

**Date:** December 16, 2011

**To:** Delaware Justice Reinvestment Task Force

**Subject:** Proposals for Violations of Probation and Parole

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

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The purpose of this memorandum is to prepare the Delaware Justice Reinvestment Task Force for its December 19<sup>th</sup> meeting, at which it will discuss proposals for improving the effectiveness of responses to violations of supervision conditions.

In the October 28, 2011 memorandum, “System Assessment of Probation and Parole,” the Vera Institute presented several proposals for addressing violations of probation and improving community supervision.<sup>1</sup> The proposals are as follows:

1. Measure outcomes related to risk reduction.
2. Assess offenders for risk, needs, and abilities prior to assigning supervision level.
3. Coordinate with courts to tailor supervision.
4. Increase community treatment and programming capacity to meet offender needs.
5. Use identified needs and strengths to develop case plans.
6. Support staff to include more positive reinforcements.

Based on additional information gathered recently, Vera adds the following proposals:

7. Increase availability of intermediate sanctions.<sup>2</sup>

Part I provides contextual information about evidence-based practices for addressing violations of supervision conditions. Part II discusses Delaware’s process for responding to violations. Part III presents seven proposals with supporting information.

## **I. Overview: Violations of Supervision Conditions**

Research demonstrates that an effective way to address violations of probation is by implementing evidence-based practices designed to reduce recidivism. These practices can be divided into two categories: prevention efforts and responses to violations. Sound science supports prevention efforts that focus on screening individuals and targeting interventions. Research also guides how to respond to violations.

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<sup>1</sup> The basis for these proposals appears in the October 28 memorandum, which is available on Lieutenant Governor Matt Denn’s website at <http://ltgov.delaware.gov/taskforces/djrtf/>.

<sup>2</sup> The list of proposals previously included a separate recommendation to “Increase swiftness and certainty of sanctions in New Castle County.” Based on a finding that DOC needs more options for sanctions, this has been broadened to propose that Delaware “Increase availability of intermediate sanctions.”

These core evidence-based practices are as follows:<sup>3</sup>

1. Use a validated tool to assess the individual’s “criminogenic” risk and needs;
2. Develop case plans responsive to individual criminogenic needs with realistic and pertinent behavioral goals;
3. Engage supervisees in the process of changing behavior through positive and negative reinforcements;
4. Focus resources on moderate- to high-risk individuals; and
5. Respond to every infraction with appropriate and proportionate interventions or sanctions.

As described in the next section, the Delaware Division of Probation and Parole already makes use of some of these practices. Part III reviews recommendations made in the October 28<sup>th</sup> memorandum that are designed to reduce the number if individuals incarcerated for violations of probation.

## II. Violations of Probation in Delaware

### *SENTAC Levels*

Delaware law and the Sentencing Accountability Commission define five levels of supervision in the criminal justice system. These levels range from Level I, which requires minimal interaction with the individual, up through Level V, incarceration. The SENTAC levels from the 2011 Benchbook are below:

Level I	Unsupervised	Fine or Administrative Supervision, i.e., criminal record checks, checks to determine compliance with program completion, certification of payment of financial obligations, etc.
Level II	Field supervision	1 to 50 hours of supervision per month. This may be accomplished by office visits or field visits and/or the imposition of special conditions such as payment of a fine.
Level III	Intensive supervision	1 hr./day and no more than 56 hrs./wk. Level supervised by officers carrying limited caseloads to allow sufficient time for full follow up. May include sentencing options such as community service, payment of a fine, day reporting, curfews, etc.
Level IV	Quasi-Incarceration or Partial Confinement	Offender is placed under house arrest with electronic monitoring, a halfway house, a restitution center, a residential treatment facility, &/or a reentry program. As a result, supervision should amount to approximately 9 or more hours daily.
Level V	Incarceration or Full Confinement	Commitment to DOC for a period of incarceration with or without the imposition of a fine as provided by law.

Individuals assigned to levels I through III and electronic monitoring (technically level IV) are supervised by DOC Bureau of Community Corrections, Division of Probation and Parole.

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<sup>3</sup> See October 19, 2011 Memorandum “Evidence-Based Practices in Community Supervision”; October 28, 2011 Memorandum “System Assessment of Probation and Parole.”

## ***Conditions of Supervision***

When on probation or parole supervision, individuals are held accountable for complying with “conditions of supervision”—the rules set by the court and/or Department of Correction. In Delaware, **nine** conditions apply to offenders at Levels I and II, with **four** additional conditions for those at Level III. The SENTAC Benchbook lists these conditions, as well as additional conditions for sex offenders.<sup>4</sup> These conditions include not committing new crimes, abiding by a curfew, and reporting changes of residence promptly, among others.

The sentencing court also often prescribes special conditions, such as submitting to substance abuse evaluation or treatment. DOC may add special conditions as well, subject to court approval. Probation officers are responsible for monitoring compliance with all conditions.

## ***Responding to Violations***

When an offender violates one or more supervision conditions, two procedures are available for responding: administrative resolution and court resolution.

### **Administrative Resolution**

For administrative resolution of violations, DOC probation officers have a range of options. DOC-approved sanctions are as follows:<sup>5</sup>

1. Verbal warning
2. Travel restrictions
3. Curfew increased (Levels III/IV)
4. Increased office visits
5. Increased home visits
6. Increased substance abuse/alcohol testing
7. Job search/job training referral
8. Community service hours
9. Work crew
10. Increase in treatment requirements
11. Increase in supervision level
12. Administrative commitment<sup>6</sup>
13. Movement within Level IV
14. Curfew applied for Level II
15. Use of electronic monitoring
16. Wage attachment
17. Work referral
18. Special condition addition, e.g.,
  - No contact orders (geographical, people, places, etc.)
  - Undergo evaluation/complete recommended treatment
  - Attend GED/education classes

Violations fall into one of four categories: (1) minor technical violations, (2) major technical violations, (3) minor offenses, and (4) major offenses.<sup>7</sup>

Procedure 7.7 defines a ***minor technical violation*** as one that does not indicate that the offender poses any risk to the community, and that continued supervision remains an appropriate punishment. An officer reports a ***major technical violation*** when an offender engages in a

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<sup>4</sup> See Appendix A for the list of standard and additional sex offender conditions.

<sup>5</sup> DOC is in the process of incorporating this response list into written procedure.

<sup>6</sup> As a result of the 2003 Probation Reform Law, DOC can provide a swift and certain response to violations in some circumstances—DOC has authority to respond to technical violations by placing supervisees at Level IV for up to 5 days at a time, not to exceed 10 days in a calendar year.

<sup>7</sup> Delaware DOC Procedure Number 7.7, “Reports” (1991).

pattern of repeated violations, the offender is a risk, or the violation otherwise meets the standards for increasing supervision by more than one SENTAC level. A probation officer determines whether a technical violation is minor or major.

Probation officers have discretion about how to respond to minor technical violations. Officers use professional judgment to determine at what point a recommendation of revocation is warranted.

Regarding new criminal charges, *Minor offenses* include minor traffic or criminal offenses that do not represent an increased threat to public safety and where the current supervision conditions remain the appropriate punishment. A *major offense* is a new crime that indicates the supervisee presents a risk to the community and that a change of more than one SENTAC level is warranted. Officers report all known offenses to the court, but they do not necessarily recommend revocation in all cases. This is a case-by-case determination. Ultimately, however, it is the court that decides whether to revoke probation.

## **Court Resolution**

The court process requires that the offender must be brought before the court, and the DOC must submit a report to the court. The court determines whether a violation occurred, and if so, the appropriate sanction. However, the order of these steps may vary depending on the circumstances of the case.

To secure an offender's appearance in court, the court can issue a summons or *capias* (arrest warrant), or the DOC can execute an administrative warrant. The selection of service method depends primarily on an assessment of risk to public safety and on whether the probation officer knows where the offender resides. If the officer does not believe the offender to be dangerous, the officer may request a summons. The officer requests a *capias* if the offender is a risk to public or if the offender's address is unknown. An administrative warrant is used when the offender's address is known, but the offender is deemed to be dangerous. Administrative warrants result in faster resolution of violations. DOC reports that the use of administrative warrants has increased as a result.

Before the hearing occurs, DOC must submit a violation report to the court that outlines the violations and the recommended sanction. At the hearing, the court determines whether the evidence establishes a probation violation. If the court finds a violation, it must consider whether to maintain the probationer at the same SENTAC level, elevate the supervision by one or more SENTAC levels, or require the individual to serve the remainder of the sentence in an incarcerated setting.<sup>8</sup>

In practice, many individuals are incarcerated as a result of a violation of probation (VOP). Analysis of the detention population showed that individuals awaiting court resolution of a VOP

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<sup>8</sup> Delaware Code Title 11, §4334(a)-(c).

charge made up 35% of the detention population in 2010.<sup>9</sup> Of all admissions to prison, 41% included a conviction for VOP.<sup>10</sup>

### ***Tracking Violations of Probation***

DOC is able to track basic information about violations of probation. Currently, DOC records the number and type (technical/new crime) of violations in the Department's offender management information system, Delaware Automated Corrections System (DACS). DACS also captures the specific conditions that were violated, allowing the Department to determine the most prevalent reasons for violation. Specifically, 30% of violation reports in 2010 included a violation of Condition 9, a catch-all category for "special conditions." This category includes no contact orders, zero tolerance orders, restitution orders, and treatment orders. Committing new crimes, a violation of Condition 1, appeared on 18.5% of violation reports. Condition 3—failure to report—appears as a violation on 18% of reports.<sup>11</sup>

However, when individuals are incarcerated because of a violation of probation, the system often does not track the underlying charge for which they were originally sentenced. Therefore, Vera's researchers are not able to analyze the incarcerated VOP population to determine some of the most salient characteristics, such as whether their underlying charge involved violence.

## **III. Proposals for Addressing Violations of Probation**

### ***1. Measure outcomes related to risk reduction***

- Current performance measures include curfew checks, discharges from supervision in various categories, employment rate, Level I case closures, and LSI-Rs<sup>12</sup> completed. These measures are important indicators that the way DOC's Bureau of Community Corrections (BCC) does business generally aligns with evidence-based practices. In addition, the number of violations of probation is an important intermediate outcome measure.
- However, the existing measures do not tell us whether these practices are working to reduce risk of those supervised in the community. Recidivism is an outcome measure that helps measure whether programs and practices are effective.
- DOC plays a pivotal role in reducing the risk to reoffend. How well the Department plays this role cannot be determined without a commitment to measuring recidivism. By recommending that recidivism be measured, the Task Force can help align the mission of BCC with the other efforts that BCC has undertaken and may undertake as a part of the Justice Reinvestment Initiative. The Statistical Analysis Center's technical capacity and

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<sup>9</sup> See October 28, 2011 Memorandum.

<sup>10</sup> These include convictions pursuant to Delaware Code, title 11 § 4334 and § 4352. Stock sentenced population analysis is not yet available.

<sup>11</sup> DOC Report to Joint Finance Committee, 2010.

<sup>12</sup> "LSI-R" refers to the Level of Service Inventory-Revised. Delaware DOC uses this tool to assess offenders' risk of reoffending and dynamic, criminogenic needs. Research shows that interventions targeted at addressing criminogenic needs can reduce recidivism.

expert knowledge of Delaware’s criminal justice data make it particularly well suited to this task.

## ***2. Assess offenders for risk, needs, and abilities prior to assigning supervision level***

- A core finding of research on offender behavior is that the greatest return, in terms of promoting law-abiding and pro-social behavior, is from supervising moderate-to-high risk offenders more intensively—in terms of both the number and frequency of contacts, services, and interventions. Additionally, intensive supervision of low-risk offenders may actually increase their likelihood of reoffending. Therefore, it is important to tailor supervision on an individual basis.
- When Delaware courts sentence individuals to a specific level of supervision, this assignment is not based on an objective risk assessment, such as the LSI-R, but rather the court’s subjective determination of what is appropriate.
- After 60 days, BCC may adjust the level of supervision administratively based on the outcome of the LSI-R. BCC may be “over-supervising” some individuals in the first 60 days—that is, providing intensive supervision to those whose risk level does not require it, drawing on resources that could be better used by targeting higher-risk individuals.

## ***3. Coordinate with courts to tailor supervision***

- As described above, the level of supervision is assigned by a sentencing court and is not based on an objective risk assessment, such as the LSI-R. BCC may adjust the level of supervision administratively based on the outcome of the LSI-R.
- Perhaps as a result of this delay, Probation Officers tend not to rely heavily on the results of the LSI-R to identify offender needs. Vera’s 2011 survey of Probation Officers showed that 34% of respondents selected “Risk/Needs Assessment Instrument” as one of the three factors they rely on most to identify offender needs. By contrast, 66% of respondents selected “criminal history,” 65% selected “sentencing order,” and 51% selected “interactions with offenders” as factors relied on to identify offender needs.
- Probation officers frequently rely on conditions prescribed by the sentencing court to create supervision plans. This is in large part to recognize that goals outlined in a supervision plan must be reasonable in number and achievable to effectively shape offender behavior.
- To ensure that supervision is tailored to the risks, needs, and abilities of the offender, the Task Force should encourage better coordination between courts and DOC.

## ***4. Increase community treatment and programming capacity to meet offender needs***

- The lack of programs in certain areas impedes officers’ ability to refer offenders to appropriate interventions to address their needs.<sup>13</sup> Officers identified decisionmaking and

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<sup>13</sup> Our evaluation of program capacity derives from a series of questions in the Probation Officer survey. Respondents were first asked to select the 5 most common “offender needs” from a list of 13 needs, including life skills, education, job skills and development, employment, housing, substance abuse, criminal thinking/attitudes, decisionmaking, anger management, family/marital dysfunction, mental health, physical health, and dual diagnosis (mental health/substance abuse). For each “offender need” they selected they were then asked to list up to three

criminal thinking/attitudes as the two “offender need” areas that lacked program availability.<sup>14</sup> This suggests that officers are unable to target interventions at the needs that are most frequently associated with risk of reoffending behavior: antisocial attitudes, antisocial associates, antisocial personality, and history of antisocial behavior.

- The results from the survey also indicate a possible need for sex offender programming. Although the survey did not separately ask about programming for sex offenders, open-ended comments suggested that such programming is needed. At a minimum, the data suggest that the availability of programming for sex offenders is a question that deserves closer examination.

## **5. Use identified needs and strengths to develop case plans**

- The foundation of good correctional practice is the administration of a validated risk and needs assessment tool. These instruments can assure that individuals are neither over nor under supervised.
- BCC uses the LSI-R on most offenders under supervision.<sup>15</sup> In 2010, BCC administered LSI-Rs for 80% of eligible offenders. While BCC assesses for purposes of placement in or movement to a particular level of supervision, the assessment is not systematically used for case planning to address criminogenic factors.

## **6. Support staff to include more positive reinforcements**

- An effective system of graduated responses should also incorporate *incentives and rewards*. Research indicates that a ratio of at least four positive to every one negative reinforcement (4:1) is most effective for promoting behavior change.<sup>16</sup>
- The survey of Probation Officers indicated that a number of respondent officers do not use positive reinforcements as part of their supervision practice.<sup>17</sup> To address this, DOC could provide guidance on positive reinforcements endorsed by DOC, train staff to model

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programs to which they most frequently referred offenders. If there were no programs available to meet that need, respondents wrote in “no program.”

<sup>14</sup> Of 100 program ratings in the decisionmaking area, 68% indicate there was no programming available. Of 92 program ratings in the criminal thinking/attitudes area, 62% indicate there was not programming available. These percentages do not represent the percentage of respondents who evaluated programs in this way, but the percentage of total ratings. Because of the survey’s structure, one respondent could rate the same need area as lacking programming multiple times. Despite this qualification, the data do demonstrate that officers perceive a lack of programming to address these needs.

<sup>15</sup> Exceptions include sex offenders, domestic violence offenders, Key/Crest participants, and boot camp participants, either because a different screening tool is used for those individuals and/or the sentencing order has mandated a program. In addition, BCC does not assess offenders sentenced to Level I supervision.

<sup>16</sup> P. Gendreau, P. & C. Goggin, *Correctional Treatment: Accomplishments and Realities*, Correctional Counseling and Rehabilitation, edited by P. V. Voorhis, M. Braswell and D. Lester (Cincinnati, OH: 1997).

<sup>17</sup> Some caveats about this result are in order. First, respondents may not have understood “reward” to mean “positive reinforcement.” Second, for those who answered “No,” the structure of the survey did not allow them to view examples of “rewards.” Despite these concerns, the responses could indicate that staff skills building is in order, as well as better organizational supports for the use of positive reinforcements.

and reinforce pro-social attitudes, monitor use of staff's skills and techniques, and provide feedback and coaching.<sup>18</sup>

## **7. Increase availability of intermediate sanctions**

- While probation officers have a range of options for responding to violations of probation, two additional options would allow officers to sanction offenders without returning them for long prison stays: expanding swift and certain sanctions to New Castle County and adding home confinement.
- As a result of the 2003 Probation Reform Law,<sup>19</sup> DOC can provide a swift and certain response to violations in some circumstances —DOC has authority to respond to technical violations by placing offenders at Level IV Work Release or Level IV Violation of Probation Centers for up to 5 days at a time, not to exceed 10 days in a calendar year. DOC reports that this is working well in southern and central parts of the state, where there are VOP centers.<sup>20</sup> However, in New Castle County, which accounts for 62% of reported major crimes<sup>21</sup> and where 56% to 60% of those supervised are located,<sup>22</sup> there is no such option. Based on anecdotal reports of delays of court hearings for VOPs in New Castle County, there may be an opportunity to improve the swiftness and certainty of sanctions for violations. If an appropriate group of offenders can be identified, there is a potential to save detention bed space for those awaiting judicial resolution.
- Home confinement is used as a sentence, but is not currently available to probation officers as a sanction. Allowing home confinement as a sanction would permit more flexibility in responding to someone for whom more structure is required, but where employment or other community obligations make incarceration a less desirable option.

## **Conclusion**

The Justice Reinvestment Task Force has a unique opportunity to encourage efforts to reduce recidivism by considering the reform proposals outlined here. With the assistance of policymakers and other agencies, community corrections can do even more to improve outcomes for individual probationers and the communities in which they live.

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<sup>18</sup> Examples include gestures that have little to no impact on public safety, including a waiver of the supervision fee; words of praise; the assignment of a task that demonstrates confidence in the individual's abilities and level of responsibility; a token of appreciation (e.g., a written note of acknowledgement or a certificate); acknowledgement of accomplishment in front of others (e.g., praise in public, acknowledgement by a person in an authority position); a more desirable housing or work assignment; a "pass" on a scheduled office visit; a bus voucher; reduced drug testing; or early discharge from supervision. Mark Carey, *Coaching Packet: Shaping Offender Behavior* (Silver Spring, MD: Center for Effective Public Policy, 2009).

<sup>19</sup> Senate Bill 50, as amended by Senate Amendment No. 3 and Senate Bill No. 150 (2003).

<sup>20</sup> The Central Violation of Probation Center is located in Smyrna, Delaware; and the Sussex Violation of Probation Center is located in Georgetown, Delaware.

<sup>21</sup> 62% is the average percentage of reported crimes in New Castle Country for 2005–2009. Office of Management and Budget, Delaware Statistical Analysis Center, "Delaware Major Crimes 2005 Thru 3<sup>rd</sup> Quarter 2010," (Nov. 2010).

<sup>22</sup> Unpublished DOC Data.