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ATTORNEY GENERAL
STATE OF MICHIGAN

August 29, 2014

Jane Wilensky
Michigan Law Revision Commission, Executive Secretary
Michigan Law Revision Commission
P.O. Box 30036
Lansing, MI 48909-7536

Re: Invitation for Public Comment on CSG Sentencing Study Summary of
Legislative Recommendations and Draft Legislation

Dear Ms. Wilensky:

CSG has proposed numerous changes to Michigan's long-established sentencing scheme. CSG's proposals come at the expense of ensuring public safety, holding felons accountable and protecting crime victims. The recommended changes ignore realities about Michigan's inmate population and the cost of crime on both the victim and the community.

As Michigan's Chief Law Enforcement Officer, I am opposed to a number of CSG's recommended changes to Michigan's sentencing scheme. Michigan's current sentencing system works. Judges impose individualized sentences warranted by the individual defendant and his crime with victim input. CSG's cookie-cutter approach to sentencing cannot work as it does not ensure that felons receive sentences proportionate to their crimes and it ignores the reality of differing local community standards in our state. Most importantly this cookie-cutter approach reduces the significance of the crime victims' voices at sentencing and parole.

Michigan's legislative sentencing guidelines were years in the making and have been in effect since 1999. Judges, prosecutors and defense attorneys use them effectively every day. They provide a comprehensive framework for sentencing. They provide consistency and predictability for offenders and victims while allowing for judicial discretion and recognizing differing community standards.

CSG's current recommendations differ from those CSG discussed with stakeholders in numerous meetings held throughout Michigan. During these meetings, a variety of stakeholders expressed their satisfaction with Michigan's current guidelines and their many objections to CSG's recommendations. CSG's most recent

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recommendations do not reflect some of the stakeholders' objections and contain new components not vetted by these same stakeholders. CSG's draft legislation fails to hold felons accountable, fails to account for the costs of crime to victims and our communities, reduces necessary judicial discretion during sentencing, eliminates parole board discretion, creates prison management issues, and endangers public safety.

My principal objections to CSG's recommendations are based on concerns for public safety and for crime victims. In particular, I object to

- the requirement that a sentencing court impose a judicial maximum sentence between 1½ and 2 times the minimum sentence in addition to the statutory maximum sentence set by the legislature.
- the narrowing of the sentencing grids.
- providing a list of statutory "mitigating factors" (reasons for leniency) for judges to depart from presumptive jail or prison sentences.
- the requirement that the prosecution choose between using prior felony convictions to score a felon's criminal history under the sentencing guidelines and using them to ask the court to impose an increased sentence on a habitual (repeat) offender.
- the elimination of "straddle cells" that restrict the ability of judges to impose a prison sentence when the facts surrounding the felony's commission warrant one.

These proposals appear to be directed at reducing incarceration costs without due regard for public safety or the cost of crimes to victims and our communities.

Public Safety Concerns

1. A judicially-imposed maximum sentence

The Michigan Penal Code sets the maximum statutory penalty to be imposed upon a convicted felon at sentencing. MCL 750.1 *et. seq.* The minimum sentence a convicted felon is to serve is chosen by the sentencing judge from a sentencing range calculated by using sentencing guidelines the Legislature adopted in 1998. These guidelines are divided into two components: characteristics related to the offender's background (prior record variables) and his offense (offense variables). The prior record variables consider the offender's prior criminal history, his relationship to

the criminal justice system, and the number of felonies he was convicted of committing. MCL 777.50 through MCL 777.57. Also considered are as many as twenty offense variables related to the circumstances surrounding the crime or crimes. MCL 777.30 through MCL 777.49a. The sentencing court retains discretion to depart from this recommended minimum sentence range if there are substantial and compelling reasons to do so.

CSG recommends adding another layer to Michigan's sentencing scheme, and, in effect, replacing the statutory maximum. It would require the sentencing judge to impose a maximum sentence that is no more than 1½ to 2 times the minimum sentence. And it would require an inmate to be released on supervision after he serves his minimum sentence unless he has additional criminal charges or has engaged in "serious and persistent institutional misconduct," but, even then, the inmate must be released to supervision when he reaches his maximum initial term. This recommendation reflects CSG's misconception that most prisoners are being held well beyond their minimum parole eligibility dates. But more than 61% of inmates are being paroled at their earliest parole eligibility date. (Citizen's Alliance on Prisons and Public Spending 2009, p. 28.) And, more than 76% of inmates are paroled within one year of their earliest parole eligibility date. (*Id.*) Only the worst offenders, about 5%, remain incarcerated until their maximum sentence is served. (*Id.*) The highest percentage of these inmates have committed sex crimes or assaultive crimes. (*Id.*)

CSG's recommendation is also bad policy. Current Michigan sentencing practice protects citizens by giving the parole board discretion to parole an inmate who has completed his minimum sentence only after it is reasonably assured that the inmate is no longer a menace to society or to public safety. MCL 780.233(1)(a). CSG's proposal has no such limitation. Logic dictates that releasing imprisoned felons simply because they have hit their judicially-imposed maximum sentence date without any assurance that they will not reoffend will lead to more crime and more victims. Moreover, CSG's proposal expands existing community corrections programs to include parolees who may still pose a public safety risk.

Importantly, CSG's proposed mandatory judicial release date provides no incentive for an inmate to behave in prison. This creates a penological nightmare. Michigan's current system, on the other hand, encourages and rewards good behavior by inmates with parole when they demonstrate that they are reformed. We should not replace the current system with one that mandates release of misbehaving inmates just because they reach their judicially-imposed maximum sentence.

2. The narrowing of the sentencing grids

Michigan's current sentencing system divides felony offenses into crime groups, including crimes against a person and property and those involving controlled substances, public order, and public safety. Within each crime group, offenses are further categorized by their seriousness into crime classes. A felony's crime class is designated by the letters "A" through "H" and "M2" (second-degree murder). MCL 777.61 through MCL 777.69. "M2" and "A" represent the most serious felony offenses, and the remaining letter represent the remaining guidelines offenses in decreasing order of seriousness. Each class contains sentencing grids that correspond to the scores the offender receives for his prior record and the circumstances surrounding his offense. There are 258 potential sentencing cells. Currently, there is a range within each cell so that a judge can fashion a sentence fitted to the offender and his offense.

Statistics show that Michigan judges reserve prison sentences for the most dangerous, and often repeat, offenders. In 2011, just over 20% of Michigan's offenders were sentenced to prison, including probation violators. (Michigan Department of Corrections, 2011 Statistical Report, A1, p A-4.) The remainder were sentenced to jail, probation, a combination of jail and probation or some other sentence. (*Id.*) The majority of these prison sentences were for assaultive offenses. (*Id.*) As Michigan's 20% imprisonment rate is about one-half the national average, reducing the range within the sentencing guidelines' cells is unnecessary.

3. The provision of statutory mitigating factors

CSG proposes a list of 11 mitigating factors that a sentencing court may take into consideration to depart downward from an appropriate sentencing range. These mitigating factors were never vetted or discussed with the stakeholders in the hearing process, but were inserted in CSG's latest draft legislation without the input of prosecutors, law enforcement or judges. This recommendation, like others, is unnecessary as a judge may already take into account mitigating factors at sentencing and depart downward in an appropriate situation. MCL 777.34(3) provides that a court can depart downward based on substantial and compelling reasons. To be substantial and compelling, the reasons must be objective and verifiable. *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). Defense attorneys routinely and effectively argue for downward departures from the guidelines and courts grant them.

CSG's list contains subjective factors that Michigan has decided should have no place in departing downward from a recommended minimum sentence range. Moreover, one of CSG's factors suggests the sentencing court can conclude that the

crime victim is at fault for the crime committed against him or her. Blaming the victim is offensive, wrong, and fails to hold the felon responsible for his criminal conduct. Similarly, several of CSG's proposed factors ask the sentencing court to reconsider defenses the defendant's jury rejected when it convicted him of his crime. CSG's list also includes a litany of other factors that blame the felon's societal circumstances for his crime rather than holding him accountable for his choice to engage in felonious criminal activity. This is unacceptable.

Finally, CSG has provided no corresponding list of aggravating factors for a judge to consider in order to depart upward from a recommended sentencing range. This leaves one with the conclusion that CSG's proposals are heavily slanted in favor of the offender, not public safety or victims.

4. The elimination of "double-counting"

In an earlier version of its most recent proposals, CSG recommended the elimination of what it called "double-counting" of a felon's prior record. CSG's characterization reveals a fundamental misunderstanding of Michigan sentencing law and practice, which rationally holds an offender accountable for his entire criminal history.

Under Michigan law, a prosecutor who wishes to charge a defendant as a habitual (repeat) offender must give him timely notice. Once convicted of the underlying offense, the sentencing judge has discretion to impose graduated, higher *maximum* sentence, one not less than the maximum sentence for the underlying felony. MCL 769.10 through MCL 769.13. A second habitual offender is subject to a maximum sentence one and one-half of the maximum for his underlying felony. A third habitual offender is subject to a double penalty. And, an offender committing a fourth or subsequent penalty may be sentenced up to life in prison if his underlying felony is punishable by five or more years imprisonment.

In fashioning a *minimum* sentence, Michigan's sentencing guidelines require a sentencing judge to consider a convicted felon's entire prior record, including his prior felony convictions, his prior misdemeanor convictions, and his juvenile adjudications; however, it may do so only when these crimes are committed within a certain timeframe. MCL 777.50 through MCL 777.55. When a defendant's prior record includes high-severity felonies, more points are awarded, and the defendant's proposed minimum sentence increases. Compare MCL 777.51 with MCL 777.52.

This process does not double count the felon's prior record when it is used for two distinct purposes – setting a minimum sentence range and proposing a potential maximum sentence.

CSG now recommends that prosecutors be given the option of using a defendant's prior felony record to either score the defendant's sentencing guidelines or use them to give the defendant notice that he is being charged as a habitual (repeat) offender. These "options" unnecessarily tie prosecutors' hands and fail to hold repeat felony offenders accountable for the crimes they commit. Failing to allow prosecutors and courts to fully consider a defendant's criminal history in setting both a minimum and potential maximum sentence compromises public safety.

5. The elimination of "straddle cells"

Michigan's current sentencing guidelines have what are called "straddle cells." When a defendant's sentence guidelines' score places him within one of these cells, the sentencing court has the ability to sentence him to probation, with or without jail, or prison. MCL 769.34(3)(c)(i) and (ii). CSG proposes eliminating "straddle cells."

Yet again, CSG's recommendation unnecessarily limits judicial discretion. Not every felon who commits the same felony does so in the identical manner with identical impact on his victim or victims. Sentencing judges are in the best position to impose an individualized sentence on a felon and decide whether a prison or jail sentence with probation is a necessary and appropriate punishment.

In lieu of "straddle cells," CSG proposes the creation of zones with grids for prison, jail, and intermediate sanctions. However, a felon sentenced to an intermediate sanction without an initial jail term and probation or one sentenced to jail, receives a sanction term of up to one year in the county jail. In other words, he cannot receive a prison term if he violates his underlying sentence. And, CSG does not specify how counties will acquire the necessary resources to deal with the increased number of offenders sentenced to jail.

Crime Victim Concerns

Michigan has been a national leader in establishing and implementing rights for victims of crime. We had the second law in the country, and the first constitutional amendment, both of which are still models for other states. One of the main goals was for law enforcement, the courts, and the MDOC to have victim input in order to administer the most appropriate sanctions, and to most effectively make crime victims as whole as possible after suffering from a crime.

The CSG proposal negatively affects victims in three significant ways:

- a victim's right to input and to restitution is impaired by the "first time offender waiver" provision
- a victim's right to restitution is markedly diminished by shorter terms of supervision
- a victim's right to address the parole board is essentially moot

1. First-time offender status negatively affects victims

CSG recommends that some first-time felony offenders can be placed in "first-time offender status" which means that they will not have a felony conviction if they successfully complete a short jail or probation term. However, Michigan crime victims have the right to submit an impact statement to both the probation officer preparing a pre-sentence investigation report, and verbally to the judge at sentencing. By providing that the first-time offender waiver is based on a plea and avoiding sentencing, the victim's right to address the court is lost at all levels. Additionally, the victim's right to notice of an escape, release from jail, and release from probation is also nullified by the waiver. Given that felonious domestic violence offenders, stalkers, child abusers, gang members, and a host of other offenders qualify for this provision, the loss of victim notification is significant and puts victim safety at risk.

The proposed first-time offender waiver provision, by eliminating a conviction, also makes restitution problematic as a conviction or delayed sentence is required for an order of restitution. If an offender successfully completes the waiver, there is no conviction, no sentence, and likely no restitution, effectively nullifying a constitutional right of victims. As this provision is open to hundreds of felonies that impose losses on victims, including false pretenses, mortgage fraud, and elder abuse, it effectively turns back the clock on victim rights and enables the offender to benefit from the victim's loss.

2. A victim's right to restitution is markedly diminished by shorter terms of supervision

A restitution order is effective until satisfied in full. By law, any offender on supervised release is required to make payments on any restitution order that resulted from their course of conduct. Failure to make payments is a violation of release, and can lead to sanctions until payments are made. While an order can be enforced by the victim, real life experience is that once supervision is ended, payments also end. By significantly shortening supervision periods, the CSG proposal is likely to lead to reduced collection and satisfaction of outstanding restitution orders.

The proposal merely makes restitution collection a performance measurement; there is no requirement that restitution be paid, be paid timely, or be paid in a manner so as to be meaningful to the victim. While the collection of restitution is to be a "performance measure" for the MDOC and the courts, the mere collection of de minimis payments would be deemed a success, regardless of the amount of restitution ordered and paid. If, as commonly happens, a defendant pays a small amount every month on restitution orders totaling hundreds of thousands or even millions of dollars, the courts and the MDOC would be seen as successfully collecting payments, versus having restitution orders be satisfied. This subordination of victim constitutional rights to defendant release from supervision is another step backward for victim rights.

3. A victim's right to address the parole board is essentially moot

As discussed above, CSG proposes that "a prisoner shall be released" at his earliest minimum release date unless he has pending felony charges/detainer or a history of institutional misconduct. In other words, the victims' statements to the parole board, which it now considers, are excluded from its consideration in deciding public risk and whether to release a prisoner. Ignoring victim input markedly impacts victim safety.

To date, Michigan has been a national leader in advancing the interests of crime victims, working to accommodate their needs and input. CSG's recommendations diminish crime victim rights.

As Michigan's Chief Law Enforcement Officer, I would encourage the Michigan Law Revision Commission to closely examine CSG's recommendations in light of public safety concerns as well as the constitutional and statutory rights of victims.

Sincerely,



Bill Schuette
Attorney General