UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HENRY HILL, JEMAL TIPTON, DAMION TODD, BOBBY HINES, KEVIN BOYD, BOSIE SMITH, JENNIFER PRUITT, MATTHEW BENTLEY and KEITH MAXEY, Plaintiffs, v. RICK SNYDER, in his Official Capacity as Governor of the State of Michigan, RICHARD McKEON, in his Official Capacity as Interim Director, Michigan Department of Corrections, and BARBARA SAMPSON, in her Official Capacity as Chair, Michigan Parole Board, jointly and severally, Defendants.	HON. JOHN CORBETT O'MEARA Case No. 10-cv-14568

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR ALTERNATIVELY FOR SUMMARY JUDGMENT

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ISSUES PRESENTED

I. By operation of Michigan law, Plaintiffs were all charged, tried, convicted and sentenced to life without parole for crimes they committed when they were under 18 years old. Michigan law excludes Plaintiffs from the jurisdiction of the Michigan Parole Board, and thus excludes them from being considered for release. In *Graham v. Florida*, 130 S. Ct. 2011 (2010), the U.S. Supreme Court held that persons sentenced to life without parole before they were 18 years old have a right to a meaningful opportunity to obtain release based on their demonstrated maturity and rehabilitation. Does the three year statute of limitations under Michigan law for bringing § 1983 claims apply to Plaintiffs' claims to a meaningful opportunity to be considered for release, which are seeking to address on-going and continuing constitutional harms?

II. *Graham v. Florida* changed the legal landscape on life without parole sentences for juveniles. Are Plaintiffs precluded from bringing this challenge to their continued incarceration without a meaningful opportunity for release because they failed to raise this issue in their state court criminal cases and appeals?

III. The *Rooker-Feldman* rule prohibits litigants who lose in state-court from subsequently bringing suit in federal court seeking to challenge the state-court judgment against them. Plaintiffs here do not seek to challenge their state-court convictions or sentences; rather they challenge Defendants' continuing failure to afford them a meaningful opportunity to be considered for release. Does the *Rooker-Feldman* doctrine operate to bar Plaintiffs' challenge to the constitutionality of M.C.L. 791.234 (6), which prevents them from being considered for parole?

IV. *Heck v. Humphrey*, 512 U.S 477 (1994) and its progeny limit the types of claims that can be brought under § 1983 and precludes claims which if successful on the merits, "would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005). Plaintiffs' claims brought under § 1983 all relate to Defendants' current and continuing failure to afford them a meaningful opportunity to be considered for release. They do not seek to challenge their judgments of conviction. Nor do they seek to invalidate their sentences. Are these claims barred under *Heck*?

V. In *Graham v. Florida*, the U.S. Supreme Court held that under the Eighth Amendment, primarily because of their lessened culpability, juvenile offenders could not be sentenced to life imprisonment without being afforded some meaningful opportunity to obtain release based on their demonstrated maturity and rehabilitation. Have Plaintiffs stated a claim that these same protections extend to them?

VI. *Graham v. Florida* established that juveniles must be afforded a meaningful opportunity to be considered for release upon demonstrating their maturity and rehabilitation. Have Plaintiffs stated a claim that they have a due process right to such consideration under the Fourteenth Amendment?

VII. Customary international law prohibits the imposition of life without parole sentences on anyone under the age of 18. This customary international law norm forms part of U.S. federal common law and gives rise to a private cause of action in U.S. courts. § 1983 provides a remedy against any state official who violates any federally protected right. Are Plaintiffs' Claims based on Defendants' violations of the customary international law proscription of life without parole sentences cognizable under § 1983?

INTRODUCTION

In this action, brought under 42 U.S.C. § 1983, Plaintiffs challenge the constitutionality of M.C.L. § 791.234(6) to the extent that it prohibits the Michigan Parole Board from considering the case of any individual who was charged with first degree murder as a juvenile, subsequently convicted and sentenced to life imprisonment. After the United States Supreme Court's decision in *Graham v. Florida*, 130 S. Ct. 2011 (2010), Michigan's failure to afford juveniles sentenced to life with a meaningful opportunity to be considered for release based on their demonstrated maturity and rehabilitation must be considered a violation of the Eighth and Fourteenth Amendments of the United States Constitution and customary international human rights law. It also violates customary international human rights law.

Defendants' motion to dismiss this case is based upon a fundamental misinterpretation of Plaintiffs' claims. Defendants wrongfully contend that Plaintiffs challenge the validity of their convictions or their sentences. This lawsuit does neither. Plaintiffs do not ask that their convictions be vacated or overturned. They do not seek a reduction in their sentences. Instead, Plaintiffs ask that M.C.L. § 791.234(6)(a) be declared unconstitutional and enjoined such that the Michigan Parole Board may consider them for release after a meaningful hearing on whether they meet the relevant criteria. Because Plaintiffs seek relief from an ongoing constitutional violation and because Plaintiffs' claims are properly pled, this Court has jurisdiction over this action, and Defendants' motion should be denied.

STATEMENT OF FACTS

Michigan law considers youth between the ages of 14 and 16 too young and immature to vote, to enter into valid contracts, to serve on juries, to join the armed forces, to smoke tobacco, to marry without parental consent, to leave school or to work full-time. It does not, however, consider them too young or immature to receive the most onerous criminal punishment permitted by law: life imprisonment without the possibility of parole.

Michigan law permits children who are between the ages of 14 and 16 and who have been charged with first degree murder to be tried as adults at the sole discretion of the prosecutor. If convicted as charged, Michigan law mandates that they receive a sentence of life imprisonment. It forbids a court from considering the child's age, cognitive capabilities or competency at sentencing. Although these youth may develop and mature into model citizens while incarcerated, Michigan law prohibits the State's Parole Board from ever considering them for parole. They must remain in prison until they die.

- Plaintiff Henry Hill, for example, has been imprisoned for nearly 30 years. When he was just 16, he was charged, convicted and sentenced to life imprisonment for aiding and abetting a first degree murder. He had been with his cousin in a park shortly before the cousin shot and killed another young man. After his arrest, Henry, a high school student, was evaluated and found to have the academic ability of a third grader, and the mental maturity of a nine-year-old. Today, he works and participates in his bible study group for which he consistently receives excellent reports. He has not had a misconduct citation for over a decade and has a custody level II, the lowest possible for his sentence. He is regarded as a model prisoner.

- Plaintiff Jennifer Pruitt was 16 when she participated in a plan to rob one of her neighbors. Jennifer was a runaway from sexually and physically abusive parents with no prior record. Jennifer's co-defendant stabbed and killed the neighbor. Jennifer reported the incident and her involvement to police the same day, leading to the arrest of her co-defendant. Jennifer was charged, convicted and sentenced as an adult to a life sentence for felony first degree murder. While in adult prison Jennifer was raped by two male corrections officers. Jennifer has served 18 years in adult prison, more than half of her natural life. Jennifer has completed her GED and all recommended rehabilitation programs offered her. Jennifer is assigned to the lowest custody level possible for her offense, and she has been described by prison officials as an "inmate role model and excellent worker, dependable, honest, sincere and reliable."

- Plaintiff Matthew Bentley was 14 years old when he broke into a house, stole a gun, and shot the homeowner when unexpectedly confronted. Mathew came from an abusive home, had been prescribed anti-depressants and shortly before his crime had been placed in a foster home. Matthew was charged, convicted and sentenced as an adult to a life sentence for felony murder. Matthew has served twelve years in adult prison. He earned his GED and a trade certificate in custodial maintenance. He acts as a mentor and a guardian to incoming young prisoners who are targeted by older sexually predatory inmates. He is assigned to the lowest custody level possible for an individual serving this sentence.

- Plaintiff Kevin Boyd was 16 when his mother asked him for keys to his father's home so that she could kill him. Kevin gave her the keys without reporting the threat to the police. The next morning he found his father murdered and called the police. His mother confessed. Kevin was charged, convicted and sentenced as an adult to a life sentence for first degree premeditated murder. Kevin has served 14 years in adult prison. He is assigned to the lowest custody level possible for an individual serving this sentence. Kevin has received his GED, several trade certificates and is considered a model prisoner.

The relief sought by Plaintiffs in this lawsuit is modest. They seek some realistic opportunity to obtain release before the end of their terms based upon their demonstrated maturity and rehabilitation. In denying them such an opportunity Defendants violate the Eighth Amendment's proscription of cruel and inhuman treatment, Plaintiffs' Fourteenth Amendment right to procedural due process and customary international human rights law which prohibits in absolute terms the imposition of life sentences without the possibility of release or parole on anyone under the age of 18 years.

ARGUMENT

Defendants have moved to dismiss the Complaint pursuant to both Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 56. However, because their motion appears to contest only the adequacy of the Complaint, Plaintiffs respond as if it were a motion to dismiss for failure to state cognizable claims.[1]

[1] Because Defendants' motion was filed after their responsive pleading, it should be treated as a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c). *See Lindsay v. Yates*, 498 F.3d 434, 437 n.4 (6th Cir. 2007). "[T]he legal standards for adjudicating Rule 12(b)(6) and Rule 12(c) motions are the same." *Id*. n.5.

Defendants claim that the Complaint fails to state causes of action upon which relief can be granted under the Eighth and Fourteenth Amendments and international law. They argue that Plaintiffs' claims are barred by the three-year statute of limitations that applies to actions brought pursuant to § 1983, *res judicata*, the *Rooker-Feldman* doctrine and the United States Supreme Court's decision in *Heck v. Humphrey*. (Defs.' Brf. 17, 19, 23, 26.) Each argument is without merit. As set forth in further detail below, Plaintiffs' claims are not time barred; this Court is not precluded from adjudicating this matter by *res judicata*, the *Rooker-Feldman* doctrine or *Heck v. Humphrey;* and Plaintiffs have stated causes of action upon which relief may be granted.

I. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.

Defendants' argument that Plaintiffs' claims are time-barred barred must fail for three reasons. First, Plaintiffs seek relief to remedy an ongoing constitutional wrong which results in ongoing injury. As a result, the statute of limitations is tolled. Under the continuing violation doctrine, a statute of limitations is tolled if: "1) the defendants engage in continuing wrongful conduct; 2) injury to the plaintiff accrues continuously; and 3) had the defendants, at any time, ceased their wrongful conduct, further injury would be avoided."[2] *Hensley v. City of Columbus*, 557 F.3d 693, 697 (6th Cir. 2009); *see Ex parte Young*, 209 U.S. 123, 148-51 (1908); *Carten v. Kent State Univ.*, 282 F.3d 391, 395-96 (6th Cir. 2002).

Plaintiffs do not challenge their life sentence imposed pursuant to M.C.L. § 750.316; they challenge Michigan's continuing refusal to provide them with a meaningful opportunity to be considered for release under M.C.L. § 791.234(6)(a). Under Michigan state law, the only entity that could provide Plaintiffs with such an opportunity is the Michigan Parole Board. Yet, as alleged in

[2] While the duration of the statute of limitations for § 1983 actions is governed by state law, federal standards govern the accrual date. *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir. 2004).

Plaintiffs' Complaint, M.C.L. § 791.234(6)(a) specifically precludes the Board from considering Plaintiffs' cases. (*See* Compl. ¶¶ 163-75.) Thus, as long as that statute remains in force, Plaintiffs will continue to be deprived of their constitutional rights. Likewise, enjoining the statute would end Defendants' ongoing wrongful conduct and avoid future injury.

Second, the cases cited by Defendants in support of their argument are not on point. *Kuhnle Bros, Inc. v. County of Geauga*, 103 F.3d 516 (6th Cir. 1997), *McClune v. City of Grand Rapids*, 842 F.2d 903 (6th Cir. 1988), and *Kovacic v. Cuyahoga County Dep't of Children & Family Servs*, 606 F.3d 301 (6th Cir. 2010), are damages actions in which plaintiffs challenged a past, as opposed to continuing, wrong.[3] The only non-damages case, *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007), is restricted to its unique legal and factual context. In *Cooey*, a death-row inmate challenged the manner in which he was to be executed. The Sixth Circuit ruled that his claim was time-barred even though he had yet to be executed. To prevent a flood of lawsuits by death row inmates seeking to delay their execution, the court found that the statute of limitations began to run at the conclusion of the plaintiffs' criminal case. *Id.* at 422.

Third, Plaintiffs' claims were not ripe for consideration until last year, after the Supreme Court decided *Graham v. Florida*, 130 S. Ct. 2011 (2010). In *Graham*, the Court held for the first time that the Eighth Amendment's prohibition against cruel and unusual punishment rendered unconstitutional life without parole sentences for youth convicted of nonhomicide offenses, and ruled that such youth must be afforded a meaningful opportunity to be considered for release because of their lesser culpability, relative immaturity and unique capacity for rehabilitation as

[3] Moreover, in *Kuhnle*, the Sixth Circuit specifically noted that the statute of limitations does not bar challenges to continuing violations of constitutional rights: "A law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within two years of its enactment. '[T]he continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations.'" *Kuhnle*, 103 F.3d at 522.

compared to adult offenders. *Id*. at 2028-29.[4] With this action, Plaintiffs argue that *Graham* should be applied or extended to youth serving life sentences in Michigan for felony murder or homicide.

II. THE DOCTRINE OF *RES JUDICATA* DOES NOT BAR PLAINTIFFS' CLAIMS.

The doctrine of *res judicata* does not preclude Plaintiffs from challenging the constitutionality of M. C. L § 791.234 as it is currently being applied to them. In Michigan, the purpose of *res judicata* is "to ensure the finality of judgments and to prevent repetitive litigation." *Bergeron v. Busch*, 579 N.W.2d 124, 126 (Mich. App. 1998). Plaintiffs' claims, which challenge the inability of the Parole Board to exercise jurisdiction over their cases and provide them with a meaningful opportunity to be considered for release, in no way threaten the finality of their underlying judgments of conviction and sentence, which will remain undisturbed if Plaintiffs prevail. These claims, moreover, are not repetitive because they have never been brought before.

Although Defendants fault Plaintiffs for not having brought these claims on direct appeal in their criminal cases, the claims were not even available to Plaintiffs before the Supreme Court's groundbreaking ruling in *Graham.* As the Supreme Court held in *State Farm Mut. Auto Ins. Co. v. Duel*, 324 U.S. 154 (1945), "res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation." *Id.* at 162. "[P]reclusion . . . may be defeated by showing . . . that there has been a substantial change in the legal climate that suggests a new understanding of the governing legal rules

[4] The United States has acknowledged that *Graham* opened up the possibility of new avenues of redress for juveniles sentenced to life without parole. In its response to a petition filed with the Inter-American Commission on Human Rights on behalf of juveniles serving life without parole, the United States noted "that while the court in *Graham* was not presented with the question of whether life in prison without parole is an unconstitutional sentence for a juvenile offender convicted of a homicide crime, the court has left open this question . . . [and] much of the court's analysis in *Graham* could be found to be applicable to a juvenile convicted of a homicide crime." *See* Resp. of the Gov't of the United States of America to the Inter-American Comm'n on Human Rights Regarding Juveniles Sentenced to Life Without Parole, Petition 161.06, (Sept. 22, 2010).

which may require different application." *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 550 (6th Cir. 2001) (internal quotation marks and citation omitted).

The law in Michigan is no different. The Michigan Supreme Court has held that *res judicata* is not a bar "where a subsequent change in the law altered the legal principles upon which the case was to be resolved." *Pike v. City of Wyoming*, 433 N.W.2d 768, 771 (Mich. 1988). *Res judicata* "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities." *Id.* at 772 (quoting *Internal Revenue Comm'r v. Sunnen*, 333 U.S. 591, 599 (1948)). *See also Socialist Workers Party v. Sec'y of State*, 317 N.W.2d 1, 5 (Mich. 1982) (recognizing exception to *res judicata* "in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws"); *Young v. Edwards*, 207 N.W.2d 126, 127-28 (Mich. 1973).

Under the Eighth Amendment, new claims arise over time, not simply because new decisions are published, but also because the Amendment itself requires courts to examine "the evolving standards of decency that mark the progress of a maturing society." *Graham*, 130 S. Ct. at 2021 (internal quotation marks omitted). "Faced with changing law, courts hearing questions of constitutional right cannot be limited by res judicata." *Parnell v. Rapides Parish Sch. Bd.*, 563 F.2d 180, 185 (5th Cir. 1977). Here, in light of profound developments in Eighth Amendment law that bear directly on the merits of Plaintiffs' claims of current and continuing violations of their constitutional rights, *res judicata* does not bar this suit.

As stated previously, Plaintiffs are not challenging their underlying convictions or sentences, the subject of their criminal appeals in state court. Rather, Plaintiffs are seeking a declaration that the statute denying the Parole Board jurisdiction over persons sentenced to life for first-degree murder is unconstitutional as currently applied to them. Under Defendants' *res judicata* theory, the State could continue to impose this unconstitutional punishment on Plaintiffs even though the law has changed since they pursued their criminal appeals and even though the relief sought in this case is different from that pursued in their criminal appeals. "While the doctrine of res judicata is meant to foster judicial efficiency and protect defendants from the oppression of repeated litigation, it should not be applied inflexibly to deny justice." *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 874 (3d Cir. 1972).

Here, Plaintiffs raise different claims, seek different relief, and are unquestionably before this Court after a significant change in the relevant legal landscape. "Adoption of [Defendants'] rule of preclusion would threaten important interests in preserving federal courts as an available forum for the vindication of constitutional rights." *Haring v. Prosise*, 462 U.S. 306, 322 (1983). The Court should therefore reject Defendants' *res judicata* defense.

III. *ROOKER-FELDMAN* DOCTRINE DOES NOT DIVEST THIS COURT OF JURISDICTION OVER PLAINTIFFS' CLAIMS.

Defendants' argument that the *Rooker-Feldman* doctrine presents a jurisdictional bar to Plaintiffs' lawsuit also mischaracterizes Plaintiffs' claims and stretches the doctrine beyond its narrow confines as defined by the Supreme Court, most recently in *Skinner v. Switzer*, 131 S. Ct. 1289 (2011) (holding that *Rooker-Feldman* did not bar petitioner's § 1983 action challenging the constitutionality of the statute that was used by state courts to deny him access to post-conviction DNA testing).

The *Rooker-Feldman* rule prohibits a party in a state court proceeding from appealing an unfavorable decision to a lower federal court. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005). The Supreme Court has construed the doctrine very narrowly, repeatedly insisting that it be "confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments." *Id.* at 284.[5]

In rejecting the application of the *Rooker-Feldman* doctrine in *Skinner*, the Supreme Court emphasized that the petitioner in that case was not challenging the Texas Criminal Court of Appeals' *judgment* denying him access to DNA testing, but instead the *statute* upon which the Court relied in issuing its judgment. *Skinner*, 131 S. Ct. at 1298. Like the petitioner in *Skinner*, the injuries alleged by Plaintiffs here are not the state court judgments upholding their convictions and sentences for murder in the first degree under M.C.L. § 750.316, but rather the injury inflicted upon them by the state statute which strips the Michigan Parole Board of jurisdiction over prisoners serving a life sentence for offenses under M.C.L. § 750.316, even when those offenses were committed when the prisoners were under the age of 18. *See* M.C.L. §791.234(6)(a). Thus the injury Plaintiffs allege is not their convictions and sentences, but rather Defendants' continuing failure to afford them a meaningful opportunity to be considered for release. As the Supreme Court held in *Skinner*, "a state-court decision is not reviewable by lower federal courts, but a statute or rule governing the decision may be challenged in a federal action." *Id*. This is the precise nature of Plaintiffs' challenge: that M.C.L. § 791.234(6)(a) as applied to them is unconstitutional.[6] As such, Plaintiffs' Complaint "encounters no *Rooker-Feldman* shoal." *Id*. at 1291.

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[5] Indeed, the Court has only applied *Rooker-Feldman* twice in its history – in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). *Skinner*, 131 S. Ct. at 1297; *Exxon Mobil*, 544 U.S. at 287.

[6] Even before *Skinner*, the Sixth Circuit's *Rooker-Feldman* jurisprudence would not have barred Plaintiffs' claims. *See Kovacic v. Cuyahoga County Dep't of Children & Family Servs.*, 606 F.3d

IV. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE SUPREME COURT'S DECISION IN *HECK v. HUMPHREY*.

Defendants argue that Plaintiffs cannot bring their claims under 42 U.S.C. § 1983 because of *Heck v. Humphrey*, 512 U.S. 477 (1994), which excludes from § 1983 those claims that lie at the "core" of habeas corpus. However, the "*Heck* exception," as both the Supreme Court and Sixth Circuit have held repeatedly, only bars claims that, if successful, "would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005); *see also Thomas v. Eby*, 481 F.3d 434, 438-40 (6th Cir. 2004). By contrast, where a plaintiff's success on a claim would not *necessarily* entail the invalidity of the conviction or speedier release, the § 1983 suit may proceed. *Dotson*, 544 U.S. at 82; *Heck*, 512 U.S. at 482.

In *Dotson*, the Supreme Court held that a challenge to parole procedures could be brought as a § 1983 action. Because success on the claim "[would not] mean immediate release from confinement or a shorter stay in prison," but instead would entail "at most a new eligibility review, which at most will speed *consideration* of a new parole application," the *Heck* exception to § 1983 did not apply. *Id.* at 82 (emphasis in original). "*Dotson* establishes that when the relief sought in a § 1983 claim has only a *potential* effect on the amount of time a prisoner serves, the habeas bar does not apply." *Thomas v. Eby*, 481 F.3d 434, 439 (6th Cir. 2007) (emphasis in original).

Most recently, in *Skinner v. Switzer*, 131 S. Ct. 1289 (2011), the Supreme Court relied heavily on *Dotson* in allowing a prisoner's § 1983 claim, leaving no doubt that when the relief sought has only a *potential* effect on the fact or duration of confinement, the *Heck* bar does not apply. *Id*. at 1298-99 & n.13. In *Skinner*, where the Court held that a convicted state prisoner

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301, 303 (6th Cir. 2010); *Coles v. Granville*, 448 F.3d 853, 857 (6th Cir. 2006) ("*Rooker-Feldman* is a doctrine with only limited application."); *Pittman v. Cuyahoga County Dep't of Children & Family Servs*., 241 F. App'x 285 (6th Cir. 2007); *McCormick v. Braverman*, 451 F.3d 382, 393 (6th Cir. 2006); *Todd v. Weltman, Weinberg & Reis Co.*, 434 F.3d 432, 436-37 (6th Cir. 2006).

seeking DNA testing of crime-scene evidence was not confined to a habeas petition but rather could pursue such testing under § 1983, the Court reasoned that granting the relief sought (DNA testing) would not "necessarily imply" the invalidity of the plaintiff's conviction: test results may prove to be exculpatory, inconclusive, or may further incriminate. *Id.* at 1298. *Skinner* underscores the significance of *Dotson's* teaching: when applying *Heck*'s "necessarily implies" test, courts should focus on the actual immediate consequences of a successful suit.

Here, the relief Plaintiffs seek is limited: eligibility for a hearing that constitutes a meaningful opportunity to be considered for *possible* release. Plaintiffs challenge neither their homicide convictions nor their life sentences, but rather the constitutionality of M.C.L. § 791.234(6)(a) as applied to them and Michigan's refusal to afford them a meaningful opportunity to be considered for release. As stated previously, the injuries alleged by Plaintiffs here are not the state court judgments upholding their convictions and sentences. Instead, their injuries flow from the state statute that strips the Michigan Parole Board of jurisdiction over prisoners serving a life sentence for first-degree murder. Success on these claims would not demonstrate the invalidity of their confinement or its duration and would not necessarily entail speedier release.

Defendants argue that granting the relief sought in this case will alter the nature of the punishment ordered for each Plaintiff by the state trial courts. (Defs.' Br. 12.) However, again, Plaintiffs do not challenge their sentences, but the application of a separate statute, M.C.L. § 791.234(6)(a), that denies them parole eligibility after sentencing. In fact, each Plaintiff is sentenced to "life," M.C.L. § 750.316, the same sentence given to prisoners over whom the Parole Board does have jurisdiction, *see, e.g.*, M.C.L. § 750.317 (sentence for second-degree murder); M.C.L. § 791.234(7) (prisoners with life sentences eligible for parole). Moreover, the *Heck* doctrine does not bar § 1983 challenges *related* to punishment, so long as success in the challenge would not

necessarily "terminat[e] custody, accelerat[e] the future date of release from custody, nor reduc[e] the level of custody." *Skinner*, 131 S. Ct. at 1299, quoting *Dotson*, 544 U.S. at 86 (Scalia, J., concurring) (alteration in original).

Defendants further argue that Plaintiffs' third cause of action, their due process claim, is barred by *Heck*. Defendants characterize the claim as an attack on the underlying conviction and sentencing. (Defs.' Br. 11.) In reality, however, Plaintiffs challenge the lack of procedural due process post-*Graham* that results in a sentence of life in prison without a meaningful opportunity to obtain release. Again, if Plaintiffs prevail the result will not necessarily mandate their release from confinement nor guarantee an earlier release.

Plaintiffs' suit thus sits comfortably outside of *Heck*'s ambit under both Supreme Court and Sixth Circuit law, and all of Plaintiffs' claims are cognizable under § 1983.

V. PLAINTIFFS' COMPLAINT SETS FORTH A VALID CAUSE OF ACTION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AND THUS DEFENDANTS HAVE FAILED TO MEET THEIR BURDEN FOR DISMISSAL UNDER EITHER FED. R. CIV. P. RULE 12 OR FED. R. CIV. P. RULE 56.

A. Punishment of Life Without Possibility of Parole for Crimes Committed as a Juvenile Constitutes Cruel and Unusual Punishment in Light of *Graham v. Florida.*

In *Graham v. Florida*, the Supreme Court struck down life without parole sentences for juveniles who commit nonhomicide offenses. *Graham v. Florida*, 130 S. Ct. 2011 (2010). In so doing, the Court applied to a term-of-years sentence the categorical analysis it had traditionally reserved for its death-penalty jurisprudence – i.e., assessing the constitutionality of a particular type of sentence as it applies to an entire class of offenders. *See Roper v. Simmons*, 543 U.S. 551 (2005) (holding that execution of individuals who were under 18 years of age at the time of their capital

crimes is prohibited by Eighth and Fourteenth Amendments).[7] That decision was based on the "fundamental differences" between juveniles and adults as demonstrated by "developments in psychology and brain science." *Graham*, 130 S. Ct. at 2026. Hence, "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Id.* As in *Roper*, the Court emphasized that as compared to adult offenders, juveniles lack maturity, have an underdeveloped sense of responsibility, are vulnerable to negative influences, susceptible to peer pressure, and have characters that are "not as well formed." *Id*. (citing *Roper*, 543 U.S. at 569-70). Because of these inherent differences, the Court observed, juveniles have lessened culpability, and are thus less deserving of the most severe punishments. *Id*.[8]

Mirroring *Roper*, *Graham*'s analysis turns not on the category of *crimes* committed but on the category of *offender*. *Graham*, 130 S. Ct. at 2023-24 ("[T]his case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes."). The

[7] By applying a categorical rule to a term-of-years sentence, the *Graham* Court rejected the narrow proportionality principle that it had applied to life without parole sentences for adults and instead embraced the categorical analysis it had utilized in *Roper* to evaluate punishment of juveniles in the context of the death penalty. *Graham*, 130 S. Ct. at 2031-33; *see also Id*. at 2037 (Roberts, C.J., concurring in the judgment).

[8] Giving short shrift to *Roper* and *Graham* and attempting to sidestep *Graham*'s categorical approach to juvenile offenders, Defendants rely almost entirely on *Harmelin v. Michigan*, 501 U.S. 957 (1991), which held that mandatory life without parole sentences without any consideration of mitigating factors for possession of 650 grams of cocaine, while perhaps cruel, were not unconstitutional. However, the petitioner in *Harmelin* was an adult, and thus petitioner's age was not an issue in the case. Here, of course, Plaintiffs are not challenging mandatory life sentences without parole for *adult* offenders, but rather for juvenile offenders, and thus *Harmelin* is inapposite. *Graham*, by contrast, confronts squarely the constitutionality of life without parole sentences for juveniles who commit nonhomicide offenses, *Graham*, 130 S. Ct. at 2040. It is *Graham* and its emphasis on the category of offenders, therefore, not *Harmelin* and its focus on the punishment for adult offenders that controls here. By relying on *Harmelin*, the State ignores the basic starting point in this case, as dictated by *Graham*, that "[a]n offender's age is relevant to the Eighth Amendment." *Graham v. Florida*, 130 S. Ct. 2011, 2031 (2010).

focus on youthfulness is most acute when a state seeks to impose a "sentence [that] alters the offender's life by a forfeiture that is irrevocable." *Id*. at 2027. Though no sentence is harsher than death, both capital punishment and life without parole are permanent deprivations of liberty that guarantee death in prison and, as the Court notes, are linked by their irrevocable alterations to offenders' lives and liberties. Applying the logic of *Roper*'s and *Graham*'s categorical approach to juvenile offenders, it is clear that the Eighth Amendment no longer tolerates life without parole sentences for juveniles who commit homicide offenses without affording them a meaningful opportunity to be considered for release.[9]

To determine whether a sentencing practice is categorically unconstitutional under the Eighth Amendment, *Graham* prescribes a two-step analysis. First, the Court must determine whether there is a national consensus against the sentencing practice at issue, measured by objective indicia of society's standards as expressed in both legislative enactments and *actual* sentencing practices. *See*

[9] Defendants' only other argument to justify the constitutionality of juvenile life without parole sentences for homicide crimes stems from an incorrect interpretation of *Roper*. Defendants argue that *Roper* – by implication – established the constitutionality of sentencing juveniles convicted of murder to life without parole. *Roper* does no such thing. The question before the Court in *Roper* was whether the death penalty – not life without parole – was cruel and unusual as applied to juveniles, a question the Court answered in the affirmative. *Roper* certainly did not explicitly propound a rule regarding life without parole sentences for juveniles who had committed homicide, nor should it be presumed that the Court would answer such a significant Eighth Amendment question implicitly. In fact, in *Roper* the Court discussed life without parole sentences only when rejecting deterrence as a legitimate penological goal to justify executing juvenile offenders. *Roper*, 543 U.S. 572 ("life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person"). Moreover, while *Roper* indeed recognized that individuals who commit homicides have a higher culpability than perpetrators of other crimes and are thus deserving of a more severe punishment, *Roper* also recognized, in harmony with *Graham*, that since juvenile offenders, as compared to adults, have *lesser* culpability, they should receive *lesser* punishments. Further, in the *Graham* Court's discussion on the constitutionality of applying life without parole sentences to juveniles for nonhomicide crimes, the court cited approvingly *Naovarath v. State*, 779 P.2d 944 (Nev. 1989), a Nevada case striking down a life without parole sentence for a juvenile homicide offender. *See Graham*, 130 S. Ct. at 2027. To interpret *Roper*'s prohibition against executing juvenile offenders as an endorsement of sentencing juveniles to death in prison is not only unsupported by its plain text but also contravenes both the logic and spirit of the Court's reasoning.

Graham, 130 S. Ct. at 2022-23; *see also Kennedy v. Louisiana*, 554 U.S. 407, 433-34 (2008). The Court must then exercise its own independent judgment to determine whether the punishment in question violates the Constitution, guided by controlling precedent and the Court's understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose. *Graham*, 130 S. Ct. at 2022 (citations and quotation marks omitted).

1. Plaintiffs Have Alleged Facts Substantiating a National Consensus Against Life Without Parole Sentences for Juveniles Who Commit Homicide Offenses.

Michigan is one of only two States where juveniles as young as 14 are given the harshest punishment possible for adult offenders in the State while stripping courts of any discretion to impose a less severe sentence based on considerations of youth, diminished culpability, and the nature of the offense. (Compl. ¶¶ 149, 151-54.) As the Supreme Court made clear in *Graham*, "criminal procedure laws that fail to take defendant's youthfulness into account at all would be flawed." *Graham*, 130 S. Ct. at 2031. Michigan's laws present a stark example of just such a constitutionally bereft juvenile sentencing scheme.

Furthermore, taking into account actual sentencing practices, as *Graham* instructs, only a small percentage of juveniles convicted of murder throughout the country are sentenced to life without parole. According to data collected by Human Rights Watch and the Federal Bureau of Investigations, from 1980 through 2000, while there were a total of 35,812 known murder (including felony murder) offenders who were below the age of 18 at the time of the offence in those years, only 1,439, or 4% received life without parole sentences. *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, Human Rights Watch, 2005, at 32 (attached as Exhibit A). Set against this backdrop, as Plaintiffs have alleged, Michigan is an outlier in sentencing juveniles to life in prison without parole. Compl. ¶ 149-155. According to a report that examined sentences between 1990 and 2001, Michigan led the nation in number of juveniles sentenced to life

without parole, both in absolute numbers and relative to its youth population. *Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons*, ACLU of Michigan, 2004, at 8 (attached as Exhibit B). Indeed, as a result of giving youthful offenders such as Plaintiffs mandatory sentences without any consideration of factors that bear upon their actual culpability, Michigan accounts for over 15% of the world's youth serving life without parole. Compl. ¶ 150. In other words, while Plaintiffs' sentences are highly unusual in most states and throughout the world, they are comparatively commonplace in Michigan.

2. The Court's Independent Judgment Should Confirm the Unconstitutionality of Life Without Parole Sentences for Juveniles Who Commit Homicide Offenses.

Under the second step of *Graham*'s analysis, this Court must also exercise its own independent judgment on whether the challenged sentencing practice is constitutional. *Graham*, 130 S. Ct. 2011, 2022 (2010). In doing so, the Court must take into consideration three factors: (1) "the culpability of the offenders"; (2) the "severity of the punishment"; and (3) "whether the challenged sentencing practice serves legitimate penological goals." *Id.*

Regarding culpability, *Graham* establishes that because of juveniles' immaturity, undeveloped sense of responsibility, unformed character, and vulnerability to negative influences, as a class they possess "lessened culpability" and thus are "less deserving of the most severe punishments." *Id*. at 2026 (citing *Roper*, 543 U.S. at 551, 569-70).

As to the harshness of life without parole sentences, *Graham* observed that they are the "second most severe penalty permitted by law" and "share some characteristics with death sentences," *Id*. at 2027 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (internal quotation marks omitted)), namely that they "deprive[] the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency," a "remote possibility." *Id*. *Graham* also noted that the severity of

juvenile life without parole sentences is magnified because a juvenile "will on average serve more years and a greater percentage of his life in prison than an adult." *Id*. at 2028.[10]

Turning to the third factor, *Graham*, guided by *Roper*, assesses carefully the penological justifications of retribution, deterrence, incapacitation, and rehabilitation that typically justify the sentencing practice at issue, and concludes that none of these penological justifications were sufficient to support the imposition of a life without parole sentence on a juvenile convicted of nonhomicide offenses. *Id*. at 2028-30. *Graham* found that because of this, such a sentence was disproportionate to the offense. *Id*. Significantly, this finding was largely untethered to the nature of the crime committed and instead was premised almost entirely on its analysis of the severity of the life without parole sentences as applied to youthful offenders.

Beginning with retribution, the Court held that because retribution centers around the idea that a "'criminal sentence must be directly related to the personal culpability of the criminal […] whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult.'" *Id*. at 2028 (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)); *see also Roper v. Simmons*, 543 U.S. 551, 571 (2005) ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished . . . ."). The Court then went on to find that while retribution is a legitimate reason to punish, retribution cannot support a life without parole sentence for a juvenile convicted of a nonhomicide offense.

[10] In Plaintiffs' case, the relative severity of the punishment is even more profound. In 1846, Michigan became the first English-speaking jurisdiction to abolish the death penalty. It remains unconstitutional to this day. Mich. Const. art. IV, § 46. Consequently, despite their "diminished moral capacity," *Graham v. Florida*, 130 S. Ct. at 2027, Plaintiffs received the *harshest* penalty permitted by law.

Regarding deterrence, the Court recognized that "the same characteristics that render juveniles less culpable than adults suggest that juveniles will be less susceptible to deterrence." *Graham*, 130 S. Ct. at 2028. The Court concluded that in light of the "diminished moral responsibility … any limited deterrent effect provided by life without parole is not enough to justify the sentence." *Id*.

Next, *Graham* found that incapacitation was an inappropriate penological justification for juvenile offenders because a finding that a juvenile could not be rehabilitated would be in its nature "inconsistent with youth." *Id*. at 2029 (quoting *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968)) (internal quotation marks omitted). As the Court stated:

> While incapacitation may be a legitimate penological goal sufficient to justify life without parole in other contexts [,] . . . [t]o justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentence to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable.

Graham, 130 S. Ct. at 2029.

Finally, the Court determined that there can be no rehabilitative quality to a sentence of life without parole, as parole by its very nature is inextricably tied to a belief in rehabilitation. To forever withhold parole from juvenile offenders is to disbelieve at the outset that a child has any prospect of self-improvement worthy of release and to withhold from that child recognition and reward for having reformed. A life without parole sentence "forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society." *Id*. at 2030. For a juvenile nonhomicide offender, such an unforgiving judgment is "not appropriate in light of [their] capacity for change and limited moral culpability." *Id*.

The logic that drove the Court's dismantling of the four penological pillars upon which the state sought to justify life without parole sentences for juveniles who commit nonhomicide offenses in *Graham* applies with equal force to life without parole sentences for juveniles who commit homicides. Although the offense at issue is more serious, the category of offender, the sentence, and the justifications for the sentence remain the same. Therefore, as in *Graham*, the penological justifications for life without parole sentences for juveniles who commit homicides cannot survive Eighth Amendment scrutiny.

3. International Law and Practice Confirms That Juvenile Life Without Parole Is Unconstitutional.

As in *Graham*, this Court should look to international law and practice to confirm its conclusion that the challenged sentencing practice is unconstitutional. *See Graham*, 130 S. Ct. at 2033-34. The United States is the only country in the world that incarcerates juvenile offenders for their entire lives. *Id*. Moreover, international law and practice's condemnation of juvenile life without parole sentences does not differentiate between nonhomicide and homicide offenses; in both instances the practice is absolutely prohibited. *See, e.g.*, United Nations Convention on the Rights of the Child art. 37(a), Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) ("CRC") (prohibiting the imposition of "life imprisonment without possibility of release … for offenses committed by persons below 18 years of age."); *see also* Point V.C., *infra*. Given that "the global consensus against the sentencing practice in question" is relevant to the constitutional analysis, *Graham*, 130 S. Ct. at 2034, this Court should interpret the Eighth Amendment as it applies to Michigan's sentencing scheme in the light of international law and its universal condemnation of and prohibition against juvenile life without parole sentences for homicide offenses.

4. Conclusion

In sum, *Roper* and *Graham* are unequivocal in their recognition that juvenile offenders are less culpable for their actions than adults and that the sentences they suffer should reflect this critical difference. *Graham* stands for the proposition that children change and that laws that irrevocably deny juvenile offenders' opportunity to repair and redeem themselves are inconsistent with the Eighth Amendment's protection from cruel and unusual punishment. Under *Roper* and *Graham*, there is no logical basis to limit the Eighth Amendment's proscription of juvenile life without parole sentences to nonhomicide offenses and thus withhold the same protections to juveniles who commit homicide. The harshest punishment in Michigan for both adult and juvenile offenders is life without the possibility of parole. Under the current scheme, Michigan is foreclosing "'whatever the future might hold in store for [Plaintiffs'] mind and spirit … for the rest of [their] days.'" *Graham*, 130 S. Ct. at 2027. Eternal foreclosure of this magnitude as applied to juvenile offenders is unconstitutional. In light of the lesser culpability of juveniles, and given that a greater weight must be placed on the youth of the offender than on the type of crime committed, *Graham* mandates a less severe punishment for juvenile offenders in Michigan. This, at the very least, would entail giving all juvenile offenders a reasonable opportunity to be considered for release based on their demonstrated maturity and rehabilitation.

Accordingly, Plaintiffs have set forth a valid cause of action and are entitled to present their proofs to support their Eighth Amendment claims.

B. Post-*Graham*, Juvenile Defendants Have a Procedural Due Process Right Under the Fourteenth Amendment to a Meaningful Opportunity to Obtain Release Based Upon Their Demonstrated Maturity and Rehabilitation.

The Supreme Court ruled in *Graham* that "the State must … give defendants like Graham some *meaningful* opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 130 S. Ct. at 2030. *Graham* thus stands for the proposition that Defendants cannot deprive

Plaintiffs, as prisoners serving sentences for crimes committed when they were children, of their liberty for the rest of their natural lives without periodically giving them a meaningful right to demonstrate their maturity and rehabilitation and thus their suitability for release. Because of the requirement that this opportunity for release must not only exist, but be "meaningful," *Graham*, 130 S. Ct. 2030, the state is required to adopt a procedurally fair system for determining periodically whether each individual juvenile is eligible for release. *Cf. Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (due process requires opportunity to be heard "at a meaningful time and in a meaningful manner"); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) (due process requires more than a "hollow formality").

The inequity of Plaintiffs' current predicament is exacerbated by the fact that in Michigan, courts are precluded from considering specific factors – such as a defendant's youth, immaturity, reduced mental capacity, reduced role in the offense, and potential for rehabilitation – that the *Graham* Court concluded apply categorically to all juvenile offenders under 18, *Graham*, 130 S. Ct. at 2026, and indeed which the Court found conclusive in abolishing the penalty of life without parole for nonhomicide offenders. *Id.* at 2034. Under M.C.L. § 764.1(f)(1), all juveniles between the ages of 14 and 18 are automatically charged and tried as adults for homicide offenses. Under M.C.L. § 769.1(1)(g) and (h), the age of the individual cannot be considered during the charging, trial or sentencing phase. The punishment for first degree murder, whether it be premeditated, felony murder or aiding and abetting a murder, is mandatory imprisonment for life. M.C.L. § 750.316(1). And once that sentence is imposed, the child is never given the opportunity to demonstrate their maturity and rehabilitation and consequent eligibility for release. M.C.L. § 791.234(6)(a). As the Court held in *Graham*, "criminal procedure laws that fail to take defendants' youthfulness into account at all

would be flawed." *Graham*, 130 S. Ct. at 2031. No system is more flawed in this respect than Michigan's.[11]

By denying Plaintiffs periodic meaningful opportunities to be heard regarding their maturity and rehabilitation – indeed, by failing even to have a mechanism in place by which such an opportunity can be realized – Defendants are depriving Plaintiffs of their post-*Graham* procedural due process rights.

The relief sought by Plaintiffs here is neither foreign to Michigan law nor difficult to provide. Michigan law already vests jurisdiction in its Parole Board to consider applications for parole from prisoners serving a life sentence for second-degree murder and various other offenses. M.C.L. § 791.234(7). Thus, this Court need only declare that the statute stripping the Parole Board of jurisdiction over Plaintiffs is unconstitutional as applied to Plaintiffs because they were juveniles when they committed their offenses.

C. Plaintiffs' Claims for Violations of Customary International Law are Cognizable Under 42 U.S.C. § 1983.

Defendants' arguments are based upon a fundamental misunderstanding of the relevant sources of international law and the place of customary international law in the U.S. legal system generally and in the context of § 1983 specifically. Contrary to Defendants' assertions, Plaintiffs base their claims in Count IV on Defendants' violations of customary international law and specifically the *jus cogens* prohibition of life without the possibility of parole for juveniles (JLWOP). Customary international law has long been recognized as forming part of U.S. law, and

[11] Plaintiffs are not, however, directly challenging these procedurally flawed components of Michigan's criminal justice system in this lawsuit.

more specifically, federal common law, binding on the U.S. and the fifty States.[12] Once a norm of customary international law is established, that rule applies to all nations, including those that have not formally ratified it.[13]

Evidence that the prohibition of JLWOP forms part of customary international law includes: widely ratified U.N. treaties;[14] other international instruments;[15] regional standards and prohibitions;[16] and overwhelming state practices.[17] The United States is now the only nation in the world that sentences juveniles to prison for life without parole. Indeed, the prohibition of JLWOP is

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[12] *Sosa v. Alvarez-Machain*, 541 U.S. 692, 729 (2004); *The Paquete Habana*, 175 U.S. 677, 686 (1900); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793).

[13] *U.K. v. Norway*, Case No. ICJ 116, Judgment ¶ 138-39 (1951). *See generally*, Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987).

[14]CRC, art. 37(a), Nov. 20, 1989, U.N. Doc. A/44/49; International Covenant on Civil and Political Rights, art. 7, 10, 14 & 24, Dec. 16, 1966, S. Treaty Doc. No 95-20 1992, 99 U.N.T.S. 171; Comm. Against Torture Conclusions and Recommendations of the Committee Against Torture: United States of America, July 25, 2006, U.N. Doc. CAT/USA/CO/2; Committee on the Elimination of Racial Discrimination, Concluding Observations of the United States, Feb. 6, 2008, U.N. Doc. CERD/C/USA/CO/6 at para 21; U.N. Human Rights Comm., Comments on the United States of America, 2006, U.N. Doc. CCPR/C/SR 2395 at para 34.

[15] G.A. Res. 61/146, 31 (a). U.N. Doc. A/RES/61/146 (Dec. 19, 2006). The only country to vote against this resolution was the United States; "Beijing Rules" G.A. Res. 45/112, ¶ 46, U.N. DOC. A/40/53 (Nov. 29, 1985); "The Riyadh Guidelines" G.A. Res. 45/112, ¶ 46, U.N. Doc. A/RES/45/112 (Dec. 14, 1990); "Rules for the Protection of Juveniles Deprived of their liberty" G.A. Res. 45/113, U.N. Doc. A/RES/45/113 (Dec. 14, 1990).

[16] *Hussain v. United Kingdom*, 22 Eur.Ct.H.R. (1996); Organization of American States, American Declaration on the Rights and Duties of Man, 1948, Res. XXX, Art. VII (establishing right of all children… to special protection, care, and aid); Organization of American States, American Convention on Human Rights, Jul. 18, 1978, O.A.S.T.S. No 36, 1144 U.N.T.S. 123 (every minor child has the right to measures of protection required by his condition as a minor); *Michael Domingues v. United States*, Merits, Obligation of States to provide enhanced protection to children, Judgment, Inter-Am. Ct. H.R. No.62/02, doc. 5 rev. 1, at 913.

[17] There are at least 135 countries that have expressly rejected the sentence via domestic legal commitments and 185 countries have done so in the U.N. General Assembly. *See* Connie De La Vega, Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983, 987 (2008) and G.A. Res. 61/146, 31 (a). U.N. Doc. A/RES/61/146 (Dec. 19, 2006). *See also*, *Graham v. Florida*, 130 S. Ct. at 2033 (noting in relation to JLWOP for nonhomicide offenses that "the United States adheres to a sentencing practice rejected the world over.")

so widely recognized and the practice so universally condemned that it has risen to the level of a *jus cogens* norm of customary international law.[18]

Perhaps the strongest indication that the prohibition against JLWOP sentences has attained the status of a norm of customary international human rights law is the U.N. Convention on the Rights of the Child, a treaty ratified by every country in the world except the United States and Somalia. Article 37(a) of this treaty explicitly forbids the sentencing of child offenders to life in prison without the possibility of release.[19] The prohibition is also recognized as an obligation of the International Covenant on Civil and Political Rights, a treaty that the United States has signed and ratified.[20] In 2006, the Committee on Human Rights, the oversight authority for the treaty, found that the United States violates article 24 (1) of the treaty through its practice of sentencing child offenders to life imprisonment.[21] In the same year, the U.N. Committee Against Torture, the body tasked with monitoring member state compliance with the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment,[22] during its review of the United States compliance with the

[18] *See* De la Vega and Leighton, *Id*; Brief of Amicus Curiae Amnesty International, et Al., *Graham v. Florida*, No. 08-7412 (130 S. Ct. 2011, July 23, 2009) & *Sullivan v. Florida*, No. 08-7621 (130 S. Ct. 2059, July 23, 2009). *Jus cogens* norms override all other sources of international law, including inconsistent treaty provisions and are "accepted by the international community of States as a whole as a norm from which no derogation is permitted...." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N.Doc. A/Conf. 39/27, 8 I.L.M. 679. *See also, Committee of United States Citizens Living in Nicaragua, et al. v. Reagan*, 859 F.2d 929, 940 (D.C. Cir 1989).
[19] United Nations Convention on the Rights of the Child, art. 37(a), Nov. 20, 1989, 1577 U.N.T.S. 3.
[20] International Covenant on Civil and Political Rights, art. 7, 10, 14 & 24, Dec. 16, 1966, S. Treaty Doc. No 95-20 1992, 99 U.N.T.S. 171.
[21] *See*, U.N. Human Rights Comm., Comments on the United States of America, 2006, U.N. Doc. CCPR/C/SR 2395 at para 34.
[22] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. The United States has signed and ratified this treaty.

treaty found that the practice "could constitute cruel, inhuman or degrading treatment or punishment," in violation of the treaty.[23]

Significantly, Plaintiffs do not, as Defendants incorrectly contend, rely on any international legal agreement to substantiate their claims. Defs' Br. at 23-24. Rather, Plaintiffs reference treaties and other international instruments as evidence of a norm of customary international law binding on the United States prohibiting JLWOP sentences.[24]

In numerous cases, most recently *Sosa v. Alvarez-Machain*, the Supreme Court has affirmed that customary international law is part of U.S. federal common law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."). Moreover, courts can determine whether violations of certain well-defined norms of customary international law give rise to a private cause of action under common law. *Id.* at 725 (noting that federal courts have a limited power to "adapt[] the law of nations to private rights" by recognizing "a narrow class of international norms" to be judicially enforceable through our residual common law discretion to create causes of action. *Id*. at 728-29.)

42 U.S.C. § 1983 provides remedies against state officials' violations of federally protected rights secured by "the Constitution and laws" of the United States. The Supreme Court, applying "the plain language of § 1983 and our consistent treatment of that provision," has determined that the word "laws" means *all* laws.[25] The breadth with which U.S. courts have approached the

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[23] *See*, Comm. Against Torture Conclusions and Recommendations of the Committee Against Torture: United States of America, July 25, 2006, U.N. Doc. CAT/USA/CO/2 at para. 35.

[24] *See Flores v. S. Peru Copper Corp*., 414 F.3d 233, 256-257 (2d Cir. 2003) (noting that "[a]ll treaties that have been ratified by at least two States provide *some* evidence of the custom and practice of nations."); *see also, Taveras v. Taveraz*, 477 F. 3d 767, 777 (6th Cir. 2007) (looking to treaties and other international instruments to ascertain "[w]hether cross-border 'parental child abduction' by an individual with full guardianship (or custody) violates the law of nations …").

[25] *Maine v. Thiboutot*, 448 U.S. 1, 6 (1980). In *Jogi v. Voges (Jogi II)*, 480 F.3d 822 (7th Cir. 2007) the Seventh Circuit applied the broad reading of "laws" in *Thiboutot* to find that the violation of

universe of federally protected rights encompassed by § 1983 suggests that Plaintiffs' claims based on violations of the customary international law prohibition of JLWOP are properly included within the scope of the "and laws" prong of § 1983.[26]

To proceed with their customary international law claim under § 1983, Plaintiffs must make two showings: first, that a personal right to enforcement of the prohibition of JLWOP can be inferred; and second, that they are entitled to a private remedy for the violation. *Cf. Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (noting in relation to § 1983 actions based on alleged violations of a federal statute, a plaintiff must demonstrate "that a statute confers an individual right" and where this is the case, "the right is presumptively enforceable by § 1983." *Id.* at 284); *see also*, *Jogi II*, 480 F.3d at 828-36 (applying the *Gonzaga* two-part test to treaty violations). The prohibition of JLWOP clearly meets the requirement of the first part of the *Gonzaga* test, as the norm contains explicit rights-creating language and "unambiguously" confers rights on Plaintiffs not to be subjected to life without parole sentences. The second part of the *Gonzaga* test is also easily met. The prohibition of JLWOP confers rights on Plaintiffs, Defendants have violated these rights, and § 1983 thus provides them with a remedy to vindicate their federally protected rights. *Gonzaga*, 536 U.S. at 284; *Jogi II*, 480 F.3d at 835. Accordingly, Plaintiffs' customary international law claim not to be subjected to JLWOP may be properly brought under § 1983.[27]

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rights enshrined in treaties were encompassed by the "and laws" component of § 1983. Following the Court's analysis in *Thiboutot*, the Seventh Circuit reaffirmed the principle that "laws" for purposes of § 1983 means all laws and not a subset thereof, rejecting the government's "novel argument" that the word "laws" in § 1983 should be restricted to statutes and not treaties. *Jogi II*, 480 F.3d at 826-27.

[26] Not every violation of customary international law is cognizable under § 1983. Rather, as the Court notes in *Sosa* in the context of customary international law norms cognizable under the Alien Tort Statute, only violations of those norms that are sufficiently specific, definable and obligatory come within § 1983. *Sosa*, 542 U.S. at 732. The prohibition of JLWOP clearly meets this standard.

[27] Defendants contend, based in part on *Buell v. Mitchell*, that the applicability of international law in this context "is a question that is reserved to the executive and legislative branches of the United

CONCLUSION

For the reasons and upon the authorities cited above, Defendants' motion to dismiss or alternatively for summary judgment should be dismissed.

Respectfully submitted,

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States government, as it is their constitutional role to determine the extent of this country's international obligations and how best to carry them out." MTD at 26; *Buell v. Mitchell* 274 F.3d 337 (6th Cir. 2001). However, in *Sosa* the Supreme Court recognized that the creation of a private damages remedy based on violations of customary international law is an act of judicial lawmaking. *Sosa*, 542 U.S. at 715. Both, *Buell* and *Coleman v. Mitchell*, were decided pre-*Sosa* and did not consider claims based on customary international law as part of federal common law or the proper application of this body of law. *Coleman v. Mitchell* 268 F.3d 417, 443, n.12 (6th Cir. 2001). Moreover, neither case was brought under § 1983. In both cases, the customary international law claims were raised in the context of habeas petitions and concerned an alleged violation of a customary international law norm prohibiting the death penalty. However, as the Court notes in *Buell*, there is no such norm. *Buell*, 274 F.3d at 373. In contrast, the norm prohibiting JLWOP sentences is well established. Moreover, the *Buell* court expressly stated, "[o]ur holding is limited to the question of whether customary international law prevents a State from carrying out the death penalty when it is acting in full compliance with the United States Constitution. We take no position on the question of the role of federal courts to apply customary international law as federal law in other contexts …" n.10. Here, by contrast, Plaintiffs' claims arise from Defendants' violations of the customary international law prohibition of JLWOP in a § 1983 action, a statute in which Congress has provided a remedy "against all forms of official violation of federally protected rights," *Monnell v. Department of Social Services of City of New York*, 436 U.S. 658, 700-701 (1978), when those violations are committed by state actors.

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2011, the foregoing document was filed with the ECF system which will send notification to the following ECF participants:

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I declare under the penalty of perjury that the statements made above are true to the best of my knowledge, information, and belief.

Respectfully submitted,

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