Legislative Analysis

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**EXPLOITATION OF A VULNERABLE VICTIM:
INCLUDE UNDERCOVER POLICE OFFICER AS VICTIM**

House Bill 4867 reported from committee without amendment
Sponsor: Rep. Tom Leonard
Committee: Criminal Justice

First Analysis (12-3-13)

BRIEF SUMMARY: When determining a sentence for an offense that includes *predatory conduct towards a victim*, the bill would allow a court to score 15 points even when the "victim" is an undercover law enforcement officer posing as a potential victim.

FISCAL IMPACT: A fiscal analysis is in process.

THE APPARENT PROBLEM:

If the penalty for committing a crime does not specify a mandatory punishment, such as life imprisonment without the possibility of parole, an appropriate sentence is determined by "scoring" elements, or facts, of the crime, and plotting the total score on a series of grids based on the type of crime (e.g., property crime, crime against a person, etc.). The higher the score, the greater the chance the person will be sent to prison instead of the county jail or placed on probation. Thus, it is not unusual for offenders to appeal their sentences based on scoring errors. Some recent court cases challenging how to score crimes against vulnerable victims have resulted in courts not being able to score some points if the "victim" was really an undercover law enforcement officer in a sting operation, for example, posing as a young girl on the Internet in order to catch men who would solicit young females for sex or child pornography.

Currently, under the sentencing guidelines, if a crime against a victim considered to be a *vulnerable person* involves predatory conduct on the part of the offender, the court may add an additional 15 points to the offender's score. For some, these additional points may mean being sent to prison instead of jail, or may mean a longer minimum sentence in prison. However, in light of the recent court decisions, courts are not able to add these 15 points if the "victim" was a law enforcement officer, even if the offender intended to victimize a person who would be considered to be a "vulnerable victim," such as a minor, and believed the person being targeted was indeed a vulnerable victim. Prosecutors, on the other hand, believe that the law should be changed so that the extra points may be scored based on who the offender intended, and believed, the victim to be.

THE CONTENT OF THE BILL:

When determining an appropriate sentence range for the crime of *exploitation of a vulnerable victim* under sentencing guidelines, 15 points must be scored under Offense Variable 10 if "predatory conduct" was involved in the commission of the crime. The

term "predatory conduct" is defined to mean pre-offense conduct directed at a victim for the primary purpose of victimization.

House Bill 4867 would amend the Code of Criminal Procedure (MCL 777.40) to also include in the definition of "predatory conduct" *pre-offense conduct directed at a law enforcement officer posing as a potential victim*.

ARGUMENTS:

For:

Under the sentencing guidelines, an offender may have additional points scored if the offender engaged in pre-offense conduct directed at a vulnerable victim for the primary purpose of victimizing that vulnerable person. In recent years, however, several defendants successfully challenged the addition of these points based on the fact that their "victim" turned out to be an undercover law enforcement officer posing as a victim and therefore was not "vulnerable" at all. The bill would address the issue by including pre-offense conduct directed at a law enforcement officer posing as a victim. Supporters of the bill say it is right to punish the intended action, and that to do otherwise is akin to rewarding an offender with a lighter sentence for being lucky enough to have victimized an undercover officer instead of a child or other vulnerable person.

In 2006, Public Act 374 was enacted to address a similar situation involving receiving stolen property. Judges were throwing out cases arising from sting operations conducted by law enforcement agencies based on the fact that the property or motor vehicles involved in setting up the stings were not stolen to begin with or couldn't be proven to have been stolen. The act extended penalties for buying, receiving, possessing, and concealing stolen property to property a person had reason to know or *reason to believe* was stolen. Public Act 185 of 2000 extended the crime of using a computer for certain criminal acts against a minor to include acts in which the victim or intended victim is *believed by that person to be a minor*.

Against:

Some would say the examples above are apples and oranges. PA 374 and PA 185 go to the elements that decide whether a crime had been committed or not. This bill instead involves penalty enhancements that potentially lengthen a defendant's sentence and the time that may be spent in jail or prison. Offense Variable 10 is only scored when a person is convicted of a crime, and then only if a vulnerable victim was involved. The courts have ruled that a police officer is not a victim. The person is already being punished for the underlying crime; that should be sufficient.

Response:

The bill will enable prosecutors to get those who would intentionally target vulnerable victims off the streets longer, thus the bill would increase public safety. Some would say it is appropriate to enhance the punishment for anyone who would deliberately target anyone showing signs of reduced cognitive functioning with elaborate financial schemes or look for a woman of small stature to overpower in a purse snatching in addition to the penalties in place for the underlying crime. Thus, the fact the "victim" happens to be a

police officer means only that an innocent person was spared. The bill rightly goes to the action intended.

POSITIONS:

A representative of the Office of Attorney General testified in support of the bill. (10-2-13)

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■ 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.