

From: Howard Rodstein, Crime Victims United
To: Justice Paul DeMuniz, Commission on Public Safety Chair
Cc: Public Safety Commissioners, Governor Kitzhaber, Legislators, Criminal Justice Commission
Date: January 14, 2013
Subject: Correction to Public Safety Commission Final Report

After two years of meetings and presentations from the Pew Center on the States (Pew) and the Oregon Criminal Justice Commission (CJC), the Commission on Public Safety (Commission) has issued its [final report](#) including its options for changes to criminal sentencing in Oregon. The report will now be sent to the Oregon Legislature for its consideration.

One of the sentencing reform options presented in the final report is entitled "Sentences for Robbery 2nd, Assault 2nd, and Sex Abuse 1st - M11 Modification". This option is similar to longstanding and frequently-used existing provisions of Oregon law. The report's description of the option is written as if these important provisions did not exist. This creates a false impression. Legislators can not have an informed discussion without understanding the existing provisions so here we fill in this gap.

SB 1049 (1997), HB 2494 (1999) and HB 2379 (2001) give discretion to sentence below Measure 11 mandatory minimums under specified conditions in cases of Sex Abuse I and all second-degree Measure 11 crimes. Crime Victims United has supported all of these exceptions and has, for over a decade, advocated expanding the exception for Sex Abuse I and second-degree age-related sex offenses.

HB 2494 covers Manslaughter II cases and is rarely applicable. HB 2379 covers Sex Abuse I and all second-degree Measure 11 sex crimes and applies in a relatively small number of cases.

SB 1049 covers Assault II, Robbery II and Kidnapping II and applies in a large number of cases. It is frequently used. In the 2012-06-29 meeting of the Commission Pew consultant and former CJC analyst Mike Wilson said that roughly half of Assault II, Robbery II and Kidnapping II sentences are "opt-out" sentences - that is, they are guideline sentences which allow earned time and are not subject to mandatory minimums. These "opt-out" sentences can be as low as probation.

Here is a transcript of part of Mr. Wilson's presentation including questions from the commissioners:

Wilson: [The Oregon Legislature] allowed opt outs for some second degree offenses, also Sex Abuse I. And that was passed, Senate Bill 1049, and so that allowed for certain offenses - the main ones Rob II, Kidnapping II, Assault II - to get guideline sentences within Measure 11.

And some of those crimes, those three in particular, that happens a fair amount of time - up to half of those cases get opt out of Measure 11 under SB 1049.

Q: Which three was it?

Wilson: Robbery II, Kidnapping II, and Assault II - it's around half of those get an opt-out sentence.

Q: When you say get, you mean they are eligible for one?

Wilson: No they actually get one - so they get a non-mandatory minimum. They're convicted of one of those second-degree offenses but end up serving a guidelines sentence.

The Commission's final report barely acknowledges these provisions and leaves the impression that they do not exist. On page 16 the Commission's final report says:

"Option 1: Mandatory minimum sentencing restrictions do not permit the courts to exercise discretion that responds to the particulars of the offense or the criminal history of the offender."

The term "mandatory minimum sentencing" presumably refers to Measure 11 as amended by the Oregon legislature and currently practiced. That is certainly how it will be understood. Then the quoted statement ignores the exceptions in existing law which do respond to the particulars of the offense and to the criminal history of the offender. The statement is incorrect and misleading.

The Commission's final report (page 16) explains the sentencing option like this:

"Robbery II can include everything from two teenagers pushing a man down and stealing his cell phone to a person holding an unloaded gun at someone's head and demanding money."

This is true, but the implication that under current law the teenagers would receive mandatory sentences is wrong. Unless they

had a serious prior felony criminal record they would certainly receive non-mandatory sentences as low as probation.

The report continues:

"Assault II can capture everything from 'substantial pain' caused by using a shoe as a weapon to beating someone into a life-threatening medical condition."

This is also true and also misleading for the same reason.

In March of 2011 CJC produced a report on Measure 11. On page 38 there is a section entitled "Exceptions to Measure 11" which presents these statistics:

M11 "Opt Outs", 2005-2009				
Crime	M11 Sentence		Opt Out	
	N	%	N	%
ASSA II	460	47%	519	53%
KID II	77	43%	102	57%
MANS II	92	100%	0	0%
RAPE II	92	76%	29	24%
ROBB II	519	52%	484	48%
SEX PEN II	16	76%	5	24%
SEX AB I	712	96%	29	4%
SODO II	26	90%	3	10%
All	1994	63%	1171	37%

This shows that 53% of Assault II convictions, 57% of Kidnapping II convictions and 48% of Robbery II convictions resulted in non-mandatory sentences.

The report then shows how many of the opt-out sentences resulted in probation or local control versus prison:

M11 "Opt Out" Sentence Distribution, 2005-2009			
Crime	% to Prison	Ave. LOS	Total Departures
ASSA II	52%	28.7	519
KID II	42%	27.6	102
RAPE II	45%	20.4	29
ROBB II	65%	30.8	484
SEX PEN II	0%	0.0	5
SEX AB I	48%	19.8	29
SODO II	0%	0.0	3
All	56%	29.3	1171

This shows that 48% of the Assault II opt-out sentences, 58% of the Kidnapping II opt-out sentences and 35% of the Robbery II opt-out sentences resulted in non-prison sentences.

This is important information that the commissioners and the legislators should understand when considering sentencing in Oregon.

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