

# Studying Sentencing

NEW MEXICO CRIMINAL JUSTICE REFORM SUBCOMMITTEE  
RUIDOSO, AUG. 20, 2019

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**Justice Center**

THE COUNCIL OF STATE GOVERNMENTS

“The legal process by which criminal sanctions are authorized and imposed in individual cases following criminal convictions.”

*Oxford Handbook of Sentencing & Corrections, Reitz and Petersilia, ed. (2012)*

“Within American criminal law, it would be difficult to find a subject of greater social importance than the sentencing of offenders.”

*Reporter’s Memorandum, ALI Model Penal Code: Sentencing, Tentative Draft #1, (April 2007)*

# Overview



1

**Qualitative  
Considerations**

2

**Quantitative Analysis**

3

**Constitutional  
Considerations**

# Part 1 – Qualitative Considerations



- A.** Offense Severity and Criminal History
- B.** Model Penal Code and Sentencing Guidelines
- C.** Degree of Determinacy
- D.** Probation and LFOs

# A. Crimes of varying types should be systematically ranked and grouped in order of severity.

## Colorado DPS Offense Grouping v. Minnesota SGL Severity Level Example Offenses

<p><b>Crime Against Persons</b>            09A - Murder and Non-negligent Manslaughter            09B - Negligent Manslaughter            09C - Justifiable Homicide            100 - Kidnapping/Abduction            11A – Rape</p> <p>...</p> <p><b>Crime Against Property</b>            200 - Arson            510 - Bribery            220 - Burglary/Breaking &amp; Entering</p> <p>...</p> <p><b>Crime Against Society</b>            35A - Drug/Narcotic Violations            35B - Drug Equipment Violations            39A - Betting/Wagering</p> <p>...</p> <p><b>Group B Offenses</b>            90A - Bad Checks            90B - Curfew/Loitering/Vagrancy Violations</p> <p>...</p> <p><b>Offenses of General Applicability</b></p>
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11	<b>Murder, 2<sup>nd</sup> Degree (Intentional Drive-by-Shootings)</b>
10	<b>Murder, 2<sup>nd</sup> Degree (Unintentional) Murder, 3<sup>rd</sup> Degree (Depraved Mind)</b>
9	<b>Murder, 3<sup>rd</sup> Degree (Controlled Substances), Assault, 1<sup>st</sup> Degree</b>
8	<b>Agg. Robbery, 1<sup>st</sup> Degree Burglary, 1<sup>st</sup> Degree (w/Weapon or Assault)</b>
7	<b>Felony DWI, Financial Exploitation of a Vulnerable Adult</b>
6	<b>Assault, 2<sup>nd</sup> Degree, Burglary, 1<sup>st</sup> Degree (Occupied Building)</b>
5	<b>Residential Burglary, Simple Robbery</b>
4	<b>Nonresidential Burglary</b>
3	<b>Theft Crimes (Over \$5,000)</b>
2	<b>Theft Crimes (\$5,000 or less), Check Forgery (\$251-\$2,500)</b>
1	<b>Assault, 4<sup>th</sup> Degree Fleeing a Police Officer</b>

Source: Colorado Bureau of Investigation, "Offenses Glossary," [https://coloradocrimestats.state.co.us/offenses\\_glossary.aspx](https://coloradocrimestats.state.co.us/offenses_glossary.aspx);  
 Minnesota Sentencing Guidelines, Grid, <http://mn.gov/msgc-stat/documents/Guidelines/2019/StandardGrid.pdf>.

A. Convene practitioners to candidly discuss what each offense tends to look like in the typical case.

1. **Create or obtain a list of jailable offenses and convene judges, prosecutors, defense lawyers, supervision and correctional staff, policy staff, and legislators.**
2. **In multiple meetings, dissect what the “typical case” looks like for each offense.\* Build a scale of relative severity and cluster the severity scale into 4–10 levels.**
3. ***Debate guidelines, enhancements, allowable/presumptive/mandatory dispositions, lengths, determinacy, etc. [The “#3 debate”]***

*\*Example – Robbery as discussed in Texas, 1992: Two typical cases that differ greatly in severity: armed robbery—very severe and dangerous, and the penalty should be high; “bump and run shoplifting,” where the fact that the perpetrator ran into someone completes “robbery,” and penalty should be lower.*

## A. The ranking exercise is also an opportunity to rethink offenses.

**Scalable offenses:** For property crimes, use a consistent “value ladder” to rank severity throughout and establish a reasonable felony threshold amount (typically \$1000–\$1500). For crimes with degrees of severity by conduct, use severity scaling.

**Burglary:** Differentiate in multiple potential ways: habitation v. building v. auto; day v. night; and theft v. more harmful intent.

**Drug offenses:** Revisit the amounts that trigger offense levels, proof of intent to distribute, designer substances, etc.

**Special interest offenses:** Repeal offenses that were deemed important enough at one time to include, even though the conduct is amply covered by more prosaic and general crimes. Example: Securing Execution of a Document by Deception covers a lot of more specialized offense descriptions.

**Outlier offenses:** Compare unique state laws to other states. Example: Criminal endangerment in Montana is the third-highest volume felony and carries a much higher penalty than other states—up to 10 years versus a misdemeanor generally punishable up to one year elsewhere.

A. In non-sentencing guideline states, criminal history is typically accounted for with habitual offender laws.

### **New Mexico**

Current + 1 prior = add 1 year to basic sentence

Current + 2 priors = add 4 years to basic sentence

Current + 3 priors = add 8 years to basic sentence

Three violent felonies = Life/30 years minimum + current offense sentence

### **Colorado**

“Little”: Current + 2 prior felonies = 3X maximum or 48 years for level 1 drug crime

“Big”: Current + 3 prior felonies = 4X maximum or 64 years for level 1 drug crime

“Bigger”: Current + Big = Life/40 years minimum

“Three strikes”: Current and 2 prior class 1–3 violent crimes = Life/40 years minimum

## A. Criminal history enhancements should be part of the #3 debate.

Criminal history enhancements are virtually universal in guidelines and non-guidelines systems and justified on “retributive” as well as “crime control” grounds.

Some negative consequences of these policies suggest that the scale of enhancements should be revisited:

1. Reduced proportionality of punishment to conviction offense severity
2. Increased prosecutorial discretion and leverage
3. Increased need for prison beds to house people convicted of property and drug offenses who tend to be the most active recidivists
4. Increased numbers of aging, high-cost people in prison
5. Potential for increased racial disproportionality in prison

Some sentencing guideline states are starting to examine this.

B. The American Law Institute (ALI) adopted the Model Penal Code in 1962, and 34 states adopted it to some extent.

“The Model Penal Code [MPC] took 300 years of American criminal law and distilled a coherent and philosophically justifiable statement of the bounds and details of the criminal sanction.”

The MPC describes a system, not just a collection, of offenses, and embodies an indeterminate philosophy of sentencing.

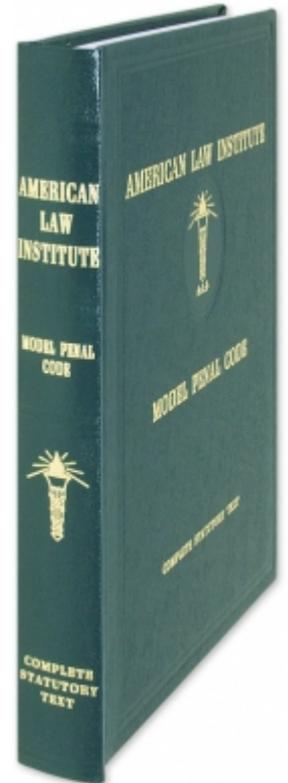
States adopting versions of the MPC:

1960s: Illinois, Minnesota, New Mexico, New York, Georgia

1970s: Kansas, Connecticut, Colorado, Oregon, Delaware, Hawaii, New Hampshire, Pennsylvania, Utah, Montana, Ohio, Texas, Florida, Kentucky, North Dakota, Virginia, Arkansas, Maine, Washington, South Dakota, Indiana, Arizona, Iowa, Missouri, Nebraska, New Jersey

1980s: Alabama, Alaska, Wyoming

Draft criminal codes produced in other states such as California, Massachusetts, Michigan, Oklahoma, Rhode Island, Tennessee, Vermont, and West Virginia, did not pass legislative review.



B. The ALI's 2017 "Model Penal Code: Sentencing" recommends sentencing guidelines and the abolition of parole release.

### Summary of Contents

#### Authorized Dispositions of Offenders

- Deferred Prosecution
- Deferred Adjudication
- Probation
- Economic Sanctions
  - Victim Compensation
  - Fines
  - Forfeiture
  - Costs, Fees, and Assessments
- Imprisonment
- Post-Release Supervision
- Violations of Probation or Post-Release Supervision

#### Collateral Consequences

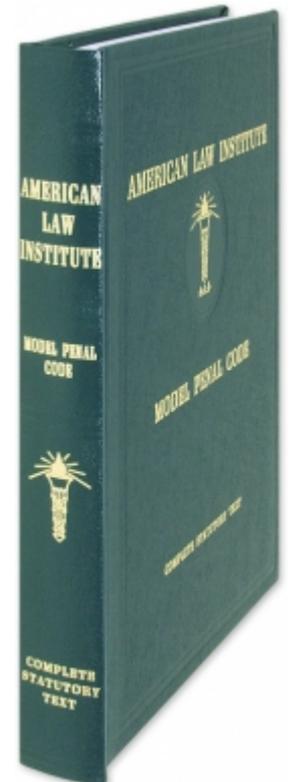
#### Authority of Sentencing Commission

#### Sentencing Guidelines

#### Authority of the Court in Sentencing

#### Research and Evaluation

#### Prison Release and Post-Release Supervision



## B. Sentencing guidelines (“SGLs”) typically have dimensions for severity of offense and severity of criminal history.



258 cells



150 cells



133 cells



126 cells



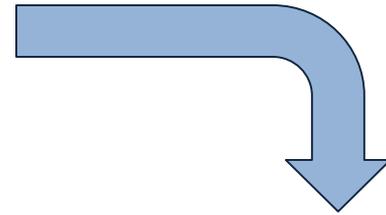
112 cells



99 cells



72 cells

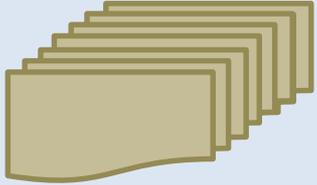


		Offender Score									
		0	1	2	3	4	5	6	7	8	9+
S e r i o u s n e s s  L e v e l	LEVEL XVI	LIFE SENTENCE WITHOUT PAROLE/DEATH PENALTY									
		280m	291.5m	304m	316m	327.5m	339.5m	364m	394m	431.5m	479.5m
	LEVEL XV	240-320	250-333	261-347	271-361	281-374	291-388	312-416	338-450	370-493	411-548
		171.5m	184m	194m	204m	215m	225m	245m	266m	307m	347.5m
	LEVEL XIV	123-220	134-234	144-244	154-254	165-265	175-275	195-295	216-316	257-357	298-397
		143.5m	156m	168m	179.5m	192m	204m	227.5m	252m	299.5m	347.5m
	LEVEL XIII	123-164	134-178	144-192	154-205	165-219	175-233	195-260	216-288	257.342	298-397
		108m	119m	129m	140m	150m	161m	189m	207m	243m	279m
	LEVEL XII	93-123	102-136	111-147	120-160	129-171	138-184	162-216	178-236	209-277	240-318
		90m	100m	100m	119m	129m	139m	170m	185m	215m	245m
	LEVEL XI	78-102	86-114	95-125	102-136	111-147	120-158	146-194	159-211	185-245	210-280
		59.5m	66m	72m	78m	84m	89.5m	114m	126m	150m	230.5m
	LEVEL X	51-68	57-75	62-82	67-89	72-96	77-102	98-130	108-144	129-171	149-198
		36m	42m	47.5m	53.5m	59.5m	66m	89.5m	101.5m	126m	150m
	LEVEL IX	31-41	36-48	41-54	46-61	51-68	57-75	77-102	87-116	108-144	129-171
		24m	30m	36m	42m	47.5m	53.5m	78m	89.5m	101.5m	126m
LEVEL VIII	21-27	26-34	31-41	36-48	41-54	46-61	67-89	77-102	87-116	108-144	
	17.5m	24m	30m	36m	42m	47.5m	66m	78m	89.5m	101.5m	
LEVEL VII	15-20	21-27	26-34	31-41	36-48	41-54	57-75	67-89	77-102	87-116	
	13m	17.5m	24m	30m	36m	42m	53.5m	66m	78m	89.5m	
LEVEL VI	12+-14	15-20	21-27	26-34	31-41	36-48	46-61	57-75	67-89	77-102	
	9m	13m	15m	17.5m	25.5m	38m	47.5m	59.5m	72m	84m	
LEVEL V	6-12	12+-14	13-17	15-20	22-29	33-43	41-54	51-68	62-82	72-96	
	6m	9m	13m	15m	17.5m	25.5m	38m	50m	61.5m	73.5m	
LEVEL IV	3-9	6-12	12+-14	13-17	15-20	22-29	33-43	43-57	53-70	63-84	
	2m	5m	8m	11m	14m	19.5m	25.5m	38m	50m	59.5m	
LEVEL III	1-3	3-8	4-12	9-12	12+-16	17-22	22-29	33-43	43-57	51-68	
		4m	6m	8m	13m	16m	19.5m	25.5m	38m	50m	
LEVEL II	0-90 d	2-6	3-9	4-12	12+-14	14-18	17-22	22-29	33-43	43-57	
			3m	4m	5.5m	8m	13m	16m	19.5m	25.5m	
LEVEL I	0-60 d	0-90 d	2-5	2-6	3-8	4-12	12+-14	14-18	17-22	22-29	
Unranked		0-12m									

Source: *State Sentencing Guidelines, Profiles and Continuum*, National Center for State Courts, 2008.

A. SGLs use some method of “scoring” prior criminal history to increase severity of potential punishment.

7 PRV Questions



PRV questions address prior felony and misdemeanor and prior juvenile adjudications.

**Scoring of these 7 questions slots defendant into one of six PRV Levels on the nine sentencing grids.**

Using Grid E,  
OV Level II  
as an example...

Non-Habitual Minimum Prison  
Sentence Length (SL) Ranges

PRV Level A	PRV Level B	PRV Level C	PRV Level D	PRV Level E	PRV Level F
0 Pts	1-9 Pts	10-24 Pts	25-49 Pts	50-74 Pts	75+ Pts
NA	NA	NA	7-23 Mos	10-23 Mos	12-24 Mos

B. Some SGL states are revisiting the scale and policy dimensions of their criminal history enhancements.

## **Magnitude of Criminal History Enhancements**

### **Decay and Gap Policies**

### **Timing of Current and Prior Crimes: What Counts as a “Prior” Conviction?**

### **Prior Juvenile Adjudications**

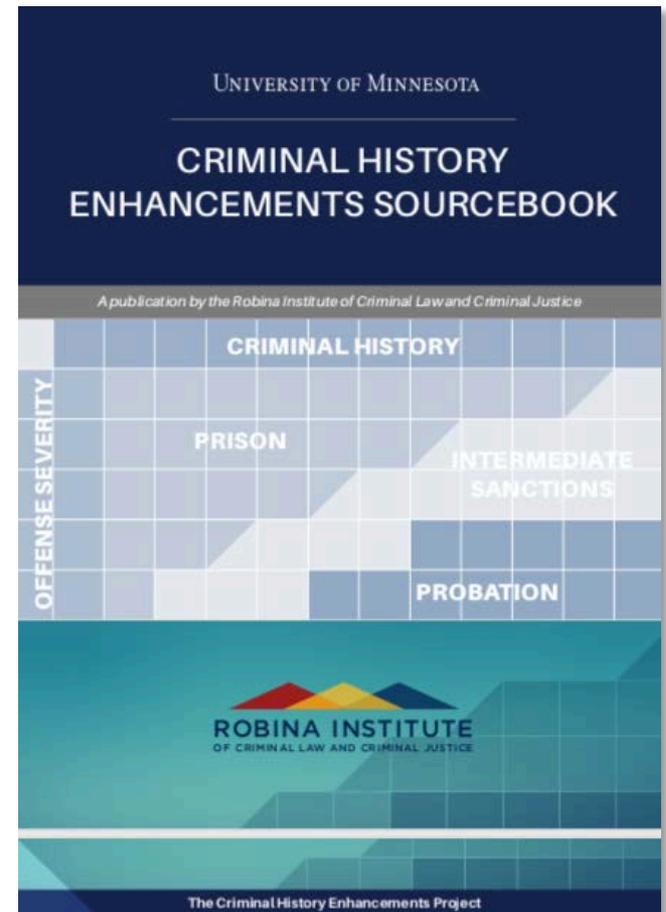
### **Prior Misdemeanor Convictions**

### **Severity Premium for Similar Prior Offending: Patterning Rules**

### **Multiple Current Offenses**

### **The Relationship between Criminal History and Recidivism**

### **Criminal History Enhancements as a Cause of Minority Over-Representation**



C. New Mexico is among seven states that do not use sentencing guidelines and do not rely on parole release (in general).

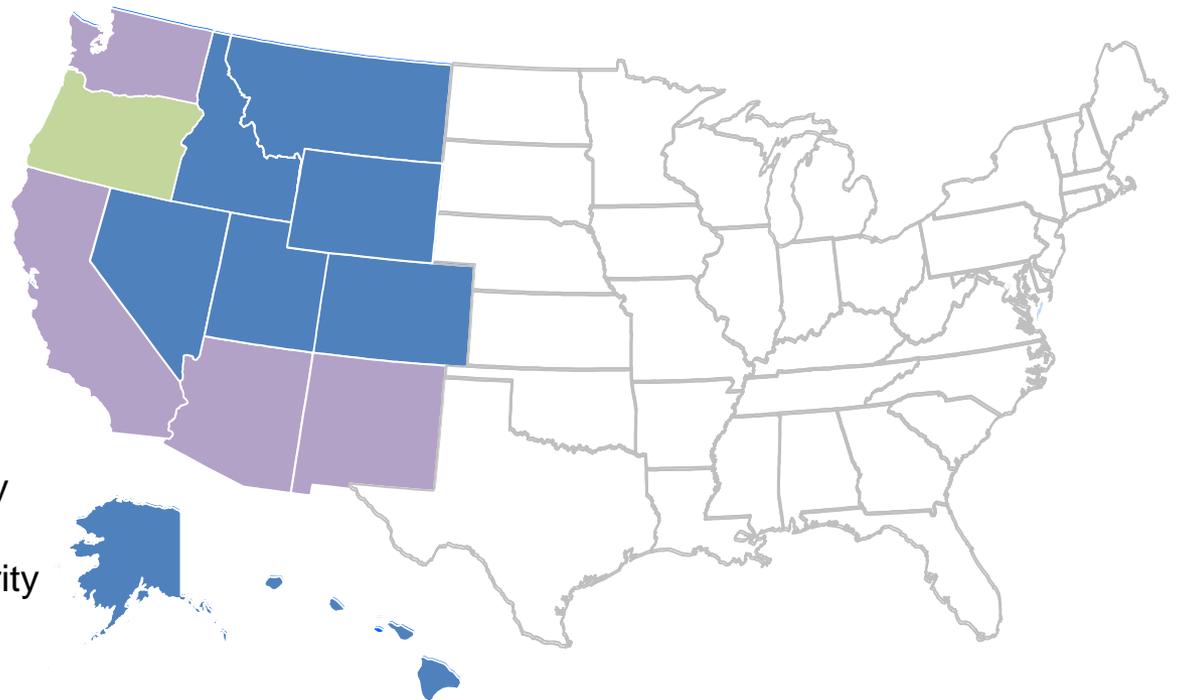
	<b>Indeterminate (parole release)</b>	<b>Determinate</b>
<b>Sentencing Guidelines</b>	AL, AR, MD, MA, MI, PA, TN, UT	DC, DE, FL, KS, MN, NC, OH, OR, US, VA, WA
<b>No Sentencing Guidelines</b>	AK, CO, CT, GA, HI, IA, ID, KY, LA, MO, MS, MT, ND, NE, NH, NJ, NV, NY, OK, RI, SC, SD, TX, VT, WV, WY	AZ, CA, IL, IN, ME, <b>NM</b> , WI

- In some states (Virginia for example) adopting sentencing guidelines and abolishing parole went hand in hand.
- Sentencing guidelines and discretionary parole release still operate simultaneously in eight states (upper left).

## C. Use of parole release varies in the West and should be examined in a study of sentencing.

### Modernizing Parole Law:

- Release Timing
- Decision Criteria
- Including Victims
- Due Process



- Full parole release authority
- Limited parole release authority
- No parole release

Sources: [https://www.themarshallproject.org/2015/07/10/life-without-parole?utm\\_medium=email&utm\\_campaign=newsletter&utm\\_source=opening-statement&utm\\_term=newsletter-20180816-1120](https://www.themarshallproject.org/2015/07/10/life-without-parole?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20180816-1120); Catherine C. McVey, Edward E. Rhine, and Carl V. Reynolds, *Robina Inst. of Crim. Law & Crim. Just., Modernizing Parole Statutes: Guidance from Evidence-Based Practice* (2018); <https://robinainstitute.umn.edu/publications/modernizing-parole-statutes-guidance-evidence-based-practice>

## C. Explore the balance between “truth” (determinacy), and providing incentives and discretion (indeterminacy).

**Kansas SGLs affect maximum sentence and available time credits.**

<b>No less than 60 months w/ good time</b>	<b>Max = 71 months</b>
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**North Carolina SGLs affect minimum and maximum sentence.**

<b>Min sentence = 60 months</b>	<b>Max = 84 months</b>
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**No parole board, and people must earn their way to the minimum.**



**Michigan SGLs affect minimum sentence, and parole controls most of the prison sentence.**

**Parole board determines when released.**

<b>Min sentence = 60 months</b>	<b>Max sentence = 180–240 months</b> (set in statute for specific offense)
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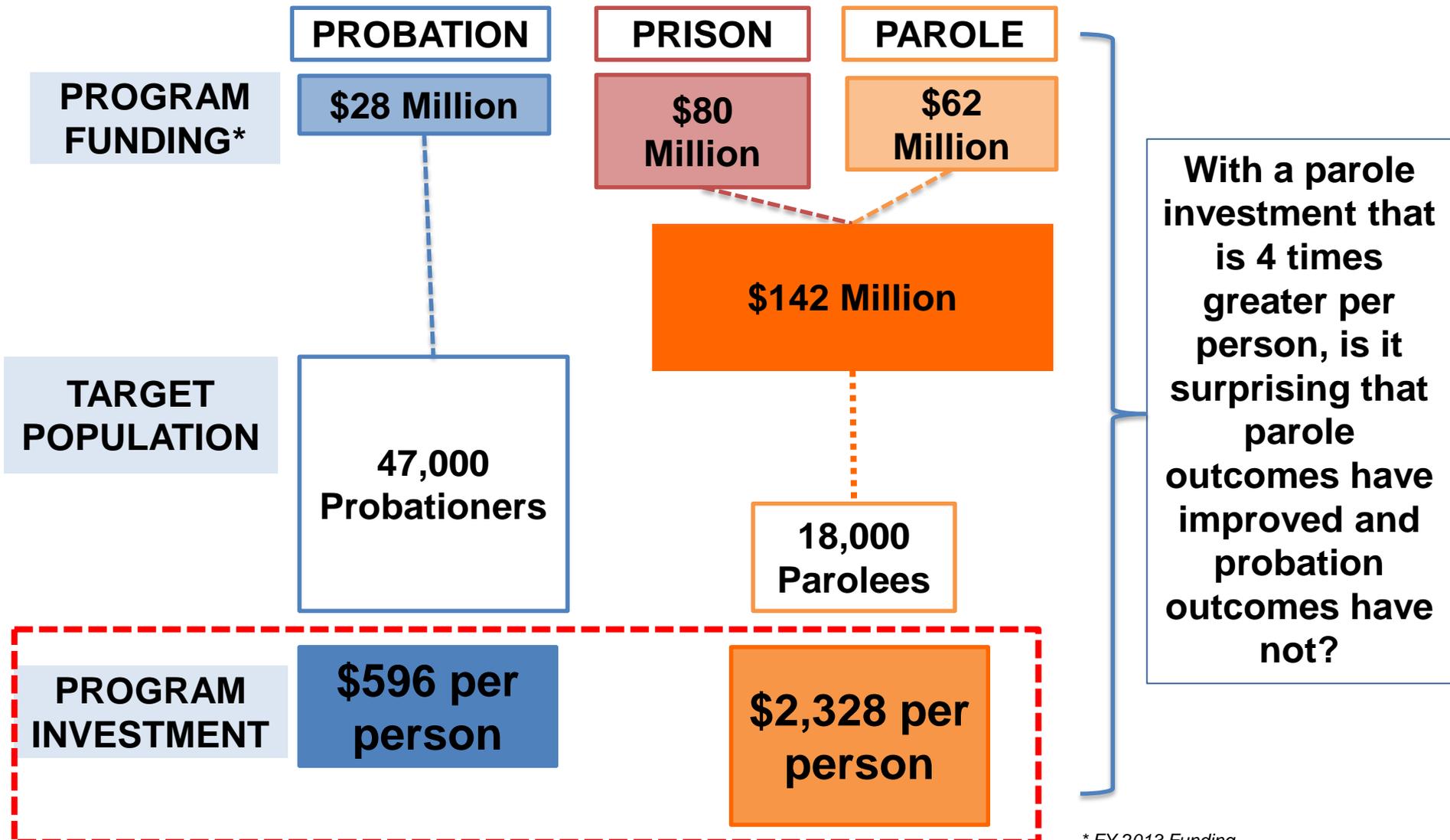
# C. Important considerations for the #3 debate

- Consider a guideline approach to dispositions, e.g., Pennsylvania (right).
- Revisit various specifications, enhancements, mandatory minimums, etc., as matters of policy, informed by impacts and variable application.
- Consider that discretion among actors cannot really be removed; it can only be reallocated.
- Decide commitment to current degree of determinacy (min/max, scale of good time, parole release). Balance between “truth in sentencing” and ensuring there are incentives throughout a sentence.
- Include resource allocation and target resources to community interventions that are the most likely to reduce recidivism and provide meaningful sentencing choices.

## Guidelines Approach Structuring Dispositions

Level	QOS	Example Offenses	Prior Record Score									
			0	1	2	3	4	5	RREL	REVOG	AGG/MIT	
LEVEL 5 State Incar	14	Murder 3	72-5L	84-5L	96-5L	120-5L	168-5L	192-5L	204-5L	5L	-7-12	
		Inchoate Murder (5B) Rape (victim <13 yrs)										
	15	Inchoate Murder (No 5B) Weapons Mass Desir-Use PWID Cocaine (>1,000 g)	60-78	66-84	72-90	78-96	84-102	96-114	108-126	240	+/- 12	
		Rape-Forcible Compulsion (DSI-Forcible Compulsion Robbery-Inflicts 5B)	48-66	54-72	60-78	66-84	72-90	84-102	96-114	120	+/- 12	
	11	Agg Assault-Cause 5B Voluntary Manslaughter Sexual Assault PWID Cocaine (100-1,000 g)	36-54	42-60	48-66	54-72	60-78	72-90	84-102	120	+/- 12	
		Kidnapping Agg Indecent Assault F2 Arson-Person in Building Hom by Vehicle-DUI & Work Zone PWID Cocaine(50-<100 g)	22-36	30-42	36-48	42-54	48-60	60-72	72-84	120	+/- 12	
9	Sexual Exploitation of Children Robbery-Committ/Threat F1/F2 Burglary-Home/Person Present Arson-No Person in Building	12-24	18-30	24-36	30-42	36-48	48-60	60-72	120	+/- 12		
	Agg Assault -Cause BI w/DW Theft (Firearm) Identity theft (3rd/4 & Vic>60 yrs) Hom by Veh-DUI or Work Zone Theft (>500,000) PWID Cocaine (10-<50 g)	9-36	12-18	15-21	18-24	21-27	27-33	40-52	NA	+/- 9		
LEVEL 4 State/ Incar/ RP trade	8 (F1)	Robbery-Inflicts 11/2/3/4/5/6/7/8/9/10/11/12 Burglary-Home/No Person Present Statutory Sexual Assault Theft (>\$50,000-\$100,000) Identity Theft (>6/Id/Id/g) PWID Cocaine (5-<10 g)	6-34	9-16	12-18	15-21	18-24	24-30	35-45	NA	+/- 6	
LEVEL 3 State/ City/ Incar RP trade	7 (F2)	Agg Assault-Cause Fear of 5B Homicide by Vehicle Burglary-Not a Home/Person Prsent Theft (>\$25,000-\$50,000) Arson-Endanger Property PWID Cocaine (2x5 g)	3-12	6-14	9-16	12-18	15-21	21-27	27-40	NA	+/- 6	
LEVEL 2 City Incar RP RS	5 (F3)	Burglary F2 Theft (>\$1000-\$25,000) Bribery PWID Marij (1-<10 lbs)	RS-0	1-12	3-14	6-16	9-16	12-18	24-36	NA	+/- 3	
		Indecent Assault M2 Forgery (Money, Stocks) Weapon on School Property Crim Trespass F2	RS-3	RS-9	RS-12	3-14	6-16	9-16	21-30	NA	+/- 3	
LEVEL 1 RS	3 (M1)	Simple Assault-Attempt/Cause BI Theft (\$100-\$2000) Carrying Explosives Simple Possession	RS-1	RS-6	RS-9	RS-12	3-14	6-16	12-18	NA	+/- 3	
		Theft (\$50-<\$200) Retail Theft (1st/2nd Offense) Bad Checks (\$500-<\$1,000)	RS	RS-2	RS-3	RS-4	RS-6	3-9	6-<12	NA	+/- 3	
LEVEL 1 RS	1 (M1)	Most Misd. 3's; Theft (<\$50) DUI (M) Poss Small Amount Marij	RS	RS-1	RS-2	RS-3	RS-4	RS-6	3-6	NA	+/- 3	

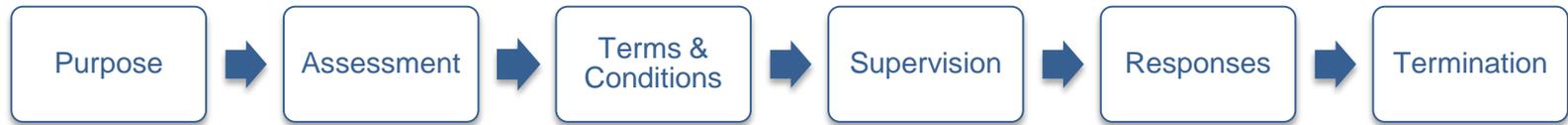
## C. Examine and reallocate resources by target populations.



\* FY 2013 Funding

\*\* Rounded based on 2012 population data

D. Probation sentencing will affect by far the most defendants, and statutes should support best practices.



**Purpose:** Probation law should reflect the state’s policy for what is expected of probation as a sentencing option.

**Assessment:** Consult reliable risk and needs assessment instruments when deciding the length of a probation term and what conditions to impose,

**Terms & Conditions:** Limit probation lengths and frontload resources. Conditions of supervision should be individualized and as minimal as possible.

**Supervision:** Ensure agency policy and practice shift a probation sentence from a mere judicial disposition to a targeted intervention with an outcome of reduced recidivism.

**Responses:** Structure discretionary responses, define “technical” or “compliance” violations, and limit the potential response to those types of violations.

**Termination:** Use positive incentives to reward behavior, including early termination from supervision.

D. New Mexico data must be further developed to quantify the impact of supervision violations on prison and jails.

# CONFINED AND COSTLY

How Supervision Violations Are Filling Prisons  
and Burdening Budgets



## DATA ALERT

This state was not able to provide the following data at the time of data collection.

**Missing prison admissions data include:** probation total, probation new offense, probation technical, parole technical and parole new offense.

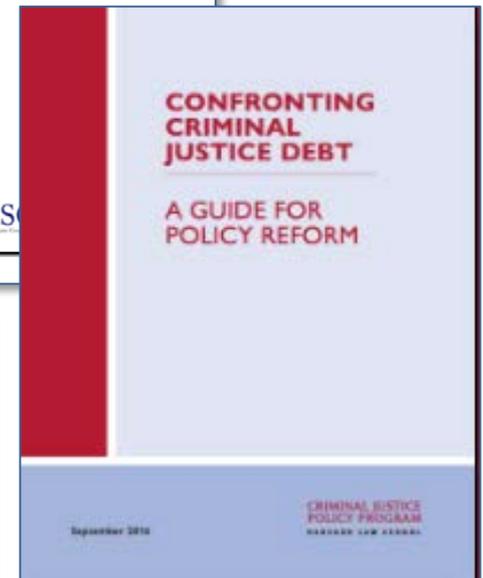
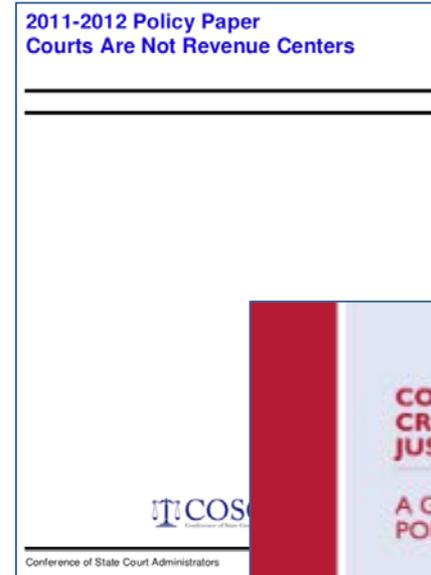
**Missing prison population data include:** violation total, non-violation total, probation total, parole total, probation new offense, probation technical, parole technical and parole new offense.

**Missing costs data include:** number of people, violation annual cost, technical supervision violation cost and new offense supervision violation cost.

## D. Unpacking fees, fines, and restitution can be part of a sentencing study but requires additional commitment of resources and time.

There are many valuable resources to help understand and tackle this topic. Some basic principles should guide the effort, which is *all about the revenue*:

- Hold harmless current recipients of court revenue (including counties).
- Eliminate uses of revenue that are unrelated to the courts, but . . .
- Guard the connection between generating revenue and using it.



Sources: <https://csgjusticecenter.org/courts/publications/2011-2012-policy-paper-courts-are-not-revenue-centers/>; <https://www.ncsc.org/Topics/Financial/Fines-Costs-and-Fees/Fines-and-Fees-Resource-Guide.aspx>; <http://cjpp.law.harvard.edu/publications/confrontingcjdebt>.

# Overview



**1** Qualitative Considerations

**2** Quantitative Analysis

**3** Constitutional Considerations

## Part 2 – Quantitative Analyses



- A. Pressure
- B. Disposition
- C. Length
- D. Outcomes

# Overview of sentencing data analyses

In general, analyses should look at the following issues with different lenses, e.g., **crime type** and level; degrees of **variation** based on data available to analyze demographics, geography, court, defense counsel, etc.

**A. Pressure** or volume of all **cases entering** (and, if possible, diverted from) the sentencing system

- Reported crime
- Arrests and diversions
- Case filings

**B. Volume into all disposition** options, such as deferred probation, convicted probation, jail, jail + probation, prison, prison + probation

- Court sentences
- Dispositions (from arrest record)

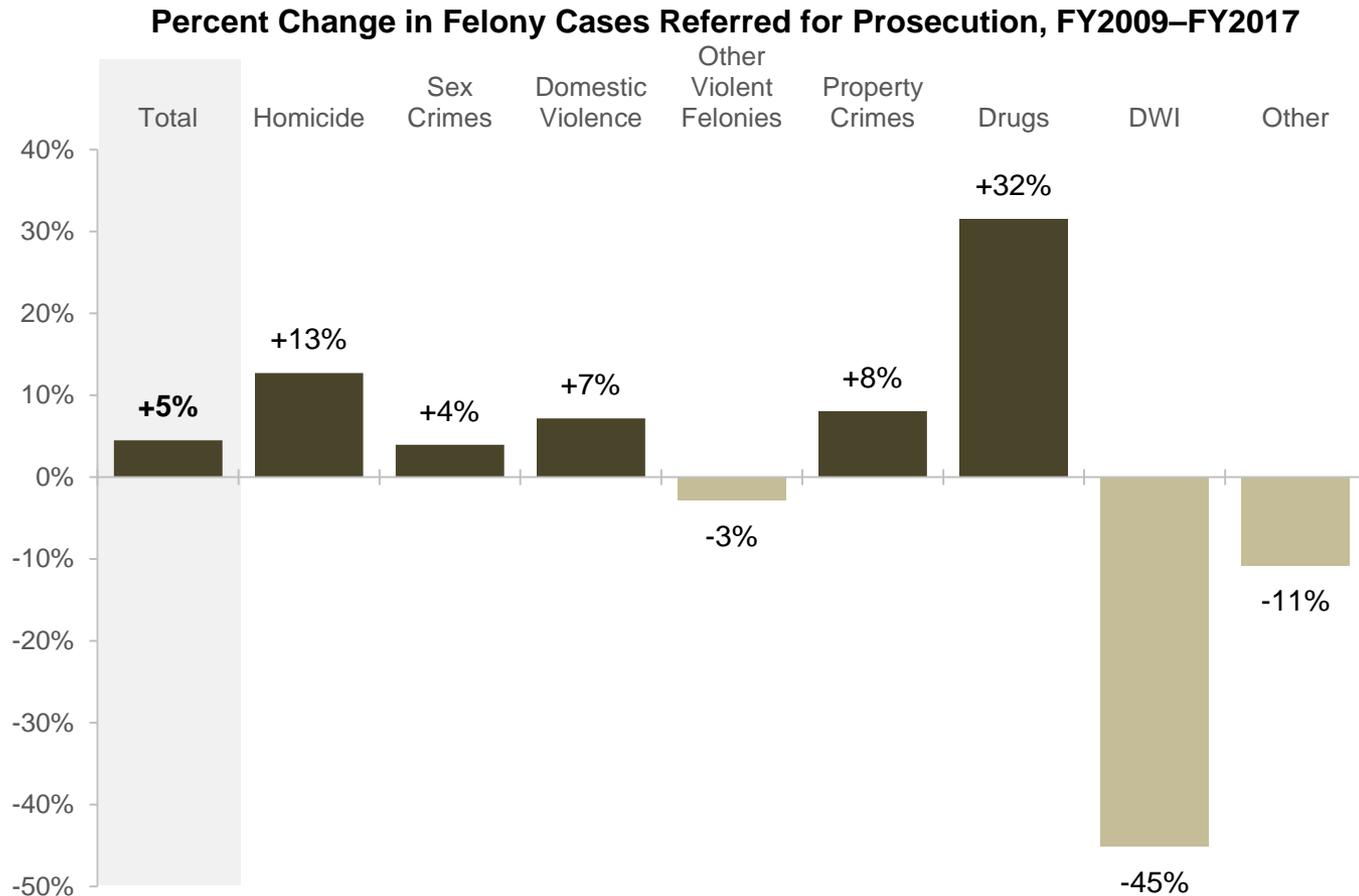
**C. Average, range and variation of lengths of sentence**

- Probation supervision records
- Prison records
- Parole supervision records

**D. Outcomes** (e.g., rearrest as a short-term recidivism measure) by disposition for similar cases/people

- Arrest/criminal history records
- Prison admission records
- Supervision violation records

# A. Front-end pressure on sentencing: cases referred for prosecution by offense type—New Mexico

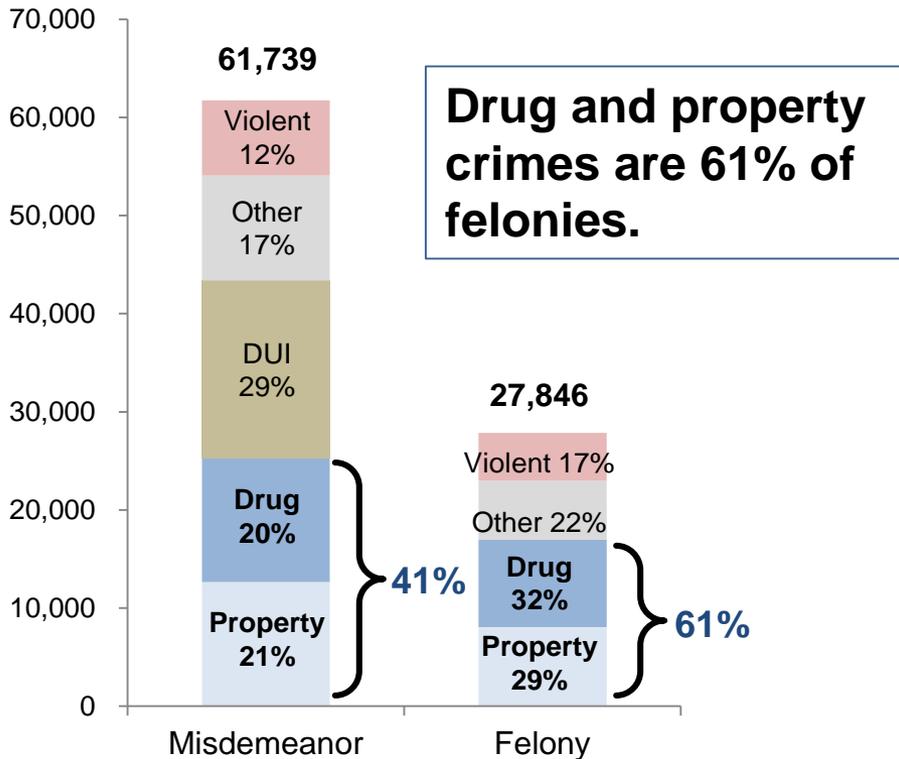


**While percentages varied across district, on average about two-thirds of felony drug cases referred for prosecution in FY2017 were for possession rather than trafficking or distribution.**

Source: Analysis provided by New Mexico Administrative Office of the District Attorneys (February 13, 2019).

# A. Sentencing volume for offense types (property and drug) that are most susceptible to policy change – Pennsylvania

**Misdemeanor and Felony Sentences by Offense Type, 2014**



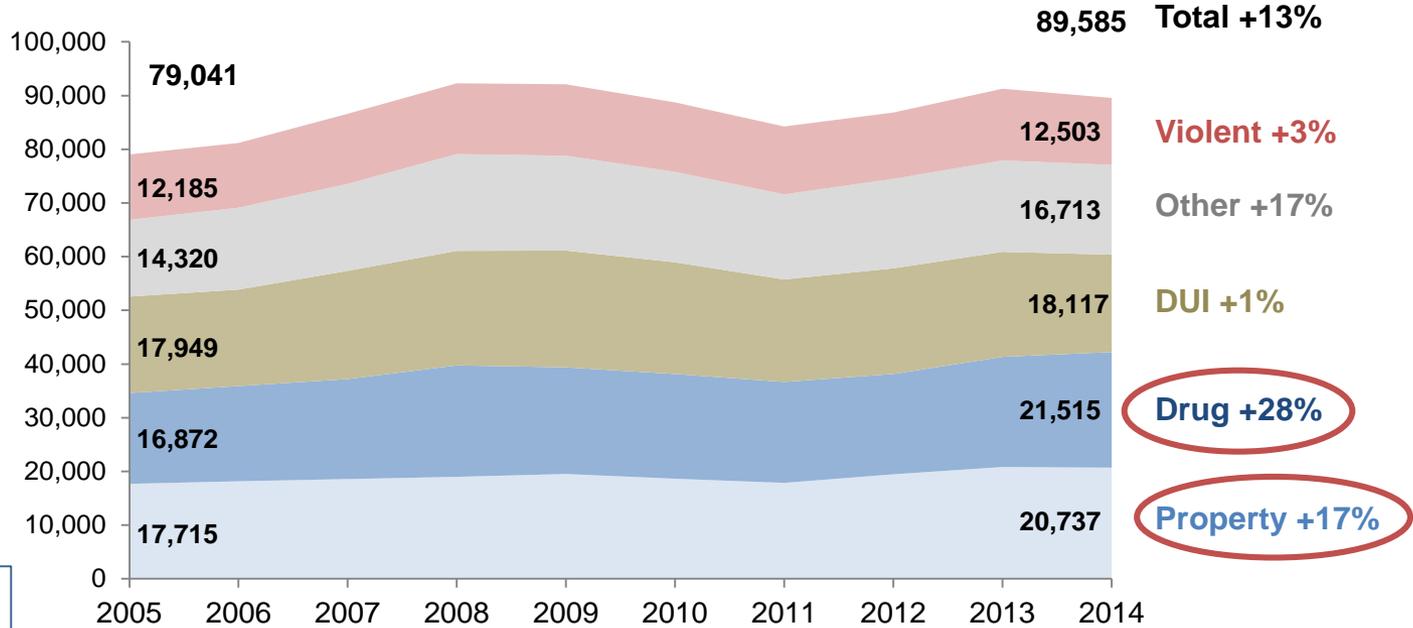
<p><b>Violent Misdemeanor</b></p> <ul style="list-style-type: none"> <li>62% Simple Assault</li> <li>14% Terroristic Threats</li> <li>14% Reckless Endangerment</li> <li>7% Stalking/Harassment</li> </ul>	<p><b>Felony</b></p> <ul style="list-style-type: none"> <li>31% Robbery</li> <li>31% Aggravated Assault</li> <li>15% Rape/Sexual Assault</li> <li>11% Homicide</li> <li>10% Burglary of Occupied House</li> </ul>
<p><b>Other Misdemeanor</b></p> <ul style="list-style-type: none"> <li>15% Escape/Hindering/Resisting</li> <li>11% Disorderly Conduct</li> <li>9% Criminal Mischief/Trespassing</li> <li>8% Instruments of Crime</li> <li>7% Weapons</li> <li>6% False ID to Law Enforcement</li> </ul>	<p><b>Felony</b></p> <ul style="list-style-type: none"> <li>26% Weapons</li> <li>19% Trespassing</li> <li>6% Sex Offender Registry</li> <li>5% Child Pornography</li> </ul>
<p><b>Drug Misdemeanor</b></p> <ul style="list-style-type: none"> <li>59% Possession</li> <li>39% Drug Paraphernalia</li> </ul>	<p><b>Felony</b></p> <ul style="list-style-type: none"> <li>93% Possession w/Int. to Deliver</li> <li>5% Acquisition by Fraud</li> </ul>
<p><b>Property Misdemeanor</b></p> <ul style="list-style-type: none"> <li>94% Theft/Retail Theft</li> <li>4% Bad Checks</li> </ul>	<p><b>Felony</b></p> <ul style="list-style-type: none"> <li>72% Theft/Retail Theft</li> <li>19% Other Burglary</li> <li>7% Forgery</li> </ul>

Offense type in this presentation is based on the most serious offense of the judicial proceeding only.

Source: Justice Center analysis of Pennsylvania Commission on Sentencing data.

# A. Growth over time in those offense types—Pennsylvania

Total Number of Judicial Proceedings by Offense Type, 2005–2014



**Sentencing events for drug and property crimes are increasing over time.**

	2005	2014
Violent	15%	14%
Other	18%	19%
DUI	23%	20%
Drug	21%	24%
Property	22%	23%

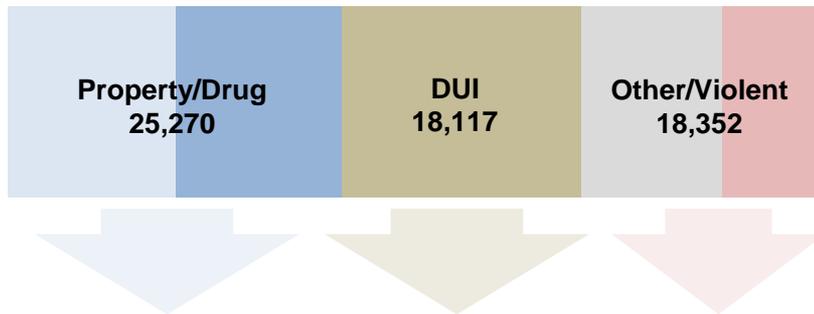
Increases in property and drug offenses constituted **73%** of the 10,544 increase in total judicial proceedings from 2005 to 2014.

Source: Justice Center analysis of Pennsylvania Commission on Sentencing data.

## B. Use of incarceration for those offense types—Pennsylvania

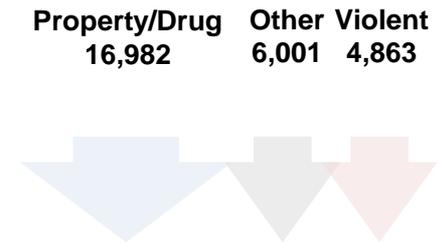
**60% of property and drug felonies are sentenced to jail or prison.**

Misdemeanor Sentences by Offense Type and Disposition, 2014



	Property/Drug	DUI	Other/Violent
<b>Probation</b>	67%	6%	58%
<b>CIP</b>	3%	37%	5%
<b>Jail</b>	<b>23%</b>	53%	32%
<b>Prison</b>	2%	3%	4%
<b>Other</b>	4%	0%	2%

Felony Sentences by Offense Type and Disposition, 2014



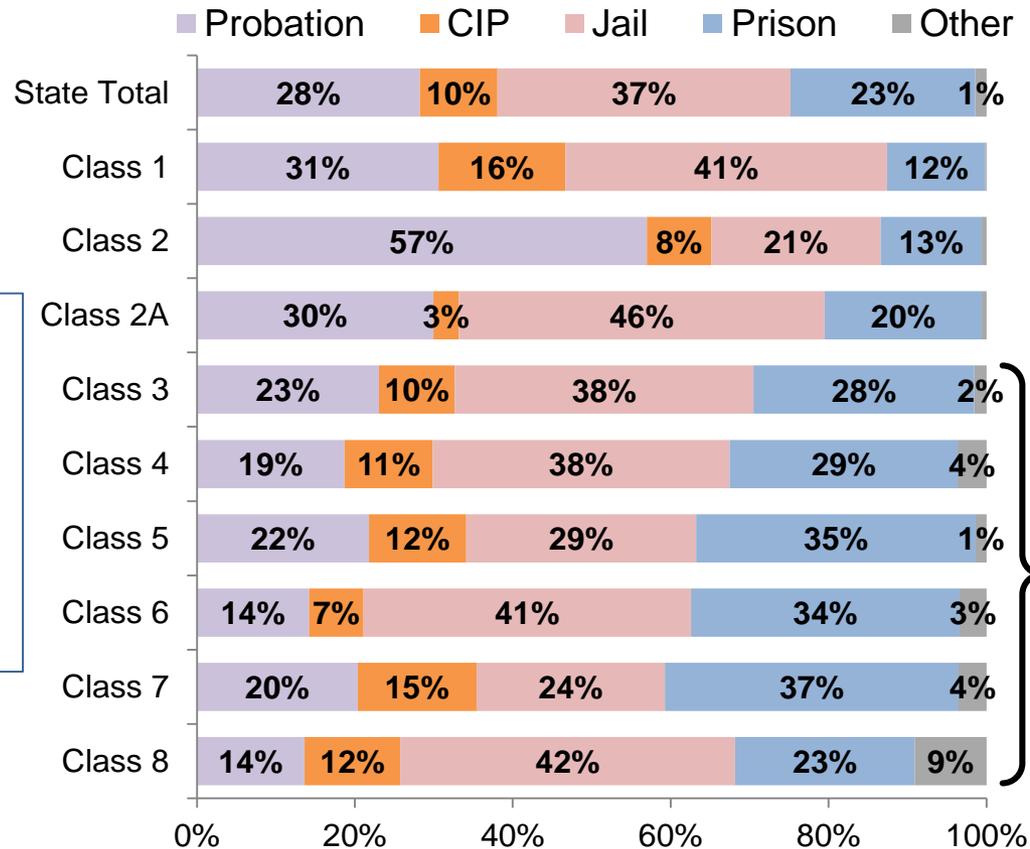
	Property/Drug	Other	Violent
	28%	24%	8%
	10%	5%	1%
	<b>37%</b>	38%	30%
	<b>23%</b>	32%	61%
	1%	1%	0%

Source: Justice Center analysis of Pennsylvania Commission on Sentencing data.

## B. Variation in basic dispositional patterns by geography— Pennsylvania

### Felony Property and Drug Sentences by Disposition and County Class, 2014

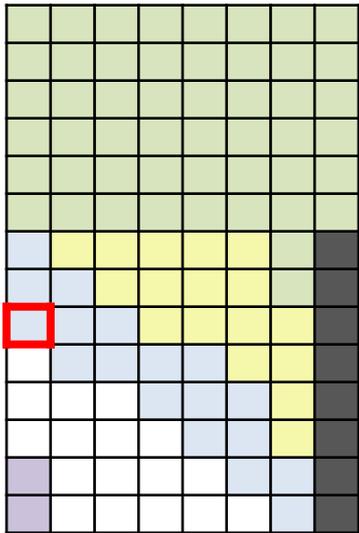
**Property and drug sentencing varies widely by county class. Allegheny County (Class 2) sentences the largest portion to probation by far.**



Use of prison sentences for property and drug offenses in Classes 3 through 8 is twice as high as 1 and 2.

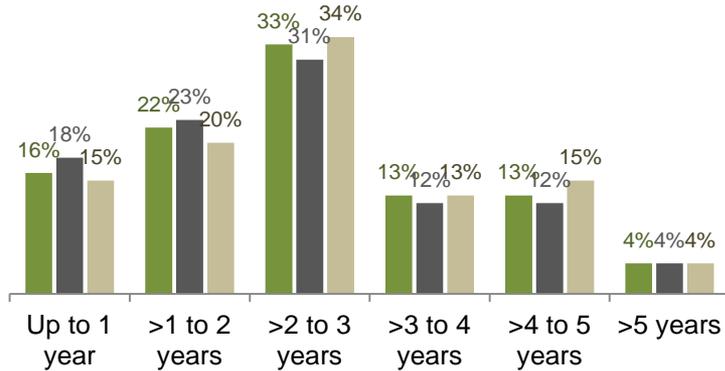
# B. SGLs and consistent data collection allow for much more detailed analysis—Pennsylvania

Probation Sentence Lengths (months) for Specific OGS 6, PRS 0 Felony Crime, 2014



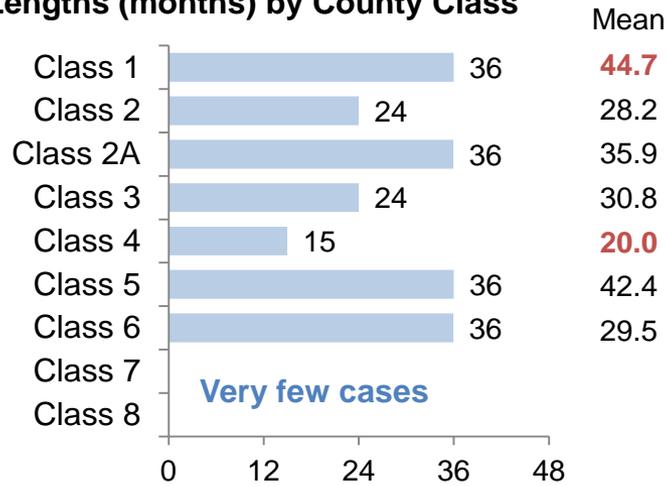
Felony probation terms within an example grid cell and crime type show a large range and geographic disparity, but not racial disparity.

6,0 Felony Drug Possession w/Intent to Deliver by Probation Length and Race



	N	Mean	Median
Total	666	36.0	36.0
Black	205	35.6	35.9
White	420	36.1	36.0

Median Probation Lengths (months) by County Class



Source: Justice Center analysis of Pennsylvania Commission on Sentencing data.

## B. Variation in disposition by geography for a particular cell in a sentencing grid—Michigan

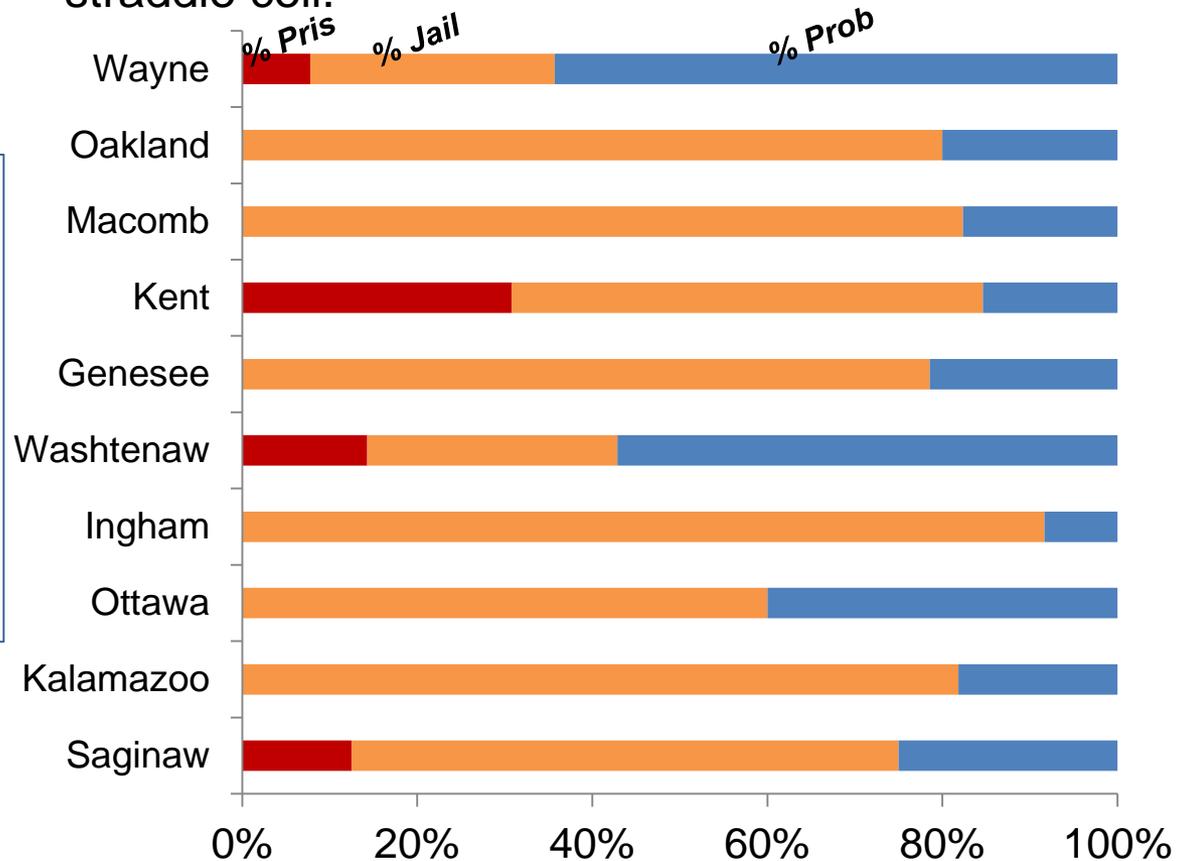
Sentencing breakdown of brand new cases in the 'E' grid 'Straddle' cells (Non Habitual)

**Total 2012 Sentences = 1,463**

	A	B	C	D	E	F
I				402	128	103

The 10 most populous counties accounted for 299 (74%) of the 402 sentences falling in this one straddle cell.

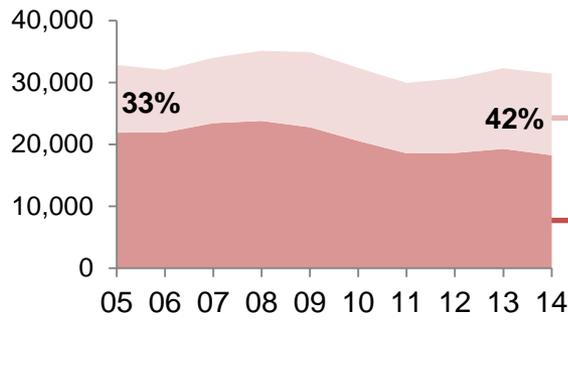
- **6 of the 10 counties didn't use prison at all**
- **1 county used prison for almost a third of cases**
- **2 counties used probation for more than half of cases**



## B. Split sentences as a distinct disposition, here in combination with parole supervision—Pennsylvania

**Growing volumes of split sentences add significant supervision time on top of a likely parole period.**

**Proportion of jail sentences with a probation tail**

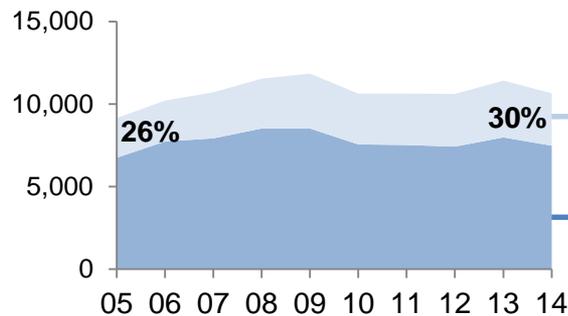


Median Jail Min  
**3 months**

Median Parole Window  
**1 year**

Median probation tail for split jail sentences  
**2 years**

**Proportion of prison sentences with a probation tail**



Median Prison Min  
**2 years**

Median Parole Window  
**2.7 years**

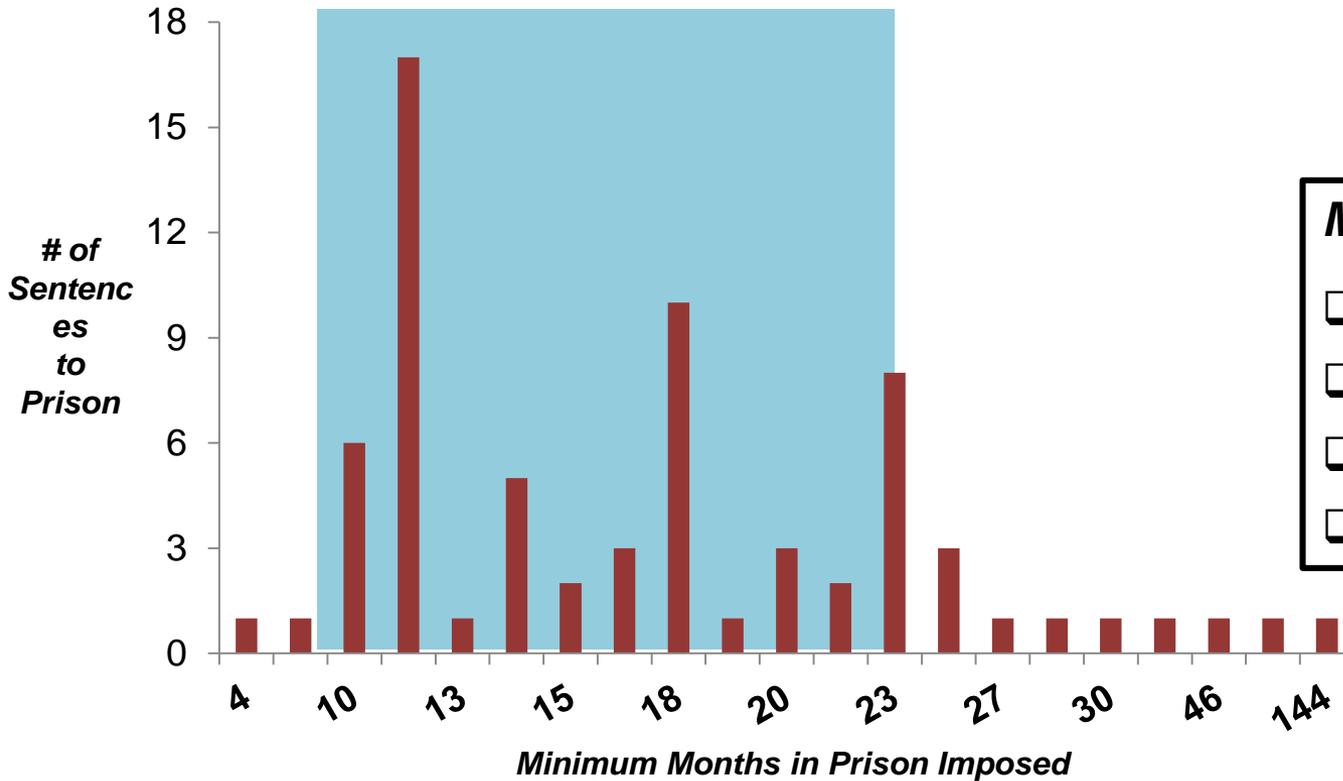
Median probation tail for split prison sentences  
**3 years**

Source: Justice Center analysis of Pennsylvania Commission on Sentencing data.

# C. Wide variation in minimum sentences for the same offense— Michigan

Min SL Distribution for Del./Man. < 50g I-II CS (Class D):  
Prior Level F, Offense Level I – Straddle Cell (excl. Habitual Offenders)

**Minimum guidelines range is wide (10–23 months), and sentences vary across the range and beyond.**



- Minimum SL Imposed:**
- 9% to 10 months
  - 24% to 12 months
  - 14% to 18 months
  - 11% to 23 months

Source: *Felony Sentencing (BIR) Data 2008-2012*, Michigan Dept. of Corrections.

## C. Sentencing practices leading to long parole periods— Pennsylvania

### Jail sentences with minimum sentences over 90 days in 2014

	Property	Drug	DUI	Other	Violent
Percent of maximum sentences that were more than twice the minimum	84%	79%	78%	77%	78%
Mean length of maximum in relation to the minimum	3.9 x longer	3.4	7.3*	3.4	3.5
Median	3.7 x longer	2.6	5.0	2.6	2.6

**Maximum sentences average more than twice the minimum, especially for property and DUI offenses.**

### Prison sentences in 2014

	Property	Drug	DUI	Other	Violent
Percent of maximum sentences that were more than twice the minimum	59%	45%	72%	42%	40%
Mean length of maximum in relation to the minimum	3.3 x longer	3.5	4.0	2.8	2.8
Median	2.4 x longer	2.0	3.8	2.0	2.0

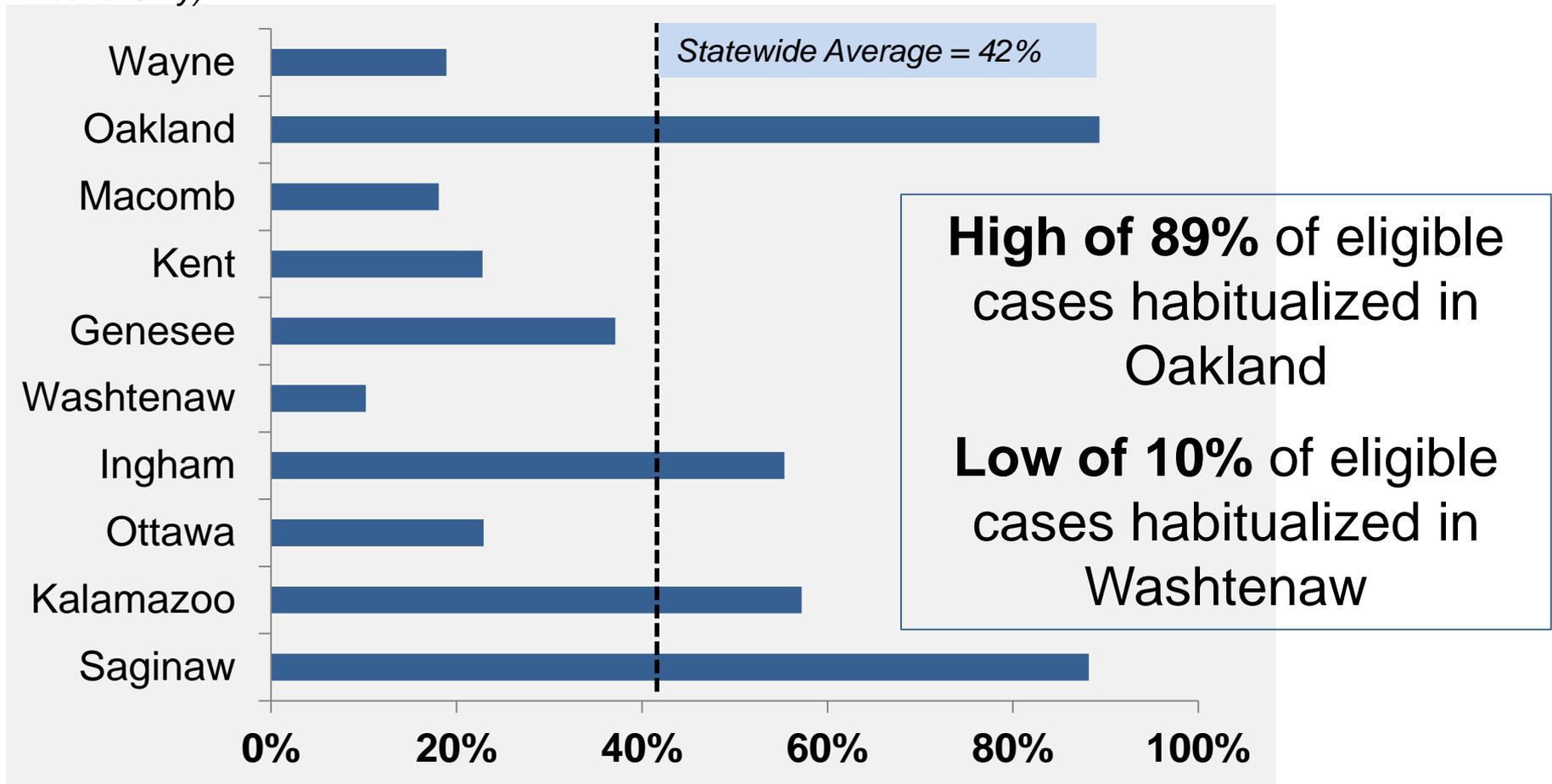
#### Judicial Survey

97 percent of judges anticipate parole at most halfway through the parole window for prison sentences, and none anticipate a max-out.

\* 17% were 90 days to 5 years. If assessment shows a need for treatment, the sentencing judge “shall impose a minimum sentence as allowed by law and a maximum sentence equal to the statutorily available maximum.” 75 Pa.C.S. §3804(d).

## C. Wide variation in prosecution's use of habitual sentencing to enhance length of sentence—Michigan

**Percent of Eligible Cases Sentenced as Habitual Offender in 2012** (*SGL Prison Bound Only*)



# C. Disparity in length of incarceration for jail versus prison—Michigan

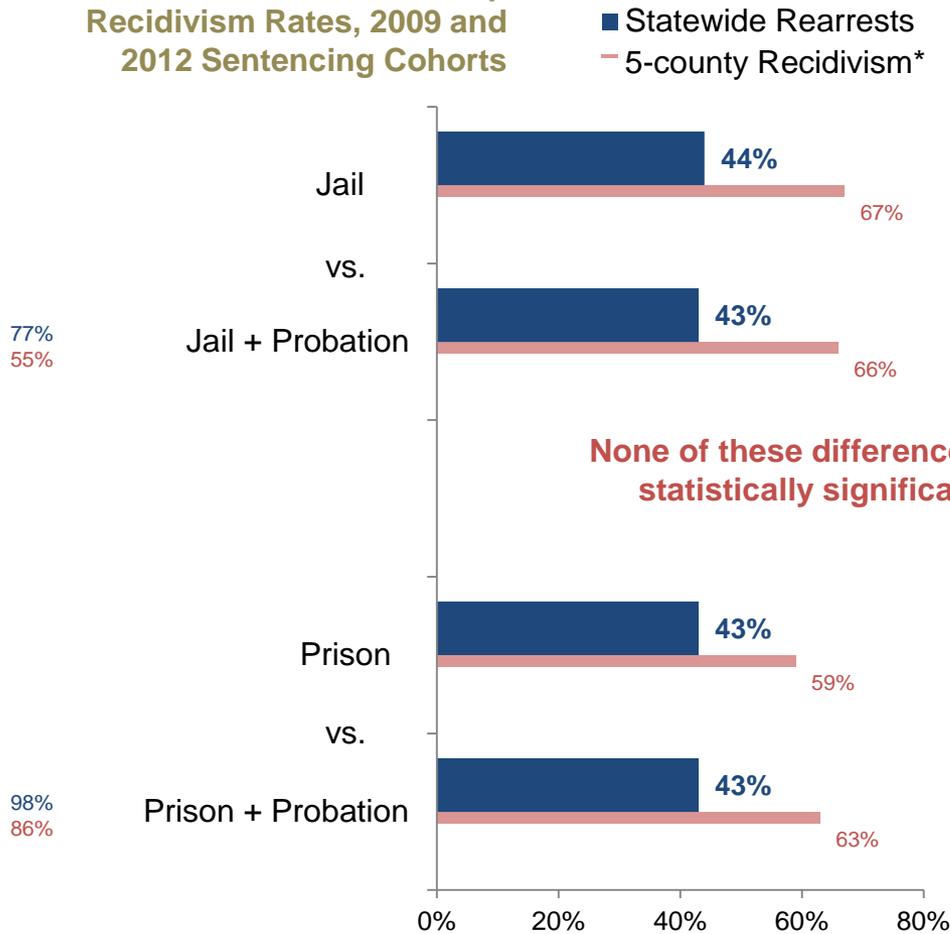
**Time Served Confined for 2008 Cases Sentenced to Terms of Incarceration of 9-15 Months**  
(“New” cases only; excludes habitualized cases)



Source: *Felony Sentencing (BIR) Data 2008-2012*, Michigan Dept. of Corrections.

## D. Recidivism (rearrest) outcomes for comparable people who received different dispositions—Pennsylvania

### Three-Year Matched Group Recidivism Rates, 2009 and 2012 Sentencing Cohorts



**Split sentences show no recidivism benefit compared to straight incarceration sentences to jail or prison.**

**If split sentences are meant to increase accountability by creating extended periods of post-release supervision, as indicated in the judicial survey, they do not appear to achieve that goal.**

# Principles to consider while studying sentencing

## **State and county resources should be allocated to maximize the availability and use of sentencing options that are the most likely to change behavior.**

- Focus on the amount, distribution, and utilization of resources for supervision, community intervention, and treatment..
- Balance appropriate discretion with increased fairness by closely tailoring consequences to conduct.

## **Sentencing policy should emphasize that the bargaining and decision process for most felonies includes information and deliberation on how the sentence can promote behavioral health and reduce offending.**

- Information should include individualized assessment of needs, and the prospects to address those needs.
- Local systems should be incentivized to innovate away from just moving cases to more purposeful resolutions, scaling up the the attention and focus of collaborative courts.

## **Sentencing is too important to be empirically opaque and must be consistently monitored.**

- Practitioners should receive feedback on the outcomes of their decisions.
- Policymakers should have high-quality data on sentencing decisions and outcomes, including demographic and geographic variables.

## **Sentencing policy should rely on research-based conclusions.**

- Effective treatment is more cost-effective at crime reduction than incapacitation.
- Imprisonment is consistently uncorrelated with reductions in recidivism.
- “Sending a message” through enhanced punishment laws is not effective as a way to deter criminal behavior.
- Behavior change is best achieved by reinforcing desirable behavior and skills; punishing undesirable behavior may feel necessary but is less effective.

# Overview



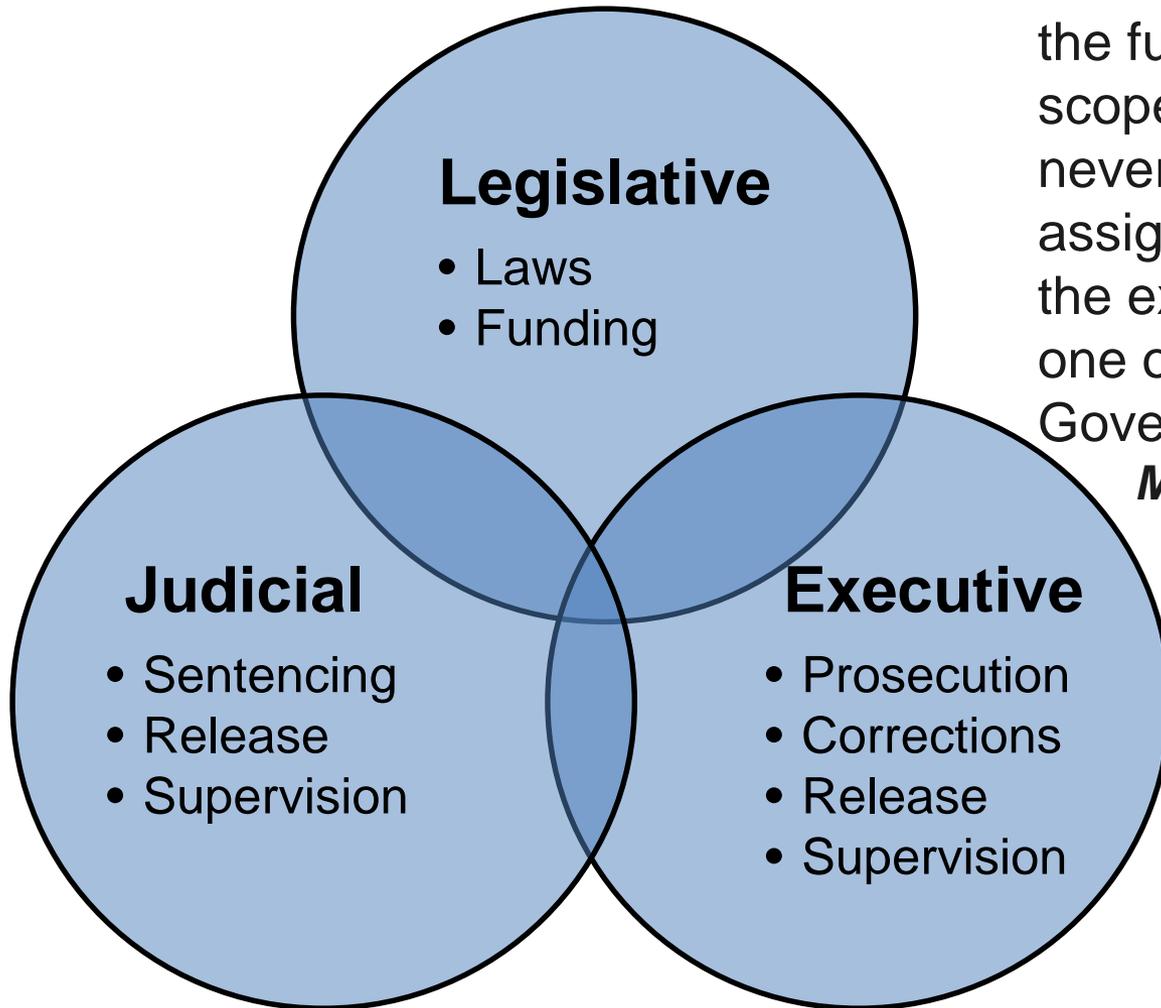
- 1 **Qualitative Considerations**
- 2 **Quantitative Analysis**
- 3 **Constitutional Considerations**

## Part 3 – Constitutional Considerations



- A. Separation of Powers
- B. Due Process
- C. Ex Post Facto Laws
- D. Right to a Jury

A. Separation of powers: sentencing implicates all three branches of government, at the federal, state and local levels.



"Historically, federal sentencing - the function of determining the scope and extent of punishment - never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government."

***Mistretta v. United States***

488 U.S. 361 (1989)

A. In Texas, Pennsylvania, and elsewhere, laws reducing punishment retroactively have been voided as interfering with executive *or* judicial power.

“...[T]statute ... extends commutation to those previously convicted of certain offenses as a mere gift or a matter of clemency upon a filing of a resentencing petition. This is clearly violative of the constitutional provision placing the power of clemency in the hands of the Governor....”

**State Ex rel. Smith v. Blackwell**, 500 SW 2d 97 (Tex. Crim. App. 1973)

“[T]he amendment undermines and thus fatally interferes with final judgments of the judiciary. . . . The amendment is, in operation and effect, a legislative command to the courts to open a judgment previously made final, and to substitute for that judgment a disposition of the matter in accordance with the subsequently expressed legislative will. The vesting in the legislature of the power to alter final judgments would be repugnant to our concept of the separation of the three branches of government.” **Commonwealth v. Sutley**, 378 A. 2d 780 - Pa: Supreme Court 1977

## A. Separation of powers analysis raises the *nondelegation doctrine*, applied to legislative and judicial delegations.

Legislative Delegation: (Re the U.S. Sentencing Commission) “The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. ... So long as Congress ‘shall lay down by legislative act an *intelligible principle* to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.’” **Mistretta v. United States**, 488 U.S. 361 (1989)

Judicial Delegation: A judge generally **may not delegate** to a probation officer a **core judicial function** like deciding if a probationer will serve additional jail time or abide by new conditions.

“[[j]ail time is to be imposed by judges” and a “**court may not delegate the authority to impose a jail sentence**, or to eliminate a jail sentence, to a non-judge....” **State v. Lee**, 467 N.W.2d 661 (Neb. 1991)

The probation department has no authority to “add conditions” of probation because “**the imposition of sentences is a judicial function**” and “exercise of this function by a [probation] officer, ... violate[s] the doctrine of separation of powers” **State v. Archie**, 470 S.E.2d 380 (S.C. 1996)

A. Some state legislatures have succeeded in structuring policies that allow delegation of limited sanctioning authority.

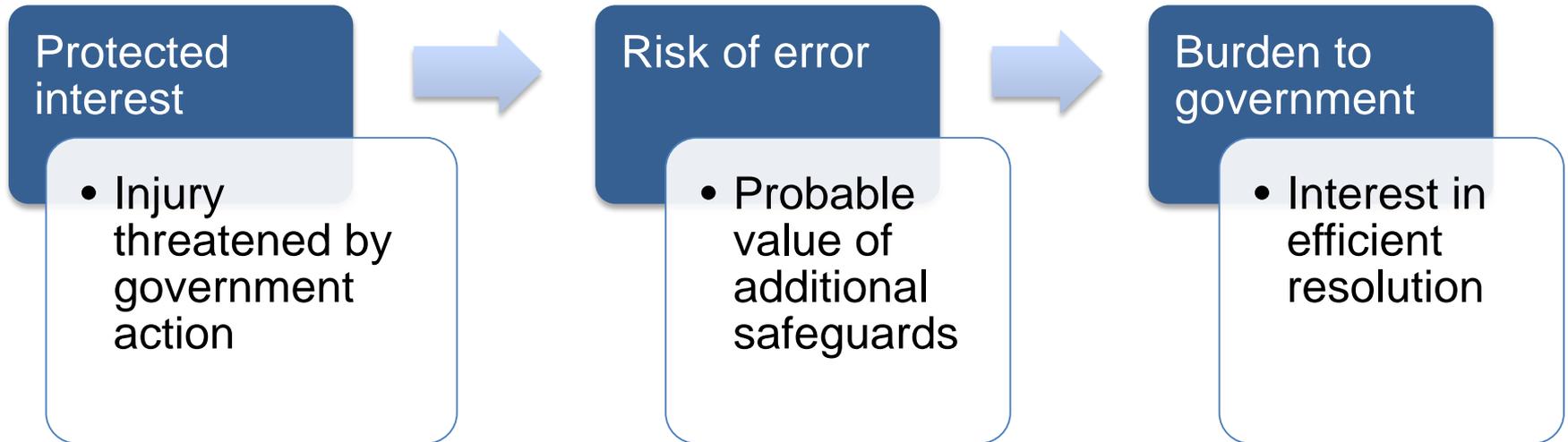
A judge likely may delegate to a probation officer if the delegation is **statutory**, includes the power to impose new conditions, and is subject to possible **judicial review**.

**Statutory delegation** allowing probation officers to revoke a probationer, **does not intrude** upon the judiciary's power to sentence criminals. **State v. Horn**, 594 N.W.2d 772 (Wis. 1999)

“...although the [probation department] may be authorized...to impose conditions of probation, **the judiciary retains the ultimate authority to review** [those conditions]...Thus the separation of powers is not violated by the judiciary's delegation of authority...”  
**State v. Merrill**, 999 A.2d 221 (N.H. 2010)

B. Due Process doctrine under the 5<sup>th</sup> Amendment is typically analyzed using a three-pronged approach.

“No person shall be . . . deprived of life, liberty, or property, without **due process of law**; nor shall private property be taken for public use, without just compensation.”



***Matthews v. Eldridge*, 424 U.S. 319 (1976)**

B. Stakeholders should be familiar with these due process cases in addition to *Matthews v. Eldridge*.

***Morrissey v. Brewer***, 408 U.S. 471 (1972) – parole revocation due process

***Gagnon v. Scarpelli***, 411 U.S. 778 (1973) – probation revocation due process

***Wolff v. McDonnell***, 418 U.S. 539 (1974) & ***Sandin v. Conner***, 515 U.S. 472 (1995) – prison disciplinary hearing due process

***Greenholtz v. Inmates of Nebraska***, 442 U.S. 1 (1979) - parole release due process – liberty interest in expected release slightly increases due process requirements

C. The prohibition on *ex post facto* laws means that punishments cannot be increased retroactively, among other things.

**“No bill of attainder or ex post facto Law shall be passed.”**

Article I, Section 9, U.S. Constitution

An ex post facto law retroactively changes the legal consequences of actions that were committed before the enactment of the law. The law cannot

- criminalize actions that were legal when committed;
- aggravate a crime by bringing it into a more severe category than it was in when it was committed;
- alter the rules of evidence to make conviction for a crime likelier than it would have been when the deed was committed; or
- ***change the punishment prescribed for a crime, as by adding new penalties or extending sentences. Calder v. Bull, 3 U.S. 386 (1798)***

C. Florida has historically pushed the *ex post facto* envelope with changes to credit and sentencing laws.

*In Weaver v. Graham*, 450 U.S. 24 (1981), Florida lost after retroactively reducing the amount of “gain time” from a convicted prisoner's sentence.

After another attempt at retroactive reduction in accumulated credits, Lynce was rearrested after release, when his prison overcrowding credits were rescinded retroactively, per new legislation. “[T]he fact that the generous gain-time provisions in Florida’s 1983 statute were motivated more by the interest in avoiding overcrowding than by a desire to reward good behavior is not relevant to the essential *ex post facto* inquiry.” *Lynce v. Mathis*, 519 U.S. 433 (1997)

Miller was sentenced under Florida’s new guidelines. Increasing the applicable guidelines range created a significant risk of a higher sentence and was an *ex post facto* violation. *Miller v. Florida*, 482 U.S. 423 (1987)

C. Retroactive legislative proposals should trigger ex post facto and separation of powers analysis.

***Retroactive changes in punishment are susceptible to challenge, one way or another.***

- ***Reducing punishment – separation of powers***
- ***Increasing the “quantum of punishment” – ex post facto***

Example policy: Ensuring that there is post-prison supervision to avoid “max-outs” straight to the street.

If this period is added to the sentence it must be prospective only, to avoid an obvious *ex post facto* violation.

If this period is subtracted from the time that would otherwise be in confinement, it may be possible to apply it to people currently in prison (i.e., retrospectively). It depends on the state’s separation of powers jurisprudence.

D. Under *Apprendi* and progeny, the 6<sup>th</sup> Amendment right to a jury includes sentencing factors that increase the applicable punishment.

“Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt.” ***Apprendi v. New Jersey***, 530 U.S. 466 (2000)

“[These cases reflect the] need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.” ***Blakely v. Washington***, 542 U.S. 296 (2004)

“*Apprendi*’s definition of “elements” necessarily includes *not only facts that increase the ceiling, but also those that increase the floor*. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. ... *Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.*” ***Alleyne v. United States***, 570 U.S. 99 (2013)

## D. State mandatory minimums based on judicial findings can trigger 6<sup>th</sup> Amendment violations.

**Pennsylvania:** “[N]umerous provisions of Section 6317 are unconstitutional in light of . . . Alleyne. After Alleyne, these aspects of the statute—that the provisions are declared not to be elements of the offense, that notice is not required prior to conviction, that factfinding is conducted at sentencing, that the sentencing court performs fact-finding, that the applicable standard is preponderance of the evidence, and that the Commonwealth has the right to appeal where the imposed sentence was found to be in violation of the statute—are now infirm.”

**Commonwealth v. Hopkins**, 117 A. 3d 247 - Pa: Supreme Court 2015

**New Jersey:** “The mandatory minimum sentence under N.J.S.A. 2C:39-5(i) is based on a judicial finding of fact and cannot survive constitutional scrutiny. We therefore vacate defendants' sentences and remand for resentencing on the unlawful possession of a weapon convictions”. **State v. Grate**, 106 A. 3d 466 - NJ: Supreme Court 2015

**Michigan:** “to the extent that OVs scored on the basis of facts not admitted by the defendant or necessarily found by the jury verdict increase the floor of the guidelines range, i.e, the defendant's "mandatory minimum" sentence, that procedure violates the Sixth Amendment.” **People v. Lockridge**, 870 NW 2d 502 - Mich: Supreme Court 2015

D. In some states, departing from presumptive probation triggers 6<sup>th</sup> Amendment violations.

**South Dakota:** “When a sentencing court finds the facts necessary to impose a prison term rather than that of [presumptive] probation, the core concern of *Apprendi*—“a legislative attempt to ‘remove from the province of the jury’ the determination of facts that warrant punishment for a specific statutory offense[,]”—is not implicated.” ***State v. Anderson***, 867 NW 2d 718 - SD: Supreme Court 2015

**Oregon:** “upward dispositional departures are subject to the rule of *Apprendi* and *Blakely*.” ***State v. Frinell***, 290 Or. App. 296 (Or: Court of Appeals 2018)

**Florida:** “It is one thing to enlarge a penalty where Congress or the State of Florida has made a prior conviction a central feature of a crime; it is another to allow a trial judge to engage in wide-ranging fact-finding — constitutionally entrusted to a jury — about an offender's potential for being a "danger to the public" to support an enhanced penalty.” ***Woods v. State***, 214 So. 3d 803 (Fla: Dist. Court of Appeals, 1st Dist. 2017)

## Review of policy topics where constitutional issues may arise

<b>Doctrine</b>	<b>Source</b>	<b>Topics</b>
Separation of Powers	Unstated*	<b>Decrease in punishment</b> <b>Administrative sanctions</b> <b>Mandatory minimums</b>
Due Process of Law	5 <sup>th</sup> Amend. U.S. Const.	<b>Administrative sanctions</b> <b>Presumptive parole</b>
Ex Post Facto Laws	Art. 1, Sec. 9 U.S. Const.	<b>Law increasing punishment</b> <b>Post-release supervision</b>
Right to a Jury	6 <sup>th</sup> Amend. U.S. Const.	<b>Facts increasing punishment</b>

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