



**House
Legislative
Analysis
Section**

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SENTENCING GUIDELINES

House Bill 4684 (Substitute H-2)
Sponsor: Rep. Nick Ciaramitaro

House Bill 4782 (Substitute H-2)
Sponsor: Rep. Michael E. Nye

First Analysis (9-29-93)
Committee: Judiciary

THE APPARENT PROBLEM:

Criminals in Michigan are sentenced under an indeterminate sentencing structure, meaning, basically, 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 exact duration of the sentence served is not established at the time of sentencing; thus, sentencing is "indeterminate." 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. Case law is determining what constitutes acceptable reasons.

The supreme court's guidelines have been criticized for failing to sufficiently restrict departures, among other things; whether they have sufficiently reduced sentencing disparities based on race and other unacceptable factors is a matter of some dispute. In addition, the guidelines essentially codified existing practices and thus may fail to ensure a coherent and consistent system of punishment. Current guidelines have been criticized both for excessive leniency and for undue harshness. 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 is needed to ensure that limited prison and jail space is used for the worst offenders and that community alternatives

are employed whenever possible. Finally, many have asserted that as it is the legislature that establishes the penalties for various offenses, the legislature should provide for sentencing guidelines. 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 4782 would amend the Code of Criminal Procedure (MCL 769.31 et al.) to create a sentencing commission to develop sentencing guidelines that would be made mandatory upon enactment into law. 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 12 months or less, and provide for the development of separate sentence ranges to apply to habitual offenders. Provisions for intermediate sanctions, application of guidelines, departures from guidelines, and departure appeals would take effect when enacted sentencing guidelines took effect.

House Bill 4684 would amend the Code of Criminal Procedure (MCL 769.12 et al.) to delete language calling for judicial approval prior to parole of certain habitual offenders, to limit community placement to those prisoners who had 12 months or less left to serve on their sentences, to add to the statutory list of specifically-allowed conditions of probation, require presentence investigation reports to include certain guidelines-related information, and to revise various deadlines for appeals to make them multiples of seven days in conformity with court rules. Provisions on habitual offenders, conditions of probation, and community placement would take effect October 1, 1993. Provisions on appeals deadlines and presentence investigation reports would take effect when enacted sentencing guidelines took effect.

Both bills would be tie-barred to each other and to a House Concurrent Resolution (this resolution has not yet been introduced, but has been given the

request number R 4161 '93). According to information provided to the House Judiciary Committee, the resolution would amend the joint rules of the House and the Senate to forbid amendments to commission guidelines if the amendments had the effect of increasing or decreasing prison population.

A more detailed explanation follows. Except where otherwise noted, the provisions described are those of House Bill 4782.

Existing guidelines. Guidelines promulgated by order of the supreme court would not apply on or after the effective date of the act by which the legislature enacted sentencing guidelines into law.

Guidelines criteria. Guidelines would include sentence ranges for the minimum sentence for each offense, along 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 12 months or less. 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 a nineteen-member commission created within the Legislative Council, which would provide office space and staffing. The commission would consist of: four senators (two members from each caucus), four representatives (two members from each caucus), two judges (one circuit court judge and one recorder's court judge), plus representatives of prosecuting attorneys, criminal defense attorneys, law enforcement, the Department of Corrections, advocates of alternatives to incarceration, crime victims, and the Department of Management and Budget, along with two members representing the general public. Legislative members would be appointed by their respective caucus leaders. Other members, one of whom would be appointed chairperson, would be appointed by agreement between caucus leaders and the governor.

Terms would be four years, except for some shorter initial terms to establish staggered terms. 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.

Commission duties. In addition to developing guidelines meeting the bill's requirements, the commission would 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 necessary 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 by November 10, 1994. If the guidelines were not enacted into law by December 31, 1994, the commission would

resubmit them by January 15, 1995. If the guidelines were not enacted within 90 days after they were resubmitted, the commission would revise them and resubmit them within 180 days after they were previously submitted. The process would continue until guidelines were enacted.

The commission could recommend modifications to the enacted guidelines. Generally, modifications could not be implemented more often than every two years; exceptions 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. An offender would be sentenced under the guidelines in effect on the date the crime was committed. 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 penalty; 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 minimum 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, or increase a sentence appealed by the prosecution. An appeal would not stay the execution of the sentence.

Consistent with court rules, House Bill 4684 would revise various deadlines applying to bringing appeals from district courts, circuit courts, and the Detroit recorder's court. Where the law now allows 60 days to bring an appeal, the bill would allow 42 days. Where 20-day deadlines now apply, the bill would provide 21 days.

Intermediate sanctions. Beginning on the effective date of the bill's guidelines, if the upper limit of the guidelines' range for a defendant's minimum sentence was 12 months or less, 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").

Habitual offenders. House Bill 4782 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. House Bill 4684 would delete language calling for written approval from the sentencing judge before parole of a habitual offender sentenced under the fourth-felony habitual offender statute.

Presentence investigation reports. House Bill 4684 would require a presentence investigation report to include, in addition to the information now required, the following: a specific statement on the applicability of intermediate sanctions; guidelines computations and the appropriate minimum sentence range; 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.

Conditions of probation. House Bill 4684 would add to the list of specifically-allowed conditions of probation the intermediate sanctions that are not already mentioned. The bill also would allow a court to make payment of crime victims assessments (levied under Public Act 196 of 1989) and garnishment for costs or fees (including victims assessments) conditions of probation.

BACKGROUND INFORMATION:

One of the issues presented by the legislation is the bills' use of the "substantial and compelling" standard for departures from guidelines. That standard is employed in the Public Health Code as the standard for departing from the minimum sentences that otherwise are to be imposed for certain controlled substances offenses; the judge may depart from the sentence if he or she finds "substantial and compelling" reasons to do so.

In 1991, a "superpanel" of the court of appeals, formed to resolve conflicting opinions of different panels of the court, issued its interpretation of "substantial and compelling" (*People v. Windall Hill*, 192 Mich App 102). That decision is binding, as the supreme court declined to hear the case.

The "superpanel" held that "trial courts may depart from mandatory minimum sentences for substantial and compelling reasons that are objective and verifiable. Trial courts will be permitted to consider both prearrest and postarrest factors in determining whether to depart from the mandatory minimum sentences."

FISCAL IMPLICATIONS:

There is no fiscal information at present. (9-28-93)

ARGUMENTS:

For:

By acting to control sentencing practices, the legislature will be making a clear and rational declaration 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 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 approval of the commission's proposals.

For:

The bills complement the supreme court's decision in People v Milbourn (461 N.W.2d 1, 435 Mich. 630), issued September 11, 1990. In that decision, the court replaced its earlier "shocks the conscience" test for overturning sentences on appeal with a test applying the "principle of proportionality." The principle of proportionality, as articulated by the court, "requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." The court noted that a proportionality test is "better tailored to and in keeping with the sentencing scheme adopted by the legislature." The court reasoned that "the legislature, in setting a range of allowable punishments for a single felony, intended persons whose conduct is more harmful and who have more serious prior criminal records to receive greater punishment than those whose criminal behavior and prior record are less threatening to society."

Sentencing guidelines, which use offense characteristics and prior record to determine the range for a minimum sentence, embody the principle of proportionality. While there has in the past been some concern over whether sentencing guidelines are within the proper purview of the legislature, any lingering doubts have been answered by the discussion in Milbourn: the court expressed reluctance to require strict adherence to guidelines because the court's guidelines did not have a legislative mandate. The court also noted that departures would be appropriate where guidelines did not adequately account for important factors legitimately considered at sentencing, and that to require strict adherence would effectively prevent their evolution; both of these concepts are reflected in the legislation.

Against:

To link sentencing with prison and jail overcrowding as the package proposes 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 community corrections and making more creative use of institutional space (such as with the "boot camp" program). At a minimum, any legislative approach to sentencing reform should include "truth-in-sentencing" provisions to ensure that minimum sentences actually are served.

Against:

By implicitly suggesting that the legislature simply approve or disapprove guidelines offered by the commission, the bills would circumvent the proper role of the legislature. 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 attempt 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.

Response:

The limitation on legislative changes to commission-recommended guidelines would be adopted through the joint rules of the House and the Senate; constitutional concerns thus would be avoided. The alternative, to allow the legislature to amend the guidelines, would be to allow the guidelines to be influenced by political expediency and passing public opinion; the balanced, rational structure that guidelines are supposed to provide would be lost. As it is, the proposal offers some protection against this happening. Some have suggested however, that stronger protection could be afforded by a stronger presumption for acceptance of commission recommendations. For example, the legislation could provide for guidelines to take effect if the legislature failed to act by a specified deadline. Or, the bills could do as earlier versions have proposed and provide for the guidelines to take effect via adoption of a concurrent resolution.

Rebuttal:

Concurrent resolutions are subject to legislative amendment and thus would not guarantee that the guidelines process was not overly politicized. To define crimes and prescribe their punishments is the prerogative of the legislature, and would remain so, regardless of the mechanism of guidelines approval; there may be no way to eliminate the influences of politics. Besides, it would not necessarily be wrong for guidelines to be influenced by the public opinions of the time; if public opinions changed, so could the guidelines. However, approval of the guidelines by mere resolution might be inadequate for them to carry the force of law and withstand constitutional challenges. With enactment into law, the guidelines would bear the power of the full legislative process, including gubernatorial approval.

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 4684 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. Finally, the bills do not incorporate a concept of what the correctional capacity should be at a given

time; "correctional capacity" could continue to include beds at aging and inadequate facilities such as Jackson prison and the Ionia Reformatory, which should have been "decommissioned" by now.

Response:

By proposing that joint rules limit guidelines amendments to those that would have a neutral effect on prison population, the guidelines package recognizes the importance of allocating finite correctional resources. The proposed rules change, in conjunction with the commission's charge to consider correctional capacity, should be adequate to ensure that prison beds are there for the most serious offenders. Further, although new limits on community placement would tend to worsen prison crowding, this tendency would be offset by requirements for the use of jail and nonincarcerative sanctions for relatively minor offenders.

Against:

The bills could unduly interfere with the discretion of the judicial branch to deal with individual circumstances. Although departures from sentencing guidelines would be allowed, they would be limited to cases that presented "substantial and compelling" reasons. Sentencing departures based on factors already considered by guidelines would be barred; however, this restriction assumes that guidelines will so well weigh offense and offender variables that justice would 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 guidelines variables into account, even though reasons would have to be stated on the record and appellate review would be available. Further, House Bill 4684 would eliminate the authority that trial judges now have to bar the parole of habitual offenders. Generally, to the extent that the bills would limit judicial discretion, they would place sentencing power in the hands of prosecutors through the exercise of prosecutorial discretion over charging. Sentencing decisions are best left where they belong, in the hands of impartial judges.

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 or philosophical differences 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. Rather than restrict legitimate judicial discretion, the bills recognize the role of the judicial branch, for exactly what constitutes "substantial and compelling" is being settled by the development of case law. (See Background Information.) Further, the bills are consistent with Milbourn in that they bar departures based on factors already considered by guidelines. The supreme court said that "a departure from the recommended range in the absence of factors not adequately embodied in the guidelines should alert the appellate court to the possibility that the trial court has violated the principle of proportionality."

Against:

House Bill 4782 would require the use of "intermediate sanctions," including jail and nonincarcerative 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 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 justice of applying 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:

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 uncertain 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 disapproving proposed guidelines.

Against:

Some may object to the way commission membership is to be chosen. Standard procedure for such a commission is to have members appointed by the governor, subject to Senate approval; in the alternative, statute sometimes provides for represented groups to choose their own commission representatives. Some may argue that the latter procedure should be employed for the judicial members, in any event; when a judge is to serve on a commission by virtue of his or her position as a judge, it should be the supreme court who appoints him or her.

POSITIONS:

There are no positions at present.