UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

KENNETH FOSTER, *et al.,*

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

PLAINTIFFS-APPELLEES' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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REQUIRED STATEMENT

Under Fed. R. App. P. 35 and 40, the plaintiff class moves for rehearing and rehearing *en banc*, for the following reasons:

1. Consideration by the full Court is necessary because the panel's decision conflicts with prior decisions of (a) this Court, *see Dyer v. Bowlen,* 465 F.3d 280 (6th Cir. 2006), *and Michael v. Ghee,* 498 F.3d 372 (6th Cir. 2007); (b) sister circuits, *see Mickens-Thomas v. Vaughan*, 321 F.3d 374 (3rd Cir. 2003) *(Mickens I)*, *and* 355 F.3d 294 (3rd Cir. 2004) (*Mickens II), see also Fletcher v. Reilly,* 433 F.3d 867 (D.C. Cir. 2006); and (c) the U.S. Supreme Court, *see Garner v. Jones*, 529 U.S. 244 (2000). Fed. R. App. P. 35(b)(1)(A).

2. The case involves a question of exceptional importance. The panel's decision converts the sentences of some 1,000 Michigan prisoners from parolable life to life without any real possibility for parole. The stakes of the case are huge. Fed. R. App. P. 35(b)(1)(B).

3. On the facts, the panel's decision makes the wrong comparison (for *ex post facto* purposes) between the pre- and post-1992 parole regimes, and gives no weight to undisputed evidence supporting the district court's findings.

Summary of the Case

Before 1992: For the better part of five decades, the Michigan parole board applied a policy of "equal time for equal crimes," regardless of whether prisoners were serving long indeterminate (LID) or parolable life sentences.[1] The board's long-term policies also favored parole for well-behaved LID prisoners soon after they passed their minimum term. Because the board used the same parole criteria and scoring guidelines for LID prisoners and for lifers, lifers benefitted by being paroled at nearly the same time as their LID counterparts. R.143, Op., at 21-28.

These norms remained the same for decades, under both Republican and Democratic administrations. Board members were typically experienced corrections professionals. They had civil service status with life tenure, and they answered to a bipartisan state corrections commission. R.143, Op., at 7.

For decades the average time lifers served was 18 years. Most lifers were paroled well before 18 years, but "all it took was a few inmates with much longer

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[1] In Michigan all serious crimes except Murder I could be punished by "life or any term of years." On an LID sentence (like 25-40 years), the board would not consider a prisoner for parole until the minimum term (less credits) was served. On a life sentence, however, the board could grant parole after a flat ten years. R.143, Opinion, at 24-25. As a result, in plea negotiation and at sentencing, a life sentence was viewed as the better choice, because it gave defendants a chance for *earlier* parole. *Id.* Because the board could not know from the sentence alone if the judge meant to be harsher or more lenient in imposing a life sentence, it treated the two sentences the same for parole purposes. *Id.*; R.124, Decls., Exhs. 2-4, 10.

time served [at release] to raise the mean considerably." R.124, Exh. 5, ¶ 7. From the 1940s to the 1980s, the old board's five-year-averaged parole rate for lifers never fell below five percent.[2] Lifers were also entitled to in-person parole interviews every 1-3 years, to written reasons for adverse parole decisions, and to at least some state court appellate review.[3] R.143, Op., at 6.

The New Board: In 1992, Michigan's new governor and legislature decided to "get tough on parole." They passed legislation that abolished the old board and created a new larger board. The 1992 law took board members out of civil service and made them answerable to the executive. The law replaced life tenure with 4-year terms. It required that at least four members of the board have no corrections experience. It reduced the frequency of lifer interviews from a 4+2+2 year schedule to a 10+5+5 year schedule. R.143, Op., at 6-7.

Further amendments in 1999 took away all appellate rights, allowed prosecutors and crime victims to appeal grants of parole, changed mandatory in-person interviews to file reviews, and waived written reasons for nearly all lifer denials.

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[2] The parole rate is the number of people who were paroled divided by the number of people who were eligible for parole (that is, who had served ten years) for any given period.

[3] The board's decision not to move forward with a lifer parole was treated the same as a board decision to deny parole in an LID case. The lifer decision triggered all the same rights or protections, even though in a lifer case the prisoner also had to have a public hearing before being paroled. R.124, Decls., Exhs. 2-5.

All of these statutory changes (and the formal and informal policy changes that flowed from them) were applied *retroactively*. In fact, because the 1992 law raised the parole-eligibility date to 15 years for crimes committed after 1992, the entire new parole regime applied *only* retroactively (to the pre-'92 plaintiff class) until 2007 – when the first post-1992 lifers became parole-eligible after 15 years.

The governor packed the new board with people from law enforcement. When the new board took over in late 1992, it postponed all regular lifer reviews, citing the new 5-year review schedule. In 1993-94, the new board limited its lifer docket to the so-called "pipeline" paroles – the 39 lifers whom the old board had approved for public hearing in 1992. The new board denied most of those "pipeline" cases. R.124, Gabry Decl., Exh 6.

The new board began processing its own lifer cases in 1995. From 1995 to 2004, it paroled on average just over two lifers a year, even as the pool of eligible lifers reached all-time highs. R.130, Exh. 51. For those years the new board's parole rate fell below .2 percent.[4] The new board boasted that "life means life," and it admitted that it viewed (and treated) lifers as categorically different from LID prisoners. The new board based its denials almost exclusively on the crime,

[4] The defendants claimed 47 lifer paroles from 1995-2004. But they inflated their numbers by counting non-violent "drug lifers" who were not class members. The district court rightly rejected this evidence. R.143, Op., at 38. The correct number is 23 lifer paroles from 1995-04. R.130, Chart, Exh. 51.

without regard to the prisoner's rehabilitation or the sentencing judge's intentions. R.143, Op., at 24-31. *Half the class has now served 27-50 years. The minimum time served by class members is now 18 years* (1992 to 2010).

Michigan judges were dismayed. They expected that well-behaved lifers would be out in 12-18 years, and that young first-offenders might serve 10-12 years. R.128-130, Exhs. 35-38 (judges' letters supporting parole or objecting to the new board's "life means life" policy; judicial survey; sentencing transcripts).

The plaintiffs submitted evidence from two former MDOC directors, the head of the MDOC program bureau, every living member of the old parole board from 1962 to 1992, the administrative assistants to both boards, the only person to serve on both boards, a member of the new board, as well as the first chair (and chief architect) of the new board. These were hardly what could be described as "pro prisoner" advocates, yet they were unanimous in their conclusion that but for the statutory and policy changes of the 1990s, many if not most of the pre-1992 lifers would have been released long ago. *See* R.128, Decls., Exhs. 2-12. As the first new board chair Gary Gabry put it:

> 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-'92] lifer population.

R.128, Gabry, Exh. 22.

Proceedings to Date: The district court granted summary judgment to the plaintiffs on their *ex post facto* claim and entered a modest remedial order. R.168, Judgment and Order. Motion panels of this Court twice denied requests for stays. The merits panel reversed and remanded, with instructions to grant summary judgment to the defendants.

ARGUMENT

1. The Panel Decision Is at Odds with Sixth Circuit, Sister Circuit, and U.S. Supreme Court Law

In *California Dept. of Corrections v. Morales,* 514 U.S. 499 (1995), and *Garner v. Jones,* 529 U.S. 499 ((2000), the U.S. Supreme Court set out the legal standard to be applied in analyzing an *ex post facto* claim of the sort presented here – where the changes are to the parole regime, rather than to the substantive statutory standard. This Court has read those cases to hold that the test is whether the cumulative changes "present a significant risk of increasing the ... amount of time actually served." *Michael v. Ghee,* 498 F.3d 372, 383 (6th Cir. 2007). *See also Fletcher v. Reilly,* 433 F.3d 867, 869-70 (D.C. Cir. 2006) ("the critical question ... is whether, as a practical matter, the retroactive application creates a significant risk of prolonging an inmate's incarceration"). A prisoner need not show that his prison time has actually been increased, but only that he suffers the "sufficient risk." *See Dyer v. Bowlen,* 465 F.3d 280, 288 (6th Cir. 2006).

A good example of how a court should review such retroactive changes to a parole regime can be found in *Mickens-Thomas v. Vaughan*, 321 F.3d 374 (3rd Cir. 2003), and 355 F.3d 294 (3rd Cir. 2004). In *Mickens-Thomas*, Pennsylvania had revamped its parole laws in the wake of the election of a new governor, who ran on an anti-crime platform. There, as here, although the substantive statutory standard for parole did not change, the governor was able to create a new board largely of his own choosing. Parole rates dropped precipitously as a result, the same as in Michigan. *See* R.13, Parole Rate Chart, Exh. 53.

In *Mickens I*, the court reviewed a range of evidence comparing the two regimes. It looked at written policies and procedures, statements of the two boards, an internal review charting the changes after the new board took office, changes in parole rates, *etc.* "We look at all of the Board's actions and statements of policy to determine how it interpreted the statutory provisions." *Id.,* at 378. The court concluded that the new board was retroactively applying a harsher standard, in violation of the *ex post facto* clause. The Third Circuit said:

> Although some discretion might still exist within the pre-1996 parameters, a parole decision that fails to address any of the criteria mandated by Board policy, such as institutional recommendations, willingness to undergo counseling and educational achievements, and instead utterly ignores all factors counseling in favor of release, falls outside of the realm of the legitimate exercise of discretion under the pre-1996 policies.

Id., at 387. The court found, based on all the evidence, that the board "mistakenly

construed [the amendments] to signify a substantive change in its parole function." *Id.,* at 391. The court remanded for the parole board to re-evaluate the case, giving "genuine consideration and due regard to the factors prescribed by the Board's pre-1996 policies." *Id*.

When the board again denied parole, the Third Circuit reviewed the board's reasons in detail. The court found ongoing *ex post facto* violations, and granted the petitioner an unconditional writ. *Mickens-Thomas II*, at 310.

In *Mickens-Thomas*, as here, the board argued that it was simply exercising its discretion. The Third Circuit, however, noted that:

> A Parole Board policy, although partly discretionary, is still subject to ex post facto analysis when there are sufficiently discernable criteria to suggest to a reviewing body that the new retroactive policies are being applied against the offender's interest.
> * * * * * *
> That a Board or legislature may learn from experience does not mean that those who were sentenced at an earlier juncture may now be more severely re-sentenced in the light of newly-found wisdom. This is precisely what the Ex Post Facto clause prohibits.

Id., at 387. In short, "The presence of discretion does not displace the protections of the *ex post facto* clause." *Garner, supra,* at 253, *see also Dyer, supra*, at 288.

The *Foster-Bey* panel, on the other hand, staked out the opposite position. Slip Op. at 11-13. The panel found, *as a matter of law*, that because the board always had discretion, it retained unlimited (and unreviewable) discretion to apply new, harsher criteria retroactively to the plaintiff class:

> The decision whether to grant parole has always been within the Board's discretion. ... Therefore, from the time plaintiffs committed their offenses, there was always the possibility the Board would exercise its discretion in a way that would result in fewer paroles and longer prison terms.

Id., at 12. The panel effectively found that because the statutory standard itself did not change, the plaintiffs could never prevail, because the board always retained discretion. *Id.,* at 12-14. By the same token, the plaintiffs could never show that a retroactive change was attributable to specific amendments, because the changes *might* be attributable only to the manner in which the board exercised its discretion.[5] *Id.,*at 12-16.

In sum, instead of evaluating the proofs – as the Third Circuit did in *Mickens-Thomas,* and as this Court did in *Michael* and *Dyer*, and as the district court did below – the panel held *as a matter of law* that the *ex post facto* clause cannot be violated absent a change in the substantive statutory standard. This is an outlier position that by itself justifies *en banc* review.[6]

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[5] This argument proves too much, as it could be made with equal force even in cases where the substantive statutory standard changes. According to the panel, one can simply never know whether the change in the board's practice is attributable to the amendment, or to the board's "legitimate exercise of its discretion." Slip Op. at 13-21.

[6] The panel relies on a quote from Justice Scalia in *Garner* to the effect that "an inmate has no cause to complain that the Board in place at the time of his offense has been replaced by a new, tough-on-crime board...." Slip Op. at 15. But Justice Scalia's comment comes from a concurrence that no other member of the Court joined. *See Garner,* 529 U.S. at 249 *et seq*.

The panel tried to support its position by arguing that a parole board will inevitably change over time, producing gradual fluctuations in the relative harshness or leniency of its decisions. Slip Op. at 15. This case itself, however, is proof that such long-term organic changes present little risk, and are categorically different from what occurred here. From 1942 to 1992, the membership of the Michigan parole board changed many times, without ever applying harsh new criteria retroactively, to a degree that would implicate the *ex post facto* clause.[7]

But what happened in 1992 was not a long-term or organic change. The old board was fired *en masse* and supplanted by a new board for the specific political purpose of retroactively increasing the time that Michigan prisoners would serve. That is the very essence of an *ex post facto* violation. *See e.g., Lynce v. Mathis*, 519 U.S. 433 (1997), *and Weaver v Graham*, 450 U.S. 24 (1981). Indeed, at bottom the district court found that the board *stopped* exercising its discretion, and made a categorical decision not to parole lifers as a class. R.143, Op., at 20, 31.

The panel's decision is equally an outlier as to specific statutory changes. In *Morales* and *Garner*, the U.S. Supreme Court held that the reduced frequency

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[7] For 50 years sitting board members trained and acculturated new members in such a way that the center always held. Even from 1985 to 1992, when the old board's lifer parole rates fell, the fall was not due to a shift in board philosophy, applied retroactively, but to a severe lack of resources in the face of an exploding prison population. *See* R.124, Decls., Exhs. 2-5, *and* R.143, Opinion, at 39-42.

of parole review is not necessarily an *ex post facto* violation: the question is whether the less frequent review creates a "sufficient risk of increased punishment." Both cases held that because the challenged state schemes required individualized assessment before the less frequent review was invoked, and because both states permitted the parole board to see worthy candidates on an accelerated schedule, the prisoners had not proven the requisite risk. (*Garner* remanded for discovery.)

In *Shabazz v. Gabry*, 123 F.3d 909 (6th Cir. 1997), this Court held the same thing. *Shabazz* was a facial challenge limited to the 1992 amendment that reduced lifer parole review to a 10+5+5 schedule. This Court's denial of relief hinged on two facts, namely (1) that "no reliable statistical analysis was available ... because the statute had been in effect for too short a period," and (2) that "other viable opportunities for parole" existed apart from the 5-year reviews. *Id.,* at 914.

Here, however, the plaintiffs proved, and the district court found, that in practice the 5-year review was *automatic*. R.143, Op., at 31-34. The MDOC director in the 1990s could not recall a single case of accelerated review other than for terminal illness, and the sitting board chair seemed unaware that shorter than 5-year intervals were even possible. *See* R.130, Exh. 39, at 74-77; Exh. 42, at 41; Exh. 43, at 67, 84. Whether the prisoner had served 15 or 40 years, and whether the vote in executive session (to deny parole) was 10-0 or 6-4, *all* lifer reviews were set out five years, by computer. The new board created an irrebuttable pre-

sumption that if a person was not parolable today, he or she would not be parolable for five more years. Contrary to *Morales, Garner,* and *Shabazz*, the panel found no *ex post facto* violation, because any untoward effect might equally be due to "the Board's stricter exercise of its discretion." Slip Op. at 16.[8]

2. The Panel Made the Wrong Comparison for *Ex Post Facto* Purposes

In evaluating the parole release rates,[9] the panel erred in using 1985-92 as the linchpin period for comparison. The *ex post facto* clause requires a court to compare the parole regime in effect *when the prisoner committed the crime* with the regime in effect when the prisoner comes up for parole. Here, roughly 60 per-

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

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

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

[9] The panel suggests that it is an open question whether, in comparing parole regimes, one should look at the number of prisoners paroled *per* year as opposed to parole rates. *See* Slip. Op., at 17. This cannot be correct. As the district court understood, if the old board paroled 10 people out of 100 eligible lifers in a given year, its parole rate was 10 percent. But if the new board paroled 10 people in a given year (not that it ever did) out of 1,000 eligible lifers, its parole rate would be just one percent. To inflate their performance, the defendants argued in both courts that only the numerator – the raw number paroled – matters. This is statistical hogwash, which the district court correctly rejected. R.143, Opinion, at 37.

cent of the plaintiff class committed their crimes *before* 1985, at a time when the old board's historical 5-year-averaged parole rate had never fallen below five percent. Thus, even if the panel were correct (that there was no significant difference between the last years of the old board and the first decade of the new board), the panel's holding could not be applied to the bulk of the class who committed their crimes before 1985. The undisputed evidence is that the pre-1985 class members were *at least* 25 times more likely to be paroled under the old board (when they committed their crimes) than under the new board from 1995-2004.[10]

Looking at the old board's decisions from 1985-92, the panel concluded that the parole rates between the two boards were not significantly different. The numbers may all be small, but if people who committed their crimes from 1985-89 had a five-year-averaged chance for parole of .6 percent, and ten years later (under the new board) from 1995-99 they had a chance of only .2 percent, or from 2000-04 a chance of only .15 percent, *see* Slip Op. at 19, their collective chances for parole dropped by a factor of three and four, respectively – hardly an insignificant drop.

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[10] Lifers who were eligible for parole from 1985-92 may have had a *different ex post facto* claim that they could have brought against the old board: namely that its policy of focusing its funding and resources on non-lifers, thereby postponing lifer interviews and delaying public hearings even in the lifer cases it approved, created a significant risk of increased punishment. The fact that such a claim might have been possible *then*, however, does not bar the current class from bringing its own *ex post facto* claim against the *new* board, based on its "life means life" policy and the 1992 and 1999 statutory changes.

Moreover, as to the period from 1990-92, the panel gave *no weight* to the fact that the outgoing board in 1992 approved 47 class members for public hearing. Under the old board, such approval was tantamount to granting parole, as the old board rarely denied a lifer parole *after* a public hearing. R.124, Exh. 8, at 2. Although eight of the "pipeline" approvals were blocked by state-court judicial vetoes, the 39 remaining cases still amounted to *more than five percent* of the parole-eligible lifer population. Thus, in 1992, the old board was on course to match its long-term historical lifer parole rate of five percent.

Instead of considering this evidence, the panel ignored the old board's approvals for public hearing. Slip Op. at 19, n.6. But these cases are ideal "comparables" that highlight the radical difference in the two boards' approaches to lifer parole. The new board not only rejected most of the old board's "pipeline" people in 1993-94 – blocking their public hearings or voting against their paroles – but from 1995 to 2004 (and beyond) the new board repeatedly *denied public hearings* to these very same candidates, and routinely set the cases five years out before the next possible review.

Many of these people were still in prison when this case was filed in 2005. Many remain in prison today, 18-25 years after the old board first approved them for public hearing. *Garner* and *Dyer* and *Mickens-Thomas* require this Court to look at *all* the evidence. The 1992 public hearing cases show that under the new

board, "increased punishment" was not just a risk, but a certainty.

Finally, as to the numbers, if from 1995-04 the new board was *not* applying a harsher standard, then the change in lifer paroles produced by this litigation is hard to explain. The lower court entered an injunction requiring the new board to apply (to the extent possible) "the parole laws, policies, procedures, and standards that were applied by the old board in the decades before 1992." R.168, Order, at 4. Since 2008, the board has approved at least 90 members of the class for public hearings, and to date more than 40 class members have been paroled. The district court enjoined the new board's "life means life" policy, with immediate results. To undo the injunction will doom the plaintiff class to mandatory life in prison.

Conclusion

Because the panel decision is at odds with Sixth Circuit, sister circuit, and U.S. Supreme Court case law, and because the panel made the wrong comparison for *ex post facto* purposes, the plaintiffs request rehearing and rehearing *en banc*.

Respectfully submitted,

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Proof of Service

The plaintiffs' motion for rehearing and rehearing *en banc* was filed on March 2, 2010, using the Court's ECF system, which will send e-mail notice to all attorneys of record.

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Dated: March 2, 2010