UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HENRY HILL, JEMAL TIPTON, DAMION TODD, BOBBY HINES, KEVIN BOYD, BOSIE SMITH, JENNIFER PRUITT, MATTHEW BENTLEY and KEITH MAXEY,

Plaintiffs,

v.

RICK SNYDER, in his Official Capacity as Governor of the State of Michigan, RICHARD McKEON, in his Official Capacity as Interim Director, Michigan Department of Corrections, and BARBARA SAMPSON, in her Official Capacity as Chair, Michigan Parole Board, jointly and severally,

Defendants.

File No. 10-cv-14568

HON. JOHN CORBETT O'MEARA
MAG. JUDGE R. STEVEN WHELAN

DEBORAH LaBELLE (P31595)
221 N. Main St., Ste. 300
Ann Arbor, MI 48104
734.996.5620

STEVEN M. WATT
EZEKIEL R. EDWARDS
American Civil Liberties Union Foundation
125 Broad St., 17th Floor
New York, NY 10004
212.517.7870

DANIEL S. KOROBKIN (P72842)
MICHAEL J. STEINBERG (P43085)
American Civil Liberties Union Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
313.578.6824

Attorneys for Plaintiffs

MARGARET A. NELSON (P30342)
ANN M. SHERMAN (P67762)
CHRISTINA M. GROSSI (P67482
JOSEPH T. FROEHLICH (P71887)
Michigan Dept. of Attorney General
Public Employment, Elections & Tort Division
P.O. Box 30736
Lansing, MI 48909
517.373.6434
Attorney for Defendants

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL AND REQUEST FOR STAY PENDING APPEAL

NOW COME Plaintiffs, by and through their counsel, and respond in opposition to Defendants' Motion for Certification of Interlocutory Appeal and Request for Stay, as follows:

ARGUMENT

I. DEFENDANTS DO NOT MEET THE STRICT SHOWING NECESSARY FOR A CERTIFICATE OF APPEALABILITY.

Defendants place before this Court an extraordinary request: to certify as immediately appealable this Court's order denying Defendant's motion to dismiss Plaintiffs' case for failure to state a claim. Defendants cannot file this interlocutory appeal by right, and therefore seek an order certifying this case as an exception to the rule of non-appealability pursuant to 28 U.S.C. §1292(b).

1. Standard for Interlocutory Appeal.

To obtain permission to appeal pursuant to 28 U.S.C. §1292(b), Defendants must demonstrate that:

> (1) the question involved is one of law; (2) the question is controlling; (3) there is substantial ground for difference of opinion respecting the correctness of the district court's decision; and (4) an immediate appeal would materially advance the ultimate termination of the litigation.

Vitols v. Citizens Banking Co., 984 F.2d 168 (6th Cir. 1993). As the Sixth Circuit has recognized, "[r]eview under §1292(b) should be sparingly granted and then only in exceptional cases." *Id*. at 170.

2. Defendants have not Demonstrated that this Court's Ruling Involves a Controlling Question of Law.

This Court denied Defendants' 12(b)(6) motion to dismiss Plaintiffs' Eighth Amendment claim "at this early stage of the proceedings," recognizing that, accepting Plaintiffs' allegations as true, Plaintiffs had set forth a valid cause of action.

Defendants' argument in support of their claim that this Court's ruling involves a controlling question of law is that if the denial of their 12(b)(6) motion to dismiss was reversed on appeal, the case would be dismissed. Of course, this is true for every 12(b)(6) motion that is denied. However, to allow appeals of denials of near-routine 12(b)(6) motions would open the floodgates to such appeals and run contrary to the clear constraints of 28 U.S.C. §1292(b), which is to limit interlocutory appeals only to extraordinary cases.

In denying summary dismissal for failure to state a claim this Court conducted the customary 12(b)(6) analysis by applying the factual allegations to the law and determining whether under these circumstances Plaintiffs had set forth a cognizable claim. This routine analysis does not constitute a "controlling question of law" as contemplated under the standards for interlocutory review.

3. There Are No Substantial Grounds for Difference of Opinion as to Whether Plaintiffs' Claims are Proper Under 42 U.S.C. §1983 or Whether Plaintiffs Stated a Valid Claim Under the Eighth Amendment.

Defendants must also demonstrate that there is a substantial ground for difference of opinion with regard to the asserted controlling question of law. *Estate of Hickman v. Moore,* Slip Op. *7, 2011 WL 1058934 (E.D. Tenn. 2011). However, Defendants' assertion that there is a basis to distinguish Plaintiffs' claims from the cases that this Court relied upon does not establish the requisite "substantial ground for difference of opinion."

A substantial ground for disagreement exists when there are rulings within the controlling circuit that demonstrate a difference of opinion or Defendants can point to a split within the circuits. *West Tennessee Chapter of Assoc. Builders & Contractors v. City of Memphis*, 138 F.Supp.2d 1015, 1019 (W.D. Tenn. 2000). Turning first to Defendants' request for a certificate of appealability with regard to this Court's ruling that Plaintiffs' claims are cognizable under 42 U.S.C. §1983, Defendants' mere disagreement with this Court's interpretation of *Wilkerson v. Dotson*, 544 U.S. 74,

83 (1994), and its application to Plaintiffs' claims, without more, does not suffice to demonstrate a substantive ground for difference of opinion. Instead of presenting evidence of a difference of opinion either within this Circuit or among the Circuits, Defendants rely solely on a disagreement with this Court's interpretation of *Wilkerson*. Moreover, Defendants ignore the more recent ruling by the Supreme Court in *Skinner v. Switzer*, 131 S. Ct. 1289 (2011) (holding that a convicted state prisoner seeking DNA testing of crime-scene evidence, which if granted would not necessarily imply the invalidity of his conviction or sentence, could pursue such testing under §1983), which left no doubt that Plaintiff's claims are cognizable under 42 U.S.C. §1983.

Turning next to Defendants' request for a certificate of appealability with regard to this Court's ruling that Plaintiffs set forth a valid claim under the Eighth Amendment, similarly Defendants point to no cases in conflict with this Court's ruling. The cases cited by Defendants to support their allegation of the existence of substantial difference of opinion are habeas cases that stand generally for the proposition that *Graham v. Florida*, 130 S. Ct. 2011 (2010), does not mandate the release of prisoners who are serving life without parole sentences for homicide offenses. Therefore, these cases do not conflict with this Court's holding that *Graham* does not preclude a cause of action that claims Michigan's scheme of depriving juveniles of any meaningful opportunity for release, before they die, constitutes cruel and unusual punishment.

Defendants cite only one case from this circuit in support of their argument, an unpublished habeas case decided *before* both *Roper* and *Graham*. *See Foster v Withrow*, 42 Fed. Appx. 701 (6th Cir. 2002), Def.'s Brf. p. 5. This 2002 decision cannot support Defendants' argument that there is a *substantial* difference of opinion in this Circuit regarding this Court's post-*Graham* ruling that Plaintiffs set forth a valid claim. The only post-*Graham* federal cases relied upon by Defendants are *Brown v. Horel*, 2011 WL 900547 (N.D. Cal. 2011), which is also an unreported habeas case that did

not, in fact, even involve a juvenile (*see* Plaintiffs' Correspondence to this Court regarding Defendants' reference to this case during oral argument), and *Jensen v. Zavaras*, 2010 WL 2825666 (D. Colo. 2010), a habeas case in which the petitioner argued he should be released pursuant to *Graham* because he did not commit the homicide.

Neither of the cases cited, nor the criminal state court cases cited by Defendants, provide a basis for asserting that a substantial difference of opinion exists in the Circuits which is contrary to the rulings by this Court: that under the facts as alleged in Plaintiffs' complaint setting forth Michigan's unique system and laws under which Plaintiffs are being incarcerated for crimes committed as juveniles, Plaintiffs set forth a valid claim that their continued incarceration without any meaningful opportunity for release violates the prohibition on cruel and unusual punishment.

4. Interlocutory Appeal would not Materially Advance the Termination of this Case.

Defendants' argument that an interlocutory appeal at this stage would advance the ultimate termination of this case is simply unsupportable. *Filbern v. Habitat for Humanity, Inc.*, 57 F.Supp.2d 833 (W.D. Mo. 1999) (defendant was not entitled to have the denial of its motion to dismiss for failure to state a claim upon which relief could be granted certified for interlocutory review; since district court had to assume all facts alleged in complaint as true, interlocutory appeal would not materially advance ultimate termination of litigation). *See* also *Seidenberg v. McSorleys' Old Ale House, Inc.*, 308 F.Supp. 1253 (S.D.N.Y.1969), subsequent determination 317 F.Supp. 593.

The Sixth Circuit would more likely be able to address the merits of this case, and thus avoid piecemeal appeals, before resolving this interlocutory matter. Currently, trial in this matter is scheduled for January 2012. If this case is not resolved beforehand by a Rule 56 summary judgment

motion, it could be tried to finality before the Sixth Circuit would likely rule on an interlocutory appeal.[1]

II. DEFENDANTS FAIL TO SET FORTH ANY BASIS IN LAW OR FACT FOR AN INJUNCTION STAYING PROCEEDINGS IN THIS MATTER.

Defendants argue that a stay of proceedings is warranted while they seek an interlocutory appeal, because 1) two petitions for certiorari have been filed in the United States Supreme Court which "have the potential" to be dispositive of the issue before this Court, and 2) this case is "massive and complex" and a stay would promote judicial economy. Neither assertion is supported by the facts or law regarding an interlocutory stay.

1. The Remote Possibility that the Supreme Court will Grant Cert on Pending Petitions that Raise Distinct Claims does not Support an Interlocutory Stay.

The U.S. Supreme Court receives over 7,000 petitions for certiorari a term, yet "grants and hears argument in only about 1% of the cases that are filed each term."[2] Indeed, this past term, the Supreme Court granted a hearing on the merits in only 70 of the 7,700 cases presented to it. The vast majority of petitions are simply denied by the court without comment.

Moreover, grants of petitions from state court rulings, such as the pending certiorari cases referenced by the Defendants, are even rarer.[3]

Even in the unlikely event that the Supreme Court was to grant cert in these pending cases, which challenge the sentences of 14-year-olds, these cases do not raise the same issues and claims raised by these Plaintiffs, and thus would not be dispositive of the claims before this Court. Both

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[1] This Court noted in its Order Denying Leave to File Amicus Brief (Dkt. 32, 07/15/11) that the merits would most likely be considered at the summary judgment stage.

[2] *See* Office of the Supreme Court of the United States, Guide for Prospective Indigent Petitioners for Writs of Certiorari. www.supremecourt.gov/casehand/guideforifpcases.pdf.

[3] *See* Harvard Law Review, Vol. 120: 372 p. 380 Nov. 2006 Table II(B) Cases Granted Review, http://hlr.rubystudio.com/media/pdf/statistics06.pdf.

cert cases are appeals of dismissal of habeas petitions arguing that sentencing a 14-year-old to life without parole violates their respective state constitutions. As such, there is no basis for denying these Michigan Plaintiffs the right to proceed on their § 1983 claims under the federal Constitution claims because 14-year-old individuals from two different states have filed a request that the U.S. Supreme Court hear the denial of their habeas claims.

2. An Interlocutory Stay Would Hinder, Rather than Promote, Judicial Economy.

Moreover, Defendants have met none of the criteria for granting a stay. Fed. R. Civ. P. 62(c) governs Defendants' request for a stay and provides:

> **(c) Injunction Pending Appeal**. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. . . .

Id. In determining whether a stay should be granted pursuant to Rule 62(c), the court considers the same four factors that are traditionally considered in analyzing a motion for preliminary injunction. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991):

> These well-known factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Michigan Coalition, 945 F.2d at 153. The Sixth Circuit has emphasized that these "factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Id.*

> The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent a stay. Simply stated, more of one excuses less of the other.

> This relationship, however, is not without its limits; the movant is always required to demonstrate more than mere "possibility" of success on the merits. For example, even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the defendant if a stay is granted, he is still required to show, at a minimum, "serious questions going to the merits."

Id. at 153-54.

Defendants made no showing of probability of success on appeal, have no automatic right to appeal a denial of a motion to dismiss, and have not even adequately demonstrated a basis for their request for a certificate of appealability. Even if Defendants could show a likelihood of success on appeal, they have failed to demonstrate irreparable injury if a stay is not issued.

> In evaluating the degree of injury, it is important to remember that [t]he key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Michigan Coalition, 945 F.2d at 154 (citations omitted) (emphasis in original). This court's order simply allows Plaintiffs to proceed with their claim in a complaint which sets forth one claim, a violation of the Eighth Amendment. Defendants can show no certain irreparable injury in responding to a valid cause of action. *McCoy v. Meridian Auto System, Inc.*, 390 F.3d 417, ___ (6th Cir. 2004).

CONCLUSION

Interlocutory appeals in the federal system are highly disfavored. *Firestone Tire & Rubber Co. v. Rasjord*, 449 U.S. 368 (1981); *Sinclair v. Schriver*, 834 F.2d 103, 105 (6th Cir. 1987). Exceptions to this rule exist but they require a demonstration of extraordinary circumstances. A denial of a motion to dismiss, like the denial of Defendants' motion before this Court, is a classic interlocutory order. There is nothing exceptional about this Court's ruling to warrant certification

for appeal, nor do Defendants demonstrate exceptional circumstances for an appeal at this stage, nor an accompanying stay of proceedings.

DATED: August 5, 2011

Respectfully Submitted,

/S/ DEBORAH LABELLE
DEBORAH LABELLE (P31595)
Counsel for Plaintiffs
221 N. Main St., Ste. 300
Ann Arbor, MI 48104
(734) 996-5620
deblabelle@aol.com

STEVEN M. WATT
EZEKIEL R. EDWARDS
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., 17th Fl.; New York, NY 10014
(212) 549-2500

DANIEL S. KOROBKIN (P72842)
MICHAEL J. STEINBERG (P43085)
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
2966 Woodward Avenue; Detroit, MI 48201
(313) 578-6800

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2011, 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.

/s/Deborah LaBelle
Deborah LaBelle (P31595)
Counsel for Plaintiffs
221 N. Main St., Ste. 300
Ann Arbor, MI 48104
734.996.5620
deblabelle@aol.com