

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

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

Defendants.

No. 2:10-cv-14568

HON. MARK A. GOLDSMITH

MAG. R. STEVEN WHALEN

**DEFENDANTS' REPLY TO
PLAINTIFFS' RESPONSE
TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT
AS TO COUNT VI OF
PLAINTIFFS' SECOND
AMENDED COMPLAINT**

Deborah L. LaBelle (P31595)
Attorney for Plaintiffs
221 N. Main Street Suite 300
Ann Arbor, MI 48104
(734) 996-5620

Daniel S. Korobkin (P72842)
Michael J. Steinberg (P43085)
American Civil Liberties Union of Michigan
Attorneys for Plaintiffs
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6824

A. Peter Govorchin (P31161)
Sara E. Trudgeon (P82155)
Attorneys for Defendants
Michigan Department of Attorney General
Complex Litigation Division
P.O. Box 30736
Lansing, MI 48909
(517) 335-3055

Steven M. Watt
American Civil Liberties Union
125 Broad St., 17th Floor
New York, NY 10004
(212) 519-7870

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TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO
COUNT VI OF PLAINTIFFS' SECOND AMENDED COMPLAINT**

Defendants Reply to Plaintiffs' Response to Defendants' Motion for Summary Judgment by emphasizing three essential points.

I. Hill class members' claim that they need certain specific MDOC programing to demonstrate they are not irredeemably corrupt is unsupported

Hill class members are entitled to receive a re-sentencing hearing as a result of the *Miller v Alabama*, 132 S. Ct. 2455 (2012) and *Montgomery v Louisiana*, 136 S. Ct. 718 (2016) decisions. Programming plays a very small role.

Plaintiffs assert that when the Hill class members go to their re-sentencing hearings they are unable to demonstrate that they are not irredeemably corrupt because they had not received the core programming recommended years before at intake in the MDOC. This latter assertion is patently false and without any factual support whatsoever. The reality is that Hill class members have many opportunities for "programing" and other means for showing they are not irredeemably corrupt. The depositions of Plaintiffs' selected Hill class member witnesses demonstrate that they could participate in school to achieve their GED if they lacked a high school diploma. The vast majority of the Hill class member witnesses received their GED while incarcerated. (R. 267, Ex. J)

The Hill class member witnesses testified about their engagement in numerous self-help activities and programs while incarcerated, such as "cage your

rage,” cognitive therapy, substance abuse prevention programming (a “core” program), working as peer counselors or mentors for other prisoners in substance abuse, or dialectical behavior therapy. (R. 267, Ex. J)

The Hill class member witnesses also testified to their experience doing a wide-range of useful work assignments in the MDOC. Some of the Hill class members testified about their work as Prisoner Observation Aides (POA’s) and the training they received to perform peer observations on prisoners who were on psychological observation status to assist in preventing harm to their fellow prisoners or testified about their successes in the dog training programs. (R. 267, Ex. J)

Defendants collected the sentencing transcripts of the approximately 80 Hill re-sentenced class members that had re-sentencing transcripts prepared. Defendants produced those transcripts along with a grid analysis of the minimum sentence range, the requests for minimum sentence lengths by the prosecutors, and the factors that the sentencing judge described as important in reaching the new sentence. Not a single transcript reflected a re-sentencing comment by a judge that the Hill class member not having a particular program while incarcerated in the MDOC was material in the minimum term of sentence issued at the re-sentencing. Usually, when the sentence minimum term was less than the statutory highest minimum sentence of 40 years, the court might reference some of the programming

the Hill class member had received. These references often included a GED, work history, substance abuse programming, or other therapeutic or self-help efforts. But even when the Judge made such references, they were something of an afterthought because, for those class members receiving a minimum sentence less than 40 years, the court more often emphasized the class member's remorse, lack of vindictiveness in the crime, and especially the lack of recent (last 7-15 years) violent or assaultive misconducts committed while in custody. (R. 267, Ex. H)

The bottom line is this: what does appear to be important at a Hill class member's re-sentencing, based on the re-sentencing transcripts, is that the Hill class member show some effort at self-improvement to indicate they have turned away from being a danger to society. The Hill class members can do this by demonstrating both remorse for their previous criminal actions and that they have learned how to manage their behavior. Finally, to the extent that self-improvement efforts reflect a new, positive outlook, prisoner work assignments, education, voluntary activities to participate in charitable work, or other productive activities can well demonstrate that the Hill class member is not irredeemably corrupt. (R. 267, Ex. H)

II. Certain MDOC Programming is made available based on where a prisoner is in the queue to be paroled

There is no dispute that the MDOC does not have the resources to provide all programming immediately to all of the prisoners who have not had it yet. The

MDOC generally makes programming available based on when the prisoner gets to the front of the queue that is set based on one's proximity to parole eligibility.

Programming is available occasionally if there are open seats at a given institution.

A prisoner serving life without parole has no parole eligibility. For the Hill class members who have not yet been re-sentenced and still have their original life without parole sentence, there is no way to calculate where they would be in the queue. However, once the Hill class member is re-sentenced, their parole eligibility date (or parole jurisdiction date - PBJ) can be calculated. When that happens the Hill class member enters the queue wherever their new PBJ date puts them.

For the 56 Hill class members who have been re-sentenced and, as a result of their re-sentence, are not at, near, or past their re-calculated PBJ date (*see* Ex. A – attached, parole board status grid from January 9, 2019) it does not make sense to move them in front of the many thousands of other MDOC prisoners who are approaching their PBJ dates and who have not had nearly the length of time, as the Hill class members have had or will have, to demonstrate self-improvement and reformed self-management to allow the parole board to decide that they do not present a current risk to society if released on parole.

The Hill class members, by and large, by the time they will get to see the parole board after serving anywhere from a 25-40 year minimum (as modified by

applicable sentence credits, if any) will be in similar circumstances as other long-term prisoners. Additionally, most of the Hill class members have less active criminal pasts than older prisoners serving similar long term sentences, and, therefore, make even better candidates for parole by the time they reach parole eligibility. Of the 74 Hill class members who have received parole consideration, 69 of them have been granted parole, and only five have been delayed for another period. (Ex. A) That 93.24% success rate for parole grants is far better than the general, non-Hill class member parole rate for those thought to have a high probability of parole (about 82%). (R. 267, Ex. K, att. 8)

III. Access to “core” programing is not essential for a re-sentenced Hill class member to be granted a parole

With Defendants’ Brief In Support of their Motion For Summary Judgment (R. 267), they attached exhibit C, which is a list of the programing that the Hill class members had received by the time they were granted a parole. This is reality, not fictional fears of what might happen or what might be. This exhibit is a list of what actually is. Plaintiffs emphasize that VPP (violence prevention programing) is one of those programs in high demand and one for which the Hill class members, not yet re-sentenced, are excluded from. Yet for all of the Hill class members granted a parole, less than five had received VPP or its predecessor program Assaultive Offender Programing (AOP).

Parole Board chairman Michael Eagan explained why this counter intuitive result occurs. He testified that by the time a Hill class member gets to their PBJ date, they have usually shown a substantial period of time without assaultive misconducts. They have, through the absence of the assaultive misconducts demonstrated that they can manage their own behavior without violent interactions with others. Therefore, the parole board often waives the original intake recommendation from 20 or more years before because that person's own experience demonstrates that they have already learned the requisite self-control. The same can be said for substance abuse prevention programming and it can also be said that the prisoner's efforts at work and self- improvement, however manifested, are taken into account.

In 2016, when the impact of the re-sentencing process was not known and there was no experience with how the parole board would react to a group of prisoners who had achieved access to parole through litigation, it is somewhat understandable that the concerns expressed in the Plaintiffs' Second Amended Complaint, count VI, could have been issues that would cause the Hill class members and their advocates to wonder. However, as with the voluntary dismissal of count IV alleging the parole board would deny parole to Hill class members generally, the concerns asserted in count VI about specific programming have turned out to be unrealized. The actual experience of the class members has been

commensurate with their new time status' and like so many other long-term prisoners granted paroles over the last decade, the Hill class members' success on parole appears solid. As of the filing of this Reply, the first of the re-sentenced Hill class members to be paroled for a two-year term will have completed his two-year parole and been discharged on January 10, 2019. (Ex. A, Mr. Timothy Jordan, line 16).

RELIEF

The worry that certain programing would be essential, and if not provided, would be held against the Hill class member at their re-sentencing is clearly not supported. The Hill class members have many opportunities within the MDOC to demonstrate, if they choose to do so, that they are not irredeemably corrupt. Similarly, there is no single essential program that makes a prisoner parole eligible or a guaranteed success for parole. Rather, the prisoners' behavior demonstrating a lack of serious misconduct in recent years, efforts at self-improvement through work and voluntary programs, and efforts to show through interaction with fellow prisoners and staff that the person does not present a substantial risk to society is what provides the support for positive parole action. In light of this reality, Defendants' motion for summary judgment should be granted and Plaintiffs' Count VI should be dismissed.

Respectfully submitted,

Dana Nessel
Attorney General

/s/ A. Pete Govorchin
Assistant Attorney General
Attorneys for Defendants
Complex Litigation Division
P.O. Box 30736
Lansing, MI 48909
(517) 335-3055
govorchinp@michigan.gov
P31161

Dated: January 11, 2019

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on January 11, 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/ A. Peter Govorchin
A. Peter Govorchin (P31161)
Assistant Attorney General
Attorney for Defendants
Complex Litigation Division
P.O. Box 30736
Lansing, MI 48909
517.335.3055
govorchinp@michigan.gov