MONITORING SENTENCING REFORM

A Sentencing Commission Staff Report

By Jeffry Harris & David Diroll

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OHIO CRIMINAL SENTENCING COMMISSION
Chief Justice Thomas J. Moyer, Chairman
David J. Diroll, Executive Director

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EXECUTIVE SUMMARY

The Ohio Criminal Sentencing Commission has a statutory duty to propose comprehensive sentencing plans and to monitor any plan enacted by the General Assembly. This report tracks the impact of the felony sentencing plan (enacted as S.B. 2) in great detail, since it has been in effect since 1996. More recent reforms of the juvenile (2002), misdemeanor (2004), and traffic (2004) codes will receive more attention in future reports when we have greater experience with those changes.

We learned that S.B. 2 is generally meeting its goals:

- After decades of steady growth, the state's prison population has declined since S.B. 2 took effect. Crime rates also have declined.
- Those going to prison are a tougher crowd than before, with S.B. 2 steering more violent and repeat felons to prison while fostering community sanctions for less menacing offenders.
- Annual prison intake continues to rise. With more offenders subject to community supervision under S.B. 2, many chronic violators eventually end up in prison.
- Before S.B. 2, well over half of the offenders leaving state prisons were *un*supervised. Since the bill took effect, almost two-thirds of offenders leaving prison were supervised.
- There is greater consistency in sentencing patterns across the state and across felony offense levels under S.B. 2.
- The racial makeup of Ohio's prison population generally tracks the racial makeup of those arrested for crimes. However, since S.B. 2 became law, the share of total prison intake represented by African-American offenders has slowly, but consistently, declined.
- Criminal filings in Ohio's courts are increasing as more arrests are made. While some feared that S.B. 2 guidelines would compel more defendants to seek jury trials, the percentage of common pleas cases being decided by juries actually has decreased since 1996.
- The number of offenders entering state prisons under Ohio's felony impaired driving (OVI) law has risen substantially since 1997. But the numbers are small relative to the volume of impaired driving arrests and the likely number of those who are prison-eligible for having three or more prior OVI convictions.
- S.B. 2 extended new rights to appeal to both the state and the defendant. Yet, an onslaught of criminal appeals has not occurred. The proportion of appeals filed from completed criminal cases is now actually below levels seen before S.B. 2. Since it was not needed, the Sentencing Commission returned the $2 million allocated by the General Assembly for extra appeals.
- At the appellate level, however, there remains some adherence to standards of review and procedures made obsolete by S.B. 2.

SENTENCING COMMISSION DUTIES

The Ohio Criminal Sentencing Commission (the "Commission") was created by statute to recommend, help implement, and monitor changes to the state's criminal code. The Commission is charged under Ohio Revised Code §§181.21 to 181.26 with studying the existing criminal laws of the state, developing and recommending to the General Assembly comprehensive criminal sentencing plans, and monitoring the impact of Commission proposals, if enacted.

SENTENCING COMMISSION PRODUCTS

To date, the General Assembly has enacted four major bills, and several companion acts, based on the Commission's recommendations.

Adult Felony Sentencing: S.B. 2

The Commission recommended its plan for adult felony sentencing to the General Assembly in 1993. The proposal sought to enhance public safety, help manage the prison population, simplify the state's sentencing structure, and make penalties easier to understand.

The General Assembly adopted the Commission's recommendations in Senate Bill 2 and its companion, House Bill 269, effective July 1, 1996. (In this report, discussion of "S.B. 2" includes H.B. 269.)

S.B. 2 changed hundreds of provisions of the state's criminal code and reworked the way in which judges sentence convicted felons. Sponsored by Senator Tim Greenwood, S.B. 2 included these key changes:

- **"Truth in Sentencing"** in the form of definite sentences. If prison is warranted, the judge's sentence imposed in open court is the sentence actually served by the offender.

  Before S.B. 2, convicted felons were sentenced under a hybrid system of indeterminate and determinate sentencing. Indeterminate sentences gave discretion to the Ohio Parole Board to release felons relatively early from prison or to hold them for long periods. Determinate sentences, used mostly for lower level felons, allowed for unsupervised releases after a relatively short stay in prison. In both cases, offenders received "good time" reductions to shorten their prison terms by about 30%. In short, control over the *actual* length of a prison term fell to administrators rather than to the sentencing judge.

With S.B. 2, a judge imprisoning a felon chooses a definite, fixed term from a range of years provided for each felony offense level. Good time was eliminated as were traditional parole releases. Felons now serve the prison time imposed in open court.

- **Guidance by Offense Level & Appellate Review.** Under S.B. 2, a judge imposing a sentence on a felon is guided by a presumption in favor of prison for high level offenders: first degree felons (F-1s) and second degree felons (F-2s).

  Conversely, the judge must review a list of factors to determine if prison is necessary for lower level felons: fourth (F-4) and fifth degree (F-5) felons. For example, when sentencing for F-4s and F-5s, the judge must make one of several specified findings (*e.g.* the offender caused physical harm to a person or the offense was committed for hire). If the judge does not make at least one such finding, the guidance suggests a community based sanction.

  To police the courts, S.B. 2 enacted a new kind of appellate review of sentencing. Judges going against the guidance would have to give reasons subject to scrutiny by the courts of appeal.

- **Broader Continuum of Sanctions.** S.B. 2 enacted a broader range of "community control" sanctions for felons who are less threatening to the public.

  If a prison term is not mandated, the judge can tailor a sentence from a sweeping range of residential, non-residential, and financial sanctions. A judge may opt to house the offender in a local jail, halfway house, or community based correctional facility (CBCF). The judge may decide against a residential facility, but still require the offender to report each day to a specific location at a specific time ("day reporting") or be subject to electronic monitoring, house arrest, intensive probation, or other non-residential sanctions. The judge may impose financial sanctions against the offender, including restitution, fines, and pay-for-stay reimbursement. The judge also may impose these sanctions in any reasonable combination.

  Additionally, S.B. 2 fostered supervision after prison for more releasees. The Adult Parole Authority decides on the level of supervision and assigns its parole officers to monitor offenders released from prison. This is called post-release control (PRC). The period of supervision ranges up to five years for offenders having committed sex offenses and other serious felonies.

- **Expanded Victims' Rights.** S.B. 2 consolidated earlier victims' rights legislation and filled gaps. It made the impact on a victim a key consideration to be weighed in every case.

Under its statutory duty to monitor any plan that becomes law, the Commission suggested refinements that were enacted in S.B. 107 (2000) and H.B. 327 (2002). The Commission also suggested, as part of H.B. 331 in 2000, modifications to the appellate review process. H.B. 331 provided that a sentencing court's failure to make required findings on the record should result in a remand to the court with instructions to make the findings.

Juvenile Offender Sentencing: S.B. 179

The Commission presented a juvenile plan in July 1999. The General Assembly approved many of the proposals as S.B. 179, effective January 1, 2002.

Sponsored by Senator Bob Latta, S.B. 179's reforms included:

- **Broader Purposes.** The bill created a new chapter in the Revised Code (Ch. 2152) to deal with juvenile offenders separately from juvenile victims. Abused, neglected, dependent, and unruly children continued to fall under Ch. 2151, the historic juvenile dispositions code. The new chapter provided new purposes for addressing juvenile offenders (delinquents and traffic offenders). The purposes now foster public safety as well as rehabilitation and addressing the needs of problem children.

- **Blended Sentencing for Serious Youthful Offenders.** The bill's key reform was to create a new option for juvenile court judges to deal with persons defined as "serious youthful offenders" (SYOs). For juveniles accused of very serious felonies, the court's historic options were to transfer the case to adult court ("bindover") or to keep the case, realizing that the offender would be free at age 21 or earlier.

  The new blended sentencing option for SYOs allows the juvenile court to retain jurisdiction, to impose *both* a juvenile disposition and an adult sentence. The juvenile term would be served and, if successful, would negate the need for invoking the adult sentence. If the juvenile continues to commit serious offenses, however, the juvenile court may invoke the adult term.

Later refinements were made at the Commission's suggestion by H.B. 393 in 2002, sponsored by Rep. Bob Latta.

Adult Misdemeanor Sentencing: H.B. 490

The Commission first submitted a plan for sentencing misdemeanants and for redistributing revenue from fines in 1998. The General Assembly enacted much of the plan in 2002 as H.B. 490, effective January 1, 2004. The fine revenue recommendations were not included.

Sponsored by Representative Bob Latta, H.B. 490:

- Brought direct sentencing to an organized continuum of sanctions to misdemeanor law;
- Increased the maximum fine for the most common offenses (minor misdemeanors) from $100 to $150;
- Expanded restitution opportunities for victims;
- Encouraged greater use of community service and new monitoring technologies;
- For the first time, required mayor's court registration and reporting.

Further tweaking occurred in June 2004 in H.B. 52, sponsored by Rep. Jim Hughes.

Traffic Law Reforms: S.B. 123

The Commission's traffic proposals first reached the General Assembly at the end of 1998. After scores of hearings over two sessions of the General Assembly, the legislature enacted the traffic package as S.B. 123 in 2002. The bill took effect January 1, 2004.

Sponsored by Sen. Scott Oelslager, S.B. 123's 1,000 pages:

- Consolidated traffic offender provisions in a new chapter (Ch. 4510), standardized license suspension law, and merged penalties with substantive offenses;
- Made it easier for deserving drivers to stay valid through flexible payment plans, particularly for impaired driving and insurance-related offenses, and allowing driving privileges during suspensions for legitimate medical, treatment, and educational purposes;
- Made it harder to lose a license through speeding alone. But toughened penalties for underage alcohol offenses, hit-skip cases, and for fleeing or eluding law enforcement;
- Expanded the use of restricted license plates and immobilizing technologies;
- Created a new physical control offense to cover persons who are intoxicated in the driver's seat but are not operating the vehicle.

- Eliminated seizures of innocent parties' vehicles, but beefed up the law on wrongfully entrusting a vehicle to an unlicensed, uninsured, suspended, or impaired person.

Refinements were proposed (and made) in S.B. 57, H.B. 52 and H.B. 163, effective January 1, June 1, and September 23, 2004, respectively.

NEW FOR 2005: FORFEITURE REFORMS

§181.25(B) calls for the Commission to make proposals to improve the state's complex statutes governing the forfeiture of property used in misconduct. The Commission submitted its forfeiture plan in 2003. Concerns with the plan were addressed in 2004. The package is ready for legislative consideration by the 126th General Assembly.

The forfeiture package would accomplish several things. It would:

- Streamline forfeiture law into a new Revised Code chapter;
- Simplify forfeiture statutes by more clearly defining terms and providing simpler rules for what is forfeitable;
- Protect individual interests by:
    - Formalizing a hardship release process;
    - Refining the link between property and alleged misconduct;
    - Requiring the amount forfeited to be proportionate to the misconduct;
    - Setting up a pre-seizure review for real estate; and
    - Safeguarding the rights of innocent parties such as true owners, lien and security holders, law-abiding spouses, and business associates;
- Protect the public interest by:
    - Affording more tools to protect forfeitable property;
    - Creating a new crime of transferring, hiding, or diminishing the value of property subject to forfeiture;
    - Making the burden of proof "a preponderance" of the evidence in civil forfeiture cases rather than the higher burden of proof by "clear and convincing evidence" used in some statutes;
    - Clearly giving the State or political subdivision the right to a jury trial in civil forfeiture cases; and
    - Authorizing criminal forfeitures in Medicaid fraud cases;
- Protect victims' interests by prioritizing the victim's right to receive restitution or a civil recovery from forfeited assets;
- Retain the basic formulas for distributing forfeited assets: amounts from forfeited contraband, proceeds, and instrumentalities would go largely to law enforcement agencies. As now, amounts from

other property room "forfeitures" would go largely to the appropriate general fund.

MONITORING ADULT FELONY SENTENCING: IS S.B. 2 ACHIEVING ITS GOALS?

The Commission's Role

Pursuant to §181.25, once the Commission's sentencing proposals are enacted, the Commission must monitor the changes and report to the General Assembly. In particular, §181.25(A)(2) requires the Commission to monitor and biennially report on all the following:

- The impact of the changes on local government. This includes tracking the number and type of offenders who, prior to S.B. 2, were held in state prisons, but are now punished through the use of community control sanctions.
- The impact on state prison populations. This includes tracking and reporting on the type of offenders incarcerated before and after the passage of S.B. 2.
- The impact of the changes in the state's felony sentencing structure on the state's appellate courts. This includes reporting on the number of S.B. 2 appeals, their associated costs and the expediency with which appeals are handled.

Under this duty, the Commission has frequently suggested clarifying measures, as noted in the earlier discussion of the Commission's products. In addition, the staff prepares a statistical report every two years, such as the one you are about to read and, no doubt, enjoy.

Scope of This Report

This report tracks the impact of the felony sentencing plan (enacted as S.B. 2) in great detail, since it has been in effect since 1996. More recent reforms of the juvenile (2002), misdemeanor (2004), and traffic (2004) codes should receive more attention in the next biennial report when we have greater experience with those changes.

Anticipated Impact of S.B. 2

In its 1996 *Felony Sentencing Manual*, the Commission anticipated the following results from the enactment of S.B. 2's new felony structure:

- An initial drop in the state prison population in the period immediately after S.B. 2 took effect, with a gradual increase

thereafter at a rate lower than for the period before S.B. 2. (Between 1983 and 1996, prison intake had increased at an average rate of 7.7% per year.) The Commission also anticipated that S.B. 2 would make prison populations easier to predict.
- That inmates imprisoned under S.B. 2 would, on balance, be more violent and be held for longer prison terms. In short, prisons would hold a "tougher crowd" than before, on average.
- That S.B. 2 would result in diverting more nonviolent felons from prison to CBCFs and other community control sanctions. About 1,800 additional felons would be punished in local facilities and programs.
- The Commission predicted some increase in the number of appeals as a result of the new appellate review provisions in S.B. 2, but not enough to cause problems. In particular, the Commission estimated local governments statewide would incur additional costs equal to $1.2 million for the new appeal provisions.

The analyses in this report test these assumptions now that S.B. 2 has been in effect for eight years.

Non-S.B. 2 Influences

Before sharing our findings on felony sentencing patterns under S.B. 2, it is worth noting that S.B. 2 does not exist in a vacuum. Several criminal justice bills have become law since 1996. Obviously, these might skew the impact S.B. 2, *per se*. Here are some things to think about:

- Many changes have been made regarding individual crimes since the Commission's felony plan became law in 1996. Invariably, these have increased the likelihood of prison terms being imposed and/or the length of prison sentences. Some imposed mandatory prison terms. A good example is H.B. 52 from last session. It targeted vehicular homicides and assaults in construction zones.

- The most noteworthy changes in terms of potential statistical impact on prison and jail populations probably involve operating a vehicle under the influence of alcohol or drugs (OVI) and domestic violence. Since both offenses are common, changes have a significant cumulative impact on correctional resources.

    - For example, OVI was not a felony when the General Assembly passed S.B. 2. Fourth and subsequent OVI offenders now are felons and may face mandatory prison terms. Subsequent offenders always go to prison. Increases in the "look back" period for prior offenses (that enhance penalties) increase the pool of potential felons. The period first went from five to six years, then went to 20 years for

certain offenders. (For more on felony OVI, see S.B. 180 (1996) and a line of bills culminating in H.B. 163 last session.) These changes are discussed in more detail in the "Felony OVI" section of this report.
  - While the basic domestic violence penalties have not changed, the General Assembly enacted a "preferred arrest" policy for these cases that results in many more offenders being taken to local jails for domestic violence.

- Since S.B. 2, the General Assembly also enacted the sexual offender registration law and coupled it with long indeterminate sentences for the most serious sexual offenders.

Where applicable, this report's analyses and attendant discussions reference these legislative changes. It is difficult to isolate the affects such changes have had on the sentencing trends depicted. We mention them to alert the reader to the fact that S.B. 2's reforms are not the only influences on the system.

Prison Population and Intake

Prison Population Patterns. One of S.B. 2's intended results was to remove persons from state prisons whose illegal conduct was generally less serious and who were less likely to commit future crimes. The bill guides sentencing judges toward community sanctions in such cases. Of course, prison remains an option, when warranted.

Under S.B. 2, therefore, Ohio prison population should grow more slowly and prisons should hold a larger share of repeat and violent offenders. In 1996, the Commission staff forecast that, "by holding repeat and violent offenders for longer terms, and diverting low level offenders, over time the prisons will have a tougher crowd in them."

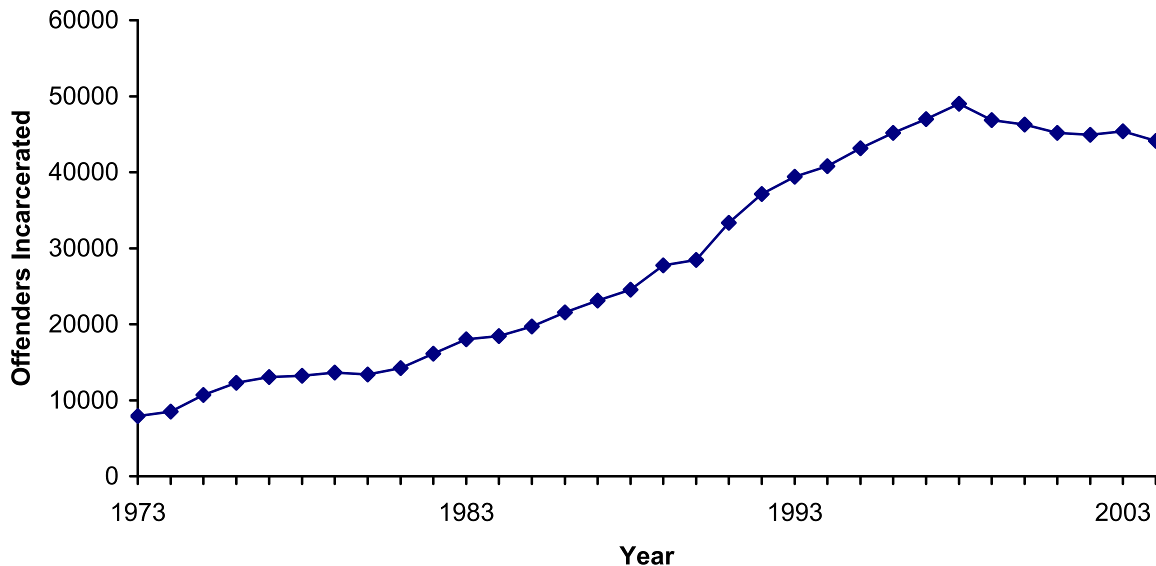
Has this happened? To answer the question, the Commission staff tracked the prison population and offenses committed by persons coming into prison.

Chart 1 tracks the changes in Ohio's prison population since 1973.[1] Notably, the population experienced a steady decline since its high water mark in 1998. And the drop in the number of state prison inmates has sustained itself for six years. As of July 2004, there were approximately 44,100 offenders in Ohio's prisons, representing a drop of almost 4,900 offenders since 1998. In fact, the state's prison population is currently at its lowest point since 1995.

[1] Data in Chart 1 were compiled from DRC's Master Population Count sheets issued on the first day of each fiscal year (July 1).

The Commission staff in 1996 anticipated an initial drop in Ohio's prison population immediately following S.B. 2's effective date. But it projected that the population thereafter would rise steadily, albeit at a slower growth rate than seen before S.B. 2. From the data represented by Chart 1, it appears the Commission staff had it half right. Ohio's prison population declined in the period after S.B. 2 became effective, but has since continued to decline steadily.

Chart 1: Ohio Prison Population, 1973 to 2004

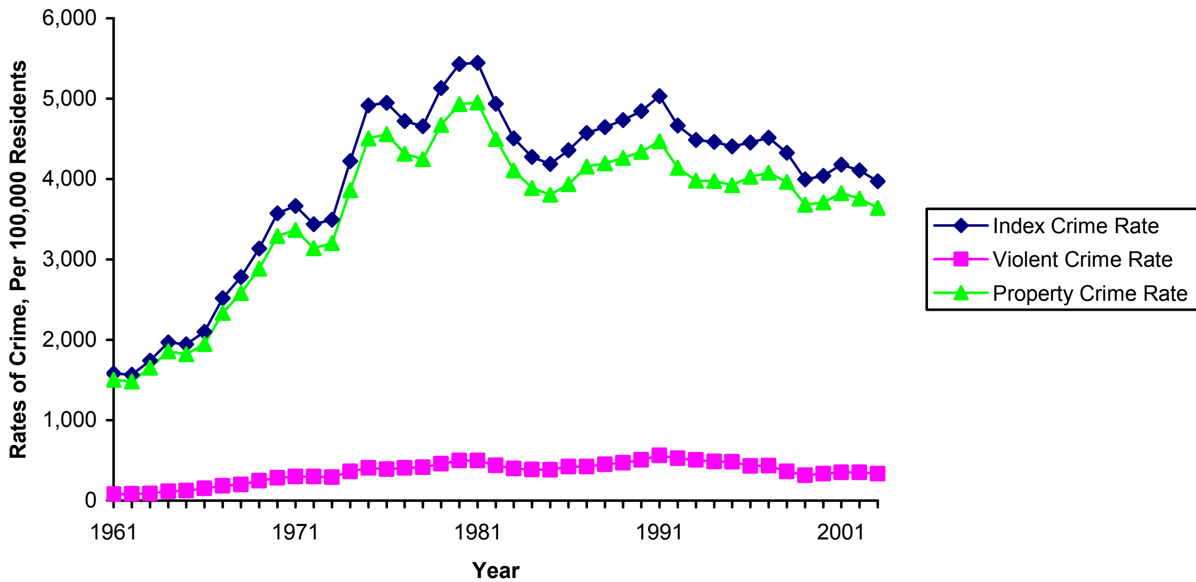


However, S.B. 2 only deserves some of the credit for the decline in the state's prison population.

Crime Rates.[2] Chart 2 tracks the crime rate reported in Ohio across several decades. Between 1961 and 1981, Ohio witnessed a significant increase in the overall index crime rate, resulting from a large surge in the rates of crime reported against property. (The index crime rate comes from the Uniform Crime Reports prepared by the Federal Bureau of Investigation.) At the same time, violent crime rates also rose steadily. Since the 1980s, however, Ohio's crime rates have fluctuated. Notably, since 1991, the reported crime rates have decreased steadily.

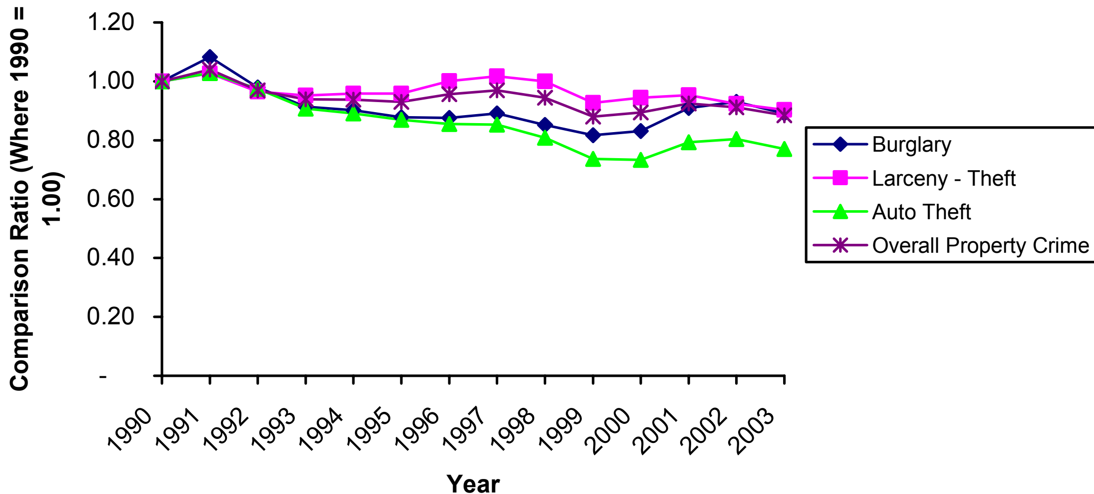
[2] Data in this section were compiled from annual Sourcebooks of Criminal Justice Statistics, published by the Bureau of Justice Statistics, U.S. Dept. of Justice.

Chart 2: Reported Crime Rates, 1961 - 2003



More specifically, Chart 3 depicts the changes in reported crimes against property. The rates did not shift dramatically, but it reflects the across-the-board drop since 1991.[3]

Chart 3: Types of Property Crime Compared to 1990 Reported Figures



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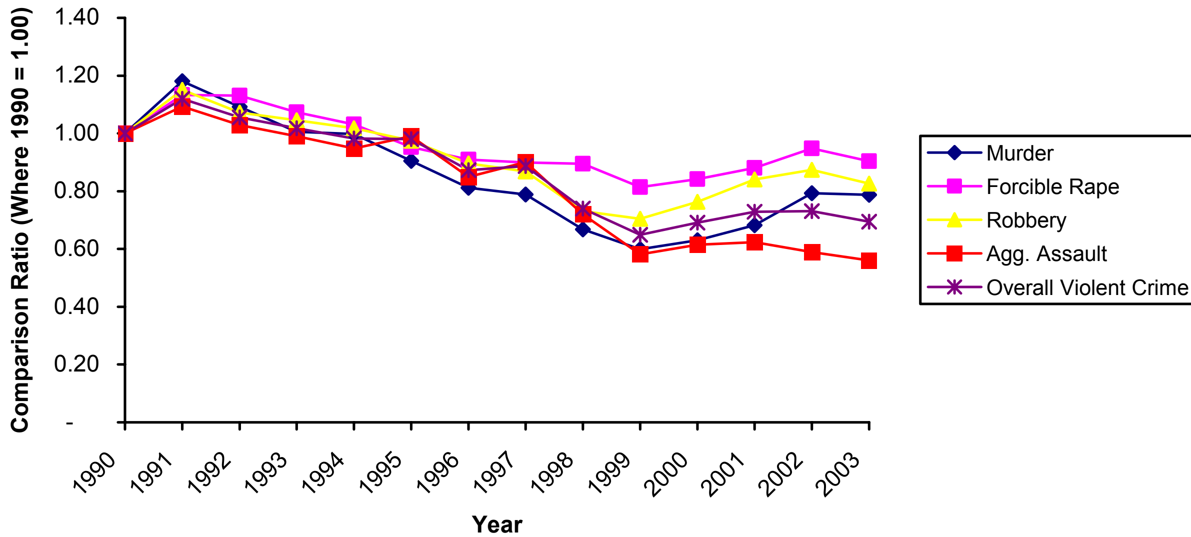
[3] For ease of comparison, in Charts 3 and 4 the rates of crime reported in 1990 were standardized (where 1990 equals 1.00), and subsequent years' variations were computed in relation to the 1990 rates.

However, note that crimes against persons changed appreciably, as depicted in Chart 4. For instance, reported aggravated assaults dropped substantially since 1991.

Chart 4: Types of Violent Crime
As Compared to 1990 Reported Figures



In sum, irrespective of a one-time surge in 1991, crime rates reported for Ohio, including both violent and property crimes, generally decreased or remained static from 1990 to 2003. How should one interpret Ohio's declining crime rates in relation to its declining prison population? Clearly, *some* of the trends shown in this report can be attributed to the drop in crime rather than to sentencing practices.

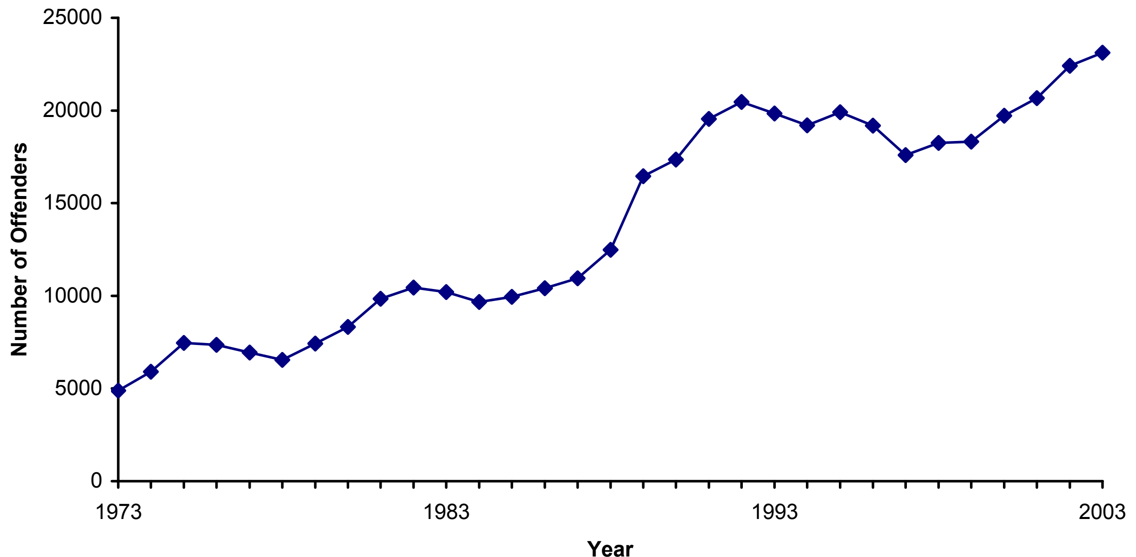
S.B. 2 was written to encourage sending to state prisons more violent and repeat offenders, while sentencing many less violent offenders to non-prison sanctions. After reaching precarious crowding levels in the early '90s, there is now space in prison for these serious felons as well as to punish community sanction violators. The drop in the prison population may be because pre-S.B. 2 inmates, comprised of both high and low level offenders, are being replaced numerically with short-term offenders (typically violators of community sanctions), while the stock population now holds more menacing, long-term offenders.

Prison Intake. The Commission staff tracked over time the number of new inmates entering state prisons. Chart 5 depicts the growth in prison intake since 1973.[4] Notice that prison intake has increased at a fairly uniform rate since 1973. This occurred despite

[4] Data appearing in Charts 5 and 6 were collected from the DRC's annual (CY) Commitment Reports, published by the agency's Bureau of Research, Office of Policy.

declining crime rates and the broader range of non-prison sanctions available under S.B. 2. Confusingly, intake has increased while the overall prison population has decreased.

Chart 5: Total Prison Intake, CY 1973 - 2003



The staff compared intake numbers during the periods immediately before and after S.B. 2 took effect. Intake rose during both periods. However, post-S.B. 2, after an initial dip (due to removing repeat petty thieves, etc.), intake rose at a steadier rate than before the bill took effect. Chart 6 depicts the number of offenders sentenced to prison in the seven years before S.B. 2 and in the seven years after S.B. 2.

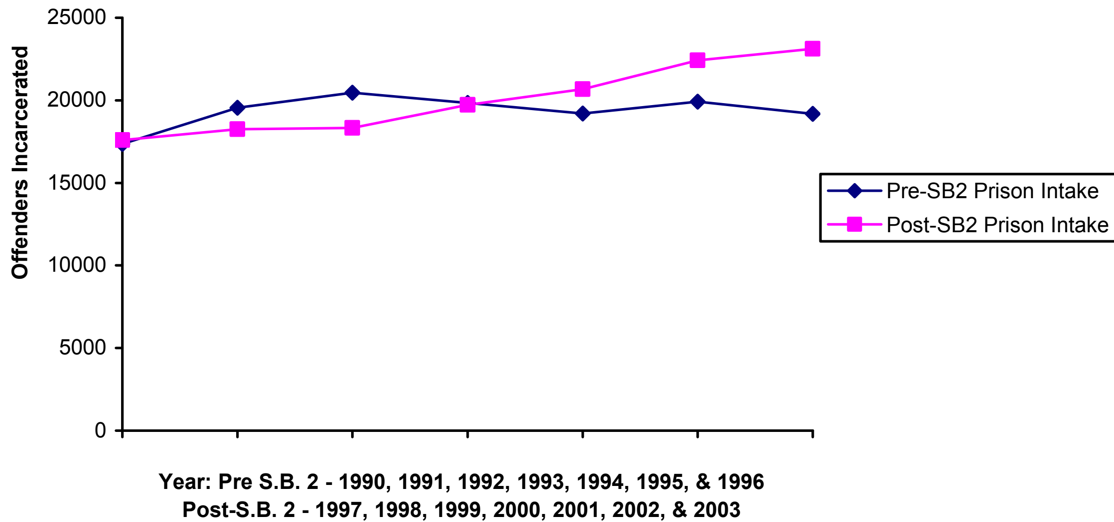
So how can intake go up while the overall prison population goes down? The growth in the number of offenders entering prison, especially after S.B. 2, suggests that the legislation's goal of imprisoning more violent and repeat offenders is being met. As you will see, data show that more high-level felons are coming to prison under S.B. 2. Property offenders are becoming a smaller percentage of those committed to prison while violent offenders have taken a growing share.

But that is only part of the equation. Under S.B. 2, judges sentence greater numbers of low-level offenders to community control sanctions instead of prison. Also under S.B. 2, more offenders are being supervised in the community after leaving prison. Invariably, this means more offenders are caught violating conditions of community control. Serious and/or chronic violations mean new prison terms. In particular, drug offenders continue to be arrested in significant numbers. While relatively

few are sentenced to prison at first, many find their way there by chronic violations of local sanctions.

Separately, there was a significant increase in the number of law enforcement officers in the last decade (discussed later). Obviously, this, too, affects prison intake.

Chart 6: Prison Intake For 7 Year Periods
Pre-S.B. 2 (CY 1990-1996) & Post-S.B. 2 (CY 1997-2003)

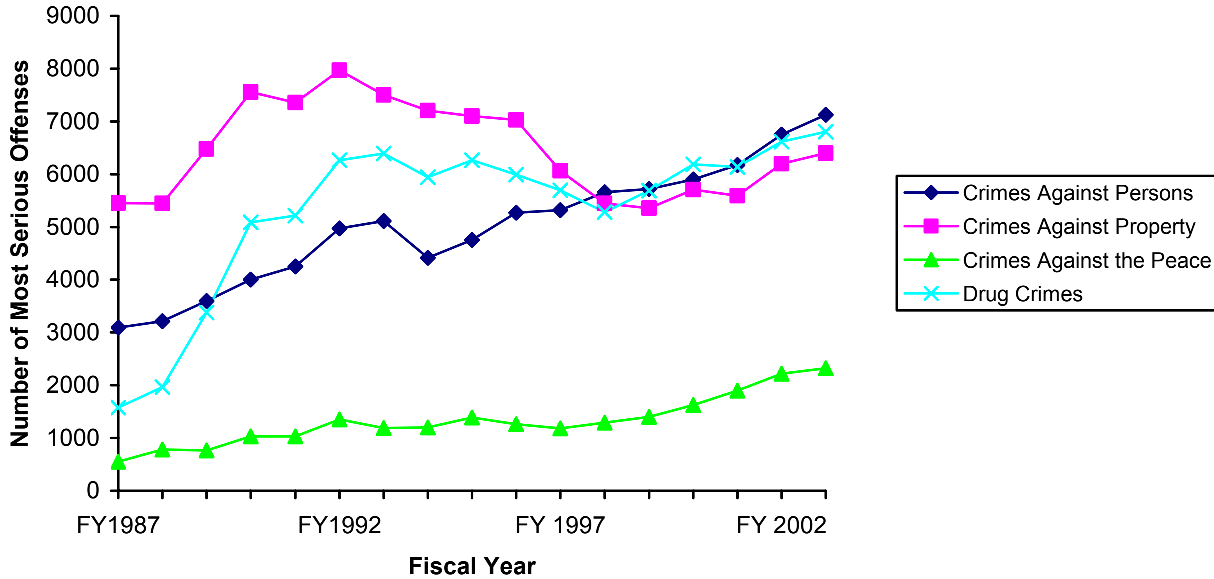


To better understand the types of inmates entering prison, we turn to an analysis of the types of offenses that have resulted in prison terms. Chart 7 tracks the most serious types of offenses committed by newly incarcerated felons since FY 1987.[5]

Of late, each year's cohort of prison-bound felons is more equally distributed by offense type. In contrast, for FY 1987 property offenders dominated. Over 5,000 inmates entered Ohio's prisons in FY 1987 for committing crimes such as burglary, theft, and receiving stolen property. Offenses in this category comprised over half of the total intake.

[5] Because copies of the CY reports used in the two previous charts were unavailable for certain years, the data appearing in Charts 7 and 8 were collected from DRC's FY Commitment Reports, published by the agency's Bureau of Research/Office of Policy.

Chart 7: Most Serious Offense Type for Prison Commitment, FY 1987 - FY 2003



But since FY 1997—the S.B. 2 era—property offenses have comprised roughly the same numbers of offenders incarcerated as the other offense types. This reflects the Commission's goal of safely diverting less serious offenders to meaningful community controls.

Note also that the number of incarcerations for drug crimes is now similar to those of other major offense types. This development shows that drug figures have leveled off since the sharp up tick in the late 1980s and early 1990s. During the crack cocaine explosion marking that period, the Ohio Department of Rehabilitation and Correction (DRC) unsurprisingly reported strong growth in the number of inmates entering prison as a result of drug crimes. Although the number of drug crime incarcerations continues to rise, it has done so in smaller numbers, and in line with other offense types.

Chart 8 better shows the effect of S.B. 2 on the types of offenses resulting in prison terms by depicting the *percentage* of prison-bound offenders for each offense type.

Chart 8: Percentage by Which Most Serious Offense Types Comprise Total Prison Commitments, FY 1987 - FY 2003

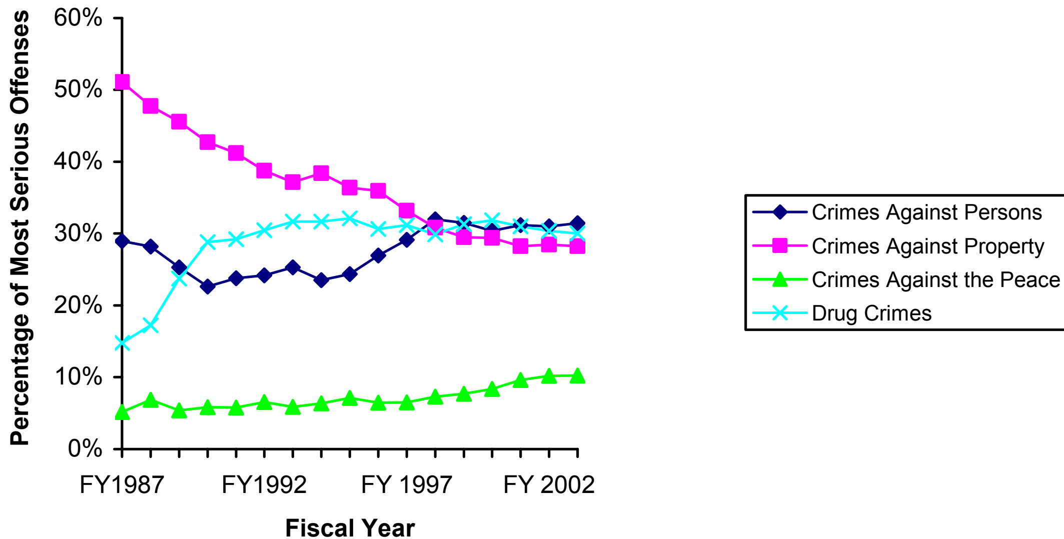


Chart 8 clearly illustrates a relative equalization of the major types of offenses resulting in prison terms. The percentage of crimes against the peace (e.g. bribery, obstruction of justice, and tampering with evidence), has remained generally static across time. But, as noted, since S.B. 2, property offenses account for about the same proportion of incarcerations as crimes against persons and drug crimes.

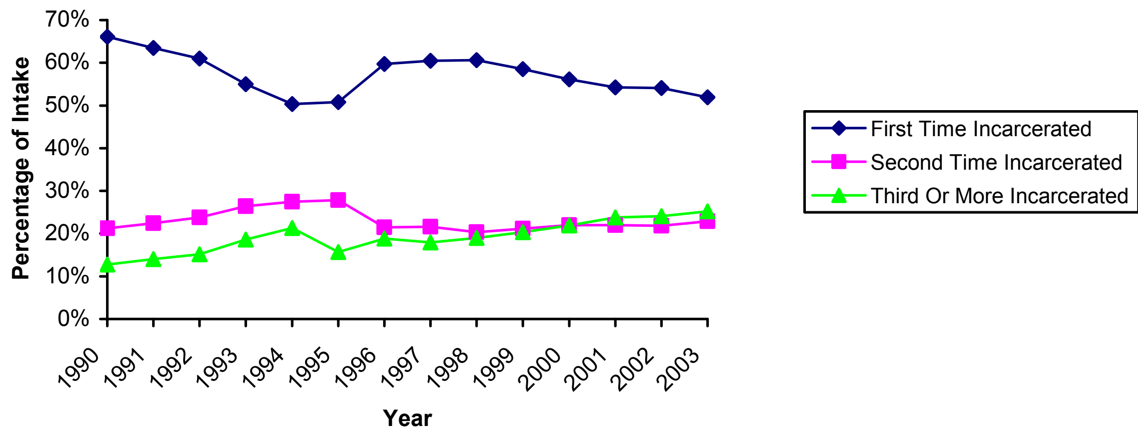
Again, under S.B. 2, the prison intake mix is no longer dominated by property offenders and their so-called "lower level" offenses. Since S.B. 2, inmates entering Ohio's prisons have tended to be more evenly distributed, with the numbers of violent offenders and drug offenders proportionally similar to the numbers of property crime offenders.

The intake trends show that more violent, "higher level" offenders are entering Ohio's prisons than were doing so before S.B. 2's passage.

The Commission staff then compared the percentages of offenders entering prison for the first time with those having entered prison more than once. The results appear in Chart 9.[6]

[6] The data appearing in Chart 9 were collected from the DRC's annual (CY) Summary of Institution Statistics reports, published by the agency's Bureau of Research/Office of Policy.

Chart 9: Percentage of Prison Intake Commitment Number: First, Second, and Third or More, CY 1990 - 2002



Although still a majority, first-time prisoners have shrunk as a proportion of incoming prisoners. Since S.B. 2 took effect in FY 1997, first timers have declined as a percentage of the offenders entering Ohio's prisons (from 67% to 56%). Conversely, persons already incarcerated more than twice have increased as a share of incoming prisoners (from 12% to 23%). Second timer figures remained largely unchanged.

The evidence suggest that S.B. 2 succeeded in one of its goals: to lock up, over time, more violent and repeat offenders, all the while diverting lower level felons to community-based sanctions. Assuring adequate space for violent and chronic felons was a key goal of S.B. 2.

Racial Disparity

S.B. 2 specifically advised judges that felony sentences are not to be based on the offender's race (§2929.11(C)). The bill also created appellate processes to address consistent patterns of disparate sentencing by judges on the basis of race (§2953.21(A)(5)).

Has S.B. 2 had any impact in leveling the rates of imprisonment among blacks and whites in Ohio?

Arrests by Race. As a Sentencing Commission, we are concerned with whether *sentencing* practices are even-handed. We leave to others the discussions of what conduct should be a crime, how law enforcement should use its discretion to arrest, and what communities expect their peace officers to do. We instead focus on what happens at sentencing.

To do this, we start with the people arrested and charged with crimes. In our 1993 study of sentencing disparity, we found that the number of blacks and non-blacks admitted to prison closely reflects the rates of arrest and indictment. We concluded that judges appeared to be colorblind when deciding between prison and community sanctions for felonies. That is, the percentage of black persons arrested and indicted for crimes tends to reflect the percentage imprisoned.

(The one troubling area was drug possession. But the skewed drug numbers may reflect how the General Assembly categorizes drugs of choice. The vast majority of prison-bound crack cocaine offenders were black. It may come as a surprise that the majority of powder cocaine offenders sent to Ohio prisons also was black. Conversely, marijuana and alcohol were the drugs of choice for larger percentages of non-blacks. Cocaine offenses are always felonies. Marijuana crimes are often misdemeanors. Sometimes they are minor misdemeanors, allowing no jail term. Alcohol possession after age 21 is not a crime in most cases.)

Blacks are arrested at higher rates than non-blacks in the United States. While non-Hispanic blacks constituted about 12% of the U.S. and Ohio populations in the 2000 Census, they accounted for nearly 35% of the arrests during the decade studied. Table 1 depicts, at the national level, the portion of blacks arrested for Uniform Crime Report index crimes.[7]

Table 1: Percentage of Index Crime Arrests by Race

Black Percentage of U.S. Population (2000): 12.1%

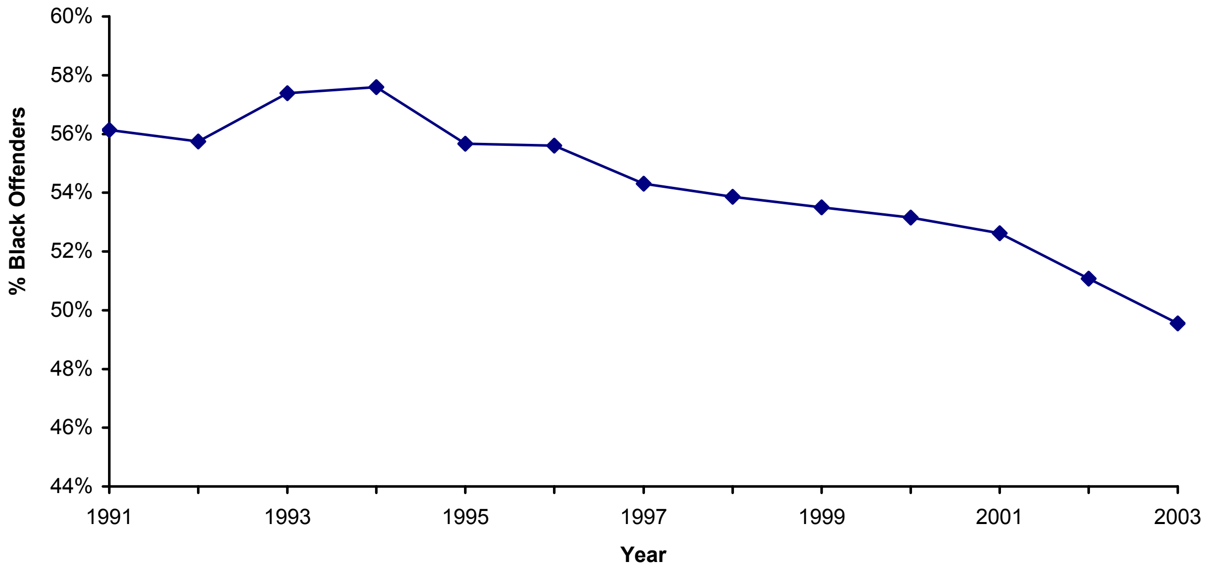
Year	Black Arrestees	Non-Black Arrestees
1992	35.2%	64.8%
1993	36.5%	63.5%
1994	36.3%	63.7%
1995	35.7%	64.3%
1997	34.7%	65.3%
1998	34.2%	65.8%
1999	33.4%	66.6%
2000	32.9%	67.1%
2001	33.1%	66.9%
Average	34.7%	65.3%

Prison Intake by Race. Since sentencing patterns have tended to track arrest patterns, it follows that African-Americans enter prison in

[7] Data in Table 1 were compiled from annual Sourcebooks of Criminal Justice Statistics, published by the Bureau of Justice Statistics, U.S. Dept. of Justice.

numbers disproportionate to their share of the *general* population, but more proportionate to their share of the *arrested* population.

Gradual change is occurring, however, as Chart 10 illustrates.[8]



As a percentage of the DRC's total annual intake, black offenders represented a smaller group in 2003 than in previous years. In fact, in the years since S.B. 2 became law, the share of total prison intake represented by black offenders has slowly, but consistently, declined.

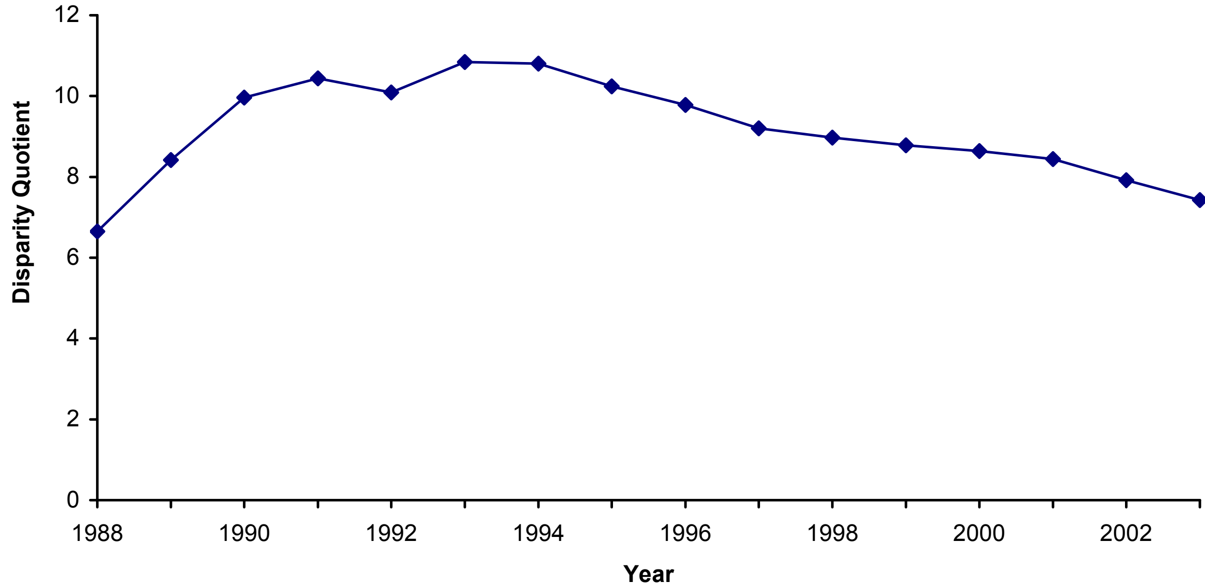
That is not to say that black and white offenders are entering Ohio's prisons in proportion to the shares by which they comprise the state's population. Blacks still comprise approximately 50% of newly incarcerated felons. So there is *statistical* disparity generally, but, as just noted, the difference tends to disappear if we look at who gets arrested.

Studying the same period, Chart 11 shows the multiple by which the black incarceration rate exceeds the rate by which whites are incarcerated. In 2003, for instance, the rate of black incarceration was about 859 offenders per every 100,000 persons in the general black population. And the rate of white incarceration was about 116 offenders per every 100,000 persons in the white population. Thus, the black

[8] Data appearing in Charts 10 and 11 were compiled from the DRC's annual (CY) Commitment Reports, published by the agency's Bureau of Research/Office of Policy.

incarceration rate was about 7.4 times the rate for whites. While still high, it represents less statistical disparity than recorded before S.B. 2.

Chart 11: Multiples by which the Black Incarceration Rate Exceeds the White Incarceration Rate, CY 1988 - 2003



By instructing courts not to consider race in sentencing determinations and by creating an appeal process to remedy potential wrongs, S.B. 2 formally recognized a race-neutral approach to felony sentencing.

More importantly, perhaps, S.B. 2 reduced the direct impact of prior records in drug and theft cases. For example, since 1996, a prior drug offense no longer enhances a crime by a degree. Rather, a prior offense is considered by the judge in determining if the offender is likely to commit another crime in the future. This means that fewer offenders receive increased sentences on the basis of prior offenses alone. Because minority offenders often have longer criminal histories, particularly with drug offenses, this aspect of S.B. 2 may help explain the decline in the proportion of black offenders entering prison.

In fairness, as with so many other facets of this review of S.B. 2, of course, a myriad of confounding variables might have played a role in reducing the percentage of blacks entering prison.

Impact on Crime Rates, Caseloads, Jury Trials, Etc.

S.B. 2 guides judges to consider an offender's conduct and likelihood of recidivism when meting out punishment. As such, the lion's share of S.B.

2's impact on Ohio's criminal justice system can be observed only after a conviction has been obtained.

Filings and Crime Rates. The changes wrought by S.B. 2 affected an ongoing, complex criminal justice system. How has the procedural environment affected the goals of S.B. 2? To answer that question, the Commission staff tracked the number of criminal filings made annually in Ohio's courts.[9]

Chart 12: Common Pleas Criminal Filings, 1961 - 2002

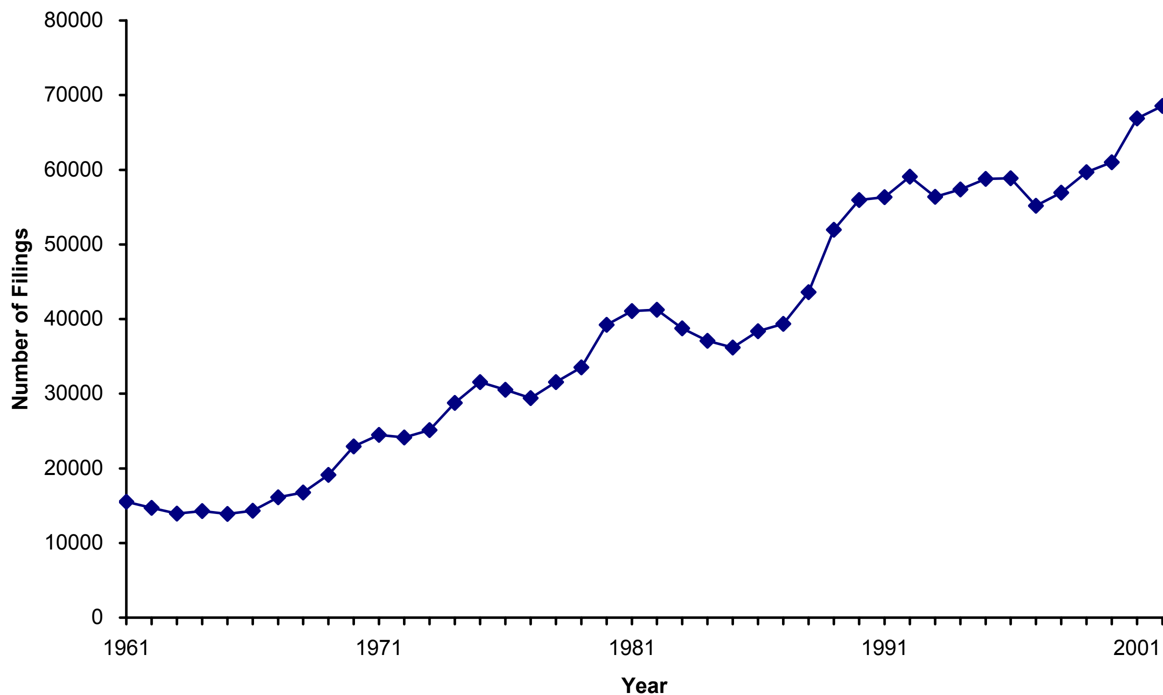


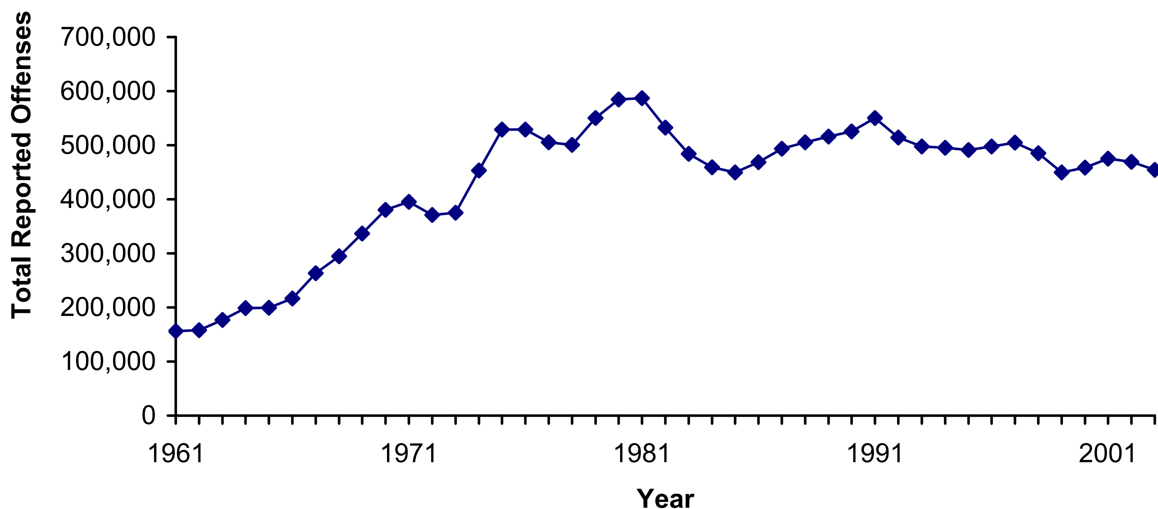
Chart 12 depicts the number of criminal filings made in Ohio's common pleas courts. After holding relatively steady for most of the 1990s, these filings have increased dramatically in recent years.

One might argue that criminal filings have increased steadily because more crimes are committed each year in Ohio. But a review of the actual number (not rate) of reported index crimes in the state during the period reveals the growth in the number of criminal filings outdistances the number of reported crimes. In other words, as the number of felony court filings has increased, the total number of serious crimes has actually remained constant or even decreased. In fact, as shown in Chart 13, the

[9] Data appearing in Chart 12 were collected from annual Ohio Courts Summaries, published by the Supreme Court of Ohio.

number of index crimes reported in Ohio has declined continuously since 1991. (Note this development mirrors the drop in the reported index crime *rate* as shown in Charts 2 through 4, above, pp. 13-14).[10]

Chart 13: Total Index Crimes (Violent & Property Offenses) Reported in Ohio, 1961 - 2003



What does all this mean? First, it must be noted that, as a share of the number of reported index crimes each year, the number of arrests and resulting criminal filings remains small.

Chart 14 compares the total number of reported index crimes (including violent and property offenses) with arrests every year since 1982. The ratio between reported index crimes and arrests (the "clearance rate") measures the number of arrests as a percentage of the total number of crimes reported each year. The number of arrests and therefore, the clearance rate, remained relatively static each year across the entire period measured. The highest clearance rate was 13.4% in 1983. The lowest clearance rate was in 2001: 8.8%.

The Commission staff assumes those individuals arrested each year are not responsible for committing all crimes reported that year. There are arguably many more persons committing serious crimes, who likely would go to prison, who are not apprehended by law enforcement.

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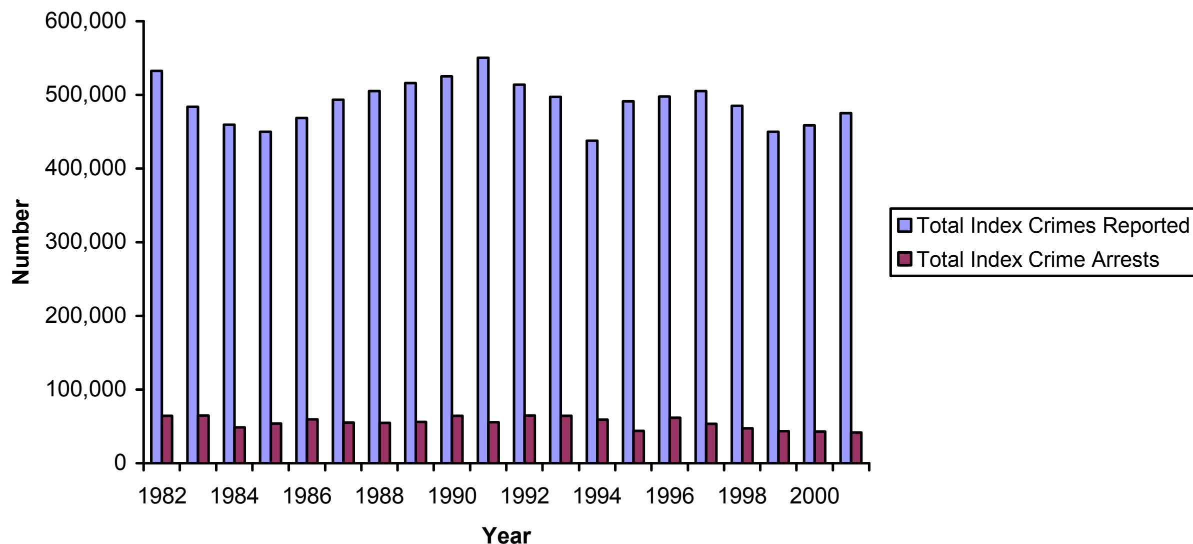
[10] The data appearing in Charts 13 and 14 were compiled from annual Sourcebooks of Criminal Justice Statistics, published by the Bureau of Justice Statistics, U.S. Dept. of Justice.

Chart 14: Reported Index Crimes Compared to Arrests 1982 - 2001

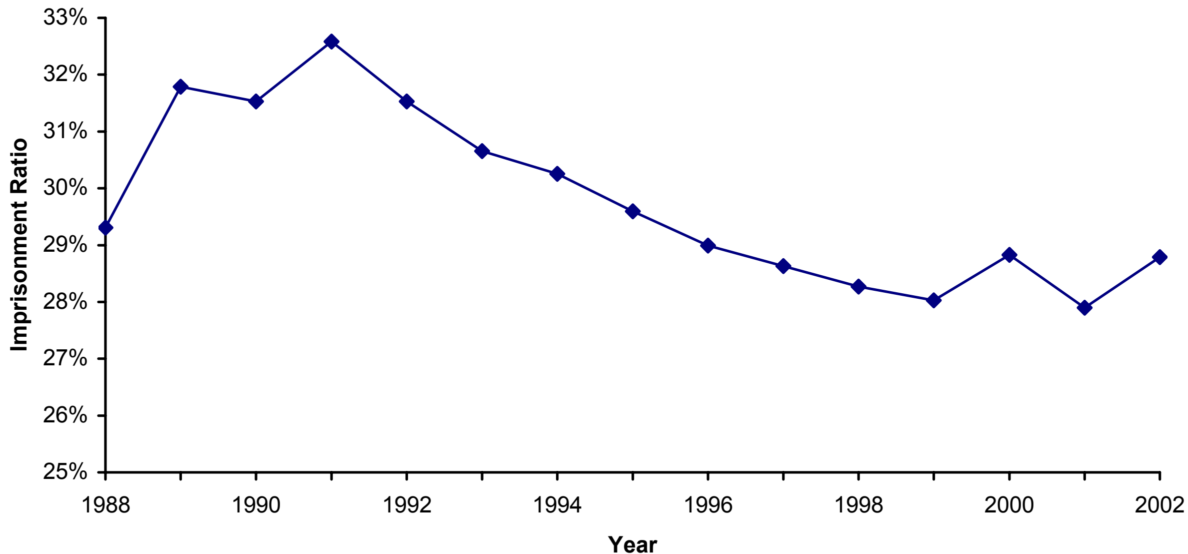


So, criminal filings in common pleas courts are increasing at a time when total offenses are decreasing. This strengthens the argument, first made by the Commission staff in 1996, that Ohio law enforcement agencies and courts are implementing more effective case management methods. More offenders are being processed through the court system, at least at the common pleas court level. That would explain why the number of offenders entering state prisons has likewise increased during a period in which fewer crimes are occurring (see Chart 5, above).

Caseload and Prison Intake. On the subject of increased prison intake, the Commission staff tracked the percentage of criminal cases *terminated* in common pleas courts that resulted in somebody going to prison. Chart 15 depicts the changes observed over time in the percentage of cases terminated with an offender going to state prison.

Interestingly, as prison intake and criminal common pleas filings have similarly increased over time, the overall percentage of terminated cases resulting in prison sentences has generally decreased. In 1991, the year in which serious crimes spiked across Ohio, about one-third of terminated felony cases resulted in a state prison term. In recent years, that percentage is lower. This decline in cases resulting in prison, coupled with generally increasing prison intake figures, is probably a function of the following: as more criminal filings are made in common pleas courts, the *actual number* of individuals entering prison may be increasing, even though, with the larger number of filings, the *percentage* of cases is lower.

Chart 15: Prison Intake as Percentage of Total Felony Cases Terminated, 1988 - 2002



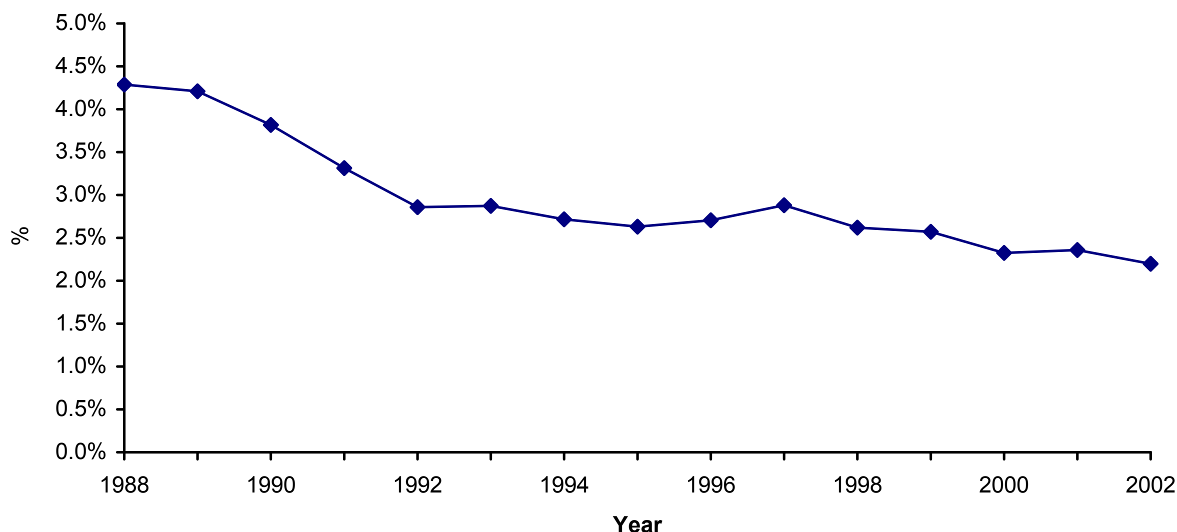
Jury Trials and Caseloads. When S.B. 2 passed, some judges were worried that the bill would encourage defendants to seek more jury trials. Because S.B. 2 guides judges against prison for some low level felony offenses, there was concern that such low level defendants would be less inclined to plea bargain, choosing instead to proceed to jury trial. Because of the time and other costs associated with jury trials, the fear was that Ohio's court system would become more expensive.

Chart 16 tracks the percentage of terminated common pleas cases that had jury trials.[11]

Note that since 1997, the first full calendar year in which S.B. 2 was effective, the percentage of jury trial cases has generally decreased. Prior to the legislation, jury trials comprised a small proportion of terminated common pleas cases (always less than 5% of the total number of terminated cases). The share of terminated cases resolved through juries shrank even more after S.B. 2's passage, thus allaying fears of increased time and cost burdens from jury trial in the common pleas court system under S.B. 2.

[11] Data appearing in this section of the report were collected from annual Ohio Courts Summaries, published by the Supreme Court of Ohio.

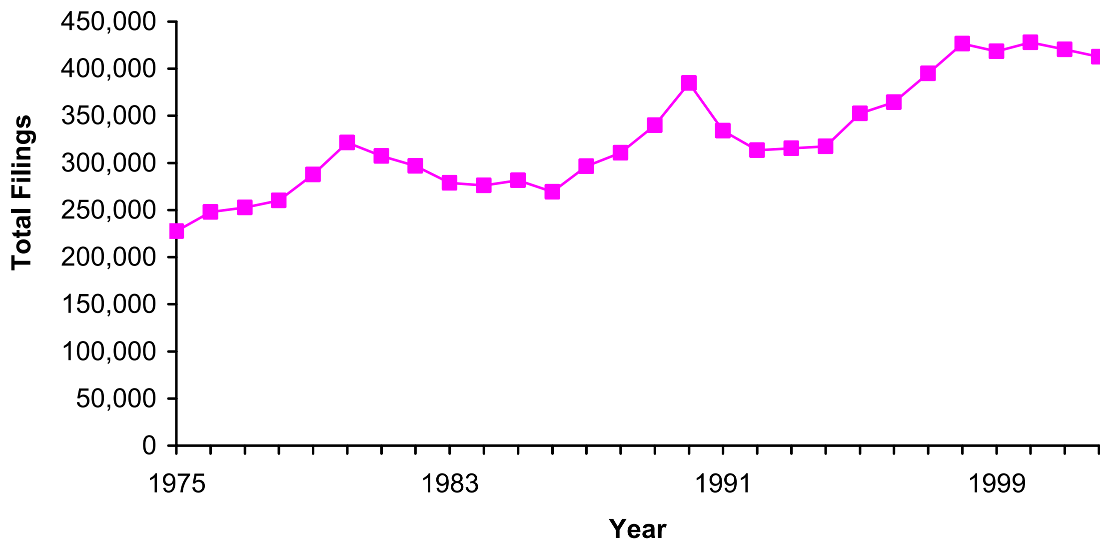
Chart 16: Jury Trials as Percentage of Terminated Felony Cases, 1988 - 2002



Theft Offense Changes. S.B. 2 was expected to impact the courts by virtue of its reducing some offenses to misdemeanors. The legislation reduced to misdemeanors those repeated theft offenses involving less than $500 and raised the felony theft threshold to $500, from $300. By doing so, the Commission staff anticipated the number of criminal *misdemeanor* filings would increase, but at a rate similar to the decrease in the number of criminal *felony* filings.

Thus, it was believed criminal common pleas filings would drop after the enactment of S.B. 2. Clearly, this has not occurred. But have criminal misdemeanor filings increased, as was first anticipated?

Chart 17 depicts the number of criminal filings (non-traffic) in municipal and county courts. Since S.B. 2's enactment, municipal and county courts have experienced a larger number of criminal misdemeanor filings. Indeed, from 1997 to the present, such filings increased to, and leveled off at, numbers much higher than existed prior to the legislation's enactment. To be fair, however, municipal and county courts experienced surges in criminal filings during the period immediately preceding S.B. 2. And before that, the general pattern observed was that of criminal misdemeanor filings generally increasing over time.



S.B. 2's reduction of certain theft offenses to the misdemeanant level probably help explain some of the increase in criminal misdemeanor filings. However, there are other likely factors. For example, the domestic violence "preferred arrest" law (see §2935.03(B)(3)(b)) has increased the number of filings at the municipal and county court level.

In addition, as a result of increased Federal funding in the 1990s, law enforcement agencies in Ohio have dramatically increased the number of full-time police officers patrolling the streets. Between 1990 and 2000, there occurred a 145% increase in the number of uniformed police officers in Ohio, from approximately 23,000 officers in 1990 to over 33,000 in 2000. This permits more effective specialization and more efficient enforcement. Better officers mean better arrests.

The drop in the number of serious crimes in Ohio, coupled with a sizeable increase in the number of officers in the streets, means that arrests are more likely today than 10 to 15 years ago.

In sum, while S.B. 2 may contribute, other changes to the misdemeanor laws and the increased police presence in Ohio also contribute to the increase observed in the number of criminal misdemeanor filings.

Death Penalty and Aggravated Murder[12]

In a provision that did not originate with the Sentencing Commission, S.B. 2 gave juries the new option of recommending life with no possibility of parole in the penalty phase of aggravated murder trials. Previously, the alternatives were death or life with parole eligibility after serving 25 or 30 years (see §2929.03(D)). The provision was expanded in 2004 to apply to non-capital cases as well.

Now that life in prison can be virtually guaranteed, the Commission staff thought that some close cases would fall (or rise) to the new category. That is, a jury reluctant to impose the death penalty may find comfort in life without parole. A jury that does not think death is warranted, but has concerns about the offender walking free at some point, may find comfort in knowing the person is not eligible for parole release.

Has there been a decrease in the number of death sentences handed down since S.B. 2's enacted change in the penalty phase of aggravated murder trials? Is there evidence to support the theory that juries are more often choosing life rather than death?

Chart 18: Death Sentences as Share of Total Aggravated Murder Intake, 1991 - 2003

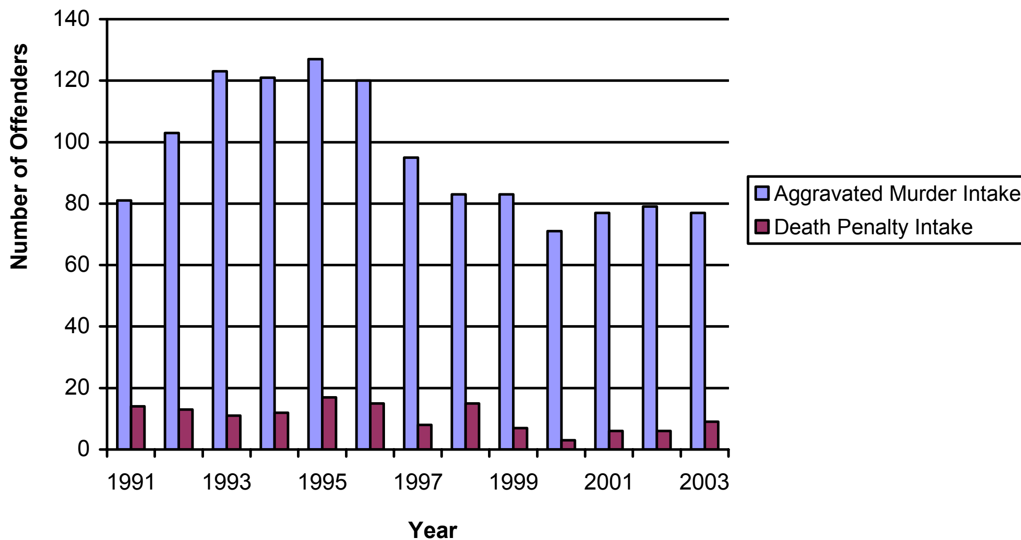


Chart 18 depicts the number of offenders convicted of aggravated

[12] Data appearing in this section were compiled from the DRC's annual (CY) Commitment Reports, published by the agency's Bureau of Research/Office of Policy.

murder entering state prisons each year since 1991. The chart compares this with the number committed to prison with a death sentence.

As shown, of all the convicted murderers entering prison, those with death sentences have traditionally comprised a small proportion of the aggravated murderers arriving at prison.

Table 2 reinforces this. Since 1991, convicted murderers entering prison with death sentences have comprised less than 20% of the total number of such offenders entering prison each year.

Table 2: Percentage of Aggravated Murderers Entering Prison with Death Sentences

Year	Aggravated Murderers Entering Prison	Those with Death Sentences	Percentage
1991	81	14	17.3%
1992	103	13	12.6%
1993	123	11	8.9%
1994	121	12	9.9%
1995	127	17	13.4%
1996	120	15	12.5%
1997	95	8	8.4%
1998	83	15	18.1%
1999	83	7	8.4%
2000	71	3	4.2%
2001	77	6	7.8%
2002	79	6	7.6%
2003	77	9	11.7%

The number of convicted murderers with death sentences entering Ohio's prisons each year has been generally lower in the period since S.B. 2's passage than in the period before the legislation. Since 1997, the number entering Death Row has averaged 9.6% of the total number of aggravated murderers entering prison. And from 1991 to 1996, before S.B. 2, the share of aggravated murderers joining Death Row was 12.1% of the total.

This may indicate that the life without parole option has reduced the number of death sentences. Remember, however, the number of instances in which an offender is sentenced to death remains very small. Therefore, it is difficult to accurately describe trends. Moreover, the total number of convicted murderers entering Ohio's prisons has declined dramatically each year since the mid-1990s, perhaps reflecting other social changes.

Local Jail Impact[13]

Petty Thieves. Generally, full-service county and municipal jails hold offenders for terms of six months or less. They also house prisoners awaiting trial, sentencing, or transfer. All incarcerated misdemeanants go to jails. Felons—typically lower level felons—may be sentenced to jail as a community control sanction.

As noted earlier, S.B. 2 raised the line between felony and misdemeanor thefts from $300 to $500 and removed the felony enhancement for repeat petty thieves. This "defelonization" of lower level theft offenses was widely expected to increase the volume of criminal filings at the county and municipal court levels. Chart 17 on p. 28 indeed shows that from 1997 to the present, criminal misdemeanor filings increased to, and leveled off at, numbers much higher than existed before S.B. 2. But many factors contribute to that increase (OVI penalties, domestic violence arrests, *etc.*), since it dwarfs the impact of defelonized thieves and direct sentencing of felons to jails.

Caseloads and S.B. 2 Guidance. Increases in the number of criminal filings at those levels would arguably lead to similar increases in local jail populations. And that possibility was expressed as a fear by decision makers at the time of S.B. 2's enactment: there was reluctance by the Commission and local officials to adding prisoners to an already overburdened jail system.

Further, S.B. 2 encouraged judges to impose non-prison, community-based sanctions on offenders less prone to recidivism and whose actions during the offense were less violent. They could be sentenced directly to jail, or (much more likely) find themselves in jail when they violate the conditions of community control.

In reducing certain offenses and guiding offenders away from state prisons, the question becomes, What impact has the legislation had on the jail system? Put another way, have more offenders found themselves in local jails because of S.B. 2's reduction of certain offenses and encouragement of non-prison sanctions?

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[13] Data appearing in this section of the report were collected by Commission staff from DRC's Bureau of Adult Detention. BAD conducts an annual on-site inspection of every full service jail in Ohio. During these inspections, information is collected regarding capacity and population and is recorded by DRC personnel on standardized data collection forms. Comparisons across county size were calculated using data from the U.S. Census Bureau.

Chart 19: Total Average Daily Inmate Count Compared to Total Reported Jail Beds, CY 1990 & 1997 - 2003

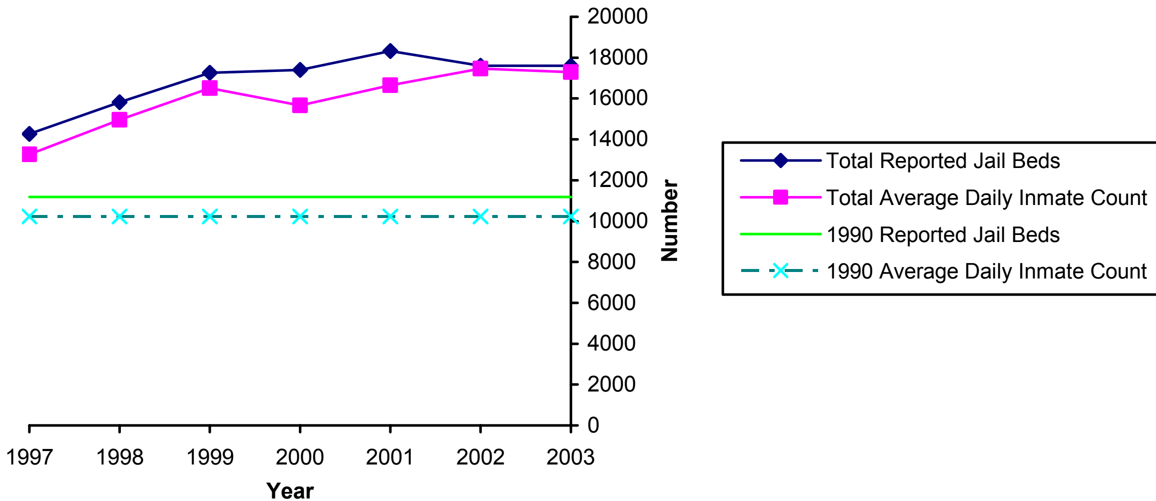

Chart 19 compares local jail populations and capacity figures in 1990 with those reported annually since 1997. The comparison illustrates a dramatic increase in Ohio's reported local jail populations *and* capacities since an earlier publication of a comprehensive jail crowding analysis.[14]

In that study, reported average daily jail populations in Ohio exceeded the state's recommended capacity by 25%. And 24 counties had jails with populations exceeding design capacities. This led to the fears expressed at the time of S.B. 2's passage that an emphasis on community-based sanctions and lowered offense levels for certain thieves would add new burdens to an overwhelmed jail system.

Chart 19 shows that Ohio's local jail population rose substantially since 1990. But a significant building program meant that reported jail capacity likewise increased during the period. Although capacity is self-reported by each jailor (it may be at odds with the state's recommended capacity or architectural design capacity), the number of jail beds so reported remained greater than or equal to the average daily population each year. This suggests that as the number of offenders held in local jails increased each year, so too did the number of jail beds necessary to hold them.

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[14] *See* Jail Crowding in Focus: A Snapshot of Ohio's County Jail Populations, Governor's Office of Criminal Justice Services, June 1989.

Non-S.B. 2 Factors. Annual jail population growth may support the contention that S.B. 2 “pushed down” a number of offenders from state prisons to the local jail system. However, there are several other factors external to S.B. 2 that probably have a greater impact:

- The “preferred arrest” policy (see §2935.03(B)(3)(b)) for domestic violence cases—enacted after S.B. 2—has increased the number of alleged and sentenced DV offenders in the jails;
- Law enforcement agencies in Ohio have dramatically increased the number of full-time police officers patrolling the streets;
- OVI offenders typically have the longest sentences in local jails, reflecting stronger social concerns—and penalties—for drinking and driving.

Growth in Capacity. With reported jail capacities growing each year at a rate similar to the population increases, it appears the jail system has adapted to the influx of offenders. The state’s jail construction boom may reflect the “if you build it, they will come” phenomenon. Regardless of size, jurisdictions seem to fill their jails.

To better understand the local jail system’s growth during the last 15 years, Table 3 compares the number of reported jail beds, or capacity, across different county populations. Capacity was calculated on a per capita basis and compared among the different-sized counties.

Table 3: Jail Beds Per 1,000 Residents, by County Population CY 1990 & 1997 – 2003

County Population	1990	1997	1998	1999	2000	2001	2002	2003
Small Counties (< 100,100 Residents)	0.90	1.09	1.32	1.41	1.44	1.61	1.63	1.61
Medium Counties (100,101 to 400,000) Residents)	0.91	1.08	1.11	1.16	1.20	1.27	1.45	1.49
Large Counties (> 400,000 Residents)	1.31	1.48	1.63	1.80	1.82	1.84	1.53	1.53

In 1990 the state’s largest counties clearly had more jail capacity, per capita, than small- and medium-populated counties. In that year, small- and medium counties had available less than one jail bed per 1,000 residents; populous counties had well over one jail bed per 1,000 residents. In 2003, however, the differences in the number of beds available in each county had narrowed substantially. In fact, as a proportion of their populations, less populous counties in 2003 exceeded the largest counties in reported jail capacity.

Given the relative equality among counties in the proportion of available jail beds, Table 4 tracks the need for such jail beds. "Need" is defined as the number of jail beds in a county adjusted to the number of index crimes reported within the jurisdiction. Although index crimes (including felonies like murder, robbery and burglary) are not generally punishable by imprisonment in local jails, the number of jail beds per index crimes provides a rough determination of jurisdictions' relative correctional needs.

Table 4: Jail Beds Per 100 UCR Crimes, by County Population CY 1997 – 2002[15]

County Population	1997	1998	1999	2000	2001	2002
Small Counties (< 100,100 Residents)	6.09	7.06	8.42	8.34	7.60	7.63
Medium Counties (100,101 to 400,000 Residents)	4.02	4.26	5.34	4.90	4.62	5.13
Large Counties (> 400,000 Residents)	3.25	3.67	3.69	3.72	3.42	2.88

As a proportion of the number of index crimes reported in each county, Ohio's less populated counties have the most jail beds available. In 2002, the last year for which county-level index crime data were available, small counties had available approximately 7.6 jail beds per 100 index crimes reported. In contrast, during the same year, populous counties had available fewer than three jail beds per every 100 index crimes reported. Generally, small- and medium-populated counties increased jail capacities across the period measured relative to the number of index crimes reported in their jurisdictions. And large counties lost jail capacity in relation to the number of index crimes reported.

What does a comparison of jail capacities by county populations have to do with S.B. 2? It shows that although counties with large, medium, and small populations send similar proportions of offenders to prison, felons in sparsely-populated counties who are not sent to prison are more likely to go to jail. In small counties, there appears to be sufficient jail space to hold sentenced offenders who otherwise would not be incarcerated in larger counties because of a lack of space.

[15] Crime data were compiled from annual Sourcebooks of Criminal Justice Statistics, published by the Bureau of Justice Statistics, U.S. Dept. of Justice. Figures for 1990 were not compared. National data on index crimes were collected by the Federal government using different methods prior to 1994. Therefore, information from periods before and after 1994 is not precisely comparable.

To better grasp available jail capacities by county population, it is helpful to track daily jail bed use. Table 5 depicts the average daily level at which jails are filled. A 100% rate represents a "full" jail.

Table 5: Average Daily Rate of Jail Beds Filled, by County Population CY 1990, 1997 – 2003

County Population	1990		1997	1998	1999	2000	2001	2002	2003
Small Counties (< 100,100 Residents)	78%		83%	82%	82%	90%	85%	89%	88%
Medium Counties (100,101 to 400,000 Residents)	89%		89%	94%	96%	93%	99%	93%	97%
Large Counties (> 400,000 Residents)	95%		101%	101%	103%	96%	94%	113%	114%

Table 5 supports the notion that less populous counties have more room to hold prisoners, including sentenced felons. Indeed, the average daily jail populations reported by large- and medium-sized counties in Ohio hover near or in excess of their jail capacities. Each bed in heavily populated counties is generally used every day. Conversely, jails in counties with small populations are not filled daily. Again, this gives judges in those counties another incarceration option for felons.

Jail Time Served. How long do alleged and sentenced offenders spend in jail? Table 6 depicts average lengths of stay. In looking at these averages, remember that these totals not only include sentenced offenders, but also persons held awaiting trial, sentencing, and transfer.

Table 6: Average Number of Days Held in Jails, by County Population CY 1990, 1997 – 2003

County Population Size	Days Served								
	1990		1997	1998	1999	2000	2001	2002	2003
Small Counties (< 100,100 Residents)	14.8		15.6	18.2	17.9	18.3	21.1	20.5	21.4
Medium Counties (100,101 to 400,000 Residents)	26.1		18.9	21.5	20.1	19.9	25.0	29.8	27.1
Large Counties (> 400,000 Residents)	108.6		73.3	88.3	100.5	101.5	54.2	47.3	49.3

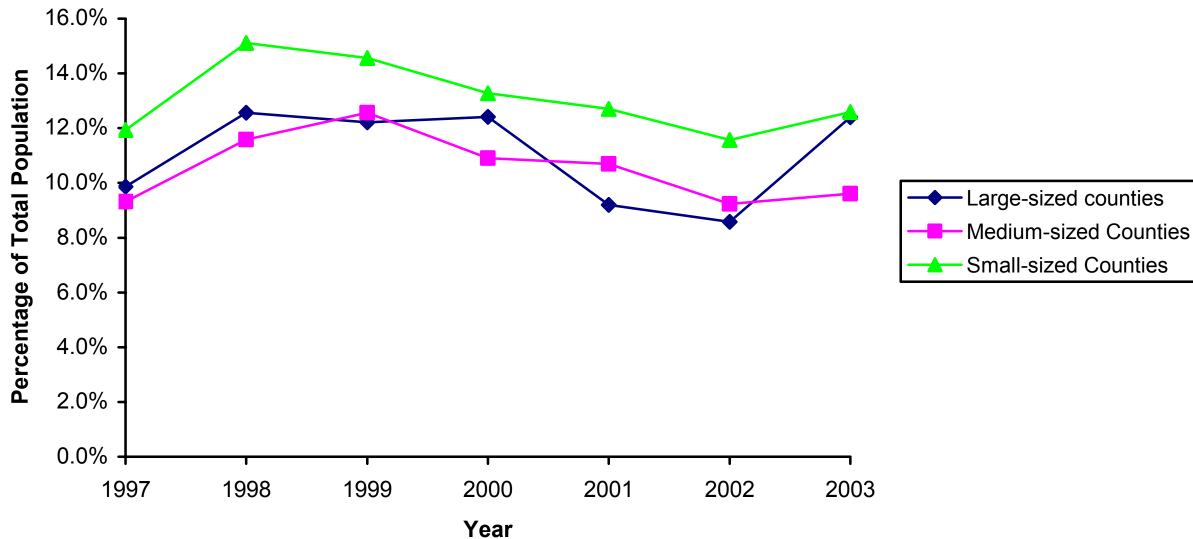
During the period studied, the average days served in jail in less populated counties increased. Such figures remained relatively static in medium-sized counties, and dropped significantly in the largest counties. In fact, other than years 1999 and 2000, offenders' average lengths of stay in large counties' jails were far lower than reported in 1990. Since

2001, offenders served time in large counties' jails, on average, less than half the number of days they spent in 1990.

Why such a large decline in the most populous counties? One reason might be that as the jail populations in those counties continue to exceed jail space, offenders are being held for shorter periods of time. Another reason might be that because S.B. 2 (coupled with increased funding by the General Assembly) made available a broader mix of sentencing options, judges have residential alternatives to jail. The development may be most pronounced in large counties because sufficient infrastructure exists to allow the full continuum of alternatives.

Jail Population Makeup. Who are the offenders in Ohio's local, full service jails? Charts 20 through 22 show the proportions of offenders in jails who are sentenced felons, sentenced misdemeanants, and persons awaiting trial or other hearing, transfer, or sentencing.

Chart 20: Sentenced Felons as Proportion of Total Local Jail Population, by County Size, CY 1997 - 2003



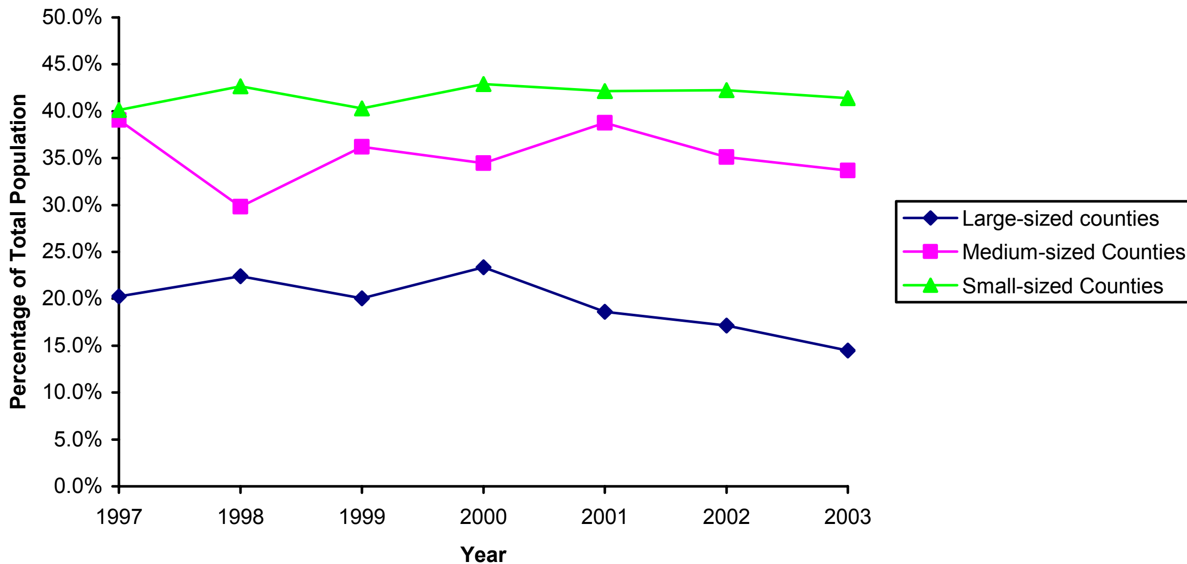
During most of the period studied, the least populous counties led the state in the proportions of their jails filled by sentenced felons. This is not surprising since the small counties proportionately have the most available jail space among Ohio's counties.

Judges in less populous counties tend to have strong working relationships with their county sheriffs. While using the jail for a higher percentage of offenders in these counties (where community based

correctional facilities and halfway houses are scarce), judges in small counties tend to impose shorter terms (see Table 6, p. 35).

Large counties, having the least available jail space, held greater proportions of sentenced felons in 2003 than in previous years.

Chart 21: Sentenced Misdemeanants as Proportion of Total Local Jail Population, by County Size CY 1997 - 2003

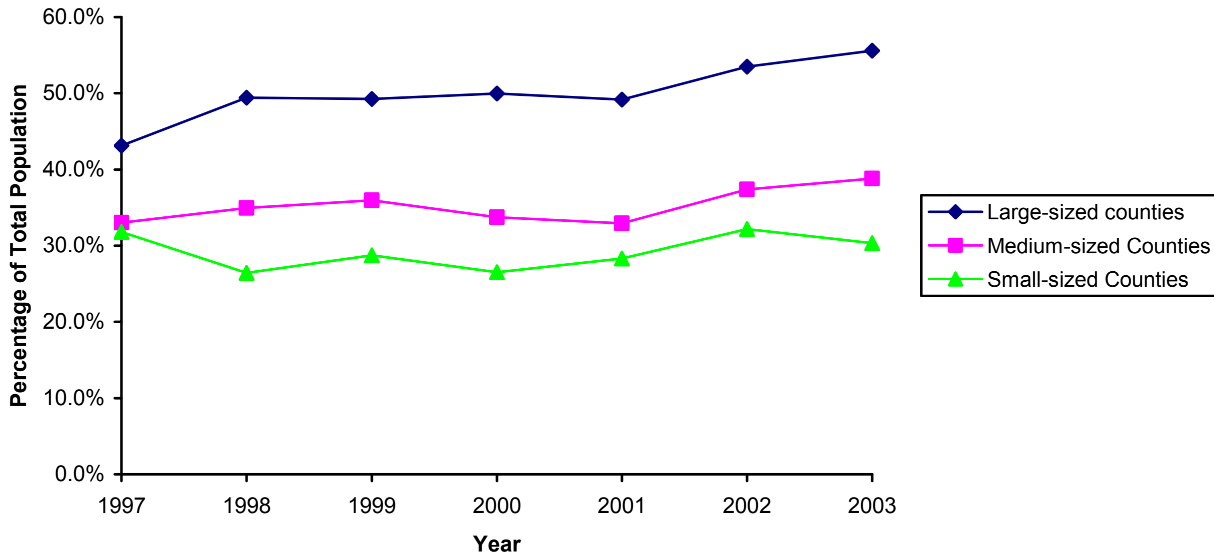


A look at sentenced misdemeanants offers starker evidence of a trend towards greater jail incarceration rates in small counties. As with sentenced felons, sparsely populated counties lead the state in the proportions of sentenced misdemeanants in their jails. Conversely, the most populous counties' jails tend to hold the smallest proportions of sentenced misdemeanants. In 2003, sentenced misdemeanants constituted over 41% of small counties' average daily jail populations. During the same year, approximately 14% of large counties' jails were comprised of sentenced misdemeanants.

Jails also hold non-sentenced persons. Most are pre-trial detainees, but the group also includes those awaiting sentencing or transfer to another facility and sanction violators awaiting hearings. Most are felony cases. Here, too, differences in county populations are telling. As shown in Chart 22, the jail populations of large counties have much higher proportions of non-sentenced persons than in medium or small counties. For example, in 2003, non-sentenced persons in felony cases comprised approximately 30% of the average daily jail population in less populous

counties. By comparison, they constituted over 55% of large counties' average daily populations that year.

Chart 22: Persons Awaiting Felony Trial, Sentencing, or Transfer As Proportion of Total Local Jail Population, by County Size, CY 1997 - 2003



Why such differences? One reason might be the court systems in highly populated counties process more criminal cases, both at the common pleas and municipal levels. The greater volume may mean longer waits for trial, sentencing, and transfer.

Early Release and Post-Release Control

Prior to S.B. 2, the actual time served by inmates was controlled by the Parole Board and/or prison administrators. This all changed with S.B. 2. Control of the actual sentence served shifted back to judges.

Under S.B. 2's "truth in sentencing":

- Parole and "shock" parole eligibility largely ceased to exist for persons committing felonies after July 1996. Releases by the Parole Board remain only for offenders convicted of murder and sentenced to life imprisonment with parole eligibility after a set number of years (see, e.g., §2929.03(D)(2)) and for some long-term sex offenders under later legislation. Parole cases you still hear about typically involve persons who committed serious crimes before July 1996;

- Time off for good behavior ("good time") was repealed. Good time used to lop off about 30% of an inmate's sentence. And it was virtually automatic;
- Control over the actual time served shifted back to sentencing judges. Judges now impose definite prison terms. If a judge imposes four years, the offender almost always serves the full four years.
- The bill allows some modification of terms imposed at sentencing, but they are under the control of the sentencing judge.
  - Judges can grant judicial releases that are similar to "shock probation" under the old law. But the court must hold an open hearing before release and the victim can participate.
  - "Boot camp" or "intensive program" prisons and "transitional control" (formerly furlough) were retained, but judges can veto any suggested placement.
- S.B. 2 also expanded the pool of offenders who could (or must) be supervised upon release from prison. Called post-release control ("PRC"), supervision can involve a full continuum of controls (see §2967.28(D)(1)). High-level offenders and all sex offenders must be supervised after prison, typically for five years. PRC is optional for all other releasees, typically for one to three years. If the releasee violates conditions of PRC, he or she may be returned to prison.

Table 7 compares the manner in which offenders were released from prison before and after S.B. 2 and whether they were subject to supervision.[16]

Table 7: Offender Release Mechanisms

	FY 1996		FY 2003	
	Releases	**% of Total Releases**	**Releases**	**% of Total Releases**
Shock Probation-Y	2,538	13.2%	49	0.2%
Judicial Release-Y	-	-	1,559	5.9%
Parole-Y	3,331	17.3%	4,200	15.9%
Post-Release Control-Y	-	-	9,326	35.3%
Expired Sentence-N	11,375	59.2%	950	3.6%
End of Court Imposed Term - Y	-	-	8,896	33.7%

Supervision Eligibility: Y = Yes; N = No

The table compares prison releases during FY 1996, the last year in which pre-S.B. 2 release programs were fully available, and FY 2003, the most recent year in which comparable data were obtained. To simplify

[16] Data appearing in Tables 7 and 8 were compiled from the DRC's annual (FY) Summary of Institution Statistics reports, published by the agency's Bureau of Research/Office of Policy.

this analysis, the table focuses on the primary release mechanisms, omitting less frequent forms of release like successful appeal, death, escape, reprieve, commutation, and pardon.

Table 8 distills, and more dramatically illustrates, the contrast in the types of releases used before and after S.B. 2 and the number of offenders under supervision.

Table 8: Offenders Released from Prison Under Supervision

	FY 1996		FY 2003	
	Releases	% of Total Releases	Releases	% of Total Releases
Supervised	7,647	39.8%	16,457	62.3%
Not Supervised	11,375	59.2%	9,846	37.2%

Note the wholesale shift in the rates of supervised releases after S.B. 2. In FY 1996, well over half of the offenders leaving prison were *un*supervised. They walked away when their prison terms expired. In contrast, almost two-thirds of offenders leaving prison in FY 2003 were supervised, to some degree, under PRC. In fact, the rate at which offenders left prison under supervision in FY 2003 (62.3%), well exceeded the rate of supervised releases in FY 2000 (54.8%), the last year for which the Commission staff analyzed release data.

Clearly, S.B. 2 is meeting its goal of making more former inmates eligible for supervision. Arguably, this protects the public while allowing a continuation of rehabilitation initiatives for the offender.

Felony Operating a Vehicle Under the Influence

The offense of operating a motor vehicle while intoxicated (OVI) can be punishable as a felony in Ohio. Specifically, the offense becomes a felony if an offender has three or more prior OVI convictions in the past six years or five priors in 20 years (see §4511.19(G)(1)(d)).

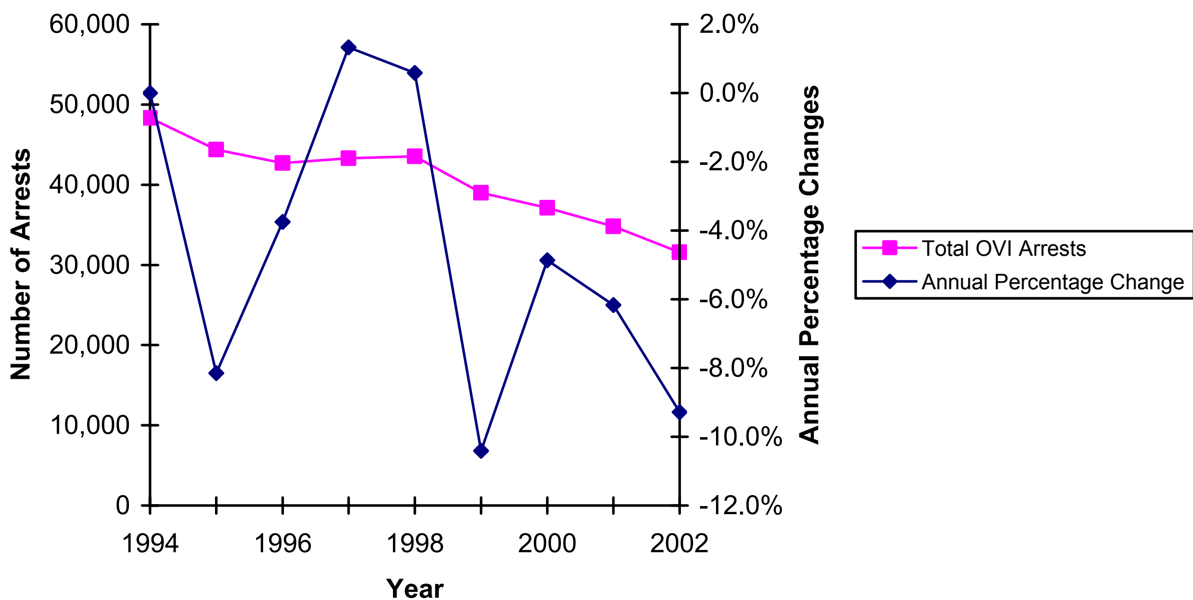
The offender with three prior OVIs in six years is an F-4, subject to mandatory incarceration of 60 or 120 days. At the discretion of the sentencing judge, the incarceration may be served either in a local jail, CBCF correctional facility, or state prison. Added time may be imposed beyond the mandatory period (see §2929.13(G)(1) & (2)).

Any subsequent OVI makes the offender an F-3 (see §4511.19(G)(1)(e)). An offender convicted of or pleading guilty to an F-3 OVI offense can be

sentenced to one to five years under S.B. 2's standard F-4. If the judge does not use the range, the court must impose a mandatory prison sentence of 60 or 120 days. Local options are unavailable (see §2929.13(G)(2)).

(Last year, the General Assembly modified the felony OVI law to require a 20-year "look-back" period in counting an offender's previous impaired driving convictions. H.B. 163, sponsored by Rep. Oelslager, makes any offender with five prior OVIs in 20 years a felon—irrespective of the number in six years—and carries a potential mandatory prison term of up to five years. The bill took effect in September 2004. It is too early to judge the impact of H.B. 163.)

Chart 23: Total OVI Arrests in Ohio, with Percentage Changes, CY 1994 - 2002



OVI Arrest Trends.[17] The number of OVI arrests in Ohio has dropped steadily since 1994, as shown below in Chart 23. As we have seen, this occurred during a period in which arrests for most offenses increased. Thus, it is reasonable to conclude that fewer people are driving impaired.

Why the decline in OVIs? The decrease seems to reflect a combination of:

[17] OVI arrest data appearing in this section of the report come from the University of Virginia's online Geostat Center, http://fisher.lib.virginia.edu/collections/stats/crime. This site made available arrest data for OVI offenses at the county level, whereas the Federal Sourcebooks of Criminal Justice Statistics compiled such information only at the statewide level. Ohio BMV reports *conviction*, not arrest, data.

- Reduced social tolerance of drinking and driving;
- Beefed up and well-publicized state and local law enforcement efforts; and
- The deterrent effect of the progressively tougher mandatory sentences enacted by the General Assembly.

OVI Prison Intake.[18] While declining, OVI remains a common crime. It would seem that the sheer number of persons arrested for OVI would net a significant number of fourth and subsequent offenders. Most of them would fall under Ohio's felony OVI laws.

In estimating the impact of the felony OVI law on Ohio's correctional system, the Commission staff predicted in 1996 that each year approximately 3,300 OVI offenders would be *eligible* for mandatory prison sentences. The staff arrived at the figure by following traditional statistical trends. In any given year, about 50% of the persons convicted for drinking and driving are first offenders and about 25% are second offenders. The numbers continue to cut roughly in half for each subsequent offense. Applying the historical patterns to mid-'90s data, the staff made the 3,300 prediction.

As Chart 24 illustrates, the number of offenders entering state prisons under Ohio's felony OVI law has risen substantially since 1997.
But it also shows that, after years marked by high growth rates in the number of OVI offenders going to prison (the OVI intake line), changes in those annual numbers appear to have leveled recently (the annual percentage changes line).

The number of OVI offenders entering prison has grown from literally zero over the past several years. In 2000, 155 OVI offenders entered prison. By 2004, the number reached 269. There is clearly a trend, but the actual intake numbers are very small relative to the number of OVI convictions annually.

Probably 85% to 90% of those convicted of OVI in a given year are not prison-eligible, since they have three or fewer prior OVIs. Moreover, not everyone with four OVIs in six years is given a felony sentence. (For instance, some prosecutors and courts drop prior mayor's court convictions for lack of a record or because the defendant did not have an attorney.) Even so, it is still surprising that prison intake has not increased more significantly under the felony OVI statutes.

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[18] Data appearing in this section of the report were collected from the DRC's annual (CY & FY) Commitment Reports, published by the agency's Bureau of Research, Office of Policy.

Chart 24: OVI Prison Intake, FY 1996 - 2004

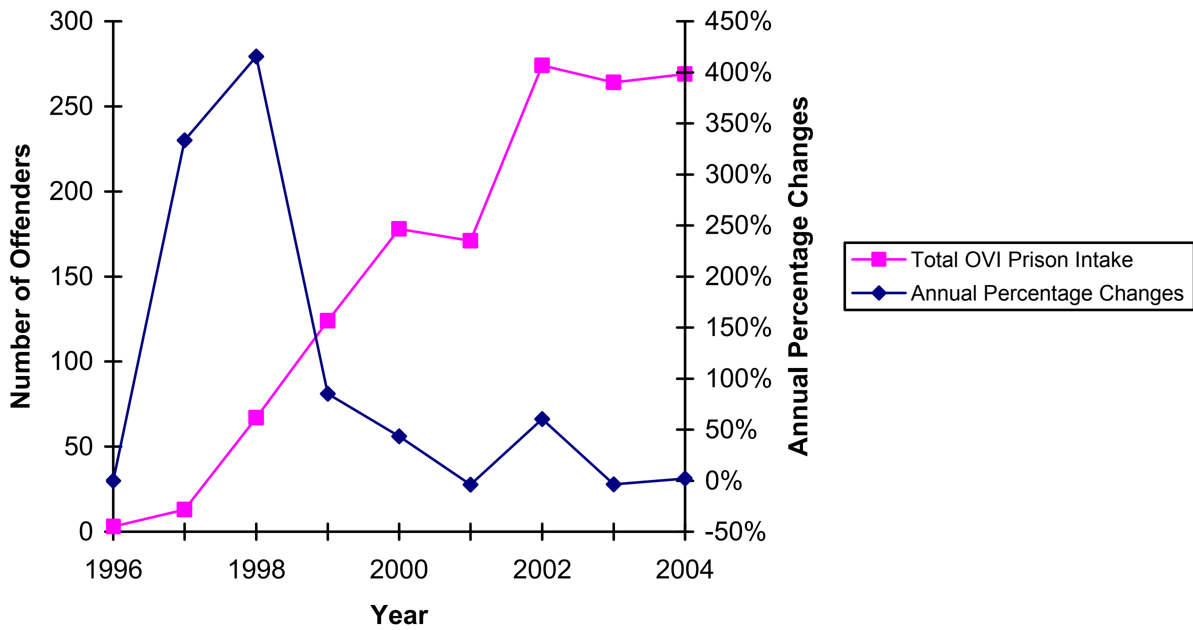


Table 9 shows the number of OVI convictions reported to BMV in two recent years. It then uses a conservative 5% to predict prison eligible OVI offenders. (This reflects the staff's rough prediction technique noted on the prior page and the assumption that up to half would be convicted of fewer priors or lesser charges, found not guilty, or sentenced to a CBCF or jail rather than prison). Then it shows the actual number of felony OVIs who entered prison.

Table 9: OVI Convictions and Prison Intake CY 2001 & 2002

	2001	2002
OVI Convictions	50,199	49,566
***Estimated* OVI Arrestees with 3 or more Prior OVIs (5% of Convictions)**	2,510	2,478
Felony OVI Prison Intake	236	254

Why is there such a difference between the number of offenders estimated to enter prison and the actual count? Why are not more OVI offenders entering state prisons and vacating local jails?

A significant reason might be that judges, when sentencing F-4 OVIs, choose to incarcerate them in community based correctional facilities

and local jails. Remember, judges have discretion to select where the mandatory term will be served for the fourth OVI in six years: *either* locally (CBCF or jail) *or* in state prison.

CBCFs provide secure confinement coupled with work and treatment programs. Jails are not treatment oriented, and cost local governments (typically counties) more, but can provide the court with greater leverage over individual offenders.

Another reason might be that fewer offenders are committing four or more OVI offenses. The deterrent value associated with mandatory terms seems to be a factor reducing the overall number of persons arrested for OVI. Logically, then, mandatory terms may be deterring repeat offenders, including those eligible for prison terms.

Also, local justice systems sometimes informally divert OVI offenders from prison sentences. Priors can become part of plea negotiations. Sometimes there is a sense that the case should stay in misdemeanor courts where the judges are much more familiar with complex OVI law and the various options it affords. This possibility was raised by the Commission staff in its 2001 monitoring report, and data collected during the ensuing period support the notion.

Where Do Sentences Fall in the Felony Ranges?

S.B. 2's truth in sentencing language provides that prison terms imposed on offenders in open court are the actual terms to be served. By eliminating such concepts as "good time" and parole, the legislation removed the ability of extra-judicial authorities (*i.e.* the Parole Board and prison administrators) to adjust prison terms imposed by sentencing judges.

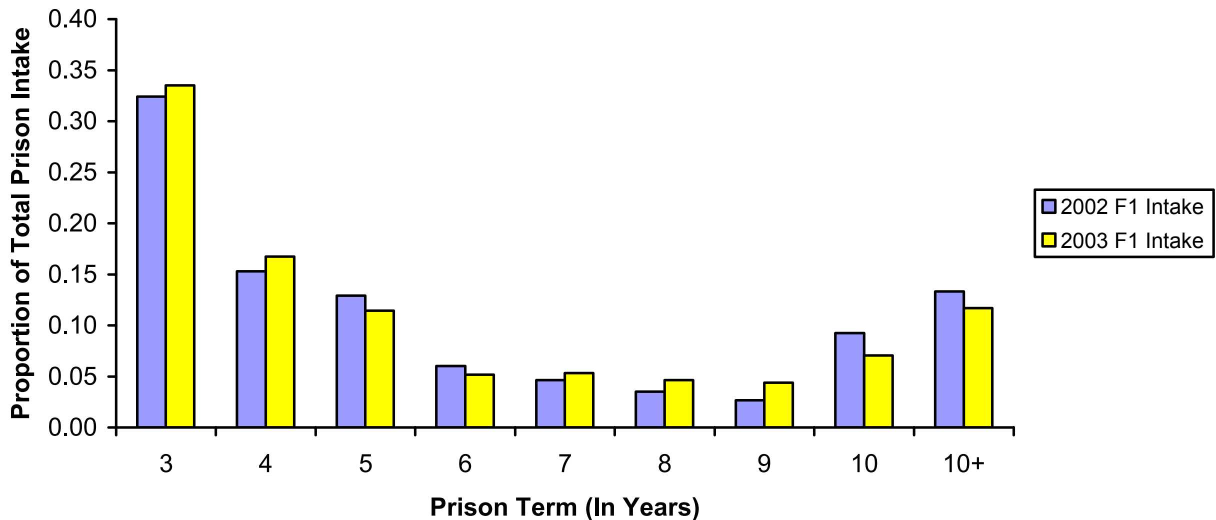
When sending an offender to prison (whether by choice or statutory mandate), a judge must choose a definite term from a range assigned by statute to the appropriate felony level (§2929.14). For example, when sentencing for an F-1, a judge has discretion to select from three, four, five, six, seven, eight, nine, or 10 years. For an F-4, the judge may impose a prison term as short as six months or as long as 18 months. S.B. 2 guides judges within the ranges by various considerations, albeit in a manner more flexible than the grid matrix guidelines used in most other sentencing commission states and developed by the United States Sentencing Commission for use in Federal courts.

What are the most common prison term lengths imposed on offenders at each level? Charts 25 through 29 illustrate the sentence lengths favored by judges in 2002 and 2003 for single offenses. [19]

F-1s. For offenders entering prison in 2002 and 2003 for F-1s, the minimum three-year term was the most frequent choice. This reflects S.B. 2's non-binding language that steers judges toward the minimum term on an offender's first commitment to prison. The minimum also was the most common choice in FY 2000. Judges sentenced F-1s to three-year prison terms approximately 30% to 35% of the time.

Because the ranges may be inadequate for some heinous offenders, S.B. 2 allows an additional one to 10 years for certain repeat violent offenders (RVOs) and major drug offenders (MDOs), as well as additional time for committing a felony with a firearm and other enhancements. One difference observed between the 2000 data and data shown in Chart 25 is the frequency with which judges imposed prison terms greater than 10 years for F-1s. Indeed, in 2002 and 2003, judges chose to imprison F-1s longer than 10 years about one-eighth of the time. By comparison, judges imposed terms longer than 10 years 4.5% of the time in FY 2000.

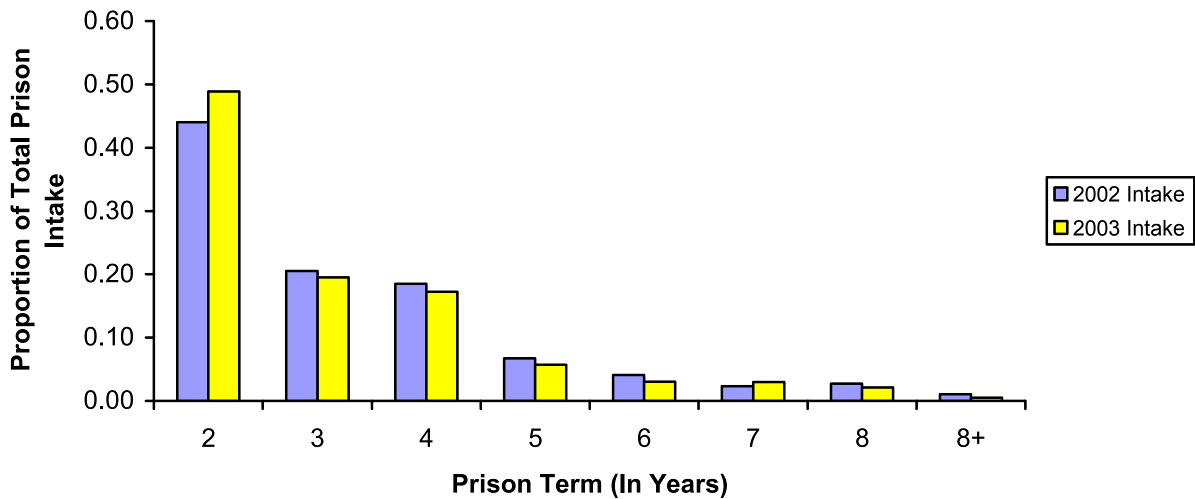
Chart 25: First Degree Felony (F-1) Prison Sentence Frequencies, CY 2002 - 2003



[19] Data appearing in Charts 25 through 29 were obtained from the DRC's unpublished annual intake database. Offenders entering state prisons during CY 2002 and CY 2003 were individually tracked and coded by offense level. Only offenders sentenced to prison for single offenses were measured. Multiple offense convictions would distort this analysis because they often resulted in longer aggregate sentences. The data were then aggregated and charted by prison term length.

F-2s. During the same period, judges imposed a two year prison term, the shortest term, for F-2s about 45% to 50% of the time. Lengthier terms were imposed with declining frequency. This tracks very closely to data analyzed by the Commission staff for FY 2000. (Terms higher than the eight year maximum reflect firearms specifications, RVOs, and the like.)

Chart 26: Second Degree Felony (F-2) Prison Sentence Frequencies, CY 2002 - 2003



F-3s. Similarly, in Chart 27, we see that judges preferred sentencing F-3s to the shortest prison term available in the range, with longer sentences declining in frequency. The Commission staff found the same pattern in FY 2000. As with the other tables, terms above the five-year statutory maximum reflect additional penalties such as time imposed for having a firearm in the commission of a felony.

F-4s. Unlike higher level felons, for F-4s and F-5s (Chart 28), judges choose prison terms in monthly increments. Thus, if an offender convicted of an F-4 faces incarceration, the judge has the option of sentencing the offender to a term of six to 18 months. (Again, terms greater than the maximum indicate firearm time or a similar add on.) The patterns were slightly different than what we saw for higher level felons.

Chart 27: Third Degree Felony (F-3) Prison Sentence Frequencies, CY 2002 - 2003

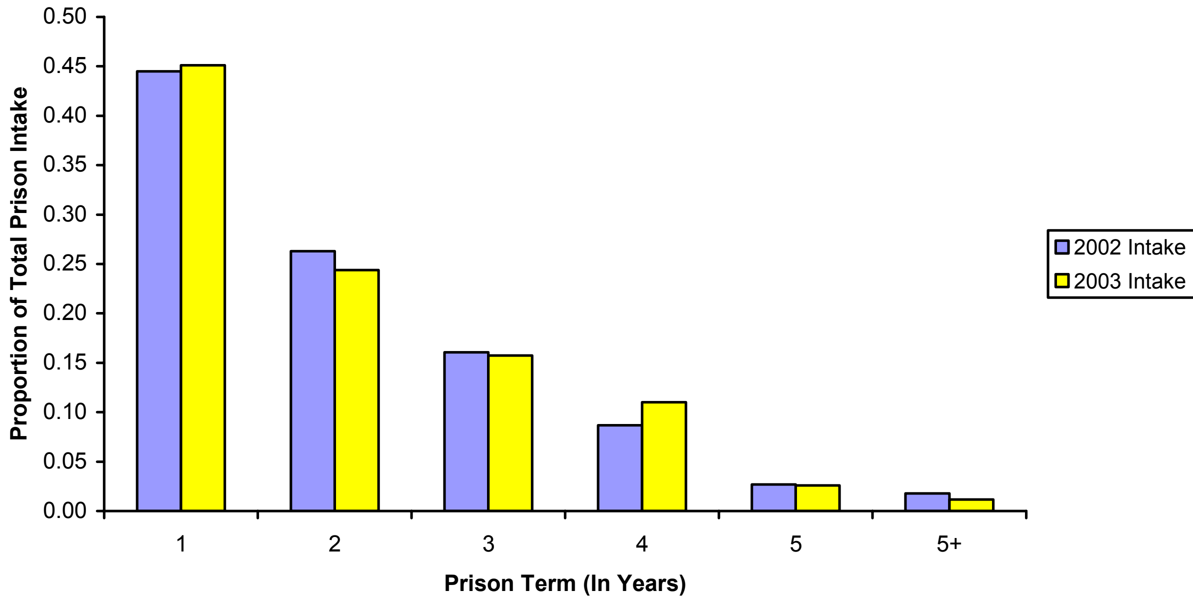
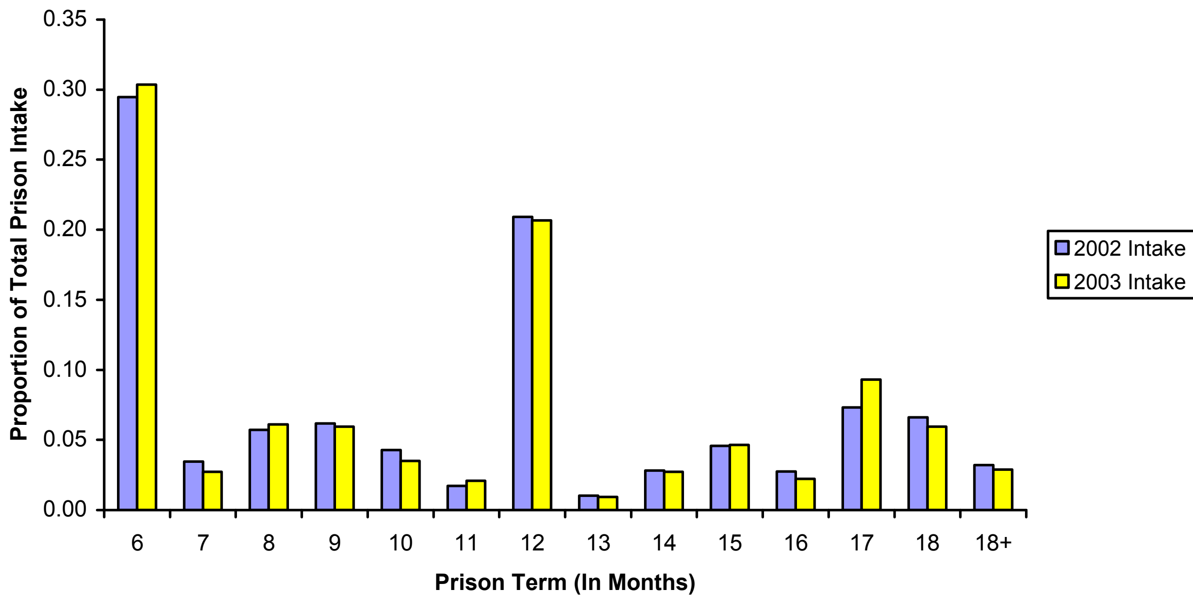


Chart 28: Fourth Degree Felony (F-4) Prison Sentence Frequencies, CY 2002 - 2003



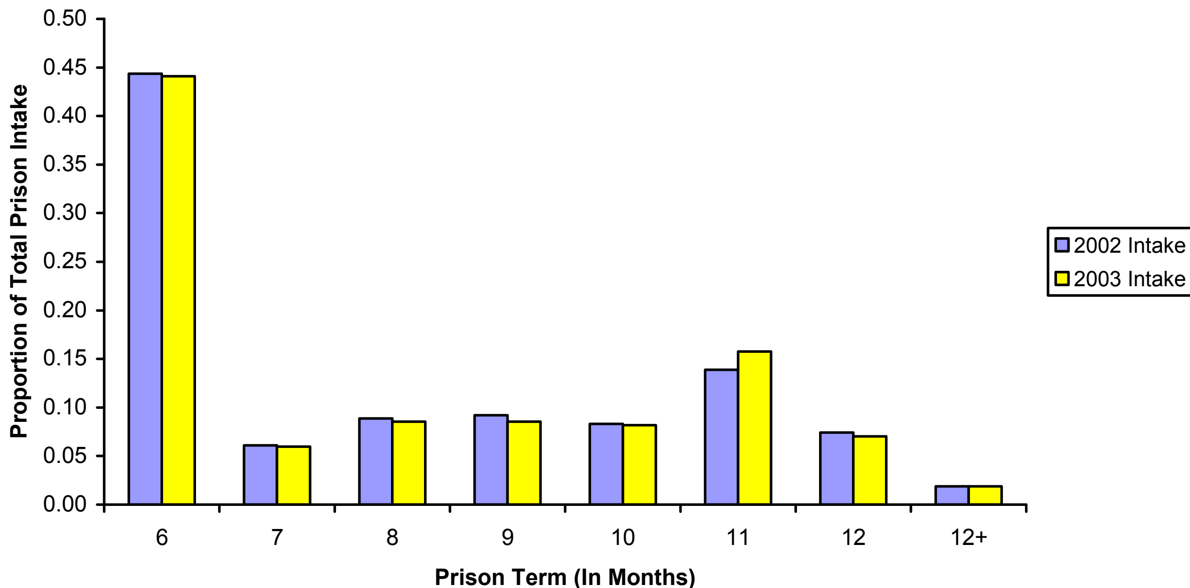
In 2002 and 2003, judges preferred prison terms of six and 12 months for F-4s. There was a lesser, but still pronounced, preference for the maximum term (18 months) and the penultimate term (17 months).

These frequencies are nearly identical to those found by the Commission staff from FY 2000 data.

F-5s. For F-5s, the lowest level felons, the range of prison terms is a definite period from six to 12 months. Judges favored the low end of the range for F-5s, choosing six month terms almost half the time in 2002 and 2003 (Chart 29). Once again, the frequencies were nearly identical to those reported by the Commission based on FY 2000 data.

The relative popularity of sentences that are one month short of the maximum available for F-4s and F-5s probably reflects sentencing judges' desire to avoid the maximum term, and its incumbent appeal of right, for less serious felons.

Chart 29: Fifth Degree Felony (F-5) Prison Sentence Frequencies, CY 2002 - 2003



Appellate Review

S.B. 2's Historic Change. Until the passage of S.B. 2, trial judges' criminal sentencing decisions were largely immune from appellate review.[20] Sentencing decisions in Ohio were reviewed only if the appellate court granted leave to appeal.

[20] This section was informed, in part, by Griffin, Burt W. & Katz, Lewis R., *Ohio Felony Sentencing Law* Ch. 10 (2004).

When sentence appeals were allowed, there was no formalized process for reviewing felony sentencing decisions. Rather, unless the decision was clearly contrary to law, the standard of review for Ohio's appellate courts was whether the trial court's action represented an "abuse of discretion".

Before S.B. 2, Ohio did not have a sentencing structure that guided judicial discretion as clearly as under the bill. It was very difficult to demonstrate a judge's abuse of such discretion. As law Prof. Lewis Katz notes, "'the abuse of discretion' standard…in effect, [was] no review."[21]

With S.B. 2, both defendants and the state were given the ability to appeal felony sentences *as a matter of right* (see below) in specified situations. The reforms effectively narrowed appellate court discretion in choosing which criminal appeals to hear.

Defendants possess the right to appeal in four specific instances (see §2953.08(A)):

- If a non-mandatory maximum prison term has been imposed for one offense or, if two or more offenses are involved, the court imposed the maximum term for the offense of the highest degree;
- If a prison term has been imposed for a fourth or fifth degree non-drug felony, and the judge has not enumerated justifying factors;
- If the maximum add-on sentence of 10 years has been imposed on a repeat violent offender or major drug offender;
- If the sentence is contrary to law.

Prosecutors, in turn, possess a new right of appeal in three instances (see §2953.08(B)):

- If a first or second degree felon has received a community control sanction instead of a prison term;
- If the court grants early judicial release to a first or second degree felon serving a prison term;
- If the sentence is contrary to law.

Note that the common law appeal that a decision is "contrary to law" is no longer subject to appeal by leave of court. It is now an appeal of right for both parties.

(Separately, after S.B. 2, the sex offender law added a right for the defendant or state to appeal a court's decision that a defendant is, or is not, a "sexual predator" or a "child victim predator.")

[21] *Id.* at §10:22.

Under S.B. 2, appeals by leave of court still are available on other grounds. For instance, a defendant may seek leave to appeal the imposition of consecutive sentences, but only when the *aggregate of the sentences* exceed the maximum sentence of the most serious offense for which he or she was convicted.[22]

Neither the state nor defendants can appeal from sentences that are recommended by both parties, provided such sentences are not contrary to law. This precludes either party from appealing sentence agreements.

Caseload and Costs Impact.[23] Since S.B. 2 created a formal sentencing appeals mechanism, there was concern among decision makers about additional costs to Ohio's appellate court system. Costs were projected to increase because of the time needed by courts, public defenders, and prosecutors to process these cases through appeal. The concern was sufficient to cause the General Assembly to create both a special Appeals Cost Oversight Committee and to allocate $2 million in the state's FY 1997 budget to reimburse counties for such costs.

Chart 30: Total Criminal Appeals Filed, 1988 - 2002

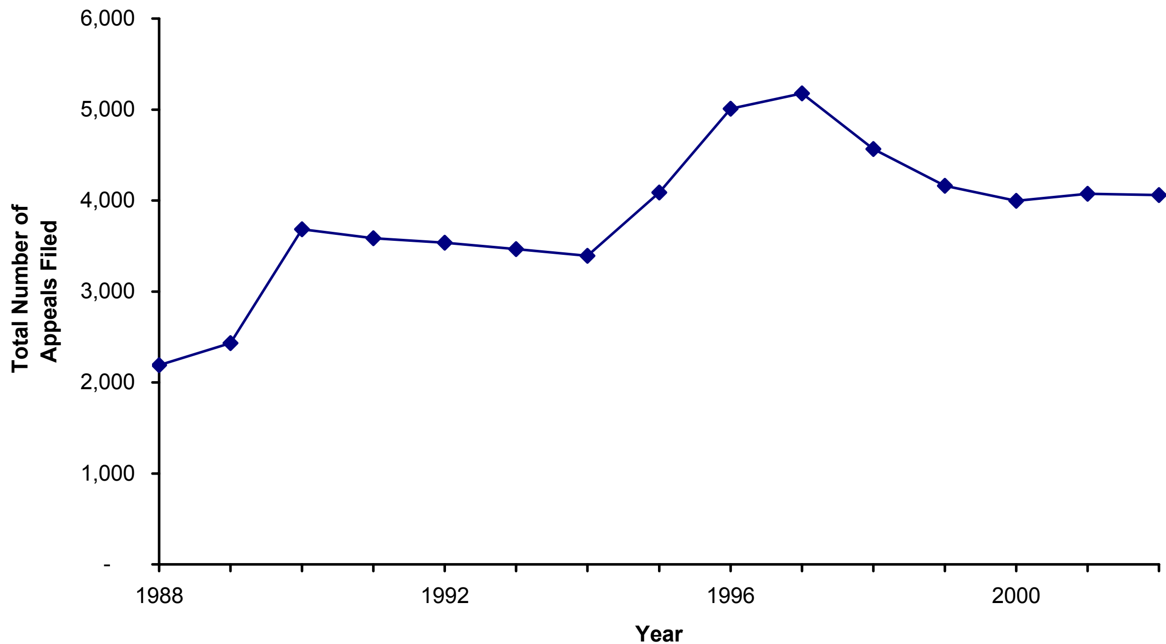


Chart 30 depicts the total number of filed appeals since 1988. This includes *all* appeals, not just those under S.B. 2. (The majority of appeals

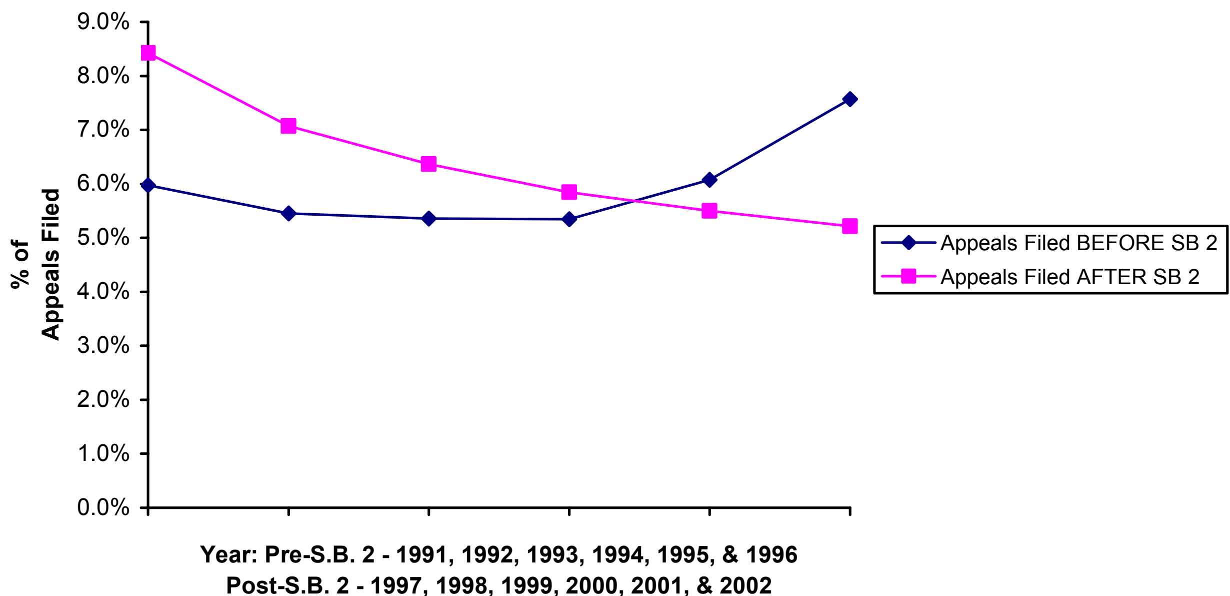
[22] Griffin, Burt W. & Katz, Lewis R., *Ohio Felony Sentencing Law* § 10:15 (2004)
[23] Data appearing in Charts 30 and 31 were collected from annual Ohio Courts Summaries, published by the Supreme Court of Ohio.

in criminal cases are not based on S.B. 2. They instead relate to procedural and other issues.) However, Chart 30 is noteworthy for showing the spike in appeals filed in 1997, the first full calendar year in which S.B. 2's reforms were effective.

Even with the spike, however, only about 9% of all cases terminated resulted in some type of appeal. Since 1997, the proportion of appeals filed to terminated cases has dropped steadily to levels below those observed before S.B. 2's passage.

The relative decline in the number of appeals filed after S.B. 2's passage is perhaps better illustrated by Chart 31. That chart overlays the proportion of appeals to the number of terminated cases for the periods immediately before and after S.B. 2 was enacted. Note the large increase in the proportion of appeals that occurred leading up to and immediately following S.B. 2's passage. From the high-water mark in 1997 until 2002 (the last year for which data were available), the proportion of appeals declined continuously.

Chart 31: Total Criminal Appeals as Percentage of Total Cases Terminated for 6 Years
Pre-S.B. 2 (1991-1996) & Post-S.B. 2 (1997-2002)



As such, it appears the onslaught of appeals first predicted in 1996 has not occurred. In fact, in 1998, the Commission returned the $2 million originally allocated for additional appeals, saying it would not be needed.

"Silent" Record. Turning from the fiscal impact to substantive issues, S.B. 2 instructs sentencing trial judges make certain findings on the record. While most do, one source of persistent trouble, according to Prof. Katz (a former member of the Sentencing Commission's Advisory Committee) is the continued adherence in some districts to the legitimacy of "silent records" in sentencing offenders when judges fail to make the requisite findings.[24]

Specifically, it appears that two pre-S.B. 2 Ohio Supreme Court cases[25] are still being cited to support appellate courts' deference to lower courts' silent records in felony sentencing decisions. A "silent" record is a decision that does not expressly set forth the factors and reasons used by the judge in sentencing a particular offender.

S.B. 2 specifically requires judges to make findings and list reasons for particular sentencing decisions. Yet, in the Second District,[26] an offender appealed her sentence to several consecutive prison terms, having had no prior criminal record, arguing the trial court failed to specify which factors were used in its decision sending her to prison. The appellate court rejected the need for the trial court to enumerate such findings. It was enough that the trial court "stated it had carefully considered the purposes and principles of sentencing…and the seriousness and recidivism factors[.]"[27] Citing the Ohio Supreme Court's pre-S.B. 2 *Adams* decision, the Second District adhered to the presumption that a silent record means the trial court considered all factors required in sentencing decisions. As of the time of this writing, this case was still good law in the Second District.

In the Twelfth District,[28] an offender appealed the trial court's sentence to the maximum prison term available. The offender argued the trial court failed to consider the required seriousness and recidivism factors and to make necessary findings before imposing the maximum. The trial court stated in its sentencing entry that it had "'balanced the seriousness and recidivism factors.'"[29] The appellate court, held the trial court's mere balancing of the factors *necessarily* involved a consideration of those factors. Although those factors were not expressly set forth in the trial court's decision, the appellate court found the required factors had been

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[24] Griffin, Burt W. & Katz, Lewis R., *Ohio Felony Sentencing Law* § 10:22 (2004).
[25] *See State v. Cyrus* 63 Ohio St.3d 164 (1992) and *State v. Adams* 37 Ohio St.3d 295 (1988).
[26] *See State v. Anderson-Melton* 1999 Ohio App. LEXIS 3372 (Ohio Ct. App. 2d Dist. Montgomery County 1999).
[27] *Id.* at 5. Note the appellate court employed the old "abuse of discretion" standard of review, instead of the "clear and convincing" standard of review preferred by S.B. 2.
[28] *See State v. Taylor* 2000 Ohio App. LEXIS 476 (Ohio Ct. App. 12th Dist. Butler County 2000).
[29] *Id.* at 6.

properly considered. In so doing, the Twelfth District cited the Ohio Supreme Court's *Cyrus* decision upholding a silent record as evidence of a trial court's consideration of the required factors. As of the time of this writing, this opinion was still good law in the Twelfth District Court of Appeals, having in fact been cited favorably in a subsequent case.[30]

The Eighth District also cited *Adams* in support of the silent record presumption.[31] As part of a second appeal of his conviction for multiple felonies, an offender argued the trial court failed to set forth reasons supporting a lengthy prison sentence. In denying the appeal, the appellate court stated a silent record raises the presumption the lower court properly considered the required factors under S.B. 2.

Calling the continued use of the silent record presumption "outdated," Prof. Katz admonishes those district courts of appeals to insist on a full explanation of each sentence by having the lower court explain the sentence on the record with specific reference to those statutory factors relied upon for the sentencing decision.[32]

Sentencing Consistency

As noted above, S.B. 2 requires sentencing judges to weigh the relative seriousness of offenses and offenders' likelihood of recidivism. The act also guides judges by offense levels and with regard to minimum and maximum prison terms.

The Commission assumed that felony sentencing across the state would be more consistent under S.B. 2. This is not to say that uniformity was expected. After all, local communities may still reflect local values regarding crime. But the goal was to further the principle that similar offenders committing similar offenses ought to be treated similarly.

Did S.B. 2 result in greater consistency across counties? The data suggest that S.B. 2 has, in fact, improved consistency, albeit not dramatically.[33]

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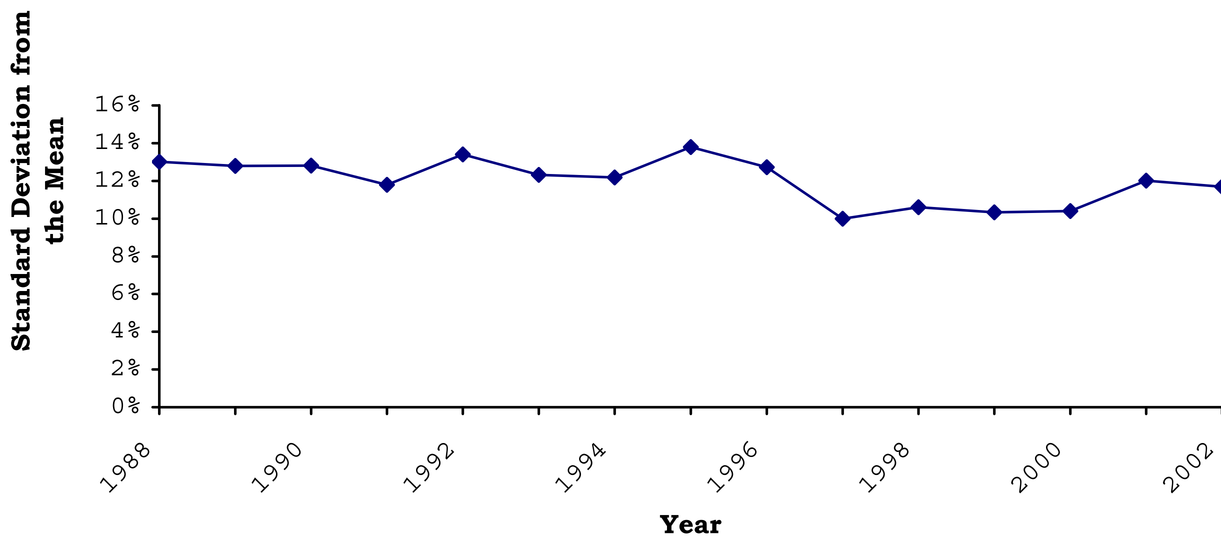
[30] *See State v. Doby* 2000 Ohio App. LEXIS 5142, at 11 (Ohio Ct. App. 12th Dist. Butler County 2000).
[31] *See State v. Cvijetinovic* 2003 Ohio App. LEXIS 6442 (Ohio Ct. App. 8th Dist. Cuyahoga County 2003).
[32] Griffin, Burt W. & Katz, Lewis R., *Ohio Felony Sentencing Law* § 10:23 (2004).
[33] The Commission staff determined the prison intake rate for each of the 88 counties. For each year since 1988, the prison intake rates of each county were averaged together to obtain a statewide intake rate. Around that average intake rate existed a range, within which all the counties' own intake rates fell. Within this range, the Commission staff calculated the average degree to which the counties' prison intake rates differed from the statewide average. This is known as standard deviation. And each year's standard deviation, or average distance of the counties' intake rates from the statewide average, represents the data points in Chart 32.

Chart 32 depicts the year-to-year variation in the percentage of common pleas criminal case terminations resulting in a prison term. On a county-by-county basis, the Commission compared the number of offenders sent to prison each year as a percentage of the total criminal cases terminated that year. For example, if a county's common pleas court terminated 100 criminal cases in 2003, and 25 offenders in those cases were sent to state prison, the county would have a prison intake rate of 25%.

Compared to the statewide average rate of prison incarceration resulting from all terminated cases, by how much do individual counties vary in their rates of prison incarceration?

In 1988, about 30% of all criminal cases terminated by common pleas courts resulted in prison terms. That year, individual counties' prison intake rates varied, on one side or the other of that rate, by an average of about 13 percentage points. The latter figure is the data point depicted in Chart 32 for 1988.



As Chart 32 illustrates, in the years since S.B. 2 took effect in FY 1997, individual counties tend to vary less from the statewide average intake rate. Put another way, counties reported prison intake rates within a narrower range around the statewide average. This suggests greater consistency. Conversely, the intake rates reported for the years immediately preceding S.B. 2 appear much more varied, as there was a larger average distance in counties' rates of imprisonment from the statewide average.

Note in 2001 and 2002 that the average distance from the statewide average intake rate increased slightly. In fact, in 2002, the counties' intake rates differed from the statewide average by about 12 percentage points, a number similar to that reported in 1988.

Table 10 compares the frequencies by which Ohio counties have imprisoned offenders. Comparing by county size, the table indicates the annual numbers of offenders sent to prison, adjusted for variations in the relative amounts of crime. Thus, in 1994, sparsely populated counties sent an average of six offenders to state prisons for every 100 index crimes reported within their jurisdictions. That same year, mid- and large-sized counties, on average, sent fewer offenders to prison per index crime. In other words, in 1994, small counties tended to imprison more offenders than medium and large counties.

Table 10: Prison Intake Per 100 UCR Crimes Reported by County Size, CY 1994 – 2002

County Size	1994	1995	1996	1997	1998	1999	2000	2001	2002
Small Counties (< 100,100 Residents)	6.0	6.2	6.3	6.3	6.0	6.6	6.7	6.1	6.7
Medium Counties (100,101 to 400,000 Residents)	3.5	4.1	4.1	4.2	4.5	5.4	5.2	4.9	5.3
Large Counties (> 400,000 Residents)	4.5	4.9	4.5	4.8	5.1	4.6	5.0	4.6	5.0

This supports the sense that judges in rural counties are more likely to send offenders to state prison than in urban counties. In 1993, the Commission staff posited that the pattern may be the result of community dynamics: individual crimes are less frequent and more visible in less populated places. More scrutiny is placed on, and by, judges in sentencing determinations. Also, there are fewer sentencing options in less populous counties, making a prison term more likely.

Since the Commission staff last studied the issue in 1993, judges across all county sizes have shown increased uniformity in their sentencing of offenders to prison. As Table 10 demonstrates, from 1994 to 2002, judges in medium and large counties sent greater proportions of offenders to state prison. In 1994, for instance, mid-sized counties sent to prison less than four offenders per 100 reported index crimes. By contrast, in 2002 (the most recent year for which the data were available), medium-sized counties sent to prison almost two more offenders per 100 index crimes reported. During the same period, the most populous counties also increased the proportions of offenders sent to state prison.

As both medium and large counties increased the proportion of imprisoned offenders, they did so during a period in which small counties sent roughly similar numbers to prison. In other words, although smaller counties continued to lead the state in the *proportion* of offenders sent to state prisons, mid- and large-sized counties increased their proportions of imprisoned offenders. At some level, S.B. 2 arguably contributed to the increased uniformity.

What can be said about the criminal histories and offense levels of prison-bound offenders from the county groups? Table 11 compares prison intake data across county sizes for 2002 and 2003.[34]

Table 11: Average Prior History of Offenders Entering Prison by County Size, CY 1999 – 2002

	CY 2002		CY 2003	
County Size	**Ave. No. of Prior Prison Commitments**	**% of F-1 or F-2 Offenses**	**Ave. No. of Prior DRC Commitments**	**% of F-1 or F-2 Offenses**
Small Counties (< 100,100 Residents)	0.64	17.2%	0.70	17.0%
Medium Counties (100,101 to 400,000 Residents)	0.82	20.1%	0.83	18.7%
Large Counties (> 400,000 Residents)	1.12	20.3%	1.22	21.8%

During both years, larger counties sent offenders with longer criminal histories to prison. In 2002, those offenders had served, on average, more than one previous term in state prison. In contrast, offenders from the least populous counties had criminal histories marked by fewer prior prison terms. Mid-sized counties also averaged less than one previous prison sentence. Although figures in 2003 were higher at each county size level, the pattern was similar to that in 2002.

What does this mean? The pattern supports the notion that small- and mid-sized counties, lacking the breadth of alternatives available in populous counties, opt to send to prison offenders who would not be shipped as readily by judges in larger counties. As noted, this may reflect community values in smaller counties where the crimes are less common and more visible.

[34] Data appearing in Table 11 were obtained from the DRC's unpublished annual intake database. Offenders entering state prisons during CY 2002 and 2003 were individually tracked and coded by offense level. For purposes of this discussion, all offenders entering prison, regardless of the number of offenses for which they were convicted, were measured.

Table 11 also illustrates the proportions of offenders entering state prisons in 2002 and 2003 having committed high level offenses (F-1s and F-2s). The patterns were similar across county sizes. Interestingly, although the difference is slight, less populous counties sent a *lesser* proportion of offenders to state prison for high level offenses. This seems to be the inverse of the general imprisonment pattern in less populous counties. An explanation might be that, if smaller counties send to prison a greater range of less chronic offenders than large-sized counties, the share of intake by higher-level offenders is likely to be smaller (and the numbers of F-1s and F-2s tends to be lower).

JUVENILE OFFENDER SENTENCING

In 2004, Magistrate David Hejmanowski of the Delaware County Juvenile Court completed a study of Ohio's blended sentencing provisions for serious youthful offenders (SYO) in 2004. The changes took effect in 2002 as part of S.B. 179.

Magistrate Hejmanowski presented his findings to the Sentencing Commission and we, in turn, share them with you. Mr. Hejmanowski surveyed juvenile courts in all 88 Ohio counties.

He found there were 177 SYO cases filed in the blended sentence law's first two years (2002 and 2003). Of those, 102 (57.6%) were given blended sentences, with 74 going to DYS for the juvenile portion of the sentence. During the period covered by the study, only one offender committed a new felony. A prison term was not invoked. Only four SYO filings (2.3%) led to jury trials.

Data aside, Mr. Hejmanowski found considerable procedural uncertainty around the state, especially regarding how an alleged SYO is charged. Additionally, several courts reject the SYO option because they do not believe that, absent an extension of juvenile court jurisdiction beyond age 21, there is sufficient time to ensure the rehabilitation of older SYOs in the juvenile system. Some courts and prosecutors would prefer extended juvenile jurisdiction beyond age 21 in these cases to avoid the perceived need to bind over older offenders to the adult court.

While the latter two paragraphs hardly do justice to the good work done by Mr. Hejmanowski, they do help us begin to frame some SYO issues for the Sentencing Commission and ultimately for the General Assembly.

- Should SYO procedure be clarified? In the Sentencing Commission's debates that led to the proposals that became S.B. 179, the Commission settled on a vague standard that would

allow each jurisdiction to tailor a procedure that fits its needs. Perhaps that was a mistake. Should the law more clearly instruct juvenile courts in SYO procedures?
- Should there be some extended juvenile jurisdiction (EJJ) beyond age 21? As drafted, S.B. 179 would have authorized EJJ until age 23 or 25, depending on the offense and offender. After initial support, the Department of Youth Services came to oppose the plan in the General Assembly, particularly as budgets tightened. The concept fell by the wayside. Should it be revived? Would EJJ make SYO a more useful tool? Would more time in the more rehabilitative and focused juvenile system work better to improve offenders and reduce recidivism? If so, should reduced costs in the adult system help to defray increased costs to the DYS system, especially if EJJs were supervised in the community, rather than incarcerated, from age 21 to age 25?
- Has the time come to enact a juvenile-specific competency statute (as we recommend in 2001) in light of the decreased DYS admission age in S.B. 179 coupled with the potential adult sentence for SYOs? If so, how should we pursue the debate on costs in what remains a tight budget? Also, since this is an SYO study, would it lead to greater use of the SYO tool?
- What other options should be considered to satisfy public sentiments in favor of rehabilitating juveniles, while holding them accountable in a meaningful way and guarding public safety?

The Commission wants to get a better feel for these and other S.B. 179 issues. As the state gets more experience with the juvenile reforms, the staff plans to elaborate on the impact of these and other changes.

In addition, the National Center for State Courts has applied for funds from the National Institute of Justice (NIJ) funds to study blended sentencing in several states, including Ohio. The study should give Ohio an outside think tank's perspective on our blended sentencing package.