



HOLLINS | RAYBIN | WEISSMAN
ATTORNEYS AT LAW

John J. Hollins, Jr. | David L. Raybin | David J. Weissman
Sarah Richter Perky | Benjamin K. Raybin | Ashley A. Farrell

July 29, 2015

To the Chair and Members of the Tennessee Governor's Task Force on Sentencing and Recidivism

On behalf of leadership of the Tennessee Association of Criminal Defense Lawyers (TACDL) I submit this letter to the Task Force as it considers its final recommendations to the Governor. TACDL is a non-profit statewide organization with over 1000 members, including private criminal defense lawyers and public defenders. Founded in 1973, TACDL is the state's leading organizations advancing the mission of criminal defense lawyers to protect the individual rights guaranteed by the United States and Tennessee Constitutions in criminal cases.

TACDL is an affiliate member of the National Association of Criminal Defense Lawyers which is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

A.

When first formed it was stated that the Governor's "Task Force [on Sentencing] was seeking input from hundreds of stakeholders throughout the state." We are not aware of any solicitation by the Task Force of input from TACDL, correctional officer organizations, prisoner advocacy organizations, or from former prisoners whose experiences in correctional facilities might aid the Task Force in formulating

recommendations. This deficiency may be perceived by the public as affecting the efficacy of the Task Force's recommendation.

Before the Task Force makes its final report we wish to address two areas which will have profound impact on future sentencing policy. First, we understand the Task Force advocates the apparent adoption of "Truth in Sentencing," with the apparent abolition of discretionary parole. As will be addressed in this letter, Tennessee has had so-called "Truth in Sentencing" at various points in its history but the truth behind that notion is that it invariably translates into longer sentences and more expensive prisons without clear and convincing evidence this is necessary.

Second, we understand the Task Force recommends:

Establishing a criminal justice research council to provide non-partisan, professional statewide research and information development. (Examples include reliable data on (a) criminal sentences by various categories of offenses; (b) actual incarceration times for various categories of offenses; (c) probation and parole violations, including the reasons and results; (d) crime rates and trends; and (e) caseloads of judges, prosecutors, and public defenders.)

We suggest this second point does not go far enough. On this issue your consultants, the Vera Institute, stated that,

To develop the revised sentencing system proposed in Recommendation 1 and provide ongoing information to the General Assembly, Tennessee should establish a criminal justice research council. In 1995, Tennessee's Sentencing Commission was abolished due to concerns about the Commission's encroachment on legislative prerogatives. Recognizing that history, the criminal justice research council would have more limited authority over sentencing laws.

As a member of the Sentencing Commission I suggest the abolition of the Commission was more a function of the legislature not wanting to hear what we recommended. At the time all criminal legislative proposals were passed by the Sentencing Commission for our comment, much as done today with the current requirement of fiscal notes. The Sentencing Commission's comments and

recommendations occasionally caused political embarrassment but they brought to light duplication of legislation, whether the proposal contradicted earlier policy determinations and, most importantly, the fiscal impact considering the number of additional beds that might be needed if a proposal were passed into law.

Given my long involvement with sentencing legislation, TACDL requested that I prepare this letter for the Task Force to address what I think are legitimate concerns in future sentencing policy for our state particularly as it relates to “Truth in Sentencing” and the need for a meaningful Sentencing Commission which does more than pass along wistful suggestions on proposed legislation. As in all things it is appropriate to know where we have been to determine where we might go. Thus, a bit of history is in order.

B.

The disposition and treatment of those who commit crimes and have to be punished therefore is always a delicate and difficult question. It should be a source of genuine satisfaction to the people of Tennessee that we have discovered and have in successful operation a system that comes as near solving that perplexing problem as any that has yet been tried.

Governor James Beriah Frazier (1903)

In early colonial times there were no penitentiaries – criminals were hung or whipped. One of the favorite punishments was branding. If the person was a horse thief, then the sheriff would brand the offender with the letters HT on the brawn of the thumb inside the right hand.¹ This served two purposes. First it was painful. Secondly it served as a very permanent record of who was a convicted felon. Back then, judges would not let people testify if they were convicted of a felony. However, the only way to tell for sure was for the individual to hold up their right hand when folks took the oath to see if a brand denoted the person was incompetent as a witness. We still have that right hand-lifting ceremony today when witnesses take an oath even though we no longer brand people and felons are now competent to testify.

¹ See Acts of 1807, c. 73, section 4.[S]hall sit in the pillory two hours on three different days, and shall be rendered infamous,--as by law persons guilty of petit larceny are infamous,--and shall be branded with the letters H. T. in such manner and on such part of the person as the Court shall direct.”

Whipping and branding eventually was perceived as brutal. So much so that in early Tennessee history juries were declining to convict people. An alternative was sought.

In 1826, Governor William Carroll prepared a report for the Tennessee legislature which contained letters from the governors of six other states concerning the successful operation of penitentiaries in those jurisdictions. A penitentiary law was proposed for Tennessee which also contained a complete revision of the penal laws. This proposal failed because of the expense of the prison. With respect to changing the methods of punishments, the opponents contended that the “quantity of suffering under the penitentiary system will far exceed that which is experienced under the criminal laws now in force and jurors will be equally disposed to acquit.”

In 1829, the Tennessee legislature finally enacted the “penitentiary bill” which also contained a complete revision of the various crimes and offenses. The Sparta Record declared the new law to be “radical.” The Knoxville Register, on the other hand, applauded the new statute because the “mystery of law was reduced to common sense and common justice.” Clearness was to prevail in the legal profession “so long entangled in the labyrinths of glorious uncertainty, hair-splitting subulation, and sometimes unfathomable absurdity.”

The Governor proclaimed the “penitentiary law” in effect on January 1, 1831 and all persons convicted after that date were subject to the new penal law. Twenty-four days later, one George Washington Cook was convicted in Jackson and was promptly deposited in the penitentiary. Cook, a tailor, had to cut and make his own suit, the first work ever done in the penitentiary.

In September 1831, Governor Carroll, extolling the virtues of the new system, remarked:

If reformation of a man can be produced it is most reasonable to expect it to occur under the influence of the penitentiary system. The violator of the law is shut up within the walls of a prison secluded from a knowledge of the passing events, obligated to labor throughout the day, without an opportunity of holding converse with his fellow convicts and when his daily labor is over, is locked in a cell with no other companion than his bible and his own thoughts. Surely in his retirement he will reflect on the follies of his past ill spent life.

This new prison system with its Bibles, work, silence and solitary confinement contemplated that the prisoners would be reformed by doing penitence for their crime. It is from the word “penitence” we get the term penitentiary.²

C.

Under the early prison system we had, literally, “Truth in Sentencing.” There was no probation. There was no parole. Every felon received a determinate, fixed sentence imposed by the jury. Every prisoner served 100%. Sentences were measured in years and decades much as they are now.

Eventually cost became an issue. The early governors sent messages to the legislature indicating that the prison system cost as much as \$12,000.00 per year but they hoped that the labor of prisoners might offset the cost of the system. See current Tenn. Code Ann. § 41-21-210, enacted in 1829, “The particular employment of each inmate shall be such as is best adapted to the inmate's age, sex and state of health, having due regard to that employment that is most profitable.” The thought was that once the prison population hit about 50 inmates the penitentiary would be self-sustaining and no money would need to be appropriated.

As you are aware the State capital building was built not by dedicated construction workers, but by slaves and prisoners. There was great resistance to the type of work prisoners could perform. In 1853, Governor Andrew Johnson opposed the practice of teaching inmates stone masonry which enabled “the criminals to engrave names upon the tombs of the departed.” He requested that convicted felons be excluded from those persons having charge of the cemeteries. He said: “if it is degrading to be associated with a felon while we are living, it must be more so to be associated with them after we are dead.”

² The Philadelphia Society for Alleviating the Miseries of Public Prisons first met in the home of Benjamin Franklin in 1787. This led to one of the first penitentiaries constructed in Pennsylvania in later years. Providing inmates with Bibles was universal in early American prisons so the inmates could commence on the road to redemption. Tenn. Code Ann. § 41-21-211, enacted in 1829, still provides: “Each inmate shall be provided with a Bible, which the inmate may be permitted to peruse in the inmate's cell at such times as the inmate is not required to perform prison labor.”

Unfortunately, by 1850 the prison was now seriously overcrowded and, coupled with the poor sanitary conditions, was described as bordering on “slow murder.” A prison report deemed it miraculous that only twenty-seven deaths had occurred from among the prison population. By 1860, the comptroller reported that, since its establishment, the penitentiary “had been a vampire upon the public treasury.”

Following the Civil War the governor reported that the number of convicts in the penitentiary has been “rapidly increasing.” In 1866, Governor William Brownlow advised that “far too many former federal soldiers and former slaves were sentenced to the maximum punishment allowed by law” due to the “violent prejudices and high passions engendered by the war.” He estimated that “twenty-five percent of the convicts now in the state prison are there on account of the color of their skin.”

In 1868, the penitentiary was “overcrowded, to the injury of the discipline, and also of the health, of the institution.” As a result, the legislature enacted a provision in 1870 for statutory good conduct time to be calculated by the superintendent of the penitentiary. This statute granted one month of credit for the first year, two months for the second, three months for the third, and three months for each subsequent year to the tenth year, and then four months for each remaining year of the term of imprisonment.

The deplorable state of the penitentiary, and the poor treatment of soldiers during the war, prompted the constitutional convention of 1870 to provide in Article 1, §32 “that the erection of safe and comfortable prisons, the inspections of prisons, and the humane treatment of prisoners shall be provided for.” This provision was amended in 1998 to remove the phrase “safe and comfortable prisons” in a largely symbolic attempt to respond to public misperception that the constitutional language was responsible for rising prison costs or “county club” prisons. Still on the books however, is Tenn. Code Ann. § 41-21-201 which provides that, “The warden is charged with the duty of treating the inmates with humanity and kindness and protecting them from harsh and cruel treatment and overwork.”

D.

Remember in the early Tennessee prison system everybody served virtually their entire sentence less some minor credits for good behavior. There was no probation or parole. The only method of relief was via executive clemency. In 1903 Governor Benton McMillin complained that “there are so many applications for executive clemency as to

consume time which might be profitably devoted to other important interests of the state.”

By the turn of the century many states adopted statutes which permitted the “parole” of prisoners after they had served a portion of their sentence. In 1905, Governor James Frazier proposed such a system for Tennessee:

While the primary object of the law in inflicting punishment for crime is to prevent the law-breaker from a repetition of his wrong, and by his example to deter others from committing like offenses, it should also have for its purpose his reformation and restoration to useful citizenship. No penal system is perfect that does not have as one of its objects the reformation of the criminal. Many persons violate the law and must be punished who are not at heart criminals. Many who commit crime for the first time and are sent to prison, particularly the young, become penitent and, if given a chance, would reform and make useful and respectable citizens. Some system of paroles should be provided under which the governor could give such prisoners a chance to make useful members of society, without granting an absolute pardon, so that if the prisoner violated the confidence reposed in him he could be retaken and again committed to prison

Governor Patterson’s 1910 administration was notable for the number of pardons which he issued. In three years and two months he granted 956 pardons, and these 152 were given to persons convicted of murder. Parole as we know the concept was instituted in 1913 as part of the new “indeterminate sentence law.”

In 1931 the legislature enacted, for the first time, statutes permitting probation. The trial judge was now granted the authority to “suspend” a sentence and place the offender on supervision for the duration of his or her sentence. The enactment of probation statutes resulted from an earlier decision of the Tennessee Supreme Court rejecting the practice. In *Spencer v. State*, 125 Tenn. 64, 140 S.W. 597 (1911) the Court had held that, while it might “promote much good,” probation was open to much abuse because to place “hundreds of men” under the personal power of a single judge, “is nothing short of despotism.” In its earliest form, the statute permitted probation for misdemeanors or any felony for which the maximum punishment did not exceed five years.

The Tennessee prison system slowly expanded through the years until about 1970 when the first serious attempt at sentencing reform was considered. A committee was formed much like the current Task Force to come up with some new sentencing laws and statutes. The Tennessee Law Revision Commission made its report in 1973. This was the first comprehensive revision of our substantive and sentencing laws since 1829. Since no public support was solicited the proposal went absolutely nowhere. Instead, the legislature authorized the jury (which had sentencing authority except in capital cases) to double the minimum indeterminate sentence and the prison population increased dramatically.

E.

In 1974 I graduated from UT Law School and went to the Attorney General's Office. I was there about a year or so when the General Assembly asked the Attorney General to draft a new death penalty law. I was tasked with the job. That was my first experience in drafting legislation for the General Assembly.

By the mid-1970 a law and order mood was sweeping the country. We had a proliferation of drugs as did the rest of the nation. Also the baby boomers reached the age where they were committing crimes in record numbers. The result was the enactment of probably the most draconian set of criminal laws ever created in Tennessee. This was the Class X felony law of 1979. I am very familiar with it. I helped write it when I was an Assistant District Attorney in Nashville.

We abolished or restricted parole and various forms of work release and added many mandatory sentences for various crimes. Plea bargaining was restricted and bail following conviction was eliminated. There was even a sticker printed up and put in the windows of 7-11 markets. It said, "Class X Protects."

After Class X went into effect there were no problems. At least at first. We learned that any time you increase the penalty it takes about a year or two for the new law to filter through the criminal justice system and for folks to commit crimes and be tried and be sentenced.

Several horrible statutes had unintended consequences such as the habitual drug offender enhancement. This statute imposed harsh penalties for those that sold drugs multiple times. We found the police would simply delay arresting a person until the

requisite number of sales were consummated thus manipulating the sentence but leaving the drug dealer at large between the intervening drug deals.³

A few years later the Class X Felony Law was a disaster. We then had another sentencing law in 1982 which I also helped draft. By that time all of the law and order statutes had gotten so out of hand we had riots in the prisons, inmates were killing guards as well as each other. Finally, TDOC was taken over by the federal court.

A sentencing commission was authorized in 1985. As the Lieutenant Governor's appointee I served on the Tennessee Sentencing Commission for its entire existence. I am proud of what we accomplished in the legislation adopted in 1989. For the years that the Commission existed, the sentencing laws worked. For the first time we had a rational sentencing system. We had a sentencing grid with sentencing reports and aggravating and mitigating factors and appropriate appellate review.

Part of the work of the Sentencing Commission was to make recommendations about new sentencing proposals. If some legislative proposal would come along with an enormous negative impact on the prison population we would say so. This upset many people even though that was our job.

By 1995 we had another crisis. There were some who demanded, "Truth in Sentencing" and so the Sentencing Commission was tasked with coming up with some new scheme to satisfy that concept.

By 1995 the perception was that the Sentencing Commission's work was not harsh enough. All we really did was to hold up a mirror to say that: If you pass this law which triples the penalty for such and such a crime it will have such and such an effect on the prison population. Folks did not want to hear that. The Governor's response to the recommendations of the Sentencing Commission was to abolish the Sentencing Commission.

In 1995 the soul and conscience of the criminal justice system passed out of existence. There was no longer a system. It was just a free-for-all except it was not free.

³ I notice in the Task Force's proposal for increased punishment for repeat drug offenders. I am unclear what the concept is here since a prior serious drug conviction already permits sentencing enhancement within the sentencing Range.

In 1995 the legislature considered a vast array of crime bills sponsored by the Governor which did away with parole for many offenses without reducing the sentence, enacted life time supervision for sex offenders, and came up with several prison-filling statutes.

I advised that the 1995 legislative proposals were contrary to the Sentencing Commission's recommendations and would cause significant sentence increases. My recollection of my words was that the proposals were nothing less than an "orgy of crime legislation." I advocated that what we needed was not so much truth in sentencing but stability in sentencing so that a statute enacted today would not be changed tomorrow and people would have more confidence in our system.

On the 1995 laws in Tennessee here is the backstory behind that. In the 1980's when the federal government was working on what would become the Federal Sentencing Guidelines they got rid of parole in the name of "Truth in Sentencing." They reviewed 10,000 presentence reports to determine, in part, how much people served on their sentences. In creating the Guidelines the Federal Commission used the time that people had served as the benchmark for establishing the ranges in the Sentencing Table.

The federal system increased the percentage to be served, but reduced the amount of time. A 20 year sentence on which one would have served 8 years before being paroled under previous law now became an 8-year no-parole sentence under the Guidelines.

In the 1990's the federal government offered money to States who would make sure that certain kinds of sentences (mostly violent offenses) were served at 85% (which mirrored the Federal Guidelines including the 54 days per year in good time).

Tennessee was one of those States which apparently took the federal government up on its offer and converted several sentences to 85%. Except that, unlike what the federals did with the Federal Guidelines, Tennessee just did a straight conversion of existing sentences to require service of 85%, instead of adjusting the sentences down to what people had actually served (30, 35, or 40%) before applying the new 85%. In doing so, Tennessee doubled or tripled the length of incarceration; a cost not covered by the offered federal money albeit the federals never demanded we keep our sentence lengths as they were only that the violent offenses have an 85% release.

Tennessee has the worst result. We have the old grid-based system of sentence lengths with a new non-parole flat date at 85% with no corresponding reduction in sentence length and zero supervision when prisoners are released.

I am attaching the fiscal note to the 1995 legislation. It provided for an ever-increasing expenditure coming to some 57 million dollars in the tenth year. Additional millions were recommended for more judges and public defenders. The money was never appropriated and the judicial positions never created. The “real” cost for the 1995 law if extrapolated out 20 years is in the hundreds of millions or perhaps billions of dollars.

The abolition of parole in 1995 for many offenses has had far reaching effects. We never designed the grid for a no-parole system. It is fine to do away with parole but you need a corresponding decrease in the length of sentences so you have parity in prison population. The 1995 laws had no significant impact for years since even under the old law most prisoners would have been there for a decade or more anyway. Under the old law many prisoners would have come up for parole by now and some might be gradually released. But since there is no parole none of them will be released and they are stacking up in the thousands with zero opportunity for release. It is no coincidence that we now find ourselves wondering what to do with our prisons at near capacity.

F.

In my 40 years of experience the only time Tennessee has ever reduced sentence lengths for some offenses was as part of the 1989 law but in the post 1995, non-sentencing commission world the sentences were increased by moving crimes into higher offense classifications and elimination of parole on a piecemeal basis. We have an ever-increasing constellation of sentencing exceptions which create longer sentences. We are all familiar with the uniform judgment document that must be changed every year because of new laws. This is the reason – in part – for why we are where we are today.

By 1995 the Tennessee Sentencing Commission was gone. Nothing anyone said made any difference. The wheels came off the bus and now twenty years later we have yet another Task Force to review our laws. Your consultants, the Vera Institute, have advised you as much:

Task Force Questions. Does state population growth correlate with growth in the prison population? State prison population growth far

outstrips overall state population growth. The best data available for our purposes covers the period from 1980-2010. During that period, Tennessee's population grew from 4.6 million to 6.3 million, an increase of around 40%. Over that same period, the prison population grew from 7,022 to 27,451, an increase of 273%. That nearly 300% increase looks significantly worse if you compare 1990 numbers with today, because Tennessee's prison population did not really spike until the 1990's.

The legislation enacted in 1995 did not differ from what we had done with the Class X Law of 1979 and the results are the same. I know this – I lived it as have some members of the Task Force. That the Task Force contemplates moving ALL sentences to an 85 % release date without a radical reduction in statutory sentence lengths is alarming since the result is not only predictable, it is inevitable. That is the “truth” in any revised “Truth in Sentencing” model.

You have commissioners of education and commissioners of roads but the commissioner of correction only houses prisoners and has no impact on who goes into his penitentiary system. TACDL suggests that we do what other states have done. We suggest we do what we did in Tennessee between 1986 and 1995. We should have a full time sentencing commission made up of professionals in the criminal justice system with judges, defense lawyers, prosecutors and citizens such as we had before. Perhaps we should add an ex-offender or two to give us some perspective. We need that.

There should be a staff and an executive director and a budget which would be a whole lot cheaper than housing several prisoners for no reason. Whatever the sentencing commission recommends the legislature still must accept or reject but still it is a conscience and it is a screening tool for radical legislation which accomplishes nothing or spends a fortune.

A sentencing commission is also a tool for finding out about problems before they get out of hand. I can assure you that a full time sentencing commission is the only solution to making meaningful progress. We cannot have committees or commissions who come together every 20 years to fix the system. We advocate routine maintenance on our cars – why not our criminal justice system?

The cost of the penitentiary is staggering. It now costs almost \$ 900,000,000 with millions more in cost for local jails. The total taxpayers' expense could shortly approach a billion dollars a year.

The number of imprisoned people in TDOC in Tennessee on June 30, 2014 included 21,246 offenders. Over 8000 are locked up in jails all over the state. *We now incarcerate more people in Tennessee than does the entire content of Australia with four times the population.*

Without a sentencing commission the people in the field do not understand what is going on. In 1995 the legislature passed a law imposing a mandatory surcharge on sex offenders. There was nobody to tell the clerks in the field that the mandatory surcharge schedule was repealed in 1996. It was only until I pointed out to a criminal court clerk that the surcharge had been repealed did they stop imposing the tax of \$2,250 per offender. That was a few months ago: they have been collecting this tax illegally on citizens for almost 20 years.

G.

The Task Force recommendations do not address other issues which may have a salutatory effect on prison length:

1. Increased funding for appointed attorneys and public defenders to learn sentencing advocacy at the trial level.
2. A review of the criteria for consecutive sentences to the tendency to pyramid punishments for offenses committed during a brief criminal episode given the change in the rule regarding identity of offenses. *State v. Watkins*, 362 S.W.3d 530 (Tenn. 2012).
3. Substantially increased utilization of judicial diversion to permit expungement of convictions so the individual does not suffer the stain of a felony conviction for the rest of his or her life.
4. Removal of some statutory restrictions on judicial diversion such as temporally remote prior Class A misdemeanor convictions.
5. Sentencing enhancements for child pornography have failed to consider that because of changes in the internet downloading even one image can trigger a torrent of equally abhorrent images. Mere possession of child pornography should not carry punishments reserved for murder.

6. Consideration of altering the standard of appellate review of sentencing determinations. Currently, the appellate courts employ an “abuse of discretion” standard. Perhaps we should use a de novo review standard where the judge bases a sentencing determination on inapplicable sentencing factors.
7. TACDL is also concerned about the paucity of appropriate medical care in our jails and prisons. This is particularly the case for mental health issues. When prisoners are released they should not be disabled by their confinement.
8. TACDL endorses the Task Force’s recommendation that recidivism should be reduced. However, aggressive job placement or even government public work projects produces positive incentives for those leaving prison rather than threats of re-incarceration.
9. Prison assignment is currently dictated by bed availability and not proximity to the prisoner’s family. Rehabilitation in prison can be promoted by access to one’s family.
10. Increased funding and training for correctional officers should be a priority to promote prisoner safety. The dangers of rape and assault by other prisoners is no less traumatizing because the victim is a prisoner.
11. Rehabilitation programs in our local jails – particularly in rural areas – is often non-existent. Most offenders’ initial contact is not prison, it is the local jail. More resources at the local level may prevent a later prison confinement.
12. We should have a serious conversation about retroactive sentence adjustments for persons sentence under the 1995 laws where they become parole eligible after serving 50 % of their sentence,⁴ or – in the case of astronomical sentences of anything other than a sentence of life without parole, say, after serving 25 calendar years.⁵ Executive clemency – given the excesses of the Blanton administration – is so seldom used as to be virtually nonexistent. Some method of sentencing equalization should be adopted.

⁴ This 50% figure is derived from Tenn. Code Ann. § 40-28-115. “Every person sentenced to a determinate sentence and confined in a state prison, after having served a period of time equal to one half (1/2) of the sentence imposed by the court for the crime for which the person was convicted, but in no event less than one (1) year, ...” This was the law in Tennessee for many decades prior to 1982.

⁵ The 25-years is derived from Tenn. Code Ann. § 40-35-501 as it appeared prior to the 1995 amendments: “A defendant receiving a sentence of imprisonment for life for first degree murder shall be entitled to earn and retain sentence credits, but the credits shall not operate to make the defendant eligible for release prior to the service of twenty-five (25) full calendar years.”

H.

We can do better. Every proposal, suggestion, statistic, and alternative that the Task Force addressed has been discussed or addressed before over the last two hundred years.⁶ Unless we make it a cohesive whole, another committee will be here in a few decades starting from scratch again.

The most influential legal writer who ever lived was Sir William Blackstone whose Commentaries on the Laws of England formed the bedrock of our jurisprudence and was the treatise which educated generations of lawyers and judges in America. Writing in 1770 he said this about the formulation of criminal laws and punishments:

But even with us in England, where our crown-law is with justice supposed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties less uncertain and arbitrary; where all our accusations are public, and our trials in the face of the world; ... even here we shall occasionally find room to remark some particulars, that seem to want revision and amendment. These have chiefly arisen from ... not repealing such of the old penal laws as are either obsolete or absurd; and from too little care and attention in framing and passing new ones.

The enacting of criminal penalties, to which a whole nation shall be subject, ought not to be left as a matter of indifference to the passions or interests of a few, who upon temporary motives may prefer or support such a bill; but by calmly and maturely considered by persons, who know what provisions of the law already exist which will remedy the mischief complained of, who can from experience foresee the probable consequences of those laws which are now proposed, and who will judge

⁶ For example, your consultants advocate that Tennessee “Require mandatory post-prison supervision with targeted services. Offenders who are not statutorily eligible for parole, and offenders who are statutorily eligible for parole but not approved by the parole board, or refuse parole, should serve the last 12 months of their prison sentence on community supervision.” Vera report, page 21. It should not come as a surprise that for the identical policy reasons, Tennessee enacted mandatory parole in 1974. See, Tenn. Code Ann. § 40-28-117 (since repealed for post-1982 offenses). “Every prisoner who has never been granted a parole of any type by the board on a particular sentence of imprisonment shall be granted a mandatory parole by the board subject to the following restrictions”

without passion or prejudice how adequate they are to the evil. It is never usual in the house of commons even to read a private bill, which may affect the property of an individual, without first referring it to some of the learned judges, and hearing their report. And surely equal precaution is necessary, when laws are to be established, which may affect the property, liberty, and perhaps even lives, of thousands of our citizens.

.... Lastly, as a conclusion to the whole, we may observe that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity. It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action that crimes are more effectually prevented by the certainty, than by the severity, of punishment.

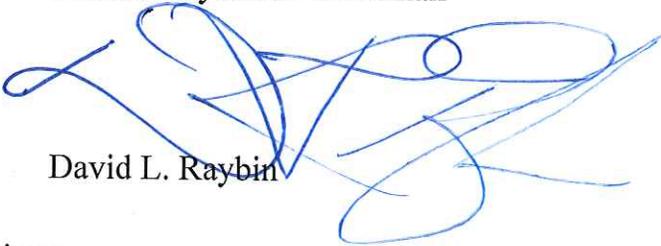
I agree with Blackstone. We need to stop this endless orgy of crime legislation and perhaps repeal two criminal laws for every one we enact. Perhaps we should impose prison quotas for each judicial district to encourage experiments in sentencing reform at the local level. However, before we start reforming individual laws we need to put the "system" back into the criminal justice system.

TACDL applauds the revision of sentencing laws, but the process should be accomplished in consultation with all appropriate stakeholders. Only in that fashion can we achieve a result which is fair, effective, cost efficient, and supported by the public.

Very truly yours,

Hollins Raybin & Weissman

David L. Raybin



CC: TACDL President and Executive Committee

FISCAL NOTE

TO: Chief Clerk of the Senate
Chief Clerk of the House

FROM: James A. Davenport, Executive Director

DATE: March 15, 1995

SUBJECT: **SB 1747 - HB 1762**

This bill, if enacted, will require persons convicted of one of the violent felonies enumerated in the **3 strikes law** to serve 100% of the sentence imposed.

The fiscal impact from enactment of this bill is estimated to be an increase in state expenditures of \$57,899,352 for incarceration*. The details of the inmate population growth and costs are shown below. Year 1 represents the first year affected by the increased sentences.

Year 1	2 Inmates	\$ 32,376
Year 2	68 Inmates	\$ 1,092,520
Year 3	472 Inmates	\$ 7,629,186
Year 4	877 Inmates	\$14,185,277
Year 5	1,297 Inmates	\$20,980,124
Year 6	1,745 Inmates	\$28,235,434
Year 7	2,208 Inmates	\$35,714,235
Year 8	2,820 Inmates	\$45,615,795
Year 9	3,346 Inmates	\$54,119,806
Year 10	3,579 Inmates	\$57,899,352

Note: These estimates are produced through the use of the Department of Correction population and cost projection formula.

Further, the fiscal impact from enactment of this bill for the judicial branch to try a substantial number of cases rather than resolving cases through plea bargaining is estimated to result in an increase in recurring state expenditures of \$2,100,040 and one-time

state expenditures of \$279,500. Details of this estimate are shown

below:

OFFICE OF COURT ADMINISTRATION

9 Judges

Salary (\$93,250 ea.)	\$ 839,250
Benefits (\$16,785 ea.)	151,065
Travel (\$2,400 ea.)	21,600
Rent (\$7,200 ea.)	64,800
Utilities (\$1,000 ea.)	9,000
Communications (\$1,800 ea.)	16,200
Maintenance (\$600 ea.)	5,400
Equipment (\$6,500 ea.)	58,500 one-time
Books (\$8,000 ea.)	72,000 one-time
Supplies (\$5,000 ea.)	45,000

9 Secretaries

Salary (\$23,592 ea.)	212,328
Benefits (\$5,898 ea.)	53,082
Equipment (\$6,000)	54,000 one-time

9 Court Reporters

Salary (\$21,000 ea.)	189,000
Benefits (\$5,460 ea.)	49,140
Travel (\$2,000 ea.)	18,000
Supplies (\$2,000 ea.)	18,000
Equipment (\$6,000 ea.)	54,000 one-time

TOTAL COURTS

\$1,930,365

PUBLIC DEFENDERS CONFERENCE

7 Assistant Public Defenders

Salary (\$30,000 ea.)	\$ 210,000
Benefits (\$7,500 ea.)	52,500
Travel (\$500 ea.)	3,500
Communications (\$1,000 ea.)	7,000
Supplies (\$500 ea.)	3,500
Rent (\$2,000 ea.)	14,000
Furniture & Equip. (\$4,000 ea.)	28,000 one-time

3 Secretaries

Salary (\$22,500 ea.)	67,500
Benefits (\$4,725 ea.)	14,175
Communications (\$500 ea.)	1,500
Supplies (\$300 ea.)	900
Furniture & Equip. (\$4,000 ea.)	12,000 one-time

SB 1747 - HB 1762

1 District Investigator

Salary	26,000
Benefits	6,500
Travel	800
Communications	700
Supplies	300
Furniture & Equipment	1,000 one-time

Total Public Defenders **\$449,175**

Judicial Grand Total **\$2,379,540**

In summary:

Cost of Incarceration \$57,899,352

Cost of Judicial Process:

Recurring \$2,100,040

One-Time \$279,500

This is to duly certify that the information contained herein is true and correct to the best of my knowledge.



James A. Davenport, Executive Director

**Section 9-6-119, TCA, requires that: For any law enacted after July 1, 1986, which results in a net increase in periods of imprisonment in state facilities, there shall be appropriated from recurring revenues the estimated operating cost of such law.*

**** This bill has a memorandum on a proposed amendment that reduces the fiscal impact of the original bill.**