



**COUNTY
JAIL**

OVER-CRIMINALIZATION IN FLORIDA

An Analysis of Nonviolent Third-degree Felonies

APRIL 2014

INTRODUCTION

Over-criminalization is the new buzzword among criminologists and legislators looking for ways to reform federal and state criminal justice systems and reduce the cost of corrections. Headline stories once monopolized by tough on crime terminology and prison building and expansion plans, now ask whether over-criminalization is making us a nation of felons.¹

This concern led the federal government in 2013 to create a bipartisan Over-Criminalization Task Force comprised of ten congressmen from large population states like California, Texas, and New York, and southeast regional neighbors Georgia, Virginia, North Carolina, and Tennessee. The work of this committee, which is focused on reducing the federal prison population, which has skyrocketed tenfold since 1980 (now 219,000 inmates at \$7 billion annually),² was renewed last month to review the 4,500 statutory federal crimes in the U.S. Code.³

Federal and state research regarding prison populations support the need for critical analysis. America leads the world in incarceration, with 760 prisoners per 100,000 compared to Britain with 153, Germany with 90 and Japan with 63.⁴ America incarcerates more than Cuba, China, Venezuela and Russia. America makes up 5% of the world's population, but has 25% of the world's prison

population.⁵ One out of every 100 Americans in in prison or jail.⁶ These statistics seem at odds with the traditional image of America as the land of the free, with unprecedented individual freedoms and liberties, and toleration for minority rights and dissenters.

Florida statistics reveal an even more acute situation than the national picture. The state prison population (102,225 as of January 2014) is projected to increase to 106,793 by 2017. To add context, in the last 35 years the state population increased 102.8%, but the prison population jumped 402.5%, resulting in state spending on corrections during this same period increasing by 1200%, to \$2.4B. This despite the fact that crime statistics have steadily declined during this period, and have reached 30 year lows.⁷ Florida has 1.5 million felons living within the state, or one in ten adults.⁸

Prison populations are not the only numbers growing dramatically, so are the number of actions criminalized by Florida laws. Thousands of different offenses are now scattered throughout Florida statutes. Some drug and environmental laws do not even require criminal intent. Removing the element of intent means anyone found with illegal substances, or disposing of hazardous waste improperly, commits a felony whether the offense was committed inadvertently or not.

1 "Over-criminalization Making Us a Nation of Felons?", CBN story March 28, 2012.

2 "Federal Prison Population Grows 27 Percent in 10 years", The Washington Free Beacon, December 6, 2013.

3 "Over-Criminalization Task Force Should Focus on Reducing Prison Populations", The Hill, July 26, 2013.

4 "Six Charts that Explain Why Our Prison System is So Insane", The American Prospect, August 15, 2013.

5 "Facts and Figures on Incarceration in America", The 4th Media, December 26, 2013.

6 "Wonkbook: 11 Facts about America's Prison Population", Washington post August 13, 2013.

7 "Understanding Florida's Justice Data", presented by Jim DeBeaugrine, Smart Justice Alliance, January 29, 2014.

8 "Florida Lead Nation in Excluding Ex-Felons from the Polls", July 12, 2012.

Florida Statutes includes a state criminal code, Title XLVI, which defines the spectrum of criminal offenses in Chapters 775-896. The most minor offenses are labeled as misdemeanors, and carry punishments up to one year in county jail. Felony offenses in Florida are divided into five categories with sentences ranging from the death penalty to a year and a day in prison. The five felony categories are as follows:

- Capital Felony-punishable by death.
- Life Felony-punishable by life imprisonment, or a variable term of years depending on when the crime was committed. After September 1, 2005 all life felony punishments are for life, or a split sentence of at least 25 years coupled with lifetime probation.
- Felony of the First Degree-punishable by up to 30 years imprisonment.
- Felony of the Second Degree-punishable by up to 15 years imprisonment.
- Felony of the Third-degree-punishable by up to 5 years imprisonment.

The section which follows the criminal code in Florida Statutes, Title XLVII, covers criminal procedure and corrections (in Chapters 900-985). Within these chapters is statute 921.0022, which distributes the five classes of felonies listed above into a severity level ranking system. There are 10 levels of severity, with Level 10 consisting of the most heinous offenses: homicide, treason, home invasion, robbery with firearm, sexual battery, kidnapping, and sale of drugs resulting in death. Conversely, Level 1 and 2 offenses are considered the least serious, and all included crimes are nonviolent in nature.

This analysis will be restricted to these lowest-priority felony offenses in Florida. These offenses constitute the minimal behavior which can result in a felony conviction and state imprisonment. This group of crimes is the prime target for reform because they focus on nonviolent crimes that do not include weapons or direct physical harm to victims, and include the lowest risk offenders.

SEVERITY LEVEL 1 FELONIES

Severity Level 1 includes 41 third-degree felonies, which carry a penalty of state imprisonment for up to five years, including:

- Failure to remit sales tax greater than \$300.
- Fleeing or attempting to elude law enforcement officer.
- Selling license plates or validation stickers.
- Tampering with an odometer.
- False application for driver's license or identification card.
- Possession of simulated identification.
- False statement or representation to obtain or increase unemployment compensation benefits.
- Tenant removes property upon which lien has accrued, value more than \$50.
- Unlawfully makes reproduction of a trade secret.
- Offenses against intellectual property.
- Engaging in bookmaking.
- Purchase or Possession (more than 20 grams) of cannabis.
- Stopping payment with intent to defraud \$150 or more.
- Passing worthless check \$150 or more.

- Possess counterfeit controlled substance.
- Bigamy.
- Setting up a lottery or advertising a drawing for prizes.

SEVERITY LEVEL 2 FELONIES

There are 30 third-degree felonies listed under Level 2. These offenses are slightly more aggravated than those in Level 1, but many continue to deal with economic and environmental misdeeds, including:

- Possession of 11 turtle eggs.
- Dumps waste in excess of 500 lbs, or hazardous waste.
- Trespassing on posted commercial horticultural property.
- False statement in support of an insurance claim.
- Obtain credit with expired credit card.
- Obtain mortgage through false representation.
- Manufacture or deliver drug paraphernalia.
- Purchase any controlled substance other than cannabis.

SEVERITY LEVEL 3 FELONIES

Level 3 lists 52 third-degree felonies and six second-degree felonies. Because these offenses are deemed to be on par with violent crimes, they are not included in this discussion, which is aimed exclusively at reforming nonviolent crimes.

IMPACTS OF CURRENT LAWS

Committing the offenses highlighted above results in felony convictions and exposes Floridians to prison sentences. The point of this analysis is not to suggest these behaviors need to be tolerated by citizens and not carry sanctions; these offenses were made illegal by elected officials in response to specific concerns, and to deter actions which are prejudicial to good order and public safety.

Most states make the majority of these actions crimes, though some state codes label them misdemeanors not felonies.

This list also shows that behaviors classified as felonies in Florida can occur even among responsible citizens.

The consequences of a felony conviction in Florida, standing alone, are significant and include:

- Loss of the right to vote, hold office or run for office.
- Disqualified from jury duty for 7 years.
- Loss of the ability to have a firearm.
- Loss of professional licenses.
- Employment restrictions to include termination.
- Inability to serve in the U.S. military.
- Restrictions on family adoptions.
- Eviction by landlord, or from public housing.
- Loss of federal assistance for higher education.
- Loss of state benefits.
- Changes in immigration status.

These adverse consequences attach immediately upon conviction and have teeth.⁹

Losing the ability to vote and own a firearm terminates treasured individual rights.

Being a felon also impairs employment opportunities, wrecks personal finances and relationships, and permanently attaches the infamous title “felon” to a Floridian. A prison sentence is additive to the punishment, and when tethered to the conviction, revokes all personal freedom, costs taxpayers \$20,000 per year, and increases the state prison population.

The teen or college student who carries false identification in order to get admitted to adult activities, or purchases and possesses cannabis, is a felon. A parent that secures medical cannabidnoid pills for a child suffering life threatening seizures also commits a felony. The internet shopper that fails to file and pay use tax commits a felony. Writing a bad check for \$150 is a felony. Misuse of credit cards is a felony, and unauthorized discard of litter or hazardous material is a felony. Overcharging for parts and repairs is a felony, and so is accepting a bet on a sports events. A computer enthusiast who misappropriates a computer program commits a felony. Seeking to elude law enforcement, whether in a vehicle or on foot, is also a felony.

Again, these behaviors are not meritorious, that is not the question. The issue is whether these offenses are so harmful to society that a state prison term is necessary, as opposed to jail or other sanctions available for misdemeanants. Prison carries many

9 “Consequences of a Felony Conviction”, OLR Research Report March 28, 2003.

negatives and exposes wrongdoers to adverse influences. When severity level 1 and 2 nonviolent offenders go to prison they get incarcerated with violent prisoners, sex offenders and those with mental illness.

The statistics are clear: going to prison often leads to more prison. Half of the new admissions to Florida prisons each year have been to prison before. More than 40 percent of those released from prison are re-arrested for another offense within three years of release.

Prison populations and costs in Florida continue to go up despite crime declining to forty year lows.¹⁰ While sentencing reform across the five felony classes in Florida would be one way to combat the corrections dilemma, the most fertile ground for immediate review and modification are third-degree felonies, the least severe nonviolent crimes.

Felony offenses should not be so broadly defined that they risk making felons of us all. While that may seem a bold statement, the fact that 1.5 million Floridians carry a felony conviction is strong indication of over-criminalization.¹¹ That striking number is even more compelling because it counts actual convicted felons, not those arrested and resolved through withheld adjudication or other resolutions short of plea or trial.

Despite popular belief, prison admissions in Florida are not dominated by Felony Severity Level 7-10 offenses. Department of Corrections statistics show that in 2012

10 “Rick Scott said Florida crime rates at 40-year low”, Tampa Bay Times, April 12, 2012

11 “State-Level Estimates of Felon Disenfranchisement in the United States, 2010”, The Sentencing Project, July 2012.

the top three categories for admission were drug offenses (24.6%), burglary (17.5%) and theft and fraud (15.2%). That's more than 57% of new prison admissions for nonviolent offenses.¹² Included within these admission numbers are third-degree felony prisoners who committed crimes in the Level 1 and 2 severity group.

RECOMMENDATION

There are a number of ways to fix over-criminalization in Florida. A few tools used by other states and the federal government to reduce the number of crimes and prisoners include reforms that:

- Decriminalize third-degree felony offenses that do not define intolerable conduct. Trade secrets, environmental crimes, landlord-tenant issues, intellectual property, tampering with odometer and license tags all have a basis in commercial practices. Civil remedies and fines make more sense than felony convictions and incarceration.
- Dial down felony offenses to misdemeanors where conduct needs to be criminal, but not so offensive as to be worthy of felony consequences, such as increasing felony threshold amounts for bad checks and theft.

- Use diversion tools designed to steer nonviolent offenders away from prison, instead of turning low-level offenders into more hardened criminals. Adult Civil Citation Programs allow offenders to plead guilty, pay fines and do community service to avoid a conviction. This seems like perfect remedy for first time offenders engaged in Severity Level 1 offenses.
- Expand Specialty Courts for drugs, veterans and mental health sufferers so they can receive treatment instead of punishment.
- Implement alternatives to incarceration following felony conviction. The consequences of a felony conviction are already significant and will create numerous life issues and burdens for the felon. In many instances house arrest, electronic monitoring and community control measures could substitute for incarceration.

If these smart justice measures were adopted it would immediately reduce the prison population and save taxpayers millions of dollars without prejudicing public safety.

¹² Florida Department of Corrections Annual Report 2012, page 31.

ABOUT THE AUTHOR



Dan McCarthy is the Director of the TaxWatch Center for Smart Justice. Dan is a Miami native and a graduate of the United States Naval Academy. He also has a law degree from Duke University and an LLM from George Washington. Before joining TaxWatch, Dan spent three decades as a naval officer where he served as a legal advisor to the Secretary of the Navy and was in command of all Naval trial offices in the Southeast and Caribbean. He has also worked at the law firm of Holland & Knight, served as the Director for Military and Veterans Affairs for the City of Jacksonville, was the Chief Assistant State Attorney for the 4th Circuit, and was a Director at Wounded Warrior Project.

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