
Getting Smarter About Sentencing: NCSC's Sentencing Reform Survey



Introduction

With the support of the Conference of Chief Justices and Conference of State Court Administrators, in January 2006 the National Center for State Courts (NCSC) launched its national sentencing reform project, “Getting Smarter about Sentencing.” The overall goal of this national project is to mobilize the collective energy and experience of the judges and administrators of the state courts under the leadership of the state chief justices and state court administrators to promote reform of state sentencing policies and practices. The project initially identified seven specific objectives. (See page following.)

Seeking to collect some basic information about state sentencing reform activities from state court leaders to guide the future development of the national sentencing reform project, the NCSC distributed a nine-question survey to the state chief justices and court administrators in January 2006. Responses were received from 42 states, the District of Columbia, and Guam. This report describes those responses.

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Seven Project Objectives

- 1** To reduce over-reliance on incarceration as a criminal sanction for those not posing a substantial danger to the community or committing the most serious offenses.
- 2** To promote alternatives to incarceration such as the development, funding, and utilization of community-based alternatives to incarceration for appropriate offenders.
- 3** To eliminate inappropriate racial and ethnic disparities in sentencing.
- 4** To promote greater flexibility and judicial discretion in sentencing policy and practice, including repeal of mandatory minimum punishment provisions.
- 5** To provide greater rationality in sentencing through improved access to and use of relevant data and information in sentencing policy making and practice.
- 6** To promote public safety and reduce recidivism through expanded use of evidence-based practices using programs that work, and offender risk and needs assessment tools.
- 7** To promote utilization of sentencing commissions and flexible sentencing guideline systems.

Executive Summary

The state court leaders identified three of the project's seven objectives as the most important for their states:

- Reducing over-reliance on incarceration (Objective 1)
- Promoting alternatives to incarceration (Objective 2)
- Expanding use of evidence-based practices (Objective 6).

Objectives 1, 2 and 6, along with Objective 5 (providing greater rationality in sentencing), were also found to be the Objectives that would most benefit from active judicial involvement.

The two Objectives found to be least important were promoting greater flexibility and judicial discretion in sentencing policy and practice, including through repeal of mandatory minimum punishment provisions (Objective 4), and promoting sentencing commissions and guideline systems (Objective 7). Promoting greater flexibility and judicial discretion in sentencing policy and practice, including through repeal of mandatory minimum punishment provisions (Objective 4), and promoting of sentencing commissions and guideline systems (Objective 7) were found to be the least amenable to judicial involvement.

Over-Reliance on Incarceration and Alternatives to Incarceration

Over 80% of the responding states reported some significant current governmental discussion or public concern about sentencing. The overuse of incarceration, and lack of sentencing and treatment alternatives, particularly for drug crimes, were the two most frequently cited topics of discussion and concern and were also among the most frequent subjects of complaints

from judges hearing felony cases. Drug courts and other problem-solving courts were also the topic of significant public discussion and were most frequently mentioned among the states' current efforts to pursue sentencing reform objectives.

Problem-solving courts were also cited along with substance abuse and mental health programs as the states' most effective non-incarceration corrections programs for nonviolent and other suitable felony offenders. A wide variety of other programs were also mentioned, however, including simple diversion, community service, electronic monitoring, intensive probation, day-reporting centers, work release, boot camps, restitution centers, employment and job-training programs, bad-check-writing programs, community-based correctional facilities, Multisystemic Therapy, Family Functional Therapy, cognitive-behavioral treatment programs, and life skills programs.

Evidence-Based Practices

Judges hearing felony cases frequently complain about the ineffectiveness of current sentencing policies and the resulting high rates of recidivism. The need for greater reliance in sentencing policy and practice on empirical data, risk assessment tools, and sentencing programs that have been proven to work were also reported to be frequent topics of governmental discussion and public concern. Expanding the use of such evidence-based practices was also described as being among the leading current reform efforts in the states.

Almost half of the responding states reported current use of specific, formal risk assessment instruments in sentencing felony offenders. The most common risk assessment instrument mentioned by respondents was the Level of Service Inventory-Revised (LSI-R). In some instances the instruments are used

only by probation or parole authorities, not by the courts. About one-third of the respondents reported no use of formal assessment instruments to determine appropriate felony sentences. Some of those respondents reported reliance on other sources of risk assessment information, including pre-sentence reports, sentencing grids and guidelines, and offense, offender, and prior offense information.

Of all the states reporting the current existence of at least some effective non-incarceration corrections programs, over 75% (30 of 38 states) reported use of one or more measures of program effectiveness. The measures of effectiveness most frequently cited by respondents were recidivism and successful program completion or retention. Other measures mentioned included reduction in general risk level of the offender, cost analysis, reductions in relapse of drug dependent offenders, absence of technical violations of probation, decrease in criminogenic factors, and increased strength of protective factors (such as employment and education).

Racial and Ethnic Disparities

States report that both felony judges and the public at large are concerned about racial, ethnic, and economic disparities in sentencing. Frequently mentioned existing reform efforts are the use of sentencing guidelines and the monitoring of sentencing statistics to eliminate inappropriate racial and ethnic disparities.

Judicial Discretion and Repeal of Mandatory Minimum Punishment Provisions

States report that felony judges are particularly concerned about the lack of judicial discretion in sentencing (and the resulting increase in prosecutorial power and discretion) and the prevalence of mandatory sentence provisions. Significant efforts are reportedly under way in at least fifteen states to repeal, sunset, or prevent adoption of mandatory minimum sentence provisions.

Yet, just as many states felt this reform objective was among the “least important” objectives as believed it is among the “most important” objectives. The judicial discretion issue appears more likely to be the subject of governmental discussion or general public concern in jurisdictions with structured sentencing and guidelines systems.

Sentencing Commissions and Greater Rationality in Sentencing

Although 43% (19 of 44) of the responding jurisdictions report having a sentencing commission, only 11% (5 of 44) believe creation of sentencing commissions is one of the most important sentencing reform objectives, and fully 48% (21 of 44) believe it is one of the least important reform objectives. On its face, this finding is somewhat puzzling in light of the positive reforms that many states attribute to the creation or existence of their sentencing commissions in previous research. (Possible explanations are explored on page 11). One of the principal purposes of sentencing commissions is to provide greater rationality in sentencing, and 17 of the 44 responding

states listed “greater rationality in sentencing” as among the most important objectives; only 2 states listed greater rationality as among the least important objectives.

According to the states with sentencing commissions, the two principal strengths of sentencing commissions are (1) the availability of reliable, trustworthy data and sentencing information to policy makers and practitioners and (2) the credibility resulting from representation on the commission of all components of the criminal justice system. The two principal weaknesses arise when (1) there are membership concerns, such as key policy makers are not represented on the commission, commission members are not sufficiently independent of outside pressure, or the commission’s diversity makes it difficult to reach a consensus; or (2) the commission’s authority is too weak as when its capacity is merely advisory.

“Our resources are misspent, our punishments too severe, our sentences too long.”

Justice Anthony M. Kennedy
Supreme Court of the United States
August 2003

SURVEY QUESTIONS

- Q1** Which of the project's seven objectives do you believe are the most important for your state? Which, the least? Which of the project's seven objectives are most amenable to/ would most benefit from active judicial involvement? Which, the least?
- Q2** Is there currently any significant governmental discussion, or expression of public concern, in your state regarding sentencing policies, practices, or programs?
- Q3** Are there any existing efforts in your state to pursue any of the seven objectives of this national project? If so, briefly describe the top two efforts, including any court involvement in those efforts.
- Q4** What are currently the most frequently heard complaints from the felony judges in your state about current sentencing policies, practices, or programs?
- Q5** Are any formal risk assessment instruments used in your state to help determine the most appropriate sentences for felony offenders? If so, please describe the top three instruments.
- Q6** Do you have effective, non-incarceration corrections programs in your state for nonviolent or other suitable felony offenders? If so, please briefly describe your two best programs.
- Q7** What criteria are used to measure the effectiveness of your corrections programs?
- Q8** Are there any efforts underway in your state to repeal, sunset, or prevent adoption of mandatory minimum sentence provisions? If so, please describe the efforts and affected provisions.
- Q9** Does your state have a sentencing commission? If yes, what are the two principal strengths and weaknesses of the sentencing commission in setting sentencing policy in your state?

Survey Results

Q1 Which of the project's seven objectives do you believe are the most important for your state? Which, the least?

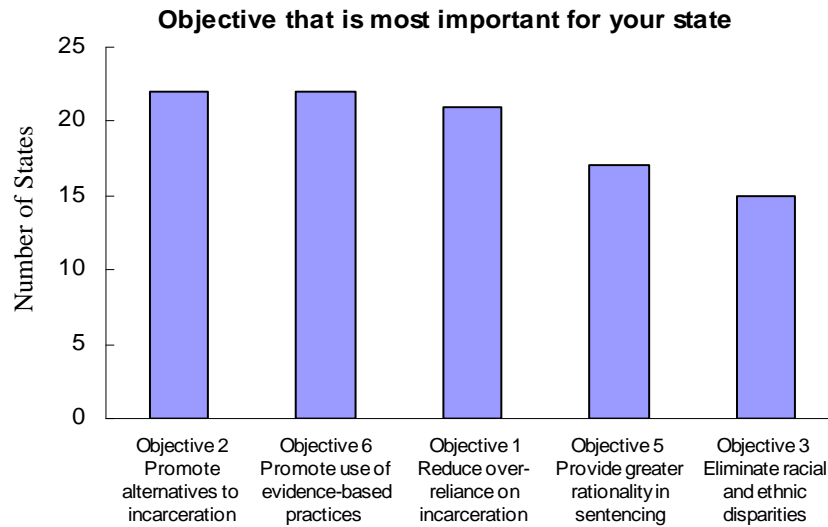
Three objectives were identified by more than half of the responding states as the “most important” objective for their state.*

Objective 1: to reduce reliance on long-term incarceration as a criminal sanction for those not posing a substantial danger to the community or committing the most serious offenses

Objective 2: to promote the development, funding, and utilization of community-based alternatives to incarceration for appropriate offenders

Objective 6: to improve the effectiveness of sentencing outcomes by promoting the use of programs that work, evidence-based practices, and offender risk and needs assessment tools

Seventeen states identified Objective 5 as “most important”, 15 identified Objective 3, and 10 identified 4 as “most important.” Objective 7 (to promote utilization of sentencing commissions and flexible sentencing guideline systems) was reported as “most important” by only 5 states. One state with a sentencing commission listed Objective 7 as most important because it saw a sentencing commission as a means to accomplish all of the other objectives.



Twenty states reported Objective 7 as “least important,” and 10 states indicated Objective 4 (to promote greater flexibility and judicial discretion in sentencing policy and practice, including through repeal of mandatory minimum punishment provisions) was “least important.” A closer review of the responses of individual states reveals that many states with sentencing commissions listed this objective as “least important” because they already have an effective commission, while several states without a commission listed the objective as “least important” because they did not have one and thus could not promote the use of it, or they felt creation of a commission was either outside their control or would compromise the judicial discretion that their judges currently enjoy. Several respondents indicated that Objective 4 was also least important because judges in their state currently have sufficient judicial

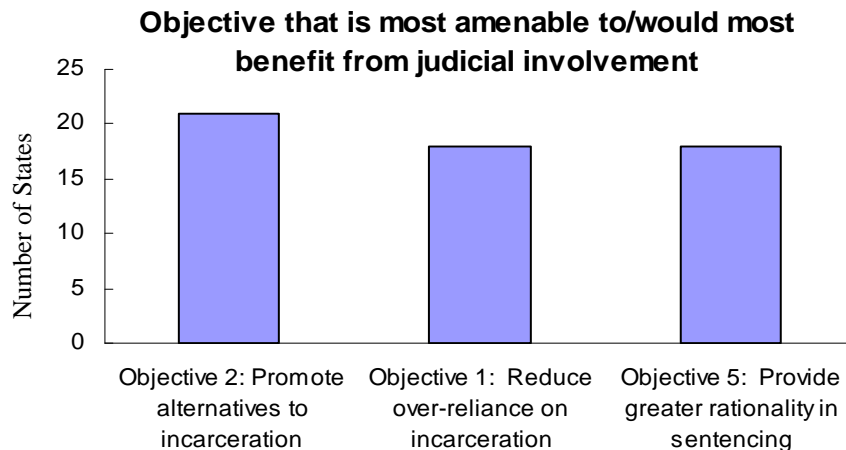
Q1 Which of the project’s seven objectives are most amenable to/would most benefit from active judicial involvement? Which, the least?

Eighteen to 20 states identified three project objectives as “most amenable to/would most benefit from active judicial involvement”:

- Objective 1: Reducing over-reliance on incarceration
- Objective 2: Promoting alternatives to incarceration
- Objective 5: To provide greater rationality in sentencing

Twelve to 16 states identified the other project objectives as being “most amenable.”

Fourteen states identified Objective 7 as least amenable to judicial involvement, while 10 states identified Objective 4. Five or fewer states reported other objectives as “least amenable.”



Q2 Is there currently any significant governmental discussion, or expression of public concern, in your state regarding sentencing policies, practices, or programs?

Of the 36 states that reported significant governmental discussion, the three most commonly mentioned topics were:

- the development of sentencing alternatives, including treatment, particularly for drug crimes
- concerns surrounding the overuse of incarceration and the costs incurred, particularly for drug offenders and due to mandatory sentence provisions
- punishment for sex offenders

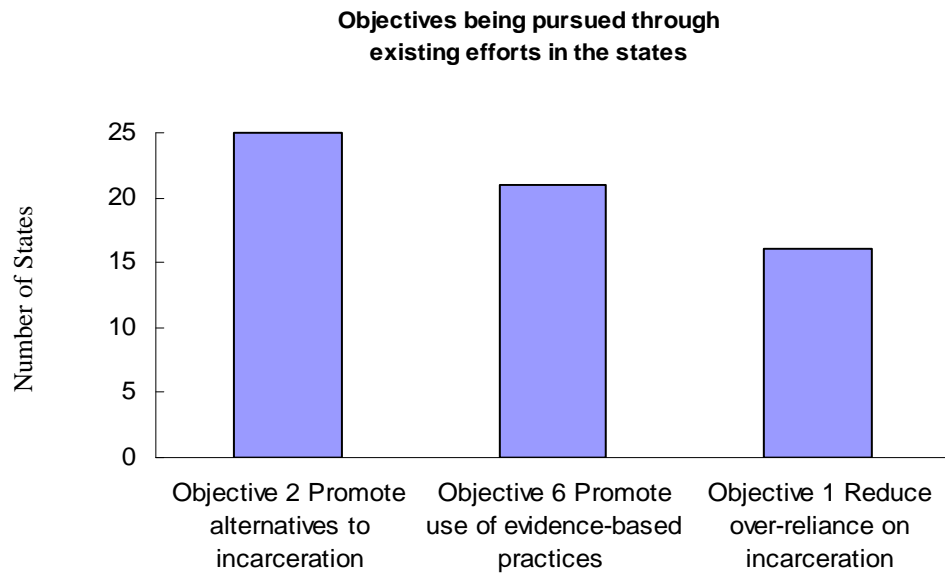
Other common topics mentioned included:

- concerns with racial and economic disparities in sentencing
- use of problem-solving courts
- concern about the increased use of methamphetamines
- use of empirical knowledge, such as risk assessments, to guide sentencing decisions, and sentencing programs that have been proven effective
- lack of judicial discretion, particularly in the context of the *Blakely* decision and use of sentencing guidelines
- the importance of reentry programs/courts

Seven states reported that there is currently no significant governmental discussion or expression of public concern regarding sentencing policies, practices, or programs.

Q3 Are there any existing efforts in your state to pursue any of the seven objectives of this national project? If so, briefly describe the top two efforts, including any court involvement in those efforts.

Respondents reported efforts in all of the seven project objective areas. Efforts were greatest in the area of promoting alternatives to incarceration (objective 2) and promoting public safety and reducing recidivism through expanded use of evidence-based practices (objective 6). The least amount of reform effort was reported in the area of promoting judicial discretion and repeal of mandatory sentencing provisions—only 8 states reported active efforts in this area.



States are pursuing the project objectives through a wide variety of efforts.

The top four efforts cited were:

- the use of problem-solving or therapeutic courts, most commonly drug courts but also reentry, domestic violence, and mental health courts
- the use of risk assessments and evidence-based practices
- increased use of alternative sentencing
- the continued use of sentencing standards or guidelines, offender scoring, and the monitoring of sentencing statistics to eliminate disparities

In addition, several states have developed initiatives or task-forces that address project objectives; many of these are inter-branch task forces.

State Programs that address Project Objectives

Arkansas - Supreme Court's Fairness and Access Committee

Georgia - Commission on Certainty

Hawaii - Interagency Council on Intermediate Sanctions (ICIS) and
Statewide Drug Court Coordination Committee (SDCCC)

Idaho - Criminal Justice Commission

Illinois - Criminal Law Edit, Alignment and Reform (CLEAR) Project

Kentucky - Blue Ribbon Commission on Sentencing

Minnesota - Chemical Dependency Task Force

North Dakota - Transition from Prison to Community Initiative

Pennsylvania - Interbranch Commission for Gender, Racial and Ethnic
Fairness and the Pennsylvania Commission on Sentencing

Washington - Race and Justice Initiative

Wisconsin - Subcommittee on Alternatives to Incarceration and the
Wisconsin Sentencing Commission

Q4 What are currently the most frequently heard complaints from the felony judges in your state about current sentencing policies, practices, or programs?

The most frequently heard complaints were:

- lack of sentencing alternatives or treatments, including a lack of funding for existing alternatives
- lack of judicial discretion
- prevalence of mandatory sentences and the need for flexibility in guidelines

Other common complaints included:

- discontent with the ineffectiveness of traditional probation supervision
- overcrowding and lack of treatment in prisons and high rates of recidivism
- unjust results and disparities
- prosecutorial power is too great, and prosecutorial overcharging is too common

Q5 Are any formal risk assessment instruments used in your state to help determine the most appropriate sentences for felony offenders? If so, please describe the top three instruments.

Half of the reporting states reported use of specific, formal risk assessment instruments. The most common risk assessment instrument mentioned by respondents was the Level of Service Inventory-Revised (LSI-R). In addition to those states reporting use of this instrument for felony sentencing, others reported use of it for other purposes or were considering implementing it. Fifteen respondents reported no use of specific, formal risk assessment instruments to determine appropriate felony sentences. Some of these respondents reported reliance on pre-sentence reports, sentencing grids and guidelines, and offense, offender, and prior offense information.

Other Formal Risk Assessment Instruments:

Adult Substance User Scale (ASUS)
Domestic Violence Screening Instrument (DVSI)
Domestic Violence Inventory (DVI)
Spousal Abuse Risk Assessment (SARA)
Static 99 (sex offenders)
PRASOR (sex offenders)
Vermont Assessment of Sex Offender Risk (VASOR)
Violent Sex Offender Risk Assessment Guidelines
Minnesota Sex Offender Screening Tool (MnSOST-R)
Youth Assessment Screening Instrument (YASI)
Risk Needs Assessment Format (Wisconsin model)
Standardized Risk Reporting Format for Substance Abusing Offenders
Probation Success Probability Measuring Tool
Compass
Indiana Judicial Center Risk/Needs Assessment Instruments
Risk assessment instrument in Sentencing Assessment Report.

Q6 Do you have effective, non-incarceration corrections programs in your state for nonviolent or other suitable, felony offenders? If so, please briefly describe your two best programs.

Thirty-eight states reported existence of effective, non-incarceration corrections programs. The two most frequently mentioned programs were:

- problem-solving courts (e.g., drug courts, domestic violence courts, mental health courts, driving-under-the-influence courts, reentry courts)
- substance abuse and mental health programs

Other programs mentioned included:

- electronic monitoring
- diversion
- sex offender
- specialized probation (regular load 60-1 and intensive load 2-25); probation with alternative sentencing plans; probation supervision for the mentally retarded
- day-reporting centers
- boot camps
- cognitive behavioral and life skills programs
- Multisystemic Therapy and Family Functional Therapy
- restitution centers
- first time OUI (operating-under-influence) and multiple OUI programs
- community service programs
- monitoring by treatment counselors (TASC)
- bad check writing
- job training

Q7 What criteria are used to measure the effectiveness of your corrections programs?

Of the 37 respondents reporting the use of effective non-incarceration corrections programs, 28 reported using one or more measures of effectiveness. The most frequently reported measures of effectiveness were

- recidivism (tracking, comparison)
- successful program completion/retention and cost analysis

Other measures mentioned included:

- reductions in relapse of drug dependent offenders
- process evaluation
- Correctional Program Assessment Inventory
- decrease in criminogenic factors
- absence of technical violations of probation
- actuarial risk assessment, reduction in general risk of the offender
- increased strength of protective factors (such as employment and education)
- anecdotal evidence
- lifestyle changes
- “the comfort judges have in the system”

Q8 Are there any efforts underway in your state to repeal, sunset, or prevent adoption of mandatory minimum sentence provisions? If so, please describe the efforts and affected provisions.

Twenty-nine of the responses reflected no efforts to repeal, sunset, or prevent adoption of mandatory minimum sentence provisions. Seven of those states reported that there currently are few such provisions, whereas six states reported current efforts to create new mandatory minimum sentences. Three of the new mandatory minimums would apply to sex offenders.

Fifteen of the responses reported some efforts to repeal, sunset, or prevent adoption of mandatory minimum sentence provisions. Of those responses, four reported that efforts were minimal or unsuccessful.

Efforts to repeal, sunset or prevent mandatory minimums

- CA - Modification of three-strikes law.
- DE - Legislation is pending to eliminate all minimum/mandatory sentences.
- HI - Current legislation to amend sentences for methamphetamine users/ traffickers. Also proposed to impose longer mandatory sentence for habitual violent offenders.
- IL - CLEAR has identified the current mandatory minimum for residential burglary as an example of gross disproportionality.
- IN - In 2005 legislation repealed mandatory sentencing factors and made changes abolishing presumptive sentences.
- NC - Sentencing Commission mandated to review all proposed criminal penalty bills for consistency with Structured Sentencing. Commission's view is that mandatory minimums and Structured Sentencing guidelines are non-compatible.
- NJ - Efforts are underway to revise School Zone law.
- NV - Legislative Study Committee is reviewing need for standards or modification of current mandatory standards.
- NY - Drug law reform legislation has already been partly revised, and there are current efforts to revise the Rockefeller law further.
- PA - In 2005 an act called for sentencing alternatives: flat 2-year sentences with treatment and supervision to replace 3-year minimum. Current efforts prevent adoption of certain minimums for sex offenders (or to reduce length of time, or limit to sexually violent).
- WV - Each year some measures are introduced in the Legislature.

Q9 Does your state have a sentencing commission? If yes, what are the two principal strengths and weaknesses of the sentencing commission in setting sentencing policy in your state?

Nineteen states responded that they have a sentencing commission, while 25 responded that they do not.*

Strengths

Among states with commissions, the two most frequently mentioned strengths were:

- all components of the criminal justice system are represented
- availability of reliable, trustworthy data allowing for information-based credibility

Weaknesses

The two most frequently mentioned weaknesses were:

- membership problems (e.g., lack of involvement or inclusion of certain parties, diversity of commission makes it difficult to reach a consensus, conflicts of interest)
- capacity is only advisory; although it's an independent agency, the legislature can issue directives that impact the guidelines.

Among the 25 states responding that they did not currently have a sentencing commission, 9 mentioned having commissions in the past, and 2 mentioned that some other organization serves the role of a sentencing commission. Three states once considered a sentencing commission and reported concern that a sentencing commission would serve to further limit judicial discretion and independence.

*One of the 25 states, Vermont, has since created a sentencing commission.

Other reported strengths of sentencing commissions included:

- membership of nonpartisan criminal justice system experts
- widespread support (governor, judges, district attorneys)
- high judicial involvement
- new director motivated to bring purpose and rationality
- gauges the extent to which sentencing disparities exist
- forum to discuss and collaborate on a wide variety of sentencing and other CJS practices
- building consensus for common goals
- a reference for judges when sentencing under similar circumstances
- goal of promoting proportionality and uniformity
- objective starting point for consideration of sentence, without restricting judicial discretion
- 20 years of consistency and flexibility to adjust to new sentencing concerns
- sentencing guidelines are grounded in historical sentencing practices
- recognition of past errors (failed drug war)
- maintains offense-seriousness rankings
- sentencing commission recommendations go into effect unless the legislature proactively takes steps to stop them
- encouragement of increased accountability (not just punishment)

Other reported weaknesses of sentencing commissions included:

- no attempt to study effectiveness of various sentencing programs
- lack of sufficient funding for commission
- "start-up" time
- need to respond to topical "front burner" issues, rather than time to focus on any fundamental restructuring of sentencing policies
- gross statistical reports fail to illustrate mitigating circumstances
- lack of resources for community-based alternative sentences
- weak appellate review of departures from guidelines
- parole decision making can undermine goals of uniformity, proportionality, and fairness
- since guidelines are grounded in historical practice, revisions require extensive research and data analysis
- fiscal assumptions not viewed as credible
- need to periodically reintroduce itself to legislators; legislature is a reactive body and old issues become new again every two or four years, thus hurting continuity
- possibility of taking a position contrary to interests of the courts and inhibit judicial discretion
- commission is wedded to current sentencing system, which takes too much discretion away from judges and gives too much to the prosecutors
- lack of support from current attorney general, who is campaigning on being "tough on crime."

We would like to thank the following states, district, and territory for their contributions to this project.

Alabama	Nebraska
Alaska	Nevada
Arizona	New Hampshire
Arkansas	New Jersey
California	New Mexico
Delaware	New York
Florida	North Carolina
Georgia	North Dakota
Hawaii	Ohio
Idaho	Oregon
Illinois	Pennsylvania
Indiana	Rhode Island
Kansas	South Carolina
Kentucky	South Dakota
Louisiana	Tennessee
Maine	Texas
Maryland	Vermont
Michigan	Virginia
Minnesota	Washington
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