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' RESPONSE BRIEF ON CROSS-MOTIONS FOR SUMMARY DISPOSITION AFTER DISCOVERY**

**1. The consensus interpretation of MCL 791.234(3) should prevail**

The defendants argue that all the lawyers in all 130 cases provided ineffective assistance of counsel because their understanding of MCL 791.234(3) was different from the parole board's understanding. The argument necessarily means that all the judges who unwittingly imposed the "mandatory" life sentences, and all the prosecutors who charged the defendants and negotiated the pleas, and all the probation departments who shepherded the cases through the criminal process – all equally ignorant of the consequences of the consecutive sentence – were also benighted

individuals who misinterpreted the law and failed in their jobs.[1]

The more likely explanation is the simpler one: that the parole board and the MDOC record office are the ones who have it wrong.

Moreover, under the constitution, it is not the parole board and the MDOC record office who decide what the law is, but rather the courts. And in *People v Waterman,* 317 Mich 429; 358 NW2d 602 (1984), the Court of Appeals held that a parolable life sentence has a minimum (which today is 15 years). Even before *Waterman,* prisoners were pleading to short consecutive sentences, with all participants believing that the plea would simply combine the minimums. But *Waterman* reinforced the consensus reading of MCL 791.234(3) in the strongest possible way, and practitioners and judges and probation officers were entitled to rely on it. *Waterman* has not been reversed; it is still the law. *Waterman* makes clear that even if a parolable life sentence has no minimum for some purposes, that doesn't mean that a parolable life sentence does not have a minimum (or the equivalent of a minimum) for other purposes, including combining minimums pursuant to the consecutive sentencing statutes.

The defendants cite *Wayne County Prosecutor v Dept of Corrections,* 451 Mich 569; 548 NW2d 900 (1996). But *Wayne County* actually supports the plaintiffs' case. In *Wayne County*, the MDOC and the board had interpreted MCL 768.7a to mean that prisoners who committed crimes while in prison or on parole became eligible for parole after service of their combined minimums, even though MCL 768.7a explicitly said the opposite:

> The term of imprisonment imposed for the [consecutive] crime shall begin to run at *the expiration of the term or terms of imprisonment which the person is serving*…. (Emphasis added.)

[1] None of the consecutive sentencing transcripts provided to counsel by the prospective class members contained a hint that anyone participating in the proceedings believed that the effect of the sentence would be anything other than that the two "minimums" would be combined.

The Wayne County prosecutor quite rightly argued that the "expiration of the term of imprisonment" had to mean the maximum of the sentence. The problem for the Court, of course, was that the MDOC's interpretation had been the ubiquitous state-wide practice for decades, so that a decision reversing that interpretation would throw into question the validity of the pleas entered in all such cases. The Court prudently decided to defer to the MDOC, saving itself a boatload of constitutional trouble. The Court noted that the MDOC's interpretation "had gone unchallenged until this litigation, entitling it to considerable deference by this Court." *Id.* at 850.

Exactly the opposite is true here, where for decades the consistent practice across the state has squarely *contradicted* the MDOC's interpretation of MCL 791.234(3). That state-wide practice has never been challenged by the MDOC (or by a prosecutor). And the MDOC and the board had to know about that practice, because there is no other explanation for why prisoners (from time immemorial) would plead guilty to a short consecutive sentence if they knew that the result would be to convert their parolable life sentence to mandatory life. In *Wayne County* it was the widespread "unchallenged interpretation" that won the day, and the same result should prevail here.

In *Wayne County*, the Court wisely interpreted an *unambiguous* statute to conform to the reality of practice that had been in place for decades. In the present case, MCL 791.234(3) is clear that it applies to parolable lifers; at worst it is ambiguous as to whether it does or not. Given what the Michigan Supreme Court did in *Wayne County,* surely this Court can interpret any ambiguity in the law to avoid constitutional problems, and to conform the statute to the unanimous view of the law by all participants in the criminal justice system across the state (excepting two small units of the MDOC – its record office and the parole board).

The defendants also rely on *People v Johnson,* 421 Mich 494; 364 NW2d 654 (1984).

But *Johnson* involved the reach of Proposal B, a "truth-in-sentencing" ballot initiative that eliminated "good time" and other credits for many prisoners, and required prisoners to serve out their full minimum terms before becoming eligible for parole. The Court's decision actually favored parolable lifers, holding that Proposal B did not apply to them. As a result, they remained eligible for parole upon reaching their (then) tenth year of incarceration, while prisoners sentenced to, say, 25-40 years, were not eligible for parole under Proposal B until they had served out their 25-year minimum.

But *Johnson* is also distinguishable because it was dealing with a ballot initiative whose text dealt explicitly with "minimum term[s]" which "shall not be diminished by allowances for good time, special good time, or special parole." The Court noted that the parole eligibility date on life sentences is not subject to good time or special good time or special parole. The Court appropriately held that Proposal B could not reach sentences not within the express language of the proposal. In MCL 734.234(3), on the other hand, the statute appears to be dealing with *both* parolable life sentences and term-of-years sentences that are (or were) subject to good time and disciplinary credits. The statute is located in the part of the law dealing explicitly with lifers, and it refers to "a prisoner other than a prisoner subject to disciplinary time," which would include a parolable lifer. Combining the parole eligibility date on a life term and the minimum on a term-of-years sentence would therefore be *consistent* with the text of the statute and would not contradict the holding of *Johnson.*

It is also worth noting that Proposal B's text referred to "the minimum term *imposed by the court."* (Emphasis added.) As the Court of Appeals recently noted in *Chico-Polo v Dept of Corrections,* 299 Mich App 193 (2013), whether or not a life sentence has a minimum for some purposes, it is not a minimum "imposed by the court" in the way that a court imposes a minimum

on a term-of-years sentence. Rather the 15-year parole-eligibility date derives from the statute. The *Chico-Polo* court based its decision on that distinction (finding that a parolable lifer was not eligible for deportation upon reaching his 10-year parole eligibility date because that date was not a minimum "imposed by the court"). The same analysis distinguishes *Johnson* from the case at bar, because MCL 793.243(3) does not speak in terms of a minimum "imposed by the court."

**Conclusion**

For the above reasons, the plaintiffs ask the Court to grant their motion for summary disposition, and to hold that they are serving parolable life sentences pursuant to MCL 791.234.

Respectfully submitted,

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**Proof of Service**

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

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Dated: August 7, 2013