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The Criminal Law Section encourages interested members of the Bar and legal community to contribute articles of interest to criminal law practitioners to further and improve the practice of criminal law in the State of Michigan. Submissions and manuscripts are reviewed by attorneys experienced in the subject matter covered.



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Does a Politically Appointed Parole Board Cost Michigan Citizens Hundreds of Millions of Dollars?

By Daniel E. Manville

Introduction

In 1991, Michigan prison population was 36,293 and at the end of 1999 that population was 46,617, an increase of 28 percent.¹ During this same period, Michigan's overall population growth was 6.9 percent.² In 1990, MDOC's budget was 730 million dollars. By 1999, the budget had increased to 1.6 billion dollars.³ In ten years, the MDOC's budget more than doubled. This tremendous increase in the MDOC's budget has taken funds from other state agencies.⁴

This article will discuss how a politically appointed Parole Board negatively impacted parole releases; how sex offenders are being denied parole even though MDOC's own statistics demonstrate that these offenders have very low parole failures and recidivism rates; and how the parole guideline scores created by the Legislature have been subverted by the Parole Board to deny parole to those who are presumed parolable.

Percentage of Paroles and Denials During 1990-1999

Prior to addressing how the present Parole Board has contributed significantly to the increase in the prison population and MDOC's budget in the 1990s, the number of paroles granted and denied will be examined.

In 1990, 10,748 paroles were ordered and 5,004 were denied.⁵ Between 1990 and 1999, the prison population increased to 46,617, which is an increase of 12,408 inmates.⁶ Based upon this increase in the prison population, it would be expected that the number of paroles ordered would increase by at least 2,500. However, a review of MDOC's statistical data shows that only 10,777 paroles were ordered in 1999, an increase of 29 paroles over the 10,748 paroled in 1990, or less than 1 percent increase in paroles.⁷ Between 1990 and 1999, the number of inmates denied parole increased from 5,004 to 10,154, an increase of over 200 percent.⁸

Politically Appointed Parole Board

In 1992, the Legislature changed the make-up of the Parole Board as a result of inmate Leslie Williams being paroled and then going on a spree of kidnapping, raping and murdering young girls.⁹ The Legislature changed the makeup of the Parole Board from appointed civil service employees, i.e., corrections professionals, to a Parole Board consisting of political appointees. The new Parole Board members have none of the protection of the civil service corrections professionals and can be removed by the Director.¹⁰

Most of these political appointees are former law enforcement officers, assistant prosecutors or victim rights advocates. They brought to the Parole Board their background in law enforcement and a focus on paroles that differed substantially from the approach taken by corrections professionals. Corrections professionals considered the crime and past record, if any, but placed more emphasis on the treatment received by the inmate and changes that inmate had made while confined. The politically appointed Parole Board generally focused on the past and present crime(s) of the inmate before it in deciding whether to parole.¹¹

A review of MDOC's data for the years 1992-1998 shows that only in 1993 did the Parole Board increase the number of inmates paroled as the number of inmates confined increased.¹² Starting in 1994, the number of inmates granted parole did not keep pace with the number of inmates being confined. During this time frame, the only additional criteria for granting parole imposed upon the Parole Board was the mandated use of parole guidelines. Because the parole guidelines were instituted to bring greater equity to the parole process, more paroles should have been granted with its implementation, not less as occurred under the new Parole Board.¹³ (The guidelines are discussed *infra*.)

MDOC's statistics show that these political appointees have impacted on the parole rates negatively.¹⁴ MDOC spokesperson Matt Davis agrees. In an interview in 2001, Mr. Davis stated:

If our parole approval rates were at the same level now [as] they were in the 1980s, I think we would be at near zero growth.¹⁵

Sex Offenders Are Good Risks for Parole¹⁶

A review of the Parole Board's own data since the political appointees assumed control shows that these members have gone after one group of inmates with a vengeance. This group of inmates is the sex offenders.¹⁷ In 1990, 46.5 percent of sex offenders were granted parole,¹⁸ whereas in 1999 only 17.3 percent were granted parole. This is a 63 percent decrease in the granting of parole to sex offenders since 1990 to 1999. No other category of offenders has suffered such a decrease.

If sex offenders had either a high parole failure or high recidivism rate, there would be no question that the Parole Board would be doing their job of protecting society. However, MDOC's statistics show that sex offenders have the

second to the highest successful completion of parole of twenty categories of offenders.¹⁹ These statistics also show that sex offenders have the second lowest failure while on parole. Finally, these statistics show that sex offenders have a recidivism rate of 3.4 percent, which is the fourth lowest.²⁰ Despite the MDOC's own statistics showing that sex offenders are one of the best group of inmates to be paroled, the Parole Board, instead, has seriously decreased the number of sex offenders paroled.²¹

In most cases, a sex offender is required to participate in group sex offender therapy (SOT) while confined.²² It is believed by both the prison SOT psychologists and inmates that failure to complete SOT will guarantee numerous years of denial of parole. As part of SOT, an inmate is required to accept responsibility for the crime, to discuss prior sex offenses, to take an active part in the group by questioning or confronting other groups members, and to prepare a "relapse prevention" plan. At the end of the group, a termination report is written by the psychologist as to the progress of the inmate in group and the suitability of the inmate's "relapse prevention" plan. This termination report is placed in the inmate's file and is available to the Parole Board.²³

The MDOC's SOT program is modeled after the National Model.²⁴ Even though "[t]herapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism,"²⁵ the Parole Board refuses to acknowledge that SOT can have a positive impact on sex offenders. One former chair of the Parole Board stated to the author that there have been no studies showing that therapy for sex offenders positively influence their deviancy. That statement is contrary to a Federal study by the U.S. Department of Justice, which found that sex offenders who receive treatment have around a 15 percent recidivism rate.

[T]he rate of recidivism of treated sex offenders is fairly consistently estimated to be around 15 percent, [whereas] the rate of recidivism of untreated offenders has been estimated to be as high as 80 percent. Even if both of these figures are exaggerated, there would still be a significant difference between treated and untreated individuals.²⁶

As demonstrated above, the Parole Board has acted contrary to MDOC's statistics and a 1988 study that sex offender therapy significantly lowers recidivism by denying parole. If the denial of parole was for one year only, one could possibly find justification for such a policy. However, parole denial for sex offenders usually involves two, three or even four continuances of one year each. The costs of incarcerating these sex offenders who have been rehabilitated adds up to hundreds of millions of dollars.

Subverting Parole Guidelines

The Parole Board has also subverted the parole guidelines that were established by the Legislature to correct a parole process that seemed more bent on denying than granting meritorious paroles. Starting in 1994, the Legislature required that the Parole Board use objective criteria in making its decisions to grant or deny parole by implementing parole guidelines scores.²⁷ These guidelines were "intended to inject more objectivity and uniformity into the [parole decision] process in order to minimize recidivism and decisions based on improper considerations...."²⁸

The Parole Board created three levels within the Legislative designed guideline system. The first level consists of those inmates with a high probability of parole scores who are to be released on parole unless "substantial and compelling" reasons are stated in writing to deny parole.²⁹ The second level consists of those inmates with an average probability of parole in which the guidelines do not restrict the decision of the Parole Board whether to grant or deny parole.³⁰ The third level consists of those inmates with a low probability of parole, which usually means a denial of parole unless "substantial and compelling reasons" are stated in writing to justify that release.³¹

In requiring the use of these guidelines, the Legislature did not take away all of the discretion of the Parole Board.³² As indicated above, the Parole Board can deny parole to inmates with high probability scores if it states "substantial and compelling" reasons in writing.³³ However, the Legislature did not define "substantial and compelling" when enacting the parole guideline statute,³⁴ but it did use this phrase in its earlier enactment of the controlled substances act³⁵ and in determining departures from sentencing guidelines.³⁶ Therefore, in determining what "substantial and compelling" reasons means in the parole context, the standard used in drugs offenses and sentencing guidelines should be followed.

In *Fields*, the court stated that since the Legislature chose to use this phrase after it had been interpreted by the Supreme Court, and did not provide a different definition, this is evidence that it intended a similar interpretation of the phrase in that case.³⁷ The *Fields* Court recognized that "the words 'substantial and compelling' constitute strong language," and found it "reasonable to conclude that the Legislature intended 'substantial and compelling reasons' to exist only in exceptional cases."³⁸ The Court also found that it is not enough for a factor to be merely substantial; it must be both substantial and compelling before departure from the guidelines is permitted, and that the Legislature is presumed to "have consciously elevated the burden of proof" by its choice of the term "compelling."³⁹

The Parole Board denies parole to a significant number of sex offenders who have high probability of parole guideline scores. The reasons used by the Parole Board for finding substantial and compelling reasons for departures from the guidelines don't meet the criteria used by courts in drug

and sentencing guideline cases. The *Fields* Court stated that substantial and compelling reasons for departures should be the exception. In the cases of sex offenders, departures from the guidelines is not the exception but is the norm. In finding substantial and compelling reasons, generally, the Parole Board will use one or more of the same factors that were used in the original scoring of the parole guidelines or used by judges in imposing sentence.

An example of a factor frequently used by the Parole Board in finding “substantial and compelling” reasons to deny parole to an inmate with a high probability of parole score is the failure of the inmate to admit remorse as to the crime or as to the victim.⁴⁰ Courts have held that remorse is not to be considered in determining “substantial and compelling” reasons to depart from a sentence.⁴¹ Based upon these decisions, a denial of a parole to someone who has a high probability of parole because no remorse is shown would be contrary to law.

Another factor used by the Parole Board in finding substantial and compelling reason to depart from a grant of parole is that the inmate does not show insight into his sexually deviant behavior. In most cases where this is listed by the Parole Board to justify departure from a grant of parole, a review of the termination report prepared by the psychologist for the sex offender group does not support that reason. Usually the termination report will state that the inmate has gained insight into his deviant behavior.

The Parole Board has also sought to make it more difficult for sex offenders to obtain a score of high probability of parole by imposing a “-5” points under the “Mental Health Variable.”⁴² According to MDOC’s parole guidelines, an inmate is then given only a “+1” point for successfully completing sex offender therapy. It is absurd that sex offenders are not given at least a “+4” for successful completion of sex offender therapy since it has been determined that treatment significantly reduces recidivism. The reason the Parole Board does not give more than “+1” point for successful completion of SOT is directed at keeping low the number of sex offenders achieving a rating of high probability of parole and thus requiring the Parole Board to then artificially create substantial and compelling reasons for not granting the presumptive parole.

Recently the Parole Board amended Ad.R.791.7716 apparently because it was granting too many paroles.⁴³ Before this amendment, an inmate’s “prior criminal record” was one of numerous factors used to determine the overall parole guideline scores. Now, the Parole Board not only still uses the “prior criminal record” to obtain the overall score, but then uses this same factor to reduce a high probability of parole to an average probability. The Parole Board’s Rule now states that if an inmate’s “prior criminal record points is greater than 06”⁴⁴ and the inmate also has an overall score of +4 or more (which is high probability), that inmate’s score is to be automatically reduced to a +3 (average probability).

What this means is that the parole board can then deny parole without stating “substantial and compelling reasons.”

Conclusion

What public need is served by continuing to confine those who have successfully completed sex offender therapy and their minimum sentence? There is none! As the Lansing State Journal put it recently:

And the longer we hold people in prisons without substantial rehabilitation, the more likely they will struggle—or revert to crime—once they are released. Is the state prepared to slam the door permanently on tens of thousands of its citizens; forswearing any chance for them to contribute to society, while guaranteeing they will drain resources from the rest of us for decades to come?⁴⁵

Based upon the above, some obvious questions are raised. First, does the politically appointed Parole Board know and understand sex offender therapy, and its potential impact on recidivism for offenders? Second, is the politically appointed Parole Board overly biased towards confinement due to its background? Third is the politically appointed Parole Board acting on behalf of the MDOC in keeping the number of those confined at a high level to ensure a high budget? Fourth, is the protection of the public best served by confining those who are least likely to violate parole or to be recidivists? These questions cannot be answered in this article but it is hoped that others will look more closely at what the politically appointed Parole Board is doing and determine whether its present policies are best serving the people of the State of Michigan.

Mr. Manville graduated from Jackson Prison in 1976 and went on to obtain a Master’s Degree in Criminal Justice from MSU, and a JD from Antioch School of Law. Since his release from prison in 1976, he has engaged primarily in litigation against the inequities in the prison system. He has also authored a number of self-help manuals for those who are confined.

Endnotes

- 1 See Michigan Department of Corrections (hereafter MDOC) 1999 Statistical Report, Table B1c, “Total Prison Population, Prison Commitments, and Michigan Census: 1940-1999”, at 52.
- 2 U.S. Census figures released in 2001.
- 3 MDOC’s 1999 Annual Report, at 111. For the year 1999, the average costs of incarcerating an inmate at a Level II prison was \$18,575, at 112.
- 4 *Id.*, at 111 (“Corrections now receives 14.7 percent of state general revenue funding, up from just 3 percent in 1980.”).
- 5 *Supra* Note 1, Table D1, “Parole Board Activity, 1985-1999,” at 171.
- 6 *Supra* Note 5.
- 7 *Supra* Note 5.
- 8 MDOC spokesperson Matt Davis stated, “Between 1990 and 2000, there was a sea [of] change in the way paroles were

- granted. We have more people in prison because many fewer are leaving.” * * * “Fewer paroles mean more prisoners: ‘90s growth was 7 times that of state population’, ” Detroit Free Press, August 1, 2001, by Dawson Bell.
- 9 MCLA 791.231(a). This new constituted Parole Board took over on November 15, 1992. MCLA 791.231(a)(5).
- 10 MCLA 791.231a (“The director may remove a member of the parole board for incompetency, dereliction of duty, malfeasance, misfeasance, or nonfeasance in office.”).
- 11 When a defendant is sentenced pursuant to Michigan’s Sentencing Guidelines, the court factors in the past and present crimes to determine an appropriate sentence. This Parole Board has decided that it will determine the minimum sentence of a sex offender and not follow what was imposed by the duly elected circuit court judge.
- 12 This was the first full year of the political appointed Parole Board.
- 13 See MCLA 791.233e. Starting in 1994, the Parole Board was required to consider the proposed parole guidelines in making its decisions and once the rules were adopted they were mandated to use them. As discussed infra, the parole guidelines were enacted by the Legislature to correct inequities in the parole process. However, based upon MDOC’s statistics, instead of correcting inequities, the Parole Board found ways to get around what was mandated by law.
- 14 Supra Note 5, see Tables B1c and D1.
- 15 Supra Note 8.
- 16 The term “sex offender” is a catch all phrase for anyone convicted under numerous criminal statutes of Michigan. A 17-year old is a “sex offender” when convicted of having consensual sex with his 15-year old girl friend, as well as the serial rapists, such as Leslie Williams.
- 17 See “Parole Approval Rates,” chart below. This chart can be found at www.michigan.gov/corrections, click on “Probation, Parole and Boot Camp.” MDOC spokesperson Matt Davis agreed that the 1990s Parole Board reforms resulted in dramatic changes in the number of sex offenders being denied parole compared to other criminal categories. Supra note 8.
- 18 1991 is the last full year that the Parole Board consisted of civil service employees. In 1992, the political appointees took over the Parole Board on November 15.
- 19 Supra Note 5, Table D2, “Parole Outcomes of Offenders Who Paroled in 1995 by Offense Group,” at 173.
- 20 Supra Note 5.
- 21 MDOC 1994 Annual Report stated that for sex offender paroled in 1990 had a parole success rate of 81 percent. It went on to state that the majority of parole failures for sex offenders “were for technical violations, not new offenses.” Only 12 of 485 paroled sex offenders committed another sex offense. At 117-118.
- 22 Probably 90 per cent of sex offenders will be recommended for sex offender therapy.
- 23 Once paroled, almost 100 percent of the parolees are required to attend sex offender therapy in the community and also are required to submit to a polygraph on demand to test whether they have been having deviant sexual thoughts. A positive result on the polygraph will usually result in the parolee being sent back to prison.
- 24 See U.S. Dept. of Justice, National Institute of Corrections, “A Practitioner’s Guide to Treating the Incarcerated Male Sex Offender” (1988);
- 25 *McKune v. Lile*, 536 U.S. —, 122 S.Ct. 2017, 2024 (2002) (citing to U.S. Dept. of Justice, Nat. Institute of Corrections, “A Practitioner’s Guide to Treating the Incarcerated Male Sex Offender” (1988)).
- 26 Supra Note 24, at xiii; see also, R. Karl Hanson, et al., “First Report of the Collaborative Outcome Data Project on the Effectiveness of Psychological Treatment for Sex Offenders,” *Sexual Abuse: A Journal of Research and Treatment*, 169-94 (April 2002).
- 27 MCLA 791.233e; *Killebrew v. Dep’t of Corrections*, 237 Mich.App 650, 655; 604 NW2d 696 (1999).
- 28 *Id.* at 653.
- 29 MCLA 791.233e(6); see also *Scholtz v. Michigan Parole Bd.*, 231 Mich.App. 104, 585 N.W.2d 352 (1998) (substantial and compelling reasons not stated by parole board in denial of parole to inmate with high probability of parole guideline score).
- 30 *Killebrew v. Dep’t of Corrections*, supra 237 Mich.App at 656 (“the Parole Board may grant or deny parole to average probability prisoners for legitimate reasons that are neither compelling nor substantial”).
- 31 *In re Parole of Johnson*, 219 Mich.App. 595, 596, 556 N.W.2d 899 (1997), the court found that grant of parole to inmate with low probability of parole was not supported by “substantial and compelling” reasons.
- 32 *Id.* at 654 (“The guidelines do not hamper [the parole board]’s discretion absolutely.”).
- 33 MCLA 791.233e(6).
- 34 See, e.g., *In re Parole of Johnson*, supra; *In re Parole of Scholtz*, supra.
- 35 MCLA 333.7401(4) (“The court may depart from the minimum term of imprisonment ... if the court finds on the record that there are substantial and compelling reasons to do so.”).
- 36 *People v. Fields*, 448 Mich. 58, 528 N.W.2d 176 (1995) (Legislature, in an effort to deter drug-related crime, intended that only in exceptional cases should sentencing judges deviate from the minimum prison terms mandated by statute).
- 37 The same is true when the Legislature enacted MCL 791.233e. No definition of “substantial and compelling” was contained in the Public Act. Courts have held that the Legislature is aware of prior law when passing a new law and, thus, the definition of “substantial and compelling” contained in case law is what was intended by the Legislature.
- 38 *Fields*, supra at 67-68. See also *People v. Hegwood*, 465 Mich. 432, 636 N.W.2d 127, 132 (2001) (courts may depart from sentencing guidelines, see MCLA 769.34(3), for “substantial and compelling” reasons).
- 39 *Id.* at 83 (Boyle, J., concurring).
- 40 This is different than an inmates refusing to acknowledge that he committed the crime even after being convicted. In *Hicks v. Parole Bd.*, 2001 WL 792153, *4 (Mich. App. 1/9/01), the court affirmed use of failure to admit guilty as substantial and compelling reason to deny parole to inmate with high probability of parole. In support of its holding, the court found that inmate was properly denied admission into therapy since admission of guilty was a prerequisite for SOT. See also *Russell v. Eaves*, 722 F Supp 558, 559-561 (E.D. Mo., 1989) (prisoner set forth a legally frivolous argument when he contended that requiring him to admit guilt in order to participate in rehabilitative therapy violated his right against self-incrimination, even though therapy was a prerequisite for parole).
- 41 See *People v. Daniel*, 462 Mich. 1, 7 and note 9, 609 N.W.2d 557 (2002) (“We expressly disapproved, however, considering a defendant’s expression of remorse in determining whether to depart from the minimum sentence required by statute.” at 7).
- 42 Ad.R.791.7716(3)(g)(ii). The Parole Board’s guidelines also imposes a “-1” point under “Offense Variables” for serving for a sex offense, Ad.R.791.7716(3)(a)(v), along with the “-5” under the “Mental Health Variable.”
- 43 R791.7716 lists factors to be scored in determining the parole guideline score.
- 44 In an article written for the *Prisons and Corrections Forum*, Barbara Levine describes how inmates without a violent criminal past can receive a score of 6 points or more. See “Revising Parole Guidelines: Prediction or Politics?”, at 9 n. 1.
- 45 Lansing State Journal, October 16, 2002 Editorial, “Prisons: Commutations put light on costly parole backlog.” See also Detroit Free Press, September 30, 2002, “Parole policy carries harsh price for prisoners, taxpayers,” by Jeff Gerritt.

Notes