STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v STEPHAN MARK MATELIC, Defendant-Appellant.	FOR PUBLICATION December 21, 2001 9:00 a.m. No. 220221 Recorder's Court LC No. 87-002517 Updated Copy March 15, 2002

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

GAGE, P.J.

Defendant appeals by leave granted the trial court's order denying his motion for earlier parole consideration. We reverse and remand for further proceedings.

I

Following an October 1987 jury trial, defendant was convicted of possession with intent to deliver 650 or more grams of a mixture containing cocaine, MCL 333.7401(2)(a)(i), and possession of a firearm during the commission of a felony, MCL 750.227b. On November 3, 1987, the trial court sentenced defendant to a mandatory term of life imprisonment for the possession with intent to deliver conviction and a consecutive two-year term for the felony-firearm conviction. This Court later affirmed defendant's convictions, *People v Matelic*, unpublished opinion per curiam of the Court of Appeals, issued September 8, 1989 (Docket No. 105679), and the Supreme Court denied defendant's application for leave to appeal, *People v Matelic*, 440 Mich 910; 491 NW2d 814 (1992), and motion for rehearing, *People v Matelic*, 441 Mich 894; 495 NW2d 386 (1992).

In 1987 when defendant committed the crime and was convicted, MCL 333.7401(2)(a)(i) provided that an individual found guilty of possessing with the intent to deliver any mixture containing cocaine that weighed 650 grams or greater would receive a mandatory sentence of life imprisonment. Furthermore, at the time of defendant's conviction and sentence the parole eligibility statute precluded any possibility of parole for the individual sentenced to a mandatory life term "for a major controlled substance offense." Formerly MCL 791.234(4), currently MCL 791.234(6). These unyielding sentences reflected the Legislature's attempt to stem Michigan-related trafficking in controlled substances and to diminish the prevalent and deleterious consequences that such trafficking in, abuse of, and addiction to controlled substances imposed

on society. *People v Bullock*, 440 Mich 15, 55, 66 (Riley, J., concurring in part and dissenting in part), 73 (Boyle, J., concurring in part and dissenting in part); 485 NW2d 866 (1992); *People v Gorgon*, 121 Mich App 203, 206-207; 328 NW2d 619 (1982).

In 1998, the Legislature revisited the question of mandatory life imprisonment for traffickers in mixtures of controlled substances in amounts weighing 650 grams or more. The Legislature passed two bills that mitigated somewhat the "drug lifer" law. 1998 PA 319 amended MCL 333.7401(2)(a)(i) to remove this subsection's mandatory life imprisonment language, instead authorizing punishment "for life or any term of years but not less than 20 years." 1998 PA 314 amended MCL 791.234(6) by deleting the subsection's explicit exclusion of violators of MCL 333.7401(2)(a)(i) from parole consideration and by specifically providing for parole eligibility for such an offender after twenty years' imprisonment if the offender "has another conviction for a serious crime," or after 17-1/2 years' imprisonment if the offender "does not have another conviction for a serious crime."[1] 1998 PA 314 also created MCL 791.234(10),[2] which permits an offender convicted under MCL 333.7401(2)(a)(i) who was sentenced to life imprisonment earlier parole eligibility, 2-1/2 years earlier than the periods set forth in MCL 791.234(6), when the sentencing court or its successor finds that the offender "has cooperated with law enforcement."

Seeking to avail himself of the Legislature's newly fashioned parole eligibility provisions, defendant through his counsel sent the Wayne County Prosecuting Attorney a January 19, 1999, letter expressing defendant's "willingness to 'cooperate with law enforcement'" by meeting "with any designated representative of [the prosecutor's] office for the purpose of providing . . .such assistance as you may request." No representative of the prosecutor's office ever arranged to interview defendant, because it was believed that after twelve years' imprisonment it was

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[1] MCL 791.234(6) currently provides in relevant part as follows:

> A prisoner under sentence for life, . . . except as provided in subsection (10), who has served 20 calendar years of the sentence in the case of a prisoner sentenced to imprisonment for life for violating or conspiring to violate section 7401(2)(a)(i) of the public health code . . . who has another conviction for a serious crime, or, except as provided in subsection (10), who has served 17-1/2 calendar years of the sentence in the case of a prisoner sentenced to imprisonment for life for violating or conspiring to violate section 7401(2)(a)(i) of the public health code . . . who does not have another conviction for a serious crime . . . is subject to the jurisdiction of the parole board and may be released on parole by the parole board . . . .

The definition of a "serous crime" appears within MCL 791.234(11)(a).

[2] Current subsection 10 was designated subsection 10 in 1998 PA 314, but became subsection 9 following the amendments of 1998 PA 512, only to again become subsection 10 following the amendments of 1999 PA 191.

unlikely that defendant possessed any useful information regarding the 1987 events surrounding defendant's conviction.

In February 1999, defendant filed a motion seeking to have the trial judge that sentenced him make a determination regarding defendant's willingness to cooperate with the authorities. Defendant reasoned that according to the clear language of MCL 791.234(10), the determining factor with respect to cooperation constituted the willingness of a prisoner serving a life sentence for selling a controlled substance to speak with law enforcement personnel, "not whether that openness and willingness to talk to law enforcement leads to any results." Defendant further clarified that he remained willing to cooperate with the police, the prosecutor's office, or the trial court.

The prosecutor replied that defendant should have offered some information at the time of his 1987 conviction and that defendant's 1999 letter represented a disingenuous attempt to qualify for earlier parole eligibility. The prosecutor suggested that the Legislature contemplated that a defendant's cooperation would involve the defendant's disclosure of other drug contacts "who, presumably, have not yet been charged or who are unknown to law enforcement." The prosecutor also asserted that the retroactive parole eligibility provisions within MCL 791.234(6) and (10) mitigated defendant's sentence and therefore unconstitutionally infringed the Governor's commutation power.

Defendant responded that no language within MCL 791.234(10) supported the prosecutor's proffered interpretation that any offer of cooperation must occur temporally near a defendant's arrest. Defendant proposed to the contrary that in light of the explicit retroactive application of the statute and the expressed lack of concern regarding the relevance of the information offered by the cooperating defendant, the statute clearly applied to any defendant who expresses a willingness to advise law enforcement personnel of "whatever he or she knows" "regardless of the age, relevance or usefulness of the information offered." With respect to the prosecutor's constitutional challenge to the early parole scheme, defendant argued that the prosecutor lacked standing to set forth an alleged violation of the Governor's commutation power. Defendant urged that the Legislature's enactment of parole eligibility provisions did not constitute a modification of the underlying life sentences. Defendant lastly argued that even if the parole eligibility provisions infringed somewhat the Governor's commutation power, this minor interference remained constitutional because the Legislature acted pursuant to its own constitutional police power to alleviate the unduly harsh penalty imposed on an entire class of prisoners.

The trial court denied defendant's motion for earlier parole consideration because it did not agree that he had cooperated as the statute intended. The court reasoned as follows:

> This present offer is distinguishable from the statutory requirement which states ". . . that the prisoner . . . *has* cooperated with law enforcement." MCL 7[9]1.234(9) . . . Emphasis added. Prior to the amendment of the law, there was no record to support any cooperation by the defendant in this matter. The court is

not convinced that an offer to cooperate twelve years subsequent to a conviction satisfies the statutory requirement.

The court did not address in its ruling the constitutionality of the parole eligibility provisions.

II

Defendant first contends that the trial court erred in finding his January 1999 offer to meet with a representative of the prosecutor's office insufficient cooperation to qualify him for earlier parole under MCL 791.234(10). We review de novo legal questions involving statutory interpretation. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998).

A

Well-established principles guide our statutory construction.

> In [construing statutes], our purpose is to discern and give effect to the Legislature's intent. We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. We must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent. [*People v Morey*, 461 Mich 325, 329-330; 603 NW2d 250 (1999) (citations omitted).]

In determining the plain meaning of statutory language, "'[t]he fair and natural import of the terms employed, in view of the subject matter of the law, is what should govern,' . . . and as far as possible, effect must be given to every word, phrase, and clause in the statute." *Id*. at 330, quoting *People ex rel Twitchell v Blodgett*, 13 Mich 127, 168 (1865) (Cooley, J.).

The disputed statutory subsection that creates the possibility of earlier parole in the event that the life-sentenced defendant cooperates provides as follows:

> *If the sentencing judge*, or his or her successor in office, *determines on the record that a prisoner* described in subsection (6) sentenced to imprisonment for life for violating or conspiring to violate section 7401(2)(a)(i) of the public health code, 1978 PA 368, MCL 333.7401, *has cooperated with law enforcement, the prisoner is subject to the jurisdiction of the parole board* and may be released on parole as provided in subsection (6), *2-1/2 years earlier* than the time otherwise indicated in subsection (6). *The prisoner is considered to have cooperated with law enforcement if the court determines on the record that the prisoner had no*

> *relevant or useful information to provide*. The court shall not make a determination that the prisoner failed or refused to cooperate with law enforcement on grounds that the defendant exercised his or her constitutional right to trial by jury. If the court determines at sentencing that the defendant cooperated with law enforcement, the court shall include its determination in the judgment of sentence. [MCL 791.234(10) (emphasis added).]

Our application of the statute under the circumstances of this case requires that we confront several questions regarding the meaning of the statute.

B

We first address the issue *when* the cooperation noted by the statute must occur to qualify a defendant for parole 2-1/2 years earlier. The trial court concluded that defendant's offer to speak with the prosecutor did not constitute sufficiently timely cooperation because it occurred only after the Legislature's 1998 amendments of MCL 791.234. We find within the statute no support for the trial court's interpretation that a defendant's cooperation must have occurred before the Legislature's enactment of 1998 PA 314. The statute clearly contemplates that the trial court must determine that a defendant "*has cooperated* with law enforcement" at some point in the past, but lacks any language whatsoever prescribing an appropriate window of opportunity during which the cooperation must have occurred. Our engrafting onto the statute a temporal limitation with respect to a defendant's opportunity to cooperate, where one otherwise plainly cannot be ascertained within the statutory language, would infringe improperly the Legislative authority to promulgate laws. See *In re Juvenile Commitment Costs*, 240 Mich App 420, 427; 613 NW2d 348 (2000) ("Nothing may be read into the statute that is not within the manifest intent of the Legislature as gathered from the act itself.").

The prosecutor, in a contention that we find somewhat appealing to our sense of logic, argues in support of the trial court's temporally restrictive interpretation of MCL 791.234(10) as follows:

> Any offers of cooperation would necessarily refer to naming individuals with whom the defendant conspired in the illicit drug trade. This would, of course, relate to his first-hand knowledge of those with whom he had contact and who, presumably, have not yet been charged or who are unknown to law enforcement. Thus, any offer of "cooperation" must necessarily relate to people and events close in time to the defendant's arrest—not twelve years later. At this point, any "information" which [defendant] may offer would be hopelessly stale or perhaps even contrived.

If the Legislature in enacting 1998 PA 314 shared any of these thoughts of the prosecutor, however, the Legislature for one reason or another ultimately failed to draft 1998 PA 314 to achieve the result imagined by the prosecutor. As we observed above, the Legislature incorporated no temporal limitation of a defendant's opportunity to cooperate with law enforcement.

Furthermore, the plain and unambiguous language of the statute defeats the prosecutor's suggestion that cooperation cannot exist when a defendant offers stale advice or information otherwise unhelpful to law enforcement.[3] MCL 791.234(10) plainly provides that a "*prisoner is considered to have cooperated with law enforcement if* the court determines on the record that *the prisoner had no relevant or useful information to provide*." (Emphasis added.) Consequently, we must interpret the statute to achieve the plain legislative intent that a law enforcement or judicial characterization or perception of a defendant's information as insignificant or unworthy cannot weigh against a finding that the defendant nonetheless cooperated. *Morey*, *supra*. We conclude that the trial court improperly interpreted MCL 791.234(10) to preclude the possibility of defendant's cooperation on the basis of its staleness or tardiness. The trial court's interpretation read too much into the otherwise plain language of the statute.

C

Despite our many references to cooperation, we have to this point not considered the meaning of "cooperation" or "cooperate" as used in MCL 791.234(10), the question to which we now turn. Because the statute nowhere defines "cooperate," other than indicating that cooperation is deemed to occur when "the prisoner had no relevant or useful information to provide," and because the scope of appropriate cooperation appears reasonably disputed and therefore ambiguous, *In re Juvenile Commitment Costs*, *supra*, we consulted dictionary definitions to aid our goal of construing the terms of the statute in accordance with their ordinary and generally accepted meanings. *Morey*, *supra*. To "cooperate" means "to work or act together or jointly for a common purpose or benefit" or "to work or act with another or other persons willingly and agreeably," and "cooperation" similarly means "more or less active assistance from a person." *The Random House Dictionary of the English Language: Unabridged Edition* (1971), p 321.

The statute appears not to limit the subject or topic of a defendant's cooperation. For instance, the statute does not expressly anticipate cooperation involving only information regarding trafficking in controlled substances. Because the statute refers to cooperation with law enforcement, however, we find that we reasonably may infer from this language that a defendant's proffered information must somehow potentially relate to the duties of law enforcement, i.e., to prevent crime and to protect public safety. Given the lack of direction and specificity of the statute, however, we cannot conclude that cooperation would not likewise encompass a defendant's willingness to act as an undercover agent or informant, to provide advice to law enforcement regarding some general knowledge of criminal enterprises irrelevant to any one particular crime or investigation, or to offer to answer telephones at a jail or police precinct, to name just a few possibilities.

Although we searched the available legislative history for guidance in interpreting the intended meaning of "cooperate," as used in MCL 791.234(10) we located only echoes of our own confusion regarding the Legislature's intent in drafting this subsection. We empathize with

[3] The prosecutor posits that "[o]ffers to cooperate with law enforcement must necessarily have some value no matter how insignificant in the investigation of crime."

the expression of the difficulties and the uncertainties with the cooperation provision that is reflected in the following passage from a second legislative analysis:

> The provisions of Senate Bill 281 that allow for the early release of a prisoner who has "cooperated with law enforcement" are extremely vague . . . and will likely result in a flood of appeals. In essence, a prisoner who was determined to have "cooperated" with law enforcement would be eligible for parole 2 1/2 years earlier than the 20- or 17 1/2-year minimum. *Unfortunately, the bill contains no specific information regarding what sort of cooperation would be expected and when it would be expected*. In fact, the bill contains only two limitations—that a defendant's exercise of his or her constitutional right to a trial by jury could not be treated as a failure or refusal to cooperate, and that a prisoner could be considered to have cooperated if a court determined that the prisoner had no relevant or useful information to provide. *The lack of further information, definitions, or guidelines raises many questions*. *What is "relevant or useful information?" Relevant and useful to whom and for what? Relevant and useful to the crime being prosecuted? Relevant and useful to the prosecution of drug crimes in general? To crime in general?* Presumably, the intent is to help prosecutors obtain information on others involved in the illegal drug trade, but this is not specified in the bill. Without clarification, it could be reasonably argued that a prisoner should only be deemed to have failed to cooperate when he or she refused to provide information that was "relevant and useful" to the specific crime for which he or she was accused. Equally supportable arguments could be made for interpretation of "relevant and useful" as covering information of other drug-related crimes or even non-drug related crimes. Less effective arguments could be made for stretching the definition even further—what about information on illegal aliens? Information that might help the local sheriff or judge in his or her campaign for re-election? Obviously a line should be drawn—at some point such information would no longer be appropriate—but without language in the bill to define "relevant and useful information," that line will have to be set through the appellate process in the courts of this state and possibly the United States.
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> . . . Relevance and usefulness depend upon context . . . and the bill leaves provision of a context to the inference of the reader. . . . [House Legislative Analysis, HB 4065 & SB 281, January 26, 1999 (Second Analysis), pp 9, 10 (emphasis added).]

Fortunately, our decision in this case does not demand that we undertake the enormous task of enumerating every conceivable example of law enforcement assistance that could constitute cooperation under MCL 791.234(10).

This defendant apparently intended to assist law enforcement by providing them some information. We merely conclude that despite the uncertain legislative intent regarding the type of cooperation anticipated from defendants with life sentences for controlled substances

convictions, where a defendant provides some information potentially pertinent to law enforcement duties, cooperation has occurred for purposes of MCL 791.234(10). We recognize that a defendant's provision of sports scores, stock market information, or entertainment gossip clearly would fall beyond the scope of MCL 791.234(10) because such information would possess no conceivable potential to aid any law enforcement activity. To deem "cooperate[] with law enforcement" to include a defendant's offer of information regarding any subject however far removed from applicability to law enforcement would create the absurd result that a defendant with no intent to assist law enforcement could provide the police with information totally unrelated to law enforcement and yet earn entitlement to parole eligibility 2-1/2 years earlier. *People v Stephan*, 241 Mich App 482, 497; 616 NW2d 188 (2000) (noting that statutes should be construed to prevent absurd results).[4] We urge the Legislature to review our interpretation of MCL 791.234(10) and to clarify to what extent it expected a defendant to cooperate.

D

In this case defendant proposed "to meet with any designated representative of [the prosecutor's] office for the purpose of providing you with such assistance as you may request," and the defense counsel at the trial court hearing regarding cooperation advised the court that defendant's offer remained open. The trial court did not consider, however, to what extent defendant might be able to assist law enforcement.

We agree with the trial court's suggestion that an offer to cooperate is not the equivalent to actual cooperation. We wish to emphasize the distinction between a defendant's mere general expression of intent to offer law enforcement some unspecified assistance, as defendant made in this case, and a defendant's demonstration of some specific information or assistance that he extended to some law enforcement employee. We find an unsubstantiated general expression of intent to cooperate, without more, insufficient to satisfy the statutory definition of cooperation with law enforcement.

Because we cannot determine from the instant record exactly what information or assistance defendant intended to lend the prosecutor, we must remand to the trial court for the purpose of conducting a hearing to determine whether defendant could provide law enforcement any specific information potentially germane to the execution of law enforcement duties. According to the plain statutory language, which we are bound to enforce, the trial court shall deem defendant to have cooperated if he provides law enforcement any specific information pertaining to the execution of law enforcement duties, even if law enforcement ultimately deems the information irrelevant to its current duties or investigations or otherwise has no use for the information.

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[4] We note that two recent cases criticize the "absurd result" rule of statutory interpretation when applied by courts that did not first detect any statutory ambiguity that the absurd result rule would help resolve. *People v McIntire*, 461 Mich 147, 155-157, nn 2 & 3; 599 NW2d 102 (1999); *Gilbert v Second Injury Fund (On Remand)*, 244 Mich App 326, 331-333; 625 NW2d 116 (2001). We further note that in this case we have found ambiguous the term "cooperate."

III

Defendant next argues that the 1998 legislative enactments providing parole eligibility for prisoners previously sentenced to mandatory terms of life imprisonment without parole do not unconstitutionally burden the gubernatorial clemency powers. We review constitutional questions de novo. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). Although the trial court's failure to consider this issue renders it unpreserved, we nonetheless consider this claim of constitutional error because it involves a dispositive legal question and the record is factually sufficient.[5] *People v Grant*, 445 Mich 535, 546-547; 520 NW2d 123 (1994); *People v Brown*, 220 Mich App 680, 681; 560 NW2d 80 (1996).

The prosecutor argued before the trial court and maintains on appeal that the Legislature's extension of parole eligibility to all defendants sentenced to life sentences for controlled substances convictions before the enactment of 1998 PA 314 qualified as a sentence modification that violated the Governor's exclusive constitutional commutation power, Const 1963, art 5, § 14. Defendant responds that the parole eligibility provisions of 1998 PA 314 do not constitute modifications of the existing life sentences. Defendant further replies that even viewing the act's authorization of parole as a sentence modification for one class of prisoners, the act nonetheless qualifies as constitutional because it falls within the Legislature's constitutional police power authority and did not otherwise restrict the Governor's clemency powers.

A

In two cases that we find instructive, the Supreme Court considered whether legislative acts affecting the terms of prisoners' and jail inmates' confinements unconstitutionally assumed the Governor's commutation power. In *Oakland Co Prosecuting Attorney v Dep't of Corrections*, 411 Mich 183, 186; 305 NW2d 515 (1981), the Court addressed the Prison Overcrowding Emergency Powers Act. The act permitted "the Governor to declare a state of emergency whenever prison population exceeds available bed space for 30 consecutive days," and "on this declaration, for the Director of the Department of Corrections to reduce the minimum terms of those prisoners who have established minimum terms by 90 days." *Id*. at 188-189. The Supreme Court held, *id*. at 195, that irrespective of whether it characterized the release of prisoners under the act a commutation, the act qualified as constitutional because it fell within the Legislature's authority under Const 1963, art 4, § 45 "to provide for the 'release of persons imprisoned or detained on [indeterminate] sentences.'" The Court explained that legislative sharing of the commutation power was authorized by Const 1963, art 4, § 45, and concluded as follows:

> The legislative history available to us demonstrates that a commutation in derogation of the Governor's power was not intended; instead this legislation was part of a broad-based effort at correctional reform. *The purpose of the instant legislation is to reduce the intolerable level of overcrowding which characterizes*

[5] We note that in the January 14, 2000, order granting defendant's application for leave to appeal, this Court directed that defendant "brief the issue of the constitutionality of MCL 791.234([10]) in light of the governor's power of commutation."

> *Michigan's prison system*. As part of a broad-based effort at correctional reform, it was intended to deal with a systemwide problem. *Although the retroactive reduction of minimum sentences because of prison overcrowding has consequences similar to commutation, it derives from a wholly separate constitutional grant of power*. The legislation was within the constitutional grant of authority to the Legislature in art 4, § 45 . . . . Further, *the Legislature has done nothing to directly interfere with the Governor's function; he remains free to pardon or commute the sentences of individual prisoners as he, in his discretion, feels the circumstances warrant*. [*Oakland Co Prosecuting Attorney*, *supra* at 196-197 (emphasis added).]

Six years later, the Supreme Court addressed whether the county jail overcrowding act infringed the Governor's power of executive clemency. *Kent Co Prosecutor v Kent Co Sheriff (On Rehearing)*, 428 Mich 314, 317; 409 NW2d 202 (1987). The county jail act permitted reduction of "low-risk" inmates' terms of incarceration when certain emergency conditions arose. *Id*. at 317-318.[6] The Court initially considered whether the act served a proper legislative purpose, finding that the purpose of the act, "to reduce or eliminate the evils fostered by overcrowded jails," fell within the Legislature's plenary power over matters affecting public health and welfare, specifically Const 1963, art 4, § 51. *Kent Co Prosecutor, supra* at 319-321.

The Supreme Court next ascertained whether the act nonetheless had the effect of unduly interfering with the Governor's commutation power. *Id*. at 321-324. The Court preliminarily noted that "it is not necessarily fatal to this legislation that, when considered in a vacuum, it appears to interfere with the Governor's executive powers." *Id*. at 321. According to constitutional separation of powers principles,

> the proper inquiry focuses on the extent to which [the act] prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where

[6] The Supreme Court summarized the workings of the county jail overcrowding act as follows:

> The jail overcrowding act directs a county sheriff to declare a jail overcrowding state of emergency when the general prisoner population of a county jail exceeds one hundred percent of the rated design capacity of the jail. Upon a declaration of emergency, the sheriff is directed to notify designated county executive and judicial officers of the emergency and is exhorted to reduce the prison population by existing legal means such as pretrial diversion, reduction in the bonds of prisoners, and use of day parole. If these steps do not reduce the jail population sufficiently to eliminate jail overcrowding, the sheriff is directed to supply the chief circuit judge of the county with the name of each prisoner, along with the details of the prisoner's sentence and the offense for which he was convicted. The chief judge is directed to classify the prisoners into two categories, those whose release would present a high risk to the public safety, and those whose release would not present such a risk. The sheriff is then directed to reduce the sentences of the low-risk prisoners by an equal percentage, set by the chief circuit judge, until the overcrowding is alleviated. [*Id*. at 317-318.]

> the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." [*Id*. at 322 (emphasis omitted), quoting *Nixon v Administrator of General Services*, 433 US 425, 443; 97 S Ct 2777; 53 L Ed 2d 867 (1977).]

The Court concluded that the jail overcrowding act did not authorize commutations violative of the Governor's constitutional powers because commutations are acts of individualized clemency reflecting a specific prisoner's personal characteristics and behavior, distinguishable from the sentence reductions under the act that are prompted by generalized jail conditions. *Id*. at 323-324. The Court explained that the extent of a jail overcrowding emergency, not the inmates' individual characteristics, governed the number of inmates benefiting from sentence reductions and observed the different goals served by commutation, which benefits one prisoner exclusively, and the jail overcrowding act, which by reducing overcrowded jails would benefit the earlier-released inmates and those inmates remaining incarcerated. *Id*. at 324.

B

We first consider whether in this case a proper legislative purpose supported 1998 PA 314. The legislative history reflects several arguments in favor of the Legislature's passage of 1998 PA 314. The second analysis regarding 1998 PA 314 observed that abolition of the mandatory life sentence and creation of parole eligibility for prisoners already serving life sentences for controlled substances convictions would remedy the injustice occasioned by the indiscriminate application of the then existing, unduly harsh mandatory life sentence. House Legislative Analysis, HB 4065 & SB 281, January 26, 1999 (Second Analysis), p 7. By amending MCL 791.234(6) to provide for parole eligibility for the class of over two hundred prisoners previously sentenced to mandatory life terms for controlled substances convictions while amending MCL 333.7401(2)(a)(i) to remove the mandatory life term, the Legislature apparently sought to maintain the integrity of its sentencing scheme to ensure that prisoners convicted of the same crime did not have to serve disparate sentences solely on the basis of the dates they were convicted and sentenced. No indication exists that the Legislature desired to effect the commutation of the sentence of any individual prisoner on the basis of the personal characteristics of the prisoner.

The available legislative history also expressed that, "despite a huge prison expansion program over the past decade, prisons are still overcrowded," and the mandatory life terms of imprisonment

> threaten[] the state's limited prison capacity and already overburdened taxpayers. The policy not only doesn't make sense financially, it also can result in the early release—due to lack of space—of such violent offenders as rapists and armed robbers, who probably pose a greater danger to more of the state's citizens than those involved in illegal drugs. [Second House Legislative Analysis, *supra* at 8.]

See also House Legislative Analysis, SB 280 & 281, December 4, 1997, pp 6-7, containing similar arguments supporting parole eligibility for prisoners serving life sentences for controlled substances convictions. The December 1997 House Legislative Analysis, *id.* at 1, also noted that

"many convicted drug offenders are nonviolent but expensive to keep incarcerated."[7] The legislative aims to lessen prison overcrowding, save taxpayer dollars, and avoid to some extent the premature return to society of certain violent offenders represent proper purposes within the Legislature's plenary authority over public health and welfare matters, Const 1963, art 4, § 51. *Kent Co Prosecutor*, *supra* at 320-321.

We further find that 1998 PA 314 does not effectively interfere with the Governor's commutation power. The eligibility for parole created by the amendment of MCL 791.234(6) and MCL 791.234(10) by the act does not qualify as a commutation. The Supreme Court repeatedly has explained that a legislative authorization of parole for a prisoner does not constitute a commutation.

> "We . . . held [in *People v Cook*, 147 Mich 127; 110 NW 514 (1907) and *In re Casella*, 313 Mich 393; 21 NW2d 175 (1946)] that such *release by parole was not a commutation of the sentence* as such parolees remained under the surveillance of the prison authorities and upon violation of the parole would be returned to the prison to serve the balance of the sentences without any deduction of the time during which they had been released on parole. [*Oakland Co Prosecuting Attorney*, *supra* at 192 (emphasis added),[8] quoting *People v Freleigh*, 334 Mich 306, 309; 54 NW2d 599 (1952).]

This Court also has recognized that a paroled prisoner remains under his original sentence:

> Parole is a conditional release; a paroled prisoner is technically still in the custody of the Department of Corrections, which is executing the sentence imposed by the court. . . . If parole is successfully completed, the remaining portion of the sentence is discharged as a "gift" from the executive branch. . . . However, unless and until parole is successfully completed, "the prisoner is deemed to be still serving out the sentence imposed upon him by the court." [*People v Raihala*, 199 Mich App 577, 579-580; 502 NW2d 755 (1993), quoting *In re Dawsett*, 311 Mich 588, 595; 19 NW2d 110 (1945).]

Consistent with the foregoing authorities, we conclude that the Legislature's authorization of parole eligibility for prisoners serving life sentences for controlled substances convictions, who if released on parole would remain under the surveillance of prison authorities, does not

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[7] The second legislative analysis regarding SB 281 noted that during "fiscal year 1996-97, the cost of incarceration was about $24,350 per prisoner." Second House Legislative Analysis, *supra* at 5.

[8] We note that the Supreme Court in *Oakland Co Prosecuting Attorney*, *supra*, declined to hold that a distinction existed between "release on parole, when the parolee remains subject to the supervision of and possible recall by the parole board, from release on unconditional pardon or commutation of sentence" because such a finding became unnecessary in light of the Court's conclusion that the prison overcrowding act came within the Legislature's constitutional power over indeterminate sentences. *Id*. at 194.

encroach on the Governor's commutation power.[9] The Governor remains free to exercise his constitutional powers of clemency with respect to individual prisoners serving life sentences for controlled substances convictions "as he, in his discretion, feels the circumstances warrant." *Oakland Co Prosecuting Attorney*, *supra* at 197.

The prosecutor suggests that the Legislature's conditioning of earlier parole on a prisoner's cooperation with law enforcement constitutes an unlawful commutation because "the statute has clearly created a condition which is highly individualized and is intended solely for the benefit of that prisoner only." We observe, however, that the Legislature, motivated by general concerns for the public welfare including an unfairly disparate sentencing scheme and prison overcrowding, provided within MCL 791.234(6) and 791.234(10) for the earlier parole of the entire subclass of drug lifers that have cooperated with law enforcement. The intent of the Legislature in enacting MCL 791.234(10) was to authorize earlier parole eligibility for this entire subclass of prisoners, irrespective of any individual prisoner's unique personal characteristics or circumstances, and that provision does not contemplate any specific prisoner's exclusive release on parole. *Kent Co Prosecutor*, *supra* at 323-324.

The prosecutor further contends that *Oakland Co Prosecuting Attorney*, which involved the Legislature's passage of a law providing for release of prisoners imprisoned under indeterminate sentences, *id*. at 194, offers no guidance in the instant case involving the Legislature's authorization of parole that alters a previously *mandatory* term of life imprisonment. In *Kent Co Prosecutor*, *supra* at 325, however, the Supreme Court rejected the prosecutor's similar argument "that *Oakland Co* can be distinguished from the present case because the jail overcrowding act affects determinate, rather than indeterminate, sentences, and the Legislature does not have a constitutional grant of authority over the former as it does over the latter." The Supreme Court concluded that "the Legislature, in confronting the present situation affecting the common good, can incidentally reduce jail sentences *whether indeterminate or not*." *Id*. at 326 (emphasis added).

As previously discussed, in this case the Legislature apparently enacted 1998 PA 314 (1) to create uniformity with respect to the penalties imposed for violations of MCL 333.7401(2)(a)(i) by bringing preamendment sentences into line with the terms of punishment to be imposed under the amended version of MCL 333.7401(2)(a)(i), (2) to alleviate to some degree

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[9] Because we have determined that 1998 PA 314 does not infringe the gubernatorial commutation power, we need not find "a constitutional grant of authority to alter determinate sentences." *Kent Co Prosecutor*, *supra* at 325.

We also note our rejection of the prosecutor's reliance on *Freleigh*, *supra*, for the proposition that in this case the Legislature may not enact a law infringing the Governor's commutation power. The act at issue in *Freleigh*, 1951 PA 159, authorized a judge to revisit, vacate, and modify a sentence previously imposed, which sentence amendment the Supreme Court deemed violative of the Governor's commutation power. *Freleigh*, *supra* at 307, 309-310. Unlike *Freleigh*, this case involves the Legislature's action to authorize a prisoner's release on parole, which does not represent a sentence amendment. *Oakland Co Prosecuting Attorney*, *supra* at 192; *Raihala*, *supra*.

the persistent problem of prison overcrowding, (3) to save taxpayers the cost of lifetime incarcerations of violators of MCL 333.7401(2)(a)(i), and (4) to reduce the likelihood that other felons who were violent might obtain early release on parole because of prison overcrowding resulting from nonviolent drug offenders not being eligible for parole. Because the primary purposes of 1998 PA 314 all serve the public good, we conclude that the Legislature acted properly to the extent that it incidentally reduced the prison terms of prisoners previously convicted of drug offenses that carried life sentences without the possibility of parole. *Kent Co Prosecutor*, *supra* at 326.

We reverse the trial court's order denying defendant's motion for earlier parole consideration and remand for a hearing to determine to what extent, if any, defendant can provide law enforcement cooperation as contemplated by MCL 791.234(10). We do not retain jurisdiction.

Cavanagh, J., concurred.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh