

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HENRY HILL, JEMAL TIPTON,
DAMION TODD, BOBBY HINES,
KEVIN BOYD, BOSIE SMITH,
JENNIFER PRUITT, MATTHEW
BENTLEY, KEITH MAXEY,
GIOVANNI CASPER, JEAN
CARLOS CINTRON, NICOLE
DUPURE and DONTEZ TILLMAN,
individually and on behalf of those
similarly situated,

Plaintiffs,

v

GRETCHEN WHITMER, in her
official capacity as Governor of the
State of Michigan, HEIDI E.
WASHINGTON, in her official and
individual capacity as Director of the
Michigan Department of Corrections,
MICHAEL EAGEN, in his official
and individual capacity as Chair of
the Michigan Parole Board, and
DANA NESSEL, in her official
capacity as Attorney General of the
State of Michigan,

Defendants.

No. 2:10-cv-14568

HON. MARK A. GOLDSMITH

MAG. R. STEVEN WHALEN

MEMORANDUM

MEMORANDUM

Defendants respectfully submit the following Memorandum pursuant to this Honorable Court's October 31, 2019 Order (R. 299):

1. Defendants' Position Regarding Discovery

Presently, Defendants plan to file a motion for a more definite statement (FRCP 12(e)), a motion to dismiss for failure to state a claim which relief can be granted (FRCP 12(b)(6)), and a motion to dismiss for failure to join a party under Rule 19 (FRCP 12(b)(7)) in lieu of an Answer.

Defendants' position is that the Court should wait to conduct any discovery pending the outcome of these motions. As this Court knows, Discovery comes with a great deal of costs in both time and resources. In this case, Plaintiffs' counsel has proposed nothing more than a fishing expedition.

In its current state, Plaintiffs' amended complaint (R. 298) does not identify any individual whose resentencing has been delayed by the actions of any specific county prosecutor. In fact, Plaintiffs' amended complaint is so vague and ambiguous that Defendants' cannot even reasonably respond. As the U.S. Supreme Court held in *Bell Atlantic*

Corp v. Twombly, 550 U.S. 544, (2007), the pleading standard Rule 8 announces does not require “detailed factual allegations,” but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.*, at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” 550 U.S., at 555. Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.” *Id.*, at 557.

Defendants’ motions quite possibly would eliminate the need for any Discovery. At a minimum, they could result in Plaintiffs filing a complaint with more definition and clarity so that Discovery can be conducted in a much more focused and efficient manner.

At this early stage, Plaintiffs’ counsel has requested an opportunity to depose the elected prosecutors from a number of counties. Deposing the elected prosecutors would amount to nothing more than annoyance, embarrassment, and oppression (FRCP 26(c)). If discovery is allowed at this phase, more specifically depositions, the elected prosecutors, based on their own familiarity with the internal operations of their respective offices and the management of their cases,

should be able to pick the prosecutor most suited to respond to any questioning relative to the resentencing of any named plaintiff.

2. *Current Pending Cases Directly Related to Resentencing*

There are currently two cases pending in the Michigan Supreme Court that are directly related to the resentencing of *Hill* class members; 1) *People v. Masalmani*, 503 Mich. 1007, 924 N.W.2d 585 (2019) and 2) *People v. Turner*, 503 Mich. 1008, 924 N.W.2d 589 (2019). The Michigan Supreme Court (MSC) has also granted leave in another *Hill* class members' case, *People v. Taylor*, 924 N.W.2d 592 (Mich. 2019), but is holding the case in abeyance pending a decision in *Masalmani*.¹ It is Defendants' understanding that the trial courts recognize the importance of the *Hill* class member resentencing hearings and is awaiting a decision on these cases before going forward with extensive resentencing hearings.

In *Masalmani*, the MSC is to hear arguments on "which party, if any, bears the burden of proof of showing that a *Miller* factor does or does not suggest an LWOP sentence." (Ex. A, *Masalmani* April 5, 2019 Order.) The court will also decide if the resentencing court correctly

¹ *Masalmani* and *Taylor* are co-defendants. Their appeals are substantially similar.

considered certain *Miller* factors. (Ex A.) In essence, the appellant is asking the court for clarification on how the *Miller* factors should be used and considered in the resentencing of the *Hill* class members. How the MSC rule on this issue will impact how the *Miller* hearings and resentencings are conducted throughout the state. Currently, appellants have filed their brief and appellee's brief is due December 15, 2019.²

In *Turner*, the MSC is to hear arguments whether the *Hill* class members should be resentenced on the other charges arising out of the same transaction as the first-degree murder charge and if so, what the process should be for doing so. (Ex B, *Turner* April 5, 2019 Order.) For example, Mr. Turner was originally sentenced in 1996 to life without the possibility of parole for first-degree murder, life with the possibility of parole for assault with intent to omit murder (AWIM), and two-years for felony-firearm. (Ex. C, *People v. Turner*, No. 336406 (Mich. Ct. App. May 17, 2018.)) The MSC is to address whether it is proper for the resentencing court to also issue a resentence on Turner's sentence to life

² Available at:

https://courts.michigan.gov/opinions_orders/case_search/pages/default.aspx?SearchType=1&CaseNumber=154773&CourtType_CaseNumber=1

with the parole for his AWIM charge. (Ex. B; Ex. C.) This ruling would affect the resentencing of other *Hill* class members who have similar sentences. Currently, both parties have filed their initial briefs, and Appellants' reply brief is due November 7, 2019.³

Respectfully submitted,

Dana Nessel
Attorney General

/s/ Scott A. Mertens
Scott A. Mertens
Assistant Attorney General
Attorney for Defendants
Complex Litigation Division
P.O. Box 30736
Lansing, MI 48909
(517) 335-3055
mertenss@michigan.gov
P60069

Dated: November 1, 2019

³ Available at:
https://courts.michigan.gov/opinions_orders/case_search/pages/default.aspx?SearchType=1&CaseNumber=158068&CourtType_CaseNumber=1

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on November 1, 2019, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

/s/ Scott A. Mertens
Scott A. Mertens
Assistant Attorney General
Attorney for Defendants
Complex Litigation Division
P.O. Box 30736
Lansing, MI48909
(517) 335-3055
nertenss@michigan.gov
P60069