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BILL



ANALYSIS

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Senate Bill 1109 (as enacted)  
Sponsor: Senator Rick Jones  
Senate Committee: Judiciary  
House Committee: Judiciary

**PUBLIC ACT 319 of 2012**

Date Completed: 7-18-13

**CONTENT**

**The bill amended the Code of Criminal Procedure to require a sentence of at least 25 years' imprisonment if the offender has been convicted of three or more felonies and subsequently is convicted of a "serious crime" and at least one of those prior felonies is a "listed prior felony".**

The bill took effect on October 1, 2012.

The Code provides for enhanced sentencing for a person who commits a felony in Michigan and who has previously been convicted of a felony or an attempt to commit a felony in this or another state. If a person has been convicted of any combination of three or more felonies or attempts to commit felonies in this or another state, and commits a subsequent felony in Michigan, the person must be punished as follows:

- If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of five years or more, or for life, the court may sentence the person to imprisonment for life or for a lesser term.
- If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term that is less than five years, the court may sentence the person to imprisonment for a maximum term of not more than 15 years.
- If the subsequent felony is a major controlled substances offense, the person must be punished as provided under Part 74 of the Public Health Code.

Under the bill, in addition to those enhanced sentencing provisions, if the subsequent felony is a serious crime or a conspiracy to commit a serious crime, and one or more of the prior felony convictions are listed prior felonies, the court must sentence the person to imprisonment for not less than 25 years. Not more than one conviction arising out of the same transaction may be considered a prior felony conviction for the purposes of this provision.

The bill defines "serious crime" as any of the following offenses against a person:

- Assault with intent to commit murder.
- Assault with intent to do great bodily harm less than murder, or assault by strangulation or suffocation.
- Assault with intent to maim.
- Armed or unarmed assault with intent to rob and steal.
- Second-degree murder.
- Manslaughter.
- Kidnapping.
- Hostage-taking by a prisoner.
- Kidnapping a child under the age of 14.
- Mayhem.
- First-, second-, or third-degree criminal sexual conduct (CSC), or assault with intent to commit first- or third-degree CSC.
- Use or possession of a dangerous weapon in the course of committing felony larceny.
- Carjacking.

The bill's definition of "listed prior felony" includes a violation or attempted violation of any of the offenses listed above or any of the following:

- First- or second-degree fleeing and eluding under Section 602a of the Michigan Vehicle Code.
- Causing the death of another person by operating a motor vehicle while the offender is intoxicated or visibly impaired, or has any amount of a Schedule 1 controlled substance in his or her body.
- A violation of Article 7 (Controlled Substances) of the Public Health Code that is punishable by more than four years' imprisonment.
- First-degree arson.
- Felonious assault.
- Torture.
- Assault with intent to commit a felony for which the punishment is not otherwise prescribed.
- Attempted murder.
- First- or second-degree home invasion.
- First- or second-degree child abuse.
- First- or second-degree vulnerable adult abuse.
- Solicitation to commit murder.
- Breaking or escaping from jail or other place of confinement.
- Carrying a firearm or dangerous weapon with intent to use it unlawfully against another person.
- Unlawfully carrying a concealed dangerous weapon, or carrying such a weapon in a vehicle regardless of whether it is concealed.
- Intentionally discharging a firearm from a motor vehicle, snowmobile, or off-road vehicle in a manner that endangers others.
- Intentionally discharging a firearm at a dwelling or other occupied structure.
- Intentionally discharging a firearm at an emergency or law enforcement vehicle.
- Discharging a firearm pointed or aimed at another person, intentionally but without malice, resulting in death.
- Stalking an individual under 18 years of age when the offender is at least five years older than the victim.
- Aggravated stalking.
- First- or second-degree fleeing and eluding under Section 479a of the Michigan Penal Code.
- Use of force or violence, assault, or putting a person in fear, in the course of committing felony larceny.
- A second or subsequent violation of carrying or possessing a firearm when committing or attempting to commit a felony.

- Instigating, causing, attempting to cause, assisting in causing, or conspiring to cause a riot at a State correctional facility.

MCL 769.12

Legislative Analyst: Patrick Affholter

### **FISCAL IMPACT**

The bill will have an indeterminate, but likely significant fiscal impact on State government. In 2011, 2,810 offenders received court dispositions for the serious felonies enumerated in the bill. Of those offenders, 516 (18.4%) had at least three prior felony dispositions. However, it is unknown how many of these 516 offenders had one or more of the "listed prior felonies" among their three or more prior crimes. Therefore, one cannot know exactly how many individuals this law would have affected, other than to view 516 as a maximum. Of those 516 offenders:

- 9% were sentenced to sanctions other than prison.
- 74% were sentenced to prison for a minimum term shorter than 25 years.
- 15% were sentenced to prison for a minimum term longer than 25 years.
- 2% were sentenced to life in prison.

Therefore, in 83% of the cases that represent the maximum pool of affected offenders, the minimum sentence of 25 years potentially could have been applicable. If this is the case going forward, the bill could result in the need for additional bed space in the State prison system at some point over the 25-year period that the policy will be phased in (relative to bed space needs based on the prior status quo). It is possible that the need for additional bed space could be met by forgone closures instead of new or reopened facilities. If reopening facilities, building new facilities, or making improvements to existing facilities is necessary to accommodate bed space needs, there might be an indeterminate increase in capital costs.

According to the Attorney General Criminal Justice Bureau, however, only 41 (8%) of the 516 offenders who were convicted of one of the enumerated felonies in 2011 and also had a prior record containing at least three felonies of any variety were *actually*

charged as habitual offenders under Section 12, Chapter IX of the Code of Criminal Procedure (the section the bill amended). Also according to the Bureau, these 41 offenders were given an average minimum sentence of 13 years. Extrapolating from this average, the main fiscal impact will not be felt until after the 13<sup>th</sup> year. For the 14<sup>th</sup> year, the State will see annual increased costs shown below:

41 offenders x \$34,000 average per capita cost = \$1,394,000 in year 14

In each of 11 years thereafter, the costs will continue to increase by \$1,394,000 per year until reaching stability after the 25<sup>th</sup> year, as follows:

- Year 15: \$1,394,000 + \$1,394,000 = \$2,788,000
- Year 20: \$1,394,000 x 7 years = \$9,758,000
- Year 25 and thereafter: \$1,394,000 x 12 years = \$16,728,000

According to the Prosecuting Attorneys Coordinating Counsel, the prosecutors have full discretion whether to charge the offender as a habitual offender. Therefore, simply because an offender with three prior felonies (at least one of which is a "listed prior felony") is convicted of a serious crime enumerated in this bill, the 25-year minimum sentence will not automatically apply. Instead, it will apply only in cases in which the prosecutor decides to add the habitual-offender enhancement described in Section 12, Chapter IX of the Code of Criminal Procedure.

If the prosecutor does decide to add this enhancement and wins a conviction, it is

then that this bill will have a direct impact by mandating that the judge provide for a sentence of not less than 25 years' imprisonment. Under the previous law, if the prosecutor added the sentence enhancement in Section 12, the judge could issue a sentence of up to life (depending on the offense), but the judge also could provide for a minimum sentence of much less than 25 years. With the enactment of this bill, it is not known whether prosecutors will be more or less likely to pursue the habitual-offender enhancement. In the past, they have added the enhancement to 8% of eligible cases. (It is likely, however, that prosecutors consider adding the enhancement, but later remove it from consideration as part of a plea bargain, which is how most convictions are achieved.)

The Michigan Department of Corrections (MDOC) Office of Research and Planning, using the 516 fourth-time offenders who potentially could have been affected by the bill as a basis, provided estimates for the number of additional beds that could be required under the bill. These bed estimates were then used to calculate potential fiscal impact estimates using an average annual cost per prisoner of \$34,000, as shown in Table 1. These numbers should be viewed only as an extreme upper limit to the cost of the bill, because this will be the case if the prosecutors choose to add the habitual-offender enhancement in every eligible case. Also, this pool of 516 fourth-time offenders will be much smaller without those offenders whose three prior felonies are not among the "listed prior felonies" described in the bill.

Table 1

	Additional Beds Needed	Potential GF/GP Fiscal Impact (Annual)
1 year from enactment	47	\$1.6 Million
5 years from enactment	487	\$16.6 Million
10 years from enactment	1,637	\$55.7 Million
15 years from enactment	3,289	\$111.8 Million
20 years from enactment	5,253	\$178.6 Million
25 years from enactment	7,374	\$250.7 Million

The impact of the bill will grow over time until stabilizing after 25 years. The impact in the first year will be small because the bill will affect only the 9% of offenders who would not have otherwise been sentenced to prison. Over the next 24 years, the other 74% of habitual offenders included under the bill will be affected by longer stays than they otherwise would have been mandated to serve. For example, if an offender would have been sentenced to a 20-year minimum sentence under the previous law, the fiscal impact of the sentence enhancement will not be reflected until the 21<sup>st</sup> year.

The estimates provided above are contingent on a number of important assumptions. First, they assume that 2011 was a typical year, in terms of the number of fourth-time offenders and their sentencing outcomes. According to the MDOC Office of Research and Planning, 2011 was 20% below the peak for number of felony dispositions.

Second, the estimates assume stable crime and arrest rates, as well as uniform charging and plea bargaining practices. People are dynamic in the ways they react to policy change, so the second assumption is unlikely to be realistic. Presumably, when faced with a 25-year mandatory minimum, fourth-time felony offenders whose three prior felonies contain a "listed prior felony" will be likely to invest heavily in legal assistance (if they have the resources to do so) and also will have a greater propensity to accept plea bargains (which may be for lesser charges, or for the same charges but without the sentence enhancement). Increased propensity to take plea bargains will have an ambiguous effect on the fiscal impact, as it will allow offenders to avoid the 25-year minimum but might cause them to take longer sentences than they would otherwise in the absence of the bill. Because most convictions are achieved via plea bargain, it is possible that the indirect impact of the bill (its impact on the plea bargains) might outweigh the direct impact.

Third, the estimates assume that under the previous law, when the fourth-time felons got out of prison, they stayed out of prison for the remainder of the 25-year period. The most recent three-year recidivism rate is 31.5%, so this assumption is also unlikely to be realistic. However, it is very difficult to estimate how long the recidivist will serve, as

it might be for a technical violation or for a new sentence (for crimes of widely varying severity). This number might be reflected in a reduction in the crime rate as more habitual offenders are removed from what can sometimes be a revolving door between prison and the civilian world.

Both prosecutors and offenders will likely change their behavior in light of the new policy change, and as a result it is difficult to give more precise estimates of the fiscal impact. In any case, the fiscal impact will be relatively small in the first several years and then grow to stabilization after 25 years. The annual fiscal impact after stabilization might be as small as \$10.0 million, but it is possible that it could be over \$50.0 million. The key variable that will cause the costs to increase is the percentage of cases in which the prosecutor adds or threatens to add the sentence enhancement. The more aggressive prosecutors become in adding the enhancement, the higher the fiscal impact will likely become.

Fiscal Analyst: Dan O'Connor

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.