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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PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

Table of Contents

INTRODUCTION

The state defendants seek summary disposition under three provisions of MCR 2.116. First, pursuant to MCR 2.116(c)(6), they argue that the plaintiffs' claims were previously litigated in the *Foster-Bey* case and are therefore barred by res judicata. Second, pursuant to MCR 2.116(c)(4), they argue that this Court lacks jurisdiction because the plaintiffs do not have standing. Third, pursuant to MCR 2.116(c)(8), they argue that the plaintiffs' ex post facto and due process claims fail to state claims for which relief can be granted. All three arguments fail for the reasons set forth below. The Court should therefore deny the defendants' motion.

ARGUMENT

I. *FOSTER-BEY* AND RES JUDICATA

a. The Foster-Bey claims have nothing to do with this case

In *Foster-Bey v. Rubitschun*, E.D. Mich. No. 05-71318, 2007 WL 7705668 (Oct. 23, 2007), *reversed* at *Foster v. Booker*, 595 F.3d 353 (6th Cir. 2011), a class of pre-1992 parolable lifers challenged changes to Michigan's parole laws and policies as applied retroactively to the plaintiff class.[1] The case involved only parolable lifers who committed their crimes before October 1992, and the claims were limited to changes in state parole laws and policies after that date.

The *Foster-Bey* claims had nothing to do with the present case, which challenges the defendants' interpretation of one statute – namely MCL 791.234(3) – the operative language of which has not changed since at least 1953. *See* Exh. 1, History of MCL 791.234(3). Indeed, although the plaintiffs in the present case *believed* that the defendants' present interpretation of MCL 791.234(3) had begun around 2005 (*see* Compl. ¶ 13), the defendants' answers to discov-

[1] In 1992 the new Engler administration pushed through a series of changes to Michigan's parole laws and policies. The amendments resulted in the elimination of the old parole board and the appointment of a new board, which then adopted a "life means life" standard for parolable lifers. The plaintiffs argued that the cumulative statutory and policy changes created a significant risk that parolable lifers would serve more time before being paroled than they had served in the past.

ery assert that the defendants have used the same interpretation of MCL 791.234(3) since before 1992. *See* Exh. 2, Answer to Interrogatory 5. The reason why no one knew about the defendants' interpretation was because they kept it secret. *See* Compl. ¶¶ 13, 42, 46, 56-53, 67 and Compl. Exh. 1 (Affidavits). To be clear, only the MDOC and the parole board knew that prisoners who were serving parolable life and who were then convicted of a new consecutive term-of-years sentence – no matter how short the sentence – were treated by the MDOC and the board as if they were serving mandatory life (that is, were "commutable only"). *Id.*

In *Foster-Bey*, the issue of MCL 791.234(3) came up just once, in the remedial phase of the case, when the defendants produced a list of the individuals who comprised the first quarter of the class (that is, the *c.* 250 longest-serving members, who had committed their crimes before 1977). The list inexplicably excluded around 30 people whom the plaintiffs knew to be serving parolable life sentences for crimes committed before 1977. When the plaintiffs inquired why these people had been left off the list, the defendants revealed for the first time that the MDOC and the parole board were treating these lifers as "commutable only" under MCL 791.234(3), because they were also serving a consecutive term-of-years sentence. The defendants said that since these people were "ineligible for parole," they could not be members of a class of "parolable lifers." Until that moment the de-listed plaintiffs were unaware of their status as "commutable only" mandatory lifers. (Their status was also news to the *Foster-Bey* plaintiffs' counsel.)

The *Foster-Bey* plaintiffs then filed a motion in federal district court challenging the defendants' refusal to include these lifers as members of the *Foster-Bey* class. The state defendants did not oppose the motion on the merits, but raised only procedural defenses. The court held that for purposes of the *Foster-Bey* case – that is, for the challenge to the *changes in the parole laws and policies after October 1, 1992* – the defendants must treat parolable lifers with consecutive sentences as *parolable* at the point where they have served the total of (a) the minimum on their

term-of-years sentence, plus (b) ten years.[2] In doing so, the court rejected the defendants' interpretation of MCL 791.234(3) put forward here.

To sum up, in *Foster-Bey* the parties only addressed MCL 791.234(3) in the remedial phase of the case, in order to decide a collateral "class membership" issue. The court ruled in favor of the *plaintiffs* on the question of how MCL 791.234(3) should be interpreted.

b. Res judicata would bar the defendants from re-litigating the correct interpretation of MCL 791.234(3).

The defendants' conception of res judicata is misguided. The doctrine of res judicata generally prevents the *losing* party from re-litigating claims (because the winner has no need to do so). *See Ward v. Detroit Auto. Inter-Insurance Exchange*, 115 Mich. App. 30, 37 (1982) ("The doctrine of res judicata provides that where two parties have fully litigated a particular claim and a final judgment has resulted, that claim may not be re-litigated by the *losing party*") (emphasis added); *United States v. Gelb*, 783 F. Supp. 748, 755 (E.D.N.Y. 1991) ("The doctrine of res judicata, or claim preclusion, bars a *losing party* from re-litigating a cause of action in which a judgment on the merits has been rendered in a previous action between the same parties or their privies") (emphasis added); *Vashey v. Rhode Island*, No. CA 07-040, 2007 WL 1202883 (D.R.I. Apr. 23, 2007) ("Since the State was not the losing party[,] ... judgment ... will not violate the doctrine of res judicata").

Moreover, after the defendants lost in federal district court, they failed to appeal the district court's separate opinion and order on this issue to the Sixth Circuit. *See Foster v. Booker*, 595 F.3d 353 (6th Cir. 2011). The doctrine of res judicata generally bars the losing party from re-litigating an issue that the party failed to appeal. *See U.S. v. Aranson*, 696 F.2d 654, 663 (9th Cir. 1983) ("California has not appealed from the district court's judgment; it is res judicata and

[2] The court used ten years as the effective minimum for parolable lifers because that was the time after which they came within the jurisdiction of the board and could be paroled. *See* MCL 791.234(7) (a); Exh. 3, *Foster-Bey* Order (12/5/08); *see also People v. Waterman,* 137 Mich. App. 429, 437 (1984) (the lifer law, "in effect, sets the minimum term on all life sentences other than first-degree murder and major controlled substance offenses at ten [now 15] calendar years").

unreviewable by us"); *Smith v. Addison*, No. 06-CV-468, 2009 WL 3075650 (N.D. Okla. Sept. 21, 2009) ("all issues previously ruled upon by this Court are res judicata, … all issues not raised in the direct appeal, which could have been raised, are waived"). In the present case, the plaintiffs do not contend that the district court's tangential ruling on the statutory-interpretation issue is res judicata for either party. *See* Part C, below. The plaintiffs present the district court's interpretation of MCL 791.234(3) in *Foster-Bey* as persuasive, not conclusive, authority. *See* Compl. ¶ 76; Exh. 3, *Foster-Bey* Order (12/5/08). The point here is that *if* res judicata applied, it would act as a bar against the *defendants* because the federal court rejected their interpretation of MCL 791.234(3), and the defendants never appealed that order.

c. The defendants fail to satisfy each of the four elements of res judicata.

Even if the defendants had prevailed on this issue in *Foster-Bey,* however, they would still lose their res judicata claim here because they fail to meet the legal standard. The Sixth Circuit has held that to establish res judicata a party must prove four elements: [3]

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

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

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

4. An identity of the causes of action.

Begala v. PNC Bank, Ohio, Nat. Ass'n, 214 F.3d 776, 779 (6th Cir. 2000). All four elements are unsatisfied here, as will be shown below.

i. First element: There was no final decision on the merits with respect to the statutory interpretation of MCL 791.234(3).

For res judicata to apply, the final decision on the merits must govern the specific issues

[3] "Because the prior action occurred in federal court, the applicability of *res judicata* must be determined under federal law." *Van Gorder v. Grand Trunk Western R.R., Inc.*, No. 08-088193, 2010 WL 3155170 at *6 (Mich. App. 2010) (citing *Pierson Sand & Gravel, Inc. v. Keeler Brass Co.*, 460 Mich. 372, 380-81 (1999)).

raised in the second action. *See O'Connor v. National Grange Mut. Ins. Co.*, No. 09–CV–463, 2011 WL 4594292 at *8 (E.D.N.Y. September 30, 2011) ("The Court . . . finds that claim preclusion only bars the 'specific claims asserted' and does not bar the litigation of claims not raised in the underlying action...."). In *Foster-Bey*, two federal courts ruled on the merits – the Eastern District of Michigan and the Sixth Circuit – and neither decision touched on the defendants' interpretation of MCL 791.234(3) or the constitutional implications of that interpretation. The two merits decisions are reported at *Foster-Bey v. Rubitschun*, E.D. Mich. No. 05-71318, 2007 WL 7705668 (Oct. 23, 2007), *reversed* at *Foster v. Booker*, 595 F.3d 353 (6th Cir. 2011). Neither contains a word about MCL 791.234(3) and consecutive sentences.

The parties only litigated the interpretation of MCL 791.234(3) to decide a class-membership issue. *See* Exh. 3, *Foster-Bey* Order (12/5/08). It is well-established that decisions on class membership and class certification do not constitute decisions on the merits. *See White v. Snider*, No. 93-CV-3666, 1994 WL 105525 at *3 (E.D. Pa. March 30, 1994) ("the usage of class definition language at the class certification stage does not have res judicata effect as to merits of plaintiffs' claims"); *In Re FleetBoston Financial Corp. Securities Litigation*, No. 02-CV-04561, 2007 WL 5433296 (D.N.J. April 16, 2007) ("At the class certification stage, the Court should not consider the merits of the case...."); *Long v. Sapp*, 502 F.2d 34, 42 (5th Cir. 1974) (it would be "improper" to conflate "the class membership question" with "the merits of plaintiff's individual claims").

Moreover, the parties litigated the class-membership issue in the remedial phase of the case, *after* the district court had already decided the substantive claims pled in the complaint on cross-motions for summary judgment. *See Foster-Bey* Opinion, 2007 WL 7705668 (E.D. Mich); *and* Exh. 3 *Foster-Bey* Order (12/5/08). Absent a decision on the merits with respect to MCL 791.234 (3), res judicata cannot bar the present lawsuit.

ii. Second element: This case involves different parties and privies.

The defendants contend that this case involves the "the same parties or their privies [*sic*]" as *Foster-Bey* because both involve a class of parolable lifers. *See* Defs' Summ. Disp. Br. at 5-7. But the plaintiffs in the two cases are distinct in crucial ways. Each lawsuit was filed to protect a specific group of parolable lifers, with different interests. The *Foster-Bey* lawsuit was based on the retroactive application of *changes* to Michigan's parole laws and policies starting in October 1992. *See Foster-Bey*, 595 F.3d at 356. The class was limited to include only parolable lifers "who committed crimes (for which they received a parolable life sentence) before October 1, 1992" – the date when the first of the new parole laws went into effect. *Id.* In contrast, here the *Allen* case concerns only those parolable lifers who are effectively serving mandatory life due to the defendants' interpretation of MCL 791.234(3). *See* Compl. ¶ 30. This group includes people who committed their lifer crimes before *and after* 1992 – adding 20 years of potential plaintiffs who were not and could not have been members of the *Foster-Bey* class.

The defendants argue that the phrase "also serving a consecutive term-of-years sentence" amounts to a "difference without a distinction." *See* Defs' Summ. Disp. Br. at 6. But this phrase identifies those who are subject to the defendants' interpretation of MCL 791.234(3), which is what separates them from the *Foster-Bey* plaintiffs and the class of pre-10/92 parolable lifers (against whom the board was applying the new, harsher parole standards at issue in *Foster-Bey*). Indeed, the defendants' claim in *Foster-Bey* was that the *Allen* plaintiffs *could not raise any parole claims* in the *Foster-Bey* case because under MCL 791.234(3) those plaintiffs "were not parolable." Now the defendants are arguing the opposite – that the *Allen* plaintiffs should have raised their claims in *Foster-Bey*. The defendants cannot have it both ways.

Finally, in *Foster-Bey*, about 1,000 parolable lifers met the class definition of "parolable lifers who committed their crimes before October 1992." Here, the defendants concede in their

discovery answers that the group of "commutable only" prisoners comprises about 130 people. *See* Exh. 4, Defs' Updated Response to Pls' First Interrogatories. The classes are therefore distinct by definition. Moreover, because the statutory interpretation issue only applied to a small percentage of the *Foster-Bey* class (130/1,000), the class interests cannot have been "sufficiently parallel" to the *Allen* plaintiffs' or proposed A*llen* "class members' interests such that privity could be implied." *See Sandpiper Vill. Condo. Ass'n., Inc. v. Louisiana-Pac. Corp.*, 428 F.3d 831, 848 (9th Cir. 2005).[4] Because the *Foster-Bey* and *Allen* cases involve different parties and distinct issues, the defendants fail to meet the second element as well.

iii. Third element: The relevant issues were not litigated on the merits in *Foster-Bey*, and it would have been improper to litigate the merits there.

The defendants argue that the statutory-interpretation issue raised here either was litigated in *Foster-Bey* or should have been litigated there. *See* Defs' Summ. Disp. Br. at 7-8. Both arguments fail. First, as noted above, the statutory-interpretation issue *was* litigated in *Foster-Bey,* but only as a question of class membership in the remedial phase of the case. Res judicata bars re-litigation only of issues that were previously litigated on the merits. *See Assisted Living Associates of Moorestown, L.L.C. v. Moorestown Twp.*, 996 F. Supp. 409, 429 (D.N.J. 1998) ("Nothing about the ... claim ... could be deemed res judicata ... because that claim was not litigated on the merits in the state court....").

It also would have been improper for the plaintiffs to litigate the claim in *Foster-Bey*. First, as noted above, the statutory-interpretation issue was *irrelevant* to most of the class. The plaintiffs would have had to create a sub-class of people who wanted to raise a different claim unrelated to the post-10/92 changes in Michigan's parole laws and policies. On this theory, plaintiffs bringing a class action lawsuit challenging one set of statutory changes would be

[4] For that matter, because the statutory interpretation issue pertained to none of the seven named *Foster-Bey* plaintiffs, and to only 13 percent of the *Foster-Bey* class, neither the named *Foster-Bey* plaintiffs nor the *Foster-Bey* class could have adequately represented the plaintiffs here.

obligated to include all possible claims that any individual class member could bring – even if those claims had nothing to do with the core claims of the class complaint. Such a theory would undermine the "rationale for permitting class actions" – namely "to render manageable litigation that involves numerous members of a *homogeneous class*." *See Guthrie v. Evans*, 815 F.2d 626, 629 (11th Cir. 1987) (emphasis added).

Second, as noted above, the plaintiffs only became aware of the defendants' interpretation of MCL 791.234(3) at the remedial stage of *Foster-Bey*, *after* the district court had decided the merits of the case in the plaintiffs' favor in 2007. It is unclear how the plaintiffs could have included a claim they were unaware of until after summary judgment had been granted to them.

Third, the plaintiffs had no reason to believe that further litigation was necessary. When they won their motion to include pre-10/92 parolable lifers with consecutive sentences within the *Foster-Bey* class, they and their counsel understood that the defendants had abandoned their previous interpretation of MCL 791.234(3). Given that the *Foster-Bey* plaintiffs prevailed on the issue, and that the defendants did not appeal, there was no reason to believe that further litigation was necessary.[5] The defendants here thus cannot meet the third element.

iv. Fourth element: The cases fail to share an "identity of the causes of action."

The defendants compare language in the plaintiffs' *Allen* complaint to language in the *Foster-Bey* plaintiffs' motion about class membership. *See* Defs' Summ. Disp. Br. (10/30/12) at 9. The language *should* be similar, given that the *Foster-Bey* plaintiffs (on the issue of class membership) and the *Allen* plaintiffs (for purposes of challenging the defendants' reversion to their pre-*Foster-Bey* interpretation of MCL 791.234(3)) make the same argument – namely, that the defendants' interpretation of the statute is wrong. But that does not mean that the two cases share the same "cause of action" for res judicata purposes, as explained above.

[5] Indeed, the present case was not filed until 2011 precisely because not until then did the named plaintiffs (and their counsel) learn that the MDOC and the parole board had reverted to their former interpretation of MCL 791.234(3) – again without telling anyone that they had done so –after the Sixth Circuit decided the *Foster-Bey* case in 2011. *See* Compl. ¶ 13, 42, 46, 56-53, 67, Compl. Exh. 1 (Affidavits).

In *Foster-Bey*, the plaintiffs contested the cumulative effect of changes to Michigan's parole laws, including less frequent parole review, shifting from in-person parole interviews to file reviews, eliminating prisoner appeals, and politicizing the board by removing its members from civil service and installing short-term gubernatorial appointees. *Foster*, 595 F.3d at 357-59. As noted, the *Foster-Bey* plaintiffs could not and did not file suit to challenge the defendants' interpretation of MCL 791.234(3) because the plaintiffs were unaware that any parolable lifers were serving "mandatory life" until the remedial phase of the case.

As the defendants note, "[i]dentity 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, Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 484 (6th Cir. 1992). Here, the plaintiffs allege, and the court must accept as true, that virtually all players in the criminal-justice system across the state – including judges, prosecutors, defense attorneys, parole/probations agents, and even the prisoners themselves – were unaware of the defendants' interpretation of MCL 791.234 (3). *See* Compl. ¶ 10.

Had anyone known, obviously no criminal defendants would have pled guilty to minor felonies subjecting themselves to mandatory life. *Id.,* ¶ 64. And sentencing judges would have balked at the punishment they were imposing. *Id.,* ¶ 25. Moreover, even while serving their sentences, the plaintiffs were led to believe that they were parole-eligible when in fact they were viewed as "commutable only." *Id.,* ¶¶ 57-63. These facts were not known when *Foster-Bey* was filed, and thus there can be no "identity of the facts creating the right of action." *Sanders*, 973 F.2d at 484. For all of the above reasons, the *Foster-Bey* case is no bar, and the Court should reject the defendants' res judicata arguments.

II. STANDING

The defendants argue that the plaintiffs lack standing. But the defendants analyze standing under the federal law's more demanding doctrine, rather than under Michigan's prudential

version. Moreover, under either standard, the plaintiffs – who are being subjected to sentences of mandatory life not imposed by a court – have a sufficient interest to create standing.

a. The defendants rely on improper federal doctrine and case law to support their standing argument.

The defendants' standing argument is based on inapplicable law. While they correctly assert that "Article III of the Constitution limits the 'judicial power' of the *United States* to the resolution of 'cases' and 'controversies,'" this assertion has little bearing on a *Michigan* court's "judicial power." This Court's jurisdiction to settle disputes flows from Michigan's constitution, which has no comparable "case or controversy" limitation. The Michigan Supreme Court has rejected the strict federal doctrine relied upon by the defendants, and has instead interpreted the Michigan constitution as creating a prudential-standing doctrine requiring only that the plaintiffs have a "significant interest" in the dispute. *Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ.*, 487 Mich. 349, 372 (2010); *see also Horseshoe Lake Corp. v. Carlson*, 2012 WL 3139545 (Mich. Ct. App. Aug. 2, 2012) ("As our Supreme Court made clear in *Lansing Schools*, plaintiffs need not meet the federal case or controversy standing requirement, *i.e.,* the establishment of a concrete and particularized injury caused directly by the challenged conduct."); *Ader v. Delta Coll. Bd. of Trustees*, 2011 WL 2732555 (Mich. Ct. App. July 14, 2011) (reversing the trial court's dismissal based on standing in light of the *Lansing* standard).

The U.S. Supreme Court has held that "the constraints of Article III do not apply to state courts, and…the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989).

b. Under the proper standard, prisoners facing mandatory life sentences because of the parole board's actions unquestionably have standing.

The Michigan Supreme Court has adopted "a limited, prudential doctrine" which does not require a cognizable injury or redressability. *See Lansing,* 487 Mich. at 372. In *Lansing*, the

Court clarified that Michigan courts may render advisory opinions, and should use their discretion to hear disputes whenever (1) there is a legal cause of action, (2) the requirements for a declaratory judgment are met, or (3) the plaintiff has a "substantial interest ... that [is] detrimentally affected, different from the citizenry at large." *Id*. The Court emphasized that "the standing inquiry focuses on whether a litigant is a proper party to request adjudication of a particular issue and *not* whether the issue itself is justiciable." *Id.* at 355 (internal quotation marks omitted). The Court emphasized that standing "in no way depends on the merits of the case." *Id*. at 273.

The plaintiffs have a sufficient interest in this dispute to create standing under Michigan law. First, as discussed in Part III below, the defendants have failed to show that the plaintiffs lack a legal cause of action under the due process or ex post facto clauses. Moreover, given that the defendants have not moved for summary disposition with regard to the plaintiffs' estoppel, Eighth Amendment, and separation of powers claims, the defendants cannot argue that the plaintiffs lack any valid legal cause of action. Each of these causes of action creates standing under *Lansing*. Second, the plaintiffs meet the requirements to seek a declaratory judgment as to the correct interpretation of MCL 791.234(3), which is also independently sufficient to create standing.[6] Third, the plaintiffs are facing mandatory life because of the defendants' interpretation of MCL 791.234(3), and because the defendants concealed their interpretation of the statute from the public and the plaintiffs. Consequently, the plaintiffs have a substantial interest in the outcome of this case – an interest that is "detrimentally affected" in a manner "unshared by the general citizenry." *Id*. As prisoners facing mandatory life, the plaintiffs' profound interest in being afforded parole eligibility is independently sufficient to create standing in Michigan.

Even under the stricter federal standard, there is no question that the defendants would

[6] To seek declaratory judgment, the plaintiffs must merely "plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised." *Lansing,* 487 Mich. at 372 n 20. Here, where the plaintiffs are facing mandatory life based on a statutory interpretation that is unknown to any actors in the state criminal process, a "sharpening of the issues" is assured.

have standing if the same claims were brought in federal court. Federal standing requires (1) an injury-in-fact to a protected right, (2) causation, and (3) redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). First, the plaintiffs have alleged specific and concrete injuries to their constitutional rights, including the imposition of mandatory life sentences which violate their Eighth Amendment rights, retroactive revocation of parole eligibility which violates their rights under the ex post facto clause, unconstitutional proceedings at their pleas and sentencings, and unconstitutional deprivation of their protected liberty interest in parole eligibility. Each of these specific injuries to the plaintiffs' constitutional rights constitutes an injury in fact. *See Rumsey v. Michigan Dept. of Corr.*, 327 F. Supp. 2d 767, 774 (E.D. Mich. 2004) (injury in fact exists where prisoners' rights are interfered with); *Brown v. Collins*, 2008 WL 4059887 (S.D. Ohio Aug. 25, 2008) (noting that specific injuries to constitutional rights achieve standing).

Second, "causation" is met because the plaintiffs' injuries result from the defendants' wrongful interpretation of the statute. Third, "redressability" is met, because a declaratory judgment and an injunction reinstating their parole eligibility would cure their injuries.

Finally, if the defendants' argument were correct on this issue, then the plaintiffs in all of the cases cited above – including *Foster-Bey* itself – would have lost for lack of standing. But in all of those cases the courts assumed jurisdiction and decided the plaintiffs' claims on the merits. Accordingly, the Court should reject the defendants' arguments and hold that the plaintiffs have standing to bring this action.

III. THE PLAINTIFFS HAVE PLED FACTS WHICH, TAKEN AS TRUE, RAISE VALID EX POST FACTO AND DUE PROCESS CLAIMS

A court should grant summary disposition under MCR 2.116(c)(8) only if the plaintiff "has failed to state a claim on which relief can be granted." *Kuznar v. Raksha Corp.*, 481 Mich. 169, 176 (2008). Only if the plaintiff's claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery" should summary disposition be

granted. *Id*. The Court can consider only the pleadings, must take the facts alleged as true, and must construe those facts in the light most favorable to the plaintiffs. *Id*.; MCR 2.116(C)(8).

Under that standard, the plaintiffs state actionable claims (1) for an ex post facto violation, because courts have squarely held that retroactive changes to parole eligibility can violate the ex post facto clause even in states where the parole board has virtually unreviewable discretion; and (2) for a due process violation, because the defendants' acts have interfered with the plaintiffs' liberty rights at their convictions and sentencings, as well as rights to parole eligibility, all of which are afforded due process protection.

a. The ex post facto claim is valid.

The defendants argue that misapplying a statute retroactively to revoke a prisoner's parole eligibility for the rest of his life cannot present a viable ex post facto claim because there was "always a significant risk" of serving the entire life sentence. *See* Defs' Brief, 11. This is a breathtaking claim. It would mean that prisoners who were sentenced to 10-50 years could later be told that their sentence was actually 50 years flat, because there was "always a risk" that they would serve their entire maximum. No court has so held.

The defendants' claim is also factually false. The difference between parolable life and mandatory life is night and day. People facing mandatory life – Michigan's equivalent of punishment for capital crimes – nearly always go to trial. But many people facing parolable life do not go to trial, precisely because they know that they will be parole-eligible after 15 years. Yet under the defendants' interpretation of MCL 791.234(3), the *Allen* plaintiffs can *never* become eligible for parole simply because they pled guilty to a short consecutive term-of-years sentence.

The plaintiffs here meet the low threshold of MCR 2.116(c)(8) because (1) the controlling law does not foreclose an ex post facto claim stemming from retroactive changes to parole eligibility in Michigan; and (2) the plaintiffs' complaint, taken as true and viewed in the light most favorable to them, indicates that the defendants have created a "significant risk" that the

plaintiffs will face longer incarceration – and that is all they need to show.

i. Case law does not foreclose ex post facto claims based on retroactive changes to the parole board's discretion to grant parole, regardless of the board's discretion to deny parole.

The defendants argue that the plaintiffs fail to state a claim because the parole board's discretion to deny parole always creates a risk that prisoner's will serve their entire sentence. This is nonsense. Retroactively-applied policies – which restrict the Michigan parole board's discretion to *grant* parole – can violate the ex post fact clause regardless of the extent of the board's discretion to deny parole. The existence of a legitimate risk does not immunize the defendants' from liability for converting parolable life to mandatory life. *See Brown v. Jansen*, 619 F. Supp. 2d 372, 378 (W.D. Mich. 2009) (noting that an ex post facto claim for parole *eligibility* exists even where there is no due process right to parole: "it is well established that retroactive changes to laws, rules, or policies governing parole may in certain circumstances violate the Ex Post Facto Clause"); *see also Garner v. Jones,* 529 U.S. 244, 250 (2000) ("The presence of discretion does not displace the protections of the *Ex Post Facto* Clause"); *Fletcher v. Reilly*, 433 F.3d 867, 869-70 (D.C. Cir.2006) (observing that it is clear after *Garner* that "the critical question in ex post facto challenges to retroactively applied parole … regulations is whether, as a practical matter, the retroactive application creates a significant risk of prolonging an inmate's incarceration").

In fact, the Sixth Circuit has held that significant restrictions on a parole board's discretion to *grant* parole – regardless of the board's discretion to *deny* parole – can violate the ex post facto clause. *See Michael v. Ghee*, 498 F.3d 372, 382 (6th Cir. 2007) (policies "that *affect discretion*, rather than mandate outcomes, are nevertheless subject to ex post facto scrutiny"); *see also Dotson v. Collins*, 317 F. App'x 439, 441 (6th Cir. 2008). In *Ghee*, prisoners challenged the retroactive application of guidelines of the Ohio parole board, which had "total" discretion to

deny parole. *Ghee*, 498 F.3d at 382. The Sixth Circuit held that a claim was stated because, while prisoners already face a serious risk of serving out their sentence due to the board's discretion, restrictions on the board's discretion to grant parole can still violate the ex post facto clause if they significantly increase the risk that prisoners will serve a longer prison term. *Id.* Similarly, in *Dotson*, the Sixth Circuit held that Ohio's parole guidelines potentially violated the ex post facto clause because (1) the parole board's discretion to *grant* parole was restricted by the guidelines, and (2) the guidelines delayed the minimum time for parole eligibility. *Id*.

The defendants argue that *Foster-Bey* foreclosed ex post facto challenges to retroactive changes to parole eligibility in Michigan. But that is simply untrue. The Sixth Circuit did not change the *Garner* standard. Nor did the Sixth Circuit hold that retroactive changes to Michigan's parole policies could never violate the ex post facto clause. Instead, the Court held only that a significant risk of increased incarceration was not shown *because the parole board's statutory discretion to grant parole was unaffected* by the legislative changes at issue in that case. *See Foster, supra*, 595 F.3d 353, 362 (6th Cir. 2010) (noting that "the statutory scope of the Board's range of discretion has remained the same…. If the Parole Board decided *within its discretion* to get tougher, that could hardly amount to an ex post facto violation as long as it was within the Parole Board's discretion to get tougher").

In short, the U.S. Supreme Court and the Sixth Circuit have made clear that just because a prisoner might serve his or her entire sentence does not cancel out an unconstitutional risk of increased incarceration due to retroactive changes in parole laws or policies. Moreover, in *Ghee* and *Dotson,* the parole board's discretion was only partially restricted and parole eligibility dates were only temporarily extended. Here, discretion has been totally revoked, and mandatory life has been imposed in its place, causing the plaintiffs to be *permanently ineligible for parole.*

Unlike the retroactive changes at issue in *Foster-Bey* or *Garner*, the defendants' interpretation of MCL 791.234(3) deprives the board of all discretion to grant parole. Eliminating parole

eligibility is the classic example of a "significant risk" of lengthening the time prisoners will serve. Mandatory life guarantees that prisoners have no hope for parole in their lifetime.[7]

Taking the plaintiffs' allegation as true, they have indisputably established that some "factual development could possibly justify recovery" under MCR 2.116(c)(8). Because the U.S. Supreme Court has held that retroactive changes to parole eligibility can violate the ex post facto clause regardless of a parole board's discretion, and because the defendants concede that the plaintiffs are forever ineligible for parole, the plaintiffs have pled a valid claim for relief under the ex post facto clause.

b. The plaintiffs have alleged breaches of their due process rights to fair convictions and sentencings, and to parole eligibility, which state valid claims for relief.

The plaintiffs allege that the defendants have interfered with two protected liberty interests: (1) the plaintiffs' due process rights at conviction and sentencing; and (2) the plaintiffs' due process right to parole eligibility. Both claims have strong support in case law and the state and federal constitution, and thus pass muster under MCR 2.116(c)(8).

i. The defendants' secret practice of applying their interpretation of MCL 791.234(3) interfered with the plaintiffs' due process rights at the time of their convictions and sentencings.

By affirmatively misrepresenting that all parolable lifers continued to be parole-eligible, the defendants interfered with the plaintiffs' due process rights at the time of their convictions and sentencings on their consecutive term-of-years sentences.

No one ever told the plaintiffs that their pleas on their short consecutive term-of-years sentences would result in mandatory life. To the contrary, they were told that the new sentences

[7] Absent the defendants' policy, plaintiff Watkins – who was recommended by the parole board for commutation in 2010 – surely would have been recommended for parole instead, if the board thought it had the authority to parole him. On this record, the defendants cannot presume that Mr. Watkins would remain incarcerated until his death of old age – let alone that the defendants' interpretation of MCL 791.234(3) poses "no significant risk" of increasing the time he will serve.

would have little or no effect on their parole eligibility dates. *See* Compl. ¶¶ 13, 42, 46, 56-53, 67 *and* Compl. Exh. 1 (Affidavits). The plaintiffs were promised parole eligibility and relied on this promise when pleading to their consecutive sentences. *See Dotson v. Wilkinson*, 300 F.3d 661, 666 (6th Cir. 2002) ("[W]hether [a defendant] is eligible for parole has … a 'qualitative effect' on his sentence – a sentence served with parole eligibility is more desirable than one without."). The defendants cannot reasonably contend that the plaintiffs (or the *c.* 130 prisoners in the same situation as they) would have voluntarily pled to a term-of-years consecutive sentence knowing that they would be serving mandatory life. *See* Exh. 4, Defs' Updated Response to Pls' First Interrogatories; *Mabry v. Johnson*, 467 U.S. 504, 507-09; *see also McCarthy v. United States*, 394 U.S. 459, 466 (1969); *Reynolds v. State,* 994 S.W.2d 944, 946 (Mo. 1999) (finding a due process violation when the state made misrepresentations to the defendant – who was sentenced to life – that he would be eligible for parole). Moreover, the defendants do not dispute in their motion that the plaintiffs have a due process right to rely on the promises made when they entered their plea, or to the sentence imposed when they were convicted, whether by plea or by trial. Here, the Court must accept as true that none of the plaintiffs was told, and none of the prosecutors or defense counsel or sentencing judges understood, that the effect of the conviction would be to convert the plaintiffs' parolable life sentences to life without parole.

Sentencing proceedings trigger "due process protections." *People v. Eason*, 435 Mich. 228, 240 (1990). While the protections may be modest in scope, due process ensures that, at a minimum, the "sentence [will] be based on accurate information." *Id*. at 233; *see also Foster, supra,* 595 F.3d at 369 ("We assume ... that the Due Process Clause would prohibit the imposition of punishment beyond limits explicitly imposed by the sentencing court"). When judges are unaware that a short consecutive sentence will make a criminal defendant forever ineligible for parole, the judges cannot be said to be "informed."

The U.S. Supreme Court itself has held that due process rights are violated if "the sen-

tencing authority lacked knowledge and understanding of the range of sentencing discretion under state law." *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *see also Dupuy v. Butler*, 837 F.2d 699, 703 (5th Cir. 1988). Given that the defendants failed to inform the courts or the public (or the prisoners themselves – who were incarcerated when they were charged with the consecutive offenses) about the MDOC's and the board's interpretation of MCL 791.234(3), the sentencing judges could not have known the effect of the sentences they were imposing.

Other courts have said that "due process precludes the imposition of punishment greater than that actually imposed or contemplated by the sentencing judge." *Beauchamp v. Sampson*, E.D. Mich. No. 10-12901, 2011 WL 4498804 (Sept. 27, 2011); *Foster, supra*, 595 F.3d at 358. While the parole board is ultimately empowered to grant or deny parole, the decision whether to sentence a criminal defendant to life with or without the possibility of parole lies with the legislature and the courts – not with the executive branch. Here, the sentencing judges were left in the dark because the defendants' interpretation of the statute was kept secret.

ii. Michigan law creates a due process right to parole eligibility which is not foreclosed by case law, and which gives the plaintiffs a valid cause of action.

Michigan's statutes create a legitimate expectation of parole eligibility notwithstanding the parole board's broad discretion to deny parole in individual cases. Federal case law has emphasized that – in addition to the traditional concepts of property and liberty – the due process clause also protects people from being deprived of state-created property or liberty interests. *Crump v. Lafler*, 657 F.3d 393, 397 (6th Cir. 2011). Whether a state has created a protectable interest turns on (1) whether a state's statutes create "a legitimate claim of expectation" and (2) whether that expectation can be characterized as a liberty or property interest. *Id*.; *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 9 (1979) (due process is triggered where state creates a protectable interest); *Jergens v. Ohio Dept. of Rehab. & Corr. Adult Parole Auth.*, 2012 WL 2855669 (6th Cir. July 11, 2012) (whether a protected interest has been created

"is entirely dependent on state law").

Although the Sixth Circuit has held that the Michigan parole board has too much discretion over *individual parole denials* to create an expectation of liberty, *see Sweeton v. Brown*, 27 F.3d 1162, 1164 (6th Cir. 1994), this does not foreclose an enforceable right to parole eligibility. Michigan law specifically makes the plaintiffs eligible for parole. *See* MCL 791.234. Moreover, other courts have noted that parole eligibility can be a protected right. *See Burnette v. Fahey*, 687 F.3d 171, 181 (4th Cir. 2012) ("[A] prisoner cannot claim entitlement and therefore a liberty interest in the parole release … [b]ut … state law 'giv[es] to a [parole-eligible] prisoner the right [to] parole consideration.'"); *In re Sturm*, 11 Cal. 3d 258 (1974) (parole applicants have the right to be "free from an arbitrary parole decision, to secure information necessary to prepare for interviews with the [Board], and to something more than … pro forma consideration").

The defendants cite a number of cases holding that the *decision* whether to parole does not implicate due process. That is correct, because the parole board has wide discretion to grant or deny parole to any individual. But no case holds that a state can retroactively revoke parole *eligibility,* in effect guaranteeing that all prisoners must serve out the full length of their sentences (whether it be a term-of-years sentence or a life sentence). Absent such a case – and given the uniqueness of the facts here – the plaintiffs have stated a due process claim that meets the liberal pleading standard of MCR 2.116(c)(8).

IV. THE DEFENDANTS HAVE ONLY MOVED FOR SUMMARY DISPOSITION ON THE PLAINTIFFS' EX POST FACTO AND DUE PROCESS CLAIMS.

The defendants' motion is really a motion for partial summary disposition because the defendants do not address all of the plaintiffs' claims. The plaintiffs' remaining claims include (1) cruel and/or unusual punishment under the Eight Amendment to the U.S. Constitution and the

Michigan constitutions;[8] (2) violation of the Eighth Amendment as to plaintiff Allen by causing a minor to be sentenced to life without the chance for parole;[9] (3) estoppel barring the defendants from applying their interpretation of MCL 791.234(3) to the plaintiffs;[10] (4) violation of separation of powers;[11] (5) abuse/abdication of discretion, because the defendants' refusal to consider the plaintiffs for parole is arbitrary and capricious, and (6) straight misinterpretation of the law. The defendants' motion for summary disposition to dismiss the *case* does not reach any of these claims and should therefore be denied.

CONCLUSION

For the above reasons, the plaintiffs ask the Court to deny the defendants' motion for summary disposition.

Respectfully submitted,

Dated: January 4, 2013

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[8] Life without any possibility of parole is grossly disproportionate to the modest nature of the crimes that resulted in the plaintiffs' consecutive sentences. *See Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012) (discussing the Eighth Amendment and mandatory life sentences).

[9] In *Miller*, the Court – analogizing to death penalty cases – held that a scheme which imposed mandatory life without parole on juveniles always violates the Eighth Amendment. Relying on precedent discussing the similarities between life without parole and capital punishment, the Court held that the same prohibition should apply to mandatory life sentences.

[10] *See Soltis v. First of Am. Bank-Muskegon*, 203 Mich. App. 435, 444 (1994) ("Equitable estoppel arises where a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and [that] party will be prejudiced if the first party is allowed to deny the existence of those facts.").

[11] *See People v. Hegwood*, 465 Mich. 432, 436-37 (2001). "[T]he ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature," and the "authority to impose sentences and to administer the sentencing statutes … lies with the judiciary."

Proof of Service

The above response brief was served this date by pre-paid first-class mail and by email attachment to the Michigan Attorney General's Office at the address in the case caption.

_____
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Attorney for the Plaintiffs

Dated: January 4, 2013

INDEX OF EXHIBITS

1. Operative language of 791.234(3) as of 1953

2. Excerpt from Defendants' Response to Plaintiffs' First Interrogatories (10/19/12)

3. *Foster-Bey* Order on class-membership issue (12/5/08)

4. Defendants' Updated Response to Plaintiffs' First Interrogatories and Requests for Production of Documents (11/29/12)