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

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General

B. Eric Restuccia (P49550)
Chief Legal Counsel
Co-Counsel of Record

Kathryn M. Dalzell (P78648)
Assistant Solicitor General
Co-Counsel of Record
Attorneys for Defendants-Appellants
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Dated: June 7, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

INTRODUCTION

This case, at bottom, is not really about credits. On these facts, the elimination of good time and disciplinary credits distracts from the easiest way to resolve the case.

Under the Ex Post Facto Clause, the question of whether earned credits were eliminated retroactively is not dispositive. Instead, when a statute—here, Mich. Comp. Laws § 769.25a—changes the quantum of punishment retroactively, the question is whether the new law is "in toto" more onerous than the prior law. The Supreme Court has held both that the new and old punishment regimes must be compared in their totality, and that the total changes brought by the new law must be compared to the law "on the statute books" at the time of the crime, *even if that law was subsequently held unconstitutional*. This forecloses Plaintiffs' ex post facto claim. A term of years without credits is not more onerous than mandatory life without parole with the accumulation of credits.

This framework makes sense. Any holding that the retroactive elimination of credits, alone, is an ex post facto violation would introduce odd results and inconsistency into the law. For example, if

elimination of credits alone suffices to make an ex post facto violation, a court might hold that a statutory change that provided—for the same crime—a sentence of 60 years to life does not violate the Clause, because it is not more onerous than the original punishment of life without parole, but that a lesser sentence of 10 to 15 years *without* credits *does* violate the Clause, solely because of the effect on credits. In that scenario, the case law would be that 10 to 15 years without credits increases the quantum of punishment from the original sentence, but 60 years to life does not. The Supreme Court has precluded such incongruous results by mandating an "in toto" analysis of the statutory changes that asks whether the overall quantum of punishment has been increased.

Even ignoring Supreme Court precedent, the ex post facto claim loses. The new sentence (a term of years without credits) is not more onerous than if Plaintiffs had received a *Miller*-compliant sentence in the first place.

And even if this Court thinks—contrary to Supreme Court precedent—that elimination of credits alone can ground an ex post facto claim, here the elimination was meaningless. Under prior law, credits

were always inapplicable for first-degree murder, and they remain so under the new law. Plaintiffs have not been resentenced for a different crime. The loss of credits on these facts has resulted in no practical change.

These arguments are not barred by law of the case. But even if they were, Supreme Court precedent makes it appropriate to revisit them. Further, their importance warrants oral argument.

Finally, for the reasons discussed in the opening brief, to the extent this Court's decision hinges on the applicability or value of credits under Michigan law, or on the circumstances under which they could be used upon resentencing, those are questions of state law that should be resolved by the Michigan Supreme Court.

ARGUMENT

I. Michigan's legislative *Miller* fix does not violate the Ex Post Facto Clause.

A. Law of the case does not preclude Defendants' arguments; in any event, law of the case cannot be contrary to the law of the Supreme Court.

Defendants disagree that the law of the case precludes their arguments on the merits of the ex post facto claim. This Court

previously held that Plaintiffs had stated a plausible claim on Count V, and while it is true that this Court stated "[t]o the extent that Plaintiffs earned credits during the mandatory life sentences, the retroactive elimination thereof is detrimental," in *Hill v. Snyder*, 878 F.3d 193, 213 (6th Cir. 2007) ("*Hill II*") nowhere did this Court address whether Mich. Comp. Laws § 769.25a increased Plaintiffs' overall punishment, engage in an analysis of what the proper comparator is for determining whether there has been an increase in punishment, or address whether continuing inapplicability of credits that had always been inapplicable disadvantaged Plaintiffs.

Even if this Court finds that Plaintiffs are correct in their assessment of the law of the case, the law of this case cannot violate the law of the Supreme Court. And as discussed below, a ruling for Plaintiffs on their ex post facto claim would be contrary to Supreme Court precedent. The law-of-the-case doctrine is a matter of discretion, not a binding rule, and the law of the case should be revisited when it is erroneous. *See Arizona v. California*, 460 U.S. 605, 618 & n. 8 (1983) (law of the case is "an amorphous concept" that "directs a court's discretion" but "does not limit the tribunal's power"; contemplating that

lower court will revisit law of the case when it is clearly erroneous and would work a manifest injustice); *Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312–13 (6th Cir. 1997) (same, and declining to adhere to law of the case where it would do damage to the Court's constitutional responsibilities); *Moody v. Michigan Gaming Control Bd.*, 871 F.3d 420, 426 (2017) (revising law of the case to correct error is warranted even when error was knowable at the time of the prior panel decision); *cf. Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) (court may revisit even "law of the circuit" when "an inconsistent decision of the United States Supreme Court requires modification of the decision").

Notably, the Supreme Court does not consider itself bound by a lower court's determination of law of the case. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 881 n. 1 (1990); *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509 n. 1 (2001).

B. Mich. Comp. Laws § 769.25a did not make more onerous the punishment for Plaintiffs' crimes.

1. Plaintiffs' new sentence is not worse than mandatory life without parole, the sentence in effect at the time of their crimes.

Even if this Court thinks both that earned credits were taken away from Plaintiffs and that those credits had value, that is not—without more—an ex post facto violation. (Appellants' Br., R. 29-1, Page ID # 11, 26, 28, 42, 46–48.) Instead, when a statute changes the standard of punishment retroactively, the question is whether the new law is "more onerous than the prior law." *Dobbert v. Florida*, 432 U.S. 282, 294 (1977). To determine that, the new and old standards of punishment must be compared "in toto," looking at the statutory provisions "on the whole." *Id.* at 292, 294. Further, the standard of punishment against which the new law is compared is the punishment that was on the books at the time of the crime—even if that punishment has subsequently been held unconstitutional. *Id.* at 297–98. This means that, here, this Court must ask whether the standard of punishment provided in Mich. Comp. Laws § 769.25a—a term of years without credits—is, "in toto," "more onerous" than mandatory life

without parole with the accumulation of credits. The answer is no. As discussed below, Supreme Court precedent forecloses Plaintiffs' claim.

a. The test is whether a retroactive law increases the quantum of punishment annexed to the crime.

In *Weaver v. Graham*, 450 U.S. 24 (1981), the Supreme Court held that for a law to be impermissibly ex post facto, it must be retrospective and it must "disadvantage" the offender. *Id*. at 29.

It is worth noting that the Supreme Court has since repudiated the "disadvantage" terminology from *Weaver*, finding it too broad. In *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), the Court explained that while prior opinions, including *Weaver*, had used the word "disadvantage," "that language was unnecessary to the results in those cases and is inconsistent with the framework developed in *Collins v. Youngblood*[]." *Morales*, 514 U.S. at 506 n. 3. The Court explained that "the focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,'" but rather whether it "*increases the penalty* by which a crime is punishable." *Id*. (emphasis added).

The Court likewise rejected the "disadvantage" language in *Collins v. Youngblood*, 497 U.S. 37 (1990), specifying that the prohibition "which may not be evaded is the one defined by the *Calder* categories." *Id.* at 46. Of relevance to the instant case, what *Calder* prohibits is "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 Dall. 386, 390 (1798) (opinion of Chase, J.). Any references to "substantial protections" or "personal rights"—or, here, a "disadvantage" in the limited sense of removal of credits that does not increase the quantum of punishment annexed to first-degree murder when committed—"should not be read to adopt without explanation an undefined enlargement of the Ex Post Facto Clause." *See Collins*, 497 U.S. at 46; *Dobbert*, 432 U.S. at 294 ("there was no change in the quantum of punishment attached to the crime").

The Court's rejection of the "disadvantage" framing is important. The Court determined that asking whether a statutory change imposes some "disadvantage" in the abstract had led courts to expand the ex post facto prohibition beyond what it really was. Not every "disadvantage" violates the Ex Post Facto Clause. Rather, the narrow

activity that is prohibited is *increasing the penalty by which a crime is punishable*. This dovetails Defendants' arguments in the principal brief. (Appellants' Br., R. 29-1, ID# 27–50.)

b. To determine whether a new law imposes a "more onerous" punishment, this Court must compare the laws "in toto."

Plaintiffs suggest that the fact that they were previously serving life without parole and are now serving a term of years is irrelevant to the ex post facto analysis, suggesting that this Court must look at any credit changes in isolation. (Appellants' Br., R. 30, ID# 32–33.) But the Supreme Court has instructed to the contrary.

In *Dobbert v. Florida*, the Supreme Court instructed that courts "must compare the two statutory procedures in toto to determine if the new may be fairly characterized as more onerous." 432 U.S. at 294. In that case, the fact that all of the changes in the new statute were "on the whole ameliorative" was an "independent basis" for the holding that there was no ex post facto violation. *Id*. at 292. The Court viewed "the totality" of the changes "wrought by the new statute[.]" *Id*. at 296.

It is true that the *Weaver* Court said the ex post facto "inquiry looks to the challenged provision, and not to any special circumstances

that may mitigate its effect on the particular individual." 450 U.S. at 33. But read in context, that statement does not help Plaintiffs because it does not alter *Dobbert*'s instruction to compare statutory changes "in toto" and "on the whole."

For the proposition that the inquiry must look at the statute itself and not its ultimate effect on an individual, the *Weaver* Court cited a passage from *Dobbert* in which the Court discussed yet another case, *Lindsey v. Washington*, 301 U.S. 397 (1937). In *Lindsey*, the defendant "received a sentence under the new law which was within permissible bounds under the old law, albeit at the outer limits of those bounds," but "under the new law it was the only sentence he could have received, while under the old law the sentencing judge could in his discretion have imposed a much shorter sentence." *Dobbert*, 432 U.S. at 300. While the actual sentence Lindsey received under the new law was not necessarily an increase in his punishment from the prior law, the sentencing scheme on its face was nevertheless more onerous because it removed discretion to apply a lower sentence. For that reason, the Court held that "the ex post facto clause looks to the standard of punishment prescribed by the statute, rather than to the sentence

actually imposed." *Lindsey*, 301 U.S. at 400–01. Notably, *Dobbert*'s discussion of *Lindsey* did not change the instruction to view statutory changes "in toto" to determine whether they are "on the whole ameliorative" because, of course, *Dobbert* is the case that required "in toto" comparison. 432 U.S. at 292, 294.

Further, nothing in *Weaver* changed the requirement to look at statutory changes "in toto." To the contrary, the *Weaver* Court engaged in the "in toto" analysis that *Dobbert* requires, finding the credit changes—some of which decreased credits and some of which increased them—overall more onerous than the prior law. 450 U.S. at 34–35. The Court did not restrict its review to only the elimination of credits; instead, it also analyzed the new credit opportunities provided by the statute and concluded that "none of these provisions for extra gain time compensates for the reduction of gain time available solely for good conduct." *Id.* at 35.

The Ninth Circuit applied *Dobbert* in a factual scenario similar to this case. In *Chatman v. Marquez*, 754 F.2d 1531 (9th Cir. 1985), the Ninth Circuit held that the retroactive addition of a firearm enhancement and less favorable gain time credits did not violate the Ex

Post Facto Clause where the change in the law also allowed a prisoner previously sentenced to life without parole to gain the possibility of parole. Regarding the firearm enhancement, the court noted *Dobbert*'s requirement that the old and new statutes must be compared "in toto" and explained that Mr. Chatman was "substantially benefitted by the new statute when considered as a whole." Under the old regime, he "had no hope of ever leaving prison," but under the new regime, he "may be granted parole," despite being subject to the retroactive firearm enhancement. *Id*. at 1535–36. The court also rejected Chatman's argument that the new law violated ex post facto principles by providing less favorable "gain time for good conduct" credit provisions. As the court explained, under the old regime, " 'gain time' provisions did not apply to appellant at all, since a sentence of 'life without possibility of parole' by definition excludes the possibility of parole." *Id*. at 1536. The proper comparison, therefore, was "between no possibility of parole under the [old law] and the earning of gain time credits toward a possible parole under [the new law]." *Id*.

Thus, the Supreme Court requires this Court to compare "in toto" the standard of punishment at the time of the crime with that under the new law. *Dobbert*, 432 U.S. at 294; *Weaver*, 450 U.S. at 34–35.

c. The required comparison is to the punishment on the books at the time of the crime, even if later held unconstitutional.

As Defendants argued in the principal brief, the required comparison point—in determining whether there has been an increase in the quantum of punishment—is mandatory life without parole, even though that sentence was subsequently held unconstitutional. (Appellants' Br., R. 29-1, Page ID # 11, 26, 28, 42, 46–48.) Plaintiffs' only response to this argument on its merits appears to be that this Court need not examine the statutory change "in toto." (*See* Appellees' Br., R. 30, ID# 32–33.) But the Supreme Court requires an "in toto" comparison. *See* Section I.B.1.b. The conclusion that mandatory life without parole is the required comparator is dictated by *Dobbert*.

In addition to requiring this Court to look at a change in the quantum of punishment annexed to a crime "in toto," the Court in *Dobbert* held that the required comparison is to the standard of punishment on the books at the time of the crime—even if that law was

subsequently held unconstitutional. 432 U.S. at 297–98. The Court rejected Dobbert's argument that the ruling of unconstitutionality rendered the statute a nullity for all legal purposes, holding instead that the existence of the statute on the books served to warn him of the penalty he could face for his crime, which the Court held was "sufficient" for ex post facto purposes. As discussed below, *Dobbert* forecloses Plaintiffs' ex post facto claim.

In *Dobbert*, the defendant was convicted of first-degree murder. At the time of his crime, Florida law provided that a person convicted of a capital felony was to be punished by death unless a majority of the jury recommended mercy. *Id.* at 288. Before Dobbert was sentenced, however, the Florida Supreme Court held the death penalty statute unconstitutional under the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), which had effectively struck down all death penalty schemes in the country pending revised legislation. *Dobbert*, 432 U.S. at 289; *see also Donaldson v. Sack*, 265 So. 2d 499, 501 (Fla. 1972). Shortly thereafter, the Florida Legislature passed a new death penalty statute, which provided that the jury would make a recommendation to the judge regarding whether to impose death; under

the new statute, the judge could overrule the jury's recommendation. *Id.* at 290–92. Under the new statute, the jury recommended by a 10-to-2 majority a sentence of life imprisonment for Dobbert, but the judge overruled the recommendation and sentenced him to death. *Id.* at 287.

Dobbert raised multiple separate ex post facto claims, two of which will be discussed here. *Id.* at 287. First, he argued that the change in function of judge and jury violated the ex post facto clause. The Court rejected this for two separate reasons: first, the change was procedural and not substantive. Second, the change was "on the whole ameliorative," which the Court held was an "independent bas[i]s" for its decision. *Id.* at 292 & n. 6.

Dobbert separately raised another ex post facto argument: there was no valid death penalty "in effect" at the time of his crime because the death penalty statute had subsequently been held unconstitutional. *Id.* at 297. The Court rejected his argument for reasons separate from the procedure-versus-substance distinction above. The Court rejected Dobbert's underlying premise that a statute ruled unconstitutional becomes a nullity for all legal purposes, citing its prior decision in *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374

(1940). In *Chicot*, the Court had explained that "[t]he actual existence of a statute, prior to [a ruling of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored." 308 U.S. at 374. In *Dobbert*, the Court explained that the existence of the death penalty statute on the books "served as an operative fact to warn [Dobbert] of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder." 432 U.S. at 298. The statute "was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder"—"[w]hether or not the old statute would[,] in the future, withstand constitutional attack[.]" *Id.* at 297. The Court held that the existence of the statute on the books at the time of Dobbert's crime, even if it was subsequently held unconstitutional, "was sufficient compliance with the ex post facto provision of the United States Constitution." *Id.*

d. Michigan law does not increase Plaintiffs' quantum of punishment, and *Dobbert* requires this Court to reject Plaintiffs' response on this point.

As argued here and in Defendants' opening brief, the punishment "on the statute books" at the time of Plaintiffs' crimes—mandatory life without parole—put Plaintiffs on notice that they were subject to the most severe penalty other than death. *See Miller v. Alabama*, 567 U.S. 460, 477 (2012) (recognizing that death and life without parole are the "State's harshest penalties"). Complying with *Dobbert* requires this Court to reject Plaintiffs' ex post facto claim. *Dobbert* held that a penalty's existence on the books—here, mandatory life without parole—has independent significance in the ex post facto analysis, even if the statute was later invalidated as unconstitutional. Michigan's mandatory life without parole is not a nullity for ex post facto purposes; instead, it is the benchmark against which any challenged subsequent statute must be compared. *See Dobbert*, 432 U.S. at 297–98; *accord Watson v. Estelle*, 886 F.2d 1093, 1097 n. 5 (9th Cir. 1989) ("While the California Supreme Court subsequently struck down as unconstitutional the death penalty statute under which Watson was sentenced, 'the existence of the statute served as an 'operative fact' to

warn the petitioner of the penalty which [the state] would seek to impose on him if he were convicted of first-degree murder.' " (citing *Dobbert*)); *see also Weaver*, 450 U.S. at 30 (comparing new law to "the law in effect on the date of the offense"); *Lynce v. Mathis*, 519 U.S. 433, 447–48 (1997) (leaving for remand determination of what the law provided at the time of the offense); *Calder*, 3 Dall. at 390 (opinion of Chase, J.) (prohibiting laws that inflict a greater punishment "than the law annexed to the crime, *when committed*" (emphasis added)).

Evaluating both Michigan statutory schemes in their totality—as the Supreme Court requires, *see* Section I.B.1.b —Mich. Comp. Laws § 769.25a does not increase the Plaintiffs' quantum of punishment, *see* Section I.B.1.a. Here, *Miller* and *Montgomery* held Plaintiffs' prior sentences of life without parole unconstitutional, *Miller*, 567 U.S. 460; *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and Mich. Comp. Laws § 769.25a replaced those sentences with either discretionary life without parole (following consideration of the *Miller* factors) or a term of years without credits. A term of years without credits is not an increase in the quantum of punishment from mandatory life without parole, even if Michigan law at the time of the crime also allowed

Plaintiffs to accumulate credits while serving life without parole. Nor is discretionary life without parole, even without credits, because it gave Plaintiffs for the first time the possibility of avoiding mandatory life without parole. *See Lindsey*, 301 U.S. at 400–01 (discretion to impose a lesser sentence is a factor that mitigates the standard of punishment). "On the whole," *Dobbert*, 432 U.S. at 292, Mich. Comp. Laws § 769.25a ameliorates the punishment that was "on the statute books" at the time of Plaintiffs' crimes—indeed, *it was designed to*. See *Miller*, 567 U.S. 460; *Montgomery*, 136 S. Ct. 718; Mich. Comp. Laws § 769.25a(2) & (3) (citing *Miller*); *id*. § 769.25(6) (citing *Miller*).

This resolves the issue—Michigan's legislative *Miller* fix does not violate the Ex Post Facto Clause. Indeed, the Supreme Court has expressly held that "a statute which mitigates the rigor of the law in force at the time a crime was committed cannot be regarded as *ex post facto* with reference to that crime." *Rooney v. State of N. Dakota*, 196 U.S. 319, 325 (1905).

The fact that this case involves credits and *Dobbert* did not is irrelevant. Indeed, *Dobbert*—by requiring an analysis of the statutory schemes "in toto"—shows why the elimination of credits is a red herring

in this case, unlike in *Weaver*. The quantum of punishment "on the statute books" when Plaintiffs committed their crimes has not been increased. It is for this reason that cases like *Weaver* and *Lynce v. Mathis*, 519 U.S. 433 (1997) are distinguishable. In *Weaver* and *Lynce*, the elimination of credits actually *did* increase the offenders' punishment in comparison to the punishment on the books at the time of their crimes. *See* discussion in Appellants' Brief, R.29-1, ID# 46–47; *Lynce*, 519 U.S. at 447–48 (leaving for remand determination of what the law provided at the time of the offense). Their sentences remained otherwise the same, but their ability to earn credits was overall reduced, leading to an increase in the duration of punishment. That is why the elimination of credits *can* be an ex post facto violation.

But it is not in every case, and it is not here. To the contrary, here Michigan has *reduced the sentence itself—it has reduced the punishment*. And while Plaintiffs may have "earned" credits during their prior life-without-parole sentences, nothing in the Ex Post Facto Clause entitles them to keep or use those credits so long as their new sentence does not increase the quantum of punishment compared to the punishment on the books at the time of their crimes. *Dobbert*, 432 U.S.

at 297–98; *see also Weaver*, 450 U.S. at 30, 34–35 (assessing overall effect of new credit regime on range of punishment and comparing the new regime to "the law in effect on the date of the offense" (emphasis added)). Here, it does not.

A state not only may eliminate credits without running afoul of the Ex Post Facto Clause, and do so retroactively, it may eliminate *large amounts of credits* consistent with the Clause, so long as—again—the statute "in toto" does not increase the standard of punishment above what was prescribed at the time of the crime. Prohibiting the State from retroactively increasing a punishment *beyond what the law provided at the time of the crime* is indeed the very essence of the ex post facto prohibition. *See, e.g.*, *Dobbert*, 432 U.S. at 297–98; *Weaver*, 450 U.S. at 28 (describing the reference point as "the punishment assigned by law when the act to be punished occurred" and explaining that "[c]ritical to relief under the Ex Post Facto Clause is . . . the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated," explaining that "the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals

to rely on their meaning until explicitly changed"); *Rooney*, 196 U.S. at 325 (statute that ameliorates law in force at time of crime cannot be ex post facto violation). No Plaintiff in this case is thinking, "if only I had known when I committed my crime that I would get 25 to 40 years minimum with no credits." That is because the law at the time of their crimes subjected every Plaintiff in this case to mandatory life without parole. Nor are they losing the benefit of their good behavior, which will assuredly increase their chances of a prompt parole if they are resentenced to a term of years.

At least three state supreme courts have concluded—in the *Miller* context, and consistent with *Dobbert*—that a juvenile offender's prior, unconstitutional life-without-parole sentence is the proper comparison point for determining whether a legislative *Miller* fix violates the Ex Post Facto Clause. *State v. James*, 813 S.E.2d 195, 209–11 (N.C. 2018); *In re McNeil*, 334 P.3d 548, 554 (Wash. 2014); *State v. Castaneda*, 842 N.W.2d 740 (Neb. 2014). In *In re McNeil*, the en banc Washington Supreme Court held that "the relevant comparison point is a mandatory minimum sentence of life in prison without the possibility of early release." 334 P.3d at 554. Because Washington's "*Miller* fix does not

provide for any punishment that could reasonably be called an 'increase' from that," the court rejected the petitioners' ex post facto argument. *Id*.

And in *State v. Castaneda*, the Nebraska Supreme Court relied expressly on *Dobbert* to reject the argument that Nebraska's *Miller* fix, which provided a sentencing range of 40 years minimum to life, violated the Ex Post Facto Clause. The offender's theory in that case was that, because *Miller* invalidated the prescribed punishment for his class of felony (Class IA), the proper comparator for determining whether the *Miller* fix disadvantaged him was *not* his prior unconstitutional sentence, but rather the applicable sentence for the next felony class down (Class IB). 842 N.W.2d at 761. Relying on *Dobbert*, the court rejected his argument. Specifically, it held that "*Dobbert* makes it clear that the effect of *Miller* on Nebraska law is not a factor in the ex post facto analysis of whether a later-enacted statute increases punishment for a crime." *Id*. "Rather, the proper comparison is the range of penalties that Nebraska law provided for a Class IA felony committed by a juvenile at the time Castaneda committed his crimes . . . ." *Id*. Accordingly, the Court held:

> At the time Castaneda was sentenced, the only possible sentence for a first degree murder committed by a juvenile was life imprisonment. Under [the *Miller* fix], the sentence is anywhere from 40 years to life imprisonment. The possible range of sentences provided for in [the *Miller* fix] is not greater than the possible range of sentences which Castaneda was originally subjected to. As such, the change effected by [the *Miller* fix] does not violate ex post facto principles.

Id. at 762. The Nebraska court observed that "this is consistent with the underlying purpose of the Ex Post Facto Clause: to 'assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.' " *Id.* at 761–62 (citing *Weaver*, 450 U.S. at 28–29). *Accord State v. James*, 813 S.E.2d 195, 209–11 (N.C. 2018) (rejecting argument that North Carolina's *Miller* fix violated ex post facto principles, citing *Dobbert* and noting that the earlier, unconstitutional statute "provided fair warning as to the degree of culpability which the State ascribed to the act of murder"); *State v. Torres*, No. 2 CA-CR 2015-0052-PR, 2015 WL 2452297, at *3 (Ariz. Ct. App. May 20, 2015) (explaining that "the Supreme Court has rejected the proposition that a judicial declaration of a statute's constitutional infirmity, issued after the commission of an offense, renders the statute a nullity for the purpose of considering whether a subsequent remedial

statute violates the Ex Post Facto Clause," citing *Dobbert*); *Com. v. Brooker*, 2014 PA Super 209, 103 A.3d 325, 343 (2014) (rejecting defendant's challenge to *Miller* fix of 35-year minimum, explaining that, "like in *Dobbert*, the very existence of the old statute requiring life without parole[] put Appellant on notice . . . . This was sufficient to serve as Appellant's 'fair warning' . . . . The fact that the old statute [] would later be declared constitutionally void as applied to him on Eighth Amendment grounds is of no moment. [] Rather, as we have explained in great detail, the underpinnings of the Ex Post Facto Clause protect fairness, fair warning and notice.").

Defendants have consistently argued that mandatory life without parole is the proper starting point and comparator for determining whether Mich. Comp. Laws § 769.25a violates the Ex Post Facto Clause. (7/18/16 Mot. to Dismiss, R. 147, ID# 1880–81, 1883–85; 6/30/17 Appellee Br., 6th Cir. R. 24, ID# 29–30, 59, 61–62; 2/6/18 Response to Mot. to Dismiss, R. 190, ID# 2737; 2/21/18 Cross-Reply, R. 195, ID# 2972–73; Emergency Mot. for Stay, 6th Cir. R. 10-1, ID# 10, 14, 15; 5/10/18 Appellant Br., 6th Cir. R. 29-1, ID# 11, 26, 28, 42, 46–48.) The issue is not barred by law of the case, and even if it were, adherence to

Supreme Court precedent would warrant revisiting it now. *See* Section I.A. Section 769.25a does not increase the quantum of punishment, and there is no ex post facto violation, because a 25-40 to 60-year sentence with no credits is not worse than mandatory life without parole, with or without the ability to earn credits. *See Dobbert*, 432 U.S. at 297–98.

2. The new term of years without credits also is not a disadvantage compared to other constitutional sentences Plaintiffs could have received.

Even if *Dobbert* did not exist and this Court compared Mich. Comp. Laws § 769.25a to the punishment Plaintiffs would have been entitled to had they received a *Miller*-compliant sentence in the first place, the ex post facto claim would still fail. Plaintiffs do not dispute that they could have constitutionally been sentenced to life *with* parole, with a minimum term of 25 to 40 years and a maximum of life, *cf.* *Castaneda*, 842 N.W.2d at 762 (noting that Nebraska's legislative *Miller* fix is 40 years to life); *In re McNeil*, 334 P.3d at 552–54 (noting that Washington's fix is 25 years to life), and they do not dispute that credits would *not* apply to that sentence. (See discussion in Appellants' Brief, R. 29-1, ID# 12–13, 26, 35, 41, 43–44, 49–50, 58; Appellees' Brief, R. 31–32.) And nowhere do Plaintiffs suggest that not being able to use

credits to reduce a life-with-parole sentence would somehow be an ex post facto violation. If that more onerous (25-40 to life), yet still *Miller*-compliant sentence would not violate the Ex Post Facto Clause, then *a fortiori* the less-onerous (25-40 to 60) sentence that they actually received under Mich. Comp. Laws § 769.25a does not violate it.

C. Credits were always inapplicable for first-degree murder and they remain so; there has been no meaningful change.

Even if elimination of credits alone were sufficient to constitute an ex post facto violation, without any increase in the overall quantum of punishment compared to the law on the books at the time of the crime, *but see* Section I.B, there still would be no violation in this case. Good time and disciplinary credits were always inapplicable in Michigan for first-degree murder. (Appellants' Br., R. 29-1, ID# 31–34, 36–39.) And Plaintiffs' convictions for first-degree murder remain following their resentencings. There has been no meaningful change, and Plaintiffs have lost nothing of value.

While MDOC regularly calculates credits when lifers are resentenced for *second-degree murder or other crimes* for which the law on the books at the time of the offender's crime *always provided a term*

of years and credits—thus treating resentenced offenders as though they had been serving their new sentence all along—Plaintiffs have identified no instance of *any* Michigan agency or court applying credits when an offender is resentenced for first-degree murder. That is because there was never any Michigan law that provided a term of years against which credits applied for first-degree murder. The first law that provided a term of years for first-degree murder—Mich. Comp. Laws §§ 769.25 & 25a—specifically instructed that credits are inapplicable. *Id*. §§ 769.25(10) & 25a(6). Thus, treating Plaintiffs here as Michigan has treated *all other offenders who get resentenced*—i.e., treating them as though they had been serving their new sentence all along—they receive no credits, because their new sentence includes no credits.

For the entire duration of their prior life sentences for first-degree murder, credits were inapplicable. Under their new sentences for first-degree murder, credits remain inapplicable. Plaintiffs have lost nothing of value.

(Of note, Plaintiffs have not even lost the possible future application of credits or the hope of such and the incentive for good

behavior that that hope brings, which Plaintiffs—and Justice Brennan in *Moore*—describe. Appellee Br., R.30, ID # 30; *Moore v. Parole Board*, 154 N.W.2d 437, 447 (Mich. 1967) (Brennan, J., concurring). That is because, should any Plaintiff ever be resentenced for second-degree murder or some other crime for which the law on the books provided a term of years and applicable credits, he would receive the benefit of the credits the new sentence would have allowed him to accumulate—consistent with MDOC's practice of treating resentenced prisoners as though they had been serving their new sentence all along, since the original sentencing.)

There is no increase in punishment, and no violation of the Ex Post Facto Clause.

II. To the extent this Court's decision hinges on the applicability, value, or use on resentencing of credits under Michigan law, those questions should be resolved by the Michigan Supreme Court.

While the analysis in Section I forecloses the ex post facto claim, to the extent this Court's decision hinges on the applicability or value of credits under Michigan law, or on the circumstances under which they could be used upon resentencing, those are questions of state law that

should be resolved by the Michigan Supreme Court for the reasons stated in the opening brief. Defendants make only these short points in reply:

Defendants asserted *Pullman* abstention and requested certification to the Michigan Supreme Court before the ex post facto claim was resolved on the merits. (*Cf.* Appellees' Br., R. 30, ID# 18.) This Court reviews abstention decisions, including under *Pullman*, de novo. *Brown v. Tidwell*, 169 F.3d 330, 332 (6th Cir. 1999); *see also Traughber v. Beauchane*, 760 F.2d 673, 676 (6th Cir. 1985) (holding that de novo is the proper standard in reviewing "decisions of abstention" due to important federalism and comity considerations; *Traughber* was a *Younger* case, but the Court appeared to be discussing the de novo mandate for review of abstention decisions generally). (*Contra* Appellees' Br., R. 30, ID# 20.)

And, lastly, contrary to Plaintiffs' argument, *Younger* abstention is not barred by law of the case because this Court did not rule on *Younger* for Count V, as noted in the opening brief. (*See* Appellants' Br., R. 29-1, ID# 60–62.

CONCLUSION AND RELIEF REQUESTED

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

Respectfully submitted,

Bill Schuette
Attorney General

B. Eric Restuccia (P49550)
Chief Legal Counsel
Co-Counsel of Record

Aaron D. Lindstrom
Solicitor General
Co-Counsel of Record

/s/Kathryn M. Dalzell
Kathryn M. Dalzell (P78648)
Assistant Attorney General
Co-Counsel of Record
Attorneys for
Defendant-Appellants
State of Michigan
P.O. Box 30212
(517) 373-1124
DalzellK@michigan.gov

Dated: June 7, 2018

CERTIFICATE OF COMPLIANCE

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

1. This reply brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this reply brief contains no more than 6,500 words. This document contains 6160 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Century Schoolbook.

/s/Kathryn M. Dalzell
Kathryn M. Dalzell (P78648)
Assistant Solicitor General
Co-Counsel of Record
Attorneys for
Defendant-Appellants
State of Michigan
P.O. Box 30212
(517) 373-1124
DalzellK@michigan.gov

CERTIFICATE OF SERVICE

I certify that on June 7, 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 (designated below).

/s/Kathryn M. Dalzell
Kathryn M. Dalzell (P78648)
Assistant Solicitor General
Co-Counsel of Record
Attorneys for
Defendant-Appellants
State of Michigan
P.O. Box 30212
(517) 373-1124
DalzellK@michigan.gov