

Michigan Justice Reinvestment First Draft Concepts, Second Draft Revisions, and Jail Impacts

Introduction

In 2013, Michigan leaders requested that the Council of State Governments (CSG) Justice Center examine how Michigan could cost-effectively improve public safety and increase offender accountability, and to report findings to the Michigan Law Revision Commission (MLRC). After extensive data analysis and stakeholder engagement across the state, the CSG Justice Center issued a report in May. Throughout the summer, the CSG Justice Center worked with the MLRC to gather input from stakeholders regarding specific policy options that could address the challenges identified in the May report. In August the MLRC made a first draft of legislation publicly available and requested additional written feedback.

This first bill draft contained a number of new policies aimed at reforming Michigan's sentencing guidelines, how supervision resources are allocated, and the amount of time people serve in prison, as well as implementing new mechanisms to gather information on crime and restitution. The MLRC received a number of comments, some in great detail, on the first draft. This is a testament to the commitment of stakeholders in the state, and to the value of transparency in policy development. While some stakeholders supported aspects of the first draft's proposed sentencing changes, most expressed concern that changes to the state's sentencing system should be more extensively discussed and considered over time.

The original proposed changes to the state's sentencing guidelines may be best considered over a longer period of time, and under the auspices of a commission with that charge. The second draft, therefore, no longer contains proposals to change the sentencing grids, provide mitigating factors, allow a first time offender waiver, set supervision and sanction terms at sentencing, and have judges set maximum sentences.

The key policies that remain in the second draft reflect those challenges that Michigan can and should act to address in 2014, to ensure that the state's criminal justice system is better able to hold offenders accountable, reduce crime, and allocate scarce resources more precisely.

Key Issues

Certainty in Prison Time. The second draft would build on the existing "truth in sentencing" concept in Michigan by increasing the certainty of prison release upon serving the minimum sentence, unless there is evidence of defined, appropriate reasons to deny release at that time. In essence, the proposal is to codify current practices and bring structure to decisions at the back end of the system, comparable to the structure that Michigan has already imposed, through sentencing guidelines, on the front end.

Habitual Enhancement. The second draft, like the first, limits habitual enhancements to using only those prior convictions that have not been, or are not able to be, factored into the PRV score. A conforming amendment is added to section 771.21.

Probation Terms. The second draft does not suggest supervision terms by grid column, as proposed in the first draft. Targeting supervision remains a resource concern, and supervision terms are slightly more targeted in the second draft by allowing supervision terms up to 2 years, with longer probation terms allowed for those needing more time to fulfill restitution, or those

with a PRV score of 25 (column D) or higher-- a PRV score that will also allow sentencing the offender to the Swift and Sure Sanctions Probation program (SSSP).

Responses to Supervision Violations. The second draft significantly refines the first draft approach to sanctioning violations, by removing a reference to retroactivity, and removing the statutory delegation of authority to probation officers. Instead, judicial hearings will be required, unless they are waived, before confinement is imposed upon a probation violator. The current grant program will remain in place to support increased judicial workloads. The second draft also continues the theme of increasing the certainty of violation response by lowering the potential severity (and cost) of the response, both through SSSP and explicit sanctions for probation and parole that are based on the severity of the violation (see below for more information on jail impacts of SSSP and violation sanctions).

Community Corrections & Reentry. The second draft, like the first, is an effort to describe in law how the executive branch handles the tension between local control and quality assurance when the state pays for reentry and community corrections services. Additional suggestions have been provided but are not taken into account in the second draft; further development of this portion of the proposal will be forthcoming.

Monitoring and Evaluation. The second draft maintains but refines the focus on measuring victim restitution collection, a system performance measure that is all the more important with increasing local pressure to collect other costs from defendants. The victimization survey proposal is also more fully described, and the criminal justice policy commission is maintained, but reconciled with the emerging consensus on HB 5078.

Policy Impacts in General

The second draft maintains focus on cost-effectiveness and reducing recidivism to increase public safety. Impacts of the policy shifts should be anticipated in several areas: crime and recidivism reduction, population impacts (supervision, jail, and prison), and cost impacts.

The primary purpose and anticipated impact of the policies is on crime and recidivism reduction, with particular focus on the probation population of almost 50,000. Increased resources and attention to recidivism reduction programs, and more effective violation response sanctions should produce beneficial results in the same way that Michigan's focus on prisoner reentry has produced 20 percent lower arrest rates in that population.

The policies will affect the populations of people who receive supervision, jail and prison, and how long they remain in those sanctions. The first draft's presumptive grid zones were analyzed based on 2012 felony sentencing data and would have resulted in significantly fewer defendants initially sentenced to jail, and supervised instead. The second draft does not pursue presumptive grid zones so sentence dispositions should be unaffected by the remaining policies. Some notable shifts should be anticipated and to some degree can be modeled:

- The **probation supervision** population may be slightly reduced over time by policies that encourage shorter terms for lower risk offenders. A greater proportion of the probation population will be on more intensive supervision through robust implementation of SSSP.
- **Jail demand** will decrease through use of SSSP and shorter sanctions in response to violations of supervision. Demand will increase from shifting some violation sanctions to jails from prison, but overall demand can be kept at or below current levels by trading

certainty for severity of sanctions (see detail below).

- **Prison demand** will decrease somewhat from shorter sanctions in response to violations.
- **Prison growth** will be avoided by increasing the certainty of prison time. The current average minimum sentence is 46 months, and the average maximum is 175 months; those translate to 33,000 beds versus 127,000 beds. Stability between those extremes is essential and it can be achieved at or below the current size of the system.

Cost impacts are also anticipated, by virtue of population shifts and policy choices. In addition to proposed statutory amendments, efforts are underway to develop specific budgetary impacts of the changes in policy in concert with the impact modeling. The major impacts expected are:

- Savings to county jails and the state corrections system due to reduced lengths of stay for supervision violations.
- Cost avoidance due to increased certainty of prison time.
- Investment in SSSP implementation by corrections and the courts.
- Investment in community-based recidivism reduction programs.
- Potential investment, depending on jail impact, in the County Jail Reimbursement Program, underscoring the intention to hold counties harmless from changes to sentencing policy.

Jail Impact of SSSP and Violation Sanctions

SSSP. Michigan has about 48,000 people on probation, 10,000 of whom are at high risk of violating their conditions of supervision or committing new crimes. These proposed policies focus on the public safety implications of that reality, along with the jail impact.

Consider the use of 300 jail beds statewide with these choices: (1) send 600 violators to jail for 6 months each (which is about the time they spend now when they are revoked to jail) and ignore many other violations due to lack of jail space ; (2) sanction 36,000 violators for their first supervision violation for 3 days each; or (3) sanction 18,000 violators twice for 3 days each. These policies are pushing toward the latter scenarios, emphasizing the importance of a certain response to violation, which conforms to the known psychology of punishment and behavior change, and allows Michigan to hold more offenders accountable for supervision violations.

To model impact it is useful to examine the experience in Washington State, where a policy of swift and certain sanctions was implemented statewide. In their 2013 report to the legislature, the Washington Department of Corrections notes: “What DOC experienced is what was expected: that there would be a significant decrease in the use of confinement beds, an increase in the number of arrests, and a significant decrease in the number of hearing processes. From the technical assistance provided by BJA, DOC has learned that these trends are similar to those found by other locations that have implemented the swift and certain principles.”¹

The following assumptions for violation dynamics are more aggressive, to avoid underestimating jail impact, than the reality observed in Washington:

- 48,000 felony probationers on active supervision
- 75% will have one low-severity or “compliance” violation (followed by a non-custodial sanction)

¹ “Community Corrections Practices; 2013 Report to the Legislature As required by Second Engrossed Second Substitute Senate Bill 6204, 2012,” Washington DOC, December 1, 2013

- 40% (of the 48,000) will have a second compliance violation (followed by a 3-day jail sanction)
- 25% (of the 48,000) will have a third compliance violation (followed by a 3-day jail sanction)
- 15% (of the 48,000) will have a fourth compliance violation (followed by a 3-day jail sanction)
- 5% (of the 48,000) will have a fifth compliance violation (followed by a 3-day jail sanction)

Those assumptions yield 40,800 instances of imposing a 3-day jail sanction over the course of a year. Based on the seasonal flow of violations and responses spaced more or less evenly throughout the year, the number of jail beds needed to accommodate such sanctioning is equal to demand for approximately *335 jail beds* throughout the state on a given day. (Obviously, the geographic distribution of those beds would need to be correlated with where the probationers are being sanctioned. It is assumed that this kind of distribution can continue to be accommodated through contractual arrangements.) That usage can be subsidized by the County Jail Reimbursement Program, but may also be mitigated by the policy for sanctioning high severity offenders, discussed next.

Violation sanction limits. The policy would impose a limit on violation sanction confinement in response to serious or “risk” violations of supervision conditions. Three policy scenarios are presented in the table below: a sixty day sanction for both probation and parole (60-60), a forty-five day sanction for both probation and parole (45-45), and a thirty day sanction for both probation and parole (30-30).

**Impacts* of Sanction Limits on
Technical Parole and Probation Violators**

Scenario		All Sanctions Served in Jails						
		CY2015	CY2016	CY2017	CY2018	CY2019	CY2020	CY2021
60-60	Prison Bed Impact	-1,399	-2,061	-2,497	-2,536	-2,573	-2,618	-2,663
	Jail Bed Impact	790	190	460	589	602	612	623
45-45	Prison Bed Impact	-1,399	-2,061	-2,497	-2,536	-2,573	-2,618	-2,663
	Jail Bed Impact	641	-145	17	108	113	117	122
30-30	Prison Bed Impact	-1,399	-2,061	-2,497	-2,536	-2,573	-2,618	-2,663
	Jail Bed Impact	492	-481	-426	-373	-376	-378	-379

* *Impact totals reflect end of calendar year bed impacts and should not be added across years.*

Again note that this depiction assumes that all sanctions will be served in county jail. Regardless of what that sanction length looks like the impact to the prisons is the same across all scenarios. Consequently, the differential impacts associated with each scenario are seen in the impacts to the jails.

The significant decrease in jail impact from CY2015 to CY2016 in all three scenarios is due to an assumed 18-month phase-in for the probation impacts to account for the fact that most probation violations on ‘day one’ will be comprised of those sentenced to probation prior to the effective date of the policy. Within 18 months of the effective date, the pool of probation violators will be comprised almost exclusively of those sentenced to probation on or after the effective date of the policy.

Jail impacts increase from CY2016 to CY2017-18 due to the impact during that time of violators looping back into the system for subsequent sanctions.

Summary Tables Comparing 1st and 2nd Drafts

In order to update stakeholders in more detail on the second draft, the tables below reflect changes to individual policies, organized by the first draft summary of 8 different pieces of legislation.

1. Sentencing Rules

	First Draft Concept	Stakeholder Concerns	Changes Based on Stakeholder Concerns
	(New to second draft)	Local government concern that jail populations will be exacerbated by changes to sentencing structure and increased use of jails for supervision violation sanctions.	<i>Added amendments to the County Jail Reimbursement Program, underscoring the intention to (at a minimum) hold counties harmless from changes to sentencing policy including violation sanction responses.</i>
1.A	Require the courts and Michigan Department of Corrections (MDOC) to track and report victim restitution collection.	SCAO concern over the legislature dictating performance measures to the third branch. MDOC concern/misunderstanding about the scope of the obligation.	<i>Revised court amendment to voice legislative intent that the Supreme Court develop restitution performance measures for courts. MDOC amendment is clarified as applying only to those sentenced to prison.</i>
1.B	Require that sentences to prison include a judicially imposed minimum and a maximum for the initial term, with the maximum set in a range between 1.5 and 2 times the minimum.	PAAM/AG concern that statutory maximums would be nullified, and (along with SCAO) that tying maximum to the minimum increases vulnerability to a “right to a jury” challenge. (Note: see Appendix: The “Lockridge Issue”) SADO/CDAM/CAPPS/ACLU concern that 2X the minimum would still allow too long a “tail” of parole board discretion, suggestion that the maximum be 1.5X minimum or 5 years more than the minimum whichever is less.	<i>Removed the concept of setting a maximum at sentencing.</i>
1.C	Require a choice between using prior convictions for scoring criminal history under the guidelines, and using them for habitual offender sentencing.	PAAM concern over loss of discretion to utilize habitual enhancement. AG concern that enhancement only affects the maximum so “double counting” is not a problem. (Note: enhancement affects both the “min-max” and the statutory maximum.)	<i>Added an amendment to 777.21 to clarify the requirement that PRV scoring should not include offenses used as prior convictions for purposes of habitual enhancement.</i>

	First Draft Concept	Stakeholder Concerns	Changes Based on Stakeholder Concerns
		<p>SCAO concern that amendments are ambiguous without a corresponding amendment to PRV scoring statute (777.21). SADO/CDAM/CAPPS/ACLU concern regarding court decisions in <i>People v Trudeau</i> and <i>People v Lamb</i>, which interpreted 769.12(5)(a) to mean that prisoners otherwise eligible for good time could not have the credits they earned applied to their minimums unless the sentencing court approved; suggestion to eliminate subsection (5) to put habitual offenders in the same position as all other prisoners for purposes of receiving whatever good conduct credits are available.</p>	<p><i>This suggestion was not incorporated, pending further discussion and clarification of the implications.</i></p>
1.D	<p>Spell out sentencing rules under the distinct zones in the sentencing grids for sentencing to prison, jail, and intermediate sanctions.</p>	<p>Judicial/defense/prosecution/AG concern that presumptive zones allow for insufficient discretion to tailor sentences. Offenses of a very different nature are together on the same grid and the straddle cells accommodate for that reality in the guidelines.</p>	<p><i>Restored the straddle cell zones in all grids by not amending grids at all.</i></p>
1.E	<p>For sentences to jail and prison that include three terms of time, provide for the: “Initial term” of imprisonment in jail or prison, with a minimum and a maximum, “Supervision term” to begin after release, and</p>	<p>PAAM concern about the additional complexity required by this concept.</p> <p>AG concern that short supervision terms will not allow for restitution completion. SADO/CDAM/CAPPS/ACLU concern that judicial supervision terms could be very long if not capped and parole board has the better option of determining the appropriate length</p>	<p><i>Revisions related to three sentencing components are removed from the second draft. As noted above, revised to require maximum to be no more than the statutory maximum.</i></p> <p><i>Removed judicially-established supervisions terms for prison sentences so the parole board would continue to set supervision term.</i></p> <p><i>Revised intermediate sanction sentencing instructions to allow/encourage judges to set a</i></p>

	First Draft Concept	Stakeholder Concerns	Changes Based on Stakeholder Concerns
	<p>“Sanction term,” available to be used for sanctioning noncompliance while on supervision.</p>	<p>of parole supervision at the point of release.</p> <p>SADO/CDAM/CAPPS/ACLU concern that across-the-board sanction terms for everyone sentenced on a particular grid does not accomplish the goal of limiting exposure to long revocation for technical violations since minimums allowed within a grid vary so widely; suggestion for a combination of percentages with an absolute maximum.</p> <p>MDSVPTB concern with domestic violence/sexual assault/stalking offenders serving their full sanction terms.</p>	<p><i>post-jail supervision term equal to the jail sentence.</i></p> <p><i>Removed sanction term concept.</i></p>
1.F	<p>Provide for some sentences to intermediate sanctions without jail, but with a potential sanction term in jail.</p>	<p>MDSVPTB/PAAM/victim concern that “jail lockout cells” would make felony punishment lower than misdemeanor punishment; specific concerns with OUI and domestic violence offenses.</p>	<p><i>Grids are not amended in the second draft, and intermediate sanction sentencing instructions are restored to the status quo except for the language allowing/encouraging judge to set a supervision term to equal the jail term in jail-bound cases.</i></p>
1.G	<p>Provide the judiciary with a specific option to sentence some prison-bound defendants to jail.</p>	<p>Local government concern over population / cost impact to jails and counties.</p>	<p><i>Removed from the second draft.</i></p>
1.H	<p>Provide statutory “mitigating factors” (reasons for leniency) to enhance the exercise of judicial discretion.</p>	<p>SADO/CDAM/CAPPS/ACLU support for concept but with suggestions for refinement.</p> <p>SCAO concerns with unintended consequences and need for refinement of the concept.</p> <p>PAAM/AG/victim concern with entire</p>	<p><i>Removed the proposed “mitigating factors,” which were intended to promote discretion to depart but are less critical due to the restoration of straddle cells.</i></p>

	First Draft Concept	Stakeholder Concerns	Changes Based on Stakeholder Concerns
		concept and individual language of factors.	
1.I	Repeal the so-called “Tanner rule,” an unnecessary statute limiting judges to a prison sentence that is no more than two-thirds of the statutory maximum.	No comments received specific to this concept.	<i>Tanner rule restored in the second draft.</i>
1.J	Create a criminal justice policy commission to monitor sentencing and advise the Legislature on related policy, guided by a statement of policy on the purposes of sentencing.	SADO/CDAM/CAPPS/ACLU concern that HB 5078 language is already worked out.	<i>Revised by merging ideas with consensus previously reached on HB 5078.</i>

2. Sentencing Grids

	First Draft Concept	Stakeholder Concerns	Changes Based on Stakeholder Concerns
2.A	Allow the risk of recidivism to guide decisions about length of supervision, as embodied in the Prior Record Variable score under the guidelines.	<p>MDOC concern that COMPAS score is a better predictor than PRV score.</p> <p>AG concern that short supervision terms will not allow for restitution completion.</p>	<p><i>Removed the “supervision guide” concept embedded in the grids and based on Prior Record Variable score.</i></p> <p><i>Instead, the pre-sentence investigation (PSI) statute is amended by repealing the requirement that officers recommend a sentence, but adding a requirement that they propose the length and conditions of supervision, based on risk, and stating that risk assessment at sentencing may not be used to determine whether or how long to incarcerate.</i></p>
2.B	Create distinct zones in the sentencing grids for	Judicial/defense/prosecution/AG concern that presumptive zones allow for insufficient	<i>Restored straddle cell zones in all grids by not amending grids at all.</i>

	First Draft Concept	Stakeholder Concerns	Changes Based on Stakeholder Concerns
	sentencing to prison, jail, and intermediate sanctions, and eliminate “straddle cells,” so that most cases will have a predictable result.	discretion to tailor sentences. Offenses of a very different nature are together on the same grid and the straddle cells accommodate for that reality in the guidelines.	
2.C	<p>Revise the grid ranges in general according to the following rules:</p> <ul style="list-style-type: none"> ○ Narrow prison sentencing ranges and shape the ranges in yearly increments when possible, in a logical progression as severity increases. ○ Make all sentences that allow jail time to be for zero to 12 months to maximize discretion for that level of sentencing, and to end the fiction of up to 17 month jail sentences in the current grids. ○ Use numbers that are used in practice, such as 18 months (1.5 years) instead of 19, and 24 instead of 23. 	<p>SADO/CDAM/CAPPS/ACLU concern that M2 and A grids should also be revised in keeping with the rest of the first draft proposal.</p> <p>PAAM/MJA concern with reducing judicial discretion by narrowing ranges.</p> <p>AG concern with narrowing ranges because Michigan already has a low rate of sentencing to imprisonment. (Note: the changes to ranges would not affect the proportion of sentences to prison.)</p>	<i>Second draft does not amend grids.</i>

3. Probation

	First Draft Concept	Stakeholder Concerns	Changes Based on Stakeholder Concerns
3.A	Provide for Swift and Sure Sanctions Probation (SSSP) as a commonly used condition by setting out criteria for using SSSP with felony probationers.	SADO/CDAM/CAPPS/ACLU support in general but concern with allowing probation officer to both recommend placement and then have delegated authority to sanction.	<i>Revised by maintain the probation officer recommendation feature but then to require prompt judicial determinations of violations.</i>
3.B	Create a distinction between low and high severity supervision violations, with corresponding short and longer terms of confinement as sanctions.	PAAM concern with lack of increasing severity of sanction responses.	<i>Not revised as research indicates certainty of sanction is the key rather than ramping up the severity.</i>
3.C	Provide for a general-purpose, first-time offender diversion and discharge.	SADO/CDAM/CAPPS/ACLU support the concept and had suggestions for refinement. SCAO provided suggestions for refinement. PAAM/AG opposed to the concept.	<i>Removed the “first time offender waiver” provision from second draft, as insufficiently foreshadowed earlier in the process.</i>
3.D	Remove the requirement that a probation officer recommend a sentence in the pre-sentence investigation, and add a requirement that the officer inform the court whether the defendant fits the criteria for SSSP.	See concern and revision noted in 3.A.	

4. Violations

	First Draft Concept	Stakeholder Concerns	Changes Based on Stakeholder Concerns
4.A	Change the SSSP program from a grant-funded voluntary concept into a statewide feature of felony supervision.	No specific concerns noted.	<i>SSSP grant program reinstated and re-purposed to provide for increased judicial activity on violation dockets.</i>
4.B	Provide probation officers with authority to impose short sanctions for low severity violations of supervision, unless the authority is withheld by the judge.	MJA and SADO/CDAM/CAPPS/ACLU concern with due process issue around delegated authority.	<i>Revised to require prompt judicial determinations of violations.</i>
4.C	Require the MDOC to promulgate rules to guide probation officers when imposing sanctions.	MLRC concern with resorting to rulemaking.	<i>Revised to provide for guidance in statute rather than by rulemaking.</i>
4.D	Provide requirements for judges who handle probation violations outside of the SSSP model.	No specific concerns noted.	<i>Revised to reflect judicial determinations as the default option.</i>

5. Prison Release and Return

	First Draft Concept	Stakeholder Concerns	Changes Based on Stakeholder Concerns
5.A	Provide for delayed release from prison after the initial, minimum prison term is served for serious and persistent institutional misconduct.	AG concern with avoiding victim protest aspect of current parole process. SADO/CDAM/CAPPS/ACLU support for concept but concern with description of institutional misconduct; suggestion for tying	<i>Revised by integrating with the parole statutes to create greater certainty of prison length of stay for those with high or average probability of parole release.</i>

		the decision to parole guidelines.	
5.B	Provide for revocation of parole for high-severity violations with graduated use, in 90-day increments, of the sanction term.	SADO/CDAM/CAPPS/ACLU support for concept but concern with lack of distinction between low and high severity violations and responses.	<i>Revised to divide parole sanctions into high(“risk”) and low (“noncompliance”) severity violations, similar to proposal for probation violations. Noncompliance violations may lead to progressive community-based sanctions or up to three days jail confinement. First and second risk violations entail sanctions up to 30 days and the third risk violation allows for full revocation..</i>

6. Community Corrections and Reentry

	First Draft Concept	Stakeholder Concerns	Changes Based on Stakeholder Concerns
6.A	Focus programs and services to be funded on recidivism reduction; require MDOC to engage in a data-driven and collaborative process to determine the resources needed in each locality to deliver community corrections and reentry programs.	Community corrections officials and MACCAB concerns with loss of local control, potential loss of resources, and removal of emphasis on jail monitoring as a purpose for community corrections funding. MCCD provided Issue Brief and proposed Community Partnership Recidivism Reduction Act as a possible substitute for the first draft language and for the existing PA 511 in totality.	<i>Revisions pending joint discussion with community corrections representatives and MDOC to arrive at compromise that achieves goals of targeting resources to reduce recidivism, and bureaucratic efficiency, with need for community buy-in.</i>
6.B	Include reentry programs under the renewed umbrella of the community corrections funding and process.	Community corrections officials/MACCAB/MCCD concerns with loss of local control and merging perceived successful program (community corrections) with struggling program (reentry).	<i>(see above)</i>

7. Drug Offenses

	Policy Proposal	Stakeholder Concerns	Changes Based on Stakeholder Concerns
7.A	Bring second-offense, drug-crime enhancement into alignment with general second-offense enhancement.	No concerns noted.	(unchanged)
7.B	For drug-offense enhancement, require a choice between using prior convictions for scoring criminal history under the guidelines and using them for habitual-offender sentencing.	No concerns noted.	(unchanged)

8. Victimization Survey

	First Draft Concept	Stakeholder Concerns	Stakeholder Reactions
8.A	Require the Crime Victim Services Commission to conduct a victimization survey, which would report results to the governor, attorney general, Supreme Court, and Legislature.	SCAO concern that purpose and meaning of “victimization survey” is unclear and if it involves re-contacting known victims it could be a re-victimization.	<i>Revised to define purpose and what is meant by “victimization survey,” and stipulate that it does not mean re-contacting victims.</i>

