



# New Jersey Criminal Sentencing & Disposition Commission

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Annual Report  
November 2019

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## Summary of Recommendations

On November 12, 2019, the Criminal Sentencing and Disposition Commission unanimously approved the following recommendations:

1. Eliminate mandatory minimum sentences for non-violent drug crimes.
2. Eliminate mandatory minimum sentences for non-violent property crimes.
3. Reduce the mandatory minimum sentence for two crimes – second degree robbery and second degree burglary – that previously have been subject to penalties associated with far more serious offenses.
4. Apply Recommendations #1, #2 and #3 retroactively so that current inmates may seek early release.
5. Create a new mitigating sentencing factor for youth.
6. Create an opportunity for resentencing or release for offenders who were juveniles at the time of their offense and were sentenced as adults to long prison terms.
7. Create a program, called “Compassionate Release,” that replaces the existing medical parole statute for end-of-life inmates.
8. Reinvest cost-savings from reductions in the prison population arising from these reforms into recidivism reduction and, to the extent available, other crime prevention programs.
9. Provide funding to upgrade the Department of Corrections’ existing data infrastructure to better track inmate trends and to develop partnerships with academic institutions to analyze this data.

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## Executive Summary

In this first report, the Criminal Sentencing and Disposition Commission (CSDC or the Commission) unanimously recommends that the Legislature pass comprehensive legislation implementing reforms to New Jersey's criminal justice system, reforms that will constitute a significant step toward addressing the lack of proportionality in New Jersey's sentencing laws. The Commission's recommendations include, among other things, eliminating or reducing mandatory minimum sentences for certain crimes; applying mandatory minimum reforms retroactively; creating a new mitigating factor that will allow sentencing judges to consider a defendant's youth at the time of the offense; creating a new "compassionate release" program that builds on the State's existing medical release program; providing the possibility of release for offenders who were sentenced to thirty years or more of imprisonment as juveniles; and improving the data collection capacity of the Department of Corrections (DOC). In identifying potential reforms, we have relied on two basic principles: first, individuals convicted of crimes should spend no more time in prison than is necessary to achieve the purposes of sentencing; and second, to the extent individuals must spend time in prison, that time should be used as productively as possible to encourage rehabilitation and prepare for their return to society.

The Commission's recommendations, as described in detail below, reflect a consensus-driven policymaking process that incorporates a wide range of perspectives, including those of judges, prosecutors, defense attorneys, community stakeholders, corrections officials, faith organizations, and victims' rights advocates. By seeking broad-based consensus, the Commission hopes to replicate the success of the State's recent bail reform efforts, when a bipartisan coalition of policymakers worked together to achieve sweeping changes to New Jersey's criminal justice system. This document contains the first of what the

Commission anticipates will be a series of recommendations for similarly significant reforms intended to promote justice and build public confidence in our criminal justice system.

The recommendations contained in this first report were passed unanimously by the Commission's members on November 12, 2019.

## Introduction

The New Jersey Criminal Code (Title 2C) was enacted in 1979 at a time when there was a national increase in crime rates and a call for action. In its original form, Title 2C was designed to fix a system that, in the consensus view, lacked a statutory framework to guide judicial discretion, was overly offender based and failed to sufficiently punish violent offenders. As initially enacted, Title 2C largely succeeded. Over the next several decades, however, the Legislature, responding to changing societal views regarding crime, enacted over 100 statutes enhancing criminal penalties for gun, drug and violent offenses.<sup>1</sup>

This “tough on crime” political climate provided the context for a series of policy choices that were the proximate cause of an unprecedented growth in incarceration. As offender accountability and crime control were emphasized, principles that previously had limited the severity of punishment were eclipsed and punishments became more severe. In practice, these sentencing laws have had two significant effects: (1) they have substantially curtailed judicial discretion, and (2) they have increased the prison population exponentially.

While New Jersey’s incarceration rate has declined from its peak in 1999, this State still maintains an imprisonment rate of 217 people per 100,000 residents, which is a 150% increase from the pre-Code rate in 1978.<sup>2</sup> Within this prison population, we find that the incarceration rate for black people is twelve times the white incarceration rate (i.e., a 12:1 ratio), the highest disparity of any state in the nation.<sup>3</sup> And, although ethnic disparity in New Jersey is lower relative to national and regional ethnic disparities, the Hispanic incarceration rate in New Jersey is nonetheless double the white incarceration rate (i.e., a 2:1 ratio).<sup>4</sup> People of color comprise 44% of New Jersey’s population, but 76.5% of its prison population.<sup>5</sup>

It is against the backdrop of these significantly disproportionate incarceration rates that the Criminal Sentencing and Disposition Commission has

been convened. These disparities are unacceptable and the Commission has committed to addressing the issue head on. But just as there is no single cause for this problem, there is no single solution. For centuries, African Americans and other marginalized communities have experienced discrimination at both the individual and systemic level. The Commission acknowledges a long and complicated history involving racial bias within New Jersey's criminal justice system. That history, and the evidence of racial disparity in New Jersey's incarceration of minorities, requires a serious, sustained examination that spans a range of issues from policing and prosecution to prison and parole. This is a tall order, one that cannot be filled in a single report. Over the coming months and years, the Commission expects to issue a series of reports that comprehensively address the various challenges facing our state's system of justice.



## Part I: The Criminal Sentencing and Disposition Commission An Opportunity for Reform

On July 2, 2009, Governor Jon Corzine signed P.L. 2009, c.81, which established the framework of the Criminal Sentencing and Disposition Commission as an entity within the Legislative branch. It was not, however, until February 11, 2018, when Governor Phil Murphy initiated the appointment process, that the CSDC began its work. The organizing statute of the CSDC, N.J.S.A. 2C:48A-1 to -4, calls for the Commission to conduct a thorough analysis of New Jersey's sentencing laws and provide specific recommendations "with the goal of providing a rational, just and proportionate sentencing scheme that achieves to the greatest extent possible public safety, offender accountability, crime reduction and prevention, and offender rehabilitation while promoting the efficient use of the State's resources."<sup>6</sup>

Emphasizing that "New Jersey has the nation's worst disparity in the rates of incarceration between black and white offenders,"<sup>7</sup> Governor Murphy explained that the Commission's purpose is to examine racial and ethnic disparities in the state's criminal justice system by reviewing sentencing laws and recommending reforms "necessary to ensure a stronger, fairer, and more just state."<sup>8</sup> Pursuant to its organizing statute, the Commission is mandated to submit annual reports to the Governor and the Legislature with recommendations regarding:

- **Sentencing Options:** whether the sentencing options available to courts are sufficient or should be expanded to provide a greater range of alternatives;
- **Judicial Discretion:** whether it would be beneficial to enhance, reduce or retain the current level of judicial discretion;
- **Mandatory Minimums:** whether existing mandatory minimum sentencing is appropriate;

- **Determinate Sentencing:** whether fixed sentencing should be extended to all criminal offenses, or to additional criminal offenses;
- **Supervised Release:** whether there should be a mechanism for changing the length of a term of supervised release after its imposition, whether there should be supervised release for offenders who serve their maximum sentence, and whether the current limits and conditions on terms of supervised release are appropriate, and
- **Sanctions:** whether intermediate, alternative or additional sanctions should be made available, including alternatives to incarceration for suitable offenders.

The CSDC is also required by its organizing statute<sup>9</sup> to assess racial and ethnic disparities in the criminal justice system and to make recommendations to address such issues. This first Commission report recommends reforms to a number of New Jersey's mandatory minimum sentencing laws in addition to the creation of a new "compassionate release" program and early release opportunities for juvenile offenders sentenced as adults who are now deemed rehabilitated and no longer a risk to public safety. Additional reports addressing other criminal justice issues enumerated in the CSDC statute will follow.

## Part II: Sentencing in New Jersey An Historical Perspective

### A. Sentencing Prior To 1979: Title 2A and the Need for Change

Prior to the passage of the New Jersey Criminal Code in 1979, sentencing was intrinsically offender-oriented, with the dominant view that the punishment should fit both the offender and the offense. Despite a focus on the rehabilitative goal of sentencing, the actual determination of an individual's sentence was relatively unstructured pre-Code. Because the Legislature had not established a framework for guiding sentencing discretion, sentencing judges exercised essentially unfettered discretion in balancing an offender's potential for rehabilitation against other purposes of punishment. Most offenses under Title 2A were not uniformly graded according to severity, leaving judges to prioritize the competing goals of sentencing on an ad hoc basis with the result that "undue sentencing disparity"<sup>10</sup> emerged as a cause for concern.

In 1963, recognizing these shortcomings, the New Jersey Legislature established a Law Revision Commission charged with modernizing, reorganizing, and classifying the criminal laws. The Commission's final report<sup>11</sup>, issued eight years later in October 1971, was strongly influenced by the American Law Institute's Model Penal Code of 1962 and reaffirmed the rehabilitation of offenders as the primary sentencing goal. The report presented a more structured framework that included a presumption of no imprisonment, subject to limited exceptions and surmountable by a showing that imprisonment is necessary for the protection of the public. During the period from 1971 to 1978, while the Law Revision Commission's report was pending, there was a fundamental nationwide shift in sentencing philosophy. Due to rising crime rates and frustration with the arbitrary nature of sentencing, academics, experts, and observers began questioning the criminal justice system. These changing views

on sentencing had a substantial impact on the Code when it was finally adopted.

## **B. Sentencing from 1979 to 1981: A Balancing of Philosophies**

On August 10, 1978, Governor Brendan T. Byrne signed the new Code of Criminal Justice into law. Codified in Title 2C of the New Jersey Statutes Annotated and effective on September 1, 1979, the new Code was largely based on the ALI's Model Penal Code of 1962. While most of the Law Revision Commission's proposal was retained, Title 2C was modified to reflect a retrenchment from the rehabilitative sentencing model that had been endorsed by the Commission.

The new Code set forth seven goals to be achieved in the sentencing of offenders:

(1) To prevent and condemn the commission of offenses; (2) To promote the correction and rehabilitation of offenders; (3) To insure the public safety by preventing the commission of offenses through the deterrent influence of sentences imposed and the confinement of offenders when required in the interest of public protection; (4) To safeguard offenders against excessive, disproportionate or arbitrary punishment; (5) To give fair warning of the nature of the sentences that may be imposed on conviction of an offense; (6) To differentiate among offenders with a view to a just individualization in their treatment; and (7) To advance the use of generally accepted scientific methods and knowledge in sentencing offenders."<sup>12</sup>

To implement these goals, the Code established a structural framework to guide judicial discretion and curb excesses at both ends of the spectrum, that is, to prevent excessively lenient sentences and excessively harsh sentences. To meet the goals of uniformity and proportionality, Title 2C adopted new degrees of crimes and offenses designed to bound discretion in sentencing to focus on the gravity of each crime and its relation to other classes of offenses. Depending on

the degree of the crime, presumptions for and against imprisonment guide the determination whether a prison sentence is warranted. Where a term of imprisonment must be imposed, or is deemed appropriate, the degree of the offense dictates the sentencing range. Thus, the lower the degree of offense, the narrower the range and the higher the degree of the offense, the broader the range, i.e., for a third degree offense, the range is 3-5 years whereas a first degree offense carries a range from 10-20 years. Non-indictable disorderly persons and petty disorderly persons offenses were also created, with authorized sentences of up to 180 days and 30 days, respectively, in a county correctional facility. In 1979, shortly after the new Code was signed into law, the Parole Act was enacted to provide for presumptive parole, in the absence of a parole eligibility term, after an offender serves one third of the sentence imposed minus credits. (See infra Part C).

When Title 2C is compared to Title 2A, we see that, generally, in 2C the punishment ranges are significantly narrowed and the maximum sentences for offenses decreased. In deciding where in the range to set the sentence, sentencing judges must evaluate the statutory mitigating and aggravating factors, which are related to either the personal characteristics of the offender or the attendant characteristics of the offenses. These characteristics are used to assess the culpability of an offender relative to others convicted of the same offense. Each grade of crime has a sentencing range with a “presumptive” sentence at the midpoint that can be increased or decreased by the finding of aggravating or mitigating factors. Although the “presumptive” sentence was eliminated by caselaw, the midpoint essentially remained the point of departure for purposes of uniformity in sentencing.<sup>13</sup> Where mitigating factors preponderate, sentences should tend toward the lower end of the range and where aggravating factors preponderate, sentences should tend toward the higher end. In devising a sentence under Title 2C as originally enacted, the final decision on an appropriate disposition was subject to a multi-level process wherein the 1979 Code channeled the trial judge’s discretion.

In summary, mandatory minimum sentences were almost non-existent under the 1979 Code. Beyond that, the Code gave trial judges latitude in exercising discretion within the newly-created ranges and in choosing alternatives for dealing with more serious offenders in cases where an extended term or period of parole eligibility might be warranted. By way of example, where the judge is clearly convinced that the aggravating factors substantially outweigh the mitigating factors, the court may impose a period of parole ineligibility of up to one-half the sentence during which the offender would not be eligible for parole despite the presumption of parole.

### **C. Sentencing from 1981 to the Present: A Significant Expansion of Mandatory Minimum Sentences**

Title 2C operated in its original form for two years before the Legislature began enacting new mandatory minimum provisions that impose a minimum term an incarcerated person must serve before he or she is eligible for parole. Beginning in 1981, the next several decades were marked by tougher, harsher sentences, including mandatory minimums for firearms offenses, drug offenses, and first and second degree violent offenses to which the No Early Release Act (NERA) applies. Since the late 1990s, additional punitive sentencing measures have been adopted, albeit more sporadically and generally targeted at certain select offenses such as child pornography, sexual assault against children, and carjacking. Between 1997 and 2007, the Legislature passed more than 100 new statutory provisions that increased punishment under the Code, 39 of which created new or harsher mandatory minimum sentences.<sup>14</sup>

The real-time impact of these fixed sentencing laws is substantial. Without a mandatory minimum, an incarcerated person is eligible for parole after he or she serves one-third of his or her sentence, minus commutation, minimum custody and work credits earned while in custody. Practically speaking, the application of credits earned while in custody can result in parole eligibility after an offender serves one fifth of the sentence. The rules that generally apply to

accumulation of credits earned in custody and the setting of a parole eligibility date are suspended, however, when the trial judge imposes a parole ineligibility period or a statute mandates a period of parole ineligibility. If, for example, a defendant is sentenced to a five year prison term with a three year period of parole ineligibility, he or she must serve every day of those three years before he or she can be eligible for parole. During that period, the commutation, minimum custody and work credits that have accumulated do not reduce the three year parole ineligibility term.

This shift toward mandatory minimum sentencing has resulted in a significant disparity in the amount of prison time actually served on the same base sentence. For example, under a mandatory minimum sentence with an 85 percent period of parole ineligibility, an individual will serve 85% of his or her sentence before becoming eligible for parole. On the other hand, if the court sentences an individual to an ordinary term of imprisonment without any mandatory or discretionary period of parole ineligibility, then that individual will be eligible for parole after serving 33 percent of the total sentence, assuming he or she completes the sentence without any commutation, minimum custody, or work credits. If that individual earns the maximum number of credits while in custody, then he or she could be eligible for parole after serving approximately 20 percent of the total sentence.

New Jersey's substantially expanded use of mandatory minimum sentences has attracted critical attention. Thus the 2004 New Jersey Sentencing Commission observed in 2006 that the accumulation of new, harsher sentencing penalties had "affected the proportional relationship between the harm of criminal acts and the severity of punishment authorized for those acts."<sup>15</sup> The following year, the same Commission echoed its earlier observation, noting that subsequent changes to the 1979 Code had eroded the "underlying philosophy and architecture" of the Code's original sentencing scheme.<sup>16</sup>

Of the many mandatory minimum sentencing statutes enacted since the adoption of the Code, two that have had wide-spread impact are the

Comprehensive Drug Reform Act in 1987 and the No Early Release Act in 1997. Consideration of those statutes follows.

### ***1. The Comprehensive Drug Reform Act (N.J.S.A. 2C:35-1 to -31)***

In 1971, President Richard Nixon declared a “war on drugs,” setting the country on a decades-long course of drug prohibition through criminalization. During this period, policies developed at the federal, state, and local level focused on high rates of drug abuse as a criminal justice issue, not as a public health issue. Individual states and the federal government began rolling out statutory regimes that mandated punishment of an unparalleled magnitude for drug use and trafficking.

The Comprehensive Drug Reform Act (“CDRA”) of 1986 marked New Jersey’s entry into the war on drugs. Consistent with the federal strategy and with the strategies of predecessor states, New Jersey enacted punitive sentencing regimes, including new mandatory minimum sentences for both preexisting and new offenses, while expanding the scope of activities deemed criminal. Even with the 1981 enactment of the Graves Act<sup>17</sup>, which requires a mandatory minimum sentence where an offender uses or possesses a firearm in the commission of certain enumerated offenses, mandatory minimum sentences had been sparingly authorized under Title 2C. The CDRA dramatically changed this status quo and, as predicted, dramatically increased the prison population. From January 1987 through 1992, the total adult inmate population in New Jersey increased from 14,000 to 21,000 people, with the result that the 1992 Criminal Sentencing Disposition Commission identified the CDRA “as the single factor to which recent inmate population increases are attributable.”<sup>18</sup> During this time period, New Jersey imprisoned the highest percentage of drug offenders in the country, 32% as compared to the national average of 20%.<sup>19</sup>



And, New Jersey had the third highest ratio of black-to-white incarceration rates in the nation, behind only Iowa and Vermont.<sup>20</sup>

The CDRA created, for at least seven existing offenses, new mandatory sentences, ranging from one year of imprisonment to life with a twenty-five-year period of parole ineligibility. The statute also further broadened the scope of criminal conduct and increased the tools for criminal prosecution by adding new offenses, including among others, leader of a narcotics trafficking network, maintaining a drug production facility, employing a juvenile in a drug distribution scheme, and possessing with the intent to distribute or distributing drugs within 1,000 feet of a school zone. The newly-drafted school zone offense was unique in its incongruent relationship between the degree of the offense and the penalty. Although graded as third degree, ordinarily carrying a presumption against imprisonment, the school zone offense abandoned the presumption and mandated a sentence of one year in prison for distribution of marijuana and three years in prison for distribution of other drugs.

A comprehensive analysis of the school zone provisions across New Jersey tells us that the “drug free” school zone laws have had a disproportionate urban effect, with urban areas bearing the brunt of prosecutions.<sup>21</sup> Because cities are, by definition, densely populated with a high concentration of schools, New Jersey’s three largest cities had essentially become massive school zones.<sup>22</sup> And because minorities comprise a greater proportion of urban populations, the school zone law has had a substantial discriminatory impact. The 2005 report by the Commission to Review Criminal Sentencing succinctly states: “nearly every offender (96%) convicted and incarcerated for a drug free zone offense in New Jersey is either Hispanic or Black.”<sup>23</sup> The numbers speak for themselves.

The CDRA’s treatment of repeat drug offenders also has had a significant impact. Under the statute, any defendant convicted of manufacturing, distributing or possessing CDS with intent to distribute who has previously been convicted of such a crime, “shall upon application of the prosecuting attorney” be sentenced to a mandatory extended term of imprisonment with a period of

parole ineligibility of at least three years but up to one half of the sentence imposed. By this provision, the statute mandates a sentence that is functionally twice the sentence ordinarily permitted under the Code, i.e., a defendant sentenced to a second-degree offense is subject to a sentence between 5 and 10 years in prison, while a repeat drug offender sentenced to a second-degree offense is subject to a sentence between 10 and 20 years in prison with a corresponding mandatory minimum term of between 5 and 10 years.

The CDRA fundamentally shifted the sentencing paradigm undergirding Title 2C by providing judges with no sentencing recourse from the imposition of mandatory minimum sentences, regardless of the circumstances of the offense, the culpability of the offender, or the length of the applicable mandatory minimum term, while at the same time conferring an “atypical grant of sentencing power to the prosecutor.”<sup>24</sup> With the goal of inducing plea agreements, the CDRA granted the prosecutor the sole power to waive or reduce the required mandatory minimum terms and expressly prevented the sentencing judge from doing so absent a plea agreement providing for a lesser sentence. Under N.J.S.A. 2C:35-12, it is the prosecutor’s motion, not the court’s discretion, that dictates in certain categories of drug cases which defendants will receive the benefit of a downward departure and which defendants will receive the mandatory minimum prison sentence. In short, a justice system in which sentencing decisions had been based on judicial balancing of aggravating and mitigating factors now delegates critical sentencing questions to the prosecutor, whose functional role in the criminal justice system is to prosecute rather than adjudicate criminal matters. As the Supreme Court has observed: “The delegation of sentencing power to the prosecutor is itself exceptional. The delegation of sentencing power to modify statutory sentencing standards is highly unusual. The power in the prosecutor directly or indirectly to mandate a minimum prison term is extraordinary.”<sup>25</sup>

This transfer of sentencing authority to the prosecutor was the subject of significant and recurring litigation about the constitutionality of the CDRA’s

provisions. In State v. Vazquez, 129 N.J. 189 (1992), the Supreme Court ruled that, as written, 2C:35-12 violated New Jersey's separation of powers clause because it imputed sentencing power to the prosecutor without any guidelines or avenues of judicial review. Rather than striking 2C:35-12, the Court ordered the Attorney General, in consultation with the County Prosecutors, to adopt guidelines to channel prosecutorial decision-making in formulating plea agreements. Then, in 1998, Attorney General Peter Verniero issued the Brimage Guidelines<sup>26</sup>, which had statewide application and limited the range of available plea offers, specifying more explicitly the permissible bases for upward and downward departures and restricting the factors that can be considered during plea negotiations. Notably, six years later in 2004, Attorney General Peter C. Harvey issued the "Brimage Guidelines 2" in response in part to ongoing concerns that the 1998 Guidelines directly contributed to the disproportionate impact of the school zone law on low-level offenders, many of whom were minority residents of New Jersey's inner cities.<sup>27</sup>

Although the CDRA was expected to disrupt drug trafficking networks through the prosecution of major drug dealers and kingpins, it actually swept up not only kingpins, but also many lower-level offenders. In 1995, eight years after the CDRA had gone into effect and before Vazquez and Brimage, an analysis of the criminal backgrounds of New Jersey's rapidly growing inmate population found that more than 8,000 inmates had no prior convictions for violent offenses and more than 2,000 of those inmates had no prior conviction whatsoever.<sup>28</sup> Against this backdrop, a 2005 report from the Commission to Review Criminal Sentencing laid the groundwork for a statutory amendment restoring judicial discretion to waive the mandatory minimum.<sup>29</sup>

Three years later, in 2008, a bill<sup>30</sup> was proposed to amend the school zone statute to restore judges' discretion, after consideration of enumerated factors, to waive the mandatory minimum period of parole ineligibility or to impose a sentence of probation. While the bill languished, eight former Attorneys General issued a letter to the governor and the legislature exhorting them to pass the

legislation.<sup>31</sup> More broadly, the Attorneys General, including W. Cary Edwards, who had been an ardent supporter of the CDRA, denounced “strict mandatory minimum sentences for nonviolent drug offenses” because they “do not work and do not make the people of New Jersey safer.”<sup>32</sup> Referencing a multitude of organizations with which they were aligned on this issue, the Attorneys General argued that “mandatory sentences for nonviolent drug offenders tie judges hands and prevent them from taking advantage of treatment alternatives” that “save lives, cut crime, and reduce costs.”<sup>33</sup> The school zone reform bill, reinstating some judicial discretion in sentencing for school zone drug offenses, was signed into law on January 12, 2010, and included a provision for defendants serving school zone sentences to apply for retroactive relief.<sup>34</sup> But judges are still, however, required to impose mandatory minimum sentences for numerous non-violent drug crimes, including the manufacture, distribution, dispensing, and possession of controlled dangerous substances under various circumstances. See N.J.S.A. 2C:35-3, -4, -5, -6, -7, -8 & -9.

## **2. The No Early Release Act (2C:43-7.2)**

The No Early Release Act (NERA), enacted in 1997, requires offenders convicted of enumerated first and second degree offenses to serve 85% of their prison sentences regardless of the circumstances of their underlying offense or their rehabilitative progress in prison. In practice, the Parole Act's presumption of parole is essentially inapplicable to offenders sentenced under NERA because when a defendant has served 85% of the entire custodial sentence, the remaining 15%, with few exceptions, will have been satisfied through the accumulation of credits. NERA applies to the enumerated offenses without exception, with the result that there is virtually no possibility of parole for those who are convicted of a NERA offense. Moreover, even though the Code permits a court, where the mitigating factors and interests of justice warrant, to sentence an offender convicted of a first or second degree crime as if he or she

had been convicted of an offense one degree lower than the actual conviction, that offender must still serve 85% of the new downgraded NERA sentence.

NERA was enacted at a time when criminal justice policymakers were advocating for “truth in sentencing” policies and limitations on offenders’ ability to seek early release from prison through parole and other mechanisms. an artifact of the truth-in-sentencing crusade of the mid-1990s. In conjunction with abolishing parole in 1984, the federal government passed the Sentencing Reform Act, requiring all federal prisoners to serve 85% of their sentences before becoming eligible for release. The truth-in-sentencing movement then gained traction with the passage of the federal Violent Crime Control and Law Enforcement Act of 1994, which encouraged states to pass truth-in-sentencing legislation with the promise of federal funding to build more prisons to accommodate the expected prison growth. Neither the legislative history nor the scholarship from that era reveal the genesis of the 85% innovation. Although the 85% is intended to prolong the duration of confinement, empirical data suggests that it does not bear a proven relationship to the offense, recidivism rates, or public safety.<sup>35</sup>

The 1997 NERA applied to first and second degree violent crimes, i.e., those in which the “actor causes death, . . . serious bodily injury . . . or uses or threatens the immediate use of a deadly weapon . . . ,” including any aggravated sexual assault or sexual assault in which the actor uses, or threatens the immediate use of, physical force. Over the next several years, issues were litigated about which offenses, committed under what circumstances, constituted violent crimes within the statute’s meaning.<sup>36</sup> In response, the Legislature amended NERA in 2001 to specifically enumerate the ten offenses to which it applied, including second-degree burglary and second-degree robbery. The inquiry shifted from whether the offense was a violent crime to whether there was a per se violation of an enumerated offense with the result that entire classes of crimes were treated the same way for sentencing. Even

after the 2001 Amendment, the Legislature expanded the list of NERA offenses, eventually doubling to encompass twenty offenses under the Code.

#### **D. Sentencing in 2019: A System in Need of Reform**

Mandatory minimum sentencing provisions dominate New Jersey's sentencing scheme and have contributed significantly to the number of incarcerated people in our prisons and our jails.<sup>37</sup> Moreover, there has been a consistent increase in the percentage of people sentenced to mandatory minimum terms: in 1982, 11% of prisoners in New Jersey had mandatory minimum terms; in 1987 the number rose to 44%; and in 2015, the number jumped to 74%.<sup>38</sup> And, even though New Jersey has in recent years seen a decline in its prison population, a review of this decline informs that it is largely attributable to the expansion of New Jersey's drug court (which diverts people from prison) and changes to the parole system that make it less likely people will be reincarcerated for minor parole violations.<sup>39</sup> In fact, the rate of decline over the past two years has generally slowed as the results of these initiatives have been realized.

Most alarming are the fundamentally inequitable racial and ethnic disparities that are a major feature of New Jersey's prisons. A 2014 report by the National Academy of Sciences (NAS) noted the racial disparities in America's prison systems, explaining that they are "partly caused and substantially exacerbated"<sup>40</sup> by mandatory minimum sentencing laws. As the NAS report made clear, these laws "mandate especially severe—in recent decades unprecedentedly severe—punishments for offenses for which black and Hispanic people often are disproportionately arrested and convicted,"<sup>41</sup> e.g., school zone cases in urban areas with high concentrations of minorities. In New Jersey, the disparities in the prison population are enormous. Blacks comprise 14% of the residents in our State, but 61% of the inmate population, and despite a decrease in overall prison population since 1999, the percentage of prisoners

who are Black has remained relatively consistent over time. Notably, racial disparity in New Jersey's prison population continues to dwarf national and regional racial disparities.<sup>42</sup> A fair justice system cannot tolerate such disparity.

As a 2016 report by the Sentencing Project, a research and advocacy organization, tells us, "the system of mass incarceration now firmly in place has not been an effective remedy for crime and is not sustainable."<sup>43</sup> While public safety is a priority, research has demonstrated that mass incarceration is not an effective or necessary means to keep our communities safe.<sup>44</sup> Today, crime and murder rates remain near record lows nationwide, even as numerous jurisdictions have implemented reforms to decrease their prison populations. In fact, "[b]etween 2007 and 2017, 34 states reduced both imprisonment and crime rates simultaneously, showing clearly that reducing mass incarceration does not come at the cost of public safety."<sup>45</sup> Further, not only is mass incarceration an ineffective strategy for public safety, but it is also expensive.<sup>46</sup>

Finally, the negative social and economic effects of the mass incarceration paradigm have a devastating impact on the families and the communities of the individuals we send to prison for long periods of time. Studies conducted by the American Bar Foundation,<sup>47</sup> among others, inform that the imprisonment of a parent or family member is associated with weaker family bonds, economic hardship and lower levels of child well-being, and that families and even entire neighborhoods are harmed as more and more people are incarcerated. Indeed, the punitive impacts of sentencing reach far beyond the individuals we intend to punish.

## **Part III: Proposed Sentencing Reforms**

### **A Pathway for Change**

What follows is a series of proposals that begin to address the problem of mass incarceration that has arisen from shortcomings in New Jersey's adult and juvenile sentencing schemes. While New Jersey's criminal justice system faces major challenges, these initial proposals will result in meaningful sentence reductions for a large number of state inmates who are highly unlikely to pose a risk to public safety. By enacting these reforms, New Jersey will reassert its status as a national leader for thoughtful reforms that promote "justice" in our criminal justice system.

#### **Recommendation #1: Eliminate Mandatory Minimum Sentences for Non-Violent Drug Crimes**

The failures of the school zone statute have been extensively documented and widely recognized, leading to a legislative amendment in 2010 that permits sentencing courts in certain circumstances to waive or reduce the mandatory minimum term for school zone offenses. Even subsequent to this amendment, however, the CDRA remains a leading contributor to the over incarceration of non-violent offenders. Under New Jersey's outdated drug laws, mandatory minimum sentences are still required for numerous non-violent Chapter 35 drug crimes, including the manufacture, distribution, dispensing, and possession of controlled dangerous substances under various circumstances (2C:35-3, -4, -5, -6, -7 -8 & -9). In addition, repeat drug offenders are subject to mandatory extended terms with mandatory periods of parole ineligibility upon application by the State.

Recognizing the correlation between mass incarceration and overly stringent sentencing laws for non-violent drug offenders, several other states have led the way over the past decade in recalibrating their sentencing laws for drug offenders. Between 2003 and 2013, more than 30 states passed nearly 50



bills changing how their criminal justice systems define and enforce drug offenses. Of these, many states, including Michigan, New York, Rhode Island, Colorado, South Carolina, Arkansas, Delaware, Ohio, Georgia, Massachusetts, Missouri, Oklahoma and Georgia, have reduced or eliminated mandatory minimum sentences for some or all non-violent drug offenses.<sup>48</sup> For instance, in 2003, Michigan repealed most of its mandatory sentences for drug offenses and in 2009, Rhode Island repealed its mandatory minimum sentencing laws for drug offenses. Significantly, studies conducted in Michigan and Rhode Island in the years following the repeals demonstrated both a decline in crime rates and significant cost saving.<sup>49</sup>

The CSDC recommends that New Jersey follow the precedent set in these states and eliminate mandatory minimum sentences for individuals convicted of the following non-violent drug offenses:

<u>Statute</u>	<u>Description</u>
2C:35-3	Leader of narcotics trafficking network
2C:35-4	Maintaining or operating a CDS production facility
2C:35-5	Manufacturing, distributing, or dispensing CDS
2C:35-6	Employing a juvenile in a drug distribution scheme
2C:35-7	Distributing, dispensing, or possessing CDS within 1,000 feet of school
2C:35-8	Distribution of CDS to persons under age 18
2C:43-6(f)	Recidivist CDS offense

It should be noted that one of these offenses, N.J.S.A. 2C:43-6(f), applies only to recidivist offenders, and does so by imposing a mandatory extended term on defendants convicted of a second or subsequent drug offense. The Commission members recognize that recidivist offenders should be subject to enhanced penalties, but have concluded that such penalties are possible without reliance on mandatory minimum terms. Therefore, for N.J.S.A. 2C:43-6(f), we recommend eliminating the mandatory period of parole ineligibility for the

extended term while preserving the upgrade of the degree of the offense for sentencing purposes.

**Recommendation #2: Eliminate Mandatory Minimum Sentences for Non-Violent Property Crimes.**

Similarly, the national trend against mandatory minimum sentences supports the elimination of mandatory periods of parole ineligibility for certain non-violent property offenses. The CSDC recommends the elimination of mandatory minimum sentences for those convicted of the following non-violent property offenses:

<u>Statute</u>	<u>Description</u>
2C:20-25(g)	First-degree computer hacking
2C:20-25(h)	Hacking of a government computer
2C:20-31(h)	Second-degree release of hacked data
2C:20-2.4(e)	Recidivist leader of cargo theft network
2C:20-2.6(c)	Recidivist theft from cargo carrier
2C:20-11(c)(4)	Shoplifting (third offense)

Although the Commission recognizes that relatively few individuals are convicted of these offenses, the members nonetheless believe that a mandatory minimum sentence is unnecessary for these crimes, especially in that all other non-violent property crimes are punishable without resorting to mandatory parole disqualifiers.

**Recommendation #3: Reduce the Mandatory Minimum Sentence for Two Crimes – Second Degree Robbery and Second Degree Burglary – That Have Previously Been Subject to Penalties Associated with Far More Serious Crimes.**

In its current version, NERA applies to twenty enumerated crimes: murder; manslaughter; vehicular homicide; aggravated assault; disarming a law enforcement officer; kidnapping; aggravated sexual assault; sexual assault;

robbery; carjacking; aggravated arson; burglary; extortion; booby traps in manufacturing or distribution facilities; strict liability for drug-induced deaths; terrorism; possessing chemical, nuclear, or radiological weapons; first-degree racketeering; firearms trafficking; and production of child pornography. Taken together, these twenty offenses constitute among the most violent and serious crimes in New Jersey. In reviewing the list of NERA crimes, however, the Commission identified two offenses in particular that should be part of this first set of reforms with respect to mandatory minimums: second degree robbery and second degree burglary. These two offenses were viewed as important subjects for reform both because of the frequency with which they are charged and the fact that they address a broad range of conduct, including conduct resulting in no physical injury to the victim.

Reducing the length of the NERA parole disqualifier for second degree burglary and robbery will allow for more just and proportionate sentencing. The CSDC therefore recommends that the Legislature reduce the NERA period of parole ineligibility from 85 percent to 50 percent for these two offenses.

**Recommendation #4: Apply Recommendations #1, #2 and #3 Retroactively so that Current Inmates May Seek Early Release.**

If enacted, the proposals described above – eliminating mandatory minimum sentences for non-violent drug and property offenses and lowering the mandatory minimum sentences for second-degree robbery and burglary – would apply prospectively to individuals sentenced for those crimes. To ensure fairness for all inmates, the CSDC recommends creating a mechanism to ensure that these reforms also apply retroactively to inmates currently incarcerated.

Because inmates' Judgments of Conviction will need to be modified by judicial order, the Commission recommends a 30-day window before these modifications become effective, which would provide an opportunity for the State to file a notice of objection. If no objection is filed, then all eligible inmates will receive retroactive relief. The Commission's members also recommend that

the Attorney General exercise his authority to oversee the filing of any notices of objection and promulgate statewide guidelines to direct prosecutorial decision making in such filings.

In the rare case where the State filed a notice of objection to retroactivity, the Commission anticipates that the court would promptly order a hearing, at which the inmate would have a right to representation by the Public Defender's Office and the State would be required to prove by clear and convincing evidence that modifying the inmate's mandatory minimum term would be likely to pose a substantial risk to public safety. If the court found that the State had met its burden, the court would order that either the inmate's parole ineligibility remain unchanged (i.e., denial of retroactivity) or that, if the aggravating factors substantially outweighed the mitigating factors justifying a discretionary period of parole ineligibility, the inmate be resentenced to a discretionary period of parole ineligibility less than the mandatory period originally imposed. If the court found that the State had not met its burden, then the inmate's parole eligibility would be automatically recalculated as if a Notice of Objection had not been filed (i.e., grant of retroactivity). Nothing in this provision would limit the ability of the State or the inmate from taking any position or advancing any argument before the Parole Board should resentencing be granted.

As a practical matter, the retroactivity provision would have the following effects:

- Inmates serving terms for non-violent drug offenses and non-violent property offenses would be resentenced as if they had not been subject to a mandatory minimum term at the time of their convictions. As a result, these inmates would be subject to the default period of parole ineligibility of 33 percent. Thus, once these inmates had served 33 percent of their sentences, minus accumulated credits, they would proceed through the parole process. As with any other parole matter, victims and the State would be notified and would have the opportunity to object to the inmate's release before the Parole Board.
- Inmates serving terms for second-degree robbery and second-degree burglary would be resentenced as if they had been

subject to mandatory minimum term of 50 percent at the time of their conviction. Once they had served 50 percent of their sentence (assuming no other parole disqualifiers), they would proceed through the parole process, where the State and any victims would have the opportunity to object to the inmate's release before the Parole Board.

**Recommendation #5: Create a New Mitigating Sentencing factor for youth.**

When determining a defendant's sentence, the judge must consider a number of statutorily-defined aggravating and mitigating factors. The CSDC recommends that the Legislature create a new mitigating factor that allows judges to consider a defendant's youthfulness at the time of the offense. The members of the Commission recommend that the mitigating factor read as follows:

The defendant was under 26 years of age at the time of the commission of the offense.

It would be within the court's discretion to determine the weight to be given to the factor in any given case. If a juvenile prosecuted as an adult, after consideration of this mitigating factor, is nevertheless sentenced to a term of 30 years or greater, he or she would have the same right to apply for resentencing after 20 years with the required consideration of the factors established by the U.S. Supreme Court in Miller v. Alabama, 567 U.S. 460 (2012), in light of the inmate's record while incarcerated (e.g., evidence of rehabilitation, greater maturity, etc.)

**Recommendation #6: Create an Opportunity for Resentencing or Release for Offenders Who Were Juveniles at the Time of Their Offense and Were Sentenced as Adults to Long Prison Terms.**

In four cases decided over the past decade the U.S. Supreme Court, relying on developmental psychological and neuroscience research, has dramatically reshaped the juvenile justice system by concluding that “children

are constitutionally different from adults for purposes of sentencing.”<sup>50</sup> Substantially limiting the severity of the sentence that may be imposed on a juvenile offender, the Court ruled that an offender who was under eighteen at the time of the offense may not receive the death penalty (Roper v. Simmons, 543 U.S. 551 (2005)); may not receive life without parole for a non-homicide offense (Graham v. Florida, 560 U.S. 48 (2010)); and may not even receive life without parole for a homicide -- except in the very unusual circumstance that the juvenile offender is found to be incorrigible (Miller, 567 U.S. at 471). This last decision was made retroactive, requiring a resentencing for any prisoner serving a mandatory life-without-parole sentence for homicide (Montgomery v. Louisiana, \_\_\_ U.S. \_\_\_, 136 S.Ct. 718 (2016)).

These decisions reflect a consensus that, as a group, juvenile offenders are less culpable and more amenable to rehabilitation than adults, and therefore require special consideration by the courts. Indeed, with the advancement of modern brain science has come the recognition that juveniles possess certain traits that differentiate them from their adult counterparts.<sup>51</sup> First, juveniles tend to be immature, irresponsible, and impulsive – characteristics which cause youth to be overrepresented statistically in virtually every category of reckless behavior.<sup>52</sup> Second, juveniles tend to have less control over their own environment and often cannot remove themselves from dangerous settings; consequently, juveniles are especially “vulnerable or susceptible to negative influences and outside pressures.”<sup>53</sup> Third, “the character of a juvenile is not as well formed as that of an adult because the personality traits of juveniles are more transitory and less fixed.”<sup>54</sup>

Although these differences do not altogether absolve juveniles of responsibility for their crimes, it is widely accepted that they may reduce their culpability. While many juveniles engage in risky conduct, for the majority, such behaviors are fleeting and cease with maturity as individual identity becomes settled. Only a relatively small number will “develop entrenched patterns of problem behavior that persist into adulthood.”<sup>55</sup> Additionally, juveniles are more

capable of change than adults, and thus, their actions are less likely to be evidence of “irretrievably depraved character,” even in the case of very serious crimes.<sup>56</sup>

In light of these advancements in the understanding of adolescent brain development, there has been sweeping change in the sentencing of juvenile offenders. Under the federal Constitution, a court, prior to imposing a mandatory life sentence on a juvenile homicide offender must consider how children are different by evaluating the so-called “Miller factors,” which include the defendant’s immaturity, impetuosity, and failure to appreciate risks and consequences; family and home environment; family and peer pressures; inability to deal with police officers or prosecutors or his own attorney; and the possibility of rehabilitation. Indeed, the Supreme Court of New Jersey has ruled that under the State Constitution a lengthy juvenile sentence that is the functional equivalent of life without parole also requires consideration of the Miller factors. A sentence that is the functional equivalent of a life sentence and is imposed without consideration of these factors is constitutionally infirm, requiring a resentencing.<sup>57</sup>

The teaching of Roper and its progeny is the concept that juveniles, regardless of the severity of their crime, must have the opportunity to demonstrate growth and earn a chance for release. Yet, in New Jersey there is no opportunity for an offender who was a juvenile at the time of sentencing to later obtain a judicial review of his sentence. As the New Jersey Supreme Court has pointed out, even in cases where a judge properly applies the Miller factors at the sentencing, there are “serious constitutional issues” about the juvenile’s right, after serving a portion of his or her sentence, to judicial review of factors that could not be fully assessed at the time of original sentencing, such as “whether he still fails to appreciate risks and consequences, or whether he may be, or has been, rehabilitated.”<sup>58</sup> Expressing concern over the lack of a statutory mechanism for this judicial review, our Supreme Court encouraged the New Jersey Legislature to take action:

We ask 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. To the extent the parties and amici urge this Court to impose a maximum limit on parole ineligibility for juveniles of thirty years, we defer to the Legislature on that question.<sup>59</sup>

The CSDC recommends following the examples of other states, such as California, Connecticut and Florida,<sup>60</sup> in 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. Under this 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, such as chronological age and immaturity, impetuosity, and the failure to appreciate risks and consequences. To guide the court's consideration, the Commission recommends that the Legislature enact a non-exhaustive list of factors as follows:

- (a) Whether the offender demonstrates evidence of rehabilitation;
- (b) Whether the offender would pose a significant risk to society if released;
- (c) The circumstances of the offense, including whether the offender was a relatively minor participant in the criminal offense or acted under extreme duress or the domination of another person and whether the juvenile's behavior was impacted by familial or peer pressures;
- (d) Whether the offender's age, maturity, and psychological development at the time of the offense affected his behavior;



(e) The offender's family and home environment at the time of the offense;

(f) The offender's history of abuse, trauma, poverty, and involvement in the child welfare system prior to committing the offense;

(g) The effect of the incompetencies associated with youth on the criminal justice process, including inability to deal with police officers, prosecutors, or defense counsel;

(h) Accomplishments while incarcerated, including the availability and completion of prison programming, academic or vocational achievements, a positive prison record, and positive relationships with correctional staff and other inmates;

(i) The results of any mental health assessment, risk assessment, or evaluation of the youthful offender as to rehabilitation.

On consideration of these factors, the court would have the option to 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. The Commission recommends that if the court grants release, the inmate be subject to parole supervision for the remainder of the sentence imposed.

**Recommendation #7: Create a Program, Called "Compassionate Release," that Replaces the Existing Medical Parole Statute for End-Of-Life Inmates.**

The CSDC recommends the creation of a third release mechanism, called "Compassionate Release," that is based on the state's "medical parole" statute but includes a number of new provisions that would allow inmates to obtain prompt release if they are suffering from a terminal medical condition or permanent physical incapacity.

Under current law, an inmate is eligible for medical parole when an inmate is diagnosed by two DOC physicians with either a (1) "terminal condition, disease, or syndrome," defined as a prognosis that the inmate has six months or less to live, or (2) "permanent physical incapacity," defined as a prognosis that the inmate is permanently unable to perform activities of basic daily living, results in the inmate requiring 24-hour care, and did not exist at the time of sentencing. N.J.S.A. 30:4-123.51c(a)(1). The medical parole statute outlines procedures for transferring inmates suffering from these conditions out of DOC custody and into alternative forms of care. The law requires that the Parole Board find that the inmate is "so debilitated or incapacitated" by the medical condition "as to be permanently physically incapable of committing a crime if released on parole." N.J.S.A. 30:4-123.51c(a)(2).

The Commission members recommend that the Legislature establish similar standards for inmates seeking Compassionate Release, but with additional mechanism to facilitate an inmate's application and prompt release. As an initial step, DOC would be required to issue a certificate of eligibility for Compassionate Release if the inmate is diagnosed with a:

- Terminal condition, disease, or syndrome; or
- Permanent physical incapacity.

Once the inmate obtains a certificate of eligibility, he or she could file a petition with the Superior Court. The CSDC anticipates that these matters would be handled expeditiously to ensure prompt resolution. After a hearing, the court could order the inmate's release upon a finding that:

- The certificate of eligibility was valid and its issuance was proper; and;
- The inmate meets all other requirements of the current medical parole statute, including the requirement that the inmate is so debilitated or incapacitated as to be permanently physically incapable of committing a crime if release.

If the inmate is granted release, he or she would remain under parole supervision until death. As with the existing medical parole statute, if the inmate's health unexpectedly improved following his or her release, then the Parole Board could move to recommit the individual to DOC custody for the remainder of the sentence. The Commission members recommend the creation of an additional provision to facilitate meritorious petitions. Under this proposal, DOC would be required to notify the inmate's attorney (or, if the inmate does not have an attorney, the Public Defender's Office) before the inmate's condition deteriorated to the point of qualifying for release.

During its review, the Commission found that the medical parole law, though well-intentioned, is rarely used. According to DOC, fewer than 5 inmates have been released from prison under the law in the past five years, despite the fact that numerous inmates suffer from serious medical conditions. It appears that one significant reason for the law's limited use is that, by the time an inmate qualifies for release, he or she is too ill to take the necessary steps to complete the process.

To address this problem, the Commission recommends the creation of a new statutory medical diagnosis, known as a "grave medical condition," that would apply whenever an inmate either had 12 months to live or, for the prior 3 months, had been unable to perform activities of basic daily living. The Commission further recommends creating a statutory requirement that, whenever a DOC physician diagnoses an inmate with a grave medical condition, DOC would be required to promptly notify the inmate's attorney or the Public Defender's Office, who may then begin preparing the inmate's petition for Compassionate Release. This mechanism would ensure that seriously ill inmates would have access to an attorney who could advocate on their behalf as their medical condition deteriorates, and could assist with the filing of a petition once the inmate is diagnosed with a terminal condition or permanent physical incapacity.

The Commission believes that this proposal would likely increase the number of ill patients released from custody, and would result in significant cost-savings for DOC. The Commission cautions, however, that individuals should not be placed in the community without adequate resources to ensure their care upon their release under this provision.

**Recommendation #8: Reinvest Cost-Savings from Reductions in the Prison Population Arising from These Reforms into Recidivism Reduction and, to the Extent Available, Other Crime Prevention Programs.**

The reforms proposed by the Commission are likely to result in shorter prison terms for certain lower-risk inmates, thereby reducing the overall state prison population. This reduction may generate cost-savings for State government over the long-term and it is important that these cost-savings are reinvested in strengthening the fairness of the criminal justice system. The Commission therefore recommends that the Legislature create a dedicated fund that captures these cost-savings and reinvests the money into recidivism reduction programs. To the extent that additional cost-savings are available, the fund would invest in other prison-based and community-based recidivism reduction programs, as well as other crime prevention measures.

This reinvestment fund is designed to create a “virtuous circle”: by investing in programs with a proven track record of reducing crime and rehabilitating offenders, the fund can contribute to further reductions in New Jersey’s prison population, freeing up additional resources for the effort. Just as importantly, these programs—including prison educational and vocational programs—promote public safety by reducing the likelihood that an offender commits another crime after leaving prison.

**Recommendation #9: Provide DOC Funding to Upgrade the Department's Existing Data Infrastructure to Better Track Inmate Trends and to Develop Partnerships with Academic Institutions to Analyze this Data.**

The CSDC cannot develop sound policy proposals without access to accurate criminal justice data. In the course of their work, the Commission workers have discovered significant gaps in the State's ability to collect, track, and analyze data related to New Jersey's criminal justice system. Although DOC maintains detailed records regarding all current inmates, the Department's research office is significantly underfunded and its technology seriously out of date. These issues limit the ability of DOC and its research partners to engage in meaningful policy development, and deprives the Commission of information necessary to support its critical effort. For these reasons, the Commission recommends that DOC invest in upgrades to its data infrastructure and that the Legislature appropriate funds as necessary to support that effort. In addition, the Commission recommends that DOC partner with academic institutions to conduct additional analysis of inmate trends and needs.

## Framework for Future Work

The Commission members have unanimously agreed on the necessity of a statutory mechanism through which inmates who are unlikely to reoffend due to age, rehabilitation or both can petition the court for early release. This important reform has been generally described by the Attorney General's forward looking op-ed earlier this year supporting, among other reforms, the creation of age-based and rehabilitative release programs, both of which would permit an inmate to petition the court for early release from prison on a showing that he or she is no longer likely to offend.<sup>61</sup>

Notwithstanding the Commission's commitment to the concepts of age-based and rehabilitative release, further work must be done prior to implementation of these programs. First, the Commission, in establishing the parameters of the early release programs, requires data to predict fiscal impacts on the courts, DOC, and reentry programming. Necessary data would include, among other things, the number of current inmates who would be eligible to apply for early release; the crimes these inmates were convicted of; the sentences the inmates received; the need for additional rehabilitative programming within the prisons and community; the estimated cost of programming; the race and ethnicity of inmates eligible to apply for release; and the potential impact the programs would have on racial and ethnic disparity. With this data, the Commission will be able to conduct an informed analysis and make specific recommendations for age-based and rehabilitative release programs.

The Commission is equally committed to continuing its examination of New Jersey's mandatory minimum sentencing laws. The Commission members intend to revisit the evolving research on whether mandatory minimum sentences serve any penological value and whether they are an effective means to increase public safety. To further the Commission's discussion, data is

needed on crime rates and their correlation to mandatory minimum sentences as well as on the racial and ethnic impact of mandatory minimum sentences.

Accordingly, it is the intent of the Commission to appoint two subgroups, one to consider age-based and rehabilitative release programs and one to consider eliminating or modifying other mandatory minimum sentences. It is anticipated that the work of these subgroups will be informed by data provided in part by Rutgers University through funding by Arnold Ventures. It is the Commission's intent to address these issues in supplemental reports.

## Endnotes

<sup>1</sup> Crossroads NJ, Reducing Mass Incarceration Would Benefit New Jersey's Communities (2017), available at <https://www.fundfornj.org/sites/default/files/crossroadsnj/FINAL%20CJ%20summary%2011-13-17.pdf>

<sup>2</sup> Rutgers Technical Assistance Team for the New Jersey Criminal Sentencing and Disposition Commission, Crime and Incarceration in New Jersey (September 20, 2019), at 5 (on file). According to this study, the state incarceration rate peaked at 387 per 100,000 in 1999, and although the rate has thereafter steadily declined, the 2017 rate still remained at 217 per 100,000. See also, The Sentencing Project, State-by-State Data (2017), available at <https://www.sentencingproject.org/the-facts/#rankings?dataset-option=SIR>

<sup>3</sup> The Sentencing Project, The Color of Justice: Racial and Ethnic Disparity in State Prisons (2016), available at <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>. According to the Sentencing Project's analysis, New Jersey had the nation's highest ratio of black-to-white incarceration, at 12.2. Id. at 17, tbl C. The rate of adult black male incarceration in New Jersey was 1 in 31; the national average was 1 in 26. Id. at 5, tbl 2.

<sup>4</sup> Crime and Incarceration in New Jersey, supra note 2 (explaining that for purposes of this study, "white" refers to non-Hispanic white, "black" refers to non-Hispanic black, and "Hispanic" refers to Hispanic of any race—they are thus non-overlapping categories).

<sup>5</sup> American Civil Liberties Union of New Jersey, A Vision To End Mass Incarceration in New Jersey (December 2017), available at [https://www.aclu-nj.org/files/5915/1318/4660/2017\\_12\\_13\\_mass\\_incarceration\\_vision.pdf](https://www.aclu-nj.org/files/5915/1318/4660/2017_12_13_mass_incarceration_vision.pdf)

<sup>6</sup> N.J.S.A. 2C:48A-2a.

<sup>7</sup> "Governor Murphy Convenes the Criminal Sentencing and Disposition Commission" (02/11/2018), available at [https://nj.gov/governor/news/news/562018/approved/20180211a\\_criminal.shtml](https://nj.gov/governor/news/news/562018/approved/20180211a_criminal.shtml)

<sup>8</sup> Id.

<sup>9</sup> N.J.S.A. 2C:48A-2b(7).

<sup>10</sup> State v. Roth, 95 N.J. 334, 353 n. 3 (1984).



<sup>11</sup> The New Jersey Penal Code: Commentary, Final Report of the New Jersey Criminal Law Revision Commission xiv (1971).

<sup>12</sup> N.J.S.A. 2C:1-2b. The Legislature added an eighth goal, to promote restitution to victims, in 1991. N.J.S.A. 2C:1-2b(8).

<sup>13</sup> State v. Natale, 184 N.J. 458 (2005).

<sup>14</sup> Reducing Mass Incarceration, supra note 1.

<sup>15</sup> New Jersey Commission to Review Criminal Sentencing, Sentencing in the 21<sup>st</sup> Century and the Necessity of a Permanent Sentencing Commission in New Jersey (June 2006) at 3, available at <http://sentencing.nj.gov/report/finaldraftinterimreport.pdf>

<sup>16</sup> New Jersey Commission to Review Criminal Sentencing, Statutory Changes to Sentencing Under the Code of Criminal Justice: 1979 to the Present (September 2007), at 3, available at [http://sentencing.nj.gov/downloads/pdf/Statutory\\_Changes\\_to\\_Sentencing.pdf](http://sentencing.nj.gov/downloads/pdf/Statutory_Changes_to_Sentencing.pdf)

<sup>17</sup> N.J.S.A. 2C:43-6

<sup>18</sup> Criminal Disposition Commission Annual Report (1992), at 13, available at <https://www.ncirs.gov/pdf/files1/Digitization/143351NCJRS.pdf>

<sup>19</sup> Id.

<sup>20</sup> Bruce Stout & Bennett Barlyn, The Human And Fiscal Toll Of America's Drug War: One State's Experience, 6 Alb. Gov't L. Rev. 525, 535 (2013), available at <http://www.albanygovernmentlawreview.org/archives/Pages/article-information.aspx?volume=6&issue=2&page=522>

<sup>21</sup> Commission To Review Criminal Sentencing, Report On New Jersey's Drug Free Zone Crimes & Proposal For Reform (2005), at 5, available at available at <https://dspace.njstatelib.org/xmlui/handle/10929/22287>

<sup>22</sup> Commission To Review Criminal Sentencing, Supplemental Report On New Jersey's Drug Free Zone Crimes & Proposal For Reform (2007), available at available at [http://www.sentencing.nj.gov/downloads/supplemental%20schoolzonereport.p\\_df](http://www.sentencing.nj.gov/downloads/supplemental%20schoolzonereport.p_df)

<sup>23</sup> Id.

<sup>24</sup> State v. Brimage, 153 N.J. 1, 10 (1998).

<sup>25</sup> State v. Vasquez, 129 N.J. 189, 195-96 (1992).

<sup>26</sup> The guidelines were issued pursuant to the Supreme Court's decision in Brimage, supra note 24.

<sup>27</sup> Report on New Jersey's Drug Free Zone, supra note 21. The Brimage Guidelines 2 were modified again by Attorney General Paula T. Dow in 2010 in response to the enactment of N.J.S.A. 2C:35-7b, which authorizes judges in certain cases to waive or reduce the mandatory minimum sentence prescribed by the school zone law. Attorney General, Supplemental Directive Modifying the Brimage Guidelines to Account for Judicial Authority to Waive or Reduce Mandatory Minimum Sentences in School Zone Cases Pursuant to N.J.S.A. 2C:35-7b (2010), available at <https://www.nj.gov/oag/dcj/agguide/directives/2010-2brimage.pdf>

<sup>28</sup> The Human And Fiscal Toll Of America's Drug War at 537, supra note 20.

<sup>29</sup> Report on New Jersey's Drug Free Zone, supra note 21.

<sup>30</sup> Assembly Bill No. 2762 and Senate Bill No. 1866.

<sup>31</sup> Letter From Former Attorneys General To Governor Corzine And The New Jersey Legislature (December 8, 2009), available at [http://www.drugpolicy.org/sites/default/files/BDS\\_former\\_AG\\_Letter\\_re\\_S1866.p\\_df](http://www.drugpolicy.org/sites/default/files/BDS_former_AG_Letter_re_S1866.p_df)

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> N.J.S.A. 2C:35-7a.

<sup>35</sup> Travis, J., Western, B., & Redburn, S. (Eds.), The Growth of Incarceration in the United States: Exploring Causes and Consequences (2014), available at [http://johnjay.ijay.cuny.edu/nrc/nas\\_report\\_on\\_incarceration.pdf](http://johnjay.ijay.cuny.edu/nrc/nas_report_on_incarceration.pdf). As a general matter, evidence compiled by the Brennan Center for Justice suggests that dramatic increases in incarceration have had a limited, diminishing effect on crime. Brennan Center For Justice, What Caused the Crime Decline (2015), at 7, 17, available at [https://www.brennancenter.org/sites/default/files/analysis/What\\_Caused\\_The\\_Crime\\_Decline.pdf](https://www.brennancenter.org/sites/default/files/analysis/What_Caused_The_Crime_Decline.pdf)

<sup>36</sup> See, e.g., State v. Manzie, 168 N.J. 113 (2001); State v. Newman, 325 N.J. Super. 556 (App. Div. 1999), certif. den. 163 N.J. 396 (2000); State v. Ferencsik, 326 N.J. Super. 228 (App. Div. 1999).

<sup>37</sup> A Vision to End Mass Incarceration, *supra* note 5.

<sup>38</sup> Ibid.

<sup>39</sup> The Sentencing Project, Fewer Prisoners, Less Crime: A Tale of Three States (July 2014), available at <https://sentencingproject.org/wp-content/uploads/2015/11/Fewer-Prisoners-Less-Crime-A-Tale-of-Three-States.pdf>

<sup>40</sup> Growth of Incarceration, at 91, *supra* note 35.

<sup>41</sup> Ibid.

<sup>42</sup> Crime and Incarceration in New Jersey, *supra* note 2.

<sup>43</sup> The Color of Justice, *supra* note 3.

<sup>44</sup> Growth of Incarceration, *supra* note 35.

<sup>45</sup> Brennan Center For Justice, Between 2007 And 2017, 34 States Reduced Crime And Incarceration In Tandem (2019), available at [https://www.brennancenter.org/blog/between-2007-and-2017-34-states-reduced-crime-and-incarceration-tandem?utm\\_source=The+Marshall+Project+Newsletter&utm\\_campaign=B5f763455e-Email\\_Campaign\\_2019\\_08\\_07\\_11\\_34&utm\\_medium=Email&utm\\_term=0\\_5e02cd\\_ad9d-B5f763455e-174333393](https://www.brennancenter.org/blog/between-2007-and-2017-34-states-reduced-crime-and-incarceration-tandem?utm_source=The+Marshall+Project+Newsletter&utm_campaign=B5f763455e-Email_Campaign_2019_08_07_11_34&utm_medium=Email&utm_term=0_5e02cd_ad9d-B5f763455e-174333393)

<sup>46</sup> A Vision to End Mass Incarceration, *supra* note 5.

<sup>47</sup> American Bar Foundation, Over-Incarceration of Nonviolent Offenders Hurts Children and Families and the Effects of Incarceration Radiate into Communities (2016); available at [http://www.americanbarfoundation.org/uploads/cms/documents/abf\\_research\\_brief\\_incarceration\\_v5\\_electronic\\_version.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/abf_research_brief_incarceration_v5_electronic_version.pdf); see also American Bar Association, A Voice for the Young Child with an Incarcerated Parent (2012), available at

<https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2012/voice-for-young-child-with-incarcerated-parent/>

<sup>48</sup> Vera Institute of Justice, Drug War Détente? A Review of State-level Drug Law Reform, 2009-2013 (2014), available at <http://archive.vera.org/sites/default/files/resources/downloads/state-drug-law-reform-review-2009-2013.pdf>

<sup>49</sup> Growth of Incarceration, *supra* note 35.

<sup>50</sup> Miller v. Alabama, 567 U.S. 460, 471 (2012).

<sup>51</sup> Roper v. Simmons, 543 U.S. 551, 569-70 (2005).

<sup>52</sup> *Id.* at 569 (quoting Jeffrey Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339, 339-40 (1992)).

<sup>53</sup> *Ibid.*

<sup>54</sup> *Id.* at 570.

<sup>55</sup> *Ibid.* (quoting Laurence Steinberg & Elizabeth S. Scott, Less Guilty By Reason of Adolescence, 58 Am. Psychologist 1009, 1014 (2003)).

<sup>56</sup> *Ibid.*

<sup>57</sup> State v. Zuber, 227 N.J. 422 (2017).

<sup>58</sup> *Id.* at 452.

<sup>59</sup> *Id.* at 453.

<sup>60</sup> Associated Press, 50-State Examination (July 2017), available at <https://www.ap.org/explore/locked-up-for-life/50-states>

<sup>61</sup> Attorney General Gurbir S. Grewal, It's time to end mandatory minimums for non-violent drug crimes (Star Ledger, July 15, 2019), available at <https://www.nj.com/opinion/2019/07/attorney-general-grewal-its-time-to-end-mandatory-minimums-for-non-violent-drug-crimes.html>

## Acknowledgements

The CSDC would like to recognize and give special thanks to the following individuals and organizations for their contributions to the work of the Commission:

### Commission Legislative Staff

**Gabriella B. Ferri**, Senior Counsel, Office of Legislative Services  
**Carolyn I. Roscoe Wright**, Principal Counsel, Office of Legislative Services

### Research Assistance

**Arnold Ventures**, formerly known as The Laura and John Arnold Foundation, which funded research by the Rutgers Research Group for the CSDC.

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