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## SENTENCING AND PAROLE GUIDELINES



**House  
Legislative  
Analysis  
Section**

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**House Bill 4114** as passed by the House  
Sponsor: Rep. Perry Bullard

**House Bill 4192** as passed by the House  
Sponsor: Rep. Nick Ciaramitaro

**Second Analysis (7-31-90)**  
Committee: Judiciary

**THE APPARENT PROBLEM:**

Criminals in Michigan are sentenced under an indeterminate sentencing structure, meaning that the sentencing judge sets minimum and maximum terms to be served. The maximum term is limited to the maximum set by the legislature in statute and the minimum term is limited to two-thirds of the maximum term. A prisoner becomes eligible for parole upon completing his or her minimum sentence, minus any reductions for good time or disciplinary credits. Prior to that time, a prisoner may be placed in a community corrections facility; by law, however, assaultive offenders may not receive community placement prior to 180 days before the expiration of their minimum terms. The system gives latitude to the judge to adjust the harshness of a sentence to the circumstances of the crime; it also gives leeway to the Department of Corrections (DOC) to promote and reward the rehabilitation of prisoners.

Across the country, and in Michigan as well, indeterminate sentencing systems have contributed to sentencing disparities where two offenders who commit very nearly the same crime and who have similar criminal histories may be sentenced to widely differing minimum terms. There is evidence that these variations may be influenced in some cases by the offender's race or gender and that they vary from county to county. A 1979 report of the Michigan Felony Sentencing Project, "Sentencing in Michigan," confirmed significant inconsistencies in Michigan sentences; data suggested that disparities existed along racial lines. Concerns over sentencing disparities in Michigan led to the development of sentencing guidelines intended to reduce or eliminate variations based on factors other than the facts of the crime and the prior record of the offender.

Since 1984, Michigan has operated with a system of judicially-imposed guidelines. A supreme court advisory committee developed sentencing guidelines that were tested in a pilot program in 1981, revised, and then issued for voluntary use under a 1983 supreme court order. In 1984, the supreme court required all judges to use the sentencing guidelines. A second edition of the guidelines has been used since October 1, 1988 under supreme court Administrative Order 1988-4.

Under the supreme court's sentencing guidelines, a range for a person's minimum sentence is determined using a grid that measures the severity of the crime against the offender's criminal history. Offense and criminal record scores are calculated by adding the scores assigned to various weighted variables. Whenever a judge determines that a minimum sentence outside the recommended minimum range should be imposed, the judge may do so, but must state his or her reasons on the sentencing

information report that is sent to the state court administrative office. What constitutes acceptable reasons is being determined by case law.

The supreme court's guidelines have been criticized for failing to sufficiently restrict departures, among other things. The guidelines essentially codify existing sentencing practices, and whether they have sufficiently reduced sentencing disparities based on race and other unacceptable factors is a matter of some dispute. Moreover, as the state's prison overcrowding has worsened despite an expensive prison construction program, many have concluded that a comprehensive review and development of sentencing guidelines in coordination with parole guidelines is needed to ensure that limited prison and jail space is used for the worst offenders and that community alternatives are employed whenever possible. What is needed, many say, is an independent commission to develop sentencing and parole guidelines for approval by the legislature.

**THE CONTENT OF THE BILLS:**

House Bill 4114 would amend the Code of Criminal Procedure to create a sentencing commission to develop sentencing guidelines that would be made mandatory upon approval by the legislature. Sentencing would continue to be indeterminate. Guidelines would establish minimum sentence ranges based on certain offense and offender characteristics, and judges would continue to set sentence maximums within the limits established by law. In developing guidelines, the commission would consider the likelihood that the capacity of state and local correctional facilities would be exceeded. The bill would set guidelines criteria, restrict judicial departures from guidelines and provide for appeals, require the use of "intermediate sanctions" when guidelines called for a sentence of less than 12 months, and provide for the development of separate sentence ranges to apply to habitual offenders. An effective date of April 1, 1990 would be specified for provisions on habitual offenders, guidelines development, and conditions of probation; other provisions on departures from guidelines, the use of intermediate sanctions, and presentence investigation reports would take effect upon the guidelines taking effect. None of the bill could take effect unless House Bill 4192 also was enacted. A more detailed description follows.

Existing guidelines. When the sentencing guidelines developed under the bill took effect, existing guidelines promulgated by Michigan Supreme Court Administrative Order 1988-4 would no longer apply.

Guidelines criteria. Guidelines would include sentence ranges for the minimum sentence for each offense, along

H.B.s 4114 &amp; 4192 (7-31-90)

with "intermediate sanctions" (that is, punishments other than incarceration in a state prison) to be applied whenever a range included a recommended minimum sentence of less than 12 months. Separate sentence ranges would be developed for convictions that fell under the habitual offender provisions of the Code of Criminal Procedure.

In developing guidelines, the commission would consider the likelihood that the capacity of state and local correctional facilities would be exceeded. "State correctional capacity" would include the capacities of all permanent and temporary state facilities in use, plus those approved for construction under the joint capital outlay process.

Guidelines and any later modifications would have to reduce sentencing disparities based on factors other than offense and offender characteristics, and ensure that offenders with similar offense and offender characteristics received substantially similar sentences. "Offender characteristics" would mean only the prior criminal record of the offender. "Offense characteristics" would be the elements of the crime plus any aggravating or mitigating factors the commission considered appropriate, providing they were consistent with the bill. Guidelines also would have to be proportionate to the seriousness of the offense and the offender's prior criminal record (an offense involving violence against a person would be considered more severe than other offenses); provide for protection of the public; and, specify the circumstances under which a term of imprisonment or intermediate sanctions should be imposed. Guidelines sentence ranges would have to be within the minimum and maximum sentences allowed by law.

Sentencing commission. The guidelines and subsequent modifications would be developed by an eleven-member commission appointed by the governor with the advice and consent of the Senate. The commission would be administratively housed in the Legislative Council, which would provide office space and staffing. The commission would consist of: three judges (including at least one circuit judge and one recorder's court judge), plus representatives of prosecuting attorneys, the criminal defense bar, the Department of Corrections, advocates of alternatives to incarceration, and crime victims, and three people representative of the general public, one of whom would chair the commission. Terms would be four years. Members would not receive salaries, but would be reimbursed for expenses. Commission business would be subject to the Open Meetings Act and the Freedom of Information Act.

In addition to developing guidelines meeting the bill's requirements, the commission would develop parole guidelines; assemble and disseminate information on state and local felony sentencing practices and prison and jail utilization; conduct research on the impact of the sentencing guidelines developed by the commission; compile data and make projections on populations and capacities of state and local correctional facilities and how sentencing guidelines affect them; and, in cooperation with the state court administrator, compile data and make projections on the effect of sentencing guidelines on case loads, docket flow, and case backlogs in Michigan. The state court administrator's office would continue to collect data on sentencing practices; it would have to provide this data to the commission.

Approval of guidelines, amendments. The commission's guidelines would not take effect unless they were enacted into law. The commission would submit its guidelines to the

legislature on October 1, 1992. If the guidelines were not enacted within 90 days after being submitted, the commission would revise them and submit the revised guidelines to the legislature within 180 days after guidelines were previously submitted. The process would continue until guidelines were enacted into law.

The commission could recommend modifications to the guidelines. Generally, modifications could not be implemented more often than every two years; an exception would be made for modifications based on omissions, technical errors, changes in the law, or court decisions. Modifications would follow the same enactment process applying to the initial guidelines.

Application of guidelines. Except for allowable departures, a sentence for a crime committed after the bill's guidelines took effect would have to follow those guidelines. Multiple convictions arising out of a single transaction would be considered one conviction when sentencing on a conviction arising out of that transaction. If a crime had a mandatory penalty, the court would impose that sentence; provisions on guideline departures and appeals therefrom would not apply. Whenever a term of incarceration was imposed, the court could also order that a fine, restitution, costs, or any combination of the three be paid.

Departures from guidelines. A court could depart from the bill's guidelines if it had a substantial and compelling reason to do so. Its reason(s) would have to be stated on the record, and could not be based on any offense or offender characteristic already taken into account in determining the appropriate sentence range. The following factors would be specifically disallowed in departing from guidelines: gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, the type of legal representation (such as whether by appointed or retained counsel), and religion.

Appeals. The court would advise a defendant of the right to appeal a sentence that was more severe than the appropriate guideline sentence. The prosecution could appeal a sentence that was less than the guideline sentence. Appeals would be to the court of appeals, which would remand the matter back to the sentencing judge or another trial court judge if it found that the trial court did not have a substantial and compelling reason for departing from the guidelines. Upon remand, the trial court could only lower a sentence appealed by the defense, and increase a sentence appealed by the prosecution. An appeal would not act as a stay on the execution of the sentence.

Intermediate sanctions. Beginning on the effective date of the bill's guidelines, if the recommended minimum sentence for a defendant was less than 12 months, the court would have to impose an intermediate sanction unless it stated on the record a substantial and compelling reason to impose a sentence of imprisonment. An "intermediate sanction" would be any sanction other than imprisonment in a state prison or reformatory that could lawfully be imposed. Intermediate sanctions would include probation, drug treatment, mental health counseling, jail, work-release or school-release from jail, participation in a community corrections program, community service, restitution, fines, house arrest, electronic monitoring, and probation with special alternative incarceration ("boot camp"). The bill would add to the list of specifically-allowed conditions of probation the intermediate sanctions that are not already mentioned.

**Presentence investigation reports.** In addition to the information now required, a presentence investigation report for sentencing under the bill's guidelines would have to include: a specific statement on the applicability of intermediate sanctions; guidelines computations and the recommended sentence; the defendant's prior criminal record, including all misdemeanor and felony convictions, probation violations, and juvenile adjudications for acts that would have been crimes if committed by an adult; and available diagnostic opinions not otherwise exempted from disclosure.

**Habitual offenders.** The bill would require the sentencing commission to develop separate sentence ranges for habitual offenders; habitual offender ranges could include as an aggravating factor that the accused had engaged in a pattern of proven or admitted criminal behavior. In addition, the bill would delete language calling for written approval from the sentencing judge before parole of a habitual offender sentenced under the habitual offender statute applying to conviction for a fourth or subsequent felony.

MCL 769.8 et al.

**House Bill 4192** would amend Public Act 232 of 1953, the corrections code, to place supervision and control of the parole board under the authority of the director of the Department of Corrections, rather than the corrections commission; to provide for the development of parole guidelines; and to limit placements in community facilities. The effective date for most of the bill would be April 1, 1990; however, the new limits on community placement would take effect on the effective date of the new sentencing guidelines to be developed under House Bill 4114. The bill could not take effect unless House Bill 4114 was enacted. Additional details follow.

**Parole guidelines.** The sentencing commission would develop guidelines to govern the release of prisoners on parole. In developing the guidelines, the commission would have to consider: the offense for which the prisoner was incarcerated, the prisoner's institutional conduct and program performance, and the prisoner's prior criminal record (including misdemeanor and felony convictions, probation violations, certain juvenile adjudications, parole failures, and delayed sentences). The commission could also consider the prisoner's age and statistical risk screening. Guidelines and modifications would be submitted to the legislature for approval under procedures paralleling those proposed for sentencing guidelines. The parole board could depart from parole guidelines in the same way judges could depart from sentencing guidelines.

**Community placement.** A prisoner could not be assigned to a community corrections center or a community residential home for more than the final 12 months of the prisoner's minimum sentence.

MCL 791.202 et al.

## **FISCAL IMPLICATIONS:**

According to the House Fiscal Agency, the fiscal implications of the bills cannot be determined at this time. (7-30-90)

## **ARGUMENTS:**

### **For:**

By acting to control both sentencing and release practices, the legislature will be making a clear and rational affirmation of public policy on the issues of crime and

punishment, rather than passively accepting a working average emerging out of judicial practice. A rational and comprehensive system of sentencing and parole guidelines would ensure that justice is served, bias is removed from decision-making, and limited prison and jail resources are used to their best advantage — that is, to house the worst offenders. The bills propose to develop this system through the creation of a commission of experts, supported by a professional staff and operating with clear statutory objectives and under firm deadlines; similar structures have worked well in other states (notably Minnesota) and in the development of federal sentencing guidelines. Ultimate authority will, however, remain with the legislature by virtue of the necessity of legislative adoption of the commission's proposals.

### **Against:**

The bills fail to adequately consider the acute problem of prison and jail overcrowding. Guidelines developed without regard to correctional capacity not only could worsen overcrowding, but also could fail to ensure that limited prison and jail beds were used for the worst offenders. Although the commission is to "consider" correctional capacity in developing guidelines, the severity of the problem warrants stronger language that would require guidelines to accommodate capacity by minimizing the likelihood that capacity would be exceeded. Such an approach would be more rational and responsible than the informal judicial responses that seem to have operated in recent years, where it appears that judges responded to prison overcrowding by sentencing offenders to jail, then responded to jail overcrowding by sentencing relatively minor offenders to prison.

The bills also contain other shortcomings with regard to prison overcrowding. For one thing, the calculation of state capacity would include temporary facilities, which would not be available indefinitely, and proposed facilities, which may not yet be built at the time a prisoner was sentenced. The guidelines likely would presume the availability of more prison beds than actually existed. In addition, House Bill 4192 would limit community placement to the last 12 months of a sentence, when corrections department policy now limits it to the final 24 months. The department would have to find beds for those prisoners elsewhere in the system, thus exacerbating overcrowding problems.

**Response:** It would be a mistake to require, as the committee version of House Bill 4114 did, that guidelines minimize the likelihood that state and local correctional capacity will be exceeded. To link sentencing with prison and jail overcrowding in such a manner would defeat the ends of justice and public safety. Criminals whose offenses and criminal backgrounds warrant incarceration should be incarcerated; their sentences should be those called for by the severity of their crimes, not by the severity of the state's problems with the corrections budget. If, as may be the case, too many relatively minor offenders are being sentenced to state prison, the solution is to improve local options, notably by adequately funding the community corrections act and making more creative use of institutional space (such as with the "boot camp" program).

### **Against:**

The bills could unduly interfere with the discretion of the executive and judicial branches to deal with individual circumstances. Although departures from guidelines would be allowed, they would be limited to cases that presented "substantial and compelling" reasons; what constitutes

"substantial and compelling" is yet to be determined. Departures based on factors already considered by guidelines would be barred; however, this restriction assumes that guidelines will so well weigh offense and offender characteristics that justice will always be served by a strict application of the guidelines. Exceptional cases could arise where guidelines scoring called for an overly harsh or lenient sentence for the individual involved, yet the judge would be prohibited from taking offense characteristics and prior criminal record into account, even though reasons would have to be stated on the record and appellate review would be available. Appellate review also would be restricted: appealed sentences could only be either affirmed or sent back to the sentencing court for specific action. Finally, House Bill 4114, while adding to the list of allowable conditions of probation, lets stand a provision that bars those conditions for someone placed on lifetime probation; it makes little sense to bar some of those conditions, such as drug treatment, to a person placed on lifetime probation.

**Response:** The unrestrained exercise of judicial discretion can lead to sentencing practices that vary from county to county and court to court, opening avenues for personal bias to influence sentencing decisions. Sentencing guidelines are supposed to remove bias and make sentencing more uniform by quantifying offense and offender characteristics. If those same characteristics may then be used by a judge to increase or decrease sentences, the objectives of sentencing guidelines may be frustrated. The bills offer adequate provision for individual circumstances by allowing guidelines to be set aside for "substantial and compelling" reasons, subject to review by appellate courts.

### **Against:**

House Bill 4114 would require the use of "intermediate sanctions," including jail and non-incarcerative sanctions, for offenders with guidelines minimums of less than one year; the proposal suggests that more felons will have to be dealt with locally. Without adequate funding and support from the state, the bill could exacerbate problems for already overburdened jails and alternative programs.

### **Against:**

The bills present several problems of implementation. They offer little guidance on what constitutes a "substantial and compelling" reason acceptable for departing from guidelines, leaving the definition of that term to the slow and expensive process of the development of case law. Also, the bills propose what could be an endless cycle of guidelines being submitted to the legislature, failing to gain approval, and being revised and resubmitted. At the least, there should be some requirement for the legislature to communicate to the commission its reasons for refusing to pass proposed guidelines. Many argue that the legislation should go a step further, that enactment of the guidelines should be made more certain by building in stronger presumptions for acceptance of commission recommendations. As it stands, the bills place no restraints on the amendatory process; there is little to prevent the details of guidelines from being unduly affected by political expediency and passing public opinion.

**Response:** The setting of sentence lengths is the duty of the legislature; Article IV, Section 45 of the state constitution says that "the legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such

sentences." While it may be practical to authorize an expert commission to make studies and recommendations, to limit the legislature's ability to modify those recommendations would be to ask the legislature to surrender its responsibility. Such limits would be on shaky constitutional ground, in any event, as one legislature cannot bind the actions of another.

### **Against:**

House Bill 4192 raises questions about how the parole process may change under the bill. The implications of placing the parole board under the department director's authority are unclear. Although the bill would limit departures from parole guidelines, it also retains statutory language that says that "release of a prisoner on parole shall be granted solely upon the initiative of the parole board;" whether and how guidelines departures could be appealed is not specified. Further, by having parole guidelines enacted as law, the bill may lead to greater burdens on courts through lawsuits brought by disgruntled prisoners denied parole.

### **Against:**

The legislation should do more to curb inappropriate sentence adjustments based on applying the same factors more than once. Because guidelines take criminal history into account, the application of habitual offender sentence enhancements is debatable. While separate sentence ranges for habitual offenders would be devised, the bill should not allow existing habitual offender provisions to apply when the offender was being sentenced under the new guidelines.

**Response:** It would be too extreme to make such changes in the way that habitual offenders are dealt with. Strong habitual offender enhancements are necessary to properly punish and incapacitate career criminals.

### **Against:**

By providing for gubernatorial appointment of commission members, the legislation may fail to ensure that various members are respected experts in their fields. It would be better for the various groups to be able to select their own representatives.

## **POSITIONS:**

The Michigan Association of Counties support the bills. (7-31-90)

The Prosecuting Attorneys Association of Michigan supports the bills. (7-18-90)

The State Bar of Michigan supports the concept of sentencing guidelines, and is in the process of analyzing the bills. (7-17-90)

The Michigan Sheriffs' Association supports the bills, but is concerned that requirements for intermediate sanctions may fail to sufficiently consider local resources. (7-31-90)

The State Appellate Defender's Office supports the concept of presumptive guidelines for sentencing and parole, but does not support the bills as passed by the House. (7-18-90)

The Department of Corrections supports the concept of sentencing guidelines and an independent commission to

develop them but opposes a provision to limit community placement to prisoners who are within 12 months of their release date. (7-17-90)

The Michigan Judges Association has no formal position at this time. (7-18-90)