House
Legislative
Analysis
Section

Romney Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

DRUG-AIDED RAPE; REPEAL "650-DRUG LIFER" LAW

House Bill 4065 as enrolled
Public Act 319 of 1998
Sponsor: Rep. Lyn Bankes
House Committee: Judiciary
First Senate Committee: Health Policy and Senior Citizens
Second Senate Committee: Judiciary

Senate Bill 281 as enrolled
Public Act 314 of 1998
Sponsor: Sen. William VanRegenmorter
Senate Committee: Judiciary
House Committee: Judiciary

Second Analysis (1-26-99)

THE APPARENT PROBLEM:

For years most people's mental picture of a "typical" rape involved an attack by a stranger where the victim was subdued through the use of violence or the threat of violence. Recently that picture has changed in many people's minds as an increasing number of rapes have occurred, particularly on college campuses, where the victim has been surreptitiously given some form of sedative and then was sexually assaulted while he or she was incapacitated by the drug. In spite of the increase in this type of crime, under the Michigan Penal Code a sexual assault on an incapacitated person is only third or fourth degree criminal sexual conduct (CSC) unless certain aggravating factors occur to elevate the crime to first or second degree CSC. In addition, it has been pointed out that current law fails to provide a serious means of dealing with these assailants if they are unsuccessful in accomplishing the sexual assault. It has been suggested that these sorts of CSC cases, where the assailant has used drugs to incapacitate his or her victim, should be treated more seriously than they are currently treated. As a result, legislation has been suggested to criminalize the use of a controlled substance to attempt or to commit criminal sexual conduct. In addition, the legislation would specifically bring *flunitrazepam* under the Public Health Code by placing them into the schedule 4 controlled substance category. (See BACKGROUND INFORMATION for a description of this drug.)

In a separate issue, ever since enactment in 1978 of the Public Health Code, which includes the so-called "650-drug lifer law," many people have believed that these provisions of the Public Health Code needed to be changed. Under the "650-drug lifer" provisions of the health code, people convicted of possessing, selling, or manufacturing 650 grams (about 1.4 pounds) or more of mixtures containing heroin or cocaine are imprisoned for life without the possibility of parole (see BACKGROUND INFORMATION). Taking advantage of the fact that the proposed "date rape drug" legislation would amend the section of the Public Health Code containing the "650-drug lifer" provisions, legislation has been proposed that would effectively repeal the "650-drug lifer" provisions of the health code. Companion legislation, that would amend the Michigan Penal Code's parole provisions, also was passed by the Senate.

THE CONTENT OF THE BILLS:

House Bill 4065 would amend the Public Health Code to make drug-aided criminal sexual conduct and the attempt thereof a felony and to add two substances to the code's schedule of controlled substances (MCL 333.7218) . The bill also would repeal the section of the health code mandating life imprisonment without parole for Schedule 1 narcotics (such as heroin) or

cocaine (a Schedule 2 drug) offenses involving at least 650 grams (23 ounces); instead the bill would require imprisonment "for life or any term of years but not less than 20 years." (MCL 333.7401 and 333.7401a)

Senate Bill 281 would amend the Department of Corrections act (MCL 791.234 and 791.236) to allow prisoners convicted for certain currently nonparolable drug crimes who are sentenced to life imprisonment to be paroled under certain circumstances after serving mandatory minimum prison sentences of 20 or 17½ years, depending on whether or not the prisoner had another conviction for a serious crime. These mandatory minimums could be reduced by another 2½ years if the prisoner cooperated with law enforcement. (Note: The two bills contain potentially conflicting provisions regarding mandatory minimum sentences for 650 drug crimes.)

DRUG-AIDED RAPE

Controlled substances. The bill would add the drug, *flunitrazepam*, to the list of schedule 4 controlled substances. The two substances would both be listed in the schedule 4 class of controlled substances that have a depressant effect on the central nervous system. (For an explanation of drug "schedules" in the health code, see BACKGROUND INFORMATION.)

Drug-aided criminal sexual conduct. The bill would add a new section to the health code that would make it a felony to deliver a controlled substance to another person without that person's consent in order to commit or attempt to commit first, second, or third degree criminal sexual conduct, or assault with intent to commit criminal sexual conduct. In such cases it would not matter whether the person delivering the drug had been convicted of the criminal sexual conduct charge. Furthermore, a conviction and sentence for this felony could be given in addition to any other conviction and sentence imposed for any other violation arising out of the same transaction. For example, a person could be convicted and sentenced for both the unconsented delivery and for the commission of the underlying CSC crime arising out of the same transaction. An individual convicted of this felony would be subject to imprisonment for no more than 20 years. (The current punishment for manufacture or possession with intent to deliver a Schedule 4 drug is up to four years imprisonment and/or a fine of up to $2,000.)

PAROLE FOR "650-DRUG LIFERS"

Drug lifer law. Currently, the Public Health Code makes it a felony, generally punishable by mandatory imprisonment for life without parole, for the manufacture, creation, delivery, or possession with intent to manufacture, create or deliver a schedule 1 narcotic drug (which includes opium and its derivatives, including heroin) or a schedule 2 drug (that is, cocaine). The one exception to this provision applies to juvenile violators who are tried as adults, either in circuit or probate court. Under Public Act 249 of 1996, such juveniles may be punished by imprisonment for at least 25 years instead of mandatory life imprisonment.

House Bill 4065 would delete the current mandatory life sentence for manufacturing or delivering (or possessing with the intent to manufacture or deliver) 650 grams or more of heroin or cocaine and instead specify that the punishment for such a violation would be imprisonment "for life or any term of years but not less than 20 years."

The bill also would remove references to the (abolished) recorder's court of the city of Detroit.

Senate Bill 281 would amend the Department of Corrections act to allow prisoners who had been convicted for drug crimes that currently carry nonparolable life sentences to be paroled after serving certain mandatory minimum terms in prison. The length of the mandatory minimum term would depend on whether or not the prisoner also had been convicted of a "serious crime." (See below.) Those who had been convicted of a serious crime would be eligible for parole after serving 20 calendar years in prison; those who had not would be eligible for parole after 17½ years in prison.

Conditions of parole for "drug lifers". The penal code currently specifies certain conditions that must be met before prisoners sentenced to life imprisonment may be paroled. The bill would list a set of requirements that the parole board would have to consider before paroling a prisoner sentenced before October 1, 1998, to life imprisonment for a drug violation involving the possession "with intent to deliver" 650 grams or more of heroin or cocaine. These conditions would include:

(1) Whether the drug violation was part of a continuing series of violations of the health code's

illegal drug "possession" or "intent to deliver" provisions;

(2) Whether the drug violation was committed in concert with five or more other individuals; and

(3) Any of the following:

** Whether the prisoner was "a principal administrator, organizer, or leader" of an "entity" that he or she knew (or had reason to know) was organized, in whole or in part, to commit violations -- or simply did commit violations -- of the Public Health Code's illegal drug possession or "intent to deliver" provision and whether the drug violation for which he or she had been convicted was committed to further the interests of that entity;

** Whether the drug violation was committed in a "drug-free" school zone; and

** Whether the drug violation involved the delivery of -- or the possession with the intent to deliver -- a controlled substance to someone less than 17 years old.

Each of the mandatory minimum sentences could be further reduced by 2½ years if the sentencing judge (or his or her successor in office) determined on the record that such prisoners had "cooperated with law enforcement." The prisoner would be considered to have cooperated with law enforcement if the court determined that the prisoner had no "relevant or useful information to provide." The fact that a prisoner had exercised his or her constitutional right to a trial by jury could not be used as grounds for determining that a prisoner had "failed or refused to cooperate with law enforcement." If the court determined at sentencing that a prisoner had cooperated with law enforcement, the court would be required to include its determination in the judgment of sentence.

Parole revocation. Currently, people convicted of drug violations involving 650 grams or more of a mixture including heroin or cocaine are sentenced to life imprisonment without the possibility of parole (the state supreme court voided, as unconstitutional, a similar provision for nonparolable life imprisonment for simple possession of 650 grams or more of such mixtures). Drug violations (whether simple possession or possession with the intent to deliver) involving 225 to 650 grams of mixtures containing heroin or cocaine carry sentences of not less than 20 years but not more than 30 years.

Under the bill, if a prisoner who had been paroled for any of the above four crimes (possession or possession with the intent to deliver either 650 grams or more or 225 to 650 grams) committed a "violent felony" or committed a violation (or conspired to commit a violation) of the Public Health Code's Article 7 (Controlled Substances) while on parole, his or her parole would be revoked.

Parole orders of prisoners paroled for any of these four crimes would have to contain a notice regarding this circumstance under which their parole would be revoked.

Definitions: "serious crime," "violent felony." The bill would define "serious crime" and "violent felony" similarly, through nearly identical lists of violations (the "violent felony" list would include two violations not included in the "serious crime" list, namely, felonious assault and assault with the intent to commit criminal sexual conduct). Both "serious crime" and "violent felony" would include "violating or conspiring to violate" Article 7 of the Public Health Code (which covers controlled substances) and the following list of offenses against persons: assaults (including assault with intent to commit murder, to do great bodily harm less than murder, to maim, to commit a felony not otherwise punished, and to "rob and steal," whether armed or not), first and second degree murder, manslaughter, kidnaping, a prisoner taking someone as a hostage, rape (first, second, third, and fourth degree criminal sexual conduct), armed or unarmed robbery, and carjacking. In addition to these listed crimes, "violent felony" also would include felonious assault and assault with the intent to commit criminal sexual conduct.

Tie-bars. The bills would not take effect unless Senate Bill 826, House Bill 5419 and House Bill 5398 (sentencing guidelines and truth-in-sentencing); House Bills 4444, 4445 and 4446 (increasing the misdemeanor and felony amount thresholds for certain crimes); House Bill 4515 (prisoner GEDs); and House Bill 5876 (legislative corrections ombudsman) all were enacted into law. (Note: All of these bills have been enacted as follows: Senate Bill 826 as Public Act 316 of 1998; House Bill 5419 as Public Act 317 of 1998; House Bill 5398 as Public Act 315 of 1998; House Bill 4444 as Public Act 311 of 1998; House Bill 4445 as Public Act 312 of 1998; House Bill 4446 as Public Act 313 of 1998; House Bill 4515 as Public Act 320 of 1998; and House Bill 5876 as Public Act 318 of 1998.)

Effective date. The bills would take effect October 1, 1998.

BACKGROUND INFORMATION:

Public Health Code classification of drugs. Following federal law, the Public Health Code classifies controlled substances under one of four "schedules." Scheduled drugs must have the potential for abuse (where, in general, the abuse is "associated with" a stimulant or depressive effect on the central nervous system) and are either (a) illegal and without any medically accepted use in the United States (all schedule 1 drugs), or (b) prescription drugs with medically accepted uses in the United States that have a potential for psychological or physical dependence in addition to the potential for abuse (schedules 2, 3, and 4).

** Schedule 1 drugs -- all of which are illegal -- must have a high potential for abuse and no accepted medical use in treatment in the United States or lack accepted safety for use in treatment under medical supervision (MCL 333.7211). In addition to opiates and opium derivatives (including heroin), schedule 1 includes hallucinogenic drugs (such as LSD and mescaline) and non-therapeutic uses of marijuana.

** Schedule 2 prescription drugs must have a high potential for abuse, a currently accepted medical use in treatment in the United States (or a currently accepted medical use with severe restrictions), and their abuse must have the potential to lead to severe psychic or physical dependence (MCL 333.7213). Schedule 2 includes opium and any of its derivatives (including codeine and morphine), coca leaves and derivatives (including cocaine), other opiates (such as fentanyl, methadone, and pethidine), and substances containing any quantity of such drugs as amphetamine, methamphetamine, methaqualone, amobarbital, pentobarbital, and secobarbital.

** Schedule 3 prescription drugs must have a potential for abuse less than those listed in schedules 1 and 2, have a currently accepted medical use in treatment in the United States, and their abuse must have the potential to lead to moderate or low physical dependence or high psychological dependence (MCL 333.7216). Schedule 3 includes any substance with any quantity of a derivative of barbituric acid and drugs containing limited quantities of codeine, opium, or morphine.

** Schedule 4 prescription drugs must have a low potential for abuse relative to those in schedule 3, have a currently accepted medical use in the United States, and their abuse must have the potential to lead only to limited physical or psychological dependence relative to schedule 3 drugs (MCL 333.7217). Schedule 4 includes such drugs as barbital, chloral hydrate, lorazepam, meprobamate, diazepam (brand name Valium), and phenobarbital.

Flunitrazepam and *Gamma Hydroxybutyrate (GHB)*. Although it is by no means the only drug that has been used for this purpose, *Flunitrazepam*, produced under the trade name Rohypnol, has become known in some circles as the "date-rape drug." *Flunitrazepam*/Rohypnol is a potent hypno-sedative member of the class of drugs known as *benzodiazapines*, of which Valium is the most familiar. However, gram for gram, Rohypnol is between 7 and 20 times stronger than Valium. Because it is colorless, tasteless, and odorless and dissolves quickly in liquids, it has been implicated in an increasing number of rapes across the country, where it been used to incapacitate victims. In these types of cases, the assailant usually places a dose of the drug in the victim's drink. Once the drug has been ingested, particularly if mixed with alcohol, the victim, within 10 - 20 minutes, is effectively unable to resist the rapist's attack. However, although Rohypnol has received the most public attention, it should be noted that any number of other drugs with a sedative effect could be and are being used for the same purpose. *Flunitrazepam*/Rohypnol is currently administratively classified as a schedule 4 controlled substance.

Gamma Hydroxybutyrate (GHB) is a metabolite of gamma-amino butyric acid found in mammalian central nervous systems. It is a central nervous system depressant that can have euphoric and hallucinatory effects. Although not approved for any use by the Food and Drug Administration (FDA), the chemical has been promoted as a steroid alternative, a replacement for L-tryptophan (a food supplement removed from the market last year by the FDA), and has recently gained favor as recreational drug because of its intoxicating effects. Most commonly found in liquid form, *GHB* has also been used by assailants to incapacitate victims for the purpose of committing sexual assault. *GHB* is not currently included in Michigan's controlled substance schedule either in statute or in administrative law.

The "650-drug lifer" law. Public Act 147 of 1978 amended the Controlled Substance Act (Public Act 196) of 1971 to impose mandatory life imprisonment for the illegal manufacture, delivery, or possession of 650 grams (23 ounces or about 1.4 pounds) or more of any mixture containing Schedule 1 narcotic drugs (that is, opium and its derivatives, such as heroin) or

cocaine (a Schedule 2 drug). (Note: The law does not require conviction for 650 grams of pure heroin or cocaine; rather, it applies to any mixture weighing at least 650 grams that contains any amount of, say, heroin or cocaine.) This "650-drug lifer" law amendment to the Controlled Substances Act was to take effect September 1, 1978. However, it was almost immediately repealed and incorporated into the 1978 recodification of the Public Health Code, Public Act 368 of 1978 [specifically sections 7401(2)(a)(I), manufacture and delivery or intent to manufacture or deliver, and 7403(2)(a)(I), possession).

In 1990, the United State Supreme Court ruled [in *Harmelin v Michigan*, 111 S Ct 2680 (1991), Justice White dissenting] that Michigan's "650-drug lifer" law did not violate the "cruel and unusual" provisions of the Eighth Amendment to the U.S. Constitution. However, in June 1991 (in the consolidated cases of *People v. Hassan*, Docket No. 89661, and *People v. Bullock*, Docket No. 89662), the state supreme court (on a 4-3 decision) struck down mandatory life imprisonment for conviction for simple possession as unconstitutional, on the grounds that it violated Michigan's constitutional prohibition against cruel or unusual punishment. While the state attorney general and the Department of Corrections almost immediately argued that the ruling did not apply to convictions for delivery, the Michigan Court of Appeals (in *People v Fluker*) struck down mandatory life imprisonment for delivery of mixtures of 650 grams or more as unconstitutional on the same grounds as the earlier decision on possession. However, in April 1993, the state supreme court overturned the appeals court rulings, thereby reinstating mandatory life imprisonment for delivery of 650 or more grams of a mixture containing heroin or cocaine.

According to the Department of Corrections, as of September 23, 1997, of the 240 prisoners who have ever been sentenced to life terms for drug law offenses, 210 currently are serving sentences, though five of these are no longer serving on the original offense (one had the sentence reversed by the court and was resentenced to life, while the other four had their convictions discharged or reversed by the court and were resentenced to minimums in the range of 6-20 years, with 30-year maximums). Of the 205 remaining prisoners serving active sentences, 196 are male and 9 are female; 85 are white, 97 are black, 13 are Mexican, and 10 are "other." In terms of the counties involved, Oakland (with 67), Wayne (with 63), and Macomb (with 22) have the highest numbers. Kent (with 9) and Saginaw (with 8) have the next highest numbers, while Kalamazoo County has 4, and Clinton, Eaton, Genesee, and Washtenaw Counties each has 3. Calhoun County has 2, while Berrien, Ingham, Ionia, Livingston, Monroe, and Van Buren Counties each have 1. With regard to the "650-drug lifer" law, 167 lifers are serving for delivery or manufacture, while 38 are serving for possession. Finally, 173 prisoners have no prior prison record, while 32 do.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, House Bill 4065 would have an indeterminate fiscal impact on the Department of Corrections. Under the bill, people convicted of the delivery or manufacture of 650 or more grams of narcotics or cocaine presumably would be eligible for parole after 20 years. Assuming no change in prosecutorial practices or conviction patterns for drug offenses, the bill would begin to decrease state costs of incarceration after the point at which affected offenders began to be paroled. To the extent that the bill decreased time in prison for affected offenders, it would decrease state costs of incarceration. However, actual fiscal impact may vary according to any changes in prosecutorial practices and conviction patterns that may result from the bill. The HFA notes that in 1996, 9 offenders were sentenced to prison for this offense, and the average age at the time of sentencing is about 33 years old. For fiscal year 1996-97, the cost of incarceration was about $24,350 per prisoner.

With regard to the drug-induced criminal sexual conduct provisions of the bill, the agency reports that to the extent that these changes led to convictions that would not otherwise have been obtained, or to longer prison stays, they would increase state costs of incarceration. However, to the extent that convicted offenders were sentenced to local punishments, local costs would increase. (1-27-99)

According to the House Fiscal Agency, Senate Bill 281 would decrease the state's costs of incarceration by reducing lengths of stay in prison, although this effect would not be felt until affected offenders began to be paroled. (1-27-99)

ARGUMENTS:

For:

Unfortunately, as is evidenced by the significant and increasing numbers of drug-aided rapes, the current laws are clearly not a sufficient deterrent. Under Michigan law, sexually assaulting a person that the assailant knows or should know is incapacitated remains only a third or fourth degree crime depending upon the type of sexual contact. Currently, the penalty for third degree CSC is not more than 15 years imprisonment, while fourth degree CSC is punishable by not more than two years imprisonment and/or a fine of not more than $500. This means that a sexual assault on an incapacitated person where sexual penetration does not occur (fourth degree CSC) can be punished by no more than two years in prison and/or a $500 fine. Furthermore, if a would-be rapist uses a controlled substance to drug an intended victim with the intent to sexually assault him or her and there is no sexual contact, the only crime for which the would-be rapist could currently be charged is illegal delivery of a controlled substance.

By dealing with the behavior, using a drug to incapacitate an intended rape victim, House Bill 4065 makes it clear that this behavior, which is so clearly predatory and premeditated, will not be tolerated. The bill treats this crime as the outrageous and horrifying crime that it is and provides a strong punishment and hopefully a far more significant deterrent effect than the current law. The bill would have the effect of providing a more significant punishment for both the attempted crime (where the drug is administered to the victim but the would-be rapist's intentions are frustrated) and the completed crime than is currently provided for the completed crime itself.

Against:

The bill is too narrow. A number of cases have been reported where drugs have been used to incapacitate victims of robberies, and the bill doesn't deal with this aspect of drug misuse. Clearly, using drugs to incapacitate victims is wrong whether the intent of the assailant is rape or robbery, and punishment for such crimes should send the message that such behavior will not be tolerated.

Additionally, the bill would only deal with sexual assaults on persons who had not voluntarily become incapacitated. Sexually assaulting an incapacitated person, regardless of how he or she became incapacitated, is a crime that warrants serious punishment.

Finally, the bill fails to deal with *Gamma Hydroxybutyrate (GHB)*, another commonly used drug in date rape cases and a drug that is far easier to obtain than *flunitrazepam*.

For:

The provisions of the bill make far more sense than previous proposals to reclassify *GHB* and/or *flunitrazepam* as schedule 1 controlled substances. Merely rescheduling one or more particular drugs, will not help to prevent drug-aided rapes. While undoubtedly the use of any drug for the purpose of assisting rapists to overcome their victims is not to be tolerated, it is the behavior (using a drug to incapacitate someone and then to take advantage of that person sexually) that should be punished. Specifically providing for the punishment of that behavior will provide a far more effective message that drugging someone and then raping them is not to be tolerated.

Rescheduling one or even two particular drugs would merely lead to the use of other drugs with similar sedative effects for the same improper purpose. In fact, according to the testimony of the drug's manufacturer and others, there is already a long list of drugs that are being used for this purpose.

Against:

The bill's placement of *flunitrazepam* in schedule 4 is inappropriate. The drug does not meet the criteria for schedule 4 because it is not accepted for medical use in treatment in the U.S. and furthermore, the evidence would suggest that the potential for abuse of this drug is high, not low. Because the drug dissolves easily in liquids and is fast acting, it can easily be given to an unsuspecting victim, and quickly and effectively eliminate the potential victim's ability to resist. Thus, *flunitrazepam* is an ideal drug for a would-be rapist to use on an intended victim. As

such, it is the drug's availability for this misuse that the law should attempt to restrict along with providing specific criminal sanctions for the behavior. Thus, it seems that *flunitrazepam* would be more appropriately included with the schedule 1 controlled substances.

Response:

According to Hoffmann-La Roche, the pharmaceutical company that produces *flunitrazepam*/Rohypnol, the drug does have legitimate medically accepted uses. *Flunitrazepam*/Rohypnol, since its introduction in 1971, has been licensed for use in 64 countries around the world. It is prescribed by physicians worldwide and used by more than a million people each day as a sedative for treatment of severe sleep disorders or as a pre-anesthetic for some patients prior to surgical or diagnostic procedures. The manufacturer argues that *flunitrazepam/*Rohypnol has not been marketed in the United States because at the time it was introduced the company felt that the U.S. market for this type of medication was already saturated with similar products, including one offered by Hoffmann-La Roche itself.

Furthermore, it should be noted that according to a representative of Hoffmann-La Roche, Rohypnol has been reformulated so that the drug will have a bitter taste, blue color and is less soluble. The company is currently in the process of applying for permission to market the new form of Rohypnol in the countries where the current version of the drug is sold.

Reply:

Although *flunitrazepam/*Rohypnol may be licensed for use in other countries, until it is licensed for use in the United States it still doesn't fit the criteria for schedule 4 controlled substances under the Public Health Code, which specifically refers to currently accepted medical uses "in the United States.

For:

With regard to proposed amendments to the "650-drug lifer law", the arguments for House Bill 4065 can be categorized as involving issues concerning fairness and proportionality, effectiveness as a deterrent to the drug trade, and costs to the taxpayers, which includes the issue of prison overcrowding.

First, if justice is making sure that the punishment fits the crime, then the law as it stands is not just. The law mandates the same punishment, no matter what the circumstances, and imposes a harsher penalty for trafficking in certain minimum "drug mixtures" than for other, violent crimes. The "650-drug lifer" law currently provides a nonparolable life sentence for everyone convicted under it, regardless of the circumstances of the case, the potential for rehabilitation, or whether the defendant is a young, first-time, non-violent "mule" (or street dealer), or the big-time drug dealer (so-called "drug kingpin") the law purportedly originally was intended to target. In fact, the law reportedly has caught mostly low-level couriers (often, addicts and first-time offenders who engage in this activity to support their drug "habit") and, at the most, mid-level drug dealers, when it has worked at all. And sometimes it has resulted in blatant miscarriages of justice, as in cases involving a large element of entrapment of addicted users who otherwise never would have become involved in dealing relatively large amounts of drugs.

Moreover, the punishment simply does not fit the crime in many cases, and in fact is disproportionately harsh -- particularly in its application to first-time offenders -- when compared to sentences for more violent crimes, where the criminal is eligible for parole. Only first-degree murder carries with it the same penalty as the "650-drug lifer" law, while other violent crimes -- such as rape, second-degree murder, and armed robbery -- carry much lesser sentences, including the possibility of parole. Surely these violent crimes should be punishable by sentences more severe than those currently meted out for dealing drugs. In addition, some people argue that life imprisonment without the possibility for parole is an unreasonably harsh sentence for first-time offenders, and should, if at all, be reserved only for those who have been repeatedly convicted for only the most serious or violent crimes.

Secondly, despite claims that the law was and is an indispensable and effective anti-drug weapon, the law never did achieve its purported goal of ridding the streets of drug pushers and serving as a deterrent to drug trafficking, as even its original sponsor and many influential former supporters now admit. In fact, many influential voices in law enforcement -- including the Macomb County prosecutor himself, once a strong proponent of the law -- now advocate giving judges, not prosecutors or parole boards, primary authority over sentencing (along with, perhaps, enforcing truth-in-sentencing policies that would guarantee that minimum sentences would not be reduced by "good time" credits or other means). Even the original sponsor of the "650-drug lifer" provision is quoted (in a Mackinac Center for Public Policy "Viewpoint on

Public Issues") as now saying that "[t]he statute is flawed because it eliminates a judge's ability to exercise discretion. It has been used to snare too many

who fit the language, the letter of the act, but who in no way fit the intent, the spirit of the act." It also can be argued that the draconian nature of the punishment has served as a disincentive for convicting people under this law, and for bargaining down offenses, so the whole purported point of the law is blunted if not rendered moot.

Finally, despite a huge prison expansion program over the past decade, prisons still are overcrowded. Mandatory life sentences for certain drug convictions -- as well as other mandatory, if lesser, sentences for drug-related crimes -- threatens the state's limited prison capacity and already overburdened taxpayers. The policy not only doesn't make sense financially, it also can result in the early release -- due to lack of space -- of such violent offenders as rapists and armed robbers, who probably pose a greater danger to more of the state's citizens than those involved in illegal drugs.

Against:

Proponents of the "650-drug lifer" law continue to argue that it was designed as, and is in fact, a deterrent to drug trafficking. Some even say that it is law enforcement's most valuable tool in the war against drugs. As for the argument that there is a lack of "proportion" between sentencing for violent crimes such as rape, second-degree murder, and armed robbery -- none of which carry nonparolable life sentences -- and the nonparolable life sentences for trafficking in large amounts of drugs, proponents of the law point out that just because a drug dealer may not be engaged in any immediate, visible violence in the drug transaction, selling drugs is, in fact, as bad as premeditated murder. They argue that severe sentences are justified for drug trafficking because the crime is, in fact, as deadly as premeditated murder. Trafficking in large amounts of drugs is more deadly than first-degree murder, in many cases, because unlike premeditated murder, which often involves only a single victim, 650 grams or more of heroin or cocaine affects -- if not destroys -- the lives of hundreds of people who come into contact with it. And drug trafficking damages society as a whole, including many of its children who live in poverty and perhaps come to see it as a way of getting the things they'll never have even if they got and held down regular jobs. But children's lives not only can be destroyed by becoming involved in drug trafficking; they also can be killed or gravely harmed when targeted as the end users of the trade in these dangerous illegal drugs. Some people believe, in particular, that adults who sell illegal drugs to children should be subject to the harshest possible penalties for these incredibly destructive crimes. Nonparolable life sentences make it clear that drug dealing is wrong and will not be tolerated in a civilized society. Moreover, if people believe that there is an improper discrepancy between sentences for obviously violent crimes such as rape, second-degree murder, and armed robbery and sentences for drug trafficking, then perhaps the sentences for these violent crimes should be increased rather than decreasing the sentences for drug trafficking. Finally, some proponents of the drug-lifer law argue that nonparolable life imprisonment is a well-known risk of doing business for those involved in the illegal drug trade, and, moreover, drug traffickers are well aware of the fact that their risks of being caught, much less convicted and sentenced to nonparolable life imprisonment are not very great. Some proponents of the current law, in fact, claim that the "first time offender" label, when used for drug traffickers, is misleading at best, and that "first time conviction" would more accurately reflect the fact that a very low percentage of people actually involved in the drug trade are ever convicted in the first place.

Response:

It should be pointed out that many people have the misperception that the law applies to trafficking in 650 grams or more of pure heroin or cocaine, which is not the case. In fact, it applies to any mixture containing these drugs, so that someone who is caught dealing a smaller but purer amount of these drugs will receive a lesser, parolable sentence, while someone who is caught dealing a mixture of at least 650 grams containing, say, only one percent heroin or cocaine, is subject to the much harsher penalty. So the incentive in the current law actually is to deal in purer -- and far more deadly, at least until "cut" or diluted for the street -- but smaller amounts of these drugs. Further, with regard to the detrimental effect that the example that the "easy" money from drug trafficking can have on children living in poverty, it can equally be argued that it is the poverty, and not the trafficking in illegal drugs per se, that constitutes the real, and much more difficult to solve, problem. Finally, it could also be pointed out that although deaths do result from drug use and trafficking, unlike premeditated murder the intent of the drug dealer is not to kill his or her "customers."

Against:

The proposed change does not go far enough. Many people believe that the whole concept of mandatory minimum sentences is questionable because judicial sentencing discretion properly rests with the judiciary, not the legislature. As the sponsor of the original "650-drug lifer law" is quoted as saying, in a Mackinac Center for Public Policy "Viewpoint on Public Issues," "The statute is flawed because it eliminates a judge's ability to exercise discretion. It has been used to snare too many who fit the language, the letter of the act, but who in no way fit the intent, the spirit of the act." All mandatory minimum sentences should be eliminated and judicial discretion should be restored to its proper role.

For:

Proponents of Senate Bill 281 argue that its provision allowing a reduction in the otherwise mandatory minimum sentences for major drugs crimes will be able to be used as leverage by the law enforcement community to get information on other people involved in the illegal drug trade that law enforcement might not otherwise have access to. The bill could result in more people being arrested, tried, and convicted for major drug crimes, which could only help in the war against drugs.

Response:

Opponents of the bill argue that the discretion that prosecutors already have under the law means that this kind of leverage already is routinely used in the prosecution of drug cases. Thus, for example, a prosecutor might tell an arrested drug dealer that unless he or she cooperates, the charge will be filed under the "650-drug lifer" provisions of the law, but that if the person cooperates with the prosecution, he or she could be charged with a lesser offense involving lower amounts of drugs.

Against:

The provisions of Senate Bill 281 that allow for the early release of a prisoner who has "cooperated with law enforcement" are extremely vague, possibly unconstitutional, and will likely result in a flood of appeals. In essence, a prisoner who was determined to have "cooperated" with law enforcement would be eligible for parole 2½ years earlier than the 20- or 17 ½ -year minimum. Unfortunately, the bill contains no specific information regarding what sort of cooperation would be expected and when it would be expected. In fact, the bill contains only two limitations -- that a defendant's exercise of his or her constitutional right to a trial by jury could not be treated as a failure or refusal to cooperate, and that a prisoner could be considered to have cooperated if a court determined that the prisoner had no relevant or useful information to provide. The lack of further information, definitions, or guidelines raises many questions. What is "relevant or useful information?" Relevant and useful to whom and for what? Relevant and useful to the crime being prosecuted? Relevant and useful to the prosecution of drug crimes in general? To crime in general? Presumably, the intent is to help prosecutors obtain information on others involved in the illegal drug trade, but this is not specified in the bill. Without clarification, it could be reasonably argued that a prisoner should only be deemed to have failed to cooperate when he or she refused to provide information that was "relevant and useful" to the specific crime for which he or she was accused. Equally supportable arguments could be made for interpretation of "relevant and useful" as covering information of other drug-related crimes or even non-drug related crimes. Less effective arguments could be made for stretching the definition even further -- what about information on illegal aliens? Information that might help the local sheriff or judge in his or her campaign for re-election? Obviously a line should be drawn -- at some point such information would no longer be appropriate -- but without language in the bill to define "relevant and useful information", that line will have to be set through the appellate process in the courts of this state and possibly the United States.

It also should be noted that the restriction against using an accused's demand for a jury trial as support for a determination that he or she had not cooperated presupposes that cooperation or lack thereof could be based upon a prisoner's behavior as an accused. As a result, the question arises -- what of an accused's other constitutionally protected rights? Although an accused's right to a trial by jury is specifically protected, the bill offers no protections for a defendant's assertion of any other rights -- for example, demanding the presence of counsel during interrogation, or attempting to suppress evidence obtained through an illegal search or through improper interrogation. Obviously, one would hope that no judge would limit a prisoner's opportunity for early release due to the prisoner's assertion of these rights at or before trial; however, the bill would not prohibit such actions. Furthermore, the lack of guidelines for a court to use when determining whether a prisoner "cooperated with law enforcement" raises questions about how a court's determination would be made -- what sort of evidence would a judge need to determine whether a prisoner had cooperated? Would the testimony of the prosecutor or law enforcement be sufficient? Would a prisoner or his or her attorney be allowed to testify or present evidence? Would a

prisoner be allowed to object to or appeal a determination that he or she had not cooperated? Again, these questions, since they are not answered in the bill, would have to be answered through the appeals process -- essentially guaranteeing the appeal of any case where a prisoner was determined not to have cooperated.

Response:

The terms "relevant" and "useful" have commonly understood meanings and those meanings would be used to answer any of the questions raised. In fact, use of the evidentiary definition of relevance (having the tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable) could result in fairly restrictive interpretation. Facts regarding other crimes or other persons likely would not be considered relevant under such a definition as they would not be of consequence to the determination of the action.

Rebuttal:

First, it should be noted that the commonly understood meanings of the words would not necessarily be helpful in this situation. The question is not 'what do these terms mean'? But rather, the question is 'how are they to be applied'? Relevance and usefulness depend upon context (what is relevant and useful in one context can be irrelevant and useless in another) and the bill leaves provision of a context to the inference of the reader. Second, the use of the evidentiary definition of relevance would seem inappropriate as the term is "relevant information", not "relevant evidence". Further, the use of the evidentiary standard could eviscerate the bill. If relevance is limited to the cause of action at hand, information regarding other drug dealers or drug kingpins who were not actually directly involved in the case at hand would not be relevant. Since the intent of the these provisions is presumably to help provide a means by which police and prosecutors can gather information on the illegal drug trade in general, such a restrictive definition could interfere with that outcome.

Against:

It is possible that the provisions in Senate Bill 281 regarding "cooperation with law enforcement" could be extremely dangerous to prisoners, since the lives of convicted drug dealers who "squeal" -- or are thought to have "squealed" -- on their fellow drug dealers could be jeopardized by angry fellow inmates. The provision would likely not result in any more arrests or convictions than can be obtained under current law but would greatly increase the danger to certain prisoners once they are incarcerated and at the mercy of their fellow prisoners.

Response:

The prisoners who had "squealed" would not be identifiable to the average prisoner until the "squealer" came up for parole 2½ years early. Even then, this alleged risk to the prisoner assumes that the other prisoners have a great deal of knowledge regarding when the informer would normally be eligible for parole consideration.

Against:

Some people argue that once a judge had certified a prisoner as having cooperated with law enforcement, the opportunity to see that a convicted drug dealer serve an appropriate sentence would be taken out of the hands of the prosecutors and instead left up to parole boards. Once a convicted prisoner had served his or her mandatory minimum term, it would be the parole board that would decide the length of the prisoner's sentence -- which, proponents of the present law contend, is one of the reasons why mandatory sentences were enacted in the first place.

Analysts: W. Flory/S. Ekstrom

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