

July 30, 2015

Governor Bill Haslam
1st Floor, State Capitol
Nashville, TN 37243

Derrick Schofield, Commissioner
Tenn. Dept. of Correction
320 6th Avenue North
Rachel Jackson Building
Nashville, TN 37243-0465

Bill Gibbons, Commissioner
Tenn. Dept. of Safety & Homeland Security
P.O. Box 945
Nashville, TN 37202

Re: Governor's Task Force on Sentencing and Recidivism

Dear Governor Haslam and Commissioners Schofield and Gibbons:

On behalf of the Tennessee Consultation on Criminal Justice, the No Exceptions Prison Collective, the Human Rights Defense Center, the TN NAACP, Davidson County Public Defender Dawn Deaner, NOAH Criminal Justice Task Force, and Knox County Public Defender Mark Stephens, we are writing to express our comments and concerns regarding the draft recommendations of the Task Force on Sentencing and Recidivism.

Our understanding is that the mission of the Task Force is to “improve public safety in Tennessee by identifying (1) strategies to reduce recidivism among individuals leaving prisons and jails and (2) changes to sentencing laws and practices that will more effectively use criminal justice resources to reduce crime and address the growth of the prison and jail population.” A copy of the draft recommendations intended to implement these goals, distributed at the Task Force’s last meeting in June, is attached for reference.

Initially, we recognize the draft recommendations have not yet been finalized and lack detail and context. Based upon the draft text, though, we commend the Task Force for making forward-looking recommendations that we believe would improve Tennessee’s criminal justice system, specifically recommendation nos. 6, 7, 8, 9, 11, 12, 13, 14, 15 and 16.

However, based upon the draft recommendations and more detailed information contained in a June 6, 2015 report by the Vera Institute of Justice, we have serious concerns regarding several of the Task Force’s other recommendations that we feel need to be addressed at this point in the process. Specifically, we have reservations regarding six of the draft recommendations. We also

are concerned about two issues the Task Force appears not to have addressed, and with the process by which the Task Force arrived at its draft recommendations.

1. Draft Recommendation #1

Our most pressing and serious concern involves the first draft recommendation: “Institute truth in sentencing for felony convictions through the establishment of clear mandatory minimum sentences [alternative: clear presumptive sentences] that are conveyed to all interested parties at the time of sentencing.”

It is our understanding that this recommendation involves keeping the existing classification of felony offenses, a range of punishments associated with each offense, and the categorization of offenders based on prior offenses. Offenders would be required to serve their sentences to their presumptive release dates, which will include up to a 15% reduction for good time credits. The presumptive release date could be extended for misbehavior, presumably to the maximum amount of the sentence, but could not be reduced below the presumptive release date set by the court at the time of sentencing. There would be no parole; rather, prisoners would be released at their presumptive release dates and would be required to serve a specified amount of time on community supervision, which also would be set at the time of sentencing.

This new practice, which would represent a significant change in Tennessee’s current sentencing scheme, would be implemented “in order to achieve greater certainty and transparency at the time of sentencing.” While we are not opposed to this goal, we are concerned about how it would be implemented – details not included in the Task Force’s draft recommendations or the Vera report. Our belief, based on research and the experience of other states, is that lengthy sentences are both counterproductive and a waste of taxpayer money and other resources. Our view of the Task Force’s recommendations depends on whether they would have the effect of imposing longer sentences or preserve existing sentence lengths but change how they are imposed.

For example, a system that calculates the proposed presumptive release dates based on the *current* release eligibility dates specified in Tennessee’s existing sentencing matrix – e.g., 20% for mitigated offenders, 30% for standard offenders, etc. – could be a workable solution. As an example, a standard (Range 1) sentence for a Class A felony is 15 to 25 years with a 30% release eligibility date. If a prisoner is released after serving 30% of the sentence imposed from within the 15 to 25 year sentencing range (the presumptive release date, less good time credits), and is placed on a term of community supervision in lieu of release on parole, that could certainly be a viable alternative to Tennessee’s current sentencing scheme.

Similarly, a workable solution could be to require prisoners to serve 85% of the total sentence imposed, but to reduce the sentencing range within the existing sentencing matrix. For example, for a standard Range 1 offender for a Class A felony, instead of a 15 to 25 year range, the range could be changed to 4.5 to 7.5 years (to reflect the current 30% release eligibility date for Range 1 offenders). The full 4.5 to 7.5 year sentence would then become the presumptive release date, less good time credits. This would result in the exact same amount of time served as in the first example, but would set the presumptive release date at the current release eligibility date of, in this example, 30% for a standard Range 1 offender, by changing the sentence range.

Our concern, however, is that the Task Force is instead contemplating a recommendation that the sentencing range remain the same – 15 to 25 years for a standard Range 1 offender for a Class A felony – and that the presumptive release date will be set at 85% of the sentence imposed within that range (85% being associated with most truth-in-sentencing type sentences as well as being consistent with the current truth-in-sentencing standard in Tennessee). That would lead to a significant increase in the amount of time that prisoners serve and result in a major increase in the state’s prison population over time, and thus incarceration costs.

Several considerations counsel against such an expansion of the 85% truth-in-sentencing model that currently exists on a limited basis in Tennessee for specified violent felonies:

- First, the increase in prison population will result in a substantial increase in cost and an even greater expanded Tennessee Dept. of Correction (TDOC) budget. During the past four years alone the TDOC’s budget has increased from \$687.7 million in FY 2010-11 to \$948.5 million in FY 2013-14 – an increase of almost 40%.¹ During the same time period, the TDOC’s population increased less than 5%. When the 1995 85% truth-in-sentencing bill was passed, the fiscal note projected a total budget increase in the tenth year of \$57 million. Twenty years after its enactment, the truth-in-sentencing law has in fact cost Tennessee taxpayers billions of dollars, evidencing a woefully negligent underestimation at the time. If, as the Task Force may recommend, the 85% truth-in-sentencing model is to be expanded to all felony convictions while maintaining the current ranges in the sentencing matrix, the increased cost would be astronomical.
- Second, current evidence-based studies find that increased sentences do not necessarily lead to increased community safety unless one utilizes the practice of universal lifetime incarceration, a practice which would be contrary to every acceptable civilized democratic government known in the Western world. It seems particularly hazardous to increase prison populations in a state where the turnover rate for correctional officers is over 50% at some state prisons, a fact that has already led to destabilized and increasingly dangerous environments for both prisoners and officers, as evidenced by recent news reports.
- Third, this draft recommendation does not address the impact on families of men and women in prison with respect to increased sentence lengths. The extremely high levels of incarceration in this country have resulted in the destruction of families and destabilized primarily minority communities. Numerous national organizations based upon years of study report that children with an incarcerated parent face a significantly greater likelihood of incarceration themselves. Even Sesame Street has recognized the problem of children who have an incarcerated parent, by creating a muppet in that situation.

At a time when a majority of states are seeing the downside of truth-in-sentencing and the overwhelming financial burden of mass incarceration, and are therefore implementing reforms that will actually decrease prison populations, the Task Force proposals could have Tennessee move in the opposite direction. The federal prison population under a mandatory minimum sentence structure is instructive. Under the federal Sentencing Guidelines, prisoners are released at their presumptive release dates based on their full sentences with the ability to earn around

¹ The TN Board of Parole was incorporated into the TDOC during this time period.

13% in good time credits, followed by a term of community supervision – similar to the Task Force’s apparent proposal. The federal Sentencing Guidelines became effective in 1987, when the federal prison population was around 50,000. Today the federal prison population is about 207,845 – a more than 400% increase. There are many factors that have contributed to this increase, of course, but the Sentencing Guidelines have played a significant role as they have a direct impact on the amount of time that prisoners serve, which in turn has a direct impact on prison population levels over time, as well as incarceration costs.

One other issue relevant to the first draft recommendation that does not appear to be addressed by the Task Force is the manner of framing sentences, in particular framing them in months instead of years. According to a [presentation](#) during the Governor’s 2014 Public Safety Summit, imposing nine-month sentences rather than one-year sentences could result in a savings of \$6 million per year; imposing 30-month sentences instead of three-year sentences could result in savings of over \$147 million per year. A month-based system provides more flexibility.

2. Draft Recommendations #2, 3 & 4

We also have concerns about draft recommendation nos. 2, 3 and 4, which would enhance sentences for repeat drug trafficking, aggravated burglary and domestic violence offenders. While some three-time offenders may require prolonged incarceration, others might require only a typical sentence combined with some other type of intervention designed to reduce recidivism. There is a current national trend to *reduce* sentences, not increase them, especially in states, like Tennessee, where crime rates are decreasing. Longer sentences do not always result in increased public safety because there is a point of diminishing returns; however, they do tend to result in increased prison populations and incarceration costs, along with the destabilization of families and communities. Moreover, once sentences are increased it is often politically impossible to decrease them, thus any sentence increases will have an ongoing impact on the state’s prison population and related correctional costs in the future.

Even without these sentencing changes for repeat drug trafficking, aggravated burglary and domestic violence offenses, there is 9% prison population growth projected in Tennessee over a 5-year period ending in April 2019. Also, the concept of a “repeat offender” must be clearly defined to mean that the new offense occurs after a conviction and not just repeated arrests, or crimes that are part of one series of offenses. To do otherwise would encourage the police to delay an arrest for the purpose of “racking up” more offenses to achieve a higher sentence, for example. That practice actually occurred under the prior Class X drug law, which was later repealed due to such abuses. See *State v. Hinsley*, 627 S.W.2d 351 (Tenn. 1982).

3. Draft Recommendation #5

The Task Force also appears to be considering intermediate sanctions for technical parole or probation violations, such as short periods of detention, but only for non-serious offenses. Even serious offenses may warrant only intermediate sanctions instead of a return to prison. The Task Force’s suggested option of community supervision for all offenders after they are released from prison, instead of parole, could result in more returns to prison based on technical violations, unless there is a significant change in the goals and strategies of post-release supervision. There

is already a high rate of parole violators returned to custody; according to the Bureau of Justice Statistics, over 38% of the TDOC's total admissions in 2012 were parole violators.

4. Draft Recommendation #10

The Task Force's draft recommendation no. 10 suggests supporting "a Social Impact Bond model of investment as a way for funding promising re-entry programs." While social impact bonds (SIB) have become trendy in some criminal justice circles, they do not have a proven track record of success. In fact, earlier this month, [news reports](#) indicated that the nation's first major social impact bond initiative, meant to reduce recidivism among youthful offenders held at the Rikers Island jail complex in New York City, "had failed to produce the desired financial and philanthropic returns. As a result, the five year investment was scrapped after three years." The investor in the program, Goldman Sachs, suffered a \$1.2 million loss.

5. Other Issues that Should be Addressed

Many of the considerations we have highlighted to this point could be taken into account by a Sentencing Commission or Council. Although the draft recommendations mention the possibility of creating such a Council, we have been told this recommendation is not currently a priority. We feel that establishing a sentencing commission independent of the TDOC for the purpose of making recommendations to the legislature about sentencing policies and related issues is crucial. A number of other states have such commissions and have seen decreases in both recidivism and incarceration costs.

A second issue that has not been addressed by the Task Force is whether to reinstate the joint Select Oversight Committee on Corrections. We believe the Committee should be reinstated in order to provide direct and ongoing legislative oversight over the Tennessee Department of Corrections. The Committee operated until 2011, and to the extent that the recommendations of the Task Force will lead to legislation that will impact the TDOC and Board of Parole, the legislature should have independent oversight to monitor those agencies' implementation of that legislation going forward, through a Committee dedicated to that purpose. Among other issues, a reinstated Select Oversight Committee on Corrections would review and monitor the TDOC and Board of Parole's progress relative to community supervision, reentry initiatives and recidivism reduction. The TDOC is, according to Commissioner Schofield, a "billion dollar a year business." It is irresponsible government and irresponsible public policy to have any government agency operate a billion-dollar-a-year budget, with complete control over almost 30,000 citizens, and yet have no independent legislative oversight committee. Continuous news reports of a Department of Correction fraught with problems, including violence and staffing issues, stand as evidence of the immediate need to reinstate the Committee.

6. The Task Force Process

We are also concerned about the composition of the Task Force. According to a news release issued when the Task Force was initially convened, the Task Force members include three district attorneys, a former district attorney, two sheriffs, a former sheriff, a chief of police and the Commissioners of two state law enforcement agencies – the Department of Safety and Homeland Security and the TBI – as well as the Commissioner of the TDOC and the chairman of

the Tennessee Board of Parole. Thus, the Task Force is weighted toward the law enforcement community. The Task Force includes only one public defender, and while one victims' rights advocate is on the Task Force, there is no advocate for prisoners or family members of prisoners. Other members of the Task Force include six state lawmakers, most of whom do not have any specific expertise with respect to sentencing or recidivism. Our concern is that the Governor's selections for the Task Force have created a bias toward law enforcement and, thus, typical law enforcement solutions with respect to our criminal justice system: Longer sentences, more prosecutions and more prisons – a position which is untenable and has led to a national crisis of mass incarceration that must end, as has been recognized by both political parties, the President, Supreme Court Justices and even the Koch brothers.

Further, a member of the Tennessee Consultation on Criminal Justice has been attending the Task Force meetings and reports there has been a dearth of public input, with Task Force members having little interest in soliciting testimony from the many state citizens who have expertise in the areas of sentencing and recidivism reduction – including criminal defense attorneys, academics, those involved in community-based reentry programs, etc. The lack of public involvement, including the inability of members of the public to address the Task Force at its meetings, necessary limits the information and data the Task Force has to work with in terms of formulating final recommendations to the Governor's Public Safety Subcabinet.

In conclusion, we hope the Task Force will seriously consider these concerns and incorporate them into its final recommendations, or allow us to express them in more detail.

Sincerely,

TN Consultation on Criminal Justice

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NOAH Criminal Justice Task Force

Walter Searcy

By: Walter Searcy

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cc: Task Force members

Attachment

DRAFT OF TASK FORCE RECOMMENDATIONS

HOLDING OFFENDERS ACCOUNTABLE

1. Institute truth in sentencing for felony convictions through the establishment of clear mandatory minimum sentences [alternative: clear presumptive sentences] that are conveyed to all interested parties at the time of sentencing. **Sentencing Structure Work Group**
2. Enhance sentences for (a) repeat drug trafficking offenders and (b) repeat aggravated burglary (home burglary) offenders. **Sentencing Classifications and Enhancements Work Group**
3. Enhance sentences for repeat domestic violence offenders by making third and subsequent convictions for domestic violence assault a felony rather than a misdemeanor as is the case currently. **Sentencing Classifications and Enhancements Work Group**
4. Make an arrest for domestic violence trigger an automatic order of protection **Sentencing Classifications and Enhancements Work Group** [Note: Based on stakeholder meetings, and initial research, this needs further discussion.]
5. To insure swift and certain accountability, develop more effective community-based responses to non-compliance with conditions of supervision which do not involve a serious offense. **Community Supervision Work Group**

(Examples include the ability to (a) detain individuals for non-compliance for up to 180 days without returning them to the state prison system and (b) refer individuals

to violation centers with a work/community service component for certain types of violations, including failure to pay fines and fees.)

6. Continue to support recovery (drug treatment) and other specialty courts, with funding for individual courts based on an effective evaluation system.

Programming and Treatment Work Group

REDUCING THE NUMBER OF REPEAT OFFENDERS

7. Establish individualized case management plans for felony offenders on community supervision (both probation and post-prison) and tailor the conditions of supervision to fit each offender's individual needs. **Community Supervision**

Work Group

8. To assist with the development of effective case management plans for incarcerated felony offenders, invest in evidenced-based, cost effective, and coordinated transitional programming and treatment services pre and post-release.

Programming and Treatment Work Group

9. For felony offenders who are incarcerated and released without parole supervision, institute a system of post-release community supervision which includes the use of intensive individualized case management plans as set forth above. **Community Supervision Work Group**

10. Support a Social Impact Bond model of investment as a way for funding promising re-entry programs. **Programming and Treatment Work Group**

11. Develop and implement a system of positive incentives through which those on community supervision can earn a reduction in the time period of supervision.

Community Supervision Work Group

12. Increase the employability of those with criminal convictions by taking steps to help them keep or obtain driver licenses or state photo identifications. **Programming and Treatment Work Group; Community Supervision Work Group; Sentencing Classifications and Enhancements Work Group**

(Examples include (a) issuing driver licenses or photo IDs to state inmates upon release and (b) issuing restricted driver licenses for purposes of getting to and from work rather than completely revoking licenses for failure to pay fines and fees.)
13. Invest in effective interventions to combat aggravated assault, particularly for offenders 18 – 34 years of age. **Sentencing Classifications and Enhancements Work Group** [Note: Needs more discussion.]
14. Re-examine the management and treatment of sex offenders to insure access to housing, employment, and other basic needs in order to be productive members of society. **Community Supervision Work Group** [Note: Needs more discussion.]
15. Raise the felony property crime threshold to \$1,000. **Sentencing Classifications and Enhancements Work Group** [Note: Needs more discussion. Does it promote public safety? Would it reduce repeat offenders by reducing those with the stigma of a felony conviction?]

INCREASING ACCESS TO RELIABLE DATA AND INFORMATION

16. Establish a criminal justice research council to provide non-partisan, professional statewide research and information development. **Sentencing Structure Work**

Group

(Examples include reliable data on (a) criminal sentences by various categories of offenses; (b) actual incarceration times for various categories of offenses; (c) probation and parole violations, including the reasons and results; (d) crime rates and trends; and (e) caseloads of judges, prosecutors, and public defenders.)

17. Develop a validated risk analysis for all stages of decision-making in felony cases, including pre-trial decision –making, sentencing, and post-prison supervision. **Sentencing Structure Work Group**