STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHELLE BAZZETTA,

Defendant-Appellee.

UNPUBLISHED
January 3, 2003

No. 237756
Oakland Circuit Court
LC No. 88-086394-FC

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant was tried with her husband, Joseph Bazzetta, on a charge of open murder for the August 1, 1983, strangulation of Joseph's stepmother, Helen Bazzetta. Helen Bazzetta had been missing for almost five years when her body was discovered in a wooded area in Oakland County. The prosecution tried defendant on the theory that she aided and abetted Joseph in murdering Helen. The defense was based on the theory that, although defendant helped Joseph dispose of the body, she did not participate in Helen's death. Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and was sentenced to life imprisonment.

Defendant appealed as of right, claiming that her life sentence exceeded the sentencing guidelines' recommendation of eight to twenty-five years. This Court affirmed, finding that the sentence was not disproportionate to the circumstances of the offense and the offender. Ten years later, the parole board declined to grant defendant a public hearing. Defendant filed with the trial court a motion for relief from judgment on the grounds that her sentence was invalid because the trial court was operating under a misconception of the law when it sentenced her to parolable life. The trial court granted defendant's motion and ordered resentencing. The prosecutor filed an interlocutory appeal, and this Court granted leave to appeal and stayed the resentencing. We reverse the trial court's order and reinstate defendant's life sentence.

In this prosecutor's appeal, this Court is asked to determine the validity of the parolable life sentence that was imposed on defendant in November 1989, in light of the fact that the trial court, twelve years later, stated that the sentence was invalid. The court concluded that it operated under a misapprehension of the law in sentencing defendant because it did not know the parole board would consider a parolable life sentence the equivalent of a sentence of life without parole. We review this issue de novo because it essentially involves a question of law. See *People v Harris*, 224 Mich App 597, 599; 569 NW2d 525 (1997).

According to MCR 6.429(B)(4), if a defendant is no longer entitled to appeal by right or by leave regarding the issue of correcting and appealing a sentence, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500. To be entitled to relief from judgment, it is necessary that a defendant demonstrate both good cause and actual prejudice as set forth in MCR 6.508(D)(3)(a) and (b). *People v Brown*, 196 Mich App 153, 158; 492 NW2d 770 (1992). MCR 6.508(D) permits a convicted defendant the opportunity to challenge a sentence even after an unsuccessful appeal of right. MCR 6.508(D) provides, in part:

> The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
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> * * *
>
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> > (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
> >
> > (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,
> >
> > * * *
> >
> > > (iv) in the case of a challenge to the sentence, the sentence is invalid.

Here, the prosecutor asserts that the elements of both good cause and actual prejudice were not met. Our review of the record shows that the question of actual prejudice is dispositive in this case.

Although the trial court unequivocally stated at the motion hearing that it was under a misconception of law when it imposed the parolable life sentence, a review of the sentencing transcript indicates otherwise. A resentencing cannot be validly ordered unless the initial sentence is invalid. *People v Robinson (After Second Remand)*, 227 Mich App 28, 37; 575 NW2d 784 (1997). As stated in *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997), "Although the authority of the court over a defendant typically ends when a valid sentence is pronounced, the court may correct an invalid sentence after sentencing." "A sentence is invalid when it is beyond statutory limits, when it is based upon constitutionally impermissible grounds, improper assumptions of guilt, a misconception of law, or when it conforms to local sentencing policy rather than individualized facts." *Id*., citing *People v Whalen*, 412 Mich 166, 169-170; 312 NW2d 638 (1981).

Here, the sentencing transcript of November 21, 1989, shows that the trial court relied on the following in sentencing defendant: (1) the trial court found the crime that defendant committed was heinous; (2) the trial court believed that defendant willingly participated in the crime; (3) the trial court had questions regarding defendant's rehabilitative potential; (4) the trial

court intended defendant to remain in prison until that time when she could demonstrate to the parole board that she was rehabilitated and posed no threat to society; (5) the trial court recognized that the minimum sentence guidelines range of eight to twenty-five years might not prove effective in rehabilitating defendant; (6) the trial court was aware of the fact that only twelve of about 1,200 inmates serving a life sentence had been released on parole at the time; and (7) the trial court concluded a parolable life sentence would serve the trial court's intentions better. Accordingly, the trial court imposed a parolable life sentence.

However, ten years later, after the parole board decided not to grant defendant a public hearing, she claimed in her motion for relief from judgment that certain 1992 parole board policy changes have rendered a parolable life sentence the equivalent of a sentence of life without parole. Defendant argued that, as a result of the parole board policy changes, the bases upon which the trial court had relied in imposing defendant's 1989 sentence became a nullity.

At the October 24, 2001, hearing on defendant's motion for relief from judgment, the trial court stated:

> . . . I believe that I can hold that I was operating under a misconception of law. I was quite clear what my thoughts were at the particular time of sentence. And what I feel [sic] that the defendant has shown good cause and actual prejudice. So I am going to have to say, based on that, that the sentence was basically invalid, based upon my understanding of the law and the facts at that time, and would resentence in connection with this matter.
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> It is interesting to observe that, at the recent Michigan Judges' Association Annual Judicial Conference, mandated by the Constitution, that the Michigan Department of Corrections and Office of Parole Board filed a great deal of material and statistics in connection with this whole concept, and they are very precise in saying that now, as to what we do and what our powers are, but they have specific language contained in that particular document emphasizing that, to them, life means life and that there is nothing to talk about. And that is not what I understood at the time I sentenced originally in connection with it and it would be unjust, as far as I'm concerned, to put the defendant in that position of jeopardy, and, therefore, that's the reasoning behind what I'm doing.

As the prosecutor aptly points out, the case law that existed at the time of defendant's sentencing demonstrates that the trial court was not under a misconception of law. Five years prior to defendant's sentencing, in *People v Waterman*, 137 Mich App 429, 438; 358 NW2d 602 (1984), this Court held that Proposal B, now MCL 791.233b, left intact the provisions of MCL 791.234 that provide that a defendant receiving a non-mandatory life sentence is eligible for consideration for parole once he has served a minimum of ten calendar years of his sentence. Here, the sentencing transcript shows that the trial court was cognizant of the fact that defendant would be eligible for parole consideration because the trial court pointedly explained that it was up to defendant to earn her parole release from the parole board.

In her motion for relief from judgment, defendant supported her argument by providing the trial court with transcripts of sentences and letters by other circuit court judges who, in the 1970s and 1980s, had imposed parolable life sentences on other defendants. However, in all these cases, the courts had imposed parolable life sentences with the intent that the defendants be released on parole after ten to fifteen years' imprisonment. Apparently, in those cases, the circuit courts imposed life sentences under the erroneous belief that a life sentence would make the defendants eligible for parole "sooner than a long term of years," as was the case in *People v Biggs*, 202 Mich App 450, 456; 509 NW2d 803 (1993). This is not the case here. The trial court was not under any false impression that defendant, who was convicted of second-degree murder, would be released for parole in ten to fifteen years. As previously noted, the trial court was cognizant of the fact that it could impose a minimum sentence within the guidelines range of eight to twenty-five years, but the trial court expressly opted not to impose such a sentence. Accordingly, the trial court was under no misapprehension of the law regarding the parole board policies that existed at the time the trial court sentenced defendant.

The next question is whether the alleged parole board policy changes of 1992 frustrated the expressed intent of the trial court, as stated on the record at the 1989 sentencing. Defendant has not offered any proof to show that parole is unequivocally denied to all those sentenced to parolable life for second-degree murder convictions. Instead, defendant showed that, during the year following the 1992 parole board changes, thirteen inmates were released on parole. Defendant also fails to show that the trial court was under any misapprehension about the fact that, in 1989, very few felons sentenced to parolable life for second-degree murder convictions were actually released on parole. On the contrary, the trial court had noted that only twelve of about 1,200 lifers had been paroled as of 1988. The sentencing transcript shows the trial court recognized the parole distinctions between an indeterminate sentence and a parolable life sentence, that the trial court questioned defendant's capability for rehabilitation, that the trial court questioned whether defendant could "earn" parole, and that the trial court made a conscious decision to disregard the minimum sentence guidelines recommendation of eight to twenty-five years. As previously noted, had the trial court intended that defendant be released in sixteen to twenty years, the trial court could have imposed a minimum sentence between eight and twenty-five years. Instead, the trial court stated that such a sentence would not serve the purposes of the punishment that defendant deserved.

Moreover, there is nothing to show that the parole board had ultimately decided not to grant defendant parole, and thus her claim is not ripe for consideration. See, generally, *People v Conat*, 238 Mich App 134, 145; 605 NW2d 49 (1999). Parole eligibility is governed by statute. MCL 791.234; *In re Parole of Johnson*, 235 Mich App 21, 22; 596 NW2d 202 (1999). A person serving a parolable life sentence is subject to the jurisdiction of the parole board after serving ten years in the case of a prisoner sentenced for a crime committed before October 1, 1992. *Johnson, supra* at 23. This means that such a defendant will be eligible for review by the parole board after serving ten years, not that she will be released. *Id*. All prisoners governed by MCL 791.234(6)(a) "shall" be interviewed by a member of the parole board after serving ten years and every five years thereafter without regard to the sentencing date. *Id*. at 24. Inmates are interviewed, but not necessarily eligible, for parole consideration at that time because several legal hurdles must still be overcome. *Id*. at 23-24. Here, defendant was only interviewed, the first of several statutory hurdles before she becomes eligible for parole consideration.

Accordingly, defendant's claim does not reflect an actual, existing controversy, as opposed to a potential one. *Conat, supra* at 145.

A review of the hearing motion transcript shows the trial court noted the rehabilitative achievements that defendant has made during imprisonment. Defendant has commendably pursued her higher education and obtained a Bachelor's Degree, magna cum laude. She successfully completed all recommended programs, and her conduct was exemplary. She became an HIV/AIDS counselor and was considered a role model in prison. It appears that the trial court was impressed, if not pleasantly surprised, by defendant's progress, and it appears that this affected the court's decision regarding defendant's motion for relief from judgment. In effect, the trial court improperly assumed the role of the parole board and determined that defendant had earned her parole. However, a trial court may not reevaluate its own discretionary sentencing and invalidate its sentences by simply changing its mind. See *People v Wybrecht*, 222 Mich App 160, 168-169; 564 NW2d 903 (1997). Moreover, the decision whether to grant parole is "discretionary with the parole board," see MCL 791.234(9), and is a function of the executive branch of government. Accordingly, the trial court erred when it allowed such considerations to influence its decision. In light of the above, the sentence was valid. The trial court improperly vacated defendant's sentence and improperly ordered resentencing.

Because defendant failed to show actual prejudice under MCR 6.508(D)(3)(b)(iv), as defendant's sentence is valid, we find it unnecessary to address whether defendant successfully showed good cause under MCR 6.508(D)(3)(a) for her failure to raise this issue in prior proceedings.

The trial court's order of October 31, 2001, is reversed, and defendant's initial sentence is reinstated. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Patrick M. Meter

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED January 3, 2003
v	No. 237756 Oakland Circuit Court
MICHELLE BAZZETTA, Defendant-Appellee.	LC No. 88-086394-FC

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

HOLBROOK, JR., P.J., *dissenting*

Defendant successfully argued below that her sentence was invalid because the trial court was operating under a misconception of the law when it sentenced defendant to parolable life instead of an indeterminate sentence. The trial court agreed, and vacated defendant's sentence. Before defendant could be resentenced, the state filed a motion for interlocutory appeal. We granted the state's motion and stayed the resentencing hearing. The majority has concluded that the trial judge erred in vacating defendant's sentence and ordering resentencing. For the following reasons, I respectfully dissent.

Defendant was tried before a jury with her husband on a charge of open murder for the strangulation of her husband's stepmother. Defendant was convicted of second-degree murder,[1] and sentenced to life imprisonment. This Court rejected defendant's appeal as of right of her sentence. *People v Bazzetta*, unpublished opinion per curiam of the Court of Appeals, issued September 8, 1994 (Docket No. 123769).

After defendant had served ten calendar years of her sentence, she was subject to the jurisdiction of the parole board. MCL 791.234(6). After being interviewed by a member of the parole board, the board determined that no public hearing would be held on the matter. MCL 791.234(6)(a) & (b). Thereafter, defendant filed a petition in the circuit court seeking leave to appeal from the board's decision. That petition was denied for lack of jurisdiction. This Court later denied her leave to appeal for lack of merit in the grounds presented. *Michelle Bazzetta v Parole Bd*, unpublished order of the Court of Appeals, entered September 12, 2001 (Docket No. 218558).

[1] MCL 750.317.

Defendant filed her motion for relief from judgment on August 8, 2001. After concluding that defendant had not argued in any of her previous appeals that the court was operating under a misconception of the law when sentencing her, the trial judge held that he "was operating under a misconception of law" when sentencing defendant:

> I was quite clear what my thoughts were at the particular time of sentence. And that I feel that the defendant has shown good cause and actual prejudice. So I am going to have to say, based on that, that the sentence was basically invalid, based upon my understanding of the law and the facts at that time, and would resentence in connection with this matter.
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> It is interesting to observe that, at the recent Michigan Judges' Association Annual Judicial Conference, mandated by the Constitution, that the Michigan Department of Corrections and Office of Parole Board filed a great deal of material and statistics in connection with this whole concept, and they are very precise in saying that now, as to what we do and what our powers are, but they have specific language contained in that particular document emphasizing that, to them, life means life and that there is nothing to talk about. And that is not what I understood at the time I sentenced originally in connection with it and it would be unjust, as far as I'm concerned, to put the defendant in that position of jeopardy, and, therefore, that's the reasoning behind what I'm doing.

Regarding resentencing, the trial judge stated:

> [T]o be very candid, the sentence that I will be giving, I'm contemplating at this point in time, is consistent with what I stated on that day as what the ordinary sentence would be for a life imprisonment. I mean, her crime was a heinous crime. I do feel that she was an active participant in it. So just so we don't get any false hopes in connection with that, I want you to understand that. I think I used the term of 20.9 [years] as the minimum in connection with it.

In response to a series of violent crimes committed by a parolee in 1992, the Legislature significantly reorganized the parole board and its procedures. 1992 PA 181. Following this reorganization, an observable change in the movement of prisoners to parole has occurred. From 1986 through 1991, the average percentage change in the number of inmates moved to parole from the proceeding year was 21.4 percent. From 1992 through 1999, the average was 0.5 percent. Not once during the years 1986 through 1991 did the number of inmates moved to parole actually decrease. Conversely, from 1992 through 1999 the actual numbers decrease in 1992, 1994, 1997, and 1999. Accompanying this transformation of the parole process has been a clarification by the board about how the lifer law process works. In order to clear up what it has characterized as "misconceptions" about this process, the board has often stated that it regards a

parolable life sentence to mean that the person so sentenced is to serve life in prison ("life means life").[2]

Although not addressed by the majority, I believe that defendant has established good cause for not arguing in a prior filing that the sentencing judge was operating under a misconception of the law. Simply put, defendant could not have argued that the parole board's clarification of the lifer law process rendered her sentence invalid until such time as she was personally affected by the board's policy. This would not occur until she came under the jurisdiction of the parole board. MCL 791.234(6).[3]

Resolution of this appeal, therefore, turns on the issue of actual prejudice, i.e., the validity of defendant's sentence. *People v Whalen*, 412 Mich 166; 312 NW2d 638 (1981), held that while a trial court is without authority to set aside a valid sentence, it may correct an invalid sentence. *Id.* at 169. The 1989 staff commentary to MCR 6.429 acknowledges the authority of this holding. See 1989 Staff Comment to MCR 6.429. While MCR 6.429 does not define the term "invalid sentence,"[4] *Whalen* sets forth a noncomprehensive list of situations in which a sentence is invalid. *Whalen, supra* at 169-170. Included in this list is when the sentencing court "is laboring under a misconception of the law." *Id.* at 170. Accord *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997) ("A sentence is invalid . . . when it is based upon . . . a misconception of the law.").

As authority for this rule of law, the *Whalen* Court cited to two cases from this Court in which the trial court had misperceived statutory language.[5] However, the phrase "misconception of the law" has not been limited to only similar situations. For example, in *People v Biggs*, 202 Mich App 450, 456; 509 NW2d 803 (1993), appeal denied 453 Mich 934 (1996), the Court remanded for resentencing based on the trial court's erroneous assumptions on when the

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[2] In material provided by the parole board to the October 2001 Annual Judicial Conference, the parole board stated:

> There are many misconceptions about the lifer law process, and what exactly constitutes a life sentence. There are some who believe a life sentence equates to a number of years of confinement; i.e., a life sentence equals 10, 20, 30 years etc. The parole board believes a life sentence means life in prison. [*What Should "Parolable Life" Mean? Judges Respond to the Controversy: Report of a Survey Conducted by the Prisons and Corrections Section State Bar of Michigan* (March 2002), p 4.]

[3] I also note that the change in policy that accompanied the 1992 revamping of the parole statutes, 1992 PA 181, could not possibly have been foreseen by defendant when she was sentenced.

[4] The 1989 staff commentary explains that "[i]nvalid sentence refers to any error or defect in the sentence or sentencing procedure that entitles a defendant to be resentenced or to have the sentence changed." 1989 Staff Comment to MCR 6.429. This circular explanation offers little guidance on the meaning of the term.

[5] *Whalen, supra* at 170, citing *People v Daniels*, 69 Mich App 345; 244 NW2d 472 (1976), and *People v Mauch*, 23 Mich App 723; 179 NW2d 184 (1970).

defendant would be eligible for parole. Likewise, in *People v Lino (After Remand)*, 213 Mich App 89, 98-99; 539 NW2d 545 (1995),[6] overruled on other grounds *People v Carson*, 220 Mich App 662, 674; 560 NW2d 657 (1996), this Court held that the defendant was entitled to resentencing because the trial court imposed sentence under an erroneous belief that given the way the parole system operated, a sentence of parolable life was a lesser punishment than an indeterminate sentence.[7]

The same trial judge who originally sentenced defendant in 1989, unequivocally stated in ruling on her motion for resentencing that he was operating under a misconception of law when imposing a sentence of parolable life. My review of the record and the applicable law supports this conclusion. When sentencing defendant, the trial judge made the following remarks:

> The term "chameleon" has been used by both attorneys, and perhaps this comes to mind to the Court in reading the extensive reports that have been done in connection with you, the letters from the people. You are many things to many people. You apparently have a potential to do good. In the environment which I necessarily must place you, you can do good if you sincerely believe in what you are saying.
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> The problem in sentencing you is that we have, on the one hand, numerous requests for leniency on my part and, by a like token, responsible requests for extreme punitive action on my part. The Probation Department has made a recommendation after their evaluation and looking at the guidelines. Their evaluation is that this Court sentence you to life in prison.
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> There has been a great deal of misconception in connection with the concept of life in prison. Many people construe that as not having a great impact. Others consider it, of course, obviously if they are serving it, as having a great impact.
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> I asked for some statistics in connection with a sentence of life in prison. In 1988, there were [259] persons sentenced for second degree murder. Fifty-seven were sentenced to life. The average minimum sentence when . . . given an indeterminate sentence was 20.5 years. As of December 31st, 1988 . . . there were [1,753] people in Michigan prisons serving sentences for second degree

[6] The defendant in *Lino* had also been convicted of second-degree murder.

[7] While I do not base my opinion on the interpretive doctrine of acquiescence, I note that although MCR 6.429 has been amended since both *Biggs* and *Lino*, it has not been changed to invalidate the reasoning of these two cases. Cf. *Craig v Larson*, 432 Mich 346, 353; 439 NW2d 899 (1989); *Smith v Detroit*, 388 Mich 637, 650; 202 NW2d 300 (1972). Coupled with the absence of case law overruling the judicial construction that was placed on the phrase "misconception of the law" by *Biggs* and *Lino*, I believe this silence by the authors of the court rule evidences a lack of fundamental concern with that construction.

> murder. [531] of those were serving life sentences. Those that had been released had served an average minimum sentence of 20.9 years. Of those who were sentenced to indeterminate sentences, not life, those paroled in 1988 served only an average of 94.9 months in prison . . . . An indeterminate sentence, as has been requested, does not, frankly, carry the impact of a determinate sentence of life because of the authority of the Michigan Department of Corrections and the past policies of that Department. At the present time, I understand there are about [1,200] people in prison serving regular life - - now, that is not life without parole, but life as contemplated here - - for a number of offenses. As of December 31st, '88, there were only twelve people of that twelve hundred on parole for life sentences. They had earned that right. They served an average of 16.1 years before parole. The point I guess I am simply making is that there are still [1,188] that are serving their sentences because it was felt that they had [not] justified nor earned the right.
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> . . . I have agonized over this because I have seen both sides. I clearly understand the prosecution's position and, as a judge, it is my duty to try and understand your position. I cannot understand your actions. Reducing the jargon that has been used to describe your being a victim, I find it difficult, given your apparent mental capacity, your apparent strength of person. I personally feel that you willingly participated out of a weakness, but that you willingly did so and did not do so unwillingly.
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> I, therefore, feel that the fairest sentence under the circumstances, to allow sufficient time to elapse to determine whether you, in fact, are capable of rehabilitation and are not a danger to society, would be a sentence of life. I, therefore, sentence you to life in prison with credit for time served to date.
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> * * *
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> By the way, the Court is well aware and understands specifically the guidelines that is [sic] enunciated by [defendant's counsel] and recognizes that the Court would have the option of sentencing you to a minimum sentence of between eight and twenty-five years. I say that for the record.

The judge's remarks evidence an extreme ambivalence about defendant. On the one hand, the judge noted that defendant had participated in a brutal murder. On the other hand, the judge believed that defendant had "a potential to do good." Further, while the judge saw defendant as a willing participant in the murder, he also believed that defendant's participation emanated "out of a weakness" in defendant's personality. The judge's conflicting perception was echoed by numerous requests for both leniency and "extreme punitive action" when sentencing defendant.

In this context, the judge strove to impose the "fairest sentence under the circumstances." Those circumstances included a sentencing guideline recommended minimum sentence of 8 to 25 years' imprisonment, and a recommendation from the probation department of life. To better understand how these two proposed sentences would actually play out, the judge reviewed some statistics comparing actual time served for similar sentences. The judge began by noting that the

average minimum of an indeterminate sentence imposed for second-degree murder in 1988 was 20.5 years.[8] Of those second-degree murderers who had received an indeterminate sentence and had been paroled in 1988, the average term of imprisonment was approximately 8 years. Comparatively, the average term of imprisonment for all second-degree murderers that had been released was 20.9 years. Considering the entire population of inmates serving parolable life in 1988, not just those convicted of second-degree murder, the judge noted that only 12 of 1,200 inmates had earned parole as of the end of 1988. The average time served for these 12 was 16.1 years.

The judge indicated that he wanted to make sure that defendant serve "sufficient time . . . to determine whether . . . [she is] capable of rehabilitation and [is] . . . not a danger to society." Given the review of the statistics engaged in, it seems clear that the judge was concerned that even if he sentenced defendant to the high end of the guideline range, she would have a chance of being released after having served less than half of the minimum. The judge obviously believed that this was not a "sufficient" sentence. He opted instead to sentence defendant to a term that the statistics told him would ensure that defendant would likely serve a term of imprisonment significantly greater than that served by a person sentenced to an indeterminate sentence.

It is also clear, however, that the judge believed that this harsher sentence would leave open the realistic option of parole in the event that defendant did rehabilitate herself in prison. The judge's research had shown that while parole was not easily attained by those second-degree murderers sentenced to life, the possibility to move to parole did exist. Further, his research had informed him for those second-degree murderers who had been paroled, the term of confinement averaged 20.9 years. In other words, the judge was operating under the perception that if an inmate did successfully rehabilitate him or herself, that inmate would not be released until having served 20 or more years in prison. It is clear that the judge believed that this was a better length of time to determine if defendant could be rehabilitated than was the 8 year period of confinement that was served, on average, by those second-degree murderers sentenced to an indeterminate sentence.

The majority attempts to distinguish *Biggs* by noting that in that case the trial court imposed a life sentence under the erroneous belief that such a sentence would make the defendant eligible for parole "'sooner than a long term of years.'" *Ante*, p ___, quoting *Biggs*, *supra* at 456. Conversely, in the case at bar, defendant was sentenced to life imprisonment under the belief that, assuming rehabilitative efforts leading to parole, defendant would serve more years in prison than if she had been sentenced to a long term of years. This is a distinction without a difference. In both instances, the sentencing judge was looking to the practices of the parole board in an attempt to forecast when the defendants would probably be released, assuming evidence of rehabilitation. That the sentencing judge in the case at bar perceived that defendant would serve roughly twice the sentence of the defendant in *Biggs* is interesting, but ultimately irrelevant.

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[8] At this point, I am not concerned with the validity of these statistics. The important point here is that the trial judge accepted them and based his sentence upon the trends they established. I note, however, that I have no reason to reject the validity of these statistics.

I also disagree with the majority's conclusion that because the trial judge was aware of the statutes and existing case law interpreting them, the judge must necessarily not have been operating under a misconception of the law. *Ante*, p ___. That this Court in *People v Waterman*, 137 Mich App 429, 438; 358 NW2d 602 (1984), determined that the 1978 Initiative Proposal B did not repeal the so-called "Lifer Law" is immaterial to the issue before us today. Further, the law of sentencing is far more than the syllogistic application of legal premises and maxims to the circumstances of a given case. In the words of Justice Oliver Wendell Holmes, "[t]he life of the law has not been logic: it has been experience." Holmes, The Common Law (1881), p 1. In the realm of sentencing, this important principle was recognized in *Garner v Jones*, 529 US 244, 255; 120 S Ct 1362; 146 L Ed 2d 236 (2000). See discussion *infra* at ___. It was the experience of the law as reflected in the real world policies and decisions of the agency charged with implementing the sentencing statutes that the trial judge in the case at bar was trying to understand. We must not forget that the practical implementation of the law is an integral part of it, not a disinterested bystander.

I believe that the record clearly establishes that the trial judge was operating under a misconception of the law when sentencing defendant.[9] The judge's comments at the sentencing hearing showed that he did not perceive that "life means life," but that "life means lengthy but not endless" period of confinement. The fact that the trial judge was aware that a relatively few number of parolable lifers were granted parole does not negate this conclusion. That the possibility for parole was minimal is not equivalent to the nearly unattainable opportunity evidenced by a policy defined by the maxim, "life means life."[10] Accordingly, under the facts of this case, resentencing is warranted.[11]

Alternatively, if the parole board "life means life" policy evidences not a clarification, but a change in direction, I believe that this shift in the process arguably violates the *Ex Post Facto* Clause, US Const, art I, § 10, cl 1. In *Garner, supra* at 250, the United States Supreme Court observed that "[r]etroactive changes in laws governing parole of prisoners, in some instances, may" violate *ex post facto* protections. "The controlling inquiry," the *Garner* Court stated, is "whether retroactive application of the change . . . created 'a significant risk of increasing the measure of punishment.'" *Id.*, quoting *California Dept of Corrections v Morales*, 514 US 499, 509; 115 S Ct 1597; 131 L Ed 2d 588 (1995). *Garner* further observed that "[w]hen the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rules' practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of

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[9] The judge's decision to give credit for time served also evidences a belief that defendant's term of imprisonment would not necessarily be for life.

[10] I also disagree with the majority's conclusion that defendant's case is not ripe. *Ante*, p ___. While it is true that defendant retains her eligibility for parole under the statutes, I take the parole board at its word that as far as it is concerned, "life means life." Given this perspective, the possibility for defendant to be actively considered for parole is cut off even before it begins. Under the majority's interpretation of the ripeness doctrine, defendant's claim will never ripen if her case is simply reflexively reviewed according to the statutory timetable.

[11] Arguably, the fact that the judge did consider the possibility of when parole might occur by itself renders the sentence invalid.

incarceration than under the earlier rule." *Id.* at 255. In reviewing the practices of a parole board, *Garner* noted that "policy statements, along with the Board's actual practices, provide important instruction as to how the Board interprets its enabling statute and regulations . . . ." *Id.* at 256.

Clearly, uncertainty is built into the parole process by virtue of the discretion granted to the parole board. As the *Garner* Court observed, "where parole is concerned discretion, by its very definition, is subject to changes in the manner in which it is informed and then exercised." *Id.* at 253. However, the board's "life means life" policy means that it has effectively abdicated exercise of the discretion bestowed upon it. MCL 791.234(6). Taking the board's policy at face value, and considering the objective evidence establishing a significant change in how the parole system operates, I conclude that the reorganization of the board has resulted in a significant risk of increased punishment for defendant. A perfunctory walk through the timetables established for consideration of parole for parolable lifers does not mitigate the risk engendered by the "life means life" stance. I also do not believe that this risk is either speculative or attenuated. See *Payne III v Dept of Corrections*, 242 Mich App 638, 643; 619 NW2d 719 (2000).

Finally, the majority correctly observes that the trial judge did review defendant's accomplishments in prison. The majority then concludes that "it appears that this affected the court's decision regarding defendant's motion for relief from judgment. In effect, the trial court improperly assumed the role of the parole board and determined that defendant had earned her parole." *Ante,* at p ___. I respectfully disagree with these conclusions. The majority's reasoning is based, I believe, on speculative assumptions about what was going on in the mind of the trial judge. I do not believe such insights are within the purview or the expertise of this Court. As I have for my colleagues in the majority, I have the highest respect for the dedication and integrity of our circuit court judges. I find nothing in the record before us to call into question the validity of this trial judge's commentary on the reasons supporting his decision to resentence defendant.

Affirmed.

/s/ Donald E. Holbrook, Jr.