

STATE OF MICHIGAN
IN THE SUPREME COURT

In re Parole of RICHARD MCBRAYER #235965

THE PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

Supreme Court No. 164311

Court of Appeals No. 357720

16th Circuit Court No. 20-000063-AP

v.

RICHARD MCBRAYER #235965

Defendant-Appellant

MICHIGAN PAROLE BOARD

Appellant-Intervenor

APPELLEE

PETER J. LUCIDO (P41237)
PROSECUTING ATTORNEY
MACOMB COUNTY MICHIGAN

JOSHUA ABBOTT (P53528)
CHIEF OF APPEALS

BY: TODD SCHMITZ (P46435)
ASST PROSECUTING ATTY
1 SOUTH MAIN ST. 3rd Floor
MOUNT CLEMENS, MI 48043
586-469-6453
todd.schmitz@macombgov.org

APPELLANT

RICHARD MCBRAYER #235965
C/O JACQUELINE OUVERY
(P71214)

ASSISTANT DEFENDER
STATE APPELLATE DEF. OFFICE
3030 W. GRAND BLVD. STE 450
DETROIT, MI 48202
(313)-256-9833

APPELLANT-INTERVENOR
H. STEVEN LANGSCHWAGER
ASST ATTORNEY GENERAL
ATTY FOR MI PAROLE BOARD
CRIMINAL APPELLATE DIV.
P.O. BOX 30217
LANSING, MICHIGAN 48909
517-335-3055

PLAINTIFF-APPELLEE'S ANSWER TO
APPELLANT'S EMERGENCY APPLICATION FOR LEAVE TO APPEAL

Dated: May 9, 2022

-1-

TABLE OF CONTENTS

Index of Authorities	3
Statement of Question Presented	4
Statement of Facts	5
ISSUE	13
I. THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW AND PROPERLY FOUND SUBSTANTIAL AND COMPELLING REASONS AGAIN EXIST THAT THE PAROLE BOARD ABUSED ITS DISCRETION IN PAROLING CONVICTED CHILD SEX OFFENDER RICHARD MCBRAYER.	13
A. The 2020 MDOC Sex Offender Risk Assessment psychologist was “skeptical” of his new claim to no longer be sexually attracted to 12 to 14 year old children, his 2018 sex offender risk assessment notes his admitted attraction to 12 to 14 year old girls, and he admitted to continued sexual fantasies and masturbation involving this age group, to include the victim, throughout his incarceration.	16
B. Mr. Mc Brayer’s relapse prevention plan will again fail to materialize because it places him relatively near the victim.	19
C. The nature of the child rape offenses were uniquely horrific crimes from which his victim still suffers.	24
D. The Parole Board had no more assurance Mr. McBrayer would not be a menace to society or to the public safety in 2020 than it had in 2018 and 2015 because the Parole Board has not demonstrated what differs now from the prior court reversals.	28
Relief Requested_____	36

INDEX OF AUTHORITIES

Cases

<i>Smith v Elias (In re Elias)</i> , 294 Mich App 507, 538; 811 NW2d 541 (2011)	28
<i>Morales v Mich Parole Board</i> , 260 Mich App 29, 48; 676 NW2d 221 (2003)	13
<i>People v Mack</i> , 265 Mich App 122 (2005)	13
<i>Jones v Department of Corrections</i> , 468 Mich 646 (2003)	13
<i>Poirier v Grand Blanc Twp</i> , 192 Mich App 539, 546; 481 NW2d 762 (1992)	16
<i>People v Brown</i> , 173 Mich App 202,209; 433 NW2d 404 (1988)	16

Statutes

MCL 791.233	14, 25
MCL 791.233e	29
MCL 780.771(1)	26

Rules

MCR 7.118(H)(3)(b)	13, 35
R 791.7715	26

STATEMENT OF QUESTION PRESENTED

ISSUE

1. **DID THE COURT OF APPEALS APPLY THE PROPER STANDARD OF REVIEW AND PROPERLY FIND SUBSTANTIAL AND COMPELLING REASONS AGAIN EXIST THAT THE PAROLE BOARD ABUSED ITS DISCRETION IN PAROLING CONVICTED CHILD SEX OFFENDER RICHARD MCBRAYER?**

Appellee Prosecutor's Answer: Yes.
Appellant Prisoner's answer: No.
Appellant-Intervenor Parole Board's likely answer: No.

STATEMENT OF FACTS

The Michigan Parole Board issued a Notice of Decision on November 4, 2020 to parole convicted child sex offender Mr. Richard McBrayer. (Appendix A, p1-5). The 16th Circuit Court reversed the Parole Board on June 11, 2021. (Appendix W). The Michigan Court of Appeals affirmed the reversal on March 10, 2022. (Appendix X).

In Mr. McBrayer's 2020 Sex Offender Risk Assessment the MDOC psychologist noted,

"Mr. McBrayer professes to no longer have a deviant sexual interest in 12 to 14 year old children. **This writer is skeptical of this statement as an individual's sexual interest typically do not change over the course of time.**" (Appendix E at 2)(*emphasis added*).

In Mr. McBrayer's 2018 Sex Offender Risk Assessment the MDOC psychologist also raised concerns:

"Deviant Sexual Interests: Mr. McBrayer admitted to having a sexual attraction to young females, age 12 - 14, which has persisted since his incarceration in the MDOC. When asked what made this age group attractive to him, he replied, 'The physical development...breasts...starting to look anything other than a kid...' Mr. McBrayer admitted to continued sexual fantasies and masturbation involving this age group, to include the victim, throughout his incarceration. Interestingly, although he cites his involvement in SOP in 2010 as being instrumental in changing his sexual behavior and thinking, he admitted to continued masturbation to sexual fantasy involving his victim and/or this target age group until 2015." Qualified Mental Health Professional Evaluation and Sex Offender Risk Assessment, dated May 1, 2018, page 3. (Appendix E at 6).

“Empirical measures assess Mr. McBrayer’s risk for sexual reoffending as LOW. **Mr. McBrayer has continued to express a sexual attraction for underage children despite his lengthy incarceration and involvement in sex offender programming.** Mr. McBrayer reports that ‘he has been tested,’ and is able to manage his sexual thoughts and behaviors when in the community; **however, the fact that he continues to entertain deviant thoughts is concerning.** Nevertheless, he has verbalized an understanding of cognitive behavioral practices that should help him resist acting on such thoughts... **Mr. McBrayer evidenced a clinically significant area of concern in the following need area: Deviant Sexual Preferences.**” Qualified Mental Health Professional Evaluation and Sex Offender Risk Assessment, dated May 1, 2018, page 4 (*emphasis added*). (Appendix E at 7).

Mr. McBrayer was charged in 1994 with five counts of first-degree criminal sexual conduct, MCL 750.520b(2)(b). He pleaded guilty to two of those counts, *People v. McBrayer*, case #1993-2894-FC, in exchange for dismissal of *People v. McBrayer*, case #1993-2895-FC, in which dismissed case he was charged with two counts of CSC 1 and one count of CSC 2. McBrayer was sentenced by Judge Mary Chrzanowski in case #1993-2894-FC to two concurrent 20 - 40 year sentences of imprisonment on March 2, 1994, with credit for 150 days. (Appendix B).

The Michigan Court of Appeals twice previously upheld the 16th Circuit Court’s reversal of the Michigan Parole Board’s decisions regarding Mr. Richard McBrayer. The reversal of the Parole Board’s 2015 decision to parole Mr. McBrayer was upheld in 2018. *In re Parole of*

Richard McBrayer, unpublished per curiam opinion of the Court of Appeals, issued August 29, 2018 (Docket No. 336084)(*McBrayer I*) (Appendix J). In April 2018, our Supreme Court denied the Board's application for leave to appeal the Court of Appeals decision in *McBrayer I*. *In re Parole of Richard McBrayer*, 501 Mich 1038 (2018)(*McBrayer II*) (Appendix K). The reversal of the Parole Board's 2018 decision to parole Mr. McBrayer was upheld in 2019. *In re Parole of Richard McBrayer*, unpublished per curiam opinion of the Court of Appeals, issued August 29, 2019 (Docket No. 346841)(*McBrayer III*) (Appendix I).

Relapse Prevention Plan again places Mr. McBrayer “relatively near” the child rape victim

The victim alleged that in 2016, during the period when McBrayer was released, she saw him at a traffic light less than a mile from her home. This allegation led to the successful parole appeal in *McBrayer I*. (Appendix *I* at 5).

In *McBrayer III*, Mr. McBrayer's Relapse Prevention Plan included locating Mr. McBrayer within approximately 4 miles from the victim's home. The Court of Appeals noted physical location is not the only part of a relapse prevention plan, but it is not irrelevant, “particularly in this case given that both the victim and McBrayer himself do not want him to be placed in Macomb County.” (Appendix J at 5 - 6).

The State of Michigan is approximately 96,716 square miles in size. Mr. McBrayer's latest Relapse Prevention Plan includes locating him within approximately 16 miles of his victim. (Appendix A-5).

"Indeed, despite McBrayer's past concerns about remaining in the area where the victim lives and despite his desire to remove himself from areas where children would likely be present, the Board intended to release McBrayer to ... Auburn Hills in December 2020." (Appendix X at 7).

Damage Inflicted on the Victim

McBrayer's convictions arose from the sexual abuse, rape and sodomization, of his step-daughter. The victim was between 12 and 14 years-old at the time. McBrayer was between 35 and 36 years-old at the time. The prisoner is a former law-enforcement officer and martial arts instructor. Resume of Richard McBrayer from MDOC Central Office File. (Appendix C, Appendix D).

His child victim details the horrific abuse perpetrated on her by this prisoner in her 1994 Victim Impact Statement, which was attached and incorporated into the March 2, 1994 Pre-Sentence Investigative Report, and in various verbal and written communications with the Parole Board since 1994. Pre-Sentence Investigative Report, dated March 2, 1994. (Appendix C).

She detailed the events that occurred the first time he anally raped her. At that time, she was 12 years-old and the prisoner was 34 years-old. She told him that she didn't want him to inappropriately touch her anymore. McBrayer stated that he wanted to know what it was like to "fuck a little girl," and threw her on the bed. She tried to get up and he held her down. She tried to scream, but he covered her mouth and told her of different ways he could kill someone, so that it "looked like an accident" to make her stop. He forced his penis into her mouth. She spit out. He then took her clothes off and performed cunnilingus on her. She states, "I was crying and he told me to stop crying." He then flipped her over onto her stomach and forced his penis into her rectum, which caused her to immediately start bleeding. He "grabbed a napkin and told me to wipe myself off." He then flipped her back over and grabbed her hand, placing it on his penis under his and "moved it until he started to cumm then he placed his penis in my mouth and made me swallow his cumm." She told him she was going to throw up and he followed her into the bathroom where she vomited. He then said, "I'm not done with you yet," and forced her back to the bed, where he licked and fondled her 12 year-old "breasts." He then "placed his penis inside my vagina and cummed." He then told her to go and not to forget what he said or she would regret it. She went to her room and cried herself to sleep.

Unfortunately, this scenario would play itself out, sometimes five times in one day, for years to come.

His victim states that, “one time he wanted to do something and I said no, he beat me black and blue, I had cuts all over, he grabbed a hold of my wrist and bent it back so far that I thought he broke it.” She stated that the prisoner repeatedly threatened her with violence if she told anyone about his deviant criminal behavior.

This prisoner used his positions of authority and influence, and sheer violence, to terrorize and frighten the young child victim into silence. Aside from beating her and making threats of further physical harm, the prisoner told her repeatedly that if she told her mother what happened, her mother would “hate” her and that she would be responsible for “breaking up the family,” “hurting everyone” and “putting me in jail.” Unbeknownst to the prisoner at the time, Michigan State Police officers tape recorded him saying these things to the child victim.

Another of the countless brutal, violent rapes of this child occurred when the prisoner took her to a motel room. On that occasion, his victim reports that the prisoner forced her into a Jacuzzi, forced his penis into her mouth and held her head underwater while orally raping her until she felt like she would drown. During that horrific event, the prisoner also shoved a sucker up her vagina “and twisted it in and out of my vagina and it burned. Then he stuck it in my rectum, then he put it in

my mouth.” She states that “by the time he was done... I got sick and threw up the rest of the night...” and for the next 3 days. Her mother took her to the doctor, who said she had blocked bowels, bleeding of the rectum, hyperextended wrists, hip injuries and a urinary tract infection. She states, “I couldn’t walk for a month.” Importantly, these facts comprise the “Victim’s Statement” portion of the PSI, as her statement was attached to it and referenced as such in that section.

The child victim states that the hundreds of violent oral, vaginal and anal rapes she was forced to endure at the hands of the prisoner for years has caused ongoing medical problems, including something she refers to as “black bowels.” She elaborated, stating that the prisoner was violent during most of the rape episodes, specifically those involving repeated anal rapes. She visited the doctor numerous times from 1991 to 1993 because of severe pain and strange anal bleeding, which caused her to miss a great deal of school at the time. She reports she continues to experience these medical problems to this day.

The circuit court judge at McBrayer’s 1994 sentencing stated:

“You are the most disgusting individual that has ever stood in front of me... I didn’t sleep after I read this letter [from the crime victim]... You took her to a motel room, you abused her in a hot tub, you made her drink alcohol, you held her underneath the water in the hot tub, pulled out a sucker and proceeded to stick the sucker into her vagina. And I don’t even want to begin to talk about the stick shift in the car... If within the bounds of law I could give you more time [than 20 - 40 years], I would,” Judge Chrzanowski, Transcript of

Sentencing Hearing, 93-2894-FC, March 2, 1994, page 50A - (Appendix N at 3).

In reversing the 2015 Parole Board decision, Judge Kathryn A. Viviano stated, "The severity of those crimes and their continuing impact on [the victim] - both emotionally and physically - can not be overstated." *Smith v McBrayer*, 16th Circuit Court case #2016-1586-AP. (Appendix O at 12).

The victim submitted letters to the Parole Board. She also contacted the Macomb County Prosecutor's Office to express concern about the Parole Board decision to parole the prisoner.

McBrayer has been in prison for approximately 28 years of his 1994 20 - 40 year sentence. He is 64 years-old.

ISSUE

1. **DID THE COURT OF APPEALS APPLY THE PROPER STANDARD OF REVIEW AND PROPERLY FIND SUBSTANTIAL AND COMPELLING REASONS AGAIN EXIST THAT THE PAROLE BOARD ABUSED ITS DISCRETION IN PAROLING CONVICTED CHILD SEX OFFENDER RICHARD MCBRAYER?**

STANDARD OF REVIEW

A prisoner has no constitutional or inherent right to parole, but merely a hope or expectation. *People v Mack*, 265 Mich App 122 (2005); *Morales v Michigan Parole Board*, 260 Mich App 29 (2003), citing *Jones v Department of Corrections*, 468 Mich 646 (2003).

A party challenging the Parole Board's decision to grant parole has the burden of establishing a clear abuse of discretion or a violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation. MCR 7.118(H)(3); *In re Elias*, 294 Mich App 507, 538; 811 NW2d 541 (2011). An abuse of discretion occurs when the Board's decision falls outside the range of reasonable and principled outcomes. *Elias*, 294 Mich App at 538. "[A] reviewing court may not substitute its judgment for that of the Board." *Id.* at 538-539.

In general, parole matters lie solely within the Board's broad discretion. *Id.* at 521. Nonetheless, "the Legislature has clearly imposed

certain statutory restrictions on the Board's exercise of its discretion." Id. at 521-522.

"Most importantly, [a] prisoner shall not be given liberty on parole until the board has reasonable assurance, after consideration of all 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." Id. at 522, quoting MCL 791.233(1)a)(brackets in *Elias*).¹

¹ MCL 791.233(1)(a) was amended in 2017 to replace the word "shall" with "must". See 2017 PA 14, effective June 29, 2017.

ANALYSIS

The Court of Appeals applied the proper standard of review and three times upheld the 16th Circuit Court's reversal of the Michigan Parole Board's Notice of Decision to grant parole to Mr. McBrayer. The Court of Appeals consistently determined that substantial and compelling reasons for a departure from the parole guidelines existed with respect to the 2020, 2018 and 2015 parole decisions. The Michigan Supreme Court denied leave to appeal a prior court reversal of the Parole Board involving these parties. *In re Parole of Richard McBrayer*, 501 Mich 1038 (2018)(*McBrayer II*) (Appendix K) The relevant facts and circumstances regarding the 2020 Parole Board decision are essentially the same as the 2018 and 2015 parole decisions; therefore, substantial and compelling reasons again exist for a departure from the parole guidelines with respect to the 2020 parole decision.

The Court of Appeals and 16th Circuit Court cited the correct standard of review: MCR 7.118(H)(3) and *In re Parole of Elias*, 294 Mich App 507, 538; 81 I NW2d 541 (2011)(Appendix W at 3, Appendix X at 3). The circuit court correctly took notice of the Court prior Court of Appeals opinions involving this case, finding them to be "well reasoned." (Appendix W at 4). The circuit court properly attempted to find what was different in the 2020 Parole Board decision that would require a different

result than prior courts reached regarding the Parole Board's 2018 and 2015 decisions. See *Poirier v Grand Blanc Twp*, 192 Mich App 539, 546; 481 NW2d 762 (1992), citing *People v Brown*, 173 Mich App 202,209; 433 NW2d 404 (1988)(explaining law of the case doctrine)(Appendix W at 4-6). The circuit court correctly noted the 2020 Parole Guidelines Score is the same as in 2018 and 2015, when Parole Board decisions were reversed.

A. The 2020 MDOC Sex Offender Risk Assessment psychologist was “skeptical” of Mr. McBrayer’s new claim to no longer be sexually attracted to 12 to 14 year old children, his 2018 Sex Offender Risk Assessment notes his admitted attraction to 12 to 14 year old girls, and his Relapse Prevention Plan again places him relatively near the victim.

In McBrayer's 2020 Sex Offender Risk Assessment the reviewer noted,

“Mr. McBrayer professes to no longer have a deviant sexual interest in 12 to 14 year old children. **This writer is skeptical of this statement as an individual’s sexual interest typically do not change over the course of time.**” (Appendix E at 2)(*emphasis added*).

This 2020 statement was listed as a factor considered by the Board. (Appendix A at 5, Factor #5.) Age 63 McBrayer's claim to no longer have a deviant sexual interest in 12 to 14 year old children was made in contrast to age 58 McBrayer's admission that he had fantasized about the victim and that he was attracted to 12- and 14-year-olds. McBrayer's new self-serving statement was made in a 1.5 hour interview

with a psychologist, only after Court of Appeals parole reversal opinions expressly noted McBrayer's long-time sexual interest in 12-14 year-old children. McBrayer's self-described new sexual preference at age 63, to counteract his admission at age 58, should not be enough to shield the Board from another abuse of discretion determination in this case, especially when his age 58 admission was consistent with his age 36 actions. Even the MDOC's reviewer was "skeptical of this [age 63] statement," and noted, "an individual's sexual interest typically do not change over the course of time." (Appendix E at 2).

The 2018 Sex Offender Risk Assessment raised concerns:

"Deviant Sexual Interests: Mr. McBrayer admitted to having a sexual attraction to young females, age 12 - 14, which has persisted since his incarceration in the MDOC. When asked what made this age group attractive to him, he replied, 'The physical development...breasts...starting to look anything other than a kid...' Mr. McBrayer admitted to continued sexual fantasies and masturbation involving this age group, to include the victim, throughout his incarceration. Interestingly, although he cites his involvement in SOP in 2010 as being instrumental in changing his sexual behavior and thinking, he admitted to continued masturbation to sexual fantasy involving his victim and/or this target age group until 2015." Qualified Mental Health Professional Evaluation and Sex Offender Risk Assessment, dated May 1, 2018, page 3. (Appendix E at 6).

"Empirical measures assess Mr. McBrayer's risk for sexual reoffending as LOW. **Mr. McBrayer has continued to express a sexual attraction for underage children despite his lengthy incarceration and involvement in sex offender programming.** Mr. McBrayer reports that 'he has been tested,' and is able to manage his sexual thoughts and

behaviors when in the community; **however, the fact that he continues to entertain deviant thoughts is concerning.** Nevertheless, he has verbalized an understanding of cognitive behavioral practices that should help him resist acting on such thoughts... **Mr. McBrayer evidenced a clinically significant area of concern in the following need area: Deviant Sexual Preferences.**” Qualified Mental Health Professional Evaluation and Sex Offender Risk Assessment, dated May 1, 2018, page 4 (*emphasis added*). (Appendix E at 7).

As a 58 year-old man, McBrayer admitted in 2015, **“that he had fantasized about the victim and that he was attracted to 13- and 14-year-olds.”** *McBrayer III*, unpub op at 4, citing *McBrayer I*, unpub op at 4 (*emphasis added*)(Appendix I). This is consistent with his 2014 Case Summary Report, which states, “[McBrayer] said the assaults were random, had a lot to do with whether he would fantasize about it, [McBrayer] said when he would spend inappropriate time thinking of [his victim]...” (Appendix F at 50).

McBrayer’s 2020 Sex Offender Risk Assessment conclusion is the same as the 2018 and 2015 Sex Offender Risk Assessments relied upon by the Parole Board in its decisions found by the court to be a Parole Board abuse of discretion. Since the Parole Board’s decisions that relied upon the 2018 and 2015 SORAs were an abuse of discretion (*McBrayer III* and *McBrayer III*), the Parole Board’s 2020 decision that relies upon the 2020 SORA, which contains the same conclusion, but even less

analysis, as the 2018 and 2015 SORAs should also be found to be an abuse of discretion.

In McBrayer's 2020 Sex Offender Risk Assessment, now relied upon by the Parole Board, the "Conclusion" section appears immediately after after the recitation of his history. (Appendix E at 2). The conclusion section states McBrayer's Static-99R and STABLE-2007 scores. "The Static-99R has moderate accuracy in ranking Offenders according to their relative risk for sexual recidivism and is widely accepted by the scientific community and by applied evaluators. Mr. McBrayer's score places him in the Below Average risk category for being charged or convicted of another sexual offense. (Appendix E at 2).

B. Mr. Mc Brayer's relapse prevention plan will again fail to materialize because it places him relatively near the victim.

There has been no meaningful improvement in McBrayer's relapse prevention plan since *McBrayer III*. Previously, McBrayer had, "plans to live away from the victim and in an area 'appropriately removed from high potential for underage traffic.' *McBrayer III*, unpub op at 5, citing *McBrayer I* unpub at 5. The court should again take into consideration, "the derailment of McBrayer's plan to stay away from the victim and avoid relapse... The various [parole guidelines] scores did not take into account the nuances of McBrayer's severe abuse of the victim coupled

with the failure of his professed plan to prevent relapse and “stay away from his victim.” [*Id.*]

Nothing has materially changed on the 2020 relapse prevention plan since *McBrayer III* and *McBrayer I*. Although there is now a specific parole condition prohibiting McBrayer from entering Macomb County, the Parole Board’s measures do not go far enough. (Appendix A at 2, specific condition 4.5.) In *McBrayer III*, the Court of Appeals was concerned about the, “[A]bsence of a relapse prevention plan that will avoid placing McBrayer **relatively near the victim’s residence.**” *McBrayer III*, unpub op at 6. (*emphasis added*). Special parole condition 4.0, states, “You must not enter unless you first obtain written permission from the field agent. MACOMB COUNTY” (Appendix A at 2, specific condition 4.0). The prohibition is not absolute because McBrayer may still enter Macomb County with the probation officer’s permission. McBrayer will presumably be paroled to Oakland County, but there he is still, “relatively near the victim’s residence.” In *McBrayer III*, the Parole Board previously planned to place McBrayer in housing within approximately only 4 miles of the victim’s apparent residence. Despite Michigan being approximately 96,716 square miles in size, the MDOC now proposes to parole McBrayer to a neighboring county whose border is only approximately 16 miles from his child rape victim’s home. Oakland County’s border is approximately a mere 12 miles farther

distance from the victim's apparent residence than was the previously proposed distance between them in *McBrayer III*.

Consideration of McBrayer's ability to stay away from the victim and avoid a relapse should be no less important today to this Honorable Court than it was to the Court of Appeals in *McBrayer I and III*. His 2018 SORA states McBrayer "has continued to express a sexual attraction for underage children despite his lengthy incarceration and involvement in sex offender programming." (Appendix E at 7), and his 2020 SORA states he professes, "to no longer have a deviant sexual interest in 12 to 14 year old children. **This writer is skeptical of this statement** as an individual's sexual interest typically do not change over the course of time." (Appendix E at 2)(*emphasis added*).

Although the Parole Board may argue that physical location is not the only part of a relapse prevention plan, this does not mean that physical location is irrelevant, particularly in this case given that both the victim and McBrayer himself do not want him to be placed near the victim. The victim's fear regarding proximity is not unfounded. The victim alleges that in 2016, during the period when McBrayer was released, she saw him at a traffic light less than a mile from her home, and this allegation led to the successful parole appeal in *McBrayer I*. *McBrayer III* unpub op at 5. The prisoner's ex-wife and a step-daughter (not the victim in the current case) filed a police report on January 29, 2018,

stating that a male came to the step-daughter's home looking for the prisoner and stated the address was given by the prisoner to a potential employer. Shortly after the male left the residence, an incoming call was received from a blocked number who asked for the victim by name. Clinton Township Police Report 2018-00003355. (Appendix L). On February 18, 2011, the victim filed a police report stating she received a phone call from the prisoner's step-sister, who stated she knows the victim's address and offered to come to her home to drive her to the prisoner's next parole hearing. The victim interpreted this to be a threat in violation of an order for no indirect contact, and she also reported it to the Parole Board, but said the Board did not view it as a threat. Clinton Township Police Report 11-6753. (Appendix M).

In addition to proximity to the victim's apparent residence being a reason the prisoner's relapse prevention plan has not materially changed from *McBrayer III*, it is unclear whether the employment portion of McBrayer's relapse prevention plan will fail to materialize. The 2020 Case Summary Report states the placement plan submitted by McBrayer includes, "Proposed job with LUJA Lawn Service in Oxford, MI." (Appendix F at 7). "Parole plan is to return to his prior job in landscaping business. He is in contact w/ his prior employer on a regular bases. (sic)" (Appendix F at 8). "Records indicate that he has worked for his employer

since his release and that he ‘looks after their property.’” (Appendix E at 5).

But the most recent State of Michigan Department of Licensing and Regulatory Affairs filing for this business is three years old: a 2017 Annual Statement listing a registered office address of, “2580 Sashabaw Road, Brandon Twp, MI 48371” (Appendix R at 4) which address was sold by the limited liability company’s Authorized Agent Joseph Weiler on July 21, 2020. (Appendix S at 1-2). It appears the business is no longer located at 2580 Sashabaw Road, and that McBrayer’s proposed employer is “not in good standing” with the State of Michigan. (Appendix R at 1). The MDOC did receive an employment address change via email on August 12, 2020, indicating a new address for Luga Lawn Service at 1155 Lasalle Ave, Waterford, MI 48238. (Appendix T). But the Parole Board should have taken steps to verify the relapse prevention plan’s proposed employer’s location, given the discrepancy in address between the email message versus the official State of Michigan and Oakland County Register of Deeds records.

Given the court’s prior focus on McBrayer’s relapse prevention plan, it is an abuse of discretion when the Parole Board failed to present a clearly detailed relapse prevention plan that includes verification of the Michigan Department of Licensing and Regulatory Affairs “good standing” of this sex offender’s proposed employer. It is an abuse of

discretion when McBrayer's relapse prevention plan does not set forth how working on a residential lawn care crew will prevent this convicted child rapist from being near neighborhood children in violation of specific parole conditions. (Appendix A at 1, specific parole condition 1.2). When McBrayer's proximity to the victim's address was previously emphasized by the court, it is an abuse of discretion by the Parole Board to include in his relapse prevention plan a potential employer whose business address has not been verified. According to the 2018 SORA, "Mr. McBrayer's longest period of employment appears to be for 2 years prior to his arrest for the instant offense, although he reported working with his father in the past." (Appendix E at 5).

C. The nature of the child rape offenses were uniquely horrific crimes from which his victim still suffers.

Over two decades later, the victim reported to the Parole Board that she continues to suffer both mentally and physically from the heinous sexual assaults that McBrayer repeatedly perpetrated on her when she was a child. In 2020, the victim told the Parole Board she had numerous surgeries. In 2015, the victim told the Parole Board that physically she is unable to have a natural bowel movement without physical assistance. (See Parole Board Confidential File: In Memorandum of Interviews & Telephone Calls 6/23/20, In Memorandum

of Interviews & Telephone Calls 05/17/18, In Memorandum of Interviews & Telephone Calls 05/06/15.)

Although the nature of the offense is usually not the most important factor in deciding whether to grant parole, see *Elias*, this court should agree with consistent explanations of the Court of Appeals in *McBrayer III* and *McBrayer I*, concerning the unique nature of the horrific crimes committed by McBrayer in this case. The nature of those offenses, together with McBrayer's continued denial that he committed child anal rape (but not the other aspects of the offenses), together with his admitted attraction to 12-14 year old girls as recently as 2015 (Appendix E, p6), renders the Parole Board's conclusion that McBrayer "will not become a menace to society or to the public safety," if released on parole, MCL 791.233(1)(a), an abuse of discretion. *McBrayer III*, unpub op at 3 (Appendix I at p4).

"We fully acknowledge the nature of the offense is not the most important factor in deciding whether to grant parole, but this [McBrayer] case presents a **unique situation** in that the damage inflicted on the victim is coupled with a professed relapse prevention plan that did not materialize."

McBrayer I, unpub op at 4 ((Appendix J at p4)(*emphasis added*)).

The offenses committed by the prisoner in this case are among the most heinous that can be committed: McBrayer violently anally, vaginally and orally raped his 12 year-old step-daughter, then he used his positions of authority and influence to violently terrorize and frighten

the young child victim into silence. The unique facts of this case are so egregious that the circuit court judge herself couldn't contain her own disgust at the 1994 sentencing:

"You are the most disgusting individual that has ever stood in front of me... I didn't sleep after I read this letter [from the crime victim]... You took her to a motel room, you abused her in a hot tub, you made her drink alcohol, you held her underneath the water in the hot tub, pulled out a sucker and proceeded to stick the sucker into her vagina. And I don't even want to begin to talk about the stick shift in the car... If within the bounds of law I could give you more time [than 20 - 40 years], I would ,” Judge Chrzanowski, Transcript of Sentencing Hearing, 93-2894-FC, March 2, 1994, page 50A - (Appendix N at 3).

The sentencing judge pointed out the facts of two (of the hundreds) of the violent, perverted child rapes immediately prior to rendering sentence. The prisoner proceeded to deny those facts in open court by repeatedly stating, "It's not true," thereby calling the victim a liar to her face immediately after pleading guilty to repeatedly raping her. (Appendix N at 3, page 50A).

In reversing the 2015 Parole Board decision, Judge Kathryn A. Viviano stated, "The severity of those crimes and their continuing impact on [the victim] - both emotionally and physically - can not be overstated." *Smith v McBrayer*, 16th Circuit Court case #2016-1586-AP. (Appendix O at 12).

A victim statement is a specific factor that must be considered by the Parole Board. MCL 780.771(1); Mich Admin Code, R 791.7715(1) (Appendix P). The victim continues to suffer and seek medical treatment to this day. She has consistently communicated with the Parole Board and appeared before the Parole Board. McBrayer's victim suffered long-term physical injuries and medical problems due to the assault, along with emotional and mental trauma. The child victim's physical injuries included blocked bowels and bleeding of the rectum.

"We first make note of the powerful evidence provided by the victim during her interview on May 6, 2016. The victim recounted how McBrayer, a former court officer in a state district court, kept her in constant fear, and she stated that she still suffers horribly, including by having panic attacks. She stated that, to this day, she cannot have a natural bowel movement and instead needs physical assistance... The victim recounted an instance when she was in the eighth grade and McBrayer sodomized her so severely that she needed hospitalization; McBrayer came to the hospital with the victim's mother and pretended to offer concern and support. We further note that the victim contracted a sexually transmitted disease from McBrayer.

McBrayer III, unpub op at 4 (Appendix I), citing *McBrayer I*, unpub op at 1-2 (Appendix J).

D. The Parole Board had no more assurance Mr. McBrayer would not be a menace to society or to the public safety in 2020 than it had in 2018 and 2015 because the Parole Board has not demonstrated what differs now from the prior court reversals.

In the 2020 SORA, there is no explanation for why McBrayer's "Deviant Sexual Interest" went from "a clinically significant area of concern" in 2018 (Appendix E at 7) to being only "of some concern" in 2020 (Appendix E at 2), especially when the 2020 reviewer was "skeptical" of his claim to no longer be sexually attracted to 12 to 14 year old children. Reason for skepticism in 2020 is justified because in 2018, "Mr. McBrayer denied using sex as a coping mechanism; however, one may suspect that his infidelity during marriage and his criminal sexual misconduct suggests otherwise." (Appendix E at 6).

McBrayer's 2020 Static-99R score is essentially unchanged from 2018 and 2015, when he was scored "low." (Appendix E at 7 and 11).

The prisoner's 2020 Parole Guidelines score is no better now than it was in 2018 and 2015 when the Parole Board decisions relying on them were reversed. McBrayer's 2020, 2018 and 2015 Parole Guidelines Scores were each +11. (Appendix G at 3, 6 and 10). "The Legislature recognized, however, that in some circumstances the parole guidelines fail to take into account adequate information." *Elias* at 522. Therefore, the Board has discretion to depart from the parole guidelines on the basis of substantial and compelling reasons stated in writing. *Id.* In so

doing, the Board may rely on objective facts as well as subjective findings, including those related to a prisoner's social attitude. *Id.* at 543-544.² Although Mr. McBrayer's +11 score places him in the high-probability category of parole, *In re Elias*, 294 Mich App 507 at 518 (2011), the Court of Appeals twice previously found substantial and compelling reasons existed for the Board to deny parole when he had the same +11 score. (*McBrayer I* and *McBrayer III*). The 2020 Parole Guidelines Score indicates no improvement from the 2018 and 2015 scores. Therefore, the Board in 2020, was authorized to depart from the parole guidelines for the same substantial and compelling reasons as was the case in 2018 and 2015. Since the 2018 and 2015 parole decisions were reversed, the 2020 parole decision with the identical guidelines score should also be reversed.

No new COMPAS Assessment was located in McBrayer's Central Office File. Mr. McBrayer's most recent COMPAS Assessment Narrative, dated April 12, 2018, does not show improvement from the June 9, 2015

² A statutory amendment effective December 12, 2018, requires any departure from the parole guidelines to be based on "substantial and compelling *objective* reasons stated in writing." MCL 791.233e(6)(emphasis added), as amended by 2018 PA 339. But those amendments do not apply here given that McBrayer's offenses were committed before December 12, 2018, i.e., the effective date of 2018 PA 339. That amendment also identified and limited the circumstances in which substantial and compelling objective reasons for a departure could be found to exist with respect to a prisoner with a high probability of parole. See MCL 791.233e(7), as amended by PA 339. In particular, MCL 791.233e(13), as added by 2018 PA 339 provides:

Subsections (6), (7), and (8) as amended or added by the amendatory act that added this subsection apply only to prisoners whose controlling offense was committed on or after the effective date of the amendatory act that added this subsection. Subsections (7) and (8) do not apply to a prisoner serving a life sentence, regardless of the date of his or her controlling offense.

COMPAS Assessment Narrative, which was used when the prior parole decision was reversed. His COMPAS Assessment Narratives from 2008, 2009, 2011, 2013, 2015 and 2018 do not indicate that Mr. McBrayer will be less of a menace to society in 2020 than he was in 2018 or 2015, which Parole Board decisions were reversed. (Appendix H).

The Parole Board may argue that restrictive parole conditions lend assurance to a finding that he is not a menace to society. However, the fact that McBrayer tormented his 12 year-old step-daughter for 2½ years with deviant sexual assaults, including forcibly raping and sodomizing her to the point of serious physical injury requiring multiple doctor visits, demonstrates his capacity to ignore well-established societal norms in order to satisfy his desires. Thus, it is unrealistic, and an abuse of discretion, for the Board to find that its temporary conditions are enough to deter him from reverting to his admitted appetites.

The relevant facts and circumstances pertaining to the 2020 parole decision are, for all practical purposes unchanged from the facts and circumstances considered in *McBrayer III* and *McBrayer I*. The Board's determination that McBrayer will not pose a menace to society or the public safety again falls outside the range of reasonable and principled outcomes, given the facts and circumstances relevant to the 2020 parole decision, including McBrayer's continued minimizing of his heinous actions, and the lack of meaningful improvement in the Sex Offender

Risk Assessment, the Parole Guidelines Score, COMPAS or in the relapse prevention plan, which still will not avoid placing McBrayer “relatively near” the victim’s residence.

Unlike in 2018, the Parole Board in 2020 did specifically consider the fact that McBrayer did not violate parole during the period he was on parole from January 2016 to April 2018. (Appendix A at 5, Factor #6). But in *McBrayer III*, the Court of Appeals also considered McBrayer’s prior parole release. After noting the Board did not identify this fact in 2016, the Court of Appeals wrote,

“It is important to note that, for most of the period that McBrayer was on parole during the identified timeframe, McBrayer’s parole was under continual appellate review by the circuit court, the Court of Appeals, or our Supreme Court. Such ongoing scrutiny will not exist if McBrayer, whose parole release was stayed pending this appeal, is released after appellate review...” *McBrayer III*, unpub op. at 6, fn 6.

The fact that the Parole Board in 2020 considered the 2016 parole release, does not diminish the court’s prior reasoning that McBrayer’s lack of violation during his prior parole was because he was under constant appellate review; especially, in light of the uniquely horrific nature of the crime for which McBrayer is incarcerated, and the lack of meaningful improvements in his 2020 relapse prevention plan.

McBrayer’s victim asked that this court be made aware that she did not receive from the Michigan Department of Corrections a copy of

the Parole Board Notice of Decision, dated 11/04/2020. During the *McBrayer I* proceedings, when victim notice was an issue, the victim reports that she received Parole Board notices via certified mail, for which she had to sign. Although she received other Parole Board Notices, including a notice in 2020 regarding the Parole Board review, she said she did not get the actual Notice of Decision. The Parole Board stated via Email that it did send the Notice of Decision to the victim via U.S. Mail. The Parole Board was unable to produce a copy of the notice or envelope specifically addressed to the victim because they “do not keep a copy of the envelope. The only thing that would have her address on it, would be her Crime Victim Application and any correspondence she sent to the Crime Victim Unit...” (Appendix U at 1). Had the Macomb County Prosecutor’s Office not been monitoring this case, then any failure by the Parole Board to send notice to the victim about Notice of Decision could have again resulted in her learning of McBrayer’s parole by encountering him at a traffic light, as happened on his prior release.

Finally, while the doctrines of *stare decisis* and *res judicata* may not strictly apply here, due to the fact that the Parole Board issued a new Notice of Decision in 2020, albeit essentially identical to 2018 and 2015, the policy behind those doctrines is worth considering. In fact, *res judicata* has been recently applied to an appeal of a Parole Decision by the Court of Appeals in an unpublished case:

“The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first.” The doctrine of res judicata is intended to relieve parties of the cost and vexation or multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication, that is, to foster the finality of litigation. (quotation marks and citation omitted.) *Szymanski v Dept of Corr. & Parole Board*, unpublished per curiam opinion of the Court of Appeals, issued Dec. 29, 2020 (Docket No. 350489) (Appendix V).

The 2020 Parole Board decision involves essentially the same facts as the *McBrayer I* and *McBrayer III* cases decided before it. In *Szymanski*, supra, a prisoner appealed to reverse a Parole Board decision to revoke his parole after he possessed and used marijuana. The prisoner had previously appealed the same Parole Board decision, and sought a writ of mandamus against the Parole Board. The Parole Board argued the prisoner “raised the same arguments in the mandamus action and was thus barred by the doctrine of res judicata from relitigating them.” *Szumanski*, id, at 3. The Court of Appeals said the prisoner’s second case raised, “the very same legal arguments” as the first, even though the first case sought a writ of mandamus and the second sought declaratory relief regarding a condition of parole. “And to the extent plaintiff seeks to relitigate the issue of the validity of his parole conditions in this Court, we decline to do so.” *Szymanski*, id, at 6.

Like *Szymanski*, the present case involves a Parole Board decision where the underlying facts are essentially the same as they were in *McBrayer I* and *McBrayer III*. Although the Parole Board made a new decision in 2020, there is not enough difference in the underlying facts to merit this court ruling differently than in *McBrayer I* and *McBrayer III*.

CONCLUSION

The Michigan Parole Board abused its discretion when it issued a Notice of Decision, dated November 4, 2020 to parole Richard McBrayer #235965.

For the reasons above, the Parole Board, abused its discretion in paroling convicted sex offender Richard McBrayer when it had no more assurance he would not be a menace to society or to the public safety than the board had in three prior court-reversed decisions where the Board abused its discretion to parole this prisoner, the nature of the child anal, oral and vaginal rapes were uniquely horrific crimes, and the Board has not demonstrated how the relapse prevention plan will not again fail to materialize, nor how the prisoner has improved since prior court reversals.

In issuing a parole release of Prisoner RICHARD MCBRAYER #235965, in this “unique case” has violated the Michigan Constitution, a statute, an administrative rule, or a written agency regulation under MCR 7.118(H)(3)(a). Furthermore, the MDOC’s decision to release this prisoner is not within the range of principled outcomes, is a clear abuse of discretion under MCR 7.118(H)(3)(b) and should be immediately reversed.

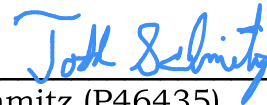
RELIEF REQUESTED

Peter J. Lucido, Prosecuting Attorney for the County of Macomb,
by Todd Schmitz Assistant Prosecuting Attorney, respectfully requests
that this Honorable Circuit Court deny the Application for Leave to
Appeal.

Respectfully submitted,
Peter Lucido (P41237)
Prosecuting Attorney

Joshua Abbott (P53528)
Chief Appellate Attorney

By:



Todd Schmitz (P46435)
Assistant Prosecuting Attorney

DATED: May 9, 2022