Approved February 25, 1991
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Wint Winter, Jr. at
Chairperson

9:30 a.m./~~p.m.~~ on February 1, 19 91 in room 514-S of the Capitol.

All members were present except: Senators Yost, Moran and Martin who were excused.

Committee staff present:
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Office of Revisor of Statutes
Judy Crapser, Secretary to the Committee

Conferees appearing before the committee:

Senator Bud Burke, President of the Senate
Ben Coates, Kansas Sentencing Commission

The Chairman opened the meeting by recognizing Senate President Bud Burke.

Senator Burke presented the committee with a request for introduction of a conflict resolution bill involving K.S.A. 21-3401 and KSA 21-3401a.

Senator Morris moved to introduce the conflict resolution bill requested by Senator Burke. Senator Petty seconded the motion. The motion carried.

Gordon Self, Office of the Revisor of Statutes, requested introduction of two additional conflict resolution bills. He explained that the requested changes were purely technical in nature and not intended to address or imply any change in the statutes.

Senator Bond moved to introduce the two conflict resolution bills as requested by the revisor. Senator Gaines seconded the motion. The motion carried.

The Chairman turned the committee's attention to the Kansas Sentencing Commission's Recommendations of the Kansas Sentencing Commission.

Ben Coates, Executive Director of the Kansas Sentencing Commission, continued his briefing on the philosophy and scope of the Commission's work and decisions. (ATTACHMENT 1)

The briefing was continued to Monday, February 4, 1991 at 10:05 a.m. in Room 514-S.
The meeting was adjourned.

Date 1 February 1991

VISITOR SHEET

Senate Judiciary Committee

(Please sign)

Name/Company		Name/Company
Rod Grant	KCCI	
Marilyn Manning		
Carla Stovall	KPB	
Ron Hein	BIDS	
Jerry Sloan	OJA	
Paul Shelby	OJA	
Will Belden	LWVK	
Jim Clark	KCPAA	
Blaine Carter	KSC	

Summary of Testimony Provided to
the Senate Judiciary Committee
February 1, February 4-5, 1991

by

Ben Coates
Exeutive Director
Kansas Sentencing Commission

Senate Judiciary Committee
Attachment 1
2-1-91

1-1/4

Summary of Testimony Provided to
the Senate Judiciary Committee

Introduction

Changing the current sentencing structure from an indeterminate system that provides a great deal of individual discretion to the sentencing judge and the Parole Board is a weighty decision. The move from this open ended system to a structured presumptive one represents a structural and philosophical change. This type of decision goes beyond "tinkering," it is a major departure from the status quo.

This decision should be made upon a sound empirical base, not isolated anecdotal incidents, or a series of what if scenarios. In order to gain a large picture perspective, it is necessary to review the current system to see if it is working. If an examination indicates problem areas, then it seems reasonable to develop an alternative method to address them.

Current System Performance

The current prison system is overloaded; the State of Kansas is under court order to reduce current populations or increase space. The prison population experienced tremendous growth during the 1980's. (1980-1989). As indicated on the chart attached entitled Cumulative Study, the total number of inmates incarcerated increased by 165%, the average number of commitments increased by 109%, and the overall crime rate remained static. In fact, the 1989 overall crime rate was within 0.3% of the 1980 one. The other compounding factor in this equation has been a significant increase in average length of stay before parole. The average time served was 16.2 months in 1983 and 28.3 months in 1989. This represents an increase of 75%.

It is interesting to note, that an increased prison population, an increased number of admissions, and an increased length of stay, have had little or no impact on the crime rate. However, they have had a significant impact on the amount of prison space and the cost of maintaining prisons.

The increased numbers do not represent an increase in the number of serious crimes, nor an increase in the level of criminal sophistication of the offenders. Since 1983, almost seven out of ten new admissions have been for "D" and "E" felonies. This trend has been steady, in fact, it has been between 67% and 68% for five years. However, in 1983, 48% of the new admissions had a previous felony record, that percent decreased to 37% by 1989 and 30% by 1990. The number of new admissions with a history of prior incarcerations followed the same trend. In 1983, 32% of the new admissions had a history of prior

incarceration, by 1989 only 19% had a history of prior incarceration, and this number decreased to 14% in 1990. Thus it is apparent, that the increased admissions and increased length of stay are not a product of more crime, great influxes of more serious offenses, nor do they reflect an increase in the number of inmates with more serious criminal histories. In fact, the opposite is true, over the past eight years the rate of "D" and "E" felonies has remained constant and their prior criminal history records have improved. That is, they have fewer prior offenses and fewer of them have been incarcerated before.

Therefore, it is apparent that the increases in prison population and the increased length of stay are not related to an increased crime rate or a steady hardening of offenders. In fact the opposite is true.

Probation and parole revocations make up a large percentage of total admissions. A review of persons sent to prison on probation and parole violations reveals that not only are the sheer number of violators increasing, the proportion brought back without a new conviction has also increased. In 1980, 446 probation/parole violators received prison sentences, 204 or 46% received new sentences as the result of additional criminal convictions. By 1989, the number of violators had increased to 1,282, a 182% increase. There were 303 cases with new felony convictions, but this category only accounted for 24% of the total revocations. This rather alarming trend is of concern. Not only are more inmates coming to prison due to probation and parole violations, but they are coming back without new criminal convictions. The average parole violator who is returned without a new conviction serves over nine months, more than the minimum term for a new class "E" felony. There are several anecdotal accounts of persons being charged but not convicted. If true, these persons are returned to prison without the benefit of a trial or representation by counsel.

In any event, the rising number of revocations is a cause for concern and points out the need for community based sanctions to maintain people in the community. Any solution to prison overcrowding must deal with the revocation issue. It must also clearly specify appropriate penalties for persons who are convicted of new felony offenses and for those who are not.

The recidivism rate for persons released is roughly one third by the end of the first year and increases up to one half by the end of the fourth year. It becomes apparent that stronger community programs are needed to keep released felons in the community.

A 1987 national survey of recidivism rates for offenders released from prison reached two important conclusions:

1) Length of stay in prison is not a good indicator of success. Persons who stayed less than six months and persons who stayed over two years have the same basic failure rates.

2) The more alarming finding revealed that persons who are put in prison for non-violent crimes are as likely to commit violent crimes when they leave as those who have prior histories of violent crimes.

Racial and Geographical Disparity

There has been considerable concern expressed that any new sentencing system should be free of racial and geographical bias. The Commission undertook a study of persons sentenced in FY 1989 to discern the presence or absence of racial and geographic disparity. The Commission read a random sample of 3,285 felony cases sentenced in FY 1989. This represents well over 60% of the cases sentenced that year.

Non-whites were disadvantaged at every decision point studied. The disparity was greatest in large judicial districts and primarily centered on property crimes.

- Non-whites experienced higher than expected rates of incarceration at original sentencing.
- The 120 day call back provision favors whites. One of three whites are called back and placed on probation compared to less than one in four non-whites.
- Non-whites have their probation violated more frequently than whites.
- Non-whites receive significantly longer sentences than whites.
- Non-whites serve significantly longer periods of time before being paroled.

These differences also hold when only persons with no prior felony histories are considered. This indicates that differences observed are not attributable to non-whites having a more elaborate criminal history. These differences are greatest in large judicial districts and tend to be minimized in small and medium sized ones. (For a thorough review of this topic see Chapter 2 in the Kansas Sentencing Commission final report).

Several socio-economic variables may explain some of the variances. However, when reviewed as a whole, race tends to be a better indicator, because when these socio-economic variables are linked with race, non-whites continue to be disadvantaged. The following chart demonstrates the overall probabilities of going to prison for the sample of cases read. The higher the probability the greater the chance of going to prison.

Probability of Receiving a Prison Sentence
by Selected Characteristics by Race

		Overall	White	Non-White
o	Total	31.8%	29.2%	37.6%
o	Employed	18.6%	17.9%	20.9%
o	Un-Employed	36.9%	34.3%	41.5%
o	Private Counsel	23.9%	22.3%	29.1%
o	Court Appointed Counsel	34.9%	33.3%	39.6%
o	High School Dropout	29.7%	24.9%	39.2%
o	High School Graduate	31.3%	29.2%	36.1%
o	Single	32.0%	28.4%	39.1%
o	Married	30.3%	29.7%	31.9%
o	Cohabitating	41.2%	32.9%	53.1%

As indicated above, unemployment is a powerful indicator, but when coupled with race, it does not explain all the differences. In fact, the difference between white and non-white unemployed is about the same as the overall difference. Being single or cohabitating are good indicators as well, but when the variable of race is added non-whites fare poorly.

Thus, there does seem to be problems with the current system. Prison populations grow in the absence of increased criminal activity, the people coming to prison have lesser criminal histories, and mainly commit lesser offenses. Time served increases, but recidivism rates remain high and are not related to sentence length. Racial and geographical biases are present. Non-whites go to prison more often, receive longer sentences, and serve longer periods before they are released. These racial differences are related to socio-economic status but cannot be fully explained by socio-economic variables.

The system lacks predictability. There are no widely accepted standards that govern who goes to prison, or how long they stay once sentenced. This not only leads to significant overcrowding, but also makes it virtually impossible to forecast resource needs. Some method of controlling who comes to prison and establishing how long they will stay once there must be established. Kansas developed a Community Corrections program several years ago to serve "prison bound" inmates. However, in a system where seven of ten inmates coming to prison are "D" and "E" felons it is hard to establish a clear definition of prison bound.

Possible Solutions

Several states have developed sentencing systems that structure discretion, clearly indicate who should go to prison, and set terms for length of stay. This is not a new practice, it has its roots in the early work on parole guidelines that were established in the 1960's and 1970's. Several states realized that inmates came to prison with similar crimes and similar backgrounds, but disparate sentences. The response was to standardize their disparate sentences by using objective weighted factors. Inmates received scores based upon these factors, the scores were plugged into a parole matrix and an expected sentence was generated. The sentence could only be impacted by negative behavior in prison. Some of these models were based upon predictive factors that were validated by recidivism studies. Others were based upon crime seriousness and prior criminal history.

This movement brought stability to prison populations and allowed states to forecast how long inmates would stay. However, it did not remedy the problem controlling how many people come to prison, it merely standardized how long they would stay once sentenced. This for the first time allowed the development of a rational sentencing policy that allowed the legislature to coordinate and control prison and community based resources. Kansas currently does not have this capacity, there is no clearly articulated policy that controls who comes to prison or how long they stay once they arrive. These two decision points are controlled by the sentencing courts and the Parole Board.

The Kansas Proposal

Roughly half the states have either adopted some form of structured sentencing or are in the process of developing one. Kansas studied these states and chose three states as appropriate models. Minnesota and Washington state have had guidelines since the early 1980's. Oregon just initiated them in 1989. All three states have adopted similar models. Washington and Minnesota have used their guidelines to limit prison growth; both states

incarcerate approximately 20% of their convicted felons. Kansas incarcerates 38%. Kansas has an incarceration rate of 223 persons per 100,000 residents. Minnesota and Washington have incarceration rates of 71 and 144 per 100,000 respectively.

Kansas developed proposed guidelines based upon the following principles:

- o Prison space should be reserved for serious/violent offenders;
- o The degree of sanction imposed should be based upon the amount of harm inflicted;
- o Sanctions should be uniform and not related to race, socio-economic status or geographical location;
- o Penalties should be clearly spelled out and everyone should understand exactly what has happened once they are dispensed;
- o Incarceration is punishment, and should be reserved for serious violent offenders;
- o The state has an obligation to provide rehabilitation oriented programs to inmates once incarcerated. However, it should be made clear that persons should not be incarcerated solely because they need education, job skills, or other programs. These programs should be made available in the community unless someone commits violent crimes or has an extensive history of prior criminal convictions;
- o The system must be rational and allow policy makers to plan for resources and to allocate resources.

Presumptive Sentencing

The Sentencing Commission developed a series of recommendations to address these principles. The core of the recommendations involve replacing the current indeterminate sentencing system with a presumptive one. This presumptive system establishes sentences based upon the seriousness level of the crime of conviction and the extent of the defendants prior criminal history. The seriousness of the current offense is the major determinant.

This system operates as a grid which provides the sentencing court with a presumptive sentence for a "typical" offense. The sentence is expressed in a potential range of months. If the case is not "typical" and there are substantial and compelling reasons why the sentence found on the presumptive grid is not appropriate, the sentencing judge can depart and impose

a different sentence. When judges depart they must make a record of the substantial and compelling reasons behind the departure. This departure is then appealable by the state or the defendant. The state's right to appeal a sentence is a major change.

Thus, the presumptive sentence is not mandatory. Judicial discretion is not eliminated, it is structured and a new standard for appellate review is created. States that have had guidelines for awhile report that approximately 85% of the cases are sentenced within the guidelines and 15% are departures.

The seriousness of the current conviction is the primary determinate of the presumptive sentence. The present indeterminate system has five levels of felonies with fairly large numbers of crimes in the bottom two categories. Crimes are added to this scheme every session. There is no systematic process that evaluates these crimes as to their relative seriousness and recommends a felony level. The decision is often an ad hoc one.

The Sentencing Commission took all existing crimes and ranked them using 10 levels of seriousness instead of five. More importantly, they were ranked according to their relative harms. The Commission established a hierarchy of harms that were premised upon the assumption that crimes against persons were the most serious followed by crimes against property, and crimes against the public order. Crimes were sub-divided into these categories and then were ranked within them. This lengthy process yielded a stratified list of crimes ranked from the most serious, (level 1) to the least serious (level 10). Additional crimes can be added to the list by using this same process.

Some crime categories are too broad to fit into a single level of seriousness. These crimes were sub-divided into distinct levels of harm and many appear in more than one seriousness level.

The offenders prior criminal history is the other major determinate of the presumptive sentence. Only prior criminal convictions count. The decision was made early on to treat prior crimes against persons more seriously than other crimes.

There are nine categories of prior criminal history ranging from no prior record to three or more prior crimes against persons. Each level is more severe and includes extra sanctions. Thus, the idea of the habitual offender act is built into this progression. This systematic reliance on criminal history is truly a new element. The current sentencing system does not have specific provisions for increased culpability due to prior criminal behavior. It may be assumed that the Parole Board will take it into account, and indeed it is one of the

seven factors they use in deciding length of stay. However, other factors often outweigh prior criminal conduct because time served does not always appear related to past criminal history.

All previous felony convictions will be considered. Class A and B misdemeanors will be considered, no class C misdemeanor will be considered.

Due to victim input, primarily battered spouses, three prior person crime misdemeanors will be counted as one prior person felony. This will allow persons with long histories of misdemeanor battery to receive stiffer punishments if they commit felony person crimes. Non-person misdemeanors do not have the same impact. They can enhance the sentence but only by one level.

Prior DUI convictions will greatly enhance the penalty for persons convicted of an aggravated vehicular homicide due to intoxication. This special rule was included as a result of testimony from MADD groups.

Residential burglaries will count as person offenses, commercial burglaries will count as property offenses. This difference has a significant impact. Persons who have two prior residential burglaries will get a presumptive prison sentence. This special rule was developed at the request of several judges and the Kansas Peace Officers Association.

Prior juvenile felony crimes will count as well. However, prior juvenile offenses that would have been "D" or "E" felonies will no longer count once the individual reaches age 25. All prior adult and prior juvenile "A", "B", and "C" will always be counted.

Prior multiple crimes will be scored using the same day/same day jurisdiction rule. That is, if a person is convicted of multiple crimes on the same day in the same jurisdiction it will count as one event. If multiple convictions occur in different jurisdictions or on different days they will be scored as separate events.

These two elements make up a totally new system that is premised upon developing sentences based upon actual current and past convictions. It excludes racial, geographical, demographic, and socio-economic variables. Persons convicted of like crimes with like criminal histories should receive like sentences. This represents a radical change, currently each sentencing decision is driven by a wide variety of factors. There is little consistency between judicial districts. This is often said to reflect local sentiments. However, upon investigation it became apparent that there is little consistency within large multi-judge districts. This indicates that sentencing is a function of which judges make the decision, and in many cases which court services officers prepare the Pre-sentence Report. This is not

reflective of local sentiment, but of individual differences among and between decision makers. Sentencing guidelines create a level playing field. A recent Rand Corporation report credits uniform sentencing practices in California with the virtual elimination of racial bias.

PSI's

A presentence investigation (PSI) shall be required in all cases. Currently many PSI's are waived, this waiver does not insure an accurate assessment of the convicted person's criminal history. Criminal history takes on new significance under the guidelines system, thus accuracy is important. The PSI will be limited to information concerning the current offense and prior criminal history. Family and socio-economic information will not be included. Sentencing decisions should reflect the actual event and prior criminal history and not be based upon social information. The inclusion of social data adversely impacts non-white offenders and leads to racial bias in sentencing. The PSI will include a complete victims statement, an assessment of prior criminal history, and a statement of where the offender falls on the grid. The format and the decision to remove socio-economic data from the PSI was the product of a working group made up of court services officers appointed by the Office of Judicial Administration. Their report was adopted by the Commission.

Departures

Departures from the presumptive sentence will require written appealable reasons. The guidelines will provide a non-exclusive list of aggravating and mitigating departure criteria. Judges are free to craft other reasons, it is assumed that this process will develop a common law of sentencing. Prosecutors and defense attorneys can recommend departures and can agree to pleas based upon them. Judges are not bound by these plea bargains, but if they accept them there must be a factual basis to support the departure. If the departure is part of the plea agreement and the judge accepts the terms, the departure is not appealable. In the three states studied, departures are truly the exception instead of the rule.

There are special departure criteria for drug crimes to enhance penalties for major drug crimes and/or the sale to minors.

Appeals

The guidelines provide both the state and the defense an appeal for sentences that depart from the guidelines. The sentence is not appealable if it falls within the presumptive range or if it is the result of plea negotiation.

The review standard is changed from an abuse of discretion to the presence of substantial and compelling reasons. The appeal will be directed to the appellate court. The court will either reverse or affirm the sentence. In cases of reversal, the appellate court will remand the case to the trial court for resentencing.

The trial court may correct an incorrect sentence at any time. It is anticipated that the new system will generate a substantial amount of mathematical and clerical errors. These errors can be called to the attention of the trial court and they can be corrected.

120 Day Call Backs

The new structure will eliminate the 120 day call back provision. This provision was put in place several years ago to allow sentencing courts to reconsider their sentence upon receiving a diagnostic report from the Department of Corrections. Over the years this practice has become a method to provide short term incarceration. In FY 1989 over 25% of persons sentenced to prison were called back and placed on probation. The cost to provide this assessment is over $12,000 per inmate, truly an expensive short term stay.

The Commission voted to eliminate the 120 day call provision. The sentence should be based upon the harm created by the event and the defendant's prior criminal history. The 120 day report does not provide any new information on these two items. It is focused on psychological and socio-demographic concerns. The report may well be helpful to the institution and the parole office in the development of a treatment and supervision plan.

Parole Board's Role

The Parole Board will no longer be responsible for releasing persons from prison. Their release will be governed by the original sentence imposed, plus or minus any administrative adjustments made by the Department of Corrections under the statutory Behavior Attitude Adjustment provisions.

This represents a major change in policy. The old system relied upon judges setting broad indeterminate sentences and the Parole Board deciding when the person should be released. Over the past several years the length of time served has dramatically increased. This increase in time served has not reduced recidivism, nor has it decreased the number of parole revocations. In fact both have increased.

The Parole Board will continue to release persons sentenced under the old system. They will also continue to parole persons convicted of off-grid crimes. The Parole Board will review all persons records before their release and may impose special conditions that must

be followed upon release. They will be responsible for conducting revocation procedures stemming from technical or new criminal conviction offenses.

Post-release Supervision

All persons will be supervised for a specific period of time upon release from prison. The length of the period of supervision will depend upon the level of offense committed. Persons convicted of a level 1-6 offense will have a mandatory supervision period of 24 months. Levels 7-10 crimes will be supervised for 12 months. Time served in the community will vest. Revocations due to technical violations will be limited to 90 days. Revocation for new crimes may serve up to the full amount of their remaining time.

Other Recommendations

Once the guidelines are in place, a monitoring system must be established to insure compliance. This monitoring system will require the development of a common data base between the courts, community corrections and the Department of Corrections. This currently does not exist. There are no standard definitions, nor are there standard data collection procedures. There will also be an increased reliance on the accurate collection of criminal history. This will necessitate changes in the current methods of recording misdemeanor convictions.

The Sentencing Commission has been instructed to study the feasibility of consolidating all field services into one administrative body. This is underway, a member task force has been appointed and will present a report to the 1992 session.

There has been considerable discussion surrounding the topic of retroactivity. The Commission recommends that the legislature consider making the guidelines retroactive. This may well reduce prison population and will help correct past disparity.

The Commission also recommends the development of a review of the guidelines on an annual basis to determine impact. In the event of potential overcrowding, the Secretary of Corrections should certify that there is a potential emergency. Once certified the Commission should develop proposed remedies to present to the legislature. This process serves as a trigger rather than a cap.

Summary

In summary, the current system is not meeting the needs of the state. Prisons are overcrowded, incarceration rates are high, lengths of stay have grown and none of these events seem to impact the crime rate, recidivism rate or success on parole. In fact, courts

are sending an increasing number of "D" and "E" felons to prison. Those currently sent to prison have less serious records than in the past.

This reflects a lack of a clearly articulated corrections policy. There are no clear cut guidelines about who should go to prison or how long they should stay. Individual judges and the Parole Board set these policies. Unless the legislature defines a policy along some set of clearly defined guidelines, current practices will continue. The proposed guidelines provide such a policy, they have proven their worth in other similar states.

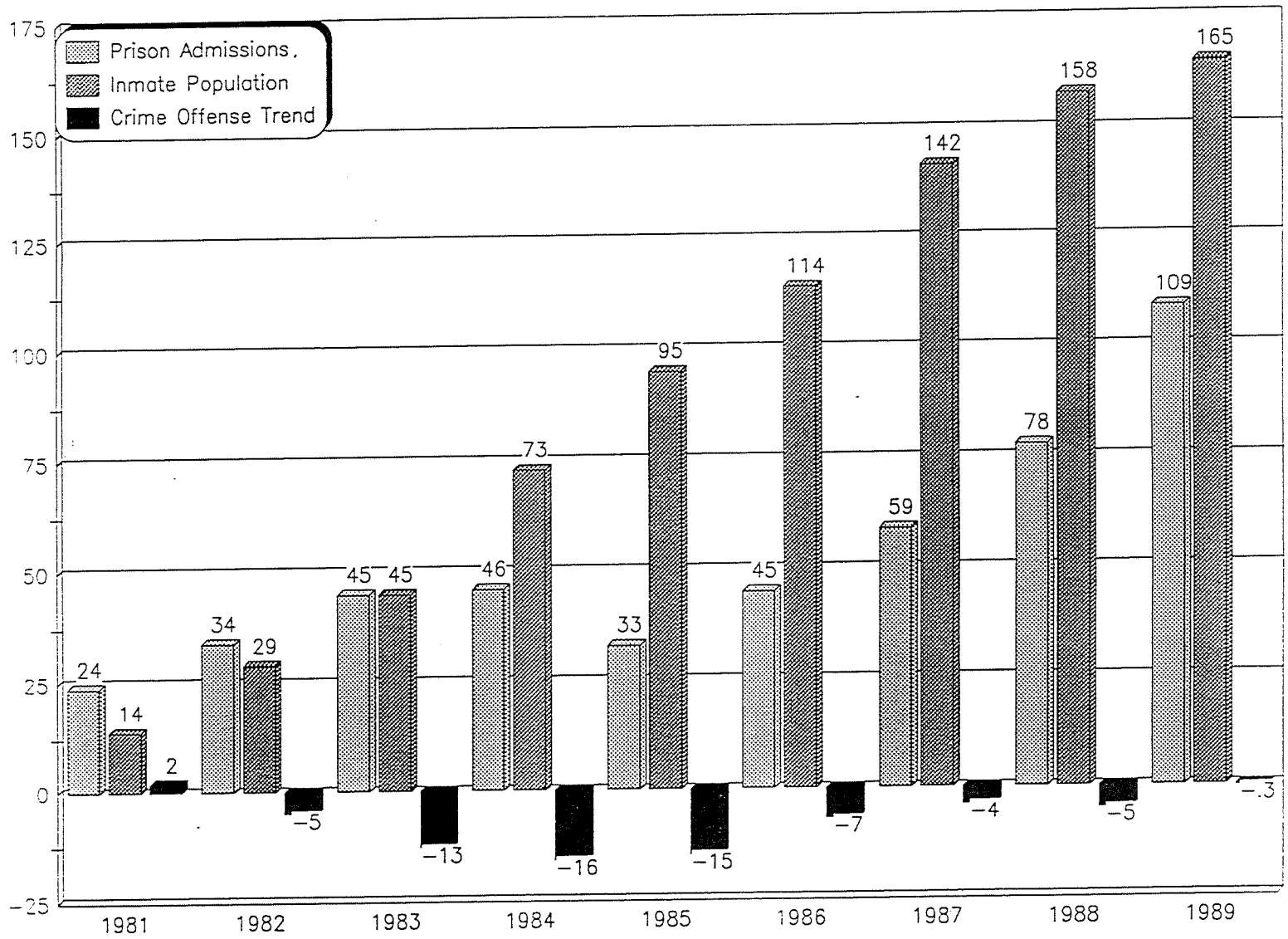
If the guidelines had been in place in FY 1989 the number of persons going to prison would have been reduced by 13.5%. There would have been clear definitions of who was going to prison and how long they would remain. The legislature would have been in a position to accurately forecast resource demands. More importantly persons with like criminal histories sentenced to like crimes will receive like penalties. They will not receive different sentences based upon racial, geographical or socio-economic variables.

For further information contact Ben Coates at 296-0923.

Cumulative Study

Prison Admissions, Inmate Population, Crime Offense Trend

Percentage Change - Base Year=1980



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