Legislative Analysis

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PRESUMPTIVE PAROLE

House Bill 4138 (reported from committee as H-4)
Sponsor: Rep. Kurt Heise
Committee: Criminal Justice
Complete to 9-30-15

BRIEF SUMMARY: House Bill 4138 makes revisions to the parole process to:

- Specify there is no entitlement to parole.
- Presume, absent substantial and compelling reasons to do otherwise, that a prisoner with a "high probability of parole" score will not be a menace to society and will be released upon serving the minimum sentence (presumptive parole).
- Apply presumptive parole only to prisoners transferred to the custody of the DOC on or after the bill's effective date. (Presumptive parole would not apply to those serving a life sentence.
- Require the parole eligibility report to include the result on any validated risk assessment instrument.
- Defer a prisoner's parole to allow time to finish a treatment program reasonably necessary to reduce the risk to public safety upon release.

FISCAL IMPACT: The bill will impact state and local correctional systems, and reentry programs, as discussed in more detail later in the analysis.

THE APPARENT PROBLEM:

Michigan has one of the largest, and expensive, prison systems in the nation. Roughly, about 20 percent of the state's annual budget, or $1 out of every $5, is spent on corrections. For several years, policymakers have studied and debated what has led to the high numbers of incarcerations and if the current approach in sentencing is having a positive impact on public safety.

Though sentencing reforms may be part of the answer, other studies highlight the role the state's parole policies play. For example, a report from the PEW Research Center for the States found that for Michigan, the average offender who was released from prison in 2009 served 4.3 years in custody, a 79 percent increase (or 23 months more) in time served than the average offender released in 1990. The cost for this extra time was almost half a billion dollars. (*Time Served: The high cost, Low Return of Longer Prison Terms* published by pewstates.org/publicsafety.) Studies fail to show any connection between longer prison terms and increases in public safety after release.

In 2013, the Council of State Governments was commissioned to conduct a study of the state's sentencing guidelines, length of stay of prisoners, and the parole board's guidelines. Among its findings was that persons sent to prison in Michigan may know the earliest date of parole eligibility and when they max out (complete their maximum sentences), but have

no way of knowing when they would, or if they would, be paroled. Critics say that such uncertainty works against motivation for self-improvement as prisoners do not know what they can do to demonstrate they are ready for release. What it does do is increase costs, roughly $300 million a year, without any improvement in outcomes such as reduced recidivism rates. The CSG recommendation was to enact reform known as presumptive parole.

Under a policy of presumptive parole, absent specifically identified substantial and compelling reasons for denial, a prisoner would have to be paroled upon reaching his or her earliest release date (generally speaking, completion of the minimum sentence). Advocates of such a policy change say there are many benefits to society at large as well as to the prisoner.

THE CONTENT OF THE BILL:

House Bill 4138 amends the Corrections Code (MCL 791.211a et al.). Currently, the Michigan Department of Corrections (MDOC) develops parole guidelines consistent with statutory requirements, with the purpose of the guidelines being to assist the parole board in making release decisions that enhance the public safety. The parole board is granted discretionary authority to depart from the guidelines; for instance, the parole board may deny parole to a prisoner who has a high probability of parole as determined under the parole guidelines, or grant parole to a prisoner who has a low probability of parole. However, a departure must be for substantial and compelling reasons and be in writing.

The bill does not change the above provisions, but adds that in order to facilitate the efficient administration of the DOC and not to create a liberty interest in or expectation of parole, it is presumed that a prisoner who scores "high probability of parole" on the parole guidelines is not a menace to society or the public safety and shall be released upon serving the minimum sentence imposed by the court. Presumptive parole would not apply to a prisoner serving a life sentence who is eligible for parole.

This would not be automatic, as the bill establishes a limited number of circumstances that would constitute substantial and compelling reasons for a departure from the parole guidelines for a prisoner with a high probability of parole. The *substantial and compelling reasons for departure* are limited to the following circumstances:

- The prisoner has an institutional conduct score lower than -1 on the parole guidelines.
- There is objective and verified evidence of substantial harm to a victim that could not have been available for consideration at the time of sentencing, or the prisoner has threatened to harm another person if released.
- The prisoner has a pending felony charge or detainer.
- The release would otherwise be barred by law.
- There is objective and verified evidence of post-sentencing conduct, not already scored in the paroled guidelines, that demonstrates that the prisoner would present a high risk to public safety if paroled.

- The prisoner has been identified in the federal combined DNA index system (CODIS) and linked to an unsolved criminal violation. The parole board could deny a prisoner's release on parole beyond the service of the minimum sentence for not more than 18 months from the date the prisoner was identified through CODIS.

Parole could be deferred upon the service of a prisoner's minimum sentence for not more than four months to allow completion of a treatment program reasonably necessary to reduce the risk to public safety from the prisoner's release.

Reviews

The parole board would have to conduct a review of a prisoner, except for a prisoner serving a life sentence, who has been denied release as follows:

- If the prisoner scored high or average probability of release, then conduct a review not less than annually.
- If the prisoner scored low probability of release, then conduct a review not less than every two years until a score of high or average probability is attained.

Application of presumptive parole and reviews of prisoners denied parole

Presumptive parole and the deferral of parole in order to complete a treatment program would only apply to prisoners whose controlling offense was committed on or after the bill's effective date (future prisoners only). These provisions *do not apply to a prisoner serving a life sentence*, regardless of the date of the controlling offense. (When a prisoner is serving multiple sentences, the "controlling offense" typically applies to the offense for which any sentencing court imposed the longest term of imprisonment.)

Regarding denials of release: the provision requiring the parole board to conduct annual reviews of prisoners scoring high or average probability of release, or conduct them at least every two years for those scoring low probability of release (until attaining a score of high or average probability), would pertain to *both current and future prisoners*, but *would not* pertain to prisoners serving a life sentence.

Presumptive parole report

By March 1 of each year, the MDOC will be required to report to the standing committees of the Senate and the House of Representatives having jurisdiction of corrections issues and the Criminal Justice Policy Commission all the following information:

****** For the preceding calendar year, the number of prisoners subject to presumptive parole:

- For whom parole was granted.
- For whom parole was deferred to complete necessary programming.
- Who were incarcerated at least four months past their first parole eligibility date as of December 31.
- Who were denied parole for a reason, or reasons, as described above. This information must be provided with a breakdown of parole denials for each of the following reasons:

- The prisoner had an institutional conduct score lower than -1 on the parole guidelines.
- There was an objective and verified evidence of substantial harm to a victim that could not have been available for consideration at the time of the prisoner's sentencing.
- The prisoner had a pending felony charge or detainer.
- There was objective and verified evidence of post-sentencing conduct, not scored in the parole guidelines, that demonstrated that the prisoner would present a high risk to public safety if paroled.
- The prisoner was identified in CODIS and linked to an unsolved criminal violation and the parole board denied the release on parole beyond the service of the minimum sentence.
- The release of the prisoner was otherwise barred by law.

****** The number of prisoners subject to presumptive parole who were denied parole whose controlling offense is in each of the following groups:

- Homicide.
- Sexual offense.
- An assaultive offense other than a homicide or sexual offense.
- A nonassaultive offense.
- A controlled substance offense.

****** Of the total number of prisoners subject to presumptive parole who were denied parole, the number who were subject to presumptive parole for the following time periods:

- Less than one year.
- One year or more but less than two years.
- Two years or more but less than three years.
- Three years or more but less than four years.
- Four or more years.

Changes to the scoring of parole guidelines

The MDOC would be required to immediately advise the Senate and House standing committees having jurisdiction over corrections issues and the Criminal Justice Policy Commission of any changes made to the scoring of the parole guidelines after the bill's effective date, including a change in the number of points that define "high probability of parole."

Miscellaneous provisions

- The bill would specify that there is no entitlement to parole.
- A parole eligibility report would, in addition to current requirements, include the result on any validated risk assessment instrument.
- A biennial report by the DOC regarding any proposed revisions to departmental rules based on the correlation between the implementation of the parole guidelines and the recidivism rate of parolees, which is currently submitted to the Joint Committee on Administrative Rules, would have to be given also to the Criminal Justice Policy Commission.

- ❖ The bill replaces references to a "GED certificate" with "high school equivalency certification."
- ❖ Under the bill, if prisoners are transferred to a prison in another state, the receiving institution would be required to provide the prisoner with high school equivalency training and certification.
- ❖ "Board" or "parole board" would be defined as the parole board established in Section 31a of the Corrections Code and "department" as the Department of Corrections.
- ❖ The bill would take effect 90 days after enactment.

BACKGROUND INFORMATION:

Under Michigan's system of indeterminate sentencing for felony sentences, a person convicted of a felony that does not carry a mandatory life sentence or other mandatory sentence (e.g., felony firearm) is given a range of months or years up to the maximum sentence that can be imposed for that particular crime, with the lowest number in the range being the minimum term of incarceration the offender will serve and the highest number being the maximum.

The range is determined by use of grids that score points for the type of crime that was committed (e.g., against property or against a person) and for various elements of the crime (e.g., if a person was harmed or if a weapon was used). A higher score usually results in a higher minimum sentence as the maximum sentence is set in statute. Depending on the score and the resulting range, some offenders may be placed on probation and/or serve a term of incarceration in a county jail. For those sent to prison, the person must serve at least the minimum sentence before being eligible to be considered for parole by the Michigan Parole Board. A prisoner may be paroled at any time after serving the minimum sentence and before reaching the maximum sentence.

The Parole Board gains jurisdiction over the prisoner on the prisoner's earliest release date (minimum sentence), calculated based on the Judgment of Sentence document submitted by the court. Typically, about eight months before the earliest release date, according to the Michigan Department of Corrections' website:

"*a Parole Eligibility Report is prepared and the prisoner will be scheduled for consideration by the Board. The Board considers many factors to determine whether parole should be granted. State law holds that 'A prisoner shall not be given liberty on parole until the board has reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety.' Most prisoners are interviewed by one member of the Parole Board. The scope of the interview includes the prisoner's criminal, social and substance abuse history, previous adjustment on parole or probation, conduct in prison, programming, parole plans, and other factors. The prisoner may have a representative at the interview, although the representative cannot be another prisoner or an attorney. The parole decision is made by majority vote of a three member panel of the Board. If granted a parole, the prisoner is allowed to return to the community under*

the supervision of a Parole Agent for a specified term. The release is conditioned upon the parolee's compliance with terms set by the Parole Board."

Parole supervision is provided by the Field Operations Administration (FOA) of the Department of Corrections, and an offender is typically supervised for a period of one to four years. To maintain parole status, parolees must meet certain conditions; failure to do so can result in the imposition of additional conditions or in having the parole status revoked and the individual being returned to prison. A prisoner who is not released on parole is released directly back to the community, without supervision by the DOC, upon completing the maximum term of the sentence.

FISCAL INFORMATION:

Under current law, a prisoner is not eligible for parole until he or she has served 100 percent of the minimum sentence imposed by the court. Even then, a prisoner cannot be released on parole until the Michigan Parole Board "has reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety." Currently, Michigan's prisoners serve, on average, approximately 127 percent of their minimum sentences.

HB 4138 would result in a savings to the state, eventually. Savings would not be realized immediately because the bill does not apply to prisoners who are currently in the custody of the Department of Corrections. Because the bill would increase the certainty of time spent in prison by implementing presumptive parole, it is expected that prison population growth would decline over time and savings to the state's corrections system would occur due to a decrease in the number of prison beds used. It is anticipated the Department of Corrections would be able to close housing units in the near future (years 2017 to 2018) and close full facilities in the near distant future (year 2019). According to the department, it is reasonable to assume that taking 1,300 prison beds offline, via facility closure, yields the state's corrections system a savings of roughly $30.0 million a year.

Given that more offenders would be on parole under HB 4138, there would be a corresponding increase in the need for parole supervision services. State costs for parole supervision averaged about $3,760 per supervised offender in fiscal year 2014. Also, the state could see an increase in costs for prisoner reentry services.

ARGUMENTS:

For:

It is becoming increasingly clear, critics say, that policies adopted in the 1990s and early 2000s meant to curb crime, appropriately punish wrongdoers, and increase public safety have resulted instead in the needless over-incarceration of defendants at a high cost to taxpayers with no resultant increase in public safety. In fact, the policies fly in the face of research showing that longer sentences do not have a corresponding positive influence on recidivism. On the other hand, shorter periods of incarceration, with appropriate

programming (such as substance abuse or anger management) and a period of parole supervision in the community, have been shown to increase rehabilitation and decrease recidivism. Reentry programs, which provide support services (housing/employment assistance, etc.) to parolees as they transition into the community, also decrease the likelihood of an offender committing a new crime. A prisoner who maxes out, meaning completes the full term of incarceration, is not supervised upon release and receives no transitional services (thus increasing the risk for reoffending).

The bill addresses the issue by instituting "presumptive parole" for those prisoners who have earned "high probability of release"–meaning they have a low risk of committing a new crime and so do not pose a high risk to the public safety. These are the prisoners, observers say, who are most likely to have had that "wake up call," who made the most of available programming or educational opportunities, who are remorseful and have taken responsibility for their own actions, and who deserve a second chance to become productive members of society. Prisoners sentenced to parolable life sentences and prisoners whose controlling offense was committed prior to the bill becoming law will not be eligible for presumptive parole, though they will be able to benefit by the changes to the review process if denied parole.

Response:

The bill should be amended to apply retroactively to all current prisoners who score high probability for release who are past their earliest release date (about 1,900 prisoners), not just for future prisoners. Even if they are not considered for release immediately, the presumption could be applied at each prisoner's next review, especially for those who have served a significant time over their earliest release date (ERD). According to advocates, this does not constitute a retroactivity problem as it does not change their sentences, nor does it change their ERD. Nor should there be any impact on victims as these prisoners are eligible and could be paroled at any time. It merely enables the parole board to apply the new guidelines to ALL prisoners, not just some. As is the case now and if the bill is enacted, prosecutors will retain the right to appeal a grant of parole.

Further, presumptive parole should be extended to those sentenced to life but eligible for parole. Under older policies, a parolable lifer could be released after serving 10 years and many offenders were encouraged by their attorneys and even judges to accept life over a sentence of say, 15-30 years which would make them eligible for parole after 12 years. Some of those are still in prison almost 40 years later even though the sentencing judge intended them to be released after 10 years. This could be due in part to misperceptions that more serious crimes that carry life sentences also carry a higher recidivism rate than lesser crimes. The reverse is actually true. A 2014 study conducted by the Citizens Alliance on Prisons and Public Spending (CAPPS) found that 99.1 percent of homicide offenders (murder and manslaughter) and sex offenders who were paroled between 2007 and the first quarter of 2010 did not return to prison for a similar crime within three years of release. That means that of 820 paroled homicide offenders, only 2 (0.2 percent) committed a new homicide. The study reported that of 4,109 paroled sex offenders, only 32 (0.8 percent) committed a similar new crime. Robbery offenders, on the other hand, had a 4.4 percent rate of return during the same time frame. Other studies echo these results, showing that murderers and sex offenders have some of the lowest recidivism rates.

Lastly, though not related to presumptive parole, the American Friends Service Committee highlights the need to clarify Section 35(7) to conform with changes in 2010 by the MDOC to the Prisoner Disciplinary Policy Directive which eliminated references to "major" and "minor" misconducts and reclassified misconducts as "Class I," "Class II," and "Class III."

For:

Supporters note that the bill will not shorten a prisoner's sentence, nor will it result in earlier release dates. The earliest a prisoner can be released on parole is established in statute and is based on the sentencing guidelines, which take into consideration the severity of the crime and certain elements, such as whether a victim was harmed and to what extent, as well as prior criminal convictions. Based on the scoring of the crime's elements, referred to as "offense variables" and "prior record variables," a range of months or years appropriate for a punishment is determined. The judge uses that range as a guide in imposing both the minimum and maximum sentence (statute sets the maximum penalty; the sentencing guidelines may suggest a maximum that is lower than the statutory maximum). A judge can depart from the guidelines, being more lenient or harsher, but must document the reasons on the record, with the understanding that departures may be overturned on appeal. A prisoner's earliest parole date is reached when the prisoner completes the minimum sentence, which cannot exceed two-thirds of the maximum imposed. *This remains unchanged; the bill does not revise this process*.

Simply put, unless there is a disqualifying factor, which the bill enumerates, a prisoner who presents a low risk of harm to society must be paroled upon completing the minimum sentence. The bill removes *subjectivity* from the parole board's determinations, such as basing decisions to deny parole on gut feelings or hearsay or uncorroborated testimony. Only if one or more of the listed disqualifiers is present, which are all objective and verifiable, can the parole board deny parole. However, the parole date can be delayed for a short time to allow the prisoner to complete treatment programming deemed reasonably necessary to decrease the risk to the public safety.

Implementation of the bill's provisions is expected to begin reducing corrections costs in about five years, with the savings to taxpayers in the tens of millions without compromising public safety.

For:

Presumptive parole is about more than just reducing corrections expenditures. As it is now, many prisoners who are years past their earliest release date have no idea why their paroles were denied or what the parole board expects of them in order to secure release. Such uncertainties erode hope and motivation to change and may negatively impact a person's chance of successful reintegration into society upon release. Research studies show no connection between longer periods of incarceration and less likelihood of reoffending.

According to advocates, the benefits of presumptive parole include requiring the parole board to give more deference to the minimum sentences imposed by judges (which already take into consideration elements of the crime) or negotiated by plea agreements; increase transparency and certainty for victims and prisoners; preserve the parole's discretion to

deny release when there is evidence indicating the prisoner is currently a risk to the public; rely on evidence-based practices (research supports release decisions based on validated risk assessment instruments are more accurate than ones based on subjective judgements of parole board members); and also depoliticize the parole process (using objective criteria may help insulate parole board members from public pressure and promote consistency). Nothing in the bill would require the parole board to release a prisoner when there is verifiable evidence that the person poses a risk to the public safety.

For:

In an address on reforming the state's criminal justice system delivered May 18, 2015, Governor Rick Snyder urged the adoption of presumptive parole for prisoners having a high probability of release who have served their minimum sentences. This position reflects recommendations made in the 2014 report by the Council of State Governments.

Further, in a guest column in MLive's Opinion section dated 7-21-15, former Michigan Governor William G. Milliken wrote that the bipartisan vote to report HB 4138 (H-4) to the House floor "is another encouraging sign that we are starting to overcome the politics of fear with leadership grounded in evidence." He admitted that during his administration, he contributed to the problem of the skyrocketing prison population by supporting harsh mandatory minimum drug laws, then writes of how he worked for years to support reforms after finding that those laws had not accomplished what the legislature or he had intended. In his letter, he cites a Pew Center on the States report that "found Michigan had the longest average prison length of stay of any of the 35 states they studied in 2009." He writes that "[a]fter decades of experience and years of research, we now know that simply keeping people longer does not keep us safer" and that "[i]t is long past time for political leaders of both parties to reverse the remaining criminal justice policies that led to a huge increase in our prison population with no payoff in public safety–and that have cost taxpayers around $2 billion a year." Applauding both Governor Snyder and the bill's sponsor for providing leadership on these issues, Gov. Milliken encourages "the full House and Senate to provide their support by enacting long overdue, safe and sensible parole reform."

Against:

Concerns have been expressed about the release of individuals back into their communities before they are ready, especially those convicted of assaultive or sex offenses. Just because inmates have no misconducts or other factors that would disqualify them from automatic parole upon reaching their earliest parole date does not necessarily mean they are ready to rejoin society successfully. Many may need services such as substance abuse or mental health programs that provide support and accountability as parolees transition back into their communities. The Michigan Prisoner Reentry Program (MPRI) has been a good start, but still needs more resources in order to provide the full range of assistance and supervision needed by parolees. For example, the bill is silent regarding providing funding to these transition programs, as well as ensuring there are adequate jobs and housing for parolees. If it is less costly to provide appropriate programming and assistance, both during incarceration and when transitioning to the community, then some of the savings realized by presumptive parole should be shifted to communities providing the supervision, employment, and housing so needed to avoid recidivism. If the support structure is not

there, some feel that public safety could be compromised. Moreover, if parolees commit a new crime, it could increase costs for local correctional systems for the time spent in a county jail. The extra burden in jail costs, transportation if no beds are available, court costs, health care costs, even office supplies, can be a hardship for communities still struggling with tight budgets.

POSITIONS:

CAPPS (Citizens Alliance on Public Prison Spending) supports the bill. (7-31-15)

The American Friends Service Committee supports the bill, though would like to see the bill extended to include all prisoners and also parolable lifers. (9-4-15)

The Libertarian Party of Michigan submitted written testimony in support of the bill. (6-16-15)

The Criminal Defense Attorneys of Michigan (CDAM) indicated support for the bill. (6-16-15)

The ACLU of Michigan indicated support for the bill. (6-16-15)

The Michigan Judges Association submitted written testimony supporting the bill in concept. (6-1-15)

The Department of Corrections supports the bill in concept. (9-22-15)

Representatives of the Michigan Association of Counties testified in opposition to the bill. (6-2-15)

The Michigan Sheriff's Association indicated opposition to the bill. (6-16-15)

The Prosecuting Attorneys Association of Michigan indicated opposition to the bill. (6-16-15)

The Conference of Western Wayne indicated opposition to the bill. (6-16-15)

The Office of Attorney General indicated opposition to the bill. (6-2-15)

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.