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Eliminating Michigan's Mandatory Minimum Sentences for Drug Offenses **By Patrick Affholter, Legislative Analyst** **and Bethany Wicksall, Fiscal Analyst**

Recently enacted legislation, Public Acts 665, 666, and 670 of 2002, will eliminate controversial mandatory minimum prison sentences that have applied to certain controlled substance offenses since 1978. The so-called "650 lifer law" once required a sentence of life imprisonment for manufacturing, delivering, possessing with intent to manufacture or deliver ("possessing with intent"), or possessing 650 grams or more of a mixture containing a Schedule 1 or 2 narcotic or cocaine. Since 1998, the law has required a sentence of at least 20 years' imprisonment.

The 1978 legislation also required imprisonment for at least 20 but not more than 30 years for a violation involving at least 225 but less than 650 grams; either imprisonment for at least 10 but not more than 20 years, or lifetime probation, for a violation involving at least 50, but less than 225 grams; imprisonment for up to 20 years and/or a maximum fine of \$25,000, for manufacturing, delivering, or possessing with intent to deliver less than 50 grams; and imprisonment for up to four years and/or a maximum fine of \$2,000, for possessing less than 50 grams. Probation, parole, and suspension of sentence were prohibited during the period of the minimum sentences. Later revisions set a one-year mandatory minimum term for violations involving less than 50 grams, applied the lifetime probation option to violations involving less than 50 grams (instead of at least 50 grams), established a separate penalty for possessing less than 25 grams, and allowed for departure from the mandatory minimum sentences under certain circumstances.

This article reviews the history of the drug sentencing law and the issues surrounding it, and examines the fiscal implications of the legislation that will eliminate the mandatory minimum sentences as of March 1, 2003.

Origins of the 650-Lifer Law and Mandatory Minimum Sentences

Before 1978, delivering and possessing with intent to deliver any amount of a Schedule 1 or 2 narcotic drug were punishable by up to 20 years' imprisonment and/or a maximum fine of \$25,000. Possession of any quantity was punishable by up to four years' imprisonment and/or a maximum fine of \$2,000. The 650-lifer law and mandatory minimum sentences for lesser amounts of drugs were added to the former Controlled Substances Act by Public Act 147 of 1978; later that year, the provisions were incorporated into the recodified Public Health Code by Public Act 368 of 1978.

The stiffer penalties apparently were aimed at snaring high-level drug dealers, often characterized as the "kingpins" of the drug trade. It was believed that sure and severe penalties for violations involving large amounts of the most potent of illegal drugs, would befall these kingpins while also acting as a deterrent on the drug trade. In a recent opinion-editorial column advocating the elimination of the mandatory minimums, former Governor William G. Milliken, who signed the original measures into law, wrote that he "believed then it was the right response to an insidious and growing drug problem" (*The Detroit News*, 9-20-02).



The 1978 enactment of the tough new sentencing laws reportedly followed a series of hearings on proposals to increase penalties for major controlled substances offenses and to provide for wiretapping authority, presumably to target high-level drug dealers and financiers of the trade. (The wiretapping provisions, however, were not enacted.) According to a May 2000 report prepared by the Legislative Research Division of the Legislative Service Bureau (LSB), a good deal of support for the 1978 legislation came from the law enforcement community, including police agencies, the Prosecuting Attorneys Association of Michigan, and judges' associations ("Michigan's Mandatory Drug Lifer Law: A Legislative History"). Arguments in support of the legislation centered around the belief that the magnitude of the drug problem demanded the enactment of stricter laws, and that harsher penalties would both serve as a deterrent against dealing in illicit drugs and decrease the number of drug-related crimes by keeping drug dealers in prison for longer periods of time.

Ongoing Controversy and Revisions

From the outset of the 1978 enactment of the mandatory minimum drug sentences, detractors claimed that weaknesses in the sentencing structure would lead to increased corrections costs and injustice to low-level and first-time offenders. Opponents pointed out that severe mandatory penalties are not a proven deterrent to crime, that the use of mandatory sentences would fail to provide for individualized sentencing that could take into account aspects of the crime other than the amount of narcotics, and that major drug dealers likely would employ drug addicts and others as couriers, thereby avoiding possessing large amounts of drugs themselves.

Throughout the next two decades or so, thousands of people were caught up in the harsh sentences meted out for the drug offenses in question. According to the 2000 LSB report, in 1991 the Michigan Department of Corrections revealed that 140 inmates were serving mandatory life sentences without the possibility of parole and that a significant number of those people had no history of drug abuse or a prior criminal record. By August 2002, according to the Department, 7,557 people were incarcerated for manufacturing, delivering, possessing with intent, or possessing a Schedule 1 or 2 narcotic or cocaine, and 228 of those were serving a life term. Since 5,909 of those prisoners were serving for violations that involved less than 50 grams, it became apparent that the strict mandatory minimum sentences were not netting the drug kingpins, as had been hoped when the sentences were enacted in 1978.

During the 1980s and '90s, the Legislature began to address the issue of the strict mandatory sentences. In 1987 and 1988, the minimum sentences for violations involving at least 50 but less than 650 grams, were halved from 20 to 10 years for 225-649 grams and from 10 to five years for 50-224 grams. At the same time, a one-year mandatory minimum was established for violations involving less than 50 grams and the lifetime probation option was moved from violations involving 50-224 grams to violations involving less than 50 grams. The part of the 1987 and 1988 measures that reduced minimum sentences quickly was reversed, however, when those 10- and 20-year minimum terms were reinstated in 1989.

By the 1990s, the 650-lifer law was being challenged in both Federal and State courts. In 1991, the U.S. Supreme Court ruled that Michigan's mandatory sentence of life without parole did not violate the U.S. Constitution's Eighth Amendment prohibition against cruel and unusual



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punishment (*Harmelin v Michigan*, 111 S.Ct. 2680). The U.S. Supreme Court ruled that, although severe mandatory penalties may be cruel, they are not unusual in the constitutional sense. In 1992, however, the Michigan Supreme Court held that the statutory penalty of mandatory life in prison, without possibility of parole, for possession of 650 grams or more of a Schedule 1 or 2 narcotic or cocaine constituted cruel or unusual punishment, which is barred by Article 1, Section 16 of the Michigan Constitution (*People v Bullock*, 440 Mich 15). As a result, the Michigan Court struck down portions of the law denying parole consideration for people sentenced to life for a possession violation involving 650 grams or more. The Court later upheld the life without parole sentence for manufacturing, delivering, or possessing with intent 650 grams or more.

Press reports also began to highlight people who had received lengthy sentences under the mandatory minimum provisions and who appeared not to be a great threat to society. *Detroit Free Press* columnist Jim Fitzgerald wrote frequently about Gary Fannon, a man who had been sentenced to life without parole at age 18 for his aborted involvement in a drug deal. Fannon evidently was enticed by an undercover police officer to introduce him to a drug dealer. Fannon did not participate in the officer's actual drug purchase and never possessed any of the drugs in question, but was convicted of conspiracy to deliver more than 650 grams. The police officer later was fired because of his own drug use and Fannon's conviction eventually was overturned on the basis of ineffective counsel, because his lawyer did not raise an entrapment defense.

In a 1994 series, the *Detroit News* profiled several people serving long prison sentences under the mandatory minimum provisions. Some, like Robert Arwood and Anita Alcorta, who were serving 20-year mandatory minimum sentences for delivering more than 225 grams, did not dispute that they committed the crimes for which they were sentenced, but apparently committed the crimes only to support their own drug habits. Both Arwood and Alcorta excelled in prison, getting an education and honing legitimate skills, and were off of drugs, yet the State continued to spend large amounts of money to keep them incarcerated. Others portrayed in the *Detroit News* series, such as Melvina Smith, apparently were unwitting participants in the transport of narcotics. According to the *News*, Smith was driving home to Michigan from Florida with a female acquaintance who had more than \$1 million worth of cocaine. Despite having no previous criminal record, Smith was sentenced to life in prison.

Increasingly more people began to believe that the strict drug laws enacted in 1978 were not, in fact, snaring the kingpins of the drug trade. As suggested by the stories of people like Fannon, Arwood, Alcorta, and Smith, the mandatory minimums appeared to be catching a lot of small-time drug users and possibly even innocent victims.

It also had become apparent that prison crowding was being exacerbated by the proliferation of prisoners sentenced to mandatory minimum terms, and that their lengthy sentences were becoming very expensive to the State. The 1994 *Detroit News* series reported that, based on a cost of about \$23,700 to house a prisoner for one year, it was costing the State about \$13 million annually for drug offenders alone, and incarcerating those sentenced to life imprisonment could end up costing more than \$1 million each. The *News* also reported that Michigan had the fourth-highest incarceration rate in the nation, yet ranked only 21st in the number of violent



offenders behind bars. The difference seemed to be explained by the mandatory minimum sentences for drug offenders.

Elimination of the Mandatory Minimum Sentences

In 1991, a national group called Families Against Mandatory Minimums (FAMM) was founded. Its express purpose, according to the FAMM mission statement, is: "To abolish harsh and unjust mandatory sentencing laws and restore judicial discretion to fit the punishment to the crime." This organization has long advocated eliminating Michigan's mandatory minimums for drug offenses, which have been widely viewed as the toughest in the nation.

As FAMM and the media focused public attention on the effects of mandatory minimums throughout the 1990s, law enforcement and corrections professionals began to join in the effort to influence policy-makers to reform the sentencing law. In 1998, Public Acts 314 and 319 amended the 650-lifer law to provide for a sentence of life or at least 20 years' imprisonment, rather than requiring a life sentence, for a violation involving manufacturing, creating, delivering, or possessing with intent at least 650 grams of a Schedule 1 or 2 narcotic or cocaine, and to provide for parole eligibility for people previously sentenced to life without possibility of parole for that offense.

Pressure to eliminate mandatory minimum sentences continued to grow. In his recent op-ed column, former Governor Milliken cited the case of Karen Shook, a prisoner also highlighted by FAMM, who is serving two consecutive 10-year sentences for delivery and conspiracy to deliver. Shook was a drug addict who introduced undercover police to her dealer. According to Milliken and FAMM, by the time of Shook's trial, she had successfully completed substance abuse treatment and had assisted police. The arresting officer urged the judge to impose a lower sentence and the judge departed from the mandatory minimum sentence to do so, but the sentence was reversed on appeal and the 20-year sentence was imposed.

Stories like Shook's, and the others mentioned above, undoubtedly served to sway the opinions of both policy-makers and members of the law enforcement community regarding the desirability of mandatory minimum sentences. In fact, the Prosecuting Attorneys Association of Michigan joined with FAMM to promote the 2002 legislation that eliminates the mandatory minimums. In testimony before the House Committee on Criminal Justice, a Macomb County assistant prosecutor advocated a "smart on crime" approach and suggested that "warehousing too many low-level nonviolent offenders with a minimal role in the drug trade for too long in costly prison beds" did not fit that model. In addition, opponents of the mandatory minimums pointed out that truth-in-sentencing and statutory sentencing guidelines will ensure that those convicted of crimes in Michigan are penalized properly, while allowing for appropriate individualized sentences.

To that end, Public Acts 665, 666, and 670 of 2002 amend the Public Health Code, the Code of Criminal Procedure, and the Corrections Code to eliminate the mandatory minimum sentences for manufacturing, creating, delivering, possessing with intent, and possessing a Schedule 1 or 2 narcotic or cocaine. The 2002 legislation also eliminates the sentencing option of probation for life; allows, rather than requires, consecutive sentencing; deletes provisions



prohibiting probation, suspension of sentence, and parole; provides for parole eligibility of people sentenced before March 1, 2003; and revises the sentencing guidelines for the drug violations.

For more detailed information about the 2002 elimination of the mandatory minimum sentences and the history of legislative changes to the 650-lifer law and mandatory minimum provisions, please see the Senate Fiscal Agency (SFA) Enrolled Summary of House Bills 5394, 5395, and 6510 of 2001-02, which is available through the SFA Website (<http://www.senate.michigan.gov/sfa/>).

Fiscal Implications of the 2002 Legislation

Although one argument in support of eliminating of mandatory minimums was based on the belief that doing so would decrease criminal justice costs, the number of provisions included in the package along with uncertainty about related factors make it difficult to estimate the amendments' overall fiscal impact on State and local government. It is yet unclear how the implementation of each of the provisions will affect the others, or how they may change current practices by prosecutors, judges, and parole board members.

Mandatory Minimum Sentences. Eliminating mandatory minimum sentences and replacing them with sentencing guideline ranges potentially could decrease the average length of sentences offenders receive for the applicable substance abuse crimes, thereby decreasing corrections costs for the State. This will occur only if most offenders actually were serving mandatory minimum sentences prior to the statutory change and if the reform does not alter current practice by judges and prosecutors. The mandatory minimum sentencing structure allowed judicial departure if there were substantial and compelling reasons or the offender had no prior felony or violent convictions. According to the Department of Corrections (DOC), as of August 2002 over 7,500 inmates in the current institution/camp population were serving sentences for the eight applicable drug offenses. Table 1 lists those offenses, the mandatory minimum sentence previously required, the average minimum sentence offenders actually received, and the number of active sentences.

In all but the under-50-grams cases, the average minimum sentence received was less than the mandatory minimum, indicating that at least some offenders were already receiving departures under the prior statute, in which case the provision's fiscal impact will be diminished. In the under- 50-grams cases, the average minimum sentence was approximately 16 months longer than the mandatory minimum, signaling that some judges felt the mandatory minimums were not long enough, were using discretion, and might not change their sentencing patterns due to the elimination of mandatory minimums, again potentially diminishing the fiscal impact of the statutory change. Data provided by the DOC also suggest that many mandatory minimum sentences were the result of plea agreements. The extent to which the statutory changes will affect a prosecutor's willingness to offer pleas for lesser offenses without the assurance that an offender will receive a mandatory minimum sentence is unclear and could further diminish the extent of the bill's impact on sentence lengths and corrections costs.

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Table 1			
Mandatory Minimums vs Actual Average Minimum Sentences			
Offense	Mandatory Minimum	Avg. Minimum Sentence (in Years)	Number of Active Sentences
Delivery/Manufacture 650+ Grams	Before 10/1/98: Life	Life	179
	After 10/1/98: 20 Years	19.0	24
Delivery/Manufacture 225-649 Grams	20 Years	14.0	299
Delivery/Manufacture 50-224 Grams	10 Years	7.8	925
Delivery/Manufacture <50 Grams	1 Year or Lifetime Probation	2.4	5,776
Possession 650+ Grams	Life with Possibility of Parole	Life	49
Possession 225-649 Grams	20 Years	14.2	51
Possession 50-224 Grams	10 Years	9.0	121
Possession <50 Grams	1 Year or Lifetime Probation	2.3	133

Source: Department of Corrections

The package also allows for those already serving mandatory minimum sentences to be eligible for parole after they have served a certain number of years depending on the offense. The DOC estimates that this will affect as many as 300 current inmates in 2003. Their release is not certain, as the parole board still has the authority to decide whether to grant parole in these cases. The DOC will save approximately \$25,000 for each year that an inmate is released earlier than would have been allowed under the prior sentencing structure. This could relieve some of the pressure on prison capacity and postpone the need for bed construction.

Consecutive Sentences. The package potentially could decrease average sentence lengths and incarceration costs by allowing rather than requiring consecutive sentences when at least one of the offenses was a relevant substance abuse crime. Again, although this was mandatory, judges often departed, allowing offenders to serve time on multiple sentences concurrently, therefore shortening their overall stay in prison. In fact, data from the DOC suggest that only 41% of drug offenders in prison with multiple sentences currently receive consecutive terms for every sentence. There are no data available to indicate whether the statutory change will further decrease the use of consecutive sentencing. A DOC estimate suggests that the maximum bed reduction will be 286 beds over the next five years. This impact will be offset to the extent that consecutive sentencing is still used as an option.

Lifetime Probation. The DOC does not have exact figures, but estimates that between 4,000 and 4,500 offenders are currently under lifetime probation status. Although regular probation



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supervision is estimated to cost \$4.38 per day, or approximately \$1,600 a year, supervising lifetime probationers most likely costs somewhat less than this. Offenders who have successfully served five or more years on probation often require less direct supervision. They might not be required to meet with their probation officers as often, in some cases may report via phone rather in person, and might no longer require regular drug testing. Therefore, although the elimination of lifetime probation may decrease probation supervision costs, the savings likely will be minimal.

Increased Thresholds. Table 2 shows both the old and the new threshold levels and the minimum-term sentencing guideline ranges for the highest three offense classes, which are the same for both the delivery/manufacture offenses and the possession offenses. The new levels will allow offenders to carry larger quantities of controlled substances while still qualifying for a lower minimum sentencing range. The new levels require the possession of 1,000 grams or more in order for an offender to receive a minimum sentence over 20 years or a life sentence. They also require the possession of at least 450 grams rather than 225 in order for a violation to be moved from a Class B offense to a Class A offense, which carries longer sentences. Again, this provision could create shorter sentences overall and savings in incarceration costs, but that result depends on how the statutory change alters actual sentencing practice. Although an offender carrying 300 grams now will be eligible for a shorter sentence, there is no indication that judges will necessarily order shorter sentences.

Table 2			
Controlled Substance Threshold Levels			
Offense Class	Previous Threshold Level	New Threshold Level	Sentencing Guidelines Minimum Sentencing Range
A	650+ Grams	1,000+ Grams	21-35 to 270-450 months or life
A	225-649 Grams	450-999 Grams	21-35 to 240 months
B	50-224 Grams	50-449 Grams	0-18 to 117-160 months

Offense Variables. One provision of the package potentially could increase corrections costs. Under sentencing guidelines, a judge determines an appropriate sentencing range depending on two scores assigned to the offender based on the offense and prior record. Public Act 666 of 2002 significantly increased the potential number of points an offender can receive for offense variables 13 and 15. The more points an offender receives, the more likely he or she will go to prison rather than jail or community supervision and that he or she will receive a longer sentence. To the extent that the increased offense variable points increase the number and lengths of prison sentences, they will increase corrections costs.

Fines. In addition to allowing judges to sentence within guidelines rather than using a mandatory sentencing structure, the package also allows judges to impose fines for offenses of 50 grams or more rather than or in addition to other punishments. The maximum allowable fines range from \$250,000 to \$1,000,000 depending on the offense. There are no data to indicate how much additional revenue will be collected due to the potential increase in penal

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finer. This will depend on the extent to which judges impose the fines and the ability of the State to collect them from offenders. Any additional raised funds will benefit public libraries, constitutionally supported by penal fines.

Conclusion. Most of the provisions included in the package have the potential to decrease corrections costs by shortening average sentence lengths for both probation and incarceration, either through eliminating mandatory minimums, consecutive sentences, or lifetime probation, or by increasing controlled substance threshold amounts. Additional provisions have the potential to increase sentence lengths and possible costs by adding offense variable points, and to increase available revenue by creating fines. It is evident that the actual impact of each of the provisions will be affected by a number of factors, and it will be some time before the new laws have been implemented long enough to provide sufficient data on their overall effect and consequent fiscal impact.