

COMPUTING CONCURRENT AND CONSECUTIVE PRISON SENTENCES

House Bill 5587 (Substitute H-3)

House Bill 5762 (Substitute H-1)

First Analysis (5-22-98)

Sponsor: Rep. James McNutt

Committee: Corrections

THE APPARENT PROBLEM:

Under Michigan court rule 6.427, a trial court must prepare a criminal's judgment of sentence within seven days after sentencing. The length of a criminal's sentence is recorded on the judgment of sentence. That document accompanies the criminal to prison, and based on that document the Department of Corrections calculates the prisoner's sentence.

Sometimes prisoners are found guilty of more than one crime. Normally the sentences for the two crimes run concurrently. There is time that judges do not indicate on a prisoner's judgment of sentence whether a prisoner's sentence is to be served concurrently with another sentence, or consecutively to that sentence. When a prisoner's judgment of sentence is unclear, the Department of Corrections writes to the judge to request clarification; however, the department reports that some judges do not respond to their written inquiries. Absent clarification from the judge, the department usually calculates the sentences concurrently, unless there is a statute describing the crime and its penalty that specifies a consecutive sentence. In these instances the department calculates the sentences consecutively. Occasionally, prisoners are not notified that their prison terms have been changed from concurrent to consecutive sentences.

Some have argued that legislation is needed in order to clarify judicial and executive responsibilities when the courts sentence prisoners, and to ensure that prisoners are notified when their sentences are changed.

THE CONTENT OF THE BILLS:

The bills would specify procedures that are to be used to calculate consecutive and concurrent prison sentences. The bills are tie-barred to each other.

House Bill 5587 would amend the Department of Corrections act (MCL 791.264) to clarify how prisoners' sentences are to be computed. Specifically,

the bill would require the record office of the prison to compute the length of a prisoner's sentence, based on a certified copy of the court's judgment of sentence, a written document that is delivered with the prisoner. When the judgment does not specify whether the sentence is to run concurrently or consecutively with other sentences, then the bill would require that the sentence be computed concurrently, unless the prisoner had been convicted of any of the following crimes (which statute requires be computed consecutively): prison or jail escape; escape while awaiting examination, trial, or arraignment for a felony, or escape while being transferred after receiving a felony sentence; possessing a firearm during a felony; or, taking another person hostage while a prisoner.

House Bill 5587 also would require that if a sentence does not specify whether it is to be computed consecutively or concurrently and is computed to be served consecutively, that the affected prisoner be notified by the department of this fact not later than three days after the sentence is computed.

House Bill 5762 would amend the Code of Criminal Procedure (MCL 769.27) to require that a judgment of sentence that commits an individual to the jurisdiction of the Department of Corrections specify whether the sentence is to run consecutively to or concurrently with any other sentence the defendant is or will be serving. The bill would require that upon sentencing, the court would provide a copy of the judgment of sentence to the prosecuting attorney, the defendant, and the defendant's counsel. Any of these individuals could file an objection to the judgment of sentence within 14 days after receiving it, and the court would be required to promptly hold a hearing on any objection filed. Under the bill, this procedure for reviewing a judgment of sentence would be in addition to any other review procedure authorized by statute or court rule.

The bill also would require that in the event the court changes any sentence imposed, the clerk of the court give written notice to the prosecuting attorney, the defendant, and the defendant's counsel. Any of these individuals, including the defendant if he or she is not represented, would be required to file any objection to the change within 14 days, and the court would be required promptly to hold a hearing on any objection filed. Under current law, only prosecuting attorneys receive such notice from the court, and the prosecuting attorney must file any opposition within five days.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

Taken together, the bills would establish a way for trial courts and the Department of Corrections to better communicate about prisoners' sentences. They clarify the functions of the judicial and executive branches of government with regard to judgments of sentence, and they allow the respective parties to make decisions that are more fully informed. These bills are intended to fix a localized and particular problem that has arisen at the interface of two large and complicated systems: courts and prisons. The legislation has been carefully negotiated in a workgroup comprising stakeholders, and deserves support.

For:

House Bill 5762 requires the trial court to make three copies of the judgment of sentence and to give them to the defendant's trial attorney, the defendant, and the prosecutor. If either of the trial attorneys or the defendant notes a clerical error that everyone can agree to correct, the error can be fixed immediately without involving the Department of Corrections. If errors exist that are not clerical and cannot be corrected simply, the aggrieved party can appeal. In the meantime, the Department of Corrections can rely on the judgment of sentence it receives. House Bill 5762 places the responsibility for identifying errors in sentencing on lawyers for the parties involved, and not on Department of Corrections clerks as has been the past practice. The legislation gets the department out of the business of trying to correct trial court errors and leaves that task to the court of appeals.

For:

House Bill 5587 requires the Department of Corrections to notify a prisoner within three days if his or her sentence has been recomputed from concurrent to consecutive. In those instances where a defendant had requested counsel for an appeal, such notice would allow the defendant to request a resentencing hearing.

Against:

The American Civil Liberties Union of Michigan points out that House Bill 5587 seeks to allow the Department of Corrections to have a role in the computation of sentences to be served by prisoners. The ACLU observes that this is a blatant violation of the Michigan and United States constitutions. Specifically, the bill violates the 1963 Michigan Constitution, Article 3, Section 2 concerning the separation of powers. In opposing House Bill 5587, the ACLU argues that there are a number of details as to why this process is unconstitutional and why it offends the separation of powers provisions of the Michigan Constitution.

First, the judiciary has been given authority over sentencing in the Michigan Constitution. This is a quintessential judicial function. This bill allows the length of sentence to be determined not from a determination of sentence, but rather from a determination made by a clerk in the record office of the Department of Corrections.

Second, the judiciary is a separate branch of the government in order to ensure fairness in conflicts between the citizen and the executive branch of government that carries out the criminal laws. Since the prosecutors' office is also a part of the executive branch of government, charged with carrying out the criminal laws of the state, the bills would essentially allow the sentence of the defendant to be made by the same branch to which the prosecutor belongs. That is to say, the length of sentence in a criminal case under this bill is being determined by the executive branch of government to which both the prosecutor's office and the Department of Corrections belong, rather than by the judiciary. This involves an elemental unfairness to the defendant. The independence of the judiciary from executive interference is one of the hallmarks of a democratic society, recognized worldwide.

Third, this bill allows an extra-judicial determination of the length of sentence. That is, it allows the determination of sentence to be made outside of the judicial branch of government and without the

constitutional safeguards that are a part of the judicial process.

Against:

Opponents of House Bill 5587 observe that sentencing is a trial court function, and that correcting trial court errors is the function of the appellate courts. In this regard, opponents note that there are a number of critical errors that can occur under the bill and that caution against its enactment: error in factual determinations; error in misconstruing the plea agreement reached by the prosecutor and the defense counsel and accepted by the judge; and, error in failing to carry out the judge's intent in sentencing the defendant. Opponents point out that consecutive sentence provisions in laws have changed repeatedly over the years and are very complicated. In order to avoid these errors, MCL 771.14(2)(d) requires the probation officer (a DOC employee) to include in the presentence report "a statement prepared by the prosecuting attorney as to whether consecutive sentencing is required or authorized by law."

In addition, the question of what procedures must be followed before a sentence can be "corrected" has been extensively litigated. Two important published opinions have been released within the last year [*People v Miles*, 454 Mich 90 (1997) and *People v Thomas*, 223 Mich App 9 (1997)], as well as a number of unpublished decisions. Together, *Miles* and *Thomas* make it clear that it is error even for the judge who imposed a sentence to "correct" that sentence by simply amending the judgment if the result will be to lengthen the defendant's incarceration. A formal resentencing must be conducted by the judge.

POSITIONS:

The Prosecuting Attorneys Association of Michigan supports the bills. (5-21-98)

The Department of Corrections supports the bills. (5-22-98)

The State Appellate Defenders Office fully supports House Bill 5762 and remains concerned about the constitutionality of amendments to House Bill 5587. (5-22-98)

The Michigan Appellate Assigned Counsel System supports House Bill 5762 and opposes House Bill 5587. (5-21-98)

The American Civil Liberties Association supports House Bill 5762 and opposes House Bill 5587. (5-22-98)

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■ 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.