Approved 3/31/92
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative John Solbach at
Chairperson

3:30 a~~m~~./p.m. on March 19, 1992 in room 313-S of the Capitol.

All members were present except:

Representative O'Neal who was excused.

Committee staff present:

Jerry Donaldson, Legislative Research
Jill Wolters, Revisor of Statutes
Judy Goeden, Committee Secretary

Conferees appearing before the committee:

State Representative Jim Garner
Bill Rich, Washburn University
Gene Olander, Kansas County & District Attorneys Association
Helen Stephens, Kansas Peace Officers Association
Anne Smith, Kansas Association of Counties
Dr. Gilbert Parks, Topeka, Ks
Ron Smith, Kansas Bar Association

The chairman called the meeting to order.

Hearing was opened on HB 2504, restoring driving privileges to a habitual violator.

State Representative Jim Garner testified in support of HB 2504. (Attachment #1)

Representative Garner moved to amend HB 2504 by correcting the dates in the bill. Representative Smith seconded the motion. Motion carried.

Representative Garner moved to report HB 2504 as amended favorably for passage. Representative Douville seconded the motion. Motion carried.

HB 3054, statute of limitations on product liability claims, was taken under consideratio

Representative Everhart moved to adopt the amendments to HB 3054 presented in committee handout (Attachment #2), and to make it a substitute bill, then report Substitute HB 3054 favorably for passage. Representative Smith seconded the motion.

Representative Vancrum made a substitute motion to table HB 3054. Rep. Lawrence seconded the motion. Motion failed.

Rep. Everhart's original motion to amend HB 3054 and recommend Substitute HB 3054 favorably for passage passed. Representatives Snowbarger, Lawrence, Vancrum, Scott and Allen requested to be recorded as voting No on the motion.

Continued hearing on SB 479, enacting Kansas sentencing guidelines act, was opened.

Bill Rich, Professor of Law, Washburn University, testified in favor of SB 479. (Attachment #3) He said he felt SB 479 must be made retroactive, and he explained how retroactivity could be phased in over a period of time. Additional funds would need to be available for retroactivity. There is a possible constitutional issue if retroactivity is not put in SB 479, but he felt it would be a tough claim. He answered committee members questions.

Gene Olander, Kansas County & District Attorneys Association, testified in favor of SB 479, however he expressed several concerns about the bill. (Attachment #4) He suggested that retroactivity not be passed until the funds from Appropriations were passed. He answered committee members questions.

Helen Stephens, Kansas Peace Officers Association testified in favor of SB 479. (Attachment #5) She supported a 7/1/93 implementation date.

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,

room 313-S, Statehouse, at 3:13 ~~xx~~m./p.m. on March 19, 1992.

Anne Smith, Kansas Association of Counties, testified in favor of SB 479, however suggested numerous changes. (Attachment #6)

Dr. Gilbert Parks testified in opposition to SB 479 in its entirety. One of his major concerns is that people of color in the justice system are discriminated against. He felt changing the judicial system with this bill would be wrong especially for African-Americans. He said well-meaning people have tried to fix institutions over the years and have only made them worse. He felt disparity as far as race is concered would be worse if this bill were passed. He said there is no system in this country that solves racial problems in sentencing. He said there are more black males in prison in Kansas than in colleges.

Ron Smith, Kansas Bar Association, testified in opposition to SB 479. (Attachment #7) One committee member felt the reason KBA was opposed to the bill was because attorneys did not want to change, and that reason was omitted from the list of objections. In answer to a member's question, he said that the criminal justice system must be looked at completely.

Hearing on SB 479 was closed.

The meeting was adjourned at 5:50 P.M.

GUEST LIST

COMMITTEE: House Judiciary DATE: 3-19-12

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATIO
R Ed Ivey	Topeka	K.T.L.A.
Tom Smith	"	KBA
Gene M Olander	Topeka	KCDAA
Jim Clark	Topeka	KCDAA
Clark V. Cavlus II	Wichita	District Judge
Helen Stephens	Topeka	KPOA
Kyle Smith	Topeka	KCDAA
STEVE KEARNEY	TOPEKA	KOTA
Jeff Cohee	Topeka	Intern
BEN BRADLEY	TOPEKA	KS Assoc of Counties
Ryan Seagers	Olathe	Intern
JEFF WASHBURN	TOPEKA	INTERN
David B. Dallam	Topeka	Div of Budget

STATE OF KANSAS

JIM D. GARNER
REPRESENTATIVE, 11TH DISTRICT
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(316) 251-1864
COFFEYVILLE, KS 67337
STATE CAPITOL
TOPEKA, KS 66612
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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE CHAIR JUDICIARY
MEMBER AGRICULTURE
TRANSPORTATION
LEGISLATIVE, JUDICIAL & CONGRESSIONAL APPORTIONMENT
JOINT COMMITTEE ON KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM (KPERS) INVESTMENT PRACTICES

TESTIMONY BEFORE THE
HOUSE JUDICIARY COMMITTEE

In Support of H.B. 2504

March 19, 1992

Mr. Chairman and members of the committee:

Thank you for the opportunity to appear before the committee and testify in support of H.B. 2504.

Currently, a person convicted of being a habitual violator loses their driving privileges for at least three years. After the passage of three years, the habitual violator may petition the court in which the person was convicted to have the driving privileges restored. This bill would simply amend the language to allow the person to petition the district court where the person resides as an alternative to the court of conviction.

It has been brought to my attention by an attorney in my district that a person in my district, who was declared an habitual violator in 1984 in Lane County, Kansas, has still not had his driving privileges restored. Needless to say, it is difficult for this person, who has no driver's license, to get to Lane County.

I see no reason to require a person who lives across the state to return to the court of conviction. The court of the person's residence is very capable of determining whether the person's driving privileges should be reinstated. In fact, the court of residence most likely will be more familiar with the individual, and thus, in a better position to judge the person's fitness to have his or her driving privileges restored.

I urge the committee to take favorable action on H.B. 2504. Again, thank you for the opportunity to testify before the committee.

HJC
3-19-92
Attach #1

Substitute for HOUSE BILL NO. 3054

By Committee on Judiciary

AN ACT concerning civil procedure; relating to the statute of limitations; amending K.S.A. 1991 Supp. 60-513 and 60-3303 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1991 Supp. 60-513 is hereby amended to read as follows: 60-513. (a) The following actions shall be brought within two years:

(1) An action for trespass upon real property.

(2) An action for taking, detaining or injuring personal property, including actions for the specific recovery thereof.

(3) An action for relief on the ground of fraud, but the cause of action shall not be deemed to have accrued until the fraud is discovered.

(4) An action for injury to the rights of another, not arising on contract, and not herein enumerated.

(5) An action for wrongful death.

(6) An action to recover for an ionizing radiation injury as provided in K.S.A. 60-513a, 60-513b and 60-513c, and amendments thereto.

(7) An action arising out of the rendering of or failure to render professional services by a health care provider, not arising on contract.

(b) Except as provided in ~~subsection~~ subsections (c) and (d), the causes of action listed in subsection (a) shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured

party, but in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action.

(c) A cause of action arising out of the rendering of or the failure to render professional services by a health care provider shall be deemed to have accrued at the time of the occurrence of the act giving rise to the cause of action, unless the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall such an action be commenced more than four years beyond the time of the act giving rise to the cause of action.

(d) ~~The--provisions--of--this--section-as-it-was-constituted prior-to-July-1,-1987,-shall-continue-in-force-and-effect--for--a period-of-two-years-from-that-date-with-respect-to-any-act-giving rise--to--a-cause-of-action-occurring-prior-to-that-date.~~ A cause of action arising out of a product liability claim, as defined in K.S.A. 60-3302, and amendments thereto, shall be deemed to have accrued at the time of the occurrence of the act giving rise to the cause of action, unless the fact of injury is not reasonably ascertainable until such time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall an action be commenced more than 20 years beyond the time of delivery of the product.

Sec. 2. K.S.A. 1991 Supp. 60-3303 is hereby amended to read as follows: 60-3303. (a) (1) Except as provided in paragraph (2) of ~~subsection--(a)--of~~ this ~~section~~ subsection, a product seller shall not be subject to liability in a product liability claim if the product seller proves by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired. "Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would

H JC 3-19-92 Attach #2 285

normally be likely to perform or be stored in a safe manner. For the purposes of this section, "time of delivery" means the time of delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold.

Examples of evidence that is especially probative in determining whether a product's useful safe life had expired include:

(A) The amount of wear and tear to which the product had been subject;

(B) the effect of deterioration from natural causes, and from climate and other conditions under which the product was used or stored;

(C) the normal practices of the user, similar users and the product seller with respect to the circumstances, frequency and purposes of the product's use, and with respect to repairs, renewals and replacements;

(D) any representations, instructions or warnings made by the product seller concerning proper maintenance, storage and use of the product or the expected useful safe life of the product; and

(E) any modification or alteration of the product by a user or third party.

(2) A product seller may be subject to liability for harm caused by a product used beyond its useful safe life to the extent that the product seller has expressly warranted the product for a longer period.

(b) (1) In claims that involve harm caused more than 10 years after time of delivery, a presumption arises that the harm was caused after the useful safe life had expired. This presumption may only be rebutted by clear and convincing evidence.

(2) (A) If a product seller expressly warrants that its product can be utilized safely for a period longer than 10 years,

the period of repose, after which the presumption created in paragraph (1) of this subsection arises, shall be extended according to that warranty or promise.

(B) The ten-year period of repose established in paragraph (1) of this subsection does not apply if the product seller intentionally misrepresents facts about its product, or fraudulently conceals information about it, and that conduct was a substantial cause of the claimant's harm.

(C) Nothing contained in this subsection shall affect the right of any person liable under a product liability claim to seek and obtain indemnity from any other person who is responsible for the harm which gave rise to the product liability claim.

(D) The ten-year period of repose established in paragraph (1) of this subsection shall not apply if the harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by a reasonably prudent person until more than 10 years after the time of delivery, or if the harm caused within 10 years after the time of delivery, did not manifest itself until after that time.

(c) Except as provided in subsections (d) and (e), nothing contained in subsections (a) and (b) above shall modify the application of K.S.A. 60-513, and amendments thereto.

(d) (1) In a product liability claim against the product seller, the ~~ten-year~~ twenty-year limitation, as defined in K.S.A. 60-513, and amendments thereto, shall not apply to the time to discover a disease which is latent caused by exposure to a harmful material, in which event the action shall be deemed to have accrued when the disease and such disease's cause have been made known to the person or at the point the person should have been aware of the disease and such disease's cause.

(2) The term "harmful material" means any chemical substances commonly known as asbestos, dioxins, or

polychlorinated biphenyls, whether alone or as part of any product, or any substance which is determined to present an unreasonable risk of injury to health or the environment by the United States environmental protection agency pursuant to the federal toxic substances control act, 15 U.S.C. § 2601 et seq., or the state of Kansas, and because of such risk is regulated by the state or the environmental protection agency.

(e) Upon the effective date of this act through July 1, 1991, the provisions of this subsection shall revive such causes of action for latent diseases caused by exposure to a harmful material for: (1) Any person whose cause of action had accrued, as defined in subsection (d) on or after March 3, 1987; or (2) any person who had an action pending in any court on March 3, 1989, and because of the judicial interpretation of the ten-year limitation contained in subsection (b) of K.S.A. 60-513, and amendments thereto, as applied to latent disease caused by exposure to a harmful material the: (A) Action was dismissed; (B) dismissal of the action was affirmed; or (C) action was subject to dismissal. The intent of this subsection is to revive causes of action for latent diseases caused by exposure to a harmful material which were barred by interpretation of K.S.A. 60-513, and amendments thereto, in effect prior to this enactment.

Sec. 3. K.S.A. 1991 Supp. 60-513 and 60-3303 are hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

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March 19, 1992

To: Kansas State House of Representatives
Judiciary Committee

Fr: Bill Rich
Professor of Law
Washburn University School of Law

Re: S.B. No. 479: Sentencing Guidelines

Summary of Testimony

I was appointed in 1978 by United States District Judge Richard Rogers to represent the class of inmates housed at the Lansing Correctional Facility who had challenged their conditions of confinement. My views are based upon experiences with that litigation.

Over the course of the last two years I have often addressed issues related to proposed sentencing guidelines. I have been involved because of my belief in the need to address the underlying problems which led to federal court relief from "flagrant and egregious violations of constitutional standards." The federal court ordered implementation of an effective population management control system. Adoption and implementation of sentencing guidelines is the only existing alternative which would meet that mandate.

My greatest concern at this stage is that the current version of S.B. 479 fails to provide retroactive application of the proposed sentencing guidelines. That failure is unconscionable:

- The Sentencing Guidelines Commission explicitly found that current inmates have been victims of racial and geographic discrimination.

- Individual inmates who would be affected most by retroactivity are the same individuals who have been most victimized by existing sentence disparity.

- Inmates harmed by a lack of retroactivity were also the individual victims of years of neglect and abuse.

For these reasons it is necessary for the Judiciary Committee to develop a reasonable proposal for retroactivity. Such a proposal could include the following:

- Phased implementation. It is reasonable to begin implementation of the guidelines with class E offenders and to move towards application to those who committed more serious offenses. This phased implementation would make early implementation logistically possible. It would also reduce the specter of a single date when large numbers of inmates

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would be released, and it would allow manageable supervision of new parolees.

- Improved parole supervision. Savings from reduced prison populations could be used, in part, to add parole officers who would be able to increase supervision of parolees. Such retroactive implementation could free adequate funds to provide a ratio of parolees to parole officers of 50 to 1 while also creating savings for the State of approximately $1 million per year for the next two years.

- Parole eligibility requirement. The Judiciary Committee could also include a provision that no inmates would be released through retroactive application of the guidelines until after they have reached their initial parole eligibility under the terms of their existing sentence. Such a provision would help to assure the public that no inmates would be released prior to the date that would have been permitted under the existing system.

This legislature should be commended for dramatic, bipartisan steps which have been taken in the last four years to restore constitutional conditions in the Kansas prisons. Continued bipartisan support for this effort will reestablish state control of our prison system. Retroactive implementation of proposed sentencing guidelines is a critical step needed to assure that Kansas prisons will be reasonably safe and habitable in the years to come.

H JC
3-19-92
Attach #3
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Kansas County & District Attorneys Association

827 S. Topeka Blvd., 2nd Floor • Topeka, Kansas 66612
(913) 357-6351 • FAX (913) 357-6352
EXECUTIVE DIRECTOR, JAMES W. CLARK, CAE • CLE ADMINISTRATOR, DIANA C. STAFFORD

TESTIMONY IN SUPPORT OF

SENATE BILL NO. 479

Presented by Gene Olander, Shawnee County District Attorney
KCDAA Legislative Chairperson

The Kansas County and District Attorneys Association appears in support of SB 479. We support the general concept of the report of the Kansas Sentencing Commission, for two basic reasons: 1. **Reduction of Disparity** - The Commission Report documents a wide disparity in sentencing throughout the state, which most if not all prosecutors were unaware of. As county and district attorneys our duties are not just to prosecute, but to seek justice. In our view, justice requires us to seek to eliminate the disparity of sentencing based on race, gender, age or geographic location. 2. **Truth in Sentencing** - Prosecutors have always been the contact point for the public, particularly victims, to the criminal justice system. Recent statutory duties require prosecutors to notify victims at various stages of the criminal proceeding, which is made more difficult by the uncertainty of indeterminate sentencing. In our view, a determinate sentence, with an established and well-publicized grid, will make the job of informing the public much easier, and will give victims and the general public more confidence in our criminal justice system.

As for SB 479, there are several concerns that our members have expressed over the provisions of the Sentencing Commission Report contained in the bill, as well as the additions made by the Interim Judiciary Committee . We understand that the legislative intent behind the creation of the Commission was to reduce prison overcrowding, and that the projections made by the Commission staff achieve that end. Our main concern, however, is that the Legislature will not adequately fund the alternatives to incarceration, including treatment programs, for those offenders who fall below the incarceration line on the grid, particularly the career property crime offenders. Adoption of the Sentencing Commission Report must be accompanied by increased funding of community corrections, which I understand is proposed to be cut this year; intensive probation; and drug and alcohol treatment facilities, yet SB 479 does not deal with these alternative measures. It is primarily for this reason that we support the effective date of July 1, 1993. Funding for alternatives to incarceration should begin immediately, regardless of whether or not SB 479 is passed this year.

(Over)

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As for other recommendations made by the Interim Committee, we oppose the insertion of good time credit. While 20% credit is an improvement over the present system, the net result is the possibility of a subtraction of 20% from truth in sentencing; and the addition of a possible 20% in racial disparity.

We were also concerned about the safety valve provisions in Section 25. The procedure raised a strong possibility that punishment depends on the year in which the offense was committed rather than the actual degree of crime severity; the result will be chronological or historical disparity. However, this was modified in the Senate and is acceptable as presently proposed.

Finally, we opposed the retroactivity provisions in Section 24. The wholesale release of inmates, those who have not met basic parole release requirements, will impose an unmanageable burden on the present system, and will impose an unacceptable threat to the safety of Kansas citizens. The Senate removed Section 24 from the bill and we concur with that action.

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3-19-92
Attach #4
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Kansas Peace Officers' Association

INCORPORATED
TELEPHONE 316-722-7030
FAX 316-729-0655
P.O. BOX 2592 • WICHITA, KANSAS 67201

March 19, 1992

HOUSE JUDICIARY COMMITTEE
SUBJECT: SENATE BILL 479

Mr. Chairman and Members of the Committee:

My name is Helen Stephens, representing the 3,000 members of the Kansas Peace Officers Association.

We ask for your support in all phases of implementing SB 479, starting with favorable passage out of committee.

I was one of two who attended the majority of the full Kansas Sentencing Commission meetings. I watched as these people wound their way through the maze of "interests" (their own, the victim's, the public's, the felon's, and the state's.), and developed the basis for what you have before you today. I can speak first-hand on the honest and open discussions that took place and the considerations they gave, and I can say this report reflects enormous hours of thoughtful discussion, and, most importantly, compromise. If you had been to the first two or three meetings, you, too, would realize the true compromises which this document represents. The authors should be highly commended for their efforts.

There were many opportunities for public input, input from the judicial system, the parole board, etc., but during the formulation of this document, few came forward with their comments or criticisms. The parole board (a member of the commission) did not express their opposition (or minority report) until the end of the commission's work.

Yes, the commission has narrowed the discretion of the judges, but they have not eliminated it.

Some have said that felons will be released before they are ready and that good time takes the "truth" out of "truth in sentencing". KPOA disagrees with those statements. Under the proposed or present system, when an inmate's release date arrives -- they walk even if their programs have not been completed. With the use of good time, DOC has a tool to encourage inmates to complete their programs to receive good time credits. KPOA, although not a supporter of good time, believes that the compromise of serving the balance of their

In Unity There Is Strength

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Attach #5
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good time in postrelease keeps the "truth" alive in that the judge will sentence a felon to a certain amount time and state, at sentencing time, that 20% may be served in postrelease. The public, the victims and law enforcement will know when that person could be eligible for post or permanent release. The parole board will retain present duties EXCEPT the power to release.

Yes, there are certain areas that KPOA would like to see changed, but overall we believe SB 479 should be put in place and all phases monitored very closely by the Kansas Sentence Commission. The Commission should be continued and report progress or suggestions for change to the legislature.

SB 479 will have an enormous impact on local units of government, the judicial system, KBI, and others.

Passing SB 479 out of committee and out of the House is only the first step and will be meaningless unless proper funding follows. KPOA would ask those of you on Appropriations to put proper funding into the appropriate state agencies and/or local units of government to insure proper implementation. Those of you not on Appropriations, we ask that you press for proper funding and vote for same when it comes to the floor. If anything makes these guidelines "fail", it will be lack of proper funding.

Our present system is broken. The public has little confidence in "justice", and some who break the law do so knowing little or nothing will happen to them. If they do serve time in prison, they are out before the public, and even law enforcement, expect it; and how many are back through the system AGAIN. It is time to change. You have a viable solution in front of you, but keep in mind that it is a solution which has a little something for everyone to like or dislike and maybe that is the balance we need for a beginning.

We urge your support for SB 479 and the proper funding to support its implementation.

Thank you for the opportunity to speak to you today.

HJC
3-19-92
Attach #5
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KANSAS ASSOCIATION OF COUNTIES

"Service to County Government"

1275 S.W. Topeka Blvd.
Topeka, Kansas 66612
(913) 233-2271
FAX (913) 233-4830

TO: Rep. John Solbach, Chairman
House Judiciary Committee

FROM: John Torbert, Executive Director
Anne Smith, Director of Legislation

DATE: March 19, 1992

RE: SB 479

The Kansas Association of Counties has been reluctant to come before the legislature to discuss SB 479 because of limited information available on the bill. The sentencing guidelines proposal has been studied for some time now by the legislature. Unfortunately, it appears to the KAC that there are still some major issues that remain unresolved. It is our understanding, for example, that the fiscal note for this legislation has not been updated to reflect numerous changes that have been made in the bill and that the fiscal note only covers the Department of Corrections. Even more important to our concern is the fact that there has been no attempt that we're aware of to determine the cost impact of this legislation on local government.

The State of Minnesota has been touted as a good example of a state where the sentencing guidelines are working. Sentencing guidelines were put into effect there in 1978. The KAC contacted the Association of Minnesota Counties to gather any information they had on how the sentencing guidelines have impacted Minnesota counties and if the sentencing guidelines had accomplished their stated purpose. The Minnesota Association referred us to Joan Fabian, who is Director of Ramsey County Community Corrections and is also the President of the Minnesota Association of Community Corrections Act Counties. Ms. Fabian provided us with some pertinent information which we wish to share with this committee.

An overview of the sentencing and correctional policies was completed in June of 1991 by the Office of the Legislative Auditor for the State of Minnesota. Some excerpts from that report that we feel are worth noting, are listed below:

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* "The evidence suggests that the Minnesota's corrections system is under growing stress. In 1990, Minnesota's state prisons operated at 102 percent of capacity and local jails operated at 92 percent. Ideally, according to the Department of Corrections, jail use should average between 60 percent and 80 percent of capacity because extra beds are needed to segregate different types of inmates and to accommodate peak demand."

* "Since 1983, correctional populations in Minnesota have increased 104 percent, while the increase in the nation as a whole has been 93 percent."

* "Compared to other states, proportionately more offenders in Minnesota are sanctioned at the local rather that the state level. Hence, jail and probation populations have grown more than state prison populations."

* "Policy decisions made at the state level and the practices of judges, prosecutors, law enforcement agencies, and other criminal justice officials at the local level constitute the major reasons that the offender population - in prison, in local jails, and on probations - has grown."

The legislative auditor's report notes that there were three principal goals that the sentencing guidelines were to meet:

1) "Uniformity. Similar offenses should carry similar sentences."
2) "Proportionality. Sentences should be proportional to the severity of the offense; more serious crimes should carry longer sentences."
3) "Control of Resource Use. State prison should be reserved for serious repeat offenders. Incarceration is state prison should be used only where necessary. Sentencing policy should be set with resource limitations in mind."

The question is then asked - have these goals been met? The answer was that "Minnesota's sentencing guidelines are only partially achieving their primary goals . . . Judges depart frequently from the guidelines when they pronounce sentences and the use of jails and prisons has increased. Guidelines have helped to predict the prison population, **but not to control it.**" (emphasis added)

How have costs been impacted? Keep in mind that Minnesota's guidelines were enacted in 1978. The report states that "the data show that counties have paid a proportionately larger share of the increased correctional costs incurred during the 1980's. Counties spent ten times more for corrections in 1988 that they did in 1975, compared to a seven-fold increase by the state." We think it is clear where costs are going to be shifted to under a sentencing guidelines approach.

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Another report was put together by a number of Minnesota counties and presented to the Minnesota Legislature in January of 1992. We would like to reprint the summary of their report to the legislature.

> "In summary, correctional services in the seven-county metropolitan area are overburdened due to a tougher stance on crime than in the past. A greater use of jail time as a sanction, particularly for DWI offenses, has resulted in severe crowding at local correctional facilities. A study by the sentencing Guidelines Commission of cases sentenced in 1987 found that 80 percent of the men and 46 percent of the women who weren't sent to prison were sent to local jails.
>
> Local units of government have assumed a disproportionate share of the financial cost of correctional services. County corrections systems have modified service delivery methods to accommodate the increased volume of offenders and additional legislative mandates. Alternative forms of offender monitoring which are not as staff intensive have been developed, i.e. electronic monitoring and group supervision. For those offenders on traditional probation supervision, contact standards have been compromised to the point that public safety is at risk. Programmatically, there is no more that local corrections administrators can do with the resources that are available.
>
> The drain on correctional resources is greater at the local than the state level and counties cannot continue to carry the financial burden for those services. The correctional crowding problems are projected to continue to get worse. The legislature cannot continue to stiffen criminal penalties and mandate additional correctional responsibilities without additional funding at the local level. It is imperative that the legislature allocate adequate resources for counties to provide a reasonable level of probation supervision for community protection."

In summary, it is our interpretation that one of the reasons that the state of Kansas is interested in sentencing guidelines is to attempt to gain more control over the size of the prison population. The Minnesota experience shows us though that exactly the opposite happened in that state. Moreover, if it does happen that fewer people are going into the state prison system, the ones that aren't being admitted are going somewhere else. The options are pretty obvious. You'll see more population being held in county jails and you'll see more pressure being put on the community corrections system. In both of these instances, the result will be higher local costs and increased pressure on the property tax. Since law enforcement is not a function that is exempt from the tax lid, it will mean that unless we see significant new state funding to assist with these costs, the money to fund these new costs will have to be "robbed" from some other function or service. We would urge this committee not to take

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3-19-92
Attach #6

action on this bill until a full cost impact statement has been prepared that covers all new state and local cost increases that can be anticipated. Once that is done, the method of dealing with these increased costs should also be spelled out in this legislation. We will resist having the local property taxpayer become the solution for the state's prison problems.

HJC
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4824

Sentencing and Correctional Policies

June 1991

Program Evaluation Division
Office of the Legislative Auditor
State of Minnesota

Centennial Office Building, Saint Paul, Minnesota 55155 • 612/296-4708

STATE OF MINNESOTA
OFFICE OF THE LEGISLATIVE AUDITOR
VETERANS SERVICE BUILDING, ST. PAUL, MN 55155 • 612/296-4708
JAMES R. NOBLES, LEGISLATIVE AUDITOR

June 1991

Representative Ann Rest, Chair
Legislative Audit Commission

Dear Representative Rest:

In May 1990, The Legislative Audit Commission directed the Program Evaluation Division to evaluate correctional policies and practices in Minnesota, focusing particularly on state jail standards, sentencing guidelines, and the community corrections program. Interest in these issues was prompted by growing use of correctional facilities and programs.

Correctional problems are less severe in Minnesota than in other states, partly because of Minnesota's innovative sentencing and community corrections programs. But several factors, including policy decisions made by the Legislature, have increased pressure on state correctional institutions and programs. State policy makers need to address these factors and consider a variety of actions.

We recommend improvements in the sentencing guidelines structure and renewed emphasis on community corrections programs, including alternatives to incarceration. Such steps will provide greater flexibility in the criminal justice system and, in the long run, may reduce costs. Finally, state jail standards need to be updated but they do not block local jail expansion nor add unnecessarily to local costs.

We received the full cooperation of the Minnesota Department of Corrections and the Sentencing Guidelines Commission.

The report was researched and written by Elliot Long (project manager), Marlys McPherson, and Jim Ahrens, with assistance from Jo Vos and Deborah Wemette.

Sincerely yours,

James R. Nobles
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SENTENCING AND CORRECTIONAL POLICY

Executive Summary

Minnesota's corrections policies have been credited with helping the state avoid problems that have reached the crisis point in other states during the 1980s. For example, overcrowded prisons and jails have resulted in federal court intervention in 41 states (not including Minnesota), and corrections is now one of the fastest growing segments of state budgets.

Meanwhile, the goal of state policy in Minnesota has been to sanction offenders fairly, effectively, and efficiently. Both the Community Corrections Act of 1973 and the 1978 legislation establishing sentencing guidelines were aimed at reserving state prisons for dangerous, repeat offenders and encouraging local sanctions for less dangerous offenders.

While these programs may have helped to control prison populations and correctional costs, now there are indications that they may not be working as well as originally intended. Although Minnesota's incarceration rate remains one of the lowest in the country, the state's prisons and jails are full despite the beds that have been added during the past ten years. State expenditures for corrections have been growing, and county spending has increased even more rapidly than the state's. In May 1990, the Legislative Audit Commission asked for a review of state corrections issues. Our report addresses the following questions:

- **How serious is the correctional overcrowding problem in Minnesota? What are the causes of the rapid increase in the number of people in prisons, jails, and on probation? Is the problem likely to get better or worse in the future?**

- **Is the Department of Corrections effective in regulating jails, and do the state's jail standards permit economical solutions to the problem of jail overcrowding?**

- **To what extent are the Community Corrections Act and sentencing guidelines achieving their intended goals? What changes may be needed?**

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- **Do sufficient alternatives to incarceration exist and are they being used? What is known about the relative cost and effectiveness of these alternatives, and how do they compare to prison and jail?**

To answer these questions, we interviewed corrections administrators and state and local officials. We visited jails and attended meetings of the Sentencing Guidelines Commission and the Jail Standards Task Force, which will be recommending changes to the current standards in 1991. We surveyed probation officers and corrections administrators, and collected and analyzed information describing corrections problems in Minnesota and the U.S.

We found that Minnesota's overcrowding problems are not as severe as those in most other states. But, paralleling national trends, Minnesota has experienced a substantial increase in the number of offenders in prisons and jails and on probation. Minnesota has managed to avoid serious problems until recently largely because there was excess capacity in prisons and jails when the period of growth in incarceration began. But now state and local correctional facilities are at or over capacity and probation caseloads have grown to critical levels.

The growth in the offender population has accelerated since 1986, and is projected to continue. The main reason for the growth is that more people are being punished in more serious ways than in the past. The state faces a choice: build more jails and prisons or make changes in sentencing and correctional policies which would manage the expected increase in offenders more efficiently.

MINNESOTA'S CORRECTIONAL PROBLEMS

The evidence suggests that Minnesota's corrections system is under growing stress.

- **In 1990, Minnesota's state prisons operated at 102 percent of capacity, and local jails operated at 92 percent.**

Minnesota's prisons and jails are full.

Ideally, according to the Department of Corrections, jail use should average between 60 percent and 80 percent of capacity because extra beds are needed to segregate different types of inmates and to accommodate peak demand. Larger facilities need less excess capacity. In 1989, over 60 percent of jails and other local detention facilities had average daily populations in excess of the Department of Corrections' suggested limits, and nine jails regularly exceeded 100 percent of capacity.

Probation services may be even more overburdened than prisons or jails.

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- **The average caseload for each of the state's 600 probation officers was approximately 98 offenders in 1990.**

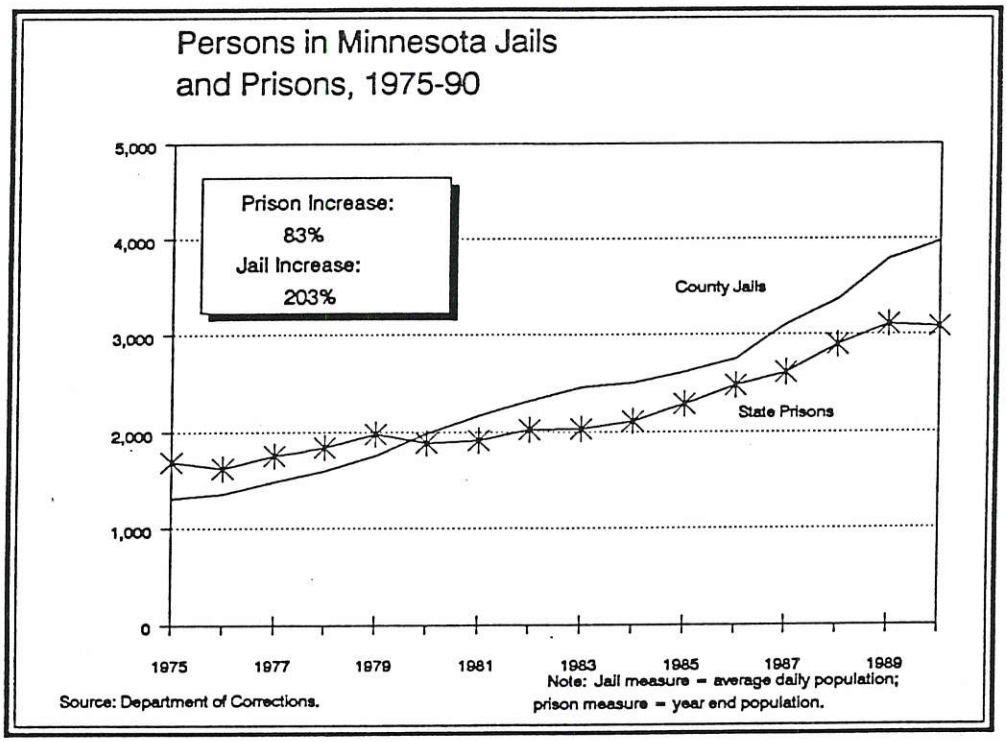
Probation staff are over-burdened.

Some probation officers, especially those in the metro area, have seen their caseloads double in the past six years.

Also, in the past six years, the number of people in prisons and jails and on probation has increased more rapidly in Minnesota than in the nation as a whole.

- **Since 1983, correctional populations in Minnesota have increased 104 percent, while the increase in the nation as a whole has been 93 percent.**

Minnesota's incarcerated population grew more slowly than the national average during the late 1970s to mid-1980s. But a sharp upward trend in prison, jail, and probation populations is evident since 1986.



The number under correctional supervision doubled in the past six years.

- **Compared to other states, proportionately more offenders in Minnesota are sanctioned at the local rather than the state level. Hence, jail and probation populations have grown more than state prison populations.**

The division of responsibility between the state and counties in Minnesota places a significant burden at the local level. Sentences of more than one year are served in a state prison, while those one year or less are served in county correctional facilities. Nearly 80 percent of felony sentences and all

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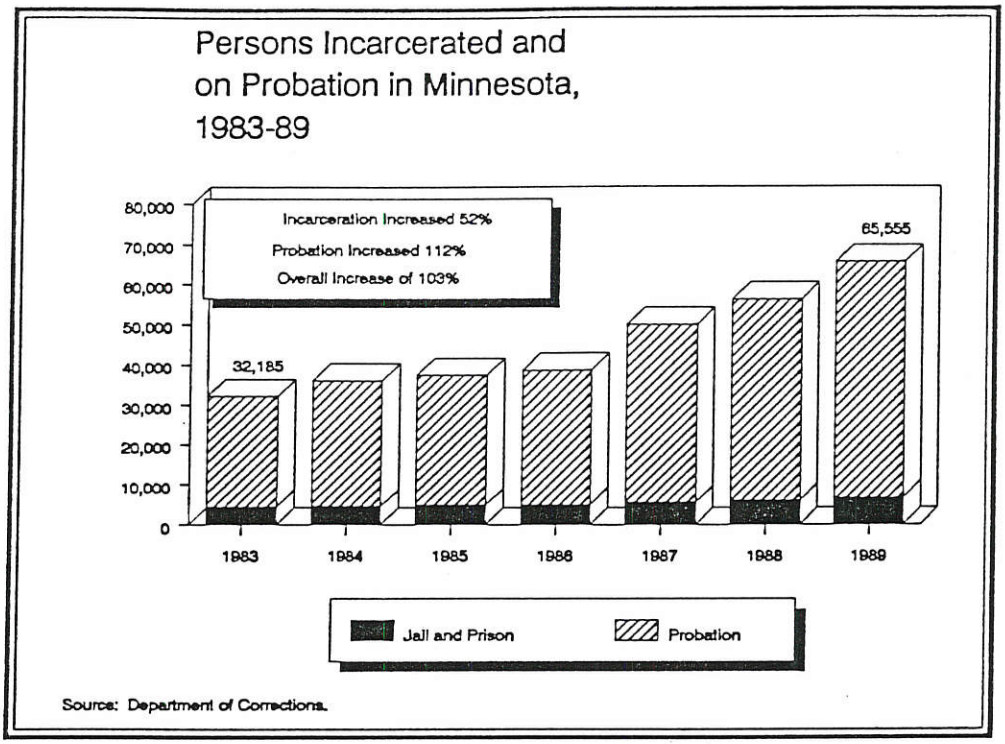
Most people are punished locally rather than in state prisons.



misdemeanor sentences are served in a jail or under the supervision of a probation officer.

In addition to existing facilities filling up, over 2,300 beds have been added in the past ten years. The Department of Corrections expects continued expansion in both the state prison system and local jails to accommodate projected increases in the number of prisoners and jail inmates. A total of 31 counties are now planning or building new jail facilities or expanding existing ones.

Causes of the Problem

We examined various factors that contribute to correctional system overcrowding: population growth and composition, the incidence and mix of crime, state sentencing policy, judicial sentencing practice, law enforcement

Minnesota Correctional Facilities Capacity

	1979-80			1990		
	Capacity	Utilization Rate	Number Beds Added Since 1979-80	Capacity	Utilization Rate	Projected New Beds Needed By 1995
State prisons	2,040	97%	1,020	3,060	102%	900
Local jails	2,991	59	1,319	4,310	92	1,300-1,600
Total	5,031	74%	2,339	7,370	96%	2,200-2,500

Source: Department of Corrections.

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practices, and other factors that affect correctional resources, such as pretrial release requirements and legislative mandates that increase probation workloads. Some of these factors are within the control of state or local officials, while others are not.

Trends in Minnesota Crime and Corrections, 1980-89

	Percent Change 1980-89
Total state population	6.2%
"At Risk" population	
Males aged 15-24	-21.4
Males aged 25-34	18.6
Index crime rate (per 100,000 population)	-7.7
Violent crime rate (per 100,000 population)	27.9
Index crimes cleared by arrest	16.3
Felony convictions per 1,000 index crimes	47.2[a]
Prison population	64.5
Jail population	90.7
Probation population	111.4[b]
Incarceration rate (per 100,000 population)	67.6

Sources: Bureau of Criminal Apprehension, Department of Corrections, Sentencing Guidelines Commission, U.S. Bureau of the Census, U.S. Bureau of Justice Statistics.

[a]Percent change 1981-89.
[b]Percent change 1983-89.

Crime and demographic changes have contributed to overcrowding, but are not the major causes.

First, changes in the age composition of the population do not generally explain the sharp upward trend in incarceration since 1986. Crime rates increased as the number of persons in the high-crime years (age 15 to 24) rose during the 1960s and 1970s. But since the mid-1980s, when the size of the crime-prone population declined, incarceration rates have increased and the problems of prison and jail crowding have developed.

Second, overall crime rates have remained relatively stable during the period in which the population under correctional control has more than doubled. But the rate of violent crime in Minnesota (which ranked 37th in the nation in 1989) shows a steady increase, up 28 percent between 1980 and 1989. Aggravated assault shows the greatest increase (up 57 percent), followed by rape (up 36 percent). Robbery and homicide rates, however, have declined slightly (down 2 to 3 percent).

Since violent crimes are more likely to be punished with a prison or jail sentence, we suspect that at least some of the growth in the incarcerated population is the result of increased criminal activity or better reporting and enforcement of certain violent crimes, such as domestic abuse.

Third,

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- **Part of the observed increase in the incarcerated population is the result of increased law enforcement activities, especially crackdowns on crimes related to alcohol and drug abuse.**

The criminal justice system has responded to public opinion with a tougher stance toward crime.

Overall, both arrests and felony convictions per reported crime are up on a statewide basis. The number of arrests doubled in the past 15 years, and felony convictions increased 45 percent from 1981 to 1989. A similar increase in volume is evident at the misdemeanor level. Most people convicted of felony or gross misdemeanor drug or alcohol offenses serve some time; DWI offenders usually spend time in jail while drug offenders are sent to jail or prison.

Fourth,

- **A major change affecting the jails has been the greater use of jail time as a sanction, particularly for DWI offenses.**

Proportionately more people are in jail serving a sentence now than 10 to 15 years ago. Judges are increasingly sentencing both felony and gross misdemeanor offenders to serve time in jail, often in addition to a period of probation. The imprisonment rate for convicted felons has remained fairly stable at about 20 percent since 1980. But the use of jail time in felony cases has increased from 35.4 percent in 1978 to 58.5 percent in 1988. Also, DWI offenders make up a disproportionate share of the increase in jail time: DWI and traffic offenders constitute almost half the sentenced inmates and use over one-third of the bed days.

Fifth,

- **Conditions of probation have become tougher. As a result, there are more offenders in prison and jail because they have violated the terms of their probation.**

From 1985 to 1988, the average length of probation pronounced by judges has increased from 20 to 22 months for gross misdemeanors and 49 to 52 months for felonies. Many of the intermediate sanctions, such as fines, day fines (which are based on an offenders' ability to pay), restitution, and treatment are typically used in addition to a jail sentence.

Nearly half of new prison commitments arrive with less than one year to serve, and one-third of these were sent to prison because of technical violations of probation or supervised release as opposed to a new conviction. In addition, excluding the Hennepin and Ramsey County facilities and the Mesabi Work Release and Northeast Regional Correctional Center, approximately 10 percent of jail bed days were used by probation violators in 1989.

Finally,

- **State legislative changes made during the 1980s, particularly those involving criminal sanctions, have directly increased correctional populations.**

The Legislature has defined new crimes and reclassified others into higher legal categories for which the prescribed penalties are more severe. It has also increased the statutory maximum sentences for about 25 crimes and has enacted more mandatory minimum sentences.

Determinate sentencing, especially mandatory minimums, is often cited as a major cause of prison and jail overcrowding. In Minnesota, mandatory minimum sentences have been enacted for drug and alcohol offenses, such as repeat DWI and second offense possession and sale of illegal drugs. Several mandatory minimum sentences affect local jails because they mandate sentences of less than one year.

Other legislative actions that affect local correctional resources include: presentence investigation requirements, victim notification, sentencing guidelines worksheets, restitution hearings, chemical abuse assessments, and DNA analyses of sex offenders. These requirements increase the time that must be spent on each case. Given the increased number of offenders supervised by each officer, less time is available for each one.

Actions taken by the Sentencing Guidelines Commission primarily affect the use of state prisons, although they may have indirectly caused some jail population growth as well. The guidelines' presumptive prison sentences have been substantially lengthened; sentences for some crime categories have been doubled. Many of these changes were made in 1989, and their full effects have yet to be felt in the prison system.

Correctional crowding is partly the result of state policy decisions and local practices.

Taking all of these factors into account and considering the contribution of each to the correctional crowding problem in Minnesota, we conclude that:

- **Policy decisions made at the state level and the practices of judges, prosecutors, law enforcement agencies, and other criminal justice officials at the local level constitute the major reasons that the offender population—in prison, in local jails, and on probation—has grown.**

Overall, these policy decisions have affected the growth of correctional populations more than changes in demographics or crime rates.

SENTENCING GUIDELINES

Through sentencing policy, state policymakers can influence the use of prisons, jails, and other correctional facilities and programs. Like much of the nation, Minnesota enacted significant sentencing reforms in the 1970s. The 1978 sentencing guidelines legislation is regarded as a national landmark of sentencing reform.

Based on the severity of the crime and the offender's criminal history, the guidelines specify, within narrow ranges, an appropriate punishment that

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judges are supposed to follow in sentencing. As articulated by the guidelines themselves, and various reports and studies by the Sentencing Guidelines Commission throughout the 1980s, the principal goals of sentencing guidelines are:

Guidelines were designed to promote uniform and proportional sentences and to control the use of state prisons.

- *Uniformity*. **Similar offenses should carry similar sentences.**
- *Proportionality*. **Sentences should be proportional to the severity of the offense; more serious crimes should carry longer sentences.**
- *Control of Resource Use*. **State prison should be reserved for serious, repeat offenders. Incarceration in state prison should be used only where necessary. Sentencing policy should be set with resource limitations in mind.**

Our study evaluated the degree to which these goals have been met.

Uniformity

To achieve uniformity in sentencing, the guidelines specify that offenders who commit the same crime and who have similar criminal histories should receive the same punishment. The guidelines' framers expected that judges would depart infrequently from the specified sentences. They required judges to justify departures in writing, and prohibited departures based on race, gender, and social factors such as marital status, educational attainment, or employment history.

The guidelines specify two things: whether a convicted offender should serve a prison term and, if so, for how long. We examined the frequency with which judges depart from the guidelines. In 1988, judges disagreed with the guidelines on who should go to prison in about 10 percent of all felony cases, and disagreed with the prescribed sentence length in about 21 percent of the cases.

Judicial departures are rare for repeat, violent offenses and for relatively minor, first-time property crimes. But, we found that:

- **Judges depart from the imprisonment guidelines in 20 to 50 percent of the cases involving: a) serious crimes against the person by offenders with no prior felony convictions, and b) property crimes by offenders with lengthy criminal records.**

In the first instance, judges tend to sentence offenders to jail or probation instead of the lengthy prison term called for in the guidelines. In the second, judges tend to sentence offenders to prison even though the guidelines do not call for it.

The guidelines explicitly state that departures should be infrequent and based on substantial and compelling circumstances. The guidelines anticipate that only a small number of cases will require departures. Departure rates as high

as those currently experienced exceed the level that the commission now finds acceptable, although its thinking about departures has evolved over the years. Departures are not viewed as negatively as in the past or as the language of the guidelines themselves suggests. We think that departure rates as high as these signal a problem with the guidelines that requires attention by commission members or other policymakers.

Proportionality

Proportionality in sentencing means that more serious crimes should receive more serious sanctions, as measured by higher imprisonment rates and longer sentences. In 1981, the first full year the guidelines were in effect, the percent of offenders given prison sentences rose with each increase in severity level of crime. However, by 1988, offenders were more likely to be imprisoned at the lowest crime severity level than at the next severity level. Similar inconsistencies were evident among higher severity levels as well. These anomolies lead us to conclude that:

Departures from the guidelines are higher than originally expected, and there are exceptions to proportionality in sentencing.

- **Overall, sentences are roughly proportional, but there are significant exceptions.**

Trial court judges have disagreed with the guidelines on the proper severity rankings of a number of offenses. The commission helped to correct a significant proportionality problem recently when it reclassified auto theft at a higher severity level.

Resource Control

A key purpose of the guidelines was to establish a clear relationship between sentencing policy and the use of correctional resources, especially the use of state prison. The guidelines have helped policymakers understand the impact of sentencing changes on the prison population. But for several reasons, the guidelines have not been as effective as anticipated in controlling resource use:

- **The 1980s were a period of increased criminal sanctions in Minnesota and across the nation. In 1989, the sentences specified in the guidelines were materially lengthened.**

- **Guidelines eliminated the use of parole, which in the past was used to control prison and jail crowding.**

- **Since the guidelines prescribe proportional sentences, when penalties for one crime are increased, the tendency is for other penalties to be adjusted upward. This happened in 1989, for example, when sentences for most crimes were proportionately lengthened.**

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Consequently, the commission has shifted away from resource *control* to resource *management* as a goal. Estimates are made of the additional beds required by sentencing guidelines changes, and these are communicated to state policymakers.

Guidelines have helped to predict the prison population, but not to control it.

We conclude that Minnesota's sentencing guidelines are only partially achieving their primary goals of uniformity, proportionality, and resource control. Judges depart frequently from the guidelines when they pronounce sentences and the use of jails and prisons has increased.

Discussion

The reasons why sentencing guidelines have not fully accomplished their goals are complex, but clearly judges and prosecutors have found ways to circumvent the guidelines. The Legislature may wish to materially increase the guidelines' authority, but before doing so, we think it should consider some of the legal and philosophical reasons, and practical circumstances, that have led to this situation.

The guidelines are built on the principle of uniform and proportional punishment. Imprisonment is specified for more serious crimes, with locally administered sanctions for lower-severity crimes. But even felony offenders and the crimes they commit are complex and the sentences that are actually handed down by judges aim to achieve multiple purposes. These include retribution (punishment), but also deterrence, incapacitation, rehabilitation, and restitution.

Over the decade in which guidelines have been in effect:

- **Appeals court decisions have undermined sentencing guidelines.**

For example, as noted, the guidelines formally list educational attainment and employment history as factors not to be considered as the basis for departures from the guidelines, but the appeals court has allowed "amenability to probation" as a basis for some departures.

Appellate decisions also have allowed more latitude in computing the criminal history score that enters into the calculation of a guidelines sentence. This has given prosecutors greater leeway in bargaining for guilty pleas. The guidelines can be circumvented through departures, appeals, and plea bargaining when they interfere with the sentence that the trial court seeks to obtain.

We believe these developments stem partly from the desire of judges and others to pursue sentencing goals other than uniform and proportional punishment. Potential for rehabilitation, threat to public safety, and deterrence of repeat offenses, are all considerations that enter into the sentencing decision. The guidelines may be too narrowly constructed to accommodate the range of varied and complex criminal cases that confront judges and prosecutors. And, as a practical matter, the calculation of criminal history scores, which can have a major effect on sentencing, is unreliable due to gaps in recordkeeping.

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We recommend modifying the guidelines to permit greater flexibility.

We do not recommend that Minnesota abandon sentencing guidelines, although their promise of uniformity and proportionality in sentencing has not been fully achieved. However, they can promote fairness when sentences are set or revised, permit monitoring of sentencing practices against standards of fairness, and help in planning for needed facilities. The Sentencing Guidelines Commission can see that sentencing disparities by race, gender, and social class are regularly monitored.

But none of these essential goals requires sentencing ranges as narrow as currently specified by the guidelines. In fact, the ranges in sentence lengths contained in the guidelines are smaller than the 15 percent leeway allowed by the enabling legislation. We think the discretion permitted judges in determining sentence lengths should be broadened somewhat, at least up to that allowed by the enabling legislation. In addition, we recommend a "gray zone" presuming neither imprisonment nor nonimprisonment for borderline offense categories that are now characterized by high rates of departure from the guidelines. The gray zone should nevertheless contain a proportional continuum of sanctions like the rest of the grid. This would provide judges with a range of sentencing options that better matches the variation encountered in criminal cases and acknowledges the multiple goals to be achieved at sentencing.

STATEWIDE JAIL STANDARDS

We examined the content and enforcement of the state's jail standards because of concerns that the standards are out-of-date and might be hampering economical solutions to the problem of jail crowding. Jail construction and operating standards are specified in rules promulgated and enforced by the Minnesota Department of Corrections (DOC).[1] State standards have been in effect since 1978, and they were last revised in 1981.

Minnesota and about 30 other states use jail standards to ensure proper inmate treatment and to limit legal liability. Where standards are absent, courts have shown a willingness to impose stringent requirements of their own.

The average annual operating cost for Minnesota jails is $14,778 per bed, compared with the national average of $10,639. Jail standards covering the physical plant, staffing ratios, and staff training can affect jail construction and operating costs.

A number of counties, including Hennepin, Ramsey, Washington, and St. Louis, need to construct new jails. In several cases, the jail planning process has gone on for years despite crowded and inadequate facilities. But, in our view,

- **State jail standards are not a major source of delays in planning, siting, and building new facilities.**

1 *Minn. Rules*, Ch. 2900 and Ch. 2910.

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In most cases, the main impediments to jail construction are local. Jails are built with county funds, and local decisions revolve around issues like whether to build or remodel, how many beds to add, and where to locate the facility. These issues, not state jail standards, have slowed progress in a number of counties.

The Department of Corrections has adopted a pragmatic, although somewhat permissive, approach to jail standards enforcement.

- **The department has allowed counties temporarily to place more offenders in their jails than allowed by the standards if the counties are making progress toward a permanent, legal solution to crowding.**

Since counties are financially responsible for the construction and operation of jails, the Department of Corrections favors negotiation and persuasion, as a rule, over the use of sanctions and penalties. The department grants variances that allow counties time to make improvements to their facilities. In 1990, a dozen local detention facilities were operating under DOC variances. Unfortunately, as a result of the department's permissive approach, long-standing noncompliance with state jail standards can and does persist.

The state's jail standards do not unnecessarily hamper counties from adding needed jail space.

As this report shows, state policy contributes to the need for expanded jail capacity and the state jail standards specify construction and staffing requirements that must be met. But many new jails have been built since the standards took effect. In fact, we conclude that much of the physical upgrading of jails that has taken place can be attributed to the promulgation and enforcement of statewide jail standards. Since the 1970s, many outmoded facilities have been shut down, and 47 counties have built new facilities that conform with the standards.

It is also true, however, that the current standards are out-of-date and in need of revision.

- **There are unsettled questions about jail design and operating requirements. The areas of greatest controversy are physical space, staffing, and staff training requirements.**

A task force is currently at work on a jail standards revision project that began in January 1990 and is due to be completed in July 1991. The task force, which represents county boards, sheriffs, jail administrative and program staff, and other corrections officials, will try to develop a consensus on jail standards and recommend changes to the Commissioner of Corrections.

Neither the task force nor the Department of Corrections has made any final decisions, but so far the task force has decided to recommend: strengthening training requirements; varying custodial requirements by jail design and inmate observability but making few other changes in overall staffing requirements; and preserving the physical space requirements in effect since 1978.

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Jail standards are in the process of being updated.

Also, the department is in the process of defining new standards for double occupancy cells. The American Correctional Association, which sets national professional standards for correctional facilities, has recently issued standards for double cells. It appears likely that the department will follow its lead. The controversy in Minnesota, therefore, between counties and the DOC over double cells may soon be settled.

A DISCUSSION OF ALTERNATIVES

A wide range of alternatives to incarceration may enable the state to reach multiple correctional goals and do so in an economical way. Traditionally, Minnesota has relied heavily on probation as a sanction. The trend nationally is toward expanding *intermediate sanctions*, which provide more supervision and control than probation but less than jail and prison. Intermediate sanctions include house arrest (with or without electronic monitoring), halfway houses, residential and outpatient treatment programs, intensive supervision probation, day centers, community service, restitution, and fines or day fines (which are based on an offender's ability to pay).

Evaluations of these programs have shown some of them to be modestly effective, although more research is needed. Most of these programs cost less per offender than incarceration. They tend to add to overall correctional costs in the short-run, however, because of program development and administrative costs.

In order to determine whether a sufficient number of alternatives to incarceration exist and are being used in Minnesota, we surveyed probation officers and local corrections administrators. The survey results indicate that:

Many people who need treatment do not receive it.

- **Many treatment-oriented programs established in the 1970s remain in place. However, there are a number of treatment needs that remain unmet.**

Outpatient alcohol and drug abuse programs are available in many areas of the state. But funding for treatment is inadequate in some areas, while in less populous areas of the state, programs are sometimes inaccessible. As a result, many offenders in need of treatment do not receive it. Also, residential sex offender treatment and halfway houses are unavailable in nearly half of local jurisdictions. Finally, there are few treatment programs available that deal with growing problems like family violence, anger control, intrafamilial abuse, or programs for women offenders. Less than 10 percent of the counties have these programs available.

We also found that most counties have community work service and restitution programs, although they may not be used as extensively as they could be. In addition, electronically monitored house arrest is available in over 60 percent of local jurisdictions. This program is new, however, so relatively few offenders have been placed in it. Sentencing to service, a program started by

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the Department of Corrections in 1986, is available in 50 percent of local jurisdictions, with another 30 percent planning to institute the program. At the same time,

- **Other alternative programs, such as intensive probation supervision and day fines, are just beginning to be developed in Minnesota. Less than 30 percent of local jurisdictions have these programs.**

There is great interest in expanding the range and number of alternative programs. Our survey revealed that local corrections officials considered "more intermediate sanctions" to be their second greatest need (after "more probation officers"). "Insufficient resources" was the main reason cited for program unavailability, although some programs (house arrest, sentencing to service, and day fines) also lack support from local policymakers in some areas.

For the most part, alternatives to incarceration are used at the discretion of judges, which means that their use varies depending on the crime, the offender, and the judge. According to corrections officials, however, there is a tendency for these sanctions to be used in addition to some jail time. This is particularly true with restitution, day fines, and intensive probation.

We recommend expanding intermediate sanctions, but also developing policies governing their use.

Overall, we conclude that:

- **Alternatives to incarceration could be expanded significantly in Minnesota. Efforts to promote them may be required, however, and policies governing their use may be needed.**

As noted, an expansion of alternative programs could help control overall correctional costs and encourage the state to maximize correctional goals other than simple punishment. To ensure that these programs are used as alternatives to incarceration rather than in addition to it, policy guidelines may need to be developed simultaneously.

COMMUNITY CORRECTIONS ACT

The Community Corrections Act (CCA) of 1973 was enacted "for the purpose of more effectively protecting society and to promote efficiency and economy in the delivery of correctional services."[2] The program encourages counties to develop community corrections programs so that less serious offenders can be sanctioned locally, reserving state prison space for dangerous repeat offenders. Through the CCA, the state has turned over considerable responsibility and autonomy for correctional programming to participating counties, which, in turn, receive a financial subsidy from the state.

At the present time, 30 counties organized into 15 units participate in the CCA. Participating counties represent two-thirds of the state's population and three-quarters of the reported crime. In 1990, the total CCA subsidy was

2 *Minn. Laws* (1973), Ch. 354.

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$18.2 million. In these 30 counties, all probation and supervised release services, treatment, community work service, victim restitution, and other correctional programs are administered by a community corrections agency, which is the direct recipient of the CCA subsidy. In the remaining 57 counties, the state finances and administers all or part of correctional services through the Department of Corrections.

As a general rule, the cost of correctional facilities and programs rises with the amount of supervision and control provided. For example, state prisons, which are designed and staffed for long-term offenders, cost more to operate than jails, which are more costly than work release facilities. In order to be cost effective, therefore, correctional programs should not provide more control over offenders than necessary. In a similar vein, the American Correctional Association recommends that states should adopt sanctions that are "the least restrictive consistent with public and individual safety and maintenance of social order."

Prisons and jails could be used more efficiently.

Applying this standard, we found that Minnesota does not use its jails and prisons efficiently. For example, many new prison commitments are short-termers and probation violators, not dangerous criminals. Similarly, jails are used largely for punishment of offenders who do not pose serious threats to public safety rather than for offenders who require the high level of supervision and control that jails provide. In some counties, offenders wait as long as a year to serve their jail sentences. Also, most sentenced inmates are DWI and traffic offenders, and the biggest growth is in work-release beds, not secure beds.

Other policies that contribute to the inefficient use of correctional resources include: "good-time" policies for jails that are more punitive than for state prisons, leading offenders to request prison instead of jail; and levy limits that provide counties with incentives to build and operate jails rather than to develop lower cost community alternatives.

- **Sentencing changes made during the 1980s have emphasized uniform punishment. This can conflict with the goal of economy and efficiency in the use of correctional resources.**

Emphasizing the use of prisons and jails for offenders who pose threats to public safety requires individualized assessments of the appropriateness of sanctions based upon the risk each offender poses. To some degree, this may require treating like offenses differently. Under mandatory and determinate sentencing (including the state's sentencing guidelines), in order to insure the proper placement of those offenders who pose the greatest threat, all offenders must be treated harshly. This dispenses justice uniformly, but it contributes to the uneconomical use of correctional resources. This is a basic trade-off involved in corrections policy.

In our view, the Community Corrections Act has not been responsible for the greater use of incarceration in Minnesota. In fact, the CCA has probably

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been a countervailing force. Our analysis of jail use since 1975 (controlling for crime) shows that:

CCA remains a viable policy, despite trends in the opposite direction.

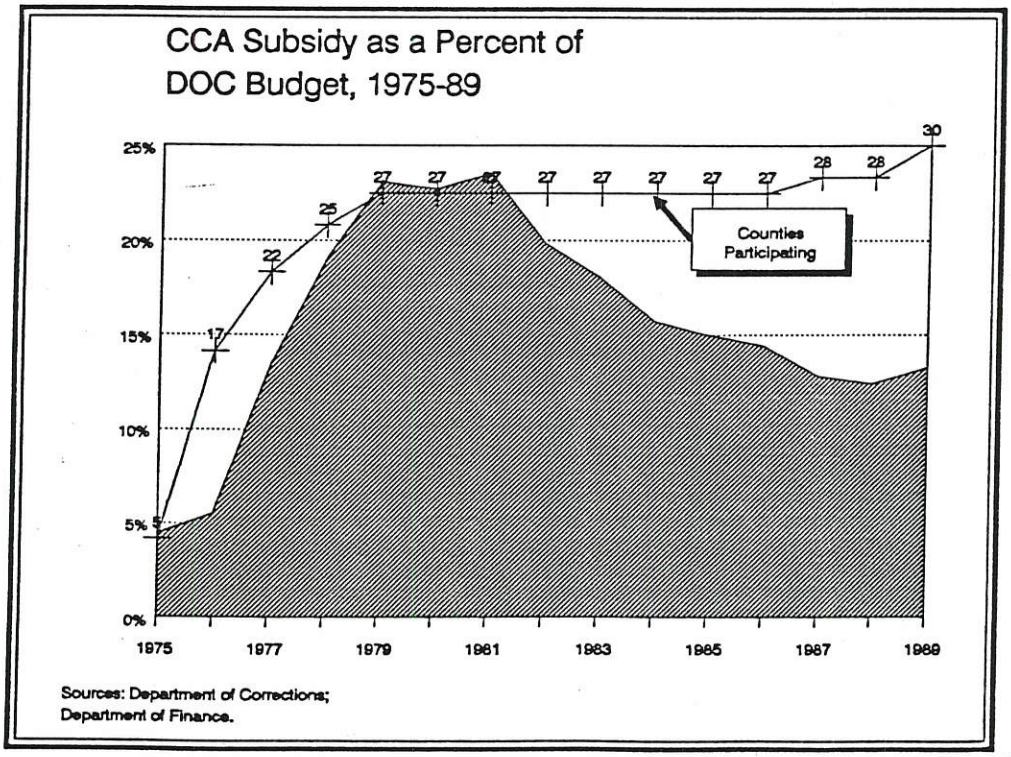
- **The use of jail has increased more rapidly in counties that are not participating in the CCA. Conversely, there are more alternatives to incarceration available in CCA counties.**

The rate of increase in jail use is more than twice as high in non-CCA counties as in CCA counties. This is true in both metropolitan and rural areas of the state. Also, there are more community-based programs in CCA areas than in counties where the Department of Corrections provides correctional services and where the department and the county share responsibilities. The typical CCA jurisdiction has 8.7 programs available for adult offenders, while other jurisdictions have an average of 6.5 programs. This does not necessarily mean that CCA is responsible for higher program levels. The fact that CCA counties also tend to have higher populations and more crime than nonparticipating counties could account for the observed difference. But the data support the conclusion that the CCA has been reasonably effective in achieving its goals, despite trends in the opposite direction.

We also found that:

- **State funding for the Community Corrections Act has not kept pace with the additional correctional expenditures borne by the counties.**

The data show that counties have paid a proportionately larger share of the increased correctional costs incurred during the 1980s. Counties spent ten times more for corrections in 1988 than they did in 1975, compared to a seven-



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fold increase by the state. In 1979, the CCA subsidy represented 37 percent of county spending for corrections, while in 1990 it accounted for only 25 percent.

The state-local relationship is in a state of flux.

The overall CCA subsidy has increased when new counties joined. But instead of maintaining the CCA appropriation at a level commensurate with the new counties, the CCA subsidy has steadily declined as a proportion of the total DOC budget during the 1980s. Meanwhile, the share of the department budget spent on institutions has increased slightly (from 70 to 74 percent).

Increasing the Community Corrections subsidy could encourage counties to develop alternatives to incarceration, especially in the metropolitan area where the need for alternative programs is greatest, provided it is clear that that is the purpose of the funding increase. In other words, we think that increased funding should be tied to more explicit state goals (see below).

In addition, we found the following problems with the Community Corrections Act:

- **Presently, there is no clear demarcation between the state and CCA counties regarding which offenders should be whose financial responsibility.**

- **The state's purpose in the CCA is no longer clear. The Department of Corrections believes that counties have no incentive to sanction offenders locally. Meanwhile, the CCA counties have come to rely on the subsidy and tend to view it like a revenue-sharing program.**

- **The subsidy distribution formula results in an inequitable distribution of the CCA funds. It does not distribute the subsidy so that counties with the greatest correctional needs get an appropriate share.**

- **There has been a drift toward DOC-sponsored programs, instead of using the CCA as a means of expanding community-based programs. The department makes minimal effort to promote CCA participation or to foster innovation in CCA counties, except by example.**

- **Current data collection and analysis capabilities, which would permit regular assessments of correctional needs on a statewide basis, are inadequate. As a result, decisions like whether to increase prison bed space, expand jail capacity, add to probation staff, or expand intermediate sanctions are made without sufficient information about what is needed and where needs are the greatest.**

If the state wants to expand the range of alternative sanctions in an economical way, the CCA appears to be a good vehicle for doing so. However, the credibility and vitality of CCA needs to be reestablished. At a minimum, the Legislature should reassess and clarify the goals of Minnesota's overall correc-

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tional policy and determine how community corrections fits into it. We recommend that the Legislature consider the following issues:

CCA is in need of legislative attention.

- *The appropriateness of the current structure and purpose of CCA, and how CCA relates to sentencing policy*: **How can the CCA be revitalized so that it promotes correctional innovation and the continued development of alternatives to incarceration?**

- *The state-local relationship for the financing and delivery of correctional services*: **Which level of government should be responsible—financially and administratively—for what kinds of offenders?**

- *The subsidy distribution formula*: **How can the formula be improved so that the subsidy is given directly in relation to spending needs and inversely in relation to revenue-raising capacity?**

- *Statewide correctional planning capabilities*: **How can statewide correctional planning be improved, and which agency should be responsible for it?**

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POSITION STATEMENT

TO: Members, House Judiciary Committee

FROM: Ron Smith, KBA General Counsel

SUBJ: Sentencing Guidelines, SB 479

DATE: March 19, 1992

Mr. Chairman, and members of the House Judiciary committee. I appreciate the opportunity to provide comments on this topic.

KBA opposes sentencing guidelines. Our opposition is primarily systemic rather than to the particulars of SB 479. We recognize SB 479 avoids the weaknesses of the Federal guidelines. Ironically, while the general public believes judges to be soft on criminals, SB 479 is testimony that judges have used the crimes and sentencing tools you've given them and have done their job so well you now want to reverse the trend because prisons cost too much.

Our reasons for opposition, summarized, are:

1. The Sentencing Commission members are divided over the relative benefits and merits of SB 479. There is not unanimity of support among Commission members for various parts of the guidelines.

2. The guidelines are a Back Door solution for Front Door problems of previous legislatures' own making, without solving the systemic problems that created need for SB 479 in the first place.[1]

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[1] *You've reviewed two bills just this year which created new felony severity levels for rustling and construction fund fraud, just to name two. The Senate Judiciary committee on 3/19/92 is considering an amendment which increases all statutes of limitations in all crimes from two to 5 years. That means more prosecutions, and more cases, although somewhat stale in nature. New Sec. 296, requiring fiscal and resource impact statements on every new crime entering the state system, should have been required a decade ago.*

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The public's own misunderstanding of the problem is found in a January 19, 1992 Wichita Eagle poll indicated that while 65% of Kansans would pay higher taxes for prosecution of crimes, only 38% indicated they would approve more taxes for prisons -- even if the expenditures would make Kansas safer. Fewer still would support money for more criminal court judges, and defense counsel. While KBA never suggests public policy be made by poll, this one discloses that **the public attitude of Kansans about the criminal justice system** is at odds with itself.

3. Retroactivity is an issue that will cost more money either way you go.[2] If history is a guide, I'm not convinced this legislature will adequately fund either approach.

4. Disparity problems are not solved by this bill. To the extent judicial discretion led to disparity, there is more than enough discretion in 479 to continue the problem.[3] If judicial discretion is desirable, and we think it is, the current system provides discretion. What the legislature apparently disagrees with is "discretion" used in a manner that costs more money, or requires building new prisons. That is not a function of being a judge; that is a function of use of the statutes and sentencing tools you give the judge.

5. Public safety is not a clear winner from these new rules.

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[2]DOC estimates immediate release of 1200 due to retroactivity. DOC will need 23 FTE and $500,000 as a supplemental to its FY 92 budget. In FY 93, another 23 FTE will be hired and $2.7 million needed for community corrections, $700,000 for "constructive alternatives for inmate program agreement plans." They hope these retroactivity costs are offset by $4.9 million cost of operation.

If there is no retroactivity, there will be more costs to DOC for added incarceration under a dual operating system: some inmates under the old system, new ones under the sentencing guidelines. The exact cost is unknown since the fiscal note presumed there would be retroactivity.

[3]See section 21(d). To depart from the guidelines, a sentencing court need only make a record of the evidence before it, and fabricate a "substantial and compelling reason" to depart. That phrase is undefined in SB 479. A reviewing appellate court has strict limits on whether it can overturn the sentence. See Sec. 21(c), (d) and (e).

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6. The Criminal Justice System in this country, and this state, is in crisis. Citizens call for a war on crime, but look for every way we can to avoid spending tax dollars on the fight.[4] SB 479 is not your most difficult decision because it will not save money even in the long run.[5] Rather, it is how to give the Criminal Justice System the priority of resources that it must have to protect the public. But if you go to the floor and tell your colleagues that SB 479 will cost more, solve fewer problems in the corrections system, still allow sentencing disparity, and result in no greater public safety than before, this bill won't pass.

7. This bill does not acknowledge the trickle-down impact on local units of government. Community Corrections is vital to the success of SB 479, but the state has never funded this program to necessary levels. The Fiscal Note on SB 479 says:

> "Impact on local units could result from a possible increase in the use of county jail time as a condition of probation, ... (A) larger proportion of offender population would shift in the direction of community-based supervision." The dollar impact on local units is not predicted. Nor are new local costs paid by state government.

8. Costs to the Judicial budget include $140,000 in FY 93 to train judges and court services officers. That does not include HIRING new court service officers; 16 of the positions lost the last two years in the Judicial Budget have been CSOs.

> CSO salaries are a state expense. The fiscal note indicates counties will spend $182,000 annually on new court services offices. Presumably this comes from the $2.7 million appropriated for community corrections. **I predict when budget crunch comes in the future, this $2.7 million will be high on the legislative hit list.**

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[4]The ABA reports taxpayers spent $60 billion annually on the war on crime, $248 per capita. Of that amount, $114 goes for police, $78 to prisons, $31 to courts, $17 for prosecution and $6 for public defense. As a percentage of the whole pie, the latter three categories decrease every year.

[5]Ben Coates has said that if lawmakers are voting for the guidelines on the promise of less-costly future Corrections budgets, the savings will prove to be illusory. We understand this to be the position of the Department of Corrections, too.

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The OJA says restoration of CSO positions are "imperative" before SB 479 can be used. The cost: $833,000 in FY 93. SB 479 does not resolve the policy question of whether OJA or the Corrections department will supervise the CSOs.

9. The KBI must have accurate criminal history information for Presentence reports mandated by the bill. All juvenile adjudications must be included. KBI estimates a doubling of fingerprint carding, 11 FTE people costing $217,000, a new $400,000 computer. They also need an optical disk storage system, a one-time cost of $1.5 million plus annual $225,000 in maintenance.

10. The fiscal impact for all state agencies the next three years is $1.08 million in FY 92, $1.3 million FY 93, and another $263,000 in FY 94. It is after that when the projected savings -- if any -- materialize. There is no estimate on new local costs.

11. The guidelines assume presumptive probation will work. It is my understanding that if probation does not work or must be revoked and there is need for revocation of probation or parole, the projections on prison population will not be accurate. Costs will increase.

12. Outside forces are going to impact costs. Chief Justice Rehnquist told the ABA convention February 4th that he wants Congress to repeal minor federal felonies. States, he said, should define and prosecute such conduct themselves. Naturally, he promises no federal money for states to undertake these new prosecutions.

The Bar would feel a bit more encouraged about guidelines if the judicial, prison, prosecutorial, KBI, the Attorney General, and the Indigent Defense Board budgets were routinely placed outside any future straight line percentage across-the-board state budget cuts. There are ways to cut back-end costs (penal) of the criminal justice system by spending a bit more on the front end.[6]

Lawyers are concerned about local taxes, since they are property taxpayers in the highest commercial category. Further, we know that for every day courts are used prosecuting crimes the civil docket gets ne-

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[6]*Michigan has studied what happens when less qualified defense counsel handle indigent cases. Their conclusion: inmates spend 12 to 24 more months in prison than similar indigents represented by more experienced counsel. Yet Kansas appropriation committees do not even provide state public defenders with adequate word processing or file cabinets, let alone salary increases.*

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glected. That has intangible costs on businesses and the public. We feel SB 479 is another of those good ideas that will have unfortunate yet highly predictable, visible and negative side-effects.

Thank you. I'll try to answer questions.