

## 1. THE SENTENCING COMMISSION

**Q. What year was the commission established? Has the commission essentially retained its original form or has it changed substantially or been abolished?**

In 1994, the Michigan legislature established a sentencing commission tasked with collecting and analyzing sentencing data and drafting sentencing guidelines.<sup>1</sup> The commission met for several years while the guidelines were in development, but appeared to lapse soon afterward.<sup>2</sup> The statutes that established this commission and its duties were repealed in 2002.<sup>3</sup> In 2014, the legislature established a second commission – the Criminal Justice Policy Commission – tasked with similar duties, including modification of the sentencing guidelines.<sup>4</sup> The measure was signed by Governor Rick Snyder on January 10, 2015, and initial appointments were made shortly thereafter.<sup>5</sup> The commission is scheduled to be abolished in 2019.<sup>6</sup>

**Q. Membership: who appoints them, for what terms, with what required qualifications?**

Members of Michigan's new Criminal Justice Policy Commission are, with a few exceptions, appointed by the Governor, and serve 2-, 3-, or 4-year terms.<sup>7</sup> The Commission is composed of individuals with many different qualifications, including:

- Two members of the State Senate, submitted by the Senate Majority Leader, one individual from each caucus;
- Two members of the State House of Representatives, submitted by the Speaker of the House, one member from each caucus;
- The Attorney General or designee;
- A circuit court judge, appointed from a list of three names submitted by the Michigan Judges Association;
- A district court judge, appointed from a list of three names submitted by the Michigan District Judges Association;
- A representative of Michigan's prosecuting attorneys, appointed from a list of three names submitted by the Prosecuting Attorneys Association of Michigan;
- A representative of Michigan's criminal defense attorneys, appointed from a list of three names submitted by the Criminal Defense Attorneys of Michigan;
- One individual appointed from a list of three names submitted by the Michigan Sheriffs' Association;
- One individual appointed from a list of three names submitted by the director of the Michigan Department of Corrections;
- One individual who represents advocates of alternatives to incarceration;
- One individual who works in the mental or behavioral health field;

<sup>1</sup> 1994 Mich. Pub. Act 445 §§ 32, 33

<sup>2</sup> Sheila Robert Deming, *Michigan's Sentencing Guidelines*, vol. 79, no. 6 Mich. Bar J. (June 2000), available at <https://www.michbar.org/journal/article?articleID=92&volumeID=8&viewType=archive> (last visited July 17, 2019).

<sup>3</sup> 2002 Mich. Pub. Act 31, § 1.

<sup>4</sup> 2014 Mich. Pub. Act 465.

<sup>5</sup> *Id.*; Office of the Governor of Michigan, *Gov. Rick Snyder Makes Initial Appointments to Criminal Justice Policy Commission*, (Apr. 2, 2015), [http://www.michigan.gov/snyder/0,4668,7-277-57577\\_57657\\_59871-351637--,00.html](http://www.michigan.gov/snyder/0,4668,7-277-57577_57657_59871-351637--,00.html) (last visited July 17, 2019).

<sup>6</sup> Mich. Comp. Laws § 769.33a(6) (2019) (scheduled to be repealed by 2018 Mich. Pub. Act 576 on September 30, 2019)

<sup>7</sup> State law provided that a portion of the original appointees to the commission be appointed to shorter two- and three- year terms in order to stagger the overall membership of the commission. Mich. Comp. Laws § 769.32a(3) (2019).

- One individual appointed from a list of three names submitted by the Michigan Association of Counties;
- One individual who represents community corrections advisory boards;
- One individual appointed from a list of three names submitted by the Michigan Coalition to End Domestic and Sexual Violence;
- One member of the public who is unaffiliated with the organizations who help to compose the rest of the Commission.

The Governor also designates one member of the public to be the chairperson of the Commission.<sup>8</sup>

**Q. Is the commission an independent agency, or is it located in or hosted by some other state agency?**

The Criminal Justice Policy Commission was established as an agency within the legislative branch. The Commission receives staffing, office space, and equipment from the legislative council,<sup>9</sup> which is a constitutionally-created bipartisan body designed to provide service and support to the legislature and its agencies.<sup>10</sup>

**Q. How many staff does the commission have? Are they dedicated to the commission, or shared with another agency?**

The legislative council must provide the commission with “suitable” staff necessary to perform its prescribed functions.<sup>11</sup> Currently the Commission’s staff includes 1 person serving as the Commission’s Data Administrator.<sup>12</sup>

**Q. What is the commission’s current statutory mandate?**

The Commission’s statutory mandate consists of the following tasks:<sup>13</sup>

- Collect, prepare, analyze, and disseminate information regarding state and local sentencing and proposed release policies and practices for felonies and the use of prisons and jails;
- Collect and analyze information concerning how misdemeanor sentences and the detention of defendants pending trial affect local jails;
- Conduct ongoing research regarding the effectiveness of the sentencing guidelines;
- In cooperation with the Department of Corrections, research the populations and capacities of Michigan’s correctional facilities, and the impact of the guidelines on these factors as well as the effectiveness of efforts to reduce recidivism;
- In cooperation with the state court administrator, collect, analyze, and compile data regarding the effect of the sentencing guidelines on the caseload in Michigan courts;

<sup>8</sup> Mich. Comp. Laws § 769.32a(1)–(2) (2019).

<sup>9</sup> Mich. Comp. Laws § 769.32a(10) (2019).

<sup>10</sup> Mich. Comp. Laws § 4.1103 (2019).

<sup>11</sup> Mich. Comp. Laws § 769.32a(10) (2019).

<sup>12</sup> Mich. Legis. Council, *Criminal Justice Policy Commission*, <http://council.legislature.mi.gov/CouncilAdministrator/cjpc> (last visited September 2, 2019).

<sup>13</sup> Mich. Comp. Laws § 769.33a(1) (2019).

- Develop modifications to the sentencing guidelines for recommendation to the legislature, with an emphasis on protecting the public, the proportionality and uniformity of criminal sentences, and utilizing correctional resources.

## Q. Do statutes and/or guidelines identify management of prison and jail resources as a goal?

It appears that correctional resource management is a significant statutory goal. The Commission must write a “prison and jail impact report” to be submitted alongside of any proposed changes to the sentencing guidelines. Any modifications to the guidelines must consider the availability of space and resources necessary for carrying out sentences in state prisons.<sup>14</sup>

## Q. Are sentencing practices studied by means of annual or other regular data sets? If so, are those data sets made available to outside researchers?

The Commission is required by statute to gather, collect, analyze, and disseminate data on state and local sentencing.<sup>15</sup> The Commission must also compile data to study the effect of the sentencing guidelines on judicial resources.<sup>16</sup> Commission writings prepared in the performance of official functions must be made public.<sup>17</sup>

## 2. THE GUIDELINES

### Q. When were the guidelines first implemented?

In 1994, the Michigan legislature created the Michigan Sentencing Guidelines Commission, which was tasked with drafting a set of sentencing guidelines.<sup>18</sup> The guidelines were enacted in 1998 and applied to felonies committed on or after January 1, 1999.<sup>19</sup>

### Q. In recent years, have they been modified at least once a year?

Until recently, Michigan lacked a sentencing commission, so modifications to the sentencing guidelines were made independently by the legislature.

### Q. Do the commission’s recommended initial or modified guidelines require affirmative legislative approval, or do they take effect subject to legislative override?

The Commission must present recommended guidelines, law, or policy modifications to the Senate Majority Leader, the Speaker of the House of Representatives, and the Governor.<sup>20</sup> Michigan’s sentencing guidelines are statutory, so recommendations must be enacted through the normal legislative process.

<sup>14</sup> Mich. Comp. Laws § 769.33a(1)(f)(ix), (2), (4)(h) (2019).

<sup>15</sup> Mich. Comp. Laws § 769.33a(1)(d) (2019).

<sup>16</sup> Mich. Comp. Laws § 769.33a(1)(h) (2019).

<sup>17</sup> Mich. Comp. Laws § 769.32a(9) (2019).

<sup>18</sup> 1994 Mich. Pub. Acts 445 §§ 32–33.

<sup>19</sup> 1998 Mich. Pub. Acts 317 § 34(1–2).

<sup>20</sup> Mich. Comp. Laws § 769.33a(5) (2019).

**Q. Do the sentencing guidelines only apply to felonies, or are some misdemeanors and other lesser offenses also covered? Are some felonies excluded (e.g., those subject to life and/or death penalty)?**

Michigan's sentencing guidelines apply to almost all felonies in the state's Code of Criminal Procedure.<sup>21</sup> However, the guidelines do not apply to first-degree murder, for which the statutory penalty is life in prison without eligibility for parole.<sup>22</sup>

**Q. Is a grid used? Are there multiple grids? How many severity levels does the grid contain?**

Michigan separates felony offenses into classes that range from Class A to Class H and M2 (second-degree murder) with Classes M2 and A representing the most severe crimes. There is a corresponding grid for each offense class, resulting in a total of nine grids. Within each grid, the vertical axis (Y-axis) represents an offense variable score, and the horizontal axis (X-axis) represents the offender's prior record score.<sup>23</sup>

**Q. How is the presumptive sentence determined?**

Michigan uses an indeterminate sentencing<sup>24</sup> scheme in which each sentence has both a minimum and a maximum term and the actual release date is determined by a paroling authority after the minimum term is served.<sup>25</sup> The guidelines are used to determine the minimum sentence that must be served before an offender is eligible for parole, and the maximum sentence is set by statute. Though the guidelines are no longer mandatory, "they remain a highly relevant consideration in the trial court's exercise of sentencing discretion." As such, the court must determine the recommended minimum sentence under the guidelines and take it into account when sentencing.<sup>26</sup> Determining the recommended minimum sentence is a multi-step process:

- The first step is to score seven prior record variables (PRVs), including prior felonies, juvenile adjudications, and whether the offender was under criminal justice supervision at the time of the offense, to arrive at a total number of points representing the prior record score for the individual.<sup>27</sup>
- The second step is to score the appropriate offense variables (OVs), which are a series of factors relating to the specific offense that attempt to hone in on its seriousness.<sup>28</sup> Offense variables include contextual factors like weapons use, injury to the victim, and the offender's role in the crime. The guidelines include twenty separate offense variables; which variables are scored depends upon the category of crime (e.g., person, property, controlled substance, etc.).<sup>29</sup>
- The third step is to determine the offense class and then locate the appropriate grid. Michigan separates felony offenses into classes that range from Class A to Class H and M2 (second-degree murder) with Classes M2 and A representing the most severe crimes. There is a corresponding

<sup>21</sup> Mich. Comp. Laws § 769.34(2) (2019); see also Mich. Comp. Laws §§ 777.11–777.19 (2019) (Code of Criminal Procedure).

<sup>22</sup> Mich. Comp. Laws §§ 750.316, 777.16p (2019); see also Mich. Comp. Laws § 769.34(5) (2019).

<sup>23</sup> Mich. Comp. Laws §§ 777.61–69 (2019).

<sup>24</sup> Michigan's sentencing scheme under the guidelines is not "indeterminate" as the U.S. Supreme Court might understand the term because the guidelines operate as mandatory constraints placed on a court's discretion when sentencing a defendant within a range of possible sentences. See *People v. Lockridge*, 870 N.W.2d 502, 516 (Mich. 2015). Thus, "indeterminate sentencing" as used here connotes merely the practice of sentencing individuals to a range of years with a minimum and maximum (thus maintaining some parole release discretion) rather than to a fixed term of years.

<sup>25</sup> See, e.g., Mich. Comp. Laws § 791.234 (2019).

<sup>26</sup> *Lockridge*, 870 N.W.2d at 520.

<sup>27</sup> Mich. Sentencing Guidelines Manual Step I (June 19, 2019); Mich. Comp. Laws §§ 777.50–770.57 (2019).

<sup>28</sup> Mich. Sentencing Guidelines Manual Step II (June 19, 2019); Mich. Comp. Laws §§ 777.31–777.49a (2019).

<sup>29</sup> Mich. Sentencing Guidelines Manual Step II (June 19, 2019); Mich. Comp. Laws §§ 777.31–777.49a (2019).

grid in the sentencing guidelines for each of these offense classes, resulting in a total of nine grids.<sup>30</sup> The recommended minimum sentence is determined by locating the cell on the appropriate grid that is at the intersection of the offender's offense variable score (X axis) and prior record variable score (Y axis). Each cell contains a recommended minimum sentence range (measured in months). Within a cell, an "L" indicates a recommended life sentence.<sup>31</sup>

**Q. Is the choice among types of sentences regulated by a "disposition" or other prison in/out line? Are "out" sentences accompanied by suspended execution of prison or suspended imposition of sentence? By definitive preclusion or prison for those cases?**

The disposition for an offense is determined by the recommended minimum sentence range within each cell. If the minimum sentence range within a cell exceeds one year, then the presumptive sentence falls within a "prison cell," meaning that the recommended sentence includes time in prison.<sup>32</sup> If the lower end of the range is one year or less and the top of the range is greater than 18 months, the sentence falls within a "straddle cell," and either a prison sentence or an intermediate sanction is appropriate.<sup>33</sup> If the upper limit of the range is less than 18 months, the guidelines recommend imposition of an intermediate sanction, which may include a jail term of 0-12 months or the cell maximum, whichever is less.<sup>34</sup> It is important to note that any minimum sentence imposed under the guidelines should not exceed two-thirds of the statutory maximum.<sup>35</sup>

**Q. Are there border boxes or other categories permitting multiple sentence types?**

Michigan's sentencing grids for crimes in Class B through Class H give sentencing judges significant discretion over sentence types. These grids each contain a range of cells that are shaded darker than the rest of the grid, and the cells above this range are marked with an asterisk.<sup>36</sup> This separates every cell on each of these grids into one of three categories: intermediate sanction cells, straddle cells, or prison cells. The cell category that permits multiple possible sentence types are the straddle cells, which indicate that either a prison sentence or intermediate sanction would be appropriate.<sup>37</sup>

**Q. Are the guidelines purely advisory, or are they legally binding?**

Prior to July 29, 2015, Michigan's sentencing guidelines were legally binding.<sup>38</sup> However, on that date, the Supreme Court of Michigan found in *People v. Lockridge* that that the guidelines are unconstitutional in light of the U.S. Supreme Court decision in *Alleyne v United States*, which requires that any fact used to increase the statutory minimum sentence must be admitted by the defendant or found by a jury beyond a reasonable doubt.<sup>39</sup> The Michigan guidelines fail to meet the standard articulated in *Alleyne* because they require the

<sup>30</sup> Mich. Sentencing Guidelines Manual Step III (June 19, 2019); Mich. Comp. Laws §§ 777.61-777.69 (2019)..

<sup>31</sup> Mich. Sentencing Guidelines Manual Step IV (June 19, 2019) (defining "L" as life sentence).

<sup>32</sup> Mich. Sentencing Guidelines Manual Step IV (June 19, 2019) (defining "prison cells").

<sup>33</sup> Mich. Sentencing Guidelines Manual Step IV (June 19, 2019); An intermediate sanction is probation or any sanction other than prison, such as residential treatment, jail, or community service. See Mich. Comp. Laws § 769.31.

<sup>34</sup> Mich. Sentencing Guidelines Manual Step IV (June 19, 2019).

<sup>35</sup> Mich. Comp. Laws § 769.34(2)(b) (2019).

<sup>36</sup> Mich. Comp. Laws §§ 777.62-.69 (2019).

<sup>37</sup> Mich. Comp. Laws §§ 769.31(b), 769.34(4); see also Mich. Sentencing Guidelines Manual Definitions (June 19, 2019) (defining "intermediate sanction" as probation or any other sanction, other than imprisonment, that may lawfully be imposed; it can include a jail term of not more than 12 months).

<sup>38</sup> Mich. Comp. Laws § 769.34(2) (2016).

<sup>39</sup> *People v. Lockridge*, 870 N.W.2d 502, 520-21 (Mich. 2015) (applying *Alleyne v. United States*, 570 U.S. 99, 103 (2013), which held that a fact that increases either the minimum or the maximum length of a defendant's sentencing range must have been admitted by the defendant or found by the jury beyond a reasonable doubt).

court to make factual findings (by a preponderance of evidence) to score the offense variables, and these facts increase the floor of the minimum sentencing guidelines range. Therefore, Michigan's sentencing guidelines today are merely advisory, but the Michigan Supreme Court also made it clear that sentencing courts must consult the guidelines and take them into account when sentencing.<sup>40</sup>

### 3. DEPARTURES AND SIMILAR ADJUSTMENTS TO GENERALLY-RECOMMENDED SENTENCES

#### Q. What is the overall/general standard for departure?

Prior to *Lockridge*, the court could depart from the sentencing guidelines when setting the minimum sentence only if it had a “substantial and compelling reason” to do so.<sup>41</sup> The court was required to state the reasons for the departure on the record and explain the extent of its departure.<sup>42</sup> The Supreme Court of Michigan had previously declared that “only those factors that are objective and verifiable may be used to judge whether substantial and compelling reasons exist.”<sup>43</sup> The *Lockridge* decision removed this requirement, and trial courts may now depart from the advisory guidelines without stating substantial and compelling reasons on the record.<sup>44</sup> This topic is discussed further in the case law summary.

#### Q. Are there lists of aggravating and mitigating circumstances permitting departure? If so, are such lists non-exclusive? Is there a list of prohibited factors?

Prior to *Lockridge*, Michigan law did not specifically provide for any factors that permit departure from the sentencing guidelines; rather, the court had to articulate its own “substantial and compelling reason” for the departure. However, the law did provide that courts in Michigan could not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance *in propria persona* (acting as one's own legal counsel), or religion to depart from the appropriate sentence range.<sup>45</sup> The law also provided that courts could not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court found from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.<sup>46</sup> Though these provisions remain in state law today, it is uncertain whether they continue to have any force or effect because *Lockridge* rendered the guidelines advisory.

#### Q. Do the guidelines expressly address mitigations based on a guilty plea, acceptance of responsibility, and/or providing assistance to law enforcement?

When departures were governed by Michigan's guidelines, the guidelines did not expressly address what factors judges could take into account in determining a sentence, mitigated or otherwise. Hence, the

<sup>40</sup> *Lockridge*, 870 N.W.2d at 520.

<sup>41</sup> Mich. Comp. Laws § 769.34(3) (2016).

<sup>42</sup> *Id.*

<sup>43</sup> *People v. Babcock*, 666 N.W.2d 231, 237 (Mich. 2003).

<sup>44</sup> *People v. Lockridge*, 870 N.W.2d 502 at 520–21 (Mich. 2015); see, e.g. *People v. Trice*, No. 325290, 2016 Mich. App. LEXIS 856 (Mich. Ct. App. Apr. 26, 2016).

<sup>45</sup> Mich. Comp. Laws § 769.34(3)(a) (2016)..

<sup>46</sup> Mich. Comp. Laws § 769.34(3)(b) (2016).

standards for mitigation based on a guilty plea, acceptance of responsibility, or aid to law enforcement were not discussed.

## Q. Are there limits on the degree of durational (length-of-custody) departure?

Michigan courts cannot impose a minimum sentence, including a departure, that exceeds two-thirds of the maximum statutory sentence.<sup>47</sup> If the judge imposes a minimum sentence that is longer or more severe than the appropriate sentence range, the court must advise the defendant on the record and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range.<sup>48</sup> The Michigan Supreme Court articulated in *Lockridge* that a sentence that departs from the applicable sentencing guidelines range will be reviewed for reasonableness.<sup>49</sup>

## Q. Are there limits on the availability of dispositional departure (executed-prison vs. stayed sentence)?

Other than a number of criminal statutes with mandatory-minimum sentence requirements,<sup>50</sup> there are no limits, in either the guidelines or case law, regarding dispositional departures. Before *Lockridge*, however, the court was required to state on the record the reasons for any departure,<sup>51</sup> and convicted criminals whose presumptive sentence fell within a “prison cell” were required to face time in prison.<sup>52</sup>

## 4. PRISON RELEASE DISCRETION

### Q. Does the jurisdiction utilize parole release discretion or has it been abolished for all or most offenders?

The Michigan Parole Board has parole release discretion over all prisoners serving an indeterminate<sup>53</sup> sentence who have served the minimum term imposed by the court, less applicable jail credit and/or good-behavior type credit.<sup>54</sup> This discretion is subject to Michigan’s parole guidelines, requiring evidence of arrangements for the prisoner’s employment, education, and/or medical care upon release.<sup>55</sup> There are some felonies, however, for which there is no possibility of parole upon conviction.<sup>56</sup>

### Q. Does the state have a “truth in sentencing” law, limiting the extent of early release?

Michigan enacted the Truth-in-Sentencing Act in 1998, which eliminated good time credits and other disciplinary considerations in parole determinations for all prisoners sentenced on or after December 15, 1998, and required them to serve the minimum term imposed by the court before becoming eligible for

<sup>47</sup> Mich. Comp. Laws § 769.34(2)(b) (2019).

<sup>48</sup> Mich. Comp. Laws § 769.34(7) (2019); Mich. Sentencing Guidelines Manual Step V (June 19, 2019).

<sup>49</sup> *Lockridge*, 870 N.W.2d at 520–21.

<sup>50</sup> Mich. Comp. Laws § 769.34(2) (2019).

<sup>51</sup> Mich. Comp. Laws § 769.34(3) (2016).

<sup>52</sup> Mich. Comp. Laws § 769.34(4)(c) (2016).

<sup>53</sup> Michigan’s sentencing guidelines use an indeterminate scheme that provides a range of possible sentence lengths between a minimum and a maximum sentence. All sentences under the guidelines are therefore indeterminate. See *People v. Harper*, 739 N.W.2d 523, 531–32 (Mich. 2007).

<sup>54</sup> Mich. Comp. Laws §§ 791.234(1), (11), 791.235(1) (2019).

<sup>55</sup> See Mich. Comp. Laws § 791.233(e) (2019); Mich. Admin. Code R. 791.7716 (2019).

<sup>56</sup> See Mich. Comp. Laws § 791.234(6) (2019).

parole.<sup>57</sup> However, special alternative incarceration (boot-camp) is available for some inmates.<sup>58</sup> Moreover, inmates convicted of certain specified crimes are potentially eligible for an early release (or “special parole”) before their minimum sentence is served with written approval from the sentencing judge.<sup>59</sup>

**Q. Do recommended and imposed sentences under the guidelines set the minimum time to serve in prison, the maximum, both the minimum and maximum, a target/recommended/expected prison duration, or some other combination of these parameters?**

Each cell on a sentencing grid contains a minimum sentencing range. When a Michigan court imposes a prison sentence under the guidelines, the court pronounces a minimum sentence within that range.<sup>60</sup> For first-time offenders, the maximum sentence is “the maximum penalty provided by law . . . .”<sup>61</sup> For subsequent offenders, the maximum may be a multiple of the statutory maximum up to life or fifteen years’ imprisonment, depending on the offense type, but no less than the sentence for a first-offender; certain repeat, violent offenders face a minimum twenty-five year sentence.<sup>62</sup> The court must pronounce both the minimum and maximum sentence.<sup>63</sup>

**Q. Is the period of post-prison supervision independent of any unserved prison term?**

The Michigan Parole Board establishes an independent parole term.<sup>64</sup> However, parole in Michigan is seen as permission for a prisoner to leave the prison, and not as a release. Therefore, paroled prisoners are presumed to be serving the sentence imposed by the court, and may be subject to serving the unexpired portion of the maximum sentence if the provisions of parole are violated.<sup>65</sup> The Parole Board can enter a final order of discharge if the individual has “faithfully performed all of the conditions and obligations of parole for the period of time fixed in the order of parole.”<sup>66</sup>

**Q. What good-time credits do prisoners earn? Is program participation considered?**

Under Michigan’s truth-in-sentencing laws, prisoners do not receive any good time credits toward the amount of time they are required to serve before being released on parole. Prisoners are required to serve at least the minimum sentence imposed by the court, less jail credit and other applicable credits, before they are eligible for parole, and even then their release is at the discretion of the Michigan Department of Corrections’ Parole Board.<sup>67</sup>

**Q. Are prisoners subject to exceptional, “second-look” releasing mechanisms?**

Other than an application process for the exercise of the Governor’s authority to grant pardons under the Michigan Constitution,<sup>68</sup> there is no “second-look” releasing mechanism.

<sup>57</sup> See Mich. Comp. Laws §§ 791.233; 791.233b; 791.234; 800.34 (2019).

<sup>58</sup> Mich. Comp. Laws §791.234a (2019).

<sup>59</sup> Mich. Comp. Laws § 791.233(1)(b) (2019).

<sup>60</sup> Mich. Comp. Laws § 769.34(2) (2019); see also *People v. Harper*, 739 N.W.2d 523, 534 (Mich. 2007).

<sup>61</sup> Mich. Comp. Laws § 769.8(1) (2019).

<sup>62</sup> Mich. Comp. Laws 769.12(1)(a) (2019).

<sup>63</sup> Mich. Comp. Laws § 769.10(2) (2019).

<sup>64</sup> Mich. Admin. Code R. 791.7730 (2019).

<sup>65</sup> Mich. Comp. Laws § 791.238 (2), (6) (2019).

<sup>66</sup> Mich. Comp. Laws § 791.242 (2019).

<sup>67</sup> Mich. Comp. Laws §§ 791.233; 791.234 (2019).

<sup>68</sup> Mich. Comp. Laws § 791.244 (2019).

## 5. RELATIONSHIP TO CRIMINAL LAWS

### Q. Did the guidelines replace some or all previous statutory maxima?

No. The guidelines did not replace previous statutory maxima.<sup>69</sup> Instead, the guidelines were established to provide recommended minimum sentences.

### Q. Are guidelines built on top of (i.e., equal to or more severe than) any remaining mandatory minima, or are they set independently and over-ridden whenever a mandatory applies?

Some specific crimes in Michigan have had a statutory minimum sentence since before the modern sentencing guidelines were enacted. Statute overrides the guidelines whenever a mandatory minimum sentence applies.<sup>70</sup>

### Q. Are some “mandatory” minima subject to case-specific “departure” or other exception?

If a mandatory minimum sentence is provided by statute, courts in Michigan must impose a sentence in accordance with the statute. This is not considered a departure from any guideline range. There are certain exceptions, like for crimes under the Michigan Vehicle Code, which authorize sentencing judges to impose a sentence below the statutory minimum.<sup>71</sup>

## 6. CRIMINAL HISTORY SCORING

### Q. What are the major components of the criminal history score?

A defendant's criminal history is scored based on seven Prior Record Variables (PRVs). The PRVs are placed into the following categories:

1. Prior High Severity Felony Convictions
2. Prior Low Severity Felony Convictions
3. Prior High Severity Juvenile Adjudications
4. Prior Low Severity Juvenile Adjudications
5. Prior Misdemeanor Convictions or Prior Misdemeanor Juvenile Adjudications
6. Relationship to Criminal Justice System (whether the convicted defendant is already a prisoner, or on probation)
7. Subsequent or Concurrent Felony Convictions<sup>72</sup>

Prior convictions are separated by high and low severity. High severity crimes are crimes categorized in Classes A-D, and low severity crimes are crimes that are categorized in Classes E-H.<sup>73</sup> A defendant's Prior Record Score is the total number of points scored for all seven PRVs.<sup>74</sup>

<sup>69</sup> Mich. Comp. Laws § 777.6 (2019).

<sup>70</sup> Mich. Comp. Laws § 769.34(2)(a) (2019).

<sup>71</sup> Mich. Comp. Laws § 769.34(2)(a) (2019).

<sup>72</sup> Mich. Comp. Laws §§ 777.51–.57 (2019).

<sup>73</sup> Mich. Sentencing Guidelines Manual Step I.C (June 19, 2019).

<sup>74</sup> Mich. Sentencing Guidelines Manual Definitions (June 19, 2019).

**Q.** Does the jurisdiction utilize “decay”/washout rules, that is, do old convictions count less or drop out? Which older convictions decay, when, and how?

Michigan has a 10-year look back period. If there are fewer than 10 years between the discharge date of the offender’s conviction or juvenile adjudication and commission of the current offense, the prior conviction must be counted. Once a prior conviction is found and scored in this manner, the exercise starts over to look backwards from the prior conviction to determine if there is yet another conviction that occurred within 10-years of *that* conviction. The exercise continues “until a time span equal to or greater than 10 years separates the discharge date of an earlier conviction or adjudication from the commission date of the next conviction or adjudication or until no previous convictions or adjudications remain.”<sup>75</sup>

**Q.** Do the Guidelines include any other significant limitations on how criminal history can be used (e.g., limits on eligibility for high-history categories; adjustments for older offenders)?

The guidelines do not contain any other significant limitation on a defendant’s Prior Record Score.

## 7. CRIMINAL HISTORY SCORING

**Q.** Are consecutive sentences limited? If so, how (e.g. prohibited, permissive, or mandatory in certain cases; limits on total duration; use of a multiple-counts enhancement formula)?

Michigan law presumes concurrent sentencing. As such, there must be statutory authority to support the imposition of a consecutive sentence.<sup>76</sup> However, the number of statutes that allow for consecutive sentencing have increased significantly over the last 25 years, giving judges substantial discretion in how they impose consecutive sentences.<sup>77</sup>

**Q.** In consecutive sentencing, how is the offender’s criminal history taken into account?

In Michigan, consecutive sentencing is permitted only if specifically authorized by statute.<sup>78</sup> When scoring prior record variable (PRV) 7, which assigns points for subsequent or concurrent felony convictions, the guidelines specifically prohibit scoring convictions that will result in a mandatory consecutive sentence or a permissive consecutive sentence imposed under Michigan’s Public Health Code.<sup>79</sup> Otherwise, all PRVs are scored for every offense.<sup>80</sup>

<sup>75</sup> Mich. Sentencing Guidelines Manual Step I.D (June 19, 2019).

<sup>76</sup> *People v. Chambers*, 430 Mich. 217, 222 (Mich. 1988)..

<sup>77</sup> Anne Yantus, *Sentence Creep: Increasing Penalties in Michigan and the Need for Sentencing Reform*, 47 U. Mich. J. L. Reform 645, 683 (2014).

<sup>78</sup> *People v. Hunter*, 507 N.W.2d 768, 770 (Mich. Ct. App. 1993). Examples of situations in which consecutive sentences are permitted are: (1) felony offenses committed while another offense is pending sentencing; (2) felony offenses committed while on parole; (3) and certain drug offenses.

<sup>79</sup> Mich. Comp. Laws § 777.57(2)(c) (2019).

<sup>80</sup> Mich. Comp. Laws § 777.21(1)(b) (2019).

## 8. ENFORCEMENT MECHANISMS (LOCATION ON THE “ADVISORY”-TO-“MANDATORY” CONTINUUM)

### Q. Are recommended sentences enforced by prosecution and defense sentence appeals?

Pursuant to *Lockridge*, when a minimum sentence departs from the recommended guidelines range, it will be reviewed by the appellate court for reasonableness.<sup>81</sup>

### Q. Are other enforcement methods used (e.g., required reasons for departure; published judge-specific departure rates; narrow permitted sentencing alternatives and/or ranges)?

Prior to *Lockridge*, a judge working under the guidelines was allowed to depart from the guidelines sentence range only where there were “substantial and compelling” reasons to do so. If the judge imposed a minimum sentence that represented an upward or downward departure from the appropriate sentence range, the court was required to state on the record the reasons for departure.<sup>82</sup> Following *Lockridge*, the court can exercise its discretion to depart without articulating a substantial and compelling reason for doing so.<sup>83</sup> There are no published statistics on departure rates or sentencing guidelines compliance.<sup>84</sup>

### Q. Are some deviations from the guidelines not deemed departures?

Any sentence mandated by statute that conflicts with the guidelines is not considered to be a departure under Michigan state law.<sup>85</sup> There are a few statutorily correct or appropriate sentences outside of specific cell ranges that are not departures. They are:

1. When a mandatory minimum sentence is required by a criminal statute;
2. Where the recommended minimum sentence under the guidelines falls in an intermediate sanction cell or straddle cell, the sentencing judge may sentence the offender below the cell range;<sup>86</sup>
3. If a statute mandates a minimum sentence for an offense and the statute authorizes the sentencing judge to impose a sentence that is less than that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure from the guidelines.<sup>87</sup>

### Q. Do some deviations require especially strong justification? Or minimal justification?

Before *Lockridge*, the law previously required the same extent of justification for all deviations.<sup>88</sup> The court in *Lockridge* adopted a “reasonableness” standard of review for departures from sentencing guidelines.<sup>89</sup> “The “reasonableness” review “merely asks whether the trial court abused its discretion.”<sup>90</sup> A trial court

<sup>81</sup> *People v. Lockridge*, 870 N.W.2d 502, 520-21 (Mich. 2015).

<sup>82</sup> Mich. Comp. Laws § 769.34(3) (2016).

<sup>83</sup> *Lockridge*, 870 N.W.2d at 520-21.

<sup>84</sup> Neal B. Kader & Brian J. Ostrom, *State Sentencing Guidelines Profiles and Continuum*, p. 16 (2008), [http://www.ncsc.org/~media/Microsites/Files/CSI/State\\_Sentencing\\_Guidelines.ashx](http://www.ncsc.org/~media/Microsites/Files/CSI/State_Sentencing_Guidelines.ashx).

<sup>85</sup> Mich. Comp. Laws § 769.34(2)(a) (2019).

<sup>86</sup> Mich. Comp. Laws § 769.34 (4) (2019).

<sup>87</sup> Mich. Comp. Laws § 769.34(2)(a) (2019).

<sup>88</sup> See Mich. Comp. Laws § 769.34(3) (2015).

<sup>89</sup> *People v. Lockridge*, 870 N.W.2d 502, 521 (Mich. 2015) (citing *United States v. Booker*, 543 U.S. 220 (2005)).

<sup>90</sup> *People v. Shank*, 881 N.W. 2d 135, 227 (Mich. Ct. App. Nov. 17, 2015) (quoting *Rita v. United States*, 551 U.S. 338, 351 (2007)).

# Jurisdiction Profile: Michigan



UNIVERSITY OF MINNESOTA LAW SCHOOL | 229 19TH AVE SOUTH | 472 MONDALE HALL | MINNEAPOLIS, MN 55455 | ROBINA@UMN.EDU | ROBINA.INSTITUTE.UMN.EDU

abuses its discretion when its decision falls outside of “principled outcomes”<sup>91</sup> or violates principles of proportionality.<sup>92</sup>

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<sup>91</sup> *People v. Unger*, 749 N.W.2d 272, 283 (Mich. Ct. App. 2008).

<sup>92</sup> *People v. Steanhouse*, 880 N.W.2d 297, 325 (Mich. Ct. App. 2015).