



Briefing Book

New Jersey sentencing and a call for reform

By Judith A. Greene
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Families Against Mandatory Minimums

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About FAMM and the Smart On Crime campaign

The Smart On Crime campaign is a project of Families Against Mandatory Minimums (FAMM). FAMM is a national nonpartisan, nonprofit organization founded in 1991 in response to inflexible and excessive penalties required by mandatory sentencing laws. FAMM promotes sentencing policies that give judges the discretion to distinguish between defendants and sentence them according to their role in the offense, seriousness of the offense and potential for rehabilitation. FAMM's 30,000 members include prisoners and their families, attorneys, judges, criminal justice experts and concerned citizens.

FAMM works with legislators, law enforcement, criminal justice experts, the media and citizens to provide public education and implement cost-effective criminal justice policies that increase judicial discretion while protecting public safety. FAMM provides information and support to policymakers concerned about the high fiscal and human costs of mandatory minimums sentencing and related policies, such as three-strikes laws, "truth in sentencing," disproportionately harsh sentences and parole disqualifiers.

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Introduction

Incarceration rates are at an all-time high, and state budgets are more constrained than during any period since the beginning of the United States prison-construction boom in the late 1970s and 1980s. One of the driving forces behind these problems are “get-tough” sentencing laws passed by the U.S. Congress and many state legislatures that force judges to give lengthy, fixed prison terms to those convicted of specific crimes, especially those that are drug-related, without concern for mitigating factors such as the degree to which the accused may have been involved in the crime or the potential for rehabilitation. These laws contribute to the explosion in U.S. incarceration, with a disproportionate impact on low-income families and communities of color.

Now state-level policymakers are scrambling for information and ideas to help them better manage correctional resources. There is a great need for easily accessible, accurate information about sentencing policies and practices and cost-effective sentencing reforms. Families Against Mandatory Minimums (FAMM) is meeting that need through state-by-state briefing books and a website on state sentencing policy that provide “smart-on-crime” responses to “tough-on-crime” policies. These resources provide comprehensive sentencing and correctional policy information resource for public officials, policymakers, reform advocates, and members of the media.

A key component of our Smart On Crime briefing books and website are our state-by-state sentencing and correctional system profiles keyed to critical sentencing reform issues. The goals of our state sentencing and correctional system profiles are:

- To provide concise, up-to-date information about the policies and practices that drive state prison populations and correctional costs.
- To stimulate and facilitate exchange of policy-relevant information about sentencing and correctional policies across states.
- To gather and disseminate information about practical, successful reform strategies.


To highlight progress toward gaining stronger control over correctional costs and more effective correctional outcomes.

FAMM’s Smart On Crime state-by-state profiles trace the state’s correctional policy history and describe the resulting sentencing and (where relevant) parole structures, identifying the factors and dynamics that underlay or influence prison population trends. Each state profile also characterizes the state’s level of commitment to crime prevention, alternatives to incarceration, community corrections, substance abuse treatment, and re-entry programs.

FAMM’s state profiles chronicle recent criminal justice policy developments that affect correctional reform efforts and analyze gains and set backs in terms of prison population impacts and fiscal costs. Political leaders that champion positive change are recognized, and successful reform initiatives are celebrated. New proposals or initiatives for change in state sentencing policy are identified, and wherever possible, we provide information on draft legislation, fiscal notes, and/or legislative testimony. Our state profiles also identify the activist networks and grassroots organizations that are working to address the need for reform and include “talking points” for legislators and advocates and related policies that drive up prison populations.

The New Jersey Smart On Crime briefing book is one of six state profiles that will be completed in 2003. Despite the “get-tough” environment, the cost of incarceration in a time of fiscal crisis is opening up opportunities for opponents of mandatory minimum sentencing to develop “smart-on-crime” approaches that are cost-effective in both fiscal and human terms. The recent win in Michigan, in which mandatory minimum sentencing laws were removed from the state’s books, was a significant example to the rest of the nation of what could be done in the presence of political will.

We hope this information is helpful to you. For more information on FAMM’s Smart On Crime campaign, please visit www.smartoncrime.org.



New Jersey's sentencing system, tightly wound with some of the nation's harshest mandatory sentencing laws, is ripe for reform. It has been many years since the state's policymakers have taken a close look at how the sentencing laws and policies impact the prison and correctional systems. Corrections Commissioner Devon Brown is urging that mandatory sentencing laws be re-considered, and legislative leaders are calling for establishment of a new sentencing commission that would review these laws, their impact, and their effectiveness.

Current prison population

New Jersey’s prisons held 27,891 prisoners at the end of 2002, up from just 5,886 in 1980. While the total New Jersey population increased by less than 15 percent during this period, the incarceration rate increased by 238 percent. New Jersey’s incarceration rate (322 prisoners per 100,000 state residents) compares favorably with the national rate, but is higher than the average rate for the northeast region (304). The state ranks fourth, behind Connecticut, New York, and Pennsylvania, in terms of its incarceration rate as compared to other states in the region.

At the beginning of 2002, the vast majority of New Jersey’s prisoners were people of color, with 63 percent African American and 18 percent Hispanic. The proportion of white prisoners has dropped from 27 percent in 1987 to 19 percent in 2001. Department of Corrections (DOC) officials attribute this decline to the heavy impact of the Comprehensive Drug Reform Act (CDRA) on the state’s economically depressed urban areas. Almost half of New Jersey’s prisoners (48 percent) serve a term of five years or less. In 2001 the median prison term was six years. Long-termers (those serving more than 20 years) and lifers make up just 16 percent of the prison population.

In 2002 New Jersey ranked ninth in a list of states with the largest community corrections populations, and was third in the northeast region in terms of the rate of adults under community supervision per 100,000 residents. The portion of the state correctional population that is incarcerated in jail or prison is 23 percent, compared to the national rate of 29 percent.

For the past two decades the proportion of prisoners serving time for drug offenses has risen (as has the incidence of prisoners with mandatory minimum terms) corresponding with a reduction in the proportion of prisoners committed for property offenses, and crimes of violence. Current figures from the DOC indicate that 42 percent are incarcerated for a violent offense (homicide, sexual assault, assault, robbery, kidnapping, and other sex or person offenses), down from 64 percent in 1987 – the year that CDRA was enacted.

Recently New Jersey’s prison population has declined, having peaked at 31,962 in August 1999. By the end of 2002, prison population levels had declined by 15 percent, allowing the DOC to reduce the number of

state prisoners housed in county jails from over 5,000 to less than 2,000. The decline in the number of prisoners since 1999 can be attributed at least in part to a decline in the state’s crime rate – but New Jersey’s crime rate has followed a downward trend for more than 20 years, falling by 47 percent since 1981. BJS data reports indicate that admissions to New Jersey’s prison declined from 16,801 in 1998 to 13,653 in 2000, while releases increased from 14,041 to 15,362, respectively.

New Jersey’s sentencing structure

Persons convicted of criminal offenses are sentenced under the New Jersey Code of Criminal Justice (NJSA Title 2C) which took effect in 1979. Punishment is the primary philosophical orientation of the sentencing structure; the predominant goal is uniformity in sentencing.

“Indictable offenses” (comparable to felony offenses in other jurisdictions) fall into four classes according to their level of seriousness. The sentencing structure, best characterized as a “hybrid determinate model,” allows judges to choose a prison term within statutory ranges set for each offense class. The normal ranges and presumptive prison sentences (the appropriate sentence unless aggravating or mitigating factors are indicated) that may be imposed at sentencing are as follows:

<i>Offense class</i>	<i>Range</i>	<i>Presumption</i>
First degree	10–20 years	15 years
Second degree	5–10 years	7 years
Third degree	3–5 years	4 years
Fourth degree	Up to 18 months	9 months

First- and second-degree offenses carry a presumption of incarceration which can be overcome only when such a sanction would constitute a serious injustice of such magnitude that would override the need to deter others. In the case of a third or fourth degree offense, the presumption favors a non-custodial sanction.

Before sentencing, a judge must conduct fact-finding about the circumstances of each case. The judge then considers any aggravating factors (e.g., a prior criminal record; evidence of cruelty in commission of the crime; evidence of organized criminal activity;) and any mitigating factors (e.g., no serious harm to a vic-

tim; provocation; victim compensation by the offender; cooperation with law enforcement authorities) to determine whether or not to deviate from the presumption. To determine the sentence, a judge begins with the presumption but can increase or reduce its length within the range limits based on aggravating or mitigating factors. The reasons for a deviation from the presumptive sentence must be made explicit on the record so that the appellate courts can conduct an adequate review if the sentence is appealed.

Mitigating terms

Where mitigating factors outweigh aggravating factors, the court may sentence an offender to a term below the presumptive sentence. And, for first- and second-degree offenses where there are substantial mitigating factors, a judge may – in the interest of justice – sentence an offender according to the requirements for an offense that falls one degree lower than the conviction offense.

Discretionary and mandatory minimum terms

A prisoner is generally eligible for parole after serving one-third of a prison term, unless the judge imposes a mandatory minimum sentence or period of parole ineligibility. There is a presumption in favor of parole release unless the candidate fails to cooperate in his or her rehabilitation or is thought to be likely to violate parole. But, as will be discussed below, most prisoners in New Jersey must serve a minimum term imposed at sentencing before becoming parole eligible. Mandatory minimum terms are served without good time or work credits, though a prisoner will be given credit for any jail time served before conviction.

If aggravating factors outweigh the mitigating factors, judges are authorized to set a mandatory minimum term (a “parole disqualifier”) that cannot exceed one-half of the maximum term set within the ranges displayed above. New Jersey case law holds that such a discretionary mandatory minimums are intended to be exceptional – they are not to be routinely imposed. Moreover, a discretionary mandatory minimum can be vacated by the trial judge on a motion for reconsideration.

Some criminal statutes require mandatory minimum prison terms that are not discretionary and cannot be waived. In murder cases where the death penalty is not imposed the law requires a mandatory minimum prison sentence of 30 years before parole.

Other examples:

- Vehicular homicide carries a mandatory minimum of between one-third and one-half of the sentence imposed, or three years – whichever is greater.
- “Child luring” carries a parole disqualifier of between one-third and one-half of the sentence, or two years – whichever is greater. If an extended term is imposed in the case, the disqualifier jumps to three years.
- Carjacking, a first-degree offense, requires a parole disqualifier of at least five years – while second degree assault by stolen automobile” carries a “parole disqualifier” of between one-third to one-half of the maximum term.
- Distribution of a firearm to a minor, a third degree offense, carries a three-year parole disqualifier.

Extended terms

The code provides for “extended terms” of prison for at least a dozen circumstances involving serious aggravating factors, and sometimes requires that a mandatory minimum or parole disqualification also be imposed. Extended terms are sometimes discretionary. The prosecutor must move for such a sentence and prove the grounds that justify it, but the choice to impose an extended term belongs to the judge. The deliberation turns on whether there is a need to protect the public. Where aggravating factors substantially outweigh mitigating factors, the judge may add a mandatory minimum term of up to one-half of the extended term.

In some cases an extended term is mandatory — if the prosecutor so moves and the defendant qualifies, the judge has no choice in the matter. Life sentences for extended terms involving mandatory minimums are provided by statute for specific serious offenses, such as:

- Murder: life with a 35-year parole disqualifier.
- Kidnapping of a victim under 16: life with a 30-year parole disqualifier.
- Leader of a narcotics trafficking networks: life with a 30-year parole disqualifier.

With other “extended terms of life,” a 25-year parole disqualifier may be imposed. If no disqualifier is imposed, a prisoner sentenced to an extended term of life is parole eligible at 11 years, seven months, and three days.

In other cases, extended terms generally vary by class:

<i>Offense class</i>	<i>Normal range</i>	<i>Extended term</i>
First degree	10–20 years	20 years to life; 50-year presumption
Second degree	5–10 years	10-20 years; 15-year presumption
Third degree	3–5 years	5-10 years; 7-year presumption
Fourth degree	Up to 18 months	5-year maximum; no presumption

Cases where extended terms may be imposed follow:

- A defendant convicted of a first-, second-, or third-degree offense who is a persistent offender (i.e., has been convicted of at least two prior offenses).
- A defendant convicted of a first-, second-, or third-degree offense who is a professional criminal (i.e., has committed the crime as part of on-going criminal activity with at least two other persons, and engages in crime as a major source of livelihood).
 - A first-, second-, or third-degree offense committed for hire.
 - A second offender with a firearm (mandatory).
 - A hate crime (mandatory).
 - An “enumerated offense” (e.g., manslaughter; robbery; intent to distribute drugs) with a stolen automobile.
 - A second conviction for manufacturing, distributing, or possession of drugs with intent to distribute (mandatory).
 - Distribution of a controlled dangerous substance to a pregnant female or a minor (mandatory).
 - Sexual assault with a threat of violence of a victim age 16 or less (mandatory).
 - A second sex offender under community supervision (mandatory).
 - A repeat violent offender (mandatory).
 - A violent crime committed by a defendant released on bail.
 - A crime committed by a street gang (mandatory).
 - Soliciting a juvenile to join a street gang (mandatory).

Younger offenders may receive more lenient treatment at sentencing. Under the New Jersey “Youth Act,” an offender who is under the age of 26 at sentencing can be sentenced to the Youth Correctional Complex instead of state prison for an indeterminate term which normally carries a five-year maximum duration (18 months for a fourth-degree offense). A Youth Act sentence may not include a mandatory minimum term.

ISSUE: Mandatory minimum sentencing laws pack the prisons

Since the 1979 criminal code revision, the New Jersey legislature has enacted a steady stream of “tough on crime” laws, many of which have served to boost the state’s prison population. Given recent trends in admissions and releases, New Jersey’s prison population level might be expected to fall yet more steeply, but the population level is powerfully driven by the state’s heavy reliance on mandatory sentencing laws, which lengthen the duration of time served in prison by offenders. In 1982, when New Jersey’s legislature enacted the Graves Firearm act, the proportion of prisoners serving a mandatory minimum term was just 11 percent. In 1987, when the Comprehensive Drug Reform Act was enacted, the proportion serving a mandatory minimum term stood at 41 percent. At the beginning of 2002, that proportion stood at 61 percent, and DOC officials were expecting the figure to rise to 70 percent.

A prisoner must serve an entire minimum term before being eligible for parole release. No credits are given for good behavior, and credits cannot be earned through work activities. DOC officials report that under current parole policies, and given administrative credits for time served and work performed, prisoners without a mandatory minimum term typically serve from one-fifth to one-quarter of their full prison term. Prisoners committed with a mandatory minimum serve approximately twice the length of time in prison as the time served by prisoners with no mandatory minimum. The majority of mandatory minimum terms (60 percent) run between two to five years in duration, with a median of three years and six months in 2001, but 14 percent are set at 15 years or more.

The Graves Firearm Act

Enacted in 1982, the Graves Act provides a framework of mandatory minimums for gun offenses. If an offender possesses a firearm with intent to use it against a person, or in commission of certain crimes (e.g., murder; aggravated or sexual assault; burglary), a prison sentence is mandatory and there must be a mandatory minimum term fixed at or between one-third and one-half of the sentence, or three years, whichever is greater. If the weapon is a machine gun or an assault firearm and the crime is one in the first or second degree, the mandatory minimum to be served before parole eligibility is 10 years; if third degree, five years; if fourth degree, 18 months. The Graves Act does not apply if the offense is not one

against the person. Mere possession of a weapon without a permit is not a Graves Act offense.

A prosecutor can move to waive a mandatory minimum for a first offender. A defendant may move for a waiver if a prosecutor's refusal to do so is a "patent and gross abuse of discretion." Waivers are prohibited in cases involving a machine gun or assault firearm. Once imprisoned for a first conviction under the Graves Act, a prisoner may move for a reduction of a mandatory minimum sentence. If the prosecutor agrees, the motion may be granted by the court.

Where an offender is sentenced as a "Second Graves Act" offender, an extended term is mandatory. No motion by the prosecutor is needed to invoke this requirement. If a judge decides to impose an extended term of life, a mandatory minimum term of 25 years must be set during which the defendant will not be eligible for parole.

The Comprehensive Drug Reform Act (CDRA)

Sentencing for drug offenders was significantly toughened in 1986 when the New Jersey legislature overhauled the statutes covering drug crimes. Weight thresholds that vary according to the type of drugs involved govern sentences for manufacturing, distributing, dispensing, or possession with intent to distribute.

<i>Type of Drug</i>	<i>Amount for Second Degree</i>	<i>Amount for First Degree</i>
Heroin	0.5 ozs.	5 ozs.
Cocaine	0.5 ozs.	5 ozs.
LSD	Any amount under 100 mgs.	100 mgs.
PCP	Any amount under 10 gms.	10 gms.
Methamphetamine	0.5 ozs.	5 ozs.
Marijuana	5 lbs. or 10 plants	25 lbs. or 50 plants

CDRA is widely cited as one of the country's toughest drug laws. Simple possession of drugs is generally a third- or fourth-degree offense for which there is a presumption of non-incarceration. But most drug offenses carry mandatory minimums under CDRA. A conviction for manufacturing, distributing, dispensing, or possessing with intent to distribute heroin, cocaine, or LSD at first-degree weights triggers a mandatory minimum prison term at or between one-third and one-half of the sentence imposed. The mandatory

minimum may be waived by a sentencing judge, but only with the agreement of the prosecutor pursuant to a plea bargain. Once the prosecutor has waived a mandatory minimum sentence and agreed to probation, the waiver is not revocable. Thus if an offender violates probation, he or she is not subject to a mandatory minimum term at re-sentencing.

When substantial mitigating circumstances are found, a judge may sentence a first-degree drug offender within the parameters set for a second-degree offense, but a mandatory minimum is still required.

An offender convicted as the leader of a narcotics trafficking network, a first-degree offense, must be sentenced to life in prison and must serve 25 years before being eligible for parole. Maintaining a drug production facility, also a first-degree offense, requires a mandatory minimum of one-third to one-half of the maximum. If an offender is sentenced as a "second drug manufacturer" and a judge decides to impose an extended term of life, the sentence must include a minimum term of 25 years during which the defendant shall not be eligible for parole. An offender sentenced in this fashion would receive a 30-year parole disqualifier.

If an offender is convicted of possessing a gun while committing certain drug offenses, he or she is guilty of a second-degree weapons offense, the sentence for which cannot be merged with the drug offense sentence but must run consecutively.

Employing a juvenile in a drug distribution operation is a second-degree offense with a required one-third to one-half mandatory minimum. An offender convicted of distribution of drugs to a pregnant female or a minor is subject to twice the normal prison term, including twice the term of parole ineligibility, if any. If such an offense is one in the third or fourth degree, the presumption of non-imprisonment evaporates.

Second drug convictions

For a second conviction for manufacturing, distributing, dispensing, or possessing with intent to distribute a dangerous or controlled substance, a prosecutor can file an application requesting that the offender be sentenced to an extended term, which shall include a mandatory minimum to be fixed at or between one-third and one-half of the sentence, or at least three

years, whichever is greater. In this context, using juveniles to distribute drugs carries a seven-year minimum. For a fourth-degree drug offense, a second drug offender is to receive an 18-month minimum. Absent a prosecutor's motion, however, no extended term is required, nor is a mandatory minimum sentence required if an extended term is not required.

1,000-foot drug-free school zone law

Distributing, dispensing, or possessing drugs with intent to sell on school property, within 1,000 feet of a school, or on a school bus is a third-degree offense carrying a three-year mandatory minimum. For less than an ounce of marijuana the minimum drops to one year. If the amount of drugs reaches a first- or second-degree threshold, the offender will be charged with both a first- or second-degree drug offense, and a school zone offense. If convicted, the charges may then be merged for sentencing – with the offender receiving a higher base term of prison for the weight, coupled with a mandatory minimum blended in from the school zone charge.

Distributing, dispensing, or possessing drugs with intent to sell within 500 feet of a public park, a public housing project, or a public building will not trigger a mandatory minimum. However, the offense is a second-degree crime for which a prison term is the presumptive sentence.

The impact of mandatory minimum drug laws

In New Jersey drug enforcement arrests far surpass those made in any other crime category. In 2000, 38 percent of the state's 153,864 arrests were for drug violations, compared with 10 percent for crimes involving violence against persons, 25 percent for property crimes, 19 percent for drunk driving, and 8 percent for liquor law violations. Most drug arrests (73 percent) were for possession, of which half were for possession of marijuana.

New Jersey maintains one of the highest rates of incarceration for drug crimes in the country. The proportion of prisoners incarcerated for drug offenses, 36 percent, compares to an average of just 20 percent for all state prisons in the U.S. In 1987, the year that CDRA was passed, the proportion of prisoners convicted of drug crimes was just 11 percent.

ISSUE: Strict prosecutorial guidelines restrict plea bargaining in drug cases

Under CDRA whenever the statutes require a mandatory minimum the judge must impose it unless the offender pleads guilty in a negotiated agreement with the prosecutor. New Jersey is one of a handful of states that does not have elected prosecutors. The governor appoints the state's attorney general to head the New Jersey Department of Law and Public Safety, as well as local county prosecuting attorneys. They serve five-year terms, and they operate as an extension of the attorney general's office, and are subject to guidelines and directives issued by the attorney general that cover case processing, plea bargaining, and sentencing.

The "Brimage Guidelines" for plea bargaining under CDRA were formulated by the attorney general's office after the New Jersey Supreme Court held in *State v. Brimage*, 153 N.J. 1 (1998), that allowing each county prosecutor's office to adopt its own plea policies for drug cases permitted inter-county disparity, thus violating the state's predominant goal of uniformity in sentencing. The Brimage Guidelines set forth basic parameters that all county prosecutors must follow when making plea offers. They generally require longer sentences than under previous guidelines that allowed for variations between counties, and in many instances the recommended mandatory minimums are longer than is required by the drug offense statutes.

To check against "arbitrary and capricious exercise of prosecutorial discretion" in plea bargaining, the guidelines require that prosecutors state on the record their reasons for waiving or not waiving any statutory mandatory minimum prison term, or for seeking an extended prison term. They must also make a record that explains the reasons for any departures from the guidelines. Prosecutors are obliged to fill out a complex "plea negotiations worksheet" that translates the relevant findings in a case to a point system.

Guidelines for plea offers are fit within the statutory sentencing framework of mid-point presumptions embodied in the New Jersey codes, with prosecutors taking aggravating and mitigating factors into account to determine whether to go above or below a presumptive offer. The guidelines require prosecutors to apply for an extended term unless there are grounds for waiver. A point value is assigned to each aggravating or mitigating factor, and a point system is used as well in scoring an offender's prior criminal history. These numeric

calculations are used to position a case within a grid-like “Table of Authorized Plea Offers,” with the vertical axis of the matrix presenting a ranked set of “offense descriptions” and the horizontal axis presenting “criminal history categories.” As can be seen in this table that governs plea offers in school zone cases, in order to encourage early pleas in drug cases, plea offers are structured to escalate as a case matures:

“Special application and enhancement features” will also increase the plea offer in certain types of cases (e.g., if an adult distributes drugs to children they must receive twice the sentence that would otherwise apply). For first-degree cases the plea offers are increased if the case involves a “substantial quantity” of drugs (i.e., 50 ounces or more of heroin or cocaine; 250 pounds of marijuana).

Offenses under NJSA 2C:35-7 (Drug Free School Zone)																	
		Criminal History Category															
Offense Description	Timing	I Minor			II Significant			III Serious			IV Extended Term			V - Enhanced Extended Term			
A	2C:35-7 less than 1 oz of marijuana no weapons	Pre-Indictment	270*	364*	9	364*	9	12	9	12	18	10	24	30	24	30	36
	Initial Post-Indictment	364*	9	12	9	12	18	12	18	24	24	30	36	30	36	42	
	Final Post-Indictment	9	12	15	12	15	21	15	21	27	27	33	39	33	39	45	
B	2C:35-7 less than 1 oz of marijuana weapons	Pre-Indictment	9	12	18	12	18	24	18	24	30	30	36	42	36	42	48
	Initial Post-Indictment	12	18	24	18	24	30	24	30	36	36	42	48	42	48	54	
	Final Post-Indictment	15	21	27	21	27	33	27	33	39	39	45	51	45	51	57	
C	2C:35-7 other than less than 1 oz of marijuana no weapons	Pre-Indictment	9	12	18	12	18	24	18	24	30	30	36	42	36	42	48
	Initial Post-Indictment	12	18	24	18	24	30	24	30	36	36	42	48	42	48	54	
	Final Post-Indictment	15	21	27	21	27	33	27	33	39	49	45	51	48	51	57	
D	2C:35-7 other than less than 1 oz of less marijuana weapons	Pre-Indictment	12	18	24	18	24	30	24	30	36	36	42	48	42	48	54
	Initial Post-Indictment	18	24	30	24	30	36	30	36	42	42	48	54	48	54	60	
	Final Post-Indictment	21	27	33	27	33	39	33	39	45	45	51	57	51	57	63	
E	2C:35-7 2nd degree amount no weapons	Pre-Indictment	12	18	21	18	24	30	24	30	36	36	42	48	42	48	54
	Initial Post-Indictment	18	24	30	24	30	36	30	36	42	42	48	54	48	54	60	
	Final Post-Indictment	21	27	33	27	33	39	33	39	45	45	51	57	51	57	63	
F	2C:35-7 2nd degree amount weapons	Pre-Indictment	18	24	30	24	30	36	30	36	42	42	48	54	48	54	60
	Initial Post-Indictment	24	30	36	30	36	42	36	42	48	48	54	60	54	60	66	
	Final Post-Indictment	27	33	39	33	39	45	39	45	51	51	57	63	57	63	69	

State of New Jersey Department of Law and Public Safety, Office of the Attorney General.
 *Denotes days in county jail as a condition of probation (no parole ineligibility). If the offense involves a first degree amount of methamphetamine or marijuana, use Table #5 (see Special Offense Characteristic #3 in part IV).

As depicted above, plea agreements in school-zone cases typically involve reduction of the three-year statutory mandatory minimum. A first offender charged with selling a third-degree quantity of drugs in a school zone, without aggravating or mitigating circumstances, could obtain a 12-month minimum by entering a guilty plea before indictment. A guilty plea made shortly after indictment would result in an 18-month minimum term. A final post-indictment plea offer in such a case would be a 21-month minimum.

The presumptive plea offer (the mid-range number) applies unless the totaled point values for aggravation or mitigation indicate that the offer should be increased or decreased within the specified range (e.g., nine to 18 months in a pre-indictment plea). A second drug conviction would trigger an “extended term” plea offer.

A “downward adjustment” of up to three months below the minimum range may be made by a prosecutor after considering “the likelihood of obtaining a guilty verdict” at trial. Prosecutors can make a “downward departure” from the Brimage Guidelines if the defendant provides “substantial cooperation” to law enforcement. Reasons for the departure must be explicit, but are given *in camera* or under seal to protect the defendant.

Defense counsel report that prosecutors generally follow the guidelines to the letter, taking advantage of every opportunity to wield a mandatory minimum or an extended prison term as a tool for plea bargaining in drug cases. Exceptions occur only in a few high-volume jurisdictions – Essex and Hudson counties. There, for example, in second drug-offense cases the extended term is not sought by prosecutors as frequently as the statute allows,

so defendants may get a break until they stack up a third drug offense. But if the offender also has a juvenile drug record, the prosecutor will probably go for an extended term, even though technically a juvenile drug conviction doesn't "count" as heavily as an adult conviction.

ISSUE: Drug rehabilitation and drug courts reach a small proportion of those in need

New Jersey Department of Corrections officials have estimated that two-thirds of the state's prisoners need drug treatment, while 59 percent need treatment for alcohol abuse. A survey of prisoners conducted in the mid-1990s found that 25 percent had first become involved with criminal activity to get money to buy drugs. Twenty-nine percent reported daily use of drugs before their arrest and imprisonment. State parole officials report that the most frequent reason for parole violation is substance abuse. The New Jersey Department of Health has estimated that the cost of drug treatment ranges from \$825 to \$5,023 (depending on the type of intervention and setting) compared with an average annual incarceration cost per prisoner of \$31,446.

In 1999 the New Jersey Legislature enacted a provision for rehabilitation, creating criteria for imposition of "special probation," to provide a drug treatment alternative to prison for drug- or alcohol-dependent offenders. The conviction offense need not be drug-related, but many types of substance-abusing offenders are not eligible – including those convicted of offenses that carry a mandatory minimum sentence. If granted "special probation," the term will run for five years.

By law, application for a "special probation" sentence may be approved only if the offender has been diagnosed as drug or alcohol dependent at the time of the offense; if the offense was committed under the influence of drugs or to support the dependency; if treatment will prove a benefit, reducing the likelihood of further criminal activity; if the offender is amenable to treatment and has been accepted for admission to a suitable residential facility for a period of not less than six months' duration. A defendant will not be admitted to "special probation" if he or she is convicted of a first degree offense and possessed a firearm during the offense; if drugs were sold to a juvenile near or on school property; or if the defendant has a prior record for certain serious violent offenses, or a record for two or more serious crimes, or presents a danger to the community.

Under special probation, offenders spend a mini-

mum of six months in a residential drug treatment program in lieu of imprisonment. If the offense was committed in a drug-free school zone (an offense that normally carries a three-year mandatory minimum), or if the offender has a prior conviction for drug distribution, special probation is only available if the prosecutor joins in making application for probation and treatment.

Drug courts were first piloted in New Jersey with federal funding in Camden, Essex, Mercer, Passaic, and Union counties. In 2001 the legislature authorized expanding the drug court program to the rest of the state. Currently 13 of New Jersey's 21 counties are served by a drug court, and by next spring every county will be covered. In January 2003 approximately 1,500 offenders were under drug court supervision.

Defense attorneys give mixed reviews to the drug court program. According to one lawyer with a busy practice in northern New Jersey, the Essex County Drug Court is effective because the presiding judge believes strongly in the drug court's mission. She says that county prosecutors have been prodded by the bench to cooperate fully with the drug court process, but this is not necessarily the case elsewhere. In Passaic County, for example, she complains that the drug court is a non-entity, with plea offers that are no bargain at all. In any case, while the drug courts and "special probation" work for some offenders, they provide limited relief given the large volume of drug cases.

New Jersey codes also allow sentencing judges to consider a treatment alternative for offenders sent to prison. A prisoner may apply for a sentence reduction by court order for transfer to a substance abuse treatment program. The prisoner must show that he or she is an addict, has been accepted into a program, and is sincerely desirous of rehabilitation. If the court accepts the request, the prison sentence is suspended and the prisoner is placed on probation. A prisoner with a mandatory parole disqualifier is not eligible for transfer to a treatment program until after the mandatory period is served, but if the parole disqualifier is discretionary, the prisoner may be considered for transfer.

ISSUE: "Drug-free zones" blanket inner-city neighborhoods, causing disparity

DOC officials report that currently the vast majority of prisoners in on drug charges were convicted of sales or distribution, rather than for simple possession of drugs. In determining whether a drug offense took

place within a school zone, the authorities have set an expansive definition of “school” to include daycare centers, vocational training centers, and so forth. In New Jersey’s poorest urban centers, minority residents find themselves blanketed in interlocking “drug-free zones” where concentrated law enforcement campaigns send thousands of young men and women to prison for offenses that would be probation-eligible if committed in less compacted suburban and rural areas of the state.

Verna Leath, the Hudson County public defender, says that except for a small area near the Holland Tunnel, all of her county is “zoned” under either the 1,000-foot drug-free school zone law or the 500-foot public park, housing project or public building law. She maintains that the situation raises serious equal-protection issues, since virtually all Hudson County residents are targeted for harsh penalties to which most residents in other counties are immune. The collateral consequences of this mandatory sentencing dragnet hit the families of defendants hard, especially since they are typically coupled with other “get-tough” measures – drug restraining orders that may prevent arrestees from returning to their homes and families if they are released from jail, or eviction of an entire family from public housing due to the arrest of one member on drug charges.

Leath says that Hudson County prosecutors are not unaware of the problems caused by such geographic injustice. They are frequently willing to consider taking drug cases outside the Brimage limitations altogether by allowing the defendant to plead to a conspiracy count, instead of requiring a plea to a charge that would have carried a mandatory minimum.

According to DOC officials, admission patterns for drug cases – though high — remain stable and consistent, with plea bargaining under the Brimage guidelines in most cases resulting in discounted mandatory minimum terms – e.g., minimum terms of 18 months, bargained down from the three-year terms set forth in the statutes.

Responding to the heavy influx of drug offenders, the Department of Corrections has managed to increase in-prison treatment from less than 200 treatment slots before the passage of CDRA to 1,400 in-prison “therapeutic community” beds. Use of community-based residential facilities, most with a drug treatment component, has increased significantly – from about 400 beds in 1987 to about 2,700 beds today. But according to DOC officials, the “special probation” law that allows for sentencing to treatment as an alternative to prison has never been extended to all eligible offenders, since provision of sufficient treatment facilities in the community would require a large increase in program funding.

ISSUE: A rigid “no-early-release” law will boost prison population levels for years to come

New Jersey’s 1997 “truth in sentencing” law, the “No Early Release Act” (NERA), requires that offenders convicted of violent crimes serve 85 percent of their sentence before becoming eligible for parole. Celebrated as a “victims’ rights” measure, NERA restricts parole eligibility for a range of first- and second-degree violent or dangerous offenses (murder, aggravated manslaughter or manslaughter, vehicular homicide, aggravated assault, disarming a police officer, kidnapping, aggravated sexual assault, sexual assault, robbery, carjacking, aggravated arson, burglary, extortion, booby traps, drug-induced deaths) and any offense where the offender used or threatened to use a deadly weapon, or caused the death or bodily injury of the victim.

NERA does not require that an offender receive a prison sentence, but the offenses to which it applies are subject to the statutory presumption of imprisonment for first- and second-degree offenses. These can be overcome only when a prison sentence would constitute “a serious injustice” of a magnitude that would override the need to deter others. Offenders sentenced under NERA are ineligible for sentencing alternatives involving rehabilitation programs and “special probation.”

For offenses covered by NERA, the judge sets a maximum term under the statutes, and then sets a minimum term to be served that is 85 percent of the maximum. If an offender is sentenced to a life term (construed to be 75 years), the applicable minimum term is 63 ³/₄ years.

Under a directive from the state attorney general, county prosecutors can not dismiss or down-grade a charge in a NERA case unless there is insufficient evidence to prove the charge. Once the charge is proved by a preponderance of the evidence, the 85 percent minimum requirement cannot be waived by the prosecutor. The requirement pertains to the total prison sentence imposed by the judge, including any years added for aggravating factors, or mandatory prison terms (e.g., such as for gun use under the Graves Act).

The Impact of NERA

Before NERA, most violent offenders served approximately half of their sentence before parole release. While dire predictions that NERA’s 85 percent rule would completely overwhelm the prison system have

not been borne out, the costs associated with its implementation will be very substantial.

An impact study of NERA by a team of researchers at the Rutgers School of Criminal Justice compared plea bargaining and sentencing practices before and after the measure took effect. Professor Candace McCoy found that New Jersey's judges and prosecutors would adjust their practices so as to somewhat blunt the effects of the stringent new law. Patrick McManimon, McCoy's research partner on the faculty at Marist College, says that before NERA judges sentenced below the sentencing presumptions in the codes on average. He says that if they had followed the presumptions, NERA would not have been seen as necessary by its proponents.

Charge bargaining (the practice of reducing an offense charge in exchange for a guilty plea) has not increased significantly under NERA, but prosecutors have used their discretion to arrange sentence bargains that – when approved by judges – have reduced the length of the prison terms imposed, typically moving them to the lower (“mitigated”) end of the presumptive range. And defense attorneys report that some judges go further than the terms agreed to in a plea bargain, sometimes making their own promise to discount the prison term by a year or two more, in acknowledgement that the offender will serve a very long term before becoming parole eligible. Notwithstanding these adjustments, NERA's “truth-in-sentencing” requirement results in actual prison terms significantly longer on average than those imposed before its enactment. However, sentences would be even longer if the 85 percent rule were applied without any adjustment in the prison terms.

DOC officials report that the prison system now contains about 1,800 prisoners sentenced under NERA since it was enacted in 1997. Many of these are reaching the point where (prior to NERA) they might have gained release. And approximately 40 to 50 new NERA offenders are admitted each month. The prison population continued to decline in the first half of 2002, but the rate of decline was slower.

DOC officials expect that the number of prisoners is moderating at current levels and will soon begin an upward trend due to the mounting effects of NERA. Prison population projections indicate that the state's prison population will remain relatively stable in fiscal year 2003. DOC officials say that the prison population should continue on this trend line for the next two or three years. The benefit of lower admissions and higher releases (if these trends continue) will be lost due to the increased length of stay for NERA cases, which will

continue to stack up in the prisons at a steady rate of about 600 per year. The system is less than half-way toward the 12 years it will take for the stock of NERA cases to reach a plateau level, after which releases should more-or-less offset admissions under NERA.

New Jersey's “three-strikes” law

Another of New Jersey's “get-tough” laws will have only a minimal effect on prison population levels. Under New Jersey's narrowly drawn three-strikes law, enacted in 1995, a sentence of life without parole is mandatory for a third conviction for murder, aggravated manslaughter, certain types of sexual assault, robbery or carjacking. The two prior convictions must both involve these same types of offenses. While New Jersey's “Three-Strikes” law carries the most severe mandatory sentence by far (life without parole) it is drawn so narrowly that, according to DOC officials, the impact on prison population this far has been negligible.

ISSUE: Early release from prison

Two avenues remain for those sentenced to prison for non-NERA offenses, who don't face – or have completed – a mandatory minimum term, to gain discretionary release before the expiration of their prison sentence.

The Intensive Supervision Program: Effective, but few are accepted

New Jersey's Intensive Supervision Program (ISP) – one of the most highly structured community supervision programs in the country – was designed to free up prison beds by allowing carefully selected prisoners to be re-sentenced to an intermediate sanction. The program was established in 1983 as a component of the Probation Services Division of the New Jersey Administrative Office of the Courts. All prisoners may apply for screening unless they are convicted of homicide, a sex offense, a crime of the first degree, or robbery – or were sentenced in connection with a finding of involvement in organized crime. Prisoners who are sentenced to a mandatory minimum term must wait until that period is served before making application to ISP. Those with extensive criminal records or a history of violence are ruled out. Just 19 percent of the 43,000 prisoners who have applied since 1983 have been accepted for ISP screening.

Before admission an applicant must develop a set of

personal goals for successful community reintegration, and an individualized case plan for securing steady employment, furthering their education, participating in substance abuse treatment if needed, paying financial obligations, and so forth. Each applicant must secure a “community sponsor” and develop a “network team” of people to help them implement their case plan. The applicant’s sentencing judge and prosecutor are contacted for a recommendation regarding program admission. The results of the application process are submitted to review by an ISP screening board made up of three citizens. If approved, the case is then sent to a three-judge ISP re-sentencing panel for their consideration.

Compared to traditional probation, ISP is very resource-intensive. Caseloads are held to a 20-participant maximum per ISP officer. Field visits are prioritized over office appointments. In fiscal year 1998 this level of supervision carried an annual price tag of more than \$7,000 per participant, but this represented a very favorable cost comparison to the \$31,000 incurred for a year in prison.

At the heart of each ISP supervision plan is the firm requirement of gainful employment. During the first half of 2000 program records showed an average full-time employment rate of more than 95 percent. In addition to holding down a job, ISP requires participants to perform 16 hours of community service each month.

By mid-year 2000 8,237 prisoners had been released to ISP. They were primarily drug and property offenders (57 and 24 percent respectively), and approximately one-third were first-time offenders. The program had returned 3,210 to custody – a revocation rate of 39 percent – including 2,431 returned for technical violations such as failing drug tests or violating curfews. Some 3,700 had graduated, while 1,224 remained under active supervision.

A recent recidivism study examined the arrest records for all of the 2,720 offenders who had graduated from ISP by October 15, 1997. The findings were very positive. These graduates had been out of prison and living in the community for an average of seven years. Just 7.9 percent had been convicted of an “indictable offense” (comparable to a felony offense in other jurisdictions) and 5.3 percent had been convicted for a “disorderly person” offense (comparable to a misdemeanor).

Parole in New Jersey

On the heels of the 1979 code revision the legislature refashioned the state’s parole policies, establishing a system of presumptive parole dates. The parole board would set a specific period of imprisonment (typically one-third of the sentence minus good-time and work credits) for each prisoner, after which – absent adverse circumstances – they could expect to gain release to parole supervision. But as mandatory minimum laws piled up, the proportion of prisoners barred by law from presumptive parole release increased.

In 1995 parole policies and practices were sharply tightened after Robert “Mudman” Simon, a Pennsylvania parolee, moved to New Jersey and murdered a Franklin Township police officer who pulled him over while investigating a burglary. State law still mandates that prisoners receive a parole hearing after serving about one-third of their prison term, but the chances of approval at the initial hearing are now dimmer. In the late 1990s parole approval rates declined (dropping from 69 percent in 1998 to 56 percent in 1999) but remained relatively high in comparison to most states.

During this same period the parole process became clogged with a huge backlog of cases, causing many months of delays in parole grants. At the zenith of the backlog, the parole hearing process was behind schedule for thousands of prisoners. In the summer of 2000 the state’s prisoners brought a court challenge, forcing the parole board to address the backlog problem. The parole rate increased to 60 percent last year after the class-action law suit was settled in January 2001. A new commissioner, Mario Pappozzi, introduced more efficient management techniques to speed up case processing and was able clear up the backlog in a matter of months.

Overall, the number of prisoners who gained release from New Jersey’s prisons nearly doubled in the last decade – from 9,779 in 1991 to 16,032 in 2001. The number released without parole increased nearly 400 percent – from 1,376 to 5,340 during the same period. Since the backlog has been cleared and more prisoners are granted parole, New Jersey parole officials expect the number leaving prison without parole supervision to decline.

ISSUE: Too many return to prison for purely technical parole violations

Currently, of approximately 14,000 admissions to prison each year, about one-third are technical parole violators. DOC officials point out that many of those returned are sent back to prison for minor violations of parole conditions, but neither the Parole Board nor the DOC have yet established uniform guidelines for handling cases such as these in the community. The Parole Board has initiated a project to create such standards with technical support from the National Institute of Corrections.

ISSUE: The need for a thorough review of sentencing laws and policies

In November 2002, Devon Brown, commissioner of corrections, unveiled a broad and ambitious plan to improve New Jersey's prison system. He called for a construction program to replace dilapidated, substandard prisons and refurbish others, and for upgrading and expanding in-prison education, substance abuse treatment, and parenting programs. He also urged the state's policymakers to review the mandatory sentencing statutes, such as the Drug-Free School Zone law, that have increased sentence lengths and fueled prison population growth. Revisions in the handling of technical parole violators that the commissioner proposed could further reduce the need for between 225 and 350 prison beds.

It has been many years since New Jersey policymakers studied the overall workings of their sentencing and correctional system. With enactment of Title 2C in 1978, the New Jersey legislature created the Criminal Disposition Commission to review all aspects of the criminal justice system related to criminal penalties, including pretrial release, imprisonment and probation, treatment interventions, monetary sanctions and parole. The commission served for many years as a strategic planning body for the criminal justice system, analyzing dispositional data and sentencing trends, and evaluating the effectiveness of the state's laws and policies. Until 1992 its annual reports to the legislature recommended improvements such as strengthening probation and parole supervision systems and expanding use of intermediate sanctions and alternatives to incarceration. In fiscal year 1993 funds for the commission were eliminated from the state budget.

That same year a sentencing commission was created to review the state's laws, policies and practices af-

fecting sentencing, incarceration, and parole of offenders. The Sentencing Policy Study Commission (SPSC) found that while crime rates fell between 1980 and 1992, arrests increased by 32 percent. The percentage of offenders confined for drug crimes increased from 11 percent in 1975 to 35 percent by 1992. Working with John DiIulio and Ann Piehl as consultants, the commissioners determined that no single factor could be blamed for prison population growth. They concluded that the system did not need a major overhaul, but rather, an infusion of adequate resources for probation and parole – particularly in the critical areas of drug treatment, juvenile justice, and intermediate sanctions.

Since the SPSC report was issued in 1994, no public policy councils or commissions have been convened for close examination of sentencing issues. Commissioner Brown has now called for re-establishing the Criminal Disposition Commission and broadening its scope. He also recommends establishing a statewide commission for the specific purpose of examining the impact and effectiveness of mandatory minimum sentences.

One initiative along these lines is already pending on the legislative agenda. In September 2002 the chair and vice-chair of the New Jersey Assembly Law and Public Safety Committee – Rep. Peter J. Barnes, Jr. (Middlesex) and Rep. Mary T. Previtte (Camden) – introduced A. 2750, a bill that would establish a 15-member sentencing commission. Sen. John Adler (Cherry Hill) and Sen. Nia Gill (Montclair) introduced the companion senate bill, S.2215. The new commission would be charged with reviewing the fairness and proportionality of all the new criminal offense codes and enhanced penalties that have been introduced since 1978, when Title 2C was enacted to restructure the criminal code.

For up-to-date information on New Jersey sentencing, please visit www.famm.org or www.smartoncrime.org.

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About FAMM and the Smart On Crime campaign

The Smart On Crime campaign is a project of Families Against Mandatory Minimums (FAMM). FAMM is a national non-partisan, non-profit organization founded in 1991 in response to inflexible and excessive penalties required by mandatory sentencing laws. FAMM promotes sentencing policies that give judges the discretion to distinguish between defendants and sentence them according to their role in the offense, seriousness of the offense and potential for rehabilitation. FAMM's 30,000 members include prisoners and their families, attorneys, judges, criminal justice experts and concerned citizens.

FAMM works with legislators, law enforcement, criminal justice experts, the media and citizens to provide public education and implement cost-effective criminal justice policies that increase judicial discretion while protecting public safety. FAMM provides support to policy makers concerned about the high fiscal and human costs of mandatory minimums sentencing and related policies, such as three-strikes laws, "truth in sentencing," disproportionately harsh sentences, and parole disqualifiers.

For more information on the Smart On Crime campaign, please visit www.smartoncrime.org, or FAMM's website, www.famm.org.

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