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' MOTION AND BRIEF FOR SUMMARY DISPOSITION AFTER DISCOVERY

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Introduction

The plaintiffs are Michigan parolable lifers who are also serving a subsequent consecutive sentence. At some point in the distant past, the "time computation" people in the Records Office of the Michigan Department of Corrections (MDOC) began interpreting Michigan's consecutive sentencing statute (MCL 791.234(3)) to mean that prisoners sentenced to parolable life, who also had a later consecutive sentence, *could never be paroled* but rather could be released only by executive clemency. Exh. 1, Defs' Discovery Responses, Interrog. #3. All parolable lifers with a later consecutive sentence are now classified by the parole board as "commutable only." *Id.,* Ints. #1 & #8; Updated Int. #2; Exh. 2, Parole Board Letters to Prisoners & Counsel (2011-12). In discovery, the defendants reported that at present 129 prisoners are so classified. Exh. 1, Updated Int. Responses #1 & #2; Exh. 3, Updated Class List.[1]

Until at least 2011-12, the MDOC and the parole board never told these prisoners of the state's interpretation of the statute. As a result, members of the proposed class, some of whom have been serving their parolable life sentences and their consecutive sentences for decades, had no inkling that they were classified by the state as "commutable only." *See* Complaint, at 6-11, Allegations of the Named Plaintiffs; Exh. 4, Verifications; Exh. 14, Survey Results Chart.

The only previous notice regarding the MDOC/parole board's policy on this issue came in 2008, in a lawsuit challenging (under the federal ex post facto clause) the retroactive application of new harsher parole standards to parolable lifers. In *Foster-Bey v Rubitschun,* ED Mich 05-CV-71318, the federal district court certified a class comprising all pre-1992 parolable lifers who were being subjected to the harsher standards. In listing the class, the *Foster-Bey* defen-

[1] The defendants reported that they counted 129 people in the proposed class, but two have since been added to that list, bringing the total to 131. The plaintiffs will use the round figure of 130.

dants excluded all parolable lifers with a consecutive sentence because the parole board viewed them as "commutable only" and therefore not "parolable."

In response, the *Foster-Bey* plaintiffs filed a motion to reject the board's interpretation of the consecutive sentencing statute, MCL 791.234(3), and to re-instate all class members who had been excluded from the class. The federal district court granted the motion. Exh. 5, *Foster-Bey* Order (12/15/08). As far as the undersigned counsel was aware, that was the end of the parole board's odd interpretation of MCL 791.234(3), and the problem was resolved.

Not until 2011-12, when the named plaintiffs in the present action learned that they were being classified as "commutable only," did counsel discover that the policy in place before the *Foster-Bey* case had been reinstated by the defendants (after *Foster-Bey* was reversed on appeal, on grounds unrelated to this issue). *See* Exh. 2, Board Letters; *Foster v Booker,* 595 F3d 353 (6th Cir 2010); Exh. 6, Office of Legal Affairs Letter (1/12/12) (confirming that the policy was indeed official). When informal efforts to change the MDOC/board's policy proved unavailing, the plaintiffs filed this action.

Proceedings to Date

The plaintiffs filed suit in August 2012. They moved for class certification, which the Court denied without prejudice in November 2012. (The Michigan Court Rules, unlike the federal rules, permit a trial court to delay the decision on class certification until later in the case, when relief to the class is appropriate.) Instead of answering, the defendants moved to dismiss the complaint on grounds of res judicata, lack of standing, and failure to state a claim. The Court denied that motion in February 2013. The defendants filed their answer. The Court then issued a calendar for discovery (as well as for motions and trial). The parties took seven depositions and exchanged various discovery requests.

With discovery complete, the case is now ripe for summary disposition under MCR 2.116 (C)(10). No genuine issue of material fact exists because no further record might be developed which "giving the benefit of reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds might differ." *Shallal v Catholic Soc Servs of Wayne Cnty*, 455 Mich 604, 609 (1997) (internal citations omitted). The plaintiffs are also renewing their motion for class certification, so that declaratory and injunctive relief can be granted to the class if the Court rules in the plaintiffs' favor.

STATEMENT OF FACTS

The named plaintiffs are three of the *c.* 130 prisoners in the custody of the MDOC who are serving both a parolable life sentence and a later consecutive sentence, and whom the defendants classify as "commutable only." The defendants base this classification on their interpretation of MCL 791.234(3), which reads in pertinent part as follows:

> If a prisoner other than a prisoner subject to disciplinary time is sentenced for consecutive terms,[2] whether received at the same time or at any time during the life of the original sentence, the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms, less the good time and disciplinary credits allowed by statute.

The defendants argue that because a parolable life sentence does not have a "minimum," there is no "minimum" to add to the minimum on the consecutive sentence, to arrive at a parole eligibility date (also known as "board jurisdiction") on the combined minimums. Exh. 1, Defs' Response to Pls' First Interrogatories & Requests for Production of Documents, #3 & #5; Exh. 6, *supra*; Exh. 7, Diana Judge Dep., at 47. The MDOC and the board maintain that this interpretation is their longstanding practice – that they have always considered prisoners with a parolable

[2] Pursuant to MCL 768.7a, if a person commits a crime while in prison, or on parole, or on escape from prison, then the sentence on that later conviction must be served consecutive to, not concurrent with, any sentence that the person is serving at the time.

life sentence and a later consecutive sentence to be "commutable only." Exh. 1(b), *supra*.

That may be true, but discovery has revealed that the defendants effectively kept their interpretation of the law a state secret. The plaintiffs and their counsel have not found a single person in the Michigan criminal justice system who was aware of the defendants' interpretation of MCL 791.234(3). That is to say, no defense attorneys, prosecutors, probation departments or parole agents, judges, or prisoners were aware that a person serving a parolable life sentence who was convicted of a later consecutive sentence would be rendered forever ineligible for parole, and would be treated by the state as serving mandatory life without the possibility of parole. [3]

During discovery, the Attorney General deposed six lawyers who had represented members of the proposed plaintiff class on the consecutive criminal charge that resulted in the conversion of their sentence from parolable to mandatory life. None of the six – one of whom is now a senior Macomb County prosecutor, and another of whom is now a St. Clair County Circuit Judge – was aware of the board's interpretation. Exh. 7, Cataldo Dep. at 23-24; West Dep. at 12; *see also* Eley Dep. at 13; Sacks Dep. at 13; Colbeck Dep. at 9; Dettman Dep. at 14-15.

To a person, these lawyers were shocked to learn of the parole board's interpretation. Exh. 8, Defense Lawyers' Affidavits (filed with the Complaint). They also disagreed with the state's interpretation of the law. Exh. 7, Sacks Dep. at 25 ("…I dramatically disagree with this reading of this statute. I think it's outrageous."); West Dep. at 18-19 ("… I mean, [my client] had been paroled, she had served 20 years in prison…. [S]he had completed the minimum term. The new sentence would then begin to run."); Colbeck Dep. at 16 ("Nobody knows about [this] change, nor do they understand the authority that the [MDOC] could have to amend statutes.").

[3] We mean, of course, that no one knew other than in the *Foster-Bey* case, or since 2011-12, as described above.

Prosecutors were similarly unaware. Richard Colbeck and William Cataldo served as prosecutors as well as defense counsel, yet they were unaware of the state's interpretation until this case. Exh. 7, Cataldo Dep. at 23-24; Colbeck Dep. at 9. The defense attorneys were also confident that the prosecutors they worked with on these cases did not know of the defendants' interpretation. Exh. 7, West Dep. at 29-30 ("…I'm certain that the prosecutor at that time knew absolutely nothing about it. And … my opinion today [is] that absolutely no one in the St. Claire County prosecutor's office knew anything about this based upon subsequent discussions that I've had with individuals there."); Sacks Dep. at 21 ("… the county prosecutor's initial response was, '… It is a parolable life sentence; it is not a life sentence without parole.'").

Nor were probation or parole officers aware of the defendants' interpretation. Exh. 7, West Dep. at 31 ("I know that no one in the [county] probation department … had any idea of this. The individual that is the supervisor of that department happens to be an attorney. And I can assure you based upon follow-up … that this came as a complete surprise to all of them."); Colbeck Dep. at 15, 23 ("… I spoke with the local parole and probation agent and … his understanding was and is today … consistent [with what] I've espoused throughout [this deposition], … that a minimum sentence imposed by [the] court would add on to the minimum of the parolable life; Q. [H]e basically had no clue what you were talking about? A. Absolutely."). The plaintiffs were also unable to find a single Presentence Investigation Report (PSI) prepared by a probation officer (on an offense running consecutively to a parolable life sentence) that so much as hinted that the combined sentences would result in the equivalent of mandatory life. Exh. 9, Sample Consecutive PSI Reports; Exh. 11, Counsel's Affidavit.

The plaintiffs were also unable to locate a single sentencing judge who was aware of the defendants' interpretation. Exh. 7, Colbeck Dep. at 24-25 ("I told [a former sentencing judge]

that I had represented somebody in front of him years ago with the understanding that a sentence … would be minimum on minimum, that now the [MDOC] is [saying] that a minimum on a parolable life makes it no longer parolable. … [H]e was taken somewhat aback, … he didn't believe that would be the circumstance."); West Dep. at 30 ("…Peter Deegan was the sitting judge at the time [who] sentenced [my client] and … took the plea. … I know him well enough to know that if there was something to be concerned about he would have given me or anyone else in that situation a proper heads up."). Exh. 10, Affidavits of Judges: Judge Pannucci (in parolable lifer cases "the defendant's parole eligibility date would be extended by the minimum on the new [consecutive] sentence. …That was the universal understanding…."); Judge Roberson ("I cannot recall any case or even any conversation in my career in which anyone expressed the idea that a consecutive sentence added to a parolable life sentence is the equivalent of a mandatory life sentence (with release only by executive clemency)."). [4]

In discovery, the plaintiffs' counsel also reviewed some 20 random parole files of class members, to see if there were any documents in the files themselves that would have informed class members of their status, at *any* time in the past. Counsel were unable to locate any such documents until after the *Foster-Bey* case in 2008. Exh. 11, Counsel's Affidavit. And even then only a handful of the random files contained a letter specifically notifying the prisoners that they were serving mandatory life. Exh. 12, Sample Parole File Docs; Exh. 2, Letters to Prisoners. It appears that not until 2011-12 did such notification letters begin to go out to any of the 130 prisoners, and then only after a scheduled 5-year review. *Id.*; Exh. 7, Diana Judge Dep. at 19, 44-45.

The defendants admit that their interpretation of the law has not been communicated to

[4] Several sitting or former judges confirmed that they were unaware of the state's interpretation of MCL 791.234(3), but felt it would be inappropriate for them to file an affidavit in a pending case on that issue. *See* Exh. 11, Counsel's Affidavit.

the proposed class: "MDOC and the Parole Board still have not notified the plaintiff class (comprising all prisoners with parolable life sentences whom [the defendants] view as 'commutable only') that they are in fact so viewed by the MDOC and the Board." Exh. 1, Parole Board Chair Combs' Response to Pls' Requests for Admissions, #7; Exh. 7, Diana Judge Dep. at 19, 53.

Indeed, the parole files reviewed by counsel appeared to be identical to the files of other parolable lifers who did *not* have a later consecutive sentence. Exh. 12, Counsel's Affidavit. The defendants concede that the parole board notices and forms do not differentiate between those prisoners who are "commutable only" (by virtue of a later consecutive sentence) and all other parolable lifers. The notices of parole review, parole eligibility reports, and all the other forms used by the board in reviewing prisoners are the same for all "parolable" lifers, regardless of whether or not people have a later consecutive sentence that makes them "commutable only." Exh. 1, Discovery Responses, Parole Chair Combs' Response to Pls' First Request for Admissions, #1, #3, and #4 ("looking only at the documents that were sent to the prisoner, it would be impossible to identify which parolable lifers were viewed as 'commutable only' and which were not.").

At least some parole board members and employees appear to have been unaware of the board's own policy. In one file the parole board explicitly stated that a parolable lifer who had been sentenced on a later consecutive charge was *eligible for parole*. Exh. 12, Parole Files, Letter to Jordan #179793 (10/1/03) ("You are parole eligible after serving 10 calendar years since the crime was committed before 10/1/1992.") On another occasion, a board member indicated that the board would *acquire jurisdiction* over a parolable lifer with a later consecutive sentence. *Id.*, Parole Files, Comments re. Moore #184638 ("no Jurisdiction till 12/94"). In 1992 a prisoner's wife complained to her Congressman that the parole board was treating her husband as if he

were a Murder I prisoner who was ineligible for parole. The MDOC director himself wrote back to the Congressman to make clear that the error had been corrected. The director never so much as hinted that under the board's policy the prisoner in fact *could not be paroled*. Exh. 12, Parole File Docs, Letters re. Snyder #146164. *See also* Exh. 2, Memo to Allen #147678 ("The remainder of your sentences can only be terminated together either through successful *parole* completion or after service of the combined maximum terms" (emphasis added)). In each of these cases the statements were made *after* the date of entry of the consecutive sentence, at a point when the prisoner was already classified as "commutable only."

Parole board members or other staff also indicated numerous times that a parolable lifer with a later consecutive sentence was not being considered for parole only because of misconduct while incarcerated, implying that the prisoner was *eligible* for parole. *Id.,* Letter to Allen #147678 (12/16/97) ("The Board would need to see an extended period of time with positive adjustment and no misconduct before it might consider any favorable action."); Case Summary Report re. Hardy #151364 (3/11/03) ("Fighting ticket as recent as last August. No basis for interest as long as [prisoner] continues to get tickets and stay at high level."); *Id.,* Letter to Michigan State Senator re. Jordan #170793 (7/11/94) ("risk factor for future assaultive behavior is in the very high category, meaning the risk is very high that he will commit another assaultive crime *if paroled*.") (emphasis added).

Finally, the plaintiffs' counsel surveyed the class in the spring of 2013. Exh. 13, Survey Instrument. Of the 131 class members surveyed, 125 responded. Even in the spring of 2013, more than half a year after this lawsuit was filed, three quarters of the class still did not know that they were ineligible for parole! Exh. 14, Survey Response Chart; Exh. 15, Sample Survey Responses, *e.g.,* Evans #125097 ("I just got this [notice of decision] from the … Board. They

had me an[d] my family believing I could make parole. I have 31 years in."); Wimbush #129712 ("In all the years I've done, when I did see the parole board or a member from it; they always led me to believe that I would be released one day as was my two co-defendants, the last one was freed over 15 years [ago]").

The defendants admit that their interpretation has not been made available to the public. Exh. 1, Discovery Responses, Defs' Response to Pls' First Interrogatories, #4 & #5 ("There has been no public announcement. I am not aware of any announcement made during previous administrations.") The defendants also admit that they "have not notified the prosecutors' association, the criminal defense bar organizations (like CDAM and SADO), the judges association, or statewide probation departments that parolable lifers with consecutive sentences are treated by the MDOC and the board as 'commutable only.'" *Id.*, Parole Chair Combs' Response to Admissions, #8. Nor does the MDOC include this information in the felony sentencing seminars conducted by MDOC staff for newly elected judges. Exh. 7, Diana Judge Dep. at 18-19; West Dep. at 27-28 ("…I walked out of [the seminar] completely flabbergasted knowing that this lawsuit was pending, knowing that these issues were [pending]. Here we have a representative from [the] MDOC there to teach new judges about issues that they need to be concerned about, and it was never mentioned.") The defendants have been unable to produce any public *or* internal document explicitly stating their interpretation of the statute. Exh. 7, Diana Judge Dep. at 20.

The class members who pled guilty on their consecutive cases say that they would not have pled guilty if they had known that the consecutive sentence would convert their parolable life sentence to mandatory life. Exh. 15, Survey Responses, *e.g.,* Silva (#295133) ("I was never made aware, if I … knew this policy existed I would have never accepted the plea agreement on my new case."). Their attorneys say the same thing. Exh. 8, Defense Attorneys' Affidavits;

Exh. 7, Eley Dep. at 13 ([my client] "was not going to plead to anything that was going to jeopardize his possibility of parole at some point in time."); Colbeck Dep. at 23 ("Q: … if the court had sentenced Mr. Allen and [said] 'By the way you're now serving mandatory life,' what would your reaction have been? A: Mine would have been shock. The defendant's, I'm sure, would have been 'I choose not to plead.'"); Cataldo Dep. at 31 ("If I knew that pleading anything [on] to a life offense would make it mandatory life, there would only be one piece of advice, and that is, we'd go to trial because there's no reason not to."); Sacks Dep. at 23 ("…you have to go to trial, you can't tell somebody to plead [to] life without parole.").

Of the *c.* 130 prisoners listed as "commutable only," most pled guilty. Some got consecutive sentences of less than a year. For example, Philip Roberson's consecutive sentence was 30 days for being drunk and disorderly, and Raymond Lewis's consecutive sentence was 4 months for an assault. At least two of the 130 people – Amy Nowak and James Fuller – were sentenced while on parole from their parolable life offense. Exh. 14, Survey Response Chart. Neither they nor their defense counsel knew that their plea would return them to prison without the possibility of parole. Exh. 12, Parole Files Docs (Fuller Correspondence).

ARGUMENT

The defendants maintain that the combined effect of a parolable life sentence and a later consecutive sentence (no matter how short) is *mandatory life*. The defendants' interpretation of MCL 791.234(3) permanently withdraws parolable lifers with a later consecutive sentence from the parole board's jurisdiction. The defendants' interpretation is wrong on its face, and if it were right it would violate the state and federal constitutions. Accordingly, the plaintiffs ask the Court to grant their motion for summary disposition, and to order declaratory and injunctive relief.

I. THE DEFENDANT'S READING OF MCR 791.234(3) IGNORES ITS TEXT, THE LEGISLATURE'S INTENT, AND THE HISTORICAL UNDERSTANDING OF ALL ACTORS IN THE CRIMINAL JUSTICE SYSTEM

The defendants' interpretation of 791.234(3) is contrary to (1) the plain language of the statute, (2) the legislature's intent, and (3) the historical interpretation relied upon by everyone in the criminal justice system. It is also an interpretation which the defendants have kept completely hidden from prisoners and the public. Because the defendants misinterpret MCL 791.234(3), the plaintiffs are entitled to judgment as a matter of law.

a. The plain language of MCL 791.234 indicates that the parole board has jurisdiction over a parolable lifer with a later consecutive sentence after serving 10 or 15 years plus the minimum on the term-of-years sentence.

Under MCL 791.234(3), the parole board has jurisdiction over a person with two consecutive sentences "when the prisoner has served the total time of the added minimum terms, less the good time and disciplinary credits allowed by statute." While the defendants argue that there is no technical "minimum" on a parolable life sentence, by law the parole board acquires jurisdiction over a parolable lifer after 10 or 15 years (depending on whether the person committed the crime resulting in the life sentence before or after October 1, 1992). MCL 791.234(7)(a). In *People v. Waterman*, 137 Mich App 429 (1984), the Court of Appeals rejected the Attorney General's argument that the minimum term on a parolable life sentence is life. The court concluded that the lifer law "in effect, sets the minimum term on all life sentences other than first-degree murder and major controlled substance offenses at [then] ten calendar years." *Id.* at 437; *see also People v. Martin*, 139 Mich App 738, 740 (1984) (affirming *Waterman*); *People v Dziuba*, 139 Mich App 789, 792 (1984).

As applied to parolable lifers with a later consecutive term-of-years sentence, *Waterman* requires that MCL 791.234(3) be read to refer to a parolable lifer's 10 or 15-year "parole eligibil-

ity date" under section (7) as the "minimum" for purposes of calculating the date when the parole board acquires jurisdiction on the "added minimums" for consecutive sentences.

This reading is buttressed by the *in pari materia* rule of statutory construction, which says that statutes should be read if possible to mean the same thing "upon the same matter or subject." *See People v Rahilly*, 247 Mich App 108 (2001). Typically the *in pari materia* rule applies to two different statutes that "relate to the same subject or share a common purpose." *Id.* at 112-13. The rule seeks a "construction that avoids conflict" between the statutes. *Id.* The rule is even stronger when applied to similar language within the same statute. Only by reading the "parole eligibility date" on a parolable life sentence as the equivalent of the "minimum" on a term-of-years sentence can the Court provide a commonsense interpretation of the parole board's jurisdiction consistent with other statutes and internally within MCL 791.234, *and* obey the dictate of *Waterman*.

The defendants' interpretation of MCL 791.234(3), on the other hand, would permanently deprive the parole board of jurisdiction (over parolable lifers with a later consecutive sentence) in the very statute which grants the parole board unqualified jurisdiction over those same parolable lifers after 10 (now 15) years, *see* MCL 791.234(7), or delays parole eligibility only until the consecutive minimum terms are served. MCL 791.234(3). The *in pari materia* rule should inform the Court's interpretation of MCL 791.234(3) as applied to parolable lifers with a later consecutive sentence, so that *both* sections can be read together sensibly.

Not only does the plaintiffs' reading make MCL 791.234 consistent across its subparts, and consistent with *Waterman, supra,* but the plaintiffs' reading also avoids absurd results, in two respects. First, if the purpose of MCL 791.234(3) were to convert a parolable life sentence to a mandatory life sentence upon the prisoner's receipt of a consecutive sentence, then the text

of section 243(3) is a downright bizarre way for the legislature to accomplish that result. One would expect such a drastic change to be explicitly written into the law. The drafters of the law could easily have said, "Any prisoner serving a parolable life sentence who is sentenced to a later consecutive sentence can never be paroled but can only be released by executive clemency." By any measure, the text of MCL 791.243(3) would be the most strained, illogical, and circuitous way to make that point.

Clearly subsection 243(3) does *not* have that purpose at all: rather it is a simple provision explaining that parolable lifers (prisoners *not* subject to disciplinary time) are subject to the same calculation as all other prisoners for purposes of computing when the parole board acquires jurisdiction if they accrue a later consecutive sentence. *See* MCL 791.234(2)-(6).

Second, under the defendants' interpretation, people who committed the same two crimes would serve vastly different amounts of time based only on the *order* in which the crimes are committed or the sentences are entered by the court. For example, if a person gets a parolable life sentence for Murder II and then a consecutive 1-3-year sentence for assault, under the defendants' interpretation of the law, that person is forever barred from parole and is "commutable only." Conversely, if the same person commits exactly the same two crimes but in reverse order, or if the person gets exactly the same two sentences but they are entered by the judge in the reverse order, under the defendants' interpretation of the law, that person is parole-eligible after just 11 (1+10) or 16 (1+15) years. Such a result would be crazy: the order of the crimes or the order of the sentencing cannot determine whether a person must serve mandatory life rather than 11 or 16 years.[5]

[5] The hypothetical is not fanciful. In discovery the defendants conceded that in cases where the two sentences are entered on the judgment of sentence at the same time, the *order* of the sen-

In *Wayne County Prosecutor v Dep't of Corrections*, 451 Mich 569 (1996), the Attorney General argued against the prosecutor's interpretation of a different consecutive sentencing statute *because the order in which the sentences were entered would have had similar consequences*. *Id.,* MDOC Brief, 451 Mich 569 (1996) (No. 101052), 1995 WL 17162967 at *7-8. The AG argued that the prosecutor's interpretation of MCL 768a(2) was "absurd" because under that interpretation "identical crimes and sentences [would] produce dramatically different parole eligibility dates" depending on the order in which they were entered. *Id.* at *7. But here, under the defendants' interpretation of MCL 791.234(3), people who commit the exact same crimes are eligible for parole if the consecutive sentence precedes the parolable life sentence, but are forever barred from parole if the order of the crimes or sentences is reversed.

The defendants have suggested that *Chico-Polo v Dep't of Corrections*, 299 Mich App 193 (2013), somehow helps their argument. But in *Chico-Polo* the Court of Appeals was interpreting a different statute, MCL 791.234b(2)(b), which required the parole board to grant parole to prisoners subject to deportation after "[t]he prisoner has served at least half of the minimum sentence *imposed by the court*." *Id.* at *3 (emphasis added). The prisoner sued demanding his parole so that he could be deported to his home country.

The Court of Appeals held that prisoners serving life sentences don't have a minimum sentence "*imposed by the court*" because the lifer law itself, not the judgment of sentence, sets the parole eligibility date at 10 (now 15) years. Unlike MCL 791.234(3) – which says only that

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tences controls. So if the judge wrote, "Count I, Murder II, parolable life" and "Count II, Assault, 1-3 years consecutive," the prisoner would be treated as serving mandatory life. But if the judge wrote the counts in the reverse order, with the life sentence consecutive to the 1-3 year term, the prisoner would be treated by the board and the MDOC as eligible for parole after 11 or 16 years. *See* Exh. 7, Diana Judge Dep, at 13.

the parole board attains jurisdiction after a person has served the combined minimums on the two sentences – MCL 791.234b specified that the minimum term must be one "*imposed by the court.*" The Court of Appeals reasoned that if there is a minimum sentence on a life term, it is not imposed by the sentencing court, but rather by the legislature under MCL 791.234. *Id.* The court in *Chico-Polo* said that the extra language "imposed by the court" must add meaning to the statute, and cannot be mere surplusage, thus making the prisoner ineligible for mandatory parole-for-deportation under MCL 791.234b. Limiting language of this sort is conspicuously absent from MCL 791.234(3), which should lead the Court to conclude that the "minimum" on a life sentence *for purposes of consecutive sentencing* is not subject to similar qualification. The Court should therefore interpret the law as it has always been interpreted by all other players in the system – to mean the 10 or 15-year parole-eligibility or "board jurisdiction" date on a life sentence.

b. The defendants' interpretation limits the parole board's jurisdiction over parolable lifers under MCL 791.234, contrary to the legislature's intent

The Michigan legislature has carefully limited the situations in which a court can impose (a) a mandatory life sentence, and (b) a consecutive sentence. These are not discretionary decisions but are narrowly circumscribed by statute. Nowhere does the legislature say that when a person sentenced to parolable life acquires a later consecutive sentence, that person's parolable life sentence converts to mandatory life. In the absence of any explicit intent from the legislature, and in light of the legislature's extremely limited use of mandatory life sentences, the Court should reject the defendants' argument that the legislature *tacitly* adopted their interpretation.[6]

Mandatory life without parole is Michigan's equivalent of a capital crime. The legisla-

[6] The legislature's failure to clarify the language referring to the "added minimum terms" cannot be indicative of "tacit approval" of the defendants' interpretation because the legislature could not possibly have known of the defendants' secret interpretation. *See* Argument I (c), *below.*

ture permits courts to impose mandatory life sentences only in a few limited situations, like first degree murder, CSC I, and certain drug "kingpin" offenses. *See* MCL 791.234(6). The statute governing parole board jurisdiction, MCL 791.234, explicitly distinguishes between parolable and non-parolable offenses by excluding persons sentenced to life imprisonment for the crimes listed in Section 234(6) from the parole board's jurisdiction. *Id.* Nowhere in this section does the legislature eliminate parole eligibility for a person with a parolable life sentence and a later consecutive sentence.

MCL 791.234(6) states: "[a] prisoner sentenced to imprisonment for life for any of the following is not eligible for parole and is instead subject to the provisions of [MCL 791.244]." (MCL 791.244 addresses reprieves, commutations, and pardons, the only ways in which a person sentenced to mandatory life can be released.) Section 234(6)(a)-(e) lists the five specific crimes for which a person can be sentenced to mandatory life, plus one catchall: a person also can be sentenced to mandatory life for "[a]ny other violation for which parole eligibility is *expressly denied under state law*." MCL 791.234(6)(f) (emphasis added). None of the statutes governing consecutive sentencing "expressly denies" parole eligibility to persons with a parolable life sentence plus a consecutive sentence. *See* Exh. 16, List of Crimes with Consecutive Sentences. To the contrary, under MCL 791.234(2)-(5), parole eligibility is simply *delayed* until the combined minimums are served.

A second rule of statutory construction, namely *expressio unius est exclusio alterius* – "the expression of one thing is to the exclusion of another" (*see Feld v Robert & Charles Beauty Salon*, 435 Mich. 352, 362 (1990)) – is also helpful here. In MCL 791.234(6), the legislature identifies the specific offenses which forever bar parole board jurisdiction because a person sentenced to life for those limited offenses is by statutory definition "not parolable." Nowhere in

that list does the legislature bar parole board jurisdiction over a person sentenced to *parolable* life with a later consecutive sentence.

Yet the defendants' interpretation effectively adds this class of persons – parolable lifers with a later consecutive sentence – to the legislature's limited list of mandatory lifers. Moreover, because under MCL 768.7a *all* offenses committed while a person is in prison or on parole must run consecutively to the underlying sentence, the defendants' interpretation of MCL 791. 234(3) would mean that the legislature intended to convert *all* parolable life sentences to mandatory life sentences for *all* crimes that fall under MCL 768.7a, *without the legislature ever saying so explicitly*. This Court should reject such an interpretation because there is no law anywhere that allows the legislature to create a mandatory life sentence *by implication*.

In *People v. Waterman*, *supra,* the Court of Appeals recognized the problem of making "life" the "minimum" on a parolable life sentence, reasoning that "[s]uch a result would, of necessity, raise a [parolable] life sentence to the same status as … a mandatory life sentence without parole...." 137 Mich App 429, 436 (1984). The legislature has clearly and carefully set forth the offenses for which a person is subject to mandatory life imprisonment. In the absence of any state law "expressly denying" parole eligibility to parolable lifers with a later consecutive sentence, the defendants' interpretation undermines the legislature's plain intent.

So, too, the Michigan legislature has carefully restricted the situations in which a court must impose a consecutive sentence. *See* Exh.16, List of Consecutive Crimes. As noted, under MCL 768.7a, the sentence for *any* crime committed while in prison or on parole must run consecutively to the sentence which the person is serving. Many of the plaintiff class members received a relatively short consecutive sentence (after their parolable life sentence) for minor offenses (like possession of contraband in prison). At least two class members (Amy Nowak and

James Fuller) picked up a later consecutive sentence while on parole from a parolable life sentence. Ms. Nowak pled guilty to shoplifting while on parole and got a 3-20-year consecutive sentence. As Jon Sacks said in his deposition, Ms. Nowak is now serving mandatory life for shoplifting. Exh. 7, Sacks Dep. at 34. While the legislature intended such sentences to run consecutively to the underlying sentence, MCL 768.7a, nowhere does the legislature *specify* that a later consecutive sentence converts the underlying parolable life sentence to mandatory life.

c. No one in Michigan's criminal justice system knew that the defendants' interpretation of MCL 791.234(3) denied parole eligibility to parolable lifers with a later consecutive sentence

Even if the defendants have interpreted MCL 791.234(3) consistently for decades, that fact is of no consequence because no one in Michigan's criminal justice system was aware of the defendants' interpretation. To the contrary, prosecutors, defense attorneys, probation agents, sentencing judges, and criminal defendants all relied on the plain language of MCL 791.234(3) and the historical practice pursuant to it. Discovery has shown that the plaintiffs' view of the meaning of the statute was and is universally accepted, without exception. The unanimous view is that parolable lifers with a later consecutive sentence remain eligible for parole, and the parole board will have jurisdiction upon the added or combined "minimums" on the two sentences. *See* Exh. 7, Colbeck Dep. at 8-9; Dettmann Dep. at 18-19; West Dep. at 29-31. This result is hardly surprising, given that most of the proposed class members pled guilty to the later crime – something that no right-minded defendant would ever do, and no right-minded defense attorney would ever permit, if anyone knew that the consequences of the plea would be to convert the underlying parolable life sentence to mandatory life (without the possibility of parole).

Indeed, nearly all of the plaintiffs in this case were unaware of their status as mandatory lifers, even decades after their sentencing on the consecutive crime. In response to a question-

naire mailed by counsel to the 131 class members, 125 of whom responded, just 22 percent (27 class members) were aware that they were being treated by the MDOC as mandatory lifers. *See* Exh. 14, Survey Results Chart. And even those people only learned of their status in the last few years, on the heels of the *Foster-Bey* case. Thus, nearly 80 percent of the class still did not know they were serving mandatory life in the spring of 2013 – six months after the plaintiffs filed this lawsuit. And 10 of the 27 who knew they were mandatory lifers would not have known but for the fact that they submitted an inquiry to the MDOC asking about their parole status after the *Foster-Bey* case. *Id.* They got a form letter in response revealing that they were ineligible for parole. *See* Exh. 12, Parole File Docs, Letters; Exh. 2, Board Letters to Prisoners.

Even class members who had been interviewed by the board multiple times were never told that they were "commutable only." Not until 2011-12 did the board begin to send letters informing people that they were ineligible for parole. *Id*. Until that time, even when class members (or family members inquiring on their behalf) asked for an explanation as to why the parole board had expressed "no interest" in the prisoners' *parole*, the board's stock response did not include any statement that the prisoners were ineligible for parole because they were mandatory lifers. *Id.* Indeed, the board's internal files indicate that some board members themselves were unaware that the board lacked jurisdiction to parole parolable lifers with a later consecutive sentence. *See* Statement of Facts, *supra*; Exh. 12, Parole File Documents.

Finally, and most damning on this issue, the plaintiffs have been unable to find a single actor within the criminal justice system who was aware of the defendants' interpretation of MCL 791.234(3). None of the six criminal defense attorneys deposed – each of whom represented class members in their consecutive cases – knew or had ever heard of the defendants' interpretation. Long-time criminal defense attorney Richard Colbeck, who has been in practice for 46

years (since January 1967) said straight out:

> Nobody knows about this [interpretation]. … I've tried cases probably in 50 or more of the 83 counties. I've had some degree of contact with probation and parole agents, again, beyond local understandings. I've had numerous contacts with defense attorneys, again outside of the immediate local area here. *I would think that in your discovery it would be most difficult for you to find any person who has practice in the criminal law at all who doesn't hold that same impression* [that for the purpose of calculating parole eligibility on a consecutive sentence, a life sentence counts as having a 10 (now 15) year minimum].

Exh. 7, Colbeck Dep. at 9. Nor were the SADO attorneys, who handle about 20 percent of all indigent criminal appeals annually (averaging some 500 cases per year), aware of the defendants' interpretation. Exh. 7, SADO Deputy Director Sacks Dep. at 15, 35, 39.

If criminal defense attorneys *had* known, of course they would have advised their clients differently: no sane defense lawyer would let a client take a plea that would result in mandatory life. Exh. 7, Cataldo Dep. at 31:7-10; Sacks Dep. at 23; Colbeck Dep. at 12; West Dep. at 37-38. The defense bar believed that a consecutive sentence to a parolable life sentence would begin to run after the person had served either 10 (now 15) years on the life sentence, and that the person would attain parole eligibility when the two "minimums" were combined. Exh. 7, Sacks Dep. at 10; Colbeck Dep. at 5; Dettmann Dep. at 14; West Dep. at 18-19. According to Mr. Sacks:

> [W]e see the statute as a straight up, add the minimum terms, and the minimum term for parolable life is 10 or 15 years. This is not a situation where we just didn't know about the statute. I mean, we encounter it every day.... It's a case of us not understanding … frankly what I see as [the defendants'] outrageous interpretation of that statute. Exh. 7, Sacks Dep. at 15-16.

Nor could the plaintiffs find any judges who were aware of the defendants' interpretation. *See e.g.,* Exh. 10, Roberson Aff. at 2-3; Pannucci Aff. at 2-3; Exh. 7, West Dep. at 26. Even six months after this case was filed, the defendants still did not include their interpretation of MCL 791.234(3) in the sentencing curriculum at the new judge's training held in early 2013. *Id*. at 27-28; Diana Judge Dep. at 18-19.

In light of the plaintiffs' and the entire Michigan criminal justice system's reliance on the plain language of MCL 791.234(3), the imposition of mandatory life sentences on persons serving parolable life with a consecutive sentence defies a fair and common-sense reading of the law.

d. The Court should not defer to the defendants' interpretation of MCL 791.234(3)

The defendants' interpretation of MCL 791. 234(3) is unreasonable, and as such, is not entitled to "agency deference." *See e.g., Chevron, USA, Inc v Natural Res Defense Council, Inc*, 468 US 1227 (1984). The state defendants do not interpret the statute but rather in effect seek to amend it to add a new class of persons who are ineligible for parole. As noted, their interpretation not only exceeds the plain language of the statute, but also contradicts the legislature's clear intent to limit the crimes punishable by mandatory life to those specified in MCL 791.234(6).

Nor are the defendants entitled to deference simply because the Michigan Supreme Court deferred to their interpretation in *Wayne County Prosecutor v Dep't of Corrections*, 451 Mich 569 (1996). In that case, the MDOC's interpretation of MCL 768.a(2) was *consistent* with the established practice – in the courts and in the minds of the participants in the criminal justice system going back decades. To accept the literal words of the statute at issue in that case – namely that the first sentence must be served to its maximum before the consecutive sentence can begin to run – would have hugely increased the time that prisoners had to serve. It also would have put in doubt the validity of all the previous pleas that were entered and all the sentences that were handed down, with the understanding that the underlying sentence did *not* have to be served in full before the consecutive sentence could begin. *Id.* [7]

[7] MCL 768.a(2) reads: "If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense." The Wayne

Moreover, in *Wayne County,* unlike here, the defendants' interpretation (adopted by the Michigan Supreme Court) did not exceed the maximums of the combined sentences imposed by the sentencing court. 451 Mich at 572. Here, in contrast, the defendants' interpretation imposes an entirely new sentence (mandatory life) for two crimes *neither of which is punishable by mandatory life*. The MDOC and the parole board lack the authority to create a new maximum sentence where the legislature has not specifically authorized that sentence. *See* Part III, below. At bottom, MCL 791.234(3) is nothing more than a "counting" provision that instructs the defendants how to calculate *when* a prisoner reaches parole eligibility in cases involving consecutive sentences. But the defendants read it as a wholesale substantive change in the law that for years has been indiscernible to anyone but the Central Records Section of the MDOC, which in turn has effectively concealed its interpretation from anyone and everyone who would need to know of it. The "bean counters" in a division of the MDOC should not determine the meaning of MCL 791.234(3).

Finally, the defendants' interpretation of MCL 791.234(3) was challenged the moment it came to light, first in the *Foster-Bey* litigation in 2008, and then in this case (after the defendants reinstated their interpretation when *Foster-Bey* was reversed by the Sixth Circuit). In *Foster-Bey,* Judge Marianne Battani of the Eastern District of Michigan rejected the defendants' interpretation and instructed them to classify parolable lifers with a later consecutive sentence as parolable lifers within the *Foster-Bey* class. *See* Exh. 5, *Foster-Bey* Order (12/5/08). The defen-

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County prosecutor argued, and the Court of Appeals held, that the statute must be read literally and that its meaning was clear: a person must serve the maximum on the underlying sentence before the consecutive sentence can begin. The MDOC argued that the law should not be read literally, and that the person should only have to serve the *minimum* on the underlying sentence before the second sentence would start. The Michigan Supreme Court agreed despite the contrary language in the statute. *Wayne County*, 451 Mich at 571-72, 579-80 (1996).

dants did not appeal the district court's order and the Sixth Circuit never addressed the issue on appeal. *See Foster v. Booker*, 595 F.3d 353 (6th Cir. 2010).

The courts, not the MDOC or the parole board, must decide what a statute means, and therefore this Court should not give any deference to the defendants' interpretation of the law.

II. THE DEFENDANTS' INTERPRETATION OF MCL 791.234(3) VIOLATES DUE PROCESS

If the defendants' interpretation of MCL 791.234(3) were correct, it would deny the plaintiffs their due process rights.

a. The plaintiffs' due process rights were violated when they were not informed upon entering their guilty pleas that the consecutive sentence would convert their sentences to mandatory life.

The record is clear that the plaintiffs who pled guilty to a consecutive crime were never notified that their conviction would convert their sentence to mandatory life. Under the Constitution, in order for a guilty plea to be valid it must be made voluntarily and intelligently. *Boykin v Alabama*, 395 US 238, 242 (1969). The plea must be made with "sufficient awareness of the relevant circumstances and likely consequences." *Brady v United States*, 397 US 742, 748 (1970). While the trial court does not have to inform the defendant of all possible *collateral* consequences of the plea, it must inform the defendant of all *direct* consequences. *Brown v Perini*, 718 F2d 784, 788-89 (6th Cir 1983). Direct consequences are those which have "'a definite, immediate and largely automatic effect on the range of the defendant's punishment.'" *People v Cole*, 491 Mich 325, 334 (2012) (quoting *Cuthrell v Patuxent Institution Director*, 475 F2d 1364, 1366 (4th Cir 1973)). While a defendant does not have to be informed of the details of parole eligibility, *Hill v Lockhart*, 474 US 52, 56 (1985), "the defendant must be aware of the maximum sentence that could be imposed" for a guilty plea to be voluntary. *King v Dutton*, 17 F3d 151, 154 (6th Cir 1994).

The Michigan Court Rules similarly require that defendants entering guilty pleas understand "the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law." MCR 6.302(B)(2). The court rules related to guilty pleas are based on constitutional due process requirements, *see Cole*, *supra,* 491 Mich at 332 ("the 'understanding, voluntary, and accurate' components of subrule (A) [of MCR 6.302] are premised on the requirements of constitutional due process"). For example, the Michigan Supreme Court has held that defendants must be notified of mandatory lifetime electronic monitoring because it is "part of the sentence itself." *Cole*, 491 Mich at 335. Courts must also tell defendants what the maximum possible prison sentence is, including a habitual-offender enhancement, "because the enhanced maximum becomes the 'maximum possible prison offense' for the principal offense." *People v Brown*, 492 Mich 684, 693-94 (2012) ("By not telling a defendant the potential maximum sentence because of his or her habitual-offender status, 'a trial court is not advising of the "true" potential maximum sentence.'").

This case is no different. The defendants' interpretation of MCL 791.234(3) is a direct consequence of a guilty plea because it increases the maximum sentence from parolable life to mandatory life. The defendants have acknowledged that there are no prisoners with a parolable life sentence and a later consecutive sentence who are *not* considered "commutable only." *See* Exh. 1, Defs' Response to First Interrogatories, Int. #8; Exh. 7, Diana Judge Dep. at 32-33. The defendants' interpretation therefore has a "definite, immediate, and largely automatic effect" on the individual's sentence. Like habitual-offender enhancements, *Brown*, 492 Mich at 693-94, the defendants' interpretation here increases the maximum sentence simply because of a previous sentence. Furthermore, the direct consequences here are more onerous than in *Cole* or *Brown, supra* – mandatory life is without question a more severe penalty than lifetime electronic mon-

itoring or a habitual enhancement. Here, the plaintiffs were never told the consequence of their pleas because the trial court judges taking those pleas – in addition to the prosecutors, defense counsel, and probation agents – were all unaware of the defendants' interpretation of the law. All of the plaintiffs who entered guilty pleas on their consecutive offenses therefore did so unknowingly and involuntarily, in violation of their due process rights. (The Court can avoid this constitutional morass by holding that the defendants' interpretation of the statute is wrong.)

b. The plaintiffs' due process rights were violated when they were sentenced to consecutive sentences by judges who were unaware of the defendants' interpretation of the law

If the defendants' interpretation is allowed to stand, then the plaintiffs were also denied due process during their sentencing proceedings. Sentencing proceedings trigger "due process protections." *People v Eason*, 435 Mich 228, 240 (1990). While the protections may be modest in scope, due process requires that "a sentence must be based on accurate information and a defendant have a reasonable opportunity at sentencing to challenge such information." *Id.* at 233. Furthermore, due process is violated if the sentencing judge did not know the range of the sentence under state law. *Dupuy v Butler*, 837 F2d 699, 703 (5th Cir. 1988) (citing *Every v Blackburn*, 781 F2d 1138, 1140 (5th Cir 1986)); *see also Hicks v Oklahoma*, 447 US 343 (1980). In addition, Michigan law requires that the sentencing judge "state the sentence being imposed, including the minimum and maximum sentence if applicable…." MCR 6.425(E)(1)(d).

The plaintiffs have been unable to locate a single judge who was aware that a sentence running consecutive to a parolable life sentence would convert the cumulative sentences to the equivalent of mandatory life. *See* Exh. 10, Judges' Affs.; Exh. 11, Counsel's Aff. Given that the sentencing judges were unaware of the defendants' interpretation of the law, the sentences the judges issued cannot have been "based on accurate information," nor can the judges have had the

requisite "knowledge and understanding" of the range of the sentence. Furthermore, since no one in the criminal justice system was aware of the defendants' secret interpretation, the plaintiffs could not have had an opportunity to challenge it at their sentencing hearings. The 130 individuals affected by the defendants' interpretation were therefore denied their rights to due process at their sentencing hearings. (Again, the Court can avoid this problem as well by rejecting the defendants' interpretation of the statute.)

c. The defendants are violating the plaintiffs' right to parole eligibility

The plaintiffs are being denied their due process right to parole eligibility. 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. *See Crump v Lafler*, 657 F3d 393, 397 (6th Cir 2011). Whether a state has created a protectable interest depends on (1) whether a state creates "a legitimate claim of expectation" and (2) whether that expectation can be characterized as a liberty or property interest. *Id.* Although the Sixth Circuit has held that the Michigan parole board has too much discretion over *individual parole denials* to create a due process right to parole itself, *see Sweeton v Brown*, 27 F3d 1162, 1164-65 (6th Cir. 1994), this does not foreclose an enforceable right to parole *eligibility*.

No Michigan case holds that a state can retroactively revoke parole *eligibility*, in effect requiring that all prisoners serve out the full length of their sentence (whether a term-of-years sentence or a life sentence). Furthermore, other courts have noted that parole eligibility is a protected right. *See Burnette v. Fahey*, 687 F3d 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 mere pro forma consideration.")

Michigan law uses unequivocal language stating that the parole board acquires jurisdiction over individuals with consecutive sentences. MCL 791.234(3) ("If a prisoner … is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, *the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms*, less the … credits allowed by the statute.") (Emphasis added.) The statutory language therefore provides prisoners sentenced to consecutive terms, including the plaintiffs, with a liberty interest in being subject to the parole board's jurisdiction – that is, in being *eligible* for parole. The defendants' interpretation of this statute results in the plaintiffs being forever *ineligible* for parole.

III. THE DEFENDANTS' INTERPRETATION OF MCL 791.234(3) VIOLATES SEPARATION OF POWERS UNDER THE STATE CONSTITUTION

The defendants' interpretation of MCL 791.234(3) violates the separation of powers mandated by the Michigan Constitution. Const 1963, art 3, § 2. "[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 enacted by the legislature lies with the judiciary." *People v Hegwood*, 465 Mich 432, 436-37 (2001). The defendants are members of the executive branch who have infringed on the provinces of the legislature and the judiciary by interpreting MCL 791.234(3) to require sentences of mandatory life for the *c.* 130 individuals who are the subject of this litigation. The legislature has specified the crimes for which a sentence of mandatory life can be imposed, and it does not include the plaintiffs or the plaintiff class. By classifying the plaintiffs as "commutable only," the defendants have invaded the constitutional province of the legislature.

In addition, the defendants have impinged on the power of the judiciary. Because the defendants never revealed their interpretation to the public or to anyone in the criminal justice system, the sentencing judges were unaware of the defendants' interpretation. As a result, the defendants nullified the judicial power when they treated the plaintiffs as mandatory lifers despite the lesser sentences that the judges thought they were imposing. The defendants' interpretation has caused the executive branch to infringe on powers given exclusively to the legislature and the courts. *See* Michigan Constitution, Art 3, § 2.

IV. THE DEFENDANTS' INTERPRETATION AMOUNTS TO AN EX POST FACTO VIOLATION

The defendants' interpretation of MCL 791.234(3) amounts to a retroactively-applied policy or interpretation that violates the ex post facto clause. The ex post facto clause forbids "enactments which, by retroactive operation, increase the punishment for a crime after its commission." *Garner v Jones*, 529 US 244, 249 (2000). The ex post facto clause bars "retroactive changes to laws, rules, or policies governing parole," *Brown v Jansen*, 619 F Supp 2d 372, 378 (WD Mich 2009), even when the parole board has discretion in deciding whether or not to grant parole. *Garner*, 529 US at 253. Here the relevant inquiry is whether the interpretation of state law "creates a significant risk of prolonging [an individual's] incarceration." *Garner*, 529 US at 251; *Peugh v US,* __ US __, 133 S Ct 2072 (2013). An individual can meet this standard by proving either (1) that the retroactive policy "by its own terms show[s] a significant risk" or (2) "by evidence drawn from the [policy's]'s practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration." *Id.* at 255. The Sixth Circuit found a valid ex post facto claim where new parole guidelines increased the minimum time for many offenses, the parole board was not supposed to depart from the guidelines, and therefore the change was "likely to result in increased incarcera-

tion." *See e.g., Dotson v Collins*, 317 Fed. Appx. 439, 442 (6th Cir 2008) (unpublished case).

While the defendants assert that their interpretation of MCL 791.234(3) is longstanding and has not recently changed, *see* Exh. 1, Defs' Response to First Interrogatories, #3 & #5, the policy is functionally retroactive if no one in the criminal justice system (including defense attorneys, prosecutors, probation agents, and sentencing judges) knew of it until now. When a state agency adopts a secret policy and conceals it even from the prisoners whom it directly affects, *see* Exh. 14, Survey Results Chart, the after-the-fact revelation is substantively no different from a new policy being applied retroactively.

The defendants' interpretation "creates a significant risk of prolonging [the plaintiffs'] incarceration" under either of the permissible methods of proof. "On its own terms," the interpretation guarantees that the plaintiffs can never be paroled, leaving them to the vagaries of executive clemency. Without judicial correction, most of the plaintiffs are almost certain to spend the rest of their lives in prison. In addition, the "evidence ... from the [interpretation's] practical implementation" demonstrates that the plaintiffs will serve a far "longer period of incarceration." In this case, the harm is all but guaranteed. The parole board has recommended nine members of the proposed plaintiff class for commutation (the only method by which they can be released). *See* Exh. 14, Survey Results Chart. Without question the parole board would instead have paroled these individuals if it could have.

The defendants' reading of MCL 791.234(3) therefore amounts to a retroactively applied policy that creates a significant risk of a longer sentence, contrary to the ex post facto clause.

V. THE DEFENDANTS SHOULD BE EQUITABLY ESTOPPED FROM ENFORCING THEIR INTERPRETATION OF MCL 791.234(3)

"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 the other party will be prejudiced if the first party is allowed to deny the existence of those facts." *Soltis v First of Am Bank-Muskegon*, 203 Mich App 435, 444 (1994). The defendants' decades-long failure to inform the plaintiffs, judges, prosecutors, defense counsel, and parole and probation agents of their interpretation of MCL 791.234(3) induced the plaintiffs' to rely on the common understanding of the parole eligibility statute to the plaintiffs' severe detriment. The defendants should be estopped from enforcing their interpretation of MCL 791.234(3) as a matter of equity.

The defendants have been unable to produce any internal or public document stating their interpretation of MCL 791.234(3). Exh. 7, Diana Judge Dep. at 20. Even assuming that the defendants have interpreted MCL 791.234(3) consistently for 50+ years, no one in the Michigan criminal justice system or the general public was aware of their interpretation, including the 130 prisoners affected, until the *Foster-Bey* case (when some of the proposed plaintiff class learned of their "commutable only" status). Instead, judges, prosecutors, defense attorneys, and probation officers involved in the prosecutions, plea negotiations, or trials of these cases all operated with the ubiquitous and unanimous understanding that parolable lifers who received a later consecutive sentence would be parole-eligible under MCL 791.234(3) upon reaching their "combined minimum." [8]

Moreover, even after the plaintiffs' consecutive sentences were entered, the MDOC and the parole board treated the plaintiffs exactly the same as those serving true parolable life sentences, while secretly reclassifying the plaintiffs as "commutable only." The notices they got

[8] The defendants had to know that their policy was unknown, at least to prisoners and to the defense bar, because parolable lifers charged with low-level crimes committed in prison routinely *pled guilty* to those new crimes. Even lay people understand that criminal defendants don't plead guilty to crimes that carry mandatory life (other than to avoid the death penalty).

before and after their periodic "parole" reviews, and their "parole eligibility reports," as well as all of the documentation in their "parole "files, were indistinguishable from what other parolable lifers got who were not classified as "commutable only." Even after the plaintiffs filed this suit in 2012, and even after the defendants compiled a list of all the potential class members for discovery, the defendants *still* did not disclose their interpretation to affected class members or to other actors in the Michigan criminal justice system.

Discovery has also shown that the defendants' policy is impossible to implement with accuracy. During discovery, the defendants were unable to report with certainty who fell within the class and who did not. The defendants found two "false negatives" – people who were *not* originally classified as "commutable only," but should have been so classified and were added to the list of the plaintiff class. The defendants also found two "false positives" – people who were included in the class initially, but upon further review of their sentences the defendants determined should not have been included. Exh. 7, Diana Judge Dep., at 56-59.[9] Upon information and belief, the defendants still have not informed the two "false negative" prisoners of their new status as mandatory lifers, *i.e.,* that they are now ineligible for parole. Exh. 7, Diana Judge Dep. at 44-45. Nor, despite knowing the allegations in the plaintiffs' complaint about the ignorance of the bench and bar, did the defendants share their unique interpretation with newly-elected judges during their formal training in early 2013. Exh. 7, West Dep. at 27-28; Judge Dep. at 18-19.

By not disclosing their interpretation of the statute, the defendants induced the plaintiffs

[9] The plaintiffs' counsel are also aware of another potential "false negative" – a prisoner who appears to have a parolable life sentence and a later consecutive sentence, but who was not included on the updated list provided by the defendants. Counsel are not at liberty to reveal the prisoner's name because at present he is not classified as "commutable only" and obviously he does not want counsel to say anything that might trigger a change in his current status as a parolable lifer.

(as well as all other actors in the criminal justice system) to rely on the long-term historical reading of MCL 791.234(3). The plaintiffs suffered two kinds of reliance harms. First, in litigating their consecutive cases, the plaintiffs gave up their right to trial – ignorant of the fact that by pleading guilty they would be treated by the MDOC and the parole board as mandatory lifers. According to criminal defense attorney Richard Colbeck, "the prisoner's primary concern is how any sentence imposed by the court or any plea that he makes will impact the sentence that he's [already] serving." Exh. 7, Colbeck Dep. at 5. Had the plaintiffs been aware of the defendants' interpretation, they would not have pled guilty. *Id.,* Cataldo Dep. at 31; Sacks Dep. at 23; Colbeck Dep. at 12; West Dep. at 37-38.

Second, if the defendants had not concealed the plaintiffs' status from them, then at any time over the years of their incarceration, the plaintiffs could have sought executive clemency not of their underlying parolable life sentence, but of their (typically) short add-on *consecutive* sentence, for the purpose of restoring their parole eligibility. Because the defendants kept their interpretation of MCL 791.234(3) a departmental secret, the plaintiffs lost the opportunity both to fight their consecutive charge at trial *and* to seek commutation or pardon of their shorter consecutive sentence after conviction. [10]

VI. THE DEFENDANTS' INTERPRETATION DENIES PAROLE ELIGIBILITY TO PAROLABLE LIFERS SENTENCED AS JUVENILES IN VIOLATION OF THE EIGHTH AMENDMENT

The defendants' interpretation of MCL 791.234(3) denies parole eligibility to parolable lifers with later consecutive sentences indiscriminately, regardless of whether the parolable lifer was sentenced when he or she was under the age of 18. As a result, plaintiff Edward Allen and

[10] The parole board has at one time or another recommended nine members of the plaintiff class for commutation – a powerful indication that but for the board's interpretation it would have put these people forward for parole instead. Exh. 14, Survey Results Chart.

all other class members who committed crimes for which they were sentenced to parolable life when they were under 18 years of age are now serving mandatory life in violation of the Eighth Amendment to the U.S. Constitution (actionable under 42 USC § 1983), *Graham v Florida*, 130 S Ct 2011 (2010), and *Miller v Alabama*, 132 S Ct 2455 (2012).

Conclusion

For the above reasons, the plaintiffs ask the Court to grant their motion for summary disposition and to hold that the defendants' interpretation of MCL 791.234(3) is mistaken. Such a ruling would obviate the need to address the thorny constitutional issues otherwise presented. If the Court finds that the defendants' interpretation is correct, then the plaintiffs' ask the Court to hold that the law itself, as applied, violates the plaintiffs' rights under the state and federal constitutions.

Respectfully submitted,

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Dated: July 22, 2013

Proof of Service

On this date the plaintiffs served the above motion and brief and all exhibits on the defendants' counsel by pre-paid first-class mail at the address in the case caption.

_____
Paul D. Reingold (P27594)
Attorney for Plaintiffs

Dated: July 22, 2013

Index of Exhibits

1. Defendants' Discovery Responses (excerpts)
2. Sample Parole Board Letters to Prisoners & Counsel (re. "commutable only" status)
3. Updated Class List (compiled by the plaintiffs from the updated discovery responses)
4. Verifications of Named Plaintiffs (July 2013)
5. *Foster-Bey* Order re. Class Certification (12/15/08)
6. MDOC Office of Legal Affairs Letter to Plaintiffs' Counsel (1/12/12)
7. Depositions (excerpts x 7)
   a. James Eley (3/4/13)
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8. Defense Attorneys' Affidavits (from the Complaint)
   a. James Eley (7/20/12)
   b. Richard Colbeck (7/12/12)
   c. Darrell Dettmann (7/18/12)
   d. William Cataldo (4/20/12)
   e. Michael West (7/30/12)
   f. Jonathan Sacks (7/25/12)
9. Sample Presentence Investigation Reports (PSIs) on Consecutive Cases
10. Affidavits of Judges
11. Counsel's Affidavit
12. Random Parole Files Reviewed (various documents)
13. Survey Instrument (sent to the class by the plaintiffs' counsel)
14. Survey Results Chart
15. Sample Survey Responses
16. List of Crimes with Consecutive Sentences