



# The Florida Senate

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Committee on Criminal Justice

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## **A DESCRIPTIVE AND HISTORICAL REVIEW OF MISDEMEANOR OFFENSES ELEVATED TO FELONIES AND A REVIEW OF MISDEMEANANTS HOUSED IN COUNTY DETENTION FACILITIES**

### **Issue Description**

In recent years, there has been discussion about whether the federal and state governments have unnecessarily created so many new criminal laws that the United States has been “overcriminalized.” One of the perceived negative effects of overcriminalization is that it results in the incarceration of persons for acts and omissions that would not have been illegal in the past. A recent report by the Pew Center on the States cited overcriminalization as a factor that has led to more than 1 in 100 adults in America being confined in jail or prison at any given time.<sup>1</sup> The report highlighted Florida as a case study in rapid prison growth, with its prison population more than doubling from 50,603 to 101,452 between 1993 and 2009 (prison population on June 30th). During that same approximate period, the average daily population of Florida’s county jails also increased by 73 percent from 34,530 to 59,740.<sup>2</sup>

The discussion in the Florida Legislature has been similarly framed with the Florida Prosecuting Attorney’s Association publicly taking the position in the last two legislative sessions that there are enough criminal provisions in the Florida Statutes for them to carry out their duties responsibly. Since prosecutors predominately charge and prosecute traditional crimes that have been in the statutes for some time, this resistance to embrace the creation of new crimes is consistent with their position.

This project examines the data that are available to determine whether recently created or elevated criminal offenses have in fact had a significant impact on the county jails and state prison system. It also identifies the most common offenses for which defendants are sentenced to incarceration in a county jail. The legislative history of these offenses is examined to determine whether they have been created recently or are of long standing. The project will also review the impact that new felonies and existing misdemeanors raised to felonies have on the prison population and consider whether alternative dispositions might be appropriate.

### **Background**

#### **Estimating the Jail and Prison Impact When New Crimes are Created or Existing Crimes Elevated**

An important consideration during the Legislature’s creation of a new felony criminal statute is the statute’s potential impact on the size of the state prison inmate population. Typically, a new felony is not created until its fiscal impact on the state prison system is projected and a consensus reached by specified principals pursuant to the estimating conference process.<sup>3</sup> Because the Department of Corrections (department) has custody of all persons who are sentenced to prison or to community supervision for a felony, it is able to readily determine the number of inmates who are incarcerated for violating a new criminal statute. This information is used by the

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<sup>1</sup> “1 in 100: Behind Bars in America 2008” Pew Charitable Trusts, 2008.

<sup>2</sup> Florida Department of Corrections’ “Florida County Detention Facilities Average Inmate Population 1998 Annual Report” and Florida Department of Corrections’ “Florida County Detention Facilities Average Inmate Population 2008 Annual Report.”

<sup>3</sup> Pursuant to s. 216.136(5), F.S., one of the functions of the Criminal Justice Estimating Conference is the development of official forecasts of prison admissions and population.

Criminal Justice Estimating Conference (CJEC) to gauge the actual impact of new felonies in the aggregate and to forecast trends in new commitments to prison.

The county jails operate independently of one another and are funded through the county budgeting process. With no single entity charged to assess the impact of new criminal laws on the county jails, there is not a comparable systematic consideration of the impact of new misdemeanors and lower-level felonies on county jail populations. Moreover, there is no accurate consolidated database of the population of the county jails from which a precise actual impact can be determined.

### **Different Criminal Sentencing Procedures for Misdemeanors Versus Felonies**

County courts can only try misdemeanors, but circuit courts can try both misdemeanors and felonies. A misdemeanor can come before a circuit court for sentencing in several ways. These include: (1) trial or plea as part of multiple charges against a felony defendant; (2) as the result of a reduction of a felony charge to a misdemeanor as part of a plea agreement; or (3) as a result of a finding by a jury that a felony defendant is not guilty of the charged felony, but is guilty of a misdemeanor that is a lesser included offense of the felony.

A misdemeanor sentence that is adjudged by a circuit court must be served in county jail, except that a misdemeanor sentence may be served in state prison concurrently with a felony sentence. A felony sentence of more than one year must be served in state prison, but a felony sentence of one year or less may be served in county jail if the total of the defendant's cumulative sentences is one year or less.<sup>4</sup>

Any sentence to confinement that results from conviction of a misdemeanor in county court must be served in a county jail. The sentence for a first-degree misdemeanor cannot exceed one year, and the sentence for a second-degree misdemeanor is limited to sixty days.

### **Adult Prisoners and Detainees Housed in County Jails; Pretrial or Sentenced; Felony or Misdemeanor**

The population of the county jails can be categorized into seven broad areas<sup>5</sup>:

- Persons who are awaiting trial;
- Convicted persons who are awaiting sentencing;
- Inmates who are serving a sentence of incarceration;
- Probation or parole technical violators;
- State inmates;
- Prisoners from other jurisdictions; and
- Others, including persons detained under the Marchman or Baker Acts and undocumented aliens.

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<sup>4</sup> Section 922.051, F.S.

<sup>5</sup> These categories and the associated table are derived from the "Florida County Detention Facilities Average Inmate Population 2008 Annual Report."

Table 1 reflects that pretrial detainees are by far the largest category of persons in county jails<sup>6</sup>:

**Table 1**

<b>Types of Detainees in County Jail for 2008</b>		
<b>Category</b>	<b>Average Daily Population</b>	<b>Percentage of Total</b>
Pretrial	37,159	61.3%
Serving Sentence	15,784	26.0%
Probation or Parole Violators	4,328	7.1%
Prisoners from other Jurisdictions	1,748	2.9%
State Inmates <sup>7</sup>	724	1.2%
Awaiting Sentencing	635	1.0%
Others	271	0.4%
<b>Total</b>	<b>60,649</b>	

According to the department, 76.8 percent of the total jail inmate population (including all categories) was in county jail in relation to felony offenses, 18.4 percent in relation to misdemeanor offenses, and the remainder for other reasons.<sup>8</sup>

## **Findings and/or Conclusions**

### **County Jail Sentences; Length and Most Frequent Type**

Information provided by the Office of the State Courts Administrator (OSCA) indicates that more than 60 percent of defendants who were sentenced to a term of imprisonment in county jail by a county criminal court received sentences for a term of 1 month or less, 88 percent for 3 months or less, and 96 percent for 6 months or less.<sup>9</sup> However, it should be reiterated that 61 percent of the jail population is in pretrial status. If convicted, these defendants will receive credit for any time served while in pretrial for the offense for which they are convicted.

Although the OSCA data are incomplete, they provide a strong indication of which offenses most often result in county jail sentences. Table 2 reflects the number of county jail sentences for offenses that resulted in 100 or more county jail sentences in 2008.<sup>10</sup> The offenses are grouped into general categories that reflect the underlying type of behavior.

**Table 2**

<b>Most Frequent Type of Offenses Sentenced to County Jail in 2008</b>		
<b>Category</b>	<b>Number</b>	<b>Offense and Number of Jail Sentences</b>
Drugs	42,531	Possession, use, or distribution of unlawful drugs (30,688)(6691 sentences are for possession of no more than 20 grams of marijuana); possession of drug paraphernalia (11,420); drug trafficking (303); possession of drugs without prescription (120)

<sup>6</sup> The data are incomplete because of non-reporting by various counties. Twenty three counties did not report for at least one month during the year, with 6 missing only one month and 2 missing all twelve months. Of 804 possible monthly reports, 97 (12%) were not made. The non-reporting counties include 18.8% of Florida’s total population, and missing reports account for 5.7% of the total Florida population that could have been represented (Florida’s population times 12 monthly reports). The department indicates that the missing data have a significant impact on statewide totals. However, complete data would not be likely to change the relative relationships between the jail population categories or frequency of incarceration for purposes of this report.

<sup>7</sup> These inmates are housed pursuant to a contract with other jurisdictions or in an “out to court” status.

<sup>8</sup> “Florida County Detention Facilities Average Inmate Population 2008 Annual Report”, p.3.

<sup>9</sup> The data are obtained from reports submitted to OSCA by participating counties through the Offender Based Transaction System (OBTS). OSCA does not receive OBTS data from 9 counties, representing approximately one-ninth of Florida’s total population.

<sup>10</sup> These offenses reflect the most serious offense for which a particular defendant was sentenced to county jail. Therefore, if an offender was sentenced for two or more offenses, only the lengthiest sentence is included.

Table 2

<b>Most Frequent Type of Offenses Sentenced to County Jail in 2008</b>		
<b>Category</b>	<b>Number</b>	<b>Offense and Number of Jail Sentences</b>
Dishonesty	24,914	Theft (16,878); retail and farm theft (2,273); worthless checks (2,139); dealing in stolen property (944); uttering forged instrument (772); fraudulent use of credit cards (437); uttering forged check (337); communications fraud (312); criminal use of identity information (253); forgery (167); leasing property with intent to defraud (153); defrauding an innkeeper (136); unauthorized use of credit cards (113)
Driving regulations	23,300	Driving with license suspended (16,757); driving without license (4,600); vehicle registration violation (626); attaching unauthorized license plate or registration sticker (443); unauthorized possession or use of license (366); violating driver's license restrictions (244); driving with license revoked (158); unlawful use of license (106)
Disobedience to Lawful Authority	18,633	Resisting officer without violence (8,316); giving false name to officer (2,274); violation of probation (1,561); fleeing or eluding law enforcement officer (1,343); violation of domestic violence injunction (1,240); contempt of court (796); tampering with evidence (741); refusing to submit to DUI test (467); violation of conditions of pretrial release on domestic violence charge (372); violation of sexual offender registration requirements (358); failure to appear on bond (355); false report to LEO (212); introduce contraband to a jail (182); violate protective injunction (179); obstruction by disguised person (122); escape (115)
Intrusion on Property Rights	15,291	Trespass in other than structure or conveyance (5,400); burglary (4,323); trespass in structure or conveyance (3,272); criminal mischief (2,142); possession of burglary tools (154)
Violent Crimes	14,513	Battery (9,368); assault or battery of a law enforcement officer or other designated person (838); robbery (786); resisting officer with violence (778); aggravated assault (684); aggravated battery (459); assault (433); felony battery or domestic violence by strangulation (389); domestic violence (366); stalking (209); false imprisonment (104); assault or battery of a person over age 65 (99)
Driving Offenses	10,038	DUI (8,197); reckless driving (1,145); leaving the scene of an accident with property damage (543); leaving the scene of an accident with injuries (153)
Public Order	4,214	Breach of peace/disorderly conduct (1,768); disorderly intoxication (1,632); loitering and prowling (671); affrays and riots (143)
Weapons	1,599	Carrying a concealed weapon (882); possession of firearm by a felon (416); improper exhibition of firearm (301)
Prostitution <sup>11</sup>	1,454	Prostitution (288); procuring person under age of 18 for prostitution (1); deriving support from proceeds of prostitution (8); criminal transmission of HIV (5)
Offenses against Children	589	Child abuse (310); contributing to the delinquency of a child (279)
Sexual Offenses	490	Exposure of sexual organs (300); lewd and lascivious act with victim less than 16 years of age (190)
Underage Alcohol	423	Possession of alcohol by person less than 21 years of age (311); providing alcohol to person less than 21 years of age (112)

<sup>11</sup> In 2002, CS/SB 570 resulted in an increase in the maximum punishment for a third or subsequent violation of s. 796.07, F.S., from a first degree misdemeanor to a third degree felony, with the requirement that that offender be offered admission into a pretrial intervention or a substance-abuse treatment program. This enhancement was consistent with a recommendation in the Task Force on Self-Inflicted Crimes Final Report that it would give faith-based volunteers and social workers a better chance of breaking the cycle of prostitution by working with habitual prostitutes in a secure setting. In 2008, 60 offenders were sentenced to confinement in the county jail for either prostitution or procuring a prostitute. The data from OSCA does not reflect how many offenders took advantage of the offer of pre-trial intervention or substance-abuse treatment.

**Table 2**

<b>Most Frequent Type of Offenses Sentenced to County Jail in 2008</b>		
<b>Category</b>	<b>Number</b>	<b>Offense and Number of Jail Sentences</b>
Regulatory Offenses	322	Pawnbroking offenses (209); unlicensed contracting (113)
<b>Total</b>	<b>158,311</b>	

Table 2 reflects that most offenders serving sentences in the county jails are convicted of drug possession and drug paraphernalia, theft, driving with a suspended license, battery, resisting arrest without violence, DUI, or trespassing.

**Recent Legislative Changes to Criminal Penalties Which May Impact Jail Populations; Newly Created and Existing Crimes Elevated**

A review of the statutory history of the offenses indicates that there were relatively few changes to traditional, long standing criminal penalties during the five-year period from 2003 to 2008. Some of most noteworthy changes were:

- Reducing of the offense level for certain driving while license suspended infractions;
- Passing of the Cybercrimes Against Children Act of 2007 to create new and enhanced penalties for child pornography and other sexual crimes against children;
- Raising fleeing or eluding a law enforcement officer from a first degree misdemeanor to a third degree felony;
- Adding additional categories of officials who are included with the class of victims that causes enhanced penalties for assault or battery of a law enforcement officer;
- Creating a third degree felony offense of “domestic violence by strangulation”;
- Expanding sex offender registration requirements;
- Reducing the monetary thresholds for determination of the penalty for criminal use of identity information;
- Creating the offense of cyberstalking;
- Making the offense of leaving the scene of an accident resulting in injury or death applicable to accidents on private property; and
- Creating a first degree misdemeanor for employers who provide alcohol to underage employees.

Twenty-seven new misdemeanors and thirty-nine new felonies were created during the 2005, 2006, and 2007 Legislative Sessions. Of the thirty-nine new felonies created during this three year period, 7 were misdemeanors elevated to felonies, either through an enhancement statute or by reclassification. These were:

- Domestic violence by strangulation, which was previously often charged as misdemeanor simple battery because felony battery required visible injury to the victim;
- Battery of a federal law enforcement officer by inclusion in the enhancement provisions of s. 784.07(2), F.S., for battery of a law enforcement officer;
- Battery of a licensed security officer or other designated person by inclusion in the enhancement provisions of s. 784.07(2), F.S.;
- Trespass on the grounds of a certified domestic violence center, which was formerly prosecutable as misdemeanor trespass; and
- Trespass on the grounds of an agricultural chemical manufacturing facility, also formerly prosecutable as misdemeanor trespassing.

Forty-two of these sixty-six new offenses did not result in a sentence to county jail during 2008. However, there were eleven new offenses that resulted in county jail sentences during 2008.<sup>12</sup> These were:

<sup>12</sup> The sentencing disposition of thirteen offenses is not certain because it cannot be determined whether or not a sentence to county jail was attributable to the new legislation or to other offenses that are part of the same statutory section or subsection.

**Table 3**

<b>Sentences to County Jail in 2008 for Offenses Created in 2005-2007</b>				
<b>Offense</b>	<b>Statute</b>	<b>Level</b>	<b>Number Sentenced</b>	<b>Year Enacted</b>
Failure of a sexual offender to report for reregistration	s. 943.0435(14), F.S.	Felony	25	2005
Manufacturing methamphetamine or phencyclidine or possessing a listed chemical with intent to manufacture	s. 893.13(1)(g), F.S.	Misd	20	2007
Domestic violence by strangulation	s. 784.041(2), F.S.	Felony	18	2007
Providing false information to a law enforcement officer investigating a missing person report or conducting a felony investigation	s. 837.055, F.S.	Misd	16	2006
Providing false or fictitious information to obtain a seaport identification card	s. 817.021, F.S.	Felony	10	2006
Maliciously touching or striking a police dog or other official animal	s. 843.19(3), F.S.	Misd	10	2005
Possession of a driver's license or state identification card without required markings indicating that the possessor is a sexual predator or sexual offender	s. 322.212(5)(c), F.S.	Felony	9	2007
Traveling to meet a minor for sexual purposes	s. 847.0135(4), F.S.	Felony	3	2007
Possessing personal identification of a deceased person	s. 817.568(8)(a), F.S.	Felony	1	2005
Harassing a police dog or other official animal while on duty	s. 843.19(4), F.S.	Misd	1	2005
Unlawful distribution of handbills at a public lodging establishment	s. 509.144(2), F.S.	Misd	1	2005

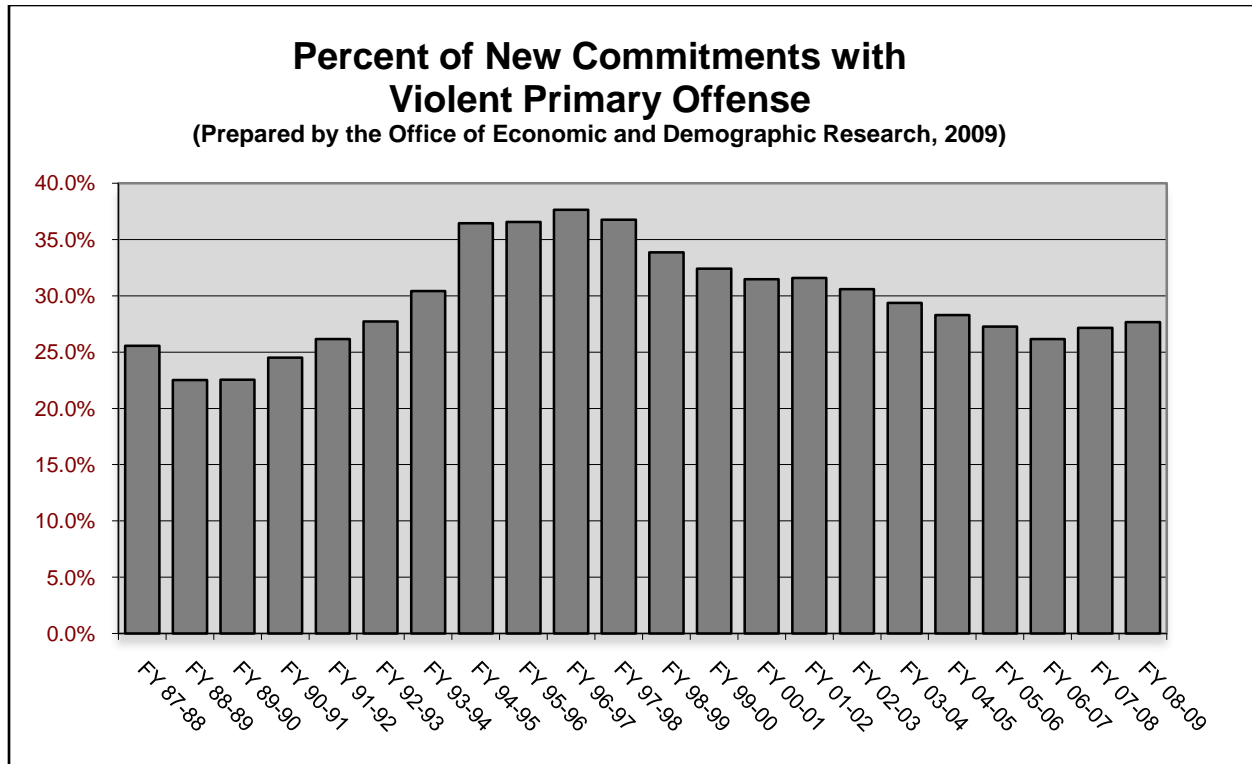
Table 3 suggests that the judicial and prosecutorial communities believed that these 11 newly created felonies and misdemeanors warranted a jail sentence but the other 31 offenses did not warrant a jail term. The most used offenses listed in Table 3 also appear to be relatively serious in nature, which is consistent with the criminal justice community choosing to allocate limited correctional resources in these instances.<sup>13</sup>

### **State Prison Sentences and New Felony Offenses Created by the Legislature**

The graph below shows that since 1996 fewer violent offenders, and conversely more non-violent offenders, are being committed to state prison.<sup>14</sup> It could be argued that as a result of a cumulative effect from yearly additions of new criminal laws and enhanced criminal sanctions, lower-level offenders are being sent to state prison unwisely. Since being prudent with limited resources is important, this report attempts to determine if the creation of new criminal laws has impacted the corrections systems in any significant way.

<sup>13</sup> It should be noted that the 31 offenses which were not sentenced to jail may have been charged, convicted, and placed on probation. The narrow scope of this report did not permit research into this vital area.

<sup>14</sup> Violent offenses include all categories of murder, sex offenses, robbery, and violent personal crimes.



During the 2005, 2006, and 2007 Legislative Sessions, thirty-nine new laws were passed that either created a felony offense or elevated a misdemeanor to a felony. A review of commitment data provided by the Office of Economic and Demographic Research for Fiscal Year 2008-2009 reflects that prison commitments can definitely be attributed to seven of the new laws. These offenses were:

**Table 4**

<b>Sentences to Prison in FY 2008-2009 for New Felony Offenses Created in 2005-2007</b>			
<b>Offense</b>	<b>Statute</b>	<b>Number Sentenced</b>	<b>Year Enacted</b>
Failure of a sexual offender to report for reregistration	s. 943.0435(14), F.S.	53	2005
Domestic violence by strangulation	s. 784.041(2), F.S.	36	2007
Traveling to meet a minor for sexual purposes	s. 847.0135(4), F.S.	9	2007
Possession of a driver's license or state identification card without required markings indicating that the possessor is a sexual predator or sexual offender	s. 322.212(5)(c), F.S.	2	2007
Manufacturing methamphetamine or phencyclidine or possessing a listed chemical with intent to manufacture in the presence of a person under 16 years of age	s. 893.13(1)(g)(1), F.S.	1	2005
Harboring a sexual predator or giving false information to law enforcement concerning a sexual predator	s. 775.21(10)(g), F.S.	1	2005
Persuading a parent or guardian to consent to sex acts by their child	s. 847.0135(3)(b), F.S.	1	2007

Twenty-five of the thirty-nine new offenses had no prison commitments during FY 2008-2009.<sup>15</sup> So, the large majority of new felonies created did not result in additional prison admissions. Also, as can be seen from the list of new laws in Table 4 that have resulted in prison commitments, the offenses are serious in nature and appear to be appropriate for a state prison sanction. With the exception of the methamphetamine offense, all of the other newly created laws were sexual or violent in nature.

## Conclusion

Based on this preliminary 3 year review, the impact of these recent new laws on jail and prison populations is not as far-reaching as might be expected. While there is no way to know the reason for this, there are several possibilities that might contribute: (1) the bulk of new laws may be focused on an unusual occurrence that is not common enough to be replicated very often. By the time the legislation is passed, the event is over and reoccurs only infrequently; (2) the law enforcement and prosecutorial communities are not familiar with the new law and therefore do not arrest or charge for it; (3) law enforcement officers and prosecutors consciously elect to arrest and charge under existing laws with which they are familiar and for which judicial precedent has been established; and (4) offenders may be sentenced for the new offenses but as an additional offense rather than as the primary offense, making it difficult to determine the impact.

While interested parties and the Florida Prosecuting Attorneys Association recently encouraged legislators to adopt a self-imposed moratorium on creating new felonies, this report suggests that a select number of the newly created felonies were useful to the judicial and prosecutorial communities. For this reason, it may not be prudent for members of the Legislature to cease creating new felonies altogether. While it is true that prosecutors and judges predominately charge and sentence using the long standing and traditional felonies in the statutes and a large number of the newly created criminal penalties do not result in jail or prison sanctions, there does appear to be a defined public safety interest in continuing in a judicious and fiscally-conscious manner to create new felony provisions.

To move forward in a “business as usual” fashion may, however, not be prudent. While the Legislature has been responsible for many years in estimating the impact of new criminal penalties prior to their passage through the Criminal Justice Impact Conference process, there is a void of information on the *actual* long and short-range impact of those new laws on our prisons, jails, and probation populations. This report attempted to provide a three year snapshot, but this analysis was limited in many ways. First, this analysis did not include the jail and prison impact associated with enhancing penalties for existing felonies (i.e., ranking previously unranked offenses and moving offenses from the non-prison level to the prison level (7)).<sup>16</sup> That would be a fruitful line of inquiry. Second, this project did not take into account to what extent probation populations have been impacted by the creation and elevation of crimes. Consequently, the Legislature may want to consider a more methodical approach to filling this information gap by tasking specific legislative, judicial, and executive entities to periodically evaluate the impact of newly enacted or elevated crimes. This specific recommendation is put forth in the next section of this report.

## Options and/or Recommendations

Based on the findings from this project, staff suggests that the Legislature consider requiring the Department of Corrections and the Office of the State Courts Administrator to track all new felony and misdemeanor offenses created or enhanced by the Legislature and to provide to CJEC the necessary information for CJEC to conduct an assessment every 5 years on the impact of particular offenses on probation populations and prison and jail bed space. This analysis could assist the Legislature in making policy decisions regarding future criminal penalties.

<sup>15</sup> It cannot be determined whether any of the remaining seven offenses resulted in incarceration because there is no way to differentiate between the new offense and pre-existing offenses that are included in the same statute.

<sup>16</sup> According to the Division of Economic and Demographic Research, since 1997 there has been a 180% increase in the number of offenses which have been elevated or placed in Level 7 of the Criminal Punishment Code Offense Severity Ranking Chart. Level 7 is the threshold in the law that requires a state prison sanction. In 1997, there were 40 specific offenses listed in Level 7 compared to 112 offenses in 2008. This shows the extent to which the Legislature has increased the possibility of a state prison sanction. While a thorough examination of this trend was outside of the specified scope of this report, these penalty changes probably have also impacted the jails and prisons.