

Date: January 27, 2009



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

**A Report of the West Virginia Law Institute
to the West Virginia Legislature
January 27, 2010**



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Established 1988*

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January 27, 2010

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Dear Judiciary Chairs:

Submitted herewith is the final report from the West Virginia Law Institute, including the requested recommendations for criminal sentencing reform for the State of West Virginia.

The members of the Institute and I are most grateful for the unique opportunity to serve our State of West Virginia. While producing the report was challenging task, it was embraced with the utmost enthusiasm and effort. We trust our recommendations will assist you in your deliberations.

Respectfully,

Scott Curnutte
President, West Virginia Law Institute

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ACKNOWLEDGMENTS

The Institute received a large amount of assistance throughout its efforts and ultimate task of compiling recommendations to the Legislature. To all of the interested citizens, members of the State bar, faculty of the College of Law and other personnel who took part in the meetings or provided information, suggestions and recommendations of their own, we extend our appreciation.

Special thanks to those who spoke at our meetings and gave commentary concerning the state of prison overcrowding in the State of West Virginia today, and assisted us in other ways.

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Finally, we extend gratitude to **Senator Jeffrey V. Kessler** and **Delegates Carrie Webster** and **Tim Miley** for their efforts in procuring this endeavor and their continued support and assistance.

EXECUTIVE SUMMARY

The West Virginia Law Institute approved this report on January 27, 2010. The report's first twenty-three pages provides background on the Institute, the Legislature's charge to the Institute, and the Institute's process in producing the report. Its substantive content begins on page 23 with a list of the Institute's principal recommendations. A discussion of those and other recommendations follows. Part I (pages 28-34) offers some background on criminal sentencing. Part II (pages 34-55) then identifies sentencing laws that the Institute's research identified as contributors to overcrowded prisons and most in need of attention because they are unduly harsh, inconsistent with comparable laws, unfair, or otherwise problematic. Sections A and B describe the sentencing provisions that the Institute believe to be most in need of legislative attention. Section A (pages 35-44) deals with specific sentencing provisions and Section B (pages 44-46) with general laws. Both sections take up the statutory provisions in the order that they appear in the Criminal Code. Section C (pages 46-54) describes other suggestions that could lead to both an improved Code and fewer people in prison for less time. Section D (page 54) lists outmoded or unconstitutional provisions whose repeal would improve the quality of our Code, although that would not affect the prison population. Parts III (pages 55-65) and IV (pages 65-70) deal with additional ideas for decreasing prison overcrowding while also enhancing public safety. These ideas derive from both the literature that the Institute researched and from suggestions made to the Institute by persons working the State's criminal and corrections systems. Those parts should be studied along with the recommended sentencing reforms.

BACKGROUND

West Virginia Law Institute

Pursuant to the West Virginia Code, the West Virginia Legislature established a state law institute as an official advisory law revision and law reform agency of the State of West Virginia to be located at the West Virginia University College of Law, and to be known as the “West Virginia Law Institute.”¹

The general purpose of the West Virginia Law Institute is “to promote and encourage the clarification and simplification of the law of West Virginia, to improve the better administration of justice and to conduct scholarly legal research and scientific legal work.”² To accomplish such an objective, the statutorily mandated duties of the Institute include:

- Consider improvements in substantive and procedural law to make recommendations concerning such to the state Legislature;
- Examine and study the law of West Virginia and discern defects and inequities and recommend needed reforms;
- Receive and consider suggestions from state officials such as judges, justices, public officials, lawyers, and the public generally as to defects and anachronisms in the law,
- Recommend such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law or recommend the repeal of obsolete statutes and suggest needed amendments, additions and deletions;

¹ W.Va. Code §4-12-1 (2000).

² W.Va. Code §42-12-2 (2000).

- Render annual reports to the Legislature, and if necessary, accompany the reports with proposed bills to carry out any of its recommendations; and
- Organize and conduct an annual meeting within the state for scholarly discussions of current problems in the law, bringing together representatives of the Legislature, practicing attorneys, members of the judiciary and West Virginia state bar and representatives of the law teaching profession.

The West Virginia Law Institute serves the state in an advisory capacity by submitting reports to the Legislature with its membership being statutorily prescribed. The West Virginia Code³ statutorily requires the governing body be composed of ex officio members and elected members as follows:

- One justice of the West Virginia Supreme Court, elected by the justices;
- One circuit court judge, elected by the judicial association;
- One federal judge residing in West Virginia;
- One legal counsel to the Governor of the State of West Virginia;
- Chairperson of the judiciary committees of the Senate and the House of Delegates of the West Virginia Legislature or an attorney member of the respective committees appointed by the chairperson of the committee;
- One member each from the majority and minority parties of the Senate and the House of Delegates of the West Virginia Legislature to be selected by the president of the Senate and the speaker of the House of Delegates, respectively;
- The director of West Virginia legislative services;
- The chairperson of the West Virginia commission on uniform state laws;
- The President and first Vice President of the West Virginia State Bar;

³ West Virginia Code §4-12-3 (2000).

- The chairperson of the young lawyers section of the West Virginia State Bar;
- The Dean of the West Virginia University College of Law;
- Two attorneys appointed by the Governor of the State of West Virginia for terms to run concurrently with the term of the Governor;
- The director of the continuing legal education program sponsored by the West Virginia State Bar and the West Virginia University College of Law;
- The Editor-in-Chief of the West Virginia Law Review;
- Two elected faculty members from the West Virginia University College of Law; and
- Four practicing attorneys from each of the Congressional Districts in the state.

A full list of the current membership of the West Virginia Law Institute, containing appropriate contact information is attached as an appendix.

The current Director and Secretary of the Institute is David C. Hardesty, Jr., President Emeritus and Professor of Law at West Virginia University's College of Law. Prof. Hardesty is a graduate of West Virginia University, Oxford University (England) and Harvard Law School. He teaches courses related to the legislative process, bill drafting and professional ethics. He serves as Director and Secretary of the Institute by appointment of the Dean of the College of Law as part of the College's service commitment to West Virginia.

Summary of the “The Governor’s Commission on Prison Overcrowding Report”⁴

The problem of prison overcrowding in West Virginia is an issue that should not and cannot be ignored. Although the state itself enjoys a history of some of the lowest reported crime rates, it currently has one of the highest increasing rates of prison growth in the country that is marked by insufficient correctional resources, inadequate imprisonment statistics and minimal alternative sanctions.

In response to these and national concerns, the Department of Military Affairs and Public Safety hosted a three day symposium at Stonewall Jackson Resort on September 17-19, 2008, to address the issue of jail and prison overcrowding. At the symposium, members from the Executive, Judicial and Legislative branches, as well as national experts met to discuss the problem and brainstorm potential solutions. The thrust of discussion resulted in the recommendation that a commission be created to study this burgeoning problem.

Created by Executive Order No. 1-09, Governor Joe Manchin, III established the Governor’s Commission on Prison Overcrowding in an effort to address the issue of correctional inadequacies throughout the state. In a collection of research, meetings, and recommendations, the Commission set forth a report based on a set of values, consistent with the “West Virginia community,” that not only outlined a compilation of the problems concerning State correctional institutions, but also made recommendations as to how the State should proceed in order to curb such deficiencies. The Commission specifically emphasized that reform is necessary not only in order to curb the overpopulation of the correctional system but to preserve a safe West Virginia. In order to do so the Commission adopted a set of values that it felt would protect and preserve public safety. Articulated in the report, the values include that public safety is paramount, victims

⁴ This summary is based on the Governor’s Commission on Overcrowding Report, submitted to the Honorable Joe Manchin, III, Governor of the State of West Virginia on June 30, 2009.

of crime need empathy and support, criminal offenders must be dealt with judiciously and humanely, government action that engages citizen support empowers communities and an engaged citizenry provides the best hope of real criminal justice. Consistent with these values the Commission analyzed the problem and imparted suggestions it felt would cure the inadequacies that presently plague the State.

Currently, as the Commission reported, there are 1,300 excess criminal offenders who have been sentenced by the courts and cannot fit within the 5,015 prison beds. This not only hinders regional jails but places stress on the community as a whole because offenders released from jail lack beneficial therapeutic and rehabilitative programs available in prisons. Further, West Virginia ranks 50 among the states in its use of community correction alternatives. Community correction programs are not only cost effective but have been found to decrease recidivism rather than further overcrowd correctional facilities. If recent trends continue, without the implementation of reform, such as amplified use of community corrections, West Virginia will need bed space for an ever increasing number of offenders; bed space it does not have and that will cost the State an exorbitant amount of money to create.

The need for reform has also been emphasized in a recent West Virginia Supreme Court decision⁵, where the court urged in its opinion that the “other two departments of government to act promptly to address the ongoing issues presented by an ever burgeoning prison population.” The court also warned that, if reformatory steps were not taken, it or a federal court might be forced to “intervene.”⁶

In response to this ruling and recognizing this concern, the Commission recommended three broad actions be taken.

⁵ *West Virginia v. Commissioner, WVDOC*, 218 W.Va. 572 (2005).

⁶ *Id.*

- First, the Commission recommends that alternative sanctions be implemented. This calls for legislative reform that will identify criminal offenders who have committed less serious offenses and in lieu of prison terms the Commission suggests that the offenders should be sentenced to appropriate community supervision and correctional programs.
- Second, there should be a reduction in the length of stay for certain offenders. Again, certain offenders should be identified by the minimalism of their offenses and sentences should be shortened.
- Third, even with the proposed legislative reforms the Commission recognized that there still needs to be an increase in prison capacity through the building of facilities that offer more beds for offenders and address rehabilitation needs.

Along with these three suggestions the Commission also promulgated a “Comprehensive Agenda for the West Virginia Criminal Justice System.” Based on policy issues it specifically proposed fourteen recommendations that it projected would reduce the need for at least half of the prison beds needed in the future.

- *“Risk-Need-Responsitivity” Model of correctional intervention.* The first recommendation proposes the implementation of a model that would emphasize the “criminogenic” tendencies of individual offenders, including substance abuse and mental illness. Through a standardized risk and needs assessment, each offender would have a management plan prior to sentencing that would assist in their ultimate return into the community. The hope is that such a model would reduce criminal recidivism and free up Department of Corrections bed space by sending offenders with a low risk assessment into community correctional programs. Although the assessment would most likely cost around \$20 per offender, the ultimate savings would be roughly \$14 million dollars per year as

approximately five hundred offenders would be diverted to community correctional facilities.

- *Expansion of alternative sanctions.* The Commission's second recommendation in particular calls for emphasis placed on expanding both probation and parole as well as the concept of maintaining and increasing funding for community correctional facilities. In terms of probation, the Commission recommended the active use of Senate Bill 760, passed in 2009, that authorizes the West Virginia Supreme Court to develop a pretrial release program targeted at nonviolent misdemeanants. This however, as the Commission indicates, would require an increase in the number of probation officers in the State. In regards to parole, the Commission also calls for an increase in the number of parole officers in hopes of returning offenders to the community earlier and with more success so that they might become contributing members of society. The final suggestion was that ten probation officers and fifteen parole officers be hired to reduce case loads for current officers. In expanding community corrections, the Commission placed emphasis on the idea of offender rehabilitation as well as restitution programs. Specifically, the Commission recommended that current programs be expanded to provide space for felony offender diversion and to assist in the re-entry process for offenders who have been awarded parole and will re-integrate into society.
- *Increase in West Virginia's substance abuse and mental health treatment facilities.* The Commission based its third recommendation on the trend that offenses often coincide with both the abuse of drugs and alcohol and mental illness. In corroboration with the Department of Health and Human Resources, Bureau for Behavioral Health and Health Facilities, the Commission identified seven initiatives that will help divert offenders or prevent anti-social behavior before it becomes criminal. The initiatives recommend the

implementation of additional residential treatment centers, medication assisted treatment, detoxification units, long-term substance abuse programs, transitional living programs, and recovery centers to help prevent criminal behavior and help with the diversion and reintegration of offenders.

- *Creation of transitional housing programs for offenders granted parole.* The fourth recommendation furthers the Commission’s emphasis on reintegration of criminal offenders. Often when offenders are granted parole they have insufficient social support in the community to prevent recidivism. By providing transitional housing and support, parolees will have a greater chance for success in their attempt to reenter society.
- *“Presumptive parole”* represents the Commission’s fifth suggestion. Specifically, the Commission suggested that the statutory language be amended to provide for early release for offenders who commit nonviolent offenses and are deemed low risk in their initial assessments. Bed-space will ultimately be increased as there will be the presumption, unless proven otherwise, that the offender will be released upon a specific date. However, it must be qualified that presumptive parole can only be implemented with legislative reform and successful only if rehabilitative and therapeutic programs are offered to offenders within the Department of Corrections.
- *Comprehensive review of the West Virginia Criminal Code.* Undoubtedly one of the Commission’s most significant recommendations was that it is necessary to bring the West Virginia Code to contemporary societal standards. In doing so two questions need to be addressed: First, do the West Virginia’s Criminal Code and its sentencing structure enhance public safety? If the answer is yes, then can public safety be enhanced in a more effective manner that meets the needs of the victim, the offender and the community at large? The Commission explicitly stated that longer prison sentences, although

emphasized throughout the legislative history of the state, may not be the best way to reduce recidivism. The Commission recommended that a concerted and collaborative effort be undertaken by the three branches of government and the law school at West Virginia University to address reform of the Criminal Code and its sentencing schemes.

- *Improvement and sharing of criminal justice data in electronic format.* The Commission's seventh recommendation suggested that a comprehensive information system be created that includes such information as risk assessment needs, sentencing outcomes, probation and community corrections data, Department of Corrections institutional data and parole data. The Commission also suggested that research be conducted to identify and monitor the factors that lead to recidivism and prison overcrowding.
- *Research in regards to the effectiveness of community correctional programs.* The Commission recommends in its eighth suggestion that the Division of Criminal Justice Statistical Analysis Center conduct an evaluation of programs based on success and failure rates of various offenders sentenced to community correctional programs. While the Commission emphasized that it is of the opinion that such programs have the propensity to be successful, it believes that review and assessment of community correctional programs will help make adjustments where necessary to help achieve public safety goals.
- *Increasing public education on the urgency of taking action and the need for community support.* The commission believed effective communication with community leaders and the community at large about such progressive ideas, and programs and about West Virginia's trends regarding crime, punishment, and prison overcrowding could produce a positive reaction from decision-makers and the public.

- *Oversight group monitoring and maintenance.* The Commission stated that oversight and data collection are necessary for the recommended remedial actions to be successful to improve, and to assure the safety of West Virginians.
- *Construction of three hundred additional beds at the St. Mary's Correctional Complex.*
- *Creation of Work Release Centers.* At a minimum, four work release centers should be created to help prepare lower security inmates for a return to community life.
- *Alternative facilities for the population of special offenders, such as older offenders and offenders with substance abuse problems and mental health issues.*
- *Construction of a twelve hundred cell, medium security prison.* The prison should be constructed in an area of the State with a workforce sufficient to staff the institution. Although this idea is aggressive, the Commission believes that without the creation of such a facility disastrous consequences will result in the regional jails that currently hold the overflow prison inmates. Such a facility is also necessary to ensure public safety by retaining incarceration of offenders who have proven to be violent and need special supervision.

In conclusion, the Commission stressed the serious management problem that prison overcrowding is causing within the State. Without urgent action, this problem will only get worse and disastrous consequences may result. However, the Commission recognized that the task of reducing prison overcrowding cannot be left to only one branch of government. A comprehensive effort is needed to implement the Commission's recommendations.

Summary of Charge to the West Virginia Law Institute from the West Virginia Legislature

The charge, sent from the Judiciary Chairs, Senator Jeffrey Kessler and Delegate Carrie Webster⁷, was officially addressed to David C. Hardesty, Jr. and Dean Joyce McConnell at the West Virginia University College of Law. It is attached as an appendix.

The objective of the study grows out of legislative consideration of the Governor's Commission on Prison Overcrowding. It is hoped that the report will lead to reductions in the demand for prison beds and meet current and immediate future needs for prison bed space. The transmittal letter notes a great sense of urgency because prison overcrowding is a pressing issue. The legislature expects a report at the beginning of the next session.

The Institute is asked to review relevant statutes and related literature and offer specific recommendations in sentence restructuring and appropriate diversions to community-based rehabilitation. As an overriding principle, the proposed reforms should minimize risk to public safety and minimize incarceration costs.

While the report calls for comprehensive review of criminal sentencing laws, including probation, parole, community service and/or other treatment options, the legislature recognized that: "... the study must be limited in scope due to the short time-frame for the project completion." Specific guidelines prescribed for the Institute's study include:

- Review the statutes referred to in the report. Also, include others identified by the institute as worthy of review.
- Focus on non-violent, property and drug crimes.
- Focus on offences with disproportionate penalty provisions.

⁷ Delegate Webster resigned her seat as Chair of the Judiciary Committee in the House of Delegates in late 2009 due to her appointment as a circuit court judge by Governor Joe Manchin, III. Shortly thereafter Delegate Tim Miley was appointed Judiciary Chair by the Speaker of the House, Richard Thompson.

- Compare West Virginia statutes with those of other states for comparability, proportionality.
- Review proportionality of sentencing for like crimes in West Virginia.
- Suggest modifications in sentencing structure.
- Suggest shifts to community based corrections design.
- Include analysis of offender types and offender profiles that are appropriate for diversion.
- Include analysis of offender types and offender profiles appropriate for non-restrictive rehabilitation services.

The process specifically mandated by the legislature called for an interim report to the Joint Committee on Government and Finance, with the final report to be presented prior to next session. It was also recommended that the review be done in a bi-partisan manner and appropriate resource persons should be consulted such as Joseph Altizer, Judiciary Staff Counsel and Rita Pauley, Senate Judiciary Counsel.

WORK UNDERTAKEN BY THE INSTITUTE

This report is the result of an official charge given to the West Virginia Law Institute and grew out of the report of the Governor's Commission on Prison Overcrowding. Administrative guidance was provided by Mr. Scott Curnutte, President of the Institute and its Director, David C. Hardesty, Jr., Professor of Law at the West Virginia University College of Law. Substantive research was conducted and directed by Professor Robert Bastress, also of the College of Law. The Commission began its work on September 16, 2009 and adopted its recommendations at a meeting on January 27, 2010.

Input Collected

In its attempt to gather information regarding shortcomings in West Virginia criminal sentencing, the Institute communicated with various state leaders and liaisons and collected opinions on areas of disparity and inequality needing reform. A Survey letter, which is attached, was sent to County Prosecutors, Public Defenders, Sheriffs, County Commissioners, Judges, Magistrates and State Probation Officers. The letter was also sent to Jim Rubenstein, the Commissioner of the West Virginia Department of Corrections, as well as the Wardens and Administrators of all correctional facilities within the state. Further, notice was afforded through the West Virginia State Bar's "Bar Blast" online newsletter, which requested feedback from individual state attorneys who might have some input involving this issue. A complete list of those who were contacted and who provided feedback is attached. The collected input is a part of the reporter's final analysis.

Role of the Reporter

The West Virginia Law Institute chose an experienced and able Professor at the West Virginia College of Law, Robert M. Bastress⁸, to serve as the reporter for its final report to the Legislature. In his role as the reporter Professor Bastress sought input from members of the legal and penal communities in West Virginia, consulted with criminal justice experts, conducted his own scholarly research, and undertook a section-by-section review of the State's criminal code and related provisions. From those efforts, he formulated the ensuing substantive analysis of West Virginia's sentencing laws and practices.

Role of the Institute

The West Virginia Law Institute's role in this project is to facilitate a review of West Virginia's criminal sentencing laws. Its position in compiling this report arises from the Governor's Commission Report on Prison Overcrowding recommendation calling for a comprehensive review of the West Virginia Code. This was a partial response to the sixth recommendation out of fourteen, which called for a complete overhaul and review of the West Virginia Criminal Code to bring it to contemporary societal standards.

In its time sensitive position the Institute's role encompasses examining criminal sentencing statutes and identifying those which are appropriate for reform. In doing so, the Institute is requested to compare criminal trends in West Virginia with those nationally and in surrounding

⁸ Professor Robert M. Bastress is John W. Fisher, II Professor of Law at the West Virginia University College of Law, where he has taught since 1978. . He holds B.A., J.D, and L.L.M. degrees from Wesleyan, Vanderbilt, and Temple Universities, respectively. Prior to his entry into teaching, he was also a directing and staff attorney with the Appalachian Research and Defense Fund in Eastern Kentucky. Professor Bastress' teaching and scholarly interests have concentrated on constitutional law, employment law, and local government law. His scholarship includes two books, *The West Virginia Constitution: A Reference Guide* (Greenwood Press, 1995) and *Interviewing, Counseling & Negotiating: Skills for Effective Representation* (Little, Brown 1991) (with Joseph Harbaugh), as well as numerous articles, course materials, and presentations.

states. Ultimately the role of the Institute, upon completion of its research and review, is to provide recommendations to the legislature, outlining specific sentencing changes , while contemplating appropriate diversion to community based rehabilitation.

Meetings Held

The Institute held five meetings to discuss its charge from the legislature on criminal sentencing reform.

- The first meeting, held **September 23, 2009**, at the Erickson Alumni Center at West Virginia University in Morgantown, West Virginia, was an introduction to the charge given by the legislature and the role the Institute would take in drafting the report on criminal sentencing reform. There were also guest presentations from Mr. Norbert Federspiel, the Director of the West Virginia Division of Criminal Justice, concerning the Governor’s Report on Prison Overcrowding, Deborah McDaniel, the Strategic Planner for the Division of Criminal Justice Services regarding individual criminal assessment, and Joseph Altizer and Rita Pauley, counsel for the judiciary committees, who discussed the guidelines for Institute research. In conclusion, the final resolution was adopted by the legislature.
- The second meeting was held **October 21, 2009**, in the Governor’s Conference Room in Charleston, West Virginia. In attendance were special guests Mr. James Spears, the Cabinet Secretary of the West Virginia Department of Military Affairs and Public Safety as well as Attorney General Darrell V. McGraw and Mr. Jim Rubenstein, the Commissioner of the West Virginia Division of Corrections, all of whom gave their opinions and suggestions to the Institute concerning potential reforms. Chief Justice Brent Benjamin of the West Virginia Supreme Court of Appeals spoke and described programs such as specialized dockets and “drug courts” as well as the Court’s

endorsement of and support for greater resources for such programs and public education efforts.

- Pursuant to an invitation, Institute **President Scott Curnutte**, addressed the Legislative Oversight Committee on Regional Jail and Correctional Facility Authority on **November 17, 2009**. He reported to the Committee that the Institute had received substantive presentations at its September and October meetings, and that additional substantive presentations would be made at the November meeting. He added that the Institute had solicited input from various groups and individuals and that the reporter, Professor Bastress, had undertaken a survey of the relevant literature.
- The third meeting was held **Wednesday November 18, 2009** via teleconference in Morgantown, Charleston and Beckley West Virginia. At this meeting, Professor Bastress gave a tentative outline of his final report to the Institute for its approval and submission to the Legislature. Members of the Institute were provided the opportunity to question and comment on his research plan.
- A meeting held **January 5, 2010**, at West Virginia University included a report given by Professor Robert M. Bastress. He presented a draft of the report and described areas of concern within the States' criminal sentencing laws and practices and offered recommendations for reform. The Institute as a whole then deliberated and reached consensus that the project was near completion and that some portions of the draft report should be modified.
- During a conference call held on **January 27, 2010**, the Institute approved this report and directed that it be forwarded to the Legislature.

PRINCIPAL RECOMMENDATIONS

The West Virginia Law Institute recommends the State Legislature take the following actions:

CRITICAL NEED

- Undertake a complete rewrite of the State's criminal code to modernize, clarify, and rationalize our criminal laws and sentencing provisions.

SPECIFIC CRIMES

- Amend the robbery statute, W. Va. Code ("WVC") § 61-2-12, as proposed in Section II-A-3 of the Report.
- Amend the forgery and uttering law, WVC § 61-4-5, to cap the amount for which a felony can be imposed and to eliminate the double penalties. *See* Sections II-A-5 & II-C-7-d.
- Amend WVC §§ 61-2-14 and -14a to eliminate the double penalty for abduction and kidnapping to clarify and rationalize the kidnapping section. *See* Sections II-A-4 & II-C-7-b.
- Amend the arson provisions, WVC §§ 61-3-1 and -1 to clarify and rationalize, as explained in Section II-A-6.
- Eliminate the felony-murder rule from WVC § 61-2-1, as proposed in Section II-A-1.
- Amend the second degree murder statute in WVC § 61-2-3 eliminate the ten year minimum requirement and to allow for a five year minimum sentence. *See* Section II-A-2.

GENERAL SENTENCING AND CORRECTIONS LAWS

- Repeal or make less rigid the penalties for second and third felony convictions in WVC § 61-11-18. *See* Section II-B-1.
- Change the presumption for consecutive sentences in WVC § 61-11-21 to a presumption for concurrent sentences. *See* Section II-B-3.
- Create objective criteria for alternative sentencing and for setting bonds, as proposed in Sections III-3 and -4.

- Establish presumptive parole, as proposed in Section III-6 and by the Governor's Commission on Overcrowded Prisons.
- Amend the juvenile transfer statute, WVC § 49-5-10, so that judges have discretion to decide whether to transfer a juvenile to the adult criminal system. *See* Section III-7.

PROGRAMMATIC MEASURES

- Establish and fund pre- and post-release programs, as proposed in Section III-1 and Part IV and by the Governor's Commission on Overcrowded Prisons.
- Provide additional state support for community corrections programs and substance abuse treatment, as proposed in Section III-2 and Part IV.
- Provide for and support statewide use at all levels of the criminal justice system of empirically supported instruments for individually assessing the criminogenic needs and risks of offenders. *See* Part IV.
- Create a West Virginia Sentencing Commission. *See* Part IV.

(Other actions are suggested throughout the report.)

THE COSTS OF INCARCERATION

The costs to West Virginia taxpayers of lengthy prison sentences are very high. Based on the estimate of the Commission on Overcrowded Prisons that it costs approximately \$28,000 a year to house one inmate in the State's prisons, the charge to taxpayers for sentences of varying lengths are:

<u>Years Spent in Prison</u>	<u>Cost in 2009 Dollars, per Prisoner</u>
1 year	\$ 28,000
5	\$ 140,000
10	\$ 280,000
15	\$ 420,000
20	\$ 560,000
25	\$ 700,000
30	\$ 840,000
35	\$ 980,000
40	\$ 1,120,000

The Commission also reported that incarceration costs have been increasing by approximately four percent per year.

REPORT AND RECOMMENDATIONS

INTRODUCTION

Part I of this analysis provides background on criminal sentencing – an articulation of the underlying premises and goals of sentencing laws and a brief history of how they have shaped sentencing practices in the United States. Part II identifies and discusses West Virginia criminal statutes that pose undue risks for the imposition of harsh or inequitable sentences. Part III describes various sentencing related proposals that the State could pursue to reduce prison overcrowding and improve the criminal system. Finally, the report concludes with Part IV’s discussion of evidence-based practices found to be effective in reducing recidivism and the alternatives available through community corrections⁹ efforts.

The report was prepared in a relatively compact period of time. It identifies specific measures that can be taken to alleviate the problem of prison overcrowding without diminishing public safety. What it does not attempt to do, and what desperately needs to be done, is to undertake a comprehensive overhaul of the West Virginia Criminal Code. According to one set

⁹ “Community corrections” embraces a wide range of sentencing devices designed to keep offenders in their community while undertaking efforts to meet their needs and, in varying degrees, limit their freedoms. This umbrella can include probation, parole, home confinement, day report center programs, drug courts, mental health courts, and other specialty courts. Generally speaking, this report uses “community corrections” in that broad sense. At times, however, the term may be used to refer to those programs specifically authorized by the West Virginia Community Corrections Act, West Virginia Code §§ 62-11C-1, *et seq.*

of experts' application of criteria to grade criminal codes, West Virginia's Code is the second worst in the country, ranking fifty-first out of fifty-two codes.¹⁰

The State's Criminal Code is currently the product of a collection of statutes enacted at different times over the course of the State's history, including many laws that were responses to fleeting political moments. The Code needs to be rewritten; it needs to be modernized, rationalized, and clarified. Both felonies and misdemeanors should be ranked by class and assigned sentences appropriate to the relative seriousness of the crime. The Institute therefore joins with the Governor's Commission on Prison Overcrowding in calling for "a complete review and overhaul of the Criminal Code of West Virginia to bring it to contemporary societal standards."¹¹

This report is a response to a crisis. According to the Governor's Commission, the Division of Corrections in 2008 spent on average \$28,000 to house an offender, and costs have risen at about four percent annually for the past five years.¹² Incarcerating prisoners is straining the state's budget and diverting resources to prisons and away from schools, roads, healthcare, and other governmental programs. There are ways to reduce the costs of corrections. One is crime prevention, which entails a combination of visible and effective law enforcement, education, and treatment programs for those with substance abuse or mental health problems.

¹⁰ ¹Paul H. Robinson, Michael T. Cahill, & Usman Mohammed, *The Five Worst (And the Five Best) American Criminal Codes*, 95 NW. L. REV. 1, 60-61 (2000). Out of a possible 20 points, West Virginia "earned" 1.55 points. Yes, Mississippi was last (1.4 points). The five best states had scores between 17.25 and 16.3. The rankings were based on a set of factors grouped under five criteria: comprehensiveness, clarity, accessibility, accuracy in assessing liability, and proportionality in sentencing. All of West Virginia's scores were less than 1.0 out of a possible 4.0. It garnered a 0 on accessibility and a 0.05 on accurately assessing liability (code is close to "entirely unreliable in assessing liability"). *Id.* at 65-69, 89.

¹¹ GOVERNOR'S COMMISSION ON PRISON OVERCROWDING, REPORT TO THE GOVERNOR (hereafter "Report to the Governor") 29 (2009).

¹² *Id.* at 16.

Another way is to send fewer persons who do break the law to prison, and yet another is to keep persons that are sent to prison in there for a shorter period of time.¹³ The challenge, of course, is how to do that without compromising public safety or the deterrent ends of the criminal law. Parts II and III below suggest ways that existing criminal provisions can be made fairer, or more appropriate to the crime, or modified to allow for more individualized decision-making. Part IV discusses how that individualized decision-making should be done and identifies forms of sentencing that may be more effective than incarceration in preventing recidivism. Improving our criminal laws, focusing on individual needs and risks, and reducing recidivism should not diminish public safety.

I. BACKGROUND ON CRIMINAL SENTENCING

Traditionally, four basic rationales have driven criminal sentencing: (1) deterrence; (2) incapacitation; (3) rehabilitation; and (4) retribution.¹⁴

Deterrence. By imposing penalties for the commission of crimes, the law seeks to deter people generally from engaging in harmful or anti-social conduct (called “general deterrence”). Moreover, by punishing those who do commit crimes, the law seeks to deter them from repeating that behavior (“specific deterrence”). Presumably, the stigma of a criminal conviction also discourages participation in crime. Although the notion that the prospect of punishment deters criminal conduct seems intuitive, the evidence that criminal sentences promote that end in a

¹³ According to the Division of Corrections:

If by legislative action sentences are reduced, or presumptive parole is instituted, more prison beds will be available for those offenders who have been sentenced to the custody of the DOC, but remain in a regional jail. If the length of stay for 3 offenders is reduced by a mere 4 months, the DOC has gained the equivalent of 1 prison bed. That figure, when taking into account the number of offenders awaiting transfer, could have a beneficial impact on the overcrowding dilemma DOC is currently experiencing.

W. VA. DIVISION OF CORRECTIONS 2008-2009 REPORT (not yet available).

¹⁴ *E.g.*, *Jones v. United States*, 463 U.S. 354 (1983); ARTHUR CAMPBELL, LAW OF SENTENCING §§ 2.1 - 2.5 (3rd ed. 2004).

meaningful way remains inconclusive. As one expert has observed:

“[T]here are great pressures on the criminal justice system – pressures to do something, to provide some relief. The frantic activity of the eighties, which continue[d] into the nineties [at least] – the furious building of prisons, the stiff laws, the cries for more, more, more in the way of punishment – what has the upshot been? The effect on crime: imperceptible.”¹⁵

Incapacitation. Removing individuals who commit crimes from the general population also serves to prevent – to incapacitate – them from committing additional crimes, at least against the general population and at least for the period of time in which they are incarcerated. There, of course, lies the rub. At some point, most all prisoners are released and returned to the general population. Advocates of using imprisonment primarily to incapacitate criminals must therefore call for longer and longer sentences to serve their end at ever-increasing costs to taxpayers.¹⁶

Rehabilitation. Others see criminal sentencing as not only removing criminals to incapacitate their criminal activity but also as an opportunity to rehabilitate them so that, when they are released from prison, they will not return to their illegal ways. Although the thinking on rehabilitation has evolved considerably (*see* Part IV, *infra*), the general premise is that the State can use the course of imprisonment to educate, train, and counsel an inmate to enable him or her to become upon release a law-abiding and contributing member of society.

Retribution. Each of the first three sentencing rationales – deterrence, incapacitation, and rehabilitation – promote utilitarian ends and are principally aimed at crime prevention. The fourth rationale, however, plays a very different role. Retribution feeds the basic societal desire to exact just desserts from those who violate the society’s rules. “The instinct for retribution is part of the nature of man[.]”¹⁷ It is deeply rooted in Judeo-Christian law: “Eye for eye, tooth for tooth, hand

¹⁵LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 460 (1993).

¹⁶Campbell, *supra* n. 14 at 43.

¹⁷*Gregg v. Georgia*, 428 U.S. 153, 183 (1976), *quoting Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

for hand, foot for foot, [b]urning for burning, wound for wound, stripe for stripe.”¹⁸

In addition to serving the above rationales, a fair criminal justice system would also impose sentences that are proportionate to the seriousness of the crime, that are administered even-handedly and without undue disparity (like cases should receive like sentences), that are based upon transparent criteria (the system is open and relies upon clearly articulated standards), and that works to eliminate inappropriate sentencing criteria (*e.g.*, race, sex, class, religion, national origin, politics). Restorative justice advocates make the additional case that the criminal justice system and sentencing should focus more on making whole, or at least helping, the victims of crimes.¹⁹ This concept affects sentencing through orders of restitution, by giving victims an opportunity to testify at sentencing and parole hearings, and in shaping sentences involving community service.

For about a century, from the last quarter of the 1800's until the 1970's, criminal sentencing in the United States emphasized (in theory) the rehabilitation rationale,²⁰ although use of the death penalty, road camps, and sometimes harsh treatment evidenced other rationales. Indeterminate sentencing dominated. “Indeterminate sentences impose a minimum and maximum incarceration term, allowing the possibility of release on parole sometime between the expiration of those terms; the date and conditions of release before the maximum term is generally determined by a board of parole.”²¹ During this era, legislation gave judges considerable discretion in setting the minimum and maximum terms before handing over the precise determination of a release date to the parole board. The thinking was that the possibility for early

¹⁸ *Exodus*, 21:24-25.

¹⁹ *E.g.*, Howard ZEHR & BARB TOEWS, CRITICAL ISSUES IN RESTORATIVE JUSTICE (2004); Howard ZEHR, CHANGING LENSES (1995).

²⁰ Campbell, *supra* n.14, § 1.13. One could seriously question whether the states actually invested the resources into their prison systems to give rehabilitation a chance. *See, e.g., Wyatt v. Styckney*, 344 F. Supp.387 (M.D. 1972, *aff'd sub nom., Wyatt v. Aderhalt*, 503 f.2d 1305 5th cir. 1974); *Crain v. Bordenkircher*, 176 W.Va. 338, 342 S.E.2d 422 (1986).

²¹ Campbell, *supra* n. 14 at 105.

release would induce good behavior from the prisoner and that the wide latitude in sentencing would permit corrections officials and parole boards to adapt sentences to meet individual cases.

Several developments coalesced to transform criminal sentencing beginning in the 1970's and then accelerating in the 1980's and into the 1990's. First, the seventies and eighties saw dramatic increases in crime rates and a corresponding public outcry to get tough on crime. Second, researchers raised serious question about the effectiveness of rehabilitation programs in reducing recidivism and about the ability of psychologists and criminologists to predict the likelihood that an offender would re-engage in anti-social behavior.²² “Nothing works” in lowering recidivism rates became the dominant belief.²³ Third, the use of inadequately constrained indeterminate sentencing had too often produced, within the same jurisdiction, inequalities in sentencing individuals who had committed similar crimes without explanation in legitimate sentencing criteria. Fourth, public attitudes shifted, especially during the ‘80's, to a greater emphasis on individual free will and accountability.²⁴ These forces converged to make retribution and incapacitation the overriding rationales for criminal sentencing, led to greater reliance on determinate sentencing (where the length of a sentence can be measured with relative certainty at the time it is imposed), and made for more and longer prison sentences.²⁵ Three strike laws (in which three convictions can result in a life sentence) proliferated, as did the use of legislatively-imposed mandatory minimum sentences.

The consequences of these developments were predictable: the United States had a prison

²²See, e.g., JOHN MOLLAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* (1981); Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974); Robert Martinson, *What Works?: Questions and Answers About Prison Reform*, 35 THE PUBLIC INTEREST 22 (1974);

²³Richard E. Redding, *Evidence-Based Sentencing: The Science of Sentencing Policy and Practice*, 1 CHAPMAN J. OF CRIM. JUSTICE 1, 5 (2009).

²⁴Campbell, *supra* n. 14 at 34.

²⁵Campbell, *supra* n.14, §§ 1.3, 4.2., 4.3.

population explosion. Between 1970 and 2005, that population grew by 700%.²⁶ At the turn of this century, the U.S. had five percent of the world's population but twenty-five percent of its prisoners,²⁷ and today clearly leads all countries in both the largest raw number of individuals behind bars and in the percentage of its people who are housed in prisons.²⁸ In West Virginia, the number of prisoners committed to the Division of Corrections rose from 1,575 in 1990 to 6,059 on December 31, 2008,²⁹ despite a relatively stable statewide population.³⁰ Between 2000 and 2007, West Virginia had the largest average annual percentage increase in prison population in the country.³¹ Funding of prisons has displaced funds to improve (among other things) the State's schools, roads, and healthcare without any appreciable improvement in public safety.

The past decade, however, has “seen enormous advances in the identification of the risk factors that contribute to offending and the protective factors that serve to reduce that risk[.]”³²

This work has been accompanied by the development of programs that have been statistically

²⁶PUBLIC SAFETY PERFORMANCE PROJECT (PEW TRUSTS), PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION ii (2007).

²⁷“The Punishing Decade,” JUSTICE POLICY INSTITUTE (1999) (<http://www.cjcr.org/pubs/punishing/punishing.html>).

²⁸Public Safety, Public Spending, *supra* n.26 at ii.

²⁹W. VA. DIVISION OF CORRECTIONS, Annual Report FY 2007-08 and “Correctional Views 2008” (both available at:

<http://www.wvdoc.com/wvdoc/officeofResearchPlanning/tabid/70/Default.aspx>). That figure includes inmates committed to the DoC but who are backlogged in the Regional Jails. The total does not include prisoners sentenced to serve their time in the Regional Jails.

³⁰West Virginia's population increased by only 0.8% between 1990 and 2000, WEST VIRGINIA BLUE BOOK 868 (2006), and, according to a Census Bureau July 1, 2009, estimate, it has increased by just 0.6% in this decade. <http://www.census.gov/popest/states/tables/NST-EST2009-01.xls>.

³¹ US Dept. of Justice, Prisoners in 2008 17 (2009) (available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>); W. VA. CRIMINAL JUSTICE STATISTICAL ANALYSIS CENTER, WEST VIRGINIA CORRECTIONAL POPULATION FORECAST, 2007-2017 (hereafter “CJS 2008 STUDY”)1 (2008) Even though we led the country through the first seven years of this decade in the rate of prison population growth, the rates were much lower than they were in West Virginia ten years earlier. *Id.* at 2.

³²Redding, *supra* n.23 at 5 (2009) (citing numerous examples); *see, e.g.*, LAWRENCE W. SHERMAN, ET AL., PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING (1998).

proven to reduce recidivism. Current trends in criminal sentencing are shifting away from retribution and incapacitation and back to rehabilitation and specific deterrence.³³ Experts now promote individualized assessments of an offender's criminological needs and risks using sophisticated, professionally developed tools and the use of evidence-based programs for reducing recidivism. Evidence-based programs are those that have been proven to be effective in achieving a specific correctional goal, such as public safety at reduced recidivism rates.³⁴ See Part IV, *infra*. Equally important has been research showing what programs have not been effective and those that are neutral in their impact on recidivism.³⁵

West Virginia's criminal sentencing laws are a combination – a hodgepodge, really – of all of these developments. They combine indeterminate and determinate sentences, sometimes even in the same statute. They reflect no overall design, lack consistency, and present undue risks for unequal treatment and inappropriate sentencing.³⁶ As noted above, the State's sentencing laws should be scrapped in favor of a modern, cohesive criminal code that classifies and standardizes penalties according to the relative seriousness of the applicable crimes.

On the other hand, the Legislature in 2002 did enact, to its great credit, the Community Corrections Act, W. Va. Code §§ 62-11C-1, *et seq.* The Act enables counties to create community-based programs that can improve the prospects for rehabilitation of offenders and for

³³Kirk Heilbrun, *Risk Assessment in Evidence-Based Sentencing: Context and Promising Uses*, 1 CHAPMAN J. OF CRIM. JUSTICE 127, 128 (2009).

³⁴See generally Symposium, *Evidence-Based Sentencing: The New Frontier in Sentencing Policy and Practice*, 1 CHAPMAN J. OF CRIM. JUSTICE 1 (2009).

³⁵Neutral programs can be still be valuable if they are less expensive than incarceration. For example, electronic monitoring has not been proven to reduce recidivism, but it does not increase it, either, and it is cheaper than imprisonment. Washington State Institute for Public Policy, *Evidenced-based Options to Reduce Future Prison Construction, Criminal Justice Costs and Crime Rates II* (2006). The Washington Post has reported on a finding from the Pew Center on the States that “it costs an average of \$79 a day to keep an inmate in prison but about \$3.50 a day to monitor the same person on probation or parole.” “States Seek Less Costly Substitutes for Prison,” July 13, 2009, available at: <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/12/AR2009071202432.html>.

³⁶See Part II, *infra*; n.10 & accompanying text, *supra*.

reducing recidivism. The Legislature supplemented it in 2009 with passage of the Drug Offender's Accountability and Treatment Act, 15 W. Va. Code §§ 62-15-1, *et seq.* The State has also developed tools for assessing the criminological needs and risks of individual offenders. The Law Institute joins with the Governor's Commission on Overcrowded Prisons in urging the expanded use of community corrections programs and the individual assessment tools.³⁷ Most counties in the State have some level of community corrections, but they vary widely in the breadth and depth of the programs and the services offered. The three branches of state government must work together to enlarge these efforts; resources are needed to create and monitor the programs and to ensure that individuals administering them have the necessary training.³⁸

II. WEST VIRGINIA SENTENCING LAWS AND PRACTICES CONTRIBUTING TO PRISON OVERCROWDING

West Virginia imposes some of the longest sentences in the country,³⁹ sends to and keeps in prison a much higher percentage of convicted defendants rather than placing them in alternative programs,⁴⁰ and maintains various practices that result in more people incarcerated for longer periods of time. The Governor's Commission on Prison Overcrowding called for a complete

³⁷The programs and assessment tools are elaborated on in Part IV, *infra*.

³⁸The Law Institute notes that some circuits have been particularly committed to using community corrections, and they can provide models for other circuits. Most notably, Judges Martin Gaughan in the Northern Panhandle, Derek Swope in Mercer County, and Russell Clawges in Monongalia County have been leaders. Justice Brent Benjamin has also been a strong advocate in promoting community corrections throughout the State.

³⁹*See, e.g.*, "State Inmates Serve some of the Longest Sentences in the U.S.," *Charleston Daily Mail*, January 12, 2002 (citing Bureau of Justice Statistics); "State Jail Terms Longer: Study Says Violent Criminals Get Stiffer Sentences in W.Va.," *Charleston Daily Mail*, April 22, 1999, 1A (citing U.S. Department of Justice data).

⁴⁰Report to the Governor, *supra* n.11 at 6 (WV "ranks number 50 among all the states in the use of community corrections as an alternative to prison"). The State also had, at least in 2003, one of the lowest rates in the country for use of probation and parole. W. VA. DIVISION OF CRIMINAL JUSTICE SERVICES, *THE WEST VIRGINIA SENTENCING STUDY: A STUDY OF THE STATE'S CRIMINAL SENTENCING PRACTICES* 10 (2004).

review of the State's criminal sentencing laws and practices to determine whether they are contributors to prison population explosion and to identify possible reforms. This Part of the report, undertaken at the request of the Legislature, responds to that call. Parts A and B identify those statutes that should receive immediate attention because of their impact on the prison population, looking at laws that impose excessive or inequitable sentences and at general sentencing provisions in the Code. Section C describes additional measures that could also be taken to improve the fairness of the criminal code and more reasonably apportion prison time. The final section lists criminal laws that are antiquated or unconstitutional or both. Their repeal would improve the quality of the criminal code.

A. PRIORITIES: Excessive or Inequitable Sentence Provisions

This section identifies provisions in the West Virginia Code that survey respondents and/or the Institute have identified as most acutely contributing to prison overcrowding or leading to inequities. The statutory provisions are discussed in the order in which they appear in the Code.

1. *Felony Murder Rule*

Under the felony murder rule, any death – even an accidental one – that occurs during the commission of a specified felony constitutes first degree murder for all perpetrators involved, punishable by life in prison. The specified felonies in West Virginia include "arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape, or manufacturing or delivering a controlled substance." W.Va. Code § 61-2-1.

The felony murder rule has been harshly criticized for several reasons. It treats accidental deaths in the commission of certain felonies not only as murder, but as first degree murder. The rule applies in the absence of premeditation or malice and even in the absence of intent. *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983). And it applies to every one involved in the

specified felony, not just to the person who actually caused the death.

The felony murder rule has been taken to unusual extremes in West Virginia, resulting in excessive use of resources to litigate the charges and excessive costs in incarcerating those charged. For example, in *State v. Holsinger*, No. 07-F-323, Circuit Court of Kanawha County (2007), a young woman was pressured by her abusive boyfriend into serving as a decoy while the boyfriend tried to rob a drug dealer. The drug dealer was armed and, to the woman's horror, the drug dealer shot her boyfriend. The woman desperately tried to save his life and rushed him to the hospital where he later died. As a result of these actions, the woman was charged with felony murder and faced life in prison for the death of her boyfriend – a death that she neither intended nor caused and a death that was not the death of a victim, but the death of the perpetrator of a robbery.

Because of the illogical and excessive consequences that the felony murder rule can create in treating as first degree murder acts that are clearly not first degree murder, all western nations except the United States have abolished the felony murder rule. Even within the United States, the states of Michigan, Kentucky and Hawaii have abolished the rule.⁴¹ Some states have adopted the approach of the Model Penal Code, which did not entirely eliminate the rule but limited its potential for unjust or harsh results by confining its scope. The Code includes in the definition of “murder” any homicide that “is committed recklessly under circumstances manifesting extreme indifference to the value of human life.” MODEL PENAL CODE § 210.2(1)(b). That is the Code’s statement of the felony murder rule.⁴² Another alternative would be to make an unintended

⁴¹See, e.g., C. Grodin, "Wrong Place, Wrong Time," *Newsweek*, Aug. 31, 2009.

⁴²The section goes on to state that such recklessness and indifference are presumed, but not conclusively, “if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.” If the presumption is conclusive, it could well be unconstitutional under recent U.S. Supreme Court rulings because it would shift the burden of proof onto the defendant on the elements of

felony murder something less than first degree murder.

As shown in the chart, “Cost of Incarceration,” *supra*, the difference to the State between a ten year sentence and life (at forty years) is \$840,000.

2. ***Second Degree Murder***

West Virginia Code § 61-2-3 provides for definite term of imprisonment of not less than ten nor more than forty years for those convicted of second degree murder. The section also states that persons so convicted cannot be eligible for parole unless they have served at least ten years or one-fourth of their sentence, whichever is greater. Consequently, persons sentenced under § 61-2-3 for twenty years or less will, with good time,⁴³ discharge without ever becoming eligible for parole.

The Legislature increased the penalty for this crime in 1994 from five to eighteen years to the current ten to forty.⁴⁴ Returning the penalty to its prior level is an option. *Compare* Va. Code Ann. § 18.2-32 (providing for five to forty years for second degree murder).

3. ***Robbery***

The Law Institute repeatedly heard from judges, lawyers, and others in the West Virginia criminal justice system that the State needs to modify its first degree robbery statute.

The statutory sentence in West Virginia for first degree (aggravated) robbery and for attempted first degree robbery is a determinate sentence with a ten-year minimum and no maximum. W.Va. Code § 61-2-12 (a). The absence of a maximum enables sentencing judges to impose terms of years that are excessively long, in some instances in excess of one hundred

recklessness and indifference. Making the presumption completely permissive could avoid that issue.

⁴³“Good time” is a deduction from a prisoner’s sentence for good behavior. Each prisoner not serving a life sentence accumulates one day good time for each day served, to be subtracted from the fixed term of a determinate sentence and from the maximum term of an indeterminate sentence. W. Va. Code § 28-5-27(b),(c), & (d). Prisoners that behave can therefore reduce their sentences by half. Misconduct can lead to revocation of earned good time.

⁴⁴ H.B. 4654; Report to the Governor, *supra* n. 11, App. 1.

years.⁴⁵ Indeed, during the years 2000-2007 (at least), the average sentence for robbery in West Virginia was higher than those for murder or sex crimes.⁴⁶

In contrast to West Virginia, neighboring states have much shorter penalties for aggravated robbery. In 2002, pursuant to the Supreme Court of Appeals ruling in *State ex rel. Sams v. Kirby*, 208 W.Va. 726, 542 S.E.2d 889 (2000), the Division of Corrections and the Regional Jail Authority entered into a Long-Term Plan for Reducing the Number of State Prisoners Held in County and Regional Jails.⁴⁷ The Long-Term Plan cites the examples of aggravated robbery statutes in neighboring states such as Kentucky (ten to twenty years, Ky. Code §§ 5.5020; 532.060); Maryland (not more than twenty years, Md. Code Art. 27, § 4880); Ohio (ten- year maximum, Oh. Code § 2929.140); and Pennsylvania (not more than twenty years, Pa. Code §§ 3701; 1103).⁴⁸

The Long-Term Plan recommended a reduction of the sentence for first degree robbery from the current sentence of a determinate ten-year minimum with no maximum to a determinate sentence of no less than five years and no greater than twenty.⁴⁹ To reduce the excessive West Virginia penalties for first degree robbery, and to help alleviate the resulting jail and prison overcrowding, the robbery statute should be amended as recommended in the Long-Term Plan. Otherwise, West Virginians could spend hundreds of thousands of dollars to house the offender into his sixties and beyond. See “Costs of Incarceration,” *supra*.

In addition, the statutory definition of first degree (aggravated) robbery and for attempted first degree robbery includes any robbery by “[c]ommitting violence to the person.” This

⁴⁵ See, e.g., *State ex rel. Hatcher v. McBride*, 221 W.Va. 760, 656 S.E.2d 789 (2007) (212 year sentence); *State v. Adams*, 211 W.Va. 231, 565 S.E.2d 353 (2002) (90 years); *State v. Ross*, 184 W.Va. 579, 402 S.E.2d 248 (1990) (100 year sentence for attempted aggravated robbery).

⁴⁶ CJS 2008 Study, *supra* n. 31, at 5.

⁴⁷ A copy of the Report is on file with the West Virginia Law Institute, the West Virginia Division of Corrections, and the West Virginia Supreme Court of Appeals.

⁴⁸ Long Term Plan at 31.

⁴⁹ Long-Term Plan, Executive Summary, 7-8; text 30-33.

definition has the unfortunate and excessive effect of treating a teenager who commits a purse snatching the same as an armed gunman who robs a bank. Both would be guilty of first degree (aggravated) robbery. As a consequence, purse snatchers in West Virginia sometimes can receive substantially sentences as harsh as those dealt bank robbers.⁵⁰

Finally, second degree robbery carries an indeterminate term of five to eighteen years. It is not uncommon for those sentenced to second degree robbery to spend more time in prison than those sentenced to the minimum of ten years for armed robbery. A person sentenced to a ten year determinate sentence for first degree is parole eligible in two and a half years and can discharge with good time⁵¹ after five years, but the indeterminate term of five to eighteen years has the offender serving five years before he or she can become parole eligible and requiring at least nine years until discharge using good time.⁵² W. Va. Code § 62-12-13(b)(1)(A).

As of the compilation of the Division of Corrections 2007-08 Report, there were 547 robbery offenders among those in the Division's custody, which accounted for nine percent of its population.⁵³

4. ***Kidnapping***

The West Virginia kidnapping statute can result in excessive charges and excessively long penalties because it fails to distinguish between the extremely serious offense of kidnapping a child for ransom and a brief detention of an adult during a domestic dispute. The breadth of the statute's language exposes a person to life in prison or a term of twenty to fifty years if that

⁵⁰See, e.g., for example, "Purse Snatcher Gets 40 Years," *Charleston Daily Mail*, Sept. 6, 2007, 1A.

⁵¹See n. 43, *supra*, for an explanation of good time.

⁵²The two and a half years to parole for first degree robbery assumes the offender did not use a firearm in the robbery. If he did, then he would not be eligible for parole until he has served at least five years or one-third of a definite sentence, whichever is greater. W. Va. Code § 62-12-13(b)(1)(A). Obviously, that is still less time than the second degree offender would have to serve to become parole eligible.

⁵³Division 2007-8 Report, *supra* n. 29 at 58.

person in a personal dispute grabs another holds him for a few moments until he agrees to any concession.

Vague and overbroad definitions can contribute to the overcrowding problem. The kidnapping statute, W.Va. Code § 61-2-14a(a), states:

Any person who, by force, threat, duress, fraud or enticement take, confine, conceal, or decoy, inveigle or entice away, or transport into or out of this state or within this state, or otherwise kidnap any other person, or hold hostage any other person for the purpose or with the intent of taking, receiving, demanding or extorting from such person, or from any other person or persons, any ransom, money or other thing, or any concession or advantage of any sort, . . . shall be guilty of a felony[.]

The penalty is life, with or without mercy, or if the victim is "is permitted to return, alive, without bodily harm . . . but after . . . any concession or advantage of any sort has been . . . yielded, the punishment shall be confinement. . . for a definite term of years not less than twenty nor more than fifty." Our Supreme Court once remarked that "kidnapping was defined so broadly" in § 61-2-14a that it could apply to "virtually any movement or detention of a person" when done to extract any concession or advantage.⁵⁴

Because the penalty in such instances can be disproportionate when applied to minor disputes, the kidnapping statute should be modified to eliminate the possibility for application to minor and fleeting altercations. (Such instances could still be punishable under other laws.⁵⁵) The Model Penal Code narrowed its proposed kidnapping statute by requiring proof (1) that the removal of the victim was from his or her home, or that the victim was transported a substantial distance from the point of removal, or that the victim was confined for a substantial period of

⁵⁴*State v. Weaver*, 181 W.Va. 274, 278, 382 S.E.2d 327, 331 (1989); *accord*, *State v. Fortner*, 182 W.Va. 345, 361, 387 S.E.2d 812, 828 (1989) ("statutory definition of kidnapping is broad enough to encompass 'almost any forced movement or detention within the State'"), *quoting State v. Miller*, 175 W.Va. 616, 620, 336 S.E.2d 910, 914 (1985).

⁵⁵Presumably, overbroad application of the kidnapping statute would normally be averted through the exercise of prosecutorial and judicial discretion. Nevertheless, clarity and precision in the criminal law are positive values, *see, e.g.*, Robinson, Cahill & Mohammed, *supra* n. 10, and would help to prevent lapses in the use of discretion as well as unfair leverage in plea bargaining.

time, and (2) that the perpetrator's purpose was seriously criminal (as described in the Code).⁵⁶

The costs to taxpayers can be significant; a five year term costs \$140,000 while a life sentence (with mercy, fifteen years to parole eligibility) would cost at least \$420,000 in 2009 dollars. *See* "Costs of Incarceration," *supra*.

In addition, West Virginia Code § 61-2-14c criminalizes threats to kidnap any person to extract a ransom "or any concession or advantage of any sort" and imposes a sentence of not less than five years. There is no maximum. The provision can thus create severe penalties, and the same inequities can occur under it that occur under the armed robbery statute, described above. Moreover, unlike the general kidnapping statute, § 61-2-14a(c), there is no lesser penalty in § 61-2-14c for threats of the abduction of a minor by a family member not motivated by monetary purposes.

Other problems with the kidnapping sections are discussed below, under II-C-7-b.

5. *Forgery and Uttering*

In 1994, the Legislature appropriately amended the larceny statute to distinguish between a theft of less than \$1,000 (a misdemeanor, punishable by up to a term in jail not to exceed one year) and a theft of \$1,000 or more (a felony, punishable by a term in the penitentiary of not less than one nor more than ten years or in jail up to one year). W.Va. Code § 61-3-13. The Legislature made similar amendments to the statute for fraudulent use of a credit card, W.Va. Code § 61-3-24a(b)(3), and obtaining property in exchange for a worthless check, W.Va. Code § 61-3-39.

By contrast, the forgery and uttering statute provides that the forgery of a check – regardless of the amount – is a felony, punishable by a term in the penitentiary of not less than one nor more than ten years. W.Va. Code § 61-4-5(a). The consequence of the failure to

⁵⁶AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 212.1 (1962). The Code also proposes creating lesser offenses for felonious restraint, false imprisonment, and interference with custody. §§ 212.2 - 212.4.

distinguish between small and large amounts is that a person who buys something as minor as a pack of cigarettes with a lost or stolen check can be (and often is) charged with two felonies and faces two terms of one to ten years in prison, the same as a person who commits a forgery and uttering as part of a multi-million dollar scheme. By contrast, if the person who wanted the pack of cigarettes had simply stolen the cigarettes, instead of using the forged check, the person would have been charged with first offense shoplifting – not even a jailable offense. W.Va. Code § 61-3A-3(a)(1).

For this reason, the forgery and uttering statute should be modified to provide the same distinction in dollar amounts that other statutes provide for similar property crimes.

See also Section II-C-7-d, *infra*, which explains that § 61-4-5 has been construed to make forging and uttering separate felonies. Thus, passing a forged check of any amount exposes the person to two felonies of one to ten years. The double penalty should be eliminated.

6. *Arson*

Under West Virginia Code § 61-3-1(a), any person who sets fire to, or causes to burn, “any dwelling, whether occupied or vacant, or any outbuilding” commits first degree arson and must serve at least two years (without opportunity for parole) and can be sentenced to as many as twenty years. “Outbuilding” is defined as including “any building or structure which adjoins, is part of, belongs to, or is used in connection with a dwelling” and includes, but is not limited to, “any garage, shop, shed, barn, or stable.” West Virginia is one of only a handful of states that defines first degree arson “regardless of whether the building burned was occupied, unoccupied, or even vacant.”⁵⁷ Section 61-3-2 makes the willful and malicious burning of any other structure second degree arson, subject to a penalty of one to ten years, with no parole eligibility for at least the first year. Third degree arson is the destruction by fire of any personal property over the value

⁵⁷Robinson, Cahill, & Mohammed, *supra* n.10 at 57 & n. 225.

of \$500 and draws a sentence of one to three years, without opportunity for parole during the first year. Section 61-3-6 provides for a punishment of one to five years for unlawfully setting fire on lands, again with no parole for at least a year.

Certainly the burning of dwellings deserves harsher treatment than arson of other types of buildings. Section § 61-3-1 nevertheless fails to make adequate account for what are accepted sentencing criteria for arson, namely “whether the arsonist has jeopardized anyone’s safety in addition to damaging property;⁵⁸ the type of property damaged; the value of the property damaged; and the extent of the damage to the property.”⁵⁹ As a consequence, serious anomalies can occur. A prankster burning down an outhouse or a tool shed⁶⁰ must serve at least two years and is exposed to a sentence of up to twenty years, while the intentional ignition of a forest fire causing massive losses will subject the arsonist (assuming no structures are burned) to a sentence of one to five years.

7. *Burglary*

The burglary statute creates some of the same difficulties as the arson provisions. Both the most serious burglary (nighttime entry or daytime breaking and entering with intent to commit a crime) and the lesser offense (daytime entering without breaking with intent to commit a crime) apply to entries of both dwellings and any “outhouse adjoining thereto or occupied therewith.” The respective penalties range between one and fifteen years and one and ten years. Neither

⁵⁸W. Va. Code § 61-3-7 does provide separate penalties of two to ten years for any person whose arson causes another to suffer bodily injury and of three to fifteen for causing serious injury.

⁵⁹Robinson, Cahill, & Mohammed, *supra* n.10 at 56.

⁶⁰These examples are not fanciful. According to information provided to the Institute, a juvenile engaged in a Halloween prank lit a paper bag filled with dog feces and left the bag on a neighbor's porch. By the time the neighbor came to the door and put out the fire, it had singed a small spot in the paint on the porch floor. The youth was charged with first degree arson because the small singe on the paint completed the crime of willfully and maliciously setting fire to, or causing to be burned, a dwelling.

section takes into account nor directs a court to consider the relative seriousness of the intended crime or the extent of the damage or injury that occurred. Again, anomalies can occur. A nighttime entry into a detached garage with the intent to remove equipment carries the same penalty as a breaking and entering with the intent to commit rape.

8. *Shoplifting*

Under West Virginia Code § 61-3A-3, first and second offense shoplifting penalties draw a distinction between thefts of less than \$500 and those over \$500. For first offense, shoplifting under \$500 is a fine-only offense while over \$500 can result in up to sixty days jail or a fine. On a second offense, the under \$500 crime can result in up to six months in jail, and the over \$500 offense gets six months to a year. Third offense shoplifting, however, is a felony and carries a penalty of one to ten years in the penitentiary, *regardless* of the amount hoisted in the third offense or in either of the first two offenses. Furthermore, at least one year of the sentence must be spent in confinement without probation, although the court may order home detention for some or all of that time.

B. PRIORITIES: General Provisions Affecting Prison Overcrowding

1. *Punishment for Second and Third Felony Convictions*

Section 61-11-18 of the West Virginia Code imposes rigid sentencing requirements for second and third time felony offenders.⁶¹ Such “one size fits all” strategies have been found to be ineffective in deterring crime while at the same time being big contributors to the prison population.⁶² Subsection (a) of § 18 requires judges to add five years to the sentence that would otherwise be imposed on a defendant if the conviction is his second felony. A judge should, of course, take into account a defendant’s prior record in fixing a sentence. Subsection (b) requires

⁶¹The procedures to be followed in imposing second and third offense sentences are set forth in §§ 61-11-19 and 62-8-4.

⁶²*E.g.*, Bonnie M. Dumanis, *One Size Does Not Fit All*, 1 CHAPMAN J. OF CRIM. JUSTICE 21 (2009).

that a person twice convicted of first or second degree murder to be sentenced to life without mercy. In the ordinary course of events, a judge or jury would be likely to reach the conclusion that two murders warrant throwing away the key to the prison doors for a two-time murderer. The State's "three strikes and you're out" law is contained in Subsection (c) and provides that a third felony conviction requires a life sentence.

But individual cases call for individual assessments, not the application of blanket rules. Section 61-11-18 makes no account for the age of the offender when the felonies were committed, their seriousness, the time lapsed between the offenses, the danger that the individual presents to society, the circumstances of the crimes, mitigating factors, or the individual's potential for rehabilitation and for contributing to society. The three strikes rule has been found to be particularly onerous. The statute has been tempered somewhat (but not a lot) by the State Supreme Court's application of Article III, § 5 of the West Virginia Constitution, which requires that "[p]enalties shall be proportioned to the character and degree of the offence."⁶³ Nevertheless, the provision can have significant impact on the prison population. For example, California experienced a nearly 100% increase in its prison population in the first thirteen years after it adopted its three strikes law in 1994.⁶⁴ Certainly, other factors likely contributed to that increase, but both common sense and the data indicate a correlation between the three-strike law and an increased prison population. As of 2008, there were forty-eight individuals serving life sentences under § 61-11-18.⁶⁵

⁶³*State v. Deal*, 178 W.Va. 142, 358 S.E.2d 226 (1987); *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981); *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

⁶⁴THE SENTENCING PROJECT, *THE STATE OF SENTENCING 2007: DEVELOPMENTS IN POLICY AND PRACTICE* 8 (2008).

⁶⁵ 2007-08 Report, *supra* n. 29 at 59.

2. *Consecutive Sentences*

West Virginia Code § 61-11-21⁶⁶ requires that multiple sentences shall run consecutively, not concurrently, unless the sentencing judge directs otherwise. Whether multiple sentences run consecutively or concurrently can make a huge difference in the length of an offender's prison residency. Changing § 61-11-21 to make concurrent sentences the default rule – that to be applied in the absence of judicial directive – could therefore ease the strain on the State's correctional system. That is, changing the default rule to concurrent sentences relieves judges of some of the political pressures to maximize prison sentences and would enable them to provide for concurrent sentencing without having to say so expressly.

C. Additional Provisions for Reform

1. *Possession of Controlled Substance*

Under West Virginia Code § 60A-4-401, simple possession of a controlled substance (other than a small amount of marijuana) – that is, possession without the intent to distribute – currently carries with it a penalty of ninety days to six months in jail. Such persons, assuming no other crime is involved in their arrest, are not likely to present threats to public safety. Section 60A-4-407 offers an alternative sentence of a conditional discharge and a probationary period for first time offenders convicted of simple possession. That alternative could be made the principal disposition for § 401 violations with jail time assigned only where the court finds some aggravating circumstances. (As discussed in Part IV, *infra*, efforts should be made to ensure that drug court is an alternative for all such defendants in all counties.)

2. *Forgery of Public Records and Seals*

Sections 61-4-1 and -2 each authorize two to ten year sentences for, respectively, forgery

⁶⁶ The section states: “When any person is convicted of two or more offenses, . . . the confinement to which he may be sentenced upon the second, or any subsequent conviction, shall commence at the termination of the previous term or terms of confinement, unless, in the discretion of the trial court, the second or any subsequent conviction is ordered by the court to run concurrently with the first term of imprisonment imposed.”

of a public record (and related acts) and of a public seal. Up to ten years for this crime seems excessive. Ohio, for example, makes such crimes a third degree felony, which carries with it a sentence in the range of one to five years. Ohio Rev. Code § 2913.21(B)(4).

3. *Workers' Compensation Fraud*

West Virginia Code §§ 61-3-24f and -24g authorize the imposition of sentences of from one to ten years for fraudulent efforts to obtain workers' compensation benefits. Although such fraud warrants a meaningful sanction, a sentence of more than five years would seem excessive in comparison to other crimes in the Code. In West Virginia, for example, a misstatement on a workers' compensation application could expose the worker to twice as many years in prison as a person convicted of the felony of sexual abuse in the first degree. W. Va. Code § 61-8B-7 (one to five years).

4. *Credit Card Fraud*

The Institute received several comments that the West Virginia Code § 61-3-24a's provision for one to ten years for credit card fraud (involving more than \$1,000) is excessive. Compare Ohio Rev. Code § 2913.21 (less than \$500 damage within 90 days is a misdemeanor, \$500 to \$5,000 in that time frame is punishable by 6 to 12 months, \$5,000 to \$100,000 in 90 days has a 6 to 18 months range, and over \$100,000 within 90 days can be punished by up to 5 years in prison); Va. Code Ann. § 18.2-187.1 (less than \$200 in 6 months is a misdemeanor while more than \$200 in that time has a sentence of 1 to 5 years).

5. *Display of Obscene Materials to a Minor*

West Virginia Code § 61-8A-2 provides for a sentence of up to five years for the distribution of or display to a minor of obscene material. The sentence seems disproportionate to the crime. That is especially so in light of the facts that (1) the definition of "minor" in § 61-8A-

1(i) includes persons up to the age of eighteen;⁶⁷ (2) the definition of “obscene matter” in § 61-8A-1(j) could well be unconstitutional for failing to meet the specificity and narrow tailoring requirements imposed by federal precedents⁶⁸; (3) the section does not include an exception for parents showing or giving “obscene” materials to their children, who could be as old as seventeen; (4) the section does not include an exception for when the exhibitor is close in age to the minor (*e.g.*, an eighteen year old would violate the section by sharing obscene matter with a seventeen year old friend); and (5) § 61-8A-4 creates a separate felony for using obscene matter to seduce a minor. The latter provision lessens the need for a heavy penalty to be attached to § 61-8A-2. The section should be rewritten to address the above concerns.

The Division of Corrections Report for 2007-08 indicated that five persons were then in the Division’s custody for violating this section.

6. *Sex Offender Supervised Release*

Several persons pointed out to the Institute how harshly the supervised release for sex offenders provided for in West Virginia Code § 62-12-26 can operate. For example, a nineteen year male old could have consensual sex with a fifteen year old girl and thus violate § 61-8B-5(a)(2), sexual assault in the third degree (commonly known as statutory rape). Upon conviction and after serving a sentence of one to five years, the man would then be placed on supervised release for not less than ten years and as many as fifty years. The terms of the release can include

⁶⁷See *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (citing as a reason for striking down ban on electronic transmission, or access, to sexually explicit materials for minors the fact that the definition of minors included individuals up to the age of 18).

⁶⁸The State may define the class of proscribable materials more broadly when dealing with access by minors to sexually explicit materials than it can for adults, *Ginsberg v. New York*, 390 U.S. 629 (1968), but it remains questionable whether the definition in § 61-8A-1(j) meets even the more relaxed standard allowed for protecting youths. See *Reno*, *supra* n.62; *A.C.L.U. v. Mukasey*, 534 F.3d 181 (3rd Cir. 2008), *affirming A.C.L.U. v. Gonzalez*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *cert denied*, ___ U.S. ___, 129 S.Ct. 1032, 173 L.Ed.2d 293 (2009) (Congressional rewrite of statute invalidated in *Reno* also failed to satisfy the First Amendment); *see also Miller v. California*, 413 U.S. 15 (1973).

any or all of the conditions that may be imposed for probation, W. Va. Code § 62-12-9, and thus would include technical, noncriminal conditions.⁶⁹ A violation of any of the terms of the release could result in re-incarceration for any part or all of the remaining release period – which could be up to fifty years or life.

7. *Multiple Charges for a Single Act*

Some provisions in the criminal code have the effect of making two or more crimes out of one course of conduct. Eliminating all such enactments is not feasible and probably not desirable (e.g., “assault and battery” is really one act involving two crimes). There are some sections, however, that the Legislature has added over the years that have turned a serious crime into two or more serious crimes carrying a felony sentence, thus resulting in excessively long commitments.

There are limitations imposed on the government’s ability to stack crimes by the Double Jeopardy Clauses in the Fifth Amendment to the United States Constitution and Article III, § 5 of the West Virginia Constitution. Nevertheless, the prosecution may obtain convictions under multiple criminal provisions if the Legislature has made clear its intent that the provisions are to be cumulatively.⁷⁰ In the absence of a clear expression of legislative intent, the courts apply the following test:

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.⁷¹

Some of the provisions that create the potential for double punishment are described

⁶⁹Section 62-12-26(b) imposes additional conditions on sex offenders that a person on ordinary probation would not face, including prohibitions on living or working within 1,000 feet of a school or child care facility and living in any household that includes a child under the age of sixteen who is not the person’s child, grandchild, or stepchild (but only if the offender was the stepparent prior to the sex crime conviction).

⁷⁰E.g., *State v. George W.H.*, 190 W.Va. 558, 567, 439 S.E.2d 423, 432 (1993).

⁷¹*Id.*, quoting *State v. Zaccagnini*, Syl. Pt. 8, 172 W.Va. 491, 308 S.E.2d 131 (1983).

below, listed in order of their appearance in the Code.

a. Unlawful Shooting at Another

West Virginia Code § 61-2-11 provides for a six month to three year penalty for anyone who unlawfully shoots at another in a populated area. While apparently not often invoked (only one reported case even mentions it), the section prohibits conduct that undoubtedly would also violate the assault provisions in § 61-2-9(a) or (b) (6 months to 5 year penalties), the brandishing a deadly weapon ban in § 61-7-11 (90 days to 1 year), and the wanton endangerment with a firearm law in § 61-7-12 (up to five years). *See State v. Sears*, 196 W.Va. 71, 468 S.E.2d 324 (1996) (defendant charged with six different crimes for shooting a firearm in downtown Wheeling).

b. Kidnapping

Given the very stringent penalties provided for kidnapping in § 61-2-14a, including life with or without mercy or, if the kidnapped person is returned unharmed, between ten and fifty years (depending upon whether a ransom or other consideration was paid), it is not clear what the additional crime in § 61-2-14 accomplishes. Section 14 makes it a felony for anyone to abduct another with an unlawful or immoral purpose and provides for sentences of three to ten and one to ten years, depending upon the particular motive. The abductions prohibited by § 14 would be subject to prosecution under § 61-2-14a, as well. The West Virginia Supreme Court has held that the two sections are separate offenses and that simultaneous prosecutions under the two sections for the same course of conduct does not violate double jeopardy. *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989). Consequently, § 61-2-14 can give prosecutors added leverage and sentencing judges the opportunity to increase a prison stay for one course of conduct by imposing the additional charge and sentence.

c. Unlawful Use of Explosives

Obviously, illegal use of explosive devices and materials poses a serious threat to public safety. Accordingly, West Virginia Code §§ 61-3E-1, *et seq.*, provides for special punishment of persons who use, or intend to use, explosives to accomplish criminal ends. Section 61-3E-2, however, states that the offenses and penalties specified in the article shall be cumulative and in addition to any other penalties in the Code. It is therefore the case that the use of an explosive in a single criminal act could produce five (or more) felonies. A person who uses an explosive device to injure a person could be guilty of illegal possession of a destructive device (§ 61-3E-3), using explosives to damage property (§ 61-3E-4) and to injure a person (§ 61-3E-5), receipt of stolen explosives (§ 61-3E-9), and wanton endangerment involving explosives (§ 61-3E-10). The thoroughly reprehensible crime of seriously injuring another by use of explosive materials penalized by § 61-3E-5(b) with a sentence of three to fifteen years could become five felonies carrying sentences ranging between nine and fifty-five years, and those would be in addition to (at least) a charge of malicious assault under § 61-2-9.

On the other hand, the 2007-08 Report from the Division of Corrections did not include any number for inmates in custody on an explosives charge, indicating there was none.

d. Forging and Uttering

Case law applying West Virginia Code § 61-4-5 states that the forging of an instrument and the uttering or use of it are distinct felonies, each punishable by one to ten years in the penitentiary. *State v. Phalen*, 192 W.Va. 267, 452 S.E.2d 70 (1994); *State v. Perry*, 101 W.Va. 123, 132 S.E.2d 368 (1926). Thus, when an individual passes a single forged check – regardless of the amount – his or her exposure is two to twenty years in prison.

e. Sex Crimes

Under West Virginia law, a parent, guardian, or babysitter who commits a single sex act

against a child is frequently charged with and punished for multiple offenses, even though the person has committed only one act. For example, if a person commits sexual act with a child within the home, the person could be charged with first degree sexual assault, punishable by 15 to 35 years, W.Va. Code § 61-8B-3. In addition, the person could be charged with sexual abuse by a parent, guardian, or person in position of trust, punishable by ten to twenty years. W. Va. Code § 61-8D-5. Finally, the person may also be charged with incest, punishable by five to fifteen years in prison. W. Va. Code § 61-8-12(c).

These penalties are often imposed consecutively. Because § 61-8D-5 states that the offenses regarding custodial abuse are to be applied in addition to any other offenses in the Code, the Supreme Court of Appeals has held that the constitutional protections against double jeopardy do not bar these multiple charges and multiple punishments for a single sex act.⁷² Consequently, offenders who have committed a single act can receive consecutive sentences of 15 to 35, 10 to 20, and 5 to 15 years -- a total of 30 to 70 years for one act, with parole 30 years away.⁷³

There are sound reasons of public policy for treating these sexual offenses harshly. Too often in the past, they have been ignored. Our society has rightfully corrected that and has confronted the problem. On the other hand, by providing multiple penalties for a single act, the Code can be used to impose penalties that can greatly exceed the penalty for first degree murder (with mercy, parole eligibility after 15 years) and second degree murder (parole eligibility after ten years). The Code has created a penalty scheme that can be disproportionately harsh and that can result in excessive imprisonment.

8. *Sex Offender Registry*

Provisions in the Sex Offender Registration Act create snares for the unwary. Section 15-

⁷²*State v. George W.H.*, 190 W.Va. 558, 566-68, 439 S.E.2d 423, 431-32 (1993).

⁷³ W. Va. Code § 62-12-13(b)(1)(A) provides that an inmate with an indeterminate sentence is parole eligible when he or she has served the minimum term of the sentence. Most prisoners with determinate sentences are eligible when they have served one-fourth of their sentence.

12-2(d) of the Act requires a convicted offender to register with the State Police in *each* county in which the person maintains a residence, owns or leases property that he visits regularly, works, or attends school or training. The registrant must also inform the State Police in each relevant county of any changes in his status. W. Va. Code § 15-12-3. Thus, in a recent case, a registrant changed jobs and began work in a different county from his place of residence. He dutifully registered with the police in the county of his new employment, but he failed to notify the police in the county of his old employment of the change in jobs. He was indicted and convicted of the felony of failure to register. In another recent case, a Putnam County resident worked for a contractor located in Charleston and had, accordingly, registered in both counties. He normally worked in Kanawha County, but on one occasion he was assigned to work for one day in Putnam County. He was indicted and convicted of the felony offense of failing to notify the police in both counties of his registration change.

In addition, the Act requires the offender to provide information regarding any motor vehicle that he or she owns or regularly uses. Recently, a registrant's wife bought a new car and used it exclusively. When she registered the car with Division of Motor Vehicles, however, she included her husband's name on the title. Even though he never used the car, he was an owner of it for purposes of the Act and his failure to register it with the State Police resulted in a violation.

First offenses of failure to register or to keep current one's registration is a misdemeanor for those offenders required to register for ten years. Second offenses by such persons, and any offenses by those required to register for life, are felonies. Because most individuals on the sex offender registry have a prior felony conviction, felony violations of the registry law expose the offender to the penalty enhancements in West Virginia Code § 61-11-18 for second and third

felony offenses.⁷⁴ Failure to maintain registration information would also constitute a violation of the terms of a sex offender's supervised release, which could, in turn, cause the offender's re-imprisonment for as much as the remainder of the supervised release period (up to fifty years or life). W. Va. Code § 62-12-26.

The upshot of the above is that there is an alarming potential for serious prison time being attached to unimportant and technical violations of the Registration Act.

D. Outdated, Unnecessary, or Unconstitutional Provisions

In reviewing the State's Criminal Code, the Institute identified a number of statutes that are antiquated or unconstitutional or both. They do not contribute to overcrowded prisons because they are rarely, if ever, enforced. Their repeal, however, would improve the quality of the Criminal Code.⁷⁵ They are listed in the order of their appearance in the Code.

- West Virginia Code § 61-1-4 (attempt to justify rebellion)
- § 61-1-5 (teaching doctrines hostile to the United States of government)
- § 61-1-6 (display of red or black flag)
- § 61-1-7 (penalty of one to five years for violations of 61-1-5 and -6)
- § 61-1-8 (flag desecration)
- § 61-2-17 (locked doors on moving vehicles)
- §§ 61-2-18 through -25 (dueling)
- §§ 61-8-3 & -4 (outdated crimes against morality)
- § 61-10-16 (productions insulting to any class of citizens)
- § 61-10-18 (conducting a bucket shop)
- §§ 61-10-25 through -28 (Sunday Blue Laws)

⁷⁴According to § 61-11-18, a second felony conviction requires the addition of five years to any determinate sentence or double the minimum number of years in an indeterminate sentence. A third felony conviction carries a life sentence. See the discussion in Section II-B-1, *supra*.

⁷⁵ See Robinson, Cahill & Mohammed, *supra* n. 10 at 44-49, 79 (inclusion of unenforced provisions diminish the quality of a criminal code). The authors specifically point out how fortunate Julius Erving was that there were no National Basketball Association franchises in West Virginia when he played. If there had been, his use of his sobriquet, "Dr. J," would have repeatedly violated W. Va. Code § 61-10-21, which prohibits the use of "Doctor" or "Dr." without an indication of a valid degree that entitles the person to use the title.

III. ADDITIONAL STRATEGIES FOR REDUCING PRISON OVERCROWDING

1. *Expand Support for Pre- and Post-Release Programs*

One of the most critical investments that the State can make is in providing residencies such as work-release houses, half-way houses, geriatric houses, and similar supervised, low-security facilities. The Division of Corrections has estimated that such housing could cut costs by fifty to seventy-five percent per prisoner.⁷⁶ Moreover, many of the residents would be eligible to find employment and could then contribute to the costs of their keep. The houses would also enable the Division to free up bed space for prisoners being warehoused in the regional jails and can be built more quickly and more cheaply than secure prisons.

The houses could serve several purposes. First, they can provide way stations for prisoners just released or about to be released whom the Division of Corrections or the Parole Board has identified as in need of help in making a transition back into society.⁷⁷ Second, such homes can be a temporary stop for those prisoners who have been found by the Parole Board to be eligible and ready for parole on all counts except that they have no home or place to go to.⁷⁸ It would be far cheaper to put these individuals in such a home than to continue to incarcerate them in a prison and they would be a population able to find employment and, in effect, pay room and board. Third, the State could use such housing, perhaps with some special medical facilities provided, for prisoners who are elderly or have debilitating diseases or disabilities. These prisoners are extremely unlikely to present a risk of escape, violence, or threat to the public and do not require the additional security measures maintained by prisons. The risk of recidivism

⁷⁶ 2008-2009 Report, *supra* n. 13.

⁷⁷ Connecticut, for example, has found that “[a] period of community supervision and targeted interventions after release lower the risk of recidivism.” CENTER ON SENTENCING AND CORRECTIONS (VERA Institute of Justice), *THE FISCAL CRISIS IN CORRECTIONS* 9 (2009). For descriptions of numerous reentry programs, see: <http://www.nationalreentryresourcescenter.org>.

⁷⁸ See Report to the Governor, *supra* n. 11 at 27-28.

diminishes dramatically after the age of fifty.⁷⁹

Pre-release programs to aid prisoners make the transition back into mainstream life have also been found to be effective in reducing recidivism.⁸⁰ The West Virginia Division of Corrections maintains programs designed to accomplish that,⁸¹ but the Division informed the Institute that its current funding level does not permit it to provide all of the programs that are needed. In addition, a pilot “re-entry court” program has been initiated in the Northern Panhandle to provide housing and supervision to parole-eligible inmates who have no other home to go to, who have not spent some minimal time in the penitentiary, who are Axis I diagnosed, or who are in need of substance abuse treatment.

A legislative commitment to provide the support needed to create or expand re-entry programs would be a very good investment.

2. *Require and Support County Implementation of Community Corrections*

The State should require counties to develop community corrections programs and should provide financial assistance to enable them to do so. (The Manchin administration has provided assistance, but the support should be expanded.) The Division of Corrections reported to the Institute that forty counties have a community corrections program, but they vary widely in the number and level of services and alternatives provided. Members of the judiciary stated that all but about ten counties now have day report centers,⁸² but there are only nine drug courts serving

⁷⁹W. VA. DIVISION OF CORRECTIONS, *RECIDIVISM 2001-03* at 4 (2007) (available at:<http://www.wvdoc.com/wvdoc/portals/0/documents/secidivism2007.pdf>). The chart on that page dramatically illustrates the precipitous rate at which recidivism drops with age, declining to under 2% at age 50, under 1% after age 55, and steadily declining thereafter. These data covered only a three year set, but there is no reason to think they would not be a fair sample, and common experience supports the belief that they are a fair sample. It should be noted, however, that recidivism can only be assessed with regards to those prisoners who have been released and would not include individuals sentenced for life without mercy.

⁸⁰See n. 77, *supra*.

⁸¹DoC 2007-08 Annual Report, *supra* n.29 at 61.

⁸²Some of the counties share day report centers. They also vary in the services that they provide.

twenty-four counties.⁸³ Recidivism rates for drug courts have been consistently lower than alternative measures for most offenders. *See* Part IV, *infra*. At the same time, several judges commented to the Institute that the State does not have sufficient treatment facilities for substance abuse to meet the demand, that even though in-patient treatment is a cheaper and preferable alternative to prison, it is too frequently unavailable. The 2009 enactment of the Drug Offender Accountability and Treatment Act, W. Va. Code §§ 62-15-1, *et seq.*, should facilitate creation of and reliance on drug courts.

Increased state support for these programs will result in net savings for the taxpayer because they are less expensive and more effective for nonviolent offenders than imprisonment. Unfunded mandates will not accomplish much.

3. *Uniform and Objective Criteria for Alternative Sentencing*

A major reform would be the articulation of objective criteria for the use of the alternative sentencing provided in West Virginia Code §§ 61-11-22 (pre-trial diversion and drug court), 62-12-2 (probation), 62-12-3 (suspended sentence and probation), community corrections (§§ 62-11C-1, *et seq.*), and other alternatives provided by law. Such articulation would promote uniformity (which is currently lacking), would result in greater use of alternative sentencing, and would provide magistrates and circuit judges political cover for using those devices. (The Institute received many comments that the biggest barrier to more widespread use of alternative sentencing has been the reluctance of some elected officials to appear to the public as soft on crime.) Although any restriction on judicial discretion raises some question about whether it is an impermissible intrusion on the unified judiciary created by the Judicial Reorganization

⁸³ This information was provided to the Institute by the Office Supreme Court Administrator. Five of the drug courts serving twelve counties were added in 2009 under the tenure of Chief Justice Brent Benjamin.

Amendment of 1974,⁸⁴ the identification of such standards is indistinguishable from the ordinary and legitimate exercise of legislative power in setting the range of prison time for any criminal offense.⁸⁵

4. *Uniform and Objective Standards for Setting Bonds*

For much the same reasons as stated in the prior section, the State should adopt specific criteria for granting personal recognizance bonds and for setting bail. The vagaries of setting bonds have a major impact on the number of inmates awaiting trial in misdemeanor cases. No definite standards currently exist. Thus, similarly situated individuals may be placed on widely divergent bonds. Assume, for example, defendants A, B, and C are arrested for the same misdemeanor offense. Defendant A is arraigned by Magistrate Smith, who permits the defendant to post a \$200 personal recognizance bond. Defendant B is arraigned by Magistrate Jones, who requires a \$10,000 property or surety bond. Defendant C is arraigned by Magistrate Brown, who requires the defendant to post a \$3,000 cash-only bond.

The effect of this inconsistency is that defendant A will post bond and be immediately released; defendant B may spend some time (possibly a day or longer) trying to get someone to post his bond; and defendant C faces the daunting task of finding someone willing to provide \$3,000 in cash to post on his behalf. Thus, A will spend no time in jail, while C may well be in jail until his hearing date (costing the county to pay for his daily keep).

The only guidelines for magistrates and judges in determining bond are found in West Virginia Code § 62-1C-1a (permitting release upon a defendant's recognizance) and in the guidelines set forth in *State ex rel. Ghiz v. Johnson*, 155 W.Va. 186, 183 S.E.2d 703 (1971). *Ghiz* identifies factors that may be considered by a court in establishing the amount of bond in any

⁸⁴W. Va. Constitution, Article VIII, §§ 1-10.

⁸⁵Of course, if the Supreme Court issued rules articulating the standards, there would be no question of their constitutionality. The Court could also adopt as its own the legislatively developed standards.

case. The amount of the bond, however, remains discretionary with the magistrate, subject to review by the circuit court. Thus, absent a showing of an abuse of discretion, a defendant may be incarcerated unnecessarily, at significant cost to himself and to taxpayers.

The Legislature could also require personal recognizance bonds for misdemeanors and nonviolent crimes unless the prosecution provides proof of a threat to public safety or risk of flight.

5. *Required Consideration of Alternative Sentencing*

Judges could be required in any misdemeanor case to consider less restrictive alternatives to incarceration, including those listed in proposal Section III-3, above, and to articulate on the record or in writing why less restrictive alternatives were rejected.

6. *Parole Reforms*

First, the Institute joins in the recommendation of the Commission on Over-Crowded Prisons in calling for presumptive parole for nonviolent offenders. According to the Commission:

Presumptive parole creates an assumption that without institutional infractions and with completion of a treatment plan created with the assistance of the risk and needs assessment, the offender will be paroled on a specific date. Instituting presumptive parole for offenders will allow offenders who are motivated toward change and rehabilitation the opportunity to leave Division of Corrections facilities under parole supervision at an earlier date, provided that the Parole Board conducts an interview with the offender and deems early release appropriate for rehabilitation and public safety.

The Division of Corrections has calculated that, if the length of stay for three offenders were reduced by four months, the Division could gain the equivalent of one bed.⁸⁶ Repeating that would enable the Division to accommodate many of the prisoners awaiting transfer from the jails

⁸⁶2008-09 Report, *supra* n. 13. The Report also states:

By instituting presumptive parole, the offender is more likely to participate in rehabilitative programs that will be beneficial upon his or her release. With a date to look forward to, the offender, in conjunction with institutional staff, is more likely to begin planning for his or her eventual release and have housing, employment and community rehabilitative programs in place prior to his or her release.

to a penitentiary.

Governor Manchin's legislative proposals include a bill that could accomplish the purposes of presumptive parole. It would amend the parole eligibility statute, W. Va. Code § 62-12-13, to authorize parole for a nonviolent offender not convicted of a crime involving a child if the offender has not violated institutional disciplinary rules and has "completed an advanced rehabilitation treatment plan created with the assistance of a standardized risk and needs assessment." This parole would operate pursuant to joint rules to be developed by the Parole Board and the Division of Corrections and submitted to the Legislature.

Second, the Institute concurs in another Commission recommendation, that advocating for an increase in the number of parole officers.⁸⁷ Lighter caseloads for parole officers will allow them more time to focus on the programming and rehabilitative aspects of their role instead of having to concentrate on the law enforcement aspect.

Third, the State could consider adopting an "earned discharge" program similar to that initiated in California in 2007. In that program, corrections officials identified low-level, nonviolent offenders on parole who posed little risk of reoffending. Persons so identified earn discharge from parole after serving six months. Because the highest risk of reoffending occurs in the first six months after release, parole officers could concentrate on low-risk individuals during the critical months and then have more resources to focus on the higher-risk population.⁸⁸

7. *Juvenile Transfer Statute*

The juvenile transfer statute, W.Va. Code § 49-5-10, currently requires transfer of juveniles for trial and punishment as adults in specified cases while precluding the judge from considering the circumstances of the case or the personal circumstances of the juvenile, including

⁸⁷ Report to the Governor, *supra* n. 11 at 19.

⁸⁸ THE SENTENCING PROJECT, THE STATE OF SENTENCING 2007 16 (2008).

the juvenile's mental and physical condition, maturity, or home environment. Such automatic transfer occurs for any juvenile, age 14 or over, where probable cause is found that the juvenile has committed any of a series of serious acts of delinquency which, if committed by an adult, would be a felony. W.Va. Code § 49-5-10(d)(1). Transfer is also mandatory for an act of violence if the juvenile had a previous adjudication of delinquency based on an act of violence. W.Va. Code § 49-5-10(d)(2). Finally, transfer is automatic if the juvenile has had two previous adjudications of delinquency based on acts which would be felonies if committed by adults. W.Va. Code § 49-5-10(d)(3). The juvenile transfer statute has the effect of eliminating what would ordinarily be a judicial decision, made after a full consideration of all the relevant facts concerning the juvenile and the nature of the allegations. The decision to transfer is instead placed in the hands of the prosecution.

Unfortunately, a significant number of juveniles in the West Virginia court system have been born into severely deprived homes, where they have been subject to prolonged physical, mental, and sexual abuse. Others are mentally ill or mentally retarded, all factors which should be taken into consideration before a decision is made regarding trial and punishment as an adult.⁸⁹

For these reasons, the juvenile transfer statute should be amended to permit judges to consider the personal factors in the case before making the decision to transfer a juvenile for trial and punishment as an adult.

8. *Post-Conviction Bail*

West Virginia Code § 62-1C-1(b) currently authorizes a court to grant bail pending appeal in cases not involving violence or use of a deadly weapon. According to the State Public

⁸⁹See, e.g., "Piles Upon Piles of Filth, Police Say," *Charleston Gazette-Mail*, June 27, 2009, 1A (describing the squalid home environment of a sexually abused 14-year-old who had been charged with murder and was facing a possible sentence of life without parole, under circumstances where no judicial consideration of the abusive home and family environment was permitted to be taken into consideration before the transfer decision was made).

Defender Services, the provision is rarely invoked. To encourage greater use of the provision, it could be amended to provide for home confinement while an appeal is pending and to credit the confinement towards satisfaction of the sentence if the appeal is not successful.

9. *Drug Penalty Enhancement Statute*

For a person to be convicted for second or third offense DUI in West Virginia, the prior offenses must have occurred within a ten-year period. Additionally, the charging document must provide notice of the date, location, and particulars of the prior offenses. W.Va. Code § 17C-5-2(m)(1) (ten-year period) and W.Va. Code § 17C-5-2(n) (notice). By contrast, for charges involving possession of controlled substances – no matter how minor – none of these safeguards or limitations apply. W.Va. Code § 60A-4-408 (enhanced penalties for subsequent drug offenses).

As a result, drug defendants are often surprised at sentencing by records of past charges that are remote in time and that are sometimes erroneous. Consequently, to avoid excessive penalties, the statute regarding enhanced penalties for subsequent drug offenses should be modified to place safeguards regarding notice and limitations on time periods similar to those that exist for DUI charges.

10. *Early Release Programs*

The Legislature could consider early release programs. California, for example, authorized local jail administrators to identify and release certain nonviolent misdemeanants to serve the balance of their sentence in home confinement with electronic monitoring.⁹⁰

Another possibility is to consider release or reassignment to a supervised living facility of prisoners sentenced to life or long-term sentences who are not yet (or never will be) eligible for parole if they have served a substantial number of years, have reached a certain age, and have

⁹⁰Cal. Penal Code §1203.016

been recommended for early release/reassignment by the officials of the correctional facility to which they have been committed.

As of June 30, 2009, the West Virginia Division of Corrections housed 260 prisoners serving sentences of life without parole. Under West Virginia law, the Division of Corrections must house these prisoners until their death. The growing number of elderly inmates presents a serious strain on Division's capacities and budgets.⁹¹ Other states have addressed the issue of the review of sentences of life without parole. In South Carolina, for example, prisoners sentenced to life without parole may have their sentences reviewed upon request of the Department of Corrections and upon the passage of certain combinations of age and years served, as well as illness and extraordinary circumstances.⁹²

The 2002 Long Term Plan made the following suggestion:

It is therefore presented as an option that when an inmate with [a sentence of life without the possibility of parole) has served a minimum of fifteen years in accordance with the Life with Mercy guidelines found in W.Va. Code § 62-12-13(c), and has the additional qualifications of fifty years of age[] and five years of conduct free of rule violations, he/she be considered for parole release by a specialized review board.⁹³

The Plan suggested the creation of a Life without Mercy Review Board to make such decisions.⁹⁴

11. *Relieve Pressure on Judges to Sentence Individuals to a Penitentiary*

When an offender is sentenced to prison for a year or more, the State will be responsible for paying for his incarceration, regardless of whether a state prison can immediately accommodate him or whether he is temporarily assigned to a regional jail pending placement in a state prison. When an offender is sentenced to less than a year, the sentence is served in a

⁹¹“Aging Inmates Create New Set of Challenges: States Struggle for Options, Deal With Tight Budgets,” *Charleston Daily Mail*, Dec. 22, 1999. The Division's 2008-09 Report states that its total medical costs for that fiscal year was \$24.3 million.

⁹³South Carolina Code § 17-25-45(E.)

⁹³Long Term Plan at 33.

⁹⁴*Id.*

regional jail and the county pays the bill. This system could put pressure on judges to sentence offenders to the longer state terms rather than jail time or community corrections in order to save the county money. That means more prisoners and longer sentences.

State assumption of the costs of the regional jails would be an equitable and effective means to eliminate that pressure, although that would require a substantial and complicated shift in fiscal responsibility from the counties to the state.⁹⁵ Less drastic options include expanded state support for home confinement⁹⁶ and community corrections alternatives, which are both less expensive than prison and, for many offenders, more likely to reduce recidivism. The state support would encourage judges to use those alternatives, rather than sentencing defendants to state prison. Reducing some nonviolent felonies to misdemeanors would force judges in those cases to sentence those convicted to either jail or some less restrictive alternative.

12. *Streamline the Criminal Process at the County Level*

A number of counties (most notably Monongalia and Mercer) reported efforts they had made to reduce jail costs for county commissions. The strategies included the following:

- Institute a regular review (every couple months) by judges, prosecutors, and commissioners (or some combination) of the county's jail list to determine if any prisoners have gotten lost in the system or are needlessly in jail;
- Hold fugitive from justice hearings the day after capture (or as soon as possible) so

⁹⁵There is precedent for such a shift in funding. Prior to the 1931 Property Tax Limitation Amendment, W. Va. Constitution, Article X, § 1, West Virginia's schools were primarily financed by local property taxes. The 1931 Amendment drastically limited property taxes and shifted to the State increasing responsibility to fund public education. The decision in *Pauley v. Kelley*, 162 W.Va. 672, 255 S.E.2d 859 (1979), which declared unconstitutional the State's school financing system because of inequities created by (among other things) variations in local property values, resulted in even further reliance on State funding of education.

⁹⁶Although home confinement is much cheaper than jail or prison, *see n. 35 supra*, it is not necessarily a great alternative for substance abusers. Without some accompanying treatment and testing (through, for example, day report centers), the temptations and opportunities to continue to abuse could make home confinement a problematic alternative for that population.

the prisoner can waive extradition and facilitate immediate transfer to the other jurisdiction (who then must assume the costs of incarceration);

- Following a sentencing hearing in a felony case, enter the sentencing order that day and fax the order to the regional jail to take the prisoner off the county's account;
- Accelerate scheduling as much as possible to minimize time spent in jail for those likely to be placed on probation or to be punished by means other than incarceration;
- Periodically review bonds and bonding practices to ensure prisoners to minimize unnecessary jail time.

IV. USE OF EVIDENCE-BASED PROGRAMS AND COMMUNITY CORRECTIONS

As previously noted, recent criminological research has focused on scientific inquiry and the collection of data to identify what works and what does not work to reduce recidivism and crime. This concept of "evidence-based practices refers to corrections practices that have been proven through scientific corrections research 'to work,' to reduce offender recidivism."⁹⁷

The use of such practices begins with individualized assessment of the offender "that typically includes the following components:

- An assessment of *risk factors* (that *increase* the likelihood of recidivism).
- An assessment of *protective factors* (that *decrease* the likelihood of recidivism).
- An assessment of *criminogenic needs* ('clinical disorders or functional impairments that, if ameliorated, substantially reduce the likelihood that the offender will recidivate').
- An estimate of *recidivism risk* (defined with reference to particular types of

⁹⁷*E.g.*, ROGER WARREN, EVIDENCE-BASED PRACTICES TO REDUCE RECIDIVISM: IMPLICATIONS FOR STATE JUDICIARIES 20 (2007).

recidivism, in particular contexts, over a specified time period) through the use of scientifically-validated risk assessment instruments and methods.

- *An identification of the most effective (i.e., recidivism preventing) sentencing options and interventions (including correctional and treatment programming) based on the particular offender’s risk factors, protective factors, and criminogenic needs.”*⁹⁸

The Report from the Governor’s Commission on Prison Overcrowding advocated throughout the need for the State to invest in risk/needs assessments, in alternative sentencing, and in the community corrections programs authorized by West Virginia Code §§ 62-11C-1, *et seq.*⁹⁹ The Law Institute joins in that chorus. Given that at least seventy-five percent of West Virginia’s prison population are incarcerated for non-violent, property, and drug crimes,¹⁰⁰ given that West Virginia was recently ranked fiftieth among the states in the use of community corrections as an alternative to prison,¹⁰¹ and given that community corrections programs have been found to be more effective than incarceration in reducing recidivism for nonviolent offenders, the gains that the State stands to make in reducing corrections costs and the crime rate are enormous.

The Division of Corrections has adopted as a measure of an offender’s risks and needs the Level of Service/Case Management Inventory (LS/CMI), which is “[t]he best-established and most empirically supported such measure.”¹⁰² The LS/CMI measures the offender’s criminal history, education/employment, family/marital background, alcohol/drug problems, pro-criminal

⁹⁸Redding, *supra* n.23 at 3-4 (emphases in the original); *accord*, AMERICAN LAW INSTITUTE (“ALI”), MODEL PENAL CODE: SENTENCING 64 (DISCUSSION DRAFT NO. 2 2009); *see also* Heilbrun, *supra* n.33 at 128-38.

⁹⁹*E.g.*, Report to the Governor, *supra* n. 11 at 18-27.

¹⁰⁰*Id.* at 14. The Commission also states, at 9, that, “[i]n 2006, 76 percent of offenders admitted to Division of Corrections facilities were admitted for crimes considered “nonviolent.” Presumably, the percentage of nonviolent offenders would be even higher among the misdemeanants committed to the regional jails.

¹⁰¹*Id.* at 6.

¹⁰²Heilbrun, *supra* n. 33 at 138. *See generally* DONALD ANDREWS, ET AL., LEVEL OF SERVICE/CASE MANAGEMENT INVENTORY USER’S MANUAL (2004).

attitude or orientation, and antisocial patterns to create a score that will predict the offender's risk of recidivism. The instrument aids in rehabilitation and in specific deterrence by informing the user what level and kind of treatment would be most likely to be effective for this offender and by informing a sentence decision-maker (*e.g.*, judge, parole board, Division of Corrections) about the extent (if any) and nature of incarceration that would be appropriate given the offender's profile. While the LS/CMI has been put into use by state officials, the information received by the Institute was that it was not yet widely used at the county or circuit level. That needs to change; investment should be made to educate potential users at all levels of the criminal justice system on the value of the LS/CMI and on how to use it. There should be a coordinated effort to assure consistent application of the testing and use of the instrument.

According to state officials and members of the judicial branch, the community corrections programs vary widely around the State. Programs that have been reported to be valuable include drug courts, mental health courts, day reporting centers with supporting services, and teen courts. Other states have experimented with a wide variety of evidence-based programs for offenders and for at-risk populations to prevent crime.¹⁰³

From information received from officials in every corner of the State's criminal justice system, substance abuse and drug usage form the root causes of crime in West Virginia. Users

¹⁰³The State of Washington collected and provided a useful summary of the studies that had been done as of 2006 to identify programs that have been shown to be effective and those that have not. WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, EVIDENCE-BASED PUBLIC POLICY OPTIONS TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE COSTS, AND CRIME RATES (2006). The report included a useful chart on the studies at page 9, which is included as an attachment to this report. According to the report, Washington has had some success with court-ordered Functional Family Therapy and with crime-prevention programs focused on at-risk populations. The report also calculated the savings that that State could realize through expanded use of evidence-based alternatives and supplements to incarceration. It estimated that the savings to taxpayers over 20 years from moderate to aggressive use of evidence-based programs would range from **\$1.9 to \$2.6 billion** dollars. *Id.* at 14. (Washington had already undertaken a review of its sentencing laws and practices to address issues similar to those dealt with in Part II of this report.)

violate drug laws (possession, possession with intent to distribute, manufacturing), they commit property and other crimes to get the money to buy drugs, and they become violent or exercise poor judgment (and commit crimes) while under the influence of drugs or alcohol.¹⁰⁴ Drug courts are one response. “[R]esearch has strongly suggested that drug courts provide a more effective, risk-reducing intervention than any other approach to dealing with offenders with drug abuse problems[,]” and they “appear useful in reducing drug use and criminal recidivism.”¹⁰⁵ On the other hand, there is no one-size-fits-all solution, and individual assessments must be made as to which sentencing alternative is best suited for a particular offender, ranging from administrative probation, to drug courts, to intermediate punishment,¹⁰⁶ to incarceration.¹⁰⁷ The Legislature’s 2009 passage of the Drug Offenders’ Accountability and Treatment Act, W. Va. Code §§ 62-15-1, *et seq.*, is a major step forward. Adequate funding should be provided for its implementation.

Other specialty courts also show promise. The First Judicial Circuit in the Northern Panhandle now has (in addition to a drug court) a mental health court, a DUI court, and, as of this fall, a re-entry court. The judges and probation officers in that circuit have found that the mental health and DUI courts have had higher rates of success in preventing recidivism than pre-existing alternatives. The First Circuit’s re-entry court is a pilot project initiated by the West Virginia Supreme Court in late 2009 to deal with prisoners from three population sets: (1) persons who

¹⁰⁴National statistics bear out the pervasiveness of the drugs-crimes connection:

Approximately eighty percent of offenders in the U.S. meet a broad definition of substance involvement and between one-half and two-thirds satisfy official diagnostic criteria for substance abuse or dependence. In a national sample of U.S. booking facilities, positive urine drug screens were obtained from approximately sixty-five percent of the arrestees in most jurisdictions.

Douglas B. Marlowe, *Evidence-Based Sentencing for Drug Offenders: An Analysis of Prognostic Risks and Criminogenic Needs*, 1 CHAPMAN J. OF CRIM. JUSTICE 167 (2009).

¹⁰⁵Heilbrun, *supra* n. 33 at 137.

¹⁰⁶These would include a variety of community-based sentences, such as intensive supervised probation, correctional halfway houses, day reporting centers, home detention, and electronic monitoring.

¹⁰⁷Marlowe, *supra* n. 104, *passim*.

have served enough time to be eligible for parole but who have not yet spent six months in a Division of Correction facility; (2) persons who are otherwise eligible for parole but who cannot get it because they have no residence to go to; and (3) persons who have an Axis I diagnosis or who are in need of substance abuse treatment. The program will provide employment, education, housing, and (if needed) treatment to help the participants to make a transition and to avoid returning to prison.

While studies from other states can be of value, it is also critical that West Virginia begin to compile the data that will permit it to learn what works in West Virginia and what does not.¹⁰⁸ Data are also needed to monitor the effectiveness of particular programs and to assess variations in and impacts of criminal sentencing practices. The Law Institute therefore recommends the creation of a West Virginia Sentencing Commission to collect and monitor data on the full range of criminal sentencing¹⁰⁹ and treatment programs, to continue to study sentencing alternatives and their effectiveness, and to make recommendations to the Legislature and to judges on appropriate sentencing ranges for various offenses.¹¹⁰ Among neighboring states, Virginia¹¹¹ and Pennsylvania¹¹² have established sentencing commissions that have

¹⁰⁸The demographic and social variations of a jurisdiction's population can affect the relative impact of particular programs. *E.g.*, ALI, *supra* n. 98 at 65-66; Redding, *supra* n. 33 at 8, Washington State Institute for Public Policy, *supra* n. 103 at 17. West Virginia-specific data should therefore be accumulated and analyzed.

¹⁰⁹A sensitive issue arises concerning data collection about the sentencing practices of individual judges. Such data could be politically risky for judges and could serve to chill their willingness to use alternative sentencing practices.

¹¹⁰Delegate Tim Armstead of Kanawha County has introduced a bill during the past several legislative sessions to establish a Sentencing Commission. The Delegate has provided the Institute with a copy of his proposed bill, and it is attached to this report. The American Law Institute has also urged states to create sentencing commissions. ALI, *supra* n. 98 at 66. Neither Delegate Armstead's bill nor the Institute's recommendation contemplate that the Sentencing Commission would have authority to issue mandatory sentencing guidelines.

¹¹¹The Virginia Commission's website is: <http://www.vcsc.state.va.us/>.

received considerable recognition in the literature for their effectiveness in helping to modernize those states' criminal justice systems. They could serve as models for West Virginia. The Institute expressly recommends, however, that the Sentencing Commission should not be authorized to create any mandatory sentencing guidelines.

¹¹²The Pennsylvania Commission's website is: <http://pcs.la.psu.edu>; *see also* Mark H. Bergstrom, *The Pennsylvania Experience: You Need a Toolbox to Build a Roadmap*, 1 CHAPMAN J. OF CRIM. JUSTICE 203 (2009).

CONCLUSION

The members of the West Virginia Law Institute appreciate the opportunity to serve their state through the preparation of this report. While the period of time for the completion of the report was relatively brief, we trust the information provided will be helpful to members of the House of Delegates and Senate during their upcoming deliberations. Questions may be directed to the following:

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APPENDICES

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GOVERNING COUNCIL**

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§ 4-12-3(b)	Ex Officio Members	Capacity of Service
(1)	<p>Hon. Brent D. Benjamin West Virginia Supreme Court of Appeals Capitol Complex, Building 1, Room E-302 Charleston, WV 25305 304-558-2602 brent.benjamin@courtswv.gov</p>	Chief Justice of the West Virginia Supreme Court of Appeals
(2)	<p>Hon. Gary L. Johnson* Chief Judge, 28th Judicial Circuit Nicholas County Courthouse 700 Main Street, Room 216 Summersville, WV 26651 304-872-7840 garyjohnson@courtswv.org</p>	Circuit Court Judge selected by West Virginia Judicial Association

(3)	<i>Federal Judges Cannot Serve on Council</i>	Federal Judge residing in WV	
(4)	Hon. Darrell V. McGraw, Jr. Office of the Attorney General 1900 Kanawha Blvd. State Capitol, Bldg. 1, Room 26 E Charleston, WV 25305-9924 304-558-2021 Fax: 304-558-0140	Jeanne Young Attorney General's Secretary jeanne.young@wvago.gov wjy@wvago.gov	Attorney General
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(6)	Delegate Tim Miley State Capitol Complex Building 1, Room 400M Charleston, WV 25305 Capitol Phone: 304-340-3248 Business Phone: 304-326-1800 timmiley@mail.wvnet.edu		Chairperson House Judiciary Committee
(7)	Sen. H. Truman Chafin Room 223M, Building 1 State Capitol Complex Charleston, WV 25305 Capitol Phone: 304-357-7808 Business Phone: 304-235-2221 truman.chafin@wvsenate.gov	PO Box 1799 Williamson, WV 25661 304-235-2221 Fax: 304-235-2777	Senate Majority Party Representative

(7)	<p>Sen. Don Caruth Room 245M, Building 1 State Capitol Complex Charleston, WV 25305 Capitol Phone: 304-357-7901 Business Phone: 304-325-9177 don.caruth@wvsenate.gov</p>	<p>Brewster Morhous Cameron Caruth Moore Kersey PO Box 529 Bluefield, WV 24701 dcaruth@brewstermorhous.com</p>	<p>Senate Minority Party Representative</p>
(7)	<p>Del. Brent Boggs Room 228M, Building 1 State Capitol Complex Charleston, WV 25305 Capitol Phone: 304-340-3220 Business Phone: 304-364-8411 Boggs34@aol.com</p>		<p>House of Delegates Majority Party Representative</p>
(7)	<p>Del. Tim Armstead Room 264M, Building 1 State Capitol Complex Charleston, WV 25305 Capitol Phone: 304-340-3240 Business Phone: 304-357-3839 tarmste1@mail.wvnet.edu</p>	<p>5012 Elk River Road, S. Elkview, WV 25071-9619 tparmstead@nisource.com</p>	<p>House of Delegates Minority Party Representative</p>
(8)	<p>John R. Homburg Director Legislative Services State Capitol, Room 132 E Charleston, WV 25305 304-347-4800 jhomburg@mail.wvnet.edu (W);</p>	<p>Fax: 304-347-4819 homburgj@aol.com (H)</p>	<p>Director of the West Virginia Legislative Services</p>
(9)	<p>Richard E. Ford, Sr. 203 West Randolph Street Lewisburg, WV 24901 304-645-1858 ref@fordlawwv.com</p>	<p>Fax: 304-645-1918</p>	<p>Chairperson, West Virginia Commission on Uniform State Laws <i>(a national committee)</i></p>
(10)	<p>Lettia Neese Chafin PO Box 1799 Williamson, WV 25661 304-235-2221 tishchafin@yahoo.com</p>	<p>Fax: 304-235-2777</p>	<p>President-Elect West Virginia State Bar</p>

(10)	Sandra M. Chapman 32-20th St, Ste 200 Wheeling WV 26003 Phone: 304-233-9500 Fax: 304-233-1363 smchapman@bwhll.com	President West Virginia State Bar
(11)	Anders W. Lindberg PO Box 2195 Huntington WV 25722 Phone: 304-526-8096 Fax: 304-526-8089 lindberga@steptoe-johnson.com	Chair Young Lawyers Section West Virginia State Bar
(12)	Dean Joyce McConnell WVU College of Law PO Box 6130 Morgantown, WV 26506-6130 304-293-6812 Fax: 304-293-6891 joyce.mcconnell@mail.wvu.edu	Dean of WVU College of Law
(13)	Michael S. Garrison Spilman Center 48 Donley St, Ste 800 PO Box 615 Morgantown, WV 26507-0615 Phone: 304-291-7926 mgarrison@wv.gov.orgmail Fax: 304-291-7979	Governor Appointed Attorney Representative
(13)	Sean P. McGinley, Esq. DiTrapano, Barrett & DiPiero PLLC 604 Virginia Street, East Charleston, WV 25301 304-342-0133 Fax: 304-342-4605 mcginley@dbdlaw1.com	Governor Appointed Attorney Representative
(14)	Jessica Justice WVU College of Law Continuing Legal Education PO Box 6130 Morgantown, WV 26506-6130 304-293-7255 Fax: 304-293-6942 jessica.justice@mail.wvu.edu	Director Continuing Legal Education
(15)	Brandon Stump, Editor-in-Chief West Virginia Law Review PO Box 6130 Morgantown, WV 26506-6130 304-293-2301 Fax: 304-293-6891	Editor-in-Chief West Virginia Law Review

§ 4-12-3(c)	Elected Council Membership - 4 year terms	Capacity of Service
Term Ends 6-30-2014	William Rhee Professor WVU College of Law PO Box 6130 Morgantown, WV 26506-6130 304-293-7081 Fax: 304-293-6891 William.rhee@mail.wvu.edu	WVU College of Law Faculty Representative
Term Ends 6-30-2012	Vincent Paul Cardi Professor WVU College of Law PO Box 6130 Morgantown, WV 26506-6130 304-293-7144 Fax: 304-293-6891 vincent.cardi@mail.wvu.edu	WVU College of Law Faculty Representative

§ 4-12-3(c)	Board of Governors Selected Practicing Attorneys for Council Membership - 4 year terms	U.S. Congressional Districts 1, 2, & 3
Term Ends 6-30-2010	David Goldenberg* Goldenberg Goldenberg & Stealey PLLC 200 Star Avenue, Suite 222 Parkersburg, WV 26101 304-485-4516 Fax: 304-485-7222 david@ggslaw.com	District 1 - Northern
6-30-2010	Erica Mani Deputy Cabinet Secretary WV Department of Revenue WV State Tax Department PO Box 963 Charleston, WV 25324-0963 304-558-0211; 4544 Fax: 304-558-2324 emani@tax.state.wv.us	District 2 - Central
Term Ends 6-30-2010	Audy Perry, Jr.* Huddleston Bolen LLP PO Box 2185 Huntington, WV 25722-2185 304-529-6181 Fax: 304-522-4312 aperry@huddlestonbolen.com	District 3 - Southern, Resources Chairman

Term Ends 6-30-2010	Jeffrey Scott Rodgers PO Box 186 Lewisburg, WV 24901 304-647-4550 Fax: 304-647-5587 rodgerslawfirm@yahoo.com	District 3 - Southern
Term Ends 6-30-2011	Yolonda Lambert Schrader Byrd & Companion 32 20th Street, Suite 500 Wheeling, WV 26003-3750 304-233-3390 Fax: 304-233-2769 ygl@schraderlaw.com	District 1 - Northern
Term Ends 6-30-2011	Lloyd W. Spring III 1201 W. Main Street Grafton, WV 26354 Office/Fax: 304-265-0117 Home/Fax: Fax: 304-265-5731 LWSpringIII@lawyer.com	District 1 - Northern
Term Ends 6-30-2011	Scott A. Curnutte* PO Box 1605 Elkins, WV 26241-5907 304-636-5904 Fax: 304-636-5907 curnutte@justice.com	District 2 - Central
Term Ends 6-30-2011	Joyce H. Morton PO Box 247 Webster Springs, WV 26288 304-847-2773 Fax: 304-847-2729 joycehm@frontiernet.net	District 3 - Southern
Term Ends 6-30-2012	Jacqueline Sikora* Gianola Barnum & Wigal LLC 1714 Mileground Road Morgantown, WV 26505 304-291-6300 jsikora@gbwlaw.net	District 1 - Northern Publication Relations Chairman
Term Ends 6-30-2012	Jessica Alsop Jackson Kelly PLLCPO Box 553 1600 Laidley Tower Charleston WV, 25322 304-340-1085 Fax: 304-340-1093 jalsop@jacksonkelly.com	District 2 - Central
Term Ends 6-30-2014	John J. Wallace, IV Wallace Law Offices PO Box 7 14 S. Randolph Avenue Elkins WV 26241 jjwlawyer@hotmail.com	District 2 - Central

Term Ends 6-30-2012	William R. Wooton The Wooton Law Firm PO Drawer 2600 Beckley, WV 25801 Phone: 304-253-2222 Fax: 304-255-5041 bill@wootonlaw.com	Room 476M, Building 1 State Capitol Complex Charleston, WV 25305 Capitol Phone: (304) 340-3164 Business Phone: (304) 253-2222 Email: wrooton@mail.wvnet.edu	District 3 - Southern
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Past President	
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Ellen Cappellanti Jackson Kelly PLLC PO Box 553 Charleston, WV 25322-0553 304-340-1277 Fax: 304-340-1080 ecappellanti@jacksonkelly.com	William R. Wooton2007-2008 The Wooton Law Firm PO Drawer 2600 Beckley, WV 25801 304-253-2222 Fax: 304-255-5041 bill@wootonlaw.com

Former Secretary/Director	
Professor Robert G. Lathrop.....2001-2008	

* Members of the Executive Committee



WEST VIRGINIA LAW INSTITUTE

*An Official Advisory Law Revision and Law Reform Agency of the State of West Virginia
Established 1988*

October 2, 2009

Re: West Virginia Law Institute Study on Criminal Sentencing Reform

Dear to Whom it May Concern:

I write to you on behalf of the West Virginia Law Institute, which researches and proposes law reforms on current issues in the State. The Institute has agreed with the Legislature to study criminal sentencing in West Virginia and to provide a report and recommendations before the start of next year's legislative session. This undertaking is in response to the report issued earlier this year by the Governor's Commission on Prison Overcrowding. Both the Governor and the Legislature want to explore whether reform of sentencing practices and laws in West Virginia can alleviate the crisis that the State is approaching in our overcrowded prisons. Examination of that question also provides the opportunity to assess the fairness and rationality of our criminal sentencing laws and to identify alternatives that could enhance the prospects for at least some defendants and criminals to find productive lives and avoid recidivism.

As part of its research, the Institute is making inquiries of various groups who regularly work on the ground with our sentencing laws and practices. We want to draw on the experience of persons in these knowledgeable groups and garner their insights, opinions, and advice. One of those groups is, of course, our state's academia. We would, accordingly, greatly appreciate it if you could take a few moments to respond to the following queries and send them back to the Institute. Please feel free to respond by any medium that you find most comfortable and convenient. The questions are:

Are there sentencing provisions in any articles or sections of the criminal code that you believe to be particularly problematic in terms of their unfairness, irrationality, lack of proportionality, or inconsistencies?

Are there programs that you have found in your work or observations to be particularly valuable in providing remedial services to criminal defendants and prisoners? Are there existing programs designed to promote those goals that you believe are ineffective or inefficient?

PO Box 6130---Morgantown, WV 26506-6130

Are there cases that you recall that would illustrate what you believe to be systemic problems in our criminal sentencing and corrections systems? Can you share those recollections with the Institute?

Do you have suggestions for sentencing alternatives for low-end offenders other than jail or prison time?

Are there questions not included within those above that you think the Institute should be asking?

What else would you want to tell or advise the Institute?

Please send your responses to Professor Robert M. Bastress at the West Virginia University College of Law. The following is his contact information:

Mail – PO Box 6130
Morgantown, WV 26506-6130

Fax – (304) 293-6891

E-mail – robert.bastress@mail.wvu.edu

If, after you respond, you identify additional information that you think the Institute ought to have, please feel free to re-contact Professor Bastress.

The Institute and I thank you very much for your assistance and input.

Sincerely yours,

David C. Hardesty, Jr.

David C. Hardesty, Jr.
Director/Secretary
West Virginia Law Institute

Survey Letter Mailing List

- Patti Hamilton *via email*, who forwarded to the letter to
 - County Prosecutors
 - Sheriffs
 - County Commissioners
- Steve Canterbury *via email*, who sent the letter to
 - Judges
 - Magistrates
 - Probation Officers
- Jack Rogers *via email*, who sent the letter to all public defenders in the state

Mr. Jim Rubenstein, Commissioner West Virginia Department of Corrections 112 California Ave. Bldg. 4, Room 300 Charleston, WV 25305	Adrian Hoke, Warden Huttonsville Correctional Center P.O. Box 1 Huttonsville, WV 26273
Teresa McCourt, Warden Anthony Correctional Center Box N-1, HC 70 White Sulphur Springs, WV 24986	Marvin Plumley, Acting Warden Lakin Correctional Center 11264 Ohio River Road West Columbia, WV 25287
William Vest, Acting Administrator Beckley Correctional Center 111 S. Eisenhower Drive Beckley, WV 25801	Scott E. Paugh, Warden Martinsburg Correctional Center 38 Grapevine Road Martinsburg, WV 25401
Jeff A. Stinnett, Administrator Charleston Work Release Center 607 Brooks Street Charleston WV 25301-1319	David Ballard, Warden Mount Olive Correctional Complex 1 Mountainside Way Mt. Olive, WV 25185
Mark Williamson, Warden Denmar Correctional Center HC 64, Box125 Hillsboro, WV 24946	Evelyn Seifert, Warden Northern Correctional Facility RD 2, Box 1 Moundsville, WV 26041
Renee Stubblefield, Administrator Huntington Work/Study Release Center 1236 Fifth Avenue Huntington, WV 25701	William Yurcina, Warden Ohio County Correctional Complex 1501 Eoff Street Wheeling WV 26003

Jim Ielapi, Warden Prunytown Correctional Center P.O. Box 159 Grafton, WV 26354	Randy Perdue, Director W V Corrections Academy Parchment Valley Rt. 2, Box 304B Ripley, WV 25271
William Fox, Warden St. Mary's Correctional Center 2880 N. Pleasants Highway St. Mary's, WV 26170	

(By Delegates Armstead, Anderson and Craig)
[Introduced February 12, 2009; referred to the
Committee on Government Organization then the Judiciary.]

A BILL to amend and reenact §4-10-8 of the Code of West Virginia,
1931, as amended; and to amend said code by adding thereto a
new article, designated §61-13-1, §61-13-2, §61-13-3 and
§61-13-4, all relating to the creation of a Sentencing
Commission, providing for the appointment, terms and
qualifications of members; establishing objectives for the
commission; and setting forth certain powers and duties of the
commission.

Be it enacted by the Legislature of West Virginia:

That §4-10-8 of the Code of West Virginia, 1931, as amended,
be amended and reenacted; and that said code be amended by adding
thereto a new article, designated §61-13-1, §61-13-2,
§61-13-3 and §61-13-4, all to read as follows:

CHAPTER 4. THE LEGISLATURE.

ARTICLE 10. PERFORMANCE REVIEW ACT.

§4-10-8. Schedule of departments for agency review.

(a) Each department shall make a presentation pursuant to the

1 provisions of this article, to the joint standing committee and the
2 committee during the first interim meeting after the regular
3 session of the year in which the department is to be reviewed
4 pursuant to the schedule set forth in subsection (b) of this
5 section.

6 (b) An agency review shall be performed on one or more
7 agencies under the purview of each department at least once every
8 six years, commencing as follows:

9 (1) 2008, the Department of Administration;

10 (2) 2009, the Department of Education and the Arts, and the
11 Department of Education, including the Higher Education Policy
12 Commission and the West Virginia Council for Community and
13 Technical College Education;

14 (3) 2010, the Department of Revenue and the Department of
15 Commerce;

16 (4) 2011, the Department of Environmental Protection and the
17 Department of Military Affairs and Public Safety and the Sentencing
18 Commission;

19 (5) 2012, the Department of Health and Human Resources,
20 including the Bureau of Senior Services; and

21 (6) 2013, the Department of Transportation.

22 **CHAPTER 61. CRIMES AND THEIR PUNISHMENT.**

23 **ARTICLE 13. WEST VIRGINIA SENTENCING COMMISSION.**

24 **§61-13-1. Creation of sentencing commission; how members are**

25 **appointed; no compensation for service of members;**

26 **terms of office for members; what constitutes**

1 quorum; how chairperson elected; Executive

2 Director.

3 (a) There is hereby created a West Virginia Sentencing
4 Commission.

5 (b) Such commission consists of the following members, who
6 shall serve without compensation:

7 (1) One member is the Chairperson of the Governor's Committee
8 on Crime and Delinquency, who shall serve as an ex officio member;

9 (2) Two members are from the West Virginia House of Delegates,
10 to be appointed by the Speaker of the House;

11 (3) Two members are members of the West Virginia Senate, to be
12 appointed by the President of the Senate;

13 (4) Seven members are current or retired circuit judges,
14 magistrates or municipal court judges, to be appointed to their
15 membership on this commission by the Governor;

16 (5) Two members are citizens of the State of West Virginia,
17 with no required prerequisite other than citizenship in this state, to
18 be appointed by the Governor;

19 (6) One member is the presiding Chief Justice of the West
20 Virginia Supreme Court of Appeals, who shall serve as an ex officio
21 member.

22 (c) Each member serves a two-year term, with the exception of
23 the ex officio members who shall serve as long as they shall hold
24 their respective offices.

25 (d) The chairperson of this commission shall be elected by the
26 other members of the commission.

1 (e) Eight members of the commission constitute a quorum.

2 (f) The Executive Director of the Governor's Committee on Crime
3 and Delinquency shall serve as the Executive Director of this
4 Sentencing Commission and will provide administrative services.

5 **§61-13-2. Purpose of Sentencing Commission.**

6 The Legislature hereby finds and declares that:

7 (a) There is a need for fair and uniform sentencing;

8 (b) There is a need for research on issues regarding sentencing
9 in order to promote a fuller understanding of the efficient, just
10 and fair operation of this state's criminal justice system;

11 (c) There is a need for establishing priorities with regard to
12 the severity of the criminal offenses and, in accordance with such
13 established priorities, to consider alternatives to incarceration
14 for nonviolent offenders;

15 (d) There is a need to utilize the limited correctional
16 resources in a manner best able to fulfill the goals of criminal
17 punishment and protect the public.

18 **§61-13-3. Objectives of the commission.**

19 The Sentencing Commission shall pursue the following
20 objectives:

21 (a) Promoting sentencing that more accurately reflects the time
22 that an offender will actually be incarcerated;

23 (b) Concentrating prison capacity on the incarceration of
24 violent and career offenders;

25 (c) Reducing unwarranted disparity in sentences for offenders
26 who have committed similar offenses and have similar

1 criminal histories;

2 (d) Preserving meaningful judicial discretion in the imposition
3 of sentences and sufficient flexibility to permit individualized
4 sentences;

5 (e) Ensuring that sentencing judges in every jurisdiction in
6 the state are able to impose the most appropriate criminal
7 penalties including correctional options programs for appropriate
8 nonviolent offenders; and

9 (f) Determining whether the state needs to set out all criminal
10 offenses in terms of priority in order of severity and harm to
11 society and to provide alternatives to incarceration for certain
12 offenses.

13 **§61-13-4. Powers and duties of the commission.**

14 The Sentencing Commission established pursuant to this article
15 has the following powers and duties:

16 (a) The commission shall establish general policies and propose
17 rules for legislative approval in accordance with article three,
18 chapter twenty-nine-a of this code as are necessary to carry out
19 the purposes of this section;

20 (b) The commission may request such information, data and
21 reports from any officer or agency of the state government as the
22 commission may from time to time require and as may be produced
23 consistent with other law;

24 (c) The commission may issue invitations requesting the
25 attendance and testimony of witnesses and the production of any
26 evidence that relates directly to a matter with respect to which

1 the commission or any member thereof is empowered to make a
2 determination under this article;

3 (d) The commission shall establish a research and development
4 program within the commission for the purpose of:

5 (1) Serving as a clearinghouse and information center for the
6 collection, preparation and dissemination of information on
7 sentencing practices;

8 (2) Assisting and serving in a consulting capacity to state
9 courts, departments and agencies in the development, maintenance
10 and coordination of sound sentencing practices;

11 (e) The commission shall collect systematically the data
12 obtained from studies, research and the empirical experience of
13 public and private agencies concerning the sentencing processes;

14 (f) The commission shall publish data concerning the sentencing
15 process;

16 (g) The commission shall collect systematically and disseminate
17 information concerning sentences actually imposed;

18 (h) The commission shall, collect systematically and
19 disseminate information regarding effectiveness of sentences
20 imposed;

21 (i) The commission shall make recommendations to the
22 Legislature concerning modification or enactment of sentencing and
23 correctional statutes which the commission finds to be necessary
24 and advisable to carry out an effective, humane and rational
25 sentencing policy;

26 (j) The commission shall establish a plan and timetable to

1 collect and disseminate information relating to incapacitation,
2 recidivism, deterrence and overall effectiveness of sentences imposed;

3 (k) The commission shall evaluate the state's sentencing and
4 correctional laws and policies and make recommendations to the
5 Governor and the Legislature on or before January 1, 2010, and at
6 its discretion thereafter, regarding the following issues:

7 (1) Whether the state should adopt guided discretion sentencing
8 guidelines and, if so, what type of guided discretion sentencing
9 guidelines should be adopted;

10 (2) Whether the state should retain parole as a correctional
11 option for all inmates or any particular category of inmates;

12 (3) Whether the state should determine the minimum portion of
13 a sentence that must be served by all inmates or any particular
14 category of inmates before becoming eligible for parole;

15 (4) Whether the state should alter the manner in which an
16 inmate may obtain credit for good time served or release on
17 mandatory supervision;

18 (5) Whether the state needs to take action to ensure that there
19 is a coordinated system of correctional options to incarceration at
20 the state and county levels and, if so, what action should be
21 taken; and

22 (6) Any other matters relating to state and local laws and
23 policies governing sentencing, parole, mandatory supervision and
24 correctional options programs.

NOTE: The purpose of this bill is to create a Sentencing Commission and setting forth its membership, responsibilities, powers and duties. The bill also requires that the commission evaluate the state's sentencing and correctional laws and policies and make recommendations to the Governor and the Legislature.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.

Exhibit 4
Reducing Crime With Evidence-Based Options: What Works, and Benefits & Costs

Washington State Institute for Public Policy Estimates as of October, 2006	Effect on Crime Outcomes Percent change in crime outcomes, & the number of evidence-based studies on which the estimate is based (in parentheses) (1)	Benefits and Costs (Per Participant, Net Present Value, 2006 Dollars)			
		Benefits to Crime Victims (of the reduction in crime) (2)	Benefits to Taxpayers (of the reduction in crime) (3)	Costs (marginal program cost, compared to the cost of alternative) (4)	Benefits (total) Minus Costs (per participant) (5)
		Notes: "n/e" means not estimated at this time. Prevention program costs are partial program costs, pro-rated to match crime outcomes.			
Programs for People in the Adult Offender System					
Vocational education in prison	-9.0% (4)	\$8,114	\$6,806	\$1,182	\$13,738
Intensive supervision: treatment-oriented programs	-16.7% (11)	\$9,318	\$9,369	\$7,124	\$11,563
General education in prison (basic education or post-secondary)	-7.0% (17)	\$6,325	\$5,306	\$962	\$10,669
Cognitive-behavioral therapy in prison or community	-6.3% (25)	\$5,658	\$4,746	\$105	\$10,299
Drug treatment in community	-9.3% (6)	\$5,133	\$5,495	\$574	\$10,054
Correctional industries in prison	-5.9% (4)	\$5,360	\$4,496	\$417	\$9,439
Drug treatment in prison (therapeutic communities or outpatient)	-5.7% (20)	\$5,133	\$4,306	\$1,604	\$7,835
Adult drug courts	-8.0% (57)	\$4,395	\$4,705	\$4,333	\$4,767
Employment and job training in the community	-4.3% (16)	\$2,373	\$2,386	\$400	\$4,359
Electronic monitoring to offset jail time	0% (9)	\$0	\$0	-\$870	\$870
Sex offender treatment in prison with aftercare	-7.0% (6)	\$6,442	\$2,885	\$12,585	-\$3,258
Intensive supervision: surveillance-oriented programs	0% (23)	\$0	\$0	\$3,747	-\$3,747
Washington's Dangerously Mentally Ill Offender program	-20.0% (1)	\$18,020	\$15,116	n/e	n/e
Drug treatment in jail	-4.5% (9)	\$2,481	\$2,656	n/e	n/e
Adult boot camps	0% (22)	\$0	\$0	n/e	n/e
Domestic violence education/cognitive-behavioral treatment	0% (9)	\$0	\$0	n/e	n/e
Jail diversion for mentally ill offenders	0% (11)	\$0	\$0	n/e	n/e
Life Skills education programs for adults	0% (4)	\$0	\$0	n/e	n/e
Programs for Youth in the Juvenile Offender System					
Multidimensional Treatment Foster Care (v. regular group care)	-22.0% (3)	\$51,828	\$32,915	\$6,945	\$77,798
Adolescent Diversion Project (for lower risk offenders)	-19.9% (6)	\$24,328	\$18,208	\$1,913	\$40,623
Family Integrated Transitions	-13.0% (1)	\$30,708	\$19,502	\$9,665	\$40,545
Functional Family Therapy on probation	-15.9% (7)	\$19,529	\$14,617	\$2,325	\$31,821
Multisystemic Therapy	-10.5% (10)	\$12,855	\$9,622	\$4,264	\$18,213
Aggression Replacement Training	-7.3% (4)	\$8,897	\$6,659	\$897	\$14,660
Teen courts	-11.1% (5)	\$5,907	\$4,238	\$936	\$9,208
Juvenile boot camp to offset institution time	0% (14)	\$0	\$0	-\$8,077	\$8,077
Juvenile sex offender treatment	-10.2% (5)	\$32,515	\$8,377	\$33,064	\$7,829
Restorative justice for low-risk offenders	-8.7% (21)	\$4,628	\$3,320	\$880	\$7,067
Interagency coordination programs	-2.5% (15)	\$3,084	\$2,308	\$205	\$5,186
Juvenile drug courts	-3.5% (15)	\$4,232	\$3,167	\$2,777	\$4,622
Regular surveillance-oriented parole (v. no parole supervision)	0% (2)	\$0	\$0	\$1,201	-\$1,201
Juvenile intensive probation supervision programs	0% (3)	\$0	\$0	\$1,598	-\$1,598
Juvenile wilderness challenge	0% (9)	\$0	\$0	\$3,085	-\$3,085
Juvenile intensive parole supervision	0% (10)	\$0	\$0	\$6,460	-\$6,460
Scared Straight	+6.8% (10)	-\$8,355	-\$6,253	\$58	-\$14,567
Counseling/psychotherapy for juvenile offenders	-18.9% (6)	\$23,126	\$17,309	n/e	n/e
Juvenile education programs	-17.5% (3)	\$41,181	\$26,153	n/e	n/e
Other family-based therapy programs	-12.2% (12)	\$15,006	\$11,231	n/e	n/e
Team Child	-10.9% (2)	\$5,759	\$4,131	n/e	n/e
Juvenile behavior modification	-8.2% (4)	\$19,271	\$12,238	n/e	n/e
Life skills education programs for juvenile offenders	-2.7% (3)	\$6,441	\$4,091	n/e	n/e
Diversion progs. with services (v. regular juvenile court)	-2.7% (20)	\$1,441	\$1,034	n/e	n/e
Juvenile cognitive-behavioral treatment	-2.5% (8)	\$3,123	\$2,337	n/e	n/e
Court supervision vs. simple release without services	0% (8)	\$0	\$0	n/e	n/e
Diversion programs with services (v. simple release)	0% (7)	\$0	\$0	n/e	n/e
Juvenile intensive probation (as alternative to incarceration)	0% (5)	\$0	\$0	n/e	n/e
Guided Group Interaction	0% (4)	\$0	\$0	n/e	n/e
Prevention Programs (crime reduction effects only)					
Nurse Family Partnership-Mothers	-56.2% (1)	\$11,531	\$8,161	\$5,409	\$14,283
Nurse Family Partnership-Children	-16.4% (1)	\$8,632	\$4,922	\$733	\$12,822
Pre-K education for low income 3 & 4 year olds	-14.2% (8)	\$8,145	\$4,644	\$593	\$12,196
Seattle Social Development Project	-18.6% (1)	\$1,605	\$4,341	n/e	n/e
High school graduation	-10.4% (1)	\$1,738	\$2,851	n/e	n/e
Guiding Good Choices	-9.1% (1)	\$570	\$2,092	n/e	n/e
Parent-Child Interaction Therapy	-3.7% (1)	\$268	\$784	n/e	n/e
Program types in need of additional research & development before we can conclude they do or do not reduce crime outcomes:					
Programs needing more research for people in the adult offender system					
Case management in the community for drug offenders	0% (13)	Comment Findings are mixed for this broad grouping of programs.			
COSA (Faith-based supervision of sex offenders)	-22.3% (1)	Too few evaluations to date.			
Day fines (compared to standard probation)	0% (1)	Too few evaluations to date.			
Domestic violence courts	0% (2)	Too few evaluations to date.			
Faith-based programs	0% (5)	Too few evaluations to date.			
Intensive supervision of sex offenders in the community	0% (4)	Findings are mixed for this broad grouping of programs.			
Medical treatment of sex offenders	-21.4% (1)	Too few evaluations to date.			
Mixed treatment of sex offenders in the community	0% (2)	Too few evaluations to date.			
Regular parole supervision vs. no parole supervision	0% (1)	Too few evaluations to date.			
Restorative justice programs for lower risk adult offenders	0% (6)	Findings are mixed for this broad grouping of programs.			
Therapeutic community programs for mentally ill offenders	-20.8% (2)	Too few evaluations to date.			
Work release programs (from prison)	-4.3% (4)	Too few recent evaluations.			
Programs needing more research for youth in the juvenile offender system					
Dialectical Behavior Therapy	0% (1)	Too few evaluations to date.			
Increased drug testing (on parole) vs. minimal drug testing	0% (1)	Too few evaluations to date.			
Juvenile curfews	0% (1)	Too few evaluations to date.			
Juvenile day reporting	0% (2)	Too few evaluations to date.			
Juvenile jobs programs	0% (3)	Too few recent evaluations.			
Juvenile therapeutic communities	0% (1)	Too few evaluations to date.			
Mentoring in juvenile justice	0% (1)	Too few evaluations to date.			