



Date: January 19, 2011

To: Delaware Justice Reinvestment Task Force

Subject: Proposals for Increased Inmate Performance Incentives and Evidence-Based Sentencing

From: Vera Institute of Justice, Center on Sentencing and Corrections

The purpose of this memorandum is to prepare the Delaware Justice Reinvestment Task Force for its January 23rd meeting. This memorandum presents proposals for increasing inmate performance incentives and for improving the quality of sentencing decision making. A separate memorandum will be distributed prior to the meeting that addresses recidivism reduction for Delaware's prisons.

The proposals for reducing length of stay for the sentenced population are as follows:

1. Implement special early release plan
2. Increase good time credits
3. Create program completion credits
4. Implement earned compliance credits
5. Eliminate conditional release
6. Cap VOP revocation sentences
7. Explore evidence-based sentencing

Part I summarizes the progress of the Delaware Justice Reinvestment Initiative. Part II discusses Delaware's sentencing structure. Part III presents seven proposals with supporting information. Data analysis of the sentenced population will be distributed in the presentation handout on January 23, 2012.

I. Justice Reinvestment Initiative Update

The justice reinvestment strategy is guided by the idea that data analysis can guide the safe reduction of prison populations and that the dollars saved can be redirected to strategies proven to decrease crime.

Delaware DOC has already made progress in cutting costs and population. From 2006 to 2010, only a handful of states have reduced expenditures on prisons and reduced the incarcerated population. Over this period, twenty-four states saw growth in their prison populations, nine states saw a decrease, and three state populations remained relatively stable over the five-year period. Arkansas, Arizona, Pennsylvania, West Virginia, and Alabama saw the largest increases in inmate populations, between 12 and 18 percent;

while Rhode Island, Michigan, and Delaware had the greatest decreases, losing between 12 and 16 percent of their prisoner populations since 2006.¹

Despite this progress, Delaware's prisons remain overcrowded. In 2010, the prisons held an average of 138% of design capacity and 109% of operating capacity.² In 2011, Delaware prisons were at 132% of design capacity and 104% of operating capacity.³

To help the Task Force understand the primary drivers of Delaware's population, Vera staff has designed data analyses that will help inform development of responsive policies. The "iron law of prison populations"⁴ guides Vera's analytical approach. The law states that the size of a prison population is determined by two factors: (1) *how many people go to prison* and (2) *how long they stay*. Therefore, "prison populations change when either the number of people going to prison changes, their length-of-stay (LOS) changes, or (for the most dramatic and immediate effect) both. Intake and LOS are the levers of prison populations."⁵

Vera staff have undertaken analyses of the detention⁶ and sentenced populations, and will present the sentenced population analysis at the Task Force meeting on January 23, 2012.

II. Sentencing in Delaware

Since enactment of Delaware's Truth in Sentencing Act of 1989, which abolished discretionary parole release, Delaware courts have made sentencing decisions using a structured, determinate sentencing system. "Determinate" sentencing refers to the absence of discretionary release from prison. The system is "structured" through a set of sentencing guidelines, "designed to ensure certainty and consistency of punishment commensurate with the seriousness of the offense and with due regard for resource availability and cost."⁷

¹ Vera's report on a national survey on population, corrections expenditures, and community corrections expenditures is forthcoming in 2012. This information differs from Vera's presentation on July 25, 2011, because it includes 2010 data. These data were not previously available.

² Delaware Department of Correction, *FY2010 Annual Report*. This measure of capacity is based on the totaled average daily populations for each facility.

³ Delaware Department of Correction, *FY2011 Annual Report*. This measure of capacity is based on the stock population counts on June 30, 2011.

⁴ Todd R. Clear and James Austin, "Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations," *Harvard Law and Policy Review* 3, no. 2 (2009): 307-324.

⁵ Todd R. Clear and Dennis Schrantz, "Strategies for Reducing Prison Populations," *The Prison Journal Supplement* to 91, no. 3 (2011): 138S-159S.

⁶ Analysis pertaining to the detained population appears in Vera's memorandum "Pretrial Recommendations" of November 18, 2011.

⁷ Delaware Sentencing Accountability Commission Benchbook 2011, 19 (citing 64 Del. Laws, c. 402 § 1).

The guidelines—known as the Sentencing Accountability Commission Benchbook—primarily consist of the following:

- comprehensive index of offenses including every Delaware crime and listing crime class (e.g., “Felony G”), statute number, and Benchbook page number;
- statement of sentencing policy;
- recommended sentence ranges and other considerations for particular classes of crimes; aggravating and mitigating factors; special categories of crimes that fall outside the felony/misdemeanor and violent/non-violent schema; and
- policy for sentencing violations of probations.⁸

As in many states, the guidelines in the Benchbook are voluntary and non-binding. Those convicted of crimes in Delaware cannot appeal their sentence on the basis that it departs from the guidelines.

Delaware statute sets the sentence ranges—11 Del. C. § 4205 details the ranges for felonies, and 11 Del. C. § 4206 classifies misdemeanors. There are seven levels of *felony* crimes in Delaware, A through G, A being the most serious and G the least.⁹ Delaware has mandatory minimum sentences for Class A and B felonies. Anyone convicted of those felonies must be sentenced to at least that amount of time, and the court cannot suspend the minimum sentence. For those felonies that do not carry a mandatory minimum or for any sentence that exceeds the minimum required, the court may suspend that part of the sentence for certain other forms of punishment, such as probation.

11 Del. C. § 4206 defines three classes of *misdemeanor* crimes in Delaware, each of which can be punished by incarceration at Level V and/or fines.¹⁰ The law permits courts to suspend incarceration sentences for misdemeanor cases in favor of alternative sanctions such as probation.

⁸ Also included are DOC’s work release policy, standard conditions of supervision and additional conditions for sex offenders, a legislative update, sex offender registration provisions, bail policy statement, considerations for the bail decision, recommended monetary bail ranges, and special case considerations. The bail guidance in the 2011 Benchbook has been superseded by the new JPC bail benchbook, issued on November 18, 2011.

⁹ The penalties are as follows:

- Class A ≥ 15 years, up to life imprisonment
- Class B ≥ 2 years, up to 25 years
- Class C ≤ 15 years
- Class D ≤ 8 years
- Class E ≤ 5 years
- Class F ≤ 3 years
- Class G ≤ 2 years

Under 11 Del. C. § 4205(k), the court can also levy appropriate fines and penalties.

¹⁰ The penalty for a Class A misdemeanor is up to 1 year incarceration, and fine of up to \$2,300. For a Class B misdemeanor, the statutory punishment is up to 6 months incarceration, and a fine of up to \$1,150. An unclassified misdemeanor, that is, those crimes that the relevant statute does not designate as Class A or B, are punishable by up to 30 days incarceration, and a fine of up to \$575.

The Benchbook lists the statutory ranges, as well as the narrower “presumptive sentences.” These recommended sentence ranges are based on the state’s sentencing philosophy:

that offenders should be sentenced to the *least restrictive* and *most cost-effective sanction possible* given the severity of the offense, the criminal history of the offender and the focus, which is, above all, to protect the public’s safety. Other goals in order of priority include: (1) incapacitation of the violence-prone offender; (2) restoration of the victim as nearly as possible to the victim’s pre-offense status, and (3) rehabilitation of the offender.¹¹

The Benchbook advises judges to consider aggravating or mitigating factors that would justify a sentence outside the presumptive range. Some examples listed in the Benchbook include aggravating factors such as “repetitive criminal conduct” and “need for correctional treatment,” and mitigating factors such as “victim involvement” in the crime and “voluntary redress or treatment,” where the defendant attempted to compensate the victim or seek treatment prior to the crime’s detection. In exceptional cases, a judge can depart from the guidelines to decree a sentence outside the presumptive range.

Delaware sentencing law also differentiates between violent and non-violent crimes, which carry different sentencing ranges. The Benchbook sets out ranges and considerations for each class of crime and for violent and non-violent crime. Therefore, there are separate guidelines for Class B felony (violent), Class B felony (non-violent), and so on—down through unclassified misdemeanors and violations. All Class A felonies are considered violent.

After accounting for these factors, the judge has discretion to sentence within or outside of this range, considering the circumstances of the case. For example, within the range of 13 to 17 months, a judge might impose a sentence of 14 months. This becomes the “maximum term” for which an offender can legally be confined within the DOC.

Criminal History in Sentencing

Delaware law permits sentence enhancements based on an individual’s criminal history. The “habitual criminal” provision, found in 11 Del. C. § 4214, increases sentences for defendants determined to be habitual criminals. The statute distinguishes between offenders that have a history of committing serious, often violent, felonies and those who have committed several other, less serious felonies.

¹¹ Delaware Sentencing Accountability Commission Benchbook 2011, 19 (citing 64 Del. Laws, c. 402 § 1) (emphases added).

- 11 Del. C. § 4214(b) dictates that an individual who has *twice* been convicted of any of the 33 crimes listed¹² must be sentenced to at least life imprisonment upon a third conviction. This subsection also applies to any convictions of *attempts* to commit the enumerated felonies.
- 11 Del. C. § 4214(a) 11 outlines the appropriate sentence for habitual offenders of felonies not listed in § 4214(b). If a person previously has been convicted of *three* felonies, the court may impose a sentence of up to life imprisonment on the fourth conviction. A life sentence is not mandatory under this subsection. If the court refrains from giving a life sentence, however, it may be required to impose a minimum sentence in some cases.¹³

In addition, 11 Del. C. § 4215 allows for an increased sentence because of a previous conviction, even if the individual does not yet meet the qualifications of a habitual criminal.¹⁴

Prior convictions for drug crimes also result in sentence increases for a current conviction of a drug crime. For example, an individual convicted of a Class C felony for manufacturing a controlled substance with a qualifying prior conviction will be sentenced as if they were convicted of a Class B felony of manufacturing a controlled substance with an aggravating factor.¹⁵ A general discussion of drug sentencing follows below.

Drug Sentencing

Title 16 outlines Delaware’s drug offenses. The sentence ranges, however, are determined under the structure of Title 11, discussed above. Thus, drug offenses defined as Class A and Class B felonies have mandatory minimum sentences.¹⁶

On April 20, 2011, Delaware enacted House Bill 19. HB 19 made sweeping changes to the drug sentencing structure, reducing mandatory minimums for first-time drug offenders and distinguishing between low-level users and more involved drug traffickers. The new law, which took effect in September of 2011, replaced existing drug offenses with three main drug crimes: *Drug Dealing* (delivery or manufacture, or possession with intent to deliver or manufacture), *Aggravated Possession* (possession of amounts generally indicative of drug dealing but where drug dealing need not be proved), and

¹² Examples include first or second degree murder, manslaughter, first degree arson, first or second degree burglary, and first or second degree rape. It also includes specific drug-related crimes.

¹³ For any individual whose fourth or subsequent conviction is for a felony listed in 11 Del. C. § 4214(c), the court must sentence the individual to at least the statutory maximum for the current felony.

¹⁴ If the court finds evidence of prior convictions, it can call upon the defendant to admit or deny the conviction. The court has the authority to increase the sentence based on an admission beyond the maximum for the current conviction. If the defendant does not admit the conviction, the court can try the issue of the previous conviction to determine whether there is a basis for increasing the sentence.

¹⁵ See 16 Del. C. §4751B(d)(1)(A).

¹⁶ HB 19 repealed the drug crime-specific mandatory minimums.

Possession. The law eliminated trafficking as a specific offense, replacing it with Aggravated Possession.¹⁷

The new laws further refine the sentencing of these three offenses by increasing penalties based on the weight of the drugs¹⁸ involved in the crime and any aggravating factors.¹⁹

Good Time

Delaware law allows reduction in the time inmates serve through application of statutory good time and meritorious good time credits. Under § 4205(f), earned good time is the only way that those serving time at Level V can have their sentence reduced. An individual can earn good time in two ways: good behavior and programming.²⁰

“Statutory good time,” or time for good behavior, requires that the individual comply with disciplinary rules and the law. For the first year of incarceration, an individual can earn 2 credit days per month. After the first year of any sentence, the rate increases to 3 days per month. No one can earn more than 36 days of these credits per year.

Individuals can also receive “meritorious good time,” or credit for participating in education, rehabilitation, work, or other programming. An individual can earn up to 5 days per month for this type of good time credit.²¹

Taken together, these two provisions allow inmates to earn good time of up to 8 days per month, except that no more than 100 days may be awarded in any year (365 days).

Good time credit is forfeited when a person is convicted of a crime while incarcerated at Level IV or Level V. For other violations of DOC rules or procedures, an individual may lose part or all of accrued good time.

If an inmate is released early due to application of good time, current law considers them in “conditional release” status. 10 Del. C. § 4348 states that the inmate is “deemed as

¹⁷ The bill commentary notes that Delaware’s trafficking laws were the most serious of the drug offenses, but did not require that the State prove the defendant intended to deliver the drugs. The revised law aims to reduce the potential for trafficking laws to target drug users.

¹⁸ 16 Del. C. §4751C of the new law accounts for five tier weights for each drug. As the tier increases, the statutory sentence range increases.

¹⁹ 16 Del. C. §4751A outlines five aggravating factors: the offense was committed within a protected school zone, the offense was committed within a protected park zone, the offense was committed in a vehicle, the offense was committed with the use of a juvenile co-conspirator, and the offender resisted arrest with force or violence.

²⁰ 11 Del. C. § 4381.

²¹ DOC procedure specifies that individuals may earn reductions based on the number of days worked or days participating in education or other programs. The maximum reduction of 5 days is awarded for 21-22 days’ participation; 4 days for 18-20 days’ participation; 3 days for 14-17 days’ participation; 2 days for 10-13 days’ participation, and 1 day for 5 to 9 days’ participation.

released on parole until the expiration of the maximum term or terms for which the person is sentenced.” Because most individuals released from incarceration serve deferred probation terms, this provision serves simply to increase the effective probation terms of these individuals.

For example, an individual with an incarceration sentence may also have been sentenced to a probation sentence of 12 months. If that individual is released 100 days early due to the application of good time, that individual will serve 100 days under supervision of probation in addition to the 365 days of probation.

Early Release Through § 4217 Sentence Modification

Since 1998, Delaware statute has permitted modification of inmates’ sentences for “good cause,” and assuring that a release “shall not constitute a substantial risk to the community or to the defendant’s ownself.” 11 Del. C. § 4217 permits the Department of Correction to petition the Board of Parole for sentence modification. The statute defines “good cause” as rehabilitation, serious medical illness or infirmity paired with prison overcrowding. If the Board approves the application, the Board forwards it to the court.

In 2002 through 2004, SENTAC intensified the review of eligible inmates, in part because of HB 210’s reduction of mandatory minimum sentences for drug trafficking and possession with intent to distribute. The Statistical Analysis Center (SAC) conducted a recidivism study of the § 4217 releases in 2008.²² The evaluation compared recidivism rates of those released early under § 4217, to rates of those released pursuant to the standard DOC procedure. SAC found that the early releases had lower recidivism rates and were rearrested for less serious crimes than the comparison group. Those in the early release group who were successful tended to be *older* (38.7 years) and to have *fewer prior felony arrests* (8.0) in comparison to those released early who were rearrested and reincarcerated at Level V, averaging 31.8 years and 13.8 prior felony arrests.

Recent DOC data indicate that § 4217 has not been used recently. According to unpublished DOC data for FY11, DOC staff reviewed 296 individuals for eligibility. DOC petitioned the Board of Parole for sentence modification on behalf of five inmates. No inmates were released pursuant to this procedure in FY 2011.

Recent Reforms

Delaware has made significant changes to sentencing policy, most recently to its framework for drug crime sentencing. House Bill 19, enacted in 2011, is discussed above. In 2009, House Bill 113 reformed property crimes, raising dollar amount thresholds for felony property crimes, among other things. In consideration of these recent reforms, the recommendations in this memorandum focus largely on areas that have not been subject to recent reexamination.

²² Richard J. Harris & John P. O’Connell, *SENTAC 11 § 4217 Early Release Process: An Outcome Evaluation* (Dover: Delaware Statistical Analysis Center, June 2008).

III. Proposals

1. *Implement special early release plan*

Research has shown no increased recidivism rate for individuals permitted to earn more good time and released prior to their maximum sentence; indeed, after three to five years of incarceration, releasing individuals early is associated with reduced recidivism.²³

While this reduction is considered to be largely due to the maturation effect—that is, older prisoners have lower recidivism rates—the research suggests that longer sentences are not associated with greater reductions in recidivism. This lack of relationship between length of stay and recidivism rates suggests that prison terms could conceivably be reduced without any major spike in reoffending.²⁴

Based on this research, this proposal would target individuals serving long sentences for a reduction in time to serve. It is important to identify the appropriate group for such a reduction—a series of studies suggest that considerations should include the following:

- Early release can provide only a temporary relief to overcrowding.²⁵
- The risk to the general public is contingent on the availability of low-risk inmates for early release.²⁶
- Community supervision capacity must be sufficient to handle increased caseloads.²⁷
- An Illinois study concluded that institutional conduct, severity of current offense, prior criminal history, and age at release are better predictors of recidivism than the length of time served.²⁸
- Delaware’s own study of 11 Del. C. § 4217 early releases suggests that age and number of previous felony convictions are the characteristics most associated with reoffending.²⁹

A cohort in Delaware could be considered for targeted early release, accounting for criteria associated with lower recidivism rates, including institutional conduct, severity of

²³ Carolina Guzman, Barry Krisberg, and Chris Tsukida, *Accelerated Release: A Literature Review* (Oakland: National Council on Crime and Delinquency, 2008).

²⁴ Patrick A. Langan & David J. Levin, *Recidivism of Prisoners Released in 1994* (Washington, D.C.: Bureau of Justice Statistics, 2002); James Austin, “Reducing America’s Correctional Populations: A Strategic Plan,” *Justice Research and Policy*, 12: 9–40 (2010).

²⁵ Sims & O’Connell (1985).

²⁶ Ibid.

²⁷ Eklund-Olson, Kelly, Joo, Olbrich, and Eisenberg, 1993; Joo et al., 1995; Kelly and Eklund-Olson, 1991. All of these studies examined parolee cohorts in Texas released early to comply with *Ruiz v. Estelle* (1980).

²⁸ Jim Austin, *Using Early Release to Relieve Prison Crowding: A Dilemma in Public Policy*, Crime and Delinquency, Vol. 32 No.4, October, 1986.

²⁹ Richard J. Harris & John P. O’Connell, *SENTAC 11 § 4217 Early Release Process: An Outcome Evaluation* (Dover: Delaware Statistical Analysis Center, June 2008).

current offense, prior criminal history, and age at release.

As in the early 2000s when sentencing reform spurred intensified review of sentences for § 4217 modification, the recent enactment of HB 19 presents a similar opportunity. Those sentenced under the old trafficking statute, for example, could be included in an intensified sentence review.

2. Increase good time credits

Accelerated release programs identify currently incarcerated individuals for release ahead of their sentenced release dates through the application of good time credit, intense community supervision, or other methods. Studies of programs in California, Colorado, Florida, Illinois, Montana, Washington, Wisconsin, have demonstrated no significant difference in rates of recidivism between those targeted for accelerated release and full-term prisoners.³⁰ Some programs showed lower rates of recidivism for early release prisoners than full-term prisoners. In addition, studies of data from the Bureau of Justice Statistics suggest that prison terms can be reduced without an increase in recidivism.³¹

A closer examination of Washington's early release program may be instructive.³² In 2003, the Washington state legislature passed a bill that increased "earned release time" for certain offenders. The bill increased earned release time for eligible non-violent offenders from a maximum of 33 percent of the total sentence to a maximum of 50 percent.³³ Excluded from the law are those who have a current or prior conviction for the following: violent offense; sex offense; crime against a person; domestic violence offense; residential burglary; manufacture or delivery of methamphetamine; or delivery of a controlled substance to a minor. Additionally, offenders must be classified as one of the two lowest risk categories as defined by DOC's risk assessment tool.

A 2008 evaluation of the bill's impact found that the law had no statistically significant effect on violent criminal recidivism, while there was a statistically significant decrease for non-violent crimes.³⁴ Overall, 39 percent of offenders released under the new law were convicted for a new felony within three years compared with 42 percent of offenders prior to the law's enactment. The evaluation estimated the cost savings of the

³⁰ Guzman et al., 2008. However, a recent study of the Montana early release program concluded that those released as part of the program reoffended at a higher rate and more quickly than individuals released using other methods. Kevin A. Wright & Jeffrey W. Rosky, *Too Early Is Too Soon: Lessons from the Montana Department of Corrections Early Release Program*, *Criminology & Pub. Pol'y* 10, issue 4 (2011). This study included technical violations as a measure of "reoffending," which is questionable in light of the variation in risk to public safety posed by different kinds of technical violations.

³¹ Langan & Levin, 2002; see also Austin, 2010.

³² Elizabeth K. Drake & Robert Barnoski, *Increasing Earned Release From Prison: Impacts of 2003 Law on Recidivism and Criminal Justice Costs*. (Olympia: Washington State Institute for Public Policy, Document No. 08-11-1201, 2008).

³³ Washington Engrossed Substitute Senate Bill 5990 (2003).

³⁴ Drake & Barnoski, 2008.

program: offenders spent an average of 63 fewer days in prison, resulting in an average cost savings of \$6,155 per person. When considered with the benefits of future crime avoided and taxpayer costs saved, the total savings was estimated at \$10,473 per offender.

To implement a program such as this, Delaware could increase the amount of good time credits for all inmates eligible to earn good time, or to a subgroup of inmates, such as non-violent inmates. This proposal would raise the cap of 100 days per year to 182.5 days per year (that is, 50% of 365 days). To reach this cap, Delaware could consider a combination of approaches, including increasing statutory good time credit from 3 days per month and raising meritorious good time from 5 days per month, as well as creating program completion credits of 30 days or 60 days, discussed below. One option is as follows:

	Current credit days/MONTH	Current credit days/YEAR	Proposed credit days/ MONTH	Proposed credit days/YEAR
Statutory good time	3	36	5	60
Meritorious good time	5	60	7	84
Completion credit	—	0	—	30 or 60 (one time credit)
<i>Annual credit cap</i>	—	100	—	182.5

If Delaware increased good time for all those currently eligible under § 4381 (*i.e.*, those not serving life sentences), 85% of inmates at Level V would be eligible.³⁵ If good time were increased only for those not serving time for a violent felony, 25% of inmates would be eligible.³⁶

More detailed impact information will be available for the February task force meeting. Preliminarily, however, this proposal may have a limited impact based on the rate at which inmates are earning good time. Based on 2010 data provided by DOC, the average number of statutory good time credit days earned by those incarcerated at Level V was 1.4 days per month.³⁷ Vera staff did not receive data on meritorious good time earned.

3. Create completion credits

DOC's current procedure is to award 4 bonus credit days to individuals who complete a program, upon approval by the facility.³⁸ Other states have increased completion credit beyond this mark to encourage positive performance. (See Appendix A.) For example,

³⁵ This estimate is based on unpublished DOC data snapshot of sentenced population on June 1, 2010.

³⁶ Unpublished DOC data snapshot of sentenced population, June 1, 2010.

³⁷ As described above, good time can be forfeited based on inmates' behavior. Good time forfeited was not included in data provided by DOC.

³⁸ Delaware Department of Correction, Central Offender Records, Meritorious Good Time Procedure (rev. Oct. 2010).

Nevada awards 10 days per month for participation in work or education programs, and 60 days' credit upon successful completion of educational, vocational, and other rehabilitative programs. Likewise, Kentucky and Kansas award 60 days for completion of educational, vocational, and other rehabilitative programs.³⁹

The Delaware Justice Reinvestment Task Force could consider a completion credit of 30 or 60 days for programs associated with reduced risk of reoffending. These programs could include vocational, educational, and treatment programs.

4. *Implement earned compliance credits*

For offenders placed on probation or parole, many states have early termination policies, which generally allow for the supervising officer to recommend early termination of the offender's supervision term based on good behavior. Delaware DOC has an "early discharge policy," discussed in the October 28, 2011 memorandum, "System Assessment of Probation and Parole."⁴⁰

By contrast, legislation known as "Earned Credit Compliance" ("ECC") is relatively new, and it applies the concept of "good time" to those individuals being supervised in the community. ECC legislation standardizes and imposes consistency on early termination policies, and it makes accelerated release from supervision more automatic and subject to less discretion from the supervising officer.

ECC is premised on the evidence-based principle that resources should be directed at those who pose the greatest risk of reoffending. Research demonstrates that moderate- to high-risk offenders benefit most from supervision and services, and that lower-risk offenders often do worse with additional conditions. By shortening the supervision period of lower-risk offenders who comply with their conditions and meet goals, agencies can manage their caseloads and devote time and effort to those who warrant it most.

Most ECC legislation reduces time that offenders serve on active supervision by a specific number of days per month that they fully comply with conditions of supervision.⁴¹ Upon recommendation of a supervising officer, either the court or the supervisory authority may reduce the term of supervision by the amount of credit earned.

³⁹ For other states' policies, see Alison Lawrence, *Cutting Corrections Costs: Earned Time Policies for State Prisoners* (Denver: National Conference of State Legislatures, 2009). The relevant excerpt is reproduced at Appendix A.

⁴⁰ The memorandum reported that DOC's early discharge policy permits Probation Officers to recommend early discharge from supervision. The recommendation must be approved by a supervisor and confirmed by the sentencing court. 2010 DOC aggregate data showed that, 26% of cases (3,627) released from supervision were discharged using this method.

⁴¹ In general, full compliance means fulfilling the terms of a case plan or conditions of supervision, having no new arrests, and being current on the payment of restitution, fines, and fees.

In the last several years, a number of states have passed and implemented ECC legislation. (See Appendix B for a summary of the states' legislation.) Most jurisdictions exclude certain categories of violent and sex offenders from receiving earned compliance credits. For example, Nevada, Arkansas, and Texas exclude certain (but not all) violent and sex offense categories.

In Delaware, excluding violent and sex offenders from receiving such credits would mean that approximately 85% of individuals, or 9,464 people, on probation on June 1, 2010 would have been eligible for earned compliance credits.⁴² 16% would be ineligible because of current convictions for violent offenses; 3% would be ineligible for current convictions of sex offenses.

5. *Eliminate Conditional Release*

As described above, an inmate is released early due to application of good time is considered to be on "conditional release" status. Because most individuals are subject to supervision after release from incarceration, this provision increases the effective probation terms for these individuals.

This proposal would eliminate the conditional release period, realigning the probation terms served with the sentence decreed by the sentencing judge.

6. *Cap VOP Sentences*

Recently, Missouri's justice reinvestment working group recommended that probationers be placed in one of the Department of Corrections' 120-day or alternative programs (shock incarceration or drug treatment) on their first revocation for a technical violation. The policy is intended to ensure that sanctions are proportional to the violation and focus prison space on violent, chronic, and career criminals, who will be excluded from the 120-day cap on VOP sentences. Missouri's recommendation requires enrollment of probation violators into specific, 120-day programs.

Delaware's policy for sentencing violators of probation states that the presumptive penalty is an increase in one SENTAC level.⁴³ If the court determines that incarceration at Level V is the appropriate sanction, the sentence "should be in accordance with the current SENTAC standard presumptive sentence for the original crime for which the probation is being served."

The Task Force could consider a cap on VOP sentences in certain circumstances, such as a probation violation that did not involve commission of a new crime. Unfortunately, Delaware has no analogue for Missouri's 120-day programs. More generally, Delaware

⁴² This percentage, representing a snapshot of the 2010 probation population, includes only the current offense. States typically exclude individuals based on current and prior convictions of excludable offenses, and therefore this number over-represents the pool of eligible individuals.

⁴³ Delaware Sentencing Accountability Commission Benchbook 2011, 121.

lacks programming to meet inmates' needs, which is the subject of the companion memorandum that will be distributed for the January task force meeting. Nevertheless, capping VOP sentences could have an impact on the prison population.

In Delaware, the average length of stay at Level V for individuals sentenced for a VOP offense is 128 days. However, 310 individuals served more than 120 days for a lead VOP charge in 2010. Capping these sentences would have resulted in a savings of 77,692 bed days. This translates into 213 prison beds. This calculation assumes that the VOP charge is the primary driver of the sentence.

The proposed policy would provide a proportional response to the violation of probation, recognizing the reasons for failure on probation and targeting support to increase chances of success during an individual's next term of probation.

7. Explore Evidence-Based Sentencing

As described in depth previously, correctional agencies increasingly have been incorporating the evidence-based principles of risk, need, and responsivity into their work. The **risk** principle states that supervision and treatment should match the individual's risk of reoffending. The **need** principle says that effective interventions focus on criminogenic factors—dynamic characteristics that are associated with reoffending. The **responsivity** principle states that interventions should use cognitive social learning strategies and be tailored to an individual's abilities.

DOC has incorporated these principles into agency practices, and the Task Force has conditionally approved proposals to increase DOC's adherence to these principles.

However, DOC's effectiveness is limited, in part, by the terms of the sentencing decisions and conditions of probation specified by the judge. If the judge's sentence is inconsistent with the risk, need, and responsivity principles (for example, the judge requires a treatment evaluation for someone who does not need treatment or sentences a low-risk offender to boot camp), DOC must implement the sentence even if it is not an effective use of resources and may increase an individual's likelihood of reoffending.⁴⁴

The National Center for State Courts' (NCSC) recent publication, *Using Offender Risk and Needs Assessment Information at Sentencing*, reports that judges can use risk and needs assessment information to improve the aspects of their decisions that relate to recidivism reduction. Specifically, NCSC advises that risk and needs assessment information can be used in the following ways:

- to help effectively manage and reduce an offender's future risk to the community;
- to determine an offender's amenability to probation (that is, whether the offender can be supervised safely and effectively in the community); and

⁴⁴ Pamela M. Casey, Roger K. Warren, & Jennifer K. Elek, *Using Offender Risk and Needs Assessment Information at Sentencing* (Williamsburg, VA: National Center for State Courts, 2011).

- to craft conditions of supervision that will help an offender successfully complete probation and to tailor appropriate responses to violations.

Judges may legitimately decline to follow the RNR principles because of other principles that guide sentencing; in Delaware, such principles include incapacitation of the violence-prone offender and restoration of the victim. “However, judges’ sentences may also be inconsistent with RNR principles because judges do not know the research, do not have adequate offender assessment information to apply the principles, and/or are basing their assessments of offenders’ likely recidivism on factors unrelated or less strongly associated with reoffending.”⁴⁵

As examples, Kentucky, Missouri, Oregon, and Tennessee require that pre-sentence investigation (PSI) reports include information about risk and needs gathered through a risk assessment instrument.⁴⁶

Missouri revised its PSI nearly eleven years ago as part of a larger effort to develop an effective, information-driven sentencing system. The new PSI, called the Sentencing Assessment Report, contains relevant information of the offense, the criminogenic risk factors of the offender (*e.g.*, prior criminal history, age, substance use, education and employment status at the time of offense and sentencing), an offender management plan, and the voluntary sentencing guideline recommendation. The management plan recommends strategies for addressing the root causes of an offender’s criminal behavior and prevent future re-offending.

Delaware’s sentencing philosophy is to impose the “least restrictive and most cost-effective sanction,” while protecting public safety. Incorporating risk and needs assessment information into sentencing decisions can only improve the judiciary’s ability to fulfill these aims. This proposal is for the Delaware Justice Reinvestment Task Force to recommend that evidence-based sentencing be introduced in Delaware.

Conclusion

The Justice Reinvestment Task Force can make recommendations to reduce the sentenced population safely, at the same time as improving the quality of information available to judges to help improve sentencing decisions.

⁴⁵ Ibid.

⁴⁶ Ky. Rev. Stat. Ann. § 532.007; Mo. Rev. Stat. § 557.026 (2000); Or. Rev. Stat. § 144.791 (2009); Tenn. Code Ann. § 41-1-412.

Appendix. Earned Time Policies in State Prisons: Amounts Established by Law									
State	Earned Time								
	Education	Vocation	Rehabilitation	Work	Disaster / Conservation	Meritorious	Other	Notes	
Alabama									
Alaska									
Arizona									
Arkansas	90 days per completion	90 days per completion	90 days per completion						Not to exceed 270 days
California	3 to 6 months per each 6 months of participation; 4 months for each 8 months in 2 to 4 year college			3 to 6 months per each 6 months working	2 days per 1 day working	Up to 12 months for service			
Colorado					1 day per 1 day of working		30 to 60 days at agency discretion		
Connecticut						Up to 120 days for service			
Delaware									
Florida	6 days per 150 hours of participation; 60 days for completion	60 days for completion				Up to 60 days for service			
Georgia	1 day per 1 day of participation	1 day per 1 day of participation		1 day per 1 day working					Statute recommends, not mandate
Hawaii									
Idaho						15 days per month for service			

Appendix. Earned Time Policies in State Prisons: Amounts Established by Law (continued)									
State	Earned Time								
	Education	Vocation	Rehabilitation	Work	Disaster / Conservation	Meritorious	Other	Notes	
Illinois	Previously earned good time multiplied by 1.5 for participation; 60 days for completion of GED		Previously earned good time multiplied by 1.5 for participation	Previously earned good time multiplied by 1.5 for working		Up to 180 days for service			
Indiana	6 months to 2 years per completion	6 months per completion	6 months per completion					Not to exceed 4 years or 1/3 of sentence, which ever is lesser	
Iowa	15/85 of a day or 12/10 of a day per 1 day of participation		15/85 of a day or 12/10 of a day per 1 day of participation	15/85 of a day or 12/10 of a day per 1 day of working		Up to 365 days for service			
Kansas	60 days for completion	60 days for completion	60 days for completion						
Kentucky	60 days for completion	60 days for completion				5 days per month for service	1/4 day per 8 hours of participation		
Louisiana				35 days per month working in lieu of incentive wages	30 days per month working				
Maine	3 days per month of participation		3 days per month of participation	3 days per month working; agency discretion for hours worked in excess of 8 hours daily					

Appendix. Earned Time Policies in State Prisons: Amounts Established by Law (continued)									
State	Earned Time								
	Education	Vocation	Rehabilitation	Work	Disaster / Conservation	Meritorious	Other	Notes	
Maryland	5 days per month of participation	5 days per month of participation		5 days per month of working			10 days per month of participation	Not to exceed 20 days per month	
Massachusetts	2.5 to 7.5 days per month of participation	2.5 to 7.5 days per month of participation		2.5 to 7.5 days per month of working			2.5 – 7.5 days per month of participation		
Michigan									
Minnesota									
Mississippi	30 days per month of participation; agency discretion for completion			30 days per month working; agency discretion for completion			30 days per month of participation; agency discretion for completion		
Missouri									
Montana									
Nebraska									
Nevada	10 days per month participation; 60 to 120 days for completion	60 days for completion	60 days for completion	10 days per month working		Up to 90 days for service			
New Hampshire									
New Jersey				3 to 5 days per month working					
New Mexico	3 to 5 months for completion	1 month for completion	1 month for completion			Up to 1 year per award and 1 year total in a 12-month period for service			

Appendix. Earned Time Policies in State Prisons: Amounts Established by Law (continued)									
State	Earned Time								
	Education	Vocation	Rehabilitation	Work	Disaster / Conservation	Meritorious	Other	Notes	
New York	Total of 1/7, 1/6, or 1/3 of the minimum sentence for participation and completion	Total of 1/7, 1/6, or 1/3 of the minimum sentence for participation and completion	Total of 1/7, 1/6, or 1/3 of the minimum sentence for participation and completion	Total of 1/7, 1/6, or 1/3 of the minimum sentence for working					
North Carolina									
North Dakota						2 days per month or more at agency discretion for service			
Ohio	1 day per month of participation	1 day per month of participation	1 day per month of participation	1 day per month working					
Oklahoma	10 to 90 days for completion	80 days for completion	70 days for minimum 4 months' participation			Up to 100 days for service			
Oregon									
Pennsylvania			3/4 or 5/6 of minimum sentence for participation and completion				3/4 or 5/6 of minimum sentence for participation and completion		
Rhode Island			5 days per month of participation; 30 days for completion	2 days per month working		3 days per month for service			
South Carolina	6 to 15 days per month of participation	6 to 15 days per month of participation		6 to 15 days per month working					

Appendix. Earned Time Policies in State Prisons: Amounts Established by Law (continued)									
State	Earned Time								
	Education	Vocation	Rehabilitation	Work	Disaster / Conservation	Meritorious	Other	Notes	
South Dakota									
Tennessee	1 to 16 days per month of participation; 60 days for completion	1 to 16 days per month of participation; 60 days for completion		1 to 16 days per month working					
Texas	10 to 30 days per month of participation	10 to 30 days per month of participation	10 to 30 days per month of participation	10 to 30 days per month working					
Utah									
Vermont				30 days per month working					
Virginia									
Washington									
West Virginia						Agency discretion for service			
Wisconsin									
Wyoming									

This chart highlights earned time policies applicable to state prison inmates listed in statute. Earned time is defined as a credit against an inmate's sentence or period of incarceration that he or she earns for participation in or completion of productive activities. Earned time is distinguished from, and can be offered in addition to, "good time" credits given to offenders for following prison rules and required participation in activities. This chart only includes earned time.

Source: National Conference of State Legislatures, 2009.