No. 17-1752

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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I. PLAINTIFFS' CLAIMS ARE NOT BARRED BY *HECK*.

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Defendants cite no authority, and there is none, to support their argument that the *Heck* doctrine bars a § 1983 plaintiff from challenging a state law before judgment has been entered by a state court enforcing that law. To the contrary, as discussed in Plaintiffs' opening brief, the law is clear that *Heck* is no bar in a § 1983 case seeking prospective relief from the enforcement of an unconstitutional law, nor is *Heck* implicated merely because success on the merits of the § 1983 action would impugn the validity of an anticipated future state-court judgment that has not yet been entered. *See* Pls.' Br. at 14.[1]

Defendants characterize Plaintiffs' position as "absurd" because it would mean that "defendants in every criminal trial could bring a § 1983 action between conviction and sentencing to challenge their future sentence." Defs.' Br. at 23. This is wrong. In a run-of-the-mill criminal case, a defendant would likely be barred by the *Younger* abstention doctrine—not *Heck*—from initiating a § 1983 lawsuit in the middle of his or her criminal case. Because this is not a run-of-the-mill case (for instance, the statute at issue and the sentence to be imposed only came into

[1] Defendants acknowledge that Plaintiffs are not challenging their conviction but seek a ruling on the constitutionality of a sentencing scheme established by a new statute which itself was enacted after their convictions and contemplates a new punishment to be imposed in the future on over 360 individuals.

existence between Plaintiffs' convictions and sentencing and after this litigation was filed), *Younger* does not apply. In any event, Plaintiffs address the state's *Younger* arguments separately. The important point is that *Heck* is no obstacle to a § 1983 lawsuit that seeks an injunction against the future application of an unconstitutional law.

Indeed, it is Defendants' position that would lead to absurd consequences in many other cases. It would mean that any use of § 1983 to bring a preenforcement challenge to an unconstitutional criminal statute, *see Susan B. Anthony List v. Driehaus*, 134 S. Ct. 246 (2014), could be thwarted by the *Heck* argument that Defendants raise. *Heck* imposes a narrow limitation on § 1983 suits brought by persons challenging existing state court judgments in order to achieve speedier release. It does not require that individuals wait until after the state obtains an unconstitutional judgment against them before they seek a federal remedy.

Count IV: Challenge to Lack of Meaningful Opportunity for Parole

Defendants make no effort to distinguish this Court's decision in *Wershe v. Combs*, 763 F.3d 500, 504 (6th Cir. 2014), which clearly holds that the habeas exception to § 1983 does not apply to the claims of a prisoner seeking a meaningful opportunity for release through changes in the parole consideration process. "Because 'success in [their] § 1983 claim[s] would not necessarily affect the duration of [their] sentence[s] because prison officials would retain discretion

regarding whether to grant [them] parole,' the habeas exception does not bar [Plaintiffs'] § 1983 claim[s]." *Id*. (quoting *Thomas v. Eby*, 481 F.3d 434, 440 (6th Cir. 2007)).

Counts I, V and VI: Parole Consideration, Good Time Credits, and Programming

Defendants' arguments that *Heck* bars Plaintiffs' claims under Counts I, V and VI fail for similar reasons.[2]

Under Count I, Plaintiffs challenge the constitutionality of the portion of the parole statute, M.C.L. § 791.234(6), that prohibits the parole board from giving parole consideration to those prisoners who are continuing to serve a mandatory life sentence for first-degree murder for an offense they committed before they were 18 years old. This is the same claim Plaintiffs brought in their original complaint, which the District Court correctly held was not barred by *Heck*. (R. 31, Op. & Order, Pg ID 474-475.) The relief sought, to be meaningfully *considered* for parole, "*would not necessarily* spell immediate or speedier release." *Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005) (emphasis in original); *see also Nelson v. Campbell*, 541 U.S. 637, 647 (2004) ("[W]e were careful in *Heck* to stress the importance of the term 'necessarily.'"). "[W]hen the relief sought in a § 1983

[2] The District Court did not dismiss Counts I, V or VI on *Heck* grounds. (R. 174, Op. & Order, Pg ID 2429-2443.)

claim has only a *potential* effect on the amount of time a prisoner serves, the habeas bar does not apply." *Thomas*, 481 F.3d at 439 (emphasis in original).

Under Count V, Plaintiffs challenge M.C.L. § 769.25a(6) as a violation of the Ex Post Facto Clause because it retroactively deprives Plaintiffs of good-time and disciplinary credits. As with Count I, relief on this claim will not *necessarily* spell immediate or speedier release because it will merely make Plaintiffs *eligible* for parole *consideration* at an earlier time, based on the credits they have already earned. Thus, the relief sought will have only a *potential* effect on the amount of time they serve. *See Thomas*, 481 F.3d at 440 (holding that *Heck* is no bar where "prison officials would retain discretion regarding whether to grant . . . parole"). Additionally, for those Plaintiffs who are still awaiting resentencing, because *Heck* does not apply to claims for prospective relief before a judgment has been entered, the doctrine does not bar Plaintiffs' prospective ex post facto claim, just as it does not apply to their prospective Eighth Amendment claim under Count II.[3]

Finally, under Count VI, Plaintiffs assert that they are being denied the educational and rehabilitative programming that is necessary for them to have a

[3] Additionally, Defendants did not adequately address this issue below as to Count V, resulting in the District Court ruling on Plaintiffs' ex post facto claim on the merits. (R. 174, Op. & Order, Pg ID 2441.)

meaningful opportunity for release.[4] How Plaintiffs could be expected to even raise such a claim through a habeas petition is unclear. The claim does not seek "an injunction ordering [their] immediate or speedier release," nor would such relief "necessarily imply the invalidity of their convictions or sentences." *Wilkinson*, 544 U.S. at 82 (internal quotation marks and alterations omitted). In any event, the Supreme Court has clearly held that when a prisoner files a § 1983 lawsuit seeking access to the tools that *may*, hypothetically and indirectly, result in an earlier release, the lawsuit is not barred by *Heck*. In *Skinner v. Switzer*, 562 U.S. 521, 533-37 (2011), the Court held that when a prisoner filed a § 1983 lawsuit seeking access to DNA testing with the hope that the test results would prove exculpatory, such a lawsuit did not sound in habeas and therefore was not barred by *Heck*. Therefore, Plaintiffs claims should proceed on the merits on remand.[5]

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[4] Plaintiffs voluntarily dismissed the component of this claim that seeks monetary damages. (R. 162, Stip. Order of Partial Dismissal, Pg ID 2206-2207.)

[5] To date, and for the foreseeable future, none of the 250 individuals, including Plaintiffs Kevin Boyd and Nicole Dupure, who are facing the challenged life without parole sentences, will have any sentence imposed. Despite *Montgomery* having been decided over a year and a half ago, prosecutors have obtained a stay of any resentencing proceedings pending a ruling on whether these resentencings will proceed with a jury or judge and a ruling on the standards and burden of proof. The two cases presenting these issues have been pending in the Michigan Supreme Court since 2015, without an oral argument date having been set. Motions to expedite briefing and set oral argument for the prior term were denied. *People v. Skinner*, Michigan Supreme Court No. 152448, Application for Leave Granted 01/24/17; *People v. Hyatt*, Michigan Supreme Court No. 153345.

II. PLAINTIFFS' CLAIMS ARE NOT BARRED BY *YOUNGER*.

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

Defendants' arguments for *Younger* abstention under Count II are fatally flawed at multiple levels. First, it is completely irrelevant under *Younger* that "Plaintiffs' state criminal cases long preceded any iteration of their federal § 1983 claims." Defs.' Br. at 30. The appropriate inquiry under *Younger* is whether, when the § 1983 case was filed, state judicial proceedings were "ongoing." They were not: Plaintiffs filed this case *after* their criminal cases were over, and *before* the Supreme Court decided *Montgomery v. Louisiana*. In fact, when Plaintiffs initiated this case in 2010, Defendants did not raise a *Younger* defense. (R. 18, Defs.' Mot. to Dismiss, no Pg ID available; *see also* R. 47, Defs.' Answer to Am. Compl., Pg ID 593-613.)

Second, Defendants are wrong that Plaintiffs' criminal cases were "reopened" and became "ongoing" before Plaintiffs filed their amended complaint when prosecutors provided the chief circuit judge of their respective counties a "list" of all individuals subject to their jurisdiction for resentencing. Defs.' Br. at 30. Providing a list of names to a chief circuit judge is not a mechanism by which long-closed criminal cases are reopened. Rather, cases were reopened when, pursuant to M.C.L. § 769.25a(4)(b) and (c), prosecutors either filed motions for resentencing to life without the possibility of parole, or the court initiated

resentencing proceedings for the remaining individuals for whom no motions were filed. Plaintiffs amended their complaint in this action, pursuant to the remand order of this Court, before their state criminal cases were reopened.

Third, Defendants cite no authority, and provide no persuasive justification, for their argument that *amending* a complaint triggers a new *Younger* analysis, such that abstention is required if state judicial proceedings commence shortly after a complaint is amended in a long-running case in which proceedings of substance on the merits had already taken place in the federal court. To the contrary, "the critical question is . . . whether the state proceedings were underway before *initiation* of the federal proceedings." *Kitchens v. Bowen*, 825 F.2d 1337, 1341 (9th Cir. 1987) (internal quotation marks omitted) (emphasis added). Here, they were not. Allowing states to evade accountability in federal court after years of federal litigation does not promote the principles of comity and federalism underlying the *Younger* abstention doctrine.

Finally, Defendants cannot avoid the "bad faith" exception to *Younger* by arguing that resentencing decisions are made by local prosecutors who are not individually named as defendants in this case. It is well established in the Sixth Circuit that, because the Michigan Attorney General is "obligated to 'supervise the work of . . . prosecuting attorneys,'" plaintiffs in § 1983 cases are not required to name individual prosecutors when seeking declaratory and injunctive relief

challenging the constitutionality of a Michigan state law. *Platinum Sports Ltd. v. Snyder*, 715 F.3d 615, 619 (6th Cir. 2013) (quoting M.C.L. § 14.30). Surely the same principle applies when the attorney general seeks to invoke *Younger* abstention and the plaintiff counters with *Younger*'s exception for "bad faith" prosecutions.[6]

Count IV: Challenge to Lack of Meaningful Opportunity for Parole

As stated in Plaintiffs' opening brief, Count IV is completely unrelated to any ongoing state judicial proceedings. In their brief on appeal, Defendants misconstrue the gravamen of Plaintiffs' amended complaint. *See* Defs.' Br. at 34. Plaintiffs' legal entitlement to a meaningful opportunity for release arises from the fact that the mandatory sentence under M.C.L. § 769.25a(4) is the equivalent of a life sentence. But the relief sought under Count IV is not an interference with or reformation of the sentencing process; it is a meaningful opportunity for release during the parole consideration process. (R. 130, Pls.' 2d Am. Compl., Relief Requested ¶ c, Pg ID 1633.) Therefore, *Younger* does not apply.

[6] Defendants' reliance on *Doe v. Claiborne County*, 103 F.3d 495, 507, 511 (6th Cir. 1996), is misplaced. *Doe* addresses concepts of *Monell* liability and supervisory liability when a plaintiff seeks damages. By contrast, it is well accepted that in official capacity suits seeking prospective relief, any official with "some connection," such as supervisory power, over the challenged law, policy or practice, is a proper defendant. *See Caspar v. Snyder*, 77 F. Supp. 3d 616, 633-35 (E.D. Mich. 2015) (citing authorities).

Counts I, V and VI: Parole Consideration, Good Time Credits, and Programming

Defendants argue for *Younger* abstention only for Counts II and IV. *See* Defs.' Br. at 28-36. And *Younger* is not jurisdictional. *Chase Bank USA, N.A. v. City of Cleveland*, 695 F.3d 548, 558 (6th Cir. 2012); *O'Neill v. Coughlan*, 490 F. App'x 733, 737 (6th Cir. 2012). Therefore, Defendants have waived any argument on appeal that the dismissal of Counts I, V or VI should be affirmed on *Younger* grounds.

III. PLAINTIFFS' CLAIMS ARE RIPE.

Plaintiffs' claims are ripe for adjudication. The main purpose of the ripeness doctrine is "to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985). Consequently, a case is ripe if it meets two basic requirements: 1) the claims presented are fit for judicial review; and 2) withholding adjudication will impose a hardship on the plaintiffs. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977). Plaintiffs' claims easily satisfy both factors.

On the first factor, Plaintiffs' claims are fit for judicial review because they are purely legal. *See Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 290 (6th Cir. 1997) (discussing and citing *Abbott Labs.*, 387 U.S. at 149). Plaintiffs bring three main classes of claims against Michigan's new sentencing scheme for

juveniles who commit first-degree murder. They categorically challenge the imposition of a life-without-parole sentence on any child; they challenge Michigan's particular statutory scheme for imposing juvenile life-without-parole sentences; and they challenge the lack of a meaningful opportunity for release for juveniles who receive a 60-year maximum instead of life-without-parole. The categorical challenge would simply require the district court to assess the national consensus against life imprisonment for juveniles, while the challenges to Michigan's statutory scheme demand nothing more than an evaluation of the relevant Michigan sentencing laws and parole regulations. None of these claims would require the court to evaluate particular instances of Defendants' enforcement of M.C.L. § 769.25a or of Michigan's parole regulations. Thus, "[n]o factual development can change what the statute bans and what it protects," or provide clarity on Defendants' parole policies. *Magaw*, 132 F.3d at 291; *see also Ammex, Inc. v. Cox*, 351 F.3d 697, 708 (6th Cir. 2003) (reviewing cases and determining that final agency regulations, as opposed to those still subject to change, are generally ripe for review).

As to the second factor, there is no doubt that Plaintiffs face imminent hardship from being resentenced under M.C.L. § 769.25a, regardless of whether without-parole – a penalty Plaintiffs assert is categorically barred by the Eighth Amendment but is part of Michigan law – or whether they receive term-of-years

sentences with a mandatory maximum of 60 years – a penalty Plaintiffs assert is a de facto life sentence barred by *Miller* insofar as Plaintiffs' opportunity for parole before then will not be meaningful or realistic. The August 24, 2016, deadline for Michigan prosecutors to initiate resentencings under the new statute has long passed. All Plaintiffs and potential class members thus know whether they face an actual life-without-parole sentence, or a de facto sentence of life imprisonment without a meaningful and realistic opportunity for parole. The Sixth Circuit has expressly permitted pre-enforcement challenges such as this "when enforcement of a statute or ordinance against a particular plaintiff is inevitable." *Magaw*, 132 F.3d at 289 (citing *Kardules v. City of Columbus*, 95 F.3d 1335, 1344 (6th Cir. 1996)); *see also Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 507 (1972) (finding challenge to Michigan statute ripe where Defendants' enforcement of statute was certain).

In their brief, Defendants first contend that Plaintiffs' claims are not ripe because they are "not based in a concrete factual context." Defs.' Br. at 37. Defendants point to the fact that three Plaintiffs for whom the State is seeking life-without-parole sentences have not yet been resentenced under M.C.L. § 769.25a(4)(b). But, as explained above, the factual context needed to resolve these claims is more than sufficiently concrete. Plaintiffs' claims do not depend on their individual cases; they instead rest on whether the Eighth Amendment

categorically bars life-without-parole sentences for all juveniles, or those exposed to Michigan's particular scheme. No additional events must come to pass before a court may competently decide these issues, and Defendants offer none.

Defendants further note that three Plaintiffs being resentenced under M.C.L. § 769.25a(4)(c) have also not been resentenced, but that "subsequent events demonstrate the claimed disputes and injuries have not come to pass" because other juveniles, including seven Plaintiffs, *have* been resentenced and are receiving parole consideration, one of whom was granted parole. Defs.' Br. at 37. Defendants are essentially saying that Plaintiffs' claims are not ripe because the statute is being properly implemented, which amounts to an argument on the merits masquerading as an argument against ripeness. With this improper conflation, Defendants necessarily concede that the claims of the six Plaintiffs who have been considered for, but not granted, parole are ripe, as these Plaintiffs are now subject to the very parole process they seek to invalidate, regardless of how well Defendants believe that system is working. In fact, Defendants expressly based their ripeness arguments in the District Court on the fact that these Plaintiffs *had not been resentenced* under M.C.L. § 769.25a. (R. 147, Defs.' Mot. to Dismiss, Pg ID 1867-1868.)

As for the three Plaintiffs awaiting resentencing under § 769.25a(4)(c), subsequent resentencings of other individuals cannot render their claims unripe.

Like Plaintiffs' challenges to M.C.L. § 769.25a(4)(b), their challenges to de facto life imprisonment do not turn on the circumstances of their individual cases. Even if they did, resentencings of other individuals would tend to alleviate any concerns with pre-enforcement review, since the subsequent parole proceedings would provide the court with some evidence of how the Michigan courts and parole board are actually applying the statute. However, such evidence must be considered in the first instance by the District Court, not introduced by Defendants on appeal of a dismissal under Rule 12(b)(6).

Defendants further assert that Plaintiffs claims are not ripe because, once resentenced, Plaintiffs can raise their challenges on direct review. Defs.' Br. at 38. This assertion does little more than repackage Defendants' arguments on abstention and habeas preclusion, and Defendants cite no authority for the proposition that it renders Plaintiffs' claims unripe. Where, as here, the claims are purely legal and a plaintiff's exposure to the challenged conduct is inevitable (points Defendants do not contest) the availability of post-deprivation review is immaterial. *Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 274 F.3d 377, 399 (6th Cir. 2001) (finding challenge to licensing ordinance ripe despite the fact that plaintiff had not sought a permit or invoked the ordinance's review mechanism for permit denials); *see also People Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 527 (6th Cir. 1998) (explaining that a pre-

enforcement challenge is ripe "if the probability of the future event occurring is substantial and of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" (internal quotation marks omitted)). Plaintiffs need not wait until unconstitutional laws and policies are inevitably enforced against them in order to bring a legal challenge; their claims are immediately justiciable.

IV. PLAINTIFFS' CLAIMS ARE NOT MOOT.

Defendants' argument that Count I is moot because Plaintiffs are "awaiting resentencing," Defs.' Br. at 39, fundamentally misconceives the essence of mootness. *Montgomery v. Louisiana* was decided 18 months ago, and yet hundreds of individuals in Michigan (including several Plaintiffs) continue to serve mandatory life sentences for offenses they committed as children. There is no date by which they must be resentenced, no resentencing hearings are scheduled, and they are not being considered for parole. In other words, they remain in the same position they were in when this lawsuit was filed: M.C.L. § 791.234(6) provides that they are not eligible for parole.[7]

[7] As discussed in Plaintiffs' opening brief, M.C.L. § 791.234(6) provides that *all* prisoners who were "sentenced to imprisonment for life" for enumerated offenses, including first-degree murder in violation of M.C.L. § 750.316, are ineligible for parole. And M.C.L. § 791.234(7) provides that any *other* prisoner sentenced to imprisonment for life *is* eligible for parole. Therefore, except for those Plaintiffs who are currently serving new, term-of-years sentences, all Plaintiffs remain subject to § 791.234(6). And, if § 791.234(6) were declared unconstitutional and

Defendants' contention that Count I is moot because the relevant Plaintiffs all await resentencing under the new statute is at direct odds with Defendants' contention elsewhere that these Plaintiffs' claims are not ripe. It would be fundamentally unfair to conclude that these Plaintiffs' claims regarding their current punishment are somehow mooted by Plaintiffs' supposedly unripe claims regarding their impending sentences.

Additionally, Defendants make no effort to address the fact that these Plaintiffs have to remain in prison under mandatory life sentences. Michigan continues to deny them a remedy for this patently illegal punishment. Until it does, Plaintiffs should be considered parole eligible.

Additionally, Count I is not moot because even if Plaintiffs are *resentenced* to life pursuant to M.C.L. § 769.25a(4)(b), M.C.L. § 791.234(6) will continue to apply to them going forward because they will still be a "prisoner sentenced to imprisonment for life for . . . [a]ny other violation for which parole eligibility is expressly denied under state law." M.C.L. § 791.234(6)(f). As argued separately, Plaintiffs maintain a claim that life without the possibility of parole is categorically unconstitutional for individuals who were children at the time of their offense, regardless of whether the sentence was mandatory or discretionary. Such a claim is

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enjoined as applied to them, such Plaintiffs would become subject to § 791.234(7) and therefore be eligible for parole.

not moot, and invalidating M.C.L. § 791.234(6) as applied to them remains a potential avenue of relief. (*See* R. 62, Op. & Order, Pg ID 866-867.)

V. PLAINTIFFS HAVE STATED CLAIMS FOR RELIEF UNDER THE EIGHTH AMENDMENT, DUE PROCESS CLAUSE, AND EX POST FACTO CLAUSE.

A. Plaintiffs have stated a claim that the statute's life-without-parole provision violates the Eighth Amendment.

Defendants alternatively argue that Plaintiffs' amended complaint fails to set forth a valid Eighth Amendment challenge to the life-without-parole sentence provided for in M.C.L. § 769.25a. Defendants' entire argument against Plaintiffs' claim is that five years ago the U.S. Supreme Court explicitly did not address the question. *See Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) ("[B]ecause our holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical ban on life without parole for juveniles."). The fact that the Supreme Court declined to impose a categorical ban on life-without-parole sentences for children in deciding *Miller* provides no support for Defendants' argument that Plaintiffs have failed to set forth a valid Eighth Amendment challenge to this punishment.

In the ensuing five years since the *Miller* court avoided the issue, the number of states that banned this sentenced for children 17 and younger has more than tripled. Seventeen states now ban the practice in all circumstances, five more ban the punishment in most cases, and 17 more have not imposed the sentenced on a

child since *Miller* was decided. Moreover, all but five states prohibit this sentence in the circumstances in which the challenged Michigan statute imposes it – for children as young as 14 and 15 and for offenses where the child did not commit the homicide. *See* Campaign for the Fair Sentencing of Youth, *Righting Wrongs: The Five Year Groundswell of State Bans on Life without Parole for Children* (2016), available at http://fairsentencingofyouth.org/.[8]

Defendants do not dispute, and did not dispute below, the new consensus against the use of this punishment for children in the United States, which now stands alone in the world in imposing this punishment. Under the Eighth Amendment's "evolving standards of decency" jurisprudence, these legislative enactments and state practices are objective indicia of national consensus and form the basis for a successful claim that the punishment should be categorically banned. *See Graham v. Florida*, 560 U.S. 48, 58-62 (2010). Plaintiffs have therefore set forth a valid challenge to this sentence and are entitled to present proofs to support their claim that Michigan's continued imposition of life-without-parole sentences on children constitutes an unconstitutionally cruel and unusual punishment.

[8] When Plaintiffs filed their second amended complaint over a year ago, 36 states had abolished this sentence or not imposed this sentence since *Miller*. (R. 130, Pls.' 2d Am. Compl., Pg ID 1591.)

B. Plaintiffs have stated a claim that the statute's provision for a de facto life sentence denies a meaningful opportunity for release.

In Count IV, Plaintiffs set forth a colorable claim that M.C.L. § 769.25a imposes a de facto sentence of life imprisonment without a meaningful opportunity for release. Defendants' brief does not contest the central premise of Count IV, i.e., that the statute's 60-year maximum term violates the Eighth Amendment if it does not restore to Plaintiffs a meaningful "hope for some years of life outside prison walls." *Montgomery v. Louisiana*, 136 S. Ct. 718, 737 (2016). Instead, Defendants assert that individuals serving a term-of-years sentence under § 769.25a "have no constitutional right to parole and the State is not required to guarantee eventual freedom." Defs.' Br. at 45 (citing *Graham*, 560 U.S. at 75).

This assertion is both correct and irrelevant. Plaintiffs do not request that Michigan guarantee their release on parole; they assert that Michigan's parole process must guarantee a meaningful opportunity for release. Numerous courts, including the District Court below, have correctly recognized that the Supreme Court's decisions invalidating life-without-release sentences for most juveniles implicate a state's sentencing *and* parole process. *Hill v. Snyder*, No. 10-14568, 2013 WL 364198, at *3 (E.D. Mich. Jan. 30, 2013) (holding that, absent sentencing relief, "compliance with *Miller* and *Graham* requires providing a fair and meaningful opportunity of *parole* to each and every Michigan prisoner") (emphasis added); *Maryland Restorative Justice Initiative v. Hogan*, No. ELH-16-

1021, 2017 WL 467731, at *19-24 (D. Md. Feb. 3, 2017) (acknowledging lack of inherent right to release on parole, yet concluding that *Graham*, *Miller*, and *Montgomery* require that parole proceedings provide a meaningful opportunity for release); *Songster v. Beard*, 201 F. Supp. 3d 639, 642 (E.D. Pa. 2016) (holding that state may not circumvent Eighth Amendment requirement of a meaningful opportunity for release by "[p]lacing the decision with the Parole Board"); *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016) (mandatory life with possibility of parole violates Eighth Amendment where parole process fails to consider mitigating factors of youth).

Defendants do not attempt to address the substance of these decisions. Rather, they characterize the U.S. Supreme Court's recent decision in *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017), as "[a]ddressing a similar question" of whether a state's post-conviction release program satisfies *Graham*'s "meaningful opportunity of release" mandate. *LeBlanc* does nothing of the sort. *LeBlanc* involved a Virginia juvenile offender who sought federal habeas relief under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254, to invalidate his life sentence. *LeBlanc*, 137 S. Ct. at 1728. The petitioner, Dennis LeBlanc, could only seek "geriatric release" under Virginia law, a process reserved, in relevant part, for prisoners over sixty years of age. *Id.* At issue in *LeBlanc* was the Fourth Circuit Court of Appeals' holding that Virginia's geriatric

release program did not comply with *Graham*, and that the Virginia Supreme Court's decision to the contrary was objectively unreasonable. *Id*.

Notably, the Supreme Court accepted the Fourth Circuit's conclusion that *Graham* requires parole systems to provide a meaningful opportunity for release for juveniles. *Id*. at 1729 (citing, without deciding, factors in Virginia geriatric release program that may allow for meaningful consideration of a juvenile's maturity and rehabilitation under *Graham*); *see also LeBlanc v. Mathena*, 841 F.3d 256, 266-67 (4th Cir. 2016) (setting forth requirements *Graham* places on parole systems). Also notable is that the Court declined to hold that the Fourth Circuit incorrectly determined that Virginia's geriatric release program violated *Graham*. *LeBlanc*, 137 S. Ct. at 1729 (expressly declining to decide the merits of LeBlanc's Eighth Amendment claim). Applying the "high bar for habeas relief" imposed under AEDPA, the Court instead held that the Fourth Circuit improperly reached this question because the Virginia Supreme Court decision approving geriatric release was not objectively unreasonable. *Id*. Thus, far from concluding that the Virginia Supreme Court correctly resolved that geriatric release satisfied *Graham*, the Court merely held that the state court's decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Id*. at 1728.

As Defendants note, the Court cited factors supporting a conclusion that geriatric release was constitutional. *Id.* at 1729. But Defendants omit the fact that the Court also acknowledged significant reasons to conclude the Virginia system was unconstitutional, including, as is relevant here, "the Parole Board's substantial discretion" to deny release and the long periods of time juveniles must wait to petition for release. *Id.* Consequently, *LeBlanc* is perhaps the strongest authority *in favor* of allowing Count IV to proceed to the merits. Only after a full evaluation of Michigan's parole system under M.C.L. § 769.25a may this or any other Court properly resolve whether the 60-year maximum term imposed under that provision amounts to a de facto sentence of lifetime imprisonment.[9]

C. Plaintiffs have stated a claim that the statute retroactively imposes additional punishment by taking away good time and disciplinary credits that they have already earned.

In providing a term of years sentence as one remedy for the Eighth Amendment violations identified in *Miller*, the State improperly created a new punishment in M.C.L. § 769.25a(6) that did not exist when Plaintiffs committed

[9] Defendants implicitly acknowledge this necessity by attempting repeatedly to proffer for the first time on appeal what they purport are initial parole statistics under the new sentencing regime. These statistics are not in the record, Plaintiffs have not had an opportunity to evaluate them, and the District Court has not assessed the proper weight to afford them. It therefore cannot be determined whether and to what extent these statistics demonstrate that M.C.L. § 769.25a as a whole complies with *Graham* and *Miller*. If this data raises an issue at all, it is one factor for the District Court to consider on remand.

their offenses and that lengthened the period of time Plaintiffs must spend in prison before having an opportunity for parole review. Specifically, prior to M.C.L. § 769.25a(6) anyone resentenced for a homicide, following an invalidation of their life sentence, would receive a credit reduction. *See Wayne Cty. Prosecuting Att'y v. Mich. Dep't of Corrs.*, No. 186106, 1997 WL 33345050 (Mich. App. June 17, 1997) (per curiam). M.C.L. § 769.25a(6) retroactively eliminated these credits and thus violates the prohibition against ex post facto laws.

Defendants' argument that the statute's retrospective removal of earned good time is not an ex post facto law is based on the unsupported assertion that "[g]ood time, special good time, disciplinary or other credits never applied to anyone convicted of first-degree murder." Defs.' Br. at 50. This is simply inaccurate and is premised on a serious misreading of Michigan's statutory law providing good time and disciplinary credit allowances for *all* prisoners as an incentive for good behavior. The plain language of the relevant statutes and case law, clearly provides that both good time and disciplinary credits are earned by prisoners serving a sentence for a conviction of first-degree homicide offenses.

All Michigan prisoners sentenced prior to 1982 were entitled to earn good time credit. The statute provided that "every convict who shall have no infraction of the rules of the prison . . . shall be entitled to a reduction from his sentence," and sets forth the specifics of the good time allowances, which included reduction for

both minimum and maximum sentences. M.C.L. § 800.33 (as existed prior to amendment). The Michigan Supreme Court, interpreting the plain language of this statute, held that prisoners accumulated good time credits while serving sentences for first-degree homicide convictions. *Moore v. Mich. Parole Bd.*, 379 Mich. 624, 647-48 (1967) ("[T]he good-time statute purports to give good-time to any convict who behaves himself in prison.") While the court in *Moore* recognized that absent a change in the traditional life sentence for a first-degree homicide, earned good time would not actually be applied, where the individual was resentenced to a term of years, the good time earned under the prior invalid sentence must be applied to the subsequent constitutional sentence. *Moore*, *supra*, at 635-36, 639-42; *see also Lowe v. Dep't of Corrs.*, 206 Mich. App. 128, 131 (1994).

In 1978, the legislature passed Proposal B, M.C.L. § 791.233b, which prohibited the use of good-time to reduce *the minimum sentence* of persons convicted of certain crimes (including first and second degree murder). However, all prisoners convicted of first and second degree murder continued to earn good time credits and "[t]hey remained eligible to receive good time and special good time on their maximum terms." *Wayne Cty. Prosecuting Att'y*, *supra* at *2.

As of 1982 prisoners convicted of enumerated crimes, including first and second degree murder, became eligible for a new type of credit called disciplinary credits, which could be deducted from both a prisoner's minimum and maximum

sentences. M.C.L. § 800.33(5).[10] Good time also continued to accrue on maximum sentences, except for offenses committed after April 1, 1987. After that date all new offenses were eligible to receive only disciplinary and special disciplinary credits. M.C.L. § 800.33.[11] This continued until December 15, 1998, after which prisoners sentenced to certain offences, including first and second degree homicide, were no longer entitled to disciplinary credits or special disciplinary credits. M.C.L. §§ 800.33(14), 800.34(5)(a)(iii). Defendants' argument that M.C.L.

[10] M.C.L. § 800.33(5) provides in relevant part that "all prisoners serving a sentence on December 30, 1982, or incarcerated after December 30, 1982, for the conviction of a crime enumerated in [subsections (a) to (cc) of M.C.L. § 791.233b] are eligible to earn disciplinary credit of 5 days a month for each month served after December 30, 1982. Accumulated disciplinary credits shall be deducted from a prisoner's minimum and maximum sentence in order to determine his or her parole eligibility date." First degree and second degree homicides are specifically included as convictions earning such credits. M.C.L. § 791.233b(n) (convictions under M.C.L. §§ 750.316 and 750.317).

[11] Named Plaintiffs Henry Hill (06/03/1982) and Damion Todd (12/30/1986) are eligible for good time credits. Bobby Hines (05/25/1989), Bosie Smith (12/31/1992), Jemal Tipton (11/10/1987), Kevin Boyd (08/19/1996), Jennifer Pruitt (11/15/1993), and Matthew Bentley (08/31/1998) are all eligible for disciplinary credit as well as other youth who were sentenced prior to December 15, 1998, which included 257 individual class members. This Court directed the District Court to reconsider, on remand, its ruling on class certification: "[B]ased on our class certification jurisprudence subsequent to *Craft*, on remand the district court should reconsider whether class certification may indeed be necessary and appropriate in this case, particularly in light of defendants' apparent history of refusing to apply the court's orders to anyone other than the named plaintiffs." *Hill v. Snyder*, 821 F.3d 763, 771 (6th Cir. 2016). Plaintiffs renewed their motion for class certification on remand (R. 135, Pls.' Renewed Mot. for Class Cert., Pg ID 1643-1665), but the District Court did not decide the motion.

§ 769.25a(6), which retroactively attempts to take away all earned credit, does not violate the Ex Post Facto Clause is based on their misreading and misconstruction of the clear statutory language and case law with regard to Plaintiffs' entitlement to disciplinary credits and good time in Michigan.

Defendants also misapply ex post facto law by attempting to use Plaintiffs' unconstitutional and invalid mandatory life sentences as a baseline for determining whether Plaintiffs are disadvantaged by the retrospective removal of Plaintiffs' earned good time and disciplinary credits. Defendants cannot base their defense on an unconstitutional and void sentence that the State had no power to impose. *See Montgomery*, 136 S. Ct. at 731 ("A . . . sentence imposed in violation of a substantive rule is not just erroneous but contrary to the law and, as a result, void."). Plaintiffs' only legal and valid sentences are a term of years sentence for which their accumulated good time and disciplinary credits are to be applied to both their minimum and maximum sentences to determine parole eligibility.[12]

The legislature chose to provide both good time and disciplinary credits for first-degree homicide convictions. This was the law when Plaintiffs were sentenced, and Plaintiffs were aware they could and were accumulating these

[12] Defendants are well aware that this is standard practice in Michigan. *See Moore v. Parole Bd.*, 379 Mich. 624 (1967) (applying good time credits accrued under a sentence that was subsequently held to be invalid and such credits were to be applied to his valid sentence.).

benefits based on good behavior. Plaintiffs relied upon the fact that good behavior would result in an allowance for reduction of their sentences, should they be successful in their challenge to their sentences.[13] *Moore*, 379 Mich. at 648-49 (recognizing that plaintiff was entitled to his credit earned during a life sentence, after he was resentenced to a term of years). Plaintiffs have now been successful in having their life sentences declared unconstitutional and vacated. Plaintiffs are therefore entitled to have their earned good time and disciplinary credits applied to their term-of-years sentences.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons and those set forth in Plaintiffs' opening brief, the District Court's judgment should be reversed, and the case remanded for further proceedings.

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[13] Plaintiff Matthew Bentley, for example, challenged the constitutionality of his mandatory life sentence as cruel and unusual punishment in his direct appeal. *People v. Bentley*, No. 214170, 2000 WL 33519653 (Mich. App. April 11, 2000) (per curiam).

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I certify that on July 19, 2017, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Description of Entry	Record Entry	Date	Page ID Range
Defs.' Mot. to Dismiss	18	02/28/2011	N/A
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Defs.' Answer to Am. Compl.	47	02/21/2012	593-613
Op. & Order	62	01/30/2013	862-867
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Pls.' Renewed Mot. for Class Cert.	135	06/27/2016	1643-1665
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