Senate Judiciary Committee Hearing on SB 827

Testimony of Citizens Alliance on Prisons and Public Spending
March 2, 2010

Good afternoon, Chairman Kuipers and members of the committee. My name is Barbara Levine and I am the executive director of CAPPS, the Citizens Alliance on Prisons and Public Spending.

I would like to begin by saying how encouraged we are by the decline in the prisoner population. We know the parole board has been working hard to release more people who are past their earliest release dates. When we did research in 2003 on the number of people eligible for parole, including parolable lifers it was nearly 35% of the population. Now that same figure, excluding people with paroles granted who are just finishing up programs, is apparently down to about 23%. Certainly that is substantial progress.

We are also encouraged by the work of the Council of State Governments Justice Center and by Senator Cropsey's willingness to put their proposals into bill form. SB 827 incorporates a number of concepts we have long advocated, including a presumption of parole at the minimum, limits on how long technical parole violators should be incarcerated, and a prohibition on holding people to their maximums, then releasing them into the community with no supervision or support. Making these concepts part of the public debate on corrections reform is a very big step forward.

Nonetheless, we all know the devil is in the details and we have a number of concerns about the details of SB 827. Most of these concerns are reflected in the analysis of the CSG proposals that we prepared in January 2009. A copy of that analysis has been provided to each committee member.

It appears that the presumption of parole at the minimum embodied in SB 827 would apply to current prisoners. That is, it would not be prospective as initially recommended. Assuming that's true, our biggest concern is with excluding people from the presumption because their offenses carry a potential maximum sentence of life. I want to be clear on how this would work.

Under Michigan law, except for first-degree murder, all the most serious offenses carry a maximum sentence of life or any term. For these crimes, the sentencing judge can impose a life sentence or can set both a minimum and maximum. In many cases, depending on the offender's prior record and the specific facts of the offense, the sentencing guidelines range doesn't even include life as an option. These offenses include second-degree murder, armed robbery, criminal sexual conduct, assault with intent to commit any of these crimes, and a number of other less common crimes. In 2008, nearly 17,000 Michigan prisoners were serving for these offenses. More than half had minimum terms of 15 years or less. More than a third had minimums of 10 years or less. A table showing a breakdown of these totals by offense type is attached to my testimony.

In addition, Michigan statutes allow prosecutors to charge people who have prior felony convictions as habitual offenders in order to have their sentences enhanced. If someone convicted of an offense that carries a statutory maximum of five years or more has three prior felonies of any kind, no matter how old, he or she can be sentenced to life or any term. We can't tell from the MDOC statistical report how many current prisoners were sentenced as habitual offenders or what their sentences actually are. But there are plenty of them, usually property offenders who have been in and out of prison for previous property crimes.

Under SB 827, subject to certain exceptions, parole would presumptively occur when people have served their minimum terms. One of the exceptions is that the presumption does not apply to anyone whose offense carries a statutory maximum of life or any term, no matter what the actual sentence was or what the person's actual re-offense risk is. In 2008, when the prisoner population was roughly 49,000, the presumption would not have applied to about 35% of all prisoners.

To fully appreciate the consequences of this exception, we have to consider why a presumption is needed in the first place. We have had a risk assessment instrument called the parole guidelines since 1992. The statute currently says that if someone scores high probability of release on those guidelines, meaning they present a very low risk for committing a violent offense, the board has to have a substantial and compelling reason for denying release. Nonetheless, at least until very recently, the board routinely denied parole to people with high probability scores based solely on the nature of the offense.

For instance, in 2006, the board denied release to nearly 3,000 people who had high probability scores. Denial rates varied dramatically by offense group. Of the drug and nonviolent offenders, 13% or fewer were denied. However, despite their low statistical risk for reoffending, the board found substantial and compelling reasons to continue 72% of the homicide offenders and 87% of the sex offenders. That is, the board was essentially ignoring both its own risk assessment instrument and the statutory mandate in order to avoid releasing people who had served their minimums for certain types of offenses. It was able to do this for two reasons. One is the commonly held belief that someone who once committed an assaultive offense, no matter how long ago, is forever dangerous. The other is that prisoners have no right to appeal parole board decisions, so they have no opportunity to get the statute enforced in court.

If there was a presumption of release that applied to all prisoners, and if there was a means of enforcing that presumption, then only those who were actually at high risk of reoffending or who had poor institutional records would be denied release once they served their minimum sentences. However a presumption that excludes people convicted of life maximum offenses actually perpetuates the problem. In fact, it makes things worse. SB 872 actually eliminates the "substantial and compelling reasons" standard for departing from the parole guidelines and expressly permits the sheer fact that someone was convicted of an offense that carries life or any term as a reason for denying parole.

As proposed in SB 872, the presumption would primarily protect the people who currently get released on their minimum anyway. To be sure, it would also give greater protection to people whose offenses carry 15-year maximums, like CSC 3rd, unarmed robbery and manslaughter. But those whose offenses are punishable by life or any term would have no protection against arbitrary or even irrational parole denials, no matter how situational their offenses or how long they served or what their sentencing judges intended or how well they've done in prison or how demonstrably safe they are to release.

A statutory presumption that applies to all offenders would restore the meaning of the minimum sentence. Now, the judge imposes the minimum based on sentencing guidelines devised by the Legislature, but the board is free to hold someone all the way to their maximum, just because the board feels differently about the crime. Now the prosecutor is free to induce a guilty plea by negotiating a certain minimum sentence but then turn to the victim and say: "don't worry, the board will never actually release him then." This is not truth in sentencing. Whatever their minimum sentence, people should be able to rely on being able to earn their way out at that point.

There is simply no principled basis for giving the minimum sentence a different meaning, depending on the crime.

Parole grant rates have fluctuated dramatically over the last two decades. While the current board is now increasing the grant rate, it requires a statute to ensure that, no matter who is on the board in the future, the standard for parole is an objective one, not simply what those particular members feel is reasonable.

But what about public safety? Isn't it true that people who committed assaultive and sex offenses pose a greater risk to the public and we should hold them as long as possible, regardless of the minimum sentence? Contrary to common belief, that is not true. The fact that someone committed a very serious crime years or decades ago does not mean that they are dangerous today. On the contrary, these offenders have the lowest re-offense rates of any crime group.

Last August we published a research report on recidivism called *Denying parole at first eligibility: How much public safety does it actually buy?* I have provided you with copies of the executive summary, along with several figures and tables. The full report was distributed to every legislator, but we can give you another copy if you would like. It is also on our website, www.capps-mi.org.

Our database included every person sentenced to an indeterminate term after 1981 who was released for the first time, whether on parole or by maxing out, from 1986-1999. We had a total of 76,721 cases. That total included more than 2,500 homicide offenders, nearly 6,700 sex offenders and about 6,500 other assaultive offenders. Success was defined as no return to prison, either with a new sentence or for a technical parole violation, within four years of release.

The ultimate question we were asking was whether public safety is improved by keeping people in prison an extra year or two. The short answer is: very, very little. We also learned a number of other important things.

Sixty-one percent of all the prisoners we studied had been released on their earliest release date or ERD; 15% were released after serving one additional year; 14.6% were released after serving two additional years. Thus, in total, 91% were released within two years of first eligibility.

The success rate of people released on their ERD was 66%. The success rate of people released after their ERD was somewhat lower at approximately 58%. While not insignificant, this eight point difference in success rates is not great. We estimate that if everyone who was released a year or two after their ERD had been released when first eligible, it would have saved more than 2,300 beds a year or nearly 33,000 beds in 14 years. In today's dollars, the cost savings would have been nearly $74 million a year or more than one billion dollars for the entire period. Yet the decrease in the total success rate, when everyone released on, one or two years after their ERD was combined, would have been 2.9%. That is, the success rate would have gone from 66.1% to 63.2%. The increase in returns with new sentences would have been only 1.7%. The increase in total arrests would have been 0.4%. This suggests that implementing a presumption of release at the minimum that applied to all prisoners not demonstrated to be at high risk for re-offending would substantially reduce prison spending without increasing risk to the public.

There are two other key points that our research demonstrates and a great many other studies we have cited confirm. One is that sheer length of time served bears no relationship to success. We want to incarcerate some people longer than others because they are deserving of more punishment, but more time will not improve success upon release. The average time served for

both drug and larceny offenders was 2.2 years but their respective success rates were 69% and 55%. The average time served for sex offenders and robbers was nearly identical, but the success rate of sex offenders was more than 20 points higher.

Even more telling, *within* offense groups there was little or no difference in length of time served among those who succeeded, those who came back as technical violators and those who returned with new sentences. Among released larceny offenders, for instance, those who succeeded had served, on average, 2.2 years, those who came back as technical violators had served an average of 2.0 years and those with new sentences had served 2.2 years. This similarity in time served regardless of outcome was true for every offense group. This suggests that keeping people past their minimum sentences solely based on their offense will not buy any increase in public safety.

The third key finding concerns the variables that do relate to re-offending. While age, prior record and institutional conduct are well known predictors of success on release, another critical factor is offense type. The data in Fig. 3 show that homicide, sex and other assaultive offenders have substantially lower failure rates for any reason than do financially motivated offenders like those who committed burglary, larceny and robbery. For homicide and sex offenders the success rate exceeds 77%. Moreover, the offenders we fear most rarely return to prison for repeating their crimes. Only 4.5% of all the people released returned for a new crime against a person. Only 3.1% of sex offenders returned for a new sex offense. Only 0.5% of homicide offenders returned for a new homicide. The data on sex offenders in particular, which wholly contradicts public perceptions and the basis of much release decision-making, is similar to that of eight other major studies shown in Table 6.

Excluding from a presumption of release those whose crimes carry a statutory maximum penalty of life or any term actually goes against the evidence about re-offense rates. Ironically, releasing more of the people who used to be passed over will, in all likelihood, reduce recidivism rates overall. And there is no question that continuing to deny them parole would be costly not only to them and their families but to taxpayers and to the very operation of the criminal justice system.

We have a number of other concerns about SB 827 that, in the interest of time, I will merely note without discussion.

The bill would allow even those who receive a presumption of parole to be kept for up to 120% of their minimum sentences in order to complete treatment or because of institutional misconduct. The use of the 20% mark-up rather than a set number of months allows for very disparate treatment depending on how long a minimum is being served. Twenty percent of a one-year minimum is 2.4 months while 20% of a ten-year minimum is two years. Thus identical misconduct histories or identical needs for treatment could bring very different results.

There are no criteria for defining "serious institutional misconduct." Would a handful of very old misconducts suffice to deny parole at the minimum or must there be a pattern of recent misconducts that show assaultive behavior?

There is also no protection in the bill for prisoners who have been unable to complete required treatment programs because the MDOC has been unable to make the programs available in time.

SB 827 would limit the length of stay for first-time technical parole violators to nine months, unless the violation involved possession or use of a weapon or injury to a victim. We used to advocate

similar fixed time limits for technical violators. However, we are now more inclined to focus on whether parole should be revoked at all. A parolee who is posing a serious threat to public safety should be returned to prison without an arbitrary limit on how long he or she can be kept. However, if someone's conduct violates supervision rules but does not threaten the public, re-incarceration is too harsh and too costly. Sanctions other than imprisonment should suffice.

Finally, in order to ensure that whatever reforms are adopted are actually enforceable, we urge that the prisoner's right to appeal, eliminated in 1999, be restored, at least for people who score low risk on the board's assessment instruments. Prosecutors have the right to appeal grants of parole and they have been exercising it with increasing vigor of late. If the prisoners whose liberty is actually at stake do not have equivalent rights, an amended statute will be as toothless as the current one.q

I appreciate your consideration of these concerns. If there is any way in which we can contribute further to your deliberations, we would be happy to do so.

Prisoners Serving For Common Offenses Punishable by Life or Any Term*

2008 MDOC Annual Statistical Report

Offense	Total	Minimum Sentence 15 Years or Less	Minimum Sentence 10 Years or Less
Drugs – delivery or possession, 1000+ grams	253	74	49
Solicitation of murder	34	19	15
Murder, second-degree	3,967	851	281
Robbery	5,234	4,040	3,071
Criminal sexual conduct, first-degree	4,603	2,608	1,590
Kidnapping	355	158	93
Assault with intent to commit murder	1,443	753	319
Assault with intent to commit robbery	716	575	442
Perjury	9	8	8
TOTAL	16,613	8, 588 *(51.7%)*	5,870 *(35.3%)*

*Does NOT include people charged as habitual offenders under MCL 769.12 which allows life or any term for anyone with three prior felonies who is convicted of an offense with a statutory maximum of five years or more. These are typically property offenders with a history of prior property crimes.