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The Public Policy Incubator Program

Sentencing in Arizona:

Recommendations to Reduce Costs and Crime

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Executive Summary

Over the past 30 years, Arizona's prison population has grown at an unprecedented rate: While the state's population increased by 150%, its prison population grew by more than 1000%. Recent projections by the Department of Corrections indicate that the state's prison population will continue to increase, which will require the construction of new facilities over the next seven years.

The growing prison population has become a financial drain on the state. In 1979, less than 5% of state general fund expenditures went to the Department of Corrections. In 2011, more that 11% of funds appropriated will go to the Department of Corrections. In addition to the approximately $949 million appropriated for corrections costs in 2011, the Department of Corrections estimates that construction of new prison facilities will cost approximately $975 million.

The rising costs of imprisonment and the present economic crisis of have led a number of Arizonans to question current incarceration policies. In response, those opposed to reforming Arizona's sentencing policies have relied on a recent report by the Arizona Prosecuting Attorneys' Advisory Council, which documents that most prisoners in Arizona either have a criminal record or have committed a violent crime. Sentencing reform opponents have used this report to argue that Arizona is currently incarcerating the "right" offenders, and that any early release of prisoners in response to budget concerns would have an unacceptably high cost to public safety.

But the current debate over sentencing reform in Arizona has largely ignored the fact that prison is not only an expensive response to crime, it is also not particularly effective. For example, despite its high incarceration rate, Arizona still has one of the highest rates of serious crime in the country. Additionally, recidivism — new crimes committed by those who have already served a prison term — is common.

This report is designed to add to the current debate on sentencing reform in Arizona by noting that current policies are not only very expensive, but they are not very successful at reducing crime. And rather than debating simply how long prison sentences ought to be, the report recommends that Arizona Legislature adopt a number of prison alternatives. Those alternatives are not only less expensive than traditional imprisonment, they are also more effective at reducing crime. In particular, we propose that the Legislature:

- Expand the availability of pretrial diversion to all offenders charged with non-violent, non-sexual offenses who do not have a significant criminal history
- Expand the scope of mandatory probation for drug possession offenses so that it no longer excludes offenses involving methamphetamines or those offenders who have prior convictions for crimes of violence
- Require drug treatment programs to adopt evidence-based practices that have proven successful in other states at reducing recidivism

- Establish a statewide system of mental health courts comprised of a specialized court docket for some portion of criminal cases involving defendants with mental illnesses and team-based monitoring of participants that includes regular judicial supervision
- Establish specialized mental health public defenders in each county to offer mentally ill indigent defendants access to both specialized legal expertise and social worker support if they are ineligible for, or decline entry to, a mental health court
- Encourage plea bargaining by amending Arizona's Rules of Criminal Procedure to allow for more negotiation between defense attorneys and prosecutors
- Encourage plea bargaining by amending the Arizona Revised Statutes to expand the scope of undesignated offenses to include class 5 non-dangerous felonies

In addition to these alternatives to imprisonment, the report also proposes the creation of a Sentencing Commission. The Commission would collect data about crime in Arizona, study successful sentencing reform programs in other states, and would suggest further changes to the Legislature. An objective Sentencing Commission is essential to ensure that state crime policies are not only economically sound, but also effectively reducing crime.

Adopting these proposals will not only reduce the costs of incarceration; in reducing recidivism they will also reduce the other costs associated with crime, such as the costs of court, law enforcement, and the damage suffered by crime victims. In particular:

- Expanding the availability of pretrial diversion is expected to result in up to a 20% reduction in recidivism and to result in a short-term savings of up to $200 million in incarceration costs alone.
- Expanding the scope of mandatory probation for drug possession offenses is expected to reduce recidivism by up to 30% and to result in a short term savings of at least $6 million.
- Establishing a mental health court and mental health defenders is expected to help the nearly 9,000 Arizona prisoners suffering from serious mental illness by reducing recidivism and substituting community-based treatment rather than imprisonment for appropriate offenders, which is expected to result in significant decreases in crime and costs
- Increasing plea bargaining will save the state money by encouraging probationary terms and reducing the costs associated with unduly long imprisonment terms.

Proposal for Pretrial Diversion

Overview

This proposal recommends:

1) Expanding eligibility for diversion programs to cover all felons likely to have a positive reaction to diversion except for those felons charged with violent or sexual felonies, those who otherwise qualify for drug or mental health courts, and those with a lengthy criminal history.

2) Developing a method of screening offenders for the likelihood of success in the program, which would then be provided to the prosecutor and judge to help determine whether an offender should be recommended for diversion.

3) Implementing graduated punishments for failing to abide by the terms of diversion prior to expulsion from the program.

4) Encouraging diversion programs to constantly evolve and use the latest research and treatment models to ensure the maximum effectiveness of the program.

If the programs are successfully implemented, the potential benefits to Arizona are substantial:

- Based on the median recidivism rate of other jurisdictions, Arizona could see up to a 20% reduction in recidivism.

- The average completion rate for offenders in pretrial diversion programs in other jurisdictions is 85%.

- Given the current prison population in Arizona, the State could immediately save as much as $200 million in incarceration costs alone.

Introduction

Despite the increasing trend over the last 30 years of dealing with criminal offenders through incarceration, the high cost and disproportionately low reduction in crime rate has caused jurisdictions to seek new alternatives. One such alternative is using community-based treatment programs prior to the commencement of the trial process. These pretrial diversion programs seek to treat the root cause of an offender's criminal behavior over a lengthy period of time. Over the course of the 18-24 month program, the offender may receive treatment for issues such as minor substance abuse or mental health problems, receive job training, housing services, or undertake any other treatment that would prevent an offender from reentering the criminal justice system. Upon successful completion of the program, the offender's charges are dismissed.

Jurisdictions that have adopted pretrial diversion as an alternative to incarceration for certain offenders have seen dramatic reductions in recidivism rates. For offenders that completed pretrial diversion programs, the average rate of recidivism was only 5% for new felonies. This is substantially lower than the current recidivism rate in Arizona which is 24% (Department of Corrections, 2005). These programs have the potential for substantial savings both in the short term, as offenders who would otherwise go to jail are instead treated in a community setting, and in the long term as reduced recidivism rates lower the costs of the entire criminal process.

Like the situation in Texas, which is discussed in more detail in the Proposal to Establish Mental Health Courts and Mental Health Public Defenders, Arizona is facing rising prison rates and the cost of incarceration is placing a substantial burden on the state. Also like Texas, Arizona has come to the point where new methods of dealing with offenders besides incarceration need to be considered. The potential for pretrial diversion as this alternative was recognized in a recent report released by the Auditor General of Arizona, which identified the expansion of pretrial diversion as a potential solution to the growing prison population. The Auditor General viewed diversion as a way of alleviating prison populations while providing economic benefit to the state and promoting the safety of the community (Arizona Auditor General, 2010). Like the Auditor General, we recommend the immediate expansion of Arizona's pretrial diversion programs.

This proposal will address the implementation of pretrial diversion in three parts. Part One will discuss the history of pretrial diversion in the United States and Arizona. Part Two will address the potential economic benefits of pretrial diversion if implemented in Arizona. Part Three will expand on the recommendations above, both in how they may be implemented and the reasons they are essential to the success of diversion programs.

The Rise of Pretrial Diversion in the United States

As defined by the National Association of Pretrial Services Agencies, a pretrial diversion program is "a voluntary option which provides alternative criminal case processing for a defendant charged with a crime that ideally, upon successful completion of an individualized program plan, results in a dismissal of the charge(s)." (NAPSA, 2008a p. 1).

The concept of pretrial diversion first received national attention in 1967, when the President's Commission on Law Enforcement & Administration of Justice recommended the use of pretrial diversion in its report *The Challenge of Crime in a Free Society* (1967). In the report, the Commission recognized the potential of using community-based programs to treat individuals who do not deserve full criminal sanctions. Specifically the Commission said:

> Prosecutors deal with many offenders who clearly need some kind of treatment or supervision, but for whom the full force of criminal sanctions

> is excessive; yet they usually lack alternatives other than charging or dismissing. In most localities programs and agencies that can provide such treatment and supervision are scarce or altogether lacking, and in many places where they exist, there are no regular procedures for the court, prosecutors, and defense counsel to take advantage of them. (p. 133)

Even before the report was published, some jurisdictions were recognizing diversion as an alternative to traditional punishments. The Citizen's Probation Authority in Flint Michigan was instituted in 1965. By 1967 Connecticut, Illinois, and New York had enacted legislation which authorized treatment programs as an alternative to prosecution for certain defendants. Following the Commission's report, however, the concept of diversion gained increasing support from other jurisdictions and professional organizations.

The National District Attorneys Association (NDAA) first supported the idea of pretrial diversion in the 1977 version of its *National Prosecution Standards*. The NDAA renewed its support of diversion in the 1991 update of the Association's standards:

> The diversion alternative to prosecution is an increasingly utilized and effective mechanism for dealing with offenders. Since the promulgation of the original standards in 1977, diversion has been adopted in almost every jurisdiction in the United States. (p. 138)

The American Bar Association has also supported the creation and implementation of diversion programs, passing a joint resolution favoring the expansion of diversion programs at its 1976 annual conference. Furthermore, the ABA's current *Pretrial Release Standards* recommend that jurisdictions "develop diversion and alternative adjudication options, including drug, mental health, and other treatment courts or other approaches to monitoring defendants during pretrial release." (American Bar Association, 2010).

The potential benefits of pretrial diversion programs have also been recognized by numerous jurisdictions around the country. At present, 26 states have authorized pretrial diversion programs. These programs range from alternatives to adjudication for first-time offenses, drug and mental health treatment programs, programs specifically for DUI offenders, and programs targeted at property offenses. These programs are most commonly run by county level pretrial service agencies, non-profit agencies, or prosecutor's offices. Diversion has grown into an acceptable alternative to the criminal justice process for those offenders most likely to be rehabilitated through an intensive, lengthy, community-based treatment program, targeted towards the specific causes of the offense and the potential causes for future offenses.

Diversion programs have also shown promising reductions in recidivism. The National Association of Pretrial Services Agencies conducted a survey in 2009 of 63 pretrial diversion programs across the country. The median recidivism rates for these

programs were 5 percent for new felonies, and 12 percent for new misdemeanors.[1] In addition, diversion programs also have a high rate of completion for offenders. In the same survey, the median rate of successful completion was 85%, with nearly 84% of programs reporting a success rate of at least 70% (NAPSA, 2009). Diversion has the potential to not only be a successful cost saving measure, but also a way of effectively reducing recidivism and thus the overall crime rate.

Arizona's Deferred Prosecution Statutes

In 1978, Arizona adopted statutes which authorized counties to adopt and implement pretrial diversion programs (also called deferred prosecution). The statutes placed the power to administer the programs with the county attorneys, required the county attorneys to keep statistical records on the programs that would be submitted to the President of the Senate and the Speaker of the House of Representatives, and provided for the state to issue matching funds to those counties that chose to adopt the programs. The 1978 statutes also excluded any offender who was previously convicted of a felony, accused of committing a felony involving the use or exhibition of a deadly weapon, accused of intentionally or knowingly inflicting serious physical injury, or anyone who had previously completed a diversion program.

In 1998, the Legislature modified the statutes in three ways. First, they eliminated the list of offenses that excluded someone from diversion, providing for the exclusion of anyone accused of a "dangerous" offense. Second, they required the county attorneys to administer the pretrial diversion programs according to standards set by the Arizona Prosecuting Attorney's Advisory Council (APAAC). Finally, they repealed matching state funds for diversion programs. Even though the legislature has twice enacted legislation authorizing diversion, very little has been done to encourage the implementation of diversion programs in Arizona by either the legislature or the counties.

There have been repeated attempts by elements within the state government to increase the use of diversion. As mentioned previously, the Arizona Auditor General's recent report recommended diversion as a possible solution to reduce the impact of growing prison population on the state (Arizona Auditor General, 2010). A similar proposal was advanced by the Arizona House of Representatives Alternative Sentencing Working Group in 2005. Recognizing the growing burden of incarceration and the effectiveness of other programs, the Working Group recommended expanding diversion and further researching its potential benefits (Arizona House of Representatives Alternative Sentencing Working Group, 2005). Despite these recommendations the counties have not acted or shown a willingness to use diversion extensively and the legislature has not taken steps to encourage the use of diversion.

[1] Of the respondents, only 23 maintained data on the recidivism rates of the offenders who successfully completed the programs. The programs submitting the data tracked the offenders for anywhere from one to five years after successful completion of the program. Despite the low number of programs who keep and maintain recidivism data, the results of the survey illustrate the effectiveness of pretrial diversion programs.

The voters of Arizona have not shown the same reluctance as the legislature or counties to implement diversion. Specifically, Arizona voters have twice voted for mandatory diversion programs for drug offenders. Arizona voters passed Proposition 200 in 1996 and have continued to support alternatives to incarceration for first and second time drug offenders. Arizona voters felt so strongly about the changes in Proposition 200 that they reenacted the legislation after the state legislature repealed a number of its provisions following the 1996 vote. The people of Arizona recognize the benefits of diversion for those offenders who might be treated through some means other than incarceration. Still, despite the public's repeated support of an alternative to incarceration for drug offenses, Arizona has not extensively utilized pretrial diversion for other types of offenders.[2]

As discussed above, one possible explanation for the lack of pretrial diversion in Arizona is the widely held belief that incarceration is the appropriate sanction for felony offenders. Another possible explanation for the lack of pretrial diversion programs, while specialty courts grow in popularity, is that substance abuse is seen as a treatable condition; if the addiction is cured, then a person is less likely to commit future crimes. Diversion programs that address less tangible causes of crime than addiction have less clear parameters for success. Success in diversion is not fully realized until the offender goes a significant period of time without re-offending. This success is not as readily apparent, or as visible, in the short term as treatment for mental health or addiction. Nevertheless, successful treatment through diversion is just as valuable to the individual and society as treatment through specialty courts.

Specialty treatment courts exist for those offenders that are facing difficult roads to rehabilitation. The offenders that find themselves before a specialty treatment court are suffering from substance abuse or severe mental health issues and are more likely to be non-compliant with the treatment program multiple times during treatment. Diversion offers an option which would allow those offenders who may not have such problems to still receive treatment for the root causes of their criminality in a more community-based setting. Diversion programs also have the benefit of being able to treat minor substance abuse and mental health issues outside of specialty treatment courts. For example, an offender who is also an alcoholic can receive treatment even if his crime is not related to his alcoholism. Likewise, an offender who suffers from Post Traumatic Stress Disorder from his time in the military could receive treatment for that condition even if the condition was not considered the root cause of the criminal behavior. The ability to treat these issues can substantially reduce the likelihood of future criminal behavior by the offender even if the condition was only an ancillary cause of the crime charged.

[2] There is some evidence that deferred prosecution has been used in Arizona to some extent. For example, in *Cranmer v. State*, 204 Ariz. 299 (Ariz. App. 2003) the Arizona Court of Appeals dealt with the issue of what a prosecutor had to show to warrant an offender's removal from diversion. Also, the Maricopa County Attorney's Office had an informal pre-filing drug diversion program where an offender arrested for a felony drug offense agreed to treatment in exchange for the prosecution not filing charges. Albonetti & Hepburn, *Prosecutorial Discretion to Defer Criminalization: The Effects of Defendant's Ascribed and Achieved Status Characteristics*. Despite these indications that pretrial diversion has been sparsely used in Arizona, there has not been the extensive implementation we recommend.

The Potential Economic Benefits of Pretrial Diversion in Arizona

The most immediate benefit of pretrial diversion is the decrease in incarceration costs as offenders are diverted to treatment programs instead of being sent to prison.[3] The Arizona Auditor General's recent report on the Arizona Department of Corrections pointed out the potential savings associated with the increased use of diversion programs as an alternative to incarceration.

The report estimated that roughly 23% of Arizona's prison population in December 2009 was incarcerated due to non-violent property offenses. (Arizona Auditor General, 2010). According to the report, in June of 2010 there were 40,477 inmates in Arizona's prisons. This means that of the prisoners currently incarcerated, roughly 9,310 were convicted of non-violent property offenses. The Arizona Auditor General's report for the fiscal year of 2009 found that the average daily cost of a minimal custody inmate in a public prison was $58.80. In other words, it costs approximately $21,462 a year to house a single prisoner. If we apply this number to the prison population for non-violent property offenders, it costs approximately $199,811,220 to house all of these prisoners. Needless to say, nearly $200 million in operating costs is a large sum of the State's budget. If pretrial diversion were currently in place, a large number of those inmates would be out of prisons and participating in diversion, resulting in an immediate savings to the state. [4]

It should be noted that not all of those prisoners would be recommended for diversion given their specific circumstances, and that the savings would be partially offset by the cost of the diversion programs itself. The Auditor General estimated that 3,538 offenders had low recidivism potential. These offenders were from the prison population at large and therefore included those offenders who would not otherwise qualify for diversion. The report estimated a total savings of $26.9 million in prison costs if an alternative to incarceration was available to these offenders (Arizona Auditor General, 2010). Even if only a quarter of those imprisoned for non-violent crimes qualified, i.e. 2,328 prisoners, the potential savings from prison costs alone would still be roughly $50 million per year. These estimates are very rough, but do suggest that savings from a diversion program would be substantial.

There is also a potential for substantial long-term savings through the reductions in recidivism rates that accompany the implementation of diversion programs. As noted above, the median recidivism rate for jurisdictions with diversion programs is 5% for new felonies. The recidivism rate in Arizona, according to a 2005 report by the Arizona

[3] It should be noted that none of the report authors are economists or financiers, and thus any predictions of future cost savings should be viewed as the educated approximations that they are.

[4] This simplistic model assumes that these offenders are housed in a public prison, not a private prison, where the daily cost per inmate is $58.80 versus $54.78. If we were to assume the private prison cost, the annual total would come to $186,150,657. The reality is that there is most likely a mixture of offenders housed in either private or public facilities. Furthermore, this rough number does not include the potential cost savings from court costs. The addition of the costs saved from judges, attorneys, witnesses, jurors, transportation, and clerical processing would likely add a substantial amount to the savings gained from a diversion program.

Department of Corrections, is 24% (Arizona Department of Corrections, 2005). The potential for a 19% drop in recidivism in Arizona would translate into immense savings not only in incarceration costs, but also law enforcement and court costs.

As the authors of this report have limited resources and expertise in making economic models and predictions, we recommend that the Legislature task the recommended Arizona Sentencing Commission (whose creation is proposed later in this document) to gather data and determine the actual costs and benefits of the proposed diversionary program prior to implementing diversion in Arizona. The Arizona Sentencing Commission would have the resources and data necessary to properly estimate the short-term and long-term savings available by implementing pretrial diversion programs in Arizona. Also, prior to successfully implementing pretrial diversion, there must be substantial changes to the system already in place.

Recommendations

To successfully implement diversion, Arizona must alter the current structure set forth by the state code. The current code is overly restrictive regarding the type of offenders eligible for diversion, and contains procedural mechanisms which hinder the effective implementation and oversight of the programs. As discussed in more detail below, the current Arizona pretrial diversion requirements ought to be changed to maximize the efficiency of the programs.[5]

The Eligibility Requirements for Diversion Should be Expanded

Currently, the question of whether to grant diversion in a certain case is committed entirely to the discretion of the county attorney. The county attorney may divert or defer the prosecution of a person accused of committing a crime prior to a guilty plea or trial except if the individual has previously been convicted of a felony, is accused of committing a "dangerous" felony as defined by A.R.S. §13-105, or has previously completed a diversion program.

The first problem with how an offender is recommended for diversion is the overly restrictive qualifications for entry into diversion. As discussed above, the potential economic savings of pretrial diversion programs are substantial. Beyond economic savings, there is also a societal benefit in lowering crime by reducing the

[5] An issue that is potentially divisive is whether or not these programs should be mandatory or voluntary for the counties. Despite the fact that pretrial diversion has been authorized by state statute twice in Arizona, the counties have not extensively implemented them in the past. There is no clear indication as to why the counties have failed to implement diversion, even with incentives such as state matched funds for the programs. The benefits of making these programs mandatory upon the counties are that the potential savings and reduced recidivism of this proposal will be realized. A potential pitfall of such a maneuver is that certain smaller counties may not benefit greatly from these programs, causing more of a burden to the local governance than a benefit to the State. As the legislature is a more equitably composed body, representing all of the counties in Arizona, it is better left to them to decide whether they should mandate participation in the program. As a result, we recommend that the legislature consider possible incentives for the county to create diversion programs or whether mandating their creation is necessary.

recidivism of offenders. Because of these potential benefits, the eligibility for diversion should be broad rather than restrictive.

In Arizona, an offender with a prior felony is automatically ineligible for diversion. This rigid standard does not allow for consideration of the length of time between offenses or the nature of the previous offense. Under the current eligibility requirements, an offender could be denied diversion for a class six felony committed twenty years prior to the current offense. In that twenty years the offender could have been a productive member of society, held a job, and raised a family. Furthermore, the felony the offender was convicted of may have been re-designated a misdemeanor under changed criminal statutes. That offender could be a successful candidate for diversion but could be denied entry under the restrictive eligibility criteria currently in place. Given the savings created by having that offender go through diversion instead of the criminal justice system, and the increased chance that he will not offend in the future, that offender should not be excluded from diversion. This example reflects the idea that the eligibility criteria for diversion should focus more on the individual offender's likelihood of success rather than an automatic disqualification for one prior offense.

The NAPSA *Performance Standards and Goals for Pretrial Diversion* (2008) reflect the idea that the eligibility criteria for diversion should be broad enough to include all potential participants that could benefit from the program:

> While a case may be made for excluding defendants with certain prior convictions, especially serious felonies, the Standards argue that little benefit is derived from uniform exclusions from diversion/intervention based on charge alone or some other factor. A case by case review of potentially eligible defendant can yield appropriate candidates. (p. 8)

As discussed below, an effective screening process prior to recommending diversion could aid the prosecutor in separating those offenders that could be potentially successful diversion candidates from those who would not. A prior felony should not automatically exclude an offender from that screening process. There comes a point, however, when an offender has repeatedly shown an unwillingness to comply with treatment or to stay away from criminal behavior. Offenders who have shown a settled propensity to re-offend should no longer be eligible for diversion, especially if they have shown themselves to be a continuing threat to public safety, regardless of treatment offered. There are also certain types of crime that should be excluded for the sake of public safety solely based on the nature of the offense. Specifically, offenders charged with violent or sexual crimes should not be eligible for diversion. These types of crimes are typically excluded from the type of treatment currently offered by diversion programs, and the interests of public safety warrant the exclusion of those offenders charged with those types of crimes.

We recommend establishing a hybrid eligibility restriction for repeat offenses in a given time frame. An offender would not be eligible for diversion if the offender:

- Has been convicted of a felony on two separate occasions within a ten year period; or

- Has been convicted of a misdemeanor on three separate occasions within a five year period; or

- Is charged with a felony involving violence or a sexual act.

This recommendation expands the eligibility for diversion while still taking into consideration public safety. Also, the recommendation contemplates that an offender who was convicted of two separate felonies stemming from the same incident would not be excluded from diversion. We further recommend changing the standard for a crime from the current definition of "dangerous" in A.R.S. 13 §13-105 to a more standard definition of "violence."

The definition of "dangerous" currently in place is overly broad and may exclude offenders who would have a high likelihood of success in a diversion program. Arizona defines a "dangerous" offense as "an offense involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person." (A.R.S. §13-105 (13)). The primary justification for denying certain offenders from being eligible for diversion is public safety. If violent offenders are allowed to live in the community while receiving treatment, there is a potential that they will harm someone else. While public safety is a very important consideration, the current definition of "dangerous" that exists in the statute does not exclude only those individuals that pose a threat to public safety. The primary problem is that the definition is so vague it is difficult to tell what constitutes a deadly weapon or instrument, or what level qualifies as a use. Therefore, we recommend defining violence "as an intentional crime resulting in physical injury to another."

By framing the restriction on violent offenses in terms of the intentional infliction of physical injury, it will only exclude those offenders who are most likely to pose a continuing threat to the community. Under this definition, offenders who are accused of simple assault or some other crime that would be considered "dangerous" under the current definition may still be eligible for diversion. This definition of violence would also make those offenders who negligently or recklessly inflicted harm but did not have the mental intent to do so eligible for diversion. Such offenders still have a high probability of rehabilitation and should not be excluded simply because the current definition is too broad.

Offenders Should be Screened Prior to Being Recommended for Diversion

Diversion will not be appropriate for all offenders. Given that one of the goals in having a diversion program is to provide for reformation to reduce recidivism, offenders ought to be screened in order to determine their chance of success in diversion. In a report by the National Association of Pretrial Services Agencies, all surveyed programs used a form of risk assessment or eligibility criteria to screen offenders. The initial use of

such a process is obvious: to only ensure that only those offenders who are likely to benefit from the programs are admitted (NAPSA, 2008b). The Arizona Auditor General's report also notes that many jurisdictions have developed effective risk and needs assessment tools, and that the Department of Corrections already uses a similar tool to determine where to hold prisoners (Auditor General, 2010). The initial screening should be done as reasonably close to the filing of charges as possible, in order to make treatment more efficient and to maximize economic savings by relieving the court costs that are entailed in further criminal proceedings (NAPSA, 2008a).

The first step in screening should be to determine whether the offenders qualify under the statutory criteria for eligibility. However, the screening process should look to more than a list of eligibility criteria when determining if an offender should be admitted to diversion. Indeed, most diversion programs appear to use additional screening tools to determine specific needs and proper programs (NAPSA, 2008a**).** The need for individualized screening has been characterized as follows:

> It is axiomatic that personal characteristics of diversion program participants will vary, as well as the nature of the offenses with which they are charged. Pretrial services practitioners agree that programs should assess the individual risk factors and corresponding needs of the participant rather than develop an intervention plan based only on the crime that was allegedly committed. The premise is that by addressing the risk factors of the participant which most likely drove the behavior that brought him or her to the attention of the system, the probability of future arrests is minimized (NAPSA, 2008a p. 16).

By tailoring the screening process to encompass characteristics that indicate risk or amenability, it will allow the program to focus on offenders it can actually help, instead of giving a trial alternative to those only formally eligible. Failing to look for individual characteristics would make a diversion program a burdensome bureaucratic route to shuffle offenders out of the system, while not gaining any of the long term economic, social, or legal benefits that a diversion program ought to provide. A formal report should be completed within a reasonable time from when this initial screening takes place. This report should be written by the person that initially screened the offender and include their recommendation on whether the offender ought to participate in diversion.

Other jurisdictions largely leave the power to put an offender in diversion to the discretion of the prosecutor, although in some circumstances this power is left to the courts. As prosecutorial discretion is fundamental in our legal system, it is best that the ultimate decision be left to the prosecuting attorney, consistent with A.R.S. 11-365.[6] In

[6] When there is a victim in a diversion eligible case, the prosecutor must make a reasonable effort to inform the victim of their decision and take into account the victim's wishes and circumstances. The victim should not be allowed a veto on the prosecutor's ultimate decision, but the victim must have a voice in the process. This would allow the diversion process to take into account the rights of the victim and comply with Article 2.1 of The Arizona Constitution.

order to respect the due process rights of the offender, however, the prosecutor's decision should follow a set of guidelines to avoid arbitrary decisions. Furthermore, an offender that is denied diversion should be afforded the opportunity to have the prosecutor or diversion program revisit their denial and reconsider the offender's eligibility. A review of the decision by the diversion program or by a supervising prosecutor may be appropriate in certain circumstances, to ensure that a meaningful review has taken place. The Supreme Court of New Jersey has opined about the importance of reviewing decisions to deny an offender from their own alternative adjudication programs:

> Providing a defendant with reasons for the denial of his application will not only allow a defendant to adequately prepare for judicial review of that decision, but will also promote the rehabilitative function which the PTI concept serves. At the very least, disclosure will alleviate existing suspicions about the arbitrariness of given decisions and will thereby foster a respect for the fair operation of the law.
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> *State v. Strychnewicz,* 68 N.J. 285 (N.J., 1975).

Since A.R.S. § 11-365 only deals with discretion, we recommend that it be amended to include the preceding interests.

After the report or assessment is completed, it should be given to the prosecuting attorney so that they may make an informed decision on how to proceed. This report should also be given to both the court and the offender at the same time it reaches the prosecuting attorney. This will allow all of the parties to discuss the option of diversion at pretrial conferences, meetings, or other procedures. Although the final decision of whether to recommend diversion should be left to the prosecutor, the input of both the court and the offender's counsel could reduce the possibility for abusive or arbitrary procedures in the eligibility process. As the purpose of diversion is to provide an alternative to traditional adjudication, this practice would promote a concerted and co-operative effort between all of the parties, as opposed to the traditional adversarial roles. This would lead to a more efficient and effective way to realize the goals of a diversionary program.

The Offender Should Make an Admission of Responsibility Prior to Entering Diversion

Arizona allows for the diversion of an offender prior to the entering of a guilty plea or trial. This system does not provide for some kind of admission of responsibility by the offender prior to entering diversion. Currently, slightly more than half of the jurisdictions that have diversion programs do not require an admission of responsibility as a criteria to be accepted into the program (NAPSA, 2009). While not universally accepted as a requirement of diversion, both the National Association of Pretrial Services Agencies and the National District Attorneys Association adopted some form of admission of guilt as part of their standards for pretrial diversion. While both recommend an admission of guilt for entry into diversion, the two standards differ in the nature of the admission. The NDAA standard favors a formal guilty plea that would be

withdrawn upon successful completion of the program, while the NAPSA standard favors more informal admissions of responsibility (NAPSA, 2008a; NDAA 1991). NAPSA addressed its concerns with requiring a guilty plea:

> The dangers of having pretrial diversion/intervention participants enter a plea of guilty are twofold. There is danger that a participant will not have the requisite information to make a voluntary and informed plea, particularly in those jurisdictions that require a decision to enroll prior to an opportunity to meet with counsel (in contravention to Standards 2.2 and 4.1). There is also the danger that by requiring a guilty plea, the program may merely become another form of plea bargaining rather than an alternative to prosecution in its own right.
>
> (NAPSA, 2008a p. 12)

NAPSA instead suggests that an informal confession could be used as an alternative to a guilty plea when the nature of the offense is tied to the offense provoking behavior. This informal confession would be used as a tool to prevent future criminal behavior but would not be admissible in any future criminal proceedings against the offender, even in the event that he is expelled from the program (NAPSA, 2008a).

In addition to the reasoning offered by NAPSA and NDAA, there are other concerns with adopting either approach. First, requiring a guilty plea provides an increased incentive to the offender to abide by the rules of the program. Unlike an informal confession where the offender still has the option of going to trial, or taking a plea bargain after failing diversion, a guilty plea ensures that there would be no option left to the offender if he wishes to avoid sentencing. Second, the guilty plea saves the state money by not restarting the entire criminal process when the offender fails diversion. By proceeding straight to sentencing the state avoids all of the judicial expenses that would otherwise occur through the offender's expulsion from diversion.

There are additional concerns in requiring guilty pleas. First, the nature of the program changes from one of cooperative rehabilitation to another form of probation. This is a philosophical shift that proponents of rehabilitation may feel is significant. Second, diversion could become another tool of plea bargaining rather than a complete avoidance of the criminal justice process by the offender. Third, the offender would be potentially prejudiced by having to report the offense while in diversion. This could keep a potentially successful diversion participant from obtaining a job, being approved for student loans, obtaining a lease on an apartment or any number of other hardships. These hardships may create difficulties in abiding by the rules of diversion or in the offender being successful after diversion.

There is a procedural mechanism that could be put into place to alleviate the fears of those opposed to a full guilty plea while still providing the benefits of having the offender plead guilty prior to entering diversion. We recommend the creation of a procedural device where an offender who has been recommended for diversion enters a

knowing, intelligent, and voluntary plea which is then stayed from filing by the court while the offender is in the diversion program. Then, at the successful completion of the diversion program, the plea is withdrawn without ever being formally entered and the charges are dismissed.

By going through all the procedural requirements of entering a guilty plea except the filing of the plea, the offender faces the same consequences for failing to successfully complete diversion, but the adverse effects of a felony conviction do not burden the defendant while participating in the program. This new procedure requires placing the ultimate decision of whether an offender will enter diversion in the hands of the judge hearing the case. While the judge has the final say in whether to stay the filing the guilty plea, the initial discretion to recommend diversion to the judge rests with the prosecuting attorney. As discussed above, the prosecutor can make the decision of whether to recommend diversion after reviewing the screening tool created by the diversion program, consulting with the victim, and using any other means of determining if diversion is an acceptable alternative to the criminal process for the particular offender. As reflected in A.R.S. §11-365, the prosecutor should be given great deference in decisions of whether an offender should be eligible for diversion. The substantive change recommended is only the judge's procedural decision to stay the filing of the guilty plea, not a reduction in the discretion granted to prosecutors.

An Offender Should Enter Into a Contract with the Prosecutor Prior to Entering Diversion

If they are eligible, the offender and his counsel will enter into a contract with the prosecutor that details their understanding of the requirements and benefits of a diversionary program. This will set forth the requirements of the treatment program for which the offender is eligible. It will contain a provision in which the offender waives his right to a speedy trial in order to participate in the diversion program. The punishments for failure to comply with the terms of the treatment process will be laid out and agreed to, as well as a procedure to review and reconsider those punishments in light of the specific circumstances of the indiscretion. The document will also contain the prosecutor's promise of dismissal upon successful completion of the program. The fines and costs associated with diversion should be clearly stated as well, so that a reasonable payment scheme can be agreed upon that allows for successful completion and not economic hardship.

The purpose of having this procedure is to provide a clear understanding of what diversion is to both the offender and the prosecuting attorney. The offender will have the benefit of counsel when they enter into this agreement, and counsel will let the offender know what is expected of them and the consequences if they do not comply with the terms. It will further allow the parties to collaborate and determine the most effective manner of treatment that suits the individual offender's needs. The American Bar Association endorsed similar procedures for drug courts in 1994:

> BE IT FURTHER RESOLVED, That the American Bar Association urges the courts to adopt treatment-oriented, diversionary drug court programs as one component of a comprehensive approach [that will]….(ii) provide carefully structured treatment programs with explicit criteria governing the successful and unsuccessful participation of defendants, including the identification of clear expectations as to the defendant's responsibilities for participation in the program, (iii) establish the expected outcomes of the program with periodic evaluation….and (v) target carefully the population of defendants with drug-related problems to be served by the program to maximize the program's effectiveness.
>
> (ABA, 1994 p. 100)

As this procedure is appropriate for diversion in a drug offense setting, the principles and reasoning that the ABA endorses should have equal validity in a diversionary program where the nature of the offense is the only difference.

The Offender Should Bear a Reasonable Amount of the Expense of Diversion

Despite the potential for long-term savings through reduced prison populations and recidivism rates, the initial costs of implementing programs are not insignificant. To help offset this cost, and to provide an additional incentive to not offend again in the future, an offender's successful completion of diversion should depend on the payment of a reasonable amount of fees. Currently, 62.3% of diversion programs charge a fee for participation. There are a range of fee structures, including paying the cost of the eligibility screening, flat fees, monthly fees, or paying a percentage of the program cost (NAPSA, 2009).

The fee structure that best combines all of these methods is to have the offender bear the financial burden of his treatment to the extent reasonable. The issue of the offender's financial ability to pay fees can first be raised during the initial screening. Since an offender's participation in diversion is voluntary, and the offender must request being screened for diversion, the offender should pay the initial screening fee. From there, the offender should be required to pay fees to the extent that it will not substantially interfere with his ability to meet his other financial obligations. In addition, the fees should not be leveled as a one-time payment but rather spread out as much as possible over the duration of the program. To ensure the payment of fees, the complete payment of the obligation should be a requirement to successful completion of the program. The fees should include a percentage of the cost of the program, a small surcharge to fund the Arizona Sentencing Commission (assuming the Proposal to Create an Arizona Sentencing Commission is adopted), and any victim restitution recommended by the prosecution.

While fees should be levied whenever possible, ability to pay the fees should never be a part of the criteria for admission into diversion. Offenders who are truly

indigent and unable to pay should not prevented from receiving treatment that may keep them from re-offending in the future.

An Offender Should Receive Graduated Punishments Prior to Expulsion from Diversion

Diversion programs are often time intensive and difficult for the offender. Given the nature of the treatment and the requirements of the program, there is a high likelihood that an offender may deviate from the standards of diversion at least once through the course of the program. Over 75% of pretrial diversion programs have some form of administrative sanction short of termination from the program for noncompliance. The reason for the wide acceptance that simple noncompliance should not warrant termination from the program in the first instance is rooted in the idea that "swift, certain, and equitable responses to noncompliance with conditions of supervision can reduce future noncompliance and recidivism" (NAPSA, 2008b p. 30).

Given the tremendous consequences of not completing the program—mainly imposition of the sentence — there should be escalating consequences for not complying by the terms of the program prior to expulsion. These sanctions could be: 1) an increase of community service hours; 2) modification of the diversion contract, 3) increasing the level of supervision while participating in diversion; 4) increased drug testing requirements; 5) short-term jail placements; 6) additional counseling hours; or 7) increasing the length of the diversion program.

These punishments are not intended to apply to an offender who is charged or convicted of a crime while in diversion. The diversion program should be able to proceed straight to expulsion after reviewing the charges filed against the offender, and it should automatically expel an offender who is convicted of a crime while in diversion. While this punishment is extreme in its application, an offender charged or convicted of a crime while in diversion has clearly shown his unwillingness to rehabilitate. While the diversion program should be allowed to make an immediate expulsion decision based on the above criteria, there should still be a review process for the offender to appeal the decision that is developed by the individual programs and subject to approval by the county attorney.

Diversion Programs Should use the Latest Research and Treatment Models

Diversion programs should be informed by the latest research from fields that are involved with modifying behavior, overcoming habits, maximizing economic benefits, or any other field that would benefit the diversion program. In implementing a diversion program, Arizona would be trying to reduce recidivism while also providing a reduction of expenditures in the criminal justice system. As recidivism can be caused by habitual behavior or certain tendencies on the part of the offender, the diversion programs should utilize the latest methods in the behavioral field to develop procedures and treatments that could overcome the driving factor that might have led to the commission of the crime. Those that perform the screenings and administer the diversion program should be kept up to date on the latest trends in these areas.

The time it takes to complete a diversion program should also be informed by the latest recidivism data. The length of a diversion program should be tailored to fit the problem that it is trying to treat. To that end, the length of any specific course of treatment needs to be in a range that has been shown to be effective in reducing recidivism for that category of offense. Although the divergence in time requirements might lead to some inefficiency, the goal of reducing repeat offenders should take priority over an arbitrary time standard that is convenient, as this will ultimately led to greater economic and social benefits.

The diversion program should also consider the models and procedures that have proved to be effective in other jurisdictions. Therefore, an avenue of communication should be set up between the diversion programs in Arizona with programs outside of Arizona. Treatment success rates, recidivism data, procedural efficiency, and other areas should be shared with other programs in order to develop a diversion program that is current and effective. All data relating to the program should be kept and analyzed to identify areas of particular effectiveness while also narrowing down areas where improvements could be made. The scarcity of records kept in the field of diversion is a major obstacle to formulating an effective program. With an open door policy to procedures and data, Arizona could become a major focal point for what makes diversion effective, statistical data on recidivism, and the economic benefits of implementing such a system.

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Proposed Legislation

To properly reflect the changes recommended above the following changes should be made to the Arizona Revised Statutes:

1) A.R.S. 11-361 Definition of the Program

For the purposes of this article, unless the context otherwise requires, "program" means a special supervision program in which **A SUPERIOR COURT JUDGE** of a participating county **SHALL, UPON THE RECOMMENDATION OF THE PROSECUTING ATTORNEY AND COMPLIANCE WITH THE RIGHTS OF THE VICTIM, STAY THE FILING OF A KNOWING, INTELLIGENT, AND VOLUNTARY PLEA, PENDING THE PERSON'S SUCCESSFUL COMPLETION OF THE PROGRAM. THE** county attorney may not **RECOMMEND** diver**SION** or defer**MENT** of a person who:

1. Has been previously convicted of a felony **ON TWO SEPARATE OCCASIONS WITHIN TEN YEARS OF THE DATE OF THE OFFENSE FOR WHICH THE PERSON IS CURRENTLY CHARGED.**

2. HAS BEEN PREVIOUSLY CONVICTED OF A MISDEMEANOR ON THREE SEPARATE OCCASIONS WITHIN FIVE YEARS OF THE DATE OF OFFENSE FOR WHICH THE PERSON IS CURRENTLY CHARGED.

3. **IS ACCUSED OF A FELONY INVOLVING VIOLENCE, OR A FELONY INVOLVING A SEXUAL ACT.**

2) Revision of A.R.S. Section 11-362

A. The program, as defined in section 11-361, shall be administered by the county attorney of each participating county according to guidelines established by ~~the Arizona prosecuting attorneys advisory council~~**THIS STATE'S LEGISLATURE.**

B. The county attorney of any county that has established a program shall establish and maintain statistical records pertaining to the program and shall annually submit **THE COLLECTED DATA AND** an evaluation of the program to the ~~president of the senate and the speaker of the house of representatives~~**ARIZONA SENTENCING COMMISSION**.

3) A.R.S. Section 11-365. Diversion and deferred prosecution of offenders

The county attorney has sole discretion to decide whether to divert or defer prosecution of an offender. **THE COUNTY ATTORNEY SHALL CONSIDER THE RECOMMENDATION OF THE DIVERSION PROGRAM IN COMPLIANCE WITH VICTIMS' RIGHTS, AS WELL AS THE GUIDELINES FOR DIVERSION OF THE COUNTY ATTORNEY'S**

OFFICE OR THE ARIZONA PROSECUTING ATTORNEY'S ADVISORY COUNCIL. THE COUNTY ATTORNEY SHOULD CONSIDER THE RECOMMENDATION OF THE OFFENDER, THE OFFENDER'S COUNSEL, THE COURT, OR ANY OTHER INTERESTED PARTY IN DECIDING WHETHER TO DIVERT PROSECUTION. This section does not preclude the ability of another prosecuting agency to divert or defer the prosecution of an offender as otherwise provided by law.

4) **A.R.S SECTION 11-366**

UPON A PERSON'S SUCCESSFUL COMPLETION OF A DIVERSION PROGRAM AS DESCRIBED IN A.R.S. §11-361, THE SUPERIOR COURT SHALL ALLOW THE PERSON TO WITHDRAWAL THE PERSON'S GUILTY PLEA, AND THE PROSECUTING ATTORNEY SHALL DISMISS THE PENDING CHARGES AGAINST THE PERSON.

Proposed Changes to the Arizona Rules of Criminal Procedure

In addition to the above changes to the Arizona Revised Statutes, Arizona Rule of Criminal Procedure 38 (which deals with deferred prosecution) would need to be revised as follows:

1) Rule 38.1. Application for suspension order

a. Whenever after ~~the filing of a complaint, indictment or information, but prior to a plea of guilty or trial,~~**THE DEFENDANT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY REQUESTS A FILING OF A GUILTY PLEA WITH THE COURT,** the prosecutor determines that it would serve the ends of justice to suspend further prosecution of a defendant so that he or she could participate in a~~deferred prosecution program~~ **PRETRIAL DIVERSION PROGRAM**, the prosecutor, with the consent of the defendant, may, by **oral or** written motion, apply to the court for suspension of ~~prosecution~~**THE FILING OF THE GUILTY PLEA.**

b. The motion of the prosecutor shall set forth facts showing that the defendant is a person legally eligible for participation in the ~~deferred prosecution program~~**PRETRIAL DIVERSION PROGRAM**, and a written consent signed by the defendant and his or her counsel, if any, agreeing to the participation by the defendant in the program shall be filed with the motion.

c. After the filing of a motion by the prosecutor as provided in this rule, the court may order that ~~further proceedings~~**THE FILING OF THE PLEA** be suspended for ~~two years~~**THE AGREED TERM OF THE PRETRIAL**

DIVERSION PROGRAM. If the defendant is in custody, the court may order him or her released.

2) Rule 38.2. Resumption of prosecution

a. If the prosecutor is **NOTIFIED BY THE PRETRIAL DIVERSION PROGRAM THAT THE DEFENDANT IS NOT SATISFACTORILY COMPLYING WITH THE TERMS OF THE PROGRAM, OR IF THE PROSECUTOR IS** not **OTHERWISE** satisfied that the defendant has fulfilled the conditions of the ~~deferred prosecution~~ program, he or she may file a written notice with the superior court that he or she desires that the order suspending prosecution be vacated and that prosecution of the defendant be resumed. The prosecutor shall serve a copy of the notice upon the defendant in the manner provided by Rule 35.5.

b. Upon filing of the notice to resume prosecution the court shall ~~vacate the order suspending prosecution and order that the prosecution of the defendant be resumed. A copy of the order shall be mailed by te ocurt to the defendant and his or her counsel.~~**FILE THE GUILTY PLEA AND PROCEED TO SENTENCING THE DEFENDANT**.

3) Rule 38.3. Dismissal of prosecution

~~a. At the expiration of two years after the entry of an order suspending prosecution, the court may order the prosecution dismissed without prejudice.~~

~~b.~~ **a.** If the defendant satisfactorily completes the terms of the ~~deferred prosecution program~~**DIVERSION PROGRAM**, the court, upon notice of the prosecutor, shall order the **PLEA WITHDRAWN AND THE** charges dismissed

Proposal to Expand Drug Sentencing Under Prop 200

Overview

Prop 200, Arizona's mandatory sentencing laws for drug possession offenses, ought to be expanded to include a wider class of individuals. This expansion will reduce drug addiction and recidivism while producing substantial savings for the State of Arizona.

These recommendations are based on elements of successful drug treatment programs in other states as well as on scientific research. Evidence based practices serve as the origin for any recommendations for modifications to treatment programs under Prop 200.

In particular, Prop 200 should be expanded so that:

(a) methamphetamine is no longer a basis for exclusion for sentencing under Prop 200; and

(b) those offenders who have a past conviction for a violent crime are not excluded from sentencing under this statute.

Excluding a whole class of people from mandatory substance abuse treatment in lieu of incarceration is inconsistent with the stated goals of Prop 200 — reducing the number of defendants sentenced to prison for non-violent drug offenses, and expanding drug intervention programs as a means to reduce crime.

Introduction

Background

In 1996, voters passed a sweeping reform to Arizona's drug laws known as Proposition 200 (Prop 200) by a 2-to-1 margin. Prop 200 had several purposes when it was presented to the voters. One such purpose was to free up prison space for violent offenders by placing non-violent drug offenders on probation. Another was to require drug treatment as a mandatory condition of probation. A third purpose of Prop 200 was to expand on the success of drug intervention programs which diverted drug users from prison to treatment.

Prop 200 created a new statutory scheme for individuals convicted of the personal possession of controlled substances.

A.R.S. § 13-901.01 established the probation scheme for persons convicted of personal possession of drugs. (see Appendix A)

A.R.S. § 41-1604.16 (renumbered § 41-1604.17) created a commission on drug education and prevention. This commission was given the duty of contracting not for

profit organizations or government entities with expertise in substance abuse treatment to administer the mandatory treatment under Prop 200.

A.R.S. § 41-1604.14 (renumbered § 41-1604.15) excluded those with convictions for crimes of violence from sentencing under Prop 200.

A.R.S. § 13-901.02 established the Drug Treatment and Education Fund, which would be used to fund the placement of individuals in substance abuse treatment programs.

Originally, Prop 200 made no distinction for crimes involving methamphetamine. However, this changed in 2006 when the Legislature referred an amendment to Prop 200 to the voters. This amendment, Proposition 301, passed with 58% of the vote and amended Prop 200 to specifically exclude individuals convicted of any offense involving methamphetamine.[7]

The Current Law

Prop 200 essentially operates as a "three strike" policy. The first strike carries a sentence of mandatory probation and incarceration is prohibited. The second strike also carries a sentence of mandatory probation, but up to a year in the county jail is permitted as a term of probation. A third strike results in ineligibility for sentencing under Prop 200.

As a condition of probation, defendants are required to participate in an appropriate drug treatment or education program administered by a qualified agency or organization. Defendants are required to pay for these programs to the extent of their ability. Violations of probation can result in new terms of probation, including intensified drug treatment. However, incarceration may not be imposed unless the individual either violates a court order regarding drug treatment or commits a new drug offense under Title 13, Chapters 34 or 34.1.

An individual is ineligible for sentencing under Prop 200 in the following situations:

1. Two Previous Convictions for Possession of Illegal Drugs or Drug Paraphernalia

An individual with two prior convictions for possession of drugs or drug paraphernalia is ineligible for sentencing pursuant to A.R.S. § 113-901.01. This is the so called "third strike."

[7] The Arizona Voter Protection Act (1998 Proposition 105, amending Arizona Constitution Article IV, Part 1, Section 1, subsections 6, 14, and 15) makes amending Prop 200 more complicated than obtaining a simple majority in both houses of the Arizona Legislature. After Prop 105, any amendments to ballot initiatives require: (1) a three-fourths majority in both houses of the Legislature; and (2) that the amendment further the purposes of the initiative; OR a new ballot initiative.

As these proposed amendments further the original purposes of Prop 200, they could be enacted by either method permitted under the Arizona Voter Protection Act.

2. Violent Offenses

A past conviction for a violent offense as defined in A.R.S. § 13-604.04 (any criminal act that results in death or physical injury or any criminal use of a deadly weapon or dangerous instrument) results in automatic ineligibility. The analysis of what constitutes a violent offense is not fact specific. Rather, it looks at the statutory elements of the offense. Convictions for offenses in other states must satisfy the elements of a violent offense under Arizona law to result in ineligibility.

3. Methamphetamines

Although not initially excluded by voters, Prop 301 in 2006 amended A.R.S. § 13-901.01 to automatically exclude individuals whose offense involves methamphetamine.

4. Refusal of Drug Treatment or Rejection of Probation

An individual who has refused drug treatment as a condition of probation or who has rejected probation is ineligible for sentencing pursuant to A.R.S. § 13-901.01.

Projected Benefits of Expanding Prop 200

Arizona is currently facing a budget crisis. The expansion of drug treatment as an alternative to incarceration will yield both short term and long term rewards.

In the short term, expanding eligibility would help the State avoid increasing incarceration costs by diverting more defendants from prison. By simply removing the prohibition on Prop 200 sentencing for those convicted of offenses involving methamphetamine, an additional 5,000 people would become eligible for mandatory drug treatment instead of potential prison sentences. Assuming a prison avoidance rate of 12%, another 600 individuals would avoid prison.[8] This represents a potential savings of an additional $6 million. Similar, if not greater, savings can be expected in prison avoidance costs by including those convicted of prior violent offenses in a revised Prop 200 sentencing scheme.

In the long term, the treatment mandated during probation is expected to reduce recidivism. Any reduction in recidivism will also produce savings for law enforcement, the courts, prosecutorial agencies, and public defenders' offices, as well as continued

[8] In 2005, an estimated 1,072 of the 8,575 individuals sentenced in Arizona under Prop 200 would have otherwise been sentenced to prison. This prison avoidance rate of approximately 12% resulted in a savings of over $11 Million in incarceration costs. Furthermore, treatment costs for these 8,575 individuals only cost $350 per participant, as compared to the cost of $22,794 per year to house an inmate in an Arizona prison.

savings on incarceration given the reduction in the prison population. These savings may be significant.

The economic benefits of the expanded drug treatment program adopted in the State of Washington, for example, exceeded the costs nine-fold — i.e. every dollar spent on drug treatment resulted in a savings of nine dollars — while also producing a 30% reduction in overall recidivism. There is no reason to expect a different outcome in Arizona.

The Current Situation

According to the 2009 Crime in Arizona Report compiled by the Arizona Department of Public Safety, there were over 31,000 arrests in Arizona in 2009 for the possession of controlled substances (20,378 for Marijuana; 5,307 for Methamphetamines and other dangerous drugs; 2,441 for narcotic drugs such as opiates, cocaine, and their derivatives; and 2,946 for synthetic narcotics.)

An August 2010 report by the Department of Corrections indicates that 20% of the 40,000 prisoners in the Department of Corrections are serving time for a drug offense. Drug use or addiction can also be a motive for or a cause of a variety of other crimes, including theft and crimes of violence. The same report also indicates that 75% of inmates (30,000) assessed at intake have significant substance abuse histories. However, only 1,810 inmates completed any substance abuse treatment in prison for Fiscal Year 2010.

Studies have shown a clear link between drug treatment and a decrease in recidivism. A 2005 study by the Department of Corrections found that 24.5% of prison inmates will return to prison within three years of their release. For drug offenders, the three year recidivism rate is 21.4%. This study also showed that substance abuse treatment in prison reduced recidivism by at least 25%. However, Arizona prisons are simply not able to adequately provide treatment for inmates with substance abuse issues. The key to breaking the cycle of crime and reducing the strain of incarceration costs on the state budget is treatment, in particular pre-incarceration treatment.

When Prop 200 was approved by voters in 1996, it was a revolutionary idea. It rejected the notion that all drug offenders should go to prison and acknowledged that drug use and addiction is a treatable condition. Prop 200 has been relatively successful in reducing incarceration costs and in combating drug addiction. However, Prop 200 is limited to a fairly narrow class of defendants — those with no violent history and no involvement with methamphetamines.

Successful Programs in Other States

Other states have adopted programs that address drug offenders' substance abuse issues with treatment instead of harsh prison sentences. These plans have adopted evidence based models of treatment to maximize the initial investment and reap

substantial rewards. By addressing offenders' addiction, which is often the root cause of their criminal behavior, these states have experienced a decrease in recidivism along with a tangible economic benefit.

Washington amended its drug sentencing laws in 1999 with the Drug Offender Sentencing Alternative (DOSA). DOSA allows a judge to reduce a prison sentence for drug offenders who agree to participate in substance abuse treatment. Typically, the sentence will be divided between prison and community supervision. Successful completion of treatment allows the person to remain on community supervision, while failure to complete treatment results in the offender completing the sentence in prison.

DOSA includes a variety of treatment programs, based on the assessed need of the participant. The average cost per participant was approximately $1,319. However, this initial investment resulted in a benefit ranging from $7.25 to $9.94 per dollar of cost. Additionally, recidivism rates dropped significantly. Drug felony recidivism after 2 years dropped from 20.9% to 13% for those who received treatment, a 38% reduction. Overall felony recidivism after 2 years dropped from 29% to 20.2% for those receiving treatment, a 30% reduction. The benefits of drug treatment were clear. Addressing substance abuse issues reduced recidivism and produced an economic benefit for the state of Washington.

Kings County, New York (i.e. Brooklyn), established a Drug Treatment Alternative to Prison program (DTAP), which provides treatment as alternative to prison for second time non-violent drug offenses. This program features extended treatment programs, some lasting over a year. As of 2005, the program had produced savings of $38 million dollars for the 971 graduates, while costing an average of $32,975 per client. The savings were realized through decreased recidivism rates, health care costs and public assistance, as well as in the increased employment earnings by the individuals.

An analysis of the California Substance Abuse and Crime Prevention Act of 2000 (SACPA) revealed net savings of $2.50 for every dollar spent. The annual savings to California totaled $173 Million in avoided criminal justice costs. There were also noted benefits with regards to increased employment, improved health, and decreased drug use among program participants.

Amending Prop 200 to incorporate the successful elements of other states' plans will greatly benefit Arizona. By expanding the scope of Prop 200 and basing substance abuse treatment on evidence based practices, Arizona will experience a reduction in crime and the accompanying economic benefits.

What Needs To Be Changed

Prop 200 currently targets low level drug offenders who generally have a limited criminal history. However, those convicted of offenses involving methamphetamine and those with any history of violent crimes are excluded. This exclusionary policy results in only a fraction of defendants with substance abuse issues being eligible for treatment. It

is clear that when these individuals arrive in prison, they are unlikely to have their substance abuse issues addressed.

By mandating treatment for individuals convicted of simple drug possession, including those individuals addicted to methamphetamine and those whose violent history may be fueled by drug use, Arizona can reduce recidivism and benefit from a reduction in incarceration costs.

Therefore, Prop 200 should be amended to require treatment in lieu of jail for all first and second time drug offenders. Treatment programs should incorporate evidence based principles. Eligibility for sentencing under Prop 200 should be expanded, not reduced. A person with a violent past arrested for a non-violent drug possession offense should be eligible for mandatory drug treatment, as this may address an issue that potentially underlies his violent nature.

Recommendations

The original intent of Prop 200 was to reduce the amount of non-violent drug offenders going to prison and to increase the use of drug treatment in the criminal justice system, ultimately reducing crime. This proposal seeks to further both of those goals.

I. Sentencing

Defendants convicted of a first or second offense for the personal possession of drugs or drug paraphernalia shall be sentenced under § 13-901.01 to probation with mandatory substance abuse treatment as a condition of probation. Jail is not available as a condition of probation.

II. Eligibility

Defendants in all non-violent cases involving the possession of drugs or drug paraphernalia should be eligible for sentencing pursuant to this section. A.R.S. § 13-901.01(H)(4) should be repealed, allowing offenses involving methamphetamine to be sentenced pursuant to this section. Prior convictions for violent crimes or sex offenses will not render a defendant ineligible for sentencing pursuant to this section. In other words, an individual's criminal history, aside from prior drug convictions, will be irrelevant in determining eligibility.

III. Exclusions

A. Pending Charges for Violent Crimes or Sex Offenses

Defendants with pending cases involving violent crimes or sex offenses are ineligible. Convictions for violent crimes or sex offenses with the same date of offense as the drug charges, will also exclude a defendant from sentencing under § 13-901.01.

B. Cases Where Pretrial Diversion Was Offered, Entered into, and Not Successfully Completed.

Defendants who are eligible for pretrial diversion programs and offered that option in lieu of prosecution should be encouraged to successfully complete those programs.[9] If sentencing under § 13-901.01 were still an option in those cases where diversion was attempted, the incentive to modify one's behavior and successfully complete the diversion program would be significantly reduced. Therefore, §13-901.01 is only available to those defendants who did not attempt a pretrial diversion program in the same case.

C. Two Convictions for Possession of Drugs or Drug Paraphernalia

Sentencing an individual to drug treatment as a condition of probation addresses substance abuse issues and aims to modify behavior. A person who has already been through treatment two times and continues to use drugs has shown a lack of willingness to modify his behavior. Continued treatment would not be an efficient use of resources. Therefore, standard sentencing including prison is appropriate.

IV. Approval of Substance Abuse Treatment Programs for Court Ordered Treatment

Treatment programs and agencies must be approved before providing court ordered treatment. Approval is contingent on an agency's acceptance and adoption of the required components (listed below) into its treatment programs. The defendant shall be placed in an appropriate treatment program after a thorough screening and assessment by an approved agency. Programs and agencies shall be periodically evaluated to ensure compliance with the required components of treatment programs. Approval and evaluation of agencies and programs shall be handled by the Arizona Parents Commission on Drug Education and Prevention pursuant to its statutory authority under A.R.S. § 41-1604.17.

V. Substance Abuse Treatment Program Requirements and Best Practices

The experience of other jurisdictions that have implemented drug treatment programs as an alternative to prison, as well as research by the National Institute on Drug Abuse, reveal key elements of a successful treatment program. Based on those experiences and research, we recommend that treatment programs conform to the following best practices:

A. Assessment and Individualized Treatment

A history of substance abuse requires a comprehensive assessment to determine the extent of an individual's addiction. Defendants sentenced under Prop 200 should be assessed and placed in an appropriate treatment program based on their specific and

[9] See Proposal for Pretrial Diversion.

individualized needs. The assessment should be comprehensive, so as to identify factors that may impact recovery, especially mental health issues.

Substance abuse treatment cannot take a one size fits all approach. Individuals will have different needs based on several factors, including age, level of addiction, and motivation. A substantial component of treatment should address these specific, individualized needs.

While treatment should be individualized, evidence shows that the most effective treatments last a minimum of 90 days. Some programs last significantly longer, sometimes more than a year. While 90 days should be a minimum treatment length, the duration of a treatment program should ultimately be determined based on the individual's needs and response to treatment. Therefore, all treatment programs under Prop 200 shall last a minimum of 90 days, with longer treatment programs being required based on the defendant's assessed level of need.

B. Defendants Must Be Closely Monitored during Treatment

Relapse is a frequent, if not expected, part of the recovery process. If program participants are not closely monitored, a relapse may result in a return to serious drug use before being detected. Close monitoring allows for treatment plans to be adjusted based on the individual's progress.

Close monitoring of program participants, including frequent drug testing, is therefore necessary. Similar to the drug court model, any relapse and the underlying reasons must be quickly addressed for treatment to be effective.

C. Treatment Must Target Criminal Thinking

Evidence indicates that criminal thinking often contributes to drug use and criminal behavior. Criminal thinking includes: beliefs that criminal behavior is justified; a failure to take responsibility for one's own actions; and a failure to anticipate the consequences of one's own actions. For treatment to be effective, this mindset must be changed.

Therefore, this mindset must be addressed by treatment. This will assist participants in recognizing and avoiding such errors in judgment that can lead to future drug use and criminal behavior.

D. Continuity of Care

Continuing care should be provided and encouraged even after the term of probation and mandatory treatment has lapsed. Living drug-free in the community represents a significant lifestyle change for some individuals. Continued participation in community based programs may help individuals avoid a return to a lifestyle of substance abuse and criminality.

E. Meaningful Rewards and Harsh Sanctions are Essential

Treatment must be a mandatory condition of probation. Successful treatment requires positive reinforcement of good behavior. Those who perform well on probation and actively participate in treatment should be rewarded. However, a reward must be meaningful in order to serve as an incentive.

Specific rewards may depend on amendments to other statutes. Therefore, none are included in the proposed legislation.[10]

Conversely, bad behavior during treatment requires sanctions. Sanctions should start out small for bad behavior and minor violations, but escalate in severity for continued bad behavior and serious violations.

A defendant who fails to complete treatment must be sanctioned with an automatic revocation of his probation and a prison sentence based on the sentencing range of the offense of conviction.[11] This provides a significant incentive to perform well and actively participate in treatment. Those who have a lengthy criminal history will find an even greater incentive to participate in treatment, especially if their prior convictions were alleged in a plea agreement or at trial.

For any system of rewards and sanctions to work, it must be perceived as fair by participants. Rewards and sanctions must also occur swiftly to reinforce or correct behavior. A lengthy bureaucratic process that delays rewards or sanctions is therefore inconsistent with this concept.

F. Medication

Research has shown that medication can be effective in treating addiction and in normalizing brain function in individuals with a history of substance abuse. The use of medication should be encouraged, where appropriate, as a component of treatment. The mental health history of an individual should be evaluated when considering the use of medication. Also, special attention must be paid to potential abuse of certain medications.[12]

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[10] As a suggested reward, those who successfully complete a substance abuse program and remain clean for the duration of probation should automatically have their offenses designated misdemeanors. This designation is already permitted by A.R.S. § 13-604 for class 6 felonies, as long as the individual does not have two or more prior felony convictions. However, § 13-604 would need to be amended to allow for class 4 drug possession felonies to also be designated misdemeanors upon the successful completion of probation.

[11] This sanction would only apply to those who fail to complete treatment. It would not apply to those who complete treatment but resume using drugs afterward.

[12] Methadone and Buprenorphine are used in the treatment of opioid-dependent individuals (i.e. heroin addicts). While there is a potential for abuse of these drugs in the absence of supervision, this risk is outweighed by the benefits of using these drugs in treatment. These drugs have a demonstrated efficacy in drug treatment programs while the likelihood of a fatal overdose resulting from abuse is low.

G. Participants Must Pay Fees

Defendants sentenced to substance abuse treatment under Prop 200 must pay a reasonable fee for their treatment. A required financial commitment by the defendant encourages active participation in treatment. Courts shall have the authority to adjust fees based on financial need so that indigent defendants are not precluded from treatment. However, a nominal minimum fee should be established.

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Proposed Legislation

Amended Statute Providing for the Expansion of Prop 200

13-901.01. Probation for persons convicted of possession or use of controlled substances or drug paraphernalia; treatment; prevention; education; exceptions; definition

A. Notwithstanding any law to the contrary, any person who is convicted of the personal possession or use of a controlled substance or drug paraphernalia is eligible for probation. The court shall suspend the imposition or execution of sentence and place the person on probation.

~~B. Any person who has been convicted of or indicted for a violent crime as defined in section 13-901.03 is not eligible for probation as provided for in this section but instead shall be sentenced pursuant to chapter 34 of this title.~~

B. ~~C.~~ Personal possession or use of a controlled substance pursuant to this section shall not include possession for sale, production, manufacturing or transportation for sale of any controlled substance.

C. ~~D.~~ If a person is convicted of personal possession or use of a controlled substance or drug paraphernalia, as a condition of probation, the court shall require **PLACEMENT** AND participation in an appropriate drug treatment or education program administered by a qualified agency or organization that provides such programs to persons who abuse controlled substances, **AS DEFINED BY SUBSECTION D OF THIS SECTION. SUCH PLACEMENT SHALL BE MADE UPON A SCREENING AND ASSESSMENT BY A QUALIFIED AGENCY**. Each person who is enrolled in a drug treatment or education program shall be required to pay for participation in the program to the extent of the person's financial ability. **REDUCTION OF FEES SHALL BE IN THE SOLE DISCRETION OF THE COURT**.

D. QUALIFIED TREATMENT AGENCIES REFERENCED IN SUBSECTION C MUST BE APPROVED BY THE ARIZONA PARENTS COMMISSION ON DRUG EDUCATION AND PREVENTION, PURSUANT TO ITS AUTHORITY UNDER SECTION 41-1604.17. QUALIFIED TREATMENT AGENCIES SHALL BE PERIODICALLY EVALUATED TO ENSURE COMPLIANCE WITH THE FOLLOWING REQUIRED COMPONENTS:

1. **TREATMENT PROGRAMS MUST ADDRESS AN INDIVIDUAL'S SPECIFIC NEEDS. ASSESSMENT OF SUCH NEEDS SHALL BE COMPREHENSIVE SO AS TO IDENTIFY ANY RELEVANT FACTOR TO RECOVER, INCLUDING MENTAL HEALTH NEEDS.**

2. **TREATMENT PROGRAMS MUST LAST A MINIMUM OF 90 DAYS.**

3. PROGRAM PARTICIPANTS MUST BE CLOSELY MONITORED, WITH FREQUENT DRUG TESTING.

4. TREATMENT MUST ADDRESS CRIMINAL THINKING.

5. MEDICATION SHALL BE USED WHEN APPROPRIATE.

E. A person who has been placed on probation pursuant to this section and who is determined by the court to be in violation of probation shall have new conditions of probation established by the court. The court shall select the additional conditions it deems necessary, including intensified drug treatment, community restitution, intensive probation, ~~home arrest~~ or any other sanctions except that the court shall not impose a term of incarceration unless the court determines that the person violated ~~probation by committing an offense listed in chapter 34 or 34.1 of this title or an act in violation of~~ an order of the court relating to drug treatment.

F. If a person is convicted a second time of personal possession or use of a controlled substance or drug paraphernalia, the court may include additional conditions of probation it deems necessary, including intensified drug treatment, community restitution, intensive probation, ~~home arrest~~ or any other action within the jurisdiction of the court, **EXCEPT THAT THE COURT SHALL NOT IMPOSE A TERM OF INCARCERATION UNLESS THE COURT DETERMINES THAT THE PERSON VIOLATED AN ORDER OF THE COURT RELATING TO DRUG TREATMENT**.

G. At any time while the defendant is on probation, if after having a reasonable opportunity to do so the defendant fails or refuses to participate in drug treatment, the probation department ~~or the prosecutor may~~ **SHALL** petition the court to revoke the defendant's probation. **THE DEFENDANT SHALL THEN BE SENTENCED PURSUANT TO CHAPTER 34 OF THIS TITLE**. ~~If the court finds that the defendant refused to participate in drug treatment, the defendant shall no longer be eligible for probation under this section but instead shall be sentenced pursuant to chapter 34 of this title.~~

H. A person is not eligible for probation under this section but instead shall be sentenced pursuant to chapter 34 of this title if the court finds the person either:

1. ~~Had been convicted three times of~~ **HAS TWO PRIOR CONVICTIONS FOR** personal possession of a controlled substance or drug paraphernalia.

~~2. Refused drug treatment as a term of probation.~~

~~3. Rejected probation.~~

~~4. Was convicted of the personal possession or use of a controlled substance or drug paraphernalia and the offense involved methamphetamine.~~

2. IS CHARGED WITH A VIOLENT CRIME, AS DEFINED IN SECTION 13-901.03, WITH THE SAME DATE OF OFFENSE AS THE OFFENSE INVOLVING THE POSSESSION OR USE OF A CONTROLLED SUBSTANCE OR DRUG PARAPHERNALIA.

3. IS CHARGED WITH A SEXUAL OFFENSE, AS DEFINED IN CHAPTER 14 OF THIS TITLE, WITH THE SAME DATE OF OFFENSE AS THE OFFENSE INVOLVING THE POSSESSION OR USE OF A CONTROLLED SUBSTANCE OR DRUG PARAPHERNALIA.

4. HAS BEEN OFFERED A PRETRIAL DIVERSION PROGRAM IN LIEU OF PROSECUTION FOR THE SAME CAUSE NUMBER AND:

a. ENTERED INTO SUCH PROGRAM, AND

b. HAD PROSECUTION REINSTATED FOR FAILURE TO SUCCESSFULLY COMPLETE SUCH PROGRAM

I. Subsections G and H of this section do not prohibit the defendant from being placed on probation pursuant to section 13-901 if the defendant otherwise qualifies for probation under that section.

J. For the purposes of this section, "controlled substance" has the same meaning prescribed in section 36-2501.

Appendix: Original Statute

13-901.01. Probation for persons convicted of possession or use of controlled substances or drug paraphernalia; treatment; prevention; education; exceptions; definition

A. Notwithstanding any law to the contrary, any person who is convicted of the personal possession or use of a controlled substance or drug paraphernalia is eligible for probation. The court shall suspend the imposition or execution of sentence and place the person on probation.

B. Any person who has been convicted of or indicted for a violent crime as defined in section 13-901.03 is not eligible for probation as provided for in this section but instead shall be sentenced pursuant to chapter 34 of this title.

C. Personal possession or use of a controlled substance pursuant to this section shall not include possession for sale, production, manufacturing or transportation for sale of any controlled substance.

D. If a person is convicted of personal possession or use of a controlled substance or drug paraphernalia, as a condition of probation, the court shall require participation in an appropriate drug treatment or education program administered by a qualified agency or organization that provides such programs to persons who abuse controlled substances. Each person who is enrolled in a drug treatment or education program shall be required to pay for participation in the program to the extent of the person's financial ability.

E. A person who has been placed on probation pursuant to this section and who is determined by the court to be in violation of probation shall have new conditions of probation established by the court. The court shall select the additional conditions it deems necessary, including intensified drug treatment, community restitution, intensive probation, home arrest or any other sanctions except that the court shall not impose a term of incarceration unless the court determines that the person violated probation by committing an offense listed in chapter 34 or 34.1 of this title or an act in violation of an order of the court relating to drug treatment.

F. If a person is convicted a second time of personal possession or use of a controlled substance or drug paraphernalia, the court may include additional conditions of probation it deems necessary, including intensified drug treatment, community restitution, intensive probation, home arrest or any other action within the jurisdiction of the court.

G. At any time while the defendant is on probation, if after having a reasonable opportunity to do so the defendant fails or refuses to participate in drug treatment, the probation department or the prosecutor may petition the court to revoke the defendant's probation. If the court finds that the defendant refused to participate in drug treatment, the defendant shall no longer be eligible for probation under this section but instead shall be sentenced pursuant to chapter 34 of this title.

H. A person is not eligible for probation under this section but instead shall be sentenced pursuant to chapter 34 of this title if the court finds the person either:

1. Had been convicted three times of personal possession of a controlled substance or drug paraphernalia.

2. Refused drug treatment as a term of probation.

3. Rejected probation.

4. Was convicted of the personal possession or use of a controlled substance or drug paraphernalia and the offense involved methamphetamine.

I. Subsections G and H of this section do not prohibit the defendant from being placed on probation pursuant to section 13-901 if the defendant otherwise qualifies for probation under that section.

J. For the purposes of this section, "controlled substance" has the same meaning prescribed in section 36-2501.

Proposal to Create Mental Health Courts and Mental Health Public Defenders

Overview

This proposal recommends two substantive changes to Arizona's current management of mentally ill offenders in the State's criminal justice system:

1) Establish a statewide system of mental health courts comprised of a specialized court docket for some portion of criminal cases involving defendants with mental illnesses and team-based monitoring of participants that includes regular judicial supervision.

2) Establish specialized mental health public defenders in each county to offer mentally ill indigent defendants access to both specialized legal expertise and social worker support if they are ineligible for, or decline entry to, a mental health court.

Nearly 9,000 prisoners in Arizona suffer from a serious mental illness. Adopting these proposals, which are aimed at reducing recidivism for those offenders and at using community-based treatment rather than incarceration, will likely result in a savings of millions of dollars to the state of Arizona.

Introduction

The large number of individuals with mental illnesses involved in the criminal justice system has become a pressing policy issue within both the criminal justice and mental health systems. An increasingly popular response to this issue across the country has been the development of mental health courts. In the late 1990's, only a few mental health courts existed. Now, there are more than 100 nationwide. Even with this rapid development and deployment, a substantial body of research has been written about mental health courts, including evaluations of individual courts, analyses of practices across courts, and commentaries on the merits of the mental health court concept. In particular, a recently published evaluation of Texas's recent reform of their criminal justice system that handles mentally ill defendants provides a great deal of insight into potential Arizona reforms.[13] Additionally, the 2005 final report from the Arizona House of Representatives - Sentencing Working Group recommended establishing mental health courts as part of sentencing reform in Arizona.[14]

[13] In the fall of 2008, Texas' Task Force on Indigent Defense initiated a two-year evaluation of the two most common models through which specialized attorneys advocate for mentally ill defendants in Texas: mental health public defenders and mental health courts.

[14] The Arizona House of Representatives – Alternatives to Sentencing Workgroup issued a Final Report on January 1, 2005 outlining recommended alternative to traditional sentencing. The Workgroup's recommendation to "consider diversion programs for less serious offenses and study the cost effectiveness

Texas's evaluation of its mental health courts showed a strong impact on reducing recidivism. In the six months following case disposition and release from custody, participants were less than half as likely to re-offend compared to their peers not in the program. Remarkably, even 18 months after their case was disposed, Texas mental health court participants remain one-third less likely to commit another offense. Additionally, Texas's mental health courts more than doubled participants' level of treatment engagement and dramatically reduced the likelihood of a criminal guilty verdict approximately 30-70% (Carmichael, 2010).

Texas's evaluation of its mental health public defenders also showed a strong impact on reducing recidivism. For defendants represented by a mental health public defender, six months after case disposition, defendants were 8-13% less likely to re-offend compared to mentally ill defendants not represented by mental health public defenders. Furthermore, even 18 months after their case was disposed, defendants represented by a mental health public defender were 5-9% less likely to re-offend. Clients of a mental health public defender were also 3-5% less likely to be found guilty and face punishment compared to otherwise identical peers. Notably, defendants represented by mental health public defenders who were found guilty were 17-36% less likely to face incarceration (Carmichael, 2010). These are notable impacts given the clear impetus toward conviction and incarceration in most cases.

The motivation behind Texas's reforms was largely economic. With incarceration rates and thus incarceration costs increasing in the state at an unsustainable rate, the Texas legislature decided to undertake significant reforms as an attempt to reduce these costs (Carmichael, 2010). Estimates of cost savings for defendants who avoid incarceration through these programs range from approximately $18,000 to $40,000 per inmate per year. (NAMI, 2010). Arizona is currently facing similar unsustainable incarceration costs. Although it is difficult to establish verifiable potential costs savings of programs such as these, rough estimates show that Arizona could see significant cost savings. The current estimate of seriously mentally ill inmates who are incarcerated in the Arizona Department of Corrections is approximately 8,900 (NAMI, 2010). If even half of these inmates were able to avoid incarceration, the annual cost savings to the state would likely range from $80 million to $180 million. Thus, the fiscal and principled arguments combine to create significant support for the enactment of mental health courts and mental health public defenders.

This section attempts to build on this substantial body of work by providing a roadmap — based largely on the experience of Texas in designing and implementing mental health courts and mental health public defenders — for Arizona to establish mental health courts and mental health public defenders. The section is organized into two subsections, described below, that should inform Arizona's criminal justice and mental health communities in considering the establishment a mental health court:

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of treatment programs for substance abuse and mental illness" was the fifth recommendation out of 18 recommendations, ranked in order of their usefulness and difficulty in implementation.

1) Understanding the concepts and rationales that underpin mental health court and mental health public defender development supported by Texas's experience with these programs.

2) Recommendations for Arizona's implementation of mental health courts and mental health public defenders.

Understanding the concepts and rationales that underpin mental health court and mental health public defender development

Previously unpublished data from a 2004-2005 nationwide study indicate that there are now more than three times more seriously mentally ill (SMI) individuals in jails and prisons than in mental hospitals. The situation in Arizona appears to be even more urgent, with almost ten times more mentally ill persons in jails and prisons than in hospitals (Torrey, 2010). Unfortunately, there is no indication that this situation is improving. Recent studies suggest that the prevalence of serious mental illnesses among all people entering jails, for example, is estimated to be 16.9 percent compared to an estimated 6.4 percent in 1983. In a relatively short period of time, less than three decades, the percentage of SMI prisoners has almost tripled with an estimated 40 percent of all individuals with a diagnosed SMI having been incarcerated at some point in their lives (Torrey, 2010).

In the fall of 2008, the Task Force On Indigent Defense in Texas initiated a two-year evaluation of the two most common models through which specialized attorneys advocate for mentally ill defendants in Texas: mental health public defenders (MHPDs) and mental health courts (MH courts). Both of these criminal justice interventions create means through which contact with the justice system can be used to address therapeutic needs of people with mental illness. Both MH courts and MHPDs also offer new opportunities for defense counsel to take a leading role in advocating for clients' access to treatment-oriented dispositions.

Mental Health Courts

People with mental illnesses often cycle repeatedly through courtrooms, jails, and prisons that are ill-equipped to address their needs and, in particular, to provide adequate treatment. Over the past decade, policymakers and practitioners have been exploring new ways of responding to these individuals, to break this costly and damaging cycle, and to otherwise improve outcomes for the systems and individuals involved. One of the most popular responses to emerge has been the mental health court, which combines court supervision with community-based treatment services, usually in lieu of a jail or prison sentence. Mental health courts generally share the following goals:

- improve public safety by reducing criminal recidivism
- improve the quality of life of people with mental illnesses
- increase their participation in effective treatment

- reduce court- and corrections-related costs through administrative efficiencies, often by providing an alternative to incarceration.

Although any jurisdiction's individual mental health court design may differ substantially, in general, the term "mental health court" describes:

> A specialized court docket for certain defendants with mental illnesses that substitutes a problem-solving model for traditional court processing. Participants are identified through specialized screening and assessments, and voluntarily participate in a judicially supervised treatment plan developed jointly by a team of court staff and mental health professionals. Incentives reward adherence to the treatment plan and other court conditions, non-adherence may be sanctioned, and success or graduation is defined according to specific criteria (Council, 2005 pg. 2).

The two essential components of an effective mental health court are therefore: 1) designation of a specialized court docket for some portion of criminal cases involving defendants with mental illnesses; and 2) team-based monitoring of participants that includes regular judicial supervision.

One of the main issues in designing and implementing MH courts and MHPDs programs is determining which defendants are eligible. In Texas, intervention begins as soon as an arrestee is booked into jail. Cases are screened through a local assessment, as well as through a match against statewide mental health records. The information is used to begin treatment in jail and to notify decision-makers to identify potential interventions appropriate to the criminal and therapeutic needs of the case. An initial objective is to identify individuals eligible for specialized legal defender or mental health diversion programs before they are able to post bond.

The following is a generalized description of the procedures used in Texas to identify and process mentally ill defendants:

Initial Screening for Mental Illness: Arrestees are interviewed to obtain background information regarding their family history, medical history, mental health history, and criminal background. A state required oral screening is usually followed by a written evaluation. The intake officer, who is not a mental health specialist, conducts these initial screenings; however, if the evaluations indicate a possible mental health issue, the individual is referred to a mental health specialist for further assessment.

Mental Health History Check Against Public Mental Health System Records: In addition to the jail intake officer's screening, all Texas counties are required to check the state's mental health services database to determine if the individual has had previous contact with the public mental health system. This database will not register a match for individuals who have been served by a private mental health care provider.

Jail Mental Health Assessment for Identified Cases: If there is a match with the database or the evaluations in step one indicate that further assessment is needed, the individual is referred to a mental health specialist for further assessment to determine the level of care and type of housing in jail.

Jail Mental Health Treatment: Treatment begins in the jail under the supervision of the jail psychiatrist. Individuals in crisis may be transferred to an emergency psychiatric facility for immediate intervention.

Dissemination of Information: Information about individuals with a database match or assessed mental health issues is disseminated by the mental health coordinator to key stakeholders including the prosecutor, public defender, pretrial services department, probation department, and MH court judge. The information is used to assign counsel and to refer qualifying cases to diversion programs.

Once a defendant has been identified as a possible candidate for one of the mental health specific legal services, a determination as to which is more appropriate — MHPDs or MH court — has to be made. Mental health public defenders and mental health courts vary considerably in the criminal risk attributes of their client populations. The specific criteria for entry into either program vary by jurisdiction, and Arizona will have to decide what those criteria will be for this state. Nevertheless, the MH courts in Texas generally choose first-time offenders without a lengthy criminal history, while the MHPD takes on more challenging cases involving violent felons with multiple prior offenses. Together they offer a continuum of resources capable of impacting the full range of mental health cases.

Process evaluation results were compiled based on site visits to the Tarrant County mental health court, the Dallas County Misdemeanor Jail Diversion Program, and the Dallas County felony probation mental health court known as ATLAS. The mental health courts differ in the selectiveness with which participants are screened for enrollment. From an evaluation perspective, the more program acceptance is influenced by immeasurable attributes such as external family supports or motivation to succeed, the more difficult it is to clearly determine to what extent success is due to the program or the participants' own strengths. All courts at a minimum consider program volunteers' mental health status, current charges, and offense history in deciding who is eligible.

The Texas mental health courts closely adhere to the traditional problem-solving court model. There is a selection process wherein potential clients must meet minimum qualifying criteria. Upon enrollment, participants are immediately connected to mental health care and other services, which vary according to the needs of the participant. Before each court hearing, the MH court team meets to inform the judge of each participant's progress and discuss whether there may be a need for rewards or sanctions based on compliance with the program.

Enrollees then report to court on a regular schedule to discuss their progress with the judge. As the participant shows improvement, the number of court appearances and

the amount of contact with service providers decrease. Once the participant is equipped to independently handle the mental illness at a "maintenance" level of services, they graduate from the program. Members of a team including representatives from the prosecutor's office, defense, probation department, and treatment providers support each of the judicially-led MH courts. Following the standard mental health court model, participants progress through a series of phases during which they receive rewards and sanctions based on treatment compliance. Successful terminations lead to charges being dismissed, while unsuccessful discharges result in the charges being prosecuted.

Mental Health Public Defenders

No mental health court, no matter how carefully planned, will be the sole answer to all the issues that arise at the nexus of the criminal justice and mental health systems. To compensate for some of the known deficiencies of mental health courts, some jurisdictions have implemented mental health public defenders who handle cases involving SMI clients who, for whatever reason, are ineligible for entry into a standard mental health court program. Compared to a mental health court, the mental health public defender model offers an alternative, but complementary, framework for addressing mental health issues in the criminal justice system. Mental health public defenders offer indigent defendants, who are ineligible for mental health court, access to both specialized legal expertise and social worker support.

The integration of case management into the defense function is a cornerstone feature of the mental health public defender model. Information about the client's situation that may be relevant to the case is maintained by the defense team and used exclusively to the defendant's advantage. Case management is often integrated into the legal strategy by helping people establish and maintain mental stability to face their charges, then using defendants' demonstrated ability to comply with a therapeutic regimen in negotiating with the court for a favorable disposition.

Mental health public defenders allow indigent defendants access to both specialized legal expertise and social worker support. Most importantly, MHPDs are able to provide specialized representation to individuals that are not eligible for mental health courts.

Mental health public defenders fill a critical void in the local justice system by providing skilled representation for mentally ill individuals who would not otherwise qualify for available diversion programs. These programs provide a means to accommodate the special needs of mentally impaired defendants charged with offenses ranging from serious misdemeanors to violent felonies. Mental health public defenders provide access to legal counsel capable of handling the mental health aspects of the case as well as social work support needed to position the client for a more successful case outcome. Specifically MHPDs in Texas were:

- more likely to view helping people access mental health treatment as a legitimate aspect of the defense function;

- more likely to utilize social workers in the delivery of defense services;
- more likely to be knowledgeable about local programs and services for clients with mental illness;
- more likely to have received advanced training on mental illness in the past two years; and
- more likely to find it easy to access clients' mental health records, and to be able to acquire them directly from the relevant agencies (Carmichael, 2010).

These findings highlight the special niche that MHPDs are able to fill in communities where they are available. The final subsection will outline the recommendations appropriate for Arizona's specific implementation of both of these concepts.

Recommendations for Arizona's implementation of mental health courts and mental health public defenders

The formation and implementation of a full-fledged MH court in Arizona will require substantial planning and preparation, whereas the creation of MHPDs is a markedly less formal undertaking. Thus, the majority of this subsection will focus on the creation of mental health courts in Arizona and only a small section will focus on the creation of mental health public defenders. Although some counties within Arizona, such as Maricopa County and Pima County, have independently undertaken establishing mental health courts, these programs currently operate with little legislative guidance or support from the State. Thus, our recommendations for the establishment of these programs does not account for those limited county programs that currently exist. Additionally, the purpose of this subsection is not to delineate every detail of a proposed MH court or MHPDs but rather to outline general recommendations to aid in the implementation of these programs.

Mental Health Court Planning and Administration

A multidisciplinary planning and oversight body, such as the Arizona Sentencing Commission proposed in this document, should be charged with creating a detailed proposal and design for the mental health court. In many jurisdictions, the judiciary ultimately drives the administration of the mental health court. Accordingly, it should be well represented on and take a visible role in any oversight body. This oversight body should also identify agency leaders and policymakers to suggest revisions to court policies and procedures when appropriate, and should be the public face of the mental health court in advocating for its support.

Along with determining eligibility criteria, monitoring mechanisms, and other court processes, an oversight body should articulate clear, specific, and realizable goals that reflect agreement on the court's purposes and provide a foundation for measuring the court's impact. Such discussions should include police and sheriffs' officials, judges, prosecutors, defense counsel, court administrators, pretrial services staff, and corrections officials; mental health, substance abuse treatment, housing, and other service providers; and mental health advocates, crime victims, consumers, and family and community

members. This oversight body should also keep high-level policymakers informed of the court's successes and failures in promoting positive change and long-term sustainability. Additionally, by facilitating ongoing training and education opportunities, the oversight body should complement and support the small team of professionals who administer the court on a daily basis, the "court team".

Mental Health Court Target Population

Because mental health courts are, by definition, specialized interventions that can serve only a portion of defendants with mental illness, careful attention should be paid to determining their target populations. Clinical eligibility criteria should be well defined and should be developed with an understanding of treatment capacity in the community. In Arizona, much like the programs in Texas, this will likely mean restricting access to the MH court to only those persons with a diagnosed SMI, and focusing on defendants whose mental illness is related to their current offenses. To that end, the oversight body should develop a process or a mechanism, informed by mental health professionals, to enable staff charged with identifying mental health court participants to make this determination.

Providing safe and effective treatment and supervision to eligible defendants in the community, as opposed to in jail or prison, is one of the principal purposes of mental health courts. This objective will only be realized if these eligible defendants are identified as soon possible after their initial contact with the criminal justice system. Thus, MH courts should identify potential participants early in the criminal justice process by welcoming referrals from an array of sources such as law enforcement officers, jail and pretrial services staff, defense counsel, judges, and family members. Prompt identification of participants accelerates their return to the community and decreases the burden on the criminal justice system for incarceration and treatment.

To ensure accurate referrals, mental health courts must advertise eligibility criteria and actively educate these potential sources. In addition to creating this broad network for identifying possible participants, mental health courts should select one or two agencies to be primary referral sources that are especially well versed in the procedures and criteria. When a competency determination is necessary, it should be expedited, especially for defendants charged with misdemeanors. Undoubtedly, the time required to accept someone into the program should not exceed the length of the sentence that the defendant would have received had he or she pursued the traditional court process. Thus, the primary MH court team members, the prosecutor, defense counsel, and a licensed clinician should quickly review referrals for eligibility so that a final determination of eligibility can be a team decision.

Mental Health Court Terms of Participation

Mental health courts need to articulate general terms of participation for the entering of plea agreements, program duration, supervision conditions, and the impact of program completion. These terms of participation should be individualized to each

defendant and should be put in writing prior to his or her decision to enter the program. The terms of participation will likely require adherence to a treatment plan that will be developed after engagement with the mental health court program, and defendants should be made aware of the consequences of noncompliance with this plan.

A defendant's participation in mental health courts is voluntary, but ensuring that participants' choices are informed, both before and during the program, requires more than simply offering the mental health court as an option to certain defendants. Mental health court administrators should be confident that prospective participants are competent to participate. Defense attorneys play an integral role in helping to ensure that a defendant's choices are informed throughout their involvement in the mental health court. Thus, MH courts should strive to make defense counsel available to advise defendants about their decision to enter the court and to have counsel be present at status hearings. It is particularly important to ensure the presence of counsel when there is a risk of sanctions or dismissal from the MH court.

Entry in the MH court will likely require the participant to enter into a plea agreement, but it is recommended that the entry of the plea agreement by the court be suspended pending completion of the MH court program.[15] It is essential that potential program participants be informed of the potential effects of a criminal conviction should they fail to complete the program. This should include informing the potential participant about the possible collateral consequences of a criminal conviction, including limited housing options, opportunities for employment, and accessibility to some treatment programs. It is especially important that the defendant be made aware of these consequences when the only charge he or she is facing is a misdemeanor, ordinance offense, or other nonviolent crime.

Although the exact length of mental health court participation will vary by participant, it should not extend beyond the maximum period of incarceration or probation a defendant could have received if found guilty in a more traditional court process. In addition, program duration should vary depending on a defendant's progress in the program. Program completion should be tied to adherence to the participant's court-ordered conditions and the strength of his or her connection to community treatment. Mental health court participants, when in compliance with the terms of their participation, should have the option to withdraw from the program at any point without having their prior participation and subsequent withdrawal from the mental health court reflect negatively on their criminal case.

Mental Health Court Treatment & Support Services

Mental health court participants require an array of services and support, which can include medications, counseling, substance abuse treatment, benefits, housing, crisis interventions services, peer supports, and case management. Mental health courts should anticipate the treatment needs of their target population and work with providers to ensure that services will be made available to court participants. When a participant is

[15] Refer to Proposal for Pretrial Diversion for a more thorough discussion on plea suspension.

identified and linked to a service provider, the MH court team should design a treatment plan that takes into account the results of a complete mental health and substance abuse assessment, individual defender needs, and public safety concerns.

Participants should also have input into their treatment plans. Mental health courts should connect participants with co-occurring disorders to integrated treatment whenever possible and advocate for the expanded availability of integrated treatment and other evidence-based practices.

Case managers — whether they are employees of the court, treatment providers, or community corrections officers — should have caseloads that are sufficiently manageable to perform core functions and monitor the overall conditions of participation. They should serve as the conduits of information for the court about the status of treatment and support services. Case managers also help participants prepare for their transition out of the court program by ensuring that needed treatment and services will remain available and accessible after their court supervision concludes.

Mental Health Court Confidentiality

To identify and supervise participants, mental health courts require information about their mental illnesses and treatment plans. When sharing this information, treatment providers and representatives of the mental health court should consider the wishes of defendants.[16]

A well-designed procedure governing the release and exchange of information is essential to facilitating appropriate communication among members of the mental health court team and to protect confidentiality. Release forms should be part of this procedure, be developed in consultation with legal counsel, adhere to federal and state laws, and specify what information will be released and to whom. Potential participants should be allowed to review the form with the advice of defense counsel and treatment providers.[17]

When a defendant is being considered for the MH court, there should not be any public discussions about that person's mental illness, which can stigmatize the defendant. Even information concerning a defendant's referral to a MH court should be closely guarded — particularly because many of these individuals may later choose not to participate in the MH court.

To minimize the likelihood that information about defendants' mental illnesses or their referral to the MH court will negatively affect their criminal cases, courts whenever possible should maintain clinical documents separately from the criminal files and take other precautions to prevent medical information from becoming part of the public record. Once a defendant is under the MH court's supervision, steps should be taken to

[16] They must also adhere to federal and state laws that protect the confidentiality of medical, mental health, and substance abuse treatment records.

[17] Defendants should not be asked to sign release of information forms until competency issues have been resolved.

maintain the privacy of treatment information throughout his or her tenure in the program. Clinical information provided to MH court staff members should be limited to whatever they need to make decisions. Furthermore, such exchanges should be conducted in closed staff meetings; discussion of clinical information in open court should be avoided.

Mental Health Court Team

The MH court team works collaboratively to help participants achieve treatment goals by bringing together staff from the agencies with a direct role in the participants' entrance into, and progress through, the court program. The court team functions include: conducting screenings, assessments, and enrollments of referred defendants; defining terms of participation; partnering with community providers; monitoring participant adherence to terms; preparing for all court appearances; and developing transition plans following court supervision. Team members should work together on each participant's case and contribute to the court's administration to ensure its smooth functioning.

The composition of this court team should include the following: a judicial officer; a treatment provider or case manager; a prosecutor; a defense attorney; and, in some cases, a court supervision agent such as a probation officer. Many courts also employ a court coordinator responsible for overall administration of the court, which can help promote communication, efficiency, and sustainability. Regardless of the composition of the team, the judge's role is central to the success of the MH court team and the MH court generally. He or she oversees the work of the court team and encourages collaboration among its members, who must work together to inform the judge about whether participants are adhering to their terms of participation.

Mental health court planners should carefully select team members who are willing to adapt to a nontraditional setting and rethink core aspects of their professional training. Planners should seek criminal justice personnel with expertise or interest in mental health issues and mental health staff with criminal justice experience. Planners should also work to ensure that the judge who will preside over the MH court is comfortable with its goals and procedures.

Team members should take part in cross-training before the court is launched and during its operation. Mental health professionals must familiarize themselves with legal terminology and the workings of the criminal justice system, just as criminal justice personnel must learn about treatment practices and protocols. New team members should go through a period of training and orientation before engaging fully with the court.

Periodic review and revision of court processes must be a core responsibility of the court team. Using data, participant feedback, observations of team members, and direction from the advisory group and planning committee, the court team should routinely make improvements to the court's operation.

Mental Health Court Monitoring

Whether a MH court assigns responsibility for monitoring compliance with court conditions to a criminal justice agency, a mental health agency, or a combination of these organizations, collaboration and communication are essential. The court must have up-to-date information on whether participants are taking medications, attending treatment sessions, abstaining from drugs and alcohol, and adhering to other supervision conditions. Case staffing meetings (an opportunity to share information and determine responses to individuals' positive and negative behaviors) should happen regularly and involve key members of a team, including, representatives from the prosecution, defense, treatment providers, court supervision agency, and the judiciary.

Status hearings allow MH courts publicly to reward adherence to conditions of participation, to sanction non-adherence, and to ensure ongoing interaction between the participant and the court team members. These hearings should be frequent at the outset of the program and should decrease as participants' progress positively. All responses to participants' behavior, whether positive or negative, should be individualized. Incentives, sanctions, and treatment modifications have clinical implications and as such, they should be imposed with great care and with input from mental health professionals.

Relapse is a common aspect of recovery; non-adherence to conditions of participation in the court is common, but it should never be ignored. The first response should be to review treatment plans, including medications, living situations, and other service needs. For minor violations the most appropriate response may be a modification of the treatment plan. The manner in which a MH court applies sanctions should be explained to participants prior to their admittance to the program. As a participant's commission of violations increases in frequency or severity, the court should use graduated sanctions that are individualized to maximize adherence to his or her conditions of release. Specific protocols should govern the use of jail as a consequence for serious noncompliance.

Mental health courts should use incentives to recognize good behavior and to encourage recovery through further behavior modification. Systematic incentives that track the participants' progress through distinct phases of the court program are also critical. Courts should have at their disposal a menu of incentives that is at least as broad as the range of available sanctions; incentives for sustained adherence to court conditions, or for situations in which the participant exceeds the expectation of the court team, are particularly important.

Mental Health Court Sustainability

Mental health courts must take steps early in the planning process and throughout their existence to ensure long-term sustainability, making performance measures and outcome data essential elements. Data describing the court's impact on individuals and systems should be collected and analyzed. Such data should include the court's outputs, such as the number of defendants screened and accepted into the mental health court, as

well as its outcomes, such as the number of participants who are rearrested and re-incarcerated. Setting output and outcome measures are a key function of the court's planning and ongoing administration.

Quantitative data should be complemented with qualitative evaluations of the program from staff and participants. Along with compiling empirical evidence of program successes, MH court teams should invite key county officials, state legislators, foundation program officers, and other policymakers to witness the court in action. Outreach to the community, the media, and key criminal justice and mental health officials also promote sustainability. To that end, MH court teams should make community members aware of the existence and impact of the MH court and the progress it has made. More important, administrators should be prepared to respond to notable program failures, such as when a participant commits a serious crime. Ongoing guidance from, and reporting to, key criminal justice and mental health leaders also helps to maintain interest in, and support for, the MH court.

Mental Health Public Defenders

The creation of a mental health public defender program in Arizona can be a markedly less complicated process as compared to establishing a fully functioning mental health court. In sum, the head of each county's public defender office can create a team of specially trained MHPD attorneys supported by specially trained mental health staff such as paralegals, social workers, and mitigation specialists. The head of each county's public defender office could be charged with setting up these teams in accordance with the needs and requirements specific to the caseload of each office with the general requirements that the MHPDs advance the interests of their clients in the following ways:

- MHPD case workers help clients connect with community services for treatment, employment, education, health care, and housing. This service not only benefits clients therapeutically, but also improves the probability of a positive case outcome in court.
- Because social workers are available on the defense team, MHPDs can assure the court they will supervise clients' compliance with court-ordered treatment.
- MHPDs should be familiar with local treatment alternatives for their clients and be prepared to present them in court for consideration in determining the disposition.
- MHPDs should ensure appropriate cases are brought to the attention of mental health prosecutors who are generally more willing to consider the role of mental impairment in the criminal case.
- The MHPD should advocate to have clients accepted into the MH court where there is a high likelihood the case would be dismissed.

Conclusion

Policymakers and practitioners across the country are focusing their attention on improving outcomes for people with mental illnesses under community corrections

supervision. Program models and principles are being developed, refined, and evaluated, and although no single program model or set of blanket policy recommendations will work in every jurisdiction, community corrections and mental health agencies are coming together around commonly defined goals and with shared purpose to tackle these challenges.

With the latest research supporting the effectiveness of such collaborations, this section represents an effort to facilitate the development of mental health courts and mental health public defenders in Arizona. When these programs are successful, they have the potential to interrupt the cycle of arrest, incarceration, release, and re-incarceration experienced by so many people with mental illnesses. In so doing, scarce institutional resources can be reserved for those who pose the greatest risk to public safety, and countless others can be linked to effective treatment and services, enabling them to make progress in their recovery from mental illnesses while contributing to, and participating in, the health of their communities.

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Proposed Legislation

X.X Mental Health Court Programs

X.X Mental Health Court Program Defined

In this chapter, "mental health court program" means a program that has the following essential characteristics:

(1) the integration of mental illness treatment services and mental retardation services in the processing of cases in the judicial system;

(2) the use of a non-adversarial approach involving prosecutors and defense attorneys to promote public safety and to protect the due process rights of program participants;

(3) early identification and prompt placement of eligible participants in the program;

(4) access to mental illness treatment services and mental retardation services;

(5) ongoing judicial interaction with program participants;

(6) diversion of potentially mentally ill or mentally retarded defendants to needed services as an alternative to subjecting those defendants to the criminal justice system;

(7) monitoring and evaluation of program goals and effectiveness;

(8) continuing interdisciplinary education to promote effective program planning, implementation, and operations; and

(9) development of partnerships with public agencies and community organizations, including local mental retardation authorities.

X.X Authority to Establish Program

The commissioners court of a county may establish a mental health court program for persons who:

(1) have been arrested for or charged with a misdemeanor or felony; and

(2) are suspected by a law enforcement agency or a court of having a mental illness or mental retardation.

X.X Program

a. A mental health court program established under Section X.X:

(1) may handle all issues arising under Articles X.X and X.X, Code of Criminal Procedure and Chapter X.X, Code of Criminal Procedure; and

(2) must:

a. ensure a person eligible for the program is provided legal counsel before volunteering to proceed through the mental health court program and while participating in the program;

b. allow a person, if eligible for the program, to choose whether to proceed through the mental health court program or proceed through the regular criminal justice system;

c. allow a participant to withdraw from the mental health court program at any time before a trial on the merits has been initiated;

d. provide a participant with a court-ordered individualized treatment plan indicating the services that will be provided to the participant; and

e. ensure that the jurisdiction of the mental health court extends at least six months but does not extend beyond the probationary period for the offense charged if the probationary period is longer than six months.

(3) (b) The issues shall be handled by a magistrate, as designated by Article X.X, Code of Criminal Procedure, who is part of a mental health court program established under Section X.X.

X.X Oversight

(a) The President of the Senate and the Speaker of the House of Representatives may assign to appropriate legislative committees duties relating to the oversight of mental health court programs established under Section X.X.

(b) A legislative committee or the governor may request the state auditor to perform a management, operations, or financial or accounting audit of a mental health court program established under Section X.X.

X.X Participant Payment for Treatment and Services

A mental health court program may require a participant to pay the cost of all treatment and services received while participating in the program, based on the participant's ability to pay.

Proposal to Promote Plea Bargaining

Overview

This proposal seeks:

1) to amend Arizona's Rules of Criminal Procedure to improve the ability of prosecutors and defense attorneys to negotiate and reach an agreement in the plea bargaining process, and

2) to amend the Arizona Revised Statutes to expand the scope of felony offenses that can be classified as undesignated "wobblers," which can be pursued as either felonies or misdemeanors.

These proposed changes will promote the use of plea agreements. Promoting plea bargains saves money not only by avoiding the costs associated with trials, but also by encouraging the imposition of probationary terms and reducing the costs associated with unduly long imprisonment terms imposed after trials.

Introduction

Prosecutors and defense attorneys rarely agree on much. One thing the two parties seem to favor, however, is plea bargaining. Plea agreements are a great tool for the prosecution because they provide certainty. They are also a good option for defendants and defense attorneys because they typically provide sentences which are more favorable than if a defendant goes to trial and is convicted. Most importantly, plea agreements save the state money by avoiding the expensive trial process and reducing costs associated with imprisonment because plea agreements tend to result in shorter sentences. Court dockets are freed up and the state and counties are not forced to spend money on expensive jury trials and unnecessarily long prison terms.

It is widely believed that sentencing policy can be used to encourage and promote plea agreements. Traditionally, the sentencing policy used to promote plea bargaining was to make sentences harsher and lengthier, therefore encouraging defendants to choose the shorter of the two sentences — i.e., the sentence which is typically offered in the plea agreement. For example, the United States Sentencing Commission (1991) has stated that:

> Although infrequently cited by policymakers, prosecutors express the view that mandatory minimum sentences can be valuable tools in obtaining guilty pleas, saving scarce enforcement resources and increasing the certainty of at least some measure of punishment. In this context, the value of a mandatory minimum sentence lies not in its imposition, but in its value as a bargaining chip to be given away in return for the resource-saving plea from the defendant to a more leniently sanctioned charge.

Additionally, Professor Ian Weinstein (2003) suggests that "[a]n optimally harsh sentence will encourage rapid pleas at the minimum investment of investigative and prosecutorial resources" while "[a]n overly harsh sentence will . . . encourage the same plea but

requires more resources as additional investigation and legal advocacy is required" (p. 130).

The problem with this traditional approach to encouraging plea agreements through harsher sentencing policy is that when a defendant chooses to go to trial and loses, she or he faces a sentence that was made longer than necessary — just to encourage plea agreements. That person then must serve a lengthier sentence, which means the state must pay more money to keep that person housed in prison. This proposal takes a different approach — it encourages plea bargaining by allowing prosecutors more flexibility to reduce sentences and by allowing prosecutors and defense attorneys to negotiate additional aspects of the plea. Specifically, the proposed changes will:

- Encourage plea bargaining by amending Arizona's Rules of Criminal Procedure to allow for more negotiation between defense attorneys and prosecutors.

- Encourage plea bargaining by amending the Arizona Revised Statutes to expand the scope of undesignated offenses to include class 5 non-dangerous felonies.

Current Law

Plea Negotiations

Under current law, a judge has the final say in sentencing when a plea agreement is negotiated. The judge may also reject a plea agreement, even if both parties have already agreed to the terms set forth in the agreement. The prosecutor and defense attorney can agree to a sentencing range, but are not allowed to agree on a specific term. This applies to both probation and imprisonment. The uncertainty involved may discourage both the defense and the prosecution from entering a plea agreement. For example, defendants or their attorneys may not want to enter into a plea agreement if they are uncertain of the severity of the sentence. Likewise, prosecutors may decline to offer a plea agreement if they believe that a judge may impose a term of probation or imprisonment that is too lenient or too short.

Undesignated Felonies

Currently, Arizona law states that in certain situations, a judge—with the recommendation of the prosecutor—may leave a non-dangerous class 6 felony undesignated and "enter judgment of conviction for a class 1 misdemeanor and make disposition accordingly or may place the defendant on probation . . . and refrain from designating the offense as a felony or misdemeanor until the probation is terminated."[18] Thus, some defendants charged with felony offenses can avoid a lengthy prison term if

[18] Arizona Revised Statutes § 13-604.

they serve a lesser sentence in the county jail and/or satisfactorily complete probation. Because the prosecutor has the discretion to designate the class 6 felony, it is a powerful tool in plea negotiations.

Recommendations

This proposal aims to remove the judge's ability to impose a sentence other than that agreed upon by the parties. Additionally, expanding the scope of undesignated offenses to include Class 5 felonies will allow prosecutors to make appropriate plea offers to defendants who may have otherwise served a term in prison. By altering the rules as set forth below, more plea agreements will occur and the state will avoid unnecessary costs associated with jury trials and excessive sentences.

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Proposed Legislation

Arizona Revised Statutes Section 13-604

Ariz. Rev. Stat., § 13-604 is amended by inserting the following language in **BOLD CAPS** and removing the language in ~~strikethrough~~:

13-604. Class 6**, CLASS 5, AND CLASS 4 FELONIES**~~felony~~; designation

A. Notwithstanding any other provision of this title, if a person is convicted of any class 6 **OR CLASS 5** felony not involving a dangerous offense**, OR A CLASS 4 FELONY THAT INVOLVES THE PERSONAL POSSESSION OR USE OF A CONTROLLED SUBSTANCE,** and ~~if~~ the court, having regard **FOR**~~to~~ the nature and circumstances of the crime and ~~to~~ the history and character of the defendant, ~~is of the opinion that it would be unduly harsh to sentence the defendant for a felony,~~ ~~the court~~ may enter judgment of conviction for a class 1 misdemeanor and make disposition accordingly or may place the defendant on probation in accordance with chapter 9 of this title and refrain from designating the offense as a felony or misdemeanor until the probation is terminated. The offense shall be treated as a felony for all purposes until such time as the court may actually enter an order designating the offense a misdemeanor. This subsection does not apply to any person who stands convicted of a ~~class 6~~ felony and who has previously been convicted of two or more felonies.

B. If a crime or public offense is punishable in the discretion of the court by a sentence as a class 6, **CLASS 5, OR CLASS 4** felony**,** or a class 1 misdemeanor, the offense shall be deemed a misdemeanor if the prosecuting attorney files any of the following:

1. An information in superior court designating the offense as a misdemeanor.

2. A complaint in justice court or municipal court designating the offense as a misdemeanor within the jurisdiction of the respective court.

3. A complaint, with the consent of the defendant, before or during the preliminary hearing amending the complaint to charge a misdemeanor.

Proposed Changes to the Arizona Rules of Criminal Procedure

Arizona Rule of Criminal Procedure 17.4

Ariz. R. Crim. P., Rule 17.4 is amended by inserting the following language in **BOLD CAPS** and removing the language in ~~strikethrough~~:

a. Plea Negotiations. The parties may negotiate concerning, and reach an

agreement on, any aspect of the case. At the request of either party, or sua sponte, the court may, in its sole discretion, participate in settlement discussions by directing counsel having the authority to settle to participate in a good faith discussion with the court regarding a non-trial or non-jury trial resolution which conforms to the interests of justice. Before such discussions take place, the prosecutor shall afford the victim an opportunity to confer with the prosecutor concerning a non-trial or non-jury trial resolution, if they have not already conferred, and shall inform the court and counsel of any statement of position by the victim. If the defendant is to be present at any such settlement discussions, the victim shall also be afforded the opportunity to be present and to state his or her position with respect to a non-trial or non-jury trial settlement. The trial judge shall only participate in settlement discussions with the consent of the parties. In all other cases, the discussions shall be before another judge or a settlement division. If settlement discussions do not result in an agreement, the case shall be returned to the trial judge.

b. Plea Agreement. The terms of a plea agreement shall be reduced to writing and signed by the defendant, the defendant's counsel, if any, and the prosecutor. An agreement may be revoked by any party prior to its acceptance by the court.

c. Determining the Accuracy of the Agreement and the Voluntariness and Intelligence of the Plea. The parties shall file the agreement with the court, which shall address the defendant personally and determine that he or she understands and agrees to its terms, that the written document contains all the terms of the agreement, and that the plea is entered in conformance with Rules 17.2 and 17.3.

d. Acceptance of Plea. After making such determinations and considering the victim's view, if provided, the court shall either accept or reject the tendered negotiated plea. The court shall ~~not~~ be bound by any provision in the plea agreement regarding the sentence or the term and conditions of probation to be imposed~~, if, after accepting the agreement and reviewing a presentence report, it rejects the provision as inappropriate~~.

e. Rejection of Plea. If an agreement ~~or any provision thereof~~ is rejected by the court it shall give the defendant an opportunity to withdraw his or her plea, advising the defendant that if he or she permits the plea to stand, the disposition of the case may be less favorable to him or her than that contemplated by the agreement.

f. Disclosure and Confidentiality. When a plea agreement or any term thereof is accepted, the agreement or such term shall become part of the record. However, if no agreement is reached, or if the agreement is revoked, rejected by the court, or withdrawn or if the judgment is later vacated or reversed, neither the plea discussion nor any resulting agreement, plea or judgment, nor statements made at a hearing on the plea, shall be admissible against the defendant in any criminal or civil action or administrative proceeding.

g. Automatic Change of Judge. If a plea is withdrawn after submission of the presentence report, the judge, upon request of the defendant, shall disqualify himself or herself, but no additional disqualification of judges under this rule shall be permitted.

Proposal to Create an Arizona State Sentencing Commission

Overview

This section proposes the creation of a Sentencing Commission. The Commission would have three primary responsibilities:

1) collect data related to crime, incarceration, alternatives to incarceration, recidivism, and the relevant economic costs
2) submit annual reports to the Legislature with that data, and respond to any legislative request for information
3) propose changes to sentencing policy and programs

Sentencing poses difficult policy issues. Recent information indicates that Arizona is spending unsustainably high amounts on incarceration while at the same time suffering from high crime rates. A neutral, expert body is needed to collect information and assist the state's policy makers in crafting sentencing polices and programs that are both effective at reducing crime and reducing costs.

Introduction

In recent years many jurisdictions have turned to the creation of sentencing commissions as a way of evaluating sentencing laws, policies and procedures and recommending changes to the legislature. Since 1970, thirty-five states have formed sentencing commissions, either on a temporary or permanent basis. As of 2010, nineteen states and the District of Columbia have created permanent sentencing commissions.[19] Once tasked with implementing the sentencing guidelines of a state, several states' commissions have now become involved in sentencing policy. For example, the commissions in Alabama, North Carolina, New York, Colorado, Nevada, Vermont, and Illinois are all tasked with data collection and analyzing in order to make informed recommendations to their on what policies and practices are effective. This trend seems to be continuing, as states, such as Connecticut, are currently considering similar proposals to create sentencing commissions.

In order to reduce recidivism and create economic savings, Arizona should create a permanent Sentencing Commission. This Commission would evaluate and collect data from a number of state agencies and other entities. Without such a Commission, the costs associated with imprisonment are projected to continue to increase at significant levels, while failing to adequately reduce crime.

[19] National Association of Sentencing Commissions Attendees, *available at* http://nasc2010.alacourt.gov/NASC/NASC%20ATTENDEES%20BY%20Jurisdiction.PDF

Recommendations

The creation of a Commission that monitors and recommends changes offers many potential benefits to Arizona. The collection and centralization of all records and statistics relating to sentencing will allow for future policy recommendations to be informed by evidence and data that are specific to Arizona. Access to this information will allow the legislature to adopt sentencing policies that will effectively reduce expenditures and recidivism.

The Commission will also be in the best position to develop expertise in Arizona-specific sentencing concerns. The Commission will be expected to review research regarding sentencing policies and program in other states, and to use the state sentencing data it collects to recommend policies and programs that are best-suited to the needs of Arizona. This state specific expertise will also allow the Commission to answer any questions that the legislature may have; and the legislature may direct the Commission to conduct specific studies. This will ensure that, when making difficult decisions about sentencing policy, the legislature can base those decisions on complete and unbiased information.

Structure of Proposed Commission

Purpose and Powers of the Commission

The Arizona Sentencing Commission's primary function would be to make recommendations to the legislature on how to improve the effectiveness and financial efficiency of programs and agencies dealing with criminal offenders in the state. The Commission would carry out this function by serving as the central collection point for data and research from around the state. The Commission would also research evolving methods of punishment and treatment in other jurisdictions and analyze their potential application in Arizona. The Commission may make recommendations as often as it deems necessary, but it is required to report annually to the President of the Senate and the Speaker of the House on the current status of these programs in Arizona. The Commission should collect information from all agencies that deal with crime in the state, including:

- Arizona Department of Corrections
- Pretrial Diversion Programs
- Probation Departments
- Drug and Mental Health Court Treatment Programs
- City and Local Jails

The Commission can also collect data by other means, such as by holding hearings, conducting fact finding tours, calling witnesses, or requesting information from other state agencies.

The Commission should meet quarterly to deliberate on potential recommendations. Those recommendations should consider the following (sometimes competing) concerns:

1. The safety of the public
2. The economic efficiency of sentencing practices and policies
3. Providing just and adequate punishment for the offense
4. Deterring criminal conduct
5. Promoting the rehabilitation of offenders

By emphasizing the importance of these concerns the Commission will be able to balance the interests of: 1) the state, by saving money through a reduction in recidivism rates; 2) society, by ensuring the safety of its citizens; and 3) convicted offenders, by ensuring that they are given the treatment they need to prevent future offenses. Above all, the Commission should attempt to ensure that Arizona's sentencing practices and procedures continue to evolve in a way that is best for the citizens of Arizona

Funding

The Arizona Sentencing Commission will require funding both at the outset and in the future. This funding would be used to support the infrastructure of the Commission and its staff. The overall cost of the Commission should be minimal because the Commission will not have a large staff, will not require large office spaces, and the members of the actual Commission would serve on a voluntary basis. In addition, the short-term costs of starting the Commission could be offset through federal grants.

Because one of the primary goals of the Commission is to save the state money in the long term by reducing recidivism rates, these savings may offset any long-term costs of the Commission. There are, however, several funding options to immediately reduce the impact of the Commission on the state budget.

Grants — The Commission's duty to create and maintain statistics relating to criminal justice, especially in relation to changing sentencing practices, may qualify it to apply for a number of federal and non-governmental grants.[20] As a result, a great deal of funding for the Commission could be derived from non-state funds.

Surcharges — A number of existing state criminal justice programs (including those proposed in other sections of this report) require that the offender pay a reasonable cost of the program. The Commission could be funded by incorporating surcharges onto the cost of these programs. These surcharges could provide a substantial portion of the funds needed to operate the Commission. In addition to providing a large amount of the

[20] According to the National Criminal Justice Reference Service, the Office of Justice Programs (OJP), which provides federal leadership in developing the nation's capacity to prevent and control crime, administer justice, and assist victims, has been designated as the lead agency in administering $2.76 billion of the Recovery Act funding. (http://www.ncjrs.gov/fedgrant.html) . Additionally, Grants.gov list over 80 grants in the most relevant category to the Commission — Law, Justice, and Legal Services.

funding, this would also be a consistent revenue stream, making the Commission's income relatively stable.[21]

Selection of Commissioners

The two most important considerations in identifying a selection method are (a) that the Commission itself remains neutral and free from political pressure, and (b) that the Commissioners have the expertise necessary to analyze the relevant data and make effective proposals for change.

Criminal sentencing can be a politically divisive issue. A neutral sentencing Commission would be able to report data impartially and make objective recommendations. While crime is obviously an important political issue, it is imperative that the Commission remain apolitical. All political considerations and decisions ought to rest with the legislature, and it would be inappropriate to impose those considerations on an unelected Commission, whose primary duty is to serve as a neutral source of information.

A wide variety of expertise among Commissioners is necessary. The Commission should include individuals with expertise in gathering and analyzing data, individuals with expertise in the causes and conditions of crime, individuals with expertise in law, and individuals with expertise in the relevant state agencies. In particular, we propose that the Commission should be comprised of 7 voting members and 2 *ex officio* members:

1. The first voting member of the Commission should be the Chief Justice of the Arizona Supreme Court or the Chief Justice's designee, who will serve as Chairperson.

2. The second voting member should be the president of the Arizona Psychiatric Society, or the president's designee. The Commission would collect data and recommend changes to the mental health programs both in diversion and the mental health court, and this member would provide expertise on the latest treatment models and research for mentally ill offenders.

3. The third voting member should be an economist appointed by the Arizona Board of Regents. This member would be able to help the Commission accurately predict the economic impact of its recommendations and also to help the Commission interpret date on the effectiveness of the programs already in place.

[21] There are potential downsides to creating such surcharges. For example, adding a surcharge to a diversionary program might discourage the participation of those that could benefit from the program. If the surcharge makes the costs of diversion higher than an offender can afford, it might undermine the benefits that program creates in saving the state money and reducing recidivism. A simple solution to this problem would be to allow a potential participant to waive the surcharge if he can show the surcharge would cause such a significant impact as to make participation in the program untenable.

4. The fourth voting member should be a person with expertise in the area of substance abuse appointed by the Board of Regents. The Commission would collect data and recommend changes to drug treatment programs, and this member would provide expertise on the latest treatment models and research for drug offenders.

5. The next three voting members should be comprised of one professor from each state university. These professors should be appointed by the university president and should possess expertise in law, criminology, sociology, or other relevant areas. These members will bring their respective areas of expertise to bear on the difficult problems of crime and punishment.

6. The first *ex officio* member should be the Director of the Arizona Department of Corrections or his designee.

7. The second *ex officio* member of the Commission should be the Governor or the Governor's designee.

We recommend that the Commissioners would serve terms of four years. Of the states surveyed, the average length of service for Commissioners was four years, with the highest being six years, and the lowest two years. This Commission would be one of the smaller Commissions as compared to those surveyed, making the commitment required of Commissioners substantial. While the burden placed on the commissioners could arguably warrant a shorter term, the initial time investment associated with joining the Commission counsels against it.

The membership criteria for the commissioners should be negligible and designed essentially to avoid the appointment of Commissioners who have any conflict of interest, ensuring that only those individuals with ties to the state are appointed. Any financial conflict should disqualify. Ties to the state could be proven merely by the length of time one has lived in the state, with a requisite minimum. The Commissioners should also be registered to vote in the state. Otherwise, no additional criteria should be imposed; the statutory criteria should ensure that only qualified applicants are selected for all positions.

Commissioner Compensation

The Commissioners shall serve on a voluntary basis for which no compensation will be provided. The Commissioners should, however, be compensated for their travel expenses and daily expenditures that occur in connection to their duties pursuant to Title 38, Chapter 4, Article 2 of the Arizona Revised Statutes.[22] This would alleviate the possible individual financial burden of serving on the Commission.

[22] All of the state sentencing commissions surveyed had similar requirements for voluntary service and expense compensation.

Full Time Staff

In addition to the seven members who sit on the actual Commission, the Commission will need to employ staff to assist the members with the collection and analysis of data from around the state. These employees would be responsible for collecting the data from the different programs and presenting it to the Commission. The staff could also assist the Commission in drafting proposals and submitting them to the Legislature.

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DC Sentencing and Criminal Code Revision Commission Enactment Stature, DC ST § 3-101

Delaware Criminal Justice Council, DE ST TI 11 § 8701

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Maryland State Commission on Criminal Sentencing Policy Enactment Statute, Criminal Procedure Article Title 6 Subtitle 2

Minnesota Sentencing Guideline Commission Enactment Statute, M.S.A. § 244.09

New Mexico Sentencing Commission Enactment Statute, N. M. S. A. 1978, § 9-3-10

North Carolina Sentencing and Policy Advisory Commission Enactment Statute, NC ST § 164-35

Ohio State Criminal Sentencing Commission Enactment Statute, R.C. § 181.21

Oregon Criminal Justice Committee Enactment Statute, 137.656

Pennsylvania Commission on Sentencing Enactment Statute, 42 Pa.C.S. §2154

Utah Sentencing Commission Enactment Statute, Utah Code, Title 63 M, Chapter 7

Virginia Criminal Sentencing Commission Enactment Statute, §17.1-800

Washington State Sentencing Guidelines Commission Enactment Statute, WA ST 9.94A.850

Wisconsin Sentencing Commission Enactment Statute, §973.30

Proposed Legislation

AN ACT ESTABLISHING THE **ARIZONA SENTENCING COMMISSION** FOR EVALUATION OF THE STATE'S SENTENCING POLICIES, PRACTICES, AND ALTERNATIVE SENTENCING PROGRAMS

Be it enacted by the Legislature of the State of Arizona:

Section 1. Sentencing commission; definition purposes; members; terms; duties

A. The **Arizona Sentencing Commission** is here by established. The Commission is established to continuously collect data and evaluate the effectiveness of this state's sentencing practices, policies, and alternative sentencing programs. The Commission shall review the collected data from the state's probation departments, pretrial diversion programs, drug and mental health courts, city and local jails, and the Arizona Department of Corrections; evaluate sentencing and treatment laws, policies and practices in other states; and submit recommendations to the Speaker of the House of Representatives and the President of the Senate.

B. In fulfilling its purpose, the **Arizona Sentencing Commission** shall consider:

1. The safety of the public
2. The economic efficiency of sentencing practices and policies
3. Providing just and adequate punishment for the offense
4. Deterring criminal conduct
5. Promoting the rehabilitation of offenders

C. The **Arizona Sentencing Commission** shall consist of the following voting members:

1. The Chief Justice of the Arizona Supreme Court or the Chief Justice's designee, who will serve as Chairperson
2. The president of the Arizona Psychiatric Society or the president's designee
3. One economist or statistician appointed by the Arizona Board of Regents
4. One person with expertise in the area of substance abuse appointed by the Board of Regents
5. One faculty member from each of the three major state universities, Arizona State University, University of Arizona, and Northern Arizona University, selected by the president of each university and having an expertise in law, criminology, sociology, or another relevant field.

D. The **Arizona Sentencing Commission** shall have two, nonvoting *ex officio* members:

1. The Director of the Arizona Department of Corrections or the Director's designee
2. The Governor of Arizona or the Governor's designee

E. Members of the **Arizona Sentencing Commission** are not eligible to receive compensation but are eligible for reimbursement of expenses pursuant to title 38, chapter 4, article 2.

F. Members of the **Arizona Sentencing Commission** shall serve for a term of 4 years.

G. The **Arizona Sentencing Commission** shall meet quarterly or on the call of the chairperson. A majority of the members constitutes a quorum for the transaction of business.

H. The legislature shall provide staff and support services to the commission.

I. The **Arizona Sentencing Commission** shall:

1. Collect recidivism data, record treatment methods, monitor financial obligation, and overall effectiveness of the programs and departments enumerated in Section A.
2. Evaluate emerging practices and trends in criminal sentencing and alternative punishments in other jurisdictions throughout the United States.
3. Review this state's sentencing structure, including laws, policies and practices and recommend changes to the criminal code and any other aspects of sentencing that are necessary to ensure appropriateness of sentencing.
4. Annually submit a report to the chairpersons of the House and Senate Judiciary Committees on the effectiveness of all departments and programs enumerated in Section A.
5. Maintain and make available for public inspection records of actions that are taken by the **Arizona Sentencing Commission**.

J. The **Arizona Sentencing Commission** may:

1. Request information, data, and reports from any agency or political subdivision in this state and from judicial officers.
2. Hold hearings, conduct fact-finding tours and call witnesses to assist the commission in fulfilling its responsibilities.
3. Perform or delegate and other functions that may be necessary to carry out the purposes of the commission.

K. On request of the **Arizona Sentencing Commission**, an agency of this state shall make its services, equipment, personnel, facilities, and information available to the greatest practicable extent to the commission without cost to the commission. If possible, information shall be provided electronically.

Appendix: Sentencing Commissions in Other States

State	Title	Enactment Statute	Website
Alabama	Alabama Sentencing Commission	TITLE 12. COURTS CHAPTER 25. ALABAMA SENTENCING COMMISSION	http://sentencingcommission.alacourt.gov/about.html
Alaska	Alaska Judicial Council	Alaska Const. Article IV, Section 8. Judicial Council	http://www.ajc.state.ak.us/
Arkansas	Arkansas Sentencing Commission	A.C.A. § 16-90-802	http://www.arkansas.gov/asc/
District of Columbia	DC Sentencing and Criminal Code Revision Commission	DC ST § 3-101	http://acs.dc.gov/acs/site/default.asp
Delaware	Delaware Criminal Justice Council	DE ST TI 11 § 8701	http://cjc.delaware.gov/
Iowa	Iowa Sentencing Commission		http://www.legis.state.ia.us/GA/77GA/Interim/1998/comminfo/sent.htm
Kansas	Kansas Sentencing Commission	1989 Senate Bill 50	http://www.accesskansas.org/ksc/
Maryland	Maryland State Commission on Criminal Sentencing Policy	Criminal Procedure Article Title 6 Subtitle 2	http://www.msccsp.org/
Minnesota	Minnesota Sentencing Guideline Commission	M.S.A. § 244.09	http://www.msgc.state.mn.us/
New Mexico	New Mexico Sentencing Commission	N. M. S. A. 1978, § 9-3-10	http://nmsc.unm.edu/
North Carolina	North Carolina Sentencing and Policy Advisory Commission	NC ST § 164-35	http://www.nccourts.org/Courts/CRS/Councils/spac/
Ohio	Ohio State Criminal Sentencing Commission	R.C. § 181.21	http://www.supremecourt.ohio.gov/Boards/Sentencing/
Oregon	Oregon Criminal Justice Committee	137.656	http://www.ocjc.state.or.us/
Pennsylvania	Pennsylvania Commission on Sentencing	42 Pa.C.S. §2154	http://pcs.la.psu.edu/

Utah	Utah Sentencing Commission	Utah Code, Title 63 M, Chapter 7	http://www.sentencing.state.ut.us/
Virginia	Virginia Criminal Sentencing Commission	§17.1-800	http://www.vcsc.state.va.us/about.htm
Washington	Washington State Sentencing Guidelines Commission	WA ST 9.94A.850	http://www.sgc.wa.gov/
Wisconsin	Wisconsin Sentencing Commission	§973.30	http://wsc.wi.gov/

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Carissa Byrne Hessick is an Associate Professor at Arizona State University's Sandra Day O'Connor College of Law, where she teaches Criminal Procedure, Criminal Law, and a seminar on sentencing law and policy. Her research focuses on aggravation and mitigation in criminal sentencing, relative crime severity, and other political and doctrinal issues associated with sentencing. Prior to joining the ASU faculty, Professor Hessick taught at Harvard Law School as a Climenko Fellow. She served as a law clerk for Judge A. Raymond Randolph on the U.S. Court of Appeals for the D.C. Circuit and for Judge Barbara S. Jones on the U.S. District Court for the Southern District of New York. Professor Hessick also worked as a litigation associate at Wachtell, Lipton, Rosen & Katz. Professor Hessick is a graduate of Columbia University and Yale Law School.

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Chaz Ball will receive his law degree from Arizona State University's Sandra Day O'Connor College of Law in December 2010. While at Arizona State University, Mr. Ball has served as president of the Black Law Student Association, interned at the Scottsdale Prosecutors Office pursuant to Rule 38, participated in numerous moot court competitions, and coached the undergraduate Mock Trial team. Mr. Ball received his bachelor's degrees from the University of Maryland at College Park in Government and Politics and the Public Policy concentration of African American Studies.

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Matthew Binford is the 2010 Truman R. Young Prosecutorial Fellow and a third-year law student at Arizona State University's Sandra Day O'Connor College of Law. He holds a Bachelor of Arts from the University of Arizona and a Master of Education from the University of Nevada—Las Vegas. Prior to attending law school, Mr. Binford taught in South Central Los Angeles and Las Vegas with Teach For America. Since entering law school, he has worked at the California Court of Appeal, United States District Court for the District of Arizona, Phoenix Prosecutor's Office, Maricopa County Attorney's Office, and United States Attorney's Office for the District of Arizona. Mr. Binford is a recipient of the Honorable Charles E. Jones Merit Scholarship and the Jonathan Paul Schubert Memorial Award. He currently serves as a Staff Writer for the ARIZONA STATE LAW JOURNAL and as a member of the American Bar Association's Prosecution Function Committee.

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Adam Reich is a third year law student at Arizona State University's Sandra Day O'Connor College of Law, where he serves as an Associate Editor of the ARIZONA STATE LAW JOURNAL. He has also served as an extern in the Maricopa County Attorney's Office. Prior to attending law school, Mr. Reich received his Bachelors of Arts degree from Arizona State University. He is also a veteran of Operation Iraqi Freedom and a recipient of the Purple Heart.

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Kathryn Lockard is a *cum laude* graduate of Northern Arizona University. She was awarded a Bachelor of Science in Criminology and Criminal Justice in 2010, when she was recognized as the most outstanding senior in the Department.