UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KENNETH FOSTER BEY,
ET AL.,
Plaintiffs,

v. Case Number: 05-71318

JOHN S. RUBITSCHUN, ET AL., HON. MARIANNE O. BATTANI

Defendants.
_____/

OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Before the Court are cross-motions for summary judgment. The Court heard oral argument and at the conclusion of the hearing, took this matter under advisement. The Court met with the parties for a status conference on June 28, 2007, for additional clarification of the issues. For the reasons that follow, the Court **GRANTS** Plaintiffs' Motion for Summary Judgment and **DENIES** Defendants' motion.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Plaintiffs, Kenneth Foster-Bey, John Alexander, Waymon Kincaid, William Sleeper, Robert Weisenauer, Eric McCullum, and Gerald Lee Hessell,[1] filed this class action against members of the Michigan Parole Board, John S. Rubitschun, James Atterberry, Miguel Berrios, Charles Braddock, Stephen DeBoer, Enid Livingston, James

[1]All the named representative, except Weisenauer, were convicted of second-degree murder in state court before October 1, 1992, and sentenced to life in prison. Weisenauer was convicted of first-degree criminal sexual conduct. All remain in the custody of the Michigan Department of Corrections.

Quinlan, Marianne Samper, Barbara Sampson, Artina Hartman, and the Director of the Michigan Department of Corrections ("MDOC"), Patricia Caruso, seeking declaratory and injunctive relief. Plaintiffs bring suit under 42 U.S.C. § 1983, alleging that changes to the parole law and policies made in 1992 and 1999, violate the *Ex Post Facto* Clause of the United States Constitution, see U.S. CONST. art . I, § 10, cl. 1, and the Due Process Clause, see U.S. CONST. amend. XIV, § 1. (Compl. ¶¶ 114-17).

Specifically, Plaintiffs allege that the amendments, viewed collectively, violate their rights. At the time they were sentenced they were entitled to parole review every other year, (Compl., ¶¶ 94-95); an in-person hearing (Compl., ¶¶ 96-97); written reasons for denial (Compl., ¶¶ 98-99); and judicial review of "a statement of no interest or a pass-over" (Compl., ¶¶ 100-03). Further, Plaintiffs allege that their rights have been violated by the change in the Michigan Parole Board from a civil service entity to one under the direct authority of Michigan's executive department (Compl., ¶¶ 104-05). See Doc. No. 44, Opinion and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, p. 2.

The case originally was assigned to Hon. Nancy G. Edmunds. Defendants subsequently moved to dismiss the Complaint on numerous grounds. Although Judge Edmunds dismissed the due process claim, the motion was denied as to Plaintiffs' *ex post facto* claim. In November 2006, Judge Edmunds disqualified herself, and the action was reassigned to the undersigned.

Now before the Court are cross-motions for summary judgment on the remaining claim. Because Defendants again advance an argument based on res judicata, the Court includes the previous discussion of the issue, wherein Judge Edmunds noted that

the Court "must examine the cumulative changes in the parole procedures since an inmate's conviction." Id.

> A state cannot continuously make minor changes in the parole process that, taken together, create a sufficient risk of an increased penalty; but, when looked at alone, would not violate the *Ex Post Facto* Clause. For example, a state makes change A to the parole procedure after Inmate is convicted. Inmate brings a suit challenging A, but a court finds that it does not create an *ex post facto* law. The state subsequently makes changes B, C, and D. Inmate is not precluded from bringing a Constitutional challenge. And, importantly, the court must be able to compare the original parole policy with the new policy (which includes change A as well as changes B, C, and D) to see if there is a sufficient risk of increasing the measure.

Id. at n.10.

Prior to reassignment, Plaintiffs' motion for class certification was granted. The order defined the class provisionally, subject to change after discovery, when and if the need for change was raised by the parties. See Doc. No. 142. The parties subsequently stipulated to an amended class definition, which reads as follows:

> All parolable lifers in the custody of the Michigan Department of Corrections who committed crimes (for which they received a parolable life sentence) 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. Excluded from this definition are so-called “drug lifers” who were convicted of distribution or possession of controlled substances, regardless of whether the crime was originally one subject to parolable life or one converted to parolable life at a later time.
> For purposes of this class definition, the “new” parole board refers to the board that came into existence pursuant to the 1992 statutory changes in parole, and that gradually took over from the old board in the period from c. 1992 to 1994. As before, if further refinement of the class definition is needed, including the creation of sub-classes, that issue will be addressed when and if the parties raise it.

See Doc. No. 142, Stipulation and Order of Class Certification.

II. STANDARD OF REVIEW

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." As the United States Supreme Court has ruled:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The movant bears the burden of demonstrating the absence of all genuine issues of material fact. See Hager v. Pike County Bd. of Educ., 286 F.3d 366, 370 (6th Cir. 2002). "[T]he burden on the moving party may be discharged by 'showing' - that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325.

Once the moving party carries that burden, the burden then shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. FED. R. CIV. P. 56(e); Chao v. Hall Holding Co., 285 F.3d 415, 424 (6th Cir. 2002). "The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 256 (1986). The court must view the evidence in a light most favorable to the nonmovant as well as draw all reasonable inferences in the nonmovant's favor. See Hunt v. Cromartie, 526 U.S. 541,

549 (1999); Sagan v. U.S., 342 F.3d 493, 497 (6th Cir. 2003).

"A fact is 'material' and precludes grant of summary judgment if proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect [the] application of appropriate principle[s] of law to the rights and obligations of the parties." Kendall v. Hoover Co., 751 F.2d 171, 174 (6th Cir. 1984) (citation omitted) (quoting Black's Law Dictionary 881 (6th ed. 1979)). To create a genuine issue of material fact, the nonmovant must do more than present some evidence on a disputed issue.

> There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the [nonmovant's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Anderson, 477 U.S. at 249-50. "No genuine issue of material fact exists when the 'record taken as a whole could not lead a rational trier of fact to find for the non-moving party.'" Michigan Paytel Joint Venture v. City of Detroit, 287 F.3d 527, 534 (6th Cir. 2002) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). The evidence itself need not be the sort admissible at trial. Tinsley v. General Motors Corp., 227 F.3d 700, 703 (6th Cir. 2000). However, the evidence must be more than the nonmovant's own pleadings and affidavits. Smith v. Campbell, 250 F.3d 1032, 1036 (6th Cir. 2001). The mere existence of a scintilla of evidence in support of the non-movant is not sufficient; there must be sufficient evidence upon which a jury could reasonably find for the non-movant. Anderson, 477 U.S. at 252.

III. ANALYSIS

The United States Constitution prohibits States from enacting *ex post facto* laws. U.S. CONST., art. I, § 10, cl. 1. The *Ex Post Facto* Clause bars enactments which, by retroactive operation, increase the punishment for a crime after its commission, Collins v. Youngblood, 497 U.S. 37, 42 (1990) (citing Beazell v. Ohio, 269 U.S. 167, 169-170 (1925)), so retroactive changes in laws governing the parole of prisoners may violate the clause. See Lynce v. Mathis, 519 U.S. 433, 445-446 (1997) (citing Weaver v. Graham, 450 U.S. 24, 32 (1981)); California Dept. Of Corrections v. Morales, 514 U.S. 499, 508-509 (1995). A court's inquiry into whether an *ex post facto* violation occurs is two-pronged: first, has a change in the law been given a retrospective effect; and second, has the change disadvantaged the offender. Weaver, 450 U.S. at 29.

A. Retrospective effect

In Michigan, a judge can sentence a defendant to "life or any term of years." MICH.COMP. L. § 791.234. Parole eligibility arises after a "lifer" has served ten years unless the prisoner was convicted of first-degree murder. The 1982 amendments governed parole eligibility procedures for nonmandatory lifers until the contested changes. The 1982 amendments required parole interviews in the fourth year and then every two years (a 4+2+2 schedule) for lifers and prisoners serving long indeterminate sentences ("LIDs"). At that time, the Michigan Parole Board could not deny parole to a prisoner without at least one Board member conducting an in-person interview. MICH.COMP.L. § 791.234 (1982). Further, a prisoner had a right to receive written reasons for a denial and to appeal the denial.

The 1992 amendments increased parole eligibility on a life sentence with the

possibility of parole from ten years to fifteen years (however, this provision was not applied retroactively); reduced the frequency of lifer parole interviews from the 4+2+2 schedule to a 10+5+5 schedule; and allowed the victim of a crime to appeal the grant of parole. The 1992 amendments also included a change in the structure and size of the Michigan Parole Board. The Board increased in size from seven members to ten, four of whom must have no prior association with the MDOC. In addition, Michigan Parole Board members were no longer under civil service, but were appointed to four-year terms by the MDOC director.

In 1999, the legislature amended the parole laws again. Under the new amendments, only the prosecutor or the victim can appeal a parole decision to state court. MICH.COMP.L. § 791.234 (6)(a) (1999). The amendments also eliminated the requirement that a member of the Parole Board interview lifers every fifth year after the initial ten-year period. A file or paper review is sufficient. MICH.COMP.L. § 791.234(6)(b)-(c) (1999). Finally under the new amendments, when the Parole Board declines to go forward to a public hearing in a lifer case, it is no longer considered a "decision" of the Board. Therefore, written reasons for the denial are not required.

The parties do not dispute that the first prong of the inquiry is met in this case as to three of the amendments: the change in the composition of the Michigan Parole Board, the change in the interview schedule, and the file review. All are retroactive. Defendants do challenge whether the other two changes at issue here meet the first prong. According to Defendants, prior to 1982, the code prohibited appeals of parole decisions. Consequently, they conclude that the change in 1999 merely reestablished the law as it existed at the time Plaintiffs were sentenced. Defendants also maintain

that written reasons still accompany a denial of parole. They cast the change as a mere redefinition of when parole is denied: a "no interest" statement is no longer deemed a formal decision subject to judicial review. Defendants therefore conclude that the change is not retroactive. The Court considers the merits of Defendants' arguments below.

1. Prisoner Appeals

Defendants assert that the 1999 change eliminating appeals of a parole denial simply restored the law as it existed prior to 1982. They rely on Sixth Circuit authority to support their position. In Jackson v. Jamrog, 411 F.3d 615, 617 (6th Cir. 2005), the court addressed an equal protection challenge to the 1999 amendment, permitting prosecutors and victims to appeal state parole decisions, but not prisoners. The appellate court rejected the plaintiff's argument that this change violated the Equal Protection Clause of the United States Constitution. In its analysis, the court observed that "[p]rior to 1982, Michigan's correctional code contained a general prohibition against appeals from parole board decisions." 411 F.3d at 617. It added that the relevant statute was amended in 1982 to permit appeals from the grant or denial of parole. After the 1999 change was enacted, state courts could no longer review a Board decision denying parole.

In addition to unassailable authority that the law has come full circle, Defendants note that the named Plaintiffs here all committed their crimes and were sentenced before 1982. Therefore, the 1999 amendment is not retrospective relative to them--Plaintiffs merely face the same law existing at the time of their sentencing.

Defendants' reliance on Jackson is misplaced. The Jackson case does not address statutory changes for purposes of *ex post facto* analysis. Consequently, the

discussion therein is not binding authority as to the issues before this Court and is distinguishable. First, even if all the named class members in this case were sentenced before 1982, not all members of the class were sentenced before 1982. Second, the general prohibition against appeals that existed prior to 1982 was not a flat-out ban; the language of the 1955 law read, "The action of the parole board in releasing prisoners shall not be reviewable *if in compliance with the law*." 1957 PA 107 (emphasis added). Accordingly, this Court is not constrained by Jackson to adopt Defendants' position that the loss of the right to appeal is not retrospective. For purposes of this law suit and these claims, the Court finds the prohibition against prisoner appeals is retrospective.[2]

2. Written reasons

Next, Defendants contend that Plaintiffs still are entitled to written reasons when parole is denied. The change here merely reflects a new interpretation of when a denial occurs. Finally, Defendants argue that even if the Court were to find a change has occurred, the Rooker-Feldman doctrine precludes consideration of the argument. The Court disagrees.

Before 1992, the Parole Board's decision of "no interest' in going forward to a public hearing was treated in the same manner as any other denial of parole. See Pls.' Ex. 46, Policy Directive PD-DWA 45.02. After 1992, a no interest decision no longer is deemed a formal decision. Likewise, a decision not to interview a lifer no longer is characterized as a denial of parole. Instead, a "decision" occurs only at the end of the

[2]Plaintiffs do not address whether this loss creates a significant risk of longer incarceration. In light of statistics cited by the Jackson panel regarding the lack of success of appeals by prisoners (.6%), this retrospective change, in and of itself, does not sustain Plaintiffs' burden.

process; after the public hearing, when the Board votes a final time on whether to grant parole. Consequently, a written reason no longer accompanies any preliminary decision by the Parole Board.

Plaintiffs maintain that the effect of the change is a ban on lifer appeals, and a ban that cannot be subject to court review. Under the current interpretation, lifers are never fully eligible for parole even after they have served ten years. Under Defendants' recharacterization of the parole process, the intervening changes can never be scrutinized for purposes of *ex post facto* analysis.

This Court agrees. There is no dispute that early board policy did not distinguish the parole eligibility between lifers and nonlifers. See e.g. Pls.' Ex. 46, PD-PWA 45.05 at 70; Pls.' Ex. 46, pp. 65-66. Before 1992, a decision not to go forward to a public hearing was treated in the same manner as a denial of parole; both decisions could be appealed. Pls.' Exs. 23, 46. Robert Brown, former MDOC Director, stated that the terms "eligible for parole" and "coming within the board's jurisdiction" were the same thing. Pls.' Ex. 13, ¶ 13. Moreover, under Defendants' argument that a "no-interest" decision was never a final decision, the 1999 statutory amendment redefining what constitutes a parole decision for nonmandatory lifers would have been superfluous. Accordingly, the Court finds that the change is in fact one that can be deemed retrospective for purposes of an *ex post facto* challenge.

The Court rejects Defendants' alternate argument that the Rooker-Feldman doctrine precludes consideration. The Rooker-Feldman doctrine bars the losing party in a state court action from filing suit in federal district court for the purpose of obtaining review of the adverse state-court judgment. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983). According to

Defendants, the decision in Gilmore v. Parole Board, 635 N.W.2d 345 (Mich. Ct. App. 2001), redefined eligibility for nonmandatory lifers and that decision bars this Court from considering Plaintiff's claim.

In Gilmore, after construing the language of the parole eligibility statute, the state appellate court held that a nonmandatory lifer is entitled to a written reason for denial of parole "only after" he has been interviewed, received notice that further action would be taken, has avoided a judicial veto, and has had a public hearing. Id., at 361.

Gilmore did not address the parole statute in the context of whether it violated the *Ex Post Facto* Clause. It merely interpreted and construed the language of the statute. Plaintiffs' injuries in this litigation do not implicate the state-court judgments; hence they are beyond the purview of the Rooker-Feldman doctrine. See Todd v. Weltman, Weinberg, & Reis Co., L.P.A., 434 F.3d 432, 436-37 (6th Cir. 2006) (holding that the Rooker-Feldman doctrine was not triggered when the plaintiff did not allege injury by the state-court judgment, but instead filed an independent federal claim).
Accordingly, the Court finds the doctrine does not bar it from rendering a decision on the merits.

Because the Court finds all of the changes meet the first prong of the test, that is, they are retroactive, it directs its attention to the second prong--whether the changes have disadvantaged the class.

B. Effect of Changes

Several Supreme Court decisions are instrumental to the Court's analysis as to whether the second prong is satisfied. First, in Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 501 (1995), the Supreme Court considered a California amendment that modified

the frequency of parole suitability hearings. Before the amendment, prisoners were entitled to a mandatory annual hearing; after the amendment, prisoners were entitled to a discretionary hearing that could be postponed for up to three years, provided the prisoner was convicted of more than one offense that involved the taking of a life, and the board found no reasonable expectation of parole during the following year. Id. (citation omitted). Notably, a full hearing was required upon initial eligibility, and annual hearings were the default. The board retained the option to conduct a subsequent hearing at its discretion. Id., at 511-13.

The Supreme Court held that these retroactive changes did not violate the *Ex Post Facto* Clause inasmuch as they failed to "produce[ ] a sufficient risk of increasing the measure of punishment attached to the covered crimes." Id., at 509. The Court reasoned that the amendment "create[d] only the most speculative and attenuated possibility of . . . increasing the measure of punishment," given the prisoner class affected already faced a remote possibility of release on parole. Id., at 510. The expansion of *ex post facto* protection to laws bearing only a "conceivable" impact on punishment would push the judiciary into the "micromanagement of an endless array of legislative adjustments of parole and sentencing procedures." Id., at 508. The Morales decision did not articulate a set formula for measuring whether a violation occurred; courts are left to discern whether the changes are sufficient on a case-by-case basis.

In Garner v. Jones, 529 U.S. 244 (2000), the Supreme Court again considered whether a change to a state's parole process violated the *Ex Post Facto* Clause. Georgia had amended its parole rule, changing the frequency of required parole reconsideration hearings for inmates serving life sentences from every three years to

every eight years, and applied the rule retroactively. The Georgia Parole Board's policies established an eight-year maximum period for reconsideration, but permitted expedited consideration when warranted. As was the case in Morales, the Supreme Court rejected the notion that the rule seemed certain to result in longer incarceration. Id., at 255.

After the Supreme Court found that the requisite risk was not inherent in the framework of the amended rule, it directed its attention to whether the prisoner could show "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. The Court held that "[o]n the record, [it could not] conclude the change in Georgia law lengthened respondent's time of actual imprisonment" and remanded the case. Id.

In sum, the Garner Court expanded Morales' "sufficient risk of increasing" punishment standard and focused its analysis on whether the amended rule, "in its operation," created a "significant risk of prolonging respondent's incarceration." Id. at 252, 255. The Supreme Court's review acknowledged that states must be accorded "due flexibility" in designing their parole procedures. 529 U.S. at 252. In discussing the role of discretion, the Garner Court noted that in the context of parole, discretion, by its very nature, must be "changing in the manner in which it is informed and then exercised." 529 U.S. at 253. Therefore, a change in the law that alters the way a parole board exercises its discretion does not necessarily violate the *Ex Post Facto* Clause. Id.

The Third Circuit Court of Appeals applied the Garner standard, and after

reviewing evidence of how the Pennsylvania Parole Board implemented a rule change found an *ex post facto* violation. See Mickens-Thomas v. Vaughn ("Michens-Thomas I"), 321 F.3d 374 (3d Cir. 2003). In that case, the state legislature added language to the parole statute that public safety must be considered "foremost." Id., at 377. The statute in effect at the time of the plaintiff's conviction required a balancing test based on several factors. In deciding the import of the modification, the appellate court considered "other events coincident with" the revision, including an operations manual, a Parole Board-authored statement on policy, board statements before and after the change, and statistical data comparing release rates before and after the change. The court held that making "concern for public safety" the overriding consideration for parole violated the *Ex Post Facto* Clause. In effect, the parole board had defaulted its duty to consider "all factors counseling in favor of release." 321 F.3d at 387.

A cursory review of the statistics aided the appellate court in reaching its finding that the plaintiff, whose life sentence had been commuted by the governor, showed a significant risk of increased punishment. In 266 instances of commuted life sentences, the plaintiff was the only one so situated who was not paroled on the first or second attempt. The court concluded that the board "mistakenly construed [the statutory change] to signify a substantive change in its parole function. Id., at 391.

In addition to Supreme Court precedent and case law from other circuits, the Court finds review of the parties' positions cannot begin without consideration of a prior challenge to Michigan's 1992 statutory amendments by state prisoners, who filed a class action challenging the reduction in the frequency of hearings. One class included prisoners, convicted before 1992, who were "serving long, indeterminate sentences,

parolable life sentences, and mandatory life sentences." Shabazz v. Gabry ("Shabazz I"), 900 F.Supp. 118, 121 (E.D. Mich. 1995). The district court characterized the "relationship between regularly scheduled parole hearings and an inmate's opportunity for early release" as "quite significant" and held the change in the interview schedule to be an *ex post facto* violation as to prisoners convicted before 1992. Id., at 127.

The Sixth Circuit disagreed, finding that the amendment, on its face, did not create a sufficient risk of increased sentences for any subclass of prisoners. Shabazz II, 123 F.3d 909, 910 (6th Cir.1997), cert. denied, 522 U.S. 1120 (1998). The Shabazz II decision addressed the postponement of the initial hearing and frequency of subsequent mandatory hearings, noting, "Where amendments to state parole laws postpone initial mandatory parole hearings and decrease the frequency of subsequent mandatory hearings, but nevertheless provide other viable opportunities for parole, such amendments do not produce a sufficient risk of increasing the measure of punishment attached to the covered crimes." 123 F.3d at 910. The court observed that "the 1992 amendments did not change the standard for parole, but allow prisoners ample opportunity to petition the Parole Board for interviews. Further, the 1992 amendments allowed the Parole Board to grant parole interviews of its own volition, and to grant prisoners parole without an interview." Id., at 914. Finally, the appellate court noted that the "anecdotal observations and personal speculations" relied upon by the lower court were not sufficient to show a significant risk. Id., at 915.

In light of Garner, the Court is not limited to a review of the text of the amendments in assessing whether the changes will likely result in a longer period of incarceration, a standard the parties agree cannot be met. Instead, the Court expands

its consideration to whether the practical implementation of the 1992 and 1999 amendments has significantly increased the risk of prolonged incarceration for members of the nonmandatory lifer class.

Before undertaking this analysis, several preliminary matters must be addressed, including whether the discretionary nature of the decision making process forecloses this Court's analysis, and what evidence can be considered in rendering a decision.

1. Preliminary matters

a. Role of discretion

The parties agree that the substantive standard governing parole, found at MICH.COMP.L. § 791.233(1)(a) is discretionary. It reads, "A prisoner shall not be given liberty on parole until the board has reasonable assurance, after consideration of all the facts and circumstances, including the prisoner's mental and social attitude that the prisoner will not become a menace to society or the public safety. The decision is discretionary." Id.

Even as the Court in Garner recognized the caution that cloaks any review of a parole board's exercise of discretion, it clarified that the mere fact that a board's decision is discretionary "does not displace the protections of the *Ex Post Facto* Clause," because there is always the "danger that legislatures might disfavor certain persons after the fact even in the parole context." 529 U.S. 253. Moreover, in Mickens-Thomas, the appellate court deemed the board's failure to exercise its discretion in accordance with the statutory mandates a violation. Additionally, the Sixth Circuit recognized that "the ultimate result [of an claim of retroactive application of a parole statute where the harm is not evident from the textual or structural change] depends on

how the parole board actually exercises its discretion." Dyer v. Bowlen, 465 F.3d 280, 283 (6th Cir. 2006) (reviewing a change in language that instructed that the parole board shall release the prisoner if certain conditions were met to language that the board may release) (emphasis added). Consequently, the discretionary nature of the Michigan standard does not immunize all Board decisions.

b. Type of evidence to be considered

Next, the parties dispute what evidence may be considered in reaching a decision on the merits. Because neither the 1992 nor the 1999 amendments altered the statutory standard on its face, Plaintiffs must show the standard as applied has changed. In reviewing the substantial amount of evidence submitted, the Court is mindful of the Sixth Circuit's warning in Shabazz that "internal memoranda and policy directives are not "laws" for purposes of the *ex post facto* clause. 123 F.3d at 915-16. Nevertheless, Shabazz does not render this evidence immaterial in light of the Supreme Court's discussion in Garner and the cautionary holding is called into question by subsequent Sixth Circuit authority.

Specifically, the Supreme Court found that the lower court erred in not considering the parole board's internal policy statements.

> 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 than an agency's policies and practices will indicate the manner in which it is exercising its discretion.

529 U.S. at 256-57. The Supreme Court further found that when a policy statement is a "formal, published statement as to how the Board intends to enforce the Rule," it should be reviewed. Id.

Finally, case law decided after the parties submitted their pleadings establishes the import of Garner to the matters at hand and provides a blueprint for the analysis to follow. In Michael v. Ghess, 498 F.3d 372 (6th Cir. 2007), the Sixth Circuit noted that for *ex post facto* purposes, the issue is not whether the parole guideline is a law or even whether it presents a significant risk of increasing the maximum penalty; the issue is whether the challenged "guidelines present a significant risk of increasing the plaintiff's amount of time actually served." Id. at *10. Accord Fletcher v. Dist of Columbia, 370 F.3d 1223, 1228 (D.C. Cir. 2004) (observing that the Supreme Court "has foreclosed our categorical distinction between a measure with the force of law and guidelines that are merely policy statements); See also Keitt v. U.S. Parole Commission, 2007 WL 1654161 (3d Cir. 2007) (suggesting that guidelines that are "administered without sufficient flexibility" might constitute laws for *Ex Post Facto* Clause purposes); See Kyle v. Garrett, No. 04-41455, 2007 WL 806916 (5th Cir. March 15, 2007) (reversing the lower court's dismissal of the plaintiff's ex post facto claim arising out of a change in the parole procedures where at the time of sentencing he needed two of three votes of a regional panel, but now needed a majority of the entire 18-member board). Accordingly, the Court reviews not only the statute, but the policy directives, depositions and declarations provided.

2. Impetus for change and conversion of Parole Board policy

At the outset, the Court notes that the cumulative impact of the amendments drives its analysis; thus, the fact that any one of the changes viewed separately fails to satisfy the standard is not dispositive. An overview of the impetus for the1992 changes, in particular the changes in the formulation and make-up of the Michigan Parole Board,

sets the stage for the analysis to follow. It is undisputed that the changes were the culmination of concerns about the release of violent offenders that arose after a parolee murdered four teenage girls in 1990. Defs.' Ex. 9.

> In 1992, Governor John Engler ordered reorganization of the Michigan Parole Board and signed into law statutory changes to accomplish this reorganization. The primary goal of the reorganization was to increase public safety by minimizing the number of dangerous and assaultive prisoners being placed on parole. Another goal was to make the Parole Board more accountable to both the governor and the public.

Defs.' Ex. 2, Michigan Department of Corrections Field Operations Administration Office of the Parole Board, p. 3. When the 1992 amendments were implemented, the MDOC Director, Kenneth McGinnis, testified that the changes were meant to create a board that would be "more accountable." Pls.' Ex. 40, McGinnis Dep. at 17-18. He added that "in all probability," the expectation was that parole rates for violent offenders would go down because those prisoners who were the greatest risk if released would be "identified and separated." Id. at 21-22, 63. McGinnis testified that the changes had "virtually nothing to do with population growth or keeping people in prison." See Pls.' Ex. 40 at 63.

An analysis conducted five years later demonstrated a course of action contrary to this initial assessment and revealed a different purpose: "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." Pls.' Ex. 26, "Five Years After, An Analysis of the Michigan Parole Board Since 1992" at 2. McGinnis summarized the trend as wanting to keep even those prisoners who had served their maximum locked-up. They were released "only . . . because courts and statutes

required them to be released." Id. Notably, "[t]he 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. State law provides and clearly defines the process which allows for parole or commutation from a life sentence." Defs.' Ex. 2, MDOC Field Operations Administration Office of the Parole Board, p. 15.

In the case of nonmandatory lifers, the evidence shows that despite the substantive standard requiring consideration of multiple factors in making the decision to parole, the post-1992 Board failed to exercise its discretion, and true to McGinnis' word, certain groups of prisoners have been kept locked-up as long as possible. Michael Steely, the Administrative Assistant to the chairman of the Michigan Parole Board characterized the change from a civil service board to an appointed board as one in which the question became "Why should we parole you?" rather than "Why shouldn't we parole you?". Pls.' Ex. 12 at ¶ 8. The Court views this characterization, involving the alteration of a single word in the question posed at the start of parole consideration for a nonmandatory lifer, as a reflection of the Board's willingness to foreclose any exercise of its discretion relative to the possibility of parole to the class members. The validity of this characterization is affirmed through the 1999 testimony of Stephen Marschke, the Board Chair, to the Michigan House Committee on Criminal Justice in support of a 1999 amendment to the lifer law.

> It has been the longstanding philosophy of the Michigan Parole Board that a life sentence means just that–life in prison . . . . It is the parol 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.

Pls.' Ex. 27.

The assumptions underlying this statement provide a basis upon which Plaintiffs build their claim. First, Plaintiffs challenge whether the "life means life" philosophy is "longstanding;" they assert that it actually was given birth with the 1992 appointments.[3] Second, they challenge the post-1992 Board's understanding of their role relative to prisoners serving nonmandatory life sentences. Representatives of the Parole Board from the years leading up to 1992 consistently testified that nonmandatory lifers were treated the same as prisoners serving long indeterminate sentences (LIDs) for purposes of parole, whereas now the board aligns nonmandatory lifers with mandatory lifers. Finally, Plaintiffs challenge what factors are considered in reaching a decision to parole: Parole Board representatives, who served prior to 1992, consistently stated that the they looked at all factors, including a prisoner's adjustment in rendering parole decisions, as required by statute, whereas after the amendments the Board uses the seriousness of the crime as a flat ban on release.

The Court examines each of Plaintiffs' contentions below. To make their claim, that the post-1992 Board views life with the possibility of parole sentences differently than previous Boards, Plaintiffs rely in large measure on the declarations of Parole Board members who served before and after the amendments as well as MDOC employees and MDOC publications.

Defendants posit that even accepting Plaintiffs' assertions, a "climate change" is not enough. They rely on the concurring opinion in Garner to support their position that in order for the *ex post facto* claim to succeed, Plaintiffs must show more than a change

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[3]The Michigan Parole Board's understanding surprised state court judges, who expected a nonmandatory lifer to serve just over 15 years. Pls.' Ex. 36 at p. 15.

in the prevailing views/goals of the individual members of the parole board. Garner, 529 U.S. 259 (noting that the *ex post facto* clause requires more than a complaint that the parole board has been replaced by a new, tough-on-crime board) (Scalia, J., concurring). Courts have endorsed Defendants' position that a "life means life" policy fails to meet a plaintiff's burden to show an *ex post facto* violation. See e.g. Shultz v. Rubitchun, No. 1:05-CV-697, 2005 WL 3262435 at *5 (W.D. Mich. Nov. 30, 2005) (internal citations and punctuation omitted) ("The fact that Parole Board members are no longer civil service employees does not give the Director greater discretion in firing them and does not make them more amenable to political influence. The bias alleged by the [Plaintiff]– the `general tendency of an administrative agency to serve the executive under which it derives its authority' and the general bias in favor the alleged state interest or policy—does not render the agency unable to make an objective analysis. Thus, although current Parole Board members are guided by an underlying philosophy that is different than the philosophy of former Board members, this does not constitute the application of a newly enacted law or formal policy in a manner that would violate the *Ex Post Facto Clause*."); See also Maile v. Lafler, 2006 WL 229876 (E.D. Mich. Jan. 30, 2006) (rejecting the argument that the composition of the board and the policy that "life means life" can serve as bases for an *ex post facto* clause violation).

Although the Court agrees that a mere philosophical change in members of the Michigan Parole Board may not satisfy the standard, Defendants' reliance is misplaced. Plaintiffs do not limit the basis of their motion to such an argument, and the circumstances giving rise to the issues at hand cannot be characterized as such. If Plaintiffs merely challenge the underlying philosophy that guides the current Michigan

Parole Board members in making decisions as to how best to protect the public safety, they have no claim. A change in the collective philosophy that limits the exercise of discretion in a manner contrary to the substantive standard and guidelines, however, may satisfy Garner.

The evidence before the Court cannot be characterized as the comments of an individual board member on his or her own philosophy about parole, but rather must be characterized as evidence of the guidelines informing the whole Board's exercise of discretion. Defendants have not contested the evidence itself, merely its materiality. Further, the Court rejects Defendants' attempt to springboard Justice Scalia's concurring opinion into one that precludes consideration of the bulk of the evidence presented by Plaintiffs to make their claim. Consequently, the import of the 1992 changes to the make-up and formulation of the Parole Board itself must be assessed relative to the other procedural and policy changes.

Plaintiffs identify several changes as demonstrative of how the amendments have created a significant risk of prolonged incarceration. All of these changes are viewed in the context of a wholesale change in Board membership and in conjunction with each other.

3. Impact of New Board

Defendants contend that Plaintiffs have no evidence that new members were appointed for their anti-parole philosophy and/or willingness to please the governor. Defendants are correct that direct evidence is lacking. Nevertheless, the manifestation of the newly appointed members' understanding of their job is revealed by the post-1992 Board conduct.

a. Comparable groups

William Hudson, who served as Administrative Assistant to the 1977-80 Board, as a member from 1980-85, and as Chairman from 1986-91, stated that the Michigan Parole Board's "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. See Pls.' Ex. 4, Hudson Decl., at ¶¶ 7, 8. Both Perry Johnson, MDOC Director from 1972-84, Pls.' Ex. 2 , Johnson Decl. at ¶¶ 10-12, and Robert Brown, MDOC Director from 1984-1991, concur. Accord, Pls.' Ex. 10 at ¶¶ 11-12, Decl. of Frank Buchko, who served on the Board from 1962-74.

To achieve uniformity, the pre-1992 Board calculated the grid scores for nonmandatory lifers as well as for LIDs. See Pls.' Ex, 3, Brown Decl., Pls.' Ex. 10, Bucko Decl. The Commutation and Long-Term Release Guidelines, which were developed in the early 1980s, allocated points for the offenses and prior record to both lifers and LIDs.

> 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 probability 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.

Pls.' Ex. 6, Gabry Decl. at ¶ 13.

"The grid score was the number of years a person with a good institutional record could expect to serve. . . . Although a score was not binding, the Board used the score routinely as a reference point." Pls.' Ex. 3, Brown Decl. "Lifers as a class scored high

on guidelines back then, being usually well-behaved and often having few or no prior offenses." Pls.' Ex. 6, at ¶ 15.

The "real difference between the LIDs and those under the lifer law other than first-degree murder was that the LIDs would one day pass their minimum term and be fully parole eligible (with or without the trial court's permission), [whereas] the second group could only be paroled if the[ ] sentencing judge did not object in writing, and after a public hearing. [Nevertheless] the standards by which these groups were judged for parole purposes were the same in most cases." Pls.' Ex. 10, Bucko Decl. See also Pls.' Ex. 3, Brown Decl. at ¶ 12.

In addition to the testimony of former Michigan Parole Board members and MDOC employees, documents created by MDOC, from as far back as 1942, demonstrate that the two groups were coupled for parole consideration purposes. The lifer law granted the parole board jurisdiction to nonmandatory lifers after they had served ten years and included LIDs with minimums so long they would be expected to serve more than the ten years. See Pls.' Ex. 24, "Third Biennial Report" at 91. Finally, Plaintiffs' sampling of prisoner files shows that the guidelines were calculated for nonmandatory lifers. See Pls.' Ex. 72, (random prisoner files) 13-19. William Kime, who worked for MDOC from 1969 until 1989, as Deputy Director in charge of the Program Bureau, oversaw research, evaluation of program success, new program and risk prediction development for use by the Parole Board. As part of his job responsibilities, he reviewed past practices of the Parole Board. He concurs that the same standards were applied to LIDs and lifers. Pls.' Ex. 5.

After the 1992 amendments, the goal changed from one of uniformity between

the two groups to one of categorical denial to nonmandatory lifers, absent a medical reason. As noted by Gabry, Pls.' Ex. 6, the Board no longer uses grid scores for lifers, and "[t]he parole of a lifer would require a majority vote of the entire Parole Board (six votes), and with the composition of the Board--except for drug-lifer cases or what you could call medical paroles--the likelihood of obtaining a majority was not great."

Stephen Marschke, who served from 1992-96, and chaired the Board from 1996-2002, Pls.' Ex. 39 at 74, and former MDOC Director McGinnis concur that the post-1992 Board treated the two groups differently for purposes of parole. One of the grounds identified as a basis for the change in treatment was the procedural differences in the process for the two groups. Gabry explained the procedures:

> After a prisoner had served his required minimum term, he or she could be paroled by two votes of a three-member panel of the board. In those days, for non-lifer cases, the parole process was as follows: the computer system would identify an inmate months before the inmate was up for review. A parole eligibility report would be put together by prison staff and added to the inmate's file. The chair would appoint a panel of three board members for each inmate. The first person would be the file screener, the second person would be the interviewer, and the third person would serve as the tiebreaker if necessary. The screener would make a recommendation based on the file. That person would normally vote based on the file alone, although the screener could wait for the interviewer's comments. If the screener and interviewer disagreed, a third member or I as chairman would break the tie.
>
> With regard to lifers, it was my position that coming within the jurisdiction of the parole board after 10 years was not the same thing as being parole-eligible upon completion of the minimum sentence (less any good time) in non-lifer cases. The process was also different, because to parole a lifer you needed a majority of the board to take interest in the case. Then you needed a request for approval of the sentencing judge to allow the scheduling of a public hearing, and after review of the information obtained at the hearing, you needed a majority vote of the board to release the prisoner on parole.
>
> The information board members received when reviewing a lifer's file consisted of (1) the central office file and (2) the parole eligibility report.

> The central office file was a history of the prisoner with the parole board, including sheets from past interviews, often by different board members; hand-written notes; and old grid scores. The parole eligibility report summarized how the prisoner was doing at a particular institution. The institutional file was used to evaluate non-lifers and was kept at the institution where the prisoner was being held. With the guidelines for non-lifers, we could identify an inmate as low, medium or high likelihood of release . . . . With lifers we just had to rely on our own judgment. . . .
>
> The process for a lifer interview began with getting the central office file and looking at it, to get a feel for the person you, as a board member, were dealing with. Then there would be an interview. The meetings were conducted as conversations, without any format beyond that. There was no real training that told parole board members what things to look for in considering lifers for parole, or how to conduct the interview. At the end of an interview, a board member might have said, "I have no interest in going to the board." Or, she might have come to the opposite conclusion.
>
> At executive committee sessions - meetings of the full parole board occurring roughly monthly . . . all eligible lifers had to be voted on, even if only to conclude that there was "no interest," the most common response. Any inmate a board member had an interest in paroling got docketed. At the executive sessions a member would speak for the inmate whose case he or she was interested in. The member would advocate for the parole of that inmate and there would be five votes of the ten on the board (including the interested member) would be needed to proceed to the next step, preparation of a lifer report. But it was very rare that anyone got through.

Pls.' Ex. 6 at ¶¶ 17-19, 22-23.

Marschke testified at his deposition that during his tenure on the Board, from 1992 through 2002, the Board would not think about looking at a lifer case before the twentieth year. Pls.' Ex. 39 at 80. Yet, Kime's study revealed that "the mean number of years actually served by parolable lifers who were paroled during his tenure, from 1969-1989, was approximately 18. 8." Id. at ¶ 6. Marschke, who coined the phrase, "life means life," stated that his view was that parolable life was essentially the same as mandatory life. Id. at 125-26. Gabry explained the genesis of the change.

> The "life means life" idea was for me really a response to the inmates who, as the more conservative board took hold, began complaining about not being released in the time they had expected - the 12 - 16 years they thought they would be serving. They would ask in the interviews, "What do you want me to do?" and I had no response other than to tell them to "serve more good time." I told them that the board did not have to parole them because "life means life" - because that had become the reality with the new board.

Pls.' Ex. 6 at ¶ 30.

Gabry's understanding is confirmed by the evidence complied by the Plaintiffs on the history of parole in Michigan. The parole approval rates from 1990 to 2004 fell from 61.2% to 34.5% for all violent offenses. Pls. Ex. 53. The Court finds the testimony further reflects the post-1992 Parole Board's belief that the procedural differences in the parole process for nonmandatory lifers and LIDs created a different standard of consideration.

Nevertheless, the testimony of Parole Board members, MDOC personnel, and records confirm that a consistent approach to nonmandatory lifers occurred until the appointed members joined the Michigan Parole Board. Because the procedural differences in parole for nonmandatory lifers and LIDs preexisted the 1992 Board, the reinterpretation of the meaning of the procedural differences may be attributed to the change in the make-up of the Board. The testimony shows that the new Board's approach to nonmandatory lifers indeed became "life means life."

b. Exercise of discretion

Plaintiffs argue that the Board executed its changed policy by refusing to exercise its discretion. Ronald Gach, who served on the old and new Board from 1985-2000, described the change in policy as follows, “it became nearly impossible [to] get the board to agree to parole even a fully rehabilitated and long-serving parolable lifer.”

Pls.' Ex. 7 at ¶¶ 2-4. He notes the seriousness of the crime alone was a significant basis for denying parole, unless the inmate was ill. This opinion is shared by Jessie Rivers, who was appointed to the Board in 1992, and Gary Gabry, first Chair of the new Board.

Specifically, Jessie Rivers, who served from October 1992 through December 1993, stated that "any discussion of lifer paroles always devolved into a discussion of the inmates' original offense, and the Board would almost always deny parole based just on the offense. The members of the [Michigan Parole] Board did not intend to release any lifer who committed a serious offense." Pls.' Ex. 11 at ¶ 10.

Gary Gabry (1992-1996) likewise testified that the decisional process "really focused on the crime, as opposed to the decades the lifer may have spent in prison with perfect conduct." Pls.' Ex. 6. He added that he attempted to expand the focus from "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 . . . ." Id.

The appointed Board's myopic view of the relevant factors stands in stark contrast to the statutory language, which requires that the Parole Board have reasonable assurance that the prisoner will not "become" a menace to society. Gabry maintains that the language itself suggests that once an inmate comes within the jurisdiction of the Board, it should look at the evolution of the inmate since the crime.

> Once the minimum term is served, the Board is to see if the person would "become a risk" if released. In other words, good behavior, adjustment, program completion, etc., all would help the Board determine if now that the person has purged himself of his risk to the public by serving his minimum, is there reason to believe he will become a further risk.

Id.

The erosion of the substantive standard becomes more clear when considering the comments of MDOC personnel. According to Brown (MDOC director 1984-1991), before the changes in policy in 1992, the members looked at whether the inmate was suitable to rejoin society. It was rare for Parole Board members to deny people based on the "nature of the crime" instead of their subsequent behavior and programs. Pls.' Ex. 3.

These observations, even if deemed anecdotal, are backed by the documentary evidence. For example, the parole criteria identified for consideration in 1974 Annual Report of the Michigan Department of Corrections, Pls.' Ex. 25 at p. 99, include prior record, seriousness and nature of current offense, circumstances of the offense, the placement situation, and the institutional record. This set of criteria, applied to nonmandatory lifers, played no role after the 1992 amendments. Specifically, the September 1997 Report by the Michigan Department of Corrections entitled "Five Years After an Analysis of the Michigan Parole Board Since 1992," Pls.' Ex. 26, summarized the overhaul by Governor Engler in 1992, the intent of which was "to make Michigan communities safer by making more criminal serve more time and keeping many more locked up for as long as possible." One difference identified is that the Parole Board is "much less willing to release criminals who complete their minimum sentence–and much less willing to release criminal at all, forcing many to serve their maximum sentences." Id. The report notes that the approval rate for parole candidates showed a drop from 66.1% from 1988-1991, to 55.7% for the new board (1994-1997). The percentage of prisoners serving their maximum sentence has increased from 19.2% under the old

board to 34.8 % under the new board.[4] Id.

After the 1992 amendments, the potential danger to the public was assessed solely from the standpoint of the seriousness of the crime. The Garner Court noted that in the context of parole, discretion must be "changing in the manner in which it is informed and then exercised." Yet, Defendants have presented no argument that new studies on recidivism or predictive factors informed the post-1992 Board's exercise of discretion. The evidence shows that the new Board reinterpreted its role relative to nonmandatory lifers, equated a procedural difference in the parole processes for LIDs and nonmandatory lifers as substantive, and manifested its understanding by categorically denying parole to nonmandatory lifers except for drug and medical hardship cases.

c. Less frequent review and elimination of interview

It is uncontested that prior to 1992, the Michigan Parole Board interviewed lifers more frequently and conducted file reviews every year. See Pls.' Ex. 4, Hudson Decl. at ¶ 4. In 1992, the review schedule was changed to a five-year period. In 1999, the in-person interview requirement was eliminated.

The parties agree that less frequent review does not constitute a *per se* violation of the clause, particularly when the parole authority is able to set hearings sooner that the outer statutory limit. Cf. Jernigan v. State, 340 S.C. 256, 264 n.5 (S.C. 2000) (finding a statute that delayed review for one year violated the *ex post facto* clause because it automatically increased violent offenders parole consideration from one year

[4]Although the numbers do not distinguish between lifers and LIDs, the information underscores the evolution and impact of the amendments and the manner in which the Parole Board exercises its discretion.

to “every two years, and failed to provided for an earlier discretionary review).

Defendants explain that the Michigan Parole Board could never keep up with interviews for the 1700 lifers eligible for parole. Marschke testified regarding the merit of interviews in support of the 1999 amendment eliminating re-interviews. He stated that interviews were of "little benefit" because the "Parole Board would probably never receive jurisdiction from the sentencing judge to parole" or make the request. Pls.' Ex. 27. Further, not every lifer is a good candidate,[5] the change in the in-person interview requirement and the change in timing merely “relieve the Board of the costly and time-consuming responsibility of scheduling parole hearings for prisoners who have no chance of being released.” See Morales, 514 U.S. at 511. Even if Defendants' goal is laudatory, the Court's focus must be on the effect of the change relative to the length of incarceration, not the stated purpose.

The evidence shows that the Michigan Parole Board's ability to schedule a review sooner than the proscribed five-year period does not play out in practice. According to Marshcke, the five-year lifer schedule is almost never accelerated. Pls.’ Ex. 39 at 74-77 (except for medical cases). After the review dates are set by computer, the file is not brought to the Board’s attention until shortly before the next five-year review. It is essentially automatic. Pls.’ Ex. 42, Rubitschun Dep. at 41. Because the review is, in practice, the precursor event or trigger for lifer parole, the changed

[5] Defendants also claim that there were 27 paroles granted prior to the 1999 elimination of mandatory interviews, and 47 granted in the six years following, when interviews were discretionary. The Court does not find these statistics helpful to its analysis because Defendants have not provided information as to whether the paroles were to drug/lifers, who are not part of this class, or medical hardship paroles or "routine" lifer paroles. Therefore, the numbers do not promote any meaningful analysis.

schedule disadvantages the offender.

Of the 19 random files reviewed by Plaintiff's counsel, in nearly every case, the old Board expressed interest in parole before the 15th year. Pls.' Ex. 72. Therefore, the new system harms nonmandatory lifers because even a close case is not reviewed more frequently than a hopeless cause. Additionally, even if new information becomes available, for example if a judge withdraws his or her judicial veto, the case would not be reviewed until the five-year period is fulfilled. Thus, the system harms the class members because new information or corrected information is not acted upon in a timely manner.

The elimination of an in-person interview similarly disadvantages the nonmandatory lifer. The in-person interview generates a written record that is part of the file. In the absence of an interview, the only new information added is the form notice of "no interest" with a number code that means a routine lifer denial. Moreover, an interview not affords a prisoner the opportunity to insure that mistakes in the record are corrected, it affords a lifer the opportunity to make an impression, whether favorable or not.

Plaintiffs' counsel describes the comments of interviewers as "riveting," a dialogue about the prisoner's progress. Moreover, seeing the prisoner can bring home the point that the "felon is now an older man or women who has lived an exemplary life for years." Pls.' Brief at 49. Plaintiffs' observations are supported by the declarations from many past members of the Parole Board and MDOC personnel regarding the import of interviews to the parole process.

For example, interviewing a prisoner in advance of eligibility facilitated an

exchange of information between the Board members and the prisoners, a process described by one member of the Board as "crucial." Pls.' Ex 4, Hudson Decl. at ¶ 11. The interview "affords board members the opportunity to record their reactions and thoughts in the file. These notes were placed on the right side of the file, so that they were part of the ongoing "story" of the prisoner. In looking at a file, you could see not only what the previous board members thought, but you could see that information in the timeline of what else was going on with that prisoner. The right side of the file included paperwork like transfer documents, misconduct tickets, work reports - all the things that provide context for what the prisoner is doing and how he is progressing." Id., at ¶ 12. Finally, according to Sampson, the Board never moves forward in a nonmandatory lifer case to a public hearing without an interview. Pls. Ex. 43, Sampson Dep. at 24-5.

In sum, the Court finds the value of the interview cannot be overstated, whether it aids a prisoner's progress toward parole or defeats it. In the absence of an interview and in the absence of a file review, parole will not occur. Therefore, before 1992, parole was possible at least every other year, once a nonmandatory lifer served the ten-year prerequisite. Now, it is only possible every fifth year. Moreover, Plaintiffs have satisfied the Court that reviews are not scheduled outside the five-year review period established in the 1992 amendment. This change, in conjunction with the others, significantly impacts the length of time of actual imprisonment.

d. Parole rates

The Citizens Alliance on Prisons and Public Spending gathered statistics which help formulate the assessment of whether the 1992 and 1999 amendments significantly

increased Plaintiffs' risk of increased incarceration. The parties review the same data and declare victory based upon the numbers. After reviewing the arguments advanced by the parties, the Court expresses its agreement with Benjamin Disraeli, "There are three kinds of lies: lies, damn lies, and statistics." It is incumbent upon this Court to sort the evidence and decide what will be considered and what the numbers means.

In resolving how to view the statistics, and what outcome they dictate, the Court must resolve how best to consider pipeline paroles, that is those paroles approved before the appointed Board took over, whether to include the 2005 statistics, as advocated by Defendants, and what role the years between 1985 and 1995 should play in the analysis. The bottom line is what the data reveal relative to assessing whether a significant risk of increased punishments resulted from the amendments.

Under Defendants' analysis[6] of the statistics, in the ten years before 1992, there were 28 paroles granted; in the ten years after 1992, 42 paroles were granted--a 50% increase over the number of paroles granted in the ten years before the "ex post facto" laws were enacted. See Defs.' Ex. 3, "Michigan Lifers Parole Between 1/1/70 to Present." Further, according to a 2002 assessment by MDOC, "[t]he statistics over the past 30 years have been fairly consistent. An average of 8.3 prisoners per year, serving

[6]Defendants also argue that the appropriate focus is not on approval rates, but denial rates. According to Defendants, approval rates overstate a prisoner's chance of parole, and refocusing on denial rates clearly shows that Plaintiffs did not have an excellent chance at winning parole. Under Defendants' viewpoint, only 5% of lifers stood a chance of being paroled. Only a small percentage of that 5% has been affected, if at all, by any of the identified changes. Therefore, Defendants conclude that Plaintiffs' claim fails as a matter of law. The Court declines Defendants' invitation to limit its review to denial rates: the overall chance of gaining parole is not the standard that Plaintiffs must meet.

a life sentence, have been released through the lifer law or commutation process." Defs.' Ex. 2, MDOC Field Operations Administration Office of the Parole Board, p. 15.

The Court observes that it is not the first to have these numbers before it in assessing whether the new Board instituted a "life means life" policy, and whether the manifestation of this policy violates the *Ex Post Facto* Clause. Those state and federal courts analyzing the numbers have unanimously concluded that claims akin to the one Plaintiffs advance here fail as a matter of law.

For example, in People v. Hill, 705 N.W.2d 139 (Mich. Ct. App. 2005), the state appellate court concluded that even if the "life means life policy exists," the defendant failed to establish that it was not in effect when he was sentenced to parolable life imprisonment." Id., at 142. The state court reached its conclusion based on the fact that from 1941 through 1974, only about twelve lifers eligible for parol were paroled in a year. From 1975 through 1992, before the policy existed, the number dropped to only four. Finally, the Hill court noted that after 1992, the numbers increased. Fourteen lifers were paroled in 1994; and twelve from 1995 through 1998. Therefore, it concluded that "no discernable change in practice" had occurred. Id.

The reasoning is flawed. First, the state court attributed paroles made after 1992 to the post-1992 board. Evidence in this case shows that the "pipeline paroles" cannot be attributed to the new Board. In 1992, before the new Board was put into place, the old Board issued or reissued favorable decision in 47 lifer cases, moving them forward for public hearing. Thirty-nine of the candidates were approved. Gabry explained,

> 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 by Tom Patten or Ron Gach about each case, where it was in the pipeline, 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.

Pls.' Ex. 6, Gabry Decl. at ¶ 31. Even beyond 1993, Gabry recalls that those lifers that were paroled were either in the pipeline or "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.)" Id. In more routine cases, the new Board rarely recommended parole for a lifer." Id. Not only did the holdover members recognize that the grants of parole in the two years following 1992 reflect pre-amendment decisions, the MDOC itself considered 1992-1993 "transitional years." See Pls.' Ex. 26. Thus, the increase in lifer paroles from roughly 1992-94, are better attributed to the old Board.

Yet another defect in the Hill analysis is its reliance on the raw numbers. The prison population and number of prisoners serving life sentences with the possibility of parole has increased dramatically over the last thirty years. In 1975, there were 66 eligible lifers; in 1985, 294 eligible lifers, in 1995, 960 eligible lifers. Consequently, the fact that the average number of lifers paroled each year has remained steady does not support Defendants' position.

When the number of prisoners paroled are considered in light of the number of parole-eligible lifers in the pool, the old Board recommended release of six percent of the pool, and five percent of the pool was released. The undisputed testimony is that the new Board did not initiate these releases and attributing those releases to it to measure the post-1992 rates defies logic. Therefore, 1995 is the beginning point for lifer paroles initiated by the new Board.

Finally, the Court must decide whether the analysis should include statistics from 2005. Defendants' analysis builds on the fact that 13 lifers were paroled that year, and when that information is included, from 2000 to 2005, the new Board paroled 36 lifers. The Court declines to review evidence arising after the lawsuit was filed, and limits the relevant time frame to what occurred before Plaintiffs filed suit. Even if the Court were to consider the rates from 2005, Defendants included drug lifers in their numbers. Because the class was redefined after the briefs were filed, drug lifers are no longer included in the class. Thus, the statistics are of little value.

Accordingly, the Court finds Defendants have failed to establish their position that the numbers unequivocally support not only an increase in paroles of nonmandatory lifers, but sustain their burden of showing that the amendments do not create a significant risk of longer incarceration to the class. The Court therefore examines the evidence offered by Plaintiffs to support their position that a significant decline in parole rates has occurred since 1992.

Plaintiffs assert that the parole rates from 1942 until 1984 show that nonmandatory lifers were paroled at a “steady 5-15 percent rate, with the average time served steady at 15-18 years." Plaintiffs use 1995 as the starting point for lifer paroles initiated by the new Board, and examine the years from 1995-2004. The new Board paroled two lifers per year at a rate of .15%. The average number of years served climbed from 19.2 during 1995-99, to 23.2 during 2000-04. In short, Plaintiffs’ position is that the average number of years served increased as the average rate of parole for eligible lifers decreased.

Plaintiffs have failed to include the numbers from the years immediately

preceding the 1992 amendments in their assessment. However, Plaintiffs' admission that lifer paroles declined markedly in the years before 1992 does not eviscerate their claim, provided they can show that the reason was not the parole laws, that is a change in the parole standards or policy, but the exploding prison population. Accordingly, the Court examines Plaintiffs' rationale for the exclusion.

In deciding how to look at the data arising from 1985-95, the Court finds the Michael decision instructive. 498 F.3d 372. The Sixth Circuit, in reviewing a "statistical study that purported to show that inmates served longer sentences" under the amended Ohio guidelines, noted that any such a showing was "unsurprising" in light of the state court's decision in Layne v. Ohio Adult Parole Authority, 780 N.E.2d 548 (Ohio 2002). Id. at 376-77. In Layne, the Ohio Supreme Court instructed the parole authority to calculate a prisoner's parole guidelines based upon the offense of conviction rather than the offense for which a prisoner had been acquitted or charges dropped pursuant to a plea agreement. Thus, those prisoners eligible for parole before the Layne decision had criminal history points based on the indicted offense rather than the conviction and the guideline ranges exceeded the minimum sentence. This fact skewed the data, rendering the increase in the length of sentence served by the prisoners nonpersuasive in showing an *Ex Post Facto* Clause violation. The plaintiffs in Michael additionally failed to establish their claim because they failed to compare the amount of time served under the new guidelines to the pre-guideline practices.

In light of Michael, the Court would be remiss in assessing the parole rates in a vacuum; the context in which the rates arose cannot be ignored. The legal standard is whether a law or rule's "retroactive application will result in a longer period of

incarceration than under the earlier rule," Garner, 9 U.S. at 255, and an analysis of whether the amendments violate the *ex post facto* clause because of their application must take into account those factors relevant thereto. Defendants have not disputed the facts underlying the reasons advanced, and they are deemed accurate for purposes of the Court's analysis.

In 1977, prisoners filed a class action lawsuit challenging the Parole Board's failure to provide fair procedures to parole-eligible prisoners. The suit, Sweeton v. Johnson, No. 77-72230, resulted in federal court monitoring of parole, which continued through June 1985. The consent judgment required timely action in preparing parole eligibility reports, notice of upcoming parole hearings, and interviews. Two years later the court granted plaintiff's motion to reopen the action and imposed sanctions for the board's failure to abide by the terms of the consent judgment. Sweeton v. Brown, 1991 WL 181751, 944 F.2d 905 (6th Cir. 1991). According to Robert Gillett, who represented the plaintiffs in Sweeton, the Parole Board's difficulty in complying with the Sweeton deadlines was threefold: the growth of the prison population; the need to implement systems; and most importantly the Prison Overcrowding Emergency Powers Act ("POEPA"), MICH.COMP.L. § 800.71 (1980).

Robert Brown, Jr., (Pl.s' 3), who served as the MDOC Director from 1984 until 1991, described the POEPA:

> Under this act, any time prison capacity was exceeded for more than 30 consecutive days, the Corrections Commission would notify the Governor, who had a certain number of days to verify the 30-days of overcrowding. If there was overcrowding for 30 days, the Governor would declare a prison overcrowding emergency and the Department had to reduce the minimum sentences for all prisoners (except for lifers and those serving mandatory gun sentences) by 90 days. This led to many prisoners having their sentences reduced significantly, and made about 1,000 more prisoners

> eligible for parole each time an emergency was declared. With those emergency releases, every prisoner basically came out of prison as an early release, and the parole board - which was just five members (later seven) back then - was overwhelmed by the extra work load.

The POEPA was invoked on nine occasions to move forward by 90 days the earliest release dates (ERDs) for all prisoners with minimum sentences. This "buried" the Board with new cases. Pls.' Ex. 23.

Moreover, as the prison population mushroomed in the mid-to-late1980s, commitments increased from 6,100 in 1981 to 12,700 in 1989, "it is fair to say that the Parole Board was overwhelmed." Pls.' Ex. 2, Johnson at ¶ 16. "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 the prisoners who were most likely to be paroled, just to get people out the door. The interviews and paroles of 10-year lifers and some LIDs were surely delayed as a result." Id. at ¶ 18.

In addition to the scarcity of resources caused by the POEPA, the 1982 lifer amendments required more frequent parole review for lifers and LIDs. MICH.COMP.L. §791.234 (4) (1982). To combat the problem, the Parole Board released the prisoners easiest to release, prisoners with shorter terms who passed their ERDs, and put off lifer parole interviews. According to Plaintiffs, even lifers who were board-interviewed and approved were not processed for public hearing. Finally, Plaintiffs maintain that another reason the rates dropped significantly after 1985, was the number of prisoners receiving life commitments skyrocketed in the mid-1970s. So ten years later, the number entering the pool jumped from under 300 in 1985, to almost 800 in 1992. Pls.' Ex. 52. This increase drove down the parole rates.

The Audit Report of Parole Decisions and Release Date Computations Department of Correction November 1, 1983, through August 31, 1987, Pls.' Ex. 32, shows that in June 1987, there was a backlog of 800 interviews for prisoners serving life and long indeterminate sentences. The annual number of lifer interviews dropped to 540 in 1984, 252 in 1986, and to 57 for the first half of 1987. At the same time, the average number of eligible lifers doubled. Pls.' Br. at 38-9.

In light of the conditions impacting the Parole Board's ability to interview nonmandatory lifers, a prerequisite to parole, the Court is not surprised that the rates dropped after 1985. The drop can be attributed to prison overcrowding, the federal court monitoring, and the POEA, rather than a change in the law governing lifer parole.

The Court agrees with Plaintiffs that the parole policy has changed for drug lifers, a group in which members have been approved by the Parole Board even before eligibility. Pls.' Exs. 70, 71. Likewise, policy has changed for nondrug mandatory lifers. Pls.' Ex. 51. In the past five years, even including medical paroles, the new Board has paroled nonmandatory lifers at a rate of .2%. Pls.' Ex. 54.

The change in the make-up of the Michigan Parole Board, the Board's understanding of why the change occurred and how it was to exercise its discretion, its redefining of the eligibility procedure for nonmandatory lifers, and changes to the timing and intervals of the interview and review process, when considered in total have significantly disadvantaged the class and constitute a violation of the *Ex Post Facto* Clause.

IV. CONCLUSION

For the reasons discussed above, the Court **GRANTS** Plaintiffs' motion and **DENIES** Defendants' motion.

IT IS SO ORDERED.

s/Marianne O. Battani
MARIANNE O. BATTANI
UNITED STATES DISTRICT JUDGE

Dated: October 23, 2007

CERTIFICATE OF SERVICE

Copies of this Order were served upon the parties of record, on this date by ordinary mail and/or electronic filing.

s/Bernadette M. Thebolt
Deputy Clerk