

Mandatory Minimum Sentences: Handcuffing the Prisoner or the Judge?

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I. The Florida Experience: A Brief History of Florida's Sentencing Schemes

Historically, Florida's sentencing scheme has been largely unstructured. The criminal statutes established a maximum sentence based upon the seriousness of the offense but, with few exceptions, there were no mandatory sentences nor any required minimum sentences. Offenses were categorized by degree of offense:

- Up to five years for a third-degree felony (e.g., theft, aggravated assault);
- Up to fifteen years for a second-degree felony (e.g., robbery, aggravated battery);
- Up to thirty years for a first-degree felony (e.g., armed robbery);
- Up to life for a life felony (e.g., second-degree murder)

Under this sentencing scheme, judges were given broad, largely unfettered discretion in determining the appropriate sentence in a particular case. The judge could impose a fine, probation, county jail time, or a prison sentence of a specific term of years (or, if permitted by statute, a sentence of life or death). The only restriction on a judge was the statutory maximum sentence that could be imposed, which was based the degree of the offense.

In 1974, Florida (like many other states during that era) adopted a utilitarian, non-retributive statement of purpose. As enacted by the Legislature, section 775.012(6), Florida Statutes (1974) provided:

To ensure the public safety by deterring the commission of offenses and providing for the opportunity for rehabilitation of those convicted and for their confinement when required in the interests of public protection.

This statement of legislative purpose was not accompanied by any significant changes to the sentencing structure, and judges continued to enjoy broad discretion in determining the sentence to be imposed in a criminal case.

Changes and restrictions on judicial discretion in sentencing began to take place in the late 1970's and early 1980's. These changes can be traced, at least in part, to events and trends occurring in Florida during this time period. Florida (and South Florida in particular) experienced significant cultural upheaval and civic unrest, including the 1980 Mariel boatlift (in which more than 125,000 prisoners were released from Cuba's jails and mental health facilities and sent to Miami); Miami's race riots in 1980 and 1982, culminating in violence, looting and fiery destruction of homes and businesses throughout portions of Miami; a flourishing narcotics industry during the late 1970's that transformed South Florida into a prime narco-

trafficking hub and led to the Miami Drug Wars of the 1970's and 1980's.¹ Added to this mix was a growing discontent with a lack of uniformity in sentencing, and overcrowded prisons that resulted in offenders serving as little as 15 percent of their actual sentence. It was in this context that the Florida Legislature enacted its first drug-related mandatory minimum statute.²

1983 Sentencing Guidelines

In the early 1980's, and as a result of this confluence of circumstances, Florida began its move away from the concept of rehabilitation and toward punishment as the primary goal of the criminal law. This movement was also intended to reduce unwarranted disparity in sentencing, and improve "truth in sentencing" through which a defendant would be required to serve a higher percentage of his actual sentence. These principles were codified in 1983 by the Florida Legislature when it created Florida's Sentencing Guidelines, which included the following express punitive purpose:

¹ DEA History Book, 1975-1980, available at www.usdoj.gov/dea/pubs/history/1975-1980.html.

² See Laws of Florida, chapter 79-1 (1979) (creating section 893.135 which established mandatory minimum sentences for possession, sale, manufacture, or delivery of various amounts of marijuana, cocaine, morphine, or opium).

The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment.³

Florida courts followed and applied this legislative directive. See, e.g., In re Rules of Criminal Procedure, 439 So. 2d 848, 849 (Fla. 1983) (creating rule implementing the Sentencing Guidelines, and providing that “the primary purpose of sentencing is to punish the offender”).

Under this structure, sentencing guidelines worksheets were created for each specified offense category (e.g., murder, drug offenses, crimes against persons, sexual offenses, etc.). Within each worksheet, points were assessed for the current offense, and points assessed for additional offenses as well as prior convictions. Point assessments were also included for “legal status” (e.g., defendant on probation or incarcerated during the commission of the crime) and for victim injury. The score was totaled and then placed in a “recommended sentencing range” which contained a floor (i.e., the minimum recommended sentence) and a ceiling (i.e., the maximum recommended sentence). Judges were required to sentence within that

³ Fla. Stat., § 921.001(4)(a)(2)(1983).

recommended range unless written reasons were provided for departing above or below the range.

At the same time, the Legislature eliminated parole eligibility, closing the “back door” of Florida’s prisons in an effort to ensure that defendants would serve a higher percentage of the sentence imposed (the “truth in sentencing” goal).

The Sentencing Guidelines in many ways proved largely unsuccessful. Some of this can be attributed to a growing epidemic of crack cocaine prosecutions that flooded the court system and filled prisons beyond their capacity, overwhelming the state’s correctional resources. Also during this time, the Legislature began implementing mandatory minimum sentences, but did not always provide the necessary funding to state correctional agencies to cover the cost that would accompany the increasing prison population. In fact, data shows that, by 1989 (six years after the Sentencing Guidelines were created), the average percentage of a sentence served by a prisoner actually decreased (to 34 percent of the actual sentence) as compared to the average percentage of a sentence served by a prisoner before the Sentencing Guidelines were implemented.

1994 Sentencing Guidelines

In 1994 the Legislature created new Sentencing Guidelines with the recognition that prison resources are finite and that the use of state incarceration should be focused on serious, violent and repeat offenders. Though similar in some respects to the prior guideline scheme, the 1994 version changed the point system and mandated a non-prison sanction when the total score on a sentencing score sheet fell below a certain number of points. The judge was given the discretion to increase or decrease the sentence by 25 percent, creating a relatively narrow range for sentences that departed from the guidelines.

The 1994 Guidelines were modified slightly between 1995 and 1997, providing for increased sanctions and increasing the length of prison sentences under certain circumstances, eliminating early release regulations, and requiring that a defendant serve at least 85 percent of his actual sentence before becoming eligible for release.

The 1998 Criminal Punishment Code

In 1998, the Florida Legislature replaced the Sentencing Guidelines with the Criminal Punishment Code.⁴ Although different in many respects

⁴ See § 921.002, Fla. Stat. (1998).

from its predecessor, its primary purpose, as set forth in the statute, remained the same. In its statement of purpose, the Florida Legislature explained:

The Legislature, in the exercise of its authority and responsibility to establish sentencing criteria, to provide for the imposition of criminal penalties, and to make the best use of state prisons so that violent criminal offenders are appropriately incarcerated, has determined that it is in the best interest of the state to develop, implement, and revise a sentencing policy.

The Legislature added the following principles in establishing the Criminal Punishment Code:

- The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment;
- The penalty imposed is commensurate with the severity of the offense and the circumstances surrounding the offense;
- The severity of the sentence should increase with the length and nature of the offender's prior record;
- The sentence imposed by the sentencing judge should reflect the actual length of actual time to be served, shortened only by the application of incentive and meritorious gain-time as provided by law, and may not be shortened if the defendant would consequently serve less than 85 percent of the sentence imposed;
- Parole eligibility is eliminated;

- There is a sentencing “floor”. Any departures below that lowest permissible sentence must be explained in writing by the trial court judge and made only when circumstances or factors reasonably justify mitigation of the sentence;
- There is no sentencing “ceiling”. A trial court judge may impose any sentence up to and including the statutory maximum for any offense;
- Use of incarcerative sanctions is prioritized toward offenders convicted of serious offenses and certain offenders who have long prior records, in order to maximize the finite capacities of state and local correctional facilities.⁵

II. The Rise of Mandatory Minimum Offenses in Florida

Now shed of any primary rehabilitative purpose, the statutory sentencing scheme was soon modified to address other perceived problems, and accelerated the movement toward a full embrace of the perceived utility of mandatory minimum sentences. For many of the same reasons that led to adoption of the Sentencing Guidelines (and later, the Criminal Punishment Code), the Legislature sought to implement mandatory minimum sentences that could not be waived, modified or deviated from by the trial judge. The prosecutor has the sole discretion to waive imposition of a mandatory

⁵ Fla. Stat. § 921.002(1)(a)-(i).

minimum sentence.⁶ The Legislature attempted to establish “guided discretion” and, in many circumstances, remove discretion altogether, in order to eliminate a perceived unjustified disparity in sentences imposed upon different offenders for similar crimes.

Initially, these mandatory minimum penalties targeted narcotics trafficking offenses and violent repeat offenders. (See *infra* at 14). However, over time, Florida has experienced a legislative “creep” through which mandatory minimums have been enacted to cover a wide variety of criminal conduct, having no particular connection to either the violent nature of the crime or the character or background of the offender. For example, Florida has mandatory minimum sentences for such crimes as:

- Criminal Use of Personal Identification Information
- Unlawful Possession or Unlicensed Sale of Certain Fish
- Sale of Horse Meat for Human Consumption
- Aggravated Abuse of Horses or Cattle

⁶ See, e.g., section 893.135(3), Fla. Stat. (2014) (authorizing prosecution to waive minimum mandatory sentence when defendant provides substantial assistance in the prosecution of co-participants in trafficking cases); section 27.366, Fla. Stat. (2014) (granting prosecutor the discretion to waive imposition of a minimum mandatory sentence); State v. Kelly, 138 So. 3d 1169 (Fla. 3d DCA 2014); State v. Weaver, 3 So. 3d 349 (Fla. 3d DCA 2009); Madrigal v. State, 545 So. 2d 392 (Fla. 3d DCA 1989)).

- Cruelty to Animals
- Unlicensed Practice of Medicine

Further, when mandatory minimum sentences for drug offenses were first implemented, they were intended primarily for large-scale traffickers and so-called “drug kingpins.” These laws have been amended more than a dozen times over the last 15 years, significantly expanding the list of substances, adding simple possession to its ambit, decreasing the amounts necessary to trigger mandatory minimum penalties, and increasing the length of a minimum sentence under the law. For example, prior to 1997, mandatory minimum sentences for cocaine offenses were limited to trafficking in amounts of 400 grams or more. Defendants convicted of cocaine offenses involving amounts less than 400 grams were required to be sentenced pursuant to the Sentencing Guidelines (and later the Criminal Punishment Code) without any mandatory minimum sentence. The scope of these mandatory minimum sentences changed dramatically beginning in the late 1990’s, with the creation of mandatory minimum penalties for possession of relatively small amounts of cocaine.⁷ Similar legislative

⁷ See Laws of Florida, chapter 99-188 (1999) (adding three-year mandatory minimum sentence for possession of 28-199 grams of cocaine and seven-year mandatory minimum for possession of 200-399 grams).

changes followed, for example, for possession of smaller amounts of morphine, opium and oxycodone (adding three-year mandatory minimum for possession of 4-13 grams and fifteen-year mandatory minimum for possession of 14-27 grams); phenylcyclidine (adding three-year mandatory minimum for possession of 28-199 grams and seven-year mandatory minimum for possession of 200-399 grams); methaqualone (adding three-year mandatory minimum for possession of 200 grams); amphetamine and methamphetamine (adding three-year mandatory minimum for possession of 14-27 grams, seven-year mandatory minimum for possession of 28-199 grams and fifteen-year mandatory minimum for possession of 200-399 grams); and flunitrazepam (adding three-year mandatory minimum for possession of 4-13 grams, seven-year mandatory minimum for possession of 14-27 grams and twenty-five year mandatory minimum for possession of 28 grams). These mandatory minimum sentences prohibit a sentencing judge from exercising any discretion, regardless of the nature or circumstances of the crime or the individual background, characteristics, and prior record of the offender.

Other mandatory minimum sentencing provisions enacted by the Florida Legislature:

Prison Releasee Reoffender Act (1997): Offenders who commit certain enumerated violent crimes within three years of release from prison are subject to a mandatory minimum prison sentence and must serve 100 percent of that sentence.

10/20/Life Act (1999): Offenders who commit certain enumerated trafficking or violent crimes must serve a mandatory minimum sentence when, in the course of such offense, they possess a firearm (mandatory minimum 10 years), discharge a firearm (mandatory minimum 20 years) or discharge a firearm causing great bodily injury or death (mandatory minimum 25 years to life).

Three-Time Violent Offender Act (1999): Offenders convicted of certain enumerated violent felonies and have two prior convictions for any such felonies must serve a mandatory minimum sentence based upon the degree of the current offense (5 years for 3rd degree felony, 15 years for 2nd degree felony, 30 years for 1st degree felony, life for life felony). Also created mandatory minimum sentences for repeat sexual battery, drug trafficking offenses, and certain violent felonies upon the elderly and upon law enforcement officers.

Habitual Felony Offender (1972) and Habitual Violent Felony Offender (1988) Laws:

These provisions are not (strictly speaking) mandatory minimum sentences, but rather create “extended terms of imprisonment” which a trial judge may impose if the defendant qualifies as a habitual felony offender or habitual violent felony offender. Significantly, though, these extended terms of imprisonment increase the existing statutory maximums.

For example, ordinarily the statutory maximum for a third-degree felony in Florida is five years. However, a defendant who qualifies as a habitual felony offender is subject to a sentence of up to ten years for a third-degree felony (for a habitual violent felony offender it is ten years and he is not eligible for release before serving at least five). For a second-degree felony (normally a statutory maximum of 15 years) a habitual felony offender is subject to a sentence of up to 30 years (for a habitual violent felony offender it is up to 30 years and he is not eligible for release before serving at least 10 years). For a first-degree felony (normally a statutory maximum of 30 years) a habitual felony offender is subject to a sentence of up to life (for a habitual violent felony offender it is up to life and he is not eligible for release before serving at least 15 years).

Even if a defendant qualifies as a habitual felony offender or habitual violent felony offender, a trial judge retains the discretion not to impose such an extended term of imprisonment. However, the judge may do so only if she makes a finding that such an extended term of imprisonment “is not necessary for the protection of the public.” The written findings made by the judge in support of a decision to impose a sentence which does not include these extended terms of imprisonment must be submitted to, and is reviewed by, the Office of Economic and Demographic Research of the Legislature.

A Non-Exhaustive List of Mandatory Minimum Sentences in Florida

1. Narcotics/Controlled Substances

Mandatory minimum sentences for sale, purchase, manufacture, delivery or possession of certain amounts of controlled substances:

Marijuana

25 to 199 lbs. or 300 to 1999 plants =	3 yrs./\$25,000 fine
2000 to 9999 lbs. or 2000 to 9999 plants=	7 yrs./\$50,000
10,000+ lbs. or 10,000+ plants=	15 yrs./\$200,000

Cocaine

28 to 199 grams=	3 yrs./\$50,000 fine
200 to 399 grams=	7 yrs./\$100,000

400 grams to <150 kilos= 15 yrs./\$250,000
150+ kilos= Life in prison/no parole

Morphine/Opium

4 to 13 grams= 3 yrs./\$50,000 fine
14 to 27 grams= 7 yrs./\$100,000
28 grams to <30 kilos= 15 yrs./\$500,000
30+ kilos= Life in prison/no parole

Hydrocodone

14 to 27 grams= 3 yrs./\$50,000 fine
28 to 49 grams= 7 yrs./\$100,000
50 to 199 grams= 15 yrs./\$500,000
200 grams to <30 kilos= 25 yrs./\$750,000
30+ kilos= Life in prison/no parole

Oxycodone

7 to 13 grams= 3 yrs./\$50,000 fine
14 to 24 grams= 7 yrs./\$100,000
25 to 99 grams= 15 yrs./\$500,000
100 grams to <30 kilos= 25 yrs./\$750,000
30+ kilos= Life in prison/no parole

Methaqualone (Quaaludes)

200 grams to < 5 kilos= 3 yrs./\$50,000 fine
5 kilos to <25 kilos= 7 yrs./\$100,000
25+ kilos= 15 yrs./\$250,000

Phencyclidine (PCP)

28 to 199 grams=	3 yrs./\$50,000 fine
200 grams to 399 grams=	7 yrs./\$100,000
400+ grams=	15 yrs./\$250,000

Amphetamine/Methamphetamine

14 to 27 grams=	3 yrs./\$50,000 fine
28 to 199 grams=	7 yrs./\$100,000
200+ grams=	15 yrs./\$250,000

Manufacture of methamphetamine or phencyclidine in structure with child present= 5 years

Flunitrazepam (Rohypnol or “roofies”)

4 to 13 grams=	3 yrs./\$50,000 fine
14 to 27 grams=	7 yrs./\$100,000
28 grams to < 30 kilos=	25 yrs./\$500,000
30+ kilos=	Life in prison/no parole

LSD

1 to 4 grams=	3 yrs./\$50,000 fine
5 to 6 grams=	7 yrs./\$100,000
7+ grams=	15 yrs./\$500,000

GBL/GHB (“Date rape drug”)

1 kilo to < 5 kilos=	3 yrs./\$50,000 fine
5 kilos to < 10 kilos=	7 yrs./\$100,000
10+ kilos=	15 yrs./\$250,000

MDMA/Phenethylamines

10 to 199 grams=	3 yrs./\$50,000 fine
200 to 399 grams=	7 yrs./\$100,000
400+=	15 yrs./\$250,000

Sale (or possession with intent to sell) of controlled substance within 1000 feet of a child care facility=

5 years

2. Sexual Offenses

Lewd or Lascivious Molestation of Child by an Adult=

25 years

Sexual Battery of Child by Adult=

25 years

Commission of certain sexual offenses causing serious personal injury or committed with use or threat to use deadly weapon=

25 years

Commission of second enumerated sexual offense=

25 years

3. Offenses Involving Firearms

Possession of Firearm in the Commission of Certain Felonies=

3 years

Possession of Semi-Automatic Firearm or Machine Gun in Commission of Certain Felonies=

15 years

Possession of Firearm in Commission of a Violent Felony= 10 years

Discharging Firearm in Commission of a Violent Felony= 20 years

Discharging Firearm in Commission of a Violent Felony with Great Bodily Harm= 25 years

Possession of Short-Barreled Rifle, Short-Barreled Shotgun or Machine Gun= 5 years
(NOTE: This mandatory minimum provision was deleted from the statute by legislative amendment in 1993)

4. Prison Releasee Offender (mandatory minimum for commission of certain offenses within 3 years of release from prison):

Commission of life felony= Life/no parole

Commission of 1st degree felony= 30 years

Commission of 2nd degree felony= 15 years

Commission of 3rd degree felony= 5 years

5. Violent Career Criminal (mandatory minimum for current offense if defendant has three or more prior convictions for certain felonies and had previously served a prison sentence):

Commission of life or 1st degree felony= Life/no parole

Commission of 2nd degree felony= 30 years

Commission of 3rd degree felony= 10 years

6. Three-Time Felony Offender (mandatory minimum for current offense if defendant has two or more prior convictions for certain felony offenses and current offense was committed within 5 years from defendant's last offense or within 5 years of release from prison):

Commission of life felony= Life/no parole

Commission of 1st degree felony= 30 years

Commission of 2nd degree felony= 15 years

Commission of 3rd degree felony= 5 years

7. 1st Degree Murder= Death or Life/no parole

8. Aggravated Assault on a Law Enforcement Officer= 3 years

9. Aggravated Battery on Law Enforcement Officer= 5 years

10. Other Offenses with Mandatory Minimum Sentences

●Deriving Support from Proceeds of Prostitution/3rd+ offense= 10 years

●DUI Manslaughter= 4 years

●Leaving the Scene of Accident Involving Death= 4 years

●Aggravated Assault or Aggravated Battery on Elderly= 3 years

- Fleeing a Police Officer Resulting in Serious Injury or Death= 3 years
- Criminal Use of Personal Identification Information
 - More than \$5,000 or 10+ victims= 3 years
 - More than \$50,000 or 20+ victims= 5 years
 - More than \$100,000 or 30+ victims= 10 years
- Unlawful Possession or Unlicensed Harvesting or Sale of Certain Fish:
 - 3rd Offense= 6 months
 - 4th Offense= 1 year
- Sale of Horse Meat for Human Consumption= 1 year
- Aggravated abuse of horse/cattle= 1 year
- Cruelty to animals/2nd+ offense= 6 months
- Unlicensed practice of medicine= 1 year
- Engaging in insurance activities Without a Valid Certificate
 - Insurance premiums < \$20,000= 1 year
 - \$20,000-\$99,999= 18 months
 - \$100,000+= 2 years
- Soliciting Fraudulent Motor Vehicle Insurance Claims= 2 years
- Domestic Violence Causing Bodily Harm= 5 days

III. Mandatory Minimum Sentences in Federal Courts

The history of mandatory minimums in federal court has largely paralleled that of Florida. The federal courts of the United States have their own set of mandatory minimum sentences, enacted by the United States Congress and covering offenses which occur on federal property; offenses committed by federal employees and members of the military; offenses committed in international waters; offenses crossing state or international borders; and offenses which substantially affect interstate commerce.⁸

Although federal mandatory minimum sentences existed as early as 1790⁹, the proliferation of federal mandatory minimum sentences began when Congress enacted the Sentencing Reform Act of 1984, intended to address, among other things, the unwarranted sentencing disparities resulting from the existing indeterminate sentencing scheme. The Act

⁸ Although the federal system generally acknowledges that states possess primary authority for defining, enforcing and prosecuting criminal laws, for more than a century federal courts have defined broadly Congress' power to enact criminal laws under the Commerce Clause of the United States Constitution, article I, § 8, cl. 3. See *generally* U.S. v. Lopez, 514 U.S. 549 (1995).

⁹ See 18 U.S.C. § 351, mandating sentence of death or life for first-degree murder; 18 U.S.C. §§ 1651-1661, mandating life sentence for certain piracy offenses.

created the Federal Sentencing Commission which (much like Florida's reforms at the time) was directed to establish sentencing guidelines to narrow the sentencing discretion of trial judges. In 1986, while the Sentencing Commission was promulgating its first set of sentencing guidelines, Congress initiated a wave of federal mandatory minimum sentences, primarily targeting narcotics trafficking offenses.¹⁰

Federal mandatory minimum sentences were subsequently enacted to cover an ever-expanding list of offenses, including sex offenses and child pornography (beginning in 1990 and expanding considerably between 2003-06); racketeering (beginning in 1992); repeat offenders (beginning in 1994); kidnapping (beginning in 1994); hijacking (beginning in 1994); unlawful immigration offenses (beginning in 1996); offenses involving use of explosives (1996); firearms offenses (beginning in 1998); violent crimes (beginning in 1998); and identity theft (beginning in 2004). Between 1986 and 2012, the United States Congress created more than 130 mandatory minimum sentences for various federal crimes.

¹⁰ See, e.g., 21 U.S.C. 841 (1986)(creating escalating mandatory minimum sentences for possession of certain quantities of heroin, powder cocaine, crack cocaine, marijuana, LSD, and marijuana).

IV. The Results of Mandatory Minimum Sentences

In 2010, there were over 1,400,000 people in state prisons and more than 208,000 in federal prison. Together with people held in local and county jails, more than 2.3 million people were incarcerated or under custodial supervision in the U.S. as of 2010, more than any other country in the world.¹¹ By the year 2000, more than 5.6 Americans had spent some time in a state or federal prison— nearly 3 percent of the U.S. population. Currently there are more than 216,000 offenders in federal custody under the supervision of the Federal Bureau of Prisons. Of that number, nearly 50 percent (100,549) were sentenced for drug offenses, and 62 percent of those drug offenders (62,340) are serving mandatory minimum sentences.¹² All told, the Federal Bureau of Prisons currently houses more than 75,000 prisoners serving sentences that include a mandatory minimum.

¹¹ See Pew Center on the States, available at https://www.prisonlegalnews.org/media/publications/pew_ctr_state_prison_count_2010.pdf (last visited August 4, 2014).

¹² See United States Sentencing Commission Annual Report, Chapter 5 at A-42 (2013) available at http://ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/2013_Annual_Report_Chap5_0.pdf (last visited August 4, 2014).

In 2010, 10,694 offenders received mandatory minimum sentences, representing more than 14% of all sentences imposed in Federal courts for that year. More than two-thirds of those offenders (7212) received mandatory minimum sentences for drug offenses.¹³

In the early 1980's (just before the rise of mandatory minimum sentences) the federal prison population was approximately 24,000. During the subsequent 25 years, that number swelled by more than 860 percent, and stood at more than 208,000 in 2010.¹⁴

In its 2011 report to Congress, the United States Sentencing Commission observed:

Statutes carrying mandatory minimum penalties have increased in number, apply to more offense conduct, require longer terms, and are used more often than they were 20 years ago. These changes have occurred amid other systemic changes to the federal criminal justice system, including expanded federalization of criminal law, increased size and changes in the composition of the federal criminal docket, high rates of imposition of sentences of imprisonment, and increasing

¹³ United States Sentencing Commission, "Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System" (October 2011) at 83, available at www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_04.pdf (last visited August 27, 2014).

¹⁴ See Bureau of Prisons Prison Population Statistics, available at <http://www.bop.gov/about/statistics/> (last visited August 4, 2014).

average sentence lengths. The changes to mandatory minimum penalties and these co-occurring systemic changes have combined to increase the federal prison population significantly.¹⁵

Florida is also a leader in this category: in 2009, Florida broke the 100,000 prisoner barrier for the first time, and as of June 2014 there are more than 101,000 inmates in Florida prisons. In the decade of the 1980's, Florida's prison population nearly doubled (from 19,692 to 38,059) and grew another 60 percent in the 1990's (from 42,733 to 68,599).¹⁶ In a 35-state study released in 2013 by the Pew Center on State Courts, Florida led all other states with a 166 percent increase (over a span of 19 years) in the average time that an offender spent in prison.¹⁷ In fiscal year 2010-11, the cost to incarcerate Florida's 100,000 prisoners was \$2.4 billion. In that same year, 70% of the prison admissions were for non-violent offenses.

¹⁵ "Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System" note 13 *supra* at 83.

¹⁶ See Florida Department of Corrections Population Timeline, available at <http://www.dc.state.fl.us/oth/timeline/pop.html> (last visited August 4, 2014).

¹⁷ Pew Charitable Trusts, "Time Served: The High Cost, Low Return of Longer Prison Terms" 35-36 (June 2012).

A 2011 report issued by Florida Tax Watch¹⁸, a privately-funded, fiscally-conservative watchdog group, found that the cost of incarcerating Florida prisoners serving mandatory minimum sentences was \$97.5 million in 2011. The average length of a mandatory minimum sentence is 10.66 years. 75% of all Florida prisoners serving mandatory minimum sentences had never previously served prison time, and 85% had no record of a prior violent felony offense.

The most recent surge in Florida's prison population involves mandatory minimum sentences for trafficking in opioids (i.e., synthetic prescription painkillers, most commonly oxycodone and hydrocodone). In fiscal year 2006-07, only 262 mandatory minimum sentences were imposed for trafficking in opioids. In fiscal year 2010-11, the number of mandatory minimum sentences for the opiod trafficking increased to 1200. A study¹⁹ of this group of 1200 prisoners revealed that:

¹⁸ Florida Tax Watch, Center for Smart Justice, "Review of Criminal Justice Data (December 2011), available at <http://www.floridataxwatch.org/resources/pdf/CSJFindings.pdf>

¹⁹ The Florida Legislature, Office of Program Policy Analysis & Government Accountability, "Opinions Are Mixed About Sentencing Laws for Painkiller Trafficking" (January 2012), available at www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1202rpt.pdf (last visited August 26, 2014).

- The great majority of these offenders (62%) were convicted of possession or sale of painkillers;
- 50% of those offenders had fewer than 30 pills in their possession;²⁰
- 25% of those offenders had fewer than 15 pills in their possession;
- 74% of those offenders had not previously been admitted to prison;
- 81% did not have a prior history of drug sales or drug trafficking.

Further, prison staff assessments (conducted of the 1200 prisoners at the time of their prison admission) revealed that:

- 65% of the offenders were in need of substance abuse treatment;
- 61% were at low risk for recidivism.

Nationwide, we have seen in the last several years (2009-present) an overall slowdown in the growth of prison populations. In fact, in 2009 (for the first time in 38 years), the total number of state inmates (all states nationwide) declined slightly (0.4%). It may be too soon to know the reasons for this overall decline, but it may well be in part the result of certain sentencing reforms implemented over the last five years (*see infra* at 42). It is also worth noting that there was wide variance among the individual states.

²⁰ The threshold weight (and thus, the requisite number of pills) for trafficking in prescription painkillers is relatively low: possession of 7 hydrocodone pills or 31 oxycodone pills will trigger the three-year mandatory minimum in Florida; 22 hydrocodone pills or 108 oxycodone pills triggers the 15-year mandatory minimum; 44 hydrocodone pills or 215 oxycodone pills triggers the 25-year mandatory minimum.

While 27 states experienced a decline in prison population for 2009, 23 states showed an increase in prison population in that year. The explanations for this increase or decrease may be unique to each state and its efforts toward sentencing reform.

Taking the longer view, the significant increases in prison population over the past several decades necessitated budget increases for the construction of new prisons and the hiring of additional prison employees to meet this growing demand. One unfortunate aspect of this economic impact was a front-end fiscal view by legislators, who might justify the added funding for prison construction by decreasing funding for drug treatment programs, educational and vocational training in prison, and community reentry programs, contributing to a greater risk of recidivism.

The philosophical conversion to punishment as the primary goal of sentencing certainly is one factor contributing to the increasing rate of incarceration. But there are a number of other factors to explain our burgeoning prison population, including: the growing number of criminal offenses enacted at both the state and federal level, the increasing length of sentences, and high recidivism rates among offenders. Moreover, and as discussed, for several decades state and federal legislatures enacted more and lengthier mandatory minimum sentences for a variety of offenses.

Pros and Cons of Mandatory Minimums

Here are a few widely-held views on the purported benefits and drawbacks of mandatory minimum sentencing:

Pros:

- Mandatory minimums provide a specific deterrent against future crime by the individual offender, because they will be in prison for an extended period of time;
- Mandatory minimums provide a general deterrent against future crime by other individuals, because they know with certainty the penalty they face if caught;
- Mandatory minimums result in an increase in public safety;
- Mandatory minimums eliminate or reduce unjustified sentencing disparity among offenders convicted of the same crime;
- “Tough on crime” is thought to be a generally popular notion and a politically expedient position;
- Unbridled judicial discretion in sentencing creates inconsistency and disparity, leading a lack of confidence in the judicial system. Mandatory minimum sentences achieve consistency and uniformity and increase confidence in the justice system;
- Mandatory minimum sentences are reserved for the violent criminal, the repeat offenders who cannot be rehabilitated, and the significant narcotics traffickers;
- Mandatory minimum sentences provide greater leverage to the prosecutor, leading to fewer trials and more guilty pleas (perhaps to a reduced or non-mandatory sentence) to avoid the risk of a mandatory minimum following a trial.

Cons:

- Mandatory minimum sentencing eliminates the use of any judicial discretion;
- Without judicial discretion in sentence, the significance of the charging decision by prosecutors is magnified;
- The punishment should fit the crime and the criminal. Each case may differ markedly in their details of and circumstances, including the risk of reoffending, prior record, substance abuse and mental health issues, and the chances for of rehabilitation. Judges should have the authority to weigh all these factors carefully in fashioning a proper sentence;
- The likelihood of recidivism increases when an individual comes into contact with other members of the prison population. Restorative justice does not work in every case. It is only forced on criminals under thirty, and was shown to be ineffective in dealing with drugs crime. Thus it only works in cases where victim and criminal would not normally meet;
- Mandatory minimum sentences are imposed disproportionately on minorities;
- There is not enough money, resources and prison space available to house all offenders, and mandatory minimum sentences should be applied more efficiently to the serious, violent and repeat offenders;
- There is not an established substantial connection between mandatory minimum sentences and a reduced recidivism rate, especially for drug offenses.
- The greatest deterrent effect comes from an increased fear of being caught-- the length of sentence is not as significant to potential offenders;
- Studies have shown that, when asked to calculate sentences, the public's response tends to match that of the sentence imposed by judges;

- Jurors' concerns that mandatory sentencing might result in disproportionately harsh punishment might cause them to acquit a defendant even in the face of legally sufficient evidence (examples of this can be found as late as nineteenth century England when many non-violent crimes (such as theft and forgery) carried the death penalty).

The Impact of Mandatory Minimum Sentences on Recidivism

The efficacy of mandatory minimum sentencing must be prefaced by considering this: some studies have indicated that non-minimum-mandatory incarceration in general (and increases in incarceration rates in general) does have some impact in reducing crime rates.²¹ However, these studies found that the reduction in crime rate is often insubstantial. One study concluded for example that a 10 percent increase in incarceration rate (at an extraordinary cost) resulted in reduced crime rates varying from .11 to 4.0 percent.²²

In the context of mandatory minimum sentences, one cannot ignore their deterrent effect in at least one respect: it keeps the individual offender off the street (and in prison) for a specific and extended period of time. But the discussion has changed in recent years and the question is no longer

²¹ W. Spelman, "What Recent Studies Do (and Don't) Tell Us About Imprisonment and Crime", Crime and Criminal Justice 27 (2000).

²² Z. Besci, "Economics and Crime in the States", Federal Reserve Bank of Atlanta Economic Review, First Quarter: 39-56 (1999).

simply: “Does incarceration increase public safety?” but rather: “Is incarceration (and mandatory-minimum sentencing) the most effective way to increase public safety?” In other words, we must measure the nature and extent of the reduction in crime (and recidivism) against the cost and effectiveness of such sentencing strategies.

Mandatory minimum sentences have not been the panacea public officials and the general public might have hoped for, and studies have failed to confirm that mandatory minimums reduce crime rates or recidivism to the extent predicted by many. More generally, one project involving over 100 studies of more than 440,000 offenders associated *longer* periods of incarceration with an *increase* in recidivism.²³ Of course, we cannot discount the bias that may be inherent in this conclusion, if we accept the presumption that those offenders who received longer sentences are also the more violent or have the more extensive criminal history.

²³ See J. Bonta, R. Jesseman, T. Ruge & R. Cormier, “Restorative Justice and Recidivism: Promises Made, Promises Kept?” Handbook of Restorative Justice 108, 110-11 (2006). See also P. Smith, C. Goggin & P. Gendreau, “The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences” (Solicitor General of Canada 2002).

There are very few studies to support the claim that mandatory minimum sentences for certain crimes have reduced crime (if not recidivism). For example, a study was undertaken by a group of criminologists from the Institute of Criminal Justice and Criminology at the University of Maryland. They collected data and trends from criminal cases in Michigan, Florida and Pennsylvania, and concluded that mandatory minimum sentences for felonies involving the use of firearms substantially reduced the rate of firearm-related homicides in those three states.²⁴ However, it should be noted that the study was published in 1992, and was based upon data collected between 1967 and 1984, well before the widespread and rapidly-expanding use of mandatory minimum sentences. Further, the data did not establish a similar reduction in other firearms-related offenses such as assault or robbery.

By contrast, in a more contemporary study involving data from two of the three same states (Michigan, Florida, and Maryland) and covering the twenty-year period from 1990-2009, the Pew Center on State Courts found

²⁴ D. McDowall, C. Loftin, & B. Wiersema, 1992 *The Journal of Criminal Law & Criminology* 378, available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6744&context=jclc> (last visited August 4, 2014).

little or no evidence that longer prison terms for non-violent offenders resulted in reduced recidivism rates.²⁵

The majority of studies (especially those utilizing the most recently-available data) concludes that no significant correlation can be found between the use of mandatory minimums and a reduction in recidivism rates.²⁶ This is particularly true in the use of mandatory minimum sentences for non-violent offenses.²⁷ In a 2002 study, for example, a group of leading Canadian criminologists conducted a meta-analysis of 117 studies measuring various aspects of recidivism. The researchers concluded that longer incarcerative sentences were associated with a slight increase in recidivism, lending credence to the popular belief that prisons often serve as “schools of crime.”²⁸

²⁵ See “Time Served”, note 17 *supra*.

²⁶ See, e.g., A. Hoel and K. Gelb, “Sentencing Matters: Mandatory Sentencing” (August 2008); United States Division of Criminal and Juvenile Justice Planning, “Final Report: Outcomes of Mandatory Minimum Sentences for Drug Traffickers” (October 2011) available at www.ncjrs.gov/App/Publications/abstract.aspx?ID=260787 (last visited August 4, 2014); Washington State Institute for Public Policy, “Sentences for Adult Felons in Washington: Options to Address Prison Overcrowding” (Olympia, WA 2004).

²⁷ See “Time Served”, note 17 *supra*, at 13.

In a 2011, Iowa's Public Safety Advisory Board conducted a study²⁹ which compared recidivism rates of drug trafficking offenders who served mandatory minimum sentences with drug trafficking offenders who were eligible for mandatory minimum sentences but received (based upon a prosecution waiver) a non-mandatory minimum sentence. The study revealed that:

- The recidivism rate was slightly higher for offenders who served mandatory minimum sentences (33%) than those who were eligible for such a sentence but served a non-mandatory sentence (28%);
- Regardless of having served a mandatory or non-mandatory sentence, a majority of those offenders assessed with a low to moderate risk of reoffending did not return to prison within three years of their release.

The Federal Fair Sentencing Act of 2010 permitted judges to impose non-mandatory minimum (or decreased mandatory minimum) sentences on

²⁸ See P. Smith, C. Goggin and P. Gendreau, "The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences" (Solicitor General of Canada 2002).

²⁹ Iowa Public Safety Advisory Board, "Final Report: Outcomes of Mandatory Minimum Sentences for Drug Traffickers" (October 2011), available at www.humanrights.iowa.gov/cjip/images/pdf/PSAB_MandatoryMinimumReport2011.pdf (last visited August 26, 2014).

certain offenders convicted of crack cocaine possession. Judges across the United States began relying on this 2010 legislation to retroactively reduce mandatory minimum sentences on certain offenders already serving their sentences, resulting in their early release from prison. The United States Sentencing Commission issued a report in 2013, indicating that the reduction of these mandatory minimum sentences, and the early release of these offenders, “did not lead to an increased propensity to reoffend.”³⁰

The contention that mandatory minimum sentences result in a lower percentage of trials and higher percentage of guilty pleas appears to be unsupported. In fact, there is evidence that charging a crime carrying a mandatory minimum actually increases the likelihood of a trial. According to a report of the United States Sentencing Commission, covering sentences imposed in the year 2010, 94.1% of those convicted of an offense carrying a mandatory minimum pled guilty, while 97.5% of the offenders *not* facing a mandatory minimum pled guilty. The Commission also found that “the longer

³⁰ Report of United States Sentencing Commission, “Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences” (September 8, 2013) at 2, available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/20130918_SJC_Mandatory_Minimums.pdf (last visited August 4, 2014).

the mandatory minimum penalty an offender faces, the less likely he or she is to plead guilty.”³¹

V. The Current Trend of Mandatory Minimum Sentences

There are indications of a growing trend away from the continued and indiscriminate use of mandatory minimum sentences. There are a variety of reasons for this change, some of which include:

- Reliable data indicating that whether the offender received a mandatory minimum sentence was not significantly related to recidivism.³²
- The burgeoning prison cost and associated fiscal impact upon states and the federal government resulting from mandatory minimums, especially as applied to non-violent, first-time drug offenders;

³¹ See “Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System” note 13 *supra*, at 125-27.

³² See, *e.g.*, 2009 Report of Pennsylvania Commission on Sentencing, “A Study on the Use and Impact of Mandatory Minimum Sentences”, available at www.pcs.la.psu.edu/publications-and-research, concluding that whether the offender received a mandatory minimum sentence was not in and of itself significantly related to recidivism, and finding that offenders sentenced to prison had a higher recidivism rate (63%) compared to those who received a county jail sentence (50%) or non-incarcerative sentence (41%).

- Growing public perception that too many people are in prison and many non-violent offenders could be released early without posing a threat to public safety³³;
- Perceived general unfairness and inequity in a “one size fits all” application of mandatory minimum sentences;
- Perceived racial bias in application of certain mandatory minimum sentences³⁴;
- Perception within the judicial branch that mandatory minimums give government prosecutors too much discretion in the charging decision.³⁵

³³ Public Opinion Strategies and the Mellman Group, “Public Opinion on Sentencing and Corrections Policy in America,” (Washington, DC: The Pew Charitable Trusts, March 2012) at 5.

³⁴ In its 2011 report to Congress, the United States Sentencing Commission set forth in detail its findings that existing mandatory minimum penalties are unevenly applied, leading to unintended consequences. United States Sentencing Commission, “Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System” (October 2011), available at www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_04.pdf (last visited August 4, 2014).

³⁵ See, e.g., United States Sentencing Commission Survey (2010) of federal trial judges, in which 62 percent of responding judges believe that that mandatory minimum sentences are too high for certain federal crimes, available at www.ussc.gov/Judge_Survey/2010/JudgeSurvey_201006.pdf. See also U.S. v. Kupa, 976 F.Supp. 2d 417, 432 (E.D. N.Y. 2013)(Judge John Gleeson expressing frustration over the unbridled discretion given to prosecutors in making charging decisions and observing that “[b]ecause there is no judicial check on the enhanced mandatory minimums prosecutors can inject into a case, they can put enormous pressure on defendants to

- The American Bar Association has for some time advanced its strong opposition to the use of mandatory minimums, stating that “sentencing by mandatory minimums is the antithesis of rational sentencing policy” and called for the repeal of the use of such sentences in federal cases, contending that there is no need for mandatory minimum sentences in a guided sentencing system³⁶; and
- A growing belief that deterrence (and hence a reduction in recidivism) is primarily a function of the certainty, rather than the severity, of the punishment.

VI. Reforms and Alternative Sentencing Strategies

The trend away from mandatory minimums is evidenced by sentencing reforms implemented by a number of states as well as by the federal government. Below are just a few examples over the past several years.

plead guilty. In many cases only a daring risk-taker can withstand that pressure. Most people buckle under it, and [the defendant in this case] is a perfect example.”).

³⁶ *The Branch News*, Administrative Office of the U.S. Courts, available at [www.uscourts.gov/News/TheThirdBranch/10-06-01/Sentencing Commission Takes New Look at Mandatory Minimums.aspx](http://www.uscourts.gov/News/TheThirdBranch/10-06-01/Sentencing_Commission_Takes_New_Look_at_Mandatory_Minimums.aspx) (last visited August 4, 2014).

Examples of State Reform:³⁷

●In 2007, Texas enacted several laws creating alternatives to prison. In 2011, despite a \$15 billion budget shortfall, the state maintained its sentencing alternatives and added laws that offer earned time to probationers and jail inmates for completing risk-reduction programs; provide performance incentive funding to counties and cities that reduce the number of low-level offenders they send to prison; and closed the first high-security prison in Texas history. The state estimated that preserving the 2007 framework is projected to keep the prison population stable (despite a rapidly-growing general population) and the earned-time legislation is projected to reduce the state jail population by 1300 inmates, at a savings of \$49 million over the next ten years.

●In 2007, the Kansas Legislature created a state-local “incentive” funding program to keep probation violators in the community; increased the amount of good time that nonviolent inmates can earn; and established additional earned time for completing education or treatment programs. Reinvestment of \$7 million supported expanded community corrections and in-prison programs, and training in “risk-reduction” offender supervision.

Building on these reforms, Kansas lawmakers created a work group in 2012 to develop programs to further reduce recidivism and corrections costs. Recommendations from the work group—including use of “swift and certain” sanctions for probation violations and the opportunity for early discharge from supervision for compliant offenders who are low-risk and have paid restitution in full—were adopted by the Legislature in 2013. The law is expected to reduce the prison population, allowing for the delay in construction of two prison units until at least 2015.

³⁷ These and other examples of past and current reforms can be found at www.ncsl.org/research/civil-and-criminal-justice/justicereinvestment.aspx (last visited August 6, 2014).

- In 2007, Vermont, faced with a high and unsustainable rate of prison population growth, created a Justice Reinvestment Working Group. As a result, a law was enacted in 2008 expanding screening and assessment of offenders for substance abuse and mental health needs and allowing reduced probation terms for some compliant offenders. The law also includes community treatment services in reentry plans and allows electronic monitoring to improve supervision of and target resources on those offenders at highest risk. One facility was closed, and another converted to a therapeutic work camp. The reforms were backed by a \$3.9 million reinvestment in assessment, treatment and supervision services, including transitional housing. The legislature has since expanded eligibility for alternatives to incarceration, such as house arrest and furlough, and reinvested an additional \$6 million in prison and community-based treatment and reentry services. As of January 2013, the prison population, which had been projected to grow by more than 20 percent, has declined by nearly 5 percent.

- In 2009, New York repealed the majority of its mandatory minimum sentences for drug offenses and, at the same time, implemented drug treatment reforms to significantly expand available treatment options, including treatment closely monitored by court personnel and returning discretion to trial judges to tailor sentences appropriate to the individual offender's case.

- In 2010, Massachusetts reinstated parole eligibility and work release eligibility for drug offenders serving mandatory minimum sentences. In 2012, the state reduced the length of mandatory minimum sentences for certain drug offenses and increased the threshold amounts needed to trigger mandatory minimum sentences for certain drug offenses.

- In 2010, South Carolina enacted an omnibus criminal justice reform act, following an analysis of the state's sentencing guidelines, parole system and options for alternatives to incarceration. The reforms included a restructuring

of criminal offenses and penalties; increases in diversion and treatment programs, good time and community supervision; and established oversight to monitor and evaluate the reforms. The law is projected to save up to \$175 million in construction costs and \$66 million in operating costs in the first five years. A report to the legislature in 2011 found that the state had saved \$4.2 million in prison expenditures due to a nearly 20 percent decrease in the number of probationers and parolees sent to prison for committing a new crime or violating conditions of their supervision. The prison population has been steadily declining and, in 2012, two prisons were closed.

- In 2011, Delaware eliminated mandatory minimum sentences for certain first-time drug offenses and reduced the length of mandatory minimum sentences for certain drug offenses.

- In 2011, Kentucky enacted a law to ensure prison space is available for the most serious offenders by distinguishing between serious drug trafficking and other, less serious, drug sales; establishing a proportionate scale of penalties; strengthening parole and probation by incorporating risk and needs assessments into the decision-making process and requiring evidence-based practices to reduce recidivism. The law is estimated to save state taxpayers \$422 million over ten years, and half of the savings will be reinvested in efforts to reduce recidivism among substance-abusing offenders.

- In 2011, Louisiana enacted five separate laws recommended by a bipartisan, inter-branch sentencing commission. The laws expand parole eligibility for first-time offenders; establish reporting requirements for home detention programs; require parole board members undergo training and consider risk assessment information in making parole release determinations; and streamline the awarding of “good-time” credit to improve transparency for the victims of crime. The state projected a cost savings of \$43 million over ten years, to be directed to strengthening probation and parole supervision and enhancing community supervision programs.

- In 2011, North Carolina passed the Justice Reinvestment Act, which expands felony drug diversion programs, requires supervision of all felony offenders released from prison, allows short jail stays for violation of community supervision, and focuses supervision and treatment resources on offenders who present the highest risks and needs. The law also included the closure of four prisons. A 2013 report of North Carolina's Sentencing Policy and Advisory Commission found that these reforms have helped contribute to a nearly 9 percent decrease in the prison population and a projected savings of \$290 million over five years.

- In 2011, Ohio repealed mandatory minimum sentences for certain first-time non-violent drug and property offenses, diverting them to probation and appropriate treatment; increases felony theft threshold from \$500 to \$1000; expands and makes more cost-effective use of community supervision and treatment programs by requiring evidence-based practices and adoption of a common set of risk assessment instruments; and sets a goal of reducing recidivism by 10 percent. The law will avert a projected 3000-inmate increase, avoiding \$500 million in prison construction and operation costs and reducing corrections spending by \$78 million by 2015.

- In 2012, a voter referendum in California revised the "Three Strikes" law which, up to that point, imposed a mandatory life sentence for a third offense, regardless of the nature or severity of the offense. The revision now requires a mandatory life sentence only if the third conviction is for a serious or violent felony.

- In 2012, the Georgia Legislature enacted a law based on recommendations of a Special Council created by legislation a year earlier. The Council found that the state prison population had more than doubled in the last 20 years, and projected another 8 percent growth in the next five years, absent policy reform. The act focuses on providing prison space for serious offenders, and strengthens probation and court supervision. It also creates graduated

degrees of penalties for burglary and forgery, raises felony theft thresholds, revises penalties for drug possession to be based on drug weight, expands the use of electronic monitoring, requires evidence-based corrections practices and establishes procedures for risk and needs assessments.

The legislation is expected to avert prison population growth of about 5,000 inmates during the next five years and lawmakers reinvested the projected \$17 million savings into accountability courts and residential programs.

- In 2012, Pennsylvania adopted a comprehensive reform package to keep low-level offenders out of state prison and reimburse counties a portion of the costs to supervise them in local communities. The legislation also provides community options for technical violations of parole, administrative sanctions for probation violations and improved reentry services. These measures are expected to save \$142 million over the next five years, with a portion of the savings to be reinvested in crime victim services and improvements in probation and policing.

- In 2013, South Dakota approved legislation to avert a projected 25 percent increase in prison population by 2022, revising sentences for several nonviolent offenses while enhancing penalties for drug trafficking and violent felonies. The new law requires fiscal impact analysis for any future proposed legislation that increases prison terms. The law is projected to save taxpayers \$200 million in prison costs over the next 10 years, and will be reinvested in recidivism reduction strategies that include substance abuse and mental health intervention and treatment and improved collection of restitution.

Examples of Federal Reform:

- In 2010, the U.S. Congress enacted the Fair Sentencing Act of 2010 which, *inter alia*, repealed the five-year mandatory minimum sentence for first-time possession of crack cocaine and reduced the sentencing disparity between

possession of certain threshold quantities of crack cocaine vs. certain threshold quantities powder cocaine. See 21 U.S.C. § 841(b)(1). For example, prior to this change, possession of 5 grams of crack cocaine or 500 grams of powder cocaine each carried the same mandatory minimum sentence. This Act increased the crack cocaine threshold from 5 grams to 28 grams.

These changes were also implemented to address the perception of racial discrimination in the different treatment of these crimes, given that an estimated 82 percent of crack cocaine offenders are African-American and 10.2 percent Hispanic, while an estimated 31 percent of powder cocaine offenders are African-American and 58 percent Hispanic.

- In 2013, members of Congress introduced the Justice Safety Valve Act of 2013, which would authorize the sentencing judge to impose a sentence below the mandatory minimum upon a finding that such a non-mandatory-minimum sentence is necessary to fulfill the express legislative goals of sentencing and the sentencing criteria set forth in 18 U.S.C. § 3353(a).

- In 2014, members of Congress introduced a bill entitled the Smarter Sentencing Act, which would, *inter alia*, (1) enlarge the so-called “safety valve” relief from drug offense mandatory minimums, to include defendants with up to two criminal history points (currently the safety valve is available only for defendant with one criminal history point); (2) apply retroactively the changes to crack cocaine sentences established by the Fair Sentencing Act of 2010 (which could then apply to a large percentage of the nearly 12,000 defendants sentenced before 2010 to mandatory minimum sentences for crack cocaine offenses); (3) reduce certain ten-year mandatory minimums to five years; and (4) reduce the corresponding five-year mandatory minimums to two years.³⁸

³⁸ It should be noted that, although the Smarter Sentencing Act has not been enacted, over the past four years federal trial judges have applied the Fair

Alternative Sentencing Strategies and Policies:

Alternative sentencing strategies and practices will prove successful only if legislative, executive and judicial branches (and their coordinate agencies) work comprehensively and collaboratively to achieve the desired goals. Legislative involvement is most significant because of the need for adequate funding and implementation of statutory reform. Executive branch participation is necessary to make sentencing reform an administration priority and devote agency resources into appropriate education and training of corrections personnel. Moreover, the governor must sign into law any legislation enacting sentencing reform, and must approve the annual budget appropriations as passed by the legislature.

Here are a few examples of strategies and policy changes that can be effectuated by the legislative and executive branches as part of a “smart sentencing” strategy:

Sentencing Act retroactively and have granted a reduction of sentence in over 7000 crack cocaine cases. See United States Sentencing Commission, Preliminary Crack Retroactivity Data Report (July 2013) available at www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/fsa-amendment/2013-07_USSC_Prelim_Crack_Retro_Data_Report_FSA.pdf (last visited August 5, 2014).

- ▶ Make appropriate changes in sentencing penalties (e.g., eliminating mandatory minimums for certain drug possession offenses and increasing threshold amount for certain drug possession offenses; increasing threshold amounts for mandatory minimums for certain drug offenses).

- ▶ Give judges the discretion, flexibility and resources to tailor the sentence to fit the offense and the offender.

- ▶ For certain offenses or offenders, utilize sentencing guidelines instead of mandatory minimum sentences. Where mandatory minimum sentences remain in place, create “safety valves” to permit judges to impose non-mandatory sentences for defendants meeting certain criteria.

- ▶ Establish (or re-establish) recidivism as an explicit sentencing goal.

- ▶ Adequately fund programs and resources to achieve the goal of reducing recidivism, and establish reporting and monitoring standards to measure success.

- ▶ Re-establish (or increase) parole, probation and community supervision.

- ▶ Increase the availability of good time credit as incentives for prisoners to be released to community supervision.

- ▶ Establish swift and certain sanctions for minor or technical violations.

- ▶ Create escalating penalties for repeated violations or increasingly serious violations.

- ▶ Provide increased funding for drug diversion, intervention and treatment programs.

- ▶ Provide increased funding for mental health intervention and treatment programs.

- ▶ Create financial incentive for local jails and courts to keep parole/probation violators under local community supervision for technical or minor violations.

The judicial branch must also participate actively in advocating the adoption of alternative sentencing strategies and policies. Additionally, there will be a need for education and training of judges, attorneys, and other court personnel in implementing these smart sentencing strategies. However, most of the judicial branch work will be accomplished by applying these strategies in the actual sentencing process. The most concrete example is the use of evidence-based sentencing by the trial judge. Below is an explanation of the concept and the principles underlying evidence-based sentencing.

Evidence-Based Sentencing

Evidence-Based Sentencing refers to judges using specific empirical information in the sentencing process. It incorporates an assessment of a variety of an offender's risk factors, needs and responsivity to formulate a

sentence that will achieve the most effective individualized proportionate punishment. The goal is to improve judicial decision-making by identifying sentences and treatments that are most effective and cost-efficient, thus maintaining public safety through proportionate punishment while managing and reducing the risk of recidivism. The information gathered helps to quantify the risk of an offender committing future criminal acts and the specific treatments likely to prevent reoffending. It provides guidance about the level of supervision and the types of intervention most likely to reduce recidivism.

The Three Principles of Evidence-Based Sentencing: Offender Risk, Needs and Responsivity:

Evidence-based sentencing helps sort out which offenders should receive incarceration, intensive supervised probation, diversion, inpatient care, outpatient treatment, vocational training, and other interventions (or a combination of the above interventions). The risk and needs information is not intended to limit judicial discretion, but rather to better inform and guide judicial decision-making by identifying who to target, what to target, and how to target so the judge may make an effective sentencing decision and ensure the lowest risk of reoffending. Evidence-based sentencing is guided by the principles of risk, needs, and responsivity.

Risk Principle

The risk principle requires that the level of supervision and treatment match the offender's likelihood of reoffending. Higher-risk offenders require more intervention, structure, supervision and resources. Providing supervision and treatment resources for low-risk offenders is inefficient and costly. The risk principle informs us who to target. The level of intervention, supervision or services should be matched to the risk level of the individual offender. In other words, the more intensive intervention should be reserved for the higher-risk offenders.

Low risk: Least intensive intervention consistent with other sentencing purposes. These offenders require less supervision and services.

Medium and high risk: Best candidates for recidivism reduction strategies. These offenders require more intensive supervision and services.

Extremely high risk: Frequently not amenable to recidivism reduction strategies; highly-intensive monitoring and controls are necessary.

One study that exemplifies the risk principle (and the sometimes counterintuitive nature of its application) was conducted of 13,000 offenders in 53 community-based correctional treatment facilities. The study noted that the majority of the programs analyzed were associated with increased recidivism for low-risk offenders and decreased recidivism for high-risk

offenders. In fact, one program showed a *decrease* of 32 percent in recidivism rates for *high-risk* offenders and an *increase* of 29 percent in recidivism rates for *low-risk* offenders.³⁹ Some likely reasons for an increased recidivism for low-risk offenders are: the level of supervision and services was unnecessary for the low-risk offenders, low-risk offenders in the facility were exposed to higher-risk offenders with anti-social or pro-criminal attitudes, and disruption of pro-social networks and support (such as family and a job).

Needs Principle:

The needs principle stresses that offender criminogenic needs be assessed and, where a need exists, targeted with the appropriate treatment and intervention. Criminogenic needs are dynamic (i.e., changeable or modifiable) risk factors associated with criminal behavior (and therefore serve as predictors of future criminal behavior). The needs principle helps inform us what to target.

³⁹ C.T. Lowenkamp, E.J. Latessa & P. Smith, "Does Correctional Program Quality Really Matter? The Impact Adhering to the Principles of Effective Intervention," Criminology and Public Policy 575 (2006).

The offender characteristics that should be targeted for intervention are those dynamic risk factors/criminogenic needs shown to be the greatest predictor of likely recidivism, which are:

- Anti-social attitudes and personality patterns (e.g., impulsive, adventurous pleasure seeking, restlessly aggressive, irritable);
- Pro-criminal attitudes (e.g., rationalization for crime, negative attitudes toward the law and authority);
- Anti-social friends and peers (criminal friends/relationships, isolation from positive social groups and peers);

Other dynamic risk factors (but less closely associated with likely recidivism) include substance abuse, dysfunction in family and marital relationships, lack of educational and employment achievement, and absence of positive social recreational activities.

It is important to distinguish between offender characteristics and offense characteristics. The underlying principle of evidence-based sentencing is to provide the most effective punishment to fit the offense and the offender while minimizing the risk of reoffending.

Responsivity Principle:

The responsivity principle helps in determining how to target offenders to ensure successful treatment and interventions, thus reducing the likelihood of reoffending. Responsivity is based upon the concept that treatment and interventions should be tailored to match an offender's developmental stage, cognitive ability, and learning styles and strengths. One meta-analysis of 374 statistical tests found a nearly six-fold reduction in recidivism when such behavioral approaches were used in tailoring judicial and correctional interventions.⁴⁰ The responsivity principle requires offenders to practice the skills they acquire in treatment and utilizes demonstration and reinforcement techniques to modify offender behavior.

Risk/Needs Assessment

This is the very essence of evidence-based sentencing and recidivism reduction strategies. Needs assessment, if done properly, has proven accurate in predicting offender recidivism. Typically, the needs assessment is performed by use of a needs assessment instrument which assigns scores

⁴⁰ D. Andrews & J. Bonta, The Psychology of Criminal Conduct 337 (4th ed. 2006).

based upon consideration of an individual's history as described in the above risk factors. An interview, evaluation, investigation and assessment gathers information regarding the offender's criminal record, education and employment background, financial status and family situation, leisure and recreation activities, friends and peers, history of alcohol and substance abuse and treatment (including a drug screening), emotional and personal issues, and attitudes/orientation. An assessment report is produced and provided to the sentencing judge for use in determining an appropriate sentence.⁴¹

Although risk (and risk factors) are dynamic and changing/changeable, risk assessment scores are static. The risk/needs assessment, and the use of a needs assessment instrument is intended to inform and guide, but not to replace, the exercise of professional judgment. The goal is to provide the trial judge with adequate reliable information, and the flexibility and discretion, to make an informed sentencing decision tailored to the individual offender, resulting in a more effective sentencing outcome.

While evidence-based sentencing has grown in popularity in the last several years, a small number of states have, for many years, been

⁴¹ A sample presentence report with risk and needs assessment information is provided in Appendix B.

incorporating these principles into their sentencing and supervision practices. Since 1995, for example, Indiana has directed probation departments to assess the risk and needs levels of Indiana’s criminal offenders. In 2010, Indiana greatly expanded its use of risk-assessment instruments and evidence-based sentencing practices, and permits trial judges to utilize risk assessment instruments to supplement the judge’s determination of an appropriate individualized sentence. The Indiana Supreme Court has expressly acknowledged the effectiveness of such practices:

Given the extensive supporting research and ongoing evaluation as discussed above, we believe that assessment tools such as the LSI-R⁴² and the SASSI are sufficiently reliable to warrant consideration of their resulting scores and/or narrative assessments with the other relevant information presented to a trial court for purposes of sentencing. Such assessment instruments enable a sentencing judge to more effectively evaluate and weigh several express statutory sentencing considerations such as criminal history, the likelihood of affirmative response to probation or short term imprisonment, and the character and attitudes indicating that a defendant “is unlikely to commit another crime.” Ind.Code § 35–38–1–7.1(a)(2), (b)(6)–(8).⁴³

⁴² Additional information regarding assessment tools can be found in Appendix A.

⁴³ Malenchik v. State, 928 N.E. 2d 564, 574 (Ind. 2010).

Studies have established that recidivism rates without treatment or services are up to three times higher than recidivism rates with effective corrections intervention.⁴⁴ Recent studies provide confirmation that the use of evidence-based sentencing practices reduce recidivism. In 2014, the National Reentry Resource Center compared changes in three-year recidivism rates of prisoners released in 2007 (i.e., what percentage of 2007 releasees recidivate by 2010) and those released in 2010 (i.e., what percentage of releasees recidivate by 2013). The study highlighted eight states that have enacted sentencing reforms, including implementing evidence-based sentencing principles and providing community-based mental health and substance abuse treatment programs for offenders. The report concluded that each state showed a significant reduction in recidivism rates between those offenders released in 2007 and those released in 2010. The reductions in recidivism rates ranged from 5.8 percent (Colorado) to as high as 19.3 percent (North Carolina).⁴⁵

⁴⁴ B. Huebner, “Drug Abuse, Treatment, and Probationer Recidivism” Illinois Criminal Justice Information Authority (2003), available at www.icjia.state.il.us/public/pdf/ResearchReports/Drug%20Abuse%20Treatment%20and%20Probationer%20Recidivism.pdf (last visited August 6, 2014); The Psychology of Criminal Conduct, *supra* note 40.

⁴⁵ “Reducing Recidivism: States Deliver Results”, The National Reentry Resource Center (June 2014), available at www.csgjusticecenter.org/wp-

However, the growing acclaim for evidence-based sentencing is not universal. In fact, the Attorney General of the United States, Eric Holder, recently gave an interview to Time Magazine in which he stated his opposition to the use of certain static risk factors in evidence-based sentencing.⁴⁶ Holder said he supports evidence-based sentence that relies on assessments of behavioral risk facts that are changeable (e.g., substance abuse, antisocial attitudes) but believes that reliance on static or immutable factors in an offender's background (e.g., employment, educational and socioeconomic history) could adversely and disproportionately impact the poor, the socially disadvantaged, and minorities. In a subsequent speech to a group of criminal defense attorneys, Holder explained:

Criminal sentences must be based on the facts, the law, the actual crimes committed, the circumstances surrounding each individual case and the defendant's history of criminal conduct. They should not be based on unchangeable factors that a person cannot control, or on the possibility of a future crime that has not taken place.⁴⁷

[content/uploads/2014/06/ReducingRecidivism_StatesDeliverResults.pdf](#)
(last visited August 6, 2014).

⁴⁶ www.time.com/3061893/holder-to-oppose-data-driven-sentencing/ (last visited August 11, 2014).

⁴⁷ www.washingtonpost.com/world/national-security/us-attorney-general-eric-holder-urges-against-data-analysis-in-criminal-sentencing/2014/08/01/92d0f7ba-1990-11e4-85b6-c1451e622637_story.html (last visited August 11, 2014).

Holder contends that the use of such factors will benefit “those on the white collar side who may have advanced degrees and who may have done greater societal harm . . . than somebody who has not completed a master’s degree, doesn’t have a law degree, is not a doctor.”⁴⁸ Holder has requested that the U.S. Sentencing Commission study the issue and make policy recommendations regarding the use of such data in sentencing decisions.

VII. Resources, Articles and Other Links

- Warren, R. K., Arming the Courts with Research: 10 Evidence-Based Sentencing Initiatives to Control Crime and Reduce Costs. Washington, DC: Pew Center on the States, Public Safety Performance Project (2009).
- Warren, R. K., Evidence-based sentencing: The application of principles of evidence-based practice to state sentencing practice and policy. 43 *University of San Francisco Law Review* 585-634 (2009).
- Ostrom, B. J., Ostrom, C. W., Hanson, R., & Kleiman, M., Assessing Consistency and Fairness in Sentencing. Williamsburg, VA: National Center for State Courts (2008).
- Kauder, N., & Ostrom, B., State sentencing guidelines profiles and continuum. Williamsburg, VA: National Center for State Courts (2008).
- Peters, T. W., & Warren, R. K., Getting smarter about sentencing: NCSC’s sentencing reform survey. Williamsburg, VA: National Center for State Courts (2006).
- Ball, D. & Dansky, K., Coordination at the front-end of sentencing: The judiciary, probation, and the pre-sentence report. Stanford, CA: Stanford Criminal Justice Center (March 2008).

⁴⁸ Note 47 *supra*.

- King, R. S., The state of sentencing 2007: Developments in policy and practice. Washington, DC: The Sentencing Project (2008).
- Warren, R. K., Evidence-based practice to reduce recidivism: Implications for state judiciaries. Washington, DC: National Institute of Corrections (2007).
- www.ncsconline.org/csi (National Center for State Courts, Center for Sentencing Initiatives)
- www.ncsl.org/research/civil-and-criminal-justice/corrections-and-sentencing.aspx (National Conference of State Legislatures, listing projects on corrections and sentencing reforms)