CAPPS
CITIZENS ALLIANCE ON PRISONS & PUBLIC SPENDING

CAPPS Testimony Regarding H.B. 5377

House Law & Justice Committee, February 6, 2018

Good morning. My name is John Cooper;[1] I am the Policy Director at the Citizens Alliance on Prisons and Public Spending (CAPPS), a criminal justice research and advocacy organization based in Lansing. I appreciate the opportunity to provide testimony today in support of H.B. 5377, which would make needed clarifications to the statutory standard as to when the Parole Board can depart from the Parole Guidelines to deny parole to a low-risk prisoner.

I strongly encourage the Legislature to pass this bill, which will make parole decisions more consistent and objective for low-risk prisoners, and save taxpayers millions over time.

Background

1. Indeterminate Sentencing

Michigan's criminal justice system utilizes indeterminate sentencing. This system divides responsibility for determining how much time a prisoner serves between the Legislature, the sentencing court, and the parole board.

- The **Legislature** determines what conduct is illegal and sets the boundaries of punishment for each crime, including the maximum sentence.

- The **Sentencing Court** determines the minimum sentence an individual convicted of a crime will serve based on the facts of the case. The minimum sentence sets a prisoner's earliest release date, which is the point at which the prisoner becomes eligible for parole.

- The **Parole Board** assesses the prisoner's current risk of reoffending when he or she has served their minimum sentence, and determines whether that risk is sufficiently low to warrant release on parole.

2. Legal Standards Governing Parole Consideration

The Parole Board's basic charge is to determine whether it has "reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public

[1] J.D./M.A. University of Virginia, 2008; *Law Clerk*, Hon. Boyce F. Martin, Jr., U.S. Court of Appeals for the 6th Circuit, 2008-09; *Litigation Associate*, Latham & Watkins LLP, 2009-2016; *Super Lawyers* (Washington D.C.), Rising Star in Criminal Defense – 2014, 2015 & 2016.

safety."[2] However, what "reasonable assurance" means and how the Board should determine whether this standard is met has been further refined over time. Most notably, in 1992, the Legislature passed MCL 791.233e, which directed the Department "to develop parole guidelines … that shall govern the exercise of discretion … as to the release of prisoners on parole." MCL 791.233e(1). In response, MDOC developed and adopted Parole Guidelines.[3]

The Parole Guidelines assess a prisoner's risk of reoffending by scoring such factors as the prisoner's age, institutional record, prior record, offense characteristics, statistical risk, and program participation. The scores in each of these categories are then aggregated. The final score is designed to predict the likelihood of release based on past practice; because of this, it falls into one of three categories: "high probability of parole," "medium probability of parole," or "low probability of parole." High probability of parole cases present the lowest risk of re-offense. To score high probability, the prisoner must pose no more than a five percent risk of committing an assaultive offense.[4]

MCL 791.233e(6) provides that the Parole Board may only deny parole to a prisoner that scores "high probability of parole," based on "substantial and compelling reasons stated in writing."

The Problem: Parole Decisions that are Inconsistent and not Evidence-Based

MCL 791.233e(6) does not say what "substantial and compelling" means, which permits individual parole board members interpret this standard in varied and subjective ways.

This causes two problems: (1) it creates inconsistency in parole decisions for similarly-situated prisoners in the lowest category of risk; and (2) it results in low-risk prisoners being detained at taxpayer expense without objective evidence of their risk to the public.

1. Inconsistent Decisions in Low-Risk Cases

The Parole Board has 10 members, each appointed to 4-year terms by the Director of MDOC. However, most parole decisions are made by 3-member panels based on interviews of the prisoner conducted by a single member, whose vote generally controls the decision. As a result, individual members' willingness to depart from the parole guidelines can create a great deal of inconsistency in the Board's treatment of similar cases. For example, in a sample of 2015 decisions, one member voted for parole in 59.2% of high probability cases, while another voted for parole in 86.1% of cases. Projected out over the 9,236 high probability cases that were reviewed in the past year,[5] the first member would grant nearly 2,500 fewer paroles of low-risk prisoners than the latter.

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[2] MCL 791.233(1)(a).
[3] *See* MDOC Administrative Rule 791.7716, available at http://dmbinternet.state.mi.us/DMB/ORRDocs/AdminCode/1556_2015-052CO_AdminCode.pdf; MDOC Policy Directive 06.05.100 (Effective 11/01/08), Attachment A, available at https://www.michigan.gov/documents/corrections/06_05_100_330065_7.pdf.
[4] *See* MDOC Administrative Rule 791.7716(2).
[5] *See* Parole Board Decisions Report – October 2017, Table 2, available at http://www.michigan.gov/documents/corrections/Section_422_Parole_Board_Decisions_-_October_603482_7.pdf.

Inconsistent decisionmaking undermines both the purpose of the parole guidelines and the directive that "substantial and compelling reasons" are necessary to justify a departure from their recommendation that a prisoner who scores high probability should be released.

2. Without Objective Evidence of Risk to the Public

This inconsistency in decisions stems from the lack of standards governing what counts as a "substantial and compelling reason" to depart from the Parole Guidelines. Without meaningful guidance, members are free to react to individual interviews in different ways, and to recommend a parole decision to their 3-member panel based on their own subjective impressions. For example, high probability prisoners are routinely denied parole based on a determination that the prisoner "lacks adequate insight into behavior."

Subjective reasons such as this are not consistent with the requirement that the decision to depart from the Guidelines be based on "substantial and compelling reasons stated in writing." This is the case for two reasons.

First, courts interpreting the phrase "substantial and compelling" in other contexts make clear that such reasons must be "objective and verifiable."[6] Subjective judgments, such as "lacks insight," are neither objective nor verifiable: they cannot (1) be meaningfully weighed against the evidence-based recommendation of the Parole Guidelines—which include a statistical risk assessment—or (2) be verified by the other members of the panel. Thus, they are not consistent with the "substantial and compelling" standard.

Second, in practice, denial rates for high probability prisoners are higher than the "substantial and compelling" standard—which suggests departures should occur only in "exceptional cases"[7]—dictates. In 2015, about 1,900 people (~4.5% of the prison population at the time) that had finished their minimum sentences and scored high probability of parole were still in prison. MDOC—to its credit—has made a concerted effort to reduce this number since then, but many high probability prisoners are past their earliest release dates, and over the past year only 62% of prisoners have been paroled at their earliest release date (82% if deferrals are excluded from the calculation).[8]

The Solution: Require Objective Evidence of Risk to Depart from the Guidelines

H.B. 5377 will address these problems by clarifying the statutory standard as to when the Parole Board can depart from the Parole Guidelines to deny parole to a low-risk prisoner. Specifically, it will limit the Parole Board's discretion to deny parole to low risk prisoners for subjective reasons while preserving its ability to do so based on objective evidence of a risk to public safety that is not reflected in the prisoner's Parole Guidelines score.

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[6] *See People v Babcock*, 469 Mich. 247 (2003); *see also In re: Parole of Elias*, 294 Mich. App 507 (2011).
[7] *People v Fields*, 448 Mich. 58 (1995) (explaining that under the "substantial and compelling" standard, "Reasons justifying departure should 'keenly' or 'irresistibly' grab our attention and be 'of considerable worth.' They should exist "only in exceptional cases.'").
[8] *See* Parole Board Decisions Report – October 2017, Table 2, available at http://www.michigan.gov/documents/corrections/Section_422_Parole_Board_Decisions_-_October_603482_7.pdf.

H.B. 5377's proposed changes represent best practices in parole policy, and have already been largely implemented internally by MDOC (which supports H.B. 5377) over the past year.

1. Best Practices in Parole Policy

H.B. 5377 addresses the problems detailed above, and represents best practices in parole policy: (1) It reduces the risk of inconsistent parole decisions for similarly-situated prisoners; (2) it puts the focus of parole release on whether the prisoner presents a credible risk to public safety if released, and creates objective standards for making this determination; [9] and (3) by increasing the transparency and predictability of the parole process, it increases prisoners' incentives to invest in their own rehabilitation.

2. Prospective in Effect and Largely Implemented by MDOC

MDOC supports objective, evidence-based parole policy for low-risk offenders and has already taken significant steps toward implementing what H.B. 5377 proposes. Further, the bill only applies to individuals convicted after its effective date (rather than to current prisoners). Because of this, we do not anticipate a significant increase in paroles to any particular county if H.B. 5377 is enacted.

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Thank you for the opportunity to testify today. Please do not hesitate to contact me if you have questions.

Sincerely,

/s/
John S. Cooper

[9] "Rather than relitigate the sentencing judge's decision concerning proportionate punishment, the board should ask whether a prison stay beyond the date of first release eligibility is necessary to serve the goal of public protection. *The only ground for denial of release should be the board's finding, based on credible evidence, that the prisoner presents an unacceptable risk of reoffending if released.* We would rest the release determination on actuarial risk assessment (taking static risk factors into account) and in-prison behavior empirically associated with readiness for release (looking to dynamic factors such as program completion or the absence of disciplinary violations)." Rhine, Petersilia & Reitz, "Improving Parole Release in America," *Federal Sentencing Reporter*, Vol. 28, No. 2, pp. 96-104 (Dec. 2015) at 97 (emphasis in original).