No. 17-1252

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HENRY HILL, JEMAL TIPTON, DAMION LAVOIAL TODD, BOBBY HINES, KEVIN BOYD, BOSIE SMITH, JENNIFER PRUITT, MATTHEW BENTLEY, KEITH MAXEY, GIOVANNI CASPER, JEAN CINTRON CARLOS, NICOLE DUPURE and DONTEZ TILLMAN, individually and on behalf of those similarly situated,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Appeal from the United States District Court
Southern District of Michigan, Eastern Division
Honorable John Corbett O'Meara

BRIEF FOR DEFENDANTS-APPELLEES

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This is an important issue to the State's criminal jurisprudence and requires a balanced and credible presentation of the facts of this case, its procedural history, and the applicable law. Oral argument is important to this presentation and will assist the Court in addressing specific questions it may have. Plaintiffs-Appellants have also requested oral argument in this case. The grant of oral argument should be given to both sides of the significant issues presented in this case.

JURISDICTIONAL STATEMENT

Defendants concur in Plaintiffs' jurisdictional statement.

COUNTER STATEMENT OF ISSUES PRESENTED

1. The *Heck* doctrine bars federal court jurisdiction to hear constitutional challenges under 42 U.S.C. § 1983 to the fact or duration of a plaintiff's confinement. Plaintiffs' Second Amended Complaint directly challenges the constitutionality of the sentences to be imposed under Michigan's new sentencing scheme applicable to juveniles previously sentenced to mandatory life without parole upon their convictions for first degree murder Mich. Comp. Laws §§ 760.25 and 25(a). Counts II, IV, V and VI are barred by the *Heck* doctrine the district court's dismissal order should be affirmed.

2. The *Younger* doctrine requires federal courts to abstain from exercising jurisdiction and interfering with pending state judicial proceedings that implicate important state interests and when an adequate opportunity to raise constitutional challenges in the state judicial proceedings exists. And federal court may only consider claims where an injury in fact is certainly impending or in which the plaintiff has a personal state in the outcome. Michigan's new sentence scheme changed the legal landscape applicable to Plaintiffs requiring their state criminal proceedings be reopened, and significantly changing the sentencing laws and applicable process. As a result, the *Younger* abstention doctrine applies precluding the exercise of jurisdiction in this case. Alternatively, Plaintiffs claims are not ripe or review or are moot. The district court's dismissal order should be affirmed.

3. Michigan's new sentencing scheme for juveniles convicted of first degree murder, Mich. Comp. Laws §§ 769.25 and 25a, provides a constitutional sentencing process compliant with the requirements of *Miller* and *Montgomery*, eliminating mandatory life without parole sentences and providing them a meaning opportunity for release. And because Plaintiffs have no constitutional right to parole or to access

programming, education, and training their previous their prior exclusion from parole eligibility and related programming is irrelevant to their possible future release from confinement. Finally, the challenged laws do not retroactively change the punishment for Plaintiffs' crimes or otherwise disadvantage them by excluding them from the application of sentence reducing credits when they are resentenced under §25a(4). Plaintiffs Eighth and Fourteenth Amendment and Ex Post Facto challenges to this new sentencing scheme fail as a matter of law. The district dismissal order should be affirmed.

INTRODUCTION

Plaintiffs have asked the federal courts to bar the State from imposing a sentence that the U.S. Supreme Court has expressly explained the State has a right to seek: life-without-parole for juveniles convicted of first-degree murder *who merit it*, or alternatively a term-of-years sentence that gives them an opportunity for parole. Michigan's resentencing statute is a proper response to the Supreme Court's decisions in *Miller v. Alabama* and *Montgomery v. Louisiana*. Mich. Comp. Laws §§ 769.25 and 25(a). It requires the state courts to consider the factors announced in *Miller* and *Montgomery* before imposing a life-without-parole sentence in appropriate cases and—for those cases in which a life-without-parole sentence is *not* appropriate under *Miller* and *Montgomery*—it alternatively provides for the imposition of an appropriate term-of-years sentence and a meaningful opportunity for release of the juvenile homicide offender. Mich. Comp. Laws §§ 25a(4)(b), 25(4)(c).

Michigan has complied with *Miller* and *Montgomery*, which neither specified limitations on the minimum or maximum term-of-years sentence nor foreclosed life-without-parole sentences for juveniles

(though indicating that such a sentence would be "rare"). Michigan's sentencing scheme recognizes two categories of offenders—those whose cases were pending either at the trial court or on direct review when *Miller* was decided and those for whom direct appeal had been exhausted. At the time Plaintiffs filed their Second Amended Complaint on June 20, 2016, Plaintiffs' cases in the latter category had been reopened and the resentencing process for those Plaintiffs had begun. § 25a(4)(a). (Pls' Second Amended Comp., R. 130, Page ID # 1577.) Prosecutors had until August 24, 2016 (180 days from the date the decision in *Montgomery* became final) to file requests to impose a life-without-parole sentence in these cases. § 25a(4)(b). The one Plaintiff whose case was on direct review at the time *Miller* was decided was resentenced August 5, 2015 and again on direct appeal. As a result, Plaintiffs' Second Amended Complaint was subject to dismissal for three principal reasons.

First, Plaintiffs claims were barred under the *Heck* doctrine, which precludes any challenge to the fact or duration of confinement under 42 U.S.C. § 1983. The entire thesis of Plaintiffs' claims is that

their impending sentences are constitutionally invalid—a classic argument reserved for direct and habeas review.

Second, because Plaintiffs' criminal cases were pending and awaiting resentencing at the time Plaintiffs filed their Second Amended Complaint, the *Younger* doctrine required the federal courts to abstain from exercising jurisdiction over these claims. Indeed, *Younger* abstention applies with even greater force here, where the Supreme Court has specifically instructed that it is *for the state* to fashion a *Miller* remedy. That process must play out in the first instance in the *state courts*, not this Court.

Third, Plaintiffs claim fail on the merits. Michigan's new sentencing scheme is consistent with *Miller* and *Montgomery* and does not violate the Eighth Amendment, the Due Process Clause, or the Ex Post Facto Clause on its face or in its application to these Plaintiffs. And for those Plaintiffs who have yet to be resentenced, any as-applied challenge is not yet ripe.

Yet, Plaintiffs continue their attempted tight-rope walk around these legal principles that resulted in the dismissal of their claims. Plaintiffs will have a full opportunity to challenge their new sentences

on direct and habeas review, just like any other prisoner. The Supreme Court has confirmed that they cannot make an end-run around this proper state process. The district court properly dismissed their claims.

STATEMENT OF THE CASE

A. November 17, 2010 Complaint

Plaintiffs filed their original complaint in this case on November 17, 2010. (R. 1.) The complaint asserted claims under 42 U.S.C. § 1983 by nine juveniles convicted of first-degree murder who received a mandatory sentence of life without parole. Plaintiffs' claims challenged the constitutionality of the then-existing version of Mich. Comp. Laws § 750.316(1) (mandating a life-without-parole sentence on conviction for first-degree murder) and § 791.234(6) (excluding a prisoner sentenced to imprisonment for first-degree murder from parole eligibility). Defendants included the then- Governor, Director of the Michigan Department of Corrections, and Parole Board Chair. Defendants filed a motion to dismiss the complaint that resulted in the dismissal of eight of the nine Plaintiffs; Keith Maxey's claim remained on statute of limitations grounds. (Opinion and Order, R. 31, Page ID ##467-479.) Plaintiffs then filed a First Amended Complaint. (First Amended Complaint, R. 44, Page ID ##545-583.)

B. February 2012 First Amended Complaint

The First Amended Complaint, filed February 1, 2012, added four Plaintiffs—all individuals who were convicted of first-degree murder as juveniles and sentenced to mandatory life without parole—and substituted the then-current office holders as Defendants—Governor Snyder, Daniel Heyns, and Thomas Combs, respectively. The amended complaint asserted the identical claims under 42 U.S.C. § 1983 based on Michigan's then-existing statutory sentencing scheme barring them from parole eligibility. *Id.*

On June 25, 2012, while the first amended complaint was pending in the District Court, the U.S. Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), was issued. The Supreme Court concluded that the Eighth Amendment prohibited *mandatory* life without parole sentences for juveniles convicted of murder, but it did not impose a categorical bar on that sentence for juvenile murderers.

Plaintiffs then filed a motion for summary judgment on August 7, 2012. (Motion for Summary Judgment, R. 50, Page ID #617-644.) Defendants filed a cross-motion, again arguing the *Heck* bar, among other grounds supporting judgment in their favor. (Response and

Cross-Motion, R. 54, Page ID ##668-695.) The District Court issued its Opinion and Order denying Defendants' cross-motion and granting Plaintiffs' motion in part, holding that Michigan's sentencing scheme imposing mandatory life without parole and excluding convicted juveniles from parole eligibility violated the Eighth Amendment's prohibition against cruel and unusual punishment. (Opinion and Order, R. 62, Page ID ##862-867.) The district court ordered supplemental briefing on the question of an equitable remedy.

On November 26, 2013, the District Court issued an injunctive order directing the Defendants to consider all juvenile offenders sentenced to mandatory life for parole and ordering other relief. (Order Requiring Immediate Compliance with *Miller,* R. 107, Page ID ##1442-1444.)

Defendants appealed that Order.

C. Post-*Miller* State Action

In 2014, while Defendants' appeal was pending, Michigan amended its sentencing scheme, as applied to juveniles convicted of first-degree murder, to comply with *Miller*. But some of those changes were made contingent on either the Michigan Supreme Court or the

U.S. Supreme Court deciding that *Miller* applied retroactively. Mich. Comp Laws §§ 769.25 and 25a. Section 25a clarifies that these new procedures will apply to any case that was final for purposes of appeal on or before June 24, 2015 if either the Michigan Supreme Court or the U.S. Supreme Court hold that *Miller* applies retroactively. Twelve Plaintiffs are in this category. Plaintiff Tillman's criminal case was pending on direct review when *Miller* issued.

In August 2015, the Michigan Court of Appeals decided a challenge to § 25 and concluded that in order to resentence a juvenile offender to life without parole, a jury, not a judge, "must make findings on the *Miller* factors as codified in MCL 769.25(6) . . . ." *People v. Skinner*, 877 N.W.2d 482, 504 (Mich. App. 2015) *lv. granted*, 889 N.W.2d 487 (2017). The Michigan Supreme Court also granted leave in a conflict case, *People v. Hyatt,* 891 N.W.2d 549 (Mich. App. 2016), *lv. granted*, 889 N.W.2d 487 (2017), on the question of the standard of review for sentences imposed under § 769.25. As a result, resentencings in cases with a pending prosecuting attorney motion requesting the imposition of a life without parole sentence, §25a(4)(b) are stayed pending a decision in *Skinner/Hyatt.*

On October 29, 2015, this Court issued an order holding Defendants' appeal in abeyance pending the Supreme Court's decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). *Hill v. Snyder*, 821 F.3d 763, 769 (6th Cir. 2016). The Supreme Court decided *Montgomery* on January 25, 2016 and concluded that *Miller* applies retroactively. As a result, the time frames and process provided in § 25a were applied to the twelve Plaintiffs whose direct appeals were exhausted before *Miller*. Prosecuting attorneys filed their motions by August 24, 2017 in each case they were requesting a life-without-parole sentence. § 25a(4)(b). In all other cases, resentencing to a term of years was begun. § 25a(4)(c).

Currently, 78 juveniles convicted of first-degree murder have been resentenced to a term of years, including seven Plaintiffs. Thirty-seven of those resentenced were parole eligible and have been interviewed by the Parole Board. Thirty-two have been granted parole—including Plaintiff Hines; two were continued for 12 months; two were interviewed the week of June 19, 2017, with no decision issued yet; and one—who is also serving a parolable life sentence on anther

conviction—was interviewed in February 2017, with no decision issued yet. The remaining 41 prisoners are not yet parole eligible.[1]

Plaintiff	Resentence Date	Sentence	Parole Eligible
Casper[2]	9/30/2016	40-60 years	11/13/48
Hill	5/4/17	36 yrs, 6 mo-60 yrs	Parole int. scheduled for 7/3/17
Hines	3/16/17	27-40 years	Granted
Pruitt	3/20/17	30-60 years	8/30/22
Smith	3/22/17	31-60 years	4/12/23
Tillman[3]	8/5/15	32-60 years	2/23/41
Todd	3/29/17	30-60 years	2/23/41

[1] This statistical information has been provided by the MDOC Parole Board. Conviction and sentencing information is available online at MDOC's Offender Tracking Information System (OTIS) site, goo.gl/h5sbRW.

[2] Casper also was convicted of a firearms charge with a mandatory 2-year term.

[3] Tillman is a direct review case. His criminal appeal was pending when *Miller* was decided and ultimately remanded for resentencing, which occurred August 5, 2015. *People v. Tillman,* unpublished Court of Appeals decision issued May 30, 2013, Mich. Court of Appeals no. 296269.

Plaintiff Bentley is scheduled to be resentenced on September 25, 2017.[4] Prosecutors have filed motions requesting a life-without-parole sentence for three Plaintiffs—Jemal Tipton, Kevin Boyd, and Nicole Dupure. (Appellants' Brief on Appeal, App. R. 18, Page ID # 23, n. 4.) (Second Amended Complaint, R. 130, Page ID # 1577.)

This Court issued its decision in Defendants' appeal on May 11, 2016, vacating the district court's orders and remanding the case with instructions to grant the parties leave to amend the pleadings and supplement the record in light of the changed legal landscape (*i.e.*, *Montgomery* and Michigan's new sentencing scheme for juveniles). *Hill,* at 771.

D. June 2016 Second Amended Complaint

Plaintiffs' second amended complaint, filed on June 20, 2016, again names Governor Snyder, but substitutes the current Corrections Director, Heidi Washington, and current Parole Board Chair, Michael Eagen, as defendants and adds Michigan Attorney General Bill Schuette as a defendant. And the second amended complaint asserts

[4] The resentencing date was provided by the Huron County Circuit Court and is available on the docket for Mr. Bentley's criminal case.

new claims under 42 U.S.C. § 1983 challenging the constitutionality of Mich. Comp. Laws §§ 769.25 and 25a and Mich. Comp. Laws §§ 750.316 and 769.234(6). (*Id.* at Page ID ##1577, 1626-1627.)

Plaintiffs also filed a motion for temporary restraining order and preliminary injunction requesting that the court enjoin the state's prosecutors from taking any actions under §§ 25 and 25a until a decision on the merits by the district court. An ex parte TRO was entered on July 7, 2016, preventing prosecutors from filing motions pursuant to § 25a(4)(b) requesting life-without-parole sentences for certain prisoners convicted as juveniles. (Order granting TRO, R. 137, Page ID #1721.) Defendants appealed, and this Court vacated the TRO on July 20, 2016. (*Hill v. Snyder,* no. 16-2003, 7/20/16 Order.) The district court subsequently denied Plaintiffs' motion for a preliminary injunction, concluding that Plaintiffs were not likely to succeed on the merits. The second amended complaint "oversteps the boundary – so carefully drawn in the original complaint – between the cases Plaintiffs may bring pursuant § 1983 and those they may not." (Opinion and Order Denying Motion for Preliminary Injunction, R. 158, Page ID ##2180, 2081.) Defendants also filed a dispositive a motion which was

was subsequently, the district court granted Defendants' motion for partial summary judgment and for dismissal of the second amended complaint. (Motion for Partial Summary Judgment and to Dismiss Claims, R. 147; Opinion and Order, R. 174, Page ID ##2442, 2443.)

The district court noted that this case began as a challenge to Michigan's parole statute—Mich. Comp. Laws § 791.234(4)(6)—that denied Plaintiffs consideration for parole but now challenged the constitutionality of their sentences yet to be imposed—a challenge that "would run afoul of Heck v. Humphrey". (*Id.* at Page ID #2434.) . The court further noted that "Plaintiffs will receive individualized sentencing hearings in which the mitigating factors of youth will be considered" and that the Michigan Court of Appeals has directed state sentencing courts to undertake "a searching inquiry" into each juvenile, the offense, and the demands of *Miller*. (*Id.*, Page ID #2442.) The court concluded by noting that Plaintiffs "will have the opportunity to fully present their constitutional claims" at their sentencing hearings and upon appellate review. (*Id.*)

STANDARD OF REVIEW

A district court's dismissal of a case pursuant to Fed. R. Civ. P. 12(b)(6) is reviewed *de novo*. *Riverview Health Institute LLC v. Medical Mutual of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010). The *de novo* review standard also applies to a district court's decisions applying the *Heck* bar and to abstain under the *Younger* doctrine is also reviewed *de novo*. *Hayward v. Cleveland Clinic Foundation,* 759 F.3d 601, 607, 608 (6th Cir. 2014); *Habitch v. Dearborn,* 331 F.3d 525, 530 (6th Cir. 2003).

SUMMARY OF ARGUMENT

Through their Second Amended Complaint, Plaintiffs attempt an end-run around normal criminal adjudication procedure, as the district court correctly recognized. They seek to disrupt ongoing state criminal proceedings—when the Supreme Court has specifically instructed that it is for *the State* to fashion a resentencing scheme under *Miller*—in order to bypass direct appeal and habeas review via a § 1983 action. Their claims not only fail on the merits, they are also barred by the *Heck v. Humphrey* and *Younger* doctrines.

Plaintiffs' claims present both direct and indirect challenges to sentences that have already been imposed and those yet to be imposed under Michigan's new sentencing scheme adopted in response to the

U.S. Supreme Court's decisions in *Miller v. Alabama* and *Montgomery v. Louisiana.* This court's authority to hear and decide these claims is barred by three longstanding principles.

First, because Plaintiffs challenge the fact and duration of their confinement under sentences that have been or will be imposed, the federal courts' review under § 1983 is barred under the *Heck* doctrine. *Heck v. Humphrey,* 512 U.S. 477 (1994); *Wilkerson v Dotson,* 544 U.S. 74 (2005). Plaintiffs' recourse, as the district court recognized, is exactly the same as it is for all other prisoners challenging their sentences—either direct review of their sentences or federal habeas review.

Second, because Plaintiffs' constitutional challenges arise out of ongoing state criminal proceedings that implicate important state interests and provide an adequate opportunity to raise these same challenges, the federal courts must abstain from exercising jurisdiction over their claims. *Younger v. Harris,* 401 U.S. 37 (1971).

Third, the claims asserted by those Plaintiffs who have not been resentenced yet are not ripe for review. Plaintiffs may be sentenced to a judicially determined sentence of life without the possibility of parole in

appropriate cases—a sentence that remains constitutional post-*Miller*—or a term of years with a meaningful opportunity for release. And these Plaintiffs, who are not yet parole eligible, have not been considered for parole, let alone denied. Yet, these are the bases of their speculative claims—that an unconstitutional sentence will be imposed, and that they will not have a meaningful opportunity for release on parole. Article 3, Clause 2 of the federal Constitution requires that an injury in fact be certain and impending before exercising jurisdiction over a claim. *Déjà vu of Nashville v. Metro Gov't of Nashville & Davidson County*, 274 F.3d 377, 399 (6th Cir. 2001). And ripeness is a particularly appropriate inquiry early in a case seeking to enjoin enforcement of a statute that has not been enforced against a plaintiff. *Ammex, Inc. v. Cox,* 351 F.3d 697, 706 (6th Cir. 2003).

Additionally, Plaintiffs' second amended complaint fails on the merits as a matter of fact and law. Neither *Miller* nor *Montgomery* impose a categorical bar to the imposition of a life-without-parole sentence on a juvenile murderer in an appropriate case. Nor is the State required to guarantee the juvenile offenders eventual freedom. Contrary to Plaintiffs' claims, Michigan provides an appropriate and

constitutional process to resentence these offender post-*Miller* and *Montgomery*. And, they have a meaningful opportunity for release on parole as demonstrated by the facts—32 of the 78 offenders resentenced to a term of years have been granted parole to date, including one of the Plaintiffs. And another Plaintiff is scheduled for a parole interview in July 2017.

Michigan's sentencing scheme establishes appropriate safeguards and guidelines for determining an appropriate sentence by expressly incorporating the factors identified in *Miller*, authorizing the use of evidence from the trial and the presentation of relevant evident at the sentencing hearing. Mich. Comp. Laws §§ 769.25(3), § and (7) and 25a are not unconstitutional facially or as applied.

And while §25a(6) precludes the application of good time and other sentence-reducing credits to those juveniles resentenced to a term of years, it does not violate the Ex Post Facto Clause. Plaintiffs were never entitled to these credits and are not disadvantaged by their exclusion when resentenced. *Weaver v. Graham,* 450 U.S. 24, 29, 30 (1981). They necessarily suffer no retroactive increase in punishment

when they go from *mandatory* life without parole to discretionary life without parole or a term of years.

For these reasons, the District Court correctly dismissed Plaintiffs' claims. This Court should affirm that dismissal.

ARGUMENT

I. Plaintiffs' constitutional challenges to Michigan's new sentencing scheme under 42 U.S.C. § 1983 are barred by the *Heck* doctrine.

The District Court concluded—correctly—that Plaintiffs' challenge to the validity of their impending sentences is "untenable" in the procedural context of this case. (Opinion and Order, R. 174, Page ID # 2437.) Indeed, as the District Court noted, Plaintiffs' challenge to Michigan's new sentencing scheme adopted in response to the U.S. Supreme Court's holdings in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) "oversteps the boundary – so carefully drawn in the original complaint – between cases Plaintiffs may bring pursuant to § 1983 and those they may not." *Id.* In other words, Counts II, IV, V and VI of the Second Amended Complaint directly challenge the fact or duration of Plaintiffs' confinement by the asserted constitutional challenge to their impending sentences. *Id.*

While the district court's decision correctly applied the Supreme Court's decisions in *Heck v. Humphrey,* 512 U.S. 477 (1994), *Wilkerson v. Dotson,* 544 U.S. 74, 78 (2005), and *Prieser v. Rodriguez,* 411 U.S. 475 (1973) to dismiss Counts II and IV it applies equally to Counts I, V and VI. Plaintiffs claim asserted in Count I challenges both the fact and duration of their confinement. Counts II, IV and V's constitutional challenges to Mich. Comp. Laws §§ 25 and 25a also seek to invalidate the duration of their confinement, either through an injunction compelling speedier release or indirectly through a judicial determination that necessarily implies the unlawfulness of their potential sentence and thus the State's custody. As a result, the habeas corpus remedy applies and this § 1983 remedy is barred—no matter the relief sought and no matter the target of the prisoner's suit. *Wilkinson,* 544 U.S. at 81. Their success in these challenges would necessarily demonstrate the invalidity of their confinement or its duration, whether an immediate release from confinement would result or not. *Id.*

That this is the case is a proper subject for the application of this procedural bar is even more evident now that 78 juvenile offenders, including 7 Plaintiffs, have been resentenced, 32 of those have been

granted parole—including one Plaintiff and another being scheduled for a parole interview on July 3, 2017—and motions have been filed seeking life without parole for three Plaintiffs.

A. The *Heck* bar applies to Count II.

Count II asserts a constitutional challenge to a life without parole sentence that *might be* imposed as a result of the prosecutors' motions requesting that sentence for Plaintiffs' Tipton, Boyd and Dupure. §§ 25(6); 25(a) (4)(b). Plaintiffs' claims rest on the underlying theory that these potential sentences of life imprisonment without parole are unconstitutionally invalid. This is a classic argument reserved for direct and habeas review, and Plaintiffs' attempt to bypass their sentencings in state court by a challenge under § 1983 is exactly the type of interference the Supreme Court sought to avoid in *Prieser*, *Heck*, and *Wilkinson* (the *Heck* doctrine).

Plaintiffs' argument they can bring a § 1983 action challenge to their *future* sentences because their *past* sentences have been voided is unpersuasive. Plaintiffs are challenging their impending *future* sentences, which have not been "reversed," "expunged," "declared

invalid," or "called into question" by issuance of a habeas writ. *Heck,* 512 U.S. at 487.

Plaintiffs' argument that they may bring a § 1983 action before resentencing also fails. Plaintiffs attempt to create a "*Heck* loophole" whereby a convicted defendant who is awaiting sentencing can use § 1983 to "prospectively" challenge his future sentence between conviction and sentencing. The absurd implication of their argument shows why it is wrong: If correct, defendants in every criminal trial could bring a § 1983 action between conviction and sentencing to challenge their future sentence. This is the exact phenomenon *Heck* sought to avoid.

Plaintiffs' cited cases in which *Heck* did not preclude a § 1983 action seeking prospective relief when *no conviction or sentencing proceedings were ongoing or certain to occur* are readily distinguishable from this case. See*, e.g., Wallace v. Kato,* 549 U.S. 384, 387 (2007) (uncertainty over whether plaintiff—against whom criminal charges had been dropped—would even be charged again or convicted); *Edwards v. Balisok,* 520 U.S. 641, 649 (1997) (similar). Plaintiffs here are awaiting certain resentencing.

This case is also manifestly different from the case Plaintiffs cite in which a habeas remedy was truly lacking. See *Gerstein v. Pugh,* 420 U.S. 103, 106 & n. 6 (1975) (no habeas remedy to test probable cause under information). Here, in contrast, Plaintiffs will be able to challenge their future sentences via habeas, and also via direct review in the state appellate courts. Case law also confirms that *Heck* bars a §1983 action when the plaintiff could seek habeas relief, but did not. *Powers v. Hamilton Cty. Pub. Def. Comm'n,* 501 F.3d 592 601 (6th Cir. 2007); *Burd v. Sessler,* 702 F.3d 429, 435 (7th Cir. 2012); *Cohen v. Longshore,* 621 F.3d 1311, 1317 (10th Cir. 2010). In fact, the very cases that held unconstitutional mandatory life-without-parole sentences for juveniles convicted of homicide and compelled Michigan's new sentencing scheme, *Miller (Jackson v. Arkansas,* sub nom) and *Montgomery*, were decided on direct and habeas review.

Plaintiffs' argument, rather than disposing of *Heck,* demonstrates that it applies with greater force in the context of this case. A favorable outcome here for Plaintiffs would prevent state court resentencing, change the sentencing options by eliminating the very sentence—life without the possibility of parole—that the Supreme Court declined to

categorically bar in *Miller*, and would avoid state court direct and federal habeas review of the new sentences—the outcome *Priesser-Heck-Wilkinson* forbids.

B. The *Heck* bar applies to Count IV.

The challenge presented in Count II—that the term-of years sentence is an impermissible "de facto life sentence"— further demonstrates the sound policy behind *Heck* and that the District Court correctly dismissed these premature, speculative claims. Six of the Plaintiffs have now been resentenced to a term of years under § 25a(4)(c). One of the six has been granted parole and one is scheduled for a parole interview on July 3, 2017. A seventh Plaintiff—Tillman—was on direct review when *Miller* was issued and was resentenced August 5, 2015 after remand. He pursued a direct appeal of the new sentence which was affirmed December 22, 2016. *People v. Tillman,* WL 7493719, *2 (Mich. Court of Appeals, December 22, 2106). And another Plaintiff is scheduled for resentencing on September 20, 2017. Each of the Plaintiffs can raise their constitutional challenges on direct review and again on federal habeas review, but not in this context via § 1983.

C. The *Heck* bar applies to Counts I, V and VI.

Plaintiff's Count I challenges both the fact and duration of their confinement directly challenging the application of § 791.2304(6) to them. If they prevail their early release could result. This is a classic habeas issue and is barred in the context of this case.

Plaintiffs' Count V challenges their exclusion from good time and other sentence reducing credits under §25a(6)—"[A] defendant who is resentenced under subsection (4) . . . shall not receive any good time credits, special good time, credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence." This claim directly challenges the constitutionality of the term of years sentence to be imposed pursuant to §25a(4). Because the application of these credits would have the effect of reducing a plaintiff's confinement, this claim is not subject to review and relief under §1983. This challenge must be raised either on direct review of their sentence or on federal habeas review. *Heck,* 512 U.S. at 481; *Wilkinson,* 544 U.S. at 78.

Similarly, to the extent Plaintiffs' constitutional challenge in Count I and VI is "characterized as seeking 'a fair and meaningful opportunity for release,' it also implicates the constitutionality of their (impending) sentences . . . ." (Opinion and Order, R. 174, Page ID #2442.) As a result, Plaintiffs may only raise their challenged exclusion from programming and a meaning opportunity for release on parole on federal habeas review.

Heck does not allow Plaintiffs to circumvent direct review or federal habeas review of their sentences and the related constitutional challenges asserted here for the reasons argued above. The dismissal of Counts I, II, IV, V and VI should be affirmed on *Heck* grounds.

II. The District Court properly abstained from exercising jurisdiction under the *Younger* abstention doctrine. Alternatively, the claims are not ripe for review or relief.

The State has provided the remedy compelled by *Miller* and *Montgomery* to these Plaintiffs. It has excluded them from a mandatory sentence of life without parole and required that they be resentenced. Mich. Comp. Law § 750.316(1), as amended by 2014 P.A. 158, effective July 1, 2014; Mich. Comp. Laws §§ 769.25 and 25a. This process

requires individual resentencings to either a term of years or to life without parole when requested by the prosecuting attorney and when the sentencer determines it is warranted. *Miller,* 132 S. Ct. 2469. The Supreme Court expressly instructed that it is the State's prerogative—not the federal courts'—to create the remedy required by *Miller* and *Montgomery*'s voiding of Plaintiffs' sentences. *Hill,* 821 F. 3d at 770, quoting *Montgomery,* 136 S. Ct. at 736.

It is this changed legal landscape that resulted in this Court's holding vacating the District Court's 2013 Orders entered with respect to the First Amended Complaint filed in this case. *Hill,* at 771. It is this changed legal landscape that made the earlier remand from this Court necessary to allow the parties leave to amend the pleadings. It is this changed legal landscape that raises the question of whether Plaintiffs can proceed with their constitutional challenges, as amended. *Id. at p.*771.

A. *Younger* abstention applies to bar jurisdiction over Plaintiffs' claims.

A federal court must abstain from enjoining ongoing state criminal proceedings. *Younger v. Harris,* 401 U.S. 37, 41 (1971). *Younger* recognizes a "strong federal policy against federal-court

interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 431 (1982). Rather than avoiding *Younger* abstention, the circumstances of this case compel its application.

Three requirements must exist for the proper invocation of *Younger* abstention—1) there must be on-going state judicial proceedings; 2) those proceedings must implicate an important state interest; and 3) there must be an adequate opportunity in the state proceedings to raise constitutional challenges. *Squire v. Coughlan,* 469 F. 3d 551, 555 (6th Cir. 2006).

1. *Younger* abstention applies to Count II.

Plaintiffs argue that *Younger* abstention does not apply to Count II's challenge to the constitutionality of a sentence of life imprisonment without the possibility of parole under Michigan's new sentencing scheme for three reasons. First, Plaintiffs contend that there were no ongoing state judicial proceedings when the case was first filed in November 2010 and proceedings of substance on the merits have taken place in federal court that preclude *Younger's* application.

As an initial matter, Plaintiffs' state criminal cases long preceded any iteration of their federal § 1983 claims. Regardless, Plaintiffs' state criminal proceedings were reopened and ongoing months before Plaintiffs filed their Second Amended Complaint. Under §25(a)(4)(a), within 30 days of *Montgomery* becoming final (February 23, 2016), the prosecuting attorneys provided the chief circuit judge of the respective counties a list of all "defendants" subject to the court's jurisdiction for resentencing. This notice reopened these criminal cases before the Second Amended Complaint was filed June 20, 2016.

But, Plaintiffs contend this doesn't matter. Their amended complaint "is merely to maintain the same constitutional challenge to a state's statutory scheme in light of legislative amendment . . . ." (May 15, 2017 Appellants' Brief on Appeal, R. 19, Page ID # 19.) This argument ignores the clear impact of the changed legal landscape that this Court recognized when it vacated the District Court's earlier Orders entered in this case. *Hill*, 821 F.3d at 771.

And, the asserted claims do more than merely maintain the same constitutional challenge: Plaintiffs' Second Amended Complaint brought *new* claims challenging a *new* statute and a *new* sentencing

scheme. They are direct challenges to the implementation of this new sentencing scheme. These new claims do not arise out of the same transactional facts on which the original case and first amended complaint were based. The Second Amended Complaint also added a new Defendant—Attorney General Bill Schuette—based on his alleged "supervisory power over prosecuting attorneys throughout Michigan"—the clear purpose being to reach all the prosecuting attorneys without having to name them separately. (Second Amended Complaint, R. 130, ¶ 30, Page ID #1588.) As a result, these claims do not relate back to the original date of filing or even the date of the First Amended Complaint. Fed. R. Civ. P. 15(c)(1)(B), (C). Nor are the previous "proceedings of substance" applicable to these claims. Indeed, those prior proceedings have been vacated given this new legal landscape and the current context of this case. *Hill*, 821 F.3d at 771.

Plaintiffs' second argument—that abstention here does not promote *Younger*'s purpose—is equally without merit. Plaintiff argues that "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* and *People v. Hyatt*. This argument is factually and legally incorrect. *Skinner* and *Hyatt* address the discrete question of the right to a jury trial on the prosecuting attorney's motion requesting a sentence of life imprisonment without parole. Only three Plaintiffs who are subject to such motions are impacted. But their individual state judicial proceedings remain open while those *Skinner* and *Hyatt* proceed in the Michigan Supreme Court. Certainly a decision in this that impacts the sentencing process, even the available sentence itself would disrupt the Plaintiffs' state criminal proceedings, especially if the Michigan Supreme Court's decision is to the contrary. And, significantly, the application of *Younger* does not depend on the length of time for resolving the ongoing state judicial proceedings especially when those state proceedings would resolve the claims presented to the federal court. Thus, proceeding with Count II does risk interference with ongoing criminal proceedings, warranting abstention under *Younger*.

Third, Plaintiffs argue that the prosecutors proceeded in bad faith by filing the motions requesting a life without parole sentence in approximately 250 of the reopened criminal cases. But, these

prosecutors are not parties and this case and their actions are not attributable to and do not provide evidence of bad faith on the part of Attorney General Schuette or any other Defendant. *Doe v. Claiborne Cnty., Tenn.,* 103 F.3d 455, 507, 511 (6th Cir. 1996). And they merely initiate a process requesting a sentence *Miller* did not bar.

Additionally, substantial culling has already occurred at the charging and trial phase with respected to these juvenile offenders. As a result, these juvenile offenders reflect the rare cases of all juvenile murders over the last 50 years. Finally, Plaintiffs have not been resentenced in violation of the *Montgomery* "rare" standard. The prosecutors are *requesting* imposition of a life without parole sentence. At most, Plaintiffs are subjected to the possibility of that sentence, but being subjected to the possibility of a life sentence is not a violation of either the *Miller* or *Montgomery* holdings. It remains the state court's responsibility to determine an appropriate sentence for each offender and it is presumed that the state courts will proceed constitutionally.

2. *Younger* abstention applies to Count IV.

Plaintiffs argue that Count IV does not challenge the resentencing process and therefore does not invoke *Younger* abstention. But, this

argument is also meritless. Count IV alleges that Plaintiffs who face resentencing to a term of years under §§ 25 and 25a do not have a "meaningful and realistic" opportunity for release given that the decision-making process of the parole board is not meaningfully constrained. (May 15, 2017 Appellants Brief, R. 19, Page ID # 22.) They contend that this claim is independent of the state judicial proceedings and is directed at the parole board. Yet, this argument is contrary to the allegations in the Second Amended Complaint.

Plaintiffs allege that they face a "mandatory term of imprisonment that is the equivalent of life imprisonment" under "Mich. Comp. Laws §§ 76=50316, 769.25 and 769.25a." This claim directly challenges the sentence maximum imposed on a term of years sentence—60 years. (Second Amended Complaint, R. 130, ¶¶ 214, 215, Page ID #1629.) Since release on parole is not a constitutionally protected right, *Sweeton v. Brown,* 27 F.3d 1162, 1164-1165 (6th Cir. 1994), this issue could, realistically, be resolved only by reducing the challenged maximum term—a direct challenge to the sentence imposed in the ongoing state judicial proceedings.

Plaintiffs' argument is also factually inaccurate. Resentencings under the term of years provision of § 25 have been proceeding. A total of 78 juvenile homicide offenders have been resentenced to date, including 8 Plaintiffs. 32 of those resentenced have been granted parole, including one Plaintiff. Two other parole-eligible Plaintiffs were interviewed but continued for 12 months and one other Plaintiff is scheduled to be interviewed July 3, 2017.

Additionally, three Plaintiffs who have been resentenced appealed their respective sentences—Plaintiff Tillman, sentenced August 5, 2015, Plaintiff Casper, sentenced September 30, 2016, and Plaintiff Pruitt, sentenced March 2, 2017.[5] Plaintiff Tillman was on direct appeal when the decision in *Miller* was issued. The case was remanded for resentencing. A direct appeal was again filed and the sentence of 32 ½ to 60 years was upheld. *People v. Tillman,* WL 7493719, *2 (Mich. Court of Appeals, December 22, 2106). Plaintiff Tillman's claims here are now also barred both *res judicata* preclusion—they either were or could have been decided in the state proceedings—and under the

[5] *People v Tillman,* Michigan Court of Appeals no. 329312; *People v. Casper,* Michigan Court of Appeals no. 335316; *People v. Pruitt,* Michigan Court of Appeals no. 337878.

Rooker-Feldman doctrine because the claimed injury arises directly from the sentence imposed by the state court. *Adair v. State Dept. of Ed.,* 680 N.W.2d 386, 396 (2004); *Peterson Novelties v. City of Berkley,* 306 F.3d 386, 394 (6th Cir. 2002); *Dist. of Columbia COA v. Feldman,* 460 U.S. 462, 476 (1983).

B. Plaintiffs' claims are not ripe.

The District Court did not decide this question. However, this Court has an independent obligation to examine its own jurisdiction and that of the district court. *Hamdi v. Napolitano*, 620 F.3d 615, 620 (6th Cir. 2010). The ripeness doctrine is drawn from both Article III limitations on judicial power as well as prudential reasons for refusing to exercising jurisdiction. *Warshak v. U.S.*, 532 F.3d 521, 525 (6th Cir. 2008) (citing *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003)). To avoid the premature adjudication of claims, courts "require[] that the injury in fact be certainly impending." *Déjà vu of Nashville v. Metro Gov't of Nashville & Davidson County*, 274 F.3d 377, 399 (6th Cir. 2001). "The ripeness inquiry arises most clearly when litigants seek to enjoin the enforcement of statutes, regulations, or

policies that have not yet been enforced against them." *Ammex, Inc. v. Cox*, 351 F.3d 697, 706 (6th Cir. 2003).

In ascertaining whether a claim is ripe, the court must ask two questions. First, is the claim fit for judicial decision in the sense it arises in a concrete factual context and concerns a dispute that is likely to come to pass? Second, what is the hardship to the parties of withholding court consideration? *Warshack,* at 525, 526, *citing Abbott Lbs. v. Gardner,* 387 U.S. 136, 149 (1967). Here the first question must be answered "no." The second question must be answered "none."

It is clear, the Second Amended Complaint asserts claims that are not based in a concrete factual context. Plaintiffs assert constitutional "as applied" challenges to Michigan's new sentencing scheme. Yet, the Plaintiffs Tipton, Boyd and Dupure have motions requesting imposition of a life without parole sentence pursuant to § 25a(4)(b) in their criminal cases and have yet not been resentenced. Plaintiffs Bentley, Maxey, and Cintron have not yet been resentenced under the term of years provision. But subsequent events demonstrate the claimed disputes and injuries have not come to pass. Rather, the juvenile offenders who do not have motions pending are being resentenced,

including seven of the Plaintiffs, interviewed and considered for parole as they become eligible, and are being granted parole, including one Plaintiff.

Further, Plaintiffs will suffer no hardships from the withholding of the Court's consideration. They can each raise these challenges on direct review once they are resentenced. Tipton, Boyd, and Dupure have not established they would otherwise be eligible for parole if they were sentenced to a term of years or even were their sentences converted to parolable life by this Court—an action even the Supreme Court declined to take in *Miller* and *Montgomery*, leaving that decision to the state.

As a result, this Court lacks jurisdiction over Plaintiffs' claims in Counts II, IV, V and VI and the district court's dismissal should be affirmed on this alternative ground.

C. Count I is moot.

A pending claims must be declared moot if a change in legal or factual circumstances since the action was filed results in the plaintiff no longer having a "personal stake in the outcome" of the case. *Lewis v. Cont'l Bank corp.,* 494 U.S. 427, 477, 478 (1990). "The test for mootness

is whether the relief sought would, if granted, make a difference to the legal interest of the parties." *McPherson v. Mich. High School Athletic Ass'n,, Inc.,* 119 F.3d 453, 458 (6th Cir. 1997).

Here, the State has provided the remedy required by *Miller* and *Montogmery*. This change excludes Plaintiffs from the imposition of a mandatory sentence of life without parole. Mich. Comp. Law §§ 750.316(1); 791.234(6). Yet, Count I here asserts an as applied challenge to §791.234(6) alleging "it deprives Plaintiffs punished with a mandatory sentence of life imprisonment without parole to a meaningful opportunity to obtain release. . . ." (Second Amended Complaint, R. 130, ¶ 204, Page ID #1627.) Plaintiffs no longer have a personal state in this claim first because seven of them have been resentenced to a term of years; three have motions pending in their criminal cases to resentence them to life without the possibility of parole pursuant to *Miller;* and the others three are awaiting resenting to a term of years pursuant §769.25a(4)(c). Plaintiffs' claims in Count I are moot.

Alternatively, this Court lacks jurisdiction over Plaintiffs' claims in Count I because they are moot and the district court's dismissal should be affirmed.

III. Plaintiffs fail to state a claim upon which relief may be granted.

Plaintiffs alternatively argue their claims are meritorious requiring reversal of the district court's dismissal and remand for consideration. Yet, their claims fails as matter of law and fact and the district court's dismissal should be affirmed.

A. Plaintiffs' Count II fails to state a claim upon which relief may be granted.

Miller and *Montgomery* determined that a *mandatory* sentence of life without the possibility of parole for juvenile homicide offenders violates the Eighth Amendment's prohibition against cruel and unusual punishment because such a sentence necessarily fails to give consideration to the particular offender's youthful characteristics. But *Miller* and *Montgomery* do not categorically prohibit a sentence of life without the possibility of parole for juvenile homicide offenders. *Miller,* 132 S. Ct. at 2469 ("we do not consider Jackson's and Miller's alternative argument that the Eight Amendment requires a categorical bar on life without parole for juvenile"; appropriate occasions for

sentencing juveniles to this harshest penalty will be uncommon); *Montgomery,* 132 S. Ct. at 726 (*Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile indicating that such a sentence is disproportionate for all but the rarest of children, those whose crimes reflect "irreparable corruption.").

What is required by these decisions? They require an individualized sentencing process that considers the characteristics of youth, how children are different and how these differences counsel against irrevocably sentencing them to a lifetime in prison. *Miller, Id.* And, while the state is not required to guarantee eventual freedom, in those cases for which a life without parole sentence is not appropriate it must provide some meaningful opportunity for release based on demonstrated maturity and rehabilitation. *Miller, Id,* quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010). "[I]t is for the State, in the first instance, to explore the means and mechanisms for compliance" with these requirements. *Id.*

Plaintiffs' Count II requests the District Court to impose a categorical ban on any life without the possibility of parole sentence for a convicted juvenile offender. That is a step that even the Supreme

Court declined to take, instead leaving to the sentencer the determination of which cases are appropriate for such a sentence within the parameters and guidelines identified in *Miller*.

Plaintiffs argue that Michigan's statutory scheme lacks sufficient safeguards and is vulnerable to "discriminatory, arbitrary and unconstitutional application to large numbers of youth." Plaintiffs' argument is misplaced, and misreads the statute. Compliance with *Miller* and *Montgomery* is exactly what the Legislature brought to Michigan law by amending Mich. Comp. Law § 750.316 and enacting §§ 769.25 and 769.25a. This legislation significantly altered Michigan's sentencing scheme for juveniles convicted of first degree murder, expressly directing compliance with the *Miller* guidelines.

The statute imposes comprehensive requirements and criteria for the imposition of a life-without-parole sentence: (1) the prosecution must timely file a motion seeking a life-without-parole sentence; (2) the a sentencing hearing must be held; (3) at the hearing, the trial court must consider the factors listed in *Miller* and "may consider any other criteria relevant to its decision"; and (4) the trial court must identify "the aggravating and mitigating circumstances" it considered and all

the reasons supporting the sentence imposed—it does not, as Plaintiffs contend, mandate consideration of such factors but requires the court to identify those it considers aggravating and those it considers mitigating—not an unusual consideration in the sentencing process. §§ 25(3), (6), and (7). This is hardly a sentencing scheme that allows discriminatory, arbitrary, or unconstitutional application. Certainly *Miller* and *Montgomery* provide clear and sufficient guidance for applying the factors the Court considered important to making this sentencing determination—guidance Michigan's statute expressly incorporates. Mich. Comp. Law § 769.25(6). And the sentence itself is reviewable on direct appeal and potentially in a federal habeas action.

None of Section 25(3), (6) or (7), nor 25a, are facially unconstitutional. They implement the holdings of *Miller* and *Montgomery*, compel the sentencer to identify his reasoning and factors compelling the imposition of this most severe penalty, and provide the juvenile offenders an opportunity to challenge the imposition of a life-without-parole sentence. By declining to impose a categorical bar on imposing this most severe sentence on juveniles convicted of homicide, the Supreme Court clearly intended for the state courts to determine

those cases where such a sentence is appropriate. *Montgomery*, 136 S. Ct. at 735 (specifically "leav[ing] to the States" the task of fashioning a *Miller* remedy and admonishing lower federal courts to "avoid intruding" on the state process) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986).

Plaintiffs do not and cannot state an as-applied challenge here because the sentencing provisions of these statutes have not been applied to them. Further, such a challenge would require the District Court and now this Court to look to the trial evidence and record, understand the nature and conduct of the crime, examine pre-sentencing reports, Plaintiffs' institutional records, and all the other evidence to be considered at a sentencing hearing to determine if these statutes have applied unconstitutionally. Such a record does not exist here. Such an action is barred by *Heck*. The federal courts must abstain from deciding such claims based on *Younger*.

B. Plaintiffs' Count IV fails to state a claim upon which relief may be granted.

Plaintiffs' Count IV alleges that the 60-year maximum imposed on a term-of-years sentence under § 25(9) is a "de facto" or "default" life sentence that violates the prohibition against cruel and unusual

punishment. Plaintiff provides a two-pronged rationale in support of this claim. First, upon serving the minimum sentence (between 25-40 years), the Michigan Parole Board alone determines whether the offender will ever be released before the end of the 60-year term. Second, 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 completing their 60-year term. This claim fails on multiple grounds.

Foremost, those Plaintiffs serving a term-of-years sentence have no constitutional right to parole and the State is not required to guarantee eventual freedom. *Graham,* at 75. And, the Parole Board analyzes and decides a completely different question than that required by *Miller* at sentencing: The Board asks whether the individual currently poses a risk to the community. This necessarily requires the Board to consider the maturity and rehabilitation achieved, and to consider the adult that the juvenile offender has become. Mich. Comp. Laws, §§ 791.231-246 (establishing the parole process, criteria, and the factors the Board must evaluate and consider); Mich. Admin. Rule 719.7716 (establishing and identifying the Parole Board criteria,

factors, scoring process and scoring documents.) It only makes sense that the Board would use the criteria and factors applied to other adult prisoners for that purpose.

Addressing a similar question related to whether the application of Virginia's geriatric release program to a juvenile-offender sentence provided a meaningful opportunity for release based on demonstrated maturity and rehabilitation, the Supreme Court reached a similar conclusion. The Supreme Court noted that *Graham* left it to the states, in the first instance, to explore the means and mechanisms for compliance. *Virginia v. LeBlanc,* 137 S. Ct. 1726 (2017), per curium opinion, p. 2, citing *Graham,* at 75. The Supreme Court concluded that the factors considered for release, including the individual's history, conduct during incarceration, interpersonal relationships with staff and inmates, and changes in attitude toward self and others are consistent with *Graham*'s requirement and "allow the Parole Board to order the former juvenile offender's conditional release in light of his or her 'demonstrated maturity and rehabilitation.'" *Id.* at 3. While this discussion does not squarely address the Eighth Amendment issue, the Court noted that "there are reasonable arguments" that the geriatric

release program does satisfy constitutional requirements. As does Michigan's parole process, criteria, and factors when applied to juvenile homicide offenders.

This is most evident from the facts extant, which demonstrate the implausibility of Plaintiffs' claim and argument. For example, of the 78 offenders resentenced to a term of years—the maximum term being 60 years—37 are parole eligible; 32 of those have been granted parole, including Plaintiff Hines; two were continued for 12 months; one who is also serving a parolable life sentence was interviewed in February 2017 but no decision has issued; one was interviewed the week of June 19, 2017 but no decision has issued; and Plaintiff Hill is scheduled for a parole interview on July 3, 2017. Thus, Michigan's parole criteria, factors, and scoring provide sufficient controls on the Parole Board's discretion and a "meaningful opportunity to demonstrate maturity and rehabilitation," and to obtain release. Plaintiffs' Count IV fails as a matter of law and fact and the dismissal of this claim should be affirmed.

C. Plaintiffs' Count V alleging an ex post facto violation fails to state a claim.

A law that is both retroactive—that is, it applies to events occurring before its enactment—and disadvantages the affected offender by either altering the definition of the criminal conduct or increasing the punishment for the crime violates the ex post facto prohibition of U.S. Const., Art. 1, § 10. *Lynce v. Mathis*, 519 U.S. 433, 44 (1997), quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981). Such laws implicate the central concerns of the Ex Post Facto Clause—"the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver,* at 30. But Plaintiffs claim that § 769.25a(6)'s exclusion of good time and other sentence-reducing credits is an ex post facto violation fails as a matter of law.

A change in good time or other sentencing reducing credits provided to prisoners may, under certain circumstances, result in an *ex post facto* violation. *Weaver* at 28 (citation omitted); *Lynce* at 441. However, those circumstances do not exist here.

As an initial matter, Plaintiffs necessarily suffer no retroactive increase in punishment when they go from *mandatory* life without parole to discretionary life without parole or a term of years.

To violate the *ex post facto* prohibition, good time or other sentence-reducing credits must have applied before the change; and the elimination, reduction, or change in calculating credits must disadvantage the prisoner by increasing the expected punishment at the time the crime was committed. The Supreme Court recognizes that a prisoner's eligibility for reduced imprisonment "is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Weaver*, at 32 (citations omitted). Section 25a(6) provides that a defendant who is resentenced under this subsection "shall not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence." The question then is whether § 25a(6) changes the legal consequences of acts completed before its effective date. The answer is no. While this provision has retroactive application, it does not disadvantage the

Plaintiffs or similarly situated offenders who are sentenced under its terms for three reasons.

First, good time, special good time, disciplinary or other credits never applied to anyone convicted of first-degree murder. Prior to December 1978, prisoners were able to earn regular and special good time on their *minimum* and *maximum* sentences pursuant to Mich. Comp. Laws § 800.33. But, convictions for first-degree murder were never eligible for a term-of-years sentence and therefore had no minimum or maximum term. Thus, Plaintiffs' first-degree murder convictions were excluded from sentence credit reductions. And, with the enactment of § 791.233b in December 1978, first-degree murder convictions were categorically excluded from good time and other credit reductions. § 791.233b(n). December 1982 amendments to this statute continued the exclusion for first-degree murder convictions from the application of credit reductions—applying them only to indeterminate sentences. Mich. Comp. Laws § 233b (1982 amendment); Mich. Comp. Laws § 800.33(5).

Effective April 1, 1987, the law was amended again to eliminate good time credits for any crime committed after that date. Mich. Comp.

Laws § 800.33(2) and (3). The law changed again in 1998 and in 2000, eliminating the disciplinary credit system and creating a disciplinary time system. Mich. Comp. Laws §§ 800.33 and 34. As a result of these changes, a prisoner had to serve the entire calendar minimum sentence to become parole eligible and the entire calendar maximum to be discharged from custody. This is the law in effect now. Plaintiffs, with the exception of Plaintiff Hill, were sentenced after April 1, 1987 and were not entitled to sentence-reducing credits.[6] Plaintiff Hill was sentenced in June 1980 and was not entitled to sentence-reducing credits on his first-degree murder conviction. Plaintiffs' reliance on Mich. Comp. Laws § 791.233b(o) to the contrary is misplaced. That statute establishes a prisoner's eligibility for parole based on the crime of conviction and applicable credits. It does not authorize or create disciplinary credits; it only applies them if earned to determine parole eligibility. Plaintiffs are not disadvantaged then by the exclusion of sentence-reducing credits.

Second, the law does not implicate the principle of fair notice. Sentence-reducing credits were not and could not be "a significant factor

[6] See Offender Tracking Information System (OTIS), goo.gl/h5sbRW.

entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed" because they were not applicable to the convicted offense—first-degree murder. There were no plea considerations and no judicial considerations at sentencing because the sentence was mandatory. Actually, the elimination of good time and other sentence-reducing credits now avoids judicial considerations that might increase the minimum sentence Plaintiffs would receive under §25(9).

Third, because good time and other sentence reducing credits are "accorded by the grace of the legislature," *Weaver,* at 31, Plaintiffs have no reasonable expectation today—had a term-of-years sentence been available for their first-degree murder convictions when committed—that the legislature would have also applied sentence-reducing credits for this most heinous of offenses. Indeed, the applicable statutes were to the contrary. And because all but one of the Plaintiffs was sentenced after April 2, 1987, they have no reasonable expectation of receiving these credits.

Finally, this claim can only be reviewed in a federal habeas action because the application of these credits would reduce Plaintiffs' sentences and is not reviewable under § 1983.

Thus § 25a(6) does not change the legal consequences of acts completed before their effective date in a way that disadvantages or is adverse to the Plaintiffs and putative class members. Because no *ex post facto* violation results, Plaintiffs' Count V fails to state claim and dismissal should be affirmed.

D. Plaintiffs Counts I and VI fail to state a claim.

Count I alleges §791.234(6), as applied, subject them to a mandatory sentence of life without parole depriving them of a meaning opportunity for release. (R. 130, ¶ 204, Page ID ##1626, 1627.) Yet, as argued above, neither §§750.316(1) nor 791.234(6) apply to them any longer. For this reason, the district court dismiss Count I as moot. (R. 174, Page ID #2436.) And, as the facts indicate, juvenile offenders resentenced under Michigan's new *Miller* compliant sentencing scheme, are provided a meaning opportunity for release on parole insofar as they may be sentenced to either a life-without parole sentence or a term-of-years' sentence.

Count VI also fails to state claim. Plaintiffs allege the denial access to programming, education and training denies them a meaningful opportunity for release. Yet, Plaintffs do not have a constitutional right to parole, or to programming or rehabilitation opportunities in prions. (R. 174, Page ID #2442), citing *Sweeson v. Brown,* 27 F.3d 1162-1164, 1165 (6th Cir. 1994). And as previously argued because the sentencing process has been initiated. Plaintiffs Tipton, Boyd, and Dupure have motions requesting life-without-parole sentences pending in the state criminal cases. Of the remaining Plaintiffs—who will be sentenced to a term of years—all but Plaintiffs Bentley, Maxey, and Citron have been resentenced. Plaintiff Bentley is scheduled for sentencing September 20, 2017. And Plaintiff Hines has been granted parole and Plaintiff Hill is scheduled for a parole interview on July 3, 2017. Contrary to Plaintiffs' argument, Defendants are applying §§ 769.25 and 25a and they are not serving mandatory life without parole sentences.

Plaintiffs' claim also fails on the scope of relief it requests. Plaintiffs request relief that even the Supreme Court did not find appropriate to provide in *Graham* or *Miller*—immediate parole

consideration. It is the State's prerogative—not a federal court's—to create a remedy as a result of Plaintiffs' voided sentences. *Hill,* 821 F.2d at 770. It has created that remedy. It is implementing that remedy. The time any Plaintiff remains in prison before being resentence will be credited to them; it does not improperly extend their potential prison terms; and it does not violate the Eighth Amendment. As a result, Counts I and IV fail to state a claim upon which relief may be granted. The dismissal of these claim should be affirmed.

CONCLUSION AND RELIEF REQUESTED

Defendants request that this Court affirm the district court's dismissal of Plaintiffs' claims for all the reasons set forth above.

Respectfully submitted,

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Dated: June 30, 2017

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 13,000 words. This document contains 11,467 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Century Schoolbook.

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CERTIFICATE OF SERVICE

I certify that on June 30, 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 (designated below).

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendants-Appellees, per Sixth Circuit Rule 28(a), 28(a)(1)-(2), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No. Range
Opinion and Order	07/15/2011	R. 31	467-479
First Amended Complaint for Declaratory and Injunctive Relief	02/01/2012	R. 44	545-583
Motion for Summary Judgment	08/07/2012	R. 50	617-644
Response and Cross Motion	08/28/2012	R. 54	668-695
Opinion and Order	01/30/2013	R. 62	862-867
Order Requiring Immediate Compliance with *Miller*	11/26/2013	R. 107	1442-1444
Second Amended Complain	06/20/2016	R. 130	1577, 1588, 1626-1627, 1629
Order Granting TRO	07/07/2016	R. 137	1721
Opinion and Order Denying Motion for Preliminary Injunction	08/03/2016	R. 158	2179, 2182
Opinion and Order	02/07/2017	R. 174	2436, 2437, 2442-2443

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