**Written Response to CSG Justice Center Legislative Recommendations**

**State Appellate Defenders Office, Criminal Defense Attorneys of Michigan, Citizens Alliance on Prisons and Public Spending, ACLU-Michigan**

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SADO, CDAM, CAPPS and the ACLU appreciate the enormous effort the Council of State Governments has put into developing its proposal to improve the delivery of criminal justice in Michigan. CSG has recognized the costs and inequities that result from various decision-makers having broader discretion than is necessary to protect public safety. It has made cost-effective suggestions that, in combination, should both reduce the prisoner population and increase public safety by lessening the likelihood that probationers and parolees will reoffend. It has identified ways to reduce disparate treatment of similar offenders, to strengthen community resources for addressing the behavior and needs of individual offenders and to rationalize statutes, policies and practices that have become inconsistent or outdated.

We particularly support the follow concepts:

- Creation of a Criminal Justice Policy Commission with broad authority to address all aspects of the criminal justice system.
- Requiring judges to set both the minimum and maximum sentences for all offenses in order to narrow the currently very wide periods available for parole board action.
- Narrowing the sentencing guidelines ranges in order to narrow the currently very broad discretion that some ranges afford judges.
- Clarifying the habitual offender statutes to avoid double counting of prior convictions in enhancing minimum sentences and to prevent multiple offenses from the same transaction from being treated as separate prior convictions.
- Establishing in statute a list of potential mitigating factors that may form the basis for downward departures from sentencing guidelines ranges.
- Statutory specification of the grounds on which parole release may be delayed.
- Statutory specification of high and low severity supervision violations as a basis for sanctioning probationers.
- Establishing in statute a uniform statewide diversion mechanism for first offenders.
- Merging the oversight of local community corrections and reentry programs.

Given the ambitious size of the undertaking, we inevitably have concerns about some aspects of the proposal. These are presented here in two sections. Section 1 provides an overview of all our concerns and concisely describes problems with specific concepts or the clarity of particular provisions. Section 2 contains a more extended discussion of several provisions with suggestions for alternative approaches. Both sections reflect the combined feedback of SADO, CDAM, CAPPS and the ACLU.

We appreciate the continuing dialogue in which CSG has engaged with all of us and the opportunity to have this feedback considered by the Michigan Law Revision Commission.

## Section 1

1. **Page 5, lines 19-21, addressing MCL 769.8 [Judicial selection of maximum sentences]**

   In requiring the judge to set the maximum, it needs to be clear that the judicial maximum cannot exceed the statutory maximum. 200% of the maximum minimum in the proposed highest cell on the B grid would be 22 years, although the statutory maxes on that grid are 20 years. Similarly, 200% of the max mins in the proposed two highest cells on the C grid would be higher than 15 years. And that doesn't account for upward departures.

   The sentence at pg 5, lines 19-21, says that the section doesn't apply "to sentences imposed outside the guidelines." It is unclear what that means. Does it refer only to flat sentences, like the 2 years for felony firearm? Or does it include mandatory minimums and/or departures from the guidelines? If it includes any indeterminate sentences, would the max be the statutory max? If it just refers to determinate sentences, it is clearer just to say that. Perhaps it would be clearer to include the language found currently in MCL 769.34(5): "If a crime has a mandatory determinate penalty or a mandatory penalty of life imprisonment, the court shall impose that penalty. This section does not apply to sentencing for that crime."

   *For discussion of the concept underlying this proposal and an alternative suggestion for implementing it, see Section 2.*

2. **Page 5, line 33, addressing MCL 769.10 [Habitual offender provisions]**

   The language should include "and each felony conviction is for an offense that occurred subsequent to the previous conviction having become final." (This language is found on page 7, lines 24-25, for MCL 769.12). The same for convictions that have become final at Page 6, line 29, addressing MCL 769.11. Additionally, the second sentence in sub (a) would appear to be redundant if the *Gardner* fix will apply to all habitual sentences, not just mandatory 25-year minimums.

   The interplay between MCL 769.8, the habitual offender statutes and proposed MCL 769.34(5)(c) (page 16, line 37) is unclear. If the general rule is that the maximum sentence is limited to 1 ½ or 2 times the minimum term per lines 37-49 on page 6, but for habitual offenders the judge has discretion to increase the maximum term by 1 ½ times for the second habitual, 2 times for the third habitual, and up to life (or 15 years) for a fourth habitual, how does this work? So does the new proposal allow the judge to set the maximum term for the habitual based on enhancement of the statutory maximum or does it require enhancement of the maximum term as limited by proposed MCL 769.34(5)(c)? In other words, does enhancement work off the statutory maximum penalty or the maximum penalty that is now limited to a fraction of the minimum term?

One additional small change should be added to fix the damage done by *People v Trudeau* and *People v Lamb,* which interpreted 769.12(5)(a). The statute says that prisoners whose offenses occurred before the implementation of truth in sentencing who are sentenced as habitual offenders are not eligible for parole until the expiration of "the minimum term fixed by the sentencing judge at the time of sentence unless the sentencing judge or a successor gives written approval for parole at an earlier date authorized by law." The Court of Appeals interpreted this 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.

The MDOC incorporated this interpretation in PD 03.01.102. It advises prisoners not to write their sentencing judges seeking permission to receive their good time credits and it does not send those requests itself. As a result, prisoners with good institutional records who accumulated years of good time and could have been paroled long ago are stuck waiting to reach their ERD. The pool of people affected is dwindling. Anyone habitualized for offenses committed after Oct. 1998 would not be eligible for good time or disciplinary credits in any event. However simply eliminating subsection (5) would put habitual offenders in the same position as all other prisoners for purposes of receiving whatever good conduct credits are available.

3. **Page 10, line 3, addressing MCL 769.31(g) [Court-ordered supervision terms]**

Having the court set the supervision term when sentencing someone to prison is problematic for several reasons. While it is done this way in the federal system and other determinate sentencing jurisdictions, MI still has a parole board. Thus it has the better option of determining the appropriate length of parole supervision at the point of release. The board will be setting parole conditions based on its assessment of the person's risk. That risk may be affected by various events that occur during incarceration, including the person's maturation, success in treatment programs and changes in physical and mental health. To set two and three year supervision terms based on the offense and prior record, years in advance, without any opportunity to consider intervening events could result in unnecessarily long periods of parole. This in turn could increase parole caseloads and related costs. CSG has not provided any projections about how the results of its predetermined supervision terms would compare to current parole terms.

This problem is further complicated by subsec (g)'s provision that deviations from the supervision term don't constitute a departure. Thus a judge could choose to set a 10-year or even a lifetime supervision term, regardless of how inappropriate that might prove to be years down the road. There would apparently be no opportunity to appeal at the time of sentencing or release.

Yet another problem with setting supervision terms in advance is that they don't account for the point in the prisoner's sentence when release occurs. In flat sentencing jurisdictions, the amount of time to be served is predictable. In Michigan, it cannot be predicted how close to the maximum a prisoner will be at the point of parole and whether there will even be enough years left to complete the entire term of supervision.

It is also unclear what the supervision term is meant to be after parole has been revoked and who sets it at that point.

Regarding the sentencing court setting the sanction term, see discussion of 769.34(5)(d) in Section 2.

4. **Page 12, lines 31-43 [Criminal Justice Policy Commission]**

   The Commission should have a level of authority so that their work is reviewed and considered by the legislature. We suggest language be added to require that recommendations of the commission must be adopted by the legislature absent specific rejection within a time certain.

   *For detailed discussion of the composition and duties of the Commission, see Section 2.*

5. **Page 14, line 34 [Duties of Sentencing Court]**

   Add language that departures from the prescribed maximum sentence are also limited by the requirement of substantial and compelling reasons.

6. **Page 15, lines 3-10:** Add language to this paragraph stating that "one or more of the following mitigating circumstances may be considered substantial and compelling reasons to depart downward from a recommended range."

   *For detailed discussion of the sentencing court's duties, including setting the maximum sentence, establishing sanction terms, and the failure to provide revisions of the M2 and A grids, see Section 2.*

7. **Page 15, lines 11-45 [Mitigating circumstances]** Need to add additional mitigating circumstances of:

   a. Need to add: the defendant's cooperation with law enforcement.
   b. Need to add: the offender's age (giving special attention to youth per the cases of *Roper*, *Graham* and *Miller*)
   c. Subsec. (vi) requires both that the offense have been principally accomplished by another person and that the defendant manifested extreme caution or sincere concern

for the victim's well-being. It is unclear why the second criterion is necessary. An aider and abettor who acted as a lookout or getaway driver for a robbery or burglary turned felony murder might not even know what was going on inside the premises and would not have been in a position to express concern for the victim.

d. Subsecs. (viii) and (x) both address situations where the defendant was responding to abuse by the victim. It would also seem to be a mitigating factor if the defendant was reacting to abuse by someone other than the victim or was suffering from PTSD not diagnosed as a mental illness. Granted this is not a form of mitigation based on the victim's conduct, like self-defense or provocation, but it does go to the defendant's culpability in a manner similar to several other factors.
e. Subsec (xi) requires proving by a preponderance of the evidence that the defendant's conduct was "causally related" to poverty, lack of education, upbringing, social surroundings. It will be virtually impossible to do this except, perhaps, when the defendant says s/he committed a property offense because s/he needed money. However that would logically lead to poverty becoming a defense to theft, which isn't likely to fly. Perhaps this could be reworded to something like "the defendant's judgment was substantially impaired by his/her upbringing or other circumstances beyond his/her control." Something more general like that would allow defense counsel to demonstrate the impact of background factors applicable to the defendant without seeming to suggest in statute that every person who is low income or unemployed could show mitigation.

8. **Page 27, lines 27-37 [Swift and sure probation supervision]**

The immediate discrepancy here (lines 31-32) is that the probation agent is supposed to recommend swift and sure, but the probation agent is not supposed to make a recommendation in the PSI anymore (see page 33, line 38). Note that we believe probation agents should have discretion to make recommendations as to the conditions of probation.

We are concerned with how "swift and sure" operates. The conditional liberty of parolees and probationers are subject to the constitutional requirements of procedural due process. *See e.g*. *Morrissey v. Brewer*, 408 U.S. 471, 480, 481-82 (1972). While we appreciate the intentions of swift and sure, particularly the desire to minimize jail time for minor offenses, we feel it is important that some level of judicial oversight remains. To comply with the minimal requirements of constitutional due process, there must be a prompt probable cause hearing by an independent officer to determine if a violation has actually occurred. The most logical independent and impartial officer would be a judge. As currently drafted, a probation officer would only require the approval of a supervisor within the same department to find a probationer in violation and impose a sanction of jail. There must be further checks on this authority to safeguard due process.

Notably, placement on swift and sure probation would be required whenever the probation officer recommended it so that probation officers would instigate the automatic delegation of authority to themselves. And even without a recommendation, swift and sure would be required whenever the prior record score resulted in a supervision guide amount of at least 18 months, which is the vast majority of cases on every grid. Thus there appears to be little intent to apply swift and sure probation selectively.

9. **Page 30, line 15, addressing 771.3g [FIRST TIME OFFENDER WAIVER** )

We support this effort as a way to minimize the jail and prisoner population and reduce the devastating collateral consequences of a felony conviction. As currently written the proposed legislation says a court "may" assign an individual to the status of first time offender. To increase the efficacy of this program we suggest amending this to say the court "shall, unless it makes a finding on the record that the circumstances of the offense are such that the individual should not be entitled to the status, without entering a judgment of conviction and with the consent of that individual, assign that individual to the status of first time offender." Such a language change will help ensure utilization of this status across jurisdictions.

**Page 30, lines 38-39**

This appears to be a mistake in terms of eliminating arson in the first, second and fourth degree from the first offender waiver. This language might be borrowed from the boot camp statute, MCL 791.234a, which apparently has not been amended since the legislature revamped the arson statutes. We would suggest excluding only first-degree arson, MCL 750.72.

10. **Page 36, lines 37-44 [Swift and Sure]**

Again, it is unclear whether "swift and sure" is to apply to EVERY probationer. We are concerned about relying on a program without evidence or proof it can reduce recidivism. Have the pilot programs been evaluated for effectiveness?

**Pages 36-37, lines 40-41**

We disagree as a matter of principle with the probation agent having authority to impose up to three days in jail for a low level violation of swift and sure. We also disagree in principle that probation agents should have discretion to impose tether without judicial approval. Again, there needs to be a check on the probation agent's authority to apply sanctions.

11. **Pages 39-40 [Delayed release for misconduct]**

Allowing for only two major misconducts over the course of the entire time served is overly harsh. It would mean over half the prison population could have their release delayed. There

should either be a shorter look-back time for the tickets and/or a greater number of tickets allowed overall. In addition, there needs to be more clarity as to what a "major" ticket is, with the reference to the tickets in terms of class level instead of "major" and "minor." The criteria should apply to all current prisoners.

*For a detailed discussion of the impact of this provision and a suggested alternative method of defining "serious and persistent institutional misconduct", see Section 2.*

12. **Page 40 [Parole revocation]**

While we strongly support reducing the number of parole revocations for technical violations and limiting the length of stay for those who are returned to prison, we have practical concerns about the impact of the proposed method of achieving this goal.

*For a detailed discussion of this provision and a suggested alternative approach, see Section 2.*

13. **Pages 40-46 [Community corrections and reentry]**

We support the concept of combining the oversight of community corrections and reentry since they involve delivering similar services at the local level. We have concerns about ensuring an adequate role for local stakeholders and not having funds intended for community programs diverted to supplant funding for in-prison programs re-characterized as reentry. We agree with the suggestion of MCCD that the combined programs be administered by a Type 1 agency that can independently advocate for its own authority and necessary resources.

## Section 2

### 769.32/pp 10-11 – Commission Composition

The commission membership proposed in HB 5078 reflects the consensus of a broad group of stakeholders who met with Rep. Haveman in a workgroup. CSG proposes a number of differences.

HB 5078 identifies the legislative members by their leadership positions on relevant committees. This helps ensure that legislators will be active commission members and that those in a position to shepherd any commission recommendations through the legislature will be invested in the commission's product. It also means that neither legislators nor the governor have any discretion to exercise. This is preferable to leaving the appointment of legislative members up to the governor.

HB 5078 has one circuit and one district judge, each appointed by their respective associations. CSG would change this to two sitting circuit judges appointed by the governor. It is unclear what the purpose of this change is. District judges handle not only misdemeanors but bail decisions, preliminary exams and guilty pleas in felony cases. Their work has a substantial impact on local resources, including jail capacity. It would seem preferable to keep a slot for one on the commission. It would also seem preferable to allow the judges to select their own representatives, including retired members of their associations who may have the time and interest to be active commission members. It also seems appropriate to have co-equal branches of government, i.e. legislators and judges, select their own representatives without the participation of the governor.

CSG replaces the AG as a representative of crime victims with simply "an individual" who represents victims. This is an improvement. While it doesn't prevent the AG from being the victims' representative, it leaves open the possibility that it could be someone else, such as a member of a victims' rights organization.

CSG replaces the representative of community corrections agencies with an individual who represents the office of community corrections. This presumably reflects the aspect of CSG's proposal which combines community corrections and re-entry within the MDOC and centralizes the operation of community programs. However it leaves out any representative of the community agencies that actually deliver services. CSG then eliminates any other representative from the MDOC.

CSG also eliminates the mental health expert, although 20 percent of the prisoner population and an even greater percentage of jail inmates are mentally ill. It also eliminates the Michigan Association of Counties, despite the counties' financial responsibility for jails and other community-based resources. CSG replaces the three eliminated positions with a representative of SCAO and two members of the general public. The CSG proposal would reduce the scope of expertise on the commission and it is not clear what would be gained by the changes.

### 769.33/pp 12-13 – Commission Duties

In listing the duties of the commission, CSG itemizes in much greater detail than HB 5078. However there is little in the CSG draft that would not be covered by the broader language of 5078, except for the requirement that the commission measure recidivism and assess efforts to reduce it. Other differences worth noting are:

HB 5078, subsec (B), though inartfully worded, requires data collection regarding the impact of pretrial detainees and sentenced misdemeanants on local jails. It is unclear why this would be omitted.

In listing the research topics the commission is charged with pursuing, CSG does not include data regarding factors listed in subsec (2) as the sentencing policy of the state, including the length and proportionality of sentences or disparities by county, race or other factors. CSG would require research on "accountability" and "victim satisfaction", although neither of these terms is defined. Victim satisfaction is a difficult concept in this context since the purpose of the criminal justice system is to replace individuals' views of what would be justice in their own cases with the broader view of the whole community. It may be that many victims think the sentences in their cases were too short or that their defendants should not be paroled because of their own emotional involvement with the crime. If, however, sentences or parole decisions comport with controlling statutes, should the commission recommend that sentences be lengthened or paroles denied based on victim dissatisfaction? Perhaps the focus should be on overall citizen satisfaction. This could include research not only on victims' reactions but on whether taxpayers feel the system is cost-effective, defendants feel they have been treated fairly or consistently with others and local residents and participants think community corrections and re-entry programs are effective.

The CSG proposal , subsec (d), refers to recommendations for modifying "criminal offenses, sentencing laws, sentencing guidelines, probation laws, parole and release laws or other statutes." This listing does not include MDOC policy directives that directly control the operational details of probation and parole. It may or may not include administrative rules. Compare HB 5078 subsecs (1)(D) and (5).

HB 5078 (1)(F) directs the commission to modify the guidelines and lists the purposes that modifications are required to fulfill. The CSG proposal instead lists the policy considerations of the state in regard to the sentencing of individuals and the administration of the sentencing system. Thus the CSG proposal is aspirational, not prescriptive. It is unclear why this would be preferable.

The CSG policy considerations are all stated in regard to sentencing, not parole or overall length of stay. There are only two references to corrections. Subsection (f) recites a policy of meeting standards of care for prisoners. Subsection (h) refers to increasing transparency, accountability and "legitimacy" of the sentencing and corrections systems.

**791.234/pp 14-26 – Duties of Sentencing Court**

*Judges setting maximums.* Having judges set the maximum as well as the minimum is a creative way to narrow the range of parole board discretion. The difficulty is in requiring the max to equal no less than 150 and no more than 200% of the minimum. Percentages obviously translate into very different actual numbers depending on the size of the minimum. Thus 200% of a two-year minimum yields a max no greater than four years, with a two-year window for the parole board while a 10-year minimum can yield a max of 20 years and 10 years' worth of parole board discretion.

This creates a problem at both ends of the spectrum. For long minimum sentences, it fails to cure the problem of excessive board discretion. For short minimum sentences, judges may not feel that the maximum allowed is long enough. When a judge imposes a sentence of 2-15 or 3-20, the press often reports that the defendant was sentenced to "up to" 15 or 20 years. If that sentence must become 2-4 or 3-6, judges may be uncomfortable with the relatively short maximum and may choose to select minimums at the high end of the guidelines range or even to depart in order to push up the maximum. They may also argue this aspect of the CSG proposal on the grounds that they would be required to impose maximums as low as two and three years in cases where the statutory max is 20 years.

An improvement would be to require the maximum to be either 150% of the minimum or up to five years longer than the minimum. The allowable maximums would then look like this, even if the statutory max is 15 or 20:

| Min | Max 150%/+5 | Largest Tail |
|---|---|---|
| 1 | 1.5/6 | 5.0 |
| 2 | 3/7 | 5.0 |
| 3 | 4.5/8 | 5.0 |
| 4 | 6/9 | 5.0 |
| 5 | 7.5/10 | 5.0 |
| 6 | 9/11 | 5.0 |
| 7 | 10.5/12 | 5.0 |
| 8 | 12/13 | 5.0 |
| 9 | 13.5/14 | 5.0 |
| 10 | 15/15 | 5.0 |
| 11 | 16.5/16 | 5.5 |
| 12 | 18/17 | 6.0 |
| 13 | 19.5/18 | 6.5 |
| 14 | 21/19 | 7.0 |
| 15 | 22.5/20 | 7.5 |
| 16 | 24/21 | 8.0 |
| 17 | 25.5/22 | 8.5 |
| 18 | 27/23 | 9.0 |
| 19 | 28.5/24 | 9.5 |
| 20 | 30/25 | 10.0 |

While this lengthens the potential tail for the shorter minimum sentences, it would not have a substantial impact if most of those defendants are actually paroled on their minimum. (See discussion below.) The difference between 150% and +5 years is one year or less for minimums between 8 and 12 years. By comparison, if maxes up to 200% are permitted, the potential max on an 8-year min would be 16 years (instead of 13) and on a 12-year max it would be 24 years (instead of 18). A 20-year minimum would become, at worst, 20-30 rather than 20-40.

*Establishment of sanction terms.* Limiting incarceration for technical parole violations is a very important goal. However, there are difficulties with the method proposed. There is logic to tying incarceration for technical violations to sentence length so that people don't spend more time in prison for a technical violation than they did for the underlying offense. However across-the-board sanction terms for everyone sentenced on a particular grid doesn't accomplish this since minimums allowed within a grid vary so widely. On the proposed B grid, for instance, without a departure or habitualization, the minimum could be as low as one year or as high as 11, but the sanction limit is five years either way. Similarly, many people currently sentenced on the A grid, particularly for armed robbery, receive sentences of 5 years or less.

Here, too, the solution may be a combination of percentages with an absolute maximum. For instance, a sanction term of no more than 20% of the actual minimum or 5 years, whichever is less, would implement the principle. For any minimum up to 25 years, the sanction term would be 20% of the actual minimum and for any minimum of 25 years or more(including lifers, we hope), it would be 5 years. This is simple to calculate at sentencing.

What this does not address is the disconnect between the sanction term and the substance of the parole violation. See discussion below re Sec 791.240a.

*Revisions to B-H grids.* The proposed revisions to the B-H grids would appear to be an improvement. In many cells the proposed minimum-minimums are shorter. Although often the difference is marginal, in a few instances it is more than a year. On the other hand, in the lower right hand quarter of the C grid, the minimum minimums would actually be increased substantially for reasons that are not clear.

The bigger change would be the narrowing of the ranges, so that the breadth of judicial discretion and the opportunity for disparities among defendants with the same guidelines scores would be reduced. In some cells the width of the ranges would be narrowed by as much as three years. This is certainly desirable.

It is also an improvement to have all the potential minimums stated in six months increments instead of odd numbers of months that don't translate readily into numbers of years.

What has not been identified is the basis of CSG's proposed changes and what the projected impact on prison and jail populations would likely be. It is not known whether, as a matter of choice or by implementing plea bargains, judges currently impose sentences that primarily fall below the maximum minimums. If the proposed ranges largely reflect the sentences already being given, the changes will have limited practical impact. Conversely, if sentences are now often selected from the high end of the

current ranges, reducing the high ends could create a substantial change. While it is hoped that the proposed changes would be substantive, until population projections are made available there is no way to be certain of that.

*Failure to revise M2 and A grids.* It is unfortunate on several levels that CSG has chosen not to include the M2 and A grids in its proposed revisions.

**As a matter of principle**, the need for reform shown by all the research is actually greatest on these grids. Because the sentences for offenses that carry the penalty of "life or any term" are both the longest and the most open-ended, the impact of every trend that affects Michigan's prisoner length of stay is magnified in life-max cases.

- The upward revision of minimum sentences for the most serious offenses when the legislative guidelines were adopted made the starting point for life-max sentences substantially longer. The mean sentence for the four most common life-max offenses grew by more than two years to an average of 13.
- The breadth of the ranges on the M2 and A grids gives judges enormous discretion in selecting a minimum sentence without departing from the guidelines. This results in wide disparities among counties. The mean sentence for armed robbery from 1998-2012 was 7.7 years in Macomb County and 16.5 years in Calhoun County.
- The rarity with which appellate courts exercise their discretion to overturn upward departures means that even sentences that far exceed the guidelines are typically permitted to stand.
- The elimination of good conduct credits means that defendants who receive 15 or 25 or 50 year minimum sentences must serve every day of them.
- The potential for sentences the defendant cannot possibly live to finish gives prosecutors enormous bargaining leverage.
- The fact that the "tail" on sentences for life-max crimes may be decades long, even when the minimum is relatively short, gives the parole board enormous periods of time within which to exercise its discretion to grant or deny release. From 1998-2012, the mean length of the tail for armed robbery was 16 years; for second-degree murder it was 22 years.

While it is easy to say that people who committed serious crimes deserve to be in prison for a long time, it is short-sighted to end the discussion there. Questions still remain about just how long a sentence is necessary to serve the purposes of sentencing, at what point a sentence becomes disproportionate to the offense and offender, and how to control disparities among counties. Inconsistent and arbitrary exercises of discretion do not become justifiable because the object of the decision has been convicted of an assaultive offense.

**As a practical matter**, efforts to reduce the size and cost of the prison system will be greatly impeded if the life-max offenses are not addressed.

- People serving for life-max offenses constitute 35% of the entire prisoner population.
- Michigan has more than 6,500 prisoners with minimum sentences of more than 15 years, not including those serving life terms. In 2013, 2,276 people had minimums longer than 25 years.

- People with shorter sentences tend to be released and replaced, keeping their total number relatively stable. People with very long sentences are released far less often, so their total number keeps increasing.
- People serving for life-max offenses are growing old and developing the medical problems associated with aging. The cost of caring for elderly prisoners is an increasingly significant portion of the corrections budget and will continue to rise.
- Research shows there is no public safety reason to keep people for 30, 40 and 50 years. As prisoners age their re-offense rates drop dramatically. Combined with the fact that recidivism rates for homicide and sex offenses are far below those of other offenses, this means that the very people who are being kept the longest and costing taxpayers so much would pose an extremely low risk if released.

**As a political matter,** if the opportunity to make at least modest changes to the M2 and A grids is not taken at the point when all the other grids are being revised, that opportunity is unlikely to come again for a very long time. In fact, CSG's failure to recommend modifications will be taken as approval of 30, 40 and 50 year minimums. It is naïve to suggest that reforms of the M2 and A grids will be feasible standing on their own at some future point when they are perceived as politically unachievable even as part of an internally consistent adjustment to the entire guidelines scheme.

In addition, people with minimums of 20 years and more will receive little or no benefit from proposed limits on the maximum. Judges already impose the maximum sentence for life or any term crimes. They rarely feel compelled to impose maximums that are more than 150-200% of the minimum. When the minimum is 40 or 50 years, 150% will produce a sentence of 40-60 or 50-75 years.

The current ranges are so broad (anywhere from 6 to 15 years in 20 of the 36 cells on the A grid) that narrowing them moderately would still allow for extremely long sentences. It seems unnecessary for CSG to omit these important changes before the legislative process has even begun.

### 791.266a/pp 39-40 – Delayed release from prison for misconduct

*The concept.* Mandating release at the minimum unless specified exceptions are met accomplishes several critical goals. By restricting the parole board's discretion, it increases consistency, transparency, accountability and fairness in the parole process. It is an effective method of decreasing the size and cost of the prisoner population. And it implements the intentions of the legislature, sentencing judges and the parties to plea bargains in setting the minimum sentence.

CSG's proposal is particularly good in theory because, aside from pending felony charges or detainers, it makes delay in release depend totally on the prisoner's own in-prison conduct. There are no exceptions for bureaucratic problems beyond the prisoner's control, such as failure to provide access to required programs or to get evaluations done in time. Prisoners will know from the start that if they avoid misconducts and participate in required activities, they will have earned their release. This is likely to have an increasingly positive effect on institutional behavior. The MDOC will know that it must perform its own tasks in a timely fashion.

*The problem.* Unfortunately, this excellent concept is wholly undermined by the proposal's definition of "serious and persistent misconduct" as two or more major misconducts or a continuous pattern of minor misconducts. This definition utterly fails to recognize the realities of prison life.

All "major misconducts" are not equal. The term does not only include assaults and escape attempts. It includes fighting, possession of homemade alcohol or tattoo devices and failing to return prescribed medicine that is no longer authorized. It includes threatening behavior not only to a staff member but to another prisoner. It can also include disobeying a direct order, insolence or being out of place. The MDOC itself treats types of major misconducts differently. Some are nonbondable, meaning the prisoner goes straight to segregation while awaiting disposition of the charge.

Not surprisingly, misconducts are more commonly committed by young prisoners who tend to lack impulse control, foresight and good judgment until they settle down and "learn to jail." They are also frequently committed by the 20% of the prisoner population that is mentally ill and has difficulty conforming to prison rules.

As with police in the free world, whether a misconduct citation is written depends heavily on the perceptions and inclinations of the particular corrections officer. Some officers routinely write more "tickets" than others. Sometimes an officer is just having a bad day. Some white officers are quicker to find disobedience by or feel threatened by a black prisoner than a white one. Prisoners can also be "set up" by other prisoners.

The CSG proposal places no limits on the timing or nature of the two misconducts it sets as the cutoff point for required release at the minimum. A 30-year old prisoner who had two fights when he entered prison as a 17-year old and not a single ticket since would be disqualified. A prisoner with a spotless record who protested when accused by an officer of inappropriately touching his own wife in the visiting room would have two tickets from that single incident. Two uncharacteristic tickets for bondable misconducts incurred several years apart and several years before first consideration for parole would constitute a "history of serious and persistent" misconduct.

**A review by CAPPS of MDOC data found that of nearly 56,000 prisoners and parolees with active sentences, only 42% had fewer than two major misconducts during their incarceration.** For blacks the figure was 34%. Thus, 58% of all prisoners and 66% of black prisoners would be ineligible for required release on their minimum. Their parole would be left entirely within the discretion of the parole board. Since current parole grant rates already hover between 53% and 67% (depending on whether the calculation includes deferred decisions), requiring the release of only 42% is unlikely to be much of an improvement.

Notably, the MDOC does not see having a few misconduct citations somewhere in a prisoner's institutional history as a management problem. Of the prisoners and parolees CAPPS reviewed, 73% or more of those with 2 misconducts were last housed at security level 1, as were 66% of those with 5 misconducts. In fact, among those with between 11-20 misconducts, more than 80% were housed at either level 1 or 2.

CSG's alternate definition of "serious and persistent" misconduct as including "a continuous pattern of minor misconduct" is equally problematic. Minor misconducts, which include such behavior as "excessive noise" and "horseplay", are dealt with summarily by corrections officers. They cannot be punished by segregation. They are not listed on parole eligibility reports and it is unclear that accurate records of them are even kept. Again they particularly reflect the nuisance behavior of younger prisoners. The proposal does not define what constitutes "a continuous pattern" but contains no limits on when the pattern may have occurred.

*A solution.* The solution to these problems of definition is quite straightforward. The MDOC's own parole guidelines include a score for institutional conduct. The score is derived by considering the age and seriousness of the prisoner's major misconducts and then weighted according to how much time the prisoner has served at the point of consideration.[1] It is a much more nuanced and realistic approach that the parole board itself uses already in assessing the relevance of misconduct to release decisions.

Scores on the institutional misconduct grid can range from +8 to -8. Someone with four bondable misconducts over the last five years but none in the last year and someone with a single ticket for assault in the last year whose security classification had not been increased would both score 0. **CAPPS's analysis of the MDOC's data shows that 73.4% of nearly 40,000 prisoners and parolees for whom parole guidelines scores were available had conduct scores of -1 or above.** Thus using a score below -1 on the parole guidelines institutional conduct grid as the definition of serious and persistent misconduct would provide a realistic, objective and accurate measurement of institutional history. It could be expected to produce a substantial increase in the total number of paroles while providing the parole board the necessary discretion to address significant institutional misconduct. It would also provide a consistent tool for measuring improvement. Every person not released at the minimum because of misconduct should be released when he or she achieves a score of -1.

The use of a specific parole guidelines misconduct score also has an advantage when it comes to enforcing the proposal for required release. The current parole guidelines require that prisoners whose overall score equates to "high probability of release" are entitled to parole unless the board provides substantial and compelling reasons why release should be denied. However, prisoners are not entitled to appeal parole denials and there is no other mechanism for reviewing these subjective, case-specific decisions. As recently as 2012, more than 1,500 prisoners who scored high probability of release had been denied parole.

Calculating the misconduct score is a wholly ministerial task. Even absent an individual prisoner's right to appeal, if a pattern of failing to grant release as the statute directs were to become apparent, presumably an action for mandamus would be available to seek a judicial order for compliance.

[1] Specifically, the score is obtained by counting: the number of major misconducts incurred in the last five years and the last one year, the number of nonbondable misconducts incurred in the last five years, the number of assault, sexual assault, riot or homicide major misconducts in the last five years, and the number of security classification increases in the last five years and the last one year.

*Retroactivity.* The final problem with the CSG proposal is the failure to make it retroactive. Since the proposal involves only releasing people who have served their entire minimum sentences, requiring release at the minimum poses no separation of powers problem. All the reasons that make the proposal an excellent one apply equally, regardless of when someone was sentenced. As a practical matter, all the benefit to be derived in terms of cost savings and population reduction will be greatly delayed if the status quo is preserved for more than 40,000 current prisoners.

*Needed clarifications.* The relationship of the CSG proposal to 791.233e, the current parole guidelines statute, is unclear. While we are suggesting that the formula in the guidelines for scoring institutional misconducts be used for defining when parole at the minimum is required, the question of the broader application of that statute remains. Would it still control in cases where someone does not meet the statutory criterion for release on the minimum but still scores high probability for release on the guidelines? Would it control in cases where parole has previously been denied?

The use of the term "major misconduct" is also unclear. In 2012, the MDOC changed from a two-level classification of misconducts as "major" and "minor" to a three-level scheme that identifies all misconducts as Class I, II and III misconducts. All former minor misconducts are Class III. All Class I misconducts were formerly majors. However some misconducts formerly considered major are now Class II. These must be elevated to Class I if the misconduct occurred during or in connection with a visit and may be elevated to a Class I based on the seriousness of the specific facts. The proposal may be read expansively to include all those misconducts formerly considered major or more narrowly to include only those now considered Class I.

### 791.240a/p 40 – parole revocation

The proposal would limit returns to prison for technical parole violations to no more than 90 days. Each period of revocation would then be deducted from the total sanction term to be allowed under 769.234(5)(c). In theory, someone with a sanction term could have his or her parole revoked up to 20 times, serving 90 days in prison each time.

Limiting length of stay for technical parole violators is an important strategy that could substantially reduce the prisoner population. Currently the average prison stay for technical violators is 13.9 months.

However, the concept of 90-day stays raises a number of issues. Unlike probation violations, which are divided into high and low severity as described at p. 36, the penalty for parole violations is not tied to the nature and seriousness of the violation. The decision to revoke parole/supervision is wholly discretionary with the parole board. The proposal would control only the length of the revocation once that decision is made.

The problem is that all violations are not equal. Those that are quite serious might well require more than 90 days of reincarceration to protect public safety. Parolees whose violations do not involve an actual threat to public safety arguably should not be returned to prison at all.

Decisions to revoke parole for technical violations can be complex. They often involve conduct that could be prosecuted as a felony but has not been, for reasons ranging from a lack of sufficient evidence to a decision to save the county the time and trouble. They may also involve conduct that has been prosecuted as a misdemeanor. Placing a 90-day limit on parole revocations could have the effect of forcing more prosecutions if it is perceived as insufficient to address the "real" behavior. It may well be appropriate to require prosecutors to do their jobs instead of relying on the MDOC to simply punish parolees on a lower standard of proof. But it may also put parolees at risk of more convictions and serving even more time.

The routine use of 90-day stays can have unintended consequences. It was apparently common in California to revoke paroles for only 90 days but to do it so frequently that parolees kept revolving back through the system, contributing greatly to California's enormous problem of prison overcrowding.

In Michigan, the concept is further complicated by the current Residential Reenty Program (RRP) which allows people charged as technical parole violators to be placed in a "residential reentry center." These centers provide little in the way of programming for technical violators; their primary function is incarceration. The average length of stay in 2013 was 84.5 days; the longest stays are typically 120 days.

Placement in RRP does not depend on having the prisoner's parole revoked. Every parole order now contains a condition that requires the parolee to complete a reentry program when referred by a field agent. Placement in a residential reentry center is in lieu of revocation. There is no right to appointed counsel, no hearing before a parole board member or attorney hearing officer and the violation need not be proven by a preponderance of the evidence. Failure to complete that program may then become the basis of a formal revocation.

RRP is in addition to the Intensive Detention Reentry Program (IDRP), which initially placed parolees "with compliance problems" in leased county jail beds for an average of 30 days. With the reopening of Ryan Correctional Facility as the Detroit Reentry Center, many IDRP beds were shifted from jails to this MDOC facility that is operated as a Level II prison.

While the proportion of parolees whose paroles were revoked for technical violations has declined substantially since 2000, the proportion who have been placed in IDRP or RRP has steadily increased. In 2012, 6,026 parolees, a third of the average total number of parolees under supervision, were placed in one of these reentry programs.[2]

While incarcerating parolees for 90 days and more without the due process protections of a revocation hearing is a practice of questionable constitutionality, it is currently the practice. The obvious question is why the board would ever go through the trouble of revoking paroles to incarcerate violators for just 90 days when it can get the same result by placing them in RRP.

As the CSG proposal recognizes, reincarceration is a punishment for violating the terms of supervision, not an occasion to say "you had your chance and messed up so now you're going back to serve the

[2] For further details, see CAPPS's May 2014 Issue Brief, *Corrections spending proposals reflect major policy choices: Examining the Consequences.*

sentence for your crime." A 90-day period of reincarceration, especially if repeated periodically, is highly disruptive for the person trying to reintegrate into the community. It interferes with efforts to maintain stable employment, housing and family relationships. It is a high price to pay for noncriminal conduct that only violates supervision rules applicable to parolees. On the other hand, if a parolee is engaging in conduct that poses a clear threat to public safety, such as weapons possession, domestic violence, or an arrest for an assaultive crime, it may be inappropriate for the parole board to return him or her to custody for only three months.

We recommend that parole revocations be divided into high and low severity, much as CSG suggests for probation violations. Low severity violations may lead to progressive community-based sanctions but not to reincarceration, whether called parole revocation or some form of residential reentry. High severity violations may lead to no more than 45 days incarceration absent a formal revocation. Revocation of parole for a high severity violation may lead to no more than 12 months total reincarceration, including time spent pending a hearing.