

**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

Appeal from the Court of Appeals  
Kurt Wilder, PJ, Donald S. Owens and Michael J. Kelly, JJ.

**PEOPLE OF THE STATE OF MICHIGAN,**

Plaintiff-Appellant,

-vs-

**ALEXANDER JEREMY STEANHOUSE,**

Defendant-Appellee.

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**Supreme Court No. 152849**

Court of Appeals No. 318329

Circuit Court No. 11-011939-FC

**BRIEF ON APPEAL – APPELLEE**

(ORAL ARGUMENT REQUESTED)

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**STATEMENT OF QUESTIONS PRESENTED**

- I. Is whether MCL 769.34(2) & (3) remain in full force and effect where the defendant's guidelines range is not dependent on judicial fact-finding unclear from *Lockridge*? Does a remedy of fully advisory guidelines conflict with the Legislature's intent expressed in MCL 8.5 and beyond? Is the most appropriate remedy that only the bottom end of the guidelines range is advisory? May this Court clarify or modify *Lockridge* without offending *stare decisis* principles? Should defendant should be able to waive his sixth amendment right and voluntarily subject himself to the binding statutory guidelines system? Must this court remand Mr. Steanhouse's case to the court of appeals to review the length of his sentence?**

Court of Appeals made no answer.

Defendant-Appellee answers, "Yes."

- II. Is it improper to remand a case to the circuit court for consideration under part VI of this court's opinion in *People v Lockridge* where the trial court exceeded the defendant's guidelines range? Is the defendant entitled to appellate review of the extent of the departure?**

Court of Appeals answered "No" in part and "Yes" in part.

Defendant-Appellee answers, "Yes".

- III. Even if Michigan's guidelines scheme is rendered advisory, is there still a mixed standard of review for sentences falling outside of the guidelines range? Is the length of a sentence and extent of a departure reviewed for an abuse of discretion under the *Milbourn* proportionality test to determine if it is reasonable?**

Court of Appeals made no answer in part and "Yes" in part.

Defendant-Appellee answers, "Yes".

## **STATEMENT OF FACTS**

Defendant-Appellee Steanhouse accepts the Plaintiff-Appellant's Statement of Facts.

## **STANDARD OF REVIEW**

This Court has asked the parties to brief the following questions:

(1) whether MCL 769.34(2) and (3) remain in full force and effect where the defendants guidelines range is not dependent on judicial fact-finding, see MCL 8.5;

(2) whether the prosecutor's application asks this Court in effect to overrule the remedy in *People v Lockridge*, 498 Mich 358, 391 (2015), and, if so, how stare decisis should affect this Court's analysis;

(3) whether it is proper to remand a case to the circuit court for consideration under Part VI of this Court's opinion in *People v Lockridge* where the trial court exceeded the defendants guidelines range; and,

(4) what standard applies to appellate review of sentences following the decision in *People v Lockridge*. (Supreme Court Order, 71a).

These involve questions of law, which this Court reviews de novo. *People v Lockridge*, 498 Mich 358, 373; 870 NW2d 502 (2015); *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

- I. **Whether MCL 769.34(2) & (3) remain in full force and effect where the defendant's guidelines range is not dependent on judicial fact-finding is unclear from *Lockridge*. A remedy of fully advisory guidelines conflicts with the Legislature's intent expressed in mcl 8.5 and beyond. The most appropriate remedy is that only the bottom end of the guidelines range is advisory. *Stare decisis* principles do not preclude this court from clarifying or modifying *Lockridge*.**

## Introduction

It is debatable whether this Court adopted a fully advisory sentencing guidelines system in *People v Lockridge*.<sup>1</sup> There is language in the opinion that ties the need for a remedy to when there has been a constitutional violation, such that the remedy only seems to apply where there is a constitutional violation in a given case. There is also language that refers to the facial invalidity of the Michigan sentencing guidelines scheme as a whole. Further, the Court indicated that it was adopting the *Booker*<sup>2</sup> remedy for future cases, and the federal courts have treated the federal sentencing guidelines as completely advisory.

Appellee agrees with Appellant that making Michigan's statutory sentencing guidelines scheme fully advisory is a remedy that is inconsistent with the legislative intent expressed in MCL 8.5 for curing statutes of constitutional error. That the statutory sentencing guidelines scheme may sometimes result in Sixth Amendment/*Alleyne*<sup>3</sup> violations can be, and should be, cured without making the guidelines entirely advisory.

The remedy that would cure a Sixth Amendment violation, require the least severance and retain the most of the existing system, and actually protect a defendant asserting his constitutional right, was the one proposed by Judge Shapiro in the Court of Appeals' *Lockridge* opinion. See *People v Lockridge*, 304 Mich App 278, 311, 314-317; 849 NW2d 388 (2014),

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<sup>1</sup> *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

<sup>2</sup> *United States v Booker*, 543 US 220, 125 S Ct 738, 160 L Ed 2d 621 (2005).

<sup>3</sup> *Alleyne v United States*, 570 US \_\_\_, 133 S Ct 2151, 186 L Ed 2d 314 (2013).

concurrence by Judge Shapiro. Judge Shapiro proposed that only the floor of the guidelines range need be advisory while the ceiling remained binding. *Id.* Appellee asks this Court to adopt that remedy.<sup>4</sup>

A remedy of a fully advisory guidelines scheme is not constitutionally mandated<sup>5</sup> and it is worse than the disease of the Sixth Amendment violation it sought to cure. The Sixth Amendment is supposed to be a shield for the defendant, not a sword used to harm him. To that end, if this Court rejects Appellee's preferred remedy, this Court should clarify that there is no Sixth Amendment violation where the guidelines range is an intermediate sanction cell or a straddle cell.<sup>6</sup> Regardless of whether there was judicial fact-finding or not, neither intermediate sanctions cells nor straddle cells mandate any incarceration. No Michigan defendant should be forced to go to prison where the applicable guidelines range was a non-prison cell or be imprisoned for longer than the legislature intended before becoming eligible for parole, without a substantial and compelling reason, and be told by the courts that this is the vindication of his Sixth Amendment rights. And, this Court should further make clear that all defendants may waive their Sixth Amendment rights under *Lockridge* prior to sentencing if they wish to be brought back into the binding statutory sentencing guidelines scheme that the Legislature intended.

The parties are asking this Court to clarify its *Lockridge* opinion. Appellee agrees with Appellant that *stare decisis* principles do not prevent this Court from doing so. However, even if this Court finds that what the parties seek is actually a modification of the remedy that would

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<sup>4</sup> The remedy that Defendant Lockridge requested was to require factual determinations to be made by a jury or stipulated to by the defendant. *Lockridge, supra* at 389. He did not request that the sentencing guidelines be made advisory.

<sup>5</sup> This Court acknowledged that it had other options. *Lockridge, supra* at 389.

<sup>6</sup> This Court will have the opportunity to clarify this again in *People v. Schrauben*, — Mich.App —; — NW2d — (2016) (Docket No. 323170); slip op at 7, lv pending.

constitute a partial overruling of *Lockridge*, *stare decisis* principles do not prevent this Court from modifying *Lockridge*.

## Discussion

- A. **It is unclear from *Lockridge* whether MCL 769.34(2)&(3) remain in full force and effect where the defendant's guidelines range is not dependent on judicial fact-finding.**

There is language in *Lockridge* that suggests that a Sixth Amendment violation only occurred if judicial fact-finding actually raised the sentencing range in the particular case at bar and that a remedy of an advisory guidelines range is limited to that situation. For example:

When a defendant's sentence is calculated using a guidelines minimum sentence range in which OVs have been scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury, the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so. [*Lockridge* at 391-393.]

There is also language that suggests that this Court was holding the statutory sentencing guidelines scheme as a whole in violation of the Sixth Amendment because it directs the sentencing judge to make factual findings that, in many cases, will result in the raising of the guidelines range. *Lockridge* at 373-374. And, this Court seemed to indicate that it was adopting a fully advisory system going forward, stating: “because sentencing courts will hereafter not be bound by the applicable sentencing guidelines range, this remedy cures the Sixth Amendment flaw in our guidelines scheme by removing the unconstitutional constraint on the court's discretion.” *Id.* at 392.

This Court should clarify or modify its *Lockridge* decision. A fully advisory guidelines system is not in keeping with legislative intent.

**B. The remedy of an entirely advisory guidelines system is in conflict with the legislature's intent as expressed in mcl 8.5 and beyond.**

The Legislature has expressed its intent that if parts of a statutory scheme are found unconstitutional, the courts should sever as little as possible and preserve as much as possible in crafting the remedy. MCL 8.5 provides:

In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:

If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

An advisory system is inconsistent with the manifest intent of the Legislature. In establishing the statutory sentencing guidelines, the Legislature sought a binding system that could only be deviated from for a substantial and compelling reason. The mandatory system was meant, in important part, to address the problem of sentencing disparities between offenders who had a similar criminal history and were convicted of the same offense committed in a similar manner. Public Act 445 of 1994; House Legislative Analysis for Public Act 445 of 1994 (filed separately). This new system was also intended to address prison overcrowding, to ensure that prison and jail space was used for the worst offenders, and to ensure that community alternatives were used more often, while maintaining public safety. *Id.*

In *People v Hegwood*, 465 Mich 432; 636 NW2d 127 (2001), this Court acknowledged that the Legislature had chosen to move on from this Court's own advisory sentencing guidelines: "Effective January 1, 1999, the state of Michigan embarked on a different course. By formal enactment of the Legislature, Michigan became subject to guidelines with sentencing

ranges that do require adherence.” *Id.* at 438-439. In *People v Babcock*, 469 Mich 247, 267 n 21; 666 NW2d 231 (2003), this Court acknowledged that the Legislature’s manifest purpose in enacting binding sentencing guidelines was to reduce unjustified sentencing disparities. As Justice Markman indicated in dissent in *Lockridge, supra* at 462, adoption of the broad federal *Booker* remedy to cure a narrower constitutional problem with Michigan’s guidelines will contravene the Legislature’s purpose and intent in enacting them.

- C. **The remedy proposed by Judge Shapiro in the Court of Appeals’ *Lockridge* opinion, i.e. making only the floor of the range advisory and keeping the ceiling of the range binding, is the most in keeping with the Legislature’s intent in enacting the statutory guidelines scheme and the most protective of a defendant’s sixth amendment rights. Alternatively, a defendant should be able to waive his Sixth Amendment right and voluntarily subject himself to the binding statutory guidelines system.**

The remedy that would have cured the Sixth Amendment violation, required the least severance and retained the most of the existing system, and actually protected defendants asserting their constitutional rights, was the one proposed by Judge Shapiro in the Court of Appeals’ *Lockridge* opinion. See *People v Lockridge*, 304 Mich App 278, 311, 314-317; 849 NW2d 388 (2014), concurrence by Judge Shapiro. Judge Shapiro proposed that only the floor of the guidelines range need be advisory while the ceiling remained binding. *Id.* It is only the floor of the sentencing guidelines range that offends the Sixth Amendment. *Id.* Appellee asks this Court to adopt that remedy.

In contrast, adopting a fully advisory guidelines system not only thwarts the Legislature’s intent as discussed above, it also punishes criminal defendants in Michigan for asserting their Sixth Amendment right. This is best illustrated by intermediate sanction cells and straddle cells, which do not provide a “floor” for incarceration. Neither mandates any prison or jail time; both

can result in no incarceration at all without the sentencing judge having to provide a substantial and compelling reason. MCL 769.34(4)(a)&(c); MCL 769.31(b);<sup>7</sup> *People v Stauffer*, 465 Mich 633; 640 NW2d 869 (2002). In fact, an intermediate sanction cell, MCL 769.34(4)(a)-(b), mandates that a defendant receive a non-prison sanction. *Id.*

But under a fully advisory system, a defendant who scores into an intermediate sanction cell may be sentenced to prison **without** the judge having to provide a substantial and compelling reason. And, whatever this Court decides a review for reasonableness constitutes, it will be a less meaningful appellate review of that prison sentence than the defendant would have had under the binding guidelines.<sup>8</sup>

Surely the Sixth Amendment right to a jury trial was not intended to make it easier to send a citizen to prison against the will of his state legislature. A remedy that includes making intermediate sanction cells and straddle cells advisory is not constitutionally mandated<sup>9</sup> and should be rejected.

It is accurate that the Legislature intended both the top and the bottom of the sentencing guidelines range be binding under the statutory scheme, as this Court noted. *Lockridge, supra* at 390. But equal treatment between the top end and the bottom end of the ranges was not the

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<sup>7</sup> MCL 769.31(b) provides: “‘Intermediate sanction’ means probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed. Intermediate sanction includes, but is not limited to, 1 or more of the following: (i) Inpatient or outpatient drug treatment or participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082. (ii) Probation with any probation conditions required or authorized by law. (iii) Residential probation. (iv) Probation with jail. (v) Probation with special alternative incarceration. (vi) Mental health treatment. (vii) Mental health or substance abuse counseling. (viii) Jail. (ix) Jail with work or school release. (x) Jail, with or without authorization for day parole under 1962 PA 60, MCL 801.251 to 801.258. (xi) Participation in a community corrections program. (xii) Community service. (xiii) Payment of a fine. (xiv) House arrest. (xv) Electronic monitoring.”

<sup>8</sup> See FN 6.

<sup>9</sup> This Court acknowledged that it had other options. *Lockridge, supra* at 389.

driving force behind the Legislature's enacting binding statutory sentencing guidelines; that already existed under the non-binding judicial sentencing guidelines. Reducing unjustified sentencing disparities, punishing violent crimes more severely than non-violent crimes, proportionality, reducing the prison population, and promoting alternative non-incarceration sanctions, while still protecting the public, were the driving forces behind the enactment of the binding statutory sentencing guidelines. Public Act 445 of 1994;<sup>10</sup> House Legislative Analysis for Public Act 445 of 1994 (filed separately).

The remedy proposed by Judge Shapiro is also the most workable remedy that is true to the Legislature's intent. Under the prosecutor's proposed hybrid system, some defendants would be subject to advisory guidelines and some to binding guidelines, and that would need to be decided on a case-by-case basis.

If this Court rejects Appellee's preferred remedy that the top end of the range remains binding while the bottom end is advisory, whether it adopts the hybrid system or more fully advisory guidelines, this Court should still clarify that there is no Sixth Amendment violation where a defendant has scored into an intermediate sanction cell or a straddle cell, regardless of whether there was judicial fact-finding or not, as neither intermediate sanctions cells nor straddle

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<sup>10</sup> See MCL 769.33 (within the public act; since repealed), which created the sentencing commission to draft the statutory sentencing guidelines and which directed that commission to develop guidelines that "accomplish" the following: "(i) provide for the protection of the public; (ii) an offense involving violence against a person shall be considered more severe than other offenses; (iii) be proportionate to the seriousness of the offense and the offender's prior record; (iv) reduce sentencing disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences; (v) specify the circumstances under which a term of imprisonment is proper and circumstances under which intermediate sanctions are proper; (vi) establish sentence ranges for imprisonment that are within the minimum and maximum sentences allowed by law for the offenses to which the ranges apply; (vii) establish separate ranges for convictions under the habitual offender provisions..., which may include as an aggravating factor, among other relevant considerations, that the accused has engaged in a pattern of proven or admitted criminal behavior.'

cells establishes a floor requiring imprisonment or even local jail incarceration. *Alleyne* sought to remedy the unconstitutional raising of the floor of required punishment for the defendant, not to shatter a mandated ceiling that protects the defendant from imprisonment.

And, this Court should further make clear that all defendants may waive their Sixth Amendment right under *Locrkidge* prior to sentencing if they wish to be brought back into the binding statutory sentencing guidelines scheme that the Legislature intended. In *Blakely v Washington*, 542 US 296, 310; 124 S Ct 2531; 159 L Ed 2d 403 (2004), the U.S. Supreme Court explained that the Sixth Amendment violation was waivable:

But nothing prevents a defendant from waiving his *Apprendi* rights....If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial. We do not understand how *Apprendi* can possibly work to the detriment of those who are free, if they think its costs outweigh its benefits, to render it inapplicable.

While it does not appear that federal defendants can waive back into a binding guidelines system under *Booker*, decided post-*Blakely*, that does not mean that Michigan defendants should not be allowed to do so. In adopting the binding statutory sentencing guidelines system, our legislature was rejecting the advisory guidelines era that had existed in Michigan. Thus, this Court should allow defendants to waive their Sixth Amendment “right” to advisory sentencing

guidelines if they find that that is in their best interest. To do so would respect the evolution of sentencing law in Michigan.<sup>11</sup>

No Michigan defendant should be imprisoned for longer than the law called for before being eligible for parole or be forced to go to prison where he scored into an intermediate sanction cell, without a substantial and compelling reason, and be told that such is the vindication of his un-waivable Sixth Amendment rights.

**D. *Stare decisis* principles do not preclude this Court from clarifying or modifying *Lockridge*.**

Appellee agrees with Appellant that *stare decisis* principles are not implicated. This is because it is unclear whether this Court was fashioning a remedy of advisory guidelines only in those individual cases where there was actually a constitutional violation, e.g. judicial fact-finding that raised the sentencing guidelines range, or whether this Court found there was such a facial invalidity that it had to be addressed with a system wide remedy of advisory guidelines. Further, because this Court did not specifically consider MCL 8.5 in fashioning a remedy, the application of 8.5 is still an open question.

However, even if this Court finds that what the parties seek is actually a modification to the remedy that constitutes a partial overruling of *Lockridge*, *stare decisis* principles do not prevent this Court from modifying *Lockridge*. In recent years, this Court has observed that “*stare decisis* is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions determining the meaning of statutes.” *Robinson v City of Detroit*, 462

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<sup>11</sup> It was a long road in Michigan to get to binding sentencing guidelines to curb unjustified sentencing disparities: from the belief that an appellate court had no authority to review a sentence other than for whether it was cruel and unusual punishment, to the “shocks the conscience” test of *People v Coles*, 417 Mich 523, 339 NW2d 440 (1983), to the judicial (non-binding) sentencing guidelines coupled with the “proportionality” test of *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), and finally to the binding statutory sentencing guidelines, which this Court explained in *Babcock, supra* at 262-264, included the concept of proportionality.

Mich 439, 463; 613 NW2d 307, 320 (2000) (citing *Holder v Hall*, 512 US 874, 944; 114 S Ct 2581; 129 L Ed 2d 687 (1994)).

*Stare decisis* is a principle of policy rather than an inexorable command. *Robinson, supra* at 464. This Court needs to address the impact of MCL 8.5 and reliance interests will not work an undue hardship. The *Lockridge* opinion is still new, having been issued on July 29, 2015, and the courts below and the bar are still trying to figure out what it means; *stare decisis* principles do not prevent this Court from clarifying or modifying it. *Id.* at 464-466.

**E. This court must remand Mr. Steanhouse’s case to the Court of Appeals to review the length of his sentence.**

There is no preservation requirement under the statutory sentencing guidelines scheme to obtain appellate review of the length of a sentence that exceeds the guidelines range. MCL 769.34(7);<sup>12</sup> *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). This Court did not sever subsection (7) from MCL 769.34 in *Lockridge*.

In his brief on appeal filed before this Courts’ *Lockridge* decision, Mr. Steanhouse challenged his sentence on traditional departure challenge grounds. Issue VI (“The trial court failed to state objective and verifiable, substantial and compelling reasons for departing from the guidelines or for the extent of the departure, and defendant must be resentenced.”). 1b-5b. He also raised an *Alleyne* challenge (Issue VII). 5b-10b. He asserted that OV’s 3, 4, 5, and 6 were scored based on impermissible additional judicial-fact finding. (Appellant’s COA Brief on Appeal, p 49; 10b). The relief he requested was that those variable be scored at 0 resulting in a lower guidelines range and that he be resentenced. *Id.* He did not request advisory guidelines.

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<sup>12</sup> MCL 769.34(7) provides: “If the trial court imposes on a defendant a minimum sentence that is longer or more severe than the appropriate sentence range, as part of the court’s advice of the defendant’s rights concerning appeal, the court shall advise the defendant orally and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range.”

After *Lockridge*, Mr. Steanhouse supplemented his brief on appeal with an additional claim that the sentence was procedurally and substantively unreasonable, including a challenge to the length of the departure, Issue I (“The sentence imposed on defendant for assault with intent to murder is both procedurally and substantively unreasonable.”). 11b-19b. He requested that the court find the sentence was excessive and remand for resentencing. (Supplemental Brief, Request for Relief, 10; 19b). He did not request a *Crosby* remand. *Id.*

The Court of Appeals held that the reasonableness standard is the proportionality standard. *People v Steanhouse*, 313 Mich App 1, 46; 880 NW2d 297, 325–26 (2015), app gtd 499 Mich 934; 879 NW2d 252 (2016). However, it did not review the length of Mr. Steanhouse’s sentence under that standard. Instead it remanded for *Crosby* proceedings. *Id.* Mr. Steanhouse’s application for leave to appeal to this Court contains both challenges to his sentence length, the traditional upward departure challenge (Issue VI) and the post-*Lockridge* reasonableness challenge (Issue VII) remains pending. (Defendant’s Application, 20b-29b; Supreme Court order; 71a)

After establishing what that review of a departure sentence will consist of, a traditional departure review if this Court adopts Judge Shapiro’s proposal as Appellee advocates above, or a new post-*Lockridge* reasonableness review, whether that entails a review for proportionality (Issue III below) or something else, this Court should remand the case to the Court of Appeals to review Mr. Steanhouse’s sentence.

**II. It is improper to remand a case to the circuit court for consideration under part VI of this court’s opinion in *People v Lockridge* where the trial court exceeded the defendant’s guidelines range. However, the defendant is entitled to appellate review of the extent of the departure.**

A remand to the circuit court for consideration under Part VI of this Court’s opinion in *People v Lockridge* is a remedy for a procedural error, proper only when four conditions are met:

- (1) The defendant was sentenced on or before July 29, 2015;
- (2) The defendant’s sentence is not a departure from the correctly-scored<sup>13</sup> guidelines range;
- (3) The defendant’s *Lockridge/Alleyne* claim is unpreserved; and
- (4) The facts admitted by the defendant and/or found by the jury were *not* “sufficient to assess the minimum number of OV points necessary for the defendant’s score to fall in the cell of the sentencing grid under which he or she was sentenced.” *Lockridge*, 498 Mich 358, 394; 870 NW2d 502 (2015).

This Court did not grant Mr. Lockridge a *Crosby* remand because the above four conditions were not met. Each condition is discussed below.

First, the *Crosby* remand is a retrospective remedy. For a *Crosby* remand to be an appropriate remedy, the defendant must be sentenced on or before the date of this Court’s decision in *Lockridge*, July 29, 2015. Since *Lockridge*, as trial courts have used the guidelines in an advisory capacity, sentencing procedures no longer violate the defendant’s Sixth Amendment rights in the manner contemplated in *Alleyne*.

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<sup>13</sup> See Issue III below.

Second, an upward departure sentence is not eligible for a *Crosby* remand *Lockridge*, 498 Mich at 395 n 31 (“Thus, we conclude as a matter of law, a defendant receiving a sentence that is an upward departure cannot show prejudice....”).<sup>14</sup> Appellant’s Brief on Appeal, 31 n 52, 32; *People v Shank*, 313 Mich App 221, 230; 881 NW2d 135 (2015) (O’CONNELL, J., dissenting).

Third, only unpreserved *Lockridge/Alleyne* claims should be relegated to the limited remedy of a *Crosby* remand. If a defendant was one of the few who preserved a *Lockridge/Alleyne* claim, and his sentence was not an upward departure, resentencing is the appropriate remedy. This element runs counter to the outcome in *People v Stokes*, 312 Mich App 181; 877 NW2d 752 (2015).<sup>15</sup> *Stokes* was wrongly decided. In *Stokes*, the Court of Appeals held that when the *Lockridge/Alleyne* claim is preserved, the Court of Appeals must nevertheless employ the *Crosby* remand procedure as the remedy. The Court of Appeals stated that this Court relied on *Crosby* when “describing the appropriate procedure to be followed in cases, such as this one, involving pre-*Lockridge* sentencing errors.” *Id.* at 200. However, what the Court of Appeals failed to recognize is that this Court was addressing solely unpreserved errors, which it made clear in saying, “...we nevertheless must clarify how that standard is to be applied in the many cases that have been held in abeyance for this one. This analysis is particularly important because, given the recent origin of *Alleyne*, virtually all of those cases involve challenges that were not preserved in the trial court.” *Lockridge*, 498 Mich 358, 394; 870 NW2d 502 (2015) (emphasis added). Discussing the *Crosby* remand remedy in footnote 33 and the differing

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<sup>14</sup> See also, *People v Olano*, 507 US 725, 734; 113 S Ct 1770 (1993) (“When the defendant has made a timely objection to an error...a court of appeals normally engages in a specific analysis of the district court record- a so-called “harmless error” inquiry- to determine whether the error was prejudicial. Rule 52(b) [, that plain error affect substantial rights’] normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.”) Nevertheless, this Court should vacate the *Stokes* decision and clarify that the remedy discussed in *Lockridge* section VI applies only to unpreserved claims regarding departure sentences.

<sup>15</sup> Held in abeyance by this Court as of May 25, 2016.

approaches across federal circuit courts of appeal, this Court cited federal cases and one law review article that discussed and/or applied only the plain error test, not harmless. In its conclusion, this Court revisits the standard a defendant must meet “[t]o make a threshold showing of plain error.” *Lockridge* at 399. The dissent understood the majority to apply its holding solely to unpreserved errors as it focuses its reply to the majority on unpreserved *Alleyne* objections. *Lockridge* at 462, n 40 (MARKMAN, J, dissenting).

This Court gave no indication it intended the *Crosby* remand remedy to apply in the small number of cases where the *Alleyne* claim was preserved and the sentence was not a guidelines departure. The correct remedy for defendants who received a within-guidelines sentence and raise a preserved *Lockridge/Alleyne* claim, as the *Stokes* hinted at, *Stokes*, 312 Mich App 181, 199-200; 877 NW 2d 752 (2015), is found in *US v Lake*, 419 F3d 111 (2005). Where a *Lockridge/Alleyne* error is preserved, the Government must show that the sentencing error was harmless. If the Government cannot show “that the possibility [of a different sentence from the Judge] is so remote as to render the sentencing error harmless,” the remedy is remand for resentencing. *US v Lake*, 419 F3d 111, 114 (2005). This Court should vacate the *Stokes* decision and clarify that the limited remedy discussed in *Lockridge* section VI applies only to unpreserved claims.

Finally, for unpreserved claims to be eligible for the limited relief of a *Crosby* remand, the facts found by the judge must alter the cell of the sentencing grid in which the defendant was sentenced.<sup>16</sup> Appellant argues that judge-found facts that “no reasonable jury could find...were not proven beyond a reasonable doubt” are to be treated as if the defendant himself had attested

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<sup>16</sup> The Court of Appeals has held that where the error is preserved, the judicially-found facts need not change the guidelines range. *People v Terrell*, 312 Mich App 450; 879 NW2d 294 (2015). This is supported by *People v Lake*, 419 F3d at 114 which acknowledges that As argued above, *Stokes*, was wrongly decided, those defendants are entitled to resentencing.

to those facts. Appellant’s brief, 38 (citing *People v McIvery*, 806 F3d 645, 651 (CA 1, 2015)). That conclusion is unsupported by *Lockridge* which considers those facts “necessarily found by the jury” and those “formally admitted by the defendant to the court.” *P v Garnes*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d\_\_\_ (Docket No. 324035) (2015).

It is helpful, as this Court did in *Carines*, to display the possible scenarios addressed above, and their appropriate remedies, as a table:

	Preserved <i>Lockridge/Alleyne</i> claim	Unpreserved <i>Lockridge/Alleyne</i> claim
Upward Departure Sentence	No relief on <i>Alleyne/Lockridge</i> . FN 31 in <i>Lockridge</i> and <i>P v Olano</i> , 507 US 725, 734; 113 S Ct 1770 (1993)	No relief on <i>Alleyne/Lockridge</i> . FN 31 in <i>Lockridge</i>
Non-Departure Sentence	If P unable to prove harmlessness beyond a reasonable doubt, then remand for resentencing even if judicial fact-finding doesn’t change range, <i>Terrell</i> .	Remand for <i>Crosby</i> only if judicial fact-finding changes range. <i>Lockridge</i> .

However, in the Court of Appeals and in his application to this Court, Mr. Steanhouse also argued that his sentence is *substantively* unreasonable. COA Supplemental Brief, 11-19b; MSC Appl, Issue VII, 23b-29b. The Court of Appeals seemed to recognize that Mr. Steanhouse was entitled to a reasonableness review but conflated a procedural remedy<sup>17</sup> with a substantive review.<sup>18</sup>

Mr. Steanhouse is entitled to that substantive review. In *Lockridge*, this Court conducted its own, albeit brief, substantive review of Mr. Lockridge’s sentence, noting that the trial court “adequately justified the minimal (10-month) departure....” *Lockridge* at 456 n 2. Appellant

<sup>17</sup> “[T]he right at issue is a procedural one...Thus, a constitutional error occurs regardless of whether the error has a substantive effect on defendant’s sentence.” *Lockridge*, 492 Mich at 393 n 30.

<sup>18</sup> Relying on *Steanhouse*, *People v Shank*, 313 Mich App 221, 881 NW2d 135 (2015), suffers from the same legal error. As it is held in abeyance for this case, that Court of Appeals opinion, too, should be vacated and remanded to the Court of Appeals for substantive review of Mr. Shank’s sentence.

quotes this portion of *Lockridge* but seems to ignore that this Court *found* the departure justified. No court has so reviewed Mr. Steanhouse's sentence for substantive reasonableness. It is therefore incorrect for appellant to argue that the panel in *Steanhouse* "should have left the question of how the reasonableness inquiry is to be undertaken to another case with the issue properly preserved," because Mr. Steanhouse is entitled to such an inquiry. Appellant's brief, 34; *Lockridge*, 492 Mich at 365. There is no preservation requirement under the statutory sentencing guidelines scheme in order to obtain appellate review of a sentence that exceeds the sentencing guidelines range. MCL 769.34(7); *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008); see Issue I (e) above. The Court did not sever subsection 7 of MCL 769.34, and to do so would be against the Legislative intent that such sentences be reviewed on appeal.

If this Court keeps the top end of the guidelines range advisory rather than binding as Appellee argues in Issue I, then this Court should vacate the remedy portion of the *Steanhouse* opinion and remand to the Court of Appeals for substantive review as outlined in Issue III. If the top end is still binding, then this Court should remand to the Court of Appeals for a traditional departure review. *Smith, supra*.

**III. Even if Michigan’s guidelines scheme is rendered advisory, there is still a mixed standard of review for sentences falling outside of the guidelines range. The length of a sentence and extent of a departure is reviewed for an abuse of discretion under the *Milbourn* proportionality test to determine if it is reasonable.**

This Court has already correctly defined the parameters of appellate review of departure sentences, including the standards of review:

the existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion.

*People v Babcock*, 469 Mich 247, 264–65; 666 NW2d 231, 241 (2003)

While a trial court no longer need supply a “substantial and compelling reason to depart,” *People v Lockridge*, 498 Mich 358, 364–65; 870 NW2d 502, 506, cert den sub nom. *Michigan v Lockridge*, 136 S Ct 590; 193 L Ed 2d 487 (2015), “a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence.” *People v Lockridge*, 498 Mich at 365. It is still true that “the trial court's justification ‘must be sufficient to allow for effective appellate review.’ ... Similarly, if it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified. A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear.” *People v Smith*, 482 Mich 292, 304; 754 NW2d 284, 292 (2008). Therefore, scoring the guidelines and departing therefrom still requires supplying factors that are “objective and verifiable.”<sup>19</sup> See, *People v. Ratliff*, 480 Mich.

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<sup>19</sup> “To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed.” *People v Young*, 276 Mich App 446, 450; 740 NW2d 347, 350 (2007) (citing *People v. Havens*, 268 Mich

1108; 745 NW2d 762 (2008) (Where the trial court departed above the guidelines the defendant is entitled to resentencing because the trial court's assumption that the defendant who was on parole would be required to serve additional time on his prior sentence before beginning the new sentence was not objective and verifiable and was in fact erroneous); *See also*, 2/24/95 Legislative House Analysis Bill 4782, ("A rational and comprehensive system of sentencing guidelines would ensure that justice is served, bias is removed from decision-making, and limited prison and jail resources are being used to their best advantage—that is, to house the worst offenders."), attached. A defendant still has a constitutional right to be sentenced on the basis of accurate information, such that departures based on the use of untrue or subjective and unverifiable factors would violate Due Process. *People v Robinson*, 147 Mich App 509, 510; 382 NW2d 299 (1997).

Objective considerations in sentencing are also preserved, in part, in the non-severed portion of MCL 769.34(3):

A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a ~~substantial and compelling~~ reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:

- (a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.
- (b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

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App 15, 17, 706 N.W.2d 210 (2005)); *See also*, *People v Michael Anderson*, 298 Mich App 178, 185; 825 NW2d 678, 684 (2012) ("A trial court's reason for departure is objective and verifiable when it relies on the PSIR or testimony on the record.")

See Issue I, addressing MCR 8.5.

The length and extent of a departure is reviewed for an abuse of discretion. Appellant's brief on appeal, 37 (citing *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008)). This review is for reasonableness, as determined by *Milbourn* proportionality principles.

The Legislature intended to incorporate *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (2015) proportionality into the guidelines. House Bill 4782 of February 24, 1995 created a sentencing commission to develop guidelines that would become mandatory. The bill creating this commission was said to “complement[] the supreme court’s decision in People v Milbourn (461 NW 2d 1, 435 Mich 630), issued September 11, 1990.” *Id.* In her 2000 article for the State Bar of Michigan on Michigan’s Sentencing Guidelines, Sheila Robertson Deming summarized the bill as a directive to develop guidelines that would:

- 1) Provide for the protection of the public
- 2) Treat offenses against the person more severely than other offenses
- 3) Include guidelines for habitual offenders
- 4) Be “proportionate to the seriousness of the offense and the offender’s prior criminal record.”
- 5) “reduce sentencing disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences”
- 6) “specify the circumstances under which a term of imprisonment is proper and the circumstances under which intermediate sanctions are proper.”

Sheila Robertson Deming, “Michigan’s Sentencing Guidelines” June 2000 Vol 70 No 6; See Public Act 445 of 1994; House Legislative Analysis for Public Act 445 of 1994 (separately filed).

Knowing that proportionality was so closely tied to the creation of the legislative guidelines is illustrative in defining reasonableness review. *Lockridge* at 65.

As the *Steanhouse* court observed, “[t]he appropriate procedure for considering the reasonableness of a departure sentence is not set forth in *Lockridge*.” *Steanhouse*, 313 Mich App at 44. Although *Steanhouse* acknowledged that this Court relied on *Booker* in arriving at the “reasonableness” standard, *Steanhouse* did not review this Court’s specific citation. The portion of *Booker* relied in *Lockridge* explained that “reasonableness” review closely adheres to the legislative intent of the guidelines. At the federal level, this was explained as:

We cannot and do not claim that the use of a “reasonableness” standard will provide the uniformity that Congress originally sought to secure. Nor do we doubt that Congress wrote the language of appellate provisions to correspond with the mandatory system it intended to create. But, as by now should be clear, that mandatory system is no longer an open choice....Congress sought to “provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted disparities...[and] maintain sufficient flexibility to permit individualized sentences when warranted....The system remaining after excision, while lacking the mandatory features that Congress enacted, retains other features that help to further these objectives....The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing. The courts of appeals review sentencing decisions for unreasonableness. These features of the remaining system, **while not the system Congress enacted, nonetheless continue to move sentencing in Congress’ preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.**

*US v Booker*, 543 US 220, 263-265; 125 S Ct 738 (2005) (internal citations omitted) (emphasis added). Therefore, appellant’s observation that “the reasonableness review...be consistent with that mandated in *Booker*,” actually requires uniformity with what *our* Legislature “originally sought to secure.”<sup>20</sup> Appellant’s brief, 40.

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<sup>20</sup> In Justice Markman’s dissenting opinion in *Lockridge*, he voiced a concern that this Court failed to engage in the “lengthy severability analysis” done by the Supreme Court in *Booker*. However, it is clear after visiting the portion of *Booker* cited by this court that, in “importing the *Booker* remedy,” this Court intended to do so only to the extent that doing so achieves our own Legislature’s intentions. *Lockridge* at 462 n 40 (MARKMAN, J., dissenting).

In practice a “reasonableness” review will look different at the federal level than it would in Michigan, in large part due to the factors enumerated in 18 USC 3553(a), a federal statute that Michigan courts “are not expressly required to consider.” *Steanhouse* at 47.

As evidenced by our Legislature’s approval of *Milbourn*, it was not error for the *Steanhouse* panel to conclude that a *Milbourn* review is appropriate. *People v Smith*, 482 Mich 292, 305; 754 NW2d 284, 293 (2008) (“...the very purpose of the sentencing guidelines is to facilitate proportionate sentences.”); *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003) (“In determining whether a sufficient basis exists to justify a departure, the principle of proportionality- that is, whether the sentence is proportionate to the seriousness of the defendant’s conduct and to the defendant in light of his criminal record- defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed.”). We agree that such a review is “consistent with the standard of review employed by the federal courts after *Booker*.” *People v Steanhouse*, 313 Mich App at 46 n 19.

The *Steanhouse* panel incompletely explains substantive reasonableness review as:

Where there is a departure from the sentencing guidelines, an appellate court’s first inquiry should be whether the case involves circumstances that are not adequately embodied within the variables used to score the guidelines. A departure from the recommended range in the absence of factors not adequately reflected in the guidelines should alert the appellate court to the possibility that the trial court has violated the principle of proportionality and thus abused its sentencing discretion. Even where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality. [*Milbourn*. 435 Mich 630, 659–660, 461 N.W.2d 1. (1990)]

Factors previously considered by Michigan courts under the proportionality standard included, among others, (1) the seriousness of the offense, *People v. Houston*, 448 Mich. 312, 321, 532 N.W.2d 508 (1995); (2) factors that were inadequately considered by the guidelines, *id.* at 324, 532 N.W.2d 508; and (3) factors not considered by the guidelines, such as the relationship between the

victim and the aggressor, *id.* at 323, 532 N.W.2d 508; *Milbourn*, 435 Mich. at 660, 461 N.W.2d 1, the defendant's misconduct while in custody, *Houston*, 448 Mich. at 323, 532 N.W.2d 508, the defendant's expressions of remorse, *id.*, and the defendant's potential for rehabilitation, *id.*

*People v Steanhouse*, 313 Mich App 1, 45–46; 880 NW2d 297, 325–26 (2015), app gtd 499 Mich 934; 879 NW2d 252 (2016).

The *Steanhouse* panel failed to include those considerations from *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995) which are objective and verifiable and not inconsequential in a system where substantial and compelling reasons are no longer required. These considerations include, but are not limited to, “mitigating circumstances surrounding the offense...the defendant’s age and work history...cooperation with law enforcement.” *Fields* at 76-77.

Although the *Steanhouse* panel correctly chose a *Milbourn* review, the remedy imposed, a *Crosby* remand, was not justified by *Lockridge* for the reasons provided in Issue II of this brief.<sup>21</sup> The judge departed from the calculated guidelines range for both Mr. Steanhouse and Mr. Masroor. Both individuals are entitled to a substantive review of the sentence length under proportionality principles.

Finally, though it is not the subject of the prosecutor’s application for leave to appeal and this Court’s leave grant, it is worth noting that post-*Lockridge*, a defendant must be sentenced within a correctly-scored guidelines range. This Court did not sever MCL 769.34(10) and its analysis in *People v Kimble*, 470 Mich 305; 684 NW2d 669 (2004) and *People v Francisco*, 474 Mich 82; 7111 NW2d 44 (2006) remain viable and proper. *People v. Schrauben*, — Mich.App

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<sup>21</sup> Appellee acknowledges that in the wake of the September 11, 1990 *Milbourn* decision, the Michigan Supreme Court remanded a number of cases to the Court of Appeals for “resentencing in light of *Milbourn*” (*see, e.g., People v Clark*, 436 Mich 883 (1990)) and then later for “reconsideration in light of *Milbourn*.” *See, People v Martin*, 440 Mich 868 (1992). Where *Milbourn* was inextricably entwined with the legislative intent behind the guidelines, and does not itself present a change in law, a remand, which also represents an abdication of the Court of Appeals duty to substantively review departure sentences, is unnecessary and legally unsound.

—; — NW2d — (2016) (Docket No. 323170); slip op at 7, lv pending.<sup>22</sup> The standards of review for a scoring challenge were recently examined in *People v Hardy*, 494 Mich 430; 835 NW2d 340 (2013), and nothing *Lockridge* requires would support a change.<sup>23</sup> This is also buttressed by the constitutional right to be sentenced based on accurate information. *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006); *People v Robinson*, 147 Mich App 509, 510; 382 NW2d 299 (1997). Post-*Lockridge* a defendant may still raise a claim of scoring error and receive the relief of resentencing consistent with *Francisco*, *Kimble*, and MCL 769.34(10).

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<sup>22</sup> Appellee acknowledges that the Court of Appeals opinion in *Schrauben*, while correct with respect to MCL 769.34 (10), is arguably incorrect with respect to *Lockridge*'s impact on MCL 769.34(4) and the statutory requirement to sentence a defendant to an intermediate sanction.

<sup>23</sup> In the small number of cases that raise both a *Lockridge* claim and a scoring error claim, the scoring error claim must be addressed first: "When this Court is presented with an evidentiary *and* a constitutional challenge regarding the scoring of the guidelines, the evidentiary challenge must initially be entertained, because if it has merit and requires resentencing, the constitutional or *Lockridge* challenge becomes moot, as a defendant will receive the protections of *Lockridge* on resentencing." *People v Biddles*, \_\_\_ Mich App\_\_\_; \_\_\_ NW2d\_\_\_ (Docket No. 326410); *See also, People v Sours*, \_\_\_ Mich App\_\_\_; \_\_\_ NW2d\_\_\_ (Docket No. 326291) ("Because we conclude that...defendant is entitled to be resentenced, defendant's *Lockridge* issue is now moot, and we need not address it."). These cases are in conflict with *People v Blevins* \_\_\_ Mich App\_\_\_; \_\_\_ NW2d\_\_\_ (Docket No. 315774) which held that "in the wake of *Lockridge*, improperly calculated sentencing guidelines ranges are reviewed for harmlessness, which necessitates remanding for possible resentencing pursuant to *United States v Crosby*, 397 F3d 103 (CA 2, 2005), as described in *Lockridge*. *See People v Stokes*, 312 Mich App 181; 877 NW2d 752 (2015))." To the extent *Blevins* stands after this Court overturns *Stokes*, see *infra*, *Blevins* should be reversed. Appellee further recognizes that this Court remanded to the trial court in *People v Naccarrato*, 498 Mich 915 (2015), to determine "whether it would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015) upon correction of the error in scoring the offense variables." This was an error that would require correction upon issuance of this opinion.

**SUMMARY AND REQUEST FOR RELIEF**

Defendant-Appellee **ALEXANDER JEREMY STEANHOUSE** asks this Honorable Court to remand his case to the Court of Appeals to review his sentence under traditional departure review principles, see Issue I. If Mr. Steanhouse fails in that request, this case should be remanded to the Court of Appeals for a reasonableness review, see Issue III. Ultimately, Mr. Steanhouse seeks resentencing.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

/s/ Jacqueline J. McCann

BY:

\_\_\_\_\_  
**JACQUELINE J. McCANN (P58774)**  
**Assistant Defender**

**ADRIENNE N. YOUNG (P77803)**  
Assistant Defender

**CHARI K. GROVE (P25812)**  
Assistant Defender

Date: September 21, 2016

1978, being sections 333.1101 to 333.25211 of the Michigan Compiled Laws, acting within the scope of practice for which he or she is licensed.

(g) A social worker registered in this state under article 16 of the occupational code, Act No. 299 of the Public Acts of 1980, being sections 339.1601 to 339.1610 of the Michigan Compiled Laws, acting within the scope of practice for which he or she is registered.

(5) Expert testimony as to the age of the child used in a child sexually abusive material or a child sexually abusive activity is admissible as evidence in court and may be a legitimate basis for determining age, if age is not otherwise proven.

(6) If a commercial film or photographic print processor reports to the local prosecuting attorney his or her knowledge or observation, within the scope of his or her professional capacity or employment, of a film, photograph, movie film, videotape, negative, or slide depicting a person that the processor has reason to know or reason to believe is a child engaged in a listed sexual act; furnishes a copy of the film, photograph, movie film, videotape, negative, or slide to the prosecuting attorney; or keeps the film, photograph, movie film, videotape, negative, or slide according to the prosecuting attorney's instructions, both of the following shall apply:

(a) The identity of the processor shall be confidential, subject to disclosure only with his or her consent or by judicial process.

(b) If the processor acted in good faith, he or she shall be immune from civil liability that might otherwise be incurred by his or her actions. This immunity extends only to acts described in this subsection.

(7) This section applies uniformly throughout the state and all political subdivisions and municipalities in the state.

(8) A local municipality or political subdivision shall not enact ordinances, nor enforce existing ordinances, rules, or regulations governing child sexually abusive activity or child sexually abusive material as defined by this section.

**Effective date.**

Section 2. This amendatory act shall take effect April 1, 1995.

Approved January 7, 1995.

Filed with Secretary of State January 10, 1995.

**[No. 445]**

**(HB 4782)**

AN ACT to amend the title and section 12 of chapter IX and sections 3 and 14 of chapter XI of Act No. 175 of the Public Acts of 1927, entitled as amended "An act to revise, consolidate, and codify the laws relating to criminal procedure and to define the jurisdiction, powers, and duties of courts, judges, and other officers of the court under the provisions of this act; to provide laws relative to the rights of persons accused of criminal offenses and ordinance violations; to provide for the arrest of persons charged with or suspected of criminal offenses and ordinance violations; to provide for bail of persons arrested for or accused of criminal offenses and ordinance violations; to provide for the examination of persons accused of criminal offenses; to regulate the procedure relative to grand juries, indictments, informations, and proceedings before trial; to provide for trials of persons complained of or indicted for criminal offenses and ordinance violations and to

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provide for the procedure in those trials; to provide for judgments and sentences of persons convicted of criminal offenses and ordinance violations; to provide for procedure relating to new trials and appeals in criminal and ordinance violation cases; to provide a uniform system of probation throughout this state and the appointment of probation officers; to prescribe the powers, duties, and compensation of probation officers; to provide penalties for the violation of the duties of probation officers; to provide for procedure governing proceedings to prevent crime and proceedings for the discovery of crime; to provide for fees of officers, witnesses, and others in criminal and ordinance violation cases; to set forth miscellaneous provisions as to criminal procedure in certain cases; to provide penalties for the violation of certain provisions of this act; and to repeal all acts and parts of acts inconsistent with or contravening any of the provisions of this act," section 12 of chapter IX as amended by Act No. 90 of the Public Acts of 1988, section 3 of chapter XI as amended by Act No. 286 of the Public Acts of 1994, and section 14 of chapter XI as amended by Act No. 85 of the Public Acts of 1993, being sections 769.12, 771.3, and 771.14 of the Michigan Compiled Laws; and to add sections 31, 32, 33, and 34 to chapter IX.

*The People of the State of Michigan enact:*

**Title and sections amended and added; code of criminal procedure.**

Section 1. The title and section 12 of chapter IX and sections 3 and 14 of chapter XI of Act No. 175 of the Public Acts of 1927, section 12 of chapter IX as amended by Act No. 90 of the Public Acts of 1988, section 3 of chapter XI as amended by Act No. 286 of the Public Acts of 1994, and section 14 of chapter XI as amended by Act No. 85 of the Public Acts of 1993, being sections 769.12, 771.3, and 771.14 of the Michigan Compiled Laws, are amended and sections 31, 32, 33, and 34 are added to chapter IX to read as follows:

**TITLE**

An act to revise, consolidate, and codify the laws relating to criminal procedure and to define the jurisdiction, powers, and duties of courts, judges, and other officers of the court under the provisions of this act; to provide laws relative to the rights of persons accused of criminal offenses and ordinance violations; to provide for the arrest of persons charged with or suspected of criminal offenses and ordinance violations; to provide for bail of persons arrested for or accused of criminal offenses and ordinance violations; to provide for the examination of persons accused of criminal offenses; to regulate the procedure relative to grand juries, indictments, informations, and proceedings before trial; to provide for trials of persons complained of or indicted for criminal offenses and ordinance violations and to provide for the procedure in those trials; to provide for judgments and sentences of persons convicted of criminal offenses and ordinance violations; to establish a sentencing commission and to prescribe its powers and duties; to provide for procedure relating to new trials and appeals in criminal and ordinance violation cases; to provide a uniform system of probation throughout this state and the appointment of probation officers; to prescribe the powers, duties, and compensation of probation officers; to provide penalties for the violation of the duties of probation officers; to provide for procedure governing proceedings to prevent crime and proceedings for the discovery of crime; to provide for fees of officers, witnesses, and others in criminal and ordinance violation cases; to set forth miscellaneous provisions as to criminal procedure in certain cases; to provide penalties for the violation of certain provisions of this act; and to repeal

all acts and parts of acts inconsistent with or contravening any of the provisions of this act.

## CHAPTER IX

**769.12 Punishment for subsequent felony following conviction of 3 or more felonies; sentence for term of years considered indeterminate sentence; eligibility for parole; provisions not in derogation of consecutive sentence; "prisoner subject to disciplinary time" defined. [M.S.A. 28.1084]**

Sec. 12. (1) If a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies, whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows:

(a) If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life, the court, except as otherwise provided in this section or section 1 of chapter XI, may sentence the person upon conviction of the fourth or subsequent offense to imprisonment for life or for a lesser term.

(b) If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term that is less than 5 years, the court, except as otherwise provided in this section or section 1 of chapter XI, may sentence the person to imprisonment for a maximum term of not more than 15 years.

(c) If the subsequent felony is a major controlled substance offense, the person shall be punished as provided by part 74 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.7401 to 333.7461 of the Michigan Compiled Laws.

(2) If the court pursuant to this section imposes a sentence of imprisonment for any term of years, the court shall fix the length of both the minimum and maximum sentence within any specified limits in terms of years or a fraction of a year, and the sentence so imposed shall be considered an indeterminate sentence.

(3) An offender sentenced under this section or section 10 or 11 of this chapter for an offense other than a major controlled substance offense is not eligible for parole until expiration of the following:

(a) For a prisoner other than a prisoner subject to disciplinary time, the minimum term fixed by the sentencing judge at the time of sentence unless the sentencing judge or a successor gives written approval for parole at an earlier date authorized by law.

(b) For a prisoner subject to disciplinary time, the minimum term fixed by the sentencing judge plus any disciplinary time accumulated pursuant to section 34 of Act No. 118 of the Public Acts of 1893, being section 800.34 of the Michigan Compiled Laws.

(4) This section and sections 10 and 11 of this chapter are not in derogation of other provisions of law that permit or direct the imposition of a consecutive sentence for a subsequent felony.

(5) As used in this section, "prisoner subject to disciplinary time" means that term as defined in section 34 of Act No. 118 of the Public Acts of 1893, being section 800.34 of the Michigan Compiled Laws.

**769.31 Definitions. [M.S.A. 28.1097(3.1)]**

Sec. 31. As used in this section and sections 32 to 34 of this chapter:

(a) "Commission" means the sentencing commission created in section 32 of this chapter.

(b) "Departure" means a sentence imposed that is not within the appropriate minimum sentence range established under the sentencing guidelines developed pursuant to section 33 of this chapter.

(c) "Intermediate sanction" means probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed. Intermediate sanction includes, but is not limited to, 1 or more of the following:

(i) Inpatient or outpatient drug treatment.

(ii) Probation with any probation conditions required or authorized by law.

(iii) Residential probation.

(iv) Probation with jail.

(v) Probation with special alternative incarceration.

(vi) Mental health treatment.

(vii) Mental health or substance abuse counseling.

(viii) Jail.

(ix) Jail with work or school release.

(x) Jail, with or without authorization for day parole under Act No. 60 of the Public Acts of 1962, being sections 801.251 to 801.258 of the Michigan Compiled Laws.

(xi) Participation in a community corrections program.

(xii) Community service.

(xiii) Payment of a fine.

(xiv) House arrest.

(xv) Electronic monitoring.

(d) "Offender characteristics" means only the prior criminal record of an offender.

(e) "Offense characteristics" means the elements of the crime and the aggravating and mitigating factors relating to the offense that the commission determines are appropriate and consistent with the criteria described in section 33(1)(e) of this chapter. For purposes of this subdivision, an offense described in section 33b of Act No. 232 of the Public Acts of 1953, being section 791.233b of the Michigan Compiled Laws, that resulted in a conviction and that arose out of the same transaction as the offense for which the sentencing guidelines are being scored shall be considered as an aggravating factor.

(f) "Prior criminal record" means all of the following:

(i) Misdemeanor and felony convictions.

(ii) Probation and parole violations involving criminal activity.

(iii) Dispositions entered pursuant to section 18 of chapter XIIA of Act No. 288 of the Public Acts of 1939, being section 712A.18 of the Michigan Compiled Laws, for acts that would have been crimes if committed by an adult.

(iv) Assignment to youthful trainee status pursuant to sections 11 to 15 of chapter II.

(v) A conviction set aside pursuant to Act No. 213 of the Public Acts of 1965, being sections 780.621 to 780.624 of the Michigan Compiled Laws.

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(vi) Dispositions described in subparagraph (iii) that have been set aside under section 18e of chapter XIIA of Act No. 288 of the Public Acts of 1939, being section 712A.18e of the Michigan Compiled Laws, or expunged.

(g) "Total capacity of state correctional facilities" means, at any given time, the capacities of all permanent and temporary state correctional facilities in use and all state correctional facilities approved for construction pursuant to the joint capital outlay process as of the preceding June 1.

**769.32 Sentencing commission; creation in legislative council; qualifications, appointment, and terms of members; vacancy; reimbursement; conduct of business at public meetings; quorum; availability of writings to public. [M.S.A. 28.1097(3.2)]**

Sec. 32. (1) A sentencing commission is created in the legislative council. The legislative council shall provide the commission with suitable office space, staff, and necessary equipment. The commission shall consist of the following members:

(a) Four individuals who are members of the senate, consisting of 2 members from each caucus.

(b) Four individuals who are members of the house of representatives, consisting of 2 members from each caucus.

(c) Two individuals who are judges, 1 of whom is a circuit court judge and 1 of whom is a judge of the recorder's court of the city of Detroit.

(d) One individual who represents the prosecuting attorneys of this state.

(e) One individual who represents criminal defense attorneys.

(f) One individual who represents law enforcement.

(g) One individual who represents the department of corrections.

(h) One individual who represents advocates of alternatives to incarceration.

(i) One individual who represents crime victims.

(j) One individual who represents the department of management and budget.

(k) Two individuals who represent the general public.

(2) The leader of each caucus in the senate and the leader of each caucus in the house of representatives shall appoint the commission members described in subsection (1)(a) and (b) by March 15, 1995. By agreement and with the governor's concurrence, the leader of each caucus in the senate and the leader of each caucus in the house of representatives shall appoint the remaining commission members described in subsection (1)(c) to (k) by March 15, 1995. The governor shall designate 1 of the members representing the general public as commission chairperson.

(3) Except as otherwise provided in this subsection, the commission members shall be appointed for terms of 4 years. Of the members first appointed pursuant to subsection (1)(c) to (k), 4 members shall serve for 2 years, 4 members shall serve for 3 years, and 3 members shall serve for 4 years, as designated by the chairperson and alternate chairperson of the legislative council. The members of the commission appointed pursuant to subsection (1)(a) and (b) shall be appointed for terms of 2 years.

(4) A vacancy on the commission caused by the expiration of a term or a resignation or death shall be filled in the same manner as the original appointment. A member appointed to fill a vacancy caused by a resignation or death shall be appointed for the balance of the unexpired term.

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(5) A commission member shall not receive a salary for being a commission member, but shall be reimbursed for his or her reasonable, actual, and necessary expenses incurred in the performance of his or her duties as a commission member.

(6) The commission's business shall be conducted at public meetings held in compliance with the open meetings act, Act No. 267 of the Public Acts of 1976, being sections 15.261 to 15.275 of the Michigan Compiled Laws.

(7) A quorum consists of a majority of the members appointed under subsection (1). All commission business shall be conducted by not less than a quorum.

(8) A writing prepared, owned, used, in the possession of, or retained by the commission in the performance of an official function shall be made available to the public in compliance with the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws.

**769.33 Sentencing guidelines; duties of commission.**

**[M.S.A. 28.1097(3.3)]**

Sec. 33. (1) The commission shall do all of the following:

(a) Collect, prepare, analyze, and disseminate information regarding state and local sentencing practices for felonies and the use of prisons and jails. The state court administrator shall continue to collect data regarding sentencing practices and shall provide the data necessary to the commission.

(b) Conduct on-going research regarding the impact of the sentencing guidelines developed pursuant to this section.

(c) Collect, analyze, and compile data and make projections regarding the populations and capacities of state and local correctional facilities and the impact of the sentencing guidelines on those populations and capacities.

(d) In cooperation with the state court administrator, collect, analyze, and compile data regarding the effect of sentencing guidelines on the case load, docket flow, and case backlog of the trial and appellate courts of this state.

(e) Develop sentencing guidelines, including sentence ranges for the minimum sentence for each offense and intermediate sanctions as provided in subsection (3), and modifications to the guidelines as provided in subsection (5). The sentencing guidelines and any modifications to the guidelines shall accomplish all of the following:

(i) Provide for protection of the public.

(ii) An offense involving violence against a person shall be considered more severe than other offenses.

(iii) Be proportionate to the seriousness of the offense and the offender's prior criminal record.

(iv) Reduce sentencing disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences.

(v) Specify the circumstances under which a term of imprisonment is proper and the circumstances under which intermediate sanctions are proper.

(vi) Establish sentence ranges for imprisonment that are within the minimum and maximum sentences allowed by law for the offenses to which the ranges apply.

(vii) Establish separate sentence ranges for convictions under the habitual offender provisions in sections 10, 11, 12, and 13 of this chapter, which may include as an

aggravating factor, among other relevant considerations, that the accused has engaged in a pattern of proven or admitted criminal behavior.

(viii) Establish sentence ranges the commission considers appropriate.

(2) In developing recommended sentencing guidelines, the commission shall consider the likelihood that the capacity of state and local correctional facilities will be exceeded. The commission shall submit to the legislature a prison impact report relating to any sentencing guidelines submitted under this section. The report shall include the projected impact on total capacity of state correctional facilities.

(3) The sentencing guidelines shall include recommended intermediate sanctions for each case in which the upper limit of the recommended minimum sentence range is 18 months or less.

(4) The commission shall submit the recommended sentencing guidelines developed pursuant to this section to the secretary of the senate and the clerk of the house of representatives on or before July 15, 1996. If a proper request is submitted by a serving member of the legislature, the legislative service bureau shall prepare by September 15, 1996 a bill embodying the commission's recommended sentencing guidelines for introduction. If sentencing guidelines are not enacted into law by the legislature by December 31, 1996, the commission shall revise the guidelines and submit the revised sentencing guidelines to the secretary of the senate and the clerk of the house of representatives by March 31, 1997. If sentencing guidelines are not enacted into law by the legislature within 60 days after the commission submits the revised sentencing guidelines to the secretary of the senate and the clerk of the house of representatives, the commission shall revise the sentencing guidelines and submit the revised guidelines to the secretary of the senate and the clerk of the house of representatives within 90 days. The revised sentencing guidelines are subject to the requirements of subsections (1), (2), and (3) and to the same enactment process as the sentencing guidelines originally submitted pursuant to this subsection. Until the legislature enacts sentencing guidelines into law, the commission shall continue to revise and resubmit the sentencing guidelines to the legislature as provided in this subsection.

(5) The commission may recommend modifications to the sentencing guidelines enacted into law under subsection (4). Modifications of those sentencing guidelines shall not be recommended sooner than 2 years after the effective date of those sentencing guidelines, unless the modifications are based upon omissions, technical errors, changes in the law, or court decisions. Subsequent modifications shall not be recommended sooner than 2 years after previous modifications other than modifications based upon omissions, technical errors, changes in the law, or court decisions. Any modification proposed by the commission as permitted under this subsection is subject to the same enactment process as set forth in subsection (4).

#### **769.34 Sentencing guidelines; duties of court.** **[M.S.A. 28.1097(3.4)]**

Sec. 34. (1) The sentencing guidelines promulgated by order of the Michigan supreme court shall not apply to felonies committed on or after the effective date of the act by which the legislature enacts sentencing guidelines into law.

(2) Except for a departure from the appropriate minimum sentence range provided for under subsection (3), the minimum sentence imposed by a court of this state for a felony committed on or after the effective date of the act first enacting into law the sentencing guidelines developed pursuant to section 33 of this chapter shall be within the appropriate

sentence range under the sentencing guidelines in effect on the date the crime was committed.

(3) Subject to the following limitations, a court may depart from the appropriate sentence range established under the sentencing guidelines enacted into law pursuant to section 33 of this chapter if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure:

(a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.

(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

(4) Beginning on the effective date of the act first enacting into law the sentencing guidelines developed pursuant to section 33 of this chapter, if the upper limit of the appropriate minimum sentence for a defendant convicted for a felony committed on or after that date is 18 months or less under the sentencing guidelines, the court shall 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.

(5) If a crime has a mandatory determinate penalty or a mandatory penalty of life imprisonment, the court shall impose that penalty. This section does not apply to sentencing for that crime.

(6) As part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments. The court shall order payment of restitution as provided by law.

(7) If the trial court imposes on a defendant a minimum sentence that is longer or more severe than the appropriate sentence range, as part of the court's advice of the defendant's rights concerning appeal, the court shall advise the defendant orally and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range.

(8) All of the following shall be part of the record filed for an appeal of a sentence under this section:

(a) An entire record of the sentencing proceedings.

(b) The presentence investigation report. Any portion of the presentence investigation report exempt from disclosure by law shall not be a public record.

(c) Any other reports or documents the sentencing court used in imposing sentence.

(9) An appeal of a sentence under this section does not stay execution of the sentence.

(10) If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate

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guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

(11) If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing pursuant to this chapter.

(12) Time served on the sentence appealed under this section is considered time served on any sentence imposed after remand.

#### CHAPTER XI

### **771.3 Probation; conditions; costs as part of sentence of probation; compliance as condition of probation; revocation of probation; [M.S.A. 28.1133]**

Sec. 3. (1) The sentence of probation shall include all of the following conditions:

(a) The probationer shall not, during the term of his or her probation, violate any criminal law of this state, the United States, or another state or any ordinance of any municipality in this state or another state.

(b) The probationer shall not, during the term of his or her probation, leave the state without the consent of the court granting his or her application for probation.

(c) The probationer shall report to the probation officer, either in person or in writing, monthly or as often as the probation officer requires. This subdivision does not apply to a juvenile placed on probation and committed under section 1(3) or (4) of chapter IX to a state institution or agency described in the youth rehabilitation services act, Act No. 150 of the Public Acts of 1974, being sections 803.301 to 803.309 of the Michigan Compiled Laws.

(d) The probationer, if convicted of a felony, shall pay a probation supervision fee as prescribed in section 3c of this chapter.

(e) The probationer shall pay restitution to the victim of the defendant's course of conduct giving rise to the conviction or to the victim's estate as provided in chapter IX. An order for payment of restitution may be modified and shall be enforced as provided in chapter IX.

(f) The probationer shall pay an assessment ordered under section 5 of Act No. 196 of the Public Acts of 1989, being section 780.905 of the Michigan Compiled Laws.

(g) Beginning October 1, 1995, if the probationer is required to be registered pursuant to the sex offenders registration act, Act No. 295 of the Public Acts of 1994, being sections 28.721 to 28.732 of the Michigan Compiled Laws, the probationer shall comply with that act.

(2) As a condition of probation, the court may require the probationer to do 1 or more of the following:

(a) Be imprisoned in the county jail for not more than 12 months, at the time or intervals, which may be consecutive or nonconsecutive, within the probation as the court determines. However, the period of confinement shall not exceed the maximum period of imprisonment provided for the offense charged if the maximum period is less than 12 months. The court may permit day parole as authorized under Act No. 60 of the Public Acts of 1961, being sections 801.251 to 801.258 of the Michigan Compiled Laws. The court may permit a work or school release from jail. This subdivision does not apply to a

juvenile placed on probation and committed under section 1(3) or (4) of chapter IX to a state institution or agency described in Act No. 150 of the Public Acts of 1974.

(b) Pay immediately or within the period of his or her probation a fine imposed when placed on probation.

(c) Pay costs pursuant to subsection (4).

(d) Pay any assessment ordered by the court other than an assessment described in subsection (1)(f).

(e) Engage in community service.

(f) Agree to pay any restitution, assessment, fine, or cost imposed by the court by wage assignment.

(g) Participate in inpatient or outpatient drug treatment.

(h) Participate in mental health treatment.

(i) Participate in mental health or substance abuse counseling.

(j) Participate in a community corrections program.

(k) Be under house arrest.

(l) Be subject to electronic monitoring.

(m) Participate in a residential probation program.

(n) Satisfactorily complete a program of incarceration in a special alternative incarceration unit as provided in section 3b of this chapter.

(3) Subsection (2) may be applied to a person who is placed on probation for life pursuant to sections 1(4) and 2(3) of this chapter for the first 5 years of that probation.

(4) The court may impose other lawful conditions of probation as the circumstances of the case require or warrant, or as in its judgment are proper. If the court requires the probationer to pay costs, the costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer.

(5) If the court imposes costs as part of a sentence of probation, all of the following apply:

(a) The court shall not require a probationer to pay costs unless the probationer is or will be able to pay them during the term of probation. In determining the amount and method of payment of costs, the court shall take into account the financial resources of the probationer and the nature of the burden that payment of costs will impose, with due regard to his or her other obligations.

(b) A probationer who is required to pay costs and who is not in willful default of the payment of the costs, at any time, may petition the sentencing judge or his or her successor for a remission of the payment of any unpaid portion of those costs. If the court determines that payment of the amount due will impose a manifest hardship on the probationer or his or her immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.

(6) If a probationer is required to pay costs as part of a sentence of probation, the court may require payment to be made immediately or the court may provide for payment to be made within a specified period of time or in specified installments.

(7) If a probationer is ordered to pay costs as part of a sentence of probation, compliance with that order shall be a condition of probation. The court may revoke probation if the probationer fails to comply with the order and if the probationer has not

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made a good faith effort to comply with the order. In determining whether to revoke probation, the court shall consider the probationer's employment status, earning ability, and financial resources, the willfulness of the probationer's failure to pay, and any other special circumstances that may have a bearing on the probationer's ability to pay. The proceedings provided for in this subsection are in addition to those provided in section 4 of this chapter.

**771.14 Presentence investigation report; contents; information exempted from disclosure; review of report; challenge; findings; copies. [M.S.A. 28.1144]**

Sec. 14. (1) Before the court sentences a person charged with a felony or a person who is a licensee or registrant under article 15 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.16101 to 333.18838 of the Michigan Compiled Laws, as described in section 1(11) of chapter IX, and, if directed by the court, in any other case in which a person is charged with a misdemeanor within the jurisdiction of the court, the probation officer shall inquire into the antecedents, character, and circumstances of the person, and shall report in writing to the court.

(2) A presentence investigation report prepared pursuant to subsection (1) shall include all of the following:

(a) An evaluation of and a prognosis for the person's adjustment in the community based on factual information contained in the report.

(b) If requested by a victim, any written impact statement submitted by the victim pursuant to the crime victim's rights act, Act No. 87 of the Public Acts of 1985, being sections 780.751 to 780.834 of the Michigan Compiled Laws.

(c) A specific written recommendation for disposition based on the evaluation and other information as prescribed by the assistant director of the department of corrections in charge of probation.

(d) A statement prepared by the prosecuting attorney as to whether consecutive sentencing is required or authorized by law.

(e) For a person to be sentenced pursuant to the sentencing guidelines enacted into law pursuant to section 33 of chapter IX, all of the following:

(i) For each conviction entered, the sentence grid that contains the appropriate minimum sentence range.

(ii) The computation that determines the appropriate minimum sentence range for each conviction entered.

(iii) A specific statement as to the applicability of intermediate sanctions, as defined in section 31 of chapter IX.

(iv) The recommended sentence.

(f) If a person is to be sentenced for a misdemeanor involving the illegal delivery, possession, or use of alcohol or a controlled substance or a felony, a statement that the person is licensed or registered under article 15 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.16101 to 333.18838 of the Michigan Compiled Laws, if applicable.

(g) Diagnostic opinions that are available and not exempted from disclosure under subsection (3).

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(3) The court may exempt from disclosure in the presentence investigation report information or a diagnostic opinion that might seriously disrupt a program of rehabilitation or sources of information obtained on a promise of confidentiality. If a part of the presentence investigation report is not disclosed, the court shall state on the record the reasons for its action and inform the defendant and his or her attorney that information has not been disclosed. The action of the court in exempting information from disclosure is subject to appellate review. Information or a diagnostic opinion exempted from disclosure pursuant to this subsection shall be specifically noted in the presentence investigation report.

(4) The court shall permit the prosecutor, the defendant's attorney, and the defendant to review the presentence investigation report before sentencing.

(5) At the time of sentencing, either party may challenge, on the record, the accuracy or relevancy of any information contained in the presentence investigation report. The court may order an adjournment to permit the parties to prepare a challenge or a response to a challenge. If the court finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made a part of the record, the presentence investigation report shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections.

(6) On appeal, the defendant's attorney, or the defendant if proceeding pro se, shall be provided with a copy of the presentence investigation report and any attachments to the report with the exception of any information exempted from disclosure, on the record, by the court pursuant to subsection (3).

(7) If the person is committed to a state penal institution, a copy or amended copy of the presentence investigation report and, if a psychiatric examination of the person has been made for the court, a copy of the psychiatric report shall accompany the commitment papers. If the person is sentenced by fine or imprisonment or placed on probation or other disposition of his or her case is made by the court, a copy or amended copy of the presentence investigation report, including a psychiatric examination report made in the case, shall be filed with the department of corrections.

(8) A prisoner under the jurisdiction of the department of corrections shall be provided with a copy of any presentence investigation report in the department's possession about that prisoner, except for information exempted from disclosure pursuant to subsection (3), not less than 30 days before a parole interview is conducted pursuant to section 35 of Act No. 232 of the Public Acts of 1953, being section 791.235 of the Michigan Compiled Laws.

#### **Effective date of §§771.3 and 771.14.**

Section 2. Sections 3 and 14 of chapter XI of Act No. 175 of the Public Acts of 1927, as amended by this amendatory act, shall take effect February 1, 1995.

#### **Conditional effective date of 5769.34.**

Section 3. Section 34 of chapter IX of Act No. 175 of the Public Acts of 1927, as added by this amendatory act, shall take effect on the effective date of the act of the legislature first enacting into law the sentencing guidelines developed pursuant to section 33 of chapter IX of Act No. 175 of the Public Acts of 1927, as added by this amendatory act.

#### **Conditional effective date.**

Section 4. This amendatory act shall not take effect unless all of the following bills of the 87th Legislature are enacted into law:

- (a) Senate Bill No. 40.

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(b) Senate Bill No. 41.

(c) House Bill No. 5439.

This act is ordered to take immediate effect.

Approved January 7, 1995.

Filed with Secretary of State January 10, 1995.

*Compiler's note:* The bills referred to in Section 4 were enacted into law as follows:

Senate Bill No. 40 was filed with the Secretary of State June 27, 1994, and became P.A. 1994, No. 217, Eff. (pending).

Senate Bill No. 41 was filed with the Secretary of State June 27, 1994, and became P.A. 1994, No. 218, Eff. (pending).

House Bill No. 5439 was filed with the Secretary of State October 12, 1994, and became P.A. 1994, No. 322, Eff. (pending).

[No. 446]

(SB 320)

AN ACT to amend section 254 of Act No. 380 of the Public Acts of 1965, entitled "An act to organize the executive and administrative agencies of state government; to establish principal departments and department heads; to define the powers and duties of the principal departments and their governing agents; to allocate executive and administrative powers, duties, functions, and services among the principal departments; to provide for a method for the gradual implementation of the provisions of this act and for the transfer of existing funds and appropriations of the principal departments herein created and established," being section 16.354 of the Michigan Compiled Laws.

*The People of the State of Michigan enact:*

**Section amended; executive organization act of 1965.**

Section 1. Section 254 of Act No. 380 of the Public Acts of 1965, being section 16.354 of the Michigan Compiled Laws, is amended to read as follows:

**16.354 Commission of natural resources; creation.  
[M.S.A. 3.29(254)]**

Sec. 254. The commission of natural resources is created as provided in the natural resources and environmental protection act.

**Conditional effective date.**

Section 2. This amendatory act shall not take effect unless Senate Bill No. 257 of the 87th Legislature is enacted into law.

This act is ordered to take immediate effect.

Approved January 7, 1995.

Filed with Secretary of State January 10, 1995.

*Compiler's note:* Senate Bill No. 257, referred to in Section 2, was filed with the Secretary of State Jan. 18, 1995, and became P.A. 1994, No. 451, Eff. Mar. 30, 1995.



**House  
Legislative  
Analysis  
Section**

Olds Plaza Building, 10th Floor  
Lansing, Michigan 48909  
Phone: 517/373-6486

## SENTENCING GUIDELINES

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

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

### ***THE APPARENT PROBLEM:***

Criminals in Michigan are sentenced under an indeterminate sentencing structure, meaning, basically, that the sentencing judge sets minimum and maximum terms to be served. The maximum term is limited to the maximum set by the legislature in statute and the minimum term is limited to two-thirds of the maximum term. A prisoner becomes eligible for parole upon completing his or her minimum sentence, minus any reductions for good time or disciplinary credits (this however, would change under implementation of "truth in sentencing" legislation, which would require certain offenders to serve their full minimum terms; for a more complete explanation of that legislation, please see the House Legislative Analysis Section analysis of enrolled House Bill 5439 and enrolled Senate Bills 40 and 41, dated 2-24-95). Prior to parole, a prisoner may be placed in a community corrections facility; by law, however, assaultive offenders may not receive community placement prior to 180 days before the expiration of their minimum terms (this too, would change under truth in sentencing, which would require certain offenders to serve their minimum terms in secure confinement).

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

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

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

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

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

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

### ***THE CONTENT OF THE BILL:***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Intermediate sanctions. Beginning on the effective date of the bill's guidelines, if the upper limit of the guidelines' range for a defendant's minimum sentence was 18 months or less, the court would have to impose an intermediate sanction unless it stated on the record a substantial and compelling reason to sentence the defendant to the Department of Corrections. An "intermediate sanction" would be any sanction other than imprisonment in a state prison or reformatory that could lawfully be imposed. Intermediate sanctions would include probation, drug treatment, mental health counseling, jail (with or without day parole, work-release, or school-release), participation in a community corrections program, community service, restitution, fines, house arrest, electronic monitoring, and probation with special alternative incarceration ("boot camp").

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

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

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

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

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

#### **BACKGROUND INFORMATION:**

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

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

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

#### **FISCAL IMPLICATIONS:**

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

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

### **ARGUMENTS:**

#### **For:**

By acting to control sentencing practices, the legislature will be making a clear and rational declaration of public policy on the issues of crime and punishment, rather than passively accepting a working average emerging out of judicial practice. A rational and comprehensive system of sentencing guidelines would ensure that justice is served, bias is removed from decision-making, and limited prison and jail resources are used to their best advantage--that is, to house the worst offenders. The bill proposes to develop this system through the creation of a commission of experts, supported by a professional staff and operating with clear statutory objectives and under firm deadlines; similar structures have worked well in other states and in the development of federal sentencing guidelines. Ultimate authority will, however, remain with the legislature by virtue of the necessity of legislative approval of the commission's proposals.

#### **For:**

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

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

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

#### **Against:**

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

#### **Response:**

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

#### **Against:**

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

legislature cannot bind the actions of another.

**Response:**

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

**Rebuttal:**

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

**Against:**

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

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

**Against:**

The bill could unduly interfere with the discretion of the judicial branch to deal with individual circumstances. Although departures from sentencing guidelines would be allowed, they would be limited to cases that presented "substantial and compelling" reasons. Generally, to the extent that the bill limited judicial discretion, it would place sentencing power in the hands of prosecutors through the exercise of prosecutorial discretion over charging. Sentencing decisions are best left where they belong, in the hands of impartial judges.

**Response:**

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

**Against:**

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

**Against:**

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

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

***Response:***

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

***Against:***

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

***Against:***

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

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