

# Safe & Just Michigan

Written Statement of

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On "Misdemeanor Incarceration"

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Michigan Task Force on Jail and Pretrial Incarceration

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*“National sources show Michigan jail populations tripling in the last 35 years. With crime now at a 50-year low, hundreds of thousands are still admitted to Michigan's jails every year, and people are staying in jail longer on average than before. Furthermore, roughly half of the people held in Michigan's jails on any given day have not been convicted of a crime and are constitutionally presumed innocent as they await trial. A significant portion of county budgets in Michigan go to justice-system costs. Growth in jail populations has stretched county resources, leaving less for investment in treatment services, crime prevention, victim services, economic development, and other local priorities.”*

Governor Gretchen Whitmer, Executive Order 2019-10<sup>1</sup>

Thank you for the opportunity to present public testimony today here in Grand Rapids.

Safe & Just Michigan is a criminal justice policy organization that works to reduce the harm caused by both crime and unnecessary incarceration. We advance evidence-based reforms that can improve public safety and eliminate unnecessary and wasteful corrections spending. We hold in common the certainty that we can build both a safer and more just Michigan. I am a member of the policy team at SJM.

I was assisted in this testimony by Alexandra Natapoff a Chancellor's Professor of Law at the University of California Irvine Law. Professor Natapoff is the author of the book "Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal."

We could drastically reduce Michigan's jail population by simply agreeing to discontinue the practice of incarcerating large numbers people for non-serious misdemeanors (misdemeanors being offenses whose sentencing guidelines require less than a year of incarceration). By reducing the costs from the low-level arrest, prosecution, and incarceration of people guilty of low-level misdemeanors, Michigan could invest in "treatment services, crime prevention, victim services, economic development, and other local priorities," just as Gov. Gretchen Whitmer suggested.

Looking at total caseloads for misdemeanors, there are hundreds of thousands processed in Michigan each year. Using numbers from the statewide district court in 2018, there were 280,038 nontraffic misdemeanors and 461,380 traffic misdemeanors. Of the 280,038 nontraffic misdemeanors, at the end of 2018, 8 percent (23,607) were listed as pending, 28 percent

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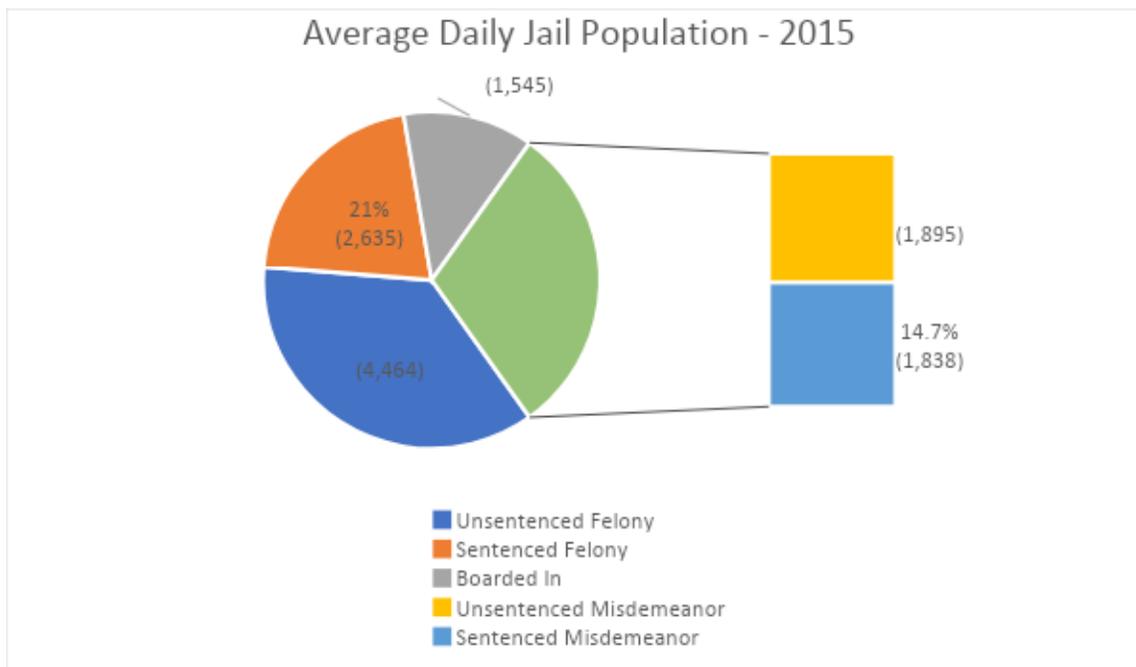
<sup>1</sup> Governor Gretchen Whitmer, Executive Order 2019-10, April 17th, 2019  
[https://courts.michigan.gov/News-Events/Resource%20Documents/EO%202019-10%20Michigan%20Joint%20Task%20Force%20on%20Jail%20and%20Pretrial%20Incarceration%20\(signed\).pdf](https://courts.michigan.gov/News-Events/Resource%20Documents/EO%202019-10%20Michigan%20Joint%20Task%20Force%20on%20Jail%20and%20Pretrial%20Incarceration%20(signed).pdf)

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77,948) were listed as inactive status, 8 percent (23,450) had been dismissed by the court, and 20 percent (57,260) had been dismissed by officer.

Guilty pleas accounted for the largest percentage of dispositions at 34 percent (95,482). Just 0.2 percent (521) were resolved by a jury verdict, and 0.5 percent (1,651) were decided by a bench verdict.<sup>2</sup> However, there is no information to convert these misdemeanor charges into the number of individuals impacted, or what kind of sentence was a result of the disposition.

From another set of data, which covers approximately 74 percent of all jails in Michigan, we infer that nearly one-third of the jail population is made up of people with misdemeanor charges.<sup>3</sup>



<sup>2</sup> The citation for this data is here

<https://courts.michigan.gov/education/stats/Caseload/reports/statewide.pdf> and was accessed from the Michigan Courts Caseloads Report page which can be accessed here

<https://courts.michigan.gov/education/stats/Caseload/Pages/default.aspx>

<sup>3</sup> Michigan Department of Corrections Jail Population Information System (JPIS)

[https://www.michigan.gov/documents/corrections/JPIS\\_-\\_CY\\_2010\\_344047\\_7.pdf](https://www.michigan.gov/documents/corrections/JPIS_-_CY_2010_344047_7.pdf)

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There are certainly limitations to this data, but it gives us a good basic idea of the scope of the problem across the state. The costs of inaction are hard to ignore. Consider this analysis of similar crimes in the states of Washington and Oregon:

“A University of Oregon study found that the marginal cost of prosecuting and convicting a misdemeanor in Oregon was \$1,679. Testimony presented to the Washington State Legislature in 2009 showed that changing simple possession of marijuana to a violation could save \$16 million per year.”<sup>4</sup>

National estimates are even more staggering:

“Right now, taxpayers expend on average \$80 per inmate per day. To lock up people accused of things like turnstile jumping, fish and game violations, minor in possession of alcohol, dog leash violations, driving with a suspended license, and feeding the homeless. By diverting or reclassifying these offenses as non-criminal violations, local and state governments could save hundreds of millions, perhaps more than \$1 billion per year.”<sup>5</sup>

And remember, these are only the direct costs to taxpayers from arrest and incarceration of people with misdemeanor convictions and legal costs associated with public defense. Incarceration also results in massive social costs ranging from labor issues, housing insecurity, social services, and human costs to each person and their families. Society bears the cost when tens and hundreds of thousands of people are incarcerated even for a short period of time. Police, prosecutors, and judges rarely weigh these full social costs when deciding to prosecute and punish.

So, what would Michigan have to do in order to realize some of these benefits from changing our approach towards low-level misdemeanor incarcerations? There are three spigots we need to turn off in order to realize these benefits.

Legislators can reduce the number of crimes that subject people to criminal charges through decriminalization, legalization, or reducing them to civil remedies. We have already begun this

process in Michigan in the area of marijuana, and we should continue this process to move to other non-serious misdemeanor offenses. We should be very careful to ensure that

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<sup>4</sup> Robert C. Boruchowitz 2010, Diverting and Reclassifying Misdemeanors Could Save \$1 Billion per Year: Reducing the Need For and Cost of Appointed Counsel, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1783057](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1783057), quoting data from HEIDI BLAINE ET AL., UNIV. OF OR., DEP'T OF PLANNING, PUB. POLICY & MGMT., THE COSTS ASSOCIATED WITH PROSECUTING CRIME IN OREGON 11 (2010), available at [http://www.oregon.gov/CJC/docs/U\\_of\\_O\\_Research\\_the\\_Costs\\_Associated\\_with\\_prosecuting\\_Crime\\_in\\_Oregon.pdf?ga=t](http://www.oregon.gov/CJC/docs/U_of_O_Research_the_Costs_Associated_with_prosecuting_Crime_in_Oregon.pdf?ga=t)

<sup>5</sup> See note 4

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decriminalization is not accompanied by net widening. We should strive not to replace one costly and intrusive bureaucracy with another.

Police can shrink the number of misdemeanors entering the system by adopting policies that better select who gets arrested and why. As law professor Rachel Harmon has argued, “Arrest is often unnecessary to achieve our law enforcement goals...and we have not yet seriously explored the possible alternatives.”<sup>6</sup> Police can also reduce the flow of people into jails by substituting citations for arrest which was recommended by the President’s Task Force on 21st Century Policing.<sup>7</sup>

Prosecutors should decline to prosecute most low-level misdemeanors and should institute practices and policies which incentivize higher declination rates. One way to ensure this happens is to commit more resources to misdemeanor review.

As we move to converting more misdemeanors to, for instance, civil penalties, we need to insist that strong protections exist against indigence, against for-profit fines, and against what have been called “pay or stay” for-profit schemes. In many of these cases the collection and incarceration costs much more than any profit collected and given the long list of collateral consequences from arrest it makes very little sense to try to generate funds in this manner.<sup>8</sup>

Finally, we must change the way we think about misdemeanor conduct. As a state we need to realize that low-level convictions carry life-long consequences. These are petty convictions in name only, as the collateral consequences can be extreme.<sup>9</sup> We should also realize that while we generally treat all people with convictions the same, this is probably inaccurate and unfair in many cases. At the bottom of the culpability pyramid where non-serious misdemeanors reside, many of the people who end up with misdemeanor charges, even those ending in pretrial or post-trial incarceration, were originally engaged in relatively blameless and harmless conduct. Most of our criminal justice lexicon doesn’t apply in the same way to minor offences. For instance, people probably obey and disobey minor prohibitions for very different reasons than

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<sup>6</sup> Rachel A. Harmon, *Why Arrest?*, 115 Mich. L. Rev. 307 (2016). Available at: <https://repository.law.umich.edu/mlr/vol115/iss3/1>

<sup>7</sup> Final Report of the President’s Task Force on 21st Century Policing, May 2015, [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf)

<sup>8</sup> Criminal Justice Policy Program, *Confronting Criminal Justice Debt: A Guide For Policy Reform*, <http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf>

<sup>9</sup> ABA Criminal Justice Section Judicial Bench Book, *The National Inventory of Collateral Consequences of Criminal Convictions*, <https://www.ncjrs.gov/pdffiles1/nij/grants/251583.pdf>

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they obey and disobey serious ones.<sup>10</sup> Most all of us have committed, at some point in our lives, similar offenses and in almost all cases, the “cure” of incarceration is worse than the disease.<sup>11</sup>

Thank you for your time and consideration.

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<sup>10</sup> Herzog, Donald J. "Democracy, Law, Compliance." *Law & Soc. Inquiry* 42, no. 1 (2017): 6-15.

<sup>11</sup> John Pfaff, "The Incalculable Costs Mass Incarceration," *The Appeal* <https://theappeal.org/the-incalculable-costs-of-mass-incarceration/#targetText=The%20other%20problem%20with%20focusing,provide%20no%20benefit%20to%20others.>