

# Joint Committee on the Judiciary

Testimony of  
Supreme Judicial Court Chief Justice  
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State House  
Boston, Massachusetts

I want to thank Chairmen Brownsberger and Fernandes, and the members of the Committee for the opportunity to testify before you today. I am here to explain why the Legislature should abolish mandatory minimum sentences for drug crimes. I will seek to present you with the facts that demonstrate the wisdom of repealing mandatory minimum sentences in these cases, taking the lead from a former Chief Justice of the Supreme Judicial Court, John Adams, who once wisely stated "facts are stubborn things."

There are at least three reasons why the Legislature needs to abolish mandatory minimum sentences: racial justice, justice reinvestment, and fairness in sentencing. Let me begin with racial justice: mandatory minimum sentences have a disparate impact on persons of color. I can spare you a thousand words by turning your attention to Exhibit 1. That chart shows that in 2013, 44% of all persons convicted of drug offenses were persons of color, but 75% of all persons convicted of drug offenses with mandatory minimum sentences were persons of color. This remarkable 31% differential is not a one year phenomenon; it is the same differential as in 2002. And the differential during this twelve year period never fell below 20%. Given the durability of this racially disparate treatment over time, there is no reason to believe that the past will not be prologue. If you do not abolish minimum mandatory sentences for drug offenses, you must accept the tragic fact that this disparate treatment of persons of color will be allowed to continue.

Let me turn now to justice reinvestment. Every time a judge is required to impose a mandatory minimum sentence that is greater than the sentence that the

judge otherwise would have imposed if the judge were allowed to apply individualized, evidence-based best practices in sentencing, the taxpayer is paying money to incarcerate that offender longer than he or she should be incarcerated. That money could be better spent on programs that are designed to combat our opiate abuse crisis. We have too few drug treatment beds; too few programs to assist those battling mental health problems; too few probation officers to closely supervise those in our drug courts and in our HOPE-MORR programs. The money saved from abolishing mandatory minimum sentences in drug cases is money diverted from needless over-incarceration that can be more wisely spent on programs proven to help those struggling with opiate abuse.

I wish to address some of the criticisms that have been leveled against this justice reinvestment argument. Some note, correctly, that Massachusetts is already the 48th lowest in the nation in our rate of incarceration per 100,000 residents. It is true that, in any discussion of mass incarceration, we should not fairly be lumped with states with far higher rates of incarceration. But it is fair to compare where Massachusetts is today in terms of our rate of incarceration with where we have been over the past 45 years. If you turn to Exhibit 2, you will see that our rate of incarceration per 100,000 residents today is 306, which is approximately 500 per cent greater than it was in 1974 and 1975, when our violent crime rate was approximately where it is today and when our property crime rate was more than twice as high as it is today. I am not suggesting that we should return our rate of incarceration to where it was in the mid-1970s, but do we need to be five times higher? Think how much money could be diverted to drug and mental health treatment if we were three or four times higher. It should be plain

that increasing the rate of incarceration by 500 per cent has not prevented the most severe opiate abuse crisis in my lifetime; it should also be plain that the first and most important step needed to address that crisis is to ensure that drug treatment is available to all who need it, and that justice reinvestment will help free up the funds to do so.

It should also be plain that we can eliminate minimum mandatory sentences in drug offenses without any adverse impact on public safety. Other states, including Michigan, New York, and Rhode Island, have eliminated or substantially reduced the scope of minimum mandatory sentences in drug cases. Since doing so, the violent crime rate in these three states combined has fallen on average by 7.4%, and the property crime rate has fallen on average by 14.1%. Here in Massachusetts, the legislation enacted in 2010 and 2012 that reduced the scope of minimum mandatory drug sentencing has had no apparent adverse impact on public safety: between 2010 and 2012, the violent crime rate fell by 13.1% and the property crime rate fell by 8.4%, and since 2012, both the violent crime and property crime rates have continued to fall.

Exhibit 2 also speaks to the argument that the increase in mandatory minimum drug sentences in 1980 reduced the rate of violent crime. It is true that the rate of violent crime dropped in the 1980s but it increased in the early 1990s to the point that it was considerably higher than it was in 1980. If one is to credit the increase in mandatory minimum drug sentences in 1980 with the reduction in violent crime in the 1980s, one could just as well blame them for the increase in violent crime in the 1990s. I think it is fair to say that the social science

scholarship, including the empirical research presented last week in this auditorium at the MassINC. conference, has demonstrated that mandatory minimum drug sentences deserve neither the credit nor the blame.

Let me also address the argument that, without mandatory minimum sentences, judges would be sentencing every drug offender to probation for trafficking crimes. Exhibit 3 is the list of drug crimes with minimum mandatory sentences. Apart from the school zone mandatory minimum, all of them are crimes that may proceed only in the Superior Court, not in the District Court or the Boston Municipal Court. Exhibit 4 shows the incarceration rate for all Superior Court cases, not just drug cases; even where there is no mandatory minimum sentence, judges still sentence 77 percent of offenders to prison or the house of correction. Exhibit 4 also gives you a window as to what would likely happen if you abolished mandatory minimum sentences in drug cases -- most drug offenders would still be incarcerated, but their sentences on average would be modestly lower. Where there is a mandatory minimum sentence, the median sentence is 42-60 months in state prison and 24 months in the house of correction; where there is not, the median sentence is 36-48 months in state prison and 17.5 months in the house of correction. I know of no evidence to suggest that a reduction of this magnitude in the length of incarceration would have a significant adverse effect on the level of deterrence for drug offenses.

Let me also address the argument that only the worst drug offenders are given mandatory minimum sentences by showing you Exhibit 5. Exhibit 5 shows

that 54 percent of those sentenced to mandatory minimum sentences in FY2013 had either no criminal record, a minor record, or a moderate record.

When you think about it, this is not surprising. Most drug distribution cases are not realistically "tryable" once the motion to suppress is denied, because the case arises from an undercover buy-bust or from the search of a residence or vehicle where drugs are found. Where a case is not "tryable," the prosecutor, for all practical purposes, will choose the sentence, because the defendant has the choice of going to trial, where he will lose and receive the mandatory minimum sentence, or pleading to the sentencing offer made by the prosecutor. The cases that generally go to trial are the "tryable" ones: the girlfriend who lives with the defendant at the residence but claims that she was not involved in his drug distribution, the passenger in the car who claims that the drugs were not his, or the driver of the car where the drugs were found in a hide who claims that he did not own the car and did not know there was a hide. These are the persons who go to trial and who, if they lose at trial, are the persons who receive the mandatory minimum sentences. As a result, sometimes the defendants who are the least culpable are the ones who, as a result of mandatory minimum sentences, receive the highest sentences.

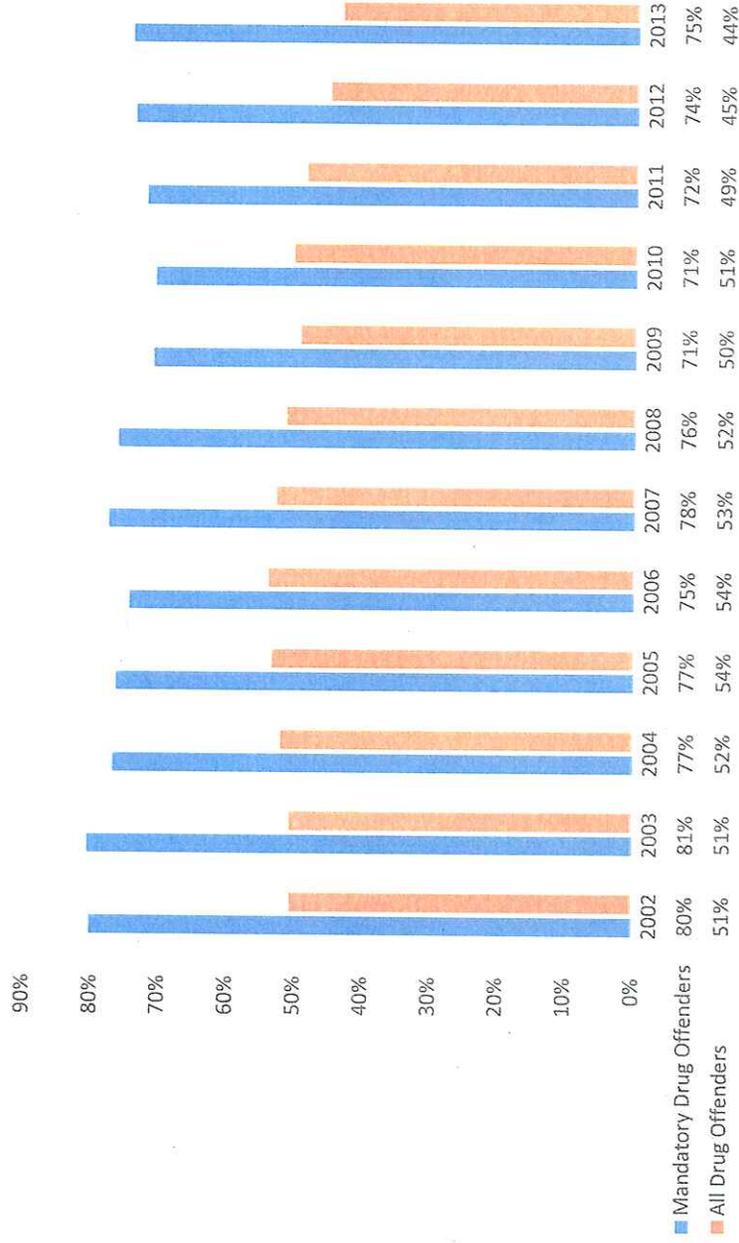
This leads me to the third reason to abolish mandatory minimum sentencing in drug cases: fairness in sentencing. With mandatory minimum sentences in drug cases, the crime of conviction determines the sentence; minimum mandatory sentences are neither individualized nor evidence-based. They are based on the principle that one size fits all, but one size does not fit all with respect to drug

crimes. The drug dealer and his girlfriend who helps him package the drugs, the drug kingpin and the courier, the dealer who sells drugs to support his drug habit and the dealer who sells to get rich, may all be charged with the same crime, but they do not deserve the same sentence, and a judge free to sentence would not give them the same sentence. Prosecutors are entitled to a great deal of discretion, but that discretion should be limited to the decision as to which charge to bring, and which sentence to recommend to the judge. It should not include the discretion to determine the sentence. But when the charge determines the sentence, that is precisely the discretion that is given to the prosecutor. You would never pass a law that provides that, upon conviction, the sentence shall be set by the prosecutor. But, for all practical purposes, that is what laws establishing mandatory minimum sentences in drug cases do. The only way to ensure fairness in sentencing is to let prosecutors do the prosecuting and let judges do the sentencing.

Thank you for your careful attention. I now welcome your questions.

# EXHIBIT 1

% of Convicted Offenders who are Race/Ethnic Minorities,  
 FY2002 to FY2013,  
 Selected Offense Categories



Source: Massachusetts Sentencing Commission, *Survey of Sentencing Practices, FY2002 to FY 2013*. The category "All Drug Offenders" includes mandatory drug offenders. Race/ethnic minorities includes defendants in the categories: Black, Hispanic, Asian, Cape Verdean, and Native American.

# EXHIBIT 2

MASSACHUSETTS STATE CORRECTIONAL POPULATION COMPARED WITH STATE CRIME RATES, 1970-2014

YEAR	STATE POPULATION <sup>1</sup>	DOC <sup>2</sup>	County <sup>2</sup>	CORRECTIONAL		VIOLENT CRIME	PROPERTY CRIME
				POPULATION	PER 100K <sup>3</sup>	RATE PER 100K <sup>4</sup>	RATE PER 100K <sup>4</sup>
1970	5,689,170	2,361	?	?	#VALUE!	202.9	3,543.40
1971	5,737,580	2390	?	?	#VALUE!	266	4,081.50
1972	5,760,302	2443	?	?	#VALUE!	295.2	3,811.80
1973	5,781,172	2018	?	?	#VALUE!	351.9	4,169.10
1974	5,773,548	2021	1576	3597	62.30137863	388.7	4,994.20
1975	5,757,756	2047	1769	3816	66.27581995	442.6	5,635.30
1976	5,743,672	2278	?	?	#VALUE!	399.2	5,421.70
1977	5,738,199	2707	?	?	#VALUE!	425.3	4,983.70
1978	5,736,469	2763	?	?	#VALUE!	462	4,888.50
1979	5,738,404	2821	?	?	#VALUE!	531.3	5,386.70
1980	5,737,037	2784	2654	5438	94.78760552	601.3	5,477.80
1981	5,768,685	3231	2928	6159	106.7661001	628.6	5,206.70
1982	5,771,222	3777	3404	7181	124.4277209	571.4	4,932.40
1983	5,799,407	4473	3447	7920	136.5656868	576.8	4,434.00
1984	5,840,773	4539	?	?	#VALUE!	523.7	4,064.80
1985	5,880,733	4943	3770	8713	148.1618023	538.2	4,219.60
1986	5,902,678	5405	?	?	#VALUE!	556.9	4,166.50
1987	5,935,204	5636	4740	10376	174.8212867	564.6	4,169.20
1988	5,979,982	6267	5300	11567	193.4286759	619.6	4,371.30
1989	6,015,478	6,731	5,596	12327	204.9213712	675	4,461.00
1990	6,022,639	7,484	5,825	13309	220.9828615	736.3	4,561.50
1991	6,018,470	8,154	6,143	14297	237.5520689	736.1	4,586.20
1992	6,028,709	9,053	7,099	16152	267.9180568	779	4,223.80
1993	6,060,569	9,478	8,290	17768	293.1737928	804.9	4,089.00
1994	6,095,241	9,657	9,306	18963	311.1115705	707.6	3,733.40
1995	6,141,445	9,619	10,067	19686	320.5434552	687.2	3,654.40
1996	6,179,756	9,435	10,756	20191	326.7281103	642.2	3,194.90
1997	6,226,058	9,926	12,534	22460	360.7419012	644.2	3,031.00
1998	6,271,838	10,014	12,015	22029	351.2367507	621.3	2,814.60
1999	6,317,345	10,117	12,326	22443	355.2600024	551	2,711.50
2000	6,361,104	9,768	11,355	21123	332.065	476.1	2,550.00
2001	6,397,634	9,572	10,937	20509	320.5716363	477.8	2,610.10
2002	6,417,206	9,218	11,322	20540	320.076993	484.9	2,612.20
2003	6,422,565	8,818	11,767	20585	320.5105748	473.1	2,562.80
2004	6,412,281	8,766	12,455	21221	330.9430763	460.2	2,468.20
2005	6,403,290	8,677	12,134	20811	325.0048022	461	2,358.00
2006	6,410,084	9,194	12,859	22053	344.0360532	500.5	2,391.50
2007	6,431,559	9,586	13,511	23097	359.1197717	441.7	2,399.20
2008	6,468,967	9,939	13,584	23523	363.6283815	463.8	2,399.50
2009	6,517,613	10,111	12,916	23027	353.3041928	462.6	2,323.10
2010	6,564,073	9,989	12,000	21989	334.9901806	468.9	2,356.80
2011	6,612,270	9,989	11,855	21844	330.355536	427.3	2,252.60
2012	6,655,829	10,436	12,491	22927	344.4649795	405.5	2,153.00
2013	6,708,874	9,995	11,693	21688	323.2733243	413.4	2,051.20
2014	6,745,408	9,620	11,022	20642	306.0155887	not yet available	not yet available
2015				0	#DIV/0!		

<sup>1</sup> Historical state population data--taken from [www.census.gov](http://www.census.gov)--are intercensal estimates of Massachusetts state population on July 1st of each year (except for 1970 and 1980, for which the actual census data, representing state population on April 1st, is used instead). See [http://www.census.gov/popest/data/state/asrh/1980s/80s\\_st\\_totals.html](http://www.census.gov/popest/data/state/asrh/1980s/80s_st_totals.html); <http://www.census.gov/popest/data/intercensal/st-co/files/CO-EST2001-12-25.pdf>; <http://www.census.gov/popest/data/intercensal/state/state2010.html>; <http://www.census.gov/popest/data/intercensal/state/state2010.html>. (Note that these figures are for total state population, not total adult population.)

<sup>2</sup> Correctional population data from 1989-2014 (for both DOC and county correctional facilities) is for the beginning of the first quarter (i.e. roughly January 1st) and is taken from 1st Quarter Overcrowding Reports available at <http://www.mass.gov/eopss/law-enforce-and-cj/prisons/rsch-data/quarterly-overcrowding-reports.html>. Pre-1989 DOC population data is also for approximately January of the year listed or December of the previous year, and is taken from reports on population movement in the Massachusetts DOC available at <http://www.mass.gov/eopss/law-enforce-and-cj/prisons/rsch-data/historical-rpts/population-movements.html>. Pre-1989 population data for county correctional facilities is taken from yearly county court commitment studies, which sometimes (but not always) also referenced the number of people in custody in county correctional facilities at a given date or the average number of people in custody at any given time in the year listed. These studies are available at <http://www.mass.gov/eopss/law-enforce-and-cj/prisons/rsch-data/county-court-commitments.html>. Note that the post-1989 numbers are the "beginning population" totals for the First Quarter, and that the numbers here for DOC population exclude persons in custody at the Bridgewater state hospital and other treatment centers, which do not appear to have been counted in the figures available before 1989; the exclusion is necessary to facilitate comparison before and after 1989. That means that, for the last decade or so, the numbers given here for DOC population will not be found in the tables in the quarterly reports, the totals from

which include numbers from the State Hospital at Bridgewater, the Shattuck Correctional Unit, the Massachusetts Treatment Center, and MASAC; the numbers here were calculated by subtracting the population at these four institutions from the "total" figures provided in the quarterly reports (which also exclude DOC inmates in non-DOC facilities). Note also that the state population data is for July but the correctional population data is for approximately January; although July figures are available after 1989, they are not readily available before 1989, and so January figures have been used throughout, also to facilitate comparison across time.

<sup>3</sup> Correctional population per 100,000 persons in Massachusetts is calculated from the state population figures given for total state population (not total adult population). These numbers are approximations only and reflect the limitations and parameters described in the previous two notes.

<sup>4</sup> Historical violent crime and property crime rates are the state estimates for Massachusetts taken from Uniform Crime Reporting Statistics available from the "table-building tool" on fbi.gov. See Uniform Crime Reporting Statistics, UCR Data Online, available at <http://www.ucrdatatool.gov/index.cfm>.

# EXHIBIT 3

Massachusetts Sentencing Commission  
Master Crime List  
By Offense Title

Offense Seriousness Level	Offense Reference	Offense	Penalty Type	Mand. Time	Min H/C	Max H/C	Min Prison	Max Prison
(6)	c. 94C s. 32(b)	DRUG, DISTRIBUTE OR POSSESS WITH INTENT, CLASS A, SUBSQ. OFF. c. 94C s. 32(b)	Felony	3 1/2 years			3 1/2 years	15 years
(5)	c. 94C s. 32A(b)	DRUG, DISTRIBUTE OR POSSESS WITH INTENT, CLASS B, SUBSQ. OFF. c. 94C s. 32A(b)	Felony	2 years			2 years	10 years
4	c. 94C s. 32A(c)	COCAINE (c.94C s. 31 Class B(a)(4)), METHAMPHETAMINE (c.94C s. 31, Class B(c)(2)), PHENCYCLIDINE, DISTRIBUTE OR POSSESS WITH INTENT c. 94C s. 32A(c)	Felony	1 year	1 year	2 1/2 years	2 1/2 years	10 years
(6)	c. 94C s. 32A(d)	COCAINE (c.94C s. 31 Class B(a)(4)), METHAMPHETAMINE (c.94C s. 31, Class B(c)(2)), PHENCYCLIDINE, DISTRIBUTE OR POSSESS WITH INTENT, SUBSQ. OFF. c. 94C s. 32A(d)	Felony	3 1/2 years			3 1/2 years	15 years
(5)	c. 94C s. 32B(b)	DRUG, DISTRIBUTE OR POSSESS WITH INTENT CLASS C, SUBSQ. OFF. c. 94C s. 32B(b)	Felony	18 months	18 months	2 1/2 years	2 1/2 years	10 years
4	c. 94C s. 32E(a)(1)	MARIJUANA, TRAFFICKING IN c. 94C s. 32E(a)(1) - 50 to 100 lbs	Felony	1 year	1 year	2 1/2 years	2 1/2 years	15 years
(5)	c. 94C s. 32E(a)(2)	MARIJUANA, TRAFFICKING IN c. 94C s. 32E(a)(2) - 100 to 2,000 lbs	Felony	2 years			2 years	15 years
(6)	c. 94C s. 32E(a)(3)	MARIJUANA, TRAFFICK IN c. 94C s. 32E(a)(3) - 2,000 to 10,000 lbs	Felony	3 1/2 years			3 1/2 years	15 years
(7)	c. 94C s. 32E(a)(4)	MARIJUANA, TRAFFICK IN c. 94C s. 32E(a)(4) - 10,000 or more lbs	Felony	8 years			8 years	15 years
(5)	c. 94C s. 32E(b)(1)	COCAINE (c.94C s. 31(a)(4)), METHAMPHETAMINE (c.94C s. 31, Class B(c)(2)), PHENCYCLIDINE, TRAFFICKING IN c. 94C s. 32E(b)(1) - 18 to 36 g	Felony	2 years			2 years	15 years
(6)	c. 94C s. 32E(b)(2)	COCAINE (c.94C s. 31(a)(4)), METHAMPHETAMINE (c.94C s. 31, Class B(c)(2)), PHENCYCLIDINE, TRAFFICK IN c. 94C s. 32E(b)(2) - 36 to 100 g	Felony	3 1/2 years			3 1/2 years	20 years
(7)	c. 94C s. 32E(b)(3)	COCAINE (c.94C s. 31(a)(4)), METHAMPHETAMINE (c.94C s. 31, Class B(c)(2)), PHENCYCLIDINE, TRAFFICK IN c. 94C s. 32E(b)(3) - 100 to 200 g	Felony	8 years			8 years	20 years
(8)	c. 94C s. 32E(b)(4)	COCAINE (c.94C s. 31(a)(4)), METHAMPHETAMINE (c.94C s. 31, Class B(c)(2)), PHENCYCLIDINE, TRAFFICK IN c. 94C s. 32E(b)(4) - 200 or more g	Felony	12 years			12 years	20 years
(6)	c. 94C s. 32E(c)(1)	HEROIN/MORPHINE/OPIUM, TRAFFICK IN c. 94C s. 32E(c)(1) - 18 to 36 g	Felony	3 1/2 years			3 1/2 years	20 years
(7)	c. 94C s. 32E(c)(2)	HEROIN/MORPHINE/OPIUM, TRAFFICK IN c. 94C s. 32E(c)(2) - 36 to 100 g	Felony	5 years			5 years	20 years
(7)	c. 94C s. 32E(c)(3)	HEROIN/MORPHINE/OPIUM, TRAFFICK IN c. 94C s. 32E(c)(3) - 100 to 200 g	Felony	8 years			8 years	20 years
(8)	c. 94C s. 32E(c)(4)	HEROIN/MORPHINE/OPIUM, TRAFFICK IN c. 94C s. 32E(c)(4) - 200 or more g	Felony	12 years			12 years	20 years
6	c. 94C s. 32F(a)	DRUG, DISTRIBUTE OR POSSESS WITH INTENT TO MINOR CLASS A c. 94C s. 32F(a)	Felony	5 years			5 years	15 years
5	c. 94C s. 32F(b)	DRUG, DISTRIBUTE OR POSSESS WITH INTENT TO MINOR CLASS B c. 94C s. 32F(b)	Felony	3 years			3 years	15 years
5	c. 94C s. 32F(c)	DRUG, DISTRIBUTE OR POSSESS WITH INTENT TO MINOR CLASS C c. 94C s. 32F(c)	Felony	2 years	2 years	2 1/2 years	2 1/2 years	15 years
6	c. 94C s. 32F(d)	COCAINE (c.94C s. 31(a)(4)), DISTRIBUTE OR POSSESS WITH INTENT, TO MINOR c. 94C s. 32F(d)	Felony	5 years			5 years	15 years
4	c. 94C s. 32J	DRUG VIOLATION NEAR SCHOOL, PARK, PLAYGROUND c. 94C s. 32J	Felony	2 years	2 years	2 1/2 years	2 1/2 years	15 years

## EXHIBIT 4

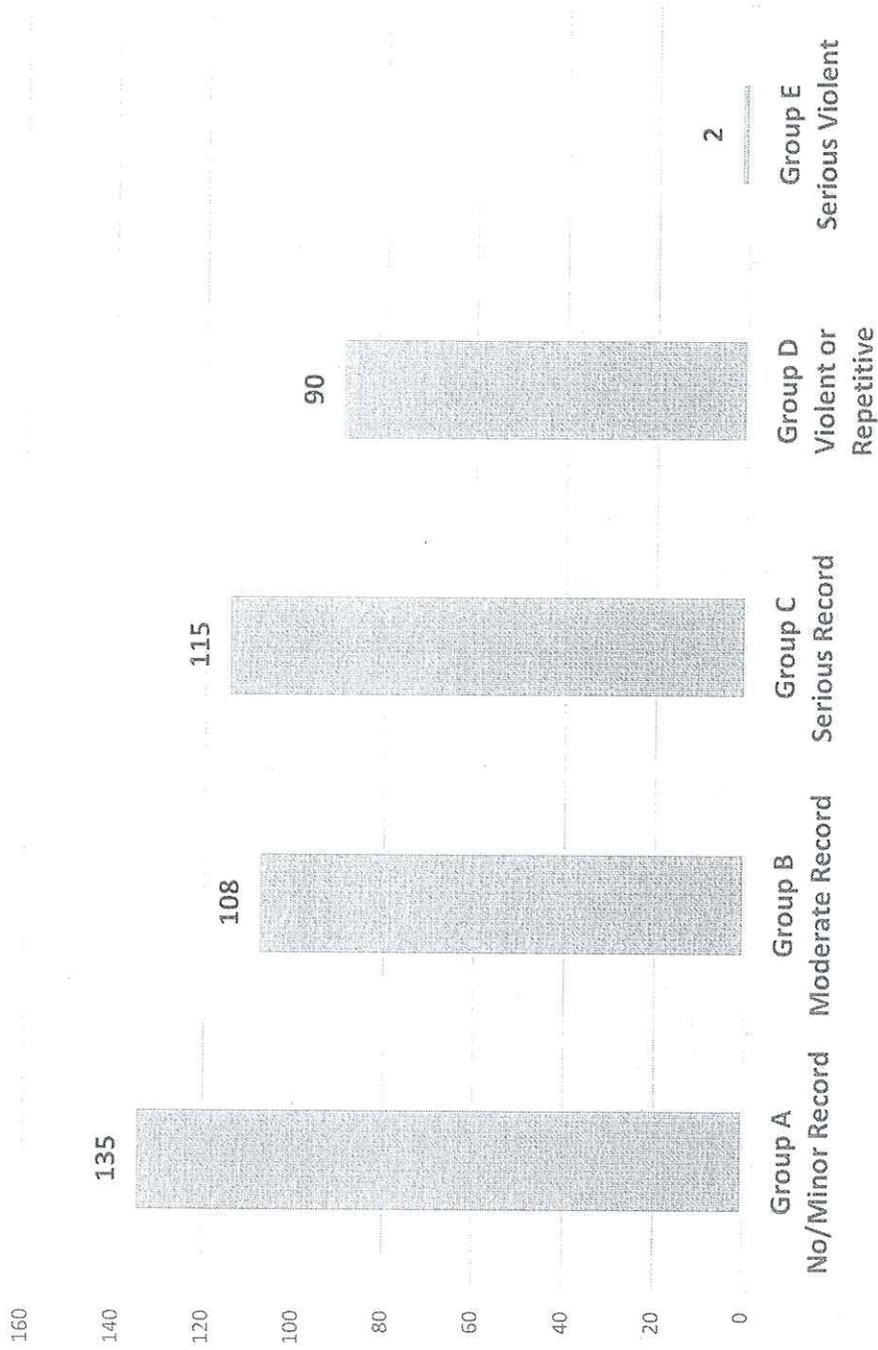
### Executive Office of the Trial Court Selected Sentencing Characteristics by Statutory Penalty, Superior Court Sentences, FY2013

	Mean	Median
<b>Incarceration Rate</b>		
Mandatory		100%
Non-Mandatory		77%
<b>State Prison Sentences</b>		
Mandatory		
Minimum	55.6 Months	42.0 Months
Maximum	64.8 Months	60.0 Months
Non-Mandatory		
Minimum	53.2 Months	36.0 Months
Maximum	66.8 Months	48.0 Months
<b>House of Correction Sentences</b>		
Mandatory	21.7 Months	24.0 Months
Non-Mandatory	16.5 Months	17.5 Months

Source: Massachusetts Sentencing Commission, *Survey of Sentencing Practices*, FY2013.

# EXHIBIT 5

## Criminal History Group of Mandatory Drug Offenders, FY2013



Source: Massachusetts Sentencing Commission, *Survey of Sentencing Practices, FY2013*. Criminal history groups are based on the number and seriousness of prior convictions. The definition of criminal history groups can be found at: <http://www.mass.gov/courts/court-info/trial-court/sent-commission/ma-sentencing-guidelines-gen.html>