Michigan Judges Association
Founded 1927

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August 27, 2014

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

Re: CSG Sentencing Study Summary of Legislative Recommendations and Draft Legislation

Dear Michigan Law Revision Commission:

The Michigan Judges Association thanks the Michigan Law Revision Commission for the opportunity to comment on the draft legislative proposals regarding felony sentencing. We understand that these drafts have not been adopted by the MLRC, and while we commit to work with the MLRC and the Legislature, we oppose the proposals as currently written.

Initially, we object to the underlying premise that drastic restrictions on circuit judge sentencing authority are needed. Sentencing commitment data confirms that year-after-year, Michigan judges use prison as a sentence option at half the national average. The average prison commitment rate is at or over 40% nationally, yet Michigan's is consistently around 21%. Furthermore, the overall prison commitment rate includes offenders sent to prison after revocation of probation. In other words, those offenders were given an initial opportunity to remain in the community on probation, yet committed one or more probation violations before being committed to prison. Subtracting probation violators, the initial prison commitment rate in Michigan – for all felonies – is only approximately 14%. Given this history of collective restraint by Michigan's circuit judges, the MJA questions the need for such drastic proposals to limit sentencing discretion.

We are similarly concerned that the "presumptive disposition" proposal unnecessarily restricts our ability to impose appropriate jail punishment in felony cases. Beginning with C Class offenses (15 year maximum year felonies such as Home Invasion, 2nd Degree) and increasing in frequency in D Class through H Class offenses, the proposal denies the judge the use of jail as a sanction, absent the judge finding a substantial and compelling basis to depart upward from the cell range. As we emphasized, Michigan's circuit judges have used laudable restraint before sentencing offenders to prison. Consequently, this proposal to prohibit the judge from using county jail in combination with a probationary sentence in what the Council of State Government estimates will be thousands of felony cases is unreasonable. Having classified these offenses as felonies, the Legislature should not restrict circuit court discretion to use modest jail sentences when there is no restriction on sentencing *misdemeanants* to jail.

An example may help illustrate our point: For the offense of Operating While Intoxicated (OWI) a district judge has discretion to sentence a first offender up to 93 days in jail. An OWI, 2nd offender faces up to 1 year in jail. Michigan law makes a 3rd offense a 5 year maximum, E Class felony. Under the MLRC draft proposal, the E class would be revised to include 9 cell ranges of a "presumptive disposition" that precludes a circuit judge from sentencing an OWI felony offender to *any* jail! If the classification of a crime as a felony reflects the increased public safety concern, shouldn't the sentencing discretion to punish for that crime be broader -- not narrower than the discretion available for a misdemeanor?

We also have concerns that the "presumptive disposition" restrictions to using jail in six classes of felony offenses will negatively impact crime victims' rights. Article I, Section 24 of the Michigan Constitution guarantees crime victims the right to make a statement to the court at sentencing. How meaningful will victim participation in the sentencing hearing be, if the circuit judge is severely restricted in the imposition of punishment? To the extent that their impact statement may be nullified by the proposed restrictions, we are concerned that their rights under the Michigan Constitution may be violated.

The proposed change to have the judge impose both a minimum and maximum sentence raises constitutional concerns under *Apprendi* and *Alleyne*, as already expressed by other groups. Even if eventually determined to be constitutionally sufficient, the proposed changes will add significant burdens to the sentencing hearing.

We understood that one of the policy goals of the proposals was to improve consistency in felony sentencing. But, some of the draft proposals have nothing to do with that goal while others go too far in seeking consistent or uniform sentences. Ultimately, the goal of sentencing should be to individualize the sentence to the offender and the offense. Over-emphasizing consistency and restricting judicial discretion will jeopardize the essential concept of individualized justice.

Finally, in addition to general objections, we have other specific concerns but have not had sufficient time to survey our membership for reaction. Examples of concerns that need further examination include, but are not limited to, the following:

- The overly broad approach of modifying numerous Codes, Acts and other laws, rather than the more focused approach to modify the current sentencing guidelines, the effect of which may result in conflicts of law.
- The failure to consider and address the distinction between Prior Record Variables (PRV) (addressing minimum sentences) and Habituals (addressing maximum sentences).
- The unconstitutionality of granting probation officers authority to act in a quasi-judicial capacity to impose sanctions for alleged parole violations fails to account for the officer's lack of jurisdiction over the defendant, and the Due Process rights of the defendant to right to counsel and a fair and impartial hearing, whereby the judge (i.e., probation officer) is not acting as both a witness to any alleged violation as well as the trier of fact.
- The failure to take into consideration the Holmes Youthful Trainee Act (HYTA or YTA), the Michigan Public Health Code (e.g., MCL 333.7411 or "7411"), or first offense dismissals for domestic violence under MCL 769.4a relative to the First Time Offender Waiver, as well as the effects the Waiver may have upon expunging felony records. The notion of sentencing criminals at the outset with a minimum and maximum imprisonment term, supervision term and sanction term is extraordinarily involved, eliminates Judge's discretion to fashion appropriate sentences

relative to any violation of probation and/or parole, and limits the incentive for felons to follow their respective terms of probation and/or parole if predetermined "sanctions" exist for same (regardless of the particular violation).

- The overwhelming costs associated with the proposed changes, including new programs.

Consequently, we would be concerned with any potential quick legislative action on these proposals - especially since many of them go beyond the broad policy discussions that took place at the Michigan Law Revision Commission hearings and the CSG sponsored listening tours. We urge the Michigan Law Revision Commission and the Legislature to allow sufficient time for a careful and deliberate examination of all of the consequences of such major alterations to our justice system.

Sincerely,

Stephen D. Gorsalitz
President
Michigan Judges Association

cc: Speaker of the House Jase Bolger
Senate Majority Leader Randy Richardville
Representative Kevin Cotter, Chairman of the House Judiciary Committee
Senator Rick Jones, Chairman of the Senate Judiciary Committee
Representative Joe Haveman, Chairman of the House Appropriations Committee
Representative Kurt Heise, Chairman of the House Criminal Justice Committee
Paul C. Smith, Deputy Legal Counsel, Office of the Governor – Legal Division