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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

FILED

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EAST. DIST. MICHIGAN  
DETROIT

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

Plaintiffs,

vs.

BARBARA SAMPSON, *et al.*,  
in their official capacities,

Defendants.

File No. 05-CV-71318-DT

Hon. Marianne O. Battani

U.S. Mag. Judge Virginia Morgan

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**DECLARATORY JUDGMENT AND FIRST REMEDIAL INJUNCTIVE ORDER  
and  
FINAL ORDER FOR PURPOSES OF APPEAL**

On October 23, 2007, the Court granted summary judgment to the plaintiffs and denied summary judgment to the defendants. The Court held that the cumulative changes to Michigan's parole laws, policies, procedures, and standards since October 1, 1992, as they have been applied in practice retroactively to non-drug parolable lifers who committed their crimes before that date, violate the *ex post facto* clause of the U.S. Constitution. As a result, the plaintiff class has not had constitutional parole review since October 1, 1992, and has suffered a significant risk of increased punishment.

Accordingly, a remedy is needed to right the constitutional wrong, and to ensure that the named plaintiffs and the members of the plaintiff class get swift, sure, and complete relief. That relief must include prompt personal parole review of the plaintiff class, subject to the laws, policies, procedures, and applying the standards, that were the norm for the decades before 1992. By this order the Court is giving the defendants a chance to show that they are both willing and able to remedy the constitutional violation. If they cannot, then stronger remedial measures will become necessary. Now, therefore,

IT IS ORDERED:

1. This order will serve as a first remedial order, to apply for six months from the date it is entered.
2. As soon as practicable, but not longer than 30 days from the date of entry of this order, the defendants will compile a list of the 250 non-drug parolable lifers who have served the longest on their life sentences. The parties estimate the total size of the class to be around 1,000 non-drug parolable lifers, so that the 250 comprise the longest-serving first quartile.
3. From that list of 250, the defendants will drop out those class members whose *true* security level is currently above Level III, based on their most recent security classification screen.
4. Within 60 days of the date of entry of this order, from those then remaining on the list the defendants will drop out those lifers with additional sentences that would preclude them from being paroled on their life sentence during the six-month period of this order.<sup>1</sup>
5. The defendants will also drop from the 250 in the first quartile those non-drug

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<sup>1</sup> These prisoners are not technically members of the plaintiff class because the parole board has not yet "denied, passed over, expressed no interest in pursuing, or otherwise rejected or deferred" their parole on the merits. *See* Revised Class Definition, Stipulation and Order, Doc. No. 142. Nevertheless, they will be counted for purposes of calculating the quartiles, so that all potential class members will be reviewed to determine whether or not they can be paroled on their life sentence.

parolable lifers who are already in the pipeline for parole. For those deleted from the first-quartile list for any of the three listed reasons, the defendants will identify who was dropped from the list and why.<sup>2</sup>

6. The resulting final first-quartile list will be one that can be sorted (a) alphabetically, (b) by inmate number, and (c) chronologically by prisoners serving the longest time on their parolable life sentence to those serving the shortest time on their parolable life sentence. Each prisoner's current true security classification level will also be shown.

7. All prisoners on the final first-quartile list will be given an in-person or video-conference interview within five months of the date that this order is entered. The parole board will begin to interview promptly, starting with the longest-serving prisoners and working backward, to the extent practicable.<sup>3</sup> In setting interview dates, the date of the last previous review or interview by the board will not be considered. Any first-quartile prisoner whose parole was denied or deferred for any reason, at any stage, and at any time will be considered anew under the terms of this order.

8. The defendants will provide 30 days' notice to the prisoners scheduled for interview so that the prisoners can place material in their file before the parole interview. Parole eligibility reports, and medical and psychological reports, may also be needed on an expedited basis if the board decides to move forward to public hearing.

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<sup>2</sup> For those lifers dropped based on security level, the defendants will provide the current true security level and the date of the last disqualifying security classification screen. For those lifers dropped based on another sentence, the defendants will provide the date when the prisoner will first pass the restrictions (of the additional sentence) that currently preclude parole on the life sentence. For those lifers dropped based on already being in the parole pipeline, the defendants will identify the prisoners and track them separately for reporting purposes.

<sup>3</sup> For example, first-quartile prisoners who are already scheduled for review need not lose their turn merely to preserve the longest-serving to shortest-serving queue. The defendants may also choose to interview all lifers at a single facility at one time, which would skew the order of review, but would be permitted.

9. In making a decision about parole, to the extent possible the defendants will apply the parole laws, policies, procedures, and standards that were applied by the old parole board in the decades before 1992.

10. The standard to be applied on this remedial review will include consideration of:

(a) the factors set forth in the parole statute, MCL 791.233(1)(a), attached as Exhibit A;

(b) the factors set forth in Administrative Rule MAC 791.7715 and 7716, attached as Exhibit B;

(c) the factors set forth in Policy Directive PD-DWA-45.05, Parole Board Interview and Decision Criteria (2-10-85), attached as Exhibit C;

(d) any parole guidelines that were used by the old board before 10/1/92, whether required by law or not, including the Commutation and Long Term Release Guidelines ("grid scores" – with advisory/presumptive out-date scores), attached as Exhibit D;

(e) the fact that the old board, in making parole decisions, used the same criteria for parolable lifers and those serving long indeterminate sentences, so that two prisoners with similar crimes and files would serve similar time regardless of the fact that one was on a life sentence and the other was on an LID sentence; and

(f) any assessment of the case by the old board as evidenced by file notes and prior votes.

11. If the parole board decides to go forward to public hearing following a majority vote in executive session, that decision,<sup>4</sup> together with a copy of this order, will be forwarded to the sentencing or successor judge. If the judge does not object in writing within 30 days, the case will move forward to public hearing and final vote by the board as soon as practicable.

12. A decision or notice of "no interest" by the board will be treated as a final decision on the merits of the prisoner's parole for all purposes.

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<sup>4</sup> The longstanding practice of the board has been to send a report to the sentencing or successor judge. The report typically contains notice of the proposed public hearing, statutory information, psychological and medical evaluations, a parole eligibility report, a summary or copy of the pre-sentence investigation report, and a narrative or summary that includes the interviewing member's observations and impressions, placement information, program and work activities, accomplishments and achievements, criminal history overview, major misconducts, and any other information deemed pertinent by the board or board member. This practice will continue as in the past, and the word "decision" as used in paragraph 11 is meant to include these documents.

13. In any case in which the defendants decide not to go forward with a prisoner's parole, at any stage, they will provide written reasons to the prisoner, subject to review by the parties and the Court. The defendants will tailor the reasons to the specific case and not merely recite or restate a standard for parole. The seriousness, nature, and circumstances of the offense alone will not be used as the sole reason for denying parole, absent extraordinary circumstances.

14. In implementing the pre-1992 standards, the parole board will be mindful of the fact that for the decades before 1992 the average time served for parolable lifers at the point of parole was 18 years, and that most parolable lifers were paroled between 15-18 years.

15. Within six months from the date of entry of this order, the defendants will report back to the Court on the results of the first-quartile interviews that they have conducted, setting forth the status of each case. By that time the defendants will also have compiled a second quartile list, to begin the second phase of remedial work.

16. Based on that report, the Court will review the defendants' ongoing willingness and ability to provide *constitutional* parole review, and will decide whether or not new or different remedies are required.

17. The defendants will continue to review class members *outside* the final first-quartile list who are already scheduled for review or who will come up for their five-year review during the period of this order. The terms of this order apply to all such prisoners whom the board interviews. The defendants will track and report separately on all paroles and denials of interviewed prisoners who are outside the final first-quartile list. Those prisoners who receive only paper review will be interviewed in the future with their cohort quartile.

18. The defendants have indicated that they are able to meet all the requirements set forth above, and that nothing in this order is beyond the parole board's resources or capabilities.

19. The Court enters a declaratory judgment, holding that the defendants have been and remain in violation of the *ex post facto* clause of the U.S. Constitution, for the reasons stated in the Court's opinion of October 23, 2007. The Court enters a permanent injunction as set forth in this order, finding that the terms of the injunction are the least restrictive relief that the Court can impose to cure the defendants' serious, long-term, and ongoing constitutional violation of the plaintiffs' rights. The injunction meets the requirements of the Prison Litigation Reform Act, 18 U.S.C. § 3636(a), if that act applies.

20. This order is deemed to be a final order for purposes of appeal.

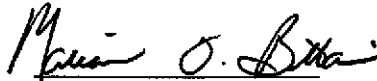
21. Given that the defendants have failed to provide constitutional parole review to the plaintiff class since 1992, and given the size of the class, and the serious ongoing harm to the individual class members (many of whom almost certainly would have been paroled years ago but for the defendants' conduct), the Court declines to grant a stay of this order pending appeal.

22. The plaintiffs will have 35 days following entry of this order to submit a petition for costs and/or for attorneys' fees pursuant to 42 U.S.C. § 1988, or otherwise permitted by law.

23. The Court will retain jurisdiction to implement this order and the Court's opinion of October 23, 2007, as well as to monitor the progress of the parole board. Although this order is intended to cover the first six months of remedial work, it has continuing force and will remain in effect until a new order is entered.

24. Either party may file motions as issues arise involving the implementation of the Court's opinion and order of October 23, 2007, and this first remedial order.

SO ORDERED.



Hon. Marianne Battani  
U.S. District Judge

Dated: February 7, 2008