

Senate Fiscal Agency  
P. O. Box 30036  
Lansing, Michigan 48909-7536

**SFA****BILL ANALYSIS**

Telephone: (517) 373-5383  
Fax: (517) 373-1986  
TDD: (517) 373-0543

Senate Bill 373 (Substitute S-9 as passed by the Senate)  
House Bill 4640 (as enrolled)  
Sponsor: Senator William Van Regenmorter (Senate Bill 373)  
Representative Jennifer Faunce (House Bill 4640)  
Senate Committee: Judiciary  
House Committee: Criminal Law and Corrections (House Bill 4640)

**PUBLIC ACT 227 of 1999**

Date Completed: 1-21-00

**RATIONALE**

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 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. Particularly,

in the case of some violent offenses for which imprisonment might be considered appropriate, the guidelines steer the sentence toward intermediate sanctions, which do not include prison time. Some people believe that the sentencing guidelines should be amended to include some offenses left out of Public Act 317, change some felony classifications, remove the crime categories, clarify provisions regarding intermediate sanctions and departures, and revise some scoring instructions.

**CONTENT**

**Senate Bill 373 (S-9) would amend, and House Bill 4640 amended, the Code of Criminal Procedure to revise the sentencing guidelines provisions. The Senate bill would do all of the following:**

- **Include additional offenses and penalties in the guidelines.**
- **Require sentencing judges to score all of the offense variables for each offender.**
- **Change the class designation of several felonies.**
- **Require the addition of 50 points to an offender's guidelines score for an offense that was part of a pattern of criminal activity involving two or more sexual penetrations against a child or children under 16.**
- **Revise requirements for the assessment of offense variable points and the conditions of some of the offense variables.**

**House Bill 4640 does all of the following:**

- **Provides that, if a statute mandates a minimum sentence but allows a departure, a departure under that statute is not a departure under the guidelines.**

- **Removes a requirement that an intermediate sanction that includes a term of imprisonment, under certain circumstances, not be less than the minimum recommended sentence range.**
- **Revises the assessment of points under offense variable 13.**

Senate Bill 373 (S-9) would take effect 90 days after its enactment. House Bill 4640 took effect on December 28, 1999.

### **Senate Bill 373 (S-9)**

The bill would add to the sentencing guidelines list graduated penalties 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 recodified; new offenses and penalties enacted in 1998 for human cloning, unauthorized process to obstruct a public 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 offenses in the Code's sentencing guidelines provisions are divided into six categories: crimes against a person, crimes against property, crimes involving a controlled substance, crimes against public order, crimes against public trust, or crimes against public safety. The categories are used to determine which of the 19 offense variables specified by the Code are to be considered and scored by a sentencing judge when determining a recommended minimum sentence range. The bill would eliminate all of the categories except "person" and "property" and repeal the section of the Code that instructs judges on which offense variable to score for a given offense category. The bill would require, instead, that a sentencing judge score *all* of the offense variables for each offender.

The bill would change the class designation of several felonies in the sentencing guidelines list. (Class designations are used to determine which sentencing grid is used.) Causing death to a person due to drunk operation of a motor vehicle, boat, or

snowmobile would move up from a Class C offense to Class B. Assault with intent to do great bodily harm less than murder would move from Class D to Class C. First-degree child abuse would move from Class C to Class B. Third-degree criminal sexual conduct would move up from a Class C offense to Class B. Several perjury offenses also would move up in class.

The bill would require 50 points to be added to an offender's sentencing guidelines score under offense variable 13 (continuing pattern of criminal activity) if the offense involved two or more sexual penetrations against a person or persons under 16 years of age. The bill also would limit the application of offense variable 5 (psychological injury to a member of a victim's family) to homicide, attempted homicide, or assault with intent to murder. Offense variable 17 (degree of negligence exhibited) could be applied only if an element of the offense involved the operation of a motor vehicle, vessel, off-road vehicle, snowmobile, aircraft, or locomotive.

### **House Bill 4640**

The Code provides that, if a statute mandates a minimum sentence, the court must impose a sentence pursuant to that statute, and imposing a mandatory minimum sentence is not a departure under the sentencing guidelines. The bill specifies, in addition, that 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.

Under the Code, intermediate sanctions must be imposed under certain circumstances. If the upper limit of the guidelines' recommended minimum sentence exceeds 18 months and the lower limit is 12 months or less, the court must sentence the offender, absent a departure, either to imprisonment with a minimum term within the recommended range or to an intermediate sanction that may include a term of imprisonment of not more than 12 months. The bill removed an additional requirement that a term of imprisonment imposed pursuant to an intermediate sanction be not less than the minimum range.

Offense variable 13 is a continuing pattern of criminal behavior. The Code previously required that 25 points be assessed when the offense was part of a pattern of felonious criminal activity involving three or more crimes against property. The bill reduced the required number of points to five. (The Code also requires 25 points for offense variable 13 when the offense was part of a pattern of felonious criminal activity involving three or more crimes against a

person, and 10 points when the offense was part of a pattern of felonious criminal activity involving a combination of three or more crimes against a person or property.)

MCL 777.1 et al. (S.B. 373)  
769.34 et al. (H.B. 4640)

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

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.

It appears, though, that there are some instances in which a violent offender, even one with prior convictions, may be given intermediate sanctions rather than prison time under the sentencing guidelines system. The crimes for which offenders are likely to be pointed toward intermediate sanctions, but perhaps should be imprisoned, include third-degree criminal sexual conduct (which involves penetration); first-degree child abuse; drunk driving causing death, even with two previous drunk driving convictions; assault with intent to do great bodily harm, even if the convicted person is a habitual offender; perjury in a trial for a life-maximum offense; and certain pedophilia cases in which there are no offense variable points for multiple previous penetrations. Indeed, an Oakland County assistant prosecutor who testified before the Senate Judiciary Committee cited several sex-crime cases in which the statutory guidelines' minimum sentence range is more lenient than the minimum recommended sentence under the former, judicially created guidelines.

By changing the class designation of some violent offenses and requiring 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, Senate Bill 373 (S-9) would go a long way toward ensuring that some violent offenders were more likely to receive a prison sentence and not intermediate sanctions. This would be in keeping with the aim of the original statutory sentencing guidelines recommendations to subject violent and repeat offenders to prison time, while opening up intermediate sanction possibilities to more nonviolent and first-time offenders.

### **Supporting Argument**

Senate Bill 373 (S-9) 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.

### **Supporting Argument**

House Bill 4610 primarily made technical corrections to the 1998 legislation that created the sentencing guidelines. Substantively, the bill specifies that a sentence imposed under a statute prescribing a mandatory minimum sentence does not constitute a departure under the sentencing guidelines, if the sentence imposed exceeds the guidelines' recommended minimum range but is less than the mandatory minimum.

### **Opposing Argument**

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. Crime classes identify which guidelines grid is to be used to determine an offender's minimum sentence, while categories identify which offense variables to apply when determining a sentencing guidelines score. These categories serve a useful purpose in that they outline for probation officers (who prepare presentencing 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. Senate Bill 373 (S-9), however, would eliminate these crime categories, with the exception of crimes against a person and property offenses, and require that *all* offense variables be scored for *all* crimes. (Crime categories for crimes against a person and property offenses would be retained because some of the offense variables take those categories into consideration.) This would constitute a sweeping change in the sentencing guidelines' application and is unnecessary and excessive. The crime categories are a crucial component of calculating sentencing guidelines scores. By requiring that all offense variables be scored for each offender, Senate Bill 373 (S-9) 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 in 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.

**Response:** 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.

### **Opposing Argument**

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. 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, but Senate Bill 373 (S-9) passed the Senate less than one year into the life of the sentencing guidelines system and would make major changes to that system while it is still in its infancy. The guidelines should be given more time to operate, and their application and usefulness should be assessed, before the guidelines are significantly amended.

**Response:** While the system appears generally to have been well developed, some problems, particularly the sentencing of some sex offenders, are glaring and must be corrected immediately. Delaying these revisions could result in the failure to imprison some very dangerous and heinous criminals.

### **Opposing Argument**

Senate Bill 373 (S-9) could cause some practical problems for those who work 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).

**Response:** 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.

Legislative Analyst: P. Affholter

### **FISCAL IMPACT**

### **Senate Bill 373 (S-9)**

The bill would have an indeterminate fiscal impact on State and local government. A report prepared by Dr. Charles Ostrum using State Court Administrative Office (SCAO) data provides information about the disposition of cases in the first nine months after the implementation of the statutory guidelines. The report, dated September 1, 1999, shows a decrease in the percentage of offenders sentenced to prison and straight probation, and an increase in the percentage sentenced to jail, and probation and jail. The report also points out that the SCAO has received fewer forms than anticipated and that the number of serious felony cases, such as second-degree murder, are underrepresented. The disposition database maintained by the Department of Corrections (DOC) is unavailable due to technical problems related to the enactment of sentencing guidelines. Other data, such as the impact on the length of sentence, are not currently available.

Although there are no data currently available that would provide information about the potential fiscal impact of any changes to the guidelines statute, the relationship between the minimum sentence range and the State and local corrections' expenditures is the amount of time that an offender will be under the supervision of the DOC or a local unit. Several factors addressed in the bill that could affect the minimum sentence range are detailed below.

The bill would eliminate language that places requirements on the minimum jail sentence a judge may impose, if jail time is given in connection with an intermediate sanction. There are no data to indicate whether this minimum requirement has affected jail sentences.

The bill would eliminate offense categories, causing all offense variables to be considered in the presentence evaluation. On the sentencing grid, offense variable points are contrasted with offender variable points to determine minimum sentence range. Under current law, of the 19 offense variables, a maximum of 13 offense variables are considered for each offense (or 15, if the offense involves the operation of a vehicle, vessel, aircraft, or locomotive). There are no data to indicate if scoring all 19 offense variables for every crime would result in higher offense variable points that would increase the length of minimum sentence.

Also, certain changes to the offense variables wording and scoring would provide additional points for offenders who match the criteria. There are no data to indicate how many offenders would qualify for additional points or whether the additional points would make a difference in the disposition and sentence length of the conviction.

### **House Bill 4640**

The bill will have no fiscal impact on State or local government.

Fiscal Analyst: K. Firestone

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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.