No. 13-2661/No. 13-2705

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-Appellees/ Cross-Appellants,

v.

RICK SNYDER, in his Official Capacity as Governor of the State of Michigan, DANIEL H. HEYNS, in his Official Capacity as Director, Michigan Department of Corrections, and TOMAS COMBS, in his Official Capacity as Chair, Michigan Parole Board, jointly and severally,

Defendants-Appellants/ Cross-Appellees.

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

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Dated: June 2, 2014

CORPORATE DISCLOSURE FORM

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-2661/13-2705 Case Name: Hill, et al. v. Snyder, et al.

Name of counsel: Steven M. Watt

Pursuant to 6th Cir. R. 26.1, Appellees/ Cross-Appellants
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 June 2, 2014 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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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

Appellees-Cross Appellants (Plaintiffs) concur in Appellants-Cross Appellees (Defendants) request for oral argument. This is a case of significant public interest. Plaintiffs were all sentenced to mandatory life imprisonment for crimes they committed as children, and the Michigan parole statute, M.C.L. § 791.234 (6), deprives them of any opportunity to be considered for parole. In July 2012, the District Court declared the parole statute unconstitutional and requested that Defendants devise procedures to ensure Plaintiffs are considered for parole in a fair and meaningful manner. To date, Defendants have failed to take any steps to implement the District Court's order, maintaining that Michigan's existing parole system is constitutionally adequate. As a consequence, Plaintiffs and another 350 individuals like them remain incarcerated without the possibility of parole. The record is significant and oral argument would be beneficial to this Court to ensure the issues are presented in a balanced and meaningful way. For all these reasons, this Court's consideration of this case will be significantly aided by oral argument.

COUNTERSTATEMENT OF JURISDICTION

This Court has held that the District Court's November 26, 2013 order was not a final order and therefore may not be appealed pursuant to 28 U.S.C. § 1291 (R. 119, Order from U.S. Ct. of Appeals., Page ID # 1490.) Instead, this Court has assumed jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) because the November 26, 2013 order is an injunction. (*Id.* at 1491.) Therefore, this Court's jurisdiction over Defendants' appeal is limited to issues that are necessary to determining whether the District Court's injunction is an abuse of discretion. *See Adams v. Fed. Express Corp.*, 547 F.2d 319, 323 (6th Cir. 1976); *see also Kaimowitz v. City of Orlando*, 122 F.3d 41, 43 (11th Cir. 1997).

Plaintiffs have cross-appealed the District Court's orders dismissing some of Plaintiffs' claims on statute-of-limitations grounds, dismissing all of Plaintiffs' claims under the Due Process Clause and customary international law, and denying Plaintiffs' alternative motion for class certification. Review or reconsideration of these orders may be necessary should Defendants partially prevail on the issues they raise in this appeal. *Anderson v. Roberson*, 90 F. App'x 886, 888 (6th Cir. 2004 (quoting *Hartman v. Duffey*, 19 F.3d 1459, 1465 (D.C. Cir. 1994) (recognizing that a protective cross appeal is appropriate "to insure that any errors against his interests are reviewed so that if the main appeal results in modification of the judgment his grievances will be determined as well").

Although the orders from which Plaintiffs cross-appeal are not final pursuant to 28 U.S.C. § 1291, this Court has discretion to exercise pendent appellate jurisdiction over Plaintiffs' cross-appeal to the extent it raises issues that are "inextricably intertwined" with the appealable issues raised by Defendants, or insofar as reviewing the issues on cross-appeal is "necessary to ensure meaningful review" of Defendants' appealable issues. *See Norton v. Stille*, 526 F. App'x 509, 514 (6th Cir. 2013); *O'Bryan v. Holy See*, 556 F.3d 361, 377 n.7 (6th Cir. 2009) (pendent jurisdiction over cross-appeal). Alternatively, if Plaintiffs are entitled to injunctive relief on grounds other than those relied upon by the District Court, this Court may affirm the District Court's order regardless of whether Plaintiffs filed a cross-appeal. *See United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 349 n.3 (6th Cir. 1998.)

STATEMENT OF ISSUES

1. *Preiser v. Rodriguez*, 411 U.S. 475 (1973) and its progeny bar civil actions under 42 U.S.C. § 1983 only if success on the merits "would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005). Plaintiffs challenge the constitutionality of the Michigan parole statute, M.C.L. § 791.234 (6), because it deprives them of "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Miller v. Alabama*, 132 S. Ct. 2455, 2469

(2012) (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2011) (internal quotation marks omitted). Plaintiffs thus seek only a meaningful opportunity to be *considered* for release; they do not seek to challenge their judgments of conviction or to invalidate their life sentences. Was the District Court correct in holding that Plaintiffs' claims are not barred under *Preiser*?

2. Plaintiffs have brought a § 1983 civil action. They do not seek collateral review of their criminal convictions or sentences. Rather, they seek a declaration that M.C.L. § 791.234(6) is unconstitutional and injunctive relief to require Defendants to devise procedures that will provide them with meaningful and realistic parole consideration. Was the District Court correct in finding the *Teague* non-retroactivity doctrine inapplicable, because it applies only in collateral habeas challenges seeking to vacate a criminal judgment?
3. The District Court declared the Michigan parole statute, M.C.L. § 791.234(6), unconstitutional as applied to all juveniles serving mandatory life sentences. Was the District Court correct to apply its ruling to all juveniles in Michigan serving mandatory life sentences, or should the District Court, instead, have granted Plaintiffs' motion to certify a class?
4. Defendants' continued enforcement of M.C.L. § 791.234 (6) denies Plaintiffs any mechanism to be considered for release, in violation of the

Eighth Amendment. Plaintiffs suffer on-going harm from this constitutional violation. Did the District Court err in dismissing some plaintiffs because they did not bring their § 1983 claims within three years of their convictions becoming final? And, in its November 26, 2013 order, did the District Court provide relief (requiring Defendants to present for the court's approval a program and process for compliance with *Miller*) for claims that were not ripe?

5. *Graham* and *Miller* require states to provide juveniles with a process to ensure that they will not be incarcerated for life absent some meaningful opportunity to obtain release. Plaintiffs presented uncontested evidence that Michigan's current parole system does not provide such an opportunity. Did the District Court exceed its authority in its order of November 26, 2013 by requiring Defendants to present a program and process for compliance?
6. *Graham* and *Miller* establish that juveniles have a constitutionally protected liberty interest in parole if they can demonstrate maturity and rehabilitation, triggering the due process protections of the Fourteenth Amendment. Did the District Court err in failing to recognize Plaintiffs' due process right to a meaningful and realistic parole process?
7. Customary international law prohibits imposing a punishment of life imprisonment without the possibility of release on anyone under the age of

18. This customary international law norm forms part of U.S. federal common law and also gives rise to a common law private cause of action in U.S. courts. Section 1983 provides a remedy against any state official who violates any federally protected right. Did the District Court err in dismissing Plaintiffs' claims based on Defendants' violations of customary international law?

STATEMENT OF THE CASE

In Michigan, children as young as 14 are directly charged as adults for first-degree homicide crimes as adults, and, prior to 2014, sentenced as adults to mandatory life sentences without consideration of their youthful status, lesser culpability, or unique capacity for rehabilitation. M.C.L. §§ 750.316, 769.1(1)(g). Once in prison, these youth have no opportunity for parole, as by statute, the parole board lacks jurisdiction over persons serving life sentences for first-degree homicide offenses. M.C.L. § 791.234(6).

Three hundred ninety-nine (399) Michigan youth have been subjected to the harshest punishment available in this state—a punishment, when imposed on children, the Supreme Court declared "akin to the death penalty." *Miller*, 132 S. Ct. at 2467. Three hundred sixty-three (363) of these individuals are still alive.

On November 17, 2010, following the Supreme Court's ruling in *Graham*, 560 U.S. 48, Plaintiffs brought this action under 42 U.S.C. § 1983, alleging

violations of the Eighth and Fourteenth Amendments to the U.S. Constitution and of customary international law. Plaintiffs seek a declaratory judgment that: (1) 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, violates the Eighth Amendment as applied to youth under the age of 18 at the time of their offense;[1] and (2) Defendants, by continuing to deprive those youth of a meaningful opportunity for release, are violating the Eighth and Fourteenth Amendments. Plaintiffs also seek a permanent injunction prohibiting the continued application of M.C.L. § 791.234(6) against such youth and requiring Defendants to provide them with a fair and meaningful opportunity for release.

Defendants sought dismissal of all counts based on statute of limitations grounds, *Heck v. Humphrey*, 512 U.S. 477 (1994), *res judicata*, and the *Rooker-Feldman* doctrine. On July 15, 2011, the District Court (O'Meara, J.) entered an Order Granting in Part and Denying in Part Defendants' Motion to Dismiss (R. 31, Op. & Order, Page ID # 467-79.) The District Court denied dismissal of Plaintiffs' Eighth Amendment claim, but dismissed all named plaintiffs except Keith Maxey on statute of limitations grounds, and dismissed all claims based on due process and customary international law. (*Id*., Page ID # 469-71, 476-78.)

[1] Throughout this brief, the terms "juveniles" or "youth" refer to individuals who were under the age of 18 at the time of the offense.

Defendants then filed a Motion for Certification of Interlocutory Appeal and Request for Stay Pending Appeal (R. 34, Page ID # 488-96). On January 12, 2012, the District Court denied Defendants' motion. (R. 42, Order Den. Defs.' Mot., Page ID # 540-41.)

On February 1, 2012, Plaintiffs filed an Amended Complaint, adding the current plaintiffs, and asserting the same claims for relief. (R. 44, First Am. Compl., Page ID # 545-83.) The parties entered into a stipulation applying the District Court's July 15, 2011 opinion and order to the Amended Complaint, which the Court approved by order dated February 21, 2012. (R. 46, Stipulation & Order, Page ID # 590-92.)

On June 25, 2012, the U.S. Supreme Court issued its decision in *Miller*, 132 S. Ct. at 2466, declaring it unconstitutional, under the Eighth Amendment, to subject juveniles to a mandatory punishment of life imprisonment without the possibility of parole.

On August 7, 2012, Plaintiffs filed a Motion for Summary Judgment on their Eighth Amendment claim (R. 50, Pls.' Mot. for Summ. J., Page ID # 617-44). In response, Defendants conceded that "*Miller v. Alabama* requires the conclusion that Michigan's mandatory life without parole sentencing scheme, specifically M.C.L. 791.234(6), is unconstitutional . . . ." (R. 54, Defs.' Br., Page ID # 677). On January 30, 2013, the District Court entered an Opinion and Order Granting

in Part and Denying in Part Plaintiffs' Motion for Summary Judgment and Denying Defendants' Cross-Motion for Summary Judgment (R. 62, Page ID # 862-67). The District Court declared that Michigan's parole statute, M.C.L. § 791.234(6), by denying the parole board jurisdiction over all prisoners serving mandatory life sentences, was unconstitutional as applied to juveniles. The District Court set a briefing schedule to address what remedial relief would be required to ensure juveniles a fair and meaningful an opportunity for release on parole. (*Id*. at Page ID # 866-67.)

Defendants sought a certificate of appealability for interlocutory appeal of the summary judgment ruling and filed a motion to stay pending appeal (R. 63, Defs.' Mot., Page ID # 868-85). While a decision on this interlocutory appeal was pending, the parties filed their supplemental briefs on the issue of remedial relief on March 1, 2013 and March 22, 2013 (R. 67, Pls.' Br., Page ID # 966-83; R. 73, Defs.' Supplemental Br., Page ID # 1074-90).

Concerned that Defendants were continuing to enforce a statute declared unconstitutional against Plaintiffs and other similarly situated juveniles, on March 29, 2013, Plaintiffs filed a Motion for Ruling on Scope of Summary Judgment Order, or, in the Alternative, Motion to Reconsider and Revise July 2011 Order Regarding the Statute of Limitations, or, in the Alternative, Motion to Reinstate Plaintiffs on Equal Protection Grounds (R. 75, Page ID # 1119-47).

On May 21, 2013, Plaintiffs filed a Motion for Class Certification (R. 84, Page ID # 1270-84). Combined, these motions sought assurance that the District Court's opinion and order of January 31, 2013 applied to all similarly situated juveniles.

On August 12, 2013, the District Court entered an Order Denying Defendants' Motion for Entry of Final Judgment or for Certification of Interlocutory Appeal. (R. 93, Page ID # 1381.) On the same day, the District Court granted Plaintiffs' motion for clarification, concluding that "MC.L. § 791.234(6)(a) is unconstitutional as applied to *all* juveniles who were convicted when they were under the age of eighteen." (R. 95, Order Granting Pls.' Mot., Page ID # 1386). Consequently, the Court denied as moot Plaintiffs' motion for class certification. (*Id.* at Page ID # 1387.)

Six months after the District Court's ruling, Defendants had failed to take any steps to implement the District Court's ruling including development of a plan to provide affected youth with a meaningful opportunity to obtain release through parole.

On November 26, 2013, the District Court issued an Order requiring Defendants to submit a plan that affords youth a meaningful and realistic opportunity consistent with *Miller*, on or before January 31, 2014. (R. 107, Order Requiring Immediate Compliance with *Miller*, Page ID # 1442-44.) The Court

also set constitutional parameters for crafting parole procedures.

Defendants next filed a Notice of Appeal on December 5, 2013, and a day later filed a motion for stay and a motion for immediate consideration with the District Court (R. 110, Defs.' Mot. for Stay, Page ID # 1449-56; R. 108, Notice of Appeal, Page ID # 1445-47). On December 19, 2013, the District Court denied the stay (R. 116, Order Den. Mot. for Stay, Page ID # 1483-85).

On December 19, 2013, Plaintiffs cross-appealed the District Court's Orders of July 15, 2011 and February 21, 2012 insofar as they dismissed some of the plaintiffs on statute of limitations grounds and Plaintiffs' due process and customary international law claims, as well as the District Court's Order of August 12, 2013, insofar as it denied as moot Plaintiffs motion for class certification. (R. 117, Pls.' Notice of Cross-Appeal, Page ID # 1486-88.)

SUMMARY OF ARGUMENT

It is uncontested that Michigan's parole statute, M.C.L. § 791.234(6), is unconstitutional because it deprives over 363 youth who are currently serving life sentences for first degree homicide offenses with any opportunity for parole consideration. The District Court did not abuse its discretion in ordering Defendants to stop enforcing the unconstitutional statute and to implement a process ensuring that these youth are given a meaningful and realistic opportunity for release as required by the Eighth Amendment.

First, the District Court properly rejected Defendants' argument that Plaintiffs' claims are not cognizable under 42 U.S.C. § 1983. Plaintiffs' claims do not lie at the "core" of habeas corpus, and are therefore not barred by the *Preiser*/*Heck* doctrine. Success on Plaintiffs' claims would not necessarily lead to their speedier release from prison. Nor are Plaintiffs' claims barred by the *Teague* non-retroactivity doctrine (*Teague v. Lane*, 489 U.S. 288 (1989)) because *Teague* applies only in collateral habeas challenges seeking to vacate a criminal judgment, not in § 1983 actions. Finally, the Eleventh Amendment is no bar to Plaintiffs' claims because they seek prospective relief, not damages.

Second, the District Court did not abuse its discretion in ruling that Defendants may not enforce M.C.L. § 791.234(6) against any juvenile serving a mandatory life sentence. Because the law is unconstitutional, Defendants were properly enjoined from enforcing it against all juveniles, including juveniles who are not named plaintiffs in this case. Alternatively, the District Court should be permitted to consider whether to certify a class. Furthermore, because the enforcement of M.C.L. § 791.234(6) is a continuing Eighth Amendment violation and the appropriate remedy for the violation is a parole system compliant with *Graham* and *Miller*, neither the statute of limitations nor the ripeness doctrine is a bar to relief.

Third, the District Court's November 26, 2013 order is an appropriate equitable remedy to ensure Plaintiffs are provided with an opportunity to obtain release that is meaningful and realistic. Plaintiffs presented uncontested evidence that the State's current parole system does not provide such an opportunity. The District Court's order was appropriately and narrowly tailored to remedying those defects.

Fourth, as an alternative basis for the relief ordered by the District Court, the requirement that parole opportunities for Plaintiffs be meaningful and realistic is required under the Due Process Clause of the Fourteenth Amendment because the Supreme Court's decisions in *Graham* and *Miller* establish a liberty interest in parole for juveniles.

Fifth, as an alternative reason why the District Court's November 26, 2013 order is not an abuse of discretion, the continued denial of parole opportunities for youth who are imprisoned for life violates customary international law enforceable through 42 U.S.C. § 1983.

The District Court's November 26, 2013 order should be affirmed.

STANDARD OF REVIEW

Appellees-Cross Appellants (Plaintiffs) concur in Appellants-Cross Appellees' (Defendants') assessment of the appropriate standard of review in this

appeal, as set forth in this Court's opinion in *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006).

ARGUMENT

I. Plaintiffs' Constitutional Claims are Cognizable Under 42 U.S.C. § 1983.

The Supreme Court's decision in *Miller v. Alabama* confirms that mandatory life imprisonment carrying no possibility of parole is an unconstitutional punishment to impose on juveniles. There is no dispute that Plaintiffs are among over 360 juveniles in Michigan currently being punished in this manner. Nonetheless, Defendants challenge the District Court's authority to order any relief at all.

Defendants mischaracterize Plaintiffs' complaint as a habeas corpus petition and argue that their claims are not cognizable under 42 U.S.C. § 1983. Defendants then borrow from habeas case law to argue that *Miller* cannot be "retroactively" applied to grant Plaintiffs parole eligibility. They further argue that this supposedly "retroactive" relief violates state sovereign immunity under the Eleventh Amendment.

As recognized by the District Court, these arguments fail. Because Plaintiffs do not challenge the fact or duration of their conferment, and because they are not seeking to collaterally challenge their convictions or sentences, their claims are

cognizable under § 1983. Plaintiffs are also entitled to prospective relief from Defendants' continuing application of Michigan's no-parole statute, M.C.L. § 791.234(6), to juveniles serving mandatory life sentences.

A. Plaintiffs' claims are not barred by the Preiser/Heck doctrine.

It is critical to clarify the nature of the relief Plaintiffs seek. Plaintiffs are challenging the constitutionality of a parole statute, M.C.L. § 791.234(6),[2] that denies parole consideration to juveniles serving mandatory life sentences. Plaintiffs seek relief from the continuing application of this statute against them, i.e., they seek parole *consideration*.[3] Relief on Plaintiffs' claims will not necessarily result in their release from prison. If Plaintiffs prevail, the State will retain its authority to keep Plaintiffs in prison for the rest of their lives. Whether Plaintiffs will ever convince the State of their actual suitability for release is a question for another day.

Defendants nevertheless assert that "Plaintiffs are seeking to shorten the length of actual confinement by attempting to obtain parole." Defs.' Br. at 19. From this premise, Defendants invoke the Supreme Court's *Preiser*/*Heck*

[2] For ease of reference, the text of M.C.L. § 791.234 is reproduced as Appendix A.

[3] By operation of state law, prisoners serving life sentences to whom M.C.L. § 791.234(6) does not apply *are* eligible for parole under M.C.L. § 791.234(7), which gives the parole board jurisdiction over other prisoners serving life sentences. *See* Appendix A.

doctrine,[4] which states that a prisoner may not use § 1983 to obtain an injunction requiring speedier release or that would necessarily imply the invalidity of the inmate's custody. Defs.' Br. at 17-18 (citing *Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005)). Defendants misapply *Preiser/Heck* to this case. Relief here would not require Plaintiffs' speedier release, nor would it necessarily imply that their continued state custody is invalid. Therefore, the District Court properly held that the *Preiser*/*Heck* doctrine does not bar Plaintiffs' claims. (R. 31, Op. & Order, Page ID # 474-475.)

The U.S. Supreme Court has repeatedly held that the *Preiser*/*Heck* doctrine bars only those claims that, if successful, "would *necessarily* demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005) (emphasis added). By contrast, where a plaintiff's success on a claim would *not* necessarily entail a speedier release or the invalidity of the conviction, the § 1983 case may proceed. *Id.* at 82; *Heck*, 512 U.S at 487. As the Supreme Court emphasized in *Nelson v. Campbell*, 541 U.S. 637, 647 (2004), and again in *Skinner v. Switzer*, 131 S. Ct. 1289, 1298-99 (2011), "[W]e were careful in *Heck* to stress the importance of the term 'necessarily.'" And, as recognized by this Court in *Thomas v. Eby*, 481 F.3d 434, 439 (6th Cir. 2007), "[*Wilkinson v.*] *Dotson*

[4] *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Heck v. Humphrey*, 512 U.S. 477 (1994).

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" (alteration in original).

In *Dotson*, the Supreme Court held that challenges to the denial of parole eligibility do not lie "at the core of habeas corpus" and may be brought in a § 1983 action. *Dotson*, 544 U.S. at 82. Success on such challenges achieves only "*consideration* of a new parole application . . . or at most a new parole hearing." *Id.* Officials may ultimately deny the prisoner release on parole. *Id.* These claims thus do not "necessarily spell speedier release." *Id.*

More recently, in *Skinner v. Switzer*, 131 S. Ct. at 1298-99 & n.13, the Supreme Court relied heavily on *Dotson* in allowing a prisoner's § 1983 claim to proceed. The plaintiff in that case sought postconviction access to DNA testing to prove his innocence. Success on the claim could *eventually* lead to his release from prison. The Court nonetheless held that his § 1983 action was proper because "[w]hile test results might prove exculpatory, that outcome is hardly inevitable." *Id*. at 1298. *Skinner* leaves no doubt that when the relief sought has only a *potential* effect on the fact or duration of confinement, the *Preiser*/*Heck* bar does not apply.

Here, the relief Plaintiffs seek is limited in the same fashion as *Dotson* and *Skinner*: future parole *consideration* that constitutes a meaningful and realistic

opportunity for release. Plaintiffs will remain in prison serving a life sentence irrespective of this suit's outcome.[5] Success on these claims, therefore, would not demonstrate the invalidity of Plaintiffs' confinement, nor would it necessarily shorten the duration of their confinement. Consequently, the *Preiser*/*Heck* bar does not apply.

Defendants attempt to distinguish *Dotson* by arguing that "Plaintiffs' parole exclusion is by operation of law" and that Plaintiffs are not "subject to parole review." Defs.' Br. at 20. Defendants cite no authority for this distinction, and none exists. In fact, in the Supreme Court's latest rejection of a *Preiser*/*Heck* defense to a § 1983 suit, the plaintiff sought postconviction access to DNA testing based specifically on the claim that a *state law* denying him such access was unconstitutional. *See Skinner*, 131 S. Ct. at 1298. The critical inquiry is whether success in this action would *necessarily* demonstrate the invalidity of Plaintiffs' confinement or necessarily shorten its duration. *Dotson*, 544 U.S. at 82. Because it will not, Defendants' distinction is of no moment.[6]

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[5] *See Foster v. Booker*, 595 F.3d 353, 362 (6th Cir. 2010) (recognizing that for parole-eligible prisoners serving life sentences in Michigan, there is a "significant risk" that they will remain in prison for the rest of their lives); *see also* M.C.L. § 791.234(7) (stating that prisoners serving life sentences other than those listed in M.C.L. § 791.234(6) are subject to the jurisdiction of the parole board and *may* be released on parole).

[6] Defendants cite an unpublished decision for the unremarkable proposition that the *revocation* of parole must be challenged in habeas, not under § 1983. Defs.' Br. at

Defendants also argue that Plaintiffs' claims are barred by the *Preiser*/*Heck* doctrine because ineligibility for parole is part of their "punishment." Defs.' Br. at 20. This assertion also misses the mark. Section 1983 allows suits for violations of the Eighth Amendment prohibition on cruel and unusual punishments. *See, e.g.*, *Nelson v. Campbell*, 541 U.S. 637 (2004) (allowing § 1983 method-of-execution challenge). The *Preiser*/*Heck* doctrine bars only those claims seeking relief that will necessarily terminate custody or shorten its duration, the core function of a writ of habeas corpus. *See Dotson*, 544 U.S. at 85 (Scalia, J., concurring) ("I am in full agreement with the Court's holding that because neither prisoner's claim would necessarily spell speedier release, neither lies at the core of habeas corpus and both may be brought under [§ 1983].") (internal quotation marks omitted).

Additionally, although Plaintiffs do assert that their ineligibility for parole is cruel and unusual punishment, Plaintiffs are not bringing a collateral challenge to the criminal judgments authorizing their imprisonment. Under Michigan law, several statutes operate together to result in over 360 juveniles being subjected to a mandatory punishment of life in prison with no meaningful opportunity for release. One statute, M.C.L. § 750.316, is the section of the Michigan Penal Code that

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21. Naturally, a prisoner challenging the revocation of his parole must do so through habeas insofar as his success will *necessarily* result in his release from custody. *See Pickens v. Moore*, 806 F. Supp. 2d 1070, 1074 (N.D. Ill. 2011).

mandates a life sentence for all first-degree murder convictions. *See* Appendix B.[7] Another statute, M.C.L. § 769.1, is the section of the Michigan Code of Criminal Procedure that requires that children as young as 14 be sentenced in the same manner as adults. Plaintiffs are not challenging the constitutionality of these statutes, which form the basis for their criminal judgments of conviction and sentence.

Instead, Plaintiffs challenge the constitutionality of a third statute, M.C.L. § 791.234(6), the section of the Michigan Corrections Code that deprives the parole board of jurisdiction over prisoners serving life sentences for certain offenses, including first-degree murder. As recognized by the Michigan Court of Appeals in *People v. Carp*, 298 Mich. App. 472; 828 N.W.2d 685 (Mich. Ct. App. 2012), *lv. granted*, 838 N.W.2d 873 (Mich. 2013), M.C.L. § 791.234(6) is unconstitutional under *Miller* because it denies parole eligibility to prisoners, including juveniles, who are serving mandatory life sentences.[8]

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[7] In March 2014, the Michigan Legislature amended M.C.L. § 750.316, which now mandates "life without eligibility for parole" for adults and refers the reader to a different statute for juveniles. For the Court's convenience, Appendix B to this brief reproduces the text of M.C.L. § 750.316 as it existed before the amendment. At the time Plaintiffs were convicted, the mandatory sentence under M.C.L. § 750.316 for all persons convicted was simply "imprisonment for life."

[8] In *Carp*, the question was whether juveniles whose convictions were final when *Miller* was decided are entitled to resentencing, not, as in this case, whether juveniles who are serving a mandatory life sentence are entitled to parole eligibility. As discussed *infra*, the retroactivity test for a collateral challenge to the

The section of the Corrections Code at issue, M.C.L. § 791.234, divides all prisoners who were "sentenced to imprisonment for life" into two classes for parole eligibility. M.C.L. § 791.234(6), (7). For prisoners serving a life sentence for second-degree murder pursuant to a conviction under M.C.L. § 750.317, the parole board is permitted to exercise jurisdiction and may place the prisoner on parole if certain criteria are satisfied. M.C.L. § 791.234(7). By contrast, for prisoners serving the mandatory life sentence for first-degree murder pursuant to a conviction under M.C.L. § 750.316, these prisoners are not eligible for parole and will never be meaningfully considered for release. M.C.L. § 791.234(6).

M.C.L. § 791.234(6) regulates only the parole board, not the criminal court. If enforcement of M.C.L. § 791.234(6) is enjoined as to juveniles serving a mandatory life sentence, by operation of law M.C.L. § 791.234(7) provides that they will be eligible for parole consideration. *See* M.C.L. § 791.234(7) ("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, an injunction against Defendants' application of M.C.L. § 791.234(6) to juveniles would not call into question the validity of a single conviction or sentence; it would simply mean that, under

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validity of a sentence is irrelevant to the question presented in this case, which is whether Plaintiffs are entitled to declaratory and injunctive relief from the no-parole statute under § 1983.

M.C.L. § 791.234(7), Plaintiffs would be eligible for consideration by the parole board.

Defendants respond that in *Miller* the Supreme Court allows only the "sentencer" to decide whether a juvenile should be eligible for parole. Defs.' Br. at 22. To the contrary, *Miller* "hold[s] 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. The Eighth Amendment thus prohibits Michigan from punishing youth with a combination of a mandatory life sentence, M.C.L. § 750.316, and no opportunity for parole, M.C.L. § 791.234(6). *See Miller*, 132 S. Ct. at 2460 (identifying a life sentence *with* the possibility of parole as an alternative punishment that would not violate the Eighth Amendment). Relying on this component of *Miller*, Plaintiffs do not seek sentencing relief, but an opportunity for parole. *Preiser/Heck* has no application.

B. Plaintiffs do not seek "retroactive" relief barred by the Teague doctrine or the Eleventh Amendment.

Continuing to mischaracterize Plaintiffs' claims as collateral challenges to their criminal sentences, Defs.' Br. at 27, Defendants argue that the relief they seek is barred because the Supreme Court's *Miller* decision is not "retroactive." Defendants also argue that such "retroactive" relief would somehow violate the Eleventh Amendment. Defs.' Br. at 26. These arguments must fail.

1. The *Teague* retroactivity doctrine for habeas review of criminal judgments is inapplicable.

Citing *Teague* , 489 U.S. 288, Defendants argue that *Miller* is not "retroactive" to "cases that were final on direct review" at the time it was decided. Defs.' Br. at 27-40. In collateral challenges to the validity of a criminal judgment, the *Teague* retroactivity doctrine is relevant to the question of whether the sentence must be vacated and a new sentence imposed. Here, the question is whether Defendants' continuing application of the no-parole statute to juveniles serving mandatory life sentences violates the Eighth Amendment and should be enjoined. As the District Court properly held, "[t]his case is not . . . before the court on collateral review" (R. 62, Op. & Order, Page ID # 864), and therefore, *Teague* does not apply.

"The purpose of *Teague* is to promote the finality of state-court *judgments*." *Gilmore v. Taylor*, 508 U.S. 333, 351 (1993) (O'Connor, J., concurring) (emphasis added). Although "a criminal judgment necessarily includes the sentence imposed," *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989), it does not include non-habeas postconviction matters that can be litigated through 42 U.S.C. § 1983. As explained above, Plaintiffs' success in this § 1983 case will not undermine their criminal judgments or life sentences. Plaintiffs' claims do not lie at the "core of habeas corpus," *Dotson*, 544 U.S. at 82 (quoting *Preiser*, 411 U.S. at 489), and are cognizable under § 1983; thus, *Teague* does not bar this suit. Indeed, this Court

has previously rejected the State of Michigan's effort to apply *Teague* outside of the habeas context, ruling in *Alabama v. Engler*, 85 F.3d 1205, 1209 (6th Cir. 1996), that "*Teague* concerned the finality of criminal convictions, and has never been applied to a civil proceeding . . . ."

The correct rule is that which applies to all civil cases:

> When [the Supreme Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect *in all cases still open* on direct review *and as to all events, regardless of whether such events predate or postdate our announcement of the rule*.

Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993) (emphasis added). Because *Miller* was decided while this case was pending, it governs Plaintiffs' Eighth Amendment claims. (*See* R. 62, Op. & Order, Page ID # 864, citing *Harper*.)[9]

2. Plaintiffs' claims seeking injunctive relief against state officials are not barred by the Eleventh Amendment.

[9] In any event, it should be noted that the trend among state courts considering this issue on collateral review is to hold that *Miller* is retroactive under *Teague*. *See People v. Davis*, 6 N.E.3d 709 (Ill. 2014); *Ex parte Maxwell*, 424 S.W.3d 66 (Tex. 2014); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *Diatchenko v. District Attorney for Suffolk*, 1 N.E.3d 270 (Mass. 2013); *Jones v. State*, 122 So.3d 698 (Miss. 2013); *State v. Mantich*, 842 N.W.2d 716 (Neb. 2014). Therefore, if this Court does conclude that the availability of § 1983 relief for Plaintiffs is dependent on *Miller* being retroactive under *Teague*, Plaintiffs urge the Court to find in favor of retroactivity for the reasons stated by the supreme courts of Illinois, Iowa, Massachusetts, Mississippi, Nebraska, and Texas.

Asserting that the District Court's order "provides retroactive relief intended to correct [and change] the sentences imposed on the Plaintiffs," Defendants argue that the injunctive relief sought by Plaintiffs is barred by an Eleventh Amendment prohibition on "retroactive relief intended to correct past actions." Defs.' Br. at 26. Defendants' argument is without merit.

It is well-settled that although the Eleventh Amendment prohibits suits for injunctive relief against the State itself, suits for injunctive relief against state officers in their official capacity are permitted by the *Ex parte Young* doctrine. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989). Furthermore, while the Eleventh Amendment shields the State from lawsuits for money damages, there is no general Eleventh Amendment protection from lawsuits that seek injunctive relief from cruel and unusual punishment. *Kentucky v. Graham*, 473 U.S. 159, 169 & n.18 (1985).

Inexplicably, Defendants invoke *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). *Pennhurst* holds that federal courts may not order state officials to comply with *state* law. There is no Eleventh Amendment bar on federal courts enjoining state officials from failing to comply with the *federal* Constitution. *Id.* at 102.

Defendants also cite *Edelman v. Jordan*, 415 U.S. 651, 677 (1974), which held that the Eleventh Amendment prohibits "a retroactive award *which requires*

the payment of funds from the state treasury" (emphasis added). *Edelman* has no relevance to claims for injunctive orders that do not involve monetary relief. *See Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977).

In compliance with *Ex parte Young*, Plaintiffs have sued state officials in their official capacity, not the State itself. Plaintiffs seek declaratory and injunctive relief, not damages or any other form of monetary compensation. There is no Eleventh Amendment violation.

II. The District Court did not abuse its discretion in prohibiting Defendants from enforcing M.C.L. § 791.234(6) against all juveniles serving a mandatory life sentence.

Defendants argue that even if 42 U.S.C. § 1983 permits Plaintiffs to challenge the constitutionality of M.C.L. § 791.234(6), only the individually named plaintiffs may benefit from a declaration that it is unconstitutional. The District Court therefore abused its discretion in prohibiting Defendants from continuing to enforce M.C.L. § 791.234(6) against non-plaintiff juveniles also serving a mandatory life sentence. (Defs.' Br. at 47.)

Defendants are wrong. The District Court's order was a proper exercise of discretion. Under 42 U.S.C. § 1983 the District Court has the authority to order equitable relief that prohibits Defendants from continuing to enforce an unconstitutional statute, even if not everyone being harmed by the unconstitutional activity is currently a plaintiff and no class has been certified. Alternatively,

Plaintiffs should be permitted to proceed as representatives of a certified class. Further, contrary to Defendants' arguments, none of the juveniles' claims are barred by the statute of limitations, and their claims are ripe.

A. The District Court did not abuse its discretion in enjoining Defendants from enforcing M.C.L. § 791.234(6).

The District Court declared M.C.L. § 791.234(6) unconstitutional because it prohibits the parole board from giving parole consideration to juveniles serving mandatory life sentences. (R. 62, Op. & Order, Page ID # 863; R. 95, Order Granting Pls. Mot., Page ID # 1386). This conclusion is not dependent on any plaintiff's individualized circumstances. All juveniles serving the mandatory life sentences at issue are suffering the same Eighth Amendment violation. Accordingly, the District Court did not abuse its discretion in ordering Defendants to treat all juveniles serving mandatory life sentences as parole-eligible.

Because its summary judgment is based on a recognition that M.C.L. § 791.234(6) is unconstitutional with respect to *all* juveniles, the District Court has broad equitable power to prohibit Defendants from enforcing the statute and to require Defendants to provide juveniles with a meaningful opportunity for release. "Article III equity jurisdiction is . . . broad enough to authorize a federal court, once it has found a constitutional violation by a state or local governmental entity, to administer intricate and expansive remedial orders." *Associated Gen. Contractors v. City of Columbus*, 172 F.3d 411, 417 (6th Cir. 1999); *see also*

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."). Here, once the District Court found M.C.L. § 791.234(6) unconstitutional, it had the authority to enjoin Defendants from enforcing it.

The District Court's authority to fashion relief that affects all juveniles also derives from the rule, long recognized in Michigan, that a statute, upon being declared unconstitutional, "is void ab initio." *Stanton v. Lloyd Hammond Produce Farms*, 253 N.W.2d 114, 117 (Mich. 1977) (quoting 16 Am. Jur. 2d, *Constitutional Law* § 177). Thus, once the District Court ruled that M.C.L. § 791.234(6) is unconstitutional, Defendants lost the authority to continue enforcing the statute. *See also Ex Parte Young*, 209 U.S. 123, 159-60 (1908) (state officials lack authority to enforce unconstitutional laws).

Defendants nonetheless assert that because this case is not a certified class action, the District Court cannot grant relief to anyone other than the named plaintiffs. (Defs.' Br. at 47.) However, class certification has not been required in this Circuit in these situations. In *Craft v. Memphis Light, Gas & Water Div.*, 534 F.2d 684, 686 (1976), *aff'd*, 436 U.S. 1 (1978), this Court held:

> As to a Rule 23(b)(2) class asserting claims to injunctive and declaratory relief, the district court properly recognized that such relief to the extent granted would

> accrue to the benefit of others similarly situated and, consequently, . . . no useful purpose would be served by permitting this case to proceed as a class action . . . .

(Alterations and internal quotation marks omitted); *see also Drumright v. Padzieski*, 436 F. Supp. 310, 325 (E.D. Mich. 1977) ("[A]bsent some unusual factors suits for determination of the constitutionality of a . . . statute or regulation should not be treated as a class action" because "[a]ny relief that [an individual] plaintiff may be able to prove himself entitled to will inure to the benefit of all those on whose behalf [the] plaintiff asserts an interest.") (internal quotation marks omitted).

Sister circuits concur with this rule, holding that when a court finds a system-wide statute or policy unconstitutional, it is appropriate to enjoin the policy or practice overall. *See Soto-Lopez v. N.Y. City Civil Serv. Comm'n*, 840 F.2d 162, 168-69 (2d Cir. 1988) (class certification unnecessary to enjoin enforcement of statute because "when it has been held unconstitutional to deny benefits to otherwise qualified persons *on the ground that they are members of a certain group*, the officials have the obligation to cease denying those benefits not just to the named plaintiffs *but also to all other qualified members of the group*") (emphasis added); *see also Clement v. Cal. Dep't of Corr.*, 364 F.3d 1148, 1153 (9th Cir. 2004) (per curiam) (statewide injunction against prison's unconstitutional internet mail policy did not require class certification because "the unconstitutional

policy ha[d] become sufficiently pervasive to warrant system-wide relief" and the Court "[could] conceive of no reason why [the policy] would be valid elsewhere.").

The same is true here. For all juveniles serving a mandatory life sentence, M.C.L. § 791.234(6) is plainly unconstitutional regardless of their individual circumstances. Because the violation is systemic and statewide, the scope of injunctive relief should be systemic and statewide as well.

Tesmer v. Granholm, 333 F.3d 683 (6th Cir. 2003) (en banc), *rev'd on other grounds*, 543 U.S. 125 (2004), on which Defendants rely, is not to the contrary. In *Tesmer*, indigent defendants and two attorneys who accepted criminal appointments challenged a Michigan statute that codified the practice of several state court judges to deny appointed counsel for all defendants who sought a discretionary first appeal after entering pleas of guilty, guilty but mentally ill, or *nolo contendere*. *Id.* at 686. The district court held that the statute and practice violated the due process rights of indigent defendants. *Id.* It then issued a blanket injunction against all state judges, including those who were not defendants in the case. While this Court affirmed the district court's ruling on the merits, it deemed improper the granting of an injunction against non-party state court judges. *See id.* at 702 ("Our deepest concern with the equitable relief fashioned by the district court is that it enjoins *non-party* judicial officers.") (emphasis added). In this case,

the only persons to be enjoined by the District Court's orders are the state party officials.[10]

While *Tesmer* contains a statement that the declaration and injunction in that particular case "applies only insofar as it states the rights of the named attorney-plaintiffs," this statement must be read in context. *See id*. at 702. The relief the district court had ordered swept beyond the named plaintiffs precisely *because* the court enjoined non-party judges. Given the uniquely sensitive nature of enjoining judicial officers, this Court concluded that the prudent course would be for non-party attorneys to assert their suitability for appointment for indigent defendants on an individual basis. *Id.* These unusual concerns are not present here, where the District Court did not enjoin nonparty, state court judges, and where suitability for relief does not turn on individual circumstances.

[10] To the extent Defendants suggest that the District Court's November 26, 2013 order improperly binds non-party state judges by eliminating the so-called "judicial veto" (*see* Defs.' Br. at 50-51), they misinterpret the District Court's order and the role of the judicial veto in the parole process. The "judicial veto" is not a court order issued by state judges; it is an ex parte, non-adjudicatory "written objection" that a state judge files with the parole board. *See* M.C.L. § 791.234(8)(c). Under current law, when a written objection is filed, the parole board is prohibited by statute from taking further steps in the parole process. *Id.* Accordingly, the District Court's November 26, 2013 order does not bind non-party judges or prohibit them from issuing written objections; it merely requires Defendants to establish a parole process for juveniles that treats a state judge's written objection as precatory, not as an outcome-determinative "veto." As explained *infra*, the District Court did not abuse its discretion in concluding that, in order to provide a meaningful and realistic opportunity for release, Defendants cannot be absolutely bound by a state judge's objection.

Notably, *Tesmer* does not disapprove of *Craft*, *supra*, which previously established the general rule in this Circuit that class certification is unnecessary for systemic constitutional violations. Indeed, *Tesmer* cites *McKenzie v. Chicago*, 118 F.3d 552, 555 (7th Cir. 1997), which expressly recognizes, consistent with *Craft*, that "a judge may overhaul a statutory program without a class action" if prudential considerations so require. Here, granting relief for Plaintiffs requires fundamental alterations in the availability and structure of Michigan's parole system. It would be enormously "inefficient and unnecessary" to make such changes only for Plaintiffs and to force others subject to the same constitutional violation to challenge the same parole statute in separate lawsuits. *Clement*, 364 F.3d at 1153. Defendants essentially request a splintering of their own parole system. Such an unwieldy path would create as many disparate, and potentially contradictory, parole systems as there were lawsuits. The wiser course is to implement one round of systemic reform, guided by one district court.

B. Alternatively, the District Court should be permitted to consider whether to certify a class.

If this Court concludes class certification was necessary for the District Court to order Defendants to treat as parole-eligible all juveniles serving mandatory life sentences, it should remand to the District Court to consider Plaintiffs' request for class certification. (*See* R. 84, Pls.' Mot. for Class

Certification.)[11] The class would consist of all juveniles serving mandatory life sentences and being denied parole consideration under M.C.L. § 791.234(6). Certification would be pursuant to Rule 23(b)(2). (*See* R. 84, Page ID # 1272, ¶ 9).

C. Juveniles' claims are not barred by a statute of limitations.

Defendants also contend that the District Court improperly ordered systemic relief because most prisoners' claims are outside a three-year statute of limitations for lawsuits brought under 42 U.S.C. § 1983. (Defs.' Br. at 23.) At the motion-to-dismiss stage, the District Court agreed with Defendants that some plaintiffs were barred by a statute of limitations. (R. 31, Op. & Order, Page ID # 468-71.) Plaintiffs subsequently asked the District Court to revisit that determination based on new law and new evidence. (R. 75, Pls.' Mot. for Ruling on Scope of Summ. J., Page ID # 1135-1140.) Because the District Court ruled that its summary-judgment decision prohibits Defendants from enforcing M.C.L. § 791.234(6) against any juvenile, it did not revisit the statute-of-limitations ruling. (R. 95, Order Granting Mot. for Ruling on Summ. J., Page ID # 1386-87.)

"[T]he continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations." *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997) (citing *Va. Hosp. Ass'n v. Baliles,* 868 F.2d 653,

[11] The District Court denied this motion as moot, assuming that its summary judgment order would apply to all juveniles serving mandatory life sentences. (R. 95, Order Granting Pls.' Mot., Page ID # 1387.)

663 (4th Cir. 1989), *aff'd,* 496 U.S. 498 (1990)) (internal quotation marks omitted). Based on this longstanding Sixth Circuit precedent, the District Court's dismissal of all the original plaintiffs except Keith Maxey on statute-of-limitations grounds was improper and should be reversed. Defendants are also incorrect that the statute of limitations prohibits the District Court from ordering injunctive relief that inure to the benefit of all juveniles subjected to M.C.L. § 791.234(6).

The gravamen of Plaintiffs' suit is that Defendants' ongoing enforcement of M.C.L. § 791.234(6) deprives Plaintiffs, who are serving mandatory life sentences for offenses committed when they were under the age of 18, of their fundamental Eighth Amendment right to a meaningful opportunity for release. *See Miller*, 132 S. Ct. at 2469 (citing *Graham*, 560 U.S. at 75). Defendants' enforcement of the no-parole statute constitutes a "continuing violation," which prevents Plaintiffs' claims from expiring under the applicable three-year statute of limitations.

Kuhnle requires finding a continuing violation. Kuhnle, a trucking company, brought a substantive due process challenge to a truck traffic ban that allegedly infringed on its fundamental right to intrastate travel. *Kuhnle*, 103 F.3d at 521-22. Because there was a fundamental liberty interest at stake, the Court determined that "each day that the invalid resolution remained in effect, it inflicted 'continuing and accumulating harm' on Kuhnle." *Id.* (quoting *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15 (1968)); *see also Tanco v.*

Haslam, No. 3:13-CV-01159, 2014 WL 997525 (M.D. Tenn. filed Mar. 14, 2014) ("Where, as here, a law impinges each day on a plaintiff's constitutional rights, a new limitations period begins to run each day as to that day's damage.") (citing *Kuhnle*, 103 F.3d at 522) (internal quotation marks omitted). This Court explained that "[a] law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within [the applicable limitations period]." *Id.* at 522; *accord Knox v. Davis*, 260 F.3d 1009, 1017 (9th Cir. 2001) (relying on *Kuhnle* to clarify accrual of limitations period).

As in *Kuhnle*, Defendants' continued enforcement of M.C.L. § 791.234(6) in violation of the Eighth Amendment cannot be insulated from challenge by the statute of limitations. By its terms, "[t]he Eighth Amendment categorically prohibits the infliction of cruel and unusual punishments." *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). Relying on this right as it has evolved[12] through *Graham* and *Miller*,

[12] As the Supreme Court has repeatedly held, the Eighth Amendment's requirements reflect "evolving standards of decency that mark the progress of a maturing society." *Miller*, 132 S. Ct. at 2463 (internal quotation marks omitted). "Punishments that did not seem cruel and unusual at one time may, in light of reason and experience, be found cruel and unusual at a later time." *Graham*, 560 U.S. at 85 (Stevens, J., concurring). In light of this unique status of Eighth Amendment law in our constitutional jurisprudence, this Court should be hesitant to accept the notion that a statute of limitations could bar relief in a case where the

Plaintiffs assert that, by blocking any access to a meaningful opportunity for parole, Defendants are enforcing "punishment that the law cannot impose." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). Plaintiffs therefore suffer cruel and unusual punishment each day M.C.L. § 791.234(6) remains in effect, and Defendants' enforcement of this unconstitutional statute inflicts "continuing and accumulating harm." *Kuhnle*, 103 F.3d at 521-22.[13]

The District Court rejected Plaintiffs' continuing violations argument, relying instead on this Court's cases determining the accrual date for method-of-execution claims. (R. 31, Op. & Order, Page ID # 470, discussing *Broom v. Strickland*, 579 F.3d 553 (6th Cir. 2009)). The District Court thus concluded that Plaintiffs' claims accrued "upon the conclusion of direct review of their

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individuals seeking relief are still being punished and where the contours of the underlying constitutional right are continually evolving.

[13] In addition to arguing that *Kuhnle* governs this case as a matter of law, Plaintiffs presented the District Court with uncontested evidence that the parole board literally reviews *every* life-sentenced prisoner's file periodically (after the prisoner has served ten years and once every five years thereafter) and summarily rejects parole consideration for those prisoners who are ineligible for parole under M.C.L. § 791.234(6). (R. 75, Pls. Mot. for Ruling on Scope of Summ. J., Page ID # 1139-40; R. 75-3, Pls.' Parole Docs., Page ID # 1175-1215.) This evidence further demonstrates that Plaintiffs suffer a constitutional violation on a continuing, ongoing basis, through a "series of decisions" that are "systematically and repeatedly revisited . . . at regular intervals." *Tolbert v. Ohio Dep't of Transp.*, 172 F.3d 934, 940-41 (6th Cir. 1999).

convictions and sentences." (*Id.*, Page ID # 471.) Defendants have adopted the same approach on appeal. (Defs.' Br. at 24.)

Reliance on *Broom* is incorrect. A method-of-execution claim challenges "only the continued risk of future harm" from a discrete event. *Broom*, 579 F.3d at 555 (citing *Walker v. Epps*, 550 F.3d 407, 417 (5th Cir. 2008)). By contrast, Plaintiffs do not challenge an anticipated unlawful event, nor do they challenge the constitutionality of their convictions or life sentences. Rather, Plaintiffs contest their continuing inability to receive meaningful parole consideration, a violation that unfolds over the course of their lives in prison, so long as Defendants refuse to grant them any opportunity for release.[14] *See Heard v. Sheahan*, 253 F.3d 316, 318 (7th Cir. 2001) (citing *Kuhnle*, 103 F.3d at 522-23) (recognizing that every day officials fail to remedy unconstitutional prison condition "mark[s] a fresh infliction of punishment that cause[s] the statute of limitations to start running anew").

D. The ripeness doctrine is inapplicable.

Defendants argue that even if M.C.L. § 791.234(6) is unconstitutional, the individually named plaintiffs would not yet be eligible for parole under M.C.L. §

[14] This reasoning also refutes the District Court's reliance on *Tolbert v. Ohio Dep't of Transp.*, 172 F.3d 934 (6th Cir. 1999), involving a challenge to an environmental impact statement, and *Lovett v. Ray*, 327 F.3d 1181 (11th Cir. 2003), involving a challenge to defendants' decision not to review plaintiff for parole for eight years. In both cases, the plaintiff complained of a discrete, past event that caused continuing ill effects, rather than a continuing unlawful enforcement of presently unconstitutional statute.

791.234(7). Based on this, Defendants conclude that the issue of whether the parole system as it currently operates is fair and meaningful is not ripe.

The ripeness doctrine has no relevance. Ripeness is a limit on the subject-matter jurisdiction of federal courts; it precludes adjudication of claims that are based on speculative or hypothetical harms that may never occur. *See Dealer Computer Servs., Inc. v. Dub Herring Ford*, 547 F.3d 558, 560 (6th Cir. 2008); *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993). In this case, Plaintiffs claim is that M.C.L. § 791.234(6) is unconstitutional. There is nothing remotely speculative or hypothetical about the harm caused by this statute. As a result of this law, Plaintiffs are *currently* facing the rest of their lives in prison and will *never* receive parole consideration.

Because M.C.L. § 791.234(6) violates the Eighth Amendment, changes to the parole process are a question of remedy. Given that the punishment currently being imposed on Plaintiffs is unconstitutional, it is clearly within the District Court's power to order a remedy that would relieve Plaintiffs of that unconstitutional punishment. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (describing scope of district court's equitable powers). The District Court's November 26, 2013 order does just that: it requires to develop a program and process that will provide a fair and meaningful opportunity for parole as required by *Graham* and *Miller*.

Additionally, Defendants' ripeness argument incorrectly assumes that Plaintiffs can claim no injury until they are denied parole. However, as emphasized in Argument Point I, Plaintiffs do not seek a particular parole determination, but a meaningful *opportunity* for parole required by *Graham* and *Miller*. Based on the uncontroverted record evidence, Michigan's current parole system does not provide a meaningful opportunity for release. (R. 67, Pls.' Supplemental Br., Page ID # 967-82.) The District Court thus properly ordered Defendants to create an administrative structure for parole consideration compliant with *Graham* and *Miller*.

Furthermore, the provision of the District Court's November 26, 2013 order that requires Defendants to provide Plaintiffs with the educational and training programs available to other parole-eligible prisoners (R. 107, Order, Page ID # 1443) underscores why the ripeness doctrine does not apply here. Where "the prospect or fear of future events may have a real impact on present affairs," or where "others are conforming to a statute or rule, limiting the opportunit[ies] of the plaintiff," there is no ripeness bar to adjudication of the controversy. 13B Wright & Miller et al., *Federal Practice & Procedure* § 3532.2. As demonstrated by uncontested record evidence (R. 105-1, Exs. to Pls.' Mot., Page ID # 1433-38), Defendants do not allow Plaintiffs to participate in the rehabilitative programming offered to other prisoners, thereby diminishing the likelihood that they will be able

to demonstrate maturity and rehabilitation should they be given parole consideration. *See Graham*, 560 U.S. at 79 (recognizing that the denial of rehabilitative programming creates "the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term"). Plaintiffs' claims are therefore ripe.

III. The District Court's injunctive order is necessary to provide a realistic and meaningful opportunity for release.

After declaring M.C.L. § 791.234(6) unconstitutional, the District Court directed the parties to "provide further briefing on the issue of the procedures that [the] court may equitably put in place to ensure that Plaintiffs receive a fair and meaningful opportunity to demonstrate that they are appropriate candidates for parole." (R. 62, Op. & Order, Page ID # 867.) For months, Defendants continued to enforce the unconstitutional statute while denying that the District Court had authority to order them to adopt new policies for the parole process. (*See* R. 73, Defs.' Supplemental Br.) The District Court subsequently ordered Defendants to submit for approval "a program and process" for constitutionally compliant parole procedures. (R. 107, Order Requiring Immediate Compliance with *Miler*, Page ID # 1443.) On appeal, Defendants maintain that the District Court lacked authority to issue such an order, that Michigan's current sentencing and parole scheme are consistent with *Miller*, and that the specific reforms ordered by the District Court go too far.

Defendants are wrong, both as a matter of law and based on the uncontested evidence in the record. First, *Graham* and *Miller* make clear that where the Eighth Amendment prohibits life imprisonment without the possibility of parole, life-sentenced youth must be given meaningful and realistic opportunities to demonstrate that they are suitable for release. Second, the uncontested record evidence demonstrates that Michigan's parole system does not provide the meaningful and realistic opportunities for release that the Eighth Amendment requires for youth. And third, the District Court's November 26, 2013 order is a proper remedy for the Eighth Amendment violation. Accordingly, this Court should affirm the District Court's order and remand to the District Court for further proceedings.

A. *Graham*, *Miller*, and the Eighth Amendment require that juveniles serving mandatory life sentences for first-degree homicide offenses be given parole opportunities that are meaningful and realistic.

Where *Miller* and *Graham* have prohibited life imprisonment without parole for juveniles, they have held that the opportunity for release from prison during an individual's lifetime must be "meaningful," *Graham*, 560 U.S. at 75, 79, and "realistic," *id*. at 82. *See also Miller*, 132 S. Ct. at 2469 (quoting *Graham*). The District Court properly recognized that because M.C.L. § 791.234(6) is unconstitutional, the appropriate remedy must include a parole consideration

process that is meaningful and realistic as *Miller* and *Graham* require. (R. 62, Op. & Order, Page ID # 866-67.)

Three distinct components of a constitutionally compliant process can be readily discerned from *Graham* and *Miller*. *See generally* Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L.J. 373, 383, 406-27 (2014) (identifying and analyzing three components of the "meaningful opportunity to obtain release" requirement). First, the opportunity for release must come at a meaningful point in time. Especially given a child's "heightened capacity for change," *Miller*, 132 S. Ct. at 2469, juvenile offenders should be given an opportunity to obtain release that allows them sufficient time to reintegrate back into their communities and to become contributing members of society. *See Graham*, 560 U.S. at 79 ("life in prison without the possibility of parole gives no chance of fulfillment outside prison walls, no chance for reconciliation with society, no hope").

Assessing a juvenile's change over time also compels the need for periodic, as opposed to a one-off, review of a prisoner's eligibility for release. Juvenile prisoners mature and reform at different times; periodic review is therefore also necessary to accommodate these differing levels of change and to promote a more accurate assessment of adolescent brain development. (*See* R. 67-5, Steinberg Aff., Page ID # 1009.)

Second, the possibility of release must be realistic. *Graham*, 560 U.S. at 82. Therefore, juveniles who are able to demonstrate that they have matured and are rehabilitated must have a realistic option for release at some meaningful point in time. This conclusion is supported by *Miller*'s strong presumption against sentencing a child to die in prison. *Miller*, 132 S. Ct. at 2469 ("we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon").

Finally, the procedures developed to consider release must be fair and allow for meaningful consideration of the individual's suitability for release based on "demonstrated maturity and rehabilitation." *Miller*, 132 S. Ct. at 2469 (citing *Graham*). If youth do not have a meaningful opportunity to demonstrate maturity and rehabilitation, or if parole authorities do not have a meaningful opportunity to consider whether maturity and rehabilitation has occurred, the process does not comply with *Graham* and *Miller*.

Defendants provide a number of reasons why the District Court lacks authority to require meaningful and fair procedures for parole consideration, none of which are persuasive. First, they point to the fact that in *Graham*, the Court assigned responsibility to "the State, *in the first instance*, *to explore* the means and mechanisms for compliance." *Graham*, 560 U.S. at 75 (emphasis added). (Defs.' Br. at 42.) Although the state *initially* has the authority to determine the

mechanisms and procedures to employ, where those mechanisms and procedures do not comply with the Eighth Amendment there is no question that the federal judiciary is ultimately the arbiter of defining the contours of Plaintiffs' rights, including determining what procedures the state must implement to ensure that those rights are protected. *See Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978) ("[S]tate and local authorities have primary responsibility for curing constitutional violations. If, however, those authorities fail in their affirmative obligations … judicial authority may be invoked." (citations and internal quotation marks omitted)); *see also Kendrick v. Bland*, 740 F.2d 432, 437 (6th Cir. 1984) ("It is fundamental that the federal forum, as the ultimate guardian of constitutional rights, possesses the authority to implement whatever remedy is necessary to rectify constitutionally infirm practices, policies or conduct.").[15]

Here, Defendants had ample opportunity—some ten months from the District Court's declaration that M.C.L. § 791.234(6) is unconstitutional—to explore and formulate the mechanisms and procedures necessary to ensure juveniles in Michigan are given an opportunity for release on parole consistent with Eighth Amendment requirements. Defendants failed – indeed, refused – to do

[15] *See also Hall v. Florida*, No. 12-10882, slip op. at 18-19 (May 27, 2014)) ("If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality.").

so. The District Court properly ordered them to develop an administrative structure for meaningful parole consideration for youth.

Next, Defendants argue that *Miller* itself does not mandate any changes in parole; it merely requires individualized sentencing. (Defs.' Br. at 42.) Although *Miller* arose in the sentencing context, the holding of *Miller* is "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. Here, Plaintiffs and hundreds of other youth are currently serving life sentences that were automatically imposed without consideration of youth-relevant factors. As reflected in *Miller* and *Graham*, the Eighth Amendment requires that youth be given meaningful and realistic consideration before being condemned to die in prison. Because Michigan's scheme of punishment precluded any consideration of Plaintiffs' youthful status and automatically deprives them of parole consideration, as if they were adults, the District Court properly held that the Eighth Amendment requires Defendants to provide meaningful consideration of youthful status in the parole review process.

Additionally, Defendants argue that prisoners have no constitutional right to be released on parole and no state-created liberty interest in the parole process. (Defs.' Br. at 43.) But the cases they cite are not relevant. Plaintiffs are not arguing that they have a right to be released; they are arguing that they have a right

to parole consideration that is meaningful and realistic. Furthermore, whether adults have procedural due process rights in the parole process is a different question from whether children serving mandatory life sentences have Eighth Amendment rights to opportunities for release that are meaningful and realistic. *See Miller*, 132 S. Ct. at 2470 ("We have now held on multiple occasions that a sentencing rule permissible for adults may not be so for children."). Defendants' argument that Plaintiffs can be denied parole "for any reason or no reason at all" (Defs.' Br. at 43) is in direct conflict with the "meaningful opportunity" requirement of *Graham* and *Miller* and demonstrates why the District Court's remedial order was necessary.[16]

B. The uncontested record establishes that the current parole process for lifers does not meet the constitutional requirements for juveniles serving mandatory life sentences.

In response to the District Court's order requesting further input from the parties regarding the need for "what procedures should be in place to ensure that Plaintiffs are fairly considered for parole" (R. 62, Op. & Order, Page ID # 866), Plaintiffs presented the Court with uncontested evidence that Michigan's current parole system does not satisfy the *Graham*/*Miller* standard of providing opportunities for release that are meaningful and realistic. (R. 67, Pls.'

[16] In Argument IV *infra*, Plaintiffs will argue the related point, implicated in their cross-appeal, that a meaningful opportunity for release is also required under the Due Process Clause of the Fourteenth Amendment.

Supplemental Br., Page ID # 967-82.) Plaintiffs have demonstrated the existing parole system for other parole-eligible lifers, *see* M.C.L. § 791.234(7) is not adequate to protect these Plaintiffs' Eighth Amendment right to a meaningful and realistic opportunity for release based upon a demonstration of maturity and rehabilitation.

To illustrate, in Michigan a hearing is a necessary precursor to any decision to grant or deny release on parole. M.C.L. § 791.234(8) (c) (a decision to grant or deny parole shall not be made until after a public hearing is held). However, there are no criteria that the parole board is required to follow in determining whether to provide a parole-eligible individual with a hearing, and the failure to provide a hearing is not subject to any review or appeal. (R. 67, Pls.' Supplemental Br., Page ID # 971.) The parole board need not give any reason for the denial of a hearing and routinely states that it simply has "no interest." (*E.g.*, R. 67-8, A. Jones Lifer Interview & Review Log, Page ID # 1032.) Although the parole board uses guidelines for prisoners serving non-life sentences to assist in parole determinations, M.C.L. § 791.233e, the parole board does not use these guidelines for prisoners serving life sentences. (R. 67-4, Stapleton Aff., Page ID # 1001-02.) Thus, without any parameters, the parole board may simply deny a hearing and thus any opportunity for parole because they do not believe that youth convicted of

first-degree homicide should ever be given an opportunity for parole, or for any other undisclosed reason.[17]

Moreover, even if a public hearing is recommended, prior to the public hearing being held a sentencing judge or the judge's successor in office has the absolute and unreviewable power to prevent a public hearing, and thus the opportunity for parole, simply by filing an objection with the parole board. (R. 67, Pls.' Supplemental Br., Page ID # 970-71, citing M.C.L. § 791.234(8)(c).) A judge's or successor judge's veto may be for any reason or for no reason at all. The judge may veto parole out of ignorance of *Miller* and *Graham*, or because the judge disagrees with *Miller* and *Graham*. No review of any records is required or even provided. As with the parole board decision of whether to hold a hearing or

[17] Plaintiffs presented the District Court with a specific example of how the parole process might work, absent changes to the process. (*See generally* R. 67, Pls.' Supplemental Br., Page ID # 978, 1012-41.) After *Graham v. Florida* was decided, Anthony Jones was ordered parole-eligible by a state court. (R. 67-6, Order Granting Relief from J., Page ID # 1022.) He had served 33 years in prison for an offense committed when he was a juvenile in which he did not kill or intend to kill anyone. *Id*. After becoming parole-eligible, Anthony was interviewed by a member of the parole board, where it was noted that he had substantial community support, he was remorseful, there was no evidence that he presented a threat to public safety, the department of corrections assessed his risk of violence and recidivism as low, and no objection to parole was interposed by the prosecutor's office, by a judge or successor judge, or by the victim's family. Nevertheless the parole board simply stated it had "no interest" in scheduling a public hearing for Anthony and provided no explanation for its decision. (R. 67-7, A. Jones COMPAS Narrative, Page ID # 1024-30; R. 67-8, A. Jones Lifer Interview & Review Log, Page ID # 1032.) Anthony may never get another interview the rest of his life. M.C.L. § 791.234(8)(b).

grant parole the judge is not required to consider evidence of a youth's maturity or rehabilitation. The judicial objection cannot be appealed. Thus, the no-parole statute allows a judge to do precisely what *Miller* and *Graham* forbid—condemn a child to life without parole absent meaningful consideration of their youthful status and its attendant circumstances.

Plaintiffs also provided the District Court with undisputed evidence regarding the importance of providing meaningful consideration to youth in their mid-twenties, the need to place in proper context a young person's institutional record, and the lack of rehabilitative programming and services currently available to prisoners serving life sentences. (R. 67-3, Caruso Aff., Page ID # 992-93; R. 67-4, Stapleton Aff., Page ID # 1001; R. 67-5, Steinberg Aff., Page ID # 1009; R. 105-1, Exs. to Pls.' Mot., Page ID # 1433-38.)

Finally, Plaintiffs informed the District Court—and Defendants did not dispute—that as a result of the policies described above, the vast majority of youth eligible for parole are never even given a hearing. Consequently, these individuals never even have the opportunity to demonstrate maturity and rehabilitation as required under *Graham* and *Miller*. (R. 67, Pls.' Supplemental Br., Page ID # 971-72.) This is despite the fact that, according to uncontested record evidence, 90% of youth who commit antisocial acts in their adolescence grow out of this behavior upon maturity. (R. 67-5, Steinberg Aff., Page ID # 1008-09.)

Defendants did not meaningfully contest any of these facts in the court below, nor do they deny them on appeal. Instead, they simply assert that the current parole process complies with *Graham* and *Miller* and no changes are necessary.[18] Based on the law and the facts, the District Court properly found otherwise.

C. The District Court's injunctive order was a proper exercise of discretion as a remedy for Defendants' continuing failure to provide meaningful opportunities for release.

Where "the mere cessation of the particular activity or method of operation will not serve to remedy the violation," *Associated Gen. Contractors*, 172 F.3d at 417, a district court has broad authority to order an equitable remedy. Here, the District Court properly concluded that an injunction only against the enforcement of the challenged statute, M.C.L. § 791.234(6), would be insufficient to provide Plaintiffs with the meaningful and realistic opportunity for release the Eighth

[18] Defendants also suggest that Michigan has subsequently complied with *Miller* by enacting a new *sentencing* statute, M.C.L. § 769.25. This argument is a red herring. The new legislation specifically states that, unless the Michigan Supreme Court or the U.S. Supreme Court rule otherwise, it does not apply to juveniles whose convictions were final before *Miller* was decided. M.C.L. § 769.25a. Therefore, the vast majority of juveniles serving mandatory life in Michigan will not be resentenced under the new legislation and will continue to be denied parole consideration under M.C.L. § 791.234(6). The District Court properly concluded that, in light of Michigan's refusal to grant new sentencing hearings to youth whose convictions are final, "compliance with *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." (R. 62, Op. & Order, Page ID # 866-67.)

Amendment requires. The District Court's November 26, 2013 order was properly tailored to address the constitutional deficiencies identified above while at the same time empowering Defendants with the ability to develop a constitutionally compliant parole consideration process for juveniles serving mandatory life sentences.

The injunctive relief ordered is fully consistent with *Graham*, *Miller* and the District Court's broad equitable authority under § 1983. To implement its January 30, 2013 declaration that M.C.L. § 791.234(6) is unconstitutional (R. 62, Op. & Order, Page ID # 866), the District Court's November 26, 2013 order requires Defendants to "[c]reate an administrative structure for the purpose of processing and determining the appropriateness of parole" for juveniles serving mandatory life sentences. (R. 107, Order Requiring Immediate Compliance with *Miller*, Page ID # 1442.) Based on record evidence that maturity and rehabilitation can be demonstrated by one's mid-twenties (R. 67-5, Steinberg Aff., Page ID # 1008-09), the order requires that meaningful and realistic parole consideration for youth begin after ten years of imprisonment. (R. 107, Order Requiring Immediate Compliance with *Miller*, Page ID # 1442.) Based on the infrequency with which parole-eligible lifers receive a hearing at which they could meaningfully attempt to demonstrate maturity and rehabilitation (R. 67, Pls.' Supplemental Br., Page ID # 971-72), the order requires that such hearings actually take place. (R. 107, Order

Requiring Immediate Compliance with *Miller*, Page ID # 1443.) For the same reasons, the order prohibits a "no interest" designation or a "judicial veto" from interfering with the availability of a hearing for juveniles who requests one. (*Id*.) To ensure that meaningful consideration is transparent, the order requires that reasons for a denial of parole be recorded. (*Id*.) And, based on the record evidence that the lack of institutional programming interferes with parole being a realistic outcome (R. 67-3, Caruso Aff., Page ID # 993; R. 67-4, Stapleton Aff., Page ID # 1001; R. 67-5, Steinberg Aff., Page ID # 1009; R. 105-1, Exs. to Pls.' Mot., Page ID # 1433-38), the order prohibits Defendants from depriving juveniles of access to such programming. (R. 107, Order Requiring Immediate Compliance with *Miller*, Page ID # 1443.)

Notably, the order does not require Defendants to provide a parole hearing for any individual prisoner by any date certain, does not establish specific procedures for the hearings or mandate the use of guidelines, and does not compel anyone's release. Rather, the Court *tasked Defendants* with developing a schedule and procedures to remedy the constitutional deficiencies in Defendants' current parole process, while recognizing that ultimately each parole decision and outcome is entrusted to the State based on a meaningful and individualized assessment of each prisoner.

The District Court's factual findings were not clearly erroneous, its legal conclusions were sound, and the scope of relief ordered was not an abuse of the Court's discretion. *Women's Medical Professional Corp.*, 438 F.3d at 602. Rather, it is a simple directive to the Defendants to bring its parole procedures into line with constitutional requirements. The District Court's order should be affirmed.

IV. Plaintiffs have a liberty interest in release on parole requiring due process.

In addition to providing proper relief based on Defendants' violation of the Eighth Amendment, the District Court's November 26, 2013 order was not an abuse of discretion because a meaningful and realistic opportunity for release is required by the Due Process Clause of the Fourteenth Amendment. The District Court dismissed Plaintiffs' due process claim, reasoning that Plaintiffs had neither a constitutionally protected nor a state-created liberty interest in release on parole. (R. 31, Op. & Order, Page ID # 477-78.) Because this conclusion was legal error, the District Court's order dismissing Plaintiffs' due process claims should be reversed, and the District Court's November 26, 2013 injunctive order should be affirmed on the alternative grounds that the equitable relief it grants is proper pursuant to those claims.

In addition to establishing substantive Eighth Amendment limitations on the punishment that states can impose on juveniles, *Graham* and *Miller*'s requirement

that states provide juveniles with a meaningful and realistic opportunity for release creates a liberty interest in release on parole that triggers due process protections. "A liberty interest may arise from the Constitution itself, . . . or it may arise from an expectation or interest created by state laws or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). *Graham* and *Miller* establish that, regardless of whether a state's laws or policies create a liberty interest in parole generally, the substantive constitutional limitations on juvenile life-without-parole punishments create a liberty interest in release for juveniles. *See also* Russell, *supra*, 89 Ind. L.J. at 417. Although not guaranteed release, juveniles are entitled to a meaningful chance of release if they demonstrate maturity and rehabilitation. *Miller*, 132 S. Ct. at 2470 (citing *Graham*). Thus, in Michigan, individuals presently serving mandatory life sentences for crimes they committed as children now have a constitutionally protected liberty interest to be considered for release within their lifetimes.

The District Court's reliance on *Michael v. Ghee*, 498 F.3d 372 (6th. Cir. 2007), Supreme Court cases cited therein, and *Juarez v. Renico*, 149 F. Supp. 2d 319 (E.D. Mich. 2001), is misplaced. These cases all concerned the due process rights of adult prisoners who are seeking release on parole. Unlike prisoners sentenced for crimes committed when they were children, adult prisoners have a constitutionally cognizable liberty interest in release on parole only if the interest is created by state law. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442

U.S. 1, 7, 13 (1979); *Jergens v. Ohio Dep't of Rehab. & Corr. Adult Parole Auth.*, 492 F. App'x 567, 569-70 (6th Cir. 2012). As discussed above, *Graham* and *Miller* change this calculus for juvenile prisoners, whose liberty interest in release "arise[s] from the Constitution itself." *Wilkinson*, 545 U.S. at 221.

The requirement that a juvenile's opportunity for release must be "meaningful" and "realistic" means that Defendants must adopt a procedurally fair system for determining periodically whether each individual sentenced as a child is suitable for release, and any decision to deny release must be based on a failure to demonstrate maturity and rehabilitation. Although neither *Graham* nor *Miller* establish the exact nature of the procedural protections to achieve this end, *see Mathews v. Elridge*, 424 U.S 319, 335 (1976) ("Due process is flexible and calls for such procedural protections as the particular situation demands." (internal citations and quotations omitted)), and the state is initially assigned responsibility for crafting procedures, *Graham*, 560 U.S. at 75, ultimately it is for the courts to decide whether they are constitutionally compliant. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541-42 (1985) (holding that the nature of the procedures required by due process is a constitutional question to be answered by the judiciary); *Chandler v. Vill. of Chagrin Falls*, 296 F. App'x 463, 472-73 (6th Cir. 2008). As discussed *supra* in Part III.A, Defendants must provide Plaintiffs with parole procedures that ensure that they are: (1) considered for parole within a

reasonable time; (2) given a realistic opportunity for release based on their demonstrated maturity and rehabilitation; and (3) afforded a meaningful opportunity to be heard. Defendants' existing parole procedures satisfy none of these requirements. *See supra*, Part III.B, C.

By depriving Plaintiffs of periodic, meaningful opportunities to be heard regarding their maturity and rehabilitation, Defendants are depriving Plaintiffs of their procedural due process rights in violation of the Fourteenth Amendment. Accordingly, this Court should reverse the District Court's dismissal of Plaintiffs' due process claims and either affirm the District Court's November 26, 2013 order on these alternative grounds or remand for further proceedings to determine the procedures required to protect Plaintiffs' due process rights to parole hearings that are meaningful and realistic.

V. The customary international norm prohibiting sentencing juveniles to life imprisonment without possibility of release is cognizible under 42 U.S.C. § 1983.

In addition to providing proper relief based on Defendants' violation of the Eighth Amendment, the District Court's November 26, 2014 order was not an abuse of discretion because it is a proper remedy for Defendants' violations of customary international norms as enforceable through 42 U.S.C. § 1983. A § 1983 action provides a remedy "against all forms of official violation of federally protected rights." *Monell v. Dep't of Soc. Servs. of N.Y.C.*, 436 U.S. 658, 660

(1978). Defendants' on-going enforcement of M.C.L. § 791.234(6) to deny Plaintiffs a meaningful opportunity for parole consideration violates the long-established customary international law norm prohibiting the imprisonment of children for life without the possibility of release. This norm confers individual federal rights on Plaintiffs; those rights are being violated; and, absent an alternative remedial scheme, are "presumptively enforceable by § 1983." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284-85 (2002); *see also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106-07 (1989).

In dismissing Plaintiffs' customary international law claims, the District Court erred by conflating intent to create a cause of action based upon customary international law with the test established by the Supreme Court for identification and enforcement of individual federal rights under § 1983. Therefore, the District Court's order dismissing Plaintiffs' customary international law claims should be reversed, and the District Court's remedial November 26, 2013 injunctive order should be affirmed on the additional or alternative grounds that such equitable relief is proper pursuant to those claims.

Federal law authorizes equitable injunctive remedies for violations of "any rights, privileges or immunities secured by the Constitution *and laws*" of the United States. 42 U.S.C. § 1983 (emphasis added). The Supreme Court has given a broad interpretation to the "and laws" clause of § 1983 and has repeatedly

rejected attempts to limit its scope. *Golden State Transit Corp.*, 493 U.S. at 106; *Maine v. Thiboutot*, 448 U.S. 1, 4, 6-8 (1980). Although in *Gonzaga* and *Golden State* the Supreme Court's focus was on individual rights created by federal statute, and no court has yet considered enforcement of individual rights established under customary international law, there is no logical basis for excluding this body of federal law from the remedial scheme established by § 1983. "For two centuries [the Supreme Court has] affirmed that the domestic law of the United States recognizes the law of nations." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004). Moreover, under § 1983, U.S. courts have recognized and enforced individual rights protected by a wide variety of federal laws, other than the Constitution and federal statutes. *See, e.g., Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 431-32 (1987) (federal regulations); *Cuyler v. Adams*, 449 U.S. 433, 442 (1981) ("congressionally sanctioned interstate compact[s]); *Jogi v. Voges*, 480 F.3d 822, 832-36 (7th Cir. 2007) (applying the broad reading of "laws" in *Thiboutot* to find that the violation of rights enshrined in a self-executing treaty are encompassed by the "and laws" component of § 1983). Individual rights established by customary international law should be treated no differently under § 1983.

Customary international law, which forms part of federal common law, long has recognized the prohibition on punishing children with life imprisonment

without possibility of release.[19] The norm's status as custom is evidenced by widely ratified U.N. treaties, international instruments, regional human rights laws and standards, and state practice.[20] The United States is the only nation in the world that sentences children to imprisonment for life without possibility of release.[21] The prohibition is now so widely recognized and the practice so universally condemned that it has attained the level of a *jus cogens* norm of customary international law.[22]

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[19] Customary international law, also known as the law of nations, has long been recognized as forming part of U.S. law, and more specifically, federal common law, binding on the United States and the fifty States. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004); *The Paquete Habana*, 175 U.S. 677, 686 (1900); *Ware v. Hylton*, 3 U.S. 199, 281 (1796); *Chisholm v. Georgia*, 2 U.S. 419, 474 (1793); *see generally*, Am. Law Inst., *Restatement (Third) of the Foreign Relations Law of the United States* § 102(2) (1987).

[20] Article 37(a) of the United Nations Convention on the Rights of the Child, art. 37(a), Nov. 20, 1989, 1577 U.N.T.S. 3, which has been ratified by every country in the world except the United States, Somalia and South Sudan, explicitly prohibits this punishment: "Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offenses committed by persons below 18 years of age." There are at least 135 countries that have expressly disavowed this extreme punishment via domestic legal commitments, and 185 countries have done so in the U.N. General Assembly. *See* Connie De La Vega & Michelle Leighton, *Sentencing Our Children To Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983, 987 (2008); G.A. Res. 61/146, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/146 at 31 (Dec. 19, 2006).

[21] *Id*.

[22] *See* De la Vega and Leighton, *supra*; Br. of Amicus Curiae Amnesty Int'l, et al., *Graham v. Florida*, 130 S. Ct. 2011, No. 08-7412 (July 23, 2009) & *Sullivan v. Florida*, 130 S. Ct. 2059, No. 08-7621 (July 23, 2009). *Jus cogens* norms override

Not only does customary international law form part of U.S. law, violations of this body of federal common law may also give rise to a private cause of action. In *Sosa*, the Court recognized that the Court recognized that federal courts have a limited power "to adapt[] [customary international law] to private rights" by recognizing "a narrow class of international norms" to be judicially enforceable through a federal court's common law discretion to create causes of action. *Sosa*, 542 U.S. at 729-32. The prohibition on life-without-parole punishment for children fits squarely within the class of norms identified by the Court in *Sosa*. As discussed *supra*, the prohibition is unquestionably, "specific, universal, and obligatory." *Id*. at 732 (citations omitted).

A determination as to whether § 1983 is available to remedy violations of Plaintiffs' rights under customary international law is a two-step process. *Golden State Transit Corp.*, 493 U.S. at 107; *see also Gonzaga Univ.*, 536 U.S. at 284-86. First, Plaintiffs must assert violation of an individual federal right prohibiting life-without-parole punishments for children. *Golden State Transit Corp.*, 493 U.S. at 107; *Gonzaga Univ.*, 536 U.S. at 286. Once this is established, "§ 1983 generally supplies a remedy for the vindication of [those] rights," unless the defendant can

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all other sources of international law, including inconsistent treaty provisions and are "accepted by the international community of States as a whole as a norm from which no derogation is permitted...." Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 8 I.L.M. 679. *See also Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988).

rebut the presumption of enforceability by demonstrating that Congress "shut the door to private enforcement either expressly, through specific evidence from the [norm] itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Gonzaga Univ.*, 536 U.S. at 284 n.4; *Golden State Transit Corp.*, 493 U.S. at 107. Courts should "not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." *Wright*, 479 U.S. at 423-24.

Based on this two-part test, the customary international law prohibition of life-without-parole punishment for children unquestionably confers individual rights on the Plaintiffs; those rights are being violated; and they are consequently "presumptively enforceable by § 1983." *Gonzaga Univ.*, 536 U.S. at 284. The norm contains explicit rights-creating language and "unambiguously" confers individual rights on Plaintiffs—as opposed to "broader or vaguer 'benefits' or 'interests,'"—not to be imprisoned without some meaningful opportunity for release during their lifetimes. *Id*. at 283. These federally protected rights are presumptively enforceable under § 1983 because the norm is silent on the question of judicially enforceable remedies for violations of the prohibition, and Congress and the State of Michigan have yet to establish a comprehensive alternative to the § 1983 remedial scheme for vindication of Plaintiffs' rights to be excluded from this ongoing punishment. *See People v. Carp*, 298 Mich. App. 472; 828 N.W.2d

685 (Mich. Ct. App. 2012) (holding that *Miller* will not be applied retroactively), *lv. granted*, 838 N.W.2d 873 (Mich. 2013). Section 1983, therefore, is an available recourse for the vindication of Plaintiffs' federally protected rights.

The District Court's dismissal of Plaintiffs' claim was therefore wrong as a matter of law. The Court conflated the existence of an individual right with intent to provide private judicial enforcement, and also failed to conduct the two-step inquiry required by *Gonzaga* and *Golden State*. (R. 31, Op. & Order, Page ID # 478.) Judicial enforcement of Plaintiffs' individual federal rights is not dependent upon establishment of an inferred cause of action based upon customary international law. *Cf. Thiboutot*, 448 U.S. at 9 (1980) (finding a right to use § 1983 as a cause of action for rights under the Federal Social Security Act, despite holding that the Act itself did not provide a cause of action, implied or otherwise, to vindicate rights under the statute.). All Plaintiffs need show is that the prohibition of juvenile life without parole creates "individual rights," that those rights were violated, and that there is no comprehensive, alternative remedial scheme for their enforcement.

Moreover, *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001) does not support the District Court's dismissal of this claim. In *Buell*, the customary international law claim was raised in the context of a habeas petition and concerned an alleged violation of a customary international law norm prohibiting the death penalty.

Here, Plaintiffs' claims arise from Defendants' violations of the customary international law in a § 1983 action. As this Court held in *Buell*, "[o]ur holding is limited to the question of whether customary international law prevents a State from carrying out the death penalty when it is acting in full compliance with the United States Constitution. We take no position on the question of the role of federal courts to apply customary international law as federal law in other contexts . . . ." *Buell*, 274 F.3d at 376 n.10.

Buell is also distinguishable because there is no customary international law norm prohibiting the death penalty. *Id*. at 373. In contrast, the prohibition on imprisoning children for the rest of their lives without the possibility of parole is well-established, and creates individual federal rights that are judicially enforceable under § 1983. Because there was no legal basis for the District Court's dismissal of Plaintiffs' customary international law claim, this Court should reverse the dismissal of these claims and affirm the District Court's November 26, 2014 order on these alternative grounds.

CONCLUSION

For the reasons set forth above, this Court should affirm the District Court's November 26, 2013 order.

Alternatively, this Court should remand for consideration of Plaintiffs' alternative motion for class certification and, on Plaintiffs' protective cross-appeal, reverse the District Court's orders on the statute of limitations, due process, and/or customary international law.

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Dated: June 2, 2014

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 15,105 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 June 2, 2014, 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

Appellees/ Cross-Appellants, per Sixth Circuit Rule 28(c), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID Number
Opinion and Order	07/15/2011	R. 31	467-479
Motion for Certification of Interlocutory Appeal	07/28/2011	R. 34	488-496
Order Denying Defendants' Motion	01/12/12	R. 42	540-541
Amended Complaint	02/01/2011	R. 44	545-583
Stipulation and Order Applying Court's July 15, Opinion and Order	02/21/2011	R. 46	590-592
Opinion and Order	01/30/2013	R. 62	862-867
Defendant's Motion for Entry of Final Judgment	02/14/2013	R. 63	868-885
Plaintiffs' Briefing in Compliance with Court's Order	03/01/2013	R. 67	966-983

Defendant's Supplemental Brief in Compliance with Court's Order	03/22/2013	R. 73	1074-1090
Motion for Ruling on Scope of Summary Judgment	03/29/2013	R. 75	1119-1147
Plaintiffs' Motion for Class Certification	05/21/2013	R. 84	1270-1284
Order Denying Defendants' Motion for Entry of Final Judgment	08/12/2013	R. 93	1380-1381
Order Granting Motion for Ruling on Scope of Summary Judgment	08/12/2013	R. 95	1386-1388
Motion for Entry of Interim Order of Compliance	11/19/2013	R. 105	1424-1431
Order Requiring Immediate Compliance	11/26/2013	R. 107	1442-1444
Notice of Appeal	12/05/2013	R. 108	1445-1447
Defendants'	12/06/2013	R. 110	1449-1456

Motion for Stay			
Order Denying Motion for Stay	12/19/2013	R. 116	1483-1485
Plaintiffs' Notice of Protective Cross-Appeal	12/19/2013	R. 117	1486-1488

APPENDIX A: M.C.L. § 791.234

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.

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

CORRECTIONS CODE OF 1953 (EXCERPT)
Act 232 of 1953

791.234 Prisoners subject to jurisdiction of parole board; indeterminate and other sentences; termination of sentence; ineligibility for parole; criteria for placement on parole; conditions; interview; release on parole; discretion of parole board; appeal to circuit court; cooperation with law enforcement by prisoner violating MCL 333.7401; offenses occurring before certain date; notice to prosecuting attorney before granting parole; definitions.

Sec. 34. (1) Except as provided in section 34a, a prisoner sentenced to an indeterminate sentence and confined in a state correctional facility with a minimum in terms of years other than a prisoner subject to disciplinary time is subject to the jurisdiction of the parole board when the prisoner has served a period of time equal to the minimum sentence imposed by the court for the crime of which he or she was convicted, less good time and disciplinary credits, if applicable.

(2) Except as provided in section 34a, a prisoner subject to disciplinary time sentenced to an indeterminate sentence and confined in a state correctional facility with a minimum in terms of years is subject to the jurisdiction of the parole board when the prisoner has served a period of time equal to the minimum sentence imposed by the court for the crime of which he or she was convicted.

(3) If a prisoner other than a prisoner subject to disciplinary time is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms, less the good time and disciplinary credits allowed by statute. The maximum terms of the sentences shall be added to compute the new maximum term under this subsection, and discharge shall be issued only after the total of the maximum sentences has been served less good time and disciplinary credits, unless the prisoner is paroled and discharged upon satisfactory completion of the parole.

(4) If a prisoner subject to disciplinary time is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms. The maximum terms of the sentences shall be added to compute the new maximum term under this subsection, and discharge shall be issued only after the total of the maximum sentences has been served, unless the prisoner is paroled and discharged upon satisfactory completion of the parole.

(5) If a prisoner other than a prisoner subject to disciplinary time has 1 or more consecutive terms remaining to serve in addition to the term he or she is serving, the parole board may terminate the sentence the prisoner is presently serving at any time after the minimum term of the sentence has been served.

(6) A prisoner sentenced to imprisonment for life for any of the following is not eligible for parole and is instead subject to the provisions of section 44:

(a) First degree murder in violation of section 316 of the Michigan penal code, 1931 PA 328, MCL 750.316.

(b) A violation of section 16(5) or 18(7) of the Michigan penal code, 1931 PA 328, MCL 750.16 and 750.18.

(c) A violation of chapter XXXIII of the Michigan penal code, 1931 PA 328, MCL 750.200 to 750.212a.

(d) A violation of section 17764(7) of the public health code, 1978 PA 368, MCL 333.17764.

(e) First degree criminal sexual conduct in violation of section 520b(2)(c) of the Michigan penal code, 1931 PA 328, MCL 750.520b.

(f) Any other violation for which parole eligibility is expressly denied under state law.

(7) 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 according to the conditions prescribed in subsection (8) if he or she meets any of the following criteria:

(a) Except as provided in subdivision (b) or (c), the prisoner has served 10 calendar years of the sentence for a crime committed before October 1, 1992 or 15 calendar years of the sentence for a crime committed on or after October 1, 1992.

(b) Except as provided in subsection (12), the prisoner has served 20 calendar years of a sentence for violating, or attempting or conspiring to violate, section 7401(2)(a)(*i*) of the public health code, 1978 PA 368, MCL 333.7401, and has another conviction for a serious crime.

(c) Except as provided in subsection (12), the prisoner has served 17-1/2 calendar years of the sentence for violating, or attempting or conspiring to violate, section 7401(2)(a)(*i*) of the public health code, 1978 PA 368, MCL 333.7401, and does not have another conviction for a serious crime.

(8) A parole granted to a prisoner under subsection (7) is subject to the following conditions:

(a) At the conclusion of 10 calendar years of the prisoner's sentence and thereafter as determined by the parole board until the prisoner is paroled, discharged, or deceased, and in accordance with the procedures described in subsection (9), 1 member of the parole board shall interview the prisoner. The interview schedule prescribed in this subdivision applies to all prisoners to whom subsection (7) applies, regardless of the date on which they were sentenced.

(b) In addition to the interview schedule prescribed in subdivision (a), the parole board shall review the prisoner's file at the conclusion of 15 calendar years of the prisoner's sentence and every 5 years thereafter until the prisoner is paroled, discharged, or deceased. A prisoner whose file is to be reviewed under this subdivision shall be notified of the upcoming file review at least 30 days before the file review takes place and shall be allowed to submit written statements or documentary evidence for the parole board's consideration in conducting the file review.

(c) A decision to grant or deny parole to the prisoner shall not be made until after a public hearing held in the manner prescribed for pardons and commutations in sections 44 and 45. Notice of the public hearing shall be given to the sentencing judge, or the judge's successor in office, and parole shall not be granted if the sentencing judge, or the judge's successor in office, files written objections to the granting of the parole within 30 days of receipt of the notice of hearing. The written objections shall be made part of the prisoner's file.

(d) A parole granted under subsection (7) shall be for a period of not less than 4 years and subject to the usual rules pertaining to paroles granted by the parole board. A parole granted under subsection (7) is not valid until the transcript of the record is filed with the attorney general whose certification of receipt of the transcript shall be returnable to the office of the parole board within 5 days. Except for medical records protected under section 2157 of the revised judicature act of 1961, 1961 PA 236, MCL 600.2157, the file of a prisoner granted a parole under subsection (7) is a public record.

(9) An interview conducted under subsection (8)(a) is subject to both of the following requirements:

(a) The prisoner shall be given written notice, not less than 30 days before the interview date, stating that the interview will be conducted.

(b) The prisoner may be represented at the interview by an individual of his or her choice. The representative shall not be another prisoner. A prisoner is not entitled to appointed counsel at public expense. The prisoner or representative may present relevant evidence in favor of holding a public hearing as allowed in subsection (8)(b).

(10) In determining whether a prisoner convicted of violating, or attempting or conspiring to violate, section 7401(2)(a)(*i*) of the public health code, 1978 PA 368, MCL 333.7401, and sentenced to imprisonment for life before October 1, 1998 is to be released on parole, the parole board shall consider all of the following:

(a) Whether the violation was part of a continuing series of violations of section 7401 or 7403 of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, by that individual.

(b) Whether the violation was committed by the individual in concert with 5 or more other individuals.

(c) Any of the following:

(*i*) Whether the individual was a principal administrator, organizer, or leader of an entity that the individual knew or had reason to know was organized, in whole or in part, to commit violations of section 7401 or 7403 of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, and whether the violation for which the individual was convicted was committed to further the interests of that entity.

(*ii*) Whether the individual was a principal administrator, organizer, or leader of an entity that the individual knew or had reason to know committed violations of section 7401 or 7403 of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, and whether the violation for which the individual was convicted was committed to further the interests of that entity.

(*iii*) Whether the violation was committed in a drug-free school zone.

(*iv*) Whether the violation involved the delivery of a controlled substance to an individual less than 17 years of age or possession with intent to deliver a controlled substance to an individual less than 17 years of age.

(11) Except as provided in section 34a, a prisoner's release on parole is discretionary with the parole board. The action of the parole board in granting a parole is appealable by the prosecutor of the county from which the prisoner was committed or the victim of the crime for which the prisoner was convicted. The appeal shall be to the circuit court in the county from which the prisoner was committed, by leave of the court.

(12) If the sentencing judge, or his or her successor in office, determines on the record that a prisoner described in subsection (7)(b) or (c) sentenced to imprisonment for life for violating, or attempting or conspiring to violate, section 7401(2)(a)(*i*) of the public health code, 1978 PA 368, MCL 333.7401, has cooperated with law enforcement, the prisoner is subject to the jurisdiction of the parole board and may be released on parole as provided in subsection (7)(b) or (c) 2-1/2 years earlier than the time otherwise indicated

in subsection (7)(b) or (c). The prisoner is considered to have cooperated with law enforcement if the court determines on the record that the prisoner had no relevant or useful information to provide. The court shall not make a determination that the prisoner failed or refused to cooperate with law enforcement on grounds that the defendant exercised his or her constitutional right to trial by jury. If the court determines at sentencing that the defendant cooperated with law enforcement, the court shall include its determination in the judgment of sentence.

(13) Notwithstanding subsections (1) and (2), an individual convicted of violating, or attempting or conspiring to violate, section 7401(2)(a)(*i*) or 7403(2)(a)(*i*) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, whose offense occurred before March 1, 2003, and who was sentenced to a term of years, is eligible for parole after serving 20 years of the sentence imposed for the violation if the individual has another serious crime or 17-1/2 years of the sentence if the individual does not have another conviction for a serious crime, or after serving the minimum sentence imposed for that violation, whichever is less.

(14) Notwithstanding subsections (1) and (2), an individual who was convicted of violating, or attempting or conspiring to violate, section 7401(2)(a)(*ii*) or 7403(2)(a)(*ii*) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, whose offense occurred before March 1, 2003, and who was sentenced according to those sections as they existed before March 1, 2003, is eligible for parole after serving the minimum of each sentence imposed for that violation or 10 years of each sentence imposed for that violation, whichever is less.

(15) Notwithstanding subsections (1) and (2), an individual who was convicted of violating, or attempting or conspiring to violate, section 7401(2)(a)(*iii*) or 7403(2)(a)(*iii*) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, whose offense occurred before March 1, 2003, and who was sentenced according to those sections as they existed before March 1, 2003, is eligible for parole after serving the minimum of each sentence imposed for that violation or 5 years of each sentence imposed for that violation, whichever is less.

(16) Notwithstanding subsections (1) and (2), an individual who was convicted of violating, or attempting or conspiring to violate, section 7401(2)(a)(*iv*) or 7403(2)(a)(*iv*) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, whose offense occurred before March 1, 2003, who was sentenced according to those sections of law as they existed before March 1, 2003 to consecutive terms of imprisonment for 2 or more violations of section 7401(2)(a) or 7403(2)(a), is eligible for parole after serving 1/2 of the minimum sentence imposed for each violation of section 7401(2)(a)(*iv*) or 7403(2)(a)(*iv*). This subsection applies only to sentences imposed for violations of section 7401(2)(a)(*iv*) or 7403(2)(a)(*iv*) and does not apply if the sentence was imposed for a conviction for a new offense committed while the individual was on probation or parole.

(17) The parole board shall provide notice to the prosecuting attorney of the county in which the individual was convicted before granting parole to the individual under subsection (13), (14), (15), or (16).

(18) As used in this section:

(a) "Serious crime" means violating or conspiring to violate article 7 of the public health code, 1978 PA 368, MCL 333.7101 to 333.7545, that is punishable by imprisonment for more than 4 years, or an offense against a person in violation of section 83, 84, 86, 87, 88, 89, 316, 317, 321, 349, 349a, 350, 397, 520b, 520c, 520d, 520g, 529, 529a, or 530 of the Michigan penal code, 1931 PA 328, MCL 750.83, 750.84, 750.86, 750.87, 750.88, 750.89, 750.316, 750.317, 750.321, 750.349, 750.349a, 750.350, 750.397, 750.520b, 750.520c, 750.520d, 750.520g, 750.529, 750.529a, and 750.530.

(b) "State correctional facility" means a facility that houses prisoners committed to the jurisdiction of the department.

History: 1953, Act 232, Eff. Oct. 2, 1953;—Am. 1955, Act 107, Imd. Eff. June 3, 1955;—Am. 1957, Act 192, Eff. Sept. 27, 1957;—Am. 1958, Act 210, Eff. Sept. 13, 1958;—Am. 1978, Act 81, Eff. Sept. 1, 1978;—Am. 1982, Act 314, Imd. Eff. Oct. 15, 1982;—Am. 1992, Act 22, Imd. Eff. Mar. 19, 1992;—Am. 1992, Act 181, Imd. Eff. Sept. 22, 1992;—Am. 1994, Act 217, Eff. Dec. 15, 1998;—Am. 1994, Act 345, Eff. Jan. 1, 1995;—Am. 1998, Act 209, Eff. Oct. 1, 1998;—Am. 1998, Act 314, Eff. Oct. 1, 1998;—Am. 1998, Act 315, Eff. Dec. 15, 1998;—Am. 1998, Act 512, Imd. Eff. Jan. 8, 1999;—Am. 1999, Act 191, Eff. Mar. 10, 2000;—Am. 2002, Act 670, Eff. Mar. 1, 2003;—Am. 2004, Act 218, Eff. Oct. 12, 2004;—Am. 2006, Act 167, Eff. Aug. 28, 2006;—Am. 2010, Act 353, Imd. Eff. Dec. 22, 2010.

Constitutionality: A mandatory sentence of life without parole does not violate the prohibition against cruel and unusual punishments of the Eighth Amendment to the United States Constitution, because the Eighth Amendment contains no proportionality guarantee. Neither does the Eighth Amendment prohibit the imposition of mandatory sentences -- "severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense ... " -- nor does it require consideration of individualized, mitigating circumstances beyond those cases in which a capital sentence is imposed. Harmelin v Michigan, 501 US 957; 111 S Ct 2680; 115 L Ed2d 836 (1991).

In People v Bullock, 440 Mich 15; 485 NW2d 866 (1992), the Michigan Supreme Court held that the Michigan Constitution prohibits cruel or unusual punishment while the Eighth Amendment to the US Constitution bars only punishment that is both cruel and unusual. Basing its decision on the textual difference, the Michigan Supreme Court held that the statutory penalty of mandatory life in prison without parole for possession of 650 grams or more of any mixture containing cocaine is so grossly disproportionate as to be cruel or unusual, the result being that those portions of the statutes denying parole consideration are struck down.

Popular name: Department of Corrections Act