

# Unfinished Business: How Sentencing Guidelines Reform Can Further Efforts to Reduce Substance Abuse in Maryland

A Justice Strategies policy brief commissioned by

The Campaign for Treatment Not Incarceration

and presented to

The Maryland State Commission on Criminal Sentencing Policy

September 12, 2005

Over the past few years, Maryland policymakers have been trying to make the difficult transition from “lock-‘em-up” to a more treatment-oriented approach to combating addiction – a move that enjoys strong public support according to opinion polls. In 2004, Governor Robert Ehrlich and state legislature enacted an historic piece of legislation designed to redirect addicts from prisons and jails into substance abuse treatment by expanding the options available to prosecutors, judges and the Parole Commission.

Even before 2004, however, key officials in state government and the City of Baltimore had begun to make the shift. Between fiscal years 2000 and 2003, funding for Baltimore Substance Abuse Systems (BSAS) doubled and the population receiving treatment grew by 40 percent.<sup>1</sup> Use of incarceration for drug offenses fell over the same period.

But Maryland’s harsh mandatory minimum drug laws and sentencing guidelines are pushing in the opposite direction. By encouraging the use of incarceration for low-level drug offenses, the mandatory minimums and drug guidelines drain the state of badly-needed resources, making it impossible to provide treatment to all of those in need.

### **What are sentencing guidelines?**

Maryland’s sentencing guidelines, which apply to the more serious criminal cases handled in the state’s circuit courts, establish recommended sentence ranges based on the nature of the offense and the defendant’s criminal history. The guidelines are voluntary, and judges are permitted to impose a sentence outside the recommended range as long as a term of incarceration does not exceed the statutory maximum or fall below any applicable statutory minimum.

Because they are voluntary, application of the guidelines differs by jurisdiction and by court, with some members of the judiciary describing themselves as “guidelines judges”, while others routinely depart from the recommended range. Although their use varies, in many instances the guidelines set the frame for both sentencing and plea-bargaining.

The sentencing guidelines are intended to promote fairness and proportionality, and to target the use of incarceration toward those individual who pose the greatest risk to public safety. The existing guidelines for drug offenses, however, fail to meet either goal.

### **What’s wrong with the current sentencing guidelines?**

In their current form, Maryland’s sentencing guidelines:

- recommend harsher penalties in drug cases than cases involving violent offenses;
- make little distinction between major drug dealers and substance abusers who sell just to feed a habit; and

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<sup>1</sup> “Baltimore City’s Treatment System Loses More Than \$7 million in Funding: Number of Clients Receiving Treatment Decreases.” Center for Substance Abuse Research (CESAR). June 2005.

- treat behaviors common to addiction – such as a record of petty crime or probation failures – more seriously than past violent behavior

Many court officials have done their best to work around the flaws in the existing guidelines by sentencing individuals convicted of low-level drug offenses to treatment instead of prison, or by imposing shorter terms of incarceration. The Maryland State Commission on Criminal Sentencing Policy has also encouraged the use of more appropriate sentences by broadening the definition of compliance to include sentences to “corrections options” (i.e. alternative-to-incarceration programs) as well as sentences established under binding plea agreements that meet standards set by the American Bar Association.

Nevertheless, Maryland’s drug sentencing guidelines put upward pressure on sentences and help to drive the state’s substantial drug prisoner population. On June 30, 2005 there were 4,923 people in custody of the Division of Corrections (DOC) for drug offenses – more than one in every five state prisoners.

Many – if not most – of those incarcerated for drug offenses are serving time for low-level sales involving very small amounts of cocaine or heroin. Treatment conditions data for probationers and parolees suggest that 70 percent of drug prisoners may have substance abuse problems. Sentencing data show that just *three percent* of drug distribution cases included a concurrent person (i.e. violent or weapons) conviction.<sup>2</sup>

If findings from Wisconsin – a state that bears a strong resemblance to Maryland in terms of its incarceration rate and urban drug problem – are any guide, half of the state’s felony drug cases may involve nonviolent defendants with substance abuse problems who have been charged with low-level drug offenses. These defendants are best served by substance abuse treatment, and incarcerating them does little or nothing to enhance public safety.

Despite recent efforts to expand access to treatment for addicts caught up in the criminal justice system, the bulk of the state resources available for addressing the problem remain “locked up” in the prison system. Maryland’s drug prisoner population represents a \$100 million-a-year “investment” in a failed approach to combating addiction.

### **What do the data show?**

At the request of the Campaign for Treatment Not Incarceration, Justice Strategies analyzed sentencing data generously provided by the Sentencing Commission along with DOC admission and release data. Key findings are as follows:

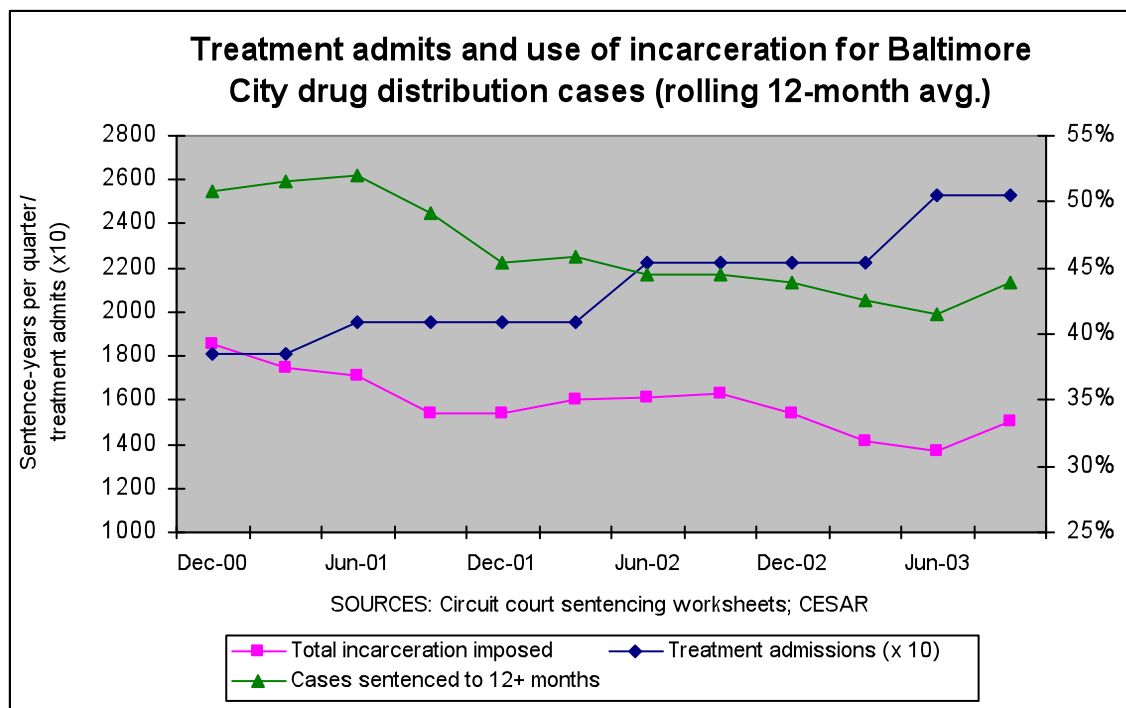
1. *The use of incarceration for Baltimore drug cases fell between 2000 and 2003, corresponding with increased investment in substance abuse treatment and growth in treatment admissions (as well as a change in the definition of guidelines compliance).*

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<sup>2</sup> Based on cases for which drug distribution was the controlling offense.

In the city of Baltimore, authorities appear to be using substance abuse treatment more often – and incarceration less – to combat addiction and the social ills that accompany it. On the treatment side, the city saw the number of individuals receiving treatment from BSAS climb from just over 18,000 in fiscal year 1999 to well over 23,000 in fiscal year 2003 – a 33-percent increase.

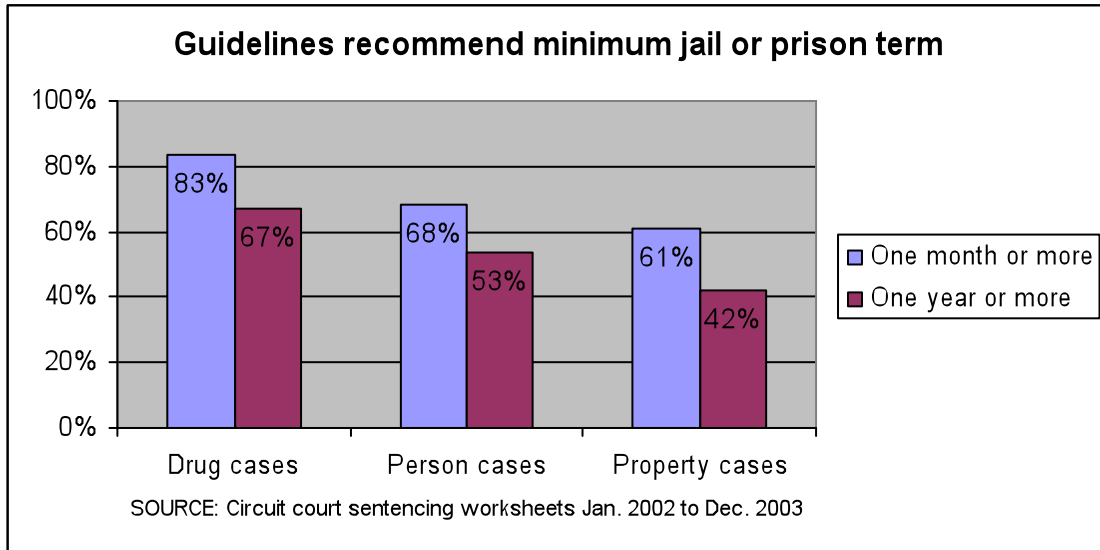
On the corrections side, the proportion of Baltimore City drug distribution cases that resulted in a prison sentence – 12 months or more of incarceration – fell from 51 percent in 2000 to 44 percent in the year ending September 30, 2003.<sup>3</sup> The total amount of incarceration imposed also fell by nearly a fifth (19 percent). All of this took place *before* the State Legislature passed and the Governor signed legislation designed to redirect nonviolent defendants with substance abuse problems from prison and jail to treatment.



<sup>3</sup> In this report, “prison sentence” is used as shorthand for a sentence to incarceration of 12 months or more – the same standard employed by the federal Bureau of Justice Statistics. In most states, individuals sentenced to 12 months or more of incarceration are housed in state prisons while those with shorter sentences serve their time in local jails. Maryland differs in two important respects: first, the Division of Pretrial Detention and Services (the former City Jail), which houses some of Baltimore’s jail-sentenced population, is a state agency and all of its sentenced inmates are included in the state’s Division of Correction prison population figures. Second, Maryland judges in the 23 counties have the option of committing individuals sentenced to between 12 and 18 months of incarceration to either the state prison system or the local jail. As a consequence, individuals sentenced in Baltimore to serve less than 12 months appear in DOC data, while some individuals sentenced elsewhere to as much as 18 months do not. In order to simplify comparisons and analysis of the use of correctional resources, this report distinguishes between sentences under 12 months and sentences of 12 months or more, using “prison sentence” to refer to the latter regardless of where the individuals sentenced will be housed.

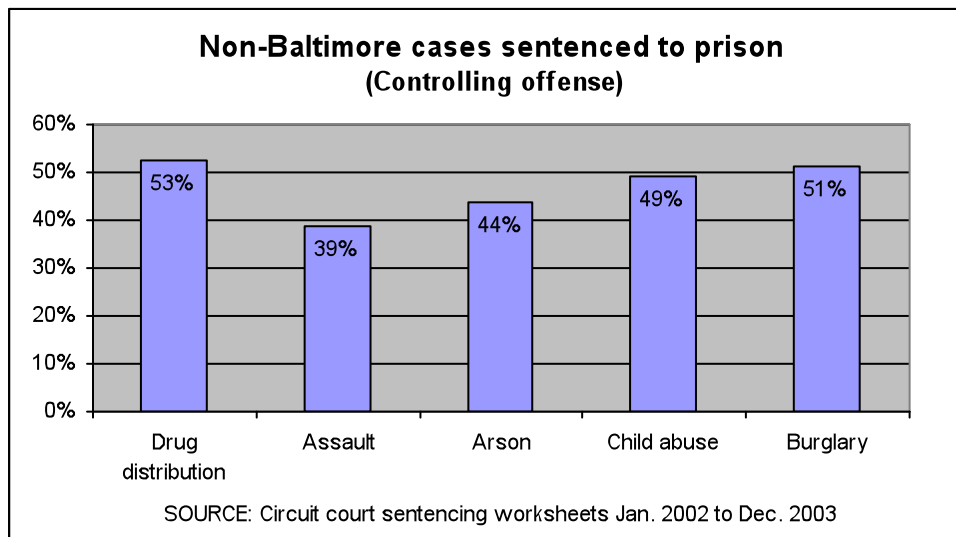
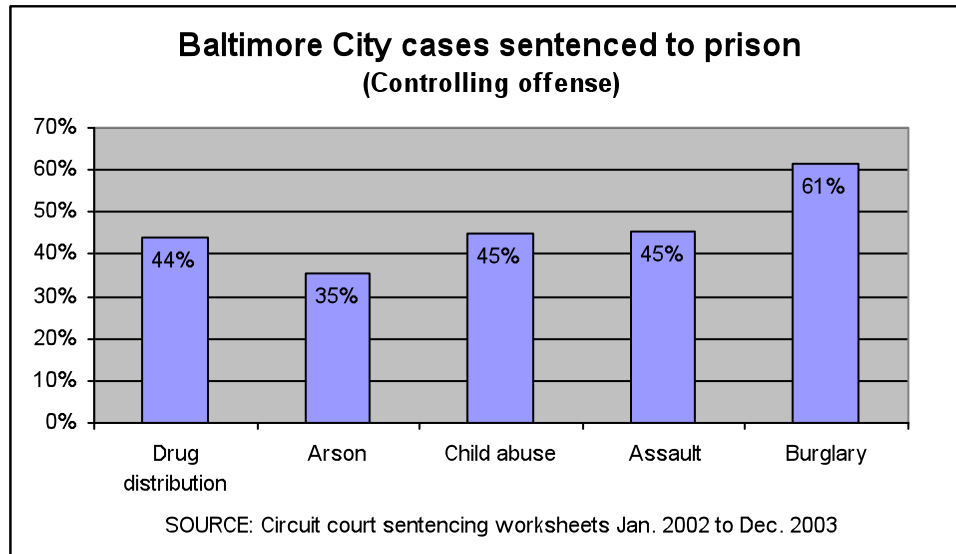
2. *The current sentencing guidelines recommend incarceration more often in drug cases than in cases involving serious, violent offenses.*

Between January 2002 and December 2003, the sentencing guidelines recommended a minimum prison or jail term in four of five Circuit Court drug cases compared to two-thirds of person cases and three in five property cases. Incarceration was recommended more often for drug distribution than for robbery, burglary, weapons crimes, arson, child abuse or assault.



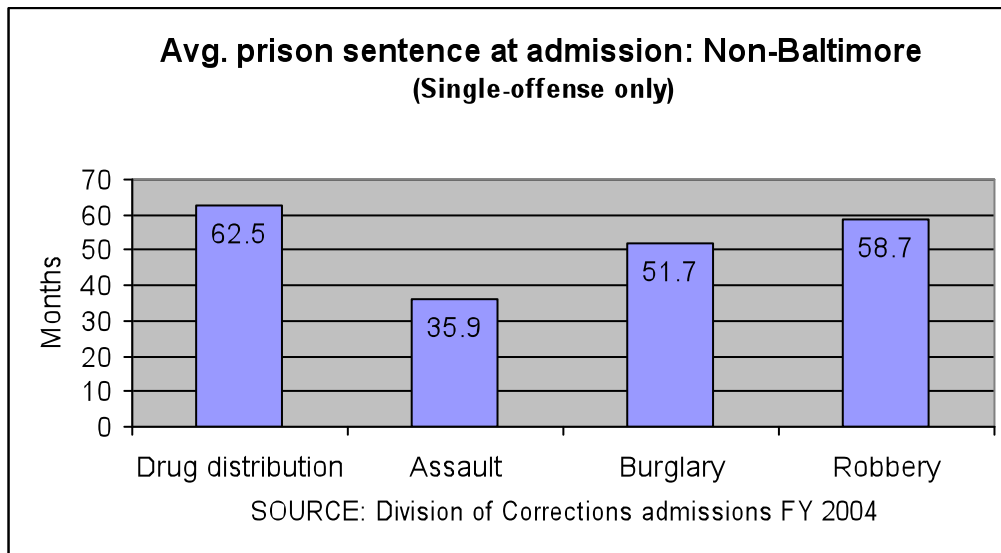
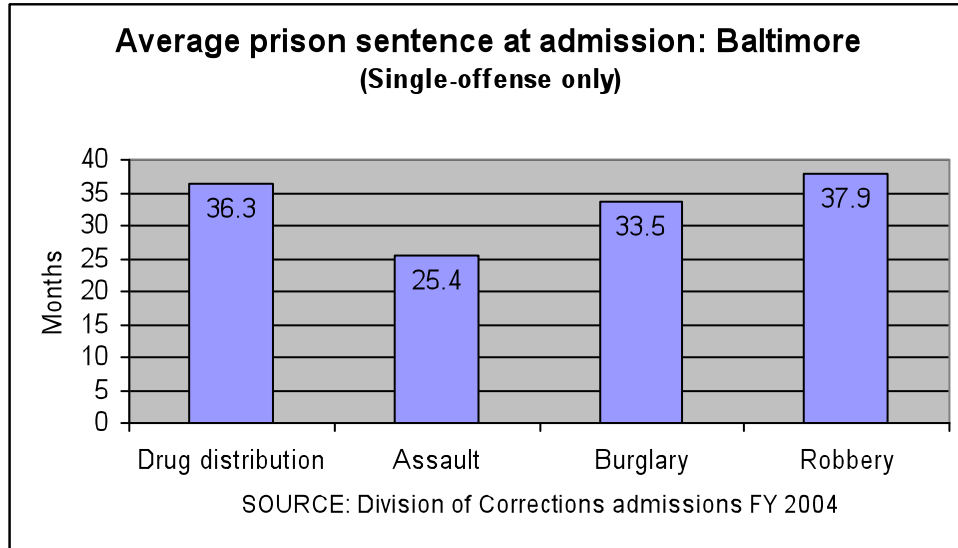
3. *Individuals convicted of drug distribution – a nonviolent offense – were sentenced to prison at rates comparable to, or higher than, those convicted of other violent and serious offenses.*

Although judges frequently imposed sentences below the guidelines range in drug cases, drug distribution cases were as likely to result in a prison sentence (12 months or more of incarceration) as many violent and serious cases. In Baltimore, the imprisonment rate for drug distribution cases was lower than the rate for burglary, but comparable to assault and child abuse, and higher than the rate for arson. Elsewhere, defendants in drug distribution cases were more likely to land in prison than defendants charged with assault, arson, child abuse or even burglary.



4. *In many cases, the sentences imposed on individuals admitted to DOC custody for drug distribution were as long as, if not longer than, sentences imposed on individuals convicted of violent and serious offenses.*

Drug distribution cases are likely to result not only in a prison sentence but also a substantial term of incarceration – three years in Baltimore and five years elsewhere for a single offense. A comparison of DOC admissions with sentences of a year or more – including probation revokees – found that individuals convicted of a single drug offense were treated more harshly than those convicted of assault, burglary and – outside Baltimore – robbery.

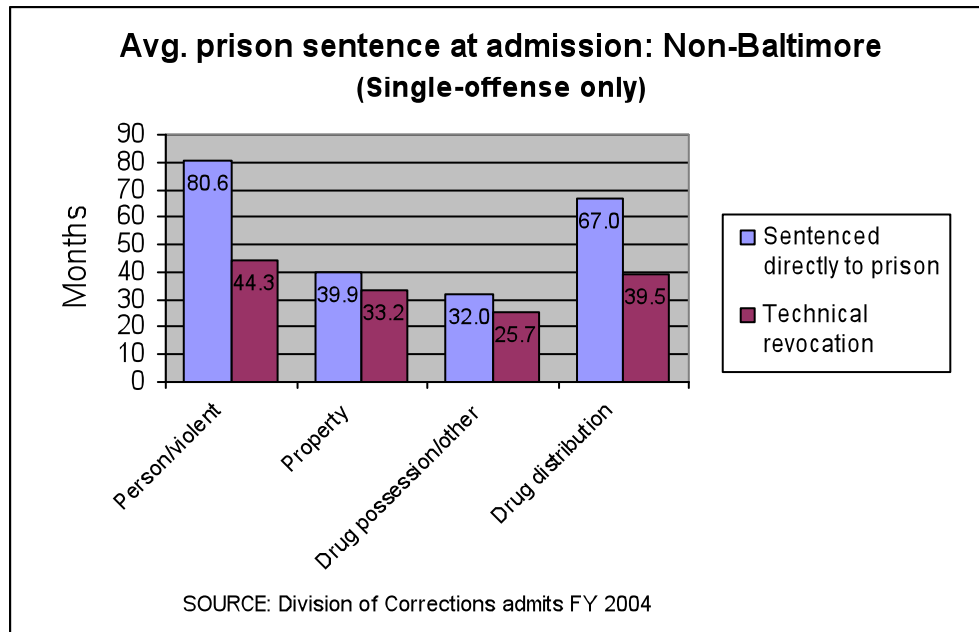
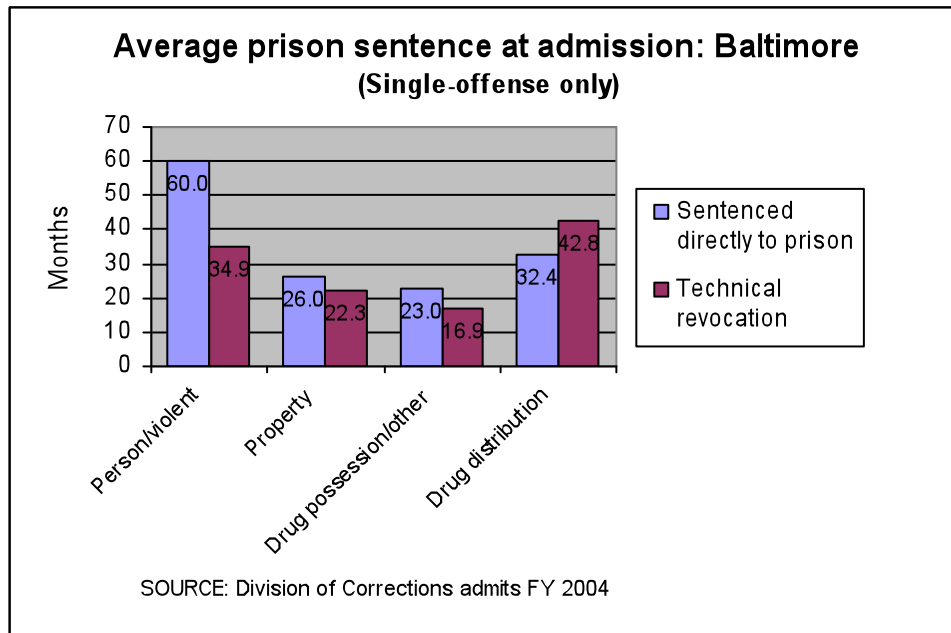


5. *In Baltimore drug distribution cases, probationers revoked for technical violations of supervision conditions received longer terms of incarceration than individuals sentenced directly to prison.*

Individuals revoked from probation for failing to meet supervision conditions – not for committing new crimes – typically receive lighter punishment than defendants sentenced directly to prison. This pattern reflects the fact that those who are granted probation generally pose a lesser risk to the public and are not as culpable as those that judges decide to incarcerate.

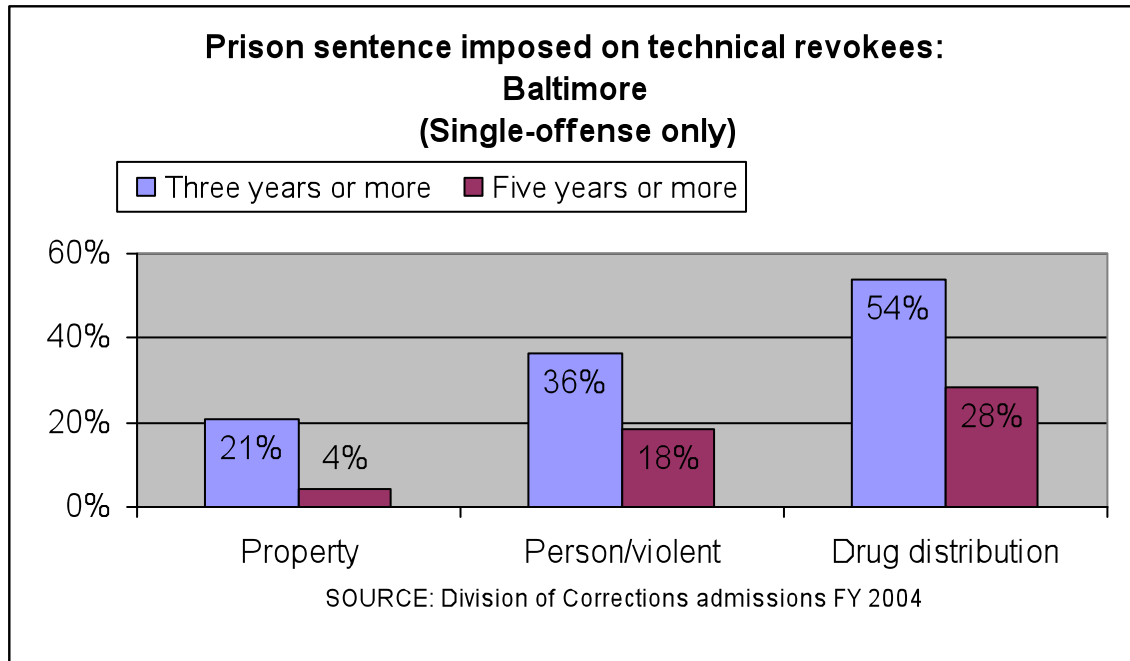
As the following charts demonstrate, the typical sentence for a “technical revokee” was 14-percent to 45-percent shorter than the sentence for a prison-bound defendant. The glaring exception to this rule is found among individuals convicted of drug distribution in Baltimore, who received a third *more* time if they were revoked from

probation. In effect, technical revokees are being punished more harshly for failing to meet supervision conditions than others were punished for the original offense.



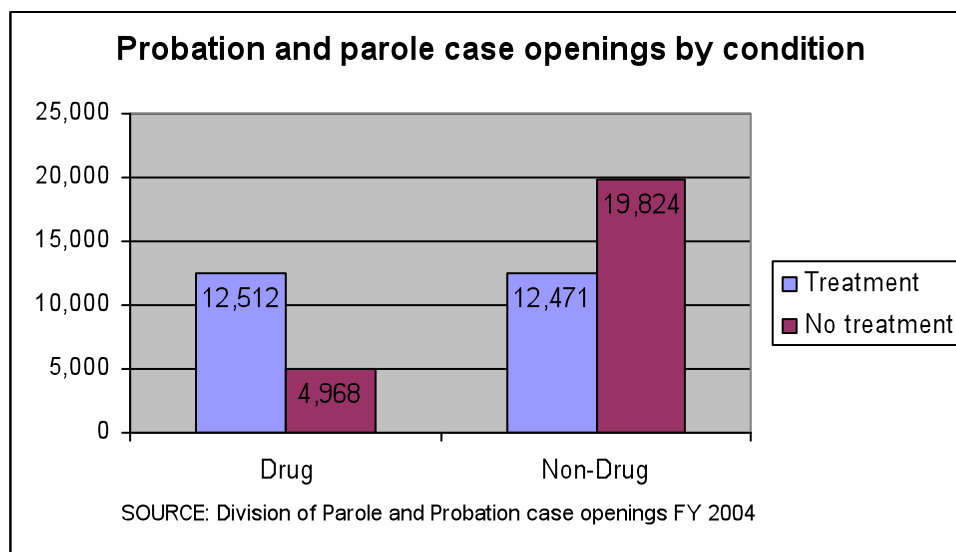
Closer analysis reveals that technical revokees in drug distribution cases were disproportionately likely to receive long prison terms – the kind of sentences recommended under the guidelines. While further research is required, it appears that the drug guidelines may be driving the imposition of substantial sentences on technical probation revokees at enormous cost to the state.





6. *A large majority of individuals sentenced to probation or released to parole with drug convictions had a substance abuse problem.*

Department of Public Safety and Correctional Services data show that treatment conditions were imposed on 72 percent of Maryland probationers and parolees sentenced for drug offenses – a strong indication that substance abuse is widespread among drug defendants. Probationers and parolees convicted of drug offenses were nearly twice as likely to have treatment conditions imposed as individuals convicted of person, property and other offenses (39 percent).



## **What can be done to fix the problem?**

Recent trends in Baltimore suggest that new treatment dollars could help reduce overuse of incarceration for individuals convicted of drug offenses, freeing up additional resources for even more treatment. In the current fiscal climate however, such an investment in treatment is unlikely unless it can be funded through correctional savings.

As *The Baltimore Sun* recently reported, funding for substance abuse treatment in Baltimore has fallen from its 2003 peak.<sup>4</sup> And we have every reason to believe that adequate treatment resources are even harder to come by in other parts of the state where drug defendants are being incarcerated at high rates.

Until changes are made to Maryland's mandatory minimum laws or sentencing guidelines, it seems likely that the state may never be able to pay for desperately needed drug treatment. Such changes are needed not only to ensure that treatment is a sentencing option but also that the state does not waste so much money incarcerating addicts that it cannot afford to fund treatment.

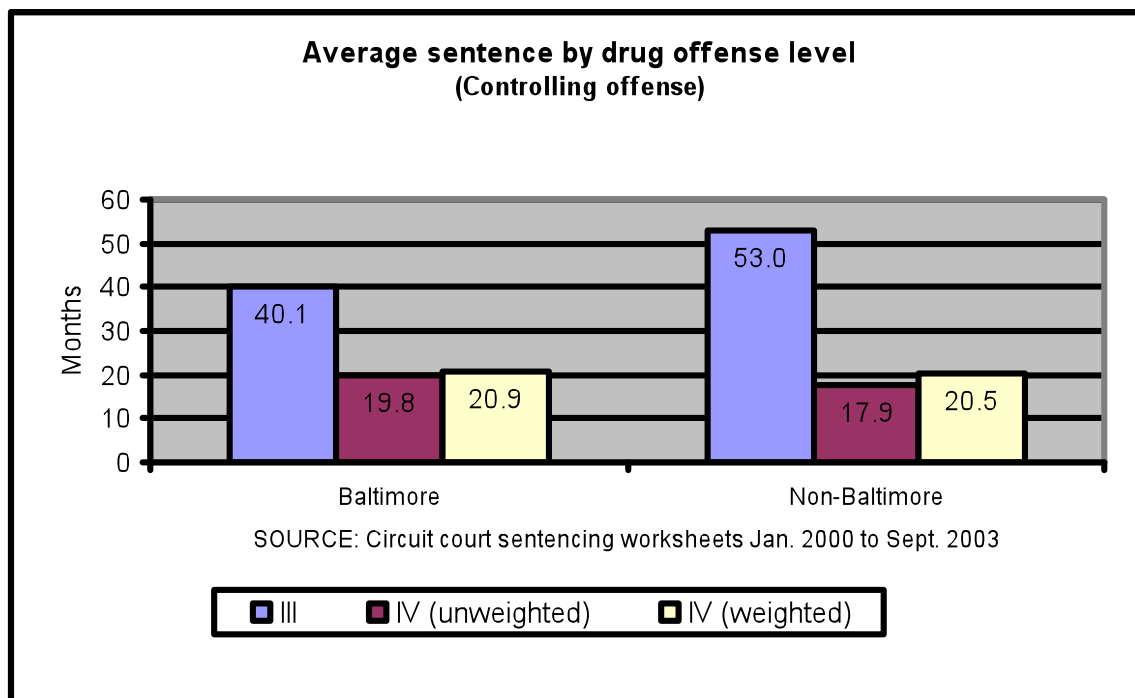
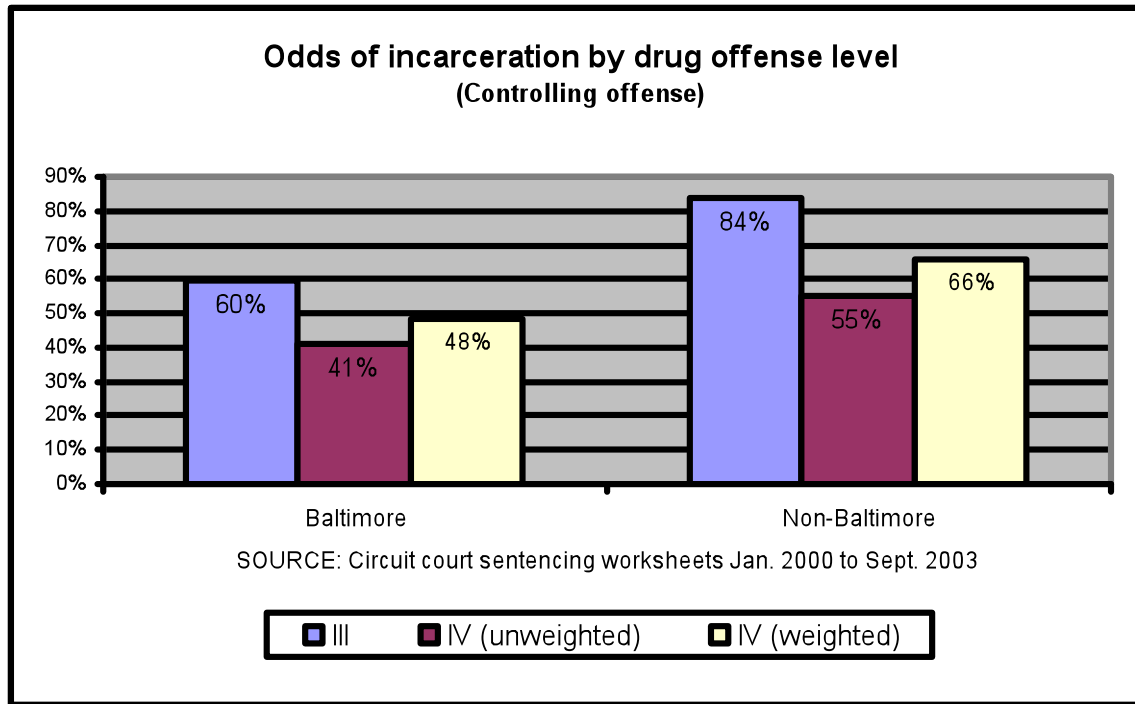
### *1. Designate low-level distribution of narcotics a Level IV offense.*

Under the existing guidelines, distribution of narcotics is a Level III offense, regardless of the amount involved or the individual's role in the drug trade. As a consequence, an addict who sells a gram of cocaine to feed his or her habit is subject to the same recommended sentence as a drug dealer who sells 100 grams for profit. Reducing penalties for the low-level, nonviolent drug offenses that are disproportionately committed by addicts would serve the interests of justice *and* public safety.

Although current Level IV offenses – which include distribution of non-narcotics (i.e. amphetamines, marijuana, Valium), distribution of imitation drugs, importing five to 45 kilograms of marijuana into the state, distribution to a minor, and drug money laundering – are no less serious than the low-level narcotics cases that fill court dockets and prison beds, the guidelines ranges and sentences imposed are less harsh. Defendants facing Level IV charges were less likely to be incarcerated, and if incarcerated, to receive much shorter average sentences.

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<sup>4</sup> MacGillis, Alec. "City drug treatment sites feel strained." *The Baltimore Sun*, September 5, 2005.



Conversations with practitioners and analysis of data from other jurisdictions suggest that more than half of Maryland's felony drug cases might meet the criteria for a nonviolent, low-level drug offense – possession or distribution of a small quantity of drugs by a defendant who is not supervising other dealers, earning significant profits or charged with a concurrent violent or weapons crime.

There is no way to know with certainty how many low-level, nonviolent offenses would be sentenced differently if the guidelines were changed. However, if defendants in just a quarter of narcotics distribution cases received sentences typically imposed on Level IV drug cases, roughly 135 fewer would be sentenced to prison at all while over 500 would see their sentences cut in half.<sup>5</sup> This could result in a nearly 700-bed reduction in the drug prisoner population and as much as \$15 million in annual corrections cost-savings.<sup>6</sup>

2. *Reserve longest recommended sentences for individuals whose criminal records include past violent, weapon or sex crimes by capping the offender score of individuals who have not been convicted of prior person felonies.*

The method currently used to calculate a defendant's "offender score" not only makes no distinction between violent and nonviolent prior convictions, but also assigns greater weight to behaviors that are common to addicts – including the accumulation of minor convictions and violations of supervision conditions – than to other behaviors that may pose a greater risk to public safety.

For example, a person with three misdemeanor convictions for simple possession of narcotics (not for distribution) receives the same designation as a person with two past felony convictions for second-degree child abuse or second-degree burglary. An individual with two past narcotics distribution convictions receives a higher prior criminal record score – regardless of amount or role in the drug trade – than one previously convicted of kidnapping a child.

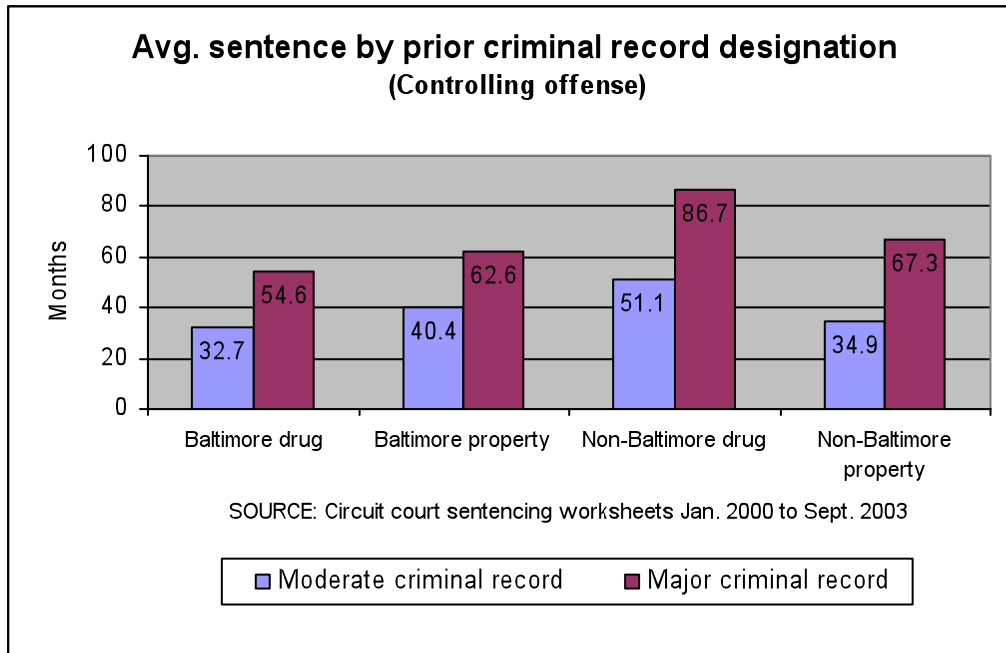
As a result, individuals convicted of nonviolent offenses are disproportionately likely to receive high offender scores that result in long recommended sentences. Between January 2000 and October 2003, 28 percent of drug defendants and 23 percent of property defendants received the highest possible criminal record score. Anecdotal accounts and findings from other jurisdictions suggest that the majority may never have been convicted of a violent felony.

If "major" criminal records were re-designated "moderate" criminal records and sentenced accordingly in just a quarter of nonviolent cases, the impact would be significant. Although there would probably be little change in the number sentenced to prison, average terms could fall substantially, potentially resulting in a 350-bed reduction in the nonviolent prisoner population and \$7.5 million in corrections savings.

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<sup>5</sup> Projections are based on a quarter of all narcotics distribution cases resulting in sentences typically imposed for Level IV drug offenses (weighted to control for differences in offender scores).

<sup>6</sup> Projections are based on typical length-of-stay for individuals incarcerated for drug distribution in Baltimore (46 percent of the sentence imposed) and elsewhere (41 percent of the sentence imposed), and on a \$22,000 annual per-prisoner cost of incarceration.



Together, the proposed sentencing guidelines reforms could significantly reduce the number of nonviolent drug defendants sentenced to prison and the time they serve, generating millions of dollars in correctional savings that could be redirected to substance abuse treatment. The rough estimate of the potential impact – over 1,000 prison beds which represent over \$20 million in annual corrections spending – does not include the likely impact of the proposed reforms on the sentencing of technical revokees. By reducing the recommended sentences for individuals revoked from probation, the reform could bring Baltimore revocation patterns in line with the rest of the state, potentially saving another 100 to 250 prison beds and avoiding \$2 million to \$5 million in corrections costs.<sup>7</sup>

<sup>7</sup> Outside Baltimore, individuals convicted of drug distribution and revoked from probation received substantially shorter sentences than counterparts that were sentenced directly to prison: 41-percent for a single offense and nine-percent for the handful of cases involving multiple offenses. If, as in the rest of the state, technical revokees convicted of drug distribution received proportionally shorter sentences than counterparts sentenced directly to prison, the likely result would be a 250-bed reduction in the drug prisoner population. If average terms imposed on technical revokees were simply equalized with those imposed on individuals sentenced directly to prison, the likely result would be a 100-bed reduction in the drug prisoner population.