**STATE OF MICHIGAN**

**IN THE 30TH (INGHAM COUNTY) CIRCUIT COURT**

EDWARD ALLEN, OLIVER HARDY, and MICHAEL WATKINS, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

DANIEL HEYNS, Director of the Michigan Department of Corrections, THOMAS COMBS, Chair of the Michigan Parole Board, and RICHARD SNYDER, Governor of Michigan, in their official capacities,

Defendants.

File No. 12-907-CZ

Hon. Joyce A. Draganchuk


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## PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR STAY

The plaintiffs oppose the defendants' motion for a stay of any remedial order.

### Argument

The defendants have a high burden. In order to get a stay they must show (1) that they are likely to succeed on the merits; (2) that they will suffer *irreparable* harm without a stay; (3) that the plaintiffs will not be substantially harmed by a stay; and (4) that granting the stay would serve the public interest.

**1. Likelihood of Success**

As to the first issue, the defendants simply restate their arguments on the merits, which

this Court has already rejected. Nothing has changed that would indicate the defendants are likely to succeed on the merits.

**2. Irreparable Harm to the Defendants**

The defendants argue that when a state is enjoined from effectuating statutes enacted by the legislature, the state suffers irreparable harm. Defs' Brief, at 9. But in granting remedial relief in the present case, the Court will not be *blocking* a state statute, but rather applying it (a) as it is written, (b) as it has been interpreted by the state appellate courts, and (c) as it has been uniformly interpreted by prosecutors, criminal defense lawyers, probation departments, and judges for decades. Applying the law correctly – consistent with the standard practice all across the state – cannot possibly cause harm to the defendants, let alone irreparable harm.

On the defendants' theory, no court could ever say what the law is, because (according to the defendants) "any such declaration … should be left to the Legislature." *Id.,* at 10. But it is the job of the courts, not of the legislature, to interpret statutes and to decide what they mean.

Moreover, a threat of irreparable harm requires that "there exists a real and imminent danger or irreparable injury." *Kernen v Homestead Dev Co,* 232 Mich App 503, 509 (1998), quoting *Jeffrey v Clinton Twp,* 195 Mich App 260, 263–264 (1992). Speculation about future harm is not enough. *See Pontiac Fire Fighters Union Local 376 v City of Pontiac,* 482 Mich 1 (2008) (significant layoffs of firefighters causing concern for safety of remaining firefighters amounted only to speculation of future harm).

The parole board retains ultimate discretion in deciding whether to grant parole to each prisoner. Each board member will retain his or her full capacity to decide when and under what conditions an inmate should be released.

The defendants might have a better argument if they maintained that the remedial order

would place a great burden on their ability to carry out their work. But that is not the argument they make, and in fact the plaintiffs' second proposed remedial order comports with, and actually exceeds, the time-lines that the defendants requested in their own proposed remedial order. *See* Plaintiffs' Reply to Defendants' Proposed Remedial Order, filed simultaneously with this brief.

**3. The Harm to the Plaintiffs Is Substantial**

The defendants argue that the harm to the plaintiffs will be "comparatively small." Defs' Brief at 10. The Court found that the defendants have been treating 130 prisoners as if they were serving mandatory life when in fact they are not. We know that the parole board recommended some members of the plaintiff class for commutation public hearings during the Granholm administration, and the cases were either rejected by the Governor, or were processed too late to be considered by the Governor before she left office.

If those prisoners had been correctly classified as serving parolable life instead of mandatory life, the board would not have needed to recommend them for *commutation* public hearings, but could and would have recommended them for *parolable lifer* public hearings instead. Based on the approval rates of cases that get such a favorable recommendation, we can be statistically certain that *some* of these people would have been paroled.

Because Michigan is not a death penalty state, the removal of liberty is the greatest harm that the state can impose. If members of the plaintiff class have served even a day in prison that they would not have served but for the defendants' misinterpretation of the law, then they have suffered not just substantial harm, but irreparable harm, because that time cannot be returned to them.

And the harm is not limited just to the ten or so class members who were recommended for commutation public hearings. The plaintiffs estimate that another 30 or so class members

have served long enough on their life sentence, with a short enough consecutive sentence, that they would be viewed by the board as comparable to other parolable lifers whom the board has recommended for parolable lifer public hearings, and whom the board has *approved for parole.*

Unlike *Rhinehart v Scutt*, 509 F App'x 514 (6th Cir 2013), a recent Sixth Circuit case in which an inmate was denied injunctive relief for a medical procedure because the treatment was not essential and he was already receiving adequate care, the *Allen* class has no alternative. The plaintiffs either get parole review or they do not. As a result of the defendants' interpretation of the statutes, the plaintiff class has been permanently ineligible for parole. The plaintiffs, many of whom (under this Court's ruling) have been *eligible* for parole for over 15 years, face a "real and imminent" risk of increased punishment if their "commutable only" status is extended.

Contrary to what the defendants argue, the question is not "Is there a right to parole?" *See* Defs' Brief at 10. Rather the question is, "Have the plaintiffs suffered substantial harm?" The defendants have the high burden of showing that their illegal policy (of treating parolable lifers as if they were serving mandatory life) has not impaired or delayed or prevented the release of some members of the plaintiff class.[1] The defendants have not and cannot meet that burden.

**3. The Harm to the Plaintiffs Outweighs any Harm to the Defendants**

The defendants have not identified any harm that results from being required to interpret the state law as it is written, as the appellate courts interpret it, and as the relevant legal community has interpreted it for decades. Nor, as noted, have the defendants claimed any burden in providing *parole* review to the modest number of prisoners (130) who comprise the class.

The plaintiffs assert the actual loss of liberty for some members of the plaintiff class (in the form of serving more time than they would have served but for the defendants' policy), and

[1] In the *Foster-Bey* case, on similar facts, the federal district court denied the defendants' motion for stay on this basis. *See* Exhibit A, *Foster-Bey* Remedial Order, ¶ 21.

the possible loss of liberty for others. Yet the defendants want this situation to continue for the 12-24 months it will take to prosecute an appeal. The "weighing" could not be starker: on the defendants' side of the scale is a feather and on the plaintiffs' side is a brick.

In balancing the harms, the Court should also be mindful of the fact that the defendants kept their policy secret despite knowing that the world outside the MDOC was unaware of the defendants' policy. The parole board and the members of the time computation unit saw case after case of parolable lifers pleading guilty to minor or modest offenses that carried very short consecutive sentences. The defendants and their agents had to know that something was amiss, because – as the evidence in this case made clear – everyone knows that people don't plead guilty to mandatory life sentences (other than to avoid the death penalty).

Yet the defendants took no steps to educate the bench or the bar even after this lawsuit was filed, nor for decades did the defendants ever notify the plaintiffs of their "commutable only" status. The harm to the plaintiffs outweighs the harm (if any) to the defendants.

**4. A Stay Is Not in the Public Interest**

When the state violates the law, everyone loses, and the harm is to the public. When the violation is permitted to go unchecked for decades, the harm becomes systemic.

The danger to the public in paroling members of the class is zero, because by definition every person paroled will be someone who would have been paroled but for the illegal conduct of the defendants. Each person paroled will have been individually adjudged not to be a danger to society.

Review of the 130 plaintiffs is likely to take a year. Entry of a stay would bring the process to a halt, and would all but guarantee another 2-4 years of incarceration before all the class members would get their remedial review, and before those found worthy would get a favorable

recommendation, a public hearing, and attain release on parole. After waiting years for lawful parole review, the plaintiffs should not have to wait another day.

**Conclusion**

For the above reasons, the plaintiffs ask the Court to deny the defendants' motion for a stay.

Respectfully submitted,

_____
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Dated: October 25, 2013

**Proof of Service**

A copy of the above response was served today on the defendants' counsel by pre-paid first-class mail to the address in the case caption, as well as by e-mail attachment.

_____
Paul D. Reingold (P27594)
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# Exhibit A