

House Judiciary Committee

June 9, 2011

Testimony on HB 4704

by

Citizens Alliance on Prisons and Public Spending

Good morning, Chairman Walsh and members of the Committee. I am Barbara Levine, executive Director of CAPPs, the Citizens Alliance on Prisons and Public Spending, and I appreciate the opportunity to talk with you this morning about the concerns we have with HB 4704.

Changes in parole grant rates have an enormous amount to do with how large and thus how expensive our prison system is, as well as how fair it is. In a groundbreaking 2008 report, the Citizens Research Council of Michigan found that the average length of time Michigan prisoners served was 14 months longer than the national average and 16 months longer than the average of other Great Lakes States. CRC attributed these findings to changes in sentencing guidelines, the elimination of disciplinary credits and the decline in parole approval rates.

In 2009, the Council of State Governments attributed the overwhelming difference between the lengths of time served nationally and in Michigan to the unique level of discretion available to our parole board.

In our own 2009 analysis of nearly 77,000 Michigan cases, CAPPs found that incarcerating people for an additional year or two, after they had served their minimum sentences, cost tens of millions of dollars annually but had very little impact on recidivism. We also found that, even though homicide and sex offenders have by far the lowest re-offense rates, they also had the lowest parole grant rates. That is, the people most likely to succeed commonly had their incarceration continued, again at enormous cost to taxpayers, based on reactions to the original offense, not on their current risk to the public.

There is no doubt that taking a comprehensive look at our whole parole process would be a very useful thing to do. There are plenty of policy questions to consider. Should we abandon parole decision-making altogether and adopt a system of determinate sentencing? Should we retain a measure of parole board discretion but establish a statutory presumption of parole for people who do not pose a high risk to public safety? How should we enforce the presumption of release that already exists in our parole guidelines statute? What should we do about hundreds of parolable lifers who have been eligible for release for decades? How should we handle releases on medical grounds?

Addressing these issues necessarily includes developing a vision of what we want our parole process to accomplish. What we should *not* do is change procedures in isolation, without regard to whether they move us in the direction of that larger vision.

HB 4704 doesn't involve just a minor procedural tweak. It implicates a significant philosophical shift in the role the prosecutor should play in the parole process. To fully appreciate just how large a shift, I'd like to place the proposal in context. I know this may sound a bit pedantic but please bear with me because it is this context that reveals all our reasons for concern.

Michigan judges impose the minimum sentence pursuant to legislative sentencing guidelines. If the sentence is above the statutory guidelines range, the defendant can appeal. If it is below the guidelines, the prosecutor can appeal. In many, many cases the sentence is the result of plea negotiations. However arrived at, the sentence reflects the knowledge of all the trial court participants about the specific facts of the offense, the defendant's role in it, the impact on the victim and the defendant's prior record and personal history.

The parole board does not get jurisdiction to release the person until he or she has served every day of the minimum sentence or, in the case of parolable lifers, either 10 or 15 years. Once the person is eligible for parole, the board calculates a score on the parole guidelines, which are also required by statute. If the person scores low probability of release, the board can just deny parole without even conducting an interview. If the person scores high probability of release, the board can grant parole without an interview unless the offense involves sex or a death. Everyone who is either serving for one of those offenses or does not have a high score cannot be released without an interview.

Interviews are conducted by just one member of the board. These days most are done by video conference. The MDOC's policy directive (PD 06.05.104) characterizes interviews as "informal, non-adversarial proceedings." The prisoner must be given 30 days advance notice and may be accompanied at the hearing by a representative, such as a friend or family member. However, the prisoner cannot have legal representation. Registered crime victims are also notified of parole interviews and many choose to provide input to the board, although they cannot attend the interview.

Of course, each year thousands of interviews do not result in release, regardless of outside input. If parole is denied, the prisoner has no right to appeal. However, if parole is granted, both the prosecutor and the victim do have the right to appeal (MCL 791.234). The prisoner cannot be released for at least 28 days in order to give those parties time to go to the circuit court. In addition, if important new information, such as outstanding charges or threats to a victim, is provided to the board during this period, the board can choose to rescind its decision.

HB 4704 (2) would give the prosecutor 42 days' notice of the parole interview -- more than the prisoner gets. It would then allow the prosecutor to actually attend the interview, even though the prisoner can't be represented by a lawyer. The prosecutor knows less than the

parole board about the prisoner's in-prison conduct, program completion, medical history, psychological evaluations and current risk assessment. Typically, what the prosecutor knows is the facts of the original offense, especially if it was a high publicity case or one with very active victims. It is all too easy to imagine the informal parole interview turning into an adversary proceeding, with a skilled lawyer on one side hammering home the details of the crime while a prisoner who may have served decades as punishment struggles to explain how he or she has changed.

The parole interview is not designed to be a resentencing hearing. The parole board's job is to decide, based on post-sentencing factors, whether someone who has served their minimum is currently a good candidate for release. Its job is not to rehash the facts of the crime and decide whether the sentence imposed by the court was long enough. Prosecutors can challenge the sentence at the time of conviction. It would be disingenuous and arguably unethical for prosecutors to come back, years later, and argue against a sentence they tacitly accepted by not appealing or that they actively negotiated as part of a plea bargain.

I don't believe that most prosecutors would choose to inject themselves at parole interviews in this way. But once the statute is amended to allow for the possibility, inevitably some prosecutors will, at least in selected cases. This would totally change the tenor and focus of the interviews. It would unfairly stack the deck against some prisoners, depending on the county they came from.

And the bill would change the process even more dramatically for people whose parole guidelines scores are so favorable that, *by statute*, the board is authorized to grant parole without an interview. In these cases, a prosecution objection could override the statute and force the board to either conduct an interview or deny release. The bill sets no standard for when the prosecutor's reasons would be sufficient to reverse the parole board's decision. Without having to go court and prove that the board had abused its discretion, the prosecutor could just unilaterally decide that the board's decision-making process was not satisfactory.

HB 4704 would fundamentally change the historical concept of parole in Michigan. It would blur the distinction between sentencing and parole. It would diminish the role of both the sentencing judge and the parole board. It implicitly approves the notion that the minimum sentence isn't a meaningful predictor of how long someone with good behavior will actually serve. It explicitly authorizes prosecutors to come back and argue against the very positions they took at trial. As a purely practical matter, it would tend to both slow down the parole process and reduce the number of releases. MDOC costs would increase without any reason to believe this would prevent crime.

I urge you to think long and hard about the impact of HB 4704, not only because I think the consequences are likely to be bad, but because they are so unnecessary. Prosecutors have ample opportunity to influence the prisoner's length of stay, from the time they decide what charges to file to the time they decide to appeal a parole board decision to circuit court. They certainly have ample opportunity to provide the board with material new

information. Whatever the prisoner's status, there is no point when the board is not going to accept and consider communications from the prosecutor. There may well be some timing issues to be worked out between prosecutors and the board, formally or informally, to ensure they receive notice promptly. But that hardly requires changing the entire scope of their participation in the parole process.

The research I mentioned at the beginning of my testimony suggests that a comprehensive reassessment of our parole process is long overdue. Addressing the relevant questions could result in a system that is fairer and less expensive but protects the public at least as well as what we're doing now. But please, don't make changes on a piecemeal basis without determining how they fit into a larger vision. It is far too easy for well-intended fixes to have damaging unintended consequences.