

STATE OF MICHIGAN
IN THE COURT OF APPEALS

STANLEY THOMAS KILLIBREW ,

Petitioner-Appellee ,

Court of Appeals
No. 217390

-vs-

Lower Court
No. 98-832412-AP

MICHIGAN PAROLE BOARD ,

Respondent-Appellant.

**BRIEF OF AMICUS CURIAE
PRISON & CORRECTIONS SECTION
SUPPORTING PETITIONER-APPELLEE
(With Certificate of Service)**

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Statement of Questions Involved

I. DOES A CIRCUIT JUDGE HAS THE AUTHORITY TO ORDER THE PAROLE BOARD TO RELEASE A PARTY ON PAROLE?

Amicus answers, "Yes."

Petitioner-Appellee answers, "Yes."

Trial court answers, "Yes."

The Parole Board answers, "No."

Jurisdiction of the Court

Amicus accepts the Appellant's assertion of jurisdiction.

Statement of Facts

Amicus adopts the Appellee's statement of facts.

Introduction

The Prison and Corrections Section of the State Bar of Michigan¹ (hereafter the Section or "P&CS") files this brief urging this Court to recognize the authority of circuit court judges to order, where appropriate, an inmate released on parole as part of its appellate remedies. The Section does not contend that this is the relief that should be granted in all or most cases, but it does believe that this remedy should be available to a circuit judge where appropriate.

The Prison and Correction Section is the successor to the State Bar's Standing Committee on Corrections. The Board of the current section consists of most of the long time members of that Committee. That Committee drafted the text of the rule which this Court is being asked to construe.

The Section files this brief because it did not intend for MCR 7.104(D) to be construed as precluding the grant of parole as one form of appellate relief.

Both sides to this dispute have consented to the filing of this brief.

¹As with all State Bar Section amici brief, the opinions contained in this brief do not necessarily reflect the opinions of the State Bar of Michigan. Notice of a vote on this issue was duly given to the council of this section. The vote to file this brief was approved by a vote of 9 to 0 on March 3, 1999.

Argument

I. **A CIRCUIT JUDGE HAS THE AUTHORITY TO ORDER THE PAROLE BOARD TO RELEASE A PARTY ON PAROLE.**

Standard of Review. This issue turns on the construction of a court rule. The appropriate construction of a court rule is a question of law which is reviewed de novo. Auto Club Ins. Ass'n v General Motors Corp., 217 Mich App 594, 598, 552 NW 2d 523 (1996).

MCR 7.104(D) was the section of the Michigan Court Rules drafted by this the predecessor of this Section to address the procedures for hearing parole appeals. The standard of review section and the remedies section was borrowed (with minor modifications) from the Administrative Procedures Act. The Section files this brief urges this Court to construe these provisions in like fashion.

A. **The Power to Order An Agency to Grant a Parole is Fully Consistent with the Rules of Statutory Construction and Established Principles of Administrative Law.**

MCR 7.104(D)(8) defines the power of the parole board after remand. The pertinent text of this rule is:

If a decision of the parole board is reversed or remanded, the board shall review the matter and take action consistent with the circuit court's decision within 28 days. If the circuit court order requires the board to undertake further view of the file or to reevaluate its prior decision, the board shall provide the parties with an opportunity to be heard. An appeal to the Court of Appeals does not affect the board's jurisdiction to act under this subsection.

This Court should note that this subsection does not define the power of the reviewing court, it defines the responsibility of the agency after a remand. It is therefore anomalous to attempt to draw negative inferences on the judicial powers of a reviewing court from a rule dealing with the authority of the agency on remand.

As the Appellee has noted, the key language is the first sentence which requires the board to take action consistent with the circuit court's decision. The second sentence provides that if the court requires a board to undertake review of the decision or reevaluate its prior decision, "the board shall provide the parties with an opportunity to be heard." It should be noted that the second sentence comes into play, only if the matter has been reversed and remanded in the first sentence. Therefore, the text plainly contemplates that there will be cases where the board will be asked to undertake actions where it is not being asked to rereview a case or reevaluate its decision. In other words, the court rule recognizes that there will be situations where the Board is simply ordered to do something, not to merely think about something.²

²Contrary to the Parole Board's arguments (Parole Board Brief at 28), this is also consistent with the commonly understood meaning of the word "reverse." According to Black's Law Dictionary (5th Ed) 1185-86, the term "reversed" means:

to overthrow, vacate, set aside, make void, annul, repeal, or revoke; as to reverse a judgment or sentence or decree, or to change to the contrary or to a former condition To reverse a judgment means to overthrow it

(continued...)

To the extent that MCR 7.104(D)(8)'s provisions can be deemed to imply the power of the reviewing court, this Court should construe to mean the same as the Administrative Procedures Act judicial review provisions. Section 106 of that act (MCL 3.506(206); MCL 24.306) provides:³

The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings.

In Griffin v Civil Service Commission, 134 Mich App 413, 420, 315 NW 2d 310, 313-314 (1984), the Court held that Section 106 was intended to provide broad discretion to the circuit court to review the agency decision below. Griffin found that a trial judge had the authority under appropriate circumstances to order the Civil Service Commission to raise the Petitioner's civil service commission. Because there were unresolved issues at the agency level, the Court found the particular case inappropriate for such relief. See also DRG Funding v Secretary of HUD, 1988 US Dist. LEXIS 16526 (recognizing jurisdiction of federal court to order agency to grant full relief to a party); League of Kansas Municipalities v Board of County Commissioners, 24 Kan App 2d 294, 944 P2d 172 (1997) (recognizing

²(...continued)

by contrary decision, make it void, undo or annul it for error.

This is precisely what the Court did in this case.

³In Michigan Waste Systems v Department of Natural Resources, 147 Mich App 729, 383 NW 2d 116 (1985), this Court previously noted that the standards of review under the Administrative Procedures Act and the less formal Revised Judicature Act were the same.

authority of court reviewing tax tribunal matters to order tribunal to grant exemption, rather than simply remanding for a new hearing); Arkansas State Board of Pharmacy v Isley, 13 Ark App 111, 115-16, 680 SW 2d 718 (1984) (recognizing authority of court to modify agency sanction); Feliciano v Racing Board, 110 Ill App 3d 997, 1004-005, 66 Ill Dec 578, 443 NE2d 261 (1982) (same).

In several situations, federal courts have ordered the parole of inmates as part of the judicial review process of that agency. For instance, in Marshall v Lansing, 839 F2d 933 (CA 3, 1988), the district court remanded a habeas proceeding to the Commission with instructions to clearly explain the reasoning for its offense categorization. Notwithstanding the court order, the Commission reassigned the same offense severity level without providing an adequate explanation. In light of the protracted history of the case and the district court's impression that the Commission intentionally had evaded its mandate, the district court ordered the Commission to reassess the prisoner's parole status under a specific offenses severity category. The Third Circuit upheld the grant of release to the prisoner. The same court ordered the release of a prisoner who was denied parole in part because of his race, where a remand would have consumed several months, by which time his sentence would have expired. See Block v Potter, 631 F2d 233 (CA 3, 1980).⁴

⁴There is no doubt that in most cases, where reversible error occurs, the remedy is to remand the matter to the agency with instructions to reconsider the
(continued...)

In re Parole of Johnson, 219 Mich App 595, 556 NW 2d 899 (1995), this Court upheld a circuit court's decision to order the Michigan Parole Board to rescind its grant of parole. Applying the analysis of the Appellant, the most that the Court could have done was remand the matter to the agency for reconsideration of its original decision.

As pointed out by the Appellee, Michigan has adopted a presumptive parole model in certain cases. The Michigan Legislature has provided that certain inmates may only be denied a parole based on factors which are substantial and compelling and the evidence that the Michigan Legislature intended this group of factors to be objectively verified is crystal clear from the Legislative history. There are situations where the Parole Board cannot simply make a naked claim that its statutory mandate to insure that a person is not a danger to the community gives it carte blanche to deny paroles as it sees fit.

In juvenile/adult sentencing proceedings, this Court has applied the same rule. In several cases, this Court has reversed judicial decisions to sentence a juvenile committing a serious offense to the juvenile justice system. In People v Lyons (On Remand), 203 Mich App 465, 513 NW 2d 170 (1994), this Court recognized that a trial judge has considerable discretion in determining whether to sentence a juvenile as an adult or a juvenile. 203 Mich App at 467. Like the

⁴(...continued)
remedy. Judicial orders granting paroles are the exception, not the rule. See Gambino v Morris, 134 F3d 156, (CA 3, 1998).

Parole Board, the sentencing judge must consider a great deal of information including an individual's psychological status, the nature of the offense, and the public safety in determining the appropriate sentence. 203 Mich App at 470. Like the parole board, a sentencing judge's decision is subject to appellate review.

Where this Court has found an abuse of discretion, this Court has ordered the juvenile sentenced as an adult. In Lyons, this Court reviewed a decision to sentence a criminal defendant as a juvenile. This Court looked at the testimony of numerous individuals and concluded that the trial judge weighted the factors incorrectly. The Court remanded the matter for the imposition of an adult sentence of natural life without the possibility of parole. This Court did not remand this matter for a new sentencing procedure. See also People v Brown, 205 Mich App 503, 517 NW 2d 806 (1994) (Jansen, J. dissenting).

The Attorney General has come forward with no evidence establishing why a court may not (in the appropriate case) reverse a decision with instructions that the lower tribunal do a specific act such as granting a parole. It is a basic principle of administrative law that agency decisions are presumed reviewable. See Abbott Laboratories v Gardner, 387 US 136, 140, 87 S Ct 1507, 18 LEd 2d 681 (1967) (discussing presumption of reviewability of agency action); Citizens to Preserve Overton Park, Inc. v Volpe, 401 US 402, 410, 91 S Ct 814, 28 LEd 2d 136 (1971). In this case, this Court has a clear enabling statute and no language in either the court rule or the statute which purports to limit the courts ability to

afford the remedy granted below. Respondent's tortured construction of the rule is a far cry from the degree of clarity needed to limit judicial review powers.

This Court should find that neither the Legislature or the Supreme Court has excluded from a circuit court's appellate toolkit, the authority to order a parole in the appropriate circumstance. This Court should affirm.

B. **The Separation of Powers Clause Cannot Not Preclude Judicial Review of Executive Agency Decisions Because the 1963 Constitution Both Authorizes and Contemplates Such Review.**

The Board's attempts to wrap its argument in the separation of powers argument, however, the Michigan Constitution plainly confers the right on the Michigan Legislature to provide for judicial review. See Const 1963, art 28.⁵ Further, as noted by the Appellee, People v Raihala, 199 Mich App 577, 502 NW 2d 755 (1993), recognizes the joint role of the judiciary and the Parole Board in agency decision making.

⁵The pertinent constitutional provision provides:

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.

The cases cited by the Board for a contrary position are generic separation of powers cases which predate the 1963 constitution. Goodfellow v Detroit Civil Service Commission, 312 Mich 226, 232, 20 NW 2d 170 (1945); Purdie v Detroit Police Department Trial Board, 318 Mich 430, 28 NW 2d 283 (1947); Ciotte v Damrom, 345 Mich 527, 77 NW 2d 139 (1956). They are not helpful to the issue at bar. All three decisions involve attempts to obtain judicial review of decisions of city governments. Detroit, of course, was a home rule city. See 1426 Woodward Ave Corp v Wolff, 312 Mich 352, 20 NW 2d 217 (1945). Further, in Bunchan v City of Flint, 231 Mich App 536, 586 NW 2d 573 (1998) and Birmingham School Dist. v Buck (On Remand), 211 Mich .App. 523, 525, 536 N.W .2d 297 (1995), this Court found that adoption of Const 1963 art 6, § 28 implicitly overruled these decisions. Buchanan found that a circuit court had the authority to judicially review the termination of the Flint City Ombudsman. Birmingham School District v Buck recognized judicial review of tenure termination proceedings. While in both cases, the Court upheld the decisions to terminate, neither court questioned the authority of the lower court to order the party's reinstatement to their jobs if the agency factfinding was not supported by the record.

C. **Courts are Not an Unwelcome Interloper in the Agency Decision Process. Only Through Active Judicial Involvement Can the Integrity of the Decisional Process Be Insured.**

Contrary to the arguments of the parole board, an agency and the courts which review them are not hostile adversaries engaged in a turf war.⁶ Properly administered, judicial review powers improve the quality of agency decision making and increase the public confidence in that process. The United States Court of Appeals for the District of Columbia (the federal court responsible for the largest amount of judicial review of agency decisions) described this relationship as a "partnership" in Greater Boston Television v FCC, 149 US App DC 322, 463 F2d

⁶The position being advocated in this issue also has textual support. While the Parole Board makes numerous references to the fact that the parole statute commits discretion to it in the first instance, an examination of the entire statute shows that this discretion and judicial review of the same discretion are inexorably intertwined. MCL 79 1.234(7) provides:

- (7) Except as provided in section 34a, a prisoner's release on parole is discretionary with the parole board. The action of the parole board in granting or denying a parole is appealable by the prisoner, the prosecutor of the county from which the prisoner was committed, or the victim of the crime for which the prisoner was convicted. The appeal shall be to the circuit court in the county from which the prisoner was committed, by leave of the court.

The first sentence provides that the parole decision is committed, in the first instance to the agency. The second sentence of the same statute conferring this discretion provides for its review. Obviously, these provisions must be read together.

268 (CA DC, 19 71) cert denied sub nom Hill, Inc. v FCC, 406 US 9 50, 9 2 S Ct 2042, 32 LEd 2d 33 (19 72).

In Greater Boston, the Court noted:

The conjunction of supervision and restraint yields a collaborative partnership between agency and court in furtherance of Congressional purpose and the interest of justice.

The process thus combines judicial supervision with a salutary principle of judicial restraint, an awareness that agencies and courts together constitute a "partnership" in furtherance of the public interest, and are "collaborative instrumentalities of justice." The court is in a real sense part of the total administrative process, and not a hostile stranger to the office of first instance.

The threat of meaningful review of agency decisionmaking increases the quality of that agency's work product. If the fear of being reversed carries with the threat of only having to reword process the same administrative order, the threat becomes meaningless and the quality of work product diminishes.

No one is suggesting that trial courts should routinely order the grants of parole, but this Section also believes that this power should be available in the appropriate cases. Federal courts have taken judicial notice that agencies will often play lip service to remand orders and will often reimpose virtually the same order on remand thumbing their noses at the reviewing court.⁷ Making reviewing

⁷In Food Marketing Institute v ICC, 19 0 US App DC 388, 587 F2d 1285 (CA DC, 19 78), the D.C. Circuit noted:

(continued...)

courts toothless tigers only encourages this cycle. The power to review becomes meaningless if a court can do nothing more than continuously remand a matter for further consideration while a prisoner continues to serve their sentence.

Relief

WHEREFORE, Amicus Curiae urges this Court to recognize the authority of a circuit court judge to issue an order providing for the grant of a parole in the appropriate circumstance.

Respectfully submitted,

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⁷(...continued)

we must recognize the danger that an agency, having reached a particular result, may become so committed to that result as to resist engaging in any genuine reconsideration of the issues. The agency's action on remand must be more than a barren exercise of supplying reasons to support a pre-ordained result.

CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WASHTENAW)

The undersigned declarant being first duly sworn, deposes and says that on June 23, 1999, a copy of the attached brief was this day mailed to:

Charles Schettler
Assistant Attorney General
Corrections Division
Post Office Box 30216
Lansing, MI 48909

Declaration in Lieu of Notarization. I declare that the foregoing is true and correct to the best of my information, knowledge, and belief.

Respectfully submitted,

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