three probation-eligible boxes, 253 out of 841 counts (30.1%) received a sentence to probation. In Drug Group 3, also with three probation-eligible boxes, the least serious group, 554 out of 1,344 (41.2%) received a sentence to probation.

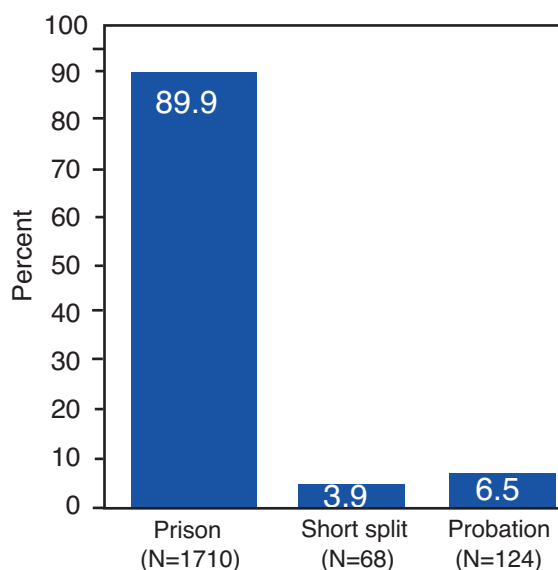
eligible boxes, 1,710 (89.9%) received a prison sentence and 124 (6.5%) received a probation sentence. 88 out of the 124 probation sentences (71%) were in dark shaded boxes that permitted a short split sentence with probation, but not an entirely suspended sentence with probation. The remaining 36 probation sentences were in prison-only boxes.¹⁸

Non-Probation-Eligible Boxes Provide a Contrast

Turning our attention to non-probation-eligible boxes, 35 out of 60 boxes on the Master and Drug Grids are unshaded, to indicate that a sentence within the prison range is the only option, and an additional 12 boxes are dark-shaded boxes, to indicate that a short split sentence with probation is permissible, but an entirely suspended sentence with probation is not. The analysis of the incidence of probation in non-probation-eligible boxes indicates that judges do occasionally take advantage of the fact that the guidelines are voluntary and impose suspended sentences with probation.¹⁷

As shown in *Figure 3-12*, of the 1,902 SGF in the sentencing guidelines database representing sentences in non-probation-

Figure 3-12: Disposition with Non-Probation-Eligible Boxes



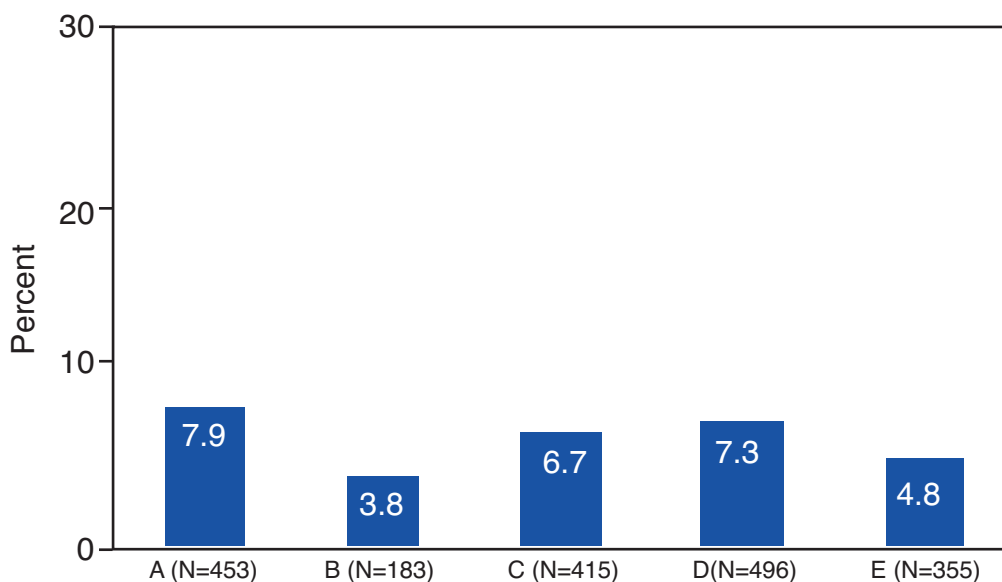
¹⁷ Not all of these sentences are non-compliant with the guidelines. They would comply if the judge cited a mitigating factor as a reason to depart or if the sentence was pursuant to a Rule 11(e)(1)(C) plea that called for probation.

¹⁸ Another 68 SGF represent short split sentences. 61 of these were in short-split-eligible boxes, and were therefore guidelines compliant. The remaining 7 were in prison-only boxes. Altogether then, less than 1% (7 out of 1902) received a short split sentence when the only option was prison and less than 2% (36 out of 1902) received probation when the only option was prison.

As shown in *Figure 3-13*, there are a small number of probation sentences in non-probation-eligible boxes across all criminal history categories, and no clear pattern emerges. Of the 453 SGF in criminal history category A, which includes only offenders with no prior adult felonies, 36 (7.9%) received a probation sentence in a non-probation-eligible box. In criminal history category B, 7 of 183 (3.8%) received a sentence to probation in a non-probation-eligible box, the lowest rate in any criminal history category. Criminal history categories C (6.7%), D (7.3%), and E (4.8%) fall in between. It is important to remember

that Drug Groups 2 and 3 are non-probation-eligible only in criminal history categories D and E. Of the probation sentences in D and E boxes, 36 of the 53 counts were for these drug crimes. Conversely, of the 36 probation sentences in non-probation-eligible boxes that are in criminal history category A, 31 are in Master Group 6A, which is a short-split-eligible box. In summary, probation is relatively rare across all criminal history categories in non-probation-eligible-boxes, but when it occurs, it is most often reserved for offenders with little or no criminal record or those convicted of the least serious offenses.

Figure 3-13 Percent of Probation Sentences within Non-Probation-Eligible Boxes by Criminal History Score

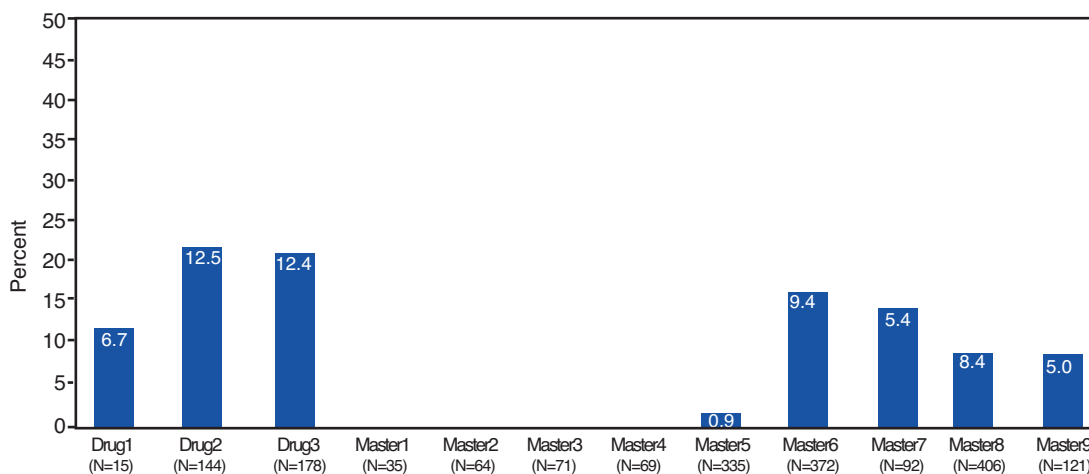


As shown in *Figure 3-14*, there are a relatively small number of probation sentences in non-probation-eligible-boxes in most offense severity groups, but no probation sentences in the most serious groups, Master Groups 1 through 4. The Drug Grid had the highest proportion of probation sentences in non-probation-eligible boxes, 41 of the 337 SGF (12%) on the Drug Grid. In Drug Group 2, 18 of 144 (12.5%) received a sentence to probation in a non-probation-eligible box. A nearly identical percentage, 12.4% (22 of 178), in Drug Group 3 received a sentence to probation in a non-probation-eligible box. Only 3 of the 335 SGF (0.9%) in Master Group 5, the most serious offense category showing any probation cases, received a sentence to probation. In Master Group 6, 35 of 372 (9.4%) received a sentence to probation in a non-probation-eligible box. Master Groups 7 (5.4%), 8 (8.4%), and 9

(5%) also had a smattering of sentences to probation in non-probation-eligible boxes.

The guidelines are intended to direct probation sentences away from the most serious crimes and most dangerous offenders based on criminal history. In summary, as one would expect, probation is relatively rare in non-probation-eligible boxes across all criminal history categories and all offense groups, but when it occurs, it is most often reserved for offenders with little or no criminal record or those convicted of the least serious offenses. Within probation-eligible boxes, probation is most frequent for the least serious crimes and defendants with the least serious criminal history. With some exceptions, which may represent exceptional cases, this pattern is fully consistent with the intent of the guidelines.

Figure 3-14: Percent of Probation Sentences within Non-Probation-Eligible Boxes by Offense Severity Group



Monitoring the Guidelines: Areas in Need of Improvement

The Commission receives sentencing guideline forms (SGF) from CSOSA on all felony charges that result in a guilty verdict or guilty plea. If the judge orders a presentence investigation report (PSI), CSOSA has seven weeks to produce the PSI with the SGF, which includes the applicable guideline recommendation. The PSI and the SGF are delivered to the judge at the same time they are submitted to the Commission. The Commission holds the SGF until it receives the actual sentence from Superior Court, enabling it to monitor compliance with the guidelines. When the sentence is one that appears to be non-compliant with the guidelines and a reason for departure has not been provided in the SGF, the Commission attempts in all such cases to follow up with the sentencing judge for an explanation of the apparently non-compliant sentence.¹⁹ Unfortunately, budgetary problems and resulting staff shortages at the Superior Court during the pilot period disrupted the business process for monitoring the guidelines. As a consequence, the Commission was forced to use its own staff to collect and record all relevant information about the sentence,

including whether the judge departed from the guideline and gave a reason for an apparent departure, functions that were supposed to be done by Superior Court staff. This alteration, while necessary, has slowed down the process and created gaps in our data. However, as explained below, we do not believe these problems have distorted in any way the picture of compliance being reported herein.



The Commission receives sentencing guideline forms (SGF) from CSOSA on all felony charges that result in a guilty verdict or guilty plea.

¹⁹Sometimes we learn that the sentence was in fact compliant because the judge had an aggravating or mitigating reason to depart, the sentence was imposed pursuant to a Rule 11(e)(1)(C) plea, or the SGF was corrected and the sentence was within the box after the correction. Sometimes the judge explains that he or she intended to sentence within the applicable guideline but imposed a non-compliant sentence inadvertently, which happens with some frequency in multi-count cases. In other cases, however, the Commission is unable to get an explanation. Whether or not these sentences were in fact compliant with the guidelines, in the absence of an explanation, these sentences must be treated as non-compliant.

Missing Sentence Information

In the data collection process, the Commission discovered a number of unmatched cases – that is, cases for which we had a sentence but no SGF, and cases for which we had an SGF but no sentence.²⁰

In an effort to ensure that we did not have systematic underreporting – that is underreporting which might indicate that the guidelines database was not a representative sample of all possible guideline cases – the Commission matched a random sample of cases from the Court Information System to its guidelines database. This analysis revealed that the guideline database, while missing some indeterminate number of cases, is an unbiased sample of the universe of all felony cases. For example, the judges with a relatively high number of unmatched cases are also the judges with the highest number of felony cases, indicating that the identity of the sentencing judge was not a factor in the underreporting of guideline sentences. Similarly, the sentencing guideline database shows no bias that can be attributed to the offense severity level. For example, Drug group 3 is the largest offense group in the guideline database (27.9% of all cases), and the largest group of unmatched cases (26.9%).

Only one offense group is over represented in the unmatched cases, and that is Master group 9 which includes Escape and Bail Reform Act violations, which are common unmatched cases (14.9% of unmatched cases although only 11.3% of SGF). Judges have told the Commission that many of these are likely to be cases sentenced without a new pre-sentence report, and may remain elusive to the extent that SGF are not initiated in such cases.

Correcting the Problem: Automation of Guideline Forms for Greater Accuracy, Completeness, and Timeliness

Missing or unmatched cases and missing information from the Court to explain sentences that appear to be non-compliant with the guidelines have highlighted the need to fully automate the data collection process. The Commission continues to move toward full automation. Currently, Commission staff is using the Sentencing Guideline Web (“SGW”) on a limited basis. Unfortunately, the use of the SGW is limited at this time because of Superior Court staff shortages mentioned above and because the electronic interface with CSOSA, while built, must be adapted to conform to CSOSA’s information system.

²⁰Many unmatched cases are easily explained. Some, particularly early on, were not guideline cases because the plea or verdict was entered before June 14, 2004. Some are misdemeanors. Others are felonies that were sentenced without a new PSI (and hence without starting an SGF), often because the judge had a relatively recent PSI from another case. A common explanation for an SGF that cannot be matched to a sentence is that the sentence was postponed or, in some cases, cancelled because the plea was withdrawn.

To overcome these obstacles, the Commission is building its own interface between the SGW and the new Superior Court CourtView database, which will transmit sentencing data between the Court, the Commission, and CSOSA electronically, thus reducing most of the need for duplicative data entry. This in turn will insure the transmission of Court information to the Commission more accurately and efficiently and will allow more timely inquiries to judges regarding sentences that require a further explanation. Automation and concomitant improvement in the business process is crucial because it will free up the Commission's staff to do the kind of research and analysis on an on-going basis that will be most beneficial to the Commission and the Council as we strive to monitor and improve the District's structured sentencing system.



The Commission continues to move toward full automation. Currently, Commission staff is using the Sentencing Guideline Web ("SGW") on a limited basis.

The Subjective Assessment of Practitioners Regarding the Sentencing Guidelines

Up to this point, we have been discussing in this Chapter judicial compliance with the pilot sentencing guidelines. The compliance information we have presented demonstrates that the guidelines have been well received and consistently applied by the judges during the pilot program. No structured sentencing system can succeed, however, unless prosecutors, defense attorneys, and other stakeholders in the criminal justice process buy into it. With that in mind, during the past year, the Commission conducted four additional focus groups of defense attorneys and prosecutors in an effort to get feedback on the operation of the guidelines and their level of satisfaction with them.²¹

The 2006 focus groups revealed that the vast majority of defense attorneys and prosecutors approve of the guidelines. Lawyers on both sides praised the sentencing guidelines for reducing inter-judge disparity. Focus group participants specifically noted that the sentencing guidelines have done a good job of capturing the midrange of historical sentences for most crimes, effectively eliminating the pre-guidelines extremes between judges sentencing in similar cases. The defense attorneys and prosecutors also noted that the sentencing guidelines have facilitated plea negotiations by increasing the predictability of sentences.

²¹In 2005, the Commission conducted a focus group with Superior Court judges, which was described in last year's Annual Report.

The participants in the 2006 focus groups also offered helpful suggestions for improvement or modification of the sentencing guidelines. Defense attorneys and prosecutors, for instance, suggested that certain offenses might need to be re-ranked to carry more or less severe sentences. The participants also recommended that the Commission consider subdividing certain offenses that may have varying degrees of seriousness depending on how they are committed. Finally, some suggested that the sentencing guidelines ranges are too wide. The Commission will continue to monitor whether certain offenses need to be re-ranked or subdivided, though there are not sufficient data for many of these decisions at this time.

Many of the defense attorneys and prosecutors also offered suggestions for improving the sentencing guidelines process. In

particular, they pointed out that the PSI and the criminal history calculation are often distributed to the defense and prosecution shortly before the sentencing hearing. The attorneys then have little time to investigate and challenge the criminal history score, which may lead to sentencing delays. The Commission intends to collaborate with CSOSA and others to determine how this process may be expedited.

In sum, while judges, prosecutors and defense attorneys have uniformly praised the guidelines for reducing disparity and increasing predictability, they have also offered constructive suggestions for refinement of the guidelines and the sentencing guidelines business process. The Commission looks forward to working with all criminal justice constituent groups to improve the operation of the guidelines in the years ahead.

