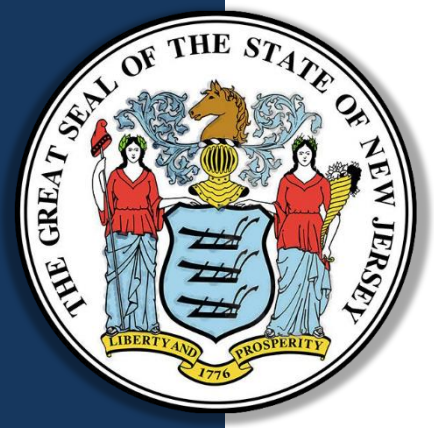

New Jersey Criminal Sentencing & Disposition Commission

March 2023 Report

COMMISSION MEMBERS

CHAIR
Chief Justice Deborah T. Poritz
(Ret.)
Governor's Appointee

VICE CHAIR
Donald A. DiGioia
Senate Minority Leader's
Appointee

Jiles Ship
Governor's Appointee

Senator Sandra B. Cunningham
Senate President's Appointee

James Nolan
Assembly Speaker's Appointee

Aidan P. O'Connor
Assembly Minority Leader's Appointee

Hon. Edwin Stern (Ret.)
Chief Justice, Designee

Matthew J. Platkin
Attorney General

Joseph E. Krakora
Public Defender

Victoria Kuhn
Commissioner, Department of Corrections

Samuel J. Plumeri, Jr.
Chairman, State Parole Board

Angelo Onofri
County Prosecutors Association of New Jersey, Designee

Brian J. Neary
New Jersey State Bar Association, Designee

Table of Contents

Part I: Introduction and Summary

The First Report of the Criminal Sentencing and Disposition Commission ("CSDC" or "Commission") was issued in 2019, about a year after Governor Murphy initiated the appointment process called for in the CSDC's enabling legislation signed by Governor Corzine in July 2009. In that Report, the CSDC presented an historical overview of the New Jersey Criminal Code from the time it was enacted in 1979 through to the time the Report was prepared in 2019, including major amendments in support of the "tough on crime" mantra sweeping the nation during those years and in response to particular crimes committed in New Jersey. The Report described a period of mass incarceration, and of "fundamentally inequitable racial and ethnic disparities that are a major feature of New Jersey's prisons." Whatever had been intended by the Code's drafters, the actual results were devastating.

In conducting its historical review, the Commission members learned that the punitive goals of the system, which were based on mandatory and lengthy prison terms, did not deter criminal activities and make us safer but, instead, destroyed lives and prevented rehabilitation. And, we learned that people of color were disproportionately arrested, sentenced to long prison terms, and released without assistance to a world they could not navigate. We relied on data pulled from multiple sources - the courts, corrections, parole, among other

sources - and we made our first recommendations, which were focused primarily on reducing mandatory minimum sentencing and providing opportunities for rehabilitation for young offenders. We anticipated that these basic reforms would reduce prison populations, maintain public safety, and begin to address the racial disparities that distort the criminal justice system.

The Commission issued its Second Report in 2022. The COVID pandemic had delayed our work and prevented the mining of data from those multiple sources. Our charge required the use of factual Information about the length of prison terms, levels of recidivism, and racial disparities, among other things, in order to better understand how the system worked in the real world and to make recommendations for reform. Arnold Ventures supported our efforts by funding criminal justice scholars who participated through the Rutgers Technical Assistance Team ("Rutgers Team") and who searched the available data for the CSDC. Arnold Ventures also supported the Office of the Attorney General ("OAG") in carrying out the consolidation of the various data bases located in different parts of the system, a project that is currently underway.

In our Second Report, we expressed our concern that the reduction in mandatory minimum sentencing and other reforms related to juveniles recommended in our First Report had not been enacted, despite widespread support, and we urged further consideration of these reforms by the Legislature. In anticipation of our next Report, we presented a framework for future work on

"new proposals … designed to reduce racial disparities and bring greater justice to the justice system in our State."

In this Third Report, we present three of those new proposals as Proposed Sentencing Reforms C, D, and E, along with another important reform brought to the CSDC's attention by one of our members, Commissioner of Corrections, Victoria Kuhn, and described in Proposed Sentencing Reform B. However, once again, our first recommendation is not new. In Proposed Sentencing Reform A, three years after initially presented, we are asking for the elimination of mandatory sentences for non-violent drug offenses and the creation of "Look Back" legislation to review the sentences imposed on juveniles who are now serving thirty years or more. We urge the passage of these fundamental reforms without further delay.

And, finally, the four remaining discrete recommendations, B, C, D and E (see Table of Contents headings) are self-explanatory, self-evident, and long overdue. Based on the data reviewed by the Commission, our members have determined that these recommendations, if enacted, will reduce racial disparities, address inequities in sentencing and advance the goal of rehabilitation, all primary goals of our enabling legislation.

The recommendations in this Third Report have been considered and approved by the members of the CSDC. Senator Cunningham, as a member of the CSDC, supported these recommendations and was an active participant

in their development during the period after the Second Report was issued and until late September 2022.

Part II: Proposed Sentencing Reforms

A. Areas Identified in the First Commission Report

In its November 2019 and January 2022 reports, the Commission unanimously recommended comprehensive reforms to New Jersey's criminal justice system to address the problem of mass incarceration that has been driven, in part, by shortcomings in our adult and youth sentencing schemes. While several of these recommendations have been enacted, many have not, including the recommendations to eliminate mandatory minimum sentences for non-violent drug offenses and to provide the possibility of release for offenders who were sentenced to thirty years or more of imprisonment as children.[1] The Commission strongly urges

[1] With regard to the recommendation to eliminate mandatory minimum sentences for non-violent drug offenses, the bills referenced in the 2022 CSDC report that relate to this issue (S2586/A4369, S3363/A5266, S3456/A5385 and A5641/S3658) have not been reintroduced during the current legislative session. With regard to youth resentencing, S2591/A4372 of the 2020-2021 legislative session, which provides for the resentencing of certain inmates, has been reintroduced during the current legislative session as S763.

In its November 2019 report, the Commission also unanimously recommended the elimination of mandatory minimum terms for the following non-violent property offenses: first degree computer hacking (N.J.S.A. 2C:20-25(g)); hacking of a government computer (N.J.S.A. 2C:20-25(h)); second degree release of hacked data (N.J.S.A. 2C:20-31(h)); second conviction for leader of a cargo theft network (N.J.S.A. 2C:20-2.4(e)); second conviction for theft from a cargo carrier (N.J.S.A. 2C:20-2.6(c)); and third conviction for shoplifting (N.J.S.A. 2C:20-11(c)(4)). This recommendation

the Legislature to expeditiously adopt these unanimously approved recommendations.

1. Elimination of Mandatory Minimum Sentences for Non-Violent Drug Offenses.

As described in the Commission's January 2022 report, the Attorney General, in the absence of our recommended legislation to eliminate mandatory minimum sentences for non-violent drug offenses, issued a Law Enforcement Directive on April 19, 2021 ("Directive"), instructing prosecutors statewide to use existing statutory authority to waive the imposition of mandatory minimum sentences for these offenses. On January 18, 2022, the Superior Court, Appellate Division upheld, with modifications, the portion of the Directive that provides for the elimination of mandatory minimum sentences for those sentenced prior to its effective date. However, mandatory minimum sentences for non-violent drug offenses remain authorized by statute in New Jersey and action by the Legislative branch will reaffirm New Jersey's commitment to the continued elimination of a mandatory sentencing scheme that has been the largest contributor to racial disparity in our prison system. Indeed, the elimination of mandatory minimum sentences for non-violent drug offenses remains an essential component of the Commission's efforts to reform New

---

was not adopted by the Legislature, and no bills related to this recommendation are currently pending.

Jersey's sentencing laws and reduce the racial disparities created by those laws. Accordingly, the Commission urges the Legislature to eliminate mandatory minimums for non-violent drug offenses in accordance with Recommendations One and Two from the Commission's 2019 report.

2. Creation of a Youth "Look-Back" Statute to Review Sentences Imposed on Offenders Who Were Sentenced as Children to Thirty Years or More of Imprisonment.

The Commission also urges the Legislature to adopt Recommendation Six from its November 2019 report, creating an opportunity for the resentencing or release of offenders who were children at the time of their offenses and were sentenced as adults to long prison terms. Over the past decade, a consensus has emerged that youth offenders are categorically less culpable and more amenable to rehabilitation than adults. This consensus has led to sweeping changes nationwide in the sentencing of youth offenders, but New Jersey still has not enacted legislation that would provide for the resentencing of offenders who were children at the time of sentencing. Last year, the New Jersey Supreme Court decided State v. Comer, 249 N.J. 359 (2022), creating a mechanism for those convicted of murder as children to petition the court for review of their sentences after 20 years. While Comer provides a resentencing opportunity for many, others who were sentenced to lengthy prison terms as children have not had an opportunity for resentencing.

The Commission's comprehensive recommendation provides that a youth offender sentenced as an adult to a term of 30 years or more would be entitled to

apply to the trial court for resentencing after serving 20 years. At the resentencing, the court could modify or reduce the sentence to any term that could have been imposed at the time of the original sentence, based on the diminished culpability of youth as compared to adult offenders. Relevant factors for the court to consider include chronological age and immaturity, impetuosity, and the failure to appreciate risks and consequences. The Commission urges the Legislature to act on this recommendation, ensuring that all those serving lengthy sentences for crimes committed as children have realistic and meaningful opportunities to obtain release.

B. Create a New Mitigating Sentencing Factor for Defendants Who Are Survivors of Abuse by Their Victims.

When determining a defendant's sentence, the judge must consider a number of statutorily defined aggravating and mitigating factors under N.J.S.A. 2C:44-1. The CSDC recommends that the Legislature create a new mitigating factor that allows judges to consider prior abuse of a defendant if it was inflicted by the victim of the crime for which the defendant is being sentenced. Currently, none of the 14 mitigating factors explicitly provide for consideration of prior physical, sexual, or psychological abuse. Rather, the most commonly applied factor for situations of prior abuse, when appropriately found by the sentencing judge, is mitigating factor four, which states broadly "[t]here were substantial grounds tending to excuse or justify the

defendant's conduct, though failing to establish a defense[.]"[2] The question whether the existing broad mitigating factor is sufficient or whether a standalone mitigating factor is warranted under N.J.S.A. 2C:44-1(b) was the basis for the Commission's discussion in developing this recommendation.

There is extensive research focused on the impact of abuse on character and conduct. We now understand that abused individuals tend to experience a variety of negative health outcomes, such as depression, suicide ideation, post-traumatic stress, alcohol or drug abuse, and even violent behavior.[3] Indeed, one study found a national consensus existed that mitigating factors associated with the conduct of victims and others in the commission of the defendant's crime should be considered at sentencing, including "when the victim had previously subjected the defendant or the defendant's family to physical or sexual abuse."[4]

With this research in mind, the New Jersey Department of Corrections ("DOC")

---

[2] See State v. Briggs, 349 N.J. Super 496, 504 (App. Div. 2022) (remanding for trial court reconsideration of aggravating and mitigating factors, including consideration of factor four).

[3] See, Centers for Disease Control and Prevention, Adverse Childhood Experiences (ACEs), https://www.cdc.gov/violenceprevention/aces/index.html; Shilo St. Cyr et al., Intimate Partner Violence and Structural Violence in the Lives of Incarcerated Women: A Mixed Method Study in Rural New Mexico, 18 Int'l J. of Envtl. and Pub. Health 6185 (2021), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8228824/pdf/ijerph-18-06185.pdf; see also State v Kelly, 97 NJ 178 (1984).

[4] Carissa Byrne Hessick & Douglas A. Berman, Towards a Theory of Mitigation, 96 Boston Law Review 161, 191-92.

studied the female inmate population and found that of the 337 incarcerated people in the Edna Mahan Correctional Facility, approximately 76% of them were incarcerated for a violent offense; and, of that 76%, 21% committed a violent offense against an intimate partner, 34% committed a violent offense against a family member or person in their care, and 23% committed a violent offense against a known acquaintance or residential partner. DOC staff also reviewed presentence reports for the inmates in the women's facility, which indicated that approximately 72% of the inmates who were first time offenders and convicted of a violent crime were abused by the victim of the crime for which they were serving their sentences.

Based on the research and data, the members of the Commission recommend implementation of a new mitigating factor to apply prospectively[5] and to read as follows:

> The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime.

As with all aggravating and mitigating factors, determining applicability and weight to be given to this new mitigating factor would remain within the sentencing judge's discretion. For example, in determining weight, sentencing judges can look to when the abuse occurred, the duration of the abuse, and any other available support such as expert reports. A standalone mitigating factor as recommended will

[5] The Commission is considering, in its continuing work, whether there should be a one-time retroactive application of the new mitigating factor.

ensure consideration of defendants' past abuse by the victims of their current crimes, while leaving application to the sentencing judge based on credible evidence presented. Discretion to apply and weigh aggravating and mitigating factors continues to remain with the sentencing judge.

The Commission notes that implementation of this recommendation does not foreclose application of other mitigating factors, especially where circumstances of prior abuse do not fall squarely within the new mitigating factor. For example, a defendant may nonetheless assert that past abuse contributed to the individual's current conduct even where the victim was not the defendant's past abuser, and the judge may consider and apply other mitigating factors, such as mitigating factor four, when appropriate.

C. Establish a Rehabilitative Release Program Allowing Inmates Who Reach a Certain Age and Length of Incarceration to Apply to a Judge for Resentencing Based on Proof of Rehabilitation.

As outlined in its first two reports, the CSDC has continued to examine the possibility of a program of rehabilitative release for certain inmates. Based on that data collection and analysis, the Commission now submits a proposal that would allow inmates who reach a certain age and length of incarceration to apply to a judge for resentencing by proving that they have been sufficiently rehabilitated.

Evidence reviewed by the CSDC shows that as people get older, they are less

likely to engage in crime.[6] The same is true for recidivism – one study found that of those convicted of violent crimes, only one percent of individuals released at age 55 or older were reincarcerated for new crimes within three years.[7] New Jersey-specific data shows a similar decrease in the recidivism rate the older an inmate is at release.[8] Thus, even before inquiring into the rehabilitative efforts of a specific individual while incarcerated, the general likelihood of a person released from custody at age 60 or older committing new crimes is significantly lower than that of younger individuals.

In addition to those facts about age and crime, the CSDC recognizes the value in providing incarcerated persons with an incentive to use their time in custody productively, in order to position themselves for successful lives post-incarceration. This recommendation for a "Rehabilitative Release" program would provide such a reason for inmates to, for example, pursue programing, further their education, learn a trade, seek mentors, and foster mentees during their time in prison. Each of those

---

[6] Families for Justice Reform (FAMM), The Older You Get: Why Incarcerating the Elderly Makes us Less Safe, https://famm.org/wp-content/uploads/Aging-out-of-crime-FINAL.pdf; The Sentencing Project, A Second Look at Injustice, https://www.sentencingproject.org/app/uploads/2022/10/A-Second-Look-at-Injustice.pdf.

[7] FAMM, The Older You Get, supra.

[8] State of New Jersey, Department of Corrections, State Parole Board, Juvenile Justice Commission, 2015 Release Cohort Outcome Report: A Three-Year Follow Up, available at https://www.state.nj.us/corrections/pdf/offender_statistics/2015_Release_Recidivism_Report.pdf.

activities would not only advance the individual's self-improvement during incarceration, but also would provide support for the individual's argument to the court for resentencing. As a result, this policy proposal would promote the rehabilitative function of our penal facilities and result in cost-savings to the State when eligible persons are released.

A Rehabilitative Release program would be distinct from other CSDC recommendations regarding compassionate release and youth resentencing, which focus on incarcerated persons with debilitating medical conditions and those who were children tried as adults, respectively. It would also be distinct from the 2020 "Earn Your Way Out" legislation that created a process of "administrative parole" in order to streamline the release of certain inmates upon parole eligibility. Rehabilitative Release, in contrast, would focus on older inmates – who have served lengthy sentences and shown significant rehabilitation – and provide them with legal representation when they make a motion for release before a court.

We therefore recommend the following framework for a Rehabilitative Release program:

- **Eligibility.** The Commissioner of Corrections will issue a Certificate of Eligibility to any inmate 60 years of age or older who has served more than 20 years of a term of imprisonment, except for those inmates serving convictions for murder. In those cases, the inmate must be 62 years of age or older and have served more than 30 years of a term of imprisonment.

- **Motion.** An inmate issued a Certificate of Eligibility can file a motion in the Superior Court where the inmate was originally sentenced for a resentencing. An inmate may file only one such motion.

- **Standard.** To succeed on the motion, an inmate must prove by clear and convincing evidence that (1) the inmate is not a danger to the community, (2) the inmate has demonstrated readiness for reentry, and (3) the interests of justice warrant a sentence modification. In order to establish readiness for reentry, the inmate must demonstrate significant efforts to participate in educational, therapeutic, or vocational opportunities while incarcerated. In applying this standard, a court will consider the following factors:
    - Inmate's age at the time of the offense;
    - Inmate's age at the time of the petition;
    - The history and characteristics of the inmate at the time of the petition, including (1) rehabilitation demonstrated by the inmate and (2) disciplinary record while incarcerated;
    - Any statement by the victim or the victim's relative;
    - Any report from a physical, mental, or psychiatric examination of the inmate conducted by a licensed health care professional;
    - Seriousness of the offense and the inmate's role;
    - Potential benefits to children and family members of reunification with the inmate;
    - Potential cost savings to the State;
    - Establishment of a reentry plan for the inmate on release, to include a community sponsor, housing, and livelihood; and
    - Any other information the court deems relevant.
- **Hearing.** The court will hold a hearing on the motion. The inmate will have the right to be present, which may be satisfied by video teleconference, as well as the right to counsel. The court shall have the option to reduce the sentence or deny the petition.
- **Victims.** The victim or the nearest relative of a homicide victim will be notified of a motion and have the right to make a statement in writing and at the

hearing.

- **Parole.** Any inmate who receives a new sentence will also be sentenced to a five-year term of parole supervision. The State Parole Board will initiate standard pre-parole investigation into post-release housing for any inmate granted a Certificate of Eligibility.

- **Appeal.** Both the inmate and the prosecutor will have the right to appeal the court's decision.

This proposed legislation would be the first of its kind in the country. According to the DOC, between two to three hundred inmates in the New Jersey prison system would currently be eligible to file a motion under this framework if in effect today. If enacted, the CSDC will evaluate the legislation's effectiveness and consider subsequent recommendations for improvements, where appropriate.

D. Implement Practical and Equitable Reform Relating to Financial Penalties Assessed by Courts at Sentencing.

Data examined by the CSDC tell a disturbing story about the consequences of fines, fees, penalties, and assessments imposed on criminal defendants under the New Jersey Criminal Code. The large majority of these Legal Financial Obligations ("LFOs") are required regardless of the person's income or ability to pay and despite the adverse effects on the rehabilitation of those unable to pay. Moreover, we know that the current system has dramatic and disproportionate impacts on people of color who live in our urban communities and who are not in a position to meet these financial obligations. And, we know that the State of New Jersey collects a shockingly low amount of the LFOs imposed. For example, based on figures provided

by the Administrative Office of the Courts ("AOC") pertaining to persons on probation as of May 20, 2022, New Jersey collects only 20.58% of the LFOs imposed, suggesting that the costs of running the collection system may well be greater than the monies actually collected. In short, we know that the system is broken.

The CSDC recommends practical and equitable adjustments to address assessments against defendants who are unable to pay, to bring down the amount of uncollectible debt, and to reduce, by those adjustments, the substantial racial disparities now built into the system. We begin with the elimination of all mandatory LFOs, their replacement with discretionary assessments based on the offenders' ability to pay, and the distribution of monies collected in accordance with the scheme set forth in N.J.S.A. 2C:46–4.1.[9] And, finally, we suggest other adjustments to the manner in which assessments are calculated which, we anticipate, will actually increase the amounts collected by keeping the amounts due within a range that people with few resources can manage as they attempt to rebuild their lives.

In the following sections of this proposal, the CSDC will present, more specifically, the reasons why these reforms are needed and how they should be implemented.

1. New Jersey Imposes Substantial LFOs on Indigent Defendants That Are Never Collected Despite Costly Collection Efforts, That Prevent Rehabilitation, and That Have Disparate Impact on People of Color.

[9] N.J.S.A. 2C:46-4.1 prioritizes the LFOs that will be satisfied by moneys collected, in order, beginning with the Victims of Crime Compensation Board assessment and ending with the Sex Offender Supervision Penalty and other non-delineated fines.

The current LFO system is a largely mandatory, one–size–fits–all scheme that imposes substantial LFOs on people who have no realistic possibility of paying them. Indeed, all adults convicted of a crime are automatically assessed at least $155 in LFOs, see N.J.S.A. 2C:43-3.1 to 3.3[10] and, with few exceptions, will incur additional, mandatory LFOs based on the offenses for which they were convicted. By way of example, persons convicted of a single third-degree possessory drug offense will automatically be liable for at least another $1,050 in mandatory LFOs, see N.J.S.A. 2C:35-15; N.J.S.A. 2C:35-20,[11] and will be required to pay additional mandatory amounts if they are sentenced to probation, N.J.S.A. 2C:45-1d,[12] or seek supervisory

[10] N.J.S.A. 2C:43-3.1 imposes a minimum assessment of $50 per conviction toward the Victims of Crime Compensation Board; N.J.S.A. 2C:43-3.2 imposes a $75 assessment per conviction toward the Safe Neighborhoods Services Fund; and N.J.S.A. 2C:43-3.3 imposes a $30 penalty toward the Law Enforcement Officers Training and Equipment Fund.

[11] N.J.S.A. 2C:35-15 imposes a mandatory Drug Enforcement and Demand Reduction penalty, per drug offense, of $500 for disorderly person offenses, $750 for fourth-degree offenses, $1,000 for third-degree offenses, $2,000 for second-degree offenses, and $3,000 for first-degree offenses. N.J.S.A. 2C:35-20 imposes a mandatory $50 forensic laboratory fee per drug offense.

[12] N.J.S.A. 2C:45-1d imposes a mandatory probation fee of up to $25 per month, which may only be waived in cases of indigency upon application to the sentencing court by the chief probation officer.

treatment, N.J.S.A. 2C:43-13.[13] In the year 2019, New Jersey courts imposed over $109,421,992 in LFOs at sentencing.[14]

Yet, most defendants sentenced in New Jersey have limited means and are represented by attorneys from the Office of the Public Defender ("OPD"). When we consider estimates from the OPD suggesting that over 90% of all defendants are in this group, it is not surprising that only 20.58% of the LFOs imposed on persons on probation as of May 20, 2022, have been collected. The reforms we propose recognize the cost to the system of trying to collect substantial monies that simply cannot be collected from persons who are indigent and without resources. CSDC members have consulted with the members of the Rutgers Team, who have looked into the actual costs of this effort and have been unable to provide precise numbers because of the complexities in how those costs are distributed, which include, among other things, the contracts with private collection agencies hired by the State and salary amounts attributable to collection when the employee carries out other tasks as well. Yet, when we consider that the large percentage of LFOs are not collected, we can conclude that the monies expended on collection are, at the very least, not achieving their purpose.

[13] N.J.S.A. 2C:43-13 imposes a $75 fee to apply to a supervisory treatment program.

[14] Criminal history report from the New Jersey State Police database (includes all persons sentenced in 2019).

Moreover, the imposition of excessive mandatory LFO's is not simply inefficient; it has devastating impacts on the people who carry the resulting debt, particularly on those who are indigent. People who are unable to pay their LFO's may lose their drivers' licenses, violate a condition of probation, or even face incarceration, see N.J.S.A. 2C:46-1b(1) and N.J.S.A. 2C:46-2.[15] In addition, outstanding LFOs reduce credit scores, limit housing/employment opportunities, and prevent access to federal benefits.[16] There is no question that outstanding LFOs constitute a "catch-22" of obstacles to rehabilitation.

While the harms posed by mandatory LFOs affect the large majority of individuals in the criminal legal system, the impact of these barriers to reintegration fall disproportionately on Black people. In 2019, for example, people classified as Black accounted for 39.12% of those sentenced, even though in 2019 only 15.3% of

[15] N.J.S.A. 2C:46-1b(1) requires that the payment of certain LFOs be made a condition of probation and affords courts discretion to make the payment of other LFOs an additional condition of probation. N.J.S.A. 2C:46-2 allows for the issuance of summonses and arrest warrants when a person fails to pay their LFOs and, in a case of default without good cause, the suspension of the person's driver's license.

[16] Alicia Bannon et al., Criminal Justice Debt: A Barrier to Reentry 27-28, Brennan Center for Justice (2010), https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf; Urban Institute, Fines, Fees, and Forfeitures (Sept. 27, 2022); Puja A. Upadhyay et al., Why Inequitable and Burdensome Court-Issued Fines and Fees Are a Health Issue - and what Health and Policy Leaders Can Do About It 7, Camden Coalition of Healthcare Providers (2021), https://camdenhealth.org/wp-content/uploads/2021/12/CCH-Fines-Fees-Brief-Oct-2021-2.pdf.

New Jersey's residents were classified as Black.[17] New Jersey incarcerates Black people at twelve-and-a-half times the white incarceration rate - the highest disparity of any state in the nation - and incarcerates Hispanic people at double the white incarceration rate.[18] Whether intended, or not intended, the inequities that we have described cry out for reform.

2. Proposed Legislative Changes that Increase Sentencing Discretion to Eliminate Excessive LFOs, Establish Payment Priorities, and Reduce the Amounts of Certain LFOs.

The Commission's model for reforming our system of assessing LFOs is designed to streamline the assessment process, eliminate mandatory LFOs, and focus on the defendant's ability to pay. Under the CSDC's recommendations, the judge, at the time of sentence, would determine the defendant's total financial obligation. The CSDC notes that the sentencing judge has access in every case to the Presentence Investigation Report, which contains the Uniform Defendant Intake ("UDI"). The UDI provides an extensive history of the offender, including information related to employment, income, financial obligations, debt, and education. Judges already rely on this information when determining an offender's ability to pay restitution and

---

[17] United States Census, Quick Facts New Jersey, https://www.census.gov/quickfacts/fact/table/NJ/POP010220.

[18] The Sentencing Project, State-by-State Data, https://www.sentencingproject.org/the-facts/#detail. The state-by-state Sentencing Project data for New Jersey covers 2021.

discretionary fines, and we anticipate that those judges would follow the same well-established approach in effectuating the CSDC's proposals.[19] In addition, the CSDC has identified the following non-exhaustive factors that it believes can be appropriately considered in the determination of ability to pay: (1) income relative to an identified percentage of the Federal Poverty Guidelines; (2) whether the individual is to be placed on probation or will be incarcerated; (3) level of education; (4) ability to work and employment status; (5) whether the individual receives or has income-based public assistance, financial resources and assets, financial obligations and dependents; (6) cost of living; and (7) other fines and fees owed to courts.

After the sentencing court sets a total amount of LFOs to be assessed,[20] that amount would be allocated to the applicable funds in accordance with N.J.S.A. 2C:46-4.1, which prioritizes, in order, the: (1) Victims of Crime Compensation Board, N.J.S.A. 2C:43-3.1; (2) Safe Neighborhoods Services, N.J.S.A. 2C:43-3.2; (3) Forensic

---

[19] Focusing on the person's ability to pay is consistent with the process for determining Sex Crime Victim Treatment Fund ("SCVTF") penalties, State v. Bolvito, 217 N.J. 221, 234 (2014), as well as restitution and other discretionary fines. See N.J.S.A. 2C:44-2a (stating courts "may sentence a defendant to pay a fine" if, among things, "[t]he defendant is able, or given a fair opportunity to do so, will be able to pay the fine"); N.J.S.A. 2C:44- 2b (imposing same consideration for restitution). It also goes without saying that focusing on the person's ability to pay is essential to avoiding the imposition of excessive financial obligations.

[20] The CSDC understands that the Supreme Court and the AOC have the authority to facilitate this process by developing appropriate guidelines and by adopting Court Rules through the Criminal Practice Committee.

Laboratory Fee, N.J.S.A. 2C:35-20; (4) Drug Enforcement and Reduction Penalty, N.J.S.A. 2C:35- 15; (5) Anti-Drug Profiteering Penalty, N.J.S.A. 2C:35A-1; (6) Anti-Money Laundering Profiteering Penalty, N.J.S.A. 2C:21-27.2; (7) Supervisory Treatment and Conditional Discharge Assessment, N.J.S.A. 2C:43-3.5; (8) Sexual Assault Nurse Examiner Program Assessment, N.J.S.A. 2C:43-3.6; (9) Sex Crime Victim Treatment Fund Penalty, N.J.S.A. 2C:14-10; (10) Computer Crime Prevention Penalty, N.J.S.A. 2C:43-3.8; (11) Sex Offender Supervision Penalty, N.J.S.A. 30:4-123.97; (12) any other fines, fees, assessments, or penalties. The CSDC recommends that all relevant statutes be amended to remove language mandating the imposition of LFOs in favor of discretionary language, such as by changing "shall" to "may" and by removing all language regarding "fixed" or "mandatory" LFOs.

Under this proposal, the hierarchy of payment in N.J.S.A. 2C:46-4.1 remains unchanged, that is the VCCB will remain the first priority for distribution of the moneys collected, followed by Restitution, Safe Neighborhood Services, the Forensic Lab Fee, and the Drug Enforcement and Reduction Penalty.

Finally, the Commission anticipates that basing the system on ability to pay will actually result in increased payments by offenders. In the experience of the OPD, representing criminal defendants with limited means, those persons facing a manageable total amount in LFOs are more likely to make payments knowing that the elimination of their debt is realistic. The Commission therefore proposes reducing certain fines and fees in addition to basing assessments on ability to pay. It is our

expectation that this proposal will result in a higher percentage of offenders making payments and that these changes will result in a fairer and more equitable system.

We therefore recommend that LFOs should be imposed per indictment, rather than per offense, to further reduce the risk of excessive financial obligations. We also recommend that certain LFOs that run counter to the goal of rehabilitation -- such as fees to apply to supervisory treatment and for making court payments -- be repealed entirely.

To ensure that the new system does not negatively impact support services for directly affected individuals, such as those seeking support from the Victim Crime Compensation Fund and the Domestic Violence Victim Fund, the CSDC urges the Legislature to appropriate monies to these funds as needed.

The CSDC's proposed reform of our system of assessing LFOs in criminal cases would accomplish the goal of reducing racial disparities and eliminating the excessive and uncollectible financial obligations that burden the system and negatively impact the lives of thousands of New Jersey criminal defendants trying to rehabilitate themselves. We recommend that our proposals be made prospective only, with the hope and expectation that judicial vacancies will be filled quickly so that our goals can be readily accomplished without interference with other judicial obligations.

E. Permit the OPD to Resume its Representation of All Individuals Facing Parole Revocation by Amending the Public Defender Act, N.J.S.A 2A: 158A-1 et seq., Thereby Ending Reliance on Court Appointed Attorneys for Those Cases.

The OPD enabling statute of 1974 expressly required the OPD to represent indigent parolees during parole revocation hearings. In furtherance of that obligation, the Office established a Parole Revocation Unit that handled those cases during the period up to 1991, when a rider was attached to the OPD annual budget that specifically precluded the Office from using State funds to continue representing indigent paroles. Subsequently, The Public Advocate Restructuring Act of 1994 formally repealed the OPD enabling statute's parole revocation provisions. As a result, reinstatement of the OPD's Parole Revocation Unit will require a statutory amendment to the enabling statute and removal of the language from the OPD annual budget that prohibits allocation of State funds for the representation of parolees in revocation proceedings.

Since the period beginning after 1991 and up to the present, representation of parolees has been provided by assignments from the so-called Madden list pursuant to the New Jersey Supreme Court decision in Madden v. Delran, 126 N.J. 591 (1992) (establishing a system of pro bono representation in certain cases involving indigent persons). In fact, there have been just over 1,000 Madden assignments to parole revocation matters, representing approximately 17% of all Madden assignments state-wide. It also should be noted that the total number of parole revocation

hearings is significantly higher because many parolees opt to represent themselves given the delays in assigning counsel under Madden and the lack of expertise of the attorneys ultimately assigned cases.

There are compelling reasons underlying this recommendation. Individuals facing parole revocation have substantial liberty interests at stake. Reducing the number of unrepresented parolees in revocation hearings will undoubtedly result in a fairer process with a greater consistency of outcomes. Counsel assigned from the Madden list rarely, if ever, have experience handling criminal matters in general, much less parole matters specifically. That lack of experience often manifests itself in inadequate representation for the parolees. Parole revocation hearings involve significant strategy decisions depending, among other things, on the nature of the alleged parole violation, the underlying facts related to whatever the parolee has allegedly done, and the availability of mitigating evidence. Representation by OPD attorneys with expertise in these matters will ensure that the process is a fair one that balances the interests of the parolee against public safety concerns. It will also ensure that fewer parolees will decide to represent themselves solely because of the substantial delay in Madden cases. Assignment of counsel by the OPD will be immediate and the attorneys will be skilled in the work.

Another factor worth consideration is that the OPD will almost certainly be representing the parolee if the alleged violation is based on a new criminal charge brought against him while on parole. Access to information about the facts and

circumstances surrounding that new charge can be critical to effective representation in the parole revocation hearing. Unlike Madden attorneys, OPD attorneys will have that important information through the discovery process in the criminal case.

The CSDC recognizes that amendment of the Public Defender Act as recommended will require an appropriation to the OPD so that it will have the resources needed to handle the additional work. Under this proposal, the OPD should be required to present an efficient model for this representation during the budget process.

Acknowledgements

The Commission acknowledges the people who have provided separate and substantial assistance in the period leading up to the third Report and who have participated in the writing and review of the draft for presentation to the full Commission.
The Commission recognizes and gives special thanks to the following:

Commission Legislative Staff

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

Research Assistance

The Rutgers Technical Assistance Team, generously funded by **Arnold Ventures**.

Advisors

Honorable Nellie Pou, State Senator
Parimal Garg, Chief Counsel to the Governor

Guest Advisor

Didier Fassin, James D. Wolfensohn Professor, School of Social Sciences, Institute for Advanced Study

Principal Writers

Derick Dailey, Senior Counsel to the Attorney General
Lawrence S. Lustberg, Chair, Commercial and Criminal Litigation, Gibbons P.C.
Andrew Macurdy, Senior Counsel to the Attorney General
Alison Perrone, Assistant Public Defender
Sara Quigley, Senior Counsel to the Attorney General

Additional Writers, Advisors, and Other Contributors

Claudia Demitro, Counsel to the Director, Division of Criminal Justice, OAG
B. Stephan Finkel, Director of Legislative Affairs, OAG
Matt Grochowiak, Assistant Chief, Probation Division Supervision Services, AOC
Atiyyah Kaid, Assistant Chief, Probation Division Comprehensive Enforcement Program, AOC
Cody Mason, First Assistant Deputy Public Defender
Jeffrey H. Sutherland, Cape May County Prosecutor, President, Prosecutors Association of New Jersey
Lenny Ward, Retired Director of the Divisions of Parole and Community Programs
Donna Westhoven, Assistant Director of Criminal Practice, AOC