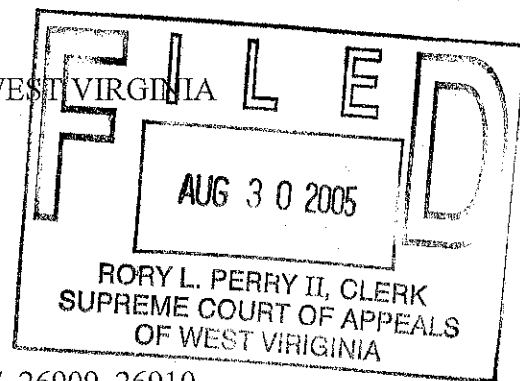


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA ex rel.
DANIEL L. SAMS, et al.,
Petitioners,

v.

Nos. 26647, 26909, 26910,
27308, 27309, and 26911

PAUL KIRBY, Commissioner, Division of
Corrections;

STEVEN D. CANTERBURY, Executive
Director of the Regional Jail and Correctional
Facility Authority; and

THE WEST VIRGINIA BOARD OF PROBATION
AND PAROLE,

Respondents

PETITIONERS' STATEMENT REGARDING EXTENT
TO WHICH EACH COMPONENT OF LONG-TERM PLAN
HAS BEEN IMPLEMENTED

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I. Introduction and Summary.

The implementation of the September 20, 2002, Long-Term Plan has been a failure, and as of August 29, 2005, the number of backlogged prisoners has risen to 1511 -- a number that is substantially higher than ever. As explained herein, there are readily available solutions to overcrowding, including those set forth in the Long-Term Plan. Many of the solutions lie in the hands of the Respondent Division of Corrections (DOC) and Parole Board, and the Respondents could promptly resolve the overcrowding problems if they chose to do so.

Instead, the Respondents have declined to comply with many of the recommendations in the Long-Term Plan, and, unlike their predecessors, have adopted practices that are among the primary causes of the skyrocketing backlog of prisoners in the first place: unreasonably low rates of granting parole, unreasonably high rates of revocation of good time credits and parole, a refusal to award extra good time, a refusal to identify appropriate candidates for commutation or early release, and a refusal to take almost any significant steps to reduce the number of prisoners in DOC custody.

In the year 2000, when the current litigation began, the total number of prisoners committed to DOC facilities but backlogged in regional and county jails was 745. By the time of the adoption of the September 20, 2002, Long-Term Plan for Reducing the Number of Prisoners Held in County and Regional Jails, the number of backlogged prisoners had risen to 857. According to current Regional Jail Authority data, as of August 29, 2005 -- nearly three years after the Long-Term Plan has been in effect -- rather than dropping in response to the Long-Term Plan, the number of backlogged prisoners has jumped to an alarming 1511, more than double the backlog that existed when this litigation began.

According to the projections set forth in the Long-Term Plan, the backlog of prisoners was expected to decline from 797 in June 2002 to only 38 prisoners by the end of June 2005. Instead, the reverse has occurred and the number of backlogged prisoners has skyrocketed. This backlog of DOC prisoners has forced the Regional Jail system to the point where, as of August 29, 2005, the Regional Jails are over capacity by 1181 prisoners -- the majority of them now sleeping on mats on the floors of dangerously overcrowded facilities.

Other jurisdictions that have struggled with similar issues have identified a variety of causes of overcrowding: massive population growth, a switch from indeterminate to determinate

sentencing, and the adoption of rigid sentencing guidelines. West Virginia has experienced none of these factors, however. Instead, the huge increase in West Virginia's prison population -- during a time of stable statewide population and declining crime rates -- is substantially attributable to factors that appear to be unique to West Virginia: a steep decline in the rate of granting parole, and harsh DOC and Parole Board practices regarding revocation of good time and revocation of parole.

In 1990, for example, the West Virginia Parole Board granted parole to 65.9 percent of prisoners appearing before the Board. Today, the rate is 37.2 percent. See Charts 2 and 3 (reproduced on pages 21 and 22 herein.)

The effect of this decline in the rate of granting parole is dramatic. As discussed in section III.B.4., below (pages 19-25), during the three years that the Long-Term Plan has been in effect, if the current Parole Board had granted parole at the 1990 rate, instead of having a backlog of prisoners, the DOC would be in the opposite position that they are in today -- the DOC would be overbuilt, with hundreds of beds they couldn't fill.

Similarly, harsh DOC practices regarding revocation of good time credits also appear to be contributing to the backlog. An example of the harsh good time practices is discussed in *Bailey v. Division of Corrections*, 213 W.Va. 563, 584 S.E.2d 197 (2003), where the Court was compelled to reverse the DOC practice of revoking more good time than had even been earned.

The harsh practices regarding revocation of Parole are reflected in the Parole Board's own data, where in calendar year 2004 the Parole Board revoked parole for 240 prisoners, all but 19 of them -- over 90 percent -- for what the Parole Board itself terms "technical" grounds.

As discussed herein, other jurisdictions have been forced to take drastic steps to release prisoners that the various local and state governments can no longer afford to house, in some

instances including mass pretrial release and mass release of prisoners who have served as little as 10 percent of their sentences. West Virginia, by contrast, has the ability to solve its overcrowding problem without shortening a single sentence: the state can simply release, under parole supervision, a greater percentage of prisoners who have already completed their minimum terms and are currently eligible for release.

As discussed in detail herein, there has been significant progress in the implementation of at least some aspects of the Long-Term Plan. Unfortunately, however, until the Parole Board and the DOC returns to a more realistic rate of granting parole and to a more realistic rate of revoking good time credits and parole, the problems of jail and prison overcrowding, and the resulting backlog of state prisoners in regional jails, will in all likelihood continue without substantial relief.

In 1987, in *State ex rel. Dodrill v. Scott*, 177 W.Va. 452, 457, 352 S.E.2d 741, 756 (1987), this Court praised the DOC for easing the backlog by its use of "good time awards, early release programs, commutations, transfers to other facilities, outside work projects, work release centers, and parole." By contrast, as set forth herein, the Respondents DOC and Parole Board have refused to take similar steps to reduce overcrowding and have refused to follow numerous recommendations set forth in the 2002 Long-Term Plan -- a Plan that the DOC participated in developing and that the DOC agreed to in the first place.

Because for the past three years the DOC and Parole Board have refused to comply with numerous components of the court-ordered Long-Term plan, and because of the resulting crisis of overcrowding in the Regional Jails, the Respondents should be compelled, by Court order, to take immediate steps to implement all components of the Long-Term plan and significantly reduce the overcrowding of the Regional Jails.

II. Procedural history.

On December 8, 2000, the Court appointed a Special Master and ordered the Special Master and the parties to create a long-range plan for the transfer to Division of Corrections facilities of those inmates lodged in regional and county jails who have been sentenced to DOC facilities and are awaiting transfer. *State ex rel. Sams v. Kirby*, 208 W.Va. 726, 542 S.E.2d 889 (2000). The Special Master submitted Part I, a Short-Term Plan, on May 29, 2001. Part II, the Long-Term Plan, was completed on September 20, 2002, and was submitted to the Court on October 9, 2002.

By per curiam Order of December 2, 2002, the Court received the Long-Term Plan, and submitted it to the Executive and Legislative branches for their consideration. The Court stated that it would reassess the progress in the implementation of the Long-Term Plan within one year.

On October 10, 2003, the Court joined the Board of Probation and Parole as a party in this case, and directed that the Respondents each furnish a report to the Court, by January 12, 2004, containing updated statistical and other information regarding the backlog of prisoners. The Court further ordered that the parties file a written statement by June 14, 2004, outlining the extent to which the long-range plan has been implemented. On July 11, 2005, the Court ordered that the parties file by August 30, 2005 a statement regarding the extent to which each component of the September 20, 2002, Long-Term Plan has been implemented.

This Statement is in compliance with the July 11, 2005, order of the Court.

III. Progress in Implementation of Long-Term Plan.

A. General Overview of Progress in Implementation of Long-Term Plan.

As directed by the Court, the Petitioners, in Part III.B., below (pages 14-34), review the extent to which each component of the September 20, 2002, Long-Term Plan has been implemented. In reviewing this progress, however, it is important to acknowledge some general developments that have a significant impact on overcrowding issues.

1. Rate of growth rate in new commitments to DOC.

The number of new commitments to the DOC grew dramatically during the 1990's, with a substantial impact on the total DOC population. As reflected in the following table, however, the rate has slowed in recent years, presumably in response to steadily declining crime rates. Unfortunately, in the calendar year 2004, the number of commitments, once again, increased sharply.

TABLE 1: New Commitment Orders to DOC

<u>Year</u>	<u>Commitments</u>	<u>Annual Change</u>	
		<u>#</u>	<u>%</u>
1993	790		
1994	938	148	18.7 %
1995	1,104	166	17.7 %
1996	1,240	136	12.3 %
1997	1,551	311	25.1 %
1998	1,747	196	12.6 %
1999	1,878	131	7.5 %
2000	1,959	81	4.3 %
2001	1,991	32	1.6 %
2002	2,161	170	8.5 %
2003	2,242	81	3.7 %
2004	2,468	226	10.1 %

There are several puzzling aspects to this dramatic growth of new commitments. With crime rates currently lower than the crime rates of the 1990's, with West Virginia's total statewide population remaining relatively constant, and with the increased use of home confinement and other alternatives to incarceration, it is difficult to understand why the DOC received only 790 commitments in 1990, while receiving more than three times that many in 2004. Additionally, the abrupt increase in commitments in the year 2004 is a troubling sign with an unclear cause, but it is not possible to predict whether the increase in 2004 represents a developing trend which should be addressed, or simply a short-term anomaly which can be disregarded.

The September 20, 2002, Long-Term Plan was based in part on the "Correctional Population Forecast, 2000-2010," produced by the West Virginia Division of Criminal Justice Services and George Washington University in February 2001. This forecast contained a projected commitment increase of 3.1% per year. Correctional Population Forecast, p. 21.

As reflected in the above table, except for the year 2001, in each year since the date of the forecast, the increase in commitments has exceeded the projected estimate. And despite the prolonged decline in West Virginia crime rates, for reasons that are difficult to understand there has not yet been a year with declining commitments.

2. Increase in DOC population, in excess of the rate of increase in commitments.

Although the number of new commitments to DOC custody continues to grow, as reflected in Table 1, in most recent years the total population committed to DOC custody has grown at a rate greater than the rate of new commitments.

TABLE 2: DOC Yearly Average Inmate Population

<u>Year</u>	<u>DOC Population</u>	<u>Annual Change</u>	
		<u>#</u>	<u>%</u>
1993	2176		
1994	2392	216	10.1
1995	2385	-7	-.3
1996	2694	309	13.0
1997	3078	384	14.2
1999	3633	243	7.2
2000	3772	139	3.8
2001	4106	334	8.8
2002	4438	332	8.1
2003	4671	233	5.2
2004	4964	293	6.3
2005 (as of June 30)	5252	288	5.8

The crime rates in West Virginia have dropped dramatically in recent years. "West Virginia's Low Crime Rate Drops Even More" Charleston Gazette, October 30, 2003, 9A (citing FBI Uniform Crime Reporting Statistics). Despite the steep decline in crime rates, the lack of growth in the total statewide West Virginia population, and the aging of the statewide population beyond the prime crime-committing years (factors which should result in a reduction in the prison population) the total population of DOC prisoners continues to rise at troubling rates.

The population forecast set forth in the Appendices to the September 20, 2002, Long-Term Plan predicted a DOC population in 2005 of 4,936 -- a prediction that seemed excessively pessimistic in light of falling crime rates. Instead, the current DOC population exceeds the population forecast by 316 prisoners.

As explained in more detail in part III.B.4., below (pages 19-25), although numerous factors may have contributed to the growth in DOC population, the dramatic increase in prisoner population since 1990 coincides with a similarly dramatic decrease in the rate of granting parole.

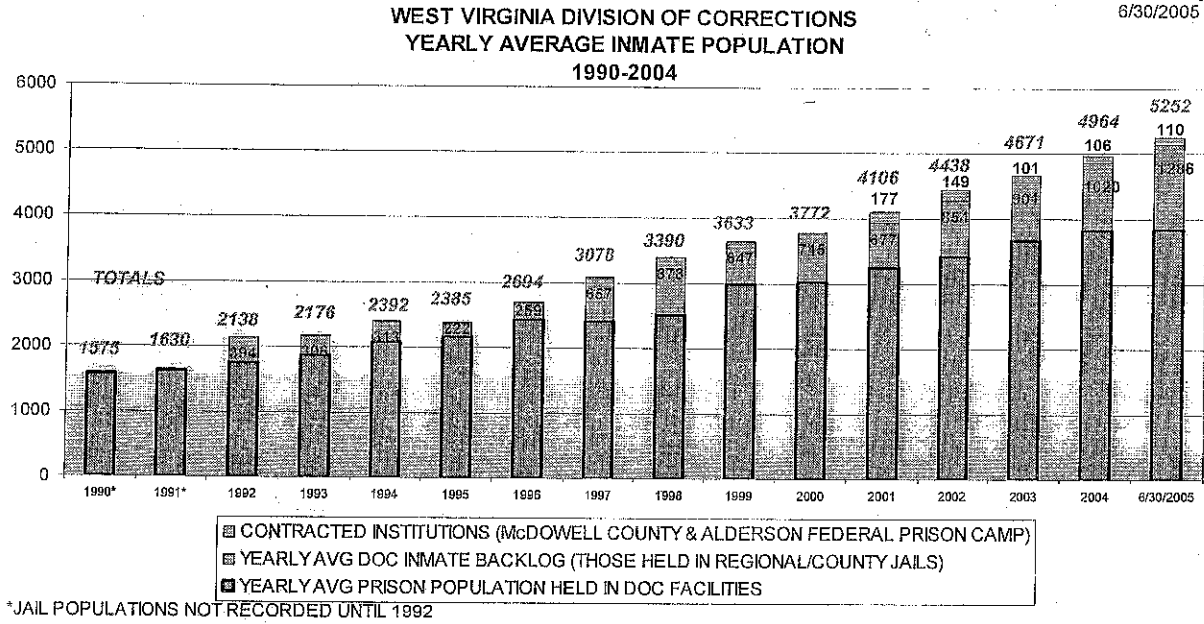
The recent declines in crime rates would have produced a concurrent decline in DOC population, were it not for West Virginia's unusually low rate of granting parole, coinciding with an unusually high rate of good time and parole revocation.

3. Increase in backlog of prisoners sentenced to DOC facilities, lodged in regional jails while awaiting transfer to DOC facilities.

As may be expected from the continuing increase in DOC population, set forth above, the number of prisoners committed to DOC facilities but backlogged in regional jails continues to grow. The growth has been significant: from 222 in 1995, to 745 in 2000 (the year that this litigation began), to 854 in 2002 (the year the Long-Term Plan was adopted), to 949 at the time of the June 14, 2004, Statements to the Court, to an annual average of 1286 as of June 30, 2005, to a staggering 1511 as of August 29, 2005. The full extent of the growth (absent the August 29, 2005 Regional Jail data) is set forth in Chart 1 (page 10).

The growth in backlogged prisoners is not inevitable. In fact, the growth runs counter to many factors, including the increase in DOC capacity (additional construction and double-bunking), declining crime rates, and increased use of alternative sentencing procedures. As set forth in more detail in part III.B.4. (pages 19-25), with a more moderate, realistic rate of granting parole, and with more moderate practices in revoking good time and parole, the overcrowding could soon be reversed and the DOC placed in the opposite position of having more beds than it could fill.

Chart 1. Increase in DOC prisoners held in regional and county jails:



4. Closure of county jails.

At the time of the September 20, 2002, Long-Term Report, perhaps the most troubling aspect of the backlog of prisoners was the particularly disturbing conditions that prevailed in some of the county jails. In a March 26, 2001, report to the Special Master, for example, counsel for the Petitioners described the squalid conditions then existing in the Cabell County Jail:

In cell 5F East . . . fifteen prisoners are packed into a single ten-bunk cell. Five of the fifteen prisoners in this cell are sleeping on mats on the floor. There is a single toilet. According to jail officials, for five days a week the men remain in that single cell for 23 hours per day. For the remaining two days per week, the men remain in the cell for 24 hours per day, never leaving these cramped quarters at all. According to jail officials, the prisoners receive no counseling, no educational program, and only leave the cell for 1 hour a day, five days a week, for exercise. The cell contains county and state prisoners mixed together.

When the current litigation began in the year 2000, of the over 850 backlogged DOC prisoners, approximately 400 were held in county jails, many for several years at a time. The County Jails still open in the year 2000 included Barbour, Cabell, Lincoln, Mason, Pocahontas, Preston, Putnam, Randolph, Taylor, and Wayne Counties. Fortunately, during the course of this litigation the regional jail system has expanded, resulting in the closing of all of the county jails. According to information provided by the DOC and Regional Jail Authority, in August 2005, the Tygart Valley Regional Jail opened and the last of the county jails closed.

Although regional jails are designed for short-term incarceration only, and have neither the facilities nor the programs for long-term incarceration, the closure of the county jails represents significant progress. Removal of DOC prisoners from county jails does not solve the problem of inappropriate long-term placement of prisoners if it only means transfer from one inappropriate facility to another, yet the overcrowded conditions in the regional jails, however inappropriate for DOC prisoners, are a significant improvement over the overcrowded conditions in the county jails.

5. Length of confinement in regional jails.

Although, as set forth above, the total number of DOC prisoners confined to regional jails is still increasing, in the past year the length of their stays appears to have decreased. According to recent DOC data, in 2004 the average number of days between commitment to DOC and transfer to DOC facilities was 250 days. For the year 2005, the number has dropped to 190 days. An average of 190 days from commitment to intake is nevertheless excessive, considering that many prisoners have also spent additional periods of time in the same regional jail in *pretrial*

confinement. Nevertheless, the reduction in average length of stay also represents at least some progress.

Although the *average* length of time for backlogged prisoners is 190 days, numerous prisoners remain in backlogged status for much longer periods. According to recent DOC data, as of August 22, 2005, the longest period of time a DOC prisoner has currently been in a jail is nearly two-and-a-half years (DOC commitment order received March 20, 2003, prisoner still in jail on August 22, 2005.) Counting pretrial detention, the longest time currently served by a DOC in a jail is over three years (booked into jail on July 18, 2002, still in regional jail as of August 22, 2005).

6. Comparative overcrowding of facilities.

Recent inspection of regional jail and prison facilities by counsel for the Petitioners confirms that the burden of overcrowding is still not being shared equally between the regional jails and DOC facilities. During an inspection of the Southern Regional Jail on April 7, 2004, for example, the Regional Jail, with a design capacity of 300, contained 484 prisoners.

Approximately 120 of those prisoners were double-bunked in single-bunk cells, so that they were sleeping on mats on the cell floors. The prisoners receive one hour of outside recreation per day, but with the overcrowding and limited recreation space, the recreation is sometimes forced to occur in shifts that run all night long. Except for a limited number of short-term classes, the prisoners spend the remaining 23 hours of most days in their cells or in the day area of their section of cells -- a space containing tables and chairs, a television with two channels, and little more.

According to jail administrators, the stress and friction of regional jail overcrowding, as well as the prolonged idleness in absence of long-term programs, leads to a number of problems, including an increase in fights among prisoners and assaults upon guards.

By contrast, in the 2004 inspection of the DOC facility at Mt. Olive, counsel for the prisoners was advised that the mainline population is confined to cells only from 9:30 pm, when the yard closes, to 7:00 am the next morning, when the yard opens again. From 7:00 am to 9:30 pm, prisoners are able to work in the prison industries programs, go to school, or spend time in the gymnasium, the library, or the yard. By comparison to regional jail facilities (1025 prisoners currently sleeping on mats on the floors), the cell blocks, gymnasium, library and yard at Mt. Olive appear to be spacious and uncrowded.

Although the Court's order in *State ex rel. Stull v. Davis*, 203 W.Va. 405, 508 S.E.2d 122 (1998), and the Short-Term Plan submitted in this matter on May 29, 2001, resulted in a limited amount of double-bunking at DOC facilities, Mt. Olive has since reduced the amount of double-bunking so that the stress of overcrowding once again appears to be borne disproportionately by the regional jails.

The goal of this proceeding is not sharing of overcrowding, however. The goal is the elimination or the substantial reduction of overcrowding and the resulting backlog of DOC prisoners in county and regional jails. Nevertheless, as long as overcrowding remains, it should be shared equally, if not borne disproportionately by the DOC facilities to which prisoners are committed in the first place, rather than borne by the regional jails.

B. Progress in Implementation of Specific Components of Long-Term Plan.

The September 20, 2002, Long-Term Plan consists of four components. The first component involves construction of additional bed space where such projects are already funded or approved. The remaining three components involve the options of changing sentencing practices, contracting with out-of-state prisons, and proposing additional construction projects. As set forth below, despite the overall increase in the number of backlogged prisoners, there has been progress in the implementation of some of the recommendations in the Long-Term Plan, progress which has prevented the backlog from growing at an even higher rate.

Component 1 of the Long-Term Plan: Implementation of already approved or funded prison bed construction.

The Long-Term Plan includes the completion of six construction projects that were already either approved or funded. The executive summary, on page 7 of the Plan, states:

"The state should adopt a six-point program of prison expansion that would increase its capacity from 3,640 to 4,797. They are:

- The completion of the Lakin Correctional Center, by adding 360 beds, in order to accommodate the majority of the female prison population.
- The completion of the St. Mary's Correctional Center for medium custody male prisoners by adding 396 beds.
- The renovation of the Stevens Clinic by providing 280 beds for medium and minimum custody males, operated under contract with the McDowell County Commission.
- The renovation of the Old Eastern Regional Jail to be used for intake/ classification and other special purposes by providing 120 beds.
- Expansion of the Mt. Olive Correctional Complex by adding 144 beds.

-- Expansion of the Huttonsville Correctional Center by adding 200 beds."

Based on a review of the January 2004 reports of the Respondents, and based on updated information provided in August 2005 by the Division of Corrections, it appears that from September 20, 2002, until today, the plans for the Lakin Correctional Center have been mostly completed, the plans for the St. Marys Correctional Center have been partially completed, the plans for the Stevens Clinic are nearly completed, the renovation of the old Eastern Regional Jail has been almost completed, the expansion of the Mt. Olive Correctional Complex has not occurred at all, and the expansion of the Huttonsville Correctional Center is currently underway.

Because the details of prison expansion are primarily within the knowledge of the Respondents, rather than the Petitioners, the Petitioners defer to the Respondents for a more detailed update on prison expansion plans.

The DOC backlog in Regional Jails has skyrocketed, rather than declined, in the period in which the Long-Term Plan has been in effect. In conjunction with the prohibitive costs of building new prisons, it is apparent that prison construction is not the answer to the overpopulation problems within DOC and the Regional Jails, particularly in light of the far less costly and far more reasonable alternatives set forth herein. See, for example, Appalachian Institute, West Virginia Council of Churches, and Grassroots Leadership, 2005 Report, "Protecting the Future: Moderating West Virginia's Budget Crisis" (recommending that state funds be directed to educational and social services instead of prison construction by various changes in policy, including full funding of day reporting centers and other alternatives to incarceration, increasing rates of granting parole to reach national averages, and capping the number of people in the state's prison system); "Report: Prison Costs Hurting Education, Sunday

Gazette-Mail, May 15, 2005, 3B; "Prison Spending Doubles," Charleston Gazette, February 15, 2005, 1A.

Component 2 of the Long-Term Plan (Option A): Changes in Sentencing and Parole Practices and Policies.

The Long-Term Plan contains thirteen recommendations for changes in sentencing and parole practices and policies. (These proposals are set forth on pages 7-10 of the executive summary in the Long-Term Plan, and are discussed in more detail on pages 30-35 and 55-62 of the Plan.) The status of their implementation is as follows:

1. Sentencing changes (first degree robbery).

Some sentencing statutes in West Virginia appear to be unduly or disproportionately excessive. See, e.g., "State Inmates Serve Some of the Longest Sentences in the U.S." Charleston Daily Mail, January 12, 2002 (citing Bureau of Justice Statistics), and "State Jail Terms Longer: Study Says Violent Criminals Get Stiffer Sentences in W.Va." Charleston Daily Mail, April 22, 1999 1A (citing U.S. Department of Justice data).

The statutory sentence in West Virginia for first degree (aggravated) robbery and for attempted first degree robbery is a determinate sentence of with a ten-year minimum and an unlimited maximum. W.Va. Code § 61-2-12 (a). The absence of a maximum sentence enables sentencing judges to impose terms of years that, compared to sentences imposed in other states, appear to be excessively long, in some instances in excess of one hundred years. *State v. Ross*, 184 W.Va. 579, 402 S.E.2d 248 (1990) (100 year sentence for attempted aggravated robbery);

"Man Receives Life Sentences Plus 240 Years in Prison," Charleston Daily Mail, July 26, 2005, 6A (240 year sentence for robbery, Circuit Court of Ohio County, West Virginia).

By contrast to West Virginia sentences, neighboring states have much shorter penalties for aggravated robbery. The Long-Term Plan cites the examples of aggravated robbery statutes in Kentucky (ten to twenty years, Ky. Code § 5.5020; 532.060); Maryland (not more than twenty years, Md. Code Art. 27, § 4880); Ohio (ten year maximum, Oh. Code § 2929.140); and Pennsylvania (not more than twenty years, Pa. Code § 3701; 1103). September 20, 2002, Long-Term Plan, p. 31.

The Long-Term Plan recommends a reduction in the statutory sentence for first degree robbery from a determinate ten year minimum with no maximum sentence to a determinate sentence of no less than five years and no greater than twenty. (September 20, 2002, Long-Term Plan, Executive Summary, pp. 7-8; text pp. 30-33)

A bill was introduced in the 2003 Legislature to reduce the sentence for aggravated and attempted aggravated robbery to a maximum of forty years. S.B. 199 (2003). Unfortunately, the bill died in committee. To the best of the Petitioners' knowledge, the bill was not reintroduced in either 2004 or 2005.

The effort to amend the sentence for first degree robbery should be revived, in order to bring the West Virginia penalty into conformity with the penalty in neighboring states.

2. Sentencing changes (life without parole).

According to data provided by the Division of Corrections, as of June 30, 2001, the Division of Corrections housed 204 prisoners serving sentences of life without parole. By June 30, 2004, this number has grown to 230. Because under West Virginia law, the Division of

Corrections must house these prisoners until their death, the growing number of elderly inmates presents a serious strain on DOC capacities and budgets. "Aging Inmates Create New Set of Challenges: States Struggle for Options, Deal With Tight Budgets," Charleston Daily Mail, December 22, 1999.

Other states have addressed the issue of the review of prisoners serving life sentences. In South Carolina, for example, prisoners sentenced to life without parole may have their sentences reviewed upon request of the Department of Corrections and upon the passage of certain combinations of age and years served, as well as illness and extraordinary circumstances. South Carolina Code § 17-25-45(E.)

The Long-Term Plan proposed the creation of a Life Without Parole Review Board, under which prisoners who have reached fifty years of age, have served a minimum of fifteen years, and have five years of conduct free of rule violations, could be considered for parole release by a specialized review board. (September 20, 2002, Long-Term Plan, Executive Summary, p. 8; text p. 33-34)

Such a change in life without parole sentences requires legislative action. To the best of the Petitioners' knowledge, no such legislation has been introduced. To relieve overcrowding and to relieve the extraordinary costs of caring for an elderly population, an effort should be made to introduce legislation to create a Life Without Parole Review Board.

3. Parole revocation.

The September 20, 2002, Long-Term Plan pointed out the high rate of parole revocation for technical violations. (Technical violations involve such matters as failure to maintain suitable employment, failure to report change of address within 72 hours, use of alcohol, and

other non-criminal violations of the rules of parole.) In the year 1999, for example, 93 percent of the parole revocations, representing 206 prisoners, were revoked for technical reasons only.

The Long-Term Plan recommended an increase in the use of intermediate sanctions, such as electronic monitoring, for those who have technically violated the conditions of their release, rather than immediately returning technical violators to prison. (September 20, 2002, Long-Term Plan, Executive Summary, p. 8; text pp. 18-20, 34-35)

According to recent Parole Board data, however, the rate of parole revocations upon technical grounds is nearly as high as ever. In the calendar year 2004, for example, of the 240 parole revocations, all but 19 were for what the parole board itself defines as "technical" reasons -- a disturbingly high rate of 92 percent.

The Parole Board should be required to reduce the rate of revocation for technical reasons only, by significantly increasing the use of intermediate sanctions.

4. Parole rates.

By far the greatest cause of the overcrowded DOC population is the dramatic decline in the Parole Board's rate of granting parole. In fiscal year 1990, for example, the Parole Board granted parole to 65.9 percent of the prisoners who appeared before the Board. By fiscal year 2001, the rate had dropped to 27.3 percent. According to the most recent data from the Board and the DOC, in fiscal year 2005, ending June 30, 2005, the rate of granting parole was 37.2 percent.

The Long-Term Plan recommended that the Parole Board, in cooperation with the DOC, Regional Jail and Correctional Facility Authority develop policies that would allow for grant rates to increase, thereby reducing overcrowding and reducing the need for new construction, if

such can be accomplished without unduly jeopardizing public safety. (September 20, 2002, Long-Term Plan, Executive Summary, pp. 8-9; text pp. 16-18).

As set forth in Charts 2 and 3 (on pages 21 and 22, herein), in the year 2000, at the time that the Court first ordered the parties to develop a Long-Term Plan, the rate of granting parole was 41.9 percent (fiscal year 2000). In 2005 -- five years later -- despite the recommendations of the Long-Term Plan, and despite the addition of the Parole Board as a Respondent in this proceeding, the rate of granting parole is lower than it was in 2000: 37.2 percent.

The low rate of granting of parole is by far the most significant factor in the development of the overcrowding that the DOC faces today. The Parole Board currently conducts about 2500 hearings per year. Consequently, each change of 10 percent in the rate of granting parole currently translates into approximately 250 prisoners per year. The drop of 28.7 percent from the 1990 rate of granting parole to the 2005 rate of granting parole equates to about 720 prisoners per year.

In the three years that the Long-Term Plan has been in effect, if the Parole Board granted parole at the rate of the 1990 Parole Board, rather than having a backlog of prisoners, West Virginia would be in precisely the opposite circumstance that it is in today, with hundreds of empty beds -- enough empty beds that the DOC could close an entire prison.

Instead, despite years of costly construction, West Virginia now has a backlog of 1511 prisoners who can't even be squeezed into our existing prisons. The cost is enormous. As of a few years ago, the expense of keeping each single prisoner was estimated to be nearly \$20,000 per inmate. The cost is even higher today. Based on the approximate cost of \$20,000 per prisoner per year, if the current Parole Board granted parole at the 1990 rate, the state would save over \$14 million in one year alone.

Chart 2. WV Parole Board % of those Interviewed that were Granted Parole - FY 1990 - 2005

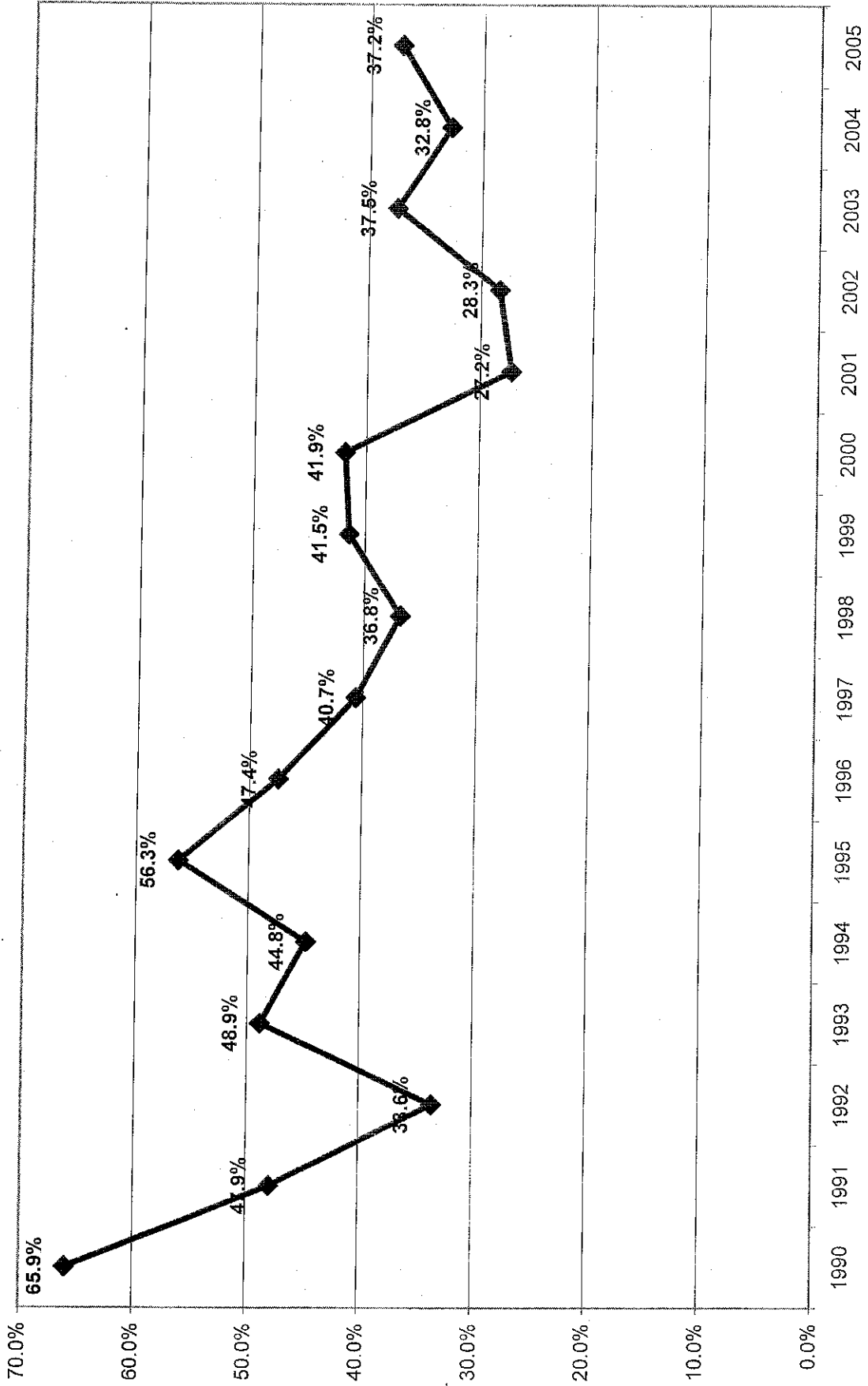
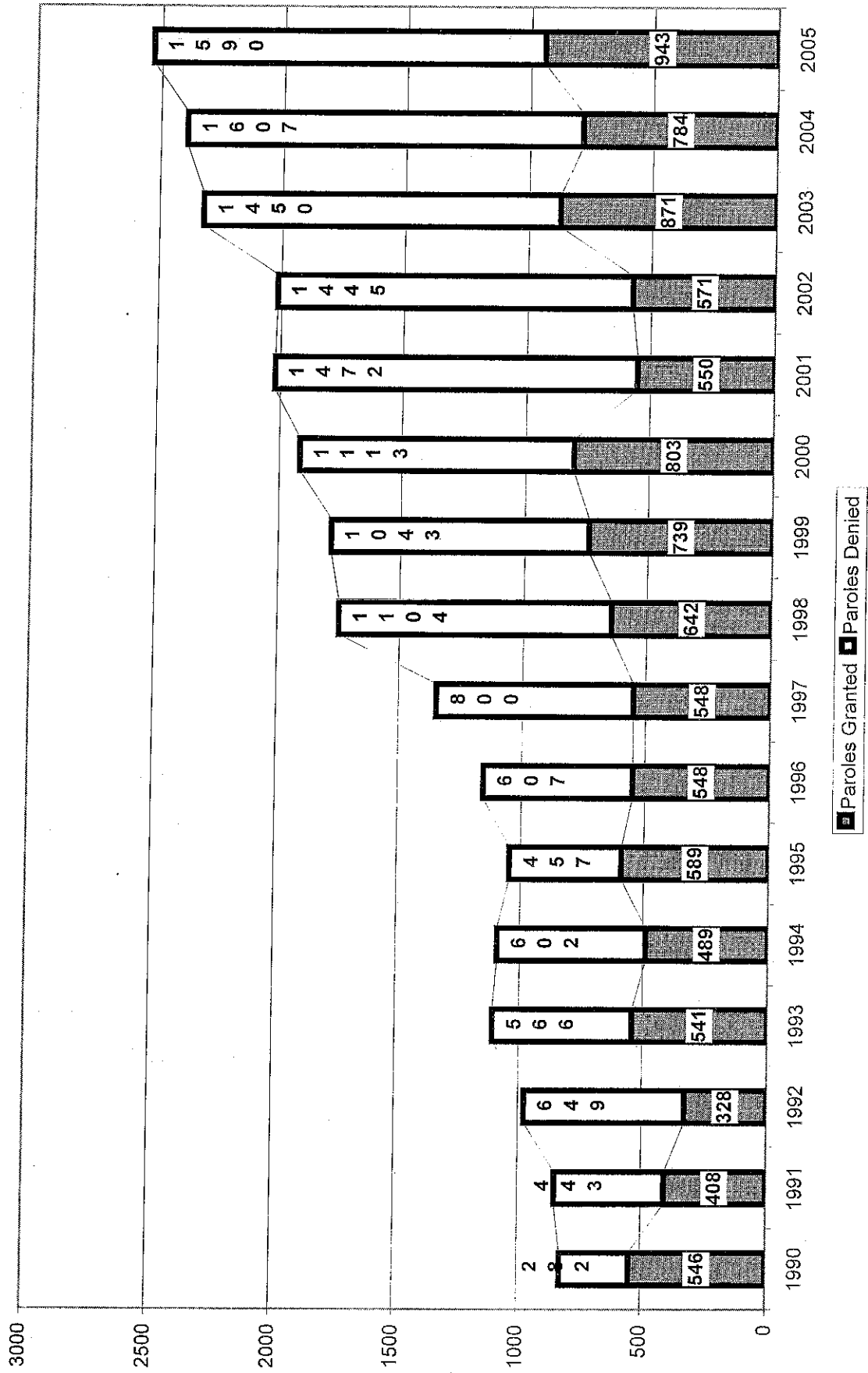


Chart 3. WV Parole Board Grants Vs. Denials FY 1990-2005



In a survey of parole grant rates in other comparable states, as set forth in the Long-Term Plan, p. 18, West Virginia's parole rate is the lowest. Data for the rate of granting parole in West Virginia has been maintained only since 1990. During that period of time, the highest rate of granting parole was the rate of 65.9 percent in 1990. The lowest rate was 27.2 percent in 2001. If, instead of either extreme, these highest and lowest rates were averaged, the Parole Board would be granting parole at an intermediate, moderate parole rate of about 47 percent. The effect of a 47 percent rate on the state correctional system and its budget would be dramatic. Within a short time, the entire backlog of prisoners, many sleeping on mats on the floors of the regional jails, would be absorbed into the correctional system where they could all receive at least some level of treatment and rehabilitation. With this intermediate parole rate, during the nearly five years since this litigation began, the entire backlog of prisoners would have vanished, and instead of spending millions more in new prison construction, the State would be saving millions per year in operating costs.

There is nothing extreme about granting parole at a rate of 47 percent. According to the Parole Board's own data, the Parole Board had a grant rate higher than 47 percent in 1990 (65.9 percent), 1991 (47.9 percent), 1993 (48.9 percent), 1995 (56.3 percent), and 1996 (47.4 percent).

In the last fiscal year alone, the Parole Board denied parole to 1590 prisoners -- that is, in just the last year, the DOC is holding 1590 prisoners who have passed their dates of parole eligibility. By contrast, the Parole Board in 1990 denied parole to only 282 prisoners.

There is little that has changed since 1990 to account for this dramatic difference, and most of the changes, such as declining crime rates, should result in a smaller prison population rather than a larger one. "West Virginia's Low Crime Rate Drops Even More" Charleston Gazette, October 30, 2003, 9A; "Violent Crime Declines to Lowest Rate Since '73," Charleston

Gazette, December 28, 1998, 1A; "Crime Rate Continues Descent," USA Today, August 28, 2000, 3A; "FBI Says Serious Crime Down For Seventh Year In a Row," Charleston Daily Mail, May 17, 1999.

According to U.S. Census Bureau statistics, since 1990 the total West Virginia population has remained stable, while the population has aged. All of these factors should have contributed to a shrinking prison population. Yet the prison population was remarkably smaller in 1990 than it is today. The primary reason should be obvious: in 1990, when prisoners became eligible for parole, the majority of prisoners received it.

The only apparent explanations for the dramatic change in rates of granting parole are (1) in recent years the Parole Board has imposed artificial impediments to granting parole (such as requiring the completion of courses that aren't available); (2) the current Parole Board penalizes prisoners excessively for relatively minor violations of prison rules and regulations; or (3) the current Parole Board believes that West Virginia penalties, some of which are among the longest in the nation, aren't long enough.

All of these situations can be corrected. Any artificial impediments to granting parole should be corrected or eliminated. The Parole Board should recognize that, unfortunately, violations of prison rules and regulations will always occur (especially with the stress of overcrowded prison life) and the Board should become more tolerant of such violations. Prisoners who become eligible for parole, except for those with exceptionally troubling records, should receive it.

With an average rate of granting parole, West Virginia has all the prison space that it will need for years. The money saved by not building new cells could then go into the types of programs that truly make a difference -- to education, counseling, job creation, and increased

parole supervision. See, for example, Appalachian Institute, West Virginia Council of Churches, and Grassroots Leadership, 2005 Report, "Protecting the Future: Moderating West Virginia's Budget Crisis" (recommending that state funds be directed to educational and social services instead of prison construction by various changes in policy, including full funding of day reporting centers and other alternatives to incarceration, increasing rates of granting parole to reach national averages, and capping the number of people in the state's prison system). With the money spent on rehabilitation rather than on prison construction, West Virginia's already low crime rate could drop even further.

5. Probation, home confinement, and day reporting centers.

The Long-Term Plan recommends that probation departments should be encouraged to develop more alternatives to incarceration and recommend such alternatives in sentencing proceedings. The extent to which probation departments are complying with this recommendation varies significantly from county to county and is difficult to assess.

The use of home confinement programs appear to be increasing, although some home confinement programs seem to be in turmoil because of managerial disagreements between probation offices, sheriff departments, and the courts.

Day reporting centers are currently funded for fiscal year 2005/2006 for Cabell, Fayette, Harrison, Jackson, Kanawha, McDowell, Mercer, Mineral, Monongalia, Ohio, Preston, Putnam, Randolph, Wayne, Wood, Logan and Wyoming Counties. The Day Report Center in Kanawha County opened in July 2005. As of today's date, the Center now has 16 clients actively reporting.

According to data provided by day reporting officials, on a statewide basis approximately 400 persons are currently reporting to day report centers. Unfortunately, it is not possible to know how many of these persons have been sentenced to day report centers who would have otherwise been sent to prison, as opposed to otherwise receiving straight probation. Needless to say, the increased use of day reporting centers will have little impact on prison populations, and will increase rather than decrease costs, if the use of day reporting centers is primarily applied as a more restrictive alternative to regular probation, rather than as a less restrictive alternative to imprisonment.

In order to reduce DOC overcrowding and to save costs, the use of home confinement, day reporting centers and other alternatives to incarceration should be significantly increased.

6. The prosecution.

The Long-Term Plan recommends that prosecutors should be provided with prison overcrowding information on a regular basis so that such factors can be taken into consideration by the State in plea negotiations and sentencing hearings, particularly for non-violent offenders. (September 20, 2002, Long-Term Plan, Executive Summary, p. 9; text p. 56-57)

In its January 8, 2004, Report to the Court, the DOC attached a copy of a two page report, from November 2003, titled "WV Inmate Population and Capacity Update." The DOC provided copies of this report to the Prosecutors' Institute for distribution to all prosecutors around the State.

The November 2003 report contains a clear and thorough statement of the overcrowding issues and the impact of overcrowding on the corrections system. Unfortunately, to the best of Petitioners' knowledge, the distribution of such reports to prosecutors hasn't occurred since the

November 2003 report. The DOC should be required to distribute regular updates to the November 2003 report.

7. Defense counsel.

The Long-Term Plan recommended that, in order to present alternatives more effectively to the trial courts, defense counsel should receive thorough training in sentencing advocacy and the appropriate use of alternatives to secure confinement. (September 20, 2002, Long-Term Plan, Executive Summary, p. 9; text p. 57)

Since the adoption of the Long-Term Plan, Public Defender Services has provided extensive training in sentencing advocacy to public defenders and to the private bar. This training was provided, by local and national trainers, at seven statewide conferences:

- February 2003, New Lawyer Training, WV Public Defenders, Charleston, WV
- June 2003, Public Defender Annual Conference, Canaan State Park, WV
- February 2004, New Lawyer Training, WV Public Defenders, Charleston, WV
- June 2004, Public Defender Annual Conference, Canaan State Park, WV
- September 2004, Public Defender Training, Charleston, WV
- February 2005, New Lawyer Training, WV Public Defenders, Charleston, WV
- June 2005, Public Defender Annual Conference, Snowshoe, WV

The June 2004, Public Defender Conference addressed many of the precise issues that affect overcrowding, including an hour-and-a-half program titled "Alternative Sentencing -- The Status of Community Corrections Programs Around the State / How To Get Alternative Sentencing Where a Board Is Not In Place -- Drug Courts; Mental Health Courts; Sex Offender

Containment Programs; Domestic Violence Offender Treatment Programs; Substance Abuse Treatment Programs; Day Fine Programs; Community Service Restitution Programs; Day Reporting Centers; Educational or Counseling Programs." The sessions on sentencing advocacy at all seven conferences were open to both public defenders and members of the private bar.

In addition, counsel for the Petitioners served on the faculty of the February 2004, Persuasive Sentencing Advocacy Seminar, in Washington, D.C., a sentencing program by the National Association of Sentencing Advocates and District of Columbia Public Defender Services. Counsel has made the materials from this conference available to all West Virginia defense lawyers.

8. The trial judge.

The Long-Term Plan recommends that the DOC should periodically provide up-to-date information regarding prison capacities to trial judges so that the courts can appropriately consider prison overcrowding and alternatives to commitment in making sentencing decisions. (September 20, 2002, Long-Term Plan, Executive Summary, p. 9; text p. 57-58)

As discussed in part III.B.6, above (pages 26-27), in its January 8, 2004, Report to the Court, the DOC attached a copy of a two-page report, from November 2003, titled "WV Inmate Population and Capacity Update." The DOC provided copies of this report to the Supreme Court Administrative Office for distribution to all Circuit Judges in the State.

This November 2003 report fulfills the recommendation of the Long-Term Plan to provide such information to Circuit Judges. The DOC should be required to distribute regular updates to this report in order to comply with the recommendation that such information be provided on a periodic basis.

9. The availabilities of alternatives.

The Long-Term Plan recommends that numerous community-based corrections services, as authorized by the 2001 Legislature, should be established as promptly as possible so that greater alternatives will be available to alleviate overcrowding in DOC facilities. W.Va. Code §§ 62-11C-1 through 9 (September 20, 2002, Long-Term Plan, Executive Summary, pp. 9-10; text pp. 58-60). As discussed in part III.B.5, above (pages 25-26), a growing number of home confinement and day reporting programs have been created throughout the State.

To relieve overcrowding and save costs, start-up funding should be provided and many more counties should be urged to open day reporting centers and other alternatives to incarceration.

10. Extra good time for appropriate prisoners.

The Long-Term Plan recommends that the Division of Corrections identify those prisoners who, through their work records, educational accomplishments and good conduct, qualify for recommendations of extra good time, and submit such recommendations to the Governor for approval, under the provisions of W.Va. Code § 28-5-27(i). (September 20, 2002, Long-Term Plan, Executive Summary, p. 10; text p. 60)

Based on the responses of the DOC, it appears that the DOC has disregarded this recommendation, even though the DOC was a party to this recommendation at the time it was made. The DOC appears to believe that awards of extra good time would not significantly affect prison populations. The DOC is mistaken in this regard. The impact of awards of extra good

time would be determined by the amount of extra good time awarded. If a significant amount would be awarded, a significant effect would be achieved.

W.Va. Code § 28-5-27 currently provides for a one day deduction from the maximum sentence for each day of good conduct. In August of 2003, a Legislative Interim Committee studied overcrowding issues and considered a proposal to create bonus good time to ease overcrowding. Unfortunately, the Chairman of the Parole Board (now former Chairman) appeared before the Interim Committee and opposed the creation of bonus good time. The Chairman stated that, in his opinion, inmates already receive an excessive amount of good time. "State Officials Look At Crowded Prisons," Charleston Gazette, August 6, 2003; "Prison Terms May Be Shortened," Charleston Daily Mail, August 6, 2003.

For two reasons, the former Chairman of the Parole Board is mistaken in this regard. First, the effect of good time is ordinarily taken into account at the time of sentencing and is often offset by a proportionate increase in the length of the sentence imposed. Prosecutors in their recommendations, and judges in their sentencing decisions, ordinarily calculate the effect of good time before imposing sentence. Because of West Virginia's day-for-day good time provisions, the initial sentences are longer in the first place, and, as discussed on pages 16-17, above, are currently among some of the harshest state-imposed penalties in the nation.

Second, rather than reducing sentences, the amount of good time currently awarded is often not a factor at all in determining the actual length of time served. For example, the penalty for burglary is an indeterminate sentence of one to fifteen years. W.Va. Code § 61-3-11. Because good time is deducted from the maximum sentence, rather than the minimum, under the penalty for burglary, a prisoner receiving all of his good time can reduce his maximum sentence from 15 years to seven and a half. But a prisoner serving a one to fifteen year sentence will be

eligible for parole after serving one year. The day-for-day good time will have no effect unless the parole board chooses to hold this prisoner for seven and a half times longer than his first date of parole eligibility. In reality, what the former Chairman of the Parole Board characterized as "extremely liberal" good time, often has no bearing on reducing a sentence at all.

Consequently, both the DOC and the Parole Board should be required to abandon their opposition to awards of extra good time, and should be required to comply with the recommendation of the Long-Term Plan of awards of extra good time in amounts sufficient to have a significant effect in reducing the prison population.

11. Creating special programs to provide prisoners with the opportunity to earn extra good time.

The Long-Term Plan also recommends that the DOC designate work programs and educational programs in which future recommendations of extra good time can be earned. (September 20, 2002, Long-Term Plan, Executive Summary, p. 10; text p. 61)

Based on the responses of the DOC, the Petitioners believe that the DOC has not complied with this recommendation. As discussed in the previous section, the DOC should abandon its opposition to this recommendation and be required to promptly designate such programs in which extra good time can be earned.

12. Identifying appropriate prisoners for commutation of sentences.

In one of the previous overcrowding cases, State ex rel. Dodrill v. Scott, 177 W.Va. 452, 352 S.E.2d 741 (1987), the Court commended the DOC for its cooperation with the Governor in

the use of commutations to reduce the prison population in order to accommodate the backlog of prisoners in the jails. As the Court stated,

The safety valve on the system . . . is the Governor's power of reprieve, pardon and parole set forth in W.Va. Const. art. 7, § 11 and W.Va. Code 5-1-16 [1923]. Convicts must be accepted by the State for incarceration; but to bring our overcrowded prisons into constitutional compliance, the Governor may pardon, parole, transfer, or otherwise make constitutional accommodations for those convicts already incarcerated.

....

The Department of Corrections, with the cooperation of the Governor, has made progress through the use of good time awards, early release programs, commutations, transfers to other facilities, outside work projects, work release centers, and parole.

177 W.Va. at 457, 352 S.E.2d at 745-46.

For the reasons set forth in State ex rel. Dodrill v. Scott, the Long-Term Plan recommended a similar effort by the DOC to identify prisoners who are the most appropriate candidates for recommendations for commutation. (September 20, 2002, Long-Term Plan, Executive Summary, p. 10; text pp. 61-62)

Unfortunately, it appears that, unlike the DOC in 1987, the current DOC is unwilling to comply with this recommendation, even though the DOC was a party to the Long-Term Plan and agreed to this recommendation. The DOC is in the best position to know which prisoners, after years of good conduct and successful rehabilitation, are the most appropriate candidates for commutation. Because the backlog of DOC prisoners in the regional and county jails is now worse than ever, the DOC should abandon its unwillingness to comply with this recommendation and should be required to promptly provide to the Governor its recommendation of prisoners most appropriate for commutations.

13. Change in furlough practices.

W.Va. Code § 25-1-13 allows the Commissioner of the DOC to establish furlough programs for prisoners in the custody of DOC. The use of furloughs programs, or "early release" programs, appears to have been used successfully by the DOC in 1987 in order to relieve overcrowding. State ex rel. Dodrill v. Scott, 177 W.Va. 452, 457, 352 S.E.2d 741, 746 (1987).

In developing the Long-Term Plan, the parties considered, but rejected, the Petitioners' proposal to use such furloughs or early release programs in order to relieve the present overcrowding. Since neither the current rate of new construction nor the twelve previous recommendations have succeeded in relieving the overcrowding, however, and the backlog is now worse than ever, this recommendation should now be reconsidered.

Other jurisdictions have taken far more drastic action to release prisoners that the jurisdiction can no longer afford. The Sheriff of Los Angeles County, for example, has shortened sentences and released 47,500 prisoners in the past year alone, some who have completed as little as ten percent of their sentences. "Jail Inmates Freed Early to Save Money," Los Angeles Times, March 25, 2004, p. A1. In December of 2002, the State of Kentucky granted early release to 567 prisoners in one three-day period alone. Cincinnati Enquirer, December 18, 2002.

The West Virginia DOC can avoid these drastic steps by a measured, moderate program of furloughs, applied only to prisoners who are currently eligible for release on parole, who have already served substantial portions of their sentences, and who have maintained long periods of good conduct while in custody. Because nothing short of furloughs has reduced the longstanding

backlog, it appears that a moderate program of release on furlough has now become a necessary step in the process of relieving the burden of overcrowding.

Component 3 of the Long-Term Plan (Option B): The Transfer of Inmates from West Virginia to neighboring state DOC's on a contract basis.

To the best of Petitioners' knowledge, no progress has been made in the consideration of transferring prisoners to out-of-state facilities, primarily because of the provisions of the West Virginia Constitution stating that "No person shall be transported out of, or forced to leave the State for any offence committed within the same," W.Va. Const. Art. III, Section 5.

Component 4 of the Long-Term Plan (Option C): The Opening of New Prison Beds for Use Beginning in fiscal year 2007 if Options A and B Do Not Produce the Anticipated Results.

To the best of Petitioners' knowledge, because of financial considerations, no progress has been made in the planning for prison construction for the fiscal year 2007 or beyond.

IV. Conclusion.

The Court's efforts to address the backlog of DOC prisoners currently lodged in the regional and county jails began in 1987 with the Court's ruling in *State ex rel. Dodrill v. Scott*, 177 W.Va. 452, 352 S.E.2d 741 (1987). The Court addressed the problem again in 1992 in *State ex rel. Smith v. Skaff*, 187 W.Va. 651, 420 S.E.2d 922 (1992), and a third time in 1998 in *State ex rel. Stull v. Davis*, 203 W.Va. 405, 508 S.E.2d 122 (1998). The current litigation, the fourth effort to address this issue, has now been in progress since the year 2000.

Unfortunately, despite repeated rulings of this Court, the Division of Corrections and the Board of Parole have, in many respects, taken numerous steps backwards in the effort to correct the burdens of overcrowding. As discussed on pages 19-35, the rates of granting parole are currently among the lowest in the Board's history of maintaining such records, and as of today's date the rates of granting parole are still lower than they were in the year 2000, the year when this litigation began.

Similarly, in 1987, in *State ex rel. Dodrill v. Scott*, 177 W.Va. 452, 457, 352 S.E.2d 741, 756 (1987), this Court praised the DOC for easing the backlog by its use of "good time awards, early release programs, commutations, transfers to other facilities, outside work projects, work release centers, and parole." Rather than an increase in the use of these measures, however, during the 18-year course of litigation involving these issues, many of these approaches to reducing the backlog seem to have diminished or totally disappeared.

Because the backlog of prisoners is now higher than ever, the Respondents must be compelled to restore many of the approaches that they have recently abandoned, including a return to a realistic, moderate rate of granting parole, awards of extra good time credits, and expanded use of work release, furloughs or other early release programs for prisoners who, through years of good conduct, have demonstrated their suitability for such programs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, George Castelle, do hereby certify that on the 30th day of August, 2005, I delivered a copy of the foregoing Petitioner's Statement Outlining the Extent to Which Long-Term Plan has Been Implemented, by hand, to:

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