STATEMENT OF JURISDICTION

The United States District Court for the District of Kansas (Rogers, J.) entered judgment denying habeas petitions of Yorie Von Kahl ("Von Kahl") and Leonard Peltier ("Peltier") on August 28, 2006. (A true and complete copy of the decision is attached hereto as Appendix A.) Von Kahl and Peltier timely filed an appeal from that judgment on September 22, 2006, pursuant to 28 U.S.C. §§ 2253, 2255.

STATEMENT OF ISSUES

I. Whether the District Court erroneously ignored the unambiguous language of Section 235(b)(3), (Pub. L. 98-473, Title II) in ruling that the Defendants did not violate that statute by the United States Parole Commission's failure to establish release dates for Petitioners before October 11, 1989 within the applicable parole guidelines.

II. Whether Section 235(b)(3) became effective October 12, 1984 as held by other circuits and by Congress' mandate, or whether the District Court erred in ruling that Section 235(b)(3) did not become effective until November 1, 1987.

III. Whether the District Court's rulings violated the ex post facto, bill of attainder and due process clauses by applying retroactively Public Law 100-182, Section 2, which Congress expressly provided would apply only to offenses committed after December 7, 1987 and which, in any event, did not resurrect the United States Parole Commission which became extinct as of midnight on October 11, 1989 by the terms of the original Section 235(b)(3).

IV. Whether This Court Should Overrule Its Prior Decision In Bledsoe v. United States, 384 F.3d 1232 (10th Cir. 2004), cert. denied, 544 U.S. 962 (2005), Because It Was Erroneously Decided And It Conflicts With Decisions Of Other Panels Of This Court And With Decisions Of Other Circuits.

STATEMENT OF THE CASE

This appeal concerns the unconstitutional application of Section 235(b)(3) of the Sentencing Reform Act ("SRA) by the United States Parole Commission ("Commission"), which actions were upheld by the District Court. By this appeal, Petitioners also request this Court to consider en banc and overrule its decision in Bledsoe v. United States, 384 F.3d 1232(10th Cir. 2004), cert. denied, 544 U.S. 962 (2005), in which this Court addressed certain of the issues raised herein and decided them against those in the position of the Petitioners. Petitioners submit (1) that their claims were pending before the decision in Bledsoe, (2) that there exists a conflict amongst panels in this Circuit with the Bledsoe decision and amongst this Circuit and other Circuits because of the Bledsoe decision, (3) that Bledsoe did not address all the issues raised by Petitioners in this case, (4) that the issues were not presented as in Bledsoe as fulsomely as in this case, and (5) that Bledsoe precludes a fair review of this claim in this Circuit.

On August 14, 2002, Petitioners Von Kahl and Peltier filed a petition for a writ of habeas corpus in the United States District Court for the District

of Columbia while they were incarcerated at the United States Penitentiary, Leavenworth, Kansas. (Doc. 1.)[1] The District of Columbia Court directed service of an order to show cause upon respondents. (Doc. 11.) Thereafter, the District of Columbia Court ruled it lacked jurisdiction and transferred the action to the United States District Court for the District of Kansas in November of 2004.[2] (Doc. 18.)

In its decision, the District Court (Rogers, J.) articulated the claims raised by Petitioners as follows (Appendix A at 2-3):

> 1. Section 235(b) (3) of Pub.L. 98-473, Title II, 98 Stat 2032, (Oct. 12, 1984) [Sec. 235(b) (3)], a provision in the Sentencing Reform Act of 1984 (SRA), granted them "unqualified rights to issuance of (parole) release dates under their respective guidelines" prior to October 12, 1989.
> 2. The effective date of this provision was October 12, 1984.
> 3. This provision was "applicable to all offenses committed prior to the effective date" and "became a certainty" for petitioners, thus "settling" their expectation of release dates established prior to October 12, 1989.

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[1] Petitioners are citing to the Record pursuant to Local Rule 28.1(B) of the United States Court of Appeals for the Tenth Circuit. The Docket is attached hereto as Appendix B.

[2] In September, 2004, a month before this case was transferred, Petitioners filed a civil rights complaint in the United States District Court for the District of Columbia. The District of Columbia Court issued an order in December, 2005, finding that the complaint "actually appears to be a petition for writ of habeas corpus," and transferred it, over Petitioners' objections, to the United Stated District Court for the District of Kansas where the petitioners at the time were incarcerated. Preiser v. Rodriguez, 411 U.S. 475, 479 (1973). The District Court for Kansas decided both cases against Petitioners. Petitioners filed an appeal from both cases.

4. The United States Parole Commission (USPC) has refused to issue release dates with respect to either petitioner.
5. Under Sec. 235(b) (3), the USPC was abolished and all parole statutes were repealed within five years of the effective date, i.e., no later than October 12, 1989.
6. All subsequent acts of the USPC and its employees are in "severe conflict" with petitioners' rights and the intent of Congress, and are void.
7. Respondents purport to hold petitioners under the amendment to Sec. 235(b) (3) enacted with other amendments to the SRA on December 7, 1987, when these amendments expressly applied only to offenses committed after the date of enactment, and therefore not them.
8. The retroactive application to them of the December 7, 1987 amendment violates the due process, ex post facto, and bill of attainder clauses of the United States Constitution.
9. [incorrectly stated issue raised].

On August 28, 2006, essentially relying on the Bledsoe rationale the Kansas District Court (Rogers, J.), ruled that Petitioners failed to establish a basis for habeas corpus relief and dismissed the Petition in its entirety. (Appendix A.) Petitioners timely appealed from that decision. (Doc. 40.)

STATEMENT OF FACTS

A. The Sentencing Reform Act of 1984.

In 1984, Congress passed the SRA, arguably the first comprehensive sentencing law reform for the federal system. (S. Rep. 98-225, 1984

U.S.C.C.A.N. 3182, 3220).[3] The Comprehensive Crime Control Act of 1984 ("CCCA"), constituted several chapters within the SRA. The CCCA represented a decade long effort by Congress to create a sentencing structure that, among other things, would eliminate disparity in sentencing, certainty as to release from confinement, and abolition of the Parole Commission. Disparities in sentencing occurred both at the sentencing itself and at the Parole Commission. (S. Rep. 98-225 at 3221). The report noted:

> At present, the concepts of indeterminate sentencing and parole release depend for their justification exclusively upon this model of 'coercive' rehabilitation. Recent studies suggest that this approach has failed. Most sentencing judges, as well as the parole commission, agree that the rehabilitation model is not an appropriate basis for sentencing decisions. Id. at 3223

When drafting the CCCA, Congress intended to "develop a system of sentencing whereby the offender, the victim, and society all know the prison release date at the time of the initial sentencing by the court, subject to minor adjustments based on prison behavior called 'good time." Id. at 3229. The Report explained that the sentencing reform was intended to eliminate sentencing disparity:

> The efforts of the Parole Commission to alleviate this disparity unfortunately contributed to a second grave defect of present law: no one is ever certain how much time a particular offender

[3] Senate Report 98-225, 1984 U.S.C.C.A.N. 3182 will hereinafter be cited by the respective page number as "S. Rep. 98-225 at ___."

> will serve if he is sentenced to prison ... Thus, prisoners often do not really know how long they will spend in prison until the very day they are released. The result is that the existing Federal system lacks the sureness that criminal justice must provide if it is to retain the confidence of American society and if it is to be an effective deterrent against crime.

Id. at 3232-3233.

The Report concluded:

> The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear, that the system is ripe for reform. Correcting our arbitrary and capricious method of sentencing will not be a panacea for all of the problems which confront the administration of criminal justice, but it will constitute a significant step forward.
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> The bill, as reported, meets the critical challenge of sentencing reform. The bill's sweeping provisions are designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase-out parole release, and make criminal sentencing fairer and more certain.

Id. at 3248.

Section 235(b) of the bill expressly provided a mechanism "in order to deal with sentences imposed under current sentencing practices," Sen. Rep. No. 98-225, P. 189, assuming that most prisoners sentenced "under the old system" would be released within a five- year period from the effective date and mandating that "the Parole Commission must set a release date" for those remaining "prior to the expiration of the five years that is consistent with the applicable parole guideline." Id. at 189 n.430. Congress' sole intent for retaining the Parole Commission and parole statutes for five years

following the effective date of the Act was "to set release dates for prisoners sentenced before that date" emphasizing that " the end of that period, the Parole Commission will set final release dates for all prisoners still in its jurisdiction." Id. at 56n.82.

To ensure accomplishing the intent of the legislation and to eliminate discretion in the Parole Commission, Section 225(b) of the bill was expressed in mandatory terms in section 235(b) (3), which plainly stated:

> The United States Parole Commission shall set a release date, for an individual who will be in its jurisdiction a day before the expiration of five years after the effective date of this Act, that is within the range that applies to the prisoner under the applicable parole guideline. A release set pursuant to this paragraph shall be set early enough to permit consideration of an appeal of the release date, in accordance with Parole Commission procedures, before the expiration of five years following the effective date of this Act.

Based on the original text of Section 235(b)(3) and the effective date of the Act of October 12, 1984, the Parole Commission would become extinct as of midnight on October 12, 1989, and the Petitioners would have each possessed release dates.

Senator Metzenbaum set forth Congress' intent in originally passing Section 235(b) (3):

> The intent [of then current § 235(b) (3)] is to reduce arbitrariness and inequities in setting release dates.

> Under the comprehensive Crime Control Act of 1984, the Parole Commission is required to set a "release date for an individual who will be in its jurisdiction the day before the expiration of 5 years after the effective date of this act that is within the range that applies to the prisoner under the applicable parole guidelines." This provision becomes effective on November 1, 1987. In addition, the Senate Report accompanying the bill states that "the committee intends that, in the final setting of release dates under this provision, the Parole Commission give the prisoner the benefit of the applicable new sentencing guideline if it is lower than the minimum parole guideline."
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> Consequently, under current law, the Commission must stay within the guidelines for persons whose sentence extends beyond November 1, 1992, and who come before the Commission for a release date after the Sentencing Reform Act becomes effective on November 1, 1987.

Id. at 7940-41.

On December 7, 1987, Congress enacted Public Law 100-182, amending Sect. 235(b)(3), by striking out "that is within the range that applies to the prisoner under the applicable parole guidelines" and inserting ' to Section 4206 of Title 18, United States Code," thus eliminating the requirement of the issuance of mandatory release dates to prisoners, within the stated parole guideline ranges. This Act thus returned to the Parole Commission complete discretion under Title 18 USC § 4206 in determining release dates and actual release of the prisoners defined in Section 235(b)(3) - an act completely contrary to the extensive language found in Senate Report 98-225. However, Congress expressly established the prospective

application only of the amendment in the "General Effective Date" of the act at section 26: "The amendments made by this Act shall apply to offenses committed after the enactment of this Act."

The Parole Commission, however, has applied Amended Section 235 (b) (3) of Public Law 100-182, Section 2(b)(2) to offenses committed before its effective date of December 7, 1987, including applying it to offenses committed by Petitioners in direct contravention of the plain language of the Act.

On December 1, 1990, Congress began to enact laws extending the life of the Parole Commission and the parole statutes at five year increments. See Public Law 101-650, sect. 316, 104 Stat. 5115. The life of the Parole Commission has currently been extended until November, 2008.

B. Unique Factual Circumstances of Each Petitioner.

1. Yorie Von Kahl

Petitioner Von Kahl was convicted in 1983 in the United States District Court for the District of North Dakota for offenses committed in 1983. He was sentenced to two concurrent life terms, a consecutive 10 year term, and a consecutive 5-year term, pursuant to 18 U.S.C. 4205(b) (2), which provided for release on parole "at such time as the Commission may

determine." He received an initial parole hearing in 1984 and was continued to a 10 year reconsideration after discussion of circumstances of his offenses involving a shootout with law enforcement officers in which two U.S. Marshals were killed and three others wounded. In 1986, he was given a statutory interim hearing and continued to a 15 year reconsideration hearing. Petitioner's offenses are rated Category Eight. (Appendix at 9-10.)

2. Leonard Peltier.

Petitioner Peltier was convicted in 1977 in the United States District Court for the District of North Dakota on two counts of first degree murder committed in 1975 and sentenced to two consecutive life terms. He was subsequently convicted in the United States District Court for the District of California for escape and possession of a firearm and sentenced to a consecutive term of 7 years.

Peltier was given an initial parole hearing in 1993, during which the circumstances of his offenses, which included the murder of two federal agents, were discussed, and he was continued to a 15-year reconsideration hearing. Mr. Peltier's offenses are also rated Category Eight. (Appendix at 10-11.)

SUMMARY OF THE ARGUMENT

This appeal concerns the unconstitutional application of Section 235(b)(3) of the SRA by the Parole Commission. This enactment made substantial changes by stripping the Parole Commission of any discretion and by establishing a method of determinate sentencing. There are several key points which should be beyond dispute, but which the District Court did not recognize: (1) Section 235(b) became effective October 12, 1984, Lyons v. Mendez, 303 F.3d 285, 289 (3rd Cir. 2002),[4] (2) Section 235(b) provided a mechanism by which prisoners sentenced "under the old system" would be issued a release date within a five-year period from the effective date, and (3) Section 235(b) required "the Parole Commission [to] set a release date consistent with the applicable parole guideline" for those remaining in its custody "prior to the expiration of the five years." Pub. L. 98-473, Title II, Section 235(b)(3). Congress' sole reason for retaining the Parole Commission for five years following the effective date of the Act was "to set release dates for prisoners sentenced before that date" emphasizing that by "the end of that period, the Parole Commission would set final release dates

[4] According to the Commission's quarterly meeting minutes from November 14, 2002 (submitted December 26, 2002), the Commission stated: "[O]n October 12, 1984 Congress eliminated federal parole and set in place provisions at Section 235(b) of the Sentencing Reform Act for the transition from a sentencing/punishment system with parole eligibility to one in which the offenders would serve determinate sentences."

for all prisoners still in its jurisdiction." Senate Report No. 98-225, 98th Congress, First Session, September 12, 1983, p. 56 n.82.

Congress thereby recognized the inherent arbitrariness underlying parole decisions. As the United States Supreme Court recognized this in Mistretta v. United States, 488 U.S. 361, 366 (1989):

> It is observed that the indeterminate-sentencing system had "unjustified" and "shameful" consequences. The first was the great variation among sentences imposed by different judges upon similarly situated offenders. The second was the uncertainty as to the time the offender would spend in prison.

On December 7, 1987, Congress amended Section 235(b)(3) to repeal the mandatory release criteria and to restore the discretionary parole system (hereafter "Public Law 100-182"). This amendment substantially changed existing law. Congress, however, expressly mandated that Public Law 100-182 **only** applied to crimes committed after its effective date.

The District Court ignored Congress' mandate that Public Law 100-182 applied only prospectively.[5] Moreover, having applied the amendment retroactively, the District Court upheld the Commission's refusal to establish mandated dates of release within the parole guidelines before the expiration

[5] The District Court literally accepted the government's argument to ignore Congress' mandate that the amendment "shall apply with respect to offenses committed after the enactment of the Act'…[of] December 7, 1987."

of the five year mandated period (October 12, 1989) in violation of the ex post facto clause and due process clause, and which constituted an unconstitutional bill of attainder. Plaintiffs submit this reply brief to address the erroneous contentions asserted by the government in its brief.

ARGUMENT

I. The District Court Misconstrued Petitioners' Claims, Ignored Congressional Mandates, And Thereby Erroneously Denied Petitioners Their Rights Under Section 235(b)(3).

The District Court misconstrued Petitioners' arguments as to their "rights to issuance of release dates under their respective guidelines," under the plain language of Public Law 98-473, Title II, Chapter II, § 235(b)(3), 98 Stat. 2032. The District Court compounded that error by utilizing an erroneous "legal standard" of review which had no application to the issues presented. (Appendix A at 15) ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence"). Construing Section 235(b)(3) properly and contrary to the District Court's analysis, Petitioners asserted that the original Section 235(b)(3) mandated that "[t]he…Parole Commission shall set a release date for [Petitioners among others]…within the range that applies to the prisoner under the applicable parole guideline…early enough to permit consideration

of an appeal…before the expiration of five years following the effective date of this Act," which has been established as October 12, 1984.[6] The District Court, however, did not address that argument which is based on the clear language of the statute.

A key issue in this appeal is the effective date of § 235(b)(3), which Petitioner's claim is October 12,1984, and which establishes the five year period during which the Parole Commission was required to establish release dates for Petitioners within the guidelines. Relying on Bledsoe, the District Court ruled that the statute did not take effect until November 1, 1987. Contrary to the government's brief, there is an intra-circuit conflict on this issue. However, Bledsoe is not only wrong it is inconsistent with other decisions of this Circuit and other Circuits. Dallis v. Martin, 929 F.2d 587 (10th Cir. 1991); Lyons v. Mendez, 303 F.3d 285, 291 (3rd Cir. 2002). In Dallis, 929 F.2d at 589 and n.4, this Court ruled that Section 235(b)(3) became effective October 12, 1984. This creates a conflict within this circuit, as well as the existing inter-circuit conflict. See e.g. Lyons, 303 F.3d at 289.

The District Court also misapplied the 1987 amendment to Section 235(b)(3) which had no application to Petitioners because Congress

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[6] Lyons v. Mendez, 303 F.3d 285, 291 (3rd Cir. 2002).

expressly commanded that the "amendment[]…shall apply with respect to offenses committed after [its] enactment" on December 7, 1987. Pub.L. 100-182, § 26, 101 Stat. 1272. The District Court ignored Congress' express mandate, applied the amendment retroactively to apply to Petitioners, and refused to apply the presumption against retroactive application of statutes, thereby violating basic principles of proper statutory construction. See Board of Pardons v. Allen, 482 U.S. 369, 377-78, 380 (1987) ("use[ ]" of "mandatory language 'shall' ... 'create[s] a presumption that ... release will be granted'" creating "a liberty interest protected by the Due Process Clause"); Zedner v. United States, 547 U.S. ___, ___, 164 L.Ed. 2d 749, 768-69 (2006) (statutory command that act "shall" be done is "unequivocal … 'absolute language'" prohibiting deviation) (quoting Alabama v. Bozeman, 533 U.S. 146, 153-54 (2001).[7]

The District Court incredibly ruled that Congress' express mandate had "no… logical merit," and that Petitioners' argument that Congress actually meant what it said to be "even more illogical." (Appendix at 28-29.)

[7] Martin v. Hadix, 527 U.S. 343, 352, 354-55 (1999) (When "Congress has expressed the statute's proper reach… [absent an 'unambiguous directive' or 'express command' compels courts to] presumes that the statute does not apply to [pre-enactment] conduct" exemplifying language "'shall apply… after the date of enactment'" as "language [that] unambiguously addresses the temporal reach of the statute"); Rivers v. Roadway Express, Inc., 511 U.S. 298, 313 n. 12 (1994) (courts have "no authority to depart" from Congress' command setting effective date of statute).

The District Court undoubtedly erred by "ignoring Congress' mandate." Gozlon-Perez v. United States, 498 U.S. 395, 409 (1991). See also United States v. Gonzales, 520 U.S. 1, 6 (1997) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last; the judicial inquiry is complete.").

Finally, the District Court turned the law on its head by ignoring Congress' mandate. Instead of avoiding Constitutional issues by applying the amendment prospectively as directed by Congress, the District Court created constitutional issues which did not have to be reached by applying the statute retroactively, i.e., that the 1987 amendment to Section 235(b)(3), applied retroactively, violated the ex post facto, the bill of attainder and due process clauses. INS v. St. Cyr, 533 U.S. 289, 299-300 (2001) (Plain language rule is "reinforced" by rule that where "an alternative interpretation of the statute is 'fairly possible'" courts "are obligated to construe the statute to avoid" "raising serious constitutional questions").

As a result of the District Court's misconstruction of Petitioners' arguments and Congress' plain language, the District Court was invariably "unable to determine" the true "issues" raised, thereby resulting in "manifest

injustice." Dobbs v. Zant, 506 U.S. 357, 358-59 (1993) (per curiam). Much of the District Court's confusion and misunderstanding stems from this Court's ruling in Bledsoe, 384 F.3d 1232., which decision should be overruled for the reasons set forth herein.

As in this case, the same District Court judge in Bledsoe refused to apply the plain language of the statutes involved, misconstrued the Petitioners' claims, and misapplied facts (the same as those misapplied in this case). The District Court refused to permit an evidentiary hearing, let alone an oral argument on the legal issues. The Bledsoe Court was not presented with the key issues raised by Petitioners in this case and thus crucial issues went unaddressed.

This District Court's decision virtually mirrors the Bledsoe case by ignoring the facts alleged and supported by Petitioners, by adopting as fact erroneous allegations of the respondent, and by ignoring statutory text. The instant Petitioners, as those in Bledsoe, have effectively "been denied an opportunity to be heard….'" United States v. Hayman, 342 U.S. 205, 220 (1952) (construing 28 U.S.C. § 2255 hearing requirement as commensurate to requirements for habeas under Section 2241) (citing Morgan v. United States, 298 U.S. 468, 480 (1936), and Snyder v. United States, 291 U.S. 97, 116 (1934), as properly defining required judicial hearings).

As long as Bledsoe stands as good law, the courts in this Circuit will be "unable to determine" the "issues" involved in the construction and application of Section 235(b)(3) as originally enacted and the 1987 amendment thereto. Bledsoe defies the plain language of the statutes, failed to apply the presumption against retroactivity, misread the Congressional mandate to "release" as "parole," and construed the five-year period of Section 235(b) to result in an anomalous and bizarre eight years and 20 days. "[M]anifest injustice" will forever be inherent upon claims, such as those by the Petitioners, if the Bledsoe anomalies remain as good law. Therefore, the Bledsoe decision should be reanalyzed and overruled in light of the arguments made herein. Dobbs, 506 U.S. at 358-59 ("manifest injustice" requires reversal per se); 28 U.S.C. § 2106 (all federal courts of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order lawfully brought before it for review in interest of justice).

II. The District Court Erroneously Accepted The Government's Contention That Petitioners' Guideline Rating of 8 Had No Upper Limit.

Before the enactment of Section 235(b)(3), the former statute (18 U.S.C. § 4206) and the Commission's regulations governing early release

(28 C.F.R. §§ 2.13(d) and 2.20)[8] created presumptive parole release for eligible prisoners within their respective guideline ranges. See Montoya v. U.S. Parole Comm'n, 908 F.2d 635, 637 (10th Cir. 1990); Misasi v. U.S. Parole Comm'n, 835 F.2d 754, 756-57 (10th Cir. 1987); Castaldo v. U.S. Parole Comm'n, 725 F.2d 94, 96-97 (10 Cir. 1984); Joost v. U.S. Parole Comm'n, 698 F.2d 418, 419 (10th Cir. 1983). See also Marshall v. Lansing,

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[8] In 1977, the Commission altered the method by which release on parole was to be evaluated. This new method responded to numerous court rulings finding arbitrariness in Commission decision-making. The proposed rule required providing the prisoner with "a presumptive release date" soon after the initial hearing, which itself was required to be held within 120 days of arrival of the prisoner at the Federal institution. 42 Fed. Reg. 112, p. 29935 (June 10, 1977). According to the Commission, the objects of this new rule were "(1) the reduction of unnecessary uncertainty on the part of the prisoner, (2) more efficient and equitable decision-making and (3) more certain punishment for the purpose of deterring potential offenders." id. The rule permitted a set-off of five years, but when the final rule was published it was reduced to four years "in order to coincide with the occurrence of the second interim (statutory) review hearing at forty-eight months form the initial hearing." 42 Fed. Reg. 151, p. 39808-9 (August 5, 1977).

The set-offs permitted by the rule has been changed from four to ten years in 1979 and to the current fifteen year period in 1984 (after Congress concluded the Commission had to be abolished with all release dates set within five years of the then-pending Act). It, of course, appears that the applicable statutes are violated on their face by any set-off for full and complete consideration for release on parole beyond the two-year mandatory period commanded by Congress in 18 U.S.C. §§ 4208(h)(2) (hearings to be held every two years for all prisoners whose offenses resulted in sentence of seven years or more), 4206 (defining criteria for all parole determination hearings) and 4207 (defining information Commission is required to consider at or after the required hearings).

Petitioners have not challenged these apparent conflicts in light of their constitutional and statutory claims that they should have received set release dates long ago within their respective guideline ranges. Notably, however, the Supreme Court has made it seemingly clear that to alter parole consideration by rule-making power within the statutory period permitted by the legislature does not violate the Ex Post Facto Clause on its face, but will if shown to "create[] a significant risk of increasing [the] punishment." Gardner v. Jones, 529 U.S. 244, 254-257 (2000). The Court implied that to exceed the statutory set-off, however, would be constitutionally offensive per se. The Court emphasized the fact of "discretion" was the basis of its ruling and again implied that the lack of such discretion – like the instant cases – makes the whole difference.

839 F.2d 933, 941-50 (3rd Cir. 1988) (exhaustive review of requirements of § 4206). Cf. Solomon v. Elsea, 676 F.2d 282, 284-85 (7th Cir. 1982) (the mandate of Section 4206 which provides that the prisoner "shall be released" creates constitutionally protected liberty interest precluding denial thereof except for "good cause" found and provided the prisoner in writing). Section 235(b)(3), properly construed and applied, established the right of so-called "old law" prisoners to be given the release dates within their respective parole guidelines within five years of the effective date of the Act (October 12, 1984), minus sufficient time to exhaust appeals pursuant to the plain language and intent of the original Section 235(b)(3).

Petitioners, whose offenses are rated as Category 8, assert that the upper limits to their respective guidelines is established at 48 months above the lower guideline which has been established by the Parole Commission regulations in effect on its effective date. See 28 C.F.R. § 2.20 ("For decisions exceeding the lower limit of the applicable guideline category by more than 48 months, the Commission will specify the pertinent case factors upon which it relied in reaching its decision."). Thus, under Section 235(b)(3), the Parole Commission should have established a firm release date for Petitioners within the guidelines as required by the Statute, which it could have done.

However, the District Court erroneously premised it ruling on its holding that Category 8 rated offense has a guideline range without an upper limit. (Appendix A at 36). Based upon this wholly erroneous proposition, the District Court held that "[a] final, simple answer to all petitioners' claims is that respondents have alleged each has an offense severity rating of Category 8, which puts him in a guideline range with no specified upper limit" from which "[i]t follows that denial of parole in each case was 'within the range that applies to the prisoner under the applicable parole guideline.'" Id. (emphasis added).

The District Court's finding of no upper limit derives from an amendment to 28 C.F.R. § 2.20, promulgated with respect to Category 8 offenders in May of 1994. See Federal Register, Vol. 59, No. 95 (May 17-18, 1994) (FR Doc 94-12049). This amendment was not merely a facial ex post facto Constitutional violation purporting to undo the presumptions created by 18 U.S.C. § 4206 and 28 C.F.R. §§ 2.13(d) and 2.20, but was also promulgated 10 years after the enactment of Section 235(b)(3), over 11 years after Petitioner Von Kahl's offense, and over 19 years after Petitioner Peltier's offense with the stated purpose of reversing their presumptive release within their guideline ranges – i.e., to expressly lengthen their term of imprisonment and to enhance their punishment.

The District Court's final ruling was undoubtedly "simple," but was incorrect and certainly not legal. The District Court completely turned Section 235(b)(3) and the amendment thereto into acts of futility (at best) with no meaning, or complete imbecility (at worst). The Court found that "denial of parole" with respect to "each" Petitioner "was 'within the range that applies to the prisoner under the applicable parole guideline,'" interposing the congressional command "shall set a release date" with "shall deny parole" into the statute, thereby turning the statute upon its head.

The District Court categorized the unambiguous language of Section 235(b)(3) as "poorly written legislation," (Appendix A at 4), for the obvious purpose of interpreting and construing the language contrary to its clearly stated intent. Indeed, the District Court rationalized that "[f]ederal inmates, like petitioners herein, have repeatedly attempted to turn this poorly written legislation into a windfall entitlement to earlier release on parole, without success." (Id.)

The District Court, however, inaccurately characterized Petitioners argument and then arrived at a legally erroneous conclusion. Petitioners did not argue that Section 235(b)(3) mandated "release on parole," but rather Petitioners simply sought the enforcement of the statutes plain dictate: "The…Parole Commission shall set a release date." As confirmed by the

Congressmen who advanced the statute, Section 235(b)(3) "addresse[d] how the Parole Commission should deal with individuals who are slated to be in its jurisdiction 5 years" following the effective date of the Act during which time "the Commission must set release dates within the range of the applicable parole guideline." 132 Cong. Rec. Sen. 7940-41 (Senator Metzenbaum). The SRA intended to "limit the Commission's discretion before putting it out of business entirely," id. (Metzenbaum), and Section 235(b)(3) "establishe[d] an absolute cut off of the parole determination function." id. (Sen. Thurmond) (emphasis added). The Senate Judiciary Committee's statement in favor of Section 235(b)(3) expressly supports Petitioners: "'All release dates must be within the applicable guideline ranges.'" 132 Cong. Rec. Sen. 7940. See Lyons, 303 F.3d at 291 ("Section 235(b)(3), as originally enacted,… mandated a release date within, rather than beyond, the guideline range.").

The District Court's erroneous ruling that there was no upper limit on category 8 offenses deprived petitioners of a fair adjudication. An evidentiary, or even an oral, hearing would have eliminated this error. By erroneously adopting the Government's false allegations, the District Court was completely "unable to determine" the "issues" resulting in "manifest injustice" for which reversal is required. Dobbs, 506 U.S. at 358-59.

III. The District Court Erred When It Read Into The Original Section 235(B)(3) A Mere "Housekeeping Provision" Which Delayed Repeal Of The Parole Statutes And The Abolition Of The Parole Commission For Five Years And Continued The Authority Of The Commission To Determine Release Dates.

The District Court found Section 235(b)(3) to be a mere "housekeeping provision" "which delayed the repeal of parole statutes and the demise of the USPC for five years" and "continued the authority of the USPC to determine release dates." (Appendix A at 4). Yet, the Court conceded there is "no[] dispute[] that the 1987 amendment… returned discretion to the USPC to decide parole release…." (Appendix A at 27). Obviously, if the original Section 235(b)(3) "limit[ed] the Commission's discretion" and "establish[ed] an absolute cut off of the parole determination function," 132 Cong. Rec. Sen. 7940, as the Senators who introduced it and as its plain language made clear, then the District Court's ruling that the 1987 Amendment applied retroactively and "continue[d]" the authority of the Commission "to determine" the dates is, of course, manifestly wrong. In fact, if the District Court had been correct, which it was not, the District Court would have read the meaning out of Section 235(b)(3) by eliminating the clear text to set release dates and replacing it with text to restore the formerly withheld discretion. That Congress did not intend to do that was

made clear by its mandate that the 1987 Amendment was intended only to apply prospectively to crimes committed after December 7, 1987.

Throughout both of its rulings below and in its initial ruling in Bledsoe, the District Court has so confused the express repeals contained in the original Act with the five-year savings clause and the five-year limitation so as to deprive the legislation of any meaning. As Petitioners clearly noted in their petitions, Section 235(b)(1) delayed the repeal of the parole statutes solely to continue the existence of the Parole Commission to exercise its non-discretionary duty to set the mandatory release dates required by Section 235(b)(3).[9] If the repeals were effected immediately, there would be no entity to set the required release dates. Congress therefore made it abundantly clear that the sole purpose of "retain[ing] the Parole Commission and current law provisions related to parole in effect for the five-year period" was solely "in order to deal with sentences imposed under current sentencing practices," Senate Report No. 98-225, p. 189, and "the Parole Commission will remain in existence for 5 years…to set release dates for prisoners sentenced before that date." id., p. 56 n. 82. (emphasis added). Congress thus summarized the statutory scheme by noting that "most" of the prisoners sentenced under the "old system will be released during the five-

[9] The repeal of 18 U.S.C., Chapter 311 – the parole statutes – were enacted on October 12, 1984 in Section 218(a)(5).

year period," and then addressed the sole and exclusive remaining function of the Parole Commission as follows:

> As to those individuals who have not been released at that time, the Parole Commission must set a release date for them prior to the expiration of the five years that is consistent with the applicable parole guidelines.

Senate Report No. 98-225 at 189 (emphasis added).

Section 235(b)(3) "limit[ed] the Commission's discretion before putting it out of business entirely" and "establish[ed] an absolute cut off of the parole determination function." 132 Cong. Rec. Sen. 7940-41; Lyons v. Mendez, 303 F.3d 285, 293 (3rd Cir. 2002) (holding that Section 235(b)(3) "took effect on October 12, 1984"); Dallis, 929 F.2d at 589 & nn. 3 & 4 (The CCCA "[a]s a whole…became effective upon enactment" and Section 235(b)(3) was "'effective immediately'" and "'effect[ive] on October 12, 1984.'"

Of extreme importance is that, when the amendment was enacted, it expressly made very clear that in amending "this Act" in Section 235(b)(3) it was referring to the Comprehensive Crime Control Act of 1984. Public Law 100-182, § 2, Dec. 7, 1987, 101 Stat. 1266 ("Section 235(b)(3) of the Comprehensive Crime Control Act of 1984 is amended."). All courts who have addressed this issue always acknowledged that the effective date of the CCCA of 1984 was none other than October 12, 1984. Thus, the five-year

limitation of the statute began to run on that date and expired by its own clear terms five years thereafter – i.e., October 12, 1989.

The District Court erred in ruling the 1987 amendment "specifically continued the parole laws as to 'old law' inmates, and was not deleted or changed by the 1987 amendment." Indeed, it completely ignored the express purposes of the legislation (1) to stop the Commission's "arbitrary and capricious" decision-making, Senate Report No. 98-225, p. 65, and (2) to ensure that all prisoners had certain release dates.

The District Court's ruling is absurd for a number of reasons. Strangely, the District Court also expressly found that the original Section 235(b)(3) applied to the "'old law' inmates," id., p. 3, "entitl[ing]" "most" of them "to release within that time" (i.e., within five years), id. at 4, and that the amendment "[dis]entitled [them] to the windfall of shorter sentences under the guidelines." id., at 24. But, by holding that the amendment "put [the petitioners and the other prisoners to whom § 235(b)(3) applied] back in the same position [they] would have been in had none of the intervening statutes been enacted," (Appendix A at 27), the District Court's ruling patently violated the ex post facto clause since Congress could not seek to return the discretionary powers back to the Parole Commission, after enacting legislation which took from the Parole Commission its

discretionary powers to exceed a prisoner's parole guidelines in setting release dates. As the Third Circuit stated, "[i]f [the original § 235(b)(3)] had not affected the parole eligibility of that group, then it is difficult to conceive why Congress amended that provision in 1987 to restore the Commission's former authority to go beyond the guideline range." Lyons, 303 F.3d at 291. Put simply, if the District Court was correct, then it construed legislation so as to be meaningless which is not the role of a court. To the contrary, a court must construe legislation to give it meaning.

IV. The District Court Erroneously Construed The Five-Year Limitation Period In Section 235(B)(3) When It Determined That The December 7, 1987, Amendment Was Enacted To Clarify The Prior Act And Extended The Life Of The Parole Commission.

Relying again on Bledsoe, the District Court premised its "BACKGROUND" upon an error of immense proportions:

> On December 7, 1987, thirty-six days after the SRA became effective, Congress amended the Act to clarify that the terms of the PCRA would continue to govern the sentences of those prisoners sentenced prior to the effective date of the SRA, and extended the life of the Parole Commission to administer those sentences….

(Appendix A at 3)(quoting Bledsoe, 384 F.3d at 1234) (emphasis added). Congress, however, introduced the amendment not as a "clarification," but as a substantive "change." 132 Cong. Rec. Sen. 7940. See Lyons, 303 F.3d

at 291 (holding the amendment was no "clarification" but massive and unconstitutional change as applied retrospectively).

Of equal importance, the amendment did not "extend the life of the Parole Commission," but rather preserved the five-year limitation of the original Section 235(b)(3) thereby continuing the mandate to set release dates therein. "'[T]his court characterized Section 235(b)(3) as a "winding up" provision to ensure… to set dates for all prisoners sentenced under the old statutes before [the Parole Commission] goes out of business on November 1, 1992.'" (Appendix A at 4)(quoting Bledsoe, 384 F.3d at 1233).

This Court has created great confusion by its finding contradictory effective dates for the Act in question. The five-year period clearly was intended to commence on the "effective date of this Act,"-- namely, October 12, 1984. Lyons 303 F.3d at 291-92 (applying rule to § 235(b)(3) and holding it effective on October 12, 1984). Yet, in Bledsoe, this Court concluded that the "five-year period after the effective date of the Act began to run on November 1,1987." 384 F.3d at 1233n.1 (citing Lightsey v. Kastner, 846 F.2d 329, 332 (5th Cir. 1988), and Romano v. Luther, 816 F.2d 832, 837-39 (2nd Cir. 1987)). Cf. Dallis, 929 F.2d at 589 & nn. 3 & 4 (stating that "most" of the SRA became effective on November 1, 1987, but

"certain parts" of the SRA became effective "upon enactment of the CCCA on October 12, 1984," including Section 235(b)(3)).

The conflicting rulings started with the Bledsoe Court's reliance on the Romano Court's misconstruction of the original Act in 1987. Romano was decided on April 3, 1987, and held that Section 235(b)(3) "is now in effect." 816 F.2d at 839. The Court also applied a primary canon of construction that "[u]nless a contrary intention clearly appears, an effective date provision becomes effective on the date of enactment." Id.. See also Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991) ("It is well established that, absent a clear direction to the contrary, a law takes effect on the date of its enactment.")

Romano reasoned, "It would be highly anomalous for portions of a section creating the time-table for a statute to have their own effective dates delayed," and concluded that Section 235(b)(3) became effective on the date of enactment, October 12, 1984, along with other subsections of 235(b). See 816 F.2d at 839. However, the Court created confusion when it held that the five-year period of the Statute did not commence running until November 1, 1987. 816 F.2d at 837, 839.

This ruling has confused many courts, see Bledsoe, 384 F.3d at 1233 n. 1; cf. Dallis, 929 F.2d at 589 & nn. 3 & 4, and has extended the five-year

period in the statutory text from five years to eight years and twenty days, ending on November 1, 1992, rather than October 12, 1989, as contemplated under the statute. The District Court nevertheless concluded, "whether one interprets the effective date of Sec. 235(b)(3) as October 12, 1984, or November 1, 1987, is of no legal consequence to prisoners [including Petitioners] who committed their offenses prior to October 12, 1984." (Appendix A at 25.)

To suggest, as did the District Court, that the effective date is irrelevant reads the statute's five-year limitation period right out of the statute. This violated basic precepts of statutory construction and constituted clear error. Petitioners should have had their release dates set before October 12, 1989, the day the five-year period ran out.[10] The Parole Commission became a statutorily extinct agency as of that date by the clear language of Section 235(b)(3). Thus, the time period is of grave consequence.

All confusion should have dissipated when Congress enacted the 1987 amendment. If Congress clarified anything by the 1987 amendment, it made unequivocally clear that "this Act" as used in the original Section 235(b)(3)

[10] Moreover, Petitioners should have transferred by operation of law pursuant to Section 235(b)(4) to the jurisdiction of their District Court for any and all actions in respect to supervised release as required by that section.

meant the Comprehensive Crime Control Act of 1984 which unquestionably became effective on October 12, 1984. Pub. L. 100-182, § 2, 101 Stat. 1266 ("Section 235(b)(3) of the Comprehensive Crime Control Act of 1984 is amended."). The Bledsoe Court, however, repeatedly misconstruing the 1987 amendment as an "amendment to the SRA". 384 F.3d at 1234.

This Court must acknowledge that the repeals of 18 U.S.C. §§ 4084 and 4085 (among other provisions) were effectively repealed on the date of enactment, October 12, 1984, pursuant to Section 218(a)(3) – the repealing section. Thus, except for the five-year savings clause, the repeals in Section 235(b)(1)(A)-(G), would have been final on October 12, 1984, and the 1989 abolition of the Parole Commission would have been accomplished on that date. Piekarski v. Bogan, 912 F.2d 224, 225 (8th Cir. 1990) (holding that pursuant to Section 235(b)(3) the Parole Commission was required to set the mandatory release dates for all "eligible prisoners who would still be in custody in 1989, when the Commission was scheduled to be abolished"). Thus, relying on Bledsoe, the District Court rendered the statutes in question unreadable and unenforceable.

V. The District Court Erroneously Construed The 1990 Amendment To Section 235(B) As Extending The Life Of The Parole Commission, Rather Than Resuscitating An Already Extinct Parole Commission, Thereby Creating Constitutional Violations.

The District Court stated that "[a]dditional amendments" were made to Section 235(b)(3) which "mainly extended the life of the USPC" (footnoting a "(1990)" extension "from five to ten…years"), (App. A at 9 & n. 3). The Bledsoe opinion is at least partially the culprit: "Congress has repeatedly extended the life of the Parole Commission to administer those prisoners with pre-SRA offenses. See e.g., Pub. L. 101-650, Title III, § 316, 104 Stat. 5089, 5115 (extension for ten years)." 384 F.3d at 1234n. 2.

Contrary to the District Court's decision, Section 316 of the December 1, 1990, statute does not suggest that the former five-year period became effective on November 1, 1987. Indeed, there would be no need to even consider extending the five year period in December of 1990, if it started on November 1, 1987. Yet, the District Court throughout its opinion stated that the effective date of Section 235(b) was November 1, 1987, without actually determining the correct date and ultimately determining it did not have any legal consequence either way.

Congress' extension on the five year period is further evidence that the five year period became effective on October 12, 1984. Congress thus belatedly sought to extend the life of the Parole Commission after it had already expired. The legal consequences of Congress' attempt to extend expired statutes are immense. "[T]he presumption against retroactivity applies far beyond the confines of the criminal law." INS v. St. Cyr, 533 U.S. 289, 324 (2001). Although Section 316 is titled "EXTENSION OF LIFE OF PAROLE COMMISSION," Pub. L. 101-650, Title III, § 316, 104 Stat. 5115, the actual text simply legislates that the terms "'five years' or a 'five-year period' shall be deemed a reference to 'ten years' or a 'ten-year period'" for Section 235(b) of "Public Law 98-473" as it relates to chapter 311 of title 18 U.S.C. However, the "title alone is not controlling," INS v. St. Cyr, 533 U.S. at 308, and "`cannot limit the text'" of the statute. Id. (quoting Pennsylvania Dept. of Corrections. v. Yeskey, 524 U.S. 206, 212 (1998)).

Since the five-year period of Section 235(b)(3) commenced October 12, 1984, it expired at midnight on October 12, 1989. Thus, the December 1, 1990, enactment purporting to extend the already expired statute of limitation adversely to Petitioners' interests is impermissible – a principle particularly applicable where, as here, the statute of limitations is also a

statute of repose. Lieberman v. Cambridge Partners, L.L.C., 432 F.3d 482, 489-90 (3rd Cir. 2005) ("'extending a statute of limitations after the existing period of limitations has expired impermissibly revives a moribund cause of action'" a principle more strenuously applied to "a statute of repose, not merely…a statute of limitations") (quoting Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 950 (1997) and citing P. Stoltz Family Partnership L.P. v. Daum, 355 F.3d 92, 102 (2nd Cir. 2004)); Stone v. Redell, 308 F.3d 751, 757 (7th Cir. 2002); Million v. Frank, 47 F.3d 385, 390 (10th Cir. 1995).

To apply the 1990 amendment to extend an expired statute of limitations and repose in order to revive the repealed parole statutes and the existence of the Parole Commission unequivocally denies Petitioners their otherwise unqualified right to have had a release date set. This in turn aggravated Petitioners' punishment, thereby establishing further additional infirmities. See Stogner v. California, 539 U.S. 607, 632-33 (2003) ("[A] law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause").

Obviously, the effective date does matter, and this Court's contradictory statements on the matter in Bledsoe which were then relied upon by the District Court has led to error and made it impossible for a

correct decision to be rendered in this circuit unless Bledsoe is overruled in the interests of justice.

VI. The District Court Erroneously Construed The 1987 Amendment To Be A Mere Clarification Which Did Not Result In An Ex Post Facto Violation By Its Retroactive Application.

(a). THE ANTI-RETROACTIVITY PRINCIPLE

The "deeply rooted" "presumption against the retroactive application of new laws…finds expression in several provisions of our Constitution." Lynce v. Mathis, 519 U.S. 433, 439 (1997) (citing Landgraf v. USI Film Products, 511 U.S. 244, 265 & 266 (1994). The "ban on retrospective legislation embrace[s] 'all statutes, which, though operating only from their passage, affect vested rights and past transactions,'" Landgraf, 511 U.S. at 268-69, and "any such affect constitute[s] a sufficient, rather than a necessary, condition for invoking the presumption." Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 947 (1997) (citing Landgraf, 511 U.S. at 269).

Where, as here, legislation has a retroactive effect, the reviewing Court must first determine "'whether Congress has expressly prescribed the statute's proper reach.'" Martin v. Hadix, 527 U.S. 343, 352 (1999) (quoting Landgraf, 511 U.S. at 280). Congress, of course, clearly prescribed that "the amendment[]…shall apply with respect to offenses committed after

the enactment of this Act," Pub. L. 100-182, § 26, 101 Stat. 1272, which was December 7, 1987. The "traditional rule," which the Court ignored, is that "statutes do not apply retroactively unless Congress expressly states that they do." Plaut v. Spendthrift Farm, 514 U.S. 211, 237 (1995) (emphasis by Court). When "application of the statute to the conduct at issue would result in retroactive effect," Martin v. Hadix, 527 U.S. at 352, the court must "presume that the statute does not apply to that conduct," id., "which occurred prior to its effective date." Hughes Aircraft, 520 U.S. at 946. The United States Supreme Court has noted the "demanding" "standard" for finding the required "unambiguous direction" in a statute for retrospective application and the only statutes "'found [having] truly "retroactive" effect adequately authorized by statute involved statutory language that was so clear that it could sustain only one interpretation.'" INS v. St. Cyr, 533 U.S. 289, 316-17 (2001) (quoting Lindh v. Murphy, 521 U.S. 320, 328 n. 4 (1997)).

The District Court acknowledged this well established rule of law, but found its application "illogical," (Appendix A at 28-29), and therefore disregarded that rule in favor of a rule it fashioned as to the how the amendment should apply. In doing so, it applied the amendment retroactively in the face of a contrary Congressional mandate and the

presumption of statutory construction. Relying on its own notion of logic, the District Court turned to "the Seventh Circuit[']s] reasoning that "'the 1987 amendments cannot be interpreted to apply to offenses after December 7, 1987,' because '…[] the 1987 amendments must apply to offenses committed prior to the enactment of the Act.'" (Appendix A at 28-29) (quoting Norwood v. Brennan, 891 F.2d 179, 182 (7th Cir. 1989).

The District Court, as well as this Court in Bledsoe, committed error by second-guessing Congress' "logic" when the statutory language was plain. The court cannot ignore Congress' mandate and must "follow the direction of the statute." Gozlon-Peretz v. United States, 498 U.S. 395, 409 (1991). The Supreme Court has repeatedly held that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last; the judicial inquiry is complete." United States v. Gonzales, 520 U.S. 1, 6 (1991) (emphasis added). The District Court erroneously refused to apply the presumption against retroactivity both in the face of Congress' mandate and without any plausible basis for ruling that Congress could have intended retroactive application.

(b). THE EX POST FACTO PROHIBITION

"The Ex Post Facto Clause flatly prohibits retroactive application of penal legislation." Landgraf, 511 U.S. at 266. "'The critical question [for an ex post facto violation] is whether the law changes the legal consequences of acts completed before its effective date.'" Carmell v. Texas, 529 U.S. 513, 520 (2000) (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)) (brackets by Court). "To fall within the ex post facto prohibition, a law must be retrospective – that is, 'it must apply to events occurring before its enactment' – and it 'must disadvantage the offender affected by it.'" Lynce v. Mathis, 519 U.S. at 43 (quoting Weaver, 450 U.S. at 29). "[E]ven if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense," Weaver, 450 U.S. at 30-31, and "materially 'alters the situation of the accused to his disadvantage.'" Greenfield v. Scafati, 277 F.Supp. 644, 646 (D. Mass. 1967), aff'd summarily, 390 U.S. 713 (1968).

"It is not disputed that the original version of Sec. 235(b)(3) expressly applied only to 'old law' inmates," which included Petitioners. Moreover, the District Court construed the amendment as stripping Petitioners of their "entitle[ment] to the windfall of shorter sentences under the guidelines,"

"delet[ing] a requirement that prisoners be given release dates within [their respective] guidelines, and [by] return[ing] discretion to the USPC to decide release under 18 U.S.C. 4206." (Appendix A at 35). Relying on Bledsoe, the District Court stated: "The only change made by the amendment…concerned the method of dealing with the eventual release of 'old law' inmates. Bledsoe, 384 F.3d at 1238 ('The language of the 1987 amendment merely amended the original SRA to delete the clause requiring the Commission to set release dates within the guideline range.')." It therefore determined that "[a]ny disadvantage" to Petitioners is constitutionally irrelevant because "[e]ach petitioner was…put back in the same position by the amendment he would have been in had none of the intervening statutes been enacted." Citing Bledsoe, 384 F.3d at 1239 (other cites omitted).

The District Court and Bledsoe, however, ignored that "the intervening statutes had been enacted," and the Supreme Court has expressly held that intervening statutes creating an earlier release fall within the protections of the Ex Post Facto Clause. Lynce v. Mathis, 519 U.S. 433 (1997). In Lynce, the respondents claimed that the cancellation of the early release credits did not violate the Ex Post Facto Clause, "[b]ecause the credits had been issued as part of administrative procedures…they are not an

integral part of petitioner's punishment; and…in petitioner's case, the specific…credits had been awarded pursuant to statutes enacted after the date of his offense rather than pursuant to the [offense era] statute." 519 U.S. at 439. The United States Supreme Court in Lynce rejected that argument and made clear that post-offense statutes permitting the award of early release credits could altered by subsequent legislation canceling the credits without implicating an ex post facto analysis.

"The narrow issue" for the Court was "whether those consequences disadvantaged petitioner by increasing his punishment." 519 U.S. at 441. Finding the legislature's "desire" "[ir]relevant to the essential inquiry," the ultimate question was reduced to "whether…the cancellation of the [early release] credits had the effect of lengthening petitioner's period of incarceration." 519 U.S. at 442-43. In Weaver, 450 U.S. 24, the United States Supreme Court addressed whether post-offense legislation altering a sentence to a prisoner's disadvantage violated the ex post facto constitutional prohibition, and, in doing so, it defined the factors involved in such inquiry. The Court found no need to "determine whether the prospect of the gain time was in some technical sense part of the sentence to conclude that it in fact is one determinant of a prisoner's prison term – and that his effective sentence is altered once this determinant is changed." Weaver, 450

U.S. at 32 (citing Greenfield v. Scafati) (other cites omitted) (emphasis added).

In Greenfield, the Supreme Court affirmed a ruling that a post-offense statute altering early release with respect to parolees violating parole violated the Ex Post Facto Clause. The Court so held even though parole was considered a matter of legislative "grace, and not of right;" the "ex post facto burden" "materially 'alters the situation of the accused to his disadvantage'" and was therefore enjoined as unconstitutional. 277 F.Supp. 644, 645-46 (D. Mass. 1967), aff'd summarily, 390 U.S. 713 (1968). Weaver's reliance upon Greenfield and the specific reference to elimination of early release by parole, 450 U.S. at 32, as a "determinant of [a] prison term," makes those cases directly on point with the instant case.

"`The essence of parole is release from prison, before the completion of sentence.'" Childs v. United States Board of Parole, 522 F.2d 1270, 1277 (D.C. Cir. 1974) (quoting Morrissey v. Brewer, 408 U.S. 471, 477 (1972)). Denial of parole causes "serious effects" and the agency's discretion results in the prisoner "suffer[ing] a 'grievous loss' or gaining a conditional liberty…[an] interest accordingly…substantial." 522 F.2d at 1278. Since at least 1974, such release has depended upon "guidelines…calculated to have a substantial effect on ultimate parole decisions" and regulations "plac[ing]

each offense" in a "category" establishing a "minimum and maximum…amount of time almost all offenders will serve." Pickus v. United States Board of Parole, 507 F.2d 1107, 1112-13 (D.C. Cir. 1974). These are "determinants" that "impact…the amount of time an inmate serves in prison" with "significant consequences," id. (emphasis added), because "the precise time at which the offender becomes eligible for [early release on] parole…is implicit in the terms of the sentence." Warden v. Marrero, 417 U.S. 653, 658 (1974). Thus, it "could not be seriously argued that…[early release] decisions would not be drastically affected by a **substantial change in the proportion of the sentence required to be served…**, parole eligibility can be properly viewed as being determined – and deliberately so – by the sentence of the District Judge." Id. (emphasis added).

Early release by parole authorities is "in fact one determinant of [P]etitioner[s'] prison term[s]," Weaver, 450 U.S. at 32, and the "change[s]" in these "determinant[s]" have resulted in their "effective sentence[s] [being] altered." Id. Before the enactment of Section 235(b)(3), Petitioners' sentences provided presumptive early release on parole within their respective guidelines pursuant to 18 U.S.C. § 4206. Montoya v. U.S. Parole Comm'n, 908 F.2d 635, 637 (10th Cir. 1990); Joost v. U.S. Parole Comm'n,

698 F.2d 418, 419 (10th Cir. 1983). The Parole Commission administered early release under guidelines and criteria established in regulations of the Commission. Section 235(b)(3) modified the procedure by which the release dates were to be set by eliminating the Commission's discretion to exceed the guidelines and ordered the dates to be set within five years. "Section 235(b)(3), as originally enacted, did affect parole eligibility for those prisoners to whom it applied, as it mandated a release date within, rather than beyond, the guideline range." Lyons, 303 F.3d at 291.

Like the early release credits shortening the prisoner's sentence in Lynce, which was "cancelled" by a subsequent statute and resulted in a "prolonged…imprisonment," 519 U.S. at 446-47, the withdrawing of the Commission's discretion by Section 235(b)(3) "provide[d] a[]…windfall to…prisoners…serving the longest terms." 132 Cong. Rec. Sen. 7940, and the 1987 amendment (as applied) has stripped Petitioners of that "entitle[ment] to the windfall of shorter sentences under the guidelines," Von Kahl MEM at 23-24, when it "deleted [that] requirement." Id. at 18.

In Lynce, the final statute "cancelled" credits and effectively cancelled early release. In the instant cases, the final statute "deleted" the requirement to set Petitioners' release dates within their guideline ranges, effectively deleting their mandatory early release within guidelines. In both

cases, the final statutes "resulted in…prolonged…imprisonment." Lynce, 519 U.S. at 447. This is precisely the "disadvantage" that prohibits application of the amendment by the *Ex Post Facto* Clause. 519 U.S. at 446-47.

For constitutional purposes there is no difference between the "determinant[s] of [a] prison term" created by early release credits or by early release by parole authorities within the decisions of Lynce (credits), Weaver (credits), Greenfield v. Scafati (early release by parole) and the instant cases. Because early release by parole authorities under prescribed guidelines is "one determinant of [P]etitioner[s'] prison term[s]," Weaver, 450 U.S. at 32, originally established "at the time of sentencing," Warden v. Marrero, 417 U.S. at 659, "and the [Commission's] action simply implements that determin[ant]," id., therefore, "the series of [post-offense] statutes authorizing [earlier release] do not affect [P]etitioner[s'] core ex post facto claim." Lynce, 519 U.S. at 449.

Just as the "new provision constrict[ing] [Weaver's] opportunity to earn early release…ma[d]e[] more onerous the punishment," Weaver, 450 U.S. at 35-36, the 1987 amendment to Section 235(b)(3) as applied to Petitioners deprived them of the setting of release dates and release within the guidelines, thereby making "more onerous" their punishment. See

Lightsey v. Kastner, 846 F.2d 329, 334 (5th Cir. 1988) (1987 amendment is "arguably…more onerous" than original Section 235(b)(3)).

Finally, "returning discretion to the USPC to decide parole release under 18 U.S.C. 4206," subjected Petitioners to a "new power" creating "uncertainty" and "immense mental anxiety amounting to a great increase of [Petitioners'] punishment." In re Medley, 134 U.S. 160, 172-73 (1890). The prisoner in Medley suffered such uncertainty and anxiety for a period within a week. Petitioners have endured such "great[ly] increase[d]…punishment" for well over a decade. It has undoubtedly passed long ago into the realm of cruel and unusual punishment. In any case, the 1987 amendment, as applied to Petitioners, violates the Constitution's ex post facto prohibition and is therefore "void" as applied. Weaver, 450 U.S. at 36.

VII. The District Court Erred By Not Fully And Fairly Considering Petitioners' Claim That The 1987 Amendment To Section 235(B)(3) Violated The Constitutional Prohibition Against Bills Of Attainder

Acknowledging Petitioners' claims that the 1987 Amendment to Section 235(b)(3) violated the Bill of Attainder prohibition of the Constitution,[11] the District Court arbitrarily denied the claim based upon this Court's decision in Bledsoe which held that "'arguments similar to

[11] MEM Von Kahl, p. 3 (No. 8 & 22).

petitioners' have been found to be without merit by federal appellate courts across the country." MEM Von Kahl, p. 22 & n. 15 (citing rulings involving *ex post facto* claims). The Bledsoe Court rejected the bill of attainder claim on the ground that the petitioners therein had "not been targeted as 'identifiable individuals.'" 384 F.3d at 1238. In doing so, the Court failed to review either the stated purpose of the 1987 Amendment or the scope of the bill of attainder prohibition.

However, Bledsoe did concede that the petitioners were "members of an entire class who might be affected." Id. at 1238 (emphasis added). The Court employed the equivocal possibility because it reconstructed the statutory limitation and identification of the persons targeted in the original Act into a completely meaningless definition. Section 235(b)(3), 98 Stat. 2032 (statutory provision applicable to prisoners "who will be in [the Parole Commission's] jurisdiction the day before the expiration of five years after the effective date of this Act"); Cf. Bledsoe, 384 F.3d at 1236 (construing the express time period of the statute to mean "that the statute was solely to affect prisoners who would be under the jurisdiction of the Parole Commission just before the Commission expired"). Thus, Bledsoe transformed the class into dependency upon whether the Commission ever "expires." Obviously, the expiration of an express period of time and the

expiration of an institution are two entirely different things and the original Section 235(b)(3) unequivocally set a date based strictly on time and **not** on the occurrence of an event. This erroneous premise led the Bledsoe Court to find that the statute and its amendment only applied to "that limited group of prisoners who will actually be incarcerated the day before the Commission does finally and ultimately expire." 384 F.3d at 1236. Because this event has been repeatedly extended by Congress, Bledsoe effectively rendered the statute originally, and as amended, to be a wholly pointless effort of Congress' legislating absolutely nothing.

Bledsoe also misconstrued the claims in that case by reading them as asserting a liberty interest "that guaranteed them the right to be resentenced under the new sentencing guidelines." 384 F.3d at 1234. In fact, the Bledsoe petitioners merely sought to enforce the plain language of the original Section 235 (b)(3) requiring the commission to "set" their "release dates" by the end of that five-year period and to enforce it within their respective "parole" guidelines.

There is, of course, a clear "kinship between bills of attainder and ex post facto laws," Carmell v. Texas, 529 U.S. 513, 536 (2000) (citations omitted), and "all of the specific examples listed by Justice Chase [in Calder v. Bull, 3 Dall. 386 (1798)] were passed as bills of attainder." 529 U.S. at

537 & n. 27 (footnoting the specific acts). More importantly, Justice Chase did not exhaust all of the acts prohibited by the *ex post facto* and bill of attainder prohibitions, he simply cited a few examples to establish the principles of the prohibitions and summed them up by stating "'[a]ll these, and similar laws, are manifestly unjust.'" Stogner v. California, 539 U.S. 607, 612 (2003) (*quoting* Calder v. Bull, 3 Dall. 386, 391 (1798)).

Bledsoe and the District Court held that the 1987 Amendment stripped Petitioners, and the prisoners to whom it applied, of their "entitle[ment] to the windfall of shorter sentences under the [parole] guidelines" as mandated by the original Section 235(b)(3). Bledsoe, 384 F.3d at 1239; MEM Von Kahl at 24 (same). Thus, there is no doubt that the Amendment lengthened their sentences by adding imprisonment without a judicial trial.

"[T]he Bill of Attainder Clause [is] not to be given a narrow historical reading…but [is] to be read in light of the evil the Framers had sought to bar: legislative punishment, in any form or severity, of specifically designated persons or groups." United States v. Brown, 381 U.S. 437, 447 (1965). "[L]egislative acts, no matter what their form, that apply to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment without a judicial trial are bills of attainder prohibited by the Constitution." 381 U.S. at 449 (quoting United States v. Lovett, 328

U.S. 303, 315 (1946)). The "anti-retroactivity principle" of the Ex Post Facto and Bill of Attainder Clause, Landgraf, 511 U.S. 244, 265-267 & n. 20, constitutionally "prohibit[s] legislatures from singling out disfavored persons and meting out summary punishment for past conduct," *id.*, 511 U.S. at 266, and forbids "the use of the political process to punish or characterize past conduct of private citizens." 511 U.S. at 267 n. 20; Lynce v. Mathis, 519 U.S. 433, 439 & n. 12 (1997).

It is undeniable that the original Section 235(b)(3) applied only "to a specific set of inmates: those who committed offenses prior to the SRA," (Appendix A at 4), "most [of whom] would be entitled [by the statute] to release within [five years of the Act]." Id. (the original section applied to a specially defined "limited group of inmates"). See Bledsoe, 384 F.3d at 1236 (original section "controls…the sentences of that limited group of prisoners…"); Romano v. Luther, 816 F.2d 832, 837 (2nd Cir. 1987) (original section "applies to an individual 'who will be in [the Parole Commission's] jurisdiction the day before five years after the effective date of this Act…'"); id. 816 F.2d at 841 ("For that limited group, Congress chose not to require service of their maximum sentences but instead to afford them release…within their…parole guideline ranges…" defining that

"limited group" as "a relatively small number of prisoners sentenced under the current system and still in custody on October 30, 1992").[12]

In any case, the original section and the amendment thereto both targeted "specifically designated" and "easily ascertainable members of a group," Brown, 381 U.S. at 447, 449, by which the original Section 235(b)(3) legislated "shorter sentences" for the prisoners to whom it applied as part of the remedy for otherwise arbitrary and capricious sentencing decisions by the Parole Commission. Of course, enacting a remedy on behalf of prisoners by shortening their sentences and ensuring certainty in their release from arbitrary punishment does not fall within any constitutional prohibition.

However, to single out an express group of prisoners, declare them the "most dangerous," 132 Cong. Rec. 7940, "without regard to whether there existed any demonstrable relationship between the characteristics of the person involved and the evil Congress sought to eliminate…is relevant" to the bill of attainder inquiry. Brown, 381 U.S. at 456. At the same time it is irrelevant "'whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of

[12] As noted earlier, Romano held the "Act" referred to in § 235 as "ha[ving] the same effective date as the entire Act" – *i.e.*, October 12, 1984, but that the five-year period runs from November 1, 1987. Regardless, Romano clearly understood the terms to mean a very specific date by which the subject-matter was to be concluded, even if the court identified the wrong date.

particular persons.'" Selective Service System v. Minnesota Publ. Interest Research Group, 468 U.S. 841, 847 (1984) (quoting Communist Party of America v. Subversive Activities Control Board, 367 U.S. 1, 86 (1961)).

When discussing the proposed amendment, the Senators introducing it expressly defined the original section as applying "individuals who are slated to be in [the Parole Commission's] jurisdiction," 132 Cong. Rec. 7940, "'the day before the expiration of 5 years after the effective date of the Act.'" Moreover, without individualized consideration they were identified as both the "most dangerous" and the "most likely to have aggravating factors warranting decisions above the applicable parole guidelines." 132 Cong. Rec. 7940. They were also noted as having the "longest sentences." id.

These are the very criteria that establishes a bill of attainder historically for which the Clause was placed in the Constitution as defined by the Supreme Court – i.e., a "legislat[ive]…judgment, undoubtedly based largely on past acts and associations…that a given person or group was likely to cause trouble…therefore inflict[ing] deprivations upon that person or group in order to keep it from bringing about the feared event." Brown, 381 U.S. at 458-59; *id.*, 381 U.S. at 449 n. 23 ("The vice of attainder is that

the legislature has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction").

Unlike the respondent in Selective Services, Petitioners and the "group" within which they were singled out for punishment had no means of escaping their formerly convicted "status" upon which Congress relied and do not "'carry the keys of their prison in their own pockets,'" Selective Services, 468 U.S. at 850-51 & n. 5, 853 (omitting citations), but are "persons in the group disqualified [from the windfall of shorter sentences]…defined entirely by irreversible acts [i.e., their former convictions and sentences]." id. 468 U.S. at 848. See also Brown, 381 U.S. at 457-58 & n. 32 (noting that the statutes found not to be bills of attainder in American Communications Assn. v. Douds, 339 U.S. 382, 414 (1950), and Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 88 (1961), were grounded at least in part on the affected persons' ability to "escape" or "extricate themselves from the [targeted] class").

"[U]nderinclusiveness" is not "a necessary feature" nor is "overbroadness…a necessary characteristic of a bill of attainder," Brown, 381 U.S. at 449 n. 23 & 457 n. 32, and Petitioners are clearly part of an easily ascertainable group and have been expressly ascertained as part of that group that have been found guilty of being dangerous and punished therefore

by Congress with the 1987 Amendment as construed by the courts within any of the established criteria laid down by the Supreme Court.

Again, Bledsoe must be reconsidered in light of its misconstruction of the claims raised, misreading of the statutes involved, failure to hold the necessary hearing to clarify the facts in dispute, and for leaving the District Courts without a guide, without which only manifest injustice can result.

VIII. The District Court's Ruling Violated Due Process Of Law.

After a decade of investigation and hearings, Congress found that Parole Commission decision-making had resulted in a "system" that was inherently "arbitrary and capricious" requiring "correction." Senate Report No. 98-225, p. 65. The system too often left prisoners in a state of "uncertainty" and/or "shameful disparity." Id. at 39, 65. All of which, Congress found to be "[un]fair" to both the prisoner and the public, id. at 39, 49, and necessarily "unjust." id. 45-46. See also Mistretta v. United States, 488 U.S. 361, 366 (1989) (the parole system had "'unjustified' and 'shameful' consequences" of which the first was disparity in sentences for similar offenses and "[t]he second was the uncertainty as to the time the offender would spend in prison").

After addressing this "arbitrary and capricious" system by eliminating the Commission discretion which caused the problems, the District Court

decided that the 1987 amendment "put" Petitioners "back in the same position by the amendment [they] would have been in had none of the intervening statutes been enacted." (Appendix at 27)(citing Bledsoe, 384 F.3d at 1239). Thus, at the very least, by the District Court's ruling, the Petitioners were "put back" under a system of "arbitrary and capricious" sentences, "uncertainty" in release, and a state of general "[in]just[ice]."

"The touchtone of due process is protection of the individual against arbitrary action of government." Wolf v. Mcdonnell, 418 U.S. 539, 588 (1974). The holdings are simply too numerous to bother pretending that "arbitrary and capricious" decision-making somehow satisfies due process of law. For the Court to construe the 1987 amendment to apply retroactively and thereby restore the arbitrary and capricious nature of the Parole Commission's decision making constituted a violation of substantive due process.

To suggest that Congress deliberately found the Parole Commission's decision-making and the parole system in general to be inherently "arbitrary and capricious" and that Congress deliberately "put" Petitioners "back" under such a system is to suggest that Congress deliberately violated the Constitution and their oaths of office. It is to be presumed that Congress "'legislates in light of constitutional limitations.'" Jones v. United States,

526 U.S. 227, 240 (1999) (quoting Rust v. Sullivan, 500 U.S. 173, 191 (1990)); United States v. Coombs, 37 U.S. (12 Pet.) 72, 76 (1838) ("a presumption ought never be indulged that Congress meant to exercise or usurp any constitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous."). Indeed, Congress did so, since it expressly mandating that the 1987 applied only prospectively.

There is no statutory language that "put" Petitioners "back" under Section 4206 in the 1987 statute. The statute directs exactly the opposite – i.e., applying the amendments to offenses committed after December 7, 1987. But, by applying the amendment against the congressional command to Petitioners, the District Court (and of course the Parole Commission) have become the constitutional violators. In any case, as applied the amendment unequivocally violates due process of law by imposing upon Petitioners additional imprisonment by lengthening their sentences, but also by imposing upon them new sentences of arbitrary and capricious uncertainty.

Finally, the Commission well knew they were scheduled to be defunct. The Senate Report was released on September 14, 1983 and the Commission knew its fate (and that of its employees) was sealed. United States v. Casson, 434 F.2d 415, 420-22 (D.C. Cir. 1970) (pre-enactment publication of bills, committee reports, etc., and/or availability of same puts

all interested parties on notice as to contents, intent of Congress, and effect of legislation and courts will take judicial notice thereof). It was to be abolished and was left only with the ministerial duty and power to set the required release dates and find new jobs. Instead, the Commission promulgated new rules giving itself power to issue set-off dates of fifteen (15) years. Knowing its life expectancy was only five years as soon as the bill was enacted, this can be viewed as nothing less than shear arrogance and defiance. It used this new power to build up a pool of unreleased prisoners upon which it sought additional extensions to its corrupt existence.

It became imperative to the Commission and its employees to ensure they did not comply with the original Section 235(b)(3) because as soon as the statutorily mandated dates were set, well, simply put, the Commission had no further purpose. Too much money and other personal interests were at stake and the prisoners, including Petitioners, became pawns in this game. They are the losers. That is clear. They lost the congressional "windfall of shorter sentences" as the District Court made clear. They were "put back" by the Commission and the courts under the former "arbitrary and capricious" regime where they now languish in desperate states of uncertainty.

The Commission, however, continued to thrive off of the prisoners (including Petitioners) and Commission employees were able to continue to retirement collecting benefits and pensions from Petitioners' "[un]just" suffering. The public has simply been milked by an amendment, as "re-legislated" by the Commission and the lower courts, continuing to pay for "arbitrary and capricious" decision-making, which in reality is nothing more than the courts and Commission employees working by concert of action.

There is not even a semblance of due process of law in the application of the amendment to Petitioners or the other prisoners to whom the original Section 235(b)(3) applied in respect to the 1987 amendment. Not even a hearing was permitted before the shorter sentences were lengthened. The District Court's decision is not an adjudication of rights between parties, but a blatant denial of due process on its own. It seems that unless a fair hearing on the evidence and the plain language of the statute (rather than statutes in essence legislated by judges) is permitted, these constitutional and statutory violations will never be corrected or the Constitution vindicated.

CONCLUSION

For the above reasons, Petitioners request that this Court reverse the judgment of the District Court and to grant Petitioners their requested relief.

YORIE VON KAHL and
LEONARD PELTIER
By Their Attorney

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Barry A. Bachrach
Law Office of Barry Bachrach
62 Paxton Street
Leicester, MA 01524
(508) 892-1533

January 3, 2007

STATEMENT REGARDING ORAL ARGUMENT

Petitioners-Appellants respectfully request oral argument. Because the case involves lengthy and complex proceedings before both the federal courts and the United States Parole Commission, Petitioners-Appellants believe oral argument would assist the Court in considering this important matter.

CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 28.1(e)(2)(i) because it does not exceed 14,000 words. I certify that the brief is proportionally spaced. I relied on my word processor to obtain the count and it is Word 2000. I certify that the information in this Certificate is true

and correct to the best of my knowledge and belief formed after a reasonable inquiry.

_____
Barry A. Bachrach

CERTIFICATE OF SERVICE

I, Barry A. Bachrach, hereby certify that on January 3, 2007 I sent the appropriate number of copies of the foregoing for filing and for delivery to counsel for Respondent at the following addresses:

For Filing:

Honorable Patrick Fisher
U.S. Court of Appeals for the Tenth Circuit
Byron White U.S. Courthouse
1823 Stout Street
Denver, CO 80257

For Service:

Jackie A. Rapstine, Esquire
United States Attorney's Office
444 S.E. Quincy, Room 290
Topeka, Kansas 66683-3592

_____
Barry A. Bachrach