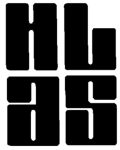
House Legislative Analysis Section
House Office Building, 9 South
Lansing, Michigan 48909
Phone: 517/373-6466

ELIMINATE MANDATORY MINIMUMS FOR DRUG SENTENCES

House Bill 5394 as enrolled
Public Act 665 of 2002

House Bill 5395 as enrolled
Public Act 666 of 2002

House Bill 6510 as enrolled
Public Act 670 of 2002

Sponsor: Rep. Bill McConico
House Committee: Criminal Justice
Senate Committee: Judiciary

Second Analysis (2-18-03)

THE APPARENT PROBLEM:

Michigan uses an indeterminate sentencing structure, meaning that a judge sets the minimum and maximum terms to be served. Where the maximum terms are actually set by statute, the minimum terms of imprisonment for felony offenses are determined by choosing from a range suggested by the sentencing guidelines. The sentencing guidelines enable a range to be determined by considering various elements of the crime, such as whether or not a weapon was used or a person was killed or injured during the commission of the crime, and not subjective reasons such as race, education, and so on. Courts are granted discretion to depart from the appropriate sentence range if there is a substantial and compelling reason to do so and if the court states the reason on the record. Supporters of such a system praise the objectivity and fairness it brings to sentencing criminals.

The manner in which the state punishes drug offenders, however, has long been criticized for being unduly harsh as well as being unfair. Currently, a person convicted of the manufacture, delivery, or possession of a narcotic such as heroin or cocaine receives a punishment based solely on the weight of the substance involved and not on any other factors such as whether or not it is a first offense. Further, current law mandates minimum sentences (and prohibits release on parole until after the minimum time is served), consecutive sentences for conviction of multiple felonies, and lifetime probation for some offenses – all based on the weight of the substance involved in the crime. The weight categories do not pertain to pure substances, such as 225 grams of heroin or cocaine, but to the weight of any substance containing the prohibited narcotics, no matter how small a component of the mixture the narcotic is. Many maintain that this has resulted in prisons being filled not with high level drug traffickers, but with many low-level dealers or people addicted to crack cocaine or heroin. Critics believe the current system is not cost effective, since judges are required to send people to prison for a statutorily-mandated period rather than use an approach that would combine jail, probation or parole, and participation in a drug rehabilitation program. Some also believe the current system has had a disproportionate impact on minorities. Many believe that a better approach would be to treat drug offenses in the same manner as other serious felonies – meaning that sentences for drug offenses would be determined under the sentencing guidelines.

In an unrelated matter, the Department of Corrections reports that it needs to house more female prisoners. Though there is the physical capacity to add more beds to existing women's prisons, the bed capacity is capped by statute. The legislation being offered would include raising the capacity for the number of prisoners that two of the DOC facilities could house.

THE CONTENT OF THE BILLS:

House Bill 5394 would amend the Public Health Code to revise the penalties for violations involving Schedule 1 and 2 narcotics and cocaine, House Bill 5395 would place the revised penalties in the corresponding section of the sentencing guidelines contained in the Code of Criminal Procedure, and House Bill 6510 would amend the Corrections Code to provide for parole for people previously convicted and sentenced under the narcotics penalty provisions of the Public Health Code. The bills are tie-barred to each other and would take effect March 1, 2003. Specifically, the bills would do the following:

House Bill 5394 would amend the Public Health Code (MCL 333.7401 and 333.7403) to eliminate mandatory minimum sentences for violations involving Schedule 1 and 2 narcotics and cocaine, revise the weight threshold for the various offenses, allow a fine to be imposed for all weight categories, allow – rather than require – consecutive sentencing for manufacture/delivery of certain drugs, and eliminate life probation for low level narcotic offenses.

Manufacture, delivery, etc. Currently, the health code prescribes mandatory minimum sentences for certain drug violations. The code makes it a crime to manufacture, create, deliver, or possess with the intent to deliver a controlled substance, a prescription form, an official prescription form, or a counterfeit prescription form. A violation involving a Schedule 1 or 2 narcotic or cocaine in the amount of 650 grams or more is a felony punishable by imprisonment for life or any number of years, but with a mandatory minimum sentence of 20 years. The punishment for a violation involving between 225 grams and 649 grams is a mandatory minimum sentence of 20 years and a maximum sentence of 30 years; for a violation involving between 50 and 224 grams the punishment is a mandatory minimum sentence of 10 years and a maximum of 20 years; and a violation involving less than 50 grams of the substance is punishable by a mandatory minimum sentence of one year imprisonment and a maximum of 20 years and a possible fine of not more than $25,000, or the offender may be placed on probation for life.

The bill would eliminate the mandatory minimum terms of imprisonment and rewrite these penalty provisions as follows:

• An offense involving 1,000 grams or more would be a felony punishable by imprisonment for life or any term of years, a fine of not more than $1 million, or both.

• An offense involving 450 grams to 999 grams would be a felony punishable by imprisonment for not more than 30 years, a fine of not more than $500,000, or both.

• An offense involving 50 grams to 449 grams would be a felony punishable by imprisonment for not more than 20 years, a fine of not more than $250,000, or both.

• An offense involving less than 50 grams would be a felony punishable by imprisonment for not more than 20 years, a fine of not more than $25,000, or both. The bill would remove the punishment of life probation for an offense involving less than 50 grams.

The bill would delete provisions that currently allow a court, for violations involving either manufacturing/delivery or possession, to depart from a mandatory minimum term of imprisonment if the court found on the record that there were substantial and compelling reasons to do so. The bill would also eliminate provisions pertaining to sentence departures for juveniles being sentenced under the Probate Code and those between the ages of 14 and 17 who are within the jurisdiction of the circuit court, if the individual had no prior convictions for a felony offense or an assaultive crime and had not been convicted of another felony or assaultive crime that arose from the same transaction as the violation involving the Schedule 1 and 2 narcotics.

Possession. Illegal possession of a Schedule 1 or 2 narcotic drug is a felony offense. Possession of 650 grams or more of a substance is punishable by life imprisonment; for a person 14 to 17 years of age who is within the jurisdiction of the circuit court or a person sentenced under the Probate Code, a court may impose a sentence of imprisonment for any term of years but with a mandatory minimum sentence of 25 years. For possession of 225 to 649 grams, punishment is a mandatory minimum sentence of 20 years and a maximum sentence of 30 years. For possession of 50 to 224 grams, punishment is a mandatory minimum sentence of 10 years and a maximum sentence of 20 years. Possession of 25 to 49 grams results in a mandatory sentence of at least one year and a maximum sentence of four years and a possible fine of not more than $25,000; if placed on probation, probation is for life.

Instead, the bill would adopt similar changes to the current provisions regarding mandatory minimum sentences for possession as detailed above for the manufacture, delivery, etc. of Schedule 1 and 2 narcotics:

- An offense involving 1,000 grams or more would be a felony punishable by imprisonment for life or any term of years, a fine of not more than $1 million, or both.

- An offense involving 450 grams to 999 grams would be a felony punishable by imprisonment for not more than 30 years, a fine of not more than $500,000, or both.

- An offense involving 50 grams to 449 grams would be a felony punishable by imprisonment for not more than 20 years, a fine of not more than $250,000, or both.

- An offense involving 25 grams to 49 grams would be a felony punishable by imprisonment for not more than 4 years, a fine of not more than $25,000, or both. The bill would remove the punishment of life probation for an offense involving more than 25 grams but less than 50 grams. (Note: Under the bill, the penalty for offenses involving less than 25 grams would be the same as for one involving 25 to 50 grams.)

Consecutive terms of imprisonment. Currently, the code states that a term of imprisonment imposed for a violation of Section 7401(2) (violations involving narcotics and drugs on Schedules 1-5, including marijuana) or for a violation of Section 7403(2)(a)(i-iv) (possession of a Schedule 1 or 2 narcotic or cocaine for weight amounts of 25 grams or more) must be served consecutively with any term of imprisonment imposed for the commission of another felony. Instead, the bill would allow a sentence imposed under a violation of Section 7401(2) to run consecutively with a term of imprisonment imposed for the commission of another felony. The bill would no longer allow or require a consecutive sentence to be imposed for a possession conviction. (Generally, by law, when multiple terms of imprisonment are imposed for more than one conviction arising from the same transaction, the sentences are served concurrently unless statute allows or requires a term of imprisonment for a specified crime to be served consecutively to the other sentence or sentences. Therefore, under the bill, sentences for multiple felonies involving a conviction for possession would be served concurrently.)

Probation for life. Currently, an individual convicted of manufacturing/delivering less than 50 grams of a Schedule 1 or 2 narcotic, or possession of between 25 grams and 49 grams may be placed on probation for life. The bill would delete the possibility of life probation. Also, the probation officer for an individual who had been sentenced to lifetime probation before the bill's effective date, but who had served five or more years of that probationary period, could recommend to the court that it discharge the individual from probation. If an individual's probation officer did not recommend discharge, with notice to the prosecutor, the individual could petition the court to seek resentencing under the court rules. The court could discharge an individual from probation under the bill's provisions. An individual could file more than one motion seeking resentencing.

House Bill 5395 would amend the Code of Criminal Procedure (MCL 769.34 et al.) to place the revised weight amounts for narcotics that trigger penalties in the corresponding section of the code, revise several offense variables, and delete provisions that would become obsolete if House Bill 5394 were enacted.

The bill would specify that delivery or manufacture (or possession) of 1,000 or more grams of certain Schedule 1 or 2 controlled substances would be a Class A felony involving controlled substances with a statutory maximum term of imprisonment of life; 450 or more but less than 1,000 grams would be a Class A felony involving controlled substances with a maximum term of imprisonment of 30 years; 50 or more but less than 450 grams would be a Class B felony involving controlled substances with a maximum term of imprisonment of 20 years.

Offense variables are used by a judge to determine the recommended minimum sentence range for a particular offense. The bill would amend several offense variables. Currently, for Offense Variable 13 (a continuing pattern of criminal behavior), ten points is scored if the offense was part of a pattern of felonious criminal activity involving a combination of three or more crimes against a person or property. The bill would add "or a violation of Section 7401(2)(a)(i) to (iii) or Section 7403(2)(a)(i) to (iii)", which would pertain to offenses involving the manufacture/delivery or possession of Schedule 1 or 2 narcotics in excess of 50 grams. (Note: The bill fails to identify that these sections are contained in the Public Health Code.) The bill also would require 10 points to be scored if the offense was part of a pattern of felonious criminal activity involving a combination of three or more violations of Section

7401(2)(a)(i) to (iii) or Section 7403(2)(a)(i) to (iv). In addition, when scoring for Offense Variable 13, not more than one controlled substance offense arising out of the criminal episode for which the person was being sentenced could be counted. Further, not more than one crime that involved the same controlled substance could be counted; as an example, the bill would specify that a judge could not count conspiracy and a substantive offense that involved the same amount of controlled substances or possession and delivery of the same amount of controlled substances.

For Offense Variable 15 (aggravated controlled substance offenses), the bill would add that 100 points would be scored if the offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver 1,000 or more grams of any mixture containing a controlled substance classified in Schedule 1 or 2 that was a narcotic drug or cocaine. Current variables would be revised to reflect House Bill 5394 amendments as follows: 75 points would be scored if the offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver Schedule 1 or 2 narcotics or cocaine for amounts of 450 grams or more but less than 1,000 grams; and, 50 points would be scored for amounts of 50 grams or more but less than 450. In addition, the bill would add that ten points would be scored if the offense was a violation of Section 7401(2)(a)(i) to (iii) pertaining to a Schedule 1 or 2 controlled substance or cocaine (manufacture, creation, delivery, or possession with intent to do the same) and was committed in a minor's abode, settled home, or domicile, regardless of whether the minor was present.

Currently, Prior Record Variable 7 (subsequent or concurrent felony convictions) specifies that a concurrent felony conviction is not to be scored if a mandatory consecutive sentence will result from a conviction. Instead, the bill would state "do not score a concurrent felony conviction if a mandatory consecutive sentence or a consecutive sentence imposed under Section 7401(3) of the Public Health Code . . ., will result from that conviction" (as amended by House Bill 5394, Section 7401(3) would allow a consecutive sentence for a violation of manufacture/delivery or possession with intent to do the same of narcotics in any amount to be imposed for the commission of another felony).

Further, the bill would delete provisions of the code pertaining to life probation for offenses involving less than 50 grams of a narcotic that would be made obsolete by the passage of House Bill 5394. The bill would, however, specify that a defendant who was placed on lifetime probation under Section 1(4) of Chapter XI (which would be deleted by the bill) prior to the bill's effective date would still be subject to the conditions of probation specified in the code, including payment of a probation supervision fee as prescribed in the code, and to revocation for violation of these conditions, but the probation period could not be reduced other than by a revocation that resulted in imprisonment or as otherwise provided by law.

House Bill 6510 would amend the Corrections Code (MCL 791.220e and 791.234) to provide for parole for people previously convicted and sentenced to mandatory minimum terms of imprisonment under the provisions of the Public Health Code that prohibit the manufacture, delivery, and possession of Schedule 1 and 2 narcotics and cocaine.

Since House Bill 5394 would eliminate the mandatory minimum sentences currently imposed for the drug offenses, and eliminate requirements for consecutive sentencing for most drug offenses, House Bill 6510 would allow for an earlier parole for those already sentenced under the current provisions. The bill would specify that an individual convicted of violating or conspiring to violate the health code's prohibition on manufacturing, delivering, or possessing 225 to 649 grams of a Schedule 1 or 2 narcotic before the bill's effective date would be eligible for parole after serving the minimum of each sentence imposed for that violation or ten years of each sentence imposed for that violation, whichever was less.

An individual convicted of delivering, manufacturing, or possessing narcotics (or conspiring to do the same) in the amount of 50 to 224 grams before the bill's effective date would be eligible for parole after serving the minimum of each sentence imposed for that violation or five years of each sentence imposed for that violation, whichever was less.

An individual convicted of manufacturing or delivering less than 50 grams of narcotics, or possessing between 25 and 50 grams of narcotics (or conspiring to do the same) before the bill's effective date and who was sentenced to a term of imprisonment that was consecutive to a term of imprisonment imposed for any other violation of Section 7401(2)(a)(i) to (iv) or Section 7403(2)(a)(i) to (iv) (delivery/manufacture/possession with intent or possession of any weight of Schedule 1 or 2

narcotics or cocaine) would be eligible for parole after serving one-half of the minimum sentence imposed for each violation of Section 7401(2)(a)(iv) or Section 7401(2)(a)(iv) – which is delivery/manufacture/possession with intent of less than 50 grams of a Schedule 1 or 2 narcotic or cocaine or possession of 25 to 49 grams of a Schedule 1 or 2 narcotic or cocaine. (This provision would appear to contain a typographical error. It is reasonable to assume that the provision was meant to read that a person sentenced to consecutive sentences for multiple offenses of delivery/manufacture/possession with intent of less than 50 grams or possession of 25 to 49 grams of a Schedule 1 or 2 narcotic would be eligible for parole after serving one-half of the minimum sentence imposed for each of those violations.) The bill would also specify that this provision would not apply if the sentence had been imposed for a conviction for a new offense committed while the individual was on probation or parole.

In addition, the bill would require the parole board to provide notice to the prosecuting attorney of the county in which the person had been convicted before granting parole under these new provisions.

Further, the bill would eliminate a provision that prohibits a correctional facility owned, operated, or leased by the state from being established in any local unit of government in which the Scott Correctional Facility or the Western Wayne Correctional Facility are located. The bill would also eliminate a provision that restricts the Scott Correctional Facility to no more than 860 prisoners and the Western Wayne Correctional Facility to no more than 775 prisoners; eliminate a provision that requires the Scott Correctional Facility to house female prisoners only; and eliminate a provision that states that the restrictions on the maximum capacity for these two facilities is not to be construed as limiting the use of the approximately 900 acres of real property owned by the City of Detroit which adjoins the former Detroit House of Corrections.

Instead, the bill would specify that no more than 880 prisoners could be housed at the Scott Correctional Facility and not more than 925 prisoners could be housed at the Western Wayne Correctional Facility. If a new housing unit were constructed within the security perimeter of either of these facilities, the capacity limits listed by the bill for each facility would be increased by the designated capacity of the new housing unit.

BACKGROUND INFORMATION:

The "650-drug lifer" law. Public Act 147 of 1978 amended the Controlled Substance Act (Public Act 196) of 1971 to impose mandatory life imprisonment for the illegal manufacture, delivery, or possession of 650 grams (23 ounces or about 1.4 pounds) or more of any mixture containing Schedule 1 narcotic drugs (that is, opium and its derivatives, such as heroin) or cocaine (a Schedule 2 drug). (Note: The law does not require conviction for 650 grams of pure heroin or cocaine; rather, it applies to any mixture weighing at least 650 grams that contains any amount of, say, heroin or cocaine.) This "650-drug lifer" law amendment to the Controlled Substances Act was to take effect September 1, 1978. However, it was almost immediately repealed and incorporated into the 1978 recodification of the Public Health Code, Public Act 368 of 1978 [specifically sections 7401(2)(a) - manufacture and delivery or intent to manufacture or deliver, and 7403(2)(a) - possession.

In 1990, the United States Supreme Court ruled [in *Harmelin v Michigan*, 111 S Ct 2680 (1991), Justice White dissenting] that Michigan's "650-drug lifer" law did not violate the "cruel and unusual" provisions of the Eighth Amendment to the U.S. Constitution. However, in *People v. Bullock*, 440 Mich 15 (1992), the state supreme court (on a 4-3 decision) struck down mandatory life imprisonment for conviction for simple possession as unconstitutional, on the grounds that it violated Michigan's constitutional prohibition against cruel or unusual punishment. While the state attorney general and the Department of Corrections almost immediately argued that the ruling did not apply to convictions for delivery, the Michigan Court of Appeals (in *People v Fluker*) struck down mandatory life imprisonment for delivery of mixtures of 650 grams or more as unconstitutional on the same grounds as the earlier decision on possession. However, in April 1993, the state supreme court overturned the appeals court rulings, thereby reinstating mandatory life imprisonment for delivery of 650 or more grams of a mixture containing heroin or cocaine.

In 1998, Public Act 319 repealed the section of the health code that mandated life imprisonment without parole for the manufacture, creation, delivery (or possession with intent to do the same) of a Schedule 1 or 2 narcotic involving at least 650 grams (23 ounces) and instead required imprisonment "for life or any term of years but not less than 20 years." In addition, Public Act 315 of 1998 amended the Department of Corrections Act to provide new standards to allow for the parole of offenders who

had been sentenced to life in prison under the 650 drug-lifer law. A prisoner who was serving a life sentence under the drug-lifer law was, under Public Act 315, eligible for parole after serving 17 1/2 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", which was defined in the act to include assaultive crimes, criminal sexual conduct, kidnapping, and first or second degree murder, among other crimes. Further, the act required a parole board to consider certain criteria when making a determination for parole, for instance, whether the violation was a part of a continuing series of violations of drug laws by that individual.

Public Health Code classification of drugs. Following federal law, the Public Health Code classifies controlled substances under one of five "schedules." Scheduled drugs must have the potential for abuse (where, in general, the abuse is "associated with" a stimulant or depressive effect on the central nervous system) and are either (a) illegal and without any medically accepted use in the United States (all schedule 1 drugs), or (b) prescription drugs with medically accepted uses in the United States that have a potential for psychological or physical dependence in addition to the potential for abuse (schedules 2, 3, 4, and 5). However, it should be noted that the penalties that would be amended by the bills under consideration pertain to offenses involving Schedule 1 and 2 narcotics (which include opium, heroin, and cocaine), not all drugs listed on Schedule 1 and 2.

Schedule 1 drugs -- all of which are illegal -- must have a high potential for abuse and no accepted medical use in treatment in the United States or lack accepted safety for use in treatment under medical supervision (MCL 333.7211). In addition to opiates and opium derivatives (including heroin), Schedule 1 includes hallucinogenic drugs (such as LSD and mescaline) and non-therapeutic uses of marijuana.

Schedule 2 prescription drugs must have a high potential for abuse, a currently accepted medical use in treatment in the United States (or a currently accepted medical use with severe restrictions), and their abuse must have the potential to lead to severe psychic or physical dependence (MCL 333.7213). Schedule 2 includes opium and any of its derivatives (including codeine and morphine), coca leaves and derivatives (including cocaine), other opiates (such as fentanyl, methadone, and pethidine), and substances containing any quantity of such drugs as amphetamine, methamphetamine, methaqualone, amobarbital, pentobarbital, and secobarbital.

Schedule 3 prescription drugs must have a potential for abuse less than those listed in Schedules 1 and 2, have a currently accepted medical use in treatment in the United States, and their abuse must have the potential to lead to moderate or low physical dependence or high psychological dependence (MCL 333.7216). Schedule 3 includes any substance with any quantity of a derivative of barbituric acid and drugs containing limited quantities of codeine, opium, or morphine.

Schedule 4 prescription drugs must have a low potential for abuse relative to those in Schedule 3, have a currently accepted medical use in the United States, and their abuse must have the potential to lead only to limited physical or psychological dependence relative to Schedule 3 drugs (MCL 333.7217). Schedule 4 includes such drugs as barbital, chloral hydrate, lorazepam, meprobamate, diazepam (brand name Valium), and phenobarbital.

Schedule 5 prescription drugs must have a low potential for abuse relative to those in Schedule 4, have currently accepted medical use in treatment in the United States, and have limited physical dependence or psychological dependence relative to Schedule 4 drugs or that the incidence of abuse is such that the substance should be dispensed by a practitioner. Schedule 5 drugs include drugs with not more than 10 mg of codeine per dosage unit, not more than 5 mg per dosage unit of dihydrocodeine, not more than 5 mg per dosage unit of ethylmorphine, and not more than 5 mg per dosage unit of opium.

Sentencing Guidelines. 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 the minimum term is chosen from a range suggested by the use of sentencing guidelines recommended by the sentencing commission and set in statute by Public Act 317 of 1998.

The Sentencing Commission was created by Public Act 445 of 1994 as a means of addressing sentencing disparities whereby two offenders who committed similar crimes and who had similar criminal histories were being sentenced to widely differing minimum terms. 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 these disparities 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.

From 1984 until the enactment of the current sentencing guidelines in 1998, Michigan operated with a system of judicially-imposed guidelines. However, the supreme court's guidelines were criticized for failing to sufficiently restrict sentencing departures. In addition, whether or not they reduced sentencing disparities based on race and other unacceptable factors was a matter of dispute. Further, the guidelines essentially codified the practices in use at that time and were seen by some as failing to ensure a coherent and consistent system of punishment – leading to both excessive leniency and undue harshness.

In 1994, Public Act 445 was signed into law. The bill created a 19-member sentencing commission within the Legislative Council, set guidelines criteria, restricted judicial departures from the guidelines to those having a "substantial and compelling" reason and provided for appeals, required the use of "intermediate sanctions" when guidelines called for a sentence of 18 months or less, and provided for the development of separate sentence ranges to apply to habitual offenders. The provisions for intermediate sanctions, application of guidelines, departures from guidelines, and sentence appeals were to take effect when enacted sentencing guidelines took effect. The bill was tie-barred to House Bill 5439 (Public Act 322 of 1994), and Senate Bills 40 and 41 (Public Acts 217 and 218 of 1994), which constituted a package of legislation requiring defendants convicted of certain crimes to serve their full minimum sentences (truth-in-sentencing).

The guidelines developed and recommended by the commission were enacted in 1998 as Public Act 317. Among many things, the bill classified over 700 criminal offenses into nine crime classes and six categories; provided for the classification of some attempted crimes; included instructions for scoring sentencing guidelines, including the application of 19 different offense variables and seven different prior record variables (recent legislation created Offense Variable 20 – anti-terrorism); and outlined sentencing grids, with various recommended minimum sentence ranges, for each of the nine crime classifications. Maximum terms of imprisonment for felonies are established in statute, and some crimes, such as for possession of narcotics, have a statutorily-specified minimum sentence.

Reportedly, the last time the Sentencing Commission met was in November of 1997, and as members' terms expired, no new appointments were made. The commission was abolished by Public Act 31 of 2002 (enrolled House Bill 5392), which repealed the provisions of law that created the commission.

Michigan Drug Reform Initiative. A petition was circulated earlier this year by the Campaign for New Drug Policies to amend the state constitution to reform drug sentencing practices and to provide treatment instead of jail time for certain offenders. The proposal would have, among many things, required a mandatory minimum term of 20 years imprisonment for major drug traffickers; required the creation of a drug sentencing commission (with an annual appropriation of $750,000 to fund commission activities); and created a drug treatment alternative to prosecution or incarceration. The proposal, if adopted, would also have eliminated current statutory mandatory minimum sentences and life probation for drug offenses, as well as eliminated the mandatory stacking of sentences for convictions involving multiple felony offenses. Though the ballot proposal received enough signatures to be placed on the November 5th ballot, the Board of State Canvassers ruled the proposal invalid due to an error in wording. The proposal would have amended the state constitution to create Sections 24 and 25 within Article I. The proposal, therefore, would have inadvertently eliminated the existing Section 24, which guarantees the rights of crime victims. Appeals to the Michigan Court of Appeals and Supreme Court to have the wording corrected were unsuccessful. The appellate court ruled that the Michigan Drug Reform Initiative had failed to show that it had a legal right to that remedy; the supreme court concurred by saying that the issues raised were not issues it needed to consider.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, overall, the bills would have an indeterminate fiscal impact on the state and local units of government, depending on how they affected prosecutorial charging practices, the numbers of prisoners released on parole, the size of the parole and probation caseload, the numbers of offenders committed to prison, and the length of time served by newly-sentenced offenders. Data provided by the Department of Corrections (MDOC) suggest that the proposed changes in offense variable scoring could gradually increase bed space needs by roughly 100 beds after the fifth year of implementation. (2-18-03)

ARGUMENTS:

For:

Currently, Michigan has a "one size fits all" approach to sentencing drug offenders, and also one of the harshest systems. Rather than looking at all the factors of a drug crime, judges in this state are required to impose mandatory minimum prison sentences for drug offenses involving Schedule 1 and 2 narcotics (e.g., heroin and cocaine) that are based on the weight of the substance involved (this is the weight of the mixture, not just the weight of the prohibited narcotic). Judges are prevented from considering factors such as addiction, prior record, education, family support, chances for successful rehabilitation, and so forth. National polls have found that a significant majority of citizens favor the elimination of mandatory minimum sentences and prefer that discretion be given back to judges to weigh all the factors in a case.

Intended to target drug "kingpins" and deter drug use, the mandatory minimums have done neither. The so-called kingpins are often able to trade information and assets for lighter sentences, where the low-level dealers and addicts, who may not have any information of value, are filling the prisons. Many of these individuals are first-time offenders, and would do better in a drug treatment program.

In addition, though the mandatory minimums appear to treat all drug offenders the same, there are still disparities in the system. For example, some prosecutors tend to double charge the offender for a single event. This means that a person may be charged with both delivery and conspiracy to deliver. For an offense involving a mixture between 225 grams and 650 grams, that means a mandatory minimum sentence of at least 20 years for each charge. Since current law requires these sentences to be served consecutively, the person would not be eligible for parole for 40 years. However, in another jurisdiction, with all things being equal, the prosecutor may bring a single charge, meaning the person would be parolable in twenty years. Further, some judges utilize the allowance to depart from the mandatory minimums for a substantial and compelling reason quite often, where other judges may never do so. Such disparities in sentencing would be addressed if the sentencing guidelines could be used to determine the range for a minimum sentence. The guidelines require each crime to be scored objectively based on the actual factors of that crime.

The Michigan Drug Reform Initiative was nearly successful in placing a ballot proposal to reform the state drug laws on the November ballot. The proposal had wide support, even though it would have amended the state constitution (instead of the compiled laws), would have been more costly to implement (at a time when state and local budgets are strained), and contained proposals that some feared could result in a too-lax policy towards serious controlled substances. What was attractive about the proposal is that it would have placed sentencing discretion back into the hands of judges and steered many offenders into drug treatment programs. The near success of the initiative should underscore the fact that citizens are ready to see the state drug laws reformed.

Most importantly, therefore, the bills represent a compromise between law enforcement and advocates for sentencing reform. They reflect the national trend to relax harsh sentences and put discretion back into the hands of the judges, but are far from being soft on criminals. House Bill 5395 would revise several offense variables; this would have the effect of increasing the guideline penalties for the most serious offenses, delivery over 50 grams to a home where a minor lives, and multiple offenses involving over 50 grams. Further, House Bill 5394 would substantially increase the amount of a fine that could be imposed for a violation (up to $1 million for the highest weight category). Passage of the bills would be good public policy and would correct a system that has been proven ineffective in meeting its targeted goals.

For:

Generally, unless <u>permitted</u> by statute to be imposed consecutively, terms of imprisonment for multiple felonies are served concurrently (at the same time). Once again, an exception was carved out for offenses involving Schedule 1 and 2 narcotics (mainly, heroin and cocaine). For several decades, people have been sentenced for convictions of both delivery and conspiracy to deliver or possession and delivery. Depending on the weight amounts involved, this mandate has meant that (unless a judge departed from the mandatory minimum sentences) even a first-time, non-violent offender has had to serve from 20 years to 40 years before parole eligibility. As has been said many times, rapists and murderers in Michigan are often released long before many first-time drug offenders.

Under the bills, sentences imposed for the commission of more than one felony in addition to the drug offense, or two or more charges for drug offenses, would no longer have to be served consecutively. In fact, consecutive sentences could no longer be imposed for multiple felony convictions involving a possession conviction. A judge could, however, still impose a consecutive sentence for multiple felony convictions that included a conviction for delivery/manufacture/possession with intent for controlled substances listed in Section 7401(2) of the Public Health Code.

For those currently serving a sentence for a drug offense or serving consecutive sentences for multiple drug convictions before the bills' effective date, House Bill 6510 would allow for earlier parole eligibility. For example, for those convicted of multiple drug offenses involving 225 grams to 649 grams, a person could be eligible for parole after serving the minimum of each sentence or 10 years of each sentence, whichever was less. Therefore, a person who had been convicted and sentenced to a mandatory minimum of 20 years for delivery and 20 years for conspiracy to deliver could be eligible for parole after serving 20 years instead of 40 years, which is the current requirement. Earlier parole eligibility for offenses involving other weight categories is also specified by the bills. It is important to note, however, that the earlier parole eligibility criteria pertain to drug offenses, not to a sentence imposed for a conviction for a non-drug felony, such as the use of a firearm in the commission of a felony. However, the bill could be read as allowing the minimum sentence to be served for a drug offense to be reduced to the terms specified in the bill. Therefore, a person serving a 20-year minimum drug sentence plus a 10-year sentence for a non-drug felony could be eligible for parole after serving 10 years of the drug sentence plus the minimum required for the non-drug sentence.

In short, those convicted and sentenced prior the bills' effective date could be eligible for an earlier parole date. The time periods specified in the bills would be comparable to the sentences that likely will be imposed under the new sentencing criteria.

Response:

House Bill 6510 does indeed include earlier parole eligibility criteria for drug offenses involving between 225 and 649 grams and between 50 and 224 grams for delivery/manufacture/possession with intent or possession of Schedule 1 or 2 narcotics, and delivery/manufacture/possession with intent of less than 50 grams or possession of 25 to 49 grams of Schedule 1 or 2 narcotics. However, the bill does not address earlier parole for those sentenced for violations involving 650 grams or more – a violation of Section 7401(2)(a)(i) or Section 7403(2)(a)(i). Therefore, it would appear that a person sentenced to a mandatory minimum term of imprisonment of 20 years per violation for more than 650 grams would still have to serve each 20 year sentence before being eligible for parole.

Further, the provision pertaining to earlier parole for those convicted of an offense involving delivery/manufacture/possession with intent of less than 50 grams or possession of between 25 and 49 grams of a Schedule 1 or 2 narcotic appears to contain an error. As written, the provision would appear to say that a person convicted of an offense involving these amounts who also had been convicted of a drug offense involving any amount of the prohibited Schedule 1 or 2 narcotics could be paroled after serving just one-half of the mandatory minimum sentence imposed for the lower offense. This would mean that a person could seek parole after serving just six months of a one-year mandatory sentence for a lower possession offense even though he or she also had been sentenced to a 20-year minimum sentence for delivery of more than 650 grams. This would not be in keeping with the spirit of the legislative package. The provision should be amended to clarify the intent.

For:

The current harsh drug sentences have not been an effective deterrent to the growing problem of drug use and illegal drug activities. Reportedly, during the 20-year time period between 1986 and 1996, the rate of incarceration per 100,000 Michigan residents for drug offenses increased by 22.7 percent for whites and 335.7 for African-Americans. In 1998, 19 percent of the new commitments to Michigan prisons were for drug offenses. That means almost one in five people who were newly incarcerated that year were sentenced under a system intended to deter the very type of crime of which they were convicted. Such statistics lead many to believe that a more effective policy would be to increase substance abuse treatment rather than just "lock people up" for extended terms of imprisonment.

The changes brought about by the bills could encourage the establishment of more drug courts, which use participation in drug rehabilitation programs as an alternative to incarceration for certain drug offenses. This is not a "get out of jail free" program; it is the successful participation and completion of a treatment program, along with other probation or parole conditions, that enables a person

to avoid imprisonment under alternative incarceration programs.

For:

According to information from the Department of Corrections, the bills as reported from the House Criminal Justice Committee were expected to be "bed neutral" as compared to estimates based on the bills as introduced, which showed a need for approximately 2,600 more beds within four years of implementation. Therefore, the bills should not result in an increase in costs for the department. It would seem, however, that as currently incarcerated inmates reach parole eligibility under the bills (and as others incarcerated under the old 650 drug lifer laws reach parole eligibility), that costs to the department would decrease as persons are paroled. It is far less costly to monitor a person on parole than it is to incarcerate him or her. Also, the elimination of lifetime probation for the lower drug offense categories should further reduce the department's costs for probation supervision.

For:

The greatest cost savings that may be realized by the bill package could be more difficult to quantify, yet these savings still carry a significant economic punch. The federal Bureau of Justice Statistics reports that 82 percent of parolees returned to prison for parole violations are drug or alcohol abusers. Further, a significant number of crimes are committed when offenders are under the influence of drugs or alcohol (some studies report 49 percent of violent crimes are committed by individuals under the influence of drugs or alcohol). Successful rehabilitation has been shown to reduce the recidivism rate and to reduce the number of parole violations due to substance abuse. Unfortunately, due to budget shortfalls, many substance abuse programs in jails and prisons are being cut.

In a study by the RAND Corporation, as referenced in an article in a publication by the State Bar of Michigan's Prisons & Corrections Section, whether substance abuse treatment occurred in prison or in the community as an alternative to prison, applying $1 million dollars to treat heavy users reduces cocaine consumption by over 100 kilograms, where the same amount of money spent to make mandatory minimum sentences longer would reduce cocaine consumption by only about 13 kilograms. The RAND Corporation also estimated that the impact on drug-related crime – both property and violent crimes – was not reduced by conventional enforcement or by mandatory minimums, but treatment reduced serious crime by 15 percent. Further, other benefits of substance abuse treatment include a reduction in health care costs, increased productivity of a person (e.g., working and paying taxes instead of being incarcerated), reduction in foster care costs to care for children of incarcerated parents, etc. In short, more and more states are finding that it is cheaper, more humane, and that safer communities are created when offenders are steered into drug rehabilitation programs instead of incarceration alone. (Levine, B., "Treatment vs Incarceration: A Question of Cost-effectiveness", Prisons and Corrections Forum, Vol. IV, No. 1, winter 2001, pp. 7-9)

For:

The bill package would eliminate the life probation imposed for violations involving manufacture/delivery of less than 50 grams of a Schedule 1 or 2 narcotic or possession of between 25 grams and 49 grams. Instead, probation could only be imposed for not more than five years, just like all other crimes. Those currently on lifetime probation could be recommended by their probation officers for release if they had served at least five years of their probationary period and had done so successfully.

There is evidence to support that lifetime probation has not proven to deter substance abuse crimes or to be a leverage to reach those higher up in the drug hierarchy. Reportedly, more than 4,000 people are currently serving lifetime probation, with over one-fourth of those in Wayne County. This puts a budget strain on not just the Department of Corrections, which is responsible for the salaries of probation officers, but also for counties, that must cover the costs of officer expenses and courts that must conduct hearings whenever a probation violation is alleged. If even just one phone check-in is missed, even if the probationer has successfully complied with his or her probation terms for many years, it is counted as a probation violation and triggers further investigation – which may involve a court hearing on the matter. Ending lifetime probation would ease the financial burden borne by the DOC and counties. Further, it would recognize that many probationers have successfully complied with their probation terms, are now leading productive lives, and deserve to be released from probation. However, the bills would not make release from probation mandatory; a court would have to review each case and decide accordingly.

Response:

Though this sounds like an improvement, in some counties, termination of probation after five years could become routine, while in others, judges might

simply take a strong stance against terminating probation. To ensure consistency in the application of criminal sanctions, the bills should require the sentencing court to terminate probation after five years, rather than allow it to do so if the probationer had a clean record of compliance with probationary terms.

Against:

The changes made by House Bill 5394 would make the penalty in the Public Health Code for possession of 25 grams or more but less than 50 grams of any mixture containing a Schedule 1 or 2 narcotic [Section 7403(2)(a)(iv)] the same as that for less than 25 grams [Section 7403(2)(a)(v)]. Currently, the former offense requires at least one year imprisonment but not more than 4 years, a fine of not more than $25,000, or life probation. However, since the bill would eliminate the mandatory minimum sentence and the provision for life probation, the two offense categories end up with the same punishment – imprisonment for up to four years, a fine of not more than $25,000, or both. The bill should be amended to either combine these two offenses (e.g., a weight category of less than 50 grams), increase the maximum term of imprisonment for an offense involving 25 to 50 grams or increase the fine, or decrease the term of imprisonment or fine for an offense involving possession of less than 25 grams.

Response:

Apparently, there are many references in law to both sections. It was decided that though the punishment for these two offenses are now identical, that for the time being, no harm would be done by having two weight categories carry the same punishment. The alternative was to introduce a flurry of additional bills in the closing days of a legislative session to make technical citation changes to a number of other acts.

Analyst: S. Stutzky

■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.