

Day Two

States' Implementation of Alternatives to Incarceration

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SUMMARY

This panel explored the efforts that various states have taken to reduce the size of prison populations through alternatives to incarceration.

North Carolina addressed an exploding prison population by abolishing parole and restructuring its criminal justice program in accordance with correctional resources. In 1990, it created a non-partisan sentencing commission to establish a set of sentencing guidelines. At the same time, the state authorized funding for counties to establish community-based programs for offenders. Under these guidelines, approximately 63 percent of felony offenders receive some form of community punishment. Notwithstanding this high percentage, studies show that offenders who receive some intermediate sanction are less likely to recidivate than offenders who are sent to prison.

Pennsylvania's system, by contrast, is indeterminate, and sentencing judges specify both a minimum and maximum penalty, which are taken from a set of advisory guidelines subject to statutory limits. These guidelines specifically promote three programs: County Intermediate Punishment, State Motivational Boot Camp, and State Intermediate Punishment. These programs are available only to people who would otherwise be incarcerated, and success is measured in terms of reduction to both cost and recidivism rates. Programs include house arrest, electronic monitoring, shorter penalties for low-risk offenders, and drug and alcohol treatment.

Arkansas has two notable programs. One is its system of community corrections centers. These centers are therapeutic communities, and successful participants in the program may be released after nine months. These programs have reduced the return rate from 39 percent to 29 percent. The other program is the technical violator program, which allows defendants with technical violations to enter a residential center rather than going immediately back to jail. This program has resulted in many defendants being able to avoid jail at a significant savings for the state.

Virginia's efforts to implement alternatives began with a statistical study of its inmate populations. As its prison beds filled up, the state considered alternatives for non-violent offenders. To do this, it created a risk assessment instrument with the goal of placing 25 percent of prison-bound, non-violent offenders into alternative sanctions. To avoid the problem of net widening, the state created a bifurcated sentencing guideline system, wherein the risk assessment would be completed only if the defendant was actually prison bound. A review of the program showed that rates of incarceration as well as crime rates dropped, and its success has prompted legislators to expand use of the risk assessment instrument.

STATES' IMPLEMENTATION OF ALTERNATIVES TO INCARCERATION

COMMISSIONER HOWELL: Good morning. I'm Beryl Howell. I'm one of the commissioners on the Sentencing Commission. Welcome to the second day of our symposium. I know all of you are very busy and two days of the symposium—even though it's talking about the most fascinating issue of our day, alternatives to incarceration—it's time consuming and takes you all away from your busy schedules, and we on the Commission truly appreciate it.

This morning we're going to start with a panel on states' implementation of alternatives to incarceration and I want to, as an introductory context, talk about something I referred to yesterday, which is the Pew Center report that came out just last month, that stated that states are spending over \$49 billion in 2007 alone on prisons, with no end in sight. The Pew Center estimates that by 2011, prison spending by states alone is going to increase another \$25 billion.

The increases in rates of spending on prisons over the last decade have outpaced the increases in rates of spending on higher education, which is another huge chunk of discretionary spending by state budgets. Some of the statistics in the Pew Center report I thought were quite startling.

In the Northeast, inflation-adjusted prison spending over the last 20 years increased 61 percent while higher education spending dropped 5.5 percent. In the western part of the country, spending on prisons, and this is a quote by the Pew Center report, "skyrocketed by 205 percent while higher education spending rose only 28 percent." So even though, as one of our speakers yesterday pointed out, prison spending and higher education spending are all going up, the rates of increases for prison spending, in contrast to higher education rates, are just shocking.

A number of outstanding reports have been issued by the ABA, the Sentencing Project, and others with recommendations for alternatives to incarceration, and one of our speakers yesterday talked about the Justice Kennedy Commission. These are all reports that the Sentencing Commission is taking a look at as we set our priorities for our next amendment cycle, and we're meeting at the end of this month. Just so you all know, the timing of our symposium is helping to give us a lot of food for thought as we set our priorities at the end of the month and consider what our priorities should be for our next amendment cycle.

This morning we're going to hear from people in the trenches who have been implementing and evaluating programs designed to reduce prison costs and over-crowding without sacrificing public safety. During this session we're going to discuss alternatives-to-incarceration programs available in four states: Arkansas, North Carolina, Pennsylvania and Virginia. One of the things that each of these states has in common is that they have a guidelines system, although the systems vary in how tightly each controls judicial discretion. So they're differing guidelines systems.

Our panelists are going to review which programs have been successful, which have not, and the most pressing challenges these states have encountered implementing alternative sanctions to incarceration, including cost considerations and justifications, staffing, and persuading policymakers that public safety will not suffer. Each panelist is going to speak for approximately 15 minutes and we're going to try very hard to leave approximately 10 to 15 minutes for questions at the conclusion of their comments. Thank you.

Now I'm going to introduce each of them so we won't interrupt the flow of the panelists, and I'm going to start with Dr. Susan Katzenelson. Dr. Katzenelson has served as the executive director of the North Carolina Sentencing and Policy Advisory Commission since 1997. Prior to joining the North Carolina Commission, she was a staff member of the United States Sentencing Commission and served as our director of the Office of Policy Analysis, so it's a welcome home for her. She has taught at the University of Pennsylvania, the American University, and the University of Maryland, and is a graduate of the University of Pennsylvania, specializing in criminology, psychology, and research methodology.

Mark Bergstrom has served as the executive director of the Pennsylvania Commission on Sentencing since April 1998, and previously served as the associate director. He is also a senior lecturer in crime, law, and justice at Pennsylvania State University and as adjunct professor of law at Duquesne University, and a state sentencing and corrections associate with the Vera Institute of Justice. He previously worked as a probation officer and director of the Office of Volunteer and Community Services for the Court of Common Pleas of Lancaster County, Pennsylvania. He received a B.A. in psychology from Millersville University of Pennsylvania and a Masters in public administration from Pennsylvania State University.

Mr. David Guntharp is director of the Arkansas Department of Community Corrections and serves as a member of the Governor's cabinet. Prior to becoming director, he served from 1970 to 1999 in various capacities including juvenile probation officer, supervisor with probation and parole, supervisor of community services, administrator of probation and parole, assistant director of special services, assistant director of field services, and chief deputy director of institutions. He received a B.A. in business administration with a minor in sociology from Arkansas State University and an M.A. in criminal justice from the University of Arkansas in Little Rock.

Last but not least is Dr. Rick Kern who has been director of the Virginia Criminal Sentencing Commission since its inception in 1994. Before that, he served as director of the Virginia Criminal Justice Research Center, as research director for the Governor's Commission on Parole, Abolition and Sentencing Reform, and as director of the Governor's Commission on Violent Crime. He also served as president of the National Justice Research and Statistics Association and is an advisory board member of the state sentencing and corrections program of the Vera Institute of Justice. He received his Ph.D. and M.S. in criminology from Florida State University.

So thank you all for coming, for being here, and sharing your wisdom with us, and I'll turn it over to Dr. Katzenelson.

DR. KATZENELSON: Good morning to everyone and thank you for the kind introduction, and as far as trenches go, North Carolina ain't that bad. So it's wonderful. Thank you for inviting us, and greetings from our Sentencing Commission and Jack Spainhour, our chairman. It's a pleasure to come back, and in a sense it's coming back home. I do talk fast. I'll try to talk really fast today, and the accent is not North Carolina in case you were wondering. But I was very taken by Commissioner Howell's question yesterday about what do states do differently, and then you look at your notes, and you say these are the wrong notes because I don't know if I'm answering it. [Off topic.] I'm going to just try to basically deal with that question.

In North Carolina, and I believe in many other jurisdictions, crisis is usually a very good prompt. It's healthy in the sense of creating change because it's needed. In North Carolina, the specific one was

budgetary resource issues, which is probably not news to a lot of the states. I think the federal government had a little bit more luck with that. And so, a lot of the solutions that came out of that crisis were very directly related to and reflective of the crisis itself.

Again, I don't want to go through the whole story, but prison crowding was getting out of control at the end of the '80s. We were under federal lawsuits and the threat of the feds taking over, which states did not really like. The legislators get very upset when that notion is mentioned. There was a total revolving door in terms of sentences imposed. Most people will have served 18 to 20 percent. There was absolutely no public trust. There was a total back-end solution to the whole issue of prisons and so, the public, the victims, and the issue of public safety was utmost in everyone's minds, and it was clear that there was change needed.

The sentencing reform that resulted was a comprehensive response to try and address the issues driven from the resource issue and the related problems, too. Prison is the most expensive resource and the longest, and prison crowding necessitated the issue of trying to predict more accurately what kind of resource needs the state will have. That led the thinking to a more rational and more structured and predictable sentencing system, and the notion of abolishing parole, and we do not have parole since the new law. A commitment on the legislative end to balance the new policies with correctional resources, which, again, sounds very obvious, but a lot of states aren't following through on that and prioritizing. It's kind of who are the people you have to have in prison kind of question. So these were the notions that were floating around, and there was a decision at that point of being up front and planning the system. So North Carolina, in that sense, is probably one of the most structured and most mandatory and most front-end systems of controlling itself, the legislation, and so on.

Again, I mentioned in terms of answering your question, that there are many reasons states start reform. Rehabilitation was not one, nor was disparity for that matter, that had driven the North Carolina reform. It was more the resource issue. So the discussion was what can we do to control the population rather than what can we do to rehabilitate it. It's not absent in North Carolina's laws, but it is definitely not the number one priority.

By the early '90s—by the end of the '80s and the early '90s—North Carolina passed the package of three pieces of legislation to clarify what we wanted the reform to be and the three pieces—and I'll mention them just in passing—created a comprehensive whole that they hoped will answer the issue. First, in 1990, they made a commitment to a commission and a lot of states had done that. The federal government had done it actually earlier than most. The legislature studied the experience of other jurisdictions and hopefully learned from it in terms of their mistakes, and they set up a commission. It was been made permanent afterwards, and I think they like the commission more than they like structured sentencing at this point.

The Commission is very broad based. It has 30 members, they're all part-time, non-paid; they're all volunteers. The Commission is non-partisan and represents the basic group of people who you would expect from the field: the judiciary, corrections, and so on. They made a commitment in that legislation and directed the Commission to develop a correction population projection model, and it's interesting that it's almost the first directive in setting up this whole reform. They made a major commitment to be research-based, empirical, and research-driven.

They also gave a directive to set up sentencing structures. The legislators by then knew what they wanted. They told us offense classifications and offender classifications. That's what they wanted the reform to look like. There was not a lot of groping and inventing things. There was kind of shopping and picking at things that they liked from other jurisdictions, and the comprehensive community corrections strategy, which was also in the directive to the Commission. The Structured Sentencing Act itself, which is the sentencing law reform, was passed in 1993, three years after the Commission was set up. It was a bipartisan vote; both chambers almost unanimously voted for it. I believe either one or two dissents. So that was a rare moment in any state's history.

I don't have the grid here, but I'll try to explain a little bit. It had no parole, there was a minimum sentence to be served and a 20 percent add-on to the maximum sentence—all this said by statute. That meant the offender could earn some time off at the discretion of the Department of Correction. No parole anymore based on participation in programs and good behavior and other things. The priority was set early on. Active and/or serious repeat offenders need to be in prison, or a combination thereof, and then for all the others we need to offer alternatives. So it always strikes me again that, at least in North Carolina, when you want to talk about alternatives, you always have to start from prison because I don't think, at least in our state, people prefer offenders to be on the street. The majority of them, they simply have to compromise. So, at least in our state, it's very much who are the people we have to have room for, and then who are the people we can take a risk on.

Interestingly, at the same time, there was twin legislation passed with the Structured Sentencing Act called the State Criminal Justice Partnership Act, which, again, showed serious intent on the part of the legislators to commit, to put their money where their mouths are, and to give support and funding to counties to continue or start additional community-based programs for offenders. That's money coming from the legislature funneled through the Department of Correction, but administered by independent boards per county. These are all front-end solutions, as you see, and the other point I wanted to mention, which I think is one of the fascinating things that a lot of other jurisdictions don't have. The legislature in a real act tied its own hands in terms of its resource responsibility. The Commission was mandated to produce annual resource projection needs, staff products, not voting on it; that goes directly to the legislature. But they also required of themselves to send every new criminal bill when introduced to the Commission for two products: one, consistency check, and the Commission votes and comments whether the new bill is consistent with the existing structure. We don't comment on the wisdom of making it illegal to sell pine straw, which it is. It's a felony in North Carolina and you don't want to do that. But we do comment on whether it fits the grid and the proportionality of penalties. The other more interesting one is we also do a fiscal impact or resource impact per bill that then goes in front of them as a fiscal note that they have to consider. There were many bills that were stopped or modified because they were too costly. So that's not the Commission telling them, "Don't do it." That's just the Commission telling them, "If you can find the money, then by all means," and it has stopped many pieces of legislation, whether they were good pieces or not. But they committed to continue with tying their hands to the grid by looking at the resources.

The grid, again, one of the interesting things—and I'll get to why community correction was so interesting. Our grid has 60 cells, prior record level one through six. I'm talking all about felonies. Offense classification: ten categories. Forty of the 60 cells only have an active option, prison, and 20 of them have increasing degrees of community options. But when you look at the population, we had last year 30,000 felony convictions. Only 18 percent of them fall into the A categories; for 88 percent the judge has an option. That is one thing that the federal government doesn't have. A lot of the states are

bottom heavy, so to speak, in terms of felonies. A lot of our felonies are not serious. The federal government gets lucky—the top, the most serious ones. So, in those 88 percent of the cells, judges gave non-prison sentences in 63 percent of them. Our incarceration rate for the last year, the initial sentence was about 35 to 37 percent initial prison sentence, and the rest of it was some form of community punishment. The community punishment that really made the difference, that was the cornerstone of this strategy, was intermediate and, again, there's a list of the sanctions we have. They are the run-of-the-mill drug treatment court, intensive probation, all the split sentences, and the other ones that you know about. But that allowed judges to look at that middle group, which was always the issue in terms of prison resources. Do we send this person to prison or not, and if it was a mid-level felony and/or a mid-level person in terms of prior record, those are the people who the courts needed to take a chance on, and they have. So, intermediate pretty much consistently has been 44 percent of our felony sentences. If I get through that page, I'll give you some statistics on how successful that is.

But the other thing that is not mentioned in terms of alternatives, but I do want, again, to tell you how our system is managed. We have very long sentences for the most serious felonies. We have a true life and death sentence for murder. The first five categories have very long sentences, no parole. There's a huge drop even in the prison sentences allowed below that. So the state had really done two steps to seriously reduce prison sentences and we don't mention it, but that helps solve prison crowding as well, and sometimes more, because there's no revocation issue. The average below that is 11 months of actual minimum sentences imposed and then, of course, the phasing in of the intermediate sanctions.

Another thing that wasn't mentioned yesterday, I wanted to bring it up, prosecutors have a great way of balancing the system. We do plea bargains; everybody plea bargains. Ninety-seven percent of our sentences, our convictions, are the result of a plea. So the prosecutor is basically the person who has more to do with what grid cell the defendant will fall into, and so, to a great degree, the prosecutor also has control over facilitating community-type sentences.

The new grid that was created made community corrections a necessity. When you limit the prison to a very small group of people, and at the very end there are actually three cells where prison isn't even allowed for the judges as a first time option, you have to work somewhere, and that's where the intermediate sanctions came in. That was a tremendous investment.

The other thing I wanted to mention is that the legislature funded this thing from the beginning. They increased probation officers by 50 percent. There was a huge investment and willingness to make this change work, which is another answer. To make some good policy that works for you, but also actually implementing it, because otherwise, it's only on the books. [Inaudible.]

I would just like to go over that basic issue of how you evaluate where you are, because I don't want to give the impression that everything is working, everything is great. In terms of the court using the new system and the alternatives, I think that the 63 percent I mentioned of giving non-prison sentences for felonies is a pretty good success rate. It could be higher, it could be lower, but I think the state is doing okay with that, and prosecutors are as much a part of that negotiation as anything else. The incarceration rate was mentioned yesterday. North Carolina has been holding steady at 360 per 100,000 and we are a southern state. There's no mistaking that. We are the 20th lowest in the nation, second lowest in the south. I think that's a pretty good indication that alternatives are working.

In terms of our budget, as Commissioner Howell just mentioned, the correctional budget is the distant number three in our state, and DHHS and public instruction are number one and two. So again, we're holding steady. The department is only six percent of the budget. What is under-funded is the community one; it's 12 percent of the department's budget and it is usually chronically out of money and needs more programs, so I think that that could be more of a success with more time.

Probation revocations—again, that's an issue you have to look at. It's okay to give a non-prison sentence to people. The question is, "What do they do with their time and their chance to rehabilitate themselves." Annually about one-third of all people on probation get terminated because of revocation. In terms of prison admissions, about 42 to 45 percent of people entering the prison gate come under revocation. So only slightly more are new crime admissions. I think it's pretty typical of states. It's not an atypical number. It comes from putting a lot of them on probation to begin with. The way to reduce that is not to give probation on the front end.

Recidivism rates are very interesting, and I'll try to almost be done here. Regular probationers get re-arrested within three years, about a third of them get re-arrested, prisoners about 50 percent. But when you look at regular probation, intermediate probation, and prisoners, it's exactly a ten-percent difference between the three groups, 31 percent, 41 percent, and 50 percent. So indirectly, I think it proves that the intermediate group is the right group to target. That's a group that does better in the community—not as well as your regular, simple probation offenders, but way better than the prisoners. In a lot of studies we control for risk. Somebody talked yesterday about the risk of re-arrest. It is the best predictor of what you will do once you're done with your original sentence. But even when you control for risk, people do worse in prison. So we call it "the prisoner add-on."

So all of these points really support trying to go and continue with community corrections. To try and answer the question again, we had a need that had to be resolved, and the need was resource-driven so we found solutions that suited that problem. There was a commitment from the beginning to be very front-end, controlling it more, and to structure the system in such a way that neither the DOC nor parole, which doesn't exist anymore, would control it. It does not control prosecutorial discretion. Again, I know that that has been an issue in the federal guidelines, with the relevant conduct. We have conviction-based sentences. The prosecutors have a huge say and a huge impact on the convicted charges. We have more garden-variety lesser felonies that help us to phase in community-based corrections. Not everybody needs prison. The state was very clear on prioritization: violent, repeat offenders, and a new [inaudible] which in the south used to be considered as serious as violent crimes. The state and the public have given that up, and they are in much lower categories. So are, by the way, non-trafficking drug offenses. Most drug offenders don't go to prison the first time around.

And, finally, there is a commitment, thanks to the guidelines and to being research-based, factual, and trying to de-politicize as many of these decisions and steps that they can. I would lie if I said that the commission isn't political, but a lot of the decisions, especially for the resource issues, are not, and, at least in terms of North Carolina, it has been so far. It's a growing state. I think as of yesterday, we had 38,000 people in prison, which is not little, but, certainly, we don't have a crisis in that sense. So far, we're managing, and we're hoping that it will stay. Thank you.

COMMISSIONER HOWELL: Thank you. Now Mr. Bergstrom is going to tell us about Pennsylvania.

MR. BERGSTROM: Good morning. [Off topic.] I'm going to follow up with what Susan talked about, about process issues. So not much detail on specific programs, but on how sentencing commissions and sentencing guidelines can be used to target offenders appropriately for alternatives for incarceration.

In Pennsylvania, we have an indeterminate sentencing system. Chairman McVey of our parole board talked yesterday, and I think there are three characteristics I'd like to point out that frame how Pennsylvania and our Commission thinks about developing and targeting alternatives to incarceration.

The first is an indeterminate system. Our courts are imposing both a minimum and a maximum sentence. The minimum sentence, generally speaking, provides the starting point for a determination of parole, and for state sentences a person can't be considered for parole before that minimum has been served. The maximum sentence is at least double the minimum, but it goes up to whatever the statutory max is, but can't exceed that statutory max. The maximum sentence really serves as that termination point for the sentence, whether it's through incarceration or through parole or through a combination of the two. So one issue is the indeterminate sentencing system we have.

The second is that we have structures. We have sentencing guidelines. So the guidelines in Pennsylvania, which are advisory according to our Supreme Court, those advisory guidelines are used to help judges determine the minimum sentence. It's sort of a starting point in Pennsylvania for suggesting what that minimum sentence should be. There are also certain mandatory minimum sentences by statute in Pennsylvania. Those would supersede the guidelines and sort of determine the shortest minimum sentence possible. So we have some structures in place that help to guide or direct the use of resources and the length of sentences in Pennsylvania. The third is that we're very much county based. A lot of what we do in Pennsylvania happens at the county level. In Pennsylvania, the state Department of Corrections can accept inmates who have a maximum sentence of two years or greater. A county jail can house offenders with a maximum sentence of less than five years. So our county jails are used much more for incarceration of offenders. Our county probation and parole systems are very engaged in the process, and really carry a big share of the criminal justice population.

So when the Commission is talking about alternatives to incarceration, we're not just talking about alternatives at the state level, we're talking about alternatives at the county level. We have to look at the entire system when we're thinking about alternatives. So we have to think about what can be done in the system as a whole, at bail and pre-trial release phases, to try to reduce the amount of time being served, so you don't have those time-served sentences at sentencing. We're trying to encourage and work with counties to develop pretrial programs and alternatives to pretrial detention that can be used at that level.

There are diversion programs that are available by statute in Pennsylvania: pre-trial, pre-conviction, pre-sentence. Generally, they capitalize on expungement of records and other types of things like that to promote those types of programs. I'm going to talk in some detail about the sentencing alternatives because that's really where the Commission focuses energies through the guidelines on promoting the use of three specific programs: County IP—County Intermediate Punishment, State Motivational Boot Camp, and State Intermediate Punishment. And then, as the chairman talked about yesterday, there are a number of efforts at coordination at the back end, at the parole phase, and re-entry and revocation phases, both by the board for state offenders and at the county level by courts to address back-end issues.

So these are the three sentencing alternatives that the Commission is trying to promote the use of. County Intermediate Punishments would serve as alternatives to incarceration for those who would otherwise be in a county jail—again, a person who would have a maximum sentence of less than five years. State Motivational Boot Camp, a program many of you are familiar with that would serve as a six-month program plus some aftercare—building aftercare that would serve as an alternative to a minimum sentence of at least two years, and up to a three-year minimum sentence in a state facility. And then State Intermediate Punishment, which is basically a comprehensive treatment program that begins in a state institution and extends out into the community—a two-year flat sentence, but that serves as an alternative to what might be a drug mandatory, or other types of sentences that could have maximums up to six or seven years. So it's a substantial change; it's the newest program that we have.

Just to give you a little sense of numbers and the role of the Commission in this, I know yesterday there was some discussion of a drop in the crime rate, and other things like that, and I think that's important to recognize, but when the Commission is trying to think about promoting sentencing programs, it often is in the context of just trying to maintain, or trying to slow the growth of admissions to state prisons or county jails. Just as an example, in 2007, the Commission received 141,000 sentences reported to us for misdemeanors and felonies in Pennsylvania. In 2006, we received 134,000. What we've seen over the last five or six years is an annual increase in the order of 5,000 sentences a year. So part of what we're doing—even if the crime rate is going down because of law enforcement activities and other things like that—we are trying to provide courts with an array of options that, hopefully, will at least maintain the current rate, but maybe will slow down that rate of growth, and that's as important as anything else that we're doing. It's one of our key considerations.

So when we're talking about these programs, we're talking about two or three things to implement alternatives. One is making sure that we start by looking at offenders who are otherwise going to be incarcerated. We want to make sure we're not net widening, developing great programs that are going to apply to people who are going to get probation anyhow. So first is identifying the right population, and then, secondly, when identifying individuals who are most appropriate for certain programs, then the question is, "Are those programs effective?" Are they effective, in terms of reducing costs or jail days, but also are they effective long term, in terms of recidivism? And sometimes you get some of that, and sometimes you get other parts of that, sometimes you get both. But I think it's important to look through all of those features. There are some programs we have, where the only purpose of the program is to provide a community-based alternative to incarceration. DUI mandatories in Pennsylvania apply almost across the board. There are community-based alternatives that use house arrest and electronic monitoring for those same offenders. The outcomes may be no different using electronic monitoring instead of a county jail cell. But the cost to the county and the use of that is a very purposeful kind of approach. That's different than when we're doing comprehensive drug and alcohol treatment for offenders, and we're hoping to have better outcomes for those offenders. So I think all of that is part of a mix that we're looking at.

Let me quickly go through some of the issues we're talking about. When we're using guidelines to promote sentencing alternatives, one of the things we try to do through the guidelines is adjust the recommendations to better sort offenders. There are times when we are recommending changes to the guidelines. We are increasing penalties for what we see or what we hear are more serious violent sustained offenders, to try to encourage or promote longer incarceration for those types of offenders, high-risk, dangerous offenders. And at the same time, we're trying to better sort and identify offenders who should not be subject to any incarceration, or maybe be subject or targeted for these alternatives I'm

talking about. So you'll often see that type of trade-off occurring, but it is important to take into account that one of the things guidelines can do is adjust downward to try to take people out of the range of incarceration.

The second thing the guidelines can do is to promote tradeoffs to incarceration within the guidelines. So having a cell in the guidelines that is presumptively an incarceration cell, a county incarceration cell, but creating a mechanism for a tradeoff, either a one-to-one tradeoff when you're using a community-based restrictive program like house arrest for incarceration in a county jail or state prison incarceration; or using, conceptually, a different type of program; using drug treatment in the community in lieu of incarceration. Either of those types of tradeoffs should be considered as part of the guidelines.

Then there are also recommendations to reduce time spent in correctional programs. The State Intermediate Punishment Program and the State Motivational Boot Camp—in both cases those individuals are going to the State Department of Corrections. We hope they will be there for a shorter period of time, and we also hope that they'll have better outcomes.

The other provision, not necessarily part of the guidelines but certainly related to them, is when you have statutory authority to change the status quo. In Pennsylvania, certain community-based programs satisfy the mandatory minimum, but the mandatory is still in place. Using community-based alternatives and treatment alternatives to satisfy that mandatory is one approach, and authorizing certain correctional programs for people who would otherwise be ineligible. For instance, individuals who are facing a mandatory minimum sentence for drug trafficking may be appropriate and exactly the target for a state intermediate punishment program that offers comprehensive treatment within a state facility. So those are some things to take into account.

Since I'm down to four minutes, let me really quickly go through this, but these slides will be available, I'm guessing, on the conference site. At the very high level of targeting, this is our matrix in Pennsylvania. Each of those cells is a recommendation based on a combination of the current offense and the criminal history. At the top range of the guidelines, level five, these are individuals we are recommending specifically for state time in state facilities and, down at the lower corner, these are individuals we're recommending for non-confinement, and there's sort of a continuum between the two that takes into account both state and county resources. And in the middle, the blue and yellow sections, level three and level four, is our target zone for people who presumptively are being incarcerated, who we are recommending for alternatives, community-based alternatives. It's very important that we can go to the budget office and we can say, "These are people who are being incarcerated right now." If there is funding for alternative programs at the county level or the state level, this is where we should target these resources, because you can show that these are people who would otherwise be incarcerated, and you can measure the outcomes of these programs versus the outcomes of those who are in jail or prison.

One of the things we use in sentencing data, as Susan and Rick and all other sentencing commissions do, I think, is to try to provide information back to the users, back to the courts and the counties about how resources are being utilized. So using our matrix as sort of the template we say, here's what we recommended, here's what you did, here's what your sentences look like in terms of how you're using state prison and county jail. So this kind of information at a state level, but also at a county level, is very helpful for a county to look at how it's using its jail and trying to determine where it could insert alternative programs that would have the greatest impact.

We use the same kind of information to help identify those who are eligible for certain programs. So, based on statute, and based on who has been incarcerated in a county jail, we plot that for the county or the state, to identify which of those offenders would be eligible for county intermediate punishment in lieu of incarceration at county jail. We do the same at the state level. Those that ended up in state prison, how many of those would have been eligible for this program, and we try to feed that back to the courts and to others.

I'm going to close by quickly running through some of the evaluations, because the first thing is making sure that we're targeting the right people, and then the second thing is to test what we've done, to see if we have equal or better outcomes, where we actually save space. On the first level of guideline revisions, we've found [inaudible] a number of changes to the guidelines. We've had guidelines since 1982. We've seen that sort of change when we target serious and violent offenders and promote longer sentences. We see the courts moving in that direction, and we see the opposite in terms of the individuals who we're targeting for alternatives to incarceration.

With comprehensive drug and alcohol treatment in lieu of incarceration, first, we made sure we were targeting the right people, people who were otherwise in county jail. We took that to the governor's budget office. We presently get \$18 million a year to provide directly to counties to use for treatment in lieu of incarceration, although most of the savings are to the county jail. The budget office looks at this and says, "The next time that person comes through the system, they're going to be in state prison." So there's a benefit to the state trying to have the counties deal with this person effectively and have better outcomes.

What we found, consistent with research across the country, is that comprehensive drug and alcohol treatment doesn't mean 28-day treatment. It's long-term sustained treatment, you try several times, you might deliver through problem-solving courts, you might deliver through traditional treatment. But we found that 16 months tends to be the key zone as far as effectiveness of that kind of treatment. And then, finally, DUI, when we can justify the number of DUI sentences served in county intermediate punishment instead of county jails or state prison.

State Motivational Boot Camp—just a quick closing comment on this. Be careful how you do your research, because two years later you might make a different finding. One of the research findings we found in 2005 about our state motivational boot camp was that there was a statistically significant better outcome as a result of aftercare and we all thought that made sense and it looked good, and so we're happy with it, and then two years later we redid our sample. We took out the people who died, and what we found was it wasn't statistically significant when you take out dead people. It was one of those things where our research staff said it's pretty common that these offenders are high-risk offenders, and we were assuming that if they didn't show up on rap sheets, they were a success. Well, it depends on how you define your terms, but it's not statistically significant anymore, although it still saves money and there's a lot of other benefits.

And then State Intermediate Punishment is a new program, but our finding at the first step of this research is that we are targeting the right people, we're making some impact. There's a need for a lot of public education and education of courts and prosecutors, but we've been collaborating with the Department of Corrections and doing a lot of work in that area. Thank you very much.

COMMISSIONER HOWELL: We're now going to hear about Arkansas.

MR. GUNTARP: Good morning. [Off topic] We have a good story to share, some things that are positively going on in our state. It has not been because we have been wealthy, because we've been able to do a lot of these programs during hard times. I think it's necessary that I go back and share a little bit of history with you, in terms of what has happened to get us where we are today, to really get into the two programs that I really want to discuss with you.

In 1993, legislation was passed in Arkansas that created the Community Correction Act. It was unique at that time, because the Department of Corrections was supervising the parolees and then the district courts had their own probation/parole officer and those who are in the correctional business know, that corrections has a tendency to suck up all the funds any time there's any excess. So the legislature and the governor had the wisdom to know that we're going to have to recreate the agency in order to be able to put the resources that we need to be able to commit to alternatives to incarceration.

In '93, the legislation was passed, the director was hired, and not much went on from '93 to 2000. The parole system was pulled out, the probation officers were consolidated as state employees, there were three community punishment centers, but the agency was called the Department of Community Punishment. At that time, there were three punishment centers, and the purpose of those centers was to [put up] individuals sentenced by the court up to a max of four years. They would work on the roads in colorful uniforms and they would recidivate no more.

In 2000, the director resigned. The board was frustrated with the agency and was looking at putting it back under the Department of Corrections. I was serving as a chief deputy director, and was the only one who really had any experience in community corrections and so they were going to put it directly under my supervision. As they started that process, they found they could not do that without legislation because the governor and legislators in their wisdom knew what could possibly happen again was that the Department of Corrections would suck up the funds.

Of course I was for it at that time because I could see those funds we could use to build more institutions. But the chair came to me and asked, "Since we cannot move it, would you be willing to move over to the Department of Community Correction until the next legislative session, which would be 2001? At that time, we will create the legislation and move it back under the Department of Corrections." Well, once I moved out, I really saw an opportunity. There was no way that this agency needed to move back within the Department of Corrections if it was going to do the task that was set out for it. Let me just share with you some of the things that have happened in the last nine years.

First of all, we changed the name from Punishment Center because the question that I kept getting asked as I traveled and talked to groups was, "What community are you truly punishing?" Of course, my response to them was, "We're punishing all communities because we have offenders throughout the State of Arkansas." So I felt really it was necessary to get the name changed to reflect more of the mission, and we were able, in 2001, to change the name from the Department of Community Punishment to the Department of Corrections, and also change the Board of Corrections from Department of Corrections and Community Punishment to the Department of Corrections, which would more reflect the two agencies that would report to the board.

Also, one of the first things that we needed to develop was some kind of offender management system. We had no offender management system. We had no clue as to what was going on in the field other than asking officers, "How many people are you supervising; what level of supervision do you have

on them?" And every time you'd run a survey, you'd get different numbers. So one of the first things we started working on was a web-based offender management system that would tell us what's going on in the field and I think we've got one of the premier systems in the nation now.

Not only is the system an integrated system with the Department of Corrections, but a year and a half after we came on line, the department came on the same system as we're on and this system allows us to interface not only with ACIC, NCIC, it also interfaces with the jail management system throughout the state, it also interfaces with several other programs that we have there. So we really have an outstanding system that tells us what's going on. If any offender happens to get picked up by law enforcement, then this is going to notify those officers that that individual there was a checkmate or was booked in the county jail.

Also, we have increased our probation/parole officers. We've been able to get caseloads down from 160 down to 80. We have five-day reporting centers. We've added 100 counselors. That has been one of the unique programs in the state because you never have enough resources and we try not to implement programs that will replace programs that already exist. What we want to do is supplement or support programs that are already out there. One of the things that we were liking is the supervision of offender referral to programs, and we were able to get funding for over 100 counselors who support not only our drug cohorts but also our probation/parole officers.

We've added a fifth center in northwest Arkansas this year. We have constructed a 300-bed technical violator program, officers to work with sex offenders. It's not where we want to be, but at least it's a start and that's what I've looked at. All this has occurred over a period of nine years. It's not happening in any one year. We did it, we were able to prove our point, and then we sold it to the legislators, to the governor, and to the board, and we continually increase.

Our staff from DCC has increased from over 700, when I came in as director, to over 1,392 staff that we had this year. Now, two programs that I wanted to tell you about this morning are a community corrections center and a technical violator program.

Those centers were set up as punishment centers, as I initially said, and the issue was is that individuals would be sentenced up to four years. Non-violent offenders would serve their time, go home, and not come back again. What we found was that 39 percent of those individuals who were sentenced to the punishment centers were returning. Of course, that was about the time the drug scene came on. In 2000, we started to change the whole mission of those centers into modified therapeutic communities. After a three-year-follow-up study, we showed that we were able to reduce our return rate over ten percent, down to 29 percent, for those who went through the therapeutic community versus those who went through just a punishment center.

Recently, in '05, we were able to get some legislation passed that allowed us to do some things. The courts were sentencing individuals up to four years, and they would serve two years in our centers. We needed to get them out in nine months, because a modified therapeutic community was set up on a nine-month structure. We had initially talked to the judges and asked them to only sentence them to 18 months, since they would get day-for-day good time and that would allow us to get them out in nine months. They went along with that for a while and then, of course, they reverted back to the old sentencing procedure. They said, "We know we shouldn't be doing it, but we just get upset and so we just slam the gavel on them."

So in '05 we were able to get legislation passed that would allow us to release offenders after nine months in our centers, rather than relying on the courts providing that, and we would take them before the parole board or release them and they would have to successfully complete. Well, what we found immediately, as our disciplinaries went down, was that it did have about a three-percent impact on the number coming into the program.

What has occurred is that the therapeutic community is set up on responsible behavior, on decision-making and so forth, and what we found was that it took about three months for offenders to buy into the program. Usually when they came in, they said, "Well, we'll play the game," and then they really found out, "Hey, this works," and they bought into it. Well, what we found is that they are advised on the front end that if you want to go home in nine months (or you can stay here longer), you are going to have to work the program successfully.

What we have found is that it had had a significant impact on a number of offenders. Just that little piece of legislation has impacted over 218,000 days, and the thing you can sell to the legislators is that it's over \$6 million just in county jail back up that we would have to pay if we did not have that legislation.

Let me get to the technical violator program. Our parole population in 1999, our total population for supervision, was over 35,000. About 7,000 of those were parolees. In '97, '98, '99, we were sending 35 percent of those on our caseload, parolees, back to the prison system. One of the things that we started looking at was what we could do to impact them. We were able to get legislation, \$6 million in funding, to build a 300-bed technical violator program. I felt, in looking at the numbers, that we could impact about 100. About 250 a month were going back, and to ADC. If we could impact over 100 of those, we would have a significant impact on the prison population.

The center opened in '05. We have run over 4,900 offenders through that program, 1.5 percent has transferred to ADC, which means that they came into the program, they didn't work out, and what you've got to do is get all your stakeholders now to buy into these programs. That's getting the parole board on board, getting the board of correction and selling it to your staff, and we have done a lot of training getting people to buy in, and it has not come without some heartaches and hardships, but we have.

The issue is that we have found that those coming in at 1.5 percent will transfer to ADC, directly go there, because they just cannot work the program. It's a 60-day program, and 19.2 percent are re-admissions. So what we have set up, as long as they're technical violators, they're going to come back to our center and only 22 percent of those have either ended up back in ADC or DCC. So when you look at 4,900 offenders, that has had a significant impact on your prison population.

Now, that was in the male facility, that's Omega, on the southeast of Arkansas. We've had over 530 offenders go through the female facility. Less than 0.6 percent of those have transferred directly out, 16.6 percent of those have been readmitted back as technical violators, and 18.8 percent of those have gone out and either ended up in ADC or DCC. When you look at the cost, and this is what you can sell legislators on, since we have opened Omega, the cost is over \$9 million for the operation of that facility; but if you had put those individuals in prison, and we know from prior studies that they spent nine-and-a-half months in the prison system, once they ended back up in the system as a violator, that would be over \$46 million.

In southeast Arkansas, in the female facility, we have spent over \$1 million on that one, and if they had ended up back in the Department of Corrections, that would be over \$4.9 million. Those are the things that you can sell legislators on when you talk about funding, and that's why we've been as successful as we have in terms of being able to get the resources to implement the programs.

Now on the future of the Department of Community Corrections, the issue is, we've still got a lot that we want to do with this year's funding. Of course, the states are going into some hardship, but we have been there before and we have been able to get our share of the funding, and so I think that we will be able to receive our share of funding for future growth of the Department of Community Corrections. Thank you very much.

COMMISSIONER HOWELL: Now we're going to hear from Dr. Kern about Virginia's system.

DR. KERN: Thank you. My name is Rick Kern from Virginia. I'm going to expedite this to allow time for questions. There's a lot of material here and I'm just going to hit some highlights. By way of background, when I first arrived in Virginia over 20 years ago, I was hired by the then-governor to conduct criminal justice research for the governor's office and found, as many criminologists do when they try and undertake any type of study, a miserable lack of good data out there. One of the things that we were able to do back in the 1980s in Virginia that has paid tremendous dividends over the last two decades, is we convinced the governor, the chief justice and the legislature to pass legislation automating presentence investigation reports, standardizing them and automating them, and to this day, that database has been used hundreds of times to support all types of wonderful criminal justice research.

Today, we have over 500,000 felons in that database and about 350 unique variable pieces of information on each and every one of those felons. So every time they come back as recidivists, they're right back into our database with very, very detailed information on their juvenile and criminal adult criminal history information. That particular database is one of many that we rely upon for the research I'm going to be talking about today, and this research ties into sentencing reform that took place in Virginia back in 1994 when the then-governor decided that he was going to pursue abolition of parole and adoption of truth in sentencing and follow the federal model, whereby all convicted felons would have to serve a minimum of 85 percent of their sentences.

We used this database to construct that system, and the first step, a very simple step, to create truth in sentencing was to take a look at everybody who had been sanctioned prior to these reforms and how much time they were actually serving on their sentences. We had a very generous parole board in place in Virginia at the time and very, very generous good conduct credit. In fact, most felons were serving about 20 percent of the imposed sentences. So if we had a drug dealer who was getting about a five-year sentence, typical time served was about a year.

So our first step in creating sentencing guidelines tied to truth in sentencing was just to take actual historic sentences imposed and convert everything to actual time served. That would certainly be a simple way of doing it but, politically, our Republicans in particular found that to be very damaging and they didn't think the public would buy that. The sentences were going to look too small. So layered on top of that, a normative decision was made that violent offenders would have their historical time-served sentences enhanced anywhere from 100 to 500 percent, depending upon the nature of the violent offense and the nature of their violent criminal history.

And “violent offender” was defined very generously by looking at not just what the instant offense was, but at the prior criminal record. So if somebody were convicted of selling cocaine, but a couple of years ago had been convicted of an armed robbery, he was now considered a violent offender. Any violent offense would trigger you as being a violent offender, whether it was your instant offense or prior record. And even with that generous definition of a violent offender, and I should add that all burglaries were considered violent offenses. So considering all burglaries, considering all juvenile adjudications of delinquency, considering all of your criminal record, even then only 20 percent of all our convicted felons were going to be labeled as violent offenders; 80 percent were not.

What I’m going to be talking about is what we were going to do with that 80 percent, to free up the prison beds in order to house these violent offenders who were going to be spending more time in prison. You’re probably familiar with the concept of risk assessment, so I’m not going to dwell on what that is. But, in essence, when the legislature created this new system, they directed us statutorily to develop a risk-assessment instrument for non-violent offenders, and to apply it to them with the goal of placing 25 percent of prison-bound, non-violent offenders into alternatives to incarceration.

We relied on that wonderful database I talked about before, and we defined recidivism in this risk-assessment study as a new reconviction for a felony within three years of release. Often when you look at recidivism research, people will use different definitions of recidivism. We had a lot of discussion on this, but ultimately that definition was decided as being the most important, reconviction of a new felony within three years of release. We then identified these 300 and some factors, and we looked at what subset of factors were consistently important in predicting the likelihood of recidivism, and what you see here is not 300 and some factors, you see about 11, and the relative length of those bars you see there registers the relative importance of these factors in predicting recidivism.

We’re not looking at what you would traditionally see in a sentencing guideline form as what factor predicts the harshness of a sentence but rather, this is a criminological study, of what factors correlate with the likelihood of recidivism. By far the single most important factor was offender age. The younger the offender, all other things being equal, the higher the likelihood of him or her being a recidivist. There are some prior record factors there, but you also see some other things you don’t traditionally see in a sentencing guideline form: acting alone, being unmarried, being a male, being unemployed. All of these things not traditionally found on a sentencing guideline form and, getting back to age, if any of you ever took a criminology course, in that introduction to criminology textbook, you probably saw this weird looking graphic. It almost looks like a warped witch’s hat. But what it is tracking is offender age by the likelihood of being arrested.

In this case, for an offense of robbery, and you see that beginning at around age 15, the number of arrests escalates quite quickly and peaks very quickly at age 18. Actually, this is two years old. We repeated this analysis a few weeks ago and now it’s peaking at age 17 in Virginia for robbery and then stays high for a very short period of time and then drops pretty dramatically. That period where you see that peak, between ages 15 and 24, is what most criminologists refer to as the crime-prone-age years and, one thing we know is that, at least for many criminal offenses, as offenders age, the likelihood of repeat offending drops pretty dramatically. There are some subsets of offenders that don’t look like this. Sex offenders do not look like this. They do not age out of the propensity to commit crime much like other violent offenders do.

Another way of looking at the relationship between age and the propensity to be a recidivist—you're looking at this chart where we're tracking three different things. Looking at age along the horizontal axis, age at admission to prison, starting with 18 to 19 year olds, 20 to 21 year olds, going up to 40-plus year olds, and in blue, those offenders who stayed in prison for their prime at the median, less than or equal to three years, and those who stayed beyond the median, stayed longer than three years. You see, if you look at this chart, that the most significant drop in recidivism is for the youngest offenders who stayed longer than three years—for the 18 to 19 year olds, 21 and 22 year olds. But generally speaking, as all these people are aging, the likelihood of recidivism is dropping, regardless of how long they stayed in prison.

So as you get up here, particularly ages 30 and beyond, recidivism rates are about comparable. They're dropping and they're about comparable regardless of length of stay. So, again, here is evidence that, if you want to get the most return for your investment, if you are an economist, not necessarily a politician, trying to think in terms of the best return for your limited investment. If you're spending \$30,000 a year to incapacitate someone in prison, where are you going to get the most return for that in terms of reduced likelihood of criminal behavior? It is for the younger aged offenders as you see here.

Essentially, we have a risk assessment tool in place and we were the first state in the country—I believe Missouri has recently joined us in this—to integrate a risk assessment tool to the sentencing guidelines and, as Mark Bergstrom pointed out before, we wanted to make sure that we avoided this concept of net-widening, and the way we do that is we make sure that in these sentencing guidelines, that first we don't have a grid type system. We have a bifurcated guideline system where a worksheet is filled out. As to offenders convicted of larceny offenses, fraud offenses, and drug offenses; they make up, in Virginia, about 65 percent of our convicted felons. If the guideline form determines that an incarceration decision is going to be recommended, only then is the risk assessment form completed. So if the guidelines recommend prison, or if they recommend jail time, the risk assessment form is filled out. So we avoid the net-widening phenomenon.

We did a pilot test and it was evaluated through a grant awarded by the National Institute of Justice and conducted by the National Center for State Courts. They did a cost-benefit analysis on it, and they concluded that the risk assessment instrument was very effective in identifying candidates who are at low risk of being recidivists, and we were saving the Commonwealth of Virginia a significant amount of money in this pilot test and not endangering public safety. In fact, the crime rate over this time period in the pilot test actually dropped. The incarceration rate dropped and the crime rate simultaneously dropped. So they recommended that we expand statewide. We repeated the risk assessment analysis, and again found offender age to be by far the most important factor, and we replicated this again and put it into place statewide. It went into effect statewide July 1st, 2002.

Now, we had such positive results with this that our legislature came back to us. We also do the prison population forecasts for Virginia, and we were looking at a growth in our prison population mostly tied to the longer lengths of stay, the violent offenders queuing up longer. Historically, if we had an armed robber who was serving three years, now he or she will be serving nine years. So they kept queuing up in our database, in our system, and that was going to cause us to have to build more prisons.

So the legislature asked us if we could move the threshold for non-violent risk assessment up a little bit, and what you see here is that if we move the threshold up from 35 to 38 points, we would affect about another seven and a half percent of these non-violent offenders who were otherwise going to prison

without significantly endangering public safety. You're talking about recidivism rates still under 14 percent, and when we took a look at the alternative sanction options that these offenders were going into, we found, for the most part, that that didn't even matter. This was such a low risk group of people. They have aged out of criminality. No matter what we did with them, we were very unlikely to ever see them again, and that includes doing absolutely nothing with them. They just were not going to be on our radar screen again. So, due to small recidivism rates, we moved that threshold up. The General Assembly, our legislature, approved that, and that went into effect in 2002.

The net effect of that, as you can see here in this chart, is in fiscal year 2007, about 7,000 non-violent offenders were scored with this risk assessment instrument, and in that year 53 percent, or 3,700 otherwise prison and jail-bound felons, were recommended for an alternative to incarceration. The effect of that has been very positive. The National Center for State Courts, in its evaluation, concluded that the risk assessment component accurately distinguished non-violent felons less likely to recidivate from those most likely.

The risk assessment instrument provides an objective, reliable, transparent and more accurate alternative to assessing an offender's potential for recidivism than a traditional reliance on judicial intuition or perceptual shorthand, and this is a workable tool for managing prison populations. It allows states the flexibility to determine how many offenders they would like to divert while balancing concerns of public safety.

There have been some legal challenges related to this. The ACLU claimed that basing a sentence on the age, education and employment history of an offender is scientifically unsound and is contradicted by the U.S. Sentencing Commission's study and policy manual. I did take a look at your policy manual and, indeed, it is contradicted by that. You do point out that a factor such as age is not ordinarily a relevant factor, and when it is potentially relevant, it is relevant relating to a departure downward. The same language is used for education and for employment and, of course, sex is a factor that is outright considered not relevant in the determination of sentence.

All of these points were raised by the ACLU in court challenges to our judges' use of this risk assessment instrument and, in short, the Virginia Court of Appeals basically said, "No dice." As long as the criminal sentence that a judge hands down in Virginia is statutorily within the range provided by law, and our ranges are pretty darn broad—for example, for selling cocaine the minimum is zero, the max is 40—so pretty much everything is a legitimate sentence within that ballpark. So they dismissed that challenge.

What has been the impact of this? One thing we started out with was the idea that we wanted to change the makeup of who is in our prisons. We spend about \$28,000 a year to keep someone in our prison system. Back in 1994, long before this process began, if we took a snapshot of everybody who was in a Virginia prison on any given day, 58.8 percent, using the definition of violent offender we talked about, would be considered a violent offender. But that's a lot of non-violent offenders. About 41 percent of the people occupying expensive prison beds are not violent. Today, 76.5 percent of the people occupying those prison beds are violent offenders. So we are gradually changing the makeup, the look of who is occupying a prison bed, and we are diverting a lot of low risk, non-violent offenders who make up a high volume of our convicted felons away from prison and having those prison beds reserved for the truly violent offenders.

Our crime rate has dropped at about the pace of the national pace, a little bit more. But our incarceration rate in Virginia over the last decade has grown only a quarter of the national pace. We recently looked at 38 states in the last year that defined recidivism in the same fashion that Virginia does. Our Department of Corrections defines recidivism as a return to prison for any reason within three years of release, and you can see, of the 38 states being ranked, there's quite a bit of variation from 24 percent up to 66 percent. We come in at about 6th in terms of having the lowest recidivism rates, right about where Texas is. There are a lot of different ways of interpreting what this means, but looking at what our crime rate is and our incarceration rate and our recidivism rate, so far all the indicators are going in the right direction.

I'll close with one last thing. Our legislature has directed us to take the same methodology and apply a risk assessment tool for sex offenders and the sex offender risk assessment does not work in the direction this one does. A lot of defense attorneys have really no problem with this risk assessment tool because more often than not, it's going to benefit their clients. If the risk assessment tool does not work to their client's advantage, no changes to the guidelines are made, there are no enhancements. The risk assessment instrument for sex offenders does not work that way. If the correlate of the likelihood of being a continuing danger to society comes out not in the offender's favor, time is added to their sentencing guideline form. So we're expecting a lot more challenges with regard to that particular risk assessment. But, so far, none of those has been successful. With that I'll close. Thank you.

COMMISSIONER HOWELL: We've heard lots of interesting facts and information about these four different state systems. Does anybody have any questions that they'd like to ask of our panelists?

MR. HEGARTY: My name is Paul Hegarty with the Hampden County Sheriffs Department in Massachusetts. I have a question about mandatory DUIs. We just had a large court case in our state relating to a mandatory offender who was placed into a community corrections program. Actually a superior court judge ordered the reporting program to close down, and we just had a big hearing in front of the appeals court, a six-judge panel, questioning whether day reporting can be run overall in the state. But it was based on a mandatory participant. Maybe it's our laws, but in a review of the laws, it is very difficult to justify putting a mandatory participant out into community corrections.

MR. BERGSTROM: First, you certainly need the statutory underpinning. In Pennsylvania, there is explicit legislation that provides that for certain offenders, certain offenses, certain programs can be used to satisfy the mandatory minimum, and they fall into two categories. One clearly is DUI, where the legislation identifies specific programs that can satisfy the mandatory minimum sentence on a one-to-one basis. So the use of inpatient treatment can be used to satisfy a mandatory minimum sentence for a DUI or house arrest with electronic monitoring and treatment can be used as combination to satisfy that DUI sentence. So a 90-day mandatory minimum sentence can be traded off, basically, one-for-one in that manner.

First, I should mention that we have two different types of mandatorics. We have some mandatorics that apply based on conviction. You're convicted of this offense and linked to that is a mandatory. Everyone's hands are tied. So if you want to avoid that mandatory, the prosecutor's going to negotiate something other than that conviction offense. But we also have a number of mandatorics that require the prosecutor to give notice. The mandatory only applies if the DA gives notice prior to sentencing and, once the DA gives that notice, the mandatory applies. So, for instance, if you're convicted of trafficking five grams of cocaine, there's a mandatory minimum provision in our judicial

code, and if the DA wishes for that to be part of the mix, the DA gives notice and the court must impose that mandatory minimum. But absent providing notice, the guidelines apply and the mandatory does not apply.

I just mention that because we do have some provisions in the statute that allow the state's intermediate punishment program to be used to satisfy those mandatories. So participation in that drug treatment program within a state correctional institution can be used to almost trump the otherwise imposed mandatory minimum sentence. So you certainly need the statutory authority. Based on that statutory authority, our courts have interpreted the contours of what programs qualify and what programs don't qualify to satisfy the mandatory. But our courts and our legislature have not taken that to the extent that you can use any program to satisfy any mandatory. It's very much tailored to specific types of programs and especially around DUI.

COMMISSIONER HOWELL: Any other questions?

DR. KATZENELSON: I think North Carolina has another solution that certainly work in terms of the resource problem. When they passed structured sentencing, they committed to not have any mandatory minimums, and even the ones that were on the books were abolished. So North Carolina has almost none. The minimum we have is that the judge always imposes a minimum-maximum range that is not mandatory. It's within the grid itself and the judge can choose any point as a minimum sentence. If the judge activates it, you have to serve that time.

If the judge suspends it, then the intermediate can be a sanction, and in that case, a day reporting center, which sounds like what you're referring to, could be used. But there are no specific mandatories within the guidelines. Even with drug trafficking, which is outside of the guidelines, there must be a sentence and it has to be active. But other than that, North Carolina has been holding the line since '93 not to pass mandatories.

COMMISSIONER HOWELL: Yes?

JUDGE ISCOE: Hi, I'm Craig Iscoe, a judge on the D.C. Superior Court, and I was intrigued with the statistics on the role that age plays in recidivism, and my question would be for Virginia in your risk assessment. Let's say you have somebody who is 18 with a first conviction for armed robbery and someone else who is 36, and both of them are high school graduates. The 36-year-old has a sporadic work history, the 18-year-old has no work history except for just getting a job. Would you recommend a significantly higher sentence for the younger person?

DR. KERN: The risk assessment instrument that I talked about today only applies to non-violent offenders. We would have to take somebody, say, selling cocaine. If you've got the 18-year-old and the 36-year-old, the likelihood is the 36-year-old offender will get more of the benefit of the doubt and more likely be considered for an alternative to incarceration than the 18-year-old would, all other things being equal, simply because of his age. The age factor by itself does not say that the offender is at a higher risk of being a recidivist. It's a collection of factors working together. Criminal records are part of that.

So if an offender at age 18 already has shown a propensity to commit offenses, juvenile offenses, he's dropped out of school, he doesn't have steady employment, all other things being equal, the 36-year-

old offender whose criminological research would suggest, with no history of violence, he is probably not a significant threat of public safety, he will get the benefit of the doubt.

And this did fly in the face of judicial intuition, and this was the hardest thing our judges had in dealing with this, because their inclination was always, when given the options for new intermediate sanctions, to take the younger offenders just beginning their criminal careers, seeing them perhaps for the first time as adults, and thinking they would be the best candidates for the intermediate sanctions. And the older offenders, who they are just simply tired of seeing time and time again, they wanted to throw the book at them and give them long incarceration sentences.

This research flew in the face of that. It was asking them to basically flip-flop that philosophy and do the opposite. So, at first, the compliance rates on this were rather low but, as time goes on, they've picked up quite a bit and the evidence is very positive. Our recidivism rates have been dropping, our incarceration rate has been dropping, our crime rate has been dropping, so all the indicators are going in the right direction.

MS. NOONAN: My name is Sara Noonan. I'm here with the Federal Public and Community Defenders. I just had a follow-up question for you, Dr. Kern. I noticed on that bar chart describing the recidivism risk factors that the second to lowest risk factor was a prior drug felony, which I believe is consistent with some of the Sentencing Commission's research. I wanted to clarify first that people with a prior drug felony are still eligible for these alternatives that you're discussing and, also, to clarify how you define a violent offender. Thank you.

DR. KERN: A violent offender definition is pretty generous. As I said before, burglary is defined as a violent offense and sometimes it's interesting, politically, how these decisions are made. When we were considering the parole-abolition approach and truth in sentencing, our governor held public hearings all around the Commonwealth of Virginia in a series of high school gymnasiums over the course of about three months. In one of those meetings a man got up and talked about the fact that he had worked all his life to earn a vacation to take his wife to Europe. They lived in a family home in southwest Virginia, a home that was built by his great-granddaddy. His grandfather lived in it, and he had willed it to him, and he hoped one day to will it to his son. It had been in their family for about 150 years or so, and while they were away on vacation, a vacation they saved a lifetime for, they came home and found the home completely trashed.

The offenders had committed some unspeakable acts on the property and the wife, upon entering it, just broke down in tears, and cried and ran out of the house and said she'd never set foot in it again. And he's telling this story, bringing tears to everybody, including our pretty tough Republican governor, and there was total silence after this testimony, and he said to him, "Sir, in my book, from this day forward, burglary will be a violent offense," and even our most liberal Democrats are sitting there nodding their heads, burglary's a violent crime. Up until that point in time, nobody had ever mentioned it. So statutorily in the code of Virginia, burglary is now a violent offense, in addition to your traditional violent offenses.

But the other thing we do is look at prior criminal record, including juvenile adjudications of delinquency. So if a kid at age 14 or 15 commits an armed robbery, and he's kept in the juvenile justice system, never certified as an adult, just treated as a juvenile, that counts just like an adult conviction for purposes of being labeled a violent offender. So even with all that, understand that when you look at their

entire criminal record, including juvenile adjudications, four out of five people are still non-violent offenders.

So even with that most generous definition, only one in five are labeled as violent; four out of five are not. And, of course, drug offenders are not considered violent offenders as long as they don't have a burglary in their background.

COMMISSIONER HOWELL: Are there any other questions? Thank you very much and enjoy the rest of your interesting day.

