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September 10, 2010

Clerk
Michigan Court of Appeals
Columbia Center
201 West Big Beaver Road, Suite 800
Troy, MI 48084-4127

Re: **Eric J. Smith, Prosecuting Attorney v Michelle Elias**
Court of Appeals No.
Circuit Court No. 2010-1213-AP

Dear Clerk:

Enclosed for filing are the following:

Application for Leave to Appeal (Emergency Appeal: Requested action by October 8, 2010)

Please note that the Docket Entries, Order of Appointment, Trial Court Opinions and Orders, Letter to Parole Board Requesting record to be sent to the Court of Appeals, Statement by Attorney [pursuant to MCR 7.204(C)(2) and MCR 7.205B)(4)(g)] regarding Oral Argument Transcript (July 8, 2010) are attached as Appendices to the Application.

Thank you for your cooperation.

Sincerely,

/s/ Susan M. Meinberg

Susan M. Meinberg
Assistant Defender

Enclosures
cc: Kerry A. Ange, Assistant Macomb County Prosecutor
H. Steven Langschwager, Assistant Attorney General
Michelle Elias
File

STATE OF MICHIGAN

IN THE COURT OF APPEALS

ERIC J. SMITH, PROSECUTING ATTORNEY
Plaintiff-Appellee

Court of Appeals No.
Circuit Court No. 2010-1213-AP

-vs-

MICHELLE ELIAS
Defendant-Appellant

MICHIGAN PAROLE BOARD
Appellant-Intervenor.
_____/

KERRY A. ANGE (P64777)
MACOMB COUNTY PROSECUTOR'S OFFICE
Attorney for Plaintiff-Appellee
_____

SUSAN M. MEINBERG (P34433)
STATE APPELLATE DEFENDER OFFICE
Attorney for Defendant-Appellant
_____

H. STEVEN LANGSCHWAGER (P52380)
MICHIGAN DEPARTMENT OF ATTORNEY GENERAL
Attorney for Appellant-Intervenor Parole Board
_____

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

EMERGENCY APPEAL PURSUANT TO MCR 7.104(D)(6)
REQUESTED ACTION BY OCTOBER 8, 2010

STATE APPELLATE DEFENDER OFFICE

BY: SUSAN M. MEINBERG (P 34433)
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STATEMENT OF APPELLATE JURISDICTION

On March 22, 2010, the Macomb County Prosecutor filed in the Macomb County Circuit Court an Application for Leave to Appeal the decision of the Michigan Parole Board. (See Docket Entries, attached in Appendix C). On April 16, 2010, the Circuit Court granted the Application for Leave to Appeal. *Id.*

On April 26, 2010, the State Appellate Defender Office was appointed to represent Ms. Elias (See Docket Entries, Appendix C, and Order of Appointment attached as Appendix D).

In a written opinion and order dated July 21, 2010, the Circuit Court reversed the Parole Board's decision granting parole to Ms. Elias. (See Circuit Court Opinion and Order dated July 21, 2010 attached as Appendix A).

On or about August 9, 2010, the Parole Board through its counsel, H. Steven Langschwager, filed a Motion for Reconsideration. (See Docket Entries attached as Appendix C). On or about August 11, 2010, undersigned counsel also filed a Motion for Reconsideration. *Id.*

On August 20, 2010, the Circuit Court issued a written opinion and order denying both Motions for Reconsideration. (See Circuit Court Opinion and Order dated August 20, 2010 attached as Appendix B).

Ms. Elias now files this timely Application for Leave to Appeal pursuant to MCR 7.104(D)(6) and MCR 7.205(E), and seeks relief from this Court.

This Court has jurisdiction to decide this application for leave to appeal pursuant to MCR 7.104(D)(6), 7.203(B) and 7.205. MCR 7.104(D)(6) specifically provides that this Application be filed as an emergency appeal under MCR 7.205(E) and that the Court of Appeals shall expedite its consideration of the matter.

JUDGMENT APPEALED FROM, RELIEF SOUGHT, AND CONCISE ALLEGATIONS OF ERROR

Defendant-Appellant Michelle Elias appeals from the Circuit Court's Opinion and Order dated July 21, 2010 (attached as Appendix A) reversing the Michigan Parole Board's decision to grant parole, and the Circuit Court's Opinion and Order dated August 20, 2010 (attached as Appendix B) denying the Motions for Reconsideration filed by Defendant Elias and the Parole Board. (See also Circuit Court Docket Entries attached as Appendix C).

Defendant-Appellant asserts that she is entitled to relief in the absence of any showing of a clear abuse of discretion by the Parole Board in deciding to grant parole. The Circuit Court's reversal of parole was in error where the Circuit Court improperly substituted its judgment for the Parole Board, attached undue weight to factors not dispositive of the parole action, and failed to adequately defer to the Parole Board's decision to grant parole – a decision that was consistent with the agency record, the facts of the case, and, the parole guidelines that provided for a "high probability" of parole. The Parole Board did not clearly abuse its discretion after considering the whole record and deciding to grant a parole, and the Circuit Court improperly substituted its opinion for that of the Parole Board. Furthermore, the Circuit Court repeatedly found that the existing record was unclear as to how the Parole Board weighed certain factors; however, the proper remedy was a remand to the Parole Board for clarification, rather than a reversal of the grant of parole.

Ms. Elias prays that this Court will peremptorily REVERSE the Circuit Court's decision, and REINSTATE the Parole Board's decision to grant parole; or peremptorily REMAND this case to the Parole Board for further clarification; or grant leave to appeal.

STATEMENT OF QUESTION PRESENTED

DID THE PAROLE BOARD OF THE MICHIGAN DEPARTMENT OF CORRECTIONS CLEARLY ABUSE ITS DISCRETION IN GRANTING PAROLE TO MS. ELIAS?

Circuit Court answered “Yes.”

Defendant-Appellant answers, "No".

Appellant-Intervenor Parole Board answers, “No”.

Plaintiff-Appellee answers, “Yes.”

STATEMENT OF FACTS

All materials referred to in the Statement of Facts, *infra*, were submitted to the Circuit Court by the Michigan Department of Corrections, and same have been requested to be sent to this Court pursuant to MCR 7.205(B)(3) for purposes of this Appeal (see request attached as Appendix E).

The facts giving rise to Ms. Elias' convictions for second-degree murder and felony firearm are detailed in the Presentence Investigation Report (PSIR)(See PSIR e-filed as a separate confidential attachment). Ms. Elias was convicted after a jury trial of second-degree murder and felony firearm. On August 28, 1985, Judge Zatkoff sentenced her to 20-40 years imprisonment for second-degree murder and two years for felony firearm. Ms. Elias served over 25 years of that sentence prior to being granted parole, effective July 1, 2010.

Ms. Elias was granted parole by the Michigan Department of Corrections (MDOC) in a Notice of Decision mailed on February 10, 2010 (See Appendix G).

Defendant's Criminal History

Ms. Elias had no prior criminal record at the time of the instant offense in 1984. (See PSIR). She does not dispute the conviction for attempt malicious destruction of property that occurred in 1996 while she was incarcerated for second-degree murder. (See Judgment of Sentence attached as Appendix H).

Psychological Screening

a. Assaultive Offender Therapy

Defendant-Appellant's access to Assaultive Offender Therapy was limited by availability within the MDOC. Ms. Elias completed Assaultive Offender Therapy on March 14, 2006. She

had ten poor ratings, four excellent ratings, eleven good ratings and three fair ratings. See Assaultive Offender Therapy Termination Report e-filed as a separate confidential attachment. The Therapy Termination Report indicates that she received a rating of excellent or good for accepting complete responsibility for her criminal behavior, for demonstrating the ability to clearly describe her criminal behavior in detail and to cope with group confrontation in a non-defensive, non-threatening and appropriate manner, for demonstrating an ability to clearly explain what led to her criminal behavior and the thoughts associated with her criminal behavior and how they played a role, demonstrating the ability to distinguish thoughts associated with her criminal behavior and to manage her criminal thinking, and that she was able to develop a comprehensive plan for managing her criminal thoughts and behavior, and her feelings of anger. The report makes it clear that Ms. Elias completed the program; she did not fail it.

b. TAP AND COMPAS

Both the TAP and COMPAS reports prepared on September 11, 2008 rated Ms. Elias as having a low violence risk and a low recidivism risk (attached as Appendix I). The COMPAS Risk Matrix Recommended Supervision is "Low."

Parole Guidelines

On December 4, 2009, the MDOC completed the Parole Guidelines score sheet for Ms. Elias (attached as Appendix J). Ms. Elias received a very high Final Parole Guidelines Score of "+15" – which calculates to **"High Probability of Parole".** This score was calculated on a variety of factors including the crime itself, mitigating conditions, prior criminal record variables, statistical risk variables, Ms. Elias' age, and programming variables. See Argument, *infra.*

Parole Board Notice of Decision

The Parole Board granted parole to Ms. Elias and mailed that Notice of Decision to the parties on February 10, 2010 (attached as Appendix G). The projected release date was July 1, 2010. In granting parole, the Parole Board specifically decided that: "***Reasonable assurance exists that the prisoner will not become a menace to society or to the public safety***." The Parole Board listed its "Reasons in Support of Parole Board Action." *Id.* See Argument, *infra.*

Major Misconducts

Ms. Elias does not dispute that she received 37 major misconduct tickets over the course of her 25 years of imprisonment. The majority of these tickets were for out of place, disobeying a direct order, unauthorized occupation of a cell, and sexual misconduct (kissing). (See undersigned counsel's chronological list of the major misconduct tickets attached as Appendix K, which was attached as Defendant's Appendix B in the Circuit Court Brief on Appeal). Ms. Elias does not dispute that she was convicted of a separate offense for attempt malicious destruction of property over $100 offense in 1996 (see Appendix H). Further, Ms. Elias does not dispute that she received a major misconduct ticket for arson of dumpster in 1999. However, there were **no** major misconduct tickets for assaults. Her last major misconduct ticket was in October 2003 for disobeying a direct order. *Id.* She has remained ticket free since then.

Defendant's Programming and Work History in the MDOC

The MDOC file indicates that during Ms. Elias' 25 years of incarceration, she has obtained Certificates in Basic Custodial Maintenance and Training in 1988, a Basic Level Course in Nonviolent Conflict Resolution in 1989, 45 hours of Substance Abuse Education in May 1990, CLEAR House (a chemical dependency program) in November 1990, Psychoeducational Group in 1994, Heritage Phase I of Substance Abuse Education in 1999, Group Counseling in 1999, Narcotics Anonymous in December 2002 and March 2003, and In-

House Substance Abuse Treatment Program in 2007. She participated in a Special Olympics Walk-a-thon in 1993. She obtained her GED in 1986. (See certificates from MDOC file attached as Appendix L). Ms. Elias has been employed in the kitchen, MSI and on the custodial maintenance crew. She has worked in the kitchen for the last six years. The MDOC file contains excellent work reports and block reports. (See also work report and block report from MDOC file attached as Appendix M; see also Parole Eligibility Report attached as Appendix N). Finally, the Parole Eligibility Report indicates that Ms. Elias has been classified as a Level I prisoner (the lowest security level) since at least February 17, 2006. (See Parole Eligibility Report attached as Appendix N).

Appellate History

On March 22, 2010, the Macomb County Prosecutor filed in the Macomb County Circuit Court an Application for Leave to Appeal the decision of the Michigan Parole Board. The Prosecutor also filed a Motion for Temporary Stay of Parole Order. (See Docket Entries, attached in Appendix C). On April 16, 2010, the Circuit Court granted the Application for Leave to Appeal. *Id.*

On April 26, 2010, the State Appellate Defender Office was appointed to represent Ms. Elias (See Docket Entries, Appendix C, and Order of Appointment, attached as Appendix D).

On April 26, 2010, the Circuit Court granted the Prosecutor's request for a temporary stay of the parole order. (See Docket Entries attached as Appendix C).

The Macomb County Prosecutor filed a Brief on Appeal on May 27, 2010. (See Docket Entries attached as Appendix C). On June 10, 2010, the Attorney General, who was granted intervenor status, filed a Brief in Support of Affirmation on behalf of the Michigan Parole Board.

(Docket Entries, Appendix C). Undersigned counsel filed an Answer in Opposition to the relief sought by the Macomb County Prosecutor on June 16, 2010. *Id.*

After argument in the Circuit Court on July 8, 2010, the Circuit Court took the matter under advisement. (See Docket Entries attached as Appendix C). A transcript of this oral argument has been ordered by undersigned counsel. (See Statement by Counsel attached as Appendix F).

In a written opinion and order dated July 21, 2010, the Circuit Court reversed the Parole Board's decision granting parole to Ms. Elias. (See Circuit Court Opinion and Order dated July 21, 2010 attached as Appendix A).

On or about August 9, 2010, the Parole Board through its counsel, H. Steven Langschwager, filed a Motion for Reconsideration. (See Docket Entries attached as Appendix C). On or about August 11, 2010, undersigned counsel also filed a Motion for Reconsideration. *Id.*

On August 20, 2010, the Circuit Court issued a written opinion and order denying both Motions for Reconsideration. (See Circuit Court Opinion and Order dated August 20, 2010 attached as Appendix B).

Ms. Elias now files this timely Application for Leave to Appeal pursuant to MCR 7.104(D)(6) and MCR 7.205(E), and seeks relief from this Court.

Further facts may be added, *infra*.

ARGUMENT

I. THE PAROLE BOARD OF THE MICHIGAN DEPARTMENT OF CORRECTIONS DID NOT CLEARLY ABUSE ITS DISCRETION IN GRANTING PAROLE TO MS. ELIAS.

ISSUE PRESERVATION: The prosecutor appealed the decision of the Michigan Parole Board to the Circuit Court. *See generally* MCL 791.234(11) and MCR 7.104(D)(2)(a). Defendant-Appellant Michelle Elias, through appointed counsel, opposed the prosecutor's appeal by way of a timely filed brief on appeal in the Circuit Court. (See Docket Entries, attached as Appendix C).

STANDARD OF REVIEW: In the Circuit Court, the Prosecutor had the burden of proving "that the decision of the parole board was (a) in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation that is exempted from promulgation pursuant to MCL 24.207, or (b) a clear abuse of discretion." MCR 7.104(D)(5). The Court of Appeals does not review the decision of the Circuit Court on this point, but undertakes *de novo* review regarding whether the Parole Board clearly abused its discretion in deciding to grant or deny parole. *See generally In re Glover (after remand)*, 241 Mich App 127, 129 (2000); *Hopkins v Michigan Parole Board*, 237 Mich App 629, (1999); *Killebrew v Department of Corrections*, 237 Mich App 650 (1999).

ANALYSIS:

In *Hopkins v Parole Board, supra,* 632-633, this Court set forth the standard for reviewing the Parole Board's decision to parole a prisoner:

> "The Legislature has entrusted to the Parole Board the decision whether to grant or deny parole. MCL 791.234(8); MSA 28.2304(8). The Parole Board's decision whether to parole a prisoner is reviewed for a "clear abuse of discretion." MCR 7.104(D)(5)(b); *In re Parole of Roberts,* 232 Mich.App. 253, 257, 591 N.W.2d 259 (1998). Generally, an abuse of discretion is found where an unprejudiced person, considering the facts on which the decisionmaker acted, would say there is no justification or excuse for the ruling. *People v. Ullah,* 216 Mich.App. 669, 673, 550 N.W.2d 568 (1996). The board's discretion is limited, however, by statutory guidelines, and whether it abused its discretion must be determined in light of the record and these statutory requirements. *In re Parole of Johnson,* 219 Mich.App. 595, 598, 556 N.W.2d 899 (1996). First and foremost, the board may not grant a prisoner liberty on parole until it "has reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety." MCL 791.233(1)(a); MSA 28.2303(1)(a). An aggrieved party bears the burden of demonstrating an abuse of discretion, and the reviewing court may not substitute its judgment for that of the Parole Board. MCR 7.104(D)(5); *Wayne Co. Prosecutor v. Parole Bd.,* 210 Mich.App. 148, 153-154, 532 N.W.2d 899 (1995)."

The Macomb County Prosecutor in the instant case argued in the Circuit Court that there was a clear abuse of discretion by the Parole Board. In a written opinion and order dated July 21, 2010, the Circuit Court reversed the Parole Board's decision granting parole to Ms. Elias. (See Circuit Court Opinion and Order dated July 21, 2010 attached as Appendix A).

Both Ms. Elias and the Parole Board each filed a Motion for Reconsideration. On August 20, 2010, the Circuit Court issued a written opinion and order denying both Motions for Reconsideration. (See Circuit Court Opinion and Order dated August 20, 2010 attached as Appendix B).

Defendant-Appellant Elias asserts that she is entitled to relief in the absence of any showing of a clear abuse of discretion by the Parole Board in deciding to grant parole. The Circuit Court's reversal of parole was in error where the Circuit Court improperly substituted its judgment for the

Parole Board, attached undue weight to factors not dispositive of the parole action, and failed to adequately defer to the Parole Board's decision to grant parole – a decision that was consistent with the agency record, the facts of the case, and, the parole guidelines that provided for a "high probability" of parole. The Parole Board did not clearly abuse its discretion after considering the whole record and deciding to grant a parole, and the Circuit Court improperly substituted its opinion for that of the Parole Board. Furthermore, the Circuit Court repeatedly found that the existing record was unclear as to how the Parole Board weighed certain factors; however, the proper remedy was a remand to the Parole Board for clarification, rather than a reversal of the grant of parole.

In *In re Parole of Johnson*, 219 Mich App 595, 598-599 (1996), the Court of Appeals discussed the parameters for reviewing parole appeals based on an alleged abuse of discretion, and made it clear that the Michigan Parole Board's discretion is limited by the parole guidelines:

> While the statutes provide the framework, the Legislature also enacted provisions to create "parole guidelines," intended to "govern the exercise of the parole board's discretion ... as to the release of prisoners on parole...." M.C.L. § 791.233e(1); M.S.A. § 28.2303(6)(1). The parole guidelines are now found at 1996 MR. 1, R. 791.7716. The guidelines were filed and became effective after the parole decision was made in the instant case. However, as mandated by statute, the Parole Board was clearly utilizing the guidelines in their proposed form to evaluate defendant's eligibility. M.C.L. § 791.233e(5); M.S.A. § 28.2303(6)(5). *Therefore, we review the Parole Board's exercise of discretion as it is governed by the parole guidelines.*
>
> The parole guidelines are an attempt to quantify the applicable factors that should be considered in a parole decision. Those factors are set forth by statute and are further refined by administrative rule. M.C.L. § 791.233e; M.S.A. § 28.2303(6); 1996 MR. 1, R. 791.7715. By quantifying the factors, the Legislature plainly intended to inject more objectivity and uniformity into the process in order to minimize recidivism and decisions based on improper considerations such as race. M.C.L. § 791.233e; M.S.A. § 28.2303(6); 1996 MR. 1, R. 791.7716. Therefore, each potential parolee is evaluated under the guidelines and scored with respect to each guidelines category. These scores are then aggregated to determine a total guidelines score. That

> score is then used to fix a probability of parole determination for each individual on the basis of a guidelines schedule. Prisoners are categorized under the guidelines as having either a high, average, or low probability of parole. (Emphasis added).

See also *Scholtz v Michigan Parole Board,* 231 Mich App 104, 108-111 (1998).

If the prisoner is determined to have a high probability of parole, parole may be denied only for "substantial and compelling" reasons. MCL 791.233e(6). The Circuit Court "may not substitute its judgment for that of the Parole Board." *Hopkins v Parole Board, supra,* 633.

The Parole Board's Notice of Decision

The Parole Board granted parole to Ms. Elias and mailed that Notice of Decision to the parties on February 10, 2010 (Appendix G). The projected release date was July 1, 2010. In granting parole, the parole board specifically decided that: "***Reasonable assurance exists that the prisoner will not become a menace to society or to the public safety***." *Id.* The Parole Board listed its "Reasons in Support of Parole Board Action." *Id.* This is consistent with MCL 791.233(1)(a) which provides:

> 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 Parole Board listed the "Reasons in Support of Parole Board Action" as follows:

> "**<u>Crime & Criminal Behavior</u>**
> The present offense is not sexually motivated
>
> **Regarding the crime, it is our belief:**
> Prisoner accepts responsibility
>
> **Regarding criminal history, it is our belief the prisoner:**
> Accepts it as indicated
>
> **<u>Correctional Adjustment</u>**

The behavior reflected in the misconducts:
Has diminished

Program Involvement

Educational programming was recommended and:
Prisoner is high school graduate or has GED

Routine work assignments have been recommended and:
Involvement has been adequate
Prisoner has completed vocational training/counseling/education

Recommendation(s) has been made S.A. programming and:
The prisoner has completed the programs

Participation in other department sanctioned program(s) has:
Resulted in completion of self-help programming

Personal History

The prisoner's social history indicates:
The prisoner has maintained family support and/or has support system in the community

The placement plan submitted by the offender in the PER:
Proposed placement acceptable; pending MDOC approval

(Parole Board Notice of Decision attached as Appendix G, emphasis in original).

Regarding Circumstances of the Offense

In the Circuit Court, the Prosecutor relied in part on the serious nature of the offense and her pleading was replete with references to the facts of the murder that occurred on September 13, 1984. Judge Zatkoff sat through the trial and determined that a 20-40 year prison term was appropriate. Judge Biernat, in reversing the Parole Board, found that "the Parole Board did not fully consider the underlying offense." (See Circuit Court Opinion dated 7/21/10, p 7, Appendix A). No one is denying that Ms. Elias committed the aforementioned murder. Instead, the focus of this appeal must be about whether the Parole Board clearly abused its discretion in granting Ms. Elias a parole. Ms. Elias does not dispute that the crime itself bears some relevance to the Parole

Board's determination, but the value of the offense should fade over time as a predictor of parole suitability. *See e.g. Biggs v Terhune*, 334 F3d 910, 916-917 (CA 9, 2003) ("The Parole Board's decision is one of 'equity' and requires a careful balancing and assessment of the factors considered. . . . A continued reliance in the future on an unchanging factor, the circumstance of the offense and conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation."). Though *Biggs* is not controlling precedent in this jurisdiction, the principles of equity cited therein are universal. In the absence of any indication that the Parole Board completely ignored the circumstances surrounding the offense, there is no clear abuse of discretion simply because the prosecutor believes that this crime is particularly egregious. At the very least, the crime itself is not *more* important than the Department of Corrections file, which reflects significant rehabilitation while incarcerated. The Parole Board acknowledged and calculated Ms. Elias' underlying offense in the parole guidelines score sheet, and the Board found that Ms. Elias had accepted responsibility for her crime. (See Appendices G and J).

Regarding Ms. Elias' Parole Guidelines

On December 4, 2009, the MDOC completed the Parole Guidelines Score sheet for Ms. Elias. (Attached as Appendix J). Ms. Elias received a very high Final Parole Guidelines Score of "+15" – which calculates to **"High Probability of Parole".** This score was calculated on a variety of factors including the crime itself, mitigating conditions, prior criminal record variables, statistical risk variables, Ms. Elias' age, and programming variables. The form coincides with the statutory requirements for assessing parole guidelines, found at MCL 791.233e:

> The department shall develop parole guidelines that are consistent with section 33(1)(a) and that shall govern the exercise of the parole

> board's discretion pursuant to sections 34 and 35 as to the release of prisoners on parole under this act. The purpose of the parole guidelines shall be to assist the parole board in making release decisions that enhance the public safety.
> (2) In developing the parole guidelines, the department shall consider factors including, but not limited to, the following:
> (a) The offense for which the prisoner is incarcerated at the time of parole consideration.
> (b) The prisoner's institutional program performance.
> (c) The prisoner's institutional conduct.
> (d) The prisoner's prior criminal record. As used in this subdivision, "prior criminal record" means the recorded criminal history of a prisoner, including all misdemeanor and felony convictions, probation violations, juvenile adjudications for acts that would have been crimes if committed by an adult, parole failures, and delayed sentences.
> (e) Other relevant factors as determined by the department, if not otherwise prohibited by law.
>
> In developing the parole guidelines, the department may consider both of the following factors:
> (a) The prisoner's statistical risk screening.
> (b) The prisoner's age.

The Parole Board's decision to grant parole is also consistent with the parole guidelines as set forth in MCL 791.233e, and neither the Circuit Court nor the Prosecutor took issue with the calculation that resulted in a "high probability" of parole. The Parole Board is required to follow the recommendation of the guidelines, unless it finds substantial and compelling reasons to deviate there from. *Scholtz v Michigan Parole Board*, *supra*, 109-110; *In re Parole of Johnson*, *supra*, 598-599. On this record, there is no basis to deviate from the guidelines, and there is no evidence of abuse of discretion in granting parole. The Parole Board's decision should have been affirmed by the Circuit Court.

Regarding Ms. Elias' TAP AND COMPAS

Both the TAP and COMPAS reports prepared on September 11, 2008 rated Ms. Elias as having a low violence risk and a low recidivism risk. (Attached as Appendix I). The COMPAS Risk Matrix Recommended Supervision is "Low."

It is important to note that COMPAS, created by the Northpointe Institute for Public Management, is software that utilizes the evidence-based practice to predict future dangerousness and identify programming necessary to assist in the successful completion of parole. COMPAS is *not* the same as parole guidelines nor does it appear to be used by the Department of Corrections Parole Board as a means by which to determine whether one is prepared to be paroled. It is simply one factor to assist in the design of a successful pre-release and parole program for the identified parolee.

Ms. Elias' criminal history is reflected in the COMPAS Narrative Assessment Summary. The section on Substance Abuse clearly speaks to the type of support she may need upon release. TAP and COMPAS are tools of support for a parolee. Assuming for the sake of argument that Ms. Elias had a high probability of risk in every single area reviewed (which she does not), such scores are of no direct consequence to her ability to parole; they are merely computer generated recommendations designed to ensure Ms. Elias some success before, during and after the parole process.

Major Misconducts

Ms. Elias does not dispute that she received 37 major misconduct tickets during her 25 years of incarceration. The majority of these tickets were for out of place, disobeying a direct order, unauthorized occupation of a cell, and sexual misconduct (kissing). (See Appendix K, undersigned counsel's chronological list of the major misconduct tickets which was attached as Appendix B of Ms. Elias' brief on appeal in the Circuit Court). Ms. Elias does not dispute that

she was convicted of a separate offense for attempt malicious destruction of property over $100 offense in 1996. (See Appendix H). Further, Ms. Elias does not dispute that she received a major misconduct ticket for arson of dumpster in 1999. However, there were **no** major misconduct tickets for assaults. Her last major misconduct ticket was in October 2003 for disobeying a direct order. (See Appendix K). Ms. Elias has remained ticket free since then.

None of those tickets are for assaults, and many of the infractions are unique to prison life (i.e, in a non-prison setting, one does not normally get cited for being out of place). If Ms. Elias still had a criminal lifestyle mindset and was a dangerous murderer, one would certainly expect to see assaultive major misconduct tickets in Ms. Elias' 25 years of incarceration; however, there are no assault tickets on inmates or staff in Ms. Elias' prison record. The MDOC was acutely aware of Ms. Elias' institutional record, as every major misconduct ticket is contained in her MDOC file. Further, the parole guidelines account for major misconduct tickets in the conduct variables.

Furthermore, Ms. Elias notes that the prisoner in *Oakland County Prosecutor v Daniel Ray Thomas,* unpublished, CA #227546, 2/2/02 (attached as Appendix O), had accumulated 65 instances of institutional misconduct during his approximately eleven years of incarceration for a "heinous" third-degree criminal sexual conduct offense. Thomas' parole guidelines range was only "average probability of parole" and he was classified as "high assaultive risk." The Court of Appeals did not find this to be a basis to deny parole. Rather, the Court of Appeals, in reversing the Circuit Court's order vacating defendant Thomas' grant of parole, noted that "Although the prosecution documents sixty-five instances of institutional misconduct by defendant during his incarceration, defendant's parole scoresheet indicates that he has had only

two major misconducts in the last five years and none in the last year of his incarceration." *Id.*, at slip opinion, p 2.

Furthermore, on balance, the MDOC file indicates that during Ms. Elias' 25 years of incarceration, she has obtained Certificates in Basic Custodial Maintenance and Training in 1988, a Basic Level Course in Nonviolent Conflict Resolution in 1989, 45 hours of Substance Abuse Education in May 1990, CLEAR House (a chemical dependency program) in November 1990, Psychoeducational Group in 1994, Heritage Phase I of Substance Abuse Education in 1999, Group Counseling in 1999, Narcotics Anonymous in December 2002 and March 2003, and In-House Substance Abuse Treatment Program in 2007. She participated in a Special Olympics Walk-a-thon in 1993. She obtained her GED in 1986. (See certificates from MDOC file attached as Appendix L). Ms. Elias has been employed in the kitchen, MSI and on the custodial maintenance crew. She has worked in the kitchen for the last six years. The MDOC file contains excellent work reports and block reports. (See also work report and block report from MDOC file attached as Appendix M; see also Parole Eligibility Report attached as Appendix N). Finally, the Parole Eligibility Report indicates that Ms. Elias has been classified as a Level I prisoner (the lowest security level) since at least February 17, 2006. (See Parole Eligibility Report attached as Appendix N).

Assaultive Offender Therapy

Defendant-Appellant's access to Assaultive Offender Therapy was limited by availability within the MDOC. Ms. Elias completed Assaultive Offender Therapy on March 14, 2006. She had ten poor ratings, four excellent ratings, eleven good ratings and three fair ratings. See Assaultive Offender Therapy Termination Report e-filed as a separate confidential attachment. The Therapy Termination Report indicates that she received a rating of excellent or good for

accepting complete responsibility for her criminal behavior, for demonstrating the ability to clearly describe her criminal behavior in detail and to cope with group confrontation in a non-defensive, non-threatening and appropriate manner, for demonstrating an ability to clearly explain what led to her criminal behavior and the thoughts associated with her criminal behavior and how they played a role, demonstrating the ability to distinguish thoughts associated with her criminal behavior and to manage her criminal thinking, and that she was able to develop a comprehensive plan for managing her criminal thoughts and behavior, and her feelings of anger. The report makes it clear that Ms. Elias completed the program; she did not fail it.

Previous Parole Denials

Ms. Elias does not dispute that she has received prior parole denials. However, this suggests that the Parole Board was aware of their earlier concerns and that they recognized her progress since the denials. Further, it is abundantly clear that even in the face of these repeated denials of parole since her earliest release date of December 26, 2005, Ms. Elias has remained focused on rehabilitation. At no point during the period of parole denials did Ms. Elias become frustrated and resort to accumulating major misconduct tickets. (See Appendix K).

Victim Opposition to Parole

Ms. Elias recognizes that the victim's family has expressed their fears and concerns to the Parole Board, as evidenced by the letters in the MDOC file. The Parole Board clearly received the letters and considered them, as the Board provided in their conditions of parole that Ms. Elias is not allowed into Macomb County and that she is prohibited from contacting Vickie Yax, Harold Yax or their families. Ms. Elias will be living with her husband in Florida and will abide by these conditions.

Conclusion

In the Circuit Court, the Prosecutor had the burden of proving "that the decision of the parole board was (a) in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation that is exempted from promulgation pursuant to MCL 24.207, or (b) a clear abuse of discretion." MCR 7.104(D)(5). The Court of Appeals does not review the decision of the Circuit Court on this point, but undertakes *de novo* review regarding whether the Parole Board clearly abused its discretion in deciding to grant or deny parole. *See generally In re Glover (after remand), supra,* 129; *Hopkins v Michigan Parole Board, supra*; *Killebrew v Department of Corrections, supra.*

The Parole Board did not clearly abuse its discretion, which is the highest standard of review. To the contrary, the Parole Board considered the entire record, including the parole guidelines, the MDOC file (including Defendant's background, the circumstances of the offense, the major misconduct tickets and Defendant's letters), and the TTR. The Circuit Court did not rely on any information that was not contained in the MDOC file and the TTR. The Parole Board reviewed the entire record, properly considered all of the factors outlined in the statutory guideline, and determined, based on Ms. Elias' entire record, that there was a reasonable assurance that Ms. Elias would not become a menace to society or to the public safety. Therefore, this Court cannot conclude that there was no justification or excuse for the Parole Board's decision. Rather, it appears that the Circuit Court simply disagreed with the Parole Board's decision and reversed. This was improper.

Regarding Circuit Court's Opinion Reversing Parole

Although the Court of Appeals conducts a *de novo* review, an examination of the Circuit Court's Opinion is instructive. The Opinion issued on July 21, 2010 reveals that the Circuit

Court repeatedly deemed the record incomplete with regard to what the Parole Board considered in reaching its decision, and/or incomplete with regard to how the Board weighed certain information in the file. (See Circuit Court Opinion dated July 21, 2010 attached as Appendix A).

In a recent case, *Lapeer County Prosecutor v David Groves and Parole Board*, unpublished, CA #294771, July 20, 2010 (attached as Appendix P), the Court of Appeals rejected the Circuit Court's finding that the Parole Board clearly abused its discretion by failing to consider public opposition to the defendant's parole. The Court of Appeals found that the Parole Board did consider the public opposition, as well as the entire record, and that the Board was not even required to consider public opposition. The Court of Appeals noted that the record evidence included a petition signed by members of the public. In reversing the Circuit Court, the Court of Appeals noted that extensive findings by the Parole Board were not required:

> "The parole board was not required to make a specific finding on the record regarding its consideration of the public opposition to its decision to grant defendant parole. Our Supreme Court, in *Glover v Parole Bd*, 460 Mich 511, 525; 596 NW2d 598 (1999), held that the parole board is not required to provide extensive findings of fact and conclusions of law, nor is it required to state legal opinions when it grants or denies parole. Rather, to comply with MCL 791.235(12), the board should simply indicate what it relied on in reaching its decision. While MCL 791.235(12) requires the board to state reasons for denying parole, there is no similar provision requiring the board to state specific reasons for granting parole." *Id*, at slip op, p 4 (Appendix P).

Likewise, in Ms. Elias' case, the record evidence before the Parole Board included details of the offense, the institutional program performance, the institutional conduct, letters from the victim's family, the prior parole denials, the prior Case Summary Reports, and the COMPAS and TAP reports. The Parole Board was not required to make extensive findings. The Circuit Court improperly reversed the Parole Board's decision to parole for failure to make extensive findings.

Even assuming arguendo that the Circuit Court was correct that the record is incomplete, the proper remedy is a remand to the Parole Board for an explanation of its decision, and/or for the Board to undertake further review of the file, and/or for the Board to reevaluate its prior decision. The remedy is *not* a reversal of the Board's decision, and the Circuit Court erred.

MCR 7.104(D)(7) and (8) expressly provide for a remand procedure:

> "(7) *Motion to Remand.* On timely motion by a party, or **on the court's own motion, the court may remand the matter to the parole board for an explanation of its decision.** The parole board shall hear and decide the matter within 28 days.
>
> (8) *Parole Board Responsibility After Reversal or Remand.* If a decision of the parole board is reversed or remanded, the board shall review the matter and take action consistent with the circuit court's decision within 28 days. **If the circuit court requires the board to undertake further review of the file or to reevaluate its prior decision,** the board shall provide the parties with an opportunity to be heard." (Emphasis added).

The Circuit Court erroneously concluded from reviewing the Parole Board's Case Summary Report dated December 14, 2009, (attached as Appendix Q), that "the Parole Board failed to consider the serious nature and surrounding details of defendant's crimes when it decided to parole defendant." (Appendix A, Circuit Court Opinion, page 7). The Circuit Court reached this conclusion by referring to the "brief description" in the Case Summary Report, which was a five-sentence summary of the criminal offense, which this Court said "fails to fully describe the particularly heinous nature of the offenses." *Id.* The Parole Board was **not** so cavalier. This was simply a shorthand *summary* of the offense for purposes of the Case Summary Report. This does **not** mean that the Parole Board was unaware of or failed to consider the serious nature and surrounding details of the criminal offense. The Parole Board had the Presentence Investigation Report (PSIR), which was prepared at the time of sentencing, and

which detailed the circumstances of this offense, including that Ms. Elias waited upstairs for the victim to arrive home, that she used a shotgun, that she fired two shots from the upstairs window as the victim exited his car (hitting his chest and arm), and that she came downstairs, re-loaded the shotgun and fired a third shot at the victim's head, as the victim laid on the ground. She was standing 2-3 feet from the victim when this third shot was fired. See PSIR. The Circuit Court, given its years of experience on the criminal docket, knew that the Parole Board had the PSIR and its detailed description of the criminal offense in this case. Further, the PSIR was clearly part of the MDOC record in this case. See MDOC file. Yet, the Circuit Court made no mention of the PSIR in its July 21, 2010 Opinion.

The Parole Board also was in receipt of the 34 letters from the victim's family. (See MDOC file). Even assuming arguendo that the Parole Board was so careless as to grant parole to a defendant without knowing the nature of the offense, the proper remedy is to remand it to the Parole Board either to clarify what it knew and considered with regard to the nature of the offense, or with direction to reconsider its decision based on additional information about the offense. Instead, the Circuit Court simply assumed the Parole Board only considered the five-sentence brief description in the Case Summary Report, and the Circuit Court reversed the Board's decision granting parole. This clearly was error by the Circuit Court.

The Circuit Court also faulted the Parole Board with regard to Ms. Elias' Institutional Program Performance, specifically her Therapy Termination Report (TTR) after completing the Assaultive Offender Program. Again, the Circuit Court relied on the Parole Board's brief summary that "merely notes defendant completed the programs." (Appendix A, Circuit Court Opinion, p 8). The Circuit Court found that the "Parole Board abused its discretion by not considering the substance of the report and only considering that the program was 'completed'."

Id. The Circuit Court seemed to suggest that the Parole Board had the TTR, dated March 14, 2006, and yet failed to consider the details of it. This is incorrect. The TTR was part of the record evidence and was considered by the Parole Board.

Even assuming arguendo that the Parole Board was so careless as to grant parole to a defendant without reading the details of the Therapy Termination Report, the proper remedy is to remand it to the Parole Board either to clarify what it knew and considered with regard to the Therapy Termination Report, or with direction to reconsider its decision based on additional information about the Therapy Termination Report. Instead, the Circuit Court assumed the Parole Board only considered that therapy was completed, and reversed the Board's decision granting parole. This clearly was error by the Circuit Court.

Further, it is apparent that the Circuit Court simply disagreed with the Parole Board with regard to the Therapy Termination Report. However, the Circuit Court may not substitute its judgment for that of the Parole Board. *Killebrew v Department of Corrections, supra,* 653.

Finally, the Therapy Termination Report was completed in 2006. The Parole Board did not act rashly and immediately parole Ms. Elias in 2006. Rather, the Parole Board continued to exercise caution and did not grant parole until 2010. Since the MDOC does not allow prisoners to re-take Assaultive Offender Therapy, it is unclear just how long the Circuit Court suggests that this Report be used to deny parole.

The Circuit Court also found that Ms. Elias has 37 major misconduct violations, and that "the Parole Board failed to consider the serious nature and extent of her institutional conduct in making its decision to grant parole." (Appendix A, Circuit Court Opinion, page 9). The Circuit Court based this finding on the "Parole Board's [sic] merely notes that defendant's behavior reflected in misconducts has diminished." *Id.* The Circuit Court detailed the categories of

misconduct violations and noted that Ms. Elias received a criminal conviction for destroying a vending machine at the facility in 1996. *Id.* The Circuit Court's finding on this prong constituted error. If the Parole Board was aware of anything, the Board was clearly aware of all of Ms. Elias' major misconduct violations. Each incident and each hearing report is written up in great detail and is a permanent part of Ms. Elias' MDOC file. See MDOC file. Further, the parole guidelines account for major misconduct tickets in the conduct variables. To accuse the Parole Board of not considering "the serious nature and extent of her institutional conduct in making its decision to grant parole" is akin to accusing the Board of being totally inept. It is abundantly clear that the Circuit Court simply disagreed with the Parole Board's assessment of Ms. Elias' major misconduct violations. Again, the Circuit Court may not substitute its judgment for that of the Parole Board. *Killebrew v Department of Corrections, supra,* 653.

Even assuming arguendo that the Parole Board was as slipshod as to grant parole to a defendant without considering "the serious nature and extent of her institutional conduct in making its decision to grant parole" (Appendix A, Circuit Court Opinion, page 9), the proper remedy is to remand it to the Parole Board either to clarify what it knew and considered with regard to the major misconduct violations, or to reconsider its decision in light of the 37 major misconduct violations. Instead, the Circuit Court simply assumed the Parole Board only considered that the misconducts had diminished, and this Court reversed the Board. This clearly was error by the Circuit Court.

The Circuit Court mentioned Prior Criminal History, but did not fault the Board in this area. (Appendix A, Circuit Court Opinion, page 9).

The Circuit Court also addressed "Other relevant factors". With regard to letters by the victim's relatives, the Circuit Court stated, "The record provided to the Court from the MDOC

includes these letters; however, it is unclear from the record whether the Parole Board gave these letters any consideration when making its determination." (Appendix A, Circuit Court Opinion, pages 9-10). This was error by the Circuit Court, as the Court of Appeals made it clear in *Lapeer County Prosecutor v David Groves and Parole Board, supra*, that the Board is *not* required to consider public opposition. (See Appendix P).

With regard to prior parole denials, the Circuit Court indicated a concern that the Therapy Termination Report was used to deny parole on May 29, 2009, and then the Board "relies on this same Therapy Termination Report when it grants defendant parole approximately eight months later." (Appendix A, Circuit Court Opinion, page 10). The Circuit Court expressed an inability to "reconcile the Parole Board's use of this report and finds its recent reliance on this report to grant parole is a clear abuse of discretion." *Id.* Again, the proper remedy is a remand for further articulation or re-evaluation, not a reversal.

With regard to the COMPAS report, the Circuit Court noted that it failed to provide a score for the cognitive behavioral/psychological section. COMPAS is a tool used to address re-entry support. It does not rise to the level of the Parole Guidelines in determining whether to parole. Further, the proper remedy is a remand, not a reversal.

With regard to the TAP report, the Circuit Court noted that it indicates a "score of highly probable to continue having problems with criminal thinking; probable to have reentry vocation/education problems; and probable cognitive behavioral problems." (Appendix A, Circuit Court Opinion, page 10). Again, the proper remedy, if there is any question, is a remand, not a reversal. Undersigned counsel also notes that the TAP report was done on September 11, 2008, which was before Ms. Elias married Mr. Udall. At a minimum, a remand is necessary for the calculation of an updated TAP report. Given her marriage and her husband's willingness to

provide assistance with reentry vocation/education problems, this concern should no longer exist. Further, TAP is a tool used to address re-entry support. It does not rise to the level of the Parole Guidelines in determining whether to parole.

With regard to the Case Summary Reports, which the Circuit Court noted were conflicting assessments over the years, this is attributable to different Board members who conducted the interviews. This does not constitute a clear abuse of discretion.

In conclusion, the Circuit Court repeatedly deemed the record incomplete with regard to what the Parole Board considered in reaching its decision, and/or incomplete with regard to how the Board weighed certain information in the file. (See Appendix A, Circuit Court Opinion). The Circuit Court faulted the Board for the lack of extensive findings, substituted its own judgment for that of the Board, and reversed the Parole Board's decision to parole. The record evidence before the Parole Board included details of the offense, the institutional program performance, the institutional conduct, letters from the victim's family, the prior parole denials, the prior Case Summary Reports, letters from the victim's family, and the COMPAS and TAP reports. Contrary to *Lapeer County Prosecutor v David Groves and Parole Board, supra,* the Circuit Court improperly faulted the Parole Board for not making extensive findings.

Regarding Circuit Court's Opinion Denying Reconsideration

In the Circuit Court's Opinion denying reconsideration, the Court again substituted its judgment for that of the Parole Board, and again faulted the Board for not making extensive findings. (See Opinion and Order attached as Appendix B, pages 3-4). The Circuit Court faulted the Board for failing to "adequately consider the serious nature and surrounding details of defendant's crimes"; that the Board only found that the Assaultive Offender Therapy was "completed", but that the Board did not consider the substance of the Therapy Termination

Report; that the Board only summarily noted that the major misconducts had "diminished"; that the Circuit Court could not reconcile the prior parole denials; that the COMPAS report was incomplete; and that the prior case summary reports reached different conclusions. *Id.*

Again, the Circuit Court repeatedly deemed the record incomplete with regard to what the Parole Board considered in reaching its decision, and/or incomplete with regard to how the Board weighed certain information in the file. (See Appendix B, Circuit Court Opinion denying reconsideration). The Circuit Court again faulted the Board for the lack of extensive findings, substituted its own judgment for that of the Board, and reversed the Parole Board's decision to parole.

This Court should peremptorily reverse the Circuit Court's decision, and reinstate the Parole Board's decision to grant parole.

Alternatively, even assuming arguendo that the Circuit Court was correct that the record is incomplete, the proper remedy is a remand to the Parole Board for an explanation of it decision, and/or for the Board to undertake further review of the file, and/or for the Board to reevaluate its prior decision. The remedy is *not* a reversal of the Board's decision.

SUMMARY AND RELIEF REQUESTED

For all of the reasons stated herein, Defendant-Appellant requests that this Court will peremptorily REVERSE the Circuit Court's decision, and REINSTATE the Parole Board's decision to grant parole; or peremptorily REMAND this case to the Parole Board for further clarification; or grant leave to appeal.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

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