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SENTENCING GUIDELINES REVISIONS

Senate Bill 373 (Substitute H-2) First Analysis (5-25-00)

Sponsor: Sen. William Van Regenmorter
**House Committee: Criminal Law and
Corrections**
Senate Committee: Judiciary

THE APPARENT PROBLEM:

Except when a mandatory sentence for a particular offense is prescribed by law, Michigan's criminal justice system uses an indeterminate sentencing policy. Maximum sentences for criminal offenses are specified in statute and a judge imposes a minimum sentence. Some people had long been concerned that this sentencing system failed to provide an evenhanded statewide standard for punishment of criminals. They contended that the broad discretion afforded judges had contributed to sometimes vast sentencing disparities in which two similar offenders could receive widely differing criminal sentences. In 1979, the Michigan Supreme Court appointed an advisory committee to research and design a sentencing guidelines system. A revised version of those judicial guidelines was in effect from October 1, 1988, until January 1, 1999, when statutory sentencing guidelines took effect.

Public Act 445 of 1994 established the Michigan Sentencing Commission and charged it with designing and recommending to the legislature a new sentencing guidelines system. The commission began its work in May 1995, with the goal of developing sentencing guidelines that would provide for the protection of the public, treat offenses involving violence against a person more severely than other offenses, and be proportionate to the seriousness of the offense and the offender's prior criminal record. On October 22, 1997, the commission adopted its recommendations for a set of sentencing guidelines and submitted them to the legislature for its approval. Public Act 317 of 1998 [enrolled House Bill 5419] essentially codified the commission's recommendations. The act established statutory sentencing guidelines for judges' use, beginning on January 1, 1999, in determining and imposing appropriate minimum sentences for people convicted of felonies.

Since the enactment of the statutory sentencing guidelines, however, several concerns have arisen. A

significant number of crimes are not part of the current guidelines either because they were overlooked or have been enacted since the guidelines were drafted, and many urge that these crimes should now be made a part of the guidelines. In addition, some feel that certain crimes have lower recommended sentences under the guidelines than are appropriate and would like to see the guidelines changed to address these crimes with punishments more in line with the perceived severity of the crime.

THE CONTENT OF THE BILL:

Senate Bill 373 would amend the Code of Criminal Procedure to revise the statutory sentencing guidelines provisions. The bill would do all of the following:

- Classify a number of felonies that were accidentally omitted or were enacted after the sentencing guidelines were enacted.
- Change the class designation of several felonies.
- Revise requirements for the assessment of offense variable points and the conditions of some of the offense variables.
- Limit the scoring of convictions to the conviction with the highest crime class, except in cases of consecutive sentences.
- Take effect October 1, 2000.

The bill would add a number of crimes to the sentencing guidelines list that were enacted in 1998 for various larceny and property destruction offenses; new and revised penalties that were enacted in 1998 when explosives offenses were revised and re-codified; new offenses and penalties enacted in 1998 for human cloning, unauthorized process to obstruct a public

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officer or employee, and assault or gross negligence against a pregnant woman resulting in miscarriage or stillbirth; and various offenses enacted or revised in 1999. In the case of new graduated penalties enacted for previously existing offenses, the bill would reclassify some of the offenses as a higher level felony within the sentencing guidelines offense list, due to the enactment of longer statutory maximum sentences for those offenses. The bill also would add felonies that were omitted when the guidelines were enacted by Public Act 317 of 1998. These include aggravated stalking and the manufacture, delivery, possession with intent to deliver, or possession of 225 grams or more, but less than 650 grams, of a Schedule 1 or 2 narcotic or cocaine.

The bill would also change the class designation of several felonies in the sentencing guidelines list. (Class designations are used to determine which sentencing grid is used.) First-degree child abuse would move from Class C to Class B. Perjury in a capital case would move from Class G to Class B. Perjury in a non-capital case would move from Class G to Class C. Subornation of perjury would move from Class E to Class C. Criminal sexual conduct, third degree would move from Class C to Class B.

The code provides that, if a statute mandates a minimum sentence, the court must impose a sentence under that statute, and imposing a mandatory minimum sentence is not a departure under the sentencing guidelines. In addition, if a statute mandates a minimum sentence and authorizes a departure from that sentence, a sentence that exceeds the recommended range but is less than a mandatory minimum sentence does not constitute a departure under the sentencing guidelines. The bill would further provide that where the Michigan Vehicle Code mandates a minimum sentence and authorizes the sentencing judge to impose a sentence that is less than minimum sentence, it would not be a departure to impose a sentence that exceeded the recommended sentence range but was less than the mandatory minimum.

Under the guidelines, before a court sentences a person, a probation officer is required to prepare and provide to the court a report that includes, among other things, the sentence grid containing the recommended minimum sentence ranges for each conviction and the computation that determines the recommended minimum sentence range for each conviction. Under the bill, in cases where a person was convicted of more than one crime, the computation to determine the recommended minimum sentence would only have to be performed on the crime with the highest crime class

and the sentence grid containing recommended minimum sentence would only have to be provided for the crime with the highest crime class. However, the sentence grid and computation would have to be performed on every conviction for which a consecutive sentence was authorized or required. [Note: A reference to this change contains a typographical error – the change is made in Chapter XI, Section 14 but the reference is to Chapter IX, Section 14.]

Changes would also be made to Offense Variable 3 - physical injury to the victim. This variable would include 35 points for a crime that resulted in the death of a victim and the elements of that crime involved the operation of a vehicle, vessel, off-road vehicle (ORV), snowmobile, aircraft, or locomotive while under the influence or while impaired.

The bill would remove language that limited the application of offense variable 5 (psychological injury to a member of a victim's family) to cases of homicide, which would allow the variable to also apply to cases of attempted homicide and assault with intent to murder. Offense variable 18 (operator ability affected by alcohol or drugs) would be amended to apply not only to the operation of a vehicle, but to the operation of a vessel, off-road vehicle, snowmobile, aircraft, or locomotive, as well.

Prior record variable 4 (prior low severity juvenile adjudications) would include a new category that would provide 15 points for five or more such prior offenses, and the bill would shift the ten point provision to three or four prior offenses, and make five points apply for two such prior offenses. Prior record variable 5 (prior misdemeanor convictions or misdemeanor juvenile adjudications) would include off-road vehicles and snowmobiles in the provisions regarding operating under the influence. Further, this provision would include attempted offenses.

HOUSE COMMITTEE ACTION:

The House Committee on Criminal Law and Corrections adopted a substitute bill that, among other things, re-instated the crime categories. The guidelines' framework employs a system of crime classifications, based mostly on the seriousness of the offense, and crime categories, based on the type of offense. The crime class identifies which guidelines grid is to be used to determine an offender's minimum sentence, while the category identifies which offense variables to apply when determining a sentencing guidelines score. These categories outline for probation officers (who prepare pre-sentencing reports), judges, and attorneys

the type and amount of points that may be scored to determine a person's sentence depending on whether the crime was an offense against a person, a property offense, a controlled substance offense, or an offense of public trust, public safety, or public order. Further, instead of reclassifying some crimes, the bill would provide for 35 points to be applied under offense variable 3; and removed a provision that would have required 50 points to be scored under offense variable 13 (continuing pattern of criminal activity) if the offense involved multiple sexual penetrations against a person or persons under the age of 16.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, several changes in the bill could have an impact on state and local correctional costs:

- It would elevate various offenses from one crime class to a crime class of higher severity, including the elevation of third-degree criminal sexual conduct from class C to class B. This change would tend to increase sentence length, with accompanying increases in state and local correctional costs. The Department of Corrections has estimated that the change with regard to third-degree criminal sexual conduct could result in the need for an additional 200 prison beds by the time the impact is fully felt, which would take about five years.
- By requiring certain additional offense variables to be scored, the bill would provide for higher offense scores for assault with intent to commit murder. Higher offense scores would tend to drive offenders into higher minimum sentences, and thus could increase state or local correctional costs. To the extent that offenders were sentenced to prison instead of local sanctions, it could increase state costs while reducing costs that otherwise could have fallen on counties.
- The bill would provide for 35 points to be assigned for an offense where death was caused by violation of any of various statutes prohibiting operation of a vehicle while drunk or impaired. This change would have an indeterminate impact on state and local corrections costs, depending on current scoring methods.
- The bill would increase from 10 to 15 the number of points assigned to an offender who has five prior low severity juvenile adjudications. This would tend to drive such offenders into longer minimum sentences, with attendant costs for the state or local units of government. To the extent that offenders who

otherwise would have received local sanctions were sentenced to prison, this change could increase state costs while decreasing costs that otherwise could have fallen to counties.
(5-24-00)

ARGUMENTS:

For:

The bill would add to the sentencing guidelines several crimes and penalties that were enacted or revised in 1998 and 1999, after the date of the guidelines' enactment. This is necessary to ensure that the statutory sentencing guidelines remain broad, consistent, and up to date with current criminal justice policies in Michigan. However, consideration should be given to establishing a clear process for additions and revisions to the sentencing guidelines. This bill provides adequate lead time for those who work in the criminal justice system to learn about the new additions to the guidelines before they take effect (which has not been true of all amendments to the guidelines).

For:

The statutory sentencing guidelines enacted in 1998 provide courts across the state with a comprehensive and uniform system for sentencing criminals on a consistent and appropriate basis, while giving judges the flexibility to depart from the guidelines for substantial and compelling reasons. The sentencing guidelines also were designed to divert some nonviolent offenders from prison sentences toward intermediate sanctions such as probation, while steering more violent offenders to prison. Generally, the sentencing guidelines seem to have been drawn to accomplish those objectives. However, there are some problems with some of the guidelines for drunk driving cases where a death occurs and some other crimes, including third degree criminal sexual conduct and first degree child abuse, which arguably should be classified higher. By changing the class designation of some of these offenses and by requiring that 35 points be added to crimes where death results from the operation of a motor vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while under the influence or while impaired, the bill would improve some of the apparent flaws in the guidelines without uprooting the entire sentencing guidelines scheme.

Against:

The House version of the bill is significantly weakened. The version of the bill that passed the Senate would have eliminated the guidelines' system of categories. The sentencing guidelines crime categories impose an

extra step in reaching a guidelines score, further complicating a system that is already quite complex. Eliminating the crime categories would simplify the sentencing guidelines procedures and make calculation of guidelines scores consistent for all criminals. In addition, according to one member of the sentencing commission, the crime categories originally were thought to be necessary because the commission anticipated a system that would have around 100 offense variables. Since the commission's final recommendation and the enacted guidelines include only 19 variables, applying them all when determining a sentence would not be cumbersome.

Response:

The Senate-passed version of the bill would constitute a sweeping change in the sentencing guidelines' application which not only is wholly unnecessary, but also, according to testimony before the House Committee on Criminal Law and Corrections, violates agreements that allowed the enactment of both the sentencing guidelines and the truth-sentencing provisions. Further, the 1994 enabling legislation for the sentencing commission prohibited the commission from recommending modifications to the sentencing guidelines for at least two years after they were enacted. The guidelines should be given more time to operate, and their application and usefulness should be assessed, before the guidelines are significantly amended.

The crime categories are a crucial component of calculating sentencing guidelines scores. By requiring that all offense variables be scored for each offender, the Senate-passed version of the bill would eliminate some of the safeguards built into the sentencing guidelines system and could result in points' being inappropriately assessed for a given offender, which in turn could result in an inordinately long and unfair sentence. This would be unjust and could drive up the cost to the state and local units for incarcerating criminal offenders. In addition, it could result in more appeals of sentences because of disagreements over which offense variables should be scored. The bill could inadvertently and unnecessarily increase the caseload of the court of appeals. Further, the attempt to eliminate the category provisions simply because of some dissatisfaction with the guidelines recommendations regarding certain crimes, ignores the fact that judges could and probably would exceed the guidelines when they felt that the recommended sentence did not fit the crime.

Understanding the application of the statutory sentencing guidelines involves a steep learning curve and is a daily challenge to all who deal with them in the

criminal justice system. Significant changes to the statutory sentencing guidelines this soon after their genesis would require the retraining of thousands of court officers and legal practitioners; the printing of about 40,000 new sentencing guidelines manuals, or at least extensive revisions of the manuals already published and distributed; and, depending on the date of the offense, confusion over which set of three different sentencing guidelines systems to apply for a given conviction (the former judicial sentencing guidelines, the current statutory guidelines, or the statutory guidelines with revisions proposed by the bill).

Reply:

It should be a simple matter, based on the date of an offense, to determine which sentencing guidelines system was in effect. Extensive retraining would not be necessary, as the bill would not overhaul the system, but only change the offense class and offense variables for some crimes and revise how points are scored in determining a sentence. Further, as stated above, the removal of the categories would simplify the process.

Against:

One of the particular problems with the guidelines is that some offenders who have committed certain sex crimes, even ones with prior convictions, are receiving recommendations under the current guidelines that are more lenient than the minimum recommended sentence would have been under the former, judicially created guidelines. In particular, a repeat offense of criminal sexual conduct involving penetration against a child under the age of 16 deserves harsher penalties than the current guidelines recommend. The Senate version of the bill would have provided for the addition of 50 points to be scored under offense variable 13 (continuing pattern of criminal activity) if the offense involved multiple sexual penetrations against a person or persons under the age of 16. This would have assured that the sentencing recommendations under the new guidelines would be more severe for pedophiles. By failing to impose these revisions, the House committee substitute could fail to require prison for some of these very dangerous and heinous criminals.

Response:

First, this change in the guidelines could have significantly increased prisons costs -- according to DOC estimates this could have resulted in a need for 763 additional beds. Furthermore, it would have likely resulted in recommendations that would be far too harsh in certain cases, e.g., cases of consensual sexual activity between a 17-year-old and a 15-year-old. By contrast, the committee substitute would only require an additional 238 beds, and would not have the

presumably unintended consequence of recommending prison time for consensual sexual activity between teenagers.

POSITIONS:

The Prosecuting Attorneys Association of Michigan supports the bill. (5-24-00)

The Department of Corrections supports the bill. (5-24-00)

Mothers Against Drunk Driving supports the bill. (5-24-00)

The Citizens Alliance on Prisons and Public Safety takes no position on the bill. (5-24-00)

Analyst: W. Flory

■ 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.