This revised analysis replaces the analysis dated 8-6-98.

House
Legislative
Analysis
Section

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SENTENCING GUIDELINES/ TRUTH IN SENTENCING

House Bill 5419 as enrolled
Public Act 317 of 1998
Sponsor: Rep. James McNutt
House Committee: Judiciary
Senate Committee: Judiciary

House Bill 5398 as enrolled
Public Act 315 of 1998
Sponsor: Rep. A.T. Frank
House Committee: Corrections
Senate Committee: Judiciary

Senate Bill 826 as enrolled
Public Act 316 of 1998
Sponsor: Sen. William Van Regenmorter
Senate Committee: Judiciary
House Committee: Judiciary

Revised Second Analysis (9-23-98)

THE APPARENT PROBLEM:

Many members of the public are concerned by what they perceive as the failure of the criminal justice system to protect them by locking up violent criminals and keeping them locked up. The revolving door impression of the prison system leads many to feel frustrated about the lack of adequate punishment for criminals and the failure of the system to keep dangerous criminals off the streets. All too frequently, a criminal who has been sentenced to prison is released even before the end of his or her minimum term of imprisonment and then commits yet another crime. Anecdotes abound of lives lost or ruined by acts committed by violent criminals who would have still been behind bars if they had been kept locked up until the expiration of their minimum terms. People are and have been outraged by this all too common occurrence.

The answer, say many, is "truth in sentencing," a concept under which offenders would have to serve their minimum sentences. In 1994, legislation (Public Acts 217 and 218) was enacted to provide for "truth in sentencing." The effective date of the 1994 truth-in-sentencing legislation, however, was tied to the enactment of statutory sentencing guidelines, after the Sentencing Guidelines Commission submitted its report to the legislature. Under the truth-in-sentencing legislation, most prisoners would have to serve at least their judicially imposed minimum sentence. Some people believe that the truth-in-sentencing concept should now be made effective and that the concept should be extended to apply to all prisoners, rather than just those who are convicted of specific offenses.

On the other hand, many people are equally concerned with the failure of indeterminate sentencing to provide an evenhanded standard of punishment for crimes. (For a brief explanation of sentencing in Michigan, see Background Information.) Many believe that 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. In 1979, the Michigan Supreme Court, apparently out of concerns regarding disparity in the imposition of criminal sentences throughout the state, appointed an advisory committee to research and design a sentencing guidelines system. In 1983, the guidelines were distributed to circuit court and Recorder's Court judges, for use on a voluntary basis. The following year, the supreme court mandated statewide use of the guidelines and

began collecting data to test the guidelines' validity and effectiveness. Michigan's criminal justice system has operated under these judicially-imposed sentencing guidelines since 1984.

A revised version of the judicial guidelines has been in effect since October 1, 1988, pursuant to a Supreme Court Administrative Order. No modifications or amendments have been made to the currently used sentencing guidelines since that date. These guidelines were designed to reduce disparity in sentencing from county to county and region to region by mirroring the existing sentencing practices of judges across the state at the time the guidelines were implemented. They were developed using the results of research on sentencing patterns of judges throughout Michigan, and attempt to capture the typical sentence for similar types of offenses and offenders. In designing the current system, the guidelines' impact on state and local correctional resources and budgets were not considered.

The supreme court's guidelines have been criticized on a number of grounds. For one thing, the guidelines essentially codified existing practices by reflecting the average sentences imposed for similar crimes and similar defendants rather than looking at what a reasonable sentence was for the particular crime. In addition, the current guidelines have been criticized both for excessive leniency and for undue harshness. 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 by the legislature (as it is the legislature that establishes the penalties for various offenses) was needed to ensure that limited prison and jail space were put to best use.

During the time that the judicially mandated sentencing guidelines have been in use, several bills were introduced in the legislature calling for an independent commission to develop a systematic statutory sentencing structure. Finally, in 1994, Public Act 445 provided for the selection of a 19-member Sentencing Guidelines Commission and charged it with designing and recommending to the legislature a new sentencing guidelines system.

The commission began its work in May of 1995, with the goal of developing sentencing guidelines that would provide for the protection of the public, that considered offenses involving violence against a person as more severe than other offenses, and that were proportionate to the seriousness of the offense and the offender's prior criminal record. In addition, the commission was instructed to take into account the capacity of state and local correctional facilities.

On October 22, 1997 the commission adopted its recommendations for a set of sentencing guidelines on a 12-3 vote and submitted them to the legislature for its approval. According to the law that established the commission, the commission's guidelines will not take effect unless they are enacted into law. Some people believe that the legislature should adopt a system of sentencing guidelines based on that report.

THE CONTENT OF THE BILLS:

The package of bills would enact sentencing guidelines and truth in sentencing. House Bill 5419, Senate Bill 826, and House Bill 5398 would amend, respectively, the Code of Criminal Procedure, the prison code, and the Department of Corrections (DOC) act to establish statutory sentencing guidelines and to modify and give effect to the provisions enacted in 1994 and commonly referred to as "truth-in-sentencing." House Bill 5419 would enact the sentencing guidelines. Senate Bill 826 and House Bill 5398 would provide for modifications and implementation of truth in sentencing.

The bills would take effect on December 15, 1998. [However, House Bill 5419 indicates that the sentencing guidelines established by the supreme court would not apply to felonies committed on or after January 1, 1999 and that on or after January 1, 1999, the minimum sentence for a crime would be determined under the sentencing guidelines in effect on the date the crime was committed.] None of the bills would take effect unless each of the bills are enacted and all of the following bills are also enacted:

-- House Bill 4065 (which would amend the Public Health Code to make drug-aided criminal sexual conduct and the attempt thereof a felony, add a substance to the code's schedule of controlled substances, and repeal the section of the health code mandating life imprisonment for Schedule 1 narcotics [such as heroin] or cocaine [a Schedule 2 drug] offenses involving at least 650 grams [23 ounces] and instead require imprisonment for life or any term of years, but not less than 20 years.)

-- House Bills 4444-4446 (which would revise penalties for larceny offenses and increase civil penalties for retail fraud).

-- House Bill 4515 (which would amend the Department of Corrections act [Public Act 232 of 1953], to make a high school diploma or a general education development [G.E.D.] certificate a condition of parole for a prisoner serving a minimum term of at least two years).

-- House Bill 5876 (which would amend correction ombudsman language).

House Bill 5419 would establish in statute most of the recommendations of the Michigan Sentencing Commission, although the bill includes a number of crimes that were not in the commission's recommendations, specifies lower sentence ranges in many cases, and includes some factors as prior record variables that were not included in the commission's recommendations.

The bill would add Chapter XVII to the Code of Criminal Procedure (MCL 769.8 et al.) to do all of the following:

--Classify over 700 criminal offenses into nine crime classes and six categories.

--Provide for the classification of some attempted crimes.

--Include instructions for scoring sentencing guidelines, including the application of 19 different offense variables and seven different prior record variables.

--Outline sentencing grids, with various recommended minimum sentence ranges, for each of the nine crime classifications.

--Require that, if a statute mandated a minimum sentence, the court impose the sentence in accordance with that statute.

--Set the longest allowable minimum sentence at two-thirds of the statutory maximum sentence (which would codify the "Tanner Rule").

--Provide for intermediate sanctions when a person's recommended minimum sentence range did not exceed 18 months.

--Allow a court to forego sentencing guidelines scoring for some departures from the appropriate sentence range.

--Provide for the Sentencing Commission to make recommended modifications to the sentencing guidelines.

Crime Classification. Under the bill, over 700 crimes in the Michigan Compiled Laws are divided into six categories: crimes against a person; crimes against property; crimes involving a controlled substance; crimes against public order; crimes against public trust; and crimes against public safety. The bill specifies, however, that the offense descriptions would be for assistance only, and that the listed statutes would govern the application of the sentencing guidelines. Within these categories, the crimes are then classified in nine different classes of descending severity. According to the Sentencing Commission's report, Class M2 is a separate classification for the offense of second-degree murder; and Classes A through H include crimes for which the following maximum sentences may be appropriate:

Class	Sentence
A	Life imprisonment
B	20 years' imprisonment
C	15 years' imprisonment
D	10 years' imprisonment
E	5 years' imprisonment
F	4 years' imprisonment
G	2 years' imprisonment
H	Jail or other intermediate sanctions

Attempted Crimes. The bill's sentencing guidelines would apply to an attempt to commit an offense listed in Chapter XVII only if the attempted violation were a felony. The sentencing guidelines structure would not apply, however, to an attempt to commit a Class H offense.

For an attempted offense listed in Chapter XVII, the offense category (e.g., crime against a person) would be the same as the attempted offense. An attempt to commit an offense listed in Chapter XVII would be classified as follows:

-- Class E, if the attempted offense were in Class A, B, C, or D.
-- Class H, if the attempted offense were in Class E, F, or G.

General Scoring. The bill includes instructions for scoring sentencing guidelines. For an offense listed in Chapter XVII, a judge would determine the recommended minimum sentence range by first finding the offense category for the offense. From the

variables spelled out in the bill, the judge then would determine the offense variables to be scored for that offense category and score and total only those offense variables. The judge also would have to score and total all prior record variables for the offense, as provided in the bill. Then, using the offense class, the judge would find the intersection of the offender's offense variable level and prior record variable level on the sentencing grid included in the bill to determine the recommended minimum sentence range. The bill shows the recommended minimum sentence within a sentencing grid as a range of months or life imprisonment.

Multiple Offense Scoring. If the defendant were convicted of multiple offenses, the applicable offense variables for each offense would have to be scored.

Attempted Offense scoring. If an offender were being sentenced for an attempted felony included in the sentencing guidelines structure, the judge would have to determine the offense variable level and prior record variable level based on the underlying attempted offense.

Habitual Offender scoring. If the offender were being sentenced under the Code of Criminal Procedure's habitual offender provisions, the judge would have to determine the offense category, offense class, offense variable level, and prior record variable level based on the underlying offense. To determine the recommended minimum sentence range, the upper limit of the range determined under the bill's grid would have to be increased as follows:

-- By 25 percent, if the offender were being sentenced for a second felony.

-- By 50 percent, if the offender were being sentenced for a third felony.

-- By 100 percent, if the offender were being sentenced for a fourth or subsequent felony.

Crime Categories. For all crimes against a person, offense variables 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, and 19 would have to be scored. Offense variables 5 and 6 would have to be scored for homicide or attempted homicide. Offense variable 16 would have to be scored for a home invasion offense. Offense variables 17 and 18 would have to be scored if an element of the offense or attempted offense involved the operation of a vehicle, vessel, aircraft, or locomotive.

For all crimes against property, offense variables 1, 2, 3, 4, 9, 10, 12, 13, 14, 16, and 19 would have to be scored.

For all crimes involving a controlled substance, offense variables 1, 2, 3, 12, 13, 14, 15, and 19 would have to be scored.

For all crimes against public order and all crimes against public trust, offense variables 1, 3, 4, 9, 10, 12, 13, 14, 16, and 19 would have to be scored.

For all crimes against public safety, offense variables 1, 3, 4, 9, 10, 12, 13, 14, 16, and 19 would have to be scored. If an element of the offense involved the operation of a vehicle, vessel, aircraft, or locomotive, offense variable 18 would have to be scored.

Offense Variables. The bill identifies each of the 19 offense variables and would assign various points to be scored depending on whether and how the offense variable applied to the particular violation.

Offense variable 1 would be aggravated use of a weapon; offense variable 2 would be lethal potential of the weapon used; offense variable 3 would be physical injury to a victim; offense variable 4 would be psychological injury to a victim; and offense variable 5 would be psychological injury to a member of a victim's family.

Offense variable 6 would be the offender's intent to kill or injure another individual; offense variable 7 would be aggravated physical abuse; offense variable 8 would be asportation or captivity; offense variable 9 would be the number of victims; and offense variable 10 would be exploitation of a vulnerable victim.

Offense variable 11 would be criminal sexual penetration; offense variable 12 would be contemporaneous felonious criminal acts; offense variable 13 would be continuing the pattern of criminal behavior; offense variable 14 would be the offender's role; and offense variable 15 would be aggravated controlled substance offenses.

Offense variable 16 would be property obtained, damaged, lost, or destroyed; offense variable 17 would be degree of negligence exhibited; offense variable 18 would be operator ability affected by alcohol or abuse; and offense variable 19 would be a threat to the security of a penal institution or court, or interference with the administration of justice.

Prior Record Variables. The bill identifies seven prior record variables and would assign various points to be scored depending on whether and how the prior record variable applied to the particular violation.

Prior record variable 1 would be "prior high severity felony convictions," which would mean a conviction for a crime listed in offense class M2, A, B, C, or D. Prior record variable 2 would be "prior low severity felony convictions," which would mean a conviction for a crime listed in offense class E, F, G, or H.

Prior record variable 3 would be "prior high severity juvenile adjudications," which would mean a juvenile adjudication for conduct that would be a crime listed in offense class M2, A, B, C, or D, if committed by an adult. Prior record variable 4 would be "prior low severity juvenile adjudications," which would mean a juvenile adjudication for conduct that would be a crime listed in offense class E, F, G, or H, if committed by an adult.

Prior record variable 5 would be prior misdemeanor convictions, prior misdemeanor juvenile adjudications, or parole or probation violations; prior record variable 6 would be relationship to the criminal justice system; and prior record variable 7 would be subsequent or concurrent felony convictions.

In scoring prior record variables 1 through 5, a conviction or juvenile adjudication could not be used if it preceded a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication.

Sentencing Grids. The bill specifies a grid of minimum sentencing ranges for each class of offenses (M2 and A through H). The appropriate minimum sentencing range would be determined by scoring the offense variable point level on one axis of the grid and the prior record variable point level on the other axis, then finding the intersecting cell of the grid.

For each offense class, the bill specifies the lowest minimum sentence cell range and the highest minimum sentence cell range, as follows:

Offense Class	Lowest Range (months)	Highest Range (months)
M2	90-150	365-600, or life
A	21-35	270-450, or life
B	0-18	117-160
C	0-11	62-114
D	0-6	43-76
E	0-3	24-38
F	0-3	17-30
G	0-3	7-23
H	0-1	5-17

[Note: These are lower in many instances than those recommended by the commission. The commission recommendations are as follows:

Offense Class	Lowest Range (months)	Highest Range (months)
M290-150		365-600, or life
A	21-35	270-450, or life
B	0-18	117-160
C	0-12	78-120
D	0-6	54-80
E	0-3	30-40
F	0-3	21-32
G	0-3	9-24
H	0-1	6-18

Presentence Reports. A probation officer who was required to provide the court with a presentence investigation could have his or her name removed from the report by request to the court, if the report had been amended or altered prior to sentencing by the officer's supervisor or by any other person with authority to amend or alter a presentence investigation report.

Mandatory Minimums. The bill specifies that if a statute mandated a minimum sentence, the court would have to impose a sentence in accordance with that statute. Imposing a statutory mandatory minimum sentence would not be considered a departure from the sentencing guidelines' minimum sentence range.

"Tanner Rule." The bill would prohibit a court from imposing a minimum sentence, including a departure from the sentencing guidelines' minimum sentence range, that exceeded two-thirds of the statutory maximum sentence. (This would codify the "Tanner Rule," established by case law, which sets two-thirds of a maximum sentence as the longest minimum sentence allowed in Michigan's indeterminate sentencing system.)

Intermediate Sanctions. If the upper limit of the recommended minimum sentence range under the sentencing guidelines was 18 months or less, the court

would have to impose an intermediate sanction unless the court stated on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the Department of Corrections. Under the bill, an intermediate sanction could include a jail term that did not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever was less. (The code currently defines "intermediate sanction" as probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed; including, for example, drug treatment, mental health treatment, jail, community service, or electronic monitoring.)

Absent a departure from sentencing guidelines' minimum sentence range, if the upper limit of the sentencing guidelines' recommended minimum sentence exceeded 18 months and the lower limit of the minimum sentence range was 12 months or less, the court would have to sentence the offender to either imprisonment with a minimum term within that range, or an intermediate sanction that could include a term of imprisonment of not less than the minimum range or more than 12 months.

The court would have to impose a sentence of life probation, absent a departure from the sentencing guidelines' minimum sentence range, for manufacturing, delivering, possessing with intent to deliver, or possessing a mixture that contained less than 50 grams of a Schedule 1 or 2 narcotic or cocaine where the upper limit of the recommended minimum sentence range was 18 months or less.

In addition, if an attempt to commit a Class H felony were punishable by imprisonment for more than one year, the court would have to impose an intermediate sanction upon conviction of that offense, absent a departure from the sentencing guidelines' minimum sentence range.

The department would be required to operate a jail reimbursement program to provide funding to counties for housing offenders in county jails who otherwise would have been sentenced to prison. The criteria for and the rate of reimbursement would be required to be established in the appropriations act for the Department of Corrections.

Departures. The code specifies that a court may depart from the appropriate sentence range established under statutory sentencing guidelines if the court has a substantial and compelling reason and states on the record the reasons for departure. The court may not base a departure on an offense characteristic or offender characteristic already considered in determining the appropriate sentence range, unless the court finds from the facts in the court record that the characteristic was given inadequate or disproportionate weight.

Sentencing Commission. The bill would revise provisions of the code that created the Michigan Sentencing Commission and specified its responsibilities. The commission would be charged with developing recommended modifications to the sentencing guidelines, rather than developing the recommended guidelines themselves. Modifications to the enacted guidelines could be recommended no sooner than January 1, 2001, unless based on omissions, technical errors, changes in law or court decisions.

The bill also would delete the code's schedules for the commission to develop and submit recommended sentencing guidelines, to submit revised guidelines if the legislature failed to enact the recommended guidelines within a specified period, and to submit subsequent modifications to enacted guidelines. The commission would have to submit recommended modifications to the Secretary of the Senate and the Clerk of the House of Representatives. If the legislature failed to enact the modifications within 60 days after introduction of a bill to enact them, the commission would have to revise the recommended modifications and resubmit them to the secretary and the clerk within 90 days. Until the legislature enacted modifications, the sentencing commission would have to continue to revise and resubmit the modifications under this schedule.

Enhancements. The bill would prohibit the use of a conviction to enhance a sentence where the conviction had been used to enhance a sentence under a statute that prohibited the use of the conviction for further enhancement. This would comport with the provisions of House Bills 4444-4446.

Disciplinary time. The bill would also eliminate references to disciplinary time as necessitated by the changes in the truth in sentencing bills.

Senate Bill 826 would amend the prison code (MCL 800.34 and 800.35) to provide for the parole board to receive and consider a prisoner's disciplinary time in making its decision to parole that prisoner.

Currently, the prison code includes provisions for the addition of disciplinary time to the minimum sentence of a "prisoner subject to disciplinary time" for each major misconduct for which he or she is found guilty. Accumulated disciplinary time is to be added to a prisoner's minimum sentence in order to determine his or her parole eligibility date. "Prisoner subject to disciplinary time" means a prisoner sentenced on or after the effective date of the disciplinary time provision to an indeterminate term of imprisonment for specified offenses. (The disciplinary time provisions were part of the 1994 "truth-in-sentencing" legislation, but the effective date of the provisions was delayed until sentencing guidelines are enacted into law after the sentencing commission submits recommended guidelines.)

Instead of requiring that disciplinary time be added to a prisoner's minimum sentence, the bill would require instead that a prisoner's accumulated disciplinary time be submitted to the parole board for consideration at the prisoner's parole review or interview. In addition, the Department of Corrections would be required to promulgate rules setting the amount of disciplinary time that would be submitted to the parole board for each type of major misconduct.

The bill would also change the definition of a "prisoner subject to disciplinary time" so that the provisions would apply to both of the following:

-- A prisoner who was sentenced to an indeterminate term for any of the specified offenses, if the crime were committed on or after December 15, 1998 (the effective date of the sentencing guidelines proposed by House Bill 5419).

-- A prisoner who was sentenced to an indeterminate term for any other crime, if that crime were committed on or after December 15, 2000.

Finally, the bill would also repeal the sections of the "truth-in-sentencing" legislation (Public Acts 217 and 218 of 1994) that delay the effective date of those provisions until after the sentencing commission submits its recommended guidelines and sentencing guidelines are enacted.

House Bill 5398 would amend the Department of Corrections act (MCL 791.233 et al.) to require that a statement of a prisoner's disciplinary time be submitted to the parole board and to remove provisions that would have allowed for disciplinary time to be added to a prisoner's minimum term for parole eligibility. However, the bill would allow for disciplinary time to be added to a prisoner's minimum sentence when determining the prisoner's eligibility for "extension of the limits of confinement" (this could include release to visit a critically ill relative, attend a relative's funeral, to contact prospective employers, or to receive medical treatment not otherwise available to the prisoner for those confined in a state correctional facility, or placement in a community residential home or a community corrections center, and work, or participation in an education, training, or drug treatment program.). Prisoners who were eligible for an extension of the limits of confinement would not be eligible until they had served their minimum sentence plus any disciplinary time. (Note: "Community corrections center" means a facility either contracted for or operated by the Department of Corrections in which a security staff is on duty seven days per week and 24 hours per day. "Community residential home" means a location where electronic monitoring of prisoner presence is provided by the Department of Corrections seven days per week and 24 hours per day, except that the department may waive the requirement that electronic monitoring be provided as to any prisoner who is within three months of his or her parole date.)

In addition, the bill would provide new standards to allow for the parole of offenders who had been sentenced to life in prison for violations of the public health code mandating life imprisonment for Schedule 1 narcotics [such as heroin] or cocaine [a Schedule 2 drug] offenses involving at least 650 grams [23 ounces] (known as the drug-lifer laws). [Note: The so-called drug-lifer provisions would be amended by House Bill 4065.] A prisoner who was serving a life sentence under the drug-lifer law would be eligible for parole after serving 17½ years or 20 years of his or her sentence depending upon whether or not he or she had also been convicted of another "serious crime" (A serious crime would include assault with intent to maim, rob or steal (armed or unarmed), commit murder, criminal sexual conduct, or a felony not otherwise punished; first and second degree murder; manslaughter; kidnaping; taking a hostage; kidnaping a child under the age of 14; mayhem; first, second, and third degree criminal sexual conduct; armed and unarmed robbery; and car jacking.) A prisoner who had been convicted of a serious crime in addition to the drug crime for which he or she was incarcerated would not be eligible for parole until he or she had served 20 years of his or her sentence. [Note: The bill contains a reference to a subsection as an exception to when a prisoner would be eligible for

parole consideration; however, the referenced subsection is a definition for the term serious crime. The intent was apparently to reference the subsection providing special allowances for prisoners who had cooperated with law enforcement.]

If the sentencing judge, or his or her successor, determined on the record that a prisoner sentenced to life imprisonment under the drug-lifer laws had cooperated with law enforcement, the prisoner would be subject to the jurisdiction of the parole board. Provided that he or she meet the considerations outlined for parole, the prisoner could be released on parole 2½ years earlier than he or she would otherwise be eligible for release. A prisoner would be considered to have cooperated with law enforcement if the court determined that the prisoner had no relevant or useful information to provide. Merely exercising his or her right to a trial by jury could not be treated as a failure or refusal to cooperate. If, at sentencing, the court determined that a prisoner had cooperated with law enforcement, the court would be required to include that determination in the judgment of sentence.

When determining whether or not a prisoner who was serving a life sentence under the drug lifer law prior to October 1, 1998 should be released on parole, the parole board would be required to consider whether the violation was part of a continuing series of violations of drug laws by the individual, or whether the violation was committed by the individual in concert with five or more other individuals. In addition, the board would have to consider whether the individual was the principal administrator, organizer, or leader of an entity that the individual knew or had reason to know committed violations of the drug laws or was organized, in whole or in part, to commit violations of the drug laws, and whether the violation for which the individual was convicted was committed to further interests of that entity; whether the violation was committed in a drug-free school zone; or whether the violation involved the delivery of a controlled substance to a minor under the age of 17 or possession with the intent to deliver to such a minor.

A parolee from a drug-lifer sentence, released on parole under the bill's provisions, would have his or her parole revoked if he or she violated or conspired to violate a drug law which was punishable by four or more years of imprisonment, or committed a violent felony while on parole. The prisoner's parole order would be required to include a notice that parole would be revoked for such actions. (A "violent felony" would include all of the crimes listed in the definition of a serious crime plus felonious assault and fourth degree criminal sexual conduct.)

In addition, the bill would require the governing bodies of the Senate and House Fiscal Agencies to have access to all Department of Corrections records that relate to individuals under the department's supervision. This would include, but not be limited to, records contained in basic information reports, the corrections management information system, the parole board information system, and any successor databases. However, access to these records would not be allowed if the department determined that access was restricted or prohibited by law, or could jeopardize an ongoing investigation, the safety of a prisoner, employee or other person, or the safety, custody or security of an institution or other facility. The governing board of the Senate Fiscal Agency, the governing committee of the House Fiscal Agency, and the DOC would enter a written agreement to establish which records would be accessed and the manner of access and to ensure the confidentiality of the accessed records.

The provisions regarding notice and proceedings for parole interviews by a parole board member for prisoners under a life sentence (except those sentenced for first degree murder or for a major controlled substance offense) would also be amended so that notice and proceedings would be provided in the same fashion for those prisoners as it is currently required for other prisoners.

Finally, the bill would change references to the "probate court" concerning mental health commitments and persons requiring treatment to "appropriate court" because the family division of the circuit court could have ancillary jurisdiction.

BACKGROUND INFORMATION:

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 statute, while, typically, the minimum term is chosen from a range suggested by the use of supreme court sentencing guidelines, which weight various factors regarding the facts of the case and the criminal history of the offender; a judge may depart from guidelines, however, and order a minimum term greater or lesser than those suggested by guidelines, but must state his

or her reasons on the record. Case law determines what constitutes acceptable reasons for departing from guidelines. In any event, under a controlling 1972 opinion of the Michigan Supreme Court, the minimum sentence cannot be more than two-thirds the maximum established by statute (People v. Tanner, 387 Mich 683).

The exact duration of the sentence served is not established at the time of sentencing; thus, sentencing is "indeterminate." The actual time that an offender serves in prison or some other correctional facility is a function of the minimum sentence and several other factors. Under Michigan statute, a minimum sentence may be reduced by the accumulation of "disciplinary credits" awarded by the Department of Corrections to prisoners. A prisoner is eligible to earn a disciplinary credit of five days per month for each month served without a major misconduct violation, plus an additional two days per month of "special disciplinary credits" awarded for good institutional conduct. A prisoner is eligible for parole upon serving his or her minimum sentence less any accumulated disciplinary credits. (While this explanation describes the disciplinary credit system for new prison intakes, it should be noted that offenders currently within the jurisdiction of the corrections system may be subject to alternate calculations of "good time" [which was eliminated by Proposal B of 1978 for certain serious offenders], or some combination of good time and disciplinary credits.)

A prisoner becomes eligible for parole upon completing his or her minimum sentence, minus any reductions for good time or disciplinary credits. Prior to parole, 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.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

The current, judicially established, sentencing guidelines are inadequate and need to be replaced. The legislature recognized this in 1994 when it passed Public Act 445, which created the Michigan Sentencing Commission and charged it with developing recommendations for a comprehensive statutory sentencing guidelines structure. The judicial guidelines reportedly incorporate only about 100 offenses, and are designed to be reflective of past sentencing practices, rather than providing a considered statement of public policy regarding criminal sentencing.

By enacting the system recommended in the bill, 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 will 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 classification and grid system proposed in the bill was created by a commission of experts, supported by a professional staff and operating with clear statutory objectives. This sentencing structure reflects a philosophy of ensuring that violent and repeat offenders are to be treated more harshly than other offenders. Further, in the guidelines, crimes against people are punished more severely than property crimes and many nonviolent crimes are punished with shorter sentences or no prison time. Sentencing practices, then, would be more proportionate to both the seriousness of the offense and the offender's prior criminal record.

For:

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 the supreme court's decision in People v Milbourn (461 N.W.2d 1, 435 Mich. 630): 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. Many feel that the decision eliminated, for practical purposes, the effectiveness and enforceability of the current guidelines. As a result, legislatively enacted sentencing guidelines are even more urgently needed to provide enforceable restraint on the exercise of judicial discretion. Without effective guidelines disparities in sentencing based on race, ethnicity, local

attitudes, and the biases of individual judges will become commonplace.

Against:

The bill 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. Generally, to the extent that the bill limited judicial discretion, it would place sentencing power in the hands of prosecutors through the exercise of prosecutorial discretion over how offenders are charged. 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. The guidelines 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:

The bill would require the use of "intermediate sanctions," including jail and nonincarcerative sanctions, for offenders with guidelines minimums of 18 months or less; 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.

Response:

Provision has been made for state reimbursement to counties for the costs of housing certain individuals in county jails. The amount and criteria for this reimbursement will be established in the Department of Corrections appropriations act.

Against:

The legislation should do more to curb inappropriate sentences that would result from applying the same factors more than once. Because guidelines themselves take criminal history into account, the justice of applying habitual offender sentence enhancements on top of this is debatable. The bill would provide for the sentences of second, third, and fourth repeat offenders to be lengthened by 25, 50, and 100 percent, respectively. This would be in addition to the fact that the habitual offender grid would expand the minimum range for the crime based on prior record. To make matters worse, the decision as to whether the prior record would be counted twice is left to the prosecutor who decides whether to charge the individual as a habitual offender. While separate sentence ranges for habitual offenders should be included, 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 guidelines are not neutral; the penalties for some crimes are increased and others are lowered. Out of the 700-plus felony offenses covered by the guidelines, there are at least 315, or 45 percent, for which the guidelines have assigned a range that is one or more classes lower than the current statutory maximum for that crime. Of those 315 crimes, 133 are assigned guidelines ranges that are two or more classes lower than the current maximum. While it is certainly within the legislature's authority to lower the sentences for these crimes and it may even be reasonable to do so, the changes should be made publicly and go through the entire legislative process on their own merits, not as part of a sentencing guidelines package.

For example, the guidelines would downgrade all attempts to commit felonies that carry a maximum possible sentence of five years or less to a maximum of one year in the county jail. Since many, if not most, "attempt" convictions are plea-bargained from completed offenses, the bill would lower punishment received by the offender and thereby the credibility of the system.

Against:

The bill fails to adequately consider the acute problem of prison and jail overcrowding. Guidelines developed without proper regard for 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. Estimates of the impact of the guidelines and the truth in sentencing bills have ranged from 4,500 to 5,700 new beds over the next decade, or eight to ten new prisons. Other estimates, taking into account the conservative nature of the parole

board, project an increase from 42,000 to 65,000 prisoners over the next decade.

Response:

To argue against the guidelines because of potential prison and jail overcrowding 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 the guidelines mean that more criminals spend more time in prison, so be it. If this means that the state needs more prisons, then more prisons should be built. It is time to put an end to the revolving door policy for prisons and time for criminals to be forced to face the punishment they deserve instead of being allowed an early out because we are more worried about the monetary cost of imposing an appropriate punishment than we are about the social cost of failing to impose such punishment.

Furthermore, many of the more extreme estimates of an increase in prison population are based in whole or in part on earlier versions of the sentencing guidelines and truth in sentencing bills. Many changes have been made in this version of the package that will mitigate some of the impact on prison population, including lowering the sentencing ranges in many cases, and tie-barring the guidelines and truth in sentencing to other bills that will help to lower prison populations -- including House Bill 4065, which would repeal the section of the health code mandating life imprisonment for Schedule 1 narcotics (such as heroin) or cocaine (a Schedule 2 drug) offenses involving at least 650 grams (23 ounces) and instead require imprisonment "for life or any term of years, but not less than 20 years," and House Bill 4515, which would make a high school diploma or a general education development (G.E.D.) certificate a condition of parole for a prisoner serving a minimum term of at least two years.

For:

Truth in sentencing is essential to improve public confidence in the criminal justice system, but, more importantly, it is essential to protect the public. All too often, heinous crimes have been committed by felons who would have still been in prison, had they been required to serve their minimum sentences in secure confinement. The current disciplinary credit system is both confusing and misleading. By eliminating disciplinary credits, the bills would ensure that most offenders would remain incarcerated for at least the duration of their minimum sentences. Truth in sentencing would also protect that offender's potential victims, and it would extend to past victims the peace of mind that can come from knowing the criminal was securely behind bars.

The bills would prevent crime, not only by more effectively incapacitating criminals, but the deterrent value of criminal sanctions would be enhanced by the bills' assurances of meaningful punishment. Although correctional costs would increase under the bill, those costs are small compared to the societal costs of crime -- crime that the bills would both prevent and appropriately punish. The bills would help to restore integrity, credibility and accountability to the criminal justice system, and help to fulfill the system's most important objective: the protection of the public.

Response:

Problems with some offenders serving too little time often have more to do with charging and sentencing than with defects of the disciplinary credit system. It is prosecutors who decide what charges to bring, but plea bargaining sometimes results in charges that are lower than those suggested by the offense committed. Further, prosecutors have the discretion to seek habitual offender status for anyone with a prior felony conviction. Moreover, any problems with overly lenient sentencing practices should be cured through the implementation of the comprehensive sentencing guidelines that are encompassed in House Bill 5419.

Against:

Since relatively few criminals are caught and punished, the bills would have little effect on crime; the deterrent value of the prospect of punishment depends on the certainty of that punishment. The bills merely would worsen problems with prison overcrowding and the corrections budget, draining more money from the educational, economic, and rehabilitative programs that offer the best chance of ultimately lowering the crime rate.

Response:

Any positive effects of long-term anti-crime programs such as education cannot be felt for many years, perhaps generations. The bills, however, would provide reforms now.

Against:

The truth in sentencing changes are premature. With the implementation of the sentencing guidelines pending, a reasonable stance would be to wait and see how these guidelines impact the system and then, only if necessary, throw truth in sentencing into the mix. The effect of the guidelines should be to provide adequate sentences under the current system for

crimes. If that is so, then the changes made by truth in sentencing will be unnecessary.

Against:

Many have assumed that the bills would have little effect on actual time served, because judges and proposed guidelines would adjust sentencing downward to accommodate "truth in sentencing," just as sentences presumably are adjusted upward now, to account for disciplinary credits. Under such circumstances, the bills would not represent truth in sentencing; rather, they would mislead crime victims and the public into believing that real change would ensue.

For:

By not applying disciplinary time to the prisoner's sentence and instead having it considered as part of his or her parole review, the bills avoid possible constitutional difficulties that could arise if the disciplinary time were used to increase a prisoner's sentence. It is asserted that over 80 percent of misconduct tickets are written for violations of prison policy directives regarding behavior and possessions, these can be something as minor as insolence or being in the wrong place or disobeying a direct order. As a result, a person's sentence could have been increased for acts that would not be punishable outside of prison walls, and scarce bedspace would be used for non-criminal conduct.

Response:

Major misconducts are directly related to the need to maintain prison discipline, including the need to prevent violence, drug abuse, gambling, and escapes. The corrections department can now in effect lengthen a prisoner's sentence by withdrawing disciplinary credits; it does not seem so different to allow the department to impose disciplinary time for the same behavior for which credits can now be withdrawn.

Against:

The bills will have little effect on the prison population as a whole. None of the bills deals with the problem of the increase in denial of parole, the increase in the rate of technical parole violators who are returned to prison, and the increase in the rate of probation violators being sent to prison. It is asserted that as many as 25 percent of all prison admissions in 1997 were for violations of probation. With the anticipated increase in the use of such penalties for nonviolent offenders included in the guidelines, it is likely that more violations of probation will occur, and when violations occur it is likely they will also go to prison unless changes occur. While it makes sense to penalize someone who has committed another crime while on parole or probation, technical violations should be punished by alternative means.

Analyst: W. Flory

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.