

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,

File No. 12-907-CZ

v.

Hon. Joyce Draganchuk

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.

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PLAINTIFFS' RENEWED MOTION AND BRIEF FOR CLASS CERTIFICATION

MOTION

Pursuant to MCR 3.501, the plaintiffs renew their motion for class certification, for the following reasons:

1. The requirements for class certification are met under MCR 3.501, as shown below.
2. The plaintiffs' original motion was filed within 91 days of the filing of the complaint, and after all the defendants had been served, in compliance with MCR 3.501(B)(1)(a) and (B)(3).
3. The Court denied the plaintiffs' motion without prejudice, on the grounds that the motion was premature under MCR 3.501(B)(3)(b) until discovery was completed and the need for class relief was shown. *See* Order (11/13/12).

4. The plaintiffs propose that the attached notice to the class be posted in a conspicuous place in all state correctional facilities that house parolable lifers, and that in addition individual notice be sent to known class members by first-class mail, with the cost of the notice and mailing to be borne by the plaintiffs (though taxable as costs if they prevail), pursuant to MCR 3.501(C). *See* Notice to Class, attached.

BRIEF IN SUPPORT

Statement of Facts

The plaintiffs are Michigan parolable lifers who are also serving a later consecutive sentence. The Michigan Department of Corrections (MDOC) and the parole board interpret the law governing the computation of consecutive sentences (*see* MCL 791.234(3)) to mean that prisoners sentenced to parolable life with a consecutive sentence can never be paroled, but rather can be released only through executive clemency.

Discovery has confirmed that until recently the MDOC and the parole board never told criminal defendants, defense counsel, prosecutors, probation departments, judges, or the public of their interpretation of the law. At present the defendants have converted the sentences of 131 prisoners from parolable life to “commutable only” mandatory life.

The only previous notice of the MDOC/parole board’s policy on this issue came in *Foster-Bey v Rubitschun*, ED Mich 05-CV-71318. In that case, the federal district court granted the plaintiffs’ motion to include as “parolable lifers” prisoners with later consecutive sentences, for purposes of the *Foster-Bey* case. *See* Complaint, ¶¶ 76-77. When *Foster-Bey* was reversed on appeal, the defendants reinstated their pre-*Foster-Bey* policy without notice to the prisoners or to their counsel or to any of the other participants in the criminal justice system.

With discovery complete, and with the case ripe for summary disposition as to all mem-

bers of the class, the plaintiffs now renew their motion for class certification.

ARGUMENT

1. The Case Meets the Requirements for Class Certification

The class action court rule, MCR 3.501, clearly sets out the requirements for class certification. This case is a paradigmatic example of one that meets the requirements and in which a class should be certified.

a. Numerosity

As noted, there are at least 131 people in the class, so that joinder of all would be impracticable.

b. Common Questions of Law and Fact

The primary question of law in the case is whether or not the parole board's interpretation of MCL 791.234(3) is correct. The plaintiffs say no. The secondary legal question is, if the defendants' interpretation were held to be correct, then would MCL 791.234(3) as applied violate the plaintiffs' state and federal constitutional rights.

With discovery complete, no questions of fact remain in the case. It is now clear that all parolable lifers with a consecutive sentence are treated as "commutable only" and are serving the equivalent of mandatory life without parole. At the least, any common questions of law and fact predominate over questions affecting only individual class members.

c. Typicality

The claims of the individual plaintiffs are not just "typical" of the claims of the class, but they are necessarily identical. Exactly the same legal issue is presented for each class member.

d. Adequacy of the Representation

The named plaintiffs will fairly and adequately represent the class and protect the inter-

ests of the class because there is a total identity of interests. The named plaintiffs took the initiative to seek out counsel and agreed to represent the class. Counsel from the Michigan Clinical Law Program have experience with prisoners' rights litigation and can draw on the resources of the many law students enrolled in the program, as well as on the resources of other law faculty if necessary.

e. Superiority to Other Methods

Maintaining the case as a class action will be superior to any other method because

- there will be no risk of inconsistent decisions;
- the case can move forward efficiently in a single forum, which is cheaper and easier for the defendants as well as for the plaintiffs;
- declaratory and injunctive relief is appropriate with respect to the class (and no damages are being sought);
- the case will be manageable as a class action (and the plaintiff's counsel has managed other prisoners' rights class actions involving much larger classes); and
- class members have little or no incentive to seek to control the litigation through separate actions.

Accordingly, the Court should grant the plaintiffs' renewed motion for class certification.

2. Class Definition, Notice, and Method of Notice

The plaintiffs have tried to come up with the simplest class definition possible, which is:

All parolable lifers in the custody of the Michigan Department of Corrections who are also serving a consecutive sentence that the defendants claim forever deprives the parole board of jurisdiction to parole the prisoners, making them forever "commutable only" and converting their effective sentence to mandatory life.

This definition uses the terminology adopted by the defendants, and includes within the class only those prisoners whom the board itself is treating as "commutable only."

As to notice, the plaintiffs have attached a proposed notice to be placed in a conspicuous place in each correctional facility that houses parolable lifers. A variant of that notice will also

be sent to all known class members (a list that at present includes 131 names) by pre-paid first-class mail. Pursuant to MCL 3.501(C), the Court may require the defendants to cooperate in the notice process, and if the plaintiffs prevail, the expenses of notice can be included as taxable costs.

3. Scope of Relief

The plaintiffs are renewing their motion for class certification because they believe that without it the Court could have problems fashioning an order for relief that covers all the class members (if the Court decides the case in the plaintiffs' favor).

In response to the plaintiffs' initial motion for class certification, the defendants argued that a decision in the plaintiffs' favor would automatically accrue to the class, regardless of whether or not the Court certified the class. *See* Defs' Response Brief (10/26/12), at 5-6, 8-9. This argument rests on the claim that "this Court's interpretation of MCL 791.234(3) would be binding upon the MDOC" as the statute pertains to all prospective class members. *Id.*, at 8. But the plaintiffs are not only asking for a declaration that the defendants' statutory interpretation is invalid. The plaintiffs are also seeking individually-enforceable injunctive relief in the form of "new parole hearings for the named plaintiffs and the plaintiff class." *See* Complaint ("Relief Requested"), ¶ c. *See, e.g., Nehmer v. U.S. Veterans' Administration*, 118 F.R.D. 113, 119-20 (D.C.Cal. 1987) (government argued class certification was pointless because relief for the named parties would benefit all class members; court held that certification was proper, given that the plaintiffs sought personal relief for each class member); *Brown v. Kelly*, 244 FRD 222 (SDNY 2007) (same, holding that equitable relief would not automatically occur despite the defendants' pledge).

Although this Court's interpretation of MCL 791.234(3) may bind the parole board going

forward, the Court will be powerless – absent class certification – to grant parole review to any unnamed parties. *See Doran v Salem Inn, Inc*, 422 US 922, 931 (1975) (“[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances *except with respect to the particular ... plaintiffs.*”); *McKenzie v City of Chicago*, 118 F3d 552, 555 (7th Cir 1997) (“The ... problem with this injunction is that plaintiffs lack standing to seek – and the district court therefore lacks authority to grant – relief that benefits third parties.... Because a class has not been certified, the only interests at stake are those of the named plaintiffs.”).

If the Court fails to certify the class – and the plaintiffs succeed on their claims – only the named plaintiffs will be empowered to compel the board to afford them timely parole review. The proposed class members – victims of unconstitutional treatment – will be left to hope that the defendants decide to provide them with similar timely review. But nothing would stop the defendants from dragging their feet, or simply applying the new interpretation of the law prospectively (at the next five-year scheduled review date) – which could deprive the proposed class members of relief for years. *See Bizjak v Blum*, 490 FSupp 1297 (NDNY 1980) (class certification may not be needed in cases “seeking only prospective relief” as opposed to individualized injunctive relief). Further, the defendants could withhold relief to non-parties pending appeal, which could prolong relief for years absent a class injunction. *See Loper v New York City Police Dep’t*, 135 FRD 81, 83 (SDNY1991) (class certification proper because proposed class members could be improperly treated while the case was on appeal).

Conclusion

For the above reasons, the plaintiffs ask the Court to grant their renewed motion for class certification, to define the class as set forth above, and to approve notice to the class by posting as well as individual notice.

Respectfully submitted,

Paul D. Reingold (P27594)
Attorney for the Plaintiffs

Dated: July 22, 2013

Attached Exhibit

Proposed notice to the plaintiff class

Proof of Service

The above motion and brief were served this date by pre-paid first-class mail on the Michigan Attorney General's Office.

Paul D. Reingold (P27594)
Attorney for the Plaintiffs

Dated: July 22, 2013