

Analysis of the Reasons for the Rejection of Parole Applications in Macao with 10 Criminal Judgments as Examples

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Abstract: The criminal law of the Macao Special Administrative Region has been influenced by European criminal law, and its provisions on parole are also very distinctive. This paper analyzes the current judicial situation of the application of the parole system in the Macao Special Administrative Region and carries out the necessary theoretical research and analysis by taking the relevant past judgments as the object of study. Based on the analysis and summarization of the cases, it can be concluded that the parole system of the Macao Special Administrative Region is characterized by the importance of the completeness of the formal and substantive elements, the impact of parole on society, and the individual's right to consent to parole. Both the protection of the right to request parole and the provision of appeal against parole decisions are the application of the right to parole doctrine.

Keywords: Parole; Macao criminal law; Case study

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1. Introduction

Parole refers to the system of early conditional release of offenders after they have served a certain period of their sentences. Nowadays, it has become an inevitable trend in various countries and regions to further regulate the application of parole in the judicial field and appropriately increase the application rate of parole. To understand the actual implementation of the parole system stipulated in the Criminal Code of the Macao Special Administrative Region of China (hereinafter referred to as the Macao Criminal Code), this paper takes the relevant past judgments as the object of study. This study will focus on analyzing the cases in which parole has been denied. This paper will also analyze the judicial current situation of the application of the parole system in Macao and conduct the necessary analysis through the textual examination of judgments. By textually examining the judgments, this paper will analyze the current judicial situation of the application of the parole system in Macao and conduct the necessary theoretical research and analysis.

2. Overview of the parole system in Macao

The Macao Criminal Code (Decree-Law 58/95/M) was officiated on January 1, 1996, having been drafted by Portuguese legal experts. The Macao Criminal Code is a typical criminal code of the civil law system, with legislative spirit and contents largely influenced by European criminal law, so the provisions on parole are also very distinctive.

The Macao Criminal Code, in its Chapter II, Section III, regulates the prerequisites for parole, the application of parole, and the termination of parole. Among them, article 56 of the Macao Criminal Code stipulates the prerequisite for parole that “when two-thirds of the sentence has been served and at least six months have elapsed, the court shall grant parole to the sentenced person if the following conditions are met (A) It is reasonable to expect that, once released, the sentenced person will be able to live in a socially responsible manner and will not re-offend; (B) The release of the sentenced person demonstrates that it will not affect the maintenance of the legal order and social peace; (2) The period of parole shall be equal to the time remaining to be served in the sentence but shall in no case exceed five years; (3) Parole shall be carried out only with the consent of the sentenced person”. At the same time, article 57 of the Macao Criminal Code stipulates the application of parole in case of concurrent sentences that “In case of consecutive execution of several sentences, and if it is shown that two-thirds of the total amount of each sentence has been served, the court shall decide on parole per the provisions of the above article.”

The above two provisions highlight several characteristics of the parole system in Macao. First, since the minimum legal term of imprisonment in Macao is one month, the Macao Criminal Code stipulates that parole can only be applied after the sentence has reached six months of imprisonment to avoid the application of parole to those sentenced to shorter terms, which would result in an excessively short term of imprisonment, thus defeating the purpose of the establishment of the parole system. Secondly, in comparison with the criminal law of Mainland China, the criminal law of Macao does not provide for life imprisonment as a type of punishment. Secondly, as compared to the criminal law of Mainland China, the Macao Criminal Code does not have life imprisonment as a type of punishment, so those who have been sentenced to imprisonment in Macao may be eligible for parole as long as they have served their sentences. Thirdly, the criminal law of Mainland China stipulates that “recidivism, as well as those who have been sentenced to more than ten years of fixed-term imprisonment for intentional homicide, rape, robbery, kidnapping, arson, bombing, releasing hazardous substances, or organized crimes of violence, shall not be subject to the same punishment as those sentenced to life imprisonment, in which no parole shall be granted to criminals who have been sentenced to more than ten years of imprisonment, life imprisonment or committed organized violent crimes”. There is no similar provision in the criminal law of the Macao region. There are only general conditions for the application of parole in the criminal law of the Macao region, and there is no provision that some types of criminals shall not be released on parole. Accordingly, some scholars believe that this is also a major feature of Macao’s criminal law as well as a place worthy of reference for mainland Chinese criminal law, stating that “Parole is essentially a means of encouraging positive reform of the sentenced person, and should not be encouraged only for one part of the offenders and excluded for the other part of the offenders. The substantive condition for parole is that the offender has shown remorse and will not jeopardize society again. As long as this conclusion is reached on a case-by-case basis, parole can be applied. To provide for so-called special circumstances without this criterion is in fact a departure from the purpose for which the parole system was established”^[1].

According to articles 58 and 53(a), (b), and (c) of the Macao Criminal Code, in the case of minor violations of parole conditions, the court will: (1) issue a stern warning; (2) request assurances regarding the fulfillment of the obligations imposed as a condition of parole; (3) order the fulfillment of new obligations or the

incorporation of new requirements in the rehabilitation plan. In case of serious violation of parole conditions, according to articles 59 and 54 of the Macao Criminal Code, if, during the parole period, the parolee has clearly or repeatedly violated the obligations he/she was ordered to perform or the rules of conduct he/she was ordered to observe, or his/her personal rehabilitation plan, or if he/she was convicted of a crime and it is shown that it is difficult for him/her to fulfill the purpose of the application of the parole, the court shall order that the application of the parole is annulled and he/she will be imprisoned to carry out the originally imposed sentence.

3. Examination of the current situation in Macao on the rejection of parole applications

3.1. Sources of the judgment

The author conducted a search on the Court of the Macao Special Administrative Region of the People's Republic of China website with the search criteria "intermediate courts" and "appeals in criminal proceedings", selecting cases with judgment dates in 2022 and 2023. Among the search results obtained, the author obtained a total of 25 judgments, and after removing the judgments that were not related to the parole process and the judgments that lacked briefs that would lead to research results, the author selected 10 judgments. These judgments cover appellants from different regions and contain different types of cases that are representative.

3.2. Composition of the appellant

There are 10 appellants in these 10 judgments. Among these, 6 are mainland Chinese residents, 2 are Macao residents, 1 is a Hong Kong resident, and 1 does not indicate in the judgment the region from which the appellant is from. Of the six mainland residents, one was of Guangxi nationality, one was of Zhejiang nationality, one was of Heilongjiang nationality, and the remaining three did not indicate the province from which they originated. The gender and age of the appellants were not disclosed in any of the 10 appellants' judgments.

Based on the above data, it can be seen that the largest number of appellants are of mainland Chinese nationality, reflecting the fact that in Macao, the number of offenders of mainland Chinese nationality is greater than that of Macao criminals and Hong Kong criminals. Since the number of Mainlanders in Macao is much smaller than the number of Macao locals, many of them come to Macao specifically for the purpose of committing crimes. The Mainlanders who appealed came from many provinces, reflecting the complexity of the Mainlanders coming to Macao nowadays.

3.3. Offenses committed by the appellant

The 10 parole appeals mentioned above involved the following offenses, false declaration of identity, illegal re-entry, solicitation or acceptance of documents, abuse of trust (substantial), usury for gambling, aggravated robbery, fraud (substantial), deprivation of liberty, blackmail, assistance, (aggravated) deprivation of liberty, unlawful trafficking in narcotic drugs and psychotropic substances, and bribery as a wrongful act. The others include (aggravated) deprivation of liberty of movement of another person, extortion, assistance, unlawful traffic in narcotic drugs and psychotropic substances, and accepting bribes for the commission of a wrongful act. Among these, there were three cases of aiding and two cases of usury for gambling and aggravated robbery.

It is shown that the above-mentioned crimes include violent crimes, property crimes, crimes of corruption, and crimes against the social order, which are relatively complex. Among them, there are ordinary crimes and aggravated crimes. Looking at the origin of the appellants, it can be seen that two of the Macao appellants were convicted of occupational crimes (assisting and accepting bribes for wrongful acts) because they were local

public officials, and one of the Hong Kong appellants was convicted of illegal trafficking in narcotic drugs and psychotropic substances. The remaining appellants of mainland nationality and unknown origin were mostly convicted of violent crimes and property crimes.

3.4. Application of penalties

The 10 persons listed in the text were all sentenced to terms of imprisonment (finite sentences) ranging from 2 years and 9 months to 9 years, of which seven were sentenced to 2 to 3 years, two were sentenced to 5 to 6 years, and one to 9 years. Six of the 10 were convicted of multiple offenses, and all had already served more than two-thirds of their total sentences.

4. Analysis of cases of denial of parole applications in Macao

According to article 56 of the Macao Criminal Code, the court must take into account the circumstances of the case, the past life of the perpetrator and his/her personality, as well as the change of the personality of the offender during the period of imprisonment, before deciding on parole, unless there is a basis for believing that the offender, once released on parole, will be able to live a socially responsible life and will not re-offend. Otherwise, parole cannot be imposed. In this paper, cases will be categorized into four groups, based on the offender's performance in prison and the reasons for denying parole, as follows. First, parole will not be granted because of disciplinary action taken in prison; second, parole will not be granted because of mediocre performance in prison; third, parole will not be granted because of the seriousness of the offense, despite good performance in prison; and fourth, parole will not be granted because of the number of offenses committed, despite good performance in prison.

4.1. Not granted parole after having been disciplined in prison

In appeal case No. 177/2023, the offender was convicted of usury for gambling, deprivation of freedom of movement, and extortion, and was sentenced to a total of three years and one month's imprisonment and an additional sentence of two years' prohibition of entry into a casino. While in prison, the offender was punished with admission to a disciplinary cell and deprivation of liberty for five days for violating the ordinance in 2021. The prison social worker and the warden filed a negative opinion on the appellant's parole application. The trial judge denied the offender's application for parole, finding that the offender's poor performance during his sentence and the presence of a record of infractions demonstrated a change of character that was not positively recognized by all aspects of the prison to the extent that the appellant's special prevention of delinquency could be concluded in his favor in terms of early release.

In appeal case No. 182/2023, the offender had been disciplined for three violations of prison rules during his sentence, including bodily injury to another inmate, possession of contraband razor blades, and tattooing inside the prison. The overall rating for his behavior during his sentence was poor. The general scenario for the offender in case 7 was that the offender and an accomplice worked together to demand repayment of a loan from the victim. The accomplice took the victim to a house and prevented the victim from leaving the room, depriving the victim of her freedom of movement, which ultimately led to the victim's death in a fall when leaping from a bathroom window. In this case, the offender was mainly responsible for guarding the victim in the house, the degree of unlawfulness of his crime was very high, and the damage to the interests of the law was extremely serious; his sense of law-abidingness was weak, and he denied the alleged facts during the trial. Although he had not committed another offense in the past year, and the prison authorities had indicated that his behavior had improved in recent years, the presiding judge considered the circumstances of the case, the

seriousness of the crime committed by the convicted person, his personality and past behavior, and the three offenses committed while serving his sentence, and concluded that the offender had to be observed for a longer period of time before they could be convinced that he had committed the crime in question. The trial judge denied the offender's application for parole, concluding that more time was needed until he had a strong internal motivation to rehabilitate himself and to live in a socially responsible manner and not to re-offend.

In appeal case No. 127/2023, the offender was imprisoned for coming to Macao from Hong Kong to sell drugs and had been in Macao for a period of time to carry out drug trafficking activities, which showed that the offender had a high degree of criminal intent and a weak sense of law-abidingness. Moreover, the offender had not been able to improve his behavior and awareness of law-abiding after his imprisonment, and he had been disciplined twice for violating prison rules, and the overall evaluation of his behavior in prison by the prison authorities was poor. Accordingly, the trial judge found that further observation of the appellant was required, taking into account his past life and personality, as well as the change of his personality while serving his sentence. It could not reasonably be expected at this time that the appellant, once released, would be able to live in a socially responsible manner and not re-offend. The offender's application for parole was accordingly dismissed.

4.2. Failure to grant parole based on mediocre performance in prison

In appeal No. 202/2023, the offender's performance in prison was rated as good, with no record of violations. Before that, the offender had not been imprisoned in Macao. During the period of imprisonment, the offender did not apply for any study course in the prison, but he did apply for kitchen training and floor cleaning, for which he is currently waiting for his turn. In his judgment, the trial judge found that the offender had not demonstrated any outstanding performance during his time in prison, which was insufficient to conclude that the offender's personal values had been completely corrected, and therefore the trial judge could not be satisfied that the offender would continue to live in a socially responsible manner and would not re-offend after his early release, and therefore rejected the offender's application for parole.

4.3. Good behavior in prison but not granted parole due to the seriousness of the crime

In appeal No. 212/2023, the perpetrator violated the prohibition of entry order issued by the government, entered Macao by concealing his identity, and committed a violent crime in a casino. The seriousness of the crime and the anti-social nature of the act are sufficient to seriously undermine the public order. In addition, the offender had not demonstrated better behavior during his prison sentence to show that he had been rehabilitated. The trial judge found that the early release of this offender would be a serious disruption to society and the legal order and that the general preventive element of the crime alone determined that this offender did not have the necessary conditions for parole.

In appeal Case No. 234/2023, the appellant was convicted of aggravated robbery and sentenced in 2021 to three years and six months' imprisonment with compensation. The general facts of the case committed by the perpetrator of case 3 are as follows. The perpetrator, after a long period of premeditation with his accomplices, traveled to Macao as a tourist and targeted the victims who were carrying a large amount of cash for currency exchange activities. The offender first led the victim to a designated place for a "transaction" under the pretext of exchanging money, and when the victim arrived, his accomplice suddenly approached and violently restricted the victim, and the offender took the opportunity to rob the victim of all the cash he had used to exchange money, and then fled from the scene with his accomplice immediately afterward. The offender had no record of violating prison rules since his admission to the prison, and the prison's overall assessment of

his behavior in prison was good. The offender was assigned to a kitchen cleaning job because of his active participation in vocational training while serving his sentence. In addition, the offender actively participated in the social reintegration activities organized by the prison. However, taking into account the reality of the Macao society, the early release of the offender would have caused considerable negative social effects, which would have hindered the public's expectation of the effectiveness of the legal provisions violated, and therefore, the presiding judge rejected the offender's application for parole, based on the need for general prevention of the crime in question.

In appeal No. 197/2023, the offender committed three counts of assistance. To gain unlawful benefits for himself and a third person, the offender, knowing that the three Mainlanders involved in the case did not have any identity document that would enable them to enter and stay in Macao legally, still willfully committed the unlawful act of assisting them to enter the territory illegally and transported them into Macao through driving a boat. The offender's criminal act demonstrates his disregard for the legal system of entry and exit of Macao, and the degree of his intention is very high, as well as the gravity of the crime he committed. Illegal immigration has been an ongoing battle against the Macao SAR Government, and has been a nuisance to the Macao society for a long time, and has brought about many negative factors to the law and order of the Macao region as well as to the stability of the society, therefore, the prevention of this kind of crime should not be delayed. Hence, the presiding judge concluded that the early release of such offenders would be psychologically unacceptable to the public and would have a significant impact on the social order, and therefore rejected the application for parole.

In appeal case No. 149/2023, the perpetrator was sentenced to four years and six months of imprisonment for aggravated robbery. The judge considered that the impact of the perpetrator's actions in committing this crime on the social peace of Macao was obvious. The appellant had not shown any significant meritorious conduct during his imprisonment that would have diluted this impact, and therefore should not have been granted parole.

In appeal case No. 121/2023, the perpetrator was a former police officer who had been imprisoned for the crimes of assistance and accepting a bribe to commit a wrongful act. He had conspired with his colleagues to take bribes to assist prohibited persons to come to Macao and to provide them with asylum. This act seriously jeopardized the Macao Special Administrative Region's immigration system. The presiding judge believed that nowadays, the public demand for public officials to be honest, and impartial and to perform their duties following the law is becoming more and more stringent and that honesty and integrity are also the most basic requirements for public officials. Therefore, the offender has dealt a great blow to the image of the Macao police force as a law-abiding and honest police force, which is highly condemnable as it has a very bad impact. The crime of assisting and the crime of accepting bribes to commit unlawful acts are also relatively serious crimes, which have brought about a rather serious negative impact on the social order, as well as difficulties for the Macao authorities in maintaining public order and law and order, and have caused a rather negative impact on the social peace, therefore, the offender's application for parole has been rejected.

4.4. Good behavior in prison but not granted parole because of the number of crimes committed

In appeal No. 245/2023, the appellant has been convicted of multiple offenses. He had been convicted of robbery, possession of narcotics for the consumption of another person, common assault on bodily integrity, drug abuse, and aggravated insult, and had been imprisoned several times from 2004 to 2018. In 2021, he had been sentenced again for usury for gambling, and abuse of a trust (for a substantial amount of money), and had been imprisoned for a third time. The trial judge wrote in his judgment that "the offender had been granted

parole when he was serving his sentence for the first offense, but committed multiple offenses again in the years following the expiration of his parole, and these prior convictions and circumstances make it difficult to believe that he, now that he has been granted parole for the second time, is going to go through life completely cleaned up and free of further offenses”. Therefore, despite the fact that the offender in that case was doing well in prison, the judge denied his application for parole because of his multiple prior offenses.

5. Characteristics of the parole system in Macao

5.1. Emphasis on completeness of formal and substantive elements

In each of the 10 cases mentioned above, the reasoning of the judgment ranges from general to specific prevention, from formal to substantive elements. Formal elements refer to the offender’s length of imprisonment following the provisions of the Macao Criminal Code, such as serving more than six months of a sentence that is more than two-thirds of the total term of imprisonment. The fulfillment of the formal elements is the basis of the parole application and is the primary consideration of the Macao judges when considering the parole application.

However, as the Portuguese scholar Dias argues, “Even in cases where there is a preliminary positive judgment as to the reintegration of the sentenced person into society, the likelihood that the early release of the sentenced person will have a serious impact on the social peace and jeopardize the public’s expectations as to the efficacy of the legal provisions that have been breached should be weighed and considered to decide whether or not parole should be granted”. It should be weighed and considered in deciding whether parole should be granted” and “It may be said that whether the release of the sentenced person will have an impact on the maintenance of law and order and social peace is the final factor to be considered in deciding whether parole should be granted or not and is a prerequisite for parole from the point of view of the society as a whole”^[2]. Positive performance of the sentence is a factor in favor of the early release of the offender, but the preservation of the social order and the authority of the law must also be taken into account. The offender’s behavior after serving the sentence, especially the change in subjective consciousness, is conducive to his or her reintegration into society, but this does not mean that his or her release from prison will not have a negative impact on social peace and the legal order. Therefore, it is necessary to find a balance between the two aspects of crime prevention. On one hand, parole does not mean the end of punishment, but is only a special form of punishment, which serves to provide a transitional period before the release of the offender, so that the offender can better adapt to society. Therefore, in the Macao region, when considering parole applications, not only the formal elements are strictly scrutinized, but also the substantive elements are fully taken into account, to ensure that parole achieves the desired effect, both in terms of the individual and the society.

5.2. Focusing on the impact of parole on society

Article 56 of the Macao Criminal Code expressly stipulates that the court, when considering a request for parole, shall take into account that the release of the sentenced person will not jeopardize the maintenance of legal order and social peace. This is a requirement for parole from the perspective of society as a whole. This indicates that when the court considers an offender’s application for parole, it should take into account the social impacts that parole may have and take into full consideration the psychology of the residents. Therefore, the Macao district court will take into account the offender’s performance during the sentence, including the reshaping of the individual’s personality and the good behaviors demonstrated during the sentence, to conclude whether the offender can be reintegrated into society or not. After parole, the offender is also required to comply with the following obligations: (1) to compensate the victim, within a certain period of time, the full amount of damages due or such part of them as the court deems possible, or to guarantee the payment of damages

through the provision of appropriate security; (2) to give the victim an appropriate moral satisfaction; (3) to make donations to mutual aid organizations or the region, or to make a specific payment of the same value. This paragraph also stipulates that the obligations ordered in any case must not be unfulfillable by the offender. In addition, the legislator has humanely considered the difficulties that may arise from the imposition of certain obligations and has therefore provided that the court may, upon being informed of important changes that have occurred during the probationary period that make it difficult for the offender to fulfill his or her obligations, modify the obligations that were originally directed.

5.3. The individual's right to consent to parole

Article 56(3) of the Macao Criminal Code contains a special provision that parole can only be granted with the consent of the sentenced person. By combing through the abovementioned judgments, it is found that in the factual aspect of each judgment, there is a special note in this regard, that is, "the appellant agrees to be released on parole". This provision restricts the application of parole from the point of view of the offender's own rights and interests. Generally speaking, most offenders want to be released on parole, but under some special circumstances, it cannot be ruled out that some offenders do not want to be released on parole. For example, some offenders do not want to return to their families or society for the time being, and for example, some offenders fear reprisals. The establishment of the right to consent to parole reflects the respect for the sentenced person and also supports the right to parole doctrine, which is one of the characteristic provisions of the Macao Criminal Code.

6. Implications for the parole system in Macao

The application of the parole system in Macao is characterized by a combination of leniency and severity. Parole is subject to strict scrutiny, as an application for parole can be filed once the formal requirements for parole have been met, and an appeal can be lodged if the application is rejected. Both the protection of the right to request parole and the provision of appeal against parole decisions are applications of the right to parole doctrine. The right to parole doctrine holds that parole is a right of the offender and not a favor bestowed by the state. Parole is the result of an offender's efforts to perform, comply with the rules of the institution, and rehabilitate during the course of his or her sentence.

In addition to the right to parole doctrine, there are also doctrines such as the favor doctrine and the manner of execution of sentence doctrine. The doctrine of beneficence holds that parole is akin to a pardon and is a favor granted by the state to the offender. In other words, if a criminal serving a sentence maintains good behavior for a long period of time, he or she can be released before the end of the sentence as a reward for his or her good behavior through the evaluation of the prison and the hearing of the judge. The theory of the way of execution of punishment, on the other hand, treats parole as a way of executing a sentence. To prevent offenders serving sentences from becoming disconnected from society due to long periods of detention, offenders who have performed well in prison are released early to continue serving their outstanding sentences in society ^[3]. Compared to these two doctrines, the right to parole doctrine is more reasonable. The offender's right to parole cannot be denied for the following reasons. First, modern criminal law theory holds that crime is not only a subjective choice made by an individual but also the result of a complex combination of social factors acting on the perpetrator. The perpetrator of a criminal act must take into account both the reasons inherent in the individual and the reasons of society as a whole. The relationship between the state and the offender in terms of punishment is not one of absolute command and obedience, but one of rights and obligations in the legal sense.

The recognition of parole as a right of the offender does not mean that the parole-determining authority, such as the court, must grant parole to the offender as long as he or she meets the formal elements of parole. In fact, the

courts of the Macao Region have done the same. Some scholars have argued that, according to the right to parole doctrine, the parole deciding authority is obliged to allow all offenders who meet the conditions of parole to be released on parole, but it is a misunderstanding of the right to parole doctrine to assume that all offenders who meet the formal requirements for parole are obliged to be granted parole by the parole deciding authority to leave the prison^[4]. Parole is based on the criminal legal relationship and is a conditional right, not without its conditions. If an offender wants to enjoy the right to parole, he or she must meet the legal, regulatory, or policy requirements to be eligible for parole. It is for this reason that the right to parole, unlike the rights that offenders are born with, such as the right to life, the right to health, and so on, is subject to a certain degree of constraint.

Some scholars have further divided the right to parole into two categories, one of which is the right to parole at the national level, including the right to review parole and the right to grant parole. The second is the right to parole at the individual level, including the right to apply for parole and the right to be released on parole. In particular, the right to review parole refers to the power to review whether an offender applying for parole has met the formal and substantive elements of parole. The power to grant parole refers to the power to approve the release on parole of an offender who has fully met the formal and substantive elements of parole and who has applied for parole. The right to apply for parole means the right to request the parole decision-making body or trial body, including prisons and courts, to review the request for parole of an offender who meets the formal requirements for parole. The right to be released on parole is the narrowest definition of the right to parole, which refers to the right to apply for and request the parole authority to grant parole to an offender who fully meets the formal and substantive requirements for parole, and the right to be released on parole is the centerpiece of the theory of the right to parole. In practice, offenders who have the formal elements of parole enjoy only the right to apply for parole, not the right to ask the parole authority or the trial authority to authorize them to leave prison. Only offenders who have both the formal and substantive elements of parole have the right to request that the parole authority or trial body grant them parole from prison. If an offender fully meets the formal and substantive elements of parole, then the parole deciding or hearing authority is of course obliged to grant him/her parole. An analysis of parole cases in the Macao Special Administrative Region shows that the right-to-parole doctrine has been recognized and applied in practice in Macao, reflecting the development of the local judicial system.

Disclosure statement

The author declares no conflict of interest.

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