

## Michigan Law Revision Commission Meeting

Wednesday, March 19, 2014 ▪ 12:00 noon  
Room 426 ▪ State Capitol Building  
100 N. Capitol Avenue ▪ Lansing, Michigan

### Members Present:

Richard McLellan, Chair  
Tony Derezinski, Vice Chair  
Representative Andrew Kandreas  
Representative Tom Leonard  
John Strand  
George Ward  
Judge William Whitbeck

### Members Absent and Excused:

Senator Tonya Schuitmaker  
Senator Vincent Gregory

### I. Convening of Meeting

The Chair called the meeting to order at 12:06 p.m.

### II. Roll Call

The roll was taken and absent members were excused. A quorum was present.

### III. Approval of December 11, 2013 Meeting Minutes

The Chair asked for a motion to approve the minutes of the December 11, 2013 meeting. No corrections or additions were offered. **Commissioner Strand moved, supported by Judge Whitbeck, to adopt the minutes of the December 11, 2013 Michigan Law Revision Commission meeting. There was no further discussion. The minutes were unanimously approved.**

### IV. Approval of February 13, 2014 Meeting Minutes/Notes

The Chair noted that although there was no quorum at the February 13, 2014 meeting, minutes were drafted. He inquired if the members' preference is to officially adopt the proposed notes to have them included in the committee record even though no action or votes were taken at that meeting. **Vice Chair Derezinski moved, supported by Representative Leonard, to approve the proposed notes of the February 13, 2014 meeting. There was no further discussion. The notes were unanimously approved.**

### V. Criminal Sentencing and Procedures Project

The Chair called on Vice Chair Derezinski who provided a summary of the project. Vice Chair Derezinski then called on Mr. Carl Reynolds, Senior Legal and Policy Advisor of The Council of State Governments, to begin the presentation. Mr. Reynolds highlighted the findings to date and called on Mr. Andy Barbee, CSG Research Manager, to continue with more in-depth details. A copy of the CSG presentation is attached to these minutes.

### VI. Comments from Commissioners

After the presentation, a period of question and answer followed. Chairman McLellan inquired about the submission of the CSG report and whether it will include specific areas the Commission should focus on. Mr. Reynolds affirmed that it would.

Judge Whitbeck queried if CSG anticipates that the report will recommend that Michigan's current structure needs tweaking or if a complete change is required. Mr. Reynolds indicated that it would more than likely just need to be tweaked.

Commissioner Ward commented that having guidelines from other states such as North Carolina would be helpful. Mr. Reynolds responded that the National Center for State Courts 2008 report entitled, "State Sentencing Guidelines, Profiles and Continuum" would be a useful source for this information.

### VII. Public Comment

The Chair asked if there were any public comments. Judge William Carmody, Chief Judge of the 11<sup>th</sup> Circuit Court, provided comments regarding the differences between jail and prison time and the problems with probation and supervision. He added that more resources should be directed for supervision at the local level. There were no other public comments.

### VIII. Adjournment

Having no further business, the meeting was adjourned at 2:19 p.m.

*(Minutes approved at the May 13, 2014 MLRC Meeting.)*

**JUSTICE CENTER**  
THE COUNCIL OF STATE GOVERNMENTS

## Sentencing and Justice Reinvestment Initiative



March 19, 2014  
Michigan Law Revision Commission



Carl Reynolds, Senior Legal & Policy Advisor  
Andy Barbee, Research Manager  
Ellen Whelan-Wuest, Policy Analyst

**Council of State Governments Justice Center**  
Justice Reinvestment Partners

- National non-profit, non-partisan membership association of state government officials
- Engage members of all three branches of state government
- Justice Center provides practical, nonpartisan advice informed by the best available evidence

**Justice Reinvestment:**  
*a data-driven approach to reduce corrections spending and reinvest savings in strategies that can decrease recidivism and increase public safety.*

Partner with Bureau of Justice Assistance and Pew Charitable Trusts

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**Michigan's Approach to Sentencing Grounded in Principles of Proportionality and Public Safety**

**1979 Zalman Study**

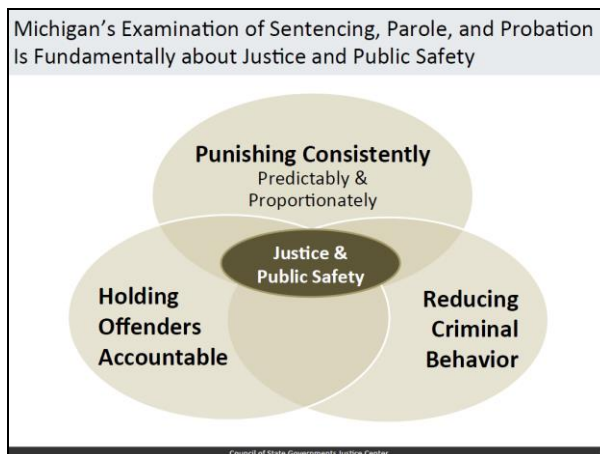
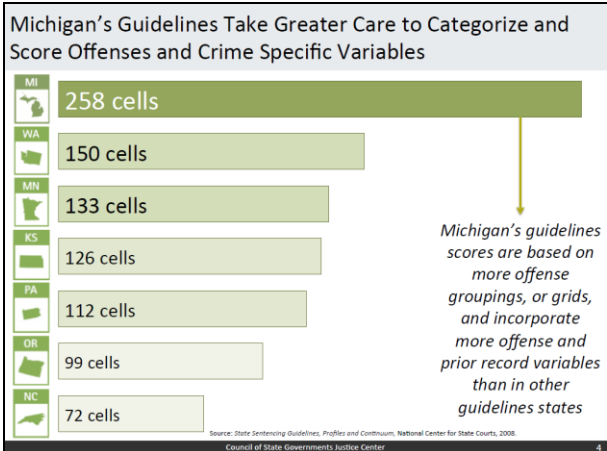
"Not all sentencing variation should be considered unwarranted or disparate. . . It is only when such variation takes the form of differing sentences for similar offenders committing similar offenses that it can be considered disparate."

**1997 Report of the Sentencing Guidelines Commission**

"It is the mission of the Commission, based upon statutory mandates and the collective philosophy of its members, to:

- Develop sentencing guidelines which provide protection for the public, are proportionate to the seriousness of the offense and the offender's public record, and which reduce disparity in sentencing throughout the state."

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**Punishing Consistently**

**Findings to Date:**

- ✓ Opportunities for significant disparity built into sentencing guidelines
- ✓ Significant disparity in actual sentencing for similar cases and between localities
- ✓ Minimum prison sentence lengths creeping upward based purely on discretion

**Today's Presentation:**

- Use of habitual enhancement compounds disparity by "double counting" prior convictions in some, but not all, eligible cases.
- Disparity in minimum sentences can translate into greater disparity in time served for those sentenced to prison.

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## Holding Offenders Accountable & Reducing Criminal Behavior

### Findings to Date:

- ✓ Sentencing guidelines structure terms of incapacitation, but fail to structure supervision to reduce recidivism and accountability
- ✓ Supervision revocation terms are not structured within the guidelines
- ✓ Swift and certain sanctioning of probation violations dependent on voluntary adoption by courts

### Today's Presentation:

- ❑ Guideline cell ranges increase disproportionately to risk.
- ❑ Time served beyond minimum has unclear impact on public safety but greatly increases cost to the State.

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## Investing Wisely:

### Focusing Program Investments to Increase Public Safety

- ❑ Recent efforts to reduce parolee recidivism should be replicated in probation.
- ❑ Lengthy incarceration terms for violators limits resources for reducing violations.
- ❑ Existing state resources funding programs to reduce recidivism should be better targeted.

**Improved investments will yield greater accountability and reductions in criminal behavior.**

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## Section One

### Punishing Consistently

#### Sentencing Enhancements Increase Disparity

- Automatic PRV scoring and discretionary habitual enhancements usually count the same convictions twice.

#### Sentencing Disparity in Time Served

- Range between minimum and statutory maximum allows for wide discretion in release decision making.
- Similar sentences can result in very different time served.
- Parole decisions consider many of the same factors as sentencing.

Accountability and Reducing Criminal Behavior

Investing Wisely

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## Multiple Ways of Counting Prior Felonies Create Disparity

1. Prior record of felony convictions (counted in the PRV) drives the sentencing cell rightward, increasing the lower end of the minimum range.
2. Optional habitual laws: any prior felonies may be counted a second time at sentencing to increase the upper end of the minimum range, widening the already wide standard cell range.
3. Disparity results from the dramatically different application of habitual sentencing by locality and the even wider (yet not always utilized) range it allows.

Source: Sentencing Guidelines Manual, Michigan Judicial Institute, June 2012.

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## Sentencing Guidelines Require Scoring of Past Criminality Through Seven Prior Record Variables

### 7 PRV Questions

PRV questions address things such as prior felony convictions, prior misdemeanor convictions, and prior juvenile adjudications.

❖ Scoring of these 7 questions slots defendant into one of six PRV Levels on the sentencing grids.

Using Grid E, OV Level II as an example...

Non-Habitual Minimum Prison Sentence Length (SL) Ranges

PRV Level A	PRV Level B	PRV Level C	PRV Level D	PRV Level E	PRV Level F
0 Pts	1-9 Pts	10-24 Pts	25-49 Pts	50-74 Pts	75+ Pts
NA	NA	NA	7-23 Mos	10-23 Mos	12-24 Mos

**Effect is that punishment severity increases based on accumulation of priors.**

Source: Sentencing Guidelines Manual, Michigan Judicial Institute, June 2012.

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## Defendants with Multiple Prior Felonies Will Typically Fall into Cells with Much More Severe Sentencing Options

2 of the 7 PRV questions already address prior\* felony convictions

PRV 1 scores prior high severity felony convictions:

- 25 pts for 1 prior
- 50 pts for 2 priors
- 75 pts for 3+ priors

PRV 2 scores prior low severity felony convictions:

- 5 pts for 1 prior
- 10 pts for 2 priors
- 20 pts for 3 priors
- 30 pts for 4+ priors

3 Prior High Severity Felonies = PRV Level F

\* Must fall w/in a 10 year gap rule.

Grid E, OV Level II

Non-Habitual Minimum Prison SL Ranges for Grid E, Offense Level II

PRV Level A	PRV Level B	PRV Level C	PRV Level D	PRV Level E	PRV Level F
0 Pts	1-9 Pts	10-24 Pts	25-49 Pts	50-74 Pts	75+ Pts
NA	NA	NA	7-23 Mos	10-23 Mos	12-24 Mos

**Prison not an option**  
(absent a departure).

**Prison is an option**  
✓ With a minimum of up to 2 years in prison.

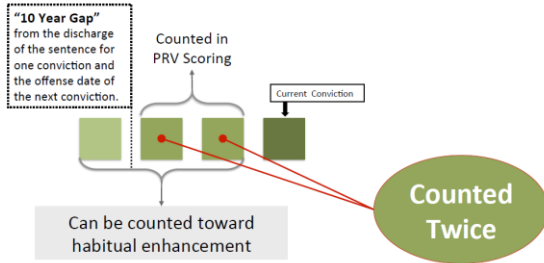
Source: Sentencing Guidelines Manual, Michigan Judicial Institute, June 2012.

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## Habitual Sentencing Allows Double Counting of Prior Felony Convictions

**Example of defendant with 3 prior felony convictions as an adult:**



Source: Sentencing Guidelines Manual, Michigan Judicial Institute, June 2012.

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## Double Counting of Prior Felonies Adds Yet Another Layer of Time in Prison

Prior felony convictions can also be used to "habitualize" the defendant for even higher punishment ranges.

PRV Level A	PRV Level B	PRV Level C	PRV Level D	PRV Level E	PRV Level F
0 Pts	1-9 Pts	10-24 Pts	25-49 Pts	50-74 Pts	75+ Pts
NA	NA	NA	7-23 Mos	10-23 Mos	12-24 Mos
1 Prior Felony Conviction (HO2)			7-28 Mos	10-28 Mos	12-30 Mos
2 Prior Felony Convictions (HO3)			7-34 Mos	10-34 Mos	12-36 Mos
3+ Prior Felony Convictions (HO4)			7-46 Mos	10-46 Mos	12-48 Mos

Consider two defendants with the same instant offense underlying a new felony conviction:

- Defendant with three prior low severity convictions (20 PRV points) will fall into Column C where prison is not an option.
- Defendant with four prior low severity convictions (30 PRV points) will fall into Column D where prison is an option. Furthermore, the prior convictions can be counted again to double the minimum prison term.

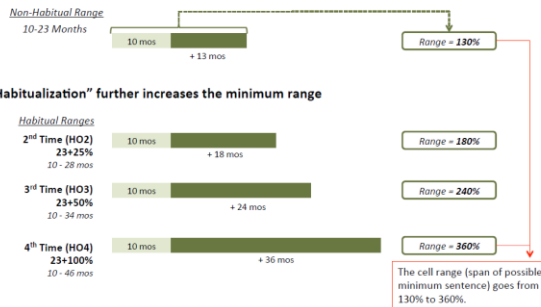
Source: Sentencing Guidelines Manual, Michigan Judicial Institute, June 2012.

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## Adding the Layer of Habitual Sentencing Further Increases Already Broad Minimum Prison Sentence Length Ranges

Prison sentence range for most frequently used cell in Michigan's guidelines (Grid E, PRV-E, OV-II)



Source: Felony Sentencing (BRF) Data 2009-2012, Michigan Dept. of Corrections, Sentencing Guidelines Manual, Michigan Judicial Institute, June 2012.

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## Additional Ways that Counting Prior Felonies and Habitual Sentencing Impact Sentencing

### When electing to sentence as an habitual offender:

- ✓ Judge may also increase statutory maximum time in prison by 50%, 100% or up to life in prison depending on the habitual offender level.

### When counting offenses to use as a fourth offender:

- ✓ Defendant does not have to have had three opportunities to reform; the three priors can arise from a single act or transaction. *People v. Gardner (2008)*

### For person, property, and some drug offenses:

- ✓ Offense Variable 13 (Continuing Pattern of Criminal Behavior) scores all crimes within a five-year period, regardless of conviction, to determine a pattern of 3 or more offenses.
  - Scoring of this variable has the effect of moving defendants downward in the grids into more serious punishment ranges.

Source: Sentencing Guidelines Manual, Michigan Judicial Institute, June 2012.

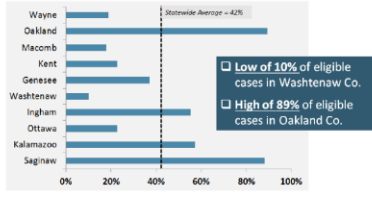
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## Unlike PRV Scoring, Application of Habitual Enhancement Is Discretionary

Wide Disparity in Use of Habitual Sentencing  
Among Top 10 Counties

Percent of Eligible Cases Sentenced as Habitual Offender In 2012 (10% Prison-Based Only)



Wide variance in use of the habitual sentencing option guarantees that similar cases will be sentenced in very different ways.

"Sentenced as Habitual Offender" means that the sentence imposed actually fell into the elevated sentence range higher than the next lower level.

Source: Felony Sentencing (BRF) Data 2009-2012, Michigan Dept. of Corrections.

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## Cost of Habitual Sentencing Option Is Unpredictable and Potentially Huge

Minimum Prison SL Range – High Utilization Guidelines Cell	
Lower	Upper
10 Mos	23 Mos
	28 Mos (HO2)
	34 Mos (HO3)
	46 Mos (HO4)

In 2012, there were over 1,000 defendants eligible to be habitualized at the HO3 level.

- ✓ Statewide, 36% were sentenced at the elevated level of the HO3 ranges.

### 10% Habitualized

- 900 sentenced to 12 months in prison yields bed demand of 900 per day (\$32M)
- 100 sentenced to 30 months in prison yields bed demand of 250 per day (\$9M)

Annual Cost

\$41M

### 36% Habitualized

- 640 sentenced to 12 months in prison yields bed demand of 640 per day (\$23M)
- 360 sentenced to 30 months in prison yields bed demand of 900 per day (\$32M)

\$55M

### 90% Habitualized

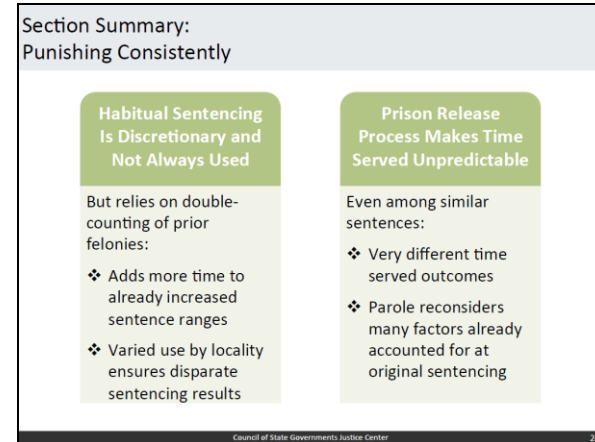
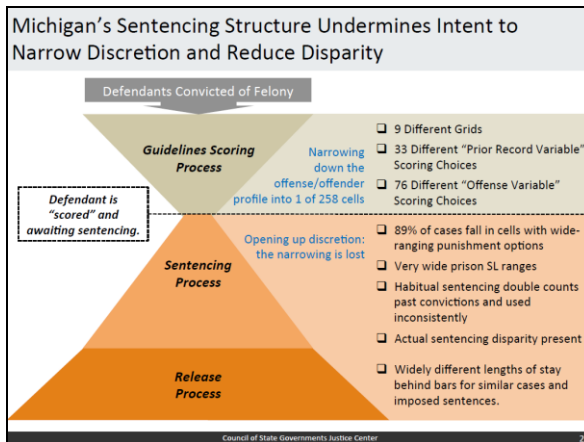
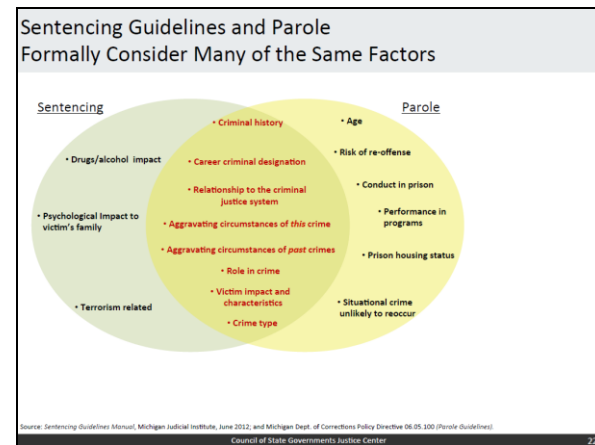
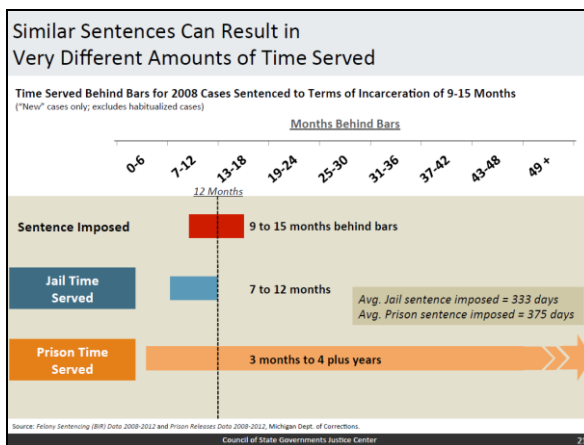
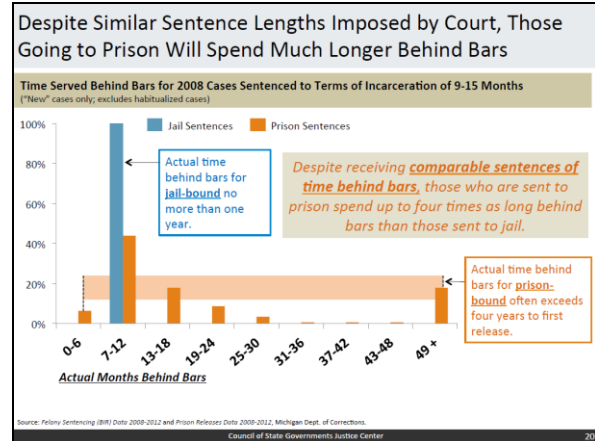
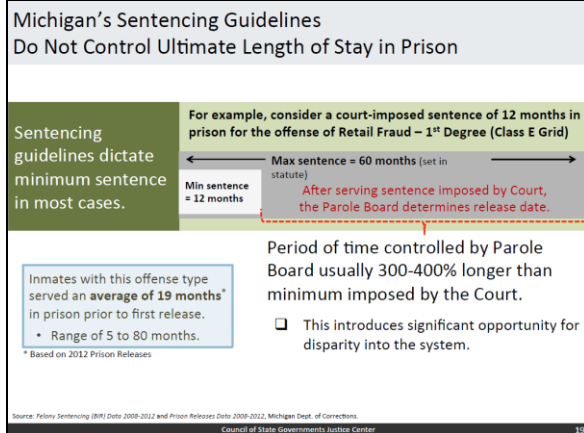
- 100 sentenced to 12 months in prison yields bed demand of 100 per day (\$4M)
- 900 sentenced to 30 months in prison yields bed demand of 2,250 per day (\$80M)

\$84M

Source: Felony Sentencing (BRF) Data 2009-2012, Michigan Dept. of Corrections, and Corrections Background Briefing, December 2012, House Fiscal Agency.

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## Section Two

### Punishing Consistently

#### Accountability and Reducing Criminal Behavior

- Relationship of Sentencing Guidelines to Recidivism
  - Offense level (OV) and prior record (PRV) as proxies for future criminality
  - Questionable structure for punishment and assignment of supervision

#### Impact of Time Served

- Huge cost to system with unclear public safety outcomes

### Investing Wisely

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## Sentencing Guidelines Should Be Structured to Support Recidivism Reduction and Public Safety

The "sorting" of the guidelines results in more severe punishment options as the PRV and OV scores increase.

- ❖ Do these increasing punishment options increase accountability?
- ❖ Do they generate reductions in future criminal behavior?

To what extent are increasing OV Levels (more aggravating offense factors) related to future criminal behavior?

To what extent are increasing PRV Levels (higher criminal history) related to future criminal behavior?

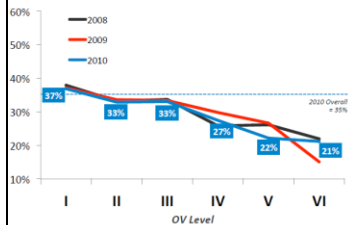
OV Level	PRV Level						Total
	A	B	C	D	E	F	
I	0	0	0	0	0	0	0
II	0	0	0	0	0	0	0
III	0	0	0	0	0	0	0
IV	0	0	0	0	0	0	0
V	0	0	0	0	0	0	0
VI	0	0	0	0	0	0	0
2008	0	0	0	0	0	0	0
2009	0	0	0	0	0	0	0
2010	0	0	0	0	0	0	0
2011	0	0	0	0	0	0	0
2012	0	0	0	0	0	0	0
2013	0	0	0	0	0	0	0
2014	0	0	0	0	0	0	0
2015	0	0	0	0	0	0	0
2016	0	0	0	0	0	0	0
2017	0	0	0	0	0	0	0
2018	0	0	0	0	0	0	0
2019	0	0	0	0	0	0	0
2020	0	0	0	0	0	0	0
2021	0	0	0	0	0	0	0
2022	0	0	0	0	0	0	0
2023	0	0	0	0	0	0	0
2024	0	0	0	0	0	0	0
2025	0	0	0	0	0	0	0
2026	0	0	0	0	0	0	0
2027	0	0	0	0	0	0	0
2028	0	0	0	0	0	0	0
2029	0	0	0	0	0	0	0
2030	0	0	0	0	0	0	0

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## OV Score Does a Poor Job Predicting Risk of Re-Arrest

Two Year Re-Arrest Rates by OV Level:  
All Probation and/or Jail Sentences (2008-10 Sentence Cohorts)



Cases in the more serious OV Levels actually have lower re-arrest rates.

- In other words, having more aggravating factors associated with the underlying case **is not** correlated with higher likelihood of recidivism.
- Suggests value of OV scoring **is not** about preventing future crime but more about "just desserts."

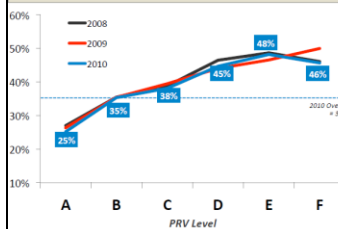
Source: Felony Sentencing (BFI) Data 2008-2012, Michigan Dept. of Corrections, and Criminal History Records, Michigan State Police.

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## PRV Score Does a Good Job Predicting Risk of Re-Arrest

Two Year Re-Arrest Rates by PRV Level:  
All Probation and/or Jail Sentences (2008-10 Sentence Cohorts)



Cases in the more serious PRV levels have higher re-arrest rates.

- In other words, having more criminal history associated with the underlying case **is** correlated with higher likelihood of recidivism.
- Suggests PRV scoring can be used to help predict future criminality.

Source: Felony Sentencing (BFI) Data 2008-2012, Michigan Dept. of Corrections, and Criminal History Records, Michigan State Police.

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## Guidelines Fail to Structure Supervision In Relation to Future Criminality

Twice as likely to be re-arrested as those in PRV Level A.

- There is no connection between the guidelines and imposition of supervision:
  - Who gets supervised?
  - And for how long?

OV Level	PRV Level						Total
	A	B	C	D	E	F	
I	0	0	0	0	0	0	0
II	0	0	0	0	0	0	0
III	0	0	0	0	0	0	0
IV	0	0	0	0	0	0	0
V	0	0	0	0	0	0	0
VI	0	0	0	0	0	0	0
2008	0	0	0	0	0	0	0
2009	0	0	0	0	0	0	0
2010	0	0	0	0	0	0	0
2011	0	0	0	0	0	0	0
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2025	0	0	0	0	0	0	0
2026	0	0	0	0	0	0	0
2027	0	0	0	0	0	0	0
2028	0	0	0	0	0	0	0
2029	0	0	0	0	0	0	0
2030	0	0	0	0	0	0	0

For example, does it make sense that those in PRV Level A would be supervised for as long as those in PRV Levels D-F?

Does it make sense that those in PRV Levels D-F sentenced to jail would have no supervision after release?

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## Sentencing Guidelines Can Result in Time Served that Is Disproportionate to Future Criminality

Twice as likely to be re-arrested as those in PRV Level A.

### For Sentences Involving Incarceration:

- Time behind bars limited to 1-3 months in jail.
- Time behind bars could be anywhere from 5-60 months in prison.

OV Level	PRV Level						Total
	A	B	C	D	E	F	
I	0	0	0	0	0	0	0
II	0	0	0	0	0	0	0
III	0	0	0	0	0	0	0
IV	0	0	0	0	0	0	0
V	0	0	0	0	0	0	0
VI	0	0	0	0	0	0	0
2008	0	0	0	0	0	0	0
2009	0	0	0	0	0	0	0
2010	0	0	0	0	0	0	0
2011	0	0	0	0	0	0	0
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2023	0	0	0	0	0	0	0
2024	0	0	0	0	0	0	0
2025	0	0	0	0	0	0	0
2026	0	0	0	0	0	0	0
2027	0	0	0	0	0	0	0
2028	0	0	0	0	0	0	0
2029	0	0	0	0	0	0	0
2030	0	0	0	0	0	0	0

PRV A 25% Re-arrest rate

1-3 months in jail

PRVs D-F 46% Re-arrest rate

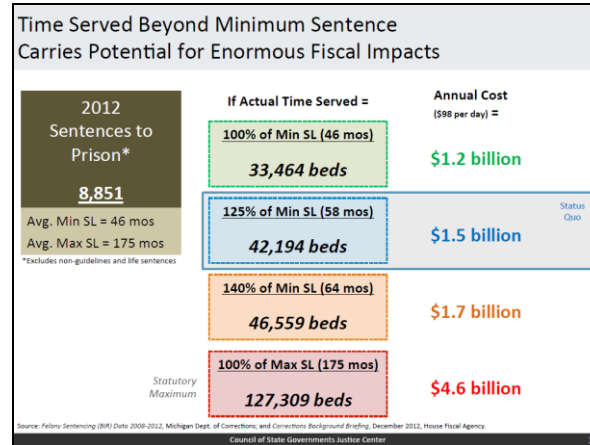
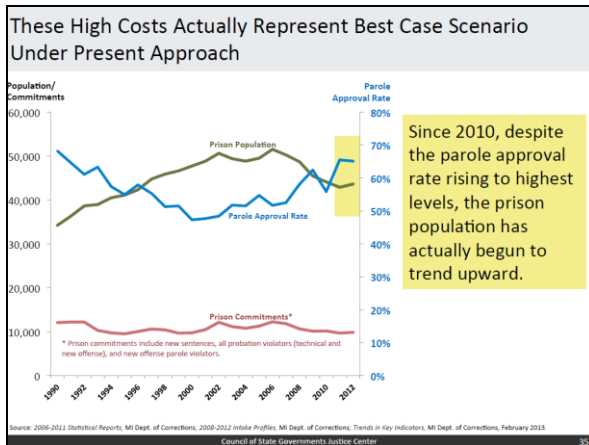
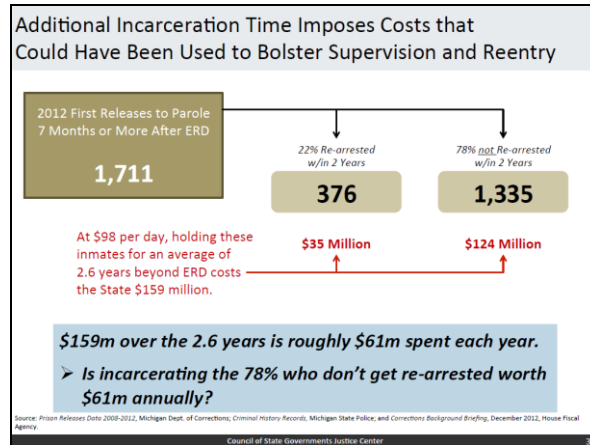
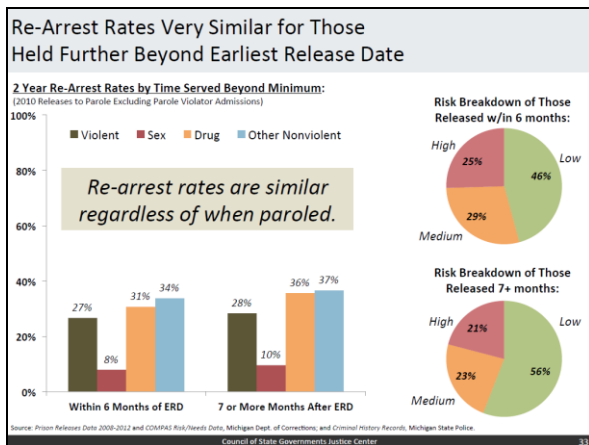
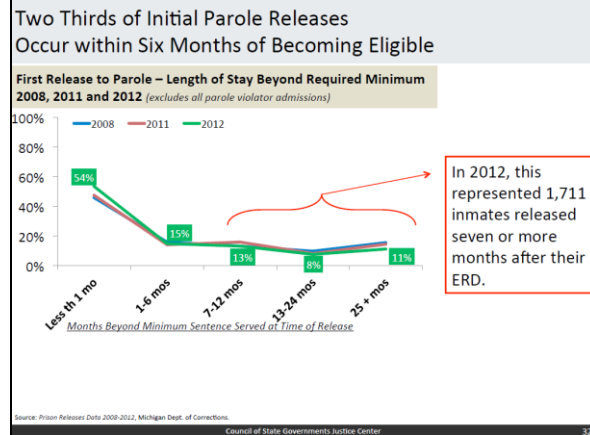
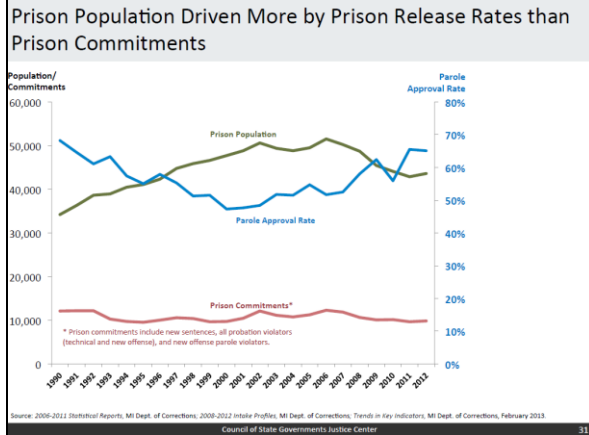
5-60 months in prison

While the odds of future criminality are 2 times higher, the length of incarceration is 5 to 20 times higher.

Source: Felony Sentencing (BFI) Data 2008-2012 and Prison Releases Data 2008-2012, Michigan Dept. of Corrections, and Criminal History Records, Michigan State Police.

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## Section Summary: Accountability and Reducing Criminal Behavior

### Criminal History Predicts Future Recidivism

But guidelines fail to use this strength:

- ❖ No structuring of supervision
- ❖ Sentence length ranges increase disproportionately to increasing risk of recidivism

### Most Parole Releases Occur w/in 6 Months of Eligibility

But benefits of holding others longer are unclear:

- ❖ No real difference in recidivism rates
- ❖ High costs of extended incarceration may actually outweigh limited benefits

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## Section Three

### Punishing Consistently

### Accountability and Reducing Criminal Behavior

### Investing Wisely

Michigan Has Success Story on Reentry

Targeting of Resources to the Front End

- Why it matters
- Community Corrections and CJRP

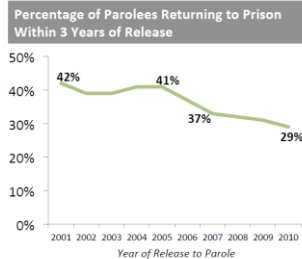
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## Michigan Has Focused on Reducing Parolee Recidivism and Achieved Nationally Recognized Reductions

### Changes Begun in 2005:

- Integration of risk assessment into parole supervision
- Training of field agents in best practices
- Engaging communities
- Increasing funding for community-based programming for parolees
- Targeting supervision resources towards higher risk parolees



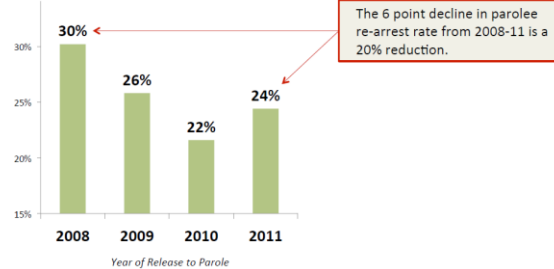
Source: 2006-2012 Statistical Reports, MI Dept. of Corrections

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## Reductions in Parolee Recidivism Hold Up When Analyzed in Terms of Arrests

### One Year Parolee Re-Arrest Rates



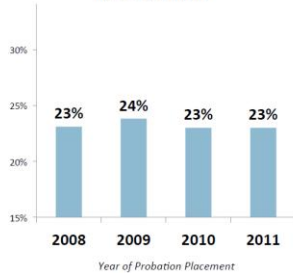
Source: Prison Releasee Data 2009-2012, Michigan Dept. of Corrections, and Criminal History Records, Michigan State Police

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## Felony Probation Outcomes Have Not Improved in the Same Way

### One Year Felony Probation Re-Arrest Rates



If the felony probationer re-arrest rate from 2008-11 experienced a 20% reduction similar to parole:

❖ **Re-arrest rate would be 18%.**

Source: Felony Sentencing (BPP) Data 2009-2012, Michigan Dept. of Corrections, and Criminal History Records, Michigan State Police

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## Reducing Probationer Recidivism Could Lower Victimization and Ease the Strain on Local Resources

### Total Felony Probation Placements in 2012

**29,432**

At current re-arrest rates:

23% w/in 1 Year

**6,769 Arrests**

If probation re-arrest rates had fallen like parole:

18% w/in 1 Year

**5,298 Arrests**

**Almost 1,500 fewer arrests...**

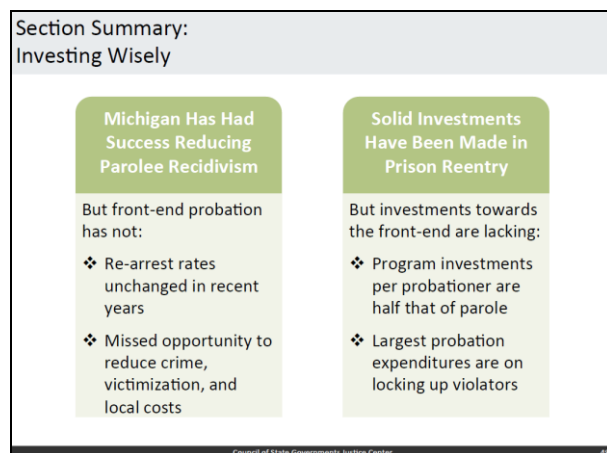
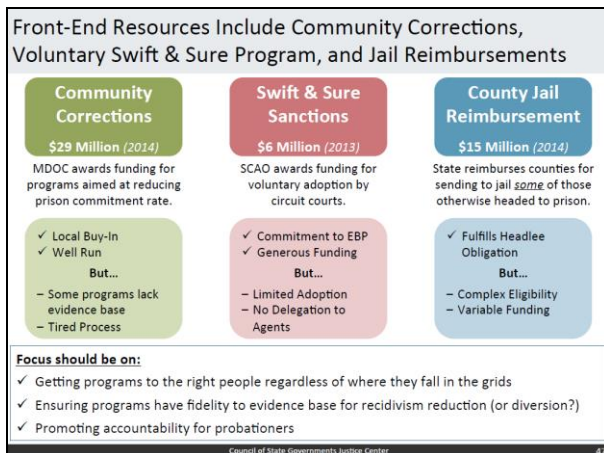
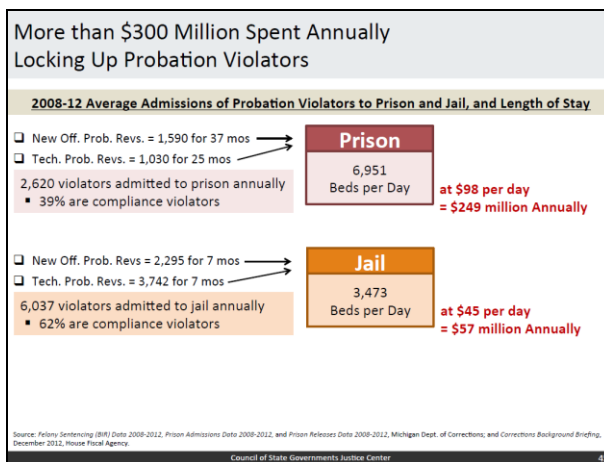
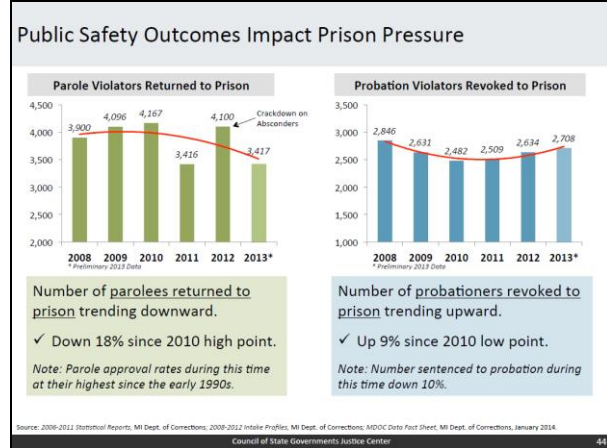
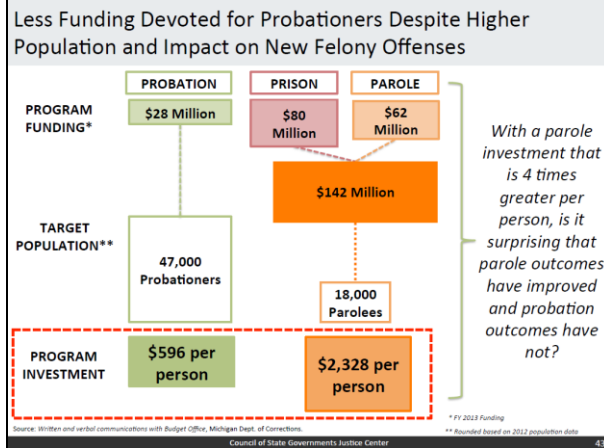
...and instances of victimization  
...and bookings into county jail  
...and initiations of court proceedings

Source: Felony Sentencing (BPP) Data 2009-2012, Michigan Dept. of Corrections, and Criminal History Records, Michigan State Police

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### The Takeaways, June 2013 – March 2014

- Opportunity for disparity built into guidelines
- Actual sentencing reveals disparity in practice
- Habitual sentencing double counts prior felonies
- Time served for similar sentences very different

- Guidelines silent on supervision: Who gets it? How much? Violation Responses?
- Limited adoption of voluntary swift & sure sanctions program
- Sentencing ranges increase disproportionately to risk of recidivism
- Time served often unpredictable and adds unclear public safety value at high cost
- Opportunity to achieve better public safety outcomes at the front end

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### Project Timeline Through 2014

Timeline: May 2013 → March 2014 → April → May → June → July → November → December

Events: MLRC Meetings 1-4, Today: MLRC Meeting #5, MLRC Meeting #6 & CSG Report, MLRC Report

Activities: Stakeholder Engagement, Policy Discussions, Data Analysis, Policy Modeling

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## Thank You

**Ellen Whelan-Wuest**  
Policy Analyst  
[ewhelen-wuest@csg.org](mailto:ewhelen-wuest@csg.org)

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