



New Jersey Criminal Sentencing & Disposition Commission

2022 Report

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Executive Summary

Just over two years ago, in November 2019, the Criminal Sentencing and Disposition Commission (CSDC or Commission) issued its first Report. In that Report, the CSDC members described their initial efforts to establish the Commission as a working entity able to carry out its mission. Through its enabling legislation, the Commission was given the power to call on State and local governmental agencies for assistance in accessing data on criminal justice issues, in analyzing the information obtained, and in preparing required reports. The members agreed that their statutory charge is generally broad in respect of fairness in the criminal justice system but, at the same time, more particularly focused on issues related to racial disparities and mass incarceration in the correctional setting. As we noted in 2019, New Jersey continues to rank with those states that have the worst racial disparities in the nation. During this early phase of the CSDC's work, the members heard from participants in the system (state sentencing boards, victim rights organizations, and non-profit criminal justice reform groups, among others), and was fortunate in obtaining financial assistance from Arnold Ventures for Rutgers University faculty members and graduate students who continue to collect and analyze criminal justice data for the CSDC.

In its first Report, after the CSDC reviewed that early data and considered the impact of current laws and practices on different racial and ethnic groups, the members unanimously approved nine recommendations for reform. Those

recommendations were developed and proposed by people who represented differing interests in the criminal justice system, people who compromised because everyone agreed that reform was necessary and because the proposals constituted an important first step. Plans were also made to continue the Commission's work, building on those recommendations.

Since the first Report, the COVID pandemic has changed our lives. In this 2022 Report, the Commission describes prison releases that were ordered to ameliorate the impact of the pandemic on corrections officers, inmates and, ultimately, the population interacting with these persons. In short, COVID created a public health emergency requiring inmates to be let out of prison just as the Commission was considering both the resources necessary to help prisoners adjust to life "outside" and the impact of early release on recidivism and racial disparities. One of the unanticipated consequences of the accelerated COVID releases is that they present an opportunity to study a large cohort of inmates in this challenging environment.ⁱ

But COVID has also made it difficult to mine that and other data, and our work has slowed during the period covered by the second Report. Nonetheless, because so much has been left undone in response to the first Report, and because we have a number of substantial inquiries underway, the CSDC has decided to issue this Report now, at the close of the first administration of Governor Murphy. This second Report begins with the recommendations made in

2019, those few enacted and those that will disappear when the new Legislature convenes; the Attorney General's attempt, through executive action, to implement avenues of release for certain inmates, delayed by the courts; and, the New Jersey Supreme Court cases that urge legislative/executive action in connection with the sentencing of juveniles and with concurrent/consecutive sentencing generally. The Report continues with an update on data collection and a recent new grant from Arnold Ventures that provides support for a joint venture between the Rutgers Justice Data System Assessment Team (Rutgers Team) and the Office of the Attorney General (OAG) to create a statewide information system in New Jersey. While this project is important work in progress, without legislation implementing a first step in criminal justice reform, new steps cannot follow.

On a positive note, assuming that the first set of reforms are passed, much remains to be done and the CSDC is poised to do that work. The final sections of this Report outline a "Framework for Future Work" that the Commission anticipates will result in new proposals for legislation, also designed to reduce racial disparities and bring greater justice to the justice system in our State.

This second Report was approved unanimously by the Commission's members on January 7, 2022.

Introduction: How We Got to Where We Are Now

New Jersey has experienced an unprecedented public health crisis as a result of the COVID pandemic. In direct response to rising COVID infection numbers, widespread changes to the criminal justice system have been implemented, changes that substantially affected the operations of our courts and our correctional institutions. On March 9, 2020, Governor Murphy issued Executive Order No. 103, declaring both a Public Health Emergency and State of Emergency due to the pandemic, leading to a statewide shut down order that remained in effect for two months. From March 2020 through June 2021, the Judiciary suspended most in-person court proceedings, including grand jury panels and jury trials, followed by a brief resumption of some of those proceedings between July and November 2020. It was not until June 2021 that the Judiciary began to gradually increase the number of in-court proceedings, with a return on September 7, 2021, to a 100% on-site court staff presence. Even as this Report is issued, there is uncertainty in respect of continued in-person proceedings because of the recent increase in COVID cases and the transmissibility of the Omicron variant.

Within the State's correctional institutions, cases of COVID among prisoners and staff have spread rapidly during the pandemic, resulting, as of December 28, 2021, in 53 deaths, 4,842 confirmed cumulative cases among inmates, and 3,786 cases among staff.ⁱⁱ This institutional crisis has led to expansive Executive,

Legislative and Judicial action aimed at decreasing populations in the County jails and State prisons.

On March 23, 2020, the New Jersey Supreme Court responded to a joint application by the Office of the Public Defender (OPD) and the American Civil Liberties Union of New Jersey (ACLU-NJ), by approving a consent order negotiated between the OAG, County Prosecutor's Association of New Jersey (CPANJ), OPD and ACLU-NJ for the release of nearly 700 people serving relatively short sentences in our County jails. On April 10, 2020, the Governor issued Executive Order 124, after which several hundred State prison inmates were released to temporary home confinement.ⁱⁱⁱ And, finally, the Public Health Emergency Credits Bill was passed by the New Jersey Legislature and signed by the Governor on October 19, 2020. This first-of-its-kind law allowed for the early release of more than 3,000 State prisoners who were nearing the end of their sentences.

It is against this backdrop that the Commission has continued to examine ways to reduce racial disparity in New Jersey's prisons.

Part I: Commission Update

A. Status of Action Areas Identified in the First Commission Report

On November 12, 2019, the CSDC unanimously approved nine recommendations for sentencing reform. Over the following year and a half, the New Jersey Legislature introduced a variety of bills incorporating these recommendations but only three of the bills were signed into law. An update on the status of passed and proposed legislation related to the Commission's nine recommendations follows:

Recommendation #1: Eliminate Mandatory Minimum Sentences for Non-Violent Drug Crimes (*Not Implemented*); **Recommendation #2**: Eliminate Mandatory Minimum Sentences for Non-Violent Property Crimes (*Not Implemented*); **Recommendation #3**: Reduce the Mandatory Minimum Sentence for Second Degree Robbery and Second Degree Burglary (*Not Implemented*):

As part of the original bill package to implement the recommendations of the CSDC, legislation (S-2586 and A-4369) was introduced to eliminate specific mandatory minimum terms of imprisonment. A-4369 was substituted for S-2586, and passed the Senate on August 27, 2020. The bill was referred to the Assembly on September 14, 2020. Identical bills (S-3363 and A-5266) were introduced on January 12, 2021. No further action has been taken on these bills.

Additional bills (S-3456/A-5385 and A-5641/S-3658) were introduced to eliminate mandatory minimum terms of imprisonment for all non-violent crimes as defined in the bill and separately to expand the CSDC's recommendations by including certain specific additional crimes, i.e. official misconduct. S-3456 was substituted for A-5385. This legislation was conditionally vetoed and returned to the Senate on April, 19, 2021. S-3658 was substituted for A-5641 on June 24, 2021. The legislation was conditionally vetoed and returned to the Senate on June 28, 2021. No further action was taken on the legislation.

As discussed in greater detail below, in the absence of legislative action, the Attorney General issued Directive 2021-4 to waive the imposition of mandatory minimums for qualifying offenses.

Recommendation #4: Apply Recommendations #1, #2 and #3 Retroactively so that Current Inmates May Seek Early Release (*Not Implemented*):

S-2593 was reported out of the Senate Judiciary Committee, with amendments, on August 25, 2020. It was amended on the Senate floor on October 29, 2020 and again on November 16, 2020. No further action has been taken on this bill. The Assembly version of this bill (A-4370) was amended in both the Assembly Law and Public Safety Committee and Assembly Appropriations Committee, and passed the Assembly on July 30, 2020. It was amended in the Senate Judiciary Committee on August 25, 2020 and again on the Senate floor on November 16, 2020. No further action has been taken on this bill.

Recommendation #5: Create a New Mitigating Sentencing Factor for Youth (*Implemented*):

S-2592/A-4373 establish a new mitigating factor for those under age 26 at the time they committed their offense (enacted as L.2020, c.110). This law became effective on October 19, 2020.

Recommendation #6: Create an Opportunity for Resentencing or Release of Offenders Who Were Juveniles at the Time of Their Offense and Were Sentenced as Adults to Long Prison Terms (*Not Implemented*):

A-4372 was amended in the Assembly Appropriations Committee and passed the Assembly on July 30, 2020 and was referred to the Senate Judiciary Committee on August 3, 2020. The bill was reported out of the Senate Judiciary Committee, with amendments, on August 25, 2020, and was further amended on the Senate floor on October 29, 2020. This bill was substituted for S-2591 on June 21, 2021. No further action has been taken on this bill.

Recommendation #7: Create a Compassionate Release Program that Replaces the Existing Medical Parole Statute for End-Of-Life Inmates (*Implemented*):

S-2594/A-2370 establish a compassionate release program for inmates suffering from a terminal condition or permanent physical incapacity that renders them permanently physically incapable of committing a crime if released, repealing the law that established medical parole (enacted as L.2020, c.106). This law became effective on February 1, 2021.

Recommendation #8: Reinvest Cost-Savings from Reductions in the Prison Population Arising from These Reforms into Recidivism Reduction and Other Crime Prevention Programs (*Implemented*):

S-2595/A-4371 require a cost savings study of the compassionate release program and elimination of mandatory minimum terms; establishes "Corrections Rehabilitation and Crime Prevention Fund" (enacted as L.2020, c.109). Although this law became effective on October 19, 2020, the mandatory minimum terms have not been eliminated. So far as the Commission is aware, few inmates have been released under the compassionate release program.

Recommendation #9: Provide Department of Correction Funding (DOC) to Upgrade the Department's Existing Data Infrastructure. (*Not Implemented*):

S-2593 was reported out of the Senate Judiciary Committee, with amendments, on August 25, 2020. It was amended on the Senate floor on October 29, 2020 and again on November 16, 2020. No further action has been taken on this bill. The Assembly version of this bill (A-4370) was amended in both the Assembly Law and Public Safety Committee and the Assembly Appropriations Committee and passed the Assembly on July 30, 2020. The bill was amended in the Senate Judiciary Committee, and was amended again on the Senate floor on November 16, 2020. No further action has been taken on this bill.

Although the Legislature did not implement this recommendation, the CSDC has obtained financial support from Arnold Ventures to create a statewide information system through a joint venture between the Rutgers Team and the OAG.

Other Legislation Related to the CSDC (Not Implemented):

S-3377/A-5239 were introduced to increase the size of the Criminal Sentencing and Disposition Commission and to broaden the Commission's reporting duties. These bills were introduced on January 21, 2021 and January 11, 2021, respectively. No further action has been taken on these bills.

The current two-year Legislative term ends at noon on January 11, 2022. Any legislation that is not approved by the Legislature and presented to the Governor for enactment into law at the end of the two-year term expires and would need to be reintroduced in the next legislative session.

B. Executive Response to Legislative Inaction: Attorney General Law Enforcement Directive No. 2021-4

In the absence of legislation to eliminate mandatory minimum sentences for non-violent drug offenders, the Attorney General issued a Law Enforcement Directive on April 19, 2021 ("Directive"), instructing prosecutors statewide to use existing statutory authority to waive the imposition of mandatory minimum sentences for non-violent drug offenders. This broad Directive establishes rules for applying waivers in four contexts: during plea negotiations, after conviction at trial, following violations of probation, and in connection with a joint application to modify the sentences of previously sentenced inmates who are currently incarcerated. The Directive took effect on May 19, 2021, and from that date through December 16, 2021, approximately 1,270 individuals who pled guilty or were convicted of qualifying non-violent drug offenses received waivers of

mandatory minimum sentences.

With respect to the Directive's retrospective component, on May 26, 2021, the Supreme Court assigned Superior Court Judge Susan J. Steele, J.S.C., retired and on recall, to oversee all motions brought under the Directive to eliminate the mandatory period of parole ineligibility for previously sentenced individuals. The Attorney General and the Public Defender filed a joint motion on behalf of an inmate who had been sentenced prior to the effective date of the Directive, seeking a change of sentence pursuant to New Jersey Court Rule 3:21-10(b)(3) to vacate the defendant's mandatory period of parole ineligibility. On August 24, 2021, Judge Steele denied the motion, ruling that the portion of the Directive that provides for the elimination of the mandatory minimum sentence for those who were previously sentenced exceeds the scope of the Attorney General's power. At the time of this writing, an appeal of Judge Steele's opinion, filed jointly by the Attorney General and the Public Defender and argued in the Appellate Division on November 15, 2021, is pending decision.

C. Judicial Developments

1. State v. Torres

In a recent significant decision, the New Jersey Supreme Court addressed the standards under existing law for imposing consecutive or concurrent sentences, holding that a trial court must provide an explanation as to the "overall fairness" of a sentence imposed on a defendant. State v. Torres, 246 N.J. 246, 272

(2021). In a unanimous opinion authored by Justice LaVecchia, the Court explained that its seminal opinion in State v. Yarbough, 100 N.J. 627 (1985), “represented [the] Court’s first attempt to formulate guidance for courts deciding whether sentences should be made consecutive or concurrent under...the [Criminal] Code.” Torres, 246 N.J. at 263. The Torres Court advised, however, that even after Yarbough’s admonition that “there can be no free crimes in a system for which the punishment shall fit the crime,” courts are required to retain focus on the fairness of the overall sentence.

Emphasizing that “uniformity and predictability should not come at the expense of fairness and proportionality,” the Court instructed that sentencing judges, even when imposing consecutive sentences, must provide “an explicit explanation of the overall fairness of a sentence, in the interest of prompting proportionality for the individual who will serve the sentence.” Id. at 271. This explanation, the Court held, will “foster consistency in sentencing, in that arbitrary or irrational sentencing can be curtailed and, if necessary, corrected through appellate review.” Id. at 272. Further, the Court accepted the principle that a person’s likelihood to recidivate dramatically decreases with age and should therefore be considered at sentencing. The Court held that “[a]ssessing the overall fairness of a sentence requires a real-time assessment of the consequences of the aggregate sentences imposed, which perforce includes taking into account the age of the person being sentenced.” Id. at 273.

The Court expressly sought the assistance of the Commission, indicating that it would “await further action by the New Jersey Criminal Sentencing and Disposition Commission, which may touch on some policy-laden sentencing arguments” advanced in the case. *Id.* at 252-253. In calling upon the Commission to take action, the Court highlighted various alternative sentencing models and stated that “although many states leave the decision to run sentences consecutively or concurrently to the discretion of the court... several states’ sentencing commissions have developed substantive guidelines or recommendations for courts to use[.]” *Id.* at 253, n.2. The Court also noted “that the Sentencing and Disposition Commission [was] slated to discuss matters related to age, recidivism, and timing of reviews for release,” and that “[t]he arguments and social science research of the parties and *amici* might assist the Commission in its deliberation of recommended legislative changes.” *Torres*, 246 N.J. at 274, n.11.

With respect to the question of consecutive or concurrent sentencing, the CSDC observes that there are a number of options available to the Legislature based on the statutory enactments of other states. These sentencing schemes run the gamut from requiring that all sentences run concurrently in the absence of express statutory provisions to the contrary, e.g., Ohio, to allowing entirely discretionary decisions with regard to concurrent or consecutive sentencing, e.g., Connecticut.^{iv} As well, there are variations in between, including the many states

that presume sentences to run concurrently, e.g., Oregon, Nevada, Missouri, Illinois, Georgia, Washington and Arkansas, and a few that presume that sentences will run consecutively, e.g., Virginia.^v In addition, some states consider factors such as whether the charges at issue were part of the same indictment, whether multiple victims were involved, and whether the defendant committed a felony offense while on parole, probation, or supervision.

New Jersey could choose any of these or other schemes. That said, an approach that includes a “general presumption in favor of concurrent sentences,” with exceptions for “selected categories of cases” has been proposed by the American Law Institute (ALI) in its Model Penal Code of Sentencing.^{vi} The Commission has looked to the ALI in its early work and anticipates that the ALI’s position will be at least a starting point for our review.

2. Juvenile Sentencing Cases

The Supreme Court has granted certification in two cases that present issues regarding juvenile sentencing, State v. Comer, No. 084509 (certification granted March 26, 2021), and State v. Zarate, No. 084516 (certification granted March 23, 2021). These grants follow a prior request by the Chief Justice that the Commission weigh in on the constitutional issues implicated by juvenile sentencing, a request that arose from the Court’s decision in State v. Zuber, 227 N.J. 422 (2017), in which the Court struck down as unconstitutional sentences of de facto life without parole imposed upon juveniles, i.e., sentences that were so

long that the defendant was unlikely to be released during his lifetime or at a time when he would have a meaningful opportunity for a life outside of prison. In the Zuber decision, the Court also discussed the “serious constitutional concerns” raised by “crimes committed by juveniles, which carry substantial periods of parole ineligibility.” The Court “encourage[d] the Legislature to examine this issue,” citing with approval statutes from a number of states that provide juveniles with an opportunity for resentencing or parole consideration from 15 to 25 years following their sentencing. Id. at 452 and n.3. The Legislature having failed to act, Comer raises the question of whether a mandatory 30-year period of parole ineligibility for a juvenile offender is unconstitutional as applied to him, and Zarate raises the issue of whether a 51-year sentence with a 42 ½ year period of parole ineligibility is unconstitutional. Comer and Zarate were argued in the Supreme Court on November 10, 2021, and are pending decision as of this writing.

D. Research Opportunities: Past and Present

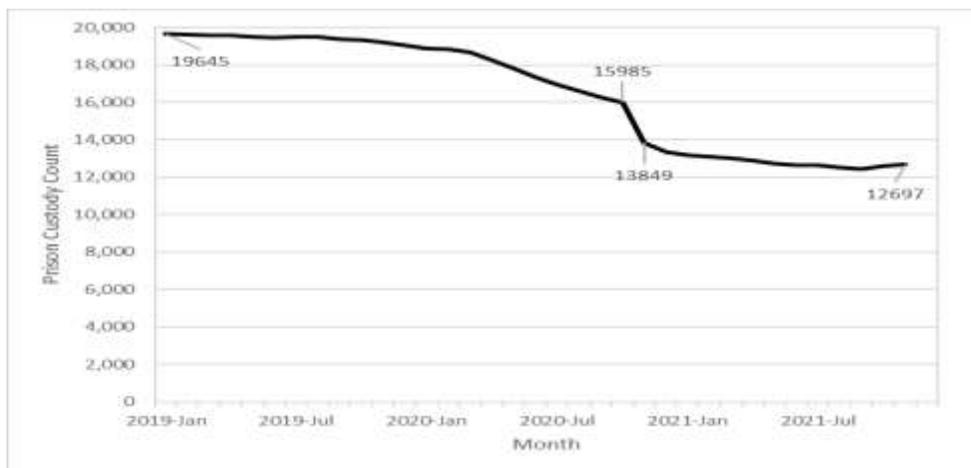
1. Data Collection

As noted earlier in this Report, an unintended consequence of the early release of thousands of incarcerated individuals in New Jersey is the availability of recidivism data. Pandemic-related early release creates a large sample size, presenting an opportunity to collect information about recidivism rates for specific crimes and the impact that certain factors, including the presence or absence of familial support or parole supervision, age at time of release; and

participation in educational programming while incarcerated, have on recidivism rates. The DOC has made data available on the prison population, and the State Parole Board (SPB) has provided similar information on parolees. This information can be linked with arrest data from the New Jersey State Police in order to study recidivism.

2. Arnold Ventures

The Commission has obtained additional financial support from Arnold Ventures to assist in collecting and analyzing this critical data. The graph below provides the number of individuals in DOC custody (an estimate of the average daily count in a given month) between January 2019 and November 2021. During this period, the prison population has declined substantially from 19,600 to 12,700, or over 35%. The largest single-month drop in that population corresponded to when the public health emergency credits bill became effective in November 2020, when the average daily population declined from 16,000 to 13,800.



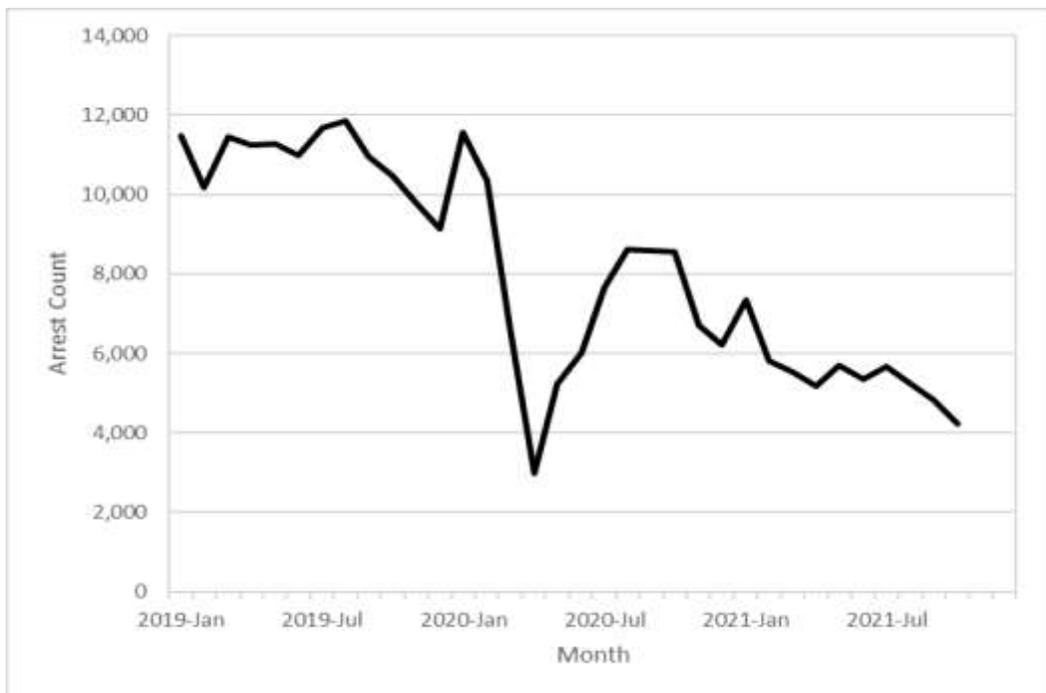
DOC single-day snapshots in November 2019 and November 2021 further indicate that the racial/ethnic makeup of the imprisoned population has remained stable over the two-year period. In November 2019, 20% of the State prison population was non-Hispanic white, 61% was non-Hispanic Black, and 17% was Hispanic.^{vii} As of November 2021, the corresponding percentages are 20%, 61%, and 16%. Thus, although large reductions in the size of the prison population have been achieved, the racial disparities remain stark.

Public safety is an obvious concern in light of the release of large numbers of individuals from DOC custody. In a provisional analysis of one-year re-arrest rates, the first cohort of individuals released under the public health emergency credits bill had only a negligibly higher likelihood of being rearrested within one year of release. The table below shows the re-arrest rates for these individuals compared to their counterparts released in earlier time periods. The conclusion from this table is that public safety was not compromised by the release of a large cohort of individuals on a single day. The CSDC anticipates receiving a report from the Rutgers Team on the practical challenges of releasing such a large group of individuals in a short period of time.

Release Cohort	Number of Individuals	% Re-arrested in One Year
2016 – 2018	30,675	23.0%
2020 (Jan. 1 – Nov. 3)	5,951	23.1%
Nov. 4, 2020	2,054	24.5%

An additional way to respond to public safety concerns is to examine statewide arrest patterns. The graph below provides the total number of arrests

for finger-printable offenses, between January 2019 and October 2021. Note that these refer to all arrests and not just arrests of individuals released from state prison. The overall total number of arrests have been on a downward trend since the middle of 2019, and have returned to that trend following a disruption during the early months of the COVID pandemic.



The CSDC intends to analyze data on these and other issues as it becomes available from state agencies. With the assistance of the Rutgers Team, the impact of the Commission's recommendations on the courts, the prison population, and public safety will be closely monitored.

3. Chapter 120 Data Project

Under a recently enacted law, the Attorney General is required to “establish a program to collect, record, and analyze data” regarding defendants

in the State's criminal justice system.^{viii} The new law, known as "Chapter 120," mandates that the Attorney General compile data concerning all aspects of a defendant's passage through the justice system, from arrest to prosecution to release from custody. This mandate presents a significant challenge, since the data is not now stored in a single repository and is instead scattered across multiple records systems maintained by various State, County, and local government agencies. To comply with Chapter 120, the Attorney General has concluded that it is necessary to build a new, comprehensive statewide criminal justice data system that integrates records from multiple sources.

The OAG seeks to build this new system in two phases. Phase 1 will involve an assessment of existing criminal justice data systems undertaken by the Rutgers Team.^{ix} The researchers will evaluate the strengths, weaknesses, and gaps in these systems and recommend ways to integrate them into a comprehensive statewide system. To complete this assessment, the Attorney General will ensure, through authority vested by Chapter 120, that the Rutgers Team has full access to State, County, and local data at relevant agencies, including the New Jersey State Police, Division of Criminal Justice, Juvenile Justice Commission, Administrative Office of the Courts, Department of Corrections, State Parole Board, County Prosecutor's Offices, and local law enforcement agencies. The Rutgers Team will also interview staff, inspect data systems, and review underlying information maintained by the participating agencies. The OAG expects the assessment to

be completed by early 2022.

Phase 2 will carry out the recommendations developed during Phase 1 and will involve the development of a new, comprehensive statewide data system, most likely through the integration, consolidation, and/or expansion of the existing data systems. The Attorney General's ultimate goal is to establish a single-source, individual-based system to (1) facilitate information sharing across criminal justice agencies, and (2) provide needed, comprehensive analytics to guide decision-making, evaluate policies and procedures, and identify patterns and trends in the data.

The creation of a consolidated data system will greatly advance the CSDC's mission. The ability to view, in a single repository, individual and aggregate data about the age, recidivism rates, and sentence lengths, among other things, of those entering the criminal justice system in New Jersey is crucial to the formulation of sound policy. The Attorney General has committed to working with other CSDC members to ensure that this new data system serves the needs of New Jersey's various criminal justice stakeholders and reflects the statutory goals of the Commission to study and eliminate racial disparities.

Part II: Call to Action

The Commission reaffirms its unanimous support for the recommendations made in its November 2019 report and, more particularly, those recommendations that have not yet been enacted. Indeed, the elimination of mandatory minimum sentences for non-violent drug offenses remains the centerpiece of the Commission's efforts to reform New Jersey sentencing laws and reduce the racial disparities created by those laws. The data is clear that the mandatory minimum sentences attached to certain drug offenses, particularly the 1,000-foot school-zone statute, have resulted in a disproportionate impact on urban residents who are predominantly persons of color. Over three-quarters of inmates serving sentences under the school-zone law are Black, likely making the school-zone law the single largest contributor to racial disparity in our prison system. The Commission urges the Legislature to eliminate mandatory minimums for nonviolent drug offenses in accordance with Recommendations One and Two from the Commission's 2019 report.

The Commission also urges the Legislature to adopt Recommendation Six, creating an opportunity for the resentencing or release of offenders who were juveniles at the time of their offenses and were sentenced as adults to long prison terms. Over the past decade, the United States and New Jersey Supreme Courts have issued numerous opinions recognizing developments in juvenile brain science and reflecting a nationwide consensus that juvenile offenders are categorically less

culpable and more amenable to rehabilitation than adults. As noted earlier, these judicial decisions have led to sweeping change in the sentencing of juvenile offenders. Yet, New Jersey continues to deny opportunities for offenders who were juveniles at the time of sentencing to later obtain judicial review of their sentences. Acknowledging the significant constitutional concerns raised by the lack of a statutory mechanism for this purpose, our Supreme Court has urged the Legislature to “consider enacting a scheme that provides for later review of juvenile sentences with lengthy periods of parole ineligibility, and to consider whether defendants should be entitled to appointed counsel at that hearing.”

Under the Commission's recommendation, an offender sentenced as an adult for a crime committed as a juvenile to a term of 30 years or greater would be entitled to apply to the court for resentencing after serving 20 years. At the resentencing, the court would consider the diminished culpability of youth as compared to adult offenders, including chronological age and immaturity, impetuosity, and the failure to appreciate risks and consequences, and could modify or reduce the base term of the sentence to any term that could have been imposed at the time of the original sentence, the period of parole ineligibility or both. On resentencing, the inmate would be subject to parole supervision for the remainder of the sentence that was originally imposed.

Again, the Commission urges the Legislature to act on this recommendation, ensuring that those serving lengthy sentences for crimes committed as a juvenile

have a realistic and meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

Part III: Subcommittee Updates and Framework for Future Work

Since the Commission's November 2019 report, the members have focused on reforms addressing racial disparity and inequities in the criminal justice system on both the "front end" (a defendant's sentence) and the "back end" (a defendant's release from prison). To that end, the Commission has created two subcommittees: one to study mandatory minimum sentences and one to study rehabilitative release. A description of each subcommittee's work follows:

A. Subcommittee to Study Mandatory Minimum Sentences

The work of the Subcommittee on Mandatory Minimum Sentences has focused on the mandatory minimum sentences for violent offenses required by the No Early Release Act (NERA or the 85% rule) and for gun related offenses required by the Graves Act. The goal of the Subcommittee is twofold: (1) to assess the impact of mandatory minimum sentences on New Jersey's prison population, and (2) to assess, consistent with the Commission's statutory charge, the impact mandatory minimum sentences have on the glaring racial disparities in our prison population.

1. Subcommittee Findings: NERA and Graves Act

The Subcommittee's initial findings are clear - mandatory minimum sentences for NERA and Graves Act offenses have a significant impact on mass incarceration in New Jersey's prisons. As of November 2021, there were 12,700 inmates in our State prisons. Although Black persons make up only 13% of the State's population, they

make up 61% of the prison population. The numbers are stark: when Hispanic persons are included, Blacks and Hispanics together account for 79% of the people in Department of Corrections custody. Most important for our inquiry, over three quarters of the prison population is serving a mandatory minimum sentence under either the Graves Act, NERA, one of the drug statutes carrying mandatory minimum penalties, or any combination of the three. The vast majority of persons in prison, 64%, are serving a sentence under the Graves Act or NERA.

The Subcommittee has reviewed data from the DOC and the Administrative Office of the Courts (AOC) in order to determine which statutes result in the largest racial disparities. Although this data does not include the population held in New Jersey's County jails, the prison data indicates that the Graves Act is the single largest contributor to racial disparities in the State system. Over a quarter of the incarcerated population, 27%, is serving a sentence under the Graves Act and Black persons are substantially overrepresented among those serving Graves Act sentences.

The offenses of unlawful possession of a weapon ("UPW"), N.J.S.A. 2C:39-5b, and possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4a, account for 24% of Graves Act sentences. In 2019, 3,167 people were incarcerated in State prison for unlawful possession of a weapon and 1,243 people were incarcerated in State prison for possession of a weapon for an unlawful purpose. Of all mandatory minimum sentences, the racial disparities for these two sentences are the most

pronounced. Of people sentenced to simple possession and UPW under N.J.S.A. 2C:39-5b, 91% are minorities and 80% are Black, a percentage that far exceeds the total percentage of Black persons in prison. Put another way, of the 3,167 people in prison on an unlawful possession of a weapon charge, 2,554 are Black, 360 are Hispanic, and 216 are white.

Preliminary simulations prepared by the Rutgers Team have shown how racial disparities in our prison population would be reduced if the Legislature made changes to the Graves Act. Because 80% of people sentenced under the Graves Act are Black, reform on this front would yield the largest gains in reducing racial disparities in our prison system. The Subcommittee has also begun a review of county-by-county disparities in the imposition of custodial sentences under the Graves Act. Preliminary analysis has shown extreme county-by-county variations for dispositions in single-count UPW cases. In Mercer County, for example, 6% of the people who pled to this charge were sentenced to State prison whereas defendants in other counties who pled to this charge were generally sent to State prison with few exceptions.^x The Subcommittee plans to examine a larger sample of cases to understand how county-by-county charging and plea-bargaining decisions lead to racial disparities in the system.

As with Graves Act sentences, NERA minority inmates are overrepresented and white inmates are under-represented. Any Legislative action on a NERA offense for which the percentage of Black and Hispanic defendants is higher than 61% and

16% – the total percentages of Black and Hispanic persons in DOC custody – has the potential to decrease racial disparities.

2. Future Work of the Subcommittee: Charging Decisions Under NERA and the Graves Act

Data from the AOC is being collected and evaluated to determine the extent to which initial charging decisions create racial disparities in the prison system. The Subcommittee will examine NERA and Graves Act offenses, starting with the top five most frequently imposed NERA sentences, to determine whether minority defendants sentenced to those charges were more likely to be charged with more serious charges at the time of arrest or indictment and whether they were more or less likely to later have their charges reduced through plea bargaining. Looking back to initial charging decisions for defendants sentenced under NERA or the Graves Act between 2013 and 2019 will help us understand how charging decisions contribute to racial disparities in our prison system. It will also show how these decisions differ county-by-county and what effect those differences have on racial disparity in the system.

More specifically, the Rutgers Team has begun to collect data on outcomes for defendants sentenced under the Graves Act between 2013-2019 who were charged with and later convicted of UPW under N.J.S.A. 2C:39-5b and/or other weapons-related offenses. For the most undiluted results, the Subcommittee will examine a data set limited to defendants charged in a single-count accusation or

indictment and then expand the data set to include multi-count cases. The Rutgers Team has requested information from the AOC on the periods of parole ineligibility received by people sentenced to prison under N.J.S.A. 2C:39-5b, including how those periods of parole ineligibility vary by County.

At this juncture in the Subcommittee's work, the members are able to report that NERA is a driving force behind mass incarceration, and that the Graves Act is the largest single contributor to racial disparities within the prison system. The Subcommittee, with the help of the Rutgers Team, will continue to expand the dataset, obtain additional information from the AOC, and craft recommendations that will reduce the glaring racial disparities created by these non-discretionary laws. The data will also include additional information about sentencing practices from county-to-county so that the CSDC can determine how different sentencing practices in the various counties may have an impact on the issue of disparity.

3. Future Work of the Subcommittee: County Jails and the Presumption Against Imprisonment

An additional issue under consideration by the Subcommittee involves the presumption against imprisonment generally applied to third and fourth degree offenses. See N.J.S.A. 2C:44-1e. In State v. Haryte, 105 N.J. 411, 419 (1987), the Supreme Court interpreted the term "imprisonment" to mean a state custodial sentence. As a result, the presumption against imprisonment does not have to be overcome in order to impose a sentence of probation that includes service in a

County jail of up to 364 days. N.J.S.A. 2C:45-1e. Similarly, the presumption does not have to be overcome in order to impose a custodial sentence of up to six months in County jail for a non-indictable offense or a custodial sentence of up to one year in County jail for a fourth-degree offense. See N.J.S.A. 2C:43-10b; 2C:43-6a(4). It is important that we understand the impact of this difference in how people are sentenced to County jail and State prison and that we evaluate whether certain people who could not be sentenced to State prison are being unfairly incarcerated. Because there has been no consideration of the quantitative impact of the presumption of imprisonment, including the number and race of defendants confined as a result of the distinction, the impact of the presumption on the goals and purposes of sentencing will be studied by the CSDC.

B. Subcommittee to Study Rehabilitative Release

The Subcommittee on rehabilitative release is considering the implementation of an early release program for those incarcerated individuals who satisfy certain criteria. The genesis for this program is a recognition that the continued incarceration of individuals who no longer present a risk of reoffending does nothing to further public safety and is an unnecessary drain on State resources. More than three-quarters of the DOC's inmates are serving prison sentences that include a period of parole ineligibility, requiring their continued incarceration for a fixed period of time, notwithstanding that they may no longer pose a risk to society. A rehabilitative release program will create a mechanism for these inmates to petition

for early release - despite parole ineligibility - if they meet certain criteria and can demonstrate their rehabilitation. This program would complement the 2020 “Earn Your Way Out” (EYWO) law that makes it easier for inmates convicted of non-violent offenses to obtain release once they become parole eligible, as discussed in greater detail below.

The Subcommittee has identified three main areas for consideration in developing a program for early release: (1) defining who will be eligible for possible release; (2) deciding who will conduct the release assessment (parole or the courts); and (3) determining what the legal standard for release will be. Critical to the Subcommittee's work is an analysis, consistent with the Commission's statutory charge, of the impact this program will have on reducing the significant racial disparities in New Jersey's prison population.

To function effectively, a rehabilitative release program will require objective criteria to determine which individuals are eligible to apply. Possible criteria include:

- A minimum number of years served in custody;
- A percentage of the sentence served at time of application;
- Minimal serious disciplinary infractions while in DOC custody;
- Passage of a number of years since the inmate filed his or her most recent petition for rehabilitative release; and/or
- A minimum number of hours enrolled in DOC programming designed to promote rehabilitation.

The program could also include additional restrictions for inmates convicted of

certain violent or serious offenses. These restrictions could take two forms: (1) excluding all inmates convicted of certain offenses; and/or (2) requiring that inmates convicted of certain offenses meet heightened eligibility criteria.

An individual who meets the eligibility criteria could request a certificate of eligibility from the DOC, which would allow the inmate to file a petition in Superior Court and obtain legal representation from the OPD. Upon the filing of a petition, the Superior Court would schedule a hearing to determine whether to order the inmate's release. Various aspects of the judicial review process are still under consideration by the Subcommittee, including:

- The standard that the court should apply in deciding whether to grant an inmate's petition (e.g., "inmate is rehabilitated," "inmate is highly unlikely to reoffend");
- The factors the court can or must consider when determining whether the standard has been met, and whether these factors are exhaustive;
- The burden of proof, and which party carries the burden; and
- Whether the State and any victims must be provided notice and an opportunity to be heard.

In addition to the above considerations, an individual's advanced age or serious health issues could be relevant to the court's determination.

While the Subcommittee members agree that the release determination should be made by the court rather than by the SPB, the group has not yet reached a consensus as to other aspects of the program. Additional data is needed to inform the Subcommittee's recommendations, including data on recidivism rates for

different offenses and over varying periods of time (e.g., one, three or five years after release). The Subcommittee also requires current data on the number of individuals who would be eligible to apply for early release, the crimes these individuals were convicted of, and the sentences they received. Also critical to the Subcommittee's work is an analysis of the fiscal impact of a rehabilitative release program on the DOC and the courts, as well as a list of available reentry programming in the community and the costs associated with those programs. Similarly, the Subcommittee requires an understanding of the rehabilitative programming available within the prison, including a determination of what programming is associated with lowering recidivism rates, the extent of programming currently available to incarcerated individuals and the costs associated with increasing programming. The race and ethnicity of inmates eligible to apply for release and the potential impact this program would have on racial and ethnic disparity is also needed.

A rehabilitative release program would be different from, though complementary to, the EYWO legislation that took effect on February 1, 2021. EYWO created a process known as "administrative parole" in order to streamline the release of certain inmates upon parole eligibility. The law establishes a presumption of parole for nonviolent offenders who have not committed any serious infractions for at least two years while incarcerated and have completed required rehabilitation programs. Parole may be granted without a hearing in those

circumstances. The first EYWO release of an individual to parole supervision occurred on July 26, 2021, and from that time through December 10, 2021, approximately 330 individuals have received administrative parole under EYWO. In contrast to a possible rehabilitative release program that entails legal representation and court involvement, EYWO is a process run entirely through the DOC and the SPB.

C. Mandatory Fines, Assessments and Penalties

The Code of Criminal Justice provides for mandatory fines, assessments and penalties^{xi} (generally, penalties), but both the Code and case law provide limits on the consequences of non-payment, collection, and allocation of those penalties. The Rutgers Team has begun to collect data about penalties not paid, how penalties are handled after release on parole, and whether sentences to probation are extended in an effort to collect penalties. Whether efforts to collect unpaid fines, assessments, penalties and costs outweigh the amount collected remains an unanswered question. The CSDC expects to evaluate whether the growing number of independent and separate monetary assessments are counterproductive and more costly than the payment into a single fund to be allocated by the Legislature or by the Executive branch as appropriate. As part of this review, the Commission will consider the impact of collection and non-collection on defendants, including their efforts to support their families and the costs to the communities in which they live.

D. Office of the Public Defender Parole Project

In April 2020, the OPD convened a Parole Project Committee to consider reforms that would facilitate the release of parole-eligible individuals who have been rehabilitated. The Committee issued a revised report on September 24, 2021, with a series of recommendations that are dependent upon structural changes within the OPD and changes achieved through legislation action. Much of the Committee's work has focused on the right to counsel because under New Jersey's current system only those parole applicants who can afford to hire an attorney receive help preparing for their parole hearings (even hired counsel cannot be physically present at the hearings) and submitting written documents to the SPB.

The OPD Report raises concerns about due process and right to counsel protections in the parole process, concerns that the Commission understands as central to its charge. In setting its agenda for next year's report, the Commission will include consideration of parole reform as proposed by the OPD.

Endnotes

- ⁱ See Yoon, H. and Gonzalez, D. (Dec. 31, 2021). What It's Like to Leave Prison During a Pandemic. *The New York Times*.
[https://urldefense.com/v3/https://www.nytimes.com/interactive/2021/12/31/nyregion/ny-nj-reentry-covid.html_!!J30X0ZrnC1oQtbA!a7RPPnYT8OUJgoRYUkpe1bFohfCY_X9h8SRzkldaxtTCz84HtpgDVlkdvS2gDly7b8PBLq\\$](https://urldefense.com/v3/https://www.nytimes.com/interactive/2021/12/31/nyregion/ny-nj-reentry-covid.html_!!J30X0ZrnC1oQtbA!a7RPPnYT8OUJgoRYUkpe1bFohfCY_X9h8SRzkldaxtTCz84HtpgDVlkdvS2gDly7b8PBLq$)
- ⁱⁱ Cumulative totals from the start of the pandemic through December 28, 2021, [New Jersey Department of Corrections \(njdoc.gov\)](https://www.njdoc.gov). These totals are updated on the DOC website regularly.
- ⁱⁱⁱ On June 5, 2020, the Supreme Court modified and supplemented Executive Order 124 to comport with due process, creating an expedited furlough decision-making process, providing inmates an opportunity to be heard, and allowing for appellate review of furlough denials. In re Request to Modify Prison Sentences, Expedite Parole Hearings, & Identify Vulnerable Prisoners, 22 N.J. 357 (2020).
- ^{iv} Ohio Rev. Code Ann. § 2929.4; Conn. Gen. Stat. Ann. § 53a-37.
- ^v Or. Rev. Stat. Ann. § 137.123; Nev. Rev. Stat. Ann. § 176.035; Mo. Ann. Stat. § 558.026; IL ST CH 730 § 5/5-8-4; Ga. Code Ann. § 17-10-10; Wash Rev. Code § 9.94A.589(1); Ark. Code Ann. § 5-4-403; Va. Code Ann. § 19.2-308.
- ^{vi} American Law Institute's Model Penal Code: Sentencing; Official Statutory Text. § 9.07(2) (Am. Law Inst. 2017).
- ^{vii} The percentages reported here do not necessarily sum to 100% because of rounding error.
- ^{viii} N.J.S.A. 52:17B-111.1 (P.L. 2020, c.120).
- ^{ix} A copy of this agreement is attached.
- ^x In 2019, 93% of people sentenced to UPW in Camden County went to prison and 95% of people sentenced to UPW in Union County went to prison.
- ^{xi} See, e.g., N.J.S.A. 2C:43-3, 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 3.8.

Rutgers will form a *Justice Data System Assessment Team* that will:

- Meet with the IT team of each statewide NJ justice agency that collects administrative data relating to the justice processes of arrest, charging, prosecution, trial, conviction, and correction.
- Conduct an assessment of the existing records system of each agency, including a catalogue of its current uses, strengths and weaknesses, as well as its potential for contribution to a comprehensive statewide data system;
- Provide a report to each agency that describes where each agency's data system sits within the constellation of NJ justice data systems; and
- Provide a report to the Office of the Attorney General (OAG) that evaluates existing statewide justice data and records management systems; identifying strengths, weaknesses, and gaps; providing recommendations for ways to create a comprehensive statewide justice data system.

Statewide justice system agencies will:

- Meet with the Rutgers justice data system assessment team, making available the IT system direct manager (person who maintains system and pulls data files when they are requested), IT administrator (person who is responsible for the data system) and any research staff who use the data to provide internal reports;
- Provide a complete description of the administrative data system, including the data structure, a listing of all data elements in that structure, a manual of the data collection instruments used for the system, a listing of routine reports that are now produced using the system, and a description of strategies for routine system modifications;
- Be prepared to discuss/explain data elements that are used to link individual records internally and externally, frequent linkages that are currently produced with other agencies, and problems that are encountered in records linkage procedures;
- Summarize the agency policy and practice regarding external requests for data with special reference to any legal limitations on data sharing; describe typical requests for data, where those requests came from, how they were (or are being) handled;
- Describe current issues they encounter with data systems management (including external contracts for system maintenance) existing plans for addressing those problems and/or upgrading the system, and summarize any resources needed to achieve/maintain a state-of-the-art data system.

The following agencies will be involved in this assessment:

- State Police
- Division of Criminal Justice
- Juvenile Justice Commission
- Administrative Office of the Courts
- Office of the Public Defender
- Department of Corrections
- State Parole Board

This assessment will begin on July 1, 2021, and will continue until it is completed, with a plan for final reports by January 1, 2022.

Acknowledgements

At the end of its first Report in 2019, the Commission members recognized and gave thanks to the many individuals and organizations who had contributed to the work of the Commission. Most of those individuals continued to provide their assistance as we continued our work under pandemic conditions and we refer the reader to the 2019 Report, “Acknowledgements” section, for the names of those who were early contributors.

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