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

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

February 3, 2023

State of West Virginia
Jim Justice, Governor

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

DIVISION OF ADMINISTRATIVE SERVICES
Justice & Community Services

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Mission and Purpose

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

Administration and Staffing

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

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

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

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

Ronni Sheets, Chair
Chief Public Defender
13th Judicial Circuit

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

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

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

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

Catie Wilkes Delligatti
Prosecuting Attorney
Berkeley County

Edmund J. Rollo
Attorney at Law

The Honorable David Kelly
Delegate
West Virginia Legislature

Sheriff Brett Carpenter
West Virginia Sheriff's Association

Melissa Richmond
President
West Virginia Association of Addiction and Prevention Professionals

The Honorable Charles H. Clements
Senator
West Virginia Legislature

Hedrick "Bo" Miller
West Virginia Chiefs of Police Association

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

Justice and Community Services Staff

Joseph Thornton, Deputy Director
Jeff Estep, Assistant Director
Marty Hatfield, Criminal Justice Program Manager
Randall Shoemake, Strategic Planner
Melissa McDowell, Administrative Secretary
Wendy Fink, Administrative Secretary
Ryan Carper, Criminal Justice Specialist
Ian Jones, Criminal Justice Specialist
Dr. Catie Clark, Research Director
Nick Martin, Research Analyst
Erica Turley, Research Analyst
Christopher Walker Akers, Research Analyst

Work of the Sentencing Commission to this Point

Building off the work that the Sentencing Commission completed in 2021, including the annual report of the Commission and recommendations of changes to the West Virginia criminal code, Commission members met in February 2022 to resume addressing the remaining objectives outlined by the West Virginia Legislature in West Virginia Code §15-9c-4. During this meeting, it was raised that several members of the West Virginia Legislature had informed Sentencing Commission members that they were unaware that the annual report had been submitted in December 2021. A motion was made and passed unanimously that the 2021 report should be emailed to all members of the Legislature. Additionally, the Commission agreed that a letter should be drafted to the Legislature urging the rejection of H.B. 4006 and the adoption of recommendations included in the annual report.

Meetings in the first half of 2022 included open discussions on the status of H.B. 4006, the desire of members to hold some future meetings in-person, membership, and a presentation by Carl Reynolds and Laura van der Lugt from the Council of State Government's Justice Center on sentencing reform and revocation guidelines.

In May the Sentencing Commission unanimously voted to appoint Ronni Sheets as the Chair and Perri DeChristopher as Vice Chair. Hedrick "Bo" Miller was introduced as the representative selected by the West Virginia Chiefs of Police Association to fill their vacant position on the Commission. Members also decided to analyze West Virginia code for inconsistencies and to provide recommendations to the Legislature for correcting those identified inconsistencies. Five subcommittees were formed, with members selected to lead each subcommittee and provide updates to the full Sentencing Commission at future meetings. The subcommittees and their respective leads are as follows:

- Parole Eligibility and Extended Supervision – Ronni Sheets
- Sex Crimes - Perri DeChristopher
- Crimes Against Persons – Catie Wilkes Delligatti
- Drug Crimes – Judge Robert E. Richardson
- Property Crimes – John Taylor

Meetings through October 2022 included updates from each of the respective subcommittee leads, including analysis and findings of their respective topics. Commission members decided to hold an in-person meeting in Morgantown in August 2022. At the September meeting, Dr. Catie Clark was introduced to the Commission as the new Director of the Office of Research and Strategic Planning (ORSP) within Justice and Community Services. Dr. Clark and the ORSP staff will be taking over as primary staff of the Sentencing Commission, rather than Justice and Community Services (JCS) program staff. It was also decided to hold an in-person meeting in October. A poll was distributed to members to determine the date and location of the meeting. The October meeting was held in-person at the Justice and Community Services office in Charleston. Commissioners decided to continue to complete the legislative report primary through a working group of members, with the final report to be drafted and voted upon by Commissioners. In December, Vice Chair Perri DeChristopher was appointed to the 17th Judicial Court Circuit as the Monongalia

County Prosecuting Attorney. A replacement, Rachel Romano, Prosecuting Attorney for Harrison County, was selected by the West Virginia Prosecuting Attorneys Association to fill the vacancy left by Vice Chair DeChristopher.

At this point in the Commission's work, it can make the following recommendations to the Legislature.

Current Recommendations

The Sentencing Commission's 2021 Report to the Legislature projected three principal areas of work during 2022:

> First, the Commission plans to establish a framework for better data collection on sentencing practices and their effectiveness in West Virginia through consultation with experts in other states and stakeholders within West Virginia, as outlined in Recommendation Five.
>
> Second, the Commission plans to continue efforts to identify proposed revisions to specific sections of the criminal code, proceeding along the same lines as the recommendations for non-violent theft offenses identified in this Report.
>
> Third, the Commission plans to continue study with the goal of making recommendations about the appropriate framework for any global sentencing reforms that might take place in West Virginia. Specifically, the Commission will address three critical questions identified by the Legislature in § 15-9C-4:
>
> (1) Should West Virginia move away from its current mix of indeterminate and determinate sentencing to a scheme that is primarily or exclusively determinate?
>
> (2) Should West Virginia create classes of felony and misdemeanor offenses to make sentences for various offenses more consistently proportionate to the severity of social harm caused by those offenses?
>
> (3) Should West Virginia adopt discretionary sentencing guidelines to reduce sentencing disparities while still allowing judges sufficient flexibility to tailor sentences to an individual's particular circumstances?

During 2022, the Commission made significant progress on the second and third of these goals. This 2022 Annual Report of the West Virginia Sentencing Commission reports on our work during the past year. It is divided into four parts:

Part I: Analysis of Possible Changes to West Virginia's Overall Sentencing Structure

Part II: Specific Recommendations Regarding Statutory Changes and Other Matters

Part III: Update on Data Collection and Analysis

Part IV: Recommendation Regarding Extending Sunset Date of the Sentencing Commission

Part I. Analysis of Possible Changes to West Virginia's Overall Sentencing Structure

In the Commission's December 2021 Report to the Legislature, the Commission's third goal was to make recommendations about the appropriate framework for any global sentencing reforms that might take place in West Virginia. Over the past year, the Commission has had the opportunity to study the history of sentencing policy in the United States and the scholarly literature regarding sentencing reforms. In doing so, we have paid close attention to the Legislature's articulation of its goals for sentencing reform as expressed in HB 4004, the bill that created this Sentencing Commission. These goals, as we understand them, are:

(1) *to reduce disparities* in sentencing and promote consistency in actual time served in prison or jail for offenders who have committed similar crimes and have similar criminal histories.

(2) to promote sentencing that *more accurately predicts the time an offender will be incarcerated*. We take this goal to include two slightly different ideas: that the amount of time an offender will serve should be reliably predictable at the time of sentencing, and that the amount of time served should be close to the sentence pronounced by the trial court. These goals might be described as predictability and transparency of sentencing.

(3) to give judges *meaningful discretion in the imposition of sentences* such that they have the flexibility to take individual circumstances into account. Obviously, there is some tension between the goals of reducing disparities and providing flexibility, but there is widespread agreement that both goals are important and that some balance between them must be struck. The Commission takes this legislative goal as an implicit recommendation that trial judges be given greater power over sentencing than they currently have.

(4) to structure the overall system of criminal penalties in the West Virginia Criminal Code so that the *penalties for various offenses appropriately track the social harm caused by those offenses*.

(5) to *use correctional resources efficiently* such that courts can appropriately use a full range of sentencing options from incarceration to alternative sentencing. As West Virginia's prisons and jails are at capacity now, the State should pursue

sentencing reforms that will not increase overall levels of incarceration or require ever greater expenditures on housing people in correctional facilities.

To date, we have been unable to reach a consensus on a set of global changes to West Virginia's sentencing system that would achieve all these goals. We are in full agreement that simply moving to a system of determinate sentencing or creating offense classes without a system of well-designed, presumptive sentencing guidelines will not achieve the Legislature's goals. Most importantly, determinate sentencing *without* the structure provided by presumptive sentencing guidelines will *increase* disparities in sentencing and time served. We have not yet achieved consensus, however, on whether a presumptive guidelines system is an improvement over the current structure.

In this section of our Report, we will:

(1) explain the structural features of West Virginia's current approach to sentencing in the context of historical trends and current practice in other jurisdictions;

(2) explain the features of a good presumptive guidelines system and how such a system would include a shift to determinate sentencing and offense classes; and

(3) explain why a shift to determinate sentencing and offense classes *without* a guidelines system would do more harm than good.

One topic of discussion in this Report will be the option of creating a system of determinate sentencing in which judges are guided by a comprehensive set of *presumptive* sentencing guidelines based on the severity of the convicted person's crime and their criminal history, as shown by a record of prior convictions. Some members of the Commission support the creation of a presumptive guidelines system; others do not. But we all agree on two things about sentencing guidelines:

First, we all agree that *if* West Virginia does move towards guidelines, the guidelines must be well-designed. It is not possible to just adopt another state's system in a cut-and-paste manner. To design a good system that works for West Virginia would require significant time, expertise, and resources.

Second, and more specifically, we all agree that creating a good guidelines system would require a Sentencing Commission permanently staffed with attorneys who have criminal law and sentencing expertise and whose full-time job would be the design, oversight, assessment, and improvement of a sentencing guidelines system. The current Sentencing Commission, in contrast, is a volunteer body composed of individuals with demanding full-time jobs who are attempting to advise the Legislature in their spare time. Volunteers like those on the current Commission could helpfully serve as an Advisory Board, but they could not do the large volume of detailed work that would need to be done. While the present Commission has staff support for which it is grateful, that staff has expertise in criminology and data analysis. They are not lawyers, and they would be the first to say they

are not the right people to be crafting a sentencing guidelines system. There is no possibility, then, that the Sentencing Commission and/or its staff as currently constituted could create a well-designed system of presumptive sentencing guidelines. It is equally unrealistic to think the Legislature and its staff have the time and expertise to do the job. If the job is going to be done and done properly, it would require the creation of a permanent Sentencing Commission with the necessary time and expertise. This, in turn, would require a significant commitment of resources that would be sustained over time.

We recognize that this is not the most welcome message in an environment of fiscal constraint, but we think it important to emphasize up front that pursuing effective sentencing reforms will be neither easy nor cheap. Conversely, sentencing reforms that seem easy and cheap are unlikely to be effective. Specifically, the Commission is uniformly skeptical that the Legislature's sentencing reform goals can be advanced through any system of offense classification or determinate sentencing without the adoption of presumptive sentencing guidelines and the creation of a permanent, adequately funded Sentencing Commission. If we as a State are not able to put the necessary resources behind sentencing reform, we would be better off to leave the structural features of our current system unchanged and focus on the types of discrete statutory changes suggested in Part II of this Report.

Overview of West Virginia's Current Sentencing Structure

West Virginia's current sentencing system has the following features:

- sentencing for the vast majority of criminal offenses is indeterminate, while a small number of offenses instead require determinate sentences;
- there are no sentencing guidelines;
- statutory sentencing ranges are determined crime by crime – there are no offense classes;
- the vast majority of incarcerated persons are eligible for parole consideration before the end of their sentences of confinement. In the parlance of the sentencing literature, West Virginia has "parole release discretion;"
- incarcerated persons who follow prison rules receive "good time credit" of a one-day reduction in the maximum length of their prison or jail stays for each day served. In other words, normal good time credits can and usually do reduce a person's time in prison or jail by 50%. For example, a person sentenced to 15 years in prison would almost never serve more than 7.5 years behind bars.

a. Indeterminate Sentencing in West Virginia

An "indeterminate" sentence means that the statute will specify a sentence of, e.g., 3 to 10 years in prison, and the trial judge formally sentences the convicted person to a term of "3 to 10 years." While the judge may recommend a specific term of imprisonment within the statutory range – e.g., 6 years – this is treated as a mere recommendation to the Parole Board, and the judicial option to recommend a sentence is rarely used with indeterminate sentences.

As a result, the functional sentence is "3 to 10 years" whether the trial judge recommends a more specific sentence or not.

The actual time served under an indeterminate sentence will be determined by a combination of "good time credits" (i.e., incarcerated persons receive credit against their maximum sentence for not violating prison rules) and the discretionary release decisions of the Parole Board.

For most offenses, good time credits presumptively reduce the maximum time served on an indeterminate sentence to half the statutory maximum sentence for that crime. (Incarcerated persons can lose their presumptive good time credit if prison officials determine that they have violated prison rules; they can also earn small amounts of good time credit for participation in certain programs geared toward rehabilitation.) To continue the example, presumptive good time credits applied to an indeterminate sentence of 3 to 10 years will mean that the maximum time served will effectively be 5 years – perhaps a bit more or a bit less depending on whether good time credits are lost, or additional program participation credits are gained.

For indeterminate sentences, the statutory minimum sentence determines the point of initial eligibility for parole consideration. E.g., a person sentenced to an indeterminate term of 3 to 10 years would become eligible for parole after serving 3 years.

Summing up, then, the effect of good time credits and the parole eligibility rules for indeterminate sentences will produce an "effective sentencing range" that is lower than the statutory range. E.g., an indeterminate sentence of "3 to 10 years" will (assuming the standard award of good time credits) translate into an effective sentencing range of 3 to 5 years. The actual release date within that window will be determined by the Parole Board.

One useful way to think about the differences among sentencing systems is to ask how the systems allocate authority among three key decisionmakers: parole boards, judges, and prison officials. A key feature of indeterminate sentencing is that it gives parole boards a great deal of discretionary authority over an offender's time in prison as they decide the release date within the effective sentencing range. (E.g., an indeterminate sentence of 3-to-10 years with normal good time credits results in an effective range of 3-to-5 years, and the parole board decides where the release date should fall in that 3-to-5-year window.) In contrast, a trial judge sentencing a convicted person to an indeterminate sentence for a single offense can at most recommend an appropriate time for release, and in West Virginia trial judges rarely make such recommendations. (Trial judges, however, do have significant authority over the length of time served when sentencing a person convicted of more than one offense, as judges have broad discretion to decide whether the sentences for multiple offenses will run consecutively or concurrently.)

Overall, then, West Virginia's present system of predominantly indeterminate sentencing gives the greatest discretionary authority over time served to the Parole Board. Determinate sentences, in contrast, increase the authority of trial judges relative to the Parole Board.

b. Determinate Sentencing in West Virginia

While most West Virginia crimes carry indeterminate sentences, a relatively small number of crimes instead carry determinate sentences. For example, first degree arson (§ 61-3-1) calls for convicted persons to be sentenced to a "definite term of imprisonment which is not less than two nor more than twenty years." Upon conviction of first-degree arson, then, the trial judge will impose a sentence of, e.g., 12 years. That sentence *does* constrain the Parole Board as the judge's sentence now displaces the statutory maximum as the ceiling on the amount of time a person can serve for first degree arson. As with indeterminate sentences, the effective sentencing range for determinate sentences will be affected by good time credits and parole release discretion, but these provisions will now operate somewhat differently.

To illustrate: suppose a judge imposes a determinate sentence of 12 years for first degree arson. West Virginia's presumptive "good time credits" scheme will now operate on that figure to create an effective maximum time served of 6 years (assuming standard good time credits). West Virginia law provides that the minimum date for parole eligibility is one fourth (¼) of the determinate sentence imposed, which in our example would be 3 years. Consequently, a convicted person sentenced to a 12-year determinate sentence will (assuming standard good time credits) have an effective sentencing range of 3 to 6 years. The actual release date for the convicted person in the 3-to-6-year range will be determined by the Parole Board. In contrast, if first degree arson instead carried an indeterminate sentence of two to twenty years and the trial judge merely recommended a 12-year sentence, the Parole Board would have discretion to pick a release date anywhere between 2 years and 10 years. The determinate sentence shifts some control over actual time served away from the Parole Board and toward the trial judge.

To sum up, judges have significantly more discretionary authority to control a person's actual time served in a determinate sentencing system than in an indeterminate one. In sentencing regimes with determinate sentencing, parole release discretion, and good time credits, judges share that discretionary authority with parole boards and prison officials. [1]

That will suffice as a basic description of current West Virginia sentencing. We now turn to examine the likely effects of changing various structural features of our current system.

Analysis of Effects of Various Possible Sentencing Reforms in West Virginia

a. Adopting a Regime of Primarily or Exclusively Determinate Sentencing

Until the 1970s, essentially all states had indeterminate sentencing regimes in which parole boards exercised most of the control over a person's release date. Since that time, the

[1] This description focuses on power and discretion determining prison time in relation to conviction for specified offenses. From a broader perspective, discretion is pervasive in the criminal justice system. Perhaps most significantly, prosecutors have considerable indirect control over sentencing through the power they exercise in charging decisions and plea bargaining.

trend has been to shift the balance of sentencing power toward judges by adopting more determinate sentencing regimes. The effects of a move to determinate sentencing, however, depend on other factors in the sentencing system.

To isolate the likely effects of a possible shift toward determine sentencing, we first assume that this shift would be the only structural change to West Virginia's sentencing system. All other factors – the statutory sentence ranges for crimes, parole release discretion, good time, absence of sentencing guidelines – would remain the same.

By itself – i.e., without changes in the other variables – a shift from indeterminate to determinate sentencing would be unlikely to significantly increase the overall length of time people spend behind bars in West Virginia and thus unlikely to overly tax correctional resources. Determinate sentences still must respect the statutory maximum penalties for specific crimes and so cannot by themselves result raise the upper limit on the amount of time a convicted person spends in prison. Determinate sentences, however, can lower the upper limit on the time a convicted person will serve when judges impose a determinate sentence below the statutory maximum. Determinate sentencing would lengthen the time to parole eligibility for offenders in instances where the determinate sentence imposed is high enough in the statutory range that one quarter of that sentence is higher than the statutory minimum. (E.g., if the statutory range is one to ten, a determinate sentence of ten years moves the initial parole eligibility date to two- and one-half years versus one year parole eligibility for an indeterminate sentence.) But some delays in parole eligibility would likely to be offset by determinate sentences shortening the maximum period of incarceration. And in any event, requiring a person convicted of a crime to serve 25% of his/her sentence prior to parole eligibility is reasonable.

The problem with a change to determinate sentences in isolation is that even if the change wouldn't make punishments longer overall and thus wouldn't overtax correctional resources, it *would* make punishments more arbitrary and inconsistent. Judges would have to decide what length of sentence to impose within the statutory range without any guiding criteria, and it is inevitable that 75 circuit judges across West Virginia would diverge significantly in how they sentence people who have been convicted of similar crimes and have similar criminal histories. Unstructured determinate sentencing adds more disparity to the sentencing system by introducing a second layer of discretion on top of the discretion already present in parole board decisions. And whereas parole decisions are made by a nine-member board operating in panels of three – *with* a set of parole release guidelines – determinate sentencing would ask 75 different circuit judges to make decisions without guidelines or appellate review. This would not reduce disparities in sentencing; it would increase them. Nor would it increase the predictability of sentences, which is the second legislative goal we have identified. For these reasons, the Commission believes that adopting determinate sentencing without guidelines, as proposed in HB 2017, would not serve the Legislature's goals.

b. Possible Adoption of Sentencing Guidelines

Some members of the Commission favor a system of determinate sentencing over our current system of primarily indeterminate sentences, but *only* if such a system is accompanied with well-designed sentencing guidelines. The Commission strongly recommends against any change to determinate sentencing without a carefully crafted set of sentencing guidelines. While there is much to be said for giving trial judges a greater voice in sentencing, good guidelines are essential to avoid unfair sentencing disparities, while preserving enough flexibility for judges to tailor their sentences to do justice in the individual case.

As the Commission is not unanimous about the desirability of adopting sentencing guidelines, we limit ourselves in this section to discussing some of the features that a good guidelines system ought to have. Most importantly, a well-designed guidelines system needs to strike the proper balance between constraint and flexibility.

Broadly speaking, guidelines systems can be categorized on a continuum from *mandatory* systems (i.e., giving judges little or no ability to depart from guidelines ranges) on one end to *advisory* or *voluntary* systems (i.e., treating guidelines sentences as mere recommendations that judges may follow or ignore as they choose) on the other. The middle territory between mandatory and advisory guidelines systems can be characterized as *presumptive* guidelines systems, which can themselves take many different forms. The basic idea of a presumptive guidelines system is that judges have authority to depart up or down from normal guidelines ranges in some situations, but they must offer some justification for the departure. Presumptive systems generally include some judicial review of sentencing departures, but the review normally shows some level of deference to the trial court's sentencing judgments.

Some members of the Commission believe that the model of determinate sentences structured by well-designed presumptive sentencing guidelines could serve all the Legislature's goals as identified in the opening of this Report. Such a system could increase the authority of judges relative to that of parole boards, it could reduce sentencing disparities while preserving needed flexibility, it could make actual time served more predictable and (depending on other choices) at least somewhat more transparent, it could tailor penalties to offense severity and criminal history, and it could be a valuable tool in managing correctional resources.

Construction of a good guidelines system would require decisions about a great many details, and there is no clear evidence that a single "right" choice exists for many issues. Structuring a presumptive guidelines system that strikes the right balance between constraint and flexibility is not easy. While the devil is in the details to a significant extent, the Commission believes that if the Legislature elects to pursue a system of sentencing guidelines at all, that system ought to have the following general features:

1) Sentencing guidelines should consider the seriousness of the offense, including assessment of victim impact, and the offender's criminal history.

2) Guidelines should establish presumptive sentencing ranges for typical instances of various crimes and allow for structured consideration of aggravating and mitigating factors.

3) Criminal history scores should be based on an offender's record of past convictions. Only the Federal Guidelines allow sentencing courts to consider other "relevant conduct" that did not result in a criminal conviction, and this feature of the Federal Guidelines has been much criticized. No other state has followed suit.

4) Guidelines should address more than just the duration of sentences of imprisonment. Ideally, they should also guide dispositional discretion (e.g., whether a sentence of incarceration or probation is appropriate) and discretion regarding whether sentences should be served consecutively or concurrently.

5) Guidelines should provide an appropriate mix of guidance and flexibility, allowing judges to make upward or downward departures from the presumptive sentencing range and presumptive disposition more readily than the pre-2005 Federal Guidelines did.

6) Guidelines should be "presumptive" rather than purely advisory or voluntary. Making guidelines presumptive means requiring some justifications for judicial departures from recommended sentencing rages, but review of a trial judge's departures can be structured deferentially. There are a number of options for making presumptive guidelines ranges moderately enforceable. Choosing an existing option or fashioning some alternative option would be among many tasks that would need to be undertaken by a permanent, appropriately staffed and adequately resourced sentencing commission if the Legislature chooses to pursue a guidelines model.

7) Guidelines should incorporate tools designed to help the State manage its correctional resources. [2]

c. Offense Classes

A system of well-designed presumptive sentencing guidelines would necessarily involve offense classes. To our knowledge, all guidelines systems include an offense severity score and so involve a systematic effort to rank offenses in seriousness and to allocate

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[2] Professor Frase writes:

> Many guideline reforms have recognized the goals of managing prison and other correctional resources and avoiding prison overcrowding. Minnesota pioneered this approach, taking advantage of the greater uniformity and predictability of sentencing under guidelines and a sentencing commission's capacity to collect and analyze detailed data on sentencing practices. The Minnesota legislature directed the new commission to "take into substantial consideration… existing correctional resources, including but not limited to the capacities of local and state correctional facilities." The commission took this directive seriously and developed a prison bed impact model, which it used to ensure that predicted prison populations would stay within 95 percent of existing and expected (already-funded) prison capacity.

Frase, *Forty Years*, *supra*, at 87-88.

punishment accordingly. To our knowledge, guidelines state also typically have statutory offense classes. Often however, the guidelines are more specific and fine-grained than the statutory offense classes. (Though this is an extreme example, federal criminal law has five levels of statutory felonies, but the Federal Sentencing Guidelines have 43 levels of offense severity.) In such a system, it is really the sentencing guidelines rather than the statutory offense classes that do the lion's share of the work in making punishments track the severity of offenses. In any event, the Commission members who endorse presumptive sentencing guidelines also endorse the creation of offense classes as a natural part of a well-designed guidelines system.

Outside the context of a guidelines system, the value of offense classes is less clear. A majority of states have statutory offense classes, and the Model Penal Code has them, though West Virginia is far from alone in specifying sentences statute by statute. California and Massachusetts do the same.

Offense classes may offer some drafting benefits. They create an orderly organization of offenses by severity and provide a simple way to grade attempts in relation to completed offenses. In a non-guidelines state, there could also be real value in statutory offense classes if they were used as part of a systematic criminal code revision that sought to rank offenses by their levels of severity considering contemporary societal values. Without some groupings, the process becomes unmanageable.

On the other hand, simply translating the current offense penalties in West Virginia's criminal code into an offense class structure has less obvious value. The sentences in our code have developed piecemeal over a long period of time – they do not reflect a unified effort to rank offenses by seriousness at one time using the same set of criteria. Creating a system of offense classes and then slotting each crime into a class by picking the class closest to the existing statutory penalties is unlikely to yield benefits beyond easing statutory drafting. And where the offense classes have broad ranges and no sentencing guidelines exist, creating offense classes and determinate sentencing without guidelines may produce more sentencing disparities than shifting to determinate sentencing without guidelines but leaving the existing statutory penalties as they are.

The Commission's bottom line, then, is that offense classes may prove beneficial as an integral part of a well-designed guidelines system, and they may be useful in the context of a systematic rethinking of criminal penalties for purposes of a thorough code revision. Outside those contexts, the Commission sees only minor benefits from the use of offense classes, along with some possible harms. Any adoption of offense classes or determinate sentencing, without well-designed sentencing guidelines, would not advance the legislative objectives identified at the beginning of this discussion. Instead, it would risk increased disparities and decreased predictability.

d. Conclusion

Given the complexities and potential unforeseen problems with a major change in this State's sentencing structure, the Commission has been unable to reach a consensus on

whether a change to determinate sentencing structured by a set of presumptive sentencing guidelines would be desirable. In the event that the Legislature concludes that such a change is appropriate, however, the Commission strongly recommends that the Legislature first create a permanent sentencing commission with sufficient staff expertise and resources to draft and implement a set of presumptive sentencing guidelines with the features identified in the guidelines section above. Without such guidelines, the Commission is confident that neither determinate sentencing nor offense classes would materially advance the Legislature's goals in pursuing sentencing reform, and they could result in significant harm to the criminal justice system.

Part II: Specific Recommendations Regarding Statutory Changes and Other Matters

The Commission's second goal for 2022 was to continue efforts to identify proposed revisions to specific sections of West Virginia's criminal code that would improve the fairness and proportionality of sentencing in West Virginia as well as improve the criminal justice system in other ways. This process is ongoing, but the Commission is prepared to share the following recommendations. We have divided our recommendations into suggested statutory changes and other recommendations that would improve the workings of West Virginia's criminal justice system.

A. Recommended Statutory Changes

We begin by reiterating the recommendations made in last year's Commission Report regarding changes to existing sentences for non-violent theft offenses.

Recommendation 1: The Commission recommends that the West Virginia Legislature reduce the sentences for non-violent theft offenses from the current norm of an indeterminate penitentiary sentence of 1 to 10 years to an indeterminate penitentiary sentence of 1 to 5 years. We further recommend that for all nonviolent theft offenses, courts should retain the discretion to impose a jail sentence of up to one year in lieu of sending a convicted offender to a state prison.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) As used in this section:

(1) “Counterfeit credit card” means the following:

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

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

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

(3) "Traffic" means:

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

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

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

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

(2) It is unlawful for any person knowingly to obtain or attempt to obtain telephone or telegraph service or the transmission of a message, signal or other communication by telephone or telegraph, or over telephone or telegraph facilities, through the use of any fraudulent scheme, device, means or method, with intent to avoid payment of charges therefor.

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

less value, is guilty of a misdemeanor, and, upon conviction thereof, shall be confined in jail not more than one year or fined not more than two thousand five hundred dollars, or both.

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

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

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

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

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

It is unlawful for any person, firm or corporation to obtain any money, services, goods or other property or thing of value by means of a check, draft or order for the payment of money or its equivalent upon any bank or other depository, knowing at the time of the making, drawing, issuing, uttering or delivering of the check, draft or order that there is not sufficient funds on deposit in or credit with such bank or other depository with which to pay the same upon presentation. The making, drawing, issuing, uttering or delivery of any such check, draft or order, for or on behalf of any corporation, or its name, by any officer or agent of such corporation, shall subject such officer or agent to the penalties of this section to the same extent as though such check, draft or order was his own personal act, when such agent or officer knows that such corporation does not have sufficient funds on deposit in or credit with such bank or depository from which such check, draft or order can legally be paid upon presentment.

This section shall not apply to any such check, draft, or order when the payee or holder knows or has been expressly notified prior to the acceptance of same or has reason to believe

that the drawer did not have on deposit or to his credit with the drawee sufficient funds to ensure payment as aforesaid, nor shall this section apply to any postdated check, draft, or order.

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

A person who violates the provisions of this section, if the amount of the check, draft or order is less than ~~five hundred~~ two thousand dollars, is guilty of a misdemeanor, and, upon conviction thereof, the person shall be fined not more than two hundred dollars, or confined in jail not more than six months, or both. A person who violates the provisions of this section, if the amount of the check, draft or order is ~~five hundred~~ two thousand dollars or more, is guilty of a felony, and, upon conviction thereof, the person shall be ~~fined not more than five hundred dollars, or imprisoned in the penitentiary not less than one year nor more than ten years, or both:~~

(a) fined not more than five hundred dollars; or

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

(c) both fined under subsection (a) and imprisoned under subsection (b).

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

A person convicted of shoplifting shall be punished as follows:

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

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

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

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

(1) When the value of the merchandise is less than or equal to five hundred dollars, the person is guilty of a misdemeanor and shall be fined not ~~less than one hundred dollars nor~~ more than five hundred dollars~~, and such fine shall not be suspected, or the person shall be~~ or confined in jail not more than six months, or both.

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Any person ~~who knowingly, willfully and with intent to defraud possesses a counterfeit or unauthorized access device or~~ who knowingly, willfully and with intent to defraud, uses~~,~~ ~~produces, or traffics in~~ any counterfeit or unauthorized access device to obtain or attempt to obtain money, goods, services, or other things of value, shall be guilty of a felony ~~and, upon conviction thereof, shall be fined not more than ten thousand dollars or imprisoned in the penitentiary for not more than ten years, or both.~~ if the value of the money, goods, services, or other things of value obtained or sought to be obtained exceeds two thousand dollars. Upon conviction of this felony, he or she shall be:

(1) fined not more than two thousand five hundred dollars; or
(2) imprisoned in the penitentiary not less than one year nor more than five years or, in the discretion of the court, confined in jail not more than one year; or
(3) both fined and imprisoned.

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

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

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

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

Recommendation 4: (*carried over from 2021 Report*) During the 2021 Regular Session, the West Virginia Legislature enacted Senate Bill 713, with an effective date of April 30, 2021. SB 713 amended and reenacted W.Va. Code §15-4-17, which governs the deduction of time from sentences of incarceration for good conduct, commonly known as "good time." The

Sentencing Commission recommends that the Legislature reexamine the applicability of good time and parole to those sentenced under §62-12-26 considering the Supreme Court of Appeals' recent decision in *State ex rel. Phalen v. Roberts*, 245 W.Va. 311, 858 SE.2d 936 (2021.)

Recommendation 5: The Commission recommends that the Legislature reduce the sentences for second or subsequent failures of a sex offender to register or to update required information in the sex offender registry.

The recommended changes to the statute are marked below:

§ 15-12-8. Failure to register or provide notice of registration changes; penalty; penalty for aiding and abetting.

(a) Each time a person has a change in any of the registration information as required by this article and knowingly fails to register the change or changes, each failure to register each separate item of information changed shall constitute a separate offense under this section.

(b) Except as provided in this section, any person required to register for ten years pursuant to subdivision (1), subsection (a), section four of this article who knowingly provides materially false information or who refuses to provide accurate information when so required by the terms of this article, or who knowingly fails to register or knowingly fails to provide a change in any required information as required by this article, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than two hundred fifty dollars nor more than ten thousand dollars or confined in jail not more than one year, or both. Any person convicted of a second offense under this subsection is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for not less than one year nor more than five years. Any person convicted of a third or subsequent offense under this subsection is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for not less than two ~~five~~ nor more than ten ~~twenty-five~~ years.

(c) Any person required to register for life pursuant to this article who knowingly provides materially false information or who refuses to provide accurate information when so required by the terms of this article, or who knowingly fails to register or knowingly fails to provide a change in any required information as required by this article, is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for not less than one year nor more than five years. Any person convicted of a second or subsequent offense under this subsection is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for not less than two ~~five~~ nor more than ten ~~twenty-five~~ years.

(d) In addition to any other penalty specified for failure to register under this article, any person under the supervision of a probation officer, parole officer or any other sanction short of confinement in jail or prison who knowingly refuses to register or who knowingly fails to provide a change in information as required by this article shall be subject to immediate revocation of probation or parole and returned to confinement for the remainder of any suspended or unserved portion of his or her original sentence.

(e) Notwithstanding the provisions of subsection (c) of this section, any person required to register as a sexually violent predator pursuant to this article who knowingly provides materially false information or who refuses to provide accurate information when so required by terms of this article or who knowingly fails to register or knowingly fails to provide a change in any required information as required by this article is guilty of a felony and, upon conviction thereof, shall, for a first offense, be confined in a state correctional facility not less than two nor more than ten years and for a second or subsequent offense, is guilty of a felony and shall be confined in a state correctional facility not less than fifteen nor more than thirty-five years.

(f) Any person who knows or who has reason to know that a sex offender is not complying, or has not complied, with the requirements of this section and who, with the intent to assist the sex offender in eluding a law-enforcement agency that is seeking to find the sex offender to question the sex offender about, or to arrest the sex offender for, his or her noncompliance with the requirements of this section:

(1) Withholds information from, the law-enforcement agency about the sex offender's noncompliance with the requirements of this section and, if known, the whereabouts of the sex offender; or

(2) Harbors, or attempts to harbor, or assists another person in harboring or attempting to harbor, the sex offender; or

(3) Conceals or attempts to conceal, or assists another person in concealing or attempting to conceal, the sex offender; or

(4) Provides information to the law-enforcement agency regarding the sex offender which the person knows to be false information is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than two hundred fifty dollars nor more than ten thousand dollars or confined in jail not more than one year, or both: *Provided*, That where the person assists or seeks to assist a sex offender whose violation of this section would constitute a felony, the person shall be guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for not less than one year nor more than five years.

Recommendation 6: The Commission recommends that the Legislature change the definition of sexual contact in § 61-8b-1(6) and that the Legislature examine the age of marriage in relation to sexual offenses.

The relevant statutory changes are marked below, with explanatory notes:

§ 61-8B-1. Definition of terms
In this article, unless a different meaning plainly is required:

(1) “Forcible compulsion” means:

(a) Physical force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or

(b) Threat or intimidation, expressed or implied, placing a person in fear of immediate death or bodily injury to himself or herself or another person or in fear that he or she or another person will be kidnapped; or

(c) Fear by a person under sixteen years of age caused by intimidation, expressed or implied, by another person who is at least four years older than the victim. For the purposes of this definition "resistance" includes physical resistance or any clear communication of the victim's lack of consent.

(2) "Married", for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship.

(3) "Mentally defective" means that a person suffers from a mental disease or defect which renders that person incapable of appraising the nature of his or her conduct.

(4) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct as a result of the influence of a controlled or intoxicating substance administered to that person without his or her consent or as a result of any other act committed upon that person without his or her consent.

(5) "Physically helpless" means that a person is unconscious or for any reason is physically unable to communicate unwillingness to an act.

(6) "Sexual contact" means any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of another person, or intentional touching of any part of another person's body by the actor's sex organs, where ~~the victim is not married to the actor and~~ the touching is done for the purpose of gratifying the sexual desire of either party.

(7) "Sexual intercourse" means any act between persons involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person.

(8) "Sexual intrusion" means any act between persons involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.

(9) "Bodily injury" means substantial physical pain, illness or any impairment of physical condition.

(10) “Serious bodily injury” means bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ.

(11) “Deadly weapon” means any instrument, device or thing capable of inflicting death or serious bodily injury, and designed or specially adapted for use as a weapon, or possessed, carried or used as a weapon.

(12) “Forensic medical examination” means an examination provided to a possible victim of a violation of the provisions of this article by medical personnel qualified to gather evidence of the violation in a manner suitable for use in a court of law, to include: An examination for physical trauma; a determination of penetration or force; a patient interview; and the collection and evaluation of other evidence that is potentially relevant to the determination that a violation of the provisions of this article occurred and to the determination of the identity of the assailant.

Explanatory Note

As sexual intercourse and sexual intrusion are defined without respect to whether the parties are married, it makes little sense to define “sexual contact” in such a way that it cannot take place between married persons.

§ 61-8B-3. Sexual assault in the first degree

(a) A person is guilty of sexual assault in the first degree when:

(1) The person engages in sexual intercourse or sexual intrusion with another person and, in so doing:

(i) Inflicts serious bodily injury upon anyone; or

(ii) Employs a deadly weapon in the commission of the act; or

(2) The person, being fourteen years old or more, engages in sexual intercourse or sexual intrusion with another person who is younger than twelve years old and is not married to that person.

(b) Any person violating the provisions of this section is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than fifteen nor more than thirty-five years, or fined not less than one thousand dollars nor more than ten thousand dollars and imprisoned in a state correctional facility not less than fifteen nor more than thirty-five years.

(c) Notwithstanding the provisions of subsection (b) of this section, the penalty for any person violating the provisions of subsection (a) of this section who is eighteen years of age or older and whose victim is younger than twelve years of age, shall be imprisonment in a

state correctional facility for not less than twenty-five nor more than one hundred years and a fine of not less than five thousand dollars nor more than twenty-five thousand dollars.

Comment on "and is not married to that person" in subsection (a) (2)

Unlike subsection (a)(1), subsection (a)(2) does not require proof of violence or threat of violence for first degree sexual assault. Under § 61-8B-2(a), the prosecution is required to prove that the sexual intercourse or sexual intrusion was nonconsensual, but that proof will always be present when the victim is less than sixteen years old because § 61-8B-2(c)(1) provides that a person less than sixteen years old is incapable of consent in the eyes of the law.

The intent of the "and is not married to that person" language in subsection (a)(2) is presumably to say that consensual sex between married people, regardless of their ages, is not first-degree sexual assault. That would seemingly have to be correct,[3] as presumably the law would not allow persons to marry who are legally incapable of consenting to sexual activity. Yet, read literally, that is exactly what West Virginia law currently does. The text of § 61-8B-2(c)(1) indicates that persons under the age of sixteen are legally incapable of consenting to sexual acts, regardless of their marital status. At the same, under certain conditions West Virginia allows persons under the age of sixteen to marry: there is no minimum age for a marriage performed under the authority of § 48-2-301(c).

The Commission doubts there is a practical problem with prosecutions for sexual acts between married persons under subsection (a)(2). There are probably very few, if any, married persons under the age of twelve in West Virginia, and no prosecutor would charge a violation of subsection (a)(2) for a "consensual in fact" sex act between legally married persons because even if "lack of consent in law" could be proved, the element "not married to that person" could not be. Nevertheless, it makes no sense for the law to all people to marry who are legally incapable of consenting to sexual activity, and something ought to be done about it.

The problem could be resolved by repealing § 48-2-301(c) and making sixteen the absolute minimum age of marriage, or by modifying § 61-8B-2(c)(1) to say that a person is deemed incapable of consent when such person is "(1) Less than sixteen years old and not married to the other person involved in the sexual act." The Commission believes that raising the minimum age of marriage to sixteen would be the better course.

§ 61-8B-5. Sexual assault in the third degree

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[3] This is not to say, however, that there can never be sexual assault in the first degree if the perpetrator and the victim are married to each other. A person's actions towards his/her spouse could constitute first-degree sexual assault under subsection (a)(1). Subsection (a)(2) is likely intended to say that the law will not *automatically* deem all sexual intercourse (or sexual intrusion) by persons less that sixteen years old to be nonconsensual if the sexual acts take place in the context of marriage.

(a) A person is guilty of sexual assault in the third degree when:

(1) The person engages in sexual intercourse or sexual intrusion with another person who is mentally defective or mentally incapacitated; or

(2) The person, being sixteen years old or more, engages in sexual intercourse or sexual intrusion with another person who is less than sixteen years old and who is at least four years younger than the defendant and is not married to the defendant.

(b) Any person violating the provisions of this section is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than one year nor more than five years, or fined not more than ten thousand dollars and imprisoned in a state correctional facility not less than one year nor more than five years.

Comment on subsection (a)(2) "and is not married to the defendant.

This subsection raises the same problems just discussed re sexual assault in the first degree, and the same solutions are available.

§ 61-8B-7. Sexual abuse in the first degree

(a) A person is guilty of sexual abuse in the first degree when:

(1) Such person subjects another person to sexual contact without their consent, and the lack of consent results from forcible compulsion; or

(2) Such person subjects another person to sexual contact who is physically helpless; or

(3) Such person, being fourteen years old or more, subjects another person to sexual contact who is younger than twelve years old and is not married to that person.

(b) Any person who violates the provisions of this section shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than one year nor more than five years, or fined not more than ten thousand dollars and imprisoned in a state correctional facility not less than one year nor more than five years.

(c) Notwithstanding the provisions of subsection (b) of this section, the penalty for any person violating the provisions of subsection (a) of this section who is eighteen years of age or older and whose victim is younger than twelve years of age, shall be imprisonment for not less than five nor more than twenty-five years and fined not less than one thousand dollars nor more than five thousand dollars.

Explanatory Note

Current subsection (a)(1), when read in conjunction with the current definition of "sexual contact" in § 61-8B-1(6), states that a person cannot violate (a)(1) in relation to a

spouse – regardless of the level of forcible compulsion involved – because by definition there cannot be "sexual contact" between spouses. That defies common sense, particularly when married persons are (correctly) said to be able to satisfy the legal definitions of "sexual intercourse" and "sexual intrusion" in § 61-8B-1. It also makes little sense to (correctly) say that although a person can commit first-degree sexual assault against a spouse by engaging in sexual intercourse through forcible compulsion under § 61-8B-3(a)(1), a person cannot commit first-degree sexual abuse against a spouse by engaging in sexual contact through forcible compulsion. There is no need to change the wording of subsection (a)(1) to address this problem. Changing the definition of "sexual contact" is all that is required.

If the definition of sexual contact is changed, it will be necessary to add the suggested language to subsection (a)(3) to bring the law into line with the analogous sections regarding sexual assault in the first and third degrees. As noted in the comments on those sections, the Legislature could clarify the law by addressing and removing the current tension between setting 16 as the age of sexual consent while allowing persons under the age of 16 to marry.

§ 61-8B-9. Sexual abuse in the third degree

(a) A person is guilty of sexual abuse in the third degree when he subjects another person to sexual contact without the latter's consent, when such lack of consent is due to the victim's incapacity to consent by reason of being less than sixteen years old and not married to the person.

(b) In any prosecution under this section it is a defense that:

(1) The defendant was less than sixteen years old; or

(2) The defendant was less than four years older than the victim.

(c) Any person who violates the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be confined in the county jail not more than ninety days, or fined not more than five hundred dollars and confined in the county jail not more than ninety days.

Explanatory Note

As the Commission recommends that the definition of sexual contact be modified so that there can be "sexual contact" between married persons, it is necessary to add the suggested language to preserve the intended result in subsection (a). As with prior provisions, the statute could be simplified if West Virginia ceased allowing persons less that sixteen years of age to marry.

Recommendation 7: Modify West Virginia's attempt and solicitation statutes to make penalties more proportionate to the penalties for the corresponding completed offenses.

Like the vast majority of states, West Virginia's law contains a general statute for criminal attempts (§ 61-11-8). West Virginia also has a crime of solicitation (§ 61-11-8a) that applies only to the solicitation of specified felony crimes of violence against the person (murder, assault/battery, robbery). West Virginia also has a general conspiracy statute (§ 61-10-31) and a statute prohibiting and punishing conspiracies to violate the Uniform Controlled Substances Act (§ 60A-4-414). The two most common approaches relating to the penalties for attempted crimes are:

> (1) Where jurisdictions employ offense classes, attempt and solicitation are graded one offense class lower than the completed target offense. OR
>
> (2) The maximum penalties for attempt and solicitation are one-half the maximum penalties for the completed target offense. (E.g., if the statutory maximum for robbery is 30 years in prison, the statutory maximum for attempted robbery is 15 years in prison). (This approach raises questions about how to treat inchoate crimes aimed at completed offenses punished by life in prison; these will be addressed in the context of the Commission's specific recommendations below.)

Both approaches share a common principle: the penalties for attempting or soliciting crimes vary in direct relationship to the penalties for the completed target crimes. The stiffer the penalty for the completed crime, the stiffer the penalty for the inchoate crime. And vice versa.

West Virginia's general attempt statute does not sufficiently observe the direct relationship/proportionality principle. Instead, it provides that all attempts at felonies not punishable by life in prison are punished with an indeterminate prison term of one to three years, or, in the discretion of the court, a jail term of six to 12 months and a fine not exceeding $500. These are strikingly low penalties when considered in relation to more serious felonies. For example, second-degree murder is punishable by a determinate sentence between ten and forty years (§ 61-2-3), yet attempted second-degree murder is punishable by only an indeterminate term of 1 to 3 years. Lack of direct/relationship/proportionality is also a problem for the solicitation statute, though the scope of the problem is narrower since the solicitation statute only applies to a set of specified felony crimes of violence against the person.

The Commission believes West Virginia's current approach in its general attempt and solicitation statutes is indefensible. The Commission sets forth below a proposed modification based on the current sentencing structure. If a class structure is adopted in the future, the Commission suggests a graded approach to attempts and solicitations as described above.

PROPOSAL: 50% penalty approach

The overarching proposition is that the penalty for attempt should be half the penalty for the completed offense. The Commission strongly favors this approach in the context of

current West Virginia sentencing law. While the basic idea is easy to understand, there are two significant problems in translating the idea into a concrete proposal that fits into existing West Virginia law.

The first, and most obvious, problem is how to handle attempts at completed crimes with a mandatory or possible term of life imprisonment. Any solution here seems somewhat arbitrary, but the Commission believes the current proposal of an indeterminate term of 3 to 15 years seems low for an offense like attempted murder in the first degree.

The second problem is applying the "half the penalty" concept to West Virginia's current scheme of no offense classes and mostly indeterminate sentences with a few determinate sentences thrown in.

Here's our proposal, with explanatory notes to follow:

§ 61-11-8. Attempts; classification and penalties therefor

(a) Every person who attempts to commit an offense shall be punished, where it is not otherwise provided, as follows: ~~but fails to commit or is prevented from committing it, shall, where it is not otherwise provided, be punished as follows:~~
~~(1) If the offense attempted be punishable with life imprisonment, the person making such attempt shall be guilty of a felony and, upon conviction, shall be imprisoned in the penitentiary not less than three nor more than fifteen years.~~
~~2) If the offense attempted be punishable by imprisonment in the penitentiary for a term less than life, such person shall be guilty of a felony and, upon conviction, shall, in the discretion of the court, either be imprisoned in the penitentiary for not less than one nor more than three years, or be confined in jail not less than six nor more than twelve months, and fined not exceeding five hundred dollars.~~
~~(3) If the offense attempted be punishable by confinement in jail, such person shall be guilty of a misdemeanor and, upon conviction, shall be confined in jail not more than six months, or fined not exceeding one hundred dollars.~~

(1) If the offense attempted is murder in the first-degree, the person making such attempt shall be guilty of a felony and, upon conviction, shall be imprisoned in the penitentiary for a determinate term not less than 7 years and 6 months nor more than forty years.

(2) if the offense attempted is any other felony offense punishable by life imprisonment, the person making such attempt shall by guilty of a felony and, upon conviction, shall be imprisoned in the penitentiary for a determinate term not less than five years nor more than thirty-five years.

(3) if the offense attempted is a felony punishable by a minimum term of imprisonment of 2 years or more and a maximum term of imprisonment greater than five years but less than life, the person making such attempt shall be guilty of a felony and, upon conviction, shall be imprisoned in the penitentiary for a term of years as follows:

(i) if the offense attempted carries an indeterminate sentence, the attempt shall be punished by an indeterminate sentence where both the minimum and maximum terms of imprisonment shall be one-half the length of the minimum and maximum terms of the completed crime. (E.g., if the completed offense is punishable by an indeterminate sentence of two to ten years, an attempt to complete that offense would be punishable by an indeterminate sentence of one to five years.)

(ii) if the offense attempted carries a determinate sentence, the attempt shall be punished by a determinate sentence where both the minimum and maximum terms of imprisonment shall be one-half the length of the minimum and maximum terms of the completed crime. (E.g., if the completed offense is punishable by a determinate sentence of two to ten years, an attempt to complete that offense would be punishable by a determinate sentence of one to five years.)

(4) if the offense attempted is a felony subject to a maximum term of imprisonment in the penitentiary not greater than five years, the person making such an attempt shall be found guilty of an offense that may be designated, in the discretion of the court, as either a felony or a misdemeanor. In making the decision whether to designate an attempt as a felony or misdemeanor, the court shall consider both the circumstances of the crime and the criminal history of the defendant. If the court designates the attempt as a felony, the convicted person shall be imprisoned in the penitentiary for not less than one year nor more than two years and six months. If the court designates the attempt as a misdemeanor, the convicted person shall be confined in jail for a determinate term not less than six nor more than twelve months and fined an amount not exceeding five hundred dollars.

(5) if the offense attempted is a misdemeanor punishable by confinement in jail, the person making such an attempt shall be guilty of a misdemeanor and, upon conviction, shall be confined in jail for a determinate term not less six months or fined not exceeding one hundred dollars.

NOTES ON PROPOSAL REGARDING SECTION §61-11-8

West Virginia's general attempt statute does not define the substantive criteria for what constitutes a criminal attempt, and the Commission follows current practice by leaving those criteria to the case law. We retain the language "where it is not otherwise provided" to make clear that treatments of attempt in specific statutes displace the provisions of this general attempt statute. We have eliminated the language defining failure to complete the crime as an element of attempts. This language is a potential source of problems, and the Commissioners who work as judges, prosecutors and public defenders have found that the language is ignored in actual practice.

Subsection (a)(1) sets a sentencing range from 7.5 to 40 years for attempted first degree murder, which is a significant increase from the current level of 3 to 15 years. As WV Code § 62-3-15 establishes 15 years as the minimum time served for parole eligibility for first degree murder punished by life with mercy, we propose setting the minimum term for attempted first degree murder at half that figure. States have taken different approaches to

setting the statutory maximum for attempted first-degree murder where the completed offense is punishable by death or life in prison. For example, Georgia and Louisiana use 50 years, Minnesota 20, and Massachusetts 10. The suggestion of 40 years seems a reasonable spot within the upper part of the range, especially given West Virginia's relatively robust approach to granting good time credits.

Subsection (a)(2) also draws upon § 62-12-13(c), which sets the minimum date of parole eligibility at 10 years for offenses other than first degree murder that are punishable by life in prison. Thus, we set the minimum sentence for attempting other felonies with a possible term of life imprisonment at 5 years. Again, the upper limit here is necessarily somewhat arbitrary, but thirty-five years seems a reasonable figure in relation to the forty-year maximum for attempted first degree murder.

Subsection (a)(3) covers the bulk of attempted felonies. On the high end, it excludes completed offenses where imprisonment for life is an option, as these are covered in (a)(1) and (a)(2). On the low end, it excludes felonies where half the minimum term of the completed offense would be less than a year and thus enter misdemeanor territory. It also excludes completed offenses where the maximum penalty is five years or less. The offenses excluded on the low end are covered in subsection (a)(4).

Substantively, subsection (a)(3) implements principles both minimum and maximum sentences are set at half the level of the corresponding completed crimes, and attempt sentences are determinate or indeterminate in parallel with their target offenses.

Subsection (a)(4) identifies a class of relatively low-level target felonies where trial judges ought to have flexibility to treat attempts at committing those felonies as either felonies or misdemeanors. The proposal gives trial judges the discretion to treat attempts at target felonies with a maximum sentence of five years or less as either felonies or misdemeanors.

Subsection (a)(5) replicates the treatment of attempted misdemeanors in the existing Code.

§ 61-11-8a. Solicitation to commit certain felonies; classification; defenses

(a) Any person who solicits another to commit a violation of the law which constitutes a felony crime of violence against the person is guilty of a felony, and upon conviction thereof, shall be punished as follows:

~~(1) Confined in a state correctional facility for not less than three nor more than fifteen years if the offense solicited is punishable by life imprisonment;~~

~~(2) Imprisoned in the state correctional facility for not less than one nor more three years or fined not more than five thousand dollars, or both, if the offense solicited is punishable by incarceration in the state correctional facility for a term of less than life imprisonment. In the~~

~~circuit court's discretion a person so convicted may be ordered confined in jail for a term not to exceed one year in lieu of incarceration in a state correctional facility;~~

(1) If the offense solicited is murder in the first-degree, the person shall be guilty of a felony and, upon conviction, shall be imprisoned in the penitentiary for a determinate term not less than 7 years and 6 months nor more than forty years.

(2) if the offense solicited is any other felony crime of violence against the person punishable by life imprisonment, the person shall be guilty of a felony and, upon conviction, shall be imprisoned in the penitentiary for a determinate term not less than five years nor more than thirty years.

(3) if the offense solicited is a felony crime of violence against the person punishable by a minimum term of imprisonment of 2 years or more and a maximum term of imprisonment greater than five years but less than life, the person shall be guilty of a felony and, upon conviction, shall be imprisoned in the penitentiary for a term of years as follows:

(i) if the offense solicited carries an indeterminate sentence, the solicitation shall be punished by an indeterminate sentence where both the minimum and maximum terms of imprisonment shall be one-half the length of the minimum and maximum terms of the completed crime.

(ii) if the offense solicited carries a determinate sentence, the solicitation shall be punished by a determinate sentence where both the minimum and maximum terms of imprisonment shall be one-half the length of the minimum and maximum terms of the completed crime.

(4) if the offense solicited is a felony subject to a maximum term of imprisonment in the penitentiary not greater than five years, the person shall be found guilty of an offense that may be designated, in the discretion of the court, as either a felony or a misdemeanor. In making the decision whether to designate an instance of soliciting a felony crime of violence against the person as a felony or misdemeanor, the court shall consider both the circumstances of the crime and the criminal history of the defendant. If the court designates the solicitation as a felony, the convicted person shall be imprisoned in the penitentiary for not less than one year nor more than two years and six months. If the court designates the solicitation as a misdemeanor, the convicted person shall be confined in jail for a determinate term not less than six nor more than twelve months and fined an amount not exceeding five hundred dollars.

(b) (1) As used in this section, “solicitation” means the willful and knowing instigation or inducement of another to commit a felony crime of violence against the person of a third person; and

(2) As used in this section, “felony crime of violence against the person” means the felony offense set forth in sections one, nine, ten-b and twelve, article two of this chapter.

(a) In a prosecution under the provisions of this section, it is not a defense:

(1) That the defendant belongs to a class of persons who by definition are legally incapable in an individual capacity of committing the crime that is the object of the solicitation; or

(2) That a person whom the defendant solicits could not be guilty of a crime that is the object of the solicitation.

(d) It is an affirmative and complete defense to a prosecution under the provisions of this section that the defendant under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, after soliciting another person to engage in conduct constituting a felony, prevented the commission of the crime.

PART II. Other Recommended Changes

Recommendation 8: (*carried over from 2021 Report)* A survey of Circuit Judges in West Virginia found that most Circuit Judges believe that judges and magistrates do not receive enough training or guidance in how they should exercise their discretion in sentencing. We therefore recommend that this finding be communicated to the Education Committee of the West Virginia Judicial Association and to the Administrative Office of the Supreme Court of Appeals.

Recommendation 9: The Legislature should commission an empirical study of the parole process in West Virginia and should pass legislation extending the principles in recently enacted § 62-12-13(b)(5) to the nonviolent offense parole program created in § 62-12-13c.

Contained within the Commission's mandate is a review of parole in West Virginia. Based on the review of currently available information, the parole process in West Virginia does not appear to be function as well as it ideally would. It appears many incarcerated persons have encountered significant roadblocks to timely and meaningful consideration for parole and release. A review of the data available also suggests that there may be a deviation from the use of evidence-based practices in determining release. A properly function parole system is essential to the criminal justice system. Any shortcomings could result in qualified people remaining in prison longer than they objectively should be, and place undue strain on the State's correctional resources. West Virginia's prisons and jails are currently operating at near full capacity, and the regional jails continue to exceed capacity.[4]

More complete data is needed to evaluate the parole process and procedures and make concrete recommendations for improvements if warranted. Therefore, the Commission recommends that the Legislature commission an empirical study of the parole process in West Virginia, similar to that conducted by the Council of State Government in 2012, which informed Senate Bill 371 (The Justice Reinvestment Act). Such review should be undertaken with an eye to W.V. Code R. §92-1-3 which requires a parole system which emphasizes valuing "evidence based research, data, and related decisional best practices by applying them to the decisions of parole, setting conditions, supporting intermediate sanctions, and making decisions to revoke parole." In addition to a summary of data, a review should highlight areas of concern and make recommendations for improvement.

[4] West Virginia Division of Corrections and Rehabilitation Adult Inmate Count, January 19, 2023.

The envisioned study should address, at a minimum:

1) the implementation of, and continued compliance with, the recommendations of the Justice Reinvestment Act,

2) the implementation of W.V. Code §62-12-13(b)(5) meant to address the inability of incarcerated individuals to complete the rehabilitation and educational components of their individualized plans of improvement while incarcerated, including the identification of programming within the community,

3) the implementation of the Non-Violent Offender Program pursuant to W.V. Code §62-12-13c,

4) to what extent, if any, the unavailability of required documentation continues to delay the consideration or grant of parole,

5) whether the Parole Board continues to release persons applying for parole at a lower rate than the parole release guidelines would suggest, including those designated as low risk, and if so, identification of factors contributing to this low release rate, and

6) any other factors related to the rules and regulations governing parole, the institutional process established to aid incarcerated persons to meet parole eligibility, including the preparation of home plans and submitting documentation to the Board, or the general practices of the Parole Board that would inform this Commission's evaluation of the granting of parole in West Virginia.

To paint a full picture of the nature of parole proceedings in West Virginia and their impact on incarceration, the study should also include a review of parole revocation, including policies, procedures, reliance on graduated sanctions, and data on the rate of parole revocation.

Recommendation 10: Guidelines Regarding Extended Supervision

The Legislature should consider enacting guidelines regarding the length of periods of extended supervision imposed, and the length of sentences imposed upon violation of supervision.

W.V. Code §26-12-26 provides for extended supervision for those convicted of certain sexually motivated crimes and offenses against children. The supervision begins only after the completion of a sentence, including periods of probation and parole. The statute grants the sentencing court broad discretion in setting the length of the period of supervision and length of sentence imposed upon violation of terms and conditions of supervision. The statute provides for, in most cases, up to 50 years of supervision, and in some circumstances, life. Upon violation of supervision, the sentencing court has the discretion to impose a

penitentiary sentence of up to the length of the remaining period of supervision. As the Legislature removed the application of good time from extended supervision sentences, defendants face sentences that can be exponentially longer than that of the underlying offense. For example, an offense that carries an indeterminate term of 1-3 years, which with goodtime is discharged in 1.5 years, subjects a defendant to potentially serving another 50 years, with no good time, for a violation of supervision, however slight.

While the statute provides broad discretion, it provides no guidance as to the exercising of that discretion. Those convicted of the similar offense with similar facts potentially face vastly different outcomes [e.g. Two similarly situated individuals could begin supervision at the same time, one having been given one year of supervision, the other, fifty. If both violated their supervision for similar reasons six months later, the first could be sentenced to serve six months and discharge his sentence. The other could be ordered to serve 49.5 years, with no reduction for good time.]

It is a shared opinion of the Commission members that the length of the period of supervision imposed varies greatly throughout the state. A survey of circuit judges and probation officers revealed a large variance in the amount of the sentence imposed upon violation. It is also a shared opinion of the Commission that similarly situated individuals should be treated similarly by the courts regardless of the jurisdiction in which they are convicted. This sentiment is echoed in the judicial survey responses.

To that end, it is recommended that Legislature consider adopting guidelines regarding the length of periods of supervision and sentences imposed upon violation. The Commission also recommends that the Legislature consider implementing a graduated sanctions scheme for violations of supervision based upon the severity and number of violations, similar in structure to that currently available for violations of probation, home confinement, and parole.

Part III: Update on Data Collection and Analysis

Recommendation 5 in the Commission's 2021 Report read as follows:

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

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

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

Relatedly, our first item of projected work for 2022 was to "establish a framework for better data collection on sentencing practices and their effectiveness in West Virginia through consultation with experts in other states and stakeholders within West Virginia."

The data we have been able to obtain through various data requests has not proven very useful to us in attempting to answer the Legislature's questions, but it's possible that those with greater expertise might be able to see more in the data West Virginia currently has that we are able to see. While we have access to staff with the relevant expertise in the Office of Research and Strategic Planning within Justice and Community Services, the Commission has probably not utilized the staff as effectively as we ideally would have due to our lack of experience in data analysis.

In the last few months, the Commission has realized in hindsight that part of our difficulty has been that the position of Director of the Office of Research and Planning within Justice and Community Services has been unfilled during most of the Commission's existence. The hiring of Dr. Catie Clark as Director roughly midway through 2022 opens greater possibilities for the Commission to make progress in this area. Dr. Clark has a Ph.D. in Criminology, experience in data-driven criminal justice reform, and experience working with commissions like ours and serving as a liaison among different stakeholder groups in the criminal justice arena. Initial conversations with her have led us to understand that more work will be needed to figure out what can be learned from West Virginia's existing criminal data, followed by efforts to identify what further data need to be collected and how to implement those collection efforts effectively.

Dr. Clark has already been working with West Virginia Public Defender Services and the SEARCH Group in seeking grant support to develop a centralized criminal justice repository for West Virginia. The Commission is certainly supportive of this effort, and we are hopeful that Dr. Clark's leadership will enable the State to develop an information infrastructure that will ultimately allow the Legislature to make the sorts of empirically based decisions about criminal justice reform that are contemplated in HB 4004.

Part IV: Recommendation re: Extending Sunset Date of the Sentencing Commission

The Sentencing Commission is currently slated to sunset on June 30, 2023, a little less than six months from now. While there are limits to what this body can currently do and the current Commissioners did not necessarily envision lifetime service when signing up, the Commission believes that extending the work of the Commission is appropriate. Thus, we offer:

Recommendation 11: The Commission recommends that the West Virginia Legislature make the Sentencing Commission a permanent subcommittee of the Governor's Committee on Crime, Delinquency, and Correction (GCCDC). Under West Virginia Code § 15-9C-6, the West Virginia Sentencing Commission is currently slated to sunset on June 30, 2023. According to the Maryland State Commission on Criminal Sentencing Policy[5] (MSCCSP), 22 states, the District of Columbia, and the Federal government have legislatively instituted some form of Sentencing Commission or Council.

Projected Future Work of the Commission

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

Our projected future work – either for the first six months or the calendar year of 2023, depending on the Legislature's reaction to the recommendation just made – would be to:

1) Work with Dr. Clark to use analysis of existing data to shed greater light on empirical questions posed in HB 4004 and to identify changes that need to make to West Virginia's criminal justice data collections systems to facilitate evidence-based decision-making on questions of sentencing, parole, and other criminal justice issues.

2) Continue to study and discuss the global questions of sentencing structure discussed in Part I of this Report in the hope of reaching deeper consensus on a path forward.

3) Continue to study and make recommendations for the improvement of various specific sections of the West Virginia Criminal Code, as we have done in both this 2022 Report and the 2021 Report.

[5] The following states have some form of a Sentencing Commission or Council: Alabama, Alaska, Arkansas, Connecticut, Delaware, Illinois, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Virginia, and Washington. Source: https://msccsp.org/state-and-federal-sentencing-commissions