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State Court Administrator

MEMORANDUM

DATE: August 28, 2014

TO: Michigan Law Revision Commission (MLRC)
Attn: Jane Wilensky, MLRC Executive Secretary

FROM: John A. Hohman, Jr., State Court Administrator

RE: Council of State Governments Justice Center Sentencing Study and Draft Legislation

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In response to the MLRC's recent invitation for public review and comment concerning the Summary of Legislative Recommendations and Draft Legislation submitted by the Council of State Governments Justice Center (CSG), the State Court Administrative Office (SCAO) has identified the following areas of potential concern.[1]

1. Proposed MCL 769.1a(17) (Performance Measures Requirement) Will Financially and Logistically Burden Trial Courts

Proposed MCL 769.1a(17) would require SCAO to "ensure that court case management systems allow for the measurement of restitution assessment and collection as a court performance measure for district and circuit courts."

Because Michigan courts utilize a variety of case management systems that are chosen (and funded) by local funding units, SCAO cannot require a case management system to do something. SCAO can require certain reporting of trial courts and we would be pleased to work with the Legislature on a workable method of meeting the intent of this language.

Additionally, as a general comment, performance measures for trial courts are developed by SCAO, in conjunction with the Trial Court Performance Measures Committee, and are approved

[1] This memo should not be construed as rendering opinion on matters of legislative policy; nor should it be considered an authoritative statement of the Michigan Supreme Court as to matters of substantive constitutional or statutory law. Rather, this memo is intended to raise for discussion certain potential technical and legal issues for your consideration.

and implemented by the Michigan Supreme Court.[2]

2. Proposed MCL 769.8(1) (Judicially-Determined Maximum Sentence Requirement) Has Potential Constitutional Implications

In stark contrast to Michigan's existing indeterminate sentencing scheme, proposed MCL 769.8(1) requires the sentencing court to "fix a definite minimum and maximum term of imprisonment[.]" Furthermore, under proposed MCL 791.266a(b), with certain limited exceptions, "[a] prisoner shall be released to supervision after having served the minimum sentence of the initial prison term imposed[.]" Presumably, this provision is intended to reduce or eliminate the discretion of the Parole Board in most felony cases.[3] Caution and further examination of the proposed amendments may be warranted in order to ensure that there are no unintended constitutional implications. See *Alleyne v United States*, 570 US ___ (2013); *Cunningham v California*, 549 US 270 (2007); *United States v Booker*, 543 US 220 (2005); *Blakely v Washington*, 542 US 296 (2004); *Apprendi v New Jersey*, 530 US 466 (2000); see also *People v Herron*, 303 Mich App 392, 401 (2013) (noting that "[i]n *People v Drohan*, 475 Mich 140, 164 (2006), our Supreme Court held that *Apprendi* and its progeny do not affect Michigan's sentencing guidelines, *primarily because the maximum sentence imposed on being convicted of a crime in Michigan . . . is the statutory maximum*[]") (emphasis supplied).

3. Proposed Probation/Supervision and Sanction Features Lack Clarity and May Overly Delegate Confinement Authority

MCL 771.4, governing probation violations and revocation proceedings, currently provides that "[i]f the probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made."[4] In other words, upon revocation of probation for a violation or attempted violation of a probation condition, the court may sentence the defendant *for the original offense* under the sentencing guidelines. The CSG proposal contemplates removing this portion of MCL 771.4. Instead, proposed MCL 771.4(b) would permit a "sanction" of up to three days' imprisonment for a "low severity violation," and proposed MCL 771.4(c)(1) would allow the court to order a probationer who commits a "high severity violation" to "serve up to 60 days of the remaining sanction term[,]" after which the probationer is to "be returned to supervision and the time served [is to] be credited to reduce the total amount of the sanction term remaining."

The proposed revisions to MCL 771.4 may engender confusion by continuing to use the term "revocation." "Revocation" of probation is still *contemplated* under the proposal; for example, proposed MCL 771.4(a) permits (but does not require) a "hearing on revocation," and proposed MCL 771.4(c) requires the court to find that "revocation is appropriate" before imposing a

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[2] For information concerning the Michigan Supreme Court's commitment to court performance measurement, see Michigan Supreme Court Administrative Order No. 2012-5 (Implementation of Trial Court Performance Measures) and the following link: http://courts.mi.gov/administration/admin/op/performance/pages/default.aspx.

[3] See number 4, *infra*, for additional comments regarding the proposal as it affects the parole process.

[4] See also *People v Hendrick*, 472 Mich 555, 557, 565 (2005) (holding that the sentencing guidelines apply to sentences imposed after probation revocation).

sanction for a high-severity probation violation. However, revocation seems to be of continuing relevance *only* in the context of a "high severity violation," and it is apparent—in light of the requirement in proposed MCL 771.4(c)(1) that a probation violator "be returned to supervision" upon completion of a term of imprisonment, as well as the proposed elimination of the provision allowing the imposition of a sentence for the original offense—that probation is not "revoked" in the traditional sense. In order to reduce the confusion that is almost certain to result, it may be more appropriate to eliminate references to "revocation" and to instead use the term "sanction" (as is done in the context of a "low severity violation," see proposed MCL 771.4(b), and which would more accurately describe the maximum 60-day term of imprisonment that is permitted for a "high severity violation").

Furthermore, the proposed revisions to MCL 771.4 are problematic to the extent that they apply to non-felony offenses and to offenses occurring *prior* to enactment of the proposed legislation. The proposed amendments appear to apply to *all* probationers (including misdemeanants), not only those sentenced under the felony sentencing guidelines. It is unclear whether this was intended and, if so, whether it was intended that the sanction provisions for "low severity" and "high severity" violations apply equally to misdemeanants. Perhaps more significantly, proposed MCL 771.4(c)(2) would apply to a "high severity violation" committed by a probationer who was sentenced for an offense committed *before* a specified date (presumably, the effective date of the legislation), and would allow the court to "order the probationer to imprisonment in the county jail for up to one year, or the remainder of the sentence, whichever is less." This limitation on the sentencing court's ability to address a probation violation committed by an offender who was sentenced to probation *prior* to enactment of the CSG legislation is particularly troubling because it alters the parameters of a *preexisting* sentence.

Additionally, there is no explanation in the proposal concerning how an imposed "supervision term" is affected if incarceration is imposed as a violation sanction. For example, it is unclear whether the supervision term is "tolled" during a sanction term or whether the supervision term continues to "run" during the time that the probation violator is incarcerated.

Finally, under the related proposed revisions to the Probation Swift and Sure Sanctions Act (see proposed MCL 771A.2 *et seq*.), unless the court states otherwise in the order of probation, the probation officer has the authority "to have probationers arrested and to impose a response or sanction[]" upon a "low severity" violator, including incarceration for three days for a repeat low-severity violation and extension of the period of supervision. Further consideration should be given to whether such delegation-by-default of judicial authority is advisable and constitutionally permissible. In addition, jails will not accept inmates without a court order, except immediately following an arrest.[5]

4. Proposed Parole/Supervision and Sanction Features May Be Incomplete and/or Lack Clarity

Like the proposed amendments affecting probation and probation violations (above), the

[5] Additionally, proposed MCL 771A.4 provides certain requirements that are stated to be applicable only to cases in which delegation is withheld. These provisions are general notification and hearing requirements that should presumably be applicable in *all* cases that are subject to the Probation Swift and Sure Sanctions Act.

proposed amendments affecting the existing parole structure may benefit from clarification.

Proposed MCL 791.266a(b) provides that a prisoner sentenced for an offense committed on or after a certain date (presumably the effective date of the legislation adopting the CSG proposal) "shall be released to supervision after having served the minimum sentence of the initial prison term imposed, unless the prisoner has pending felony charges or detainers, or a history of serious and persistent institutional misconduct as determined by the hearings division." This provision appears to very significantly alter the existing parole process, as otherwise governed by MCL 791.231 *et seq*.; however, no revisions to the provisions governing parole have been proposed (with the exception of the parole revocation statute, MCL 791.240a), likely resulting in numerous statutory conflicts or ambiguities.

Additionally, proposed MCL 791.266a would be located in Chapter IV of the Corrections Code, which governs the Bureau of Penal Institutions. The proposed revisions affecting release and parole supervision would perhaps be more appropriately placed within Chapter III of the Corrections Code (governing parole) or within the Code of Criminal Procedure.

The proposal also appears to draw an unexplained distinction between prisoners "released to supervision" and prisoners "released to parole." See proposed MCL 791.266a(d); proposed MCL 791.240a(1); but see proposed MCL 769.31(g) (defining *supervision term* as including "parole supervision following an initial prison term[]").

Under proposed MCL 791.240a(1)(b), "a prisoner revoked under [MCL 791.240a] . . . shall be recommitted to serve up to 90 days of the sanction term remaining." Clarification may be beneficial regarding the effect of imposition of a sanction on the supervision term (i.e., whether the imposed supervision term is "tolled") and regarding the procedure to be followed upon expiration of the period of incarceration (for example, a requirement that the offender be returned to supervision status at the expiration of the incarceration sanction, as is provided for in proposed MCL 791.240a(1)(a)). Additionally, a 90-day imprisonment sanction is apparently the only available sanction for repeated parole violations; it may be worth considering whether the availability of graduated penalties may be preferable.

Proposed MCL 791.240a(1)(a) provides that a prisoner sentenced for an offense committed before a certain date (presumably the effective date of the legislation adopting the CSG proposal) "that is not an offense under grid M2, A, B, or C under the guidelines . . . shall be required to serve up to 90 days of the *remaining sentence* . . . [and] shall then be returned to supervision and the time served[] . . . shall be credited to reduce the total amount of the *remaining sentence* remaining [sic]" (emphasis supplied). The term "remaining sentence" is undefined and unclear in this context. Additionally, it may be advisable to provide graduated penalties for repeat parole violations and to provide further guidance regarding parolees who were sentenced for offenses under grids M2, A, B, or C.

5. Proposed Habitual Offender Revisions May Be Unintentionally Restrictive

The CSG's Summary of Legislative Recommendations indicates that the intended result of

proposed amendments concerning habitual-offender sentencing is to "[r]equire a choice between using prior convictions for scoring criminal history under the guidelines, and using them for habitual offender sentencing." To this end, it is proposed that MCL 769.10—MCL 769.12 (the general habitual-offender statutes) and MCL 333.7413 (governing sentences for certain repeat controlled-substance offenses) be amended to provide that a prior conviction may not be used to enhance a sentence under these provisions if it is used to score the prior record variables (PRVs).

However, the statutes governing the scoring of the PRVs do not grant the court discretion to eliminate from consideration any prior convictions that apply under those variables. MCL 777.21(1)(b) directs the court to "[s]core all prior record variables for the offender as provided in part 5 of this chapter[]" and to "[t]otal those points to determine the offender's prior record variable level." Additionally, the prefatory language of each PRV (see, e.g., MCL 777.51) *requires* the sentencing court to score these variables "by determining which of the [statements concerning the defendant's prior record] apply and by assigning the number of points attributable to the one that has the highest number of points." Therefore, when read in conjunction with MCL 777.21(1)(b) and the PRVs, the proposed amendments to MCL 769.10—MCL 769.12 and MCL 333.7413 do not clearly provide a "choice" as intended, but instead appear to simply *prohibit*, for purposes of determining habitual-offender status, the use of all prior convictions that apply for purposes of scoring the PRVs. This could be remedied by amending MCL 777.21 and/or MCL 777.50 to provide that the sentencing court may omit offenses from consideration when scoring the PRVs if those offenses are being used to determine habitual-offender or repeat-drug-offender status.

6. Proposed Downward Departure Provision Lacks Clarity

MCL 769.34(3), as it currently exists and under the CSG proposal, provides that "[a] court may depart from the appropriate sentence range . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." Proposed MCL 769.34(3)(c) is a new subsection that would provide that a "court may depart downward from the appropriate sentence range or presumptive disposition if it finds that mitigating circumstances justifying that departure are established by a preponderance of the evidence[.]" Also included in proposed MCL 769.34(c) is an express, non-exhaustive list of mitigating factors.

Proposed MCL 769.34(3)(c) should be modified to clarify whether it is intended to *supplement* or *replace* the general requirements of MCL 769.34(3) and/or the applicable standard of review for purposes of downward (as opposed to upward) departures. For example, it is unclear whether a downward departure must still be supported by "a substantial and compelling reason" as required under MCL 769.34(3). Additionally, it is unclear whether the abuse of discretion standard applies[6] when reviewing a downward departure.

Proposed MCL 769.34(3)(c)(*v*) provides, as a mitigating circumstance, that "[t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired." It is unclear whether this is intended to

[6] See *People v Hardy*, 494 Mich 430, 438 n 17 (2013), citing *People v Babcock*, 469 Mich 247, 265 (2003).

contemplate only mental illness or intellectual disability,[7] or whether it implicates other forms of impairment (for example, intoxication or impairment due to ingestion of controlled substances[8]).

7. Proposed MCL 771.3g (First-Time Offender Waiver Provision) May Be Incomplete

Under this proposed discharge-and-dismissal provision, a court, upon acceptance of a guilty plea from a first-time felony offender, may waive application of the sentencing guidelines and instead impose up to 90 days' imprisonment and/or up to one year of probation. See proposed MCL 771.3g(1); proposed MCL 771.3g(4). If assignment to first-time offender status is not revoked, the proceedings are dismissed and no conviction is entered. See proposed MCL 771.3g(7).[9]

Although all offenses carrying a maximum penalty of imprisonment for life are excluded from eligibility under this proposed waiver provision, only a *very* limited number of other offenses are excluded from eligibility[10] and some serious offenses were omitted from this list. See MCL 750.136b(3) (second-degree child abuse) and MCL 750.227b (felony-firearm, which carries a mandatory minimum sentence).

Whether intended or not, the proposed waiver provision, as written, does not exclude from first-time-offender consideration individuals who have previously been granted first-time-offender status, in contrast to other existing deferred-adjudication statutes. See, e.g., MCL 600.1076(6) (providing that an individual is entitled to only one discharge and dismissal in a drug treatment court); MCL 769.4a(5) (providing that an individual is entitled to only one discharge and dismissal under the domestic violence/spousal abuse deferred adjudication statute). Similarly, unlike some other deferred-adjudication statutes, the proposed provision does not specify that an offense committed by an individual granted first-time-offender status may be considered a conviction for purposes of statutes authorizing sentence enhancements for repeat offenders. See, e.g., MCL 769.4a(5).

Finally, the proposed waiver provision does not provide guidance concerning offenses requiring registration under the Sex Offenders Registration Act (SORA). Specifically, it is unclear whether an individual who pleads guilty of an offense requiring SORA registration may avoid this requirement under the first-time-offender waiver provision.

8. Proposed MCL 18.353(1)(*l*) (Victimization Survey Requirement) May Be Unclear and May Burden Victims

Proposed MCL 18.353(1)(*l*) would require the Crime Victims Services Commission to "perform

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[7] "An individual is legally insane if, as a result of mental illness . . . or as a result of having an intellectual disability . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1).

[8] See MCL 768.21a(2); MCL 768.37.

[9] This subsection is apparently mislabeled as subsection (5) in the proposal.

[10] See proposed MCL 771.3g(2).

or contract for the performance of a periodic victimization survey by locality, and report the results to the governor, the attorney general, the supreme court, and the legislature."

The term "victimization survey" is not defined in the proposal, and the intended data collection under this proposed provision is unclear. To the extent that this provision is intended to require communication with crime victims, it could be perceived as an intrusive "revictimization." Additionally, to the extent that the provision may require courts to maintain and update victims' contact information, this may prove to be difficult given the limited victim information provided to courts.

Conclusion

Thank you for providing this opportunity to provide feedback on this proposed legislation. SCAO is available to assist as you proceed toward a resolution on these complex issues.