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, individually and on behalf of those similarly situated,

Plaintiffs,

v

RICK SNYDER, in his official capacity as Governor of the State of Michigan, HEIDI E. WASHINGTON, in her official and individual capacity as Director of the Michigan Department of Corrections, MICHAEL EAGEN, in his official and individual capacity as Chair of the Michigan Parole Board, and BILL SCHUETTE, in his official capacity as Attorney General of the State of Michigan,

Defendants.

No. 2:10-cv-14568

HON. MARK A. GOLDSMITH

MAG. R. STEVEN WHALEN

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS' SECOND AMENDED COMPLAINT (DKT #130) COUNT VI

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DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS' SECOND AMENDED COMPLAINT (DKT# 130) COUNT VI

Defendants move this court, pursuant to Fed. R. Civ. P. 56(a), for summary judgment as to Plaintiffs' claims in their Second Amended Complaint count VI for the reason that there is no dispute as to any material fact and the Defendants are entitled to summary judgment in their favor on the claims in count VI as a matter of law.

Pursuant to E.D. Mich. LR 7.1(a)(2) Defendants sought concurrence to their requested relief as to the claims in count VI from the Plaintiffs during several telephone conversations, but that concurrence was denied.

This motion is based on the accompanying brief and exhibits attached thereto.

Wherefore, for the above stated reasons and as more fully explained in the accompanying brief and exhibits, Defendants are entitled to summary judgment as a matter of law as to Plaintiffs' count VI and request that the claims in count VI be dismissed with prejudice.

Respectfully submitted,

Bill Schuette
Attorney General

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Dated: November 13, 2018

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2018, 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.

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DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS' SECOND AMENDED COMPLAINT (DKT #130) COUNT VI

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CONCISE STATEMENT OF ISSUES PRESENTED

Whether the Plaintiffs' count VI claim that MDOC is required to provide core programing for Hill class members so they may be paroled at their first eligibility date and that core programing is necessary to show lack of irreparable corruption at resentencing, is legally unsupported and factually unfounded?

Defendants say: Yes

Plaintiffs say: No

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1 (1979), states that there is no right to parole.

Makowski v. Governor, 495 Mich 465 (2014); 852 N.W.2d 61, holds that once eligible for parole, there is no right to be released on parole, but rather it is up to the parole board's discretion.

Hill v. Snyder, 878 F.3d 193 (6th Cir. 2017), holds that class members must have a meaningful opportunity for release.

People v. Payne, 304 Mich App 667 (2014); 850 N.W.2d 601, states that there is still a meaningful opportunity for release if, after a long-term minimum sentence, a prisoner may be considered for release by the parole board.

Starks v. Easterling, 659 Fed. Appx. 277 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 819 (2017), holds that a long-term minimum sentence cannot be so long as to exceed ones statistically expected lifespan.

STATEMENT OF FACTS

Plaintiffs filed their Second Amended Complaint (Dkt #130) on June 20, 2016, before many of the *Miller*[1] required resentencing hearings of the Hill class members had occurred. As pertinent to this motion for summary judgment, Plaintiffs allege in count VI that the Hill class members are going to receive longer sentence minimums or are more likely to receive a life without parole sentence due to the Michigan Department of Corrections' (MDOC) practices for disallowing or limiting access to certain programing. Plaintiffs' claim the Hill class members who become parole eligible after resentencing have no real chance of receiving a parole because they lack(ed) access to the necessary programing and they are serving longer sentences than they otherwise would have because of the same alleged limited access to parole. Now, more than two years after Plaintiffs filed their Second Amended Complaint, reality has demonstrated how completely wrong Plaintiffs were in their allegations and therefore, Plaintiffs' claim in count VI must be dismissed as factually unfounded.

The attached spreadsheet is described as the "Mandatory Juvenile Life Without Parole – Parole Board Working Document" (Ex. A), dated November 5, 2018. This document provides a snap shot of the status of the Hill class members' status vis-a-vie the parole board. The grid lists all of the Hill class members and

[1] *Miller v. Alabama*, 567 U.S. 460 (2012).

indicates: (1) those who have been resentenced; those who, as a result of their resentence, have become eligible to be considered for parole; (2) those who have been interviewed by the parole board and are waiting on a decision; (3) those who have received a decision; (4) those who have been released on parole following a positive decision; (5) those who have discharged from parole or discharged directly after resentencing; and (6) those who are still waiting for their resentencing hearing.

A summary as of November 5, 2018, of what is presented in the attached Exhibit A is as follows:

1. 19 of the Hill class members have now been discharged;
2. 47 additional Hill class members have been released on parole;
3. 2 more Hill class members have been granted parole but have not yet been released pending completion of In-reach pre-release readiness activities and release schedule;
4. 4 Hill class members who are parole eligible, have been denied immediate parole. Camper #222691 received a 12-month continuance 6-18-18; Kelly #241473 received an 18-month continuance 5-24-18; Walker #228183, serving a 30-60 year sentence and parolable life, was given a “no-interest” decision on 8-20-18 and will be considered again in five years as a parolable lifer; and, finally, Servant #217805 was given a

24-month continuance for the substantial and compelling reason, as set forth in the decision denying immediate parole, that he has "denied his guilt for years," and now he "admits his role yet continued to minimize his responsibility and shifts blame for his choices onto his codefendant. His level of insight and accountability are not commensurate with the gravity of his crime." (Exhibit B);

5. 9 Hill class members have been interviewed for parole consideration and have a decision pending;
6. 2 Hill class members are scheduled for their parole interview, and one more is now eligible for interview;
7. 53 Hill class members have been resentenced but are not yet parole eligible due to their resentence term; and
8. 236 Hill class members have yet to have their resentencing completed.

This summary shows that, as of November 5, 2018, 68 of 72 parole-eligible Hill class members who have received a parole decision have been granted parole.[2] That is a 94.44% success rate of obtaining a parole for a Hill class member who, as a result of being resentenced, becomes eligible for parole consideration due to his/her new sentence with applicable credits applied.

[2] As of November 8, 2018, item 7, above, is 54 and item 8 is 235, as James Adrian #247281 was resentenced on November 1, 2018, to 32-60 years and has a parole board jurisdiction date of September 14, 2024.

Exhibit C is a compilation of the programing recorded in the Hill class member's central office file, provided to Plaintiffs at their request during the course of discovery, that lists the programing completed by the paroled Hill class members. Here, the word "programing" is being used to describe personal improvement programing required by the MDOC, programing made available by the MDOC at the prisoner's request, and those programs that are completely voluntary and allowed to be pursued by the prisoner while in MDOC custody, though not provided by the MDOC.

Plaintiffs imply in count VI, without description, that the Hill class members are excluded from certain programing and that exclusion prevents them from being paroled. Plaintiffs have asserted that certain programing, under the description of "core" programing, has not always been available to prisoners serving a life sentence. Plaintiffs ignore the fact that other non-Hill class member prisoners serving life sentences are similarly excluded from certain programing. (*See* Ex. D, Kaminski Dep. 41:19-24; 109:12-14; 114:12-16; and 116:4-10.) Plaintiffs also ignore the fact that the "core" programing (Ex. E, Attachment A to PD 05.01.100 (listing core programs for male and female prisoners)) is to be made available to all prisoners who have a recommendation for it recorded in the prisoner's intake process but that there are insufficient resources available to provide that same "core" programing to all prisoners immediately. Therefore, the MDOC makes the

programing seats available to all prisoners on the basis of that prisoner's proximity to their earliest release date (known interchangeably as ERD or PBJ – parole board jurisdiction date). (Ex. D, Kaminski Dep. at 41:14-24; Ex. F, Eagen Dep. 71:10-20.)

Plaintiffs may argue that once they are resentenced and they become parole eligible, they then *may* have to go into the recommended programing. This is true, and it is just the same for other non-Hill class members who as a result of resentencing or the simple passage of time. Prisoners who have not completed certain programing may be directed to complete that programing, such as substance abuse prevention or violence prevention programing, before they can be released on parole or before being granted a parole, just like other non-Hill class prisoners. However, the nature of the Hill class members being resentenced to 25-40 year minimum sentences, means that for them, when they become parole eligible they fall into that category of prisoners described as long-term prisoners. (Ex. F, Eagen Dep. 82:19-83:21; Ex. G, Kosinski Dep. 81:19-23.) For these prisoners, depending on their institutional record, the parole board may not require the completion of intake recommended core programing as the programing no longer appears necessary. (Ex. F, Eagen Dep. 76:8-22; 107:9-110:7.) For example, if a prisoner has served 10 years without a substance abuse misconduct ticket, the parole board may waive that core programing and grant the prisoner

parole without it. (Ex. F, Eagen Dep. 133:1-17.) Similarly, if a prisoner had a recommendation for violence prevention programing (VPP) but has gone 10-15 years without an assaultive ticket, the parole board may waive the requirement and grant parole. (Ex. F, Eagen Dep. 107:15-23; 134:15-135:13.) Sometimes even a lessor clear conduct period is required before the prisoner is granted a parole.

The best predictor of what the parole board may do in the future is what the parole board has actually done to date when considering Hill class members for parole. Referring to the listing of the programming accomplished by the Hill class members who have been granted parole (Ex. C), it becomes immediately obvious that all of the Hill class members paroled to date have completed some programing, but a much smaller percentage have completed core programing. In fact, of the 68 Hill class members so far granted parole only one had completed VPP, three had completed both substance abuse (SA) and VPP's predecessor program Assaultive Offender Program (AOP), and another fifty had completed substance abuse programing alone. (Ex. C.)

This means that 14 of the Hill class members paroled had not completed any of the core programs of the type that Plaintiffs complain they are excluded from while still under their original life sentence, yet, to state the obvious, they were granted parole anyway. These facts demonstrate that Hill class members are not barred from being granted a parole because they did not complete originally

recommended core programing. Moreover, many of the parolees completed SA before they were even seen by the parole board. Even in those instances where the parole board considers parole but wants a recommended core program completed, the Hill class member, now parole eligible, goes to the front of the queue with other parole eligible prisoners to receive the programming. (Ex. F, Eagen Dep. 66:15-22; 71:5-20; Ex. D, Kaminski Dep. 49:20-24; 59:17; 60:1.)

In count VI of their Second Amended Complaint, Plaintiffs make an additional unfounded contention. Plaintiffs argue that core programing is necessary for the Hill class members to demonstrate at their *Miller* resentencing hearings that they are not irreparably corrupt and should receive term-of-years sentences instead of life without parole.

Defendants have looked at what is actually happening at the resentencing hearings for the Hill class members. As of October 22, 2018, there had been 137 Hill class members resentenced. Of these resentencing hearings, transcripts had been prepared for approximately 81 of the cases. Defendants have reviewed those sentencing transcripts to note the factors that the court cited in making resentencing decisions. Exhibit H is a grid showing the sentencing factors cited by the sentencing judges during the 81 resentencing hearings for which we have resentencing transcripts.

A review of this grid (Ex. H), or the source transcripts (Ex. I), shows that the most important factor in the resentencing court's consideration are the circumstances of the crime(s) for which the Hill class member has been convicted. As a contributor to this consideration, the prosecution's request for life without parole or for a term-of-years greater than the minimum of 25 years is also an important factor. In no case where the prosecutor requested life without parole or a 40 year minimum, did the Hill class member receive only a 25 year minimum sentence.

The second most significant factor was a combination of the Hill class member's expression of remorse and attempt at reconciliation with the victim's family or society. The third most significant factor considered is the prisoner's misconduct history in the MDOC, with recent years prior to resentencing having the most significance. Finally, in a distant fourth place, the Hill class members' efforts at rehabilitation and self-improvement, through participation in programming, are sometimes considered.

When the resentencing court wants to emphasize a rationale for something other than the higher minimum the prosecutor has requested, it sometimes cites the Hill class member's effort at self-improvement. This reference is often to the voluntary activities in which the Hill class members have engaged. These activities include performing their MDOC assigned work activity, seeking out and

participating in voluntary programs, obtaining their GED, taking college courses and vocational classes, furthering their religious beliefs through study, starting productive hobbies like creative writing or drawing, joining clubs, serving on the Warden's Forum, and taking self-improvement course(s) through the mail. (Ex. H.) No court has declared that because a prisoner did not complete some recommended programing that they would receive a harsher sentence. (Ex. H.)

Specifically, prisoners have the ability to engage in various MDOC work activities such as housing unit porter, yard crew, teacher assistant or tutor in GED classes, dog training program, and volunteer charitable activities. (Ex. C.) Courts have emphasized great work history when resentencing Hill class members to favorable sentences. (*See* Ex. I, Transcripts for Montalvo, Perry, Samel, Huffman, Hill, and Ross.) A prisoner's ability to hold a job and receive great work reviews helps prove to the Court that the prisoner could be a productive member in society. Further, many prisoners partake in vocational classes and receive certificates. (Ex. C.) These classes are in numerous areas, such as food service, hospitality, furniture sanding, custodial maintenance, and machine shop. (Ex. C.) The range of vocational classes allow prisoners to find their niche and prove to the Court that they have the tools to succeed on the outside.

There are also numerous voluntary programs that the Hill class members can and have taken advantage of. (*See* Ex. C.) Some of the more common voluntary

programs include; Cage Your Rage, Chance for Life, Thinking for Change, and various substance abuse programs. (Ex. C.) Participation in these programs allows prisoners to self-improve on areas that are specific to the individual. During resentencing hearings, the Courts emphasize the fact that prisoners take advantage of numerous programs when resentencing them. (Ex. H.) These programs allow prisoners to demonstrate their growth and development during their time in prison.

Plaintiffs current list of Hill class member witnesses have all been deposed. Of those witnesses, one person is now discharged, three more were on parole when they were deposed, and 20 were still incarcerated. (Ex. J, Summary of Plaintiffs' Hill Class Member Witness Depositions.) Of those 20, 11 have been resentenced. (Ex. J.)

For the four Hill class members who were released on parole prior to their depositions, their programming accomplishments (Ex. J) mirror the programming of the other paroled Hill class members, as listed in Exhibit C.

For the remaining twenty of Plaintiffs' Hill class member witnesses, the primary distinguishing feature in their programing accomplishments is the length of time they have already served. When the witness had served less than 10 years, they had accomplished comparatively less programming. (Ex. J.) By the time the witnesses had served more than 20 years, their programming accomplishments greatly increased. (Ex. J.)

It is clear that a Hill class member who has controlled their misconduct behavior, matured enough to decide to take advantage of whatever programing they were eligible for or could volunteer for, and have otherwise tried to make a real effort to reform and demonstrate their rehabilitative potential, have been able to do so.

A further observation of these listings in Exhibit A shows what parole board chairman Eagen noted that once the Hill class members become parole eligible, they have served a significant amount of time. (Ex. F, Eagen Dep. 86:7-16.) Experience shows that long term prisoners are often good parole prospects because, they have had a substantial period of time to demonstrate the absence of negative behavior, they have aged enough usually to decide to take advantage of whatever positive activity outlets are available and, like many other long term prisoners who began their sentences at age 18 or 19, have matured enough to make the decision to make the best of their situation. As a consequence, those prisoners have the opportunity to demonstrate the absence of irreparable corruption, a potential for rehabilitation and a course of conduct that can lead the parole board to determine that at some point after they become parole eligible, they represent a reasonably low risk of re-offending and warrant the privilege of being released on parole.

ARGUMENT

I. Plaintiffs' count VI claim that MDOC is required to provide core programing for Hill class members so they may be paroled at their first eligibility date and that core programing is necessary to show lack of irreparable corruption at resentencing, is legally unsupported and factually unfounded.

A. Plaintiffs do not have a right to parole or to any specific programing, but they do have a meaningful opportunity for release

"There is no constitutional or inherent right of a convicted person to be conditionally released before expiration of valid sentence." *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). Further, states do not even have a duty to establish a parole system. *Id.* However, if a parole system is created, each state may designate different factors and conditions that should be considered by the parole authority. *Id.* at 8. In *Greenholtz*, prisoners filed a class action asserting that the Board of Parole's procedures denied them procedural due process. *Id.* The Court held that a right to parole is not created simply because a state provides the possibility of parole. *Id.* at 7.

The Michigan Supreme Court reiterated that prisoners eligible for parole are not entitled to parole as a matter of right. *Makowski v. Governor*, 495 Mich 465, 478 (2014); 852 N.W.2d 61, 69. In *Makowski*, the Governor commuted Makowski's sentence of life without parole, and then subsequently revoked the commutation. *Id.* at 469. Makowski alleged that the revocation violated his due

process right. *Id*. The Court held that the commutation was final once the Governor signed the commutation and filed with the Secretary of State. *Id.* at 490. It could not be subsequently revoked by the Governor. *Id*. The commutation made Makowski parolable. *Id.* After being remanded to the parole board, the board declined to parole Makowski and decided to consider him again for parole in two years. Makowski challenged the decision of the parole board to deny him immediate release on parole. *Id.* at 442. Makowski alleged that the board had no authority to deny him parole once the Governor commuted his sentence. *Id.* The trial court and Court of Appeals held that the parole board has discretion to consider a prisoner who is eligible for parole and either grant or deny release on parole in the board's discretion. *Makowski v. Governor*, 317 Mich App 434, 443 (2016); 894 N.W.2d 753, 757; 500 Mich 988 (2017), *appeal denied*; and 501 Mich 866 (2017), *appeal denied*.

In this case, the Sixth Circuit in *Hill v. Snyder*, 878 F.3d 193 (6th Cir. 2017) held that if a prisoner is resentenced to a term of years under the *Miller* decision, that the prisoner is entitled to a meaningful opportunity of release. *Id.* The Sixth Circuit in *Hill* did not address exactly what it means to have a meaningful opportunity to release but the Michigan Court of Appeals and the Sixth Circuit have discussed the meaning of the phrase in other cases. See *People v. Payne*, 304

Mich App 667, 675 (2014); 850 N.W.2d 601, 605; and *Starks v. Easterling*, 659 Fed. Appx. 277 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 819 (2017).

In 2014, the Michigan Court of Appeals, in its *Payne* decision, held that a 25-year mandatory minimum sentence for a juvenile defendant convicted of first-degree criminal sexual conduct provides a meaningful opportunity for release because it "allows for review of an individual defendant's progress toward rehabilitation." *People v. Payne*, 304 Mich App 667, 673 (2014); 850 N.W.2d 601, 605. The Court explained that this type of mandatory sentence is not the same type of mandatory sentence found objectionable in *Miller* because the prisoner in *Payne* will be subject to the jurisdiction of the parole board after serving a specific period of time. *Id.* at 676. The Court emphasized the fact that a 17-year-old sentenced to the 25-year minimum will be no more than 42-years-old at the time of his first parole eligibility date. *Id.* This shows that the Court looks at the length of the sentence, as well as the age of the prisoner, when determining whether there was a meaningful opportunity for release. Even a prisoner with a 40-year minimum will be eligible for parole no later than age 57, even if they receive no sentence credits. As this court has already ruled, sentence credits, as set forth in the applicable state statutes must be applied to the Hill class members based on their eligibility; it would be the rare unreformed Hill class member indeed who would serve their entire minimum sentence before being considered for parole.

Next, in 2016, the Sixth Circuit again discussed what it means for a prisoner to have a meaningful opportunity for release. In *Starks*, prisoner Starks was 17-years-old when he committed his crime for which he was convicted. *Starks*, 659 Fed. Appx. 277. He was sentenced to a mandatory fifty-one-year term of years sentence for felony murder, as well as a consecutive term of eleven years for attempted aggravated robbery. *Id.* Starks will not be eligible for parole until he turns seventy-nine years old. *Id.* The Court held that Stark's minimum sentence violates his Eighth Amendment right under *Miller*, because age seventy-nine exceeds the life expectancy of African American males. *Id.* The Court, like in *Payne*, looked at both the length of the term and the age of the prisoner when determining if the prisoner had a meaningful opportunity for release. The difference was that in *Payne* the prisoner, statistically speaking, would be eligible for parole during his natural life, while the prisoner in *Starks* would statistically not live long enough to be considered for parole, thus not having a meaningful opportunity for release.

In contrast to the *Starks* decision and more consistent with the *Payne* decision, the Hill class members that are resentenced to a term-of-years under *Miller* have a meaningful opportunity for release, as described by *Payne* and *Starks*. The prisoners are resentenced to a minimum of 25-40 years and a maximum of 60 years. That means, in a worst-case scenario, a 17-year-old

sentenced to 40-year minimum sentence will be eligible for parole when he turns 57-years-old. However, that age does not take into account the potential for sentence-reducing credits. Therefore, the Hill class members resentenced to a term-of-years clearly have a meaningful opportunity for release.

B. Hill class members have ample opportunity to demonstrate parolability, even if they are not always eligible for every intake recommended program

Plaintiffs falsely claim that Defendants' policies and procedures governing access to prison "core" programming prevent successful parole consideration and release, which Plaintiffs contend, denies Plaintiffs the meaningful opportunity for release that their minimum terms of sentence would otherwise allow. However, the actual experience of prisoners resentenced under *Miller* shows that the class members actually have an even better opportunity for release than prisoners who score in the high probability of release category under the parole guidelines. (Ex. K.)

Plaintiffs also falsely claim that Defendants' failure to provide Plaintiffs with access to programming, education, training, and rehabilitation opportunities violates Plaintiffs' rights under the Eighth and Fourteenth Amendments. First, the allegation that Defendants do not provide Plaintiffs with programming, education, training, and rehabilitation opportunities is not accurate. The actual experience of

the Hill class parole-eligible members shows that the Hill class members are heavily involved in programing and other rehabilitation opportunities. (*See* Ex. C.)

Even if the prisoners are not given access to certain, specific programming, the actual experience of the resentenced Hill class members shows that the judges conducting *Miller* resentencing hearings emphasize factors other than programing in determining whether a Hill class member should receive a resentence to life without parole or a term-of-years. Hill class member's programing experience is in no way a determining factor in the Judge's declarations as to what the term-of-years minimum should be. (Ex. H.) The attached sentence grid lists the factors mentioned during resentencing that resulted in the various minimums from 25 years up to 40 years. (Ex. L, Factors Coincident with Varying Minimum Sentences.) Judges look to factors such as the circumstance of the underlying crime, the prisoner's remorse, the prisoner's prison record emphasizing misconduct history, the prisoner's age at the time of the crime, and the prisoner's family support. Specifically, the data shows that the Judge only discusses programing 38% of the time. (Ex. H; Ex. I; Ex. L.)

The attached chart, Exhibit H, is a listing of the factors used by the resentencing judges in the 81 resentencing hearings for which transcripts have been prepared. (Ex. H; Ex. I.) This chart supports the statements made above in the most direct way as it lists the factors mentioned by the court during the

resentencing hearings. It is readily noted that whether a Hill class member had substance abuse programing or violence prevention programing while in MDOC custody, the importance of that self-improvement activity is dwarfed by the more traditional factors leading to the sentencing court's decision: heinousness of the crime and the person's involvement in the particulars of the criminal act, whether they show remorse, and behavior such as prison misconducts that show behavioral propensities. (Ex. H; Ex. I; Ex. L.)

C. MDOC has no obligation to assist Hill class members with their resentencing arguments

Plaintiffs assert that the MDOC failed to provide rehabilitation opportunities necessary for Plaintiffs to demonstrate their suitability for release. This assertion is not factually accurate for reasons demonstrated above. However, even if the assertion was accurate, Plaintiffs' claim should still be dismissed for failure to state a claim because the MDOC does not have an obligation to be involved in a prisoner's criminal case, including the prisoner's request for resentencing. In regard to the Hill class members' motions for resentencing under the *Miller* case, the MDOC is not a party on the merits and has no interest in the facts or arguments used to seek a resentence or a particular outcome, consistent with the law.

Assuming, arguendo, that Plaintiffs' assertion that the MDOC has an obligation to provide specific programing to Hill class members to support their

claim that they are not irreparably corrupt is considered, it logically suggests that Plaintiffs believe the MDOC has standing to participate in the Hill resentencing hearings. However, in order to have standing in a case, a litigant must show:

> (1) [he] has suffered an 'injury-in-fact' that is
>
> (a) concrete and particularized and
>
> (b) actual or imminent, not conjectural or hypothetical;
>
> (2) the injury is fairly traceable to the challenged action of the defendant; and
>
> (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Soehnlen v. Fleet Owners Ins. Fund, 844 F.3d 576, 581 (6th Cir. 2016).

The MDOC lacks any legal interest in the particular outcome of any resentencing proceeding and, therefore, fails to satisfy the elements of standing. The MDOC has not suffered any actual or imminent damage to its interest regarding the Hill resentencing cases and does not claim that it has. It does not matter to the Defendants/MDOC with regard to the MDOC's function, whether a Hill class member receives a term-of-years sentence or life without parole on a Miller resentencing. Similarly, it does not matter to the Defendants/MDOC whether a Hill class member receives a 25-year minimum or a 40-year minimum, as the MDOC takes all persons remanded to its custody in accord with a lawful sentence.

There have been over 140 resentencing hearings and the MDOC never once tried to establish standing in any of the cases. The Plaintiffs have never sought to have the MDOC intervene in their resentence requests. The MDOC as not been served with copies of pleadings or other sentencing memoranda related to the hearings and has not been asked to participate in the hearings whether it be to contest or to support the prosecutor's or Hill class members' assertions. The MDOC does not take a position on the outcome of the Hill resentencing hearings on their merits.

In sum, the MDOC does not have either an opportunity or an obligation to be involved in a resentencing hearing and it is unfounded to suggest otherwise. Such a holding here would obligate the Defendants to seek to re-open the more than 140 resentencing hearings that have already occurred and to seek to participate in the merits of the upcoming 230 plus resentencing hearings yet to be held.

It is only after a Hill Class member is resentenced, as with all other persons convicted of one or more felonies and sentenced to the custody of the MDOC, that the MDOC pays attention to the outcome of a sentencing proceeding.

It is only after the sentencing court has finished adjudicating the Hill class members' request for resentencing that the MDOC reviews the sentence and computes the relevant minimum parole board jurisdiction date and the maximum

discharge date. Then, based on those dates, the MDOC determines how best to manage the resentenced Hill class member within the population of the other approximately 38,000 prisoners in its custody. Plaintiffs argument that the MDOC must be an active participant at the resentencing stage of the Hill class members' criminal proceedings is simply contrary to the MDOC's function.

With regard to the potential for parole for the resentenced term of years Hill class member or any other potentially parole-eligible prisoner, Mich. Comp. Laws § 791.206 provides MDOC the authority to "promulgate rules controlling the manner in which paroles are considered." *People v. Bivings*, 242 Mich App 363, 368 (2000); 619 N.W.2d 163, 166.. Further, Mich. Comp. Laws § 791.235(1) states that the "release of a prisoner on parole shall be granted solely upon the initiative of the parole board. There is no entitlement to parole."

It is clear that prisoners, not the MDOC, have the responsibility to prove to the parole board that they are suitable for release. Prisoners are not entitled to parole and they must take the necessary steps to demonstrate why they should be released. There are many ways to do this, such as; limiting their misconducts, taking correspondence college classes, or other types of study, when available, staying in contact with their family, demonstrating contrition, participating in *voluntary* programs, participating in work assignments, and, most importantly, exhibiting the self-discipline to avoid misconduct violations. There is not a

constitutional right to education or rehabilitation in prison. *Rhodes v. Chapman,* 452 U.S. 337, 348 (1981). There is no programming check list that must be completed before a prisoner is granted parole.

However, there are a number of efforts made, with regard to prisoners in MDOC custody generally and for the Hill class members in particular, that are meant to improve a prisoner's chance for successful release back into society once they are released on parole or, if after resentencing, they are discharged. This includes establishing an In-reach pre-release readiness activity, established at the Macomb Correctional Facility (MRF), to try to assist these long-term prisoners, who have spent their entire adult lives incarcerated, with some services to assist them in their re-integration to society. (Ex. F, Eagen Dep. 65:20-66:10.) Over the months the MDOC has been operating the In-reach pre-release readiness activity, the MDOC has made some adjustments based on its experience and has now shortened the standard In-reach pre-release readiness activity timeframe for the Hill class members to 60 days, from the former 90 days. This was done both in recognition of their long-term status and a determination certain work training was not suitable or desired (asbestos removal, for example). In-reach pre-release readiness activities include obtaining proper legal identification such as a birth certificate, applying for Medicaid if appropriate, awareness of proper resume

preparation, verifying housing post-release, and employment readiness skills. (Ex. F, Eagen Dep. 87:23-88:8.)

A few of the Hill class members, those whose crimes were committed before January 1, 1983, and who do not have additional complicating sentences, can expect discharge on resentencing if the court grants a term-of-years resentence. For the MDOC, the outcome of a Hill class member resentence (term-of-years or life) is not certain. An effort is made to try to determine if there is a reasonable likelihood of the resentence resulting in a term-of-years resentence. Then, if the MDOC knows when that hearing is scheduled to occur, or even if the MDOC knows that the resentencing hearing process is getting underway for a specific Hill class member, then the MDOC is reviewing the Hill class member to determine if the prisoner, with regard to their medical or mental health condition, can be safely transferred to the MRF In-reach pre-release readiness activity in advance of their resentencing hearing. In that way, when the MDOC believes it is foreseeable, though not certain, that the Hill class member will be entitled to mandatory release soon, the MDOC believes the prisoner will be better prepared for that release if he or she goes through the In-reach pre-release readiness activity. This is an important pre-release readiness process because of the long time the Hill class members have served. (Ex. F, Eagen Dep. 70:12-71:4.) This pre-resentence

placement only applies to a few of the Hill class members remaining to be resentenced.

For the other Hill class members, approximately 215 of the remining 235 to be resentenced, the time of their resentencing hearings does not matter as they cannot be resentenced to a term of years sentence that results in their immediate release. Therefore, whenever their resentence occurs and if it results in a parole board jurisdiction date that has not yet arrived, that Hill class member can be placed in the release readiness queue along with all of the other prisoners in order of their parole board jurisdiction date. (Ex. F, Eagen Dep. 66:11-68:23.) If the resentence results in a parole board jurisdiction date that has passed, then that Hill class member can move to the front of the queue for pre-release preparation. This does not implicate any legal right as no prisoner has a right to parole and the MDOC is treating the Hill class member just as it does any other prisoner whose sentence is changed through a resentence and becomes suddenly parole eligible.

CONCLUSION AND RELIEF REQUESTED

Defendants are entitled to dismissal of Plaintiffs' claims in count VI as they are beyond question unsupported by the actual experience of the Hill class members with regard to parole once they become parole eligible and with regard to resentencing. In addition, there is no legal obligation for the MDOC/Defendants to

participate in the Hill class members' resentencing proceedings. Therefore, Plaintiffs' claims in count VI should be dismissed with prejudice.

Respectfully submitted,

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Dated: November 13, 2018

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2018, 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.

/s/ A. Peter Govorchin

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