The Florida Senate

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Committee on Criminal Justice Senator Stephen R. Wise, Chair

REVIEW THE CRIMINAL PUNISHMENT CODE AND SENTENCING JUDGES' ASSESSMENT

SUMMARY

The Criminal Punishment Code ("Code") is Florida's primary sentencing policy. While the Code contains some features of the sentencing guidelines it replaced, it also differs substantially from the former guidelines. The most important difference is that the Code does not restrict judges in imposing a sentence greater than the minimum scored sentence as was the case under the former guidelines.

The Office of Economic and Demographic Research compared sentencing under the Code (FY 2003-04) to sentencing under the sentencing guidelines (FY 1997-98). Their research indicates that a larger percentage of those sentenced received a prison sanction under the Code (21.6%) than under the guidelines (17.1%), a larger percentage of those sentenced received mitigation under the Code (11.2%) than under the guidelines (9.0%), and the mean sentence length for those sentenced to prison was shorter under the Code (3.9 years) than under the guidelines (4.7 years).

Truth in sentencing has largely been achieved by reason of prison bed building and operation of the Code. According to the Florida Department of Corrections, "[t]he average prison sentence today will result in 4.0 years of imprisonment, a 150% increase from the 1.64 average in 1988-89. The percent of prison sentence served is more than 87% for offenders sentenced in FY 2003-2004, a 150% increase from the 34.9% of average sentence served 15 years ago."

A recent study of sentencing has concluded that unwarranted sentencing disparity, the impetus for creating the sentencing guidelines in 1983, exists under the Code, and to a lesser degree, under the previous and more determinate sentencing guidelines.

Forty-six circuit court judges who have sentenced under the Code responded to a survey prepared by staff in which they were asked for their views about the Code and related matters. Findings regarding this survey are that the majority of the responding judges indicated they were either satisfied or generally satisfied with the Code. None of the judges advocated returning to the former guidelines, although one judge indicated she prefers a more determinate sentencing structure and another judge proposed a 'suggested' range for sentencing. Four judges appeared to indicate they prefer indeterminate sentencing to the Code.

The main benefit of the Code noted by the judges is the discretion to impose sentences above the lowest permissible sentence. The main concern about the Code expressed by the judges is that it provides limited discretion to impose sentences below the lowest permissible sentence. Concern about unwarranted sentencing disparity was only raised by four judges. Other concerns raised about the Code and related matters are summarized in this report.

Only five judges indicated support for re-establishing a sentencing commission. (The Code abolished a previously established sentencing commission.)

While it does not appear that any of the concerns noted by the judges identify legal or implementation problems involving the Code that require legislative action, staff recommends that this report be used as an informational resource by legislators in any assessment of changes to sentencing policy or the Code.

BACKGROUND

In 1997, the Legislature enacted the Criminal Punishment Code[1] ("Code") as Florida's "primary sentencing policy."[2] The Code has been described as

[1] ss. 921.002 - 921.0027, F.S. See chs. 97-194 and 98-204, L.O.F.

[2] *Florida's Criminal Punishment Code*: *A Comparative Assessment*, Florida Department of Corrections (Sept. 2004).

"unique in that it has features of both structured and unstructured sentencing policies."[3]

> From a structured sentencing perspective, the Code provides for a uniform evaluation of relevant factors present at sentencing, such as the offense before the court for sentencing, prior criminal record, victim injury, and others. It also provides for a lowest permissible sentence that the court must impose in any given sentencing event, absent a valid reason for departure.
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> The Code also contains some characteristics of unstructured sentencing, such as broad judicial discretion and the allowance for the imposition of lengthy terms of incarceration.
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> The Code is effective for offenses committed on or after October 1, 1998 and is unlike the state's preceding sentencing guidelines, which provided for narrow ranges of permissible sentences in all non-capital sentencing events.[4]

The Code replaced more determinate sentencing guidelines. Sentencing guidelines were first adopted in 1983 after significant review and input by judges and others and a pilot project to implement sentencing guidelines in four judicial circuits. In contrast, the Code was not subject to the same deliberative review before its enactment in 1997.[5] Judges' views of the Code, which have never been publicly reported, are reported here for the purpose of providing legislators with information that they may use in any assessment of changes to sentencing policy or the Code.

Staff surveyed circuit court judges who have sentenced under the Code regarding their views of the Code and related matters. Forty-six judges responded to the survey. The number of judges who responded to the survey constitutes approximately 35 percent of judges assigned to the judicial circuits' felony divisions.[6] Therefore, a view shared by the majority of the responding judges may or may not be a view shared by the majority of judges assigned to the judicial circuits' felony divisions. Even given this limitation, the views of the responding judges provide useful information to legislators on sentencing under the Code.

Understanding Florida's various sentencing policies and structures over more than two decades may provide legislators with a better understanding of the judges' survey responses, so staff begins this report with a summary of that history.

Sentencing in Florida*: *1980s to the present

In 1983 the Florida Legislature adopted "sentencing guidelines" or what has been referred to as "determinate sentencing" or "structured sentencing."[7] These are really descriptive labels for a sentencing policy and structure that, broadly speaking, "guides" judges in sentencing. Guidelines may be "voluntary," meaning they have no "enforcement mechanism" if judges don't follow them, or they may be "presumptive," meaning they are "prescriptive rather than descriptive and are also enforceable, although they have provisions to allow judges to depart from them."[8]

Until the adoption of sentencing guidelines in 1983, Florida judges' discretion in sentencing was limited only by the statutory maximum penalties for felonies[9] and constitutional requirements. This type of sentencing, which provides judges with virtually unfettered discretion, has been referred to as "indeterminate sentencing" or "unstructured sentencing."

The "principal concern" raised about indeterminate sentencing in Florida by its critics was "unwarranted" sentencing disparity, which they asserted was occurring

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[3] *Id.*

[4] *Id.*

[5] However, there was input from some judges, prosecutors, public defenders and others regarding changes to the Code after its enactment and prior to its implementation in 1998. *A 1997-1998 Interim Monitor*: *The Florida Criminal Punishment Code*, Senate Committee on Criminal Justice (Sept. 1997).

[6] The Office of the State Courts Administrator reported to staff that in 2004 there were approximately 161 judges assigned to the judicial circuits' felony divisions.

[7] In 1982 the Legislature created a Sentencing Commission. The Commission's responsibilities immediately prior to its termination in 1997 were the "initial development of a statewide system of sentencing guidelines, evaluating these guidelines periodically, and recommending on a continuous basis changes necessary to ensure incarceration of . . . violent criminal offenders . . . and non-violent criminal offenders who commit repeated acts of criminal behavior and who have demonstrated an inability to comply with less restrictive penalties previously imposed for nonviolent criminal acts." s. 921.001(1), F.S. (1997).

[8] Parent, Dunworth, McDonald and Rhodes, *Key Legislative Issues in Criminal Justice*: *The Impact of Sentencing Guidelines*, NCJ 161837, Nat. Inst. of Justice, U.S. Dept. of Justice (Nov. 1996), p. 1.

[9] s. 775.082, F.S.

under indeterminate sentencing.[10] Guidelines proponents were concerned that similarly situated offenders were being sentenced differently in each judicial circuit and by judges within the same circuit. They were also concerned that extra-legal factors, such as gender, race, and ethnicity, were playing a part in sentencing outcomes. While everyone was opposed to sentencing based on those factors, there was disagreement on whether this was actually occurring and, if it was, whether it was the result of indeterminate sentencing or other factors. Guidelines proponents, while acknowledging that some sentencing variation was necessary, believed that fundamental fairness required uniformity in sentencing. Guidelines opponents argued that offenders only had a right to a "legal" sentence (a sentence within statutorily-imposed parameters), that guidelines could never capture the myriad of factors judges had to take into account in sentencing (many unquantifiable), and that variations in the sentencing of similarly situated offenders appropriately reflected the practices of different courtroom work groups and different community standards and values.

The 1983 guidelines structure was "comprised of nine separate worksheets for specified offense categories." "Within each worksheet points were assessed for offenses to be sentenced and prior record offenses based on the number of offenses and each offense's felony degree. Assessments were made for legal status, and victim injury. Total scores fell into sentencing ranges or cells, for each worksheet. The least severe cell provided for a non-prison sanction and the most severe cell provided for 27 years to life in prison. Departure sentences were permissible as long as written reasons were provided."[11] Departure sentences could be appealed.

While the Legislature may have been concerned about truth in sentencing -the principle that the sentence served should be roughly equivalent to the sentence imposed- when it approved of sentencing guidelines, the concern about unwarranted sentencing disparity appears to have been the impetus for adopting the guidelines. Certainly, truth in sentencing was not a reality in 1983. While parole consideration was abolished for non-capital offenders sentenced under the guidelines,[12] gain-time remained available. However, truth in sentencing eventually came to the forefront of concerns regarding sentencing.

When the guidelines were adopted, Florida was under federal judicial oversight[13] to ensure that unconstitutional conditions of overcrowding would not exist in Florida's prisons. Actions taken by the Legislature and other factors exacerbated and alleviated prison crowding. The majority of changes to the guidelines in the 1980s evinced the Legislature's intent to "toughen" the guidelines by enhancing punishments, increasing judges' discretion to impose prison sentences, and narrowing the grounds for appeal of departure sentences.[14]

Prison admissions increased significantly in the 1980s as a result of changes to the guidelines, changes to the habitual offender law,[15] mandatory minimum penalties, significant growth in the overall population of Florida, a precipitous and apparently unanticipated increase in drug offense admissions[16] (reflecting in large part the effects of "crack" cocaine), and other factors.

Although the Legislature appropriated monies for tens of thousands of prison beds during this period, there were frequent indications that Florida's prisons were on the brink of exceeding lawful capacity. To address this prison crowding, the Legislature created several early release mechanisms or programs (in addition to pre-existing basic gain-time), including administrative gain-time and provisional credits, which were administered by the Florida Department of Corrections,

[10] Griswold, *Florida's Sentencing Guidelines*: *Six Years Later*, Federal Probation (Dec. 1989), p. 46.

[11] *Florida's Criminal Punishment Code*: *A Descriptive Assessment*, Florida Department of Corrections (Oct. 1999), p. 3.

[12] The elimination of parole may have been the result of concerns that it was contrary to truth in sentencing and was subjective and arbitrary. Although the Legislature did enact uniform guidelines to assist the parole decision maker, this action apparently did not assuage parole's critics.

[13] The lawsuit was *Costello v. Wainwright*, 397 F. Supp 20 (M.D. Fla. 1975), aff'd as modified, 525 F.2d 1239 (5th Cir. 1976), aff'd in relevant part on reh'g en banc, 539 F.2d 547 (5th Cir. 1976).

[14] For an extensive discussion of changes to the guidelines, see Hogenmuller, *Structured Sentencing in Florida: Is the Experiment Over?*, 20 Law and Policy 281 (July 1998).

[15] Additionally, the Legislature decided to sentence habitual offenders outside the guidelines.

[16] In FY 1989-90, the apex for drug admissions, there were 16,169 drug admissions. Information provided by the Florida Department of Corrections.

and control release, which was administered by the Florida Parole Commission.[17]

The use of early release programs eventually proved untenable.[18] By March of 1992 the average percentage of sentences served was 31.5 percent.[19] Early release and a widely reported murder by an early releasee in 1992 heightened the public's concerns about crime. In a special session in 1993, the Legislature significantly revised the sentencing guidelines and made other changes to try to address those concerns. Perhaps the most significant change in sentencing policy was that "incarcerative sanctions" were to be "prioritized toward offenders convicted of serious offenses and certain offenders who have long prior records, in order to maximize the finite capacities of state and local correctional facilities."[20]

The 1994 sentencing guidelines differed considerably from the previous guidelines. The nine separate worksheets and groupings by category were replaced with a chart that ranked non-capital felonies based on what the Legislature determined to be their seriousness. Each offense was assigned to a ranking level on a scale of one to ten (level ten being the most serious level).[21] Additional offenses and prior offenses were also assigned level rankings. Point values were associated with those rankings. The higher the level, the higher the point values. Also, point values were greater for the primary offense relative to point values for additional and prior offenses. Points were also assigned for several other factors, such as victim injury, legal status, and supervision violations.

By scoring all of these factors and performing a mathematical computation, a recommended guidelines sentence was established. There were "basically three categories of sanction based upon total scores":[22] a mandatory non-state prison sanction when the total score was 40 points or less (though the court could increase total sentencing points by up to 15 percent); a discretionary prison or a non-state prison sanction when the total score was greater than 40 points but less than 52 points; and a mandatory state prison sanction when the total score was greater than 52 points.

Prison length (state prison months) was determined by subtracting 28 points from the total sentence points. However, the court had the discretion to increase or decrease by 25 percent the recommended guidelines state prison sentence (unless the sentence had already been increased by up to 15 percent). If the recommended guidelines sentence exceeded the statutory maximum in s. 775.082, F.S., the guidelines sentence was imposed. A departure sentence, which could be appealed, was a state prison sentence varying upward or downward from the recommended guidelines prison sentence by more than 25 percent. Reasons for a departure had to be provided. A non-exclusive list of aggravating and mitigating circumstances were provided in statute.

Florida's prison bed "crisis" was brought under control and truth in sentencing was largely achieved because of a long-term commitment to building prison beds. Other factors that alleviated prison crowding included the enactment of sentence guidelines in 1993, the repeal of basic gain-time and the curtailment of provisional credits and control release, the redefining of prison capacity (after federal oversight had ceased) to "150% of what the system was designed to handle,"[23] a requirement that a funding source be provided for new offenses and penalty enhancements, the elimination of some mandatory minimum terms, a statutory requirement that offenders serve at least 85 percent of their sentences,[24] downward departure sentences, and decreases in drug admissions and the total crime rate index.

The 1993 changes to the guidelines were ambitious and some of those changes would later be incorporated in

[17] For an extensive discussion of early release, see Kaufman, *A Folly of Criminal Justice Policy-Making*: *The Rise and Demise of Early Release in Florida, and Its Ex Post Facto Implications*, 26 Fla. St. U. L. Rev. 361 (Winter 1999).

[18] Kaufman described the situation as follows: "At bottom, the state continued to operate two conflicting subsets of Florida's overall criminal justice policy: (1) a sentencing policy implemented through the guidelines, habitual offender laws, and minimum mandatory sentences, all designed to force the judicial branch to make offenders serve more time in prison; and (2) a corrections policy, implemented through early release mechanisms, that forced the executive branch to let people out of prison earlier than ever before. In essence criminal justice policy had turned against itself." Kaufman (1999), *supra*, at p. 396.

[19] Kaufman (1999), *supra*, at p. 400 (citation omitted).

[20] s. 921.001(4)(a)7., F.S. (1993).

[21] The chart did not list all non-capital felonies; offenses not listed in the chart were ranked based on felony degree. A similar "default" section was included in the Code for ranking felonies not listed in the offense severity ranking chart. s. 921.0023, F.S.

[22] See Note 2.

[23] Kaufman (1999), *supra*, at p. 407.

[24] s. 944.275, F.S.

the Code. However, the guidelines had important critics, most notably many prosecutors and sheriffs. Several prosecutors had opposed guidelines from their original adoption in 1983. Likely their efforts to abolish the guidelines were unsuccessful, in part, because they were successful in convincing legislators to pass amendments to the guidelines. The 1994 guidelines were new territory for guidelines critics and were soon subjected to their criticism: they weren't tough enough, especially regarding prior record; they were too complex; they gave judges little real discretion, such as imposing prison sentences on nonviolent offenders where appropriate; and they reduced sentencing to a mathematical computation.

The Legislature was receptive to many of these criticisms of the guidelines. Legislators were sensitive to a growing, though statistically unsupported, perception that crime in Florida was out of control. This perception was attributable in large part to the murder of a Miami-Dade Police detective and the murders of several tourists.[25] In 1995 and 1996 the Legislature significantly amended the guidelines. Some of the changes included prohibiting sentence mitigation based on the defendant's substance abuse or addiction (without mental illness); enhancing sentencing point values for the primary offense (level 7 and above), additional offenses, prior offenses, and victim injury; and creating point multipliers for the attempted murder of law enforcement officers and other officials and grand theft of a motor vehicle.

Although these changes addressed some of the concerns of guidelines critics, what the critics really wanted were not changes to the guidelines but rather to be free of them. Bills to abolish the guidelines had been introduced as early as the 1980s, but guidelines supporters had always prevailed. By 1997, things had changed. Prison admissions and the prison population appeared to be manageable. There also appeared to be few guidelines supporters in the Legislature.

While prosecutors, perhaps the most visible critics of the guidelines, had clamored for more judicial discretion, that discretion was a two-edged sword. They wanted judges to impose more and longer prison sentences. Abolishing the guidelines and returning to indeterminate sentencing would have given judges virtually unfettered discretion to do that but would have also given them the discretion to impose non-prison sentences and shorter prison sentences. This was a concern of the Miami-Dade State Attorney because, historically, the Eleventh Judicial Circuit had the greatest number of downward departure sentences.

Staff of the State Attorney drafted a proposal for a new sentencing structure, named the Criminal Punishment Code, that limited downward departure sentences but gave judges more flexibility to impose prison sentences and increase prison sentence length than was available under the guidelines. The State Attorney brought this proposal to the Legislature and it was ultimately endorsed.[26] However, because the legislation creating the Code was hastily crafted, the Legislature revised the Code in 1998.

The Criminal Punishment Code, in its present form, applies to defendants whose offenses were committed on or after October 1, 1998. It retains some features of the guidelines it replaced: the offense severity ranking chart; point values for primary offenses, additional offenses, and prior offenses; and point multipliers and enhancements. However, the Code also differs considerably from the guidelines in several respects. Downward departures were retained as were statutory mitigating factors, but downward departures can only be appealed by the State. The Code eliminated upward departures. Judges are free to sentence from the lowest permissible sentence scored under the Code (i.e. the minimum sentence calculated from the Code scoresheet) up to the maximum sentence provided in s. 775.082, F.S.,[27] and that sentence cannot be appealed. For example, the maximum penalty for a third degree felony under s. 775.082, F.S., is a 5-year prison sentence. If the minimum sentence scored under the Code is 2-years imprisonment, the judge can impose a prison sentence of 2 years or a longer prison sentence, as long as the sentence imposed does not exceed 5-years imprisonment.

The lowest permissible sentence under the Code is scored differently than the recommended guidelines sentence under the previous guidelines. If total

[25] Noted one columnist: "Until just recently, Florida was called the Sunshine State and was on its way to being the vacation capital of the world. Now it's called the murder capital of America, a place where even visitors from Bosnia should fear to tread." Fumento, *They Shoot Tourists, Don't They*?, Investor's Business Daily (1993).

[26] Griset, *New sentencing laws follow old patterns*: *A Florida case study*, 30 Journal of Criminal Justice 287, 295 (2002).

[27] If the sentence scored exceeds the maximum penalty in s. 775.082, F.S., the scored sentence is both the minimum sentence and the maximum penalty. This feature was also retained from the previous guidelines.

sentencing points equal or are less than 44 points, the minimum sentence is a non-prison sanction, though the sentencing range is the minimum sanction up to the maximum penalty provided in s. 775.082, F.S. If total sentencing points exceed 44 points, a prison sentence is the minimum sentence, though the judge may sentence up to the maximum penalty provided in s. 775.082, F.S.[28] Sentence length (in months) is determined by subtracting 28 points from the total sentencing points and decreasing the remaining total by 25 percent.

METHODOLOGY

Staff prepared a survey consisting of several questions to circuit judges who have sentenced under the Code. The Office of the State Courts Administrator disseminated the survey to the judicial circuits. The survey asked the judges for their views of the Code as a sentencing policy. It asked them to identify problems, if any, with the Code or with actions taken by the Legislature (other than revisions of the Code) that may affect its use or raise legal challenges. It also asked them if potential appellate challenges to upward departure sentences under the former guidelines affected their consideration of such sentences, the advantages and disadvantages of the Code relative to former guidelines and other sentencing structures, their views on establishing a sentencing commission, and for any other comments they wished to make regarding the Code.

FINDINGS

Staff asked the Office of Economic and Demographic Research (EDR) to do a comparison of sentencing under the Code to sentencing under the former guidelines. EDR examined two fiscal years: one right before the change to the Code (FY 1997-98) and the most recent complete year (FY 2003-04). EDR examined the total number sentenced, the number sentenced to prison (and the calculated incarceration rate), the number and the percentage who received a sanction mitigation, and the mean sentence length for those who received a prison sentence.[29] In addition to examining totals for each of the two fiscal years, EDR looked at the ten individual offenses with the greatest number of sentencing events in FY 2003-04. These ten offenses accounted for 54.5 percent of the sentencing events in FY 2003-04.

EDR's major findings were that, overall and for each of the ten individual offenses, a larger percentage of those sentenced received a prison sanction under the Code (21.6%) than under the guidelines (17.1%), a larger percentage of those sentenced received mitigation under the Code (11.2%) than under the guidelines (9.0%), and the mean sentence length for those sentenced to prison was shorter under the Code (3.9 years) than under the guidelines (4.7 years).[30] [31]

Additionally, as one judge responding to this survey opined: "the combination of massive prison construction and the operation of [the] . . . Code has resulted in 'truth in sentencing'." According to the Florida Department of Corrections, "[t]he average prison sentence today will result in 4.0 years of imprisonment, a 150% increase from the 1.64 average in 1988-89. The percent of prison sentence served is more than 87% for offenders sentenced in FY 2003-2004, a 150% increase from the 34.9% of average sentence served 15 years ago."[32]

One recent study has concluded that unwarranted sentencing disparity exists under the Code and to a greater extent than under any of the previous guidelines. However, it's important to note that the

[28] But see Note 27.

[29] EDR used the DOC convention of recoding all sentences greater than 600 months to 600 months (including life sentences).

[30] Mean sentence lengths for burglary of a dwelling or occupied conveyance and for cocaine possession remain the same under the Code as under the guidelines.

[31] Several possible factors may explain, at least in part, the greater mitigation rate and shorter average sentence length under the Code. Under the guidelines 52 or more points meant prison while under the Code more than 44 points means prison. Therefore, if offenders who score between 44 and 52 points under the Code receive a non-prison sanction, it is the result of a mitigation, whereas under the guidelines it was not. This mitigation may also explain to some degree the shorter sentences on average under the Code than under the guidelines. Some offenders who would have received probation under the guidelines are receiving prison sanctions under the Code, and many of those sentences may be relatively short in length, which would lower the average. Additionally, some offenders who score 44 points or less may be receiving short prison sentences instead of jail sentences in order to relieve jail overcrowding. Also, the Criminal Justice Estimating Conference has noted in its February 14, 2005, forecast that "[t]he average sentencing length of admissions continues to decline, associated with the high level of technical violators of supervision sentenced to prison." (http://edr.state.fl.us/conferences/criminaljustice/ES02142005.pdf)

[32] *Time Served by Criminals Sentenced to Florida's Prisons*: *The Impact of Punishment Policies from 1979 to 2004*, Florida Department of Corrections (Aug. 2004).

study also concluded that the previous guidelines, which limited judicial discretion more than the Code, did not eliminate unwarranted sentencing disparity.[33]

Findings from the survey are that twenty-nine judges indicated they were satisfied (9) or generally satisfied (20) with the Code (some expressing concerns with particular features of the Code). Nine judges either noted one benefit of the Code counterbalanced by one concern or did not provide an opinion. Two judges noted more concerns about the Code than benefits, and eight judges noted only concerns about the Code.

None of the judges advocated replacing the Code with the former guidelines, though one judge indicated a preference for a more determinate sentencing structure like the federal sentencing guidelines and another judge proposed a "suggested" range for sentencing. Four judges appeared to indicate they prefer indeterminate sentencing to the Code.

The main concern expressed about the Code was that it does not allow judges enough discretion or "flexibility" to impose sentences below the lowest permissible sentence (17).[34] Two judges suggested that the Legislature consider bringing back the mitigator relating to a defendant's substance abuse (where there is no mental illness).[35]

Concern about sentencing disparity was only noted by four judges. As previously noted, one judge suggested a "more determinate sentencing scheme (operating or advisory)" might provide for more sentencing uniformity, and another judge proposed a "suggested" range. However, four judges expressed the opinion that structured sentencing of the type found in the former guidelines or the federal sentencing guidelines might be susceptible to constitutional challenge because of the U.S. Supreme Court's opinions in *Apprendi v. New Jersey*[36] and *Blakely v. Washington,*[37] which have profoundly impacted the federal sentencing guidelines and several states' guidelines. In *Blakely*, the Court stated: "Our precedents make clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant." [38]

While six judges noted the *Apprendi* and *Blakely* decisions, none of them expressed the view that those decisions threatened the Code. As one judge opined: "The *Blakely* opinion will probably have minimum impact in Florida. The . . . Code does not fit the mold of a typical sentencing guidelines structure. It provides a 'floor' or a minimum sentence, absent downward departure, but no 'ceiling.' The . . . Code does not forbid the trial judge from imposing the statutory maximum sentence for the least serious (Level 1) felony offenses."[39]

Some of the other concerns judges expressed about the Code are that it: is confusing (2);[40] does not sufficiently score prior record (2); does not consider other sentencing factors (e.g., prior juvenile record) (2); does not sufficiently score some offenses (e.g., some thefts and burglaries) (2); "actually affects only a small number of cases and often results in unintended

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[33] Crow, *Florida's Evolving Sentencing Policy*: *An Analysis of the Impact of Sentencing Guidelines Transformations*, Doctoral dissertation for the School of Criminology and Criminal Justice, Florida State University (Spring Semester 2005). While cautioning there were several important variables missing from his study, Crow concluded that "extra-legal factors play important roles in determining sentencing outcomes under all sentencing policies examined" and that "the policy goal of increasing sentencing severity seems to undermine the goal of reducing unwarranted disparity." *Id.* at p. 155.

[34] One judge noted that "[t]he problem comes with parties who are inflexible in coming up with appropriate sentencing alternatives when a particular case warrants it, particularly when maximum mandatory sentences are a factor."

[35] One of these judges opined: "Drug addiction *is* treatable but many long-term residential programs -particularly Faith Based- will not take individuals with any significant mental illness."

[36] 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

[37] 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

[38] 124 S.Ct. at 2537 (emphasis provided by the Court and citations omitted). An exception to the *Apprendi* rule is an enhancement above the statutory maximum based solely on the offender's prior record.

[39] This judge noted, however, that "[i]f the prosecutor seeks a punishment that is greater than the statutory maximum due to scored points in excess of that maximum, "*Apprendi* . . . requires the basis for that punishment to be charged in the information or indictment and submitted to the jury for determination unless the sole reason for the excess points is prior record." He cites as an example determining the extent of victim injury, which "may become a jury issue to be reflected in the verdict." [O]ther issues, such as whether the victim was a law enforcement officer, are usually charged in the information or indictment and, if the defendant is found guilty "as charged," the verdict reflects the aggravating circumstance…."

[40] In contrast, one judge described the Code as "simple and straightforward."

consequences in the cases it does effect" (1);[41] does not sufficiently indicate that the lowest permissible sentence is only the "starting point" for determining the appropriate sentence (1); has been changed "piece-meal . . . without looking at how previous changes have affected" the criminal justice system (1); "has the effect of discouraging defendants from exercising their right to jury trial by forcing them to accept a plea offer and is often wasteful of human and prison resources" (1); "does not accomplish stated legislative policy" (1); and does not address unnecessary challenges to sentences based on sentencing error that, if corrected, would not change the sentence previously imposed (1).[42] [43]

The most frequently cited benefit of the Code is the discretion afforded in sentencing above the lowest permissible sentence (14). Some other cited benefits are that the Code is more likely to withstand a *Blakely* challenge than the prior guidelines (2), promotes pleas (2), eliminates upward departure sentences and appeals of those sentences (2),[44] and allows for sentencing above the statutory maximum (1).

The legislation creating the Code abolished the previous Sentencing Commission. Staff asked the judges if Florida should have a sentencing commission. Of those judges indicating an opinion, fourteen indicated that Florida should not have a sentencing commission and five said there should be one. Some judges believed a sentencing commission would limit their sentencing discretion (5). Others believed it was unnecessary (4) or that the Legislature should determine what changes the Code needs (2).

One judge supporting a sentencing commission felt that it's "main advantage . . . is to provide the legislature with expertise that the legislature otherwise does not have available. The . . Commission never had any authority to enact sentencing policy or change current policy." None of the five judges specifically indicated that a sentencing commission should set sentencing standards and at least three of the judges appeared to indicate that they viewed a sentencing commission as having a purely advisory role.

RECOMMENDATIONS

While it does not appear that any of the concerns noted by the judges identify legal or implementation problems involving the Code that require legislative action, staff recommends that this report be used as an informational resource by legislators in any assessment of changes to sentencing policy or the Code.

[41] The judge who expressed this concern stated, in part, that "[w]hile the . . . Code provides a starting point in negotiating settlement of cases, it does not require specific results. Other factors, such as the sentencing policies of the trial judge, prosecutorial priorities, and constitutional considerations such as the prohibition against unreasonable search and seizure, have significant impact on the results of a given case. And since less than 4% of the cases are actually tried by jury, the . . . Code has infrequent direct impact on sentencing. This is particularly true since the vast majority of cases do not require a prison sanction to be imposed. Unfortunately, some of the cases that actually are subject to the sentencing restrictions contained in the . . . Code, and other sentencing policies, result in sentences that trial judges perceive as unnecessarily harsh and wasteful of prison resources."

[42] The judge that raised this concern stated that a sentence in which a sentencing error has occurred should be a "legal sentence" unless the defendant "affirmatively demonstrates" that the error caused the judge to sentence the defendant to prison instead of impose a non-prison sanction.

[43] Some other concerns raised in the survey include: effects of mandatory minimum terms (3); limitations on imposing greater punishment on youthful offenders (2); severity of the penalty for failure to comply with sex offender registration requirements when the offender is not an absconder (2); limitations on imposing community control for violent offenses (1); limitations on withholding adjudications (1); confusion over application of various repeat offender sanctions when several apply (1); confusion over differences in punishment for offenses punishable as life felonies, first degree felonies punishable by life, and first degree felonies (1); the 3-year term for aggravated assault under "10-20-Life" (1); appropriateness of license suspension for failure to pay child support (loss of license) (1); and the absence of any community service requirement for all offenders (1).

[44] Twenty-four judges indicated that they had imposed sentences under the former guidelines and had either considered or imposed an upward departure sentence. Twelve of these judges indicated that they had not imposed departure sentences in some cases because of potential appellate challenges to an upward departure sentence.