No. 17-1752

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HENRY HILL, JEMAL TIPTON, DAMION TODD, BOBBY HINES, KEVIN BOYD, BOSIE SMITH, JENNIFER PRUITT, MATTHEW BENTLEY, KEITH MAXEY, GIOVANNI CASPER, JEAN CARLOS CINTRON, NICOLE DUPURE and DONTEZ TILLMAN,

Plaintiffs-Appellants,

v.

RICK SNYDER, in his official capacity as Governor of the State of Michigan, HEIDI E. WASHINGTON, in her official capacity and individual capacity as Director of the Michigan Department of Corrections, MICHAEL EAGAN, in his official and individual capacity as Chair of the Michigan Parole Board, and BILL SCHUETTE, in his official capacity as Attorney General of the State of Michigan,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan, Southern Division
Case No. 5:10-cv-14568

PLAINTIFFS-APPELLANTS' BRIEF ON APPEAL

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DATED: May 15, 2017

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 17-1252 Case Name: Hill, et al v. Snyder, et al

Name of counsel: Deborah LaBelle

Pursuant to 6th Cir. R. 26.1, Henry Hill, et al
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on May 15, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Deborah LaBelle

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This is a case of significant public interest that confronts the constitutionality of Michigan's amendments to its statutory scheme that previously mandated a sentence of life without any possibility of parole for juveniles, in light of Supreme Court rulings vacating these individuals' unconstitutional sentences.

The record is significant, with a complicated procedural history, and oral argument would be beneficial to this Court to ensure the issues are presented in a balanced and meaningful way. For these reasons, this Court's consideration of this case will be significantly aided by oral argument.

STATEMENT OF JURISDICTION

Plaintiffs brought this action pursuant to 42 U.S.C. § 1983 asserting claims that Michigan's statutory scheme for punishing youth who commit homicide offenses violates the Eighth and Fourteenth Amendments to the United States Constitution. The District Court had original subject-matter jurisdiction under 28 U.S.C. § 1331, which authorizes federal courts to decide cases concerning federal questions, and 28 U.S.C. § 1343(a), which authorizes federal courts to hear civil rights cases.

The District Court issued an opinion and order, and accompanying judgment, dismissing Plaintiffs' second amended complaint with prejudice on February 7, 2017. (R. 175, Op. & Order, Pg ID 2444.) Plaintiffs filed their Notice of Appeal on March 9, 2017. (R. 176, Pls.' Notice of Appeal, Pg ID 2445.) The appeal is timely under Fed. R. App. P. 4(a)(1)(A) because the notice of appeal was filed within 30 days after entry of the order and judgment appealed from.

The order and judgment from which appeal is taken is a final order of the District Court that disposes of all parties' claims; thus, this Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. Whether Plaintiffs may seek prospective relief in this § 1983 action against the future application of a life-without-parole resentencing statute and the denial of a meaningful opportunity for release, when Plaintiffs' claims do not imply the invalidity of an existing judgment of sentence and will have only a potential effect on the amount of time they serve?

Plaintiffs-Appellants say: Yes.

II. Whether Plaintiffs may seek prospective relief in this § 1983 action against the future application of a life-without-parole resentencing statute and the denial of a meaningful opportunity for release, when there were no ongoing state judicial proceedings when this action was filed, significant proceedings of substance on the merits occurred in federal court long before the state resentencing process began, state resentencings in which life without parole is sought are currently on hold, many of the resentencings are being pursued in bad faith, and the state resentencing proceedings are completely separate from the parole review process?

Plaintiffs-Appellants say: Yes.

III. Whether Plaintiffs have stated plausible claims that Michigan's post-*Miller* scheme for punishing youth remains unconstitutional, namely:

A. Does its provision for reinstating life without the possibility parole violate the Eighth Amendment because evolving standards of decency the mark the progress of a maturing society no longer countenance the imposition of this punishment on a broad class of children, including those who were as young as 14 and did not personally commit the homicide, in a state in which life without parole is the harshest sentence available for any defendant for any offense, and where insufficient safeguards are in place to ensure that only the rarest of juvenile offenders receive the sentence?

Plaintiffs-Appellants say: Yes.

B. For youth who do not receive life without any possibility of parole, does the resulting mandatory and lengthy term-of-years sentence violate the Eighth Amendment and the Due Process Clause because it is the functional equivalent of life imprisonment without a meaningful opportunity for release.

Plaintiffs-Appellants say: Yes.

IV. Whether Michigan's post-*Miller* resentencing scheme for punishing youth is an unconstitutional ex post facto law because retroactively it deprives Plaintiffs of good time and disciplinary credits that they were entitled to at the time of their offense and earned while serving their unconstitutional sentences?

Plaintiffs-Appellants say: Yes.

V. Whether youth who received a mandatory life sentence and have not been resentenced are entitled to immediate parole consideration because they continue to be held pursuant to M.C.L. § 791.234(6) without an opportunity for release in violation of the Eighth and Fourteenth Amendments?

Plaintiffs-Appellants say: Yes.

STATEMENT OF THE CASE

Plaintiffs were children charged as adults for homicide offenses in Michigan and, upon conviction, punished by a mandatory sentence of life in prison without the possibility of release. This mandatory sentencing scheme forbade judges and parole officials from giving any consideration to Plaintiffs' child status, lesser culpability as compared to adult offenders, or their unique capacity for rehabilitation. On November 17, 2010, Plaintiffs filed this action on behalf of themselves and the 363 youth sentenced to a lifetime of imprisonment in Michigan, alleging violations of their Eighth and Fourteenth Amendment rights. Plaintiffs sought a declaratory judgment that the Michigan statute, M.C.L. § 791.234(6), which divests the parole board of jurisdiction over anyone sentenced to life imprisonment for a first degree homicide offense, violated the Eighth Amendment as applied to persons below 18 years of age at the time of their offense. Plaintiffs further sought injunctive relief requiring Defendants to provide Plaintiffs with a fair, realistic and meaningful opportunity for release upon demonstration of their growth and rehabilitation.[1]

[1] Michigan's sentencing scheme is unique in a number of ways. The harshest punishment for any crime in Michigan is a life sentence. A sentence of life imprisonment is imposed automatically for first degree premeditated murder, felony murder and aiding and abetting a murder. Life imprisonment is a discretionary sentence for cases including second degree murder, rape, certain drug offenses and habitual offenders. A separate statutory scheme determines what offenses with life sentences the parole board has jurisdiction over to consider for

Defendants sought dismissal of Plaintiffs' initial complaint largely based on the argument that *Heck v. Humphrey*, 512 U.S. 477 (1994), the *Rooker-Feldman* doctrine and *res judicata* barred Plaintiffs' claims. On July 15, 2011, the District Court entered an order denying Defendants' motion to dismiss on these grounds. The court held, in part, that Plaintiffs' claims were cognizable under § 1983 because, if successful, they would not invalidate Plaintiffs' convictions or even their life sentences, nor would they necessarily result in immediate release or a shorter sentence. (R. 31, Op. & Order, Pg ID 474-475). The District Court also held that Plaintiffs stated a plausible Eighth Amendment challenge to the punishment of life imprisonment without parole for juveniles. (*Id.* at Pg ID 476-77.)

On June 25, 2012, the Supreme Court held in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 2460 (2012), that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" Following *Miller*, the District Court granted summary judgment in Plaintiffs' favor, declaring unconstitutional

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release. Among the crimes for which the parole board lacks jurisdiction for consideration of parole are first degree premeditated murder, felony murder and other first degree homicide convictions including aiding and abetting. M.C.L. § 791.234(6). By contrast, prisoners serving a discretionary life sentence for offenses not enumerated in M.C.L. § 791.234(6) are eligible for parole consideration pursuant to M.C.L. § 791.234(7).

the Michigan statute, M.C.L. § 791.234(6), that divested the parole board from jurisdiction over Plaintiffs and those similarly situated who were serving mandatory life sentences. (R. 62, Op. & Order, Pg ID 862-867.) The District Court subsequently ordered Defendants to implement a new administrative scheme for providing all youth so sentenced with a meaningful opportunity for release. (R. 107, Order, Pg ID 1442-1444.) Defendants appealed.

During the pendency of the initial appeal, the Michigan Legislature enacted a statute, M.C.L. § 769.25, that addressed the *Miller* ruling prospectively.[2] The statute created a new sentence of discretionary "life without possibility of parole" for anyone below 18 years of age convicted of first-degree homicide crimes. M.C.L. § 769.25(2). For these individuals, a prosecutor may seek a life-without-parole sentence by filing a motion specifying the grounds. M.C.L. § 769.25(3). After a hearing, the court may impose a life-without-parole sentence on anyone aged 14-17 for any homicide offense, including felony murder or under an aiding and abetting theory, specifying the aggravating and mitigating circumstances considered and the court's reasoning. M.C.L. § 769.25(6). If the prosecutor does

[2] Post-*Miller* and pre-statute, the Michigan courts, unsure of what the available sentences for first degree homicide offences were, simply imposed parolable life sentences on persons who committed such offenses when they were below 18 years of age. *See People v. Francisco Cavazos*, File No. 12-243377-FC, *People v. Semaj Moran*, File No. 12-240822-FC, *People v. Quintin King*, File No. 11-008372-01-FC, *and People v. Taywon Williams*, File No. 11-008346-03-FC.

not seek a life-without-parole sentence, the default sentence is a minimum term of 25-40 years and a maximum term of no less than 60 years.[3] M.C.L. § 769.25(3)(9).

The Michigan Legislature also established a scheme, M.C.L. § 769.25a, for resentencing youth that would come into effect only if the Michigan Supreme Court or the U.S. Supreme Court determined that *Miller* should be applied retroactively to those youth who were already serving a mandatory life-without-parole sentence. The statute provided that prosecutors could file motions as to youth for whom they would seek to impose a life-without-parole sentence. M.C.L. § 769.25a(4). Resentencing would then proceed according to the procedure in M.C.L. § 769.25. *Id*. The remaining individuals were to be resentenced to a minimum term of 25-40 years before they would become parole eligible, and a maximum term of 60 years. The statute also took away any good time or disciplinary credits earned for those sentenced to a term of years. M.C.L. § 769.25a(6).

On January 25, 2016, the Supreme Court held in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), that *Miller* established a new substantive rule of constitutional law that must apply retroactively. The Court further declared that,

[3] The statute is silent on what factors are to be considered or what type of hearing is required before a term-of-years sentence can be imposed.

under *Miller*, all but the rarest of youth— for whom there is a finding of irreparable corruption—must be given an opportunity for release. *Id*. at 734.

In Michigan, the effect of the Supreme Court's decision in *Montgomery* was to trigger the resentencing requirements of M.C.L. § 769.25a. However, rather than comply with the *Miller* and *Montgomery* rulings that a life-without-parole sentence should be reserved for very rare youth for whom there was no possibility of rehabilitation, prosecutors in Michigan sought this sentence for over 250 of the 363 youth entitled to resentencing. To date, five years after *Miller*, none of the youth for whom prosecutors filed notices to reimpose life-without-parole sentences have had *Miller* resentencing hearings. Moreover, no youth has any date scheduled for such a hearing. They all remain in prison, post-conviction, without sentences. Prosecutors have opposed proceeding until the Michigan Supreme Court decides whether a judge or jury should make the decision on whether to impose life-without-parole sentences. *See People v. Skinner*, 877 N.W.2d 482 (Mich. App. 2015), *lv. granted*, 889 N.W.2d 487 (2017) (mem.); *People v. Hyatt*, 891 N.W.2d 549 (Mich. App. 2016), *argument on lv. app. granted*, 889 N.W.2d 487 (2017) (mem.). No date has been set for the argument of this matter.

Montgomery was decided while Plaintiffs' case was still pending before this Court on Defendants' appeal of the District Court's orders granting relief . In light of *Montgomery*, this Court remanded the case to allow Plaintiffs to file an amended

complaint to challenge Michigan's new, post-*Miller* resentencing statute, M.C.L. §769.25a. *Hill v. Snyder*, 821 F.3d 763, 771-72 (6th Cir. 2016). Michigan's post-*Miller* statutory scheme, and Plaintiffs' amended pleadings and supplements to the record, are the focus of this appeal.

On June 20, 2016, pursuant to this Court's remand order, Plaintiffs filed their second amended complaint challenging, in relevant part, Michigan's post-*Miller* statute as follows:

1. A life-without-parole sentence as imposed against youth in Michigan constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. (R. 130, Pls.' 2d Am. Compl., Pg ID 1626-28.)

2. For those youth who do not receive a life-without-parole sentence, the statute's mandatory term of years sentencing scheme creates a de facto life sentence without consideration of their youth and without providing them a meaningful opportunity for release in violation of the Eighth and Fourteenth Amendments. (*Id*., Pg ID 1628-29.)

3. The statute's retrospective deprivation of Plaintiffs' earned good time and disciplinary credits violates the Ex Post Facto Clause. (*Id.*, Pg ID 1630.)

On July 18, 2016, Defendants moved to dismiss Plaintiffs' amended complaint. (R. 147, Defs.' Mot. to Dismiss, Pg ID 1854-1886.) Plaintiffs filed their brief in opposition on September 9, 2016. (R. 163, Pls.' Br. in Opp., Pg ID 2208-

2252.) Defendants filed a reply on September 30, 2016. (R. 168, Defs.' Reply Br., Pg ID 2263-2279.) Oral argument was held on November 17, 2016. On February 7, 2017, the District Court issued its order granting Defendants' motion to dismiss in its entirety. (R. 174, Op. & Order, Pg ID 2429-2443.) Plaintiffs noticed the instant appeal on March 9, 2017 (R. 176, Pls.' Notice of Appeal, Pg ID 2445-2447) and submit this brief in support.

SUMMARY OF THE ARGUMENT

The District Court erred in dismissing this case on the grounds that only habeas, and not 42 U.S.C. § 1983, could be used to obtain the relief Plaintiffs seek. The bar against habeas relief in § 1983 cases applies only when a plaintiff's claims imply the invalidity of an existing state judgment; it has no relevance when a plaintiff seeks prospective injunctive relief against the future application of an allegedly unconstitutional state law or practice. In this case, each of the Plaintiffs challenges either the future enforcement against them of a life-without-parole resentencing statute or a parole review system; neither challenge implicates the validity of an existing judgment of sentence.

Likewise, the District Court should not have dismissed this case under the *Younger* abstention doctrine. *Younger* applies only if a plaintiff's claim would interfere with state judicial proceedings that are ongoing at the time the action is filed in federal court. This action was filed in federal court 2010, and proceedings

of substance on the merits occurred in federal court long before the state resentencing process began. Additionally, all state resentencing proceedings in which life without parole is sought are currently on hold, and not "ongoing." And many of the resentencings are being pursued in bad faith, a recognized exception to the *Younger* abstention doctrine. As for Plaintiffs' claims that they are being denied a meaningful opportunity for parole, these do not implicate *Younger* because the state resentencing proceedings are completely separate from the parole review process.

Plaintiffs have stated claims that Michigan's post-*Miller* scheme for punishing youth remains unconstitutional. They plausibly allege that M.C.L. § 769.25a, allowing resentencing to life without the possibility of parole for offenses committed by children, contravenes the evolving standards of decency that govern the Eighth Amendment's prohibition on cruel and unusual punishments. They also plausibly allege that, for individuals who are not resentenced to life without any possibility of parole, their mandatory and lengthy term-of-years sentences are the functional equivalent of life imprisonment without a meaningful opportunity for parole that is required by the Eighth Amendment and due process.

Additionally, the provision of M.C.L. § 769.25a that retroactively deprives Plaintiffs of good time and disciplinary credits that they have already earned violates the Ex Post Facto Clause. At the time of Plaintiffs' offenses, *all* prisoners,

including those serving life sentences, were entitled to earn good time and disciplinary credits. If a prisoner serving a life sentence later had their sentence reduced or became entitled to resentencing, those credits would be applied. M.C.L. § 769.25a retroactively disadvantages Plaintiffs by taking away the credit they were entitled to earn at the time of their offense and did earn while serving unconstitutional sentences.

Finally, the District Court erred in dismissing, as "moot," Plaintiffs' claim that M.C.L. § 791.234(6) is unconstitutional as applied to them. For Plaintiffs who have not been resentenced, they continue to be imprisoned without any parole consideration as a direct consequence of M.C.L. § 791.234(6). Their lack of parole consideration under that statute therefore remains a live claim.

ARGUMENT

I. STANDARD OF REVIEW

This Court "review[s] a district court's grant of a motion to dismiss de novo." *Linkletter v. Western & Southern Financial Group, Inc.*, 851 F.3d 632, 637 (6th Cir. 2017).

II. PLAINTIFFS' CLAIMS DO NOT IMPLICATE THE BAR AGAINST HABEAS RELIEF IN § 1983 CASES.

The District Court ruled that Plaintiffs' claims under Counts II and IV could not proceed because "a prisoner in state custody cannot use a § 1983 action to

challenge 'the fact or duration of his confinement.' He must seek federal habeas corpus relief (or appropriate state relief) instead." (R. 174, Op. & Order, Pg ID 2437-2438 (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005) (citing *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Preiser v. Rodriguez*, 411 U.S. 475 (1973))). The District Court misapplied the *Wilkinson-Heck-Preiser* doctrine.

Count II: Challenge to Life Imprisonment Without the Possibility of Parole

In Count II, Plaintiffs who are facing a new sentence of life imprisonment without any possibility of parole challenge this aspect of Michigan's new statutory scheme as unconstitutional.[4] This claim does not seek habeas relief because these Plaintiffs are not currently incarcerated pursuant to any valid sentencing judgments. There are therefore no sentencing judgments subject to collateral attack. In *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Supreme Court voided Plaintiffs' prior sentences of mandatory life without the possibility of parole. As Defendants have acknowledged, "Because Plaintiffs' sentences of life without parole are void, they are effectively convicted but awaiting sentencing." (R. 147, Defs.' Mot. to Dismiss, Pg ID 1867.) Plaintiffs are therefore in custody only pursuant to their first-degree murder convictions, and they do not challenge

[4] Prosecutors have served notice of their intent to seek life without parole against Plaintiffs Jemal Tipton, Kevin Boyd, and Nicole Dupure.

these convictions. Rather, Plaintiffs seek prospective injunctive relief against the resentencing process authorized by M.C.L. § 769.25a.

The Supreme Court has long held that such a request for "prospective relief" challenging *future* government actions can "properly be brought under § 1983." *Edwards v. Balisok*, 520 U.S. 641, 648 (1997) (barring damages claims that would "necessarily imply the invalidity" of the state's previous decisions denying good-time credits to Plaintiffs, while allowing prospective injunctive relief that would not impugn any previous denial of good-time credits but would instead operate to prevent good-time credits from being unjustly denied in future proceedings); *see also Gerstein v. Pugh*, 420 U.S. 103, 107 n.6 (1975) (rejecting *Preiser* habeas bar where plaintiff sought prospective injunctive relief rather than release from state custody). In fact, in *Wallace v. Kato*, 549 U.S. 384, 393 (2007), the Supreme Court expressly rejected as impractical and beyond the scope of *Heck* a rule "that an action which would impugn an anticipated future conviction cannot be brought until that conviction occurs and is set aside." *See also Eidson v. Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 639 (6th Cir. 2007) ("In *Wallace*, the court specifically held that *Heck* is not to be extended into the pre-conviction arena."); *Fox v. DeSoto*, 489 F.3d 227, 234 (6th Cir. 2007) ("In no uncertain terms, . . . the Court in *Wallace* clarified that the *Heck* bar has no application in the pre-

conviction context."). The same rule applies to Plaintiffs' claims: there is no *Wilkinson-Heck-Preiser* bar to an action targeting a future sentence.

Heck's federal preclusion rule is narrow. It applies only if a state-court judgment of conviction or sentence *has already been entered*, and a successful civil action "would necessarily imply the invalidity of [the] conviction or sentence, unless the prisoner can demonstrate that the conviction or sentence has previously been invalidated." *Edwards*, 520 U.S. at 643 (internal citations and quotations omitted). In this case, Plaintiffs' previous life-without-parole sentences are not being challenged; they have already been invalidated. In fact, Plaintiffs are not in custody pursuant to any valid sentencing orders, and Plaintiffs' complaint does not seek an order that they be released from custody. Their claims for prospective injunctive relief against future sentencing proceedings under § 769.25a therefore cannot endanger, or imply the invalidity of, any state-court judgment for the simple reason that there is no state-court judgment to endanger or invalidate. Similarly, Plaintiffs' claims cannot imply—directly or indirectly—the illegality of their current confinement. Rather, Plaintiffs' claims challenge the constitutionality of the statutory scheme that, absent the injunctive relief sought by Plaintiffs, Defendants intend to apply to them prospectively. This is a quintessential § 1983 claim for injunctive relief from future unconstitutional conduct, and there is no habeas bar.

Count IV: Challenge to Lack of Meaningful Opportunity for Parole

In Count IV, Plaintiffs who did not or will not receive a life-without-parole sentence under § 769.25a challenge the lack of a meaningful opportunity for parole on what is or will be, effectively, a de facto life sentence under § 769.25a.[5] Contrary to the District Court's interpretation of Count IV, Plaintiffs do not "challenge their impending sentences." (R. 174, Op. & Order, Pg ID 2437.) Plaintiffs do not seek to shorten the minimum term of 25-40 years they must serve before being statutorily eligible for parole, nor do they seek an order compelling their release prior to the 60-year statutory maximum. The habeas bar does not apply because the relief they do seek—which is directed at the parole board after their sentence has been imposed—is only that which would make parole review meaningful as required by the Eighth and Fourteenth Amendments.

As explained above, the *Wilkinson-Heck-Preiser* doctrine bars only those claims that, if successful, "would *necessarily* demonstrate the invalidity of confinement or its duration." *Wilkinson*, 544 U.S. at 82 (emphasis added). The Supreme Court emphasized in *Nelson v. Campbell*, 541 U.S. 637, 647 (2004), and

[5] Plaintiffs Henry Hill, Damion Todd, Bobby Hines, Bosie Smith, Jennifer Pruitt, Matthew Bentley, Keith Maxey, Giovanni Casper, Jean Cintron, and Dontez Tillman, are facing, or have received, 60-year mandatory maximum sentences because prosecutors did not seek, or are no longer seeking, life without the possibility of parole in their cases.

again in *Skinner v. Switzer*, 562 U.S. 521, 534 (2011), that it was "careful in *Heck* to stress the importance of the term 'necessarily.'" Similarly, this Court held in *Thomas v. Eby*, 481 F.3d 434, 439 (6th Cir. 2007), that *Wilkinson* "establishes that when the relief sought in a § 1983 claim has only a *potential* effect on the amount of time a prisoner serves, the habeas bar does not apply" (emphasis in original).

Clear precedent from this Court confirms that Plaintiffs' claim in Count IV is not barred by the *Wilkinson-Heck-Preiser* doctrine. In *Wershe v. Combs*, 763 F.3d 500, 504 (6th Cir. 2014), this Court held that the habeas bar did not preclude a prisoner who was serving a parolable life sentence for an offense committed at the age of 17 from bringing a § 1983 claim challenging the state's failure to provide him with an opportunity for parole that was fair, realistic and meaningful. Here, Plaintiffs assert an analogous claim. As in *Wershe*, Plaintiffs do not seek direct release from prison or a shorter sentence. They only request a parole consideration process, during the relevant statutory eligibility period, that is fair, realistic and meaningful. Accordingly, the habeas bar does not preclude Plaintiffs' § 1983 claims challenging the non-meaningful opportunity for parole for those youth who receive the mandatory 60-year maximum sentences under § 769.25a.

III. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE *YOUNGER* ABSTENTION DOCTRINE.

The District Court also invoked *Younger* abstention for dismissing Plaintiffs' claims under Counts II and IV. (*See* R. 174, Op. & Order, Pg ID 2438-2440.) This Court has held that "generally federal courts should not abstain from exercising jurisdiction on abstention grounds, for abstention is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Loch v. Watkins*, 337 F.3d 574, 578 (6th Cir. 2003). The Supreme Court has likewise admonished that, ordinarily, federal courts "should not refuse to decide a case in deference to the States," and that circumstances fitting within the *Younger* abstention doctrine are "exceptional." *Sprint Comms., Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013). The requirements for *Younger* abstention do not apply here.

Count II: Challenge to Life Imprisonment Without the Possibility of Parole

There are multiple reasons why the *Younger* abstention doctrine does not bar Plaintiffs' claims under Count II, their challenge to the component of M.C.L. § 769.25a that reauthorizes a punishment of life without any possibility of parole.

First, the law is clear that *Younger* applies only if there are ongoing state judicial proceedings "at the time the action is filed in federal court," *Federal Express Corp. v. Tenn. Pub. Serv. Comm'n*, 925 F.2d 962, 969 (6th Cir. 1991), and

only if "state court proceedings are initiated 'before any proceedings of substance on the merits have taken place in the federal court,'" *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 238 (1984) (quoting *Hicks v. Miranda*, 422 U.S. 332, 349 (1975)). This action was filed in federal court in 2010, long before any resentencing proceedings were initiated, and it is beyond dispute that proceedings of substance on the merits have taken place in federal court. Because this federal case "has proceeded well beyond the 'embryonic stage,' …considerations of economy, equity, and federalism counsel against *Younger* abstention." *Id*. (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929 (1975)).

The District Court reasoned that, because Plaintiffs amended their complaint to challenge Michigan's new law, "this is essentially a new case" and no proceedings of substance on the merits had taken place in federal court on the amended complaint. (R. 174, Op. & Order, R. 174, Pg ID 2440.) But this is not "essentially a new case," and there is no justification for using the date of the amended complaint as the point of reference for *Younger* where, as here, the purpose of the amendment to the complaint is merely to maintain the same constitutional challenge to a state's statutory scheme in light of a legislative amendment to that scheme. Instead, the point of reference of *Younger*'s date-of-filing rule is the "the time the action is filed in federal court." *Federal Express*, 925 F.2d at 969 (6th Cir. 1991); *see Mir v. Kirchmeyer*, No. 12-CV-2340-GPC-DHB,

2014 WL 2436285, at *10 (S.D. Cal. May 30, 2014) (analyzing *Younger* defense by reference to the date the initial complaint was filed, not the date the first or second amended complaints were filed). Allowing abstention here would provide states an escape from federal review in the midst of any long-running federal lawsuit: amend the statutory scheme, commence a prosecution in state court, and move to dismiss the amended complaint under *Younger*. Gamesmanship of this sort should not be encouraged.

Second, abstaining in this case does nothing to promote *Younger*'s purpose of avoiding interference with *ongoing* state criminal proceedings. There are no ongoing proceedings and no interference will occur, because resentencing hearings will not actually proceed until the Michigan Supreme Court, and possibly the U.S. Supreme Court, render final determinations in *People v. Skinner*, 877 N.W.2d 482 (Mich. App. 2015), *lv. granted*, 889 N.W.2d 487 (2017) (mem.), and *People v. Hyatt*, 891 N.W.2d 549 (Mich. App. 2016), *argument on lv. app. granted*, 889 N.W.2d 487 (2017) (mem.), cases that will address the right to a jury and the appellate standard of review. Until there is a final resolution in *Skinner* and *Hyatt*—a process that could take months, or even years—resentencings are not being scheduled or conducted. (*See, e.g.*, R. 153-2, Defs.' Motion to Stay, Pg ID 2132-2135.) Proceeding with Count II therefore does not risk interference with any ongoing criminal proceedings so as to warrant abstention under *Younger*.

Finally, *Younger* "does not require federal abstention when the state court proceeding is brought in bad faith." *Zalman v. Armstrong*, 802 F.2d 199, 205 (6th Cir. 1986). In the context of juvenile life-without-parole sentences, the Supreme Court has repeatedly emphasized that such punishment is unconstitutional "for all but the rarest of children," and that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734-35 (2016). Despite this clearly established law, prosecutors in many counties in Michigan are seeking life-without-parole resentencings for all or nearly all those individuals in their jurisdictions who committed their crimes when they were children, including those who did not directly commit the homicide, were convicted under an aider-and-abettor or felony-murder theory, and were previously offered plea deals for lesser convictions. (R. 153, Pls.' Reply Br., Pg ID 2109-2110).[6] It is implausible to suggest that all of these individuals, previously sentenced to life without parole because that punishment was mandatory, and in the state with the second-highest population of juvenile lifers in the country, are now suddenly the "rarest" of children where this "uncommon" sentence will be appropriate. "Bad faith generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." *Kevorkian v.*

[6] *See also* Roelofs, *Michigan Prosecutors Defying U.S. Supreme Court on 'Juvenile Lifers'*, Bridge Magazine (Aug. 25, 2016), *available at* http://bit.ly/2pYDmxh.

Thompson, 947 F. Supp. 1152, 1164 (E.D. Mich. 1997). Because there is no reasonable expectation of obtaining a life-without-parole sentence in any but the rarest of cases, the state court resentencing proceedings have been brought in bad faith and federal courts should not abstain.

Count IV: Challenge to Lack of Meaningful Opportunity for Parole

In also invoking *Younger* abstention to dismiss Count IV, the District Court failed to recognize that Count IV does not challenge the resentencing process. Rather, the question is whether, for Plaintiffs who face resentencing to a term of years under § 769.25a, their opportunity for eventual release is meaningful and realistic given that the decision-making process of the parole board is not meaningfully constrained. Such a claim is completely independent of any ongoing state judicial proceeding; the claim for relief is directed at the parole board and the parole process *after* resentencing proceedings are complete.

Abstention is not warranted under *Younger* when relief in the federal case would not, as a practical matter, interfere with ongoing proceedings in state court. *See Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975) (rejecting *Younger* abstention when "injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing"). Recognizing this natural limitation on *Younger* abstention, this Court has held that *Younger* does not apply when the constitutional claims brought in a § 1983 suit are "collateral" to the state

proceedings. *See Habich v. City of Dearborn*, 331 F.3d 524, 530-32 (6th Cir. 2003). This holding flows from the rule that *Younger* applies only if state proceedings provide an adequate opportunity to raise the constitutional claim. *Id*. Here, relief under Count IV will not interfere with ongoing state judicial proceedings because it is directed only at a parole review process that is independent of the criminal resentencings and takes place after the resentencing is complete. The purpose of Count IV is to guarantee a meaningful parole review process, not to interfere with the resentencing. Nor would a state sentencing court be empowered to enter orders enjoining the parole board's future conduct. Therefore, *Younger* is no bar to Count IV.

IV. PLAINTIFFS HAVE STATED CLAIMS THAT MICHIGAN'S POST-*MILLER* SCHEME FOR PUNISHING YOUTH IS UNCONSTITUTIONAL.

A. The District Court Erred in Dismissing Plaintiffs' Claim that M.C.L. § 769.25a's Provision for Reimposing a Life-Without-Parole Sentence Violates Plaintiffs' Eighth and Fourteenth Amendment Rights.

While the District Court dismissed Plaintiffs' claim in Count II that the statute's provision for imposition of a life-without-parole sentence on Michigan's children for homicide offences violates their Eighth and Fourteenth Amendment rights on procedural grounds, Plaintiffs affirm below that Plaintiffs set forth a valid claim that should be remanded for consideration on the merits.

Defendants' principal argument for dismissing this claim was that "*Miller* and *Montgomery* do not categorically prohibit a sentence of life without the possibility of parole." (R. 147, Defs.' Br., Pg ID 1873.) This argument is unpersuasive. The fact that the Supreme Court expressly declined to reach such a holding does not mean that Plaintiffs' complaint must be dismissed. Plaintiffs intend to prove that the Eighth Amendment now categorically prohibits the imposition of a life-without-parole sentence on anyone who commits an offense, whether homicide or nonhomicide, when they are below 18 years of age.

The Eighth Amendment evaluates sentencing practices based on the "evolving standards of decency that mark the progress of a maturing society," *Graham v. Florida*, 560 U.S. 48, 58 (2010) (internal quotation marks omitted). That inherently dynamic standard entitles Plaintiffs to develop a record demonstrating that, following *Miller* and *Montgomery*, a new consensus has formed that rejects life-without-parole sentences for any juvenile.

Since *Miller*, the number of states rejecting the imposition of life-without-parole sentences for persons who commit crimes under the age of 18, either by statute, by judicial ruling or by practice, has more than doubled.[7] The trend is thus

[7] In gauging the acceptance or rejection of a particular punishment by contemporary society, the court must look not only to legislative enactments, but also to the states' actual usage. *Graham*, 560 U.S. at 62 ("Actual sentencing practices are an important part of the court's inquiry into consensus.").

clearly against imposing life without parole on such persons. When a sentencing practice becomes this rare, "'it is fair to say that a national consensus has developed against it.'" *Graham*, 560 U.S. at 67 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)).[8]

In addition to considering objective evidence of society's evolving standards, the District Court should also receive evidence so that it can assess whether "in the exercise of its own independent judgment . . . the punishment in question violates the Constitution." *Miller*, 132 S. Ct. at 2471-73 (noting that a lack of national consensus against the practice is not determinative of the constitutional issue). In exercising its independent judgment the Court should consider the culpability of the offenders in light of their crimes and characteristics, along with the severity of the punishment, and determine whether the imposition of a life-

[8] Forty states have now abolished life-without-parole sentences as a punishment for children or have not imposed this sentence in the five years following the Supreme Court's ruling in *Miller v. Alabama*. Plaintiffs' amended complaint filed on June 20, 2016, set forth undisputed facts that 36 states prohibited or have not imposed life without parole on children since *Miller*. (R. 130, Pls.' 2d Am. Compl., Pg ID 1591.) The number of abolitions increased the following year: Of the remaining states, fewer allow this punishment for children who did not personally commit the homicide or who are as young as 14, as does Michigan. In proceedings before the Inter-American Commission on Human Rights, the United States State Department advised the commission of the "momentous curtailment of juvenile life without parole underway in the United States" and that "states are now rapidly abandoning juvenile life without parole sentences." Juveniles Sentenced to Life Without Parole in the U.S.A., Case No. 12.866, March 25, 2014.

without-parole sentence on persons below 18 years of age "serves [any] legitimate penological goals." *Graham*, 560 U.S. at 67.

Plaintiffs' complaint alleges that the extreme severity of a life-without-parole sentence cannot be justified by any legitimate penological goals in light of a child's reduced culpability for their criminal acts and their unique capacity for change. (R. 130, Pls.' 2d Am. Compl., Pg ID 1632.) The absence of any penological justification, the diminished culpability of children who commit crimes, and "the severity of life without parole sentences" which the Supreme Court has held is "akin to the death penalty" for children, state a plausible claim that sentencing persons below 18 years of age to life without parole for any crime is cruel and unusual punishment prohibited by the Eighth Amendment. *See Graham v. Florida*, 560 U.S. 48 (2010). This is especially true in Michigan, where the harshest punishment available, to adults and children alike, is a sentence of life-without-parole. In light of Supreme Court precedent recognizing that children are never as culpable for their actions as an adult, some differentiation in punishment for comparable offences must exist. Children, at a minimum, must always be afforded some meaningful opportunity for release. Yet, Michigan's sentencing scheme continues to impose life-without-parole sentences on persons below 18 years of age without recognizing their lesser culpability.

In addition to stating a claim that a life-without-parole for children is categorically unconstitutional, Plaintiffs have stated a claim that the manner in which life without parole as it is being implemented in Michigan violates the Eighth Amendment. In *Montgomery v. Louisiana*, 137 S. Ct. 718, 724, 734 (2016), the Supreme Court emphasized that life without the possibility of parole is unconstitutional for the "vast majority of juvenile offenders" and that the punishment, if imposed at all, must be reserved for the "rarest of juvenile offenders." In Michigan, that is not what is happening. As alleged in Plaintiffs' second amended complaint, the majority of juveniles in Michigan, rather than the rarest, are facing life-without-parole sentences, because the Michigan statute provides an arbitrary scheme for imposing the sentence.

Enacted before *Montgomery*, the statute contains a provision that, should the Supreme Court deem *Miller* retroactive, the statutory resentencing scheme would apply to the 363 youth who were serving a life-without-parole sentence, and would apply equally to those serving the sentence for felony murder and first degree homicide. The fact that the statute was passed before *Montgomery* is significant, as the law fails to address what *Montgomery* made abundantly clear: that most youth convicted of a homicide have a substantive Eighth Amendment right *not* to be sentenced to life without parole. *Montgomery*, 136 S. Ct. at 734 (it is only the irreparably corrupt youth incapable of rehabilitation that is even eligible for this

sentence). *Montgomery* broadened *Miller* to render life-without-parole sentences impermissible except for the very rarest of juvenile offenders for whom "rehabilitation is impossible." *Id.* at 733. *See also Tatum v. Arizona*, 137 S. Ct. 11 (2016).

Michigan's statutory scheme lacks sufficient safeguards, leaving it open for discriminatory, arbitrary and unconstitutional application to large numbers of youth. M.C.L. § 769.25a.[9] Of greatest significance, the Michigan statute requires courts to consider "aggravating" and "mitigating" circumstances before imposing a life-without-parole sentence. However, the statute does not specify what courts may deem aggravating or mitigating, leaving defense counsel with no idea of how to develop mitigating evidence or defend against potential aggravating factors.

In the death penalty context, upon which the Supreme Court has drawn heavily in limiting juvenile life without parole, the Court held that aggravating circumstances must be defined well enough "to furnish principled guidance for the choice between death and a lesser penalty." *Richard v. Lewis*, 506 U.S. 40, 46 (1992). By contrast, M.C.L. § 769.25a's lack of guidance with respect to

[9] This pre-*Montgomery* statute does not require a court, in determining whether a youth is incapable of rehabilitation, to consider evidence of post-offense growth and rehabilitation, but does give courts discretion to consider the youth's post-offense record while incarcerated. M.C.L. § 769.25(6).

aggravating circumstances has resulted in prosecutors seeking to impose life-without-parole sentences on over 70% of youth whose mandatory life-without-parole sentences were vacated as unconstitutional under *Miller* and *Montgomery*, rather than limiting themselves to the "rarest" youth for which a life-without-parole sentence is appropriate. *Montgomery*, 136 S. Ct. at 734 ("the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility").

In sum, the lack of specific aggravating factors, the lack of even identified mitigating factors, and the absence of requirements under *Montgomery* that courts examine whether a youth is capable of rehabilitation all render the Michigan statute an arbitrary and unconstitutional statute warranting review on its merits.

B. By Creating a De Facto Punishment of Imprisonment for Life Without a Meaningful Opportunity for Release, Michigan's Statutory Scheme Violates the Eighth and Fourteenth Amendments.

For those youth who are not sentenced to life without any possibility of parole, M.C.L. § 769.25a imposes a default mandatory maximum term of 60 years. Once a youth has served the minimum 25-40 year term imposed by the court under the statute, the Michigan Parole Board alone determines whether that youth will ever be released before the end of the 60-year term. Parole eligibility and determinations are governed by M.C.L. §§ 791.231-791.246, the same parole process that applies to adults. (R. 130, Pls.' 2d Am. Comp., Pg ID 1593.) This

maximum term amounts to a life sentence without a meaningful possibility for release because, as alleged in the second amended complaint, the Parole Board is not required to review the *Miller* and *Montgomery* factors, or otherwise grant parole to those who demonstrate that they are suitable for release prior to their 60-year term. The statute therefore contradicts "a sense of proportionality and smacks of categorical uniformity." *Songster v. Beard*, 201 F. Supp. 3d 639, 642 (E.D. Pa. Aug. 17, 2016).

As a judge of this Court recently recognized in *Starks v. Easterling*, 659 F. App'x 277 (6th Cir. 2016) (White, J., concurring), the formal label the State gives to a punishment is not dispositive in determining whether it violates the constitutional mandates of *Miller* and *Montgomery*: "lengthy sentences that approach or exceed a defendant's life expectancy, regardless whether that sentence bears the title 'life without parole,'" constitute "cruel and unusual" punishment when imposed on youth. Thus, a mandatory term- of-years sentence is invalid if, like mandatory life imprisonment without parole, it too denies a meaningful and realistic chance at release before the end of an individual's natural life. "Together, *Graham* and *Miller* establish that the Eighth Amendment prohibits a sentencing regime that mandates a term of life imprisonment for juvenile homicide offenders without a meaningful opportunity to obtain release." *Id.* at 281; *see also Atwell v. State*, 197 So.3d 1040 (Fla. 2016) (mandatory life with the possibility of parole

violates Eighth Amendment where the parole process fails to consider mitigating factors of youth); *Songster*, 201 F. Supp. 3d at 642 ("A sentencing practice that results in every juvenile's sentence with a maximum term of life, regardless of the minimum term, does not reflect individualized sentencing. Placing the decision with the Parole Board, with its limited resources and lack of sentencing expertise, is not a substitute for a judicially imposed sentence."). This is precisely the violation that Plaintiffs allege.

In the District Court, Defendants did not dispute that a term-of-years sentence for youth that is the functional equivalent of life without parole would violate the Eighth Amendment's proscription against cruel and unusual punishment, nor did they dispute that a 60-year sentence would be the functional equivalent of life.[10] *See also Bear Cloud v. Wyoming*, 334 P.3d 132, 142 (Wyo. 2014) (finding aggregate term of 45 years without parole "the functional equivalent of life without parole"). Rather, Defendants asserted—and will likely reassert—that, because Michigan's sentencing scheme allows parole review prior to 60 years,

[10] The U.S. Sentencing Commission Final Quarterly Data Report identifies, for sentencing purposes, a sentence of 470 months as the equivalent of a life sentence. While this sentence of 39.2 years is based on the average life expectancy of federal prisoners, it does not take into consideration the age of the individual at the time they enter prison. In so-called cradle to the grave sentences, the life expectancy has been shown to be much younger. Studies in both Michigan and Colorado are consistent with a life expectancy of 52.8 years, rendering a sentence that exceeds 36 years to be the functional equivalent of a life sentence.

this "opportunity" for parole automatically renders Michigan's statute constitutional.

This argument is without merit. States cannot escape constitutional scrutiny merely by providing a theoretical possibility of parole while serving a sentence that, if completed, would be the functional equivalent of life without parole. *See, e.g.*, *Maryland Restorative Justice Initiative v. Hogan*, No. ELH-16-1021, 2017 WL 467731, at *19-24 (D. Md. Feb. 3, 2017) (concluding that *Graham*, *Miller*, and *Montgomery* govern whether parole proceedings provide a meaningful opportunity for release). *Graham* and *Miller* mandate that a parole system must provide an opportunity for release that is meaningful and realistic, as opposed to illusory, arbitrary, or capricious. *See Starks*, 659 F. App'x at 281 (White, J., concurring); *see also Songster*, 201 F. Supp. 3d at 642 ("Placing the decision with the Parole Board, with its limited resources and lack of sentencing expertise, is not a substitute for a judicially imposed sentence."). As *Graham* explained, a lifetime in prison without such an opportunity "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Graham*, 560 U.S. at 79. Because Michigan's statutory scheme still requires youth to serve lengthy mandatory sentences, and those sentences if served to their completion amount to a lifetime in prison, compliance with *Montgomery*, *Miller* and *Graham* "requires providing a fair and meaningful possibility of parole to each and every

Michigan prisoner who was sentenced to life for a crime committed as a juvenile," as the District Court correctly concluded. (R. 62, Op. & Order, Pg ID 867.) Plaintiffs have stated a claim that Defendants' new statutory scheme falls well short of that constitutional requirement.

Plaintiffs' challenge to Michigan's parole process for youth that receive the mandatory maximum term of 60 years, while principally invoking the Eighth Amendment, also sounds in due process. The Supreme Court "has frequently used the term 'meaningful opportunity' in reference to procedural due process requirements." Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L.J. 373, 417 (2014). The Supreme Court has recognized that a substantive liberty interest that is entitled to due process protection "may arise from the Constitution itself." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). In *Miller*, the Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Miller*, 132 S. Ct. at 2460. Therefore, for any child who receives a mandatory life sentence, the Eighth Amendment itself creates a liberty interest in release.[11] The child might never be released, but release cannot be denied without

[11] As the District Court recognized, this Court has held that Michigan state law does not create a cognizable liberty interest in parole triggering the protections of the Fourteenth Amendment's Due Process Clause. *See Crump v. Lafler*, 657 F.3d

due process of law. Release opportunities for Plaintiffs must therefore be fair, meaningful, and realistic, as due process would require for any other protected liberty interest. Here, whether framed in term of the right against cruel and unusual punishment or the right to due process, Plaintiffs are entitled to a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *see Graham*, 560 U.S. at 75; *Miller v. Alabama*, 132 S. Ct. at 2469, because Michigan's new statutory scheme mandates a sentence that, unless release on parole is actually granted, is the de facto equivalent of life imprisonment. *See also Maryland Restorative Justice Initiative*, 2017 WL 467731, at *24 ("To be sure, there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. And in *Graham*, the Supreme Court cautioned that a State is not required to guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime. However, plaintiffs seek the opportunity to be judged under a constitutional parole scheme that gives them a meaningful opportunity to obtain release as required under *Montgomery* and *Miller*." (citations and quotations omitted)).

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393 (6th Cir. 2011). Following *Graham* and *Miller*, however, the question of whether adults have a liberty interest in parole is distinct from whether children do. For adults, any claimed liberty interest parole would have to arise from state law. But for children, the Eighth Amendment itself creates the interest. *See Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (recognizing that a substantive liberty interest that is entitled to due process protection "may arise from the Constitution itself.").

Plaintiffs are therefore entitled to a meaningful opportunity for release on parole upon demonstrated growth, maturity and rehabilitation. Plaintiffs have alleged facts supporting the lack of meaningful parole review in Michigan that renders a mandatory 60-year term a virtual life sentence. Parole Board officials are not currently required to consider the *Miller* factors in making parole determinations, nor have Plaintiffs been provided programming that is normally deemed a requirement for realistic parole consideration. (R. 130, Pls.' 2d Am. Compl., Pg ID 1583-1584.) Indeed, Defendants have admitted that under their current system, "the parole board can deny release on parole *for any reason or no reason at all*" (R. 147, Defs.' Br., Pg ID 1877, emphasis added), thereby confirming Plaintiffs' allegation that the discretion Michigan grants to the Parole Board is so boundless and arbitrary that Plaintiffs' parole opportunities are neither meaningful nor realistic. At the pleadings stage, therefore, Plaintiffs have stated a plausible claim for relief, and Defendants' motion to dismiss should be denied.

V. M.C.L. § 769.25a(6) DEPRIVES PLAINTIFFS OF EARNED GOOD TIME AND DISCIPLINARY CREDITS IN VIOLATION OF THE EX POST FACTO CLAUSE.

M.C.L. § 769.25a(6) constitutes an ex post fact law because it retroactively denies Plaintiffs their earned good time and disciplinary credits. The District Court granted Defendants' motion to dismiss Plaintiffs' claims set forth in Count V, reasoning that although the statute may retroactively take away Plaintiffs' earned

good time and disciplinary credits, Plaintiffs are not disadvantaged by this loss as the earned time was of "no benefit to them under the previous sentencing scheme." (R. 174, Op. & Order, R. 174, Pg ID 2441.) The District Court's assumption is both factually wrong and irrelevant to the question of whether M.C.L. § 769.25a(6), which applies to Plaintiffs' lawful term of years sentence, operates as an ex post facto law.

The Ex Post Facto Clause prohibits a law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Lynce v. Mathis*, 519 U.S. 433, 441 (1997). A law violates the Ex Post Facto Clause if it: 1) applies to events occurring before its enactment; and 2) disadvantages the individual affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). Both elements are present here.

Michigan law unambiguously provides for good time and disciplinary credit for all prisoners based on good behavior while incarcerated. For individuals who committed their offenses prior to 1987, the Michigan "good time" statute provides that "all prisoners serving a sentence for a crime which was committed on or after the effective date of this amendatory act shall be eligible to earn disciplinary and special disciplinary credits." M.C.L. § 800.33(3);[12] *Lamb v. Bureau of Pardons &*

[12] The original text of the statute also grants entitlement to such credit to "every convict who shall have no infraction of the rules of the prison or the laws of the State recorded against him." M.C.L. § 800.33.

Paroles, 106 Mich. App. 175, 180-81 (1981) ("at the outset it must be stated that all prisoners . . . are entitled to good time credits").[13] For those serving a sentence for a crime committed on or after April 1, 1987, Michigan law also provides that *all prisoners* earn automatic disciplinary credits at the rate of five days per month for each month in which they did not receive a major misconduct. M.C.L. § 800.33(3). The relevant "disciplinary credit" statute also provided for disciplinary credits of two additional days per month for good institutional conduct. M.C.L. § 800.33(5). Further, M.C.L. § 791.233b(o) explicitly *includes* those individuals serving a sentence resulting from a conviction for first-degree homicide offenses as among those convictions for which a prisoner is eligible to earn disciplinary credits. All Plaintiffs are in prison for first-degree homicide offenses and were designated as entitled to earned credit for good behavior.[14]

Despite Michigan law plainly providing that Plaintiffs were entitled to earn good time and disciplinary credit at the time they committed their offenses, M.C.L.

[13] There are 73 youth whose offense occurred prior to 1987 and earned good time credits under this statute.

[14] The district court erred in crediting the existence of a dispute over whether Plaintiffs have actually earned good time or other disciplinary credits. There is no real dispute that Plaintiffs earned good time and disciplinary credits while serving time for their homicide convictions. While Defendants initially asserted that "good time, special good time, disciplinary or other credits never applies to anyone convicted of first degree murder" (R. 147, Defs.' Br., Pg ID 1882), Defendants have never provided any support for this assertion which is contrary to the unambiguous statutory language.

§ 769.25a(6) retroactively deprives Plaintiffs of that credit. In so doing, the statute increases Plaintiffs' punishment by preventing their earned time from being credited toward their minimum and maximum sentencing terms, thus delaying their opportunities for release.

Plaintiffs are significantly disadvantaged by this retroactive denial of their credits. First, it is well-established under federal law that the elimination of disciplinary and/or good time credits constitutes a change in punishment that, when enacted retrospectively, violates the Ex Post Facto Clause. *Weaver*, 450 U.S. at 33. It is also well-established under Michigan law that, when a sentence has been voided or invalidated, and a new sentence is imposed, the individual is entitled to have all regular and earned credits applied to the new sentence, for purposes of determining parole jurisdiction. *See Moore v. Parole Board*, 379 Mich. 624, 630-31, 635-36 (1967) (finding plaintiff entitled to both time served and earned time during imprisonment under an erroneous conviction); *People v. Lyons*, 222 Mich. App. 319, 321 (1997) (when a previous sentence is voided, the new sentence must account for any time served in regard to the void sentence).[15] Plaintiffs were

[15] "Michigan courts have consistently held that laws limiting good time credits may only be applied prospectively" under the Ex Post Facto Clause. *Langworthy v. Dep't of Corrections*, 1999 WL 33437200, at *4 (Mich. App. Aug. 27, 1999). This jurisprudence dates all the way back to 1894, when the Michigan Supreme Court struck down a statute purporting to retroactively eliminate eight days per year of "good behavior" credits. *In re Canfield*, 98 Mich. 644, 645 (1894). Citing the Ex Post Facto Clause, it held that an inmate's "right to earn a reduction of the term

therefore entitled to their earned credits, which, in the event that their life-without-parole sentences were converted to a term of years, would apply to their parole-eligibility dates. *See McDonald v. Moinet*, 139 F.2d 939, 941 (6th Cir. 1944) (recognizing that upon resentencing, plaintiff was "entitled to the benefit of all parole regulations and good-time credits" as if the new sentence had been imposed originally).[16]

The District Court's presumption that these credits provided no value to Plaintiffs ignores reality. There are strong policy reasons why the State allows those with life sentences to earn credits. *Short v. United States*, 344 F.2d 550, 553-

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was one of which he could not be deprived." *Id.* at 647. The *Canfield* decision has been applied many times over the past century and continues to prohibit the retroactive elimination of disciplinary credits to this day. *See Lowe v. Dep't of Corrections*, 206 Mich. App. 128, 137 (1994) (holding that a statue retroactively replacing "more favorable good-time credits with less favorable disciplinary credits on a prisoner's maximum term would be unconstitutional"); *Wayne Cty. Pros. Att'y v. Mich. Dep't of Correction*s, 1997 WL 33345050, at *4 (Mich. App. June 17, 1997) (holding that "to deny prisoners . . . the right to have good-time and special good-time credits applied to their maximum terms would run afoul of the state and federal constitutional prohibitions against the enactment of ex post facto laws").

[16] The disadvantage to Plaintiffs by taking away their earned credit is illustrated by the case of Jennifer Pruitt, who has had an exemplary prison record. She was resentenced to a term of 30-60 years and has served twenty-five years and four months with credit for time served. Currently, under the existing statute being challenged, she will not be eligible for review by the parole board for over four years. Absent the statute's retroactive elimination of her earned credits, by contrast, she would be eligible for review and have an opportunity for release in three months, having accumulated approximately 1,500 days of disciplinary credits for positive behavior.

54 (D.C. 1965) ("the purpose of the statutory good conduct allowance is to reward a prisoner who has faithfully observed all the rules. The allowances are an important part of the rehabilitation effort.").[17] The earned credits provide a cache of hope that their positive behavior in prison will one day be a basis for earlier release whether as a result of resentencing after appeal, or, in this case, resentencing to a term-of-years after the Supreme Court vacated their unconstitutional sentences.[18]

The District Court disregarded the existing law that all Plaintiffs accrued and earned credits during their incarceration. The court also improperly discounted the purpose and value of such credits to Plaintiffs, who justifiably relied on the promise of credits to hasten their parole-eligibility in the event of their

[17] In opining that a basis for not considering Plaintiffs' ex post facto argument was that "such credits would have been no use to them when they were serving life sentences without possibility of parole," the District Court also confuses the separate issues of the intended purpose of the disciplinary credits (which is to encourage model behavior) with Plaintiffs' entitlement to have these credits applied to their lawful term-of-years sentences, for which the loss of earned credits has a very real disadvantage for purposes of parole eligibility.

[18] Or as the Michigan Supreme Court recognized in finding that the plaintiff was entitled to good time credit earned during his prior sentence of life without parole, after this sentence was vacated and he was resentenced to 25 to 40 years: "[s]ince hope and post-conviction pleas spring eternal within the incarcerated human breast, it cannot be said that good-time credit is not at least some encouragement to them. At least, it appears that the legislature thought it would be so…" *Moore v. Parole Board*, 379 Mich. 624, 648-49 (1967).

resentencing to a term-of-years.[19] Properly considered, these facts establish that the statute's retroactive denial of earned credits runs afoul of the Ex Post Facto Clause.

VI. YOUTH WHO HAVE NOT BEEN RESENTENCED ARE ENTITLED TO IMMEDIATE PAROLE CONSIDERATION.

The District Court dismissed Plaintiffs' claims under Count I as "moot" because "M.C.L. 791.234(6) no longer applies to Plaintiffs." (R. 174, Op. & Order, Pg ID 2436.) This, too, was legal error. Despite the fact that the Supreme Court has held that mandatory life imprisonment without the possibility of parole is a cruel and unusual punishment for individuals who commit offenses before the age of 18, over 237 such individuals in Michigan continue to serve such sentences.[20] And because their continued ineligibility for parole is a direct consequence of M.C.L. § 791.234(6), their Count I claim that M.C.L. § 791.234(6) is unconstitutional as applied to them is not moot.

[19] The District Court appeared to improperly credit the notion that increasing Plaintiffs' minimum and maximum terms, by depriving them of their earned good time, does not disadvantage them because previously they were serving an unconstitutional sentence of life without parole. This ignores the fact that these sentences have been vacated as cruel and unusual punishment and the inquiry is whether Plaintiffs are disadvantaged by Defendants' refusal to apply earned credits to their lawful sentences.

[20] Included in this group are Plaintiffs Jemal Tipton, Kevin Boyd, Matthew Bentley, Keith Maxey, Jean Cintron and Nicole Dupure, who have not been resentenced and are not being given any parole consideration.

Section 791.234(6) provides: "A prisoner sentenced to imprisonment for life for any of the following is not eligible for parole . . .: (a) First degree murder in violation of . . . MCL 750.316." Those youth who have not been resentenced continue to serve a life sentence as a result of their conviction under former M.C.L. § 750.316.[21] Additionally, M.C.L. § 791.234(6) prevents them from receiving parole consideration. M.C.L. § 791.234(7) states: "A prisoner sentenced to imprisonment for life, *other than a prisoner described in subsection (6),* is subject to the jurisdiction of the parole board and may be placed on parole" (emphasis added). Therefore, if Defendants are enjoined from continuing to apply § 791.234(6) to individuals such as Plaintiffs who are still serving life sentences for offenses committed before they were 18 years of age and have not been resentenced in compliance with *Miller* and *Montgomery*, such individuals will become subject to the jurisdiction of the parole board by operation of § 791.234(7).

This claim remains live and should be permitted to proceed, as it has been more than a year after *Montgomery v. Louisiana* was decided and 237 youth, including several Plaintiffs, remain in precisely the same position they were in when this litigation began: they are serving mandatory life sentences and are not being considered for parole. Although the District Court stated that they "now await resentencing pursuant to M.C.L. 769.25a" (R. 174, Op. & Order, Pg ID

[21] *See* Appendix A.

2436), in fact there is no date by which such resentencings must take place and 237 have been placed on hold indefinitely with no sentencing date scheduled. So long as Plaintiffs continue to serve life sentences that were imposed without consideration of their youth and continue be denied parole pursuant to § 791.234(6), their claim is not moot. And unless and until they receive relief through a resentencing process that complies with *Miller* and *Montgomery*, they should be made immediately eligible for parole consideration pursuant to § 791.234(7) because Defendants' continued enforcement of § 791.234(6) against them violates the Eighth Amendment.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, the District Court's judgment should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

Dated: May 15, 2017

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,271 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I certify that on May 15, 2017, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Plaintiffs-Appellants, per Sixth Circuit Rule 28(c), 30(b), hereby designate the following portions of the record on appeal:

Description of Entry	Record Entry	Date	Page ID Range
Opinion and Order Granting in Part Denying Part Defendants' Motion to Dismiss	R. 31	07/15/2011	474-477
Opinion and Order Granting Plaintiffs' Motion for Summary Judgment	R. 62	01/30/2013	862-867
Order Requiring Immediate Compliance	R. 107	11/26/2013	1442-1444
Second Amended Complaint	R. 130	06/20/2016	1577-1635
Motion and Brief in Support for Partial Summary Judgment	R. 147	07/18/2016	1854-1886
Plaintiffs' Reply Brief in Support of Motion for Preliminary Injunction Exhibit 2 – The People's Motion to Sentence Defendant to Life Without Parole	R. 153 R. 153-2	07/25/2016	2109-2119 2132-2135
Plaintiffs' Response in Opposition to Defendants' Motion for Partial Summary Judgment	R. 163	09/09/16	2208-2252
Defendants' Reply in Support of Motion for Partial Summary Judgment	R. 168	09/30/2016	2263-2279

Opinion and Order Granting Defendants' Motion to Dismiss	R. 174	02/07/2017	2429-2443
Judgment	R. 175	02/07/17	2444
Notice of Appeal	R. 176	03/09/17	2445

APPENDIX A: M.C.L. § 750.316 (Pre-2014 Version)

THE MICHIGAN PENAL CODE (EXCERPT)
Act 328 of 1931

750.316 First degree murder; penalty; definitions.

Sec. 316. (1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:

(a) Murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing.

(b) Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, kidnapping, vulnerable adult abuse in the first or second degree under section 145n, torture under section 85, or aggravated stalking under section 411i.

(c) A murder of a peace officer or a corrections officer committed while the peace officer or corrections officer is lawfully engaged in the performance of any of his or her duties as a peace officer or corrections officer, knowing that the peace officer or corrections officer is a peace officer or corrections officer engaged in the performance of his or her duty as a peace officer or corrections officer.

(2) As used in this section:

(a) "Arson" means a felony violation of chapter X.

(b) "Corrections officer" means any of the following:

(*i*) A prison or jail guard or other prison or jail personnel.

(*ii*) Any of the personnel of a boot camp, special alternative incarceration unit, or other minimum security correctional facility.

(*iii*) A parole or probation officer.

(c) "Major controlled substance offense" means any of the following:

(*i*) A violation of section 7401(2)(a)(*i*) to (*iii*) of the public health code, 1978 PA 368, MCL 333.7401.

(*ii*) A violation of section 7403(2)(a)(*i*) to (*iii*) of the public health code, 1978 PA 368, MCL 333.7403.

(*iii*) A conspiracy to commit an offense listed in subparagraph (*i*) or (*ii*).

(d) "Peace officer" means any of the following:

(*i*) A police or conservation officer of this state or a political subdivision of this state.

(*ii*) A police or conservation officer of the United States.

(*iii*) A police or conservation officer of another state or a political subdivision of another state.

History: 1931, Act 328, Eff. Sept. 18, 1931;—CL 1948, 750.316;—Am. 1969, Act 331, Eff. Mar. 20, 1970;—Am. 1980, Act 28, Imd. Eff. Mar. 7, 1980;—Am. 1994, Act 267, Eff. Oct. 1, 1994;—Am. 1996, Act 20, Eff. Apr. 1, 1996;—Am. 1996, Act 21, Eff. Apr. 1, 1996;—Am. 1999, Act 189, Eff. Apr. 1, 2000;—Am. 2004, Act 58, Eff. June 11, 2004;—Am. 2006, Act 415, Eff. Dec. 1, 2006;—Am. 2013, Act 39, Imd. Eff. June 4, 2013.

Constitutionality: This section, which provides a mandatory life sentence for first degree murder, does not violate constitutional guarantees of due process and equal protection or the guarantee against cruel and unusual punishment. People v Hall, 396 Mich 650; 242 NW2d 377 (1976).

The use of common-law definition of rape in this section, until it was amended by 1980 PA 28, does not violate the equal protection clause. People v McDonald, 409 Mich 110; 293 NW2d 588 (1980).

In People v Gay, 407 Mich 681; 289 NW2d 651 (1980), the Michigan supreme court held that the prosecution of defendants under this section subsequent to their convictions in federal court for the same acts is limited by the double jeopardy clause of the Michigan constitution.

In People v Wilder, 411 Mich 328; 308 NW2d 112 (1981), the Michigan supreme court held that conviction and sentence for both first-degree felony murder and the underlying felony of armed robbery violates the state constitutional prohibition against double jeopardy.

A mandatory life sentence imposed for conspiracy to commit first-degree, even if nonparolable, is not so excessive as to constitute cruel and unusual punishment; nor does it violate the Equal Protection Clauses of the Michigan and United States Constitutions. People v Fernandez, 427 Mich 321; 398 NW2d 311 (1986).

Former law: See section 1 of Ch. 153 of R.S. 1846, being CL 1857, § 5711; CL 1871, § 7510; How., § 9075; CL 1897, § 11470; CL 1915, § 15192; and CL 1929, § 16708.