IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HENRY HILL, et al.,

Plaintiffs,

Case No. 10-cv-14568

vs.

Hon. John Corbett O'Meara

RICK SNYDER, et al.,

Defendants.
_____/

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PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

FACTUAL DEVELOPMENTS

On July 5, 2016, Plaintiffs filed their Motion for Temporary Restraining Order and Preliminary Injunction, seeking an order that Defendants be enjoined from seeking new life-without-parole sentences against Plaintiffs serving mandatory life sentences deemed unconstitutional by *Miller* and *Montgomery*. Plaintiffs based their motion on three legal bases: 1) imposing life-without-parole sentences on Plaintiffs would be contrary to this Court's orders of January 30, 2013 and August 12, 2013, making all Plaintiffs parole eligible; 2) M.C.L. § 769.25a is unconstitutional insofar as it permits prosecutors to seek new life-without-parole sentences because it is an ex post facto law by imposing a harsher sentence than Plaintiffs were previously sentenced to; 3) M.C.L. § 769.25a's provision allowing the imposition of life-without-parole sentences on Plaintiffs, if enforced, would violate Plaintiffs' Eighth Amendment rights against cruel and unusual punishment by denying them any meaningful and realistic opportunities for parole; and 4) M.C.L. § 769.25a, as written and as implemented, is noncompliant with *Miller* and *Montgomery*'s requirements that the vast majority of youth shall not be subject to a life without possibility of parole sentence

This Court issued a TRO on July 7, 2016 – based on Plaintiffs' first legal basis that imposing life-without-parole sentences on Plaintiffs would violate its prior orders – and scheduled a preliminary injunction hearing for July 28, 2016.

Defendants appealed the TRO and sought an emergency stay. The Sixth Circuit ruled on July 20, 2016 that, insofar as the TRO was based on this Court's prior orders making all Plaintiffs parolable, this was a misinterpretation of the Sixth Circuit's May 11, 2016 opinion. For that reason alone, the Sixth Circuit stayed the TRO pending this Court's consideration of Plaintiffs' Motion for Preliminary Injunction. *Hill v. Snyder*, No. 16-2003, Dkt. 17-2, 07/20/16 (attached as Exhibit 1).

Despite this Court's TRO, at least one prosecutor filed motions seeking life-without-parole sentences. (*See, e.g.*, Exhibit 2, filed by the Saginaw County Prosecutor on July 13, 2016). At least one prosecutor filed the day before the TRO was entered, and following the Sixth Circuit's stay of the TRO, the remaining prosecutors filed. To date, prosecutors have sought to impose life-without-parole sentences under M.C.L. § 769.25a for the vast majority, instead of what the Supreme Court has unequivocally held must be only the "rarest" and "uncommon" youth for whom such a sentence would be constitutional.[1]

This prosecutorial misconduct demonstrates why this Court should grant

[1] In fact, the Oakland County prosecutor explicitly asserted in her motion seeking life without parole for a named *Hill* Plaintiff, Kevin Boyd, that pursuant to M.C.L. § 769.25a she need not specify any grounds or basis for seeking a life-without-parole sentence and that a defendant is not even entitled to file a response prior to a hearing. (Exhibit 3). Similarly, the prosecutor for Wayne County, in seeking life without parole for ***over 60*** youth, set forth no individualized bases for seeking such a sentence in any of the cases. (Exhibit 4).

Plaintiffs' motion for a preliminary injunction. Both facially and as applied, M.C.L. § 769.25a subjects Plaintiffs to ongoing unconstitutional punishment. Absent a preliminary injunction, Plaintiffs—who are still serving unconstitutional mandatory life sentences without a meaningful opportunity for release—will continue to face cruel and unusual punishment from state officials who are intent on thumbing their nose at the Supreme Court, doing everything in their power to delay the implementation of a fair process that would provide Plaintiffs and similarly situated individuals a meaningful opportunity for release, and seeking unconstitutional life-without-parole sentences for hundreds of youth for whom such a sentence would be unconstitutional. The Court should therefore enjoin Defendants from proceeding with these life-without-parole resentencings pending a final determination as to the constitutionality of the statute.

ARGUMENT

I. The Life-Without-Parole Resentencing Statute Is Unconstitutional.

Although the Sixth Circuit has now ruled that its decision vacated the January 2013 and August 2013 orders, those orders are not the only basis for Plaintiffs' request for a preliminary injunction. Plaintiffs' second amended complaint challenges the constitutionality of M.C.L. § 769.25a independently of whether it complies with this Court's prior orders, and Plaintiffs have a strong likelihood of success on the merits of their claim that Michigan's statute, which

allows for the imposition of a life-without-parole sentence on Plaintiffs and which Defendants intend to enforce against them, is unconstitutional both on its face and as applied.

While the legal basis for Plaintiffs' claims are set out in their opening brief, since that brief was filed, state prosecutors have filed motions seeking life without parole for the majority of the Plaintiffs:

- Macomb County filed the day before this Court issued its TRO, seeking life-without-parole sentences for ***all ten*** of the youth serving unconstitutional sentences of mandatory life.

- The Saginaw County Prosecutor simply violated the TRO and filed against ***all 21*** of the youth serving mandatory life. This included Henry Hill, the first named Plaintiff in this case, who has served 36 years for a conviction for felony murder stemming from his involvement in a murder committed by his adult co-defendant, when Henry was 16 years old. Not only did the prosecutor directly violate this Court's TRO, he also flagrantly thumbed his nose at the Supreme Court's rulings in *Miller v. Alabama* and *Montgomery v. Louisiana* by asserting that Henry Hill should receive a life-without-parole sentence that must be reserved for the "uncommon" and "rarest" of youth whose crime demonstrates such depravity and irretrievable corruption that there is no hope for rehabilitation. Even a cursory review of Henry Hill's involvement in the offense and subsequent record of rehabilitation demonstrate that attempting to impose a life-without-parole sentence on Henry Hill violates *Miller* and *Montgomery*.[2]

- Genesee County filed for ***23 of the 26*** youth whom the United States Supreme Court has held must be given an opportunity for parole except in the rarest of cases. Included in Genesee County's list is William Cooke, who has already served over 40 years – the maximum

[2] Defendant MDOC found Henry to be a good candidate for parole with a low risk for recidivism and violence in 2010, and Henry has not received any misconducts since this review.

number of years he could otherwise be sentenced to under the statute before being eligible for parole. Cooke was convicted of felony murder in 1975, has not received a misconduct ticket in over 15 years, and has repeatedly been recommended for release by the warden and the parole board. (See Exhibits 5 and 6.) Because Defendants invoked M.C.L. § 769.25a to completely block parole consideration for William Cooke by seeking a life-without-parole resentencing that is likely to delay his case for years, William Cooke will continue to serve his mandatory life sentence.

- Similarly, Oakland County filed for life without parole for ***44 of the 49*** youth entitled to resentencing and/or parole, including the eldest person serving this sentence in Michigan – Sheldry Topp – who has served over fifty years and has been in poor health. Sheldry Topp has twice been recommended for commutation by the parole board (1987 and 2008), and has not had a major misconduct in twenty years. Again, absent Defendants invoking M.C.L. § 769.25a to delay any opportunity for parole, Sheldry Topp, along with all four of the other people who have all served over 40 years, would immediately be eligible for parole.

Absent this Court acting, the prosecutors will delay any resentencing opportunities for the vast majority, if not all, of the youth in their counties pending resolution of the question in *People v. Hyatt* of whether the review should occur before a judge or a jury. Even then, the statute provides no timeline for hearings nor does it address the requirements of *Miller and Montgomery* that the vast majority of youth—in all but the "rarest" and uncommon cases—must be given a meaningful opportunity for release before the end of their natural lives.

Additionally, a review of what has occurred in those instances in which prosecutors have sought life without parole under M.C.L. § 769.25, post-*Miller*, reveals that courts have imposed the sentence in over half of these cases. Thus, the

flaws in Michigan's statute cannot, and will not, be addressed in a case-by-case application of individual criminal cases. The Sixth Circuit specifically remanded this case to allow this Court to address the constitutionality of Michigan's remedial statute as applied to the class of youth before this Court. *See Hill v. Snyder*, 821 F.3d 763, 770-71 (6th Cir. 2016). For preliminary-injunction purposes, Plaintiffs have met their burden of demonstrating a likelihood of success on the merits.

While Plaintiffs have briefed the Eighth Amendment and Ex Post Facto bases for this Court to strike down the life-without-parole resentencing provision of M.C.L. § 769.25a on its face, the developments since the previous filing confirm that juvenile life without parole, as it is being applied in Michigan, is also unconstitutional. In contrast to other states, where the practice has either been abandoned or limited to truly exceptional cases, the sentence is being sought and, thus far imposed, as a routine practice, blatantly violating the Supreme Court's holding that life without parole is unconstitutional "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016).

II. Plaintiffs' Claims Are Not Moot.

Defendants present the same mootness argument to this Court that the Sixth Circuit expressly rejected on appeal. The Sixth Circuit recognized that

> even if defendants were correct that . . . changes in the legal landscape could be said to effectively moot

> plaintiffs' claims regarding section 234(6) of Michigan's correctional code, in instances where a case's mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, the Supreme Court has counseled that the best practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully. We find this the proper procedure to follow.

Hill v. Snyder, 821 F.3d 763, 770-71 (6th Cir. 2016) (citation, quotation marks and brackets omitted). The Sixth Circuit specifically contemplated that Plaintiffs would amend their pleadings to challenge M.C.L. § 769.25a, in which case they could "supplement the record as needed, particularly with respect to the current statutory scheme governing plaintiffs' sentences and eligibility for parole." *Id*. at 771.

Notwithstanding this clear mandate from the Sixth Circuit, Defendants argue on remand that Plaintiffs should have no opportunity to develop the record and challenge Michigan's new legislation because "it is the State's prerogative to create the remedy—not the court's." (Defs.' Resp. Br. at 9.) That is not how mootness works. When a law is found to be unconstitutional and the state changes the law without providing all the relief plaintiffs seek, the case is not moot. Mootness requires the state to prove that the change in law has "***completely*** and irrevocably ***eradicated*** the effects of the alleged violation." *Ammex, Inc. v. Cox*, 351 F.3d 697, 705 (6th Cir. 2003) (internal quotation marks omitted) (emphasis added). "A case is only moot when a live controversy no longer exists such that a

court is no longer able to affect the legal relations between the parties." *Cam I, Inc. v. Louisville/Jefferson Cty. Metro. Gov't*, 460 F.3d 717, 719-20 (6th Cir. 2006).

Here, the case is not moot because Plaintiffs are still serving their mandatory life sentences without a meaningful opportunity to parole, and because Plaintiffs are now exposed to new sentences of life without parole that continue to violate their constitutional rights under the Eighth Amendment, Fourteenth Amendment, and Ex Post Facto Clause. When "changes in the law *arguably* do not remove the harm or threatened harm underlying the dispute, the case remains alive and suitable for judicial determination." *Id*. at 720 (emphasis added). Clearly, that is the case here, so Defendants' mootness argument must be rejected.

III. There Are No Grounds For *Younger* Abstention.

The Sixth Circuit has held that "generally federal courts should not abstain from exercising jurisdiction on abstention grounds, for abstention is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Loch v. Watkins*, 337 F.3d 574, 578 (6th Cir. 2003). The Supreme Court has likewise admonished that ordinarily federal courts "should not refuse to decide a case in deference to the States," and that circumstances fitting within the *Younger* abstention doctrine are "exceptional." *Sprint Comms., Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013).

There are at least three reasons why the *Younger* abstention doctrine does not apply here. First, the law is clear that *Younger* applies only if there are ongoing state judicial proceedings "at the time at the time the action is filed in federal court," *Federal Express Corp. v. Tenn. Pub. Serv. Comm'n*, 925 F.2d 962, 969 (6th Cir. 1991), and only if "state court proceedings are initiated 'before any proceedings of substance on the merits have taken place in the federal court,'" *Hawaii Hous. Auth.*, 467 U.S. at 238 (quoting *Hicks v. Miranda*, 422 U.S. 332, 349 (1975)). This action was filed in federal court in 2010,[3] long before any resentencing proceedings were initiated, and it is beyond dispute that proceedings of substance on the merits have taken place in federal court. Because this federal case "has proceeded well beyond the 'embryonic stage,' . . . considerations of economy, equity, and federalism counsel against *Younger* abstention." *Id*. (quoting *Doran*, 422 U.S. at 929)).

Second, *Younger* "does not require federal abstention when the state court proceeding is brought in bad faith." *Zalman v. Armstrong*, 802 F.2d 199, 205 (6th Cir. 1986). In the context of juvenile life-without-parole sentences, the Supreme Court has repeatedly emphasized that such punishment is unconstitutional "for all

[3] Even though the pleadings have been amended, the point of reference for the date-of-filing rule is the date the civil action commenced. *See Mir v. Kirchmeyer*, No. 12-CV-2340-GPC-DHB, 2014 WL 2436285, at *10 (S.D. Cal. May 30, 2014) (analyzing *Younger* defense by reference to the date the initial complaint was filed, not the date the first or second amended complaints were filed).

but the rarest of children," and that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734-35 (2016). Despite this clearly established law, prosecutors in many counties are seeking life-without-parole resentencings for all or nearly all the children in their jurisdiction, including those who did not directly commit the homicide, were convicted under an aider-and-abettor or felony-murder theory, and were previously offered plea deals for lesser convictions. It is frankly preposterous to suggest that all of these individuals, previously sentenced to life without parole because that punishment was mandatory, and in the state with the second-highest population of juvenile lifers in the country, are now suddenly the "rarest" of children where this "uncommon" sentence will be appropriate. "Bad faith generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." *Kevorkian v. Thompson*, 947 F. Supp. 1152, 1164 (E.D. Mich. 1997). Because there is no reasonable expectation of obtaining a life-without-parole sentence in any but the rarest of cases, the state court proceedings have been brought in bad faith and this Court should not abstain.

Finally, abstention is unwarranted under *Younger* because a federal order could not, as a practical matter, interfere with Plaintiffs' resentencings under the statute. *See Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975) (declining to abstain where relief would not interfere with ongoing state court proceedings). As a

practical matter, resentencing hearings will not proceed until the Michigan Supreme Court, or possibly the U.S. Supreme Court, renders a final determination in *People v. Hyatt*, ___ Mich. App. ___, 2016 WL 3941269, which will address the proper standards for state trial and appellate courts to apply under the statute. (*See, e.g.*, Exhibit 2). Thus, until a final resolution is reached in *Hyatt* – a process that could take months, or even years – resentencings under the statute almost certainly will not be scheduled, let alone conducted. A preliminary injunction from this Court therefore does not risk interference with any ongoing criminal proceedings so as to warrant abstention under *Younger*.

IV. This Action May Proceed Under § 1983.

There is no need to revisit Defendants' argument that Plaintiffs' lawsuit sounds in habeas and cannot be brought under § 1983. This Court has rejected that argument, and it stands as the law of the case. (*See* 7/15/11 Op. & Order Denying Mot. to Dismiss, Dkt. 31, Pg ID 474-475.)

As this Court has already recognized, 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). The Supreme Court emphasized in *Nelson v. Campbell*, 541 U.S. 637, 647 (2004), and again in *Skinner v. Switzer*, 562 U.S. 521, 534 (2011), that it was "careful in *Heck* to stress the importance of the term 'necessarily.'"

Similarly, the Sixth Circuit held in *Thomas v. Eby*, 481 F.3d 434, 439 (6th Cir. 2007), that "*Dotson* establishes that when the relief sought in a § 1983 claim has only a *potential* effect on the amount of time a prisoner serves, the habeas bar does not apply" (emphasis in original).

In this case, Plaintiffs emphasize in their second amended complaint (just as they did in their original and first amended complaints) that they do not challenge their judgments of conviction, do not seek to invalidate their life sentences, and do not seek an order from this Court ordering their release. (Pls.' 2nd Am. Compl., Dkt. 130, ¶ 11 at Pg ID 1581.) Instead, Plaintiffs seek an order requiring Defendants to afford them, as persons currently serving life sentences for offenses committed before they were eighteen years old, a meaningful opportunity to obtain release based on their demonstrated maturity and rehabilitation. (*Id.*) The analysis does not change just because Defendants now seek to impose a new sentence in the future pursuant to M.C.L. § 769.25a. Because the relief sought in this case continues to have "only a *potential* effect on the amount of time" Plaintiffs serve, "the habeas bar does not apply" to this § 1983 action. *Thomas*, 481 F.3d at 439 (emphasis in original).

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above and in Plaintiffs' opening motion and brief, this Court should grant a preliminary injunction prohibiting Defendants from continuing to seek life-without-parole resentencings under M.C.L. § 769.25a.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2016, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing as well as via U.S. Mail to all non-ECF participants.

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