

**MINUTES OF THE 2017-2018 INTERIM
NEVADA SENTENCING COMMISSION**

February 16, 2018

The meeting of the Nevada Sentencing Commission was called to order by Chair Hardesty at 9:05 a.m. at the Legislative Building, 401 South Carson Street, Room 4100, Carson City, Nevada, and via videoconference at the Grant Sawyer Building, Room 4401, 555 East Washington Avenue, Las Vegas, Nevada.

Exhibit A is the Agenda, and Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT (CARSON CITY):

Justice James W. Hardesty, Nevada Supreme Court; Chair
Assemblywoman Jill Tolles, Assembly District No. 25
Dennis Cameron, Representative, State Bar of Nevada
James Dzurenda, Director, Department of Corrections
Judge Scott Freeman, Second Judicial District Court
Chris Hicks, Washoe County District Attorney
Karin Kreizenbeck, State Public Defender
Adam Laxalt, Attorney General
Keith Logan, Sheriff, Eureka County
Elizabeth Neighbors, Ph.D., Statewide Forensic Mental Health Program Director,
Division of Public and Behavioral Health
Stefanie O'Rourke, Major, Parole and Probation
Holly Welborn, Policy Director, ACLU of Nevada, Inmate Advocate

COMMITTEE MEMBERS PRESENT (LAS VEGAS):

Senator Nicole Cannizzaro, Senatorial District No. 6
Scott Burton, Professor of Criminal Justice, CSN
Magann Jordan, Victims' Rights Advocate
Tegan Machnich, Chief Deputy Public Defender, Clark County
John McCormick, Assistant Court Administrator, Administrative Office of the Courts
Jon Ponder, Representative, Offender Reentry
Jeff Segal, Bureau Chief, Attorney General's Office
Donald Soderberg, Director, Employment, Training and Rehabilitation
Judge Jennifer Togliatti, Eighth Judicial District Court

COMMITTEE MEMBERS EXCUSED:

Connie Bisbee, Chairman, Board of Parole Commissioners; Vice Chair

Senator Ben Kieckhefer, Senatorial District No. 16
Assemblyman Ozzie Fumo, Assembly District No. 21
Chuck Callaway, Police Director, Las Vegas Metro

STAFF MEMBERS:

Nicolas Anthony, Commission Counsel, Senior Principal Deputy Legislative Counsel,
Legal Division, Legislative Counsel Bureau
Victoria Gonzalez, Deputy Legislative Counsel, Legal Division, Legislative Counsel
Bureau
Angela Hartzler, Secretary, Legal Division, Legislative Counsel Bureau
Jordan Haas, Secretary, Legal Division, Legislative Counsel Bureau

OTHERS PRESENT:

Dustin Marcello, Attorney, Law Firm of Pitaro and Fumo
Tonja Brown, Advocate for the Inmates, Advocate for the Innocent
Meredith Farrar-Owens, Director, Virginia Criminal Sentencing Commission
Michelle Hall, Executive Director, North Carolina Sentencing and Policy Advisory
Commission
John Madler, Associate Director for Policy, Staff Attorney, North Carolina Sentencing
and Policy Advisory Commission
Ginny Hevener, Associate Director for Research, North Carolina Sentencing and Policy
Advisory Commission
Mike Schmidt, Executive Director, Oregon Criminal Justice Commission
Justice Michael Douglas, Chief Justice, Nevada Supreme Court
Dwayne Deal, Offender Management Administrator, Department of Corrections

Justice James W. Hardesty (Nevada Supreme Court; Chair):

I will now open the second meeting of the 2017-2018 Interim's Nevada Sentencing Commission. We have a lot to cover today. I'll give a background for this agenda in a few minutes.

I will now open public comment. I may have to interrupt the public comment if it goes beyond or up to 9:30 a.m. We have timed certain presentations by the sentencing commission folks from Virginia beginning at 9:30 a.m. We also have timed certain presentations by the folks from North Carolina at 11:00 a.m. I'll get into the background for that before those presentations begin.

Dustin Marcello (Attorney, Law Firm of Pitaro and Fumo):

I am not acting as Assemblyman Fumo's proxy today, but for public comment. I do practice in federal and state courts and have done so for the last 10 years. I've been on the federal panel and am very familiar with the federal guidelines, as well as the—really

what I'm providing comment for today is kind of the law and economics portion of the effect of the sentencing guidelines and to provide comment with regard to the social and fiscal cost of implementing a guidelines system. Essentially, the questions submitted by Assemblyman Fumo are already part of the record with regard to the cost of what the guideline would require in order to determine whether or not they're effective to address what you're trying to address by implementing a guideline in the first place ([Agenda Item VI](#)).

I think this Commission is well aware that the federal guidelines implemented largely in the 1980s resulted in what became the largest incarceration rate in the world. That largely was achieved through incarceration of nonviolent drug offenders. They make up approximately 50 percent of the incarcerated individuals in the federal system. That result largely came about through the sentencing guidelines of how they implemented systems of determining punishments based not necessarily on circumstances of the offense, but related to weight of controlled substances. Those also resulted in a significant disparate impact on minority, as well as indigent, populations across the United States. Those two issues should definitely come into play with regard to any consideration of a guideline, largely because in the federal system, that uses a sentencing guideline, and just about any system that results in a sentencing guideline structure, results in it being extremely difficult for any individual to receive any type of probation or community supervision. It ultimately results, again, in a disproportionate impact on nonviolent drug offenses, because what happens is that, over time, there becomes drug du jour. There's an immediate, visceral response to a particular drug or substance that becomes popular during a significant period of time. Significant penalties get imposed and they never get adjusted back down once those issues have been addressed. Again, these have been largely borne in the minority communities, and there are significant statistics that I will be happy to submit after this with regard to showing that having been the case. I don't think there's too much disagreement applying guidelines to what we normally refer to as the "big seven" offenses: murder, rape, arson, things of those nature that are extremely serious and may be warranting of the public's perception of a fairness in sentencing or a truth in sentencing type of idea to have some type of impact on those types of offenses. But I think this Commission should be mindful of applying these guidelines and these mathematical formulas to simply, again, weights, drugs, things of that nature, because it does result in a disparate impact, and a substantial fiscal cost with not any marginal benefit.

Additionally, I notice that there are a number of materials provided with regard to recidivism rates, and it shows the number of offenses and it shows recidivism rates. I would ask the Commission to be mindful that oftentimes when you read those, to look at those studies carefully, because what they do say is, "I commit offense type A," let's say a burglary. It then says my recidivism rate may be x amount or percentage. However, that's recidivism for any other type of offense. So once I commit burglary, I become a felon. I then find it much more difficult to find a job. I then rob a store, and now I have recidivism, but it's not necessarily of the same offense that I committed in the past. You may see offenses, and where you'd see this is where you commit a

violent offense but you don't commit another violent offense in the future. You commit a burglary because you no longer have a job, you're indigent, whatever it is. Again, I'd ask the Commission to be mindful of looking solely at recidivism rates with regard to trying to address the sentencing guidelines to particular offenses.

Finally, I would note that the federal system, when they had implemented the sentencing guidelines, their main goal was a truth in sentencing type of issue. What they did was they went to all the judges and they said, "What are some considerations you have when you sentence an individual?" They tried to codify all those into a particular framework. Well, Nevada does have a type of truth in sentencing in that we have a minimum that people serve before they become eligible for parole, so that's not necessarily a major consideration. Really, what they're trying to do—and there hasn't been any showing that the second issue, which was that they didn't want varying sentences for similar types of conduct. I don't believe there has really been shown in Nevada that that is a significant problem, where people of similar type offenses are receiving vastly different sentences. Having practiced here for 10 years, I think there is a striking similarity between similarly situated offenses and defendants being treated similarly, so there's not really a consideration for those, and those were the two major issues that the federal guidelines were seeking to address. When we fast forward, and again, how the guidelines were implemented in practice resulted again in the highest incarceration rate in the world. But more importantly, what the courts did is that they ultimately invalidated them and said that they're advisory, so they didn't become the de facto sentencing structure anyway. You really end up right back where you started, which is trying to leave as much as you can to judges' discretion, because they're dealing with the individual and not just simply mathematical models. Additionally, you greatly increase the litigation costs. Largely what you fight about in federal court is interpretation of the guidelines, so you end up with a significant amount of appellate costs and litigation costs trying to determine what the guideline commission's directives were trying to address in the different ideas that are stated in the guidelines. You also have mismatches across time periods, where in 1985 somebody thought something was important and put it in there, but in 2005 it wasn't really as important anymore, but they never took it out, so you have language disagreement between different things. But again, most importantly is that what ends up happening is that people are going to be incarcerated at a higher rate. That has been shown with every guideline that's been imposed.

The final point that I'd like to make is that, if we're going to address whatever the people believe that the issue is with sentencing in Nevada, we need to look at whether the sentencing guidelines structure idea is really the best way to achieve that outcome, rather than some other type of outcome that may have a more fair, less disparate impact and more conservative fiscal result. That's the only thing I'd like to submit for the Commission's consideration.

Chair Hardesty:

I appreciate your comments. I do want to mention to you as a reminder to the Commission, the presentation that the Commission received from Ms. Mitchell, who is the Executive Director of the State Sentencing Commission, made the point very clearly at the last presentation that the sentencing guidelines systems that exist in the 20-plus states that have adopted this methodology are substantially different than the federal guidelines. To avoid any misunderstanding, I just wanted to remind the Commission of that and mention that to the speaker. I would urge your continued attendance and follow-up information based upon our study of state sentencing guidelines systems. They have different objectives as well.

Tonja Brown (Advocate for the Inmates, Advocate for the Innocent):

I just would like to see to it that the inconsistency in sentencing is eliminated throughout the State. You'll have one court in a different county sentence an inmate to a certain amount of time, and then you'll have another court in another county sentence an inmate or a defendant to the same type of crime, and yet their sentences are so far apart. They have to be consistent. This is something that we would like to see. Also, over the years, there have been issues brought to the Advisory Commission on the Administration of Justice (ACAJ) on inconsistency of sentencing dealing with embezzlement. When you are an individual and you have connections to the community, your sentence is so much less, if you even go to prison. But if you are someone who cannot afford a private attorney and you have a public defender, that sentence is so much higher. I think that's something that should be addressed as well.

Chair Hardesty:

Seeing no further public comment, I will now close public comment. I'll take advantage of a couple minutes here before we get into overall remarks and the Virginia presentation. Are there any edits or comments to the minutes of the meeting of November 27 ([Agenda Item IV](#))?

ATTORNEY GENERAL LAXALT MOVED TO APPROVE THE MINUTES OF THE NOVEMBER 27, 2017 MEETING.

JUDGE FREEMAN SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Let me get into some introductory remarks here, if I may. Since our meeting on November 27, I have spent a lot of time with staff, Vice Chair Bisbee and Director Dzurenda looking at approaches that the Commission may wish to continue to vet regarding the subject of state sentencing commission operations. To that end, we scheduled and held roughly 1 1/2-hour meetings with the executive director and chair and certain members of the sentencing commissions in Connecticut, Oregon, Virginia and North Carolina, on January 9 with Connecticut, January 10 with Oregon and February 1 with Virginia and North Carolina.

You will recall from the presentation we received from Ms. Mitchell when she gave an overview of sentencing commissions that, essentially, there are different types of sentencing commissions. One is a type that develops and monitors sentencing guidelines. A second type looks more broadly at the criminal justice system and makes policy recommendations. As she suggested, there are some that are hybrid. Our statute seems to suggest that we are in the hybrid category. The other point that I wanted to mention from her presentation as a reminder is that state sentencing guidelines are a set of standards that are generally put in place to establish rational and consistent sentencing practices within the state. There are five reasons for considering guidelines in state sentencing systems. One: They foster proportionality. Two: They secure public safety. Three: They reduce disparity, including race, gender and economic status. Four: They manage correctional capacity. Five: They achieve certainty in sentencing. The point of those five goals, assuming that this Commission is in agreement that those are the goals we should be focusing on as we study alternative sentencing commissions and their approaches, and one perhaps for Nevada, also addresses the issue about how different states have approached this. You may recall from Ms. Mitchell's presentation that some states are mandatory guideline states. North Carolina is an example of that. Other states are discretionary guideline states. That happens to be, in our case, Virginia. What I wanted to do was take a little bit deeper of a dive into those states' approaches, along with Connecticut and Oregon, and hear what they had been doing, what their history was and what the background was. We've heard a little bit about Connecticut already. We also heard from Ms. Mitchell about Minnesota.

Today, I have invited presentations from Virginia, a state that is a discretionary guideline state, so that all of you will have a chance to get an overview of that state's history and the use of guidelines, what is the approach and the purpose, and how it has benefited the state from these folks' point of view. I would also mention that Mr. Anthony attended a conference in Washington, D.C. on sentencing issues and other related criminal justice issues. It was highly recommended to us that we interview and speak with the folks from Virginia to learn more about their background. North Carolina is a mandatory sentencing guidelines state. That is, the guidelines, once established, are required to be followed by the judicial system. While there is some deviation, there are certain issues that they track with respect to deviation on sentencing.

I included the Oregon presentation on the agenda today. For those of you who are new to these commissions and the kinds of topics we've been talking about, I wanted to

share a little background with you about why Oregon is on board. In 2015, the Legislature considered recommendations from the Advisory Commission on the Administration of Justice to consider funding from the State general fund to help support Nevada's specialty court effort. This was a unanimous recommendation from the Advisory Commission in 2014. The 2015 Legislature entertained this, and really for the first time since we've had specialty courts in our State, the Legislature agreed to fund \$3,000,000 per year into our specialty court front-end effort in trying to deal with this matter. In the 2017 Legislative Session, the Advisory Commission had also in the 2016 Interim recommended that funding continue. There was a report presented to the judiciary committees and the money committees in the 2017 Session about what the Nevada judiciary had done with those funds, and the 2017 Legislature elected to continue that program. You'll hear a presentation from Chief Justice Douglas today on our specialty court programs and what we've done with those funds and how they've been used and applied, but preceding that, depending on how the timing works out here and maybe following Chief Justice Douglas' presentation, we'll hear from Oregon. I asked Oregon, through their Criminal Sentencing Commission, to comment about what Oregon's experience was with their investment in their specialty court programs and their frontend money. Their investment began with \$15,000,000. At the time we had made our investment of \$3,000,000, they had invested \$15,000,000. We learned during our interviews with Oregon on January 10 that that had been increased to \$40,000,000. They have made a sizable investment on the frontend of addressing the criminal justice issues in Oregon, and I thought it would be informative for the Commission to hear how that sentencing commission has evolved now toward—principally, their function is managing those dollars and using those dollars to address frontend issues in the criminal justice system.

That's an overview of today's meeting. We have a lot going on and a lot to learn about. I hope you'll ask questions. I've also asked Mr. Anthony to provide us with the overview and history of Nevada's felony sentencing practices and guidelines, just as a baseline for us to work from. I've also asked Director Dzurenda and his staff to provide us with statistics on drug crimes and property crimes for those that are incarcerated on those categories. Finally, as I mentioned earlier, I want to discuss various responses we've received from Commission members about their thoughts, goals and objectives or other areas that they would like to study. My overall suggestion for the Commission—I would prefer to put it that way, because obviously your views are critical to this whole process, but my suggestion for the Commission is, if we're going to be productive in what we're doing, I think we owe it to investigate what the sentencing commissions do and how they operate, determine whether that is a process or one of them is a process, or maybe a hybrid, that Nevada should consider, then begin to develop data research that we can use to understand which of those alternatives might be best for our State, then at the same time determine whether we should propose to the Legislature a sentencing commission model and guideline model, or abandon that approach and consider some alternative approach. That's part of our study, and I think we're going to need some meetings to get this accomplished, so I hope all of you will spend a few minutes during the break between the presentation from Virginia and the presentation from North

Carolina and please check your calendars, if you could, or check with your office and get your calendars, because we really need to set meeting dates about every month or 6 weeks in order to really accomplish these objectives. At some point, when we've received all of the presentations from the sentencing commissions, I've asked Mr. Anthony and his staff to generate a memo so we can have a piece of paper in front of us that contrasts the different approaches that are used in each of the states, what are the benefits, the pros and cons in each, so that we can make informed decisions by comparing the experiences of states that have been doing this for quite some time. Are there any questions or any comments by Commissioners based upon this overview? Does anybody object? Would you rather do something different? Be thinking about that either now or later in the meeting. I'd love to hear from you about whether you'd like to change that overall approach to what we're doing. Anybody have any comments at this point?

We have the folks from Virginia on the phone. Ms. Farrar-Owens spoke with myself and Mr. Anthony and Ms. Bisbee on February 1 and devoted a lot of time to us. I was very grateful and I thought Virginia's system would be very interesting for all of us to learn about. If you would proceed, thank you very much for being available to us.

Meredith Farrar-Owens (Director, Virginia Criminal Sentencing Commission):

I have been with our commission since it was created in 1995. I have been here throughout our history, and in fact, even prior to that, I worked on the sentencing guidelines project that had been initiated in Virginia as early as the mid-1980s. I began working with the guidelines project in 1990. I feel that I can offer you a good perspective on Virginia, where we started and how we got to where we are today. I'm going to hit on just a few points. I'll proceed quickly through some of the basics, and then I'm happy to respond to any questions that you all might have along the way. This is really for you and all about you and what is most of interest to you.

Chair Hardesty:

Please feel free to take the time that you need. We are trying to really drill down into this issue. A lot of us are learning about state sentencing guideline activities, so I think your state's history and the steps you went through with us on the phone, I urge you to repeat.

Ms. Farrar-Owens:

On slide two, I just wanted to briefly touch on the original impetus for sentencing guidelines in Virginia, which does date back into the 1980s ([Agenda Item VII](#)). For Virginia, it really was about addressing disparity. There had been some small-scale work done in Virginia that revealed some potential disparity in sentencing across the commonwealth, and not even disparity based on geographic regions or circuits across Virginia, disparity sometimes even within the same courthouse, judge to judge. Given

that concern, there was interest in pursuing the potential for sentencing guidelines here. But the first hurdle that had to be overcome was the lack of data, that we did not have statewide sentencing data in Virginia in the mid-1980s. I think very few states had that type of resource available at that time. But that was really our first step, to create a statewide felony sentencing data system for us to be able to really dig deep in terms of the issue of disparity and what the level was, what types of disparities we were seeing and the like. Once we had a couple years of data and we did that analysis, it did reveal a warranted sentencing disparity in Virginia. The results of that study were presented to our circuit court judges at a statewide conference, and it was really the judges at that point who were the drivers of the sentencing guidelines project. I believe in our previous call I said, "Guidelines by judges for judges," and that's really how they started. It was really the decision, the vote, of the circuit court judges to proceed with an exploratory study for sentencing guidelines. Our chief justice created a judicial committee to establish the blueprint, so it was a committee of judges that established the blueprint of sentencing guidelines originally here in Virginia.

Chair Hardesty:

Could you expand a little bit on the study that was conducted to determine the sentencing issues, or at least apparently to confirm some of the disparity issues? What did that study look like? How was it conducted, if you have information about that? How long did it take?

Ms. Farrar-Owens:

Absolutely. It did take several months. Once we had the statewide data, which was based on the automation of the presentence investigation (PSI) reports that judges would receive prior to sentencing that included information not just about the offense, but also specifics as to what happened with the offense, the degree of victim injury, was there weapon use, and also details about the offender's history, criminal history, substance abuse history, educational history and mental health issues. We had just a huge amount of detail on each case and the offender in order to be able to statistically analyze and model the sentencing decisions using statistical analysis to determine which factors rose to the level of being statistically significant in the collective judges' decision making. We did see factors related to race and gender, but also just the different philosophy from judge to judge and courthouse to courthouse. The types of disparity that we saw were not specific to one type, but really arose in a variety of different areas that reflected the inconsistency in sentencing outcomes in Virginia at that time.

Chair Hardesty:

Thank you.

Ms. Farrar-Owens:

Given that the judges set the blueprint for this, there were certain elements that were very important to our judges, and I've listed those there on slide three ([Agenda Item VII](#)). First, voluntary compliance: as was mentioned and as you know, Virginia's guidelines are discretionary. There are certain elements of our system that are mandatory, and I'll talk about that in a few minutes, but compliance with the guidelines' recommendations is voluntary. Our judges felt it would be important to ground the guidelines in an analysis of historic sentencing decisions, so past sentencing decisions analyzed in a collective manner to serve as the foundation for the development of these guidelines. The reason that was important to our judges is because that way, judges would understand where the guidelines came from and what they meant, and that was an important element for our judges. Our judges wanted offense-specific guidelines, so something specific to robbery and to drug offenses and to larceny and the like, assault and sexual offenses. They felt it very important that the guidelines reflect each specific type of offense.

We have relatively broad sentencing ranges in our recommendations here in Virginia, and that was important because they felt it was critical for judges to retain a certain amount of judicial discretion and to be able to account for the specific aggravating or mitigating circumstances in the case before them. Compared to some states, for example, that had guidelines at that time, like Minnesota, our guidelines' ranges were broader than that. The guidelines were pilot tested through about 1991. We went statewide in January of 1991. We have actually had statewide sentencing guidelines for that many years. We have a long history.

In slide four, I just wanted to share with you the basic structure of what our guidelines look like. We have what we call section A that will give a recommendation as to whether or not that individual should be sentenced to a prison term. Once section A is complete, if the score is below a certain threshold, prison will not be recommended and the preparer will go fill out section B, which will then determine a recommendation for either probation or jail. If prison is recommended on section A, section C then is used to compute the recommended prison sentence length. It's important to stress that we don't just have a grid or one sheet that determines what the sentencing recommendation will be. It is a two-step process here in Virginia. The reason for that is that when we did our analysis of sentencing practices, we found that our judges often considered different factors, or weighed those factors differently depending on the offense group and the type of decision being made, whether that is prison incarceration or the sentence length for a prison term. Given that we saw that in our analysis, our guidelines are structured as you see here.

One of the biggest occurrences for us here in Virginia I've laid out on slide five, and that is the sentencing reform that took place ([Agenda Item VII](#)). The legislation was adopted in 1994 and became effective for felonies committed January 1, 1995 or after. It was a very significant piece of reform legislation and dramatically altered the way felons are

sentenced and serve time here in Virginia. I did want to cover just briefly what that reform entailed. For us, one of the biggest aspects was that parole was abolished in Virginia for any offense committed in 1995 or after. Our legislature established truth in sentencing, which here in Virginia means a minimum of 85 percent of the sentence must be served by any felon. Our legislature targeted violent offenders, violent felons, for longer terms of incarceration than they had previously been serving under the parole system, and I'll talk a little bit more about that in a few minutes. But they also wanted to be able to keep the average time served the same for nonviolent felons. Here was the concern of, if Virginia just abolished parole and everybody had to serve the full sentence ordered by the court, Virginia would quickly go broke. Our prison population would quickly exceed our capacity and the legislature would have to come back and reconsider the reform that had been adopted. Virginia was very cognizant of Florida's experience, which had gone down this road before us and just simply abolished parole and didn't adjust the sentencing structure, and that is exactly what happened there. Their prison population quickly exceeded their capacity and they had to make some very dramatic changes early on. Virginia didn't want to go down that road. They wanted to target the violent felons but not increase the average time served for the nonviolent felons. That was key to being able to afford this whole package. In addition to that, there was a goal to redirect the lowest risk nonviolent felons to some alternative sanction other than traditional incarceration, imprisonment or jail. Again, to be able to afford to target violent offenders, the goal was to keep nonviolent offenders serving about the same, and if you can divert the lowest risk nonviolent felons to something less costly, that was something that was very important to our legislature to be able to do that, and I'll talk about how that was done in a few moments as well. As part of that, of course, Virginia had to expand alternative punishment options for nonviolent felons. On the last two points here, there continued to be this goal of reducing sentencing disparity, making sentencing more consistent, and then the last one is officially creating a sentencing commission to oversee the guidelines system. We began our work back in 1995. We are very fortunate to be funded with a staff of nine. I will say that we don't have a lawyer in the bunch. We are researchers. We are trainers by background. We do rely on, for example, our sister agencies if we need legal assistance. We don't have a lawyer here on staff. But one of the main goals of the truth in sentencing reform here in Virginia was really an issue of transparency. It was important for our general assembly, they felt, for the public as well as the offender and the victims to understand what a sentence meant here in Virginia, because under the parole system, our parole laws were very complicated, very difficult to understand or be able to even guess how long someone might serve under the old parole system. I will say, for example, drug offenders could serve as little as about 22 percent of the sentence ordered by the court. Violent offenders usually served a larger percentage, but nowhere near 100 percent of the sentence ordered by the court. This issue of transparency was important for us in Virginia to make it a system that's easy to understand.

Slide six talks a little bit more about some of our features here. As I mentioned, unlike the federal sentencing guidelines, our guidelines are based on historical practice and an analysis of that data. Our commission doesn't set guidelines or modify those guidelines

based on normative decisions by our 17-member commission. Compliance remains voluntary under the new system. What is different about Virginia than some systems is that failure to follow the guidelines is not reviewable on appeal here in Virginia. I know some states do allow an avenue for appeal. It's simply statutorily prohibited here in Virginia.

Chair Hardesty:

Forgive me, Commission members, if I'm jumping in, but I've had the benefit of this information, so I'm asking questions I asked during those conversations, but I think they would be informative to you as well. If we could go back to slide five for just a moment, you mentioned that, first of all, there was an abolition of parole. But my understanding is that Virginia retained its parole system for those serving sentences that had been incarcerated for convictions that preceded January 1, 1995. Is that right?

Ms. Farrar-Owens:

That is correct.

Chair Hardesty:

And the purpose behind that, if you could comment?

Ms. Farrar-Owens:

Well, that was our legislature's decision to go ahead and have a very clean implementation date so that, for any felony committed prior to that date, those individuals would continue to serve out under the parole system. Of course, we retained the parole board to do that, and the new laws were cleanly to apply for sentencing for those individuals who committed felonies January 1 and after. As I mentioned on our previous call, Chair Hardesty, our parole board now also has another function. Virginia, as part of this reform legislation, enacted a geriatric release provision. Knowing that some of these violent offenders were going to be given very long sentences under this new structure, they created this option for a geriatric review after serving a certain amount of time and reaching a certain age. I can touch on that a little bit later, but our parole board also oversees that function.

Chair Hardesty:

Great. I did want you to comment on the so-called geriatric and medical review later in your presentation. The next item, on slide five, we've heard about truth in sentencing for years, but in Virginia, when one says 85 percent, my understanding from you is that you mean it?

Ms. Farrar-Owens:

Indeed.

Chair Hardesty:

What about credits for time served? That is available in Virginia, correct?

Ms. Farrar-Owens:

It is. They will get credit for any time served in jail awaiting their trial and sentencing.

Chair Hardesty:

I wondered if you could also comment about other credits that a defendant can earn or not in the system in Virginia?

Ms. Farrar-Owens:

The only other credit that can be earned for these felons is up to 15 percent off in earned sentence credit for participating in certain programs, either be it a prison industry or a treatment program or an education program or the like. The way the statutory language is written, they are not to earn these sentence credits just by sitting in their cell and not assaulting anybody. The goal was that they should actively participate in some manner in programming or work to be able to earn those sentence credits, and there are four classes of sentence credits that can be earned. The lowest level is earning zero for each 30 days served, and the highest is earning 4 1/2 days for every 30 days served. If someone earned 4 1/2 days for every 30 days served throughout their entire sentence, that gets you to 85 percent minimum.

Chair Hardesty:

The earned credits can't exceed 15 percent of the time to be served, though?

Ms. Farrar-Owens:

Correct.

Judge Scott Freeman (Second Judicial District Court):

First of all, when you abolish parole, in the federal system, parole has been abolished, but they have supervised release. You've given us two exceptions to you still having parole. One is if they were sentenced prior to the act being enacted, and the second is a geriatric issue. Do you have any kind of supervised released, or when the offender has

finished their sentence, they're done, there's no paper, they're not on parole, it's over? What's the analysis on abolishing parole?

Ms. Farrar-Owens:

Absolutely. You've raised a very important point here for Virginia, and that is, while parole is abolished for these offenders, nearly all of these offenders will have some term of probation to satisfy once they're released. That term is set by the judge. Now, if you think about it, Virginia's judges are doing what the parole board used to do. When someone violates their probation, they've violated the terms of their community supervision, they're brought back to the judge instead of the parole board to deal with, and perhaps order additional time to be served for that violation. In essence, no. In Virginia, our judges function as the parole board for these individuals. There is no parole.

Judge Freeman:

So, they somehow retain jurisdiction post-conviction? After an offender does their time, there may be a probation tail attached to that, and if they violate their probation, they're brought back to the original sentencing judge?

Ms. Farrar-Owens:

Some jurisdictions require it to go back to the original sentencing judge. In other jurisdictions, it can be handled by any other judge within that court, and not necessarily the one who did the original sentencing. In practice, that kind of varies here in Virginia. But nonetheless, that individual will be brought back to a judge in that jurisdiction, in that court.

Chair Hardesty:

Ms. Farrar-Owens, if you could, just to follow up on Judge Freeman's question, for the document called judgment of conviction, in Virginia, how would it read for a given defendant? Let's take someone who's been convicted of burglary. The judge, as I understand it, would sentence that individual for a period to serve in prison. They'd have to serve at least 85 percent of that, and then the judge would also set a period of supervised release, so to speak, or probation post-prison. Is that right?

Ms. Farrar-Owens:

Correct. And in Virginia, our judges will typically word their court order something like this: they'll impose 5 years and suspend 2 years of it so that the individual has an effective or actual sentence to serve of 3 years, but that 2 years is still hanging over the individual's head if they violate, once they set the term of probation. Let's say it's a 2-year term of probation, and they are unsuccessful and they're brought back to the court.

The judge still has those 2 years hanging over the individual's head that he or she can re-impose and order that offender to serve. That's the stick.

Judge Freeman:

Who's supervising the probation? The department of probation, consistent with—now, there not being a division of parole officers that would supervise them, so it'd be the division of probation that supervises not only offenders that have not gone to prison, but individuals who have gone to prison and then get out of prison? Same department?

Ms. Farrar-Owens:

Yes. In fact, the same officers will supervise parolees as well as probationers. It's the same group. They are all part of the department of corrections' division of community corrections, so the same officer on his caseload might have parolees and probationers.

Chair Hardesty:

Which of course is true in our State now.

Donald Soderberg (Director, Employment, Training and Rehabilitation):

I wanted to move back. We had a little discussion there on sentencing credits. I was curious as to the type of things an inmate could do to get those sentencing credits.

Ms. Farrar-Owens:

Here in Virginia, we may not have as much of a variety of options as other states might, but we certainly have prison industries. We have mental health programs, substance abuse treatment programs and education programs within our facility as options for individuals to participate in. There may be some others that I'm not aware of that are within the department of corrections, but those probably are the basic categories of things.

Chair Hardesty:

Mr. Soderberg, one of the things, if the Commission is interested in studying this state's approach further, we'll get a more in-depth catalog of those credit options.

Ms. Farrar-Owens:

I could connect you with someone who could provide much more of that information than I can.

Chris Hicks (Washoe County District Attorney):

I have one question back on the example you talked about a minute ago, just for clarification. Going back to that 5 years on a burglary that you mentioned, and the judge may say, "You're going to serve 3 years. I'm going to reserve 2 years for probationary supervision after you're released." Is that period of supervision then typically 2 years, the remaining balance of the potential sentence, or how long does the supervised release typically last?

Ms. Farrar-Owens:

Absolutely. There is some variation in how judges decide to impose and suspend time and the length of probation that might be set for individuals. Typically, it's around 2 years. In addition, if the probationer is doing very well, they're testing clean on their drug test, they've got a job, they're paying child support and everything is going well, the probation officer can actually write a letter to the court and ask the court to go ahead and release that individual from the remainder of their probation supervision term, if they're doing well. There is an option for sort of an early release, if you will, from the probation term.

Adam Laxalt (Attorney General):

Just to follow up on Commissioner Hicks' question, if in that burglary scenario the judge just did all 5 years, is there still potentially a tail in addition to that, or does the tail have to be within that original sentence?

Ms. Farrar-Owens:

You've hit on a really great point. There is a mechanism in our statutory language that, if 5 years is imposed and nothing is suspended off of that, there is a mechanism by which the court can order a post-release term and supervision period. It is rarely used, but it is an option. I can certainly send you more details about those provisions in terms of how a judge would utilize that. It was actually originally thought up for jury sentencing and those situations where a jury might—and Virginia's one of, I think, five states that retains jury sentencing in non-capital cases. But if a jury comes back with the maximum sentence recommendation, a judge can impose what the jury wants and still have a mechanism for community supervision after release. It's used in less than five percent of the cases, but there is a mechanism for that.

Scott Burton (Professor of Criminal Justice, CSN):

Back on the truth in sentencing, 85 percent piece of the sentence, is there a mechanism that allows release, for example, to a halfway house, though legally your status is still in custody, where you can release to the halfway house and be in custody while you're finishing up your sentence?

Ms. Farrar-Owens:

That is not an option here in Virginia. They can be transferred to a minimum-security prison or a minimum-security facility, but a halfway house, per se, is really not an option here, from a state-responsible prison sense.

Tegan Machnich (Chief Deputy Public Defender, Clark County):

Is there any way in your plea negotiation process for defendants and defense attorneys to know with certainty what they'll be signing up for? Because it sounds like there's still a lot of discretion on behalf of the judges with release, release terms and extending release terms. Are plea agreements mandatory? Do the judges have to file them, or do they still have discretion?

Ms. Farrar-Owens:

They maintain judicial discretion. They're not required to accept a plea agreement if they don't think the terms would serve the ends of justice. They are free to not accept that plea agreement. Then it would have to be scheduled for resentencing with another judge. That judge can no longer be involved in the sentencing if that's the case. But as far as plea agreements, I will make the comment that a lot of defense attorneys and prosecutors like the guidelines from the perspective that everyone understands what a certain offense and certain criminal history is, if you will, "worth." You score them on the guidelines, and the guidelines are often prepared as part of the plea negotiations in terms of what a defense attorney will be able to advise his or her client on what to expect, what the guidelines would recommend in that case, and the prosecutors can then also work with the guidelines and say, "Well, if we offer to not press certain charges, the guidelines would be amended to look like this." It gives both sides a pretty clear picture of what can be expected. I will say that I've got some information later on in the presentation, but despite the fact that our guidelines are discretionary, judges in Virginia comply overall with the guidelines at 80 percent. So, 80 percent of our sentences are in compliance with our guidelines overall. In terms of departures, 10 percent fall below the guidelines and 10 percent fall above the guidelines. It's really what was hoped for in terms of the actual use of the guidelines in the field, in terms of a pretty high compliance rate, and departures are evenly split above and below, overall. It does vary a little bit from offense to offense, but overall, that's the result we've been seeing for a number of years.

James Dzurenda (Director, Department of Corrections):

Just to answer one of the questions down in Las Vegas, Connecticut on their truth in sentencing and their earned credits does allow inmates that are low-risk offenders that are drug crimes that can actually complete their sentences in the halfway houses rather than the prison as part of that earned credit status. On slide four, I just wanted to quickly bring up, just to see what they did in Virginia, the guidelines that were used for

determining probation, jail or prison length sentences. I know it's a guideline, but is there any specific, formal risk assessment tool that the courts are actually using to weigh out the risk, or is it all subjective?

Ms. Farrar-Owens:

We do have a risk assessment tool, and I was actually going to touch on that in a few minutes, if I might come to that after a couple more slides? Would that be okay?

Chair Hardesty:

That'd be great.

Magann Jordan (Victims' Rights Advocate):

Are victims allowed to speak or testify at the hearings when the judges are acting as parole boards?

Ms. Farrar-Owens:

Yes. My understanding is that individuals who have been victims can be involved in that process.

I just want to speak briefly to slide seven, because right after that we're going to jump into the nonviolent offender risk assessment tool that we use. I mentioned that, as part of the reform legislation wanting to increase the time served by violent offenders, and that was actually incorporated as a mechanism into our sentencing guidelines, so there are these enhancements built into the guidelines for anyone whose current offense is defined as violent or they have a prior felony conviction for an offense that's defined as violent. Virginia may be unique in terms of, in our guidelines, a violent offender is defined not just based on the current offense, but the entire criminal history of the defendant, including juvenile adjudications. I think that may make us somewhat unique in terms of state sentencing guideline systems. Based on our analysis of the data, about one in five felons will qualify for one of these enhancements that will lengthen or extend the guidelines' recommendation so that those individuals—of course, they're serving 85 percent—are going to serve longer than they did under the parole system. But that's a mechanism built into our guidelines.

I also mentioned the idea for diverting low-risk, nonviolent felons to alternative sanctions. As part of the reform legislation, our general assembly actually directed the new reform sentencing commission to do an analysis and develop an empirically based risk assessment tool. They were not comfortable with taking something on the shelf, an instrument that had been developed someplace else for another offender population. There was the interest that we actually develop something tailored to our specific felon population here. We did do a pretty expansive study looking at a variety of property and

drug felons. Those individuals, of course, had to have completely nonviolent criminal histories as well. We based that on an analysis of recidivism. We identified the lowest factors, if you will, those things that seemed to be most associated with recidivism. Based on our statistical model, those factors were assembled on a worksheet, and the points were laid out to reflect the relative importance of those factors in our recidivism model, in our statistical model. It's very much an empirical risk assessment tool. We did do quite a bit of pilot testing of that, and we did implement that statewide finally in 2002. We recently revised it. I've noted that on slide eight. Following a more recent study, we actually revised that tool and that became effective July 1, 2013. We do have a long history of risk assessment here in Virginia, particularly for nonviolent felons, and I have some data later on that shows, based on our research, that about 3,000 nonviolent felons are recommended for alternative sanctions each year, rather than the traditional incarceration of either imprisonment or jail. It is having the effect of recommending low-risk felons for alternatives, and I will say that judges don't have to comply with that recommendation for an alternative. They can still go along with the traditional incarceration recommendation, but if the judge does either, the judge is presented with a dual recommendation for either the traditional incarceration or, if the individual scored low enough on the risk assessment, the alternative recommendation for an alternative sanction. If the judge does either, the judge is in compliance with the sentencing guidelines. Going along with the alternative sanctions doesn't penalize the judge in any way. I think it's important to note that the guidelines don't recommend any specific alternative sanctions, because we feel the judge is in the best position to understand what the needs of that individual might be, be it substance abuse or other, and also the judge will know what resources are available in his or her locality. I will say that one of the issues that Virginia struggles with is that resources for offenders are not evenly distributed across the commonwealth. Some jurisdictions have very little in the way of community options for offenders. The judge knows what's available in his or her jurisdiction, so the type of the particular alternative sanction is left up to the judge.

Given the interest of time, I won't necessarily go into the mechanics of that nonviolent offender risk assessment, but it does only apply to the larceny, fraud and drug cases, and they have to meet the eligibility criteria, most importantly not having any violent felonies in their background. If you skip over to slide 10, I showed you the structure that we started with. Now, you'll see with risk assessment added in what that structure looks like. Here in Virginia, an individual has to be recommended for incarceration by the guidelines in order to be eligible for a risk assessment evaluation. If the individual is already recommended for probation in the community, the risk assessment is not performed, because they're already being recommended for a community sanction. But if the individual is recommended for jail or for prison, then this section D, risk assessment, gets completed to determine whether or not that individual will be recommended for an alternative punishment. In the next couple slides, we also have another risk assessment tool that's specific to sex offenders that we developed at the direction of our legislature that serves to increase the guidelines at the upper end for certain high-risk sex offenders. Unless there's specific interest in talking about that now,

in the interest of time, we can move onto the next area of my presentation. It's up to you. I'll leave it for you all to decide.

Chair Hardesty:

I think it would be helpful if you did comment on this area. It's always a challenging area, so I think it would be informative for you to share what you did with respect to this category of crime type in Virginia.

Ms. Farrar-Owens:

Well, our approach was very much similar to how we developed the nonviolent offender risk assessment, in that we studied felony sex offenders here in Virginia and monitored them for their recidivism pattern to identify factors that correlated the most with recidivism among felony sex offenders here in Virginia. We did track them for a longer period of time. We went out 5 to 10 years in terms of the return to the community. But in terms of the analysis and doing a statistical analysis, it was very much the same as I described for the nonviolent offender risk assessment. But this one works differently. Whereas the nonviolent offender risk assessment can only help a defendant, the defendant already has to be recommended for incarceration, risk assessment can then only offer a recommendation for something else. Sex offender risk assessment works in the opposite manner. It identifies the higher risk individual and increases the upper end. As you see on slide 12, it increases the upper end of the guidelines range considerably to account for risk. If the judge wishes to take risk into consideration in his or her sentencing decision, having this wider range, this upper-end stretch for higher-risk individuals, allows the judge, if they wish, to take risk into consideration and still be in compliance with the sentencing guidelines. It just offers more discretion for judges for these particular individuals. I will say that the low end of the guidelines range and the midpoint recommendation of the guidelines are not changed for sex offender risk assessment. It's only the upper end that's stretched to allow for more discretion for the judges to sentence.

On slide 13, I thought I'd run just for a couple minutes through the basic mechanics of how guidelines are used in Virginia ([Agenda Item VII](#)). We have two groups that are allowed to prepare the guidelines for the court. Either our probation officers or the prosecutors can prepare the guidelines, and we have a team of folks here and it's their job to go around the Commonwealth of Virginia and train prosecutors, probation officers, defense attorneys, and we even train judges, on the guidelines so that everybody has a common understanding of the guidelines and how they're prepared. We have two different groups that might be preparing them for the court.

If you look at slide 14, I mentioned at the very beginning that there are a couple of mandatory elements to our guidelines system. They are listed here. The court must be presented with, review and consider the guidelines worksheet. The preparation of the guidelines is required. The judge must state for the record that he or she has reviewed

the guidelines, and that's supposed to be stated in open court for the record. Those are the mandatory elements. In addition, if the judge sentences outside of the recommended guidelines range, which he or she is perfectly free to do, the judge must however file a written explanation of departure when the sentence is outside the guidelines range. We provide space for that on the back of our guidelines cover sheet so the judge can just jot down whatever the rationale or the explanation might be for departing from the guidelines. I will say there is not a minimum standard for what an acceptable departure reason is. The judge is really free to write pretty much anything that could be considered an explanation for the departure from the guidelines range. There's really not a minimum standard for that.

Judge Freeman:

I have a question for you on the worksheet. In a discretionary scenario, the judge doesn't choose to follow the guidelines. Does the judge have to say on the back of that sheet why the judge didn't follow the guidelines?

Ms. Farrar-Owens:

Yes.

Judge Freeman:

So, if they say, "I didn't feel like following the guidelines today because I didn't like the offender"?

Ms. Farrar-Owens:

Well, they could do that. We would hope that they do not. Oftentimes, we see something as brief as, "Accepted plea agreement" or "jury trial" or "jury recommendation," so it can be fairly short in words in terms of that explanation.

Judge Freeman:

But they have to give an explanation why they didn't follow?

Ms. Farrar-Owens:

Yes.

Assemblywoman Jill Tolles (Assembly District No. 25):

Thank you for this presentation. Earlier, you said that 80 percent of the judges comply with the guidelines, 10 percent go above and 10 percent go below. Do you track the range of deviation from those guidelines? Does it go significantly above the sentencing

guidelines for those that deviate in that 10 percent? Does it go significantly below? Is there even tracking of that?

Ms. Farrar-Owens:

We do track that. For the most part, the departures are not extreme. At our last analysis, we found that, on average, they're about a year above or below the range, so they're not far from the range. Except in jury cases. In jury cases, the juries do tend to impose sentences that are much longer than what a judge would impose at a bench trial for that case. The more extreme departures are when there's a jury case. But we do track that.

Chair Hardesty:

Ms. Farrar-Owens, I believe I asked you this as well at our meeting, the judges that depart, or that departure data, is available to the public to see and view?

Ms. Farrar-Owens:

Indeed. Normally, our unit of analysis is by circuit. We have 31 judicial circuits in Virginia, and the localities are divided up and assigned to one of those 31 judicial circuits. But if requested, the guidelines information is public record, and if requested, we will provide the information by judge.

Mr. Hicks:

In regard to the guidelines, I assume that there's a consideration of prior criminal record when you're getting whatever the recommendation is. Is that fair?

Ms. Farrar-Owens:

Yes.

Mr. Hicks:

In determining what the prior criminal record is, do you guys rely on a state database of criminal history?

Ms. Farrar-Owens:

We do.

Mr. Hicks:

Is that state database reliable and up to date?

Ms. Farrar-Owens:

I will say that I have mostly confidence in our system. It is getting better all the time. Up until a few years ago, there were issues where an individual, let's say a probation officer, pulled a criminal history report to prepare the sentencing guidelines. The probation officer might see where there was an arrest, but then for the disposition, it would say, "Disposition not received." So, for whatever reason, the court did not forward the disposition information. The probation officer would have to go research and find out whether or not that arrest and charge resulted in a conviction from that offense and would have to go and call the court and so on and so forth to try to confirm or deny whether there was an actual conviction in that case in order to score it as prior record. That circumstance, that situation, has gotten a lot better. Our administrative office of the courts and our state police maintain our criminal history database and have developed an interface, so a lot more of the disposition information is transferred electronically overnight from the courts to the state police. We're no longer relying on the individual clerks of court from around the state to forward the disposition information. It comes from the automated system in that interface overnight. The limitation there is that there has to be an exact match on all fields of information for the state police to accept that in the disposition. If there's a misspelling of the name, if there's a transposition of birth dates and so on and so forth, there won't be an exact match and the disposition will still show up as, "Disposition not received." It's much better than it used to be, but there are still a few limitations that would require a guidelines-preparer to do some additional research.

Mr. Hicks:

We have similar problems here in Nevada with our criminal history database, probably more rampant than what you have in Virginia. But I guess my baseline question is, would it be your recommendation that we ensure we have a reliable criminal history system to base our scoring sheets on before we implement scoring sheets?

Ms. Farrar-Owens:

I do think that would be an important element from any consistency and potential disparity point of view. Depending on the information that's there versus not there in your criminal history system, I think it would be important for individuals' criminal history to be scored consistently from offender to offender in different areas of the state.

Chair Hardesty:

As a follow-up to Mr. Hicks' question, Ms. Farrar-Owens, when you undertook the studies in 1991 and then again the reforms were initiated in 1995, what was the condition of the criminal history repositories in Virginia at that time?

Ms. Farrar-Owens:

Not as good as they are now, but we did have the benefit that the baseline we started with originally was the PSI provided by probation officers for the sentencing judge. For those reports, the probation officer pulled the criminal history and then researched anything where the disposition was not clear. That got researched and the appropriate disposition information was entered in on the PSI. The data that we had, that criminal history, actually had already been researched and resolved for us.

Chair Hardesty:

If we were to undertake a guideline program and compile the data search, your recommendation would be to initiate that same process, to start with the PSIs, identify the material contained therein and ensure that the criminal histories are as accurate as they can be?

Ms. Farrar-Owens:

That would be my recommendation, certainly from consistency in calculating the guidelines, and I think an element of fairness in accurate criminal history.

Chair Hardesty:

Are judges elected or appointed in Virginia?

Ms. Farrar-Owens:

Virginia is probably in the minority of states. Our judges are not directly elected. They are appointed by our legislature to serve specific terms. They must, at the end of that term, then appear before our legislature for an interview to determine whether or not they will be reappointed.

Chair Hardesty:

And the legislature then has available to them lots of information, but the deviation information would also be available directly to the legislators.

Ms. Farrar-Owens:

The committees that deal with the judicial appointments indeed for the last 5 years have requested for each judge coming up for reappointment their compliance rate and their departures above and below. In addition, an interesting element that they've wanted over the last couple years is that there's been an interest in situations where judges sentence outside of the guidelines but they fail to provide a written explanation. Now they also want in our report the percentage of cases where the judge failed to file a

departure reason that would have been required because of the departure. There is interest amongst our legislature in this area.

Assemblywoman Tolles:

Does Virginia utilize judicial performance evaluations, and what role does that play in the appointment and reappointment process?

Ms. Farrar-Owens:

Five years ago, the committees started requesting this report from us on the guidelines compliance and departure rates. It was really because they were starved for metrics on the judges, some quantitative measures on the judges. They were really interested in moving away from who you know and who you went to law school with and so on, more to some standard objective measures that can be used to determine whether the judges should be reappointed. They turned to the guidelines information first because that was really the only metric available. It was in process then but wasn't available yet. Now they have actually finished the implementation of the judicial performance evaluations, and that is now only in the last 2 years been available for the judges coming up for reappointment. Now the committees also see their judicial performance evaluation and the measurement and the metrics there. I will say, the last couple of years, that's really taken the front seat versus the guidelines compliance and departure rate. It's really been, "What does the judicial performance evaluation say?"

John McCormick (Assistant Court Administrator, Administrative Office of the Courts):

Just a couple quick questions regarding the judiciary in Virginia. Is it a unified judiciary and do they have a statewide case management system that all the courts have to use?

Ms. Farrar-Owens:

Yes, there is a central administration of the courts here in Virginia. There is a case management system. The clerks of court are the ones who are inputting the information into that. It was originally designed to be a docket management tool for the clerks that manage the cases. It's really not meant for research. We've learned how to use it for research. But yes, there's a case management system. Clerks are not required to participate at the circuit court level. Because the circuit court clerks are locally elected, they can choose whether or not to participate. We have 128 independent counties and cities in Virginia, and all but two of the clerks at the circuit court level participate in that case management system.

Just to complete the circle, once the case is sentenced in the court and the judge has filled out the sentencing information and any departure reason, the code of Virginia requires that the clerk of the circuit court then forward that completed guidelines record

to us here at the commission ([Agenda Item VII](#)). It is automated here, so that is where we get our automated data in terms of the sentencing guidelines. It eventually comes to us from the court after sentencing and we automate it. We have all of that, now 22 years of sentencing guidelines data, available to us for analysis, which is incredibly helpful. The worksheet by law becomes part of the record of the case as a public record, as I mentioned.

Just a couple of things to tie up, and then answer any other questions you might have, we do occasionally revise or modify the guidelines for particular offenses, and we do that by analyzing the compliance and departure patterns associated with specific offenses. If we detect that a compliance rate is very low for a particular offense and in almost all the departures the judges are either going above or they're going below, that's a sign to us that we perhaps need to revise those guidelines and catch them up to what the current sentencing practices are. In Virginia, these guidelines are intended to provide judges with a benchmark of the typical or average case, given the offense and the individual's prior record, weapon use, victim injury and legal restraint. Was someone already on probation, for example, when they committed this new offense? Those elements are taken into account on the guidelines, and the guidelines generate, based on our analysis of the historical data, what the typical case would get in the circumstances. Then the judge can look at the particular circumstances in the case before them, be they mitigating or aggravating, to decide whether to go above that benchmark or below. That's what the guidelines are intended to do. The only exceptions to this historical basis are the legislatively mandated enhancements for violent offenders. That is overlaid on top of this historical analysis. In general, we would say that our guidelines give the judges a good benchmark. While we know that sentencing is not static, it can change over time, and we do see trends, so occasionally we do need to update these guidelines. We do that by analyzing the data, looking for low compliance rates, certain patterns in the departures, and then we will go in. One of the biggest things we look at first would be what are the reasons that judges are citing for departing? If they're complying at low rates and always going above the guidelines when they depart, what are their reasons? What are we missing, potentially? Those reasons for departure can really help serve as a pointer for the commission staff to then go in and see if there's a way we can address some factor that the judges are obviously taking into consideration that isn't on the guidelines. The example I show on slide 15 ([Agenda Item VII](#)) is that we had a judge specifically say "gang-related criminal activity" as the reason for going above. Judges don't have to write detailed departure reasons, but we do stress with them that that is the most helpful to us if they want to communicate to us what they don't like about the guidelines and what they think we should change or modify. But we do that analysis. Any revisions or any recommendations that the commission adopts to revise the guidelines have to be submitted by law in our annual report that goes to the governor, our chief justice and to our legislature, and then the process is set up such that if we submit the report and they do nothing, the commission's recommendations automatically go into effect the following July 1. Our legislature would actually have to introduce legislation to counteract any of the commission's recommendations. In a way, that was set up, and I'll

be direct on this, so that the general assembly wouldn't have to put their fingerprints on something if, for example, based on the historical analysis the commission needed to revise guidelines in a downward direction. That might be unpopular if they had to proactively vote on that. That might be unpopular for the legislators to do. This way, the commission can make those recommendations to go to decrease the guidelines if that's what the analysis revealed, and the general assembly doesn't have to vote on that. It just would automatically go into effect.

The last couple things I'll mention, because the rest of it is just data, on slide 17, when I first connected to the call, I heard someone talking about the various states and the presentation that you had that talked about states being in their guidelines systems more mandatory versus more voluntary. You may have seen this information from Ms. Mitchell, and this is shown on slide 17. There was a report done by the National Center for State Courts. Based on the criteria and these questions that you see listed, they placed state guideline systems on a continuum from more voluntary to more mandatory, and I just wanted to show you that you can see where Virginia falls in the relative scheme of things. We fall at a six, so we're in the middle. There are certain elements of our system that are mandatory, like the preparation of the guidelines and writing departure reasons, although compliance remains voluntary in our system. You can see where all the states fall on that. I thought that would be helpful.

On slide 18, I've already talked about our geriatric release provision. The specific parameters of the age and time-served thresholds are laid out on that page. Originally, it was meant to just apply to individuals sentenced under the no-parole system, but our legislature has since expanded that so everybody in our prison system who reaches these thresholds can be considered for geriatric release.

The rest of these slides really are just about the data, in terms of compliance rates and departure patterns, percentage of time served and what's happened in the growth of our prison population, because there was a concern initially that the abolition of parole would lead to a skyrocketing prison population. That did not happen. I provided some of that information in the presentation as well.

Chair Hardesty:

If you wouldn't mind, please go through a few of these slides. Sometimes when people are looking at data, they misapprehend or are not clear what the data is conveying. I think it would be useful if you could indicate your interpretation of the data and how Virginia uses that data.

Ms. Farrar-Owens:

Sure. Slide 20 mentions the overall compliance rate being about 80 percent, and the departures are pretty evenly split ([Agenda Item VII](#)). But on the little table there, I show that an important aspect of this is related to dispositional compliance. Are judges going

along with the type of disposition being recommended by the guidelines, because that's a particular driver then for our populations, be it prison or jail populations. You can see by those percentages that I've circled in red, there is a high degree of concurrence between the type of disposition that's recommended versus the type of disposition that's actually received by the individual defendant. In particular, the longer terms of incarceration, that is the prison sentences, when the guidelines recommend a prison sentence, judges give a prison sentence at 87 percent of the cases. From a correctional population management perspective, we were keen on looking at the concurrence in the disposition types, so that is an excellent finding for us.

Slide 21 simply says that yes, individual offenders are now serving the minimum of 85 percent. You can see on slide 21 that, where that 85 percent line has dropped and the various offense categories and the percentage now being served compared to the percentage that was being served under the parole system right before the abolition of parole. You can see, in terms of percentage and transparency of what a sentence means, Virginia has achieved that 85 percent.

Slide 22 just gives briefly some information about the impact of these sentence guideline enhancements for violent offenders. That's the top chart there, which shows the prison time served in years. I gave an example here specific to robbery of a business with a firearm. In the blue bars, you can see the time that had been served under the parole system by the different types of prior record. The left-hand bars reflect where someone has no violent prior record. The middle bars reflect where they have a violent prior record but it falls into our less serious category. The farthest right-hand bars reflect where the individual has a violent prior record in that most serious category. This would include prior rapes, robberies, murders and very serious offenses. For those individuals, they're put in the most serious set of bars to the right. But you can see in the parole system in the blue bars, the individual served on average about 2.7 years up to 4.1 years depending on their prior record on average before being released to parole. One of the things that was keyed in on in 1994 was that having a violent prior record didn't do much to increase the time served in prison. You still got parole pretty early on and you didn't see much of a stair step of an increase in that time served, because the nature of your prior record was getting more serious and more violent. Under the new system of no parole, what we do see is that stair step. First of all, if they have no violent prior record, they're serving 4.6 years on average versus 2.7 years, so we've seen that increase. But if they have a violent prior record, we see more of this distinct stair step up into longer periods of time served associated with that prior record. Our data revealed that that objective, that goal, of truth in sentencing in Virginia has been achieved. We can do this for a variety of sentences, but I'm just showing an example here.

I mentioned a few minutes ago about risk assessment. In a given year, we have anywhere between 6,000 to 7,000 eligible offenders who are evaluated on risk assessment, and about half of those score below the threshold and are recommended for alternative sanctions. That means about 3,000 low-risk property and drug offenders are recommended for alternatives each year. Again, the goal was to try to make

recommendations to divert the low-risk offenders. We see that is being achieved as well.

Slide 23 simply tracks our prison population as far back as 1980, so you can see the growth in our population over time. There was a concern after parole was abolished that we would see this significant increase in our prison population. We did not. In fact, it levelled off a little bit before starting to grow again gradually, but the rate of growth has actually been slower after abolition of parole than it was prior to the abolition of parole, that decade before where we had significant growth as I've shown here. Certainly we've had declining crime rates in Virginia, and that was a huge help in terms of slowing down the growth in the prison population. I think most states around the country have seen those lower crime rates since about the early to mid-1990s, and certainly that was a contributing factor for us. I just wanted to give you this information that our prison population, the growth has slowed, and in fact has been pretty level for the last 5 or 6 years.

On slide 24, there was an interest in—you may hear the comment from some folks that to dedicate the most expensive correctional resource you have, that being your prison beds, to those who are the most violent or the most dangerous offenders, and that was certainly part of the goal here in Virginia, and certainly the goal when they were talking about increasing the time served by violent felons. As a companion to that, diverting the low-risk nonviolent felons. We've put together some data that looks at what percentage of our state prison beds are holding violent felons, and that's based on the definition in the code that applies to the sentencing guidelines when you look at both the current and prior record offenses. Who would be defined as violent in terms of the percentage of prison beds? Policy makers were very pleased to see that now a larger percentage of our prison beds are being dedicated to those who are violent felons either because of their current offense or their prior record. We've seen the increase that policy makers are pleased about in terms of the makeup, the composition, of our prison beds.

On the very last side, it kind of brings us around, closes this 30-year discussion about sentencing guidelines in Virginia, where the original impetus in the mid-1980s was disparity and addressing this unwarranted sentencing disparity. The National Center for State Courts did a study in 2009 where they compared three state sentencing guideline systems, Minnesota, Michigan and Virginia, on a variety of factors. But one of the things they looked at was disparity, issues of disparity. The conclusion for Virginia was that the guidelines effectively limit undesirable sentencing disparity by reducing the role of factors that shouldn't play a role in the sentencing decision. There was no evidence that guidelines must be mandatory, like in Minnesota, in order to have an impact on the undesirable racial, gender, age and so on, those influences in disparity. Finally, Virginia showed by 2009 no substantively significant discrimination in sentencing outcomes. For Virginia, it brought us full circle 3 decades later.

Chair Hardesty:

Thank you. I had one other area I wanted to ask you about that we had covered on the phone. In Nevada, I had explained that we have our various crime types divided into categories, A through E, and I had asked you if you could comment, and I'll ask you to do the same. What is Virginia's category or classification approach for crimes? What divides those classes? Has Virginia's legislature or general assembly gone off the rails and established crime types with sentencing ranges that are outside the classes? Could you comment on that?

Ms. Farrar-Owens:

Absolutely. Virginia has six felony classes defined in our code of Virginia, ranging from the punishment for capital offenses as Class One, all the way down to a Class Six felony which has an imprisonment of 1 year to 5 years. That's our lowest-level felony. However, in Virginia, over the years the general assembly has modified penalties and created new offenses that have unique penalty ranges that don't fit neatly into any of the six existing statutory ranges for us. For us, we call those unclassified felonies, and the penalty ranges are all across the board and they're specific to each of those offenses. That doesn't have an impact on our sentencing guidelines, because our guidelines are specific to offense, not crime type category, so we can accommodate that in our system even if the offense has a range that's outside what the code of Virginia outlines in terms of a penalty structure. But we now have more unclassified felonies than we have classed felonies in Virginia.

Chair Hardesty:

If you have a general assembly adopt or establish a criminal act or address a criminal act that's new, and they also take that crime and place it outside of the six existing classes so it becomes an unclassified felony, how does the sentencing guideline get established for that offense? What history is available to establish the guideline for that offense?

Ms. Farrar-Owens:

That's a terrific question, because there are a few but not a lot of felony offenses that the guidelines don't cover, and that's either because they're too new and we have not accumulated significant enough data to be able to do the type of historical analysis we would need to in our development of the guidelines for that new offense, or the offense just happens so rarely that there's insufficient data for us to be able to analyze. Typically we'd wait until we had 5 years of data to do an analysis. We consider "history" to be the most recent 5 years. If it's something that's a new offense that we've seen a lot of, for example, when our legislature defined a new felony for strangulation resulting in bodily injury, right after it became effective, prosecutors were charging that and we had a pretty significant number of people being convicted under that new felony provision, so

we only waited 2 years. We had sufficient data after 2 years to be able to do the analysis of historical data. But you hit it exactly. When there is a brand new felony offense, we don't cover it until we get enough data to develop the guidelines.

Chair Hardesty:

In those instances, then, judges are sentencing again using the same sentencing approach that is establishing whether the defendant should go to prison or not, get probation or prison, and then secondly whether there should be a period of incarceration and then a period of supervision thereafter, and that's determined based upon the general assembly's establishment of the range of sentences for that new crime. Is that right?

Ms. Farrar-Owens:

Correct. The statutory range, which may be quite broad. For example, for larceny in Virginia, the statutory range is 1 to 20 years. It's an unclassified felony. The guidelines' ranges are much narrower than that, so it offers judges more guidance than the statutory range does in terms of sentencing outcome.

Judge Freeman:

If you have a new crime, and let's say it's a new crime the prosecutors are utilizing quite a bit, so you wait the 2 years for the data as opposed to the 5, you put the 2 years of your data in the guideline report that you provide to the legislature, and then pursuant to the current law that's in Virginia, the legislature in other words wouldn't really have a say. So, unless they have an issue related to the document, the report, and then it becomes guideline law by way of the current laws created in Virginia related to that guideline manual, or report. So, then it's incorporated into a judge's consideration as a guideline crime because of the way it's set up and how the commission's recommendations are adopted, if they're not opposed by the legislature. Is that correct?

Ms. Farrar-Owens:

Yes.

Dennis Cameron (Representative, State Bar of Nevada):

I have a couple of questions revolving around the violent offender statute in your state. It looks as though the reason for that is that the violent offenders need to spend more time in prison, but I see that juvenile adjudications are also included in the violent offender determination. Is there some cutoff as to how remote those are that they can still be used?

Ms. Farrar-Owens:

You've brought up a very interesting point in our history. Early on, when the commission was first created and our guidelines were first adopted for our new system, there was a decay or an age-out of the prior record. We called it the 16-year rule. If the prior record was more than 16 years, you didn't need to score it on the guidelines, if it was more than 16 years old. It sounds simple to implement, but the field had so much struggle to implement that and being able to determine whether something was in the 16-year window or not. It actually became quite a challenge, so our general assembly struck that. So, there's not this decay rule or age-out rule that we originally had for the first 2 or 3 years. It became very unwieldy in the field to actually implement it.

Mr. Cameron:

Is there some mechanism within your departure procedures whereby, for example, a 14-year-old juvenile is opening car doors in a parking lot and taking change, and he gets adjudicated for burglary. Do you go back and look at the underlying part of it? Is there some way to mitigate that? We just look to see if he's got a burglary adjudication?

Ms. Farrar-Owens:

The judge is absolutely free to look not only at the guidelines score but for example the presentence report that will provide the detail of what that criminal history looks like and if it was a juvenile adjudication versus an adult conviction, and they can take that into consideration. A very common departure reason we see is that the violent or prior record was as a juvenile, it was quite some time ago, it's a very old conviction, they have been crime-free for a long period of time since then. Those are common sorts of departure reasons that we see. A judge can certainly look at the specific nature of that prior record, beyond just what the guidelines score would recommend.

Jeff Segal (Bureau Chief, Attorney General's Office):

I'd like to know whether under the guidelines there has been any significant change in recidivism rates.

Ms. Farrar-Owens:

The commission has not done a long-term recidivism study of that nature. Our department of corrections has tracked their recidivism measure, which is in essence a 3-year return to prison incarceration rate. So, it requires someone within 3 years of release to be returned to the prison population for either a new crime or a violation of their probation and community supervision. They can track that rate going back a number of years. Virginia never had a very high rate of that 3-year return to prison, but it's been slowly declining. I believe now the latest figures show that Virginia has either the lowest or the second lowest 3-year return to prison rate in the country.

Ms. Machnich:

Referencing slide 23, where you're tracking the inmate population, do you happen to know how that corresponds to your overall population, like per 100,000 residents how many you're incarcerating?

Ms. Farrar-Owens:

I don't have that figure in front of me, but I have it in one of my files in terms of the growth or change in our prison incarceration rate over time. I do have that. It has grown slowly, but not as fast as many other states. I can provide that information.

Ms. Machnich:

That would be great. Additionally, do you happen to track the incarceration by race or indigency status?

Ms. Farrar-Owens:

I don't track that here at the sentencing commission, but I know our department of corrections does. They would certainly have that information in terms of folks coming into their system.

Jon Ponder (Representative, Offender Reentry):

As it relates to the recidivism rate, you did indicate that those trackings of the recidivism rate do include new offenses in addition to parole and/or probation violations?

Ms. Farrar-Owens:

Yes.

Karin Kreizenbeck (State Public Defender):

I was wondering if there's a mechanism by which a defendant can challenge the guideline in his particular case.

Ms. Farrar-Owens:

The guidelines cannot be used as the basis for an appeal. However, during the sentencing hearing, there's an opportunity for the judge to make sure that everybody agrees on the computation of the guidelines. We do a lot of training here of defense attorneys on the proper completion of the guidelines. Even though they're not allowed to prepare the official version of the guidelines to be submitted to the court, we certainly think it behooves the defense to be very knowledgeable of the guidelines, to be able to

review the guidelines with their client and to detect if they think there's been an error in the computation of the guidelines that can be brought to the judge's attention at sentencing. That does happen at sentencing. We do get guidelines here where you can see that the judges have crossed out certain scores and written in lower points and initialed where they have accepted the defense's argument in essence that something was improperly scored and should have been scored at a lower level. The judges are free to make those modifications on the bench during the sentencing hearing. We will get these modified in court with the initials of the judge regarding that. The judge can hear those arguments, definitely at sentencing.

Stefanie O'Rourke (Major, Parole and Probation):

You mentioned that there is an 85 percent minimum term that inmates serve in incarceration. Without a parole board, I was wondering, when they're released to serve, I believe you said it was a term of probation. Who determines what conditions of probation they serve and the length of probation they serve after incarceration?

Ms. Farrar-Owens:

The initial probation term is set by the court at sentencing. However, as I mentioned, if the individual is doing well on supervision, the probation officer can then petition the court or send a letter to the court to allow that person to be released from supervision if they're doing well. The department of corrections has standard terms and conditions of community supervision that every offender must sign when they first are brought onto the probation caseload. When they first enter community supervision, they sign the conditions. In addition, the judge can set any special conditions. I imagine that your courts may be very similar to this, but the judge can set some special conditions at sentencing, such as the offender can't hang around in playgrounds or the individual can never go into a Wal-Mart. There can be some special conditions set such that that would also become a condition of probation once they start their supervision.

Chair Hardesty:

I believe I'd asked you in the call that we had about whether you would be able to share whether there was any proprietary limitation on the statistical model and the data collection systems that you use and whether we could have access to those. My understanding was that they could be shared, but I also have a note here that you needed to check, so I wondered if you had an answer for that at this point, or if there was further checking. Can I copycat your data systems?

Ms. Farrar-Owens:

We're happy to share anything that might be helpful. In terms of the statistical model, we've been in existence for 22 years and we've been doing guidelines analysis for a number of years before that, so there's really not one statistical model. Over time, a

number of models have been done. But we're happy to share whatever we can that would be helpful to you.

Chair Hardesty:

I believe you mentioned that you work with a firm that does the statistical calculations. Is that right?

Ms. Farrar-Owens:

No, we do that in-house.

Keith Logan (Sheriff, Eureka County):

Do you have sentences of probation that would be life or extend well beyond what their original sentence structure was, say 10 years or 15 years? Also, does the defendant get any credit for voluntarily entering into the agreement, such as receiving better consideration because he has avoided the trial process and everything else?

Ms. Farrar-Owens:

You've hit on something that's becoming a topic of discussion for our legislature, and that is a sentence reduction option for cooperating with law enforcement and the prosecution of other cases, as well as entering into a plea agreement. I know the federal system has an official deduction that can be applied in terms of the scoring for where the defendant had pled guilty or accepted responsibility for the offense. We don't have that here in Virginia really. The judge can certainly take that into consideration when sentencing and go below the guidelines and use that as the departure reason. That's certainly an option, but it's not officially something that's part of the guidelines. In terms of length of probation, it's rare to have probation more than 5 years in Virginia. It's possible. Where I've seen it longer is for sex offenses in particular, and there is actually one provision in our code for certain of the most violent sex offenses that, if someone is ever released, they need to be on probation for life with GPS (Global Positioning System) monitoring. It's a very small subset where that would be required. I rarely see probation where someone actually serves a term more than 5 years.

Sheriff Logan:

Do you address global solutions where things are pending in multiple jurisdictions where one would accept the plea and go through the process? If in other jurisdictions they're accepting responsibility for those but not being individually sentenced for those other crimes, how does that count against their point system or within the structure?

Ms. Farrar-Owens:

I'm sorry, I didn't understand the question.

Sheriff Logan:

Say, if somebody had offenses in three different counties, and they're in the first county, and in that sentence they're going to more likely than not be sentenced to incarceration at the state department of corrections, that you don't have to go back through the first two counties in order to add to that sentence, although they're accepting responsibility, and maybe county one and county two are dismissing their charges for the furtherance of justice for a global solution. Did those get counted against them in that structure, which would increase their time in the third county?

Ms. Farrar-Owens:

What does count against them is if, for example, they have this multiple-county crime spree, if they're convicted in one county first, in the next county that they go to be sentenced, that conviction is going to count as prior record. Even if the offenses were committed within a fairly short period of time, the way the guidelines were structured here that, wherever he's convicted first is going to serve as prior record for the next sentencing. We do see that as a departure reason, where judges will say, "this is part of a crime spree across multiple counties. The robbery in the next county happened just the day before this one," and they've taken that into consideration when imposing a sentence in the second jurisdiction.

Judge Freeman:

Just a follow-up to Sheriff Logan's question. I think the Sheriff's question was, do you count relevant conduct? So, for example, if there's a crime spree and one jurisdiction decides to take the brunt of those crimes, does the judge in the jurisdiction that takes the brunt of those crimes for the purpose of sentencing, is there a sentencing guideline addition or point total or category increase that the judge can take into consideration because there's a crime spree throughout a number of counties, the same type of crime? We analogize that in the federal system to relevant conduct. Is there a relevant conduct point increase or a determination the judge can use if there's a crime spree as the Sheriff suggested?

Ms. Farrar-Owens:

There is no specific point structure to go along with that. It would simply be an element that the judge could use as a departure reason for going outside the guidelines. But we don't have a point or factor in the guidelines that would directly address that.

Assemblywoman Tolles:

Along the lines of gathering information about the database system that Virginia uses, I'd like to make the request that perhaps we could get some budgetary information, as well as the cost of programs. The Chair made reference at the beginning of our meeting to the investment made, and perhaps we could do that for all the states that we're looking at, a comparative analysis to give us some information in terms of the fiscal investment and the impact.

Ms. Farrar-Owens:

Yes, I can try to provide some information along those lines. I think, from an investment perspective, they created the commission and they also in particular invested in a network of alternative sanction programs. I can certainly provide that. I think our judges would tell you that they wish there were more alternative sanction options than what we currently have, but I can certainly provide information on what was funded and what was created.

Chair Hardesty:

Just to add to that point, do you recall the budget for your department?

Ms. Farrar-Owens:

Yes. For us as an agency of nine, almost all of our budget is for staff. Our budget started a little below \$1,000,000 and now it's a little above \$1,000,000. We haven't increased significantly over the years, just maybe kept up with the pace of inflation. But that's almost entirely staff. We are very fortunate in that we are physically located within the Supreme Court of Virginia building where the administrative office of the courts is. For example, their information technology (IT) staff supports our IT efforts. We do provide some maintenance funding for that, but it's certainly less than if we had to have an independent IT staff of our own. Same thing with our fiscal needs and paying our bills. Their fiscal office in the administrative office of the courts is kind enough to process all of that for us so we don't need to have our own independent fiscal staff to take care of those things. We are very fortunate in that we have that support from the administrative office of the courts.

Chair Hardesty:

The reason I ask that question is because we had covered that in the phone call, and I wanted to ask you to reach out to the director of the administrative office of the courts to get their cost sharing contribution to your effort, because I imagine there's an allocation within their budget for the support for your department.

Ms. Farrar-Owens:

I will check to see if they have that outline.

Chair Hardesty:

Mr. McCormick is on the Commission. Mr. McCormick, if he would, will reach out to the director there in Virginia and do some number crunching on their support systems in the administrative office of the courts from the department, if we could.

Assemblywoman Tolles:

I think that it's beneficial to see a comparative analysis of the fiscal investments in a variety of states, but also to see if there's been an impact in the reduction of recidivism, the reduction of prison populations, how that's impacted the fiscal health of this state. One of the presumptions that we hear most often is that, in looking at some of these alternative sentencing programs, you can perhaps see a positive fiscal impact on the state. I'd like to see in these states that are further along in this process if that has actually panned out.

Chair Hardesty:

Did you follow that comment, Ms. Farrar-Owens?

Ms. Farrar-Owens:

Yes.

Chair Hardesty:

Can you provide us with some data and information about that, or give us the department head or the person who could assist us with getting that information from Virginia?

Ms. Farrar-Owens:

Yes. If we don't have it, we can put you in touch with individuals who could provide some of that information for you.

Chair Hardesty:

Great. I really want to thank you very much for being available and providing such a thorough presentation to us. We're very grateful for you spending the time. You've now devoted quite a few hours in our conversations and with the presentation to the Commission, and we thank you very much for that. We're grateful to have the help.

THE CHAIR CALLED FOR A RECESS.

Chair Hardesty:

As I mentioned to the Commission members, I had the privilege of visiting with Ms. Hall and Mr. Madler from North Carolina on February 1. Thanks so much for waiting for us and being patient with us. We're looking forward to your presentation about North Carolina's experience.

Michelle Hall (Executive Director, North Carolina Sentencing and Policy Advisory Commission):

I'd just like to thank you all for having us on the call, and we look forward to sharing some good information with you all and supporting you however we can. I also have our Associate Director for Policy, John Madler, and our Associate Director for Research, Ginny Hevener. I'm going to let Mr. Madler kick off with the first section of the presentation, because he is our informal historian as he's been with the commission essentially since it was created, so he's going to walk through some of the historical elements and the legal structure, and I'll pick it up with what the commission does now.

John Madler (Associate Director for Policy, Staff Attorney, North Carolina Sentencing and Policy Advisory Commission):

We want to give you a broad overview, but we still want to open it up to questions that you have along the way and areas that are of more interest to you, so we'll hit some of the highlights as we go along. There are four areas we want to talk about. We want to start with the problems that North Carolina was facing that led them to develop structured sentencing. We found that the structures are usually in response to the issues at the time. The second thing we want to talk about is the elements of our structure, how we addressed some of those problems. The third thing will be to talk about the process we went through, the way that this commission approached structured sentencing. Finally, we'll talk about what the role of the commission is going forward and the things that this commission does to help maintain the integrity of structured sentencing here in North Carolina. We'd certainly like to welcome questions as we go along and focus on what it is that interests you.

Chair Hardesty:

Of course. But as much time as you can devote to us, we welcome. It's an interesting and important area, so we want you to take as much time as you need to convey North Carolina's structure and history and results and the like. We'll let you know if the Commissioners have questions. Otherwise, please take your time and don't rush.

Mr. Madler:

We will. Starting with slide two ([Agenda Item VIII A-1](#)), talking about the issues that North Carolina faced prior to structured sentencing, we had a determinate sentencing system where there was a range of sentences available for each punishment class. The judge would select one sentence length from within that range. But also, it included a day-for-day credit for good behavior, which cut the sentence in half, a smaller credit for activities and program participation while you're in prison, and then just a brief period of parole to reintegrate back into the community. It did not address probation. It did not discuss who was right for probation or what the appropriate length would be for probation. It just focused on prison. What we found was that it was not as predictable a system. The judges had wide discretion within that range to select their sentence, and we were not able to project what the needs were for the state. As a result, we started getting longer sentences and we started running out of prison bed resources. We were facing a prison-crowding situation. As you go through that, you can imagine: judges started opposing longer sentences. They started letting offenders out earlier. We got in a position where their sentences began to lose meaning. At one point towards the end, prior to structured sentencing, our felons were serving on average of about 19 percent of the sentence that the judge imposed. Misdemeanors were barely even going into the jail. The only time they spent was usually pretrial, and once they were sentenced, they were given credit and they would be paroled pretty quickly right out of the jail, so they weren't serving any time. At that time, probation was optional. It was discretionary. The judge could not order it, but the defendant could agree to probation. We saw a situation where most of the defendants were refusing to go on probation because going into prison was quicker and easier for them. They knew they'd get out in a shorter period of time and they didn't have to comply with any of the conditions. They were more willing to go to prison, which again contributed to the prison population situation.

By the late 1980s, we got into a position where we had overcrowded prisons, and eventually the inmates sued the state for the conditions. North Carolina prisons were never taken over by the federal system, but they did enter into a consent agreement with the plaintiffs there to put a number of provisions in place as far as the amount of space that was going to be allocated for each offender. They also put in statute a cap on what the prison population would be. They had a mechanism in there for, any time they approached that cap, within a percentage of it, they had to start letting offenders out. They would look at who was closest to their release date and they would just start from there and work backwards and just start releasing people out into the community from that point. As you can imagine from that, as far as the public was concerned, they did not have any confidence in the system anymore. They knew that these offenders were getting out quickly. They knew that the sentencing punishment was not being upheld. So, they really did not have a lot of respect for the judicial system at that point.

On slide three, the legislature looked at this and did a study of the issues. Their first response was to form the sentencing commission back in 1990. They set this commission up very similar to your commission. It was a group of experts, people from

all areas of the criminal justice system. We have law enforcement, court officials, corrections officials, citizens and members of the public, all representing their different areas. It is also an independent group. It's set up so the members are nonpartisan. They serve either by virtue of their office or by appointment from one of the three branches of government, so everyone is represented there. We do not belong to the legislature or to the governor or to the chief justice. Finally, it's designed to be objective. One of the things from the very beginning was that they developed policy based upon empirical information. The legislature was very strong about joining the data with the policy and the whole process there.

Initially, the commission was given a specific set of mandates to follow. You can see that on slide four ([Agenda Item VIII A-1](#)). It's got a list of the mandates in statute. The general assembly was very specific about what it was they wanted. First of all, they were classifying their criminal offenses, but they wanted it done based upon severity. Up to this point, there had been no guidance for classifying offenses. They were assigned usually based upon the desired sentence length. But here, the commission was supposed to look at the type of harm that comes from an offense and the degree of the harm and then classify it accordingly. This allowed the commission to treat all offenses together. We looked at property offenses, person offenses and societal offenses all in one rather than developing three separate classification systems. The second one was to look at the offender's prior record. Up until now, that had been simply an aggravating factor. If an offender had one or more prior convictions, it allowed the judge to aggravate the sentence, but that was totally in their discretion. Here, the general assembly was looking for more of a structured approach to prior records and criminal history. The third item was to develop sentencing structures. At the point North Carolina approached the issue, about a dozen states were in the process of doing that, so it was something that was known and our general assembly did want to pursue sentencing structures themselves. The fourth one was to develop a community corrections strategy. At that point, they had basically probation with some conditions and they had prison. What the general assembly was looking for was more of a continuum of sanctions going from the least invasive to the most invasive before you got to prison. Finally, the sentencing commission was tasked with developing a correctional population simulation model, something that they could use to provide the long-term projections for the prison population, which was something that North Carolina did not have at that point.

Moving to slide five, the first thing the sentencing commission did was they met and they began by talking about the problems they were facing in the system. But then they set a series of goals that they put up to guide all the decisions they were going to make from there on out. You can see the list of the five different goals. The first three deal with the sentences themselves, and the last two deal more with resource issues. The first one is that the sentences should be truthful. They wanted to make sure that whatever time the judge imposed had a close and consistent relationship to the time the offender would actually serve, and it wouldn't be this wide variance for good time and for parole release. The second one was that they would be consistent. Similar offenders

who commit similar offenses would face similar sentences. It didn't matter what district they were in, what court they were in, what judge they were in front of. They would have the same options and have similar sentences. Thirdly, the sentences would be certain. Anyone could tell based upon the severity of the offense and the severity of the prior record what the sentence options would be. The other two dealt with resources. The first one was prioritizing resources. The sentencing commission acknowledged that our prison beds were the most expensive resources and were limited. We didn't have an unlimited fund for this, so those should be prioritized for our repeat offenders and our violent offenders, and we should use the community corrections and community-based sanctions more for the low-level offenders who had little or no prior record. The last goal was that the policies should be balanced with resources. Whatever the policies they developed, the state should provide adequate prison resources and community-based resources to back up those policies so they don't get in the same position they were in of having to undercut what they developed. Those are the goals they set.

The commission worked for 3 years trying to accomplish all those tasks, and we'll talk in a moment about the process they went through, but we wanted to go to the structure itself, the product, and that's on slide six. I believe we also sent you copies of our felony ([Agenda Item VIII A-2](#)) and misdemeanor grids ([Agenda Item VIII A-3](#)). For North Carolina, one of their objectives was to keep it simple. They didn't want to get into the process of having multiple grids and multiple places where you had to go to figure out what the sentence was, so we have one felony grid and one misdemeanor grid. There's a lot of information there. There are a lot of policies embedded in that, but basically the grid boils down to the four components you see on the left side of that slide. There is an offense structure. Again, all of the offenses are classified based upon their severity, and that forms the left-hand column of our grid, the A through I. Secondly, there's a defendant structure, and that is the top row of the grid. That looks at the number of prior convictions an offender has and the seriousness of those prior convictions and places them in one of the prior record levels and helps to classify every offender. These two areas form the axes of the grid, and they are not discretionary. Those are set in statute. They're easy to calculate, but there's no discretion there. That's information that the prosecutor and defense attorney then bring forward to the judge.

Once they have that information, where they intersect on the grid, that's where the judge has the options available for forming a sentence. That's where the discretion is to develop a sentence. First of all, the dispositions are represented by the A's, I's and C's you see on the grid. A's represent an active sentence. The I's and C's are intermediate and community punishments. Those are basically suspended sentences with various conditions attached to them. Also, you look at the numbers on the grid and you can see several ranges within each cell. Those ranges represent a possible minimum term that the judge can impose. The range in the center is a presumptive range. That's where the judge will start. The range on top is for aggravated sentences, and the range on the bottom is for mitigated sentences. If the court finds aggravating or mitigating factors, they can then move to one of those ranges and select the minimum from there. That minimum sentence, if they choose, is going to be the time they must serve. That

represents our truth in sentencing aspect. The judge will select the minimum. They will impose that minimum, and that is the time the offender has to serve. There is no deduction from that. There will be a maximum added onto that, which is 20 percent higher. That's time that the offender could end up serving, but it depends upon whether they earn any time while in prison. That's set up so if they participate in programs or various activities, they can earn time off down to the minimum, but they can never earn below that minimum.

If you look at that grid and you think about the goals we talked about a moment ago, you can see. First of all, you've got the minimum sentence, which creates the truth in sentencing aspect. You've got consistency. Every offender will end up in one of the cells on this grid. North Carolina does not have any departures. This grid is in statute, and every offender is sentenced according to it. That's the consistency aspect of it. For the certainty, it's based upon the offense class and the prior record level. You know what the sentence options are. If you look at where all the A's are on the grid, you'll see it's on the top half and the right side. Those are the violent offenders and the repeat offenders, so our prison beds are primarily designated for them, whereas the I's and C's down in the lower left-hand corner represent the community based sanctions. They're reserved more for the low-level offenses and low-level offenders. Having this structure and having all offenders sentenced through it does give us that predictability that we need to be able to project what our resources will be going forward.

Moving onto slide seven, we'll talk a little bit about the process that our commission went through. This is one approach, the approach that we used, to develop the structure. The commission began by looking at the different components of the sentence, and that's the four pieces that we just talked about: offense class, prior history, the duration and disposition. They broke that up into four parts and then broke it into subcommittees to handle that. We started with the offense classification and with the defendant structure. We had two subcommittees working. They reported back regularly to the commission. We reached a point where our commission was meeting, initially it was every other month, and it became every month with subcommittees in between. They would report back. The entire commission would debate the direction that the subcommittee was taking and then give them feedback so they could go back and make adjustments to it. They kept the whole commission in the loop as they developed it. Once we had the offense classifications and the prior record classifications, that formed our axes for our grid. Then, we started to fill it in. Again, we went back to a subcommittee structure where we first had a disposition subcommittee and then a duration subcommittee. They started working together to try to fill in each of those cells on the grid. Throughout this, it kept coming back to the commission for their debate. But also, all of our members, like your members, represent various agencies, organizations and so on. They reported back to them on a regular basis, whether it was their executive committee or the full group. They went back to them, got their input and brought that back to the commission. We were getting input not only from the members on the commission but also from the organizations they represented.

Now, during this process, the sentencing commission submitted an interim report every year to the general assembly so our legislators knew where we were with it and what sort of ideas we were developing. Our commission also went out, our chairman, members and our staff, to everywhere from state conferences to local bar meetings and board meetings and so on to talk about the proposals that were being developed. There was a lot of information being provided. Everyone was sort of being kept in the loop as we went along. When we reached the point of submitting the final report to the legislature, there were no surprises in it. We had input from all the bodies, and all the bodies knew what the recommendations were going to be. I feel that that helped a great deal moving this forward.

If you look at slide eight ([Agenda Item VIII A-1](#)), you see a timeline of our process here. We started in 1990 and we had that entire package finished by 1993 and submitted to the general assembly. It passed that same year. We feel a lot of that was because everyone was informed, everyone knew what it was about already and had already had some say in the development of it. It passed in 1993. The effective date actually wound up being moved up to October 1994, which gave us just about a year for planning and implementation. I will say that was somewhat of a tight schedule. We originally had hoped for a 1995 effective date, but it wound up getting switched on us. We did make it for October 1994.

Since that point, there really are only three spots that we would point to where there have been changes to the structure itself. In 1995, we had the first set of changes. That really was a result of implementation. After the first year, people came back to the commission and said, "Well, there are certain things that don't work smoothly in practice." We ran into some unintended consequences, so we made some adjustments going through that. The next adjustment didn't really come until 2009. As we said before, one of the benefits of this was that we were able to project resource needs based upon the policy. The sentencing commission was projecting a growth beyond the capacity of the prison system within 10 years. The legislature was able to come back to the commission. They asked the commission to look at options for stemming that growth, things that they could do, policies they could change, to possibly reduce the projected growth in the future. The commission went through the system. We looked at it the same way. We looked at those four basic components and what could be changed there, but still uphold the goals of structured sentencing. We came back with a package of proposals. The legislature did adopt some of those proposals, not all of them, but they did adopt some of them in 2009, so that's when we saw some changes to the minimum sentences, some changes to the prior record scoring, but that was it. The structures still stayed in place.

Finally, the third change was in 2011, and that was when North Carolina went through the Justice Reinvestment process. That primarily focused on changes to our community corrections system, not as much to sentencing, although there were some changes to offenses and some of the ways they were handled. But those are the real areas that we would look at. We would say where there were changes made over the last 24 years,

but still, the grid that you have in front of you that we developed is about the same as what the commission proposed back in 1993. It has been durable and it has survived through this time. Unless there are questions, we'll switch over and Michelle will talk about what the commission does today then to maintain the integrity of that system.

Ms. Hall:

Starting on slide nine ([Agenda Item VIII A-1](#)), you can see the list generally of the statutory responsibilities of the sentencing commission. Some of them are related to maintaining structured sentencing, and I'll walk through them each one by one in a little bit more detail. Some were added following the commission's original responsibility to allow the legislature to have greater information to make decisions for various things within the criminal justice system.

Switching to slide 10, one of the commission's mandates is to monitor sentences imposed under structured sentencing. The reason for this is, although we have an incredibly stable system because of the structure itself and the felony and misdemeanor punishment charts, the commission uses the data that the court system provides to make sure that things are stable from year to year and that we don't have things happening in practice that are not supporting the goals of the structured sentencing act. We're looking for that consistency year to year through our annual statistical report, which is the main report and the main way that the commission monitors what's happening across the state. So, that is an analysis of all the felony and misdemeanor convictions and sentences imposed under structured sentencing. We have tons of those reports. We do it every single year, if that's of interest to you all. We basically slice and dice our conviction data in a variety of different ways to ensure that practices are occurring as we would expect based on the law.

Secondly, and this is related to one of the original responsibilities of the commission, we produce annual population projections for both the prison system in our state and, on the juvenile side, our youth development centers, which are the confinement facilities for our youth in North Carolina. Essentially, this population projection is a tool, a resource planning tool for our department of public safety and for our legislature to know, are we going to need to be building prisons, or do we need to make any adjustments to our sentencing laws or practices in order to achieve that original goal of the sentencing commission to balance policy with resources? These projections will take a 10-year look at what we're seeing, both with the resident stock population that's currently incarcerated as well as what's coming into the system through our court data and how that plays out over a 10-year period to look at any deficits in the capacity of the prison system itself. That project is in close coordination with our department of public safety, because as I said, it is a resource-planning tool for them. We have found our model to be incredibly accurate. We have used two models historically. The original model that was used for the development of structured sentencing, and then when Justice Reinvestment came to North Carolina, we had a need to develop a new model in order to adapt to changes under that law. But for both of those models, the historical accuracy

of the prison projections has been within 2 percent. We're really proud of that, because it gives our legislature confidence in the ability to plan on what we're presenting and providing to them.

On slide 12, this is a more recent mandate that was given to the commission when Justice Reinvestment came to North Carolina. The commission was tasked to evaluate the implementation of changes under the new law. The reason why is that the legislature wanted to make sure that policies were being implemented as intended and asked the commission to monitor the empirical data, monitor the practices in the field to ensure that the goals of Justice Reinvestment were being realized. That's an annual report that the commission submits to the legislature to let them know how Justice Reinvestment is working. A number of recommendations from the commission have resulted in changes to that law as it moves forward in North Carolina over the past 7 or 8 years.

Chair Hardesty:

When was North Carolina selected as a Justice Reinvestment state?

Ms. Hall:

The Justice Reinvestment process for North Carolina started really in 2009. There was some initial planning and getting stakeholders on board, getting the three branches of government on board as part of the process of becoming involved with the Justice Reinvestment initiative at the time, as it was. The legislation actually passed and was implemented in the same year in 2011, so there was a year-long process of examining the data in North Carolina, getting input on the policy changes and legal changes that were going to be incorporated into the legislation, and then it ultimately passed in 2011.

Chair Hardesty:

Maybe you could briefly comment on how Justice Reinvestment helped support your Justice Reinvestment effort and your bill and the data collection?

Ms. Hall:

The Justice Reinvestment Act didn't really support the data collection. It required new data collection. It required some edits to both our court system information management system as well as our department of public safety's information management system. We had to adapt as well with our prison projections model like I said to account for some of the legal changes. At first there was no empirical data. The systems had to be changed so that we could understand the practices through the capturing of data, and now we're in a different position. Obviously, 7 years in, we have some recent historical data to look at. I'm not sure if that answers your question.

Chair Hardesty:

Partially. You were assisted in this effort by the Justice Reinvest Institute?

Mr. Madler:

Yes. The Council for State Government, their group came in. Actually, they did it. This is not our initiative. It was something the state had applied for, and they came in here and actually did the work themselves. We assisted them by providing the data we had and the information and what questions we could answer for them. So, they really did all the work for their proposals.

Chair Hardesty:

I wanted to put a footnote on your presentation, if I may, for the benefit of the other Commissioners. In May of 2014, Governor Sandoval, the leadership of the Nevada Legislature and the Supreme Court jointly signed a letter requesting that Nevada be selected as a Justice Reinvestment state. At the time we submitted it, it was a tad late. They selected three other states. But as I reported to the Advisory Commission and as I've told Governor Sandoval just this week, I received a call back from Justice Reinvest, and Nevada is one of three states currently being considered for selection. They're only going to pick one. We've started the process now of the possibility of Nevada being selected. I think it's a unique coincidence that we might have access to that support and that effort and those initiatives. I just wanted to bring that to the attention of the Commission. In the next 30 days, they're sending staff to the state to interview many of the stakeholders in the criminal justice system and our leadership, probably some in the Legislature as well, to make a decision about whether Nevada will be picked. I just wanted to bring that up because I noticed they had been of assistance to North Carolina, and hopefully we can get them to be of assistance to Nevada as well.

Ms. Hall:

I apologize for not understanding your question. I appreciate Mr. Madler jumping in, because he did understand what you were asking. North Carolina, prior to Justice Reinvestment, was a very data-rich state already, so I understand that is a major benefit for some other Justice Reinvestment states that don't have data systems that they really understand the information or can analyze it in a way that informs policy, but that wasn't necessarily the case in North Carolina. The Council of State Governments had a different task and a lot of available data to inform the changes in North Carolina that were being proposed at the time. Our job as staff in helping the commission do its work is tracking the empirical data through this. We do our annual report to inform the commission about the implementation of Justice Reinvestment in the state.

Switching to slide 13 ([Agenda Item VIII A-1](#)), this is another ongoing responsibility of the commission that's related to its original duties, which are to review criminal justice

legislation and to provide impact. This is to make sure that resources and policy are balanced as was intended under structured sentencing, and also to maintain the consistency of structured sentencing over time. The commission does this by looking at every single piece of legislation that either proposes the creation of a new offense or changes an existing offense, and provides a finding and potential recommendation back to the legislature as to whether or not the offense or the classification is consistent with structured sentencing. The commission does that using the original criteria that it used to classify offenses in the early 1990s. So, that is to help maintain the consistency of the offenses that are within each class and make sure that the grid is maintained in terms of its integrity. The other responsibility that goes along with that is more of a staff function, but it is again as I said to balance resources with policy. During the legislative session, staff will analyze every single criminal justice bill for incarceration impact, and we'll provide that back to the legislature in what we call a fiscal note. That is intended to provide legislators with the prison bed resources that would be required by any given change to an existing offense or through the creation of a new offense, or any savings that might be realized through any changes. But usually we're going the other direction with legislative changes.

On slide 14, there's a brief description of recidivism reports that the commission has a mandate to produce. Every other year, we're either looking at the recidivism of adult offenders or juveniles in our state. The purpose of these reports is, again, these were added subsequently to the commission's mandate, but it's to provide information to the legislature about how their resources are working for them, what are they getting out of the correctional resources that they are sending, either through prison or in the community or through juvenile programs in terms of recidivism. It's public safety being enhanced by the resources that are being expended within the system.

Lastly, on slide 15, another broad area of responsibility for the commission is to respond to requests for study, and there are a couple of examples on that slide that I won't necessarily go through in detail. But the request can come through a variety of ways and make it in front of the commission. They can be a direct mandate from the legislature, they can come through other agencies or they can come to the attention of the commission by the commissioners themselves. For example, right now, the commission has been asked by a group of legislators to look at our driving while impaired sentencing and correctional practices for possible recommendation, so the commission has been working for about 1 1/2 years on that particular study, and we'll eventually report back to the legislature with any recommendations on that subject area.

That's a broad overview of the commission's responsibilities that are laid out in statute. We provided you with our contact information. We have a ton of information and reports on our website if any of those materials would be useful as you go forward in your work. We're certainly happy to answer any questions you might have about the structure, the history and duties of the North Carolina Sentencing Commission.

Chair Hardesty:

Let me ask a few questions that might move things along based on the interview that we had. It covers some other areas that we asked Virginia about. First of all, the commission in North Carolina is part of the judicial branch, so to speak. It's under the Administrative Office of the courts (AOC). Is that right?

Ms. Hall:

We are under the judicial branch. Technically, the staff would be considered judicial branch employees. It sounds like we have a similar structure to what Virginia described in that our budget functions, our financial service functions and human resources are all shared with the AOC in the sense that they provide that support for us. Our offices are located within the AOC. So yes, we are technically housed for administrative purposes within the judicial branch of the government.

Chair Hardesty:

Ms. Hall, how many are on your staff, and roughly speaking, what's the size of your budget?

Ms. Hall:

We have 10 full-time staff members, so we have 9 professional staff and 1 administrative secretary. Our budget is roughly just under \$1,000,000 annually, and that is primarily for staff, the same as Virginia.

Chair Hardesty:

Okay. We had discussed our ability to access your previous data collection model, your current model. I wonder if you could go into that for my colleagues on the Commission here, and maybe also discuss the statistical analysis system institute.

Ms. Hall:

We have our new model that was developed with staff, which is fortunately for us located in Cary, North Carolina, which is right down the street. It's a software company. I'm oversimplifying what staff does, but they have a product that's called Simulation Studio, and that is how our model was built, through a contract between us and them. They actually built it within the studio. We own it, but they have been great about providing support and making edits to that model as our needs have arisen.

Ginny Hevener (Associate Director for Research, North Carolina Sentencing and Policy Advisory Commission):

The model is very flexible in terms of making adjustments to the structure of the criminal justice system, the process flows that mimic the criminal justice system. As changes are made to the criminal justice system, the model can easily be adapted. We do have the capability in staff to make those adjustments. Unlike the previous model that we had, which was in the public domain, it was the structured sentencing simulation model developed for Minnesota, and that's what we had historically used. But when Justice Reinvestment was passed, it could not accommodate those changes. We could not make those changes within staff to simulate the processes under the new law.

Chair Hardesty:

This is a mandatory sentencing system, as opposed to discretionary, for the judges, right?

Ms. Hall:

Correct.

Chair Hardesty:

Is there any deviation permitted outside the sentence ranges contained in the various boxes?

Ms. Hall:

No.

Chair Hardesty:

Could you comment on the credit for time served, and whether you had and whether you currently have a parole system, and what happens when folks are released?

Ms. Hall:

Could you be more specific about what you're interested in with regard to credit for time served?

Chair Hardesty:

You mentioned that defendants will get a sentence that includes some additional time, 20 percent higher roughly, but they can earn that down. Could you describe the areas or

list some of the areas where a defendant can earn a reduction of that 20 percent period?

Ms. Hall:

Yes, absolutely. So, each sentence is sort of like a mathematical equation. You have the minimum sentence that will be served 100 percent, and the max is 20 percent of that. Essentially, for our incarcerated offenders, the 20 percent can be earned down through earned credits, which are based on 3-6-9 days per month, and that can be earned through jobs, through programs, through activities at certain rates that are determined through policy by our department of public safety. The interplay between the max and the min works out so that, depending on their level of participation during incarceration, they could go from—they start at the maximum and then they earn down to the minimum, but not below the minimum. Also built into the maximum sentence length is a period of supervision that will follow their release from prison. We call it post-release supervision. It's not parole. It's not discretionary. It's automatic upon release. Every felon in the state will have, depending on their offense seriousness level, either 9 months of post-release supervision following their release from prison or 12 months of post-release supervision following their release from prison. That's both a controlling and rehabilitative purpose within the statute as to what that period of supervision is intended for. If they violate while they're under that supervision period following their release, they can be returned to prison to serve out potentially their maximum sentence.

Chair Hardesty:

Do you have any release periods or supervision periods that are longer than 12 months in North Carolina?

Ms. Hall:

For sex offenders, yes. Their post-release supervision is 60 months.

Chair Hardesty:

Do you have a geriatric release policy and a medical release policy?

Ms. Hall:

We have medical release whereby individuals that are terminal can be released from prison, but there still needs to be a determination made. It's not automatic. That's still discretionary. Our Post-Release Supervision and Parole Commission makes those determinations about who will be released. I will say that it's very, very infrequently used in North Carolina, mostly due to the types of offenses that people have committed. They don't want to release them, even under that authority. We don't have a geriatric release, as far as I'm aware, in terms of just an age-related release.

Chair Hardesty:

Under slide 14, you mentioned the biennial recidivism reports. What was the date or the period for the last recidivism report, and if you have that handy, could you just share with the Commission some of the information that that report revealed regarding increased public safety through reduced recidivism?

Ms. Hall:

Right now, this is an even-numbered reporting year, so we're working on adult recidivism. Our last adult recidivism report was submitted to our legislature in 2016. For our sample, who we examine in North Carolina are those individuals that have either been placed on probation or released from prison in a given fiscal year. We follow them for 2 years after that sample entry event, and we track their recidivist activity through our primary measure, which is arrest, and we also look at convictions and incarcerations that occur during that 2-year follow up. Not to get too data-specific, but our last recidivism report revealed that for our entire criminal justice population for the sample of time, which includes all probationers and prisoners, our recidivism rate overall was 40 percent. If we look at it over time, it's relatively stable in terms of the rate of recidivism for structured sentencing, probationers and prison releases. We've been around 40 percent since 2009-ish.

Holly Welborn (Policy Director, ACLU of Nevada, Inmate Advocate):

I would just like to see if, down the road, we could get something similar to what Virginia gave us on the prison population rates over time after adoption of the new guidelines.

Ms. Hall:

Sure. We produce annually a prison population projection, and as part of those annual projections, we provide a historical look at the prison populations. We can also go back as far as you want, probably back close to after structured sentencing was passed all the way up to current date.

Ms. Welborn:

That's great, thank you.

Mr. Hicks:

I had more of an application question of how you guys do it in the courts. For example, in going through the guidelines to reach the numbers, looking at slide six, first and foremost, who's responsible for scoring where a defendant might land within the guidelines?

Mr. Madler:

First, we start with the offense, and that is offense of conviction. We don't get into anything before that. It's whatever they end up being convicted of or pleading to. Then you go to the prior record. The prosecutor is responsible by statute with providing all criminal history information. They bring it forward on a worksheet, and the judge reviews it, they give the defendant an opportunity to respond to it, and then eventually the judge makes a finding as to what the prior record level is. Both of those are set. Then the judge just goes to the combination of those two factors on the grid. That's where they have the discretion then to put their sentence together.

Mr. Hicks:

What's the level of proof required for the prior record level? Is it every prior conviction? Does the prosecutor actually have to submit a certified conviction, or is there some level of presumption based on the criminal history? How does that all play out?

Mr. Madler:

We have in statute a list of accepted resources. One of them is our AOC criminal history printout. We have a centralized database so they can get a printout. We actually had the legislature appropriate money for a position in each of the prosecutors' offices to handle prior record searches, and they would then bring that printout in, and that is acceptable by the court. There are a couple other ones, but that's the main one they use.

Mr. Hicks:

Building off that, these are mandatory, as you all said. So, is the prior record level something that can be appealed to the next level of court on every sentencing if there's a dispute about it between the defense and the prosecution, let's say?

Mr. Madler:

I don't think it can. That's a good question. I'm afraid I haven't looked at that statute lately, but I don't think they appeal prior record level.

Mr. Hicks:

So, if a judge chooses to either mitigate the sentence or aggravate it based on whatever factors, is there an appellate remedy either for the prosecution or the defense in that regard?

Mr. Madler:

They can appeal aggravating and mitigating factors, yes.

Mr. Hicks:

Could you guys provide the commission with the scoring sheets as to how you get these numbers and the prior record level, and what crimes fall within each offense class?

Mr. Madler:

Yes, we could do that.

Judge Freeman:

I had a question, which was an interesting comparison with Virginia. If you look at slide 13, if there's a recommendation based upon what's occurring in the community and maybe there are some new crimes, etc., does the legislature have the ability to debate whether or not a new proposal by the commission should be implemented? In Virginia, seemingly the commission does a report, and if there's not opposition to it, it becomes law that year, which I found very interesting. In your slide 13, it looks like there's full-on legislative debate if there's a change in law. Is that correct?

Ms. Hall:

That's correct. In our name, we're an advisory body, as intended by the legislature. Some commissions are set up where they just do the determination of classification and it becomes law at a certain point if there's no disagreement over it. But in North Carolina, the recommendations that the commission makes to the general assembly have to be acted upon by the general assembly, so they're free to implement them or ignore them, and anything that's going to go into law as a change related to structured sentencing or related to offense classification or related to changes in penalties, etc., all of that is legislative action. It would be debated and decided upon by the legislature, potentially based on the recommendation of the commission. But that's not to say that all recommendations are acted upon. Sometimes they're not.

Mr. Madler:

Our recommendations would be introduced as a bill, just like any other proposal. Exactly as Ms. Hall said, we'd follow the whole process through judiciary committees, appropriations committees, all of that.

Judge Freeman:

What I found interesting about Virginia's approach was that it took away from the legislature—if the commission felt that a downward departure or a lesser review of a particular crime allowed for a lesser penalty, it would take the politics out of the situation where a legislator would be in a difficult position to advocate, for example, a lesser penalty. That would be a challenging way to vote, being a public official, in that regard. It sort of insulated the legislature in that regard because it automatically became law. But you don't have that same process, is that right?

Ms. Hall:

That's right. I think there are pros and cons depending on which angle you're looking at. There's definitely a tension between some things that the legislature wants to pursue that maybe the commission would disagree about, and who's elected versus not, that does take some consideration. Our current structure is to advise.

Mr. Segal:

In situations where a defendant is being charged for multiple offenses or in more than one case, is there a formula for determining how those multiple sentences are aggregated and how the determination is made as to whether sentences are to run consecutively versus concurrently?

Mr. Madler:

No. There's no formula. For felons, that is purely discretionary. Actually, for misdemeanors it is as well. It's with the judge. They can run them concurrent, consecutive, they can consolidate them for judgment. There's no guidance in statute for that.

Mr. Burton:

I want to return to the prior record issue there is North Carolina. How far in advance does the defense counsel learn of what's been determined by the prosecutor as to what that prior record is? Is there a period prior to sentencing or is it at sentencing?

Mr. Madler:

There's no requirement in statute as to that period. It certainly varies by county, by district, whether it's large urban districts or small rural districts. But my sense of it is that they are aware of it prior to going into court for sentencing. I don't know how quick they are, but in most cases, what we hear anecdotally is that they do discuss it beforehand so they are able to determine what the plea might be. They've already been made

aware of what the record would be and what cell they're falling into so they can discuss plea options.

Mr. Burton:

So at that point prior to sentencing, whatever that point is, the defense attorney could appeal to the prosecutor to reconsider a finding they may have made on a piece of the prior record?

Mr. Madler:

They could raise questions. If there were questions about the identity of the defendant, for example, they're not sure that this is the same person, they could raise that issue and they could discuss that with the prosecutor. Like I said, they have a statutory duty to bring forward all prior records, so it's not a negotiation necessarily, but they do want to make sure they all agree that this is definitely this offender's prior record.

Chair Hardesty:

I see no additional questions from members. We have some follow up information that we'd like to request, if that's okay. I really appreciate you and Mr. Madler's presence here today and your patience in waiting to get started. Thank you very much for the informative presentation. We're grateful to have your help.

Ms. Hall:

Thank you for having us. We appreciate the opportunity to teleconference, and look forward to following your progress.

Chair Hardesty:

Commission, we have a presentation from Oregon, and Mike Schmidt is present. As I mentioned earlier, we had an opportunity to conference with him as well on January 10, and we already have a little bit of a connection with Oregon. You were extremely helpful to the Advisory Commission on the Administration of Justice back in 2014 and shared with us some of the work of the Oregon commission then, so we want to get an update on some of that and also learn more about the additional investments that have been made and the efforts of the commission in their specialty court program, which the legislature agreed to follow here. Thank you for being here.

Mike Schmidt (Executive Director, Oregon Criminal Justice Commission):

I've been the Director since 2015, so I think when you received advice last time it was from my predecessor, Craig Prins, about his work around specialty courts. I'll be happy to update you on that.

Just as a little bit of background about our commission, I thought I'd give you a little bit about the size, who serves, a little bit of our history. We are a much smaller commission in terms of commissioners than you all are. I understand you have 25 members, and we have 9 ([Agenda Item X](#)). We have two legislators. The rest are appointed by the governor, so we're considered a state agency under the executive branch.

For our mission, there are a lot of similarities, and I sat through North Carolina, obviously, to a lot of the different things that they do. In broad strokes, our broad range is to improve legitimacy, efficiency and effectiveness, but we do a lot of the same things that North Carolina was talking about. We are a planning agency, so we work with the legislature and the governor's office on long-range plans, things like specialty court programs, Justice Reinvestment programs, strategies for the state. We do a lot of analysis on capacity of prisons, probation, ways that crimes are sentenced, a lot of the data stuff. We fund and evaluate courts, do research. We do fiscal impacts, much like North Carolina was talking about. We are the agency that advises the legislature whenever they're passing a new statute on what the potential impacts to our system might be. We also recently had the addition of racial and ethnic impacts on our agency, so upon request, the legislature could ask us, "Hey, we want to change this particular crime. What kind of impact would that have racially and ethnically in our system?" That's rather new. We've only performed three or four of those since its implementation, so it's still pretty new for us. For statistical analysis, our Criminal Justice Commission houses the State Analysis Center, the Statistical Analysis Center (SAC) of the state, as well as the State Administering Agency (SAA), so we are also the recipients of the federal Byrne Justice Assistance Grant (JAG) Program funds. So, we have the SAA and the SAC housed within our criminal justice commission, a lot of statistical analysis, obviously we administer the sentencing guidelines, which I'll give you some information on that, and we staff other political or public safety advisory committees. So, there are a lot of different things in our mission that we do.

Just a background of how we get to where we are today, we have not always been the Criminal Justice Commission. We started as the prison-overcrowding project, then we moved onto being the Criminal Justice Council. Up until 1989 when we were going through developing our guidelines, that's when the state sentencing guidelines board was chaired by the attorney general at that time. That turned back into the criminal justice council and then moved us into the Criminal Justice Commission around 1995. In 2005 is when we really started building our grant programs, so our specialty courts and what now is our Justice Reinvestment grant programs. So, all the various iterations of our commission over time have typically seemed to sprout up around prison overcrowding and resource management in the state, so a lot of the different iterations are in response to that.

Unfortunately, our presentation says "cell range" at a lot of the dates and times ([Agenda Item X](#)), but what I attempted to do here, and we'll go through them in the next slides so you'll still have the relevant information, is just put a timeline of major sentencing changes across our system. The first one is our sentencing guidelines. So, 1989, that's

really when we started going from an indeterminate to a determinate system. This is the guidelines in our rules, in the criminal justice commission's rules. It's not incredibly useful. Most of the folks who are actually practicing in the courts and using the guidelines use this, which looks very similar. We have fit all of our criminal laws into this front-and-back laminated sentencing guidelines handout that folks could use. When I was a deputy district attorney in Portland, this is what I'd go into the courtroom with. The judge had one of these, the defense attorney had one of these, and we all operated off this. It's nice and succinct and all in one place. This has all of our crimes. Pretty much every situation you could run into usually can be answered by this document.

The next big sentencing change after the sentencing guidelines adoption was Ballot Measure 11. Oregon has a robust initiative referendum system. So, the voters in 1994 passed Ballot Measure 11, which essentially created mandatory minimum sentences for the 16 most severe crimes, the ones that you would probably expect. Obviously murder, rape, robbery, sex abuse, sodomy. So, our most serious crimes in the state were assigned mandatory sentences pursuant to this ballot measure. That essentially removed those crimes off our sentencing guidelines. Now they're mandatory sentences. Senate Bill 1145 the next year really wasn't so much of a sentencing change, but it did change a lot of things for our system. It said that the state had responsibility for any sentence over a year. The state would be the one. They'd go to a state prison instead of serving that time in a local jail, and the state would pay for the cost of that incarceration and supervision. That really changed some things in our system in terms of sentence length, especially on the shorter end of things. As counties were figuring out that if you stay locally, that costs county money. If you go over a year, that's state money. I think that's really had an impact on some of the sentencing changes that we saw subsequent to that and how things have worked out for financial incentivizations to the counties. Although this wasn't really a sentencing bill, it was more of a financial bill, I think it really has had a pretty decent impact on our system.

Following that bill was our repeat property offender statute. This created presumptive 13-month sentences for a host of property crimes, which was the next big change in our sentencing system that removed a lot of crimes off the sentencing guidelines. Now, you have a bunch of the violent crimes that are removed from the guidelines and then you have a host of the property crimes that have been removed from the guidelines with these presumptive 13-month sentences under certain circumstances. That was another big change for the state in terms of how our guidelines have been used.

Identity theft became a crime in 1999. It's kind of hard to imagine a time when identify theft wasn't a crime, since it's so ubiquitous today. I call that out because that crime has had a very specific, big impact on our women's population. Most women in Oregon who go to prison are there for identity theft sentences. Thirteen percent of all incarcerative sentences for women in Oregon are pursuant to identity theft as the most serious crime that sent them to prison. I just wanted to call it out because I think it's had a big impact on our system, especially as it pertains to women.

Measure 57 was the next ballot measure. We had the repeat property offender statutes which said that if you commit these property crimes, you're going to get a 13-month sentence. The voters basically changed that to say that now those are going to be 18 to 24-month sentences. While they are not mandatory minimums in the sense that our Measure 11 sentences are, they're not mandatory because the prosecution and the defense can agree that, although the sentencing will be pursuant to these crimes, they could be sentenced to some lower amount, unlike our mandatory sentences, which if you're convicted of that crime, that's the sentence you get no matter what. So, it's not a mandatory scheme, but it's a very strong presumptive scheme, because it takes both the prosecution and defense to agree to get out from underneath the sentencing scheme. Again, another big, major sentencing change in the state that has removed and continues to kind of move us away from using our guidelines for sentencing.

That bill was briefly suspended because it cost a lot of money to enhance all those sentences across the state, and that was right in 2008 and 2009. Oregon, like many places around the country, was experiencing obviously a big recession at that time, so the legislature temporarily suspended that law and put it back into place in 2012. That also had an impact on our prison population growth.

Fast-forward to 2013, which was the passage of our Justice Reinvestment program. We were chosen around 2011 by Pew to begin phase one work of looking at our system and coming up with recommendations for what we would change. That legislation was officially adopted in 2013, and it's our agency that has been tasked with its implementation and tracking and monitoring outcomes. We both administer the grant program, and I'll talk more about the Justice Reinvestment program because it's a major driver of our work today. But we administer the grants and we do all the data tracking and components around that.

Finally, most recently, House Bill 3078, the so-called Safety in Savings Act, expanded and took some of the crimes out of the Measure 57 property measure that was passed by the voters recently. That's currently being challenged legally in our state right now. There are some opinions that just came out this week saying that change by the legislature was unconstitutional because it takes a two-thirds majority of the legislature to amend a ballot measure that pertains to sentencing, so that's being debated right now in our state. But this bill really was targeted to our expanding female population in our state. It targets identity theft and theft I, which are two of the crimes most likely to have an incarcerative sentence for women.

Those are the major sentencing changes that have happened. This is Oregon's prison population going back to pre-guidelines ([Agenda Item X](#)). We had this back to 1984. It was pretty flat from 1983 and 1984 to 1987. You can see 1989, which is when our guidelines were adopted. I'll explain what that line was. So, 1989 when our guidelines were adopted, we did see a spike which then leveled off after some years, until we got to the ballot measure for mandatory minimum sentences for the violent crimes. That really drove a lot of our prison sentences to increase pretty regularly across the system.

That drove a lot of growth in here for Oregon's prison population, and some of those other things that I mentioned, property crimes, having those presumptive sentences, identity theft, so some of those things have had a big impact on the system. Until you get up to 2009, which is when the ballot measure for property crimes was passed, and then Justice Reinvestment. Since implementing Justice Reinvestment, our prison population has essentially stayed flat. It has not reduced, but it has not continued to grow at the same pace it was growing.

Assemblywoman Tolles:

How does this correlate with the population growth in Oregon in the same time period?

Mr. Schmidt:

Oregon's population has been growing pretty rapidly. This outpaces that growth. We have incarceration rates, but I don't have that information with me. I know it was asked of some other presenters. We can figure that out. But the growth in our prison population has outstripped our population growth quite dramatically. But the state definitely has been growing for sure, so that's a part of it.

I broke out the exact same information in the female population. This has become a pretty important issue in Oregon, as we only have one prison that is dedicated to women, and right now it's currently over capacity. Our legislature is trying to figure out ways, either they're going to have to open a new prison that currently exists but is mothballed. They'll have to reopen that and get it up to code and everything that they need to do, or they need to figure out how to not have as many women in prison, so this is really what's been debated and was the cause of that legislation that passed in 2017, because the legislature is trying to avoid opening a new prison and spending the money on that. With the Justice Reinvestment approach, they really have put an emphasis on trying to make investments in communities rather than into the prisons. If those points on the graph didn't say "cell range," they could correspond with all the timeline stuff I showed.

I'll talk just a little bit more about the sentencing guidelines, because a lot of your conversation today has really been around that in terms of what our commission does. I would characterize it as maybe 5 percent of the work that drives what our commission does. It's not a big part of our job, and you can see just from the sentencing changes that have happened in our state with the ballot measures, where a lot of these sentences have been removed from the guidelines. The last time that we looked at this, which has been a few years, we estimated that less than 50 percent of the sentences being handed down by courts are still pursuant to guidelines. They now are pretty much 50-50, maybe slightly more pursuant to those ballot measures that have assigned sentences to those person and property crimes. The process for when the legislature amends a law, if they don't tell our commission what to rank a crime, what to categorize a crime in the guidelines, then it's up to our commissioners to have that debate. Our

commissioners will look at other crimes and they will have a conversation amongst themselves about what this is most like, and they try to give crimes parity in the system, so if you're looking at property crimes, you want to rank it on par with other property crimes, things like that. That's really what our commissioners do when we have the opportunity to do that, but it really doesn't happen as much anymore. The other thing that's happened is that in the legislature, the advocates have realized that they can write into the legislation, "The criminal justice commission shall rank this new crime as a level six." Then we just have no discretion and we rank it as a six.

In the very few crimes where we do have discretion to do the ranking, we do that and then we enter into a rule-making process where we have testimony, we elicit feedback from the public and we go through the fixed period of time that needs to be posted and all that, and then we submit to the legislature at the end of the rule-making process, "These are the rankings that we have come up with," and it's then up to the legislature to either adopt those rankings or to disagree and then send it either back to us or rank them themselves at that time. Probably at the end of every legislative session, I'd say we have between maybe five or six statutes of crimes that have been modified in some way where our commission might have some discretion to rank those, but it's a very small part of the job in the work that we do today.

Chair Hardesty:

The crimes that are sentenced pursuant to the guidelines, those are mandatory guidelines, is that correct? No deviation permitted by the trial judge from the guidelines sentencing on those graphs?

Mr. Schmidt:

They can make aggravating or mitigating findings that would allow them to either do an upward departure or a downward departure out of the guidelines system, but they have to make those findings and it's set by rule exactly what are the things they can consider to make those.

Chair Hardesty:

Are those departures appealable or reviewable by an appellate court?

Mr. Schmidt:

I believe they are. I'd have to get back to you for certain on that. I believe they are, because you have to make a record in the court. The judge has to say clearly and plainly why it is that they made those findings. I think it's a very high bar to overturn a judge's findings in that. I'll just tell you some of the mitigating factors are things like amenability to treatment. There's a treatment program that exists in the community that

could reduce recidivism, so some of the findings that a judge makes would be pretty challenging to overturn, but I do believe that you could challenge them.

Judge Jennifer Togliatti (Eighth Judicial District Court):

Do you have a great impact on the sentences, either the length of probation or the length of the sentence being impacted by good-time credits, depopulation credits or automatic statutory credits?

Mr. Schmidt:

So, for prison sentences, you can earn good time if it's not one of those mandatory sentences. If you're sentenced under Measure 11 mandatory minimums, you will serve the entire thing day for day. There is no earned time, good time, any kind of program eligibility or anything. If you're not sentenced pursuant to a mandatory sentence, then you are presumably, unless you, in a plea agreement or some other way, waived your eligibility for programs, you'd be eligible for a 20 percent reduction in your sentence for earned time within the institution, which I think pretty much corresponds to your behavior within the institution and pursuing programs. We also do have some other programs that are called Alternative Incarceration Programs (AIP), where if you pursue treatment you can have some time taken off your sentence if you're eligible for those programs. On probation, you can, as long as you are eligible, have your probation terminated early. It's called earned discharge. It was something that was brought in under our Justice Reinvestment legislation in 2013, so it's a little bit newer to the state, but if you are actively working through your supervision and you're completing treatment and you're paying your restitution and you're doing all the things that the court and your probation officer would expect, you could be eligible to get up to half of your probation time off.

Mr. Cameron:

Just as a point of clarification, with your mandatory guideline sentences, are the upward or downward departures considered by the judge limited by any specific list, or does he have latitude?

Mr. Schmidt:

A list of what factors?

Mr. Cameron:

Factors that he can consider for upward or downward departures.

Mr. Schmidt:

Yes. There are specific lists and criteria, and if you were in a trial setting, the prosecution has to give notice of going for those upward departure factors, which becomes a sentencing hearing where they then have to prove those additional elements to the court.

Mr. Cameron:

What about downward departures?

Mr. Schmidt:

Same. Obviously, a downward departure would be more the defense at the sentencing phase requesting a downward departure and then putting on some evidence of amenability to treatment or other things that they think the judge could make those findings based on.

Mr. Cameron:

But they are limited to the certain issues that are compiled in the list?

Mr. Schmidt:

Yeah, that's right. And those are pursuant to rules which were written by our commission, so our commission administers those rules.

Really, the work of the Criminal Justice Commission in Oregon is summed up by my MasterCard logo slide ([Agenda Item X](#)). We do grants and research. That's really the bulk of what we do for the state. Here's just a quick run-down of our two biggest grant programs. We have some very small ones, but these are the two main ones. For Justice Reinvestment, in this biennium, we are administering \$47,000,000 to be reinvested into the counties. Every single county in the state participates in Justice Reinvestment. They are all grant recipients, but that is not guaranteed. We currently are working with, for example, four counties right now that are going to have to go back in front of the commission to continue receiving those funds based on performance, so it is a performance-based grant, but right now, currently all of our counties are participating. Our specialty court grants, that's \$17,000,000 in this biennium. That is funded by three different funding streams. We use federal Byrne JAG money to fund some of those grants. We use general fund and we use asset forfeiture proceeds to fund those, so we have three different funding streams to fund our specialty courts. Like I said, we are the administering agency, which is why we are able to use the federal Byrne JAG grants.

For Justice Reinvestment, this was the story that our legislature was being faced with, our growing prison population, a correctional biennial budget of \$1,400,000,000. In the

latest biennium, it was actually \$1,800,000,000. The legislature was being faced, where our prison forecast was going to go was they were going to have to build a new prison for men if we would have stayed on the exact same forecast that we were on. That's why we applied for the assistance for Justice Reinvestment technical assistance, and we ended up passing that legislation. For our agency, the implementation of Justice Reinvestment, what we have really done—so, we work with what we call our local public safety coordinating councils. A lot of states have something similar. I'm not sure if you do or not. Each county has essentially a local board. You'll have your district attorney, your presiding judge, your local top defense attorney, whoever that might be, mental health folks, anyone in your system that touches criminal justice. Each county has one of these groups locally. They are really the group that we work with to get the justice reinvestment grants.

We contract with the county and they are the ones who write the applications for how the money will be spent, and they are the ones who are really deciding how they will use that money to reach the four goals of Justice Reinvestment, which are reducing recidivism, reducing reliance on the department of corrections, increasing public safety and holding offenders accountable. Those are the four goals that we laid out for Justice Reinvestment, but the counties have wide latitude on how they think to best spend that money to meet those four goals. We combine the state into four regions of similarly sized counties, and quarterly the commission goes out and shares data information with the counties about how things are going. "What does your arrest rate look like? What does your prison usage rate look like, your recidivism rates?" We break that all down by county so they can have that information and understand in a pretty immediate way how it is they are doing towards the goals of justice reinvestment and their public safety. That takes a lot of work of our commission, getting out, driving across the state, meeting folks, and we try to do it face to face as much as we can, because it's just really important to have those conversations. Some of them are tough conversations, so it's important to have them face to face, we've found.

Here's a screenshot from our website ([Agenda Item X](#)). I encourage you, if you haven't had the opportunity, to go to our website. We have an interactive dashboard section where we track all different kinds of things, and recidivism is one of those things we look at. You can see here that what we're doing is, you can click on any county in the state and immediately have our recidivism measurements compared to the statewide measurements. This is something that I think is used quite a bit. Our definition of recidivism is a little different than both of the two states you've heard from so far. We look for 3 years of recidivism data, so that's from the time you either start probation or leave an institution or prison. We start the 3-year clock at that point and we measure arrests, conviction or incarceration for a new crime. A parole violation that does not involve a new crime, even if that sends you back to prison, would not be a recidivating event. If you committed a new crime and got sent back to prison, that would be a recidivating event. That's a little bit of a distinction from the two previous states you've heard from today. We measure this statewide, ongoing. The commission and my staff write two reports a year where we not only just kind of track the statewide numbers, but

we try to really look and take a deep dive into specific issues of recidivism in each of these reports. For instance, the last report that we completed, we looked at people who recidivate, do they recidivate in the same crime that they were originally convicted of, or is it more scattershot or all over the board? We found that the crime you originally committed, that was the most likely crime for you to recidivate in. It was just interesting. We try to drill down and give information to people and practitioners around the state come to us and they have questions, and that kind of guides what our commission might look into a little bit deeper. We produce these reports twice a year. They're available on our website, where we really do the deep dive. But 24/7, anybody can go to our website and see how their county or how the state is performing and the local recidivism rates.

Chair Hardesty:

Could you interpret the recidivism rate on the graph ([Agenda Item X](#))?

Mr. Schmidt:

Yes. On the left, you have the statewide numbers. This is just one county that I selected at random when I took the screenshot, Lane County. The top line that's right about at 50 percent is a new arrest for a crime within 3 years from either release of prison or beginning of probation. We do include misdemeanors in that, so we are not just looking at felony arrests. Any arrest for a new crime, you're going to be in this number. That is about 50 percent. This goes back to 1997, and probably we can even go back farther. It's remarkable how flat those numbers are over time. They go up, they go down a little bit, but really they're pretty consistently flat. The line below that is convictions. So, conviction for a new crime, again a misdemeanor or a felony, what is the percentage of that population. You can see that right around in the 40s to 45 percent will be convicted of a new crime within 3 years. The very bottom line, which is hovering between 10 and about 16 or 17 percent there is incarceration to a department of corrections institution. So, not a jail sentence, which would be less than a year, but a department of corrections sentence of more than a year. You can see that within 3 years, between 12 and 16 percent or so of people will end up back in a department of corrections institution for committing a new crime. Then, we do the exact same thing by county. The same three lines for Lane County. In this example, you can see their arrest rates at the top, their conviction rates below that, and then their incarceration rates through a department of corrections facility below that. We track this actively.

As we administer the grants for Justice Reinvestment, if a county's recidivism rates are going up since they've received grants, we want them to address that in their applications. "Why is it that you used this money and you had a recidivism strategy but it's clearly not working?" We ask them to explain that to us as the agency that administers the grants. Since Justice Reinvestment has only passed law in 2013, the grants really started for all intents and purposes in 2014, so to get 3 years of recidivism data, that puts you in 2017, so we really are just right now finding out what the

recidivism rates for the very first people of our Justice Reinvestment program are, because that's how long it takes to wait for these things to work their way through the system.

Another one of the big goals of the Justice Reinvestment program is to decrease reliance on our department of corrections by local communities. Like I said, the legislature was faced with having to build a new prison. At that time, the estimated cost of that was \$350,000,000, so the idea of the Justice Reinvestment program was, if the legislature can take some of that money that they would have to spend and invest it into the counties into treatment and resources and programs that the counties believe would enable them to keep more people locally safely in their communities if they had those resources, that's what they're to be using the money to reinvest. The idea is that the state makes that investment, the county is able to decrease their reliance on the department of corrections, and that kind of keeps the circle of investment going. Happily, we were projected to build a new prison. It would have had to be ready to open in February of 2017, and since implementation of Justice Reinvestment, we have essentially flat lined our prison growth for the men and have completely avoided that eventuality. I think the last forecast that I saw has it beyond a 10-year window when we might need to have another prison ready to build, despite population growth in the state. That is a significant avoided cost for our legislature, and they continue to invest in the program.

This is a snapshot of Klamath County in Oregon. It just shows you their prison usage. Klamath County is not one of our bigger counties, so in smaller counties, prison usage bumps up and down over time. I should step back and say that our Justice Reinvestment grants target property and drug offenders. We're not targeting prison usage for any of the serious, violent crimes. We're not trying to incentivize counties to send murderers to prison for less time than they otherwise would have. This is focused at resources for property and drug crimes, so keeping those people locally if you have the right housing, supervision resources, jail space, treatment programs. That's the population we're targeting. When we're measuring prison usage on this slide, we're looking at property and drug crime prison usage in this county. We're not factoring in prison usage for any of those violent crimes that I mentioned. So, we really look county by county. "When you received the grant money, how has your prison usage changed?" This is one small county, one of our smaller, so you can see that they probably received their first grant money right around here. Their prison usage went up, but since then has continued to decline and stay pretty much below this gray line. We benchmarked each county on their historical prison usage, so it's tailored to a specific county instead of sticking them with some sort of a statewide average or some number that we came up with. We looked at their historical prison usage over a 3-year period and said, "Because of this grant money, we expect you to be below your historical prison usage in these crime areas." That's what we measure. We measure them against themselves and their past history, with the idea that giving them additional resources would enable them to go below their historical prison use. For every single county in the state, they can see this. This information is updated monthly. They can look at it any which way you want to

cut it, male, female. They can look at revocations versus what we call first sentences or straight out of courtroom prison sentence at sentencing. We have found that prison use is driven by different practices. Some counties, it's really revocations. They give a lot of downward departures, but then they revoke a lot of people. Some counties, they don't hardly give any downward departures. If you're prison eligible, you're going to prison. It really has been pretty different locally, county by county, in the reasons for their prison use, which is why the Justice Reinvestment grant program is nice because they can tailor those resources to whatever it is that they locally are experiencing that could be driving their use.

This is the Uniform Crime Report (UCR) data. Ignore the giant dip in 2015. We did not solve crime this year, we just stopped tracking it very well. We were switching over to National Incident-Based Reporting System (NIBRS) in some of our bigger metropolitan areas, so that left us with a big hole in our data. This is a big important part of our justice reinvestment program, public safety, and so we want to know about reporting crimes. Again, we break this out county by county. They can have access to it. As probably many of you in this room know, the UCR data lags quite a bit. It's not as up to date as some of our other data, like prison usage or arrests or things like that. Reporting crime takes a while for that to get filtered into our state police, then to the Federal Bureau of Investigation (FBI) then back to our state police and now to the state. It's a useful measure, but it lags at least about a year before we have it up to date. It's useful, but maybe not as up to date as some of our other measures. But again, we make it available for every single county to look at.

This intimidating piece of artwork that we created is our grant program ([Agenda Item X](#)). What this does, if you were to have this on your computer in front of you, you could hover over any one of our 36 counties, and when you did that, it would look like this. In this situation, we picked Deschutes County, which is where Bend, Oregon is. What you can see is exactly how they spent their Justice Reinvestment grant dollars, what percentage went to housing, what percentage went to supervision, to alcohol and drug treatment, to program management, to domestic violence and sexual assault and child abuse and neglect services. This is just a way for anybody in the community, other counties who are wondering how these resources are used, and obviously the legislature as the people who have the purse strings, to just have a transparent way of seeing how this money is being spent by county. Then, you can look at it the other way too, which is if you want to see what percentage of our Justice Reinvestment grants go into services, you can just look over here and hover over this service button and you can see a quarter of our money, the Justice Reinvestment grants, are spent on what we would characterize as being services, so mentoring, reentry, housing, education, employment, parenting services, restitution collection services. This is just another way to look at how it is that we are spending those grant dollars.

That's our Justice Reinvestment program. That really drives a lot of our staff work. Specialty courts are our other major grant program. We currently fund 41 specialty courts across the state. We estimate that there are approximately 72 specialty courts

across the state. We don't fund them all, but we are the biggest source of funding for specialty courts. We use the terms specialty courts because it's an umbrella term. It encompasses mental health courts, veteran courts, adult drug courts, juvenile courts, family courts. We have a wide range of court types that we fund, but we supply them with the resources they need, mainly court coordinators and some other ancillary staff needs. They use their local system to access things like treatment, housing and other things that those programs might need. We try to get them as many resources as we can, but \$17,000,000 spread out across 41 courts kind of spreads it a little bit thin.

The other half of the work that we do is the research side of things. I'm happy to report that we currently have four researchers on staff in our commission. We are the statistical analysis center for the state. We put out reports. We do random control trials, we do quasi-experimental models where we look at the impacts of programs that are implemented to see if they're working, so we study all kinds of things, all kinds of different interventions that are happening in Oregon. An example of one of the things that we have going on right now is just a basic housing random control trial where we are seeing that where offenders are provided just housing, not wrap-around services or anything else above and beyond that, but just looking at, "Do you have stable housing or not," what kind of an impact does that have on recidivism? We're studying that right now in a random control trial, and the hope is of course that we will be able to really put a return on investment for counties that are having to make decisions with their funding to say, "We know every dollar we spend on housing has this kind of return on public safety and reduction in crime" and those things. We do a lot of research like that. We're also engaged right now in a victimization survey. We're trying to for the first time in Oregon do a statewide victimization survey. We have another random control trial of a downward departure property offender program, so property offenders who would have been sent to prison but instead are given the opportunity to stay locally in the community with high-intensity supervision and wrap-around services, again looking at their recidivism rates and reductions in future crime. It's kind of nice that we both house funding and research, because we can both fund programs and then we can study those programs. A lot of times research is burdensome, it's time consuming and it costs money and you need expertise to be able to do that, so counties implementing programs might not necessarily have those things. It's nice that we're able to both provide those services for them and incentivize their participation with our grant funds. It's kind of a nice pairing for us to have both grants and research in the same house.

This is just a snapshot of our interactive dashboard on our website. These are the different things that if you go one there, you could click through our justice reinvestment prison usage, prison use by all crime types, recidivism, some program-specific dashboards that we have up there. Again, we just try to make information accessible to anybody who wants to interact with that and hopefully make it very timely so people who are making decisions both at the statewide level and the local level can have information to base those decisions on. We spend a lot of time trying to get data out to people. We created a resource called the Oregon knowledge bank. This is a website we partnered with our department for policing training and standards, and what this website

does is it both synthesizes research for practitioners, so not for researchers. We try to research studies and then summarize those to what people in the field might find accessible. Then, it shares program information, anything from homeless programs or bike thefts or crime in parks or whatever it is that jurisdictions are working on locally that they think are promising, this is the place where they can go and share that information so their colleagues can go on and see if there are already programs that are being used across Oregon that are working in these specific areas. It's a really great way of sharing information about what's happening in Oregon for other people in Oregon to see what works.

Chair Hardesty:

Thank you very much for the informative presentation. As a starting point for questions, the legislature has progressively increased the amount of grant money, so what has been the driving force, the driving information maybe that has caused the Oregon legislature to keep upping the ante? Secondly, how was the legislature convinced to go into this county grant process and not be so controlling over what counties do with the money and allow counties to exercise local control with their strategies?

Mr. Schmidt:

First, the funding. The legislature's first investment in Justice Reinvestment in 2013 was for \$15,000,000 across the state. They significantly increased that in the next biennium to \$40,000,000, so that was a huge increase. In this most current biennium, they increased it by \$7,000,000 more with an additional, more targeted grant program for that additional \$7,000,000. I think it's a few things. Part of it actually feeds into your other question, the local control question. It really has been a uniting force for the broad range of public safety actors in our system. We have had district attorneys, sheriffs, chiefs of police, defense attorneys, sentencing reform advocates walking the halls of the legislature saying that it makes sense to make these investments in local communities to get them the resources that they need to be able to supervise these people locally and hopefully get better outcomes. I think part of it is that there's been a broad coalition of people who don't necessarily always walk arm in arm with each other down these hallways. That's been very well received by the legislature. The other thing I think is really the data. We had a couple remarkable stories that I'll share with you. When we first started looking at the data county by county, the first time we really had done this before, counties both internally did not realize necessarily how much prison they were using, and as a state, we didn't really realize, "Well, county X, county Y, how are they different, how are they the same?" When we very first started looking at this, two of our larger counties, Lane and Marion Counties, we found out were using twice the amount of prison per capita on property and drug crimes than any other county in the state. When we do the statewide averages, they were doubling. It was for two different reasons. Lane County was sending people to prison for twice as long for property crimes as anybody else in the state. The statewide average for a property crime sentence in Oregon is around 22 to 24 months is the typical property crime prison

sentence. In Lane County, it was about 44 months. They were a huge outlier. They didn't know it. Marion County, their problem was different. They weren't sending people for much longer, they were just sending twice as many people as anybody else per capita. They were not giving downward departures, they were not trying supervision. They just were essentially looking at cases and saying, "You're prison eligible, you're going to go to prison," where other counties had started to do some of those other things. When we showed both of those counties that data, we said, "You're a massive outlier," it was really kind of news to them. Both counties separately and individually took their data to heart, they set up subcommittees of their local public safety coordinating councils, they mapped their systems, they tried to figure out why these things were happening, why it is that they were so out of step with their peers. There were very legitimate reasons for those things and how these systems kind of build up a local system culture that's specific to them. A lot of it actually goes back to lacking resources. Lane County in particular, one of the things that they saw is they didn't have jail resources. They were constantly closing their jails. What that meant was, every time you catch somebody for a property crime, they're immediately released, and then you catch them again and then you catch them again. By the time they're important enough to hold, they're serious enough to hold, they've now racked up three or four or five charges, so whereas you might have been able to put them on probation in that first instance, now they're going to go to prison, and they're probably going to go to prison for a long time because now they've racked up three or four or five charges. For Lane County, it really ended up being a jail problem, so they've used Justice Reinvestment resources to invest in jail. They've created additional jail beds and space and invested in treatment in their jails so they can hold more people and also use those beds for sanctions, because it's not very useful to put somebody on supervision or probation if you can't sanction them when they're messing up. There's no stick. For them, it was a very rational move to send people to prison and not keep them locally, and send them as long as they possibly could because there were no resources in their community. Marion County had a different reason for why they were supervising so many, but again, it went back to resources. Keeping people local costs county money, but sending them to the state costs state money, so let's just send them to the state. By investing resources in both of those counties and them looking at it, this is the local control, what has turned out to be a really positive move is you allow them to dig into their data, dig into what's happening in their system, why their systems have grown up the way they have, and then target these funds to those specific things. If the legislature would have said, "You shall use this money for this discrete thing," that may have worked in some counties, but it wouldn't have worked for everybody. I think it's really been smart to let the local system, as long as they're informing their decisions with the actual data that's happening, and then let them attack their problems. Both of those counties, it took a couple years, but both of those counties' prison usage in these areas has returned to the mean. Lane County's sentences are slightly above state average. I think they're around 26 months, but they were at 44. Marion County has invested a lot of their money in a downward departure probation program, intensive supervision probation program for property offenders, so they're keeping a lot more people locally with those wrap-around services and additional things that are keeping the community safe.

Chair Hardesty:

So the key, in part, to this is the local public safety coordinating council. As I understand it, by statute, those are created and are mandated in each county. Is that right?

Mr. Schmidt:

That's correct, yes.

Chair Hardesty:

So the one area where the legislature said, "Okay, you're going to have local control but you're going to do it through these council operations, and here are the component members of the council." Is that right?

Mr. Schmidt:

That's exactly right. It's all spelled out in statute who has to be there. Justice Reinvestment really breathed life into those councils. We have had them for probably 16, maybe 18 years, and they came out of that 1145 legislation where I talked about how the state said that anything over a year the state would fund, anything less than a year, local will fund. That's where they came, those local public safety coordinating councils. Their only job was to submit a public safety plan to the criminal justice commission, which then sat on a shelf and we said, "Thank you, we received your plan." Nobody ever looked at it. Many of these committees really got together once a year. They stamped the plan of their local community corrections director, and that was what they did. Justice reinvestment has breathed life back into them, because now they have a grant to administer locally, they have to make decisions about where they're going to allocate funding, they have to respond to questions from us about, "Hey, your recidivism rate's going up. What's that about?" or "Your prison usage is out of step in these areas. What's that about?"

Chair Hardesty:

The council then submits the grant application and develops the programs that they believe will be effective on the front-end of this issue. My understanding from our interview back on January 10 is that these are focused largely on property crimes and drug crimes, substance abuse crimes. Is that fair to say?

Mr. Schmidt:

That's correct.

Chair Hardesty:

Part of that strategy is specialty courts, but there's another component of that strategy, and each community then is identifying what they can do best to attack those crime types through this process.

Mr. Schmidt:

That's correct.

Chair Hardesty:

The reason I pose those questions is because I had another separate group of meetings with Director Dzurenda and others, and we'll get that presentation shortly, but I've asked them to give us statistics on those sitting in our prison that are substance abuse and property crime folks so we can get a sense today of how big a population we're talking about. I think it will be eye opening for many of us.

Assemblywoman Tolles:

I hope this is still within the scope of what it is we're attempting to accomplish today. If we could go back to your slide on recidivism, I'm just curious if you could help me to interpret this data. What I observe here is that the number of arrests has remained relatively flat on new crimes, I believe as you described it, not for parole or probation violations. However, the number of convictions went down in a significant enough manner for those repeat offenses or those new crimes. I'm just curious, do you know the cause of that? Is it that the arrests were not appropriate in the first place, or is it that the judges are convicting less often for a repeat offense?

Mr. Schmidt:

There are a few things. One that I know for sure is that our data systems have improved over time. There's one county that, if I put it up here, Clackamas County, you'd see that the convictions are significantly above the arrests for some period of time, then they drop below. Clearly there's a data issue there, because otherwise a lot of people were being convicted without ever being arrested. We're going back to 1997 in this slide, so there are probably some data issues that are built into that, especially when I look and I see that arrests and convictions are right at the exact same percentage. That makes me think that there's some data incongruity there. I think there's a data component to it. It could be that if you are recidivating, you probably are on some form of supervision, either post-prison or probation. It's my experience being a prosecutor that sometimes, even for new crimes, you might wrap that up with a revocation instead of a new conviction just to expedite the process if you can get a prison sentence or whatever it is you're looking for anyway. Or, say it was a misdemeanor arrest, so maybe you can handle it through a violation instead. That would not necessarily be captured in our data,

because we look for new convictions of new crimes in the data, so we would see it as an arrest for a new crime. But if the judge decided to handle it as, it was a new misdemeanor, but we'll just handle it in our already existing case, that could be another reason why you see a distance between those two things, because these people are most likely to be on some sort of supervision.

Mr. Dzurenda:

When you're calculating your recidivism rates, when the offender leaves the prison system that you start to monitor, are you removing those that are not from Oregon or deported to other countries? In Nevada, we have 28 percent of our population falls in that category. That's why I don't know what Oregon is.

Mr. Schmidt:

I'm trying to understand the question. Are we accounting for out of state conviction, is that what you're asking?

Mr. Dzurenda:

Not out of state convictions. You have someone who was sentenced 10 years in your prison system then gets released, but after release he gets deported to Puerto Rico, which probably will not come back into your system. Is that successful reentry?

Mr. Schmidt:

It's a fair point. Anybody who leaves our system, if they're arrested or anything else in any other state, they won't end up in our data, so if they are removed from Oregon for whatever reason that is, then they would not show up as a recidivist because we only capture it when they do a new crime in Oregon.

Mr. Dzurenda:

But also, are you counting it as successful recidivism if they go back to Puerto Rico, that you didn't get this guy back again from another country?

Mr. Schmidt:

I suppose they would. I mean, they wouldn't count as being a recidivist, so I suppose they would show up in a success rate. It's really a data question for us. We get this question a lot about out of state convictions and things like that and if we account for that or not. We're just not able to at this point with our data systems. We'd like to, of course.

Chair Hardesty:

Mr. Schmidt, thank you so much for coming down and being with us today. The discussion has been very informative, and we really appreciate the input, and obviously you've made some progress in various areas with the legislature's support and your commission's activity. I think that's been informative. I've asked the question, and you probably heard me ask earlier to the folks in Virginia and North Carolina, can I steal your data subset or models and statistical analysis?

Mr. Schmidt:

Yeah, absolutely. Our prison forecasting is done by the office of economic analysis, and they've developed their own in-house algorithms for figuring that out. We could get that to you if that was of use, and then anything that we do in terms of modeling our data on prison usage or anything else we have to share.

Chair Hardesty:

What I find interesting is centralizing the research and data collection, because quite frankly, for a lot of our counties, certainly 15 and maybe 16 of the 17 counties in our state, collecting data and analyzing it is a real challenge fiscally. If the state were to, say, fund the AOC or a statewide agency to perform this service for the counties, it could be a tremendous step in being able to make good business decisions.

Mr. Schmidt:

Our ability has really been enhanced by having access to our law enforcement data (LED) system. We have access to the court system where we get our conviction data, and then our department of corrections parole and probation has a statewide case management system for anybody on felony supervision and/or in a prison. What we do as a commission is we merge all three of those data sets into a bundle. We do matching across to make sure we can track people, and that's really been key, having all three of those.

Chair Hardesty:

And what is the gross amount of your commission's budget?

Mr. Schmidt:

In a biennium, we have 15 full-time equivalents, and we are, just for staff and not the grants and everything that I talked about, approximately \$4,000,000.

Chair Hardesty:

Thank you so much. We really appreciate it.

We will now move to Chief Justice Douglas' presentation.

Justice Michael Douglas (Chief Justice, Nevada Supreme Court):

What we did in response to the request to appear today was try to put together a brief presentation that has some elementary data in terms of what we are doing statewide in Nevada as to specialty courts. The interview you just went through with Oregon was very interesting, and some parts as he got into specialty courts comports with some of the things you will see in the presentation that we are doing here in Nevada. I wish we were as advanced and I wish we had the money that they talked about in Oregon. We will tell you what we are doing here.

The first slide is just an overview and a reminder that Nevada's first drug court came about in 1992 ([Agenda Item IX](#)). The late Judge Jack Lehman here in Las Vegas, closely followed by Judge Peter Breen, in Northern Nevada, they are kind of rock stars on a national basis for what they've done and what they were visionaries for. Over the years, we've had over 13,000 participants, we have over 9,000 graduates. More importantly, one of the things that people can applaud, over 700 drug-free babies have been born because of the relationship to the programs. We've looked at our stats, and in the last 20 years, we've had a savings of more than \$40,000,000 based on what has been put together by the National Association of Drug Courts (NADCP) and other national drug organizations in terms of what every one dollar to drug treatment or specialty court treatment does in terms of saving the community. The ratio is 1 to 27.

The next slide talks about funding in Nevada. On the left-hand side of the slide is the funding from Assembly Bill (A.B.) 29 money, the money the Legislature back in 2003 or 2004 initially allowed the collection of through fines and fees to folks in the state. As you can see, the amount went up, peaking in about 2011 or so and sliding back. It has remained somewhat consistent, but it created some challenges and also the amount of funding limited what we could actually do. On the right-hand side, it illustrates the general fund appropriation the Legislature was kind enough to put forward to address the problem of specialty courts. This is the fourth year of that money that comes out of the general fund directly from the Legislature. Between the two, we are able to come up with roughly about \$10,000,000 a year for funding.

The next slide just demonstrates where that's going. The fee funding is \$5,700,000. There are 34 programs. Overall, the general distribution is 15 programs in Clark County, 9 in Washoe and 10 in the rurals. It indicates what was actually spent.

On the next slide, it's a continuation. The general fund portion, the \$3,000,000, is a little less, because some money comes out of it. There are 14 programs in Clark, 7 programs

in Washoe and 13 programs in the rurals. There are 2,567 participants because of that general fund. The amount actually spent is over \$3,417,000 and some change. The numbers don't reflect other specialty courts that we have that either come through federal funding or are completely locally funded.

The next slide is just a highlight because, as your last speaker talked about, we talk in terms normally that you're used to, which is drug courts, but drug courts really come under the umbrella of specialty courts. They make up drug dependency, and in that, the top five drugs of choice: methamphetamine, alcohol, heroin, marijuana and opioids. That's the statistic we have today. We are in the process of each year better defining and getting better reports on substances of choice. What we found looking at some of the data we collected in previous years, some of the drugs of choice were not being properly reported. They were being missed. The source of our information is from the offenders, and so some are honest and some are not in terms of telling us what their drug of choice is. I'll misuse a term of art, the drug term is the Eight Ball, which is a particular type, but a lot of them are using a number of drugs or whatever they can get their hands on for that next high. We are conscious of that.

Within that, we have the veterans' courts and veterans' issues. We have family-related matters, families and their dependency and such, plus the oldest, which is the alcohol abuse, and we have the newest, the mental health and the illness. I know coming here to Las Vegas today, before I came to the government center here, I made a stop just north of this building where Catholic Charities is, and I noticed the people who were on the streets there. They are there every day. The number ebbs and flows, and you have those that partake of that program and those who refuse to come in because they won't surrender the material in their cart, their basket, their backpack, which is sometimes drugs or alcohol. Some of them have a combination of what we call traditional drug or alcohol, and the mental health component, and you can't treat one without treating the other. That's the reality of this.

The next slide talks about Fiscal Year 2017 and tries to give you a breakdown, a snapshot so to speak, of the people who were in the various specialty court programs throughout the Nevada. At some points, it almost mirrors somewhat on the one side, demographics, our population breakdown in our state. There's good news and bad news. The bad news is that we have 65 percent males. The good news is only 34 percent females. That's good news because our female population is the bearer of babies.

In 2017, our next slide indicates that we admitted roughly 3,000 individuals, 797 graduated, 9 drug-free babies. The graduation rate was 65 percent. That's the hard data. The soft data is, people don't complete programs in 12 months. We have people in the statistic that actually came to the program before or their drug of choice was such, and them being affected by it was very minor. Because in most of the programs, the minimal effect is 16 to 18 months in a program before you can say they are, I won't say clean, but they're starting to turn over a new life and have an opportunity. It's very hard

when you look at a fiscal year and say, “How many graduates?” A graduate meant you were in the program for as long as you needed to be in the program, subject to you being released from supervision to be a graduate. That’s kind of tough to measure accurately.

The next slide is very sobering, no pun intended ([Agenda Item IX](#)). For drug abuse history, 78 percent acknowledge previous abuse, some type of substance, some type of alcohol, a combination thereof, previously. There was no previous abuse for 21.4 percent. For prior treatment, 37.45 percent, and the number which is encouraging but depressing at the same time, 63 percent have not been treated. We don’t have a handle on that, not being treated because they didn’t seek out treatment, not being treated because they didn’t realize or accept the fact that they had an abuse problem, a dependency. We know that 5,000 had been to other programs, and 8,000-plus acknowledged they had not attended any type of treatment program previously.

For adjudication, 69 percent are discharged from the court’s jurisdiction, with 6,447 graduating. Thirteen percent continue on probation by discharge. This does not mean they completed the program, because again, each person is slightly different. Some require more time. Nineteen percent have other types of supervision that are not itemized within the system.

That concludes the presentation, but what I’d like to share with you briefly, something that came across my computer screen yesterday morning. It was a publication that said, “Americans want jails, then treatment first, punishment second.” This talked about a poll that demonstrated that the American public is ahead of public officials in thinking about what is fair and equitable treatment under the law. Most Americans feel that local jails should serve a rehabilitative role rather than a punishment one, particularly for nonviolent offenders and those with serious mental illness, according to a new RTI International (Research Triangle Institute) and Zogby public opinion poll that was supported by the John D. and Catherine T. MacArthur Foundation. More than one in three residents said that rehabilitation or treatment was jail’s purpose, not punishment or containment, and nearly 60 percent agreed in the case of nonviolent offenders. It goes on, but that’s the general thesis and what’s in the report that just popped out.

In Nevada, I appreciate what Oregon was saying, we’ve got the funds we received. We’re grateful for that, but the funds have gone primarily to treatment of offenders in the program. What we have really been lacking in is sufficient funding for the individuals in our system, the court system, the cities and the counties that actually provide the treatment and monitoring. That money that we’re receiving goes to the clinical people, where they’re sent out to a drug treatment program. We’ve had the effect the last 4 to 5 years, and most of you are aware of it, with the decline of block grant money, our partners in the nonprofit community have all but disappeared. We are having to send people for inpatient treatment to paid providers, people who are doing it for money. I can’t say it any other way. Before, we were able to send people to Catholic Charities or other community-based programs that provided bed-space and food and shelter. We

have been addressing our programs in Nevada as purely the treatment program, but we are very well aware, we understand, that treatment is only one part of it. If you don't have a stable environment, i.e. a bed, you possibly are not going to be successful in the program. If we are not doing some kind of job training if they had no skills, the person will have some type of breakdown thereafter because they can't get gainful employment to support themselves, or a family if they come out of a family situation. They will be back in our system. We are at a point where we need a partnership to be successful.

Recently, there was a meeting of chief justices from across the United States. The last two meetings I've attended, we've been struggling with the term that was used, recidivism. What is recidivism in drug treatment programs? Chair Hardesty, we don't necessarily have the personnel to track recidivism as to drug treatment. Are we looking for continued offenses? Are we looking at it in terms of just by falling off the wagon and you have a substance abuse program? The third thing that really complicates the whole picture, which I'm unhappy to talk about, is the use of opioids. A lot of the opioid problem right now is not coming to us in the form of major felony crimes, but just individuals who have a substance abuse program and are falling out on our public streets and are being arrested for low misdemeanor crimes, as to trespass, loitering, things of that nature, or the minor stealing of, and I'll use the term "stuff." It's not a legal term, but stuff, and they get arrested. They're brought in. Sometimes they're able to receive minimal treatment, and they're placed back on the street and they reoffend. That's the newest and most frightening thing you're seeing coming to Nevada. We are not as bad as some other states. There are 10 jurisdictions in the Midwest that banded together, from the governor's office and from social services and the courts to deal with the opioid problem, because in their cases, many of it is families on opioids and what do you do with the children and how do you deal with those children to keep them out of the social service foster care system? How can you get them back to their families across state borders? In our state, our state borders would be California, Arizona and Utah. In our smaller rural, and as we get into Washoe and Clark here, where are your immediate relatives to get those children back into stable places with family members, not institutionalized? But our specialty courts in Nevada right now, as was talked about a little bit, we managed to do it in the beginning by saying we would let our providers, the courts and the local jurisdictions run their programs, trying to use the 10 key components of best practices to fit their community. We are now looking at, and our second meeting is coming up next week, to look at standardized best practices for programs so we can certify the programs in our state because it has a direct application to funding, to make sure they're doing the things they need to be, cooperating and providing this data, and having similar definitions and methodologies in the treatment of individuals within their program, because groups like this and the full legislative body task us with saying, "Okay, we gave you this money. You're telling us it's successful, but how good is your data? How uniform is your data?" and we've been struggling with that, because the first thing that we try to do is treat people, but now, because of the demand that is out there, we want to make sure for one that they're running good programs, that there's uniformity, and we can begin to come up with the statistic for, what is recidivism and what is success? Are there any questions?

Chair Hardesty:

Thanks for making your presentation and giving us a brief overview of the utilization of the funds allocated from the general fund for specialty courts or to support those.

Mr. Soderberg:

I just wanted to point out to the Commission that Chief Justice Douglas talked a lot about the drug courts. At the Department of Training, Employment and Rehabilitation (DETR), what we have found is that doing outreach at the veterans' court has been phenomenal for us to reaching veterans who really need our services. Prior to doing that outreach, we were depending on people coming through the door, and a few outreach over at Nellis Airforce Base, and we literally were giving money back to the federal government. The individuals who work on the veterans' issues are termed by the federal government "veterans with significant barriers to employment," would often be sitting much of the day not doing anything because we could not have them work on even regular veterans who walked through the door or regular clients while there'd otherwise be people in the waiting room. Now, that situation over the last couple years has reversed by doing the outreach there, and actually our workforce service representatives who have the highest rate of placing people who were formerly incarcerated, which is hard, we've discussed during the session and in this committee, very hard to place people who've been incarcerated into jobs. There is that bias out there, but the ones who are the champions in our office that we're trying to recognize and pat on the back are those who work with veterans with significant barriers to employment that they have done the outreach over at the veterans' court. Along with all the other good work that you're doing with these specialty courts and that veterans' court, it has wound up inadvertently doing something that was unintended, and that is concentrating these individuals who need the help at a time where they realize it, and it's allowing us to really make an impact where, quite frankly, we weren't making an impact before.

Ms. Machnich:

Do you happen to know what percentage of the participants in the specialty court programs are in the specialty court programs pursuant to actual deferment orders as opposed to as conditions of probation? We have the statutes that allow for them to be used as deferment programs, where in the end, their offenses are expunged or taken off their record or reduced as opposed to a condition of probation where, especially in felony cases, you're ending up with a felony conviction at the end, even with a successful completion of the program.

Justice Douglas:

It's a very good question. I don't have that information at my fingertips. I know initially when you have a singular drug charge against you, your sentence is automatically

deferred and successful completion wipes it out. There's not, and I'll just speak candidly, as much deferment as there once was. Deferments tend to be, in many cases, pre-plea, where it goes to the charging stage where an arrangement, if you successfully complete some kind of program, and usually it's not in the drug court, it's in a private program, you're not charged. In some cases, and the courts traditionally, and I go back to the Neanderthal years 15 years ago when I was a general jurisdiction judge, part of the probation sometimes was that we would place you in a drug court or some kind of program. If you were successful, the charges would be reduced down if it was a nonviolent situation, understanding what was going on. That's a statistic we haven't really pulled out, and I'll make a note and I'll start trying to see if we can get our providers to start looking at if we could provide that kind of information.

Chair Hardesty:

I don't see any further questions. Chief Douglas, thanks so much for being with us. We appreciate your input and comments. Mr. McCormick, thank you for your help in preparing the presentation.

I'd like to ask Director Dzurenda, if we could move to agenda item XII, if he and his colleagues would make a presentation as I referred to earlier concerning the inmate population for property and drug offenses. As I mentioned earlier today, this was requested in part because of some of the information that we heard regarding the sentencing commission's activities, and as well what they're doing up in Oregon with respect to their localized programs.

Mr. Dzurenda:

What I had our offender management do, just to try to get a snapshot of what we were trying to look for, we broke down—and a lot of this we had a breakdown anyway for the second chance reentry grant, which was concentrating just on drug and property crimes, because those are the majority of our primary offenses in the NDOC sentences. But we just broke it down. Dwayne Deal from our offender management can go over specifics on how we broke it down, but we just basically separated out all of our property crimes ([Agenda Item XII A-1](#)) and drug ([Agenda Item XII A-2](#)) crimes, listed what they were, what actual statute was broken and the category of the offense, which will show you the severities of the crimes but also where they came from and what court actually sentenced them, which might be of interest.

Dwayne Deal (Offender Management Administrator, Department of Corrections):

What was provided should already be in everybody's handouts. Basically, we were asked to provide a list of offenses that we have designated as property and drug offenses. We were also provided a list from Mr. Anthony on what they determined as drug and property, and there are some differences, obviously. I'm sure you're probably all aware, there's nothing really in statute that I'm aware of that designates how these

offenses fall in which category. The Nevada Department of Corrections has basically six offense groups: sex, violence, drugs, property, DUI and other. This is a list of the descriptions of all the offenses that have been designated in those offense groups. For the actual offenses, the primary offense snapshot handout ([Agenda Item XII A-3](#)), it's broken down by the specific offenses, I need to clarify that this is not just counting a single offender. If you do that, basically when you're trying to get down to the number of inmates common, one inmate each time, you have to sort by what's referred to as the highest offense group, and sex is basically the highest, and then violence. If you're sorting to try to get one line for every inmate and you sort by the highest offense group, you could miss some of these property offenses if the offender has a sex or a violent offense group as well. Property and drugs are towards the lower end of this hierarchy. This is actually for every one of these offenses, how many sentences there are of inmates in the system right now. This was an active population. The only thing that we would remove from this so far is the sentences that have already discharged, so this would include sentences that are actively being served, sentences that have parole but the inmates has not been released on parole yet, and also these offenses that would still be in a pending status, meaning they haven't started serving them. We're more than happy to work with Mr. Anthony or whoever to try to refine this data to whatever you guys feel you may need in addition to this, but by providing these offenses, you get, I think, a better picture of how many of each of these offenses we have inmates in prison for on the number of sentences. Keep in mind, this can include inmates who have multiples of a single offense. Just scrolling through the raw data, one guy popped up at me at like 54 sentences of a specific drug offense. Just keep that in mind when you're looking at this. If you guys want to get down to a simple number, we can do that, but in doing that, we could be missing some of these lower hierarchy offenses, property and drugs, because they might default to a higher offense group of violence or sex, for example. Then there's also some recidivism data that was provided ([Agenda Item XII A-4](#)). Basically, our presentation is just giving the information that was requested to the best of our ability, and then I'll be more than happy to try to answer whatever questions any of the commissioners may have.

Chair Hardesty:

So, what is the information that you have there?

Mr. Deal:

The one with the color graphs ([Agenda Item XII A-4](#)) is basically a breakdown of the primary offenses by category. This shows what the percentage is of inmates are in for the specific offense categories, violence being the largest, and then the rest of the categories I mentioned previously are broken down by percentage. I believe this number here is one per inmate, so this is based upon the highest offense group. It's not based upon the same information we pulled together for the individual, specific property and drug offenses handouts.

Chair Hardesty:

If I could state that slightly differently, 17.94 percent of the population of the prison has a primary offense category of property.

Mr. Deal:

Correct. If by primary, you mean highest.

Chair Hardesty:

Yes. And as well, for 12.08 percent, their highest offense category is drugs.

Mr. Deal:

Correct.

Chair Hardesty:

That doesn't mean they might not have other offenses, but that's their primary offense.

Mr. Dzurenda:

That is correct. That's why when you break it down this way, it doesn't even show the true numbers that are for drug and property, because the majority of the violent crimes are related to drug and property, but it won't show that on here because it's only the primary offense.

Chair Hardesty:

Right. And my request was the primary offense was drug and property.

Mr. Deal:

So, you wanted just a single line for every inmate that would correspond to our total in-house population and whatever their highest offense category would be. If it's property, it's property. If it's drugs, it's drugs. I will certainly get with Mr. Anthony and get that breakdown. We can further process this data pull that we did based on these two offense lists, and we should have no problem getting you that data.

Judge Togliatti:

Burglary has a lot of different possibilities as a factual scenario. Does the prison distinguish between residential versus otherwise? I assume you don't but I don't want to assume.

Mr. Deal:

No, we don't make a distinction. If they're convicted of burglary, that's what the judgment of conviction says, that's the statute they're sentenced under, that's what we put in our system.

Judge Togliatti:

I take it you would need the courts to be able to provide information as to how many burglary offenders that are currently incarcerated may have had an auto burglary versus a residential burglary, or a commercial burglary or something like that. Would you agree with that?

Mr. Deal:

We would not normally get that type of information. It may be available in the PSI, but the data that goes in our system as far as what they're convicted of and sentenced under is based on the judgment of conviction, and that doesn't really include that type of information. We don't really have a place in our system to document and track that. We have a criminal history that shows a number of certain variables as far as the number of prior felony convictions or something like that, but we don't have the ability to really track in our current system that level of detail, so that might be something that would have to come from the courts or the police, if they're tracking those types of statistics.

Judge Togliatti:

When the defendant arrives there and there's this classification time period, what happens during that classification, meaning the 30 days or whenever they're in that period of time? I know the inmates have a lot of names for it, but let's call it the period of time.

Mr. Deal:

There's a lot that takes place during that initial classification. The inmate comes in, gets fingerprinted, gets his picture taken, his identification made, we talk to him, have some initial evaluations by medical and other staff. He has some testing, he gets provided some information. During that process, we put all the information we have available to us, the sentence structure, the terms, dates and jail credits, criminal history, all of that stuff is put into our database, and then there's an initial classification recommendation, then that goes to the initial classification committee and they make the recommendation for appropriate housing and custody level. All that's typically supposed to take place in 21 days. I'm sure I haven't covered everything. There's quite a bit of stuff that goes on.

Judge Togliatti:

Do you use the PSI for that, meaning the offense synopsis and everything that's in it?

Mr. Deal:

Yes. The PSI is our primary source of data. We typically get the judgment of conviction, which outlines the criminal offense he was convicted and sentenced under, the terms of his sentence, the jail credits, if he's got lifetime supervision. Those types of things come from that, and pretty much everything else comes from the PSI and/or his intake interview. The PSI is one of the primary sources of our information.

Judge Freeman:

To follow up on what Judge Togliatti said, if you get your information from the judgment of conviction, that doesn't make a difference from a classification perspective if you're putting the judgment of conviction that it was a residential burglary versus an unoccupied residential burglary versus an occupied residential burglary. None of that's going to make any difference. It's really logged in as a burglary for purposes of your classification. If you're going to look behind it for purposes of where they're going to be housed, you look at the PSI, correct?

Mr. Deal:

Correct. There is sometimes a disconnect between the judgment of conviction and the sentence, because we look at that, but we also look at the offense summary and the PSI. For a burglary, he'd have that scored as whatever category severity, and that ties into the risk factor score, which is incorporated into those classification determinations. Whether it's a residential or commercial burglary, that really wouldn't impact one way or the other the classification decisions, necessarily. There'd be other information. The timeframe from a violent incident, if he has any prior escapes, timeframe to probable release, those are some of the key issues we look at. Institutional adjustments, those are some of the key factors that wander into the classification analysis.

Mr. Hicks:

I think I misheard you. Are you saying on this offense list that you provided that there's an inmate in custody on at least every one of these charges, or these are just the possible property charges by statute?

Mr. Deal:

There are two separate handouts. One has a list of property offenses ([Agenda Item XII A-1](#)) and another one is a burglary, and that's just a list of all the offenses we have under those two categories. We may not necessarily have someone in on each of those

offenses. The other one that's labeled the primary offense snapshot ([Agenda Item XII A-3](#)), those are the actual inmates we have in on those offenses and the numbers as broken down by category are stipulated. So, everybody who's on this list will be somebody who has one of these sentences that's currently in prison that hasn't properly discharged.

Mr. Hicks:

Okay. On which list?

Mr. Deal:

The one that says the primary offense snapshot. There's one for drugs and one for property.

Mr. Hicks:

That's why I'm confused. I was looking at the offenses list. This answers a lot of my questions. So, NDOC has an ability to break down or to show what each inmate is actually in on as far as the primary offense, essentially?

Mr. Deal:

We have an object code in our database. When we pull data from our database, we have different object codes we can use. To get one line per inmate, so to speak, is called the highest offense group. Basically, there's a hierarchy that is used to determine which offense comes out on that report. If you have a sex offense and a robbery, you fall under the highest offensive group of sex offenses. If you had a robbery and a burglary, you'd fall under the violence one because robbery is violent and that's higher than property. That's how we would get that. It's historically been that method of information being pulled, because it equates to the number of inmates we have in our custody because it's kind of a one-to-one ratio, but you can lose some of the detail. Like I said, for persons who have property but they also have another offense or drugs and they also have another offense, you could be losing how many of those drug or property sentences are actually in prison because they're now falling under another offenses group such as sex or violence because it's a hierarchy. It's a higher offense group than the property or drugs. We can do it either way, and we'll certainly provide the highest offense group as Chair Hardesty requested. This list that shows the primary offense snapshot, it's a little bit of a misnomer, but it actually isn't the primary, but it does show every offense of these drug and/or these property offenses, and that could include multiple sentences on an individual inmate if they've got multiple sentences for the same offense or multiple drug offenses or multiple property offenses. It will show up for each sentence they have under each of those categories. They'll show up one time on this report.

Mr. Hicks:

As far as primary offense, does it matter if it's been ordered to be concurrent or consecutive, in that situation of multiple offenses? Your concern is whatever's the largest sentence, probably what's most important to you and parole eligibility's going to be up, so there could be a large sentence on let's say a robbery and then another sentence of possession of stolen property. Obviously robbery's going to add more time, so that would be your primary offense, if I'm understanding you correctly. But if there's a consecutive sentence, does it account for the other charge because that will have to be scored secondary to the robbery. Does that make sense?

Mr. Deal:

Yeah, I think it does. The length of the term is not really a factor in which offense group they fall into. If you get a habitual criminal, for example, you can get a pretty lengthy sentence on those, and that falls into the other offense group, which is actually the lowest category. You can run into some issues when you're trying to pull data depending on what you're trying to get, because some of the habituals are going to be A's or B's and they could have seriously long-term sentences, but in the hierarchy of offense groups, it was determined that the sex offenses are going to be the highest offense group. If you're pulling data on the highest offense group, you would have whatever offense is under the highest offense group. If he has a sex offense, that would be his highest offense group. If he has a sex and robbery offense, he'd still come under sex. If he's got robbery and habitual, he'd come under the robbery, the violence offense group. The actual length of the term doesn't really factor into that sort of a data pull.

Sheriff Logan:

Do you have the ability then, if you look at the last charts you were talking about with the drugs and the property crimes that are broken out, those that are in the larger categories, not where there's like three people or seven people or anything like that, are you able to break that out for us as to from what county they came from and the general length of sentence so we can see, very similar to what we were hearing from Oregon, where self-realization of how that sentence structure is coming from.

Mr. Deal:

Yeah. The original data pull, this was kind of a consolidation, because when we do these data pulls, we basically start with everything. We put as much in there as we can, and then we try to filter it down based upon what information we're trying to provide. I believe the original data pulled does include—another reason for that is because, after you get down so far in this process, if you get to a point where you're needing an object or a data element that you don't have, you basically have to go back and start all over again and pull that new data report in with the new object. So, we try to put as much as we can and as we think we're going to need in the original data pull, and still make it so

it's not overwhelming to the system where it takes forever. Every time you do a calculation, the little circle's spinning for 5 minutes trying to do the calculations and the filter you're trying to do. We try to include as much as we can. I believe the original data pull does have the county, and I believe we should have the min and max terms for the sentence. The question is, do we want to include that information on the current breakdown we have where we're showing a sentence for each offense, or do we want that on the highest data pull, the primary?

Sheriff Logan:

Obviously, I think we'll need it to see many things, but let's start with the primary offense and go from there. I know you know how many beds you have, but does it also classify for you guys, for halfway houses, for medical or mental health facilities that would still be incarcerated in juvenile facilities? Do you have that data, or is that going to have to be broken out into a couple other entities?

Mr. Deal:

The halfway house, like the Ridge House and stuff like that, we don't have that number. That wouldn't be in our database. Juvenile stuff we wouldn't have. We would have the information on the juveniles who are sentenced to prison as an adult. We would have those guys in our system, but outside of that, we would not have that data.

Mr. Hicks:

I started looking at the primary offense snapshot, and it's a little confusing to me because, for example, if you go to the snapshot of drug offenses, if you were going to go to the second one from the bottom, possession of a controlled substance for the purpose of sale, you have it down as 189, but you have 7 that are category B's. That can't be a Category B. That's necessarily a Category D. I don't really get how—I think you have some errors in here, and maybe it's in the database or something, but a lot of your crimes here, you have them labeled as categories of felonies that, statutorily, they're either a couple grades below that or above that.

Mr. Deal:

Yes. I actually noticed that as well. I don't know the law and the statutes as well as you do, I'm sure. The one that stuck on me, for example, was that attempted trafficking was a Category A felony. We were actually a little bit rushed on this, so there probably are going to be some data issues. But on this particular one, the Category A, attempted trafficking, I looked that guy up, and his statute was actually trafficking, so it was a data entry error. It was put in as attempted trafficking, but it should have been as trafficking. As we find stuff like this, we do periodically—any time you've got people's fingers on keyboards putting stuff in the system, you're going to encounter that. As we encounter these, we do try to correct them right away. That one was corrected, but it was already

after we provided the data. I'm sure there are probably others like this. It's just that this one stood out to me. I'm not an expert in all the felony statutes and categories, but there are other issues like that that will likely be found in this. If anybody has anything that definitely looks like it's an issue, if you guys want to point that out to me, I'll have staff take a look at that and see if it's something that does need to be corrected.

Chair Hardesty:

We're going to talk about data collection in the Commission here, and I want to try to get ourselves more organized, because the one thing I don't want to have happen is NDOC being asked to respond to 25 different requests. You don't have time for that. We're not going to approach it that way. I'm going to ask the Commission members to look at this material, consider these presentations today, and we're going to get an organized approach to the data requests. But I think one of the key components, and part of the reason I wanted to go through this exercise, is to show to the Commission that we do have some data collection availability. We're not completely flying blind in making some business decisions here. Yes, some of this needs some refinement and the like, but Mr. Deal, you sat through the presentations from Virginia and North Carolina. Let's focus on Virginia, for example. When they talked about pointing to the PSIs as well as the prison data to help develop their discretionary guidelines. Do you think that the prison has the ability to retrieve that data? Should we start a similar study to determine sentencing patterns for all the crime types, basically?

Mr. Deal:

In our Nevada Offender Tracking Information System (OTIS), there is a criminal history screen that is entered based upon the information in the PSI, primarily the criminal history section. It lists the arrests, and it also usually lists the dispositions. That's usually pretty straightforward. It usually says to charge with a felony, a felony misdemeanor, found guilty of felony misdemeanor, whatever. In those straightforward, unequivocal issues, there's not a question that the data should be pretty good. I will say that I'm not entirely confident in how accurate all the data that's been entered over the years has been. You have two people looking at the PSI, you might have them come up with a little bit of a different account of felonies versus misdemeanors or whatever. But we do have some of that data. It's going to be very limited on the specifics. I think there are a number of sexual arrest convictions, violent felony arrest convictions, nonviolent felony arrest convictions, but that's going to be the limit. It's not going to get down into the specifics as far as the individual offenses. For that, you'd actually have to probably look at prior felonies, and that's probably going to limit the availability of data, because it's going to be strict. We don't put anything below misdemeanors in there. We only put the felony convictions in our system. We would have some data, but maybe not to the extent that some of these other places are talking about.

Chair Hardesty:

So, when we get the models from those states, we'll be able to look at those models, see what kind of data input they put in there, and determine what portion of that might be capable of coming from NDOC.

Mr. Deal:

Certainly. If we get an example of what data they're using, we'll be able to tell you if we have that data available in our system.

Chair Hardesty:

The other issue that I wanted to ask about is, in connection with the PSIs, other than using that for classification purposes and then inputting the criminal history data from the PSIs, does the prison use the PSIs for anything else?

Mr. Dzurenda:

We also use them for programs. If it does any, how bad is the drug history, how significant is the family history, all that falls into our programs and what evidence-based programs are going to either track the individual or put them into to make sure they get that before they're released.

Mr. Segal:

We often hear this critique that the prisons are filled with nonviolent, harmless drug offenders and property offenders. I think the information that you've provided here strongly rebuts that critique. Only 12 percent of people who are serving a primary sentence for a drug offense are drug offenders. Of those, the vast majority appear to be incarcerated for drug trafficking, which is a crime that is often directly or indirectly associated with high levels of violence. With respect to the 18 percent of people who are serving sentences for property offenses, the vast majority of those are incarcerated for burglary, and I suspect that most of those are residential burglaries, which also could easily be characterized as violent offenses. Would you agree that the critique that our prisons are filled with nonviolent drug and property offenders is effectively rebutted by the information that you've provided?

Mr. Deal:

Yeah. I mean, the pie chart was pretty self-explanatory. The majority of the inmates in our prisons currently are for violent offenses as their highest offense group. Like I said, this is only looking at the hierarchy I mentioned earlier, so if they have a sex offense, they'd show under the sex offense group. If they have a violent and a burglary, they'd

show up under violent. They could have other offenses as well, but for your single highest offense group, by far the vast majority is the violent offenses.

Judge Togliatti:

Earlier we had a question related to how there could be a difference between the number of arrests in Oregon and the number of convictions. I instantly thought to myself, because they're packaging it into a revocation, and that happens a lot in our jurisdiction. Do you get in the violation reports when these folks are revoked from probation? Many times they will have committed another offense, but Nevada doesn't charge the offense because they determine it's a more efficient use of taxpayer money to just go with the one case and not get more blood from a stone, if you will. I assume that's also part of the information that's included in everything to do with the inmates and the classification and the parole and everything else?

Mr. Deal:

The way that we track this is what we have imprisonment statuses. If you come in basically brand new, you're a new commit. When you come back as a parole violator, we have, with or without new offenses. The way that's entered is if you come back into NDOC as a parole violator with a new felony conviction at the time you are returned, that's counted as "with a new offense." Otherwise, it's counted as "with no new offense," and then if later you're convicted of another felony offense, we would get the judgment of conviction on that and then the imprisonment status at that point when we enter the subsequent judgment of conviction data, it should be changed to "with new offense." Historically, I'm not going to say I'm extremely confident that was always being done, so some of the historical data may have skewed that a little bit where it may look like we've had more tacticals than maybe we did, but I've talked with the people that I have right now doing this, and that's the procedure they have, where we only score it as "with a new offense," when they come back in with a new felony conviction on a revocation on a violation, which is rare because they're usually still going through court. When they get to a subsequent judgment of conviction on a new felony conviction, they're supposed to change that prisoner's status from "no new offense" to "with a new offense," and that would then be incorporated into subsequent data pulls that look at that figure. It's the same for paroles, mandatory parolees and then probation violations as well.

Judge Togliatti:

So if the district attorney doesn't prosecute for the new offense, even though it's the grounds for the violation in the first place, because they determine that it's a better use to just pursue revocation and skip a whole new felony conviction and the costs associated with that, that's not something that the prison particularly cares about. I don't mean that in a derogatory way, I just meant that it doesn't fit into your way of doing business.

Mr. Deal:

Without a conviction, there's really no way for NDOC to know what all went into that determination. We couldn't very well start classifying inmates based upon what we think the judge may have used or the district attorney or whoever may have used as reasoning on why to prosecute or not. We have to go on what we actually have. If he comes back and the Parole Board decides to revoke his parole, they'll determine what amount they're revoking, what credits they're restoring, if any, and we basically go by that. If there's a new felony mentioned, we'll obviously do the casework to make sure we can find out what the disposition is on that. But ultimately, if there are no charges or it's dismissed or something, that really wouldn't come into classification decisions.

Judge Togliatti:

But you do get the violation report itself?

Mr. Deal:

Yes.

Judge Togliatti:

The Category E felonies listed in the snapshots that you have for both the property and the drugs, that would necessarily be revocations, yes? Because they have to be placed on probation in the first place.

Mr. Deal:

Yeah, I would imagine if there's a mandatory probation freeze and we have them in prison now, then they would have been a probationer violation or revocation, here they went to probation and then it pulls the underlying suspended sentence.

Judge Togliatti:

So, that's 390-some-odd people who were given community supervision and arguably failed. That would be about the number.

Chair Hardesty:

It's 389.

Mr. Deal:

Keep in mind, this document is not individually removing duplicates. This is the number of sentences in the snapshot. It's not individual inmates, it's individual sentences. These are the sentences for that total, not inmates.

Ms. Jordan:

I just want to know, are the snapshots reflective of the little-over-200 inmates that were shipped to Arizona recently?

Mr. Dzurenda:

We don't classify them differently because they're in Arizona. They're still classified as being on our count. If they're in Arizona, they're on this. It's all the same. They're not taken off of our count. They're counted still as a body in our state. We just have them as, like, a facility, the Arizona facility. But they're all under our whole system.

Mr. Ponder:

Director Dzurenda, as it relates to the PSI, you indicated that the information that is gathered off the PSI, that's used as a guideline for programming in prison. Can we talk a little bit more about those programs that would be available? I know we said substance abuse, but are there any other programs based off the information gathered off the PSI that they'd be able to utilize while in prison?

Mr. Dzurenda:

What we look at on the PSIs, it's only a piece of it. We also look at the evaluations from the clinicians, we look at the evaluations that the inmate actually gives themselves, the self-evaluation. All these things we look at based upon their mental health history on where we're going to be guiding them for their mental health service programming. Any type of behavior issues that were mentioned in the PSI and the corrections history will dictate whether they get certain dialectic behavioral therapies through anger management. All that information is broken down to say what we believe through evidence-based programming would be necessary to change those types of behaviors or to be able to get that individual stabilized enough so that we could make them successful. But it's a whole array of things. We did eliminate all those programs that were not evidence-based so that we're only using evidence-based programs for those determinations under the PSI and that other information to get the most amount of services for what we're paying for.

Mr. Ponder:

Once the information was gathered off the PSI and they got these services while they're in prison, is there a mechanism in place through parole that there can be a continuum of care this way so that those things that are getting addressed in prison, it just doesn't stop right at the gate, there's a continuum of care while they're still under the parameters of parole and/or probation?

Mr. Dzurenda:

We pretty much just started that up a year ago with our new reentry programs that we're doing and services so that we can make sure that whatever we are determining is the evidence-based program for the needs of that offender is transferred or given to our reentry team, who also refers that to the parole plan for that offender, which is also put in the community plan for when we release to the community providers, and it should be a continuum of care, especially if the offender did not complete those evidence-based programs or has a need to continue it. It all should be connected. I'm not saying it's perfect, but we're doing pretty well.

Mr. Segal:

Did I understand you correctly in saying that the decision about what type of mental health services or other care is based largely on the inmate's self-evaluation of their mental health needs?

Mr. Dzurenda:

No, not the major. It's all brought together. What happens is that all of the information that we gather goes to the clinician: the PSI, the self-evaluations, the evaluation or the interview with the inmate. All that goes to the clinicians and they do the follow-up treatment to say what they believe is necessary. They do their own evaluation, but it's used as a basis for the most important need at the time. If the PSI comes in and has a significant mental health history, we're not waiting for a clinician to say, "This person needs mental health services." We use that to refer them immediately to the mental health, who do their own evaluations based upon their other psychiatric evaluations and tests that they do. This is just a portion that alerts us to say that they have a need that we have to refer them to.

Judge Togliatti:

Do you keep track or a number of inmates that have mental health issues or a diagnosis or anything like that? Do you have a way of getting a number or a percentage or an approximation? Do you track that?

Mr. Dzurenda:

Yes, we do. We could identify those that are on psychotropic medication by number. We could identify those that are seriously mentally ill by a number, or those that have a mental illness or a need. Those are all tracked. Whatever the Commission wants us to do with mental health, we could break it down to give overall numbers for those that are receiving care today or those that had care in the past could also be broken down.

Judge Togliatti:

For the justice courts and some municipal courts in all of Clark County and outlying areas, I handle the competency calendar, and I'm particularly interested in getting those numbers from the prison, if you and the Commission are in agreement to request it.

Chair Hardesty:

Sure. I think that makes good sense.

Mr. Dzurenda:

You just have to be clear what you're looking for, because some of the data can overlap and you don't want to count inmates twice. They could be seriously mentally ill and also had received some other type of mental illness history that is not being treated at the time. It just has to be clear what data you're looking for. If you're just looking for seriously mentally ill, we could get you that because that doesn't change. Those that are on psychotropic medication, it could change periodically. We could get that snapshot. Those who have had past mental illness who are not currently being treated for a mental illness, we've got that snapshot, or the ones who are currently being treated for a mental illness, we have that snapshot. Just what is requested needs to be exact just so that it's not overlapped data.

Chair Hardesty:

What we're going to do, in the first meeting I had asked members of the Commission to provide input with respect to data they would like to see us obtain, whether it came from you folks or it came from other folks wasn't the point. It had to do more with the data collection. I'm going to make a similar request along with some additional requests here towards the end of the meeting, and then what we'll do is identify those various requests and then the Commission will clarify with the agency before we actually formally submit it so that there isn't some ambiguity surrounding the nature of the request so we don't have to do this multiple times and have a bunch of uncertainty about the data that's actually later produced.

This is a follow up to Sheriff Logan's question about tracking sentences from jurisdictions or by county. It's my recollection, and Mr. Anthony will have to dig this out,

somewhere in the Advisory Commission records, but it's my recollection that in 2010, Dr. Austin did a study, and I believe it was through data provided by NDOC that showed the sentencing patterns by judge. A report was generated that showed the incarceration rates in NDOC by judge. My first question is, can we expand that so that, as was suggested in the Virginia model and even in North Carolina, but focusing on Virginia for now, they were able to identify the sentencing practices of the judges as part of their study, and that's what they looked at. Their concern was that there was a disparity in the sentencing practices by judges for individuals who were charged with similar offenses with similar criminal histories. That was a floor for Virginia's guideline building and one of their concerns. I remember from the study that we did in 2010 that there was quite a disparity in the incarceration rates by judges around the state, but this is more specific. This is, for a residential burglary, what is Judge Freeman's sentencing practice and what is Judge Togliatti's sentencing practice with a defendant who has no prior criminal history? That's the kind of drill-down that was being done in Virginia to help guide their guidelines to address the disparity concern between judges. Is that data available? I recognize there are entry issues, Mr. Deal. I appreciate that point, but it would seem like since you're working off the judgments of conviction and the PSIs, the data at least is available to look at that for a certain period of time.

Mr. Deal:

That is one of the areas we need to keep records on. Unfortunately, the records are in the form of judgments of conviction over PSIs. There's not a location for that data object in OTIS. At this point, if we were to have to provide that data, we would have to go manually and look at every offense, every judgment of conviction and document that and put that into some sort of a spreadsheet, a vast undertaking.

Chair Hardesty:

Sure. My understanding is the University of Nevada may be willing to undertake that work. Would the records be in a place or would they be available in NDOC if those teams were willing to undertake that data compilation?

Mr. Deal:

We should have all records for anybody currently incarcerated in the central file locations up in Carson City.

Chair Hardesty:

What about those that have been expired terms or put on probation?

Mr. Deal:

Once they've paroled, the files come up through the central records. I believe we keep those, I'm not sure on the timeframe. At some point, they go to an archived location, our central archives. If they've been discharged for a period of time and we're looking at that sort of data for historical purposes, then we'd have to submit requests to have all those files returned, and there are some costs associated with that request and delivery process.

Chair Hardesty:

Great. Thank you Director and thank you Mr. Deal for being available today and making your presentation. I would like to ask Mr. Anthony to present to us. Meanwhile, I'd like all of you to look at your calendars and tell me whether or not you are available for our next meeting on March 16.

Nicolas Anthony (Commission Counsel, Senior Principal Deputy Legislative Counsel, Legal Division, Legislative Counsel Bureau):

I'm with the Legislative Counsel Bureau, nonpartisan staff to the Legislature and commission counsel to the Nevada Sentencing Commission. I'll just quickly go through this presentation ([Agenda Item XI](#)). The gist of this presentation is to give you a history of Nevada's development of categories of felonies. As you all are aware, we currently have five categories of felonies. Chair Hardesty has asked me to explain how we get to where we are today.

Just in terms of background, there are a number of ideals from criminologists and those who practice in the area of criminal justice and public safety that the criminal justice system should be responsive to public safety, victims' rights, retribution and deterrence. We've heard today from Virginia and North Carolina, uniformity, certainty, predictability, those kinds of factors should play into criminal justice decisions. With that said, the declaration of public policy contained at the beginning of Senate Bill (S.B.) 451, which is the enabling legislation for this very commission, outlines and enumerates a number of those factors, including fairness, proportionality and opportunity and the like.

Generally, there's thought to be three different types of sentencing structure. There's determinate sentencing, which is a fixed sentence. There is no judicial discretion. The statute simply says, "Do crime X, you're going to do time Y." There are sentencing guidelines, which we've heard about, often referred to as structured sentencing where you have a grid and it's up to the sentencing judge to look at the grid, go across the axis of prior convictions and down the list of statutory definitions for each offense set out by the legislature, come up with a sentence and it's based off the grid. Then there's what's called indeterminate sentencing, which is largely discretionary. The legislature will lay out a crime and the elements of a crime and provide a range of punishments, and then it's up to the judge at sentencing to determine the appropriate punishment.

Pre-1995 in Nevada, we had four different categories. They weren't labeled as categories, per se, but rather they were ranges of sentences. This was done largely in response to the model penal code that was enacted in 1962. The model penal code laid out that there should be at least three categories of offense. From that, states developed their own ranges, their own classifications, their own categories. In a state-by-state sentencing in 1994 according to the National Conference of State Legislatures (NCSL), five states had determinate sentencing with no judicial discretion, 16 states had sentencing guidelines at that time and 29 were indeterminate. Nevada was classified as indeterminate pre-1995.

With that said, political forces changed. There were a number of high-profile crimes. The crime rate across the country was going up in the early 1990s. In response to that, a number of states adopted what's called truth in sentencing. You've heard a couple other states reference that today. Nevada adopted their form of truth in sentencing during the 1995 Session. The idea was that the sentence should be measured and the defendant should know exactly what he or she is going to serve. The victim should also know exactly what that defendant is going to serve. The Nevada Legislature undertook S.B. 416, a rather lengthy bill. It was over 1,000 pages of legislative history. There were a number of hearings that went on, much debate and much input from national organizations, victims' groups, prosecutors, district attorneys all weighed in and they came up with Nevada's version of truth in sentencing. This was in response to, again, perhaps a political bent on tough on crime and a push for a more determinate sentencing. Pre-1995, you will recall we spoke about, Nevada had an indeterminate sentence, meaning the judge specifically assigned a defendant for a set period of years. If you were convicted of robbery, the judge could sentence you somewhere between 1 and 15 years, but often times it would just be for a set number, such as 10 years. There was no mandatory minimum, no maximum, just a set term, 10 years.

Pre-1995, we had the four different—I won't call them categories, but four different ranges. You had your most serious offenses, your death, life without, etc. You had 1 to 20 years, 1 to 10, and 1 to 6. Again, these were pretty broad ranges that the judge would then pick one term within the range. With truth in sentencing under S.B. 416, that was changed so that the judge now sets out a mandatory minimum and a maximum range. The goal was that the offender would serve that mandatory minimum before becoming parole eligible. There was nothing off the so-called front-end of the sentence they were going to do. If they had a sentence of 5 to 10 years, they were going to do 5 years at a minimum, 10 years at a maximum.

During that truth in sentencing shift by S.B. 416, the Legislature took it upon themselves to create five different categories of crimes, and that's what we have today. We have Category A, which are your most serious punishments resulting in death, life with or without parole. Category B is 1 to 20 years. Category C is 1 to 5 years. Category D is 1 to 4 years, and category E is 1 to 4 years. Where did the Legislature come up with five categories? What they did was they took the prior offenses, they looked at every crime, every sentence that was handed down in Nevada and they looked at what the offender

was actually sentenced to. They then took those sentences and broke them into five distinct categories. Some offenses moved up the list, some moved down the list. It was very similar to what they modeled after what Arizona had done in their truth in sentencing. As part of the trade-off there, you'll notice the new category essentially was Category E, mandatory probation. The less serious offenses moved down the ladder. Since then, there's been discussion that there have been new crimes created. Where they fit within the categories largely depends on the facts and the legislation, the legislative history, how it moves through the Legislature. I can tell you from experience having been on this side of the legislative staff for almost 20 years, there's a lot of debate that goes into each and every bill. The Legislature hears from prosecutors, from defense attorneys, from victims, from offenders before they make that determination, ultimately where a new crime will fit in within the existing Categories A through E. You'll see the number of crimes by category. If you'll recall, at the last meeting, we handed out some materials, just fact sheets that our office has prepared. They're on the legislative website as well. We categorize every single felony in Nevada. Currently, we have over 700 felonies. You'll see on this, Category A, 51 offenses. Zero new offenses were added in 2017. Category B offenses, 7 were added in 2017. Category C, 6 new offenses in 2017. In Category D, 3 new offenses. In Category E, 1 new offense. Speaking from experience, I can say it's kind of been a legislative process over the years. They also look at the fiscal impact of, when a new crime is created, how much prison time is that going to cost the state, how much does that hard bed cost? Are we going to have to develop and build new prisons? There's been a shift over time towards maybe making some new crimes lower on the category scale just for that very reason, more community-based, category mandatory probation to get away from some of those hard fiscal costs.

Chair Hardesty:

Before you move on, as an example of the 225 offenses that are in category B, which started off with a sentencing range of 1 to 20, we've gotten away from that sentencing range for quite a number of offenses in Category B, correct?

Mr. Anthony:

I don't know how many fall outside the range of 1 to 20. There are perhaps maybe a couple. I don't know off the top of my head. I could certainly look at the fact sheets and pull that number. I don't know that it would be substantial. I think there are a few instances in each category where the Legislature takes it upon themselves to fashion a penalty that's outside the category.

Chair Hardesty:

The reason I pose the question in part, in Virginia, they started off with six classes and then over time the legislature developed a whole bunch of offenses that they ended up having to call unclassified. I think one of the questions for our Commission to address is

whether we want to stay with categories. If so, how should those categories be defined so that going forward, at least offenses are placed within proper categories based on the sentencing range, if that's the definition, or do we want to just have a system that starts off with five categories and then you end up with a bunch of unclassified offenses? That's part of the question.

Mr. Anthony:

I will say, according to some research I've looked at, 14 states use no categories whatsoever. One of the most famous states for that is California next door. Don't know whether their sentencing structure is any better, worse, what have you, but there, you simply are convicted of robbery, you look at the robbery statute and the bottom of it provides the penalty. There are no categories or classifications. Some states such as Minnesota do the same thing, although they have guidelines. There are no categories or classifications, just guidelines. That is certainly an option that the Legislature could look at.

One of the questions that comes up oftentimes is, "Does Nevada still have truth in sentencing?" You'll hear about A.B. 510 a lot. That was a bill passed in 2007. What that bill did was allow sentences to be reduced off the front-end of the sentences, effectively, for lack of a better term, eviscerating truth in sentencing for certain crimes. To be fair on A.B. 510, it does not apply to Category A or B felonies, certain violent offenses, sex offenses and DUIs. But for those offenders convicted after 2007 of C, D or E felonies, that offender can get credits off their parole eligibility day, their front-end. That effectively removed truth in sentencing for about half our categories. There have been a number of other legislative changes over the years. Assembly Bill 142 in 2011 changed the theft thresholds. They hadn't been raised in a number of years. The Legislature felt it was imperative that perhaps maybe those should be adjusted, given inflation. There's also been an expansion to the diversionary programs. Several sentencing reforms have not passed or have been vetoed. For instance, A.B. 136 in 2011, which would have extended A.B. 510 credits to certain Category B felonies, was vetoed by the Governor. Assembly Bill 25 just this last session in 2017 authorizes the Governor, if he sees fit, to grant additional credits of up to 5 days each month, and then S.B. 451 established this very Commission. I think there's been a thought from the Legislature that perhaps this issue needs more study, and they're looking to this Commission for guidance. This Commission serves as an advisory body and has been allocated a bill draft to convey your thoughts to the Legislature.

With that, let me just add one more point that often gets asked when you're talking about what's the difference between Categories A, B, C, D and E. Again, the Legislature back in 1995 looked at all the sentences that were handed out and came up with the scheme A through E. If you look at them, Category A is typically your most serious offenses. These are your murder, sex offenses. Category B, typically crimes against the person. You have your batteries in there, robberies, pretty serious crimes. Category C, you get into perhaps some property crimes. D and E are substance abuse, controlled

substance violations. It's not to say there might be trafficking up in the higher ranges, but I think there was a look at that too. What is the end result to society and where do we want to place this on the range?

The last thing is, what different does it make if you're convicted of an A or a B, C, D or E? One of the major differences beyond the front-end parole eligibility that we talked about with A.B. 510 credits is the restoration of rights. That has shifted towards automatic restoration for almost everybody except for Category A felonies and certain Category B offenses. Also, in sealing the records, there can be a difference there. If you've been convicted of an A, B, C, D or E, the Legislature adjusted those time periods just this last session. That's one area where the category makes a difference beyond just saying, "I was convicted of a Category A and the penalty is such and such." There are statutory instances where the Legislature has decided Category A are our most serious felonies. You're not going to get your restoration of rights back automatically. You still have to apply for a pardon and go through that process. That's been a policy decision the Legislature has made.

Chair Hardesty:

I see no questions from the Commission. Thank you Mr. Anthony, we appreciate that. I'd like to move to agenda item VIII and conclude our meeting with a general discussion of what you've heard today and what you heard in our first meeting. It gets to the earlier question about data and data requests. I'll pose some general questions. Is the Commission interested in pursuing further information regarding what you heard regarding sentencing guideline states and including those that were presented today, or is this an area where the Commission has no interest and wants to inform the Legislature that we don't want to be a guidelines state under any circumstances? I'm not asking you to resolve the issue, I'm asking is this a topic you want to continue to pursue, because it kind of shapes what kind of data we should be requesting. Is there a need to further study certain of these areas? For example, if the Commission had an interest in one of the guidelines states that we heard from today, we'd want to try to find out what data is available similar to what they had used to assess whether or not it makes sense to pursue that. That would inform the kind of data that we have to start reaching out to our criminal justice partners and stakeholders on whether it's available. As an example, developing sentencing departures between judges. Is that an interest of the Commission? I would think it would be, but I'm not going to speak for you all. It's time for you to speak and tell us what your sense is. So, as a threshold question, does the Commission want to continue to study guidelines states? If so, are there particular states you'd like to have more information about?

Ms. Welborn:

The short answer is yes, I would definitely like to keep looking at different states that have adopted guidelines practices. We proceed with caution on those issues because we're very much against mandatory minimums, but there are certain states where

guidelines are better than the correct systems we have. To that point, one thing I want to make sure is very clear to this Commission is all of the work that was done through the Advisory Commission on the Administration of Justice that gave birth to S.B. 451 and the creation of this Commission, and that was really looking at the prison overcrowding issue. At least from my perspective, we were really looking at the prison overcrowding issue. I would really like to look at that data and for our state and really look at how or where these guidelines systems have actually resolved that problem in the states we're looking at. Based on some of the data we saw today, I don't really see this huge decrease in that, but I definitely think that's valuable knowledge for us to have as we drive forward.

Sheriff Logan:

We've gone through three of the more mandatory states, one of the more voluntary states and probably looking at states that were similar to construction to us, Utah, open space, that type of stuff, and maybe one other to have kind of a more rounded look, see what other ideas are out there. I'm still not sure how to narrow it all down to what we're looking for.

Chair Hardesty:

All right. So, you would be interested in a presentation from another western state or a state closer to our population that has a sentencing guidelines system?

Sheriff Logan:

Yes.

Mr. Hicks:

I'd give the same short answer to what Ms. Welborn gave, and that's yes. I think, in my opinion, a lot of the decisions we might have to make or recommendations we might make are going to be largely based on the data. To me, I think it's abundantly important for this Commission to know who's in our prisons, which we got a little bit of an insight on that today, but I think it needs a lot of work. Where they were sentenced from, what their race is. I also think it's really important, and I think the PSI is the critical element here. We also have to know what were the original charges. We also have to know what were the plea negotiations and what's the criminal history, because we could find out that we're doing it very wrong and we need a lot of reform, but we might also find out that a lot of the people who are in our prisons are the people we would expect to be. We just don't know that yet, and I don't know what the answer is. I would love to know. I think it's a tremendous amount of data to collect. I recognize the hurdles that probably exist, but I think it's a unique opportunity to do an in-depth study of who's coming into the system, what kind of diversion opportunities they're getting, how many probation opportunities they're getting, who's going into prison, are they in fact first time

offenders? If they are, what types of crime? Are they probation offenders, and if they are, what types of crime? And just an overall explanation in that regard I think could really help drive our decisions as to recommendations to the Legislature, recommendations for reclassifications of our felonies, if that's necessary. I'm very excited about all of this, but I think it's hugely important that we get accurate data about those defendants in our system first and foremost.

Judge Freeman:

I agree with Mr. Hicks in part. I think that data that involves our particular situation in the state is extremely important. I'm not certain we need a lot of presentations from other states as to how their sentencing commissions work. I say that not because I'm not interested, but because we have a tremendous amount of work to do and pretty limited time to get it done in. To me, and I'm only speaking for myself, delving further into the different types of sentencing commissions to determine the sentencing guideline-driven sentencing, I think everyone here has a pretty good grasp on that. I think we probably need to get the data that Mr. Hicks is talking about that's particularly germane to this state and start working on what our policies are going to be.

Mr. Burton:

I don't want to repeat things, but certainly I agree. We need to see the data from our state. What are the offenses of conviction, any other peripheral issues with regard to the convictions, the types of crimes. That's going to drive a lot of what I believe that we look at with regard to developing these guidelines.

Mr. Segal:

I would also like to learn a lot more about the sentencing guidelines. I think our number-one priority needs to be protecting the public, so I'd like to see a lot more research into the recidivism rates and, to the extent that we're going to look at alternatives to incarceration and prison, I'd like to know more about what types of alternatives can affect our recidivism in a positive way. I'd like to know about how successful our probation programs are in terms of making sure that people comply, they don't recidivate, they don't commit new crimes, how much of the restitution that judges order is getting paid to victims? I think that's really important. Of the people who are ordered to complete high school or its equivalency, how many of those people are actually doing those things? Those are the kinds of things I'd like to know, because I know that alternative sentencing is going to be an important consideration. We can't lock everyone up, but I'd like to know a lot more about what programs actually work. Following up on something that Chief Justice Douglas said, to the extent that we are referring people with drug problems and mental health problems out to programs in the community, I'd like to see if there's a way to make sure that those programs are accountable for results, because to the extent that we have for-profit companies out there who we are farming these people out to, I'd really like to see, is there a way to make those programs

more accountable, especially just looking recently at the sorry state of the way people with mental illnesses are cared for in this state. I'm referring to the recent audits regarding the community homes for the mentally ill. A lot of money is being spent on those programs, and yet the people are living in squalor, so I think we need to take a serious look at those programs.

Chair Hardesty:

I'd like to interrupt the process, partially based on Mr. Segal's comment. By a show of hands, how many on the Commission would be interested in more information about the locally focused programs through grant processes that Oregon uses? It's fairly substantial here in Carson. How about in Las Vegas? It seems to be pretty unanimous.

Senator Nicole Cannizzaro (Senatorial District No. 6):

Looks like we have most.

Chair Hardesty:

I'm sorry for interrupting and cutting off some of you who haven't had a chance to comment yet, but I do think the Commission ought to really drill down into these local opportunities. It seems to me, not only from a data collection standpoint and a data usage standpoint, but it's also a very attractive localized, "These are the kinds of things we could do best." I imagine Mr. Hicks would feel that, if he could sit down with a local council, you guys could formulate a pretty good plan about what's going to work best in Washoe County to try to slow or divert crime or deal with alternate sentencings. Is that fair?

Mr. Hicks:

Sure.

Chair Hardesty:

And you don't want to be told what to do by Sheriff Logan.

Mr. Hicks:

That's also fair.

Chair Hardesty:

Let's continue with other folks about whether we should continue to study the activities of other guideline states and the kind of data that we need to collect.

Senator Cannizzaro:

I think it would be fine to continue to look at other jurisdictions and how they've handled establishing guidelines as well. I think that's useful, but I think it's only useful to the extent that we can also, and I know everybody's sort of said this, so I'll reiterate and ditto others' comments, to the extent that we can use our own data to decide where and how much of that we would like to implement. A lot of what we see here in Clark County is that most cases resolve in some fashion, and most judges tend to follow those negotiations. So, whether there's disparity in sentencing I think needs to be broken down further, because oftentimes, if parties are agreeing to a particular prison term, that judge is following that recommendation. I think it would be particularly useful to look at cases where the judge is making that decision and it's not based simply on an agreement from the parties. Also, I think it would be useful for the people who we do have who are in NDOC, I think some of the data we had today illustrated that as well, that there are individuals who are incarcerated for Category E felonies, and they either are a probation revocation where they have been given a chance at community supervision, or they're someone who does have a lengthy criminal history and warrants incarceration even for something that otherwise would be a mandatory probation situation. Those are some of the data points that stuck out to me in terms of how we can make use of what we have here. I also think that some of these questions we received in the middle of the meeting from Assemblywoman Tolles, where she was asking about what, in terms of the arrest and conviction categories, violent versus nonviolent, victim or victimless crimes, victims known or unknown by the perpetrator, those I think are important things for us to consider as well if we're going to talk about how to structure those guidelines. I think the burglary statute that we've discussed today is an excellent pinpointing of that. A residential burglary with homeowners and victims is a very different situation than someone who is burglarizing a commercial business. I think from my standpoint, I'm welcome and be open to the idea of looking at other states who are implementing sentencing guidelines, but I think that without our own data to be brought before this Commission, it's a little hard to place where we would even start, so maybe looking at some more places here in Nevada that could give us some of that data would be useful.

Ms. Machnich:

To echo what the Senator just stated, I definitely want to look into more data with regard to disparities both by judge and by judicial district. I know that people have brought that up, and the Chair brought that up as something that we potentially want to hear. Additionally, deferment opportunities, this could be something that piggybacks off of information we receive from other states, because we've been focusing a lot on sentencing guidelines for offenses that would necessarily end up in prison, but are we setting aside potential guidelines and structures for offenses that may be more nonviolent drug-related offenses where deferment opportunities might be authorized by statute, utilized by statute, and what's used on the ground both here in Nevada, actually

contemplated by statute, used on the ground and implemented in Nevada, or potentially implemented in other jurisdictions that we're considering.

Ms. Jordan:

Due to the fact that we've heard over and over how important PSIs are, I would also like to add that I would be interested in collecting some type of data cross-jurisdictional regarding job qualifications of people who are actually doing the PSIs and the consistency, the case management tool that they're using and those types of things, because as we've heard from several states as well as our state, PSIs are extremely important and follow people throughout, and different facilities utilize the PSI, so I would be interested in just seeing that kind of consistency and research if possible.

Chair Hardesty:

Well Ms. Jordan, your comment is very timely. I'm sure Chief Wood from the Division of Parole and Probation will be happy to comment on that, because they've just gone through a whole new process, so we'll make sure that she makes a presentation on what they've done. It's a step forward. I think you'll be pleased to hear.

Ms. Jordan:

Thank you.

Chair Hardesty:

If I could just ask another question before we go to Dr. Neighbors up here and Mr. Dzurenda, by a show of hands without committing, and we're not voting on any measures, but by a show of hands, how many of you are concerned that our credit system, at least with respect to C, D and E felonies, undermines truth in sentencing? I would say that's a majority. I think we need to examine our credit system and how it's operating. I think we need to get some data with respect to that issue too. We'll go to Dr. Neighbors, then I'll ask another general question.

Elizabeth Neighbors, Ph.D. (Statewide Forensic Mental Health Program Director, Division of Public and Behavioral Health):

I would like to add a yes to continuing with the topic, probably with less extensive out-of-state, but the suggestion about Oregon's programs, I think it would be an interesting one to follow up on. I think it would be important to gather more local data on the nexus between mental illness and substance abuse issues and how decisions are made with diversion and programming by various venues and judges is important.

Mr. Dzurenda:

To me, the most important data is going to come from the jails and from the courts, not from the prisons, because we don't technically get all the felony convictions coming into the prison system, especially those on time served. They've been in the jail systems a while, they've made wheels and deals in the courthouses, we don't get those offenders, but the police departments know who they arrested and what they arrested them for, the courts know who they got and who they sentenced them with and what the charges were that they finalized and the sentences that go along with it. We don't necessarily get all the in-between data in NDOC, which might be misinformation.

Assemblywoman Tolles:

I'd just like to reiterate, and I don't want to oversimplify it, but a cost-benefit analysis of taking a look at the comparison of costs of programs and data collection systems and then seeing the benefit to increasing public safety, decreasing recidivism and decreasing costs to the prison system and long-term societal costs.

Chair Hardesty:

One of the things that I know to be the case because the Advisory Commission on the Administration of Justice developed this in the last session, Connecticut and its reform measures reduced its prison population by about 5,000 people over a 5-year period, right Director Dzurenda?

Mr. Dzurenda:

Correct.

Chair Hardesty:

So, I do intend to have Connecticut in some way present to the Commission so we can get specifically that state's population reduction, because that is clear—

Mr. Dzurenda:

The crime rates went down. It wasn't that the crime rates went up, but a reduction.

Chair Hardesty:

Right. So, I want to have Connecticut present, because that's a very real event that occurred in the last 6 years. That also has recidivism data as well. It also has a cost-benefit analysis that goes with it, because they invested money and they got a return for it because they avoided having to construct two prisons as a result of that. Since Mr. Schmidt is still here in the audience from Oregon, and thank you, one of the things that I

want to try to get from Oregon is a breakdown by jurisdiction of the types of programs that they sought grants for that they thought would be beneficial in diverting folks away from incarceration or alternatives to incarceration, some of those. But I think having examples of the kinds of programs that you're funding up there, and then a cost-benefit analysis of those programs and what they produced would be very, very helpful. Judge Togliatti, if you could refine your request, I know you have a great expertise in this area, but if you could refine your request about mental health data from the prison, that would be very helpful.

Judge Togliatti:

I'll be talking to Dr. Neighbors, the true expert.

Chair Hardesty:

Okay. If you folks could then send an email to Mr. Anthony and me, then we can talk to the prisons and be sure that they are able to answer the questions that you are posing.

Judge Freeman:

From a judicial perspective, I thought today was an excellent opportunity to see how different jurisdictions work, not only with the sentencing guidelines but with funding. At least, I for one since I've been on the bench have seen that we have such a significant criminal justice problem with people who were forced to sentence to prison because they haven't had an opportunity for other programs. It was very refreshing to me. What really gave me pause to think was the Oregon presentation, related to the fact that they had funding. What I got from it, in a very simplistic approach, is that the legislature was very interested in funding the various programs to keep offenders from going to prison by their recidivism rate, and that's one of the things that his commission looks at, is "Hey, your recidivism rate is going up. We hold the purse strings. Tell us a little bit about what's going on. We can do some improvements." It was very, very enlightening, because the basis of the funding was they didn't want to build a new prison, so I think Mr. Schmidt said they saved \$300,000,000 by spending \$40,000,000 on programs. I took a quick look, in conjunction with Judge Togliatti's concerns, because mental health is a big issue in Washoe County as well. We don't have enough funding for that to help offenders stay out of prison with mental health issues. There's a significant funding that's being done for mental health issues in Oregon based on what the county needs, and then there's money for that. That was very refreshing to me, so I learned a lot of things today that gave me pause for thought, so thank you Chair for your presentation and the people you invited today, because from a judicial perspective, Judge Togliatti and I in some ways are on the hot seat because you're talking about us and how we sentence and how we decide to sentence. For the record, she and I sentence exactly the same.

Chair Hardesty:

We'll soon learn that. I have one other important question to poll you on. Again, nobody's committed to this necessarily, but it gives us direction. We have heard that the term recidivism is defined in different ways, and that's always been a frustrating thing for as long as I've been a lawyer and a judge. I think it's going to be critical for this Commission to use as a baseline its definition of recidivism. I'd like to hear some conversation about that, because it makes a big difference in how we approach data collection and how we assess this. How do we want to examine or consider recidivism when we're doing our data build up? Anybody care to share an opinion on this?

Mr. Dzurenda:

Right now, NDOC cannot change the way we do recidivism, because there's a thing called the Second Chance Reentry grant that dictates how we actually do our reentry recidivism rate and what categories we use for it. So, if we do something different outside of here, it will contradict what we do in the prison system, but we can't change what we're doing. It's a reentry of any offender who left the system who actually comes back into the system. The corrections system, prisons, not the jails, so it doesn't calculate sentences that were time served from the jails or from the courts and let go. It has to be someone who actually walked back in our front door again and they calculate it that way, up to 3 years.

Chair Hardesty:

Up to 3 years, okay. So, somewhat similar to I believe it was North Carolina, a return to the prison within 3 years, either as a result of a probation violation or a new offense. Is that fair?

Mr. Dzurenda:

And the Second Chance Reentry grant doesn't dictate how, it just says that they came back.

Chair Hardesty:

They came back. All right, that's fair enough too. Does anybody have an objection to that approach?

Mr. Segal:

I think that approach and the approaches of the other states that we studied today is severely undercounting the actual recidivist rate by limiting the recidivist rate to reoffending within 2 years or 3 years I don't think accurately captures the actual recidivist rate and the threat that recidivism has with respect to the public. We're

defining it so narrowly that it means returning to NDOC in Nevada. I don't think any of those types of ways of going about calculating the recidivist rate really accurately measure the risk that these offenders have long-term to commit new crimes.

Mr. Ponder:

I believe the Chief Justice alluded to the question of what is the definition of recidivism? I know that we talk about it. If that person returns back to prison, but that person who has violated parole and is taken back into custody, should we not count that as recidivism because he or she is technically going back into the system? I guess what we really need to do is try to define exactly what is the true definition of recidivism.

Chair Hardesty:

That's exactly right. I think for us to have an understanding of what we're going to collect, we need to define the term. So, you would define it, Mr. Ponder, as a return to prison, but you would expand it to include someone who has sustained a probation violation also within a period of time?

Mr. Ponder:

Right. If you think about it, if a person is in the custody of NDOC and they go out on parole and there's a condition of their parole, and for whatever reason there's been a violation and he's been taken back into custody, I think that we should really take a real close look at, should that be considered recidivating? He's actually gone back into the system.

Chair Hardesty:

Would you consider a dirty test to qualify as recidivism?

Mr. Ponder:

I think that, where parole and probation is moving into right now, the dirty test I don't think necessarily brings someone back in on a violation.

Chair Hardesty:

Actually, it does.

Mr. Ponder:

Right. But I think there are alternatives to that individual not going back to prison. Maybe there's some kind of substance abuse treatment that they may be able to participate in.

But if that person's going back into the system, again, I think that the question is, he's gone back into the system, should that not be considered a part of the recidivism rate?

Chair Hardesty:

Mr. Schmidt, you wanted to comment on this?

Mr. Schmidt:

Just because Oregon has had this debate recently. When we originally changed our definition of recidivism in 2013, we defined it as a new arrest, conviction or incarceration for any reason. That was our original definition of recidivism. What we quickly found out is that, when you look at some of our programs like high intensive supervision or drug courts or things like that where you're monitoring people very closely, you're going to find things like dirty urinalysis (UA) for sure, but even less serious violations like maybe missing an appointment for treatment or something. You're going to figure out that the closer you supervise people, the higher your recidivism rates are if you define it as "for any reason." That's why Oregon changed to "for a new crime," because essentially, the better a job you do intensively supervising people, that could lead to you having a higher recidivism rate just because you're actually keeping track. I just felt compelled to share that with you because we have had that conversation and been through it. Recidivism changes incentives in our system, because programs want to show that they have low recidivism rates. You don't want your programs and your specialty courts not holding people accountable because it might adversely impact their recidivism rates if you define it a certain way.

Chair Hardesty:

So, as defined by Director Dzurenda, "A person who is released from the Nevada State correctional system and returned." He just handed me the statistics for January 1, 2014 through January 1, 2015. Of those who had been released from the Nevada State Prison and returned during that period of time, the recidivism rate was 28.64 percent. My memory since I've been associated with the Advisory Commission on the Administration of Justice, that 28 percent rate, I believe, has been the rate for probably 10 years around here in Nevada, of using that definition. If one were to change it slightly, consistent with Oregon's, it would say "a new offense," whether or not they've been incarcerated, so it'd probably expand the percentage, which is probably why you folks are closer to the 40 or 45 percent range, and probably why Virginia is closer to the 40 percent range also. It is important how you define it, really important.

Sheriff Logan:

If we're currently struggling with figuring out what somebody is charged with originally, what they're actually arrested for, what they're charged with, what they're convicted of, and that reporting system of having accurate information for the criminal history, how

then are we recommending that if, for a new arrest, even a contempt of court or anything for failing a drug test on drug court, how are we thinking we're going to be able to track that information any better than the current structure under the Nevada offense codes to show any arrests and any incarceration?

Chair Hardesty:

That's why we need to have this conversation, because it makes it that much more difficult to try to determine, if you change the definition to something along the lines—no offense, Mr. Ponder, but if you changed it to the suggestion just made, where you get the data from to be able to show that is going to be very, very difficult.

Sheriff Logan:

Smaller jails such as mine, it would possibly be easy to calculate that. The Clark County Detention Center, not even close.

Chair Hardesty:

No, you'd have no chance.

Sheriff Logan:

In Washoe County with 1,200 inmates, also difficult. We're asking for a possibility for something to possibly study that I don't think we could ever even come close to pinpointing, versus do they return to prison?

Chair Hardesty:

The Justice Department uses a definition for recidivism. I think it's the same as the one you're talking about, Director Dzurenda. Let's have everybody think about this a little bit. We'll need to take a vote on this policy. I have one additional poll I'd like to take. If you would all turn to agenda item VII from our last meeting, Kelly Mitchell's presentation, it had to do with the guideline goals and objectives. I'll ask these one at a time. Do you believe our recommendations from the Commission should foster proportionality in sentencing? Raise your hands if you agree. Do you believe that the recommendations of the Commission should secure public safety? Should one of the goals be to reduce disparity? That is in the context of race, gender and economic impact. Do you believe that one of our goals should be to manage correctional capacity? There are four hands in Vegas. How many up here on that subject? Okay. Finally, do you believe that one of our goals should be to achieve certainty in sentencing? How many hands are up in Vegas?

Senator Cannizzaro:

About seven.

Chair Hardesty:

All right. What I'm going to ask Mr. Anthony to do is, one of our agenda items will be to take some of these polls, they'll be on agendas so that we can formally vote on some of these issues at the next meeting so we have some direction about the decisions that we're making in the context of the goals and objectives that at least a majority of the Commission believes we should be pursuing. Are there any other general comments or questions that any of you have? I have one final request of all of you. In order for us to be productive on March 16, I need you to provide in the next 2 weeks an email to Mr. Anthony and to myself that identifies specifically, not some general "I want data," a specific request for data related to the subject matters we've been talking about today. Because when we have those, I'm going to sit down with Mr. Anthony and we're going to go through the data requests, try to synthesize them into a group listing, and then we're going to try to go around the state and figure out where we can find the data so that we can have that conversation and give you some indication on March 16 about where we might be able to locate the data.

Mr. Dzurenda:

Just to let you know, the Juvenile Justice Committee is going over a new CaseloadPRO computerized system that the juvenile system is going to use, and the local counties. They're just doing it now. They could probably incorporate a lot of this stuff if we want to look into that CaseloadPRO to get data that they could actually pull out of it. We have a meeting in 2 weeks, because I'm trying to get on that system as well, instead of our OTIS system. If I can get some of what we're looking for, I can bring it up to them and see if they can get any of this data.

Chair Hardesty:

Great. So again, please, 2 weeks. That doesn't mean March 15. That means 2 weeks from now. If you could please send an email to Mr. Anthony and myself indicating the specific data that you would like to see us recover. We've talked about some of it today, but we want to really operate from your written input.

Any other general questions or comments from members of the Commission before I open it up for public comment? Seeing none, I will now open public comment. Seeing none, I will now adjourn this meeting at 3:39 P.M.

RESPECTFULLY SUBMITTED:

Jordan Haas, Secretary

APPROVED BY:

Justice James Hardesty, Chair

Date: _____

Agenda Item	Witness/Agency	Description
A		Agenda
B		Attendance Roster
<u>Agenda Item IV</u>	Jordan Haas, Secretary	Draft Minutes of the November 27, 2017 Meeting
<u>Agenda Item VI</u>		Commission Members' Remarks Regarding Possible Study Topics
<u>Agenda Item VII</u>	Meredith Farrar-Owens, Director, Virginia Criminal Sentencing Commission	Overview of Virginia's Sentencing Guidelines System
<u>Agenda Item VIII A-1</u>	North Carolina Sentencing and Policy Advisory Commission	Presentation on the Sentencing Commission and Structured Sentencing in North Carolina
<u>Agenda Item VIII A-2</u>	North Carolina Sentencing and Policy Advisory Commission	Felony Punishments in North Carolina
<u>Agenda Item VIII A-3</u>	North Carolina Sentencing and Policy Advisory Commission	Misdemeanor Punishments in North Carolina
<u>Agenda Item VIII A-4</u>	North Carolina Sentencing and Policy Advisory Commission	History of the North Carolina Sentencing and Policy Advisory Commission
<u>Agenda Item IX</u>	Justice Michael Douglas, Chief Justice, Nevada Supreme Court	Presentation on Specialty Court Funding
<u>Agenda Item X</u>	Presentation on the Oregon Criminal Justice Commission	Michael Schmidt, Executive Director, Oregon Criminal Justice Commission
<u>Agenda Item XI</u>	Nicolas Anthony, Commission Counsel	History of Criminal Sentencing Categories in Nevada

Agenda Item XII A-1	James Dzurenda, Director, Nevada Department of Corrections	List of Property Offenses
Agenda Item XII A-2	James Dzurenda, Director, Nevada Department of Corrections	List of Drug Offenses
Agenda Item XII A-3	James Dzurenda, Director, Nevada Department of Corrections	Primary Offense Snapshot
Agenda Item XII A-4	James Dzurenda, Director, Nevada Department of Corrections	Inmate Population for Drug and Property Offenses