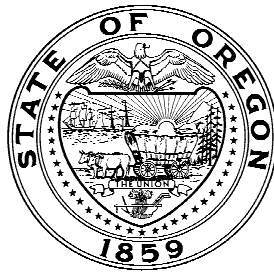


# Measure 11 Analysis

February 2011



Criminal Justice Commission

State of Oregon

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## **Executive Summary**

No public safety issue in Oregon evokes more emotional responses from participants in Oregon's criminal justice system than our mandatory minimum sentencing structure, Measure 11 (M11), passed in 1994. This report seeks to move beyond the strongly held beliefs about M11, to measuring how it has changed how sentencing decisions are made in Oregon in the past 15 years. The data from this report illustrates that M11 changed who makes the decision in individual cases as to appropriate punishment, when that decision is made, how that important choice is imposed in Oregon's 36 counties, and what the sentence in individual cases will be.

Part of the argument in favor of M11 offered by its chief petitioner in the November 1994 General Election Voter's Pamphlet<sup>1</sup> stated:

“The mandatory minimum sentences for the violent crimes listed in this measure are the minimum required for justice to society and the victim.”

The chief petitioner's assertion, that the sentences he proposed were the minimum necessary for justice to be served, cannot be measured as a true or false belief. Each individual's moral sense of what justice requires in an individual criminal case varies based upon the individual's own worldview, the facts of the case, and the individual's relation to the victim and the offender. To test whether millions of Oregonians would agree with whether the sentences in thousands of criminal cases provided justice to society and to the victim is impossible.

The sentences called for in M11 were only for those offenders who are convicted of committing the offense listed in the voter's pamphlet. What can be tested with Oregon data from the last 15 years is how many of those who were indicted for committing a crime listed in M11 by an Oregon grand jury based upon the evidence presented by the prosecutor were actually convicted of the offense for which the minimum sentence must be imposed. From 1995-2008, only 28 percent of offenders indicted for a M11 offense were convicted of the most serious offense for which a grand jury returned an indictment. In only 28 percent of the cases indicted did M11 accomplish the goal of assuring the judge imposed the sentence the chief petitioner claimed was the minimum necessary for justice to society and the victim. M11 altered how the other 72 percent of cases were handled: it shifted control of the sentencing process from the judge to the prosecutor, but gave no guidance as to what sentence was appropriate. The critical decision became whether to seek conviction for the charge in the indictment that carried the mandatory minimum sentence. M11 left the decision about what sentence to seek in thousands of the most serious cases up to the individual district attorneys, and their deputies, in Oregon's 36 counties. It provided no rules, guidelines, or law about how that decision should be reached. It did not list specific factors that should be weighed in determining whether or not the minimum sentence was required in a specific case. On its face it simplified sentencing, eliminating the gray areas that a neutral judicial officer might probe. Whether the defendant who sexually touched a 13 year old victim was a 17 year old “boyfriend” or a 45 year old ex convict were not factors to be weighed. If the criminal elements of

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<sup>1</sup> See the appendix for arguments for and against M11.

sexual abuse in the first degree, satisfied by either scenario, were proven by guilty plea or trial, the sentence called for was 75 months in prison. Whether the weapon in a robbery in the first degree was a pocketknife in the hands of a high school freshman or a handgun in the hands of a “seasoned” bank robber were not factors to be weighed by a neutral judge on a case by case basis. Where the legal sufficiency for a robbery with a dangerous or deadly weapon were satisfied M11 proscribed the sentence must be 90 months. This report makes clear the effect of the law was to push tough choices about what the sentence should be in an individual case to the executive branch. It marginalized the role of the judge in the sentencing process. This report illuminates the importance of tracking the 72 percent of cases in which the offender is convicted of a lesser charge through individual case decisions made by the prosecutor. For the first time, data is available to track a case from indictment to conviction, and the impact of the measure can now be measured with greater clarity.

Punishment to fulfill a moral sense of justice and accountability is a principle of criminal justice enshrined in Oregon’s Constitution: that those who cause crime victims and the greater society the pain of crime should suffer the pain and loss of liberty proportionate to their crime is one of the foundations of Oregon’s criminal justice system. However, the chief petitioner did not stop at this moral justification for the sentences in M11. In a diverse state where consensus on a moral issue may be impossible, other justifications for a criminal sentence may be necessary. This other basis for criminal sentencing is usually another purpose of punishment enshrined in Oregon’s constitution: public safety.

The chief petitioner moved from a moral justification regarding M11 to justifying M11 on what are often called “utilitarian” or “public safety” grounds as well. The chief petitioner asserted in the 1994 voter’s pamphlet to justify M11:

“Requiring solid, minimum prison time for violent crimes will result in:

- Incapacitation. The criminal cannot commit other crimes while in prison. This will reduce actual crime in society.
- Deterrence. Career criminals will learn that crime does not pay in Oregon. Some of them will leave, or change their ways.
- Predictability of sentences. Right now, the range of sentences is so broad, and the reasons for increasing or reducing sentences so broad, that it is hard to predict what actual sentence will be imposed. With these mandatory minimums, everyone will know the exact minimum sentence which must be served for the crime.
- Comparable sentences. All judges in Oregon, no matter how soft, must impose the minimum sentence for a violent crime when a jury has found the criminal guilty. Sentences can be higher if the circumstances call for it, but they cannot be lower.”

These four outcomes can be considered with more practical or quantitative means than the cultural and moral conflicts inherent in the moral justification discussed earlier.

As to incapacitation, that M11 greatly increased Oregon's use of incarceration, as the means to incapacitate offenders, is evident from the last 15 years of data. How much crime is actually avoided due to incapacitation of offenders generally, due to all Oregon's sentencing policies, has been explored in earlier reports by the Oregon Criminal Justice Commission.<sup>2</sup> The magnitude of crime avoided due to incapacitation is dependent upon how adept Oregon's criminal justice system is at identifying those offenders who pose the highest risk of engaging in criminal behavior in the future. M11 did not validate this type of assessment of individual offender's likelihood of committing crimes in the future, in fact it contravened such an evaluation by a judge if that analysis would lead to a shorter prison sentence for low risk offenders who committed a crime that did not, in the judge's opinion, require the sentence set for all cases by M11. Also, M11 never assessed the opportunity cost of a policy of investing a greater amount of taxpayer funds in imprisonment rather than community policing, mandatory supervision, local jail sanctions to modify behavior that violated the terms of that supervision, offender education, addiction treatment, domestic violence issues, and juvenile services. According to research regarding "what works" gleaned in the 16 years since its passage, this opportunity cost has meant Oregon has not invested in those aspects of the public safety system designed to provide the greatest "bang for the buck." Instead, those dollars have been instead concentrated on severity of punishment measured in an increase in years of prison served, with a return on investment that has been diminishing over time according to the earlier Oregon Criminal Justice Commission report cited above.

As to deterrence, the chief petitioner predicted "career criminals will learn that crime does not pay in Oregon. Some of them will leave, or change their ways." At the outset, it is important to note that most offenders who committed a M11 offense, as evidenced by indictment for a M11 offense, had no prior convictions for a felony when they committed the crime. Even fewer had a prior conviction for a "person felony," meaning a crime that injured or threatened to injure a person, rather than the possession, sale, or manufacture of drugs or theft or damage to property.

Deterrence as a crime control policy has been debated for decades, and this examination of M11 does not seek to add to that debate. However, several things about deterrence must be pointed out when one critically evaluates if M11 met this stated goal. First, deterrence depends on the offender's perception of the probability and severity a punishment will occur because of his or her actions. While incapacitation "works" without this perception, deterrence does not. Deterrence is a way to avoid crime by making the threat for getting caught too likely or too severe. It demands a calculation of the risk of apprehension and the severity of the probable punishment. It is important to point out that M11 sentences govern crimes committed by 15, 16, and 17 year old offenders who may be less likely to assess such a calculus and then control their impulses than adults. M11 also encompasses criminal behavior where the offender acted recklessly rather than intentionally. M11 sets mandatory minimum sentences for reckless behavior (Manslaughter 1, Manslaughter 2, Assault 1, and Assault 2) where the offender is aware

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<sup>2</sup> See pages 9-12 of the Criminal Justice Commission's 2007 Report to the Legislature (<http://www.ocjc.state.or.us/CJC/CJC2007Reporttolegislature.pdf>).

of and consciously disregards a substantial and justifiable risk that a result will occur, but does not know or want such a result to occur. The grave impact to the victim if he or she is killed or seriously injured does not change, but the likelihood of deterring an outcome that was not the conscious objective of the actor seems less likely than where the act is intentional.

The effect of deterrence is also minimized when the offender is intoxicated by drugs or alcohol at the time of the offense. Oregon Department of Corrections data, stored in the Corrections Management Information System, indicates that 72 percent of offenders incarcerated in state prison in October of 2010, disclosed a severe to moderate problem with drugs and alcohol. That intoxication leads to violence has been a subject of some research, and the diminished ability to control aggression in individuals who are intoxicated would also diminish the ability to control one's actions in light of a more severe possible prison punishment.

If deterrence works, it eliminates the need for the punishment because the criminal act is prevented. That two thousand offenders are indicted every year for M11 crimes is an indication that it did not work in those cases. Whether the offenders in those cases knew they were committing a crime that carried a mandatory prison sentence if they were caught and prosecuted is an area where future research may be enlightening as to M11's deterrent effect.

Another favorable outcome promised by the chief petitioner if voters passed M11 was predictability of sentences. M11 sought to achieve this end by creating a "one size fits all" mandatory minimum sentences for offenders convicted of crimes listed in the statute for offenders 15 years of age and older. However, the predictability that is seen when someone is convicted of one of the crimes in M11 does not mean there is predictability as to the 72 percent of cases where the plea bargain process allows the offender to plead guilty to an offense that is something less than he or she actually committed, based upon the grand jury indictment. The data presented here makes clear that although the sentencing structure of the guidelines was taken away for those cases that begin with a M11 indictment and end with a felony conviction outside its scope, case by case analysis still occurs. M11 pulled the sentencing discussion away from the judge in open court, and into the prosecutor's office. Rather than authorizing a judge, and guiding that judge with a legal structure as to how to decide sentences in individual cases, M11 drove more of the sentencing decisions to the plea negotiation. If the offender accepted a plea agreement to any crime other than the M11 offense, M11 did not give guidance to the sentence. If the offender did not accept the proffered plea agreement, the prosecutor terminated negotiations and sought conviction at trial, and if a M11 conviction was obtained the decision making on the sentence was taken out of the judge's hands. The passage of Senate Bill 1049 in 1997, and other following legislation, allowed judges to decide the sentence for certain offenses and changed this dynamic, but M11 as passed by the voters focused so greatly on establishing uniformity in sentences upon conviction that it left most of the sentencing decisions to the prosecutor in determining when he or she would actually seek a conviction for the charge that carries the mandatory sentence.



The tables below show that the range of sentences that result from plea negotiations continues to be broad, despite the promise of predictability.

The chief petitioner also asserted M11 would produce an outcome of “comparable sentences” throughout Oregon no matter the judge. While M11 made the sentence clear and definite in the minority of cases where a conviction is obtained for the most serious crime, it did not give guidance as to which offenders and offenses merited such a sentence, and gave no guidance as to whether the mandatory minimum sentence was warranted in individual cases. M11 provided a definite and certain sentence for those who were convicted, but data reveals it also has caused prosecutors to seek that conviction less frequently than prior to its passage. This report illustrates that prosecutors do not apply the decision making powers granted to them by M11 comparably in the 36 counties. This report also illustrates that without guidance as to how to apply M11 statewide, there is broad county by county disparity as to the sentences actually imposed where the offender was indicted for a M11 crime.

The necessity of carefully choosing whether or not to seek a M11 conviction became a constitutional question of proportionality when the Oregon Supreme Court decided **State v. Rodriguez**, 347 Or. 46, 217 P.3d 659 (2009). In the Rodriguez case, the court decided that the sentence for sex abuse in the first degree of 75 months prison proscribed by M11 was too severe when applied to a woman who had no prior felony convictions and committed the crime of holding the back of the 12 year-old victim's head against her clothed breasts for a sexual purpose, while massaging the sides of his head. The court decided the M11 sentence was “cruel and unusual punishment” as applied in that case. With the *Rodriguez* case, the Oregon criminal justice system can no longer apply the M11 sentence blindly in any case where there is a conviction. The “comparable sentences” outcome promised by the chief proponent can no longer be delivered in all cases where there is a conviction without violating the Oregon Constitution. A judge now must look at cases with mitigating circumstances and decide if M11’s “one size fits all” is unjust as applied in an individual case. The court’s decision is too recent to be evaluated, but future research will indicate how often judges step in to avoid a sentence that is not proportional to the harm.

This report sheds light on how M11 has been applied across counties, demographics, crime types and other factors. The report makes the following findings of how M11 has been applied and its impact on the criminal justice system:

- The typical M11 offender is white (74 percent), male (91 percent), adult (89 percent) and has no adult felony convictions in their criminal history. Only 30 percent have been previously convicted of a felony, 15 percent have been convicted of a person felony and 15 percent have been previously incarcerated at an Oregon prison.
- In 2009, M11 charged and M11 convicted offenders made up 34 percent of prison intakes and 64 percent of all prison months imposed in 2009 were imposed on these offenders.

- Statewide, 29 percent of M11 indicted offenders were convicted of their most serious charge and 42 percent were convicted of either that offense or another M11 crime. Statewide, 62 percent of M11 indicted offenders were sentenced to prison.
- M11 is applied differently across counties. In the five most populous counties, Multnomah County convicts the lowest percentage of M11 indicted offenders for a M11 crime at 36 percent, while Marion County convicts 63 percent. The differences across counties are statistically significant even after controlling for other factors. Offenders indicted for a M11 offense in one of the five most populous counties are 79 percent more likely to be convicted of a M11 and twice as likely to receive a prison sentence as offenders in the other 31 counties. This is counter to the prevailing myth that officials in counties in Eastern Oregon, away from Oregon's four largest cities, would be less likely to offer offenders plea negotiations to lesser offenses.
- M11 is also applied differently across demographics. Juveniles and females indicted for a M11 are both less likely to receive a M11 conviction. These differences are statistically significant with juveniles and females both being about 20 percent less likely to be convicted of a M11 offense. M11 conviction rates also differ by ethnicity. Blacks who are indicted for a M11 are about 20 percent less likely to be convicted of a M11 offense than whites. Hispanics indicted for a M11 offense are 40 percent more likely to receive a prison sentence than whites.
- The type of attorney an offender obtains and whether or not the case goes to trial are both important in the outcome of M11 cases. M11 indicted offenders who go to trial are nearly four times more likely to be convicted of a M11 offense. M11 indicted offenders who have a private attorney are about 30 percent less likely to be convicted of a M11 offense. Both attorney type and whether or not a case went to trial are highly significant.
- A M11 indicted offender's criminal history is important in determining whether they are convicted of a M11 offense. A M11 indicted offender with three or more prior person felonies is nearly twice as likely to be convicted of a M11 offense.
- Upon the passage of M11 fewer M11 indicted offenders were convicted of their most serious offense. During the 1990's, offenders who were subject to M11 were 34 percent less likely to be convicted of their most serious offense than those who committed crimes before the passage of M11.
- Upon the passage of M11, M11 indicted offenders were much more likely to go to prison and more likely to receive a longer prison sentence. Offenders who were subject to M11 were 36 percent more likely to go to prison and their median length of stay in prison was 81 percent longer.

- Upon the passage of M11 many more offenders were convicted of attempts of crimes listed in the M11 statute (ORS 137.700). Prior to M11 only one in eight convictions were for attempts while after M11's passage that increased to one in three.
- The number of convictions for M11 and M11 attempts changed little after the passage of M11, increasing by 4 percent from 1990 to 2009. The number of prison months imposed increased by nearly 140 percent; meaning the number of convictions changed very little but the likelihood of going to prison and the length of stay for prison sentences increased sharply.
- The estimated impact on the overall prison population from the passage of M11 was ??
- It appears that SB 1049, which allowed guidelines sentences for some M11 offenses, did not have much of an impact on the prison population. The prison months imposed for offenders indicted for crimes eligible for an "opt out" sentence changed very little after the passage of this law. It appears that the main effect of the law was that the prosecutor was more comfortable seeking the conviction for those cases in which the judge could "opt out" of the M11 sentence. Rather than the prosecutor offering a conviction to a lesser charge that did not carry a mandatory prison sentence, the case was more often resolved with a conviction for the most serious offense with the judge deciding the sentence.

## **Introduction**

Before delving into the data on how Measure 11 (M11) is applied, a brief reflection on the sentencing structures that existed before it passed may be helpful to understand the context of the measure. Oregon instituted a parole system of sentencing in the early 1900s. In such a system, for offenders who were sentenced to prison the judge would set a maximum term of imprisonment, and the parole board had broad discretion to allow the offender to serve out a great portion of the sentence in the community rather than in a prison cell. If an offender violated the terms of parole while in the community he or she could be sent back to prison. Prior to 1977, the Oregon parole system was a “discretionary” parole system, meaning the parole board did not give the offender, or the victim and parties, a release date when the offender could expect to be paroled if they did not cause problems in prison. Instead, the offender was notified of hearings at which the issue of parole would be considered. In 1977, this system was moved from a discretionary system, to a matrix system. Under the matrix system, after sentencing but at the beginning of incarceration, the parole board gave the offender a projected parole date. This change sought to achieve equity among inmates so that similar prisoners would serve a similar length of time.

The 1970s saw a dramatic increase in violent crime in Oregon that continued through to the early 1990s. Due to this increase in crime, and the lack of construction of prison beds to keep pace with it, Oregon began to experience prison overcrowding issues in the mid-1970s. Inmate litigation alleging that prison conditions violated the United States Constitution’s 8<sup>th</sup> amendment’s prohibition against cruel and unusual punishment ensued. In Capps v. Atiyeh, 495 F.Supp. 802 (D.Ore.1980), a federal district court held that Oregon prisons presented unconstitutional conditions and ordered the state to reduce the institutional populations. On appeal, the U.S. Court of Appeals vacated and remanded the order to the U.S. District Court. In December of 1982, the U.S. District court said that while Oregon’s prisons did not violate constitutional standards they were, nonetheless, so seriously overcrowded that future court intervention could be likely if remedial steps were not taken. The overcrowding caused greater pressure on the parole process, so that paroles increased in this time period.

The legislature sought increased revenues to pay for increased prison capacity to deal with the increase in violent crime and reduce overcrowding and paroles. From 1980-1986 the Oregon legislature sent three referrals to Oregon voters to finance building more correctional facilities.<sup>3</sup> All three measures failed at the ballot box. For frame of reference as to Oregon’s prison capacity at this time, when Measure 8 failed in 1980, the prison population in Oregon was just under 2,800 inmates. In May of 1986, when Measure 5 failed, the prison population had increased to just less than 3,800.

In 1985 the Oregon Prison Overcrowding Project was initiated. This project sought to deal with overcrowding in Oregon, and called for the creation of the Oregon Criminal Justice Council to create a forum for planning and coordination of Oregon’s sentencing and corrections systems so that overcrowding would no longer ensue. As the legislative measures failed, the Oregon Criminal Justice Council recommended Oregon move away

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<sup>3</sup> Measure 8 on November 4, 1980, Measure 3 on May 18, 1982, and Measure 5 on May 20, 1986.

from a parole system of sentencing to a sentencing guidelines system that reflected the current prison capacity. In 1987, the Oregon legislature directed the Oregon Criminal Justice Council and the State Sentencing Guidelines Board to create sentencing guidelines for Oregon. In 1989, the Oregon Legislature ratified the sentencing guidelines created by the council and the guidelines board with House Bill 2250. The guidelines would apply to all felonies committed on or after November 1, 1989. It abolished parole for offenders sentenced under the guidelines. The sentence would be determined in the court room, and be imposed by the Department of Corrections without parole board consideration. When HB 2250 passed in July, 1989, the number of prisoners in Oregon's prisons had increased to 5,300.

When enacted, the Oregon Sentencing Guidelines governed the sentencing of all felons. The sentencing guidelines, a matrix of grid blocks, based the sanction (probation or prison) and the sentence length on the crime's severity and the offender's criminal history. Each felony is assigned a severity score, 1-11, and each offender is assigned a criminal history score, A-I, which together, determine the presumptive sentence for the offender. The judge is authorized to depart upward or downward from the presumptive sentence, if the facts of the individual case provide a compelling reason to do so. The sentencing guidelines also eliminated parole; thus offenders serve their entire sentence minus earned time of up to 20 percent.<sup>4</sup> In the two decades since 1989, other sentencing schemes have overridden the guidelines, notably, M11 and the Repeat Property Offender (RPO) statute, ORS 137.717. These statutory sentencing structures have pushed Oregon's current prison population to over 14,000.

In 1994 voters passed M11, which created mandatory minimum prison sentence for 16 violent or sexual offenses and created a mandatory waiver for juveniles 15 years of age and older to adult court for these offenses. Since 1994, the legislature has added six more crimes and has increased the length of sentence for four of the existing mandatory minimums under certain circumstances. The legislature also moved to allow certain offenders convicted of the "second degree" or less serious offenses within M11 to be eligible for an "opt out" of M11 if they meet certain criteria.<sup>5</sup>

The sentences range from 70 months to 300 months and "trumped" the sentencing guidelines. For example, under the guidelines an offender convicted of Robbery II with a criminal history of C<sup>6</sup> would face a presumptive prison sentence between 56-60<sup>7</sup> months with a potential 20 percent reduction in sentence for good behavior. M11 created a mandatory minimum prison sentence of 70 months for Robbery II for all offenders, regardless of the facts of the individual case or the offender's criminal history.

The analysis below quantifies how M11 has been applied and what factors contribute to M11 indicted offenders being convicted of a M11 offense and sentenced to prison. It also

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<sup>4</sup> HB 3508 temporarily increased earned time for many offenses to 30 percent.

<sup>5</sup> ORS 137.712 allows for exceptions to the mandatory minimums for Assault II, Kidnapping II, Rape II, Sodomy II, Unlawful Sexual Penetration II, Sex Abuse I and Robbery II if certain conditions are met.

<sup>6</sup> A "C" on the sentencing guidelines grid is one person felony plus one or more non-person felonies.

<sup>7</sup> The full range of sentences under the guidelines for Robbery II is 36-70 months of prison.

examines the impact SB 1049 and the overall estimated impact of M11 on the prison population.

<b>Offenses in M11</b>		
<b>Crime</b>	<b>ORS number</b>	<b>Minimum Sentence</b>
<b>Arson 1 (CS 10 only)</b>	164.325	90
<b>Assault 1</b>	164.185	90
<b>Assault 2*</b>	164.175	70
<b>Attempt or Conspiracy to Commit Aggravated Murder</b>	163.095	120
<b>Attempt or Conspiracy to Commit Murder</b>	163.115	90
<b>Compelling Prostitution</b>	167.017	70
<b>Kidnapping 1**</b>	163.235	90, 300
<b>Kidnapping 2*</b>	163.225	70
<b>Manslaughter 1</b>	163.118	120
<b>Manslaughter 2*</b>	163.125	75
<b>Murder</b>	163.115	300
<b>Rape 1**</b>	163.375	100, 300
<b>Rape 2*</b>	163.365	75
<b>Robbery 1</b>	164.415	90
<b>Robbery 2*</b>	164.405	70
<b>Sexual Abuse 1*</b>	163.427	75
<b>Sexual Penetration 1**</b>	163.411	100, 300
<b>Sexual Penetration 2*</b>	163.408	75
<b>Sodomy 1**</b>	163.405	100, 300
<b>Sodomy 2*</b>	163.395	75
<b>Use Child in Display of Sex Act</b>	163.670	70
<b>Aggravated Vehicular Homicide</b>	163.149	240

\* ORS 137.712 may authorize the court to impose a sentence of less than the M11 minimum.

\*\* 300-month minimum applies only to adult defendants and for crimes committed on or after April 24, 2006. See ORS 137.700 for complete information about 300-month minimum sentences.

Table 1

## Methodology

Nationally, very few studies have examined how mandatory minimum sentencing laws have been applied from indictment through conviction. Even fewer studies have looked specifically at how Oregon's M11 changed the disposition of cases.<sup>8</sup> Prior studies of M11 relied on Department of Corrections (DOC) data on sentences imposed after a conviction to infer how M11 was applied. However, DOC data records do not contain the original charge issued against the offender by the grand jury indictment. Without this key information, it is impossible to track the actual charging and disposition practices that show how M11 crimes are handled from indictment to conviction. This is important because the prosecutorial discretion inherent in this phase of sentencing has not previously been quantified. Understanding and quantifying this dynamic brings more transparency to Oregon's criminal justice system and improves the state's ability to estimate the impact of changing sentencing laws. This problem has been rectified by recently available data from the Oregon Judicial Information Network (OJIN), which has data on both charge and conviction.

OJIN contains information on all charges in Oregon, the dispositions and sentences on those charges, as well as demographic information of offenders. Using OJIN data, allows analysts to identify the initial charges in the formal accusatory instrument, charges indicted by the grand jury, how often individual offenders are convicted of those charges, and the sentences imposed based on those convictions. These comparisons are important because Oregon law directs the grand jury "may only find an indictment when all the evidence before it, taken together, is such as in its judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury."<sup>9</sup> The prosecutor does *not* have a duty to seek conviction for the charges in the indictment, and in many cases reduces or dismisses charges found in the indictment to resolve the case by agreement with the offender rather than at trial. This report seeks to better understand the discretion that is used in applying M11 and how that discretion has changed over time.

For this analysis, we rely on the language of ORS 132.390 to provide the best information about what crime actually occurred and the state has evidence to prove if an offender asserts the right to a jury trial. Our analysis then considers the movement from indictment to conviction as the point in the system where application of prosecutorial discretion impacts the actual sentence for the crime. There is certainly discretion before this point by police officers on the arresting charge and discretion by prosecutors on the initial charges filed and presented to the grand jury. The prosecutors have discretion on whether or not to present the case to the grand jury, and then upon indictment they have discretion on whether or not to offer a sentence recommendation as part of a negotiated settlement to the case. Judges still have discretion as to whether to accept the agreement proffered by the parties, and under ORS 137.712 have some discretion as to the sentence on certain M11 crimes. Yet, this analysis makes clear that the prosecutor's case by case

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<sup>8</sup> A 2003 Rand study analyzed the impact of M11 but did not have indictment data and as a result was unable to analyze the discretion from indictment to conviction.

<sup>9</sup> See ORS 132.390 (<http://www.leg.state.or.us/ors/132.html>)

disposition involving indictments returned by grand juries is where the bulk of the sentencing decision is made on M11 offenses. This decision is in part governed by the strength of the case, including practical considerations like witness availability, but may also be governed by what the prosecutor believes is in the interest of justice considering the victim, offense, and offender in an individual case or indictment.

Cases where charges are dismissed or reduced after an indictment are more likely to be the result of prosecutorial discretion in light of sentencing considerations than cases screened before the indictment by grand jury. Certainly some cases will be dismissed after the indictment because of lack of evidence, but this is less likely than in cases that were never indicted in the first place because of lack of evidence.

In order for a charge to be included in this analysis there needed to be an indictment date with the indictment date occurring prior to the disposition date. This means that if a M11<sup>10</sup> charge was reduced to a non-M11 charge before the indictment that case was not included in this analysis. However, if the charge was reduced after the indictment it was included as a M11 case. Additional cases were dropped if they were concurrent with another M11 case in a different county. Only cases that had a status of “Closed” or “On Appeal” were included. 2008 was the last year analyzed, as many cases begun in 2009 or 2010 were still unadjudicated at the time of this report.

Once it was determined there was a M11 indictment on the case, the most serious<sup>11</sup> charge was chosen. Analysts then looked in OJIN to see what the most serious conviction was on that case as well as the sentence on the most serious conviction. It is not clear from OJIN data which sentences are consecutive and which are concurrent so analysts merged in DOC data to estimate the length of stay if there was a prison sentence on the case. Finally, we used the Law Enforcement Data System (LEDS) for arrests as well as DOC data for convictions to include the criminal history of each M11 indicted offender. The data were merged together using the state identification number which is nearly always available for M11 crimes.

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<sup>10</sup> For this analysis M11 crimes includes all crimes currently listed in ORS 137.700 and 137.707 except for Arson I. It is a M11 crime only when the offense represented threat of serious physical injury and the crime seriousness is a level 10, but OJIN data does not include this field making it impossible to determine which charges were for a M11 Arson.

<sup>11</sup> We used the DOC severity score to determine the most serious charge.



### Trends in M11 Indictments

Table 2 shows that M11 indictments have remained stable since its inception in 1995. Not including 1995, there has been an average of just over 2,200 indictments per year for crimes listed in M11. The number of indictments in 2008 was 11 percent higher than 1996, but once adjusted for population the number of indictments per Oregonian over this time period has decreased by nearly 5 percent. This decrease is much smaller than the 44 percent decrease in violent crime<sup>12</sup> over the same time period. In other words, there has not been a reduction in cases indicted by the grand jury for M11 offenses commiserate with the reduction in Oregon's violent crime rate. The consistent number of indictments through the years parallels the number of M11 arrests over this time period. This indicates a greater percentage of reported offenses resulted in an offender's prosecution in 2008 compared to 1995.

M11 Indictments by Year		
Year	N	Rate per 100k pop.
1995	1361	N/A
1996	2043	63.0
1997	2087	63.2
1998	2382	71.1
1999	2182	64.3
2000	2170	63.1
2001	2115	60.9
2002	2192	62.5
2003	2319	65.5
2004	2295	64.1
2005	2192	60.4
2006	2183	59.2
2007	2316	61.8
2008	2272	59.9
All	30109	63.0

Table 2

The number of indictments for crimes listed in M11 regardless of when the crime was actually committed is also relatively stable. It follows a trend similar to the one seen in table 2 with nearly 2,300 indictments per year. The number of indictments has been stable with only a 13 percent increase since 1991 and a 13 percent decrease in the number of indictments per Oregonian since 1991.

M11 Indictments by Demographics and Criminal History, 1995-2008		
	N	%
<b>Age</b>		
18 or older	26565	89.2%
Under 18	3209	10.8%
<b>Gender</b>		
Female	2579	8.7%
Male	27195	91.3%
<b>Race</b>		
Other	1204	4.0%
Black	3056	10.3%
Hispanic	3592	12.1%
White	21922	73.6%
<b>Criminal History</b>		
Prior Felony	8710	29.3%
Prior Person Felony	3816	12.8%
Prior Incarceration	3844	12.9%
<b>Total</b>	<b>29774</b>	<b>100%</b>

Table 4

<sup>12</sup> The violent crime rate is measure by the FBI's UCR program and includes homicides, rapes, robberies and aggravated assaults.

Table 3 shows the frequency of M11 indictments, by the most serious offense, since its inception in 1995.<sup>13</sup> Assault II is the most common M11 offense, accounting for more than one in five M11 indictments. Some crimes listed in M11, Assault II and Robbery II being the most common, are eligible for a non-mandatory minimum sentence.<sup>14</sup> These crimes are sentenced based on the sentencing guidelines. Since the “opt out” is determined upon conviction, not indictment, these offenses are included in this analysis of M11.

<b>M11 Indictments by Crime, 1995-2008</b>		
<b>Crime</b>	<b>N</b>	<b>%</b>
<b>ASSAULT II</b>	6352	21%
<b>ROBBERY I</b>	3606	12%
<b>SEX ABUSE I</b>	3441	11%
<b>ROBBERY II</b>	3049	10%
<b>RAPE I</b>	2774	9%
<b>ASSAULT I</b>	1719	6%
<b>SODOMY I</b>	1564	5%
<b>KIDNAPPING I</b>	1504	5%
<b>KIDNAPPING II</b>	1152	4%
<b>SEX PENETRATION FOREIGN OBJ I</b>	1137	4%
<b>MURDER ATTEMPT</b>	1030	3%
<b>RAPE II</b>	921	3%
<b>MURDER</b>	606	2%
<b>MANSLAUGHTER I</b>	310	1%
<b>MANSLAUGHTER II</b>	294	1%
<b>USE CHILD DISPLAY SEX ACT</b>	280	1%
<b>MURDER AGGRAVATED ATTEMPT</b>	128	0%
<b>SODOMY II</b>	83	0%
<b>PROSTITUTION COMPELLING</b>	80	0%
<b>SEX PENETRATION FOREIGN OB II</b>	79	0%
<b>All</b>	30109	100%

Table 3

Table 4 breaks down M11 indictments by demographic characteristics. The typical offender indicted for a M11 crime is an adult, white male. However there are large differences across crime types.<sup>15</sup> About one in twelve indictments are for females, but for Manslaughter I and II nearly one in five indictments are for females. Just over one in ten of all M11 indictments are for juveniles but nearly one in five indictments for Robbery II are juveniles. Blacks also make up about one in ten of all M11 indictments but make up over one in five indictments for Robbery II and Attempted Murder.

Table 4 also examines the Oregon criminal history of offenders indicted for a M11 offense. Most offenders have no previous adult felony convictions in the state of Oregon, with 70 percent of offenders having no prior felony convictions. Even fewer offenders have been previously incarcerated at an Oregon prison or convicted of a person felony, with just over one in eight M11 indicted offenders having at least one prior incarceration or person felony in the state of Oregon.<sup>16</sup>

<sup>13</sup> Using a child in a display of sexually explicit conduct, compelling prostitution, attempted murder and attempted aggravated murders were added in SB 1049 in 1997.

<sup>14</sup> ORS 137.712 lists the offenses and the reasons a case can be sentenced under the guidelines instead of the mandatory minimum.

<sup>15</sup> See the appendix for a detailed table on demographics by M11 crime.

<sup>16</sup> The DOC data only captures prior adult convictions in Oregon and is somewhat unreliable for convictions prior to 1990. Offenders convicted further in the past may be missing prior convictions and incarcerations. However, when the criminal history for indicted offenders in 2008 was used the results were

## M 11 Dispositions

In 1989 the sentencing guidelines were enacted to bring “truth in sentencing” to Oregon’s courts by making sentencing more predictable, proportional and fair, and by ensuring that criminal offenders would serve the bulk of their sentence without eligibility for early parole. The guidelines created a structured system where the sentence and time served is fairly predictable. There is room for judges to depart upward or downward but most sentences fall within the presumptive sentence set by the sentencing grid. All M11 convictions, not eligible under ORS 137.712, receive a mandatory prison sentence upon conviction and are not eligible for earned time. However, the disposition practices from indictment to conviction for M11 cases are neither structured nor uniform. This section analyzes the dispositions of M11 indictments.

When M11 appeared on the ballot in 1994 part of the intent was to ensure predictability of sentences. The argument in favor of M11 forwarded by one of the chief petitioners stated: “Right now, the range of sentences is so broad, and the reasons for increasing or reducing sentences are so broad, that it is hard to predict what actual sentence will be imposed. With these mandatory minimums, everyone will know the exact minimum sentence which must be served for the crime.”<sup>17</sup>

M11 sought to accomplish this by creating mandatory minimum sentences for offenders convicted of crimes listed in the statute. However, the predictability that is seen at sentencing does not mean there is predictability as to what sentence will be served for the crime *committed* if the grand jury indictment is a better indicator of the crime committed, based on ORS 132.390, than the crime of conviction after the plea bargaining process.

The tables below break down convictions into four categories: most serious M11 conviction, other M11 conviction, other felony conviction and no conviction. If the most serious charge in the grand jury indictment is for Robbery I and the offender is ultimately convicted of Robbery I, that case is classified as “Most Serious”. If the most serious charge in the grand jury indictment was Robbery I, but the conviction was for a less serious mandatory minimum charge of Robbery II that case would be classified as having an “Other M11”<sup>18</sup> conviction. If the most serious charge in the grand jury indictment is for Robbery I, but the most serious conviction was for a crime not included in ORS 137.700, like Robbery III or “Attempted Robbery II”, that case would be classified as having an “Other” conviction. Finally, if the case was dismissed or the offender acquitted of all charges on that case it would be classified as “No Conviction”.

The five largest counties account for 56 percent of all M11 indictments, with Multnomah County alone accounting for 21 percent. Table 5 below shows the differences in dispositions for M11 indictments in the five largest counties.<sup>19</sup> Marion County has the highest percentage of offenders who are convicted of their most serious M11 indictment

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similar with 30 percent having at least one prior adult person felony and 15 percent having at least one prior adult person felony or at least one prior incarceration at an Oregon prison.

<sup>17</sup> See voter’s pamphlet in Appendix B.

<sup>18</sup> This includes conviction that may be eligible for a non-M11 sentence under ORS 137.712.

<sup>19</sup> Dispositions for all counties can be found in table A-2 and map A-1.

while Multnomah County has the lowest. The differences are large with indicted offenders in Marion County more than twice as likely to be convicted of their most serious offense. There are large differences within the five largest counties, and there are also differences between the five largest counties and the rest of the state. Offenders indicted for a M11 offense in the five largest counties are 41 percent more likely to be convicted of a M11 offense than offenders prosecuted in the rest of the state, with nearly half of the M11 indicted offenders in the five largest counties being convicted of a M11 offense.

M11 Dispositions by County, 2008									
County	Convicted Most Serious		Convicted Other M11		Other		No Conviction		All
	N	%	N	%	N	%	N	%	N
<b>MULT</b>	99	21%	69	15%	263	56%	42	9%	473
<b>WASH</b>	110	41%	39	15%	109	41%	8	3%	266
<b>MARI</b>	120	48%	37	15%	70	28%	25	10%	252
<b>LANE</b>	57	38%	23	15%	64	42%	8	5%	152
<b>CLAC</b>	46	34%	22	16%	58	43%	9	7%	135
<b>5 County Total</b>	432	34%	190	15%	564	44%	92	7%	1278
<b>Rest of State</b>	230	23%	112	11%	541	54%	111	11%	994
<b>State</b>	662	29%	302	13%	1105	49%	203	9%	2272

Table 5

There are also variations in dispositions across M11 crimes.<sup>20</sup> Table 6 shows that out of the five most frequent M11 offenses, Robbery II cases are the most likely to be convicted of the most serious charge while Robbery I cases are the least likely to be convicted of the most serious charge. Part of the reason for the higher conviction rate for Robbery II charges is likely because offenders convicted of Robbery II do not necessarily receive a mandatory minimum sentence due to ORS 137.712. This factor means the prosecutor can seek conviction for Robbery II and still recommend a lesser sentence if the circumstances of the individual case merit it, as the judge is authorized to consider the individual case facts. This may include mitigating circumstances that would only be accounted for in the disposition phase for those charges not regulated by ORS 137.712. Close to half of all convictions for Robbery II and Assault II end up with a non-M11 sentence. The added discretion after conviction seems to make it more likely for prosecutors to convict these offenders for their most serious crime. The first degree M11 crimes typically have a large percentage of convictions for other-M11 crimes, with over half of Robbery I indictments ending up with a conviction for a M11 crime. Robbery II is the most common conviction on cases where Robbery I is the most serious charge.

M11 Dispositions by Crime, 2008									
Crime	Most Serious		Other M11		Other		No Conviction		All
	N	%	N	%	N	%	N	%	N
<b>ASSAULT II</b>	159	31%	0	0%	317	62%	33	6%	509
<b>ROBBERY I</b>	68	26%	80	30%	100	38%	18	7%	266
<b>ROBBERY II</b>	93	37%	1	0%	133	53%	26	10%	252
<b>SEX ABUSE I</b>	73	30%	0	0%	140	57%	34	14%	247
<b>RAPE I</b>	64	30%	42	20%	78	37%	28	13%	212
<b>All</b>	662	29%	302	13%	1105	49%	203	9%	2272

Table 6

Table 7 shows that dispositions also vary according to the offender's age, gender, and ethnicity. Juvenile offenders are 21 percent less likely to be convicted of their most serious offense. The greatest difference is from male to female where females are 40 percent less likely to be convicted of their most serious offense. Blacks are 25 percent less likely than whites to be convicted of their most serious offense while Hispanics are 22 percent more likely than whites to be convicted of their most serious offense.<sup>21</sup> The

reasons for these differences are unclear. If members of certain demographic classes commit less serious crimes then we would expect a lower percentage to be convicted of their most serious offense. If, for example, women were more likely to be the drivers in a robbery rather than the principal criminal actor, we would expect them to be convicted of their most serious offense less often.

Another reason may be the criminal history of

offenders. Juveniles on average have shorter criminal records and as a result may get convicted less often. Whatever the reasons are, there are large differences in dispositions by demographic characteristics.

	<b>Most Serious</b>	<b>Other M11</b>	<b>Other</b>	<b>No Conviction</b>
<b>Age</b>				
Under 18	23.6%	15.5%	48.1%	12.6%
18 or older	29.9%	13.1%	48.8%	8.0%
<b>Gender</b>				
Female	17.9%	10.8%	62.2%	8.9%
Male	30.4%	13.6%	47.3%	8.5%
<b>Ethnicity</b>				
Black	21.6%	8.8%	56.7%	12.7%
Hispanic	36.9%	20.1%	38.1%	4.7%
White	28.7%	12.7%	49.5%	8.9%
Other	32.6%	12.0%	51.1%	4.3%

Table 7

Dispositions also vary by the type of defense attorney that an offender has. In cases that go to trial, offenders who have a private attorney are more likely to be found not guilty and less likely to be convicted of a mandatory minimum. In cases that do not go to trial, offenders with a private attorney are also less likely to be convicted of a mandatory minimum and more likely to have their case dismissed. Table 8 shows that offenders who have a publicly appointed attorney are 37 percent more likely to be convicted of a M11 offense.

<b>Attorney Type</b>	<b>Convicted Most Serious</b>		<b>Convicted Other M11</b>		<b>Other Conviction</b>		<b>No Conviction</b>		<b>All</b>
	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	
<b>Appointed</b>	560	31%	264	14%	863	47%	148	8%	1835
<b>Private</b>	100	24%	37	9%	238	57%	41	10%	416
<b>All</b>	660	29%	301	13%	1101	49%	189	8%	2251

Table 8

<sup>21</sup> These differences are examined in greater detail in the logistic regression section below using a statistical model that holds other measurable factors constant to examine the individual impact of each demographic characteristic.

The final table on dispositions examines the dispositions for offenders who went to trial. The majority of indicted offenders settle their case without going to trial. The 15 percent that do go to trial are much more likely to be convicted of a M11 offense than those who resolve their case by guilty plea. Nearly 70 percent of M11 cases that go to trial are convicted of a M11 offense. This is 87 percent higher than those that do not go to trial. On the other hand, those who go to trial also are 50 percent more likely to have their case end with no conviction, but not guilty dispositions are still only a small percentage of cases that go to trial. This table illustrates that the stakes are high when an offender decides between pleading guilty and avoiding a mandatory prison, or asserting his or her constitutional right to a jury trial.

<b>M11 Dispositions and Trials, 2008</b>									
<b>Trial</b>	<b>Convicted Most Serious</b>		<b>Convicted Other M11</b>		<b>Other Conviction</b>		<b>No Conviction</b>		<b>All</b>
	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	<b>N</b>
<b>No</b>	453	24%	265	14%	1043	54%	159	8%	1920
<b>Yes</b>	209	59%	37	11%	62	18%	44	13%	352
<b>All</b>	662	29%	302	13%	1105	49%	203	9%	2272

Table 9

## M11 Sentences

The tables above examined the dispositions of offenders indicted for M11 crimes. This information is important in clarifying the discretion surrounding M11 and quantifying how this differs across counties, crime types, and demographics. Equally as important is the sentences imposed on the offenders once a conviction is obtained. For those convicted of M11 offenses not subject to an “opt out” sentence under ORS 137.712, the sentence will be a prison term for the mandatory minimum or higher. However, in 2008, 58 percent of M11 indictments ended in a non-M11 disposition. The sentences on these convictions will vary by many of the same factors as the dispositions.

Table 10 shows that in the five largest counties<sup>22</sup> variations exist in the sentences imposed on offenders indicted for M11 offenses. The categories below are for the most serious sentence on the most serious conviction for a case that began with an indictment that alleged at least one crime in ORS 137.700 or ORS 137.707. The prison category refers to those cases where the sentence in OJIN is listed as prison. The probation category includes both misdemeanor and felony probation sentences. The “other” category includes mostly those sentenced to jail without a probation sentence. Those with no disposition have a sentence of “none”. There are also a small number of offenders adjudicated as “guilty except for insanity” under ORS 161.295 included in the “none” category.

Tables 5 and 10 illustrate that county prosecutors use their discretion in different ways in their respective counties. Multnomah County has a lower percentage of M11 indictments ending in a M11 conviction than the state average (36 percent vs. 42 percent). However, Multnomah County’s percentage of M11 indicted offenders that receive a prison sentence is higher than the state average (70 percent vs. 62 percent). Marion County is the opposite, having the highest percentage of M11 indictments ending in a M11 conviction (63 percent) but having the same percentage sentenced to prison as the state average (62 percent). It appears that in Multnomah County prosecutors are more likely to indict an offender for a M11 crime, and then obtain a plea agreement to lesser offenses. The plea agreements still include a prison sentence in many of these cases. In Marion County it appears that prosecutors are much more likely to convict of what they indict for. If they are unable to obtain a conviction for the M11 offense indicted, then offenders are more likely to receive a probation sentence or have their case dismissed. The differences between the five largest counties and the rest of the state are substantial. The percentage of M11 indictments ending in a prison sentence for each of the five largest counties is equal to or higher than the state average. M11 indicted offenders in the five largest counties are 38 percent more likely to go to prison than those indicted for crimes in the rest of the state. In the logistic regression section these differences are examined using a statistical model to isolate the county impacts by holding all other factors constant.

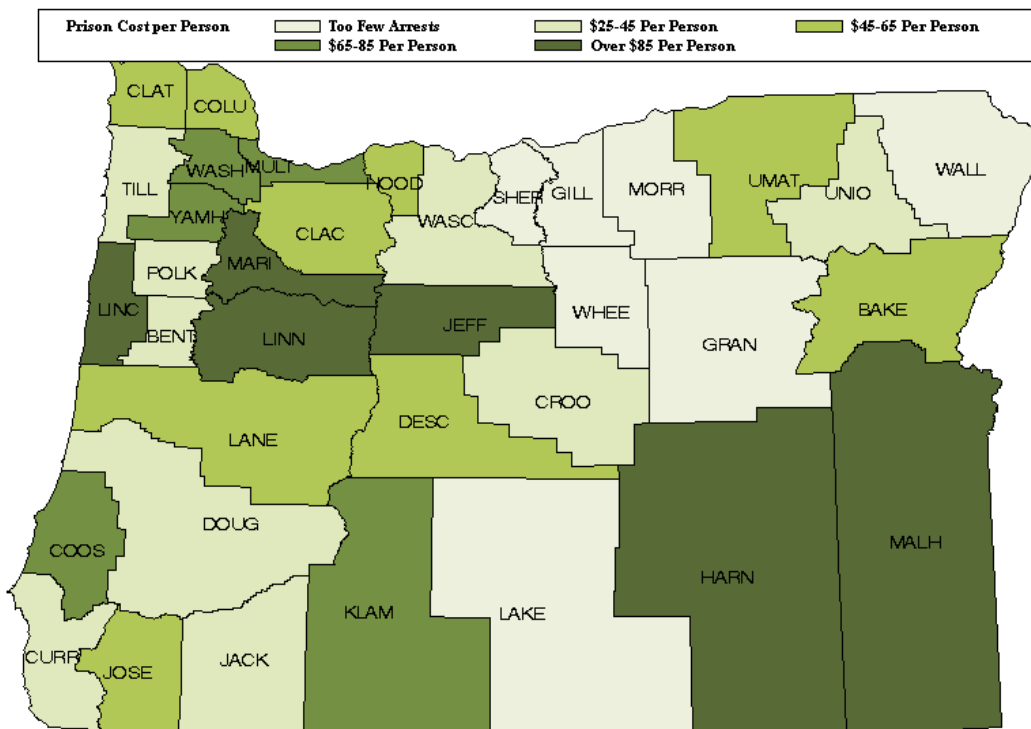
M11 Sentences by County, 2008									
County	Prison		Probation		Other		None		All N
	N	%	N	%	N	%	N	%	
<b>MULT</b>	329	70%	93	20%	9	2%	42	9%	473
<b>WASH</b>	192	72%	63	24%	1	0%	10	4%	266
<b>MARI</b>	155	62%	64	25%	6	2%	27	11%	252
<b>LANE</b>	116	76%	25	16%	3	2%	8	5%	152
<b>CLAC</b>	105	78%	20	15%	1	1%	9	7%	135
<b>5 County Total</b>	897	70%	265	21%	20	2%	96	8%	1278
<b>Rest of</b>	507	51%	333	34%	47	4%	112	11%	994

County differences in prosecution and sentencing of M11 offenders have an impact on the state budget as well. While examining the complete costs of M11 to the state and local criminal justice system is beyond the scope of this paper, map 1 below looks at county differences in the use of state prison resources. This is important because prison is a cost to the state’s general fund, composed primarily of income tax revenues, that is shared by all Oregonians. It is also a cost that has increased by more than 163 percent in nominal dollars and 54 percent in inflation and population adjusted dollars since the passage of M11.

The map shows there are large variations in state spending on offenders with an indictment for a crime in ORS 137.700. The map shows the number of prison sentences, multiplied by the average length of stay, multiplied by the DOC cost per day of \$84, divided by the county’s population, in order to calculate the state general fund cost per county resident per year for prison sentences for M11 crimes. This estimate is based on each county’s population but the costs estimated are borne by the citizens of the entire state equally. The map below illustrates the large variations by county in the use of this important state general fund resource.

We examined counties with more than 50 indictments for cases with a M11 offense from 2004 to 2008. In these 29 counties the prison costs per person per year ranged from \$26 in Union county to \$118 in Marion County. To be clear, this is not the prison cost impact of M11 as many of these offenders would have been in prison before the passage of M11. This also is not a complete estimate of costs as it includes prison operational costs only and does not include all the other criminal justice costs. The map below is not meant to capture all the costs associated with M11 but is meant to show that there are large differences in how much state prison resources counties are using, with the highest county using four and half times as much state prison resources per resident for M11 offenders as the county using the least.

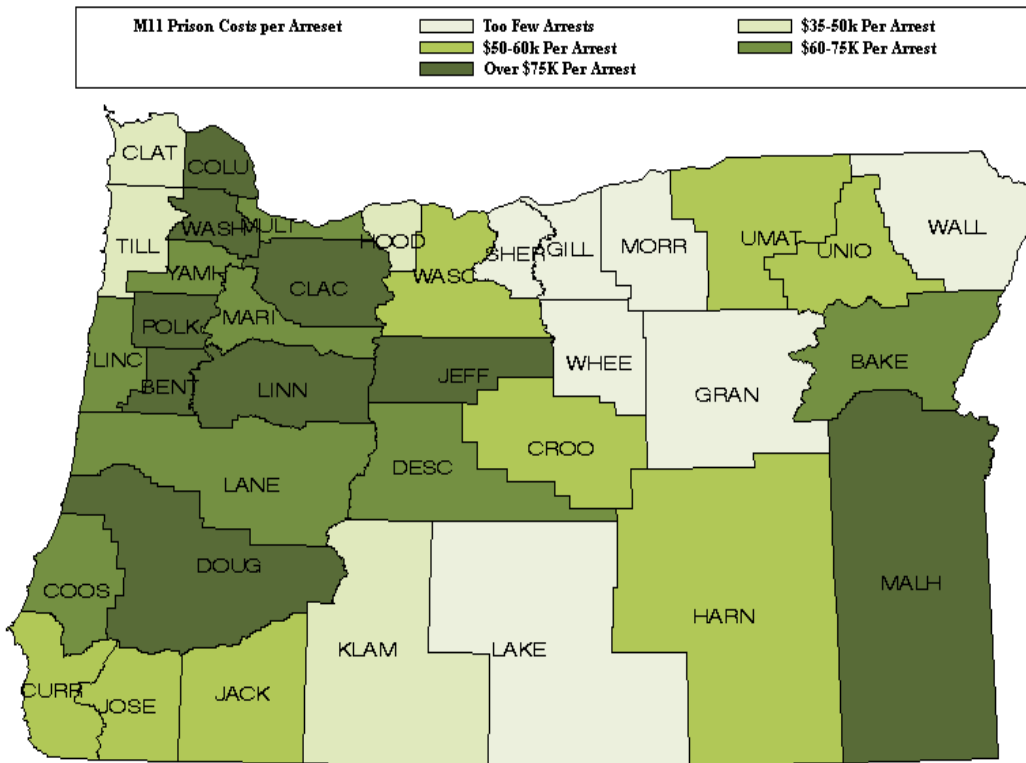
**M11 Prison Costs per Person per Year, 2004-2008**





Map 1 above looks at spending per resident but does not take into account the different levels of crime across counties. One would expect counties with more violent crime to use more state prison beds than counties with lower violent crime rates. By looking at the cost per arrests, we can better see the differences in costs of prosecution per each crime that occurred. This way, we are isolating the prosecution differences, rather than the crime prevalence difference in each county. Map 2 examines the use of state prison resources per M11 arrest for counties that had more than 50 indictments that included a M11 charge. We looked at the number of prison months imposed for indicted offenders with at least one M11 charge, multiplied that by the cost of prison of \$84 per day, and divided by the total number of arrests with a M11 charge. The map below shows that even after taking into account the number of M11 arrests, there are still large variations in the use of state prison resources. While the differences are smaller than above, the highest county still uses 2.8 times as much state prison resources as the lowest county. Klamath County is the lowest, using an estimated \$38,600 of prison resources per arrest, and Malheur County is the highest, using just under \$108,800 per M11 arrest. While Malheur County uses the most prison beds per M11 arrest, rural counties typically use less than urban counties with Marion, Clackamas, Washington and Multnomah all among the highest seven counties.

**M11 Prison Costs per M11 Arrest, 2004-2008**



Map 2

While the tables and maps above showed large variation by counties, table 11 shows variation in sentences across crimes. This is not surprising as one would expect to see more prison sentences and longer sentences for the more serious M11 offenses. If an offender is indicted for Assault I and convicted of a lesser charge of Assault II it is still

very likely they will receive a prison sentence. However, if an offender is indicted for Assault II and convicted of a lesser charge, depending on their criminal history, the presumptive sentence will likely be probation. For the five most common M11 crimes in 2008, the more serious offenses of Robbery I and Rape I were both more likely to receive a prison sentence.

<b>M11 Sentences by Most Serious Crime of Indictment, 2008</b>									
<b>Crime</b>	<b>Prison</b>		<b>Probation</b>		<b>None</b>		<b>Other</b>		<b>All</b>
	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	<b>N</b>
<b>ASSAULT II</b>	223	44%	231	45%	36	7%	0	0%	509
<b>ROBBERY I</b>	213	80%	32	12%	18	7%	0	0%	266
<b>ROBBERY II</b>	130	52%	86	34%	26	10%	0	0%	252
<b>SEX ABUSE I</b>	144	58%	64	26%	32	13%	0	0%	247
<b>RAPE I</b>	147	69%	32	15%	30	14%	0	0%	212
<b>All</b>	1404	62%	598	26%	208	9%	0	0%	2272

Table 11

Table 12 combines information from tables 6 and 11 and looks at a single offense in detail. This table shows the number of cases where Robbery I was the most serious indictment and the dispositions and sentences on those indictments. Nearly three quarters of Robbery I indictments ended in a conviction for Robbery I or a Robbery related offense. The appendix contains tables of all crimes with more than 50 indictments in 2008 and breaks down the detail of the convictions.

<b>Robbery I, Indictment to Conviction</b>						
<b>Convictions for Offenders where Robbery I is the Most Serious Offense Indicted, 2008</b>			<b>Sentences for Offenders where Robbery I is the Most Serious Offense Indicted, 2008</b>			
<b>Conviction</b>	<b>Number</b>	<b>Percent</b>	<b>Sentence</b>	<b>Number</b>	<b>Percent</b>	<b>Projected Length of Stay (Months)</b>
Robbery I	68	26%	Prison	213	80%	65
Other Rob Related	126	47%	Probation	32	12%	N/A
Other Felony	52	20%	None	18	7%	N/A
Misdemeanor	2	1%	Other	3	1%	N/A
None	18	7%	All	266	100%	N/A
Total	266	100%				
M11 Conviction	148	56%				

Table 12

<b>Sentences by Demographics, 2008</b>				
	<b>Prison</b>	<b>Probation</b>	<b>Other</b>	<b>None</b>
<b>Age</b>				
Under 18	60.0%	26.9%	0.4%	12.6%
18 or older	62.9%	25.7%	3.0%	8.3%
<b>Gender</b>				
Female	46.6%	41.9%	1.4%	9.9%
Male	64.2%	24.1%	2.9%	8.6%
<b>Ethnicity</b>				
Black	61.8%	25.4%	0.0%	12.7%
Hispanic	79.8%	13.2%	2.5%	4.4%
White	58.7%	28.7%	3.1%	9.3%
Other	72.8%	18.5%	4.3%	4.3%

Table 13

Demographic differences also exist for sentences of M11 indicted offenders. The differences are similar to the differences in dispositions. Juveniles are slightly less likely to have a prison sentence<sup>23</sup> than adults and more likely to have no sentence. Females are much more likely than males to receive a probation sentence. Sentences by ethnicity are somewhat different than dispositions by ethnicity with blacks having a higher percentage of indictments receiving a prison sentence than whites. Whites who are indicted for a M11 offense are more likely to be convicted of the mandatory minimum than blacks but less likely to receive a prison sentence. Hispanics are more likely to be convicted of their most serious sentence and more likely to receive a prison sentence.<sup>24</sup>

There are also large difference in sentences between offenders who have a publicly appointed defense attorney and those who have a privately retained attorney. While more than four out of five M11 indicted offenders have a publicly appointed attorney, those who retain a private attorney are much less likely to receive a prison sentence. Less than one half of offenders with a private attorney receive a prison sentence while two out of three offenders with an appointed attorney receive a prison sentence.

<b>Sentences and Type of Attorney, 2008</b>										
<b>Attorney Type</b>	<b>Prison</b>		<b>Probation</b>		<b>None</b>		<b>Other</b>		<b>All</b>	
	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>
<b>Appointed</b>	1212	66%	419	23%	154	8%	50	3%	1785	82%
<b>Private</b>	199	48%	165	40%	40	10%	12	3%	404	18%
<b>All</b>	1411	63%	584	26%	194	9%	62	3%	2189	100%

Table 14

<sup>23</sup> This includes sentences to OYA close custody.

<sup>24</sup> These differences are examined in greater detail in the logistic regression section below using a statistical model that holds other measurable factors constant to examine the individual impact of each demographic characteristic.

### **Logistic Regression Analysis of M11 Convictions and Prison Sentences**

From the tables shown in the above sections there are several variables that influence whether an offender indicted for committing a M11 offense receives a M11 conviction or a prison sentence. These tables show the impact of a single variable on these outcomes, but do not take into account other variables that also have an effect. Logistic regression can be used to show the effect of multiple variables on an outcome. Instead of looking at the effect of each variable one at a time, they are combined into a logistic regression model so that all of the variables are accounted for simultaneously. The logistic regression model also provides the statistical significance of the variables included in the model. This statistical modeling can also do variable selection, which chooses the “best” combination of variables to explain the outcome. The effect shown in the logistic regression model is the effect of that variable while taking into consideration all other variables in the model. For example, a previous incarceration might look important in explaining a M11 conviction when analyzed by its self. But after accounting for the county of the crime and whether bail was posted, a previous incarceration may no longer be important or significant in explaining the outcome. The summaries below show logistic regression models for predicting whether an offender receives a M11 conviction or a prison sentence. These models were compiled using available data, and it is possible there are other important factors in predicting these outcomes that are not included here. Possible factors include the weapon used, the impact to the victim(s), the offender’s cooperation with the state or willingness to admit guilt, and any other unmeasured variable that could impact the outcomes.

The data used in this analysis is all M11 indicted cases filed from 1995 to 2008 and a crime commit date on or after April 1, 1995. Those M11 convictions under OR 137.712 that did not have a mandatory minimum sentence were included in this analysis. For more information on these variables and data used see the appendix. This logistic regression model identifies the factors that are important in predicting whether a M11 indicted offender receives a M11 conviction. Several explanatory variables were considered in the logistic regression model. The variables considered for selection include: gender, age, race, county<sup>25</sup>, a juvenile indicator, a sex crime indicator, trial, private attorney, bail, which M11 crime the offender was indicted for, the number of M11 charges on the case, an indicator for offenses eligible for ORS 137.712, and several criminal history variables.

In addition, interactions of the variables were also considered. An interaction occurs when the effect of a variable on the outcome depends on the level of another variable. An interaction term in the model accounts for this relationship. An example of this could be an interaction between gender and trial. If the effect of gender on a M11 conviction is different depending on whether there was a trial, then an interaction term between gender and trial would account for this. Variable selection was used in logistic regression modeling to pick the best combination of these variables and their interactions to estimate if the offender received a M11 conviction. The variables not selected for inclusion in the

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<sup>25</sup> The county variable is divided by Multnomah, Washington, Marion, Lane, Clackamas and all other (Rural) counties.

model by the variable selection technique are prior incarceration, number of prior felony convictions, number of prior felony charges, number of prior misdemeanor charges, number of felony arrests, number of non-felony arrests, and a categorical variable to indicate downward departure eligible offenses. The logistic regression model shows favorable variance inflation factors and area under the curve values.<sup>26</sup>

The variables, odds ratio, and statistical significance from the logistic regression model are shown in table 15 below.<sup>27</sup> The odds ratio shows the impact of a variable on the odds of receiving a M11 conviction. For example, an odds ratio of 3.96 for trial indicates that if an offender goes to trial the odds of a M11 conviction are 3.96 times greater than for an offender that does not go to trial, or about 300 percent higher. This is assuming that all

<b>Logistic Regression Results for M11 Conviction</b>			
<b>Variable</b>		<b>Odds Ratio</b>	<b>Statistical Significance**</b>
Number of M11 Charges	5 or more vs. 1	8.54*	<.0001
Number of M11 Charges	2-4 vs. 1	3.07*	<.0001
Trial	Yes vs. No	3.96	<.0001
Which M11 Crime Indicted		see appendix for details	0.0163
Bail	Yes vs. No	0.54	<.0001
County	Clackamas vs. Rural	2.48*	0.0003
County	Lane vs. Rural	1.33*	0.14
County	Marion vs. Rural	6.83*	<.0001
County	Multnomah vs. Rural	1.30*	0.0441
County	Washington vs. Rural	2.30*	<.0001
Number of Prior Person Felony Convictions	3 or more vs. 0	1.76	<.0001
Number of Prior Person Felony Convictions	1-2 vs. 0	1.08	0.2438
Race	Black vs. White	0.79	0.0008
Race	Hispanic vs. White	1.06	0.3879
Race	Other vs. White	1.13	0.2273
Private Attorney	Yes vs. No	0.7	<.0001
Gender	Female vs. Male	0.81	0.0028
Juvenile	Yes vs. No	0.81	0.0024
Age		1.01	0.0024

\* The interpretation of the Odds Ratio does not account for the interaction effect. If the variable is included in an interaction, the impact it has on a M11 conviction varies depending on the level of another variable.

\*\* Wald Chi-Square Test P-value from Maximum Likelihood Estimates

Table 15

<sup>26</sup> See appendix for more detail.

<sup>27</sup> This model also contains two interaction terms: Number of M11 Charges \* ORS and County \* ORS. See appendix for more details.

other variables in the model are held constant, meaning that if two offenders have the same values for all other variables, the effect of going to trial nearly quadruples the odds of a M11 conviction. The odds ratio does not account for the interaction effect. If the variable is included in an interaction, the impact it has on a M11 conviction varies depending on the level of another variable.

The statistical significance column shows that all of the variables in the model significantly predict a M11 conviction at the 5 percent level except for the comparisons between Lane and rural counties, one to two prior person felonies and zero felonies, Hispanic and white race, and white and other races.

The odds ratio for trial is interpreted as the odds of a M11 conviction with a trial are 3.96 times the odds without a trial. That is, an offender that does not go to trial is much less likely to receive a M11 conviction. This interpretation assumes all other variables in the model are held constant; that is for two offenders who have the same values for all the other variables, going to trial increases the odds of a M11 conviction nearly four times as much.

For an offender that posts bail, the odds of a M11 conviction are half as much as an offender that does not post bail. This variable indicates either the severity of the crime (offender was denied bail) or the offender did not have the resources available to make bail if it was an option. Unfortunately, it is not possible to distinguish between the two options given the data currently available at the statewide level.

The odds of a M11 conviction for an offender with five or more M11 charges on their case are over eight times the odds for an offender with one M11 charge. For an offender with two to four M11 charges the odds are three times those for an offender with one M11 charge. The effect of the number of M11 charges on a M11 conviction vary depending on the ORS of the most serious offense.

An offender in Marion County has nearly seven times the odds of a M11 conviction than an offender in a rural county. In Washington and Clackamas counties the odds are over twice as high as rural counties. In Multnomah County the odds are 30 percent higher than rural counties. The comparison between Lane and the rural counties is not significant. The effect of the county on a M11 conviction varies depending on the ORS of the most serious offense.

The odds of a M11 conviction for a black offender are about three-quarters the odds for a white offender. The comparison between Hispanic and white offenders is not significant in predicting a M11 conviction. The comparison between the other group, which includes Asian and Native American races, is also not significant.<sup>28</sup>

For each year increase in age, the odds of a M11 conviction increase by about 1 percent. The odds of a M11 conviction for a female are about three-quarters the odds for a male; females are less likely to receive a M11 conviction. Juvenile offenders are also less likely

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<sup>28</sup> See appendix for further analysis on the race variable.

to receive a M11 conviction. The odds for a juvenile are about three-quarters the odds for an adult offender. With a private attorney the odds of a M11 conviction are also about three-quarters the odds with a public attorney. And lastly, those with prior person felony convictions are more likely to receive a M11 conviction. The odds of a M11 conviction for an offender with three or more prior person felony convictions are almost twice those for an offender with no prior person felony convictions. For an offender with one or two prior person felony convictions, the odds are not significantly different from an offender with no prior person felony convictions.

These results show the impact of these variables on a M11 conviction. An offender's age, gender, race, prior person felony convictions, whether they have a private attorney, whether the case goes to trial, if they were able to post bail, the number of M11 charges on the case, the most serious charge on the case, and the county all are significant indicators of whether the offender will receive a M11 conviction.

The model above examines the factors that predict if an offender will be convicted of a M11 offense. It is also of interest to examine what factors help explain whether an offender indicted for a M11 offense receives a prison sentence. The data and variables considered for selection are the same as those used in the model for a M11 conviction. A new model was compiled to predict prison sentences. The variable selection and logistic regression modeling methods are also the same, see the appendix for more detail.

The variables, odds ratios, and statistical significance from the logistic regression model are shown in table 16 below.

<b>Logistic Regression Results for Prison Sentence</b>			
<b>Variable</b>		<b>Odds Ratio</b>	<b>Statistical Significance**</b>
Which M11 Crime Indicted		see appendix for details	<.0001
Bail	Yes vs. No	0.46	<.0001
Number of M11 Charges	5 or more vs. 1	5.06	<.0001
Number of M11 Charges	2-4 vs. 1	1.92	<.0001
County	Clackamas vs. Rural	1.82	<.0001
County	Lane vs. Rural	1.63	<.0001
County	Marion vs. Rural	1.98	<.0001
County	Multnomah vs. Rural	2.31	<.0001
County	Washington vs. Rural	2.54	<.0001
Number of Prior Felony Convictions	3 or more vs. 0	1.91	<.0001
Number of Prior Felony Convictions	1-2 vs. 0	1.37	<.0001
Trial	Yes vs. No	1.73	<.0001
Gender	Females vs. Male	0.58	<.0001
Private Attorney	Yes vs. No	0.7	<.0001
Number of Prior Felony Charges	4 or more vs. 0	1.43	<.0001
Number of Prior Felony Charges	1-3 vs. 0	1.15	0.0077
Race	Black vs. White	0.84	0.0109
Race	Hispanic vs. White	1.39	<.0001
Race	Other vs. White	1.2	0.0502

The statistical significance column shows that all of the variables in the model significantly predict a prison sentence at the 5 percent level except for the comparison between other races and white, age, and the juvenile indicator. The p-value for the race comparison between other races and white is 0.0592, and for the juvenile indicator is 0.0977, which are close to the 5 percent cut-off.

The odds ratio for bail is interpreted as the odds of a prison sentence for an offender who posts bail is half the odds of an offender who does not bail. Again, this variable indicates either the severity of the crime (offender was denied bail) or the offender did not have the resources available to make bail if it was an option. Unfortunately, it is not possible to distinguish between the two options given the data currently available at the statewide level.

If an offender's case contains multiple M11 charges, they are more likely to receive a prison sentence. The odds for an offender with five or more M11 charges are five times the odds for an offender with one M11 charge. For an offender with two to four M11 charges, the odds are twice those for an offender with one M11 charge.

An offender charged in Clackamas, Lane, Marion, Multnomah, or Washington County is more likely to receive a prison sentence than an offender charged in any other (rural) county. The odds of a prison sentence for an offender in Lane County are about 60 percent higher than the odds for an offender in a rural county; in Clackamas County the odds are about 80 percent higher. In Marion County the odds are nearly twice those in a rural county, and in Multnomah and Washington Counties the odds are more than double for those in a rural county.

If an offender's case goes to trial, the odds of a prison sentence are nearly twice (1.73) the odds for an offender that does not go to trial. Females are less likely to receive a prison sentence; the odds for a female are nearly half the odds for a male. With a private attorney the odds of a prison sentence are about three-quarters the odds with a public attorney.

The odds of a prison sentence for a Hispanic offender are about 40 percent higher than for a white offender. Black offenders are slightly less likely to receive a prison sentence than white offenders and the difference is significant. The comparison between the other group, which includes Asian and Native American races, and white offenders shows marginal significance.

Lastly, the number of prior felony convictions and number of prior felony charges affect the odds of a prison sentence. An offender with three or more prior felony convictions has twice the odds of a prison sentence than an offender with no prior felony convictions. For an offender with one or two prior felonies, the odds of a prison sentence are about 40 percent higher than an offender with no prior felony convictions. A similar relationship holds with the number of prior felony charges, although the impact is smaller. An offender with four or more prior felony charges has 40 percent higher odds of a prison



sentence than an offender with no prior felony charges. For an offender with one, two, or three prior felony charges, the odds of a prison sentence are 15 percent higher than for an offender with no prior felony charges.

These results show the impact of these variables on prison sentences for offenders indicted with a M11 offense. An offender's gender, race, prior felony convictions, prior felony charges, whether they have a private attorney, whether the case goes to trial, if they posted bail, the number of M11 charges on the case, the most serious charge on the case, and the county the offense was prosecuted in all are significant indicators of whether the offender will receive a prison sentence.

Looking at the models for a M11 conviction and a prison sentence, there are several variables that one would expect to impact if an offender is convicted of a M11 offense or receives a prison sentence. We would expect the number of M11 charges and the ORS to be important in explaining a M11 conviction or a prison sentence. The more severe the type of crime, the more plea downs that are available that are still M11 crimes, or crimes with prison sentences on the sentencing grid. If an offender is charged with Assault I, but is pled down to Assault II they are still convicted of a M11, and will still likely receive a prison sentence. However, if an offender is charged with a less serious M11, like Robbery II, any plea down will result in a non-M11 conviction, and often a non-prison sentence.

For Non-M11 sentences younger offenders and females typically serve shorter sentences and are less likely to go to prison. However, for M11 convictions the mandatory minimum still applies regardless of age or gender. For those indicted for a M11 crime the outcomes vary by demographic characteristics because of the discretion in the system in spite of M11's rigidity. For similarly indicted crimes, younger offenders and female offenders are less often convicted of the M11 and less likely to go to prison. In general the demographic factors that influence if an offender is convicted of a M11 offense also impact if they receive a prison sentence. However, the impact of age in predicting whether an offender receives a prison sentence is not statistically significant. Offenders under 18 are less likely to be convicted of a M11 offense and less likely to receive a prison sentence but after controlling for juvenile offender status age does not impact the likelihood of receiving a prison sentence.

Other variables in the model provide more insight into the discretion that surrounds M11 convictions. The county variables have a significant effect, further highlighting county differences for M11 convictions and prison sentences. Part of the intent of M11 was to provide consistent sentences across jurisdictions. M11 accomplished that for offenders who were convicted of a M11 offense, but there are large differences across jurisdiction for those indicted for a M11 offense. An offender indicted for a M11 offense in a rural county is much less likely than a similar offender in an urban county to be convicted of a M11 crime and serve a prison sentence.

M11 indicted offenders who use a private attorney are less likely to be convicted of a M11 and less likely to go to prison. This could be a proxy for the effect of income and

assets available to an offender or it may be the result of a private attorney having more skills or resources available. Either way, it indicates that an offender's ability to obtain a private attorney is important in the outcome of their case.

The effect of bail is difficult to determine. An offender either did not post bail because it was not available (due to the severity of the crime) or the offender did not have the resources available to post bail. So while this variable is difficult to interpret, it is most likely a combination effect of crime severity and resources available to the offender.

Black offenders are both less likely to receive a M11 conviction and a prison sentence than white offenders. Hispanic offenders are more likely to receive a prison sentence and show no significant difference for the likelihood of a M11 conviction. The other group, which includes Asian and Native American races, shows no significant difference from white offenders for the likelihood of a M11 conviction and shows marginal significance for a prison sentence. These differences are accounting for the effects of the other variables in the model. It is possible that the variation across race could be explained by other factors that are not included in this analysis. Other factors include the type of weapon used, the impact to the victim(s) or any other unmeasured variable that could impact the outcomes. Further analysis was done to better understand the effects of race, county, and criminal history on these outcomes.<sup>29</sup> We were concerned that criminal history or county effects might be driving the statistically significant differences in racial outcomes, meaning county differences or criminal histories might be highly correlated to race making it difficult to determine what the impact of each of these factors is by itself. We used standard techniques to test for this and this does not appear to be the case.

M11 did not instruct prosecutors to consider criminal history when deciding if a M11 indicted offender be convicted of a M11 crime. Although the guidelines were designed to use criminal history to determine an offender's sentence, M11 did not direct the system to consider criminal history, only the severity of the crime determined the prison sentence. However, an offender's number of prior person felony convictions is significant in predicting whether or not they are convicted of a M11 offense. This indicates that prosecutors consider criminal history in the use of their discretion and more often offer first time offenders a non-M11 plea agreement. Other criminal history variables such as prior incarceration, prior charges, and prior arrests were not significant in the M11 conviction model. For explaining whether a prison sentence was imposed, criminal history variables are more important since a M11 plea-down to a sentence pursuant to the guidelines would factor into the presumptive sentence.

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<sup>29</sup> See appendix for details

**Lengths of Stay for Prison Sentences**

Since the passage of M11, other statutory laws have been passed by the legislature and citizen initiative that override the guidelines. A special session of the legislature passed House Bill 3488, creating prison sentences for certain repeat property offenders (RPO) effective July 1, 1997. Since 1997 there have been amendments made to the RPO laws, adding identity theft and forgery. The largest change since M11 was made by the voters in 2008 with Measure 57, adding additional crimes, creating longer sentences and making it easier to incarcerate repeat offenders. Like M11, the RPO statute trumps the sentencing guidelines. The RPO statute governs the sentences rather than the guidelines if the offender’s crime and criminal history make the offender eligible for consideration for the RPO sentence. Unlike M11, Measure 75 is a presumptive sentence from which the judge may depart to probation under certain circumstances.

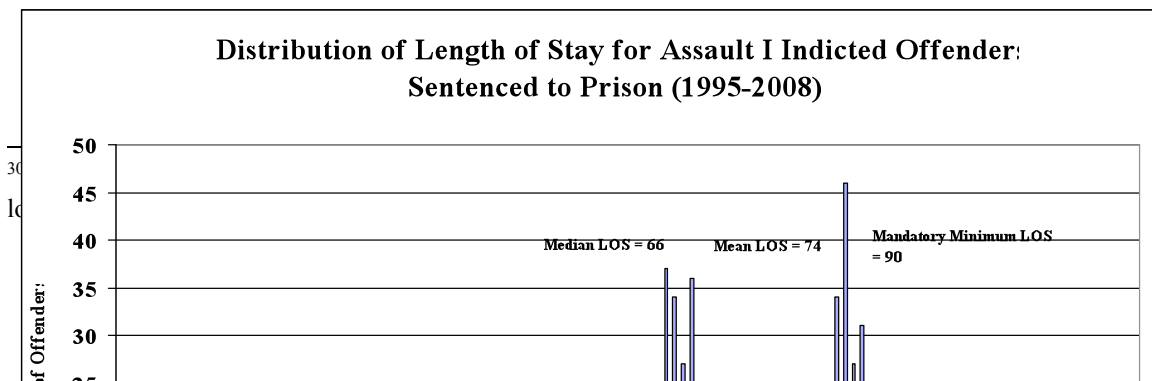
The sentencing guidelines govern most felony convictions in Oregon, but apply to fewer offenders who are sentenced to prison. Table 17 matches all adult offenders sentenced to prison for a new crime, to the type of offense and sentencing

	N	Average LOS (months)	% of Total Intakes	Prison Months	% of Prison Months
<b>Guidelines</b>	1879	24	43%	44307	24%
<b>M11</b>	765	125	17%	95870	51%
<b>M11 Plea Down</b>	739	33	17%	24335	13%
<b>Repeat Property Offender</b>	1036	21	23%	22150	12%
<b>All</b>	4419	42	100%	186662	100%

Table 17

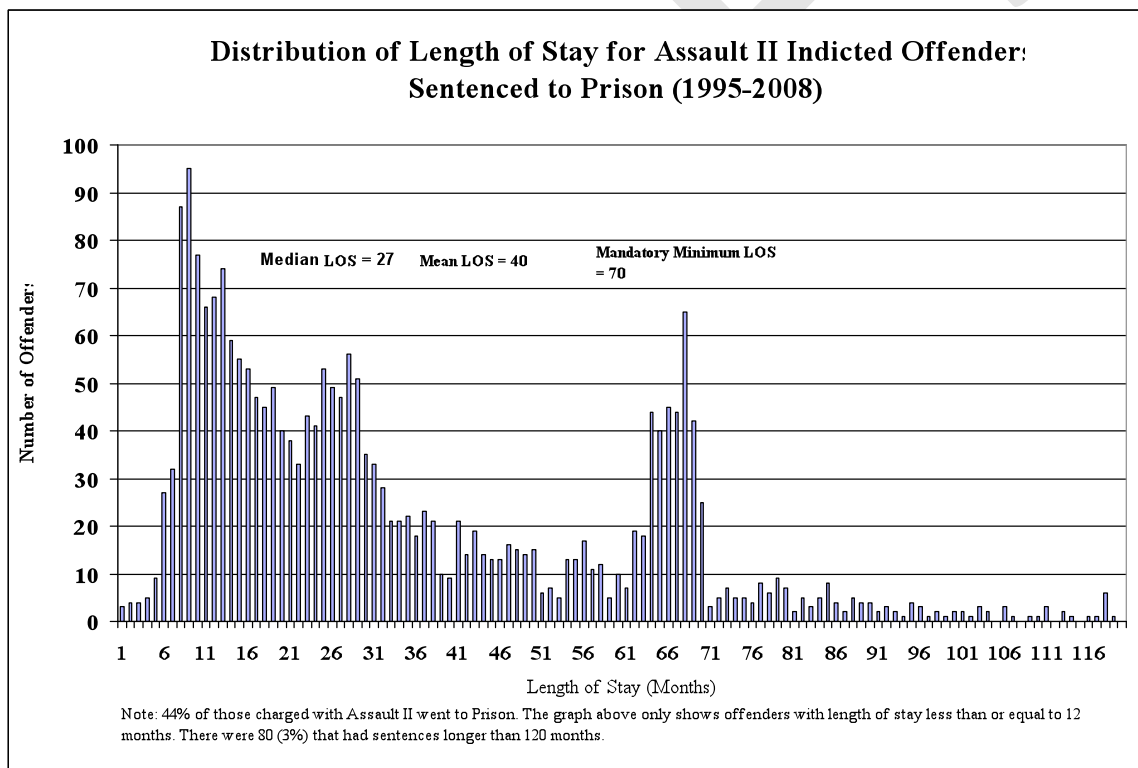
structure that governed their sentence. In 2009, 43 percent of prison intakes were governed by the guidelines,<sup>30</sup> 23 percent were repeat property offenders (RPO), 17 percent were M11 convicted and 17 percent were M11 charged but convicted of a lesser charge that did not carry a M11 sentence.

The guidelines and RPO sentences made up the majority of intakes in 2009 at 66 percent, but the length of stay for those offenders were much shorter than the length of stay of offenders charged with M11 offenses. The number of prison months (number of intakes times the average length of stay) imposed in 2009 is larger for M11 convicted offenses than guidelines and RPO offenses combined. This means that although the number of intakes from the guidelines and RPO are larger than M11 convicted intakes, the impact on the prison system from the M11 convicted offenders is much larger than the guidelines and RPO offenders. In other words, the sentencing guidelines only govern 24 percent of the impact of prison time imposed in 2009.



Mandatory minimum sentencing makes the sentencing outcomes very structured and predictable for those convicted. Other than those offenders eligible for the “opt out” on second degree offenses mentioned above, when an offender is sentenced under M11 they will serve a determinate sentence in a state correctional facility. However, there is a wide range of sentences for offenders indicted for committing M11 crimes. Graphs 1 and 2 look at the distribution of projected lengths of stay for offenders indicted for Assault I and Assault II. Graph 1 shows the variation in lengths of stay<sup>31</sup> for those sentenced to prison where their most serious indictment was for Assault I. The two peaks represent offenders who were sentenced for their most serious offense (90 months) and those sentenced to a lesser M11 (70 months). There are many other sentences received but the frequencies are fairly low for sentences that are not clustered around 70 and 90 months.<sup>32</sup>

Graph 2 shows the length of stay distribution for offenders indicted for a most serious charge of Assault II. This graph only represents prison sentences and more than half of the cases for Assault II end with a non-prison sentence. The distribution has a spike around 70 months but has the highest frequencies for shorter lengths of stay between eight and 13 months. Other than the spike around 70 months, this distribution resembles the length of stay distribution of Burglary I more than the Assault I distribution.



Graph 2

<sup>31</sup> This is the actual length of stay for released offenders and the projected length of stay, as calculated by DOC, for offenders still in prison.

<sup>32</sup> The length of stay is the projected length of stay at DOC and does not include time served awaiting trial. Therefore, many sentences are close to 70 and 90 months but not exactly equal to the mandatory minimum.

### Disposition and Sentence Changes upon Passage of M11

The above sections summarize M11 indictments by county, crime, demographics and other factors. Many of the tables attempt to quantify the discretion that prosecutors use in applying M11 and how that discretion varies by different factors. While the tables and charts above summarize current M11 practices they do not address how the passage of M11 changed the percentage of cases that go to trial, dispositions, and sentences.

Typically when there are major law changes criminal justice professionals change their behavior to adapt to the new set of rules.

When M11 was passed many predicted that the courts would be backlogged with cases going to trial. People thought that as the penalties increased offenders would be more likely to take a chance of going to trial than to accept a more severe plea agreement. Initially this was the case and a higher percentage of offenders asserted their right to trial with over 21 percent of M11 indicted cases going to trial in the first year compared to 16 percent for cases indicted before M11's passage, a 33 percent increase. After the initial increase, the percentage going to trial dropped and continued to drop until 1999. It then increased some and has leveled off with nearly the same percentage going to trial today as did before M11's passage. Once the criminal justice professionals figured out what the "going rate" was for a certain offense in the negotiation process and all legality of the M11 sentence was explored, the trial rate declined and has held relatively steady for the past decade.

Analysts also predicted that Oregon would need an additional 9,000 beds in 10 years following the passage of M11. The actual increase in beds was about 6,000 and would have been less if other sentencing enhancements were not passed during that time period. Part of the reason there were fewer beds needed than predicted was prosecutors used their discretion and more often convicted offenders of non-M11 crimes. The analysts who predicted the impact of M11 in 1995 did not have thirteen years of data to show how prosecutors would apply M11. The analysts understandably looked at the language of the chief petitioner that said the sentences in M11 "are the minimum required for justice and society" and assumed that the law would be applied so those sentences would be imposed. Instead, as shown by this report prosecutors have decided not to seek the mandatory minimum in many cases.

Trials by Year for M11 Crimes Committed After 4/1/95				
	TRIAL			
	No		Yes	
	N	%	N	%
<b>1995</b>	1072	79%	289	21%
<b>1996</b>	1674	82%	369	18%
<b>1997</b>	1737	83%	350	17%
<b>1998</b>	2074	87%	308	13%
<b>1999</b>	1921	88%	261	12%
<b>2000</b>	1881	87%	289	13%
<b>2001</b>	1828	86%	287	14%
<b>2002</b>	1874	85%	318	15%
<b>2003</b>	1944	84%	375	16%
<b>2004</b>	1903	83%	392	17%
<b>2005</b>	1795	82%	397	18%
<b>2006</b>	1845	85%	338	15%
<b>2007</b>	1961	85%	356	15%
<b>2008</b>	1920	85%	352	15%
<b>All</b>	25429	84%	4681	16%

Table 18

The increased use of plea downs is shown in Table 19 below. M11 went into effect for crimes committed on or after April 1, 1995. For cases filed in 1995 just about half were subject to M11. For those cases subject to M11, 25 percent were convicted of their most serious offense and for the half that were not subject to M11 41 percent were convicted of their most serious offense. This is the best indicator of how prosecutors changed their disposition practices in light of the new sentences and shift of discretion from judge to prosecutor. For the decade, offenders who were subject to M11 were 34 percent less likely to be convicted of their most serious offense. This reduction is the dynamic that assured that 9,000 beds would not be needed to carry out M11's new sentences. Prosecutors sought conviction for the most serious charge that carried the minimum sentence to a lesser degree than before the law. Table 19 shows that 326 fewer offenders were convicted of their most serious M11 offense in 1996 than in 1994. The table also shows that most of these offenders were convicted of a felony outside of M11 for which there was no mandatory sentence.

<b>M11 Dispositions by Year for Cases Filed 1991-1999</b>									
	<b>Convicted Most Serious</b>		<b>Convicted Other M11</b>		<b>Other Conviction</b>		<b>No Conviction</b>		<b>All</b>
	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	<b>N</b>
<b>1991</b>	783	39%	199	10%	700	35%	333	17%	2015
<b>1992</b>	806	36%	277	12%	772	34%	388	17%	2243
<b>1993</b>	957	39%	306	12%	839	34%	372	15%	2474
<b>1994</b>	899	37%	332	14%	774	32%	407	17%	2412
<b>1995</b>	759	32%	330	14%	934	39%	366	15%	2389
<b>1996</b>	573	25%	303	13%	1083	48%	313	14%	2272
<b>1997</b>	619	28%	255	11%	1050	47%	308	14%	2232
<b>1998</b>	700	28%	305	12%	1181	47%	314	13%	2500
<b>1999</b>	623	27%	276	12%	1119	49%	262	11%	2280

Table 19

While the passage of M11 made it more likely for offenders receive an offer to plead guilty to a crime that did not carry a mandatory minimum sentence, it also made it more likely for offenders to go to prison and for a longer period of time. It is not surprising that increasing the penalties for crimes increased the percentage of offenders that went to prison as well as their length of stay once they got there. Table 20 shows a substantial increase in the percentage of offenders sentenced to prison after the passage of M11.<sup>33</sup> In 1996 an offender indicted for a M11 offense was 36 percent more likely to go to prison than an offender indicted in 1994. The differences are even larger for the median length of stay, with an 81 percent increase from 1994 to 1996 for M11 indictments that were

<b>M11 Prison Sentences by Year for Cases Filed 1991-1999</b>			
<b>Year</b>	<b>% to Prison</b>	<b>Median LOS</b>	<b>Ave. LOS</b>
<b>1991</b>	43%	35.9	57.4
<b>1992</b>	40%	30.6	52.7
<b>1993</b>	41%	35.1	56.2
<b>1994</b>	42%	35.4	60.0
<b>1995</b>	52%	59.4	73.7
<b>1996</b>	57%	64.2	72.9
<b>1997</b>	58%	64.9	76.9
<b>1998</b>	60%	65.1	76.9
<b>1999</b>	58%	65.8	80.4

Table 20

<sup>33</sup> Graph A-1 shows the percent of convictions for M11 and M11-attempts that received a prison sentence.

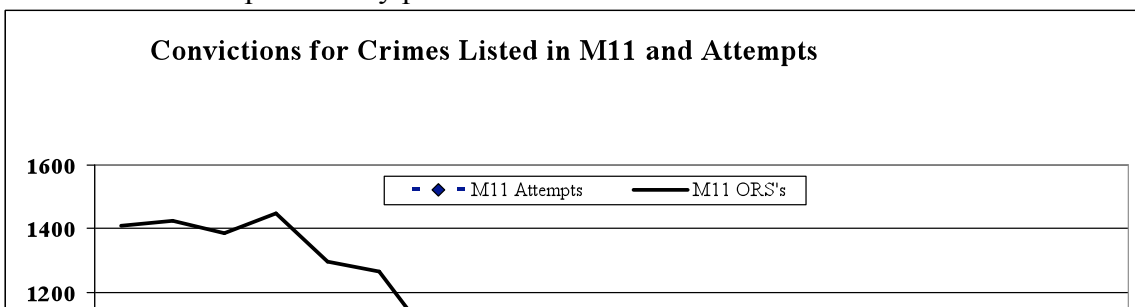
sentenced to prison. The average length of stay did not increase nearly as much, meaning the sentences for inmates who already received substantial prison sentences did not change very much as a result of M11. The offenders serving sentences shorter than the minimums in M11, however, were impacted much more by the increased sentences from M11.

Table 21 summarizes the information from tables 19 and 20 and adds additional information on whether the most serious conviction was for a M11 offense. For offenders convicted of crimes listed in M11, the passage of M11 had a large impact on the percentage that received a prison sentence as well as their length of stay. For offenders who committed crimes after April 1, 1995 the percentage going to prison following the conviction of an offense in M11 went up by 35 percent. The change in the median length of stay was even more dramatic, increasing by 73 percent. The table also shows that for crimes committed after April 1, 1995 there were many more plea downs. The plea downs also received much longer sentences than they did prior to the passage of M11. The biggest change for the plea downs was in the percentage that went to prison, with an increase of more than 150 percent, and an increase in length of stay for these offenders of 35 percent. The increase in the percentage to prison and the length of stay for both M11 convictions and plea downs is part of the reason for the increased prison population Oregon experienced over the past 15 years. However, this increase would have been larger if prosecutors had not changed their practices, and used their discretion to increase the number of plea downs.

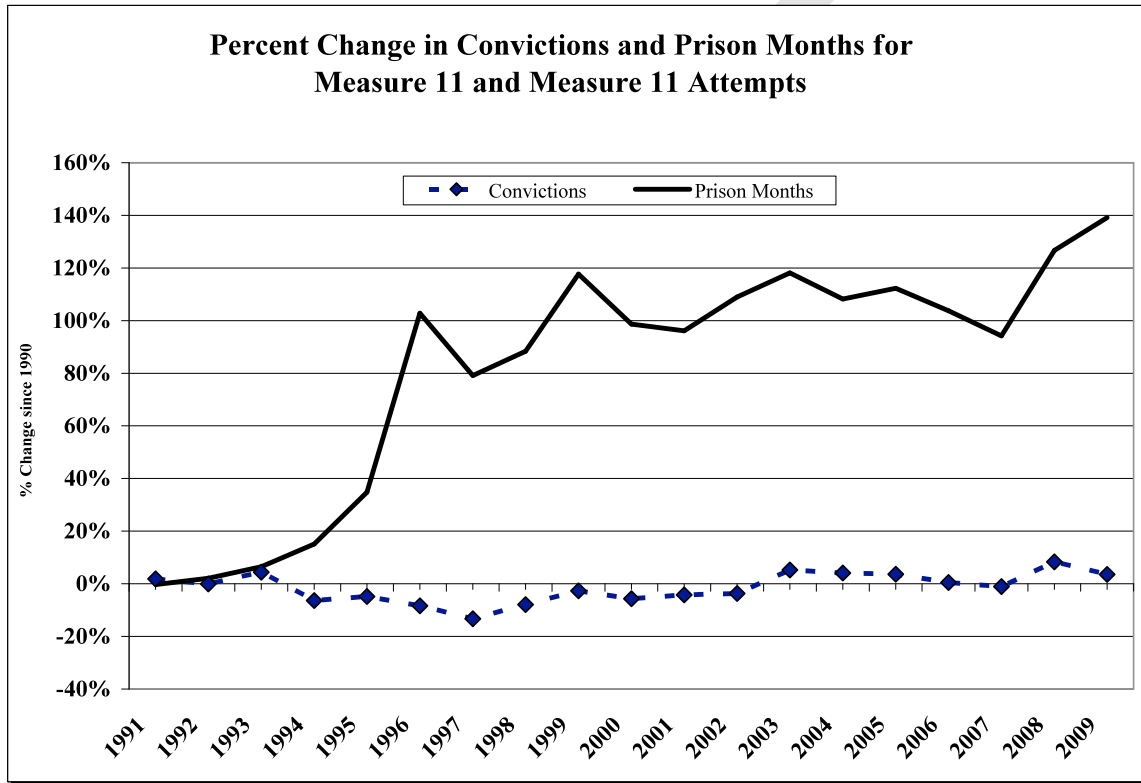
Dispositions and Sentences for Indictments Alleging M11 Offenses Before and After 4/1/1995, for Cases Filed 1991-1999									
Crime After 4/1/1995	Convicted of Crime Listed in 137.700 and 137.707						All		
	Yes			No					
	%	% to Prison	Median Prison LOS	%	% to Prison	Median Prison LOS	% to Prison	Median Prison LOS	N
Yes	38%	91%	76.5	62%	39%	21.8	59%	65.2	10056
No	51%	68%	44.3	49%	15%	16.2	42%	36.9	10767

Table 21

The tables above have shown that the number of indictments where a M11 offense is the most serious crime have been relatively stable since 1991 but the percentage convicted of a M11 offense has gone down. However, the number of convictions for attempts of M11 offenses has increased substantially after the passage of M11. Prior to 1995, there were very few convictions for crimes like Attempted Assault I or Attempted Robbery II. After 1995, M11 attempted crimes went up while the convictions for crimes listed in M11 went down. Prior to 1995, only one out of eight M11 or M11-related convictions was for a M11 attempt. After 1995 more than one in three convictions was for a M11 attempt. This does not show an increase in the actual number of attempted crimes, it shows a change in how cases were disposed of by prosecutors.



As shown in the graph above, following the passage of M11 there was a large decrease in convictions for crimes listed in M11 and an increase in attempts for those crimes. Many of the crimes that were previously being convicted of the most serious offense were now being pled down to attempts. Graph 4<sup>34</sup> combines M11 convictions with M11 attempt convictions and shows that the number of convictions for M11 and M11 attempts has changed little since 1990, increasing by only 4 percent. The large impact from M11 was the change in the percentage that went to prison and the length of time spent in prison. The graph shows that the number of prison months imposed for M11 and M11 attempts has increased substantially since the passage of M11. While the increase in prison months for M11 convictions is larger in magnitude, the percent change in prison months for attempts is much larger, increasing by nearly 600 percent since 1990.<sup>35</sup>



Graph 4

The graphs and tables above show that after the passage of M11 the plea down process changed and resulted in many more convictions for M11 attempts. These offenses no longer carry a mandatory minimum sentence and are sentenced under the Oregon Sentencing Guidelines. Most M11's have a crime seriousness level of 9 or 10. An attempt conviction is dropped down two seriousness levels so that most M11 attempts have a crime seriousness level of 7 or 8. Table 18 compares sentences for M11 attempts to crimes with the same seriousness level on the grid. The most common non-M11 crimes in this category are Burglary I, Delivery or Manufacturing of a Controlled Substance, and

<sup>34</sup> Graphs A-1, A-2, and A-3 break this down by Assaults, Robberies and Sex Offenses.

<sup>35</sup> See graph A-1 in the appendix.

2005-2009 Convictions for Grid Blocks 7 and 8				
Conviction Type	% to Prison	Ave. LOS	Ave. Prison Months per Convictions	N
No-M11	39%	23.2	9.1	10730
M11-Att	57%	30.4	17.2	1600
All	41%	24.6	10.2	12330



Sex Abuse II. The sentences for the M11 attempts are more severe, with both a higher percentage receiving a prison sentence and with those going to prison staying longer. The average M11 attempt will spend nearly twice as long in prison as the non-M11 offender with the same crime seriousness level. Both crime seriousness and criminal history factor into an offenders sentence. When these same offenders are further broken down by their criminal history the same patterns hold, offenders in grid blocks 7 and 8 convicted of M11 attempts go to prison more often and for longer than those convicted of non-M11 attempts. While the sentencing for M11 attempts is nominally governed by the guidelines, this difference in sentences shows that the possibility of a M11 sentence at trial increased the length of the stay for those offenders compared to those sentenced purely under the guidelines.

DRAFT

### **Prison Bed Impact of M11**

M11 caused a significant increase in the number of prisoners in Oregon. As this report describes, M11 not only increased sentence lengths for the specific offenses it lists, but also shifted convictions to non-M11 ORSs (e.g., attempts) through the plea process. The potential impact associated with longer sentences was mitigated by the shifts in what offenses were convicted, but the overall effect was an increase in the number of prison sentences and an increase in the average length of stay for those sentences which, in turn, increased the prison population.

This section of the report estimates the M11 prison impact<sup>36</sup> over time. Each monthly estimate corresponds to the prison population on the first day of the month. The M11 impact is the number of people who would not have been in prison if M11 had not passed.

Conceptually, this analysis works by estimating the ‘would be’ prison population from 1995 to 2009 if sentencing laws for crimes listed in ORS 137.700 had worked like they did before M11 existed. It uses indicted court cases from 1990 to 1994 as a starting point to establish statistical rules for the actual prison stays resulting from indictments. Those rules are applied to indictments from the post-1995 period to get prison stays consistent with the pre-M11 period. The prison stays are then converted to a simulated prison population size. The simulated population is smaller than the actual population, and the difference between them is the M11 impact.

An example may clarify how this works. Before M11, about 60 percent of court cases with a Robbery I indictment resulted in a prison sentence with an average length of stay of 52 months in prison. Both those values increased after M11 with 78 percent of Robbery I indictments sentenced to prison with an average length of stay of 74 months in prison. The actual sentences from post-M11 are replaced with simulated shorter sentences which statistically match sentencing from the pre-M11 period. The prison population resulting from the shorter sentences is then calculated. The simulated prison population estimates what would happen with the same court cases and indictments, but with the shorter sentence outcomes from before M11.

M11 became effective for crimes committed on or after April 1, 1995, and the first M11 prison impact appeared within a few months. By July 1, 25 people had been sentenced to prison for new 'M11-listed' offenses.<sup>37</sup> Of those 25, most would have been in prison with

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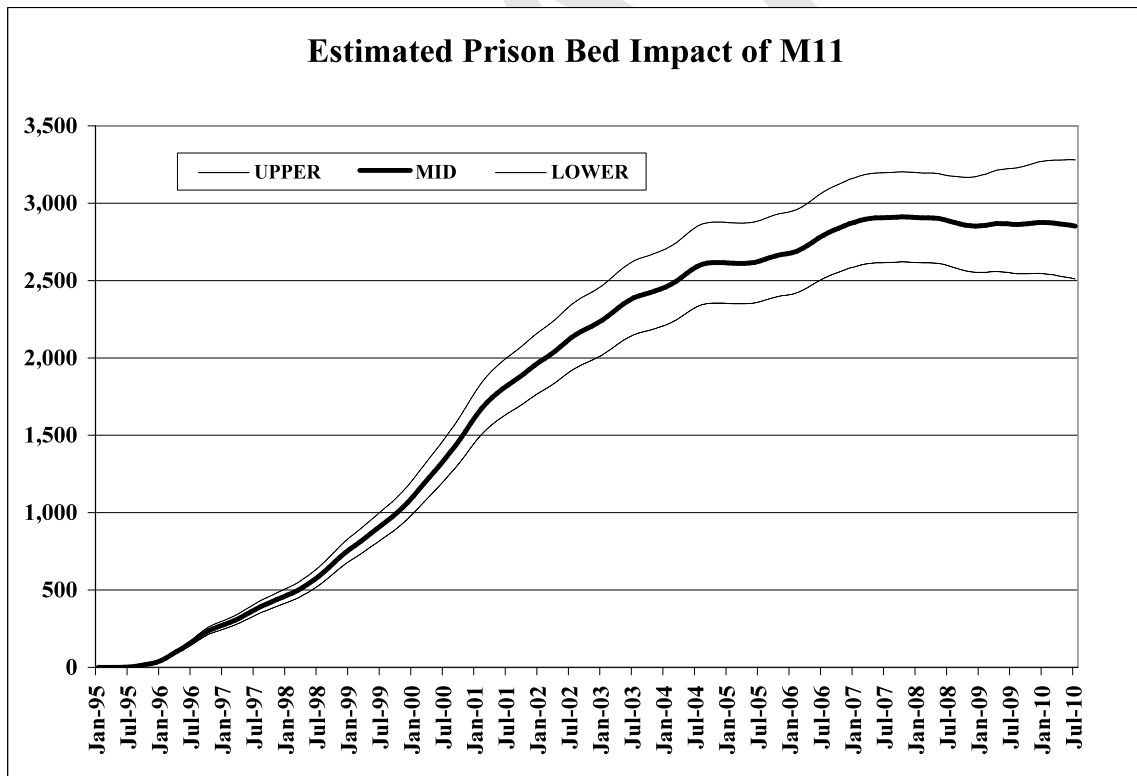
<sup>36</sup> Since M11 was such a major change in sentencing, its impact likely goes beyond the scope of the assumptions used for this analysis. In particular, this analysis assumes ‘indictment equivalency’ – meaning the criminal justice process up to the point of indictment did not change as a result of M11. Therefore, indirectly, it assumes M11 had no impact on the nature of criminal behavior, law enforcement practices or prosecution practices before indictment. Fundamentally, the reason for this and other assumptions is to establish a baseline from which unbiased data analytic methodology can be applied. The ‘indictment equivalency’ assumption is the most minimal assumption possible which still allows a reasonably clean, simple, unbiased, and data-driven analytic approach.

<sup>37</sup> An offense is called “M11-listed” if it appears in ORS 137.700 or 137.707. In addition to all full M11 offenses, this includes inchoate offenses (attempts, etc. at an offense).

or without M11. However, we estimated that two of the 25 would not have entered prison if M11 had not become law, hence the M11 prison impact as of July 1, 1995 was two to reflect the two additional inmates.

The M11 prison impact is the number of additional prison beds needed as a result of M11 passing. The impact does not include prisoners who would have been in prison regardless of M11. For example, a prisoner might have served 60 months for Rape I prior to M11, but because of M11 mandatory minimums must serve 100 months. That prisoner does not contribute to the M11 impact for the first 60 months they serve; but they do contribute to the impact for each of the 40 additional months since they would not have been in prison those months if not for M11. M11 also resulted in prison sentences for some offenders who might otherwise have received probation. In those cases, the prisoner contributes to the M11 impact every month they are in prison. Each month, the number of additional prisoners equals the M11 prison impact for that month.<sup>38</sup>

Graph 5 below shows the M11 impact over time. Statistical variability could move estimates up or down by 10 percent, which corresponds to the lower and upper ranges in the chart below. The M11 impact grew over the first 10 years following implementation but has since leveled off. The M11 impact has remained fairly stable at around 2,900 prison beds over the past five years. The minor changes in the M11 impact shown on the chart from 2006 onward lack statistical significance.



Graph 5

<sup>38</sup> The M11 impact includes the original M11 sentencing changes passed in 1994 as well as changes in the last 15 years, including ORS 137.712.

When M11 was passed in November of 1994, state forecasters estimated that over 9,000 prison beds would be needed to accommodate the growth predicted as a result of the law change.<sup>39</sup> However, more than 15 years after M11 was enacted the estimated impact is about one third of what was originally estimated. The discrepancy in the estimated number of prison beds needed and the actual impact is largely a result of the discretion that the district attorneys used in the application of M11. The original forecast was calculated by looking at conviction rates for offenses listed in M11 and applying the new mandatory minimum sentences to those conviction rates. However, as seen in this report the way in which cases were handled changed after M11 was enacted. Prosecutor's used their discretion to plea down a greater percentage of the cases to non-mandatory sentences thus reducing the impact of M11 on the prison system.

There is an important distinction between the M11 prison impact and the number of M11 inmates. A M11 inmate is a prisoner who is either serving time on a M11 sentence or who has a pending M11 sentence to serve. While there are over 5,500 M11 inmates, the impact of M11 is much smaller than the total number of M11 inmates. Many of these offenders would be in prison even if M11 was had not passed, but often serve longer sentences as a result of M11. The additional prison time they serve contributes to the M11 impact. Part of the M11 impact also comes from inmates that are not sentenced to a crime listed in M11 but receive a plea down from a M11 crime. On average they more

<b>Estimated Prison Bed Impact of M11</b>					
	<b>Impact Estimate</b>		<b>Breakdown of M11 Impact</b>		<b>M11 Impact as a Percentage of the Total Prison Population</b>
	<b>Estimated Impact</b>	<b>Range of the Estimated Impact</b>	<b>Impact of those Convicted of a M11</b>	<b>Impact of Offenders Convicted of a M11 Plea Down</b>	
January 1996	45	41 to 50	18 (41%)	27 (59%)	1%
January 1997	276	248 to 304	104 (38%)	172 (62%)	4%
January 1998	467	420 to 514	190 (41%)	277 (59%)	6%
January 1999	766	689 to 843	358 (47%)	408 (53%)	9%
January 2000	1,107	996 to 1,218	620 (56%)	487 (44%)	14%
January 2001	1,629	1,466 to 1,792	1,018 (63%)	611 (37%)	19%
January 2002	1,974	1,777 to 2,171	1,330 (67%)	644 (33%)	21%
January 2003	2,244	2,020 to 2,468	1,568 (70%)	676 (30%)	22%
January 2004	2,458	2,212 to 2,704	1,720 (70%)	738 (30%)	22%
January 2005	2,613	2,352 to 2,874	1,844 (71%)	769 (29%)	22%
January 2006	2,679	2,411 to 2,947	1,928 (72%)	751 (28%)	22%
January 2007	2,877	2,589 to 3,165	2,048 (71%)	829 (29%)	23%
January 2008	2,907	2,616 to 3,198	2,034 (70%)	873 (30%)	22%
January 2009	2,855	2,554 to 3,180	1,975 (69%)	880 (31%)	21%
January 2010	2,875	2,544 to 3,272	1,983 (69%)	892 (31%)	21%

Table 23

often receive a prison sentence and stay in prison longer than comparable inmates from the pre-M11 period. Their convictions are often connected with a plea down from a full M11 offense to an attempt. The M11 impact and the split of the impact between M11 inmates and non-M11 inmates is shown in table 23. In the first four years the M11 plea downs had a larger prison bed impact than the M11 sentenced offenders. This is because most offenders convicted of a M11 offense would have been in prison anyway but M11 lengthened their sentences. Those that pled down from a M11 offense were much more likely to receive a prison sentence after the passage of M11.

This analysis does not include the M11 impact on juvenile offenders incarcerated under the supervision of the Oregon Youth Authority (OYA). Since M11 applies to juvenile offenders age 15 and older, it does impact juvenile incarceration. Since 2000, OYA has had between 250 and 350 people incarcerated, ranging in age from 15 to 24, who were convicted in adult court of a M11-listed offense. Of those, the majority are either serving on a M11 sentence, or are serving on a sentence which was likely influenced by M11 (e.g., a plea to an attempt at M11-listed ORS). Given the seriousness of the offenses, most of them would have faced OYA incarceration regardless of M11, but M11 acted to lengthen the time they served in OYA. Estimates suggest that in each month since 2000, OYA has had between 100 and 200 additional people incarcerated as a result of M11.

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<sup>39</sup> See the estimate of financial impact in Appendix B.

### Exceptions to M11

Most of the discretion in M11 occurs before the conviction in the plea bargaining process. For most M11 crimes, once the offender has been convicted they serve the mandatory minimum sentence. In 1997, the legislature passed Senate Bill 1049, codified as ORS 137.712, allowing judges the limited ability to consider sentencing an offender convicted of Assault II, Robbery II and Kidnapping II to a sentence on the guidelines if an individual review of the impact to the victim and offender provided a substantial and compelling basis for such a sentence. Amendments in 1999 and 2001 added Manslaughter II, Rape II, Sodomy II, Unlawful Sexual Penetration II and Sex Abuse I to the crimes that may be considered, albeit under limited circumstances.

Table 23 shows over the past five years how many convictions were sentenced pursuant to ORS 137.712 and received an “opt out” sentence. Robbery II and Assault II are the most common crimes receiving an “opt out” sentence accounting for 86 percent over the five year period. Kidnapping II had the highest percentage of non-M11 sentences, 57 percent, with Robbery II and Assault II both having about 50 percent “opt out” sentences.

Crime	M11 Sentence		Opt Out	
	N	%	N	%
ASSA II	460	47%	519	53%
KID II	77	43%	102	57%
MANS II	92	100%	0	0%
RAPE II	92	76%	29	24%
ROBB II	519	52%	484	48%
SEX PEN II	16	76%	5	24%
SEX AB I	712	96%	29	4%
SODO II	26	90%	3	10%
All	1994	63%	1171	37%

Table 24

When an offender receives an “opt out” from the M11 sentence they are then sentenced under the Oregon Sentencing Guidelines. The most common “opt out” crimes, Robbery II and Assault II, are both 9’s on the grid meaning the presumptive sentence is a prison term between 34 and 72 months depending on the criminal history score. The judge can give a dispositional departure and sentence the offender to probation if additional mitigating factors are found in the case.<sup>40</sup>

Table 24 shows how often “opt out” offenders go to prison and what their average length of stay is. Many of the “opt out” offenders receive a downward dispositional departure and receive a non-prison sentence. These offenders may still end up in prison if they are revoked from probation.

Crime	% to Prison	Ave. LOS	Total Opt Outs
ASSA II	52%	28.7	519
KID II	42%	27.6	102
RAPE II	45%	20.4	29
ROBB II	65%	30.8	484
SEX PEN II	0%	0.0	5
SEX AB I	48%	19.8	29
SODO II	0%	0.0	3
All	56%	29.3	1171

Table 25

<sup>40</sup> See ORS 137.712 (1)(b).

Over this five year period there was an average of nearly 220 “opt out” sentences per year. Many of these offenders received a probation sentence and those that were sentenced to prison, on average, stayed less than half as long as they would have under the mandatory minimum sentence.

If one looked only at convictions in tables 23 and 24 it would appear that the law change in 1997 likely had a large impact on reducing or slowing the growth of Oregon’s prison population. However, if one uses indictments as the starting point it is not clear that the passage of SB 1049 had an impact on the prison population. Prior to the passage of M11, offenders indicted for Robbery II, Assault II and Kidnapping II were convicted of their most serious offense 31 percent of the time and went to prison about a quarter of the time. When M11 passed fewer indicted offenders were convicted of their most serious charge but a much higher percentage went to prison. When SB 1049 passed, a higher percentage of offenders were convicted of their most serious offense. Throughout the 2000’s the percentage convicted of their most serious offense increased. As this increased the number of “opt outs” also increased, causing the overall impact on the average offender to change very little. It appears that SB 1049 did have an effect on how offenders were prosecuted, with many more receiving a conviction for their most serious charge. Those offenders then, on average, received a lesser sentence than they did before SB 1049, thus offsetting the higher percentage of convictions. One would expect SB 1049 to result in a lower percentage of indictments going to prison and a shorter length of stay for those that do go to prison. Instead, table 25 shows that the prison months per indictment went up substantially after the passage of M11 but did not drop after the passage of SB 1049.

Tables 25 and 26 show an important aspect of the discretion in M11 convictions. On its face SB 1049 would appear to have a large impact on the future prison population by allowing some M11 convicted offenders the chance to receive a non-mandatory minimum sentence. In fact, from 2005-2009 around 220 convictions a year received a guidelines sentence, with 44 percent receiving probation instead of the mandatory minimum prison sentence. When only convictions are examined it appears that this bill avoided hundreds of prison beds by allowing some offenders, who would have previously received a mandatory minimum prison sentence, a probation or shorter prison sentence. However, when we examine indictments for the second degree M11 offenses in SB 1049 we can see that a lower percentage of offenders were now receiving plea downs and were getting convicted of more serious crimes. The sentences on these convictions were now shorter as a result of SB 1049 so the net impact was small. Offenders who were previously being convicted of attempts and third degree crimes were now being convicted more often of the M11 offense but receiving a guidelines sentence that was similar to the previous plea down sentence. So the prison impact of the law on offenders indicted where the most serious offense was a second degree M11 crime in SB 1049 seems to be negligible. Offenders indicted for Robbery I, Assault I and Kidnapping I do have a small decrease in their likelihood of receiving a prison sentence and their length of stay in prison after the passage of SB 1049. This small difference may be the result of the law change or may be the result of changes to the application of M11 as the system figured out how M11 cases were to be handled. Either way the impact of SB 1049 on the overall prison population appears to be small.

<b>Robbery II, Assault II and Kidnapping II Indictments</b>					
<b>Time Period</b>	<b>Indictments per Year</b>	<b>Convicted of Most Serious Offense</b>	<b>% to Prison</b>	<b>Average LOS of Prison Sentences</b>	<b>Ave. Months in Prison per Indictment</b>
<b>1991-1995 pre-M11</b>	720	31%	24%	25.6	6.2
<b>1995-1997 post-m11 pre 137.712</b>	697	18%	46%	40.4	18.6
<b>1998-2000 post 137.712</b>	767	24%	47%	42.8	20.0
<b>2001-2008</b>	801	33%	44%	43.9	19.4

Table 26

<b>Robbery I, Assault I and Kidnapping I Indictments</b>					
<b>Time Period</b>	<b>Indictments per Year</b>	<b>Convicted of Most Serious Offense</b>	<b>% to Prison</b>	<b>Average LOS of Prison Sentences</b>	<b>Ave. Months in Prison per Indictment</b>
<b>1991-1995 pre-M11</b>	527	38%	56%	53.9	30.4
<b>1995-1997 post-m11 pre 137.712</b>	548	28%	73%	81.1	59.2
<b>1998-2000 post 137.712</b>	520	25%	70%	77.0	53.7
<b>2001-2008</b>	476	24%	75%	74.7	56.1

Table 27

This is important because it shows that the discretion that surrounds M11 makes it difficult to predict how policy changes will impact the prison population. In 2010, Governor Kulongoski's Reset Report<sup>41</sup> made recommendations on how the prison population could be changed by making some modifications to M11. However, if these changes were made and prosecutors changed the plea bargaining these savings may not be realized.

<sup>41</sup> The public safety Reset Report can be found at:  
[http://governor.oregon.gov/Gov/docs/pubsafe\\_subcomreport\\_final.pdf](http://governor.oregon.gov/Gov/docs/pubsafe_subcomreport_final.pdf)



**Conclusion**

In Conclusion, M11 did not eliminate the tough choices about what the appropriate sentence is in a specific case. It did change who makes that decision from the judge to the prosecutor. It did eliminate the structure the guidelines gave for guiding these tough decisions in cases involving a M11 charge. The result has been an increase in severity of sentence, and an increase in incarceration in Oregon, though not nearly as great an increase as there would have been if prosecutors had sought conviction for the charge carrying the mandatory minimum as they had before the measure's passage.

In the United States, the separation of powers between the executive, legislative, and judicial branches has developed into well defined roles for each branch. In states and sentencing systems with sentencing guidelines, the legislature approves the sentencing laws, the executive branch prosecutes the laws and carries out the sentences imposed within its corrections system. The role of the judicial branch is to apply the law at the individual case level by evaluating the facts of the criminal case before it: the impact of the harm to the victim, the culpability of the offender, the public safety threat posed by the offender, and the societal impact of the crime. The judge then imposes a sentence that holds the offender accountable for his or her criminal action and promotes public safety. The judicial branch is usually seen as the neutral party in our adversarial criminal justice system that is best structurally situated to bring all the facts together and make an informed decision. The prosecutor's role in such a system is to bring the facts, from the State's perspective, to bear in the case. The prosecutor, due to familiarity with the case, is best situated to understand and explain the case from the perspective of the victim and law enforcement. The defense can provide information about the defendant that would be unknown to law enforcement and seek to mitigate the punishment that is necessary.

Usually, the executive branch discretion is controlled by adherence to objective criteria that are the basis of discretion. The judicial branch is usually given broader discretion. M11 flipped this dynamic for sentencing on Oregon's most serious offenses. And this structural change has had a far greater impact than the measure's impact measured in prison beds.