STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

-vs-

CURTIS MICHAEL LEWIS

Defendant-Appellee.
_____/

Supreme Court No. 142819

Court of Appeals No. 294687

Lower Court No. 09-5687FH

JACKSON COUNTY PROSECUTOR
Attorney for Plaintiff-Appellant

RANDY E. DAVIDSON (P30207)
Attorney for Defendant-Appellee

DEFENDANT'S BRIEF OPPOSING PROSECUTOR'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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COUNTERSTATEMENT OF JURISDICTION

The prosecutor did not file a statement of jurisdiction. Defendant does not contest the prosecutor's right to file an application for leave to appeal within 56 days of the date of the Court of Appeals opinion in this case. This Court has jurisdiction under MCL 600.215(3); MCL 770.3(6); MCR 7.301(A)(2); and MCR 7.302(C)(2)(b).

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. DOES THE *TANNER* RULE APPLY TO LIFE MAXIMUM OFFENSES WHERE THE TRIAL COURT IMPOSES A TERM OF YEARS LESS THAN LIFE IMPRISONMENT?

Trial Court made no answer.

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "Yes".

COUNTERSTATEMENT OF FACTS

Introduction

Curtis Michael Lewis appealed as of right under MCR 7.203(A)(1), following his conviction by a jury of one count of armed robbery, MCL 750.529; and sentence in the Jackson County Circuit Court.

The prosecutor claimed that on April 13, 2009 at about 5:00 p.m., Mr. Lewis, clothed in a hooded sweatshirt and wearing a bandana, entered a Check 'N Go store, screamed "get the fuck down," said he had a gun, demanded money from two employees, and left the store with $3,151.29; that the employees recognized Mr. Lewis as the same individual who had come into the store earlier that day with two female customers; that the police questioned the customers and identified Mr. Lewis; and that Mr. Lewis voluntarily came to the police station and confessed (T I 147-152).[1]

The defense was that Mr. Lewis had not gone back and robbed the store; and that Mr. Lewis falsely confessed because the police had "browbeaten" a statement from him (T I 155).

Trial proceedings

During jury selection, the following exchange occurred without objection:

> *Mr. Mehalco (prosecutor)*: . . . Mr. Gaecke [defense trial counsel] asked a question of a couple of jurors a while back, if police officers ever lied or ever any – I may have the second wrong, but ever tricked or used untrue information in an interview. Well, let me ask you this, if – if a police officer tricks or minimizes what somebody did in order to get them to confess a crime that they actually committed would you find it difficult in any way?
>
> *Juror Delong*: I'd find it difficult if they were – (inaudible).
>
> *Mr. Mehalco*: Okay, even if they actually committed the crime that they were tricked into confessing to?

[1] Transcript references are: T I – 8/17/2009 Jury Trial; T II – 8/18/2009 Jury Trial; and ST – 9/24/2009 Sentence.

Juror Delong: If they committed the crime?

Mr. Mehalco: Yes.

Juror Delong: Well, no I wouldn't –

Mr. Mehalco: Let me draw a distinction. It's one thing to be tricked into confessing to a crime that you didn't commit, but if you've been tricked into confessing to a crime you actually did commit would you have a problem with that if the police used those tactics in the interrogation?

Juror Delong: Yes, I would – (inaudible).

Mr. Mehalco: And would you – would that problem rise to the point where even if you believe the guy committed the crime you'd be so upset with the police for using tactics that you don't approve of that you would find him not guilty?

Juror Delong: No.

Mr. Mehalco: Okay, thank you.

The Court: Mr. Mehalco, wait. I think Mr. Gaecke's referenced it, now Mr. Mehalco is, and I guess I would instruct the jury that – that there are certain levels of permissible deception that the police can use when they're interviewing a suspect in a crime. Ultimately, if an admission comes in the court has to be satisfied that it was made knowingly, intelligently and voluntarily, so you know, I just wanted to instruct the jury of that.

I mean, there could – (undecipherable) – situation that there's so much over-reaching police misconduct that as a matter of law the court wouldn't even let the admission and/or confession in, so I just wanted to make sure that – that all of you understand that a certain amount of that is allowed.

Now, what – what significance you want to attach to that is up to the jury. Do all of you understand that? All right, so okay [T I 108-110].

Complainant Ashley Sanders testified at trial to being employed at the Jackson Check 'N Go store on April 13, 2009 (T I 156-157). That day, the store was scheduled to close at 6:00 p.m. (T I 157). At about 4:45 p.m., Sanders was present with store manager Wendy Alexander when an individual entered the store, pulled a bandana onto his face, walked around the counter, announced a hold-up, and told Sanders to "get the fuck down on the ground" (T I 158-159). The subject wore black pants, a gray hooded sweatshirt, and white surgical gloves (T I 173).The subject held his hand in his pocket like he had a gun, and when Sanders nervously laughed, the subject told her "I will pull my pistol out" (T I 161-162). Sanders had been sending a text message on her cell phone (T I 159). The subject told Sanders "where's your fucking phone, bitch" (T I 159). Sanders gave the subject her phone, and the subject threw it across the room (T I 159).

Sanders further testified that the subject asked her "where's the fucking money at" and she opened her drawer (T I 159). The subject then asked "where's the rest of the money at" (T I 160). The subject went to Alexander's drawer, which had to be manually popped open (T I 160). The subject got frustrated and told Alexander "you have three seconds to open the fucking drawer or else I'm going to blow your head off, bitch," and the subject started counting (T I 160). Alexander opened the drawer and sat back down (T I 160). The subject asked for the rest of the money, and the two informed the subject that it was in the safe (T I 160-161). The subject opened the unlocked safe, removed a bag, and walked out, telling Sanders and Alexander that they had to sit there for thirty seconds "or else I'm going to blow this bitch up" (T I 161). After the subject left, Sanders phoned the police (T I 163).[2]

[2] The prosecutor played a video recording of the robbery from the store surveillance cameras (T I 167; 173). Sanders acknowledged the poor quality of the recording (T I 168-169; 173).

Sanders testified that she recognized the subject as having entered the store earlier that day with a female customer who had given the name Curtis Lewis as a reference (T I 164-165). At that time, the subject had been wearing a gray hooded sweatshirt, a hat, a jersey with the number "54" on it, and white tennis shoes (T I 170).[3] Sanders could not say for sure that Mr. Lewis was the robber, but he had the same size, build, and complexion (T I 178-179; 184).

The second complainant, Wendy Alexander, testified that the subject had come in and said the store was being robbed and it was not a joke (T I 192). The subject told Alexander and Sanders to "get on the fucking floor right now" and they did (T I 193). The subject was screaming and it was "horrifying" (T I 193). Alexander could not see the subject's face, which was covered by a bandana (T I 204). Alexander thought the subject had a gun because he held his hand in his sweatshirt pocket (T I 193-194).[4]

Alexander further testified that the subject had demanded Sanders' cell phone and had thrown it into the lobby (T I 195). The subject demanded money from Sanders' till and Sanders opened it (T I 196-197). Alexander tried to open her own till and finally did so after the subject told Alexander she had three seconds or he was "going to put a bullet in my fucking head" (T I 197-199). The subject next asked for the location of the safe, and Alexander told him (T I 200). The subject left with about $3,100.00 from both tills and the safe, after threatening to "blow this bitch up" if Alexander or Sanders got up within the next two minutes (T I 197; 199; 201-202). Alexander's mother had approached the store, and Alexander waved her away (T I 203).

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[3] Sanders identified a jersey with the number "54" as the same one the subject had worn when he entered the store the first time; and identified a sweatshirt and K-Swiss sneakers as similar to what the robber wore (T I 174-177). Detective Ed Smith testified to obtaining the sneakers from Mr. Lewis during a subsequent police interview; and to obtaining the other items in a pile of belonging outside an address on Biddle street, from which the occupants, with whom Mr. Lewis had been residing, had just been evicted (T I 299-302; 304).

[4] Alexander identified the recovered sweatshirt as consistent with the robber's clothing (T I 194).

Alexander testified that the robber's mannerisms, voice, body shape, height, and weight were very similar to that of a suspiciously acting subject who had come into the store earlier the same day with friends who obtained a loan (T I 205; 210).[5]

Alexander could not identify Mr. Lewis as the robber, but he was approximately the same height, build, and weight (T I 211-212).

Brenda Wyman (Alexander's mother) testified that she had stopped by the store and become alarmed when there were no employees at their register stations (T I 217; 219). Wyman approached the door and Alexander gestured for Wyman to leave (T I 219). Wyman had passed a subject who quickly left the store and was attempting to run but appeared to be slowed by something heavy in his right side pockets (T I 220). The subject was wearing a hoody over his head (T I 229). He might have been Hispanic, with a slight build, and was approximately the same size and had the same complexion as Mr. Lewis, though Wyman could not positively identify him (T I 223-225).

Detective Ed Smith testified that Mr. Lewis voluntarily appeared at the Jackson police department on April 22, 2009 (T I 232; 235). Mr. Lewis was not under arrest when Smith interviewed him (T I 235-236). Smith had information that Mr. Lewis had been present at the Check 'N Go a few hours before the robbery and had matched the robber's description (T I 234-235). Smith decided to use the tactic of minimizing the crime in order to get Mr. Lewis to talk (T I 239-240). During the interview, Mr. Lewis initially acknowledged having gone to the Check 'N Go to try and get a loan to pay rent, and denied knowing anything about the robbery (T I 242).[6]

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[5] Alexander identified the recovered jersey and sweatshirt as consistent with the subject's clothing (T I 208-209. Alexander also identified the recovered K-Swiss shoes as similar to the robber's footwear (T I 209-210).

[6] Smith digitally recorded the interview, and the prosecutor played the recording to the jury (T I 237; 241).

Smith further testified that he decided to confront Mr. Lewis with discrepancies in his account of the other stores he went to after leaving the Check 'N Go (T I 251-252). Smith initially asked if Mr. Lewis could pay restitution, and Mr. Lewis replied: "The thing is, the thing is, I didn't do it" (T I 263). The following exchange also occurred during the recorded interview:

> *Detective Smith*: All Check 'N Go wants is their money back.
>
> *Mr. Lewis*: I – (undecipherable). The money that my sister-in-law got, that's what she got. Look, after that we don't know what happened.
>
> *Detective Smith*: Would you be willing to pay restitution back?
>
> *Mr. Lewis*: Yeah, I'll pay it.
>
> *Detective Smith*: You'd pay restitution back? How much could you afford?
>
> *Mr. Lewis*: Well, whatever the amount is, I'll pay it.
>
> *Detective Smith*: Okay. Do you know about how much you'd have to pay back at all?
>
> *Mr. Lewis*: No – (undecipherable).
>
> *Detective Smith*: Right. I mean, do you know how much you would owe, do you think?
>
> *Mr. Lewis*: Probably like three, four something [T I 272-273].

Smith further explained his interrogation technique:

> The technique that I tried there, a lot of times if somebody's stealing something, if you just tell them, okay, would you at least pay the money back, yes, if they say, yes, nobody who – who didn't do it is going to say yeah, I'll pay the money back and then have an amount that they think they'd have to pay back [T I 273].

Further on in the recorded interview, the following exchange occurred with Detective Garcia:

Detective Garcia: . . . How much did you walk away with? How much restitution do we need to try to fix with these people?

Mr. Lewis: I'd say eight hundred.

Detective Garcia: Eight hundred roughly?

Mr. Lewis: Yeah.

Detective Garcia: Okay. And that money's spent to pay grocery bills and you – (undecipherable).

Mr. Lewis: Family stuff.

Detective Garcia: Any kids?

Mr. Lewis: Yes, Sir, I got two.

Detective Garcia: Understand. Okay. I'm a dad, I'm a parent – (undecipherable) – put food on the table. You got to do what you got to do and I understand that, okay? I respect you as a man for that. I also respect you as a man for manning up and working with us to try to fix this, okay? The last thing we want to do is put someone in your shoes in a jail cell. That's not what we're – that's not my job, you understand?

Mr. Lewis: Yes, Sir.

Detective Garcia: But you have to understand that we go back to Check 'N Go and tell them, they're going to say, what kind of guy is he? Is he hard? Is he some career criminal? We say no, he's a guy that's down on his luck. Made a bull head mistake basically. Not going to happen again, right?

Mr. Lewis: No, Sir.

Detective Garcia: You didn't rob any other places?

Mr. Lewis: No, Sir [T I 280-281].

In the recording, Mr. Lewis also admitted going home, changing his pants, coming back a second time to the Check 'N Go, telling the employees to "just give me the money" and then going home (T I 283; 287-288).

Smith further testified to arresting Mr. Lewis after the interview and giving *Miranda* rights (T I 292; 295). In a second interview, Mr. Lewis admitted taking the bus to the Check 'N Go because he needed money and had waited for the "perfect opportunity"; that the tellers had retrieved money from three different drawers; and that Mr. Lewis had walked home to Biddle street afterwards (T I 298).[7]

Smith admitted that detective Garcia had misled Mr. Lewis to believe the incident was a misdemeanor; and that Smith misrepresented having the ability to make the case "go away" (T I 306; T II 22). Smith also admitted that Mr. Lewis had reported having only two hours of sleep (T II 36).

Mr. Lewis did not testify (T II 38).

Verdict and sentence

The jury found Mr. Lewis guilty as charged of a single count of armed robbery (T II 106-108).

At sentencing, the prosecutor agreed to dismiss a notice of intent to enhance Mr. Lewis' sentence as a second habitual offender, where Mr. Lewis' prior Texas conviction had been dismissed following a delayed sentence (ST 6-7).

The trial court sentenced Mr. Lewis to 15-20 years in prison (ST 25). The initial judgment of sentence indicated that Mr. Lewis was sentenced as a second habitual offender (9/24/2009 Judgment of Sentence, in lower court file).

[7] Smith testified he thought he had recorded the second interview but later discovered the recorder had failed to do so because the battery in the recorder had discharged (T I 195-296; 298).

Appellate proceedings

SADO raised four issues on appeal: (1) defense trial counsel was constitutionally ineffective in failing to move to suppress Mr. Lewis' coerced confession where counsel had argued at trial that Mr. Lewis falsely confessed and the police had "browbeaten" Mr. Lewis; (2) defense trial counsel was constitutionally ineffective in failing to object to the trial court instructing the prospective jurors that there were "certain levels of permissible deception" that the police could use in interviewing a suspect, and that the trial court had to be satisfied Mr. Lewis' statement was "made knowingly, intelligently and voluntarily" before admitting it into evidence; thereby improperly influencing the weight the jurors likely gave to Mr. Lewis' statement; (3) due process entitled Mr. Lewis to resentencing to a lesser minimum term where the trial court violated the *Tanner* rule and imposed a 15-20 year prison term; and (4) the judgment of sentence should be amended to correct a clerical error where the prosecutor had withdrawn the notice of intent to seek an enhanced sentence for a second habitual offender (5/4/2010 Brief on Appeal, p 9-24).

Prior to disposition of the appeal, the trial court amended the judgment of sentence, on the stipulation of counsel, to provide that Mr. Lewis was not sentenced as an habitual offender (see 5/14/2010 stipulation and order, and amended judgment of sentence, in lower court file).

The Court of Appeals thereafter issued an opinion denying relief on issues (1) and (2), and granting resentencing on issue (3) (2/17/2011 opinion).

Mr. Lewis filed a pro per application for leave to appeal. The prosecutor then filed an application for leave to appeal on issue (3).

I. THE *TANNER* RULE APPLIES TO LIFE MAXIMUM OFFENSES WHERE THE TRIAL COURT IMPOSES A TERM OF YEARS LESS THAN LIFE IMPRISONMENT.

Issue Preservation

Defendant did not raise this issue in the trial court. The Court of Appeals denied SADO's timely motion to remand under MCR 7.211(C)(1), raising this issue (5/4/2010 Motion to Remand, ¶6; 8/2/2010 order). Furthermore, this Court may correct plain error involving an excessive sentence. See generally, *People v Carines,* 460 Mich 750; 597 NW2d 130 (1999).

Standard of Review

The "de novo" standard of review applies to the interpretation of statutes pertaining to sentencing. See generally, *People v Smith,* 488 Mich 193, 198; 793 NW2d 666 (2010).

Discussion

In *People v Light,* ___ Mich App ___; ___ NW2d ___ (Docket No. 293746, published 11/23/2010), lv den ___ Mich ___; ___ NW2d ___ (2011), our Court of Appeals recently reaffirmed the following principles of statutory interpretation concerning the statutory sentencing guidelines:

> The primary goal of statutory construction is to give effect to the intent of the Legislature. If the language of the statute is unambiguous, judicial construction is not permitted because the Legislature is presumed to have intended the meaning it plainly expressed. Judicial construction is appropriate, however, if reasonable minds can differ concerning the meaning of a statute. Where ambiguity exists, this Court seeks to effectuate the Legislature's intent by applying a reasonable construction based on the purpose of the statute and the object sought to be accomplished. The court must look to the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute. In construing a statute, the statutory provisions must be read in the context of the entire statute in order to produce a harmonious whole; courts must avoid a construction that would render statutory language nugatory [*Id,* slip op, p 3; internal quotation marks and citation omitted].

Furthermore, statutory sections which are part of the same code (such as the Code of Criminal Procedure, which includes the sentencing guidelines and general sentencing statutes) must be read together as a single law. *People v Buehler,* 477 Mich 18, 26; 727 NW2d 127 (2007).

Applying the above principles, MCL 769.8(1) provides, in pertinent part:

> When a person is convicted for the first time for committing a felony and the punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, except as otherwise provided in this chapter. The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence.

MCL 769.9(2) likewise provides:

> In all cases where the maximum sentence in the discretion of the court may be imprisonment for life or any number or term of years, the court may impose a sentence for life or may impose a sentence for any term of years. If the sentence imposed by the court is for any term of years, the court shall fix both the minimum and the maximum of that sentence in terms of years or fraction thereof, and sentences so imposed shall be considered indeterminate sentences. The court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence.

In *People v Tanner,* 387 Mich 683; 199 NW2d 202 (1972), the trial court had sentenced the defendant to 14 years, 11 months to 15 years in prison for manslaughter. This Court observed:

> [W]e are convinced that 30 days is not a sufficient interval of time to guarantee that the corrections authorities will be able to exercise their jurisdiction or judgment with any practicality. The net effect of such severe judicial limitation on indeterminate sentencing is to frustrate the intended effect of indeterminate sentencing [*Id*, p 689-690].

This Court held:

> Convinced as we are, that a sentence with too short an interval between minimum and maximum is not indeterminate, we hold that any sentence which provides for a minimum exceeding two-thirds of the maximum is improper as failing to comply with the indeterminate sentence act [*Id*, p 690].

In adopting the statutory sentencing guidelines, our Legislature subsequently provided:

> The court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence [MCL 769.34(2)(b)].

The prosecutor wants the above section to say "provided further, that if the statutory maximum is life or any term of years the 2/3 rule does not apply, because the minimum will never exceed 2/3 of the statutory maximum sentence of life."[8]

There are two problems with the prosecutor's position. The first problem is that for crimes such as armed robbery, punishable "by imprisonment for life *or* for any term of years," MCL 750.529 (emphasis added), the sentencing court may not combine a life sentence with a term of years. MCL 769.9(2). Therefore, there are two *alternative* statutory maximums. If the sentencing court chooses a life sentence, opting for that statutory maximum alternative, arguably *Tanner* and MCL 769.34(2)(b) do not apply. However, if the sentencing court chooses any term of years, then it must impose an indeterminate sentence, with a minimum and maximum, and the maximum *becomes* the statutory maximum for purposes of MCL 769.34(2)(b) and *Tanner*.

The second problem is that the legislative history for MCL 769.34 demonstrates that our Legislature intended to codify *Tanner* for sentences imposed under the guidelines, and not otherwise overrule or limit it:

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[8] SADO acknowledges that this Court has issued contradictory orders interpreting the statute, and most recently disavowed an earlier order favorable to the defense position. See *People v Washington*, ___ Mich ___, ___ NW2d ___ (Docket No. 141929, issued 4/8/2011). In that case, the defendant proceeded *in propria persona*, and this Court did not invite SADO or CDAM to file briefs or appear for argument.

> The bill prohibits a court from imposing a minimum sentence, including a departure from the sentencing guidelines' minimum sentence range, that exceeds two-thirds of the statutory maximum sentence. (This codifies the "Tanner Rule", established by case law, which sets two-thirds of a maximum sentence as the longest minimum sentence allowed in Michigan's indeterminate sentencing system.) [Senate Fiscal Agency, Enrolled Analysis, SB 826 et al (1998), p 7; see Appendix 1].

In the present case, the jury convicted Mr. Lewis of armed robbery, and the trial court sentenced Mr. Lewis to 15-20 years in prison (ST 25). This violated the *Tanner* rule.

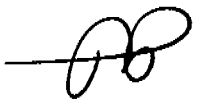
The remedy is to reduce the minimum sentence to two-thirds of the maximum. *People v Thomas,* 447 Mich 390; 523 NW2d 215 (1994). Therefore, Mr. Lewis must be resentenced to a minimum term of 13 years, 4 months (that is, 160 months).

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant asks that this Honorable Court deny the prosecutor's application for leave to appeal.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE



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Dated: April 15, 2011

APPENDIX 1

Senate Fiscal Agency
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Lansing, Michigan 48909-7536

SFA BILL ANALYSIS

Telephone: (517) 373-5383
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Senate Bill 826 (as enrolled) **PUBLIC ACT 316 of 1998**
House Bill 5398 (as enrolled) **PUBLIC ACT 315 of 1998**
House Bill 5419 (as enrolled) **PUBLIC ACT 317 of 1998**
Sponsor: Senator William Van Regenmorter (Senate Bill 826)
Representative A.T. Frank (House Bill 5398)
Representative James McNutt (House Bill 5419)
Senate Committee: Judiciary
House Committee: Judiciary

Date Completed: 10-23-98

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 have long been concerned that this sentencing system may fail to provide an evenhanded statewide standard for punishment of criminals. They contend that the broad discretion afforded judges in this indeterminate sentencing structure has contributed to sometimes vast sentencing disparities in which two similar offenders may receive widely differing criminal sentences. In 1979, the Michigan Supreme Court, apparently out of concerns regarding disparity in the imposition of criminal sentences throughout the State, appointed an advisory committee to research and design a sentencing guidelines system. In 1983, the guidelines were distributed to circuit court and Recorder's Court judges, for use on a voluntary basis. The following year, the Supreme Court mandated statewide use of the guidelines and began collecting data to test their validity and effectiveness. Michigan's criminal justice system has operated under these judicially imposed sentencing guidelines since 1984.

A revised version of the judicial guidelines has been in effect since October 1, 1988, pursuant to a Supreme Court administrative order. No modifications or amendments were made to the judicially mandated sentencing guidelines after that date. These guidelines were designed to reduce disparity in sentencing from county to county and region to region by mirroring the existing sentencing practices of judges across the State at the time the guidelines were implemented. They were developed using the results of research on sentencing patterns of judges throughout Michigan, and attempted to capture the typical sentence for similar types of offenses and offenders. When this system was designed, the guidelines' impact on State and local correctional resources and budgets was not considered.

During the time that the judicially mandated sentencing guidelines were in use, several bills proposed an independent commission to develop a systematic statutory sentencing structure. In 1994, Public Act 445 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, would treat offenses involving violence against a person more severely than other offenses, and would be proportionate to the seriousness of the offense and the offender's prior criminal record. The Commission also was instructed by its enabling legislation to take into account the capacity of State and local correctional facilities. On October 22, 1997, the Commission adopted its recommendations for a set of sentencing guidelines on a 12-3 vote and submitted them to the Legislature for its approval. The recommendations include the classification of numerous crimes, based on their nature and the maximum punishment imposed by statute. Many people advocated the adoption of statutorily imposed sentencing guidelines based on that report.

Further, in a 1990 Michigan Supreme Court decision *(People* v *Milbourn*, 435 Mich 630) that changed the appellate standard for reviewing sentences imposed by trial courts, the Court declined to require trial courts to adhere strictly to the judicial sentencing guidelines because they did not have a legislative mandate, and stated that trial courts could continue to depart from the guidelines' recommended sentencing ranges if a range were disproportionate to the seriousness of the offense. Some felt that this left unclear the appropriate use of the judicial sentencing guidelines and suggested that statutory guidelines should be developed.

In addition, some people believe that the range of prison terms specified in Michigan's indeterminate sentencing system can be misleading, because the actual time a prisoner spends in incarceration almost always is less than his or her minimum term. Sentence reduction programs administered by the Department of Corrections (DOC)--the earning of "good time" and "disciplinary credits"--act to move up a prisoner's parole eligibility date. In addition, most prisoners are eligible to participate in community residential placement (CRP) programs up to two years before they will be eligible for parole. Often, these parolees or CRP participants then commit new crimes. This has led many people to feel frustrated about the apparent inability of the criminal justice system to keep dangerous criminals off the streets. In response to these concerns, the Legislature approved, and the Governor signed into law, a 1994 measure to enact provisions commonly known as "truth-in-sentencing". Under that legislation, most prisoners would have to serve at least their judicially imposed minimum sentence. For certain specified crimes, disciplinary credits and good time (which *reduce* a prisoner's minimum sentence by hastening parole eligibility) would be eliminated and those prisoners would be subject to "disciplinary time" for prison infractions (which would *increase* a prisoner's minimum sentence by delaying parole eligibility). The effective date of the 1994 truth-in-sentencing legislation, however, was tied to the enactment of statutory sentencing guidelines, after the Sentencing Commission submitted its report to the Legislature. Also, the 1994 legislation's use of disciplinary time to lengthen a prisoner's minimum sentence has been a controversial aspect of that measure. Some people believed that the truth-in-sentencing concept should be extended to apply to all prisoners, rather than just those who are convicted of specific offenses and that disciplinary time should not automatically lengthen a term of incarceration. (For further information on Michigan's sentencing policies, truth-in-sentencing, and the *Milbourn* decision, see **BACKGROUND**.)

CONTENT

Senate Bill 826 and House Bills 5398 and 5419 amended, respectively, the prison code, the Department of Corrections law, and the Code of Criminal Procedure to establish statutory sentencing guidelines that will apply to enumerated felonies committed on or after January 1, 1999; and to provide for the effectiveness of provisions enacted in 1994 and commonly referred to as "truth-in-sentencing", extend these provisions to all crimes committed on or after December 15, 2000, and delete the requirement that disciplinary time be added to a prisoner's minimum sentence. House Bill 5398 also requires that the governing bodies of the Senate and House Fiscal Agencies be given access to DOC records and includes provisions added by Senate Bill 281 (Public Act 314 of 1998) relating to parole for major controlled substance offenses.

The bills will take effect on December 15, 1998. The bills are tie-barred to each other and to all of the following:

- House Bill 4065 (Public Act 319), which amended the Public Health Code to allow a sentence of at least 20 years' imprisonment, rather than a mandatory life sentence, for manufacturing, creating, delivering, or possessing with intent to deliver 650 grams or more of a mixture containing a Schedule 1 or 2 narcotic or cocaine; make it a felony, punishable by up to 20 years' imprisonment, for a person to deliver a controlled substance or cause a controlled substance to be delivered to a person in order to commit or attempt various criminal sexual conduct (CSC) offenses; and add "flunitrazepam" and "prazepam" to the Public Health Code's list of Schedule 4 controlled substances.
- House Bills 4444 and 4445 (Public Acts 311 and 312), which amended the Michigan Penal Code to raise the felony threshold level and increase the penalties for various larceny, property damage, and bad check offenses.
- House Bill 4446 (Public Act 313), which amended the Revised Judicature Act (RJA) to require the payment of specific fees and charges for checks written on insufficient funds or no account and revise a provision of the RJA concerning the recovery of damages and costs by a merchant who is a victim of retail fraud.

-- House Bill 4515 (Public Act 320), which amended the DOC law to make, with certain exceptions, earning a high school diploma or a general education development (G.E.D.) certificate a condition of parole for a prisoner serving a minimum term of at least two years.
-- House Bill 5876 (Public Act 318), which amended Public Act 46 of 1975, to revise the procedures and duties of the Legislative Corrections Ombudsman.

Senate Bill 826

The prison code, under provisions enacted in 1994 but whose effective date was tied to the enactment of sentencing guidelines, states that a prisoner subject to disciplinary time must receive disciplinary time for each major misconduct for which he or she is found guilty. The bill deletes provisions requiring that a prisoner's accumulated disciplinary time be added to his or her minimum sentence in order to determine the prisoner's parole eligibility date. Instead, the bill requires that accumulated disciplinary time be submitted to the parole board for consideration at the prisoner's parole review or interview.

In addition, the bill expands the definition of "prisoner subject to disciplinary time". Under the provisions enacted in 1994, that term includes prisoners sentenced to an indeterminate term of imprisonment on or after the effective date of the disciplinary time provisions for any of the following offenses:

-- Drunk driving or drunk boating that caused a death or long-term incapacitating injury (MCL 257.625(4), 257.625(5), 281.1171(4), and 281.1171(5)).
-- Burning a dwelling house or other real property (MCL 750.72 and 750.73).
-- Setting fire to mines and mining materials (MCL 750.80).
-- Felonious assault; assault with intent to murder; assault with intent to do great bodily harm, less than murder; assault with intent to maim; assault with intent to commit a felony; and armed or unarmed assault with intent to rob or steal (MCL 750.82-750.89).
-- Sexual intercourse under pretext of treatment (MCL 750.90).
-- First-degree home invasion (MCL 750.110a(2)).
-- First-degree child abuse and involvement in child sexually abusive activity or material (MCL 750.136b(2) and 750.145c).
-- Burglary with explosives; sending explosives with intent to injure; sending a device represented as explosive; placing explosives with intent to destroy; aiding and abetting in the placing of explosives; possessing bombs, with unlawful intent; and manufacturing explosives with unlawful intent (MCL 750.112, 750.204-750.209, and 750.211).
-- Making or possessing a device designed to explode upon impact or with the application of heat or a flame (MCL 750.211a).
-- Malicious threats to extort money (MCL 750.213).
-- First- or second-degree murder; causing a death as a result of fighting a duel; manslaughter; willful killing of an unborn quick child; causing a death due to explosives; and causing a death when a firearm is pointed intentionally, though without malice (MCL 750.316, 750.317, 750.319, 750.321, 750.322, 750.327, 750.328, and 750.329).
-- Kidnapping; a prisoner taking another as a hostage; and kidnapping a child under 14 years of age (MCL 750.349, 750.349a, and 750.350).
-- Mayhem (MCL 750.397).
-- Aggravated stalking (MCL 750.411i).
-- Disarming a peace officer (MCL 750.479b).
-- First-, second-, third-, or fourth-degree CSC and assault with intent to commit CSC (MCL 750.520b-750.520e, and 750.520g).
-- Armed robbery; unarmed robbery; and robbery of a bank, safe, or vault (MCL 750.529-750.531).
-- Carjacking (MCL 750.529a).
-- Felonious driving (MCL 752.191).
-- Riot; incitement to riot; rioting in a State correctional facility; and unlawful assembly (MCL 752.541-752.543).
-- Any offense not listed above that is punishable by imprisonment for life (which includes, for instance, attempted murder, a second CSC offense, some conspiracy violations, and certain habitual offender violations).
-- An attempt, conspiracy, or solicitation to commit an offense listed above or a life-maximum offense.

Under the bill, "prisoner subject to disciplinary time" will mean prisoners sentenced for those crimes on or after December 15, 1998. The term will be expanded to include prisoners sentenced to an indeterminate term of imprisonment for any other crime committed on or after December 15, 2000.

The bill also repeals Enacting Section 2 of Public Acts 217 and 218 of 1994. Those enacting

sections specify that the disciplinary time provisions will take effect on the date that sentencing guidelines are enacted into law after the Michigan Sentencing Commission submits its report to the Legislature.

House Bill 5398

Disciplinary Time

The DOC law, under the truth-in-sentencing provisions enacted in 1994, provides for prisoners subject to disciplinary time to serve at least their minimum sentence plus any accumulated disciplinary time before becoming eligible for parole. House Bill 5398 removes "plus disciplinary time" from several parole provisions in the DOC law. The bill specifies, instead, that a parole eligibility report must include a statement of all disciplinary time submitted for the parole board's consideration pursuant to Senate Bill 826.

The House bill also deletes language providing for the DOC law's disciplinary time provisions to take effect beginning on the date that sentencing guidelines are enacted into law after the Sentencing Commission submits recommended guidelines to the Legislature.

Access to Records

The bill specifies that the governing bodies of the Senate and House Fiscal Agencies will have access to all DOC records relating to individuals under the Department's supervision including, but not limited to, records contained in basic information reports and in the corrections management information system, the parole board information system, and any successor databases.

Records will not be accessible, however, if the DOC determines that any of the following apply:

-- Access is restricted or prohibited by law.
-- Access could jeopardize an ongoing investigation.
-- Access could jeopardize the safety of a prisoner, employee, or other person.
-- Access could jeopardize the safety, custody, or security of an institution or other facility.

Records that are to be accessed, and the manner of access, must be determined under a written agreement entered into jointly between the governing board of the Senate Fiscal Agency, the governing committee of the House Fiscal Agency, and the Department of Corrections. The agreement must ensure the confidentiality of accessed records.

Major Controlled Substance Offenses: Parole

The bill includes provisions relating to parole for persons sentenced for manufacturing, creating, delivering, or possessing with intent to deliver 650 grams or more of a mixture containing a Schedule 1 or 2 narcotic or cocaine. These provisions are identical to language in Senate Bill 281 (Public Act 314 of 1998).

House Bill 5419

Overview

The bill added Chapter XVII to the Code of Criminal Procedure to do all of the following:

-- Classify over 700 criminal offenses into nine crime classes and six categories.
-- Provide for the classification of some attempted crimes.
-- Include instructions for scoring sentencing guidelines, including the application of 19 different offense variables and seven different prior record variables.
-- Outline sentencing grids, with various recommended minimum sentence ranges, for each of the nine crime classifications.

The bill also does all of the following:

-- Requires the imposition of statutory mandatory minimum sentences, regardless of a sentencing guidelines-recommended minimum sentence.
-- Sets the longest allowable minimum sentence at two-thirds of the statutory maximum sentence (which codifies the "Tanner Rule").
-- Provides for intermediate sanctions when a person's recommended minimum sentence range does not exceed 18 months.
-- Provides for the Sentencing Commission to make recommended modifications to the sentencing guidelines.
-- Requires the DOC to operate a jail reimbursement program to house in county jails prisoners who otherwise would have been sentenced to prison.

Crime Classification

The bill classifies over 700 crimes in the Michigan Compiled Laws into nine different classes of descending severity. (According to the Sentencing Commission's report, Classes A through H include

crimes for which the following maximum sentences may be appropriate:

Class	Sentence
A	Life imprisonment
B	20 years' imprisonment
C	15 years' imprisonment
D	10 years' imprisonment
E	5 years' imprisonment
F	4 years' imprisonment
G	2 years' imprisonment
H	jail or other intermediate sanctions

Class M2 is a separate classification for the offense of second-degree murder.

The crimes to which the bill's sentencing guidelines apply also 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; and crimes against public safety. The bill specifies, however, that the offense descriptions are for assistance only, and that the listed statutes govern the application of the sentencing guidelines.

Attempted Crimes

The bill's sentencing guidelines apply to an attempt to commit an offense listed in Chapter XVII only if the attempted violation is a felony. The sentencing guidelines structure does not apply, however, to an attempt to commit a Class H offense.

For an attempt to commit an offense listed in Chapter XVII, the offense category (e.g., crime against a person) is the same as the attempted offense. An attempt to commit an offense listed in Chapter XVII is classified as follows:

- Class E, if the attempted offense is in Class A, B, C, or D.
- Class H, if the attempted offense is in Class E, F, or G.

If an offender is being sentenced for an attempted felony included in the sentencing guidelines structure, the judge must determine the offense variable level based on the underlying attempted offense.

Scoring

General. The bill includes instructions for scoring sentencing guidelines. For an offense listed in Chapter XVII, a judge must determine the recommended minimum sentence range by finding the offense category for the listed offense. From the variables spelled out in the bill, the judge then is to determine the offense variables to be scored for that offense category and score and total only those offense variables. The judge also must score and total all prior record variables for the offense, as provided in the bill. Then, using the offense class, the judge is required to use the sentencing grid included in the bill to determine the recommended minimum sentence range from the grid's intersection of the offender's offense variable level and prior record variable level. The bill shows the recommended minimum sentence within a sentencing grid as a range of months or life imprisonment.

Multiple Offenses and Habitual Offenders. If the defendant is convicted of multiple offenses, each offense must be scored.

If the offender is being sentenced under the Code of Criminal Procedure's habitual offender provisions, the judge must determine the offense category, offense class, offense variable level, and prior record variable level based on the underlying offense. To determine the recommended minimum sentence range, the upper limit of the range determined under the bill's grid is to be increased as follows:

- By 25%, if the offender is being sentenced for a second felony.
- By 50%, if the offender is being sentenced for a third felony.
- By 100%, if the offender is being sentenced for a fourth or subsequent felony.

The bill specifies that a conviction may not be used to enhance a sentence under the Code's traditional habitual offender provisions if the conviction is used to enhance a sentence under a statute that prohibits use of the conviction for further enhancement under the habitual offender provisions.

Crime Categories. For all crimes against a person, offense variables 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, and 19 must scored. Offense variables 5 and 6 are to be scored for homicide or attempted homicide. Offense variable 16 is to scored for a home invasion offense. Offense variables 17 and 18 are to be scored if an element of the offense or attempted offense involves the operation of a vehicle, vessel, aircraft, or locomotive.

For all crimes against property, offense variables 1, 2, 3, 4, 9, 10, 12, 13, 14, 16, and 19 must be scored.

For all crimes involving a controlled substance, offense variables 1, 2, 3, 12, 13, 14, 15, and 19 must be scored.

For all crimes against public order and all crimes against public trust, offense variables 1, 3, 4, 9, 10, 12, 13, 14, 16, and 19 must be scored.

For all crimes against public safety, offense variables 1, 3, 4, 9, 10, 12, 13, 14, 16, and 19 must be scored. If an element of the offense involves the operation of a vehicle, vessel, aircraft, or locomotive, offense variable 18 is to be scored.

Offense Variables

The bill identifies each of the 19 offense variables and assigns various points to be scored depending on whether and how the offense variable applies to the particular violation. The offense variables are as follows:

1 - Aggravated use of a weapon.
2 - Lethal potential of the weapon used.
3 - Physical injury to a victim.
4 - Psychological injury to a victim.
5 - Psychological injury to a member of a victim's family.
6 - Offender's intent to kill or injure another individual.
7 - Aggravated physical abuse.
8 - Asportation or captivity.
9 - The number of victims.
10 - Exploitation of a vulnerable victim.
11 - Criminal sexual penetration.
12 - Contemporaneous felonious criminal acts.
13 - Continuing pattern of criminal behavior.
14 - The offender's role.
15 - Aggravated controlled substance offenses.
16 - Property obtained, damaged, lost, or destroyed.
17 - Degree of negligence exhibited.
18 - Operator ability affected by alcohol or abuse.
19 - Threat to the security of a penal institution or court, or interference with the administration of justice.

Prior Record Variables

The bill identifies seven prior record variables and assigns various points to be scored depending on whether and how a prior record variable applies to a particular violation. In scoring prior record variables 1 through 5, a conviction or juvenile adjudication may not be used if it precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication.

Prior record variable 1 is "prior high severity felony convictions", which includes a conviction for a crime listed in offense class M2, A, B, C, or D. Prior record variable 2 is "prior low severity felony convictions", which includes a conviction for a crime listed in offense class E, F, G, or H.

Prior record variable 3 is "prior high severity juvenile adjudications", which includes a juvenile adjudication for conduct that would be a crime listed in offense class M2, A, B, C, or D, if committed by an adult. Prior record variable 4 is "prior low severity juvenile adjudications", which includes a juvenile adjudication for conduct that would be a crime listed in offense class E, F, G, or H, if committed by an adult.

Prior record variable 5 is prior misdemeanor convictions or prior misdemeanor juvenile adjudications; prior record variable 6 is relationship to the criminal justice system; and prior record variable 7 is subsequent or concurrent felony convictions.

Sentencing Grids

The bill contains a grid of minimum sentencing ranges for each class of offenses (M2 and A through H). The appropriate minimum sentencing range is to be determined by scoring the offense variable point level on one axis of the grid and the prior record variable point level on the other axis, and then finding the intersecting cell of the grid.

For each offense class, the bill specifies the lowest minimum sentence cell range (for 0 offense variable points) through the highest minimum sentence cell range (for 75 or more points), as follows:

Offense Class	Lowest Range (months)	Highest Range (months)
M2	90-150	365-600, or life
A	21-35	270-450, or life
B	0-18	117-160
C	0-11	62-114
D	0-6	43-76
E	0-3	24-38
F	0-3	17-30
G	0-3	7-23
H	0-1	5-17

Sentencing

Mandatory Minimums. The bill specifies that if a statute mandates a minimum sentence, the court must impose sentence in accordance with that statute, and that imposing a statutory mandatory minimum sentence is not considered a departure from the sentencing guidelines' minimum sentence

range. (As already provided, a court may depart from the appropriate sentence range established under the guidelines if the court has a substantial and compelling reason for the departure.)

"Tanner Rule". The bill prohibits a court from imposing a minimum sentence, including a departure from the sentencing guidelines' minimum sentence range, that exceeds two-thirds of the statutory maximum sentence. (This codifies the "Tanner Rule", established by case law, which sets two-thirds of a maximum sentence as the longest minimum sentence allowed in Michigan's indeterminate sentencing system.)

Intermediate Sanctions. Under the Code, if the upper limit of the minimum sentence under statutory sentencing guidelines enacted after the Sentencing Commission submits its recommendations is 18 months or less, the court must impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the Department of Corrections. (The Code defines "intermediate sanction" as probation or any sanction, other than imprisonment in a State prison or State reformatory, that may lawfully be imposed; including, for example, drug treatment, mental health treatment, jail, community service, or electronic monitoring.) The bill specifies that an intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

The bill also provides that if the offense is for manufacturing, delivering, possessing with intent to deliver, or possessing a mixture that contained less than 50 grams of a Schedule 1 or 2 narcotic or cocaine, and the upper limit of the recommended minimum sentence range is 18 months or less, the court must impose a sentence of life probation, absent a departure from the guidelines' minimum sentence range.

In addition, if an attempt to commit a Class H felony is punishable by imprisonment for more than one year, the court is required to impose an intermediate sanction upon conviction of that offense, absent a departure from the guidelines' minimum sentence range.

If the upper limit of the guidelines' recommended minimum sentence exceeds 18 months and the lower limit of the minimum sentence range is 12 months or less, the court must sentence the offender, absent a departure from guidelines' minimum sentence range, to either imprisonment with a minimum term within that range or an intermediate sanction that may include a term of imprisonment of not less than the minimum range or more than 12 months.

Sentencing Commission

The bill revises provisions of the Code that created the Michigan Sentencing Commission and specify its responsibilities. The bill charges the Commission with developing recommended modifications to the sentencing guidelines, rather than developing the recommended guidelines themselves.

The bill also deletes the Code's schedules for the Commission to develop and submit recommended sentencing guidelines, to submit revised guidelines if the Legislature failed to enact the recommended guidelines within a specified period, and to submit subsequent modifications to enacted guidelines. The bill also revises the schedule for the Commission to submit any recommended modifications to enacted sentencing guidelines. The Code's provisions that created the Sentencing Commission specify that modifications may not be recommended sooner than two years after the sentencing guidelines' effective date, unless based on omissions, technical errors, changes in law, or court decisions. The bill prohibits modifications before January 1, 2001, with the same exceptions.

The bill requires the Commission to submit recommended modifications to the Secretary of the Senate and the Clerk of the House of Representatives. If the Legislature fails to enact the modifications within 60 days after introduction of a bill to enact them, the Commission is to revise the recommended modifications and resubmit them to the Secretary and the Clerk within 90 days. Until the Legislature enacts modifications, the Sentencing Commission is to continue to revise and resubmit the modifications under this schedule.

Jail Reimbursement Program

The bill requires the DOC to operate a jail reimbursement program to provide funding to counties for housing in county jails offenders who otherwise would have been sentenced to prison. Criteria for reimbursement, including but not limited to determining the offenders who otherwise would have been prison-bound, and the rate of reimbursement must be established in the annual DOC appropriations acts.

MCL 800.34 & 800.35 (S.B. 826)
791.207a et al. (H.B. 5398)

769.8 et al. (H.B. 5419)

BACKGROUND

Indeterminate Sentencing and Disciplinary Credits

Under Michigan's indeterminate sentencing system, a sentencing judge sets minimum and maximum terms to be served. Maximum terms for criminal offenses are dictated by statute, while, typically, the minimum term is determined from a range suggested by the use of Supreme Court sentencing guidelines, which weigh various factors pertaining to the facts of the case and the criminal history of the offender. (A judge may depart from guidelines and order a minimum term greater or less than that suggested by the guidelines, but must state on the record his or her reasons for doing so.) Under a controlling 1972 opinion of the Michigan Supreme Court, the minimum sentence imposed by a judge cannot be more than two-thirds of the maximum term of imprisonment (*People* v *Tanner*, 387 Mich 683).

The actual amount of time that an offender is incarcerated is a function of the minimum sentence imposed and several other factors. Under Michigan statute, a minimum sentence may be reduced by the accumulation of disciplinary credits awarded to prisoners. A prisoner is eligible to earn a disciplinary credit of five days for each month served without a major misconduct violation, plus an additional two days per month awarded for good institutional conduct. If a prisoner does commit a major misconduct, previously awarded credits may be revoked. Although this system of awarding disciplinary credits replaced an earlier and more generous sentence reduction system that awarded "good time" credits, some prisoners who were incarcerated before that change apparently continue to receive good time credits or a combination of disciplinary credits and good time credits.

A prisoner is eligible for parole upon serving his or her minimum sentence less any accumulated disciplinary credits and/or good time credits, which is known as the prisoner's earliest release date. Even before parole eligibility, however, a prisoner who meets various criteria may be placed in a community corrections facility up to two years before his or her earliest release date. Assaultive offenders, however, may not receive community placement until 180 days before the expiration of their minimum terms.

Truth-in-Sentencing

Public Acts 217 and 218 of 1994 enacted the truth-in-sentencing provisions in the Department of Corrections law and the prison code, respectively (subject to the enactment of sentencing guidelines). Although these provisions have been amended by Senate Bill 826 and House Bill 5398, as described above, most of the original provisions will take effect on December 15, 1998. A brief overview of these provisions follows.

In addition to establishing disciplinary time for enumerated offenses, Public Act 217 provides that a prisoner subject to disciplinary time and committed to the DOC's jurisdiction must be confined in a "secure correctional facility" for the duration of his or her minimum sentence.

Parole may not be granted to a prisoner subject to disciplinary time until he or she has served the minimum term imposed by the court. The does not apply to prisoners who are eligible for and successfully complete a special alternative incarceration (boot camp) program, since these prisoners must be paroled upon certification of program completion.

An order of parole for a prisoner subject to disciplinary time may contain a condition requiring the parolee to be housed in a community corrections center or a community residential home for at least the first 30 days, but not more than the first 180 days, of the term of parole. (This parole condition originally was mandatory, but House Bill 5398 made the provision permissive.)

If a prisoner subject to disciplinary time is sentenced to consecutive terms of imprisonment, he or she will come under the jurisdiction of the parole board only after serving the total time of the added minimum terms. The prisoner's maximum terms must be added to compute the new maximum term, and discharge may be issued only after the total maximum term is served, unless parole is granted and completed satisfactorily.

A prisoner subject to disciplinary time will not be eligible for an extension of the limits of confinement (e.g., to work at paid employment or attend a training program) until after the prisoner has served his or her minimum term.

Under Public Act 218 of 1994, a prisoner subject to disciplinary time must receive disciplinary time for each major misconduct for which he or she is found guilty. A prisoner's minimum sentence, plus disciplinary time, may not exceed his or her maximum sentence.

The DOC may reduce any or all of a prisoner's accumulated disciplinary time if he or she has demonstrated exemplary good conduct during the term of imprisonment. Deducted disciplinary time may be restored if the prisoner is found guilty of a major misconduct.

The DOC must promulgate rules to prescribe the amount of disciplinary time for each type of major misconduct.

People v *Milbourn*

In the *Milbourn* decision, the Michigan Supreme Court adopted a new standard for reviewing trial courts' imposition of criminal sentences. In a 1983 case, *People* v *Coles* (417 Mich 523), the Court had held that sentences were subject to review by Michigan's appellate courts and that the standard for determining whether a particular sentence represented an abuse of judicial discretion was whether the sentence "shocks the conscience" of the appellate court.

In 1990, the *Milbourn* court reaffirmed the 1983 finding that criminal sentences are subject to appellate review, but rejected the earlier "shocks the conscience" standard in favor of assessing a "principle of proportionality". The Court opined that the broad spectrum of criminal penalties in Michigan law reflects this concept (i.e., "...sentences are proportionate to the seriousness of the matter for which punishment is imposed"). In adopting this standard for appellate review of criminal sentences, the *Milbourn* Court ruled that "...a given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences...to be proportionate to the seriousness of the circumstances surrounding the offense and the offender".

The Court described its administratively ordered use of sentencing guidelines as a "barometer" for determining appropriate sentencing practices, but it chose not to order strict compliance with the guidelines by trial courts: "...because our sentencing guidelines do not have a legislative mandate, we are not prepared to require adherence to the guidelines". The Court suggested that requiring strict adherence to the guidelines would prevent their "evolution". Thus, the Court specifically authorized trial courts to depart from the guidelines "when, in their judgment, the recommended range under the guidelines is disproportionate...to the seriousness of the crime".

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 judicially established sentencing guidelines were inadequate and needed to be replaced. The Legislature recognized this in 1994 when it passed Public Act 445, which created the Michigan Sentencing Commission and charged it with developing recommendations for a comprehensive statutory sentencing guidelines structure. The judicial guidelines reportedly incorporated only about 100 offenses, and were designed to reflect past sentencing practices, rather than representing an established public policy regarding criminal sentencing. The Sentencing Commission completed its recommendations and reported them to the Legislature. The recommendations essentially have been incorporated into House Bill 5419. (The bill, however, includes more offenses than were included in the Sentencing Commission's report, it treats prior juvenile adjudications differently than was recommended by the Commission, and it includes shorter sentence ranges in many of the sentencing grids' cells.)

The judicial sentencing guidelines system had been called descriptive rather than prescriptive. It made no public policy statement about how certain types of offenders ought to be punished, but tried to ensure that they were handled in roughly the same manner as similar offenders typically were treated in the past. Although the Michigan Supreme Court, in *Milbourn*, called the guidelines "an invaluable tool" for gaging the seriousness of an offense by a particular offender, the Court declined to require strict adherence to the guidelines due to the lack of a legislative mandate. The system recommended by the Sentencing Commission and, with modifications, enacted by House Bill 5419, is a result of such a mandate. The new system reflects an aim to treat violent offenders and repeat property offenders more severely than other criminals. The bill makes a clear declaration of public policy on the issues of crime and punishment. A rational and comprehensive system of sentencing guidelines will 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.

Under the classification and grid system enacted by House Bill 5419, barring a judicial departure from the recommended minimum sentence range, offenders in Classes M2 and A must receive a prison sentence. Class B and C offenders very likely will receive a prison sentence. Offenders in

lower classes are more likely to receive an intermediate sanction rather than prison time. In addition, and in compliance with the directive in Public Act 445 to the Sentencing Commission, House Bill 5419 requires a court to impose an intermediate sanction rather than a prison sentence if the upper limit of a recommended minimum sentence range is 18 months or less. This sentencing structure reflects a philosophy of ensuring that violent and repeat offenders are to be treated more harshly than other offenders. Sentencing practices, then, will be more proportionate to both the seriousness of the offense and the offender's prior criminal record. This, in turn, will provide for greater protection of the public.

Supporting Argument

While there has in the past been some concern over whether sentencing guidelines are within the proper purview of the Legislature, any lingering doubts surely were answered by the Michigan Supreme Court's discussion in *People* v *Milbourn*. In a decision that changed the appellate court standard for reviewing a trial court's sentence, the Court expressed reluctance to require strict adherence to judicial sentencing guidelines because those guidelines did not have a legislative mandate. The Court also noted that departures would be appropriate when guidelines did not adequately account for important factors legitimately considered at sentencing, and that to require strict adherence would effectively prevent the guidelines' evolution. By its suggestion that statutory guidelines are needed and its reluctance to require lower court compliance with the Supreme Court guidelines, the Court's decision in *Milbourn* may have eliminated, for all practical purposes, the effectiveness and enforceability of the judicially implemented sentencing guidelines. (In fact, since House Bill 5419 was enacted, the Supreme Court issued an administrative order rescinding the judicially promulgated sentencing guidelines for all crimes, effective January 1, 1999.) Legislatively enacted sentencing guidelines have been urgently needed to ensure the proportionality in sentencing that was advocated by the *Milbourn* Court, and to promote consistent sentencing practices. Effective statutory guidelines also are needed to prevent disparities in sentencing based on race, ethnicity, local attitudes, and individual bias.

Supporting Argument

Truth-in-sentencing is essential to improving public confidence in the criminal justice system and to providing greater protection to the public. All too often, crimes are committed by felons who still would be in prison if they had to serve the minimum sentence for previous offenses in secure confinement. If a judge sentences a felon to five-to-10 years in prison, it stands to reason that he or she should serve at least five years behind bars. By incapacitating a dangerous offender for at least the duration of his or her minimum sentence, the bills will help protect potential future victims and extend to past victims the peace of mind of knowing that the criminal is confined.

In addition, the deterrent value of criminal sanctions likely will be enhanced by the bills' assurances of meaningful punishment. Knowing that they will have to be incarcerated for their entire minimum sentence and that no system of sentence reduction will apply, some people might avoid criminal activity. Although correctional costs may increase as some criminals serve longer periods in prison, those costs are insignificant compared with the societal costs of crime, which the bills will mitigate. Giving effect to the 1994 truth-in-sentencing provisions will help both to restore integrity, credibility, and accountability to the criminal justice system, and to fulfill the system's most important objective: the protection of the public.

Response: The truth-in-sentencing provisions are unnecessary, because options to deal with criminals' serving insufficient time in prison are currently available in law. Problems with some offenders' serving too little time often have to do more with charging and sentencing than with any perceived defects in the disciplinary credit system. Prosecutors decide what charges to bring against an accused criminal, and plea bargaining often results in less severe penalties than may be appropriate for the offense committed. Further, prosecutors have the discretion to seek habitual offender status for anyone with a prior felony conviction, but this option is rarely used. Someone sentenced as a habitual offender must serve his or her minimum term and is subject to a higher maximum term.

In addition, more severe penalties do not discourage people from committing crimes because criminals generally do not believe they will be caught. Certainty and swiftness of punishment are more likely than length of sentence to deter criminal activity.

Supporting Argument

The disciplinary credit system is both confusing and misleading, and should be abandoned. Due to sentencing reductions and the practice of placing convicted criminals in community settings before they are actually paroled, it is difficult, if not impossible, for courts and prosecutors accurately to inform victims exactly how long a criminal

offender will be imprisoned. The truth-in-sentencing provisions replace this convoluted system with a simple policy: that a convicted criminal will serve, at a minimum, the minimum sentence imposed by a judge. Unlike the current system, this straightforward approach is reasonable, credible, and understandable.

Response: The disciplinary credit system actually *is* effective, simple, and straightforward. For persons sentenced after April 1, 1987, when the disciplinary credit system was expanded to cover almost all prisoners, five-to-seven days of credit are awarded for each month of a sentence. Credits can be withheld or revoked for misconduct. A prisoner's earliest release date is routinely calculated by the Department of Corrections and this information can easily be determined and announced at the time of sentencing. Such a requirement, which reportedly has been adopted by New Jersey courts, surely would constitute "truth-in-sentencing" without dismantling an effective prisoner management system.

Opposing Argument

House Bill 5419 may unduly interfere with the discretion of the judicial branch to deal with individual circumstances. Although departures from sentencing guidelines are allowed under the bill, they are limited to cases that present "substantial and compelling" reasons. Generally, to the extent that the bill limits judicial discretion, it places sentencing power in the hands of prosecutors through the exercise of prosecutorial discretion over how offenders are charged. 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, and open avenues for personal bias or philosophical differences to influence sentencing decisions. Sentencing guidelines will remove bias and make sentencing more uniform by quantifying offense and offender characteristics on a consistent basis and applying those standards statewide. House Bill 5419 accommodates individual circumstances by allowing the guidelines' recommended sentence ranges to be set aside for substantial and compelling reasons, subject to review by appellate courts.

Further, the *Milbourn* Court's comments regarding judicial sentencing discretion under the judicially developed sentencing guidelines system continue to apply under House Bill 5419: "...the discretion of trial courts adhering to the guidelines is not unduly restricted, since the recommended sentence range in a given cell of the guidelines is generally quite broad". In any event, setting sentences is a proper function of the Legislature. As Justice Boyle pointed out in her dissent in *Milbourn*, Article IV, Section 45 of the Michigan Constitution "...gives the Legislature the authority to provide for sentencing, a power which the people gave to that department [sic] of government. Pursuant to that authority, the Legislature enacted statutes which set the maximum punishment and gave the authority to set the minimum punishment to the trial court judiciary."

Opposing Argument

House Bill 5419 will require the use of intermediate sanctions, including jail and noninstitutional sanctions, for offenders with sentencing guideline recommended minimum sentences of 18 months or less. This suggests that more felons will have to be dealt with locally. Without adequate funding and support from the State, the bill may exacerbate problems for already overburdened jails and alternative programs.

Response: While the bill does not explicitly include any local funding, it does include a provision for State reimbursement to counties for the costs of housing individuals in county jails. The amount and criteria for this reimbursement are to be established annually in the Department of Corrections appropriations act.

Opposing Argument

Inappropriate sentences will result from applying the same factors more than once. Since the guidelines themselves take criminal history into account, the justice of also applying habitual offender sentence enhancement is debatable. House Bill 5419 provides for the sentences of second, third, and fourth repeat offenders to be lengthened by 25%, 50%, and 100% respectively. In addition, the prior record variable axis of the sentencing grids expands the recommended minimum sentence range for each class of crime. Moreover, the decision as to whether the prior record will be counted twice is left exclusively to the prosecutor, who decides whether to charge an individual as a habitual offender. While an offender's prior record should be considered when the recommended sentence range is determined, the existing habitual offender provisions should not apply when the offender's sentence is based in part upon consideration of prior offenses.

Response: It would be extreme to make such changes in the way habitual offenders are dealt with in Michigan's criminal justice system. Indeed, prior record variables have been used in judicially established sentencing guidelines, while habitual offender provisions also have been applied. Strong habitual offender enhancements continue to be

necessary to punish and incapacitate career criminals adequately.

Opposing Argument

The bills fail to consider adequately the acute problem of prison and jail crowding. Guidelines developed without proper regard for correctional capacity not only may worsen the crowding situation, but also may fail to ensure that limited prison and jail beds are used for the worst offenders. There have been wide-ranging estimates of the impact of the sentencing guidelines, in conjunction with truth-in-sentencing provisions, with some suggesting that as many as eight-to-10 new prisons may be necessary. Other estimates, taking into account the restrictive nature of the parole board in recent years, project even greater growth in the prison population and the need for correctional facilities over the next decade.

Response: To delay the implementation of sentencing guidelines and truth-in-sentencing provisions because of potential prison and jail crowding would defeat the goals 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 and their prior offenses, not by the severity of the State's problems with the corrections budget. If the guidelines mean that more criminals spend more time in prison, public safety will be served. If this means that more prisons must be built, then those projects should be undertaken. It is time to put an end to the revolving door policy for prisons and time to force criminals to face the punishment they deserve.

Further, many of the more extreme estimates of an increase in prison population were based in whole or in part on earlier versions of the sentencing guidelines and truth-in-sentencing bills. The enacted version of the legislation incorporates changes that will mitigate some of the impact on prison population, including lowering the sentencing ranges in many cases. In addition, other enacted bills will help to lower prison populations; House Bill 4065 and Senate Bill 281, for example, revise the penalty and provide for parole eligibility for controlled substance offenses involving at least 650 grams.

Opposing Argument

Denying disciplinary credits to prisoners will hinder the effective management of prisons. The reward of sentence reductions provides prisoners with significant incentive to stay out of further trouble while incarcerated. Replacing this "carrot" with the "stick" of potential added prison time for misconduct will be less effective in controlling prisoners' behavior.

Response: There should be little, if any,

difference in the psychological impact of possible disciplinary time versus disciplinary credits. One of the problems with the disciplinary credit system is that the credits seem to be awarded automatically, and may be lost for misconduct. This, essentially, takes the same philosophical approach as the disciplinary time penalty, but without reducing a prisoner's sentence from what was imposed by the judge. (That is, time may be added in the form of denied parole for misconduct.) The award of disciplinary credits is so routine that some have characterized the policy as a means of reducing correctional costs and demand for prison beds, rather than as a system employed to induce and reward good behavior. The disciplinary time approach is more consistent with the idea of punishing criminals for their actions: They will have to serve their minimum sentence, while parole may be delayed due to accumulated disciplinary time.

Opposing Argument

By eliminating disciplinary credits, the bills will require prisoners who have not misbehaved during imprisonment to serve longer terms, while not affecting habitual offenders, lifers, or major drug offenders, since those offenders have not been eligible to receive disciplinary credits. The bills' major effect, then, is to punish the best behaved prisoners--those who have been eligible for credits and serve their time free of major misconduct violations. Even under the disciplinary credit system, prisoners who misbehave can be imprisoned for up to the length of their maximum sentence, so the truth-in-sentencing provisions will be no tougher on them.

Opposing Argument

As originally enacted in 1994, the truth-in-sentencing provisions not only would have eliminated sentencing reduction programs, such as the accumulation of disciplinary credits, but would have *required* that accumulated disciplinary time for prisoner misconduct be added to a person's minimum sentence in order to delay his or her parole eligibility. The bills change that system by requiring only that the parole board consider a prisoner's accumulated disciplinary time when determining whether to grant parole. This will not be adequate punishment for prisoners who misbehave while incarcerated. The 1994 provision for extending a prisoner's minimum term by the amount of disciplinary time earned should have been retained.

Response: The system enacted in 1994 blurred the responsibilities of the executive and the judicial branches of government. Authorizing the DOC to increase a prisoner's minimum sentence through the imposition of DOC-determined disciplinary time would have usurped judicial sentencing authority. In effect, a person's minimum sentence would have been determined not by the sentencing judge, but by the Department. Acts of prisoner misconduct do not necessarily amount to violations of law, so adding to a prisoner's sentence based on disciplinary time would lengthen a criminal sentence for acts that might not constitute crimes. In addition, mandating increased incarceration for prison infractions could deprive a person of his or her liberty without basic due process. Although there would have to have been a disciplinary hearing at which a prisoner could respond to charges and present evidence, there is no right to counsel in those administrative hearings and guilt need not be proved beyond a reasonable doubt.

Opposing Argument

Some have assumed that truth-in-sentencing will have little effect on actual time served, because judges and sentencing guidelines will merely adjust sentencing downward to accommodate the truth-in-sentencing provisions just as sentences presumably may have been adjusted upward to account for disciplinary credits. Under this reasoning, the bills do not represent "truth" in sentencing at all; rather they mislead crime victims and the public into believing that real change in time served will ensue.

Response: Truth-in-sentencing simply will ensure that a prisoner is incarcerated for at least the minimum term imposed by a judge.

Opposing Argument

Under the truth-in-sentencing provisions enacted in 1994, a prisoner who is subject to disciplinary time must be confined in a secure correctional facility for the duration of his or her minimum sentence. This requirement actually may lead to proposals for *shorter* minimum sentences for all criminal offenders. In 1972, when the Michigan Supreme Court established the Tanner Rule, under which a prisoner's minimum sentence can be no longer than two-thirds of the statutory maximum, it rejected the recommendation of the American Bar Association that a minimum sentence not exceed *one-third* of the maximum sentence. In setting Michigan's two-thirds standard, the Court considered Michigan's generous good time credits system and held that, in conjunction with the sentence reduction policy, the two-thirds rule adopted by the Court "fairly approximates the objective of the American Bar Association's minimum standards [for criminal justice]" (*People* v *Tanner*).

Some legal scholars reportedly have believed that,

because of Michigan's elimination of good time credits in favor of the less generous disciplinary credit system, the Tanner Rule should be revised downward to a one-third standard, as recommended by the American Bar Association. A statutory requirement that denies any type of sentence reductions simply strengthens the argument that the Tanner Rule should be reduced to one-third of the statutory maximum sentence.

Legislative Analyst: P. Affholter

FISCAL IMPACT

The recently enacted bills are designed to affect sentencing practices, resulting in a change in the characteristics of the prison population and the time served by prisoners in State prisons. As a result of limiting State prisons to offenders with minimum sentences greater than 18 months, the average minimum sentence of the State prison population should increase. On the other hand, offenders with minimum sentences less than 18 months should remain the responsibility of local government and increase the use of local jail and probation alternatives, referred to as intermediate sanctions. Several projections have estimated the impact on State prison population over 10 years, yet no single projection incorporates all of the enacted legislation in its estimate. Therefore, the fiscal impact of sentencing guidelines and truth-in- sentencing is indeterminate.

A recent projection incorporating work by Dr. Charles Ostrom of Michigan State University and Dr. James Austin of the National Council on Crime and Delinquency compared baseline prison population through the year 2007, with a projected population based on an earlier version of House Bill 5419 and the application of truth-in-sentencing to all prisoners. The projection shows a 1,323-prisoner increase over baseline by 2007 as a result of the legislation. However, the increase may be insignificant in terms of fiscal impact. Two reasons that the impact appears to be minimal are discussed below.

First, historically, population projections have been prepared for five-year periods by the Department of Corrections using a model similar to the one used for this projection. In the DOC projections, which have a three-year verification period, a 1,300-prisoner difference from actual population has occurred, and may be considered within the margin of error. The difference in actual population is generally observed because these models build upon assumptions and trend data. The assumptions and trends considered include, but are not limited to, the parole rate, the affects of legislation creating new crimes, and judicial behavior. Once a trend changes or a new event occurs, the projections are no longer valid. An example of a new event is the *Young* decision in which a Recorder's Court judge ruled that parolees convicted of a second offense while on parole must serve the maximum sentence of the first crime before serving the minimum sentence of the second crime. It was assumed that second-offense parolees would serve long periods in prison, increasing the prison population. Instead, the number of parolees with second sentences dropped dramatically, and only began to increase to historic levels when the Court of Appeals overturned the *Young* ruling.

Second, a component of truth-in-sentencing, disciplinary time, must only be reported to the parole board, and not automatically added to the minimum sentence. The projection cited above assumes that all offenders will have to serve all disciplinary time and that, on average, prisoners will serve an additional 13% of their sentence beyond the minimum sentence for disciplinary infractions. The difference between accrued disciplinary time and actual time served will not be known until parole board decisions are made. The possibility that the parole board will not require prisoners to serve all of the accrued disciplinary time, could make the disciplinary time population neutral, and, therefore, make the fiscal impact on State government cost neutral, as well.

Fiscal Analyst: K. Firestone

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STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

-vs-

CURTIS MICHAEL LEWIS

Defendant-Appellee.

_____/

Supreme Court No. 142819

Court of Appeals No. 294687

Lower Court No. 09-5687FH

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

RANDY E. DAVIDSON, being first sworn, says that on April 15, 2011, he mailed one copy of Defendant's Brief Opposing Prosecutor's Application for Leave to Appeal; and Proof of Service to:

JACKSON COUNTY PROSECUTOR
County Courthouse
312 South Jackson Street
Jackson, MI 49201

RANDY E. DAVIDSON

Subscribed and sworn to before me
April 15, 2011.

Joanne M. Moritz
Notary Public, Wayne County, Michigan
My commission expires: 9/2/2012
24336T-J/Randy E. Davidson

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April 15, 2011

Clerk
Michigan Supreme Court
P. O. Box 30052
Lansing, MI 48909

Re: People v Curtis Michael Lewis
Supreme Court No. 142819
Court of Appeals No. 294687
Lower Court No. 09-5687FH

Dear Clerk:

Enclosed please find the original and seven (7) copies of the following: Defendant's Brief Opposing Prosecutor's Application for Leave to Appeal; and Proof of Service for filing in your Court.

Thank you for your cooperation.

Yours truly,

Randy E. Davidson
Assistant Defender

RED
Enclosures
cc: Jackson County Prosecutor
Mr. Curtis Michael Lewis
File