

Policies on Good Time and the Effects on Sentencing Practices: History and Survey Results

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BACKGROUND AND HISTORY

This report is a summary of the recent history on good time policies in Montana. A survey was conducted to ascertain whether sentencing recommendations or sentencing practices have changed or will change in response to the elimination of good time. The intent of this report is to explore those issues and whether the Department of Corrections (DOC) is factoring the elimination of good time into its prison population projections. Other related sentencing practices are also explored.

Good Time Provisions

Good time in general refers to the practice of crediting an inmate's prison sentence with time off for good behavior. The concept fits within Montana's indeterminate sentencing scheme and within a traditional rehabilitative model. Wide sentence ranges allow judges to take individual circumstances and characteristics into consideration. By 1993, before significant changes were made, the maximum amounts of good time that could be awarded were limited in statute by classification of the inmate, enrollment in education, or self-improvement. Good time continued during parole, but did not apply to probation. Good time credits could be forfeited for escape or violation of rules and were able to be restored for subsequent good behavior. An additional 180 days of good time credits could be granted toward parole eligibility or to discharge if the design capacity of the men's or women's prison was exceeded. An offender could be designated:

- (1) ineligible for parole;
- (2) a dangerous offender, requiring that one-half of a sentence less good time be served prior to parole eligibility; or
- (3) a nondangerous offender, requiring that one-fourth of a sentence less good time be served prior to parole eligibility.

In the past, statutory provisions and administrative practices made calculation of good time complicated. In addition, lack of computer automation practices force good time calculations to be figured by hand, which contributes to the overall uncertainty as good time accrual information is not readily available.

Governor's 1994 Advisory Council on Corrections and Criminal Justice Policy

By Executive Order in 1994, Governor Marc Racicot created the Advisory Council on Corrections and Criminal Justice Policy (Council). The Council divided into three subcommittees, one of which was the Truth in Sentencing Subcommittee (subcommittee). In its Final Report of January 1995, the Council recommended establishing regional correctional facilities, lifetime sex offender supervision and registration, sex offender DNA registration, truth in sentencing, and good time reform and also recommended establishing a Montana sentencing commission. It was from these recommendations that the DOC went forward. It was the truth in sentencing proposals that would affect good time. The final report states, "The priority of the subcommittee was to address the truth in sentencing issue and to ensure it would have a neutral impact on prison population". The report notes that simplicity is vital for judges to know exactly how long an inmate will serve a sentence. The subcommittee proposed that:

inmates receive a flat thirty (30) days of good time per month; in addition, inmates will have to serve at least 25% of their sentence before becoming parole eligible. The truth in sentencing proposal does away with dangerous and non-dangerous designations at sentencing by essentially adopting the minimum time presently required under the dangerous offender designation. Further, the subcommittee recommended eliminating the 17-1/2 year rule pertaining to parole; abolishing good time for life sentences, requiring inmates to serve thirty (30) years, not

fifteen (15), as is presently required; and eliminating early parole releases relating to overpopulation.

The Council recommended the subcommittee's proposal in the form of legislation. The proposal does provide some simplicity, yet in no way could it be considered to have a neutral impact on prison population or to offer precision to a judge during sentencing. The subcommittee also proposed establishing a Montana Commission on Sentencing to study good time, sentencing practices and guidelines, and the effects of sentences. The legislation recommended for introduction to the 1995 Legislative Session (LC984) included as one of the Commission's discretionary duties to "identify the impact of good time credits and sentencing guidelines on the criminal justice system". The final report also included a memo from DOC Director Rick Day to Candyce Neubauer (Montana State Prison classification staff) providing his response to a request regarding the primary objectives behind good time statute revisions. The first priority was "truth in sentencing without an effect of increasing prison population or length of stay", the second was simplicity, and the third was inmate management and motivation.

Department of Corrections and the 1995 Legislature

Based on the Council's recommendations in 1995, the DOC requested the bill for the purpose of "implementing truth in sentencing by making the time a prisoner will actually serve more apparent". The bill, House Bill No. 356, sponsored by Representative Bill Boharski, was passed into law (Ch. 372, L. 1995). Certain provisions of the bill had a delayed effective date. The bill abolished the designation of dangerous or nondangerous offender for the purposes of parole, effective April 12, 1995, virtually the same as was recommended by the Council, but the bill went further and eliminated good time credits altogether, with a delayed effective date of January 31, 1997.

Also based on the Council's recommendation in 1995, the DOC requested the bill, House Bill No. 357, creating the Montana Sentencing Commission (Ch. 306, L. 1995). The Commission was authorized, but not required, to make recommendations to the 1997 Legislature concerning

modifications or enactment of sentencing and correctional statutes, continuation of the Commission, identification of the impact of good time credits and sentencing guidelines on the criminal justice system, and the advisability of retaining or eliminating good time credits. The Commission was required to determine the advisability of proposing sentencing guidelines and to make recommendations to the 55th Legislature.

Montana Sentencing Commission

In its January report to the 1997 Legislature, the Montana Sentencing Commission recommended that the Legislature not implement sentencing guidelines and that the Commission should continue in existence for four purposes: (1) to continue to collect sentencing data; (2) to develop a system of voluntary guidelines; (3) to review the current criminal code and sentencing structure; and (4) to serve an educational function. The Commission made recommendations on the two-strikes and three-strikes law, voted to support the elimination of good time credits, and determined that "the elimination of good time should not be evaluated until the Legislature's action has had time to take effect", even though in a section on Prison Overcrowding the report stated that the Commission had learned that:

The Legislature eliminated good time in Montana effective January 31, 1997. The elimination of good time may increase prison populations. The projected impact could be as significant as [sic] 600 more prisoners by the year 2001.

1997 Legislature

The 1997 Legislature did not extend the funding or authorization for the Montana Sentencing Commission, and it is no longer in existence. The 1995 Legislature's actions eliminating good time that were requested by the DOC took effect as of January 31, 1997, as no legislation was requested nor considered to stop the implementation by the effective date. Except to the extent represented in this report, the results of the elimination of good time are not being evaluated

systematically. With the exception of the DOC, no group, such as the former Montana Sentencing Commission, exists to measure or estimate the impacts of this legislative decision.

DOC Good Time Policy

The DOC has taken the position that the law in effect at the time of the commission of an offense prevails¹. For crimes committed prior to April 12, 1995, an offender must serve one-fourth of the offender's sentence if designated as a nondangerous offender or one-half of the offender's sentence if designated as a dangerous offender less good time for parole eligibility. Most inmates serving a time sentence (certain number of years) were parole-eligible after 17 ½ years, and an offender on a life sentence served 30 years less good time to reach parole eligibility. For the time period prior to April 12, 1995, there are variable rates for earning good time.

For offenses committed on or after April 12, 1995, through those committed on January 30, 1997, offenders must serve one-fourth of their sentence before they are eligible for parole. An offender on a life sentence must serve 30 years prior to reaching parole eligibility. Good time is earned at a day-for-day rate by inmates in an adult correctional facility or while on parole and applies to a reduction in the sentence for purposes of calculating the date of discharge. Allocation of good time will apply in a situation involving the revocation of probation for a crime committed before January 31, 1997.

For offenses committed on or after January 31, 1997, an offender must serve one-fourth of the sentence prior to achieving parole eligibility and there is no good time earned toward a discharge date. An offender incarcerated on a life sentence must serve at least 30 years prior to achieving parole eligibility. Population projections based on the elimination of good time have not been

¹ Information derived from DOC document "Good Time Laws--and what they mean." Dates have been corrected to reflect effective dates of legislation.

calculated by the DOC, but as of January 23, 1998, the DOC listed 40 inmates that had been sentenced to prison since the January 31, 1997, effective date of the elimination of good time².

The DOC has implemented an inmate incentive program to encourage and reward positive behavior while in the institution, but it does not affect sentence length or parole eligibility. However, it may affect the willingness of the Board of Pardons and Parole (BOPP) to grant parole.

Correctional Standards and Oversight Committee

The 1997 Legislature established an interim legislative committee, the Correctional Standards and Oversight Committee, to review many aspects of criminal justice and corrections. The Committee divided into four subcommittees, one of which, the Private Prisons and Programs Subcommittee, was concerned about the effect of the elimination of good time on prison populations and interested in how the elimination of good time has affected sentencing practices. A snapshot, informal survey regarding sentencing and sentencing recommendation practices since the elimination of good time was conducted of District Court Judges, probation and parole officers, and County Attorneys.

The Subcommittee plans to use the information in conjunction with an Ad Hoc Committee on Sentencing that will include District Court Judges, County Attorneys, defense attorneys, and legislators to explore the ramifications of the statutory changes on sentencing practices and on correctional populations.

GOOD TIME SURVEY

² Correctional Standards and Oversight Committee, January 23, 1998, meeting minutes, p. 17.

Methodology

Three separate, but similar surveys were prepared to ascertain the extent of understanding of good time provisions in the state among District Court Judges, County Attorneys, and probation and parole officers. These three groups were chosen because of their direct involvement in the sentencing process. The surveys were distributed at the end of September 1997.

The probation and parole officers³ employed by the DOC are required by law to conduct a presentence investigation (PSI) and prepare a report that may include a sentencing recommendation, although the only specific mention in statute is for treatment recommendations for offenders who have committed certain sexual offenses⁴. The County Attorney, as the arm of the state, represents the public and often makes sentencing recommendations, formally or informally, and has the authority to engage in discussions on plea bargains that may affect the eventual plea, conviction, and sentence. The District Court Judge makes the final judgment and imposes a specific sentence. The survey is intended to ascertain how the elimination of good time will affect sentencing and sentencing recommendations.

There were six questions that dealt with good time and sentencing provisions common to all three surveys. The only difference being that County Attorneys and probation and parole officers were asked about sentencing recommendations instead of the act of actually sentencing a defendant. In addition, the probation and parole officer survey included two questions specifically related to PSIs. Two final questions allowed the respondent to make comments to the Correctional Standards and Oversight Committee on sentencing specifically or anything in general.

³The probation and parole officer pool did not include Intensive Supervision Program officers, institutional probation and parole officers, juvenile parole officers, or administrative support.

⁴ These offenses include sexual assault, sexual intercourse without consent, indecent exposure, deviate sexual conduct, incest, sexual abuse of children, and violation of order of protection.

The response rate varied between categories of respondents. The responses were received over a 3-month period.

RESPONSE RATE		
District Court Judges	21/36	58%
County Attorneys	18/55	33%
Probation and Parole Officers	25/71	35%
Total	64/162	39.5%

Findings and Conclusions

Presentence investigations and sentencing recommendations

A PSI and report is required, with some exceptions, by statute (46-18-111, MCA) and is a report of historical information including a defendant's criminal, social, medical, and psychological history and offense and victim data. For certain sexual offenses (see footnote #4), an evaluation is required, and in 1997, the Legislature adopted language requested by the DOC specifically requiring a psychosexual evaluation by a member of the Montana Sex Offender Treatment Association. The court may make a finding that a PSI report is unnecessary; and if that finding is not made, a defendant convicted of any offense that may result in incarceration for more than 1 year may not be sentenced before a written report is made. The PSI report may contain a sentencing recommendation, and the survey is intended to determine whether the elimination of good time will be taken into account in future recommendations.

The first two questions reviewed are the questions specific to probation and parole officers on PSIs and reports.

What percentage of felony defendants do you estimate that you do a presentence investigation on?

Out of 25 responses, the mean or average amount was 84.6%, the median was 90%, and the most common response was either 95% or 99.9%/100%. Some examples were given by jurisdiction: Bozeman and Livingston 80%, Deer Lodge and Anaconda 75%, Butte and Dillon 60%, and Helena 45%. Ninety percent of Flathead felons have a PSI ordered by the judges. These comments indicate there is considerable variation across the state.

Do you include a sentencing recommendation in any of your presentence investigations?

Twenty-three of 24 respondents (96%) indicated that they did include a sentencing recommendation, although one respondent qualified the response by stating that the respondent included a type of sentence but not a length of sentence.

A DOC memo dated January 15, 1997, indicated that of the 1,095 felony files of offenders who were sentenced in 1994 that were reviewed for the Montana Sentencing Commission, 62.2% included a PSI report. In information received by the Private Prisons and Programs Subcommittee, the point was raised that PSIs are ordered in nearly all cases in which the recommendation will be for a prison sentence, which only partially comports with the statutory requirement in 46-18-111, MCA. The problem arises when a defendant receives a suspended or deferred sentence initially, but becomes involved in a probation revocation proceeding that results in a prison stay, but without a PSI report.

There are two basic elements that need to be explored. First, if a PSI report is required for any sentence that may result in incarceration for 1 year or more, then what are the reasons that more PSIs are not being performed? A review of whether the judgments contain any written findings

that the PSI report is unnecessary, as well as the reasoning behind the findings, would be informative and should be conducted.

Second, the results indicate that most probation and parole officers who answered this survey make sentencing recommendations. If sentencing recommendations are desirable, does there need to be statutory authority or guidance? This may be an area where the DOC can administratively affect sentencing by providing guidance in the form of policies and training for probation and parole officers making recommendations and by providing additional information on the effect of the elimination of good time. If sentencing recommendations are not appropriate, does there need to be a statutory prohibition?

Whether or not a sentencing recommendation is provided, a PSI report may be an opportunity to supply judges with comparative information on the type of crime, sentences being imposed statewide, and simple statistical data. This information is not available to date, but with the many technological projects occurring in the DOC, the Department of Justice, and the State Court Administrator's Office of the Supreme Court, it could be made a priority. Until comparative data is available, the probation and parole officers could provide information regarding the minimum length of stay to reach parole eligibility that is possible given the elimination of good time.

Sentencing and sentencing recommendations

The first shared question by all three groups was:

When sentencing a defendant or making a sentencing recommendation for a defendant prior to the elimination of good time, did you take into consideration (and include as a calculation in the sentence recommendation) the amount of good time a defendant would receive toward a discharge date?

Of the 60 responses, only 30 (50%) took good time into consideration prior to its elimination. Over one-third (22) did not, and another five answered that it was taken into consideration but was not included in a calculation, that it was only verbal, or that it was occasional. This may indicate, especially in light of the answers to the following question, that credit for good time was confusing and not uniformly considered across the state in the past, which may have resulted in past disparity.

The results indicate a general misunderstanding of DOC and BOPP practices that could be mitigated by training and increased communication with judges and that should be pursued now that the effects of the elimination of good time will begin to be seen.

The next question was a subquestion intended to illustrate past practices:

For the purposes of example, under the law in effect prior to the elimination of good time as of January 31, 1997, could you illustrate your understanding of how long a defendant with one prior property crime would serve in prison before becoming parole-eligible for a 10-year sentence for the offense of felony theft?

A significant drop in response was noted (in part due to the electronic transmission of the questionnaire) but the range of the 38 answers to the question was from 15 months to 3 years. Many responded one-fourth less good time, which is accurate but the rate by which good time was earned was variable prior to April 12, 1995. Some answered one-eighth or one-fifth, and one County Attorney made a distinction between dangerous and nondangerous offender (a designation that was deleted in 1995). Another stated one-fourth less 30 days each month assuming the good time allowance between April 12, 1995, and January 30, 1997. The question did not include a date for which the crime was committed, leaving it ambiguous. Therefore it is no surprise that the answers would also be

ambiguous, but the range of answers is informative and probably best illustrates that good time was a confusing factor when judges determined sentences or when County Attorneys and probation and parole officers made recommendations.

The DOC may want to extend some efforts in assisting the judges, County Attorneys, and probation and parole officers in better understanding the ramifications of good time on past sentences since some inmates continue to earn good time. Especially important are the implications of the lack of good time on sentences for crimes committed on or after January 31, 1997, for which a significant number of offenders are yet to be sentenced or are coming to trial and for which the judges could still have an opportunity to alter their sentencing practices.

Do you include treatment requirements for parole eligibility in any, all, or most of your sentence recommendations?

Thirty-eight (63%) indicated that yes, all or most sentences or sentence recommendations include treatment requirements for parole eligibility, another 22% (13) respondents indicated that they do so for some, if warranted, or indicated seldom. Two respondents stated treatment requirements were included for sex offenders only, and two responded no or rarely.

Treatment recommendations are statutorily required only for those offenders who have committed certain sexual offenses. There are no other statutes either authorizing or defining requirements for treatment recommendations for parole eligibility. The results indicate that treatment is included in the sentences for over half of the inmates as a requirement for parole eligibility regardless of the offense. Recommendations for treatment have a significant impact on prison populations based on the availability of treatment programs, the length of waiting lists, and the understanding of the BOPP about those factors in granting parole.

Also, there is evidence that the BOPP adds additional treatment requirements before granting parole. This would indicate strictures imposed on the system at the front end, in sentencing, and at the back end, in granting parole. Probation and parole officers, County Attorneys, District Court Judges, and the BOPP may not be sharing the same assumptions regarding parole. In addition, there is no analysis of treatment resources or outcomes in the prisons or correctional system that is made available to the parties that require use of those same resources.

Change in sentencing recommendations due to good time changes

Since the elimination of good time on January 31, 1997, have you changed or will you change your sentence recommendations to take into consideration the fact that a defendant will not be earning good time toward a discharge date?

Of the 63 responses, 37 (59%) indicated "yes" or "probably" they would change, but 23 (36.5%) indicated that they would not. Of the third that indicated they would not, it was 9 (43%) of the judges that indicated that they would not change.

Any assumption that the elimination of good time is population-neutral needs to be seriously challenged. Some judges may not change sentencing practices, assuming good time was an administrative decision and that those who are administering the prison are responsible for dealing with the consequences.

The results indicate the DOC should conduct a serious assessment of population neutrality claims and provide specific population projections based on the elimination of good time. The Population Management Plan that is regularly prepared by the DOC has to date not included the elimination of good time in its projections.

The survey responses would also indicate that BOPP practices may need a similar review. By statutorily requiring that all offenders serve one-fourth of their sentence before becoming eligible

for parole, the extended portion of time in prison should be of greater consideration to the BOPP. It also gives the DOC more time to ensure that each inmate gets the treatment that is required in a judgment or that is determined to be needed. If the DOC cannot ensure the opportunity for treatment, the policy question must be asked--is it appropriate that the DOC be in essence administratively lengthening an inmate's length of stay? By not having sufficient programs available to inmates that have treatment required in their sentence or required by the BOPP for parole, the lengthening of the period of incarceration is inevitable by default. Perhaps a greater distinction needs to be made between the treatment that is required in a secure setting in order to prepare an inmate for a safe release to society and that which is necessary for rehabilitation but that could be obtained outside the walls of a secure correctional facility.

This is an indication of the disjointed nature of the system and a lack of understanding between the participants. A higher percentage of players will now pay attention to good time than had in the past, but not everyone will, and that seriously challenges any population-neutral effect of the elimination of good time.

When making a sentencing recommendation for or sentencing a defendant now, or under the good time provisions, do you assume that any, most, or all inmates will actually be paroled, if eligible, at or near their parole eligibility date?

When asked this question, 75% (45) of the respondents indicated that yes, all or most inmates will actually be paroled, 20% (12) indicated no, and 5% (3) acknowledged it depends on the DOC or the BOPP.

The BOPP is responsible for the granting of parole. Section 46-23-201, MCA, grants the BOPP authority to grant parole "when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community". Restrictions on parole from the original sentence include the statutory requirement for how much of that sentence must be served before parole, i.e., one-fourth for a time sentence and 30 years for a life sentence. (Some

offenders may be ineligible for parole as well, 46-18-202(2), MCA.) Further, "parole may be ordered under this section only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon. A prisoner may be placed on parole only when the board believes that the prisoner is able and willing to fulfill the obligations of a law-abiding citizen" (46-23-201(4), MCA).

Autonomy and authority of this citizen body (BOPP) is an important and traditional piece of Montana's correctional system, but analysis of the percentage of inmates who are paroled and the understanding that those involved in the sentencing process have regarding parole indicates a weak link. In the October 1996 Report of the Montana Board of Pardons and Parole, fiscal year 1996 data indicates that a combined total of 46.4% of inmates are paroled at either their initial appearance or a subsequent reappearance. Only 13.6% of inmates at annual review are paroled, which combined with the other categories indicates that 34% of inmates who had parole hearings in fiscal year 1996 were paroled. The BOPP report demonstrates that "all or most" inmates are not being paroled, as was indicated by survey respondents, less than one-half are. If sentencing recommendations and practices are being performed under the assumption that "all or most" inmates are paroled, then it is no wonder that overcrowding is occurring. With that assumption of a high number of paroles, the elimination of good time should not be expected to affect the sentencing practices of judges for at least a number of judgments in the future. Judges need to be better informed of parole practices, and the BOPP needs to be better informed of sentencing practices and assumptions.

Have you received any information regarding either the elimination of or the effects of the elimination of good time from either the DOC or the BOPP? If so, please describe.

Thirty-eight percent (24) recalled receiving information, but 57% (31) stated no or they couldn't recall if there was any. This was even after the DOC sent a memo on September 15, 1997, 2 weeks before this survey was sent. Probation and parole officers had the highest percentage of positive answers, 42%, and they are

employees of the DOC. Only 3 of 18 County Attorneys and 3 of 21 District Court Judges recalled receiving information.

These results point to a vital need for greater and more effective communication from both the DOC and the BOPP on the effects of the elimination of good time on prison length of stay and therefore prison populations and a need for District Court Judges and County Attorneys to acknowledge DOC communications. Enhanced communication efforts by the BOPP on their parole philosophy and practices are needed because if judges and County Attorneys are truly to provide truth in sentencing, they need to know what will happen when inmates are under the administrative control of the DOC and the BOPP. Judges and County Attorneys may believe that it is not their concern what the DOC does with an inmate after they are sentenced, but overcrowding in the correctional system is a matter of statewide importance and each sector of the system should acknowledge its contributions to the situation, warranted or not, including the Legislature.

Do you have any recommendations for consideration by the Legislature for changes in sentencing in general? If so, please describe. AND Please include any other comments you feel would be helpful for the Correctional Standards and Oversight Committee.

Fifty-five persons responded to the first question and 32 persons responded to the second. A summary of the responses follows and only answers related to sentencing or good time are included.

The two questions elicited some interesting responses. There is still sensitivity to the issue of sentencing guidelines that the Montana Commission on Sentencing was mandated to study. Seven respondents were against guidelines, and two respondents were in favor of guidelines, although both still believe in exceptions and a range of sentence options for judges' discretion. One respondent commented that guidelines give discretion to the prosecutor and take it away from the judge. Two respondents seem to have mixed feelings on guidelines, yet inferred that an

inmate should serve the entire sentence. It is clear that truth in sentencing has different meanings to different people.

One respondent desired greater uniformity as compared to the wide sentence ranges that currently allow disparity in actual time served. The example was given comparing a 90-day jail sentence for a misdemeanor drug charge to a net sentence of 90 days in jail on a 10-year suspended sentence for a \$60,000 embezzlement.

The Montana Sentencing Commission voluntary guidelines were mentioned as positive work that one respondent wanted implemented. The Commission had recommended that mandatory sentencing guidelines not be implemented, but they were interested in continuing their work and developing voluntary guidelines for use on an experimental basis. One respondent who was against sentencing guidelines believed them to be mandates that would only worsen overcrowding and another believed they would be manipulated for convenience and budgetary considerations of the DOC.

Judicial discretion is the crux of the issue and was supported by many respondents. One respondent wanted complete discretion within guidelines set in statute instead of sentencing requirements. One respondent wanted judges' discretion to extend even into housing classification decisions. Another wanted to eliminate District Court Judges' discretion to grant a deferred imposition of sentence because it resulted in first-time offenders being more willing to risk a jury trial because of the perception that probation is the most that will result.

One prosecutor saw sentencing as the role of the judge and of the Probation and Parole Bureau at the DOC. A respondent believed that the Legislature should set the maximum sentence length and allow judges to impose the sentence. Another wanted the Legislature to let the judges and prosecutors do the sentencing. The statutes currently cause confusion and examples were given of the exceptions and considerations that are expected of judges, but are then taken away in other statutes. Section 46-18-225, MCA (criteria for sentencing nonviolent felony offenders), was both

praised as good direction and criticized as something that needs to be repealed. One respondent wanted the law rewritten and organized to incorporate all restrictions and exceptions in a more orderly manner.

Mandatory minimum sentences were raised as problematic four times. Two examples were given: (1) that it created too large a net for offenses such as those involving small amounts of drugs; or (2) in the case of "statutory rape". Faced with these cases, the judges may be unwilling to apply exceptions. One respondent believed mandatory minimum sentences to be micromanagement that creates numerous difficulties when applied in individual cases. Rigid minimums often result in "charge bargaining" with the prosecution, which eventually affects accuracy in criminal history records. Another respondent stated that the threat of mandatory minimums often results in jury trials because the defendant has nothing to lose and it makes it difficult to get a plea bargain. One respondent believed that many first-time offenders could be dealt with more effectively through rehabilitation, which a mandatory minimum precludes. On the other hand, there was a respondent that wanted minimum sentences raised as the respondent believed that judges only imposed minimum jail time.

There were six responses that agreed with no longer providing good time, with one of the respondents making the assumption that "it" will shorten sentences given by judges. Another respondent believed that the abolishment of good time would mean longer stays because judges would not change sentences, which is borne out in the survey that showed that 43% of the judges would not change their sentencing practices with the elimination of good time. Two responses questioned the change, believing that a great deal was lost in not providing to inmates an incentive such as good time. One respondent disagreed, believing that good time created too much uncertainty and that other methods for incentive or compliance should be considered. (The DOC has implemented an alternative incentive system to encourage positive behavior by inmates without affecting sentence length). One respondent stated the lack of good time credits for parole hindered appropriate supervision of inmates who graduate from boot camp.

Additional education on good time, DOC commitments, and deferred and suspended sentences was raised as vital since the issues are not well understood, at least by judges, and are most likely misunderstood by all parties in the system. One respondent stated that judges need the tools and the discretion to work with the inmates as the judges are directly accountable to the victim and the public. One respondent wanted more information on good time accrual forwarded to prosecutors and judges so that information is known on an offender's potential parole eligibility and discharge. Others wanted statistical information on sentencing (averages, ranges) as part of PSI reports. A comment was made that stated a frustration with judges and the inability to get them to follow the statutes.

A provision was passed in the Legislature in 1995 to allow a commitment directly to the DOC, which permits the DOC to administratively decide the most appropriate placement for an inmate⁵. This DOC commitment was raised twice as a provision that respondents wanted eliminated and raised at least twice as problematic and requiring more education. One respondent appreciated the DOC commitment, but desired additional resources so that programs could be offered to all inmates. Many comments were received on the need for additional resources, such as prerelease centers and treatment, across the state and especially in rural Montana, so that the prison in Deer Lodge can be reserved for violent offenders.

Other areas of comment include eliminating stays in county jails because they do not allow for the treatment that is necessary for rehabilitation. One respondent believed that the state should take responsibility for violent felons and not leave them in county jails, and another stated that the Legislature should give better consideration to societal and economic costs from overly punitive sentencing policies and should provide more resources to both communities and institutions, including resources for fourth-time DUI offenders, when prison is not appropriate. The concepts of simplicity and the Legislature leaving the statutes alone for awhile were mentioned. There were at least two references that DOC line staff or the "people" should be

⁵ The provisions was limited to 5-year commitment in 1997.

listened to over the DOC administration. One respondent hoped that the Correctional Standards and Oversight Committee included correctional professionals and another, judges. There were two comments supporting building more prisons instead of sending money out of state. One comment bemoaned having sentencing affected because of overcrowding and the impact on county jails.

CONCLUSIONS AND POLICY ISSUES

Some of the basic tenets under which House Bill No. 365, implementing "truth in sentencing", was recommended were never honored or incorporated in the legislation that promoted the concept. Although progress toward truth in sentencing is furthered by the elimination of good time, the assumptions underlying sentencing actions by various parts of the criminal justice system do not seem to be shared or communicated among the participants. The corrections system is overcrowded and may be suffering from some of the ramifications of this lack of communication. A neutral impact on prison population was stated as an initial priority for truth in sentencing, yet no mechanism for achieving population neutrality was incorporated into the legislation. Elimination of good time and the potential of doubling the amount of time inmates must serve to reach parole eligibility will increase the length of stay and therefore prison populations and cannot have the effect of population neutrality without some corresponding cut in sentence length and without coordinated parole practices.

Although the Montana Sentencing Commission was authorized to identify the impact of good time credits and the advisability of retaining or eliminating good time credits, they did not do so. In fact, the Commission decided not to evaluate the elimination of good time credits until after the legislation had time to take effect. The elimination of good time credits has taken effect and still no entity has evaluated, either in a hypothetical or actual case scenario, the impact of the elimination of good time credits on future prison populations. The question must be asked--in a state that already has burgeoning correctional populations and budgets, is it responsible to pursue

"truth in sentencing", even partially, when there is no information on which to gauge the effects of such practices until long after they are in effect?

Elimination of good time credits has made administration of parole eligibility for offenders sentenced for an offense committed on or after January 31, 1997, easier. Inmates sentenced for an offense committed before that date are still receiving variable good time credits. That function must be continued until every inmate sentenced prior to January 31, 1997, is paroled, is discharged, or dies. The task should be institutionalized and automated rather than relying on a single individual to accomplish that task. Any future change in good time policy must take into consideration a retroactive effect to prevent yet another category of good time accrual. Whether the elimination of good time will have an effect on judges' sentencing practices is debatable and is not an assumption that should be made. This survey, albeit informal, indicates that at least one-third of those polled will not change their sentencing or recommendation practices, including 43% of the judges who responded.

The question of whether PSI reports are being prepared as mandated by statute must be explored further. This is a judicial matter as well as an administrative issue within the DOC. The DOC receives copies of all judgments of persons who are placed in a correctional institution or under probation on a felony deferred or suspended sentence. A review to determine whether sentencing judgments contain any written findings that either order a PSI report or find one unnecessary should be performed, as well as to determine the extent to which judgments follow any recommendations included in a PSI report. This information could assist the DOC in understanding reasons why judges may not believe that PSIs are necessary and could begin a dialogue with the judges. The DOC would also eventually need to analyze the effects on probation and parole officer workload if additional PSIs are ordered.

The issue of sentencing recommendations by probation and parole officers needs to be reviewed by the DOC. Sentencing recommendations include treatment recommendations. Two-thirds of those who responded include treatment recommendations in their sentencing recommendations

or sentences. Statutorily, treatment recommendations are required only for sex offenders, which constitute only a portion of the offenders⁶. If a majority of probation and parole officers are making sentencing recommendations, then questions arise as to whether they are using any sort of uniform standards or general guidelines to do so and whether they are making recommendations knowing the amount of resources available in the DOC institutional and community correctional programs and the effects of their recommendations on the entire system.

The questions of relevance and appropriateness of the sentencing recommendations should be discussed as public policy. The probation and parole officers spend more time with the inmates in the community and their knowledge is vital, but their actions concerning PSI sentencing recommendations have consequences on a statewide system and need to be incorporated systematically. The PSI report also provides an opportune forum for probation and parole officers to inform District Court Judges and County Attorneys.

The PSI sentencing recommendation presents an opportunity to inform judges and County Attorneys as to DOC resources. As better and more coordinated statewide data becomes available on sentencing, a PSI report would be an ideal vehicle to provide information on specific offenses, such as average sentence length, range of sentences statewide, minimum time to serve to reach parole eligibility, etc. A more general and regular report on statewide sentencing practices and all of the resources available in the DOC institutional and community correctional programs is also information that needs to be disseminated to probation and parole officers, County Attorneys, District Court Judges, and the BOPP.

The autonomy and integrity of the various parties in the criminal justice and corrections system must be respected, but these elements have evolved into a situation in which the participants do

⁶ From 1990 to 1994, between 19% and 23.8% of the prison population was convicted of a sex crime (DOC unpublished annual report FY 1990-1994). In a 1994 Sentencing Study for the Montana Sentencing Commission, 6.5% of the total cases for calendar year 1994 that were reviewed were for sexual offense crimes (Report on Data Collection Findings, Sept. 16, 1996), which is the same percentage of felony cases disposed in calendar 1987 reported in a 1987 Study of Montana Sentencing Practices by the Criminal Justice and Corrections Advisory Council.

not communicate with one another. Information sharing does not have to mean overstepping one's bounds, but in a state where the expansion of the corrections budget has an effect on every other part of the criminal justice system and all other state functions, it is unwise to allow this to persist. Problems associated with prison overcrowding must be shouldered by every person in the state of Montana and by every part of the criminal justice and corrections systems in particular. A mere sharing of information may lead to better planning and problem solving and at the very least the left hand would know what the right hand is doing and the reasons behind those actions. The elimination of good time did not cause the current prison overcrowding, but it certainly has the potential to exacerbate the situation if no change in sentencing practices occurs.

Since elimination of good time credits is a reality, the question must be asked--is it responsible to wait until the full-blown ramifications of that decision take place before any projections can be calculated or theoretical effects on populations tested? If an assumption was made at the beginning of the proposal that any change in good time was population-neutral, what do the sentences have to look like for that assumption to be true, has a comparison to actual sentencing practices been accomplished, and what is the conclusion? If the intention of population neutrality was abandoned, was there a realistic explanation of the effect on population in the prisons and the concomitant costs?

The fiscal note to House Bill No. 356 that implemented the truth in sentencing provisions did assume that the fiscal impact would be related to the length of sentences issued by the District Court. If the Court sentences remained consistent, the average stay in prison would be extended and the prison population would grow, therefore it was not assumed to be population-neutral on its face. Any inference in the fiscal note that the length of sentences imposed would be reduced was not supported by any specific proposals such as statutory changes to sentence ranges, a systematic effort to educate the judiciary, or a statutory requirement that they be reduced. A long-range effect of the proposed legislation noted:

If length of sentence is not reduced, inmates who do not receive parole (37.4% of all inmates in the last five years) will serve twice as much time in prison. It is projected that the prison population would grow by an estimated 898 inmates by

fiscal year 2001. An increase in prison population of this proportion would necessitate the construction of additional prison capacity.

These three simple sentences speak volumes, especially in hindsight. The current situation is a form of acceptance of the above-stated, long-range effect, and a doubling of the prison population by 2001 appears to be a reality that will have significant financial ramifications even without the elimination of good time. From the outset of the discussion of truth in sentencing, this was not the assumption, and it appears that the implications of this proposal were not debated or adopted with any true understanding of the actual financial and resource impact on the state. Prison populations had risen dramatically before the change in good time, and populations are projected to continue to rise even without factoring in the elimination of good time.

POLICY OPTIONS

There are several options that the Committee may consider and that could become recommendations:

1. Discussion on a recommendation for a sentencing study that takes the truth in sentencing concept one step further, that addresses the elimination of good time within the existing sentencing structure, and that allows the realistic exploration of the consequences of the existing sentencing parameters now in statute. It could also be performed to further the goals of simplicity in sentencing.

Because Montana has an indeterminate sentencing system, this would involve a review of each criminal offense statute and statutes governing criminal procedure. The Montana Sentencing Commission did intend, had it remained in existence, "to review the current maximum and minimum penalties prescribed in the Montana Criminal Code, as well as current sentencing policy and sentence ranges, and make recommendations to the 1999 Legislature for modifications to achieve a simpler, more understandable sentencing system".

Because much of the Montana Sentencing Commission's energy and attention was devoted to reviewing mandatory sentencing guidelines that were eventually not recommended, it is suggested that sentencing guidelines not be taken up in this discussion. Instead, the effects of sentencing on prison populations and state resources should enter more fully into the discussion. The concerns about mandatory minimums, judicial and prosecutorial discretion and its effects, and any confusing statutes could be addressed in this review.

2. Discussion on the need for increased communication and education efforts within the DOC with the probation and parole officers and with the BOPP regarding available resources and the effects of sentencing and treatment recommendations; and the need for information sharing to extend externally to the judiciary, perhaps through the probation and parole officers and PSI reports.
3. Discussion on whether PSI reports and investigations are necessary for all felony offenders and if so, methods to enforce the statutory provisions or at least to aid the courts in ordering them. The ramifications on DOC probation and parole staffing levels would need to be considered, but the information gained may be well worth it. The information gathering could be streamlined and incorporated into the many criminal justice data collection efforts being conducted across the state.
4. Discussion of ways to address the treatment recommendation situation in the DOC Probation and Parole Bureau, in the sentence and judgment, and in the BOPP practices and requirements for parole eligibility. Major policy considerations for treatment recommendations in PSI reports and judgments include:
 - a. Are treatment recommendations by the probation and parole officers, County Attorneys, or District Court Judges appropriate? If appropriate, should the parameters be statutorily defined? If not, should they be statutorily prohibited?
 - b. Should the DOC be required to provide resource information to probation and parole officers, County Attorneys, District Court Judges, and the BOPP in order to

better formulate sentencing and parole decisions? This information could guide decisions that would provide greater truth in sentencing through a better understanding of the limitations of what can feasibly happen while under the DOC's custody,

- c. Should the BOPP be required to take DOC resources into consideration and allow more treatment in communities so long as public safety is not compromised?
- d. Is the DOC currently analyzing or should the DOC be required to analyze court recommendations for placement in the treatment and program planning?

The good time survey was accomplished in a short span of time and is informational rather than statistical in nature. While considerable followup is needed, the survey was effective in revealing information that if acted upon by the DOC could assist in eventually mitigating prison overcrowding concerns. The effects of the elimination of good time must be analyzed and incorporated into future prison population projections. The survey reveals that the District Court Judges, County Attorneys, and probation and parole officers all make certain assumptions about the DOC and the BOPP that are not accurate or shared. By implementing a thorough educational and information-sharing process that ensures that the contributors to the correctional populations are fully informed, each participant becomes a stakeholder in the system. Most importantly, the survey indicates that the Legislature needs to provide clearer direction and parameters in statute for sentencing and that an effort to review and revise sentencing statutes may be in order.

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