No. 18-1418

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HENRY HILL, JEMAL TIPTON, DAMION LAVOIAL TODD, BOBBY HINES, KEVIN BOYD, BOSIE SMITH, JENNIFER PRUITT, MATTHEW BENTLEY, KEITH MAXEY, GIOVANNI CASPER, JEAN CINTRON CARLOS, NICOLE DUPURE and DONTEZ TILLMAN,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Honorable Mark A. Goldsmith

BRIEF FOR DEFENDANTS-APPELLANTS

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Dated: May 10, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

STATEMENT IN SUPPORT OF ORAL ARGUMENT

The State defendants are aware that this case has been before this panel on two prior occasions, resulting in two published decisions. *Hill v. Snyder*, 878 F.3d 193, 215 (6th Cir. 2017), and *Hill v. Snyder,* 821 F.3d 763 (6th Cir. 2016). In the 2017 opinion, this Court provided some provisional analysis on the ex post facto claim. Even so, the State defendants believe this Court would benefit from oral argument.

In the prior opinion, this Court's analysis on the ex post facto question did not address two critical points, either of which the State contends are dispositive on the claim here. On the first point, the State will explain why the plaintiffs have lost nothing of value in not applying credits when resentenced on Michigan's legislative fix. On the second point, the State will explain why the plaintiffs would not have suffered a disadvantage even if Michigan law did take away something of value.

Also, there is a new point that this Court has not yet addressed, involving abstention and the State's request for certification to the Michigan Supreme Court on ex post facto. This is actively playing out in the State courts, and because it involves embedded state law issues, this Court should await a final decision from the state's highest court.

JURISDICTIONAL STATEMENT

Plaintiffs-Appellees brought this action under 42 U.S.C. § 1983, claiming that Michigan's legislative remedy enacted in response to *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) violates the United States Constitution. The district court had original subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a).

On April 9, 2018, the district court issued an opinion and order and final partial judgment awarding Plaintiffs summary judgment on Count V, the ex post facto claim, and awarding declaratory and injunctive relief. (Opinion & Order 4/9/18, R. 203, Pg ID 3171; Final Partial Judgment 4/9/18, R. 204, Pg ID 3204.) Defendants filed their Notice of Appeal on April 11, 2018. (Notice of Appeal 4/11/18, R. 206, Pg ID 3210.) This appeal is timely under Fed. R. App. P. 4(a)(1)(A) because the notice of appeal was filed within 30 days after entry of the order and judgment appealed from.

The order and judgment from which Defendants appeal is a final order that disposes of Count V; thus, this Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. After the U.S. Supreme Court invalidated mandatory life-without-parole sentences for youthful first-degree murderers, Michigan created a new statutory scheme in response in which such an offender would face either a term of years sentence or life-without-parole sentence. The statute also provides that these offenders are not entitled to good time or disciplinary credits.

   A. Where Michigan's credit system is only applicable for a person with a fixed sentence, did these offenders lose anything of value when the Michigan Legislature created a possible fixed minimum sentence without credits when it had no obligation to establish a fixed minimum at all?

   B. Did this statutory fix – replacing a mandatory life-without-parole sentence – with a possible term-of-years sentence increase the punishment these offenders were facing?

2. The ex post facto issue has embedded state law questions and the issue is currently pending in the Michigan appellate courts. The State defendants lost the issue in the Michigan Court of Appeals and plan to file in the Michigan Supreme Court. Did the district court err in declining to certify the question to the Michigan Supreme Court or otherwise abstain under *Younger* or *Pullman* while the state-law issue is pending in ongoing state criminal proceedings?

INTRODUCTION

This Court previously reversed the district court's grant of summary judgment on the ex post facto issue, indicating both that the plaintiffs "plausibly" explained why they earned credits while serving a sentence for first-degree murder and that they have pled "sufficient factual information" these credits were valuable to them. *Hill v. Snyder,* 878 F.3d 193, 212–13 (6th Cir. 2017). On remand, after a reassignment, the district court held that the Michigan statute violated the Ex Post Facto Clause. In denying the State's motion for stay, this Court cited the district court's "thoughtful and well-reasoned" opinion in its order dated April 18, 2018. And just last week, on May 4, 2018 in a published decision, the Michigan Court of Appeals adopted almost in total the district court's decision as its "own" on this issue.

Despite these rulings, the State presses its case, and it does for two primary reasons with respect to the merits.

First, none of the analysis provided so far has addressed the key point that the plaintiffs did not have to have an opportunity to receive a sentenced of a fixed duration. Without it, credits are inapplicable. And this is the key point.

The Michigan Legislature could just have easily made the alternative a parolable life sentence in which the sentencing court would establish the minimum time before which parole was considered, between 25 to 40 years. This would have achieved the same end. And there is no dispute that good time and disciplinary credits have never applied to those without a fixed sentence. While it is true that one who committed murder before 1998 would receive credits if resentenced for another crime (e.g., second degree murder), that is because a fixed sentence was available for that crime at the time of the crime. Not so here. The 2014 legislation created a fixed sentence for first-degree murderers for the first time. Before then, they all received life without parole.

Second, regardless whether the loss of inapplicable credits was a disadvantage to the offenders, it did not increase their punishment. The Legislature could have just as easily created different minimums and maximums to include the credit system, such as making the range for those between 1982 and 1998, subject to a 30-to-48 year minimum and 72 year maximum (the disciplinary credits reduce a sentence by 20%). Their punishment was not increased.

This question has a dramatic effect on Michigan's sentencing scheme. For the 28 offenders who committed their first-degree murder before 1978, the practical effect of the district court's order is to make their sentence a 12½-to-25 year minimum to 30 year maximum, and for those 250 offenders who committed their crime before 1998, they have received in practical terms a 20-to-32 year minimum with 48 years on maximum. And for the 90 offenders who committed their crimes after 1998, they are subject to the 25-to-40 minimum to 60-year maximum sentence. It entirely subverts the uniformity of the sentencing scheme.

With regard to the argument regarding abstention and certification, the predicate state-law questions to the ex post facto argument should ultimately be resolved by the Michigan Supreme Court. This is a criminal law question. The matter is pending in the state appellate courts. Contrary to the district court's determination that the state courts would not reach the merits, the state appellate court did reach the issue. While the State defendants disagree with the analysis, the State is appealing the decision and continues to insist that the state courts – specifically the state's highest court – should resolve these issues.

STATEMENT OF THE CASE

With respect to the ex post facto, the facts and proceedings are relatively brief. The State defendants will first provide a short background description of Michigan law before addressing the specific proceedings of this case.

A. Michigan law on the credit system

The State defendants provide a short summary of the legal landscape in Michigan to address the practical importance of the claim at issue here. At the time of the *Miller* decision, there were approximately 368 juvenile murderers who had been sentenced to life without parole as a mandatory matter. The oldest offense date stems from 1961, running through 2012 (the year the *Miller* decision came down). For those whose cases were still pending, the Michigan Legislature passed Mich. Comp. Laws § 769.25, which provided for either a life-without-parole sentence, or a sentence of a term of years (from 25-to-40 years to 60-year sentence). For those whose cases were final at the time of *Miller,* the Michigan Legislature provided for the same basic framework in Mich. Comp. Laws § 769.25a, which became applicable once the decision in *Montgomery* was rendered.

In order to demonstrate the significance of the claim that the Ex Post Facto Clause requires the application of good time or disciplinary credits, this Court should be aware of the five different frameworks that would apply depending on the offense date and on whether the offender is ultimately given a fixed sentence:

1. Before 1978 (28 offenders);
2. 1978-1982 (28 offenders);
3. 1982-1987 (47 offenders);
4. 1987-1998 (175 offenders);
5. After 1998 (90 offenders).

Before 1978, for those offenders who were subject to a term-of-years' sentence, Michigan law provided for a relatively generous accruing of good time credits that would accrue both toward the minimum sentence and the maximum sentence. Public Act 105 of 1953, which was the version of Mich. Comp. Laws § 800.33 in place until 1978, provided for the accruing of a certain number of days per month depending on the number of years served, as follows:

Years	Days per Month
1-2	5 days
3-4	6 days
5-6	7 days
7-9	9 days
10-14	10 days
15-19	12 days
20 to end	15 days

Mich. Comp. § Laws 800.33 (1953). *See also Lowe v. Dep't of Corrections,* 521 N.W.2d 336, 336 (Mich. Ct. App. 1994).

These days would accrue quickly. *See People v. Hurst,* 425 N.W.2d 752, 755 (Mich. Ct. App. 1988) (graph indicating the accrual of good time credits). In addition to these credits, prisoners with a minimum sentence were also eligible for "special" good-time credits under the statutory framework, for persons who had "achieved a decided reformation," for "good work records," or "for exemplary conduct." Mich. Comp. Laws § 800.33 (1953); *Lowe,* 521 N.W.2d at 336. The statute also provided for the forfeiture of good time for infractions or a "serious act of insubordination." Mich. Comp. § Laws 800.33 (1953).

In 1978, this system changed by the passage of Proposal B, which eliminated good time credits, special good time, and special parole for those convicted of certain offenses, including murder, toward the minimum sentence. *See* Public Act Initiated Measure of 1978, the original version of Mich. Comp. Laws § 791.233b(n) (1978). The statute provided that the "minimum term shall not be diminished by allowances" for these credits. *Id.* *See also Lowe,* 521 N.W.2d at 337. Nonetheless, offenders who committed crimes during this time continued to receive good time and special good time credits toward their *maximum* sentence. *Id.*

As a notable example of this anomaly, an offender who received a 20-to-30 year sentence for second-degree murder for a crime committed in 1981 completed his maximum term before his minimum term and was discharged from the Department of Corrections without serving his minimum sentence. *Wayne County Prosecuting Attorney v. Michigan Dep't of Corrections,* an unpublished per curiam opinion, released June 17, 1997 (No. 186106) (Ex. A). It underscores the value of the good time credits.

Describing this "oversight" as one of the more "glaring inadequacies of Proposal B," the Michigan Court of Appeals determined that the prisoner was entitled to his release even though he had not finished his minimum:

> The crime for which defendant pleaded guilty was particularly heinous, and the Department of Corrections should have had more control over defendant's release date and the conditions of his parole. However, it did not, due to an oversight in the Legislature's codification of Proposal B in 1978 and a failure to close the loophole until 1982. Our Legislature has acknowledged that this situation presents "one of the more glaring inadequacies of proposal B."

Id.

In 1982, the Legislature corrected this anomaly, creating a system of disciplinary credit for offenders who were subject to Proposal B and serving a sentence on the effective date of the amendment (which was December 30, 1982). The system of credit applied to both the minimum and maximum sentence. Under this system, a prisoner would earn credit of five days per month, but this number of days would not continue to increase during the length of the incarceration. 1982 P.A. 442, Mich. Comp. Laws § 800.33(5). These offenders were also eligible for "special" disciplinary credit of two days per month for "good institutional conduct." *Id.*

The Michigan Court of Appeals described this disciplinary credit system as "less favorable" to prisoners than the good time credit system. *Lowe,* 521 N.W.2d at 338. That was so because the offender would accrue credit at a slower rate. And the court affirmed the validity of the MDOC directive, which provided that for offenses subject to Proposal B committed after January 1, 1983, an offender would receive disciplinary credit against the minimum and maximum sentence. And for offenses committed after December 10, 1978, the Proposal B offender would now receive disciplinary credits against the minimum and good time and special good time credits against the maximum sentence. *Id.* at 133, 138 ("The DOC's Policy Directive PD-DWA-35.05 is an appropriate response to the statutory scheme enacted by the Legislature.").

In 1987, the Legislature's amendment took effect in which it eliminated good time credit altogether for all offenses committed after April 1, 1987 and replaced it with the system of disciplinary and special disciplinary credits. 1986 P.A. 322, Mich. Comp. Laws § 833.33(3). *See also Lowe*, 521 N.W.2d at 338. This eliminated the distinction between Proposal B offenders and all other offenders.

In 1998, the Legislature passed truth in sentencing, in which it eliminated all of the disciplinary credits, requiring an offender to serve his minimum sentence and also not allowing for a reduction in the maximum sentence. 1998 P.A. 320, Mich. Comp. Laws § 791.233. It ended the credit system for offenses going forward.

Thus, in summary, for an offender sentenced to a minimum and maximum term of years in Michigan, the following represents how the credit system worked depending on the offense date:

Offense Date	**Credits**
Before 1978	Good time credits reduce minimum and maximum.
1978-1982	Proposal B offenders: Disciplinary credits reduce minimum, and good time credits reduce maximum.
1982-1987	Proposal B offenders: Disciplinary credits to reduce minimum (and applied to offenders back to 1978) and maximum.
1987-1998	All offenders: disciplinary credits reduce minimum and maximum.
After 1998	No reductions in minimum or maximum.

B. Facts and proceedings on the ex post facto claim

After Michigan enacted its legislative *Miller* remedy and reopened the relevant offenders' cases for resentencing, Plaintiffs in this federal case filed a second amended complaint, asserting – among other things – a new claim that the new term-of-years sentence violates the Ex Post Facto Clause (Count V), and requesting class certification. (Second amended complaint, R. 130, ¶¶ 217–22, Pg ID 1630.) Plaintiffs claimed that they "accumulated good-time and/or disciplinary credits" while serving their life sentences and that Michigan's statutory *Miller* remedy unconstitutionally "deprives" them of these credits. (*Id.* ¶¶ 218, 221, Pg ID 1630.)

The district court initially rejected Plaintiffs' ex post facto argument and granted summary judgment for Defendants on Count V. (Order granting summary judgment, R. 174, pp. 12–13, Pg ID 2440-2441.) This Court reversed, holding that "Plaintiffs have stated a plausible claim for relief in Count V" and stating "[t]o the extent that Plaintiffs earned credits during the mandatory life sentences, the retroactive elimination thereof is detrimental." *Hill v. Snyder*, 878 F.3d 193, 213 (6th Cir. 2017).

On remand, the district court granted Plaintiffs summary judgment on Count V. (Order granting summary judgment, R. 204, Pg ID 3203–04.) The court held that Plaintiffs earned credits under state law, and that by precluding those credits when it provided a term of years in 2014, the state Legislature disadvantaged Plaintiffs in violation of the Ex Post Facto Clause. (Opinion, R. 203, Pg ID 3176–3194.) The district court also certified a class of all offenders in the State's custody who were convicted of first-degree murder as juveniles, for crimes before December 15, 1998, and who were or will be resentenced under Mich. Comp. Laws § 769.25a and are or could become eligible for parole. (*Id.* R. 204, Pg ID 3203.)

The State defendants sought a stay of this decision here, and this Court denied the motion. In its April 18, 2018 order, this Court reviewed the stay balancing factors and determined that a stay was not warranted:

> [F]or the reasons set for in *Hill II,* 878 F.3d 211–13, Defendants appear unlikely to succeed on the merits of their appeal. The factual information submitted to the district court since *Hill II* further undermines Defendants' position on Count V. We decline to disturb the district court's thoughtful and well-reasoned decision.

Order, April 18, 2018, p 3. This Court also expedited the appeal.

In the filing for stay, the State defendants had highlighted the significance of the fact that the same substantive issue was pending in two consolidated cases in the Michigan Court of Appeals, *People v. Wiley* (Case No. 336898) and *People v. Rucker* (Case No. 338870), which was argued on April 10, 2018. After this Court denied the stay, the State defendants moved that court to expedite its review to issue a published decision by May 4, 2018. The court granted this motion. Ex. B. As more fully explained in the body of this brief, in a 2-to-1 decision, the court ruled that the Michigan statute was unconstitutional in removing credits, adopting the district court's analysis. In fact, it block-quoted seven pages of the district court's decision. Ex. B, pp. 14–20. It did, however, reject the argument that the state court should not reach the merits of the issue, a position taken by the district court below. Ex. B, p. 9. In contrast, the dissent concluded that the state court should await an action filed by a prisoner against the parole board. Ex. B, pp. 5–9.

Consistent with the position that the State defendants took below, they are filing an application for leave to the Michigan Supreme Court and will be seeking expedited review. The State defendants contend that the issue here is best resolved by the state's highest court.

SUMMARY OF ARGUMENT

Michigan's legislative remedy does not violate the Ex Post Facto Clause. What is more, the ex post facto question depends on questions of state law, and for that reason the district court should have abstained or certified those questions to the Michigan Supreme Court.

No law ever told these offenders that they could reduce their life sentences using credits. And no law ever *entitled* them to a sentence that they could reduce using credits. To hold that they have been disadvantaged under the Ex Post Facto Clause requires that they lost something of value, or that they either had or were legally entitled to a more lenient sentence than the one they received. Not so.

First, they have lost nothing of value because before 2014, they had no hope of ever using credits to reduce their sentences for first-degree murder, even accepting that they accumulated credits while serving life-without-parole sentences. The fact that the Legislature chose to leave the credits inapplicable at the same time as it gave Plaintiffs – for the first time – a new term-of-years sentence that had never before existed for first-degree murder in Michigan did not take anything of value from them.

Second, Plaintiffs never had, and were never legally entitled to, a sentence more lenient than the one they received here. To say that there is a "disadvantage" requires this Court to answer: "compared to what?" Compared to their mandatory life-without-parole sentences, a term of years that does not make credits applicable is not a disadvantage.

It also is not a disadvantage compared to what they were legally entitled to. What *Miller* and *Montgomery* require is that juvenile offenders not be sentenced to *mandatory* life without parole, and that, for all but the particularly corrupt, they be given – at the time of sentencing – a meaningful opportunity for release. There is no dispute that the Michigan Legislature *could have* chosen to give these offenders life *with* parole (in which case credits would not apply), or a term of years with a higher minimum and maximum than what Plaintiffs received here. The fact that the Legislature instead chose a shorter, 25-to-40 to 60-year term of years without credits is not a disadvantage.

And finally, the questions about credits are questions of state law. And they are ongoing in state appellate proceedings. The district court should have abstained or certified the state-law questions to the Michigan Supreme Court.

ARGUMENT

I. The Michigan statutory scheme for the resentencing of juvenile murderers creating possible fixed sentences without credits does not violate the Ex Post Facto Clause.

A. Standard of Review

The Court reviews legal issues, such as ex post facto questions, de novo. *Doe v. Bredesen,* 507 F.3d 998, 1002 (6th Cir. 2007).

B. Analysis

While this Court is fully apprised of the issues and has a prior decision and issued an order related to the substance, the State defendants ask this Court to view with fresh eyes two arguments (on the merits) that it contends that this Court has not previously addressed.

First, the accrual of credits is meaningless, without value, and pointless unless a prisoner has a fixed sentence. That is the reason the Department of Corrections does not calculate them for those sentenced to life without parole and those sentenced to life with the opportunity of parole. They have no value. The point is not that they have not earned them, but the earning of the credits means nothing unless the credits may reduce a fixed sentence. The 2014 statute created a fixed sentence for the first time and did not allow for credits to apply. Nothing was lost.

Second, regardless whether these offenders lost anything of value, their position has not been worsened by Michigan's new statutory scheme. They have not been subject to increased punishment. The change from a life sentence to a term of years, even if something of value was lost, is still a reduction in terms of the punishment that a person convicted of first-degree murder in Michigan would have expected.

1. The fact that the credits have no value unless an offender has a fixed sentence answers the issue.

The Ex Post Facto Clause forbids the imposition of punishment for an act that was not punishable at the time it was committed or an increase in the punishment assigned by law when the act to be punished occurred. *Weaver v. Graham*, 450 U.S. 24, 28–30 (1981). The U.S. Supreme Court has identified two critical elements in determining whether there is a violation: (1) it must be retrospective, i.e., apply to events that occurred before its enactment; and (2) it must disadvantage the offender by its application. *Id.* at 30. *See also Lynce v. Mathis*, 519 U.S. 433, 441 (1997). For the latter question, the issue is whether the new statute "objectively . . . lengthened" the period the prisoner must spend in prison. *Lynce*, 519 U.S. at 442.

The U.S. Supreme Court examined this standard and determined that the elimination of good time credits that would otherwise reduce a sentence after the sentence was imposed would violate ex post facto principles. *Weaver*, 450 U.S. at 32–36. The Court determined that it was both retroactive and disadvantageous. In rejecting the point that the credits were not a part of the sentence, the Court explained that "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Id.* at 32. It also disadvantaged the offender, reducing the number of credits gained per month, and consequently made "more onerous the punishment for crimes committed before its enactment." *Id.* at 36. In an earlier decision, the Michigan Supreme Court ruled likewise. *See In re Canfield*, 57 N.W. 807, 808 (Mich. 1894) ("we think the law [reducing good time credits] is ex post facto, its effect to increase, and not to mitigate, petitioner's punishment").

Unlike the case in *Weaver*, however, Michigan here did not eliminate credits for prisoners that were otherwise valuable for them. (The sentences in *Weaver* and *Lynce* were fixed.) Rather, the statute

itself established the possibility of a fixed sentence, which created the ability *for the first time* for these offenders convicted of first-degree murder to apply credits but simultaneously explained that they were not eligible to receive them under Mich. Comp. Laws § 769.25(10) and Mich. Comp. Laws § 769.25a(6).[1]

It is clear juvenile first-degree murderers did not have a minimum or maximum sentence before the statutory fix passed in 2014. Before then, these offenders were given a life sentence. *See* Mich. Comp. Laws § 750.16 (2013). "[I]f a life sentence is imposed there can be no minimum term." *People v. Johnson*, 364 N.W.2d 654, 656 (Mich. 1984). And such offenders were also excluded from consideration of parole. *See* Mich. Comp. Laws § 791.234(6)(a) (2010). Michigan law imposed a mandatory life-without-parole sentence for juveniles convicted of first-degree murder. *People v. Carp*, 852 N.W.2d 801, 812 (Mich. Ct. App. 2014), vacated on other grounds, 136 S Ct 1355 (2016). The sentence's mandatory nature caused the constitutional wrong. *Miller*, 567 U.S. at 465.

[1] As an aside, it is important to remember that any reading of the statute does *not* eliminate the opportunity to receive these credits if sentenced to a term of years under another statute, for another crime, e.g., second-degree murder. Just for first-degree murder under this statute do the credits not apply.

Because these offenders did not have a fixed sentence, either minimum or maximum, the Michigan credit statutes were inapplicable to these juvenile offenders. In its prior iterations, the good time credit statute indicated that a prisoner who earns these credits "shall receive a reduction" from that prisoner's sentence, up to and including the "period fixed for the expiration of the sentence." Mich. Comp. Laws § 800.33(2). *See also* 1994 P.A. 218, 1986 P.A. 322, 1982 P.A. 442, 1978 P.A. 80, and 1953 P.A. 105 for earlier renditions of the statute. Thus, this statute does not apply to someone who receives a life sentence, as recognized by the Michigan Supreme Court:

> *[T]he question of good time* ***applies only*** *to those where the date of expiration of sentence is fixed.* Petitioner was sentenced to imprisonment for life. The period of his imprisonment was not fixed.

Meyers v. Jackson, 224 N.W. 356, 356 (Mich. 1929) (emphasis added). This point was true in 1929 and is true now. Since the sentence was not fixed, the good time statute was inapplicable. Without a fixed sentence, credits mean nothing.

The same is true for the disciplinary credit statute, first enacted in 1982. While the original version provided that "[a]ll prisoners serving a sentence on the effective date" of the Act listed as a Proposal

B offense (which includes first-degree murder) "shall receive a disciplinary credit of 5 days per month," the statute further provided that "[a]ccumulated disciplinary credits shall be deducted from a prisoner's minimum and maximum sentence in order to determine his or her parole eligibility dates." 1982 P.A. 442, Mich. Comp. Laws § 800.33(5). The subsequent versions provided essentially the same, except that the language changed in 1986 to be "eligible to earn" as against "shall receive" a disciplinary credit. 1986 P.A. 322, Mich. Comp. Laws § 800.33(5); 1994 P.A. 218, Mich. Comp. Laws § 800.33(5). Any doubt in the practical meaning of this language was eliminated by the Legislature in 1994, when it defined the universe of prisoners subject to disciplinary time:

> "[P]risoner subject to disciplinary time" means a prisoner sentenced on or after the effective date of the amendatory act that added this section to an *indeterminate term of imprisonment*. [1994 P.A. 218, Mich. Comp. Laws § 800.34(5) (emphasis added).]

In brief, like good time credits, disciplinary credits were inapplicable in the absence of a fixed sentence. And a sentence for first-degree murder did not include a fixed sentence, just a sentence of life, which has no minimum nor maximum.

Thus, at the time of the *Miller* decision, there were hundreds of juvenile offenders who were sentenced to life without the opportunity for parole. Because they had no fixed sentences (no minimum and no maximum), these credits were inapplicable for these offenders even though the credit system was in place. The credits held no value for them. And that is why MDOC does not calculate the credits for them.

In 2014, the Legislature enacted § 769.25 and § 769.25a to respond to the *Miller* decision. Under § 769.25, the Legislature addressed those juvenile murderers whose cases were pending at the time of *Miller* and offenders going forward. § 25(1)(a), (b). Under § 769.25a, the Legislature addressed those juvenile offenders whose cases were final on direct review, if the *Miller* decision was made retroactive (which *Montgomery* held that it was). § 25a(1), (2). For either category of offenders, the scheme provides for either a life-without-parole sentence option where the prosecution files an appropriate motion, § 25(3), § 25a(4), or a sentence of a term of years, with 25-to-40 years on the minimum and 60 years on the maximum. § 25(9), § 25a(4)(c). But each provision includes a limitation that an offender will not receive any credits on the sentence:

> A defendant who is sentenced under this section shall be given credit for time already served but shall not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence.

Mich. Comp. Laws § 769.25(10). *See also* § 769.25a(6) (same). In this way, all of the offenders who are subject to either a new sentence or a resentencing under *Montgomery* would be governed by the same parameters for their sentence, regardless of when the offense was committed. The minimum and maximum sentences would not be altered by the different credit systems.

So, the statute does not eliminate anything of practical value to those who committed their offenses when either the good time credit system or the disciplinary credit system were in place. The statute does not "substantially alter[] the consequence attached to a crime already completed," *see Weaver*, 450 U.S. at 33, because these credits were inapplicable before the creation of this statutory scheme. They would only have value if the offender had a fixed sentence, and the same statute that created that possibility also foreclosed an offender's eligibility for the credit.

Nothing in *Miller* required that an offender receive a sentence for a term of years, as the Legislature could have decided alternatively to make the lesser sentence be life *with* parole. *Miller* expressly stated that life with parole is an option. 567 U.S. at 465 ("for example, life *with* the possibility of parole") (emphasis in original). *Montgomery* noted the same point. 136 S Ct at 736 ("A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole"). The Legislature elected to create a term-of-years sentence.

In fact, for a perfect analogy, the Legislature and could have created a parolable life sentence and established the minimum time periods of between 25-and-40 years before which the offender could be considered for parole. And Michigan's law is clear that for life with parole the credit system does not change the time period before a person is eligible. It never has. The current statute makes the time "15 calendar years" before someone "is subject to the jurisdiction of the parole board" for a parolable life sentence, and before 1992, it was "10 calendar years." Mich. Comp. Laws § 791.234(7). This is a critical point because it confirms that there was no necessary value to the credit system, since there were other sentencing schemes that would leave the credits valueless.

The Legislature's decision to make the minimum sentence a range of between 25-to-40 years integrated the fact that the offenders who committed their crimes when the good time and disciplinary credit system was in place would not receive any credits. To ensure uniformity in the sentencing scheme, the contrary system would have required the Legislature to create different minimums and maximums depending on the date of offense, from before 1978, between 1978 and 1982, between 1982 and 1987, between 1987 and 1998, and those after 1998, who were not eligible for any good time or disciplinary credits. It did not do so.

In this Court's prior decision, the Court noted the Michigan Supreme Court's decision in *Moore v. Parole Board*, 154 N.W.2d 437 (Mich. 1967). The case is distinguishable.

In the decision in *Moore*, the Michigan Supreme Court examined the questions whether a person sentenced in 1938 to life imprisonment for a first-degree murder conviction and then resentenced in 1958 to a term-of-years sentence (25-to-40 years) was entitled to credit for the time he served, and whether the offender was entitled to good time credits that would have accrued during that same time.

The eight-member Court splintered into the three opinions, none of which garnered a majority, but the answer in all three was that yes, the prisoner was entitled credit for time served as well as good time credits. That is not applicable here.

All three opinions in *Moore* relied on the Michigan statute providing that a criminal defendant will receive credit for time spent on a "void sentence," which currently reads as follows:

> Whenever any person has been heretofore or hereafter convicted of any crime within this state and has served any time upon a void sentence, the trial court, in imposing sentence upon conviction or acceptance of a plea of guilty based upon facts arising out of the earlier void conviction, shall in imposing the sentence specifically grant or allow the defendant credit against and by reduction of the statutory maximum by the time already served by such defendant on the sentence imposed for the prior erroneous conviction.

Mich. Comp. Laws § 769.11a. At the time of the resentencing for Moore, the language of the statute was permissive, providing only that the court "may" grant or allow the defendant credit. The statute was amended in 1965 to become "shall" so that credit is now mandated.[2]

[2] The statute's language only applies to credit for time served, as against good-time or disciplinary credit, *see People v. Tyrpin,* 710 N.W.2d 260, 261 (2005), but the Supreme Court did not address this textual point.

The lead opinion, written by Justice Adams, and joined by Justice Dethmers, reasoned that the pre-amendment "may" was "mandatory" and not "merely permissive." 154 N.W.2d at 441. The second opinion, which garnered four votes, disagreed with that point, but nonetheless concluded that the trial court is bound to award the credit because it is "unfair to exact double time." *Id.* at 445 (Adams, J., joined by Kelly, J., Kavanagh, J., and O'Hara, J.). Setting aside the disagreement about the issue on "may" as against "shall," each opinion determined that he was not just entitled to credit for the time served, but also to good time credits. *See id.* at 644 (Souris, J.) ("plaintiff was entitled by statute to the credit he seeks"); *id.* at 645 n. 3 (Adams, J.) ("such credit includes recognition of regular or special good time earned"). The third opinion written by Justice Brennan relied on Mich. Comp. Laws § 800.33 (every convict "shall receive a reduction from his sentence" based on good time credits"). *Id.* at 648. But the convict "is entitled to have such allowances for good behavior as were earned by him during those years credit to him, for purposes of parole consideration." *Id.* at 649.[3]

[3] Justice Brennan noted that there was an issue whether the credit ran only to the maximum, and not the minimum, under Mich. Comp. Laws § 769.11a. 154 N.W.2d at 446.

These points are distinguishable here, as the Legislature did not apply a statute retroactively to eliminate good time credits for an existing statutory sentence. The criminal defendant in *Moore* was sentenced to a term of years for second-degree murder *under law that existed at the time of his crime in 1938*. That is not true here. All of the offenders who are being resentenced in Michigan under Mich. Comp. Laws § 769.25a, consistent with *Miller* and *Montgomery*¸ are being given the opportunity for a term-of-years sentence – a new sentencing scheme – based on the statute enacted in 2014. Never before has a first-degree murderer in Michigan had a fixed, minimum sentence. The sentence had always been life before then.

Thus, for the first-degree murderer, good-time credits and disciplinary credits were irrelevant – and those statutes inapplicable – because there was no sentence to reduce. *Meyers*, 224 N.W.3d at 356 ("[T]he question of good time ***applies only*** to those where the date of expiration of sentence is fixed") (emphasis added). Even Justice Brennan recognized the point. 154 N.W.2d at 447 ("no amount of good time earned can reduce a life sentence").

The Legislature created the opportunity for a minimum and maximum sentence for these murderers when it passed these statutes, Mich. Comp. Laws § 769.25 and Mich. Comp. Laws § 769.25a, because before this time, the only sentence was life. It is not true that good time credits and disciplinary credits were "taken away." Rather, in the same statute creating a possible minimum, the Legislature decided to continue to leave them inapplicable. In this way, nothing of value lost.

This analysis examining the practical effect of the statute as a whole is exactly the approach taken by the U.S. Supreme Court in *Weaver*. In that decision, the Court rejected the State's argument that "other provisions" enacted at the same time as the reduction in good time credits were counterbalanced by other opportunities so that the "net effect" was to increase the availability of sentence reductions. *Weaver*, 450 U.S. at 34. But the Court ultimately rejected this argument, not because it refused to consider the countervailing provisions, but because as a practical matter, the changes made "more onerous the punishment." *Id.* at 35–36. Not so here. Nothing changed for the worse for these offenders with respect to good time credits or disciplinary credits.

And nothing in *Miller* and *Montgomery* required the Legislature to create a sentence of a term of years. Rather, in Michigan, this Court explained before this legislation, the proper outcome for a sentencing court would have been either a life sentence with parole or life without parole. *See People v. Carp*, 828 N.W.2d 685, 723 (Mich. Ct. App. 2012), aff'd 852 N.W.2d 801 (2014), vacated on other grounds, *Carp v. Michigan*, 136 S. Ct. 1355 (2016). The court provided an interim decision for cases moving forward after "urg[ing]" the Legislature to address *Miller*:

> [A]s guidance for our trial courts for those cases currently in process or on remand following direct appellate review, we find that MCL 791.234(6)(a) is unconstitutional as currently written and applied to juvenile homicide offenders. When sentencing a juvenile, defined now as an individual below 18 years of age for a homicide offense, the sentencing court must, at the time of sentencing, evaluate and review those characteristics of youth and the circumstances of the offense as delineated in *Miller* and this opinion in determining whether following the imposition of a life sentence the juvenile is to be deemed eligible or not eligible for parole.

Carp, 828 N.W.2d at 723. While this remedy was for pending cases, this same process would have applied to the cases final on direct review in the absence of a legislative fix. Under that regime, there would still be no "fixed" minimum or maximum and so the good-time disciplinary-credit statutes would remain inapplicable.

Thus, the new statutes enacted in 2014 do not "alter the consequences" for the offender. *See Weaver*, 450 U.S. at 32. The *Carp* decision only underscores the point that a first-degree murderer – whose conviction stands – previously had no vested interest in good time credits or disciplinary credits. And the Legislature's new scheme does not change that.

2. Regardless whether they lost something of value, Michigan has not increased the punishment for these offenders.

The proper baseline comparator for determining whether these offenders' new sentence disadvantages them remains mandatory life without parole, even though that sentence was subsequently determined to be unconstitutional. That is because what the Ex Post Facto Clause forbids is a law that "changes the punishment, and inflicts a greater punishment, than *the law annexed to the crime, when committed*." *Calder v. Bull*, 3 U.S. 386, 390 (1798) (Chase, J.) (emphasis added). The law annexed to their crime at the time of commission was always mandatory life without parole. They have now received something less than that. There is no disadvantage.

But even assuming that is not the correct baseline comparator due to its unconstitutionality, the question becomes: What *is* the correct baseline sentence for determining whether a 25–40 to 60 year sentence without credits leaves them *worse off*?

Plaintiffs' argument that they are *disadvantaged* entails that, somehow, they were legally entitled to a more favorable sentence, and that *that* more favorable sentence is the proper baseline for comparison. But that is not true. To the contrary, the People—through the Legislature—had several constitutional options from which to choose:

(a) *discretionary* life without parole, *Miller*, 567 U.S. at 479–80; *Montgomery*, 136 S. Ct. at 733–34;

(b) life *with* parole (i.e., parolable life), *Miller*, 567 U.S. at 465; *Montgomery*, 136 S. Ct. at 736;

(c) a term of years with a *higher* minimum and maximum than what Plaintiffs received here, with or without credits, so long as Plaintiffs receive a meaningful opportunity for release during their lifetimes, *see Miller*, 567 U.S. at 479 (requiring only a meaningful opportunity for release);

(d) the term of years Plaintiffs received here, i.e., 25–40 to 60 years with no good time and/or disciplinary credits, *see id.* (same); or

(e) a term of years that includes credits, *see id.* (same).

Here, the Legislature chose option (d), a flat term of years that precludes credits (as well as option (a), discretionary life without parole in appropriate cases for the most serious offenders as determined by prosecutors and the fact-finder).

It is important to emphasize that the Legislature chose a 25-to-40 to 60-year sentence without credits over multiple other constitutional options that – as illustrated above – *would have been less favorable for Plaintiffs*. This shows why they have not been disadvantaged.

Further, the text of the statute makes clear that the Legislature's choice of 25-to-40 to 60 years was conditioned on Plaintiffs *not* receiving any prison credits. *See* Mich. Comp. Laws § 769.25a(6). Had the Legislature known that courts would be forced to include credits, there is every reason to believe it would have chosen a *higher* minimum and maximum to offset the decrease caused by credits—say, for example, 30 to 48 years on the minimum and 72 on the maximum.[4]

And so long as the lengthier term still permitted a reasonable opportunity for release in the offender's lifetime, that choice would have

[4] *See Hurst*, 425 N.W.2d at 755 (showing that disciplinary credits are worth a 20% reduction approximately).

been constitutional under *Miller*. The fact that the Legislature chose 25-to- 40 to 60 years *without* credits over (a) parolable *life* (no credits) or (b) a lengthier term of years *with* credits creates no disadvantage.

There is yet an additional reason for the Legislature's choice of a shorter term of years *without credits*: uniformity. The Plaintiffs' crimes span from 1961 through 2012 (the year that *Miller* was decided). Michigan's credit regime changed multiple times through that period, meaning that the number of credits a Plaintiff or class member would be entitled to – assuming they earned credits at all while serving "life" sentences – depends on the year of his crime. "Good time" credits – available before 1982 if accorded to these offenders – are significantly more generous than disciplinary credits, which began in 1982 and ended in 1998. *See* Mich. Comp. Laws § 800.33(2) (good time); *id.* § 800.33(3) & (5) (disciplinary); *People v. Hurst*, 425 N.W.2d 752, 755 (Mich. Ct. App. 1988) (chart showing accrual of good time credits). Offenders who committed crimes after 1998 earn no credits at all. By assigning Plaintiffs and class members a term of years that precludes credits, the Legislature brought uniformity to the resentencing process.

What is more, courts take credit availability into account when choosing a sentence. But here, where many juvenile homicide offenders have already been resentenced to a term of years (and with no consideration of credits), *now* applying varying credit reductions depending on the date of the crime will result in disparate and unanticipated sentences for these offenders.

Faced with the task of resentencing over *five decades' worth* of juvenile homicide offenders spanning multiple disparate credit regimes, the state Legislature reasonably and constitutionally chose a flat – and *shorter* – term of years *without* credits. *See* Mich. Comp. Laws § 769.25a(6). This choice maintained uniformity across offenders, eliminated confusion for sentencing courts, and – most importantly – did not disadvantage these offenders compared to anything they ever *had* or *were entitled to*.

For these reasons, this case stands apart from other ex post facto cases involving prison credits. Take, for example, the Supreme Court's seminal cases holding that the elimination of credits can be a disadvantage: *Weaver v. Graham*, 450 U.S. 24 (1981), and *Lynce v. Mathis*, 519 U.S. 433 (1997).

In those cases, the law in force at the time of the crime and sentencing told the defendant that he would be able to reduce his sentence by earned credits. *Weaver*, 450 U.S. at 26 (discussing credit statute in place at offense and sentencing to discount 15-year sentence); *Lynce*, 519 U.S. at 437 (same, for 22-year sentence). But then, after the defendant was convicted, sentenced, and imprisoned, the Legislature changed that law to take away reductions he reasonably expected not just to earn, *but to actually use*. It is easy to see how this disadvantaged the offenders in *Weaver* and *Lynce*. The law promised them that they could get out on *x* date if they behaved well, and then, after they relied on that promise, the law gave them a different and later release date.

That is not what happened here. At all relevant times, Michigan law told Plaintiffs that they would spend their lives behind bars, with no possibility of parole – regardless of whether they earned credits on their life sentences, as the district court held. As already noted, any earned credits were valueless. So long as their convictions for first-degree murder remained, at no point were they told that they could be released early for good behavior – because they had no fixed sentence.

Any ruling for the Plaintiffs here would thus be an *extension* of ex post facto case law. The theory underlying the Ex Post Facto Clause is that defendants rely on the law in force at the time of the crime and sentencing. *See Calder*, 3 U.S. at 388 (Chase, J.); *Weaver*, 450 U.S. at 32 (credits influence plea decision and sentence imposed). Here, that law left no hope that Plaintiffs could ever use credits to reduce their sentences for first-degree murder. Their sentences were irreducible. Nor did the law ever entitle them to a sentence reducible by credits. And to reiterate: they received a shorter sentence *because* the Legislature precluded credits. *See* Mich. Comp. Laws § 769.25a(6). They have lost nothing; the law did not trick them. Plaintiffs and the district court have lost the forest for the trees.

3. The district court erred in its analysis, as did the state court of appeals in adopting it.

And this Court should rule that contrary decisions are not persuasive. They reflect two basic flaws on the merits of the issue.

First, the courts fail to understand the significance of the fact that the statute under which the juvenile offenders seek to have the credits applied was only passed in 2014. This is the key point.

It is not in dispute that if any of the juvenile offenders who committed their crime before 1998 were resentenced to a term of years for second-degree murder, they would be entitled to their disciplinary credits. *See Moore,* 154 N.W.2d at 441, 445, 447. And that any effort to remove those credits would violate ex post facto. *See In re Canfield*, 57 N.W. at 808. But there was no possible fixed sentence for any of these offenders for first-degree murder when they committed their crimes.

The district court below asked the question "why this should make a difference." (Opinion, R. 203, p. 21, Pg ID 3191). It makes a difference because the credits had no value as long as the offenders were serving a sentence that did not have a fixed duration. The Legislature had no obligation to create a fixed sentence, because it could have created a parolable life sentence as the alternative, *see Carp,* 828 N.W.2d at 723, and this sentence would not be reduced by any credits. A parole eligibility date under the parole statute, Mich. Comp. Laws § 791.233(b), is not a fixed sentence and the credits do not apply. Because they had no entitlement to a new sentencing regime that included a fixed sentence, they cannot complain about the Legislature's decision to create one and not provide for the application of their credits.

Second, the new sentencing regime did not disadvantage them. The Legislature elected to create a uniform system of sentencing regardless when the crime occurred, whether before 1998 or before 1978, they were going to receive the same possible term-of-years' sentence. The Legislature could instead have applied the credit regime to the offenders and then created different ranges based on date of offense.

The point is that the offenders were not entitled to have a better sentencing regime than those who committed their crimes of first-degree murder later. The credit system does not create a claim of preferred sentencing scheme in comparison to other offenders. Rather, the focus is on whether they have had their sentence increased by the passage of the statutory fix in § 769.25 and § 769.25a. The answer is "no."

The State notes that the state appellate decision is "viewed as persuasive" on state law questions. *In re Dow Corning Corp.*, 419 F.3d 543, 549 (6th Cir. 2005). There are state law questions embedded in the issue here. The state decision is a significant "data" point for this Court, and this Court should give it careful consideration. *Mroz v. Lee*, 5 F.3d 1016, 1019 (6th Cir. 1993). *See also* p. 44 for the State's position. Even so, the State contends that there is no violation here.

II. The district court should have certified the embedded state-law questions to the Michigan Supreme Court or otherwise abstained while the state-law issues are pending in the state courts.

A. Standard of Review

This Court reviews abstention decisions de novo, *GTE Mobilnet of Ohio v. Johnson*, 111 F.3d 469, 481 (6th Cir. 1997); *Brown v. Tidwell*, 169 F.3d 330, 332 (6th Cir. 1999), and it reviews for an abuse of discretion a district court's decision whether to certify a question to a state supreme court. *Sims Buick-GMC Truck, Inc. v. Gen. Motors LLC*, 876 F.3d 182, 190 (6th Cir. 2017).

B. Analysis

Both this Court and the district court have correctly acknowledged that resolution of Plaintiffs' ex post facto claim hinges on the interpretation and application of Michigan law. *See Hill*, 878 F.3d at 211–213 (evaluating "[s]everal Michigan cases"); Opinion & Order 4/9/18, R. 203, Pg ID 3176 ("The crux of Plaintiffs' claim, therefore, hinges on an interpretation of the good time and disciplinary credit statutes, and whether these statutes previously afforded credit to individuals who were sentenced to life without parole."); *id.* Pg ID 3177

("[T]he Court concludes that state law regarding good time and disciplinary credits is unmistakably clear and solidly supports Plaintiffs' position."). But the district court erred in deciding the predicate state-law questions rather than abstaining or certifying those questions – resolution of which could avoid the constitutional claim – to "the ultimate expositors of state law," *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), the state courts—and in particular, the state supreme court.

The result is that the district court held a Michigan statute unconstitutional when final state-court interpretation of state law could have avoided it, contrary to well-established precedent on abstention, as discussed below.

And it resolved the state-law questions incorrectly. While this Court properly looks to the Michigan Court of Appeals decision on the ex post facto issue in *People v. Wiley, et al.*, No. 336898, 2018 WL 2089549, at *6 (Mich. Ct. App. May 4, 2018), it is ultimately the Michigan Supreme Court that will provide the final answer on state law, as Defendants advised the district court:

> [Counsel for Defendants]: . . . I'm going to ask that [Michigan Court of Appeals] panel to publish its decision and assuming regardless of the outcome the case and it's the anticipation that whoever loses that case, there will be an

> application filed in the Michigan Supreme Court and that the point at which the Michigan Supreme Court resolves the question, I think that would be definitive resolution, ...
>
> * * *
>
> One final point of clarification. The Court also asked what data [a decision from the Michigan Court of Appeals] would provide. I think that would be excellent data. We would still push forward if we lost to get the final resolution from the Michigan Supreme Court, but I know we have often said in other litigation we expect and hope that the federal courts will look to the Michigan Court of Appeals as excellent guidance for what state law is. That won't stop us from pushing forward, but I do want the Court to be alerted that it is the State's position that we hope that the Court is attentive to even intermediate decisions on state law issues regardless how it comes out for us. I mean, there's obviously no guarantee we're going to win that issue in the Michigan Court of Appeals, but I would expect this Court however it comes out to pay it great attention even though I think the definitive resolution will be in the Michigan Supreme Court and I think there are some embedded state law questions.

Ex. C, 3/22/18 Hearing Tr., pp. 51–53. Consistent with those statements, the State Defendants will seek final resolution by the Michigan Supreme Court of the state-law questions that ground Plaintiffs' ex post facto claim.

While the district court thought those questions were clear-cut, it overlooked important nuance, as discussed above in Section I, that the state courts – and specifically the Michigan Supreme Court – are best equipped to analyze.

This Court's confidence in its and the district court's predictions on complex state-law questions should be undermined by the fact that the Michigan Court of Appeals ruled directly contrary to the district court on whether the former court had jurisdiction to hear the ex post facto claim regarding credits at all. In the words of the district court:

> Michigan Courts do not typically play any role in determining good time and disciplinary credits to which a defendant may be entitled. Rather, the Michigan court rules require the sentencing court to state only the time served by the defendant. . . . It is the MDOC that regularly calculates good time and disciplinary credits to determine eligibility for parole. [] And MDOC has done this historically when a prisoner serving a life sentence has been resentenced to a term of years. [] Thus, the relief this Court now orders will not present any interference with the state courts, within the meaning of *Younger*.
>
> * * *
>
> [] Plaintiffs are correct in arguing that the relief they seek is "directed at the Michigan Department of Corrections and the Parole Board, not the state-court resentencing process." [] They properly note that the resentencing courts will only decide a prisoner's minimum and maximum term, and that any application of good time or disciplinary credits "is an administrative and executive function outside the purview of state judicial proceedings[.]" [] [Opinion & Order 4/9/18, R. 203, Pg ID 3182–83.]

But the Michigan Court of Appeals saw state law differently:

> The prosecution therefore contended that the "current appeal[s are] not the correct vehicle for such review" and suggested that these defendants can only seek redress by

"filing a complaint for habeas corpus challenging the legality of [their] detention or an action for mandamus to compel the Board to comply with its statutory duties." We disagree.

First, the prosecution is mistaken regarding the gist of these appeals. . . . [D]efendants are not challenging a decision of the Parole Board. Rather, defendants are challenging the constitutionality of the statutory provision, MCL 769.25a(6), that allows "credit for time already served," but that precludes the receipt of "any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence." This Court is neither usurping nor trespassing on the Parole Board's authority . . . . Under MCR 7.203(A)(1), this Court has jurisdiction over "[a] final judgment or final order of the circuit court. . . ." In a criminal case, a final order or judgment is defined as encompassing "a sentence imposed following the granting of a motion for resentencing." MCR 7.202(6)(b)(iii). We therefore reject the prosecution's initial challenge to this Court's subject matter jurisdiction over these appeals.

Second, the prosecution's initial desire to prohibit this Court from weighing in on a constitutional question of law that directly impacts defendants' sentences of incarceration and eligibility for parole unless they file a habeas corpus complaint or a mandamus action—for which appointment of counsel for the indigent is discretionary, not mandatory—smacks of gamesmanship. Regardless, our appellate courts have, in fact, weighed in on similar issues before without requiring civil actions to do so. [Citing cases.] Moreover, the relevant entities that would be involved in a habeas corpus complaint or mandamus action are actively involved in this case. . . . In any event, we are not reviewing a challenge to the conduct of either the MDOC or the Parole Board. We are simply analyzing the constitutionality of a law passed by the third branch, our Legislature, and our decision will directly impact Wiley and Rucker, as MCL 769.25a(6) affects both their minimum and maximum sentences. [*People v. Wiley, et al.*, No. 336898, 2018 WL 2089549, at *6 (Mich. Ct. App. May 4, 2018).]

Because the "state courts are the ultimate expositors of state law," *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), and are best equipped to do so, as illustrated by the above exchange, abstention or certification of the predicate state-law questions to allow final state-court resolution is appropriate.

Finally, because the ex post facto issue is and was pending in ongoing state-court proceedings involving the same parties, the district court also should have abstained under *Younger* to avoid any possible interference.

1. *Pullman* abstention or certification of the predicate state-law questions to the Michigan Supreme Court is warranted.

"Where uncertain questions of state law must be resolved before a federal constitutional question can be decided, federal courts should abstain until a state court has addressed the state questions." *Brown v. Tidwell*, 169 F.3d 330, 332 (6th Cir. 1999); *accord Harman v. Forssenius*, 380 U.S. 528, 534 (1965). In such cases, abstention is proper to "avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication."

Harman, 380 U.S. at 534. Indeed, "[t]he paradigm case for abstention arises when the challenged state statute is susceptible of a construction by the state courts that would avoid or modify the (federal) constitutional question." *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 510 (1972) (quotation omitted).

This Court concurs and has held that abstention is "especially appropriate" where "an authoritative statutory interpretation by [the state] courts would settle [the] case." *Brown*, 169 F.3d at 332; *see also Planned Parenthood of Cincinnati Region v. Strickland*, 531 F.3d 406, 412 (6th Cir. 2008) (certifying question to Ohio Supreme Court where interpretation of state law could save statute from unconstitutionality); *Am. Booksellers Found. for Free Expression v. Strickland*, 560 F.3d 443, 447 (6th Cir. 2009) (same); *Bellotti v. Baird*, 428 U.S. 132, 146–47 (1976) (holding that district court should have abstained where state statute was susceptible of an interpretation that would avoid constitutional question). This Court has also noted that *Pullman* abstention has been "applied regularly" in Section 1983 actions. *Brown*, 169 F.3d at 332.

Abstention is appropriate here. If, under state law, Plaintiffs never earned credits, never earned credits of value, or could constitutionally have received other sentences on resentencing that did not include credits, the federal constitutional ex post facto issue will be avoided entirely. This Court should allow final resolution of the predicate state-law questions by the Michigan Supreme Court.

As an alternative to abstention under *Pullman*, the state-law questions should be certified to the Michigan Supreme Court. "Certification today covers territory once dominated by" *Pullman* abstention. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997). Certification is, in fact, preferable to abstention under Pullman, because it "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Id.*

In *Arizonans for Official English v. Arizona*, for example, the Supreme Court held that the lower federal courts should have adopted "[a] more cautious approach" and certified the state-law question to Arizona's highest court. *Id.* at 77–80. The Court first noted the

"cardinal principle" that federal courts confronting a challenge to the constitutionality of a statute must "first ascertain whether a construction . . . is fairly possible that will contain the statute within constitutional bounds." *Id.* at 78 (quotations omitted). The Court cautioned that "[w]arnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Id.* at 79. "Speculation by a federal court" about the meaning of state law is "particularly gratuitous" when "the state courts stand willing to address questions of state law on certification from a federal court." *Id.* The Michigan Supreme Court stands ready to decide questions of state law on certification from this Court. Mich. Ct. R. 7.308(A)(2).

2. *Younger* abstention is warranted.

Abstention was – and is – also appropriate under *Younger v. Harris*, 401 U.S. 37 (1971). The ex post facto issue is and was pending in ongoing state-court proceedings involving the same parties. While the Michigan Court of Appeals has rejected Defendants' argument,

People v. Wiley, et al., No. 336898, 2018 WL 2089549 (Mich. Ct. App. May 4, 2018), Defendants will appeal the decision to the Michigan Supreme Court. And as explained above, the district court's reason for rejecting Defendants' *Younger* argument – its prediction that its ruling would not interfere with the ongoing state appellate proceedings because the state Court of Appeals lacked jurisdiction over claims regarding prison credits – has proved to be wrong. *People v. Wiley, et al.*, No. 336898, 2018 WL 2089549, at *6 (Mich. Ct. App. May 4, 2018).

Younger abstention is appropriate for the reasons given to the district court. As a threshold matter, the *Younger* argument on count V is preserved and is not precluded by this Court's prior decision or reasoning. Defendants raised a *Younger* argument as to all counts in their initial motion to dismiss Plaintiffs' second amended complaint. (Mot. for Partial Sum. Jgmt and to Dismiss, R. 147, Pg ID 1856, 1869–71.) In granting that motion, the district court invoked *Younger* to dismiss counts II and IV, but it did not address *Younger* for count V and instead dismissed that count for failure to state a claim. (Order, R. 174, Pg ID 2440–41.) On appeal, Plaintiffs argued that the district court incorrectly invoked *Younger* for counts II and IV (Appellants' Br., R. 19,

Pg ID 28), and Defendants responded that *Younger* for counts II and IV was proper (Appellees' Br., R. 24, Pg ID 38).

This Court reversed the district court's dismissal of counts II and IV, holding that *Younger* abstention does not apply to those counts because they "incorporated the same thread that has tied Plaintiffs' claims together from the first" amended complaint, which preceded the reopening of the state criminal proceedings in June 2016. Specifically, that thread is that "Michigan's sentencing and parole statutes deny juvenile offenders convicted of first-degree murder a meaningful opportunity for release." *Hill*, 878 F.3d at 206. "This coherent and consistent theme has animated every iteration of Plaintiffs' complaint," and "[s]ubstantive proceedings on the merits of Plaintiffs' overarching claim – that Michigan denies them a meaningful opportunity for release – have occurred" in the federal case. *Id.* at 206–07.

Thus, while this Court has rejected *Younger* for counts II and IV, it did not reject *Younger* for count V.

Nor does this Court's reasoning apply to count V. While this Court reasoned that counts II and IV continued the "overarching claim," the "coherent and consistent theme," and the "same thread" from the

first amended complaint in 2012 – that is, that Michigan's sentencing and parole statutes deny juvenile offenders a meaningful opportunity for release – that is not true of count V. Instead, count V – Plaintiffs' ex post facto claim regarding good time and disciplinary credits – is an entirely new claim predicated on a law not passed until 2014 that shares nothing in common with the claims in the first amended complaint. It is conceptually distinct.

Indeed, Plaintiffs raised no ex post facto claim at all in their original and first amended complaints. (Complaint, R. 1, Pg ID 1; First Amended Complaint, R. 44, Pg ID 545.) Plaintiffs even acknowledged in their motion for class certification that count V is a completely new claim: "Plaintiffs' second amended complaint asserted that under the new statutory scheme, Plaintiffs continued to be deprived of a meaningful opportunity for release and *additionally faced a new ex post facto law* that deprived all youth . . . of earned good time and disciplinary credits[.]" (Second Renewed Mot. for Class Cert., R. 180, Pg ID 2479) (emphasis added.) This Court's decision leaves open a *Younger* argument for count V.

And the federal courts should abstain. The Plaintiffs' state criminal proceedings were reopened for resentencing when prosecutors notified the state trial courts in March 2016 which prisoners were subject to resentencing under Mich. Comp. Laws § 769.25a. Thus, the state proceedings were ongoing for purposes of *Younger* when Plaintiffs first filed their ex post facto claim in June 2016. And the state cases remain ongoing. At least three class members currently have the ex post facto issue pending in the state appellate courts.

While "generally federal courts should not abstain," "[t]he Supreme Court has announced several circumstances which qualify as exceptional and in which abstention is appropriate" – including *Younger* abstention. *Loch v. Watkins*, 337 F.3d 574, 578 (6th Cir. 2003). Indeed, absent an "extraordinary circumstance," federal courts facing an ongoing state proceeding "should abstain." *Squire v. Coughlan*, 469 F.3d 551, 555 (6th Cir. 2006) (emphasis added). *Younger* applies with particular force here, where the Supreme Court has specifically "le[ft] to the State[s]" the task of fashioning a *Miller* remedy and admonished lower federal courts to "avoid intruding" on the state process. *Montgomery v. Louisiana*, 136 S. Ct. 718, 735 (2016).

Proceeding on Plaintiffs' new and conceptually distinct count V, when class members have that issue pending before the state appellate courts in ongoing litigation, is inappropriate.

CONCLUSION AND RELIEF REQUESTED

This Court should reverse the district court decision below and dismiss Count V.

Respectfully submitted,

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Dated: May 10, 2018

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 13,000 words. This document contains 11,108 words.

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CERTIFICATE OF SERVICE

I certify that on May 10, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendants-Appellants, per Sixth Circuit Rule 28(a), 28(a)(1)-(2), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No. Range
Complaint for Declaratory and Injunctive Relief	11/17/2010	R. 1	1
First Amended Complaint	02/01/2012	R. 44	545
Second Amended Complaint	06/20/2016	R. 130	1630
Motion for Partial Summary Judgment and Brief in Support	07/18/2016	R. 147	1856, 1869-71
Opinion and Order Granting Motion to Dismiss	02/07/2017	R. 174	2440-2441
Motion for to Certify Class	01/16/2018	R. 180	2479
Opinion & Order	04/09/2018	R. 203	3171, 3176-3194
Final Partial Judgment as to Count V	04/09/2018	R. 204	3203-3204
Notice of Appeal	04/11/2018	R. 206	3210

EXHIBIT A

STATE OF MICHIGAN

COURT OF APPEALS

WAYNE COUNTY PROSECUTING ATTORNEY,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant-Appellee,

DAROL WAYNE HOLBROOK,

Intervening Defendant-Appellee.

UNPUBLISHED
June 17, 1997

No. 186106
Wayne Circuit Court
LC No. 95 512562 CZ

Before: Sawyer, P.J., and Marilyn Kelly and D.A. Burress,* JJ.

PER CURIAM.

The Wayne County Prosecuting Attorney appeals as of right from the denial of its amended complaint for declaratory relief. Plaintiff argues that the manner in which the Department of Corrections computes good time credit violates the principles of indeterminate sentencing enunciated in *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). We affirm.

I

Following a jury trial, Darol Holbrook was convicted of first-degree murder for an offense that occurred on December 4, 1981. MCL 750.316; MSA 28.548. The trial judge sentenced him to life imprisonment. On appeal, Holbrook's conviction was reversed and the case remanded for a new trial. *People v Holbrook*, 154 Mich App 508; 397 NW2d 832 (1986). On remand, Holbrook pleaded no contest to second-degree murder. MCL 750.317; MSA 28.549. He was sentenced to twenty to thirty years' imprisonment, with credit for 2,236 days served.

Holbrook was scheduled to complete the minimum term on or about January 3, 2002, and the maximum term on or about January 3, 2012. However, from the time that Holbrook was initially

* Circuit judge, sitting on the Court of Appeals by assignment.

incarcerated in 1982, he earned 4,056 days of regular good-time credit and 2,028 days of special good time credit. The Department of Corrections applied the good-time credit to Holbrook's maximum sentence. As a result, his thirty-year maximum sentence was scheduled to be completed on May 8, 1995.

Plaintiff sought to prevent Holbrook's release by filing a complaint seeking declaratory relief against the Department of Corrections. It argued that the Department was relying on an erroneous interpretation of the statute governing the calculation of good-time and special good-time credits. MCL 800.33; MSA 28.1403. Plaintiff asserted that, by releasing Holbrook before completion of his minimum sentence, the Department had violated *Tanner*, *supra.*

The parties stipulated to add Holbrook as an intervening defendant. Both Holbrook and the Department of Corrections moved to dismiss the complaint. The trial court held that Holbrook was entitled to receive good-time and special good-time credits pursuant to MCL 791.233b; MSA 28.2303(3) as it existed before December 30, 1982. Accordingly, the trial court denied plaintiff's complaint for declaratory relief.

II

Plaintiff argues that, because of the manner in which the Department calculates good-time and disciplinary credits, Holbrook was able to complete his thirty-year maximum sentence in thirteen years and four months. Therefore, he was released from prison before the expiration of his twenty-year minimum sentence. This result, plaintiff contends, is contrary to the principle enunciated by the Supreme Court in *Tanner*. There, the Court held that a minimum sentence which is greater than two-thirds of the maximum sentence violates the intent and purpose of indeterminate sentencing. Plaintiff asserts that, in order to be consistent with *Tanner*, the Department of Corrections should not be allowed to award good-time credit so aggressively that a maximum sentence is reduced to the point where it approaches the length of the minimum sentence.

The Department of Corrections argues that Holbrook falls within a unique group of offenders whose crimes occurred between the effective date of MCL 791.233b; MSA 28.2303(3), and the amendment to MCL 800.33; MSA 28.1403, which took effect on December 31, 1982. Offenders in this category earn disciplinary credit on their minimum sentence and good-time credit on their maximum sentence. Because Holbrook earned all of the available good-time and special good-time credits, he was able to complete his thirty-year maximum sentence in thirteen years, four months and was entitled to be released. The Department asserts that to require an offender in Holbrook's position to complete his minimum sentence before discharge would negate the good-time and special good-time credits to which he is entitled by statute.

Whether the Department of Correction's award of credits violates *Tanner* is a question of law. We review such matters de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

A

Before the merits of plaintiff's issue can be addressed, it is necessary briefly to examine the legal background regarding the calculation of good-time, special good-time and disciplinary credits. Before December 30, 1982, prisoners in the custody of the Department of Corrections who did not violate prison rules or state laws were entitled to receive good-time credit. This credit served as an incentive for good behavior and reduced both minimum and maximum sentences. MCL 800.33(2)(a-g); MSA 28.1403(2)(a)-(g); *Lowe v Dep't of Corrections (On Rehearing)*, 206 Mich App 128, 131; 521 NW2d 336 (1994).

However, in 1978, the people of this state voted to pass Proposal B, codified at MCL 791.233b; MSA 28.2303(3). Under Proposal B, the minimum sentence of a person convicted for certain enumerated crimes, including first and second-degree murder, could not be reduced by allowance for good-time or special good-time credits. Therefore, prisoners convicted after December 12, 1978, the effective date of the statute, were no longer eligible to receive good-time or special good-time credit on their minimum terms. They remained eligible to receive good-time and special good-time on their maximum terms. *Lowe, supra*.

In 1982, MCL 800.33; MSA 28.1403 was amended to create a new type of credit for Proposal B offenders. *Lowe, supra*. Proposal B offenders became eligible for disciplinary credit and special disciplinary credit. These new credits accrued at a slower rate than good-time credit. 1982 PA 442; *Lowe, supra* at 133. Disciplinary credit was deducted from both the minimum and maximum sentences. MCL 800.33(5); MSA 28.1403(5)

In 1987, MCL 800.33; MSA 28.1403 was amended once again to eliminate good-time credit altogether for offenses committed on or after April 1, 1987. After that date, all new offenses were eligible to receive only disciplinary and special disciplinary credits. 1986 PA 322; *Lowe, supra* at 133.

In light of the various amendments to the credit system, the Department of Corrections attempted to clarify the procedure by which good-time and disciplinary credits were to be awarded. Policy Directive PD-DWA-35.05 was adopted which provides, in pertinent part:

> Disciplinary credits are earned as follows:
>
> 1) When serving for a Proposal B crime committed on or after January 1, 1983, prisoners earn disciplinary credit on both their minimum and maximum sentence. (Type A)
>
> 2) When serving for a Proposal B crime committed on or after December 10, 1978 but prior to January 1, 1983 prisoners earn disciplinary credit on their minimum sentence beginning January 1, 1983, but earn special and regular good time on their maximum sentence beginning from the date the sentence is effective. (Type B).

Under this interpretation of the statutory scheme, a prisoner such as Holbrook who committed a Proposal B offense after December 12, 1978, but before December 30, 1982, is eligible for disciplinary credit on his minimum term beginning January 1, 1983, but is eligible for special and regular good-time credits on his maximum term dating back to the time of sentencing. *Lowe, supra* at 133-134. This

Court has held that Policy Directive PD-DWA-35.05 conforms to the legislative intent behind MCL 800.33(5); MSA 28.1403(5). *Id*.

B

Application of Proposal B and the various amendments to MCL 800.33; MSA 28.1403 can lead to results that are contrary to common sense. Prisoners in Holbrook's position are eligible for good-time and special good-time credits on their maximum terms, but only the less favorable disciplinary credit on the minimum sentence. Therefore, the potential exists that these prisoners will complete their maximum term before they have served their minimum sentence. Because prisoners in this situation are not yet eligible for parole and have served their maximum term, they are released without supervision.

That is precisely what occurred here. The Department of Corrections applied Holbrook's regular and special good-time credits to his maximum sentence, and he became eligible for release before completing his minimum term.

C

Plaintiff contends that this result violates *Tanner*. In *Tanner*, the defendant pleaded guilty to manslaughter and was sentenced to a term of imprisonment from fourteen years, eleven months to fifteen years. *Tanner, supra* at 686. On appeal, he argued that the trial court abused its discretion in imposing a minimum sentence that was only thirty days shorter than the maximum sentence. *Id*. at 687. The Supreme Court found that the sentence violated the intent and purpose of the indeterminate sentence act, MCL 769.8; MSA 28.1080, MCL 769.9; MSA 28.1081. They reasoned that thirty days was not a sufficient time interval to enable the corrections authorities to exercise their discretion or judgment with any practicality. *Id*. at 689-690. The Court adopted the "two-thirds" rule, under which a minimum sentence must not exceed two-thirds of the maximum. *Id*. at 690.

Plaintiff argues that the instant case represents the mirror image of the issue addressed by the Court in *Tanner*. According to plaintiff, the Department of Corrections violated *Tanner* by applying good-time and special good-time credits in such a manner as to allow the length of Holbrook's maximum sentence to approach the length of his minimum term.

D

In our opinion, *Tanner* does not afford plaintiff the relief it seeks. As noted, the Court in *Tanner* was concerned with providing for indeterminate terms at the time of sentencing so that corrections authorities would be able to exercise their jurisdiction and judgment. The Court stated that a sentence either does or does not comply with the indeterminate sentence act, "irrespective of the effect of special remedial provisions such as those granting regular and special good time." *Id*. at 689.

Here, Holbrook's sentence was indeterminate at the time it was imposed. It was only after the Department of Corrections applied good-time credit that the length of the maximum sentence was reduced to a point where it was less than the minimum.

Moreover, to deny prisoners in Holbrook's position the right to have good-time and special good-time credits applied to their maximum terms would run afoul of the state and federal

constitutional prohibitions against the enactment of ex post facto laws. US Const, art I, §§ 9 and 10; Const 1963, art 1, § 10. A law enacted after the date of a prisoner's sentence that attempts to reduce the amount of credit given for good behavior, and in effect increases the sentence, is unconstitutional. *Lowe, supra* at 137, citing *Weaver v Graham*, 450 US 24, 27; 101 S Ct 960; 67 L Ed 2d 17 (1981).

Under the law as it existed in 1981, defendant Holbrook was entitled to good-time and special good-time credits applied to his maximum term. Therefore, any interpretation of the sentencing statutes that would prevent Holbrook from acquiring these credits would enhance his sentence and violate the constitutional prohibition against ex post facto laws. See *Lowe, supra* at 137-138.[1]

E

We are in sympathy with the position of the Wayne County Prosecutor.[2] The crime for which defendant pleaded guilty was particularly heinous, and the Department of Corrections should have had more control over defendant's release date and the conditions of his parole. However, it did not, due to an oversight in the Legislature's codification of Proposal B in 1978 and a failure to close the loophole until 1982. Our Legislature has acknowledged that this situation presents "one of the more glaring inadequacies of proposal B." House Legislative Analysis, HB 6165, 6166, December 7, 1982, p 2.

We find comfort in the fact that few prisoners become eligible for release before their minimum terms have been completed. Due to the 1982 amendment to MCL 800.33; MSA 28.1403, prisoners sentenced after January 1, 1983 for a Proposal B offense earn disciplinary credit on both their minimum and maximum sentences. Moreover, MCL 800.33; MSA 28.1403 was amended again in 1987 to do away with good time credit altogether for offenses committed on or after April 1, 1987. The amendment will ensure that prisoners will not be released before the expiration of their minimum sentences.

III

Lastly, plaintiff argues that the trial court erred in awarding Holbrook good-time credit for time served on his void sentence for first-degree murder. Plaintiff failed to raise this issue below. Therefore, it has not been properly preserved for review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992).

Affirmed.

/s/ David H. Sawyer
/s/ Marilyn Kelly
/s/ Daniel A. Burress

[1] In *Lowe*, we held that it would be unconstitutional to replace good-time credit with less favorable disciplinary credit for a prisoner sentenced after the enactment of Proposal B, but before the 1982 amendment to MCL 800.33; MSA 28.1403.

[2] This is true even though defendant Holbrook's counsel asserted at oral argument that the 20 to 30 year sentence was part of the plea bargain. If the claim is accurate, the prosecution should have anticipated the result in this case at the time of the plea agreement.

EXHIBIT B

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v CHRISTOPHER WILEY, Defendant-Appellant.	FOR PUBLICATION May 4, 2018 9:00 a.m. No. 336898 Wayne Circuit Court LC No. 95-002388-01-FC
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v WILLIAM LAWRENCE RUCKER, Defendant-Appellant.	No. 338870 Wayne Circuit Court LC No. 92-014245-01-FC

Before: BOONSTRA, P.J., and BECKERING and RONAYNE KRAUSE, JJ.

BECKERING, J.

These appeals arise in the aftermath of the United States Supreme Court's proclamation that mandatory life-without-parole sentencing schemes are unconstitutional with respect to juvenile offenders and the Michigan's Legislature's enactment of MCL 769.25a in an attempt to retroactively rectify the problem. In Docket No. 336898, defendant Christopher Wiley appeals by right the trial court's order resentencing him to 25 to 60 years' imprisonment for his 1995 conviction of first-degree murder, MCL 750.316, under MCL 769.25a. In Docket No. 338870, defendant William Lawrence Rucker appeals by right the trial court's order resentencing him to 30 to 60 years' imprisonment for his 1993 conviction of first-degree murder, MCL 750.316,

under MCL 769.25a.[1] Both defendants allege on appeal that MCL 769.25a(6) unconstitutionally deprives them of the application of earned disciplinary credits to their term-of-years sentences. These appeals were consolidated by order of this Court.[2]

We affirm the sentences defendants received at the time of their resentencing, but we agree with their contention that MCL 769.25a(6) is unconstitutional. Put simply, we agree with our federal colleague Judge Mark A. Goldsmith's analysis in *Hill v Snyder*, opinion and order of the United States District Court for the Eastern District of Michigan, issued April 9, 2018 (Case No. 10-cv-14568), wherein he concluded that MCL 769.25a(6) runs afoul of ex post facto laws.

I. RELEVANT LEGAL HISTORY

As alluded to above, these appeals arise following the United States Supreme Court's decisions in *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012) and *Montgomery v Louisiana*, ___ US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), and our Legislature's concomitant enactment of MCL 769.25a.

The *Miller* Court found, in relevant part:

> [A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory-sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment. [*Miller*, 567 US at 489.]

Subsequently, the Supreme Court recognized that the ruling in *Miller* had resulted in some confusion and disagreement among various state courts about whether *Miller* applied retroactively. *Montgomery*, 136 S Ct at 725. In determining that *Miller* was to be afforded retroactive application, the Court explained:

> *Miller's* conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution.
>
> Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received

[1] Both Wiley and Rucker were also convicted of possession of a firearm in the commission of a felony (felony-firearm), MCL 750.227b. Their sentences for those convictions were not altered on resentencing, have been served, and are not relevant to the issues presented in these appeals.

[2] See *People v Wiley*, *People v Rucker*, unpublished order of the Michigan Court of Appeals, issued January 17, 2018 (Docket Nos. 336898, 338870).

> mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.
>
> Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller's* central intuition—that children who commit even heinous crimes are capable of change. [*Montgomery*, 136 S Ct at 736 (citations omitted).]

After *Miller* but before *Montgomery*, our Legislature enacted MCL 769.25, which set forth the procedure for resentencing criminal defendants who fit *Miller*'s criteria, provided either that their case was still pending in the trial court or that the applicable time periods for appellate review had not elapsed. In other words, MCL 769.25 applied only to cases that were not yet final, and did not retroactively apply *Miller* to cases that were final. See 2014 PA 22, effective March 4, 2014.

However, in anticipation of the possibility that *Miller* might be determined to apply retroactively, our Legislature simultaneously enacted MCL 769.25a, which set forth the procedure, in that event, for the resentencing of defendants who fit *Miller*'s criteria, even if their cases were final. See 2014 PA 22, effective March 4, 2014. In other words, if *Miller* were determined to apply retroactively, MCL 769.25a would apply it retroactively both to cases that were final and to those that were not final. MCL 769.25a states:

> (1) Except as otherwise provided in subsections (2) and (3), the procedures set forth in section 25 of this chapter do not apply to any case that is final for purposes of appeal on or before June 24, 2012.[3] A case is final for purposes of appeal under this section if any of the following apply:
>
> (a) The time for filing an appeal in the state court of appeals has expired.
>
> (b) The application for leave to appeal is filed in the state supreme court and is denied or a timely filed motion for rehearing is denied.
>
> (c) If the state supreme court has granted leave to appeal, after the court renders its decision or after a timely filed motion for rehearing is denied.
>
> (2) If the state supreme court or the United States supreme court finds that the decision of the United States supreme court in *Miller v Alabama*, 576 [sic] US

[3] *Miller* was decided on June 25, 2012.

___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), applies retroactively to all defendants who were under the age of 18 at the time of their crimes, and that decision is final for appellate purposes, the determination of whether a sentence of imprisonment for a violation set forth in section 25(2) of this chapter shall be imprisonment for life without parole eligibility or a term of years as set forth in section 25(9) of this chapter shall be made by the sentencing judge or his or her successor as provided in this section. For purposes of this subsection, a decision of the state supreme court is final when either the United States supreme court denies a petition for certiorari challenging the decision or the time for filing that petition passes without a petition being filed.

(3) If the state supreme court or the United States supreme court finds that the decision of the United States supreme court in *Miller v Alabama*, 576 [sic] US ___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), applies retroactively to all defendants who were convicted of felony murder under section 316(1)(b) of the Michigan penal code, 1931 PA 328, MCL 750.316, and who were under the age of 18 at the time of their crimes, and that the decision is final for appellate purposes, the determination of whether a sentence of imprisonment shall be imprisonment for life without parole eligibility or a term of years as set forth in section 25(9) of this chapter shall be made by the sentencing judge or his or her successor as provided in this section. For purposes of this subsection, a decision of the state supreme court is final when either the United States supreme court denies a petition for certiorari challenging the decision with regard to the retroactive application of *Miller v Alabama*, 576 [sic] US ___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), to defendants who committed felony murder and who were under the age of 18 at the time of their crimes, or when the time for filing that petition passes without a petition being filed.

(4) The following procedures apply to cases described in subsections (2) and (3):

(a) Within 30 days after the date the supreme court's decision becomes final, the prosecuting attorney shall provide a list of names to the chief circuit judge of that county of all defendants who are subject to the jurisdiction of that court and who must be resentenced under that decision.

(b) Within 180 days after the date the supreme court's decision becomes final, the prosecuting attorney shall file motions for resentencing in all cases in which the prosecuting attorney will be requesting the court to impose a sentence of imprisonment for life without the possibility of parole. A hearing on the motion shall be conducted as provided in section 25 of this chapter.

(c) If the prosecuting attorney does not file a motion under subdivision (b), the court shall sentence the individual to a term of imprisonment for which the maximum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years. Each victim shall be afforded the right under section 15 of the William Van Regenmorter crime victim's rights act, 1985 PA 87,

> MCL 780.765, to appear before the court and make an oral impact statement at any resentencing of the defendant under this subdivision.
>
> (5) Resentencing hearings under subsection (4) shall be held in the following order of priority:
>
> (a) Cases involving defendants who have served 20 or more years of imprisonment shall be held first.
>
> (b) Cases in which the prosecuting attorney has filed a motion requesting a sentence of imprisonment for life without the possibility of parole shall be held after cases described in subdivision (a) are held.
>
> (c) Cases other than those described in subdivisions (a) and (b) shall be held after the cases described in subdivisions (a) and (b) are held.
>
> (6) A defendant who is resentenced under subsection (4) shall be given credit for time already served, but shall not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence.

The instant appeals challenge MCL 769.25a(6)'s proscription against the inclusion of good time and disciplinary credits when resentencing juvenile offenders to sentences in which they are eligible for parole, in addition to raising other constitutional challenges.

II. FACTUAL AND PROCEDURAL HISTORIES

A. DOCKET NO. 336898 – DEFENDANT WILEY

The events leading to Wiley's conviction of first-degree murder involved the death of Jamal Cargill on June 22, 1994, and were described by this Court as follows:

> Defendant entered the backyard of a home where several people, including the victim, were playing basketball. Defendant, who had a gun concealed on his person, asked who had been messing with his car. No one threatened defendant or tried to hurt him. Defendant twice asked the victim why he was smiling, and placed his hand on the gun. The victim told defendant that he was not scared, but did not rush defendant and made no motions toward him. Defendant pulled out the gun, cocked it, and pointed at the victim's chest area. Defendant then fired seven to eight shots at the victim. After the victim fell, defendant ran away but then came back when the victim began to get up. Defendant then fired two more shots at the victim. [*People v Wiley*, unpublished per curiam opinion of the Court of Appeals, issued November 21, 1997 (Docket No. 193252).]

At the time of the commission of this crime, Wiley was 16 years and 9 months old. Wiley was convicted by a jury on August 30, 1995, of first-degree murder, MCL 750.316, and felony-firearm, MCL 750.227b, and was originally sentenced on December 19, 1995 to life in prison

without parole for his first-degree murder conviction and two years' imprisonment for his felony-firearm conviction.

After the issuance of *Miller* and *Montgomery*, and the enactment of MCL 769.25a, the Wayne County Prosecutor's Office prepared a sentencing memorandum indicating that it would not seek to resentence Wiley to life in prison without parole, but would instead seek to have Wiley resentenced on his first-degree murder conviction to a term of imprisonment "for which the maximum term shall be 60 years and the minimum term shall not be less than 25 years or more than 40 years," in accordance with MCL 769.25a(4)(c). While numerous prison misconducts were documented for Wiley following his incarceration in 1996 and until 2008, the prosecutor's office noted that, while in prison, Wiley completed his general equivalency diploma (GED), enrolled in several community college courses, and had maintained employment in the prison in various capacities since 1999. The prosecution requested that the trial court resentence Wiley to a term of 35 to 60 years' imprisonment for his first-degree murder conviction.

Wiley's resentencing hearing was held on December 21, 2016. After a statement from the victim's family and Wiley's allocution, the trial court reviewed the history of the case and sentencing as well as Wiley's record while in prison and his achievements. The trial court sentenced Wiley as follows:

> I think it was a horrific crime, and I certainly hope that you don't ever forget about what you've done, and before there's any confrontational situation again, you think about what happened the last time you didn't think, 'cuz I think you really went looking for trouble.
>
> But I am going to, I think there is sufficient time for completion of programming within the 25 years and a review at that point by the Parole Board for determining whether or not he has met the standards that they feel are adequate for parole, and they've got the ability to keep him up to 60 years, so the sentence will be 25 to 60 years on the first[-]degree murder with credit for 7,441 days served, consecutive to the felony firearm which he will get credit for 700, the 2 years on the felony firearm, and be given credit for the 730 days served.
>
> I know that that may not be satisfactory to the Cargill family, but there is nothing that this court can do to restore the life of your brother, son, or friend, and I'm, I think we're looking at a situation in all of these cases where it's not just one family but multiple families and multiple people whose lives are destroyed by the senselessness of these actions.
>
> I only hope that with the sentence that you will continue to grow and that you will, if paroled, become a productive member of society.

A judgment of resentencing was entered on December 21, 2016. Wiley appealed, contending that MCL 769.25a(6), which deprives him of sentencing credits on his term-of-years sentence, violates the Ex Post Facto Clause of both the Michigan and United States Constitutions, US Const art I, § 10, Const 1963, art 1, § 10. He also contends that the statute violates Const 1963,

art 2, § 9 because it repealed "Proposal B" concerning parole eligibility, and Const 1963, art 4, § 24, because it violates the Title-Object Clause.

B. DOCKET NO. 338870 – DEFENDANT RUCKER

The events leading to Rucker's conviction of first-degree murder involved the death of Earl Cole on November 27, 1992, and were described by this Court as follows:

> There was evidence of animosity between defendant and the decedent because of defendant's replacement by the decedent as the drug seller at the Tireman address. Further, defendant brought a shotgun to the Tireman address and talked the decedent into leaving the home with him. Later, a neighbor heard someone say, "Please don't shoot me," just prior to shots being fired. The decedent was found dead from five gunshot wounds, which were inflicted from a gun that had to be reloaded each time it was fired. Finally, defendant told various stories to different people regarding what had happened. [*People v Rucker*, unpublished memorandum opinion of the Court of Appeals, issued December 29, 1994 (Docket No. 167012).]

At the time of the commission of this crime, Rucker was 17 years and 3 months old. Rucker was convicted by a jury on May 20, 1993, of first-degree murder, MCL 750.316, and felony-firearm, MCL 750.227b, and was originally sentenced on June 8, 1993, to life in prison without parole for his first-degree murder conviction and two years' imprisonment for his felony-firearm conviction.

After the issuance of *Miller* and *Montgomery*, and the enactment of MCL 769.25a, the Wayne County Prosecutor's Office prepared a sentencing memorandum indicating that it would not seek to resentence Rucker to life in prison without parole, but would instead seek to have Rucker resentenced on his first-degree murder conviction to a term of imprisonment "for which the maximum term shall be 60 years and the minimum term shall not be less than 25 years or more than 40 years," in accordance with MCL 769.25a(4)(c). The prosecution detailed Rucker's juvenile record. While numerous misconducts were documented for Rucker after his incarceration in 1993 and until 2016, the prosecutor's office noted that, while incarcerated, Rucker completed his GED and participated in numerous training and employment opportunities or classes. The prosecution requested that the trial court resentence Rucker to a term of 32 to 60 years' imprisonment for his first-degree murder conviction.

Rucker's resentencing hearing was held on February 28, 2017. After a statement from the victim's mother and Rucker's allocution, the trial court resentenced Rucker to "thirty to sixty years" in prison for the first-degree murder conviction, with credit of 8,132 days on the first-degree murder conviction and 730 days credit on the felony-firearm conviction. At the conclusion of the resentencing hearing, Rucker's counsel, for purposes of record preservation, stated the following:

> Any challenges to mandatory sentencing range of twenty-five to forty on the minimum, and sixty on the maximum per [*Alleyne*[4]]. I'm just placing them on the record, and to preserve any ex-post facto challenges to the denial of disciplinary credits, per MCL 769.25a(6). [Footnote added.]

A judgment of resentencing was entered on February 28, 2017. Rucker appealed, contending that MCL 769.25a(6) unconstitutionally deprives him of disciplinary credits in violation of the Ex Post Facto Clause of the United States Constitution, US Cons art I, § 10, and that his minimum sentence was imposed in contravention of *Alleyne* because it was based on judge-found facts.

III. SUBJECT MATTER JURISDICTION

Before addressing the substantive issues on appeal, it is necessary to address the prosecution's initial contention that this Court lacks subject matter jurisdiction to review defendants' claims. Specifically, the prosecution asserted in both appeals:

> Since defendant's constitutional claim has no effect on the validity of his sentence, but only to how the Department of Corrections is calculating parole eligibility, it seems that defendant's challenge would be better directed in a suit against the Department of Corrections and not in an appeal of his validly imposed sentence.

The prosecution in Wiley's case further expanded on this argument in its brief as follows:

> Judicial review of a Parole Board decision is governed by MCL 769.234(11). While the statute provides an avenue for the prosecution to appeal the granting of a prisoner's release on parole, it does not extend the same for a defendant seeking to challenge the Board's parole decisions, including the awarding or denial of disciplinary credits. . . . Importantly, this Court has no subject-matter jurisdiction to consider defendant's challenge to the Parole Board's decisions in determining a prisoner's eligibility for parole or to deny him parole.

The prosecution therefore contended that the "current appeal[s are] not the correct vehicle for such review" and suggested that these defendants can only seek redress by "filing a complaint for habeas corpus challenging the legality of [their] detention or an action for mandamus to compel the Board to comply with its statutory duties." We disagree.

First, the prosecution is mistaken regarding the gist of these appeals. It is well recognized and undisputed that the Department of Corrections "possesses sole jurisdiction over questions of parole." *Hopkins v Mich Parole Bd*, 237 Mich App 629, 637; 604 NW2d 686 (1999), quoting MCL 791.204. However, defendants are not challenging a decision of the Parole Board. Rather, defendants are challenging the constitutionality of the statutory provision, MCL

[4] *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013).

769.25a(6), that allows "credit for time already served," but that precludes the receipt of "any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence." This Court is neither usurping nor trespassing on the Parole Board's authority and "exclusive discretion to grant or deny parole." *Hopkins*, 237 Mich App at 637. Under MCR 7.203(A)(1), this Court has jurisdiction over "[a] final judgment or final order of the circuit court. . . ." In a criminal case, a final order or judgment is defined as encompassing "a sentence imposed following the granting of a motion for resentencing." MCR 7.202(6)(b)(*iii*). We therefore reject the prosecution's initial challenge to this Court's subject matter jurisdiction over these appeals.

Second, the prosecution's initial desire to prohibit this Court from weighing in on a constitutional question of law that directly impacts defendants' sentences of incarceration and eligibility for parole unless they file a habeas corpus complaint or a mandamus action—for which appointment of counsel for the indigent is discretionary, not mandatory—smacks of gamesmanship. Regardless, our appellate courts have, in fact, weighed in on similar issues before without requiring civil actions to do so. See *People v Tyrpin*, 268 Mich App 368; 710 NW2d 260 (2005) (interpreting whether a defendant was entitled to good time credits), and *People v Cannon*, 206 Mich App 653; 522 NW2d 716 (1994) (interpreting MCL 51.282, regarding good time credits for county prisoners). Moreover, the relevant entities that would be involved in a habeas corpus complaint or mandamus action are actively involved in this case. The Michigan Attorney General, who acts as the chief law enforcement officer for the State[5] and has the authority to intervene in any matter in which, "in his own judgment the interests of the state require it[,]"[6] filed amicus briefs in both appeals[7] and his Deputy Solicitor General actively participated in oral argument.[8] He also took over the briefing for the prosecution. Thus, the executive branch, which speaks for the Michigan Department of Corrections (MDOC) and the Parole Board, has stated its position. In any event, we are not reviewing a challenge to the conduct of either the MDOC or the Parole Board. We are simply analyzing the constitutionality of a law passed by the third branch, our Legislature, and our decision will directly impact Wiley and Rucker, as MCL 769.25a(6) affects both their minimum and maximum sentences. Because everyone agrees that time is of the essence with respect to this constitutional issue, we deem it appropriate to address the question of law that was raised on appeal by Wiley and Rucker.

And finally, it is worth noting that the tables have turned on the parties' opposing positions with respect to whether we should address the constitutionality of MCL 769.25a(6). Shortly after the prosecution filed its briefs challenging subject matter jurisdiction as to the

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[5] *Fieger v Cox*, 274 Mich App 449, 465; 734 NW2d 602 (2007).

[6] MCL 14.28

[7] See *People v Wiley*, unpublished order of the Court of Appeals, entered November 1, 2017 (Docket No. 336898) and *People v Rucker*, unpublished order of the Court of Appeals, entered November 1, 2017 (Docket No. 338870).

[8] See *People v Wiley; People v Rucker*, unpublished order of the Court of Appeals, entered March 23, 2018 (Docket Nos. 336898 and 338870).

constitutional questions presented, it changed its stance when the Sixth Circuit issued an opinion in *Hill v Snyder*, 878 F3d 193, 213 (6th Cir 2017), remanding a federal civil rights act case to the federal district court for a substantive analysis of what it deemed to be a "plausible" allegation that MCL 769.25a(6) violates the Ex Post Facto Clause.[9] Following the Sixth Circuit's remand, the prosecution filed motions to expedite the appeals before us "on the merits," conceding that determining the matter immediately in these cases was appropriate because each

> "Defendant asserts that he is being denied good time and disciplinary credits that would permit early parole consideration by the Michigan Department of Corrections or a reduction of the maximum sentence. Those claimed credits will continue to accrue during the pendency of this appeal and cannot possibly be applied, if defendant's claim is successful, until the appeal reaches finality."

This Court granted the prosecution's motions to expedite these appeals.[10] And it was after the Sixth Circuit tipped a hopeful hand to the defendants when remanding *Hill* that they each filed motions seeking to voluntarily withdraw their appeals in this Court. The prosecution objected to defendants' motions, asking in their briefs that we either "deny the motion[s], or, alternatively, grant the motion[s] and dismiss the appeal[s] with prejudice, ruling that [defendants Wiley and Rucker have] waived any claim that [they are] entitled to disciplinary credits under the Ex Post Facto Clause." The prosecution accused defendants of forum shopping while claiming that it was not seeking to do the same thing itself, explaining,

> "The State is not looking to obtain a tactical advantage, but rather seeks resolution of the underlying question of state law in the appropriate forum. The State courts are the proper forum and are best suited to interpret state law on how Michigan's credit system operates. . . . The proper resolution of [Wiley's and Rucker's motion to dismiss] is to deny the motion and leave [Wiley and Rucker] to [their] arguments on appeal."

In his reply brief, Wiley accused the prosecution of forum shopping by objecting to his motion to withdraw, but he also requested that if we deny his motion, we hold his appeal in abeyance pending a decision in *Hill*. This panel denied defendants' motions to withdraw,[11] and the matter proceeded to oral arguments, where all interested parties had their say.

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[9] Judge Goldsmith's April 9, 2018 opinion, which will be discussed further herein, was the outcome of that remand.

[10] *People v Wiley, People v Rucker*, unpublished order of the Court of Appeals, issued January 17, 2018 (Docket Nos. 336898, 338870).

[11] *People v Rucker*, unpublished order of the Court of Appeals, issued February 16, 2018 (Docket No. 338870); *People v Wiley*, unpublished order of the Court of Appeals, issued March 5, 2018 (Docket No. 336898).

IV. MCL 769.25A(6) AND THE EX POST FACTO CLAUSE

Defendants contend that MCL 769.25a(6) violates the Ex Post Facto Clause of the United States and Michigan Constitutions, US Const art I, § 10; Const 1963, art 1, § 10, because it precludes them from receiving disciplinary credits on their term-of-years sentences, and thus, it is a retroactive statute that increases their potential sentences or punishments. We agree.

To be preserved for appellate review, an issue must be raised before and addressed by the trial court. *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006). Wiley did not raise concerns regarding the Ex Post Facto Clause or any other constitutional claim at his resentencing. Consequently, this issue is not preserved with regard to Wiley. Nonetheless, we conclude that appellate review of his constitutional challenge is appropriate. See *People v Wilson*, 230 Mich App 590, 593; 585 NW2d 24 (1998) ("Although [a] defendant should have challenged the constitutionality of the statute in the trial court to preserve the issue for appellate review, we may still consider this constitutional question absent a challenge below."), *People v Blunt*, 189 Mich App 643, 646; 473 NW2d 792 (1991) ("[W]here a significant constitutional question is presented, as in this case, appellate review is appropriate."). Although Rucker did not ask the trial court to decide either his ex post facto challenge or his challenge, under *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013), to the minimum sentence imposed, he did place his objections on the record, so they could arguably be considered preserved.

This Court reviews de novo constitutional issues and questions of statutory interpretation. *People v Harris*, 499 Mich 332, 342; 885 NW2d 832 (2016). However, we review unpreserved constitutional issues for "plain error affecting defendant's substantial rights." *People v Bowling*, 299 Mich App 552, 557; 830 NW2d 800 (2013). Under the plain error rule, a "defendant bears the burden of establishing that: (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). "To establish that a plain error affected substantial rights, there must be a showing of prejudice, i.e., that the error affected the outcome of the lower-court proceedings." *Id*. at 356. "[R]eversal is only warranted if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

As a starting point, we recognize that any challenge to the constitutionality of a statute is governed by certain precepts. Specifically:

> Statutes are presumed to be constitutional unless their unconstitutionality is clearly apparent. Statutes must be construed as proper under the constitution if possible. The party opposing the statute bears the burden of overcoming the presumption and proving the statute unconstitutional. [*People v MacLeod*, 254 Mich App 222, 226; 656 NW2d 844 (2002).]

The particular statutory provision being challenged as unconstitutional and violative of the Ex Post Fact Clause is MCL 769.25a(6), which states as follows:

> A defendant who is resentenced under subsection (4) shall be given credit for time already served, but shall not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence.

MCL 769.25a(4) refers to the procedure for resentencing juvenile offenders convicted of first-degree murder both when the prosecution is seeking a continuation of a life in prison without parole sentence (regardless of the sentence ultimately imposed), MCL 769.25a(4)(b), and when the prosecution is not seeking a continuation of a life in prison without parole sentence, MCL 769.25a(4)(c). The latter subsection, which applies to defendants in the instant cases, directs that a trial court at resentencing "shall sentence the individual to a term of imprisonment for which the maximum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years." *Id*.

As discussed by this Court in *People v Tucker*, 312 Mich App 645, 651; 879 NW2d 906 (2015):

> The United States and Michigan Constitutions prohibit ex post facto laws. *People v Callon*, 256 Mich App 312, 316-317; 662 NW2d 501 (2003), citing US Const art I, § 10; Const 1963, art 1, § 10. This Court has declined to interpret the Ex Post Facto Clause of the Michigan Constitution as affording broader protection than its federal counterpart. *Callon*, 256 Mich App at 317. All laws that violate ex post facto protections exhibit the same two elements: "(1) they attach legal consequences to acts before their effective date, and (2) they work to the disadvantage of the defendant." *Id*. at 318. "The critical question [for an ex post facto violation] is whether the law changes the legal consequences of acts completed before its effective date." *Id*. (quotation marks and citations omitted; alteration in original). This Court has identified four circumstances that implicate the Ex Post Facto Clauses:
>
> > A statute that affects the prosecution or disposition of criminal cases involving crimes committed before the effective date of the statute violates the Ex Post Facto Clauses if it (1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence. [*Riley v Parole Bd*, 216 Mich App 242, 244; 548 NW2d 686 (1996).]

The purpose underlying ex post facto prohibitions is "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed," and to "restrict[] governmental power by restraining arbitrary and potentially vindictive legislation." *Weaver v Graham*, 450 US 24, 28-29; 101 S Ct 960; 67 L Ed 2d 17 (1981), overruled in part on other grounds *California Dep't of Corrections v Morales*, 514 US 499, 506 n 3; 115 S Ct 1597; 131 L Ed 2d 588 (1995). As stated and explained by the United States Supreme Court in *Weaver*:

> [T]wo critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. . . . [A] law need not impair a "vested right" to violate the ex post facto prohibition. Evaluating whether a right has vested is important for claims under the Contracts or Due Process Clauses, which solely protect pre-existing entitlements. The presence or absence of an affirmative, enforceable right is not relevant, however, to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense. [*Id*. at 29-31 (citations omitted).]

Therefore, "[t]he critical question is whether the law changes the legal consequences of acts completed before its effective date." *Weaver*, 450 US at 31 (The Supreme Court held that as applied to a prisoner whose crime was committed before a statute's effective date, the statute reducing the amount of good time credit violated the Ex Post Facto Clause). "The imposition of a punishment more severe than that assigned by law when the criminal act occurred is a violation of the Constitution's *ex post facto* prohibition." *Hallmark v Johnson*, 118 F3d 1073, 1077 (CA 5, 1997), citing *Weaver*, 450 US at 30.

It is undisputed that MCL 769.25a *alters* the punishment for both convicted and future juvenile offenders committing first-degree murder. Our inquiry therefore focuses on "[w]hether a retrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor." *Weaver*, 450 US at 33. In other words, for purposes of these appeals, does the challenged statutory provision serve to increase the punishment for a prisoner by imposing "new restrictions on eligibility for release" and therefore "make[] more onerous the punishment for crimes committed before its enactment"? *Id*. at 34, 36. We conclude that it does.

As noted at the outset of this opinion, we are not the first court faced with assessing the constitutionality of MCL 769.25a(6). Just a few weeks ago Judge Goldsmith issued his opinion analyzing this very issue. *Hill v Snyder*, opinion and order of the United States District Court for the Eastern District of Michigan, issued April 9, 2018 (Case No. 10-cv-14568). In a case brought by individuals similarly situated to Wiley and Rucker, Judge Goldsmith determined that MCL 769.25a(6) violates the United States Constitution's ban on ex post facto laws, and in fact, he certified a class of plaintiffs that includes Wiley and Rucker.[12] *Hill*, pp 26, 32. Although this Court is not bound by the decisions of lower federal courts, we may find their "analyses and

[12] Wiley's appellate counsel, who represents other parties in that action, was appointed to serve as class counsel. *Id*, p 32.

conclusions persuasive." *Abela v General Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004). After a careful review of Judge Goldsmith's opinion and the applicable law, we find his analysis and conclusions to be, in the words of the Sixth Circuit, "thoughtful and well-reasoned."[13]

The salient portion of Judge Goldsmith's analysis, which we find persuasive and respectfully adopt as our own[14], states as follows:

> The crux of Plaintiffs' claim . . . hinges on an interpretation of the good time and disciplinary credit statutes, and whether these statutes previously afforded credit to individuals who were sentenced to life without parole. [*Hill*, p 6.]
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> * * *
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> [T]he Court concludes that state law regarding good time and disciplinary credits is unmistakably clear and solidly supports [the incarcerated] Plaintiffs' position. Before modification by the Michigan legislature in 2014, Michigan law regarding good time and disciplinary credits made no distinction based on whether the prisoner was serving a life sentence and allowed such a prisoner to earn credit if otherwise eligible [*Id.*at 7-8]
>
> * * *
>
> Good time and disciplinary credits are applied to a prisoner's minimum and/or maximum sentence in order to determine his or her parole eligibility dates.[7] Thus, if Michigan's statutory scheme permitted any Plaintiff to earn good time or disciplinary credits at the time the Plaintiff's crime was committed, the removal of such credits increases the Plaintiff's punishment and violates the Ex Post Facto Clause. [*Id*. at 16.]
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> * * *
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> i. Statutory Interpretation
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> Michigan's statutory scheme regarding good time and disciplinary credits has changed over the years. Prior to 1978, prisoners could apply good time credits to both their minimum and maximum terms; the law was amended in 1978

[13] The Sixth Circuit offered this sentiment when denying the state parties' recent motion for a 14-day stay so they could appeal Judge Goldsmith's permanent injunction, which included enjoining the state parties from enforcing or applying MCL 769.25a(6) and ordering them to calculate the good time credits and disciplinary credits for each member of the class who has been resentenced.

[14] The party designations would be switched, however, as the plaintiffs in *Hill* are similarly situated to defendants in the instant case.

to provide that prisoners convicted for certain crimes, including first and second-degree murder, could only apply good time credits to their maximum terms. See Wayne Cty. Prosecuting Atty. v. Mich. Dep't of Corrections, No. 186106, 1997 WL 33345050, at (Mich. Ct. App. June 17, 1997). In 1987, good time credits were eliminated altogether for offenses committed on or after April 1, 1987. Id.

Disciplinary credits were created in 1982, and were deducted from both the minimum and maximum sentences of prisoners convicted of certain crimes, including first and second-degree murder. See Mich. Comp. Laws § 800.33(5). Disciplinary credits were less favorable to prisoners than good time credits, as the amount of good time credits available to a prisoner increased with each year of imprisonment, while disciplinary credits remained constant over the entirety of the term to which they applied. See Lowe v. Dep't of Corrections, 206 Mich. App. 128, 521 N.W.2d 336, 338 (1994). The law changed again in 1998 to provide that prisoners who committed certain crimes, including first and second-degree murder, on or after December 15, 1998, or any other crime on or after December 15, 2000, are unable to earn disciplinary credits. See Mich. Comp. Laws §§ 800.33(14) and 800.34(5) . . . .[15]

The broad language used in both the good time and the disciplinary credit statutes does not draw any distinction based on whether the prisoner is serving a life sentence.[16] The good time credit statute provides as follows:

> (2) Except as otherwise provided in this section, a prisoner who is serving a sentence for a crime committed before April 1, 1987, and who has not been found guilty of a major misconduct or had a violation of the laws of this state recorded against him or her shall receive a reduction from his or her sentence as follows:
> (a) During the first and second years of his or her sentence, 5 days for each month.
> (b) During the third and fourth years, 6 days for each month.
>
> [. . .]

[15] MCL 769.25a(6) only affects individuals who were convicted of first-degree murder for offenses committed prior to December 15, 1998 when they were under the age of 18, and who receive a post-*Miller* sentence in which they are eligible for parole.

[16] Although neither Wiley nor Rucker are entitled to good time credits based on the dates they committed their offenses, the statutory language used in both the good time and the disciplinary credit statutes is relevant to the constitutional question before this Court.

> (g) From and including the twentieth year, up to and including the period fixed for the expiration of the sentence, 15 days for each month.

Mich. Comp. Laws § 800.33(2). The statute providing for disciplinary credit provides,

> (3) . . . [A]ll prisoners serving a sentence for a crime that was committed on or after April 1, 1987 are eligible to earn disciplinary and special disciplinary credits as provided in subsection (5). Disciplinary credits shall be earned, forfeited, and restored as provided in this section. Accumulated disciplinary credits shall be deducted from a prisoner's minimum and maximum sentence in order to determine his or her parole eligibility date and discharge date.
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> [. . .]
>
> (5) . . . [A]ll prisoners serving a sentence on December 30, 1982, or incarcerated after December 30, 1982, for the conviction of a crime enumerated in section 33b(a) to (cc) of 1953 PA 232, MCL 791.233b, are eligible to earn a disciplinary credit of 5 days per month for each month served after December 30, 1982. Accumulated disciplinary credits shall be deducted from a prisoner's minimum and maximum sentence in order to determine his or her parole eligibility dates.
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> Mich. Comp. Laws § 800.33(3), (5).

Nothing in the text of the good time credit or disciplinary credit statutes excludes their application to prisoners serving life sentences. In fact, both statutes use language that is all encompassing. See Mich. Comp. Laws § 800.33(2) ("[A] prisoner who is serving a sentence for a crime ..."); Mich. Comp. Laws § 800.33(5) ("[A]ll prisoners serving a sentence ...").[17] Further, the disciplinary credit statute states explicitly that first-degree murderers earn disciplinary credit; it provides that disciplinary credits are earned by those convicted of a crime enumerated in Mich. Comp. Laws § 791.233b – which includes first-degree murder. See § 791.233b(n) (listing Section 316 of the Michigan penal code as one of the enumerated crimes); § 750.316 (first degree murder).[8]

Despite this unambiguous language, Defendants argue there is some shade of gray. They point out that the good time statute indicates that a prisoner "shall

[17] See also MCL 800.33(3).

receive a reduction" from his or her sentence, up to and including the "period fixed for the expiration of the sentence." Mich. Comp. Laws § 800.33(2). They argue that prisoners serving a life sentence cannot have that sentence "reduced," and that there is no time "fixed" for the "expiration" of such sentence; therefore, they say, this statute cannot be applied to prisoners serving a life term. . . .

This argument is unconvincing. The language may mean that the good time credits are not actually applied to a life sentence so long as it remains a life sentence. But there is no reason to think that a prisoner serving a life sentence could not, nonetheless, earn good time credits. They would be applied if and when the sentence was converted, for some reason, to a fixed sentence. Once changed to a term of years, there is an "expiration" that is "fixed," and the sentence can then be "reduced." In fact, this view of the statutory language is precisely the view of the MDOC, whose practice has routinely been to calculate credits when a prisoner previously serving a life sentence is subsequently resentenced to a term of years. . . .

As for the disciplinary credit statute, Defendants have no explanation for the explicit inclusion of first-degree murder as one of the crimes for which credits could be earned. They maintain that the language in other parts of the statute, which references deductions from a minimum and maximum sentence, means that the statute cannot apply to those serving a life sentence, as such prisoners have no minimum or maximum term. . . . But again, a plausible interpretation of the statute—and one that renders the statute as a whole internally consistent—is that the disciplinary credits are not applied to a life sentence, although prisoners serving such term still earn them. To agree with Defendants would be to ignore a portion of the statute, and courts have a "duty to give effect, if possible, to every clause and word of a statute." Duncan v. Walker, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (internal quotations omitted); see also Williams v. Taylor, 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (describing this rule as "a cardinal principle of statutory construction").

The lack of any ambiguity in the statutory language is, perhaps, best evidenced by the action of the Michigan legislature itself, in adopting Mich. Comp. Laws § 769.25a(6). If the legislature had believed that Michigan law did not provide credits to those convicted of first-degree murder, there would have been no purpose for a provision that expressly stripped them of those credits. The inference is ineluctable that the legislature understood that these individuals would invoke these credits unless the legislature affirmatively repealed them. In doing so, the legislature eloquently testified to the state of Michigan law prior to the adoption of Section 769.25a(6).

ii. Michigan Case Law

The Michigan Supreme Court is in accord with the view that good time credit is earned even by individuals serving life sentences. In Moore v. Buchko,

379 Mich. 624, 154 N.W.2d 437 (1967), the Michigan Supreme Court considered whether a prisoner who had been unconstitutionally sentenced to life imprisonment in 1938 for first-degree murder should receive credit, including good time credit, when he was resentenced following vacation of his conviction, retrial, and conviction for second-degree murder in 1958. Although no opinion received a majority of votes, all the Justices agreed that the prisoner was entitled to good time credit for the time he had served. Justice Souris's opinion, which was joined by Chief Justice Dethmers, concluded that the prisoner was "entitled by statute to the credit he seeks," which was "the nearly 20 calendar years he served under his invalidated conviction . . . and the regular and special good time credit he earned during that time." Id. at 438, 441 (Souris, J.). Justice Adams, writing for three other justices, wrote that a sentencing judge "shall give credit for time served under an illegal sentence," and that "[i]t follows, A [sic] fortiori, that such credit includes recognition of regular or special good time earned during an illegal incarceration." Id. at 445 n. 3 (Adams, J.).

Justice Brennan addressed the issue of whether the prisoner had earned good time credits in much greater detail, ultimately concluding that "the good time statute purports to give good time credits to every convict who behaves himself in prison." Id. at 447 (Brennan, J.). He described the rationale behind allowing all prisoners, even those serving a life term, to earn credits:

> Clearly, the purpose of this enactment is to encourage good behavior by prisoners and thus generally to improve conditions in the prisons and reduce custodial costs to the taxpayers.
>
> Presumably, the statute makes no distinction between lifers and other convicts by reason of the fact that the legislature wanted to encourage good behavior by lifers as well as by all other prisoners.
>
> Admittedly, the good time credit incentive is rather nebulous in the case of a convict imprisoned for life. But since hope and post conviction pleas spring eternal within the incarcerated human breast, it cannot be said the good time credit law is not at least some encouragement to them. At least, it appears that the legislature thought it would be so, and its policy determination is binding on this Court.

Id. Thus, seven of the eight justices joined an opinion that held that the prisoner was entitled to good time credit.[9]

Defendants attempt to distinguish Moore by arguing that Moore was resentenced to a term of years under law that existed at the time of his crime in 1938. . . . Plaintiffs' new sentencing options, they contend, did not exist until 2014. . . . However, Defendants have not explained why this should make a difference. Nothing in Moore suggests that the availability of a term-of-years

sentence while Moore served his first-imposed sentence had some bearing on the question of his entitlement to credit. Additionally, Defendants position that Plaintiffs should not receive credit because Michigan law did not provide a constitutional sentence for them until 2014 would punish Plaintiffs for the shortcomings of Michigan's unconstitutional sentencing of youth offenders.

Defendants argue that the Michigan Supreme Court recognized that the good time statute does not apply to someone serving a life sentence in Meyers v. Jackson, 245 Mich. 692, 224 N.W. 356 (1929).[18] In Meyers, the petitioner was convicted of murder and sentenced to life in prison; the governor later commuted his sentence "so that the same will expire 15 years from the date of sentence." Id. at 356. The court denied the petitioner's request for good time credit, stating that "if he accepts the benefit of the commutation granted[, he] must accept it in accordance with the terms imposed by the executive authority granting it." Id. at 356–357. The court also noted that "the question of good time applies only to those where the date of expiration of sentence is fixed. Petitioner was sentenced to imprisonment for life. The period of his imprisonment was not fixed." Id. at 356.

This last statement is dictum, as it was not necessary to the Meyers court's holding that a prisoner who accepts a commutation must accept it according to its terms. See Moore, 154 N.W.2d at 447 (Brennan, J.) ("[T]he language in the Meyers Case to the effect that good time allowances do not apply to life sentences was not essential to the decision there."); see also Petition of Cammarata, 341 Mich. 528, 67 N.W.2d 677, 682 (Mich. 1954) ("In Meyers . . . we held that a prisoner who accepts the benefit of a commutation must accept it in accordance with the terms imposed by the executive authority granting it.").

Thus, the only decision by the Michigan Supreme Court containing a holding applicable to our case accords with the view that credits are earned by those convicted of first-degree murder and applied to their sentences once those sentences become term-of-years sentences. . . .[10] [*Id*. at 16-22.]

* * *

For all of the above reasons, this Court interprets Mich. Comp. Laws § 800.33 to provide good time and disciplinary credits to prisoners who were serving a term of life imprisonment. The elimination of those credits by Mich. Comp. Laws § 769.25a(6), therefore, violates the Ex Post Facto Clause of the Constitution . . . Defendants must apply good time and disciplinary credits in

[18] The Michigan Attorney General cited *Meyers* and made the same argument in its amicus brief filed in the present case.

calculating parole eligibility dates for prisoners resentenced under Mich. Comp. Laws § 769.25a. [*Id*. at 24.]

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[7] As the Sixth Circuit noted . . . "[C]redits deducted from a term-of-years sentence do not automatically result in earlier release; they merely hasten the date on which prisoners fall within the jurisdiction of the Michigan Parole Board. Even after an inmate falls within its jurisdiction, the Board retains discretion to grant or deny parole." *Id*. at 16 (citation omitted).

[8] Whatever exceptions to credit that exist in the statutes have nothing to do with whether the defendant committed first-degree murder. For example, the good time credit statute excepts those who have committed later crimes or were guilty of misconduct. See Mich. Comp. Laws § 800.33(2).

[9] Justice Black concurred only in the result and did not join any opinion.

[10] Defendants cite People v Tyrpin, 710 NW2d 260 (Mich. Ct. App. 2005), for support, but that case is distinguishable.[19] There, the defendant was originally given a determinate one-year jail sentence. After serving some time, the sentence was reversed, based on the prosecutor's appeal that an indeterminate sentence was required. Defendant argued on resentencing that he should receive disciplinary credit that he earned on the initial improper sentence. The court of appeals affirmed the trial court's refusal to award any disciplinary credit, reasoning that if the defendant had been properly sentenced to an indeterminate sentence originally, he would not have been entitled to such credit based on an express exclusion in the statutory language. (This was because, as discussed supra, individuals sentenced for assaultive crimes committed on or after December 15, 1998 were not eligible for disciplinary credits.) Our case is entirely different. Tyrpin sought credit that he would not have received had he been sentenced properly initially. Here, Plaintiffs do not seek any credit they would not have received had they been sentenced properly initially. Tyrpin thus is no help to Defendants. [*Id*. at 16-22].

In light of our determination that MCL 769.25a(6) violates the Ex Post Facto Clause, we need not address Wiley's other constitutional arguments claiming that the statute repeals an initiative adopted by the voters as "Proposal B" concerning parole eligibility or his claim that the statute violates the Title-Object Clause of the Michigan Constitution, Const 1963, art 4, § 24.

[19] The Michigan Attorney General cited *Tyrpin* and made the same argument in its amicus brief filed in the present case.

V. USE OF JUDICIAL FACT-FINDING

Finally, Rucker contends that his resentencing under MCL 769.25a(4)(c) violated the Sixth Amendment because the trial court used judicially found facts in imposing a minimum sentence of 30 years' imprisonment (rather than 25 years' imprisonment). Citing *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013), and *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), Rucker argues that the only sentence that could be imposed was 25 to 60 years' imprisonment and that the increase in the minimum sentence to 30 years was improper because such increase required the use of facts found either by a jury or admitted by defendant. We disagree.

"This Court reviews de novo the proper interpretation of statutes." *People v Campbell*, 316 Mich App 279, 297; 894 NW2d 72 (2016). Constitutional issues are also reviewed de novo. *People v Pennington*, 240 Mich App 188, 191; 610 NW2d 608 (2000). "Any fact-finding by the trial court is to be reviewed for clear error, any questions of law are to be reviewed de novo, and the court's ultimate determination regarding the sentence imposed is for an abuse of discretion." *People v Hyatt*, 316 Mich App 368, 423; 891 NW2d 549 (2016). "An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes. A trial court necessarily abuses its discretion when it makes an error of law." *People v Franklin*, 500 Mich 92, 100; 894 NW2d 561 (2017) (quotation marks and citations omitted). "A trial court's factual finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *Id*. (citation and quotation marks omitted).

In accordance with MCL 769.25a(4)(c), if the prosecution opts not to seek resentencing to life in prison without parole,

> the court shall sentence the individual to a term of imprisonment for which the maximum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years. Each victim shall be afforded the right under section 15 of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.765, to appear before the court and make an oral impact statement at any resentencing of the defendant under this subdivision.

At Rucker's resentencing, the victim's mother, Cynthia Cole, addressed the court, and opposed Rucker's receipt of less than a life sentence. The trial court also had available for its review sentencing memoranda prepared by the prosecution and defense counsel, detailing the original offense, Rucker's prior juvenile criminal history and misconduct while in prison, in addition to any accomplishments attained, such as the procurement of his GED. The prosecution requested that Rucker be resentenced to a term of 32 to 60 years' imprisonment. The trial court elected to impose a sentence of "thirty to sixty years" for the first-degree murder conviction, seeking to balance the propriety of the punishment to be imposed with the severity of the crime that occurred, while respecting the concerns expressed by the victim's family.

Contrary to Rucker's argument, the trial court's imposition of a 30-year minimum sentence did not constitute a Sixth Amendment violation proscribed by *Alleyne*. This Court squarely addressed this issue in this very context in *Hyatt*, 316 Mich App at 394-395, stating:

> For all that was said in *Apprendi* [*v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000)] and its progeny, we note that the Supreme Court's holding in those cases must not be read as a prohibition against all judicial fact-finding at sentencing. Indeed, the rules from *Apprendi* and its progeny do not stand for the proposition that a sentencing scheme in which judges are permitted "genuinely to exercise broad discretion . . . within a statutory range" is unconstitutional; rather, as articulated in *Cunningham*, "everyone agrees" that such a scheme "encounters no Sixth Amendment shoal." *Cunningham* [*v California*], 549 US [270,] 294; 127 S Ct 856[; 166 L Ed 2d 856 (2007)] (citation and quotation marks omitted; alteration in original; emphasis added). See also *Alleyne*, 570 US at [116]; 133 S Ct at 2163 ("Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."). Therefore, a judge acting within the range of punishment authorized by statute may exercise his or her discretion—and find facts and consider factors relating to the offense and the offender—without violating the Sixth Amendment. *Id*. at [116], 136 S Ct at 2163, citing *Apprendi*, 530 US at 481; 120 S Ct 2348. As explained in *Alleyne*, 570 US at [117]; 133 S Ct at 2163:
>
> > [W]ithin the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment. [1 J Bishop, Criminal Procedure 50 (2d ed, 1872), § 85, at 54.]
> >
> > [E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things. *Apprendi*, [530 US] at 519; 120 S Ct 2348 (THOMAS, J., concurring).

Rucker's reliance on *Lockridge* is similarly unavailing. In *Lockridge*, 498 Mich at 442, our Supreme Court was clear that the use of judge-found facts *in conjunction* with mandatory sentencing guidelines was the source of the Constitutional infirmity. Following the issuance of *Lockridge*, this Court in *People v Biddles*, 316 Mich App 148, 158; 896 NW2d 461 (2016) further explained:

> The constitutional evil addressed by the *Lockridge* Court was not judicial fact-finding in and of itself, it was judicial fact-finding in conjunction with required application of those found facts for purposes of increasing a mandatory minimum sentence range. *Lockridge* remedied this constitutional violation by making the guidelines advisory, not by eliminating judicial fact-finding.

Rucker was resentenced within the minimum range statutorily mandated by MCL 769.25a(4)(c). The trial court was afforded discretion in determining and imposing a minimum sentence for Rucker that comported with the required statutory range. There is no Sixth Amendment violation as contemplated by *Alleyne*, *Lockridge*, or their progeny.

VI. CONCLUSION

This Court has subject matter jurisdiction of defendants' appeals. MCL 769.25a(6) unconstitutionally deprives defendants of the application of earned disciplinary credits to their term-of-years sentences in violation of the Ex Post Facto Clause of the United States and Michigan Constitutions, US Const, art 1, § 10; Const 1963, art 1, § 10. The statute may not be used to prevent either Wiley or Rucker from receiving disciplinary credits on their minimum and maximum sentences. We need not address Wiley's other constitutional challenges to the statute. Rucker's argument regarding the use of judicial fact-finding when imposing a minimum sentence of 30 years' imprisonment lacks merit.

We affirm defendants' sentences, but declare MCL 769.25a(6) to be unconstitutional.

/s/ Jane M. Beckering
/s/ Amy Ronayne Krause

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v CHRISTOPHER WILEY, Defendant-Appellant.	FOR PUBLICATION May 4, 2018 9:00 a.m. No. 336898 Wayne Circuit Court LC No. 95-002388-01-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v WILLIAM LAWRENCE RUCKER, Defendant-Appellant.	 No. 338870 Wayne Circuit Court LC No. 92-014245-01-FC

Before: BOONSTRA, P.J., and BECKERING and RONAYNE KRAUSE, JJ.

BOONSTRA, P.J. (*concurring in part and dissenting in part*).

I agree with the parties (both plaintiff and defendants at various times) that the constitutional ex post facto issue is not properly before us. Further, I discern—from the issues and arguments raised on appeal—no challenge to any aspect of the sentences imposed by the trial court (apart from an *Alleyne*[1] challenge); rather, the sole issue raised is whether a nonparty (the parole board or the Michigan Department of Corrections (MDOC)) may—in the future—constitutionally apply MCL 769.25a(6) to the unchallenged sentences imposed by the trial court. Accordingly, I dissent from the majority's determination to decide the constitutional issues in the current context. I concur with the majority's disposition of the *Alleyne* challenge. Accordingly, I would affirm.

[1] *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013).

I. THE ISSUES ON APPEAL

In Docket No. 336898, defendant Christopher Wiley ostensibly appeals by right the trial court's order resentencing him to 25 to 60 years' imprisonment for his 1995 conviction of first-degree murder, MCL 750.316, under MCL 769.25a. Wiley's brief on appeal contains neither the required "statement of the basis of jurisdiction," MCR 7.212(C)(4), nor the required "statement of questions involved," MCR 7.212(C)(5). Wiley's arguments on appeal are limited, however, to raising constitutional challenges to MCL 769.25a.[2] Wiley did not raise any constitutional claims at his resentencing. To be preserved for appellate review, an issue must be raised before and addressed by the trial court. Consequently, the constitutional issues are not preserved with regard to Wiley. *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006). We review unpreserved constitutional issues for "plain error affecting defendant's substantial rights." *People v Bowling*, 299 Mich App 522, 557; 830 NW2d 800 (2013). Under the plain error rule, a "defendant bears the burden of establishing that: (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). "To establish that a plain error affected substantial rights, there must be a showing of prejudice, i.e., that the error affected the outcome of the lower-court proceedings." *Id*. at 356. "[R]eversal is only warranted if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). Wiley concedes that the proper analysis is that of plain error, but does not articulate what errors the trial court purportedly made.

In Docket No. 338870, defendant William Lawrence Rucker ostensibly appeals by right the trial court's order resentencing him to 30 to 60 years' imprisonment for his 1993 conviction of first-degree murder, MCL 750.316, under MCL 769.25a. Rucker's brief on appeal asserts that this Court "has jurisdiction of this appeal under MCR 7.203(A)(1) and MCR 7.202(6)(b)(iii).[3] Rucker raises two issues on appeal: (1) an *Alleyne* challenge; and (2) a constitutional ex post facto challenge. Rucker arguably preserved those issues in the trial court. With regard to the constitutional challenge, however, Rucker—like Wiley—does not articulate on appeal any errors that the trial court purportedly made.

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[2] The constitutional issues raised by Wiley on appeal include (a) whether MCL 769.25a(6) violates the Ex Post Facto Clause of United States and Michigan Constitutions, US Const art I, § 10; Const 1963, art 1, § 10; (2) whether MCL 769.25a(6) improperly repeals an initiative adopted by voters as "Proposal B," in violation of Const 1963, art. 2, § 9; and (c) whether MCL 769.25a(6) violates the Title-Object Clause of the Michigan Constitution, Const 1963, art 4, § 24. In light of its disposition of the first of these issues, the majority does not reach the remaining two issues. I would not reach any of them in the context of these appeals.

[3] MCR 7.203(A)(1) provides for an appeal of right of a "final judgment or final order" of a circuit court, "as defined in MCR 7.202(6). MCR 7.202(6)(b)(iii) defines a "final judgment or final order" in a criminal case to include "a sentence imposed following the granting of a motion for resentencing."

II. THE PARTIES' MORPHING LEGAL POSITIONS

In responding to Wiley's appeal, plaintiff argued in part as follows:

> The People first note that this Court has no subject-matter jurisdiction to consider defendant's claim. Defendant's challenge has no relevancy to the validity of his sentence. Defendant was sentenced to a term of years within the range of sentences proscribed by statute. Defendant's challenge is not that the courts or the prosecution are denying him constitutional rights that would affect the validity of his sentence. The sentencing court does not have authority to award disciplinary or special disciplinary credits. Defendant's challenge is to the legislative branch's denial of credit reductions and the executive branch's execution of that legislative directive in determining when defendant is eligible for parole. Once a defendant is committed to the custody of the Michigan Department of Corrections, authority over a defendant passes out of the hands of the judicial branch. The Michigan Department of Corrections, an administrative agency within the executive branch of government, possesses *exclusive* jurisdiction over questions of parole. Parole can be granted *solely* by the Michigan Parole Board, a division of the MDOC. Once a defendant has been lawfully committed to the custody of the MDOC, the Michigan Legislature has determined that the only body that can release defendant from prison is the Parole Board, not the sentencing court or any subsequent reviewing courts. Whether or when a defendant should be released on parole is devoted exclusively to the discretion of the Parole Board. Because parole is a discretionary function, no due process right is implicated. "That the state holds out the possibility of parole provides no more than a mere hope that the benefit will be obtained . . . a hope which is not protected by due process."
>
> > "The Michigan parole statute . . . does not create a right to be paroled. Because the Michigan Parole Board has the discretion whether to grant parole, a defendant does not have a protected liberty interest in being paroled prior to the expiration of his or her sentence. The Sixth Circuit has held that Michigan Complied Laws § 791.233 does not create a protected liberty interest in parole, because the statute does not place any substantive limitations on the discretion of the parole board through the use of particularized standards that mandate a particular result.
>
> Since defendant's constitutional claim has no effect on the validity of his sentence, but only to how the Department of Corrections is calculating parole eligibility, it seems that defendant's challenge would be better directed in a suit against the Department of Corrections and not in an appeal of his validly imposed sentence. Judicial review of a Parole Board decision is governed by MCL 791.234(11). While the statute provides an avenue for the prosecution to appeal the granting of a prisoner's release on parole, it does not extend the same for a defendant seeking to challenge the Board's parole decisions, including the awarding or denial of disciplinary credits. Prisoners "have no legal right to seek

> judicial review of the denial of parole by the Parole Board." Importantly, this Court has no subject-matter jurisdiction to consider defendant's challenge to the Parole Board's decisions in determining a prisoner's eligibility for parole or to deny him parole.
>
> The judiciary has limited review of the Parole Board's process in determining parole. But, defendant's current appeal is not the correct vehicle for such review. Challenges to the procedures used by the Parole Board in determining whether to grant parole, how the Board exercised those procedures, or the decisions reached by the Board based on those procedures are properly subject to a totally different appellate procedure.
>
> The Parole Board is an administrative body. By statute, the Parole Board has been entrusted to develop its own guidelines for exercising its discretion in considering prisoners for parole and deciding whether to grant parole. In *Hopkins v Parole Board*, this Court determined that there were three avenues for a prisoner to challenge the Parole Board's decisions: (1) review pursuant to a procedure specified in a statute applicable to the particular agency, here the applicable statute being MCL 791.234; (2) the method of review for contested cases under the Administrative Procedures Act (APA), MCL 24.201 et. seq, or (3) an appeal pursuant to the Revised Judicature Act (RJA), MCL 600.631. The Court then determined that review under either the APA and RJA was unavailable to prisoners because parole hearings are not contested cases and because the prisoner has no private right to parole. The final avenue for review, MCL 791.234, as previously mention, also does not provide for review. Although none of the avenues for review listed in *Hopkins* are available, the legality of a prisoner's detention "is not insulated from judicial oversight." The prisoner is still able to challenge the Parole Board's action by filing a complaint for habeas corpus challenging the legality of his detention or an action for mandamus to compel the Board to comply with its statutory duties. It is only by these avenues, and not by an appeal of the underlying sentences, that defendant may challenge the guidelines or decisions of the Parole Board concerning parole. This Court has no subject-matter jurisdiction to review the guidelines of the Parole Board, the process the Parole Board conducted in determining defendant's eligibility for parole, or the Board's final decision regarding parole. [Citations omitted).]

Plaintiff argued similarly—and to a large extent verbatim—in response to Rucker's appeal. The Attorney General subsequently filed amicus curiae briefs in support of plaintiff in both appeals, addressing only the constitutional ex post facto issue.

After the filing of plaintiff's briefs on appeal, both defendants moved to voluntarily dismiss their appeals under MCR 7.218. Plaintiff, then represented principally by the Attorney General, opposed the motions, arguing that the ex post facto issue presented questions of state law that should be decided by a state court, and that defendants had moved to dismiss their

appeals because of the pendency of the related putative class action challenge presented in the United States District Court proceeding captioned *Hill v Snyder*, Case No. 10-cv-14568. This Court denied defendants' motions to dismiss in separate orders.[4]

At oral argument, counsel for defendants agreed with the position stated in plaintiff's briefs—that the proper parties are not before the Court, that the matter is not ripe, and that the sentencing judge has no authority to compute good time or disciplinary credits or to order the parole board or the MDOC to do so.[5]

III. SUBJECT-MATTER JURISDICTION

Because Rucker raises an arguably preserved *Alleyne* challenge, and because these appeals were consolidated by order of this Court,[6] I conclude that this Court has subject-matter jurisdiction over these appeals generally. I therefore disagree with plaintiff's initial characterization that this Court lacks subject-matter jurisdiction. However, for the reasons that follow, I also conclude—as plaintiff initially asserted and as defendants now assert—that these appeals of defendants' sentences are not the proper vehicle by which to decide the constitutional challenge asserted. Rather, I conclude that we should address only Rucker's *Alleyne* challenge, and that the constitutional issues are not properly before us.

IV. RIPENESS/AGGRIEVED PARTY

Irrespective of whether, as plaintiff now argues, the ex post facto issue presents questions of state law, such that a state court should weigh in on those questions apart from the federal court's April 9, 2018 decision in *Hill*,[7] it still begs the question of whether *this* Court, in *these* cases, is the proper forum in which to decide the issue. I conclude that it is not.

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[4] See *People v Rucker*, unpublished order of the Michigan Court of Appeals, issued February 16, 2018 (Docket No. 338870); *People v Wiley*, unpublished order of the Michigan Court of Appeals, issued March 5, 2018 (Docket No. 336898).

[5] As noted, the parties' positions in this case have morphed and shifted with the developments in *Hill*. For example, plaintiff's briefs on appeal (in part challenging this Court's subject matter jurisdiction) were filed before the December 20, 2017 decision of the United States Court of Appeals for the Sixth Circuit, see *Hill v Snyder*, 878 F3d 193 (CA 6, 2017), that reversed the District Court's earlier dismissal of the ex post facto challenge in that case, see *Hill v Snyder*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued February 7, 2017 (Case No. 10-14568). And defendants filed their motions to dismiss their appeals—and plaintiff opposed those motions—after that decision of the Sixth Circuit.

[6] See *People v Wiley*, *People v Rucker*, unpublished order of the Michigan Court of Appeals, issued January 17, 2018 (Docket Nos. 336898/338870).

[7] *Hill v Snyder*, opinion of the United States District Court for the Eastern District of Michigan, issued April 9, 2018 (Case No. 10-cv-14568).

In appealing their sentences, defendants did not challenge the sentences themselves, but essentially sought a declaration from this Court that MCL 769.25a(6) is unconstitutional and that it must not be applied so as to affect their future parole eligibility.[8] Plaintiff argued that the request was improper in this context. Now, in an unusual swapping of legal positions, defendants essentially concede that their request was improper; yet plaintiff now advocates that we issue the diametrically-opposed declaration.

I conclude that the claims presented (if indeed they can be described as such in this criminal sentencing context) are not ripe, that defendants were not aggrieved by any decision of the trial court (and therefore are not "aggrieved parties"), and that the constitutional issues presented are otherwise not appropriately decided by this Court in this context, for several reasons.

First, it bears repeating that defendants did not seek, by their constitutional challenges, any relief from their convictions or from their sentences as imposed by the trial court. Yet the rules of this Court limit its jurisdiction over appeals by right to those filed by an "aggrieved party" from an order of the trial court. See MCR 7.203(A). "To be aggrieved, a party must have suffered a "concrete and particularized injury." *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006). Further, "a litigant on appeal must demonstrate an injury *arising from either the actions of the trial court or an appellate court judgment rather than an injury arising from the underlying facts of the case*." *Id*. at 492 (emphasis added). Neither defendants nor plaintiff has identified any injury arising from any actions of the trial court. I therefore conclude that, apart from Rucker's *Alleyne* challenge, defendants are not "aggrieved parties" for the purpose of challenging MCL 769.25a(6) in this context.

Moreover, and regardless of whether defendants presented their constitutional challenges in the trial court, it is far from clear to me that the trial court would have possessed the authority, in the context of the criminal proceedings then before it, to essentially enter a declaratory judgment that would have bound the parole board or the MDOC; our Supreme Court has stated that, depending on the type of underlying claim, a *complaint* for declaratory relief against a state agency must be filed in either the Court of Claims or the circuit court. See *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Authority*, 468 Mich 763, 773-775; 664 NW2d 185 (2003). These cases are criminal prosecutions, however, not actions for declaratory relief. No such complaint was filed, nor could one realistically have been filed, in the course of these criminal proceedings. Yet defendants essentially sought (and plaintiff now seeks) to transform these appeals into declaratory judgment proceedings originating in this Court. We lack original jurisdiction over such actions. *Id*. Further, we are an error-correcting court, see *W.A. Foote Mem Hosp v Michigan Assigned Claims Plan*, 321 Mich App 159, 181; 909 NW2d 38 (2017). But neither plaintiff nor defendants have identified any errors by the trial court that either of them seeks to have us correct, and the declaratory relief that defendants essentially sought (and

[8] It remains unknown at this time whether either Wiley or Rucker will ever become eligible for parole, when they might become eligible, or whether MCL 769.25a(6) will continue to exist in its current form at any such time.

plaintiff now seeks) was never even considered by a court with original jurisdiction over such matters.

In any event, even if we possessed the ability to order declaratory relief in this context, our ripeness doctrine precludes "the adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim is not ripe if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " See *Michigan Chiropractic Council v Comm'r of OFIR*, 475 Mich 363, 371 n 14; 716 NW2d 561 (2006), overruled on other grounds by *Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349 (2010), quoting *Thomas v Union Carbide Ag Products Co*, 473 US 568, 580-581; 105 S Ct 3325, 87 L Ed 2d 409 (1985) (citation omitted); see also *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 554; 904 NW2d 192 (2017). In this case, even assuming that defendants accrued disciplinary credits during their terms of imprisonment before resentencing, MCL 800.33(3) and (5) provide that such credits "shall be deducted from a prisoner's minimum and maximum sentence in order to determine his or her parole eligibility dates." MCL 800.33 also empowers the warden of a prison, as well as the parole board in the case of parole violations, to both reduce and restore such credits based on prisoner conduct.[9] See MCL 800.33(6)-(10), (13). In other words, the language of MCL 800.33 pointedly does not provide for a trial court, when resentencing a defendant, to consider the disciplinary credits then earned by the defendant, because the amount of credits earned is not then known or even a sum certain—a defendant may gain and lose credits based on his or her conduct in prison. Rather, these credits are to be considered by the parole board or the MDOC, at the appropriate future time, in determining parole eligibility.

Although defendants appeal from their resentencings, they had suffered no injury to their parole eligibility at the time of the resentencings. Rather, their claims appear to rest upon a contingent future event, i.e., a denial of disciplinary credits, assuming they were earned and have not been forfeited by misconduct, at the time that their parole eligibility will be determined (again, assuming that MCL 769.25 a(6) exists in its current form at that time). Such a claim is not ripe. See *Michigan Chiropractic* 475 Mich at 371 n 14; see also *In re Parole of Johnson*, 235 Mich App 21, 25; 596 NW2d 202 (1999) ("[A] prisoner is not truly 'eligible' for parole until each and every one of the statutory 'conditions' [for the granting of parole] has been met.").

My conclusion is strengthened by the fact that a prisoner may not take an appeal, either by claim of right or by leave granted, from the denial of his parole. See MCL 791.234(11); see also *Morales v Michigan Parole Bd*, 260 Mich 29, 42; 676 NW2d 221 (2003). A prisoner has no constitutional right to parole. *Morales*, 260 Mich at 39. A prisoner may, however, use the "legal tools of habeas corpus and mandamus" actions in order to "have the judiciary review the legality of inmates' imprisonment." *Id*. at 42. I see no reason why this same standard should not apply to a prisoner aggrieved by a potential *future* denial of parole, even if he could overcome the ripeness problem. I note that cases relied upon by the federal Court in *Hill v Snyder*, opinion of

[9] A circuit court may order the reduction or forfeiture of credits only in limited circumstances related to a prisoner's malicious or vexatious court filings. See MCL 800.33(15), MCL 600.5513.

the United States District Court for the Eastern District of Michigan, issued April 9, 2018 (Case No. 10-cv-14568), for the proposition that "good time credit is earned even by individuals serving life sentences," arose in such contexts. See *Moore v Buchko*, 379 Mich 624; 154 NW2d 437 (1967) (mandamus); *Meyers v Jackson*, 245 Mich 692; 224 NW2d 356 (1929) (habeas corpus); *In petition of Cammarata*, 341 Mich 528; 67 NW2d 677 (1954) (habeas corpus).[10]

The Attorney General, as amicus curiae, nonetheless contended at oral argument in this case that we should decide the ex post facto issue in the context of these criminal sentencing appeals because this Court and our Supreme Court have previously considered issues involving good time credits or disciplinary credits on direct review. The majority agrees. But I find these cases distinguishable. For example, in *People v Tyrpin*, 268 Mich App 368; 710 NW2d 260 (2005), the defendant had originally been sentenced to a jail term, and was later resentenced, after a prosecution appeal, to a prison term. *Id*. at 370. The defendant argued that the jail good-time credit that he had earned under MCL 51.282 should have been applied on resentencing by increasing the number of days for which he would have received credit for time served. *Id*. at 371. The defendant made no argument concerning parole eligibility, but was aggrieved by what he believed to be the trial court's failure to add 61 days to his sentencing credit as reflected in the judgment of sentence. *Id*. The injury alleged by the defendant (although his claim was ultimately unsuccessful) was neither contingent nor hypothetical; the defendant alleged that the trial court had erred by calculating his credit for time served. *Id*. Our analysis of good-time and disciplinary time statutes was conducted in that context. By contrast, there are no alleged errors by the trial court in the instant appeals.

In *People v Cannon*, 206 Mich App 653; 522 NW2d 716 (1994), the defendant argued that the imposition of a fixed jail sentence with a specified release date violated his right to receive good-time jail credits under MCL 51.282. *Id*. at 654. Again, the defendant was aggrieved by the trial court's sentencing order, which had already injured him by fixing his release date to a specific date regardless of sentencing credits. *Id*. at 656 (holding that "a court may not deprive a prisoner of good-time credit to which a prisoner may be entitled under statute before that prisoner has even begun serving the term of imprisonment.")

And in *People v Johnson*, 421 Mich 494; 364 NW2d 654 (1984), our Supreme Court considered the effects of Proposal B on life sentences. *Id*. at 497. Although the Court did declare Proposal B to be binding on the parole board with regard to indeterminate sentences, the context of the defendant's appeal was that the trial court had not correctly informed him of the consequences of his guilty plea. *Id*. at 496. Once again, the defendant was aggrieved by an action of the trial court.[11]

[10] *Hill* itself arose in the context of a claim under 42 USC 1983.

[11] I note also that our Supreme Court is much freer than we, as an intermediate appellate court, to consider issues beyond the claimed errors of the lower courts and to opine on broader issues of Michigan law. See *People v Woolfolk*, 304 Mich App 450, 475-476; 848 NW2d 169 (2014).

V. CONCLUSION

For all of these reasons, I would not reach the constitutional issues presented.[12] They are not properly raised in the context of these appeals, inasmuch as they do not present any claim of error by the trial court in its resentencing decisions. Plaintiff is already litigating the ex post facto issue with a class of plaintiffs (which includes Wiley and Rucker) in federal court, and plaintiff or defendants remain free to additionally raise the issue in a proper state court proceeding in which the proper parties are present. By contrast, Wiley and Rucker are the only persons who will be directly affected by this Court's disposition of the issue in the context of these criminal sentencing appeals; in essence, we would be declaring the rights of two individuals with regard to this statute, while in the meantime a class action (of which Rucker and Wiley are also a part) is already proceeding and has already resulted in declaratory relief.

Because I would not reach the constitutional issues, and because I agree with the majority's treatment of the *Alleyne* issue, I would affirm (and would not, as does the majority, affirm while still issuing a declaration of unconstitutionality).

/s/ Mark T. Boonstra

[12] Although I do not express any opinion on the constitutional issues, I note that the parties have not briefed (nor does it appear to me that either the federal court in *Hill* or the majority in the instant appeals has addressed) whether a finding of unconstitutionality would relate solely to MCL 769.25a(6), or whether, alternatively, and given that the Legislature's enactment of that statutory provision was made in the context of the sentencing scheme set forth in MCL 769.25a(4), the entire sentencing scheme would be rendered unconstitutional. This gives me additional pause about deciding the constitutional issues in the current context.

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HENRY HILL, et al,

Plaintiffs,

-v- Case No. 10-cv-14568

RICK SNYDER, et al,

Defendants.
_____/

MOTION FOR PARTIAL SUMMARY JUDGMENT, ET AL

BEFORE THE HONORABLE MARK A. GOLDSMITH

Detroit, Michigan, Thursday, March 22nd, 2018.

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TABLE OF CONTENTS

PAGE

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At or about 2:08 p.m.

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THE CLERK OF THE COURT: All rise. The United States District Court for the Eastern District of Michigan is now in session, the Honorable Mark Goldsmith presiding. You may be seated.

The Court calls case number 10-14568, Hill versus Snyder. Counsel, please state your appearances for the record.

MS. LABELLE: Good afternoon, your Honor. Deborah LaBelle on behalf of the plaintiffs.

MR. KOROBKIN: Good afternoon. Daniel Korobkin for the plaintiffs.

MS. LABELLE: And your Honor, we also have the plaintiff, Henry Hill, with us here today.

THE COURT: Okay, good afternoon.

MS. DALZELL: Good afternoon, your Honor. I'm Kathryn Dalzell here on behalf of the state defendants.

MR. RESTUCCIA: Good afternoon, your Honor. Eric Restuccia also on behalf of the state defendants.

MR. FROEHLICH: Good afternoon. Joe Froehlich for the defendants.

THE COURT: All right. Good afternoon to you, too. We have the plaintiff's motion for summary judgment on two of

the counts and we have a cross-motion from the defendants and I've read your submissions and I'm ready to hear your argument.

MS. LABELLE: Thank you, your Honor. Deborah LaBelle, thank you. In 2010, plaintiff filed this Civil Rights action challenging Michigan's sentencing scheme that imposed life sentences on children without any opportunity for release and plaintiff sought a meaningful and realistic opportunity for release for the 363 youths who were serving this sentence. While the case was pending, Miller was decided by the U.S. Supreme Court in 2012 and the lower court struck down the statute prohibiting parole review for all youth and ordered the defendants to develop a meaningful and realistic process, review process to provide release for those who could demonstrate growth and rehabilitation and the Court at that time ordered that the defendants also provide all programming, rehabilitative programming relevant to prepare for these parole hearings. Defendants appealed arguing in part that the Court's order at that time, Judge O'Meara's order constituted an improper retroactive application of Miller prescription against mandatory life sentences. While we were on appeal again in the Sixth Circuit, Montgomery was decided applying Miller as a substantive rule of law to all the children serving mandatory life sentences in Michigan. Also while on appeal, defendants responded by passing the legislation that's at issue here today.

In light of the legislative fix that the defendants had proposed, the Sixth Circuit remanded the case to allow us to file an amended Complaint to address the state's statutory response to Miller and our Complaint alleged several aspects of the statutory fix were unconstitutional, two of which are at issue before the Court today based on the Sixth Circuit's recent reversal of Judge O'Meara's dismissal of these counts and the remand.

The first one I want to address is that plaintiffs challenged what we felt was a particularly punitive new provision in the statute taking away earned good time and disciplinary time for those youth resentenced to a term of years which further would delay their opportunity to present their case of rehabilitation to the parole board. We're also addressing the defendant's continued denial of rehabilitative programming to the plaintiff class which impacts their ability to adequately present themselves at resentencing and at parole to obtain a meaningful and realistic opportunity for release.

The challenge to the stripping of good time and disciplinary credits was under the ex post facto clause. The statute at 769.25(a)(6) provides that plaintiffs, upon resentencing, shall be given credit for time already served, but shall not receive any good time credits, special good time credits, disciplinary credits or any other credits that could reduce their minimum or maximum sentence. Now the Sixth

Circuit is decided as a matter of law two points. When Judge O'Meara dismissed this ex post facto on the merits, he based it on saying that it wasn't retroactive and plaintiffs weren't disadvantaged because they were already serving life without parole sentences. The Sixth Circuit said it is retroactive and plaintiffs were disadvantaged and to, holding specifically to the extent plaintiffs earned credit during their life sentences, the retroactive elimination of them by this statute is detrimental and it constitutes an ex post facto violation and while the Sixth Circuit left not a lot of room for debate, but there is some debate between the parties as to whether in fact the plaintiffs earned the credits that they seek and if they did, the Sixth Circuit has said it's an ex post facto violation.

Defendants are arguing that the legislation added a purely superfluous statute section taking away good time that never existed, saying, you know, they put this in there to take it away, but the clients, the plaintiffs never earned it to begin with, but the statutes are very clear, your Honor.

I want to talk about the disciplinary statute first because the disciplinary statute provides for disciplinary credits for all the plaintiffs at issue and it says where disciplinary credits are provided for a person convicted and sentenced to certain crimes, for certain crimes. It includes everyone convicted and serving a sentence for first-degree

homicide. There is no dispute that the statute says here is who gets disciplinary credits and some people are carved out, people with CSCs, certain CSCs didn't get them, but people who were serving this very sentence that all of these plaintiffs were serving, first-degree homicide conviction and sentenced under that, the statute explicitly at 791.233(b)(n) which was the statute before Truth in Sentencing came in and the section after was 233(b)(o) or I might have those switched, but it's very clear these are the provision -- these are the convictions for which if you're serving a sentence, you get disciplinary credits and that included first-degree homicide.

Everybody whose offense occurred before December 15th, 1998 earned these credits based on productive behavior in prison. When plaintiffs were resentenced, these credits should then be applied to reduce the amount of time if they're resentenced to a term of years. That means they have an opportunity to see the parole board. Potentially those whose behavior was, you know, exemplary, would have an earlier opportunity to see the parole board and MDOC has been adhering to this practice consistently for adults who were serving first-degree homicide sentences and then resentenced to a term of years forever. We have an affidavit of by Richard Stapleton which defendants don't dispute nor do they address the case where they actually defended this practice when they were sued by the Wayne County prosecutor's office in 1997. At that time

the prosecutor's office said this person was serving a life without parole sentence and now he's getting resentenced to a term of years and you want to apply, the department applied as they did for everyone and continued to do adults all of these disciplinary credits and the Wayne County prosecutor sued them and the department in that case argued that the prisoner was entitled to them under the statute and to deny him those credits would run afoul of the ex post facto clause which is what the Court of Appeals held and the Court of Appeals said the statute's clear, they earned disciplinary credits during their first-degree sentence and you have to give them to them.

Defendants now suddenly argue that the disciplinary credit statute is somehow internally consistent, that while it explicitly says people who are serving first-degree homicide sentences and all of our clients understood that they were getting these credits, while it explicitly says that, that it's internally inconsistent because it says that the credits will be applied to a term of years. There's nothing inconsistent about it. The credits accumulate during your first-degree homicide sentence and you earn them. They of course may only be applied to someone if their sentence reverts to a term of years which is what's happening here. The statute's clear. The department has applied it in that way. It consistently when people serve first-degree homicide and they have a life without sentence and then for whatever reason they get

resentenced to a term of years, they apply the disciplinary credits. There's no case law, there's no to the contrary and the statute explicitly says it.

Now defendants have a slightly different argument as to why good time credits are not earned under that statute which is a separate statute that says all convicts shall earn good time and they don't dispute that they have handled good time credits for adults in the same way that they've hired -- handled disciplinary credits. They don't dispute Stapleton's affidavit that for adults who earned good time under a first-degree life sentence and then got that re-sentencing to a term of years, they applied good time because the statute, 800.33, says good time applies to all conduct -- convicts, but they now argue that they're not required do that and they rely on a 1929 case, Meyers v. Jackson. It's really unclear why defendants rely on Meyers to say this these youths did not earn good time on their illegal life sentences, but they continue to provide adult lifers their good time on their first-degree sentences when they get resentenced. Since Meyers, they have done it consistently as the Stapleton affidavit says and they don't dispute it, but somehow Meyers which defendant says stands only for the proposition that if you are serving a determinant life sentence, you don't earn good time credits should only apply to these youth and why wouldn't defendants have followed Meyers if they thought it actually said that and

it's because it doesn't, it's just dicta. Meyers only addressed is dicta and it's not binding. The judgment of the Court was that when the governor offered a commutation of a term of years, a deal is a deal, that the person who was alleging that he earned good time credit so he should be able to reduce that deal on the front end to get less time, the Court simply said you can't add good time to change the deal. Even if you earned it, you couldn't do it so it was irrelevant as to their comment that, you know, lifers don't earn good time. It's irrelevant and it's contrary to what the defendants have been doing the continual time since Meyers. They've been giving good time credits to people who go to term of years.

The Court in Meyers didn't grapple with whether a prisoner under the statute earns good time while saving -- serving a life sentence such that when they're resentenced the good time applies and the Supreme Court in the Moore case in 1967 said just that. It said Meyers was not controlling, it was dicta and the Moore Court did grapple with the question of whether individuals who are serving a life without parole sentence when they went to a term of years, whether they earned good time such that had to be applied. All eight justices in Moore and, you know, I looked at the Court of Appeals decision in Moore and the Court of Appeals decision said we ruled that the prisoner is not entitled to credit for time served and because of that, it follows he's not entitled to the good time

allowance he accumulated under the statute. There's no dispute in the Court of Appeals that the guy accumulated good time as well as time served, but they said that it would not -- neither of them would be applied to his resentencing because it was an illegal sentence and therefore on his new sentence, he couldn't have either the time served nor the good time that he accumulated during his life sentence. What the Supreme Court did, all eight justices in Moore in three different opinions agreed that prisoners accumulated time served and good time earned by the good time credits when they're serving an illegal sentence regardless of whether the sentence was life without parole or a term of years. The only divergence of the three opinions was on the proper disposal of the case on appeal because it came up under a mandamus. They all reversed. They all said that he got good time and time served and in fact the four judge -- there was a two, four, four and the four said having ruled that -- having ruled that he shall get credit for time served, it follows a fortiori that such credit includes recognition of regular or special good time earned during the sentence. So that decision, the four-person decision or what we call the Adams opinion clearly said that they're entitled to it, but thought they should send it back to the judge for resentencing first rather than directly to the parole board. The only point of departure was whether the resentencing judge must credit the time served and earned or whether a mandamus

should also issue to the parole board to consider Moore in light of the credits because his sentence properly credited brought him into the parole board jurisdiction and six of the judges said, one said directly mandamus; four said well, court first and then if the parole board doesn't take jurisdiction, we'll issue the mandamus, but what nobody disagreed with was that Mr. Moore got what he was asking for which was all of his time served and all of his good time credits even though he was serving a life without parole sentence.

The two-judge sort of went into a description as to why which is whether we quote a lot that while he was a convict within the meaning of the good time sentence during his prior incarceration, is he entitled to have allowances for good time? Yes, they said that he was. They said the good time statute gives good time credits to every convict who behaves himself in prison and they also went into what the purpose of it was; to encourage good behavior by prisoners and to approve conditions in the prison and reduce custodial costs to the taxpayers.

They also went into what was, you know, why would you give this to somebody who didn't at that time have, umm, have a clear opportunity to get out and the same way the disciplinary credit statute did it, because presumably it's a carrot that when people get re-sentenced and they do, that when it becomes relevant, it gets applied to the sentence that you have for a term of years and they talked about how, you know, that hope is

eternal inside the prison and it is and that it encourages the good behavior, there's a great policy decision and the statute was clear, everyone gets it. The question is is it applied and it gets applied when you accumulate it, so sort of like a bank account, you can accumulate it and that at a certain time it applies when you withdraw and here you have an opportunity to actually apply it to a term-of-years sentence and again the defendants have been doing this consistently for all adults that go from a life without parole sentence and then for whatever reason they get resentenced to a term of years.

THE COURT: What would happen if I agreed with you and the Michigan Court of Appeals went the other way in one of the pending cases? I understand the Rucker case they denied the motion to withdraw the appeal recently.

MS. LABELLE: So --

THE COURT: So if they proceed to consider what I understand is the same issue that we have in front of us here, umm --

MS. LABELLE: It's not quite -- I'm sorry, your Honor.

THE COURT: Is it not the same issue?

MS. LABELLE: It's not quite the same. They're not address -- they don't have -- they were all sentenced after the time when good time credits were gone so there's no good time credit issue there. They're only under the disciplinary credit

statute so the issue, the Moore, Meyers, all of that will be wholly unrelevant there. The only question is whether the disciplinary statute which says, you know, if you served a first-degree homicide, you're entitled to those credits, what that statute means and it's pretty unclear, too, since, you know, they're raising it, you know, not as a sentencing issue. The Court of Appeals could easily say we don't have jurisdiction over that, that's not a sentencing judge act, we're not going -- we're challenging, our defendants are the executive branch, the MDOC which is the one who actually has to comply with the Statute. The judge has nothing to do with assessing -- the judge has something to do with time served in terms of crediting that, but the judge below, the trial judge would not look at disciplinary credits, certainly wouldn't have any even knowledge of that, of the misconducts that have happened or not happened to a prisoner. That goes into the MDOC.

So, one, it wouldn't resolve it. Two, it's just collateral challenge to two people in the sentence and certainly has no mechanism to provide the kind of injunctive class relief that we're seeking here and wouldn't bind this Court in any event and, you know, I guess we could start to get into the Bouie rule, Bouie v. City of Cleveland, the Supreme Court's ruling that says when a state court, when you've been in the federal court and the state court comes in and then does

something completely contrary to the statute, that the court, it is an unforeseen, the statute is very clear, I don't think the Sixth Circuit disagreed and that when the state court comes in and does something like that and flips the statute without any precedent or case law, that this Court actually, the federal court need not follow or be attentive to it because it's akin to a violation of due process in which a state court does that and I guess we could invoke the Bouie rule, but I don't, I don't think we need to go that far.

There are two people who have a limited issue which it's very unclear that the Court is even going to address. It came up after we had been doing this for years, your Honor, and I don't, you know, it doesn't bind this Court and I think it would be speculative to see what -- to say what the Court of Appeals might even do, whether they're even going to address it and in one case it wasn't even preserved below so I can't speculate on what the Court is going in that case, but I don't --

THE COURT: Well, one of the things as you know the defendants have asked me to abstain from ruling, arguing that these issues are before the Michigan courts. You're saying maybe some of them are, maybe some of them aren't and they're arguing that we would have potential conflict between what the state courts might rule. If it did get up to the Michigan Supreme Court and it had a different view than the view I might

adopt, I'm wondering what sort of implications there would be from having now the highest court of the state declaring what the state's law is and a federal court having come to a different conclusion if I were to adopt your point of view.

MS. LABELLE: Well, there might be and I actually would like to address their Pullman and their Younger abstention arguments, but first, I mean, we have -- it's so speculative, you know. We don't know if there will be an unpublished decision. We don't know if they'll grapple with it. They certainly are not grappling with the good time issue, it doesn't apply to everyone and then, you know, we have no idea if it gets up to the state supreme court. You know, I suppose that if this Court ruled first, there might be some discussions with regard to the collateral nature of it, but those are -- you know, the collateral estoppel nature of it, but those are two different, you know, those are two pro se prisoners involved with the prosecutor's office. We don't even have the same parties. We're not engaged, you know, we're here on a 1983 action that we've done quite early, much earlier than this and the fact that if every time a pro se prisoner filed an action making a similar argument about, not, you know, an overlapping argument, if it stopped the federal courts in its tracks, I think that there would be a lot of issues that we'd have to deal with. I don't see that it prevents this Court or in any way stops this Court's jurisdiction especially since,

you know, defendants are asking two things. They're asking under Pullman that they waited until the eleventh hour to urge for the very first time to wait until the state courts rule on this issues eight years after the case was filed, two years after we challenged the ex post facto. No one said anything back then and they're arguing that because this -- their basis is Pullman is certainly abstention is certainly discretionary with this Court and they're arguing that the state law is uncertain, but the statute, you can't get any clearer than the disciplinary statute that is at issue in those cases. It says if you're serving a conviction and sentence for a first-degree homicide offense, you get disciplinary credits. There's no uncertainty there and so to stop because defendants in this case have intervened in there to argue that there's uncertainty and that the court should, the state court should have a chance to rule on this first, they argue it in the face of the Sixth Circuit's direction to move expeditiously on this matter after the Sixth Circuit clearly rejected the Younger abstention argument.

They say a state court answer's coming quickly. As I said, it doesn't even involve good time as those individuals were sentenced after '87 and, you know, there is no uncertainty. If it was uncertainty, you know, I think that if the court, state court as I said goes differently and somehow makes a, I would find it somewhat bizarre decision to say the

statute doesn't say what it says it does and there's no case law interpreting differently and the Michigan Department of Corrections have been doing it consistently this way, I think that, you know, again we would be talking about saying, you know, that there is a question here with regard to their altering their prior interpretation of the statute after the fact, changing the construction and then that would be a violation of due process of these plaintiffs who have a right to rely upon what the Court has ruled on in the past, has a right to rely upon the Sixth Circuit. I mean, think of it. The Sixth Circuit says we're making two determinations. We've already determined that it's retroactive and we've already determined that it's detrimental and now we have the Attorney General intervening in that case to argue it's not retroactive, it's not detrimental to try to circumvent. They only did this after the Sixth Circuit ruled and to allow them to circumvent the federal court ruling in the case that we've been at for quite some time, almost eight years in law that's not uncertain would be pretty appalling, your Honor. You know, they tried that in the Sixth Circuit with Younger, but what the Sixth Circuit said, I mean, they started out their decision saying since 2010, plaintiffs who sought federal court review of the punishments Michigan may Constitutionally impose on individuals convicted of first-degree murder for acts they committed as children and they explicitly rejected the argument that

defendants said that you should hold, hold off because of Younger abstention which is not discretionary, but the Sixth Circuit found Younger abstention is completely inapplicable to plaintiff's claims. The Sixth Circuit rejected it and it rejected all of the defendants' arguments that they're making here today, that the second-amended Complaint raised the ex post facto argument somehow restarted the clock and somehow they should get to go back and, you know, challenge it in the middle of this because they did a new legislation. The Sixth Circuit heard all their arguments and said no, you know, and they argued listen, we have all these criminal matters pending and the Court should abstain under Younger because it's an interference and the Court said no, this is a class challenge, the Sixth Circuit said and we seek permanent injunction relief here against the MDOC and there's no pending judicial proceedings in the state court that would provide any forum for that in a class-based injunctive relief for whether we're seeking here, and so I think with regard to the Younger abstention issue and regard to the Pullman which is discretionary, this Court should not hold its hand and I say that especially because, you know, there has been nothing but attempts to delay this case from day one and, you know, they've already tried to circumvent by going arguing state court proceedings. They've argued that to the Sixth Circuit. That did not work. They came back down here, intervened in a pro

per case and now argue Pullman in cases that won't even address all the issues that are before this Court?

I do not think that this Court should stay its hand. I don't think -- if a conflict somehow develops down the line, I think there would be arguments with regard to I think this Court's injunction should prevail. I don't think that you can and it may be that the state Supreme Court says well, you know, we don't have to follow it, but we find it highly persuasive even if they do take it and the Court of Appeals may find it highly persuasive even if they do address it.

THE COURT: The other suggestion by the defendants is to certify this to the Michigan Supreme Court. Do you have any history on how often the Michigan Supreme Court has responded to certification requests and how long it typically takes that Court to issue an opinion when it has agreed to do so?

MS. LABELLE: Umm, I only know that they're running about -- I've seen applications for mandamus that were expedited that took six to eight months. I know their application for leave to appeal now is running about 18 months at best and again, I'm not sure what would be certified since, you know, all of the issues that are here are not even in the state court and frankly, your Honor, you know, as I've said before, you know, we're not talking about something slight here. We're talking about the ability to be free and so every day, every day there are people there who would be impacted by

this. You know, the Sixth Circuit gave an example of Jennifer Pruitt. She, if this Court issues an injunction, she has enough good time credit she would immediately see the parole board and given that even the warden has recommended her release, it's hard to say that, see that she wouldn't be home, you know, within a couple days as opposed to sitting in a cell. There are people who are in wheelchairs who have served decades of a sentence that is cruel and unusual punishment under the Supreme Court who have been there since they're 15 and 16 years old, so a delay of any time and I think that, I mean, I'm sure there are many others, but in all my Sixth Circuit arguments, I've never seen one sent back down with the instruction to move expeditiously. I mean, I've seen different language, but I think the Court got it, that we're talking about very serious issues here and why should children who have spent decades serving an unconstitutional sentence have to wait around any more because the Attorney General's office is trying to circumvent the Sixth Circuit's directions in this matter in a case we've been -- they didn't do it, they didn't do it years ago. They didn't say hey, this should be in the state Supreme Court. They didn't when we filed the Complaint. They didn't say when we challenged the statute saying it was ex post facto, they didn't say wait a minute, let's get a ruling two and-a-half years ago from the Michigan Supreme Court. They only asked for that ruling when they got a reversal from the

Sixth Circuit and the Sixth Circuit said this is an ex post facto violation and it looks like the plaintiffs were earning these credits under the statute and law that exist. Now for the first time they argue Pullman let's certify it and because it's forum shopping at the worst and even if it weren't, it's a delay, you know, a delay that shouldn't happen to these, these individuals.

I -- if -- you know, I, umm, I don't see a basis for certification. It was just a let's do this and the law is not even uncertain. The only case they have to say let's have the state Supreme Court weigh in is dicta from a 1929 case that they haven't even been applying all these years. There's no doubt in the MDOC's mind as to what happens when someone gets a term of years who's been serving a life sentence. They do it consistently and they've even done it in the situation where we had a youth who after Graham was serving a life sentence for, non-parolable life sentence for a crime that the court, the trial court had said he didn't either commit or intend to commit so he was a youth under the Graham thing and the Court at that time resentenced him to parolable life and what was the first thing that the Department of Corrections did? They computed his good time and disciplinary credits to see where he was at because that's what they do and why here and of course that's what the Legislature knew what they did and so they said no, we're going to take it away from kids and it was, it was

particularly vindictive because, you know, being involved in this whole process, your Honor, this state of Michigan who has the second highest number of youth serving this sentence in the world was the leader to fight Miller, the amicus briefs were filed by the current attorney general gathering others saying no, keep, you know, it's not an unconstitutional sentence; came back with Montgomery, no, it's not an unconstitutional sentence and they lost and then they did legislation that, you know, was as harsh as they could be and what do we have now? We still have over 200 people sitting in what the Sixth Circuit called carceral limbo because they haven't even had their opportunity to even go before resentencing or a parole board. To allow them to further delay this when they delayed it for years because it was one of the few states that said it's not retroactive so we're not going to comply with Miller while other states around resentenced and people are out and further delay I think would be unjustified.

I just have a few comments, your Honor, on the programming issue. I think we've briefed it.

THE COURT: Let me ask you, do you think there's any utility in having the parties engage in some discovery on count six? I know they're engaging in some discovery on count four. There's an issue raised in the briefing about the extent to which the denial of the ability to participate in this programming actually has any significant impact on a parole

decision. Would there be some benefit in conducting discovery on count six issues?

MS. LABELLE: If that -- I mean, we have been working to schedule the parole board director and now and get some documents regarding that. Umm, plaintiffs would not be opposed to putting this issue within that discovery context and I think that the, the urgency, I mean, it has some urgency in that it both affects resentencing. You know, I think defendants mistakenly think that we're not talking about, umm, you know, the programming is both for resentencing and for parole. The question of whether people can show that they've been rehabilitated. You know, the issue under Miller and Montgomery is that you have to have an opportunity to show that the crime doesn't reflect irreparable corruption and you're capable of reform and rehabilitation. So whether you go for resentencing initially or for parole, if you've been deprived prior to that time, if these youth have been deprived of the very rehabilitative programming that can allow them to show listen, I've completed this, listen, I've done this, then you're, you know, really at a disadvantage and it's a barrier to what the Court has instructed you have a right to which is a meaningful and realistic opportunity to show that and the only reason they're denying this group any of that programming is they continue to declare that they're lifers under the vacated sentence because, you know, they're in this limbo well your

sentence has been vacated, but we don't know how else to treat you so we're going to treat you as non-parolable lifers which means you don't have access to the programming that you need and some of the more significant ones that you've actually been told to have like violence prevention program and substance abuse programming because and, you know, we attached I think it's undisputed one of the putative class members, Lynn McNeill, who has a term of years. He's going to be resentenced to a term of years in front of a Court and the Michigan Court of Appeals just ruled that under a term of years the judge must consider the Miller factors even in a term of years because of the consequences of the parole, you know, if you get 40 to 60, the Michigan Court of Appeals says in the case of People v. Wines (phonetic) which was decided about a week or so ago, said if you get 40 years, it's a geriatric parole for given the limited life span of people who come into prison as children and so it's tantamount to looking at de facto life and you have to go through the Miller factors. So Mr. Mc Neill says can I get these programming that the parole when I entered into prison they said I need to have, you know, substance abuse, violence prevention, assaultive offender programs, thinking for change and the answer was no, you're a lifer.

So, you know, defendants argue that oh well it hasn't affected the group so far, it hasn't affected this group because most have been paroled, but this is a pretty unique

group, the first group, your Honor. They're all well past they're earliest release date. Some of them have already served more than the maximum 40 years and the parole board treats people who are past their ERD or earliest release date quite differently, especially if you haven't had any misconducts during that time, but to say that, you know, so for parole I think we don't know what's going to happen. For resentencing, it's really significant because these are the programs that having been before many of the trial judges in the re-sentencing, your Honor, they're looking at them. They're say well, you know, I see you haven't had any of this, any of this program and the thing is well we weren't allowed to get into them and then the judge is like well, okay, but still don't you need these programs before you, you know, I can rest assured and even, you know, so I think it shows to your rehabilitation and what you've done and to deny them that, I mean, defendants say well, you know, many of them are going to get life without parole anyways so they won't need them. It's sort of like saying you don't need a lawyer, you're going to get convicted any way. You know, it may be the very programs that prevent you from getting life without parole and so all -- I mean, it's a small ask your Honor just saying put them in with the rest, you know, put the 200-and -- well, I guess it's 300-and-some youth who have been serving all this time and don't have opportunities that the regular people have, the

Court's now saying, the Supreme Court says they have a right to an opportunity for release and all we're saying is put them in with the general group and let them get in line and get the programming. We're not saying put them to the front of the line, but don't exclude them from rehabilitative programming.

THE COURT: I understand the argument.

MS. LABELLE: Okay.

THE COURT: Is there anything else on the count five or count six that you want to bring up?

MS. LABELLE: Umm, I think I would only note that in their reply brief, defendants cited a case. I think it's -- I think I would like to say, your Honor, defendants have a number of times in their brief said that the ex post facto clause was raised by plaintiff Dontez Tillman and the Court found that he had waived it. They have said that three times in their briefing. Dontez Tillman is only 24 years old. He was sentenced in 208 -- 2008 when he was 14, well after there being any good time and disciplinary credits and he didn't raise this at all. What he -- the ex post facto was he argued that when Judge O'Meara said that he was resentenced to parolable life, that it was unfair for them to then go back when the statute passed and say that you get a term of 32 to 60 which is what he got and he said I was going to have an opportunity for parole at 15 years under Judge O'Meara's ruling and the Court said -- and that to do that he argued was ex post facto and the Court

said you waived that by not raising it below, so and by accepting a plea deal for a number of different reasons. It has nothing to do with this issue and the last thing I would note is defendants raise for the first time in a cross-reply brief a case, People v. Tyrpin and say that well, that proves that you don't get disciplinary credits. Tyrpin was a CSC case in which he got a sentence to jail and, you know, well after he was again sentenced in 2005 well after the state prohibited any good time or disciplinary credits, but jails allowed them and so he when he was resentenced to the proper sentence, the Court said you should have never gone to jail, you should have gone prison and they violated the lower guidelines. He said well can I have my jail good time credits and the Court said no, you didn't -- you wouldn't -- you weren't entitled to them under the proper sentence, the Michigan Department of Corrections doesn't allow them had you been in your proper sentence so you can't get them from there. It's completely inapposite to the current status where plaintiffs raised earned them both by statute under serving a first-degree homicide conviction and in their resentencing, you know, that didn't change, their conviction was the same and their sentence then became a term of years. Under any circumstance they're entitled to these credits. Thank you, your Honor.

THE COURT: All right. Before you step away, I didn't mention at the outset the motion for certification,

class certification.

MS. LABELLE: Mr. Korobkin was going to argue that, your Honor.

THE COURT: All right. We'll take that separately.

MS. LABELLE: Thank you, your Honor.

THE COURT: All right. Let's hear from the defendants then.

MS. DALZELL: Good afternoon, your Honor, and may it please the Court. I'm Kathryn Dalzell here on behalf of the state defendants. I'd first like to make a couple of preliminary points with respect to each of counts five and six and then I plan to go back and discuss each of them in more detail.

First with respect to count five which is the ex post facto claim, these offenders have not been disadvantaged. Two things distinguish these offenders from all other ex post facto cases involving credits of which I am aware or which plaintiffs have cited and that is first, no law told these plaintiffs that they could reduce their sentences using credits, not at the time of the crime, not at the time of their plea, not at the time of their original sentencing and not on their resentencing.

Second, no law ever entitled them to a sentence for first-degree murder that they could reduce. In fact, in 2014 when the Legislature passed the resentencing statute, it could

have given them parolable life. There's no question the credits would not have applied for parolable life and parolable life would have been consistent with Miller. So there's been no increase in the punishment that the law ever said these offenders would get. The rug has not been pulled out from under them.

Their claim also hinges on at least two questions of state law; first, whether they earned credits at all during their life without parole sentences; second, if they did, which sentence earned the credits? Was it their life sentence that they were serving or is it their new sentence and you go back and look at what they would have earned had they been sentenced Constitutionally originally. The Michigan Supreme Court has said that credits do not apply for life sentences, that's the Meyers case and the Michigan Supreme Court and the other state courts have only, umm, the only context in which the state courts have applied credits for lifers is when they're resentenced for a different offense; in other words, they started out with first-degree murder and they're resentenced for second degree murder and when they're resentenced to the term of years that existed in the law at the time they committed the crime for which credits always applied. That's the only circumstance in which state courts have given lifers credits that I'm aware.

THE COURT: Why should that make a difference?

MS. DALZELL: Pardon me?

THE COURT: Why should that make a difference in terms of the analysis?

MS. DALZELL: Because those are credits or those are questions that would need to be resolved in order to rule for the plaintiffs on the ex post facto claim.

THE COURT: No, but why should it make a difference that the earlier cases involved resentencing to or for another offense?

MS. DALZELL: Because here the plaintiffs are being resentenced for the same offense which is first-degree murder. Under measure law, there was never a term of years for first-degree murder. It just wasn't an option. The punishment and the only punishment was always mandatory life without parole, so to resentence them for first-degree murder to something other than life without parole, a new sentence had to be created. We're not going back and sentencing them to the term of years that existed under state law at the time, we're sentencing them to a new sentence which is the sentence that the Legislature created pursuant to the Supreme Court's instruction in 2014 and that sentence that they created for the first time under state law for first-degree murder was a term of years that does not allow credits. That's --

THE COURT: Well, why should that make a difference in our analysis here? For example, they would be getting

credit for the time they served, right, even though it's a resentencing for a different crime, right?

MS. DALZELL: That's true.

THE COURT: There's no question about that, right?

MS. DALZELL: Right, that's true. If you go back and re-sentence someone to a term of years, they would get the credit for, as if they had been serving the term of years the whole time so that if they had served 10 cries already on their life without parole sentence --

THE COURT: So why for the ex post facto analysis does it make a difference that it's, the other cases involved cases where it was for another crime?

MS. DALZELL: It makes a difference because the question is if they were earning credits, did they earn them as part of their life without parole sentence? Again, our position is that lifers do not earn credits under Michigan law and I'm happy to discuss the case law and the statutes on that, but there's a second unresolved question under Michigan law which is even if they are considered to have earned credits while serving that sentence, that doesn't answer the different question of which sentence earned those credits. Are we thinking of the credits as something that they accumulated while they were serving a sentence that somehow continue after the sentence is voided or are we looking back and saying well if they had been Constitutionally sentenced in the first place,

that's the baseline and we have to ask ourselves what credits they would have earned serving that Constitutional sentence.

THE COURT: Well, how do you address MCL 791.233(b) that does recognize a right to credit for first-degree murder?

MS. DALZELL: So that would be the disciplinary credit statute and that statute contemplates fixed sentences. So under Michigan law, credits have only ever applied to a fixed sentence and it's consistent with that statute. It's true that the statute say all prisoners shall receive disciplinary credits and that it incorporates first-degree murder, but from the rest of the statute it's clear that the contemplated sentence is a fixed sentence and that's because the statute goes on to say accumulated disciplinary credits shall be deducted from a prisoner's minimum and maximum sentence. Now that, the context of the statute and we always interpret the text of the statute in its context, it shows that a fixed sentence is contemplated and that's consistent with Michigan case law; namely, Meyers which specifically held that quote "The good -- "The question of good time credits applies only to those where the date of expiration of sentence is fixed." Petitioner was sentenced to imprisonment for life. The period of his imprisonment was not fixed now.

Now Meyers was with respect to good times credits, but the principle is the same that credits only apply to fixed sentences and again under state law, that is what the Michigan

Supreme Court has held and the only scenario in which the state courts have accorded credits to someone serving a life sentence previously is the scenario in the Moore case, the scenario in the Wayne County Prosecutor's case --

THE COURT: Put aside the cases, I'm talking about the statute now. The statute specifically says that first degree murderers do get these credits and yet they're serving a sentence that's life so there's no definitive endpoint to that sentence, so how does that square with your theory that people never are entitled to earn any credits when they had life sentences before when the statute seems to recognize that expressly?

MS. DALZELL: Again, our position is that if you read the statute as a whole, it contemplates a fixed sentence.

THE COURT: So we should just ignore that provision of the statute?

MS. DALZELL: We shouldn't ignore it, but we should read it in its context and, umm --

THE COURT: Well, the Sixth Circuit in its opinion thought that that statute should be read as recognizing credit for first degree murderers. Isn't that right? Isn't that what they said in their opinion?

MS. DALZELL: Well, the Sixth Circuit did not address the specific questions here which is there are -- 'cause it didn't resolve the ex post facto question. It said to the

extent plaintiffs earned credits and it didn't resolve that question. It's our position that there's still an unresolved question as evidenced by the length of time that we have discussed what state law means because we've got these state Supreme Court cases out there that say you don't earn credits during a life sentence and we would argue that if there's any question at all under state law, this Court should abstain because the issue's presently in front the Michigan Court of Appeals. It will be heard on April 10th and these are parties who are represented, this is Wiley and Rucker. One is represented by the state public defender's office. The other is represented by Peter Van Huck (phonetic) I believe. These are fully-capable attorneys. The issue will get a thorough hearing --

THE COURT: And if that case comes out the way the plaintiffs here are asking for this case to come out, will the State then apply that to all prisoners throughout the state?

MS. DALZELL: Umm, I mean, the state would follow what is held. I mean, that is only with respect to two offenders. Here, a class is being asked for and so --

THE COURT: Well, that's what I want to know. Is the State going to commit to following whatever ruling and apply to to all the prisoners throughout the state of Michigan?

MS. DALZELL: Umm, we would take an appeal. I apologize. It'll be a published decision and we would take an

appeal. I apologize and we would follow it just as we would have to follow whatever this Court ordered, but the bottom line is that there is the real potential for directly conflicting orders with respect to the exact same parties, particularly if this Court certifies a class because those two cases are members of the putative class.

I would also note that plaintiff's counsel, Ms. LaBelle, has filed an appearance in those cases and we presume that she will be arguing, so the state court is ready to hear this. It's set for April 10th in Detroit.

THE COURT: Now Ms. LaBelle has said that those cases are not exactly the same as our case on all fours, not all of the issues here in our case are going to be presented to and then decided by the Michigan Court of Appeals. Do you have a different point of view about that?

MS. DALZELL: Yes. We disagree with that because the question, the basic question is whether a prisoner serving a life sentence earns credits and if so, on which sentence it's earned whether it's on the void life sentence or it's on the new sentence and it's our position that there's no reason to distinguish in that case between disciplinary credits or good time credits. It's the exact same analysis so there would be a direct conflict between this case because of course plaintiffs have asked this Court to resolve both disciplinary credits and good credits, good time credits so there's the real potential

for direct conflict if that happens. And I would note, it sounds like the Court is aware two panels of the Michigan Court of Appeals have unanimously denied the defendants' motions to withdraw in that case so they are fully aware of the situation at hand. We have every reason to expect that they will decide this question and it's appropriate to abstain because these are fundamentally state law questions and the Sixth Circuit recognized that. It said to the extent plaintiffs earned credits under state law, it didn't go on to decide that question. It is a state law question as evidenced by the amount of discussion that needs to go into the state Supreme Court cases on it, the state statutes how to interpret those, for example the good time credit statute refers to reductions against the sentence, it doesn't refer to credits and it would again be our position that a reduction can't apply to a life sentence, reduction implies a sentence that can be reduced so there are numerous unresolved questions of state law as well as the question I mentioned before which is to what sentence do the credits apply and I would note with respect to that the state Court of Appeals has held in that People v. Tyrpin case that we cited that the question is what credits the offender would have earned under the proper sentence. If the original sentence is voided, the state court has said, it's asked not what credit the defendant earned in conjunction with an illegal sentence, but rather what credit the defendant would have been

entitled to if he had been sentenced properly. Again, state law is just unresolved on that issue.

One of the Sixth Circuit cases that the plaintiff cites stands for the same principle. That's the McDonald v. Moinet case from 1944. The Sixth Circuit recognized that upon resentencing, plaintiff was quote "entitled to the benefit of all parole regulations and good time credits as if the valid resentence of 25 years imprisonment had been pronounced on January 26th, 1939, the date of the original void sentence." So these are questions that need to be answered. Again, it's our position that they are best answered in the state courts who are best equipped to answer this thorny question of state law and the Supreme Court has cited the cardinal principle that federal courts are supposed to determine whether a Constitutional construction of statutes is possible. If the state courts resolve this and say that the plaintiffs never earned credits during their life sentences, then the federal ex post facto question will be resolved entirely because that's the predicate upon which plaintiff's ex post facto claim depends. So by letting this work its way through the state courts, this Court could avoid the Constitutional question.

THE COURT: Well, what happens if the Michigan Court of Appeals comes out and decides the way plaintiffs here believe Michigan law should be understood? Would I then be

able to just take that ruling and move forward with the case at that point?

MS. DALZELL: I mean, you would not be bound by that ruling of course.

THE COURT: Well, that's pretty good indication of what state law is, right, what an intermediate appellate court rules? It's not dispositive, but it's datum that I could use, right?

MS. DALZELL: That's true, although we would appeal it to the Michigan Supreme Court so we could seek a final resolution of it under state law. I would also note and emphasize that the Supreme Court has instructed it is the State's prerogative to fashion a Miller remedy. In Graham, the Supreme Court said it is for the State in the first instance to explore the means and mechanisms for compliance and in Montgomery, it instructed the lower federal courts that they must be careful to avoid intruding more than necessary upon a state's sovereign administration of the criminal justice systems.

Michigan has implemented a Miller remedy. That's exactly what it has been doing. 117 of these offenders have already been resentenced. 44 have already been paroled. The rest will be resentenced. The state courts are currently resolving the ex post facto question. This resolution of the Miller remedy in the state courts is exactly what the Supreme

Court expected and instructed and that process is working its way out. There's just no reason for this Court to unnecessarily wade into these thorny questions of state law and create the potential for directly-conflicting opinions.

I'd also like to address the Younger argument with respect to class certification just to clear up that the Sixth Circuit did not address Younger for count five, the ex post facto claim. The defendant's initial motion to dismiss raised Younger for all counts. Judge O'Meara dismissed counts two and four on the basis of Younger and dismissed count five for failure to state a claim. The question on appeal was whether Younger was proper for counts two and four so the Sixth Circuit did not address Younger for count five and its reasoning doesn't decide Younger for count five either. The reason it found the Younger abstention didn't apply for counts two and four is because those are fundamentally Miller claims. It said it was the same -- those counts were of the same thread as the original Complaint from 2010 which was that Michigan sentencing and parole statutes denied juvenile offenders convicted of first-degree murder a meaningful opportunity for release. Counts two and four are Miller claims. Count five is an ex post facto claim. They're based on different Constitutional provisions. The ex post facto claim is new and didn't come into existence until the statute was passed, the Michigan resentencing statute in 2014 so the Sixth Circuit did not

preclude a Younger argument for count five and again as we've already been discussing, the Younger abstention would also be an appropriate for count five because again we have these ongoing proceedings for putative class members so if the Court were to certify a class, that would create the about potential for a direct conflict.

With respect to the programming claim which is count six, I'd just like to hit on three reasons why that claim fails. First, it is refuted by the facts on the ground. All of the plaintiffs who have been resentenced and were parole eligible are being paroled and quickly, virtually all. Specifically of the 44 or 46 who were parole eligible upon re-sentencing, 44 of them have been paroled and that's a 96 percent success rate. Of those 44, 93 percent of them were granted parole either before their parole eligibility date, within six months of re-sentencing and that's for those who became immediately parole eligible upon re-sentencing or within six months of parole eligibility. That means that the programming is not denying the plaintiffs a meaningful opportunity for release nor is it delaying a meaningful opportunity for release because those who have been paroled, as I mentioned, it's either before their parole eligibility date when they're granted parole by the parole board or within six months of either re-sentencing or their parole eligibility date.

I would also note there's no reason to think that the 250 who are currently awaiting re-sentencing will be treated any differently. Contrary to what the plaintiffs are arguing, the 44 who received parole already were not all significantly past their parole eligibility date. It's true that 28 out of 44 became immediately parole eligible upon re-sentencing and they were paroled, but 19 out of 44 were granted parole within their first parole-eligible date. That's over 40 percent of them so that shows they're not just being paroled because they're way past their earliest release date.

Parole has also been swift for those who are more serious offenders. Many received sentences that are well above the minimum of 25 years. Of those 19 who were granted parole, like I said within six months of their earliest release date, eight had minimum sentences in the 30s or 40s; in other words it wasn't just the minimum of the 25 so it shows that parole is not being delayed even for the most serious offenders. This makes sense because programming is only worth one to two points in the parole decision. Under the preliminary guidelines for the parole decision, aggravating or mitigating sentencing variables are worth up to four points, prior criminal record is worth up to five points, institutional conduct is worth up to eight points, statistical risk variables are up to nine points and the list goes on. Programming is worth one to two points in the entire analysis so it makes sense that it has not held

up parole for any of these individuals.

I'd also like to note with respect to the programming claim that even if parole were being delayed which again the facts on the ground show that it is not, under Miller and Graham, the plaintiffs are entitled to a meaningful opportunity for release and they are getting that. They're not entitled to the release at the first available parole eligibility date. The programs that are being discussed I understand are typically three to six months. Again, Graham and Miller and Montgomery, they are sentencing decisions. They require a meaningful opportunity for release. The facts on the ground show that these plaintiffs are getting that.

THE COURT: Would you have any objection if we had had some period for discovery with respect to count six just as we're doing with count four?

MS. DALZELL: It would be our position that discovery is not necessary. We don't believe count six is legally cognizable, again because Miller, Graham and Montgomery are sentencing decisions, they don't govern the parole process and these offenders are entitled to a meaningful opportunity for release. Even if they were somehow delayed programming until they are resentenced to a term of years and then they have to spend three to six months doing this program, they're still getting a meaningful opportunity for release on parole. Again, nothing in Miller or Graham requires release on parole at the

parole eligibility date.

THE COURT: But when you say those are sentencing decisions and not parole decisions, are you saying that if the parole board just said we're adopting a policy, we're just going to not entertain these requests for parole even though somebody's eligible, we're simply going to as a blanket rule we're going to add another 10 or 15 years before we'll even they think about considering that, are you saying that would not potentially state a claim?

MS. DALZELL: At some point it may. Umm, we would also have to think, you know, if the claim boils down to a claim against the minimal or maximum re-sentencing years, you know, it's 25 to 40 on the minimum or 60 on the maximum. If the claim devolves into just focusing on the number of years, that could potentially be a Heck issue because then it would just directly implicate the sentence, but it's our position that here that's not what the parole board is doing as evidenced by how many have been paroled and with the speed at which they've been paroled. The parole board is not holding them for a long time.

THE COURT: I'm not suggesting that's what's happening here, I'm just suggesting to read Graham and other decisions as only applying as sentencing decisions and not parole decisions, I'm not really sure what the distinction is that you're making there because it seems to me that if the

parole board did adopt practices or policies that deprived prisoners of any meaningful opportunity for release, that that would state potentially some kind of Constitutional claim. Now maybe it's not exactly the issue that was raised in Graham, but it's somewhat allied with that theory.

MS. DALZELL: I still think that in that case, you know, if the issue were that there were just no opportunity for release on parole, it sounds like that's what it would be, you know, if the parole boarded no, or a policy not to release them. It seems then that whether they're getting a meaningful opportunity for release would boil down to a question of whether the number of years on their sentence is giving them a meaningful opportunity and at that point, that strikes me as a Heck claim because it goes directly to the length of sentence and so that would have to be raised on direct appeal or habeas so that would not be an issue here.

I'd also note our other concern with count six and why we think it's not legally cognizable is that it's just premature at this point because these plaintiffs have not been resentenced yet. It's entirely hypothetical that they will be resentenced to a term of years. Some won't be. Some will Constitutionally be resentenced to life without parole and to say that they are all entitled to start programming now is just not legally cognizable. They don't have a sentence yet. Some of them will never, ever be eligible for programming and MDOC

has limited resources for programming and to give people who don't even have a sentence yet programming would be inconsistent with how they treat prisoners across the board. It's just not a practice, a thing for the Michigan Department of Corrections to accord programming to people who have not been resentenced yet. So --

THE COURT: Okay. Getting back to the Heck issue, didn't the Sixth Circuit already address that given it that the parole issue is not a right to release, but a right to have a meaningful opportunity and so that whatever judicial response might be implemented wouldn't direct the release of a prisoner, but it would direct there to be a Constitutional parole process that would allow for meaningful release. Doesn't that solve the Heck problem?

MS. DALZELL: The Sixth Circuit did reject Heck for this claim because it is a parole-based claim. I'm simply thinking about the hypothetical that the Court posed which is if there were a policy, you know, no parole, it does seem to me that that would turn into a challenge to the length of the term of years. So that is my honest thought on what that would be, but again, there are just, there are numerous reasons to reject count six, it's just it's got supported by the facts on the ground. These offenders are being resentenced. They're being paroled. They're being paroled very quickly. There is no evidence that programming is holding any of them up and even if

it were holding them up for the three to six months that these programs take, again Miller and Graham just do not entail a Constitutional right to release at the parole eligibility date versus six months later. So for all those reasons, this Court can comfortably reject count six.

I would also note for class certification, I mean, we've mostly already discussed class certification, but I would just add another option for this Court on class is just to defer the class certification decision until it resolves the merits of these claims. Again, we cited the Sixth Circuit case in our brief that says it is well within the discretion of the Court to defer a class ruling pending a summary judgment ruling, and just making sure.

One other thing I'd like to add is with respect to certification to the state courts and letting the state courts decide this either under Pullman or certification or under the theory that this Court shouldn't exercise its discretionary declaratory judgment jurisdiction, the plaintiffs argue that we somehow didn't preserve that claim and I will just point out that the idea that these claims belong in state court is not new. We've been arguing Younger abstention from the beginning. It's always been our position that these claims belong in state court and with respect to Pullman and certification, frankly in our view it was obvious that there was no ex post facto problem. These offenders as I said never had any expectation

of reducing any sentence for first-degree murder by credits. To the extent the Sixth Circuit's opinion suggests that the answer hinges particularly on how state law regarding credits interacts with life sentences, you know, without addressing which sentence accrues the credits or whether the credits ever had value or whether the plaintiffs ever had an expectation of using them, then the state courts must decide that.

THE COURT: Do you have any data on how often the Michigan Supreme Court responds positively to requests for certified answers to other Court's questions and how long that typically takes?

MS. DALZELL: I don't have specific data on that. We were discussing that during the argument and my co-counsel, Eric, the last he remembers is in 2010 the Michigan Supreme Court granted a certification request and we think it took them about a year to resolve it. My other answer to that question would be that the state court rules contemplate the certification process and allow for certification, so, you know, the Michigan court stands ready to consider these issues.

Another thing to consider is that we could request that it be expedited and decided potentially by July 31st. Of course, we don't have control over whether it grants that, but the Michigan Supreme Court is currently considering an issue related to this issue about juvenile lifers and the re-sentencing statute and those are the cases in Hyatt and

Skinner in which the Michigan Supreme Court is deciding whether a judge or jury has to decide whether to impose a life without parole sentence, so it's entirely possible because they're considered related questions for these offenders, but that might be an option to expedite it. That's the best information that I have at this point.

THE COURT: All right and once the Supreme Court issues its rulings in those cases, does that mean that the re-sentencings will then start for those prisoners for whom the prosecutors have filed the appropriate motion?

MS. DALZELL: Yes, that is what we expect. As far as I know, that is the only thing that is, umm, that we're waiting on in terms of having the re-sentencings proceed. Again, with respect to the prisoners who have gotten terms of years, 117 have already been sentenced and I fully expect that once the Michigan Supreme Court decides that issue for the approximately 250 who are awaiting re-sentencing, re-sentencings will proceed swiftly is my expectation.

THE COURT: All right. Anything else?

MR. RESTUCCIA: Your Honor, could I add one additional thing? Eric Restuccia?

THE COURT: Well, I want to take a break and I'm going to let everybody talk, but I know we've got some response from the petitioner so let's -- can we take a 15-minute break now?

MR. RESTUCCIA: I was just going to clarify one of the answers. I was whispering to her and I felt bad. I didn't want to be rude to the Court, but I just wanted to clarify one of the answers.

THE COURT: Go ahead, sure.

MR. RESTUCCIA: And that was the question the Court asked is whether the state would accept the judgment of the Court of Appeals in the two pending matters that are set for argument on April 10th. I have motions pending for oral argument in both of those cases and I had filed an amicus brief and I'm going to ask that panel to publish its decision and assuming regardless of the outcome the case and it's the anticipation that whoever loses that case, there will be an application filed in the Michigan Supreme Court and that the point at which the Michigan Supreme Court resolves the question, I think that would be definitive resolution, but if -- there's also this issue pending in another case that's pending before the Michigan Court of Appeals and if somehow this Court of appeals panel did not address the issue or resolve its issue in an unpublished decision, it would be my position or the State's position that we would then press that issue in that other case until we have a published decision because that will then bind all the lower courts and will provide guidance to the Department of Corrections. So we're looking for a definitive resolution on the state law issue in

the Court of Appeals and I understand Mrs. LaBelle has also filed an appearance in one of the two cases pending in the Court of Appeals so I fully expect that the issue will be resolved at that argument. Now how long that will take, again, I can't answer that question, but I wanted to make clear that our position is that once we have a published decision from the Michigan Court of Appeals, that's a point at which we will think we are bound and obviously the order will govern those parties, but we're looking for published precedent from the Michigan Court of Appeals, but I'm going ask regardless of the outcome that that panel publish its decision and I think it's clued into the significance of the case given that it denied, two different panels denied the motion to dismiss the case based on the analysis that the State put forward that these are state law issues that require the Michigan Court of Appeals to provide guidance.

One final point of clarification. The Court also asked what data that would provide. I think that would be excellent data. We would still push forward if we lost to get the final resolution from the Michigan Supreme Court, but I know we have often said in other litigation we expect and hope that the federal courts will look to the Michigan Court of Appeals as excellent guidance for what state law is. That won't stop us from pushing forward, but I do want the Court to be alerted that it is the State's position that we hope that

the Court is attentive to even intermediate decisions on state law issues regardless how it comes out for us. I mean, there's obviously no guarantee we're going to win that issue in the Michigan Court of Appeals, but I would expect this Court however it comes out to pay it great attention even though I think the definitive resolution will be in the Michigan Supreme Court and I think there are some embedded state law questions. In any event I just wanted to clarify the question of what the State's position is with respect to that Court of Appeals decision.

THE COURT: Okay, thank you.

MR. RESTUCCIA: Thank you.

THE COURT: We're going to take a 15-minute recess. We'll come back at 3:45. Thank you.

(Recess taken at 3:29 p.m.)

(Reconvened at 3:52 p.m.)

THE CLERK OF THE COURT: Please rise. Court is now back in session. You may be seated.

THE COURT: All right. Who would like to lead off for plaintiff in our second session here? Ms. LaBelle?

MS. LABELLE: Would you mind if I reply to a few things?

THE COURT: No, go ahead.

MS. LABELLE: Thank you. My co-counsel, Mr. Korobkin, reminded me about the local court rules 8340

saying that certification can't occur unless the issue will not cause undue delay or prejudice and not only have defendants waited over a year and-a-half to request certification, the inevitable delay inherent in the certification process is certain to prejudice these plaintiffs. We cited the Western District case and also an Eastern District case which talks about how disagreement with the Sixth Circuit's analysis doesn't weigh in favor of seeking a second opinion from the Michigan Supreme Court.

You know, the issue in the state court and I have asked to argue because there was a pro se brief filed late and the prisoner below lost oral argument because of the delay in filing his brief and so I have asked to step in and argue, concerned about what could happen there, but the only thing that's going to happen in the state court case is that the Court of Appeals is either going to affirm or reverse a criminal conviction. Defendants have said that they will, if there is any indication that he earned good time either and if the Court says all we're here is on the sentencing so either if they don't speak to it or if they speak to it, Mr. Restuccia says we will appeal to the Michigan Supreme Court and that will take an application about 18 months and that if they lose there, they're going to do a cert application to the U.S. Supreme Court so we're talking about years and defendants can be relentless, they have been on these issues since the

beginning and they have a right to be, but this Court has the power now to issue an injunction and the harm to the plaintiffs, it's irreparable harm versus a speculative ruling by a state court that doesn't address all the issues here and in which they will not apply if we win to anybody -- well, if they get -- they'll ask for a stay, but they'll only apply to the two people in front of them and we already have a published opinion, we have more and we have a clear statute. So I think this Court has the power if after, umm, if this Court issues an injunction and then the Court of Appeals does something different, they could certainly come back to this Court and ask that the injunction be changed.

I would also note that, you know, all of these requests for delays that have come so late including the Younger one on this particular count five, they did raise Younger and Heck and the merits in front of Judge O'Meara. Judge O'Meara ruled on the merits of the count five, but on appeal the defendant said we're challenging, we think that on the merits we win, we also want to preserve our Heck argument, but they abandoned the Younger argument and so to come back down now and say oh, the Sixth Circuit didn't rule on that because we didn't's take the Younger argument up on count five I think is a bit disingenuous and also the Sixth Circuit did broadly rule that Younger abstention was inappropriate in this case and so we would ask this Court to issue an injunction

simply that the earned time and credits that people got while they were serving this unconstitutional sentence be calculated and it be used to determine the time in which they can go before the parole board and we're not even talking release, it's just go before the parole board and say to the parole board, you know, I've been rehabilitated. The parole board can say no, can't go home. It's just the opportunity is what we're asking for. Thank you, your Honor.

THE COURT: Okay, thank you. All right, I just want to make sure we've said everything we want to say on counts five and six. Anything else from the defendants?

MS. DALZELL: No, your Honor.

THE COURT: Okay. We're going to move on to class certification. Mr. Korobkin?

MR. KOROBKIN: Good afternoon, your Honor. Daniel Korobkin for the plaintiffs. This is a quintessential class action and I say that on the basis of the Rule 23 factors, on the basis of the precedent under Rule 23, but also on the basis of what the Sixth Circuit said in this very case and they said relegating these issues to piecemeal resolution by individual offenders risks duplicative litigation and inconsistent determinations of Constitutional questions. By contrast, evaluating the facial challenges presented in counts four, five and six in one class action will avoid patchwork decisions, promote consistency, conserves scarce judicial resources and

provides crucial guidance to the parties and the public alike.

Now that comes out of a passage that was on its face discussing the ripeness analysis, but I think it could hardly be doubted that the Sixth Circuit envisioned that in connection with its ripeness ruling, that this case would proceed and could proceed as a class action.

After all, the plaintiffs don't allege that they're being singled out on the basis of any individualized circumstances. That's not what this case is about. They allege that statutes, policies and engrained practices that apply across the board to all juvenile lifers or the certain subclasses of them that we've identified are unconstitutional and so the plaintiffs have demonstrated that they meet all the requirements under Rule 23(a), under Rule 23(b)(2) for the three classes corresponding to our three remaining claims.

I don't think I need to spend a lot of time on the argument that the defendants made which was the Court shouldn't certify a class because they're not going to win on the merits. The bulk of the state's opposition is sort of based on that idea, but of course it's well established that merits questions are completely separate from class certification or at least it's a distinct analysis. The Amgen case and In Re Whirlpool from the Sixth Circuit all establish that and I think even more to the point for this particular case is that the plaintiffs of course are asking for immediate relief on the merits on counts

five and six of their Complaint so class certification should be decided now along with our motion for summary judgment particularly as the Sixth Circuit noted itself in Hill-1, its previous Hill decision, particularly in light of the defendants' refusal to apply this Court's previous rulings to anyone other than the named plaintiffs and of course as the defendants have themselves indicated if for some reason there's a positive ruling or from their view a negative ruling from the Michigan courts on this state law issue, again they're not going to apply that to anyone other than the two defendants in that case.

So looking at the Rule 23 requirements, the defendants, essentially they object to numerosity, class representatives and commonality. We've responded in our reply brief and I hope that takes care of most of those issues, but, you know, very simply there are over 50 individuals no matter how you define the classes, no matter what those classes are, who are eligible for relief on the three claims. They can easily be identified and there are named plaintiffs in this case who adequately would serve as representatives for each of those situations.

Now as the re-sentencings occur, some of the classes are going to get larger and some of them would get smaller, right? So if someone in the -- if someone is resentenced to -- if someone is resentenced to a term of years and they are

paroled, they're no longer part of the class, but if someone is resentenced to a term of years and they were -- they're awaiting parole, they would move from the class associated with count six to the class associated with count four and five depending on the date of their offense and this is, I bring this up just because it indicates that these are fluid classes and fluid classes of this nature, especially in institutional settings, are considered ideal for class certification under Rule 23(b)(2), but for each claim, the common glue that holds the class together is that all class members, however you define the class, are subject to the same statute or the same policy or the same practice that's being challenged and so even if applying these policies would affect individuals in a little bit of a different way on an individualized basis, it's the policies themselves are being challenged and that's why class certification is appropriate and again, I would just refer the Court back to the Sixth Circuit's discussion of the ripeness issue in Hill-2 where they basically, you know, make that very point that we're talking about the same policies that are being applied across the board. That's both why the case was ripe for adjudication at the Sixth Circuit and it's also why the case should be certified as a class.

There was I think underlying the defendants' objections to numerosity, I'm not sure that it was properly framed as numerosity, but I think underlying them was this idea

that the, we hadn't identified who was, umm, who was going to be eligible right away for, umm, for parole review under the ex post facto claim, right, because I think they argued that we had sort of lumped together -- excuse me, if they had lumped together people who were awaiting re-sentencing and people who had already been resentenced, but the reality, your Honor, is that all of these, all of these people are eligible or could easily become eligible for re-sentencing and that is why they are part of the same class.

Now I say that, but it's also the case that this Court has discretion to define the classes in a way that it deems more appropriate and even if the class, even if the classes were defined such that it's only the people who are eligible for parole right now, we still meet all of the requirements including the numerosity requirement and specifically there are, umm, in count five that's associated with ex post facto claim, there are 51 individuals who have all been resentenced and are right now eligible for relief under count five and we've established that in document number 181-4 so that's exhibit 3 to document number 181 and so we have established the numbers and who these people are for each of these claims and whether the Court decides to define the class broadly or narrowly, in each case there are sufficient numbers who are eligible for relief under the three claims and we have named plaintiff representatives who are plaintiffs rights now

who would serve adequately as representatives for those claims.

THE COURT: Can I count the people who are the subject of these motions who have not yet been sentenced, they may not be sentenced for several months and perhaps even longer and if they do receive life sentences, then they may not benefit at all from count five in terms of credit and the defense argues that those are people who shouldn't be counted then as part of the numerosity analysis.

MR. KOROBKIN: Right. So in our initial opening motion for count, for the count five class or sub-class, we said it could be all individuals who were or are subject to re-sentencing for offenses committed before 1998 which is the cut-off date for the ex post facto claim. There are about 250 of them and the defendants came back and said oh no, you're counting too many 'cause some of them will just get life without parole. It's our position that enough, there's enough of a commonality to all of those individuals that they could all be part of the same class especially if you look at the statements from the U.S. Supreme Court in Miller and Montgomery that basically say, you know, the vast majority of individuals should get -- should not be getting life without parole, but I think it's -- I -- if the Court were to define the class instead which is I think what underlies the defendant's objection to all individuals who have already been resentenced and for offenses that were committed before December 15th,

1998, we have established that there are 51 such individuals right now and that's the exhibit I was referencing so the defendants said in their response you didn't satisfy numerosity and our reply to that is we have, it's in an exhibit so we've got the proof of it and it's 51 individuals which I think easily satisfies the numerosity requirement and we have people, we have named plaintiffs who are in that category, too, who would, you know, who would adequately represent the class. Does that answer the Court's question on that issue?

THE COURT: Well, so would I just not consider others who are in this limbo category of awaiting a decision from the Michigan Supreme Court about how their sentencings or re-sentencings are going to proceed?

MR. KOROBKIN: And I assume you mean on the count five issues only?

THE COURT: Yes.

MR. KOROBKIN: So that's where the fluidity of classes comes in. So we assume that if the Court were to narrow the definition of the class in that way, the Court would define that class in a fluid nature which is by which I simply mean that as -- it would be defined so that as individuals who were in the limbo category now are resentenced to term of years; that is the extent to which they do not get life without parole, that those individuals will then essentially exit class six, the class associated with count six which is the

programming claim and they would sort of go into the classes associated with counts four and five because they'd be eligible for parole so therefore they would be part of the class challenging the fairness of the parole process, the count four claim and they would also to the, you know, the subgroup of those whose offenses occurred before 1998, they would enter the count five class for ex post facto and in the same way, you know, individuals who are either released on parole or they are resentenced, they would exit their, you know, they would exit those classes and either enter a new class or be out of the, you know, be out of the case entirely and this is very common in Rule 23(b)(2) injunctive declaratory relief cases where especially in institutional settings, so prisons and mental hospitals and school desegregation cases, that sort of thing. You have people coming into the class and people going out. The key I think is, is that fluidity plus the numerosity such a large number that joinder is impracticable under Rule 23(a)(1) and surely it is. We've already got 51 in the class and there's going to be, you know, there's going to be more coming in and all of those individuals should be eligible for relief. So I guess all I mean to say is if the Court does decide to sort of narrow the class definition in the way that the defendants have suggested, we would ask that the Court do it in such a way that allows people to enter the class as they become resentenced to terms of years if their offense was, you know,

before the cut-off date for good time and disciplinary credits.

I'm not sure how much the defendants' Younger abstention argument in the class context overlaps with that in the rest of the case. I think there is significant overlap, but I think it's important to emphasize that the defendants seem to be arguing that out of the hundreds of class members that there are in the various classes and subclasses, there are essentially only two who aren't even named plaintiffs in the case who have raised apparently or have, there's something going on with an ex post facto argument in a state court sentencing appeal and their argument appears to be that because of those two cases out there, that the Court should not certify a class at all under the Younger abstention doctrine. They haven't cited any Younger cases that stand for the proposition that that should be a bar to class certification. As Ms. LaBelle already indicated, look, the Sixth Circuit has really rejected the Younger abstention argument in this case completely anyway. You know, the Hill-2 case basically said when you file a second amended Complaint, that's not -- years into the litigation, that's not a time to re-examine Younger and contrary to the defendant's point about, you know, count five technically wasn't part of the Younger analysis, I think that all that needs to be said on that issue is if you go to the very first sentence of the Sixth Circuit's Hill-2 decision, the very first sentence says since 2010, plaintiffs have sought

Federal Court review of the punishments, of the punishments Michigan may Constitutionally impose on individuals convicted of first-degree murder for acts they committed as children and I think that gets to the very point of what this case is all about. We've been challenging their punishments from the very beginning. It's true that the legislation changed and as a result of the legislation changing, the pleadings were amended, but if the case is about the Constitutionality of punishments and it's been going on for this whole time, surely the Sixth Circuit's reasoning about Younger abstention for all of the other counts applies to their Younger, the defendant's Younger abstention defense for --

THE COURT: But this specific ex post facto issue in count five is really only since 2016. Is that right?

MR. KOROBKIN: Right, along with every other count that we brought other than count one which was dismissed, right, so I think, I think the entire second-amended Complaint which responds to the Michigan Legislature changing the law, it was all reformulated in order to basically say Michigan, your proposed fix doesn't do the trick, it doesn't do the trick so the way we read the Sixth Circuit's decision is that it doesn't really matter whether, you know, you locate the problems with the punishment in the Eighth Amendment, the Fourteenth Amendment, the ex post facto clause, the exact, the exact Constitutional violation part -- the exact sentence of the

Constitution that's being violated is not the key. The key is has the case been going on for this whole time and are you simply amending your Complaint and the whole case has been about punishment from the beginning and it's, you know, the plaintiffs' claim that they are still being punished unconstitutionally, that Michigan's effort to fix it was defective and that I think is the proper reading of the Sixth Circuit's Younger analysis, but even if Younger could be considered, this is not a case for Younger because the key in Younger is whether the, umm, adjudicating the plaintiffs' claims will actually interfere with an ongoing state court proceeding and I think the interference requirement is critical because there's nothing in Younger or really any the cases interpreting Younger that say that there cannot be parallel proceedings where the same general issue comes up. That's not the test. The test is whether what the federal court is being asked to do will interfere with the state court proceedings and so we've cited Judge Edmunds' decision, the Dwayne B versus Coleman case and I think that goes through very, you know, very coherently how just because an issue might be in state court somewhere and just because maybe it's even possible for a litigant in state court to talk about that issue doesn't mean that the federal court will be interfering with any state court proceedings by ruling and in this case, your Honor, the issue in the state court, the issue in those two Rucker and Wiley

cases that have been alluded to, it's got to be, you know, they're appealing their -- it's got to be whether their sentences are going to be affirmed or reversed and the state courts do not to my knowledge go through during the sentencing process and decide how much good time credit or disciplinary credit someone's going to get. In fact, they don't even mention that as part of their judgment at all. As far as I know, they include time served in the judgment of sentence and then they have a range and it's under this statute, it's going to be a minimum sentence of somewhere between 25 and 40 years and a maximum sentence of 60 years. That's the sentence and it's really up to the Department of Corrections and the parole board to calculate things like good time or disciplinary credits and determine whether they should be provided or not and so just as in the Dwayne B case, I think I'm getting that case right, Judge Edmunds' case and just as in the other cases that that Court cited, the injunctive relief from this Court if it's issued will go to the Department of Corrections or the parole board. It will not go to any state courts, it will not enjoin any state court proceedings and it will not interfere as that critical word comes from Younger. It will not interfere with any state court proceedings.

THE COURT: I want to just throw out an idea. I'm not advocating it, I'm just exploring it. Sometimes in class cases we carve out certain people from a class. Would it

advance the resolution of the Younger issue if anyone who is litigating with the state over the issue of an ex post facto claim regarding his or her credits would be carved out from the class? Is that anything that is beneficial or it wouldn't solve a problem or would create more problems?

MR. KOROBKIN: Right. I mean, I think it would be unfair to Mr. Rucker and Mr. Wiley and I think it's not necessary for all the reasons I have, I have discussed, but to use and analogy, you know, when -- so I know there's this exhaustion debate that's going on in this case. Typically in a class case, only the named plaintiff needs to exhaust. The unnamed class members are not part of the exhaustion analysis. There are all sorts of cases where there are un, the unnamed plaintiffs or the unnamed putative class members don't have to, you know, the fact that they haven't done certain things or they have done certain things doesn't affect whether they get to be part of the class and our argument of course is that this is one of those cases, that just because Mr. Rucker and Mr. Wiley has a state court appeal pending where it's possible for them to raise this issue and it's possible for the Court to address it doesn't mean that they cannot be part of this class. You know, I guess, you know, if the Court cannot reach any other conclusion but that Mr. Rucker and Mr. Riley -- Wiley I think, that if the Court cannot reach any other conclusion but that they cannot benefit from an injunction from this Court,

then I guess carving them out of the class definition will save everyone else, but we're hesitant to throw any putative class member under the bus as it were just because the defendants have sort of dug up this case out there that seems to have some overlapping issues, but you're absolutely right, your Honor, that in the implication that it would be incredibly unfair to the hundreds of other class members who are not litigating the issue in state court, to deny them the benefit of class-wide injunctive relief that would otherwise seem so incredibly appropriate here just because there are two or whatever putative class members who are out there who have something going on in the state Court of Appeals and again I just don't know of any other case, certainly the defendants haven't cited any where a court has completely denied class certification based on that kind of a Younger concept having to do with unnamed putative class members who are just sort of out there.

THE COURT: All right. Anything else?

MR. KOROBKIN: Nothing. Thank you, your Honor.

THE COURT: All right, thank you. Defendants?

MS. DALZELL: Thank you, your Honor. With respect to class certification, there are a couple different issues to discuss. One is the Rule 23 factors. The other is of course Younger extension. With respect to the Rule 23 factors, we are prepared to essentially concede that the Rule 23 factors are satisfied. As we did in our briefing, we took issue with how

numerosity was treated initially by the plaintiffs. We don't think it's proper to count the offenders who are currently subject to life without parole motions, but it does seem to us that even if you count those people out, you know, for the count five we're talking about potentially 51 offenders who have already received a term of years and who have earned credits, but have not yet been paroled, we would be fine saying there is numerosity for purposes of that.

For count six, again our position is it's speculative. It's not proper to include people who have not received a term of years yet because that is of course the only group for whom count six will be relevant. For count six, you have to ask how many also will not only be resentenced to a term of years, but how many of those will be immediately parole eligible because of course if they get a term of years and they're not immediately parole eligible, they have time to take programming and programming will not delay them. So, you know, it is speculative how many are in the class, but we're not overly concerned about the Rule 23 factors. Our concern is more with Younger abstention for the reasons that we've discussed, but again if this Court certifies a class, it will potentially create a direct conflict so I'd like to talk about that more, but first I do want to address the plaintiffs' argument that we have somehow waived our Younger claim with respect to count five and we didn't.

The Sixth Circuit just flat out did not address Younger for count five. It wasn't at issue in the Sixth Circuit. There was no reason to brief it. The district court did not address Younger for count five and of course what the Sixth Circuit is analyzing on appeal is whether the district court erred in the decisions it did make so Younger for count five was simply not at issue in the Sixth Circuit, we did not waive it and it's also true that the Sixth Circuit's reasoning does not cover Younger for count five. Again, the Sixth Circuit was addressing whether Younger abstention applied for counts two and four. The reason it held it did not is because it decided that the plaintiffs' federal case was pending before the state criminal cases were reopened for re-sentencing and the Court held that because even though the plaintiffs filed a second-amended Complaint after the state criminal proceedings were reopened for re-sentencing, it held that counts two and four essentially related back to their original Complaint and that's because the Sixth Circuit said that counts two and four were of quote "the same thread" and quote "the same overarching claim" that tied the plaintiffs' claims together from the first-amended Complaint and we don't have to worry or wonder what the Sixth Circuit meant by that because it said what it meant. When it said that the claims were of the same thread, it said that Michigan sentencing and parole statutes denied juvenile offenders convicted of first-degree murder a

meaningful opportunity for release. When it described counts two and four as of the same quote "overarching claim as the prior counts", it said that the claim was that Michigan denies them a meaningful opportunity for release. That is different in kind than the ex post facto claim and in fact as the Court recognized, the ex post facto claim did not even come into existence until 2016 when these offenders became subject to Michigan's new re-sentencing statute that has this specification on credits. So counts two and four, again, are Miller claims, count five is an ex post facto claim. They're under different provisions of the Constitution. There was NO ex post facto claim in plaintiffs' original cause. It doesn't conceptually relate back to any of the prior claims so the Sixth Circuit just did not decide this issue for count five.

Now in terms of the application of Younger, it does apply here because again the state criminal proceedings were reopened before plaintiffs filed their second-amended Complaint which it added the ex post facto claim for the first time so the state court proceedings were ongoing at the time which triggers Younger and if this Court certifies a class, there will not just be parallel proceedings that created possible tension, there will be a direct conflict with respect to the exact same parties because again if the Court certifies a class, it will include Mr. Wiley, Mr. Rucker and those are not the only ones. We're aware of at least one other case that is

currently pending in the state courts that has raised --

THE COURT: Let me ask you something. Wouldn't this argument end up barring almost any class action that's challenging how a state administers its criminal justice system because there's always going to be a lawsuit in the state court percolating up in all likelihood. If something is a big enough problem that it justifies potentially class treatment, it must mean that there are several individuals who would be similarly situated, many of whom might already be in a state court system so I'm trying see what kind of precedent this would be setting if I apply Younger in this context. I'm trying to imagine when would you ever have a federal class action then that addressed a state criminal justice matter?

MS. DALZELL: It is true that if there are state prisoners in a state criminal justice matter who are arguing the exact same issue in the state courts, it is our issue that Younger would preclude class certification because that's exactly what Younger was designed to prevent is conflicting federal and state rulings with respected to the same party. It would have that effect in other class actions. Now it might be that there are other federal classes that for which there's not an ongoing state proceeding, but that is what we have here. There would be a direct conflict, potentially depending on how the Michigan state courts rule of course, so that is exactly what Younger was designed to prevent. It says federal courts

abstain, let the process work itself out in the state court particularly in the context here which again as I mentioned Graham and Miller, the Supreme Court was clear in both of those cases that fashioning a Miller remedy and implementing it was the state's prerogative and that's exactly what the state is doing and that includes the mechanics of how the remedy works which is being worked out by the state courts. So it's our position that Younger is designed for exactly this situation where you have not just Mr. Wiley and not just Mr. Rucker, but at least one other plaintiff who has this ongoing claim in state courts and potentially others. We have not taken all of the potential putative class members and seeing, you know, who has raised the ex post facto claim, but there may be others. So Younger should preclude this.

The plaintiffs have also suggested that the direct appeals in the criminal cases are not the proper venue to be raising this claim regarding credits and we disagree with that. The Michigan Court of Appeals does address credit claims on direct appeal. It did in the published People v. Tyrpin case cited in our brief. Also here the credits are addressed as part the sentencing statute so it only makes sense that the plaintiffs or the defendants in the criminal cases would raise this as a challenge to their sentence because the credits are incorporated in the sentencing statute, they are part of the sentence and indeed the judgments of sentence in Wiley and

Rucker address the subject of credit.

I'd also like to comment on the fact that, you know, the Sixth Circuit has made these comments to the effect that maybe class certification is warranted here. First, the Sixth Circuit hasn't decided the issue of class certification and it hasn't considered the arguments that we have made here before this Court, but more specifically the Sixth Circuit suggested that maybe class certification might be appropriate to avoid quote "inconsistent determination of Constitutional questions" and I would just note that that's exactly what we would get here if this Court does certify a class because again as we've been saying we have these competing state court cases so the Sixth --

THE COURT: What do you think they had in mind about inconsistent court decisions?

MS. DALZELL: I'm sure they had in mind that they wouldn't want the federal class proceeding in individual cases, you know, for the Rule 23 factors. You know, we don't want one decision here for one offender and a different decision here for a different offender because they're proceeding separately and not as a class. My only point is --

THE COURT: That's an argument for Younger, not class certification, right?

MS. DALZELL: Pardon me?

THE COURT: That would be a Younger consideration.

You don't think they were talking about inconsistent state determinations within the state?

MS. DALZELL: I took what they were saying as it makes sense to proceed as a class on these federal claims because otherwise we wouldn't want one federal district court making one determination and another federal district court making another interpretation. That's how I interpreted what they were saying.

THE COURT: Was there another federal district court considering this Michigan statute?

MS. DALZELL: Not that I'm aware of, no. Conceivably, I mean, depending on where the putative class members are located, however I don't see why that couldn't happen if a class is not certified. Again, that's how I interpreted what the Sixth Circuit was saying, a class would solve the inconsistent determination, but again, our response is simply that that's what would happen here if a class is certified. There is the real potential for a direct conflict and again it's not just parallel proceedings on the same issue, it's parallel proceedings with the same exact parties, the same defendants and the same putative plaintiffs so there would be a conflict if the class's certification -- if class certification is granted and again it's our position that that's exactly what Younger was designed to avoid. I believe that's all I have affirmatively to say on class certification unless the Court

has further questions.

THE COURT: I just wanted to get your views on the timing of a decision on class certification relative to the other issues that are raised in the summary judgment motion.

MS. DALZELL: As we said in our brief, the Thompson v. City of Medina case in the Sixth Circuit from 1994 said it's well within this Court's discretion to defer a class ruling pending a ruling on summary judgment, so that would be a way that this Court could proceed is not to make a decision on class, instead to make a decision on the merits first. Again, our position is that the plaintiffs' claims lose on the merits, alternatively if there's any question under state law, the state courts need to decide that so we would just reiterate all of the arguments that we made earlier today, that abstention would be proper under Pullman, Younger, certifying to the Michigan Supreme Court or declining to exercise this Court's discretionary declaratory judgment jurisdiction.

THE COURT: Well, when you say defer until there's a ruling on the merits, the plaintiffs are asking me to make a ruling on the merits so are you saying I should be deciding the class certification motion in the same opinion I'm deciding the motion for summary judgment or do you have something else in mind?

MS. DALZELL: Umm, no. I mean, our position with respect to the merits is that the plaintiffs lose so when I say

that, that is what I have in mind is that these claims will lose on the merits. Alternatively like I said if this Court has any question about what state law entails for the credits, the ex post facto claim, that question is properly resolved in state court. So that would be our position.

THE COURT: Well, I can understand if I ruled in your favor on the merits, let's say of count five and let's put count six to the side for just a moment, the class certification would be moot as to count five if I were to agree with you, right?

MS. DALZELL: Correct.

THE COURT: Okay. If I didn't agree with you, if I agreed with the plaintiffs on count five, is there any reason I shouldn't proceed to consider and grant certification; that is, class certification? Are you saying even if I agree with them on the merits and awarded them summary judgment on count five, are you saying the most I should do is make a ruling regarding the named plaintiffs, but not for the entire class that they're asking me to certify?

MS. DALZELL: I mean, our, our position would go back to we're trying to avoid conflicting rulings between the state and federal courts so for all the reasons I stated, we think that Younger creates a problem for class certification because we have these pending cases in state court. So it's our position that class certification should be denied.

If the Court delays class certification and rules with respect to these individual plaintiffs at issue in this case, as we stated in our briefing it's our position that a declaratory judgment would only bind these named plaintiffs so those state court cases would just proceed as they are, so that would be a form of deferring to the state courts with respect to those cases, if, if that makes sense, if I'm following you correctly.

THE COURT: Okay. That answered my question.

MS. DALZELL: Okay. Thank you, your Honor.

THE COURT: Is there anything else for the plaintiffs?

MR. KOROBKIN: May I take a couple of minutes?

THE COURT: Okay.

MR. KOROBKIN: The argument that count six is speculative, I think that rests on a mischaracterization or a misunderstanding of our claim in count six. We're not asking for people to get rehabilitative programming after they're resentenced to a term of years. My understanding is that they would probably be eligible for it then. Our position is that they should be getting rehabilitative programming now before they're resentenced to a term of years because they've been in this carceral limbo as the Sixth Circuit has said for all of this time and one of the reasons it's important, well, there are two reasons. One and I think the defendants have focused

on this which is that the parole board would want to see rehabilitative programming, but another reason and this really I think defeats the defendants' objection to this, this part of our class motion is that the re-sentencing courts, too, have expressed a desire to see rehabilitative evidence and if they're not getting rehabilitative programming before they're even resentenced even though they've, they're waiting for re-sentencing, they face prejudice in the re-sentencing process or at the very least they face a real uphill battle in showing that they should get a, they should get a lesser sentence. So count six in that sense is not speculative at all. Our claim is that you should act -- that these individuals are actually entitled to this programming before they're resentenced.

On the Younger issue, I mean, obviously we just have a fundamental disagreement on how the Sixth Circuit decision ought to be read. It's our position that they abandoned their Younger defense, but even if that's not the case, the Hill-2 decision says does the filing of the second amendment -- second-amended Complaint seven years into the litigation require the federal court system to re-evaluate whether to exercise its jurisdiction; we think not. A concern with the initiation of proceedings adheres in the Younger doctrine so courts look to the moment the lawsuit was filed and then they say defendants offer no authority and we can find none that would support the proposition that the filing of an amended

Complaint requires a federal court to re-examine whether to exercise its duly-authorized jurisdiction. So the opinion of the Court does not seem to distinguish between the ex post facto claim and the all the other claims.

On the issue of whether there would be a direct conflict if this Court ruled in our favor on count five and the Rucker and Wiley Courts decided that issue somewhat differently, there would not be a conflict as I understand the word conflict in the legal sense. This Court presumably would issue an injunction requiring the Department of Corrections to appropriately recalculate or appropriately calculate everyone's good time and disciplinary credit as Mr. Stapleton's affidavit indicates that they do routinely anyway and let's say the Michigan Court of Appeals heard those arguments, they heard Ms. LaBelle's argument and they just didn't agree with this Court's interpretation of state law, they would just say Mr. Rucker, Mr. Wiley, your sentence is affirmed and at that point there would not be a conflict. The defendants would be required to comply with this Court's injunction notwithstanding the fact that there's a state court out there that doesn't agree with the basis for, the legal basis for that conclusion and Younger is not about avoiding inconsistent rulings. Younger is about a federal court interfering with an ongoing state -- usually criminal state court proceeding and there would be no interference here because here we're talking about calculation

of good time; the state court proceedings are talking about sentences.

And finally or actually I'm sorry, I have two more things I'd like to address. The issue of whether -- the defendants stated that they thought our position was that the state court wasn't the proper place to raise this ex post facto issue, but that's not exactly our position. If you look at Dwayne B and the cases that Dwayne B cites, it's not that -- even if a state court proceeding could be a proper place for an issue to be raised even if it wouldn't be, you know, improper to raise that issue there, that doesn't mean that Younger abstention applies and that doesn't mean that there's going to be interference with the state court proceedings just because an issue could be raised in state court. So it's not our position that, you know, Rucker and Wiley should be tossed out and they can't consider it at all. They'll make a decision about whether that's something they want to consider or not. It's our position that even if they decide to consider that issue, that doesn't equate to interference such that this Court cannot consider the issue and of course it's our position that even if this Court thought that it could not consider that issue for Rucker and Wiley, as your Honor mentioned it would be highly irregular or it would cause a lot of problems with class actions all over the country if that single fact about an ongoing proceeding meant that a class couldn't be certified at

all.

THE COURT: Okay.

MR. KOROBKIN: Thank you, your Honor.

THE COURT: All right. Is there anything else for the State?

MS. DALZELL: No, your Honor.

THE COURT: Okay. All right. We will be issuing a written opinion. Are there any housekeeping issues that we need to take up while we're all gathered here?

MS. LABELLE: No, your Honor.

MS. DALZELL: No, your Honor.

THE COURT: Okay. All right, thank you all and have a good day.

MS. LABELLE: Thank you, your Honor, for your time.

MR. KOROBKIN: Thank you, your Honor.

MS. DALZELL: Thank you, your Honor.

(Hearing concluded at 4:45 p.m.)

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C E R T I F I C A T E

I, David B. Yarbrough, Official Court Reporter, do hereby certify that the foregoing pages comprise a true and accurate transcript of the proceedings taken by me in this matter on Thursday, March 22nd, 2018.

4/13/2018 /s/ David B. Yarbrough

Date

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