

STATE OF MICHIGAN
IN THE SUPREME COURT

MARY GLOVER,

Plaintiff-Appellee,

-vs-

MICHIGAN PAROLE BOARD,

Defendant-Appellant.

Supreme Court No. 111221

Court of Appeals No. 189303

Lower Court No. 94-784419-AP

BRIEF OF AMICUS CURIAE
PRISON AND CORRECTIONS SECTION OF
THE STATE BAR

Barbara R. Levine (P24207)
Chairperson
Prison & Corrections Section
State Bar of Michigan
Post Office Box 12037
Lansing, Michigan 48091
(517) 373-8002

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STATEMENT OF QUESTIONS PRESENTED

I. IS MICHIGAN'S STATUTORY SCHEME DESIGNED TO INSURE THAT ALL PRISONERS ENTITLED TO PAROLE CONSIDERATION, INCLUDING LIFERS, RECEIVE A FAIR AND ACCURATE ASSESSMENT OF THEIR SUITABILITY FOR RELEASE, A WRITTEN STATEMENT OF REASONS FOR DENIAL, AND A MEANINGFUL OPPORTUNITY FOR JUDICIAL REVIEW?

Appellant answers: "Yes"

The trial court answered: "No"

The Court of Appeals answered "No"

II. DOES THE FAILURE TO PROVIDE, ONLY TO PAROLABLE LIFERS, A WRITTEN EXPLANATION OF REASONS FOR DENYING PAROLE VIOLATE FEDERAL AND STATE DUE PROCESS GUARANTEES?

Appellant answers: "Yes"

The trial court answered: "No"

The Court of Appeals answered "Yes"

STATEMENT OF FACTS

According to the Michigan Department of Corrections (MDOC), the number of prisoners serving a life sentence grew from 680 in 1974 to nearly 4000 by 1997, an increase of nearly 480%.¹ At the end of 1995, the number of lifers in Michigan was greater than the total prisoner population in 14 other states.² Over 2200 of these prisoners are serving non-parolable life terms for first degree murder. Unless their convictions are reversed, their only way out of prison is commutation or death.

Approximately 1700 lifers are serving parolable terms for various offenses. In theory, so long as the sentencing judge or that judge's successor does not object, these prisoners can be released on parole once they have served 10 or 15 calendar years (depending on whether they were convicted before or after October 1, 1992).³ In practice, however, parolable lifers are rarely released.

The large number of parolable lifers results from two factors. First is the number

¹Mich. Dept. of Corrections, *FYI*, 1/8/98, p.6

²Mich. Dept. of Corrections, Office of Planning, Research and Management Information Services, *Trends in Prison Intake, Growth and Population Projections* (Lansing, 12/6/96), p. 20.

³1998 PA 315 made prisoners serving life terms for delivering 650 or more grams of a controlled substance eligible for release after serving 15, 17 ½, or 20 years, depending on the application of several statutory criteria. See discussion *infra*.

of offenses for which a life sentence may be imposed. While some states reserve life sentences for murder convictions or repeat violent offenders, Michigan historically permitted life or any term for such offenses as armed robbery, first degree criminal sexual conduct, kidnapping, and delivery of over 650 grams of a controlled substance, even if the defendant had little or no prior record.

The second factor that creates the large population of lifers is the parole board's assumption that "life means life". In *People v Hurst (After Remand)*, 169 Mich App 160 (1988), the question was how much time a prisoner would typically serve on a very long term of years as opposed to a life sentence. Then parole board chairperson William Hudson testified at an evidentiary hearing that he did not think a lifer was ever "eligible" for parole in the same manner as a person with an indeterminate sentence. He said that falling within the board's jurisdiction does not equate to eligibility because of the conditions that lifers must meet. The first condition he identified was that the parole board must be in favor of parole. *Id.* at 163-164. Mr. Hudson emphasized that a lifer is "not eligible for parole until such time as there has been a public hearing and a sentencing or successor judge has not filed written objections." He noted that in 1985, only nine lifers had been released. *Id.* at 165-166.

As it happens, 1985 was a relatively generous year for lifer paroles. An issue of

the DOC's employee newsletter, published some months before the drug lifer law was amended, summarized the statistics this way:

“A recent examination of Michigan lifers eligible for parole between Jan. 1, 1977, and Dec. 17, 1997, proves that a life sentence means a life sentence in Michigan. The lifers examined were those serving for crimes other than First- Degree Murder and drug lifer cases, for which only commutation by the Governor will allow parole.

Of a total of several thousand eligible lifers only 87 prisoners were paroled over the 20 year period, most serving for Second-Degree Murder. During the past 10 years, the average number of lifers interviewed each year ranged between 225 and 250, or about 2,500, but only 28, or less than 1 percent were paroled. The average time served before parole, for those paroled since 1990 was 20.2 years. Prior to 1990, it was 15.4 years. Almost 1,500 prisoners are currently serving non-mandatory life sentences.” Mich. Dept. of Corrections, *FYI*, January 22, 1998, p.4.

Although the number of lifers eligible for parole increases every year, the number actually released does not. In the five year period from December, 1993 - November, 1998, a total of 24 lifers were paroled. (See list, Exhibit A) Fifteen of these paroles occurred by December, 1994 and were a result of the “new” parole board's review of lifers in whom the “old” board had shown interest without taking any action. In 1995, there were three lifer paroles; in 1996, there were none; in 1997, there were four; in 1998, there were two more. Of the total, 13 had been convicted of second-degree murder, three of conspiracy to murder, and the rest of armed robbery or kidnapping. Most had had no prior Michigan prison sentences. The average years served was 20.7.

The question before this Court is whether the Michigan parole board can perpetually deny release to parolable lifers without providing any explanation of its reasons. To place this question in context, it is useful to consider some background information about the prisoners, the parole board, and the governing statutory scheme.

THE PRISONERS

Appellee Mary Glover is one of 661 parolable lifers sentenced before December 31, 1983 who are still incarcerated. Basic information about these prisoners appears in the charts attached as Exhibit B. This information includes the following:

- These prisoners have served anywhere from 15 to 47 years. At least 444 have served more than 20 years; 115 have served more than 25; 31 of them have served over 30 years.
- They range in age from 32 to 86; their median age is 47.
- They are predominantly male (97%) and nonwhite (63%).
- While just over half (347) were convicted of second degree murder, 119 were convicted of rape or first-degree criminal sexual conduct, 116 of armed robbery, 36 of assault with intent to murder, 23 of kidnapping, and the remaining 20 of other non-homicide offenses.
- Overall, 54.8% had served no prior Michigan prison term, as is evidenced by the “A” prefix on their inmate numbers. Among those convicted of murder, 65.7% have “A” prefixes; among the non-homicide offenders, it is 42.4%.

These prisoners were sentenced before appellate review of sentencing was first adopted in *People v Coles*, 417 Mich 523 (1983), and sentencing guidelines were introduced to reduce disparities caused by such considerations as race, economic status, or the personal biases of individual sentencing judges. Under both the first and second editions of the judicial guidelines, and the recently enacted legislative guidelines, a defendant without a substantial prior criminal record cannot be sentenced to life for a

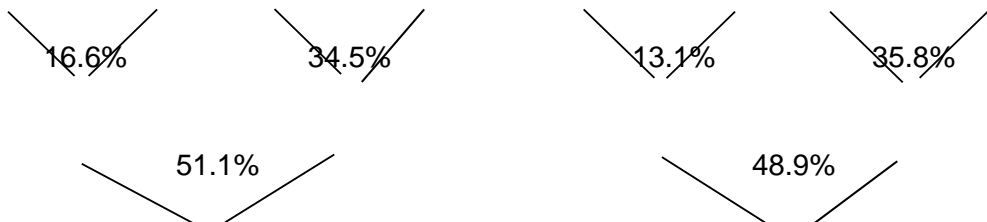
crime other than murder unless the sentencing judge articulates reasons for departing from the recommended minimum.

Nearly eighty percent of these lifers come from just eight counties – Wayne, Oakland, Saginaw, Berrien, Genesee, Kalamazoo, Kent, and Macomb. Data from these counties shows substantial differences in the extent to which defendants, particularly non-white defendants, received life terms, even for non-homicide offenses and even though they apparently lack substantial prior records. For instance, the chart below indicates that:

- Some of the largest counties, such as Kent, Macomb and Genesee, sentenced substantially fewer defendants to life terms than did the less populous counties of Berrien and Saginaw.
- The proportion of lifers serving for crimes other than murder ranges from 42-44% in Wayne, Macomb and Kent Counties to 73% in Berrien County.
- The counties that have proportionally more non-homicide lifers overall, also have more non-homicide lifers with little or no prior record. For example, Kent and Macomb Counties each have three such lifers with “A” prefixes who have now served at least 15 years; Berrien County has 15.
- Nearly three times as many non-homicide lifers are non-white than white, regardless of prior record.

Prisoners Sentenced Through 12/31/83
to Parolable Life Terms in Eight Counties

Prefix	<u>Homicide</u>				<u>Non-Homicide</u>			
	<u>White</u>		<u>Non-White</u>		<u>White</u>		<u>Non-White</u>	
	A	B or>	A	B or>	A	B or>	A	B or>
Wayne (N=274)	11 4%	8 2.9%	78 28.5%	62 22.6%	4 1.5%	8 2.9%	42 15.3%	61 22.3%
Oakland (N=52)	14 26.9%	6 11.5%	3 5.8%	3 5.8%	7 13.5%	8 15.4%	3 5.8%	8 15.4%
Saginaw (N=43)	7 16.3%	3 7.0%	8 18.6%	2 4.7%	2 4.7%	4 9.3%	8 18.6%	9 20.9%
Berrien (N=41)	5 12.5%	--	4 9.8%	2 4.9%	3 7.3%	4 9.8%	12 29.3%	11 26.8%
Genesee (N=32)	4 12.5%	2 6.3%	2 6.3%	3 9.4%	3 9.4%	5 15.6%	5 15.6%	8 25.0%
Kalamazoo (N=30)	5 16.7%	2 6.7%	2 6.7%	2 6.7%	5 16.7%	3 10.0%	4 13.3%	7 23.3%
Kent (N=24)	4 16.7%	2 8.3%	7 29.2%	1 4.2%	2 8.3%	3 12.5%	1 4.2%	4 16.7%
Macomb (N=23)	10 43.5%	3 13.0%	--	--	2 8.7%	5 21.7%	1 4.3%	2 8.7%
Total (519)	60 11.6%	26 5.0%	104 20.0%	75 14.5%	28 5.4%	40 7.7%	76 14.6%	110 21.2%



These disparities can undoubtedly be explained in part by differences in local crime rates, local population demographics, and the details of individual offenses.

Nonetheless, the data at least suggests that this large group of parolable lifers contains

a significant number whose sentences would be considered disproportionate by current objective standards.⁴

THE PAROLE BOARD

From 1976 until October, 1992, the Michigan parole board had seven members, all with corrections experience and civil service protection. However, in response to publicity surrounding several rape-murders committed by a parolee in the summer of 1992, numerous statutes affecting parole were rewritten. The board was increased to 10 members, stripped of its civil service protection, and entirely reconstituted.

Today, the DOC Director appoints the members to four year terms and selects the chairperson. By statute, at least four members must have no prior DOC employment. The Director can remove a member for “incompetence, dereliction of duty, malfeasance, misfeasance, or nonfeasance in office.” MCL 791.231a; MSA 28.2301(1). Of the 10 members originally appointed to the “new” board, only three remain. One of these three served on the old board. No other current member has corrections experience.

In his introduction to a report on the new board’s activities, MDOC Director Kenneth McGinnis observed: “Among the most important differences since the overhaul is a Parole Board that is much less willing to release criminals who complete their minimum sentences – and much less willing to release criminals at all, forcing many to serve their maximum sentences.” Referring to prisoners who had been

⁴Also not evident from this data is the extent to which defendants from each county received lengthy indeterminate terms instead of life. However, prisoners sentenced before the adoption of ballot proposal B in 1978 received such generous good time credit they could discharge from a 60 year maximum sentence after serving 21 years and two months.

released after serving their maximum sentences and then committed new offenses, Mr. McGinnis stated: “The Parole Board would have liked to keep them locked up longer. They got out only because courts and statutes required them to be released.”⁵

Specifically, the board has adopted a policy of denying parole to prisoners convicted of assaultive offenses, particularly sex offenses, regardless of their institutional behavior or other individual characteristics. The total rate of paroles granted fell from 68.2% in 1990 to 54.5% in 1997. The rate for assaultive offenders, whose average sentences are by far the longest to begin with, dropped from 54% to 42% in 1996.

In theory, there are three constraints on parole board decisionmaking. First, statutorily mandated parole guidelines are supposed to provide an objective basis for consistently weighing relevant criteria. The guidelines award either positive or negative points for various factors (including many that duplicate the offense and prior record variables scored in the sentencing guidelines). (See parole guidelines score sheet, Exhibit C.)

Depending on the total score, the prisoner is considered to have high, low or average probability of parole. If the probability is average, the board has broad discretion to grant or deny. The scoring system is designed to produce both a large proportion of average scores and more negative outcomes for lifers and sex offenders. Lifers, who typically receive more positive points for their age, have this offset by an automatic -4 that is scored for just having a life sentence. A prisoner serving for any sex offense automatically receives a -5 under “mental health variables”, along with those who have

⁵Mich. Dept. of Corrections, *Five Years After: An Analysis of the Michigan Parole Board Since 1992* (Lansing, Sept. 1997), p. 2.

been diagnosed psychotic.

The second constraint on parole board decisionmaking is a statutory scheme that mandates compliance with procedural safeguards.

The third constraint is judicial review for abuse of discretion.

THE STATUTORY SCHEME

MCL 791.231 - 791.246; MSA 28.2301 - 28.2316 is the body of statutes that govern parole board decisionmaking. Although amendments have been squeezed in over the years, the statutes reflect a cohesive vision of the entire parole process. (For a detailed outline, see Exhibit D.) They begin with provisions that establish the bureau of field services (sec. 31), which investigates potential parole placements and supervises parolees, and the parole board itself (sec. 31a).

Section 33 sets various substantive criteria for release on parole, ranging from assurances that the prisoner will not be a menace to society to the availability of “special” early paroles and the applicability of disciplinary credit. Section 33e was added in 1992 to mandate the development and use of parole guidelines. The statute specifies which factors must, may, and must not be considered in designing the guidelines.

Section 34 defines when the parole board obtains jurisdiction of prisoners serving both indeterminate and life sentences. For non-lifers, it spells out in subsections (1)-(5) the complexities of determining parole eligibility depending on whether the prisoner is subject to good time, disciplinary credits or disciplinary time, and whether consecutive sentences are involved. For parolable lifers, subsection (6) defines board jurisdiction in terms of the number of calendar years the prisoner must serve and it

adds several conditions that apply only to lifer releases:

- (a) lifers must be interviewed after serving 10 years and every 5 years thereafter;
- (b) the board must hold a public hearing after notifying the sentencing judge (or that judge's successor) and may not grant parole if written judicial objections are filed within 30 days;
- (c) the parole period must be for at least four years;
- (d) parole may not be granted under this section to prisoners prohibited from consideration by law (i.e. those serving mandatory life terms and those who have not completed long minimum sentences can only be released through the pardon and commutation process).

In August, 1998, eight months after the Court of Appeals issued its decision in the instant case, the Legislature voted to amend subsection (6) in two important ways. First, it gave the board jurisdiction to parole prisoners serving life for delivering over 650 grams of a controlled substance.⁶ Second, it clarified the interview process applicable to lifers.

Previously, subsection 34(6)(a) read:

“One member of the parole board shall interview the prisoner at the conclusion of 10 calendar years of the sentence and every 5 years thereafter until such time as the prisoner is paroled, discharged, or deceased. The interview schedule prescribed in this subdivision applies to all prisoners to whom this subsection is applicable, whether sentenced before, on, or after the effective date of the 1992 amendatory act that amended this subdivision.”

Effective December 15, 1998, subsection 34(6)(a) states:

⁶These “drug lifers” come within the board’s jurisdiction after serving either 17 ½ or 20 years, depending on whether they have a prior conviction for a “serious crime”. New subsection (7) requires the board to consider specified aggravating factors for drug lifers sentenced before October 1, 1998. New subsection (9) grants the board jurisdiction 2 ½ years earlier if there is a judicial determination that the prisoner cooperated with law enforcement. New subsection (10) defines “serious crime”.

“At the conclusion of 10 calendar years of the prisoner’s sentence and every 5 years thereafter until the prisoner is paroled, discharged, or deceased, *and in accordance with the procedures described in section 35(4) to (6)*, 1 member of the parole board shall interview the prisoner. The interview schedule prescribed in this subdivision applies to all prisoners to whom this subsection is applicable, regardless of the date on which they were sentenced.” (Emph. added)

Finally, renumbered subsection (8) declares that, except for prisoners who are automatically entitled to release after completing the special alternative incarceration program (SAI), the parole board has discretion in deciding whether to release a prisoner within its jurisdiction. However, the exercise of that discretion is subject to judicial oversight. Subsection (8) goes on to state that the board’s action in granting or denying a parole is appealable by the prisoner, the prosecutor or the victim of the offense to the circuit court of the sentencing county.

Section 34a describes in detail prisoner eligibility for SAI and the parole process that applies to prisoners who complete that program.

Section 35 describes in detail the process the parole board must follow in making release decisions. On its face, this section makes no distinctions between lifers and non-lifers. Subsection (13) expressly states that the section does not apply to the parole of prisoners in SAI.

Subsections (1) and (2) address whether and when the board is required to conduct an interview of a prisoner before granting or denying parole. For lifers these subsections are superceded by subsection 34(6)(a).

Subsection (3) says the board can consider a prisoner’s marital history and arrests without convictions but cannot deny parole solely on these factors.

Subsections 35(4)-(6) are the provisions made expressly applicable to lifers by

the amendment of subsection 34(6)(a). These three provisions describe the interview procedure the parole board must follow in interviewing prisoners within its jurisdiction.

Subsection (4) is a notice provision. The prisoner must be sent a notice of intent to conduct an interview at least one month in advance. The notice must state “the specific issues and concerns that shall be discussed at the interview...” The subsection continues:

“A denial of parole shall not be based on reasons other than those stated in the notice of intent to conduct an interview except for good cause stated to the prisoner at or before the interview and in the written explanation required by subsection (12).”

Subsection (5) addresses the qualifications of the interviewing board member. Except for good cause, he or she must not have previously voted for or against the prisoner’s release. The board member must also review information relevant to the notice of intent before conducting the interview.

Subsection (6) establishes the prisoner’s right to present his or her best case at the interview. While the prisoner may choose to waive the interview altogether, he or she may also be represented at it by an individual other than an attorney or another prisoner, and “may present relevant evidence in support of release.”

Subsections (7) and (8) concern the preparation of parole eligibility reports. Subsection (9) addresses who may perform psychological evaluations. Subsections (10) and (11) address the paroles of prisoners needing medical and mental health treatment.

Subsection (12), which was incorporated by reference in subsection (4), states:

“When the parole board makes a final determination not to release a prisoner, the prisoner shall be provided with a written explanation of the reason for denial and, if appropriate, specific recommendations for

corrective action the prisoner may take to facilitate release.”

Sections 36-42 address issues that arise only after parole has been granted. They include the contents of parole orders, supervision fees, the arrest and detention of parolees, and procedures for revoking parole.

Sections 43 and 44 establish the procedure for release by means other than parole – pardon, reprieve, or commutation. Subsections 44(f)-(h) describe the public hearing procedure that is incorporated by reference in subsection 34(6)(b). Section 45 grants board members the authority to administer oaths to witnesses; section 46 directs that decisions and recommendations of the board be by majority vote.

Very few lifers are denied parole because of judicial objections. Most denials result from the exercise of parole board discretion. Occasionally this discretion is exercised after a public hearing, as in Ms. Glover’s case. Typically, the board decides after a statutorily required interview that it has no interest in paroling the prisoner. Not intending to start the public hearing process in any event, the board does not take the first step of notifying the sentencing judge. The prisoner is simply “flopped” (continued) until the next mandatory interview date arises five years later.

The process by which the parole board exercises its discretion in hundreds of lifer cases is significant on many levels. The decision to grant or deny parole obviously has a tremendous impact on the individual prisoner and the prisoner’s family, as well as on victims and their families. The “stockpiling” of aging lifers, whose care becomes increasingly expensive as medical problems inevitably arise, burdens taxpayers and contributes to the need for prison expansion. The routine denial of parole to lifers as a matter of policy raises questions about whether the intent of the Legislature and of

individual sentencing judges is being undermined by an executive branch agency.

It is for all these reasons that the Prisons and Corrections Section of the State Bar of Michigan adopted the position statement on parole that is attached as Exhibit E. This amicus curiae brief reflects, in particular, the following aspects of the Section's position:

2. All eligible prisoners, including those serving parolable life sentences, have a right to fair and meaningful parole consideration by an impartial and fully-informed decisionmaker.
4. The parole guidelines and the statutes governing the parole interview and decisional process should apply to statutorily eligible prisoners serving parolable life terms as they do to other prisoners.
5. All prisoners who are denied parole should be given, at a minimum, a meaningful written explanation of the reasons for denial and, to the extent possible, of corrective steps the prisoner can take.

I. MICHIGAN'S STATUTORY SCHEME IS DESIGNED TO INSURE THAT ALL PRISONERS ENTITLED TO PAROLE CONSIDERATION, INCLUDING LIFERS, RECEIVE A FAIR AND ACCURATE ASSESSMENT OF THEIR SUITABILITY FOR RELEASE, A WRITTEN STATEMENT OF REASONS FOR DENIAL, AND A MEANINGFUL OPPORTUNITY FOR JUDICIAL REVIEW.

The Court of Appeals decided the instant case before MCL 791.234(6)(a); MSA 28.2304(6)(a) was amended. Its interpretation of the statutory parole scheme even as then written was questionable. However, there is no question that the majority reached the right result.

A. THE STATUTES CLEARLY EXPRESS THE LEGISLATIVE INTENT THAT THE PAROLE BOARD PROVIDE A WRITTEN EXPLANATION OF ITS DECISION WHENEVER IT ACTS TO DENY PAROLE TO A PRISONER SERVING LIFE OVER WHOM IT HAS JURISDICTION

The Court of Appeals acknowledged that subsection 34(7) [now subsection (8)] provides for circuit court review of board decisions regarding parolable lifers. However, it declined to apply to lifers the requirement of subsection 35(12) that the board provide a written explanation of its reasons for denying parole because, it said, section 35 concerns only prisoners who become parole eligible after serving the minimum sentence of an indeterminate term. The panel concluded that it was "obvious" the Legislature had created different parole processes for lifers and for prisoners serving indeterminate sentences. *In re Parole of Glover*, 226 Mich App 655, 661 (1997).

This conclusion is not obvious. In fact, it stands the rule that statutes are to be read *in pari materia* on its head. Read as a whole, it is apparent that the statutory scheme does not create two parole processes. It creates a single process, then adds some additional conditions for lifers.

Provisions within this unified scheme that do not expressly apply to either non-lifers or lifers are logically applicable to both. Thus, for instance, no one suggests that

subsection 33(1)(a), which forbids parole unless the board is assured that the prisoner will not menace public safety, and subsection 33(1)(d), which forbids parole unless arrangements exist for the prisoner's employment, education, or care, should not apply to lifers even though subsections 33(1)(b) and (c) expressly apply to prisoners with indeterminate terms. Similarly, section 33e says nothing about the applicability of parole guidelines to lifers. Yet the MDOC's understanding that the guidelines are supposed to apply to all prisoners is evidenced by its award of extra negative points for the sheer status of being a lifer.

Section 34 defines when the parole board obtains jurisdiction of both lifers and non-lifers. For lifers this section also sets up a schedule that requires an interview every five years. Section 35 has provisions that address the decisionmaking process, including how interviews are to be conducted and denial decisions are to be issued. These procedural provisions contain no indication that lifer interviews should be conducted any differently than those afforded other prisoners or that lifer denials should be issued differently. On the contrary, subsection 35(12) states in the clearest of terms that the board must provide a written explanation of its reasons when it determines not to release "a prisoner". The phrase is unqualified and all encompassing. The fact that subsections 35 (1) and (2) create rules for when non-lifers must be interviewed that differ from the lifer interview schedules does not negate the applicability of other portions of section 35 to lifers.

The very rules of construction that the Court of Appeals cited support the conclusion that the written explanation requirement was always intended to apply to lifers. The panel noted that statutes relating to the same subject or sharing a common

purpose must be read together even if they contain no cross-reference. Ironically, the parole statutes do not need a lot of artful construing. They are quite straightforward and easy to understand. When the Legislature wanted to exempt a selected group of prisoners from aspects of the parole process, it expressed its intent unequivocally, as it did with prisoners in SAI.

At base, the decision governed by the parole statutes is the same, whether the prisoner is serving life or an indeterminate term. Can the individual be safely returned to free society? In some states, the distinction between life and indeterminate sentences is blurred. A judge may set a minimum term of years while a statute sets a maximum of life, resulting in sentences like 25-life. In Michigan, the minimum sentence, which is, after all, simply the time which must be served before the parole board gets jurisdiction, is effectively set by the Legislature for non-drug lifers at 10 or 15 years.

The parole statutes necessarily draw distinctions between lifers and non-lifers that are inherent in the terms of their sentences, as when time is calculated by reference to a judicially imposed minimum. However, for the most part, the statutes recognize that there are no inherent differences between the two groups that dictate differences in the parole decisionmaking process. The lifer has no right to be released once the board has jurisdiction, but neither does any other prisoner who has served a minimum term. There is nothing about the nature of a life sentence that suggests lifers should be given any less meaningful consideration for parole. The penal statute that permits imposition of a life sentence carries no more legal weight than the parole statute that allows release at 10 or 15 years. While a prisoner serving life can be kept in prison until he or she dies, that does not mean that any particular lifer should be.

More specifically, the written explanation requirement and the appeal to circuit court are both mechanisms for insuring that board decisions are well-reasoned. Moreover, the right to seek judicial review is meaningless if no agency reasoning is available to be reviewed.⁷ It is not rational to conclude that the Legislature wanted both lifers and non-lifers to be able to appeal, but it wanted only non-lifers to have a record on which to base an appeal. Construing the statutes to avoid conflict leads to the conclusion that lifers, too, are entitled to written explanations when parole is denied.

This interpretation was validated by the Legislature's reaction to the Court of Appeals decision in this case. In less than a year, it amended subsection 34(6)(a) to expressly require that lifer interviews be conducted "in accordance with the procedures described in section 35(4) to (6)." Subsection 35(4), the notice provision, in turn refers to subsection 35(12), the written explanation requirement. The language could not be plainer: "A denial of parole shall not be based on reasons other than those stated in the notice of intent to conduct an interview...and in the written explanation required by subsection (12)."

Subsection 35(12) is also very clear. It requires a written explanation of the reason for denial "[w]hen the parole board makes a final determination not to release a prisoner." The statute does not distinguish among final determinations made with or

⁷Appellant suggests that requiring the board to state its reasons does not enhance appellate review because courts can read the record for themselves. This argument might be persuasive if the standard of review was *de novo*. However, subsection 34(8) states that board decisions are discretionary, then establishes a right to appeal by leave. Thus the standard of review is abuse of discretion, a standard that can only be applied if the reviewing court knows how the agency actually exercised its discretion. The logical extension of Appellant's position is that the reviewing court should either substitute its judgment for the board's, or it should simply guess why the board denied parole. The Court of Appeals rightly rejected this position in its opinion at note 3.

without an interview of the prisoner, or with or without a public hearing having been held. On its face it applies whenever the board votes on a case and says “no”.

In finding that due process required that Appellee Glover be given written reasons, the Court of Appeals focused on the fact that she had been denied parole after a public hearing. The Court seemed to suggest that only lifers who are given public hearings are entitled to be told why they are being denied release. It stated: “The Parole Board must already provide a written explanation for its denial of parole to a vast majority of prisoners that are denied early release, and imposing this requirement for the very few parolable lifers who will ever get past the initial interview stage will not substantially burden the public fisc.” *Glover, supra* at 670.

However well intended, this statement is highly ironic. The “vast majority of prisoners that are denied” are, of course, non-lifers who do not have public hearings. They are denied by a board vote after an interview with one member. If their guidelines scores yield a low probability of parole, they can even be denied the interview. But in either case, they are entitled to receive a written explanation of reasons along with the board’s notice of action. Roughly 200 lifers a year are interviewed by one member of the board. Their cases are voted on and they are sent notices of action denying parole. The only difference between the lifer and non-lifer denials is that the lifers will not be considered again for another five years.

The fact that most lifers are rejected without a public hearing does not make them any less entitled to a written explanation. The determination not to release them

is no less final because it is made at an earlier point in the process.⁸ To require a reasoned explanation of denials only for those lifers who reach the public hearing stage would almost completely undercut the legislative purpose in applying procedural safeguards to lifer interviews. The Court of Appeals correctly recognized that written explanations reduce the risk of error and arbitrariness, and facilitate judicial review, when lifers are denied parole after a testimonial record is made at a public hearing where the rules of evidence are relaxed. The statute recognizes that the need to have these purposes served is, if anything, even greater when decisions to deny parole are made in a closed room, with no record of the evidence considered, and no public scrutiny.

B. THE LEGISLATURE DID NOT INTEND TO GIVE THE PAROLE BOARD UNFETTERED DISCRETION TO TREAT ONE CLASS OF PRISONERS ARBITRARILY AND CAPRICIOUSLY.

The Legislature's decision to provide the same procedural safeguards to all prisoners being considered for parole was a wise one. The Court of Appeals majority accurately summarized in note 3 of its opinion the board's treatment of Appellee Glover:

"In the face of a mountain of information concerning plaintiff's correctional history, the Parole Board here abjured any meaningful explanation. It indicated that it considered all the information before it and decided to "withdraw" interest in or consideration of parole. In other words, thumbs down...The Parole Board did indicate a "reason code of 92," which refers to the "lifer law interview". We take that to mean that the Parole Board considered its job to conduct an interview of the plaintiff because it had to, declined to grant parole and gave no reasons because it need not."

Unfortunately, this description fits most lifer reviews. A prisoner who has served 20, 25 or even 30 years is perfunctorily interviewed, then sent a notice stating the board

⁸Compare *Hohn v United States*, 524 US _____; 118 S Ct 1969; 141 L Ed 2d 242 (1998) holding that the denial of a certificate of appealability by a single federal circuit judge is itself a case that may be appealed because it fits the functional definition of the term.

has “no interest”. The notice has a “next action date” five years in the future. The prisoner may have had no misconduct citations for a decade and may have completed every positive program available. He or she may have had no prior record when sentenced to a life term. The facts of the offense may be comparable to those for which many prisoners serve far fewer years.

Why, exactly, are these prisoners being denied release? That, of course, is what we cannot know for sure without a written explanation from the board itself. However, we do know some things that suggest many of these denials may be more a matter of across-the-board policies than individualized assessments.

Even the “old” parole board assumed that “life means life”, regardless of whether it is parolable or non-parolable, in all but a handful of unique cases. The board viewed lifer releases as so wholly within its discretion that in *Hurst, supra*, then chairperson Hudson was quoted as defining a lifer’s eligibility for parole in terms of whether the board had an interest in proceeding.

The “new” board members, effectively all political appointees, have implemented a policy of holding many prisoners serving indeterminate terms to their maximum sentences. The philosophy is that prisoners convicted of assaultive offenses should be kept as long as the law allows. Under this approach, a lifer is a bird perpetually in the hand. The decision to deny parole based on the immutable nature of the offense becomes virtually automatic. All the other factors the board is required by statute to consider become secondary. It does not matter if the prisoner would not have received a life sentence under current guidelines. It does not even matter that the odds of the prisoner ever reoffending are very slim. The board does not have to take the chance –

or the political heat for any misjudgment.

The situation for lifers is made even worse by the high turnover among new board members. Recent appointees without corrections experience lack a context for making hard decisions. Aware that they were chosen “to keep violent felons locked up”, they are poorly positioned to assess the individual qualifications of lifers they are seeing for the first time. The lack of continuity means that, at every five year review, the lifer faces a new cadre of board members who have no sense of how this prisoner may have grown and changed over the course of a long incarceration.

Appellant argues variously that lifer parole decisions are like commutations given by the governor [Appellant’s brief, p. 9] and like verdicts rendered by juries [Appellant’s brief, p.16], neither of which need be explained. But these analogies are false. The parole board is an administrative agency and all its decisions should be as justifiable, and reviewable, as those of any other administrative agency. Lifer parole decisions are not like commutation decisions precisely because these lifers are eligible for parole. It is only by building in at the outset the circular assumption that lifer paroles are virtually never granted that one can justify not holding the board to the same decisionmaking standards that apply to other cases.

If the parole board is free, as a matter of policy, to deny parole to virtually all lifers, and to any lifer in particular, without offering a word of explanation, it can unilaterally eliminate the distinction between parolable and non-parolable life sentences. No matter that the sentencing judge expected the defendant to be given serious parole consideration if he or she exhibited positive conduct for 15 years. No matter that the defendant pled guilty on the representation that a life sentence for second-degree

murder actually meant something different than one for first-degree murder. No matter that the Legislature enacted an entire statutory scheme that assumes parolable lifers will actually be considered for parole like other prisoners once they are within the board's jurisdiction.

As the Court of Appeals explained, requiring the board to articulate reasons for denying lifer paroles reduces the risk of error in individual cases and facilitates judicial review. It forces the board to justify each decision on the basis of objective criteria and relevant information. It exposes flawed reasoning or improper influences. But, above all perhaps, written reasons act as a check on the exercise of enormous power by the executive branch. Whether the board is consciously implementing a policy agenda or simply reflecting the views of an entrenched bureaucracy, it is not entitled to make arbitrary decisions, then hide behind a cavalier refusal to explain its own actions.

This Court has pending before it, in *Blank v Michigan Department of Corrections*, 222 Mich App 385 (1997), lv grntd 459 Mich 878 (1998), the constitutionality of legislative oversight of administrative agency rulemaking. Parole board rules, like other MDOC rules, are supposed to be made pursuant to the Administrative Procedures Act, which includes submission to the Joint Committee on Administrative Rules. The Executive already has free rein in hiring and firing parole board members. If legislative oversight of the board's rules is ultimately eliminated, judicial review of individual parole decisions will be the only independent check left on the exercise of board authority. If no reasons for lifer parole denials need even be given, nothing can prevent the board from treating this entire group of prisoners as arbitrarily as it chooses.

Certainly most lifers are not as accomplished as Appellee Glover, though many

may be no more of a threat to public safety. If, upon individualized assessment of each lifer's facts, it turns out that most should never be released, so be it. But each lifer is a separate human being who has waited many years for fair consideration. Each denial of parole to a lifer costs the prisoner another five years and the public \$125,000. And each written statement of the board's reasons for denying a parole, assuming those reasons were aired in the process of voting, might take 15 or 20 minutes of the board's time to prepare.

The real question is not why the board should be expected to explain its actions, but why it should not. What gain can there be from stiffnecked silence? Why does the board cling so tenaciously to its perceived discretion to treat lifers differently than all other prisoners within its jurisdiction? If there really is a good reason for keeping Mary Glover in prison for five more years, why won't the board just say it?

II. THE FAILURE TO PROVIDE, ONLY TO PAROLABLE LIFERS, A WRITTEN EXPLANATION OF REASONS FOR DENYING PAROLE VIOLATES FEDERAL AND STATE DUE PROCESS GUARANTEES.

The Court of Appeals majority grounded its holding that Appellee had been denied due process on the dissenting opinion in *Greenholtz v Nebraska Penal Inmates*, 442 US 1; 99 S Ct 2100; 60 L Ed 2d 668 (1979). In light of the statutory amendments discussed above, this Court may choose not to reach the constitutional question.

Nonetheless, a few points may be worth brief consideration.

In *Greenholtz*, a five-member majority reached two conclusions. First, it held that the mere existence of a parole system does not give rise to a “liberty interest” requiring protection under the federal due process clause. The majority reasoned that the possibility of parole creates a basis for hope, not an entitlement to release that must be constitutionally protected. The decision to parole is a predictive one, made on the basis of board members’ experience and their assessment of who the prisoner is, not just what he has done. *Id.* at 442 US 10. The majority concluded that even serious Executive Branch decisions “do not automatically invoke due process protection.” *Id.* at 442 US 7.

The majority’s second conclusion was that the language of state statutes could create a protectible expectation of parole. It found that the Nebraska statute created such an expectation by mandating release unless one of four very broad justifications for denial existed.

Greenholtz generated a series of decisions in which a prisoner’s entitlement to due process protections depended on a close analysis of statutory language to determine whether a liberty interest had been created. A number of these involved decision-

making by prison officials about such matters as inter-prison transfers, the imposition of discipline, and the regulation of privileges. However, a parole statute was also at issue in *Board of Pardons v Allen*, 482 US 369; 107 S Ct 2415; 96 L Ed 2d 303 (1987).

In finding that a Montana statute created a liberty interest, the *Allen* majority observed that there are two types of discretion. One is absolute, as when parole authorities may simply release whomever they wish. With that sort of discretion, no liberty interest exists. However, when official discretion is guided by standards, a liberty interest may be found even though reasonable people might apply the standards differently. While statutes that presume release “if”, “when”, or “unless” certain broad findings are made necessarily create a liberty interest, other statutory schemes may do so as well. Explicit substantive guidelines, mandatory procedural requirements, and provision for judicial review all indicate “a legislative intent to cabin the discretion of the Board.” *Id.* at 482 US 381 and note 10.

The continuing viability of *Greenholtz* has been seriously undermined by *Sandin v Conner*, 515 US 472; 115 S Ct 2293; 132 L Ed 2d 418 (1995), a decision not mentioned by either Court of Appeals opinion in the instant case. In *Sandin*, another five-member majority abandoned the effort to wrestle with the language of prison regulations in order to decide whether a liberty interest exists. The analysis must now focus on the nature of the deprivation. Justice Rehnquist derived his guiding principles from two pre-*Greenholtz* decisions. From *Wolff v McDonnell*, 418 US 539; 94 S Ct 2963; 41 L Ed 2d 935 (1974) he drew the proposition that a prisoner’s interest in not losing good time credits that shorten a sentence is one of “real substance” that must be protected by minimum procedures. From *Meachum v Fano*, 427 US 215; 96 S Ct

2532; 49 L Ed 2d 451 (1976) he concluded that certain incidents of confinement, such as transfers to higher security facilities, are within the normal limits of the custody authorized by conviction and do not require procedural protection.

While a state may create liberty interests that are protected by the federal due process clause, these will generally be limited to freedom from restraints that impose “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Sandin*, at 132 L Ed 2d 430 . In holding that a prisoner had no right to present witnesses at a disciplinary hearing that resulted in punitive segregation, Justice Rehnquist found that discipline by prison officials “falls within the expected parameters of the sentence imposed by a court of law.” *Id.* at 431. He also stressed that the misconduct finding would not inevitably affect the prisoner’s parole.

Under *Sandin*, no matter how mandatory or detailed state statutes and regulations governing prison officials may be, if they do not implicate lost good time, they cannot create a federal right to due process. Justice Rehnquist justified this extreme outcome by reference to two concerns. One is the disincentive to developing desirable regulations that occurs if litigation over liberty interests is the price. The other is the involvement of federal courts in prison management. Such involvement, he said, squanders judicial resources and fails to give appropriate deference to prison administrators “trying to manage a volatile environment.” *Id.* at 429.

The implications of *Sandin* for due process in the parole context are unclear. The *Sandin* majority was concerned with litigation over “the ordinary incidents of prison life.” *Id.* It did not think complex techniques of statutory construction are appropriate to “a prison regulation primarily designed to guide corrections officials in the administration

of a prison.” *Id.* at 428. However, the parole decision is not a routine aspect of daily prison life and parole procedures do not involve prison management. On the contrary, they directly implicate the factor that in *Sandin* was critical by its absence – impact on the duration of confinement. If one takes the two-prong *Sandin* test at face value, parole should always implicate a liberty interest. It involves the prisoner’s interest of “real substance” in the length of incarceration and it does not involve routine prison conditions that require judicial deference to prison administrators. Under this analysis, the parsing of statutes for mandatory language is irrelevant.

Sandin did not purport to overrule *Greenholtz* or *Allen*. See *Sandin*, note 5. In fact, the majority cited *Allen* as an example of a circumstance in which a state may create a protectible liberty interest. *Id.* at 429-430. Lower federal courts have tended to assume that *Greenholtz* still applies to parole procedures. Yet the poverty of *Greenholtz*’s analysis is evident. Concluding that a prisoner has no liberty interest in his or her liberty is the sort of semantic reasoning that makes non-lawyers shake their heads in disbelief. Equally disagreeable is the circular notion that because a prisoner has no entitlement to release, he is not entitled to a fair process for determining whether he ought to be released.

This Court is faced with a statutory scheme that plainly evidences a legislative intent to apply procedural safeguards to parole board decisions. Notice and a meaningful opportunity to be heard, as required by the parole interview procedure, are the essence of due process. *Armstrong v Manzo*, 380 US 545, 552; 85 S Ct 1187; 14 L Ed 2d 62 (1965); *Dow v State of Michigan*, 396 Mich 192, 205-206 (1976). Numerous other mandatory provisions, including the use of parole guidelines, the inclusion of

specified information in parole eligibility reports, and the requirement that parole denials be explained in writing, all bespeak a recognition that parole decisions must be made carefully and objectively if they are ultimately to be accurate and fair. Permitting appeals of board decisions by all interested parties is the ultimate indication that the board's discretion is not unlimited.

This Court is also faced with a judicial tradition of not allowing individuals, even though they are prisoners, to be treated arbitrarily and capriciously by state officials. Nearly 10 years ago, in *Burton v Department of Corrections*, COA No. 112681 (5/3/89) (See copy of order, Exhibit F), Justice Weaver presided over a Court of Appeals panel that suspected a deputy warden had arbitrarily awarded special good time. Although there was no statutory right to review of this particular administrative action, the panel found that due process demanded judicial review to prevent substantial injustice. Notably, the order remanding gave the circuit court two options: send the matter back to the warden for reconsideration or require an explanation of the deputy warden's action that would effectuate judicial review.

More recently, this Court ordered a successor sentencing judge to make written findings regarding the exercise of an objection to a lifer parole, even though there is no express statutory requirement that such objections be explained. A disqualified member of the same bench had previously objected to the prisoner's parole solely on the basis of the offense. *Vargas v Michigan Parole Board*, 457 Mich 886 (1998). Notably, when the correct successor reviewed all the available information and prepared a thoughtful written opinion, the objection was lifted.

This Court may well find the dissent in *Greenholtz*, standing alone, a thin reed on

which to base a decision that Michigan prisoners are constitutionally entitled to basic due process safeguards in the parole decisionmaking process. However, the *Greenholtz* dissent does not stand alone. The subsequent reassessment of the *Greenholtz* analysis in *Sandin*, the procedural protections afforded by Michigan statutes, the inherent authority of this Court to correct arbitrary and capricious conduct by administrative agencies, and Const 1963, art 1, sec 17 all combined would give such a decision ample support.

RELIEF REQUESTED

WHEREFORE, *Amicus Curiae* Prisons and Corrections Section of the State Bar of Michigan respectfully requests this Honorable Court to find that the Michigan parole board must provide Appellee Mary Glover and all other prisoners serving life terms a written explanation when parole is denied, whether the final determination is made before or after a public hearing has been conducted.

Respectfully submitted,

By: _____
Barbara R. Levine (P24207)
Chairperson
Prisons and Corrections Section
State Bar of Michigan
P.O. Box 12037
Lansing, Michigan 48901
(517)373-8002

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