



House
Legislative
Analysis
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SENTENCING GUIDELINES

House Bill 4782 as enrolled
Public Act 445 of 1994
Sponsor: Rep. Michael E. Nye

Second Analysis (2-24-95)
House Committee: Judiciary
Senate Committee: Judiciary

THE APPARENT PROBLEM:

Criminals in Michigan are sentenced under an indeterminate sentencing structure, meaning, basically, that the sentencing judge sets minimum and maximum terms to be served. The maximum term is limited to the maximum set by the legislature in statute and the minimum term is limited to two-thirds of the maximum term. A prisoner becomes eligible for parole upon completing his or her minimum sentence, minus any reductions for good time or disciplinary credits (this however, would change under implementation of "truth in sentencing" legislation, which would require certain offenders to serve their full minimum terms; for a more complete explanation of that legislation, please see the House Legislative Analysis Section analysis of enrolled House Bill 5439 and enrolled Senate Bills 40 and 41, dated 2-24-95). 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 (this too, would change under truth in sentencing, which would require certain offenders to serve their minimum terms in secure confinement).

The exact duration of the sentence served is not established at the time of sentencing; thus, sentencing is "indeterminate." Both the current disciplinary credit system and the proposed truth in sentencing system (which would allow the Department of Corrections to punish misconduct with the imposition of "disciplinary time") give latitude to the judge to adjust the harshness of a sentence to the circumstances of the crime; they also give leeway to the Department of Corrections (DOC) to promote prisoner rehabilitation while managing prisoner behavior.

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

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

Under the supreme court's sentencing guidelines, a range for a person's minimum sentence is determined using a grid that measures the severity of the crime against the offender's criminal history. Offense and criminal record scores are calculated by adding the scores assigned to various weighted variables. Whenever a judge determines that a minimum sentence outside the recommended

minimum range should be imposed, the judge may do so, but must state his or her reasons on the sentencing information report that is sent to the State Court Administrative Office. Case law is determining what constitutes acceptable reasons.

The supreme court's guidelines have been criticized for failing to sufficiently restrict departures, among other things; whether they have sufficiently reduced sentencing disparities based on race and other unacceptable factors is a matter of some dispute. In addition, the guidelines essentially codified existing practices and thus may fail to ensure a coherent and consistent system of punishment. Current guidelines have been criticized both for excessive leniency and for undue harshness. Moreover, as the state's prison overcrowding has worsened despite an expensive prison construction program, many have concluded that a comprehensive review and development of sentencing guidelines is needed to ensure that limited prison and jail space is used for the worst offenders and that community alternatives are employed whenever possible. Finally, many have asserted that as it is the legislature that establishes the penalties for various offenses, the legislature should provide for sentencing guidelines. What is needed, many say, is an independent commission to develop sentencing and parole guidelines for approval by the legislature.

THE CONTENT OF THE BILL:

The bill would amend the Code of Criminal Procedure (MCL 769.12 et al.) to create a sentencing commission to develop sentencing guidelines that would be made mandatory upon enactment into law. Sentencing would continue to be indeterminate. Guidelines would establish minimum sentence ranges based on certain offense and offender characteristics, and judges would continue to set sentence maximums within the limits established by law. In developing guidelines, the commission would consider the likelihood that the capacity of state and local correctional facilities would be exceeded. The bill would set guidelines criteria, restrict judicial departures from guidelines and provide for appeals, require the use of "intermediate sanctions" when guidelines called for a sentence 18 months or less, and provide for the development of separate sentence ranges to apply to habitual offenders. The bill also would add to the list of specifically-allowed conditions of probation,

and require presentence investigation reports to include certain guidelines-related information.

Provisions for intermediate sanctions, application of guidelines, departures from guidelines, and sentence appeals would take effect when enacted sentencing guidelines took effect. Provisions on conditions of probation and presentence investigation reports would take effect February 1, 1995. The bill could not take effect unless Senate Bills 40 and 41 and House Bill 5439 also were enacted. (Those bills, which would provide for "truth in sentencing," were enacted as Public Acts 217, 218, and 322 of 1994, respectively.) A more detailed explanation follows.

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

Guidelines criteria. Guidelines would include sentence ranges for the minimum sentence for each offense, along with "intermediate sanctions" (that is, punishments other than incarceration in a state prison) to be applied whenever a range included a recommended minimum sentence of 18 months or less. Separate sentence ranges would be developed for convictions that fell under the habitual offender provisions of the Code of Criminal Procedure.

In developing guidelines, the commission would consider the likelihood that the capacity of state and local correctional facilities would be exceeded. State correctional capacity would include the capacities of all permanent and temporary state facilities in use, plus those approved for construction under the joint capital outlay process as of the preceding June 1.

Guidelines and any later modifications would have to reduce sentencing disparities based on factors other than offense and offender characteristics, and ensure that offenders with similar offense and offender characteristics received substantially similar sentences. "Offender characteristics" would mean only the prior criminal record of the offender. "Offense characteristics" would be the elements of the crime plus any aggravating or mitigating factors the commission considered appropriate, providing they were consistent with the bill. Explicitly to be considered an aggravating factor would be a conviction for an offense described by Proposal B of

1978 (which eliminated "good time" for certain serious offenders) that arose out of the same transaction as the offense being considered.

Guidelines also would have to be proportionate to the seriousness of the offense and the offender's prior criminal record (an offense involving violence against a person would be considered more severe than other offenses); provide for protection of the public; and, specify the circumstances under which a term of imprisonment or intermediate sanctions should be imposed. Guidelines sentence ranges would have to be within the minimum and maximum sentences allowed by law.

Sentencing commission. The guidelines and subsequent modifications would be developed by a nineteen-member commission created within the Legislative Council, which would provide office space and staffing. The commission would consist of: four senators (two members from each caucus), four representatives (two members from each caucus), two judges (one circuit court judge and one recorder's court judge), plus representatives of prosecuting attorneys, criminal defense attorneys, law enforcement, the Department of Corrections, advocates of alternatives to incarceration, crime victims, and the Department of Management and Budget, along with two members representing the general public. Legislative members would be appointed by their respective caucus leaders by March 15, 1995. Other members, one of whom would be appointed chairperson, would be appointed by that same date by agreement between caucus leaders and the governor.

Terms would be four years, except for some shorter initial terms to establish staggered terms. Members would not receive salaries, but would be reimbursed for expenses. Commission business would be subject to the Open Meetings Act and the Freedom of Information Act.

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

compile data and make projections on the effect of sentencing guidelines on case loads, docket flow, and case backlogs in Michigan. The state court administrator's office would continue to collect data on sentencing practices; it would have to provide necessary data to the commission.

Approval of guidelines, amendments. The commission's guidelines would not take effect unless they were enacted into law. The commission would submit its guidelines to the legislature by July 15, 1996. If a proper request was submitted by a serving member of the legislature, the Legislative Service Bureau would prepare by September 15, 1996 a bill embodying the commission's recommended sentencing guidelines. If the guidelines were not enacted into law by December 31, 1996, the commission would resubmit them by March 31, 1997. If the guidelines were not enacted within 60 days after they were resubmitted, the commission would revise them and resubmit them within 90 days after they were previously submitted. The process would continue until guidelines were enacted.

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

Application of guidelines. A felony offender would be sentenced under the guidelines in effect on the date the crime was committed. If a crime had a mandatory determinate penalty or a penalty of mandatory life imprisonment, the court would impose that penalty; the bill generally would not apply to such sentences. As part of a sentence, the court could also order the defendant to pay any combination of a fine, costs, or applicable assessments. The court would have to order restitution as provided by law.

Departures from guidelines. A court could depart from the bill's guidelines if it had a substantial and compelling reason to do so and stated its reasons on the record. Unless the court found from facts contained in the court record (including the presentence investigation report) that a characteristic had been given inadequate or disproportionate weight, a departure could not be

based on any offense or offender characteristic already taken into account in determining the appropriate minimum sentence range. The following factors would be specifically disallowed in departing from guidelines: gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, the type of legal representation (such as whether by appointed or retained counsel), and religion.

Appeals. The court would advise a defendant of the right to appeal a sentence that was more severe than the appropriate guideline sentence. Appeals would be to the court of appeals, which would affirm the sentence if it fell within the appropriate guidelines sentence range, providing that there was no error in scoring the offense and that the trial court had not relied on inaccurate information in determining the sentence. However, an appeal could not be based on a challenge to scoring or accuracy unless that issue had been raised at sentencing in the form of a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals. The court of appeals would have to remand a case for resentencing if it found that a trial court did not have a substantial and compelling reason for departing from sentencing guidelines. An appeal would not stay the execution of a sentence, and time served on a sentence being appealed would be considered time served on any sentence imposed after remand.

Intermediate sanctions. Beginning on the effective date of the bill's guidelines, if the upper limit of the guidelines' range for a defendant's minimum sentence was 18 months or less, the court would have to impose an intermediate sanction unless it stated on the record a substantial and compelling reason to sentence the defendant to the Department of Corrections. 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 (with or without day parole, work-release, or school-release), participation in a community corrections program, community service, restitution, fines, house arrest, electronic monitoring, and probation with special alternative incarceration ("boot camp").

Habitual offenders. The sentencing commission would have to develop separate sentence ranges for habitual offenders; habitual offender ranges could

include as an aggravating factor that the accused had engaged in a pattern of proven or admitted criminal behavior.

Presentence investigation reports. A presentence investigation report would have to include, in addition to the information now required, the following: a specific statement on the applicability

of intermediate sanctions; guidelines computations and the appropriate minimum sentence range; the recommended sentence; and available diagnostic opinions not otherwise exempted from disclosure.

Conditions of probation. The bill would add to the list of specifically-allowed conditions of probation the intermediate sanctions that are not already mentioned. The bill also would allow a court to make payment of an assessment a condition of probation.

BACKGROUND INFORMATION:

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

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

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

FISCAL IMPLICATIONS:

The House Fiscal Agency reports that \$250,000 has been allotted for the sentencing guidelines commission under the current year's general government budget. Estimates on the full annual

cost of the commission are being developed. Any additional fiscal implications cannot be determined at this time, because fiscal impact on the Department of Corrections will depend on the details of the guidelines to be developed and subsequently enacted. (2-16-95 and 2-24-95)

ARGUMENTS:

For:

By acting to control sentencing practices, the legislature will be making a clear and rational declaration of public policy on the issues of crime and punishment, rather than passively accepting a working average emerging out of judicial practice. A rational and comprehensive system of sentencing guidelines would ensure that justice is served, bias is removed from decision-making, and limited prison and jail resources are used to their best advantage--that is, to house the worst offenders. The bill proposes 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 and in the development of federal sentencing guidelines. Ultimate authority will, however, remain with the legislature by virtue of the necessity of legislative approval of the commission's proposals.

For:

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

Sentencing guidelines, which use offense characteristics and prior record to determine the

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

Against:

To link sentencing with prison and jail overcrowding as proposed would defeat the ends of justice and public safety. Criminals whose offenses and criminal backgrounds warrant incarceration should be incarcerated; their sentences should be those called for by the severity of their crimes, not by the severity of the state's problems with the corrections budget. If, as may be the case, too many relatively minor offenders are being sentenced to state prison, the solution is to improve local options, notably by adequately funding community corrections and making more creative use of institutional space (such as with the "boot camp" program).

Response:

Any concerns regarding sentence lengths and adequacy of time served should be resolved by the planned simultaneous implementation of "truth-in-sentencing," which will ensure that minimum sentences actually are served.

Against:

By implicitly suggesting that the legislature simply approve or disapprove guidelines offered by the commission, the bill would circumvent the proper role of the legislature. The setting of sentence lengths is the duty of the legislature; Article IV, Section 45 of the state constitution says that "the legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences." While it may be practical to authorize an expert commission to make studies and recommendations, to attempt to limit the legislature's ability to modify those recommendations would be to ask the legislature to surrender its responsibility. Such limits would be on shaky constitutional ground, in any event, as one

legislature cannot bind the actions of another.

Response:

To explicitly provide for the legislature to amend the guidelines would be to allow the guidelines to be influenced by political expediency and passing public opinion; the balanced, rational structure that guidelines are supposed to provide would be lost. Some have suggested, however, that stronger protection could be afforded by a stronger presumption for acceptance of commission recommendations. For example, the legislation could provide for guidelines to take effect if the legislature failed to act by a specified deadline. Or, the bill could do as earlier versions have proposed and provide for the guidelines to take effect via adoption of a concurrent resolution.

Rebuttal:

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

Against:

The bill fails to adequately consider the acute problem of prison and jail overcrowding. Guidelines developed without regard to correctional capacity not only could worsen overcrowding, but also could fail to ensure that limited prison and jail beds were used for the worst offenders. Although the commission is to "consider" correctional capacity in developing guidelines, the severity of the problem warrants stronger language that would require guidelines to accommodate capacity by minimizing the likelihood that capacity would be exceeded. Such an approach would be more rational and responsible than the informal judicial responses that seem to have operated in recent years, where it appears that judges responded to prison overcrowding by sentencing offenders to jail, then responded to jail overcrowding by sentencing relatively minor offenders to prison. The bill's potential to exacerbate problems with shortages of

prison bedspace is increased by the way prison capacity would be calculated. State capacity would include temporary facilities, which would not be available indefinitely, and proposed facilities, which may not yet be built at the time a prisoner was sentenced. The guidelines likely would presume the availability of more prison beds than actually existed.

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 charging. Sentencing decisions are best left where they belong, in the hands of impartial judges.

Response:

The unrestrained exercise of judicial discretion can lead to sentencing practices that vary from county to county and court to court, opening avenues for personal bias or philosophical differences to influence sentencing decisions. Sentencing guidelines are supposed to remove bias and make sentencing more uniform by quantifying offense and offender characteristics. The bill offers adequate provision for individual circumstances by allowing guidelines to be set aside for "substantial and compelling" reasons, subject to review by appellate courts. Rather than restrict legitimate judicial discretion, the bill recognizes the role of the judicial branch, for exactly what constitutes "substantial and compelling" is being settled by the development of case law. (See Background Information.)

Against:

The bill would require the use of "intermediate sanctions," including jail and nonincarcerative sanctions, for offenders with guidelines minimums of less than 18 months; the proposal suggests that more felons will have to be dealt with locally. Without adequate funding and support from the state, the bill could exacerbate problems for already overburdened jails and alternative programs.

Against:

The legislation should do more to curb inappropriate sentence adjustments based on applying the same factors more than once. Because guidelines take criminal history into account, the

justice of applying habitual offender sentence enhancements is debatable. While separate sentence ranges for habitual offenders would be devised, the bill should not allow existing habitual offender provisions to apply when the offender was being sentenced under the new guidelines.

Response:

It would be too extreme to make such changes in the way that habitual offenders are dealt with. Strong habitual offender enhancements are necessary to properly punish and incapacitate career criminals.

Against:

The bills present several problems of implementation. They offer little guidance on what constitutes a "substantial and compelling" reason acceptable for departing from guidelines, leaving the definition of that term to the uncertain process of the development of case law. Also, the bills propose what could be an endless cycle of guidelines being submitted to the legislature, failing to gain approval, and being revised and resubmitted. At the least, there should be some requirement for the legislature to communicate to the commission its reasons for disapproving proposed guidelines.

Against:

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