final minutes

Criminal Justice Policy Commission Meeting
9:00 a.m. • Wednesday, August 5, 2015
Senate Appropriations Room • 3rd Floor State Capitol Building
100 N. Capitol Avenue • Lansing, MI

Members Present:
Senator Bruce Caswell, Chair
Stacia Buchanan
Representative Vanessa Guerra
D. J. Hilson
Kyle Kaminski
Sheryl Kubiak
Barbara Levine
Sarah Lightner
Laura Moody
Sheriff Lawrence Stelma
Jennifer Strange
Judge Paul Stutesman
Andrew Verheek
Judge Raymond Voet
Representative Michael Webber

Members Excused:
None

I. Call to Order and Roll Call
The Chair called the meeting to order at 9:00 a.m. The Chair asked the clerk to take the roll. A quorum was present and there were no absent members.

II. Approval of the July 1, 2015 CJPC Meeting Minutes
The Chair asked for a motion to approve the July 1, 2015 Criminal Justice Policy Commission meeting minutes.
Mr. Hilson moved, supported by Ms. Lightner, that the minutes of the July 1, 2015 Criminal Justice Policy Commission meeting as proposed be approved. There was no objection. The motion was approved by unanimous consent.

The Chair announced that he received an email from the Robina Institute of Criminal Law and Criminal Justice inviting one or two members of the Commission to participate in a one-day workshop devoted to exploring the use of criminal history in sentencing guidelines. The event is scheduled October 20, 2015 at the University of Minnesota Law School in Minneapolis and the cost to attend will be covered by the Robina Institute. The Chair shared that he would like to participate in the event and would like one other member to attend as well. He asked members who are interested to let him know by the end of today's meeting.

The Chair also shared two emails he received regarding the potential impact a decision the Michigan Supreme Court will make in the Lockbridge case which deals with sentencing guidelines. The second email, from the same person, was sent after the MSC ruling and expressed concern regarding the likelihood that the MSC decision will increase sentencing disparity and commitments to prisons. The writer noted that it will be incumbent upon the Commission to monitor prisoner intake month-by-month to see what impact the advisory guideline system will have on commitment rates. The Chair agreed and asked Commissioner Kyle Kaminski to provide the Commission with prison intake data going back six months to a year and then month-by-month hereafter. Commissioner Kaminski responded that there may be some data system issues, but he will do his best to find some workarounds to get the information the Chair has requested.

III. Presentation on History of Sentencing Guidelines by Dr. Brian Ostrom, Kevin J. Bowling, Marge Bossenbery, Nick Ciaramitaro, and the Honorable Paul L. Maloney

The Chair welcomed the panel and thanked Judge Paul Stutesman for being responsible for the program. The Chair then called on Judge Stutesman to provide the introductions and lead the presentation. After Judge Stutesman introduced and provided background on each of the members of the panel, Mr. Kevin J. Bowling began the presentation. He was followed by Marge Bossenbery, Dr. Brian Ostrom, Nick Ciaramitaro, and the Honorable Paul L. Maloney. A question and answer period followed. Details of the presentation are attached to these minutes.

IV. Homework Assignments
There was no discussion of this agenda item.

V. Commissioners' Most Important Concept – Flexibility vs. Consistency
There was no discussion of this agenda item.

VI. Commissioners' Assessment of CSG Findings and Policy Options
There was no discussion of this agenda item.

VII. Overview of CJPC Statutory Charge
There was no discussion of this agenda item.

VIII. Public Comment
The Chair then asked if there were any public comments. Bruce Timmons of Okemos, Michigan offered comments regarding sentencing guideline policies and disparity. There were no other public comments.

IX. Commissioner Comments
Chairman Caswell cautioned the Commission to be careful not to rush forward into unknown territory because of the Supreme Court's decision and to continue to be respectful of the Legislature's role. He urged the members to remember the advice that any changes will reverberate throughout the system in unexpected ways.

Judge Stutesman thanked the panel for the information they shared in their presentation.

Andrew Verheek commented that he appreciated learning the historical background of the current sentencing guidelines and stressed the important distinction between geographic disparities in terms of sentence length vs. types of sentence.

Jennifer Strange thanked the panel for the education and the reminder of the importance of good data.

Representative Guerra also thanked the panel and the opportunity to learn from the panel's experience.

DJ Hilson appreciated what the panel has shared and also the Chair's comments regarding the time needed for the Commission to do its work and the impact of any its decisions.

Laura Moody agreed for the need to be deliberative and not rush through. She was also interested to learn that budgetary forces were not the motivating factor in driving the work of the previous sentencing guidelines commission.

Barbara Levine thought it was an informative meeting.

Kyle Kaminski stressed the need to communicate with some of the key folks who are working on these issues in the Legislature.

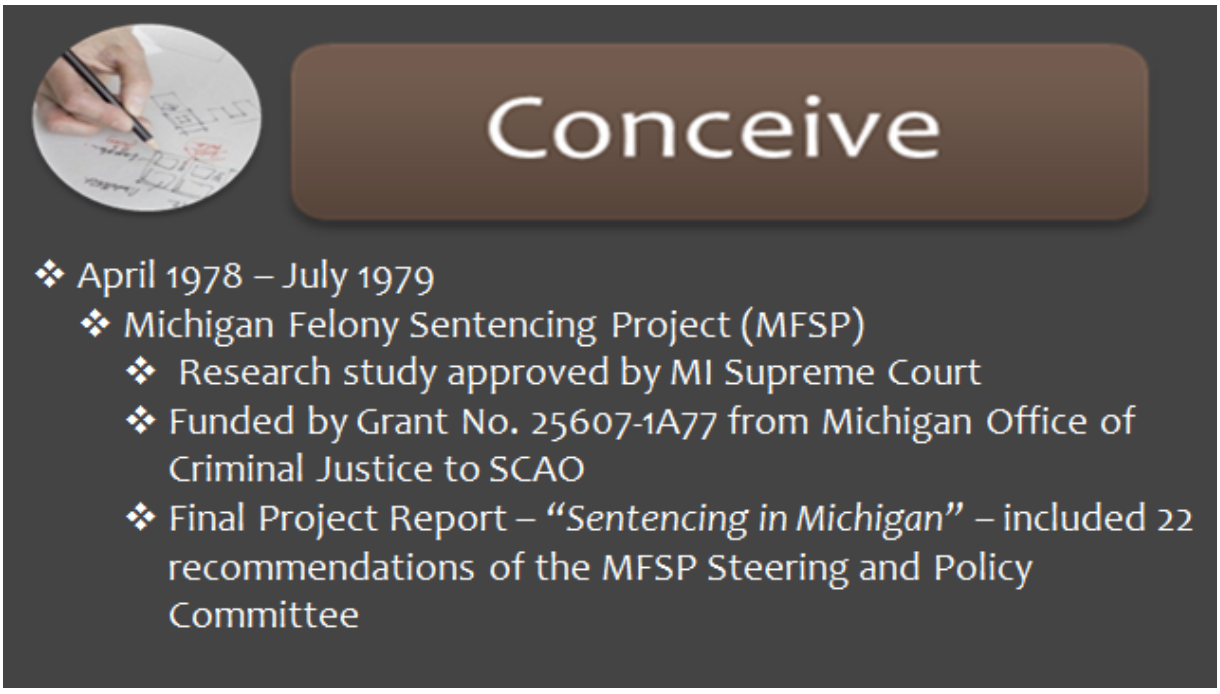
The Chair agreed and will continue to make efforts to communicate with the Senate and asked Representative Guerra and Representative Webber to let him know who the appropriate members in the House are that he should speak to.

The Chair remarked that he thinks it is appropriate for the Commission to have a recommendation for data collection by the next meeting. He will attempt to put together a general recommendation and have it distributed to the members for input.

X. Adjournment
There was no further business. The Chair adjourned the meeting at 12:20 p.m.

(Approved at the September 2, 2015 Criminal Justice Policy Commission meeting.)


A Brief History of Michigan Sentencing Guidelines 1978-1998
Analyze
Implement
Test
Develop
Conceive


Conceive
April 1978 – July 1979
Michigan Felony Sentencing Project (MFSP)
Research study approved by MI Supreme Court
Funded by Grant No. 25607-1A77 from Michigan Office of Criminal Justice to SCAO
Final Project Report – "Sentencing in Michigan" – included 22 recommendations of the MFSP Steering and Policy Committee

MFSP Steering and Policy Committee

Hon. Blair Moody, Jr. Chairman – Michigan Supreme Court
Mr. Einar Bohlin – State Court Administrator

1 Appellate Court Judge
6 Trial Court Judges
3 Legislators
Department of Corrections Director
Parole Board Chairman
Prosecuting Attorneys Association
State Bar of Michigan
Sheriff
Legal Aid & Defender Association
Private Practice Attorney

MFSP Staff

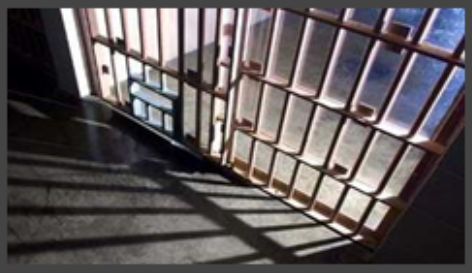
Marvin Zalman
Charles W. Ostrom, Jr.
Phillip Guilliams
Garret Peaslee
Jacqueline Kron
4 Consultants
31 Data Collectors

MFSP Statewide Study Results

- "Briefly, the MFSP provided evidence of unacceptable racial, gender and geographic disparity in felony sentencing practices."

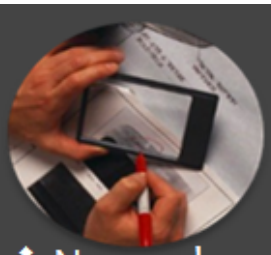
Justice Blair Moody, Jr.
Sentencing Guidelines Update
October 2, 1981

"Sentencing in Michigan" MFSP Final Report



Key Recommendations – July 1979

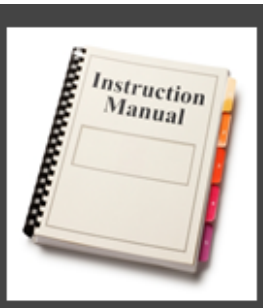
#2 Legislative establishment of a diverse SG commission
#3 MSC establishment of an interim SG commission
#4 Once adopted, optional use of SG for a 2 year experimental period
#7 MDOC should direct all probation officers to score SG for each sentence and share worksheets with Commission for analysis
#9 Data analysis should be published and used to update SG as needed
#13-22 Appellate review of sentences; including the correction of sentences when SG are used incorrectly…



Develop

- November 1979 – September 1980
  - MFSP Steering and Policy Committee reconstituted
  - Sentencing Guidelines Advisory Committee appointed by MSC
  - Development of Prototype SG Manual
    - Included review of available sentencing data and extensive discussion using actual case scenarios

Prototype SG Manual



- October 1, 1980
  - Committee presentation of prototype to MSC
  - Guidelines constructed to accomplish five goals
    1. Provide filtering process to assure sentences are based on consistent set of legally relevant factors
    2. Structure assures legally relevant factors are given equal weight for all offenders
    3. Regularize sentencing process to assure sentencing is coherent and consistent
    4. Increase predictability of sentencing
    5. Retain sufficient trial judge discretion
  - Anticipated result – to reduce and control disparity

Supreme Court Approval

- October 9, 1980
  - MSC approves SG Advisory Committee recommendations
  - Advisory Committee is continued
  - Approval granted to conduct a limited pilot project

Test

- February 1981 – August 1981
  - SG Pilot Project
  - Selection of 3 diverse sites – including a small, medium and large jurisdiction
  - February – training of judges, probation officers and attorneys in 5th Circuit (Barry County), 30th Circuit (Ingham County), and Detroit Recorder's Court (Wayne County)
  - March/May – experimental usage of SG
  - June/August – data analysis; preparation of staff report

Review and Revise

- September 1981 – May 1982
  - SG Advisory Committee considers pilot project results
  - Revision of SG manual
  - Review focused on court process impacts (e.g., pleas, delay, procedural reforms/new hearings, impact on staff workloads, paper flow difficulties) and substantive impacts on actual sentences

Sentencing Guidelines Update to MSC

- October 2, 1981

- Justice Blair Moody, Jr. – Update Memo to MSC
  - Project Chronology
  - Outline of Project Goals
  - Review of Pilot Project Findings
  - Questions for Consideration
    - … including: "Should use of the manual be shelved as an interesting academic study having insufficient practical use?"

SG Manual Revisions

- Major Revision Components
  - Variable definitions
  - Variable weighting
  - Sentence recommendations
  - Policy statements (e.g., statement of purpose; departure policy)
- Many revisions, yet basic structure of SG did not change

Implement

- June 23, 1982
  - SG Advisory Committee presentation to the Michigan Supreme Court
    - Following the Conception, Development and Testing of the prototype SG…
    - Advisory Committee presented 8 specific Implementation Recommendations
    - The first recommendation included commencement of SG use in all Michigan Circuit Courts, effective January 1, 1983

Additional Implementation Recommendations

- Provide project structure through an enabling MSC Administrative Order
- Preliminary case scoring by PO; independent review by sentencing judge
- Develop a Sentencing Information System for data collection and analysis
- Ongoing training
- MSC should appoint Sentencing Guidelines Commission and retain professional staff
- SG system should eventually expand to include appellate review of sentences

Longevity of Judicial Sentencing Guidelines

- Once implemented, the first set of judicial guidelines were in use 1983 – 1988
- The 2nd Edition was prepared and in use 1988-1998
- Original Judicial SG text is still available:

http://courts.mi.gov/education/mji/felony-sentencing/Documents/1983-1988_SGM.pdf

http://courts.mi.gov/education/mji/felony-sentencing/Documents/1988_2ndEd_SGM.pdf

Analyze

- Once the SG were implemented, Commission members and staff began an ongoing process of analysis and process improvement
- Sentencing Information Reports (SIR) were gathered on all felony convictions
- Departures were expected to be in writing and in conformity with the approved Departure Policy
- SCAO monitored and certified Circuit Court compliance with SG procedure
- The sentencing information system monitored implementation progress and general sentencing patterns; revisions were recommended as experience dictated; and specific data regarding disparity reduction was reviewed

Next Steps…

- Judicial SG used for nearly 15 years
- 1994 PA 445 created Michigan Sentencing Commission to design new legislative guidelines system
- 1998 PA 317 created statutory sentencing guidelines that apply to enumerated felonies committed on or after January 1, 1999

For Further Information

- Kevin J. Bowling, JD, MSJA
  - Former Sentencing Guidelines Project Director
  - Court Administrator 20th Circuit and Ottawa County Probate Courts
  - kbowling@miottawa.org

MICHIGAN SENTENCING GUIDELINES

A DECADE AND A ½ IN THE MAKING

UNFINISHED WORK OF LAST COMMISSION

- CONTINUED REVISION OF GUIDELINES IN LIGHT OF EXPERIENCE, IMPACT, AVAILABLE RESOURCES AND CHANGES IN LAW
- MISDEMEANOR IMPACTS ON INCARCERATION RATES
- EFFECTIVENESS OF PROPOSALS MADE BY THE COMMISSION
- OTHER IMPORTANT CRIMINAL JUSTICE POLICY RECOMMENDATIONS

CONCURRENT JUDICIAL ACTIVITY

- CAVANAGH TASK FORCE
- JUDICIAL GUIDELINES ENACTED AND PHASED IN
- FOCUSED ON RACIAL DISPARITY
- COULD NOT ADDRESS PRISON OVERCROWDING
- SUPERCEDED BY LEGISLATIVE GUIDELINES

SUBSEQUENT LEGISLATIVE ACTION

- Shortly after adoption of the Sentencing Guidelines in 1998, the Michigan Sentencing Commission was defunded by the Legislative Service Bureau and subsequently repealed in 2003
  - Since first adopted guidelines have suffered the same problems prior to the commission – lack of proportionality and prioritization
  - Need to take a systematic new look
- New Commission with similar responsibilities (and more)

LEGISLATIVE HISTORY

- 1983: THE HOUSE JUDICIARY COMMITTEE FORMED A THREE MEMBER SUBCOMMITTEE TO EXPLORE THE OPTION OF SENTENCING GUIDELINES
- THE MOTIVATION WAS TWOFOLD:
  - PRISON OVERCROWDING
  - SENTENCE DISPARITY
- MULTIPLE OPTIONS WERE CONSIDERED OVER SEVERAL TERMS
  - DETERMINATE SENTENCING PLUS REENTRY PERIOD
  - LEGISLATIVE RULE CHANGES
  - LEGISLATIVE ACTION
- RESULTED IN ADOPTION OF PUBLIC ACT 445 OF 1994
- GUIDELINES ENACTED INTO LAW IN 1998

NEXT STEPS

- NEW COMMISSION FACING A GREAT DEAL OF WORK
- 16 YEARS OF UPDATES FOR GUIDELINES
- COMPLETION OF UNFINISHED BUSINESS OF OLD BUSINESS
- IMPACT/REACTION TO PEOPLE v LOCKRIDGE

COMPETING THEORIES OF INCARCERATION

- REASONS FOR INCARCERATION
  - RETROBUTION (PUNISHMENT)
  - INCAPACITATION
  - REHABILITATION
- IMPORTANT PRINCIPLES
  - PROPORTIONALITY
  - AVOID DISPARITY
  - FLEXIBILITY
  - ACKNOWLEDGE LIMITED RESOURCES

NEW LOCKRIDGE CHALLENGES

- REQUIRES CONSIDERATION OF ALTERNATIVES
  - ALL HAVE GOOD AND BAD IMPLICATIONS
  - CONSIDER FEDERAL EXPERIENCE WHILE ACKNOWLEDGING FEDERAL SYSTEM IS SUBSTANTIALLY DIFFERENT
- OPTIONS
  - DO NOTHING
  - ADJUST GUIDELINES TO MEET LIMITED ISSUES AVAILABLE FOR CONSIDERATION
  - ADOPT CHANGES TO INCLUDE MORE JURY INVOLVEMENT

RECOMENDATIONS

- NEED ACCESS TO RESEARCH
- NEED ACCESS TO DATA
- NEED FUNDING FOR ABOVE
- DON'T EXPECT EASY ANSWERS TO COMPLEX QUESTIONS
- WILL TAKE TIME AND STUDY
- SEEK BALANCE

DANGERS OF IGNORING LOCKRIDGE

- INCREASED DISPARITY
- LACK OF LEGISLATIVE CONTROL OVER AVAILABLE RESOURCES

CRIMINAL JUSTICE POLICY COMMISSION

CONGRATULATIONS ON THE CHALLENGE AND BEST WISHES FOR SUCCESS IN MEETING THESE COMPLEX ISSUES. IF I CAN BE OF ANY ASSISTANCE, PLEASE CONTACT ME

NICK CIARAMITARO - nick@miafscme.org - 313-330-5313

THE MICHIGAN SENTENCING GUIDELINES

HONORABLE PAUL L. MALONEY*

Thank you, ladies and gentlemen. I am pleased to participate today to talk about an issue that I have lived with since I received a call from the Governor's office asking me to be the chairman of the Michigan Sentencing Commission in April 1995, shortly after I took the bench as a district judge. I want to thank the Thomas M. Cooley Law School for inviting me today in my capacity, not only as Chairman of the Michigan Sentencing Commission, but also as a circuit judge, who will be implementing the Michigan sentencing guidelines that have been passed by the Legislature.

I also want to acknowledge Judge Paul Borman. Indeed, Judge Borman and I, in our previous capacities, I representing the United States Department of Justice, and Paul Borman representing the American Bar Association and defenders, had many discussions, animated as they were, over the federal sentencing guidelines.

Also, Representative Baird minimizes her contributions to the Commission while she was with us. Indeed, Representative Baird was thrown into a situation where a vast majority of the work of the Commission had already been accomplished, and the Chair of the Commission was urging an up or down vote almost immediately as Representative Baird took her seat on the Commission. She was a very valuable member of the Commission who made many positive contributions. She minimized her contributions to the Commission during her remarks, and I just wanted to set the record straight, if you will.

I think where we are right now is really a product of where we have been over the course of the last century, and I think a review of history, before I get into the nitty-gritty of our guidelines, is important.

Michigan was part of a movement in the late nineteenth to early twentieth century to move towards indeterminate sentencing. Indeed, a 1902 constitutional amendment voted on by the people amended the

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* Judge Maloney has served as Special Assistant to the Director for the Michigan Department of Corrections, Deputy Assistant Attorney General for the U.S. Dept. of Justice, Exofficio Member of the U.S. Sentencing Commission, and was appointed Chairman of the Michigan Sentencing Commission in 1995. J.D. University of Detroit School of Law 1975, B.A. Lehigh University, 1972.

1850 Constitution to allow indeterminate sentencing in our state.[1] This was after indeterminate sentencing had been struck down by the Michigan Supreme Court as an unlawful delegation of control over sentencing to the executive branch of government, effectively the modern-day equivalent of the parole board.[2] The people passed indeterminate sentencing at the 1902 election.[3] It was codified into law after the 1902 election[4] and the Michigan Supreme Court thereafter, with the new constitutional provision, found indeterminate sentencing to be constitutional.[5] That provision continued in the 1908 Constitution[6] and was drafted into our law as Article IV, Section 45 of the 1963 Michigan State Constitution.[7]

It is interesting to note, when you read old case law in the early twentieth century, that the expectations of indeterminate sentencing were: "to reform criminals and . . . convert bad citizens . . . and thus protect society."[8] That is a 1907 Michigan Supreme Court case.[9] I think the essence of what the court was saying was that sentences were to be individualized to the offender rather than a singular focus on what crime had been committed.

The source of power to prescribe punishment in our state has always been vested in the Legislature. Through the 1960s, the exercise of the power to prescribe punishment was really confined to the passage of criminal statutes, which merely prescribed the statutory maximum and left the judges unconstrained to fashion sentences within those maximums. Indeed, Michigan law, for quite some time, upheld indeterminate sentencing while also asserting that judicial discretion remain largely unconstrained within the statutory maximum, and that the exercise of judicial discretion was inherent in any indeterminate sentencing structure.

Now, the predominate judicial philosophies, regarding sentencing throughout the early and middle part of this century, waxed and

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1. *See* MICH. CONST. of 1850 art. IV, § 47 (1902).

2. *See* People v. Cummings, 50 N.W. 310, 315 (Mich. 1891) (finding Mich. Pub. Act No. 228 unconstitutional because it conferred too much power on the prison board).

3. *See* MICH. CONST. of 1850 art. IV, §47 (1902).

4. *See* Act of June 7, 1905, 1905 Mich. Pub. Acts 184 (codified as amended at MICH. COMP. LAWS ANN. §§ 769.8-.9 (West 1978)).

5. *See* People v. Cook, 110 N.W. 514, 517 (Mich. 1907) (holding that indeterminate sentencing does not constitute cruel and unusual punishment).

6. *See* MICH. CONST. of 1908 art. V, § 28.

7. *See* MICH. CONST. art. IV, § 45.

8. *Cook*, 110 N.W. at 516.

9. *See id.*

waned between the various options, if you will, of how to sentence offenders. In the 1950s, the philosophy of punishment predominantly dealt with deterrence and rehabilitation over the competing concerns of retribution or incapacitation. However, most recently, as is quite obvious to any commentator of what has occurred in our state over the past couple of decades, there is increasing skepticism over the rehabilitation model. We have, in large measure, shifted to a crime control model emphasizing punishment and incapacitation. But, through most of the century, judicial discretion remained unreviewed and unchecked, absent constitutional violations.

The 1970s, however, began a movement that started us down the road toward a diminution of judicial discretion. One of the first steps in that regard was *People v. Tanner*,[10] the 1972 decision that limited judges to two-thirds of the statutory maximum in the imposition of minimum sentences.[11] In addition, commentators started to comment regarding the issue of sentencing disparity and whether it was something that needed to get full review, and to analyze why sentencing appeared so disparate.

The Zalman report[12] issued in 1979, acted, I think it is fair to say, as a catalyst for review of sentencing practices in Michigan. Indeed, the court itself, in addition to *Tanner*, also made fairly significant pronouncements regarding sentencing itself in the *McFarlin*[13] case in 1973, but continued to decline invitations for appellate review of sentencing as late as 1976.

Now, as the subject matter of guidelines or the need for guidelines and reduction of sentencing disparity became a part of the Michigan discussion here in the state, the supreme court got very active in both the administrative side of the court as well as in case law throughout the 1970s in dealing with this issue. I find it interesting that the first branch of government to deal with this issue was the judicial branch of government and not the Legislature. The court's movement in this arena has really followed two tracks.

The first committee regarding sentencing, or one of the first committees, chaired by Justice Blair Moody in 1979 through October

10. 199 N.W.2d 202 (Mich. 1972).

11. *See id.* at 204-05 (holding that "a minimum sentence exceeding two-thirds of the maximum" did not comply with the Indeterminate Sentencing Act).

12. *See* MARVIN ZALMAN ET AL., MICHIGAN FELONY SENTENCING PROJECT, SENTENCING IN MICHIGAN (1979).

13. *See* People v. McFarlin, 208 N.W.2d 504, 514 (Mich. 1973) (holding that judges may consider a juvenile offender's history when determining sentencing).

of 1980, ultimately concluded that sentencing guidelines should be pursued in Michigan. The first rudimentary guidelines were pilot tested in several counties. My county happened to be one of the pilot test counties in the early 1980s. Then the guidelines went through a voluntary process in 1983 and 1984,[14] and then, of course, became mandatory on the courts in 1984.[15] All of this was by supreme court action utilizing administrative orders with subsequent renewals imposing guidelines for use by the circuit judges of our state.

On a separate track, the court was issuing, what I consider to be, some of the significant cases in sentencing law in the early 1980s. As it was embarking on the guideline proposals, and making them mandatory on the trial court benches, the court issued *People v. Coles*,[16] which for the first time, opened the door to review of sentencing under the "shocks the conscience" standard,[17] *People v. Moore*,[18] as well as the "proportionality" analysis of *People v. Milbourn*.[19]

Independently, the Michigan Legislature created the first committee to consider sentencing guidelines in the early 1980s. It was a bipartisan group, of which the only member who is still remaining in the Legislature is Representative Michael Nye. This bipartisan group of legislators explored the notion of legislative guidelines for our state. In various terms of the Legislature, bills passed the House and the Senate, but there was never a consensus on Michigan sentencing guidelines or the initiation of legislatively passed guidelines, until 1994 in Public Act 445.[20]

In the meantime, it is fair to say that the supreme court sentencing guidelines, since they were initially promulgated in 1984, have gone through an erosion of their efficacy. Only one set of substantive

14. *See* Admin. Order No. 1983-3, 417 Mich. cxxi (1983).

15. *See* Admin. Order No. 1984-1, Sentencing Guidelines, 418 Mich. lxxx (1984) (making sentencing guidelines mandatory as of March 1, 1984).

16. 339 N.W.2d 440 (Mich. 1983).

17. *Id.* at 453.

18. 439 N.W.2d 684, 691 (Mich. 1989) (finding that the sentencing court abused its discretion when it sentenced the defendant to 200 years in prison).

19. 461 N.W.2d 1, 9-14 (Mich. 1990) (holding that the sentences should be in proportion to the "seriousness of the matter").

20. *See* Act of Jan. 10, 1995, 1994 Mich. Pub. Acts 2152 (codified as amended in scattered sections of MICH. COMP. LAWS ANN. §§ 769, 771 (West 1995)).

amendments of the court's guidelines in 1988 have been promulgated.[21] Indeed the 1984 guidelines and the 1988 guidelines do not cover all the crimes that are on the books, and no crimes have been added to the Michigan Supreme Court guidelines since, at least, 1988. As you all know, the Legislature has been very active in the passage of new laws and new crimes over the past twelve or fifteen years, and those crimes, as practitioners know, were simply not covered.

Inevitably, when you have significant numbers of offenses not covered by the guidelines, and you have no changes being made to a system of guidelines—and I am not here to suggest that we ought to be tinkering like the Federal Commission does every year or every other year on guidelines—but when the system is not being amended from time to time, I think its efficacy is eroded significantly, and disparity creeps into the system. When home invasion, for example, is not covered, but the old breaking and entering statutes are covered, or when retail fraud is not covered, but the old larceny statute was covered, inevitably, there is disparity, because the judges are left unconstrained. Again, it is not any malevolence, but the bottom line is that left unconstrained without guidelines, more disparity results.

In Public Act 445 in 1994,[22] the Legislature created the Commission and enacted a policy statement for felony sentencing in our state. And I think it is also fair to say that Public Act 445 represents a number of very significant policy choices of the Legislature regarding use of the finite, incarcerative resources of Michigan.

It created the Commission, a nineteen member commission, eight of whom were members of the Legislature on a bipartisan basis: four from each body split politically between Democrats and Republicans.[23] Significantly, there were only two statutory members who were judges: one representing the Recorder's Court, now the Wayne County Circuit Court, and one other circuit court judge.[24]

I happen to be a public member as chairman of the Commission;

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21. *See* Admin. Order No. 1988-4, Sentencing Guidelines, 430 Mich. ci (1988) (authorizing the Sentencing Advisory Committee "to issue the second edition of sentencing guidelines"), *rescinded by* Admin. Order No. 1998-2, Sentencing Guidelines, 458 Mich. xvi (1998), *vacated by* Admin. Order No. 1998-4, Sentencing Guidelines, 459 Mich. lxv (1998) (making the Sentencing Guidelines authorized by Admin. Order No. 1988-4 effective for offenses committed before Jan. 1, 1999).

22. *See* Act of Jan. 10, 1995, 1994 Mich. Pub. Acts 2152 (codified as amended in scattered sections of MICH. COMP. LAWS ANN. §§ 769, 771).

23. *See* MICH. COMP. LAWS ANN. § 769.32(1) (West Supp. 1998).

24. *See id.* § 769.32(1)(c).

so indeed, during most of our deliberations, we had three judges on the Commission, but it is significant to note that there were only two that were mandated by the statute.[25] The Legislature deserves significant credit in terms of the policy statements that were made in the legislation. First, that violent offenses were going to be treated more severely than others; and second, that offenses were also going to be proportionate to the seriousness of the offense and the prior record of the offender.

Now that, of course, dovetails well with the Michigan Supreme Court guidelines.[26] But this was a policy pronouncement by the legislative and executive branches of government when Governor Engler signed the bill, which, as far as I know, was the first real pronouncement that indeed was the way they wanted to move with sentencing. The Commission's work was to reduce disparity. We were to deal, for the first time, with habitual offenders. And perhaps most significantly of all, we were required to consider existing prison resources in the promulgation of the guidelines and provide the Legislature with a prison impact statement contemporaneously with submission of the recommended guidelines.

The statute also provided the first codified departure standard, basically dovetailing the "substantial and compelling reasons to [depart]" language of the *People v. Fields*[27] case. Another major policy choice was the introduction of the idea of mandatory intermediate sanctions,[28] that is unless the guidelines score exceeded eighteen months in the maximum of any cell, there was, absent a departure, a mandatory intermediate sanction.[29] They were, in essence, cutting off the judge's discretion, absent a departure, to sentence those individuals to prison.

The Commission's work started in earnest in May 1995 at our first meeting. One of the earliest decisions concluded that the Michigan Supreme Court sentencing guidelines system was fundamentally sound. We solicited comment from the bench and bar about the guidelines as they were operating in the courts and received very

25. *See id.*

26. *See* MICH. SENTENCING GUIDELINES (2d ed. West 1988).

27. 528 N.W.2d 176, 179-83 (Mich. 1995).

28. *See* MICH. COMP. LAWS ANN. § 769.31(c) (defining an intermediate sanction as "probation or any sanction, other than imprisonment in a state prison or reformatory, that may lawfully be imposed").

29. *See* Act of July 28, 1998, § 769.34(4)(a)-(d), 1998 Mich. Legis. Serv. 1084, 1089-90 (West) (to be codified at MICH. COMP. LAWS ANN. § 769.34(4)(a)-(d)).

little, if any, comment that this system was bankrupt and should not be utilized. And indeed, it was a quick consensus of the members of the Commission that, basically, the notion of evaluating the offender's prior record and the seriousness of the crimes constituted a fundamentally sound approach to formulate legislative guidelines.

Early on, there was a very significant debate, over the course of several meetings, about whether the Commission was going to adopt one overriding sentencing philosophy. A significant minority number of commissioners sought a policy determination adopting one sentencing philosophy to the exclusion of all the others. And, fortunately, I think those arguments did not succeed with the majority of the Commission members. And indeed, the product that we recommended to the Legislature, and which was passed by the Legislature, represents an amalgam of the various philosophies of sentencing: deterrence, rehabilitation, retribution, punishment, and incapacitation. All of these you can find in the guidelines submitted to the Legislature.

I think the Commission's product was true to the legislative mandate that we were given by the Legislature. The notion of mandatory intermediate sanctions represents a sound policy choice to punish, without confinement in prison, those individuals who do not have a significant prior record and have not committed a serious crime. In other words, a policy determination that finite prison space will not be utilized for those individuals.

I think the significance of that cannot be underestimated when you take a look at some of the data across the state in terms of the number of individuals who were going to prison for relatively low-level offenses. I think the significance of that, in terms of requiring a departure to commit someone to prison when they are convicted of a low-level crime, should not be underestimated as a policy choice of how this State will utilize its prison resources in the future. And indeed, we recommended, and the Legislature codified, the *Tanner* rule.[30] For the first time, it is actually on the books as law passed by statute rather than a supreme court decision. Now all two-year felony offenses will be intermediate sanctions, absent a departure by

30. *See* MICH. COMP. LAWS ANN. § 769.34(2)(b) (West Supp. 1998); *see also* People v. Tanner, 199 N.W.2d 202, 204-05 (Mich. 1972).

the judge.[31]

In addition to that, the threshold for non-prison sanctions was raised. Most people have the assumption that you are going to stay local if your guideline range is twelve or less at the upper end. Well, the statute said eighteen months.[32] That represents a legislative policy judgment that the threshold for local confinement is also going to be higher than it has been in previous years. This represents a legislative policy choice that for these offenders, at initial sentencing, we are going to try the rehabilitation mode of sentencing and deterrence to the near exclusion of prison.

Now, in contrast, at the upper end of crime seriousness and for those individuals with significant prior records, the Commission's product shifts to a distinct mode of punishment and incapacitation. This again is true to the legislative mandate that we were given in Public Act 445 of 1994.[33] The Commission's product represents recommendations that for defendants committing these offenses, the statutory maximums of which are generally fifteen years and above, incarceration in prison is more likely and for a longer period of time. So, for these offenders, the balance is clearly towards punishment and incapacitation.

Clearly, one crucial issue examined by the Commission was the breadth of judicial discretion. When I first became an assistant prosecutor in 1975, the judge was left unconstrained except by the statutory maximum which was subject only to the *Tanner* rule came across a quote which talks about the "transcendent ironies" of the pre-guidelines system of criminal justice: "at sentencing, precisely the point where most is at stake, the judge is unceremoniously [cut] adrift from all the moorings of law . . . and only [has] his mind and heart to go on."[34] Well, I think that pretty well describes the process that we had for sentencing before the supreme court guidelines came into effect. The guidelines clearly are a diminution of judicial discretion,

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31. *See* Act of July 28, 1998, § 769.34(4)(a)-(d), 1998 Mich. Legis. Serv. 1084, 1089-90 (West) (to be codified at MICH. COMP. LAWS ANN. § 769.34(4)(a)-(d)) (providing that felony offenses with a minimum of 18 months or less will receive an intermediate sentence unless the sentencing court states, on the record, a substantial and compelling reason for its departure).

32. *See id.*

33. *See* Act of Jan. 10, 1995, 1994 Mich. Pub. Acts 2152 (codified as amended in scattered sections of MICH. COMP. LAWS ANN. §§ 769, 771 (West 1995)).

34. People v. Coles, 339 N.W.2d 440, 449 & n.22 (Mich. 1983) (quoting DONALD DALE JACKSON, JUDGES 360 (1974)).

and the indeterminate sentencing practice that we have further implicates judicial discretion.

The challenge to the Commission was to create a balance between unfettered judicial discretion and confining discretion too stringently and thereby destroying the goal of individualized sentences. The supreme court guidelines, as practitioners know, have very wide ranges at the upper levels: 180 to 360 month cells.[35] Even at the lower end, at the five-year maximum level, there are very wide ranges: twelve months to thirty months,[36] a very significant breadth of cell ranges for the judges to choose a sentence. Frankly, I find myself at some point wondering whether the guideline cells, with that breadth of ranges, are providing much guidance at all as to what sentence I ought to impose.

A majority of the Commission members, as we went through our deliberations regarding judicial discretion, believed strongly that the existing guideline ranges were too broad. This especially was true of the legislative members of our Commission, who opined in no uncertain terms, that if we recommended guidelines to the Legislature which included the width of the present ranges in the supreme court guidelines, the product would be dead on arrival.

What the Commission settled on was a compromise of various views of the Commission members as expressed over time. Generally, the cell ranges that are in the guidelines that were passed by the Legislature, and recommended by the Commission, represented a twenty-five percent variance, plus or minus, from the midpoint of the guideline range. We felt that was a legitimate compromise, a position that accommodated the concern of all members of the Commission. The Legislature, during the course of its deliberations, widened the width of the guideline ranges at the lower end. It was, I believe, to accommodate concerns about resources and the need for widening the ranges to give the judges slightly more discretion when imposing non-prison sentences.

So the enacted bill at the lower end, at the crime classification levels E through H, does have wider ranges than the twenty-five percent, plus or minus, from the midpoint that we recommended to

35. *See* MICH. SENTENCING GUIDELINES (2d ed. West 1988).
36. *See id.*

the Legislature.[37] However, in my view as a sentencing judge, I think these ranges provide the appropriate balance between giving the judge enough guidance to formulate a sentence, but also giving him or her enough discretion to fashion an individualized sentence. I do believe, over time, that this will result in a reduction of sentence disparity.

Now, in terms of the consideration of the Commission regarding resources, this was an issue that, I think it is fair to say, dominated the many discussions. There were several members of the Commission that did not want to consider resources at all. They basically said, "Let us set the guidelines that we think are right, and where the chips fall in regard to resources, so be it." Many of the members of the Commission did not feel that this was consistent with our legislative mandate to consider existing prison resources.[38]

The numbers are really staggering in terms of how our corrections system has grown. In 1980, Michigan had a prison population total of about 13,500.[39] In 1994 we were at 30,000.[40] When the bill was passed, we were at 38,000.[41] The prison intake has fluctuated up and down over the course of time, but we were dealing with intake numbers of about 5,100 or 5,200 in 1980,[42] spiking in 1989 at 10,870,[43] and at the time of the passage of the bill about 8,800 or 8,850.[44]

One of the staggering numbers that just jumped out at me during the course of our deliberations was that the Department of Corrections (DOC) baseline calls for a prison system of about 65,000 people in the year 2007.[45] The pure economics of this were, I know, a major concern of the Legislature. We have gone from a corrections budget in 1979 of $151 million,[46] which is a pittance when you consider

37. *See* Code of Criminal Procedure–Judgment and Sentence–Felonies, Offense Categories, No. 317, §§ 777.66-.69, 1998 Mich. Legis. Serv. 1084, 1131-32 (West) (to be codified at MICH. COMP. LAWS ANN. §§ 777.66-.69).

38. *See* MICH. COMP. LAWS ANN. § 769.33(2) (West Supp. 1998) (requiring the commission to submit a "prison impact report" to the legislature in connection with the sentencing guidelines).

39. *See generally* MICH. DEPT. OF CORRECTIONS, 1996 STATISTICAL REPORT (1996).

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.*

45. *See id.*

46. *See* Act of Aug. 3, 1978, 1978 Mich. Pub. Acts 1555.

that we are spending $1.3 or $1.4 billion this year.[47] So you can see that the allocation of state money to corrections has skyrocketed.

I think if we adopted the position of some of the members of the Commission that we were not going to consider resources, as I said before, we would not have been true to our legislative mandate, and that is what we did not do. And indeed, if you at all followed the deliberations of the Commission when we were doing guideline sentence estimates, constant interest focused on the effects on the gross prison population numbers. The DOC baseline was a do-nothing position. If we did not pass guidelines, the system was going to grow to about 65,000 people in 2007.[48]

In addition, we had the advent of truth-in-sentencing as well as the notion of disciplinary time, which at the time that we were considering it, was going to be an add-on to the minimum sentence. In other words, if a person going to prison for a truth-in-sentencing crime, and the judge uttered five to fifteen from the bench, then that person was going to do five, and any time for misconduct was going to be added day for day to his minimum sentence. That was ultimately changed by the Legislature. But in addition to the guidelines that we had to formulate, we were also given the task of formulating how truth-in-sentencing was going to be affected, and then, by the way, add in the new notion of disciplinary time.

Needless to say, this was a very complex process. We basically had three waves of reform hitting our system all at once, and as of the beginning of the year, we will have new guidelines, truth-in-sentencing for a limited number of crimes, the notion of disciplinary time as a consideration for parole, and then in the year 2000, truth-in-sentencing goes across the board.

For the first time, now with the passage of Public Act 317,[49] the Legislature has spoken about what sentencing is going to be in our court system. I think the policy choices that we have made will guide us for some time.

I agree totally with Representative Baird's statement that we need to give this system time for implementation and time to rest. The judges, my colleagues, are going to be dealing with an entirely new

47. *See* Appropriations–Department of Corrections, No. 321, § 101, 1998 Mich. Legis. Serv. 1139, 1140 (West).

48. *See* MICH. DEPT. OF CORRECTIONS, 1996 STATISTICAL REPORT (1996).

49. *See* Code of Criminal Procedure-Judgment and Sentence-Felonies, Offense Categories, No. 317, 1998 Mich. Legis. Serv. 1084 (West).

system of sentencing, and they simply are going to need time to digest that without significant changes to the system. So, I hope that the Legislature gives the system time to rest after we start the implementation process early next year.

So, in conclusion, what have we wrought here as we have gone through this process? Now, for the first time, we have uniform coverage of all felony crimes by the sentencing guidelines. No longer will some crimes be covered and others not. I believe that will serve the important goal of reduction of sentencing disparity in our state.

We have tried as best we could—and I want to emphasize this—we tried as best we could during the course of the guideline process to make the guidelines as simple to administer as possible, but we have added some complexity. But we tried as best we could to avoid the complexity of the federal sentencing guidelines. I also firmly believe we have left to the judiciary significant discretion to fashion a sentence for each individual defendant.

As has been historically true in the past, and the new system will not change it, a vast majority of these cases will be resolved by plea. The role of the prosecutor, the defense lawyer, and the plea negotiation process remains unchanged, although plea agreements may take on a somewhat heightened importance at the upper levels of crime seriousness. The dynamic of the plea negotiation process will continue to be very, very important.

One of the interesting issues for the future will be to observe the response of the appellate court as cases are appealed under the new sentencing guidelines. Will the Michigan Court of Appeals and the Michigan Supreme Court be relatively aggressive in reviewing cases or will they vest in the trial bench a wide range of sentencing discretion and only in egregious cases of alleged error remand for resentencing? There is a statutory provision that if the guidelines have not been scored properly, an appeal may be had by the non-prevailing party on guidelines issues.[50]

We are clearly embarking on a new era in sentencing in Michigan. The Commission labored very hard and very long to produce the product that passed legislative and executive branch muster. I take some satisfaction in saying that largely the debate in the Legislature did not center on any fundamental weaknesses in the system that we produced and recommended. As was their clear jurisdiction to do, the Legislature made some very difficult policy.

50. *See* MICH. COMP. LAWS ANN. § 769.34(10)-(11) (West Supp. 1998).

The Commission will be watching closely, as well as, I am sure, the commentators of the Michigan criminal justice system in our state.

Thank you.