

**STATEMENT OF THE PRISONS AND CORRECTIONS SECTION
REGARDING EXTENDING PAROLE TERMS FOR PAROLEES WHO OWE
RESTITUTION**

Disclosure pursuant to Administrative Order 2004-1: The Prisons and Corrections Section is a voluntary section of the State Bar, not the State Bar itself. The position expressed here is that of the Section. The State Bar has no position on the extension of parole periods for unpaid restitution. The Prisons and Corrections Section has a membership of approximately 145. The Section's governing body, a Council elected by the membership, is composed of 15 voting members. This policy position was adopted, after due notice, at a meeting of the Section's Council on May 19, 2007. The vote was 9 yes, 0 no, 0 abstention.

I. Introduction

The Prisons and Corrections Section of the State Bar of Michigan provides education, information and analysis about issues of concern to its members, who include corrections officials, attorneys involved with the criminal justice system, and others interested in the effective functioning of Michigan prisons. One of the priorities of the Prisons and Corrections Section is to advocate for the efficient use of correctional resources.

It is currently the policy of the Department of Corrections to extend the parole term of all parolees who continue to owe restitution at the end of their standard parole terms. For example, if an individual has a maximum ten year sentence, and is released after two years of incarceration, that individual would typically be discharged after completing a two-year parole term. However, if the individual still owes restitution, the parole term would be extended to the max date, resulting in an eight-year parole term, rather than a two-year parole term.

The Prisons and Corrections Section believes that, in light of the Michigan Prisoner Reentry Initiative (MPRI) and the state's budget crisis, it is time for the Department of Corrections to revisit this policy. MPRI recognizes that parole agents play a critical role in helping released prisoners reintegrate into society, and demands that agents be actively involved in assisting parolees. These heightened responsibilities are difficult to fulfill unless agent caseloads are kept to manageable levels. When individuals are extended on parole due to the inability to pay restitution, rather than because they present a continuing danger to society, this diverts the attention of agents away from parolees who need closer supervision to those who have already successfully completed their regular parole term.

Moreover, because many parolees are returned to prison for technical violations of their parole conditions, rather than for committing new crimes, the longer a person remains on parole, the more likely it is that the individual will be returned to prison for

such a technical violation. Scarce prison beds are then allocated to individuals whose conduct would not have resulted in imprisonment, had they not been continued on parole as a result of unpaid restitution.

Finally, extending parole is a significant burden on the parolee, as the parolee remains subject to supervision, reporting requirements, parole conditions, and the constant possibility of a return to prison for any violation. Just as debtors' prisons are inappropriate, so too is it inappropriate continue parole supervision simply because an individual lacks the resources to pay restitution. Parolees who have successfully completed their regular parole term deserve the opportunity to put their criminal justice involvement behind them, and move on with their lives.

II. The Legal Framework

Although the Department's policy is being applied in practice to extend parole terms whenever restitution remains unpaid, the policy as written does not actually mandate an extension. Rather, the policy states that the agent, in preparing the final review prior to the scheduled parole discharge date,

shall provide the Parole Board with specific information on the parolee's employment status, earning ability, financial resources, the willfulness of the parolee's failure to pay and any other special circumstances that may have a bearing on the parolee's ability to pay. Absent compelling reasons to the contrary, the field agent shall recommend to the Parole Board that it extend the parole period whenever a parolee has *wilfully* failed to pay court-ordered restitution.... The Parole Board may extend the parole period of a parolee who *wilfully* fails to pay court-ordered victim restitution...

DOC Policy Directive 4.02.107 of December 19, 2003 (emphasis added). An individual who does not have the resources to pay is not willfully failing to pay, and therefore should not be extended on parole under the existing policy. Only individuals who have the ability to pay, but fail to do so, may have their parole terms extended.

There is no statutory requirement that the Department extend the parole period when an individual has not paid off the remaining restitution. The statute merely requires that the parole agent review the payment of restitution at least twice a year, as well as not less than 60 days prior to the expiration of the parole period. *See* MCL 791.236(13). The agent is required to report on a parolee's failure to pay, and provide information about why the parolee did not pay. *See id.* The statute does not require an extension of the parole period. Certainly such an extension may be appropriate in cases where an individual has adequate resources to pay restitution, but has failed to do so. But the statute does not mandate an extension in every case. Rather, the statute merely mandates reporting, which allows for individualized consideration of the reasons why payment has not been made.

While the statutory scheme does not speak to the issue of extending parole, it specifically prohibits incarcerating an individual for failure to pay restitution “unless the court or parole board determines that the defendant has the resources to pay the ordered restitution and has not made a good faith effort to do so.” MCL 780.766(14). *See also* MCL 769.1a(14) (same). In other words, the legislature was clearly concerned that individuals not be punished merely due to an inability to pay. Similarly, the inability to pay should not be a basis for extending parole.

In sum, neither current Department policy nor state law require parole to be extended in every case where restitution remains owing. Given that agents apparently believe that Department policy does require such extensions, the Department should clarify or amend its policy to make clear that extensions are only appropriate where a parolee has the ability to pay restitution, but refuses to do so.

III. Why Extending Parole Terms for Unpaid Restitution is Ineffective

The justification for extending parole where restitution remains owing is that this encourages parolees to pay restitution. Clearly former offenders should be required to pay any restitution that was ordered. Offenders are responsible for the losses they cause victims, and it is only just that they be required to make their victims whole. However, it is unclear whether, in the majority of cases, extending parole actually encourages parolees to pay restitution. Moreover, the goal of getting former offenders to pay restitution could be achieved more effectively through other means, which do not require limited correctional resources to be spent on supervising individuals simply because they have been unable to pay restitution.

Many released prisoners have little or no income with which to pay restitution. Some are disabled and cannot work, while others are chronically unemployed due to limited job skills and the unwillingness of employers to hire people with criminal records. In many cases, those who are working find that payments towards child support arrearages eat up half or more of their meager earnings, and it is therefore difficult or impossible for them to make substantial payments towards restitution as well. Extending such individuals on parole will simply tie up agent time, while doing very little to encourage the payment of restitution. It makes no sense for taxpayers to bear the heavy cost of parole supervision for individuals who remain on parole only because they are poor or disabled. Supervision costs will often exceed the amount of restitution being collected. Moreover, if these individuals could be removed from parole caseloads, overburdened parole officers might have more time to devote to those parolees who need intensive assistance and supervision.

In some cases, the reason a parolee does not pay restitution is that the amount owed is so large, that it is unlikely that the parolee will ever be able to pay off the full amount, even if the parolee has a decent job. In such cases, an extension of the parole term is unlikely to induce larger payments, since the parolee will be unable to pay off the full amount before the max date in any event. For example, if a parolee owes \$100,000 in restitution, extending parole for a couple of additional years will have little effect,

since the parolee will most likely be unable to pay off that amount in time to get discharged before the max date. Here again, the parole extension has little effect on repayment, but diverts correctional resources from other parolees who need more supervision.

In sum, the extension of parole terms is only likely to motivate those individuals who have a real capacity to pay, and who owe relatively small amounts of restitution. Yet even in those cases, keeping an individual on parole in order to force restitution payments adds to the burden on parole agents, whose time could be better spent supervising higher risk parolees. The question, then, is whether there are ways to ensure victims receive restitution, without using up valuable spots on parole officers' caseloads.

IV. An Alternative Approach To Collecting Restitution

If the goal here is to ensure that victims are made whole, the focus should be on finding the most effective way to collect restitution. As discussed above, extending parole will have little effect on collection rates in many cases. Moreover, as the state has discovered in the context of child support enforcement, and as many judgment creditors know, collection rates increase significantly if one simply takes money owing out of individual's paycheck, rather than asking the individual to make payments affirmatively once he or she has the funds in hand. In other words, wage garnishment is likely to be at least as effective as extending parole in ensuring that restitution is paid.

While restitution has historically been collected by the state, this need not be the case. The statutory scheme specifically allows the victim to collect restitution. Moreover, the victim can collect regardless of whether the payor remains on parole. MCL 780.766(13) provides:

An order of restitution...remains effective until it is satisfied in full. An order of restitution is a judgment and lien against the property of the defendant for the amount specified in the order of restitution. The lien may be recorded as provided by law. An order of restitution may be enforced by the prosecuting attorney, a victim, a victim's estate, or any other person or entity named in the order to receive the restitution in the same manner as a judgment in a civil action or a lien.

An alternative to extending parole – with all the resulting supervision costs – is to assist victims in collecting restitution. Because a restitution order is a judgment, there are multiple mechanisms for collection, most notably wage garnishment. These mechanisms are quite simple, and are already routinely used by creditors to collect on debts. Victims may not be collecting restitution because they are unaware that they have the right to do so, or because they are unfamiliar with the process. Instead of extending parole terms, parole agents could inform victims about their collection rights.

V. A Proposal To More Efficiently Collect Restitution Without Extending Parole Terms

Ensuring that victims receive restitution is critically important. Unfortunately, in some cases, due to the debtor's disability or indigence, the debt will probably never be paid. In those cases, extending parole is unlikely to result in payment, and only has the effect of over-burdening already overwhelmed parole agents. However, in cases where debtors do have the resources to pay, it should be possible to ensure that victims can obtain payments, without debtors using up valuable slots on a parole agent's caseload.

I. Proposed Legislative Changes

MCL 780.766(14) and MCL 769.1a(14) contain identical language prohibiting the incarceration of individuals who are unable to pay restitution despite a good faith effort to do so. That language should be amended to clarify that a person should also not be extended on parole due to an inability to pay restitution.

Specifically, we propose that these sections be amended as follows:

MCL 780.766(14): Notwithstanding any other provision of this section, a defendant shall not be imprisoned, jailed, ~~or~~ incarcerated, **or have probation or parole extended** for a violation of probation or parole ~~or otherwise based on~~ ~~for~~ failure to pay restitution as ordered under this section unless the court or parole board determines that the defendant has the resources to pay the ordered restitution and has not made a good faith effort to do so. **If restitution remains owing at the time of discharge, the court or the Department of Corrections shall contact the party/parties to whom restitution is owed, if known, and shall inform them, on a form provided by the Department, of (a) the amount still owed; (b) the fact that this debt is a collectible judgment; and (c) the methods through which the debt can be collected.**

MCL 769.1a(14): Notwithstanding any other provision of this section, a defendant shall not be imprisoned, jailed, ~~or~~ incarcerated, **or have probation or parole extended** for a violation of probation or parole ~~or otherwise based on~~ ~~for~~ failure to pay restitution as ordered under this section unless the court or parole board determines that the defendant has the resources to pay the ordered restitution and has not made a good faith effort to do so. **If restitution remains owing at the time of discharge, the court or the Department of Corrections shall contact the party/parties to whom restitution is owed, if known, and shall inform them, on a form provided by the Department, of (a) the amount still owed; (b) the fact that this debt is a collectible judgment; and (c) the methods through which the debt can be collected.**

In addition, we recommend that the legislature review statutes that impose supervision or other fees on probationers and parolees, and that the legislature prohibit the imprisonment, jailing, incarceration, or extension of probation or parole, in cases where a probationer or parolee is unable to pay those fees.

II. Proposed Policy Changes

We also propose that the Department consider amending its own policies. Such changes are not contingent on any legislative action, since, as discussed above, nothing in the current statutory scheme requires parole extensions where an individual is unable to pay restitution.

Specifically, we propose that paragraph T of Policy Directive 4.02.107 be amended to read as follows:¹

- T. **If the parolee is otherwise eligible for discharge, the field agent shall recommend a discharge from parole, unless there is clear evidence that the parolee has willfully failed to pay court-ordered restitution. A failure to pay is not willful if the parolee lacks the ability to pay. Circumstances where it shall be presumed that the failure to pay is not willful include, but are not limited to: the parolee is disabled, the parolee is receiving public assistance, the parolee has been unemployed throughout the balance of the parole period despite a genuine effort to find employment, or the parolee is employed in a low wage job.** When submitting a report pursuant to paragraph S for a parolee not scheduled to discharge on his/her maximum sentence, the field agent also shall provide the Parole Board with specific information on the parolee's employment status, earning ability, financial resources, the willfulness of the parolee's failure to pay and any other special circumstances that may have a bearing on the parolee's ability to pay. ~~Absent compelling reasons to the contrary, the field agent shall recommend to the Parole Board that it extend the parole period whenever a parolee has willfully failed to pay court-ordered restitution.~~ **If restitution remains owing at the time of discharge, the parole agent shall contact the party/parties to whom restitution is owed, if known, and shall inform them, on a form provided by the Department, of (a) the amount still owed; (b) the fact that this debt is a collectible judgment; and (c) the methods through which the debt can be collected. The parole agent shall also provide written notice to the parolee of his or her right, pursuant to MCL 780.766(12), to petition the sentencing judge to modify the method or amount of payments which are to be made towards the balance owing, if the parolee can demonstrate manifest hardship.**

¹ Deleted text is marked with strike-out. New text is marked in bold.

We believe that these proposed changes would increase collection rates for restitution, while simultaneously freeing up parole agents to focus their attention on those parolees who most need supervision and assistance.

Finally, we recommend that the Department also consider amending paragraph U of Policy Directive 4.02.107 to bring that policy in line with the Department's actual policy of not extending parole terms for unpaid fees or costs. Such fees or costs are typically owed to the state. In most cases, the costs of supervision exceed the sums to be collected. Therefore, as the Department has recognized in practice, it makes little sense to extend parole terms to collect these sums. Accordingly, we recommend that paragraph U be amended to read:

- U. The Parole Board may extend the parole term of a parolee who willfully fails to pay court-ordered victim restitution ~~and/or filing fees or costs owed pursuant to a special condition of parole.~~