PAROLABLE LIFERS IN MICHIGAN:

Paying the price of unchecked discretion

A report by the Citizens Alliance on Prisons and Public Spending

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CAPPS
CITIZENS ALLIANCE ON PRISONS & PUBLIC SPENDING

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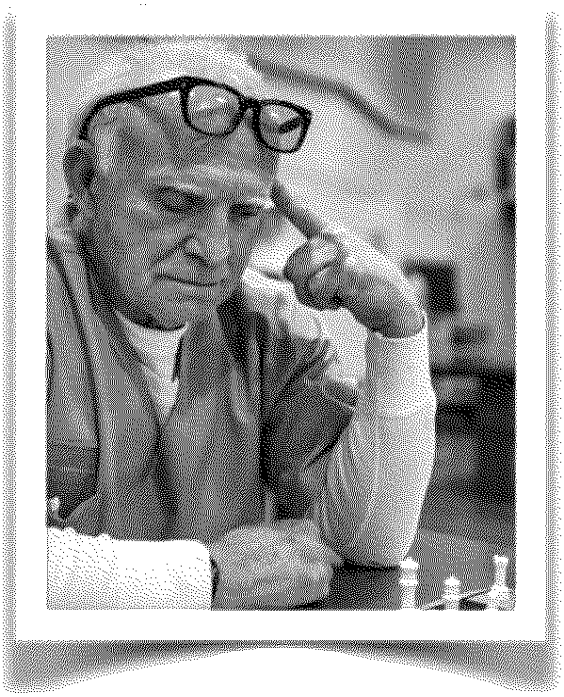

Michigan could save nearly $17 million a year by paroling just half of the aging, low-risk "lifers" who have been eligible for release for decades.

These prisoners continue to be incarcerated because policies and practices that have evolved since 1992 drastically changed how lifers are reviewed by the parole board. Restoring past practices would implement both the legislature's intent in enacting the "lifer law" and the intentions of judges who imposed parolable life sentences in the 1960s, '70s and '80s. These reforms would in no way reduce public safety or the rights of victims to participate in the parole process.

Unlike most states, Michigan gives judges the broad discretion to impose a sentence of "life or any term" for serious crimes such as second-degree murder, armed robbery, assault with intent to murder and first-degree criminal sexual conduct. If the judge sets both a minimum and maximum sentence, the person becomes eligible for parole after serving the minimum. If the judge imposes "life," the person becomes eligible for parole under the "lifer law" after serving 10 years for offenses committed before October 1992 and 15 years for offenses committed thereafter.

As a practical matter, for decades there was relatively little functional difference between a parolable life term and a long indeterminate sentence. Before 1999, prisoners could reduce their minimum sentences substantially by earning good conduct credits. A 40-year minimum imposed in the 1970s could be served in 16 years. Lifers were commonly paroled after 14 years. Judges chose sentences based on how long they believed the person would actually serve.

Lifers were by no means "the worst of the worst."

People who received life sentences and those who received long terms of years had generally committed similar crimes — often situational offenses unlikely to be repeated. The difference was in how the sentencing judge chose to exercise his or her discretion. Today, sentencing guidelines help constrain judicial discretion. However, there are no effective constraints on parole board discretion. As a result, while people who received terms of years were released long ago, lifers sentenced at the same time

continue to languish in prison. Consider, for example, people convicted of a single count of second-degree murder:

- For sentences imposed in the 1970s, 90 percent of those who received a term of years but only 30 percent of the lifers have been granted parole.
- For sentences imposed in the 1980s, 79 percent of those who received a term of years but only 10 percent of the lifers have been granted parole.

The process that produces these results is worth examining.

With the average annual cost of incarcerating an aging prisoner at roughly $40,000, each decision to continue a lifer for five years costs taxpayers about $200,000. Research demonstrates that lifers have by far the lowest re-offense rates of all parolees. Yet because of the many years when virtually no lifers were paroled and the slow pace of releases since, the number of lifers currently eligible for parole has grown to roughly 850.

In deciding to deny release, the parole board is accountable to no one.

The only legal barrier to continued incarceration is the maximum sentence, which lifers do not have. Prisoners can no longer appeal parole denials to the courts (unlike prosecutors and victims who can appeal decisions to grant release). Without judicial review, guidelines that are meant to inform parole board decisions are unenforceable. Decisions that are supposed to be based on the prisoner's re-offense risk are justified by subjective assessments of the person's "insight", "remorse" and "empathy." For lifers, the board has chosen not to even calculate guidelines scores before it decides whether to conduct the public hearing that is required in lifer cases.

The decision-making process for lifers could hardly be less transparent.

A single board member reviews the person's file once every five years and decides whether to conduct a personal interview or to simply recommend that the board take "no interest." Lifers who have not received misconduct citations in decades routinely receive "no interest" notices that give them no idea of why they are being passed over or what they can do to earn release. The board has no idea of how the prisoner, who was typically young when convicted, has matured. It seeks no input from institutional personnel who know the prisoner well. The prisoner has no way of knowing who may have influenced the board's decision and no way to contest what they have said.

The process leads to results that are inconsistent and often inexplicable:

- A man who has served 45 years for a murder he committed at the age of 19 is denied parole despite several commendations earned while working in the community for years under a now-defunct work pass program. His more culpable co-defendant was released in 1979.
- A man who pled guilty to second-degree murder as a result of a vendetta between families and whose judge stated clearly at sentencing the belief that life, with good behavior, meant serving ten years, has served 37 years because the parole board decided the last shot he fired was "unnecessary."

- A woman, now 64 and in ill health, has served 26 years for killing her abusive spouse, despite her outstanding institutional record and the support of her sentencing judge, apparently because the parole board is dissatisfied with her version of the offense.
- A man who explained at his public hearing exactly what he would do if he felt tempted to use drugs was denied parole because he did not have an adequate "relapse prevention plan," a strategy to be developed in an MDOC treatment program he was not allowed to enter because he was a lifer.

Unbridled parole board discretion is compounded by unbridled judicial discretion.

If the board does choose to conduct a public hearing on a lifer, the sentencing judge or that judge's successor in office has 30 days to submit a written objection that prohibits the board from granting parole. The judge need not conduct any hearing or offer any reasons and a judicial "veto" is not subject to any review. More than a fifth of public hearings scheduled in recent years have been cancelled by judicial vetoes – 50 of them since 2007. Most vetoes are by successor judges who have no personal familiarity with the case.

Unfortunately, the parole process was politicized in 1992 when the board's membership was changed from corrections professionals with civil service protection to appointees. Members who base their decisions on the best available evidence are no longer insulated from media pressure at the time of review or the judgment of hindsight if something goes wrong.

Solutions

The process for reviewing parolable lifers can be made more open, more consistent and ultimately more cost-effective by simply returning to pre-1992 practices that promoted thorough, individualized assessments of each lifer's actual risk for re-offending:

- Use the same decision-making criteria and risk assessment tools for lifers as for all other prisoners
- Conduct personal interviews (preferably recorded) every two years once the person becomes eligible for release
- Require written explanations for no interest decisions
- Reinstate prisoner appeals of parole denials
- Eliminate judicial vetoes by successor sentencing judges

If just half of the currently eligible lifers are deserving of public hearings, at the current rate it will take nine years to conduct them. The most efficient way to work through this backlog would be to create, at least temporarily, a lifer review board with the capacity and authority to make lifer parole decisions and recommend commutations.

Paroling lifers in Michigan:
Paying the price of unchecked discretion

This report examines how one piece of Michigan's criminal justice system got broken, what the resulting costs have been and how the system can be fixed.

Hundreds of Michigan prisoners sentenced to "parolable life" terms have been eligible for release for one, two or even three decades. As a group, they are aging, low-risk and guilty of offenses comparable to those for which thousands of other people have served a term of years and been paroled.[1]

Each parole board decision to incarcerate a lifer for another five years — often based on nothing more than a single board member's review of a file — costs taxpayers roughly $200,000.

Americans have certain expectations of government. In times of tight budgets and soaring costs, the one most discussed is **cost-effectiveness**. We want to spend as few taxpayer dollars as possible to fulfill governmental functions. We also want **transparency**, so we know how decisions are being made; **accountability**, so that decisions are subject to review and, if necessary, correction; **consistency**, so that outcomes are predictable and similarly situated citizens are similarly treated; and **objectivity**, so that decisions are based on evidence, not emotions or unsupported assumptions.

The parole decision-making process for lifers violates all these norms. It is one of the few areas where a group of unelected officials has virtually unlimited power over people's lives and the public purse. Over the last few decades, a series of policy changes with no proven impact on public safety has undermined the parole process for prisoners generally and for lifers in particular. The solutions are simple and straightforward: return to practices that protected both public safety and taxpayers' pocketbooks.

Controlling discretion in criminal justice decisions

The State of Michigan convicts more than 50,000 people a year of committing felonies. At each stage of the process, officials make discretionary decisions that are then "checked" by other officials. The police decide whom to arrest, then prosecutors decide whether to prosecute. Prosecutors decide what charges to bring and district judges decide whether there is probable cause to make the defendant stand trial. Circuit judges (and sometimes juries) decide whether the evidence shows guilt beyond a reasonable doubt. If so, those judges select the punishment. But both convictions and sentences are subject to review by higher courts.

THIS CAREFULLY CONSTRUCTED SYSTEM OF CHECKS AND BALANCES IS DESIGNED TO CONTROL THE USE OF OVERWHELMING GOVERNMENT POWER AGAINST THE ACCUSED.

This carefully constructed system of checks and balances is designed to control the use of overwhelming government power against the accused. The officials who apply the law to individual cases must be able to exercise judgment with flexibility and common sense in order to ensure that the laws serve their purpose. That exercise of discretion by officials must, in turn, be subject to review to ensure that decisions in individual cases are fair, rational and consistent.

Decisions about how and for how long a guilty person should be punished are especially sensitive. The more serious the crime, the more risk there is that decision-makers will be influenced by their own emotions or by pressure from victims, the community or elected officials.

The judge's initial decision about punishment is bounded by numerous rules. (See box, Page 12.) But if the sentence imposed is prison, the judge's choice does not determine how long the person will actually be incarcerated. Once the minimum has been served, the parole board has enormous discretion to decide when the prisoner will be released, based on whatever criteria it chooses to apply. The board itself was politicized in 1992 when its membership was changed from civil servants with substantial corrections experience (the "old" board) to appointees (the "new" board). And its exercise of discretion is not subject to review by anyone. **When it comes to parole decisions, the checks that exist throughout the criminal justice process largely evaporate.**

The impact of unbridled discretion on parolable lifers

The consequences of this unlimited authority are most evident in the cases of parolable lifers. Michigan's "lifer law" is designed to let parolable lifers earn their way out of prison like other people convicted of serious offenses.[ii] However, the decision-making process gives first the parole board and then the successor to the sentencing judge total discretion that they can exercise without explanation or review. As a result, release decisions about parolable lifers have been inconsistent, costly and often difficult to understand. Consider, for example, Robert Middleton.

Robert Middleton

By the time Robert Middleton was 18, his mother had married eight times and borne seven other children. The family moved frequently and his adolescence was troubled. When Middleton was 19, he began dating a 17-year old woman named Marie who engaged in prostitution. On February 17, 1968, Marie brought a client to the apartment Middleton shared with another young man, Richard Broughton. A fight ensued. Middleton struck the client once with a board and Broughton hit him repeatedly. Both young men were convicted of second-degree murder and given parolable life terms. The parole board had the discretion to release them after 10 years. It released Broughton in 1979.

During his early years in prison, Middleton's clashes with authority led to many misconduct citations. By the time he became eligible for parole in 1978, the interviewer noted that Middleton had matured and showed insight into the offense and remorse for his actions. However the board wanted more evidence of Middleton's rehabilitation and denied him parole.

Middleton earned an associate's degree, discovered his artistic talent and spent time painting and drawing. He was in the work pass program from 1985 until 1989, when the participation of lifers was ended. During those years, Middleton often worked unsupervised in the community. He has letters of commendation from staff and work supervisors, including the Village of Pinckney police chief. His last misconduct was in 1992.

The "old" civil service parole board voted to start the release process for Middleton in 1988 and again in 1992, but never got as far as conducting the requisite public hearing. The "new" appointed board reconsidered him in 1992 and every five years thereafter but had "no interest" in releasing him until 2013. Board notes from that year indicate that Middleton, who was then 64 years old and had served 45 years, stood throughout his interview because of the pain he was experiencing from cancer.

As required by law, the parole board notified the Oakland Circuit Court of its intent to conduct a public hearing. The successor to the sentencing judge objected to Middleton's release based on the violent nature of the crime and the judge's belief that the murder had resulted from a planned robbery that Middleton still refused to acknowledge. The judge also expressed concern that the MDOC had not completed an assessment of Middleton's current propensity for violence or risk of recidivism. The parole board notified Middleton that, because of the judge's objection, it had lost the authority to grant parole and that he would be reviewed next in 2017.

To place Middleton in context:

- From 1970-74, the five years after Middleton was sentenced, nearly twenty percent of all the sentences for second-degree murder were parolable life.[iii] The people who received them became eligible for parole after serving ten years.

- The average minimum sentence for those convicted of second-degree murder who received a term of years was less than 17 years. These people actually became eligible for parole much sooner than that because they could earn good time credit that reduced their sentences substantially.
- By his next review date, Middleton will have served 49 years.

Middleton's case raises numerous questions:

- Is the public any safer because Middleton continues to be locked up? At what point could he have been released without jeopardizing public safety?
- Is it consistent to require Middleton to serve 30-35 more years than most other people sentenced for the same crime at about the same time?
- Although it took Middleton until the late 1970s before he started to settle down, is it reasonable to make him serve 38 years longer than his more culpable co-defendant?
- Since the "old" board voted to proceed toward release in both 1988 and 1992, why was the "new" board unwilling to proceed when it considered his case in 1992?
- Why did the board show "no interest" in Middleton during the 21 years from 1992-2013?
- Why did the board not send a current risk assessment with the materials it sent the successor judge?
- Should the successor judge, who had no personal knowledge of Middleton or the crime, have been allowed to effectively overrule the parole board and stop the release process?
- Given his age and health, is continuing to incarcerate Middleton worth $200,000 to taxpayers?
- Does it make sense not to review him for another five years?

When "life" and "long" were very much alike

Michigan grants judges enormous discretion in sentencing for such serious crimes as second-degree murder, assault with intent to murder, first-degree criminal sexual conduct and armed robbery. (First-degree murder requires a sentence of life without parole.) Under the state's unusual scheme these offenses all carry the penalty of "life or any term." That is, the judge can choose to impose life with the possibility of parole or select both the minimum and maximum sentence. Until the advent of sentencing guidelines, nothing prevented one judge from giving 10-20 years, another from giving 20-40 and a third from giving parolable life to virtually identical defendants who had committed virtually identical crimes.

The sentencing guidelines impose some constraints on these choices. As with other offenses, the recommended minimum range depends on both the offender's prior record and the facts of the offense. When the prior record is minimal and/or the facts are relatively less egregious, life is not a recommended option. Many current lifers who were sentenced before sentencing guidelines took effect would not have received life terms today.

Despite this breadth of judicial discretion, until the 1990s, sentences of life and a long term of years were not as different from each other as they sound. The "lifer law" said that anyone, regardless of their sentence, became eligible for parole consideration after serving 10 calendar years. And, for offenses

Sentencing guidelines control judicial discretion

The primary constraint on judicial discretion is the maximum penalty for the offense set by statute. In addition, a Michigan Supreme Court ruling requires that, in most cases, the minimum not exceed two-thirds of the maximum, in order to preserve some area for parole board action. Within these boundaries, judicial discretion used to be absolute.

Two defendants facing a 15-year maximum for breaking and entering could receive widely different minimums, even if their crimes and their backgrounds were similar, because they were sentenced by different judges. Ideas about what was an appropriate sentence for a given individual varied from judge to judge and county to county. And if those ideas were influenced by personal bias or mistaken assumptions, the defendant had no recourse.

This situation began to change in the early 1980s, when the Michigan Supreme Court took the first steps to reduce sentencing disparities and ensure that sentence lengths were proportional to the offense and the offender. The Court held that the length of sentences could be appealed and required judges to comply with an early version of sentencing guidelines. The Legislature subsequently enacted its own version of the guidelines that became effective in 1999.

The guidelines award points based on the details of the offense and the defendant's criminal history. The points determine a range within which the judge is supposed to select a minimum sentence. If the judge wants to go above or below the range, s/he must articulate substantial and compelling reasons for doing so. Both the prosecution and defense have the right to appeal. Over the last several decades a large body of appellate decisions has explained the correct process for scoring the guidelines and defined the reasons that justify judicial departures.

committed before 1999, people serving a term of years could accumulate substantial amounts of "good time" (or, as it was later called, "disciplinary credits"). As a practical matter, few people serving very long minimums were paroled under the lifer law because they could earn enough good conduct credit to become eligible for release in not much more than 10 years in any event.[iv]

JUDGES WERE WELL AWARE THAT SENTENCES WERE NOT WHAT THEY SEEMED AND THAT "LIFE" DID NOT MEAN LIFE.

Judges were well aware that exceedingly long sentences were not what they seemed and that "life" did not mean life. They chose sentences that they believed, based on past parole board practice, would result in the prisoner serving an appropriate amount of time. This is confirmed by the responses of 95 judges from 43 different counties to a 2002 survey about what they intended when they imposed life sentences.[v]

Asked to explain their understanding of a parolable life sentence in the 1970s and '80s (with multiple responses possible), 59 said the defendant would become eligible for parole in an average of 12 years, 24 said they expected the defendant to actually serve an average of 15.6 years and nine said it was "possible"

the defendant would spend the rest of his or her life in prison. Only four believed it was "probable" that defendants would actually be incarcerated for the rest of their lives. In addition:

- Two-thirds said the availability of parole was a factor they considered in choosing a life term.
- Sixty percent thought that a life sentence imposed before 1978 was less harsh than a 25- year minimum which, with good time, could be served in twelve years.
- Two-thirds said that a parole board policy that "life means life" would not reflect their intentions.
- Two-thirds supported the concept that some action should be taken to promote the release of parolable lifers in appropriate cases, whether by permitting resentencing or changing parole board practices.

More than 40 percent of the survey respondents were aware of defendants being advised of a specific number of years they could expect to serve on a parolable life term, assuming appropriate behavior. For example, in 1978, Detroit Recorder's Court Judge Joseph Maher sentenced Ralph Purifoy on two counts of second-degree murder for killing his wife's lover and another man. The judge imposed 30-50 years for one count and parolable life for the other. He explained:

> *These will be served concurrently. His life sentence should be available for discharge from the State Prison for Southern Michigan at the end of 12 years and on the other one, depending on his conduct, his time for release should run approximately the same, possibly a year or two more.*

In 1976, Washtenaw County Circuit Judge William Ager sentenced Edward Hill for armed robbery. The judge gave Hill two choices. A 40-60 year sentence, with all the good time credits available then, would have meant parole eligibility in 16 years. A parolable life term, the judge said, would likely bring release in 12 years, eight months. Naturally, Hill chose life.

PAROLABLE LIFERS WERE NOT THE "WORST OF THE WORST."

Parolable lifers were not the "worst of the worst." They were generally similar to thousands of people convicted of the same offenses who have been paroled over the last several decades. Their sentences reflect the understanding and the predilections of their sentencing judges.

Caught in a wave of change

Unfortunately, no one could anticipate how the parole board would change the way it exercises its discretion. As a result, while the large majority of people who received a term of years in the 1970s and 1980s have long since been paroled, the large majority of those who received parolable life are still incarcerated. Edward Hill was not paroled until 2011, after serving 35 years. At age 63, Purifoy is still in prison after 36 years without a single misconduct citation.

The box on Page 14 illustrates how the disparity in release decisions affected nearly 3,000 people convicted of second-degree murder.

The disparity in release decisions between lifers and long-termers

*In the 1970s, 1,236 people were sentenced for a single count of second-degree murder**

*Total receiving a **term of years** = **1,010** (81.7 percent)*

Average minimum (which could be reduced by good time) = 12.2 years

- **Proportion paroled by 12/31/2013 = 919 (91.0 percent)**
- Proportion discharged on maximum = 85 (8.4 percent)

Total receiving **parolable life = 226** (18.3 percent)

- **Proportion of lifers paroled by 12/31/2013 = 62 (27.4 percent)**

*In the 1980s, 1,663 people were sentenced for a single count of second-degree murder**

Total receiving a **term of years = 1,475** (88.7 percent)

Average minimum (which could be reduced by disciplinary credits) = 16.4 years

- **Proportion paroled by 12/31/2013 = 1,170 (79.3 percent)**
- Proportion discharged on maximum = 140 (9.5 percent)

Total receiving **parolable life = 188** (11.3 percent)

- **Proportion of lifers paroled by 12/31/2013 = 17 (9.0 percent)**

***People may have had additional sentences for other offenses.**

Discretion in parole decisions: the "checks" disappear

In Michigan's scheme of indeterminate sentencing, the defendant becomes eligible for parole upon serving the minimum sentence. The parole board has the sole authority to decide when, between the minimum and the maximum, the prisoner is actually released. Thus, if the sentence imposed by the court is 5-20 years, the defendant will become eligible for parole after serving five but the board can choose to continue incarceration up to the full 20.

MCL 791.233, the statute that sets the standard for parole board decision-making, says:

> *(a) A prisoner shall not be given liberty on parole until the board 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 safety.*

The statute, enacted in 1953, sets a single criterion for release: the likelihood that the person will cause future harm. However, it gives no direction as to how specific risk factors should be measured or the relative weight they should be given. The statute not only permits but encourages totally subjective judgments by the board about what facts and circumstances are relevant and how much assurance is reasonable. Not surprisingly, the proportion of parole decisions that are favorable has varied widely depending on the views of the board, from as high as 68 percent to as low as 48 percent.

The rationale for giving the parole board so much discretion is that, in theory, it allows corrections professionals to review the person's progress while in prison, assess the person's current risk for reoffending and make a decision that protects victims and the public. The assumption, relied on by defense attorneys and prosecutors in plea bargaining and by judges in sentencing, is that people who behave well in prison and participate in available programs will be released when first eligible, making the minimum the "real" sentence. People who are continued beyond their minimum, it is assumed, have spoiled their own chances for release through institutional misconduct or failing to respond to treatment programs.

These assumptions have been greatly eroded by the politicization of the parole process over decades of "tough on crime" attitudes. The composition of the parole board itself and the board's policies and practices have changed. Far less credit is given for in-prison conduct and achievements and far more emphasis is placed on the offense and prior record — things the prisoner can never change. Assaultive offenders and sex offenders, in particular, are defined overwhelmingly by their crimes. The traditional goal of rehabilitation has become secondary.

The "new" board's willingness to ignore judicial intentions and override plea bargains is epitomized by the case of Reynaldo Rodriguez, a parolable lifer whom the board has effectively found guilty of first-degree murder and resentenced to life without parole.

Reynaldo Rodriguez

Rodriguez was a 20-year old husband and father who had no criminal convictions and no substance abuse problem. He was employed as a service representative for Pitney Bowes when, as the presentence investigator put it, he "inadvertently became caught up in a vendetta situation."

The Rodriguez and Barrera families both had ongoing disputes with the Cuellar family. At an Easter dance in 1976, Robert Cuellar threatened Rodriguez's younger brother Cruz. In June there were several incidents involving shots being fired at Cruz, at Rodriguez's home and at his mother's house. The Barreras believed that Robert Cuellar had killed a member of their family.

The next month, Rodriguez heard that Cuellar had just threatened him and Cruz again. Rodriguez, Cruz, Raymond Barrera and another friend drove around looking for Cuellar. When they saw him riding a bike, Rodriguez stopped the car and challenged

Cuellar to fight. Barrera placed a gun on the car's console. When Cuellar made a sudden move towards his waistband, Rodriguez thought Cuellar was reaching for a gun. He took the gun from the console and shot at Cuellar several times. When Cuellar continued to pedal, Rodriguez shot several times more until Cuellar fell off the bike. Someone in the vehicle said: "You better make sure he's dead." Rodriguez left the car and shot Cuellar a seventh time at close range.

Rodriguez pled guilty to second-degree murder. Judge Gary McDonald offered him a choice between 15-30 years or parolable life. Advised that a 15-year minimum would require serving 12 years, 4 months and that Judge McDonald would recommend parole at ten years if he were a model prisoner, Rodriguez opted for the life term. Judge McDonald observed:

> *"And I feel myself, at this time, that you will not be any menace to society when you're released in ten years."*

In prison, Rodriguez obtained his GED and took college classes. His work as a head mechanic responsible for maintaining machinery in the garment factory earned him reference letters filled with praise from several factory superintendents. In 1984, after two years of group psychotherapy, the psychologist described Rodriguez as sensitive to other people's feelings, possessed of excellent conflict negotiation skills and having a good prognosis for parole.

Rodriguez first became eligible for parole in 1986. Despite several letters of support from Judge McDonald, the board did not conduct a public hearing until January 1994. A dozen people attended on behalf of Rodriguez. Sixteen correctional officers signed a petition supporting his release. No one opposed it.

Assessing the Rodriguez decision

- The facts of the offense had not changed since 1976 and never would.
  - —Judge McDonald was fully aware of them when he accepted the guilty plea and imposed sentence.
  - —The old and new parole boards were fully aware of them when they both voted to proceed to public hearing.
- The board was fully aware of the sentencing court's intent that Rodriguez serve 10 years.
- Nothing in the decision addressed the multitude of positive factors Rodriguez had presented.

The presiding board member cross-examined Rodriguez about whether the shooting had been an act of vengeance or self-defense. Rodriguez insisted that he had thought Cuellar had a weapon but also agreed when the board member characterized vengeance as a motivation.

When the board decided two months later that it was no longer interested in releasing Rodriguez, it gave him this explanation:

"Nature of crime as described in public hearing causes further concern. During public hearing you admitted the fatal shot was act of vengeance. Victim was shot a total of 7 times, the last shot was reflected upon by you and was unnecessary."

Since 1994, the board has reviewed Rodriguez's file every five years as required by law. The only time it actually spoke to Rodriguez was in 2008, as the result of a court order in federal class action litigation. Now age 57, Rodriguez has served 37 years.

Parole guidelines fail to control parole board discretion

Parole board discretion is much like judicial discretion before there were sentencing guidelines. The only real constraint is the maximum penalty set by statute.

As with judicial discretion, the legislature has made an effort to create more limits. In 1992 it required the MDOC to develop parole guidelines that focus primarily on the statistical probability that a prisoner will commit an assaultive offense if released. Research has shown that statistically based guidelines are substantially more accurate than the subjective judgments of individuals in predicting whether a person will reoffend.[vi]

The parole guidelines are comparable in design to the sentencing guidelines. Points are awarded for offense, prior record and institutional conduct but are scaled according to the person's age and time served. Prisoners are categorized as high, average or low probability for release. People who score "high probability of release" are supposed to be granted parole unless the board articulates, in writing, substantial and compelling reasons for denying parole.

THERE IS, HOWEVER, ONE CRITICAL DIFFERENCE BETWEEN THE TWO SETS OF GUIDELINES. THE PAROLE GUIDELINES ARE NOT ENFORCEABLE.

There is, however, one critical difference between the two sets of guidelines. The parole guidelines are not enforceable. There is no judicial review of whether substantial and compelling reasons are adequate in individual cases. The right of prisoners to appeal parole denials was eliminated in 1998.[vii] Therefore prisoners have no way to challenge the board's decision in their own cases and no body of law has evolved to define what "substantial and compelling" means in all cases. As of February 2012, his lack of accountability resulted in 1,550 people who had not been paroled despite scoring high probability for release.

Although the guidelines do not effectively limit the substance of the parole board's decisions, the substantial and compelling reasons given for denying release in high probability cases provide some insight into the board's thinking.

Instead of objective evidence of the person's current risk, it frequently:

- Cites aspects of the offense or the prisoner's prior record, even though these have been scored already.
- Uses a subjective assessment of the prisoner's thinking. Five characterizations, singly or in combination, are used repeatedly. They are: "lacks sufficient insight," "fails to show remorse," "lacks empathy," "minimizes role in the offense," and "fails to accept responsibility."

These conclusions are largely based on a brief, unrecorded interview conducted by a single board member, typically by videoconference. There may or may not be some sort of treatment report that may or may not support the conclusion, but the controlling opinion is always the board's.

THE BREADTH OF THE BOARD'S DISCRETION MEANS THERE IS LITTLE TRANSPARENCY AND NO ACCOUNTABILITY IN PAROLE DECISION-MAKING OVERALL. FOR LIFERS, THE SITUATION IS EVEN MORE EXTREME.

Reliance on such subjective judgments raises two fundamental questions. First, how are these qualities defined and measured? For example, how much insight is sufficient? How do you show remorse other than by saying you feel it, especially if you have been cautioned against contacting victims or their families? Is it minimizing responsibility to explain that you were high or drunk when you committed your crime? Is it failing to accept responsibility to point out that you were less culpable than your co-defendant? Does expressing regret that you have lost decades of your life to incarceration mean that you lack empathy for others?

Second, how clear is the connection between these assessments and the actual likelihood that someone will reoffend? If, after 30 years of trying to explain his actions as a teenager, a person can only say that he was "young and stupid", does that mean he is likely to repeat his crime if released at age 47? If a person disagrees with the description of the offense in the presentence report, does that mean he is going to do it again?

The breadth of the board's discretion means there is little transparency and no accountability in parole decision-making overall. For lifers, the situation is even more extreme.

The parole process for lifers

Although lifers may become eligible for parole at much the same time as their peers serving long terms of years, the process for releasing them, designed as a legislative compromise in 1941, differs.[viii] Unlike non-lifers, who need only two positive votes from a three-member panel, the lifer has to obtain a majority vote for release from the entire board. If the board is favorably inclined, it must conduct a public hearing at which the prisoner is questioned at length and anyone who supports or opposes release can appear and testify. The board must give advance notice of the hearing date to the county prosecutor and to the sentencing judge or that judge's successor in office. If the judge objects in writing, within 30 days, the board loses the authority to grant parole. The judge does not have to give any reasons for objecting or hold any hearing. There is no appeal from the judge's decision.

Before 1992

While the review process differed for lifers, the decision-making criteria did not. The statutory standard for parole decision-making makes no distinction between lifers and other prisoners. And until the 1990s, the parole board itself viewed parolable lifers much like judges did — as no different from people serving a long term of years. As Frank Buchko, a parole board member from 1962-1974, has said: