UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case Nos. 08-1371, 08-1372, 08-1626

KENNETH FOSTER, *et al.,*

Plaintiffs-Appellees,

v.

SHAREE BOOKER, in her official capacity as a member of the Michigan Parole Board, *et al.,*

Defendants-Appellants.

PLAINTIFFS-APPELLEES' CORRECTED RESPONSE BRIEF and BRIEF ON APPEAL

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Dated: April 27, 2009

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Statement in Support of Oral Argument

The plaintiffs request oral argument for the following reasons:

1. The case involves a significant constitutional issue that will affect the parole of more than 1,000 Michigan prisoners.

2. Many prisoners' rights cases are appealed and decided *pro se*. When prisoners in a civil rights action have a lawyer, and when the case raises important constitutional issues, oral argument is appropriate.

Jurisdictional Statement

The plaintiffs agree with the parole board's jurisdictional statement. The plaintiffs timely filed their cross-appeal on 3/18/08. The defendants' had timely filed their appeal on 3/5/08, after entry of the district court's final order on 2/7/08. (R.187, Pls' Notice of Cross-Appeal; R.177, Defs' Notice of Appeal; R. 168, Declaratory Judgment, First Remedial Order, and Final Order for Purposes of Appeal.) This Court has appellate jurisdiction over all issues presented.

Standard of Review

The plaintiffs agree with the defendants' account of the standard of review, but note that on cross motions for summary judgment, on claims seeking only *injunctive* relief, the district court reviews virtually the same evidence that it would review at trial: there is no jury.

As to the cross appeal, the Court reviews *de novo* a district court order granting a motion for failure to state a claim. *Inge v. Rock. Fin. Corp.,* 281 F.3d 613, 619 (6th Cir. 2002).

Statement of Issues Presented

ON THE DEFENDANTS' APPEAL:

1. Did the district court err in finding that the defendants' post-1992 changes to Michigan's parole laws, policies, procedures, and standards – as applied retroactively to pre-1992 parolable lifers – violated the *ex post facto* clause of the U.S. Constitution?

2. Did the district court err in granting limited injunctive relief to permit the defendants to cure the constitutional violation?

3. Did the district court err in awarding the plaintiffs their attorneys' fees under 42 U.S.C. § 1988?

   The plaintiffs say that the district court did not err and should be affirmed.

ON THE PLAINTIFFS' CROSS-APPEAL

4. Did the district court err in dismissing the plaintiffs' parallel claim for relief under the due process clause of the U.S. Constitution?

   The plaintiffs say that the district court erred and should be reversed, but that this Court need not reach the issue if it affirms as to issue #1 above.

STATEMENT OF THE CASE

Introduction

In their brief to this Court, as in the court below, the defendants try to present the case as involving only minor technical changes to Michigan's parole laws after October 1992. In fact, what the plaintiffs proved, and what the district court found, was that the cumulative changes to Michigan's parole laws, policies, procedures, and standards – as they were applied on the ground by the post-1992 "new" parole board – created a new parole regime. The changes were designed to keep violent offenders in prison longer, and the changes were applied retroactively for that very purpose. The district court found that the changes created a substantial risk that the plaintiffs would serve longer prison terms, in violation of the *ex post facto* clause. (R.143, Opin. and Order on Summary Judgment, at 42.) This Court should affirm.

Statement of Facts

The case is nothing if not fact-intensive: it requires the Court to understand both the parole regime that existed in Michigan from 1942 to 1992, and the parole regime that replaced it, from 1992 to 2005.[1] The plaintiffs will state the key facts

[1] The district court rightly refused to consider evidence after the lawsuit was filed in 2005, because changes to the new board's practices after that date could have been tactical responses to the lawsuit. (R.143, Opin. & Order on Sum. Jmt., at 38.)

here, but in less detail than below, due to the space constraints of the appellate rules.[2]

A. The Parole Regime from 1942 to 1992

For the period from 1942 (when the parolable lifer law was first passed) to 1992 (when the parole/lifer laws were amended), Michigan had an independent parole board. Its members had life tenure under Civil Service. The board was further insulated from political interference by a bipartisan Corrections Commission, which shielded the autonomous board from the executive and legislative branches. The board comprised mostly corrections professionals who had worked with prisoners for years. (R.143, Opinion & Order on Sum. Jmt., at 7.)

The pre-1992 or "old" parole board treated people sentenced to parolable life and people sentenced to long indeterminate sentences (like 30-50 years) the same. The board did so for good reason. In Michigan, most serious crimes were punishable by parolable life or any term of years. While both lifers and long indeterminate (LID) prisoners were eligible for parole after ten years, LID prisoners normally would not be considered for parole until they had completed their mini-

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[2] The plaintiffs' brief on their cross-motion for summary judgment, the three volumes of exhibits that accompanied it, and the plaintiffs' response brief, contain a detailed history of parole in Michigan, with factual support for every issue raised. (*See* R.114, Pls' Brief on Sum. Jmt.; R.124, 127-133, Exhibits in Support; R.134, Pls' Response Brief on Sum. Jmt.)

mum sentence less good-time. The anomalous result was that a life sentence could result in *earlier* parole eligibility.[3]

Consequently, the old board's default position was that prisoners should serve "similar time for similar crimes" regardless of whether the trial court had imposed an LID sentence or a life sentence. (R.143, Opin. & Order on Sum. Jmt., at 24-25.) William Hudson, who served as the administrative assistant to the old board (1977-80), and then served on and chaired the old board (1980-91), described the policy and practice on this issue as follows:

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[3] For example, a prisoner serving a 30-50 year sentence, while technically eligible for parole (under the lifer/LID statute) after ten years, would not be considered for parole until about year 14, when the prisoner passed the minimum on the LID sentence, less good-time. A lifer, on the other hand, was always eligible for parole after ten years, and some in fact were paroled at years 11-14. A long-serving state court trial judge described the accepted wisdom in her day as follows:

> I was elected back in 1979 to serve on the then Recorder's Court bench. Thus, I have had the opportunity to take many pleas and to try many cases where the maximum possible penalty was life in prison. On the armed robberies and second degree murders there were often times when a plea would be negotiated and the attorney would state to the Court the hope that a life sentence would be imposed rather than a term of years. It was my understanding, as well as the lawyers who appeared before me, that a life sentence meant that the defendant would be eligible for parole in ten years. We also understood that the defendant might not be paroled on that tenth year but by twelve to fifteen years he probably would be paroled. Therefore, a lot of lawyers as well as defendants wish[ed] to have life sentences imposed. Such a sentence would lessen the amount of time that the defendant would spend before being eligible for parole or release from prison.

(R.128, Pls' Sum. Jmt. Exh. 35, Jones Letter.)

> As to the LIDs and the [parolable] lifer[s]..., in making the parole decision the board used the same criteria. By that I mean that the standards we applied were the same for both groups. This followed a longstanding policy of the parole board, going back as far as I can recall. ... The goal was to ensure that prisoners who had committed similar crimes, and who had similar criminal and institutional records, would serve about the same amount of time, regardless of whether they were serving [LID] or life sentences.

(R.124, Pls' Sum. Jmt. Exh. 4, Hudson Decl., ¶¶ 7-8).[4]

Well-behaved LID prisoners were usually paroled shortly after they passed their minimum (less all credits).[5] The old board paroled well-behaved parolable lifers in the same time frame to ensure "similar time for similar crimes," even for the most serious crimes like second-degree murder. Frank Buchko, who started work at the MDOC in 1948, and who served on the parole board from 1962-74,

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[4] One of the unusual features of this case is that the bulk of the plaintiffs' evidence came not from prisoners but from former parole board members and MDOC officials. The plaintiffs procured affidavits from two former MDOC directors, the former program director, the long-term chair of the old board, the first chair of the new board (himself a former prosecutor and advisor to the governor who implemented the '92 changes), administrators who had served both the old and the new boards, and nearly every surviving member of the pre-1992 board from the 1960s to the 1990s. These officials were hardly knee-jerk liberals or pro-prisoner advocates, but the injustice of what had occurred to the pre-1992 lifers was well known both within the MDOC and within the former parole board. They all told the same story: that but for the post-1992 changes in the state's parole laws, policies, procedures, and standards, many of the 1,000+ plaintiffs – and especially the longest-serving members of the class – would have been paroled long ago, despite the serious nature of their crimes. (*See* R.125, Pls' Sum. Jmt. Exhs. 2-12.)

[5] The longer prisoners served the more credits they earned each month, which is why even a 50-80 year sentence would result in a "minimum less good-time" parole eligibility date of around 20+ years.

described the typical release dates in his day as follows:

> ... [Y]our average lifer, say someone who was in for murder II or an assaultive offense, and who had a good institutional record, would be considered by the board and be paroled between the 10th and 18th year – typically well before their 20th year.
>
> I'm told that nearly all parolable lifers (except for medical cases and drug lifer cases) are now routinely serving 25 and even 30+ years in prison, despite clear institutional records going back years. When I was on the parole board (*c.* 1962 to 1974), almost no lifers served terms like that, except for extreme cases, meaning the few people who were probably never going to be paroled. In those days 18-20 years would have been a long term for a parolable lifer.

(R.124, Pls' Sum. Jmt. Exh. 10, ¶¶ 10 and 22.)

William Kime, who was the MDOC Deputy Director in charge of the Program Bureau from 1969-89, confirmed that this norm remained in effect during his tenure:

> Tabulation of the parole board's past practices revealed that the mean number of years actually served by parolable lifers who were paroled was approximately 18. Of course a few individuals were probably never going to be paroled and a few died in prison. But excepting some inmates who committed particularly heinous crimes or had serious prior criminal histories, if a parolable lifer behaved well in prison, he or she could generally expect – based on the past practices of the parole board – to be paroled in less than 15 years.
>
> ... The mean was 18 years because although many inmates got out well before then, all it took was a few inmates with much longer time served before release to raise the mean considerably.

(R.124, Pls' Sum. Jmt. Exh. 5, Kime Declaration, ¶¶ 4-7.)

Because parolable lifers were paroled at about the same time as comparable

LID prisoners, it isn't surprising that the old board's *rate of parole* for lifers was historically quite high, averaging 5-15 percent from 1942 to 1984 (using five-year averages to even out random fluctuations). (R.143, Opin. & Order on Sum. Jmt., at 38.)

In addition, under the pre-1992 regime, lifers had strong statutory, regulatory, and policy-based protections. The board was required to conduct personal interviews even before the tenth year (when parole eligibility began), and thereafter every 1-3 years for most prisoners (depending on the law in effect when the crime occurred). Lifers were entitled to written reasons for any parole denial, and a "no interest" decision was considered to be a final decision of the board for all purposes, including appeal to state court. (R.143, Opin. & Order on Sum. Jmt., at 6-8.)

B. The Parole Regime from 1992 to 2005

All of this changed in 1992, when a new governor proposed, and a new legislature approved, sweeping statutory changes.[6] The seven members of the old board were terminated by law. The "new" board was taken out of the protection of Civil Service, and the Corrections Commission was eliminated. Ten new mem-

[6] The changes came on the heels of the release of a prisoner named Leslie Allen Williams, who raped and murdered four young women, months after his parole. His release was a flashpoint for those who believed Michigan's parole system was too lenient. (R.130, Pls' Sum. Jmt. Exh. 41, Steinman Dep., at 32.)

bers were appointed by the executive branch to serve 4-year terms, with renewal at the pleasure of the governor. By statute, 40 percent of the new board members could have no affiliation with corrections. *Id.,* at 7. Most of the new board members were affiliated with law enforcement. The 1992 amendments reduced lifer review from every 1-3 years to every fifth year after year ten, though it kept the requirement of personal interviews at each review. MCL 791.231a, 234 (1992).

The 1999 amendments eliminated personal interviews after year ten: thereafter a file review every fifth year sufficed, and the new board never *had* to see a lifer again after year ten. A "no interest" decision could not be appealed to state court by the prisoner (although prosecutors and victims could still appeal a *favorable* parole decision to state court). Written reasons no longer had to be given for a decision denying parole at the periodic review. MCL 791.234 (1999).

As the district court found, the post-1992 changes were implemented with the specific goal of keeping violent felons locked up as long as possible. (R.143, Opin. & Order on Sum. Jmt., at 20.) The results since 1992 were predictably consistent with the purpose of the changes and with the new board's view of its mandate. From 1995 to 2004, the new board paroled just two (non-drug) lifers a year (again using five-year averages to even out annual fluctuations), including medical mercy cases, even as the number of eligible lifers rose to over 1,000 men and women. For that period the new board's (non-drug) lifer parole rate hovered at about

.2 percent, compared to the old board's long-term historical rate of 5-15 percent. (A 5-15 percent rate would generate 50-150 paroles a year out of an eligible population of 1,000 lifers.) The new board was thus at least 25 times less likely to parole eligible lifers than had been true of the old board for most of the period from 1942 to1992. The new board made clear that "life means life." (R.128, Pls' Sum. Jmt. Exh. 27, Marschke Test'y, at 1.)

In the briefing below, the defendants tried to inflate the new board's parole rate by including drug-lifers in their statistics. The district court would have none of it, for good reason. (R.143, Opin. & Order on Sum. Jmt., at 32 n.5, 38, and 41.) The drug-lifers were not members of the plaintiff class because they were *non-violent* felons (convicted of possession or distribution) whom the new board routinely paroled the moment they became parole-eligible.

For statistical purposes, it made no sense to include drug-lifers when the old board had no similar category of non-violent felons to whom the drug-lifers could be compared. (If the old board had also been able to parole a group of non-violent lifers, no doubt its lifer parole rate would have been far higher. But the drug-lifer laws did not affect parole-eligible lifers before 1992.) The district court properly recognized that to include drug-lifers would be to compare apples and oranges.[7]

[7] The district court asked: how did the two boards treat *violent* offenders on life sentences; not, how many non-violent offenders did the new board also release?

Disappointingly, the defendants continue to try to mislead this Court in the same way. In their chart, Defendants' Brief at 19, and in their discussion of the new board's paroles, *id.* at 18-28, the defendants once again include the drug-lifers and claim credit for these paroles, vastly inflating their number of lifer paroles.[8]

For the handful of non-drug lifers whom the new board did parole, the average time served also increased.[9] (R.143, Opin. & Order on Sum. Jmt., at 27, 38.) Today, more than half the class has served at least 26 years, (R.158, Defs' Brief on Remedies, Exh. 16, Chart), while the shortest-serving members of the class have now been in prison for 17 years (from 1992 to 2009). The average time served for the (non-drug) lifers whom the board released in 2007-08 exceeds 30 years, compared to the old board's long-term historical rate of 18 years. (R.233, Pls' Show Cause Motion, Exh. M, Lifer Chart.) It cannot be disputed that lifers are serving hugely longer sentences than they did under the old board.

Many state court judges who had imposed life sentences before 1992 were dismayed by the post-1992 changes. For example, one judge wrote:

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[8] An accurate chart, showing all lifer *and* drug-lifer paroles, based on information provided by the MDOC, was included below. (*See* R.130, Pls' Sum. Jmt. Exh. 51, last page). The defendants' 32+ drug-lifers from 1999-2005 should be rejected.

[9] From 2000-2004, when the new board was paroling only a handful of lifers a year, the average time served had increased to about 23 years. *See* Pls' Updated Chart, Parolable Lifer Public Hearings (non-650 drug cases), attached as Exh. C to Pls' Sixth Circuit Brief in Opposition to Motion for Stay (8/22/08).

> I ... chose the 2nd degree life sentence thinking I was in the long run doing both the public and the defendant a benefit and to encourage the defendant to take advantage of it, which he did. ... What was the policy in 1975 is not the policy now and Mr. Foster is serving a sentence ... this sentencing Judge never expected or intended when he sentenced him in 1975. In my opinion this is a wrong that should be righted. I had every right to believe this was a parolable offense in 10 years in 1975 and so stated on the record. Nor was this the opinion only of this judge but the vast majority of the entire judiciary of this state.

(R.128, Pls' Sum. Jmt. Exh. 35, Colombo Letter.) In hindsight, the first chair of the *new* board, Gary Gabry, said of the post-1992 treatment of parolable lifers:

> We created a system of injustice, one without hope, one based on disparity and arbitrary decisions.... [T]he decisions made on lifers almost ignore the criteria the MDOC has in place, such as risk level and management level.... Nowhere is there ... more disparity or arbitrariness than in the parole decision process as it applies to the older [pre-10/1/92] lifer population.

(R.128, Pls' Sum. Jmt. Exh. 22, CAPPS Consensus Interview 12/04.)

C. Summary

Contrary to what the defendants argue, the differences in the parole system before and after 1992 were day and night. The plaintiffs submitted a mountain of evidence from which the district court drew the only possible conclusion: that the cumulative changes to the parole laws, policies, procedures, and standards, as applied retroactively to the plaintiff class in the day-to-day operations of the new board, created a sufficient risk of increased punishment to violate the *ex post facto* clause. (R.143, Opin. & Order on Sum. Jmt., at 42.)

Summary of the Argument

The district court did exactly what it was supposed to do in analyzing an *ex post facto* claim. It focused on the "practical implementation" of Michigan's 1992 and 1999 statutory changes. It reviewed the parole laws, policies, procedures, and standards, to see if cumulatively – as applied in the day-to-day operations of the post-'92 board – the changes created a sufficient risk of increased punishment. The district court's findings were amply supported by the record, and this Court should affirm them.

The district court's injunctive relief was narrowly tailored to cure the constitutional violation, and its award of attorneys' fees was appropriate.

As to the cross appeal, the district court erred in dismissing the plaintiffs' subsidiary due process claim, but the Court need not address that issue if it affirms as to the *ex post facto* claim.

ARGUMENT

I. The District Court Used the Correct Legal Standard to Decide the Case

The defendants argue – as they argued below – that only substantive laws are subject to the *ex post facto* clause. In their view, because some of the parole changes were "procedural" or "policy-based" (and also because the underlying "standard for parole" remained the same and the new board retained "discretion" to grant or deny parole), the plaintiffs' *ex post facto* challenge must fail. (Defs' Brief, at 18-28.)

But in *Garner v. Jones*, 529 U.S. 244 (2000), the Court adopted a far less formalistic approach.[10] Under *Garner*, courts must focus not on the nature of the changes, but on their practical effect. The question is, do the changes, as they are applied by the board in its day-to-day operations, create "a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Id.* at 250.

Both the district judges below rightly rejected the defendants' argument. On the defendants' motion to dismiss, Judge Edmunds noted:

> Defendants' argument may be interpreted as follows: a new policy or law that only changes the procedures, when the Board retains complete discre-

[10] Even before *Garner*, the defendants' law *versus* policy argument would be weak because in this case the bulk of the changes were in fact *statutory*, including the reduced frequency of review, the loss of appellate rights, the withdrawal of Civil Service protections, the switch to paper review, and the packing of the board.

> tion over the ultimate decision, cannot constitute an *ex post facto* law. This view was accepted by Justice Scalia in his concurrence in *Garner*. [*Garner* quotation omitted.] This view was not, however, adopted by the five Justice majority. *See id.* at 253 ("The presence of discretion does not displace the protections of the *Ex Post Facto* Clause."). Thus, the rule does not control this Court's decision.

(R.44, Order on Defs' Motion to Dismiss, at 8, n.7.)

On the cross-motions for summary judgment, Judge Battani said that under *Garner* a court must focus on whether the change – *in its operation* – creates a significant risk of increased punishment. (R.143, Opin. & Order on Sum. Jmt., at 13, citing *Garner* at 252-255.) Judge Battani relied on several cases holding that after *Garner* the substance/procedure or law/policy distinction no longer has merit. *Id.* at 18, citing *Michael v. Ghee*, 498 F.3d 372 (6th Cir. 2007). In *Michael*, this Court held that the issue is not whether the change is to a guideline or a law, but whether the change presents a significant risk of increased punishment. *See also Fletcher v. Dist. of Columbia*, 370 F.3d 1223, 1228 (D.C. Cir. 2004) (*Garner* forecloses "our [previous] categorical distinction between a measure with the force of law and guidelines that are merely policy statements"). (R.143, Opin. & Order on Sum. Jmt., at 18.)[11]

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[11] *See also Knox v. Lanham,* 895 F. Supp. 750, 755-58 (D. Md. 1995), *aff'd as Worsham v. Lanham*, 76 F.3d 377 (4th Cir. 1996) (table) (an unwritten policy can be a "law" covered by the *ex post facto* clause); *Himes v. Thompson*, 336 F.3d 848 (9th Cir. 2003) (the term 'laws' includes "every form in which the legislative power is exerted, including regulation or order"); *Ganci v. Washington*, 318 Ill. App.

Under *Garner*, the plaintiffs must prove the risk of increased punishment, but they can do so using a broad range of relevant evidence:

> At a minimum, *policy statements*, along with the Board's *actual practices*, provide important instruction in how the Board interprets its enabling statute and regulations, and therefore whether, *as a matter of fact*, the amendment ... created a significant risk of increased punishment. It is often the case that *an agency's policies and practices will indicate the manner in which it is exercising its discretion*.

Garner, 529 U.S. at 256-57 (*emphasis added*).

In another recent *ex post facto* case, *Dyer v. Bowlen*, 465 F.3d 280 (6th Cir. 2006), this Court contrasted cases like *Lynce v. Mathis,* 519 U.S. 433 (1997), and *Weaver v. Graham*, 450 U.S. 24 (1981), where the harm to the prisoners was evident from the text or structure of the change itself, with cases like *California Dept. of Corrections v. Morales,* 514 U.S. 499 (1995), where the harm from the change – in *Morales* it was less frequent parole review – was likely but not inevitable:

> Intuitively, the retroactive application ... might effectuate a sufficient risk of increased punishment, but the ultimate result depends upon how the parole board actually exercises its discretion. ...[T]he Supreme Court has made clear that in order for us to conduct the necessary *ex post facto* inquiry, we

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3d 1174, 1187-81 (Ill. App. Ct. 2001) (allegations of informal policy changes that increased punishment were sufficient to withstand a motion to dismiss); *Johnson v. Million*, 102 Fed. Appx. 15 (6th Cir. 2004) (a new law *or policy* violates the *ex post facto* clause if it is retrospective and disadvantages the offender affected by it); *Kyle v. Garrett*, 2007 WL 806916 (5th Cir.) (*ex post facto* clause applies to parole procedures increasing the number of votes needed for parole).

> must determine whether [the prisoner] has produced specific evidence of a sufficient risk of increased punishment.

Dyer, supra, at 286. In *Dyer*, the Court made clear that under this standard, the plaintiff need not show that he "*actually received* a more serious punishment" – but only that he suffered the requisite risk. *Id.* at 288 (*emphasis in original*).[12]

Perhaps the best example of how a court should handle an *ex post facto* claim (after *Garner*) is *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3d Cir. 2003). In that case, following statutory amendments, the Pennsylvania board of parole toughened its criteria for parole.[13] *Id.* at 385. Violent offenders got less sympathetic review, and the number of favorable decisions plummeted. *Id*.

The Third Circuit conducted a thorough review of all the evidence that had been presented in the case, including the statements of the board before and after the change, and statistical data comparing release rates before and after. The court

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[12] In *Dyer*, Judge Rogers agreed that the case should be reversed, but dissented on the grounds that remand for fact-finding was unnecessary. In her view one parole change violated the *ex post facto* clause on its face. She would simply have issued the writ so that the parole board could "make its determination under substantive criteria no more onerous than those applicable at the time of the ... crime." *Id.* at 296.

[13] In Pennsylvania, what sparked the outcry for parole change was the release of a prisoner who then committed another murder. *Id*. at 279-80. In Michigan, it was the parole and rampage of Leslie Allen Williams in 2001. Both states reacted with sweeping changes to their parole systems, including increasing the size of the parole board, and packing it with the new governor's get-tough-on-crime appointees.

concluded that the board "mistakenly construed [the statutory change] to signify a substantive change in its parole function." *Id.* at 391. The court found that the change – as applied retroactively to the inmate – violated the *ex post facto* clause. *Mickens-Thomas* is nearly on all fours with *Foster-Bey*, where similar allegations were at the heart of the plaintiffs' complaint.

In sum, the district court did exactly what it was supposed to do. It asked: Did the post-10/1/92 changes in Michigan's parole laws, policies, procedures and standards, *taken cumulatively, and as applied on the ground*, create a sufficient risk of increased punishment for the plaintiff class?

II. The Evidence Supports the District Court's Conclusions

The legal standard set forth above required the district court to consider all changes implemented by the new board (and applied retroactively to the plaintiff class), and to decide whether those changes created a sufficient risk of increased punishment. The district court's findings were amply supported by the record.

A. The Purpose of the 1992 Amendments Was to Reduce Paroles for Violent Felons

The plaintiffs have argued from the start that there is nothing wrong with a state choosing to make its parole process stricter, or even to eliminate it. But the one thing a state or its parole board cannot do is implement a harsher standard for parole, and apply it retroactively to prisoners who committed their crimes in the

past. *See Weaver, supra,* at 30-31; *Mickens-Thomas, supra,* at 393; *Dyer, supra,* at 285-86. The district court rightly found that the new board did just that.

The MDOC spokesmen were remarkably candid about the reasons for the 1992 parole amendments. Robert Steinman, who had worked in the governor's office of legal counsel before returning to the MDOC as deputy director in 1991, said:

> ... the bottom line is I don't think there is any question that the focus and the reason why the parole board was overhauled was as a result of Leslie Allen Williams and as a result the community, the legislature, the governor was [*sic*] concerned about violent offenders.

(R.130, Exh. 41, Steinman Dep., at 32.)

Kenneth McGinnis, who was the MDOC director when the 1992 law was implemented, said that the changes were meant to bring a "wider perspective" to the board, to create a board that would be "more accountable." (R.130, Exh. 40, McGinnis Dep., at 17-18.) When pressed, however, he conceded that:

Q. ... – if you take the civil service board and replace it with a board that is mostly law enforcement, victims' rights and public safety oriented, and [if] that's what you're looking at for the board, ... the parole rates for [violent] ... offenders ... would drop?
A. The high risk category would drop, yes.
Q. And that's, in part, the point of the change in the board?
A. *I would agree, because that was the impetus of the change.*

(R.130, Exh. 40, McGinnis Dep., at 21-22) (*emphasis added*).

The most damning evidence came from report issued by Director McGinnis

in 1997. Looking backward, he described the 1992 changes as follows:

> To reinforce public confidence in Michigan's penal system, [the governor] in 1992 ordered an overhaul of the Parole Board and the way in which paroles were granted. *The intent of the overhaul was to make Michigan's communities safer by making more criminals serve more time and keeping many more locked up for as long as possible. ...* Among the important differences since the overhaul is a Parole Board that is much less willing to release criminals who complete their minimum sentences – and much less willing to release criminals at all, forcing many to serve their maximum sentences. ... *The new parole process is much tougher on criminals, ... clamping down especially hard on violent and assaultive prisoners. ...*

(R.124, Exh. 26, Five Years After, An Analysis of the Michigan Parole Board Since 1992, at 2.)

Regarding LID prisoners who had served their maximum, McGinnis said:

> The Parole Board would have liked to keep them locked up longer. They only got out because courts and statutes required them to be released.

Id. The MDOC's Website echoed the director's report. It said, "The primary goal of the reorganization was to increase public safety by minimizing the number of dangerous and assaultive prisoners being placed on parole." (R.130, Exh. 30.)[14]

McGinnis summarized the 1992-97 changes as follows:

> The overall trend is attributable, in large part, to the makeup of the new Parole Board .... On average, these new members have backgrounds heavily grounded in law enforcement and prosecution when compared to the previous board, all of whom were bureaucrats without such backgrounds. Ap-

[14] The board's own statistics show that from 1990 to 2004, parole approval rates fell from 61.2% to 34.5% for all violent offenses, and from 46.5% to 13% for sex offenses. (R.130, Pls' Sum. Jmt. Exh. 53, Parole Approval Chart.)

> pointments are now made by the director ... for four-year terms. They are no longer part of Civil Service.

(R.130, Exh. 26, Five Years After, at 10.)

The new board confirmed McGuinnis's account. Stephen Marschke, who seved on the board from 1992-96 and chaired it from 1996-2002, testified (in support of the 1999 amendments) as follows:

> It has been the longstanding philosophy of the Michigan Parole Board that a life sentence means just that – life in prison. ... It is the parole board's belief that something exceptional must occur which would cause the parole board to request the sentencing judge ... to set aside a life sentence. Good behavior is expected and is not in and of itself grounds for parole.

(R.128, Exh. 27, Marschke Test'y, at 1.) Indeed, Marschke said straight out that under the policies of the new board, in his view parolable life was essentially the same as mandatory life.[15] (R.130, Sum. Jmt. Exh. 39., Marschke Dep., at 125-26.)

Nevertheless, the defendants continue to argue that the real purpose of the 1992 amendments was to make the parole board more efficient (by increasing its

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[15] Once lifers understood that what they had experienced personally (or what they had heard anecdotally) had become official board policy, they went to court. Between 1997 and 2003, some 40 lifers filed separate state-court 6.500 petitions (for collateral review) seeking to be re-sentenced from life to an LID sentence. They argued that their trial judges had sentenced them to life under the mistaken belief that well-behaved lifers would be paroled within a reasonable time after 10 years, and that under the new board's policies that was no longer true. Following a split in the state Court of Appeals on this issue, the Michigan Supreme Court held that – as a matter of state criminal law – such a mistake of law or fact cannot support re-sentencing. *People v. Moore*, 468 Mich. 573 (2003). This lawsuit followed.

number from seven to ten members), and that more lifer paroles were expected as a result. Defs' Brief, at 26-28. This is like arguing that when Franklin Roosevelt sought to pack the U.S. Supreme Court with new appointees in 1937 – by increasing it from nine to 15 members – he did so to make it more efficient! The district court rejected the defendants' argument as specious, and this Court should too.

B. The New Parole Board's "Life Means Life" Policy Contributed to the Risk of Increased Punishment

The new board's post-1992 standard for *lifer* paroles could not be clearer:

> The parole board believes a life sentence means life in prison. There is nothing which exists in statute that allows the parole board to think, or do, otherwise.

(R.128, Exh. 33, MDOC Materials for Mich. Judges' Assoc., at 15.)

The change in the board's standard for lifers was immediately apparent to those in the best position to see it. Ronald Gach, who was the only member of the old board to be kept on the new board in 1992, described the change as follows:

> Soon after the 1992 board took over, it became nearly impossible [to] get the board to agree to parole even a fully rehabilitated and long-serving parolable lifer. The crimes that lifers have committed are usually very serious, and that fact alone would lead the board to deny parole, unless the inmate was very ill. Prior to 1992, it was virtually guaranteed that such lifers would have received parole.

(R.124, Exh. 7, Gach Declaration, ¶¶ 2-4.)

New-board member Jessie Rivers, who came from the MDOC, made the same appraisal:

> Any discussion of lifer paroles always devolved into a discussion of the inmate's original offense, and the board would almost always deny parole based just on the offense. The members of the board did not intend to release any lifer who committed a serious offense.

(R.124, Exh. 11, Rivers Declaration,¶¶ 10-14; *see also* Exh. 6, Gabry Decl.¶¶ 5-6.)

Mr. Gabry made clear that the new policy was in place right from the start, even if it was not widely publicized:

> From 1992 to 1996, the only lifers I recall being paroled were either those who were in the pipeline from the old board – and the new board vetoed many of those – or else ... medical paroles. (These were people who had a terminal illness and were going to die in prison if we didn't let them out.) In what you could call a routine case, like an armed robbery or murder II or a sex case, it was very rare for the new board to parole any lifers ... absent something like medical mercy.

(R.124, Exh. 6, Gabry Declaration, ¶ 32.) The district court did not err in finding that the substantive standard for parole had changed in practice, even if the underlying textual standard had not. (R.143, Opin. & Order on Sum. Jmt., at 23-31.)

C. The New Board's Failure to Treat Lifers and LID Prisoners the Same Contributed to the Risk of Increased Punishment

Until 1992, parolable lifers and LID prisoners were judged by the same substantive standard for purposes of parole. Frank Buchko (1962-74) said:

> When I was on the board we used exactly the same standard for parole for both lifers and those serving long indeterminate sentences. What I mean is that if you had two prisoners with similar backgrounds and similar crimes, and similar institutional records – one a lifer and one on a long indeterminate sentence – you would expect both to be paroled at about the same time.

(R. 124, Exh. 10, Buchko Decl., ¶¶ 11-12; *see also* Exh. 9, Reese Decl., ¶ 11; Exh.

5, Kime Decl.,¶ 8; Exh. 3, Brown Decl., ¶ 12.)

Perry Johnson (MDOC Director from 1972-84) confirmed that the same policy was in place throughout his tenure:

> With the judge's permission, you would expect two prisoners serving time for the same crime – one on a [parolable] life sentence, and the other on a long indeterminate sentence – to be approved for parole at about the same time ....

(R. 124, Exh. 2, Johnson Decl., ¶¶ 10-12.) Marvin May agreed that the policy remained the same until 1992:

> ... We used the same criteria for parole of non-mandatory lifers that we used for LIDs. ... *That way similar crimes would result in similar time.*

(R.124, Exh. 8, May Declaration, ¶ 11) (*emphasis added*).

Most well-behaved LID prisoners were paroled soon after they passed their minimum less good-time:

> Absent a poor prison record, or a bad criminal or prior parole record, many [LID] prisoners were paroled at the first meeting with the board after they became eligible for parole.

(R.124, Exh. 10, Buchko Decl., ¶ 13; R.128, Exh. 25, 1974 MDOC Annual Report.) Marvin May agreed that this norm, too, remained in place until 1992:

> Once the prisoner had passed the minimum and the board got jurisdiction, then absent a compelling reason not to parole, the person would normally be approved at or shortly after passing the minimum. *The board tended to look for reasons to parole.* It is always easy not to parole, but if the person has served what the sentencing judge ordered, and has done well in prison otherwise, then parole should follow – that was the practice when I was at the board from 1980-1992.

(R.124, Exh. 8, May Declaration, ¶ 9) (*emphasis added*).[16]

In the court below, the defendants admitted that parolable lifers and LIDs were no longer judged by the same substantive standard. New board member/ chair Marschke could not have been clearer on this point:

> Q. Does that mean then, given those differences [between LIDs and lifers], that the standard that you're applying when it comes to making the decision for parole is also different for lifers?
> A. Oh, yeah. It is different.

(R.130, Exh. 39, Marschke Dep., at 74.) Post-1992 director McGinnis concurred:

> Q. So you view [lifers and LIDs] as radically different cases *because of the fact of the life sentence?*
> A. *Yes.*

(R.130, McGinnis Dep., Exh. 40, at 61-62 (*emphasis added*).

The MDOC's post-1992 written materials made the same point:

> There is a higher threshold for lifers due to the nature of their sentence. The ... Board does not, nor will they in the future, "read into" the statute ... to provide something the law does not provide for. ... There are usually good reasons why a life sentence was imposed versus an indeterminate sentence.

(R. 130, Exh. 33, MDOC Materials for Mich. Judges' Assoc., at 16.)

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[16] Even the MDOC's pre-1992 Policy Directives suggested that parole soon after the minimum on an LID sentence was to be expected:

> A prisoner will be granted a parole upon the expiration of her/his minimum sentence, less regular and special good time credits or disciplinary credits where applicable, unless a majority of the Board or panel reasonably believes that release on parole would constitute a menace to society or to the public safety. (R.1130, Exh. 46, PD-DWA-45.05 (2/10/86), at 65.)

Gary Gabry, who chaired the new board from 1992-96, agreed that lifers were treated differently. He noted that parolable lifers (like many sex offenders) "were generally well-behaved, often non-violent [in prison], and without prior offenses." He said the new board stopped applying the parole guidelines to lifers "because the prisoners would have been released on parole earlier if the board applied the guidelines to them." (R.124, Exh. 6, Gabry Declaration., ¶¶ 13-14).

The defendants characterize this evidence as "anecdotal." Defs' Brief at 31. Far from it: this is exactly the sort of evidence – drawn from those who were most intimately familiar with the workings of the two boards – that a court is supposed to consider in deciding an *ex post facto* claim. The court below correctly found that after 1992, lifers and LIDs were judged by different substantive standards, to the detriment of the lifers. There could not be a clearer violation of the *ex post facto* clause.

D. Less Frequent Parole Review Contributed to the Risk of Increased Punishment for Lifers

In *Shabazz v. Gabry*, 123 F.3d 909 (6th Cir. 1997), lifers brought a facial attack on a single provision of the 1992 law – the reduced frequency of parole review. At that time (1993-95), unanimous case law held that *any* delay in parole

review was a *per se* violation of the *ex post facto* clause.[17] While *Shabazz* was pending, however, the U.S. Supreme Court decided *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995).

In *Morales*, California had reduced the frequency of parole review for murderers who committed a second murder while in prison (though it still required an individualized finding that the delay would not harm the inmate's chances for parole). On those facts, the High Court held that the less frequent parole review was not a *per se* violation of the *ex post facto* clause.

As this Court noted in *Shabazz*, the *Morales* test required a showing of sufficient risk of increased punishment, not merely "some ambiguous sort of 'disadvantage' suffered by an inmate." 123 F.3d at 914. The *Shabazz* Court held that the plaintiffs had not proven that the postponement of review – in and of itself – necessarily produced the requisite risk. *Id.*

The decision hinged on the fact "that no reliable statistical analysis was available ... *because the statute had been in effect for too short a period.*" *Id.* (*emphasis added*). This Court was unwilling to rely on "anecdotal observations and ... speculation to conclude that the amendments *may* present sufficient risk of

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[17] *See e.g., Roller v. Cavanaugh*, 984 F.2d 120 (4th Cir. 1993); *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991); *Watson v. Estelle*, 859 F.2d 105, *vacated on other grounds*, 886 F.2d 1093 (9th Cir. 1989).

increased punishment" in the future. *Id.* at 914-15. Due to the limited data available (in 1993-95), the plaintiffs had failed to *prove* that the delay in parole hearings would inevitably lead to later paroles. In essence, the Court said that the plaintiffs had brought their case too soon.

The *Shabazz* Court also based its decision in part on the fact that "other viable opportunities for parole" existed apart from the scheduled (5-year) interviews. *Id*. at 914. The U.S. Supreme Court said the same thing in *Garner* (2000), holding that the reduced frequency of parole review was not a *per se* violation in part because the parole board could set hearings *sooner* than the outer statutory limit. Both Courts cited these provisions as evidence of protections that could ameliorate the harshness of the new schedules in worthy cases. *Shabazz*, at 914; *Garner*, at 254.

The 1992 Michigan statute reduced the frequency of lifer parole review to a 10+5+5 schedule (from the 7+3+1+1 and 4+2+2 schedules previously mandated by state law or regulation). MCL 791.234(4)(a) (1992); *Shabazz,* 123 F.3d at 911. The *Shabazz* litigation showed that the delayed schedule was implemented by the new board without any individualized review whatever. *Id.* Soon after the new board took office, all lifers simply had their next review date set out five years from their last date, regardless of how close the vote for parole had been at their last hearing, or how many years they had served.

Moreover, in discovery below, the defendants admitted that the five-year schedule was *almost never* accelerated or waived. (R.130, Pls' Sum. Jmt. Exh. 39, Marschke Dep., at 74-77) (schedule could be accelerated in theory, but in reality acceleration/waiver occurred only in terminal cases); Exh. 42, Rubitschun Dep., at 41 (five-year schedule was essentially automatic). Indeed, the current chair of the board seemed unaware that shorter-than-five-year intervals were even possible, and she could not identify a single case of speedier review. (*See* R.130, Exh. 43, Sampson Dep., at 67, 84.) Former Director McGinnis concurred:

> Q. Other than so-called medical paroles where somebody is dying, are you aware of any case where a lifer was seen in fewer than five years?
> A. No. I don't recall any of that, no.

(R.130, Pls' Sum. Jmt. Exh. 40, McGinnis Dep., at 61.)[18]

The way the new board ran lifer review, no event (barring a terminal illness) would *ever* trigger "interim" review. In sum, the buffer built into the statute – to permit quicker lifer review in worthy cases – was illusory in practice. (R.143, Opin. & Order on Sum. Jmt., at 31-32.)

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[18] The board training materials suggest not that the five-year schedule is an outer limit, but that it is *the only possibility*: "If the parole board votes no interest, or the process is stopped by the sentencing judge, the prisoner's case *will be scheduled for a review at the five year interval* as indicated above." (R.128, Pls' Sum. Jmt. Exh. 29, at 3 (*emphasis added*); Exh. 33, MDOC Materials for Judges' Assoc., at 15 (if the parole board has no interest, "the prisoner's case will be scheduled for review at five year intervals").

On similar facts, the South Carolina Supreme Court found a *per se ex post facto* violation. Distinguishing *Garner*, the South Carolina court said:

> ... unlike the Georgia Parole Board's rules, South Carolina's statute *automatically* increases violent offenders parole consideration from every year to 'every two years.' ... South Carolina's system does indeed create 'a significant risk of prolonging respondent's incarceration' by one year without *any* chance for review....

Jernigan v. State, 340 S.C. 256, 264 n.5 (S.C. 2000).

The new board stopped exercising discretion about how much more time was needed before parole, because the five-year extension was automatic. There was an irrebuttable presumption that if a person was not parolable today, then *he or she would not be parolable for five more years.*

Finally, the new board's policy guaranteed that new information would not be acted upon in a timely fashion. That is, even when new material came into the file – for example, curing a defect that had blocked a favorable parole decision in the past – the board did not timely process that information and revisit the case.[19]

E. The Elimination of In-Person Lifer Interviews Contributed To the Risk of Increased Punishment

The 1999 amendments took away the right to an in-person interview and

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[19] Even if a state judge withdrew objections to parole, the new board would not review the case in fewer than five years. (R.131, Pls' Sum. Jmt. Exh. 72(k), Lazin File Excerpts.) Mr. Lazin was not paroled until three years after his successor judge's objections were withdrawn, and 16 years after the old board had first approved him for public hearing. Mr. Lazin served a total of 41 years in prison. *Id.*

permitted only a paper review after the tenth year. Under the old board, an interview could correct mistakes. Errors in the record (or in the assumptions of the board member) could be aired. (*See e.g.,* R.124, Pls' Sum. Jmt. Exh. 19, Weisenauer Decl., ¶¶ 14-15) (mistake corrected during interview). The personal contact gave the prisoner the chance to advocate for himself. In reviewing the notes made by old board members before 1992, in entry after entry the board's comments had to do with the *impression* that the prisoner made. The prisoners who came across as honest and responsible were the ones where the comments were likely to say, "I have interest," or "I can see saying yes at the next review." (R.131, Pls' Sum. Jmt. Exh. 72, File Excerpts.) And sometimes just *seeing* the prisoner could bring home to the board member that the felon in the paper file was now an older man or woman who had lived an exemplary life for years.

Former board member/chair Hudson (1980-91) described the process:

> As to the interviewing of lifers, in my opinion the interview is crucial. I don't know how you can make a decision without an interview. ... In my view the interview is the most important part of the process. You learned a great deal from meeting with the prisoner in person. ... [T]he prisoner got a chance to make the case for his parole.

(R.124, Pls' Sum. Jmt. Exh. 4, Hudson Decl.,¶ 11.) Sandra Reese agreed:

> The interview was extremely important..., especially with long-term prisoners who were in for serious crimes. What you were trying to assess was their growth: is this the same person who committed the crime. Looking at the paper file just doesn't do it. You need to hear from the individual.

(R.124, *id.,* Exh. 9, Reese Decl., ¶ 12.) Even Mr. Gabry, the first chair of the new board, agreed that "in-person interviews were very important, because that was how you got to know the prisoner." (R.124, *id.*, Exh. 6, Gabry Decl., ¶¶ 26-28.)

Although the defendants argued below that the interview was not crucial, their actions spoke louder than their words. The defendants conceded that *in no lifer case had the board ever approved someone for public hearing without first conducting an in-person interview.* (R.130, *id.,* Exh. 43, Sampson Dep., at 24-25.)

Finally, before 1992, the in-person interview generated a written record that became a permanent part of the file. Each member plainly had read the comments of his or her predecessor, and there was a kind of continuing dialogue *in the file* that generated momentum toward parole. William Hudson described the process nicely:

> In reviewing a file, you would look at the notes of the previous interviewers, their reasons for taking interest or not interest in the case, and their projections as to when they might be ready to act on the case. This information, taken cumulatively, was of immense value in making the decision whether or not to go forward with the case. If you don't interview, and if little or none of this information is recorded and reviewed, *the prisoner and the board member are disadvantaged*.

(R.124, Exh. 4, Hudson Decl., ¶13) (*emphasis added*).

Without an interview, the cumulative information about the prisoner – the stuff that charted his progress or showed his personal development over the years *through the eyes of the board members* – was completely lost. The new board

could go years without adding anything about the prisoner to the file, and – given the higher board turnover rate – could make its decision to deny parole without *any member of the board ever having met the prisoner*.

The defendants argue that the elimination of in-person interviews allowed the board to focus on the most deserving prisoners. Defs' Brief, at 34-35. If that were the case, however, then one would expect the number of lifer paroles granted by the new board to have risen after 1999, when the law changed. But the number of non-drug lifer paroles (averaged over five years) stayed the same: two (non-drug) lifer paroles a year from 1995 to 1999, and two (non-drug) lifer paroles a year from 2000 to 2004. *See* Part F, below. The new board did not *want* to conduct lifer interviews because it was a waste of its time once the board had decided that "life means life." It denied 99.98 percent of the lifer cases it reviewed before *and* after the 1999 amendment, so the defendants' argument about freeing up time for the most "deserving" candidates cannot be right.

F. The Parole Data Strongly Supported the District Court's Finding of a Violation and a Risk of Increased Punishment

The district court found that the new board's board "life means life" policy resulted in a far lower rate of parole than had been true under the old board in the decades before 1992. (R.143, Opin. & Order on Sum. Jmt., at 42.) The district court also agreed with the plaintiffs that the annual number of lifer paroles is irrel-

evant in and of itself: what matters is the *lifer parole rate* – that is, the number of people paroled *out of the number who are eligible for parole*.[20]

Until this case was brought, it was impossible for anyone to calculate lifer parole rates over time in Michigan, because the data were not available. That changed when the Citizens' Alliance on Prisons and Public Spending (CAPPS) went to the Michigan Archives and pulled every lifer index card from a database of some 160,000 Michigan prisoners. (R.124, Pls' Sum. Jmt. Exh. 1; *id.*, Exh. 20, Levine Affidavit.) The CAPPS data, combined with the MDOC's own computerized data after 1985, for the first time gave a clear picture of the number of lifers who were eligible for parole (after having served ten years) for each year from the inception of the lifer law in 1942 to the filing of the lawsuit in 2005. The numerator (the number of lifers paroled each year) was always known; what was missing was the *denominator* (the number of lifers eligible for parole each year). Only

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[20] The defendants argued below that if the old board granted X paroles for some period of time, and the new board granted X paroles for an equal period of time, then the two boards' performance was the same, and the plaintiffs' *ex post facto* challenge must fail. That is wrong.

For example, if the old board granted its X paroles out of a pool of **100** eligible lifers, and the new board granted its X paroles out of a pool of **1,000** eligible lifers, then the old board's parole rate is X percent, while the new board's parole rate is **.**X percent. The old board's rate is *ten times* higher than the new board's rate, in this example.

The defendants continue to make the same misleading argument here that they made below. The district court rejected it, and this Court should as well.

with both was it possible to calculate and to compare *lifer parole rates*.

1. The Old Board's Lifer Parole Rates from 1942 to 1984

What the CAPPS data showed was that from 1942 to 1984, the old board's lifer parole rate hovered between 5-15 percent, using five-year averages. (Five-year averages give a more accurate picture, offsetting year-to-year fluctuations.) (R.124, Pls' Sum. Jmt. Exh. 1, CAPPS Report.) The following chart summarized the CAPPS data. (R.113, Pls' Sum. Jmt. Brief, at 35.)

Date/Period	Average Annual # Lifers Parole Eligible	Average Annual # Lifers Paroled	Average Annual % Rate of Parole	Average Years Served at Parole
1980-84	141.0	7.4	**5.3**	15.1
1975-79	63.2	3.4	**5.4**	15.1
1970-74	72.8	12.6	**17.3**	20.3
1965-69	84.6	9.2	**10.9**	18.0
1960-64	125.4	19.4	**15.5**	18.0
1955-59	169.0	15.2	**9.0**	18.1
1950-54	184.2	10.2	**5.5**	16.2
1945-49	221.0	17.4	**7.9**	16.9
1942-44	199.7	10.0	**5.0**	14.2

The historical lifer parole rates completely belied the "conventional wisdom" – espoused by Steven Marschke, who served as chair of the new board from 1996 to 2002 – that "... even under the old board, I mean, there was a handful of [lifer paroles] a year ...going back to the '70's ... *out of thousands of people serving life sentences*." (R.130, Pls' Sum. Jmt. Exh. 39, Marschke Dep., at 90-92, *emphasis added*.)

To the contrary, from 1942 to 1984, the (five-year-averaged) number of *eligible* lifers never exceeded 225 people. In fact, the old board consistently paroled eligible lifers faster than new lifers entered the system, with the result that the eligible parolable lifer population declined by two-thirds from the early 1940s to the late 1970s. The denominator – the number of lifers who had served ten years – did not began to climb again until 1980-84, when an increasing number of lifers (who had been convicted ten years earlier) began to enter the pool. In short, the old board may not have paroled a lot of lifers, but only because *there were not a lot of eligible lifers to parole.*

2. The Old Board's Lifer Parole Rates from 1985 to 1992

The defendants argue that the lifer parole rate had dropped off before 1992. The rate did drop during that period, but for reasons that had nothing to do with any retroactive changes in the parole laws or in the board's attitude toward lifers.

By the end of the 1970s, Michigan's prison population had started to rise, due to more and tougher criminal laws. (R.124, Exh. 2, Johnson Decl., ¶¶ 13-14.) As the prison population mushroomed, the parole board began to fall behind in its work. (*Id.*, ¶ 18-19.) In 1981, a consent decree was entered in *Sweeton v. Brown*, E.D. Mich. No. 77-72230, requiring the board to meet a host of timeliness requirements in the non-lifer parole process. (R.128, Exh. 23, Gillett Decl.; R.124, Exh. 8, May Decl., ¶ 8.)

At the same time, the state legislature – to avoid new prison construction – passed the Prison Overcrowding Act. MCL 800.71 (1980). The act was invoked by the governor nine times. (R.124, Exh. 2, Johnson Decl., 16.) Each time, the release date for all non-lifers was moved up 90 days, burying the board in new cases. (R.124, Exh. 4, Hudson Decl., ¶ 15; Exh. 5., Kime Decl., ¶ 12.) To make matters worse for the board, the 1982 amendments required far more frequent parole review for lifers and LIDs. MCL 791.234 (4) (1982) (4+2+2 schedule).

William Hudson, who chaired the board for much of the 1980s, said:

> It is fair to say that the board was overwhelmed by the numbers at some point, and that we had to put our energy and resources into interviewing prisoners who were most likely to be paroled.
> In the best of circumstances we kept just marginally abreast of the regular parole cases, and no doubt in the mid-to-late 1980s and early 1990s the lifers suffered for it.

(R. 123, Exh. 4, Hudson Decl., ¶¶ 15-16; Exh. 2, Johnson Decl.,¶ 16-18). An audit done in 1982-93 found that the parole board had a backlog of 800 lifer interviews. (R.128, Exh. 32, Audit Report, at 9.) The annual number of lifer interviews went from 540 in 1984 to 57 for the first half of 1987 – while the number of lifers eligible for parole nearly doubled in the same period. (R.128, Exh. 32, at 15; R.130, Exh. 52, MDOC Pool Estimate.) The board was unable to process even the lifers whom it interviewed and approved for public hearing, and whom it wanted to parole. (R.124, Exhs. 13-19; Pls' Decls.; R.130, Exh. 45, Board Correspondence.)

As former director Perry Johnson put it:

> As the prison population mushroomed in the mid-to-late 1980s, commitments increased from 6,100 in '81 to 12,700 in '89, it is fair to say that the Parole Board was overwhelmed. The Board had no choice but to meet its statutory requirement to provide hearings for regular indeterminate cases and put its time and resources into releasing prisoners who were most likely to be paroled, just to get people out the door. The interviews and parole of [parolable] lifers ... were surely delayed as a result.
>
> I am not aware of any significant change in the board's philosophy or in the standards applied to lifers and LIDs from 1972 when I became the director until 1988 when I retired. What changed significantly was the numbers.

(R.124, Exh. 2, Johnson Decl., ¶¶ 18-19.)

There is a second reason why lifer parole rates dropped after 1985: lifer commitments took off in the mid-1970s. From 1975-82, some 835 new (non-drug) lifers flooded the system. (R.130, Exh. 54, Chart of Lifer Commitments.) Ten years later, as each new "class" of lifers entered the pool of those parole-eligible, the pool went from under 300 in 1985 to close to 800 in 1992. (R.130, Exh. 52, MDOC Estimate, at 9.)

What is significant about these numbers is that, as the wave of 1970s commitments crested into the pool of parole-eligible lifers in the late 1980s, most of the "new arrivals" would not have reached the point where parole was yet likely. They were thus added to the rate denominator, without a concomitant increase (in the number *yet* being paroled) to the rate numerator. The surge of "new arrivals" thus drastically drove down lifer parole rates, quite apart from the board being

overwhelmed for other reasons.

In short, although lifer paroles declined in the years before 1992, the decline was primarily due (1) to the exploding prison population (and the board's inability to interview and process lifers despite its desire to do so), and (2) to the skewed effect of the growth in the lifer rate denominator, with so many "new arrivals" in the pool.

That the old board's attitude toward lifers never changed is evident from what the old board did when it learned that it would be eliminated in 1992. The old board issued or re-issued favorable decisions in 47 lifer cases, moving them forward to public hearing.[21] (R.130, Exh. 49, List.)

Although these cases were not processed by the new board until 1993-94 (the new board rejected most of them), they were all approved and put forward by the *old* board, which is why the district court treated them as old-board cases and not as new-board cases. (*See* R.143, Opin. & Order on Sum. Jmt, at 37.) As the first chair of the new board said:

> [T]he increase in lifer paroles from roughly 1992-94 was due to the releases pushed through by the old board before the turnover. All of these inmates were "in the pipeline" when the new board came in....
> The new board honored some of the pipeline paroles out of respect for the old board, but if the crime was severe, members of the new board would not defer to the old board. Some got through, but many if not most did not.

[21] Nine were stopped by judicial veto, leaving 39 approved cases.

(R.124, Exh. 6, Gabry Decl., at ¶ 31; R.130, Exh. 42, Rubitschun Dep., at 36-37; Exh. 40, McGinnis Dep., at 48-49 (agreeing that all of these cases were initiated by the old board.) Moreover, when the old board approved a lifer for public hearing, it *was* tantamount to *granting* parole, because – unlike the new board – the old board rarely denied parole after moving forward on a case. (R.124, Exh. 8, May Decl., at 2.)

In 1992, according to the MDOC, there were 788 parole-eligible lifers in the pool. (R.130, Exh. 52, MDOC Estimate.) When the outgoing board approved 47 lifers that year, it was – as its last act – seeking the release of *six percent of the entire pool*. This figure was consistent with the lifer parole rate for the previous 50 years. Even using a figure of 39 lifers (those who survived judicial veto), the old board was prepared to release more than *five percent* of the total pool. Nevertheless, the defendants ignore the old board's action, and want to give the old board no statistical credit for approving 47 (or 39) lifers in 1992. Defs' Brief, at 18-28.

If just those 39 lifers (who got past judicial veto) are counted as lifers whom the old-board sought to parole (because all or nearly all would have been paroled if the old board had not been removed), then the 1985-92 chart for the old board would look as follows:

Date/Period	Average Annual # Lifers Parole Eligible	Average Annual # Lifers Paroled	Average Annual % Rate of Parole	Average Years Served at Parole
1990-92	740	14.3	**1.9**	unknown
1985-99	474	3.0	**.6**	15.1

For the whole period from 1985 to 1992, using eight-year averages, the chart would read:

Date/Period	Average Annual # Lifers Parole Eligible	Average Annual # Lifers Paroled	Average Annual % Rate of Parole	Average Years Served at Parole
1985-92	573	7.3	**1.3**	unknown

Although these figures are well below the old board's historical rate of 5-15 percent, they are far above the new board's rate from 1995 to 2004.

Moreover, the evidence showed that while the old board may have fallen behind on lifer paroles during its last years, it caught up in 1992 when it approved the 47 (39 after vetoes) people for public hearing. Under the pre-1992 practice, parole was almost certain to follow – especially given the old board's recognition that these people had been unfairly delayed for parole for several years already.

3. The New Board's Parole Rates

When the new board took over in 1992, it immediately deferred all lifer parole interviews to five years from the date of the last interview. *Shabazz, supra,* at 911. Thus, the soonest the new board had any of its *own* cases was 1995. (R.143, Opin. & Order on Sum. Jmt., at 36-37.)

The defendants continue to try to claim credit for the 1993-94 lifer paroles,

the same way they want to claim credit for the drug-lifer paroles. But the evidence below showed that the "pipeline" paroles were the work of the old board. And far from moving these cases forward, the new board rejected two-thirds of them. Indeed, many of the "pipeline" lifers who were put forward by the old board in 1992, and whom the new board rejected in 1993-94, were rejected *two more times* by the new board and were still in prison in 2005 when this lawsuit was filed, despite superb institutional records. The district court did not err in refusing to count the "pipeline" paroles as new-board cases. (R.143, Opin. & Order, at 37.)

If 1995 is used as the starting point for lifer paroles *initiated* by the new board, then the period to look at is 1995 to 2004. (The district court rightly did not include 2005 because this lawsuit was filed early that year.)

The new board's (non-drug) lifer parole rate is shown below, again using five-year averaged data, from statistics provided by the defendants:

Date/Period	Average Annual # Lifers Parole Eligible	Average Annual # Lifers Paroled	Average Annual % Rate of Parole	Average Years Served at Parole
2000-04	1,454	2.2	.15	23.2
1995-99	1,091	2.2	.20	19.2

Under the new board, non-drug lifer paroles dropped to an average of just over two a year, even as the pool of parole-eligible lifers swelled to 7-10 times what it had been from 1980-84. The new board also had the advantage of three extra members, (and, after 1999, the time-saving benefit of paper or file reviews.)

Nevertheless, from 1995-2004, the lifer parole rate plunged again.

In sum, although the old board's rate declined markedly from 1985-92, its rate was still at least *three to six times* higher than the new board's rate from 1995-2004. Moreover, for that period the new board did not have the excuse that a disproportionate number of lifers in the eligible pool were "new arrivals." To the contrary, those "new arrivals" (who had just reached parole eligibility in the late 1980s, after having served ten years), had all served *20 years* by the late 1990s. Nevertheless, the new board *still* paroled the entire pool at only a .2 percent rate.

The lifer parole rate for the new board was thus far lower even than the *lowest* average rate for the old board (1985-89, when it was "overwhelmed"), and more than 25 times lower than the old board's historical five percent rate that had held from 1942 to 1984, and that the old board matched as it was leaving office in 1992. The old board admitted that it had trouble doing its job in its last years, and it tried to catch up before it left office. The new board, on the other hand, boasted that denying lifer paroles *was* its job, and it trumpeted its "success."

The new board's parole rate of .2 percent can only be attributed to its "life means life" policy, as the district court rightly found. Accordingly, the district court did not err in holding that the changes to the parole laws, policies, procedures, and standards, as applied retroactively by the new board, created a sufficient risk of increased punishment.

G. The Loss of a Final Decision, Written Reasons, and the Right to Appeal Contributed to the Risk of Increased Punishment

Before 1992, whenever the board interviewed a lifer and decided that it had "no interest" in going forward to a public hearing, the board's decision was treated as a final decision not to parole. (R.132, Pls' Sum. Jmt. Exh. 46, PD-DWA-45.05 (2/10/86), at 65-66; R.128, *id.,* Exh. 23, *Sweeton* Monitor's Report, at 12.) Such a decision required written reasons and was appealable: the "no interest" notice gave lifers the same rights as LID prisoners who were passed over for parole. *See* MLC 791.235(12) (requiring written reasons) *and* 792.234(7) (allowing appeals).

After 1992, however, the new board said that when it sent the same "no interest" notice, it had made no decision at all. Instead – according to the new board – a "decision" came only at the *end* of the process, *after* a public hearing, when the board voted one final time on whether or not to release the prisoner.[22] The new board's re-interpretation of the law meant that written reasons were no longer required, and lifer appeals to state court were effectively barred.

The new board justified the change based on its revisionist view that lifers were not "eligible" for parole. (R. 130, Exh. 39, Marschke Dep., at 63-65; R.124,

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[22] Overnight the new board went from making hundreds of lifer "decisions" a year to making two "decisions" a year. The change made perfect sense in light of the new board's "life means life" policy: why issue written reasons if the life sentence *was itself* the reason for denial, and why waste resources on appeals if the default policy was that lifers *would not be paroled...?*

Exh. 6, Gabry Decl., at ¶ 18). This view reversed longstanding black-letter parole board policy. As former director Robert Brown said:

> In all the years I worked at the MDOC [1961to 1991] and around the parole board, to my knowledge the terms "eligible for parole" and "coming within the board's jurisdiction" meant exactly the same thing. A term-of-years prisoner could be paroled after serving his minimum sentence less all good-time credits, and a lifer, except those convicted of first-degree murder, could be paroled after having served ten years.

(R.124, Exh. 3, Brown Decl.,¶ 13.) MDOC policy directives going back 35 years confirmed that parolable lifers were viewed as being fully "eligible" for parole at ten years. (R.132, Exh. 46, Policy Directives, 1973 to 2005.)

The policy directives made clear that they fully applied to lifers (except as to the review schedule). (R.132, Exh. 46, PD-DWA-45.05 (6/18/79), at 70.) The 1986 version of the parole policy directive said that lifers "shall be brought before the Parole Board for a *parole release hearing*" (on the schedule then required by statute). (R.132, Exh. 46, *id.*, (2/10/86), *emphasis added*.) The defendants ignored decades of accepted practice, and re-interpreted the parole statute simply to implement their "life means life" policy.

The 1999 statutory amendments – proposed and passed at the new board's urging – codified these changes (and went further). The 1999 law barred appeals (by prisoners) of *any* parole decision. And contrary to what the defendants argue, Defs' Brief at 38-41, the 1999 law subtly changed the definition of a parole *deci-*

sion to fit what the new board was already doing. *Compare* MCL 791. 234(6)(b) (1992) ("A parole shall not be granted to [a lifer] until after a public hearing...") *with* 791.234(6)(c) (1999) ("A decision to grant or deny parole to [a lifer] shall not be made until after a public hearing...").

The defendants argue that these changes were accomplished by litigation. Defs' Brief, at 38-41, citing *Parole of Johnson*, 235 Mich. App. 21 (1999) and *Gilmore v. Parole Board*, 247 Mich. App. 205 (2001). They argue implicitly that a court's re-interpretation of a statute is beyond the reach of the U.S. Constitution. That argument (though wrong)[23] need not be addressed because the changes were incorporated into the 1999 *statute* and were applied retroactively to the class, and therefore fall squarely within the *ex post facto* clause.

The defendants also argue that the loss of the right to appeal (in 1999) was no loss at all, because historically few such appeals succeeded. Defs' Brief, at 32-33. But that is true for all criminal appeals. What makes the right to appeal important for *ex post facto* purposes is that just one successful case can change the law for all prisoners. For example, when the new board stopped giving written

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[23] State courts, by re-interpretation of established law, cannot increase the risk of punishment for a crime, any more than the legislature or the executive can. *See e.g., Bouie v. City of Columbia*, 378 U.S. 347, 351-52 (1964) ("If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction").

reasons even after denying parole *following* a public hearing, that right was restored to all lifers because one prisoner could and did appeal. *See Glover v. Parole Board*, 460 Mich. 511 (1999) (holding that written reasons were statutorily and constitutionally required for the denial of parole at that stage). The right to appeal does not guarantee success, but for *ex post facto* purposes, the loss of the right, like any other retroactive change, only has to contribute to the *risk* of increased punishment. *Dyer, supra,* at 286.

H. The New Board's Failure to Consider the Sentencing Judge's Intentions Contributed to the Risk of Increased Punishment

The new board's harsher standard was also evident from its refusal to consider the sentencing judge's intentions.

As noted, a life sentence sent an ambiguous signal: some judges used it to be harsh, while others used it to allow for parole in ten years. (R.126, Pls' Sum. Jmt. Exh. 21, No Way Out, at 14-15; Exh. 35, Judges' Letters & Survey; R.127, Exhs. 36-38, Sentencing Excerpts; R.128, Exh. 33, Defense Counsel Affidavits.) Accordingly, if the old parole board wasn't sure about a case, it would contact the judge, or look at the transcript of the sentencing hearing. (R.124, Exh. 8, May Decl., ¶¶ 16-17.)

The new board admitted it didn't care what the sentencing judge intended:

A. [W]e're far better able to make decisions on people than the judges in sentencing. That's one of my problems with judges is that, you know, there is

> inaccuracy of sentencing .... That's my pet peeve with the courts, is that – because we're supposed to respect the sentence that a judge gives? ... You know, we don't put much emphasis on that.

(R.130, Exh. 39, Marschke Dep., at 105-06; *see also* Exh. 42, Rubitschun Dep., at 18) (under new board's policy, the sentencing judges' intentions carry no weight). As Marvin May said, "If the new board doesn't care what the sentencing judge thought in lifer cases, then that is a total change in orientation from the years when I was at the board." (R.124, Exh. 8, May Decl., ¶¶ 16-17.) The new board *didn't* care: it assumed that all judges imposed the life sentence to be harsh and it refused to consider any evidence to the contrary, to the detriment of the plaintiff class.

In this case, the plaintiffs submitted more evidence and stronger evidence than in any of the other cited cases in which an *ex post facto* violation was found. The district court's decision was neither a minority position nor an outlying case. Based on all of the evidence present below, the district court did not err in finding that the cumulative changes to Michigan's parole laws, policies, procedures, and standards, as applied by the new board, created a sufficient risk of increased punishment for the plaintiff class.[24]

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[24] It is also worth noting that *all* of the changes (with the exception of the review schedule) applied *only* retroactively from 1992 to 2007. Because the 1992 law increased the parole eligibility period for lifers from 10 years to 15 years, the new board did not get jurisdiction over new lifers until 2007. There was thus no prospective component to the changes (other than the review schedule) until 2007.

III. The District Court's Remedial Plan Was Narrowly Tailored to Cure the Constitutional Violation

After granting summary judgment to the plaintiffs, the district court invited the parties to submit remedial proposals. The plaintiffs argued in their proposal that because the new parole board had applied its "life means life" philosophy for some 15+ years – and because the new board had denied any constitutional violation throughout the litigation – it could not or would not change its stripes and reform itself. Instead, the plaintiffs asked the district court to create a provisional parole review panel to resolve the pre-1992 lifer cases. (R.152, Pls' Brief on Remedies; R.157, Pls' Response Brief on Remedies.)

The district court rejected the plaintiffs' proposal in order to give the defendants "a chance to show that they are both willing and able to remedy the constitutional violation." The court said, "If they cannot, then stronger remedial measures will become necessary." (R.168, First Remedial Order, p. 2.)

The remedial order is a model of judicial restraint. *Id.* The defendants themselves assured the district court that they were "able to meet all the requirements set forth ... and that nothing in this order is beyond the parole board's resources or capabilities." *Id.*, ¶ 18. The district court also explicitly found that:

> the terms of the injunction are the least restrictive relief that the Court can impose to cure the defendants' serious, long-term, and ongoing constitutional violation of the plaintiffs' rights. The injunction meets the requirements of the Prison Litigation Reform Act, 18 U.S.C. § 3636(a) ....

Id., ¶ 19. Throughout the remedial phase of the case, the district court has been accommodating to the defendants, granting them extra time, relaxing some of the requirements of the remedial order, and rejecting (so far) the plaintiffs' objections to the pace of relief, as well as to the board's procedures and its substantive decision-making. (R.249, Order Denying Pls' Motion for Order to Show Cause.) In sum, the district court has bent over backwards to give the defendants the chance to cure the constitutional violation.

Moreover, this Court twice denied the defendants' motions for stays of the district court's remedial plan. Both times the panel rejected the defendants' arguments that the remedial plan was too intrusive. *See* Orders Denying Defendants' Motions for Stay (10/30/08 and 11/18/08).

At bottom what the defendants have argued for – both in the court below and in their brief here – is discretion without any judicial review whatever. But that is what enabled them to set up an illegal retroactive "life means life" regime in the first place, and it is what emboldens them to continue to deny parole (in 2009) to lifers whom the old board had recommended for parole before *1992* and who have been model prisoners ever since. (*See* R.233, Pls' Brief in Support of Motion for Order to Show Cause; *and* R.242, Pls' Show Cause Reply Brief.)

As the Third Circuit made clear in a similar situation, both the district court and the appellate court must ensure that the parole board is no longer making un-

constitutional parole decisions after it has been ordered to cease and desist. *See Mickens-Thomas v. Vaughn,* 321 F.3d 374 (3d Cir. 2003), and 355 F.3d 294 (3d Cir. 2004). The only way to measure compliance is to review the new board's decisions to see how they stack up against the old board's decisions (in terms of outcomes), and to see if the new board is relying on reasons or analysis that the old rejected, or to which the old board gave little or no weight.

In *Mickens-Thomas I*, at 385, the Third Circuit, like the district court here, found that the board's policy changes had effectively altered its substantive parole function, in violation of the *ex post facto* clause. The court set out the substantive criteria for the board's decision on remand, just as the district court here set out the substantive criteria for the defendants' future decisions (in its first remedial order). In both cases, the courts informed the board in no uncertain terms that it must apply the previous laws, policies, procedures, and standards (as applied by the old board) in order to cure the *ex post facto* violation. (*Mickens-Thomas II* at 300, *and* R.168, First Remedial Order, ¶¶ 9-10, 14.)

On remand in *Mickens-Thomas*, the board again denied parole. On appeal, the Third Circuit found that the board had made exactly the same error that it had made in denying the petitioner's parole in the first instance.[25] The court noted that

[25] The court said, "Instead of balancing factors favoring parole with unique factors that may weigh against parole, the Board considered the old factors in the same

the board was continuing to focus, *e.g.*, on the crime rather than on rehabilitation, on old substance abuse charges rather than on the prisoner's current sobriety, on the non-admission of guilt as indicative of "remorselessness and refusal to accept responsibility" rather than on the prisoner's superb record and recommendations in the years since his crime. *Id.* at 305-306.

These were the very factors that had led the court to conclude that the board was violating the *ex post facto* clause in the first place. The Court of Appeals held that the board had acted in "willful noncompliance" and "bad faith" on remand; it issued a writ ordering the board to release the petitioner within seven days.[26]

Here, the district court's remedial plan was designed to permit the same kind of monitoring (for the class) that the Third Circuit used to review the Pennsylvania parole board's post-remand decision-making in *Mickens-Thomas II*. The district court narrowly tailored the relief and did not exceed its authority under the

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manner found by us to be violative of the *ex post facto* prohibition in our earlier opinion." *Id.* at 304. The same as here, the old policies favored granting parole absent specific reasons not to parole, while the new policies favored denying parole absent exceptional reasons to parole.

[26] The two *Mickens-Thomas* cases are nearly on all fours with this case. *Mickens-Thomas II* includes a full description of what the court did in the first case, and its discussion of the remedial failure of the board on remand could have been written for this case. *Mickens-Thomas II* focuses on the *substantive* factors the board applied in making its decision to deny parole. *See also Fletcher v. Reilly*, 433 F.3d 867, 878-879 (D.C. Cir. 2006) (focusing on the substantive differences between the old and new regimes as applied in practice by the board).

Prison Litigation Reform Act. The defendants' arguments to the contrary should be rejected.

IV. The District Court Did Not Err in Awarding Attorneys' Fees to the Plaintiffs under 42 U.S.C. § 1988

The defendants concede that the plaintiffs are entitled to attorneys' fees if this Court affirms on the merits. The defendants do not contest the district court's calculations. Rather they argue that the award should be reduced for the due process claim that was dismissed below.

The plaintiffs need only show that they prevailed on a "significant issue" in the case to be eligible for attorneys' fees. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Texas St. School Teachers Ass'n v. Garland Indep't School Dist.*, 489 U.S. 782 (1989). The plaintiffs prevailed on a "significant issue" when the district court granted summary judgment in their favor, ruling that the changes in Michigan's parole laws and policies since 1992 violated the e*x post facto* clause of the U.S. Constitution.

The plaintiffs achieved not just some, but all of the benefit they sought. The district court's declaratory judgment and first remedial order required the defendants to provide constitutional parole review to the plaintiff class using the parole laws, polices, procedures, and standards that guided the board before 1992. The district court also required the defendants to document its reasons for denying pa-

role, and ordered a process by which every class member would be re-evaluated using the same pre-1992 criteria for parole. As the district court put it, "... looking at this overall case," the plaintiffs were "a hundred percent successful." (R.221, Fees Hearing Transcript, at 18.)

As to the due process issue, it was a secondary legal theory that paralleled the *ex post facto* claim and required very little separate legal research or analysis. As can be seen from this brief, the due process claim would only come in to play if the *ex post facto* clause were held to be an inappropriate constitutional basis for the relief sought. Where a related claim, especially one that requires little extra legal work, is lost while the main claim is won, the federal courts typically have not reduced attorneys' fees. *See Hensley,* 461 U.S. at 435; *Imwalle v. Reliance Medical Products*, 515 F.3d 531, 554 (6th Cir. 2008); *and Sinajini v. Board of Ed.,* 233 F.3d 1236 (10th Cir. 2000) (no reductions for unsuccessful related claims).

Finally, because the defendants did not raise the due process issue below (as a reason to reduce the fee award), they are precluded from raising it on appeal. (R.193, Defs' Brief Opposing Fees; R.221, Fees Hearing Transcript) (the defendants never argued for a reduction of fees based on the fact that the plaintiffs' due process claim was dismissed.) *See Director, Office of Workers' Compensation Programs v. Quarto Mining Co.*, 901 F.2d 532, 536 (6th Cir. 1990) (parties cannot raise in this Court issues that they did not raise but could have raised in the

court below); *McFarland v. Henderson*, 307 F.3d 402, 407 (6th Cir. 2002) (only exception might be for pure issues of law that would not require remand).

THE PLAINTIFFS' CROSS-APPEAL

I. The District Court Erred in Dismissing the Plaintiffs' Due Process Claim

The plaintiffs did not claim a *right to parole* in Michigan. They claimed a right to meaningful parole *consideration*. The relief they sought was review using the parole laws, policies, procedures, and standards that were in effect when they committed their crimes.

A. The *Ex Post Facto* Clause and the Due Process Clause Provide Overlapping Protection Against Unconstitutional Conduct

The plaintiffs properly brought their lawsuit under the *ex post facto* clause. *See* U.S. Const., Art. I, § 10. Nevertheless, their complaint included an alternate cause of action under the due process clause. (R.1, Complaint, ¶¶ 115-117.) The plaintiffs pled the due process clause essentially as a backup, so that if any of the changes in Michigan's parole laws, policies, procedures, and standards were held not to be covered by the *ex post facto* clause, the same claim could still be made under the due process clause. Thus, if this Court affirms (the district court) on the *ex post facto* issue, it need not address the due process issue at all.

That the two clauses must work in tandem can be shown by a hypothetical. Assume that in 1992 there were no formal changes to Michigan's parole laws or written policies. Instead, assume that a new anti-crime governor told the board in 1992 to stop reviewing lifers for parole because "life means life." Assume that the board stopped reviewing all lifers, including those who had committed their crimes before 1992. In short, no law was changed by the legislature; no written policies were altered in any way; and no new parole denials were ever issued.[27] Finally, assume that the prisoners could not appeal a decision (or non-decision) of the parole board to state court, and that state courts lacked jurisdiction (or otherwise rejected a writ of mandamus) to force the board to exercise its discretion.

No doubt the defendants would argue that no "law" had changed, and that therefore the *ex post facto* clause could not apply to the case. Yet all lifers who previously had gotten full parole consideration before 1992 got zero parole consideration thereafter (necessarily resulting in increased punishment).

In situations much like this hypothetical, both before and after *Garner*, the federal courts have found that the due process clause can provide the same relief as the *ex post facto* clause. *See e.g., Devine v. New Mexico Dept. of Corrections*,

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[27] This scenario is not far-fetched. In 2009, Michigan's Governor eliminated the 10-member parole board by executive decree and created a new 15-member parole and commutation board. *See* Executive Order 2009-5.

866 F.2d 339 (10th Cir. 1989) (due process clause applies even if *ex post facto* clause does not); *Culter v. United States*, 241 F. Supp. 2d 19 (D.C. 2003) (retroactive change in longstanding federal prison policy denies prisoner due process even if the change is not an *ex post facto* violation). Indeed, the district judge below (to whom the case was assigned when the motion to dismiss was decided) had herself ruled that due process applied where relief might not be available under the *ex post facto* clause. *See United States v. West*, 2003 WL 1119990 (E.D. Mich.) (same facts and holding as *Culter, supra*).[28]

These cases do not hinge on a "substantive right" to parole (or to placement in a half-way house as opposed to a prison), but rather on the fundamental unfairness of increasing punishment after the fact – the same as the *ex post facto* clause. The district court need not have reached the due process issue, but it erred by dismissing the claim as meritless.

B. State Judges Who Sentenced the Plaintiffs to Parolable Life Sentences Did So Under a Mistaken Belief of Fact and Law

Some state court trial judges sentenced class members to parolable life under the belief that they could serve *less* time in prison with a life sentence than

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[28] In *West*, the district court relied upon *Snowden v. Lexmark Intern, Inc.*, 237 F.3d 620 (6th Cir. 2001) (due process clause limits the retrospective imposition of criminal penalties), and *DeWitt v. Ventetoulo*, 6 F.3d 32 (1st Cir. 1993) (late retroactive correction of sentence, resulting in increased punishment, can violate due process).

with an LID sentence, and that otherwise the two sentences would result in comparable time for comparable crimes (with good behavior). After 1992, the judges' belief proved to be mistaken. (R.128, Pls' Sum. Jmt. Exhs. 33-37.)

When a judge makes a mistake and sentences a defendant to a longer term in prison than the judge intended, the sentence is invalid as a matter of federal constitutional law. *United States v. Kerley*, 838 F.2d 932, 941 (7th Cir. 1988). This is true regardless of whether the state courts treat the same mistake as a violation of state criminal or constitutional law. *See People v. Moore*, 468 Mich. 573 (2003).

A criminal defendant has a due process right to have his sentence be based upon accurate information. *Townsend v. Burke*, 334 U.S. 736 (1948) (where prisoner is sentenced on the basis of false assumptions, the result is inconsistent with due process of law). This Court has held that reliance on untrue facts at sentencing violates federal due process. *Collins v. Buchkoe*, 493 F.2d 343, 346 (6th Cir. 1974) (where a trial judge relies on false evidence, "the defendant is deprived of due process.")

Even if a sentencing judge demonstrates a misunderstanding of when a defendant *might* be paroled, due process rights can be implicated. In *Kerley*, 838 F.2d at 940-41, Judge Richard Posner wrote for the Seventh Circuit:

> Kerley argues that the judge relied on misinformation and improper considerations in sentencing him to three years in prison (two years short of the statutory maximum) …. We agree. Although the sentence was lawful in the

> sense of being within the limits set in the statute, and although the judge's discretion to impose a lawful sentence is plenary in the absence of irregularities, [*citations omitted*] a sentence predicated on misinformation cannot stand, *see, e.g., United States ex rel. Welch v. Lane,* 738 F.2d 863 (7th Cir. 1984) [(sentence based on inaccurate information violates due process)]. …. The judge said in the sentencing hearing that a "sentence of three years would mean *perhaps* one year [of actual imprisonment] *or less*." This is incorrect. The time served could not be less than one year, because with irrelevant exceptions a federal prisoner must serve a minimum of one-third of his prison sentence before he is eligible for parole. [*Citations omitted*.] Thus, [the judge] may have sentenced Kerely to a longer term in prison than the judge realized.

Id. (*first emphasis added*).

In Michigan, state court judges sentenced class members to life with the understanding (a) that the prisoners would be fully eligible for parole after ten years, (b) that they would then get full and fair parole consideration, and (c) that they could and would be paroled (with good conduct) in about the same time as comparable LID prisoners with similar crimes/records. (R.1, Complaint, ¶¶ 31-50; R.124, Pls' Sum. Jmt. Exhs. 13-19, Pls' Decls.) The 1992 and 1999 changes guaranteed that the judges' understanding was false. *Kerley*, 838 F.2d at 941; *Collins*, 493 F.2d at 346.

C. Some Plaintiffs Pled Guilty or Chose Parolable Life Sentences in Reliance on Meaningful Future Parole Review

The plaintiffs are entitled to meaningful parole review because they pled guilty or, in some cases, even chose life sentences, in *reliance* on such review. "[T]o create a protectable liberty interest ... [a prisoner] must show – by reference

to statute, regulation, *administrative practice*, contractual arrangement *or other mutual understanding* – that particular standards or criteria guide the State's decision makers." *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 11-12 (1979); *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) (Brennan, J., concurring) (*emphasis added*).

Although the Court has foreclosed due process relief where a promise is made to a prisoner who has already been sentenced, *see Jago v. Van Curen*, 454 U.S. 14 (1981), a due process claim remains with regard to promises made *at the time of sentencing*. The plaintiffs therefore have a legitimate claim of entitlement to a meaningful chance at parole using the laws, policies, procedures, and standards that were in effect when they committed their crimes.

For example, in *INS v. St. Cyr*, 533 U.S. 289, 321-23 (2001), the Court held that a statutory amendment (barring discretionary relief from deportation) could not apply retroactively where a plea agreement involved "a *quid pro quo* between a criminal defendant and the government." To hold otherwise "would be contrary to 'familiar considerations of fair notice, reasonable reliance, and settled expectations'" [citing *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994)]. In *St. Cyr*, the Court found a *quid pro quo* agreement based on the frequency with which relief was granted; the likelihood that competent defense counsel would have provided advice about the importance of the relief; the trial court's statement that

the plea would not foreclose the relief; and the awareness the defendant had of the consequences of his plea and conviction. *Id*. at 323.

The same factors were present here as well. The parole board granted lifer paroles at much higher rates in the decades before 1992. Defense counsel (along with prosecutors, judges, and probation departments) understood the norms of practice to be that lifers and comparable LID prisoners would serve similar time (and that lifers could actually be paroled sooner). Judges told class members in open court not only that a guilty plea would not foreclose parole, but that the life sentence was premised upon parole review after ten years and the chance for earlier parole. (R.128-129, Pls' Sum. Jmt. Exhs. 33-37.) Class members were acutely aware that without meaningful parole review, the consequence of their plea would be far more onerous than what they had bargained for. Like Mr. St. Cyr – who pled guilty relying on the chance for a waiver of deportation – here class members pled guilty relying on the chance for parole.

The state thus made an implicit promise when it sentenced the plaintiffs to life: if they demonstrated good conduct, they could be paroled earlier than – and would be fairly considered for parole not substantially later than – comparable LID prisoners. The plaintiffs' decision to plead guilty, or to choose a life term over an LID sentence, is senseless but for the *quid pro quo* they were offered at

sentencing. The plaintiffs have suffered a detriment as a result of their reliance on the promise at sentencing.

D. The New Board's Failure to Exercise Discretion Violated the Plaintiffs' Due Process Rights

The plaintiffs' right to a meaningful chance for parole was arbitrarily withheld from them. The due process clause prohibits denying parolable lifers access to real parole review. *See Ohio Adult Parole Auth'y v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring) ("Judicial intervention might, for example, be warranted … in a case where the state arbitrarily denied a prisoner any access to clemency proceedings.") The plaintiffs proved that under the new parole regime they were not part of the parole process: denial and a five-year bump were virtually automatic. The new board's policy arbitrarily denied the plaintiffs fair parole proceedings, and violated due process. *See Ohio Adult Parole*, 523 U.S. at 289 (O'Connor, J., concurring).

Conclusion

For the above reasons, as to the defendants' appeal, the Court should affirm the district court in all respects. As to the cross-appeal, the Court should not reach the due process issue. If the Court does, then it should reverse the district court.

Respectfully submitted,

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Dated: April 27, 2009

Addendum – Plaintiffs' Designation of Relevant District Court Documents

Foster-Bey et al. v. Rubitschun et al.

E.D. Mich. No. 2:05-cv-71318-MOB-VMM

Date Filed	#	Docket Entry Description
11/13/2006	124	Exhibit List and Exhibits 1-20 in Support of Pls' Cross Motion for Sum. Jmt. (113 and 114)
11/13/2006	126	Exhibit 21 in Support of 113 and 114
11/13/2006	127	Exhibit 21 (cont.) in Support of 113 and 114
11/13/2006	128	Exhibits 22-35 in Support of 113 and 114
11/13/2006	129	Exhibits 36-38 in Support of 113 and 114
11/13/2006	130	Exhibits 39-71in Support of 113 and 114
11/13/2006	131	Exhibits 72a-72j in Support of 113 and 114
11/14/2006	132	Exhibit 46 in Support of 113 and 114
12/18/2006	137	Pls' Reply to Defs' Response Brief on Cross Motions for Sum. Jmt.
07/02/2007	140	Stipulation to Amend Order for Class Certification
02/08/2008	169	Exhibit List and Exhibits to Declaratory Judgment & First Remedial Order
12/22/2008	253	Transcript of Civil Motion Hearing Held on 2/7/2007

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v.

SHAREE BOOKER, in her official capacity as a member of the Michigan Parole Board, *et al.,*

Defendants-Appellants.

Certificate of Compliance

Pursuant to Fed. R. App. P. 28.1(e), the plaintiffs certify that the attached brief complies with the appellate rules in that it contains 16,354 words.

s/ Paul D. Reingold
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Dated: April 27, 2009

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Proof of Service

The plaintiffs' corrected response brief and brief on appeal was filed on April 27, 2009, using the Court's ECF system, which will send e-mail notice to all attorneys of record.

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Attorneys for the Plaintiffs

Dated: April 27, 2009