

Testimony in Support of House Bill 257
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on behalf of the Missouri Association of Prosecuting Attorneys
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Mr. Chairman, Members of the Committee:

My name is Eric Zahnd. For more than eight years, I have had the privilege to serve as Platte County Prosecuting Attorney. I testify today on behalf of the Missouri Association of Prosecuting Attorneys (MAPA), which is comprised of Missouri's 114 County Prosecuting Attorneys, as well as the St. Louis City Circuit Attorney.

MAPA strongly supports House Bill 257. This bill will eliminate a bureaucracy in state government that promotes bad sentencing policy. We support abolishing the Missouri Sentencing Advisory Commission (MoSAC) because it lacks transparency in how it arrives at its recommended sentences, regularly misrepresents recidivism statistics, and mischaracterizes data regarding sentencing costs. In its place, we suggest Missouri do something it has never done: Conduct a scientific evaluation of the effect of different sentencing practices on crime rates, recidivism, prison population, and, most importantly, public safety.

If we complete such a study, we will be on our way to truly having the data we need to determine "smart sentencing" practices for our state, giving judges, prosecutors, defense attorneys, and policymakers the unbiased information they need to make good decisions. Without a true, scientific study, any claims that so-called "smart sentencing" in Missouri works—as often trumpeted by MoSAC—are unjustifiable.

As the Committee is probably aware, MoSAC was created by the legislature in 1993 to study sentencing practices in Missouri. The law was amended in 2003. Among other things, the 2003 amendments required MoSAC to establish a system of recommended sentences.

Sadly, MoSAC has made sentencing recommendations with virtually no scientific foundation and with only one apparent goal in mind—decreasing the prison population without regard to public safety.

Let me begin with some actual sentence recommendations from MoSAC:

- A mother repeatedly videotapes herself and her boyfriend raping and sodomizing her daughter. The videos are made over a period of time. In some of the videos the victim—the defendant's own daughter—is pregnant and bound. The Missouri Sentencing Advisory Commission's recommendation: probation.

- A registered sex offender who had previously served 8 ½ years in prison for sexually abusing five different children is caught with more than 600 images of child pornography. While serving his earlier 8 ½ year prison term in Washington State, the man admitted being aroused by pubescent and prepubescent males and “grooming” his victims. Washington state prison staff reported his likelihood of committing another sexual offense was “high.” Prior to sentencing in Missouri, a probation and parole officer administered the Static 99 test, which is used to predict sexual and violent recidivism. The score placed the defendant in the medium-high risk category, and the probation officer wrote that he believed the Static 99 “under represents the defendant’s risk at this time.” The Sentencing Advisory Commission’s recommendation: 120 days of treatment in prison or shock incarceration. That is 120 days of treatment or incarceration for someone who had previously served 8 ½ years in prison after sexually abusing five children, was judged likely to do it again, and was then caught collecting child pornography.
- A man attacks a woman in broad daylight. It’s 1:00 in the afternoon, and the man approaches the woman from behind in the parking lot of a suburban grocery store. He hits her in the head and face. When she screams for help, the man covers her mouth with his hand and continues hitting her. The victim bites and kicks at the man, who knocks her to the ground. The man then grabs the woman’s car keys and gets into her car. Fortunately, he is subdued by onlookers as he attempts to back out of the parking spot. This man had been on probation for only one month when he committed the robbery. He was serving probation in Johnson County, Kansas for carrying a concealed weapon and fleeing from police officers. Despite all of this, the Sentencing Advisory Commission’s recommendation: again merely 120 days of in-prison treatment or shock incarceration.
- A man repeatedly sells crack to an undercover officer across the street from an elementary school. During one of the narcotics sales, children were playing soccer in the school playground across the street. To compound things, the man, who had earlier posted bond, flees in the middle his trial. This Missouri Legislature has classified dealing drugs within 1,000 feet of a public school as a class A felony—like rape, murder, and kidnapping, one of the most serious crimes a person can commit. The Missouri Sentencing Advisory Commission’s recommendation: Probation, which the court ultimately imposed.

You might wonder how I know so much about these cases. The reason is simple. My office prosecuted each of them. They all took place over the last five years in Platte County. But these cases are representative literally thousands of outrageously lenient sentencing recommendations regularly made by MoSAC in every Missouri county.

These recommendations are so lenient they should be disregarded. And, thank goodness, judges can disregard them, as they are not mandatory. However, many in judges in the state follow them some of the time, and some judges follow them almost all of the time.

The Sentencing Advisory Commission tells judges, prosecutors, defense attorneys—everyone really—that its recommended sentences are “averages, based upon current sentencing and corrections practices in the state as a whole.” But that is not true.

Let me show how it works, using just one of hundreds of crimes for which MoSAC makes sentencing recommendations. The recommendations are drawn from a table that looks roughly like this. This table is for second degree robbery:

Charge code 12020: Robbery 2nd Degree:

Circumstance	Level I	Level 2	Level III	Level IV	Level V
Mitigating	Probation	CSS	Shk/Trt	7	9
Presumptive	CSS	Shk/Trt	7	9	11
Aggravating	5	7	9	11	12

Notes: CSS is Community Structured Supervision; Shk/Trt is 120 day shock incarceration or mandatory treatment program.

There is a similar table for every crime in Missouri. The columns represent a potential defendant’s criminal history, Level I being relatively a minor criminal history and Level V being a lengthy criminal record.

The horizontal rows yield one of three potential sentences for any given criminal history level, a mitigating sentence, a presumptive sentence (recently renamed the “typical” sentence), and an aggravating sentence, based on what a judge ultimately believes the nature of the crime and risk of the defendant to be. MoSAC suggests judges determine whether they should impose the mitigating, so-called “typical”, or aggravating sentence based on how a defendant scores on an 11-factor risk score that probation and parole officers calculate as part of the Sentencing Assessment Report or other factors.

Based on conversations with David Oldfield, the Research Manager for the Missouri Department of Corrections, the truth is that only this score—the middle score in the table—has even any loose basis on an actual average sentence. I say “loose basis,” because that number—7 years in prison—is not the average sentence for people incarcerated for second-degree robbery. Instead, that number is drawn from a large number of crimes that MoSAC has categorized as medium-severity class B felonies.

But this number is not even the average for that set of crimes. Rather, it has been “adjusted downward” by some subjective amount to reflect that not all sentences result in prison terms. All of these other numbers surrounding the middle number are then subjectively adjusted up or down, perhaps loosely informed by some observed

sentencing patterns, to reflect different criminal histories and whether the crime is “mitigated,” “typical,” or “aggravated”.

All of this is a far cry from these recommended sentences being “averages, based upon current sentencing and corrections practices in the state as a whole.” But MoSAC wants judges, prosecutors, defense attorneys and others to believe they are, in fact, average sentences, which they simply are not.

Though I had long had suspicions that something more than met the eye was going on these recommended sentences, I learned the truth only after attending a number of MoSAC meetings over more than two years. Together with several colleagues, St. Louis County Prosecuting Attorney Bob McCulloch, Dunklin County Prosecuting Attorney Steve Sokoloff, Worth County Prosecuting Attorney John Young, Missouri Office of Prosecution Services Executive Director Jason Lamb, I attended a these meetings at the invitation of MoSAC’s Chair, Missouri Supreme Court Judge Michael Wolff.

The prosecutors who attended expressed our concerns, suggested elimination of recommended sentences—at least for violent and sexual offenses—and struggled to learn what MoSAC was really trying to do. We learned a bit about how MoSAC does what it does, but accomplished nothing in trying to improve MoSAC’s practices.

Recently, MoSAC turned its attention from merely making sentencing recommendations to providing new data to judges and others in the criminal justice system—data about recidivism and prison costs.

That new data captured attention not only in Missouri, but nationwide. Several national publications, including the *New York Times*, wrote stories about the new information MoSAC was providing judges.

One editorial, in the *Denver Post* last September, correctly observed the following:

As state lawmakers around the country struggle to balance their budgets, the criminal justice system is becoming a target for cuts.

The state of Missouri, for example, recently started informing judges just how much their sentences will affect the public coffers.

Three years of prison? That will cost taxpayers \$37,000, while probation would ring up just a \$6,770 bill.

The idea of putting a specific price tag on justice, and dangling it in front of judges as they mete out punishment, makes us uncomfortable.

It's not because we think it's wrong to figure out ways of trimming court and prison costs. But we think judges ought to impose appropriate sentences without regard to cost. The financial questions ought to be considered, but that should be the job of legislators, who can adjust penalty statutes to take prison population trends and social mores into account. . . .

In Missouri, the information provided to judges comes at the direction of the state's sentencing advisory commission.

It's the only state in the union that routinely tells judges the cost of the sentences they are considering. . . .

Some believe it is part and parcel of the fiscally conscious times we live in. Everything has a price tag, and that ought to be a part of the equation.

Others, and we find ourselves among them, aren't so sure it's proper to put that burden on judges. We're reasonably sure judges have a general idea of the cost of incarceration versus alternative sentences.

We believe judges ought to spend their time focusing on whether criminals are a risk to society if they were to remain outside prison walls, and not be preoccupied with calculating how much they've "spent" in putting people behind bars.

There also is a cost, though near impossible to tally, when a criminal who should have been in prison commits another crime. That cost is borne by the victims, to be sure, but it is a cost nonetheless. . . .

In addition to the prison cost data that captured the most attention, MoSAC simultaneously began providing data on recidivism, supposedly outlining the average recidivism rate for similar offenders depending on whether they were sentenced to probation, shock incarceration, or prison.

But there is one catch with this new information: MoSAC's misinterpretation of the data has the potential to seriously mislead judges. Dr. Jeffrey Milyo, who is the Middlebush Professor of Social Sciences at the University of Missouri, has examined MoSAC's conclusions about this data. Dr. Milyo is here today, and I believe you will have a chance to hear from him later in this hearing. But let me highlight just two of his findings:

- MoSAC's statistics regarding recidivism are "extremely misleading," according to Dr. Milyo. MoSAC routinely misinterprets the data it has collected regarding recidivism. Dr. Milyo's report shows there is absolutely no scientific evidence to support MoSAC's claim that its recommended sentences reduce recidivism—and the recommended sentences may actually *increase* recidivism.
- The so-called cost savings from lowering prison population is based solely on the fiscal impact to government, without considering the social costs of crime. According to Dr. Milyo, "by providing information about some but not all costs, there is a danger that judges will discount the importance of the social costs of crime." One study shows that each offender not incapacitated in prison commits 15 additional crimes and another study puts the costs of criminal victimization at \$680 billion nationally each year.

Let me close by with saying prosecutors, perhaps more than any other group, understand that not all offenders need or should go to prison. And everyone in the criminal justice system, particularly prosecutors, supports having more data before we make sentencing decisions.

But the data provided by MoSAC is not helpful. It is not generated in a way to yield scientifically supportable conclusions. Instead, MoSAC provides conclusions that likely mislead judges in one direction—to grant probation or short prison sentences. The result is that Missourians are less safe because of MoSAC's mischaracterizations.

We simply should not spend taxpayer funds on a Commission created by this legislature that recommends outrageously lenient sentences, provides little transparency on how it arrives at those sentences, and then compounds the problem by misinterpreting recidivism and prison cost statistics in a way that suggests its sentences reduce crime and save money, when just the opposite is as likely to be true.

As such, MAPA supports House Bill 257 to eliminate MoSAC. In MoSAC's place, we support conducting a scientific evaluation of the effect of different sentencing practices on reducing costs while simultaneously increasing public safety. The good news is that a serious effort to conduct such a study is already underway, and it would not require state financing. Missouri Supreme Court Chief Justice Ray Price has led a group of officials who have applied to the Pew Charitable Trust, working in conjunction with the federal Bureau of Justice Statistics and the Vera Institute, to fund a study that appears that it might give us the real, unbiased data we need to make the right decisions. MAPA has met with representatives of the Pew trust and Vera Institute to express our support for the study, and I am told that the Governor office, the Speaker of the House, the President Pro Tem of the Senate, and others have also expressed their support.

We need a rigorous, scientific study of sentencing in Missouri, not more unsupported propositions encouraging woefully lenient sentencing practices from MoSAC.

Thank you. I'd be happy to take any questions.