

Sentencing Times

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ADVOCACY

Momentum builds for crack cocaine sentencing reform

Republican Senator Jeff Sessions, a former federal prosecutor and conservative Alabama legislator, is an unlikely champion for sentencing reform.

Sessions, however, has repeatedly called for reform of federal crack cocaine sentences and has introduced a bill three times, most recently in May, to do just that.

"I believe that as a matter of law enforcement and good public policy that crack cocaine sentences are too heavy and can't be justified," said Sessions in a *USA Today* article describing the political momentum in Congress this year to finally address the excessive penalties for low-level crack cocaine offenses.

When Congress established drastically different penalties for crack and powder cocaine offenses under the Anti-Drug Abuse Act of 1986, it did so believing that crack cocaine was more dangerous than powder cocaine and posed a greater threat to communities.

However, the drugs are pharmacologically identical. The primary differences between them are their production and means of consumption.

Despite the similarities, defendants convicted with just five grams of crack cocaine (the weight of two sugar packets) are subject to a five-year mandatory minimum prison sentence. The same five-year penalty is triggered for powder cocaine only when an offense involves 500 grams — 100 times the minimum quantity for crack cocaine.

Coalition increases advocacy efforts

Since 2006, The Sentencing Project has been a principal leader in the coalition to reform the harsh federal penalties for low-level crack cocaine offenses. Prospects for reform improved dramatically when



Ryan King (left) testifies before the United States Sentencing Commission.

Congress reconvened in January.

The Sentencing Project's advocacy on Capitol Hill included holding regular meetings with Congressional offices, hosting briefings for policymakers and staff, and drafting and distributing materials about the devastating impact of the crack cocaine sentencing law to key policy leaders.

In August, The Sentencing Project launched a grassroots outreach and media campaign with the ACLU, Drug Policy Alliance and Open Society Institute to complement its legislative reform efforts (*see sidebar, p. 5*).

The Sentencing Project's Ryan King testified before the United States Sentencing Commission last year, as the Commission prepared its fourth report and recommendations to Congress on crack cocaine sentencing. On May 1, the Commission submitted a sentencing guideline amendment to Congress that would reduce the current sentences for crack cocaine offenses by an average of 15 months.

If Congress takes no action to reject the Commission's proposed amendment, the new sentencing range will go into effect on November 1.

The Commission is also considering whether the guideline adjustment will be retroactive for cases adjudicated before November 1,

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EXECUTIVE DIRECTOR'S MESSAGE

A two-tiered justice system fails us all

It's often said that our nation maintains a two-tiered system of justice, one for those with resources and another for those without. An experience with a friend of mine brought that home to me very clearly.

My friend and his wife are parents to three children, including a teenage son. In recent years their son, I'll call him Lenny, began to engage in some of the troubling behaviors that many teenage boys are known for.

He started skipping classes, came home late at night, and his parents suspected there was some drinking and drug use. Nothing too serious, but they were concerned. Then one night they received a call from the police station, after Lenny had just been arrested for shoplifting from a local convenience store.

Over the course of the next two weeks, Lenny's parents spoke with the police and the prosecutor assigned to the case. They told them that they were concerned about Lenny's behavior and had found a social worker they believed could help Lenny deal with the problems he was confronting.

The prosecutor recognized this as a constructive response and agreed to drop the charges. Lenny spent some months working with the social worker, and began to straighten out his behavior. He later went off to a good college and seemingly will have a good future.

The other teenager

I can't help thinking, though, that on the same night that Lenny was arrested for shoplifting, so too was another teenager, but one from a low-income family. This boy's parents probably didn't have the personal resources to pay for a social worker and may not have had the negotiating skills to work with the prosecutor.

He wouldn't go to prison, of course, for a first-time shoplifting conviction, but if he was subsequently arrested for another shoplifting or larceny, all of a sudden he begins to look like a habitual offender and starts to take a very different life path from Lenny's.

A need to balance the scales

What this experience tells me is that the degree of justice one receives is dependent in part on how our criminal justice system functions, but is also related to the personal

...drug abuse in middle-class communities is often treated as a public health problem, while in low-income [areas], it's handled as a criminal justice issue.

resources one brings to the system.

We can see this very clearly in the nation's war on drugs, whereby drug abuse in middle-class communities is often treated as a public health problem, while in low-income communities, it's handled as a criminal justice issue.

Or, in the quality of justice that indigent defendants receive, far too often represented by overworked or inexperienced defense counsel, and limited in the sentencing options available to them.

At The Sentencing Project we're working to try to balance the scales of justice. We're actively supporting the Second Chance Act and reentry measures that will increase the odds that people returning to the community from prison can gain access to housing, employment, and other critical services.

We're helping to lead coalition efforts aimed at reforming the unjust crack cocaine mandatory sentencing policies.

And we're trying to restore voting rights to people with felony convictions so that they can fully participate in our democracy.

A system of justice can only be effective if it's both fair and perceived to be fair by all citizens. A two-tiered justice system fails on both counts.

Through our work and that of many of our allies we hope to remedy these injustices and strive for a justice system that truly works for all citizens.

Thank you for helping us to work toward making that goal a reality.



Marc Mauer

Iowa highest in black-to-white incarceration rate

A new study by The Sentencing Project examining the racial and ethnic dynamics of incarceration in the United States finds wide variation in racial disparity among the 50 states.

Uneven Justice: State Rates of Incarceration by Race and Ethnicity, finds that African Americans are incarcerated at nearly six (5.6) times the rate of whites and Hispanics at nearly double (1.8) the rate.

The report also reveals wide variation in incarceration by state, with states in the Northeast and Midwest exhibiting the greatest black-to-white disparity.

The black-to-white ratio ranged from a high of 13.6-to-1 in Iowa to a low of 1.9-to-1 in Hawaii.

In Iowa, Vermont, New Jersey, Connecticut, and Wisconsin African Americans are incarcerated at more than ten times the rate of whites.

Uneven Justice includes recommendations for steps policymakers should take to address the broad disparities in the system:

- **revisit drug sentencing laws** which result in disproportionate numbers of low-level offenders being prosecuted;
- **revisit mandatory minimum sentences and restore discretion to judges** to consider individual circumstances in sentencing;
- **establish enforceable and binding standards** for indigent defense; and
- **mandate that all new policies affecting the prison population be accompanied by a Racial Impact Statement** to document the projected consequences for people of color.

While disparities in the use of incarceration are in part a reflection of differential crime rates, they are also influenced by decisions by policymakers and practitioners regarding arrest, conviction, sentencing, and the severity of criminal penalties.

The report provides clear evidence that states should enact reforms to their sentencing and other criminal justice policies to make them more equitable.

Uneven Justice is available at www.sentencingproject.org.

Sentencing reform

continued from page 1

2007. The Commission amendment does not affect the harsh mandatory minimum penalties for crack offenses; they can only be amended by Congress.

The recent Commission report, however, calls on Congress to raise the crack cocaine quantities that trigger the five-year and ten-year mandatory minimum sentences in order to focus penalties on major traffickers, and to repeal the mandatory minimum for simple possession.

Building momentum

Senator Sessions' legislation set an important precedent of Republican support for sentencing reform when it was first introduced in 2001. The bill would reduce, but not eliminate, the sentencing disparity between crack and powder cocaine, and includes an expansion of mandatory sentencing for powder cocaine offenses as part of its remedy. The proposal would raise the trigger quantity for a five-year

mandatory minimum from five grams to 20 grams but lower powder cocaine from 500 grams to 400 grams.

In June, two new reform proposals entered the debate. Sessions' Republican colleague Senator Orrin Hatch (UT) introduced the Fairness in Drug Sentencing Act of 2007 (S. 1685) — a bill that also seeks to reduce the sentencing disparity between powder and crack cocaine. The legislation would raise the quantity trigger for the five-year mandatory minimum for crack cocaine offenses from five grams to 25 grams.

The second bill, Drug Sentencing Reform and Kingpin Trafficking Act of 2007 (S. 1711), introduced by Democratic Senator Joseph Biden (DE), would equalize penalties for crack and powder cocaine by raising the quantity trigger for crack cocaine to the current level of powder cocaine.

Both the Hatch and Biden bills would leave current quantity triggers for powder cocaine alone and eliminate the mandatory minimum sentence for simple possession of crack cocaine.

Senator Leahy has promised to hold a hearing on the proposals this fall.

Report could signal end of a bleak era

Is the end of the "tough on crime" era visible on the horizon?

Recent legislative developments documented in a new report by The Sentencing Project suggest that there is reason to be optimistic.

The report, *Changing Direction? State Sentencing Reforms 2004–2006*, found that at least 22 states have enacted legislative reforms to sentencing policies or adopted changes to probation and parole procedures in recent years.

The changes focused on the diversion of drug offenders from incarceration through expanded treatment options, an expansion of alternatives to incarceration for persons convicted of non-violent offenses, and reforming parole and probation revocation procedures to make greater use of community supervision resources.

These developments continue a trend dating back to 2001, as the impact of three decades of growing rates of incarceration resulted in dramatic prison overcrowding and strains on state budgets.

Noteworthy reforms

■ Maryland established a diversion system for persons convicted of drug offenses, permitting the striking of an entry of judgment upon the successful completion of treatment;

■ Connecticut repealed

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Report

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the state's sentencing disparity between crack and powder cocaine offenses; and,

■ New York finally took steps to reform some of the more punitive elements of the infamous Rockefeller Drug Laws.

Changing Direction? State Sentencing Reforms 2004–2006 by Ryan S. King is available at www.sentencingproject.org

The Sentencing Project needs your support!

Contributions from our friends like you are vital to The Sentencing Project's work.

Support our efforts to promote fair and effective criminal justice policies, and alternatives to incarceration by sending a contribution today.

Contribute online at www.sentencingproject.org, or send a check to: The Sentencing Project, 514 Tenth Street, NW, Suite 1000, Washington, DC 20004.

Thank you!

Leave a legacy for sentencing reform

For information about planned giving opportunities or how you can make a bequest to The Sentencing Project, please contact Development Manager, Angela Boone at (202) 628-0871.

ADVOCACY

Maryland, Florida and Rhode Island continue trend to expand voting rights

Tears of joy ran down Kimberly Haven's face as she stood outside the doors of the Baltimore City Board of Elections and prepared to enter to submit her voter registration application.

She was joined by a crowd of onlookers, supporters, media, and other individuals who recently won back their right to vote.

July 2 was the first day on which 52,000 newly eligible citizens in Maryland who had completed their sentence but had previously been denied the right to vote could apply for voter registration cards.

"We have a voice now and our vote can make a difference," said Marlo Hargrove, a father of four, director of a program for former prisoners, and a newly eligible voter.

Maryland's progress

The celebration outside the Board of Elections was all the result of a new law, the Voter Registration Protection Act of 2007, signed by Governor Martin O'Malley in April, which restores voting rights to citizens with two felony convictions who have completed their sentences.

Marc Mauer and Ryan S. King provided testimony before committees in both Houses of the Maryland Legislature urging restoration of voting rights, along with colleagues from many other organizations.

The Sentencing Project also teamed up

with the Maryland Got Democracy campaign, helping to plan media outreach during the legislative session.

National movement for reform

The victory in Maryland is one of several over the past year, adding to a growing national trend towards expansion of voting rights for people with felony convictions.

In April, Florida Republican Governor Charlie Crist paved the way to restore the vote to potentially hundreds of thousands of people who have completed their felony terms by convincing the Office of Executive Clemency to remove the voting ban for most formerly incarcerated people.

In November, Rhode Island voters approved a ballot measure restoring voting rights to approximately 15,000 men and women on probation or parole.

Since 1997, 16 states have reformed their disenfranchisement laws.

Maryland now joins 38 other states and the District of Columbia that allow voting upon completion of sentence, if not sooner.

"We're changing the political landscape in Maryland; we're charting a new course in Maryland's history and that is significant," said Haven, who coordinates the Maryland Got Democracy campaign and is executive director of Justice Maryland.

"I could not be happier for finally achieving my goal of civic equality or prouder of Maryland for recognizing the democratic rights of over 50,000 men and women like me."



"We have a voice now and our vote can make a difference," said Marlo Hargrove while filling out his voter registration form.

Kimberly Haven's personal crusade becomes state-wide Maryland victory

Nothing worthwhile comes easy — that's the adage Kimberly Haven said she's adopted after having personally fought for six years to restore the rights of formerly incarcerated individuals.

With the support of other advocates and organizations, Haven's work has brought the Senate and House to approve the "Voter Registration Protection Act," which Maryland Governor Martin O'Malley signed on April 24, 2007.

Though it was initially a selfish act, as Haven wanted her voting rights restored after release from a Maryland prison in 2001, she soon recognized the unfairness of disenfranchising citizens after they have completed their sentence and returned to the community.

"At first, it became my personal crusade, but when I learned about the magnitude, I said 'hell no,'" recalled the 45-year-old Baltimore resident. "There is no reason why I and 50,000 other people should not be able to vote."

Before Maryland changed its law in 2007, Haven, whose probation ended in 2006, would have had to wait three more years to vote again.

Reforming self, reforming the state

After her release from a three-year sentence Haven immersed herself in criminal justice reform. For Haven, who rose to the role of executive director of Justice Maryland, a prominent state-wide criminal justice reform organization, this was the fulfillment of promises she made to herself and those around her during her incarceration.

As the leader of the nonprofit, she has become a national spokesperson for the issue and has worked with numerous advocacy groups including The Sentencing Project, Brennan Center for Justice, NAACP and ACLU to educate the public on rights for formerly incarcerated individuals — primarily voting rights and sentencing reform.

After running into powerful opponents, including then-Governor Robert Ehrlich, the movement came to a halt when Maryland legislators refused to consider changing the state's antiquated and draconian lifetime voting ban.



Prior to Kimberly Haven's work on the new legislation, more than 110,000 Maryland residents were disenfranchised.

time I wanted to walk away from the fight. Knowing that I have the ability to have my voice counted and to be part of the discussion is critical to me."

As a result of her hard work coupled with the support and guidance of organizations and affected individuals, the House and Senate in March 2007 approved the "Voter Registration Protection Act," which

- re-enfranchises the state's 50,000 residents who have completed their sentences,
- ends the draconian lifetime voting ban, and
- eliminates the three-year waiting period for certain people with past felony convictions.

Prior to the new legislation, more than 110,000 Maryland residents were disenfranchised due to felony convictions — one out of every 37 residents. The state was one of only 11 with a permanent felony disenfranchisement policy.

Among those with felony records, nearly half (52,272) have completed their full sentence, while another 31% are living in the community on probation or parole.

"When you go to the State House in Annapolis and talk to one of the delegates, the first thing they ask is if you're one of their constituents and if you're a registered voter. As of July 1, I can say 'yes.'"

Persistence pays off

Instead of giving up in 2006, however, Haven was propelled to continue on.

"I never once gave up or thought about it," said Haven, who has a newly registered 19-year-old son.

"Even last year when the door was shut, I thought 'how do we make this better for next year.'"

There was never a

Crack cocaine sentencing campaign launched

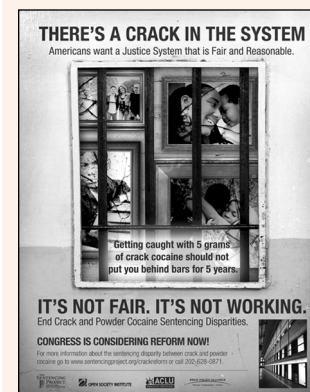
In August, a coalition of criminal justice advocacy organizations launched *"It's Not Fair. It's Not Working."*

This national effort seeks to reform the 100-to-1 federal drug quantity ratio between crack and powder cocaine, which results in excessive mandatory minimum sentences for possession of small amounts of crack cocaine.

The coalition, made up of The Sentencing Project, the ACLU, the Drug Policy Alliance and the Open Society Institute, released a series of ads that focus on the disparity in sentencing between crack and powder cocaine.

"These laws have had no impact on reducing the availability of drugs in our communities and have in fact diverted precious resources," said Kara Gotsch, Advocacy Director of The Sentencing Project. "Possessing a quantity of drugs equivalent to 2 sugar packets should not send a person to prison for 5 years."

To view the entire ad campaign, visit www.sentencingproject.org/crackreform.



Pro bono sparks lawyers' passions



Matthew Shors (right) and Pamela Quinn of the firm O'Melveny & Myers authored the two amicus briefs on crack cocaine sentencing that The Sentencing Project submitted to the Supreme Court.

Shors, who's been with the firm for six years and has done appellate criminal defense work, was attracted to the firm's commitment to *pro bono* work. "That commitment has made it possible for me to pursue these kinds of opportunities," he said.

"The unfairness of the current system really became clear as we dove into this work. First-time non-violent crack offenders are spending far more time in prison than any rational criminal justice system would allow."

Pamela Quinn has worked with the firm for five years and previously worked as a law clerk for a federal judge and at the Justice Department.

While working on the case her views on sentencing became more enlightened, she said. "Although I knew very generally about the crack/powder disparity, I had heard and believed all the myths. I had no idea of the extent of the injustice inherent in federal crack sentences."

Thanks O'Melveny & Myers for the generous *pro bono* commitment!

POLICY

The Sentencing Project makes a federal case about crack cocaine

Supreme Court takes on sentencing guidelines

As the U.S. Supreme Court geared up to consider critical questions regarding the federal Sentencing Guidelines, and in particular, the future of crack cocaine sentencing, The Sentencing Project prepared an amicus brief addressing the need to reform one of the nation's most unjust laws.

In December, The Sentencing Project and the American Civil Liberties Union, in partnership with the law firm of O'Melveny & Myers, submitted an amicus brief to the Supreme Court in the case of *Claiborne v. United States*.

Mario Claiborne was facing a Guideline range of 36–47 months for a crack cocaine offense, but the judge handed down a sentence of 15 months because of Mr. Claiborne's limited criminal history, gainful employment, and likelihood of re-offending. Mr. Claiborne was also a married father of two children, employed and working to support his family.

The U.S. Attorney argued that the departure was unreasonable, and the question presented to the Court was what circumstances justify a sentence below the Guideline range.

The Sentencing Project amicus argued that federal cocaine laws routinely subject low-level defendants to punishments far out of proportion to the conduct for which they have been convicted.

This puts the Guideline range in conflict with other criteria that a sentencing judge must consider, namely, whether a sentence is "sufficient but not greater than necessary" to achieve the statutory goals of punishment. By their very nature, crack cocaine sentences often subject defendants to prison sentences longer than their conduct would merit. Therefore, the district court was not only justified, but required to issue a sentence below the recommended Guideline range.

Federal judges should have discretion

The Court heard oral arguments in the case in February. Just before a ruling was expected in June, Mr. Claiborne tragically died. This led the Court to dismiss the case, leaving criti-

cal questions regarding crack cocaine policy and federal sentencing unanswered.

Two weeks later, the Court agreed to hear *Kimbrough v. United States*, a case which addresses whether a sentencing judge can take into account the impact of the 100-to-1 crack/powder disparity codified in the Sentencing Guidelines, and/or the recommendations for reform recently released by the United States Sentencing Commission.

In conjunction with O'Melveny & Myers, The Sentencing Project and the Center for the Study of Race and Law at the University of Virginia Law School submitted an amicus to the Court in July.

The brief argues that "the drug Guidelines ranges are driven almost entirely by the type and quantity of the substance involved" and, as such, are a poor reflection of the seriousness of involvement a defendant may have had in the charged offense.

For this reason, federal judges should be afforded discretion to craft sentences, even those below the recommended Guideline range, that most accurately reflect the seriousness of the conduct and the statutorily prescribed goals of sentencing.

The Court will hear oral arguments in *Kimbrough* in October 2007, and a ruling is expected in early 2008.

Stay tuned to www.sentencingproject.org for updates on this important case.

The [Sentencing Project] brief argues that "the drug Guidelines ranges are driven almost entirely by the type and quantity of the substance involved" and, as such, are a poor reflection of the seriousness of involvement a defendant may have had in the charged offense.

Quoting The Sentencing Project

Los Angeles Times

December 1, 2006

Prison numbers up 35% in 10 years

"What is our prison system accomplishing? It's not reducing crime because people are not being rehabilitated."

— Kara Gotsch, Advocacy Director

The Washington Post

May 23, 2007

Seeking to close the book on a bad law

"For the first time in 20 years, there is some real prospect for a change in policy."

— Marc Mauer, Executive Director

THE WALL STREET JOURNAL

March 30, 2007

Fears of new crime wave are said to be overblown

"A closer look at the numbers reveals a more complicated picture."

— Marc Mauer, Executive Director

THE ROANOKE TIMES

July 23, 2007

Locking away minorities

"Racial disparities in incarceration reflect a failure of social and economic interventions to address crime effectively and also indicate racial bias in the justice system."

— Ryan King, Policy Analyst

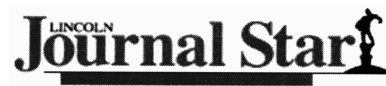


March 15, 2007

Ex-cons sentences don't always end with release

"We've created a class of people who essentially don't fit in."

— Ryan King, Policy Analyst



July 24, 2007

State above average in minority incarceration, study says

"The criminal justice system does not exist in a vacuum. If we could reform the criminal justice system overnight, it still would not address the underlying issues."

— Ryan King, Policy Analyst,

regarding disparity in criminal justice system and underlying social issues.



January 2007

Felons push for voting rights

"There's an enormous amount of change in a relatively short period of time.... I don't want to say any of these changes had been easy in coming about. But I think the direction of change is dramatically toward expansion of the franchise and a reconsideration of policies that have been in place, in some cases, for 200 years."

— Marc Mauer, Executive Director



August 12, 2007

Oklahoma is locking 'em up fast, and letting 'em out slowly

"We incarcerate more people for more types of offenses for longer periods of time than any other country in the world. For a country that advertises itself internationally as a model of democracy and freedom ... it's quite distressing."

— Ryan King, Policy Analyst

Arbitrary Justice, new book from Angela J. Davis, featured in *Time*

Angela J. Davis knows how powerful prosecutors have become in the criminal justice system and has written about it in *Arbitrary Justice: The Power of the American Prosecutor* (Oxford University Press, 2007).

Drawing on her dozen years of experience as a public defender, The Sentencing Project board member discloses how the everyday, legal exercise of prosecutorial discretion contributes to inequities in the criminal justice system.

The former director of the Washington, D.C., Public Defender Service, where she began as a staff attorney representing indigent juveniles and adults, is now a professor of law at American University's Washington College of Law.

In July, she was profiled in *Time* after the resignation of Mike Nifong, the prosecutor in the Duke lacrosse players' case.

Arbitrary Justice has received praise from Harvard Law Professor Charles Ogletree, Congressman Jesse Jackson, Jr. and Cardozo School of Law Professor Barry Scheck, who writes: "Finally, a book by a scholar that describes what's really going on in the trenches — a dangerous shift in power from judges to prosecutors This is a very important work."

For more information, log onto: www.arbitraryjustice.com.

THE SENTENCING PROJECT

works for a fair and effective criminal justice system by promoting reforms in sentencing law and practice, and alternatives to incarceration. To these ends, it seeks to recast the public debate on crime and punishment.



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ADDRESS SERVICE REQUESTED

Lawmaker introduces first racial impact legislation

Oregon Representative William “Chip” Shields became the first state elected official to propose addressing racial disparities proactively in his state’s criminal justice system in March when he introduced HB 2933.

The bill would require any new legislation that could change the prison population in Oregon to be accompanied by a racial and ethnic impact statement, similar to environmental impact statements for development-based bills.

The bill was referred to the Judiciary Committee for further action.

Salem attorney Jess Barton, who asked Representative Shields to introduce the legislation after hearing about it from The Sentencing Project, explained why his state should adopt the measure.

“We incarcerate 1,400% more African-American males for drug crimes than white males,” said Barton. “As a result, African Americans in this state are about eight times more likely to be living in prison than whites. Adopting racial impact statements is a crucial step Oregon must take to make its system more fair and equitable.”

Shields, who chairs the Public Safety Subcommittee and recently became Assistant Majority Leader, makes the case for the use of racial and ethnic impact statements:

“For those concerned about minority over-



Chip Shields chairs
Oregon’s Public Safety
Subcommittee.

representation in the criminal justice system, it just makes sense to make an analysis of how certain legislation will effect overrepresentation *before* it is passed,” Shields said.

“If that analysis shows the legislation will exacerbate minority overrepre-

sensation, we can take a deep breath and try to improve that legislation, or maybe we can implement a different tactic that will still get us to the end result of increasing public safety without compounding minority over-representation in our prison system.

“... it just makes sense to make an analysis of how certain legislation will effect overrepresentation before it is passed.”

Representative Chip Shields