

Diverting Low-Risk Offenders From Florida Prisons

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OPPAGA

Office of Program Policy Analysis and Government Accountability

Diverting Low-Risk Offenders From Florida Prisons

EXECUTIVE SUMMARY

In 2018, Florida had 143 prison facilities, including 50 major institutions housing 96,253 inmates. Florida's inmate population is the third largest state prison population in the United States. The Florida Department of Corrections' total budget for Fiscal Year 2017-18 was \$2.4 billion, with the estimated cost to house an inmate at \$59.57 per day, or \$21,743 annually. Over the past 8 years, both admissions to prison and prison population have decreased. However, Florida continues to have the 10th highest incarceration rate in the United States at 500 per 100,000.

There are multiple points at which offenders can be diverted from the path between arrest and prison, and Florida currently uses many of these diversion programs. Diversion programs include pretrial intervention, plea bargaining, problem-solving courts, and probation. Probation and plea bargaining are the most utilized types of diversion in Florida. Our analysis finds that there are additional lower-risk offenders who could be diverted from prison, which could likely result in reduced recidivism and long-term cost savings. As such, the Legislature may want to consider various options for diverting additional offenders from prison.

This review answers five questions:

- How are offenders sentenced in Florida?
- What factors influence Florida's incarceration rate?
- How does prison diversion occur in Florida?
- Are there low-risk offenders who could be diverted from prison?
- What options exist for diverting low-risk offenders from prison?

REPORT SCOPE

Chapter 2018-9, *Laws of Florida*, directs OPPAGA to conduct a review of Florida's sentencing laws and identify policy options to reduce or divert low-risk offenders from entering Florida's prisons.

QUESTIONS AND ANSWERS

How are offenders sentenced in Florida?

Offenders in Florida are sentenced under the Criminal Punishment Code

Almost all criminal offenses in Florida are divided by severity into the two categories of misdemeanors and felonies. Misdemeanor offenses are less serious than felonies and can be punishable by a term of incarceration in a county correctional facility, or jail, for not more than a year. Felonies are crimes that are more serious and are punishable by imprisonment in a state correctional facility, or state prison, for more than one year.

The Criminal Punishment Code (Code), enacted in 1998, is Florida's guideline sentencing structure for non-capital felonies. The Code establishes sentencing criteria, the provision of criminal penalties, and limitations upon the application of such penalties. Felonies under the Code receive an offense severity level ranking (Levels 1-10). Statute categorizes each felony offense in a level according to the severity of the offense, corresponding with the harm or potential harm to the community that is caused by the offense.¹ Offenders are assigned sentencing points based upon the level ranking assigned to the primary offense, additional offenses, and prior offenses. For example, a felony of the third degree falls within offense level one, which carries four sentencing points as the primary offense. The total number of points both indicates whether a defendant is at risk of receiving a prison sentence and becomes part of the formula to determine the length of a potential sentence. Sentencing points escalate as the level itself escalates. Points may also be added or multiplied for other factors such as victim injury or the presence of a firearm. The lowest permissible sentence refers to the least amount of time a defendant could spend in prison, according to a score calculated from the Code's points using a mathematical formula. Absent mitigation, the permissible sentencing range under the Code is generally the lowest permissible sentence scored up to and including the maximum statutory penalty as described in s. 775.082, *Florida Statutes*.

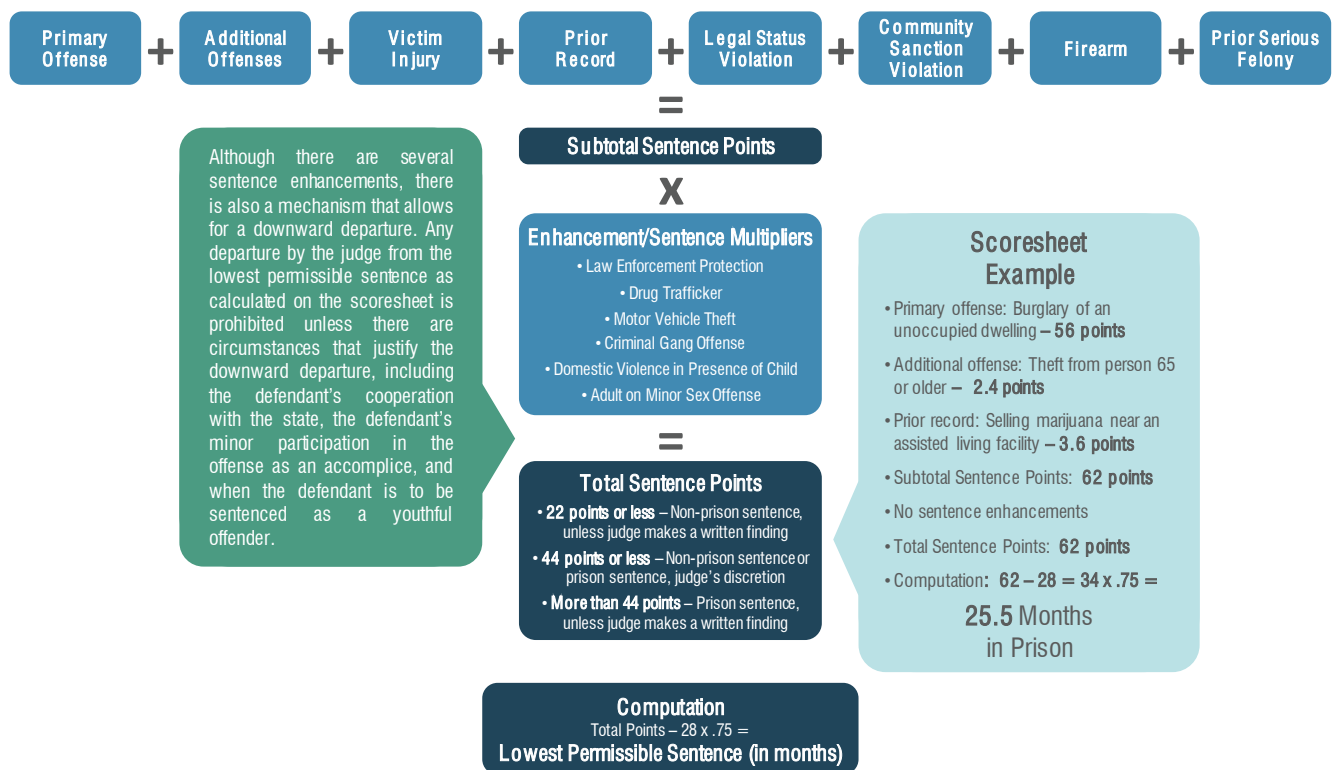
Offenders in Florida are sentenced under the Criminal Punishment Code, which provides judges with a sentence range based on a number of offense and offender characteristics, such as the seriousness of the offense and the offender's prior criminal record. Additionally, some offenses have mandatory minimum sentences requiring a set term of imprisonment.

Under the Criminal Punishment Code, at least one sentencing scoresheet must be prepared for each offender, including all offenses pending before the court for sentencing.² The state attorney's office, as the representative of the state in criminal trials, is required to prepare the scoresheet and present it to the defense counsel and the court before sentencing. The sentencing judge also reviews the scoresheet for accuracy. The lowest permissible sentence is any non-prison sanction in which total sentence points equal, or are less than, 44 points, unless the court determines that a prison sentence is appropriate. If the total sentence points exceed 44 points, the lowest permissible sentence in prison months is calculated by subtracting 28 points from the total sentence points and decreasing the remaining total by 25%. (See Exhibit 1.)

¹ See the offense severity ranking chart in s. [921.0022, F.S.](#), for more information.

² See the Florida Department of Corrections [Sentencing Scoresheet Preparation Manual](#).

Exhibit 1 Sentencing Score and Sentencing Calculation



Source: OPPAGA analysis of the Criminal Punishment Code sentencing scoresheet.

Several factors, including plea bargaining, departures, and mandatory minimum sentences, can affect an offender's final sentence. Approximately 96% of felony sentences in Florida are the result of offenders' pleas. As a result, while the Criminal Punishment Code provides a recommended sentencing range for non-capital felony offenses, it is common for sentences to be below the recommended minimum sentence. Through the process of plea negotiation, a defendant pleads guilty to an offense or offenses and gives up their right to a trial in exchange for what may be a less severe penalty. In this process, the state attorney has discretion over what sentencing offers are made to defendants and what the terms of those offers will be. The ultimate responsibility for sentence determination rests with the trial judge and the judge is not bound by the recommendations for a particular sentence from a negotiated plea agreement. However, by rule, a judge's discretion is essentially limited to either accepting or rejecting a negotiated plea agreement. In practice, it is unusual for a judge to reject a negotiated plea.

If a defendant does not accept a plea and the case goes to trial and results in a conviction, a judge has some discretion to depart below the lowest permissible sentence. As discussed, a defendant's total accumulated points may put them at risk of a prison sentence. However, the sentencing judge may depart below the lowest permissible sentence of state prison. Downward departure by the judge from the lowest permissible sentence as calculated on the scoresheet requires that there are circumstances or mitigating factors that reasonably justify the downward departure.³ Factors include defendant

³ Per s. [921.0026\(2\)](#), F.S., mitigating factors include the departure results from a legitimate, uncoerced plea bargain; the defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct; and the offender's capacity to appreciate the criminal nature of the conduct was substantially impaired.

cooperation with the state, defendant minor participation in the offense as an accomplice, and when a defendant is to be sentenced as a youthful offender. A written statement delineating the reasons for departure must accompany the sentence.

Mandatory minimum sentences may also impact defendants' final sentences. Florida has over 100 mandatory minimum terms that apply to many different crimes. Mandatory minimum terms for felony offenses range from 18 months in prison to life imprisonment. (See Appendix A for a list of statutes that include mandatory minimum sentences that result in a prison term.) Mandatory minimum sentences take precedence over the guideline sentencing structure. For example, if the lowest permissible sentence calculated under the Code is less than the mandatory minimum sentence, the judge must sentence the defendant to the mandatory minimum instead.

Florida's criminal sentencing schemes have changed over time

Prior to 1983, Florida had an indeterminate sentencing scheme.⁴ Under indeterminate sentencing, judges had broad discretion, limited only by statutory maximum penalties for felonies. Statutory maximum penalties of incarceration limited the full discretion of judges to 5 years for a third degree felony, 15 years for a second degree felony, 30 years for a first degree felony, and life imprisonment for a life felony. In addition, most offenders were eligible for parole and could be released by the Florida Parole and Probation Commission prior to the end of their sentences.⁵ In 1983, the Legislature enacted the Florida Sentencing Guidelines and eliminated parole eligibility for almost all offenses. Under the guidelines, the final sentencing point score generated both a specific sentence and a sentencing range. For example, an offender scoring 138 points would have a recommended sentence of 4 years and a range of 3.5 years to 4.5 years. New sentencing guidelines enacted in 1994 replaced the prior approach with a chart that ranked non-capital felonies based on their seriousness. Each offense was assigned to a ranking level on a scale of 1 to 10. A significant amendment in 1995 increased point values in many areas. Additionally, in 1995, the Legislature enacted a requirement that inmates serve 85% of their sentences.⁶

The Criminal Punishment Code, enacted in 1998, retains some features of guideline sentencing but has key differences from prior approaches. (See Exhibit 2.) The Code retains the offense severity ranking system; point values for primary offenses, additional offenses, and prior offenses; and the use of point multipliers and enhancements. However, there are some key differences. Specifically, the Code eliminated the use of upward departures; instead, judges are free to sentence from the minimum sentence calculated on the scoresheet up to the statutory maximum sentence provided in s. 775.082, *Florida Statutes*, and are not limited to an established range. For example, the maximum statutory penalty for a third-degree felony is a five-year prison term. If an offender scores a minimum sentence of two years under the Code, the judge can impose a sentence from two years up to five years. Also, this sentence cannot be appealed. Additionally, the Code lowered the number of sentencing score points required to receive a prison sentence from 52 points to 44 points. The cumulative effect of these changes has been to increase the severity of penalties and the length of prison sentences.

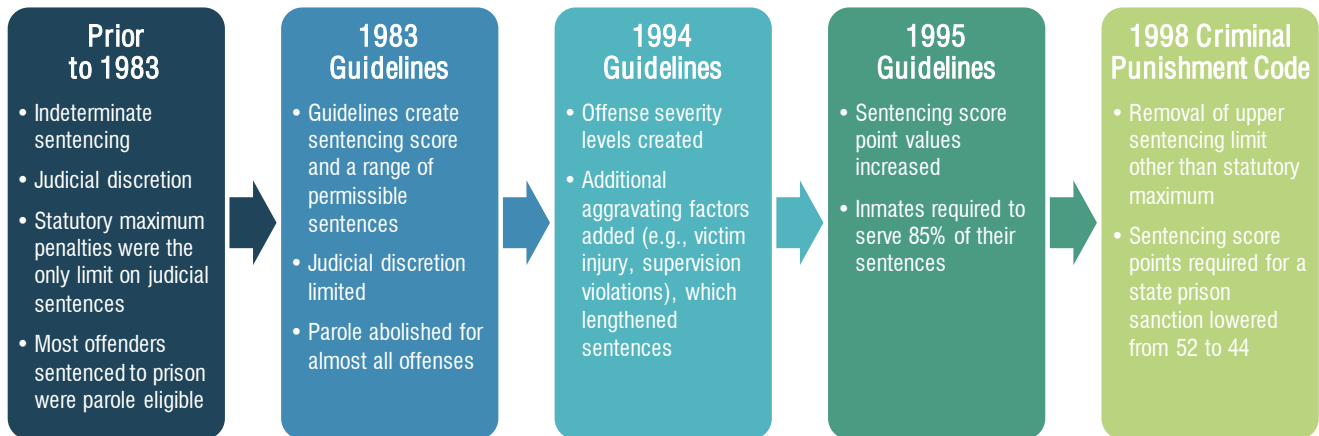
⁴ From 1982 until 1997, a 17-member sentencing commission operated in Florida. The commission was charged with reviewing sentencing practices and recommending modifications to the sentencing guidelines; estimating how sentencing score thresholds and weights affect rates of incarceration; conducting ongoing research on the use of the guidelines and alternatives to imprisonment; and estimating the impact of any proposed changes. Guideline revisions recommended by the commission were effective only upon subsequent adoption by the Legislature.

⁵ In 2014, the Florida Legislature changed the name of the Parole Commission to the Florida Commission on Offender Review.

⁶ Section [944.275\(4\)\(b\)3](#), F.S.

Exhibit 2

Changes in Felony Sentencing in Florida

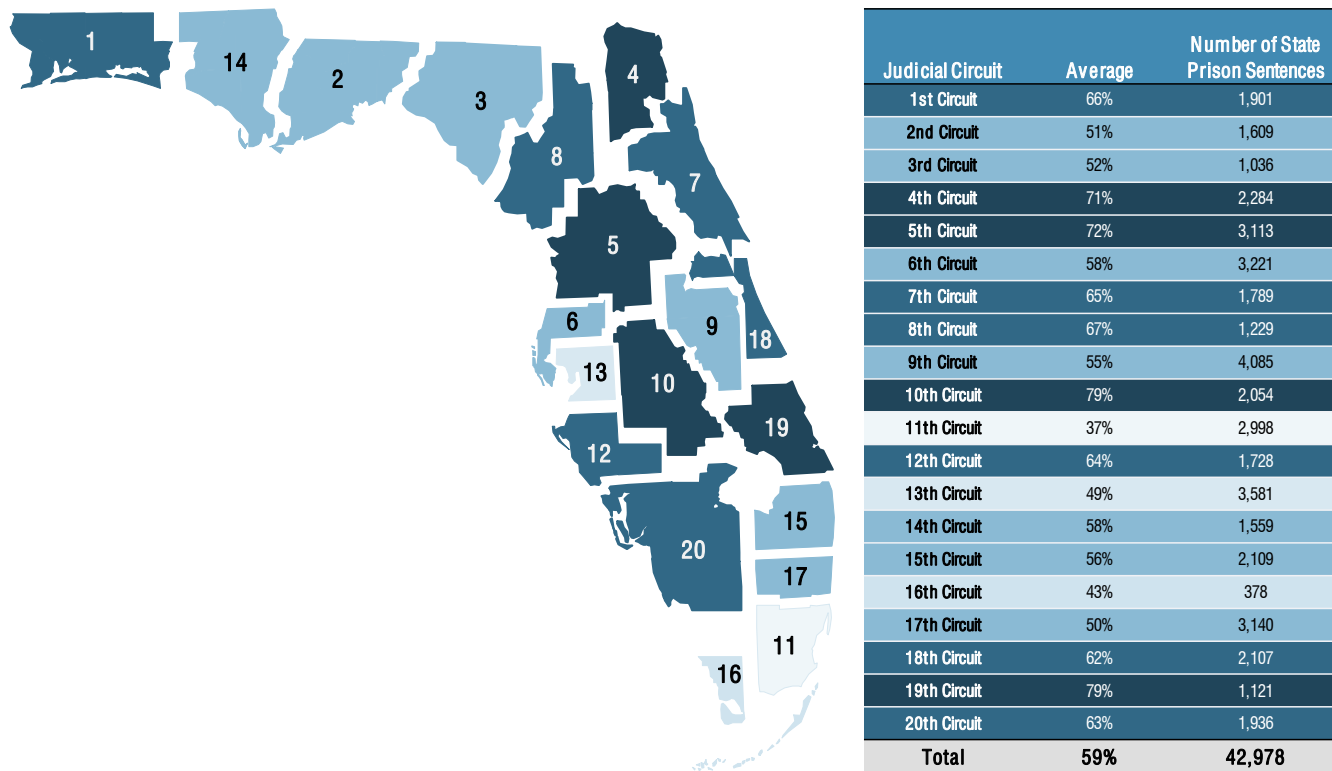


Source: Florida Department of Corrections.

Judicial circuits vary in their application of the Criminal Punishment Code. While all non-capital felony offenders in the state are under the Code, sentencing outcomes vary from one judicial circuit to another. For example, offenders who score above 44 points should receive a mandatory sentence of state prison unless a downward departure is granted. However, statewide, 59% of offenders that scored above 44 points receive a state prison sentence, suggesting that there were downward departures in at least 41% of such cases. As shown in Exhibit 3, there were substantial variations among circuits for state prison sentences of defendants that scored above 44 points. In the 10th and 19th circuits, 79% of offenders who scored above 44 points received a sentence of state prison, whereas 37% of similar defendants in the 11th circuit received a sentence of state prison. Thus, even though Florida has a formula for determining appropriate criminal sentences based on multiple factors that include the seriousness and nature of the crime and characteristics of the offender, local practices, such as plea bargaining, sentencing norms, and the availability of diversion programs, may result in similar offenders receiving different sentences depending on the judicial circuit.

Exhibit 3

Imprisonment Rates for Offenders That Scored Above 44 Points by Circuit for Fiscal Year 2016-17



Note: Lighter blue color indicates lower imprisonment rate.

Source: OPPAGA analysis of Florida Department of Corrections scoresheet data.

What factors influence Florida's incarceration rate?

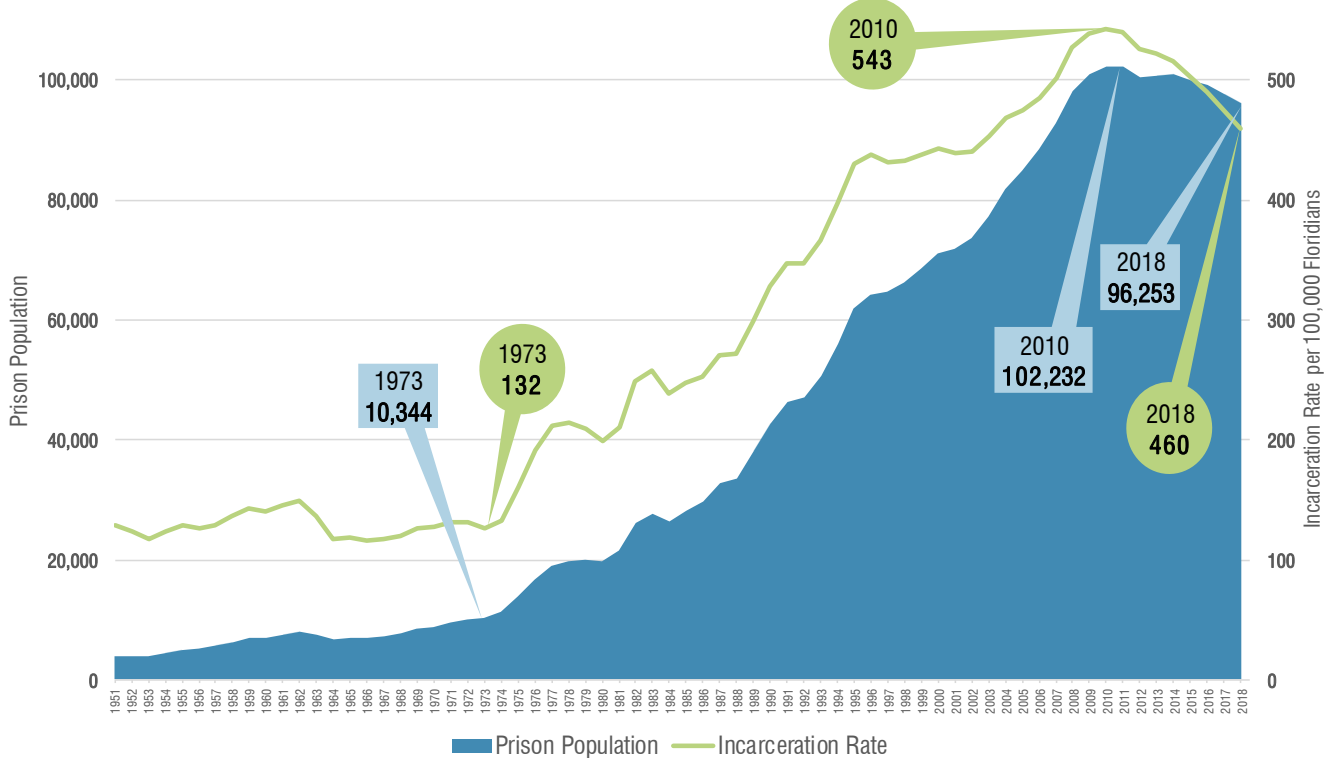
Data indicate a weak link between incarceration rates and crime rates

Florida's prison population has grown significantly over time, from approximately 10,000 inmates in 1973 to a peak of over 102,000 inmates in 2010. Over the last eight years, the inmate population has declined (roughly 1% annually) to slightly above 96,000 inmates. Factoring for population growth, in 1973 there were roughly 132 inmates per 100,000 Floridians. That ratio peaked to 543 inmates per 100,000 Floridians in 2010. As of June 2018, there were roughly 460 inmates per 100,000 Floridians. (See Exhibit 4.)

Historically, the relationship between crime rates and incarceration rates in Florida has been weak. There are significant differences in incarceration rates across counties; however, crime rates do not explain this variation in the use of state prisons. Statewide, prison admissions and releases determine changes in Florida's incarceration rate.

Exhibit 4

Florida's Prison Population and Incarceration Rate per 100,000 From 1951 to 2018

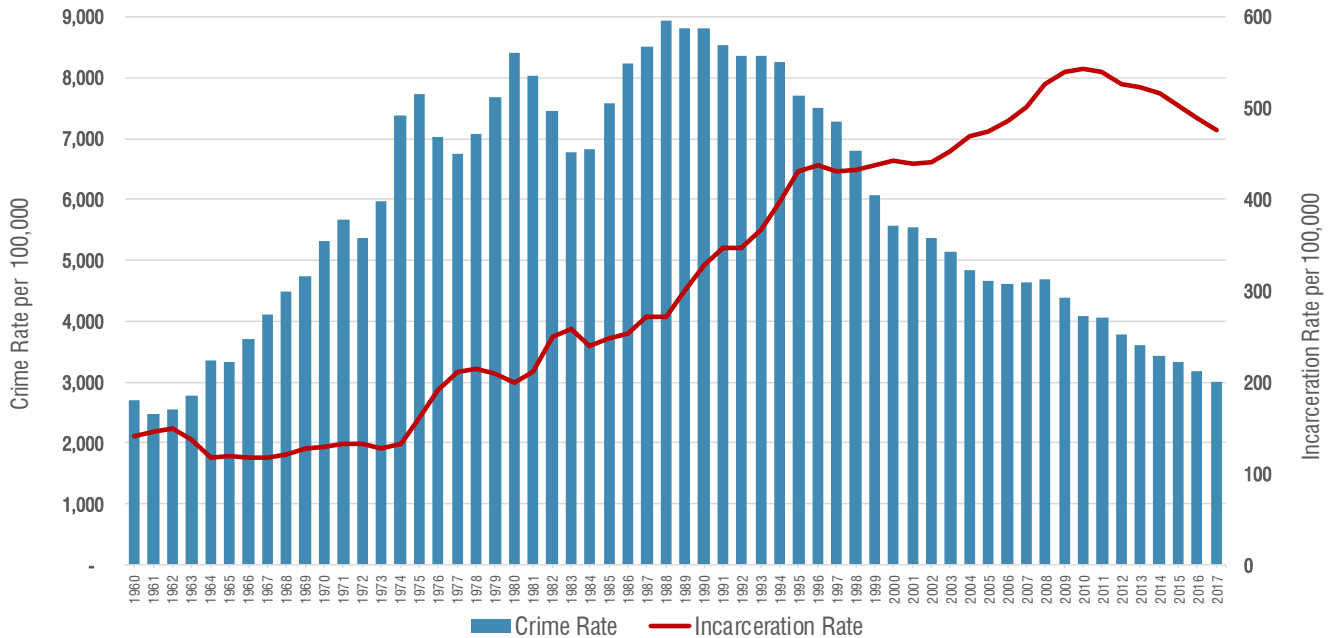


Source: OPPAGA analysis of Department of Corrections and Office of Economic and Demographic Research population data.

Crime trends in Florida have followed a different pattern and do not mirror changes in Florida's incarceration rate. As shown in Exhibit 5, crime rates in Florida generally rose from 1960 to 1990, followed by a decline beginning in the early 1990s. Over this same period, the incarceration rate rose and peaked in 2010, nearly 20 years after the decline in the overall crime rate. In recent years, the incarceration rate has declined.

Exhibit 5

Annual Crime Rate per 100,000 and Incarceration Rate per 100,000 From 1960 to 2017

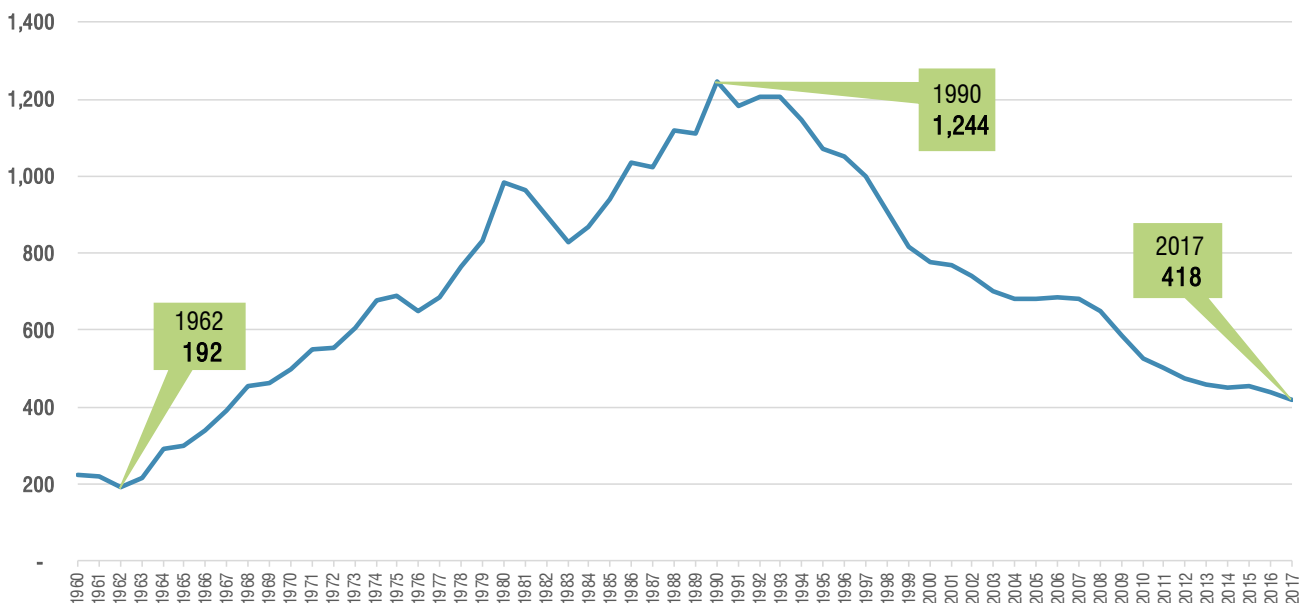


Source: OPPAGA analysis of Federal Bureau of Investigation and Florida Department of Law Enforcement Uniform Crime Reporting Program data.

Trends in violent crime in Florida follow the same trajectory as the state's overall crime rate. The violent crime rate grew from 223 in 1960 to a peak in 1990 of 1,244 violent crimes per 100,000 Floridians, before declining to 418 violent crimes per 100,000 Floridians in 2017. In other words, the violent crime rate today is roughly one-third the violent crime rate in 1990. (See Exhibit 6.)

Exhibit 6

Annual Rate of Violent Crimes per 100,000 Floridians From 1960 to 2017



Source: OPPAGA analysis of Federal Bureau of Investigation and Florida Department of Law Enforcement Uniform Crime Reporting Program data.

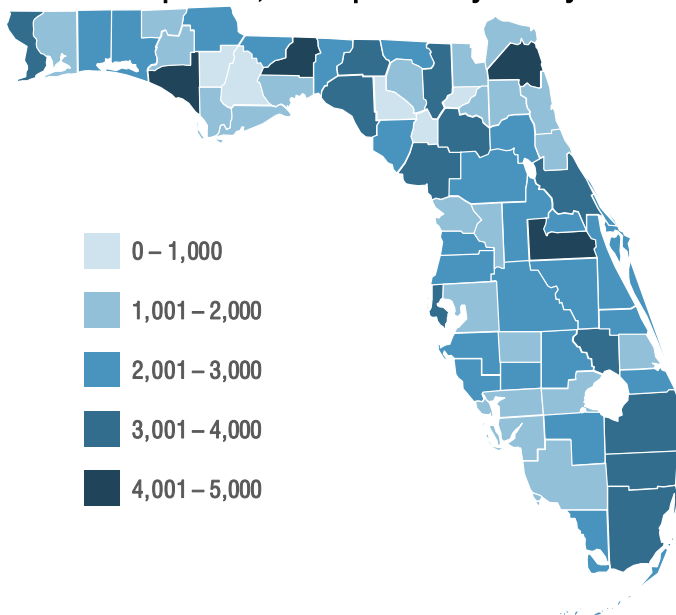
There is significant variation in incarceration rates across Florida; however, crime rates do not explain county variation in the use of state prisons

While there are prisoners from every county in Florida, from a low of 43 (Lafayette) to a high of 7,534 (Duval), prison utilization rates vary greatly. As shown in Exhibit 7, counties with the highest rates of prison admissions per 100,000 population are predominately located in the north and northwestern areas of the state, and in predominately less populated counties. The lower use of incarceration in densely populated counties has kept Florida's prison population smaller than it could have been.

For example, if the rest of the state had a similar incarceration rate to Bay County, the state would roughly double the inmate population (roughly 199,000, as opposed to the current prison population of roughly 97,000). If the state incarceration rate were similar to Miami-Dade County, the state would have roughly 43,000 fewer inmates (54,000 versus 97,000).

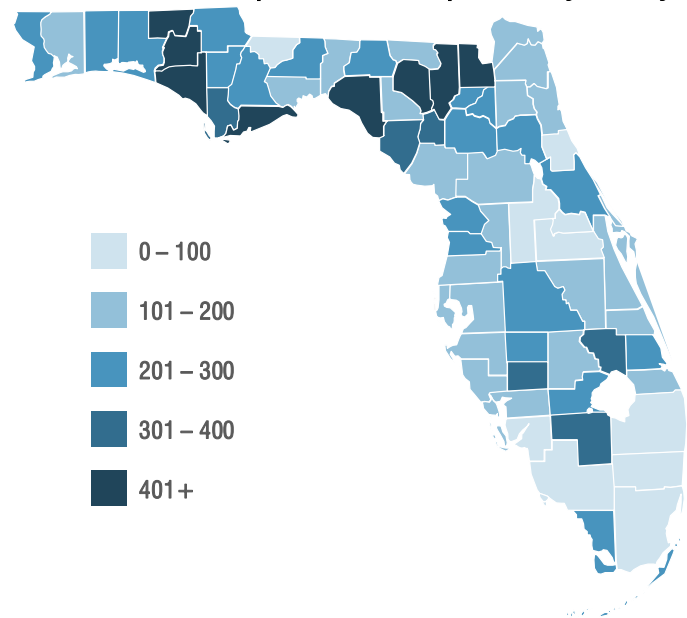
Counties' use of incarceration does not necessarily relate to county crime rates. As shown in Exhibit 8, crime rates are higher in urban counties. For example, in 2017, the counties with the highest crime rates were Leon, Bay, Duval, Orange, and Miami-Dade. However, these same counties had prison admissions rates that ranked them among counties in the state as 20th, 7th, 41st, 64th, and 67th,

Exhibit 8
Crime Rates per 100,000 Population by County



Source: OPPAGA analysis of Florida Department of Corrections data, Fiscal Year 2016-17.

Exhibit 7
Incarceration Rates per 100,000 Population by County



Source: OPPAGA analysis of Florida Department of Corrections data, Fiscal Year 2016-17.

respectively. Thus, these trends suggest that at the county level, there is little correlation between crime rates and the use of state prison.

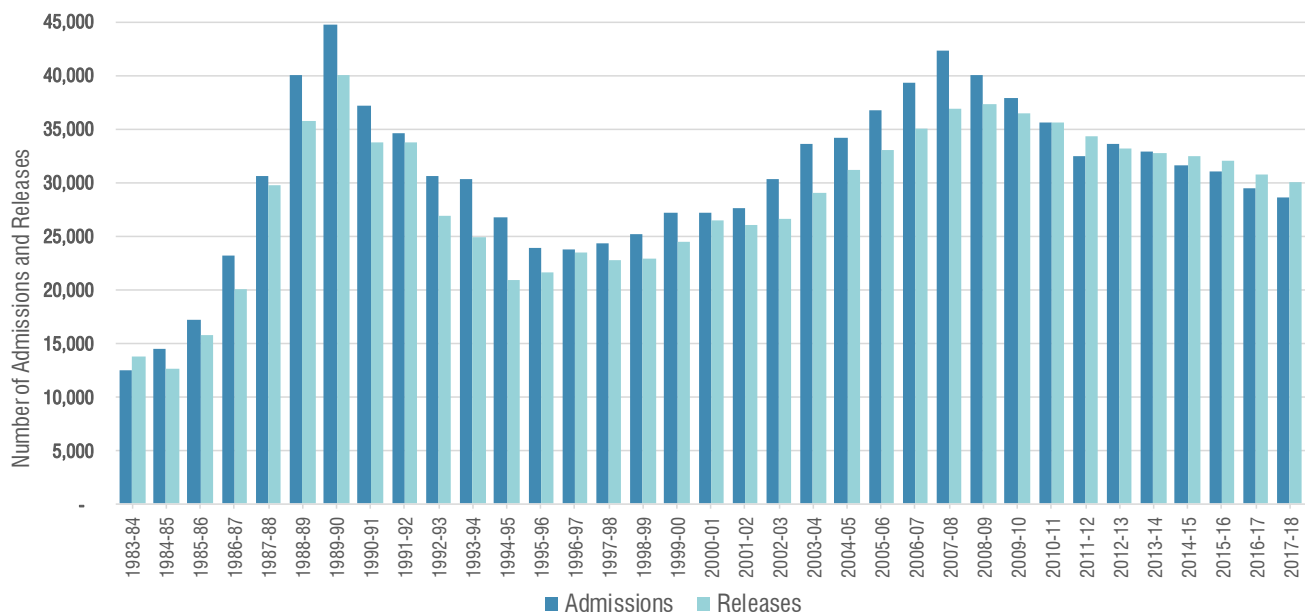
Prison admissions and releases determine changes in Florida's prison population; diversion programs can reduce the number of inmates by limiting admissions to prison

There are two mechanisms for lowering state prison inmate populations: 1) limiting the number of offenders admitted to prison or 2) increasing the number of inmates released from prison. Often the analogy is used to describe reductions in admissions as front-door prison reduction policies and increases in inmate releases as back-door prison reduction policies. Florida's prison population has decreased over the past eight years because the number of

inmates released has been greater than the number of offenders admitted. As shown in Exhibit 9, for most years prior to 2011, the annual number of admissions surpassed the number of releases, even though there was significant fluctuation in both admissions and releases over the past 30 years. This fluctuation can be seen when comparing Fiscal Year 1989-90, when there were 44,701 prison admissions, to six years later in Fiscal Year 1995-96, when admissions decreased 47% to 23,893. In Fiscal Year 2017-18, there were 28,532 admissions to Florida prisons, the lowest number of admissions since Fiscal Year 2001-02. Fluctuations in admissions may be the result of multiple factors, including arrest rates, changes in law and other policies, local charging practices, local funding for diversion programs, and public attitudes towards crime control.

Exhibit 9

Prison Admissions and Releases From Fiscal Year 1983-84 Through Fiscal Year 2017-18



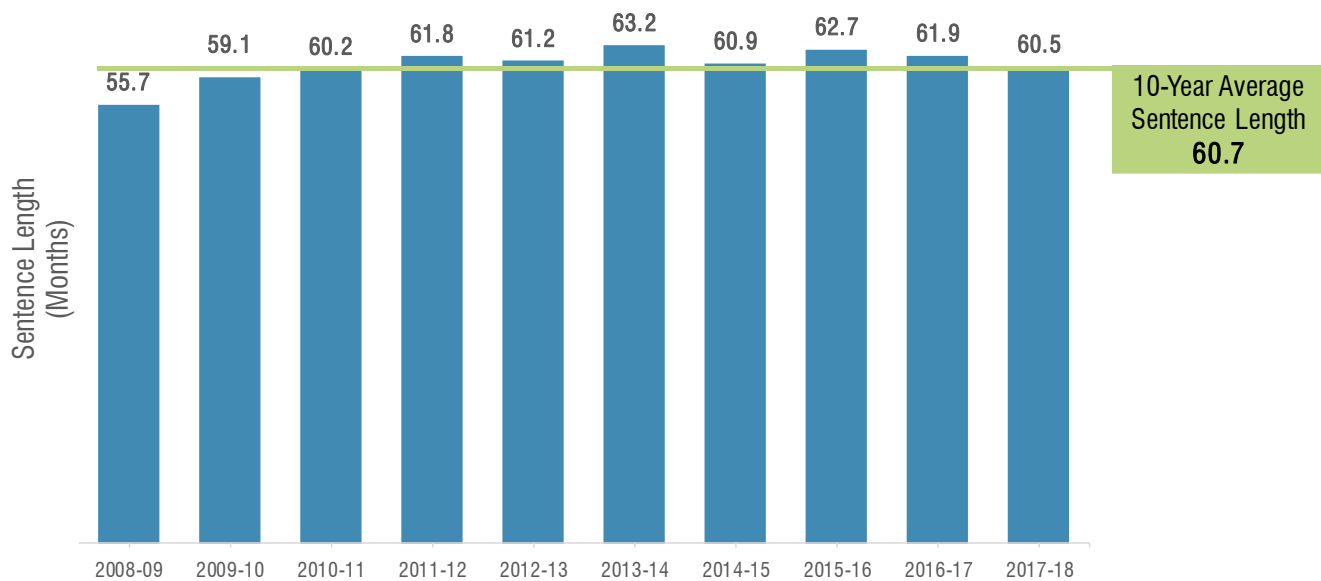
Source: OPPAGA analysis of Florida Department of Corrections and Office of Economic and Demographic Research data.

Releases from Florida's prisons have shown a similar pattern as admissions. Releases peaked in Fiscal Year 1989-90, at 40,027, and in Fiscal Year 2017-18, there were 30,073 releases. Since Fiscal Year 2011-12, there have been five years where releases were greater than admissions, resulting in an overall decline in the prison population. The finding that prison admissions have declined in recent years is consistent with other research that examined Florida's sentencing practices.⁷

Over the past 10 years, inmates' average length of sentence has remained relatively stable at around 61 months. For sustained decreases in Florida's prison population to occur, prison admissions must be lower than prison releases. This can be achieved by decreasing admissions through sentencing practices and prison diversion programs and through increasing releases resulting from shorter terms of imprisonment. In Florida, the average sentence length for new commitments has remain relatively stable over the past decade, even though the prison population has declined slightly over this same period. (See Exhibit 10.) This suggests that some of the decline in Florida's prison population has been a reduction in the number of admissions to prison, as opposed to a reduction in the length of incarcerations.

⁷ *An Examination of Florida's Prison Population Trends*, Crime and Justice Institute at Community Resources for Justice, 2017.

Exhibit 10 Average Sentence Length of New Prison Commitments



Source: The Florida Legislature's Office of Economic and Demographic Research Criminal Justice Trends Report, July 2018.

How does prison diversion occur in Florida?

Offenders may be diverted from prison in various ways but probation is the most common

Diversion from incarceration can occur at multiple points during the criminal justice process. Traditionally, cases in the criminal justice system have followed a linear pathway from the detection of a crime to completion of a sentence. The aim of the criminal justice system is largely focused on determining guilt and culpability of the defendant and punishing the offender.⁸ The first steps along the pathway of criminal case processing begins with law enforcement learning of a crime, conducting an investigation, finding probable cause, and making an arrest. Once an individual is arrested and detained, there are multiple steps within the criminal courts, including having a preliminary hearing before a judge; having a prosecutor review a case and determine whether there is sufficient evidence to prosecute; a criminal trial; and if found guilty, a sentencing hearing before a judge to determine an appropriate punishment or sanction.

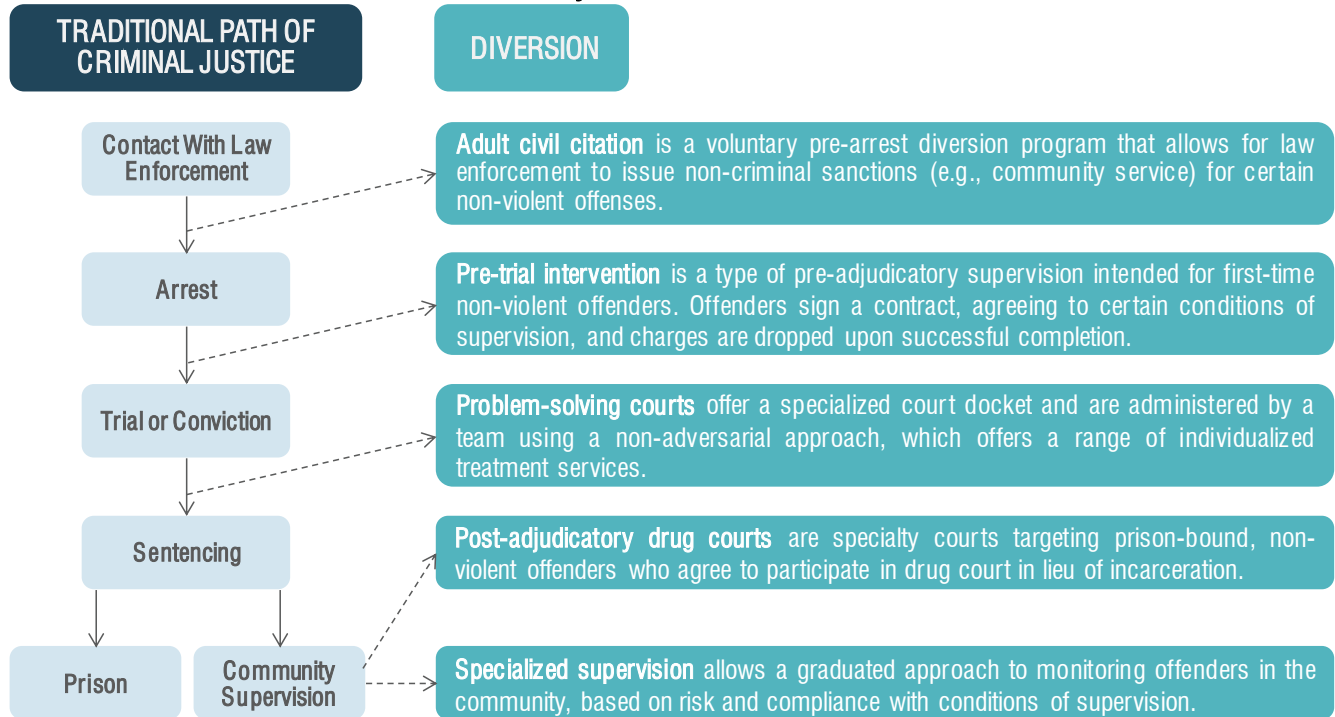
Several mechanisms allow select offenders to be diverted from traditional criminal prosecution at various stages of the criminal justice process in Florida.

Diversion programs are designed to divert individuals from this traditional pathway with the aims of increasing public safety, holding offenders accountable, and effecting behavioral change and rehabilitation. In Florida, offenders can be diverted from incarceration at various points along a path from arrest to prison. These mechanisms include pre-trial intervention, plea bargaining, problem solving courts, and community supervision. (See Exhibit 11.)

⁸ Section 921.002(1)(b), F.S., states "[t]he primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment."

Exhibit 11

Prison Diversion in Florida's Criminal Justice System



Source: OPPAGA analysis of *Florida Statutes*.

Pre-trial intervention and plea bargaining. Pre-trial intervention (PTI) and plea bargaining are two mechanisms that may divert offenders from prison early in the criminal justice process. PTI is a program run by the Florida Department of Corrections to allow first-time offenders a chance to avoid a prison sentence. Offenders charged with certain third-degree felonies may be considered for the program, although some third-degree felonies such as weapons offenses or attempted residential burglary may be disqualifying. The state attorney has discretion to select which offenders are allowed to participate in PTI from the offenders who meet the written criteria for the program. Consent must be obtained from the victim, the state attorney, and in some jurisdictions, the judge. Offenders sign a contract, agreeing to certain terms and conditions of supervision. Typical terms and conditions include random drug testing, drug treatment, community service, and restitution to the victim. Often the conditions of the agreement are more severe penalties than the sanctions the offender might receive at trial. If the offender completes the program successfully, charges are dropped. If the offender does not comply with the terms of the contract, the case is referred back to the state attorney for further prosecution. As of June 2018, there were 10,005 offenders participating in pretrial intervention programs statewide.

The practice of plea bargaining is another potential mechanism for diverting offenders from prison terms. State attorneys we spoke with emphasized the importance of this type of pretrial diversion. In exchange for giving up their right to a trial for the charges against them, defendants agree to accept the offer of a sentence that may be less than what they could be convicted of at trial. As stated previously, approximately 96% of felony sentences in Florida are the result of offenders' pleas. Plea bargains save the state considerable resources since they eliminate the need to have full criminal trials.

In exchange, offenders avoid the uncertainty of a trial outcome that could result in a harsher sentence than the state attorney is offering.

Problem-solving courts. Florida's problem-solving courts seek to address the root causes of offending using an alternative approach to traditional criminal trials. Multidisciplinary teams, specialized dockets, and a non-adversarial approach characterize problem-solving courts. An evidence-based approach is intended to reduce recidivism while holding offenders accountable. The problem-solving or multidisciplinary team is made up of various stakeholders, including judges, case managers, prosecutors, defense attorneys, treatment professionals, law enforcement officers, corrections personnel, and guardians ad litem. The team, led by the judge, provides individualized interventions that are appropriate to the participants and designed to help them succeed. The judge monitors the case with multiple hearings to check on an offender's progress. In addition to treatment resources, problem-solving courts may provide additional services such as job training, employment assistance, and housing. Offenders who do not comply with program requirements may be terminated from the program, which can result in prosecution and sentencing through traditional criminal court.

Requirements for successful completion of problem-solving court are generally rigorous, requiring participants to make a substantial commitment of time and resources. For example, participants may be required to attend outpatient drug treatment multiple times per week and submit to frequent random drug testing. Participants also appear regularly before the judge. Not all offenders are able to participate in problem-solving courts. Similar to the pre-trial intervention programs discussed above, in many problem-solving courts the state attorney decides who is allowed into the court. State attorneys may also have additional criteria that offenders must meet in order to participate. In some problem-solving courts, court staff may be responsible for referring cases to the court or offenders may be automatically assigned depending on their offense.

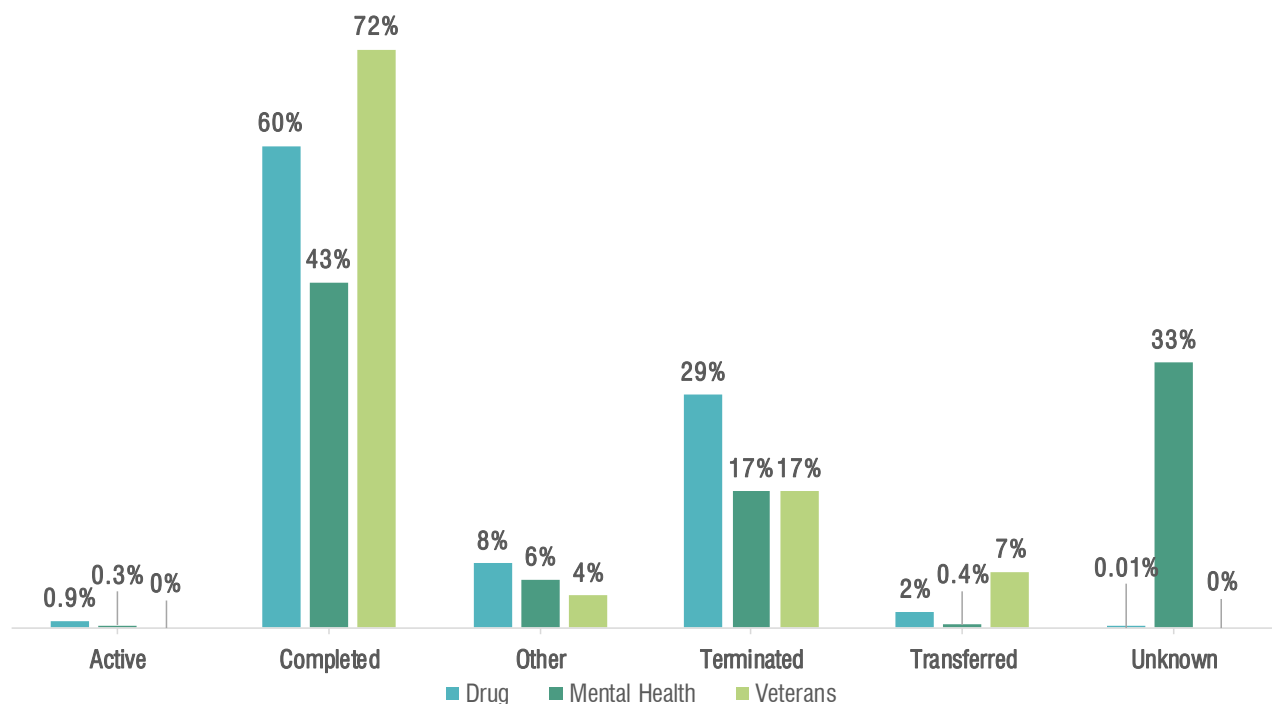
In Florida, problem-solving courts include drug courts, mental health courts, and veterans courts.

- *Drug courts* place substance abusers entering the criminal court system into treatment under monitoring by a judge and a team of treatment and criminal justice professionals. The first drug court in the United States was created in Miami-Dade County in 1989. The program requires defendants to submit to drug testing and court monitoring. Participants who violate program rules receive graduated sanctions instead of incarceration. Incentives are offered for successful progression and completion. Florida has pre-trial diversion drug courts aimed at diverting first-time offenders from the criminal justice system, and post-adjudicatory drug courts that tend to serve offenders with prior convictions. As of July 2018, Florida had 94 drug courts in operation, including 46 adult felony, 22 juvenile, 15 family dependency, 7 adult misdemeanor, and 4 DUI courts.
- *Mental health courts* divert defendants with untreated serious mental illness away from traditional criminal justice sanctions towards court-monitored treatment services. Similar to drug court, these programs offer defendants access to treatment supports and services and aim to reduce recidivism and criminal justice-related costs; offenders often have prior criminal history. As of July 2018, Florida had 23 mental health courts operating in 14 circuits.

- *Veterans courts* assist defendants with the complex treatment needs associated with substance abuse, mental health, and other issues unique to the traumatic experience of war. Participants must be current or former members of the military. The problem-solving team includes at least one member who is familiar with veteran and military culture, terminology, benefits, and other issues. The team also includes representatives of the Veterans Health Administration, the Veterans Benefit Administration, the State Department of Veterans Affairs, Vet Centers, Veterans Service Organizations, and the Department of Labor. Veterans courts also make use of volunteer veteran mentors who assist participants with their needs. As of July 2018, Florida had 30 veterans courts.

The number of admissions and percentage of successful completions varies by type of problem-solving court.⁹ During the five-year period we reviewed, drug courts admitted 16,012 people with a felony case, which accounted for 83% of all specialty court admissions. (See Exhibit 12.) About 60% of participants completed drug court successfully in a median time of 13 months. Additionally, mental health courts admitted 1,213 people with a felony case. About 43% completed the mental health court successfully in a median time of 11 months. Finally, veterans courts admitted 430 veterans with a felony case. About 72% of participants completed drug court successfully in a median time of 14 months.

Exhibit 12 Problem-Solving Court Outcomes¹



¹ The “Other” category includes people who left the program due to medical reasons, death, or because they were nolle prossed. Additionally, the “Unknown” category means that a discharge reason was not specified. Thus, a possible reason why mental health courts have a lower completion percentage may be that some of the unknown reasons could be people who successfully completed mental health court.

Source: OPPAGA analysis of felony admissions provided by circuit courts.

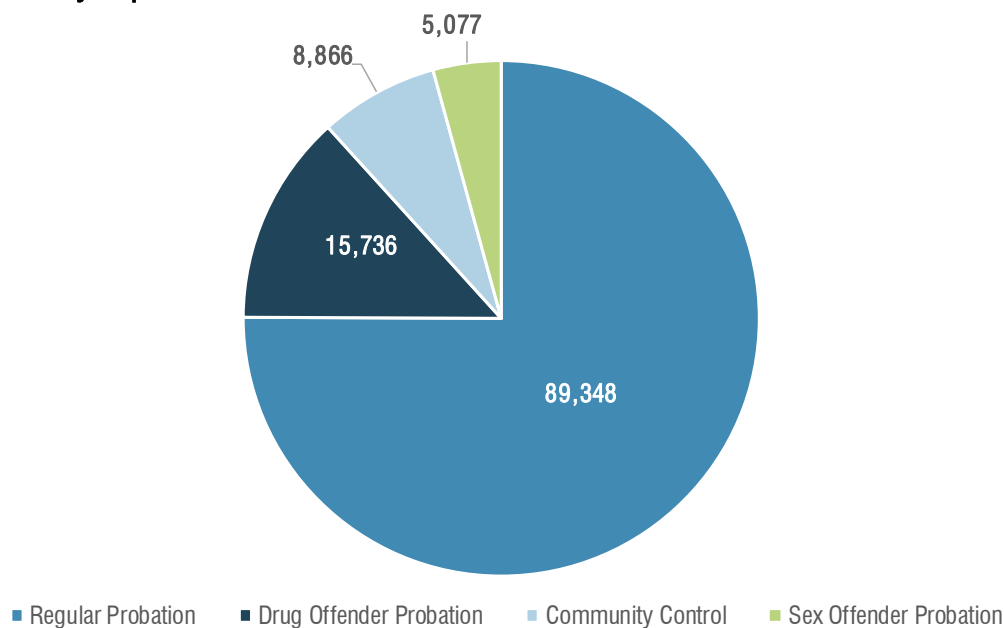
⁹ OPPAGA requested data for people with a felony case who were admitted to a problem-solving court from Fiscal Year 2009-10 through Fiscal Year 2013-14. We received data from 18 of 20 circuits. The data include 34 drug courts, 16 mental health courts, and 12 veterans courts. Additionally, the data include 1,607 people that did not have a specialty court type identified.

Community supervision. Many offenders diverted from prison receive a sentence of community supervision or probation instead of a term in state prison. The goal of community supervision is to promote public safety by holding offenders accountable through effective supervision while connecting offenders to services that reduce recidivism. Offenders may be placed on probation at various points in the criminal justice process. As discussed previously, pretrial intervention is a type of community supervision intended primarily for first-time offenders. Other offenders are sentenced to probation by the judge after trial or after a plea agreement is reached. Standard conditions of supervision include no additional violations of the law, monthly reporting to a probation officer, random drug testing, not changing jobs or residences or leaving the county without the probation officer's approval, and paying costs of supervision. The sentencing judge may also impose special conditions such as drug treatment, community service, or restitution. Offenders on probation must comply with all conditions ordered by the court. Violation of the conditions may result a variety of sanctions, including modification of the sentence or revocation of probation by the court and a prison term.

As of June 2018, 119,027 offenders were on probation, not including pretrial intervention. In addition to regular probation, the Department of Corrections also supervises offenders on drug offender probation, sex offender probation, and community control. Drug offender probation is a more intensive type of supervision that emphasizes treatment and monitoring of offenders' substance abuse through drug testing and coordination with treatment providers. Sex offender probation focuses on sex offender treatment and close supervision to ensure compliance with conditions of probation and the requirements of sex offender registration. Finally, community control is supervision in the form of house arrest. The offender is restricted to their residence except to work, report to the probation officer, and attend treatment. As shown in Exhibit 13, regular probation is the most common type of community supervision in Florida.

Exhibit 13

Types of Community Supervision as of June 2018



Source: Florida Department of Corrections.

In Fiscal Year 2017-18, over 31,000 offenders had their probation revoked either for a technical violation (18,432) or because of a new offense (12,801). In an effort to reduce the number of

probationers who end up going to prison for violations, the Department of Corrections developed the Alternative Sanctioning Program. Alternative sanctions provide the court with an administrative method of handling specific court-approved technical violations for certain non-violent offenders instead of judicial violation hearings. A technical violation is not the commitment of a new misdemeanor or felony offense but rather the offender failing to comply with terms of supervision. Examples of technical violations include failing to complete required community service hours, violating curfew for the first time, or failing to report or reporting late. The program requires authorization and coordination with the judge regarding which technical violations may be reported administratively as well as the sanctions that may be imposed. In order to participate, an offender must admit to the alleged violation, agree with the recommended sanction, and waive the right to counsel and formal hearing. The program reduces the number of warrants that must be served for violations, the number of offenders in custody waiting for violation hearings, and the overall criminal docket workload. As of May 2018, judges in 49 counties have signed administrative orders authorizing the use of alternative sanctions.

Multiple barriers may limit the number of offenders who are diverted from prison

Despite the existence of pretrial intervention and problem-solving courts in Florida, relatively few prison-bound offenders are diverted through programs other than probation. For example, participants in drug courts made up only 10% of all defendants who had a filing for a drug offense in 2016. Multiple factors can limit participation in diversion programs. Prior research identified strengths and challenges of diversion programs. Strengths include inclusive planning processes that involve the public defender and the court, and a willingness to offer diversion to offenders with prior criminal histories or felony charges. Challenges include the use of fines and fees as a precondition for completion, and the use of the same services to treat offenders regardless of their individual needs.

Stakeholders we spoke with about diversion in Florida echoed some of these same concerns. Diversion programs often serve very low-level offenders who may not have been at risk of imprisonment. For example, drug courts may only serve first-time offenders. Mental health courts are often limited to offenders charged with misdemeanors who do not have prior criminal histories. These restrictive admissions criteria mean that offenders with more serious charges or prior criminal histories are not candidates for problem-solving courts, although these offenders are the ones most at risk of receiving a prison sentence. A related factor is the gatekeeper function of state attorneys, who in many programs make the final determination about who is allowed to participate and may require additional criteria for participation. In some circuits, judges are not able to divert offenders to these programs unless the state attorney agrees.

Limited resources available for treatment programs and the limited financial means of many offenders may also affect diversion program participation. State attorneys and public defenders both mentioned a lack of treatment programs in some areas of the state and a lack of funding to pay for treatment that does exist. Without sufficient treatment options, judges may be hesitant to divert offenders from prison. Additionally, the lack of treatment resources limits the capacity of problem-solving courts. Finally, some diversion programs require offenders to pay to participate; which may be beyond the means of the poorest offenders.

Are there low-risk offenders who could be diverted from prison?

Lower-level offenders make up a small proportion of the overall inmate population

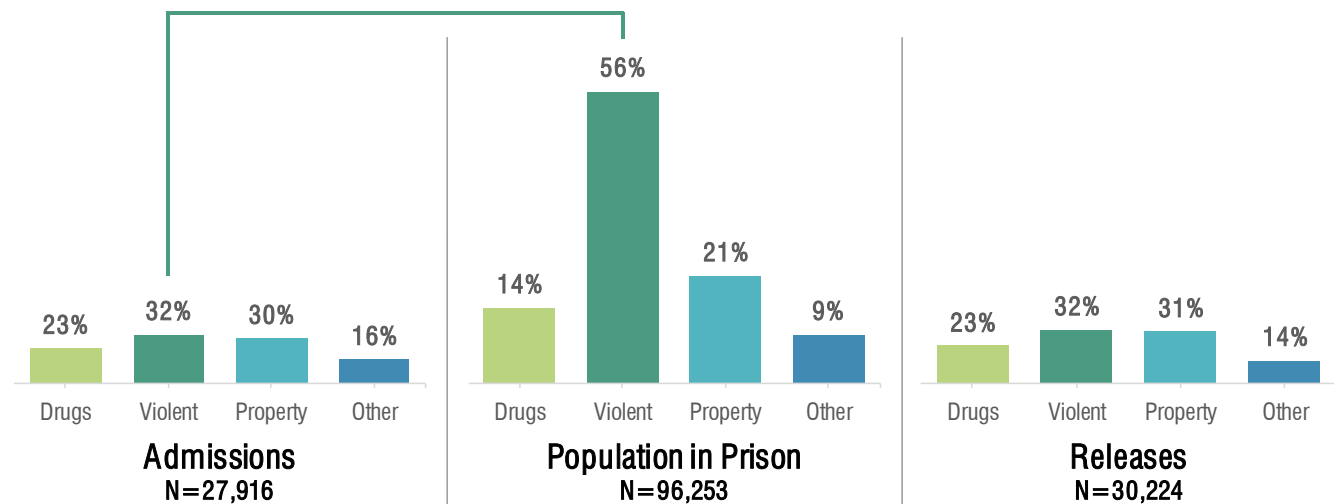
Most inmates in Florida's prisons are serving a sentence for a violent offense.¹⁰ As shown in Exhibit 14, 56% of prison inmates had a violent primary offense. However, only 32% of offenders entering prison had a violent primary offense. Because violent offenders have longer sentences than non-violent offenders, violent offenders make up a greater proportion of prison inmates. Likewise, drug and property offenders comprise the majority of prison admissions but because of their shorter sentences, they tend to churn in and out of prison relatively quickly and comprise a smaller portion of the total inmate population, 14% and 21% respectively.

Our analysis suggests that some lower-level offenders may be diverted from state prison without increasing the risk to public safety.

Exhibit 14

Most Offenders in Florida Prisons Are Serving Sentences for Violent Crimes¹

Although **violent offenders** make up about one-third of those admitted to prison, they make up **over half of the population in prison**



¹ Offenses in the "Other" category include third DUI convictions, obstruction of justice, witness tampering, escape, animal cruelty, and fishing/wildlife offenses.

Source: Florida Department of Corrections Annual Report, Fiscal Year 2017-18.

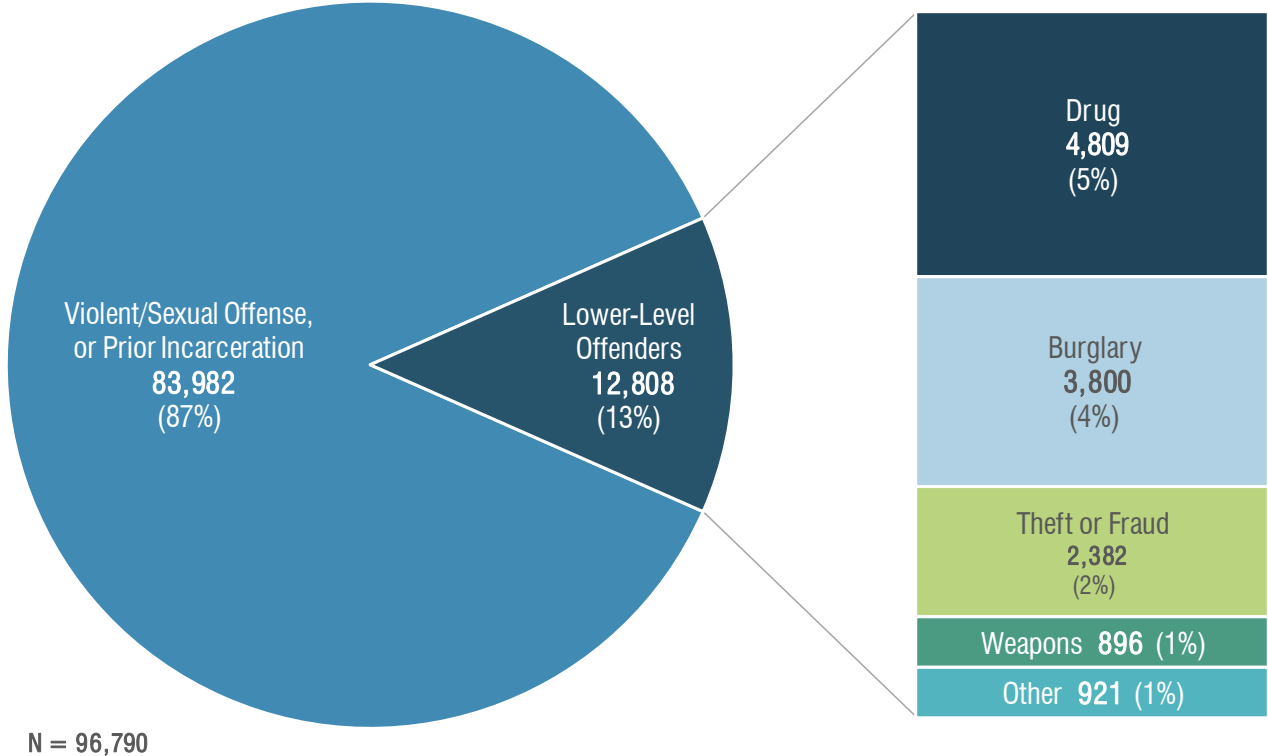
Much of the work in other states on prison diversion has focused on diverting non-violent, non-sexual, non-serious offenders from prison. These lower-level offenders make up a small portion of the overall inmate population in Florida's prisons. However, given the high costs associated with incarceration, diverting a portion of lower-level offenders from prison could result in significant taxpayer savings. For example, Florida's Criminal Justice Estimating Conference projects that for budgeting purposes, a

¹⁰ Violent crimes include murder, manslaughter, and violent personal offenses. Sexual offenses, robbery, burglary, and theft/forgery/fraud may also be considered violent in instances where there was actual physical harm or threat of physical harm, or a reasonable probability existed that individual criminal acts could have resulted in unintended physical harm or the threat of physical harm.

reduction of 1,500 inmate beds has a cost savings equivalent to closing an entire prison, roughly a \$30 million annual expenditure.

We examined inmates’ current and prior criminal records to identify lower-level inmates who have never been convicted of any violent or sexual felony and who have never served any sentence of imprisonment prior to their current sentence. This group of lower-risk offenders comprised 13% of the inmate population in Florida. (See Exhibit 15.) Drug offenders were the largest group of lower-level nonviolent offenders (4,809), followed by burglary (3,800), and theft or fraud offenders (2,382).

Exhibit 15
Primary Offenses of Inmates With No Violent/Sexual Convictions and First-Time Imprisoned¹

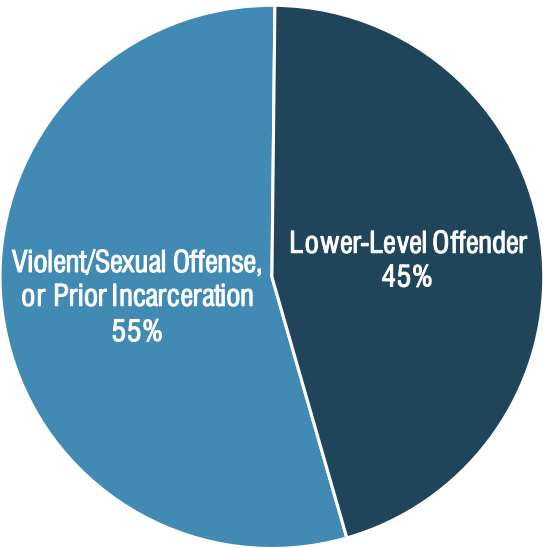


¹ Twenty two inmates were excluded from the analysis because of missing information on their primary offense. Offenses in the “Other” category include third DUI convictions, obstruction of justice, witness tampering, escape, animal cruelty, and fishing/wildlife offenses.
Source: OPPAGA analysis of Florida Department of Corrections October 2017 inmate data.

Florida has several mandatory minimum sentences that apply to offenders convicted of a drug offense. For example, drug trafficking mandatory minimum sentences require offenders to be sentenced to a term of 3, 7, or 15 years, based on the amount or weight of drugs involved in the offense. Drug-free zone mandatory minimum sentences require a three-year minimum state prison sentence for drug crimes that occur within 1,000 feet of a school, child care facility, park, community center, recreational facility, public or private college or university, physical place of worship, convenience business, public housing facility, or an assisted living facility.

Of the more than 96,000 inmates in state prisons, 5% (4,696) were serving mandatory minimum sentences for drug offenses. As shown in Exhibit 16, almost half (45.4%) of offenders serving a mandatory minimum sentence for a drug offense were first-time, non-violent, non-sexual offenders.

Exhibit 16
Inmates Serving a Mandatory Minimum Prison Sentence for a Drug Offense



N = 4,696

Source: OPPAGA analysis of Florida Department of Corrections inmate data, 2017.

Lower-level offenders sent to prison had higher rates of recidivism compared to identical offenders who received sentences of community supervision

To examine the potential public safety and criminal impact of diverting lower-level offenders from state prison, we conducted a matched-pairs recidivism analysis. We divided cases into two groups based on their sentences (state prison vs. community supervision) and matched offenders on several individual and case characteristics. (See Exhibit 17.)

Exhibit 17
Offender Match Criteria for Recidivism Analysis

Community Supervision



Match Criteria

- Type of Offense
- Total Sentencing Points
- Criminal History
- Probation Violations
- Age
- Race
- Sex

Prison



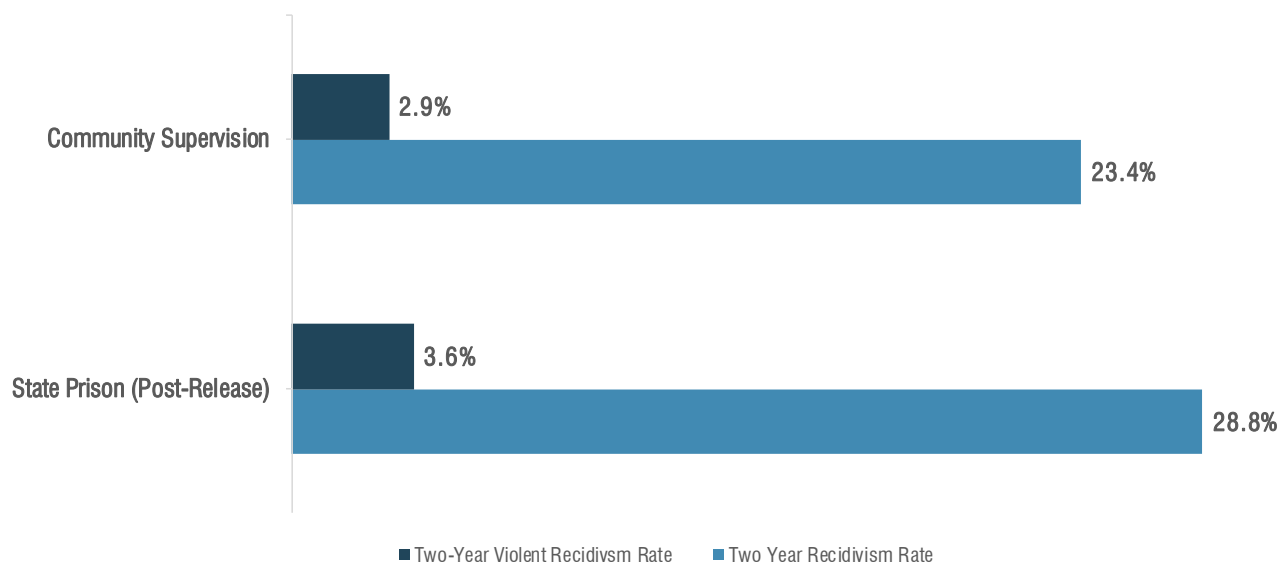
Source: OPPAGA analysis of Florida Department of Corrections and Florida Department of Law Enforcement data.

To limit our analysis to lower-level offenders, we excluded cases involving violent or sexual offenses, cases involving victim injury, and cases where the term of imprisonment was greater than five years. We selected the cases from a five-year window from July 2009 through June 2014 in order to provide ample time for an offender to recidivate. Our final analysis included over 48,000 offenders (over 24,000 matched pairs). Of these offenders, 86% were male, the median age was 30, and the median sentencing score was 44 points. Drug offenses (37%) were the most common primary offense, followed by burglary (23%) and theft or fraud (22%).

Our analysis found that lower-level offenders released from prison have higher recidivism rates than offenders sentenced to community supervision. We found that there are lower-level offenders who could be diverted from prison without increasing recidivism. Specifically, once an offender is released from prison, felony recidivism rates and violent felony recidivism rates are significantly higher for offenders relative to similar offenders sentenced to community supervision. We measured recidivism as an arrest resulting in a felony conviction within two years of release into the community. As shown in Exhibit 18, two years after release from prison, 28.8% of offenders in our matched-pairs analysis were arrested for a felony for which they were convicted and 3.6% of these offenders were arrested for a violent felony for which they were convicted. In comparison, similar offenders that received community supervision had a lower recidivism rate (23.4%) and violent felony recidivism rate (2.9%) two years after sentencing. Thus, our analysis found that recidivism rates of lower-level offenders sent to prison were higher than recidivism rates for similar offenders sentenced to community supervision. These findings are consistent with other research on recidivism in Florida that finds that offenders sentenced to prison have higher recidivism rates relative to offenders on community supervision.¹¹

Exhibit 18

Comparison of Two-Year Recidivism Rates for Offenders on Community Supervision and in State Prison



Source: OPPAGA analysis of Florida Department of Corrections and Florida Department of Law Enforcement data.

¹¹ Bales, William D., and Alex R. Piquero. "Assessing the impact of imprisonment on recidivism." *Journal of Experimental Criminology* 8.1 (2012): 71-101. Mears, D. P., Cochran, J. C., Bales, W. D., and Bhati, A. S. "Recidivism and time served in prison." *Journal of Criminal Law & Criminology*, (2016) 106, 83. Cochran, Joshua C., Daniel P. Mears, and William D. Bales. "Assessing the effectiveness of correctional sanctions." *Journal of Quantitative Criminology* 30.2 (2014): 317-347.

Additional analysis indicates that, among lower-level offenders, those sentenced to state prison have higher recidivism rates relative to those sentenced to community supervision, regardless of their offense. (See Exhibit 19.) Specifically, drug offenders that received sentences of community supervision had the lowest recidivism rates for both violent and non-violent crimes. The highest recidivism rate (33.7%) was for offenders sent to prison for theft or fraud crimes and the highest violent recidivism rate (5.5%) was for offenders sent to prison for a weapons offense.

Exhibit 19

Comparison of Two-Year Recidivism Rates for Offenders on Community Supervision and in State Prison¹

	Felony Recidivism		Violent Felony Recidivism	
	Community Supervision	State Prison	Community Supervision	State Prison
Drugs	21.1%	25.1%	2.2%	2.8%
Burglary	22.9%	29.3%	3.7%	4.5%
Theft or Fraud	27.4%	33.7%	2.7%	3.4%
Weapons	22.8%	28.2%	4.4%	5.5%
Other	24.5%	30.2%	3.3%	4.0%

¹ Offenses in the "Other" category include third DUI convictions, obstruction of justice, witness tampering, escape, animal cruelty, and fishing/wildlife offenses.

Source: OPPAGA analysis of Florida Department of Corrections and Florida Department of Law Enforcement data.

What options exist for diverting low-risk offenders from prison?

Diverting offenders from prison can result in annual savings to the state. The daily cost to incarcerate one prisoner in Fiscal Year 2016-17 was \$55.80 per day, compared to only \$5.52 for community supervision. If 1,500 offenders sentenced to prison were sentenced to community supervision instead, Florida could realize approximately \$27.5 million in savings annually. (See Exhibit 20.)

Exhibit 20

Probation Is Significantly Less Expensive Than Prison



Prison

- \$55.80/day or \$20,367/year
- 1,500 inmates cost \$30.5 million/year



Probation

- \$5.52/day or \$2,015/year
- 1,500 supervisees cost \$3 million/year
- \$27.5 million saved

Source: OPPAGA analysis of Florida Department of Corrections and Florida Department of Law Enforcement data.

Our analysis identified lower-level inmates who have never been convicted of any violent or sexual felony and who have never served any sentence of imprisonment prior to their current sentence. This group of lower-risk offenders comprised 13% of Florida's state prison population in October 2017. Our analysis also suggests that imprisonment seems to increase their recidivism relative to identical offenders given community supervision. Consequently, focusing on diverting these types of offenders could result in less crime and decreased costs.

When considering the diversion of offenders from prison, impacts on public safety and costs are critical concerns. For example, violent recidivism rates for lower-level drug offenders sentenced to community services was 2.2%, indicating that some reoffending occurs within this group. Thus, violent recidivism was not eliminated but could be reduced relative to similar offenders who were sentenced to state prison. In addition, it should be noted that there may be additional costs for diversion options such as drug courts, as the costs of treatment may exceed the costs of regular probation. While providing these kinds of services may partially offset the savings of not sending offenders to prison, additional societal benefits may be achieved. Diverting offenders from prison into community alternatives involving drug and mental health treatment can result in maintaining offenders' employment, ties to family and friends, and positive contributions to society and reduce future recidivism.

Given the limited availability of individual-level data on participation in diversion programs, such as problem-solving courts, the Legislature could consider requiring the circuit courts to report individual participation and outcomes on problem-solving courts and other court-based diversion programs to the Florida Department of Law Enforcement as part of the criminal justice data warehouse. This would allow for statewide evaluation of program use and effectiveness that could aid in making future funding decisions, as well as provide better information on related costs and associated cost savings.

As directed by the Legislature, we spoke with several stakeholders in Florida's criminal justice system. Many identified mechanisms that could be used to divert lower-level offenders from prison. These options include the greater use of problem-solving courts, creating a safety valve in mandatory minimum terms for drug offenses, and reviewing the reduction of some third-degree felonies to misdemeanors. In addition, the Legislature may wish to consider changes to the Criminal Punishment Code to divert additional offenders from prison. (See Exhibit 21.)

Exhibit 21

The Legislature Could Consider Options for Diverting Low-Level Offenders From Prison

Increase the number of lower-level prison bound offenders served by problem-solving courts

- **The Legislature could encourage problem-solving courts to serve more offenders at risk of prison.**
 - Create eligibility criteria for all problem-solving courts to target offenders that would be best served by treatment.
 - Make additional state funding for problem-solving courts contingent on diverting prison bound offenders.

Create a safety valve or modify mandatory minimum terms for drug offenses

- **The Legislature could create a safety valve or modify mandatory minimum terms for drug offenses.**
 - Create a safety valve allowing judges to downward depart to a non-state prison sentence from the three year mandatory minimum terms for trafficking in controlled substances if the violation only involved possession, was non-violent, and no one was injured.
 - Consider steps other states have taken to limit the application of the mandatory minimum to only certain offenses occurring within a drug free zone, such as requiring sale or delivery to a minor or the application of the zone to certain hours. More broadly consider repealing the mandatory minimum term associated with drug free zone offenses or eliminating the three-year mandatory minimum terms for drug possession when there is no evidence of intent to sell.

Reduce some third-degree felonies to misdemeanors

- **The Legislature could divert additional lower level offenders from prison by reducing certain third degree felonies to misdemeanors.**
 - Stakeholders we spoke with mentioned changing the threshold amount used for felony theft, driving with a suspended license three or more times, and joyriding as examples of felonies that could be reduced to misdemeanors.
 - Conduct an annual review of new felony and misdemeanor offenses created or enhanced by the Legislature and assess the impact on prison and jail bed space and probation populations.

Revise the Criminal Punishment Code

- **The Legislature could consider some ways to revise the Criminal Punishment Code to divert additional offenders from prison, while retaining judges' discretion to use prison as a sanction when appropriate.**
 - Raise the number of points for a prison sentence from 44 to 52, as it was under prior sentencing schemes. This change could divert offenders from prison who currently score within the presumptive state prison sanction range.
 - As a companion revision, the Legislature could raise the threshold for a non-state prison sentence from 22 points to 44 points.
 - Reinstate an upper limit in the sentencing guidelines, which would fall below the statutory maximum term and limit sentences above this upper limit to cases where aggravating circumstances were found.
 - Increase the factor subtracted from total scoresheet points in the sentencing computation formula from 28 to 36. This would have the broader effect of decreasing the lowest permissible sentence a judge may impose by roughly six months for all offenders and would allow for some lower-level offenders to be sentenced to term of community supervision without a downward departure.
 - Consider conducting a review of the criminal history points in sentencing scores to determine if they are contributing to the imprisonment of lower-level offenders and their association to offender recidivism. This could aid the Legislature in exploring options to modify the formula in ways such as eliminating or reducing points received on the sentencing scoresheet for non-violent prior offenses and/or shortening the amount of time criminal history is considered from the current 10 years.

Source: OPPAGA analysis.

APPENDIX A

Mandatory Minimum Statutes Requiring Prison Sentences

Florida has multiple statutes that require a defendant to serve a set minimum time in state prison. In Exhibit A-1, OPPAGA identified mandatory minimum imprisonment terms in over 30 statutes, with some including more than one mandatory minimum sentence. Mandatory minimum terms for felony offenses range from 18 months in prison to life imprisonment, while mandatory minimum terms for misdemeanors range from five days to one year. This list includes repeat offender sanctions.

Exhibit A-1

Florida Mandatory Minimum Statutes That Result in a Prison Sentence

Statute	Offense
316.027	Crash involving death or serious bodily injury
316.1935	Fleeing or attempting to elude a law enforcement officer
379.407	Saltwater product violation penalties
456.065	Unlicensed practice of a health care profession
624.401	Unauthorized action as insurer
741.283	Domestic violence with intentional bodily harm
775.082	Sentences for certain reoffenders previously released from prison
775.084	Sentences for habitual felony and three-time violent offenders
775.087	Possession or use of a weapon
782.065	Murder of law enforcement, correctional, or probation officer
784.07	Assault or battery of law enforcement or other specified officers
784.08	Assault or battery on persons 65 years of age or older
787.01	Kidnapping; kidnapping of child under age 13
787.02	Kidnapping; custody offenses; human trafficking
787.06	Human trafficking
790.166	Possession, hoax, or attempted use of weapon of mass destruction
790.23	Possession of firearm or weapon by felons or delinquents
790.235	Possession of firearm or ammunition by violent career criminal
794.0115	Dangerous sexual felony offender
796.05	Deriving support from the proceeds of prostitution
796.07	Prohibiting prostitution and related acts
817.234	False and fraudulent insurance claims
817.568	Criminal use of personal identification information
876.39	Intentionally defective workmanship
893.13	Drug abuse prevention and control; manufacturing
893.135	Drug trafficking

Source: OPPAGA analysis of *Florida Statutes*.

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