



House
Legislative RECEIVED
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House Bill 4114 (Substitute H-3)
Sponsor: Rep. Perry Bullard

House Bill 4192 (Substitute H-4)
Sponsor: Rep. Nick Ciaramitaro

First Analysis (1-10-90)
Committee: Judiciary

THE APPARENT PROBLEM:

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

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

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

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

administrative office. What constitutes acceptable reasons is being determined by case law.

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

THE CONTENT OF THE BILLS:

House Bill 4114 would amend the Code of Criminal Procedure to create a sentencing commission to develop sentencing guidelines that would be made mandatory upon approval by the legislature. Sentencing would continue to be indeterminate. Guidelines would establish minimum sentence ranges based on certain offense and offender characteristics, and judges would continue to set sentence maximums within the limits established by law. Guidelines would be developed so as to minimize the likelihood of prison and jail overcrowding. The bill would set guidelines criteria, restrict judicial departures from guidelines and provide for appeals, require the use of "intermediate sanctions" when guidelines called for a sentence of less than 12 months, and provide for habitual offender provisions differing according to whether the subsequent offense triggering the provisions was committed under existing guidelines or those developed under the bill. Except for allowable departures, sentences would have to follow the guidelines in effect on the date a crime was committed. Provisions limiting judicial departures from guidelines would apply to current guidelines as well as those developed under the bill. The bill would take effect April 1, 1990, providing House Bill 4192 was enacted. A more detailed description follows.

Existing guidelines. The bill would provide that the sentencing guidelines promulgated by Michigan Supreme Court Administrative Order 1988-4 would "take immediate effect" and remain in effect, without amendment, until sentencing guidelines under the bill took effect. The bill's provisions pertaining to departures (see below) would

apply to existing guidelines as well as the guidelines developed under the bill.

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

Guidelines would have to minimize the likelihood that the capacity of state and local correctional facilities would be exceeded. State correctional capacity would include the capacities of all permanent and temporary state facilities in use, plus those approved for construction under the joint capital outlay process.

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

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

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

Approval of guidelines, amendments. The commission's guidelines would not take effect unless they were enacted into law. The commission would submit its guidelines to the legislature on October 1, 1992. The guidelines would be referred to the judiciary committees. The guidelines could not be amended either in committee or on the floor unless the proposed amendment would cause neither a net

increase nor a net decrease in the number of prisoners committed to state and local correctional facilities.

If the guidelines were not enacted within 90 days after being submitted, the commission would revise them and submit the revised guidelines to the legislature within 180 days after guidelines were previously submitted. The process would continue until guidelines were enacted into law. Until the commission's guidelines were enacted, the sentencing guidelines promulgated by Michigan Supreme Court Administrative Order 1988-4 would remain in effect, without amendment.

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

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

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

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

Intermediate sanctions. Beginning on the effective date of the bill's guidelines, if the recommended minimum sentence for a defendant was less than 12 months, the court would have to impose an intermediate sanction unless it stated on the record a substantial and compelling reason to impose a sentence of imprisonment. An "intermediate sanction" would be any sanction other than imprisonment in a state prison or reformatory that could lawfully be imposed. Intermediate sanctions would include probation, drug treatment, mental health counseling, jail, work-release or school-release from jail, participation in a community corrections program, community service, restitution, fines, house arrest, electronic monitoring, and probation with special alternative incarceration ("boot

camp"). The bill would add to the list of specifically-allowed conditions of probation the intermediate sanctions that are not already mentioned.

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

Habitual offenders. Existing provisions enhancing the sentences of habitual offenders would be limited to offenses committed prior to the bill's guidelines taking effect. For felonies committed after the bill's guidelines took effect, the schedule of sentence enhancements would be revised, and would apply only if the upper limit of the guideline sentence was less than two-thirds of the statutory maximum.

MCL 769.8 et al.

House Bill 4192 would amend Public Act 232 of 1953, the corrections code, to place supervision and control of the parole board under the authority of the director of the Department of Corrections, rather than the corrections commission; to provide for the development of parole guidelines; and to limit placements in community facilities. The bill would take effect April 1, 1990, providing House Bill 4114 was enacted. Additional details follow.

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

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

MCL 791.202 et al.

FISCAL IMPLICATIONS:

Fiscal information is not available at present. (1-9-90)

ARGUMENTS:

For:

By acting to control both sentencing and release practices, the legislature will be making a clear and rational affirmation of public policy on the issues of crime and punishment, rather than passively accepting a working average emerging out of judicial practice. A rational and comprehensive system of sentencing and parole guidelines would ensure that justice is served, bias is removed from decision-making, and limited prison and jail resources are used effectively. The bills propose to develop this system through the creation of a commission of experts, supported

by a professional staff and operating with clear statutory objectives and under firm deadlines; similar structures have worked well in other states (notably Minnesota) and in the development of federal sentencing guidelines. Ultimate authority will, however, remain with the legislature by virtue of the necessity of legislative adoption of the commission's proposals.

Against:

House Bill 4114 would require that sentencing guidelines minimize the likelihood that the capacity of prisons and jails will be exceeded. To link sentencing with prison and jail overcrowding in this manner would defeat the ends of justice and public safety. Criminals whose offenses and criminal backgrounds warrant incarceration should be incarcerated; their sentences should be those called for by the severity of their crimes, not by the severity of the state's problems with the corrections budget. If, as may be the case, too many relatively minor offenders are being sentenced to state prison, the solution is to improve local options, notably by adequately funding the community corrections act and making more creative use of institutional space (such as with the "boot camp" program). As it stands, the proposal will require more felons to be dealt with locally, thereby exacerbating problems for already overburdened jails and probation systems.

Response: For one thing, the bill requires not just state capacity to be considered, but both state and local correctional capacity. Also, by incorporating considerations of capacity into guidelines development, the bill would discourage such considerations in individual decision-making. It is widely held that judges consider state and local capacity in making individual sentencing decisions. A few years ago, prison overcrowding apparently caused judges to tend to sentence defendants to jail in the expectation that the full term was more likely to be served there than if the defendant went to prison. With the jail overcrowding problems that have now developed, judges now appear to be sentencing relatively minor offenders to prison to ensure a minimum period of incarceration. The bill proposes to deal with prison and jail overcrowding problems more rationally and responsibly by having the commission incorporate a response to those problems in the formulation of a state sentencing policy.

A disregard of correctional capacity in the development of a state sentencing policy has contributed to a monumental problem of prison overcrowding. The problem is worsening despite the undertaking in early 1985 of a massive prison construction effort that will have more than doubled capacity by 1992 at a cost of about \$900 million. October 1989 estimates from the Department of Corrections are that prison capacity will be short by nearly 16,000 beds by the end of 1992; the state is at present about 4,000 beds short, and at the end of 1984 population exceeded capacity by no more than a few hundred. While the fastest rate of growth in the current prison population is represented by the short-termers (that is, prisoners with minimum sentences of 24 months or less), over time existing capacity is expected to be filled by the steadily growing numbers of people being sentenced to longer terms. The state needs a sentencing and parole policy that will put and keep the worst offenders in prison while ensuring that comparatively minor offenders receive alternative community-based sanctions.

For:

Several aspects of the legislation will curb inappropriate sentence adjustments based on applying the same factors more than once — a sort of "double-dipping." Because

guidelines take criminal history into account, the application of habitual offender sentence enhancements is debatable. The legislation would address this issue by establishing separate sentence ranges for convictions under revised habitual offender provisions; current habitual offender statutes would continue to apply to convictions for crimes committed under current guidelines. Excessive departures from both existing and future guidelines would be curbed by prohibiting the consideration of factors already taken into account by the guidelines.

Response: Changes proposed in the way habitual offenders and guideline departures are handled are too extreme. Strong habitual offender enhancements are necessary to properly punish and incapacitate career criminals. Banning departures based on factors used in guidelines assumes guidelines to be more complete than they really are; the scoring system is inadequate to fully account for the wide range of circumstances possible. Some crimes are so shocking and violent that they demand a response stronger than guideline scoring provides.

For:

Provisions limiting departures from guidelines would apply to the current sentencing system, and this could significantly reduce the effect that "upward" departures have on prison overcrowding. Over the years, the number of months in upward departures has consistently exceeded the number of months in downward departures. Thus the effect of limiting departures overall may be a net reduction in the total number of months to which prisoners are sentenced.

Against:

The bills fail to sufficiently consider the acute problem of prison overcrowding. While the guidelines are to take prison capacity into account, the calculation of capacity would include temporary facilities, which would not be available indefinitely, and proposed facilities, which may not yet be built at the time a prisoner was sentenced. The guidelines likely would presume the availability of more prison beds than actually existed. Further, House Bill 4192 would limit community placement to the last 12 months of a sentence, when corrections department policy now limits it to the final 24 months. The department would have to find beds for those prisoners elsewhere in the system, thus exacerbating overcrowding problems.

Against:

It is questionable whether the legislature can require the state court administrator to provide office space and staffing for the commission. That position is a judicial office provided for by the state constitution. The separation of powers doctrine may prevent the legislature from imposing requirements on the office.

Against:

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

Against:

House Bill 4114 presents several problems of a procedural nature. It offers little guidance on what constitutes a "substantial and compelling" reason acceptable for departing from a guideline sentence, leaving the definition

of that term to the slow and expensive process of the development of case law. The bill proposes what could be an endless cycle of guidelines being submitted to the legislature, failing to gain approval, and being revised and resubmitted. Enactment of the guidelines should be made more certain by building in stronger presumptions for acceptance of commission recommendations.

Against:

House Bill 4192 lacks specificity about how the parole process may change under the bill. The implications of placing the parole board under the department director's authority are unclear, and the bill leaves unanswered questions on whether and how the parole board would be able to depart from parole guidelines. Further, by having parole guidelines enacted as law, the bill may lead to greater burdens on courts through lawsuits brought by disgruntled prisoners denied parole.

Against:

The setting of sentence lengths is the duty of the legislature; Article IV, Section 45 of the state constitution says that "the legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences." While it may be practical to authorize an expert commission to make studies and recommendations, the legislature should express its intent that sentencing be made uniform by some formulation more specific than proposed by the legislation. Some sort of articulation of the specific ranges of deviation which would be permissible would serve to guide the commission and to assure that legislative intent is carried out. Further, the legislation would unduly limit the amendatory process; the legislature should be able to enact guidelines as it sees fit.

Response: It is very difficult to reach agreement on a theoretical expression of sentence ranges which will achieve the goals specified by the legislation. The commission will have the duty and the resources to make determinations in this regard, and its proposals will be tested against legislative intent when they are presented to the legislature for approval. To open up the amendatory process would be to risk having the details of sentencing structure become political fodder and the work of the commission undone. Indeed, it may be that rather than having a more open amendatory process, the legislation should limit amendments more than it does.

Against:

There is a need for a more comprehensive review of criminal justice policy as embodied in statute and practices. A thorough review and evaluation of statutes should be among the commission's duties.

POSITIONS:

The Michigan Council on Crime and Delinquency supports the bills. (1-3-90)

The State Appellate Defender's Office is supportive of the legislation. (1-8-90)

The Michigan Judges' Association has no position at this time. (1-9-90)

The State Bar of Michigan has no position at this time. (1-4-90)

The Prosecuting Attorneys Association of Michigan opposes requiring guidelines to be adjusted in response to prison capacity. (1-3-90)