UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEITH MAXEY, GIOVANNI CASPER, JEAN CARLOS CINTRON, NICOLE DUPURE and DONTEZ TILLMAN,

Plaintiffs,

v

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

Defendants.

No. 5:10-cv-14568

HON. JOHN CORBETT O'MEARA

MAG. R. STEVEN WHALEN

Daniel S. Korobkin (P72842)
Michael J. Steinberg (P43085)
American Civil Liberties Union of Michigan
Attorneys for Plaintiffs
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6824

Deborah A. LaBelle (P31595)
Attorney for Plaintiffs
221 N. Main Street
Suite 300
Ann Arbor, MI 48104
(734) 996-5620

Margaret A. Nelson (P30342)
Ann M. Sherman (P67762)
Christina M. Grossi (P67482)
Joseph T. Froehlich (P71887)
Attorney for Defendants
Michigan Department of Attorney General
Public Employment, Elections & Tort Division
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434

Steven M. Watt
Co-Counsel for Plaintiffs
c/o ACLU Foundation
Human Rights Program
125 Broad Street, 18th Floor
New York, NY 10004
(212) 519-7870

Ezekiel R. Edwards
ACLU Foundation
Criminal Law Reform Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2610

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DEFENDANTS' SUPPLEMENTAL BRIEF IN COMPLIANCE WITH THIS COURT'S ORDER OF JANUARY 30, 2013

INTRODUCTION

On January 30, 2013, this Court held that *Miller v. Alabama,* 135 S. Ct. 455 (2012), governed this action. (Opinion, Doc. #62, at Pg ID # 863, 864). As a result of the Court's analysis, it granted judgment for Plaintiffs on their Eighth Amendment claim concluding that Mich. Comp. Laws § 791.234(6) is unconstitutional as applied to them. (*Id.* at Pg ID # 863, 864.) The Court denied judgment to Plaintiffs on the remaining legal claim for relief and on Defendants' cross-motion. (*Id.* at Pg ID # 866.) This Court further ordered the parties to provide supplemental briefing "on the issue of the procedures that the court may equitably put in place to ensure that Plaintiffs receive a fair and meaningful opportunity to demonstrate that they are appropriate candidates for parole." (*Id.* at Pg ID # 866.) On March 1, 2013, Plaintiffs filed their supplemental brief as requested by this Court. (R. 67, Plaintiffs' Supplemental Briefing, ID # 966 – 1041).

This Court should deny the sweeping equitable relief sought by Plaintiffs for several reasons. The holdings of *Graham* and *Miller* cannot justify the relief sought by Plaintiffs. Neither case creates a new constitutional right in parole for juveniles, nor do the cases contain a mandate to revamp Michigan's parole procedures. Moreover, not a single Plaintiff has yet been subjected to the parole procedures in Michigan; as a result, any challenge to the procedures in premature. In short, this Court lacks jurisdiction to grant further equitable relief. And in any event, the procedures already in place in Michigan are constitutionally sufficient.

I. The Court lacks authority to enter any equitable relief related to the declaratory judgment that Mich. Comp. Laws §791.234(6) is unconstitutional as applied to Plaintiffs or to equitably insure Plaintiffs receive a fair and meaningful opportunity to demonstrate they are appropriate candidates for parole.

This lawsuit raises a specific challenge to the constitutionality of Mich. Comp. Laws § 791.234(6) and the named state officials' application of that provision to the Plaintiffs. In the context of this case, only Defendant Combs, the Parole Board Chairperson, is the state official that would apply the challenged statute and other related parole statutes to the Plaintiffs. Thus equitable relief against the remaining Defendants Snyder and Heyns is neither appropriate nor within the court's authority.

A suit challenging the constitutionality of a state official's action is not one against the state and the court may issue an injunction to address that state official's conduct. *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 101 (1984) citing *Ex Parte Young,* 209 U.S. 123 (1908). Yet, this theory announced in *Young* has not been provided "an expansive reading." *Id.; Edelman v. Jordan,* 415 U.S. 651, 666, 667 (1974). Consideration of the Eleventh Amendment permits only the issuance of an injunction governing the official's future conduct. Indeed, interpreting *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer "would be to adhere to an empty formalism and to undermine the principle" reaffirmed in *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996) and *Coeur d'Alene Tribe of Idaho v. Idaho,* 521 U.S. 261 (1997).

These principles of state sovereignty and immunity from federal court jurisdiction are no less significant in this case with respect to these Plaintiffs. There can be no question the court's January 30, 2013 ruling applies only to these five Plaintiffs; and that any remedy fashioned by the court applies only to these Plaintiffs. (Opinion, Docket # 62, Pg ID 864, 866.) Thus, the court must carefully consider whether Plaintiffs have even established a right to equitable relief in this case. In order to invoke the court's equitable powers, Plaintiffs must demonstrate they have sustained an injury that is both "real and imminent" not "conjectural" or "hypothetical." *O'Shea v. Littleton,* 414 U.S. 488, 493-494 (1974). Plaintiffs do not otherwise satisfy this or any other requirements for injunctive relief here. The court's declaratory judgment provides Plaintiffs relief from the challenged statute. Mich. Comp. Laws § 791.234(6). Plaintiffs, though, have not demonstrated a real and imminent injury now or even in the future once they become eligible for parole. *Los Angeles v. Lyons,* 461 U.S. 95, 101-102 (1993).

Applying the sovereignty principles of the Eleventh Amendment and the elements required for issuance of injunctive relief, Plaintiffs' are not entitled to invoke the equitable powers of this court and no further relief is available. First, their claim on which the requested relief is based—that they will not be provided a meaningful opportunity to demonstrate maturity and rehabilitation—is not ripe. Second, the Supreme Court has clearly indicated the fashioning of relief must be first left to the State. Third, the relief requested by Plaintiffs is beyond the scope of the court's decision. Plaintiffs obviously are attempting to sweep all juveniles

serving a life sentence for murder or other crimes into the remedy this court may fashion, even though the constitutional issue presented was decided only as applied to them

The narrow holding of *Graham v. Florida,* 130 S. Ct. 2001 (2010), demonstrates the Supreme Court's deference to state sovereignty even while addressing the constitutional question involved. Specifically, *Graham* notes that the state "is not required to guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime." Rather, it must give "*some* meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 2030. (Emphasis added).

Nor does *Graham* require the State release the juvenile offender during his or her natural life. "The Eighth Amendment does not foreclose the possibility that persons convicted … of crimes prior to adulthood will remain behind bars for life." *Id.* As long as the parole mechanism is available to the juvenile offender, that gives him or her a "meaningful opportunity" to eventually obtain release. And, the Supreme Court also noted, "[i]t is for the State, *in the first instance,* to explore the means and mechanisms for compliance." *Id.*

Likewise, the holding of *Miller v. Alabama,* 132 S. Ct. 2455 (2012) is similarly narrow. States are prohibited from imposing mandatory sentences of life without parole on juvenile homicide offenders. Yet, *Miller* does not foreclose the imposition of all life without the possibility of parole sentences for juvenile homicide offenders or any parolable life sentence. Rather, *Miller* requires individualized sentencing and

the consideration of certain enumerated factors before imposing such a sentence. *Miller* also reiterates the *Graham* standard—a state "is not required to guarantee eventual freedom" but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

Although the *Miller* and *Graham* Courts require the states provide minors with a "meaningful opportunity" for release on parole, neither explains what "meaningful opportunity" involves. Instead, the Supreme Court indicates "it is for the State, in the first instance, to explore the means and mechanisms for compliance" with the requirement to provide a realistic opportunity for parole. *Graham*, 130 S.Ct. at 2030.

Simply put, neither case provides this court with a mandate to revamp Michigan's parole procedures as they pertain to the Plaintiffs. Neither *Graham* nor *Miller* create a constitutional right regarding parole procedures applied to juveniles. Rather, *Miller* establishes the factors to be considered at the time of *sentencing,* not parole. The language in *Miller* and *Graham*, requiring a "meaningful opportunity for release," stands only for the proposition that criminal defendants under the age of 18 sentenced to life have to be given an opportunity for parole in accordance with already existing constitutional standards. This is a state executive function, not a task of the federal judiciary.

Moreover, the court has no meaningful context in which to fashion any relief beyond that already granted—the declaratory judgment. The court's judgment provides Plaintiffs the opportunity for parole within the State's applicable statutes,

rules and policies. A prisoner serving a sentence of life imprisonment with possibility of parole is not subject to the Parole Board's jurisdiction until that person has served at least 15 years of that sentence. Mich. Comp. Laws § 791.234(7)(b).[1] The Plaintiffs are years away from Parole Board jurisdiction.[2] This Court should not impose itself into the State's parole processes when Plaintiffs' are not parole review eligible and "it is for the State, in the first instance, to explore the means and mechanisms for compliance" with the court's judgment. Plaintiffs' assertion they will not be accorded a meaningful opportunity to demonstrate maturation and rehabilitation under Michigan's parole process in violation of the Eighth Amendment is not ripe and, thus, not proper subject for the court's equitable relief powers.

In sum, this Court lacks jurisdiction to grant the equitable relief contemplated by its Opinion and impose on the State's authority over its parole process.

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[1] This term is reduced by application of jail time credit and begins to run only after serving a mandatory 2 year felony firearm conviction, if applicable. (Ex. 1, Combs Aff. ¶ 4.)

[2] Plaintiffs' are subject to the Parole Board's jurisdiction as a result of the court's January 30, 2013 decisions as follows: Dupure – 7/16/20; Maxey – 12/16/22; Tillman – 8/23/23; Casper-11/4/23; Cintron – 9/14/25.

II. The relief requested by Plaintiffs is outside the scope of the court's equitable authority, is excessive in light of the relief already granted in this case, inappropriate and unnecessary.

Plaintiffs seek to revamp Michigan's parole procedures as they apply to all juvenile lifers—not just to them contrary to the Court's January 30, 2013 decision. The requested relief is not tailored to the narrow judgment already entered in this case or to the Plaintiffs in particular. Plaintiffs' request are generalized and sweeping in nature and an obvious attempt to impose federal court control over the State's parole process as it applies to juvenile lifers as a whole. Plaintiffs seek (1) public parole hearings after ten years of incarceration, and every three years thereafter; not subject to a judicial veto or a "no interest" designation by the parole board; (2) consideration and incorporation of the *Miller* sentencing factors in parole decisions, training of parole board members in the *Miller* sentencing factors and development of assessments by individuals knowledgeable of the *Miller* factors and their impact on youth; (3) a requirement that the parole board give specific reasons for a denial of parole along with a list of expectations that the individual shall complete, and (4) a review process for parole board decisions.

1. Parole hearings at 10 years and every three years thereafter without the possibility of judicial veto or a "no interest" designation is an impropriate remedy.

The "judicial veto" regarding parole decisions is a function of Mich. Comp. Laws § 791.234(8)(c), a statute that has not been challenged by the Plaintiffs. Plaintiffs' Complaint is devoid of any challenge to the constitutionality of Mich. Comp.

Laws § 791.234(8) on its face or as it may be applied to them. Regardless, the Plaintiffs' claim that "judicial veto" forecloses their ability to demonstrate maturity and rehabilitation. At the current time, not a single Plaintiff has been availed of Michigan's parole procedures, and no "judicial veto" has occurred. Nor have they demonstrated the likelihood of a judicial veto when or if they are considered for parole. There is no existing substantial controversy regarding any parole procedure – "judicial veto or otherwise – involving the Plaintiffs. Rather, Plaintiffs' arguments regarding Michigan's parole system are anchored in future events that may or may not occur as anticipated or may not occur at all and offer no grounds for further relief. *Norton v. Ashcroft,* 298 F. 3d 547, 554 (6th Cir. 2002); *Nat'l Rifle Ass'n. v. Magaw,* 132 F. 3d 272, 284 (6th Cir. 1997).

Additionally, the elimination of the "judicial veto" in any process applied to Plaintiffs would require the court to substitute its judgment for that of the Legislature in determining the need for judicial involvement in the parole decision. The "judicial veto" represents a check and balance on the Parole Board's discretion. It recognizes the important function of the trial court's sentence; involves the judge in subsequent decisions that impact that sentence; and, provides the judge another opportunity to review the case, the offender and the sentence. This makes sense because the judge, even a successor judge, has the record, represents the court and the community in which the crime was committed, and balances the interests of the criminal justice system with those of the victims and the offender. Plaintiffs do not demonstrate any basis to conclude that application of the "judicial veto" provision to

them will violate the Eighth Amendment by eliminating their opportunity to demonstrate maturation and rehabilitation. A judicial veto might temporarily prohibit parole review for them individually but does not foreclose future opportunities.

A parole hearing at 10 years and every three years after that is impractical, and unnecessary. Under Michigan's parole process, Plaintiffs will be accorded an interview at 10 years. Mich. Comp. Laws § 719.234(8)(a). (Ex. 1, Combs Aff. ¶5 a.) The interview is conducted by a member of the Parole Board. Plaintiffs will be given a notice of this interview 30 days in advance. They are entitled to have a representative, other than another prisoner, present at the interview. The Plaintiffs or their representatives may present "relevant evidence" in favor of holding a public hearing. Mich. Comp. Laws §791.234(9). Additionally, the Parole Board is required to review the Plaintiffs' files after 15 years and every 5 years thereafter. The Plaintiffs will be given a 30-day notice of this review and are allowed to submit written statements or documentary evidence for the parole board's consideration.

Further, prisoners who are denied parole "shall be reconsidered at intervals not to exceed 24 months, as determined by a majority vote of the Parole Board or a panel of the Board." (Ex. 1, Attachment 1, Policy Directive 06.05.104, p. 5, § X.) The Parole Board may extend that period to 60 months under certain circumstances, only one of which might apply to Plaintiffs: the prisoner's history of

predatory, deviant or violent behavior indicates a present risk to public safety which cannot reasonably expected to mitigate in less than 60 months. *(Id.)*

Thus, the existing procedures accord Plaintiffs the opportunity to address the issue of maturation, rehabilitation and most critically, their present risk to public safety. (Ex. 1, Combs Aff. ¶¶ 3, 5(a)-(e).

2. Application of the *Miller* factors during the parole process is not required by the Eighth Amendment and are otherwise included within the Parole Board's evaluation of the Plaintiffs' eligibility for parole.

Plaintiffs request the court impose a requirement that the Parole Board specifically consider the sentencing factors identified by *Miller*. But *Graham* and *Miller* contain no such requirement. Again, the *Graham* Court clearly stated it is for the State "to explore the means and mechanisms" for providing Plaintiffs with a meaningful opportunity for release based on demonstrated maturity and rehabilitation. *Graham*, 130 S. Ct. at 2030. This was effectively reinforced by *Miller*. Notwithstanding, the factors Plaintiffs seek to impose on the parole process are, as a matter of course, already considered in the existing parole guidelines and procedures. Mich. Comp. Laws § 791.233e provides factors to be considered in developing parole guidelines[3]:

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[3] Plaintiffs argue some of these factors cannot be meaningfully applied to them because prisoners serving life without parole are not eligible for many programs the Parole Board looks at. The Court's decision has remedied that problem, though. Plaintiffs are now eligible for parole, unless that decision is reversed, and have 7 or more years to participate in programs or treatment based on individual parole eligibility dates.

> (a) The offense for which the prisoner is incarcerated at the time of parole consideration.
>
> (b) The prisoner's institutional program performance.
>
> (c) The prisoner's institutional conduct.
>
> (d) The prisoner's prior criminal record. As used in this subdivision, "prior criminal record" means the recorded criminal history of a prisoner, including all misdemeanor and felony convictions, probation violations, juvenile adjudications for acts that would have been crimes if committed by an adult, parole failures, and delayed sentences.
>
> (e) Other relevant factors as determined by the department, if not otherwise prohibited by law
>
> (3) In developing the parole guidelines, the department may consider both of the following factors:
>
> (a) The prisoner's statistical risk screening.
>
> (b) The prisoner's age.
>
> (4) The department shall ensure that the parole guidelines do not create disparities in release decisions based on race, color, national origin, gender, religion, or disability.
>
> (5) The department shall promulgate rules pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws, which shall prescribe the parole guidelines….

The Michigan Department of Corrections has promulgated administrative rules prescribing the parole guidelines. Mich. Admin. R. 791.7715 outlines the factors considered in granting and denying parole. The Rule states:

> (2) The parole board may consider all of the following factors in determining whether parole is in the best interests of society and public safety:
>
> (a) The prisoner's criminal behavior, including all of the following:

(i) The nature and seriousness of the offenses for which the prisoner is currently serving.

(ii) The number and frequency of prior criminal convictions.

(iii) Pending criminal charges.

(iv) Potential for committing further assaultive or property crimes.

(v) Age as it is significant to the likelihood of further criminal behavior.

(b) Institutional adjustment, as reflected by the following:

(i) Performance at work or on school assignments.

(ii) Findings of guilt on major misconduct charges and periods of confinement in administrative segregation.

(iii) Completion of recommended programs.

(iv) Relationships with staff and other prisoners.

(v) Forfeitures or restorations of good time or disciplinary credits.

(c) Readiness for release as shown by the following:

(i) Acquisition of a vocational skill or educational degree that will assist in obtaining employment in the community.

(ii) Job performance in the institution or on work-pass.

(iii) Development of a suitable and realistic parole plan.

(d) The prisoner's personal history and growth, including the following:

(i) Demonstrated willingness to accept responsibility for past behavior.

(ii) Employment history before incarceration.

(iii) Family or community ties.

(e) The prisoner's physical and mental health, specifically any hospitalizations or treatment for mental illness and any irreversible physical or mental condition which would reduce the likelihood that he or she would be able to commit further criminal acts.

These guidelines necessarily require the Parole Board to address the mitigating sentencing factors outlined in *Miller*. First, the offenders' age and immaturity, impetuosity, and failure to appreciate risks and consequences are considered by many of the parole guidelines, as are the circumstances of the homicide offense, including the extent of the participation and the way familial and peer pressures may have affected the offender. Of course, the parole board must consider the offender's age and attributes at the time of his offense in order to evaluate how the offender has changed over the course of their incarceration. The offender's youthful status at the time of the offense is used as a baseline to determine how the offender has progressed, matured, and rehabilitated. (Ex. 1, Combs Aff,, ¶ 3.) A mechanical application of the *Miller* factors, as proposed by Plaintiffs, is impractical to and unhelpful in this analysis. But clearly, these factors are included in the guidelines, considerations and evaluation process applied by the Parole Board to achieve its principle purpose—assessment of the current and future risk to public safety.

3. The Parole Board is required to give specific reasons for a denial as well as identify corrective action the prisoner may take to improve the probability of being granted a parole in the future.

The Parole Board is currently required to provide a written decision either granting or denying parole after a public hearing is held. Additionally, if parole is denied, the decision "shall set forth the reasons for that decision and, if appropriate, what corrective action the prisoner may take to improve the probability of being granted a parole in the future." (Ex. 1, Combs Aff. ¶5(f); Ex. 1, Attachment 1, Policy Directive 06.05.104, p5 § X.)

4. A review process for parole decisions in not required by the Eighth Amendment or the Due Process Clause.

The grant or denial of parole is within the exclusive discretion of the Parole Board. The federal courts have consistently recognized this discretion. There is not now, and has never been, an Eighth Amendment constitutional right to parole or to review a denial of parole. A prisoner has no constitutional or inherent right to be released on parole before the expiration of the prisoner's sentence. *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). Additionally, a prisoner has a liberty interest in the possibility of parole if, but only if, state law creates a legitimate expectation of parole release by the use of mandatory language limiting the discretion of the parole board. *Bd. of Pardons v. Allen*, 482 U.S. 369, 381 (1987). No such expectation is created by Michigan law. In the absence of a state-created liberty interest, a parole board can deny release on parole for any

reason or no reason at all, and neither the Eight Amendment nor the Due Process Clause has any application. *See Inmates of Orient Corr. Inst. v. Ohio State Adult Parole Auth.*, 929 F.2d 233, 235-36 (6th Cir.1991). What then would a reviewing body or court be examining?

The review of Parole Board decisions Plaintiffs request this court impose thus, has no constitutional foundation. Such a requirement does not relate to *Graham's* "meaningful opportunity" standard. It would also require this court to improperly extend itself into the state's process. This court would have to determine the "appeal" period; what administration or court would provide the review; the standard of review; and whether further appeal was available. Finally, requiring this review is also contrary to the State's legitimate interest in saving public funds from innumerable frivolous requests for review of Parole Board denials. *Ryan v Dept of Corrections,* 259 Mich App 26 (2003).

CONCLUSION

For all the reasons stated above, the court lacks equitable authority to fashion any additional remedy for Plaintiffs beyond the issuance of the declaratory judgment granted in its January 30, 2013 Opinion. Additionally, the court must reject the specific relief requested by Plaintiffs because their claim on which the requested relief is based—that they will not be provided a meaningful opportunity to demonstrate maturity and rehabilitation—is not ripe; the Supreme Court has clearly indicated the fashioning of relief must be first left to the State; and, the

relief requested by Plaintiffs is beyond the scope of the court's January 30, 2013 decision.

Respectfully submitted,

Bill Schuette
Attorney General

s/Margaret A. Nelson (P30342)
Margaret A. Nelson (P30342)
Joseph T. Froehlich (P71887)
Assistant Attorneys General
Public Employment, Elections &
Tort Division
P.O. Box 30736
Lansing, MI 48909-8236
(517) 373-6434
Email: nelsonm9@michigan.gov

Dated: March 22, 2013

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2013, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record and via US Mail to Patrick Kinney # 253729 .

s/ Margaret A. Nelson
Assistant Attorney General
Dept of Attorney General
Public Employment, Elections & Tort Div.
P.O. Box 30736
Lansing, MI 48909-8236
(517) 373-6434
Email: nelsonm9@michgian.gov
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