UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HENRY HILL, et al.,

Plaintiffs,

vs.

GRETCHEN WHITMER, et al.,

Defendants

Case No. 10-cv-14568

Hon. Mark A. Goldsmith

/

PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT

By this motion, and pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, Plaintiffs request leave to amend their complaint. In support of this motion, Plaintiffs state as follows:

1. As discussed at the August 22, 2019 telephone status conference, Plaintiffs seek leave to amend their complaint to add a claim seeking a declaratory judgment that unreasonable delays in resentencing violate their due process rights. (Order, Dkt. 286, Pg ID 4545.)

2. More than three years after the Supreme Court confirmed in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), that *Miller v. Alabama*, 567 U.S. 460 (2012), is retroactive and Plaintiffs must therefore be resentenced or made eligible for parole, nearly 200 class members in this case remain in "carceral

limbo," *Hill v. Snyder*, 878 F.3d 193, 204 (6th Cir. 2017) ("*Hill II*"), because they have not been resentenced. Many will be immediately eligible for parole upon receiving a sentence of 25 to 60 years under Mich. Comp. Laws § 769.25a; some will be immediately eligible even if they receive a sentence of 40 to 60 years; and some will have served more than the maximum sentence thus entitling them to immediate release on the day of their resentencing.

3. Rule 15 requires that leave to amend be freely given when justice so requires. Fed. R. Civ. P. 15(a)(2). There is no "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, [or] undue prejudice to the opposing party by virtue of allowance of the amendment . . . , etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

4. The Court instructed the parties "not to raise futility arguments as part of the briefing on the motion to amend" (Order, Dkt. 286, Pg ID 4545), so that issue, and thus the legal merits of the claim Plaintiffs propose to add, is not addressed here.

5. Local Rule 7.1(a) requires movants to ascertain whether their contemplated motion will be opposed. Defendants' counsel stated at the August 22, 2019 telephone status conference that they would oppose this motion.

6. Pursuant to Local Rule 15.1, Plaintiffs submit as Exhibit A their proposed Third Amended Complaint.

Respectfully submitted,

Dated: September 9, 2019

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BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT

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ISSUE PRESENTED

Should Plaintiffs be permitted to amend their complaint to add a claim seeking a declaratory judgment that the unreasonable delay in resentencing Plaintiffs violates their due process rights?

Plaintiffs' answer: Yes.

AUTHORITY FOR RELIEF SOUGHT

Fed. R. Civ. P. 15(a)(2)

Foman v. Davis, 371 U.S. 178 (1962)

INTRODUCTION

When this case was previously before the Sixth Circuit, that court warned that Defendants' continuing delay in resentencing Plaintiffs would leave them in "carceral limbo," which would give rise to a due process claim for an "unwarranted or impermissible delay in resentencing." *Hill v. Snyder*, 878 F.3d 193, 204 (6th Cir. 2017) ("*Hill II*"). That delay, which the Sixth Circuit at the time said "certainly gives us pause," *id.*, is even more pronounced now. More than three years after the United States Supreme Court's ruling in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), confirmed that Plaintiffs are entitled to be resentenced, nearly 200 *Hill* class members remain in prison awaiting resentencing with no relief in sight. To compound this injustice, many would be eligible for release on parole or even immediate release if they are resentenced to a term-of-years. A delay this serious should no longer be countenanced. Therefore, Plaintiffs request permission to amend their complaint to add a claim seeking a declaratory judgment that the unreasonable delay in resentencing violates the Plaintiffs' due process rights.

FACTS

Plaintiffs' third amended complaint adding a due process claim is based on the fact that three and a half years after the Plaintiff class's mandatory life-without-parole sentences were vacated as cruel and unusual punishment, over half of the

class has not been resentenced and continues to be subjected to unconstitutionally cruel and unusual punishment.

For the majority of the Plaintiff class the consequences of this unreasonable delay in holding resentencing hearings is severe as the lack of a resentencing hearing prevents them from the opportunity of securing their release. A meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation is at the core of the U.S. Supreme Court's rulings in *Miller/Montgomery* that vacated Plaintiffs' mandatory life sentences. Delays in Plaintiffs' resentencing directly impose on that constitutional right.

If resentencing hearings had been held, over a hundred class members, who have already been imprisoned for more than 20 years, could have become parole-eligible or even been released if they had been resentenced to a term-of-years at resentencing. This was the case for the over 100 Plaintiffs who have been resentenced; the vast majority of whom have been released on parole at their first review or released within months of their being resentenced. To date, after resentencing, over 100 Plaintiffs have been released and none of them has reoffended.

The delay in resentencing has resulted in further prejudice to Plaintiffs. Defendants continue to treat them as if they are serving non-parolable life

sentences and deprive them of CORE and other rehabilitative programing necessary for them to demonstrate their maturity and rehabilitation.

The delay in resentencing Plaintiffs is inexcusable. It came about by Michigan's initial over-designation of the majority of the Plaintiff class as the rarest of youth whose crime evidences irreparable corruption and is incapable of rehabilitation, and seeking to reimpose Plaintiffs life-without-parole sentences. But seeking to reimpose life-without-parole sentences on the majority of youth, (including those who were convicted of felony murder, those who have exemplary prison records and demonstrable rehabilitation) should not result in over three years of delay in Plaintiffs having the opportunity to demonstrate that a term-of-years sentence is warranted and thus provide them with their constitutional right to a meaningful opportunity to obtain their release.

LEGAL STANDARD

Except in circumstances not present here, "a party may amend its pleading only . . . with the court's leave." Fed. R. Civ. P. 15(a)(2). "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The Sixth Circuit has made clear that such motions should be liberally granted. *See InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 112 (6th Cir. 1989). Although granting leave to amend is discretionary, the court's discretion is "limited by Fed. R. Civ. P. 15(a)'s liberal policy of permitting amendments to ensure the determination of claims on their merits." *General Elec. Co. v. Sargent & Lundy*, 916 F.2d 1119, 1130 (6th Cir. 1990) (quoting *Marks v. Shell Oil Co.*, 830 F.2d 68, 69 (6th Cir. 1987)). Even when a "motion to amend comes late in the schedule, it would be mere conjecture to infer bad faith from the mere passage of time." *Blumberg v. Ambrose*, No. 13-cv-15042, 2015 WL 1737684, at *1 (E.D. Mich. Apr. 16, 2015) (Goldsmith, J.). Indeed, in order to deny such a motion, there must be "at least some significant showing of prejudice to the opponent." *Janikowski v. Bendix Corp.*, 823 F.2d 945, 951 (6th Cir. 1987) (internal quotation marks omitted).

ARGUMENT

I. There is No Bad Faith or Dilatory Motive in Plaintiffs' Request to Amend Their Complaint.

Plaintiffs seek leave to add a due process claim because, more than three years after *Montgomery*, they remain in "carceral limbo," *Hill II*, 878 F.3d at 204, with no end in sight. Plaintiffs bring their claim in good faith: as the Sixth Circuit itself said, "an unwarranted or impermissible delay in resentencing sounds in

procedural due process," *id.*, anticipating the very situation that has come to pass here. There can be no bad faith in Plaintiffs asserting the claim when nearly 200 class members' constitutional rights have been denied.

Nor is there dilatory motive in Plaintiffs' request. In *Hill II*, the Sixth Circuit recognized that two cases then pending before the Michigan Supreme Court, *People v. Skinner* and *People v. Hyatt*, had delayed resentencings. *See Hill II*, 878 F.3d at 202-03 ("[T]his group of roughly 250 class members must await resolution of *Skinner* and *Hyatt* before they may receive a new *Miller*-compliant sentence under Sections 769.25 and 769.25a."). While the Michigan Supreme Court did not grant a stay of resentencing hearings pending their review, few resentencing hearings occurred until the issue of whether resentencing hearings should take place before a judge or a jury was unresolved. Plaintiffs, however, anticipated that once resolved resentencings would proceed swiftly. The cases were decided on June 20, 2018, but delays in resentencing the majority of the Plaintiff class has continued giving rise to Plaintiffs' new claim.

On April 15, 2019, the U.S. Supreme Court denied a petition for certiorari on *Skinner* and *Hyatt* yet the majority of Plaintiffs are still to be resentenced and dates for the hearings are still to be scheduled. Therefore, Plaintiffs were not dilatory in waiting until after *Skinner* and *Hyatt* were finally resolved to bring their new claim.

II. Plaintiffs' Proposed Amendment is Made Without Undue Delay and Will Not Prejudice Defendants.

Plaintiffs seek leave to amend without undue delay. Based on the nature of Plaintiffs' new claim, Plaintiffs could not reasonably plead it until the delay in their own resentencings was itself undue. Plaintiffs' new claim inherently takes time to ripen, since Plaintiffs seek a declaratory judgment that the delay in their resentencings violates due process. Even if the necessity of Plaintiffs waiting for Defendants' delay was attributable to Plaintiffs, it would be circular to reject Plaintiffs' motion based on that delay alone.

Indeed, "[d]elay alone does not justify the denial of a motion brought under Rule 15(a)." *Mote v. City of Chelsea*, 252 F. Supp. 3d 642, 655 (E.D. Mich. 2017). "Delay that is not intended to harass the defendant is not in itself a permissible reason to refuse leave to amend." *Janikowski*, 823 F.2d at 951. And if a party opposes a motion to amend on the grounds of undue delay, the party opposing the motion to amend must make a significant showing not only of delay, but also of prejudice. *Prater v. Ohio Educ. Ass'n*, 505 F.3d 437, 445 (6th Cir. 2007); *Security Ins. Co. of Hartford v. Kevin Tucker & Assocs., Inc.*, 64 F.3d 1001, 1009 (6th Cir. 1995); *Janikowski*, 823 F.2d at 951; *Moore v. City of Paducah*, 790 F.2d 557, 562 (6th Cir. 1986). Merely being "inconvenienced by another round of motion practice . . . does not rise to the level of prejudice that would warrant denial of leave to amend." *Morse v. McWhorter*, 290 F.3d 795, 801 (6th Cir. 2002).

Allowing Plaintiffs' proposed amendment will not prejudice Defendants in any way, much less significantly. There would be no advantage to Defendants by forcing Plaintiffs to assert the new claim in a separate lawsuit. Indeed, allowing it to be made in this case will be more efficient for all parties and the Court. And it would make little sense for the Court to require Plaintiffs to bring the claim separately given that a class has already been certified and the Sixth Circuit has already alluded to the issue in this very case, *see Hill II*, 878 F.3d at 204. Further, this issue is intertwined with Plaintiffs remaining denial-of-programming claim, which Defendants defend by arguing that Plaintiffs will continue to be treated as serving a non-parolable life sentence until they are resentenced. Moreover, if Plaintiffs brought the claim separately, Defendants would almost certainly incur more costs defending new litigation brought from scratch than whatever minimal costs they might incur addressing Plaintiffs' new claim made in their proposed pleading.

III. Plaintiffs Did Not Fail to Cure Deficiencies by Amendments Previously Allowed.

In deciding whether to allow amendment of pleadings, courts may also consider whether there has been a "repeated failure to cure deficiencies by amendments previously allowed." *Foman*, 371 U.S. at 182. There has been no such failure in this case. The Second Amended Complaint was filed in 2016 after the

Sixth Circuit remanded this case "with instructions to grant the parties leave to amend the pleadings and supplement the records in light of the changed legal landscape from *Miller*, *Montgomery*, and Michigan's new sentencing statutes." *Hill II*, 878 F.3d at 200 (citing *Hill v. Snyder*, 821 F.3d 763 (6th Cir. 2016) ("*Hill I*")). At that time there was no reason for Plaintiffs to plead a due process claim based on delay in resentencing Plaintiffs because *Montgomery* was less than a year old. Thus, Plaintiffs cannot be faulted for having failed to assert their new claim in an amended complaint "previously allowed."

IV. Futility Will Not Be Addressed Here.

The Court instructed the parties "not to raise futility arguments as part of the briefing on the motion to amend" (Order, Dkt. 286, Pg ID 4545), so that issue, and thus the legal merits of the claim Plaintiffs propose to add, is not addressed here.

CONCLUSION

For the reasons set forth above, Plaintiffs request leave to file the Third Amended Complaint attached as Exhibit A.

Respectfully submitted,

Dated: September 9, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2019, I electronically filed this paper and all attachments with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

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