STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30217
LANSING, MICHIGAN 48909

BILL SCHUETTE
ATTORNEY GENERAL

October 30, 2012

Clerk of the Court
Ingham County Circuit Court
313 West Kalamazoo
Lansing, MI 48901

Dear Clerk:

Re: *Edward Allen, et al v Daniel Heyns, Thomas Combs, Richard Snyder*
Ingham Circuit Court No. 12-907-CZ
AG No. 2012-0020322-A

Enclosed for filing in the above-referenced matter, please find the original and Judge's copy of Defendants' Motion for Summary Disposition with Brief in Support, together with Proof of Service.

Thank you for your assistance in this regard.

Sincerely,

A. Peter Govorchin

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Assistant Attorney General
Corrections Division
(517) 335-7021

APG:smc
Enclosures
c: Honorable Joyce A. Draganchuk
Paul Reingold, Esq.
2012-0020322-A Allen/Clerk ltr Mot & Brf for SD 10-30-12

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

Edward Allen, et al,

Plaintiffs,

v

Daniel Heyns, Thomas Combs, Richard Snyder,

Defendants.

No. 12-907-CZ

Honorable Joyce A. Draganchuk

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DEFENDANTS DANIEL HEYNS, THOMAS COMBS, AND RICHARD SNYDER'S SUMMARY DISPOSITION MOTION

Defendants, through their attorneys, bring this summary disposition motion pursuant to MCR 2116(c)(4), (6), and (8) stating in support:

1. Plaintiffs' action is barred by the doctrine of res judicata as the claims asserted in this action were previously litigated and ruled upon. *Sanders Confectionery Products, Inc. v Heller Financial, Inc.*, 973 F 2d 474 (6th Cir. 1992).

2. It is well established that Plaintiffs have neither an inherent constitutional right to parole nor a protected liberty interest created by mandatory state parole laws; thus their due process claim fails to state a claim upon which relief can be granted. "There is no federal constitutional right to be paroled," *Payne v Lavigne*, 2002 US Dist LEXIS 2520 at 11(ED Mich 2002); *Bd of Pardons v Allen*,

482 US 369, 373; 96 L Ed 2d 303; 107 S Ct 2415 (1987); *Greenholtz v Inmates of Neb Penal and Corr. Complex*, 442 US 1, 7; 60 L Ed 2d 668; 99 S Ct 2100 (1979).

3. Plaintiffs have failed to articulate a viable *ex post facto* claim.

   a. The decision whether to grant parole has always been within the Board's discretion. Therefore, from the time plaintiffs committed their offenses, there was always the possibility the Board would exercise its discretion in a way that would result in fewer paroles and longer prison terms. As the Michigan Court of Appeals stated in *People v Hill*, 267 Mich App 345, 705 NW 2d 139, 143 (Mich Ct App 2005), [t]here was always a significant risk that [plaintiffs] would be made to serve their life sentence[s]. *Foster v Booker*, 595 F 3d 353 (6th Cir. 2010).

   b. Loss of a right to appeal "creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment attached to plaintiff's crimes." *Id.* (citing *Cal. Dep't of Corr. v Morales*, 514 US 499, 509).

4. This Court lacks jurisdiction over the subject matter as Plaintiffs lack standing to pursue this action since:

   a. Plaintiffs' complaint fails to establish an "injury in fact" that is not "conjectural or hypothetical." *Lujan v Defenders of Wildlife*, 504 US 555, 560; 112 S Ct 2130; 119 L Ed2d 351 (1992).

   b. Plaintiffs cannot establish any causal nexus between their alleged "injury" and Plaintiffs' allegations of changes in parole policy in Michigan. *Lujan v Defenders of Wildlife*, 504 US 555, 560; 112 S Ct 2130; 119 L Ed2d 351 (1992); and

   c. It is speculative for Plaintiffs to assert that their alleged "injury" will be redressed with a favorable decision. *Id.*

WHEREFORE, Defendants respectfully request that this Court grant their summary disposition motion and assess Plaintiffs with taxable costs and attorney fees.

Respectfully submitted,

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Dated: October 30, 2012

APGCases/2012-0020322-A/Mot for SD 10-30-12

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BRIEF IN SUPPORT OF DEFENDANTS'DANIEL HEYNS, THOMAS COMBS, AND RICHARD SNYDER'S SUMMARY DISPOSITION MOTION

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COUNTER-STATEMENT OF FACTS

In *Foster-Bey et al. v Rubitschun*, ED Mich 05-cv-71318, a group of male prisoners all convicted prior to October 1, 1992, serving parolable life sentences bought a 42 USC § 1983 certified class action asserting due process and Ex Post Facto Clause violations of the United States Constitution. Plaintiffs sought declaratory and injunctive relief from what plaintiffs alleged were changes in substantive parole standards that have resulted in fewer paroles and longer prison sentences for prisoners sentenced to life in prison. Although plaintiffs' class was ultimately certified, it became apparent that there was some dispute as to whether parolable lifers should be included in the class. In 2008, the district court held that parolable lifers with consecutive sentences are parole eligible and should be included in the plaintiffs' certified class (hereinafter "2008 Order"). Later in the case, both plaintiffs and defendants filed summary judgment motions and the district court ruled in favor of plaintiffs. Defendants specifically appealed the two major issues in the case, namely the alleged due process violations and the alleged *ex post facto* violations. This is a common occurrence among legal professionals to appeal major issues rather than minor issues because when the major issues are resolved, the minor issues are usually resolved or deemed moot.

Apparently, Plaintiffs believe that since Defendants did not specifically appeal the 2008 Order, the Defendants were still bound by that order. Instead of Plaintiffs initiating a federal court enforcement proceeding alleging violation of Judge Battini's 2008 Order in *Foster-Bey*, they filed the current state court action

seeking class recertification. The Plaintiffs assert the same issues based on the same facts that they asserted in *Foster-Bey*. Defendants contend the current lawsuit should be dismissed in its entirety because:

1. Plaintiffs' action is barred by the doctrine of res judicata as the claims asserted in this action were previously litigated and ruled upon. *Sanders Confectionery Products, Inc. v Heller Financial, Inc.*, 973 F 2d 474 (6th Cir. 1992).

2. Plaintiffs have neither an inherent constitutional right to parole nor a protected liberty interest created by mandatory state parole laws; thus, their due process claim fails to state a claim upon which relief can be granted. "There is no federal constitutional right to be paroled." *Payne v Lavigne*, 2002 US Dist LEXIS 2520 at 11(ED Mich 2002); *Bd of Pardons v Allen*, 482 US 369, 373; 96 L Ed 2d 303; 107 S Ct 2415 (1987); *Greenholtz v Inmates of Neb Penal and Corr. Complex*, 442 US 1, 7; 60 L Ed 2d 668; 99 S Ct 2100 (1979).

3. Plaintiffs have failed to articulate a viable *ex post facto* claim because "from the time plaintiffs committed their offenses, there was always the possibility the Board would exercise its discretion in a way that would result in fewer paroles and longer prison terms." *Foster v Booker*, 595 F 3d 353 (6th Cir. 2010).

4. This Court lacks jurisdiction over the subject matter as Plaintiffs lack standing to pursue this action.

ARGUMENT

I. Under the doctrine of res judicata, Plaintiffs are barred from re-litigating a claim if a final decision on the merits was rendered involving the same parties, the same issues, and the same facts. Plaintiffs' action is barred by the doctrine of res judicata because the proposed class members have previously brought this action and lost.

Res Judicata prohibits a party from re-litigating a claim previously decided by a court. "A final judgment on the merits of an action precludes the parties or their privies from re[-]litigating issues that were or could have been raised in that action." *Federated Department Stores, Inc. v Moitie*, 452 US 394, 398 (1981). "Courts apply the doctrine of res judicata to promote the finality of judgments, which in turn increases certainty, discourages multiple litigation[,] and conserves judicial resources." *Sanders Confectionery Products, Inc. v Heller Financial, Inc.*, 973 F 2d 474, 480 (6th Cir. 1992). The doctrine of res judicata has four elements:

i. A final decision on the merits in the first action by a court of competent jurisdiction;

ii. The second action involves the same parties, or their privies, as the first;

iii. The second action raises an issue actually litigated or which should have been litigated in the first action; [and]

iv. An identity of the causes of action.

Begala v PNC Bank, Ohio, National Association, 214 F 3d 776 (6th Cir. 2000).

In the instant case, all four elements of res judicata have been met.

A. Final Decision on the Merits

There was a final decision on the merits in the first action. In the first action, the district court held that parolable lifers with consecutive sentences are parole eligibile. The defendants appealed the case on the two major issues – due process

violations and *ex post facto* violations because these two major issues encompassed all other minor issues. The Sixth Circuit in *Foster v Booker*, held in favor of the defendants and rejected the plaintiffs' argument that the defendants application of Michigan's parole law and policies were unconstitutional. The Supreme Court denied plaintiffs' petition for a writ of certiorari. Thus, the first element of res judicata is met.

B. Same Parties or their Privies

The first action involved the same parties or their privies as the instant action. The privity issue generally relates to the party against whom res judicata is being asserted, which in this case is the proposed class of prisoners. "The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction." *Richards v Jefferson County, Alabama*, 517 US 793, 797 fn 4 (1996). In both *Foster* and the instant case, the Plaintiffs are a class, or proposed class, of prisoners serving parolable life sentences that have been denied parole and are challenging alleged changes in Michigan parole law and policies.

In the instant case, Plaintiffs acknowledged in their complaint that the parole board was allegedly misinterpreting parole statutes since 2005 and that "the district court judge agreed with plaintiff[s] position to include parolable lifers with consecutive terms-of-years sentences" in the *Foster* certification because they were parole eligible. [Complaint ¶ 76]. The difference between *Foster* and the instant case certification is that in *Foster*, the Plaintiffs' class was certified as:

> [a]ll parolable lifers in the custody of the Michigan Department of Corrections who committed crimes (for which they received a parolable life sentence) before October 1, 1992, and whose parole the "new" parole board has denied, passed over, expressed no interest in pursuing, or otherwise rejected or deferred.
>
> *Foster*, 595 F 3d at 356.

And the plaintiffs in the instant case proposed class certification is:

> All parolable lifers in the custody of the Michigan Department of Corrections who are 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." [Complaint ¶ 30].

Thus, the only difference between *Foster* and the instant case certification is in the last clause, "defendants claim deprives the parole board of jurisdiction or authority to parole the prisoners, making them forever 'commutable.'" *Id.* This is the same exact class with just a small difference without a distinction in the inclusive language. That is the certified class in *Foster* included the proposed class in the instant case, for all prisoners whose sentences string includes a parolable life sentence from before October 1, 1992. Therefore, the Plaintiffs in the instant case were the same parties or privities as in the *Foster* case.

Even if the proposed class members in the instant case may be slightly different than the class members in *Foster*, it is a difference without distinction and it is not enough to bar the application of res judicata because of the holding in *Hansberry, et al v Lee, et al*, 311 US 32, 42-43 (1940). "It is a familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present . . ." *Id.* The prosed class of prisoners had the opportunity to litigate this matter in the first case (*Foster*), even if the particular prisoners in

the proposed class in the instant case may be different. In fact, the same attorneys represented the prisoners in both *Foster* and the instant case—attorney Paul Reingold of the University of Michigan Clinical Law Program. In Plaintiffs' brief in support of their motion for class certification, at pages 5-6, they assert that they are being adequately represented by the Michigan Clinical Law Program. Accordingly, even if a proposed class member in the instant case was not an eligible class member when *Foster* was being litigated, the interests of those future class members were adequately represented. Any decision on the merits of the argument would apply equally to persons receiving a favorable life sentence before or after October 1, 1992. Consequently, the second element of res judicata has been met.

C. Issue Actually Litigated in the First Action

The third element of res judicata prohibits parties not just from bringing claims they have already brought, but also claims that they "should have brought." *Sanders Confectionery Products*, 973 F 2d at 482. Res judicata bars a subsequent action "as to every ground of recovery that *might* have been present." *Black v Ryder/P.I.E.*, 15 F 3d 573, 582 (6th Cir. 1994) (emphasis added). This rule against "splitting claims" is meant to avoid piecemeal litigation. Res judicata precludes litigation of claims that "were previously available to the parties, regardless of whether they were asserted or determined in the first proceedings." *Brown v Felsen*, 442 US 127, 131; 60 L Ed 2d 767; 99 S Ct 2205 (1979). As a side issue, if Plaintiffs believe they were granted relief in the December 5, 2008 Order and Defendants did not follow that Order, then the appropriate action is to go back to the original court who granted the order and have that court enforce the Order. *See*

Knop v Johnson, 700 F Supp 1457 (1988); *U.S. v Michigan*, 1995 US App LEXIS 23152 (6th Cir. 1995) (reversed on other grounds).

Plaintiff stated the following in their motion for class certifications:

> In that case, the federal district court judge certified a class comprising all pre-1992 parolable lifers who were being subjected to the harsher standards used by the post-1992 parole board. When the [C]ourt ordered the defendants to produce a list of the longest-serving members of the class – comprising about 260 parolable lifers sentenced before 1976 – some 30 known parolable lifers were left off that list . . . In response, the plaintiffs filed a motion in the *Foster-Bey* case to reject the board's [interpretation] of the consecutive sentencing statute and to re-instate the *c.* 30 deleted class members. The AG's Office did not oppose the motion on the merits, and the federal court granted the motion for purposes of the *Foster-Bey* case . . . The plaintiffs therefore had no choice but to file suit, and now file this motion for class certification. [Plaintiffs Motion and Brief for Class Certification p. 3-4].

Accordingly, Plaintiffs allege in their motion that they had the opportunity to fully and fairly litigate this issue and a decision was issued on the merits, but the Defendants did not follow the December 5, 2008 decision. Plaintiffs allege that they had no choice but to file suit. This is not true. The Plaintiffs could have sought to have the Order enforced with the federal court; instead of filing another class action regarding the same parties, the same issues, and using the same facts as the first case. "The law does not allow [the class members] the luxury of returning to federal court [or state court] with the same set of facts until [they] succeed in alleging a federal cause of action." *Begala v PNC Bank*, 214 F 3d 776, 780 (6th Cir. 2000). Thus, the third issue of res judicata is met.

D. Identity of the Causes of Action

"Identity of causes of action means an identity of the facts creating the right of action and of the evidence necessary to sustain each action." *Sanders*

Confectionery Products, 973 F 2d at 484. A review of the entire complaint, especially paragraphs 14 through 27 indicates the same set of facts Plaintiffs used to argue in their supplemental brief on minimization/innocence and consecutive sentencing filed on October 2, 2008 in *Foster-Bey et al v Rubitschun*, ED Mich 05-cv-71318. (Ex. 1 Plaintiffs' brief on minimization/innocence and consecutive sentencing). Accordingly, the fourth element of res judicata has been met.

II. There is no due process violation unless plaintiff can prove he or she was deprived of a liberty interest. Plaintiffs' due process claims fail to state a claim upon which relief can be granted because Plaintiffs do not possess a liberty interest in parole or commutation.

To establish a due process claim, plaintiffs must first establish that the eligibility for parole is a recognized liberty interest, entitled to protection by the Due Process Clause. *Meachum v Fano*, 427 US 215, 224; 96 S Ct 2532; 49 L Ed 2d 451 (1976), see also *Bd of Pardons v Allen*, 482 US at 373. However, courts have already ruled "[t]here is no legitimate claim of entitlement to parole and thus no liberty interest in parole." *Crump v Lafler*, 657 F 3d 393, 404 (6th Cir. 2011). In the absence of a state-created liberty interest, the Parole Board can deny release on parole for any reason or no reason at all, and the Due Process Clause has no application. *Inmates of Orient Correctional Inst v Ohio State Adult Parole Auth.*, 929 F 2d at 236.

Under the "Due Process Violations" section, Plaintiffs' complaint asserts that their due process rights have been violated because:

> 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 . . . [and defendants] 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. [Complaint ¶¶ 78-80].

In multiple areas of their complaint, Plaintiffs contend that these alleged misinterpretations of the parole statutes have lengthened their prison sentence by converting their sentence to a mandatory life sentence. Yet Plaintiffs assert that they "are not seeking release" only that the Parole Board be enjoined from misinterpreting "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." [Complaint, ¶ 26]. Accordingly, Plaintiffs are requesting parole eligibility and they have no protected liberty interest in parole.

Thus, Plaintiffs' claims that Defendants' alleged misinterpretation of parole laws impose mandatory life for crimes not punishable by mandatory life, Defendants interpretation of parole laws impose harsher punishment without notice and without opportunity to contest the increased punishment, or even allegations that Plaintiffs were not given "meaningful" parole interviews, are without merit. As this is an argument that Plaintiffs have a right to parole consideration earlier than the parole board believes they do and are thereby deprived of their due process. Plaintiff prisoners do not possess a liberty interest in parole, the Due Process Clause has no application, and its claim should be dismissed.

III. The Supreme Court has held that changes that alter the definition of criminal conduct or increases the penalty by which a crime is punishable are in violation of the Ex Post Facto Clause. Where Plaintiffs allege that the Parole Board misinterpretation of parole rules increased parolable lifers' punishment, there is no *ex post facto* violation because there was always a significant risk that plaintiffs would serve their entire life sentence. Therefore, Plaintiffs' claims should be dismissed for failure to state a claim.

The Ex Post Facto *Clause* applies to any statutory or policy change that 'alters the definition of criminal conduct or increases the penalty by which a crime is punishable. *California Dep't of Corr v Morales*, 514 US 499, 506 n.3; 131 L Ed 2d 588; 115 S Ct 1597 (1995). It does not prohibit every legislative change that carries a theoretical risk of affecting a prisoner's punishment. *Id* at 509. As noted by the United States Supreme Court in *California Dep't Corrections v Morales,* "the focus of the *ex post facto* inquiry is not whether a legislative change produces some, ambiguous sort of 'disadvantage,' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Id* at 506-507. "Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*." *Dobbert v Florida*, 423 US 282, 293; 97 S Ct 2290; 53 L Ed 2d 344 (1977). Legislative changes that create "only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes" are not protected by the Clause. *Morales*, 514 US at 509. The only "legislative" changes referenced in Plaintiffs' complaint have already been reviewed by the Sixth Circuit Court of Appeals. That Court held the described "changes" did not violate the Ex Post Facto Clause. *Foster*, 353 at 356. "There was always a significant risk that [plaintiffs] would be made to serve [their] life sentence." *People v Hill*, 267 Mich App 345, 351.

Plaintiffs complain that the Defendants' alleged misinterpretation 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." [Complaint ¶ 83]. Plaintiffs' allegations of retroactive changes create, at best, a speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes because there was always a risk that Plaintiffs would be made to serve their entire life sentence. Thus, Plaintiffs' *ex post facto* claim fails to assert a claim upon which relief can be granted.

IV. In order to prove Plaintiffs have standing to bring a claim, Plaintiffs must first establish an injury in fact, the injury must be fairly traceable to Defendants' actions, and a decision must redress Plaintiffs' injury. Where Plaintiffs cannot prove standing, this Court lacks jurisdiction over the subject matter as Plaintiffs lack standing to pursue this action.

"Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies'." *Valley Forge v Americans United for Separation of Church and State Inc.*, 454 US 464, 471; 102 S Ct 752; 70 L Ed 2d 700 (1982). "Standing is an essential and unchanging part of the case-or-controversy requirement of Article III" and is made up of three essential elements. *Lujan v Defenders of Wildlife*, 504 US 555, 560; 112 S Ct 2130; 119 L Ed2d 351 (1992).

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact' –an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will

> be ' redressed by a favorable decision.' *Id* at 560-561. (Citations omitted).

Similarly, Michigan law requires an actual injury before a party may have standing to bring a claim. *Crawford v Dept. of Civil Serv.*, 466 Mich 250 (2008), 645 NW 2d 6; *People v Hopson*, 480 Mich 1061, 743 NW 2d 926 (2001). Plaintiffs bear the burden of establishing these elements, yet their complaint fails to satisfy these prerequisites.

A. Injury in fact.

Plaintiffs do not possess a constitutional right to parole. *Greenholtz v Inmates of Neb Penal and Corr. Complex*, 442 US 1, 7; 60 L Ed 2d 668; 99 S Ct 2100 (1979). Similarly, Plaintiffs have "'no constitutional or inherent right' to commutation of his sentence." *Connecticut Board of Pardons v Dumschat*, 452 US 458, 464 (1981). According to their complaint, the Plaintiffs brought this action not seeking parole but instead a "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." [Complaint ¶ 30]. Plaintiffs' alleged injury appears to be set forth in paragraphs 71 through 74 of their complaint under the section titled "Irreparable Harm":

> 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 . . . 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 . . .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. . . . [Complaint ¶¶ 71-74].

Although Plaintiffs assert that they "do not seek release" as set forth in paragraphs 26, Plaintiffs contend that their "injury" is their apparent belief that they would have been paroled or their sentence would have been commuted had the Parole Board not misinterpreted Michigan's parole statutes. The above-mentioned case law clearly points out that Plaintiffs have no constitutional right to parole or commutation. Therefore, Plaintiffs have not established an injury in fact but instead have established a hypothetical injury.

B. The injury has to be fairly traceable to the challenged action of the defendant.

"[P]arole eligibility does not mean that a defendant has a right to parole." *People v Hill*, 267 Mich App 345, 351 (citing *Morales v Michigan Parole Bd*, 260 Mich. App. 29, 39; 676 N.W.2d 221 (2003)). The decision on whether to grant parole has always been within the board's discretion. *Foster v Booker*, 595 F 3d 353, 362 (6th Cir.) (citing MCL 791.234(11)). "Therefore from the time plaintiffs committed their offenses, there was always the possibility the Board would exercise its discretion in a way that would result in fewer paroles and longer prison terms." *Foster v Booker*, 595 F 3d 353, 363 (6th Cir. 2010). "In the absence of a state-created liberty interest, the Parole Board can deny release on parole for any reason or no reason at all." *Inmates of Orient Correctional Inst. v Ohio State Adult Parole Auth.*, 929 F 2d 233, 236 (6th Cir. 1991). Plaintiffs allege that the alleged misinterpretation of parole statues "guarantees that the plaintiffs can never be paroled." [Complaint ¶ 24]. If the Parole Board acts with discretion, Plaintiffs cannot state a claim by contending that their difficulty in achieving parole is

somehow causally related to any changes in Michigan's parole standards. Since the parole decision is discretionary, it cannot be challenged on the basis that the discretionary decision was unfavorable for Plaintiffs.

The Governor exercises discretion when denying or granting commutation. (Ex. 2 – *Smith v Sampson*, No. 08-14002, 2009 US Dist LEXIS 84662 *1, *28 (quoting Ex. 3 – *Lewis-El v Simpson*, No. 08-15060, 2008 US Dist LEXIS 109999)). In *Smith v Sampson*, the court held that "[t]he unpredictability of a wholly discretionary grant of commutation" in Michigan precludes plaintiff from demonstrating that any changes in MDOC policy regarding commutations raise a "significant risk" that he will be denied a commutation he otherwise would have received." *Id.* (internal citations omitted). The court went on to hold "while parole provision may violate the Ex Post Facto Clause in certain circumstances, provisions relating to commutations are different in light of the power and discretion granted to the executive branch." *Smith*, 2009 US Dist LEXIS 84662 at *28. Thus, the alleged changes in the parole board's interpretation of parole statutes cannot have an effect on whether or not Plaintiffs would have received commutation on their "add-on" sentences. Thus, the alleged misinterpretation of parole statutes could not have been casually related to Plaintiffs' ability to get commutation of their shorter add-on sentences because of the unpredictability in granting or denying commutation.

C. It must be likely that the injury will be redressed by a favorable decision.

Simply suggesting to this Court that if the Parole Board acted pursuant to Plaintiffs' interpretation of the identified parole statutes, Plaintiffs' situation would be different is pure speculation.

> Prior decisions of this Court establish that unadorned speculation will not suffice to invoke the federal judicial power . . . In *Warth v. Seldin* we held that low-income persons seeking the invalidation of a town's restrictive zoning ordinance lacked standing because they had failed to show that the alleged injury, inability to obtain adequate housing within their means, was fairly attributable to the challenged ordinance instead of to other factors. **In language directly applicable to this litigation, we there noted that plaintiffs relied "on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had [defendants] acted otherwise, and might improve were the court to afford relief."**
>
> *Simon v Eastern Ky. Welfare Rights Organization*, 426 US 26, 44; 96 S Ct 1917; 48 L Ed 2d 450 (1976). (Citations omitted) (Emphasis added).

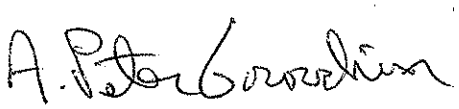
A similar result should be reached in the instant case. There is no basis on which to assume that if the relief that has been requested by Plaintiffs is granted that their alleged injury must be redressed. For Plaintiffs to suggest that if relief is granted, they would receive a more "meaningful parole review" is purely speculative. Since, the Parole Boards' and the Governor's decisions are discretionary it is almost impossible to know whether or not the decisions not to grant parole or commutation would have been the same. Furthermore, this Court would not have any mechanism available to it to determine whether the prisoners were receiving a "meaningful parole review."

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, Defendants respectfully request that this Court grant their dispositive motion and assess Plaintiffs taxable costs and attorney fees.

Respectfully submitted,

Bill Schuette
Attorney General



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Dated: October 30, 2012

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PROOF OF SERVICE

I certify that on October 30, 2012, a copy of Defendants' Motion for Summary Disposition with Brief in Support was sent via e-mail and U.S. Postal Service to: Paul D. Reingold, Michigan Clinical Law Program, 363 Legal Research Bldg., 801 Monroe Street, Ann Arbor, MI 48109-1215.

S Catalini

Legal Secretary
Corrections Division

APGCases/2012-0020322-A/POS Mot & Brf for SD10-30-12