

**Comments of the Florida Public Defender Association  
to the Criminal Punishment Code Task Force Report**

TO: Governor Ron DeSantis  
President Wilton Simpson  
Speaker Chris Sprowls  
Attorney General Ashley Moody

FROM: Florida Public Defender Association

DATE: January 12, 2021

RE: The Criminal Punishment Code Task Force's June 2020 Report

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The Florida Public Defender Association (FPDA) files this response to the Criminal Punishment Code (CPC) Task Force's 2020 Report. Even if the Legislature adopts the recommendations laid out in the Report, mass incarceration and sentencing disparity (both racial and geographic) will persist in Florida. Indeed it may increase with the recommendations of the Task Force. The FPDA recommends that the Legislature adopt more substantial reforms to decrease the size of both the overall prison population and the disparities among prisoners; at the very least, it should support additional studies into racial and geographic disparity in sentencing and the impact of the CPC on Florida's economy.

**Statement of Interest**

The Florida Public Defender Association, Inc. ("FPDA") is a nonprofit corporation comprised of 19 elected Public Defenders and nearly 2000 employees of public defender offices throughout Florida. The members of the FPDA represent the majority of individuals charged with crimes in Florida, and thus are intimately familiar with the operation of the CPC. One member of the FPDA, the Honorable Larry Eger of the Twelfth Judicial Circuit, was on the CPC Task Force.

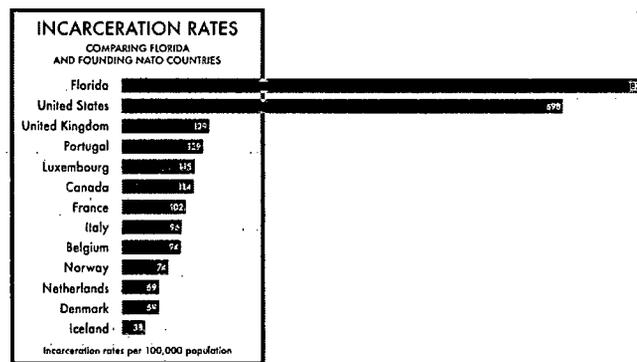
## Analysis

This response covers three major features of Florida sentencing: (1) the societal and economic costs of mass incarceration; (2) the problem of racial and geographic disparity in Florida sentencing; and (3) the origins of the CPC. These issues were not acknowledged in the Task Force Report, and thus the Report does not offer any proffered solutions to solve them. The FPDA uses this response to fill that gap.

### I. Florida's mass incarceration and budget crisis

The FPDA worries that the Task Force's recommendations do not sufficiently address Florida's incarceration and budget crisis.

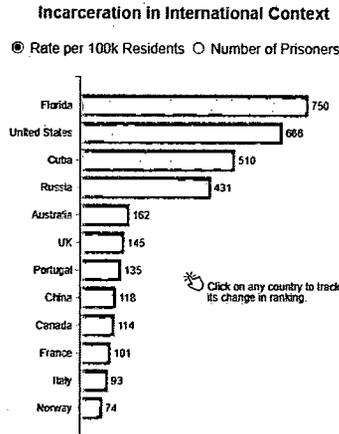
There can be no doubt that Florida maintains an extraordinarily high rate of incarceration. Florida incarcerates more people than entire countries:<sup>1</sup>



Even within the United States, Florida is an outlier. “Florida’s incarceration rate is 20 percent higher than the national average.”<sup>2</sup>

<sup>1</sup> Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context of 2018*, Prison Policy Initiative, (June 2018), available at <https://www.prisonpolicy.org/global/2018.html>.

<sup>2</sup> Cyrus O’Brien, *Florida Criminal Justice Reform: Understanding the Challenges and Opportunities*, The Project on Accountable Justice (2019), available at <https://accountablejustice.github.io/report/>.



This mass incarceration has significant costs, both economic and societal. “As a prison system expands, it is almost inevitable that there will be a point of diminishing returns in crime control. That is, the additional costs expended to apprehend and imprison offenders will not outweigh the costs of crimes prevented.”<sup>3</sup> Stated otherwise, “this massive increase in incarceration is not actually making America safer and more stable. Research and scholarly consensus support the idea that increasing the length of sentences has little or no beneficial effect on the crime rate besides the short-term gains of incapacitation itself.”<sup>4</sup> And mass incarceration has not only an economic impact, but also takes a “human toll.”<sup>5</sup> “The harm of mass incarceration starts at the individual level and then reverberates.”<sup>6</sup> Removing tens of thousands of individuals from communities through incarceration “represents collective losses similar in

<sup>3</sup> Marc Mauer, *Thinking About Prison and Its Impact on the Twenty-First Century*, 2 Ohio St. J. Crim. L. 607, 613 (2005).

<sup>4</sup> Brennan T. Hughes, *Strictly Taboo: Cultural Anthropology’s Insights into Mass Incarceration and Victimless Crime*, 41 New Eng. J. on Crim. & Civ. Confinement 49, 51 (2015); see also Professor Mirko Bagaric, Dr. Gabrielle Wolf, & William Rininger, *Mitigating America’s Mass Incarceration Crisis Without Compromising Community Protection: Expanding the Role of Rehabilitation in Sentencing*, 22 Lewis & Clark L. Rev. 1, 59 (2018) (“greater numbers of prisoners have not made the community safer.”).

<sup>5</sup> Anne R. Traum, *Mass Incarceration at Sentencing*, 64 Hastings L.J. 423, 431 (2013).

<sup>6</sup> *Id.*

scale to the losses due to epidemics, wars, and terrorist attacks--with the potential for comparable effects on the survivors and the social structure of their families and communities.”<sup>7</sup>

In addition to the societal cost, the need to reduce incarceration has arguably never been greater, as Florida faces an economic downturn accompanying a global pandemic. State costs have increased due to the unprecedented number of individuals who have lost their jobs and sought unemployment benefits.<sup>8</sup> At the same time, revenues have “plummeted” because, among other things, the pandemic has restricted tourism, one of Florida’s greatest revenue generators.<sup>9</sup> Significant state budget cuts are inevitable.

The Florida Department of Corrections could absorb a portion of the necessary budget cuts. The DOC has a budget of about \$3 billion dollars.<sup>10</sup> In 2019, it spent \$62.16 per day to incarcerate an individual inmate.<sup>11</sup> Reducing the DOC budget by 10% would save Florida nearly \$217 million dollars in one year.<sup>12</sup> Even the Secretary of the DOC has recognized that “the

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<sup>7</sup> Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 Stan. L. Rev. 1271, 1277 (2004) (quoting Ernest Drucker, *Population Impact of Mass Incarceration Under New York’s Rockefeller Drug Laws: An Analysis of Years of Life Lost*, 79 J. Urb. Health 1, 7-8 (2002)). The cited study looked at incarceration in New York over a thirty-year period. Florida reached the same number of overall prison admissions in six years. *Criminal Justice Trends*, (July 27, 2020), at 60, available at <http://edr.state.fl.us/content/conferences/criminaljustice/trends.pdf>.

<sup>8</sup> Malena Carollo, Sara DiNatale, & Emily L. Mahoney, *Florida’s economy under coronavirus: Pandemic devastated peak season*, Tampa Bay Times, (June 25, 2020), available at <https://www.tampabay.com/news/business/2020/06/25/floridas-economy-under-coronavirus-pandemic-devastated-peak-season/>.

<sup>9</sup> *Id.*; Christine Sexton, *Florida agencies asked to cut 8.5 percent to adjust for COVID-19*, Tampa Bay Times, (Aug. 12, 2020), available at <https://www.tampabay.com/florida-politics/buzz/2020/08/12/florida-agencies-asked-to-cut-85-percent-to-adjust-for-covid-19/>.

<sup>10</sup> Florida Department of Corrections, *About the Florida Department of Corrections*, available at [http://www.dc.state.fl.us/about.html#:~:text=About%20the%20Florida%20Department%20of,active%20community%20supervision%20\(probation\)](http://www.dc.state.fl.us/about.html#:~:text=About%20the%20Florida%20Department%20of,active%20community%20supervision%20(probation).).

<sup>11</sup> Florida Department of Corrections, *Annual Report 2018-19*, at 12, available at [http://www.dc.state.fl.us/pub/annual/1819/FDC\\_AR2018-19.pdf](http://www.dc.state.fl.us/pub/annual/1819/FDC_AR2018-19.pdf).

<sup>12</sup> It costs \$22,688 to house a single inmate per year. Last fiscal year, the DOC housed about 95,626 individuals on a given day. A 10% reduction of that number would result in costs

status quo is unsustainable.”<sup>13</sup> Other states have already adopted this tactic; for instance, the state of Washington has decided to shrink its prison population by 30% in order to compensate for COVID-19 cuts in the state budget.<sup>14</sup>

The Report does not acknowledge Florida’s outsized incarceration rate.<sup>15</sup> As a result, none of the Task Force’s recommendations address this problem. The recommendations will not reduce the total number of incarcerated individuals in the state. Instead, the Report recommends fairly minor changes that will not alter the status quo. For instance, the first recommendation is that the Legislature codify an already existing rule.<sup>16</sup> Other recommendations are cosmetic, like adding a “checkbox” on the scoresheet or requiring electronic scoresheets.<sup>17</sup> The Task Force further recommends the removal of various point categories on the scoresheet, but also

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savings of \$216,956,668.80. *See id.* at 12 (listing the costs of incarcerating individuals); 16 (listing the number of inmates).

<sup>13</sup> Ana Ceballos, *Prison Chief: Status quo ‘unsustainable,’ WJXT/WCWJ*, (Oct. 16, 2019), available at <https://www.news4jax.com/news/2019/10/16/prison-chief-status-quo-unsustainable/>.

<sup>14</sup> Nina Shapiro, Washington’s prisons may have hit pivotal moment as they eye deep cut in their population, *The Seattle Times* (Sept. 17, 2020), available at <https://www.seattletimes.com/seattle-news/politics/a-transformational-moment-washingtons-prison-system-backs-reforms-as-it-faces-covid-19-budget-cuts-and-protests-over-racial-injustice/>.

<sup>15</sup> Unfortunately, the Task Force Report not only fails to recognize the problem, but rather acts as if Florida has overcome its mass incarceration problem. *See* Report at 16; *see generally* Report at 5-10. However, Florida’s prison population has steadily grown over the past three decades, continuing to do so after the adoption of the CPC. Vera Institute, *Incarceration Trends in Florida*, available at <https://www.vera.org/downloads/pdffdownloads/state-incarceration-trends-florida.pdf>; Wagner & Sawyer, *supra* n.1.

Additionally, the Task Force appeared to believe that no cause for concern exists unless prisoners are unconstitutionally overcrowded. *See* Report at 16 (“Unlike prior eras when major sentencing reforms were adopted, Florida is not currently experiencing prison capacity issues.”). But the question for the Florida Legislature and for the Task Force should be whether incarcerating hundreds of thousands of individuals has made Florida safer and more prosperous, not whether Florida has filled every prison to capacity.

<sup>16</sup> Report at 16.

<sup>17</sup> Report at 17-18.

recommends moving those points to other areas of the scoresheet – for example, by removing the victim injury points but increasing the point values assigned to crimes that necessarily involve victim injury<sup>18</sup> – which means that that the changes will have no effect.

Some of the changes might increase Florida’s incarceration rate. For example, some recommendations involve raising the point values for various crimes, which will increase lowest permissible sentences and thereby increase the minimum amount of prison time judges must impose.<sup>19</sup> The recommendation to change the number of felony degrees from three to five may very well increase incarceration because, with the exception of fifth degree felonies, the felony degrees all increase the statutory maximum.

Without significant and meaningful change to the CPC, Florida will remain an outlier, both with regards to number individuals incarcerated and state expenditures on incarceration. Unfortunately, these problems will persist even if the Legislature adopts all of the Task Force’s recommendations.<sup>20</sup>

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<sup>18</sup> Report at 16-18.

<sup>19</sup> Report at 19.

<sup>20</sup> Given the resources devoted to the Task Force, the end result is a bit underwhelming.

The Legislature put a significant amount of recourse into the Task Force. The Task Force was “appointed to study a specific problem and recommend a solution or policy alternative with respect to that problem,” specifically, to study the problem of Florida sentencing and provide recommendations or alternatives to the CPC. Ch. 2019-167, § 152, Laws of Fla. It was comprised of major players in the Florida legal system, including the Attorney General, several judges, members of law enforcement, and attorneys. *Criminal Punishment Code Task Force*, available at

<http://myfloridalegal.com/pages.nsf/Main/1428A8474EFDAEFA8525845F005C25F7>.

Over the course of a year, the Task Force met 35 times and created thousands of pages of documents between the various meeting materials, agendas, and minutes. *Id.* The Legislature set aside \$250,000 for the Task Force. Ch. 2019-167, Laws of Florida.

In light of these resources, the Task Force’s output was a bit disappointing. The Report is mostly an Appendix, with the actual substantive content comprising less than 20 pages. Report at 5-15. The actual recommendations span only 5 ½ pages and, as detailed above, only tinker at the

## II. Sentencing disparity

The FPDA's other big concern is that the Task Force Report does not acknowledge, and therefore does not address, sentencing disparity. As explained below, irrespective of the total number of individuals Florida incarcerates, Florida does so unfairly. Disparity has only increased since the Legislature replaced the guidelines with the CPC. This response includes evidence of disparity that the Task Force omitted, while also addressing the Report's decision to not meaningfully engage with the possibility of sentencing guidelines.

### A. Racial Disparity

Individuals of color, and especially Black defendants, receive harsher sentences than their White counterparts in Florida.

In 2017, the Sarasota-Herald Tribune published its groundbreaking "Bias on the Bench" project,<sup>21</sup> which went viral and won numerous journalism awards.<sup>22</sup> That project detailed the sentencing practices of every judge in the state of Florida.<sup>23</sup> It ultimately concluded that "judges throughout Florida sentence black defendants to harsher punishments than whites charged with

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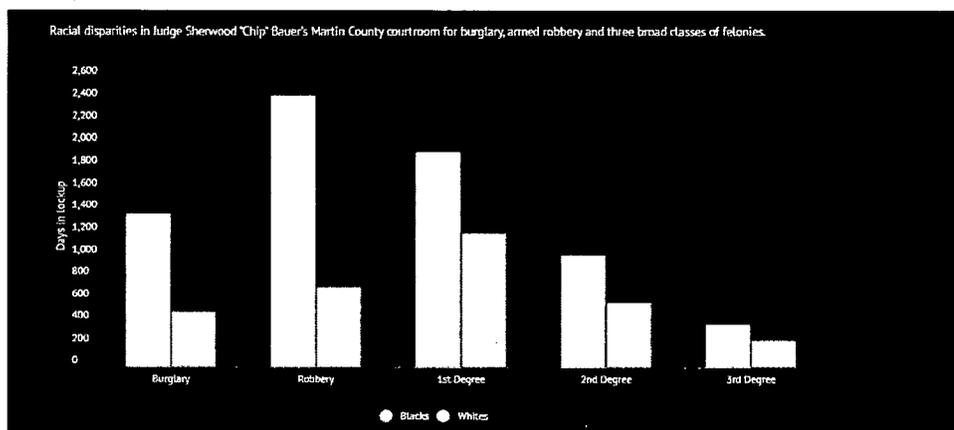
edges of the CPC. Most of the Report is devoted to a "Historical Overview of Florida's Sentencing System" that, as explained below, leaves out key information.

<sup>21</sup> Josh Salman, Emily Le Coz, and Elizabeth Johnson, *Bias on the Bench*, Sarasota Herald-Tribune, Dec. 8, 2016, available at <http://projects.heraldtribune.com/bias/>.

<sup>22</sup> Staff Report, '*Bias on the Bench*' wins Robert F. Kennedy Award, Sarasota-Herald Tribune, (May 5, 2017), available at <https://www.heraldtribune.com/news/20170505/bias-on-bench-wins-robert-f-kennedy-award>; *Bias on the Bench*, Online Journalism Awards, (2017), available at <https://awards.journalists.org/entries/bias-on-the-bench/>.

<sup>23</sup> Specifically, investigative reporters spent a year reviewing the sentences received by defendants from 2004 to 2016. They then compared the sentences imposed upon Black and White defendants who had similar CPC scores. Michael Braga, *How we did it: Read the methodology behind the analysis*, Sarasota Herald-Tribune, available at <http://projects.heraldtribune.com/bias/how-we-did-it/>.

the same crimes under similar circumstances.”<sup>24</sup> For instance, Judge Bauer in the 19th Judicial Circuit sentences Black people more harshly than Whites for every category of crime:<sup>25</sup>



Across judges, Black individuals are both more likely to be sentenced to prison and, when they do receive a prison sentence, their sentences are usually longer.<sup>26</sup>

Additionally, in 2018, the Fourth District Court of Appeal issued an opinion highlighting “disturbing” statistics from the Florida Department of Corrections “showing a disparity between average sentences for white defendants and minority defendants.”<sup>27</sup> The Court cited with approval the Sarasota Herald Tribune research.<sup>28</sup> It also encouraged the Florida Legislature to take action in light of the project, stating: “From that study, we certainly hope and desire that any necessary protections against actual racial bias in sentencing can be implemented to assure that it

<sup>24</sup> Staff Report, *H-T project takes home top state award*, Sarasota Herald-Tribune, (November 9, 2018), available at <https://www.heraldtribune.com/news/20181109/h-t-project-takes-home-top-state-award>; see also Josh Salman, Emily Le Coz & Elizabeth Johnson, *Florida's Broken Sentencing System: Designed for Fairness, It Fails to Account for Prejudice*, Sarasota Herald-Tribune, Dec. 8, 2016, available at <http://projects.heraldtribune.com/bias/sentencing/>; Josh Salman, Emily Le Coz & Elizabeth Johnson, *Tough on Crime: Black Defendants Get Longer Sentences in Treasure Coast System*, Sarasota Herald-Tribune, Dec. 8, 2016, available at <http://projects.heraldtribune.com/bias/bauer/>.

<sup>25</sup> Josh Salman, Emily Le Coz & Elizabeth Johnson, *supra* n.24.

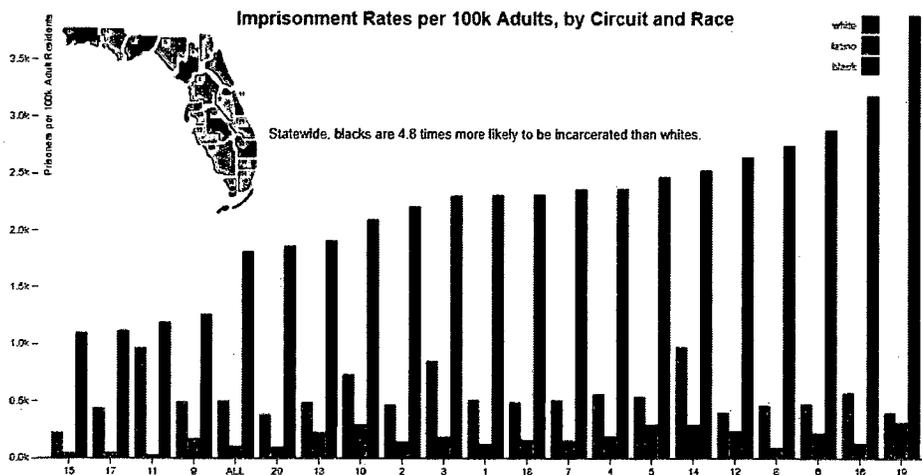
<sup>26</sup> Braga, *supra* n.23.

<sup>27</sup> *Delancy v. State*, 256 So. 3d 940, 947 (Fla. 4th DCA 2018).

<sup>28</sup> *Id.* at 947-48 & n.1.

is not present in the criminal justice system.<sup>29</sup> Unfortunately, however, the Task Force Report does not make any such recommendations.

The Project on Accountable Justice also issued a report detailing, among many other problems, racial disparity in Florida sentencing.<sup>30</sup> The report found that, in fiscal year 2015, “one in 42 black adults was incarcerated by the Florida Department of Corrections,” while that figure was only “one in 229 for white adults.”<sup>31</sup> This table illustrates the disparity across judicial circuits.<sup>32</sup>



Unfortunately, the Task Force Report does not contain any of this information or acknowledge racial disparity, and thus does not recommend that any “necessary protections against actual racial bias in sentencing . . . be implemented.”<sup>33</sup>

### B. Geographic Disparity

<sup>29</sup> *Id.* at 948.

<sup>30</sup> O’Brien, *supra* n.2.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Delancy*, 256 So. 3d at 948.

In addition to disparity along racial lines, geographic disparity persists in Florida sentencing.

“The CPC is a general law that applies uniformly across the state irrespective of the nature and size of the community in which the crime was committed.”<sup>34</sup> Accordingly, individuals with similar crimes and backgrounds should receive similar sentences regardless of where they committed their crime.

Florida has yet to achieve this goal because sentences vary significantly by judicial circuit. A few years ago, the Florida Senate contracted with the Crime and Justice Institute (CJI) to analyze trends in the state’s prison population.<sup>35</sup> The organization’s 2017 report concluded that the incarceration rate “varies widely across the state.”<sup>36</sup> “In general, southern and eastern Florida counties send people to prison at a lower rate than northern, central, and western counties.”<sup>37</sup> The report further analyzed the data and concluded “that the disparity is not driven by underlying crime rates.”<sup>38</sup>

The CJI’s 2019 report reached the same conclusion. The report explained that the “CJI’s data findings reflect that the CPC, in practice, penalizes lower-level offenders more harshly than necessary and results in sentencing disparity for similar offenses and criminal history based on

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<sup>34</sup> *State v. Robinson*, 149 So. 3d 1199, 1203 (Fla. 1st DCA 2014).

<sup>35</sup> Community Resources for Justice, *Data-Driven Solutions to Improve Florida’s Criminal Justice System*, available at <https://www.crj.org/publication/data-driven-solutions-improve-floridas-criminal-justice-system/>

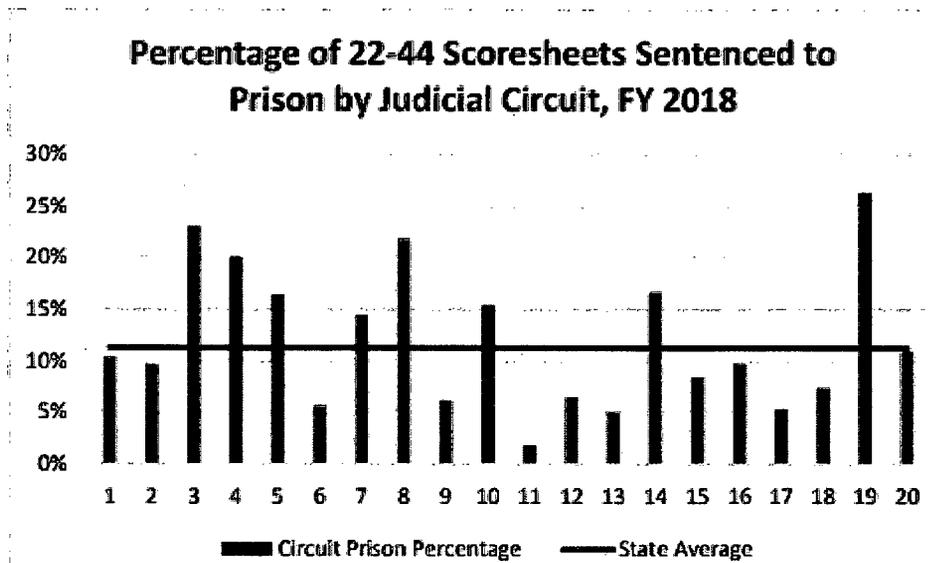
<sup>36</sup> Felicity Rose *et al.*, *An Examination of Florida’s Prison Population Trends*, The Crime and Justice Institute, (May 2017), at 12, available at <http://www.crj.org/assets/2017/08/FL-state-report.pdf>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

geographic location.”<sup>39</sup> Take, for example, the statistics for individuals who scored between 22-44 points on the scoresheet. At that score, a prison sentence is optional.<sup>40</sup> The chance that an individual who scored within that range would receive the optional prison sentence varied depending on judicial circuit:<sup>41</sup>

**Figure 7. Wide Variation in Likelihood of Prison Sanctions Among Judicial Circuits**



The CJJ Report also recognized that, contrary to Legislative policy, prison sentences were not correlated to the severity of the underlying offense. Under the CPC, the length of sentence should correspond to the seriousness of the offense. The CPC says that the “use of incarcerative sanctions” should be “prioritized toward offenders convicted of serious offenses and certain offenders who have long prior records, in order to maximize the finite capacities of state and local correctional facilities” and that the penalty imposed should be “commensurate with the

<sup>39</sup> Lisa Margulies, Sam Packard, and Len Engel, *An Analysis of Florida’s Criminal Punishment Code*, The Crime and Justice Institute, (June 2019), at 25, available at <http://www.crj.org/assets/2019/06/An-Analysis-of-Florida-CPC-June-2019.pdf>.

<sup>40</sup> § 921.0024(2), Fla. Stat.

<sup>41</sup> Margulies, Sam Packard, & Len Engel, *supra* n.39, at 18.

severity of the primary offense and the circumstances surrounding the primary offense.”<sup>42</sup> But the CJI Report found that the “severity of [the] primary offense does not correlate to [the] prison sentence.”<sup>43</sup> For example, individuals whose primary offense scored as a Level 2 on the scoresheet were more likely to receive a prison sentence than those who had a Level 6 offense on their scoresheet.<sup>44</sup>

The Task Force Report does not grapple with or make recommendations with respect to geographic disparity. It does not cite the 2019 Crime and Justice Institute report, although that report was also commissioned by the Florida Legislature and provides numerous recommendations related to Florida sentencing. The FPDA encourages the Legislature to look at the CJI’s report in addition to, or in lieu of, the Task Force Report when it comes to sentencing policy recommendations.

### **C. Sentencing Guidelines**

Perhaps because it does not acknowledge the disparity problem, the Task Force Report did not explain why the Legislature should not reconsider adopting a guidelines regime. The Report devotes a single sentence to the issue of whether guidelines or a top on the CPC should be adopted: “After consideration of the United States Sentencing Guidelines and the determinate sentencing systems used by other states, the Task Force ultimately determined not to recommend adoption of an upper guideline range or the use of one or more sentencing grids.”<sup>45</sup> The Report does not explain why or how the Task Force came to this conclusion.

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<sup>42</sup> § 921.002(1)(c), (i), Fla. Stat.

<sup>43</sup> Margulies, Sam Packard, & Len Engel, *supra* n.39, at 16.

<sup>44</sup> *Id.*

<sup>45</sup> Report at 15.

The FPDA wishes that the Task Force had given more attention to a guidelines option because history has revealed that the guidelines reduced disparity while the CPC has exacerbated it. Prior to the guidelines, Florida had indeterminate sentencing, meaning that no standards existed to guide sentencing discretion.<sup>46</sup> This resulted in a sentencing process “thoroughly lacking in uniformity and fraught with subjectivity,” which led to geographic, judge-to-judge, and racial sentencing disparity.<sup>47</sup> The sentencing guidelines arose out of concern about this disparity. In 1978, the Florida Supreme Court established a committee to address sentencing disparity, something it said required “immediate attention.”<sup>48</sup> That sense of urgency was heightened when the committee “conducted an in-depth study” and found racial disparity in sentencing: “The committee found that, after holding legally relevant factors constant, non-white offenders were significantly more likely to receive a jail or prison sentence than white offenders.”<sup>49</sup> The work of the Sentencing Study Committee “led to the creation of a Sentencing Commission whose purpose was to develop a system of sentencing guidelines on a statewide basis.”<sup>50</sup>

Sentencing guidelines were eventually adopted, the goal of which were to provide uniformity in Florida sentencing.<sup>51</sup> That goal was achieved; the guidelines resulted in the great reduction – and arguably the elimination – of racial disparity in Florida sentencing. In 1997, the

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<sup>46</sup> William H. Burgess, *Fla. Sentencing* § 2:1 (2018-19 ed.)

<sup>47</sup> *Manning v. State*, 452 So. 2d 136, 138 (Fla. 1st DCA 1984) (Ervin, C.J., specially concurring).

<sup>48</sup> Alan C. Sundberg et al., *A Proposal for Sentence Reform in Florida*, 8 Fla. St. U. L. Rev. 1, 1 (1980).

<sup>49</sup> Harry K. Singletary, *Sentencing Guidelines 1995-96 Annual Report: The Impact of the 1994 and 1995 Structured Sentencing Policies in Florida*, Florida Department of Corrections, (March 1997), at 34 (citing *A Report on the Analysis of Sentencing Procedures in Florida's Circuit Courts*, Sentencing Study Committee, Feb. 29, 1979).

<sup>50</sup> *Manning*, 452 So. 2d at 139 (Ervin, C.J., specially concurring).

<sup>51</sup> *Id.*; see also *Hendrix v. State*, 475 So.2d 1218 (Fla. 1985).

Florida Department of Corrections found that an offender's race has no "meaningful effect on decisions made by Florida courts under the 1994 and 1995 sentencing guideline structure."<sup>52</sup>

Florida eventually abandoned the sentencing guidelines, instead adopting the CPC. This resulted in disparity creeping back into Florida sentencing.<sup>53</sup> This is because, unlike sentencing guidelines, the CPC provides no upper limit on judges' sentencing discretion. "[I]ncreased judicial discretion" leads "to large and robust increases in racial disparities in sentencing" especially when, as was true in Florida, there is "reduced appellate scrutiny" of sentencing.<sup>54</sup> Unfortunately, the Task Force Report neither acknowledges the fact that the CPC reintroduced disparity into the Florida sentencing nor the fact that guidelines went a long way toward fixing that problem.

Although the Task Force Report does not explain why it rejected sentencing guidelines, other parts of the Report (namely, the "Historical Overview" portion) suggest that the Task Force may have had two main problems with guidelines. The FPDA wishes to address, and rebut, these potential criticisms.

First, the Task Force may have thought that sentencing guidelines were too "complicated."<sup>55</sup> But the CPC requires the same calculations – and thus the same "complications" – as the guidelines. This is because the CPC kept the same scoring system as

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<sup>52</sup> Harry K. Singletary, *Sentencing Guidelines 1995-96 Annual Report: The Impact of the 1994 and 1995 Structured Sentencing Policies in Florida*, Florida Department of Corrections, (March 1997), at 36.

<sup>53</sup> See *supra* n.21-44 & accompanying text.

<sup>54</sup> Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. Legal Stud. 75, 108 (2015); see also Robert Batey & Stephen M. Everhart, *The Appeal Provision of Florida's Criminal Punishment Code: Unwise and Unconstitutional*, 11 U. Fla. J.L. & Pub. Pol'y 5, 7 (1999). ("the trial judge's total discretion in indeterminate sentencing caused a problem: disparate sentencing.").

<sup>55</sup> Report at 7.

the guidelines, simply removing the rule that judges had to sentence within 25% of the guidelines.<sup>56</sup> Additionally, some of the Task Force's recommendations, such as increasing the number of offense levels from 10 to 16 and increasing the number of degrees of felonies, arguably would further complicate Florida sentencing. For these reasons, complication cannot justify the CPC over a guidelines system.

Second, the Task Force might think that sentencing guidelines curb judicial discretion too much.<sup>57</sup> The FPDA has several responses to this. First, the guidelines did not curb discretion that much. Under Florida's prior guidelines regime, a judge could depart 25% above or 25% below the recommendation – a 50% range – for any reason or no reason at all.<sup>58</sup> A judge could even depart beyond that range, as long as he had a valid reason for doing so.<sup>59</sup> The guidelines thus achieved the best of both worlds; it provided judges with plenty of discretion, while still imposing some limits to prevent judges from going “hog-wild” in particular cases.<sup>60</sup> Second, other aspects of the Task Force Report embrace limiting discretion. For instance, the Report supports mandatory minimums,<sup>61</sup> a type of sentencing regime that does not just reduce sentencing discretion, but rather completely eliminates it.

Ultimately, sentencing requires delicately balancing the need to limit judicial discretion to reduce disparity while simultaneously providing judges with enough discretion to properly

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<sup>56</sup> Pamala L. Griset, *New sentencing laws follow old patterns: A Florida case study*, 30 *Journal of Criminal Justice* 287, 289 (2002) (noting that the “CPC kept the form, but not the substance, of the sentencing guidelines scoring system”).

<sup>57</sup> Report at 9 (“The 1994 sentencing guidelines structure was heavily criticized for curbing the discretion of the sentencing judge.” (citation omitted)).

<sup>58</sup> § 921.0014(2), Fla. Stat. (1997); Fla. R. Crim. P. 3.991.

<sup>59</sup> See, e.g., *Seastrand v. State*, 474 So. 2d 908 (Fla. 5th DCA 1985); *Kennedy v. State*, 475 So. 2d 247 (Fla. 2d DCA 1985).

<sup>60</sup> Griset, 30 *Journal of Criminal Justice* at 290-91.

<sup>61</sup> Report at 9.

individualize sentences. Unfortunately, the Task Force Report does not appear to appropriately grapple with these competing concerns.

### **III. History of Florida Sentencing**

The Task Force devoted the bulk of its report to a “Historical Overview” of Florida sentencing. The FPDA wishes to note two key omissions from that overview.

First, as explained in the prior section, the Task Force does not address that the impetus behind the adoption of sentencing guidelines was a desire to reduce sentencing disparity and that the guidelines did in fact achieve that goal. It does not address that the CPC has undermined that goal.

Second, the Task Force Report does not detail exactly how the CPC came into being. The Task Force Report gives the impression as if the CPC was adopted to redress purported problems with the guidelines system. In actuality, the CPC was drafted by a single State Attorney office for the purpose of increasing the power of prosecutors.

The CPC was not drafted by Tallahassee legislators and policymakers, but rather by the State Attorney in the Eleventh Judicial Circuit (Miami). The State Attorney wanted to eliminate sentencing discretion, but feared that judges in the Eleventh Judicial Circuit would sentence too leniently.<sup>62</sup> “Staff of the State Attorney drafted a proposal for a new sentencing structure, named the Criminal Punishment Code, that limited downward departure sentences but gave judges more flexibility to impose prison sentences and increase prison sentence length than was available under the guidelines.”<sup>63</sup> As one prosecutor said: “After we explained our plan to the Sheriff’s

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<sup>62</sup> Griset, 30 *Journal of Criminal Justice* at 295.

<sup>63</sup> *Committee on Criminal Justice, Review the Criminal Punishment Code and Sentencing Judges’ Assessment*, The Florida Senate (Nov. 2005), at 5, available at [http://archive.flsenate.gov/data/Publications/2006/Senate/reports/interim\\_reports/pdf/2006-112cj.pdf](http://archive.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-112cj.pdf).

Association, it started to roll. The Senate and House sponsors of the original abolition bills both bought the plan and substituted the CPC for abolition. It happened overnight. We're real proud of the CPC. It has a bottom but no top. It's the best of both worlds for us."<sup>64</sup>

The drafters admitted that the purpose of the CPC was not to improve Florida sentencing policy, but rather augment the power of prosecutors to coerce guilty pleas. Among other things, prosecutors said when discussing the CPC: (1) "[we've] stacked the deck. Now, there's a much bigger hammer . . . a better position to strong arm pleas;" (2) "we've got to plea bargain from a few years down under the guidelines. Now we can plea bargain down from fifteen years, or whatever the statutory maximum is;" and (3) "Now, if we can threaten everybody with prison, there will be more offenders going to prison."<sup>65</sup> Professor Griset summarized the results of this process:

By rejecting the substance, but keeping the form of the guidelines scoring system, Florida policymakers had abdicated responsibility for structuring sentencing outcomes. In the process, prosecutors had further increased their already-powerful positions.

....  
The prospects for unfairness were many. Even if most sentences remained within the guideline ranges, some long sentences would be imposed arbitrarily or discriminatorily. One interviewee speculated that "some judges will just impose monstrous sentences." Another agreed that "a few judges will go hog wild."<sup>66</sup>

Unfortunately, as summarized in prior sections, Professor Griset's predictions came true.

The FPDA believes it is important to understand exactly how the CPC came to fruition when evaluating the efficacy of that sentencing regime. For this reason, it has provided this supplement to the Task Force's historical overview of Florida sentencing.

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<sup>64</sup> Griset, 30 *Journal of Criminal Justice* at 295.

<sup>65</sup> *Id.* at 290.

<sup>66</sup> *Id.* at 290-91.

## Conclusion

Overall, while the FPDA appreciates the effort the Task Force put into this project, the Task Force's Report ultimately leaves out important issues and recommendations. The Task Force did not address Florida's over incarceration or sentencing disparity. At best, the recommendations will do nothing to solve these problems; at worst, they will exacerbate them. The FPDA recommends that the Legislature commission a new task force with different players and more directed goals. If the Legislature does adopt any of the Task Force's recommendations, the FPDA recommends that the Legislature also commission a study on the impacts of those new policies on racial and geographic disparity.

Respectfully submitted.



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