University of Nevada, Reno

Evidence-Based Sentencing as Applied in a Circuit Court Using Missouri Sentencing Advisory Commission Recommendations

A thesis submitted in partial fulfillment of the requirements for the degree of Master of Judicial Studies

by

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ABSTRACT

The last fifty years have been ones of great turmoil in the field of criminal justice. The focus of much attention has been the sentencing process in serious cases, and many legislative initiatives enacted harsher sentencing policies, which resulted in a sizable increase in the number of persons incarcerated in the U.S. The changes had a disproportionate effect on African-Americans, which magnified the public sentiment that the criminal justice system was broken.

During the same period, the concept of evidence-based sentencing was being developed. Some form of it was adopted in federal courts and almost half the states, including Missouri. However, evidence-based sentencing had a sizable number of critics, many of whom contended the practice works to exacerbate the phenomena of mass incarceration and injustice towards African-Americans.

Here in the City of Saint Louis, the seat of the Twenty-Second Judicial Circuit of Missouri, that public sentiment has been even more pronounced. In the last ten years, there has been a startling increase in the number of homicides. The reasons for that trend have been difficult to understand; homicides had been steadily declining since a peak in the early 1990's through 2010, only to then see a reversal of the trend with the number of homicides per capita in the City reaching a record number in 2020. Almost all of those homicides were perpetrated with a handgun.

This study does two things: first, it looks at the evolution and criticisms of evidence-based sentencing, especially as developed and used in Missouri. In 1990, the Missouri Legislature established a Sentencing Commission to study sentencing practices

in the state, and in 1994 expanded the Commission's role to include developing a system of recommended sentences. The body, renamed the Sentencing Advisory Commission, published its first set of sentencing guidelines in 1997. In subsequent years, the Commission refined its sentencing recommendations and included in its user guides a considerable amount of information about dispositions of felony cases statewide for use by judges, prosecutors, defense counsel, probation and parole officers, corrections officials and others involved in the implementation of sentences.

However, there was resistance to the use of the sentencing recommendations, which in 2012 led the Legislature to eliminate the Commission's authority to publish sentencing recommendations. By 2017, the Commission became dormant, although remaining an authorized agency in the statutes. In 2020, an effort to revitalize the Commission began, and continues today.

The second part of this study examines felony cases in which one of the charges involved a gun – "gun cases" – that were disposed of in one division of the Circuit Court of the Twenty-Second Judicial Circuit of Missouri. The study examined how the sentencing recommendations and other information provided by the Commission related to the sentences defendants received in those cases. With regard to those defendants who were granted probation, the study examined their performance on probation and whether probation was completed successfully or revoked.

The study demonstrated that the Commission's sentence recommendations gave the Court useful tools that helped in arriving at the sentencing decision in any case, as did the data provided about the length of sentences in similar cases statewide, and the data the Commission provided from the Department of Corrections about the length of time

offenders were required to serve before eligibility for parole and the length of time that was actually served before release on parole.

It is hoped that the study may be useful in the ongoing effort to revitalize the Sentencing Advisory Commission.

ACKNOWLEDGMENT

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Chapter I – Introduction

In the latter decades of the last century, rising crime rates generated a loss of confidence in the ability of the criminal justice system to "rehabilitate" offenders. Legislatures across the country reacted with laws requiring longer sentences, mandatory minimums, and restrictions on the discretion of judges in sentencing defendants. The result of these trends was a rapid growth in incarceration rates, resulting in ever greater financial burdens on limited government resources, especially those of state governments.

During the same period, the concept of evidence-based sentencing (EBS) was being developed and gaining proponents. Initially used by probation and parole agencies to make decisions regarding supervision and parole release of offenders, the concept was adapted to sentencing decisions and in some form the concept was adopted in a number of states. Evidence-based sentencing was not without its critics; the accuracy of scoring criteria was questioned, and some opposed its use because they saw it as a pretext for race discrimination.

By 2003, judges, lawyers, and legislators were recognizing that decades of "get tough" policies had resulted in greatly increased levels of incarceration without a proportionate corresponding reduction in crime. Proponents of evidence-based sentencing believed that the use of EBS was one measure that could help correct at least some of the problems in the criminal justice system.

This study examines the history of evidence-based sentencing, and in particular its use in Missouri. In 1990 the Legislature established a Sentencing Commission to study

sentencing disparities,[1] and in 1994 the Legislature expanded the Commission's role, directing the Commission to develop a system of recommended sentences.[2] The Legislature decided not to follow the example of the federal sentencing guidelines, which Congress had made mandatory for U.S. district court judges to follow. Missouri legislators recognized the importance of retaining judicial discretion in sentencing decisions, and stipulated that the Commission's recommended sentences would be advisory, not mandatory.

In the 1990 legislation, the Legislature required the Commission to study sentencing practices in felony cases statewide.[3] The data gathered by the Commission in following that mandate from the Legislature would serve as the basis for sentence recommendations when the Legislature gave the Commission the task of developing sentencing recommendations in 1994.

The Department of Corrections in Missouri had developed a risk assessment tool for use by probation and parole officers and other corrections officials. The Commission modified that tool and adapted it for use in sentencing.

In 1997, the Missouri Sentencing Advisory Commission (MoSAC) published its first set of recommended sentences, which covered all classes of felonies. In subsequent years, the Commission revised and refined its recommendations, searching for a framework that was both practical and acceptable, and published user guides explaining

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[1] 1990 MO. LAWS, H.B. 974, SECTION 558.019.8.
[2] 1994 MO. LAWS, S.B. 763, SECTION 558.019.6.
[3] 1990 MO. LAWS, *supra.*

how the recommendations were derived and the various factors to be considered in making the decision on sentencing in any case.

However, there was resistance to the use of the recommendations, and over time outright opposition grew among some prosecutors. In 2012, eighteen years after giving the Commission the job of developing recommended sentences, the Legislature took away that authority. However, legislators left in place the Commission's duties of studying sentencing practices and the feasibility of various alternative sentencing options.[4]

The Commission continued to publish data and information related to sentencing for a few more years, but by 2017 had become inactive. In 2020 an effort began to revive the Commission, and that effort continues today.

The second part of this study examines the use of Missouri's evidence-based system of recommended sentencings in cases involving guns over a nine-year period (from 2005-2013) in one division of the Circuit Court of the City of Saint Louis. Data was gathered from a number of sources, some public and others not available to the public. Information was collected about the defendants in the cases, including their prior criminal records, education, employment, substance abuse, and family background. Information was also gathered about each case, including the charge or charges, sentence enhancement provisions, plea negotiations, jury or bench trial verdicts, and dispositions. If probation was granted or the sentence was to a prison treatment program that allowed release on probation, the subsequent performance of the defendant on probation or in the

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[4]2012 MO. LAWS, S.B. 628, SECTION 558.019.6.

treatment program was also tracked. If probation was revoked, information was gathered about the subsequent sentencing, as to whether the defendant was granted a second period of probation or was sent to prison.

The period covered coincides with the time when Missouri courts were provided with sentencing recommendations by the Missouri Sentencing Advisory Commission.

The study focused on cases involving guns because gun violence has been on the rise in the Circuit for a number of years, and what to do about it is a grave concern throughout the community.

This study did involve gathering empirical data; however, it is meant to be a descriptive study rather than an "experimental" or "quasi-experimental" one, for several reasons. Gun cases and other criminal cases were randomly assigned to the division, which was one of twelve to twenty divisions within the circuit hearing criminal cases during any year (the number changed over the years of the study due to reorganizations of the circuit; however, the principle of random assignment of cases remained applicable). However, the total number of such gun cases was not large enough to justify drawing conclusions about cause-and-effect for the many variables; and in a few of the cases, some of the key data was not available. Another reason one cannot generalize from the sentencings in this study is that all of them were by the same judge; other judges might have arrived at different sentencing decisions.

One benefit from this study may be the insights derived concerning the complexity of sentencing decisions, and how that complexity impacts the efficacy of a system of recommended sentences. Another benefit is that the study validates the Legislature's wisdom in retaining judicial discretion in sentencing decisions: discretion is

necessary because of the complexity of the many factors that must be considered in making every decision.

Hopefully, if Missouri is to have a re-constituted Sentencing Advisory Commission, a third benefit of this study is that it may be useful in pointing the way to improving on the previous iterations of the Commission.

Finally, it is also hoped that the study may be useful in gaining some insights into the problem of gun violence that plagues many communities across Missouri and other states across our country.

Chapter II – Literature Review

The turbulence and upheavals in American society during the 1960's have been well-documented and reported. One of the trends that gained traction during that decade was the growing rate of crime, including violent crime. As crime rates continued to rise in ensuing decades, skepticism about the ability of the criminal justice system to deal with offenders increased, and consensus about how to approach the task of sentencing in criminal cases evaporated. Many elected officials of both major political parties responded with calls for harsher sentences and law and order. Public sentiment shifted away from a rehabilitative goal and towards a punitive approach. Various catch-phrases like "career criminals," "criminal predators," "three strikes and you're out," "truth in sentencing," and ideas like mandatory minimum sentences, elimination of parole, "life without parole" sentences, and "boot camp" for young offenders found their way into law in many states and the federal government.

By the time President Bill Clinton signed the 1994 Crime Bill, sponsored by then-U.S. Senator Joe Biden, thirty-seven percent of Americans identified crime as the nation's most important problem.[5] The bill was a response to that sentiment; however, the consequence of the bill's "get tough" provisions was a growing prison population. The problem of "mass incarceration" was starting to materialize, with an ever-greater proportion of Americans being incarcerated. The problem was disproportionately worse for African-Americans.

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[5] B. KELLER, "PRISON REVOLT," THE NEW YORKER, June 29, 2015, at 22.

In addition to the 1994 crime bill's unacceptable disparate impact on African-Americans that signaled the presence of odious racially discriminatory factors, another by-product of the bill's resulting mass incarceration was its deleterious effect on recidivism. By 2004, it was well-recognized that "recidivism rates are abysmal," as Judge Michael Marcus wrote in a publication of the American Judges' Association.[6] An Oregon circuit judge at that time, and a prominent advocate for evidence-based sentencing, Judge Marcus cited U.S. Bureau of Justice Statistics Criminal Offenders Statistics showing more than 70% of inmates had prior sentences of probation or prison, with 63% of those having been re-arrested for a new crime within 3 years after release.[7] The latter statistic has remained fairly stable: in a 2021 report on a 10-year study on recidivism among prisoners released in 2008, the finding was that 66% of prisoners released across 24 states in 2008 were arrested within 3 years, and 82% were arrested within 10 years.[8] When one is considering those statistics, it is important to keep in mind some other statistics from the U.S. Department of Justice cited by Judge Marcus in a different publication in 2008: "At least 95% of all State prisoners will be released from prison at some point; nearly 80% will be released to parole supervision."[9] That is why reducing recidivism is so

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[6] M. MARCUS, "SMARTER SENTENCING: ON THE NEED TO CONSIDER CRIME REDUCTION AS A GOAL," 40 COURT REVIEW 16, 19 (2004).

[7] *Id.*

[8] L. ANTENANGELI AND M. DUROSE, "RECIDIVISM OF PRISONERS RELEASED IN 24 STATES IN 2008: A 10-YEAR FOLLOW-UP PERIOD (2008–2018)," U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS (SEPTEMBER, 2021), https://bjs.ojp.gov/library/publications/recidivism-prisoners-released-24-states-2008-10-year-follow-period-2008-2018 .

[9] M. MARCUS, "SYMPOSIUM: CONFRONTING THE CRISIS: CURRENT STATE INITIATIVES AND LASTING SOLUTIONS FOR CALIFORNIA PRISON CONDITIONS: ARTICLE: FOUR STEPS TO PROGRESS: A REALITY TEST FOR ASSEMBLY BILL 900," 43 U.S.F. L. REV. 13, 23 fn 40 (2008), citing U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS, GROWTH IN STATE PRISON AND PAROLE POPULATION (2002).

important: sending offenders off to prison does not solve the problem; if prison makes many offenders worse, then the problem for the public will be worse when those offenders serve their time and are released back into society.

The problems of the criminal justice system caused some to believe the system needed a complete overhaul. Michael Tonry argued all the "get tough" laws on sentencing passed over the last forty years in the U.S. needed to be repealed; he advanced ten proposals toward achieving that goal.[10] Mirko Bagaric, Gabrielle Wolf, and William Rininger examined how rehabilitation had taken a back seat in sentencing policy in the U.S. for many years, and they advocated a return to the rehabilitative ideal.[11]

Judge Marcus identified two opposing camps in the argument over how to best reduce crime, which he labeled "incarcerationists" and "anti-incarcerationists." He believed the incarcerationists were correct that longer sentences do prevent some criminal behavior; however, he believed that the anti-incarcerationists were also correct in their contention that longer sentences cause an increase in post-prison criminal behavior among some offenders. Judge Marcus found there was common ground between the two groups: both sought sentences that would achieve a reduction in recidivism.[12]

Obviously, following Judge Marcus' logic, if longer sentences have opposite effects on two different subsets of offenders (one subset are those whose criminal

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[10] M. TONRY, "MAKING AMERICAN SENTENCING JUST, HUMANE, AND EFFECTIVE, 46 CRIME & JUST. 441 (2016).
[11] M. BAGARIC, G. WOLF, AND W. RININGER, "MITIGATING AMERICA'S MASS INCARCERATION CRISIS WITHOUT COMPROMISING COMMUNITY PROTECTION: EXPANDING THE ROLE OF REHABILITATION IN SENTENCING," 22 LEWIS & CLARK L. REV. 3 (2018).
[12] M. MARCUS, "SMARTER SENTENCING: ON THE NEED TO CONSIDER CRIME REDUCTION AS A GOAL," 40 COURT REVIEW 16, 18-19 (2004).

behavior is best curbed by longer sentences, and the other subset are those whose criminal behavior will be increased by longer sentences), then locking up any two individuals with the same sentence, even though it is for the same crime, means that the sentence may be correct for one defendant but will not be the correct sentence for the other person. (That is, if one defines "correct" as the sentence that will have the effect of making it less likely the defendant will commit crimes in the future.) What was needed was a way to determine which sentence will be the "correct" one for each offender, the sentence that will make it more likely that that particular individual offender will not repeat criminal behavior. Making that determination and achieving that goal is what the concept of evidence-based sentencing is all about.

At the same time that crime and incarceration rates were both surging – from the 1960's into the new millennium – a parallel trend was occurring: the development of the concept of "evidence-based sentencing" (EBS) as a way to solve the problem of the high rate of recidivism among those prosecuted and sentenced for crimes, and thereby to reduce the overall crime rate.

One of the problems with the label "evidence-based sentencing" is that it has a number of different meanings, depending on who is using it. One critic of EBS, Sonja Starr, defined it as the use of "**empirical** research on factors predicting criminal recidivism … [that] provides sentencing judges with **risk** scores for each defendant." (emphasis in original).[13] But Starr found that EBS as used in practice resulted in

[13] S. STARR, "EVIDENCE-BASED SENTENCING AND THE SCIENTIFIC RATIONALIZATION OF DISCRIMINATION,"

disproportionate impact on minorities, and therefore opposed the use of EBS unless a reliable way to avoid discriminatory implications could be devised.

Judge Marcus advocated for EBS, which he described as "smarter sentencing." Based on his experience as a judge in Multnomah County, Oregon, with the development and use of EBS tools, he believed evidence-based sentencing was a solution to the problems of controlling crime and reducing recidivism. Judge Markus concluded EBS makes the criminal justice system stronger by making crime reduction a focus of the sentencing process.[14]

Judge Marcus, in commenting on the 2008 draft of the Model Penal Code, argued evidence-based tools were better solutions to the problem than what he saw as a surrender to the idea that "just desserts" – that is, a focus on punishment for crime – was the main goal of the criminal justice system. [15]

Evidence-based sentencing, as put into practice in various places in the U.S. through the use of risk assessments, has generated criticism and opposition in some quarters. John Monahan and Jennifer Skeem pointed to the difficulty of identifying which risk factors bear on ways to reduce the chances of offenders' recidivism, and the racial disparities associated with the use of evidence-based tools, also known as risk assessments, as significant problems with the use of evidence-based tools in sentencing.[16]

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[14]MARCUS, *supra* at 25.
[15] M. MARKUS, "MPC--THE ROOT OF THE PROBLEM: JUST DESERTS AND RISK ASSESSMENT," 61 FLA. L. REV. 751 (2009).
[16] J. MONAHAN AND J. SKEEM, *supra* at 36-39.

Nicholas Scurich and John Monahan, in their study published in 2015, found the vast majority of Americans agreed that race should not be a factor in sentencing.[17] However, they also found there was more support in the general public than among legal scholars for the inclusion of demographic risk factors in sentencing tools. They found that Americans are almost evenly divided on the question whether it is appropriate and proper to include demographic risk factors in gauging the likelihood an individual will commit a serious crime in the future. Scurich and Monahan recommended further research to determine the reasons why people are so evenly divided on the question. [18]

Professor Sonja Starr's assessment was blunt: "The technocratic framing of EBS should not obscure an inescapable truth: sentencing based on such instruments amounts to overt discrimination based on demographics and socioeconomic status."[19]

Bernard Harcourt went further, contending that risk assessment instruments exacerbate the racial imbalance in prison populations and the problem of "mass incarceration."[20]

Aziz Huq researched various algorithmic tools in search of a solution to the problem of disparate and therefore discriminatory effects in risk assessment. Huq found that even when race-related criteria were not used, the algorithms still produced results that had racially-discriminatory effects. The problem for a person designing an algorithm was to devise classification rules governing the offender populations that did not produce

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[17] N. SCURICH AND J. MONAHAN, "EVIDENCE-BASED SENTENCING: PUBLIC OPENNESS AND OPPOSITION TO USING GENDER, AGE, AND RACE AS RISK FACTORS FOR RECIDIVISM," J. OF LAW AND HUMAN BEHAVIOR [online version] (2015) http://dx.doi.org/10.1037/lhb0000161 .
[18] *Id.*
[19] STARR, *supra* at 806.
[20] B. HARCOURT, "RISK AS A PROXY FOR RACE," 27 FED. SENT'G REP. 237 (2015).

racially-discriminatory results. Huq found none of the algorithms he studied were capable of producing non-discriminatory results.[21] Huq suggested that in order to design a risk assessment instrument that was not racially discriminatory, one had to take account of the criminal justice system's effects on the already-existing "racial stratification" of society and find an algorithm that allowed the risk-assessment instrument to adjust to this" racial stratification."[22] However, he did not find an algorithm that could accomplish that difficult goal. In effect, he concluded a satisfactory – that is, non-discriminatory – algorithm had not yet been devised.

Crystal Yang and Will Dobbie examined algorithmic tools commonly-used in risk assessment for EBS, and found these tools resulted in racial discrimination by producing results which had disparate, adverse effects on African-Americans.[23] They noted that the algorithms did not use race as one of the factors, but that other factors in effect stood in for race, because other factors such as education and employment were correlated with race. Applying an Equal Protection Clause analysis of various algorithms, they found that including race and race-correlated characteristics in an algorithm did violate the Equal Protection Clause, but they also found that the results were the same when all race-related characteristics were excluded from the algorithm, in that the results of the latter algorithms still had adverse impacts on minority populations. Yang and Dobbie

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[21] A. HUQ," RACIAL EQUITY IN ALGORITHMIC CRIMINAL JUSTICE," 68 Duke L.J. 1043, 1053 (2019).
[22] *Id.* at 1055.
[23] C. YANG and W. DOBBIE,"EQUAL PROTECTION UNDER ALGORITHMS: A NEWSTATISTICAL AND LEGAL FRAMEWORK," 119 Mich. L. Rev. 291, (2020).

concluded that new statistical approaches were needed to eliminate racial discrimination in evidence-based sentencing.

Virginia was the first state to add risk assessment to its system of sentencing guidelines.[24] Missouri followed, beginning with the creation of the Sentencing Advisory Commission in 1994, although the Commission did not incorporate risk assessment into its sentencing recommendations until 2004. Despite the criticisms of EBS, other states also adopted some form of risk assessment, and today there are about twenty states which use risk assessments in criminal sentencings.[25].

Perhaps the concerns about racially discriminatory effects formed part of the basis for the Missouri Legislature's action in amending the statute governing the Missouri Sentencing Advisory to remove its authority to promulgate recommended sentences in 2012 and the lapse of the Commission into dormancy within a few years thereafter. Certainly there were other factors at play.

Currently, Missouri Supreme Court Judge J. Brent Powell is leading an examination into whether the Commission should be revived. Hopefully this study will be useful determining whether Missouri should use some form of evidence-based sentencing; and if so, whether to use a version similar to the one in place when the Commission became dormant, or some other iteration based on further research.

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[24] B. GARRETT AND J. MONAHAN, "JUDGING RISK," 108 CALIF. L. REV. 439, 444 (2020).

[25] J. MONAHAN AND J. SKEEM, "RISK ASSESSMENT IN CRIMINAL SENTENCING," UNIVERSITY OF VIRGINIA SCHOOL OF LAW PUBLIC LAW AND LEGAL THEORY RESEARCH PAPER SERIES 2015-53 at 6 (September 2015).

Chapter III – Methodology

This research focuses on felony "gun cases" assigned to and disposed of in one division of the 22nd Judicial Circuit of Missouri over the seven-year period 2007-2013. During those years, sentencing recommendations developed and published by the Missouri Sentencing Advisory Commission relating to all types and classes of felonies were available to all sentencing judges statewide.

What constitutes a "gun case"?

For this study, a "gun case" is defined as one in which the defendant was charged with at least one count which involved the use or possession of a firearm.

However, in most cases it cannot be readily determined whether a gun was involved just by looking at the charge or charges in the case. Of the commonly charged gun crimes, only two include reference to a gun in the charge: possession of a firearm by a felon, and stealing a firearm. Other crimes which may be committed with the use of a gun, such as murder, robbery, or assault, can also be committed with the use of some other weapon or perhaps no weapon at all. Less serious offenses such as carrying a concealed weapon can also be committed either with a firearm or with some other weapon. In order to tell whether a firearm was involved, one must examine the court documents in the case: the information or indictment which lists the charge or charges and contains a succinct statement of the essential elements of the offense, and the probable cause affidavit attached to the application for the arrest warrant, which usually gives a bit more detail.

Categories of gun cases examined in this study

The gun cases studied here fall into three categories. The first category are those cases in which a serious crime such as murder first or second degree, assault first degree, robbery first degree, felony sex offense, or kidnapping was charged and a firearm was used in the commission of the crime. All of those cases involved one or more victims. The second category are those cases in which the defendant's use of a firearm occurred in circumstances which involved a "potential" victim. Crimes in this category relate to one of two types of circumstances: one, when the charge was shooting from or into a vehicle or dwelling; the other, when the charge was flourishing or exhibiting a firearm in an angry or threatening manner. The third category consists of crimes in which the possession of a firearm under certain circumstances was in and of itself a crime: carrying a concealed firearm (the circumstance was the concealment) and possession of a firearm by a person with a prior felony (the circumstance was the person's prior criminal record).

It should be noted that although most of these gun crimes could have been committed with a rifle or a shotgun, almost all of the cases studied involved handguns. It should also be noted that the crimes in the three categories mentioned comprise only a few of a long list of crimes involving firearms in Missouri laws. However, these other gun crimes are rarely charged by prosecutors. No case assigned to the division during the time period of the study included a charge of any of the other gun crimes in Missouri criminal laws, such as transfer of a firearm to a felon, carrying a loaded firearm into a school; discharging a firearm at a train; and possession of a firearm by an intoxicated person.

The charge of "armed criminal action"

There is a fourth category of crime in Missouri laws which could involve firearms: the charge of "armed criminal action." That charge, by itself, does not reveal whether the "armed" portion relates to a firearm; that offense can be committed with a firearm or with any other deadly weapon or dangerous instrument.[26]

During the period studied, there were a number of cases assigned to the division studied which included a charge of armed criminal action, and examination of the court documents showed some weapon other than a gun was the basis for the charge. Data from those cases was not included in this study.

The offense of armed criminal action can only be charged in conjunction with another, underlying charge. For example, a defendant can be charged with murder (first or second degree) and with armed criminal action, if the murder was committed with the use of a deadly weapon or dangerous instrument. But that defendant could not be charged only with armed criminal action; there must an underlying charge on which the charge of armed criminal action is based. In this study, when armed criminal action was included in the charges against the defendant in the case, that fact was noted, as was the disposition of the armed criminal action charge along with the disposition of the main charge – whether there was a finding of guilty, whether by a jury or by a judge in a bench trial; or not guilty, or whether the prosecutor nolle'd (dropped) the charge. However, the case was considered a "gun case" regardless of the inclusion of and disposition of a charge of armed criminal action.

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[26] MO. REV. STAT. SECTION 571.015.

“Lead” gun charge

Many of the cases studied involved only one charge; other cases involved two or more charges. When there were two or more gun crimes charged, the study focused on the “lead” gun charge; that is, the gun charge with the most serious class under Missouri’s criminal laws, meaning the class that carried the most severe punishment. Missouri’s criminal code during the period studied had four classes of felonies: A, B, C and D, and in addition there were some crimes that were “unclassified,” meaning they were not designated as within one of those four classes. Class A are the most serious crimes in the Missouri criminal laws, and class D are the least serious of the felonies. So, for example, in a case in which robbery 1st degree (a class A felony) and possession of a gun by a felon (a class C felony) were both charged, the case data collected would indicate the lead gun charge to be robbery 1st degree.

In most cases involving two or more charges, the lead gun charge was also the most serious offense charged. However, there were a few cases in which there was a more serious charge that did not involve use of a firearm. In those cases, the more serious non-gun charge was also noted.

One of the unclassified crimes is armed criminal action. Technically, it might be considered to carry a more severe punishment than any of the other crimes, because the statute does not set an upper limit on the number of years that could be given as the sentence. However, armed criminal action carries a minimum penalty of three years, so for purposes of this study it was not considered to be a lead charge in any of the cases in which it was charged.

During the annual legislative sessions in the years studied, the Legislature made a variety of changes to Missouri criminal laws and procedures. However, there were no major, substantive changes made during those years to any of the gun crimes which were involved in the cases in this study, nor were there any major, substantive charges to the procedures relating to sentencing that impacted any of the cases in this study.

Sources of data

Data was collected about each case from a variety of sources. Some of that data remains available to the public. Some court records were open to the public while the case was pending, but now are confidential. For example, whenever a defendant is arraigned in a case involving a felony, the case appears in court records that are open to the public. While that case remains pending, those records remain open to the public. However, if the defendant pleads guilty or is found guilty and is granted probation with a "suspended imposition of sentence" (SIS), and then successfully completes probation, that case becomes confidential under Missouri law, and the case can no longer be accessed on publicly available court records. Similar procedures apply when a defendant is found not guilty, or charges are dropped (nolle'd) by the prosecutor, or are dismissed by the court.

Court Documents and Minute entries

Data gathered for this study from court records was collected during the period when the case was publicly available. Court documents include the charges filed by the prosecutor in the information or the indictment, and court orders regarding plea hearings,

trials, sentencings and probation hearings, which were recorded in the minute entries made by the clerk into the court record of the case. Data from court records collected in this study included the court cause number for the case, the case identification number used in the court's electronic information processing system, the charge or charges in the case, the disposition (plea, trial, nolle or dismissal), the initial sentence pronounced by the court and any subsequent sentence if there was a revocation of probation, the status of probation if granted (successfully completed, suspended, reinstated, extended, revoked, or still on probation), and the time periods spent in jail pending disposition and pending probation revocation. In some cases, if the defendant was charged in a second case during the course of the study, some information about the new case was also collected.

Probation and Parole Officer Reports

Data was also collected from Probation Officer and Parole Officer reports. This data is not available to the public in any case. Probation reports include ***Sentencing Assessment Reports*** which were submitted to the court in those cases in which the court ordered a report to be prepared. Judges in Missouri are not required to order a report in any case. In the division of the court which was the subject of this study, the court's practice was to order reports in most cases involving victims (since one of the components of Sentence Assessment Reports is a victim impact section, compiled by the Probation Officer after contacting any victims). In addition, the court ordered Sentence Assessment reports to be submitted in a good number of the cases which did not involve victims.

Sentence Assessment Reports included information about the defendant, the sentencing commission guidelines for the lead charge in the case, and statistical data about cases involving the same charge and the sentences in those cases.

Information about the defendant included the prior criminal record, if any, and any prior grant of probation, or sentence to prison or jail; any mental health issues; any substance abuse history and prior treatment; family background including marital status and children; employment status and work history; and educational background. The reports also included information based on the Sentencing Advisory Commission's guidelines regarding the offense group of the lead charge (violent, sex or child abuse, non-violent, and drug); the defendant's designated criminal history level; and the defendant's risk assessment including the calculated risk score and the classification of the defendant's risk level (good, above average, average, below average, and poor). In many cases, the report included the calculated recommended sentence for the lead charge in the case, based on the Commission guidelines. Sometimes the recommended sentence would be a specific number of years in prison; other times the recommendation might cover a range of possible sentences.

In the last two years of the period covered by the study, there was a change in the law removing the Commission's authority to recommend sentences. After that change, the sentence assessment reports no longer included sentence recommendations. Instead, the reports provided certain statistics relating to the lead offense charged: the average prison sentence for the offense for those offenders having the same risk level and prior criminal history as the defendant; and the percentages of statewide dispositions for that charge in which probation was granted, or in which the sentence included placement in

certain prison treatment programs, or the sentences was to prison without assignment to those treatment programs (a so-called “straight” prison sentenced).

Sentence Assessment Reports also included statistical data from the Department of Corrections gathered over a period of years prior to the date of the report. This data related to the lead charge in the case. This information gave the Board of Probation and Parole guidelines for the percentage of the prison sentence which the defendant was required to serve before becoming eligible for release on parole, and the percentage of the sentences which defendants actually served before being released on parole.

In any case in which probation was granted and the court ordered supervision by the Board of Probation and Parole, the Probation and Parole Officer assigned to supervise the defendant was required to submit periodic reports to the court about the defendant’s performance on probation. These reports were not open to the public, because they contained personal information about the defendant and sometimes the defendant’s family or other acquaintances.

When a supervised defendant committed a violation of any condition of probation, a report would be submitted. Violations could be relatively minor, such as failing to complete community service hours as a condition or probation, or failing to keep an appointment to report to the supervising probation officer; other violations could be more serious, such as committing another crime. Upon receiving notice of a violation, the court had various options. Usually a hearing was scheduled for the defendant to appear and the court would hear from the probation officer or other witnesses pertinent to the violation, and then make a decision regarding what to do about the violation. A wide range of sanctions is available to the court. Sometimes the court would extend the period of

probation or impose additional conditions, or both. Sometimes probation would be suspended but later reinstated, usually with some additional condition. In other cases, the court would revoke probation, and at that point another sentencing would take place. In this study, in cases in which probation was granted, data was collected regarding whether the court had reinstated, extended or revoked probation; and in instances of revocation, data was gathered on what sentence resulted.

Information gleaned from court hearings

In most cases, data was available from the court's notes of information obtained from the defendant during any plea or sentencing hearing. This often included information about the defendant's employment status and history, educational background, and family information such as marital status and whether the defendant had any children. Sometimes information about substance abuse would be obtained, often by the defendant's counsel in the course of a presentation suggesting probation be granted to facilitate drug treatment in the community, or to suggest a sentence to a prison drug treatment program. These hearings were all "on the record," and the court reporter prepared a transcript of the hearing when ordered to do so by the court, or when requested to do so by one of the parties to the case. When a transcript was prepared for the court, that transcript would be a part of the court file, and would be available to the public if the court file was not confidential. However, as discussed above, in some situations the court file became confidential, and in those cases the transcript of hearings in the case would also be confidential. If a transcript was prepared at the request of one of the parties, the transcript would be filed in the court file only if the requesting party chose

to do so or was required by the court to do so. The court's notes of hearings were not part of the official record of the case and were not preserved in the official records. For this study, data from the hearings was collected at the time the case, the hearings, and the court file were open to the public.

IRB requirements

The University of Nevada, Reno requires that research which involves study of human subjects be conducted in compliance with ethical standards and applicable federal regulations and requirements, state and international laws, and University policies. This research falls into that category because personal information about each defendant was collected from the available sources.

In order to comply with the University's requirements for research integrity, a detailed description of the research and data to be collected was submitted to and approved by the University's Institutional Review Board (IRB). In accordance with the IRB guidelines, information which would identify the individuals whose cases were studied was separated from the other data collected. Data reported in the study does not include any of the case identification information, so that individuals' identities are not revealed. Defendants' names, court case numbers and court case identification numbers were segregated from the other data collected, and such information was not mentioned in this study.

Chapter IV – History of Evidence-Based Sentencing in Missouri: the Missouri Sentencing Advisory Commission

In 1990 the Missouri Legislature established a Sentencing Commission. The legislation authorized the Commission to study sentencing practices in courts throughout the state to determine whether, in death penalty cases, there were disparities in sentencings among economic and social classes; and in other cases, whether there were disparities in the length of sentences imposed and probations granted for defendants convicted of similar crimes who had similar criminal histories. The Commission was required to compile statistics, examine cases, draw conclusions, and perform other duties relevant to the research and investigation of disparities in death penalty sentencing, and to deliver a report within a year after the effective date of the legislation.[27] The research undertaken by the Commission in carrying out the Legislature's mandate provided the foundation for the task later assigned to it of developing sentencing recommendations.

In 1994 the Legislature amended Section 558.019, changing the name of the Commission to the "Sentencing Advisory Commission" and directing the Commission to establish a system of recommended sentences. That legislation laid down the parameters for the recommended sentences: they were to be within the statutory minimum and maximum sentences provided by law for each felony. In addition, in developing a recommended sentence for each crime, the Commission was to take into account the nature and severity of the offense, the record of prior offenses of the defendant, the data gathered by the Commission showing the duration and nature of sentences imposed for

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[27] 1990 MO. LAWS, H.B. 974; MO. REV. STAT. SECTION 558.019.

each crime, and the resources of the department of corrections and other authorities to carry out the recommended sentences. The legislation provided that the Commission publish its system of recommended sentences on or before July 1, 1995; the Commission continue to study the implementation and use of the system of recommended sentences and publish a report on July 1, 1998; and subsequent to that report, the Commission was authorized to revise the recommended sentences every three years. The legislation also directed the Commission to distribute its system of recommended sentences to all sentencing courts within the state of Missouri.[28]

The Legislature chose not to follow the example of the federal sentencing guidelines, which Congress had made mandatory for sentencings in federal courts.[29] Missouri's legislation did not require judges to adhere to the published recommended sentences. Rather, the legislators obviously contemplated the Missouri system would provide a system of "recommended" sentences, leaving judges free to exercise their discretion and sentence defendants to any sentence within the statutory minimum and

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[28] 1994 MO. LAWS S.B. 763, SECTION 558.019.6.

[29] The Comprehensive Crime Control Act of 1984 was passed by Congress as Title II of P.L. 98-473, which was a massive piece of legislation dealing with a wide variety of subjects, most of which had no relation to criminal justice. Included in the Comprehensive Crime Control Act as Chapter II was The Sentencing Reform Act of 1984. The Crime Control Act also included The Bail Reform Act of 1984, The Comprehensive Forfeiture Act of 1984, The Insanity Defense Reform Act of 1984, The Controlled Substances Penalties Amendments Act of 1984, The Dangerous Drug Diversion Control Act of 1984, The Justice Assistance Act of 1984,The Juvenile Justice, Runaway Youth and Missing Children's Act Amendments of 1984, among others.

The Sentencing Reform Act amended Title 18 of the United States Code, adding a number of sections including Section 3553, which included the provisions on sentencing guidelines to be used by federal district court judges in sentencing proceedings. The law required judges to impose sentences within the guidelines unless the judge had made a determination that aggravating or mitigating circumstances existed which required deviation from the guidelines. This made the guidelines effectively mandatory for judges to follow. Twenty-one years later, in 2005, the U.S. Supreme Court held that the guidelines were not to be considered mandatory, but only advisory, in *U.S. v. Booker,* 543 U.S. 220 (2005).

maximum sentences and any other statutory requirements and restrictions governing sentencings.

In January,1997 the Commission published its set of "advisory sentencing guidelines" and a users' manual.[30] On the cover page, the Commission set out its understanding of its mission:

> The purpose of the Missouri Sentencing Guidelines is to recommend a uniform policy that will ensure certainty, consistency, and proportionality of punishment, recognize the impact of crime on victims, and provide protection for society. The use of these guidelines will result in minimal sentencing disparity and a rational use of correctional resources consistent with public safety.[31]

In a letter which accompanied the users' manual, the Chair and Vice-chair of the Commission at that time summarized the approach taken to the sentencing guidelines:

> The Commission respects the need for judicial discretion in sentencing, and as such, was careful to incorporate discretion into the guidelines. Judicial discretion is built into the guidelines through the use of sentencing ranges for all presumptive sentences, the use of aggravating and mitigating sentences, which are often ranges, and by suggesting a variety of alternative sanctions as appropriate.[32]

In cooperation with the Office of the State Courts Administrator, the Commission sponsored a series of training sessions for judges, probation and parole officers, and other guidelines users.

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[30] MISSOURI SENTENCING ADVISORY COMMISSION, ADVISORY SENTENCING GUIDELINES USERS MANUAL (1997).
[31] *Id.*, cover page. For emphasis, the statement was repeated on p. 6 of the manual.
[32] LETTER FROM J. MOSELEY, CHAIR, AND D. SCHRIRO, VICE-CHAIR OF THE MISSOURI SENTENCING ADVISORY COMMISSION, TO SENTENCING ADVISORY COMMISSION GUIDELINES USERS (January 23, 1997).

In April, 1998 Duane Benton, the Chief Justice of the Missouri Supreme Court at that time wrote to all sentencing judges in the State (all Circuit and Associate Circuit judges), sending them a survey seeking information about the their use of the guidelines. Chief Justice Benton noted there had been insufficient response from judges to a previous request for information on the use of the guidelines, and encouraged full participation in the survey, explaining that the data collected would be used to assess the need for revisions to the guidelines and the impact of the guidelines on supervised populations.[33]

In September, 1998 after the survey results were compiled and considered, the Commission published updated and revised guidelines. However, the guidelines were generally ignored in most circuit courts. Precisely why this happened is hard to identify, and most likely there were a number of reasons. Perhaps the main factor was the general distaste among Missouri state court judges, prosecutors, and the defense bar for the mandatory sentencing guidelines in use in federal courts. Even though the Missouri guidelines were purely advisory and left the sentencing judge with the same unfettered discretion as had been the case before the publication of the Commission's guidelines, many judges, prosecutors, and defense attorneys feared the guidelines were only a first step toward a system of mandatory sentencing guidelines similar to the federal system, and therefore they resisted any use of the Commission's promulgated guidelines.[34]

State Senator Harold Caskey, a former prosecutor, Chair of the Judiciary Committee, and one of the most highly respected members of the Legislature, was one of

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[33] MEMORANDUM FROM CHIEF JUSTICE D. BENTON TO ALL CIRCUIT AND ASSOCIATE CIRCUIT JUDGES (April 24, 1998).

[34] MICHAEL A. WOLFF, "MISSOURI'S INFORMATION-BASED DISCRETIONARY SENTENCING SYSTEM," 4 OHIO STATE J. OF CRIMINAL LAW 95, 99-100 (2006).

the leading advocates for the implementation of an evidence-based sentencing system in Missouri. Senator Caskey, working with other proponents of an EBS system of sentencing, continued the effort to craft a workable framework that would be acceptable to legislators, judges, prosecutors and others whose support was needed if a system of sentencing recommendations was to be effective. In 2003, the Legislature again amended Section 558.019, including the provisions relating to the Sentencing Advisory Commission.[35] This in effect established a third version of the Commission and its mandated tasks.[36]

The legislation represented an attempt to meet the concerns of the many groups of persons who interact with sentencing judges: prosecutors, public defenders and private defense attorneys, probation and parole officers, the Parole Board, Department of Corrections officials, law enforcement officers, and others. Each of these persons and groups had their own attitudes and degree of influence on others in the system and with the legislators who were deciding what, if any, changes were needed in the statutes relating to sentencing and the Commission. If the Sentencing Advisory Commission was to be an effective body whose work was to have an effective impact on sentencing decisions, a good majority if not all of those involved in the system had to be convinced that the use of the Commission's advisory guidelines was a beneficial addition to the sentencing process.[37]

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[35] 2003 MO. LAWS S.B. 5, SECTION 558.019.6.
[36] WOLFF, *supra* at 96.
[37] *Id.* at 101.

In response to the 2003 legislation, new members of the Commission were appointed. Armed with the knowledge that there was resistance to the idea of a system of recommended sentences, the new Commission sought ways to shape its guidelines so that potential users of the Commission's recommendations would appreciate the information provided by the Commission as helpful in dealing with the task of determining fair and just outcomes of sentencing decisions.[38]

Judge Michael Wolff, in 2003 the Chief Justice of the Missouri Supreme Court and Chair of the Sentencing Advisory Commission, has commented that the Commissions prior to 2003 had done "interesting work, but had little or no influence on sentencing practices."[39]

Judge Wolff explained that in 2003 the new members of the Commission made their decision to base their sentencing recommendations on data collected on sentencing practices of the state's judges in prior years, they wanted to give the recommendations "a sense of legitimacy" as a strategy for overcoming the resistance of potential users.[40] He listed four questions which guided the Commission's approach to developing a useful system of recommended sentences:

> 1. What do judges do in similar cases?
> 2. What resources are available—in prison or in the community—to construct and impose a sentence that fits the offender and the crime?
> 3. What is the risk that the offender will re-offend?
> 4. What does a sentence really mean? If an offender is sentenced to a certain term in prison, how long is the offender actually likely to serve before being paroled?[41]

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[38] *Id.* at 97-101.
[39] *Id.* at 96.
[40] *Id.* at 99.
[41] *Id.* at 105.

The answer to the first question was based on the Commission's research into the sentencing practices in all of the Missouri courts which handled sentencings in felony cases. The answer to the second question was provided by the department of corrections and the probation and parole board. The answers to the third and fourth questions were more elusive. As a starting point toward answering the third question, the Commission borrowed the risk assessment factors used by the department and the board in their decisions regarding release on parole and supervision on probation, modified to apply to sentencing decisions. To answer the fourth question which some might characterize as seeking "truth in sentencing," the Commission obtained statistics on the board's policies for how long an inmate was required to serve on a sentence before being considered for release on parole, and from the department statistics on the amount of time actually served before release on parole.

In June, 2004 the Commission published its "Report on Recommended Sentencing."[42] The report began by emphasizing the non-mandatory nature of the recommended sentences and the importance of retaining judicial discretion in sentencing decisions:

> Judicial discretion is the cornerstone of sentencing in Missouri courts. The Sentencing Advisory Commission believes that sentencing in Missouri is at its best when the decision makers have accurate and timely information about the offender, the offenses and the options available for sentencing.[43]

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[42] MISSOURI SENTENCING ADVISORY COMMISSION, REPORT ON RECOMMENDED SENTENCING (June 2004).
[43] *Id.* at 4.

The report addressed the concerns of users that had generated resistance to prior Commissions' sentencing guidelines:

> The goal of these Sentencing Recommendations, which are consistent with Senate Bill 5 and other statutes on sentencing, is to achieve a system of sentencing that is fair, protects the public and uses corrections resources wisely. One goal of the Sentencing Advisory Commission is to reduce sentencing disparity. However, achieving that goal has often proven to be elusive because the disparities in sentencing often are the result of differences between offenders and in the circumstances of their crimes.
>
> The Commission builds upon the work of the previous commission whose Advisory Sentencing Guidelines were promulgated in 1998. The commission has examined data and studies of the use and deviations from those guidelines.[44]

In a footnote, the report noted the contrast to the federal guidelines:

> The commission decided to abandon the phrase "sentencing guidelines because the same phrase is used in the federal courts to describe a system that is entirely different from the sentencing system in Missouri courts. The commission labels its work as Sentencing Recommendations because that is what they are. They are not compulsory. The Missouri Sentencing Advisory Commission does not support a federal style guidelines system.[45]

In April, 2005 the Commission published an updated report on sentencing.[46] The report noted the main change in the sentencing recommendations was in the way the defendant's prior criminal history was used.[47] An explanation of the manner in which the defendant's criminal history level was derived was included in an appendix.[48]

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[44] *Id.*
[45] *Id.,* n. 1.
[46] MISSOURI SENTENCING ADVISORY COMMISSION, REPORT ON RECOMMENDED SENTENCING (Revised April 2005).
[47] *Id.* at 1.
[48] *Id.* at *65,* app. B.

In June, 2005 the Commission updated its report, noting that a pilot program in six judicial circuits, both urban and rural, had tested the use of the sentencing recommendations.[49] A summary of the results of the survey was included.[50]

Statewide implementation was projected for November, 2005.[51] The updated report noted the Commission's goal was to ensure that those making sentencing decisions would have as much information as possible, and highlighted the fact that the sentencing recommendations were derived from the sentences given by Missouri judges:

> **The sentences recommended in this report are based upon current and recent sentencing practices of Missouri's trial judges.**[52]

The 2003 legislation added another task for the Commission, requiring the commission to "study alternative sentences, prison work programs, work release, home-based incarceration, probation and parole options, and any other programs and report the feasibility of these options in Missouri."[53] In accordance with that legislative mandate, the Commission included in its June, 2005 report a section headed "Community Structured Sentencing" outlining various community sentencing programs sponsored by the Department of Corrections which might in some cases serve as an alternative to imprisonment, and certain institutional programs as well.[54] The community programs were drug courts (later the nomenclature changed to "treatment courts"), electronic

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[49] MISSOURI SENTENCING ADVISORY COMMISSION, RECOMMENDED SENTENCING REPORT AND IMPLEMENTATION UPDATE (June, 2005).
[50] *Id.* at 90, app. G.
[51] *Id.* at 4.
[52] *Id.*
[53] 2003 MO. LAWS S.B. 5, *supra* note 35.
[54] COMMISSION REPORT AND UPDATE (JUNE, 2005), *supra* note 49.

monitoring programs, Alt-care programs (an intensive out-patient treatment program for woman with a demonstrated need for substance abuse treatment), the TREND program in Kansas City (a rehabilitative program for male offenders), and intensive supervision (by the probation and parole officer assigned to the defendant). In addition, the Guide noted there were other programs in local areas providing various services such as counseling, chemical dependency education and treatment, mental health services, and relapse prevention. The institutional programs listed were the shock incarceration program, the institutional (drug) treatment program, the sex offender assessment unit, the post-conviction drug program, and the long-term drug treatment program. For admission to these institutional programs, the sentencing court had to include a referral to the program in the sentence. The advantage of these programs to the defendant was that if the program were completed successfully, the defendant could be released on probation rather than serving the full sentence imposed by the court.

In August, 2005 the Commission published its updated Users Guide, reflecting statutory changes which affected sentencing made during the 2005 legislative session.[55] The Guide also included a section on "community structured sentencing," with concise descriptions of the programs.[56]

In the section of the Guide describing the system of recommended sentences, the Commission explained (somewhat tersely, and as a consequence, vaguely) that "[t]he Sentencing Recommendations are **averages**, based upon current sentencing and

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[55]MISSOURI SENTENCING ADVISORY COMMISSION, RECOMMENDED SENTENCING USER GUIDE (August 1, 2005)

[56] *Id.* at 24-27.

corrections practices in the state as a whole."[57] (emphasis in original). What the Commission did was to compile all of the sentences imposed for each crime throughout the state, and then average those sentences to come up with the recommended sentence for that crime. In a further measure of refinement, the sentences were grouped according to the criminal histories of the defendants, so that the averages represented the sentences imposed for that crime on defendants with similar criminal histories.

In 2006 and 2009, the Commission published updated User Guides, each reflecting statutory changes affecting sentencing which had been made in the intervening legislative sessions. The Guides also updated the statistical data regarding sentences and time served in prison. The number of and types of sentences and the average sentences for each crime were presented in tables, broken down by defendants with similar criminal records. The Guides also included Department of Corrections data on Parole Board policies regarding time offenders would have to serve before eligibility for release on parole and actual time served in prison before release on parole.

Despite the efforts of the Commission and various proponents of the system of recommended sentences to respond to the criticisms of the recommended sentences and to make adjustments to the system of recommendations, resistance to the system continued. In 2011, a bill was introduced to eliminate the Sentencing Advisory Commission, and the bill garnered enough support to get passed by the Missouri House of Representatives; however, the bill did not make it through the Senate to final passage.

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[57] *Id.* at 4.

The proposal had the backing of the Missouri Association of Prosecuting Attorneys, whose representatives argued there were "intractable" problems with the Commission.[58] The prosecutors argued the Commission's statistics were misleading. They took issue with the Commission's claim that the recommended sentences were "averages" of the sentences given by judges throughout the state, and argued the sentence recommendations were too lenient.[59]

In making their criticisms, prosecutors conceded that the idea of providing sentencing judges with more information was a good idea. "Having more information prior to sentencing is good," said Platte County Prosecuting Attorney and MAPA Board Member Eric Zahnd. "But having misinformation is always bad. And nothing could be more misleading to judges than telling them that a sentence recommended by MoSAC is the average sentence, when that is simply not true."[60]

Prosecutors did not oppose the concept of "evidence-based sentencing." Dr. Jeffery Milyo, a Professor of Social Sciences at the University of Missouri who had studied the Commission's work, was one of the witnesses who testified along with the prosecutors at the 2011 legislative committee hearing on the bill to eliminate the Commission. Professor Milyo testified that

> [i]n principle, evidence-based sentencing holds much promise, but it must be implemented and evaluated objectively…The first step is to recognize that we simply do not yet know whether 'smart sentencing" is working in Missouri. The next step is to get serious about objectively analyzing the data to determine what sentencing policies really do work.[61]

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[58]MISSOURI ASSOCIATION OF PROSECUTING ATTORNEYS, PRESS RELEASE (April 14, 2011)
[59] *Id.*
[60] *Id.*
[61] ASSOCIATION OF PROSECUTIORS PRESS RELEASE (APRIL 14, 2011), *supra* note 58.

After the 2011 legislative session, legislators' and prosecutors' concerns about the Commission's sentencing recommendations and about sentencing in general moved the Governor, a former Attorney General, to form a "Working Group on Sentencing and Corrections.[62] Members of the group included the President *pro tem* of the State Senate and the Speaker of the House of Representatives, a Judge of the Missouri Supreme Court, a Circuit Judge, and a number of other legislators and corrections officials. The Working Group got assistance from the Pew Center on the States. The Group had as its goal the study of the effectiveness of the Missouri corrections system, and to "develop a strategy to reduce recidivism."[63]

The efforts of the Working Group led to the passage of a bill in the 2012 legislative session, the "Justice Reinvestment Initiative," H.B. 1525. The legislation contained a number of reforms designed to reduce the prison population by allowing inmates to get "earned compliance credits" toward their sentences, thus becoming eligible for release sooner, and had a similar provision for defendants on probation, allowing them to accumulate credits toward their periods of probation which allowed them to be released from probation supervision earlier. The legislation also included a new option for defendants on probation, the Court Ordered Detention Sanction (CODS) program, which allowed the court to send a probationer to prison for 120 days as a sanction for a violation of a condition of probation, after which they would be back on probation, without revoking the probation. The benefit for the defendant was that there remained the

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[62] T. HODGES, PRESENTATION ON THE JUSTICE REINVESTMENT INITIATIVE, MISSOURI JUDICIAL COLLEGE, AUGUST 2013.
[63] *Id.*

opportunity to complete the period of probation, without being sent to one of the correctional institutions to serve a full sentence and gaining the prison record. All of these measures, and others contained in the bill, showed the legislators appreciated the value of alternatives to prison sentences that were just and fair, and focused on enhancing public safety by reducing recidivism.[64] In addition, the reduction in prison population and number of offenders under probation supervision saved the state a considerable amount of money.

The 2012 legislative session also saw the prosecutors' opposition to the Commission's recommended sentences come to fruition, when the legislature again amended Section 558.019, this time removing the Sentencing Advisory Commission's authority to "recommend" sentences. However, legislators did not do away with the Commission entirely. The legislation kept the Commission in place, and retained the provisions of the statute mandating that the Commission study whether there were disparities in sentences in death penalty cases and in sentences in other felony cases as well, and to study various alternative-to-prison sentencing options like home-based incarceration."[65]

The Commission understood the concerns that caused the Legislature to act. In its next Users Guide published in 2013, the Commission acknowledged the legislative changes. The Commission eliminated the sentencing recommendations, and published the data showing, for each of the various crimes, the number of cases disposed of statewide,

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[64] MO. LAWS 2012, H.B. 1525, MO. REV. STAT. SECTIONS 217.147, 217.703, 217.718, 221.105, 559.016, 559.036, 559.100, and 559.115 (2012).
[65] 2012 MO. LAWS S.B. 628, MO. REV. STAT. SECTION 558,019.6(3).

the types of dispositions (probations, sentences to institutional shock or treatment programs, and sentences to prison), and the average number of years of prison sentences. The data were taken from the cases disposed of during the preceding eight years. The Commission also revised the format of the Sentence Assessment Report which was prepared upon request by the sentencing judge. The new format included statistics for each offense that were related to different levels of defendants' prior criminal histories. The Commission made corresponding changes were to the Automated Sentencing and Risk Assessment program, which the Commission made available on its website, along with the other information in the User Guide.[66]

One of the sections in the User Guide outlined the numerous provisions in Missouri law relating to sentencing, including those relating to enhanced sentencing and minimum terms for repeat offenders, to inchoate offenses and conspiracy crimes, and to restrictions on parole eligibility for certain offenses and exclusions from eligibility for certain institutional treatment programs.[67] It also included an outline of the format of the Sentence Assessment Report (SAR), and a sample report.[68]

The Guide presented five tables, one for each of the five groups of offenses: violent, sex and child abuse, non-violent, drug, and DWI offenses. Each table showed the dispositions and average sentences for defendants whose crimes were in that offense group and were at the same criminal history level.[69] Each table was further broken down

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[66] MISSOURI SENTENCING ADVISORY COMMISSION, USER GUIDE 2012-2013 1 (April 26, 2013).
[67] *Id.* at 2-7.
[68] *Id.* at 16-26.
[69] *Id.* at 27-29.

by class of offenses (A, B, C or D felony), and gave the total number of defendants within each of the five criminal history levels who were sentenced for that offense; each of those numbers was broken down into percentages of those who received probation, or were sentenced to a prison shock or treatment program, or were given a prison sentence without any assignment to a program; and the table listed the "average" sentence for the offense for defendants at each of the five criminal history levels. In the sample SAR report, it was noted that "average prison sentence" was "calculated from new sentences received by the Department of Corrections for probation or incarceration from July 1, 2007 to June 30, 2012."[70] The Guide did not further explain how this calculation was made. A probation sentence could be either a suspended execution of sentence, which would include the number of years in prison that was being suspended; or a suspended imposition of sentence, which would not include any prison term. How these alternatives were accounted for when the average sentences were calculated was not explained.

As Judge Wolff noted, when the Commission was developing its system of recommended sentences in 2003-2004, questions about which sentences were effective for particular crimes and offenders and what was the impact of the recommended sentences on recidivism were important. Judge Wolff defined "effective" as a sentence that is "not counterproductive"; that is, a sentence that "improves the prospects for avoiding future criminal behavior by the offender" and "does not encourage the offender to re-offend."[71]

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[70] *Id.* at 24.
[71] M. WOLFF *supra* at 99.

The Commission addressed the question of how to structure sentences to address repeat offenders in the section of the User Guide dealing with "Prior Criminal History Level and Offender Risk Factors."[72] That showed how a defendant's prior criminal record affected the sentencing faced by the defendant as a resulted of having committed the new crime. Common sense would indicate that someone facing sentencing for a first offense will have a better chance to receive a more lenient sentence than a repeat offender.

However, the more difficult question is how to structure sentences to ***reduce*** recidivism: that is, what sentence option is the most likely to reduce the defendant's likelihood of re-offending in the future? That question has not yet been answered with any certainty.

During the 2014 legislative session, a massive revision of Missouri's criminal code was passed with an effective date of January 1, 2017, the first comprehensive revision of the Code since it was first enacted in 1976.[73] That new Code included the addition of a fifth felony class (class E offenses).

In its 2015-2016 User Guide, the Commission indicated that the next update of the guide, for 2016-2017, would incorporate changes resulting from the revision of the criminal code.[74] However, for reasons that are not clear, the Commission did not publish that edition; and after a few years of operation without the task of recommending

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[72]MISSOURI SENTENCING ADVISORY COMMISSION, USER GUIDE 2012-2013 *supra* at 127-130.
[73] The 2014 revision was comprised of 2014 MO. LAWS S.B. 491 and H.B. 1371 (which were merged; the full text can be found in the following link: § 556.001, RSMo (LexisNexis, Lexis Advance through 101st General Assembly, Regular Session and the 2021 1st Extraordinary Session). The original Criminal Code was enacted in 1977 MO. LAWS S.B. 60.
[74]MISSOURI SENTENCING ADVISORY COMMISSION, USER GUIDE 2015-2016 1 (May 2016).

sentences, and because of a number of factors, by 2017 the Commission had become dormant, although still authorized in the statutes. In 2020, an effort began to revitalize the Commission, led by Missouri Supreme Court Judge J. Brent Powell. That effort continues today.[75]

This study examines cases in which dispositions and sentencing proceedings took place from 2005-2013. Therefore, the changes made in the revision of the Missouri criminal code did not have any effect on the cases that were studied. Information on sentencing guidelines and recommendations relating to the cases studied was derived from the Users Guides in effect at the time of the sentencing decisions.

It is also worth noting that the most common charge in the cases studied, carrying a concealed weapon (a firearm), was based on a statute that was amended many times during the period studied. However, the amendments did not change the basic provisions of the statute, at least until the end of the period studied.[76]

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[75] COALITION FOR PUBLIC SAFETY, BLOG [online] (March 12, 2021); https://www.coalitionforpublicsafety.org/news/2021/3/12/the-return-of-the-missouri-sentencing-advisory-commission-and-the-news-in-criminal-justice-this-week .

[76]MO. REV. STAT. SECTION 571.030 (RSMo 1939 § 4425; A.L. 1959 H.B. 43; A.L. 1981 H.B. 296; A.L. 1993 H.B. 562 merged with S.B. 250; A.L. 1995 H.B. 160; A.L. 1997 S.B. 367; A.L. 1998 S.B. 478; A.L. 2000 S.B. 944; A.L. 2003 H.B. 349, et al. merged with S.B. 5; A.L. 2007 S.B. 62 & 41; A.L. 2010 H.B. 1692, et al; A.L. 2011 H.B. 294, et al; A.L. 2012 H.B. 1647, § A, eff. Aug. 28, 2012; A.L. 2013 H.B. 533, § A, eff. Aug. 28, 2013; A.L. 2013 S.B. 75, § A, eff. Aug. 28, 2013; A.L. 2014 S.B. 656 merged with S.B. 745 merged with S.B. 852; 2016 sb656, § A, effective January 1, 2017; A.L. 2021 S.B. 26, § A, merged with S.B. 53 & 60, § A, effective August 28, 2021; A.L. 2021 S.B. 26, § A, merged with S.B. 53 & 60, § A, effective August 28, 2021.).

Chapter V – The Sentence Assessment Report and Information in the MoSAC User Guide

Over the last three decades the Missouri Sentencing Advisory Commission (MoSAC) gradually developed its system of sentencing recommendations. In its first users' manual, sentencing recommendations were presented in separate tables for the four classes of felony offenses (A, B, C, and D) and a fifth table for drug offenses. The tables were in a matrix format. There were four columns, one for each of the four levels of prior criminal history. On the rows, some offenses were listed; for example, the offense of murder 2nd degree was listed, as was robbery 1st degree, assault 1st degree. Offenses not specifically listed were covered by an "all other Class _ offenses" listing for each class of felony offenses. For example, the offense of felon in possession of a firearm (or "felon in possession" for short) is a class C felony. It is not one of the offenses specifically listed in the table of Class C felony offenses; therefore, the sentence recommendations for the offense of felon in possession were found under the listing "All other class C Felonies."[77]

After each offense listing were the recommended sentences in sets of three, one set under each of the four columns. The set of three recommended sentences had a middle sentence or range that was labeled the "presumptive" sentence; there was a higher (more severe sentence) range labeled "Aggravated," and a lower (less severe) range labeled "Mitigated." Instructions in the Guide indicated the sentencing judge should determine whether aggravating or mitigating factors were present; in the absence of any such factor, then the recommended sentence was the middle, or "presumptive," sentence or range.

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[77] MISSOURI SENTENCING ADVISORY COMMISSION, ADVISORY SENTENCING GUIDELINES USERS MANUAL – 1997 8-13 (January 23, 1997).

Each matrix had a column for each of four criminal history levels that a defendant might fall into, depending on the extent of the defendant's prior criminal record. The levels were denominated I, II, III and IV, and there were instructions detailing how to determine which level was applicable to a particular defendant.[78]

For example, for the offense of felon in possession the matrix presented three possible sentences or ranges of sentences for each of the four criminal history levels. For a defendant with Criminal History Level I, the presumptive sentence was a range of either probation, or a sentence of 1 or 2 years. The "Mitigated" sentence was indicated "N/A," which meant no sentence less than the range of the presumptive sentence was recommended. Since a grant of probation was the least severe of any of the possible sentences, whenever a presumptive sentence included probation in the recommended range, there was no mitigated sentence provided. The "Aggravated" sentence for the same offense for a defendant in the same criminal history level was listed as 3 years – a specific number, not a range. Below the set of mitigated, presumptive and aggravated sentences was a series of letters which referred to various "alternative sanctions," such as a sentence to a department of corrections institutional drug treatment program or to one of a variety of probation programs, which could be considered in connection with or as an alternative to the sentence. These alternatives were set forth in the "Key to Alternative Sanctions" in the instructions.[79] For example, for the offense of felon in possession, if the

[78] *Id.* at 13 and 19.
[79] *Id.* at 15.

defendant was classified in criminal history level I, there were six alternative sanctions referenced.

An amendment to Section 558.019 required the Commission to publish a report by July 1, 2004; and to publish an update no later than July 1, 2005; and thereafter to publish reports biennially.[80]

One major criticism of the 1997 guidelines was that there was no explanation as to the basis for the recommended sentences in the matrices, and thus the guidelines appeared arbitrary. In 2004, the Commission modified the sentencing recommendations, taking into account the feedback from users as well as the legislative changes made in the intervening years.

In response to some of the criticisms of the recommended sentences, the Commission emphasized in its report that the sentencing recommendations were based on data on sentences statewide.[81] The 2004 Commission report listed four main elements which underlay the sentence recommendations for any offense. These were: (1) a risk assessment of the defendant who was convicted of the offense; (2) the type of offense – that is, to which group of offenses did the offense belong: violent, sex and child abuse, non-violent, drug, and DWI; (3) a classification of the severity of the offense – High, Medium, or Low; and (4) a determination whether there were any aggravating or mitigating factors to consider.

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[80]MO. LAWS 2004, H.B. 1055, MO. REV. STAT. SECTION 558.019.6(5) (2004).
[81]MISSOURI SENTENCING ADVISORY COMMISSION, REPORT ON RECOMMENDED SENTENCING 4, 5 (June, 2004).

The report explained that the risk assessment was based on risk factors used by the Missouri Board of Probation and Parole, which had developed them to determine eligibility for release on parole or from probation supervision.[82] The Commission's report noted "These risk factors have been validated by statistical studies of Missouri offenders."[83] However, the Report did not specify who had conducted the studies nor whether they were published or otherwise publicly available. There had been four risk categories in the 1997 version; in 2004 the Commission expanded to five levels, labeling them Excellent, Above Average, Average, Below Average, and Poor.[84]

The second element, grouping of offenses, referred to the placement of felony offenses into five groups, depending on the nature of the offense: violent, sex and child abuse, non-violent, DWI, and drugs.[85] For example, felon in possession was designated to be in the non-violent group. The report indicated offenses were placed "in groups in the same manner as the offenses are categorized by statute and by the Board of Probation and Parole."[86] This explanation was vague; no further explanation of how particular offenses were determined to have belonged to one or another of the designated groups was given.

The third element, the severity of the offense, referred to three possible designations: "high," "medium" or "low." Each offense was given a designation based on statistical studies of the variations in severity of sentences within the five offense

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[82] *Id.* at 4.
[83] *Id.*
[84] *Id.* at 4, app. B at 65.
[85] *Id.* at 4, 10.
[86] *Id.* at 4.

groups.[87] For example, felon in possession was designated a high severity offense.[88] It is important to keep in mind that the labels "high," "medium," or "low" severity are relative; they are not meant to characterize the nature of the offense itself. Rather, the label refers to how severe was a sentence received for a particular offense *in comparison to* how severe were the sentences received for *other offenses within the same offense grouping.* Once again, the Commission's report says these labels or categories were derived from statistical studies, but there is no mention of who did the studies or whether they were publicly available.

The fourth element was the determination whether there were any aggravating or mitigating offense circumstances. This was left to the discretion of the sentencing judge to determine[89]. The report discussed aggravating and mitigating offense circumstances briefly,[90] and a list of aggravating and mitigating factors appears after each of the tables of recommended sentences.[91] For each offense, the Commission laid out three possible recommended sentences or range of sentences: a more severe sentence for when there were aggravating circumstances; a less severe sentence for mitigating circumstances; and a "presumptive" sentence" that was in between.[92]

For another example, robbery 1st degree, a class A felony, was in the violent offense group; and it had a rating of severity level II (medium severity). If a defendant

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[87] *Id.* at 4, 10.
[88] *Id.* at 30.
[89] *Id.* at 17 – although one should note that the report does not specifically state that the determination of aggravating and mitigating circumstances lies within the discretion of the sentencing judge.
[90] *Id.* at 11
[91] *Id.* at 20, 24, 29, 36 and 39.
[92] *Id.* at 11.

had a prior criminal history level of I, and a risk assessment score of "Excellent," then for all violent class A felonies with medium severity, including robbery 1st degree, the Commission's matrix of recommended sentences indicated the "presumptive" sentence was 10 years; the "Aggravating" sentence was 14 years; and the "Mitigating" sentence was probation with assignment to a community-structured sentence. (The range of punishment for a class A felony is ten to thirty years or life. Robbery 1st degree is a "dangerous felony" in Missouri law, which requires a defendant to serve 85% of the sentence imposed before becoming eligible for parole.) The same table showed that of all defendants with Excellent risk assessment scores who were sentenced for violent, class A felonies, 77.5% received prison sentences without any assignment to a prison shock or treatment program; and the average prison sentence for them was 19.1 years. [93]

One more example: carrying a concealed weapon was a class D felony, in the non-violent offense group, with a rating of medium severity. For a defendant with a prior criminal history level of I, and a risk assessment score of "Excellent," the Commission's matrix of recommended sentences for all of the recommended sentences for non-violent class D felonies of medium severity indicated that both the "presumptive" and the "mitigating" sentence would be probation (with regular supervision by a Probation Officer, and not with any "community-structured" sentence); the "aggravating" sentence would be probation as well, but with some form of "community-structured sentencing" – that is, some type of non-prison sentence with more stringent requirements than ordinary

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[93] *Id.* at 19.

probation."[94] The tables also showed that of all defendants with Excellent risk assessment scores who were sentenced for non-violent, class D felonies, 7% received prison sentences without any assignment to a shock or treatment program; and the average prison sentence was 3.4 years.

It is important to notice that the 2004 version of the recommended sentences matrices introduced risk assessment as a factor for the first time. The 1997 version did not include any discussion of risk assessments, nor did it include a risk assessment factor in determination of the recommended sentence.

The Commission continued to use the matrix approach in later updates of the User Manual, with a few modifications; some were relatively minor, to account for changes in the statutes; others were refinements by the Commission. However, one of the Commission's modifications was significant: in the 2005 User Guide, the offender's risk score no longer was a factor in the determination of the recommended sentence. The matrix for each offense had five columns, one for each level of prior criminal history. In each column, there was a set of three recommended sentences, mitigated, presumptive, and aggravated. For example, for the offense of possession of a firearm by a felon, for a defendant in prior criminal history level III, the matrix showed the presumptive sentence to be "Shk/Trt" – a sentence to either the shock incarceration program or the 120-day institutional drug treatment program; the mitigating sentence was "CSS" – community structured sentence, involving some form of enhanced probation; and the aggravated sentence was 2 years prison sentence.

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[94] *Id.* at 29.

The offender's risk assessment category had no bearing on the recommended sentences; rather, there was an additional table next to the matrix of recommended sentences. The table had five columns for the five offender risk categories of Good (a change from "Excellent" in the previous Guide), Above Average, Average, Below Average, and Poor. Under each column there were two statistics, one for the parole board's guidelines for what percentage of the sentence a defendant was required to serve before eligibility for parole, and the second the percentage of the sentence that a defendant actually served before being released on parole. For example, the defendant with a prior criminal history level of III might still have a risk score of Above Average. The table showed that for the offense of possession of a firearm by a felon, the parole board guideline for release was 17% of the sentence received, and the percentage of the sentence that the defendant actually served was 34%. If the defendant received probation, these percentages would have no significance, unless probation were revoked and the defendant then received a prison sentence. If the defendant received a prison sentence of four years, 17% of 4 years would be a little over 8 months; that is, parole board guidelines required the defendant to serve 8 months before eligibility for parole. The amount of time the defendant would likely serve before being released on parole would be twice that – 34%. Because these statistics were published in the Commission's User Guide, the sentencing judge, the prosecutor and defense counsel could all take them into account in making their respective decisions. However, it is important to understand that these percentages were not mandatory or controlling. The parole board had the discretion to parole someone earlier than its guidelines, or later, or not to grant parole at all but instead require service of the full sentence.

A shortcoming of the 2005 User Guide was its failure to highlight the change in how the risk assessment was utilized. There was no explanation given about why the Commission made the change, to remove the risk score from the matrix of recommended sentences.

A minor change made by the Commission in 2005 was the name for the most favorable risk assessment category, which was changed from "Excellent" to "Good." However, a more significant change was related to risk assessments. In the 2004 version, a defendant's risk assessment score affected the range of the recommended sentences for that defendant's offense. Under the 2005 version, the matrices of recommended sentences did not include the risk assessment as a factor. In applying the 2005 matrices, one found that the defendant's risk assessment score had no effect on what the recommended sentence would be. Adjoining the table with the matrix of recommended sentences was a second table labeled "Expected Time Served." This table gave two percentages for each of the five risk assessment categories. The first percentage, "Guidelines," referred to the policies of the Missouri Board of Probation and Parole which required the defendant to serve a certain percentage of the sentence received before becoming eligible for release on parole. The second, "Actual," indicated the percentage of the sentence that a defendant actually served on a prison sentence for that offense before being released on parole. The parole release guideline and actual time served information was practical and important information about the effect on the defendant's prospects for parole that any particular sentence of years to prison might have. However, the sentencing judge was not required to take this information into account.

The 2005 Users Guide improved the information presented about the risk assessment scoring,[95] the grouping of offenses, and the determination of offense severity.[96] It also included tables showing the Board of Probation and Parole's guidelines to determine parole release date eligibility.[97]

In 2006, the tables with the Parole Board guidelines on parole release and actual time served were made more sophisticated by breaking down the data listed for each offense so that the percentages for male defendants was given separately from the percentages for female defendants (unless there was no difference). However, as with the 2005 Guide, there was no explanation given about why risk assessments were removed as a factor in the matrix of recommended sentences.

In the 2009-2010 User Guide, the Commission re-inserted risk assessment as a factor in determining the recommended sentence. Once again, the Commission failed to include any explanation in the Guide for why the change was made. The change was also confusing, because the Commission left in the Guide the definition of aggravating and mitigating circumstances, but then mixed in those same words in the way the risk assessment was to be used. The risk assessment score did not appear on the matrices of recommended sentences. In the section on the Sentencing Assessment Report, the Guide instructs that in the conclusion of the SAR, the following was to be inserted:

> The Sentencing Commission Recommended Sentence will be the Mitigating Sentence if the Risk Score is Good (low risk), or the Aggravating sentence if the Risk score is Below Average or Poor (high risk). In instances where the Risk Score is Above Average or Average, the

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[95] MISSOURI SENTENCING ADVISORY COMMISSION, RECOMMENDED SENTENCING USER GUIDE 128-130, app. B (August 1, 2005)
[96] *Id.* at 131-132.
[97] *Id.* at 133-139.

> Sentencing Commission recommendation will be the Presumptive sentence.[98]

In the 2010-2011 User Guide, the Commission changed the label for the middle range recommendation from "presumptive" to "typical."[99] However, this change had no substantive effect. The Guide also included references to the risk assessment scores in the lists of aggravating and mitigating circumstances; and in the sample SAR, the following appeared in the conclusion section:

> Unless there are offsetting aggravating or mitigating circumstances the Sentencing Commission Recommended Sentence will be the mitigating sentence if the risk score is Good (low risk) and the aggravating sentence if the risk score is Below Average or Poor (high risk). In instances where the risk score is Above Average or Average and there are no other mitigating or aggravating circumstances the recommendation will be the typical sentence.[100]

The addition of the clauses referencing offsetting aggravating or mitigating circumstances was a slight improvement over the similar provision in the 2009-2010 Guide; however, the Guide did not give any further elaboration on why the change had been made to consider risk assessment in this way.

In the 2012-2013 User Guide, in response to the 2012 legislation which eliminated the Commission's authority to publish "recommended sentences," the Commission removed the matrices with typical, aggravated and mitigated recommended sentences. In their place, the Commission presented new matrices which no longer

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[98] MISSOURI SENTENCING ADVISORY COMMISSION, RECOMMENDED SENTENCING USER GUIDE 2009-2010 33 (OCTOBER 21, 2009).
[99] MISSOURI SENTENCING ADVISORY COMMISSION, RECOMMENDED SENTENCING USER GUIDE 2010-2011 3 (January 31, 2011).
[100] *Id.* at 41.

included recommended sentences, and were organized in a different way. The five offense groupings were retained. Appendix B still listed the five levels of prior criminal history. Charts were provided showing the number of cases, the dispositions (probation, shock or treatment, and prison sentences), and the average sentences for each of the offense groupings, subdivided by each of the four classes of felonies, and further subdivided by each of the five criminal history levels.[101] The User Guide contained an appendix which listed which offenses fell into each of the five offense groupings.[102] The count of the number of cases statewide in each of the matrices was for the six-year period from July 1, 2007 to June 30, 2012.[103] The language about using the risk assessment score as a factor in the recommended sentence disappeared, since there were no more recommended sentences. However, the Guide did still include an appendix with details on how the prior criminal history level and offender risk factors and risk score were determined, in virtually identical form to that same appendix in previous editions of the Guide.[104]

As an example of how the matrices were changed in the 2012-2013 Guide, and to contrast with the matrices in previous editions, consider the offense of Robbery 1st degree, which is shown to be in the violent offense group, a class A felony, and rated at medium severity (just as it had been in previous editions of the Guide). In the table for violent offenses showing Disposition and Average Sentence by Offense Group and

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[101] MISSOURI SENTENCING ADVISORY COMMISSION, USER GUIDE 2012-2013 27-29 (April 26, 2013).
[102] *Id.* at 134-135, app. D.
[103] *Id.* at 27-29.
[104] *Id.* at 127-130.

Criminal History,[105] statistics are listed for each of five prior criminal history levels. The table shows that during the five-year time period from July 1, 2007 to June 30, 2012, for defendants determined to have a prior criminal history level of Level I, there were 1,326 sentences statewide for all violent class A felonies. Of those, 23.0% were granted probation; 6.6% were sentenced to prison with a shock incarceration or drug treatment program; and 70.4% got a prison sentence with no assignment to a shock or treatment program. The average sentence for all of the Level I defendants who were sentenced for a violent class A felony was 16.7 years.[106]

There were also separate tables for each offense; for example, there was a table for robbery, with data for each of five robbery-type offenses (robbery 1st, robbery 2nd, pharmacy robbery 1st, pharmacy robbery 2nd, and bus hijacking (repealed). For each of those offenses, there are two tables, headed "Sentence Disposition" and "Guidelines and Actual Time Served." There is no reference to levels of prior criminal history. For each listed offense, the table lists the total number of sentences for that offense, the average sentence, and the percentages of those sentenced for that offense who got probation, or who got a sentence to a prison shock or treatment program, or who got a prison sentence without an assignment to a shock or treatment program.[107]

For another example, the offense of carrying a concealed weapon, a class D felony, is in the non-violent offense group. The table shows that during the same six-year time period, for defendants determined to have a prior criminal history level of Level I,

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[105] *Id*. at 27.
[106] *Id.*
[107] *Id.* at 27 and 37.

there were 7,211 sentences statewide for all non-violent class D felonies. Of those, 92.7% were granted probation; 1.8% were sentenced to prison with a shock incarceration or drug treatment program; and 5.4% got a prison sentence with no assignment to a shock or treatment program. The average sentence for all of the Level I defendants who were sentenced for a violent class A felony was 2.9 years.[108]

The 2012-2013 User Guide was the last one published during the time period of the cases covered by this study.

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[108] *Id.* at 28.

Chapter VI – Sentencing in Gun Crime cases

When a defendant either pleads guilty or is found guilty in a trial, the judge is faced with the decision of which sentence to impose. Missouri laws and the particulars of each case and each defendant present a myriad of considerations and permutations that make the judge's job of sentencing very complex.

Even though the sentencing decision will not be made until the finding of guilty, what sentencing possibilities apply to the charges in the case affect the case from the outset. The more serious the possible penalty, the more likely it will be that the judge who sets the bond amount will make that a more significant amount, the logic being that the greater the punishment that could result, the more likely the defendant will be to flee the jurisdiction to avoid being brought to justice. There is research which suggests that defendants who are held in jail awaiting trial or disposition of their cases because they cannot post bail are likely to receive a more severe sentence for the same crime as a defendant who is not held in pre-trial detention, which could be because the latter defendant was able to post bail, or was released on a recognizance bond.[109]

Prosecutors and defense counsel will take the possible punishments and sentencing alternatives into consideration when they are negotiating a possible plea agreement. Even when no plea agreement can be reached, the possible sentencing

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[109]C. LOWENKAMP, M. VANNOSTRAND AND A. HOLSINGER, RESEARCH SUMMARY: INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES, LAURA AND JOHN ARNOLD FOUNDATION (NOVEMBER 2013); https://craftmediabucket.s3.amazonaws.com//uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf .

alternatives will guide the defense attorney in deciding whether to recommend the defendant enter a “blind” or “open” plea, meaning that the judge will be free to sentence the defendant to anything within the possible sentences authorized by law for the offense or offenses the defendant faces; and the same considerations will affect the defendant's decision whether to follow defense counsel’s advice or not.

There are only a few situations where there is no decision for the judge to make. An example of one of those exceptional situations is the case in which the defendant has been found guilty of the charge of murder in the first degree, and the prosecutor did not file pleadings required in order to pursue a sentence of death. Missouri law leaves only one sentence available to the judge: life imprisonment without possibility of probation or parole. For that reason, the User Guide shows, in the table in which information is presented of the percentage of the sentence that must be served under parole release guidelines before eligibility for parole, that for murder first degree the percentage is 100%, and the same percentage is given for the amount of time actually served before release (since there is no release permitted).

The only other gun case charge in any of the cases in this study which had the same restriction of no probation or parole was one in which there was the following charge:

> [D]ischarges or shoots a firearm at or from a motor vehicle, as defined in section 301.010, discharges or shoots a firearm at any person, or at any other motor vehicle, or at a building or habitable structure, unless the person was lawfully acting in self-defense.[110]

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[110] MO. REV. STAT. SECTION 571.030.1(9).

However, the restriction of no probation or parole until the full sentence has been served was only applicable to the sentence for that charge if the court had made a finding that the defendant was a persistent offender, which was not the situation presented in the case in this study.[111]

The portion relating to the different punishments for that one offense (of shooting at or from a vehicle, … etc.) from the statute which sets out that charge follows:

> 9. Violations of subdivision (9) of subsection 1 of this section shall be punished as follows:
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> > (1) For the first violation a person shall be sentenced to the maximum authorized term of imprisonment for a class B felony;
> >
> > (2) For any violation by a prior offender as defined in section 558.016, a person shall be sentenced to the maximum authorized term of imprisonment for a class B felony without the possibility of parole, probation or conditional release for a term of ten years;
> >
> > (3) For any violation by a persistent offender as defined in section 558.016, a person shall be sentenced to the maximum authorized term of imprisonment for a class B felony without the possibility of parole, probation, or conditional release;
> >
> > (4) For any violation which results in injury or death to another person, a person shall be sentenced to an authorized disposition for a class A felony. [112]

When Missouri adopted its first comprehensive criminal code in 1977, the classification system of four classes of felonies, A, B, C, and D, was adopted in part to simplify the sentencing options. Each class was given a specified range of punishment, with class A being the most severe – 10 to 30 years or a life sentence; B was 5 to 15 years; C and D had no minimum, with C being up to 7 years and D being up to 5 years.

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[111] MO. REV. STAT. SECTION 571.030.9.
[112] *Id.*

Other sections of the Code related to the granting of probation, which was allowed for all the Code offenses (including murder). There were other sections of Missouri laws that contained punishments for crimes that pre-dated the Code and were not repealed when the Code was enacted.[113]

Between the 1977 enactment of the Missouri Criminal Code and the enactment of the revision of the Code in 2014, many other statutes were passed to specify certain conduct as crimes; some of those included placing the new crime within the ABCD classification framework, while others set out a punishment just applicable to the particular new crime. In addition, over those years the legislature added numerous provisions to the Code which placed additional restrictions on sentences. Some of those provisions restricted the sentencing judge in the sentence which was applicable: for example, adding a provision such as the one relating to the crime of shooting from or at a vehicle …(etc.) which is a class B felony; even for the first offense, the statute limits the sentencing judge to sentencing the defendant to the maximum sentence for a class B offense, 15 years. If there has been a finding that the defendant is a prior offender, then the 15-year sentence must be served without probation or parole for 10 years; and if the finding has been that the defendant is a persistent offender, then the entire 15 year sentence must be served without probation or parole.

Notice that if no finding has been made that the defendant is a prior offender, the statute requires a "sentence" to be the maximum for a class B – 15 years; BUT, the statute does not prohibit probation unless there has been that finding of a prior or

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[113] 1977 MO. LAWS, S.B. 60, MO. REV. STAT. SECTION 556.011 ff, the MISSOURI CRIMINAL CODE (1977).

persistent offender. So the sentencing judge still has the option to grant probation, which can be a suspended imposition of sentence – meaning no 15-year sentence, in fact no sentence at all, is pronounced. Alternatively, the judge can grant probation with a suspended execution of sentence – but in that case the judge must pronounce a sentence of 15 years, and that sentence is then suspended while the defendant is on probation. If the defendant successfully completes probation, then the defendant does not have to serve any portion of the 15 years. The sentencing judge also has the option to sentence the defendant to one of the institutional shock or treatment programs; however, to do so the judge must sentence the defendant to the 15 years; if the defendant successfully completes the program, the judge can then release the defendant on probation and suspend the execution of the remainder of the 15-year sentence.

This example is relating just to the options and restrictions for one offense; there are many such restrictions throughout the criminal statutes. Of those relating to gun crimes, besides the ones discussed above, the most common provisions enhance the possible punishment one class above the class of the offense charged when the court has made a finding that the defendant is a prior and persistent offender. (As noted above that finding has different results for certain offenses.) Another common restriction requires that a defendant who has a prior prison commitment must serve 40% of any sentence imposed, or 30% of the sentence if the defendant has reached the age of 70. If the defendant has two prior prison commitments, then 50% of the sentence must be served, or 40% of the sentence if the defendant reaches the age of 70. If a defendant has three or more prior prison commitments, the defendant is required to serve 80% of any sentence imposed, or 40% if the defendant reaches the age of 70. And another common restriction

is for those defendants who have been found guilty of an offense which is classified as a "dangerous felony" – they are required to serve 85% of the sentence. However, these restrictions do not prohibit probation. So, for example, when the judge has a defendant found guilty of robbery 1st degree, which is a class A felony, and also is one of the offenses classified as a dangerous felony, the judge has the option to grant probation, which can be either a suspended imposition or suspended execution of sentence. If a sentence is imposed, whether execution is suspended or not, the minimum sentence is 10 years and the maximum sentence is 30 years or life. A life sentence is defined as 30 years. If the judge does not grant probation, then the judge knows that if the minimum sentence of 10 years is imposed, the defendant will have to serve 8 1/2 years before being eligible for parole. If the judge sentences the defendant to 20 years, then the defendant must serve 17 years before parole eligibility. If the sentence is to the 30 year or life maximum, the defendant will have to serve 25 1/2 years before parole eligibility.

Assault first degree, like murder first degree, murder second degree, and robbery first degree, is another offense classified as a dangerous felony, requiring a defendant to serve 85% of any sentence imposed.

Possession of a firearm by a felon and carrying a concealed weapon do not carry any restrictions on the length of time that must be served before eligibility for parole, nor do they contain any restriction on probation in the statutes. When a judge sentences a defendant to prison for one of these crimes, the amount of time that the defendant will have to serve in prison before being eligible for parole is left to the discretion of the board of probation and parole.

The offense of armed criminal action carries its own special restrictions, including a range of punishment that begins at 3 years in prison. The statute requires a defendant to serve a minimum of three years in prison. The section of the statutes relating to armed criminal action was revised during the 2020 legislative session; however, the revisions were not in place during the time period covered by this study.[114]

Another consideration that a judge has in mind in making a sentencing decision is the question whether the defendant has already accumulated jail time while awaiting sentencing. Often a defendant will not have been able to post whatever bond amount was set by the court, and as a result has been incarcerated while awaiting disposition of the case. This is often true in the case of the more serious, violent offenses; however, it can also be the situation with many of the nonviolent offenses, such as carrying a concealed weapon. Depending upon how efficient the courts have been, which can vary widely from locality to locality and also from year to year, defendants are sometimes confined for many months or even several years prior to their case coming to trial or being otherwise disposed of. Once the defendant has either pled guilty or been found guilty, if any sentence to jail or prison is imposed, Missouri laws have required since 1971 that the amount of time spent confined while awaiting disposition must be credited towards the defendant's sentence, in effect subtracted from the amount of time that the defendant must serve if the sentence is incarceration.[115] If a case disposition has been delayed because a defendant has been found to be mentally incompetent, and then is later found to

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[114] MO. REV. STAT. SECTION 571.015 (2020).
[115] State *ex rel.* Jones v. Cooksey, 830 S.W.2d 421 (Mo. en banc 1992).

be competent and the case is disposed of, the time that the defendant was confined in a mental institution prior to being found competent also counts as a credit towards the time that must be served of any sentence that is imposed.

One can think of sentencing as a decision tree. The first and biggest decision is whether or not to grant probation, unless the offense is one for which probation is not allowed. The only time that decision is not a factor is in the case of most serious, violent crimes. For all other cases, that decision whether or not to grant probation will continue to re-emerge in those cases in which probation is granted, whenever the defendant violates a condition of probation, because the judge will have as an option to keep the defendant on probation (which can be done in a number of ways) or to revoke probation and sentence the defendant to prison.

Those decisions are ones which are at the heart of the questions about sentencing that Judge Wolff posed, discussed earlier: What is the risk that the offender will re-offend? More important: What sentence is not counterproductive? That is, what sentence will not encourage the offender to re-offend? What sentence will improves the prospects that the offender will avoid future criminal behavior?[116]

If probation is granted, the next decision is whether to suspend imposition of the sentence, or to impose a specific term and then suspend the execution of the sentence. In either case, the next decision is on the period of probation. Missouri statutes require a period of 1 to 5 years. If the judge chooses a probation period of less than five years, the

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[116] See notes 41 and 71, *supra.*

statutes allow a later extension of the period, as long as the total length of the period of probation does not exceed five years.

The next decision for the judge is whether the probation should be supervised by the board of probation and parole, supervised by the court, or unsupervised. When the judge orders probation supervised by the board of probation and parole, there are a number of conditions of probation that are standard in every case. In addition, the judge has the discretion to order any other conditions of probation, so the next decision would be whether to order any conditions. The statutes permit the judge to add conditions at any time during the period of probation.

If a defendant violates a condition of probation, the probation can be suspended, and the judge has a new set of decisions to make. The judge can revoke the probation, add additional conditions, extend the period of probation, or reinstate the defendant on probation, and perhaps reprimand or warn the defendant. Some violations are relatively minor, such as failing to report to the supervising probation officer on the day and time ordered, and the defendant will already have been punished, because the defendant has often been held in jail on a probation violation warrant while awaiting a probation hearing before the judge. Other violations can be more serious, such as committing a crime, and those usually result in revocation.

If the judge decides to revoke probation and impose a sentence, or order the previously imposed sentence to be executed, Missouri law grants the judge the authority to credit the defendant for any or all of the time the defendant was on probation towards time to be served on any prison sentence.

Another consideration that is taken into account by the judge, the prosecutor, and the defense counsel is the concept of "earned compliance credits" included in legislation enacted in 2012.[117] This statute requires the board of probation and parole to credit a defendant with a certain amount of time if the defendant's conduct while on probation or serving a sentence in the department of corrections is satisfactory. The statute has its own conditions and exceptions, but the prospect that the period of time pronounced by the judge at sentencing, whether it be a period of probation or a prison sentence, might be reduced certainly will influence what will be the practical meaning of the sentence imposed.

If the judge makes the initial decision not to grant probation, the next decision is whether to impose a prison term but make it with a referral to one of the prison shock incarceration or drug treatment programs, or simply to sentence the defendant to a term in prison. If the decision is to make the sentence pursuant to one of the prison programs, then if the defendant successfully completes the program, the judge has the decision whether to suspend the remainder of the sentence and release the defendant on SES probation (which is the result in the overwhelming majority of these situations) or to require the defendant to continue to serve the prison term that was imposed at the time the sentence and referral to the prison program was made. If the defendant fails to successfully complete the program, the prison authorities notify the judge, and the decision is the same: whether to suspend execution of the remainder of the sentence, or require the defendant to serve the original prison sentence. However, in the case of failure

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[117] 2012 MO. LAWS H.B. 1525; MO. REV. STAT. SECTION 217.703 RSMo.

to successfully complete one of the prison programs, the decision most commonly made is to require service of the prison term.

If the judge revokes the first term of probation granted, whether it be as the initial sentence, or after completion of one of the prison programs, the judge has the decision whether to grant a second period of probation, or sentence the defendant to prison. The judge can again make the prison sentence pursuant to one of the prison programs, and if that choice is made, then the same decisions will be faced depending on whether the defendant does or does not successfully complete the program. However, if the initial sentence included a prison term, whether it was suspended at the outset, or only after completion of one of the prison programs, then the judge cannot modify the prison term either up or down when imposing sentence after a probation revocation.

If the judge at any of the decision points decides not to grant probation nor to make the sentence pursuant to one of the prison programs, and instead opts to impose a "straight" prison sentence, then at that point the judge's decisions regarding the length of the prison sentence are done. The board of probation and parole then has jurisdiction to determine when, if at all, the defendant is to be released on parole, or "conditional release" as it is referred to in the statutes. The board, of course, is subject to any of the restrictions discussed above with regard to prohibitions on parole, or a requirement for a certain minimum number of years or percentage of sentence to be served before parole is permitted.

All of these considerations must be weighed by the judge in deciding on what will be a fair and just sentence for the defendant in each particular case. The circumstances surrounding the offense are of course another consideration – if the defendant's conduct

was particularly egregious a more severe sentence would be called for; if there were circumstances which made the defendant's conduct less egregious, then a less severe sentence might be in order. Missouri laws make accomplices guilty of the same offense as the perpetrator, for most offenses. For example, a person who was an accomplice, having given the gun to the person who pulled the trigger, intending that the shooter would shoot and kill the victim, is guilty of the same offense and degree and faces the same punishment as the person who fired the shot that killed the victim. Should each get the same sentence? One can think of many different circumstances which might arise in different cases, and make one of the two perpetrators a candidate for a more severe sentence than the other.

Finally, judges may have a defendant who is pleading guilty to or has been found guilty of just one offense, or of two or more offenses. Sometimes multiple offenses are charged for what is in effect one action (for example, robbery first degree and armed criminal action); sometimes multiple offenses are charged for multiple crimes committed at different times and in different places, sometimes for a crime spree that occurs over a number of days or even weeks or months. Sometimes multiple crimes are charged in multiple cases. Sometimes all of those cases are in one jurisdiction; sometimes there is one case in one jurisdiction and one or more in other jurisdictions. Sometimes there is a case in state court, and another case pending in federal court; and sometimes those cases arise from the same set of facts, and other times the cases involve entirely unrelated crimes. Sometimes the defendant is pleading guilty to multiple crimes at the same time and one judge will decide on the sentences for all the crimes charged in all of the cases; at other times the defendant will already have pled guilty in another jurisdiction; and

sometimes the sentence will already have been imposed in the other jurisdiction, so the sentencing judge has the decision whether to make his or her sentence concurrent with or consecutive to the sentence in the other jurisdiction; sometimes the situation is reversed, and the judge knows that whatever sentence he or she imposes may be concurrent with the sentence later to be imposed in the other jurisdiction, or that judge may decide to make the later sentence consecutive to the earlier sentence.

Sometimes the judge will have to decide on a sentence in a case involving a defendant facing probation revocation in a different case, which may be pending before a different judge, or even in one or more different jurisdictions.

When one considers the complexity of the sentencing decision, and the many different factors that bear on the options available to the sentencing judge, one appreciates the wisdom of the Missouri legislators when they chose to retain the judge's discretion in sentencing decisions.

For the same reason, that is, the complexity of the decision, the more information the judge has, the more likely the judge will arrive at the sentence that is the fair and just one for that defendant in that case. Providing more information to the sentencing judge was one of the main benefits of having the Sentencing Advisory Commission Guides with all the information included, and the Sentencing Assessment Report with information specific to the case in front of the judge for sentencing, such as detailed victim impact information, background information about the defendant and details about the defendant's prior criminal history, as well as the risk assessment scoring included (whether or not the risk assessment score is a factor in the Commission's matrix). For that reason, the revitalization of the Commission is a worthy goal.

Chapter VII – The Experience in Sentencing Gun Cases with the Missouri Sentence Advisory Commission Recommended Sentences Available

This study examines the gun cases that were disposed of by plea or trial in one division (by one judge) of the 22nd Judicial Circuit of the City of Saint Louis over the nine-year period of 2005-2013. That judge was this writer. For that reason alone, this study could not be considered an experimental study.

The first step in this study was to compile as much information as was available on the felony cases assigned to the division. The pleadings in those cases then had to be examined to determine whether the charges involved the use or possession of a gun. One hundred and five cases were found in which firearms were involved.

Five of the one-hundred-and-five gun cases were disposed of other than by a plea or verdict of guilty. Of those five, one involved five counts: two of assault of a law officer in the first degree, two of armed criminal action and one of discharge of a firearm at or from a motor vehicle resulting in injury or death. The case was filed in June of 2009; it was set for trial to begin on November 28, 2011. On November 15, 2011 the prosecutor filed a *nolle prosequi* memo, dismissing the case. The second of the five cases involved one count of attempted robbery in the first degree and one count of armed criminal action. A jury trial began with the court hearing pretrial motions, and a jury panel of 54 persons was seated. Before voir dire questioning began, the prosecutor filed a nolle memo, dismissing the case. The third case involved one count of carrying a concealed weapon, a pistol, and one count of possession of a defaced firearm (the same gun). The defendant waived the right to a jury trial, and the case was heard in a bench trial. After hearing the evidence in the case, the court entered a verdict of not guilty on

both counts. The last two of the five cases were both jury trials. In one there were three counts: murder in the first degree, armed criminal action, and carrying a concealed weapon. After hearing the evidence in the case, the jury returned verdicts of not guilty on all three counts. The fifth case involved one count of possession of a firearm by a felon. After hearing the evidence in the case, the jury returned a verdict of not guilty. All of those cases became confidential. No further information about those cases was gathered for this study.

That leaves exactly one-hundred gun cases for the time period, and all of those were disposed of either by a plea or verdict of guilty, and about which there was sufficient information available to be useful. In some of those cases, defendants were granted probation with a suspended imposition of sentence, and in some of those SIS cases the defendant successfully completed probation; at that point the court case became confidential. Information about those cases is included in this study; however, none of the identifying information, such as the case number, the court case identification code, the defendant's name or other identifying information is published or disclosed in this study. Even though the remainder of the cases did not become confidential under Missouri law (those in which there was an SES or a prison sentence), none of the identifying information relating to those cases is published or disclosed in this study in order to comply with IRB requirements.

Upon examination of the one-hundred cases, there was a clear distinction that was readily be made: the cases were divided into the offense groupings selected by the Sentencing Advisory Commission. All of the one-hundred cases fell into one of three of

those groupings: those classified as violent crimes (murder 1st or 2nd degree, robbery 1st degree, and assault 1st degree), those classified as non-violent crimes (possession of a firearm by a felon, stealing a gun, and carrying a concealed weapon which was a firearm), and those classified as drug crimes in which there was a charge involving drugs and a different charge involving a gun..

The violent gun crimes in this study were all class A felonies, except for Assault 1st degree, which could be charged as either a class A or class B felony, and shooting at or from a vehicle…(etc.), which was a class B felony; the non-violent crimes were class C and D felonies. Interestingly, the two gun crimes in which the charge involved a "potential" victim were classified in different offense groups. Shooting at or from a vehicle…(etc.) was classified as a violent crime, even though the offense could be (and often was) committed without any real threat of injury to anyone. Flourishing or exhibiting a firearm in an angry or threatening manner was a class D felony, classified as a non-violent crime. Both crimes could occur under widely varying circumstances. For example, it was a class B felony and in the violent grouping to shoot a firearm from a vehicle – it made no difference whether the vehicle was moving in traffic along a crowded street in the middle of town, or out in a field somewhere with no one around for miles. On the other hand, it was only a class D felony to flourish a firearm in an angry or threatening manner, whether the firearm was a .22 derringer and the action is done when no one is close enough to the perpetrator to be in any serious danger, or when the perpetrator is confronting a crowd of people walking down the street and the firearm brandished is an AR-15. It is not the gravity of the danger to the victim, but rather the

manner of the perpetrator, which makes the conduct a crime. True, the first crime does involve at least one shot being fired, while the second one does not; but that seems to be a distinction that does not justify the big difference in possible penalties: the shooting at or from… crime carries a minimum sentence of fifteen years; while the flourishing crime carries a maximum of only four or five years (the maximum was changed from 5 to 4 years by the Legislature during the time period covered). These are circumstances that the judge can take into account when deciding on a sentence.

There is one other wrinkle with regard to the one-hundred cases studied. In four of the cases in which the gun charge was in the non-violent group, the case had at least one other charge which was not gun-related and which had a higher classification than the gun charge. In all four of those cases, the non-gun charge involved drug trafficking 2nd degree, which could be either a class A or class B felony, depending on the amount of drugs which were involved in the charge. The gun charges in those cases did not involve shooting anyone, nor trying to, so the non-gun charge was the more serious offense.

As you can see from the table below, in addition to the four drug cases which also had a non-violent gun charge (all four of those cases had the gun charge of CCW – carrying a concealed weapon), there were sixty-nine other cases where the lead gun charge was in the non-violent group, for a total of seventy-three cases in which the gun charge was in the non-violent group; and there were twenty-seven of the cases in which the lead gun charge was in the violent crime grouping:

Violent	
Murder 1 – A	8
Murder 2 – A	1
Robbery 1 – A	16
Assault 1 – A	1
Assault 1 – B	1
Shoot at or from vehicle, … etc. – B	2
Total Violent	29
Non-violent	
Possess gun by felon – C	19
Steal gun – C	4
Flourish gun - D	5
CCW (incl Drug + CCW) - D	43
Total non-violent	71
Total All	100

The number of gun cases assigned to the division varied from year to year, from a low of four in 2007 to a high of twenty-five in 2011; the mix of gun crimes also varied, from some years when there were five or six different types of gun crimes in each year from 2009 to 2013, to the other years when there were only 3 or 4 types in each of those years. The murder cases were spread almost evenly, with one case in every year but 2013. These distributions tend to support what was the policy of the 22nd Circuit throughout the years covered: all felony cases were randomly assigned to the various divisions throughout the year. There were 24 Circuit Judges in the Circuit during the period; a few

had assignments such as Family Court, and did not receive felony cases during years with non-criminal assignments. There were usually 17 or 18 Circuit judges handling criminal cases in most of the years covered by the study.

Of the 100 cases, only 1 involved a female defendant; the other 99 cases all had male defendants.

The age range varied widely. There were two cases in which the defendant was a certified juvenile (during the period of the study, in Missouri that was under the age of 17. Later, the age was raised to under 18). One of the Sentence Advisory Commission (SAC) risk factors was age. Including the two certified juveniles, there were 10 in the under 18 age range, 32 in the 18-21 range, 46 in the 22-34 range, 8 in the 35-44 range, and 2 in the 45 and over range.

The data collected regarding educational level attained was interesting, and points the way for further study in this area. It is important to keep in mind the caution that the number of cases in this study was not a large enough sample to give a statistically significant degree of confidence in the results, nor to draw generalizations about crime in the circuit. One problem with the education date was that of the 100 cases studied, education data was not available for 22. However, of the 78 cases remaining which did have education data, there were a couple of patterns which, if found to prevail in a large enough and randomly selected sample, would be significant.

Of the 78 defendants for which the education data was available, only 16 had graduated from high school and 1 had obtained a GED; of those 17, only 4 had gone on to either a community college, a college or university, or a trade school.

Of the 61 who had not completed high school nor attained a GED, 30 had completed 11th grade; 17 had only completed 10th grade, and 6 had only completed 9th grade. Of the other 8, 4 had not attended even the first year of high school. The other 4 had entered, but had not completed 9th grade.

Of the 78 defendants for which education data was available, information was available about which high school was attended for 70; for 8 of the 78, it was not. Of the 70, there was 1 who had not completed 9th grade, but had attended a high school for part of the year but did not finish; 53 who did attend high school and completed grades 9, 10, and 11; and 16 who had graduated, including the 4 who had gone on to higher education.

Of the 70 whose high school was known, there were 17 who had attended a public high school in Saint Louis County, 8 who had attended a private or charter school, and 2 who attended high school outside of St. Louis City and County. The rest, 43, attended a public high school in the City of Saint Louis school district. This finding is not meant to put the City public schools in a bad light; one must understand the complex system of the City school district that requires far more detail than is possible here. In fact, perhaps the more significant of the statistics on education relates to just which schools those were. There were more than 17 City public high schools during the time period when the defendants would have been attending high school, including the older defendants who would have attended a couple of decades prior to the case that brought them within the purview of this study. Those 17 City public high schools does not include charter schools, which do get public education funds, but are not under the control of the City school district. Also, it should be noted that some City high schools were closed, and others had

different missions assigned; for example, McKinley was at one time a grade 9-12 high school; at some point in the 1980's it was converted to a middle school; and later in the 2000's its mission changed again.

For those 43 defendants who attended a public high school in the City more than 75% – 35 of the 43 – attended one of 4 schools; the other 8 attended various City public high schools that had specialized curricula, some of the "magnet" schools. The 4 high schools attended by 75% of the defendants are in different neighborhoods spread throughn the City. It must be stressed, again, that the number of cases in the study, and in particular the number of defendants who attended high school in the City, was not a large enough number to draw statistically significant conclusions. Obviously, a necessary first step would be a broader study, to obtain sufficient data to be able to draw reliable conclusions. Then, it the pattern is confirmed, educators and others with far more knowledge about the City's school district should find out what reasons account for this pattern. At this point, any conclusion would be mere speculation.

The following table shows the initial sentence in each of the 100 cases in the study: 42 were prison sentences; and 8 were sentences to prison pursuant to one of the shock incarceration or institutional drug treatment programs that could result in an SES and probation if the program was completed successfully. The remaining half of the 100 cases had an initial sentence of probation, either an SIS or SES.

Type of Sentence	Count of Cases
DOC	42
doc PURS 559 217	8
SES	10
SIS	40
Grand Total	**100**

The table below gives a further breakdown: of the 8 sentenced pursuant to 559 or 217 programs, all 8 were granted an SES probation after completing the program successfully. 6 of those completed the SES probation successfully. The other 2 had their probation revoked.

Type of sentence	Count of Cases
DOC	**42**
DOC purs 559 or 217	**8**
COMPLETED PROBATION	6
REVOKED 1st Probation SES after 559 or 217	2
SES	**10**
COMPLETED 1st Probation	8
Still on 1st Probation	2
SIS	**40**
COMPLETED 1st Probation	25
REVOKED 1st Probation	10
Still on 1st Probation	5
Grand Total	**100**

Regarding plea agreements and negotiations, of the 100 cases, only 20 were resolved by a guilty plea pursuant to a plea agreement. In this respect, during the period covered by the study, the 22nd Circuit was somewhat of an anomaly, compared to most judicial circuits in Missouri and across the U.S., in which the majority of guilty pleas are the result of prosecutors and defense counsel discussing the case and arriving at a plea agreement.

The reason for this was that the elected prosecutor in the City of Saint Louis, during the period covered by the study, had a policy which required the defendant's counsel to propose terms of a plea agreement, which the prosecutor would then either agree to or refuse. Most defense attorneys found this to be to their disadvantage, and so serious plea negotiation seldom took place. It should be noted that even if the attorneys did arrive at a plea agreement, the judge in the case always has the option to refuse to accept the agreement. If this happens, the defendant then has the option of withdrawing the plea. Such a happenstance is very rare; it occurred in only one case in the division during the time period of the study. That case was a homicide; the charges that the prosecutor and defense counsel had made the subject of the plea agreement were involuntary manslaughter and armed criminal action, and the agreement was for a sentence of a certain number of years on the manslaughter charge with the sentence on the armed criminal action charge to be concurrent. Other details of the case are not relevant to the discussion here; and because the court did not accept the plea pursuant to the proposed plea agreement, the plea was withdrawn. Under the local court rules, the

case was re-assigned to a different division, and the data regarding the case were not included in this study.

Of the 100 cases that were included, sentence assessment reports were prepared by a probation officer in about half the cases; in the other half, no sentence assessment report was ordered. Sometimes that was because there was a plea agreement which the court had accepted and felt the prosecutor and defense attorney had provided sufficient information about the case and the circumstances for the court to feel secure in finding the plea agreement to be acceptable. In other cases, the court's reasoning was similar: even though in those cases no plea agreement had been reached, the court found the information received from the prosecutor and the defense counsel gave the court confidence that the court could make the decision on sentencing without the need for a full sentence assessment report. Most of those cases involved the less serious charges such as carrying a concealed weapon and defendants with no or very little prior criminal record. In those cases, the court knew that the Sentencing Advisory Commission's sentence recommendations would be for probation, and the court was inclined to grant probation, so there was no need to spend the taxpayers' money to have a Sentence Assessment Report prepared; there was also no need to delay the proceedings for a number of weeks to allow time for a probation officer to do the necessary research and prepare a report. The plea and sentencing could take place forthwith, and that is what was done.

In this study, if there was a sentence assessment report in a case, data on the risk assessment scores, the prior criminal history and criminal history level, and the offense grouping and risk severity called for by the SAC guide was all gathered. In those cases

where there was no sentence assessment report, most of the scores and other data could be calculated by the court, based on the information provided to the court by the prosecutor and defense counsel at the plea hearing and on the court's own knowledge and understanding of the Commission's sentence recommendation matrices and the other information provided to the Court by the Commission in the User Guides.

The lead charge in the case would be considered, and an estimate would be made as to what the SAC Guide's likely recommended sentence would be. Then a comparison could be made between the SAC recommended sentence and the sentence actually pronounced by the court. If there were multiple charges in the case, or if there were multiple cases, or any of the other situations that might result in a different sentence than if there was only the lead charge in the one case, all of that would be taken into account in determining whether the court's pronounced sentence fit the situation.

In four of the cases there was insufficient data to estimate what the guideline recommendation would have been.

In the remaining 96 cases, the court's initial sentence was to a sentence of life imprisonment in the Department of Corrections without probation or parole, 3; to a term of years in the Department of Corrections, 39; to a shock or treatment program, 8; and to probation, either SIS or SES, 45. In addition, in lieu of a sentence, in one case the court referred the defendant to the 22nd circuit post-plea treatment court, which was not a disposition contemplated in the SAC guidelines, but which was treated as a grant of probation in this study.

Of the 45 cases in which the court granted probation in the initial sentence, plus the 1 referral to the post-plea drug treatment program, the SAC guidelines recommended

probation in 36 of the cases. In 10 of the 46 cases, the guidelines called for a more severe sentence than probation, so the court's decision was to deviate to a less severe sentence than recommended in the guidelines.

Of the 8 cases in which the court sentenced the defendant to a shock or treatment program, the SAC guidelines recommended a shock or treatment sentence in 3 of the cases. In 3 more, the court decided on a shock or treatment sentence, when the guidelines recommended a more severe sentence. In 2 cases, the court decided on a shock or treatment sentence, when the guidelines recommended a less severe sentence.

In the 42 cases in which the court sentenced the defendant to a term of years in the Department of Corrections without any referral to a shock or treatment program, a so-called "straight" prison sentence, the court sentenced the defendant to the number of years which the guidelines recommended in 3 of the cases; the court sentenced the defendant to a term of years that was less than the number of years recommended in the guidelines in 9 of the cases; and the court sentenced the defendant to a longer, that is, more severe, sentence than recommended in the guidelines in 30 of the cases. The 3 sentences to life without possibility of probation or parole all matched the guideline recommendation because all three were in cases where the defendant either pled guilty or was found guilty of murder in the first degree, and the only sentence option the court had was that sentence of life WOPOP.

As you can see, the court's sentences in comparison to the SAC recommended sentences varied from case to case, with a total of 41 cases in accordance with the guidelines, 23 cases with the sentence being less severe than the guidelines, and 32 cases in which the sentence was more severe than the guidelines.

This writer, admittedly with a bias, but trying to be objective, believes that this shows a number of things. First, the court appears to be weighing the facts and circumstances of each case, and making a decision that often is in consonance with the SAC guidelines, but which varies sometimes toward a sentence more severe than is called for in the guidelines, and sometimes toward a less severe sentence. When one considers the complexity of most sentencing decisions, that type of pattern seems to be appropriate.

This writer also concludes that the SAC guidelines were in the ballpark of what would be a typical sentence. That is not surprising, since the SAC guidelines were derived from averages of sentences statewide over a period of years, broken down by each offense, with consideration given to its nature and severity, as well as to the defendant's prior criminal record. This writer further believes that the pattern and variety of sentences and conformity with or deviation from the guidelines demonstrates the wisdom of retaining judicial discretion, and not requiring adherence to the guidelines' recommended sentences. With the complexity of the sentencing decision and the many factors which vary from case to case, there is simply no way to craft guidelines that account for every possible factor. The final decision depends on the judge's wisdom and conscientious approach to the task of determining a fair and just sentence in each case.

Chapter VIII – A Note on Risk Assessment

As discussed in Chapter II, the development of evidence-based sentencing has been accompanied by much criticism, with the harshest criticism from those who have contended that EBS serves only as a pretext or cover for race discrimination. Those critics concede that EBS tools do not include the race of defendants in the set of characteristics used to devise an algorithm or protocol to gauge the likelihood that an individual defendant will commit another crime in the future. However, the critics contend that using other factors like education, employment, substance abuse, and even prior criminal history result in disparate impacts on African-Americans, because those characteristics are skewed against African-Americans as the consequence of past and present race discrimination. Other critics contend that, even if there was a way to devise a predictive instrument that did not have results skewed against African-Americans or any other group, there remains the problem that there has been insufficient research into whether risk assessment instruments are accurate. The critics contend that until we can be confident of accuracy, the use of risk assessments is not helpful.

Missouri's experiment with EBS, through the Sentencing Advisory Commission's recommended sentences and the other helpful information provided in the User Guides, did include a risk assessment of the defendant; and of the eleven factors that went into that assessment to produce the defendant's risk score, seven related to the defendant's prior criminal record, and four were so-called "dynamic" factors: the defendant's age group (under 22, 22-34, 35-44, 45 and over; the first versions included a fifth group, under 21), level of education (high school grad or equivalent, or less than high school grad), employment status (full-time or part-time employed or unemployed), and history

of substance abuse (yes or no). We have discussed in Chapter V the on again-off again use of the risk assessment and risk score in the recommended sentences. To the extent that the risk assessment and risk score played a role in the sentencing process, Missouri's system was susceptible to those same criticisms. This writer has not been convinced that the critics are correct; however, if use of risk assessments does result in racially discriminatory results, Missouri certainly does not want to be a part of that.

However, in this writer's experience, risk assessment played a very minor role as a factor in the sentencing decision. Far more important were the nature of the crime or crimes for which the defendant was being sentenced, and the circumstances surrounding the crime or crimes. That most important question, should this defendant be given a chance on probation, or should the sentence be to prison? was answered primarily based on the crime or crimes charged and of which the defendant-about-to-be-sentenced was found guilty or pled guilty.

However, the question of whether the defendant should be granted probation had two parts. The first was more of an elimination question: was the crime such that probation is simply not appropriate? For example, the circumstances of most violent crimes simply make probation inappropriate in the vast majority of cases. But the second part of the question does call for information about the personal characteristics of the defendant. Will the defendant act in accordance with the conditions of probation? Will the defendant be able to get a job? Does the defendant have sufficient education to get a job and hold onto it? Most don't have full-time employment by the time they appear before the court for sentencing. Is the defendant likely to engage in substance abuse? It

seems if these social-economic characteristics are much needed in the determination of what conditions should be placed on the defendant if the defendant is granted probation. This appeared to be the direction the Sentencing Advisory Commission was headed when, for whatever reason, it became inactive.

If the Missouri Sentencing Advisory Commission is re-vitalized, then there are several considerations that should govern the use of any form of risk assessment and risk score:

1. The design of the risk assessment tool should be based on reliable research to show that there is good reason to believe it will produce accurate results.

2. Every caution should be taken to ensure that nothing in the use of the risk assessment will have a discriminatory impact on African-Americans or any other ethnicity or national origin.

3. Training sessions for judges, prosecutors and defense attorneys, as well as probation officers and other corrections officials and any others involved in the sentencing process should emphasize the proper use of the risk assessment.

Chapter IX – A Note on Race, Ethnicity and National Origin

There is no question there have been hateful and detestable patterns and practices of discrimination against African-Americans in the 400+ years since the first slave-traders arrived in the New World of the Americas; and persons of other ethnicities and national origins have also been the victims of contemptible and destructive forms of discrimination as well. Sadly, the history of Missouri includes such stains on our heritage.

There has been progress. But there remains the need for vigilance to ensure that the arc of history keeps moving in the right direction, which is to someday have a society in which, to paraphrase Dr. King, persons are not judged on their color, but on their character. The conundrum is that, to achieve that end, it is not possible to simply be "color-blind" in all situations. In order to ensure that odious discrimination is not creeping out from under the rocks, it is often necessary to take notice of persons' ethnicities. For example, to make sure that there is no discrimination in college admissions, it is necessary for admissions officials to ask persons to state their ethnicity or national origin or race, so that the percentages of various groups can be tracked to ensure there is no pattern of discrimination employed against anyone.

On the court documents in the cases studied, as with such documents in virtually every jurisdiction in the United States, there is a place where the race of the defendant is listed. It is not clear where the listing came from: did the defendant provide it during the booking process? Did a police officer or court employee fill it in on a form that was part of the process? Was it derived from some other record that contained a reference to such information? No matter how the listing got there, the next question should be "Is it accurate?" Sometimes that is readily apparent from appearance, but sometimes it is not so

apparent. Is that good or bad? Why does the court need it, after all? The ethic of the court is to ensure equal justice for all, regardless of ethnicity or color or national origin.

For this study, the information on the listed race or ethnicity of defendants was gathered along with other data that was gleaned from court records. However, this writer does not see any value in including the information in this report on the study. As discussed above, the one-hundred gun cases in this study simply is not a large enough sample to generalize conclusions about subgroups, whether they be of persons with or without prior criminal records, or of persons of different ethnic backgrounds. To include data on the race or ethnicity of defendants would be to invite unreliable conjecture. This writer has considered the data, and is confident there was nothing in this study that could serve as an avenue for odious and hateful discrimination of any kind.

Chapter X – A Note on Future Studies and Recidivism

There are two logical next steps along the lines of this study. One is to engage in a much larger sample size. For example, a study of sentencings, whether limited to gun crimes or encompassing a broader scope, should be done for the entire circuit, or even better, for multiple circuits. More detailed information could be gathered regarding performance on probation, as well as success or failure in the various institutional and community programs such as are listed in the Commission's User Guides. A study in cooperation with the City Board of Education, to examine why certain public high schools have negligible numbers of students who drop out and commit crimes, while a few other public high schools sharing the same neighborhoods have disproportionate numbers of dropouts who turn to crime.

Another path for study would be to do a long-term study to get a much better handle on the question of recidivism. How many of the defendants in this study who successfully completed probation get arrested and sentenced for felonies five years down the road? Ten years? Same question for those who completed treatment programs. Were there different percentages for those who completed institutional treatment programs as opposed to those who completed programs in the community? What about those who received prison sentences? Most of those defendants will someday complete their sentences and be released, whether on parole or after serving the entire sentences they received. How many of them will re-offend within five years after their release? After ten years.

It was encouraging to see the wide variety of ongoing research reported in the literature that shows that there is great interest in finding the answer to that elusive question “What sentence will make this defendant renounce crime and become a good citizen?” Finding the answer to that question will be good for defendants, and good for our society as well.

Chapter XI – Conclusion

This writer agrees with others who have commented that the decision on sentencing in a criminal case is one of the most daunting for a judge. For one thing, the sentencing decision will have an immediate and long-lasting effect on the life of the person being sentenced and that person's family and friends, particularly if others rely on the defendant to provide them with support, such as is the case when a defendant has minor children. But the defendant and the defendant's circle are only the beginning; there are many more lives that will be impacted by the sentence. If the crime involved one or more victims, their lives have already been impacted by the crime itself. In some cases, one or more victims may have suffered injuries that may be permanent, affecting the rest of their lives as well as the lives of their families and friends. In homicides, the victims have lost life itself. Their families and friends may see the justice meted out in the courtroom to the perpetrator as the closest they can get to having some sense of closure that will allow them to go on with their lives, despite the permanent loss they have suffered. Some victims who did not suffer physical injury still often bear emotional scars from the trauma of being victimized; sometimes those psychological injuries take far longer to heal than physical injuries.

Even if a crime has no immediate victims, there is the general traumatization of the community that can be associated with any crime to a greater or lesser extent. Most people expect judges to render sentences that are fair, but also just. The judge must balance the principle that "the punishment should fit the crime" against considerations of what sentence will be appropriate for the individual defendant. These are matters which

are extremely subjective; reasonable people will have differing opinions about what is fair and just in any given situation – but it is the judge who makes the decision in the end.

As expressed earlier, this writer believes this study provides strong arguments for retaining the judge's discretion in the sentencing decision and endorses the wisdom of the legislators who retained that discretion when they created the first Sentencing Advisory Commission. At the same time, this writer believes that the SAC system of recommended sentences, accompanied by the voluminous information provided to the judge and other users in the published guides, can only be a welcome aid to any judge making sentencing decisions. The more useful information the judge has, the better the judge's decisions are likely to be.

This writer hopes that the current effort to re-constitute and re-invigorate the Sentencing Advisory Commission is successful. Evidence-based sentencing is not a substitute for a judge's common sense and good judgment; however, it is certainly a helpful adjunct.

Finally, this writer hopes that a reborn Sentencing Advisory Commission will continue to work, along with legislators, corrections officials, judges, prosecutors, and defense attorneys, as well as scholars and practitioners in many social science disciplines, toward answering the ultimate questions: what sentence in any given situation will be the most likely to have an effect on the defendant to make the better choices in the future, and not commit another crime? And will such a sentence also appropriate for both the defendant and the crime? We can agree on the goal: for every sentence to be fair and just.

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