STATE OF MICHIGAN
IN THE 30TH (INGHAM COUNTY) CIRCUIT COURT

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

Plaintiffs,

v.

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

Defendants.

File No. 12-907-CZ

Hon. Joyce Draganchuk

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Pursuant to MCR 2.113(C)(2)(a), there are no other pending cases between the parties raising substantially the same issue presented here. A previous case in federal court raised substantially the same issue. That case is cited and explained in the complaint below, at paragraphs 76-77.

CLASS ACTION COMPLAINT

The plaintiffs, by counsel, state the following for their complaint:

Introduction

1. This is an action for declaratory and injunctive relief challenging the MDOC's and the parole board's interpretation of MCL 791.234(3) and related sentencing/parole statutes.

2. The plaintiffs are prisoners in the custody of the Michigan Department of Corrections (MDOC) who are serving a parolable life sentence *and* a consecutive term-of-years sentence, for separate crimes.

Parties

3. Plaintiffs Edward Allen (#147678), Oliver Hardy (#151364), and Michael Watkins (#216776) are inmates in the custody of the MDOC.

4. Defendant Daniel Heyns is the director of the MDOC. In his official capacity he has authority over the MDOC and the parole board.

5. Defendant Thomas Combs is the chair of the parole board. In his official capacity he has authority over the board.

6. Defendant Richard Snyder is the Governor of Michigan. The executive power of the state is vested in the Governor, and the Michigan Constitution provides that the Governor shall take care that applicable state laws are faithfully executed. Mich. Const., art. 5, § 8.

Background Information

7. Pursuant to MCL 791.234(3), if a person in Michigan commits two different crimes and is sentenced to two term-of-years sentences, one of which is *consecutive* to the other, the person is not eligible for parole until he or she has served the combined minimum on both the sentences.

8. For example, if a person is serving a 20-30 year sentence for armed robbery, and then picks up a consecutive 1-3 year sentence for, say, possession of contraband in prison, that person will be eligible for parole at 21 years (20 + 1) (less any good time or other credits that the person has earned on the two minimum sentences). MCL 791.234(3).

9. Under Michigan law, parolable lifers come within the jurisdiction of the parole board and are eligible for parole after serving either 10 or 15 years of their parolable life sentence, depending on whether they committed their crime before or after a 1992 amendment to the lifer law.

10. For decades, criminal defendants, defense counsel, prosecutors, probation depart-

ments, judges, and the parole board itself viewed the 10 (or 15) year "parole eligibility date" on the parolable life sentence as the equivalent of a "minimum term" on a term-of-years sentence, for purposes of MCL 791.234(3).

11. For decades a person serving a parolable life sentence who was convicted of another crime that carried a *consecutive* term-of-years sentence would be parole-eligible after 10 (or 15) years on the life sentence plus the minimum term on the consecutive term-of-years sentence.

12. Using the example above, for decades if a person were serving a parolable life sentence for armed robbery and then got a consecutive 1-3 year sentence for possession of contraband in prison, that person would be eligible for parole at 11 (or 16) years (10 + 1 or 15 + 1).

13. Upon information and belief, sometime around 2005 - 2008, and without notice to criminal defendants, defense counsel, prosecutors, probation departments, judges, or the plaintiff class, the MDOC and the parole board stopped reading MCL 791.234(3) in this way.

14. Instead, the MDOC and the parole board began reading MCL 791.234(3) to mean that a person serving a parolable life sentence and a consecutive term-of-years sentence is in actuality serving the equivalent of a *mandatory* life sentence (even though neither of the crimes for which the person was convicted is punishable by mandatory life).

15. Under the MDOC/parole board's current interpretation of the statute, if a person is serving a parolable life sentence for armed robbery, and then picks up a consecutive 1-3 year sentence for possession of contraband in prison, that person can never be eligible for parole.

16. To use the current terminology, such a person is now regarded by the MDOC and the parole board as "commutable only."

17. Upon information and belief, the MDOC/board's rationale is that because a parolable life sentence has no legal "minimum term," the minimum is effectively "infinity," and therefore

(the MDOC and the board maintain) the appropriate calculation for purposes of MCL 791.234(3) is: infinity + 1 = infinity (which the board interprets to mean mandatory life).

General Allegations

18. The defendants are misinterpreting the sentencing calculation statute, MCL 791.234 (3), which should be read to permit parole eligibility after the prisoner has reached the parole eligibility date on the parolable life sentence plus the minimum term on the consecutive term-of-years sentence.

19. The defendants are misinterpreting the consecutive sentencing statute, MCL 768.7a, which should be read in conjunction with MCL 791.234(3) to permit parole eligibility after the prisoner has reached the parole eligibility date on the parolable life sentence plus the minimum term on the consecutive term-of-years sentence.

20. Nothing in the penal codes permits imposition of a mandatory life sentence for two crimes neither of which is punishable by mandatory life.

21. Nothing in the statutory history of the parole/sentencing statutes suggests that the Legislature intended to convert a parolable life sentence to a mandatory life sentence by virtue of any change in the laws regarding consecutive sentencing.

22. Nothing in the sentencing or calculation statutes prevents the board from paroling a prisoner from a parolable life sentence to a consecutive term-of-years sentence (but still without releasing the prisoner) once the prisoner attains parole eligibility at 10 (or 15) years.

23. The defendants' interpretation permanently deprives the parole board of jurisdiction.

24. The defendants' interpretation guarantees that the plaintiffs can never be paroled, and means that they (and the class they represent) can only be released through executive clemency, the same as prisoners sentenced to mandatory life.

25. The defendants' policy of treating such "consecutive" prisoners as if they were serving mandatory life has been kept secret from criminal defendants, defense counsel, prosecutors, and judges, all of whom operate in the criminal justice system without knowing the consequences of combining a parolable life sentence with a consecutive term-of-years sentence, as currently interpreted by the MDOC and the parole board. *See* Exh. 1, Affidavits of Defense Counsel.

26. The plaintiffs do not seek their release. Rather, they seek declaratory and injunctive relief mandating the correct interpretation of the state law, so that they can get meaningful parole consideration, as well as retain the possibility of being paroled that was and is part of their lawfully imposed sentence.

27. If the defendants' interpretation of the law were correct, then the statutes themselves would violate the plaintiffs' state and federal constitutional rights.

Jurisdiction and Venue

28. Jurisdiction in this Court is proper under MCL 600.605, and the relief requested is proper under MCR 2.605 (declaratory judgments), 3.310 (injunctions), and 3.501 (class actions).

29. Venue is proper because the plaintiffs are in the custody and control of the MDOC, and the named defendants have their offices in Ingham County. *See* MCL 600.1621 and 1615.

Class Action under MCR 3.501

30. The proposed class definition is:

> All parolable lifers in the custody of the Michigan Department of Corrections who are also serving a consecutive term-of-years sentence that the defendants claim deprives the parole board of jurisdiction or authority to parole the prisoners, making them forever "commutable only."

31. The class is so large (*c.* 200 people) that individual claims are impracticable.

32. Upon information and belief, like the named plaintiffs, many of the class members committed the crime that generated the consecutive term-of-years sentence long ago, typically

within the first decade after entering prison, so that today they are good candidates for parole.

33. There are questions of law and fact common to the class, and a single question of law predominates.

34. The claims of the named plaintiffs are typical of the claims of the class members.

35. The named plaintiffs will fairly and adequately protect the interests of the class.

36. On the facts and claims alleged, a class action will promote the administration of justice better than any other form of litigation.

Factual Allegations of Plaintiff Edward Allen

37. Edward Allen was convicted by a jury in 1976 of assault with intent to rob while armed (MCL 750.83) and assault with intent to murder (MCL 750.89).

38. He was sentenced to 40-60 years on the first charge and to parolable life on the second charge. The sentences were concurrent.

39. In 1984, while in prison, Mr. Allen pled guilty to larceny in a building (MCL 750. 360). In 1987, also while in prison, he pled guilty to attempted escape (MCL 750.193).

40. For these crimes he received consecutive sentences of 1-2 years and 16 months - 2 years, respectively.

41. With good-time and other credits that he has earned on his 40-year minimum, Mr. Allen has passed the minimum sentences on all of his term-of-years convictions, and but for the defendants' interpretation of the statutes, would be eligible for parole on his parolable life sentence. MCL 791.234(3).

42. In 2008-09, Mr. Allen was interviewed three times by a member of the parole board. The board then instructed him to file an application for commutation.

43. In March 2009, in executive session, the board voted 6-4 to proceed to public hearing.

44. By the time the public hearing was held and Mr. Allen's case came back to executive session, the parole board had been expanded from ten members to 15 members.

45. In November 2009, in executive session, the board voted 8-7 not to recommend his commutation.

46. Neither at the three interviews nor at the public hearing did anyone ever tell him that he was ineligible for parole or "commutable only."

Factual Allegations of Named Plaintiff Oliver Hardy

47. Oliver Hardy was convicted of armed robbery (MCL 750.529) in 1977. He was sentenced to parolable life.

48. In 1985, Mr. Hardy pled guilty to furnishing a weapon (a plastic Afro comb) in prison (MCL 800.283). He was sentenced to 18 months - 5 years, to be served consecutively.

49. Mr. Hardy has long since passed the minimum sentences on his term-of-years conviction, and but for the defendants' interpretation of the law, would be eligible for parole on his parolable life sentence.

Factual Allegations of Named Plaintiff Michael Watkins

50. In 1992, Michael Watkins pled guilty to and/or was convicted by a jury of a series of felonies, namely armed robbery (MCL 769.11), felonious assault (MCL 750.82), and two felony firearms (MCL 750.227B-A). The armed robbery also resulted in a habitual offender conviction (MCL 769.11).

51. Upon information and belief (the record is murky), for these convictions Mr. Watkins was sentenced to a parolable life sentence, a consecutive sentence of 32 months - 4 years, a concurrent sentence of two years, and a consecutive sentence of two years.

52. After 20 years in prison, Mr. Watkins has now served out the minimum on each of his

term-of-years sentences, and but for the defendants' interpretation of the law he would be eligible for parole.

53. In 2010, the parole board approved Mr. Watkins for a public hearing on an application for commutation.

54. Upon information and belief, the board rescinded the public hearing in late 2010 because it was too late for the board to hold the hearing and get the case to Governor Granholm before the end of her term, even if the parole board recommended in favor of the commutation after the public hearing.

55. Mr. Watkins' family then FOIA'd the board's paperwork on the commutation, which included a "Commutation Case Summary." The summary included the notation: "P's felonious [assault] conviction was made as a consecutive sentence to the parolable Life sentence, so *P will always be a commutation case*." (Emphasis added).

56. This was the first notice that Mr. Watkins ever had that the MDOC and the parole board were treating him as a mandatory lifer who could be released only by executive clemency.

Factual Allegations as to All Named Plaintiffs

57. Throughout their years in prison (until recently), the plaintiffs were treated the same as all other parolable lifers (who did not have consecutive term-of-years sentences).

58. The plaintiffs were granted "parole review" on the same schedule as other parolable lifers, and the periodic notices and denials they received were identical to those received by other parolable lifers (who did not have consecutive term-of-years sentences).

59. Parole board members interviewed the plaintiffs on multiple occasions for statutorily mandated pre-parole and parole reviews, in exactly the same way as other parolable lifers (who did not have consecutive term-of-years sentences).

60. The plaintiffs received parole eligibility reports, notices of upcoming parole reviews, "no interest" denials, and notices of their next "parole" review dates that were identical to those given to other parolable lifers (who did not have consecutive term-of-years sentences).

61. During the plaintiffs' interviews with board members, no one ever disclosed to them (a) that the purpose of the review was for anything other than to consider them for *parole,* or (b) that they would have to file an application for commutation, and that the application would have to be granted by the Governor, for them ever to be released.

62. From the time the plaintiffs were convicted of the consecutive term-of-years charge, no one (including their defense attorneys, the prosecutors, the probation department or agents, or the sentencing judges) ever told them that the effect of their pleas/convictions could or would be to convert their parolable life sentence to a mandatory life sentence (or its equivalent).

63. The plaintiffs did not learn that the MDOC and the parole board were treating them as non-parolable until the past 6-15 months, when housing staff on their cellblocks, or notations in their files, or the parole board itself, revealed for the first time that their consecutive sentences made them forever ineligible for parole and that therefore (according to the board) they could be released by "commutation only."

64. Had the plaintiffs known that they could or would be treated as "commutable only" on account of their consecutive sentences, they would not have pled guilty to the charges but would instead have gone to trial.

65. Had the plaintiffs known that they could or would be treated as "commutable only" on account of their consecutive sentences, they would have sought commutation, reprieve, or pardon of their consecutive term-of-years sentences, so that they could "regain" eligibility for parole on their parolable life sentence.

Factual Allegations as to the Proposed Class

66. For purposes of calculating the parole eligibility date of prisoners serving a parolable life sentence and a consecutive term-of-years sentence, under MCL 791.234(3), the prisoner is parole-eligible after serving 10 (or 15) years on the life sentence (the time after which the prisoner becomes eligible for parole) plus the minimum on the consecutive term-of years sentence (less any credits that can be earned).

67. For decades, criminal defendants, defense counsel, prosecutors, probation departments, judges, and the public have read MCL 791.234(3) to mean that parolable lifers who are convicted of consecutive term-of-years sentences must first become eligible for parole on their parolable life sentence, and then must serve the additional minimum term on their consecutive term-of-years sentence, before they are eligible for release on parole. *See* Exh. 1, Affidavits.

68. The Michigan Executive lacks the power to convert a parolable life sentence and a consecutive term-of-years sentence to the equivalent of a mandatory life sentence.

69. The Michigan Legislature lacks the power (retroactively) to convert a parolable life sentence and a term-of-years sentence to a mandatory life sentence.

70. As a policy matter, it makes no sense for long-serving, rehabilitated parolable lifers, who no longer pose a threat to the safety of the community, and whom the parole board *wishes to parole,* to be released only through the unwieldy, unpredictable, and politically-charged process of executive clemency.

Irreparable Harm

71. The named plaintiffs and the plaintiff class have suffered irreparable harm by virtue of the defendants' interpretation of the parole/sentencing laws, which permanently denies them the possibility of parole, and treats them as mandatory lifers who are "commutable only."

72. By keeping the board's interpretation of the statutes secret, and by failing to inform the plaintiffs and/or the members of the class that they were or would be "commutable only," the defendants induced the plaintiffs and/or the members of the class to plead guilty to crimes that carried relatively short consecutive sentences when they otherwise would not have done so.

73. By keeping the board's interpretation of the statutes secret, and by failing to inform the plaintiffs that they were or would be "commutable only," the defendants denied the plaintiffs the opportunity to seek re-sentencing through 6.500 petitions, which avenue for relief may now be foreclosed to them, or which at present they cannot afford.

74. By keeping the board's interpretation of the statutes secret, and by failing to inform the plaintiffs that they were or would be "commutable only," the defendants denied the plaintiffs the opportunity to seek commutation not of their parolable life sentences (which is always difficult), but rather of their short term-of-years "add-on" sentences, which the Governor might well have commuted, knowing that the only effect would be to "restore" *parole eligibility* on what is now being treated by the MDOC and the parole board as a mandatory life sentence.

Claims

Count I: Misinterpretation of the Applicable Statutes

75. A plain reading of MCL 791.234(3), and the structure of Michigan's parole statutes, and the history of parole in Michigan, shows that the Michigan Legislature intended that parolable lifers with consecutive term-of-years sentences remain eligible for parole and not become "commutable only."

76. In *Foster-Bey, et al, v Rubitschun, et al,* ED Mich 05-CV-71318, a federal district court judge agreed with the plaintiffs' position here and ordered the parole board to include parolable lifers with consecutive term-of-years sentences within the class of "parole-eligible"

lifers for purposes of the federal case. *See* Exh. 2, *Foster-Bey* Order (12/5/08), attached.

77. In *Foster-Bey,* the Michigan Attorney General did not oppose the motion on the merits. Although the case was reversed on appeal on other grounds, *see Foster v Booker,* 595 F3d 353 (6th Cir 2010), the district court order in question was never appealed.

Count II: Due Process

78. The defendants' interpretation of the parole laws, or the laws themselves, violate due process in violation of the Michigan Constitution, art. 1, § 17, and the Fourteenth Amendment to the U.S. Constitution (actionable under 42 USC § 1983).

79. The defendants' interpretation of the parole laws, or the laws themselves, violate substantive due process by imposing the penalty of mandatory life for crimes not punishable by mandatory life.

80. The defendants' interpretation of the parole laws, or the laws themselves, violate procedural due process by imposing a harsher punishment without notice to criminal defendants (as well as defense counsel, prosecutors, probation departments, judges, or the public), and without the opportunity to contest the increased punishment before (or after) it was imposed.

Count III: Separation of Powers

81. The defendants' interpretation of the parole laws, or the laws themselves, permit the executive and/or the legislative branch of the state government to re-sentence the plaintiffs to a harsher punishment after they have been sentenced by the judicial branch, in violation of the separation of powers doctrine of the Michigan Constitution, art. 3, § 2.

Count IV: Ex Post Facto Clause

82. The defendants' interpretation of the parole laws, or the laws themselves, as applied violate the ex post facto clause of the Michigan Constitution, art 1, § 10, and of the U.S. Consti-

tution, art 1, § 9.

83. The defendants' interpretation of the laws, or the laws themselves, are being applied retroactively, which increases the severity of the plaintiffs' sentences, and all but guarantees that the plaintiffs will serve more time in prison than they would serve if they became parole-eligible after 10 (or 15) years on the parolable life sentence plus the minimum time on the consecutive term-of-years sentence.

Count V: Estoppel

84. By failing to notify criminal defendants, defense counsel, prosecutors, probation departments, judges, or the public of their interpretation of the parole laws, and by failing to publish their secret interpretation in any form available to the public, and by treating the plaintiffs for decades as if they were eligible for parole, the defendants induced the plaintiffs to rely on the historical reading of MCL 791.234(3), to their extreme detriment.

85. The defendants are estopped from enforcing their interpretation of the parole laws as a matter of equity.

Count VI: Juvenile Lifers and the Eighth Amendment

86. As to plaintiff Edward Allen and all others who committed the crimes for which they were sentenced to parolable life when they were under 18 years of age, the defendants' policy of treating these class members as if they were sentenced to life without parole violates the Eighth Amendment to the U.S. Constitution (actionable under 42 USC § 1983), contrary to *Graham v. Florida*, 130 S Ct 2011 (2010) and *Miller v. Alabama*, 132 S Ct 2455 (2012).

Relief Requested

The plaintiffs, on behalf of themselves and the plaintiff class, ask this Court to:

a. certify this action as a class action under MCR 3.501, upon the filing of a motion for class certification;

b. enter declaratory relief holding that the parole board obtains jurisdiction over all parolable lifers with consecutive sentences (and that those prisoners are eligible for parole) after imprisonment for a period of time no longer than (i) either 10 or 15 years on the parolable life sentence (depending on whether the crime was committed before or after the 1992 statutory amendment), plus (ii) the minimum sentence on any consecutive term-of-years sentence (less any credits that can be earned);

c. enter an injunction barring the defendants from using their interpretation of the statute, and ordering the defendants to conduct new parole hearings for the named plaintiffs and the plaintiff class pursuant to MCL 791.234, if at any time in the past the defendants have denied the plaintiffs parole or parole consideration in whole or in part by virtue of their ostensible "mandatory life" or "commutable only" status;

d. enter declaratory relief holding that the defendants' interpretation of the parole statutes, or the statutes themselves, as applied to the plaintiffs and the class, violate the due process, separation of powers, cruel and/or unusual punishment, and ex post facto provisions of the state and/or federal constitutions, and that the defendants are equitably estopped from using their interpretation of the statutes;

e. enter declaratory and injunctive relief holding that class members who committed the crime for which they were sentenced to parolable life before the age of 18 cannot be treated as serving life without the possibility of parole absent an individualized hearing that finds them to be incapable of rehabilitation based on their record in prison in addition to their crime(s);

f. grant the plaintiffs their costs and reasonable attorneys' fees as permitted by law, including actual attorneys' fees under 42 USC § 1988; and

g. grant such further relief as the Court deems fair and just.

Respectfully submitted,

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