



# Prosecuting Attorneys Association of Michigan

116 W. Ottawa Street - Suite 200  
Lansing, Michigan 48913  
(517) 334-6060 - FAX: 334-6351

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August 28, 2014

To: Michigan Law Revision Commission

From: Victor A. Fitz  
President

Re: Request for Public Comment on CSG/Justice Reinvestment Proposals

Thank you for the opportunity to provide public comment on the CSG/Justice Reinvestment draft legislation on Sentencing, dated July 30, 2014 and distributed August 7. We understand that the drafts we reviewed were an attempt to get concepts on paper, and are expected to be changed as a result of public meetings conducted by CSG and feedback provided through the public comment process.

The Prosecuting Attorneys Association of Michigan has been an active participant in providing data and feedback to CSG as they have studied Michigan's sentencing system over the past 12 months. We agree with some of the policy recommendations proposed, such as enhancing victim restitution and enhancing "swift and sure" policies. Other recommendations we would oppose.

Our public comment, attached, is focused on the main issues impacting prosecution and the victims/citizens we serve. We expect that other groups will provide comment on such issues as local costs that we would agree with, but will not be a focus of our comments.

It is our understanding that the intention is to pass legislation in lame duck. This is a very aggressive timetable to achieve an overhaul of our sentencing system. In addition, we expect the Michigan Supreme Court to address *People v. Lockridge* in the summer, which reviews Michigan's sentencing guideline system in light of the U.S. Supreme Court's opinion in *Alleyne v United States*. In *Alleyne*, the U.S. Supreme Court held that a sentencing system that allows judicial fact-finding to establish certain minimum sentences is unconstitutional. We recommend that the MLRC and the legislature take the time needed to carefully review and discuss proposals, to consider the impact of the upcoming case on any guidelines changes, and to work with the partners in the criminal justice system who will need to implement any proposals.

We stand ready to work with the MLRC, the legislature, and CSG as you review legislation in the months ahead.

# Prosecuting Attorneys Association of Michigan

## Michigan Law Revision Commission CSG Sentencing Proposals July 30, 2014 draft

### BACKGROUND

In its report, CSG asserts there are means to improve the consistency and predictability within the Michigan sentencing system. Specifically, but not limited to, CSG asserts:

- People with similar criminal histories who are convicted of similar crimes receive significantly different sentences,
- After a person is sentenced, it remains unclear how much time they will actually serve.

The determination of what constitutes a *significantly different* sentence by CSG is reflected in their examples and replete in the proposed changes. For example, CSG cites the 2012 sentences for 486 individuals who scored out in the same G grid. Of those 486 individuals, 238 were sentenced to probation and no jail, 188 received probation with jail, 58 were sentenced to jail only, and two were sentenced to prison. Less than 1% of those sentenced in this grid were sent to prison, while the remainder received jail and/or probation. CSG further characterizes a common grid range of 10 to 23 months as reflecting a *wide range of sentence lengths*. These features or results are posited by CSG as reflecting significantly different sentences and unpredictability.

Prosecutors disagree with this fundamental characterization. According to the CSG report, only **14%** of all felons are sentenced to prison (CSG, 12/2013, slide 9). The other 86% are sentenced to jail, probation, or both. Over 82% of felons sentenced to prison are paroled on their earliest release date, or within 120% of their earliest release date (MDOC). These statistics show that the system is working to narrow prison exposure, and to have predictability for the defendant and victim.

When the Michigan Sentencing Commission was established in 1994, its goals included:

- 1) Increasing consistency in sentencing so that similarly situated offenders receive similar sentences,
- 2) Eliminating discrimination in sentencing outcomes, and
- 3) Providing a platform for forecasting the number of offenders entering prison each year.

After four years of discussion by the Commission and the Legislature, statutory guidelines were enacted which met the above goals by establishing minimum sentencing ranges, required structured guideline scoring forms, and eliminated sentencing deviations absent a substantial and compelling reason.

Prior to the imposition of the 1998 guidelines, judges had considerable ranges to consider. By way of example, for a defendant convicted of a 20 year felony, the minimum sentence could range anywhere from 0-13 years. Upon passage of the 1998 guidelines, this discretion was substantially narrowed, yet these narrow corridors still allowed a judge modest flexibility to

sentence a defendant based upon the case-specific facts of each episode, as well as the needs and expectations of the community.

The CSG report and proposals determine that the four year work of the Michigan Sentencing Commission did not go far enough in reducing judicial sentencing discretion. This is predicated on the example that a sentence range of 10 to 23 months is too permissive and locally elected judges should be further restricted in fashioning sentences based not only on guidelines factors, but other considerations taking into account both aggravating and mitigating circumstances, resources (e.g. jail bed space) and the individual needs of the community in meting out justice and insuring public safety.

PAAM submits that if 8 out of 10 defendants are released from prison after serving 120% or less of their minimum sentence, the guidelines as constituted, along with current parole practices mitigate against a claim of *unpredictability* as it relates to our most serious or repeat criminal offenders. Also if a sentencing range of 0-6, or 0-12 or 10-23 months provides *too much* discretion to local judges attempting to individualize each case and defendant, then the very purpose and effectiveness of judges in dispensing justice is greatly diminished.

Michigan's current sentencing scheme allows for consistency and predictability, while reserving at least some level of judicial discretion, permitting judges to impose individualized sentences taking into account the need for deterrence, rehabilitation and ultimately justice for victims. While PAAM agrees that the review by CSG has been informative and points to areas of improvement in sentencing practices, it does disagree with the certainty of its premises and proposals.

CSG has characterized the Michigan sentencing scheme as *complex*, citing its myriad of grids, variables and ranges. While PAAM submits that to the practitioner, the system is not complex, adopting the numerous proposals will significantly add layers of consideration for the sentencing court by requiring it to 1) set a maximum sentence, 2) set a supervision term, 3) set a sanction term, 4) consider specific statutory mitigation factors.

Finally, since what is proposed is a major change in a significant aspect of our criminal justice process, PAAM asks the Michigan Law Revision Commission and the Legislature, to reflect on the four years taken during the last major rewrite of our sentencing laws, and review these proposals with care and deliberation, rather than push forward in an attempt to achieve some *result* before the end of the year.

## **FOCUS**

### **Judicial discretion:**

PAAM believes that judges should have discretion to determine what outcome is best for a defendant and just for the victim. The advent of specialty courts show that different strategies work with different defendants, and we should not limit the tools judges have to address these needs. Additionally, local communities have different public safety issues and further restricting the sentencing options available to judges chosen to reflect those concerns is an added burden by the State. Judges (and prosecutors) must approach cases and the facts surrounding same, along with defendants on an individual basis. More restrictive sentencing proposals (jail lockout,

elimination of straddle cells) demonstrably change the system from particularized to the event, to “one-size-fits-all” justice.

Therefore, we recommend the following:

1. **Eliminate the proposal requiring courts to set a maximum sentence.** This greatly reduces the concern that our guidelines would be rendered as advisory in nature under the U.S. Supreme Court opinion in *Apprendi v New Jersey* (2000). It also maintains some ability of MDOC to address prisoner conduct through the parole process, which would be lost if maximum sentences were limited to 1 ½ to 2 times the minimum sentence. If there are concerns as to the appropriate maximum sentence of individual crimes (e.g. forgery – 14 years), those penalties can be addressed on an individual basis. As previously indicated, CSG’s report indicates that 82% of prison inmates are paroled within 120% or less than their minimum sentence. If the Legislature is truly concerned that this level of parole is insufficient as related to the remaining 18% of the inmates, establish a *presumptive* parole at some marker, such as 150% or 200%. This would provide an alternative method of instituting CSG’s 1 ½ to 2 times cap, without unnecessarily eliminating MDOC’s ability to restrain those violent or recalcitrant inmates from release to their communities. It is critical to note that public protection is an essential part of the current parole process. For many years, our guidelines structure has limited prison bed allocation to violent and career criminals. The sober reality is that they are incarcerated for serious offenses. The 18% who remain in prison beyond the 120% of the minimum mark are there for tangible, identifiable reasons which indicate a serious danger to public safety. However, if this CSG proposal is adopted, the parole board would be forced to release these dangerous prisoners into our community even where evidence-based risk assessments show an extremely high likelihood of re-offense and the prisoner has not yet served the statutory maximum.
2. **Retain straddle cells.** Straddle cells are a primary example of the flexibility needed for judges to individualize sentences. For example, assume two defendants are convicted of assault with intent to do great bodily harm (10 year maximum) under the same facts. The offense variables score out on the IV axis and the prior record variables score out on the C axis. The sentencing range is 10-23 months (as indicated in the discussion above). While the facts surrounding the offense are the same for both defendants, their prior convictions are different. Defendant A has two prior felonious assault convictions for which he is still on probation, while Defendant B has three prior misdemeanor theft convictions. They both will be scored under the current guidelines to the range of 10-23 months for a minimum sentence. This range would allow the judge to sentence either defendant to jail or prison. Would it be unreasonable for the judge to sentence Defendant A to an 18 month prison term and Defendant B to a 10 month jail term? Clearly there is a distinction relative to these two individuals based upon criminal history, which CSG states is the most significant predictor of recidivism.

The proposal eliminating straddle cells under the guise of increased consistency and predictability restricts a court’s ability to individualize sentences based on the distinctive facts, victim impact, attitude and criminal history of each offender. Further, it removes application of that discretion in perhaps the most significant felony sentencing circumstance: whether to send an offender to prison or retain him in the community. It was informative that during the various forums, on this specific proposal, prosecutors,

defense attorneys and judges agreed, elimination of straddle cells was ill-advised. From a practical standpoint, plea agreements which result in straddle cell types of convictions, enables both the prosecution and defense to advocate for opposing sentences (e.g. prison vs jail), and leaves the ultimate decision to the court. Elimination of this sentencing option would place greater discretion and authority in the hands of the prosecutor who determines what plea offer to make, and to a lesser extent, in the hands of a defendant as to whether to accept same. Additionally, it is reasonable to believe that without this option, plea agreements where one side seeks prison and the other jail, may not be reached.

**3. Remove statutorily mandated “mitigating factors” to allow a downward departure.**

This recommendation was not discussed as part of the public review, and causes significant workload to the criminal justice system. How will each mitigating factor be established? What about the factors that are subjective rather than objective? A judge can depart downward today, and many do. CSG suggests that the guidelines as currently constructed provide for *aggravating* factors, and therefore mitigating factors should naturally be included. PAAM disagrees. The offense variables were developed by the Michigan Sentencing Commission after much discussion, and reflect facts *specific to the criminal event*. What would then constitute either an aggravating or mitigating factor to justify a departure from the guidelines is open to the sentencing court to consider, which requires a substantial and compelling reason, both *objective and verifiable*. The proposed mitigating factors are vague and overbroad. CSG’s goal of consistency and predictability would be diminished in a sentencing’s courts attempt to apply them.

## **Sentencing:**

- 1. Eliminate the “jail only” and “probation only” cells.** The jail lockout of many felonies is concerning because it treats felonies less severely than misdemeanors. For several crimes, a district court judge with a less severe crime will have the option of jail, while a circuit judge with a more severe crime will not. For example, a defendant convicted the felony offense of assault with a dangerous weapon, absent a serious record, will likely be “locked out” of serving any jail time, while a district court judge would be free to sentence a defendant, again with little or no prior record, to up to 93 days in jail for a simple misdemeanor assault. Defendants charged with felonies may will seek to resolve their case in circuit court with a felony conviction to avoid a jail sentence from a reduced plea to a misdemeanor. This incongruity turns the concept for increased punishment for more serious crimes on its head.

In addition, rehabilitation is benefited by a probation term in addition to a jail sentence, allowing a defendant to undergo treatment, community service and payment of restitution of victims. Concurrently, probation needs the ability for short jail stays in order to have a sanction for an offender who violates. While prosecutors do not believe a change is needed in this area; the legislature could consider “jail presumptive and “probation presumptive” cells. Finally, this “jail lockout provision” will seriously erode victim and public confidence. A felony conviction is a serious matter which should not be trivialized by a jail “lockout” provision.

2. **Eliminate the “first time offender” diversion.** Under Michigan’s sentencing scheme, a first time offender is unlikely to go to prison unless the crime is so severe that the offender must be removed from society. Instead, first time offenders often receive probation, treatment, specialty courts, and other options that help them change behavior. In addition, Michigan has many diversion options already available, which include minor in possession (MCL 436.1703), Holmes Youthful Trainee (MCL 762.13), drug court (MCL 600.1070, domestic violence (MCL 769.4a), controlled substance diversions (MCL 333.7411), mental health courts (MCL 600.1209), veterans courts (MCL 600.1209), parental kidnapping (750.350a) and prosecution dismissal after a delay of sentence (MCL 771.1).
  
3. **Retain the use of both prior record variables to establish the cell the defendant falls into, and the use of the habitual offender statute to treat the most serious offender appropriately.** CSG and others involved in the criminal justice system recognize that evidence based studies show one’s prior criminal history is the single most important predictor of recidivism. In Michigan’s sentencing system, the prior record variable is used to establish the minimum time an offender has to serve, by determining the cell the offender is in. The habitual offender statute is an *optional* tool allowing for a wider range of discretion for a judge to set the sentence within a cell. It also gives the discretion for the judge to impose a longer maximum sentence to properly account for the criminal’s repeat criminality. Both are appropriate tools to look at the offender criminal history and to determine the appropriate sanction for this offense.

## **Recidivism**

PAAM supports the measures in the CSG proposal intended to reduce recidivism, specifically beefing up local “swift and sure” programs. We encourage Michigan to use the national model for swift and sure proposals, where sanctions increase for each violation.

## **IN SUMMARY:**

The Prosecuting Attorneys Association of Michigan believes that we should continually look to improve our criminal justice system to keep our citizens safe and provide justice for our victims. We appreciate the work of CSG, where they demonstrate that Michigan infrequently uses prison as a sanction for felons and look for ways to reduce the recidivism of criminals. The other proposals will require amendment and careful work to not create more costs to the criminal justice system, the state or the locals, with no gain to our system.