

**Recommendations for Criminal Sentencing Law Reform for the
State of West Virginia**

**A Report of the Sentencing Commission Subcommittee of the Governor's
Committee on Crime, Delinquency, and Correction to the West Virginia
Legislature**

December 20, 2021



**State of West Virginia
Jim Justice, Governor**



**Department of Homeland Security
Jeff S. Sandy, CFE, CAMS, Cabinet Secretary**



**Michael Coleman, Director, Division of Administrative Services
Joseph Thornton, Deputy Director, Division of Administrative Services
Jeff Estep, Assistant Director, Justice and Community Services**

Mission and Purpose

The Justice and Community Services (JCS) Section of the West Virginia Division of Administrative Services serves as staff to the Governor's Committee on Crime, Delinquency and Correction (GCCDC), which was created in 1966 by executive order of the Governor, and was later codified into West Virginia Code §15-9-1, to develop a statewide planning capacity for the improvement of the state's criminal justice system. The West Virginia Sentencing Commission was established as a subcommittee of the GCCDC following the passage of House Bill 4004 during the 2020 Regular Session of the West Virginia Legislature. The purpose of the Commission is to promote a fuller understanding of this state's criminal justice sentencing system.

Administration and Staffing

The Sentencing Commission Subcommittee is responsible for pursuing the following objectives:

- Promoting sentencing that more accurately reflects the time that an offender will actually be incarcerated;
- Reducing unwarranted disparity in sentences for offenders who have committed similar offenses and have similar criminal histories;
- Preserving meaningful judicial discretion in the imposition of sentences and sufficient flexibility to permit individualized sentences;
- Ensuring that sentencing judges in every jurisdiction in the state are able to impose the most appropriate criminal penalties, including correctional options programs for appropriate nonviolent offenders; and
- Determining whether the state needs to set out all criminal offenses in terms of priority and in order of severity and harm to society, and to provide alternatives to incarceration for certain offenses.

The members of the Sentencing Commission are appointed according to statute and include:

Jeff S. Sandy, CFE, CAMS
Cabinet Secretary
WV Department of Homeland Security

Ronni Sheets, Chair
Chief Public Defender
13th Judicial Circuit

Perri J. DeChristopher, Vice-Chair
Prosecuting Attorney
Monongalia County

The Honorable Robert E. Richardson
Circuit Judge
11th Judicial Circuit

The Honorable Jacob E. Reger
Circuit Judge
26th Judicial Circuit

John E. Taylor
Jackson Kelly Professor of Law
West Virginia University

Catie Wilkes Delligatti
Prosecuting Attorney
Berkeley County

Edmund J. Rollo
Attorney at Law

The Honorable David Kelly
Delegate
West Virginia Legislature

Joseph Martin
Chief of Police
Parkersburg Police Department

Melissa Richmond
President
Association on Alcoholism and Drug
Abuse Counselors

The Honorable Charles H. Clements
Senator
West Virginia Legislature

Staff members of the JCS section and its Office of Research and Strategic Planning (ORSP) are responsible for providing administrative support to the Sentencing Commission.

Justice and Community Services Staff

Joseph Thornton, Deputy Director
Jeff Estep, Operations Manager
Marty Hatfield, Criminal Justice Program Manager
Randall Shoemake, Strategic Planner
Melissa McDowell, Administrative Secretary
Dina Williams, Criminal Justice Specialist
Ryan Carper, Criminal Justice Specialist
Ian Jones, Criminal Justice Specialist
Nick Martin, Research Analyst
Christopher Walker Akers, Research Analyst

Work of the Sentencing Commission to this Point

Though HB 4004 contemplated that the Sentencing Commission would begin its work on July 1, 2020, the COVID-19 pandemic caused substantial delays in forming the Commission. The first official meeting did not take place until March 12, 2021, more than 8 months behind schedule. As a result, the Commission has considerable work remaining to address the objectives outlined by the West Virginia Legislature in West Virginia Code §15-9c-4.

At the first meeting of the Sentencing Commission, the body elected Ronni Sheets to serve as Chair and Perri DeChristopher to serve as Vice-Chair. Under their able leadership, the work of the Commission thus far has been carried out through working groups on the following topics: Determinate and Indeterminate Sentencing, Probation Data, Parole Data, Addiction Data.

The initial meetings of the Commission were primarily concerned with identifying data to be collected by JCS staff and working out a structure for sharing that data. Data collection is especially necessary to fulfill two of the Commission's objectives: reducing sentencing disparities for offenders who committed similar crimes and have similar criminal histories and ensuring that sentencing judges across the state are able to impose the most appropriate criminal penalties, including alternative sanctions.

The Commission found that the lack of available data made it difficult to draw firm conclusions about the current level of sentencing disparities across the state and about how alternative sanctions programs are being used across the state. Concluding that the shortcomings in available data could not be remedied in the short-term, the Commission decided to address the data gap by doing a survey of judges and probation officers around the state in order to gauge their perceptions about current sentencing practices in West Virginia and how those practices might be improved. The survey questions and results are included as Appendices A and B of this Report.

Survey questions were distributed electronically in mid-October, and by November 9, 39 Circuit Judges and 107 Probation Officers had responded. The Commission continues to study the survey responses, and those responses have had a significant impact on the recommendations the Commission is able to make at this time, as outlined below.

The Commission asked respondents to identify particular statutes in need of revision. In the Commission's last two meetings in November and December of 2021, most of the discussion was directed to using the survey results and the collective experience of Commission members to identify some suggested revisions to West Virginia's criminal code. While discussion of other specific statutory reforms continues, the Commission reached consensus on the goal of equalizing the penalties for a number of non-violent theft offenses, regardless of the method of theft employed. At this point in the Commission's work, it is able to make the following recommendations to the Legislature.

Current Recommendations

The Sentencing Commission Subcommittee has thus far identified six primary recommendations. The first three of these recommendations relate specifically to modifying the code sections for non-violent theft offenses; the last three address other matters.

Recommendation 1: The Commission recommends that the West Virginia Legislature reduce the sentences for non-violent theft offenses from the current norm of an indeterminate penitentiary sentence of 1 to 10 years to an indeterminate penitentiary sentence of 1 to 5 years. We further recommend that for all nonviolent theft offenses, courts should retain the

discretion to impose a jail sentence of up to one year in lieu of sending a convicted offender to a state prison.

Recommendation 2: The Commission recommends that the West Virginia Legislature raise the threshold for non-violent felony theft offenses from the current value of \$1,000 to \$2,000.

Recommendation 3: The Commission recommends that the West Virginia Legislature revise Code section §61-3A-3 to make probation available as an alternative sentence for a third shoplifting offense. We further recommend that the Legislature remove subsection (d), which requires convicted shoplifters to pay a penalty to the store from which they have stolen in the amount of \$50 or double the value of the merchandise stolen, whichever is higher. Other non-violent theft offenses do not include similar provisions, and thus the elimination of this section is required by the general goal of treating non-violent theft offenses in a more equal manner.

Recommendation 4: A survey of Circuit Judges in West Virginia found that most Circuit Judges believe that judges and magistrates do not receive enough training or guidance in how they should exercise their discretion in sentencing. We therefore recommend that this finding be communicated to the Education Committee of the West Virginia Judicial Association and to the Administrative Office of the Supreme Court of Appeals.

Recommendation 5: The Commission's efforts to study current sentencing practices in West Virginia have been greatly hampered by the lack of adequate data regarding the actual sentences currently being served for various offenses. Coding of offenses in the data that exist has been haphazard at best, and it is difficult to make recommendations about how to make sentences more consistent without good data on the level of inconsistency that currently exists.

This is not a new problem. In 2009, the Report of the Governor's Commission on Prison Overcrowding identified an urgent need for better data about our correctional practices. Fortunately, it is a problem that can be solved with adequate time and resources. Other jurisdictions have developed effective mechanisms for generating data about the fairness and effectiveness of their sentencing practices, and West Virginia should attempt to replicate those mechanisms.

While designing and implementing a new data collection system is far beyond the scope of what a Sentencing Commission staffed by volunteers with full-time jobs can do, the Commission is willing in the remainder of its term to begin this work by consulting with experts in other jurisdictions and with judicial and administrative officials in West Virginia to develop recommendations for a more satisfactory approach to collecting data. It will likely be necessary in the future for the West Virginia Legislature to mandate the collection of certain data by the Division of Corrections and Rehabilitation (DCR). Creating an effective system of data collection and analysis will also likely require that additional financial and other resources be provided to the court system and the DCR. Investment of time and money will be needed if the Legislature and any future Commissions it creates are to have better information to assess possible sentencing reforms.

Recommendation 6: During the 2021 Regular Session, the West Virginia Legislature enacted Senate Bill 713, with an effective date of April 30, 2021. SB 713 amended and reenacted W.Va. Code §15-4-17, which governs the deduction of time from sentences of incarceration for good conduct, commonly known as “good time.” The Sentencing Commission recommends that the Legislature reexamine the applicability of good time and parole to those sentenced under §62-12-26 in light of the Supreme Court of Appeals’ recent decision in *State ex rel. Phalen v. Roberts*, 245 W.Va. 311, 858 SE.2d 936 (2021.)

The Commission believes that the three general recommendations listed above regarding non-violent theft offenses could be appropriately implemented by amending the six statutes below in the following manner. All changes from current statutory language are highlighted:

1. §61-3-13 Grand and petit larceny distinguished

(a) If a person commits simple larceny of goods or chattels of the value of ~~one~~ **two** thousand dollars or more, such person is guilty of a felony, designated grand larceny, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one nor more than ~~ten~~ **five** years, or, in the discretion of the court, be confined in jail not more than one year and shall be fined not more than two thousand five hundred dollars.

(b) If a person commits simple larceny of goods or chattels of the value of less than ~~one~~ **two** thousand dollars, such person is guilty of a misdemeanor, designated petit larceny, and, upon conviction thereof, shall be confined in jail for a term not to exceed one year or fined not to exceed two thousand five hundred dollars, or both, in the discretion of the court.

2. §61-3-24 Obtaining money, property, and services by false pretenses; disposing of property to defraud creditors; penalties

(a) (1) If a person obtains from another by any false pretense, token, or representation, with intent to defraud, any money, goods or other property which may be the subject of larceny; or

(2) If a person obtains on credit from another any money, goods or other property which may be the subject of larceny, by representing that there is money due him or her or to become due him or her, and assigns the claim for such money, in writing, to the person from whom he or she obtains such money, goods or other property, and afterwards collects the money due or to become due, without the consent of the assignee, and with the intent to defraud;

(3) Such person is guilty of larceny. If the value of the money, goods or other property is ~~one~~ **two** thousand dollars or more, such person is guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one year nor more than ~~ten~~ **five** years, or, in the discretion of the court, be confined in jail not more than one year and be fined not more than two thousand five hundred dollars. If the value of the money, goods or other property is less than ~~one~~ **two** thousand dollars, such person is guilty of a misdemeanor, and, upon conviction thereof, shall be confined in jail not more than one year or fined not more than two thousand five hundred dollars, or both.

(b) If a person obtains by any false pretense, token or representation, with intent to defraud, the signature of another to a writing, the false making of which would be forgery, the person is guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one year nor more than five years, or, in the discretion of the court, be confined in jail not more than one year and fined not more than two thousand five hundred dollars.

(c) (1) If a person removes any of his or her property out of any county with the intent to prevent the same from being levied upon by any execution; or

(2) If a person secretes, assigns, or conveys, or otherwise disposes of any of his or her property with the intent to defraud any creditor or to prevent the property from being made liable for payment of debts; or

(3) If a person receives the property of another with the intent to defraud any creditor or to prevent the property from being made liable for the payment of debts;

(4) The person is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than two thousand five hundred dollars and be confined in jail not more than one year.

(d) If a person, firm or corporation obtains labor, services or any other such thing of value from another by any false pretense, token, or representation, with intent to defraud, the person, firm or corporation is guilty of theft of services. If the value of the labor, services or any other such thing of value is **one two** thousand dollars or more, the person, firm or corporation is guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one year nor more than **ten five** years, or, in the discretion of the court, be confined in jail not more than one year and be fined not more than two thousand five hundred dollars. If the value of the labor, services or any other such thing of value is less than **one two thousand dollars**, the person, firm or corporation is guilty of a misdemeanor, and, upon conviction thereof, shall be confined in jail not more than one year or fined not more than two thousand five hundred dollars, or both, in the discretion of the court.

(e) Theft of services includes the obtaining of a stop payment order on a check, draft, or order for payment of money owed for services performed in good faith and in substantial compliance with a written or oral contract for services, with the fraudulent intent to permanently deprive the provider of such labor, services, or other such thing of value of the payment represented by such check, draft, or order. Notwithstanding the penalties set forth elsewhere in this section, any person, firm or corporation violating the provisions of this subsection is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than two times the face value of the check, draft, or order.

(f) Prosecution for an offense under this section does not bar or otherwise affect adversely any right or liability to damages, forfeiture or other civil remedy arising from any or all elements of the criminal offense.

3. §61-3-24a Attempted or fraudulent use, forgery, traffic of credit cards; possession and transfer of credit cards and credit card-making equipment; false or fraudulent use of telephonic services; penalties

(a) As used in this section:

(1) "Counterfeit credit card" means the following:

(A) Any credit card or a representation, depiction, facsimile, aspect, or component thereof that is counterfeit, fictitious, altered, forged, lost, stolen, incomplete or obtained in violation of this section, or as part of a scheme to defraud; or

(B) Any invoice, voucher, sales draft or other reflection or manifestation of such a card.

(2) "Credit card making equipment" means any equipment, machine, plate mechanism, impression or any other contrivance which can be used to produce a credit card, a counterfeit credit card, or any aspect or component of either.

(3) "Traffic" means:

(A) To sell, transfer, distribute, dispense, or otherwise dispose of any property; or

(B) To buy, receive, possess, obtain control of, or use property with the intent to sell, transfer, distribute, dispense, or otherwise dispose of such property.

(4) "Notice" means either information given in person or information given in writing to the person to whom the number, card or device was issued. The sending of a notice in writing by registered or certified mail in the United States mail, duly stamped and addressed to such person at his last known address, is prima facie evidence that such notice was duly received. A cardholder's knowledge of the revocation of his or her credit card may be reasonably inferred by evidence that notice of such revocation was mailed to him or her, at least four days prior to his or her use or attempted use of the credit card, by first class mail at his or her last known address.

(b) (1) It is unlawful for any person knowingly to obtain or attempt to obtain credit, or to purchase or attempt to purchase any goods, property or service, by the use of any false, fictitious or counterfeit credit card, telephone number, credit number or other credit device, or by the use of any credit card, telephone number, credit number or other credit device of another beyond or without the authority of the person to whom such card, number or device was issued, or by the use of any credit card, telephone number, credit number or other credit device in any case where such card, number or device has been revoked and notice of such revocation has been given to the person to whom issued.

(2) It is unlawful for any person knowingly to obtain or attempt to obtain telephone or telegraph service or the transmission of a message, signal or other communication by telephone or telegraph, or over telephone or telegraph facilities, through the use of any

fraudulent scheme, device, means or method, with intent to avoid payment of charges therefor.

(3) Any person who violates any provision of this subsection, if the credit, goods, property, service or transmission is of the value of ~~one two~~ thousand dollars or more, is guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one year nor more than ~~ten five~~ years or, in the discretion of the court, be confined in jail not more than one year and be fined not more than two thousand five hundred dollars; and if of less value, is guilty of a misdemeanor, and, upon conviction thereof, shall be confined in jail not more than one year or fined not more than two thousand five hundred dollars, or both.

(c) A person is guilty of forgery of a credit card when he or she makes, manufactures, presents, embosses, alters or utters a credit card with intent to defraud any person, issuer of credit or organization providing money, goods, services, or anything else of value in exchange for payment by credit card and he or she is guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one year nor more than ~~ten five~~ years, or, in the discretion of the court, be confined in jail not more than one year and fined not less than fifty nor more than two thousand five hundred dollars.

(d) Any person who traffics in or attempts to traffic in ten or more counterfeit credit cards or credit card account numbers of another in any six-month period is guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one year nor more than ten years, or, in the discretion of the court, be confined in jail not more than one year and fined not less than fifty nor more than two thousand five hundred dollars.

(e) A person who receives, possesses, transfers, buys, sells, controls or has custody of any credit card making equipment with intent that the equipment be used in the production of counterfeit credit cards is guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one year nor more than ten years, or, in the discretion of the court, be confined in jail not more than one year and fined not less than one thousand nor more than five thousand dollars.

(f) A person who knowingly receives, possesses, acquires, controls, or has custody of a counterfeit credit card is guilty of a misdemeanor, and, upon conviction thereof, shall be confined in jail not exceeding six months or fined not more than five hundred dollars, or both.

4. §61-3-39 Obtaining property in return for worthless check; penalty

It is unlawful for any person, firm or corporation to obtain any money, services, goods or other property or thing of value by means of a check, draft or order for the payment of money or its equivalent upon any bank or other depository, knowing at the time of the making, drawing, issuing, uttering or delivering of the check, draft or order that there is not sufficient funds on deposit in or credit with such bank or other depository with which to pay the same upon presentation. The making, drawing, issuing, uttering or delivery of any such check, draft or order, for or on behalf of any corporation, or its name, by any officer or agent of such

corporation, shall subject such officer or agent to the penalties of this section to the same extent as though such check, draft or order was his own personal act, when such agent or officer knows that such corporation does not have sufficient funds on deposit in or credit with such bank or depository from which such check, draft or order can legally be paid upon presentment.

This section shall not apply to any such check, draft, or order when the payee or holder knows or has been expressly notified prior to the acceptance of same or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to ensure payment as aforesaid, nor shall this section apply to any postdated check, draft, or order.

No prosecution shall be confined to the provisions of this section by virtue of the fact that worthless checks, drafts, or orders may be employed in the commission of some other criminal act.

A person who violates the provisions of this section, if the amount of the check, draft or order is less than ~~five hundred~~ **two thousand dollars**, is guilty of a misdemeanor, and, upon conviction thereof, the person shall be fined not more than two hundred dollars, or confined in jail not more than six months, or both. A person who violates the provisions of this section, if the amount of the check, draft or order is ~~five hundred~~ **two thousand dollars** or more, is guilty of a felony, and, upon conviction thereof, the person shall be:

- (a) ~~fined not more than five hundred dollars; or~~
- (b) ~~imprisoned in the penitentiary not less than one year nor more than five years or, in the discretion of the court, confined in jail not more than one year; or~~
- (c) ~~both fined under subsection (a) and imprisoned under subsection (b).~~

5. §61-3A-3 Penalties [for Shoplifting]

A person convicted of shoplifting shall be punished as follows:

(a) First offense conviction. --Upon a first shoplifting conviction:

(1) When the value of the merchandise is less than or equal to five hundred dollars, the person is guilty of a misdemeanor and shall be fined not more than two hundred fifty dollars.

(2) When the value of the merchandise exceeds five hundred dollars, the person is guilty of a misdemeanor and shall be fined not ~~less than one hundred dollars nor more than five hundred dollars, and such fine shall not be suspended, or the person shall be~~ or confined in jail not more than sixty days, or both.

(b) Second offense conviction. --Upon a second shoplifting conviction:

(1) When the value of the merchandise is less than or equal to five hundred dollars, the person is guilty of a misdemeanor and shall be fined not ~~less than one hundred dollars nor~~

more than five hundred dollars, and such fine shall not be suspended, or the person shall be or confined in jail not more than six months, or both.

(2) When the value of the merchandise exceeds five hundred dollars, the person is guilty of a misdemeanor and shall be fined not less than five hundred dollars more than one thousand dollars and shall be confined in jail for not less than six months nor more than one year.

(c) Third offense conviction. --Upon a third or subsequent shoplifting conviction, regardless of the value of the merchandise, the person is guilty of a felony and shall be fined not less than five hundred dollars nor more than five thousand dollars and shall either be imprisoned in the penitentiary for not less than one year nor more than ten five years or, in the discretion of the court, be confined in jail not more than one year. At least one year shall actually be spent in confinement and not subject to probation: Provided, that an order for home detention by the court pursuant to the provisions of article eleven b, chapter sixty two of this code may be used as an alternative sentence to the incarceration required by this subsection.

(d) Mandatory penalty. --In addition to the fines and imprisonment imposed by this section, in all cases of conviction for the offense of shoplifting, the court shall order the defendant to pay a penalty to the mercantile establishment involved in the amount of fifty dollars, or double the value of the merchandise involved, whichever is higher. The mercantile establishment shall be entitled to collect such mandatory penalty as in the case of a civil judgment. This penalty shall be in addition to the mercantile establishment's rights to recover the stolen merchandise.

(e) In determining the number of prior shoplifting convictions for purposes of imposing punishment under this section, the court shall disregard all such convictions occurring more than seven years prior to the shoplifting offense in question.

6. §61-3C-13 Fraud and related activity in connection with access devices

(a) As used in this section, the following terms shall have the following meanings:

(1) "Access device" means any card, plate, code, account number, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument);

(2) "Counterfeit access device" means any access device that is counterfeit, fictitious, altered, or forged, or an identifiable component of an access device or a counterfeit access device;

(3) "Unauthorized access device" means any access device that is lost, stolen, expired, revoked, canceled, or obtained without authority;

(4) "Produce" includes design, alter, authenticate, duplicate, or assemble;

(5) "Traffic" means transfer, or otherwise dispose of, to another, or obtain control of with intent to transfer or dispose of.

(b) Any person who knowingly and willfully possesses any counterfeit or unauthorized access device shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than ~~one thousand five hundred~~ dollars or confined in the county jail for not more than six months, or both.

[NOTE: the penalty has been changed here to match the penalty for the very similar crime defined at WV Code § 61-3-24a (f).]

(c) Any person ~~who knowingly, willfully and with intent to defraud possesses a counterfeit or unauthorized access device or~~ who knowingly, willfully and with intent to defraud, uses, produces, or traffics in any counterfeit or unauthorized access device to obtain or attempt to obtain money, goods, services, or other things of value, shall be guilty of a felony if the value of the money, goods, services, or other things of value obtained or sought to be obtained exceeds two thousand dollars. Upon conviction of this felony, he or she shall be:

(1) fined not more than two thousand five hundred dollars; or

(2) imprisoned in the penitentiary not less than one year nor more than five years or, in the discretion of the court, confined in jail not more than one year; or

(3) both fined under clause (1) and imprisoned under clause (2).

If the value of the money, goods, services, or other things of value obtained or sought to be obtained is less than two thousand dollars, the person shall be guilty of a misdemeanor and may be confined in jail not more than one year, fined no more than one thousand dollars, or both.

(d) Any person who knowingly, willfully and with intent to defraud produces or traffics in any counterfeit or unauthorized access device shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than ten thousand dollars or imprisoned in the penitentiary for not more than ten years, or both.

[NOTE: The Commission recommends reworking the current subsections (b) and (c) to create three levels of crimes relating to counterfeit or unauthorized access devices: knowing possession, knowing use (divided into felony and misdemeanor levels depending on the value of the goods and services sought to be obtained), and producing or trafficking in counterfeit or unauthorized access devices.]

(e) This section shall not prohibit any lawfully authorized investigative or protective activity of any state, county, or municipal law-enforcement agency.

Projected Future Work of the Commission

Under West Virginia Code § 15-9C-6, the West Virginia Sentencing Commission is currently slated to sunset on June 30, 2023. In the remainder of its term, the Commission envisions the following work:

First, the Commission plans to establish a framework for better data collection on sentencing practices and their effectiveness in West Virginia through consultation with experts in other states and stakeholders within West Virginia, as outlined in Recommendation Five above.

Second, the Commission plans to continue efforts to identify proposed revisions to specific sections of the criminal code, proceeding along the same lines as the recommendations for non-violent theft offenses identified in this Report.

Third, the Commission plans to continue study with the goal of making recommendations about the appropriate framework for any global sentencing reforms that might take place in West Virginia. Specifically, the Commission will address three critical questions identified by the Legislature in § 15-9C-4:

- (1) Should West Virginia move away from its current mix of indeterminate and determinate sentencing to a scheme that is primarily or exclusively determinate?
- (2) Should West Virginia create classes of felony and misdemeanor offenses in order to make sentences for various offenses more consistently proportionate to the severity of social harm caused by those offenses?
- (3) Should West Virginia adopt discretionary sentencing guidelines in order to reduce sentencing disparities while still allowing judges sufficient flexibility to tailor sentences to an individual's particular circumstances?

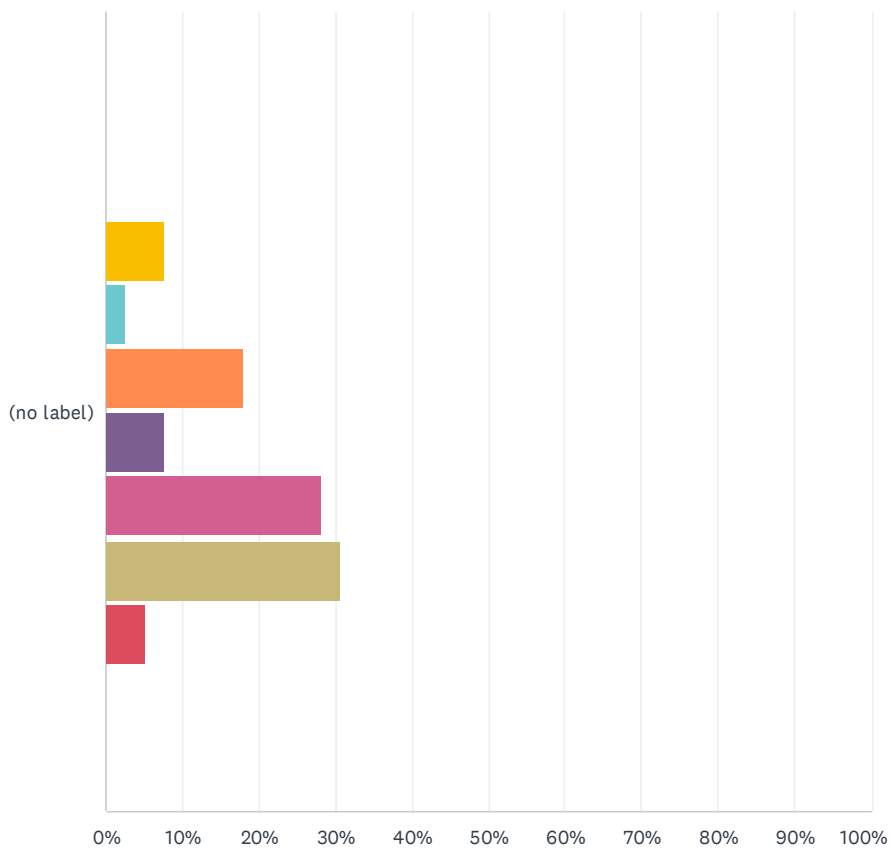
The Commission notes that the American Law Institute's recent revisions to the Model Penal Code's sentencing provisions embrace determinate sentencing, offense classes, and sentencing guidelines. More time is needed for the Commission to digest the work of the ALI and to assess whether a similar approach is appropriate for West Virginia.

Appendix A

Summary of Circuit Judge Survey Data

Q1 The sentences established by statute for various crimes in West Virginia are generally proportionate to the seriousness of the offenses.

Answered: 39 Skipped: 0

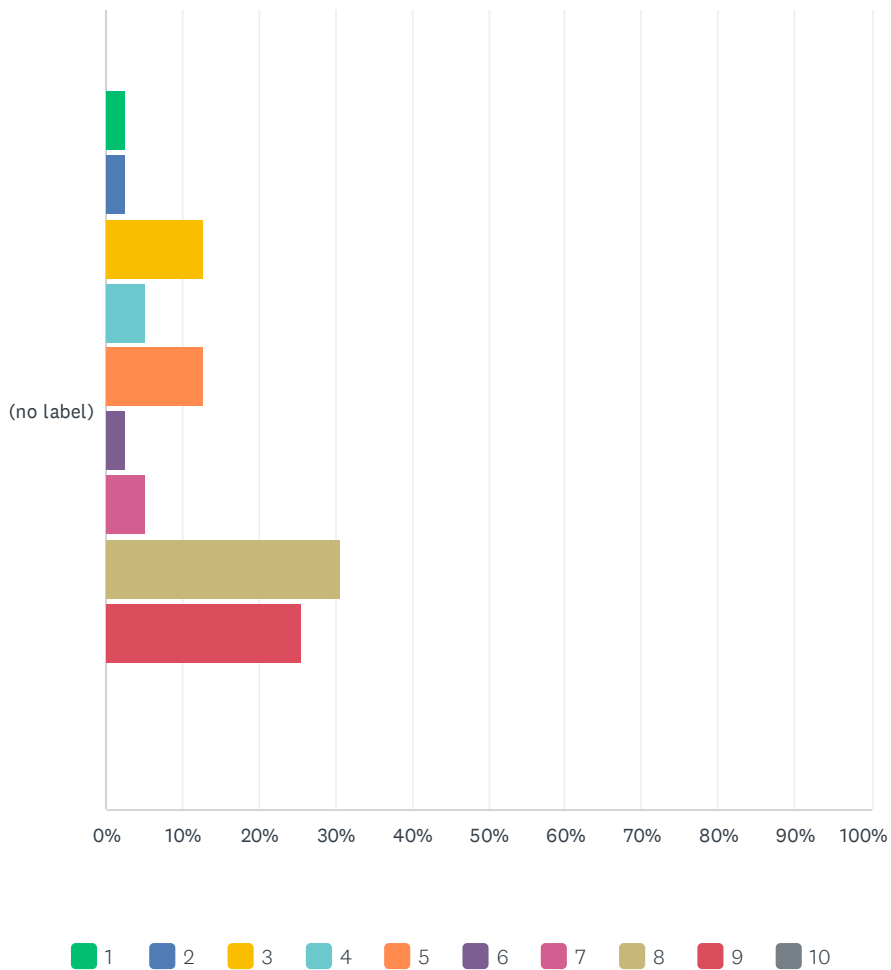


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	1	2	3	4	5	6	7	8	9	10	TOTAL	WEIGHTED AVERAGE
(no label)	0.00% 0	0.00% 0	7.69% 3	2.56% 1	17.95% 7	7.69% 3	28.21% 11	30.77% 12	5.13% 2	0.00% 0	39	6.59

Q2 Under existing law, judges and magistrates in West Virginia have sufficient discretion in sentencing to ensure that the sentence is appropriate to the offense and the offender, in light of all the circumstances.

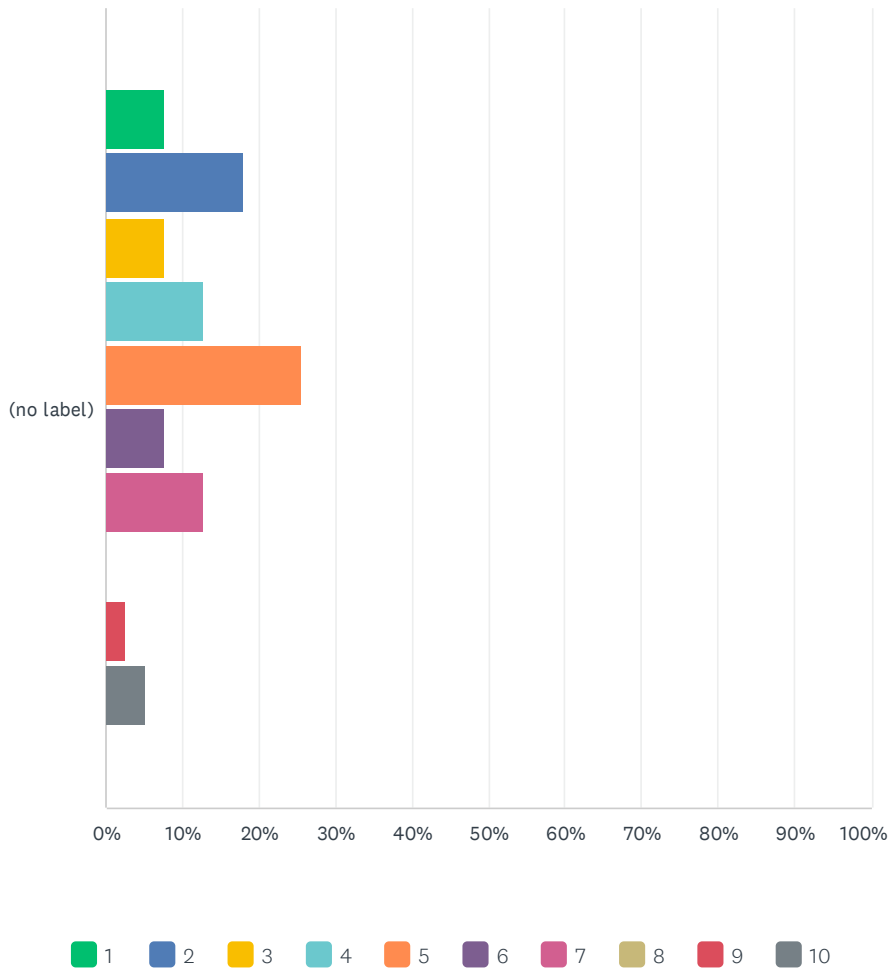
Answered: 39 Skipped: 0



	1	2	3	4	5	6	7	8	9	10	TOTAL	WEIGHTED AVERAGE
(no label)	2.56%	2.56%	12.82%	5.13%	12.82%	2.56%	5.13%	30.77%	25.64%	0.00%	39	6.59
	1	1	5	2	5	1	2	12	10	0		

Q3 Sentencing in West Virginia should be reformed so as to ensure a greater level of consistency among the sentences imposed on individuals who have committed similar crimes.

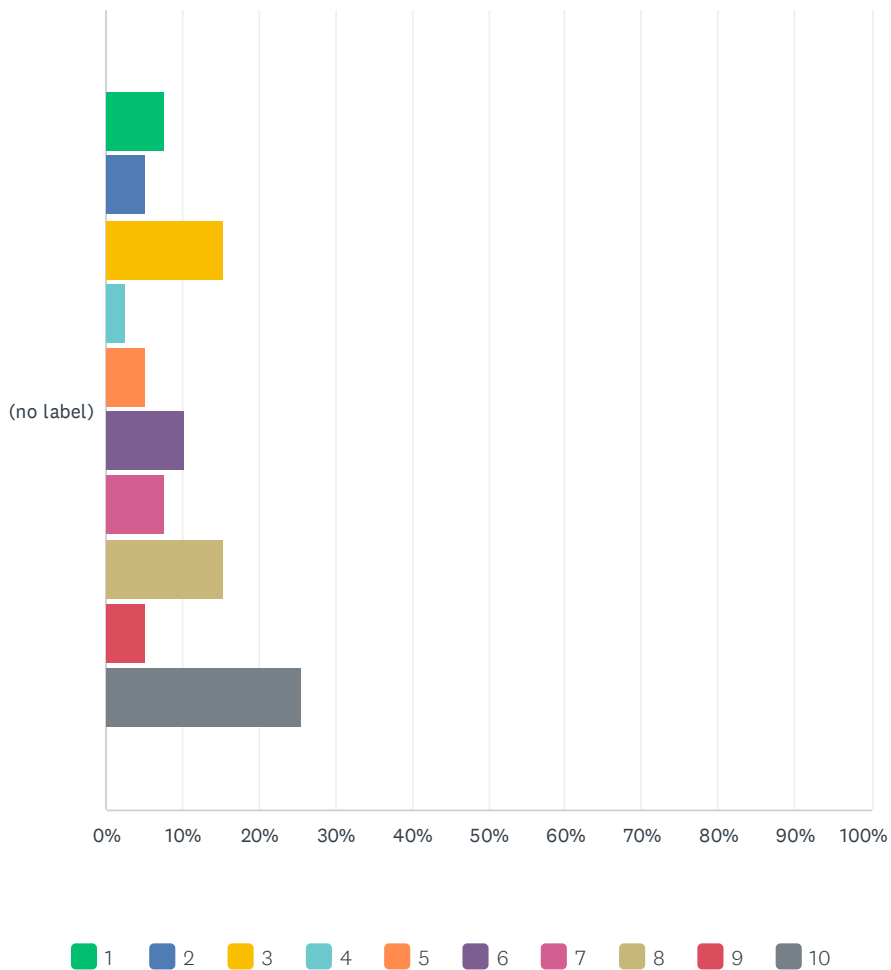
Answered: 39 Skipped: 0



	1	2	3	4	5	6	7	8	9	10	TOTAL	WEIGHTED AVERAGE
(no label)	7.69%	17.95%	7.69%	12.82%	25.64%	7.69%	12.82%	0.00%	2.56%	5.13%	39	4.56
	3	7	3	5	10	3	5	0	1	2		

Q4 Indeterminate sentencing leaves too much authority in the hands of the parole board to determine how much time an individual actually serves in prison.

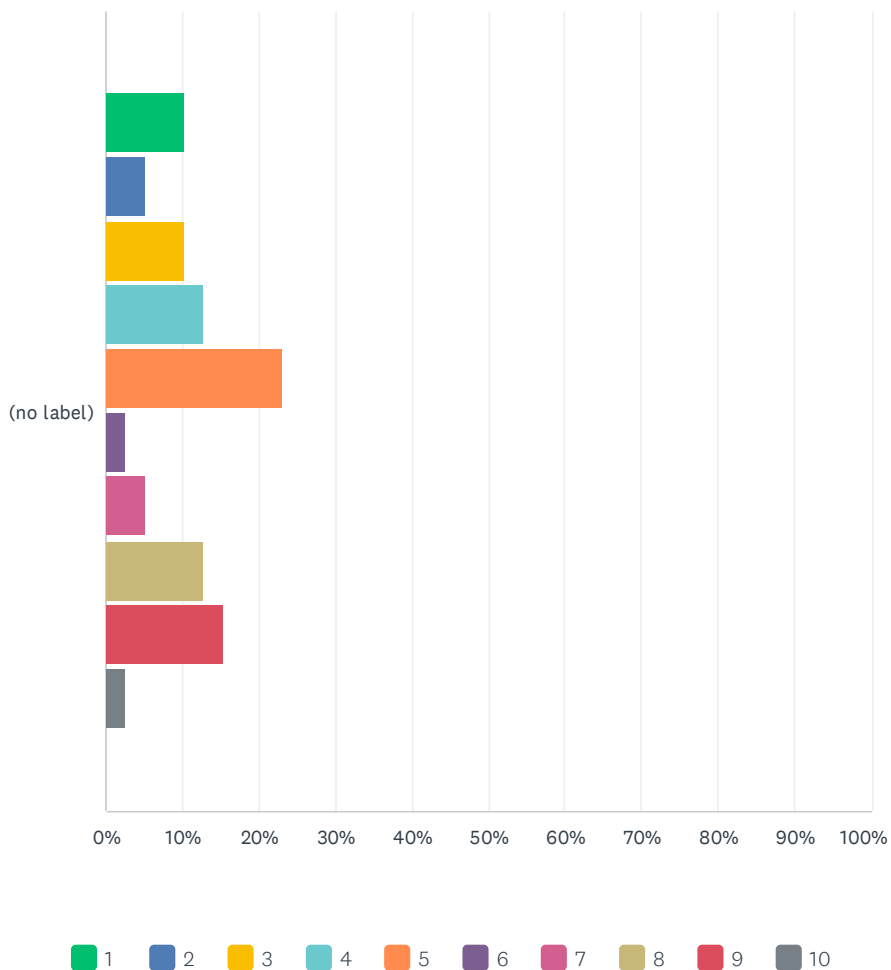
Answered: 39 Skipped: 0



	1	2	3	4	5	6	7	8	9	10	TOTAL	WEIGHTED AVERAGE
(no label)	7.69%	5.13%	15.38%	2.56%	5.13%	10.26%	7.69%	15.38%	5.13%	25.64%	39	6.41
	3	2	6	1	2	4	3	6	2	10		

Q5 Graduated sanctions are useful in securing compliance from persons placed on probation or home incarceration.

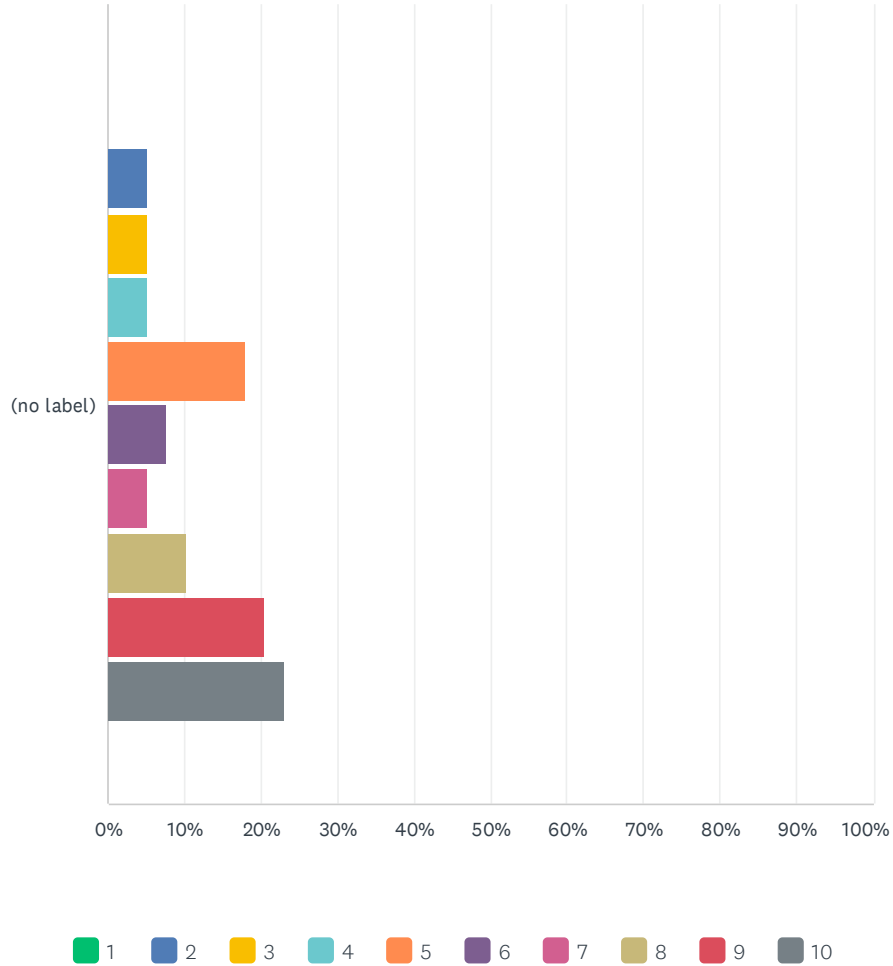
Answered: 39 Skipped: 0



	1	2	3	4	5	6	7	8	9	10	TOTAL	WEIGHTED AVERAGE
(no label)	10.26% 4	5.13% 2	10.26% 4	12.82% 5	23.08% 9	2.56% 1	5.13% 2	12.82% 5	15.38% 6	2.56% 1	39	5.36

Q6 It is important that a person convicted of a crime in one part of the state be treated in a similar manner to another person convicted of the same crime under similar circumstances in another part of the state.

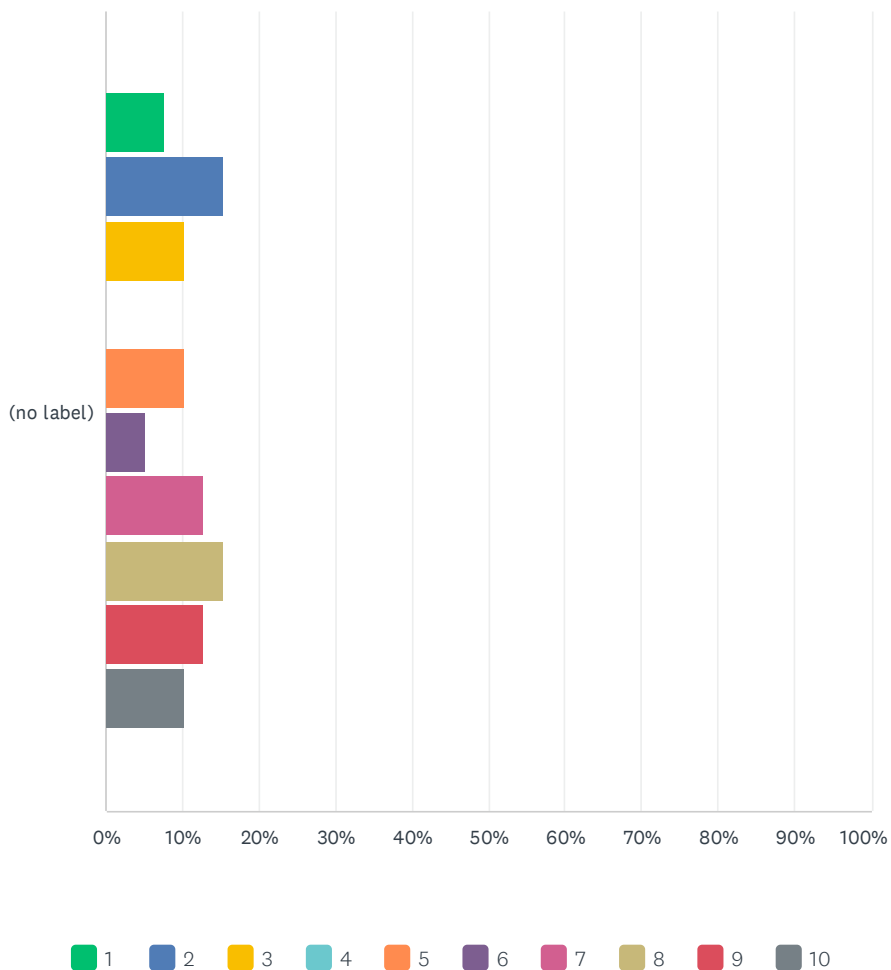
Answered: 39 Skipped: 0



	1	2	3	4	5	6	7	8	9	10	TOTAL	WEIGHTED AVERAGE
(no label)	0.00%	5.13%	5.13%	5.13%	17.95%	7.69%	5.13%	10.26%	20.51%	23.08%	39	7.15
	0	2	2	2	7	3	2	4	8	9		

Q7 Judges and magistrates do not receive enough training or guidance in how they should exercise discretion in sentencing.

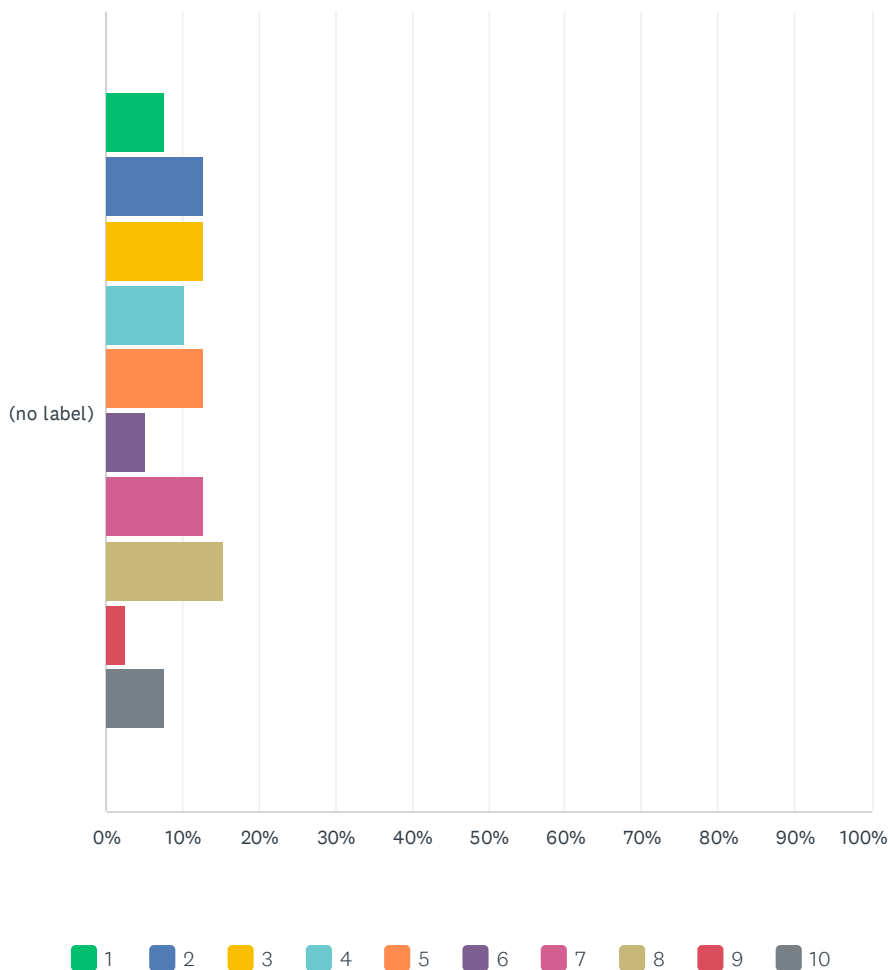
Answered: 39 Skipped: 0



	1	2	3	4	5	6	7	8	9	10	TOTAL	WEIGHTED AVERAGE
(no label)	7.69% 3	15.38% 6	10.26% 4	0.00% 0	10.26% 4	5.13% 2	12.82% 5	15.38% 6	12.82% 5	10.26% 4	39	5.82

Q8 Indeterminate sentencing is a good approach to sentencing because it allows the parole board to make a decision on a person's release that takes into account the most up-to-date information, including the steps that person has taken toward rehabilitation while in prison.

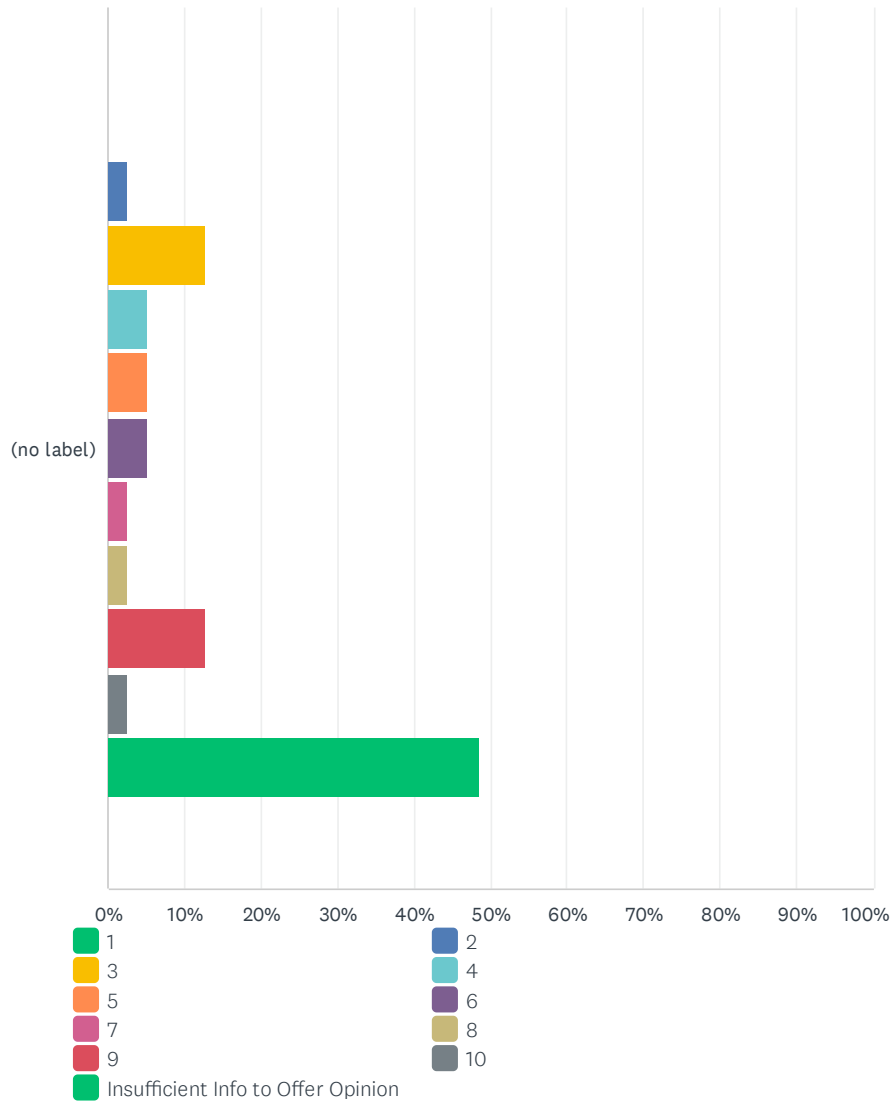
Answered: 39 Skipped: 0



	1	2	3	4	5	6	7	8	9	10	TOTAL	WEIGHTED AVERAGE
(no label)	7.69%	12.82%	12.82%	10.26%	12.82%	5.13%	12.82%	15.38%	2.56%	7.69%	39	5.21
	3	5	5	4	5	2	5	6	1	3		

Q9 Alternative sentences are equally available across the state of West Virginia.

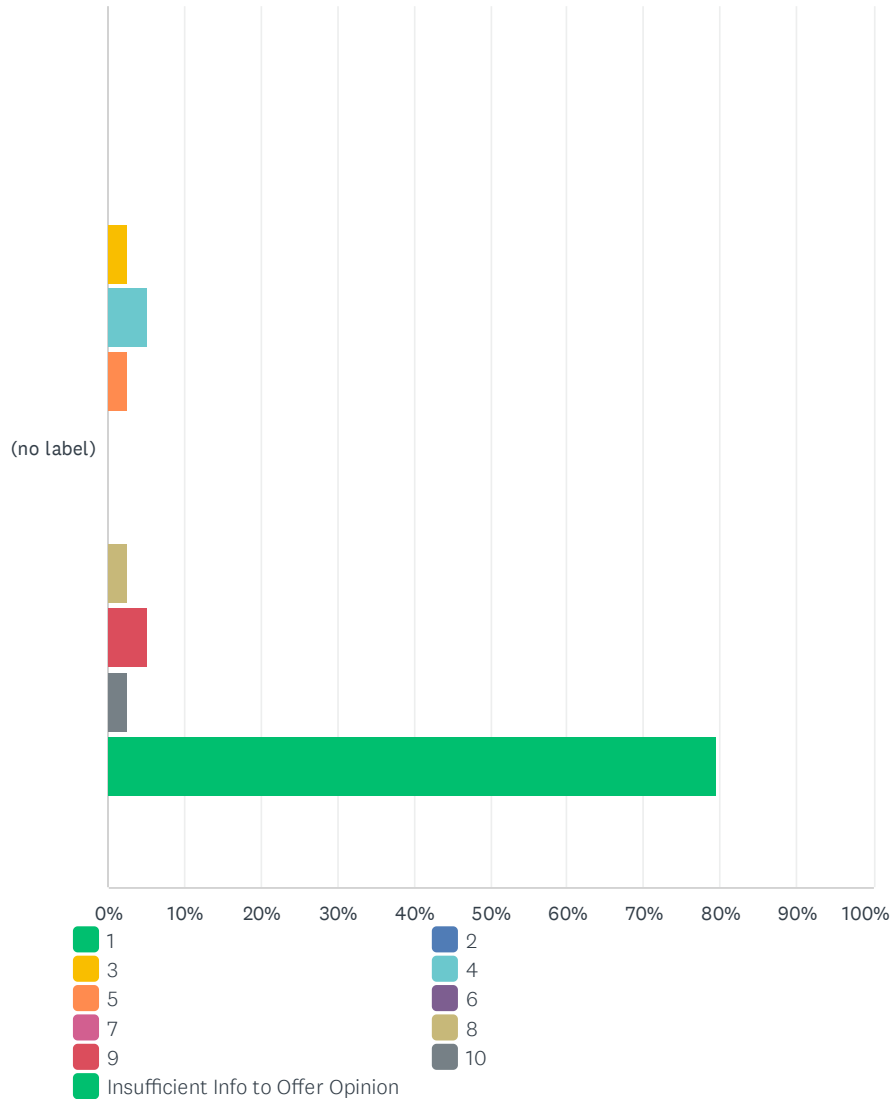
Answered: 39 Skipped: 0



	1	2	3	4	5	6	7	8	9	10	INSUFFICIENT INFO TO OFFER OPINION	TOTAL	WEIG AVER
(no label)	0.00%	2.56%	12.82%	5.13%	5.13%	5.13%	2.56%	2.56%	12.82%	2.56%	48.72%	39	
	0	1	5	2	2	2	1	1	5	1	19		

Q10 Decisions about when to grant an alternative sentence to incarceration for a given level of crime are made in similar ways across the state of West Virginia.

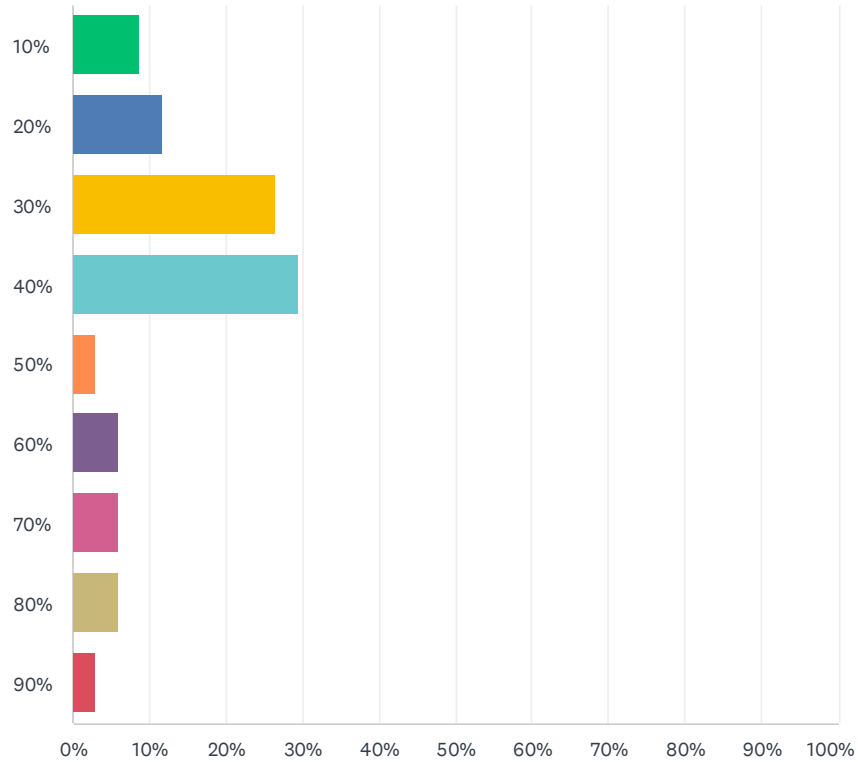
Answered: 39 Skipped: 0



	1	2	3	4	5	6	7	8	9	10	INSUFFICIENT INFO TO OFFER OPINION	TOTAL	WEIGHT AVERAGE
(no label)	0.00%	0.00%	2.56%	5.13%	2.56%	0.00%	0.00%	2.56%	5.13%	2.56%	79.49%	39	
	0	0	1	2	1	0	0	1	2	1	31		

Q11 Approximately what percentage of probationers in your circuit ultimately have their probation revoked?

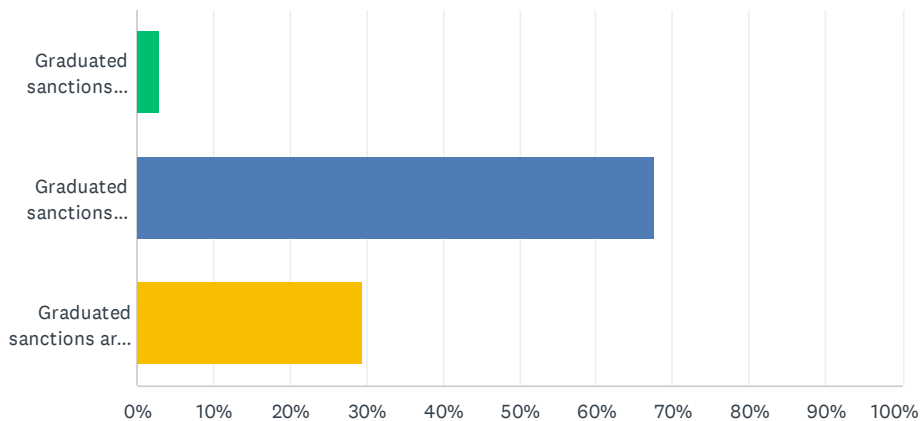
Answered: 34 Skipped: 5



ANSWER CHOICES	RESPONSES	
10%	8.82%	3
20%	11.76%	4
30%	26.47%	9
40%	29.41%	10
50%	2.94%	1
60%	5.88%	2
70%	5.88%	2
80%	5.88%	2
90%	2.94%	1
TOTAL		34

Q12 Which of the following statements best reflects your experience with the imposition of graduated sanctions for violations of probation? Please use the comment box to elaborate on your response.

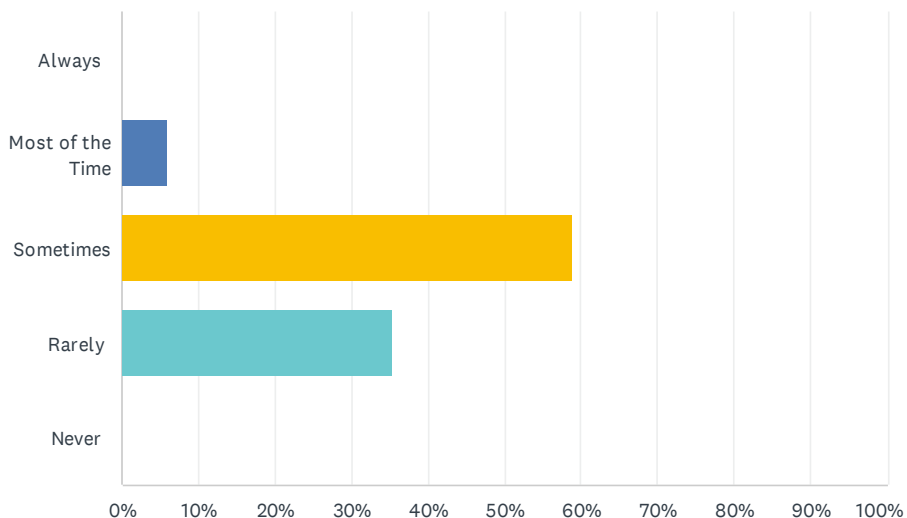
Answered: 34 Skipped: 5



ANSWER CHOICES	RESPONSES	
Graduated sanctions usually get the attention of probationers after a first or second violation, so that they change their behavior and come into compliance with the requirements of probation.	2.94%	1
Graduated sanctions sometimes work to change the behavior of probationers, and it is worth the effort to use them in order to keep offenders in the community, under supervision.	67.65%	23
Graduated sanctions are generally not successful in changing the behavior of probationers, and they simply drag out the process that ultimately ends a revocation of probation anyway.	29.41%	10
TOTAL		34

Q13 How frequently do you revoke probation or home incarceration for a first violation? Please use the comment box to expand on your answer.

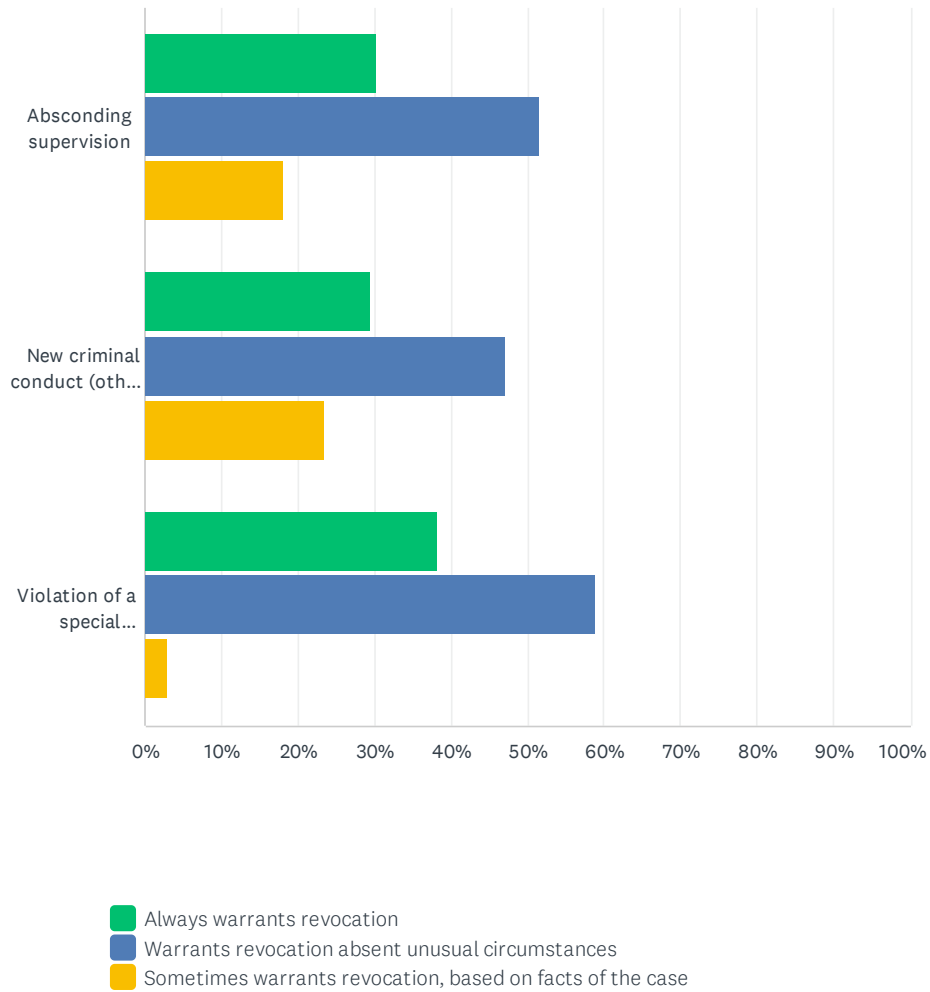
Answered: 34 Skipped: 5



ANSWER CHOICES	RESPONSES	
Always	0.00%	0
Most of the Time	5.88%	2
Sometimes	58.82%	20
Rarely	35.29%	12
Never	0.00%	0
TOTAL		34

Q14 The West Virginia Code permits the revocation of probation for a first or second violation, without the imposition of graduated sanctions, in certain circumstances, set out below. Which of these circumstances do think warrant revocation without the use of graduated sanctions:

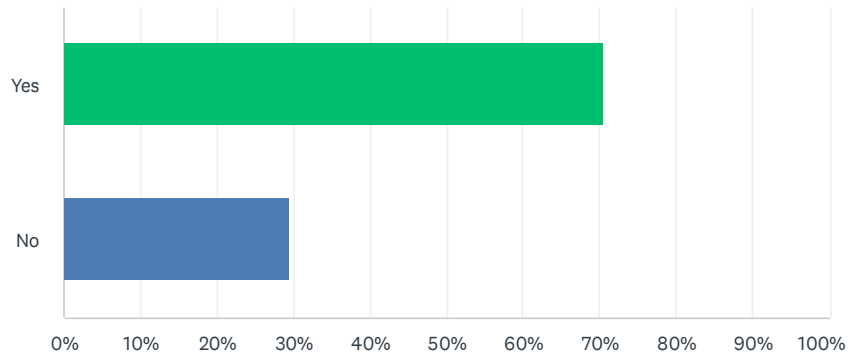
Answered: 34 Skipped: 5



	ALWAYS WARRANTS REVOCATION	WARRANTS REVOCATION ABSENT UNUSUAL CIRCUMSTANCES	SOMETIMES WARRANTS REVOCATION, BASED ON FACTS OF THE CASE	TOTAL	WEIGHTED AVERAGE
Absconding supervision	30.30% 10	51.52% 17	18.18% 6	33	1.88
New criminal conduct (other than a minor traffic violation or simple possession of a controlled substance)	29.41% 10	47.06% 16	23.53% 8	34	1.94
Violation of a special condition of probation designed either to protect the public or a victim	38.24% 13	58.82% 20	2.94% 1	34	1.65

Q15 Are there other violations that, in your view, merit revocation without first imposing graduated sanctions?

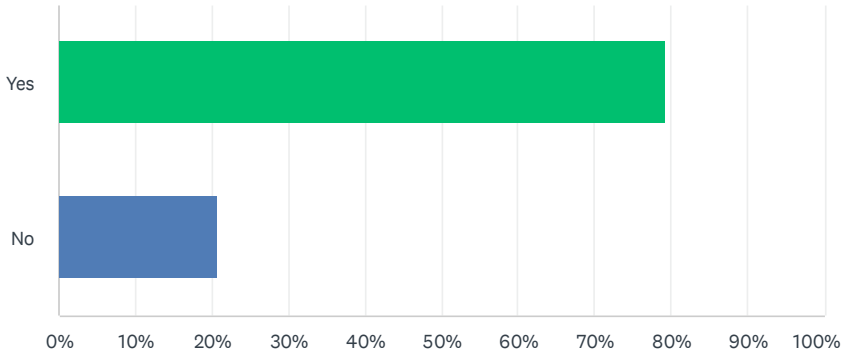
Answered: 34 Skipped: 5



ANSWER CHOICES	RESPONSES	
Yes	70.59%	24
No	29.41%	10
TOTAL		34

Q16 In your view, do you have an adequate range of alternative sentences available in your circuit?

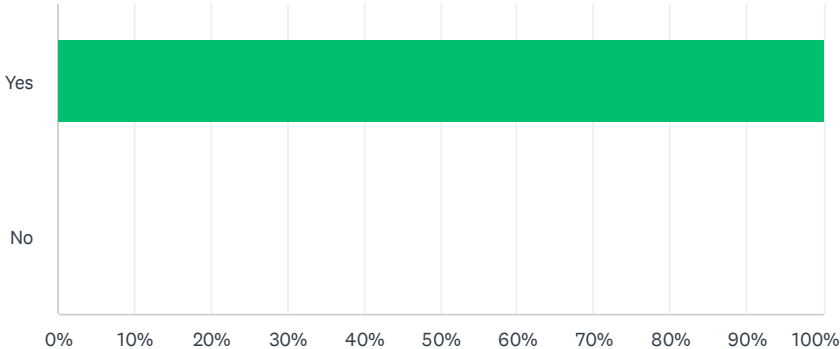
Answered: 34 Skipped: 5



ANSWER CHOICES	RESPONSES	
Yes	79.41%	27
No	20.59%	7
TOTAL		34

Q17 Is home confinement available in your county?

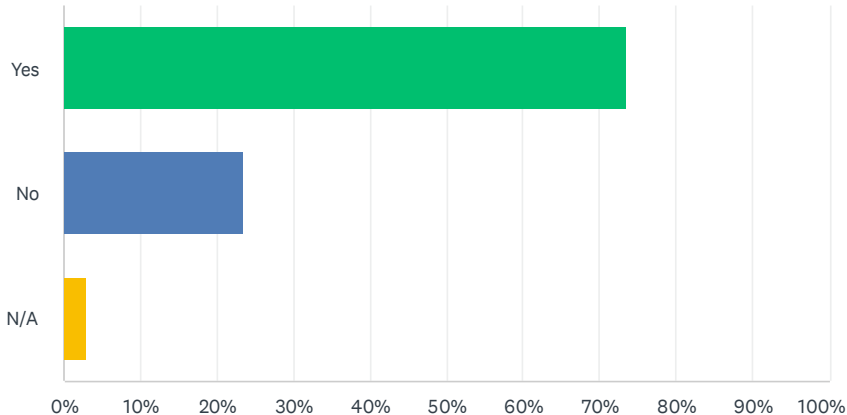
Answered: 34 Skipped: 5



ANSWER CHOICES	RESPONSES	
Yes	100.00%	34
No	0.00%	0
TOTAL		34

Q18 If you answered "Yes" to Question 16, is home confinement administered by the Sheriff?

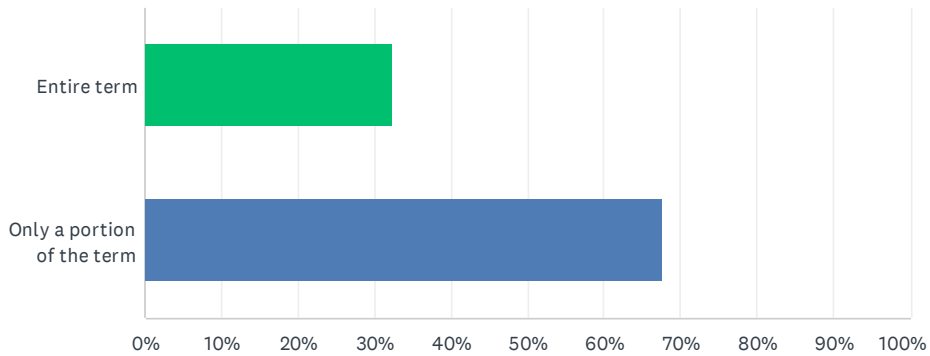
Answered: 34 Skipped: 5



ANSWER CHOICES	RESPONSES	
Yes	73.53%	25
No	23.53%	8
N/A	2.94%	1
TOTAL		34

Q19 When a person subject to supervised release following conviction for a sex offense has violated the terms of supervised release, do you typically revoke the entirety of their term of supervised release or only a portion of that term?

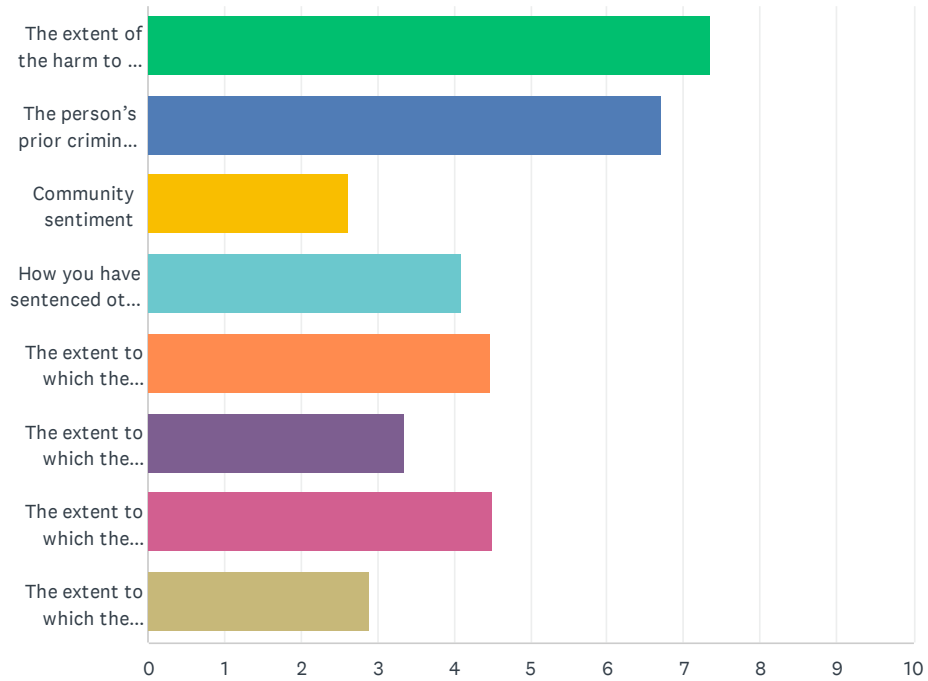
Answered: 34 Skipped: 5



ANSWER CHOICES	RESPONSES
Entire term	32.35% 11
Only a portion of the term	67.65% 23
TOTAL	34

Q20 In cases where current law affords you the discretion to impose a sentence of a determined duration, which of the following factors most influence your decision? (Rank in order, with 1 being most important)

Answered: 34 Skipped: 5

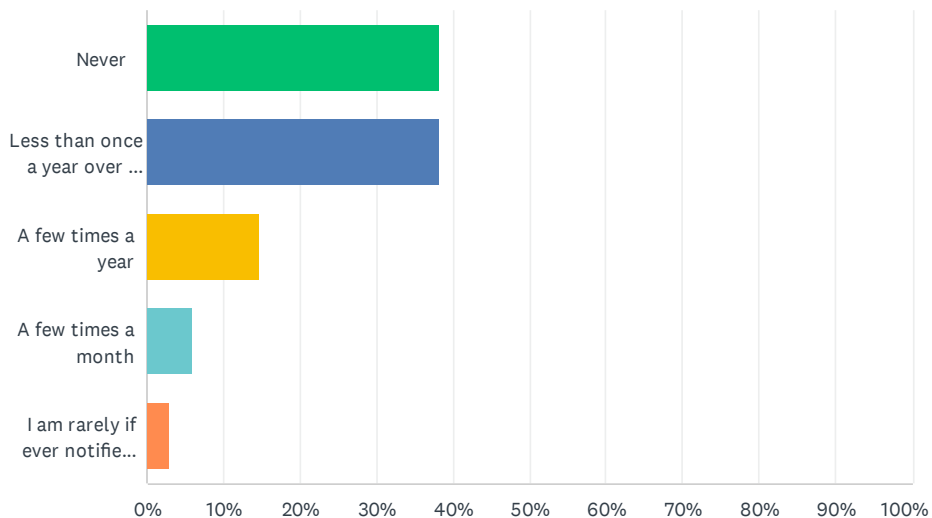


Survey of West Virginia Judges Regarding Sentencing and Alternative Sentencing Practices

	1	2	3	4	5	6	7	8	TOTAL	SCORE
The extent of the harm to the victim of the crime	73.53% 25	17.65% 6	2.94% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	5.88% 2	34	7.35
The person's prior criminal history	20.59% 7	61.76% 21	5.88% 2	2.94% 1	2.94% 1	0.00% 0	5.88% 2	0.00% 0	34	6.71
Community sentiment	2.94% 1	2.94% 1	5.88% 2	5.88% 2	8.82% 3	14.71% 5	14.71% 5	44.12% 15	34	2.62
How you have sentenced other persons convicted of the same offense in the past	2.94% 1	5.88% 2	20.59% 7	14.71% 5	11.76% 4	17.65% 6	20.59% 7	5.88% 2	34	4.09
The extent to which the person is engaged in positive activities (e.g., employment, substance abuse treatment, etc.)	0.00% 0	2.94% 1	11.76% 4	35.29% 12	32.35% 11	14.71% 5	2.94% 1	0.00% 0	34	4.47
The extent to which the person expresses remorse	0.00% 0	0.00% 0	8.82% 3	20.59% 7	20.59% 7	14.71% 5	17.65% 6	17.65% 6	34	3.35
The extent to which the person was the primary actor in the offense (or, conversely, the extent to which the person was an accessory to the crime, rather than the primary actor)	0.00% 0	2.94% 1	38.24% 13	11.76% 4	17.65% 6	17.65% 6	5.88% 2	5.88% 2	34	4.50
The extent to which the person assisted in the criminal investigation or prosecution of another	0.00% 0	5.88% 2	5.88% 2	8.82% 3	5.88% 2	20.59% 7	32.35% 11	20.59% 7	34	2.91

Q21 How frequently have you provided information to the parole board when you are notified that a person you have sentenced is coming before the parole board for consideration?

Answered: 34 Skipped: 5



ANSWER CHOICES	RESPONSES	
Never	38.24%	13
Less than once a year over the course of my career	38.24%	13
A few times a year	14.71%	5
A few times a month	5.88%	2
I am rarely if ever notified when a person I have sentenced is coming before the parole board.	2.94%	1
TOTAL		34

Q22 Please list any specific West Virginia statutes where you believe the statutory sentence is inappropriate and should be modified.

Answered: 34 Skipped: 5

Q23 In your view, what is the single biggest problem with sentencing practices in West Virginia?

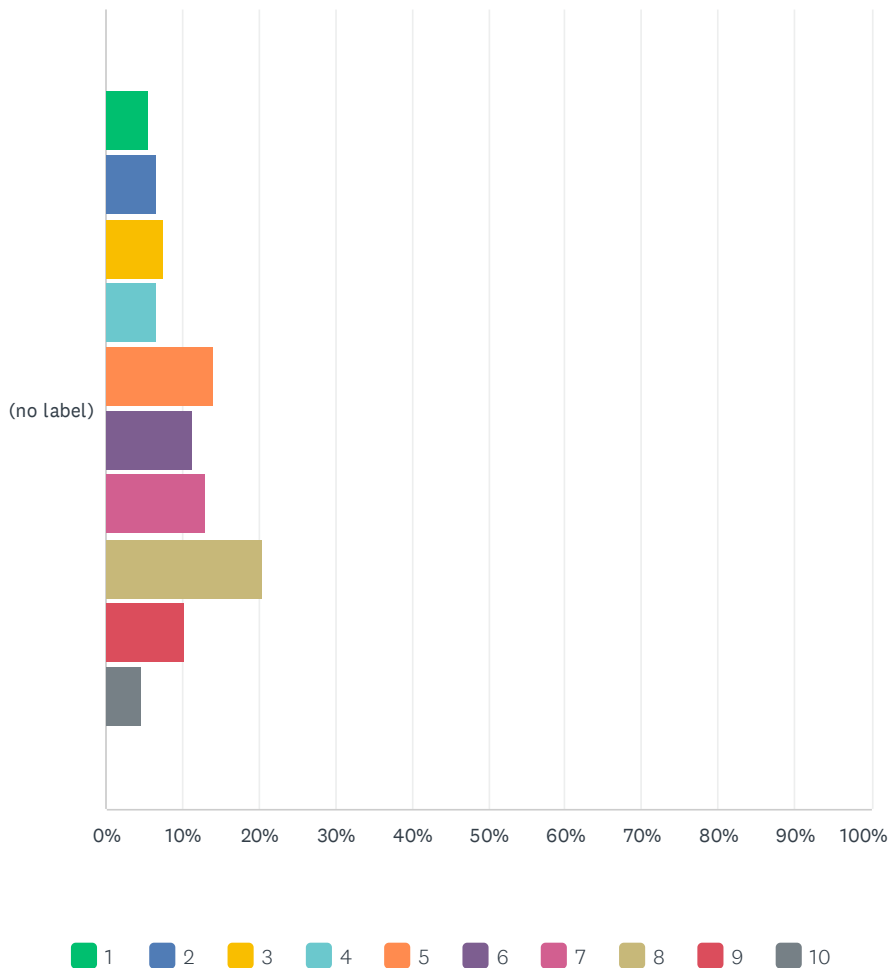
Answered: 34 Skipped: 5

Appendix B

Summary of Probation Officer Survey Data

Q1 The sentences established by statute for various crimes in West Virginia are generally proportionate to the seriousness of the offenses.

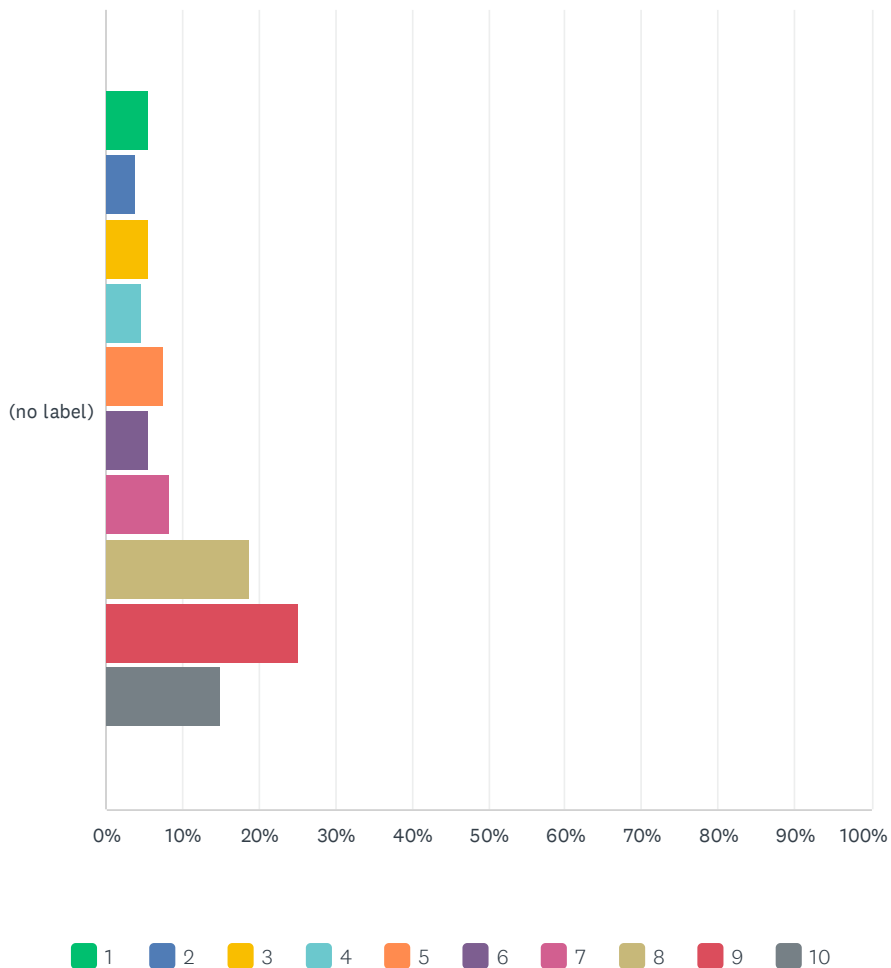
Answered: 107 Skipped: 0



	1	2	3	4	5	6	7	8	9	10	TOTAL	WEIGHTED AVERAGE
(no label)	5.61% 6	6.54% 7	7.48% 8	6.54% 7	14.02% 15	11.21% 12	13.08% 14	20.56% 22	10.28% 11	4.67% 5	107	6.00

Q2 Under existing law, judges and magistrates in West Virginia have sufficient discretion in sentencing to ensure that the sentence is appropriate to the offense and the offender, in light of all the circumstances.

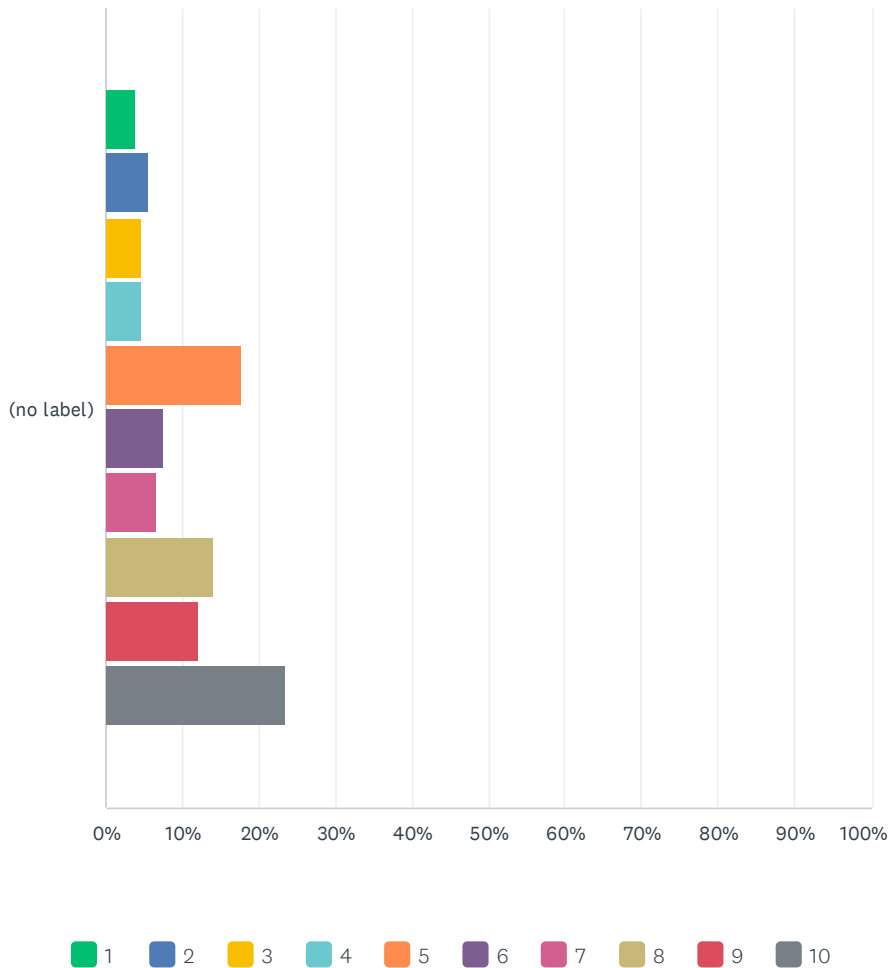
Answered: 107 Skipped: 0



	1	2	3	4	5	6	7	8	9	10	TOTAL	WEIGHTED AVERAGE
(no label)	5.61% 6	3.74% 4	5.61% 6	4.67% 5	7.48% 8	5.61% 6	8.41% 9	18.69% 20	25.23% 27	14.95% 16	107	7.05

Q3 Sentencing in West Virginia should be reformed so as to ensure a greater level of consistency among the sentences imposed on individuals who have committed similar crimes.

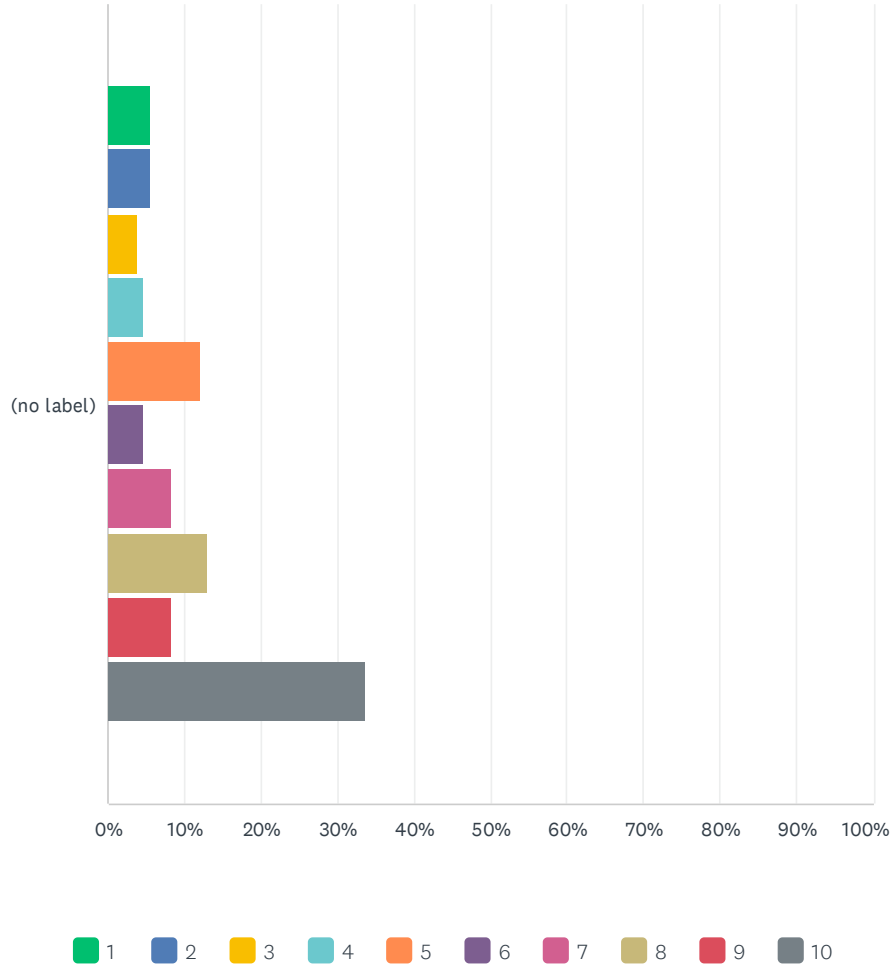
Answered: 107 Skipped: 0



	1	2	3	4	5	6	7	8	9	10	TOTAL	WEIGHTED AVERAGE
(no label)	3.74%	5.61%	4.67%	4.67%	17.76%	7.48%	6.54%	14.02%	12.15%	23.36%	107	6.82
	4	6	5	5	19	8	7	15	13	25		

Q4 Indeterminate sentencing leaves too much authority in the hands of the parole board to determine how much time an individual actually serves in prison.

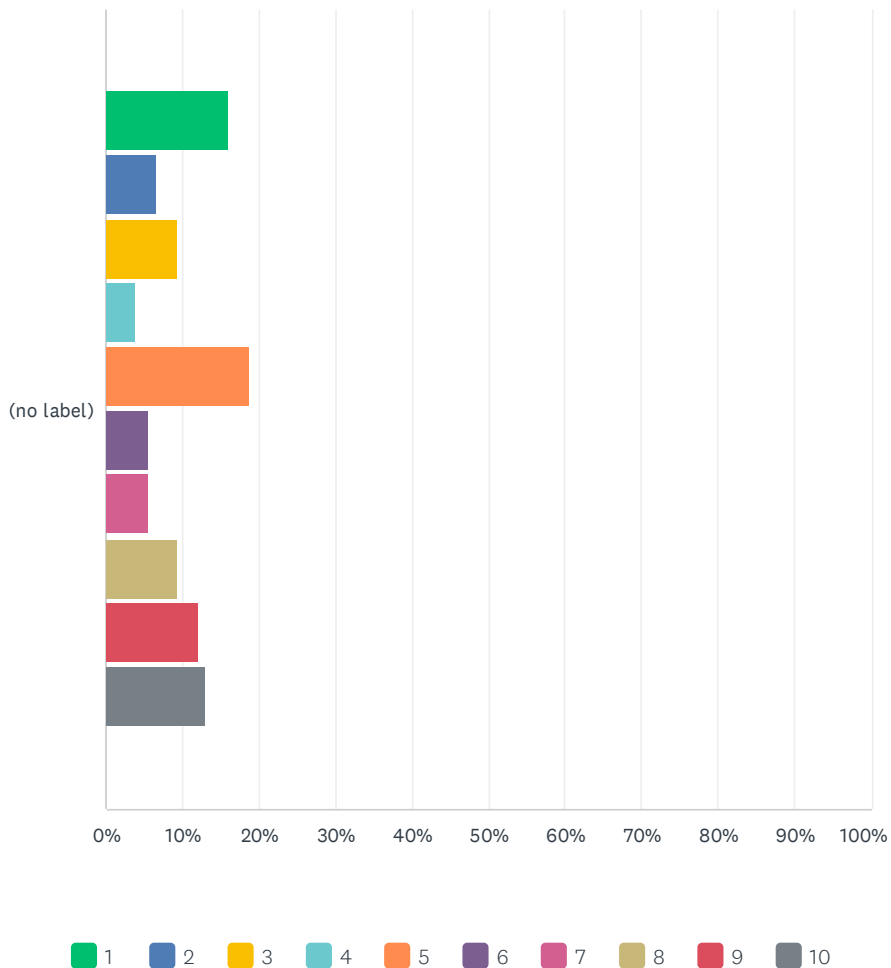
Answered: 107 Skipped: 0



	1	2	3	4	5	6	7	8	9	10	TOTAL	WEIGHTED AVERAGE
(no label)	5.61% 6	5.61% 6	3.74% 4	4.67% 5	12.15% 13	4.67% 5	8.41% 9	13.08% 14	8.41% 9	33.64% 36	107	7.11

Q5 Graduated sanctions are useful in securing compliance from persons placed on probation or home incarceration.

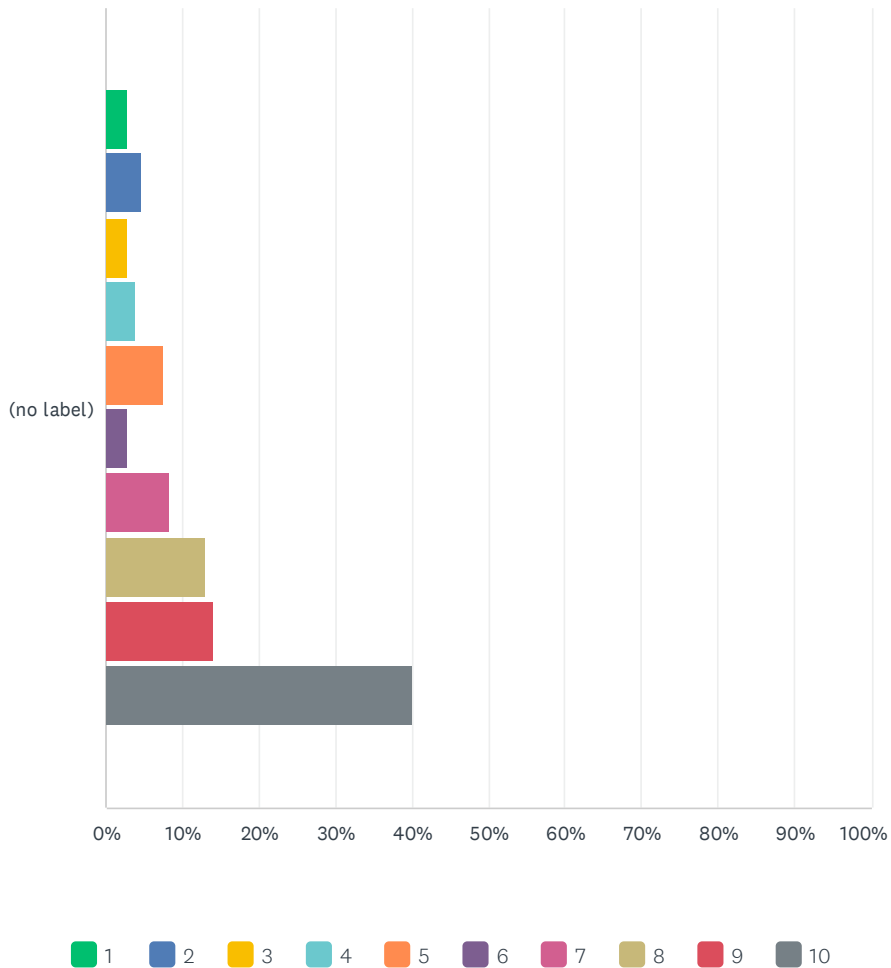
Answered: 107 Skipped: 0



	1	2	3	4	5	6	7	8	9	10	TOTAL	WEIGHTED AVERAGE
(no label)	15.89% 17	6.54% 7	9.35% 10	3.74% 4	18.69% 20	5.61% 6	5.61% 6	9.35% 10	12.15% 13	13.08% 14	107	5.53

Q6 It is important that a person convicted of a crime in one part of the state be treated in a similar manner to another person convicted of the same crime under similar circumstances in another part of the state.

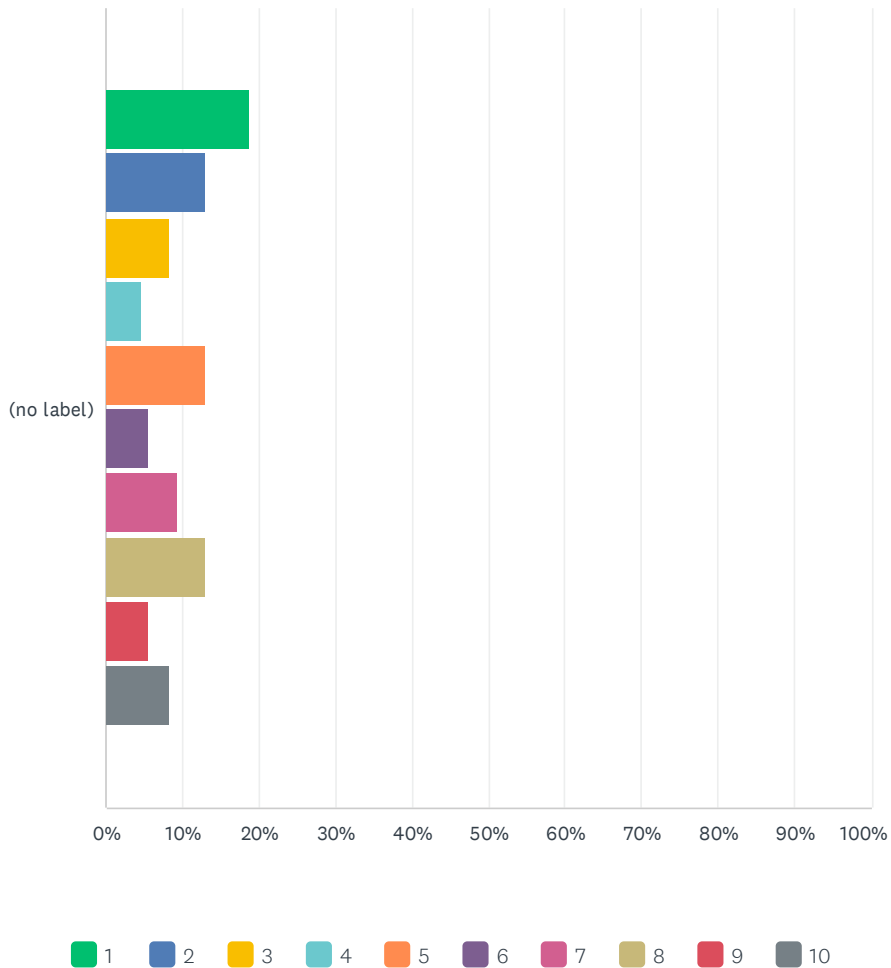
Answered: 107 Skipped: 0



	1	2	3	4	5	6	7	8	9	10	TOTAL	WEIGHTED AVERAGE
(no label)	2.80%	4.67%	2.80%	3.74%	7.48%	2.80%	8.41%	13.08%	14.02%	40.19%	107	7.81
	3	5	3	4	8	3	9	14	15	43		

Q7 Probation officers do not receive enough training or guidance in how to develop appropriate sentencing recommendations, so as to assist judges in exercising their discretion in sentencing.

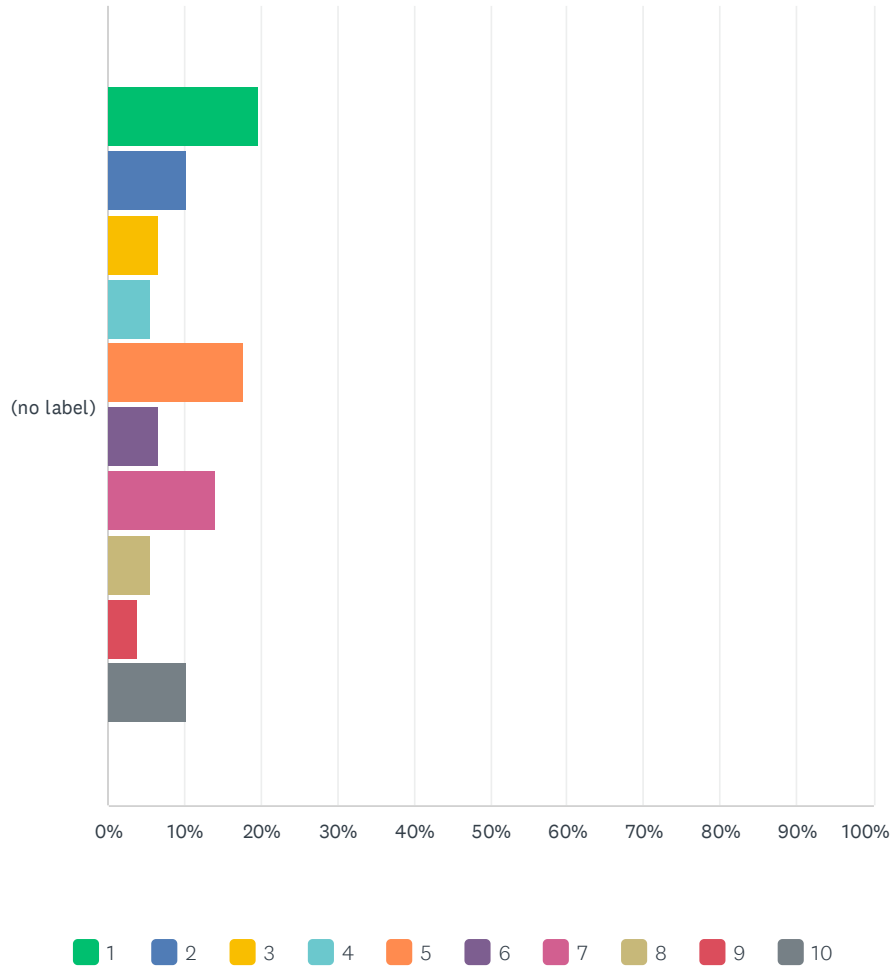
Answered: 107 Skipped: 0



	1	2	3	4	5	6	7	8	9	10	TOTAL	WEIGHTED AVERAGE
(no label)	18.69%	13.08%	8.41%	4.67%	13.08%	5.61%	9.35%	13.08%	5.61%	8.41%	107	4.93
	20	14	9	5	14	6	10	14	6	9		

Q8 Indeterminate sentencing is a good approach to sentencing because it allows the parole board to make a decision on a person's release that takes into account the most up-to-date information, including the steps that person has taken toward rehabilitation while in prison.

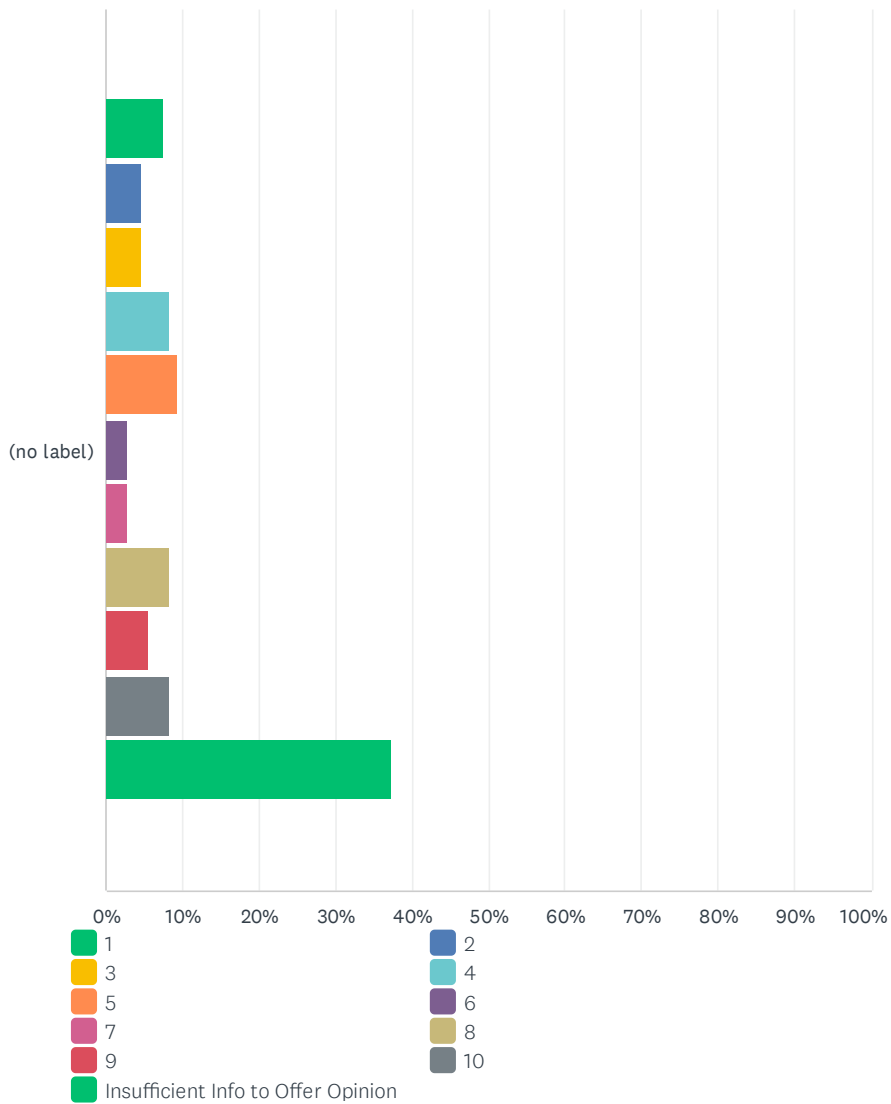
Answered: 107 Skipped: 0



	1	2	3	4	5	6	7	8	9	10	TOTAL	WEIGHTED AVERAGE
(no label)	19.63% 21	10.28% 11	6.54% 7	5.61% 6	17.76% 19	6.54% 7	14.02% 15	5.61% 6	3.74% 4	10.28% 11	107	4.90

Q9 Alternative sentences are equally available across the state of West Virginia.

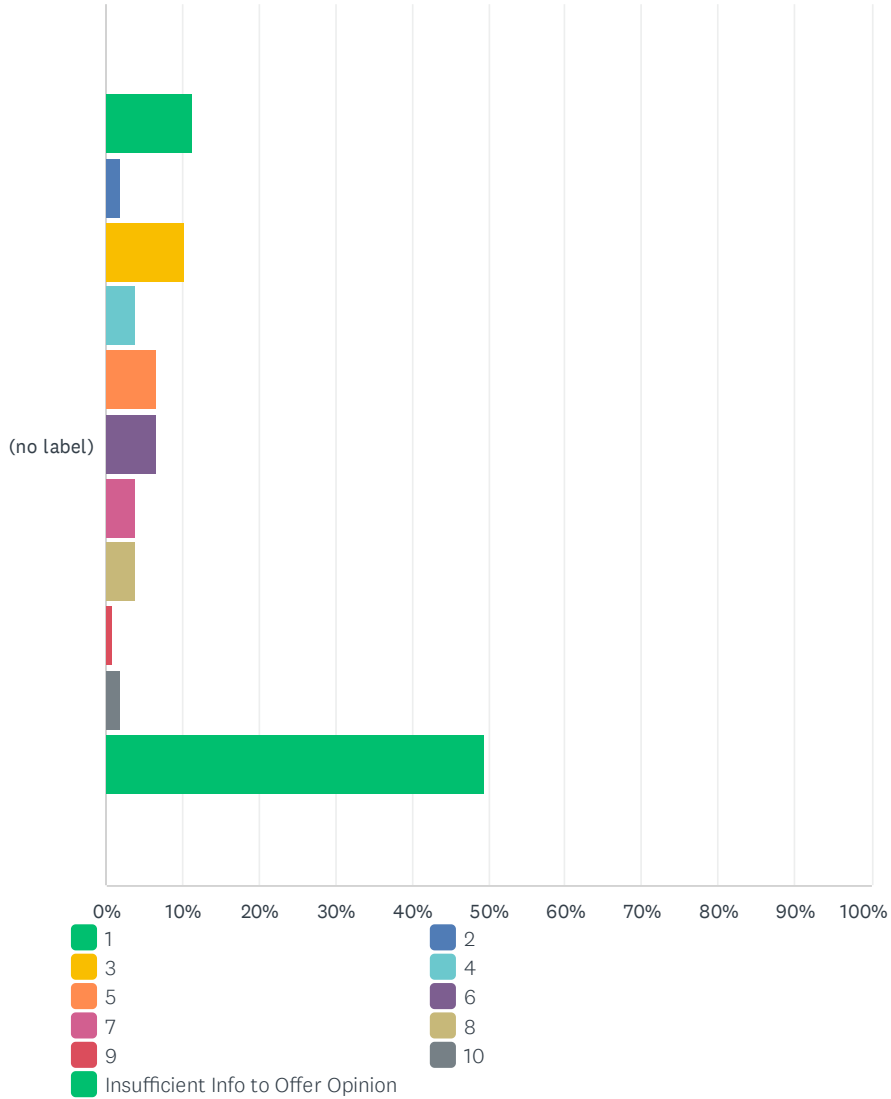
Answered: 107 Skipped: 0



	1	2	3	4	5	6	7	8	9	10	INSUFFICIENT INFO TO OFFER OPINION	TOTAL	WEIGHT AVERAGE
(no label)	7.48%	4.67%	4.67%	8.41%	9.35%	2.80%	2.80%	8.41%	5.61%	8.41%	37.38%	107	
	8	5	5	9	10	3	3	9	6	9	40		

Q10 Decisions about when to grant an alternative sentence to incarceration for a given level of crime are made in similar ways across the state of West Virginia.

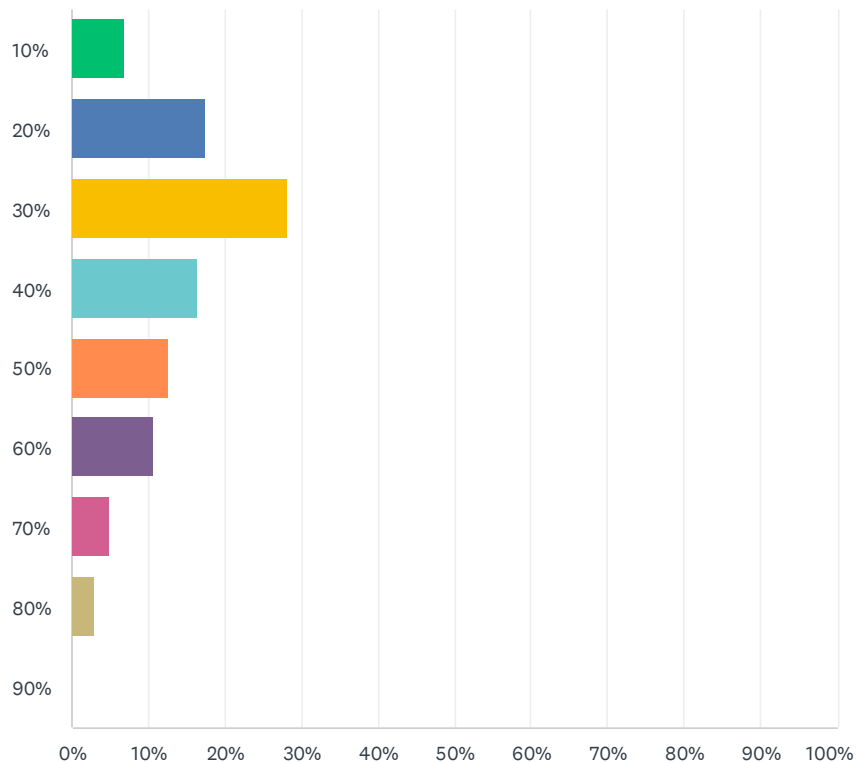
Answered: 107 Skipped: 0



	1	2	3	4	5	6	7	8	9	10	INSUFFICIENT INFO TO OFFER OPINION	TOTAL	WEIG AVER
(no label)	11.21% 12	1.87% 2	10.28% 11	3.74% 4	6.54% 7	6.54% 7	3.74% 4	3.74% 4	0.93% 1	1.87% 2	49.53% 53	107	

Q11 Approximately what percentage of probationers in your circuit ultimately have their probation revoked?

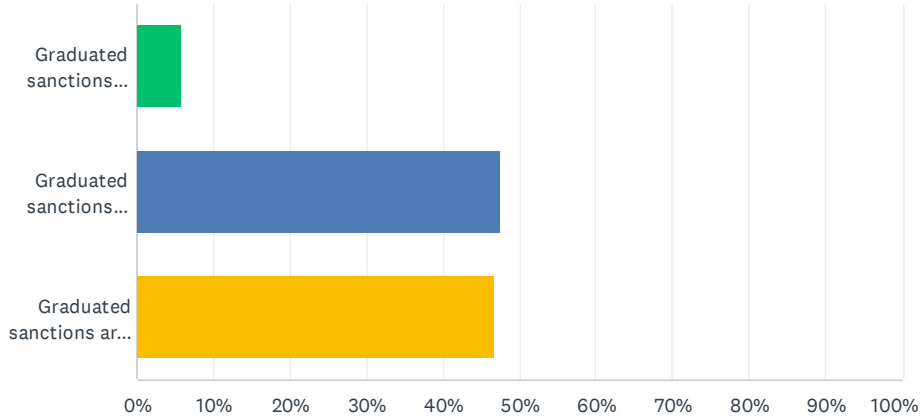
Answered: 103 Skipped: 4



ANSWER CHOICES	RESPONSES	
10%	6.80%	7
20%	17.48%	18
30%	28.16%	29
40%	16.50%	17
50%	12.62%	13
60%	10.68%	11
70%	4.85%	5
80%	2.91%	3
90%	0.00%	0
TOTAL		103

Q12 Which of the following statements best reflects your experience with the imposition of graduated sanctions for violations of probation? Please use the comment box to elaborate on your response.

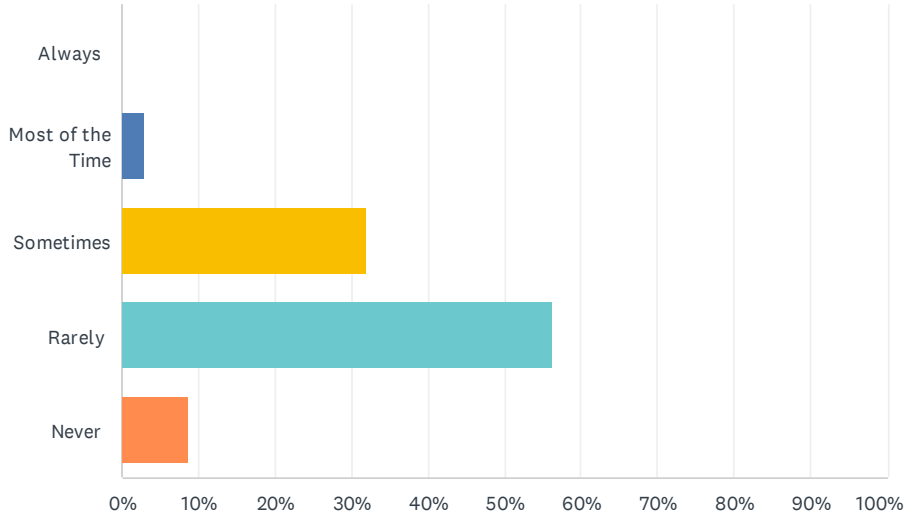
Answered: 103 Skipped: 4



ANSWER CHOICES	RESPONSES	
Graduated sanctions usually get the attention of probationers after a first or second violation, so that they change their behavior and come into compliance with the requirements of probation.	5.83%	6
Graduated sanctions sometimes work to change the behavior of probationers, and it is worth the effort to use them in order to keep offenders in the community, under supervision.	47.57%	49
Graduated sanctions are generally not successful in changing the behavior of probationers, and they simply drag out the process that ultimately ends a revocation of probation anyway.	46.60%	48
TOTAL		103

Q13 How frequently do you witness judges revoke probation or home incarceration for a first violation? Please use the comment box to expand on your answer.

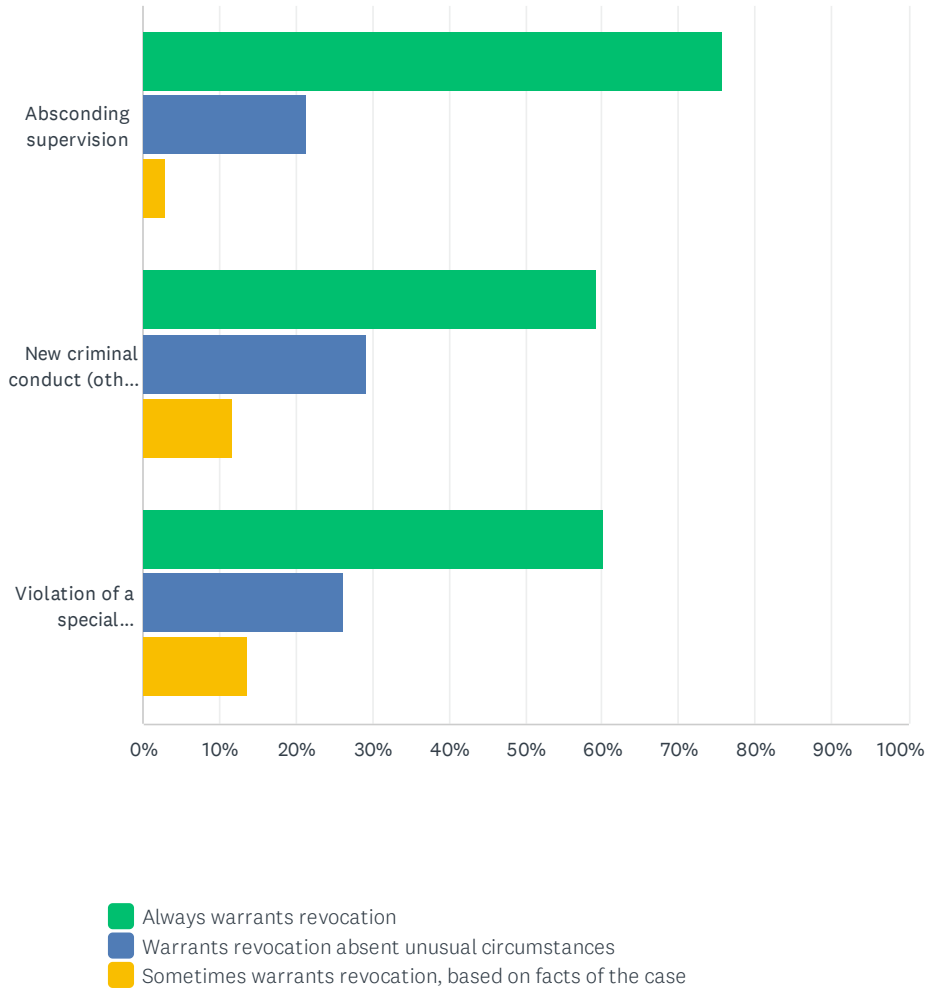
Answered: 103 Skipped: 4



ANSWER CHOICES	RESPONSES	
Always	0.00%	0
Most of the Time	2.91%	3
Sometimes	32.04%	33
Rarely	56.31%	58
Never	8.74%	9
TOTAL		103

Q14 The West Virginia Code permits the revocation of probation for a first or second violation, without the imposition of graduated sanctions, in certain circumstances, set out below. Which of these circumstances do think warrant revocation without the use of graduated sanctions:

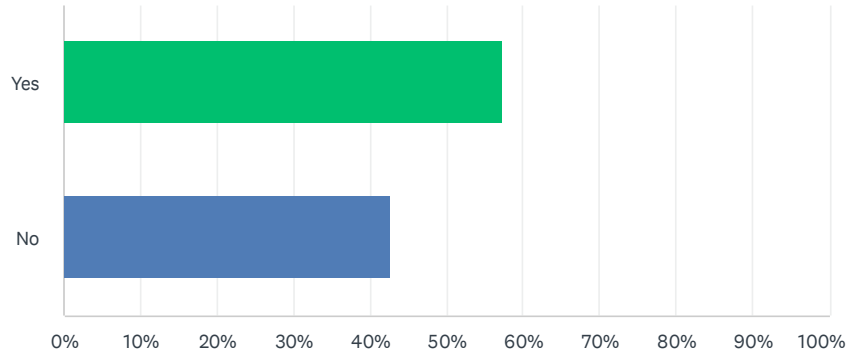
Answered: 103 Skipped: 4



	ALWAYS WARRANTS REVOCATION	WARRANTS REVOCATION ABSENT UNUSUAL CIRCUMSTANCES	SOMETIMES WARRANTS REVOCATION, BASED ON FACTS OF THE CASE	TOTAL	WEIGHTED AVERAGE
Absconding supervision	75.73% 78	21.36% 22	2.91% 3	103	1.27
New criminal conduct (other than a minor traffic violation or simple possession of a controlled substance)	59.22% 61	29.13% 30	11.65% 12	103	1.52
Violation of a special condition of probation designed either to protect the public or a victim	60.19% 62	26.21% 27	13.59% 14	103	1.53

Q15 Are there other violations that, in your view, merit revocation without first imposing graduated sanctions?

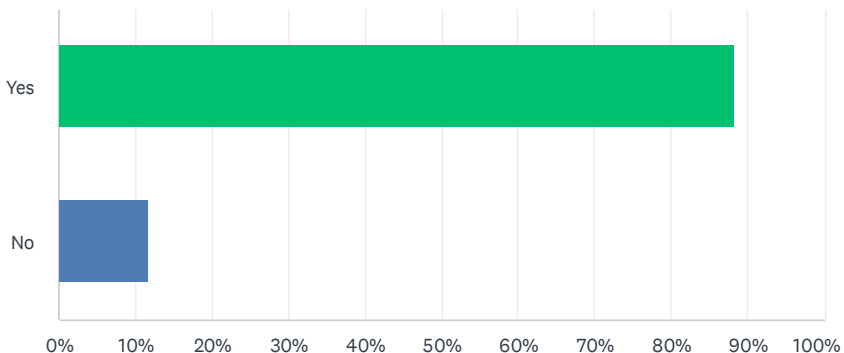
Answered: 103 Skipped: 4



ANSWER CHOICES	RESPONSES	
Yes	57.28%	59
No	42.72%	44
TOTAL		103

Q16 In your view, do you have an adequate range of alternative sentences available in your circuit?

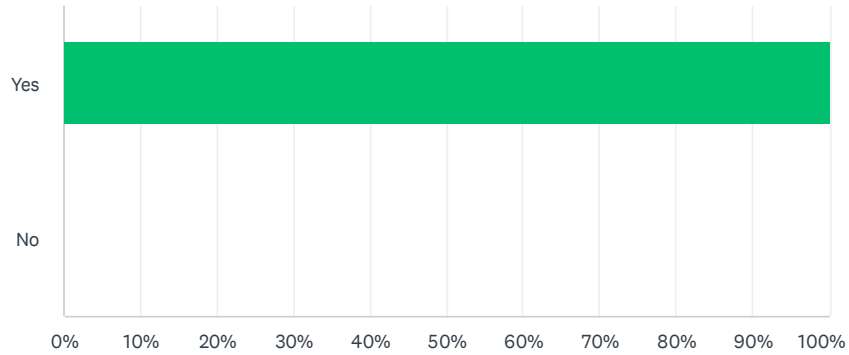
Answered: 103 Skipped: 4



ANSWER CHOICES	RESPONSES	
Yes	88.35%	91
No	11.65%	12
TOTAL		103

Q17 Is home confinement available in your county?

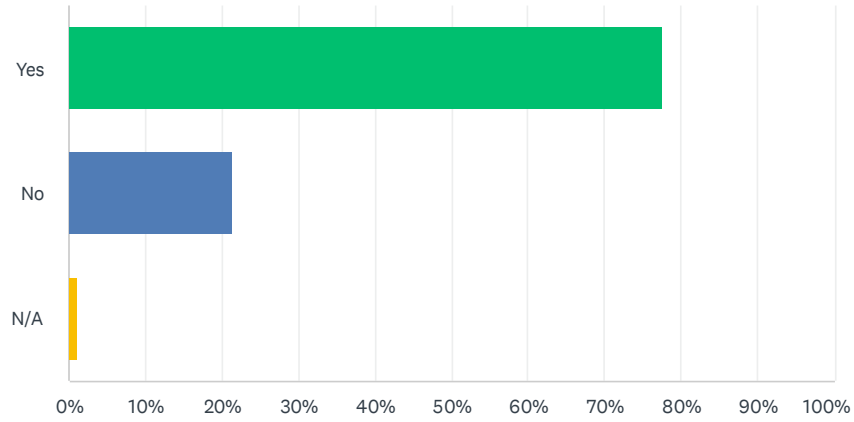
Answered: 103 Skipped: 4



ANSWER CHOICES	RESPONSES	
Yes	100.00%	103
No	0.00%	0
TOTAL		103

Q18 If you answered "Yes" to Question 16, is home confinement administered by the Sheriff?

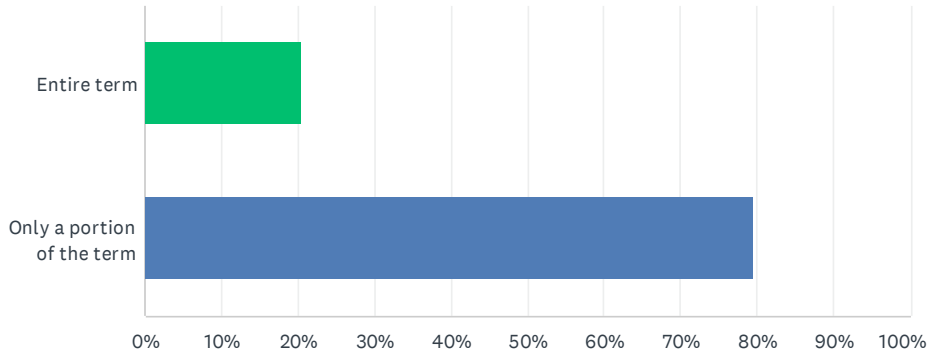
Answered: 103 Skipped: 4



ANSWER CHOICES	RESPONSES	
Yes	77.67%	80
No	21.36%	22
N/A	0.97%	1
TOTAL		103

Q19 When a person subject to supervised release following conviction for a sex offense has violated the terms of supervised release, do the judges in your circuit typically revoke the entirety of their term of supervised release or only a portion of that term?

Answered: 103 Skipped: 4



ANSWER CHOICES	RESPONSES
Entire term	20.39% 21
Only a portion of the term	79.61% 82
TOTAL	103

Q20 Please list any specific West Virginia statutes where you believe the statutory sentence is inappropriate and should be modified.

Answered: 103 Skipped: 4

Q21 In your view, what is the single biggest problem with sentencing practices in West Virginia?

Answered: 103 Skipped: 4