

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK LAWRENCE IDZIAK,

Defendant-Appellant.

Michigan Supreme Court No. 137301

Court of Appeals No. 285975

Kent County Circuit Court
No. 07-000044-FC

**AMICUS BRIEF ON BEHALF OF THE
MICHIGAN DEPARTMENT OF CORRECTIONS**

Michael A. Cox
Attorney General

B. Eric Restuccia (P24215)
Solicitor General
Counsel of Record

Henry Boynton (P25242)
Assistant Solicitor General

Charles C. Schettler (P28884)
Assistant Attorney General
Department of Attorney General
Appellate Division
P.O. Box 30212
Lansing, MI 48909
Telephone: (517) 373-1124

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QUESTIONS PRESENTED

In an order dated January 28, 2009, this Court invited the Department of Attorney General to respond on behalf of the Michigan Department of Corrections related to the following four questions it posed to the parties:

- (1) whether the Parole Board is required to compute a new parole eligibility date for inmates who commit new criminal offenses while on parole, by exercising its discretion to determine what is the "remaining portion" of the sentence for the previous offense [see MCL 768.7a(2); *Wayne County Prosecutor v Michigan Department of Corrections (People v Young)*, 451 Mich 569 (1996)];
- (2) if so, whether this requirement is satisfied by an MDOC policy to automatically begin the new sentence as of the date of the most recent sentencing, minus any days of jail credit awarded by the trial court;
- (3) whether (a) the judiciary is precluded from revising such a decision by the MDOC under *Warda v City Council*, 472 Mich 326, 333 (2005), or (b) the decision can constitute a violation of a defendant's right to due process or equal protection under the law; and
- (4) whether a trial court is authorized, required, or not authorized to award jail credit to parolees under MCL 769.11b.

INTRODUCTION

The Michigan Parole Board has the authority by statute to determine the amount of time that a defendant will serve once he has served his minimum sentence, up to the maximum sentence. But it is for the courts to set a defendant's sentence, not the Department of Corrections.

The answers to the questions presented by this Court requires an evaluation of the interplay between three statutes: MCL 768.7a (consecutive sentencing statute); MCL 791.234(3) (consecutive sentences); and MCL 769.11b (jail credit statute).

The consecutive sentencing statute, MCL 768.7a, requires that a defendant's sentence for a crime that was committed on parole will begin to run at the "expiration of the remaining portion of the term of imprisonment imposed for the previous offense." As properly evaluated by this Court in *Wayne County Prosecutor v Department of Corrections*, 451 Mich 569 (1996), and by the prosecution's brief here, the "remaining portion" refers to any remaining time for the minimum sentence on the original sentence that is then added to the minimum sentence on the new crime. This point is confirmed by the statute within the Corrections Code, MCL 791.234(3), which provides that for consecutive sentences the Department should total the minimums and the maximums to create the new earliest date and the new maximum date.

Consistent with this analysis, the jail credit statute under MCL 769.11b provides that a defendant will receive jail credit where bond is denied or where the defendant is unable to furnish the bond for the offense for which he is convicted. A defendant who is arrested for a new crime while on parole, however, is subject to a parole violation and the Department is authorized to detain such a defendant under MCL 791.238. Therefore, where a parole violation warrant has been issued, the pretrial detention relates to the parole warrant and not the new offense. The defendant then receives credit for the time against the minimum (if any remaining) and the maximum sentence from the original conviction, not for the new conviction.

This analysis is the preface to the Department's response to the Court's questions.

First, as a matter of policy, the Department does not impose any additional sanction on a defendant who violates a parole and is given a new prison sentence. Rather, as required by statute, the Department recalculates the new minimum and the new maximum sentences by adding any minimum and maximum sentence remaining to the new conviction's minimum and maximum sentence. But ordinarily, as here, the defendant will have served his minimum from his original sentence before his release on parole and therefore the new minimum is determined by the new minimum alone.

Second, the Department does comply with the statutory requirement in MCL 768.7a(2) by adding the remaining part of the minimum and maximum with the new minimum and maximum.

Third, because the Department does not exercise its discretion and tack on another period of time on top of the new established minimum date before an inmate becomes parole eligible, this Court's decision in *Warda v City Council*, 472 Mich 326 (2005) is not implicated. The application of this statutory scheme requires the conclusion that a parolee will not receive jail credit for the new conviction. The effect of Michigan law is to encourage pleas. Thus, there is no violation of due process or equal protection under the law.

Fourth, the trial court is not authorized to award jail credit for the new offense under MCL 769.11b, but only for the previous offense. The time spent as a pretrial detainee – based on the parole hold – is counted as time served against the maximum of the original sentence under MCL 791.238(6). Although not true of this defendant, a defendant would also receive credit against the remaining portion of the minimum of the original sentence if released before the minimum was served, such as where the defendant was given "special parole" under MCL 791.233(1). But Michigan does not provide double credit for parolees who commit new offenses.

FACTS AND PROCEEDINGS

The Department of Attorney General refers the Court to defendant's statement of facts.

ARGUMENT

The statutory framework in Michigan requires that a parolee who commits a new crime will be sentenced consecutively. The Department only recalculates the defendant's sentencing term by adding the minimums and maximums. The Department does not impose a sentence. Because the parolee was held pretrial based on the parole hold – and not based on the new charge – the jail credit statute does not apply. Instead, the parolee receives credit on his maximum and on his minimum if there is any remaining from his original sentence. This scheme does not violate due process or equal protection.

A. Standard of Review

This evaluation of this Court's questions requires the review of several statutes. As such, these are legal questions subject to de novo review.¹

B. Analysis

The four questions posed are interrelated and touch directly on the role the Department of Corrections plays in its supervision of parolees. As effectively advanced by the prosecution in its brief on the merits, the answers to these questions are dependent on the proper interplay of three statutes. But the questions themselves from the Court are predicated on a basic misunderstanding of the role that Corrections plays in these cases. The Department does not sentence defendants, the courts do. The Department merely calculates the new earliest date and the new maximum date by adding the minimum and maximum for the parolee's new crime to the remaining portion of the minimum (if any) and maximum sentence of the original sentence. The defendant receives credit for this time against his original sentence. In this setting, the Department does not exercise its discretion regarding parolees, other than to place a parole hold on a parolee who has been arrested and charged with a new crime. Once convicted, parole is revoked by operation of law. The Parole Board does not impose any additional time to delay consideration of parole for these violators once convicted. This point underlies the answers to each of the four questions.

¹ *Cardinal Mooney High School v MHSAA*, 435 Mich 75, 80; 467 NW2d 21 (1991).

1. *As a matter of law, not discretion, the remaining portion of the original prison term is added to the minimum and maximum sentence for the new conviction.*

The key provision here is the consecutive sentencing statute, MCL 768.7a. This statute provides that a new crime while committed on parole will begin to be served at the end of the "remaining portion" of the defendant's original sentence:

If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the *later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.* [MCL 768.7a(2)(emphasis added).]

This Court provided a comprehensive and accurate analysis of the significance of this statute in its decision in *Wayne County Prosecutor v Department of Corrections*.² In brief, this statute mandates consecutive sentencing.

In *Wayne County Prosecutor*, this Court rejected the claim that the new sentence only begins to run after the defendant completes his maximum sentence on the original conviction. In reaching this conclusion, this Court identified the parallel language in subparagraph (1) for escapees, MCL 768.7a(1):

The Legislature responded with the enactment of § 7a(2) to require parolees to be treated the same as prisoners who commit crimes while incarcerated or at large on escape.³

This Court noted that the escapee statute had long been interpreted as requiring that the defendant only serve the remaining part of his previous minimum sentence before beginning his new minimum.⁴

² *Wayne County Prosecutor v Department of Corrections*, 451 Mich 569, 577-582; 548 NW2d 900 (1996).

³ *Wayne County Prosecutor*, 451 Mich at 579.

⁴ *Wayne County Prosecutor*, 451 Mich at 580.

Thus, this Court held that the statute only required adding the remaining portion of the minimum (if any) with the minimum from the new conviction:

We conclude that the "remaining portion" clause of § 7a(2) requires the offender to serve at least the combined minimums of his sentences, plus whatever portion, between the minimum and the maximum, of the earlier sentence that the Parole Board may, because the parolee violated the terms of parole, require him to serve.⁵

This analysis comports with MCL 791.234(3), which requires adding the minimum sentences.

But where the defendant has already served his minimum sentence, the result is that "ordinarily the new sentence will be consecutive to nothing."⁶

The reference in *Wayne County Prosecutor* to the additional "portion" that the Parole Board may impose refers to the authority of the Parole Board to hold the parole violator to the maximum of the original sentence under MCL 791.238(2).⁷ Both defendant and the prosecution correctly noted in their briefs that the Department does not exercise this discretion with respect to the calculation of the sentences. Rather, as a matter of policy, the Department merely recalculates the sentence under the statutes for the defendant by adding the remaining portions of the minimum (if any) and the maximum from the original sentence with the minimum and maximum of the new conviction. See Amicus Department of Corrections' Response in *People v Wright*, filed December 7, 2005, pp 10-13, which is included as Attachment B to defendant's brief. Further, the conviction alleviates the obligation of the Parole Board to hold a fact-finding hearing because the parole violation occurs as a matter of law based on the new conviction consistent with MCL 791.240a(1) and Departmental policy.

⁵ *Wayne County Prosecutor*, 451 Mich at 584.

⁶ *Wayne County Prosecutor*, 451 Mich at 579.

⁷ MCL 791.238(2) provides in pertinent part for this authority:

A prisoner violating the provisions of his or her parole and for whose return a warrant has been issued by the deputy director of the bureau of field services is treated as an escaped prisoner *and is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment.* [Emphasis added.]

As noted above, the action of recalculating a defendant's sentence based on consecutive sentencing is based on MCL 791.234(3), which requires the Parole Board to calculate the earliest release date and the maximum term for consecutive sentences by adding the minimums and maximum sentences:

If a prisoner other than a prisoner subject to disciplinary time is sentenced for consecutive terms, *whether received at the same time or at any time during the life of the original sentence*, the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms, less the good time and disciplinary credits allowed by statute. The maximum terms of the sentences shall be added to compute the new maximum term under this subsection, and discharge shall be issued only after the total of the maximum sentences has been served less good time and disciplinary credits, unless the prisoner is paroled and discharged upon satisfactory completion of the parole. [MCL 791.234(3)(emphasis added).]

The statute governs how consecutive sentences are calculated when imposed "at any time during the life of the original sentence." For a parolee who commits a new crime, the parolee is sentenced on the new crime during the life of the original sentence. Consequently, MCL 791.234(3) applies to the consecutive sentence mandated by MCL 768.7a(2) when a parolee commits a new crime.

The paramount issue for defendant here is the applicability of the jail credit statute. MCL 769.11b provides that a defendant will receive credit where he has served jail time "because" he has been denied bond or is unable to furnish bond "for the offense for which he is convicted:"

Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing *because* of being denied or unable to furnish bond *for the offense of which he is convicted*, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing. [MCL 769.11b (emphasis added).]

The statute therefore requires that the jail time be served because of the new crime, and not for some other reason. In other words, the basis of the detention must be for the denial of bond on the new case as against some other basis for the detention.

Defendant argues that this statute provides generally that a defendant is eligible for jail credit for a new conviction even if he his being held for another reason, i.e., being held for another conviction or, as here, based on a parole hold. This does not give effect to the plain language of the statute. This position of defendant also ignores the fact that he is already receiving jail credit on his original sentence because of the parole hold. Defendant is seeking double credit by claiming he should receive credit on his new sentence.

In its recommendations to sentencing courts, the Department will routinely recommend that the trial court provide no jail credit for the new conviction where there has been a parole detainer for the defendant during the pendency of the case. As persuasively argued by the prosecution, this position is supported by this Court's decision in *People v Prieskorn*.⁸

In *Prieskorn*, this Court evaluated the jail credit statute and its applicability for a defendant who was arrested and charged with a crime and granted bond, and then he was incarcerated for a different crime while still awaiting the disposition of the case for which he had been originally granted bond. The Court held that the defendant would not be eligible for this time while incarcerated because he was not being held for the offense for which he sought credit:

The Legislature sought, in enacting the statute, to give a criminal defendant a right to credit for any presentence time served "for the offense of which he is convicted," and not upon any other conviction. Had the Legislature intended that convicted defendants be given sentence credit for all time served prior to sentencing day, regardless of the purpose for which the presentence confinement was served, it would not have conditioned and limited entitlement to credit to time served "for the offense of which [the defendant] is convicted."⁹

The same is true here.

⁸ *People v Prieskorn*, 424 Mich 327; 381 NW2d 646 (1985).

⁹ *Prieskorn*, 424 Mich at 341.

Once the Department places a parole violation hold on a defendant, any limitation on his custody does not relate to the new charge, but to the parole hold. The Department has the authority to detain a parolee who is arrested and charged with a new crime:

The warrant of the deputy director of the bureau of field services is a sufficient warrant authorizing all officers named in the warrant to detain the paroled prisoner in any jail of the state until his or her return to the state penal institution. [MCL 791.238(2).]

A prisoner held on a parole hold "shall be incarcerated" pending any charge of a parole violation under MCL 791.238(1).¹⁰ Several decisions of the Michigan Courts of Appeals have recognized that where the defendants were not held on the new crime, but on the parole warrant, they were not entitled to credit on the new conviction.¹¹

These cases are consistent with the Michigan policy of not allowing a defendant to receive a double credit for his jail credit. There can be no dispute that a defendant who is held on a parole violation detainer during the pendency of the new case is credited with the jail time for his original sentence under MCL 791.238(6). This is because the defendant continues to accrue time for his original case's maximum sentence. As a consequence, a defendant will receive the benefit from his jail credit when the new total maximum sentence is calculated because the remaining portion of the maximum sentence from the original sentence will be reduced the number of days served while held on the parole detainer during the pendency of the new case. This is significant because there are more than 12,000 prisoners who are serving beyond their minimum sentence

¹⁰ MCL 791.238(1) provides in pertinent part that "[p]ending a hearing upon any charge of parole violation, the prisoner shall remain incarcerated."

¹¹ See, e.g., *People v Filip*, 278 Mich App 635, 664; 754 NW2d 660 (2008); *People v Stead*, 270 Mich App 550, 551; 716 NW2d 324 (2006). See also *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004) ("When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense").

currently in the Department based on the exercise of the Parole Board's discretion to deny a prisoner's release. A defendant's maximum sentence matters.

Moreover, there are circumstances in which the defendant will also receive a benefit on his minimum sentence on the original conviction. Although this Court did not rely on this point in *Wayne County Prosecutor*, this Court did note that there is a "special parole" opportunity under MCL 791.233(1)(b) in which the sentencing court can recommend that the prisoner be released before the minimum sentence.¹² In that situation, the defendant could be released before he served his minimum sentence. If that defendant committed a new crime while on parole, that defendant may well have time remaining on his minimum sentence. Thus, in this circumstance, the defendant would receive credit for his original sentence against his minimum sentence.

In the absence of the conclusion that the jail credit sentence does not apply to parolees who are held on a parole hold, the defendant will at the very least receive a "double credit" for the maximum sentence. Stated differently, the defendant will be credited for his time served for his maximum sentence on his previous conviction and on his new conviction's minimum and maximum sentence despite the clear legislative intent in MCL 768.7a(2) to eliminate this practice. MCL 768.7a(2) would be effectively nullified.

The Department notes, of course, that it merely makes recommendations regarding jail credit to the sentencing court in the presentence investigation report. Where the sentencing court orders that the defendant receive credit on his minimum for the new crime, the Department complies with the order. It is the responsibility of the prosecutor to challenge the validity of the order.

¹² *Wayne County Prosecutor*, 451 Mich at 581 n 24.

2. *The Department of Corrections complies with the Michigan statutory law.*

As noted in response to the first question, the Parole Board does not impose a new sentence for a defendant that commits a crime while on parole. That is the role of the courts. Rather, the Department will place a parole hold on a defendant and will revoke the defendant's parole where he is convicted of a new crime. As noted in the amicus brief in *Wright*, the Department does not impose new sentences even for offenders who are "technical violators" who are returned to prison. In those circumstances, the Parole Board conducts a parole violation hearing, and if the defendant is found to have violated parole, the Department will set a new "continuation period" before the Parole Board will again review the prisoner for parole-worthiness. This standard also applies to other prisoners who are considered for parole but not given parole. The Parole Board will set a new "continuation period" – ordinarily 12 months or 24 months later – when the prisoner will again be reviewed for whether the prisoner is a good candidate for parole.

3. *The Warda case is not implicated by this case and the legislative scheme here does not violate a defendant's right to due process or equal protection.*

It is significant to begin this analysis with the recognition that there is no constitutional right to be released on parole.¹³ Parole is conferred as a matter of grace, not of right.

The Court requested that the parties address the applicability of the *Warda* case to the Department of Corrections for parole violators. In *Warda*, this Court determined that there were certain authority conferred by legislation on an administrative agency that were beyond review:

Because the city council's decision under this statute constitutes a discretionary act of a separate branch of government, the judiciary is without authority to review it.¹⁴

¹³ *Jones v Department of Corrections*, 468 Mich 646, 451; 664 NW2d 717 (2003).

¹⁴ *Warda*, 472 Mich at 328.

The analysis on this point from this Court was rooted in the doctrine of the separation of powers in which the judiciary would not set policy for the city council where the Legislature invested this responsibility in the city.¹⁵

This Court did identify a judicial role in *Warda* for examining whether the discretionary act may be improper because of the obligation of a government agency to comport with the State and Federal Constitutions:

Even a discretionary action of a governmental agency must still comport with the constitutions of this state and the United States.

* * *

The decisions of a governmental agency, for example, to award attorney fees on the basis of race, religion, or nationality might implicate the equal protection guarantees of the federal and state constitutions, while decisions influenced by corruption might implicate the due process guarantees of these same constitutions.¹⁶

Thus, the discretionary acts of a governmental agency must comport with equal protection and due process and are subject to judicial review on these issues.

The *Warda* decision is not implicated here, however, because the Parole Board does not exercise its discretion in this setting – it does not impose any new burden on a defendant who commits a crime while on parole other than to enforce Michigan's consecutive sentencing scheme. The Legislature has given the Department this authority in MCL 791.238(2) to hold a prisoner who commits a new crime to serve out the "unexpired portion of his or her maximum term," but these offenders are reviewed for parole, just as any other prisoner, after completing their minimum sentence.

¹⁵ *Warda*, 472 Mich at 334 ("So long as the power to govern the city and control its affairs is vested by the people of Flushing in an elected city council, neither this Court nor any other may assume to direct the local policy of the city of Flushing").

¹⁶ *Warda*, 472 Mich at 335 (citations omitted).

Insofar as defendant claims that Michigan's statutory scheme is unconstitutional in failing to give a parolee credit for both his previous conviction and his new conviction, this Court should reject this argument. As already noted, a defendant will receive credit for his time served on his original sentence while held on the parole detainer for the remaining portion (if any) on his minimum, and for the remaining portion of his maximum. In his argument, defendant fails to address the point that a defendant does receive a benefit from the time spent pending as a detainee pending the disposition of the new case.

The suggestion that Michigan is required to double count this time for both the original conviction and the new conviction is not supported in law. The effect of Michigan's legislative scheme for parolees is to encourage pleas because prisoners are generally paroled before they reach their maximum sentence. Therefore, the earliest release date (the adding of the minimums) is when the Parole Board is vested with jurisdiction over parolees for purposes of parole, see MCL 791.234(3), and can exercise its discretion to release if it concludes that a prisoner should be granted a parole. In this way, a parolee who has already served his minimum sentence from his previous conviction is encouraged to plead guilty under Michigan's consecutive sentencing scheme because that prisoner is not making any progress against the new minimum that will be imposed if convicted.

This issue of providing leniency in exchange for waiving a constitutional right has been previously addressed. This issue was placed in stark relief in a case in a case in the Court of Appeals in which a trial court noted that it provided "sentence concession" for a defendant who waived his right to a jury trial and then was convicted at a bench trial:

And why do defendant's waive [his right to a jury trial]? Because their attorneys tell them precisely what Mr. Evelyn [defendant's trial counsel] said he told Mr. Godbold in this case. The attorney makes a judgment about the likelihood of winning or losing either before a bench trial or a jury trial. I want attorneys to tell

defendants. I've never told them to tell them that, but I do want attorneys to tell defendants that they're going to get a sentence concession [sic, concession] for a bench trial if they do. That does not mean the flip side, that they get punished for exercising their right to trial because they do not. It is simply that the Court owes the defendant nothing for saving the Court time.¹⁷

In examining this issue, the Court of Appeals concluded that there was no constitutional violation because the trial court did not punish but rather granted leniency in exchange for a waiver of the right to a jury trial that assisted the Court.¹⁸

In reaching this decision, the Court of Appeals expressly relied on the case (cited by the prosecution here), *Corbitt v New Jersey*, in which the United States Supreme Court upheld the New Jersey sentencing scheme that provided a sentencing concession to a person that pled guilty rather than exercised the right to have a jury trial:

Specifically, there is no per se rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea.¹⁹

The same incentives are at play here. In fact, the federal guideline system expressly gives a guideline reduction to a defendant who pleads guilty ("Acceptance of Responsibility") under 18 USCS Appx § 3E1.1 of the federal sentencing guidelines manual. The opportunity to begin to serve one's minimum sentence immediately is a similar incentive.

In fact, this Court noted the point in *Prieskorn* that the practical effect of the consecutive sentencing statute would to create incentives for a defendant to plead guilty:

It may be that for defendants who find themselves incarcerated for multiple unrelated offenses, one of the motivations to plead guilty to some of the charges is the desire to accelerate the imposition of sentence in order to benefit, as much as

¹⁷ *People v Godbold*, 230 Mich App 508, 515; 585 NW2d 13 (1998).

¹⁸ *Godbold*, 230 Mich App at 520 ("In sum, because there is no indication that had defendant opted for a jury trial, he would have faced 'retaliatory sentencing,' and the practice does not needlessly encourage waiver of the right to a trial by jury, we conclude that the trial court did not coerce defendant's waiver")(citation omitted).

¹⁹ *Corbitt v New Jersey*, 439 US 212, 218-219; 99 SCt 492; 58 LEd2d 466 (1978).

possible, from Michigan's concurrent sentencing law. But that ingredient of a given defendant's motivation derives from the peculiar facts with which the defendant facing multiple charges is confronted and not, we think, from limiting application of the sentence credit statute to those circumstances described by its terms.²⁰

Nevertheless, the Court concluded that the language of the statute (MCL 768.7a[2]) must be given effect:

We think it is clear that the Legislature sought, by the statute, to give a criminal defendant a right to credit for any presentence time served upon "the offense of which he is convicted." Judicial obedience to the language of the legislation may, incidentally, indeed coincidentally, have the effect of motivating a defendant, who is charged with multiple offenses and who has posted bond for one offense and was released, but who is incarcerated for a second offense, to waive his right to trial and proceed to plead guilty in the first case in order to get the sentencing clock running on that conviction while awaiting final disposition of the offense for which he is denied bond, or final resolution of an unrelated "hold" or "detainer." However, that motivation does not change the language of the statute and should not be judicial excuse for applying the statute to situations to which it does not extend.²¹

There was no suggestion in this analysis that this result violated a defendant's due process or equal protection guarantees.

In two separate dissents, several Justices of this Court have expressed reservations about the fairness of this process that allows two similarly-situated parolees who are charged with committing a crime while on parole to serve different amount of times toward their new minimum based on whether they challenged their charge or plead guilty. These dissenting opinions, in *People v Wright*,²² and in *People v Conway*,²³ were predicated on the mistake of fact that the Department *elected* to impose this loss of jail credit as punishment. This is not so. Rather, the

²⁰ *Prieskorn*, 424 Mich at 341.

²¹ *Prieskorn*, 424 Mich at 341.

²² *People v Wright*, 474 Mich 1138; 716 NW2d 552 (2006)(Kelly, J., dissenting; Markman, J., dissenting, joined by Cavanagh, J.).

²³ *People v Conway*, 474 Mich 1162; 746 NW2d 867 (2008)(Kelly, J., dissenting; Markman, J., dissenting, joined by Cavanagh, J.).

Department merely recommends to the sentencing court that it apply the consecutive sentencing statute, which effectively does not allow a parolee to receive double credit when held on a different case. The Parole Board does not impose any specific limits on a parolee's eligibility for parole after the parolee has served the new minimum sentence (established by adding the remaining portion of the previous conviction's minimum with the new conviction's minimum).²⁴ The Parole Board may, of course, consider the fact that the defendant failed on parole once before in determining the defendant's parole-worthiness but this does not affect the date for that defendant's parole-eligibility. The difference for a defendant who pleads guilty as against one who challenged his charge and goes to trial is created by the legislative scheme.

And the variations identified by the justices in *Wright* and *Conway* occur already for defendants who are unable to meet the cost of bond regardless whether they are parolees. For two defendants charged with the same crime that will result in only a probationary sentence without jail time, the defendant who is unable to meet bail will be required to be incarcerated while the one who can meet bond will not. For two defendants who are charged with same crime and ultimately are acquitted, the one who can post bond will not serve any jail sentence while the one who cannot will remain incarcerated for the pendency of the case. These differences all reflect the policy selection of the Legislature to create substantial benefits for pleading guilty. As the Michigan courts have found, as has the United States Supreme Court, this practice does not violate the Constitution.

²⁴ The only exception to this point is the "zero-tolerance" policy instituted by the Governor on July 14, 2004 for new gun offense convictions committed while on parole. The Parole Board will not grant parole to such an offender until the prisoner has served at least five years in prison. Thus, if the parolee is given a sentence of 2-to-10 years on a new gun offense committed while on parole, the new minimum would be two years assuming that there was no remaining time on his original minimum. The Parole Board would not parole this offender until at least three more years had passed, there by ensuring that he served at least five years.

4. *The trial court is not authorized under MCL 769.11b to award jail credit for the new crime to parolees where that prisoner is being detained during the pendency of the new case on a parole detainer. Rather, the credit is applied to the previous conviction.*

As noted in the answer to the first question, the Legislature has created a policy of imposing consecutive sentences for parole violators who commit new crimes under MCL 768.7a(2) to eliminate the double counting that occurs for concurrent sentences. The language of the jail credit statute, MCL 769.11b, requires that the time be counted only where the bond conditions for the new crime are the basis for the defendant's detention. Otherwise, under the example provided by the prosecution, a defendant who commits a crime while in prison will receive the benefit of jail credit even if the defendant would have served that same time in prison on his original conviction. See prosecution brief, p 7. In this example, the defendant would receive double jail credit – against both his original sentence and his new sentence. This effectively rewards a defendant who commits a crime while on parole and defeats the purpose of the consecutive sentence statute in MCL 768.7a(2).

This is a powerful point about the reason that the detention for which the defendant seeks credit under MCL 769.11b must be based on the conviction for which he seeks credit. The express language of MCL 769.11b requires that the defendant has served time in jail "because of being denied or unable to furnish bond for the offense of which he is convicted." That was not the case here – defendant was held based on his parole hold. Consequently, the sentencing court here correctly denied defendant any jail credit for his new offense. Instead, he received the credit for this time in the reduction of the maximum of his original sentence.

Conclusion and Relief Sought

WHEREFORE, the Department of Corrections respectfully requests that this Honorable Court affirm the decision of the sentencing court.

Respectfully submitted,

Michael A. Cox
Attorney General

B. Eric Restuccia (P49550)
Solicitor General

Henry Boynton (P25242)
Assistant Solicitor General

Charles C. Schettler (P28884)
Department of Attorney General
P.O. Box 30212
Lansing, MI 48909
Telephone: (517) 373-1124

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