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, 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.

File No. 10-cv-14568

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

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PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND EQUITABLE RELIEF

NOW COME Plaintiffs, by and through their counsel, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, move this Honorable Court for Summary Judgment and Equitable Relief. Plaintiffs rely on the facts and reasons set forth in their accompanying brief for their request that this Court issue:

1. A declaratory judgment that M.C.L. § 791.234(6) is unconstitutional as applied to juveniles, finding that:

   a. Michigan's sentencing scheme, which requires the imposition of a life without parole sentence on children without consideration of their youthful status at the time they committed their offense, is unconstitutional.

   b. The lack of parole opportunity for children who committed first-degree homicide offenses before the age of 18 is unconstitutional as it deprives them of a meaningful opportunity for release;

2. A judgment that Plaintiffs are entitled to injunctive and remedial relief that will provide them with judicial mitigation hearings and a meaningful and realistic opportunity for release as required by the Eighth Amendment.

In accordance with Local Rule 7.1(a), Plaintiffs' counsel sought concurrence in this motion from Defendants' counsel and concurrence was denied.

Respectfully submitted,

DATED: August 7, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2012, 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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BRIEF IN SUPPORT OF PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT AND EQUITABLE RELIEF

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INTRODUCTION

In this civil action, seeking declaratory and injunctive relief under 42 U.S.C. § 1983, Plaintiffs challenge Michigan's statutory scheme that imposes the mandatory punishment of life without possibility of release on all children and adults alike who are convicted of first-degree homicide offenses. This automatic imposition of the harshest punishment on Plaintiffs, without consideration of their child status at the time they committed their offenses, violates their Eighth Amendment right to be spared cruel and unusual punishment. The Supreme Court's recent decisions in *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455 (2012), and *Graham v. Florida*, 560 U.S. __, 130 S. Ct. 2011 (2010), confirm that "children are constitutionally different from adults for purposes of sentencing," and that children as a class are less culpable than adults. Plaintiffs are thus entitled to a remedy that takes into consideration the hallmark features of their chronological age in determining the appropriate punishment.

In Michigan, 361 youth, including Plaintiffs, have received this harshest sentence, deemed by the *Miller* Court to be "akin to the death penalty," as a mandatory adult punishment without any individualized consideration of mitigating circumstances due to their child status. Michigan's mandatory punishment scheme runs afoul of the Eighth Amendment because its courts are precluded from taking into consideration the wealth of characteristics and circumstances attendant to a child's age prior to assessing culpability and the appropriate proportional punishment. *Miller*, 132 S. Ct. at 2467. Plaintiffs are entitled to judicial hearings with full consideration of the mitigating circumstances attendant to their child status at the time they committed the offense so that their punishment reflects their lesser culpability and inherent rehabilitation capabilities.

Under Michigan's current statutory scheme, anyone convicted of a first-degree homicide offense receives a life sentence and can never be considered for parole, thereby creating a system where all *children* convicted of such offenses are automatically condemned to life in prison without any possibility of parole. Plaintiffs, who were convicted of first-degree homicide offenses committed before their eighteenth birthday, are therefore entitled to a declaratory judgment that M.C.L. § 791.234(6), which prohibits the parole board from granting parole to any individual convicted of first-degree homicide and thereby subjects them to life in prison without any possibility of parole is unconstitutional as applied to juveniles.

Further, such punishment violates Plaintiffs' Eighth Amendment rights because it is the harshest punishment available in Michigan and is being imposed on children and adults alike. The Supreme Court's recognition of the fundamental difference between the culpability of children and adult offenders—upon which *Roper, Graham*, and *Miller* are based—prohibits Michigan from imposing on a child the most severe punishment available for an adult convicted of premeditated murder. That trio of cases and our evolving standards of decency require that Plaintiffs be given at least an opportunity for release that is both meaningful and realistic.

Finally, parolable life under Michigan's adult parole system does not satisfy the requirements of *Graham* and *Miller* for a meaningful opportunity for release to which Plaintiffs are entitled. Under the current parole system a judge or successor judge may veto any parole consideration without taking into consideration youthful status or rehabilitation upon maturity, creating a de facto punishment of life in prison without the possibility of parole.

BACKGROUND AND FACTS

The hallmarks of childhood include immaturity, impetuosity and failure to appreciate risks and consequences. A wide array of Michigan statutes reflect the acknowledgment that, unlike adults, "children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them." *J.D.B. v. North Carolina*, 564 U.S. ___, 131 S. Ct. 2394, 2403 (2011) *i.e.* a child, under the age of 18 is not deemed responsible enough to make a decision to leave school (M.C.L. § 380.156(1)); enter into a contract (*Woodman v. Kera LLC*, 486 Mich. 228, 236; 785 N.W. 2d 1 (2010); serve on a jury (M.C.L. § 600.1307a); marry without parental consent (M.C.L. § 551.103(1)); or consent to sexual activities. *People v. Cash*, 419 Mich. 230, 242; 351 N.W. 2d 822, 826-27 (1984) ("on the presumption that their immaturity and innocence prevents them from appreciating the full magnitude and consequences of their conduct"); or vote (M.C.L. § 168.492).

Michigan's mandatory criminal sentencing scheme utterly fails to take children's lesser culpability and impulsiveness into consideration in meting out upon mature adults and children alike the harshest punishment available, life in prison without the possibility of parole, without recognizing the differences between child and adult intent and behavior.[1]

In Michigan, children as young as 14 are charged with first-degree homicide crimes as adults, tried as adults, and if convicted, sentenced as adults to mandatory life sentences without any consideration of their youthful status or lesser culpability. M.C.L. §§ 750.316, 769.1(1)(g). Whether they are convicted for aiding-and-abetting for felony murder where they did not commit

[1] And this lengthiest possible incarceration is an "especially harsh punishment for a juvenile" because he will almost inevitably serve "more years and a greater percentage of his life in prison than an adult offender." *Graham*, 130 S. Ct. at 2028. The penalty when imposed on a teenager, as compared with an older person, is therefore "the same in name only." *Miller*, 132 S. Ct. at 2466 (internal quotation marks and ellipses omitted).

homicide or intend to kill anyone, or for premeditated murder, M.C.L. §§ 750.316(1)(b), 767.39 (accessory), children are sentenced without regard for the diminished culpability that attend their age and circumstances, and in disregard of their unique capacity for rehabilitation.[2] Once in prison, these youth have no opportunity for parole because, by statute, the parole board lacks jurisdiction over all persons convicted of first-degree murder. M.C.L.§ 791.234(6)(a).

Plaintiffs are all serving mandatory life without parole sentences for first-degree murder for offenses committed before they turned 18. The facts of their individual cases are set forth in detail in their First Amended Complaint (Dkt. # 44).

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[2] The facts of Plaintiff Keith Maxey's case demonstrate just how broad Michigan's definition of first-degree murder is:

> [Maxey], who was 16 years old at the time of this crime, did not shoot any of the victims and did not possess a weapon himself. His actual role in the robbery was to restrain one of the victims by wrapping his arms around him. Another robber pointed a gun at the victims. The person [Maxey] was restraining was able to draw his own gun and shoot [Maxey], who then attempted to flee the scene. After [Maxey] fled, there was additional gunfire and two of the robbery victims were shot by one of the robbers. One of these victims died.

People v. Maxey, Docket No. 289023, 2010 WL 1818913 at *3 (Mich. Ct. App. May 6, 2010) (Shapiro, J., concurring) (unpublished). Maxey's conviction for first-degree felony murder was affirmed because he aided and abetted an armed robbery and the death of one of the victims was deemed a "natural and probable consequence" of the robbery. *Id.* (It is just such a case that Justices Breyer and Sotomayor (in *Miller's* concurrence) found to be covered by *Graham's* categorical ban on life without parole sentences as *Graham* dictates that "the only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses who "kill or intend to kill." *Miller,* 132 S. Ct. at 2476.

ARGUMENT

I. Michigan's mandatory sentencing scheme is unconstitutional in so far as it subjects Plaintiffs to life without parole sentences without judicial consideration of their youthful status as a mitigating circumstance.

A "foundational principle" has emerged from recent developments in Eighth Amendment jurisprudence: "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 132 S. Ct. at 2466.

Under Michigan law, children as young as 14 are charged with first-degree murder as if they were adults, tried as adults, and if convicted, are automatically sentenced as adults to life sentences. *See* M.C.L. §§ 750.316, 764.1f, 769.1(1) ("The court shall sentence a juvenile convicted of any of the following crimes [including first-degree murder, subsection (g)] *in the same manner as an adult*." (emphasis added)). The life sentence is mandatory and automatic; the court is not permitted to vary the sentence based on considerations of youth, such as their lesser culpability for their criminal acts, the circumstances of the offense, their personal histories or or any other criteria relevant to the offender's age. This mandatory life sentence combines with Michigan's parole statute to impose a mandatory punishment of life in prison without possibility of release on children, including Plaintiffs. M.C.L. § 791.234(6) (depriving the parole board of jurisdiction over anyone sentenced to life for a first-degree homicide offense).

It is this sentencing scheme that *Miller* clearly deemed unconstitutional. The *Miller* Court held that the Eighth Amendment prohibits juvenile life without parole sentences in *all* cases—including homicide cases—where the punishment is imposed without consideration of the individual's child status and youthful characteristics that may mitigate the need for punishment. *Miller*, 132 S. Ct. at 2460. Recalling that "*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest

sentences on juvenile offenders, even when they commit terrible crimes," the Court found that logic equally applicable to youth facing life without parole sentences. *Roper v. Simmons,* 543 U.S. 551 (2004); *Graham,* 132 S. Ct. at 2465 ("*Graham*'s reasoning implicates *any* life-without-parole sentence imposed on a juvenile . . . ." (emphasis added). The Court held that such a uniquely harsh punishment—which it characterized as "akin to the death penalty"—could not be imposed without individualized consideration of the "mitigating qualities of youth . . . and the wealth of characteristics and circumstances attendant to" a child's age. *Miller,* 132 S. Ct. at 2467. Upon consideration of these youthful characteristics, the Court anticipated that imposition of this punishment would be "uncommon." *Id.* at 2469

Michigan law imposes a mandatory punishment of life without possibility of parole on children ages 14 through 17 who are convicted of any type of first-degree murder, thereby directly violating *Miller* as well as the "basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Miller,* 132 S. Ct. at 2463.

> Under these schemes, every juvenile will receive the same sentence as every other – the 17-year-old and the 14-year-old, the shooter and the accomplice, the children from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14-year-olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses – but really, as *Graham* noted, a *greater* sentence than those adults will serve. In meting out the death penalty, the elision of all these differences would be strictly forbidden. And once again, *Graham* indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison.

Id. at 2467-68.

Miller, Graham and *Roper* mandate that Michigan's youth, including Plaintiffs, are now entitled to full mitigation hearings so as to provide for a constitutionally proportional punishment that complies with the Eighth Amendment and takes the appropriate youth-related factors into account. It is through this process that "[d]iscretionary sentencing in adult court would provide

different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term *with* the possibility of parole or a lengthy term of years." *Miller*, 132 S. Ct. at 2475.

Plaintiffs seek a ruling by this Court on their claim that Michigan's mandatory sentencing scheme, which fails to consider Plaintiffs' youthful status, violates the Eighth Amendment.

II. Plaintiffs are entitled to a declaratory judgment that M.C.L. § 791.234(6) is unconstitutional as applied to children serving life sentences in Michigan.

Plaintiffs seek a declaratory judgment that M.C.L. § 791.234(6) is unconstitutional as applied to Michigan's children because it also directly violates the foundational principle that children are different from adults. By automatically excluding from parole board jurisdiction all children convicted of first-degree homicide offenses, M.C.L. § 791.234(6), violates Plaintiffs' rights under the Eighth Amendment to a meaningful opportunity for release based on demonstrated maturity and rehabilitation.

M.C.L. § 791.234 is unconstitutional as applied to Plaintiffs because it automatically and permanently excludes them from the parole board's jurisdiction and thus denies them the opportunity to be meaningfully considered for release at any time during their natural lives. In Graham, the Court held that the Constitution requires such juveniles to be given a meaningful and realistic opportunity for release based on demonstrated maturity and rehabilitation. *Graham*, 130 S. Ct. at 2030, 2034; *see also Miller*, 132 S. Ct. at 2469.

Under Michigan's Penal Law, murder is categorized as either first-degree or second-degree. M.C.L. §§ 750.316, 750.317. For all first-degree homicide convictions, the mandatory sentence is life. M.C.L. § 750.316. For second-degree murder, the court may sentence the defendant to any term of years or life. M.C.L. § 750.317. Then, if a prisoner has received a life

sentence, whether he or she is eligible for parole (or will ever become eligible) is determined by Michigan's Corrections Code, specifically M.C.L. § 791.234. Under M.C.L. § 791.234(7), prisoners who were sentenced to life for second-degree murder are subject to the jurisdiction of the parole board and may be placed on parole if they satisfy certain criteria. But under M.C.L. § 791.234(6), prisoners who were sentenced to life for first-degree murder are not eligible for parole and will never be meaningfully considered for release.

As a result of this system, and M.C.L. § 791.234(6) in particular, juveniles convicted of first-degree murder are imprisoned for life with no possibility of parole. Once the child enters the corrections system, the parole board is powerless to grant parole because *all* individuals serving life sentences for first-degree murder, including juveniles, must be denied parole pursuant to M.C.L. § 791.234(6). This statutory scheme, as applied to youth who commit their offenses before the age of 18, plainly violates the Eighth Amendment.

In this case, Plaintiffs are all serving life sentences for first-degree murder as a result of offenses committed before they turned 18 and are all entitled to a meaningful and realistic opportunity for release as required by the Eighth Amendment. M.C.L. § 791.234(6) denies them that opportunity and should be declared unconstitutional.

III. Imposing a life sentence without an opportunity for release on Plaintiffs would violate their Eighth Amendment rights.

The Supreme Court's reasoning in *Graham* applies with equal force to all juveniles, no matter their crime. Simply put, the psychological and behavioral characteristics of children who commit homicide are no different from those of children who commit very serious non-homicide offenses. The Eighth Amendment does not tolerate condemning any child to "die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate

that the bad acts he committed as a teenager are not representative of his true character." *Graham*, 130 S. Ct. at 2033.

Plaintiffs are entitled to a meaningful opportunity for release under the principles of *Graham* and *Miller* and seek a ruling on their claims that the imposition of a life without parole sentence violates the Eighth Amendment.

In a series of recent groundbreaking decisions, the Supreme Court has recognized that "children cannot be viewed simply as miniature adults." *J.D.B.*, 131 S. Ct. at 2404. In the Eighth Amendment context in particular, the "evolving standards of decency that mark the progress of a maturing society," have led the Court to strike down state laws that impose society's harshest punishments on children who break the law. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

In *Roper*, citing to developments in neuroscience and psychology, the Court observed that children in the criminal justice context are fundamentally different from adults, and held therefore that the Eighth Amendment prohibits the execution of anyone whose offense was committed before the age of 18. 543 U.S. at 569-70. Due to their lack of maturity and underdeveloped sense of responsibility, children are more likely than adults to act recklessly and without considering or even understanding the probable consequences of their actions. *Id*. at 569. They are also more vulnerable than are adults to peer pressure and negative family influences, and less able to extricate themselves from such settings. *Id*. And their characters are not as fully formed those of adults, meaning they are more capable of reform and rehabilitation over time. *Id*. at 570. These differences, the Court concluded, render young offenders less culpable for their criminal acts than adults, and thus less deserving of society's harshest punishments. *Id*. at 571.

Applying and relying on the same principles, *Graham* held that juveniles under the age of 18 who did not kill or intend to kill cannot be punished with life sentences with no meaningful opportunity for release. 130 S. Ct. at 2027. A life sentence without the possibility of parole is similar to the death penalty, the Court noted, insofar as it represents a deprivation of liberty that is irrevocable, leaving the offender without hope of ever returning to society. *Id.* Such harsh punishment is not appropriate for children given their diminished culpability and unique capacity for change and rehabilitation as compared to adults. *Id*. at 2030.

The Supreme Court's reasoning in *Roper* for prohibiting the death penalty for juveniles, and then applied in *Graham* to strike down life without parole sentences imposed on children who commit non-homicide crimes, applies with equal force here. In the only post-*Graham* Michigan case involving the resentencing of a youth convicted of a first-degree homicide, the court in vacating the life without parole sentence held:

> While this court recognizes the *Graham* Court considered these factors in a non-homicide context, the *Roper* court considered and, in fact, found persuasive, those same factors while considering the culpability of a juvenile murderer. Thus the differences that exist between juveniles and adults neither change nor become less persuasive whether the underlying conviction is for a homicide or otherwise.

People v. Jones, No. 1979-1104-FC, Opinion and Order Granting Defendant's Motion for Relief from Judgment, 12/21/11 (internal citation omitted) (Exhibit 1).

While also noting that *Graham* applied to non-homicide crimes, the *Miller* Court recognized that "none of what is said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime specific." *Miller*, 132 S. Ct. at 2458.[3] It is because they are children with children's characteristics "'lack of maturity and an

underdeveloped sense of responsibility [which] often result in impetuous and ill-considered actions and decisions'" that as a class they are "less deserving of the most serious punishments." *Graham*, 130 S. Ct. at 2026; *Roper*, 543 U.S. at 569-70; *see also J.D.B.*, 131 S. Ct. at 2404.

These traits are not peculiar to certain children or subsets of children but rather describe youth as a class. *See J.D.B.*, 131 S. Ct. at 2404-05. Accordingly, when evaluating any child offender's culpability, youth is, in every case, a significant mitigating factor, its universal relevance "'deriv[ing] from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in *younger* years can subside,'" and indeed they usually do. *Roper*, 543 U.S., at 570 (quoting *Johnson v. Texas*, 509, U.S. 350, 368 (1993). Imposing the harshest punishment Michigan can impose on a child is therefore disproportionate no matter the nature of a child's offense.

The Supreme Court's Eighth Amendment jurisprudence prescribes a two-step analysis to determine whether a sentencing practice is categorically unconstitutional.

> The Court first considers objective indicia of society's standards, as expressed in legislative enactments and state practice[,] to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.

Graham, 130 S. Ct. at 2022 (citations and quotation marks omitted). As explained below, for all the reasons life without parole sentences for children who commit non-homicide offenses were

[3] The *Miller* court stated that because of its decision to strike down all mandatory life without parole punishments for children, "we do not consider Jackson and Miller's alternate argument that the Eighth Amendment requires a categorical ban on life without parole for juveniles." *Miller* 132 S. Ct. at 2469.

found unconstitutional in *Graham*, Plaintiffs' sentences are categorically unconstitutional as well.

A. A national consensus against sentencing children to life without possibility of parole has developed since 2005.

The Supreme Court has recognized that "legal disqualifications placed on children as a class— e.g., limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal." *J.D.B.*, 131 S. Ct. at 2403-04.

It would be a mistake to imbue the interplay of multiple statutes which result in the current sentencing scheme for youth as an intentional legislative expression that all youth convicted of first-degree offenses should receive the mandatory life without parole. Rather, it is a result of a largely unplanned interplay of the punishment scheme for all first-degree homicide offenses; the mechanism by which a juvenile is prosecuted in adult court and the preexisting limitation of parole board jurisdiction. M.C.L. § 791.234(6).

In gauging the acceptance or rejection of a particular punishment by contemporary society, the court must look not only to legislative enactments, but also to the states' actual usage. *Graham*, 130 S. Ct. at 2023 ("[A]ctual sentencing practices are an important part of the court's inquiry into consensus"). Thus, the mere fact that the laws of a jurisdiction result in life without parole sentences for children does not "indicate that the penalty has been endorsed through deliberate, express and full legislative consideration, nor that most states deem the punishment appropriate." *Graham*, 130 S. Ct. at 2026. While forty-one states allow for the imposition of a sentence of life without parole on children below 18 years of age, since 2006,

twenty-one of those states have not actually imposed this sentence on a single child. Since *Roper*, thirty-nine (39) states have imposed zero or one life without parole sentence on a child, per year. During this same time period six states have changed their laws to limit the imposition of life without parole sentences on children.[4] Twelve states have rewritten their juvenile sentencing processes to provide greater recognition of an offender's youthful status. (Connecticut, Illinois, Mississippi, Arizona, Colorado, Virginia, Delaware, Indiana, Nevada, Utah, Washington, and Texas). The trend, for states that have discretion, is clearly against imposing life without parole on persons below 18 years of age.

Since 2008, twenty-seven (27) of the states that allow this sentence have not imposed it, and another six have imposed it only once. Thus, the majority of states (thirty-three), have rejected the practice of subjecting persons below 18 years of age to life without parole sentences except in the rarest of circumstances. (*See Basic Decency* at pp. 24-27). When a sentencing practice becomes rare, "it is fair to say that a national consensus has developed against it." *Graham*, 130 S. Ct. at 2026 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

In fact, only five states now account for two-thirds of these sentences. (Pennsylvania (475), Michigan (371), Florida (355), California (301) and Louisiana (238)). (*See Basic Decency* at pp. 24-27). Yet, these states' usage of life without parole cannot be viewed as an intentional use of these sentences, where they are solely the result of unintentional mandatory sentencing schemes preventing any discretion to impose lesser sentences on youth and reflect the evolving standards of decency.

B. This Court's independent judgment is central to a determination that the imposition of life without parole sentences for children who commit homicides is unconstitutional.

[4] Alaska, Colorado, Kansas, Oregon, Texas (for those under age 17) and Virginia. *Basic Decency: Protecting the Human Rights of Children*, pp. 24-27, http://www.aclumich.org/sites/default/files/file/BasicDecencyReport2012.pdf.)

Notwithstanding the objective evidence of society's standards, a court must assess whether "in the exercise of its own independent judgment … the punishment in question violates the Constitution." *Graham*, 132 S. Ct. at 2022 (a finding that there is no national consensus against the practice is not determinative of the constitutional issue).

In exercising its independent judgment the court must consider the culpability of the offenders in light of their crimes and characteristics, along with the severity of the punishment, and determine whether the imposition of a life without parole sentence on persons below 18 years of age "serves [any] legitimate penological goals." *Graham*, 130 S. Ct. at 2026. The Supreme Court's reasoning in *Roper*, prohibiting the death penalty for persons below 18 years of age, and applied in *Graham* to strike down life without parole sentences for children who commit non-homicide crimes, applies with equal force here. The extreme severity of a life without parole sentence cannot be justified by any legitimate penological goals in light of a child's reduced culpability and for their criminal acts and their unique capacity for change.

Graham analyzed the four legitimate penological goals: retribution, deterrence, incapacitation, and rehabilitation in concluding that imposing a sentence "akin to death" on a child, could not be justified by these goals. *Graham*, 130 S. Ct. at 2028 (internal quotation marks and brackets omitted). Nor can the sentence be justified when analyzing these goals in the context of Plaintiffs' crimes. All children, including those who commit homicide offenses, have a "culpability or blameworthiness [that] is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. These common-sense truths that diminish children's culpability apply no matter the crime. Accordingly, "whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim,

the case for retribution is not as strong with a minor as with an adult." *Graham*, 130 S. Ct. at 2028.

These characteristics of adolescents, which led the *Graham* Court to hold that children who commit non-homicide crimes must be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," have been recognized by the Court to be shared by all persons below 18 years of age, including those guilty of homicide. *See Miller*, 132 S. Ct. at 2458; *Graham*, 130 S. Ct. at 2030; *J.D.B.*, 131 S. Ct. at 2404-05; *Roper*, 543 U.S. at 569-70. Even a child who commits murder—just like a child who intends to kill and believes he has killed, but fortuitously has not—cannot be deemed worthless or a danger to society in perpetuity based on an act that is more likely to "reflect[] transient immaturity" than "irreparable corruption." *Roper*, 543 U.S. at 573.

The absence of any penological justification, the diminished culpability of children who commit crimes, and "the severity of life without parole sentences" necessarily lead to the conclusion that sentencing persons below 18 years of age to life without parole for any crime is a cruel and unusual punishment and therefore prohibited by the Eighth Amendment. *See Graham*, 130 S. Ct. at 2030.

This is especially the case in Michigan, where the harshest punishment available, to adults and children alike, is a sentence of life without parole. Unlike the states' systems at issue in *Miller*, which maintain the death penalty for adults, in Michigan, the maximum sentence an adult can be given is life without parole. To effectuate the recognition of the diminished culpability of youth as a class, children, at a minimum must be afforded some meaningful opportunity for release.

IV. Plaintiffs seek injunctive and remedial relief to ensure judicial consideration of the *Miller* elements prior to imposing a punishment and to provide a meaningful and realistic opportunity for release.

Upon demonstration of a violation of their constitutional rights, Plaintiffs are entitled to equitable prospective relief. The equitable relief necessary to remedy the constitutional wrong includes: 1) judicial mitigation hearings with full consideration of Plaintiffs' youthful characteristics so as to provide for a constitutionally proportional punishment; 2) a declaration that M.C.L. § 791.234(6)(a) is unconstitutional as applied to persons below 18 years of age and an injunction against its application to Plaintiffs; 3) an injunction against imposing any punishment on Plaintiffs, based on conduct committed before they turned 18, that denies them an opportunity for release as required by *Graham* and *Miller*; and 4) an appropriate remedy to ensure that Plaintiffs are in fact provided a meaningful and realistic opportunity for release.

A. This court has broad equitable powers to fashion appropriate relief for the violation of constitutional rights.

"'Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.'" *United States v. Paradise*, 480 U.S. 149, 183-84 (1987) "Article III equity jurisdiction is . . . broad enough to authorize a federal court, once it has found a constitutional violation by a state or local governmental entity, to administer intricate and expansive remedial orders." *Associated Gen. Contractors v. City of Columbus*, 172 F.3d 411, 417 (6th Cir. 1999); *United States v. Michigan*, 62 F.3d 1418, 1995 WL 469430 at *14 (6th Cir. 1995) (unpublished table decision) (upholding district court order imposing detailed remedial measures governing mental health treatment of inmates in state prisons as necessary "to enable them to provide care for mentally ill inmates, care which they are constitutionally obligated to give"); *see United*

States v. Spearman, 186 F.3d 743, 752 (6th Cir. 1999) (citing additional cases for federal courts' equitable jurisdiction in remedying constitutional violations).

In this case, requiring resentencing with individualized judicial consideration of the elements and characteristics of Plaintiffs' youthful status; enjoining M.C.L. § 791.234(6)(a) as applied to persons below 18 years of age; and ensuring a meaningful opportunity for release is necessary to ameliorate the violation of Plaintiffs' Eighth Amendment rights. As explained below, further injunctive relief beyond declaring the parole statute unconstitutional is warranted here, and the court should exercise its equitable powers accordingly. If "the mere cessation of the particular activity or method of operation will not serve to remedy the violation," *Associated Gen. Contractors*, 172 F.3d at 417, then an injunction against the enforcement of the challenged statute, without more, is insufficient.

B. The Eighth Amendment requires that persons below 18 years of age facing life in prison without the possibility of parole are entitled to hearings taking their youth and its attendant characteristics into consideration as mitigating factors.

In *Miller*, the Court delineated specific mitigating factors that courts must consider when making an individualized sentencing decision. *Miller*, 132 S. Ct. at 2468. In this case, Plaintiffs were each sentenced to life in prison without *any* individualized "consideration of [their] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 132 S. Ct. at 2468. No consideration was given to their "family and home environment . . . —no matter how brutal or dysfunctional." *Id.* Nor was consideration given to "the circumstances of the homicide offense, including the extent of [their] participation in the conduct and the way familial and peer pressures may have affected them]." *Id.* Also ignored was the fact that they "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth." *Id.* And, of course, no

consideration was given to their "possibility of rehabilitation." *Id.* If Plaintiffs' sentences are to meet constitutional muster, these mitigating factors must be considered by a judge or jury.

C. The Eighth Amendment prohibits the State from punishing Plaintiffs with life sentences that preclude any possibility of their release.

The *Miller* court opined that upon an appropriate consideration of the mitigation facts, it should be an uncommon event to sentence a persons below 18 years of age to a life without parole sentence. Plaintiffs assert that any imposition of a life without parole sentence on Plaintiffs would be unconstitutional as it would fail to recognize their youthful status, lesser culpability and unique capacity for growth and rehabilitation as compared with adults. *See* Argument III, *supra.*

D. The Eighth Amendment requires that children have an opportunity for release that is meaningful and realistic.

Graham and *Miller* stand for more than just the proposition that punishing persons below 18 years of age with a sentence of life in prison and without *any* possibility of parole contravenes the Eighth Amendment. They also hold that the opportunity for release from prison during his or her lifetime must be "meaningful," *Graham*, 130 S. Ct. at 2030, 2032, and "realistic," *id.* at 2034. *See also Miller*, 132 S. Ct. at 2469. Simply converting Plaintiffs' sentences to life with the possibility of parole fails to provide the individualized determination required by *Miller* and lacks the meaningful opportunity for release mandated by *Graham.*

To be "meaningful," a review process must use fair procedures, entail faithful consideration of all relevant factors, and not be subject to arbitrary roadblocks. And to be "realistic," there must be a non-negligible possibility of eventual release. If these criteria are not satisfied with regard to Plaintiffs serving life in prison, then their "opportunity" for release—at least from a constitutional standpoint—is inadequate at best and illusory at worst.

In *Graham*, the Court specified that the "meaningful opportunity to obtain release" should be based on the ability to demonstrate "maturity and rehabilitation." 130 S. Ct. at 2030. Not only are Plaintiffs entitled to an opportunity for release as a result of their lesser culpability due to youthful mitigation factors, such an opportunity for release must be meaningful to distinguish their status from adults serving life sentences with no possibility of parole. As set forth below, Michigan's adult parole system fails to provide Plaintiffs with that meaningful opportunity for release.

E. Michigan's adult parole system, as it currently functions, would not provide Plaintiffs with the meaningful and realistic opportunity for release that the Eighth Amendment requires.

If M.C.L. § 791.234(6) is enjoined as applied to persons below 18 years of age, Plaintiffs will be subject to the jurisdiction of a parole board that still will not provide the meaningful and realistic opportunity for release that *Graham* and *Miller* require. *See* M.C.L. § 791.234(7).

An individual serving a parolable life sentence in Michigan must obtain a majority vote of the parole board to obtain a public hearing, which is a prerequisite to any actual granting of parole. By statute, a decision to grant a public hearing shall not proceed if the sentencing judge or the judge's successor in office, objects. M.C.L. § 791.234(8)(c). The objection need not contain any reasons and is not subject to any appeal or review. Thus, a youth may be denied any opportunity for review and/or release, based simply upon a successor judge's veto, governed by no criteria or guidelines, which converts a parolable sentence into life without possibility of parole without consideration of youthful status, mitigating factors, maturity or rehabilitation. *Id.*

The parole board may also refuse to consider a Plaintiff for a public hearing or parole without consideration of youthful status, rehabilitation or maturity or mitigating factors, as such criteria are not contained in the parole board's adult guidelines, thus converting a parolable sentence to life without parole, without review or consideration of youth's mitigation factors.

The parole board need not provide any reasons for its refusal to proceed with a hearing or with a denial of parole and neither actions are appealable. M.C.L. § 791.234(11).

In addition to enjoining the State from automatically and permanently excluding Plaintiffs from the parole board's jurisdiction, the court should require the State to provide Plaintiffs with a meaningful and realistic opportunity for release that comports with the Eighth Amendment.

CONCLUSION

For the reasons set forth above, Plaintiffs request that the court grant the following relief:

1. Enter summary judgment in favor of Plaintiffs on their Eighth Amendment claims;

2. Issue a declaratory judgment that Michigan's sentencing scheme, that fails to take Plaintiffs' youth into consideration is unconstitutional;

3. Issue a declaratory judgment that M.C.L. § 791.234(6) is unconstitutional as applied to juveniles;

4. Enjoin Defendants from failing to provide Plaintiffs with mitigation hearings and a meaningful and a realistic opportunity for release as set forth above; and

5. Retain jurisdiction and award attorney fees and costs and such other relief as is just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2012, 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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