

# RACE AND SENTENCING IN VERMONT

*Submitted to:*

The Vermont Legislature and  
The Vermont Commission on Human Rights

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Robin Weber, JD, PhD  
Vermont Center for Justice Research  
P.O. Box 267  
Northfield Falls, VT 05664  
802-485-4250  
[www.vcjr.org](http://www.vcjr.org)

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Crime Research Group  
PO Box 1433  
Montpelier, VT 05601

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## Summary of Findings

Vermont correctional facilities have seen an increase in the incarceration of minority populations that does not match the increase in the minority population in Vermont. This is especially true for African American defendants who have comprised just about 10% of the incarcerated population for the last seven years.<sup>1</sup> According to the United States Census, only 1.2% of Vermont's population identifies as Black or African American.<sup>2</sup> In response to this apparent disparity, in 2012 the Vermont Legislature passed Act 134, mandating the Vermont Center for Justice Research (VCJR) conduct research to determine if a defendant's race influences the sentencing decision.<sup>3</sup> When a defendant had an out of state record regardless of race was a driving factor in the decision to incarcerate. This study found no evidence of systemic racial bias in the sentencing decision. Act 134 required that the research answer the following questions:

### Question 1

How do sentences for people of color<sup>4</sup> compare to sentences of white defendants with respect to sentence type, length, and level of restriction?

#### *Finding 1*

***People of color are disproportionately sentenced to incarcerative sentences relative to white defendants. However, this study found no evidence of systemic racial bias in criminal case sentencing.***

### Question 2

How does actual prison time served compare between whites and people of color?

#### *Finding 2*

***The data provided by the Department of Corrections does not distinguish which charge a defendant is currently serving a sentence on (in the case of concurrent or consecutive sentences). Nor does the data include information on programming, external housing availability or other factors related to time served. Accordingly, this question could not be answered with this research.***

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<sup>1</sup><http://www.doc.state.vt.us/about/reports/latest-facts-figures-adobe/view>

<sup>2</sup><http://quickfacts.census.gov/qfd/states/50000.html>

<sup>3</sup><http://www.leg.state.vt.us/DOCS/2012/ACTS/ACT134.PDF>

<sup>4</sup>The Act specifies National Incident Based Reporting System and United States Census Reporting Categories. People of Color or Minority are used throughout this document to mean: Black or African American, Asian, Hispanic or Latino and Native American.

***However, race was not statistically significant in predicting the length of time sentenced to serve in straight incarcerations, on either the minimum or the maximum sentence. Nor was race statistically significant in predicting the days to serve in split sentences. Therefore, this study did not find evidence of systemic bias in the length of time to which a defendant is sentenced.***

### **Question 3**

If disparity exists, what variables explain it?

#### ***Finding 3***

***The presence of an out-of-state criminal record is statistically significant in predicting sentencing as are variables that hint at the nature of the offense, such as total charges filed in the case. However, this research supports the conclusion that the decision to incarcerate a particular defendant is nuanced and not readily predictable based on available data. Other factors that could influence the decision include but are not limited to the circumstances of the offense, availability of programming, victim impact.***

## Introduction

Vermont has a long history of a commitment to treating all people within her borders with justice and fairness. Vermont did not join the United States until after the Bill of Rights was ratified and was the first state in the Union to abolish slavery in the State Constitution. Through the centuries Vermont has been at the forefront of many civil rights issues, including sexual orientation, disability, gender identity, and race. The Vermont Legislature consistently monitors how governmental and private institutions interact with people of marginalized societal status. Most recently, the Legislature expanded the bias-free policing law and mandated that police departments record the race of drivers in traffic stops.

The criminal justice system has the ability to deprive people of their liberty and, in some cases, their lives. As such, it is imperative to a fair and just system that racial bias not enter into the decision making process. **In 2012, Act 134 was passed by the Legislature to determine if race is a factor in sentencing.**

There are several decision making points in the criminal justice system. A person decides to report a crime, a police officer decides to investigate and arrest, the prosecutor decides whether to charge and what to charge. After all of those decisions, and a finding of guilt, comes the decision to sentence; **this report focuses only on that decision.** It is important to note that the decision to sentence is influenced not just by the decisions made by people in that particular case. As this research shows, the decision is also influenced by decisions made by other people, in other cases, in other states.

This report analyzes the effect of race in the sentencing decision, and concludes that there is no evidence of systemic bias in the sentencing decision for the crime studied. The report outlines prior research on race and sentencing in Vermont and some of the weaknesses in those studies. Then the current methodology is discussed and the results are presented. The report ends with a discussion of the meaning of the results and recommendations for further research.

## Prior Research on Race and Sentencing in Vermont

### Felony Sentencing in Vermont<sup>5</sup>

The Vermont Sentencing Commission was charged with determining if there was sentencing disparity in the counties. The Sentencing Commission was also interested in race and gender

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<sup>5</sup>[http://www.vcjr.org/reports/reportscrimjust/reports/felsentence\\_files/Felony\\_Sentencing.pdf](http://www.vcjr.org/reports/reportscrimjust/reports/felsentence_files/Felony_Sentencing.pdf)

disparity in sentencing. Accordingly, it asked the VCJR to design and conduct a study that would answer these questions.

The design covered those cases disposed from 2001 to 2006 and the most common felonies disposed of for that time: Aggravated Assault, Aggravated Domestic Assault, DWI3 or higher, Marijuana Trafficking, Felony Sale of Cocaine, Grand Larceny, Forgery, Burglary, and Fraud. There were 3,595 offenders studied. An overwhelming majority of the defendants were white (95%), 3% were African American. There was disparity in the crimes that whites and minority defendants committed. Whites were more likely to be convicted of a DWI, while minority defendants were more likely to be convicted of domestic violence offenses or drug related offenses.

The Felony Sentencing study included in-state criminal histories, but at the time the capacity to distinguish between true incarcerative sentences and those that were pre-approved furloughs did not exist, therefore, the number of people sentenced to incarceration was overestimated.

The study found, that in addition to county and offense severity, race was a statistically significant factor in determining whether someone was sentenced to incarceration or received a community sanction. Minority defendants were more likely to be sentenced to a facility than whites.

#### **Key Findings:**

Race was a factor in the decision to incarcerate, but not the length of time served.

County was a factor in the decision to incarcerate.

In-state Criminal History was a factor in the decision to incarcerate.

Offense Severity (violence vs. property vs DWI) was a factor in the decision to incarcerate.

#### **Domestic Violence Case Processing<sup>6</sup>**

This study examined all domestic violence cases sentenced from 2004-2008. The sentencing analysis included both misdemeanor and felony sentences. As with the Felony Sentencing study, this study used in-state criminal histories. This study also was not able to accurately determine pre-approved furlough status versus true incarceration.

The study analyzed 1,925 sentences. Race was not a statistically significant factor in predicting the sentence; however, county, offense level, prior parole violations, and criminal history were

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<sup>6</sup><http://www.vcjr.org/reports/reportscrimjust/reports/dvcaseprocess.html>

all statistically significant. Gender, with women being more likely to be sentenced to an incarcerative sentence than men, was statistically significant.<sup>7</sup>

#### **Key Findings:**

Race was not a factor in the decision to incarcerate.

County was a factor in the decision to incarcerate.

Prior parole violations were a factor in the decision to incarcerate.

In-state Criminal History was a factor in the decision to incarcerate.

#### **Sexual Assault Case Processing<sup>8</sup>**

This study analyzed sexual assault convictions and sentencing from 2004-2010. This study also used in-state criminal history. It too was unable to distinguish between pre-approved furlough and incarceration. There were too few (94) sentences to use reliable statistical methods to predict sentencing outcomes. Correlations were used to determine if there was a relationship between the variables and the outcome. Race was not related to the sentence; however, the race data was missing in 25% of the cases. The original offense level and whether or not the defendant was a sexual offender recidivist were related.

#### **Key Findings:**

Race was not correlated to the sentence.

If the defendant was a recidivist was correlated to the sentence.

If the original charge was a felony was correlated to the sentence.

#### **Methodology<sup>9</sup>**

The methodology chosen for this study was designed to address some of the weaknesses identified in previous studies. Policy makers and stakeholders of the prior reports rightfully questioned the strength of the findings, given that minority representation in some crimes was so low, or there was insufficient variance in sentences to measure. This study addresses those concerns.

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<sup>7</sup> After the capacity to identify pre-approved furlough status was developed, the VCJR completed another study on domestic violence. That study found that there were no gender differences in sentencing when the pre-approved furlough was identified. That study is currently under review.

<sup>8</sup> <http://www.vcjr.org/reports/reportscrimjust/reports/sexassaultcaseprocessing.html>

<sup>9</sup> The full methodology is described in the appendix.

### **Step 1**

The first step was to develop the capacity to identify pre-approved furlough sentences. This was done using data provided by the Department of Corrections. The data was compared with the court adjudication database to determine what kind of sentence someone actually served on a particular case.

### **Step 2**

The second step was to decide how best to measure the impact of race and sentencing given the overall low minority numbers in crime in Vermont. This was a criticism of the Felony Sentencing study and the Sexual Assault study, where there were low minority numbers or low minority numbers in specific crime categories. Using the National Incident Based Reporting System (NIBRS), a distribution of crimes by race was conducted. Several crimes were identified as having a higher minority involvement than others. These crimes included: Larceny, Simple Assault, Burglary, Drug Offenses, Domestic Violence, Forgery and Fraud Offenses.

### **Step 3**

The third step was to identify within those crimes, which crimes had sufficient variability in sentencing amongst the defendants and which crimes had a sufficient number of minority defendants convicted. Variation was required to accurately measure if there was a difference in the way defendants were treated. Misdemeanor crimes had the most variability in sentencing as they involve more discretion and sentencing options than most felonies.

Four crimes met the requirements: Simple Assault, Domestic Assault, Possession of Marijuana Less than 2 Ounces, and Possession of Cocaine Less than 2.5 Grams. All of these crimes are misdemeanors. Other crimes did not have sufficient minority convictions and/or the variance in the sentences necessary to conduct the analysis below. The distribution of sentences for the entire cohort is illustrated in Table 1.



**Table 1**

	<b>Straight</b>	<b>Split<sup>10</sup></b>	<b>Probation</b>	<b>Fine</b>	<b>Deferred</b>	<b>I.S.<sup>11</sup></b>
<b>White</b>	616 12.7%	360 7.5%	1,460 30.1%	1,800 37.1%	180 3.7%	426 8.8%
<b>Minority</b>	94 25.0%	56 14.9%	85 22.6%	96 25.5%	15 4.0%	30 8.0%
<b>Asian</b>	2 8.7%	2 8.7%	5 21.7%	12 52.2%	2 8.7%	0 %
<b>Black</b>	84 26.6%	52 16.5%	69 21.8%	76 24.1%	13 4.1%	22 7.0%
<b>Hispanic/     Latino</b>	5 23.8%	1 4.8%	5 23.8%	6 28.6%	0 0%	4 19%
<b>Native     American</b>	3 18.8%	1 6.3%	6 37.5%	2 12.5%	0 0%	4 25%
<b>Totals</b>	706 13.5%	421 8.1%	1,545 29.6%	1,896 36.3%	195 3.7%	456 8.7%

As Table 1 illustrates, minority defendants were more likely to be sentenced to an incarcerative sentence (straight time and split sentences) than whites. Over 40% of minority defendants were sentenced to incarceration, compared to 20% of whites. This cohort included 5,219 defendants convicted of these crimes and sentenced from 2006-2010.

#### **Step 4**

Act 134 required that the out-of-state criminal history records of defendants be included in the analysis. The Legislature required this because anecdotal evidence suggested that out-of-state defendants were strongly influencing sentences. Including these records in the analysis tests the anecdotal assertions.

The FBI provided criminal histories in paper form and the budget for the study did not allow for the hand coding of 5,219 out-of-state paper criminal history records. Possession of Cocaine had only 187 convictions during the 5-year study period so all defendants were studied. For the remaining crimes, defendants were sampled for inclusion in the study.

<sup>10</sup> A split sentence is one where the defendant is sentenced to a certain period of time inside a facility, and then serves a certain period of time on probation.

<sup>11</sup> I.S. stands for Intermediate Sanctions, also referred to as pre-approved furlough – an incarcerative sentence served in the community.

Because the purpose of this study was to determine the effect of race on sentencing, the sample was constructed with that in mind. All people of color and an equal number of whites were included in the study. However, race was not the only variable used to choose the sample. The defendant's in-state criminal histories were electronically coded to calculate a criminal history score. That score was then stratified into categories: first-time offenders, low level offenders, medium level offenders and high level offenders<sup>12</sup>. Defendants were also categorized by age group, sex and state of residence at the time the charge was filed. For example, for each female, minority defendant who had no criminal history, was between the ages of 18 and 21 and was from out of state, a white female matching those demographics was randomly selected. The final sample included 852 defendants.

### **Step 5**

The final step involved requesting the out-of-state criminal histories of the defendants in the sample from the FBI. Those criminal histories were matched to the particular defendant and then coded for convictions and type of crime. As this is the first study in Vermont to include out- of-state criminal histories, the content of those histories is discussed.

Table 2 illustrates the percent of defendants in the final cohort who had out-of-state records. Minority defendants were more likely to have an out-of-state record only. About 30% of minority defendants had an out-of-state record, compared to about 15% of white defendants. Fifteen percent of minority defendants only had an out-of-state record, compared to about 7% of white defendants. Almost an equal proportion of white defendants (46%) and minority defendants (45%) had in-state criminal histories.

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<sup>12</sup> See Appendix for calculations.

*Table 2*

	<b>Out-of-State</b>	<b>In-State</b>	<b>Both</b>	<b>Out-of-State Only</b>
<b>White</b>	71 14.8%	221 46.0%	37 7.7%	35 7.3%
<b>Minority</b>	112 30.2%	167 45.0%	55 14.8%	57 15.4%
<b>Asian</b>	2 8.7%	8 34.8%	1 4.3%	4.3%
<b>Black</b>	104 33.4%	135 43.4%	49 15.8%	55 17.7%
<b>Hispanic/Latino</b>	4 19.0%	15 71.4%	4 19%	0
<b>Native American</b>	2 12.5%	9 56.3%	1 6.3%	1 6.3%
<b>Total</b>	183 21.5%	388 45.6%	92 10.8%	92 10.8%

The presence of out-of-state records was relatively equally distributed across the crimes studied. Table 3 illustrates that distribution. Twenty- three percent of defendants convicted of Possession of Marijuana had out-of-state records, compared with 20.5% of Assault defendants. Possession of Marijuana defendants were the most likely to only have out-of-state records, with 13.2% of those defendants only having an out-of-state record.

*Table 3*

<b>Crime</b>	<b>Out-of-State</b>	<b>In-State</b>	<b>Both</b>	<b>Out of Sate Only</b>
<b>Assault</b>	20.5%	46.0%	10.0%	10.7%
<b>Domestic Assault</b>	21.5%	53.0%	12.7%	9.4%
<b>Possession Cocaine &lt;2.5 gm.</b>	21.0%	47.3%	10.8%	10.2%
<b>Possession Marijuana &lt; 2 oz.</b>	23.0%	36.3%	9.8%	13.2%

Minority defendants were more likely than white defendants to have out-of-state convictions for felonies. Violent Felonies included convictions for Murder, Manslaughter, Sex Offenses and Assaults and Robberies. Almost 8% of minority defendants had an out-of-state violent felony conviction, compared to 1% of white defendants. Almost 2% of white defendants had an out-of-state Drug Felony conviction and almost 2% had an out-of-state Property Felony conviction. Table 4 illustrates the distribution of out-of-state felony convictions by type and minority status.

**Table 4**

	<b>Violent Felony</b>	<b>Drug Felony</b>	<b>Property Felony</b>
<b>White</b>	5 1.0%	9 1.9%	9 1.9%
<b>Minority</b>	27 7.5%	27 7.5%	23 6.2%

Minority defendants were more likely than white defendants to have out-of-state convictions for misdemeanors. Just over 10% of minority defendants had convictions for Violent Misdemeanors or Drug Misdemeanors. Only 2% of whites had a conviction for a Violent Misdemeanor, and almost 4% had a conviction for a Drug Misdemeanor. Table 5 illustrates the distribution of out-of-state misdemeanor convictions by type and minority status.

**Table 5**

	<b>Violent Misd.</b>	<b>Drug Misd.</b>	<b>Property Misd.</b>
<b>White</b>	10 2.0%	19 3.9%	24 5%
<b>Minority</b>	41 10.8%	41 10.8%	47 12.7%

### **Logistic Regression Models – In/Out decision**

To determine if minorities were more likely to be sentenced to an incarcerative sentence versus whites, a logistic regression model was created for each crime. Logistic regression predicts the effects of independent (explanatory/control) variables on a dependent variable after controlling for the effects of other variables in the model. However, with logistic regression, any direct effect of an independent variable is calculated as an odds ratio and discussed as a probability—that is, as an increase/decrease/no change in the probability of a particular event or outcome occurring with a change in the independent variable. For a variable to be statistically significant

in influencing the decision, the probability value must be lower than .05. This means that the likelihood that the relationship is due to chance is less than five percent.

The primary independent variable of interest is minority status. If, after controlling for the effects of other variables in the model, minority status exerts a significant direct effect on the sentencing decision, this means that other variables in the model do *not* account for any apparent relationship between being a minority and that decision. If minority status does not exert a significant direct effect on the sentencing decision, other variables in the model *do* account for any apparent relationship between being a minority and the sentencing decision.

The datasets for each crime contained over 100 variables that were created and tested for significance.<sup>13</sup> Variables included: prior probation violations, prior sentences to incarceration over 1 year, prior offenses by offense type, number and type of offenses filed on the same day, gender, resident status and age. Only those variables that were significant are reported below.

The court data does not capture victim participation and detailed circumstances of the offense. For example, we were not able to measure the effect of a victim impact statement on a sentencing decision. Likewise, if there were circumstances of the offense or arrest that might affect the sentencing decision, we were not able to control for that.

### Simple Assault

There were 229 defendants in the final cohort, 116 whites and 113 people of color. Forty-two percent (98) of defendants were sentenced to incarceration, 60% of those defendants were people of color.

*Table 6*

	<b>Straight</b>	<b>Split</b>	<b>Probation</b>	<b>Deferred</b>	<b>Fine</b>	<b>I.S.</b>
<b>White</b>	21	23	34	27	3	8
<b>Minority</b>	31	23	31	4	16	8

Race was not a significant factor ( $p = .454$ ) in predicting incarceration. The following factors were significant in predicting incarceration:

<sup>13</sup> A code book is available from the researcher, by request.

*Table 7*

Variable	Significance	Odds Ratio
Out-of-State Criminal History	.040	1.27
County (Compared to Chittenden)	.038	N.A.
In-State Criminal History	.044	1.26
Felony Charges Filed on the Same Day	.004	1.98

If a defendant had at least one felony charge filed at the same time as the simple assault, the defendant's odds of being incarcerated increased by 1.98 times. Thus, defendants having a felony charge in addition to a charge of simple assault were about twice as likely to be sentenced to incarceration relative to other defendants. Having a criminal history increased the odds of incarceration by 1.27 times for out-of-state, and 1.26 times for in-state. County was statistically significant when all counties were compared to Chittenden. Bennington, Rutland, Windsor and Windham Counties were less likely to sentence to incarceration than Chittenden County.

#### *First-time Offenders- Simple Assault<sup>14</sup>*

There were 121 first-time offenders in this cohort. Forty-one defendants were sentenced to either a split or a straight sentence. Of those, 22 (53%) were African American. There were a total of 49 (40.1%) African American first-time offenders. Despite the disproportionate representation, race was not a statistically significant factor in determining in/out  $p = .135$ . County is no longer significant in this model ( $p = .597$ ) indicating that there may be uniformity in dealing with first-time offenders. Only total felony cases filed on the same day remains significant ( $p = .008$ ) with an odds ratio of 2.50. This model correctly predicted who would be sentenced to a community sanction 95.5% of the time and who would be sentenced to a facility only 11.4% of the time.

#### **Domestic Assault**

There were 182 defendants in this cohort. Ninety-one defendants were white, and ninety-one defendants were people of color. Eighty-three defendants (45%) were sentenced to an incarcerative sentence. Sixty-one percent (51) of those sentenced to a facility were people of color.

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<sup>14</sup>First Time offenders are discussed for each crime to further highlight the impact of race on the decision. This analysis is included in the report at the request of an early reviewer.

*Table 8*

	<b>Straight</b>	<b>Split</b>	<b>Probation</b>	<b>Deferred</b>	<b>Fine</b>	<b>I.S.</b>
<b>White</b>	11	21	47	6	3	3
<b>Minority</b>	23	28	28	6	4	2

The regression model correctly predicted who would not receive an incarcerative sentence 78% of the time. The model was less accurate in predicting who would be sentenced to a facility, correctly predicting 49 of the sentences or 57%. This low prediction ratio on incarcerative sentences indicates that other factors not captured in the data impact the sentencing. Race was not a significant predictor of the incarceration decision ( $p = .340$ ).<sup>15</sup> Table 9 indicates the relevant factors.

*Table 9*

<b>Variable</b>	<b>Significance</b>	<b>Odds Ratio</b>
<b>In-State Criminal History</b>	.003	1.26
<b>Out-of-State Criminal History</b>	.005	1.49
<b>Total DV Filed Same Day</b>	.015	2.48

The odds of being sentenced to incarceration increased 2.48 times for those defendants with multiple Domestic Assaults filed on the same day. A criminal history increased the likelihood of an incarcerative sentence by 1.26 times for an in-state and 1.49 times for an out-of-state record.

#### ***First-time Offenders – Domestic Assault***

There were only 68 first-time offenders in this cohort, which is too small a number to perform a logistic regression. Race, however, was not correlated to incarceration (Chi Square=.652).

#### **Marijuana Possession**

There were 203 people in the sample cohort. There were 101 minority defendants and 102 white defendants. Only 18 defendants; 14 minorities and 4 whites, received an incarcerative sentence. Table 10 illustrates the distribution of sentences. Almost an equal number of minorities and whites received a probationary sentence or were sentenced to a fine. However, only 3.9% of whites received an incarcerative sentence compared to 13.8% of minority defendants.

<sup>15</sup> County was not a significant predictor ( $p = .079$ ), nor was the sex of the defendant ( $p = .076$ ).

*Table 10*

	<b>Straight</b>	<b>Split</b>	<b>Probation</b>	<b>Deferred</b>	<b>Fine</b>	<b>I.S.</b>
<b>White</b>	4	0	12	0	62	24
<b>Minority</b>	11	3	11	3	59	14

The regression model correctly predicted who would not receive an incarcerative sentence 99.5% of the time. It correctly predicted all but one community sentence. The model was less accurate in predicting who would receive an incarcerative sentence; correctly predicting only 16.7% of the time. It correctly predicted only three of the incarcerative sentences. This low prediction ratio on incarcerative sentences indicates that other factors not captured in the data impact the sentencing. Race is a significant factor in this model; however, if the sample had included 2 more white defendants sentenced to a straight or split sentence, race would not be a factor.

*Table 11*

<b>Variable</b>	<b>Significance</b>	<b>Odds</b>
<b>Race</b>	.020	4.37
<b>Out-of-State Criminal History</b>	.010	1.34
<b>Other Jail Sentence</b>	.000	8.296

Because the model is best read as describing who does not go to a correctional facility, it would be more accurate to say that white defendants, who have no other jail sentence and who have a minor or no out-of-state criminal history, are more likely to receive sentences in the community or fines. The odds ratios are presented here for consistency, but do not accurately reflect the odds of being sentenced to a facility.

Several factors were not statistically significant in this model, including the in-state criminal history ( $p = .420$ ) and county ( $p = 1.000$ ).

#### ***First-Time Offenders – Marijuana Possession***

There were 103 first-time offenders in this cohort, 57 whites and 46 minorities. First-time offenders accounted for 5 of the original 15 straight sentences. The logistic regression model correctly predicted who would not go to a facility 100% of the time. The model only correctly predicted one incarceration (20%). This low prediction ratio on incarcerative sentences indicates that other factors not captured in the data impact the sentencing. Race was not statistically significant ( $p = .102$ ). Only the total number of felony charges filed was significant, with  $p = .018$  and an odds ratio of 6.86. This model was unable to correctly predict any incarcerative sentence, but predicted 100% of the community based sentences.



## Possession of Cocaine

This crime was not sampled. All defendants convicted of Possession of Cocaine Less than 2.5 Grams during the study period, were used for analysis. There were 186 people in the final cohort. Thirty-eight defendants were people of color. Seventeen (65%) of the minority defendants were sentenced to incarceration. Of the 148 white defendants, 67 (45%) were sentenced to incarceration.

*Table 12*

	<b>Straight</b>	<b>Split</b>	<b>Probation</b>	<b>Deferred</b>	<b>Fine</b>	<b>I.S.</b>
<b>White</b>	33	34	44	3	26	8
<b>Minority</b>	17	8	3	0	6	4

The regression model correctly predicted who would receive a community sentence 69% of the time, and who would be sentenced to incarceration 56% of the time. This low prediction ratio on incarcerative sentences indicates that other factors not captured in the data impact the sentencing. Race was not a statistically significant factor in determining sentence ( $p = .123$ ), nor was the in-state criminal history ( $p = .062$ ), nor county ( $p = .281$ ). Table 13 illustrates the statistically significant factors and the odds ratios:

*Table 13*

<b>Variable</b>	<b>Significance</b>	<b>Odds Ratio</b>
<b>Out-of-State Criminal History</b>	.012	1.67
<b>Other Misdemeanor Drug Charges File</b>	.003	2.145

Defendants with an out-of-state criminal history were 1.67 times more likely to receive an incarcerative sentence. Defendants with other misdemeanor charges filed were 2.15 times more likely to be sentenced to a facility.

## *First-time Offenders – Possession of Cocaine*

There were 79 first-time offenders in the cohort. This number is too small to perform a regression analysis. There were 13 minority defendants, of whom 9 (69%) were sentenced to incarceration. Of the 66 white first-time offenders, 21 (32%) were sentenced to incarceration. Despite the apparent disparity, it is not statistically significant.

## Regression Model- Sentenced Time

Act 134 asked if minority defendants served more time than white defendants. The data provided by the Department of Corrections does not distinguish on which charge a defendant is

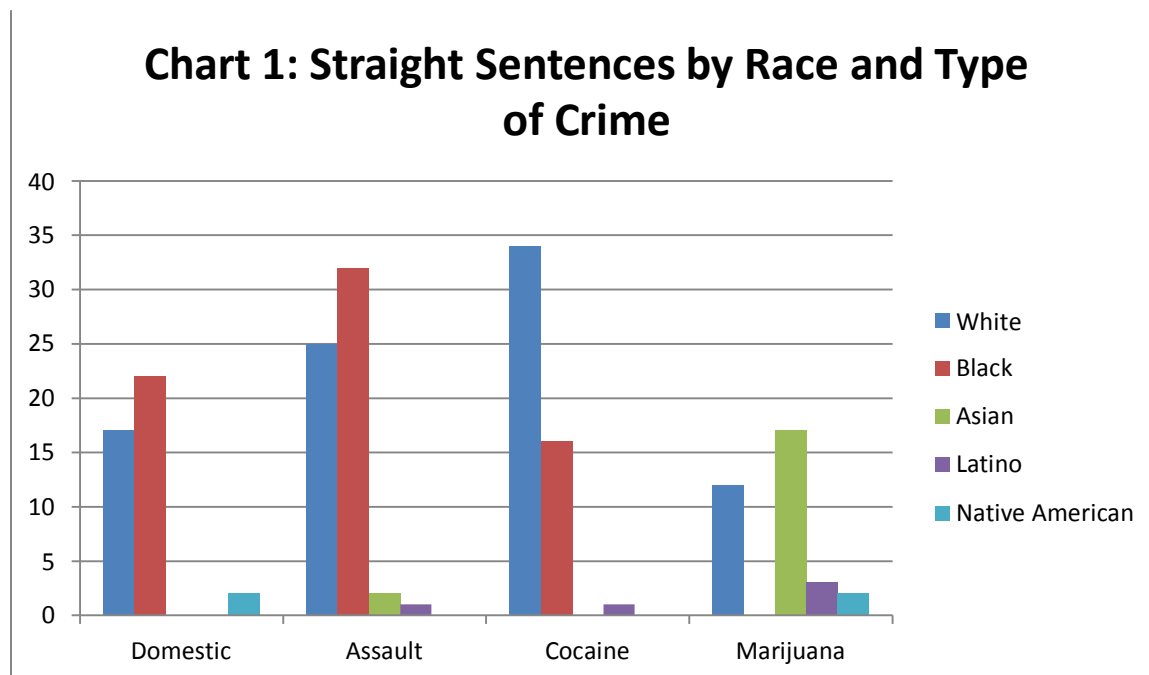
currently serving a sentence (in the case of concurrent or consecutive sentences). Nor does the data include information on programming, external housing availability or other factors related to time served. Accordingly, this question could not be answered with this research.

The data could answer whether race was a factor in the time a defendant was sentenced to serve. To test this, Ordinary Least Squared (OLS) Regression was used. Like the logistic regression above, this regression technique measures the effect of independent variables on the dependent variable. In this case, the dependent variable is the amount of time to which a person was sentenced. This type of regression is used when the dependent variable is an interval scale. The scale measured here is “days.”

As with logistic regression, at least 100 cases are required to perform the analysis. None of the crimes studied had 100 persons sentenced to a straight sentence or 100 people sentenced to a split sentence. Therefore, the regression analysis was run on all of the defendants together. There were 184 people sentenced to a straight sentence and 151 people sentenced to a split sentence.

### Straight Sentences

Of the 184 people sentenced to straight incarceration, 88 were white, 87 were black, 5 were Latino, 2 were Asian and 2 were Native American. Chart 1 illustrates the race of the defendant and the crime committed.



As Chart 1 illustrates, more whites were sentenced to straight incarceration for cocaine possession than black defendants. More black defendants were sentenced to straight incarceration than whites for both domestic assault and simple assault.

The average minimum sentence was 92 days and average maximum sentence was 159 days. The minimum sentences ranged from 1 day to 1 year, and the maximum sentences ranged from 1 day to 2 years. Fifty percent of the defendants were sentenced to 60 days or less on the minimum. Fifty percent of the defendants were sentenced to 90 days or less on the maximum.

### **Sentence Minimum**

In the Felony Sentencing study, gender, county and the offense level were all found to be statistically significant in predicting the minimum sentence. Those variables and race of the defendant as well as the state of residence were tested here.

Only the state of residence was significant ( $p = .009$ ) in predicting the minimum sentence. Race was not significant ( $p = .596$ ). Gender was not statistically significant ( $p = .327$ ), nor was the offense severity (violent or not) ( $p = .323$ ). Each county was tested and none were significant. Criminal histories were not significant in the Felony Sentencing Study or in this one. In-state criminal histories had a  $p$  value of .873 and out-of-state histories had a  $p$  value of .913. Criminal histories was important in decision to incarcerate but was not significant in length of time.

When the insignificant variables were removed, leaving only the state of residence, the model correctly predicted the sentence length 3.7% of the time. This indicates that there are other factors not captured that may more accurately determine the sentence length (e.g. sentenced to time served, housing issues).

### **Sentence Maximum**

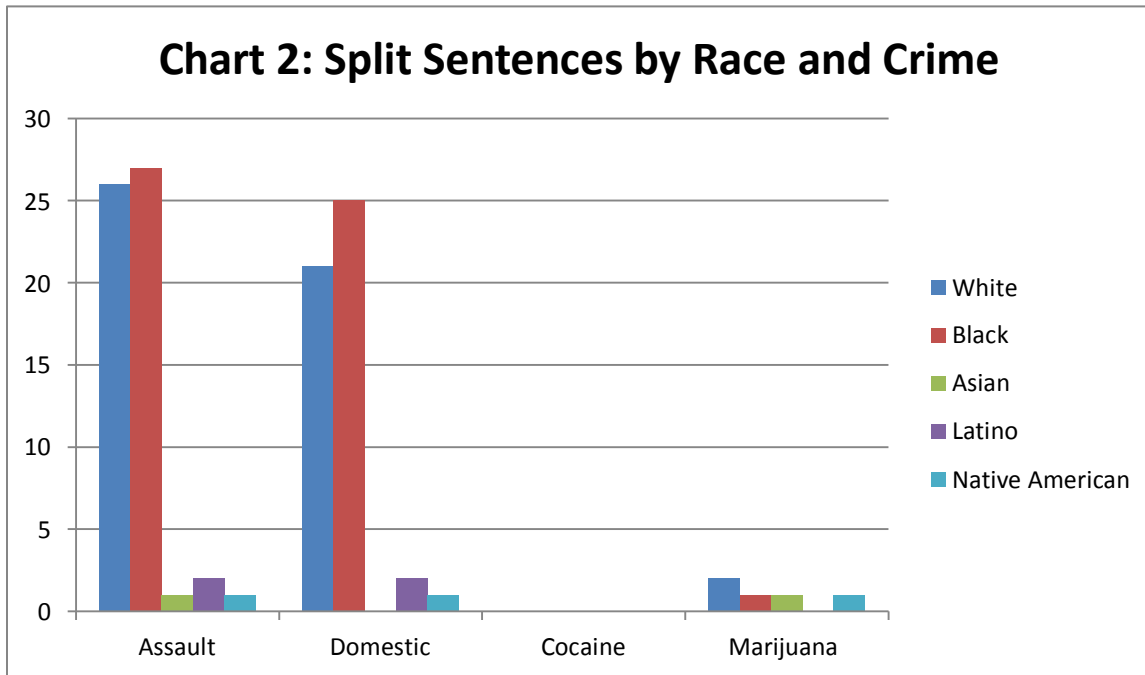
In the Felony Sentencing Study, criminal history, offense severity, county, gender and race were found to be statistically significant in predicting the maximum sentence. Those variables, as well as the state of residence were tested.

Only the state of residence ( $p = .014$ ) and the in-state criminal history ( $p = .031$ ) were significant in predicting the maximum sentence. Race was not statistically significant ( $p = .217$ ). Gender was not significant ( $p = .141$ ) nor was the offense severity (violent or not)  $p = .240$ . Each county was tested individually, and no county was statistically significant.

As with the analysis on the sentence minimum, and our prior research, the prediction rate of the model was low. When only the state of residence and the in-state criminal history were entered into the model, it correctly predicted the time sentenced only 8% of the time. This indicates that other factors are influencing the decision.

## Split Sentences- Days to Serve

There were 151 defendants sentenced to a split sentence. Eighty defendants were white, 61 were black, five were Latino, three were Native American and two were Asian. The average time sentenced to was 40 days, and fifty percent of the defendants were sentenced to 30 days or less. The range of sentences went from 1 day to 290 days. Chart 2 illustrates the race of the defendant and the crime committed.



No defendants convicted of Cocaine Possession were sentenced to a split sentence. Only five people were sentenced to a split were sentenced for Marijuana Possession. More blacks were sentenced to split sentences for Simple Assault and Domestic Assault.

In the Felony Sentencing Study, split sentences were not analyzed separately from straight sentences. However, the same variables were tested. Race was not statistically significant in determining the sentence length ( $p = .149$ ). Criminal History, either in-state ( $p = .837$ ) or out-of-state ( $p = .711$ ) was not statistically significant. The state of residence was not significant ( $p = .309$ ).

Rutland County ( $p = .002$ ) was more likely to impose longer sentences than other counties. No other county was statistically significant. Men were more likely to get longer sentences than women ( $p = .026$ ). Crimes of violence were more likely to get longer sentences than Marijuana Possession ( $p = .050$ ). When the insignificant factors were removed, the model correctly predicted the length of time only 10% of the time, indicating that other factors not captured are influencing the decision.

## Discussion

This study identified three key findings:

1. This study found no evidence of systemic racial bias in the decision to incarcerate.
2. This study found no evidence of systemic racial bias in the length of time a court sentences the defendant to.
3. Out-of-state records, independent of in-state criminal histories, are important in sentencing decisions.

### **FINDING #1: The Decision to Incarcerate**

This study found no evidence of systemic racial bias in sentencing decisions. In the one crime, possession of marijuana, where race was statistically significant in predicting the outcome, the relationship is too tenuous to find evidence of racial bias in decision making. As the study found no evidence of systemic bias, it is unlikely that the racial disparity observed in Vermont facilities is due to systemic bias at sentencing.

The prediction rate of the various models was better at predicting community sanctions than at predicting incarceration. This difference has held true in the prior research studies. This should be interpreted as indicating that the decision to incarcerate is more nuanced than the decision not to incarcerate. There are some factors that the administrative records do not contain, such as victim participation and circumstances of the offense. These factors may influence the sentencing decision.

### **FINDING #2: Length of Time**

This study found no evidence of systemic racial bias in the amount of time to which a defendant is sentenced. Race was not a statistically significant factor in predicting the minimum, maximum or days to serve on incarcerative sentences.

The prediction rate of incarceration of the various models was not high. This result was consistent with prior studies in Vermont. This indicates that other factors are contributing to the sentence length. These may include, sentence for time served, victim participation in the process or circumstances of the offense.

### **FINDING #3: Out-of-State Records**

The importance of out-of-state records in the decision making process cannot be understated.<sup>16</sup> The impact of out-of-state records was more consistent than any other variable. Police have access to those same records when they make a stop or an arrest. The impact of out-of-state records on the decision making process of police should be examined. Any further sentencing research in Vermont should consider the impact of out-of-state records.

Of note is that the state of residence at the time of the offense is not statistically relevant in decision making. A caveat to this conclusion is the source of the state of residence information. The state of residence was determined using Court Filings Database, which records the state of residence at the time of filing is the facility address if the person is detained. As defendants held in pre-trial detention would have a state of residence of Vermont, the number of Vermont residents may be overestimated in this sample.

## **Study Limitations**

Because this study was designed to test for the significance of race in sentencing, it should not be read as an explanation of all factors that contribute to a sentencing decision. For example, County was generally not statistically significant in these models, where it has been in other studies. It may be that County was acting as a proxy for the presence of an out-of-state record; however, more research with out-of-state records is needed to test this hypothesis.

This study captured one decision making point in the criminal justice system. The findings here only apply to the sentencing decision. To accurately measure the effect of race in criminal justice decision making processes, cases should be tracked from initial police contact all the way through charging and disposition processes. If racial bias is occurring earlier in the criminal justice system, then race is a factor in who appears before a judge and who gets sentenced to incarceration. This study examined only the sentencing decision, not the case flow of minorities and whites through the system.

## **CONCLUSION**

There is racial disparity in Vermont correctional facilities. This is not likely due to sentencing decisions. This study found no evidence of systemic racial bias in sentencing. The disparity may be a product of systemic bias earlier in the criminal justice system. This study does not answer that question.

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<sup>16</sup> The rate of out of state convictions for these crimes is consistent with a Bureau of Justice Statistics study finding that 25% of prisoners studied had an out of state arrest record.  
<http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>

## Appendix

### Study Methodology

This Appendix details the steps outlined in the body of the report.

### Step 1- Pre-Approved Furlough Capacity

The Court Adjudication Database does not distinguish between straight time and a pre-approved furlough. Both are coded as a sentence to straight incarceration. This is because a defendant on pre-approved furlough is in constructive custody. If a defendant fails to report for pre-approved furlough, the Department of Corrections has the authority to remand the defendant to jail.

The most accessible source for pre-approved furlough status is the Department of Corrections. The Department of Corrections created a listing of all defendants in their custody by the date and most serious level of restriction. This list is chronological by person, and reflects changes in status. The statuses recorded are: Intermediate Sanctions, Detained, Sentence Detained, Home Confinement, Sentenced, Probation, Parole and Re-Entry. A sample entry is illustrated below.

Table 1

Personal ID Number	Level	Start Date	End Date	Supervision Days
99999	Detained	01/01/2000	01/03/2000	2
99999	Intermediate Sanctions	03/01/2000	03/21/2000	20

Data from the Court Adjudication Database are matched into the Department of Corrections listing. Using specific dates in the court database, such as Arraignment Date or Disposition Date, a match is made to a specific Court event and a Department of Corrections action. This identifies specific DOC actions related to a specific court case. Using the data presented above, if the court disposition date was 02/28/2000, it is assumed that the Intermediate Sanctions that started on 03/01/2000 was the sentence for the disposed case. If the defendant was recorded as being on intermediate sanctions shortly after the disposition, and there was no sentenced days served, then it is assumed that the court sentenced the defendant to Intermediate Sanctions. These assumptions have been tested in several projects and found to be valid.

### Step 2- NIBRS

Using Vermont Crime on Line, all arrestees from 2004-2008 were identified. The breakdown of offense type and minority status is presented in Table 2.



Table 2

<b>Arrest Offense By Minority Status 2004-2008</b>					
Count					
		White	Minority	Missing	Total
	Aggravated Assault	1442	232	18	1692
	All Other Offenses	1037	70	23	1130
	Arson	86	7	1	94
	Bad Checks	32	0	1	33
	Burglary/B&E	1630	94	16	1740
	Counterfeiting/Forgery	343	25	4	372
	Credit Card/ATM Fraud	80	1	0	81
	Curfew/Loitering/Vagrancy Violation	1	0	0	1
	Destruction of Property/Vandalis	1716	113	28	1857
	Disorderly Conduct	497	26	7	530
	Driving Under the Influence	493	25	8	526
	Drug Equipment Violations	21	1	1	23
	Drug/Narcotic Violations	5683	672	134	6489
	Drunkenness	2	0	0	2
	Embezzlement	137	5	6	148
	Extortion/Blackmail	5	2	0	7
	False Pretense	690	33	11	734
	Family Offenses, Nonviolent	80	9	0	89
	Forcible Fondling	34	3	1	38
	Forcible Rape	244	28	3	275
	Forcible Sodomy	2	0	0	2
	Impersonation	81	0	0	81
	Incest	7	0	0	7
	Intimidation	155	24	2	181
	Kidnapping	77	14	7	98
	Larceny-other	1895	81	33	2009
	Liquor Law Violations	286	10	5	301
	Motor Vehicle Theft	377	36	8	421
	Murder/NNMS	28	7	0	35
	Negligent Manslaughter	5	0	0	5
	Peeping Tom	1	0	0	1
	Pickpocket	10	3	0	13
	Pornography	5	1	1	7
	Promoting Prostitution	1	0	0	1
	Prostitution	14	1	0	15
	Purse Snatching	6	2	0	8
	Robbery	84	12	0	96
	Runaway	1	0	0	1
	Sex Assault with an Object	3	0	0	3
	Shoplifting	2990	205	52	3247
	Simple Assault	6105	636	114	6855

	Statutory Rape	66	2	1	69
	Stolen Property	596	44	11	651
	Theft from Building	209	20	2	231
	Theft from Coin-Operated Machine	2	0	0	2
	Theft from Motor Vehicle	128	3	3	134
	Theft of Motor Vehicle Parts	21	0	0	21
	Trespass of Real Property	192	7	2	201
	Weapon violation	62	8	2	72
	Welfare Fraud	6	0	0	6
	Wire Fraud	5	0	0	5
Total		27673	2462	505	30640

Using this breakdown of crime categories and race, we identified those crime categories that had a high proportion of minority defendants. We determined non-whites were likely to be arrested for: Larceny, Simple Assault, Burglary, Drug Offenses, Domestic Violence, Forgery and Fraud Offenses. We then requested the criminal histories from Vermont Crime Information Center, for all defendants convicted of those crime categories from 2006-2010. Over 14,000 defendants were identified. After some preliminary cleaning of data, 11,118 defendants were left in the cohort. From there, frequency tables were run that indicated the race of the defendant and the statute under which they were convicted. To complete the analysis required by Act 134, a crime must have a sufficient number of non-whites convicted. Only a few crimes met that requirement: Simple Assault (13VSA 1023) Misdemeanor Domestic Assault (13 VSA 1042) Felony Domestic Assault (13 VSA 1043), Misdemeanor Possession of Marijuana (18VSA 4320(a)(1)) Misdemeanor Possession of Cocaine (18 4231(a)(1)), Felony Possession of Cocaine-2.5 grams (18 VSA 4231(a)(2)), Felony Possession of Cocaine-1 ounce (18 VSA 4231(a)(3), and Sale of Cocaine (18 VSA 4231(b)(1)).

### Step 3- Sentence Variance

Misdemeanor sentences were more likely to have a wider range of sentences imposed than felonies. There were also more convictions for misdemeanors than felonies during the study period. For example, Felony Possession of Cocaine had only 118 convictions, and 95% of the defendants were sentenced to incarceration. There were 1,560 people sentenced for Simple Assault, and 40% were sentenced to incarceration. The tables below indicate the sentence distribution (In/Out) by race for the entire cohort and the individual crimes.

**Table 3: Entire Cohort from VCIC**

Race/Ethnicity	Incarceration		Total
	NO	YES	
AFRICAN AMERICAN	247 37.3%	416 62.7%	663 100.0%
ASIAN	29 61.7%	18 38.3%	47 100.0%
CAUCASIAN	6192 60.0%	4136 40.0%	10328 100.0%
HISPANIC	22 43.1%	29 56.9%	51 100.0%
NATIVE AMERICAN	12 41.4%	17 58.6%	29 100.0%
Total	6502 58.5%	4616 41.5%	11118 100.0%

**Table 4: 13 VSA 1043 Felony Domestic Violence**

Race/Ethnicity	Incarceration		Total
	NO	YES	
AFRICAN AMERICAN	1 3.7%	26 96.3%	27 100.0%
ASIAN	1 33.3%	2 66.7%	3 100.0%
CAUCASIAN	53 18.7%	231 81.3%	284 100.0%
HISPANIC	1 33.3%	2 66.7%	3 100.0%
NATIVE AMERICAN	0 .0%	3 100.0%	3 100.0%
Total	56	264	320

**Table 5: 13 VSA 1023(A)(1) Simple Assault**

Race/Ethnicity	Incarceration		Total
	NO	YES	
AFRICAN AMERICAN	57 47.1%	64 52.9%	121 100.0%
ASIAN	5 62.5%	3 37.5%	8 100.0%
CAUCASIAN	872 61.5%	545 38.5%	1417 100.0%
HISPANIC	5 55.6%	4 44.4%	9 100.0%
NATIVE AMERICAN	4 80.0%	1 20.0%	5 100.0%
Total	943 60.4%	617 39.6%	1560 100.0%

**Table 6: 18 VSA 4230(A)(1) Misdemeanor Marijuana Possession**

Race/Ethnicity	Incarceration		Total
	NO	YES	
AFRICAN AMERICAN	63 76.8%	19 23.2%	82 100.0%
ASIAN	10 90.9%	1 9.1%	11 100.0%
CAUCASIAN	1759 82.2%	380 17.8%	2139 100.0%
HISPANIC	3 50.0%	3 50.0%	6 100.0%
NATIVE AMERICAN	1 20.0%	4 80.0%	5 100.0%
Total	1836 81.9%	407 18.1%	2243 100.0%

**Table 7: 18 VSA 4231(a)(1) MISDEMEANOR COCAINE POSSESSION**

Race/Ethnicity	Incarceration		Total
	YES	NO	
AFRICAN AMERICAN	10 27.8%	26 72.2%	36 100.0%
CAUCASIAN	77 51.7%	72 48.3%	149 100.0%
HISPANIC	1 50.0%	1 50.0%	2 100.0%
Total	88 47.1%	99 52.9%	187 100.0%

**Table 8: 18 VSA 4231(a)(2) Felony Cocaine Possession  
2.5 Grams or More**

Race/Ethnicity	Incarceration		Total
	NO	YES	
AFRICAN AMERICAN	1 1.7%	57 98.3%	58 100.0%
CAUCASIAN	5 8.3%	55 91.7%	60 100.0%
Total	6 5.1%	112 94.9%	118 100.0%

**Table 9: 18 VSA 4231(a)(3)-FELONY COCAINE POSSESSION  
1 OZ OR MORE**

Race/Ethnicity	Incarceration		Total
	NO	YES	
AFRICAN AMERICAN	3 15.8%	16 84.2%	19 100.0%
CAUCASIAN	6 26.1%	17 73.9%	23 100.0%
Total	9 21.4%	33 78.6%	42 100.0%

**Table 10: 18 VSA 4231(b)(1) Sale of Cocaine**

Race/Ethnicity	Incarceration		Total
	NO	YES	
AFRICAN AMERICAN	1 2.5%	39 97.5%	40 100.0%
CAUCASIAN	11 13.1%	73 86.9%	84 100.0%
HISPANIC	0 .0%	2 100.0%	2 100.0%
Total	12 9.5%	114 90.5%	126 100.0%

The final crimes chosen were those misdemeanors that had sufficient variability in sentencing were: Simple Assault, Domestic Assault, and Possession of Marijuana Less than 2 Ounces and Possession of Cocaine Less than 2.5 Grams. From these defendants, the sample was chosen.

#### **Step 4 –Sampling**

All minority defendants were included in the sample design. A sample of white defendants was chosen based on the demographics of the minority defendants. This is called stratified sampling. Stratified sampling is used when the populations vary considerably. Defendants vary considerably based on age, gender, state of residence and criminal history.

Criminal History was calculated from VCIC rap sheets. A criminal history score was calculated using the following formula: Total Prior Felony Convictions + (Total Prior Misdemeanor Convictions/2). This weights misdemeanor convictions at half of the value of a felony conviction. The range of Criminal History scores was from 0 (first-time offender) to a score of 41. The average criminal history score was 3.7.

Because of the range and variance in criminal history scores, they were categorized into groups for sampling. First-time offenders were one group. Defendants with a criminal history score of .5 through 3 were another group (low level offenders). Defendants with a criminal history of greater than 3 through 6 were another group (medium level offenders). Defendants with criminal histories over 6 were the final group. This grouping was used for sampling only, the actual criminal history scores were used in the regression models.

The age of the defendant also varied considerably from age 16 to 65. The average age was 29.89 years. Age groups were created for sampling: 16-17; 18-20; 21-25; 26-34; 35-44; 45-54; 55-64 and 65 and over. These age groups were only used for sampling, the actual age of the defendants were used in the regression models.

State of residence of the defendant was also variable, about 20% of the defendants were from out of state. Originally, state of residence was going to be determined if the defendant had a Vermont Department of Motor Vehicles driver's license or state identification card. The 11,118 names and dates of birth of the defendants identified in NIBRS and VCIC were sent to the DMV. Unfortunately, they were able to match less than half of those defendants to records in their system. That was not a reliable enough match to consider the data useful or accurate. Therefore the Court Filing Database, which records the state of residence at the time of filing, was used for determining the state of residence. For sampling, and regression analysis, defendants were coded as either a Vermont Resident or Not.

Once the coding of variables was complete, a matrix was constructed for each crime to be sampled (Assault Simple, Domestic Assault and Possession of Marijuana). The matrix included all minority defendants, categorized by gender, state of residence, age group and criminal history group. For every minority defendant in each box of the matrix, the same number of white defendants was randomly selected from those that met the demographic profile for that box. For example, for every minority female from Vermont, with no criminal history and between the ages of 35-44 an equal number of whites were randomly selected from those whites with that profile.

The final sample cohort was 852 defendants.

### **Step 5- Out-of-state Records**

The researchers requested the out-of-state records for all 852 defendants. The FBI sent back over 10,000 pages of criminal histories. These records were reviewed and coded by a group of Norwich University students. Students did not score those records that had only Vermont convictions. Students recorded: year of conviction, conviction level (felony/misdemeanor)/if the defendant was sentenced to greater than 1 year in prison and if there was a probation violation.

After the students scored the record, the student's scoring was checked by a researcher. At this point, the type of crime the defendant was convicted of was also recorded. The number and type of convictions were manually entered into the analysis file. Only those convictions that occurred before the conviction under study were included.

The final analysis files were broken out by crime, so that each crime was analyzed separately. There is an analysis file that contains all four crimes together, that file was used to describe the cohort and perform the regression analysis on the sentenced time.