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February 11, 2020

Anne M. Boomer  
Administrative Counsel  
Michigan Supreme Court  
P. O. Box 30052  
Lansing, Michigan 48909

**Re: Support for ADM File No. 2019-13**

Dear Ms. Boomer:

I write on behalf of the Prisons and Corrections Section of the State Bar of Michigan. The Section supports amending MCR 7.118 to require the appointment of counsel to incarcerated individuals who have been granted a parole when the Parole Board's decision is appealed by the prosecutor or a victim.

MCL 791.234 (11) states:

The action of the parole board in granting a parole is appealable by the prosecutor of the county from which the prisoner was committed or the victim of the crime for which the prisoner was convicted. The appeal shall be to the circuit court in the county from which the prisoner was committed, by leave of the court.

Prisoners do not have the same right to appeal when their parole is denied.

MCR 7.118 establishes the procedure for prosecutor/victim appeals. It states that the prisoner "shall be the appellee" and that the Parole Board "may move to intervene as an appellee." Subsection (D)(3)(b) further states:

(i) the prisoner may respond to the application for leave to appeal through retained counsel or in propria persona, although no response is required, and

(ii) if an order of parole is issued under MCL 791.236 before the completion of appellate proceedings, a stay may be granted in the manner provided by MCR 7.108, except that no bond is required.

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The Parole Board routinely intervenes, represented by the Office of the Attorney General. Few incarcerated individuals have the resources to retain counsel. The individual's release is routinely stayed, requiring him or her to remain in prison throughout the pendency of the appeal. Although in the past some counties assigned the State Appellate Defender Officer (SADO) to represent individuals, from 2016-2018, none of the 45 prisoners who faced parole appeals in 21 different counties had counsel appointed. Eight of them faced two appeals during that time.<sup>1</sup>

The Assistant Attorney General (AG) focuses on defending the board's authority to exercise its discretion and the propriety of its procedures. The Assistant AG does not communicate with the incarcerated individual, provide the individual with any assistance in navigating the appeal process, or argue the facts that make the individual a good candidate for release.

Appointed counsel would meet with the individual to provide information about the process and assurance that his or her interests will be represented. These attorney/client meetings can be invaluable to the case. The individual knows his or her file better than anyone and can often identify weaknesses in the prosecutor's appeal. Sometimes the individual has relevant information of which the Assistant AG is unaware.

Counsel for the individual is also very helpful during oral argument in the Circuit Court. In addition to making the legal arguments to the Court, the attorney can encourage the frustrated individual to abstain from making unwise statements in court or writing to the judge. Counsel can also advise their clients about the lengthy process, the challenges involved, how to conduct themselves during the interim and how to handle any subsequent meetings with the Board.

Counsel is also critical to making the determination whether to appeal the Circuit Court decision revoking parole to the Court of Appeals. Sometimes it is in the individual's best interest to wait for the Board to grant another parole. Sometimes it is not. Appointed counsel could consult with the Assistant AG in developing the most effective strategy for ultimately ensuring the grant of parole is honored. If pursuing an appeal of the Circuit Court's decision is in the individual's best interest, a lawyer who understands the factual and legal arguments would handle the case instead of forcing unprepared incarcerated individuals who lack the resources and ability, to proceed on their own.

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<sup>1</sup> These numbers were obtained from cross-references of data from the Michigan Department of Corrections, the Court of Appeals, Circuit Court dockets, and the State Appellate Defender Office. See also Appendices A and B.

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Although there are not a great many of these parole appeals, the consequences to the affected individuals are substantial. Providing appointed counsel would be relatively inexpensive for those counties that choose to file appeals, although associating a cost with the choice to appeal may encourage some prosecutors to be more selective. In the alternative, the courts could appoint SADO at no cost.

Where a county prosecutor appears or a victim has representation, an unrepresented incarcerated individual is no match in litigating complex legal issues. The inequity is plain. The Prisons and Corrections Section believes it is essential, as a matter of fairness, that prisoners who are unable to hire counsel to defend these appeals have counsel appointed to represent them.

While there is no right to have a parole granted in Michigan and therefore no right to counsel in the parole decision-making process, once a person has been released, a liberty interest attaches. Michigan already recognizes the right to counsel in the context of parole revocation proceedings and appoints counsel in such proceedings where the parolee is indigent.

The cases where a decision to grant parole has been made but the prisoner's release has been stayed by a prosecutor's or victim's appeal fall in something of a gray area. The situation, however, is most similar to revocation proceedings. The Parole Board's decision-making process has ended with an outcome favorable to the incarcerated individual. The person has a scheduled release date and is simply waiting to walk through the gates. The prosecutor or victim is trying to prevent the Board's decision to grant release from taking effect. At that point, but for the intervention of a third party, the incarcerated individual would be at liberty in the community, at which point he or she would have an undisputed right to the appointment of counsel to defend against his or her return to prison.

We urge the Court to recognize the right to counsel in the context of these appeals and to amend the court rule to require that counsel is appointed for indigent individuals.

We note that several members of the Section Council would urge you to also require the appointment of counsel for victims who choose to appeal a parole grant but cannot afford retained counsel. The rationale is that allowing prisoners a right to an attorney while victims must hire their own or represent themselves would place victims at a disadvantage relative to the person who victimized them.

Attached are two appendices. Appendix A summarizes facts about the 53 parole appeals filed by victims and prosecutors from Jan. 2016 – Dec. 2018. Appendix B

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briefly describes some cases that illustrate the consequences of these appeals for prisoners.

Thank you for your consideration. Please do not hesitate to contact me if you have any questions.

Sincerely,



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Chair

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## **Appendix A: Facts about parole appeals by prosecutors/victims (2016-2018)**

*Note:* This data was compiled by hand and may be incomplete. Many trial courts have little or no information online. If there was no appeal to the Court of Appeals, it was often impossible to confirm that no counsel was appointed or to see what happened in the trial court. On some points the numbers are more suggestive than exact.

### **Number and Frequency of Appeals**

- For the entire period there were 53 appeals filed. For eight people, there were two appeals each, so the 53 cases involved 45 prisoners.
- The appeals came from 21 different counties:
  - 16 from Monroe (12 people)
  - 9 from Macomb (8 people)
  - 6 from Wayne (4 people)
  - 3 from Genesee
  - 2 from Ingham
  - 2 from Oceana (1 person)
  - 1 each from 15 other counties.
  - Notably, none were from Oakland County, which appealed routinely until appellate decisions set a standard that generally supported the Parole Board's exercise of discretion.
- Of the 45 prisoners, 20 were convicted of sex offenses and 11 were convicted of murder, manslaughter or solicitation to murder. Among the other offenses were assault, home invasion and aggravated stalking.
- 16 appeals (involving 14 people) were initiated by victims, not prosecutors.
  - All the appeals from Wayne and Ingham Counties were by victims, as were two of three from Genesee.
  - Victim appeals run the risk of being dismissed on procedural grounds or denied for lack of merit. We know that at least five failed in the trial court.
  - In one case the victim appealed twice, i.e. two different Parole Board decisions, and in another the victim initiated the appeal of the first Parole Board decision and the prosecutor appealed the second.
- It appears that counsel was not appointed to represent the prisoner in any cases.
  - Retained counsel appeared in seven cases.
  - SADO, which used to be appointed by some counties to represent the prisoners, has not received an appointment for several years.
- Fourteen circuit court decisions (involving 13 prisoners) that reversed parole grants were appealed to the Court of Appeals with the following outcomes:

- Five were reversed by the Court of Appeals
- In seven, the Court of Appeals denied leave
  - The Supreme Court remanded for full consideration in three; leave applications to the Supreme Court are pending in two
  - In one, reconsideration was recently denied by the Court of Appeals
  - In one, denial occurred in early April
- In one, the Court of Appeals affirmed the circuit court and the Supreme Court denied leave
- In one, the Court of Appeals affirmed, and it does not appear there was an appeal to the Supreme Court
- Of the 45 people who had one or two parole grants appealed:
  - 27 have been paroled
  - 2 have been discharged from custody (we don't know if they were paroled or served their whole sentence)
  - 16 are still in prison.

### **Timeline of Appeals**

- The timeline of the appeal ranged from a few months (for appeals that were filed recently or were quickly dismissed by the trial court) to 33 months and counting.
- The median extra time prisoners served as a result of appeals was 12 months.
- *Note:* The date the appeal was served was subtracted from either the date the person was paroled or March 3, 2019 (the date this appendix was compiled) for people who are still incarcerated in an attempt to measure the consequences of these appeals to prisoners.

## Appendix B: Sample Cases

- **Richard McBrayer** was convicted in Macomb County of CSC1 and sentenced to serve 20-40 years. He first became eligible for parole in 2010. He was first granted parole in 2016 but the victim appealed. The trial court reversed the Parole Board's decision. The trial court was upheld on appeal. The Parole Board subsequently granted parole again and Mr. McBrayer was released. However, the victim saw him in the community and persuaded the prosecutor to appeal. The trial court reversed the Parole Board's decision and Mr. McBrayer was returned to prison. The Court of Appeals recently affirmed the trial court's decision.
- **Ronald Spears** was serving 7.6-30 years for malicious destruction of property as a fourth offender in Monroe County. The prosecutor appealed the first decision to grant parole in 2014. The Parole Board responded by rescinding its decision. The prosecutor appealed the second parole grant in February 2016. The trial court reversed the Parole Board. There was no appeal to the Court of Appeals. The prosecutor appealed the third parole grant in May 2017. The trial court reversed the Parole Board again. This time there was an appeal and the Court of Appeals reversed the trial court in May 2018. Spears was finally paroled on November 28, 2018, 21 months after the second appeal was filed and four years after the board's initial decision to release him.
- **Antonio Evans** was serving 10-20 years for murder plus two for felony firearm from Wayne County. The victim appealed the Parole Board's first decision to grant release in August 2016. Although the trial court reversed the Parole Board, there was no appeal to the Court of Appeals. The Parole Board shortly granted parole a second time. The victim appealed that decision in February 2017. The trial court again reversed the Parole Board. That time the Court of Appeals reversed the trial court in an order dated September 14, 2017 that was given immediate effect. The appeal was dismissed by the trial court on November 29, 2017. Evans was paroled on January 30, 2018. The victim's appeals cost him an additional 18 months in prison.
- **Robert Stumpmier** was convicted by a Monroe County jury of six counts of using a computer to commit a crime. He was sentenced to 1.5-7 years. The Parole Board was apparently prepared to release him on his earliest release date (ERD) of December 5, 2016. The prosecutor served an appeal on October 6, 2016. The trial court reversed the Parole Board and there was no further appeal. The Board granted parole again and the prosecutor served another appeal on November 17, 2017. The trial court again reversed the Parole

Board. This time the Court of Appeals denied leave to appeal. The Michigan Supreme Court remanded the case to the Court of Appeals for consideration on the merits on January 23, 2019. On July 25, 2019, the Court of Appeals reversed the trial court and reinstated his parole.

- **Rex Layman** was sentenced in Monroe County to 8-30 years for CSC1. His ERD was in 2004 but the Parole Board repeatedly denied parole. It decided to grant release in 2009 and 2011, but rescinded its decision both times at the request of the prosecution. In 2013, the Board granted parole again but the prosecutor appealed and the trial court reversed the Board's decision. There was no further appeal. In 2015 the Board denied parole.

The Parole Board granted parole again in 2017. The prosecutor appealed in May 2017 and the trial court reversed the Board's decision. This time, Mr. Layman retained counsel and appealed to the Court of Appeals. The Court of Appeals denied leave in December 2017. The Michigan Supreme Court remanded to the Court of Appeals in April 2018. The Court of Appeals reversed the trial court's decision on September 20, 2018. Mr. Layman was finally paroled on January 3, 2019, 19 months after the prosecution filed its last appeal and roughly nine years after the prosecution began its campaign to keep him in prison.

- **David Albers** was sentenced in Macomb County to 9-30 years for solicitation of murder. His ERD was July 27, 2017. The Parole Board granted parole. The prosecutor served a parole appeal on August 4, 2017. The trial court reversed the Parole Board's decision on January 4, 2018. The Court of Appeals granted leave to appeal on June 13, 2018 and reversed the trial court on January 29, 2019.