

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

KENNETH FOSTER-BEY, *et al.*,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

vs.

JOHN S. RUBITSCHUN, *et al.*,
in their official capacities,

Defendants.

File No. 05-CV-71318-DT

Hon. Nancy G. Edmunds

U.S. Mag. Judge Virginia Morgan

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**PLAINTIFFS' BRIEF IN SUPPORT OF
CROSS-MOTION FOR SUMMARY JUDGMENT**

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Statement of Issues Presented

1. Do the changes to Michigan’s parole laws, policies, and practices, applied retroactively since 1992, violate the *ex post facto* clause because they create a “sufficient risk of increased punishment” for the plaintiff class?

The plaintiffs say yes.

2. Is this action ripe for decision by cross-motion for summary judgment under Rule 56?

The plaintiffs say yes.

Controlling Authority

California Dept. of Corrections v. Morales, 514 U.S. 499 (1995)

Dyer v. Bowlen, ___ F.3d ___, 2006 WL 2482819, 2006 Fed. App. 0330P (6th Cir. 8/30/06)

Garner v. Jones, 529 U.S. 244 (2000)

Lynce v. Mathis, 519 U.S. 433 (1997)

Mickens-Thomas v. Vaughn, 355 F.3d 294 (3rd Cir. 2004)

Shabazz v. Gabry, 123 F.3d 909 (6th Cir. 1997), *cert. denied*, 522 U.S. 1120 (1998)

Weaver v. Graham, 450 U.S. 24 (1981)

The Legal Standard

New parole provisions are barred by the *ex post facto* clause if (1) they apply retroactively, and (2) they create a “sufficient risk of increasing the measure of punishment attached to the covered crimes.” *Dyer v. Bowlen*, ___ F.3d ___, 2006 WL 2482819, 2006 Fed. App. 0330P (6th Cir. 8/30/06), citing *Garner v. Jones*, 529 U.S. 244, 250 (2000). The risk of increased punishment can be shown either from the textual changes themselves, or from their practical effect as implemented. For the latter, the Court must look at how the parole system actually functions. *Id.* at *6, citing *Garner* at 255.

For summary judgment, the plaintiffs must show that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Horton v. Potter*, 369 F.3d 906, 909 (6th Cir. 2004).

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Proceedings to Date

The plaintiffs filed their class action complaint on April 4, 2005.¹ The defendants responded with a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and (6). The Court granted the motion as to the plaintiffs' due process claim but denied the motion as to the plaintiffs' *ex post facto* claim. The Court found that the plaintiffs had standing to sue, and that the action was barred neither by the statute of limitations nor by *res judicata*. R. 44, Opinion and Order (8/18/05). The Court also noted that although the *ex post facto* clause applies to legislative changes and other changes having the force and effect of law, policies and practices adopted pursuant to such changes are relevant. The legal question – for *ex post facto* purposes – is the *practical effect* all such changes have when applied retroactively. *Id.* at 11-13. The Court then denied the defendants' motion for reconsideration. R. 47, Order (8/22/05).

Following the motion to dismiss, the defendants consented to class certification. R. 106, Order (10/26/05). The plaintiff class was defined as follows:

All parolable lifers in the custody of the Michigan Department of Corrections who were convicted [for crimes committed] before October 1, 1992, and whose parole the “new” parole board has denied, passed over, expressed no interest in pursuing, or otherwise rejected or deferred.

Discovery then commenced. Following one extension of time, discovery was completed on August 15, 2006. The plaintiffs now file this timely cross-motion for summary judgment under Rule 56.

¹ The plaintiffs waited to file their complaint until the U.S. Supreme Court decided *Wilkinson v. Dotson*, 544 U.S. 74 (2005). *Wilkinson* held that prisoners could challenge parole policies and procedures under 42 U.S.C. § 1983 and need not raise such claims in *habeas*.

ARGUMENT

Introduction

The plaintiff class comprises all parolable lifers who committed crimes before October 1, 1992. This action challenges the changes to Michigan's parole system from then until now, as applied retroactively to the class. Current parole laws, policies, and practices are different from those in effect when the plaintiffs committed their crimes. The cumulative effects of the changes create a "sufficient risk of increased punishment" to violate the *ex post facto* clause. *See* U.S. Constitution, Article I, Section 10.

What is at stake in this action is the fate of 800+ individuals. If the post-1992 parole changes continue to be applied retroactively, then nearly all of the plaintiffs should expect to die in prison. If instead the plaintiffs are judged (for parole purposes) under the parole laws, policies, and practices that were in effect when they committed their crimes, then they will have an excellent chance at winning parole. Indeed, the plaintiffs can show that but for the parole changes since October 1, 1992, many members of the class would have been paroled by now. *See* Plaintiffs' Decls., Exhs. 13-19; No Way Out, Exh. 21.

In this case the factual record is critical, because the legal standard to be applied requires the Court to look at parole laws, policies, and practices not in the abstract, but in reality. The question is whether the *cumulative* parole changes create a "sufficient risk of increased punishment" *in practice, on the ground*. As the U.S. Supreme Court has made clear, the question is "a matter of degree." *Garner v. Jones*, 529 U.S. 244, 250 (2000), quoting *Beazel v. Ohio*, 269 U.S. 167, 171 (1925).

I. THE CHANGES TO MICHIGAN’S PAROLE LAWS, POLICIES, AND PRACTICES

A. Lifer Parole in Michigan Before 10/1/92

1. The Origins of Lifer Parole in Michigan

In order to understand the changes in Michigan’s parole laws, policies, and practices that have occurred since 10/1/92, the Court must know something about parole in Michigan (as it applied to lifers) before 10/1/92.

Until 1942 Michigan did not distinguish between parolable life and mandatory life. Although Michigan’s governors historically used clemency liberally, before 1942 pardons and commutations did not keep pace with the number of prisoners sentenced to life (for more and more “capital” crimes). *See When “Life” Did Not Mean Life*, Exh. 1, at 6.

In 1937, the legislature created a Corrections Department. The law was intended to stop the cycle of patronage hiring in corrections and to eliminate accusations of graft by the old paroling authority. *See Johnson Decl.*, Exh. 2, ¶ 8. The 1937 act created a 3-member parole board appointed by the bi-partisan corrections commission. *See 1937 P.A. 255 §§ 2-4*. But parole jurisdiction still did not extend to lifers. By 1941, Michigan had more than 850 lifers. The parole board sent a statement to the Legislative Committee of the State Bar:

For two decades “life” has meant “life.” So, in 1941, Michigan has the largest number of lifers in the United States, whose cases can not become eligible for parole consideration. Whenever a lifer is considered worthy in Michigan, resort must be made to the Governor’s power of commutation. Pardon and commutation are devices for the correction of miscarriages of justice and extreme hardship, where no other power exists to alleviate the distress. They were never intended for the purpose of submitting to parole those whose rehabilitation in prison over a long period indicates acceptability of supervised release into the community....

Id., at 6, from Lifer Act Biennial Report (1942-43), at 1-2; Exh. 24. That same year, the Michigan legislature passed the first “lifer law,” which took effect in January 1942. *See* 1941 P.A. 173.

2. The Lifer Law and Parole from 1942 to 10/1/92

Under Michigan law, for most serious crimes, judges can sentence defendants to “life or any term of years.” The lifer law, now codified at MCL 791.234, created parole eligibility after ten years for all lifers except those serving sentences for first-degree murder. The lifer law *also* applied to prisoners serving long indeterminate (LID) sentences (like 25-40 years).² As to lifers, the law gave the sentencing judge the power to veto any parole,³ and it required a public hearing. As to LID prisoners, the law also gave the board jurisdiction after ten years (even though the board typically would not parole LIDs until they had served their minimum term less any credits allowed by statute).⁴

² The parole board defined a long indeterminate (LID) sentence as more than 18.5 years, because the minimum term less good-time credits on an 18.5 year sentence was ten years. *See* Hudson Decl. Exh. 4, ¶ 4. Inherent in the structure of the lifer law was the idea that lifers and LIDs should have the same parole eligibility after ten years, because both faced long potential sentences and both were sentenced for crimes subject to “life or any term of years.” *See* Biennial Report, Exh. 24, at 91, *and* Part III(A), below.

³ The veto power was later extended to successor judges as well. *See* MCL 791.234 (1953).

⁴ In theory LIDs could be paroled under the lifer law the same as lifers, through the public hearing process, absent judicial objection. But this process appears never to have been invoked because LIDs could *also* be paroled through a process called “special parole.” *See* 1937 P.A. 255 § 3(b); 1974 Annual Report, Exh. 25, at 101. A special parole required the board to go back to the sentencing judge, essentially to get a modification of the sentence, at which point no public hearing was necessary. The parole board used the “special parole” process to grant early release to LID prisoners until 1978, when voters passed a referendum which prohibited special or early paroles. *See* MCL 791.233b (1978) (Proposal B). *See also* Hudson Decl., Exh. 4, ¶ 4 (describing the process before Proposal B), and OAG #6346 (1986) (Proposal B LIDs cannot be paroled until they have served their minimum less any credits allowed by law).

The first parole eligibility date on an LID sentence is referred to as the “earliest release date” or ERD. Because lifers do not have a minimum or a maximum number of years, good-time and disciplinary credits do not apply to them. In practice the lifer law created an anomaly with respect to lifers *versus* LIDs. Al-

In 1947, the legislature placed the 3-member parole board within Civil Service and required that “[t]he members of the parole board shall be selected for their familiarity with the problems of penology.” *See* 1947 P.A. 4 (2nd Extra Sess.) § 30. In 1953, the legislature consolidated the parole laws, creating a 5-member Civil Service board appointed by the bi-partisan Corrections Commission. MCL 791.232 (1953). In 1958 the legislature amended the parole laws to clarify that prisoners serving indeterminate sentences up to life (for example, “5 years to life”) were to be eligible for parole on their minimum less good-time, notwithstanding that the sentence might otherwise be construed as a life sentence. MCL 791.234 (1958). In 1982, the legislature boosted the size of the parole board from five to seven members. The 1982 amendments required parole interviews in the fourth year and then every two years (a 4+2+2 schedule) for lifers and LIDs.⁵ The 1982 law also made clear that the board cannot deny parole to prisoners – including lifers – without at least one member of the board having conducted an (in-person) interview. *See* MCL 791.234 (1982). The 1982 amendments also clarified that prisoners have the right to receive written reasons for the denial of parole, and to appeal any such denial.

though both came within the jurisdiction of the parole board after ten years, lifers were fully eligible for parole at that point (absent judicial veto), while LID prisoners would not be paroled (except by special parole, and only until 1978) until they had served their minimum less any statutory credits. As a result, parolable lifers could actually be paroled *sooner* than prisoners serving LID sentences (*i.e.*, those whose minimum term less credits put their ERD at more than ten years). Prisoners with very long minimums (like 40 years) could gain several years of “early” eligibility by virtue of a parolable life sentence instead of an LID sentence. *See* Part III(A), below.

⁵ Before 1977, a 7+3+3 interview schedule was a matter of board policy. From 1977 to 1982, the frequency of lifer parole interviews was set by formal rule at 7+3+1+1. *See* MAC 791.7710. *See Shabazz v. Gabry (Shabazz I)*, 900 F. Supp. 118, 122 (E.D. Mich. 1995); *Shabazz v. Gabry (Shabazz II)*, 123 F.3d 909, 911 (6th Cir. 1997). The 1982 law also re-defined the parole-eligibility date for LIDs from ten years to the minimum term less good-time.

All these changes (like parole policies and practices in the past) applied with equal force to parolable lifers.

B. Changes in the Lifer Law and Parole After 10/1/92

In 1991, John Engler became governor of Michigan. One of his goals was to change the way the state's administrative agencies were organized, making them more directly answerable to the governor's office.

Not long after, a prisoner named Leslie Allen Williams was released on parole. Within a few months, he kidnaped, raped, and murdered four young women. Williams' crimes provoked a public hue and cry for parole reform. The timing was propitious for the governor and his new MDOC director, both of whom favored a tougher stance on parole. What they wanted was what they called a "more accountable" board. *See McGinnis Dep., Exh. 40, at 12; Steinman Dep., Exh. 41, at 21-22, 30-31.*

In 1992, at the governor's urging, the Michigan legislature passed new laws that radically altered the existing structure of the parole board. *See MCL 791.231a and 791.234(4) (1992).* The 1992 amendments:

- abolished the bipartisan corrections commission, which had set policy and served as a political buffer between the MDOC and the governor's office for 55 years;
- abolished the old parole board and increased the size of the new parole board from seven to ten members;
- took the parole board out of Civil Service and put it under the MDOC director, who was himself a political appointee;
- limited – for the first time – the term of board members (to four years), with renewal/reappointment at the will of the appointing authority;
- required that at least four members of the new parole board have no prior connection with the MDOC;
- increased (prospectively) the parole eligibility date on a parolable life sentence from ten years to 15 years;

- reduced the frequency of lifer parole interviews from the then-existing 4+2+2 schedule to a 10+5 +5 schedule;⁶ and
- allowed the victim of a crime to appeal the grant of parole.

All of the changes (except the 15-year parole eligibility) were applied retroactively to the plaintiff class. Indeed, because the law raised the lifer parole eligibility date from ten years to 15 years, parolable lifers who committed their crimes after 10/1/92 *have not yet come within the jurisdiction of the new parole board*. (They will not do so until October 2007.) Thus, by definition, *all of the changes applied by the new board to date have only been applied retroactively to prisoners who committed their crimes before 10/1/92*.

In 1999, the legislature amended the parole laws again. First, the amendments took away the right of prisoners to appeal parole decisions to state court. Now only the prosecution and the victim can appeal. Second, the amendments removed the requirement that a member of the board interview lifers at least every fifth year after the tenth year. MCL 791.234(6)(a)-(b) (1999). Now a file or paper review is sufficient, and the parole board never has to see a lifer again after the 10th-year interview. *Id.* Third, a decision not to go forward to a public hearing in a lifer case is no longer considered to be a “decision” of the board. As a result, written reasons for the denial of lifer paroles are no longer required. *Id.* *All of these changes, too, the new board has applied only retroactively to the plaintiff class, because parolable lifers who committed crimes after 10/1/92 are not yet within the board’s jurisdiction.*

⁶ Unlike parole statutes in some other states, the law did not *on its face* permit the board to interview parolable lifers more often than every five years. The language read, “One member of the parole board shall interview the prisoner at the conclusion of 10 calendar years of the sentence and every 5 years thereafter until such time as the prisoner is paroled, discharged, or deceased.” MCL 791.234(4)(a).

II. OVERVIEW OF THE LEGAL STANDARD / REVIEW OF THE MAJOR CASES

The *ex post facto* clause forbids changes in state parole laws, policies, or practices that (1) apply retroactively, and (2) effectively increase the measure of punishment. The *ex post facto* clause prevents the states from enacting any law “which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then proscribed.” *Weaver v. Graham*, 450 U.S. 24, 28 (1981). The *ex post facto* clause protects against “arbitrary and potentially vindictive legislation” and the questionable motives and passing political forces that give rise to it. *Id.* at 29.

The U.S. Supreme Court has held that the *ex post facto* clause applies not just to increased punishment, but also to the retroactive loss of *opportunities for parole*, because a “prisoner’s eligibility for reduced imprisonment is a significant factor entering into both the defendant’s decision to plea bargain and the judge’s calculation of the sentence to be imposed.” *Lynce v. Mathis*, 519 U.S. 433, 445-46 (1997), quoting *Weaver*, 450 U.S. 24, 32. Because retroactive changes in parole affect the politically weakest element of society, such changes are more likely to be politically motivated. *See Lynce*, 519 U.S. at 540. Accordingly, the *ex post facto* clause applies with special force when the changes that create the risk of increased punishment are politically or ideologically motivated. *Id.*

For many years courts treated any delay in parole review as a *per se* violation of the *ex post facto* clause.⁷ In *California Dept. of Corrections v. Morales*, 514 U.S. 499

⁷ 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); *Rodriguez v. U.S. Parole Commission*, 594 F.2d 170 (7th Cir. 1979); *State v. Reynolds*, 642 A.2d 1368 (N.H. 1994); *Griffin v. State*, 433 S.E.2d 862 (S.C. 1993); *Tiller v. Klincar*, 561 N.E.2d 576 (Ill. 1990). See

(1995), the Supreme Court tightened that standard. In *Morales*, California had reduced the frequency of parole review for murderers who committed a second murder while in prison. California still required a paper review and 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. Rather, the test was whether, all things considered, the change "produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Morales*, 514 U.S. at 509.

In *Shabazz v. Gabry*, 123 F.3d 909 (6th Cir. 1997), the Sixth Circuit applied the *Morales* test to a facial attack on Michigan's 1992 law reducing the frequency of lifer interviews. The court said, "The *Morales* test requires a showing of sufficient risk of increased punishment, not merely 'some ambiguous sort of 'disadvantage'' suffered by an inmate." *Id.* at 914. The Sixth Circuit held that the plaintiffs had not proven that the postponement of review – in and of itself – necessarily produced a "sufficient risk of increasing the measure of punishment attached to the covered crimes." *Id.*⁸

also *Devine v. New Mexico Dept. of Corrections*, 866 F.2d 339 (10th Cir. 1989) (similar result based on due process analysis).

⁸ The court noted "that no reliable statistical analysis was available ... because the statute had been in effect for too short a period." *Id.* at 914. The Sixth Circuit said that the district court had erred in relying on "anecdotal observations and personal speculation to conclude that the amendments *may* present sufficient risk of increased punishment." *Id.* at 914-15. Based on the limited data available (from 1993 to 1995), the plaintiffs had failed to *prove* that the delay in parole hearings would inevitably lead to later paroles. The Sixth Circuit also noted that because "other viable opportunities for parole" existed apart from the regularly scheduled interviews, increased punishment did not necessarily follow from the longer interval alone. *Id.* at 914. Finally, the Sixth Circuit's opinion was based on the fact that the reduction in frequency of parole review did not "change the standard for parole." *Id.* The court clearly implied that retroactive laws or policies that *do* change the standard for parole violate the *ex post facto* clause. *Id.*

The Sixth Circuit's interpretation of *Morales* was confirmed by the U.S. Supreme Court in *Garner v. Jones*, 529 U.S. 244 (2000). In *Garner*, Georgia had reduced the frequency of parole review from every third year to every eighth year for lifers who had previously been denied parole. The *Garner* Court reiterated that retroactive application of parole provisions falls within the *ex post facto* prohibition if such application creates "a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Id.* at 250. Although the *Garner* Court acknowledged that the requisite risk could be inherent in the text of the statute, less frequent review alone did not make the risk self-evident. Accordingly,

When the [changed] rule does not by its own terms show a significant risk, the [inmate] must demonstrate, *by evidence drawn from the rule's practical implementation* by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule.

Id. at 255 (*emphasis added*).

The *Garner* Court also made clear that parole policies and practices implemented pursuant to formal statutory or regulatory changes are relevant to the inquiry:

... At a minimum, policy statements, along with the Board's actual practices, provide important instruction as to how the Board interprets its enabling statute and regulations, and therefore whether, as a matter of fact, the amendment to [the rule] 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. The Court of Appeals was incorrect to say the Board's policies were of no relevance in this case. Absent a demonstration to the contrary, we presume the Board follows its statutory commands and internal policies in fulfilling its obligations.... The policy statement here, [in contrast to the one in *Morales*], is a formal, published statement as to how the Board intends to enforce its Rule. It follows *a fortiori* ... that the Court of Appeals should not have disregarded the policy.

Garner, 529 U.S. at 256-57 (citations omitted). The *Garner* Court remanded the case to give the prisoner the chance to make a factual record. *Id.* at 256-57. *See also Fletcher v. District of Columbia*, 391 F.3d 250 (D.C. Cir. 2004) (noting that law/guideline distinction previously applied in the court’s *ex post facto* cases is no longer valid in light of *Garner*’s focus on the practical effects of the changes).⁹

A new Sixth Circuit case is especially instructive. In *Dyer v. Bowlen*, ___ F.3d ___, 2006 Fed. App. 0330P, 2006 WL 2482819 (6th Cir. 8/30/06), the Tennessee parole board denied parole based upon a standard that was in effect at the time of the hearing (in 1998) rather than the standard in effect at the time the prisoner committed his crimes (in 1975). The panel (**Gilman**, Suhreinrich, Rogers) contrasted easier cases like *Lynce* and *Weaver*, *supra* (where the harm was evident from the text or structure of the changes) with harder cases like *Morales* and *Garner* (where the harm was probable but not certain):

⁹ The Sixth Circuit has said almost the same thing. In *Johnson v. Million*, 102 Fed. Appx. 15, 2004 WL 954429 (6th Cir. 2004), *see* Exh. 55, the court held:

The Clause applies to any statutory *or policy change* that “alters the definition of criminal conduct or increases the penalty by which a crime is punishable” [citing *Morales*]. A new law *or policy* is in violation of the Ex Post Facto Clause (1) when it is retrospective, *i.e.*, when it applies to events occurring prior to its enactment, and (2) when it disadvantages the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

Johnson, 102 Fed. Appx. at 17 (*emphasis added*). Although on the merits the Sixth Circuit found no violation, the court plainly read *Morales* and *Garner* the same way that the D.C. Circuit did in *Fletcher*. *See also Curtis v. Benik*, 2005 WL 300381, at 2 (W.D. Wis. 2005) (Illinois prisoner stated an *ex post facto* claim by alleging that retroactive application of a new parole policy – designed to “keep violent offenders in prison as long as possible under the law” – was the cause of his denial of parole). *See* Exh. 56. *See also Knox v. Lanham*, 895 F. Supp. 750, 755-58 (D. Md. 1995), *aff’d*, 76 F.3d 377 (4th Cir. 1996) (change in parole policies violated the *ex post facto* clause; an unwritten policy can be “law” covered by the *ex post facto* clause); *Himes v. Thompson*, 336 F.3d 848 (9th Cir. 2003) (more onerous parol regulation violated the *ex post facto* clause; the term ‘laws’ includes “every form in which the legislative power is exerted, including regulation or order”); *Ganci v. Washington*, 318 Ill. App. 3d 1174, 1187-81 (Ill. App. Ct. 2001) (allegations of informal policy changes that increased punishment were sufficient to withstand a motion to dismiss).

Intuitively, the retroactive application of new parole statutes ... 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 must determine whether [the prisoner] has produced specific evidence of a sufficient risk of increased punishment.

Dyer, supra, at *5. The court made clear that under this standard, the plaintiff need not show that he “*actually received* a more serious punishment,” *cf. Richardson v. Penn. Bd. of Probation and Parole*, 423 F.3d 282, 292 (3rd Cir. 2005), but only that he suffered the requisite risk. *Id.* at *5 (*emphasis in original*).¹⁰ As a new Sixth Circuit decision, *Dyer* sets out an unusually clear roadmap of how to apply the *Morales/Garner* standard in an action like this one.

Finally, *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3rd Cir. 2003), is a case that is nearly on point.¹¹ In that case, following some statutory amendments, the Pennsylvania parole board changed its criteria, making “concern for public safety” the overriding consideration for parole. *Id.* at 385. The predictable result was that violent offenders got far 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,

¹⁰ 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 the changes violated the *ex post facto* clause on their 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 *10.

¹¹ The similarities are striking. 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 of Leslie Allen Williams. Both states reacted with sweeping changes to their parole systems, including increasing the size of the board, and packing the board with the new governor’s appointees. *Id.* at 377.

and statistical data comparing release rates before and after. The court 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 lie at the heart of the plaintiffs’ complaint.¹²

In sum, the legal standard that the Court must apply is straightforward and rooted in the facts: Do the post-10/1/92 changes in Michigan’s parole laws, policies, and practices, taken cumulatively, and as applied on the ground, create a sufficient risk of increased punishment for the plaintiff class? The answer to this question is yes – by the overwhelming weight of the evidence.

III. A COMPARISON OF THE PRE- AND POST-10/1/92 PAROLE REGIMES

A. Lifer Parole Law, Policy, and Practice Before 10/1/92

Pursuant to the 1942 lifer law, lifer paroles started during World War II and were quickly viewed as a success. *See When “Life” Did Not Mean Life*, Exh. 1, at 6. Throughout the 1950s, 1960s, and 1970s, lifer paroles became routine. The raw number of paroles was always small, but so was the number of parolable lifers who had served ten calendar years and who therefore were statutorily eligible for parole. *Id.*, at 10.

Until now, the only data available about lifer paroles were lists showing the num-

¹² *Mickens-Thomas* provides unusually strong support because the Third Circuit issued a second opinion in the case. After the court remanded the case to the board, the board again denied parole. On the subsequent appeal, the Third Circuit found that the board had failed to comply with the court’s mandate and instead had used the very factors that violated the *ex post facto* clause. The court issued a writ of *habeas corpus* granting the prisoner his unconditional release. *See Mickens-Thomas v. Vaughan*, 355 F.3d 294 (3rd Cir. 2004).

ber of paroles annually. Because the annual number of paroles was never very high, some courts concluded that getting parole on a life sentence was *always* very difficult. *See e.g., People v. Lino*, 213 Mich. App. 89, 96 (1995) (life is necessarily a harsher sentence because lifer paroles are rare), *and People v. Hill*, 267 Mich. App. 345, 351 (2005), *leave denied*, 474 Mich. 1069 (2006) (*ex post facto* claim denied because lifer paroles have always been low over the years, ergo the policy of “enforcing a valid life sentence has almost invariably been the policy and practice of the parole board”).¹³ We now know that these courts were just wrong on the facts.

In the past year, following research of 168,000 MDOC records at the Michigan Archives (combined with data supplied during discovery), we can now calculate the lifer parole *rate* with reasonable accuracy, going back to 1942 (and beyond). Levine Decl., Exh. 20. It turns out that for decades after the inception of the lifer law, the *rate* of lifer paroles ranged steadily between five and 18 percent – high enough that more lifers were paroled than became eligible for parole. That is, the number of parolable lifers who had served ten years (and thus who were in the pool of lifers eligible for parole) *declined* from roughly 250 in 1946 to under 50 in 1975. *See* 1941-42 Biennial Report, Exh. 24, at 99; “*Life*,” Exh. 1, at 10-11. The *rate* of lifer paroles exceeded five percent for 40+ years.

The average *time served* on a life sentence at the point of parole was also steady

¹³ The reasoning of these opinions never made sense, because what matters is not the raw number of lifer paroles, but the lifer parole *rate*. For example, assume that 10 lifers are paroled in a given year. If only 10 lifers were eligible for parole that year, then the parole *rate* would be 100 percent. But if 1000 lifers were eligible for parole that year, the *rate* would be 1 percent. In looking at parole statistics, and especially when comparing the effect of parole policies in different eras, only the *rate* has any meaning. The raw numbers of paroles are irrelevant. *See* McGinnis Dep., Exh. 40, at 39.

throughout this period, averaging about 18 years for all lifers who were paroled. *Id.*

Frank Buchko, who started work at the MDOC in 1948, and who served on the parole board from 1962-74, described the lifer parole “norm” 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.

Buchko Declaration, Exh. 10, at ¶¶ 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:

When predicting prison populations, one of the factors I had to consider was the rate at which the prison population was being paroled. I came up with projected parole rates by reviewing the past practices of the parole board.

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.

On the high end, I don’t remember any parolable lifer serving more than 36 years, even for a terrible crime. 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.

Kime Declaration, Exh. 5, ¶¶ 4-7.

The steady lifer parole *rate* and the low *average time served* reflected the parole board's longstanding policy – inherent in the structure of the lifer law – to treat lifers and LIDs the same when it came to making parole decisions. *See* Part IV(A)(1), below. The objective was to attain consistency, so that people who committed similar crimes would serve roughly the same amount of time, regardless of whether they were sentenced to a life or an LID sentence. *Id.* A second reason for treating LIDs and parolable lifers the same was the statutory anomaly described above, whereby lifers could actually be paroled sooner than LIDs.¹⁴ Because Michigan's criminal laws allowed judges to sentence defendants *either* to LID sentences *or* to parolable life sentences (life or any term of years), the parole board could not know whether the trial court meant to be tougher, or more lenient, in imposing one sentence or the other. *See* Part IV(A)(1), below. As former executive assistant (1980-90) and board member (1990-92) Marvin May said:

You have to remember that judges are elected, too, and sometimes at the local level they may need to look like they are throwing the book at a defendant, and a

¹⁴ Wayne County Circuit Judge Vera Massey Jones described the accepted wisdom 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.

Jones Letter (10/25/99), Judges' Letters, Exh. 35.

life sentence certainly does that. But a life sentence can be more lenient as well. If the defendant is young, and the crime is a first offense, or if there are other mitigating circumstances, the judge might also want to send a signal that if the person does well in prison, then the judge will have no objection to parole when the board decides to move forward on the case, which could be as soon as 10 years....

May Decl., Exh. 8, ¶ 5. Accordingly, the pre-1992 parole board treated lifers the same as LIDs who had committed similar crimes. *Id.*

B. Lifer Parole Law, Policy, and Practice After 10/1/92

The new administration’s spokesmen were remarkably candid about the reasons for the 1992 parole amendments. Robert Steinman, who served as assistant house majority counsel when John Engler was speaker, and who 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.

Steinman Dep., Exh. 41, 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.” McGinnis Dep., Exh. 40, at 17-18.

When pressed, however, he conceded that:

Q. ... I’m asking you – if your definition of accountability means bringing in people, ... using your words, in the categories of law enforcement, victims rights and public safety [to serve on the board], then isn’t the expectation that the ... parole rates for violent offenders ... are going to go down?

A. In all probability, yeah.

* * * *

- 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 the categories of offenders we’ve just been describing 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.*

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

In a report issued in 1997, that looked backward, Director McGinnis 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 Parol 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. ... The Parole Board is ... far more conservative than its predecessor.

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

Regarding prisoners who had served their maximum, former Director 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.” MDOC Web Page, Exh. 30. Concluding his 1997 report, Director McGinnis summarized the 1992-97 changes as follows:

The overall trend is attributable, in large part, to the makeup of the new Parole

Board – a more conservative 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. Appointments are now made by the director ... for four-year terms. They are no longer part of Civil Service.

Five Years After, Exh. 26, at 10.¹⁵

Because lifers have no maximum, they were the group most affected by the 1992 changes. Nonetheless, the new parole board's tougher policy for assaultive crimes did not garner much public attention *as to lifers* until 1999, when board chair Stephen Marschke submitted testimony to the Michigan House Committee on Criminal Justice. Supporting the 1999 amendments to the lifer law, Marschke said:

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.

Marschke Test'y., Exh. 27. In discovery for this case, Mr. Marschke conceded that during his tenure on the board (1992-02), the board would not think about looking at a lifer case before the 20th year. Marschke Dep., Exh. 39, at 80. Indeed, he said straight out that under the policies of the new board, in his view parolable life was essentially the same as mandatory life. Marschke Dep., Exh. 39, at 125-26.

This revisionist view of parolable life is reflected in other public statements. As MDOC spokesman Matt Davis put it:

¹⁵ The board's own statistics show that from 1990 to 2004, the parole approval rates fell from 61.2% to 34.5% for all violent offenses, and from 46.5% to 13% for sex offenses. Parole Approval Chart, Exh. 53.

If you sentence someone to life, expect him to get life through the parameters of the statute. If you want someone to get out in 12 years, sentence him to 12 years.

The expectation of the public is life means life. The courts can't have it both ways. I would hope that judges don't make a habit of saying one thing in court and then saying they mean something else. I think that would be shocking to the legal system.

Davis Statements, Lansing State Journal (3/3/00) and Oakland Press (7/16/01), Exh. 28.¹⁶

The MDOC and the new parole board revised parole policy in two other ways.

Before 10/1/92, whenever the board interviewed a lifer and notified him that it had “no interest” in going forward to a public hearing, the board’s decision was treated the same as any other denial of parole. *See e.g.*, Policy Directive PD-DWA-45.05 (2/10/86), Exh. 46, at 65-66; *Sweeton* Monitor’s Report, Exh. 23, at 12. That is to say, the old board viewed a “no interest” notice in a lifer case as a parole denial, giving the lifer the same rights as any other prisoner who was passed over for parole. *Id.*

After 1992, however, the MDOC and the new parole board asserted that when (after an interview) the board told a lifer that it had no interest in going forward, no formal “decision” had been made. Instead, they said, a “decision” came only at the *end* of the process – *after* the public hearing had occurred, and the board had voted a final time on whether or not to grant parole. As a result, in lifer cases the new board did not issue

¹⁶ Once the board’s policy was out in the public domain, lifers understood that what they had experienced personally (or what they had heard anecdotally) had become official board policy. In response, between 1999 and 2003, some 40 lifers filed state-court 6,500 petitions 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 lifers who behaved 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. *See People v. Moore*, 468 Mich. 573 (2003).

written reasons, and lifer appeals were effectively barred.

The new parole board also argued that lifers were never fully “eligible” for parole. *See e.g.*, Marschke Dep., Exh. 39, at 63-65; Gabry Decl., Exh. 6, at ¶ 18. This change, too, reversed what had been longstanding MDOC and parole board policy. As former MDOC Director Robert Brown said:

In all the years I worked at the MDOC [1961 to 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.

Brown Decl., Exh. 3, ¶ 13. Internal MDOC documents confirm what Director Brown says. Going back 35 years, the directives governing the parole process consistently state that lifers are “eligible for parole” after ten years, and only mandatory lifers are described as “not eligible for parole consideration.” *See* Policy Directives on Parole Process, 1973 to 2005, Exh. 46. The 1979 policy directive makes clear what had been implicit in the previous versions going back to 1972 – that lifers are fully covered by the policy directive, but for the frequency of their re-interview schedules:

Prisoners serving under the “Lifer Law” (MCL 791.234) shall be re-interviewed at no greater than 36 month intervals following the initial interview after service of seven calendar years on their sentence. *All other provisions of this policy apply to Lifer Law cases.*

Id., PD-DWA-45.05 (6/18/79), Exh. 46, at 70.¹⁷ In short, from at least the early 1970s,

¹⁷ The “other provisions” plainly refer to the procedures for notice, the standard to be applied, and the requirement that written reasons be provided for a denial. *Id.* Even the terminology did not distinguish between lifers and non-lifers. The 1986 version of the same Directive says that lifers “shall be brought

the MDOC’s own policy directives treated scheduled lifer interviews as the equivalent of a parole review, subject to all of the same requirements and protections as other parole reviews.

C. The 1999 Amendments

The 1999 amendments took away from lifers the right to an interview after the tenth year. The 1999 changes also codified what the post-1992 MDOC administrators and the new parole board had already adopted as policy – that when the board issues a notice of “no interest” following a lifer review, it has not made a parole decision that (1) requires written reasons, (2) can be appealed by the prisoner, or (3) is even a “decision” of the board.¹⁸ MCL 791.234 (1999).

before the Parole Board for a *parole release hearing*” on the 4+2 +2 schedule then required by statute. *Id.* (2/10/86), Exh 46, (*emphasis added*). Even the *current* version of the Policy Directive uses the language that prisoners serving a life sentence are “*eligible for parole consideration*” and “*eligible for parole*” when talking about lifers. Policy Directive 06.05.104 (8/15/05), Exh. 46 (*emphasis added*).

¹⁸ In *Glover v. Parole Board*, 460 Mich. 511 (1999), the Michigan Supreme Court held that written reasons for the denial of parole were required in lifer cases, but in *Glover* (by chance) the prisoner had appealed from a denial that came after a public hearing. Although the 1999 statutory amendments barred the appeal of parole decisions by *all* prisoners, the change had already been applied to lifers, by virtue of the new board’s policy that a “no interest” notice was not a “decision.” In *In re Parole of Johnson*, 235 Mich. App. 21 (1999), *appeal denied*, 466 Mich. 864 (2002), and *Gilmore v. Parole Board*, 247 Mich. App. 205, *appeal denied*, 466 Mich. 864 (2002), the Court of Appeals had adopted the new board’s interpretation, holding that a lifer pass-over or “no interest” notice is not a “final decision” of the board. In neither case did the appellate court cite to the Policy Directives referenced above.

For *ex post facto* purposes, it doesn’t matter whether the new policy came into being as the result of a statutory amendment or because of a new regulatory interpretation adopted by the parole board and ratified by the courts. State courts, by re-interpretation of established law, *also* cannot increase the risk of punishment for a crime any more than can the legislature or the executive. *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”).

IV. THE EFFECTS OF THE POST-10/1/92 CHANGES ON LIFER PAROLE IN MICHIGAN

A. The New Parole Board Has Violated the *Ex Post Facto* Clause by Applying a Harsher Substantive Standard for Lifer Parole

The one thing a parole board cannot do is adopt a *harsher* substantive standard for parole and apply it retroactively to prisoners who committed their crimes before the new standard was implemented. *See e.g., Weaver*, at 30-31; *Mickens-Thomas I*, at 393; *Mickens-Thomas II*, at 300 ; *Shabazz II*, at 914; *Dyer*, at *7. Discovery proves beyond doubt that the post-10/1/92 board has done exactly that.

1. The Old Parole Board Judged Parolable Lifers and Long Indeterminate (LID) Prisoners by the Same Substantive Standard in Making Parole Decisions

Until 1992, and going as far back as memory serves, parolable lifers and LIDs were judged by the same substantive standard for purposes of parole. William Hudson, who served as the administrative assistant to the old board (1977-80), and then served on the old board (1980-85), and then chaired the old board (1985-91), described the policy and practice on this issue as follows:

As to the LIDs and the lifer law other than first-degree murder prisoners, 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 idea was that there should be a “frame of reference” approach to our decision-making. 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 long-indeterminate or life sentences.

Hudson Decl., Exh. 4, ¶¶ 7-8.

Perry Johnson, who was the MDOC Director from 1972-84, said that the same pol-

icy was in place throughout his tenure:

During the time that I was Director [parolable] lifers and prisoners on long indeterminate sentences (LIDs) were treated exactly the same for parole purposes. That is, they were both handled under the lifer law. As noted above, I recall they were interviewed on the same schedule, at least until the long-indeterminate prisoners passed their minimum.

To the best of my knowledge the Parole Board used exactly the same standards or principles for [parolable] lifers and LIDs in making the actual parole decision. The big difference between the two groups was in the process: the lifers had to go to a public hearing before they could be paroled, and of course the sentencing judge or successor judge could veto any proposed [parolable] lifer parole.

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, though it might take the lifer longer to get through the process. I'm assuming here that the two prisoners otherwise had similar criminal and institutional records, and that the sentencing judge did not object.

Johnson Decl., Exh. 2, ¶¶ 10-12. Frank Buchko, the oldest living member of the board (1962-74), confirmed that lifers and LIDs were judged by the same criteria in *his* day:

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.

The process was different because the lifer had to go to public hearing, and the sentencing judge could veto the board's decision to go forward. But the standard the board used for granting or denying parole was identical. The fact that someone was a lifer – I mean except for the mandatory lifers who could only be commuted by the Governor – had no bearing on the case. The only question was whether or not the person would be a threat to society if released.

Buchko Decl., Exh. 10, ¶¶ 11-12. *See also* Reese Decl., Exh. 9, at ¶ 11; Kime Decl., Exh. 5, at ¶ 8; *and* Brown Decl., Exh. 3, at ¶ 12.

The Commutation and Long-Term Release Guidelines, which were developed in the early 1980s, reflect the same policy. Applied to both lifers and LIDs, the guidelines allocated points for the offense and the prior record. The resulting “grid score” was the number of years a person with a good institutional record could expect to serve. For first offenders, including many lifers, the grid scores often came in at 10-14 years. Although never binding, the board routinely used the grid scores as a reference point. *See e.g.*, File Excerpts, Exh. 72; Plaintiffs’ Decls., Exhs. 13-19.

The board’s policy to judge lifers and LIDs the same was rooted in the two commonsense ideas alluded to above. The first was that, consistent with the structure of the statute, “likes” should be treated alike. Marvin May (executive assistant 1980-90 and board member 1990-92) put it this way:

... We used the same criteria for parole of non-mandatory lifers that we used for LIDs. ... It wouldn’t matter that one was a lifer and one was an LID. ... In fact, one way to increase the uniformity of parole was to calculate the grid scores for non-mandatory lifers as well as for LIDs. *That way similar crimes would result in similar time. You can defend your parole decisions more easily when there is consistency within the process.*

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

The second reason for treating LIDs and parolable lifers the same was the board’s uncertainty about the judge’s intentions. We know that prosecutors, probation officers, defense counsel (and judges) believed that a parolable life sentence could work to defendants’ advantage, and that judges sentenced some defendants to life precisely so that – if they turned their lives around in prison – they would have the chance for earlier parole.

See No Way Out, Exh. 21, at 14-15; Judges' Letters & Survey, Exhs. 35 & 36; Sentencing Excerpts, Exhs. 37 and 38. As a result, there was little or no down-side risk to a parolable life sentence (if the prisoner behaved in prison).¹⁹ See Defense Counsel Affs., Exh. 33. The old parole board applied the *same substantive standard* to lifers and LIDs, safe in the knowledge that if a sentencing/successor judge were unhappy with the board's decision in a lifer case, the judge could always veto it.

Treating LIDs and parolable lifers the same explains *why* so many parolable lifers were paroled before their 20th year. In practice, the old board's "default" position was to parole well-behaved, well-adjusted LID prisoners soon after they passed their "earliest release date" (ERD), which was the minimum term imposed by the court less any credits:

In those days [1962 to 1974] the prisoners serving long indeterminate sentences were entitled to lots of good-time credits, and the board could also grant special paroles. Absent a poor prison record, or a bad criminal or prior parole record, many such prisoners were paroled at the first meeting with the board after they became eligible for parole. And since lifers were eligible for parole at 10 years, they could actually be considered for parole before someone on a long indeterminate sentence had served his minimum.

Buchko Declaration, Exh. 10, ¶ 13; MDOC Annual Report (1974), Exh. 25. Marvin May agrees that the board's practice of paroling many LIDs soon after they passed their ERD

¹⁹ Prosecutors who wanted to ensure that certain defendants would never be paroled could seek "basketball score" sentences, like 90-120 years, to guarantee that defendants would die in prison before they passed their minimum. See *e.g.*, *People v. Crawford*, 144 Mich. App. 86 (1987) (100-300 year LID sentence given to a 35-year-old defendant); *People v. Merriweather*, 435 Mich. 630 (1990) (upholding a 60-120 year sentence even though the effect might be to prevent parole board jurisdiction). There was an ongoing debate in the state Court of Appeals about whether – especially for purposes of re-sentencing – parolable life was harsher or more lenient than a long-indeterminate sentence. Compare *e.g.*, *People v. Hurst (After Remand)*, 169 Mich. App. 160 (1988) (40-80 year sentence is harsher than life because of the lifer's earlier eligibility for parole), with *People v. Lino (After Remand)*, 213 Mich. App. 89 (1995) (a life sentence is necessarily harsher than an LID sentence because it includes no maximum).

remained the norm all the way up to 1992:

When I worked for the board and when I served on the board, the board's approach to parole was that when a judge set an indeterminate sentence, the judge was setting a limit. 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.

May Declaration, Exh. 8, ¶ 9.

Even the MDOC's pre-1992 Policy Directives suggest 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.

PD-DWA-45.05 (2/10/86), Exh. 46, at 65. So a prisoner who had been sentenced to, say, 25-40 years for Murder II, and who had a modest criminal record and a good record in prison, would be parole eligible by the 12th year, and normally could expect to be paroled by the 13th year. *See* Good-Time Worksheet, Exh. 47. Because good-time credits were awarded at an accelerating rate as more time was served, MCL 800.33 (1947-78), even a prisoner serving a 30-50 year sentence would pass his minimum at less than 15 years if he got all his good time, and in less than 20 years with just his regular good time. *See* Time Computation Manual, Exh. 48. The result was that treating parolable lifers and LIDs the same worked to the advantage of the lifers, because to ensure consistency the board keyed lifer paroles to the comparable earliest release dates on LID sentences for similar crimes.

2. The New Parole Board Judges Parolable Lifers and LIDs by Different Substantive Standards in Making Parole Decisions

The post-1992 board candidly admits that parolable lifers and LIDs are no longer judged by the same substantive standard. Lifers are viewed as categorically different by virtue of their life sentence. Stephen Marschke, who served on the board from 1992-96, and chaired it from 1996-2002, 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.

Marschke Dep., Exh. 39, at 74. Former Director McGinnis concurred:

- Q. I take it from what you have said, that under the new board, if you had two guys who ... committed the same offense, and whose files are otherwise ... as close to identical [as] they can be, but one gets ... a 30-50 year sentence and the other gets a life sentence, in your view, these two people should be treated differently, and will be paroled at far different times, is that accurate?
- A. Yes, and that was a determination of the sentencing judge or the prosecutor, whoever decided on that particular sentence structure....
- Q. Okay. And what that means to you, then, is that the life sentence, in and of itself, is the determining factor given otherwise two identical files?
- A. Well, I think it's a very important consideration, you know.
- Q. ... It's important enough that your expectation is that the lifer will never be paroled absent something extraordinary, and the guy on the 30 to 50 year sentence will get out at some point past his ... minimum?
- A. Well, he has the eligibility of getting out sometime past his –
- Q. Assuming terrific institutional adjustment, and so on, by both.
- A. Yes.
- Q. So you view them as radically different cases because of the fact of the life sentence?
- A. Yes.

McGinnis Dep., Exh. 40, at 61-62.

The MDOC's written materials make the same point:

There is a higher threshold for lifers due to the nature of their sentence. The Michigan Parole 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.

MDOC Materials for Mich. Judges’ Assoc., Exh. 33, at 16. Gary Gabry, who served as the first chair of the new board (1992-96), agreed that lifers (and sex offenders) were viewed quite differently from other LIDs by the post-1992 board, as exemplified by the way the parole guidelines were employed:

The parole guidelines had already been developed by the time I came onto the board, and they changed little while I was there. The guidelines were initially adopted to identify those prisoners with a high or low probability of parole, to make the board’s work more efficient. Those who scored high probability on the parole guidelines were essentially automatic paroles, and those who scored low ... were essentially automatic denials. The real work of the board was to decide the medium or mid-range cases, to see who among that group should be paroled.

One problem with the guidelines was that many sex offenders ended up being high-probability candidates. They were generally well-behaved, often non-violent, and without prior offenses. *Lifers tended to be high-probability candidates, too, for similar reasons. The guidelines were not used in these cases because the prisoners would have been released on parole earlier if the board applied the guidelines to them.*

Gabry Declaration., Exh. 6, ¶¶ 13-14 (*emphasis added*).

To sum up, the plaintiffs have shown beyond question that when they committed their crimes, parolable lifers and LIDs were judged by the same substantive standard for parole purposes. Today, lifers and LIDs are judged by different substantive standards, to the detriment of the lifers. There cannot be a clearer violation of the *ex post facto* clause.

3. The New Parole Board Applies a Harsher Substantive Standard to Parolable Lifers than Did the Old Board

For purposes of this case, the new board's standard for *lifer* paroles is what matters, and on this point, too, the new board has been very clear:

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.

MDOC Materials for Mich. Judges' Assoc., Exh, 33, 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, 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.

Gach Declaration, Exh. 7, ¶¶ 2-4.

Jessie Rivers, who had been serving as a deputy warden in Ionia when she was appointed to the new board in 1992, 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. Ron Gach and I were willing to consider other factors when evaluating an inmate, such as their behavior in the institution, whether they had obtained a GED, *etc.*, but you were just never going to get six votes.

... After the first few times that I advocated for lifers during executive session, I recognized that the board was never going to approve the parole of a lifer, and I became discouraged from presenting any more lifers. They (the other board members) were appointed because of their philosophy or attitude about parole, and

nothing was going to change that.

I was disturbed by the board's refusal to parole. In my long institutional experience I have seen that the real possibility of parole gives inmates hope, which is essential for sound institutional management, because it encourages good behavior and self-improvement on the part of the inmates. With the composition of the board when I was on it, there was no hope for lifers (and for many prisoners serving long-indeterminate sentences). Most of the new board members had no experience in corrections and some of them had trouble treating the prisoners as people.

Rivers Declaration, Exh. 11, ¶¶ 10-14. Even the first chair of the new board agrees with this assessment:

Regarding the drop-off in lifer paroles, I believe the change was largely a reflection of the new type of people who were appointed to the parole board in 1992. Before 1992, the board members were mostly MDOC staff who were deeply involved with the correctional system. The new board included – in addition to law enforcement people – school teachers and other professionals with little experience with the criminal justice system or the inmate population.

When deciding whether or not to release someone, they were horrified by the crime and really focused on the crime, as opposed to the decades the lifer may have spent in prison with perfect conduct. In executive sessions I often found myself trying to get the focus off the crime and onto the candidate's recent record in prison. I pushed the board to focus more on the prisoner's behavior, adjustment and future plans and not primarily the sentencing offense, but it nearly always fell on deaf ears with at least five members of the board.

Gabry Decl. Exh. 6, ¶¶ 5-6. Mr. Gabry makes 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 they were drug-lifer cases or 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 (or to recommend commutation in a mandatory lifer case) absent something like medical mercy.

Id., at ¶ 32.

The new board's revised standard for parole – reflected in the epigram that “life means life” – is also evident in its disregard for the sentencing judge's intentions. The old board viewed the judge's intentions as critical because of the anomaly in the statute (whereby life could be viewed as a more lenient sentence by virtue of its earlier parole eligibility date). The old board therefore went out of its way to learn what the judge intended, and to abide by it:

Another thing that was important to the pre-1992 parole board – especially in lifer cases – was what the sentencing judge thought about the case. If you weren't sure about a case, you would contact the judge, or look at the transcript of the sentencing hearing.

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.

May Decl., Exh. 8, ¶¶ 16-17.

The new board says it doesn'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.

Marschke Dep., Exh. 39, at 105-06; Rubitschun Dep., Exh. 42, at 18 (stating that under current policy the sentencing judges' intentions carry no weight).

Michigan's trial judges have been vociferous in their criticism of the new board's harsher parole standards as applied retroactively to lifers. Retired Wayne Circuit Judge Robert J. Colombo is typical:

On July 16, 1975, I sentenced Kenneth Foster to two concurrent life sentences for conviction of the crime of Second Degree Murder which occurred [in] 1974....

At the time of sentencing not only I, but the vast majority of trial judges in the State ... were aware that by imposing life sentences rather than determinative sentences of minimum and maximums, the Michigan Parole Board at that time was able to parole defendants who had made substantial progress toward rehabilitation upon completion of a term of 10 years. It was with that in mind that I imposed a sentence of life ... in the case of Mr. Foster and I publicly stated on the record that I was aware that he could be paroled by 10 years time by the Parole Board if he had rehabilitated himself. ... The reason I did so was also to encourage Mr. Foster to take advantage of all the programs the Corrections Department had for self-improvement which apparently Mr. Foster has done with outstanding success.

Unfortunately there has been a huge change in the position of the... Parole Board during the length of time between my sentence and this date, and Mr. Foster is caught in the middle of it having served now [in 2001] over 27 years for a crime that I never would have intended him to serve that long.

I would never have sentenced Mr. Foster to a term of more than two concurrent terms of 25 – 30 years because to do otherwise would have been jury nullification by judicial sentence [because Mr. Foster was acquitted of first-degree murder]. And in the year of 1975 that would have meant with then-applied good time he would have served no more than 17 or so years in prison [before he would “max out” on the maximum].

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.

Colombo Letter (7/24/01), Exh. 35. *See also* No Way Out, Exh. 21, at 14-16. Many of Michigan’s judges share the same opinion. *Id.*, at 14-17; State Bar Judges’ Survey, Exh. 36. Judge John N. O’Brien, of the Oakland Circuit Court, put it this way:

At the time of Mr Davey's plea, a chambers discussion was held with the Prosecutor, Defense counsel, and the Court regarding the potential sentence. The Prosecutor agreed, in the event of a plea, to request not more than a 25 year minimum.

On the date set for sentencing this Court told Mr. Davey's attorney that it would be inclined to sentence Mr. Davey either to a parolable life sentence, or the 25 years recommended by the Prosecutor. [Defense counsel] conferred with Mr. Davey and the Court was informed that the Defense agreed to the life term.

I would like to state as clearly as possible that it was my understanding then, as it is now, (an understanding that I think is shared by most trial court judges) that when such a sentence is imposed, the Parole Board opens a parole file on the person after 10 years and thereafter the average release will occur after 14 years.

O'Brien Letter (11/30/90), Judges' Letters, Exh. 35; Criminal Defense Affs., Exh. 34.

In hindsight, Gary Gabry now says of the post-10/1/92 standard applied to 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.

Gabry, CAPPS Consensus (December 2004), Exh. 22. Sandra Reese (Johnson) agreed:

Because I served on the old board for almost a decade, and then worked with the new board for several years, I have a clear sense of the difference. In my opinion one of the purposes of the new board, and certainly its effect, was to keep prisoners in prison longer, especially prisoners with assaultive crimes. This is most evident in the case of parolable lifers.

Reese Decl., Exh. 9, ¶ 19. Of course, the best evidence of the change in policy is what happened to the named plaintiffs in this case. *See* Plaintiffs' Decls., Exhs. 13-19; No Way Out (prisoner profiles), Exh. 21, at 27-63.

To sum up, the post 10/1/92 board admits that it will not release lifers using the standards that had been used for some 45 years before 1992. The same as in *Mickens-*

Thomas, the new board has “mistakenly construed [the 1992 statutory changes] to signify a substantive change in its parole function.” *Id.* at 391. Accordingly, the new board’s retroactive use of a harsher parole standard for lifers violates the *ex post facto* clause.

B. The New Parole Board Has Violated the *Ex Post Facto* Clause by Reducing Lifer Parole Rates Almost to Zero

In *Shabazz II*, the Sixth Circuit found no *ex post facto* violation because the evidence of harm was still anecdotal – there were not yet sufficient data for the plaintiffs to prove actual harm to the class. *Shabazz II*, at 914-15. Ten years later the evidence of harm is not just abundant, it is overwhelming.

1. Lifer Paroles Under the Old Board

Until now, comparative lifer parole rates were impossible to calculate because no one knew how many lifers were parole-eligible in a given year. MDOC computerized statistics only went back to about 1985. In the past year, the Citizens Alliance on Prisons and Public Spending went to the Michigan Archives and researched all *c.* 168,000 index cards on each Michigan prisoner who has ever been in the system, dating back to the 19th century. Every lifer card was pulled, the information was recorded, and then it was coded and entered into a spreadsheet database. *See Levine Decl.*, Exh. 20. For parolable lifers sentenced from 1986 to 10/1/92, the MDOC supplied computerized printouts that generate similar – though more complicated and less reliable – data.²⁰

²⁰ The pre-1985 data are much cleaner because – for the first 35-40 years of the lifer law – most people had only a life sentence. What this means is that in all but a few cases the prisoner entered the “pool” of parole-eligible lifers in ten years. The post-1985 MDOC data are more complex because more prisoners came into the system with concurrent LID sentences, with, *e.g.*, minimums longer than ten years, and/or

The CAPPs results are summarized in Exh. 1. The most important document is the chart showing five-year averaged lifer parole rates from 1942 to 1984. An updated version is attached to Exh. 20, and is reproduced here, with average time served included.

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 belie the “conventional wisdom” (as espoused by the 1996-02 board chair) 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.” *See* Marschke Dep., Exh. 39, at 90-92. The bottom line is that for 43 years –

mandatory two-year gun charges, or other consecutive sentences, all of which can postpone the “entry date” as to when the person is parole-eligible on the life sentence. (Changes in the allocation of good time or disciplinary credits also complicate how much time a concurrent LID sentence adds to the pool entry date.)

The task of trying to calculate the “entry date” for every such prisoner individually after 1985 proved to be impossible (or not worth the gain), although the MDOC data were used to revise the CAPPs database to make it even more accurate. *See* Exh. 20. What matters, though, is the broad pattern of parole. The very clean data up to 1984, and the rougher data thereafter, allow us (for the first time) to calculate the lifer parole rates and compare them over time. The number of lifers paroled each year provides the numerator. The number of lifers eligible for parole each year provides the (long missing) denominator. The fraction is the *rate* of parole.

across all categories of crimes – parolable lifers were paroled at a steady 5-15 percent rate, with the average time served at the point of parole also steady at 15-18 years.²¹

2. The Effect of Prison Overcrowding on Lifer Paroles

The defendants will no doubt argue that lifer parole rates dropped off during the 1980s, well before the advent of the new board. But that argument is disingenuous.

By the end of the 1970s Michigan’s prison population was starting to rise. *See* Johnson Decl., Exh. 2, ¶¶ 13-14. In 1978, Michigan voters passed Proposal B, which (prospectively) eliminated good time credits on the minimum term for indeterminate sentences, for most categories of serious crime. After Proposal B, judges did not fully compensate (for the elimination of good time) in their sentencing, with the predictable result that the time served on a typical sentence increased. Proposal B, combined with mandatory drug and weapons sentences, and the increased use of habitual offender laws, caused the prison population to grow. *See* Girard, Michigan Prison Sentences, A Guide for Defense Attorneys (1996), at 28. In 1982, the legislature sought to ameliorate the

²¹ The Court should note that the plaintiffs have excluded all so-called “drug-lifers” from the analysis. In the late 1970s, delivery and possession of 650+ grams of drugs became life offenses. The mandatory life term for delivery was changed in 1999 to permit parole after 15, 17.5, or 20 years. The parole board took the statutory change as a mandate to release drug-lifers. The new board views drug-lifers differently; it interviews them on a different schedule, and it clearly uses a more lenient standard with them. *See* Marschke Dep., Exh. 39, at 95-96; File Excerpts, Exh. 72 (drug-lifer files); *and* Counsel’s Decl., Exh. 70. Because the drug-lifers are on a separate track from the non-drug lifer cases, and because there is no corollary set of “non-assaultive” crimes that the old board ever considered, to compare parole rates with the drug-lifers included is to compare apples and oranges. The only fair calculation is to exclude drug-lifers from the lifer parole rate calculation, to the extent that the data allow us to identify them.

problem by creating a system of disciplinary credits, but the new credits were much less generous than the old good-time allowances.²²

As the prison population mushroomed, the parole board began to fall behind in its work. Johnson Decl., Exh. 2, ¶ 18-19. In 1981, a consent decree was entered in *Sweeton v. Brown*, E.D. Mich. No. 77-72230. The *Sweeton* case had challenged the parole board's wholesale failure to interview prisoners and to process their paroles within the time-lines required by state law. The consent judgment required the board to meet a host of timeliness requirements in the parole process. See Gillett Decl., Exh. 23. *Sweeton* had the untoward effect of further delaying *lifer* interviews and processing, because the board was subject to the federal court's monitoring primarily on issues relating to non-*lifer* paroles. *Id.*; see also May Decl., Exh. 8, ¶ 8.

At about the same time, the legislature – to avoid expensive new prison construction – passed the Emergency Powers Prison Overcrowding Act. See MCL 800.71 (1980). In the early 1980s, the act was invoked by the governor some nine times. See Johnson Decl., Exh. 2, ¶ 16. Each time it was invoked, the earliest release dates for all prisoners with minimums were moved forward by 90 days, effectively burying the parole board in new cases with each invocation of the act. *Id.*; Hudson Decl., Exh. 4, ¶ 15; Kime Decl., Exh. 5, ¶ 12. To make matters worse for the board, the 1982 *lifer* amendments required

²² For example, the good-time credit system (in part because it awarded more credits over time) could reduce a 20-year minimum to about 11 years, and a 50-year minimum to around 18½ years. In contrast, the disciplinary-credit system requires service of roughly 80% of the minimum term. See Exhs. 47- 48. The result of the change – a rising prison population as prisoners serve more time – is self-evident.

far more frequent parole review for lifers and LIDs. MCL 791.234 (4) (1982). Faced with an overwhelming workload, the parole board did what made sense: it put its time and energy into releasing the prisoners who were easiest to parole, namely prisoners serving shorter terms who had passed their ERDs. Board Chair William Hudson summarized the situation as follows:

In the early 1980s the legislature changed the lifer interview schedule to the fourth year and every two years thereafter. This change placed an impossible burden on the board, and I don't believe the board ever met that schedule. In addition the Prison Overcrowding Act was invoked several times, pushing up all parole dates by 90 days each time.

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. Lifer interviews got pushed back, and even when we did lifer interviews, it was more to comply with the law, and not with an eye to moving anyone forward to parole, because we were so far behind in our work. 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.

Hudson Decl., Exh. 4, ¶¶ 15-16; *see also* Johnson Decl., Exh. 2, ¶ 16-18; May Decl., Exh. 8, ¶ 7-8; Reese Decl., Exh. 11, at ¶ 9.

Despite the increase in the size of the parole board from five to seven members in 1982, the board remained hopelessly behind, and lifer parole interviews were routinely put off, sometimes for years. *Id.* For example, an audit done of the parole board from 11/1/82 to 8/31/83 found that the board had a backlog of 800 lifer interviews as of June 1983. Audit Report, Exh. 32, at 9. The annual number of lifer interviews (including mandatory lifers) declined from 540 in 1984 to 252 in 1986 to just 57 for the first half of 1987 – while the number of lifers eligible for parole nearly doubled during the same per-

iod.²³ *Id.*, at 15; MDOC Pool Estimate, Exh. 52. More importantly, even the lifers whom the board interviewed and approved, and who were told that they would be processed for public hearing, were not processed. *See* Pls' Decls., Exhs. 13-19; Board Correspondence, Exh. 45. 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 and some LIDs were surely delayed as a result.

By the late 1980s the Board may have been slightly more conservative as well. But any major decline in lifer paroles would primarily be the result of the Board being overwhelmed by the huge prison population, and putting its resources elsewhere in order to get as many lower-level prisoners out as quickly as possible. 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.

Johnson Decl., Exh. 2, ¶¶ 18-19.

There is a second reason why one would expect the lifer parole *rates* to drop significantly after 1985. We know that after years of relatively stable numbers, lifer commitments began to skyrocket in the mid-1970s. In just three years – from 1976-78 – some 418 people were sentenced to parolable life. *See* Chart of Lifer Commitments, Exh. 54. From 1975-82, some 835 new (non-drug) lifers flooded the system. *Id.* Ten years later,

²³ In 1987, the *Sweeton* case was revived, based on the repeated failure of the board to abide by the terms of the consent judgment. *See* Order Granting Plaintiffs' Motion to Find the Defendants in Non-Compliance, Exh. 23, at 4. The case was ultimately dismissed in 1994. *See Sweeton v. Brown*, 27 F.3d 1162 (6th Cir. 1994) (*en banc*), *cert. denied*, 513 U.S. 1158 (1995) (changes in federal law required the dismissal of the underlying consent decree, regardless of the board's failure to comply with state-mandated time-lines or procedures).

as each “class” of lifers entered the “pool” of those parole-eligible, the pool also overflowed – it went from under 300 in 1985 to close to 800 in 1992. *See* MDOC Estimate, Exh. 52.

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 would thus be added to the rate denominator without a concomitant increase (in the number *yet* being paroled) to the rate numerator. The surge of “new arrivals” would thus necessarily drive down lifer parole rates, quite apart from the board being overwhelmed for other reasons.

In short, although lifer paroles declined markedly 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), and (2) to the skewed effect of the growth in the lifer rate denominator, with so many “new” members in the pool. The decline was not due to any change in the law, in the substantive parole standards, or in the philosophy of the board.

That the old board’s standards and philosophy never changed is evident from what the old board did just before it ceased to exist as a legal entity. In 1992, the old board issued or re-issued favorable decisions in 47 lifer cases, moving them forward to public hearing.²⁴ *See* List, Exh. 49. Although most of these cases were not processed by the new board until 1993 or 1994, there is no dispute that they were approved and put for-

²⁴ The original list included 49 names, but, upon information and belief, two were serving mandatory life and were added in error. Eight others were stopped by judicial veto, leaving 39 approved candidates.

ward by the old board, and therefore should be treated as favorable recommendations of the *old* board when it comes to counting them for statistical purposes. As the chair of the post-1992 board said:

It is true that the 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. These inmates were dealt with a bit more summarily – there was a presentation ... why the old board proposed going forward with that inmate, and who on the old board had voted to go forward. I recall the new board voted on some of these inmates without ever seeing them. 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.

Gabry Decl., Exh. 6, at ¶ 31; Rubitschun Dep., Exh. 42, at 36-37; McGinnis Dep., Exh. 40, at 48-49 (agreeing that all of these cases were initiated by the old board).

In 1992, according to the MDOC, there were about 788 parole-eligible lifers in the pool. *See* MDOC Estimate, Exh. 52. When the outgoing board approved 47 lifers to go forward to public hearing that year, it was – as its last act – seeking the release of *six percent of the entire pool*. This figure is wholly consistent with the pattern for the previous 50 years. Even using the figure of 39 lifers (who survived judicial veto), the old board would still have released more than five percent of the total pool.

In sum, although the rate of lifer paroles dipped sharply in the period leading up to 1992, the decline cannot be attributed to a change either in the old board’s substantive standards for lifer paroles, or in the parole laws themselves. To the contrary, the great weight of the evidence shows that – when it came to lifer paroles – the old board simply could not and did not get its work done.

2. Lifer Paroles Under the New Board

When the new board took over in 1992, *all* non-drug lifer interviews were automatically deferred, to five years from the date of the last interview. *Shabazz I*, at 122-23; *Shabazz II*, at 911-12. The soonest the new board had any of its own cases in the pipeline was 1995. If we use 1995 as the starting point for lifer paroles *initiated* by the new board, then the period to look at is 1995 to 2004. (We don't include 2005 because this case was filed in the spring of that year.) The new board's lifer parole rate is shown below:

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 though the pool of parole-eligible lifers swelled to *five times* what it was in 1985. Moreover, the new board – for the period 15-20 years after 1985 – does not have the excuse that a disproportionate number of the lifers in the pool are “new arrivals.” To the contrary, the bulge of “new arrivals” (in the late 1980s) have now served 25+ years. The lifer parole *rate* for the new board is 2-3 times lower even than the average rate for the last years of the “overwhelmed” old board, and more than 25 times lower than the baseline five percent rate that held since 1942, and that the old board tried to match as it was leaving office. By any standard, the new board's parole rate is microscopic in comparison.

The combined effect of a vastly increased, aging pool of non-drug lifers eligible

for parole, and a new board that paroles almost no non-drug lifers, has caused lifer parole rates to drop off the charts. At present it appears that lifers who were eligible for parole in the 1970s had more than *40 times* the chance for parole that non-drug lifers sentenced in the 1970s have today. See “Life”, Exh. 1, at 11.

Most importantly, the old board admits that at the end of its term the lifer parole rates fell because it was not doing its job, while the new board boasts that the rates have fallen off the charts precisely because it *is* doing its job. The new board’s “life means life” policy is fully borne out by the rate statistics. The decline in lifer paroles provides the strongest possible evidence that the new board’s retroactive policies violate the *ex post facto* clause.

C. The Post-10/1/92 Parole Regime Violates the *Ex Post Facto* Clause by Reducing the Frequency of Parole Review and Eliminating In-Person Lifer Parole Interviews

1. Less Frequent Review Has Created a Sufficient Risk of Increased Punishment for Lifers

The 1992 statute reduced the frequency of lifer parole interviews to a 10+5+5 schedule (from the 7+3+1+1 and 4+2+2 schedules previously mandated by state law or regulation). See MCL 791.234(4)(a) (1992); *Shabazz II*, at 911.

The 1992 law applied the new 10+5+5 schedule retroactively to the plaintiff class. We know from the *Shabazz* litigation that the delayed schedule was implemented without any individualized review whatever. *Shabazz II*, at 911-12; *Shabazz I*, at 122-23.

In both *Garner* and *Shabazz II*, the U.S. Supreme Court and the Sixth Circuit held

that the reduced frequency of parole review was not a *per se* violation of the *ex post facto* clause. In so doing, both Courts relied on the fact that the state laws at issue permitted the parole authority to set hearings *sooner* than the outer statutory limit; the Courts cited these provisions as evidence of added protections that – at least in theory – could ameliorate the harshness of the new schedules. *Garner*, at 254; *Shabazz II*, at 914.

Accordingly, in discovery the plaintiffs looked closely at this issue, to see if the new board uses its discretion to conduct lifer reviews sooner than the five-year outer limit. The evidence shows that since 1992, the five-year lifer schedule is *almost never accelerated*. See Marschke Dep., Exh. 39, at 74-77 (although in theory the five-year schedule could be accelerated, he only recalls it being used for medical cases); Rubitschun Dep., Exh. 42, at 41 (five-year schedule is essentially automatic). Indeed, a new member of the board seemed unaware that shorter-than-five-year intervals were even possible and could not identify a single case of accelerated review. Sampson Dep., Exh. 43, at 67, 84. Kenneth McGinnis, who hired the new board in 1992, 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.
- Q. No one else does either. And you agree that absent a special review, the only time a lifer is going to be considered is on that fifth year review?
- A. Yes.
- Q. I mean, in that sense it serves a gate-keeping function?
- A. Yes.
- Q. So even in a case where you have a [close] vote, and the person is literally one vote away from favorable recommendation to a public hearing, it makes no difference – ... it's still going to be five years before [he or she] get[s] seen again?
- A. Correct.

McGinnis Dep., Exh. 40, at 61.²⁵

The way the parole system currently operates with regard to lifers, there is no event – barring a debilitating or terminal illness – that would ever trigger “interim” review. The five-year review dates are all set by computer, and once the board has issued a “no interest” letter, the file simply does not come back to the board’s attention until shortly before the *next* five-year review. Indeed, Mr. Marschke suggested that only by enforcing the five-year review could the system be “fair” to all lifers – to prevent cutting in line, as it were. Marschke Dep., Exh. 39, at 76.

The new board’s practice is in marked contrast to the practice before 1992, when the old board not only interviewed lifers on a much more frequent schedule, but also conducted file reviews of all parolable lifers *every year*. See Hudson Decl., Exh. 4, at ¶ 14 (all lifers were file-reviewed every year in addition to the scheduled interviews). In contrast, with the current board, everyone operates as if the five-year schedule were written in stone.

In sum, the board’s discretion to set a parole review date of less than five years is *almost never* invoked. And the idea of speeding up an already scheduled date (say, on account of new information) seems to be virtually unrecognized in practice, but for medi-

²⁵ Even the parole 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.” Parole Training Materials, Exh. 29, at 3 (*emphasis added*); see also MDOC Materials, Mich. Judges’ Assoc., Exh. 33, at 15 (if the parole board has no interest, “the prisoner’s case will be scheduled for review at five year intervals”).

cal cases. Accordingly, in Michigan, the buffer built into the statute – to permit tailored lifer review in close cases – is completely illusory in operation.

Examples of the harms that flow from the five-year interview schedule are easy to identify in 2006, even though they were only “anecdotal” in 1995. *See Shabazz II*, at 914-15. The first kind of harm is that parole is truly only possible every fifth year (where before 1992 it was possible *at least* every third year, and, since 1982, *at least* every second year). Given that the review itself is *in practice* the exclusive precursor event or “trigger” for lifer parole, not only does the less frequent review logically (indeed inevitably) delay some paroles, but the harm is borne out by the files.

In August 2006, as part of discovery the plaintiff’s counsel reviewed 19 random open lifer files. *See* Counsel’s Decl., Exh. 70. Of the non-drug-lifer files, in nearly every case the old board “expressed interest” in parole before the 15th year, and sometimes the board indicated its desire to proceed soon after jurisdiction vested in the 10th year. *See* File Excerpts, Exh. 72. Reviewing the old board’s file notes, the sense conveyed – especially as the years of clear conduct and successful programming mount – is, “If not this year, then maybe in a year, or two, or three.” Since the review date now serves the exclusive gate-keeping function, the gate cannot be cracked until a minimum of five years has passed.

The result is functionally the same as if the statute did not allow for the possibility of interim review, even in exceptional cases. On those facts, the South Carolina Supreme Court found an *ex post facto* violation. Applying *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 pro-longing respondent's incarceration' by one year without *any* chance for review....

Jernigan v. State, 340 S.C. 256, 264 n.5 (S.C. 2000). As a practical matter – which is what matters for *ex post facto* analysis – the same is true in Michigan.

A second kind of harm is the harm that comes from treating each lifer the same. The close cases continue to be set over for the same five-year interval as the hopeless cases, thus equating the “nearly rehabilitated” lifers with the sociopaths. Similarly, whether lifers have served 15 years or 35 years, *all* must wait five full years before their next consideration date. The board is no longer exercising discretion about how much more incarceration is needed before parole, because the five-year extension is automatic. At present there is an irrebuttable presumption that if a person is not parolable today then *he will not be parolable for five more years*.

A third kind of harm is that new information is not acted upon in a timely fashion. That is, even when new material comes into the file – for example, curing a defect that blocked a favorable parole decision in the past – the board does not timely process that information by revisiting the case.²⁶

In 2006, unlike in 1995, it is certain that the 5-year review schedule, *as it is being applied by the new board*, creates a significant risk of increased punishment for lifers.

²⁶ Even if a judge withdraws his or her judicial veto (blocking the parole), the new board still will not review the case in less than five years. *See e.g.*, Lazin File Excerpts, Exh. 72. Mr. Lazin was not paroled until three years after his successor judge's objections were withdrawn – 16 years after the old board had first approved him to go forward to a public hearing. Mr. Lazin served a total of 41 years in prison. *Id.*

The Court should find that this change – independently, as applied – violates the *ex post facto* clause.

2. The Elimination of In-Person Lifer Interviews Has Created a Sufficient Risk of Increased Punishment for Lifers

The 1999 amendments took away the right to an in-person interview at each lifer review. Of course, if the new board is almost never going to parole lifers, then at one level the *form* of the review is irrelevant: the denial of parole is pre-ordained. But if the board actually exercised discretion, the difference would be important.

First, an interview can correct mistakes. Errors in the record (or in the assumptions of the board member) get aired, and the prisoner can say, face to face, “No – that’s just not true. Let me tell you why.” *See* Weisenauer Decl., ¶¶ 14-15. Second, the personal contact gives the prisoner the chance to advocate for himself. In reviewing the notes made by board members before 1992, in entry after entry the board’s comments have to do with the *impression* that the prisoner made. Of course some prisoners hurt their chances by being abrasive or strident, but what shines through in reading file after file is the attention paid to the prisoner as a person. Those who come across as honest, or responsible, or regretful are the ones where the comments are likely to say, “I have interest – or I can see us saying yes at the next review.” *See* File Excerpts, Exh. 72. Third, sometimes just *seeing* the prisoner can bring home to a board member that the felon in the file is now an older man or woman who has lived an exemplary life for years.

In the end, everyone agrees that a discretionary parole decision is as much an art as

a science, and that the files in many cases are indistinguishable. In this decision-making environment, the intangibles are what matter. For the old board, the impression the prisoner made on the board member was often outcome determinative. *Id.* William Hudson described the process well:

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.

Hudson Decl., Exh. 4, ¶ 11. Sandra Reese (Johnson) 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. You can't make the decision simply by looking at the number of certificates ... or whether they are ticket free. You want to know how manipulative they are – and you can only do that in an interview.

Reese Decl., Exh. 9, ¶ 12. Even the first new board chair agrees that “in-person interviews were very important, because that was how you got to know the prisoner.” Gabry Decl., Exh. 6, ¶¶ 26-28. The new board itself apparently agrees that the interview is critical, *because in no lifer case does the board ever move forward to a public hearing without an interview.* See Sampson Dep., Exh. 43, at 24-25.

Finally, and perhaps most importantly, before 1992, the in-person interviewer generated a written record that became a permanent part of the file. Again, sitting down and reading file after file, the written reactions of the interviewing board members are riveting. Each member plainly has read the comments of his or her predecessor, and there is a

kind of continuing dialogue *in the file* about the prisoner's progress. A momentum builds as each new interviewer is persuaded by the prior entries that the time for parole is approaching (assuming that the prisoner has stayed the course since the last interview). The movement toward a favorable decision is palpable, as the judgment of each new member is reinforced by the comments of those who sat in the same chair over the years. 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.

Hudson Decl., Exh. 4, ¶13.

Without an interview, the only new information added to the file *by the board member* is a form notice of "no interest," with a number code that means a routine lifer denial. The cumulative information about the prisoner – the stuff that actually charts his progress or shows his personal development over the years *through the eyes of the board members* – is completely lost.

And of course the old board's written entries were much more frequent, because the schedule was quicker, and the interview was mandatory. If the new board chooses to interview – and even that decision is at the discretion of the individual board member – but expresses "no interest," then the next (5-year) review is almost certain to be a file review only. The result is that even if the new board wanted to add useful information to

the file, it would do so *only every ten years*. Today the board can go for decades without placing any new information by a board member in the file, and – given the higher board turnover – can make its decision not to parole without *any member of the board ever having met the prisoner*.

Based on how the interviewing process works *in practice*, the Court should find that the 1999 amendments – eliminating mandatory lifer interviews after the tenth year – independently create a sufficient risk of increased punishment to violate the *ex post facto* clause.

D. The Switch from a Civil Service Board to a Political Board Has Created a Sufficient Risk of Increased Punishment

The defendants may argue that many of the changes described above are merely the result of the personal philosophies of the board members who were appointed since 1992 – and that such “personnel” changes are one of the risks of a life sentence.

First, although it is true that even with the old parole system the character of the board might change over time, with a Civil Service board such a change would occur slowly and without political interference. This is so because the old board members had life-time tenure (and for many years they were hired by the bi-partisan corrections commission). Over extended periods of time one might expect slow cyclical change (from conservative to liberal and *vice versa*), but the shape of the sine curve of the change would be long and flat.

In contrast, the 1992 amendments to Michigan’s parole laws let the governor fire

the old 7-member board and replace it with a hand-picked 10-member board. It is as if the U.S. President had the power to remove the nine sitting Justices of the U.S. Supreme Court and to hire 12 new Justices to replace them – without the advice and consent of the Senate, and with the ability to “non-renew” any Justice in short order if the President did not like the way he or she voted. Is there any doubt that a dramatic shift in the Court’s jurisprudence would soon follow? Yet that is exactly the power that the governor exercised in 1992 with regard to parole – *for the purpose* of applying the new parole board’s “jurisprudence” *retroactively* to the plaintiff class!

The second response is that the 1992 statute itself *guaranteed* the change. The 1992 law sacked the old board, gave appointing authority to the governor, made the new board beholden to the executive, and restricted the service of corrections professionals. Former Director McGinnis, who currently works as a corrections consultant, studied the Texas parole board. He noted that in Texas – a state notorious for its tough parole policies – all parole board members grant parole at extremely low rates, far below national averages. When asked how he accounts for the extraordinarily low rates in Texas, he candidly admitted, “Well, I think it’s ... because that’s who they appointed to the [board].” McGinnis Dep., Exh. 40, at 46.

Carry-over board member Ronald Gach put it this way:

Until 1992, virtually all parole board members had a significant amount of correctional experience, like myself. Through regular exposure to the inmate population, we understood that inmates are people, like ourselves.

Afer 1992, when the parole board became politically appointed, virtually all parole board members had no significant correctional experience These new board members' only previous exposure to the prison population was reading newspaper articles about local crimes, or through law enforcement. ... As a result of the extreme differences in the make-up of the parole board pre-*versus* post-1992, it was inevitable that lifer releases would drop dramatically.

Gach Decl., Exh. 7, ¶ 6. Former board chair William Hudson was equally blunt about the change:

[Civil Service] was critically important, because it protected the board from political influence in the appointment process as well as in our decision-making. By taking the board out of civil service, you lose that independence. How can a board member make a hard but correct decision if the members knows that he is at risk of non-renewal for a mistake? You would be afraid to make the right decision if your job is at risk, and no doubt the parole rates reflect that change.

Hudson Decl., Exh. 4, ¶ 18.

The purpose of the pre-10/1/92 “professional” board structure was to produce fair and consistent parole policy over time, so that a prisoner who committed a crime in 1961 would be treated the same for parole purposes as a prisoner who committed a similar crime in 1991 (assuming no intervening change in the law, applied prospectively). In contrast, the purpose of the post-10/1/92 “political” board structure was to create a new parole regime that reflected the law-and-order philosophy of a new administration.

A Civil Service board insulated from political shifts lay at the heart of the parole regime that was in place when the plaintiffs committed their crimes. Gradual changes within such a board structure would not support an *ex post facto* challenge. But radical change at a single point in time, politically motivated, and *designed* to increase the measure of punishment for all lifers – without distinguishing between prospective and retro-

active application – falls at the other end of the spectrum. The *ex post facto* clause prohibits precisely this sort of politically motivated change of policy. *Weaver*, 450 U.S. at 28-29.

Conclusion

In *Shabazz II*, the Sixth Circuit effectively told the plaintiffs that they had filed their lawsuit *too soon*. The message of *Shabazz II* was, “Right now your claim of harm is too speculative; come back when you can show certain harm.” *Id.* at 914-15. The plaintiffs did as instructed. They waited until now, when they can show beyond doubt that the cumulative changes to Michigan’s parole laws, policies, and practices have created a “sufficient risk of increased punishment” to violate the *ex post facto* clause. The plaintiffs ask the Court to grant summary judgment in their favor.

Respectfully submitted,

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 - Eff. 06/01/75, at p. 74
 - Eff. 09/19/73, at p. 76
 47. MDOC Good Time and Disciplinary Credit Guide for Judges (Feb. 1994) (“cheat sheet”)
 48. MDOC Time Computation Manual (7/16/01) (Table of Contents and Chapter 3)
 49. Parolable Lifers Moved Forward for Public Hearing by the Old Board (list compiled by new board chair Gary Gabry in January 1994)
 50. Parole Status (as 9/29/06) of Lifers Identified in Exh. 49

51. List of Lifers Paroled from 1/1/70 to 1/25/05 (showing *e.g.*, offense and time served, and updated by the plaintiffs through 9/8/05)
52. MDOC Estimate of Pool of Parole-Eligible Lifers, Answers to Interrogatories #8-10
53. MDOC Chart of Parole Approval Rates by Offense Group (1990-2005)
54. Parolable Lifer Commitments, from MDOC Annual Reports (1975-2002)
55. *Johnson v. Million*, 102 Fed Appx. 15 (6th Cir. 4/29/04) (unpublished opinion)
56. *Curtis v. Benik*, 2005 WL 300381 (W.D. Wis. 2005)
57. *Dyer v. Bowlen*, ___ F.3d ___, 2006 WL 2482819 (6th Cir. 2006)
- 58-69. Reserved

Volume III

Tab Description

70. Declaration of Paul Reingold, Class Counsel (re. discovery of lifer files)
71. Random Sample of Drug-Lifer Parole Files
 - a. Leroy Arquette #216085
 - b. Anthony Jackson #194884
 - c. Sylvester Bailey #190996
 - d. Conrad Smith #201698
 - e. John Martin #220283
 - f. Gil Gavilan #189995
72. Random Sample of Lifer Parole Files
 - a. John Gaddie #129053
 - b. Ronald Wondero #135884
 - c. Glenn Peters #134268
 - d. Martin Vargas #133525
 - e. Carl Anderson #148371
 - f. Marian Beach #156094
 - g. Emanuel Rivera #146378
 - h. Reynoldo Rodriguez #149675
 - i. Curtis Smith #157839
 - j. William Lutzke #138996
 - k. Nick Lazin #108786

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

KENNETH FOSTER-BEY, *et al.*,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

vs.

JOHN S. RUBITSCHUN, *et al.*,
in their official capacities,

Defendants.

File No. 05-CV-71318-DT

Hon. Nancy G. Edmunds

U.S. Mag. Judge Virginia Morgan

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CERTIFICATE OF SERVICE

I certify that on November 1, 2006, I electronically filed the plaintiffs' brief in support of motion for summary judgment, along with this proof of service, with the clerk of the court using the ECF system, which will send notification of such filing to the defendants' attorney.

I also certify that I have sent the same pleadings with all exhibits by overnight U.S. mail to the same attorney.

/s/ Paul D. Reingold
Attorney for the Class

Dated: November 1, 2006