

1 CARTER C. WHITE, CSB # 164149
U.C. Davis Civil Rights Clinic
2 One Shields Avenue, Building TB-30
Davis, CA 95616-8821
3 Telephone: (530) 752-5440
Facsimile: (530) 752-5788
4 ccwhite@ucdavis.edu

5 DANIEL J. BRODERICK, CSB #89424
Federal Defender
6 MONICA KNOX, CSB #84555
DAVID M. PORTER, CSB #127024
7 Assistant Federal Defenders
801 I Street, 3rd Floor
8 Sacramento, CA 95814
Telephone: (916) 498-5700
9 monica_knox@fd.org
david_porter@fd.org
10

11 Attorneys for Plaintiffs
12 RICHARD M. GILMAN, et al.

13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE EASTERN DISTRICT OF CALIFORNIA
15

16 RICHARD M. GILMAN, and CHRIS
17 FOWLER, on their own behalf and on
behalf of those similarly situated,

18 Plaintiffs,

19 v.

20 EDMUND G. BROWN, Jr., Governor
of California, in his official capacity;
21 ROBERT DOYLE, Chairman, Board
of Parole Hearings, in his official
22 capacity; All Commissioners of the
Board of Parole Hearings, in their
23 official capacity; All Deputy
Commissioners of the Board of Parole
24 Hearings Who Hear Lifer Cases, in
their official capacity,
25

26 Defendants.

No. Civ. S 05-830 LKK GGH

**FIFTH AMENDED/SUPPLEMENTAL
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF – CLASS
ACTION**

27 **I. INTRODUCTION**

28 1. Plaintiffs Richard M. Gilman and Chris Fowler respectfully submit this Fifth

1 Amended/Supplemental Complaint for Declaratory and Injunctive Relief.

2 2. Plaintiffs are California state prisoners convicted of murder and sentenced to prison
3 terms that include the possibility of parole. They are eligible for parole, and have been
4 denied parole on one or more occasion; Plaintiff Fowler was previously granted parole but
5 had the grant reversed by the Governor.

6 **II. JURISDICTION AND VENUE**

7 3. Plaintiffs bring this action to redress the deprivation of rights secured to them by the
8 *Ex Post Facto* Clause of the United States Constitution.

9 4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1343,
10 and 42 U.S.C. § 1983.

11 5. Venue is proper in this judicial district under 28 U.S.C. § 1391 because the
12 defendants are employed in the County of Sacramento, which is in this judicial district.

13 **III. THE PARTIES**

14 **A. Plaintiffs**

15 6. Plaintiffs Richard M. Gilman and Chris Fowler are California state prisoners with
16 convictions for murder and sentences that include the possibility of parole.

17 **B. Defendants**

18 7. Defendant Edmund G. Brown, Jr. is the Governor of the State of
19 California. He is authorized to affirm, modify, or reverse any decision by the Board
20 granting or denying parole to a prisoner convicted of murder. He is sued in his official
21 capacity only.

22 8. Defendant Robert Doyle is Chairman of the Board of Parole Hearings. He is
23 sued in his official capacity only.

24 9. The remaining defendants are all the Commissioners of the Board of Parole
25 Hearings, and all Deputy Commissioners of the Board of Parole Hearings who conduct
26 parole consideration hearings for life inmates.

27 **IV. FACTS APPLICABLE TO ALL CAUSES OF ACTION**

28 10. All California prisoners with life sentences for murder are eligible for parole after

1 serving a minimum number of years, although that minimum number of years varies from
2 seven to twenty-five. Once a life prisoner is eligible for parole, it is up to the Board of
3 Parole Hearings in the first instance and the Governor in the second instance to determine
4 if he is “suitable” for parole. The first hearing to determine suitability occurs a year before
5 eligibility. Cal. Pen. Code § 3041(a). The statute provides that the Board “shall normally
6 set a parole release date” at that first hearing. *Id.*

7 11. The standard for setting parole release dates is set forth in subsection (b) of section
8 3041 of the California Penal Code:

9 The panel or board shall set a release date unless it determines that the gravity
10 of the current convicted offense or offenses, or the timing and gravity of
11 current or past convicted offense or offenses, is such that consideration of the
12 public safety requires a more lengthy period of incarceration for this
13 individual, and that a parole date, therefore, cannot be fixed at this meeting.

14 12. Thus, state law mandates that the prisoner is suitable for parole and must have a
15 release date set unless the evidence shows that his release would be a risk to public safety:
16 that is, he is a current risk to the community. *In re Lawrence*, 44 Cal.4th 1181 (2008).

17 13. California life prisoners have the right to be free of any law, regulation, practice or
18 policy that increases punishment from what it was at the time of the commission of their
19 offenses.

20 14. The grant of parole to a California life prisoner is governed by statute and
21 regulation. As noted, the statute creates a presumption of suitability once a prisoner
22 reaches his minimum eligibility date; and it allows for the denial of parole only if release
23 of the prisoner jeopardizes public safety. The Board has established regulatory criteria for
24 guiding its determination of current risk. 15 C.C.R. §§ 2280 *et seq.*, & 2400 *et seq.* The
25 factors set forth in the regulations, however, are for guidance only; the actual decision of
26 whether the prisoner is suitable for parole must be premised on the sole statutory criterion:
27 whether he is a current risk to public safety. The Governor is bound by the same
28 guidelines and same statutory determination as is the Board.

15. Defendants’ policies, practices, conduct, and acts alleged herein have resulted and
will continue to result in irreparable injury to Plaintiffs and Plaintiff Class, including but

1 not limited to violations of their constitutional rights. Plaintiffs and Plaintiff Class have
2 no plain, adequate or complete remedy at law to address the wrongs described herein.

3 16. An actual controversy exists between Plaintiffs and Defendants in that Plaintiffs
4 contend that the policies, practices, and conduct of Defendants alleged herein are unlawful
5 and unconstitutional, whereas Plaintiffs are informed and believe that Defendants contend
6 that said policies, practices, and conduct are lawful and constitutional. Plaintiffs seek a
7 declaration of rights with respect to this controversy.

8 **V. CLASS ALLEGATIONS**

9 17. Plaintiffs bring this action on behalf of themselves and all other persons similarly
10 situated pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2). The class as it
11 has been certified as to the First Cause of Action consists of all California state prisoners
12 who have been sentenced to a life term with possibility of parole for an offense that
13 occurred before November 4, 2008. The class as it has been certified as to the Second
14 Cause of Action consists of all California state prisoners who have been sentenced to a life
15 term with possibility of parole for an offense that occurred before November 8, 1988. The
16 requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(2) are met because the
17 class is so numerous that joinder of all members is impracticable.

18 18. There are questions of law and fact common to the proposed class that predominate
19 over questions affecting only the individually named Plaintiffs.

20 19. The claims of the named Plaintiffs are typical of the claims of the proposed class.

21 20. The named Plaintiffs will fairly and adequately represent the interests of all
22 members of the proposed class because they seek relief on behalf of the class as a whole
23 and have no interests antagonistic to other members of the class. The named Plaintiffs are
24 represented by counsel from the U.C. Davis Civil Rights Clinic and the Office of the
25 Federal Defender for the Eastern District of California. Counsel for Plaintiffs have
26 extensive experience in civil rights, prisoner rights, and class action litigation. Finally, the
27 Defendants have acted on grounds generally applicable to the class, thereby making
28 appropriate preliminary and final injunctive relief with respect to the class as a whole.

1 **The Named Plaintiffs**

2 **Mr. Richard M. Gilman**

3 21. Plaintiff RICHARD M. GILMAN (CDC # C-47508) was convicted of first degree
4 murder in 1982, and sentenced to 25 years to life. His victim, his former fiancée, died
5 after being assaulted by persons hired by Mr. Gilman.

6 22. Mr. Gilman became eligible for parole in 1995. He has had numerous subsequent
7 parole consideration hearings at which parole was denied. The Board relied primarily on
8 the circumstances of the commitment offense and what it perceived to be Mr. Gilman's
9 limited programming and lack of insight and remorse to deny parole.

10 23. Mr. Gilman's psychological reports evaluate him as a low or relatively low risk to
11 others if granted parole.

12 24. Mr. Gilman has received favorable evaluations of his work in prison and has
13 engaged in numerous rehabilitation efforts, including participation in various self-help and
14 therapy programs. He has never been violent while incarcerated, nor has he ever incurred
15 a CDC 115 (Rule Violation Report).

16 **Mr. Chris Fowler**

17 25. Plaintiff CHRIS FOWLER (CDC # C-96996) was convicted of second degree
18 murder in 1984, and sentenced to 15 years to life. He struck and killed his then-
19 girlfriend's son.

20 26. He became eligible for parole in 1993. He has been denied parole at numerous
21 hearings. In 2007, the parole consideration hearing resulted in a tie vote. The
22 commissioner who voted to deny parole did so due to the commitment offense and what he
23 perceived to be Mr. Fowler's lack of insight and an insufficient relapse plan. In 2009, the
24 Board sitting *en banc* denied parole. In 2010, Mr. Fowler was granted parole by the
25 Board, but the Governor reversed the grant in 2011.

26 27. Mr. Fowler's psychological reports consistently state that he presents a low or very
27 low risk to re-offend.

28 28. Mr. Fowler has a significant record of rehabilitation, including an exemplary prison

1 work record and participation in and completion of numerous self-help and substance
2 abuse programs.

3 **VI. CAUSES OF ACTION**

4 **FIRST CAUSE OF ACTION**

5 29. Plaintiffs reallege and incorporate by reference paragraphs 1 through 28 of this
6 complaint as though fully set forth herein.

7 30. Pursuant to laws in effect when Plaintiff Gilman committed his offense, the law
8 provided for only annual reconsideration hearings absent convictions for multiple
9 murders.¹

10 31. Subsequent amendments extended the permissible period of parole deferral, first to
11 two years (by amendment in 1982), and then to five years (by amendment in 1994).

12 32. The Board could order a deferral for more than one year only if it found that it was
13 not reasonable to expect that parole would be granted at a hearing during the intervening
14 period, and it was required to state in writing the bases for such a finding.

15 33. If a Board deferred parole for five years, the prisoner's central file would be
16 automatically reviewed within three years by a deputy commissioner who could direct that
17 a hearing be held within one year.

18 34. On November 4, 2008, the California electorate passed the Victims' Bill of Rights
19 Act of 2008, also known as Marsy's Law, through a ballot initiative designated
20 Proposition 9. Section 5.1 of the proposition amends Section 3041.5 of the California
21 Penal Code in ways that, when applied retroactively, create a significant risk of increasing
22 the measure of punishment attached to the original crime. Specifically, the proposition:

- 23 (a) Changes the default deferral period between parole hearings from one year to
24 15 years;
- 25 (b) Raises the minimum possible deferral period between parole hearings from
26 one year to three years, eliminating all Board discretion to set the deferral
27 period at one or two years;

28 ¹ At the time Plaintiff Fowler committed his offense, the presumption was for annual
hearings but for cause and upon specific findings could be extended to two years before
reconsideration.

- 1 (c) Increases the possible deferral periods from one, two, three or five years, to
2 three, five, seven, ten or 15 years;
- 3 (d) Changes the standard for and alters the Board's ability to set the deferral
4 period from a presumption of *minimum* deferral period (one year) unless the
5 Board finds "it is not reasonable to expect that parole would be granted at" an
6 earlier hearing to a presumption of *maximum* deferral period (15 years),
7 unless the Board finds by clear and convincing evidence "that consideration
8 of the public's and victim's safety does not require a more lengthy period of
9 incarceration for the prisoner" than the next shortest deferral period possible;
and,
- 7 (e) Changes the process and possibility of an earlier review following imposition
8 of a lengthy deferral period from an automatic review if a five-year deferral
9 period has been imposed to a review available only if the prisoner makes a
request (which he may do only once every three years) and establishes
changed circumstances or new information.

10 35. Proposition 9 violates the *Ex Post Facto* Clause of the United States
11 Constitution, and denies Plaintiffs and Plaintiff Class due process of law.

12 **SECOND CAUSE OF ACTION**

13 36. Plaintiffs reallege and incorporate by reference paragraphs 1 through 28 of this
14 complaint as though fully set forth herein.

15 37. Prior to November 1988, Board decisions granting parole of prisoners convicted of
16 murder were final and not reviewable by the Governor. At that time, the Board found
17 approximately ten percent of life prisoners suitable for parole at their initial suitability
18 hearings and approximately fifteen percent of life prisoners suitable for parole at
19 subsequent hearings. Once found suitable for parole, those prisoners were released on
20 reaching their parole dates without their dates being subject to reversal by the Governor.

21 38. In 1988, the California electorate passed Proposition 89, which added Section 8(b)
22 to Article V of the California Constitution. This constitutional provision authorizes the
23 Governor to affirm, modify, or reverse the Board's parole decisions with respect to
24 prisoners convicted of murder based on the same criteria the Board considers. The stated
25 purpose of Proposition 89 was to grant to the Governor, for the first time, the power to
26 "block" the parole of convicted murders.

27 39. Since the passage of Proposition 89, Section 8(b) of Article V has never been used
28 by any governor to reverse a decision by the Board finding a prisoner *unsuitable* for

1 parole, but has been used by all governors *exclusively* to reverse decisions by the Board
2 finding prisoners *suitable* for parole.

3 40. Plaintiff Fowler has been found suitable for parole by the Board on at least one
4 occasion. The Board set a term for him; at the point he was granted parole, he had
5 exceeded the term set. Had his grant not been subjected to Article V, Section 8(b) and the
6 Governor's review, he would have been released immediately upon the finality of the
7 Board's decision. Accordingly, the application of Article V, Section 8(b) to him has not
8 simply created a significant risk of increasing his punishment but has in fact increased his
9 punishment in violation of the *Ex Post Facto* Clause of the United States Constitution.

10 41. The Governor's reversals of the decisions in over 70 percent of the cases in which
11 the Board has granted parole has, at the least, significantly increased the risk of increasing
12 prisoners' incarceration in violation of the *Ex Post Facto* Clause of the United States
13 Constitution.

14 **IX. RELIEF SOUGHT**

15 WHEREFORE, Plaintiffs and Plaintiff Class seek the following relief:

16 1. A declaration that defendants have denied plaintiffs' rights under the *Ex Post*
17 *Facto* Clause of the United States Constitution;

18 2. A preliminary and permanent injunction against application to any Plaintiff or
19 member of Plaintiff Class of the provisions of Proposition 9 that amend California Penal
20 Code section 3041.5(b) and increase the deferral of subsequent parole hearings to
21 (presumptively) 15 years;

22 3. A preliminary and permanent injunction against application to any Plaintiff or
23 member of the Plaintiff Class of the provisions of Article V, Section 8(b) of the California
24 Constitution to the extent they permit the Governor to reverse or modify a decision of the
25 Board to grant parole;

26 4. Retain jurisdiction over this case until defendants have fully complied with
27 all orders of this Court, and there is a reasonable assurance that defendants will continue
28 to comply in the future absent continuing jurisdiction;

- 1 5. Costs and attorneys fees incurred in this action; and
2 6. Such other and further relief as may be just and proper.

3 Dated: August 21, 2012

4 Respectfully submitted,

5 DANIEL J. BRODERICK
6 Federal Defender

7 /s/ Monica Knox
8 MONICA KNOX
Assistant Federal Defender

/s/ Carter C. White
CARTER C. WHITE
Supervising Attorney

9 Attorneys for Plaintiffs
10 RICHARD M. GILMAN, et al.
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