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RESEARCH

# Incarcerating at Any Cost: Drug Trafficking and Imprisonment in Brazilian Court Reasoning

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Brazil has the third largest prison population worldwide—over 700,000 people. At least 28% of them are in prison for drug trafficking. Given that situation, this paper explores the conflicts among the law; the *Supremo Tribunal Federal*, or Brazilian Federal Supreme Court (STF) and lower court precedents. Based on a qualitative and quantitative study of *Tribunal de Justiça de São Paulo*, or São Paulo State Supreme Court (TJSP) and *Superior Tribunal de Justiça*, or Brazilian Superior Court of Justice (STJ) decisions between 2017 and 2018, this paper focuses on the arguments put forward by those courts to prevent the imposition of non-custodial sanctions on people convicted of drug trafficking even though they may be first-time offenders with no criminal record. Our research shows the main arguments used are related to the amount, type and variety of seized drugs; the convict's criminal history; the person's employment status at the time of arrest and the insufficiency of non-custodial sentences in cases of drug trafficking. Our conclusion is that the reasoning behind convictions for drug trafficking favors imprisonment even in situations in which the law and the STF precedents would allow non-custodial sentences.

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**Keywords:** drug trafficking; small-time drug trafficking; sentence calculation; sentence reduction factor; alternative punishment; precedent research

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## 1. Introduction

Sentencing is a crucial stage of the criminal justice system's activity.<sup>1</sup> As far as drug trafficking is concerned, a complex gear system, scarcely discussed in and out of the legal arena,<sup>2</sup> is in place mainly in Brazil. Based on legislative material, jurists' opinions and precedents, this paper is meant to contribute to the development of a broader and more thorough examination of the legal factors—the legal framework, decision-making processes and types of legal reasoning—which, along with political factors, have led the Brazilian prison population to soar by over 700% in the last two decades.

It focuses on sentencing decisions and, in particular, the argumentative obstacles created by courts to prevent the application of non-custodial sanctions, such as alternative punishments, in drug trafficking convictions. It is difficult to study the profile of those convicted specifically for drug trafficking because data in Brazil are insufficient and unreliable; however, the profile of the overall prison population leaves no doubt: drug trafficking convicts are mainly young black men and women with poor education, ranking low in illegal

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<sup>1</sup> This paper is the result of research conducted at FGV Direito SP's Crime and Punishment Study Center under supervision of Professor Maíra Rocha Machado. The four people named as authors were involved in determining the sample, collecting and reviewing the appellate decisions, gathering quantitative data and conducting the bibliographic survey, in addition to writing this text jointly.

<sup>2</sup> The Brazilian prison population totaled about 726,000 in 2016, 707% up from the early 1990s (DPN 2017: 7–9). The 2016 report, the latest available when this paper was concluded, states 28% of all those prisoners are criminally liable for drug trafficking. Among women, that share is 62% (DPN 2017: 43).

markets. This profile is consistent with research findings about the selective strategies of law enforcement and the institutional incentives for detention in flagrante delicto and incarceration at any cost.<sup>3</sup>

Between detention in flagrante delicto and the calculation of the total number of prison inmates, the pivotal role played by courts becomes apparent both in the manner in which they select and interpret the law (legal provisions, precedents and higher court decisions) and in the manner in which it perceives, and the position it adopts about, the use and sale of substances that cause physical or psychological dependence. Both factors appear in different combinations in courts' statements of reasons—often very concise—based on which the punishment and the length of the sentence to be imposed on a drug trafficking convict are determined.

To explore this point more thoroughly, this paper focuses on the quantitative and qualitative findings of two studies conducted in 2017 and 2018 on appellate decisions from the *Tribunal de Justiça de São Paulo*, or São Paulo State Supreme Court (TJSP) and the *Superior Tribunal de Justiça*, or Brazilian Superior Court of Justice (STJ).<sup>4</sup> Based on that material, this paper argues punishing and sentencing is an arena of dispute among different actors, both from the political system (lawmakers) and the legal system (courts).<sup>5</sup> It focuses on three specific conflicts. The first relates to a task distribution scheme that assigns the law the central role in determining punishments. As a result, the role of courts in punishment decisions is somewhat diminished. The second relates to the high value placed on imprisonment to the detriment of all other types of punishment. In addition to those conflicts, described in previous studies, a third has emerged directly from the material examined here: the assignment of a specific moral value to each defendant and his or her world—based on views on drugs, trafficking and traffickers—which has a direct effect on how rules are interpreted and how both punishments and sentences are determined.

This paper is structured around those three conflicts. Accordingly, the next section briefly describes the main features of the Brazilian punitive system regarding punishment decisions. The purpose is to describe the manner in which the STF rules and precedents make a distinction between the legal treatment of ordinary drug trafficking and small-time drug trafficking (section 2). The following sections focus on the obstacles—created by the very wording of Law 11.343/06 (Anti-Drug Act)—to applying the legal concept of small-time drug trafficking and fitting it into our penalty framework (section 3), as well as the obstacles connected with the rules governing the substitution of imprisonment by non-custodial punishments (section 4). This path showed us the amount and variety of seized drugs are considered at different times during the sentencing process, which is prohibited by Brazilian law due to the double jeopardy rule, or *ne bis in idem* (section 5).

## 2. The Legal Restraints and the Centrality of Imprisonment

Punishing under Brazilian law bears the strong mark of a conception of separation of powers that gives lawmakers, not judges, a central role in this regard. Accordingly, lawmakers set the penalty rules by determining types of punishment, as well as the minimum and maximum lengths of sentences. The law provides for a single type of punishment for all crimes except drug use: imprisonment.<sup>6</sup> All other types of punishment—community service, restraint of rights, pecuniary penalties—serve as substitutes for imprisonment and can only be imposed by a judge if other requirements, also laid down by law, are fulfilled. One of those requirements is precisely the length of the sentence pronounced by the judge.

<sup>3</sup> For further information, refer to Jesus (2018), Sinhoretto et al. (2013) and Grillo (2013).

<sup>4</sup> The methodological strategy followed in the research about the TJSP is described in detail in Machado et al. (2018). In turn, our research on STJ material focused on all the appellate decisions decided between December 1, 2017, and February 28, 2018, available on the STJ's website. They can be accessed by entering *tráfico privilegiado* (Portuguese for small-time drug trafficking) (Section 33, Paragraph 4) in the *legislação* (legislation) field. The search found 192 appellate decisions—209 cases considering some of those decisions involved more than one person. We refer to both male and female justices named as rapporteurs in the cases we studied in the masculine in this paper because only 6 of the 33 STJ justices are women. In fact, our sample contains only one case in which a woman, Justice Maria Thereza Rocha de Assis Moura, was judge-rapporteur. There is currently only one woman, Justice Laurita Vaz, in the Third Section of the STJ, responsible for criminal cases, according to the Court's fact sheet dated September 26, 2018: [http://www.STJ.jus.br/static\\_files/STJ/Mídias/imagens/COMPOSICAO\\_MINISTROS.pdf](http://www.STJ.jus.br/static_files/STJ/Mídias/imagens/COMPOSICAO_MINISTROS.pdf). Accessed on October 18, 2018. We mentioned the male predominance in the TJSP above. A survey dated February 7, 2018, shows only 4 out of the 79 members of that court were women (Machado et al. 2018: 611–612 footnote 18).

<sup>5</sup> For information about this difference and its explanation, refer to Cauchie and Pires (2007, 2011).

<sup>6</sup> Even though the Brazilian legislation uses different terms, such as *reclusão* and *detenção*, the U.S. legislation does not make this distinction. For a table of punishments—type and length—provided in the Brazilian legislation, refer to Machado et al. (2010). Section 28 of the Anti-Drug Act stipulates the following punishments for drug users: warning about the effects of drugs, community service, participation in an educational program or course.

Only prison sentences no longer than four years can be substituted by other types of punishment. In other words, imprisonment is the punishment for almost all crimes, even if a judge may substitute prison confinement by an alternative punishment in a few very specific cases, also established by the legislature.

Indeed, lawmakers have established different rules to limit judges' leeway by determining minimum prison sentences, limiting the number of cases in which non-custodial sanctions may be applied, prohibiting the substitution of prison sentences by alternative sentences, et cetera. This legal framework prevents judges from handing out any punishment—other than incarceration (imprisonment)—that they may consider fair and appropriate to each specific person and case. Nevertheless, courts systematically accept, and subject themselves to, this situation. Very seldom do any legal decisions challenge this legal framework in the name of the principle of the individualization of the sentence, which incidentally is enshrined in the Federal Constitution of Brazil. To make matters worse, courts themselves sometimes make decisions that curtail their leeway even further in this regard.<sup>7</sup>

Brazil has a specific law against drug offenses: Law 11.343/06 (Anti-Drug Act). The head provision of section 33 criminalizes any acts considered trafficking and prescribes a punishment of imprisonment for five (5) to fifteen (15) years.<sup>8</sup> In turn, section 42 provides the amount and quality of the drugs seized be considered in sentencing (see **Chart 1** below). As shown below, this provision has become one of the main arguments to imprison even first-time offenders with no criminal records, who would be eligible for alternative punishments.

Concerning drug trafficking specifically, the configuration of the sentencing process poses major obstacles to the application of non-custodial sanctions. One of the requirements for the imposition of alternative punishments is a sentence no longer than four years; therefore, Brazilian law automatically eliminates the possibility of administering those punishments for drug trafficking crimes, which carry a sentence of at least five years. In fact, the main reason the Anti-Drug Act increased the minimum sentence for drug trafficking from three to five years was to prevent the application of non-custodial sanctions for drug trafficking crimes after the reform of the Criminal Code, which introduced the requirement of a sentence of up to four years for substitution.

Consequently, the imposition of a non-custodial punishment is only possible if a sentence reduction factor is recognized, as provided for in paragraph 4 of section 33 of the Anti-Drug Act. This provision allows a reduction of the sentence by 1/6 to 2/3 if the judge considers the convicted person a first-time offender with no criminal record, no involvement in criminal activities and no connection with organized crime. That is the legal concept of small-time drug trafficking.<sup>9</sup>

In Brazil, sentence reduction factors are examined in the third phase of the sentencing process, called sentence calculation by both the law and legal scholars. **Chart 1** summarizes those three phases.

**Chart 1:** The phases of the sentencing process.

Phase 1	Phase 2	Phase 3
<p><b>The nominal sentence—between 5 and 15 years in prison—is established.</b></p> <p>Anti-Drug Act, Section 42. When sentencing, the judge shall consider the type and amount of the substance or product, as well as the actor's personality and social behavior, all of which shall take precedence over the provisions of Section 59 of the Penal Code.</p>	<p><b>Existence of aggravating factors (recidivism, etc.) and mitigating factors (convict under age 21, voluntary admission, etc.).</b></p> <p>STJ Precedent 231 states mitigating factors shall not be applied to make the sentence shorter than the minimum stipulated by law.</p>	<p><b>Existence of sentence enhancing or reduction factors.</b></p> <p>Sentence reduction factors can lead to a sentence shorter than the minimum established by law.</p>

<sup>7</sup> This is the case of STJ Precedent 231, which states: 'Mitigating factors shall not be applied to make the sentence shorter than the minimum term stipulated by law.' Refer to Machado (2016) for the meaning and effects of that precedent on sentencing.

<sup>8</sup> Section 33. Importing, exporting, shipping, preparing, producing, manufacturing, purchasing, selling, displaying for sale, offering, storing, transporting, carrying, keeping, prescribing, administering, distributing for consumption or supplying drugs, albeit free of charge, with no authorization or in violation of any laws or regulations: Penalty—imprisonment for five (5) to fifteen (15) years and payment of five hundred (500) to one thousand five hundred (1,500) daily fines.

<sup>9</sup> Section 33, paragraph 4 of the Anti-Drug Act: 'Sentences for the offenses described in the head provision and in Paragraph 1 of this Section may be reduced by one-sixth to two-thirds as long as the actor is a first-time offender, has no criminal record, is not involved

Considering an act ordinary drug trafficking or small-time drug trafficking has significant effects on the type of punishment, as well as on the length of the sentence and the manner in which it is to be served. The main differences are described in **Chart 2**.

For the purposes of this paper, it is worth noting the different possibilities of punishment for these two categories of drug trafficking—regular drug trafficking and small-time drug trafficking—have arisen from normative changes and interpretations adopted by the STF; however, they remain disputed in lower courts.<sup>10</sup> The original wording of the Anti-Drug Act expressly prohibited substituting imprisonment by any alternative punishments even if the sentence reduction factor was applied. This prohibition was ruled unconstitutional by the STF in 2010, and its effects were suspended two years later by the Brazilian Federal Senate.<sup>11</sup> In 2016, the STF ruled small-time drug trafficking would no longer be considered a heinous crime when

in criminal activities and is not a member of a criminal organization.’

**Chart 2:** Ordinary drug trafficking and small-time drug trafficking.

	Minimum Term	Substitution	Initial Punishment Option	Transfer to Less Strict Options	Parole
<b>Ordinary Drug Trafficking (Head Provision of Section 33, Anti-Drug Act)—Heinous-Like Crime</b>	5 years	Not possible	Despite legal provisions requiring imprisonment (Section 2 of Law 8.072/90), there are STF decisions (Petition for Writ of Habeas Corpus (HC) 111.840/ES and Interlocutory Appeal to the STF 1.052.700/MG) allowing courts to determine the most appropriate option to each individual case.	After serving 2/5 or 3/5 or of the sentence (first-time offenders and recidivists, respectively) (Paragraph 2 of Section 2 of Law 8.072/90)	Parole after serving over 2/3 of the sentence, except specific recidivists (actors of a heinous or heinous-like crime after having been finally convicted of a heinous or heinous-like crime) (PC, Section 83, V)
<b>Small-Time Drug Trafficking (Paragraph 4 of Section 33, Anti-Drug Act)—Non-Heinous-Like Crime</b>	1 year and 8 months	Possible if the requirements of Section 44 of the PC are fulfilled (HC 97.256/RS and Senate Resolution 5/2012)	Since the decision about HC 118.533/MS, small-time drug trafficking has no longer been considered a heinous crime, so courts may determine the most appropriate option for each individual case.	Eligibility for less strict option after serving 1/6 of the sentence ( <i>Lei de Execução Penal (LEP)</i> , or Sentence Execution Act), Section 112)	Parole after serving 1/3 of the sentence (1/2 if recidivist) (PC, Section 83, I and II)

<sup>10</sup> The Brazilian legal machinery is organized in instances. The first instance is a state or federal court, which judges the cases submitted to it. It is possible to appeal this decision, and the appeal will be considered by a *Tribunal de Justiça* (State Supreme Court) or a *Tribunal Regional Federal* (Regional Federal Appellate Court), usually composed of three appellate judges. Both of those instances examine all the points of fact presented by the prosecution or the defense, but it is possible to file new appeals to the higher courts. After the second instance decides the appeal, a new appeal may be filed to the STJ, responsible for considering, among other things, issues concerned with the interpretation of federal legislation. Finally, it is also possible to appeal to the STF, Brazil’s constitutional court and court of last resort. It is worth noting higher courts do not consider points of fact, just points of law. Furthermore, any instance may decide a Petition for Writ of Habeas Corpus provided a procedural rule based on court hierarchy is followed: jurisdiction is exercised by the court immediately higher than that whose act the petition is challenging.

<sup>11</sup> HC 118.533/MS. Judge-Rapporteur Justice Carmen Lúcia decided at a plenary session on June 23, 2016. For further details about this dispute and the effects of that change on the TJSP decisions, refer to Machado et al. (2018).

judging HC 118.533/MS. As a result, the strict system introduced by the Heinous Crime Act—which prevents courts from imposing any initial punishment type other than imprisonment and increases the sentence time to be served before transfer to less strict options (*regime aberto* and *semiaberto*, roughly similar to intermittent imprisonment in the U.S.) and parole—should no longer be applied to small-time drug trafficking, at least in the STF’s opinion.

Therefore, **Chart 2** shows both routes for punishing drug trafficking crimes in Brazil based on the interpretive possibilities established by the STF’s decisions. Nevertheless, the studies on which this paper is based show the manner in which lower courts interpret and apply the law creates more and greater obstacles to applying non-custodial sanctions to drug trafficking crimes, thus breaking the limits imposed by the law itself. This will be discussed below.

### 3. Argumentative Obstacles To Reducing Sentences for Small-Time Drug Trafficking

**Chart 2** describes the main differences between the treatment both the law and the STF’s precedents give to ordinary drug trafficking and small-time drug trafficking. There are various differences, from detention in flagrante delicto to the dismissal of sentence. However, the law, instead of allowing this distinction from the classification of the act (*i.e.*, at the very moment of detention in flagrante delicto) postpones it to the last stage of sentencing, after it is ascertained that the acts described in the information from the public attorney’s office were committed and that the accused committed them. Section 41 of the Brazilian Code of Penal Procedure (CPP), which establishes the minimum requirements to file an information, states the description of the criminal act must contain all its circumstances, as well as the identification of the accused.

This requirement is explained by the constitutional guarantees of the opportunity to be heard and to a broad defense (Art. 5, LV of the Brazilian Federal Constitution). It is crucial for the accused to know the details of the conduct with which he or she is being charged to be able to defend him or herself as effectively as possible. That is exactly why authors such as Aury Lopes Jr.<sup>12</sup> say the criminal information must set out any sentence enhancing or reduction factors suggested by the circumstances of the act. If the legal concept of small-time drug trafficking is seen from this perspective, its application cannot be considered a benefit or a discretionary option of the sentencing judge. On the contrary, its recognition is ‘a right of the accused’—subject to the conditions set forth by law—once the elements required to classify the charge are established (Leite Neto & Silva 2006).

The TJSP is still reluctant to accept this interpretation of the rules. In some decisions we examined, judges construed the use of ‘may’—sentences *may* be reduced by one sixth to two-thirds’—as meaning that the law gives the court a discretionary option. Consequently, the sentence may not be reduced even though the defendant fulfills all the requirements. One of the appellate decisions based on this interpretation states that ‘by using ‘may,’ the legislature meant to state in black and white that it is merely a discretionary option of the trial court,’ not a right of the defendant. In addition, ‘if the legislature believed that the benefit (...) was a right of the defendant, it would have used the word ‘shall,’ thus expressing obligation, strong necessity.’<sup>13</sup> Our research found decisions in the opposite direction,<sup>14</sup> but that position clearly shows how courts interpret the statutory text, as far as sentences are concerned, and limit their own decision leeway. In addition, it indicates a particular way of interpreting a sentencing rule, the sentence reduction factor discussed here, as a benefit that may or may not be granted to defendants.

However, we can see even greater obstacles when we focus on the circumstances of the act courts must consider when recognizing small-time drug trafficking. Shortly after the Anti-Drug Act went into force,

<sup>12</sup> ‘The information must contain, as required by section 41, a description of the criminal act (a description of the factual situation) with all the circumstances (thus, both the circumstances that enhance/aggravate the sentence and those that reduce/mitigate it).’ (Lopes Júnior 2014: 391).

<sup>13</sup> TJSP; Appeal from final judgment 0015220-36.2009.8.26.0127; Jud.-Rapp.: Justice Machado de Andrade; Court: 6th Chamber of Criminal Law; Carapicuíba Courthouse—1st Criminal Court Decision Date: 09/29/2011. In the very same regard, refer to TJSP; Appeal from final judgment 0067972-12.2015.8.26.0050; Jud.-Rapp.: Justice Machado de Andrade; Court: 6th Chamber of Criminal Law; Barra Funda Central Criminal Courthouse—26th Criminal Court; Decision Date: May 11, 2017.

<sup>14</sup> ‘Regarding the mitigating factor dealt with in Paragraph 4 of Section 33 of the aforementioned Anti-Drug Act—the defendant is a first-time offender with no criminal record, and there is no proof that he or she is a member of a criminal organization—, the benefit must be granted since it is a right of the defendant.’ TJSP; Appeal from final judgment 0044890-25.2010.8.26.0050; Jud.-Rapp.: Justice Luis Augusto de Sampaio Arruda; Court: 15th Chamber of Criminal Law; Barra Funda Central Criminal Courthouse—2nd Criminal Court; Decision Date: September 5, 2013.

Greco Filho and Rassi (2007: 102) pointed out how difficult it is to prove compliance with negative requirements, as well as how vague the expressions 'be involved in' and 'be a member of' are.

They argue producing negative evidence is difficult. Therefore, the presumption that the defendant is a first-time offender, has no criminal history, is not involved in criminal activity and is not a member of a criminal organization should favor him or her so that the burden of proof of those elements should fall on the prosecution. This reasoning is consistent with the preservation of the presumption of innocence, established in Article 5, LVII of the Brazilian Federal Constitution. Greco Filho and Rassi also question how the expressions 'be involved in' and 'be a member of' are used in the statutory text. The former implies doing the activity somewhat habitually but not as a full-time occupation. In turn, being a member means participating actively in a criminal organization. Both circumstances (doing the activity habitually but not as a full-time occupation and being a member of the organization) should be sufficiently proven before the possibility of small-time drug trafficking is dismissed.

In addition to the issues arising from the wording of the statutory text, many others have emerged in the last decade due to the manner in which courts of different instances dispute the interpretation of the law and justify their decisions. Studies on the TJSP's and the STJ's statements of reasons for recognizing or not recognizing small-time drug trafficking have identified three controversial issues arising frequently: the manner in which the amount, type and variety of seized drugs are determined; the convict's involvement in prior legal proceedings and his or her employment status.<sup>15</sup>

### 3.1. Amount, type and variety of seized drugs

The argument standing out the most in our study about the STJ's reasoning is the amount, type and/or variety of seized drugs as obstacles to imposing a non-custodial punishment. Section 42 of the Anti-Drug Act states the amount and type of drug must be considered in the first phase of sentencing (*i.e.*, the determination of the nominal sentence, between the minimum and the maximum term, on which the other circumstances will be applied) (**Chart 1**). However, those elements are considered in other phases as well, separately or along with other arguments, as seen throughout this paper.

The decisions behind the refusal to classify an act as small-time drug trafficking for that reason are often based on the idea that the amount and type of seized drugs are evidence that the defendant is involved in drug trafficking.<sup>16</sup> In addition, the manner in which the drug is packaged is also used as evidence of a *modus operandi* of the drug trade or familiarity with drug trafficking, sufficient to characterize an involvement in criminal activities, according to STF's reasoning.<sup>17</sup>

Our study examined 192 STJ appellate decisions, 163 of which contained some information about the seized drugs. A total of 89 cases (46.4%) are concerned with seizures of a single type of drug. The remaining cases involved two or three types of drugs (41, or 21.4%, and 29, or 15.1%, appellate decisions, respectively.) Only four proceedings were related to seizures of four or more different substances. It is worth noting the high number of appellate decisions not mentioning the amount of each drug: 29. Those decisions either

<sup>15</sup> In the same regard, Haber (2018: 66) conducted research on trial court decisions about drug trafficking cases in the state of Rio de Janeiro and categorizes judges' arguments not to grant the benefit provided in paragraph 4 as '(i) defendant not a first-time offender; (ii) defendant with criminal records; (iii) defendant involved in criminal activities; and (iv) defendant belonging to a criminal organization.' The study, mainly quantitative, found paragraph 4 was applied in 42.35% of all drug trafficking convictions. The author further points out that judges have conflicting opinions as to the characterization of 'being involved in criminal activity' and 'being a member of the criminal organization' and that those arguments are often associated with the amount of drugs seized (2018: 78).

<sup>16</sup> For examples of this type of argument, refer to the lower court's statement of reasons to dismiss the application of the sentence reduction factor provided for in paragraph 4 of section 33 of Law 11.343/06 (*i.e.*, the defendant's involvement in criminal activity, shown mainly by the amount and type of drugs seized—393 g of marijuana, 49 g of cocaine and 12 g of crack—is in keeping with this Court's understanding (HC 424.570/SP, Jud.-Rapp.: Justice Joel Ilan Paciornik, 5th Panel, decided on December 12, 2017). Moreover, 'its application was rejected in view of the amount and diversity of the drugs found in the defendant's possession' and, 'based on the context described in the appellate decision being challenged, the defendant, although a first-time offender with no criminal record, was frequently involved in drug trafficking' (HC 332.523/SP, Jud.-Rapp.: Justice Sebastião Reis Júnior, 6th Panel, decided on December 12, 2017). In the latter case, the defendant was carrying marijuana (23.6 g), crack (6.8 g) and cocaine (15.5 g).

<sup>17</sup> *Agravo Regimental*, or Internal Interlocutory Appeal (AgRg) in HC 424.059/MS, Jud.-Rapp.: Justice Reynaldo Soares da Fonseca, 5th Panel, decided on February 8, 2018 and HC 413.110/SP, Jud.-Rapp.: Justice Maria Thereza de Assis Moura, 6th Panel, decided on February 6, 2018.

contained no information in this regard or mentioned only the manner in which the drug was packaged (e.g., 20 bags of marijuana).

Considering only the 76 cases in which the STJ recognized small-time drug trafficking and applied paragraph 4, the amount of seized drugs was as follows: crack from 1.79 g<sup>18</sup> to 500 g;<sup>19</sup> cocaine from 1.90 g<sup>20</sup> to 11.886 kg;<sup>21</sup> marijuana from 0.85 g<sup>22</sup> to 31 kg.<sup>23</sup>

In the case in which the sentence reduction factor was applied, even though almost 12 kg of cocaine was seized, the convict was an immigrant sentenced for drug trafficking.<sup>24</sup> The second largest cocaine seizure leading to a case in which small-time drug trafficking was recognized was 4.122 kg, also for international drug trafficking.<sup>25</sup> Both cases are specific situations because they involve federal investigations and proceedings. However, they clearly show the possibility of interpreting small-time drug trafficking as a legal category regardless of the amount of drugs seized.

Among the 132 appellate decisions in which the STJ did not recognize small-time drug trafficking, the smallest amounts seized were 1.40 g of crack, 0.2 g of cocaine and 3.6 grams of marijuana. In the first case, in which 1.4 g of crack was seized, the defendant was a first-time offender but carried 20.1 g of cocaine and 43.5 g of marijuana as well.<sup>26</sup> However, he failed to produce proof of employment—which often leads the Court to assume an involvement in drug trafficking, as discussed below—and was sentenced to *prisão em regime fechado* (similar to prison confinement in the U.S.) in all three court instances due to the amount, variety and type of drugs. The trial court sentenced him to six years and six months, but the appellate court reduced that sentence to five years in prison. In the second case, in which 0.2 g of cocaine was seized, the defendant was also carrying 5.0 g of crack. He was a first-time offender with no criminal history. His prison sentence (in the trial and appellate courts) was converted to *prisão em regime semiaberto* (similar to intermittent confinement in the U.S.) only by the STJ. The nominal sentence was set above the minimum: five years and two months and 500 daily fines.<sup>27</sup> In the third case, in which 3.6 g of marijuana was seized, the defendant was also a first-time offender with no criminal history and no other drug was seized. The trial court recognized small-time drug trafficking and sentenced the convict to one year and eight months in *prisão em regime aberto* (similar to home detention in the U.S.). However, he was assumed to be involved in a criminal organization because he was a defendant in another criminal action for drug trafficking—with no final and unappealable judgment. The higher courts dismissed small-time drug trafficking and sentence reduction and sentenced him to five years in *prisão em regime semiaberto*.<sup>28</sup>

Those cases suggest the amount of seized drugs is not the primary reason for courts to recognize or not recognize small-time drug trafficking.<sup>29</sup> Nevertheless, the statement of reasons in many cases we analyzed in this study did mention the amount of the drugs seized, alongside other data, such as the type and variety of drugs, or other factors, such as the existence of ongoing proceedings or joblessness, as discussed below. Shimizu and Cacicedo (2016) point that out as well by saying ‘judges never, or almost never, convict anyone of drug trafficking based solely on the amount of drugs seized’. They observe court decisions are based on other criteria, often related to the defendant’s economic disadvantage or the place in which the drugs were

<sup>18</sup> HC 427.177/SP, Jud.-Rapp.: Justice Maria Thereza de Assis Moura, 6th Panel, decided on February 27, 2018.

<sup>19</sup> HC 426.070/SP, Jud.-Rapp.: Justice Joel Ilan Paciornik, 5th Panel, decided on February 20, 2018.

<sup>20</sup> HC 428.847/SP, Jud.-Rapp.: Justice Felix Fischer, 5th Panel, decided on February 6, 2018.

<sup>21</sup> AgRg in *Agravo em Recurso Especial*, or Interlocutory Appeal to the STJ (AREsp) 560.737/SP, Jud.-Rapp.: Justice Ribeiro Dantas, 5th Panel, decided on February 8, 2018.

<sup>22</sup> AgRg in HC 409.216/RJ, Jud.-Rapp.: Justice Antonio Saldanha Palheiro, 6th Panel, decided on December 7, 2017.

<sup>23</sup> HC 426.070/SP, Jud.-Rapp.: Justice Joel Ilan Paciornik, 5th Panel, decided on February 20, 2018.

<sup>24</sup> AgRg in AREsp 560.737/SP, Jud.-Rapp.: Justice Ribeiro Dantas, 5th Panel, decided on February 8, 2018.

<sup>25</sup> HC 418.406/AC, Jud.-Rapp.: Justice Maria Thereza de Assis Moura, 6th Panel, decided on February 8, 2018.

<sup>26</sup> HC 389.588/SP, Jud.-Rapp.: Justice Joel Ilan Paciornik, 5th Panel, decided on December 5, 2017.

<sup>27</sup> HC 403.987/RS, Jud.-Rapp.: Justice Maria Thereza de Assis Moura, 6th Panel, decided on February 6, 2018.

<sup>28</sup> HC 428.404/SC, Jud.-Rapp.: Justice Felix Fischer, 5th Panel, decided on February 27, 2018.

<sup>29</sup> During our research, we found no mention of international normative experiences or academic reflections about the use of amount-based criteria to distinguish between different types of drug trafficking, similar to those in place to distinguish between drug use and drug trafficking. In fact, even the latter distinction remains under discussion. Refer to Carlos (2015), Instituto Terra, Trabalho e Cidadania (ITTC) (2016), Plataforma Brasileira de Política de Drogas (PBPD) (2016). Moreover, refer to Giacomello and Guillén (2016) for an account of the devastating effects of the distinction between drug trafficking and use adopted in Mexico, based on drug amounts.

seized, among other assumptions about the defendant's involvement in drug trafficking connected with social class prejudice.

### 3.2. *Involvement in prior legal proceedings*

The sample of court decisions we studied showed us some situations in which the existence of other ongoing proceedings or judgments of conviction not yet final—although not considered criminal records or recidivism by the STF—is used as evidence of continuing criminal involvement, thus preventing the application of paragraph 4 of section 33. One of the decisions states 'the existence of ongoing police investigations and criminal actions, although not affecting the accused's criminal history, amount to valid evidence of criminal involvement according to the STJ's Precedent 444'.<sup>30</sup> This understanding renders the presumption of innocence meaningless. In fact, our material includes a decision in which the convict's criminal involvement is based 'on [his] involvement in juvenile offenses'.<sup>31</sup> The only two situations in which defendants charged in other criminal cases were not considered to have a regular involvement in criminal activities relate to a case in which the defendant was acquitted in the ongoing proceedings and another one concerned with a traffic offense.<sup>32</sup>

In some cases, an involvement in prior legal proceedings, although not considered a criminal conviction or evidence of recidivism by the STJ, is used in combination with other factors, such as the amount of seized drugs and a failure to produce proof of lawful occupation, discussed below,<sup>33</sup> to show the defendant's regular criminal involvement.

### 3.3. *Employment status*

Another point often mentioned as indicating the defendant's involvement in criminal activity is his or her economic situation, usually shown by employment status. In the 209 STJ cases we examined, the defendant's employment status was somehow mentioned in 35 (16.7%). In 14, the STJ applied, or upheld the application of, the sentence reduction factor as provided in paragraph 4 of section 33 of the Anti-Drug Act. In the other 21 cases, the STJ upheld the decision not to apply the sentence reduction factor. Among the reasons for that refusal is the inference about the accused's criminal involvement or membership in a criminal organization drawn from his or her failure to produce proof of a lawful occupation. The excerpts from the STJ decisions we investigated show the defendant's employment status often mentioned to his or her detriment, even in the face of proof of lawful occupation produced in a minority of cases. Our material contains decisions indicating how strict courts are about proof of lawful occupation, as shown by the use of the adverb 'apparently' and observations about a lack of 'sufficient' proof.<sup>34</sup> In one case, the judgment of conviction states the defendant 'is a retired nursing assistant and earns R\$2,000.00' and 'was in a difficult financial situation since her daughter was in prison and she had to support her grandchildren.' Nevertheless, the court argued that 'her lack of means does not represent a license to commit crimes (...) [a] different understanding would imply a seal of approval to impunity'.<sup>35</sup>

In general, the argument centers on the idea that a lack of a lawful occupation implies a regular involvement in criminal organizations. Being unemployed, the defendant would not have been able to buy drugs with his or her own money, and this shows an involvement in the criminal organization providing the seized drugs.<sup>36</sup>

<sup>30</sup> HC 422.614/ES, Jud.-Rapp.: Justice Reynaldo Soares da Fonseca, 5th Panel, decided on December 7, 2017.

<sup>31</sup> For examples, refer to HC 422.136/RS, Jud.-Rapp.: Justice Ribeiro Dantas, 5th Panel, decided on December 5, 2017 and HC 423.378/SP, Jud.-Rapp.: Justice Ribeiro Dantas, 5th Panel, decided on December 12, 2017.

<sup>32</sup> HC 357.222/AC, Jud.-Rapp.: Justice Joel Ilan Paciornik, 5th Panel, decided on February 27, 2018; HC 413.562/RS, Jud.-Rapp.: Justice Ribeiro Dantas, 5th Panel, decided on December 7, 2017.

<sup>33</sup> Consider, for example, 'there is enough evidence to prove the defendant's regular criminal involvement since, in addition to the amount and type of the drug seized [...], the actor is a defendant in other criminal actions for domestic violence and offenses against property.' HC 421.437/SP, Jud.-Rapp.: Justice Ribeiro Dantas, 5th Panel, decided on February 6, 2018. Moreover, 'the defendant is involved in criminal activities considering he is a defendant in ongoing criminal proceedings—also for drug trafficking—and has not produced proof of lawful occupation, evidence of habitual involvement in drug trafficking, an opinion in keeping with this Court's precedent' (HC 415.104/RS Jud.-Rapp.: Justice Reynaldo Soares da Fonseca, 5th Panel, decided on December 5, 2017).

<sup>34</sup> AgRg in AREsp 1003804/SP, Jud.-Rapp.: Justice Jorge Mussi, 5th Panel, decided on February 6, 2018.

<sup>35</sup> Excerpt from a trial court sentence mentioned in HC 419254/SP, Jud.-Rapp.: Justice Maria Thereza de Assis Moura, 6th Panel, decided on December 5, 2017.

<sup>36</sup> The following excerpts illustrate those arguments: 'failed to produce convincing proof of lawful occupation, which indicates his "profession" or means of livelihood is really the vile trade, hence his involvement in criminal activity, incompatible with the benefit, an obstacle reinforced by the massive amount of the drug, closely connected with an involvement in the vile activity' (Appellate decision quoted in HC 420.955/SP, Jud.-Rapp.: Justice Joel Ilan Paciornik, 5th Panel, decided on December 12, 2017) and 'the accused has neither a fixed place of residence, nor a lawful occupation; when detained in flagrante delicto, he said he was living

On the other hand, the court had a different understanding in a case worthy of note. It placed the burden of proof not on the defense, which would otherwise have had to disprove the ‘assumption of involvement in an illicit activity,’ but on the prosecution, which had to prove the defendant was actually involved in the illicit activity. Therefore, it is clear that a minority of judges respect the presumption of innocence.<sup>37</sup>

#### 4. Substitution by Alternative Punishments: The Sufficiency Issue

Only when small-time drug trafficking is recognized and the sentence reduction factor is applied can a sentence for drug trafficking be equal to or shorter than four years, the first requirement to substitute imprisonment by an alternative punishment. However, Section 44, III, of the Penal Code states substitution is only possible if the substitute sentence is considered sufficient in relation to the convict’s culpability, criminal history, social conduct and personality, as well as the motives and circumstances of the crime. This rule serves as one last criterion for substitution because subsections I and II of the same section prohibit imposing alternative punishments on convicts sentenced to over four years or for crimes committed with threat of force or violence, as well as intentional crime recidivists. Consequently, a sentence may not be substituted even though the convict fulfills all the requirements stipulated in both of those subsections as a result of a judgment based on the insufficiency of alternative sanctions.

The wording of subsection III of Section 44 of the Penal Code is open-ended, leaving ample room for interpretation about the (in)sufficiency of a sentence and forcing the person interpreting it to start by answering the question, ‘what should a sentence be sufficient for?’<sup>38</sup>

In our material, the argument of the (in)sufficiency of alternative punishments for small-time drug trafficking was used in combination with three other factors: the purposes of punishment (retribution, deterrence and rehabilitation); abstract formulations about drug trafficking; and the amount, type and diversity of seized drugs, mentioned repeatedly above. It is worth noting many court decisions consider two or even three of those factors.

Regarding theories of punishment, we found arguments explicitly stating that ‘substituting imprisonment by alternative punishments’ is ‘out of the question’ for the following reasons: ‘it would be preposterous to believe this legal concept could be applied to such major crimes’, ‘because the benefit is not sufficiently retributive *in casu*’, ‘absolutely incompatible with such an ominous crime, which wrecks individuals and homes day after day in a tidal wave of drug trafficking looming large against social order;’ in addition, ‘drug trafficking is known to be totally connected with other crimes, serving as a basis for criminal organizations and eroding any social value.’<sup>39</sup>

The only connection between this type of reasoning and the requirements of section 44 is the use of the adverb ‘sufficiently’ to refer to the nature of alternative punishments. None of the other requirements—that the court consider the circumstances of the case at issue and the convict’s life story—was fulfilled. Our material also contains decisions stating ‘[an alternative punishment] would be insufficient to deter [crime]’<sup>40</sup> and ‘a substitute sentence is not sufficient to rehabilitate the convict.’<sup>41</sup>

Given the central role of imprisonment in Brazil’s drug policy, the efforts to justify a custodial sentence are strongly based on abstract views of drug trafficking and drug traffickers. In one of the cases we studied, substitution was denied because of the motive of the crime. The alternative sanction was considered insufficient due to ‘the greed or any other equally vile reason [of those who] decided to make a living by ruining others’ lives,’ because drug trafficking is a ‘factor of severe family and social disruption,’ thus requiring a stricter retaliation.<sup>42</sup>

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with a friend without paying rent and scavenged for recyclable waste material to make a living, but the records contain no proof of the latter information’ (Trial court decision quoted in AgRg in AREsp 1131402/MS, Jud.-Rapp.: Justice Sebastião Reis Júnior, 6th Panel, decided on February 6, 2018).

<sup>37</sup> ‘The defendant is a first-time offender and, although he has produced no proof of lawful occupation, it has not been proven that he is involved in any illicit activity’ (Appellate decision quoted in HC 424.662/SP, Jud.-Rapp.: Justice Ribeiro Dantas, 5th Panel, decided on February 6, 2018).

<sup>38</sup> For more about the argument of the sufficiency of non-custodial sanctions in drug trafficking convictions, refer to Machado et al. 2018: 628.

<sup>39</sup> TJSP; Appeal from final judgment 0080632-43.2012.8.26.0050; Jud.-Rapp.: Justice Luis Soares de Mello; Court: 4th Chamber of Criminal Law; Barra Funda Central Criminal Courthouse—4th Criminal Court; Decision Date: 09/24/2013.

<sup>40</sup> TJSP; Appeal from final judgment 0090147-68.2013.8.26.0050; Jud.-Rapp.: Justice Ruy Alberto Leme Cavalheiro; Court: 3rd Chamber of Criminal Law; Barra Funda Central Criminal Courthouse—19th Criminal Court; Decision Date: 05/30/2017.

<sup>41</sup> TJSP; Appeal from final judgment 0007377-93.2012.8.26.0198; Jud.-Rapp.: Justice Willian Campos; Court: 4th Chamber of Criminal Law; Franco da Rocha Courthouse—1st Civil Court; Decision Date: 09/24/2013.

<sup>42</sup> TJSP; Appeal from final judgment 0017898-12.2015.8.26.0451; Jud.-Rapp.: Justice Cláudia Lúcia Fonseca Fanucchi; Court: 3rd

In the same context of arguments, we also found decisions based on the amount, type and/or diversity of the drugs to dismiss the imposition of alternative punishments. A TJSP decision points out substitution is impossible due to the length of the sentence and stresses any punishment other than imprisonment would be insufficient considering the ‘extremely harmful’ type of drugs (marijuana and cocaine.) In addition, the amount of the drugs (113.35 g of marijuana and 117.68 g of cocaine) shows ‘substituting imprisonment by alternative punishments would not be sufficient to repudiate and deter the crime at issue.’<sup>43</sup>

We found the same argument used by the STJ, which stated substitution ‘is insufficient since a requirement (Section 44, III, CP), namely the amount, variety and type of drugs seized, was not fulfilled.’<sup>44</sup> In this case, the defendant had 21 g of crack, 56.1 g of cocaine and 95.2 g of marijuana. On the other hand, substitution was also denied to a person arrested with 31 g of marijuana and 500 g of cocaine.<sup>45</sup>

## 5. The Prohibition Against Double Jeopardy (*Ne Bis In Idem*)

Considering the amount/type/variety of seized drugs repeatedly during the sentencing process is not permitted by Brazilian law and is under debate in courts.

In 2014, the STF, in a decision binding on all other courts, upheld its precedent and ruled the amount, diversity and type of drugs may only be used in one of the three phases of the sentencing process.<sup>46</sup> Otherwise, those factors would have a negative effect on two or three phases, which amounts to double jeopardy.<sup>47</sup> Nonetheless, lower courts still adopt that practice, thus giving it a seal of approval. An STJ decision dated 2018 allows using the amount and type of drug to increase the sentence term in the first phase of the sentencing process, as well as to dismiss the reduction factor set forth in Section 33, Paragraph 4, of the Anti-Drug Act in the third phase ‘when the actor’s regular involvement in illicit drug trading is established.’ It should be noted the possibility of substituting imprisonment by an alternative punishment depends on the application of the above-mentioned reduction factor.<sup>48</sup> A distinguishing factor between that decision and the STF precedent is related to the habitual nature of the involvement in drug trafficking although the supreme court stressed on that occasion that ‘the circumstances of the type and amount of the seized drugs should be considered only in one of the phases of the sentencing process.’<sup>49</sup>

This STF precedent was mentioned in 17 of the STJ appellate decisions we studied.<sup>50</sup> Nevertheless, only 5 were considered to violate the prohibition against double jeopardy, even though the amount, variety and/or type of drugs were used both to calculate the nominal sentence and to adjust the reduction factor or even to dismiss the application of paragraph 4 of section 33 of the Anti-Drug Act in the other 12 cases. Even though the failure to follow an STF precedent is iconic of a situation in which imprisonment is the state’s main response to drug trafficking, the opposing opinion—observing the prohibition against double jeopardy—still persists both in the TJSP<sup>51</sup> and in the STJ.<sup>52</sup>

## 6. Closing Remarks

The research underlying this paper reveals how courts construct their reasoning to favor the imposition of imprisonment and makes it clear that prison overcrowding in Brazil is mainly due to court practices and the sentencing process. What is even worse is that criminal justice reaches only minor drug dealers—who

Chamber of Criminal Law; Piracicaba Courthouse—4th Criminal Court; Decision Date: 05/16/2017.

<sup>43</sup> TJSP; Appeal from final judgment 0002826-23.2014.8.26.0288; Jud.-Rapp.: Justice Airton Vieira; Court: 3rd Chamber of Criminal Law; Ituverava Courthouse—2nd Court; Decision Date: 05/09/2017.

<sup>44</sup> HC 353.913/SP, Jud.-Rapp.: Justice Ribeiro Dantas, 5th Panel, decided on December 12, 2017.

<sup>45</sup> HC 426.070/SP, Jud.-Rapp.: Justice Joel Ilan Paciornik, 5th Panel, decided on February 20, 2018.

<sup>46</sup> Sentencing is the procedure adopted to determine the length of a criminal sentence. Section 68 of the Penal Code states sentencing has three phases: (i) determination of the nominal sentence within the legal parameters; (ii) application of aggravating and mitigating factors; (iii) application of sentence enhancing and reduction factors.

<sup>47</sup> *Recurso Extraordinário com Agravo*, or Interlocutory Appeal to the STF, 666334 RG; Jud.-Rapp.: Justice Gilmar Mendes, decided on April 3, 2014.

<sup>48</sup> HC 430.488/MS, Jud.-Rapp.: Justice Ribeiro Dantas, 5th Panel, decided on February 27, 2018.

<sup>49</sup> ARE 666334 RG, Jud.-Rapp.: Justice Gilmar Mendes, decided on April 3, 2014.

<sup>50</sup> It should be noted that the STF does not prevent the use of the amount, type and/or diversity of drugs as a negative factor in any of the sentencing phases and, later, to determine the initial imprisonment type. Refer to HC 155512 ED, Jud.-Rapp.: Justice Roberto Barroso, 1st Panel, decided on August 31, 2018.

<sup>51</sup> For an example, refer to Appeal from final judgment 0057799-89.2016.8.26.0050; Jud.-Rapp.: Justice Laerte Marrone; Court: 14th Chamber of Criminal Law; Barra Funda Central Criminal Courthouse—24th Criminal Court; Decision Date: 05/04/2017. In the same regard, Appeal from final judgment 0010779-30.2015.8.26.0635; Jud.-Rapp.: Justice Alexandre Almeida; Court: 11th Chamber of Criminal Law; Barra Funda Central Criminal Courthouse—20th Criminal Court; Decision Date: 05/31/2017.

<sup>52</sup> AgRg in REsp 1484961/GO, Jud.-Rapp.: Justice Joel Ilan Paciornik, 5th Panel, decided on December 5, 2017.

are easily replaced—thus proving unable to check the drug market, which has shown no signs of weakening since the advent of the new Anti-Drug Act in 2006.

The wording of the Anti-Drug Act obviously does not help. The use of negatives—‘is not involved in criminal activity’ and ‘is not a member of a criminal organization’—in a context in which the principle of the presumption of innocence is mostly ignored favors the interpretive trend discussed here. The prohibition against substituting imprisonment by alternative punishments also requires lower courts to accept and incorporate into their decisions the STF’s declaration of unconstitutionality.

Despite that legal framework, the constitutional principle of the individualization of the sentence could prompt judges to interpret the rules in keeping with each specific case, however poor the evidence produced may have been. Incidentally, the Brazilian judicial rules state courts themselves are supposed to assess the quality of any evidence produced, which we observed in none of the cases we examined.

As seen throughout this paper, the arguments used to prevent sentence reduction and dismiss the substitution of imprisonment by alternative punishments tend to be based on judges’ very abstract views on drug trafficking. Even judges’ reverence for the legal text concerning sentencing seems to be varied, as shown by the discussion about considering the type, amount and variety of seized drugs repeatedly in the sentencing process.

The fact that there are many flaws during investigations and the production of evidence—limited to police officers’ testimonies and the report about the seized substances (Jesus 2018)—helps explain this situation, but justifies neither violating the double jeopardy rule, nor lower courts’ ignoring the STF’s position. Those internal conflicts in the judiciary have become particularly apparent as well. As this paper has shown, STF decisions have introduced major changes in the Anti-Drug Act. This qualifies, but does not settle, the discussions and conflicting opinions of judges from lower courts. The STF’s current position about the possibility of executing the sentence before a final decision helps us see Brazil’s Supreme Court’s position is not entirely consistent as regards constitutional guarantees.

Those findings help understand the limits of the efforts to change the criminal justice system by revising the law and the STF’s precedents. Additionally, they show a need to broaden the focus of research about court reasoning as far as sentencing is concerned to include lower court sentences as well. The systematic production of knowledge about sentencing and the legal justification for keeping thousands of people in prison is a crucial step to the development of political and legal strategies that help change this situation. Above all, it allows a public debate about how court decisions produce and maintain prison overcrowding in Brazil.

## Competing Interests

The authors have no competing interests to declare.

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