No. 19-2910

United States Court of Appeals for the Eighth Circuit

NORMAN BROWN, et al.,

Appellees,

v.

ANNE PRECYTHE, et al.,

Appellants

On Appeal from the United States District Court for the Western District of Missouri, Honorable Nanette K. Laughrey

APPELLANTS' REPLY BRIEF AND RESPONSE TO CLAIMS ON CROSS-APPEAL

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Argument

I. The Court should not expand *Miller* and *Montgomery* to allow federal courts to micromanage state parole procedures.

Despite the inmates' claim that the district court's order was a "necessary consequence" of *Miller* and *Montgomery,* in fact they ask this Court to radically expand the Supreme Court's Eighth Amendment case law. (Inmates' Br. at 27).

This Court should make no mistake—the district court departed from the holdings of *Miller* and *Montgomery* and expanded those cases to apply to inmates serving *paroleable* sentences. Not only that, the district court ignored well-established Eighth Amendment case law, by finding that cases about *sentencing* could force states to enact new *parole procedures*. And the district court disregarded *Montgomery v. Louisiana* and made hollow the Supreme Court's promise that States "may remedy a *Miller* violation by extending parole eligibility to juvenile offenders." *Montgomery v. Louisiana,* 136 S.Ct.718, 724 (2016).

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A. The district court erred in finding that *Miller v. Alabama* applies to inmates serving paroleable life sentences.

The relief ordered by the district court cannot be based on the holding of *Miller* because there was no sentencing claim before the court. In fact, in a suit under 42 U.S.C. § 1983, the court *cannot* find that the inmates' sentences are illegal. *Preiser v. Rodriguez,* 411 U.S. 475, 489 (1973). Recognizing that, many of the inmates have sought federal habeas relief in other cases, and federal courts have repeatedly found that Missouri's legislative remedy cured any *Miller* sentencing error the inmates suffered.[1] And for good reason. There is no reasonable argument that a life sentence with parole eligibility violates *Miller*.

Miller makes clear that its provisions only mandate that a sentencing court follow a heightened process before imposing "a particular penalty"—life imprisonment without the possibility of parole. *Miller v. Alabama,* 567 U.S. 460, 483 (2012). But *Miller* has no

[1] *See e.g., Davis v. Bowersox,* case no. 16-CV-00246, 2020 WL 1878743 (W.D.Mo. April 15, 2020); *Hack v. Cassady,* case no. 16-CV-04089, 2019 WL320586 (W.D.Mo. Jan. 24, 2019); *Ramirez v. Griffith,* case no. 16-CV-1058 (W.D.Mo. Dec. 2 2016); *Saddler v. Pash,* case no. 16-CV-00363, 2018 WL 999979 (E.D.Mo. Feb. 21, 2018).

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applicability to cases where a juvenile offender is not facing life without parole. *Miller,* 567 U.S. at 479; *Bowling v. Dir., VA. Dept. of Corr.,* 920 F.3d 192, 197 (4th Cir. 2019). And so *Miller* does not apply to this class of inmates.

The undisputed facts show that Missouri's *Miller* inmates are now serving paroleable life sentences, and that they will receive regular parole hearings until the Board sets a release date for them. (J.A. at 273–74, 303, 312,–13, 327, 328, 329, 331); Mo. Rev. Stat. § 558.047 (2016); 14 C.S.R. 80-2(C). If Missouri had passed that sentence on them after trial, *Miller* would not have applied. *Miller,* 567 U.S. at 479; *Bowling,* 920 F.3d at 197. Missouri's legislative grant of parole eligibility has placed the inmates in the same position they would be in if they had been sentenced to life with parole originally. That is the remedy *Montgomery* requires, nothing more. *Montgomery,* 136 S.Ct. at 724.

This Court and its sister circuit courts have declined to extend *Miller* to apply to offenders who are not facing life without parole sentences or equivalent "de facto life without parole sentences." *Ali v. Roy,* 950 F.3d 572, 575–76 (8th Cir. 2020) (collecting federal and state cases); *United States v. Jefferson,* 816 F.3d 1016, 1019 (8th Cir. 2016);

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Bowling, 920 F.3d at 197; *Bunch v. Smith,* 685 F.3d 546, 550 (6th Cir. 2012); *United States v. Grant,* 887 F.3d 131, 144 (3d Cir. 2018), *reh'g en banc granted, opinion vacated,* 905 F.3d 285 (3d Cir. 2018); *McKinley v. Butler,* 809 F.3d 908, 913–14 (7th Cir. 2016); *Moore v. Biter,* 725 F.3d 1184, 1191–92 (9th Cir. 2013).[2] "And even where circuit courts have found that the constraints of *Graham* and *Miller* apply to de facto life without parole sentences, those courts have only gone so far as to require parole boards to consider a juvenile's "*eligibility* for parole within the juvenile's lifetime." *Bowling,* 920 F.3d at 198 (citing *Grant,* 887 F.3d at 147). Federal appellate cases agree that *Miller* and *Graham* do not extend to "a juvenile offender who has and will continue to receive parole

[2] The federal courts of appeal disagree as to whether de facto life without parole sentences (those sentences long enough that juvenile offenders are not expected to receive parole eligibility in their lifetime) are governed by *Miller* and *Graham*. *Compare, e.g., United States v. Jefferson,* 816 F.3d at 1019 (600 month sentence does not fall within *Miller's* categorical ban on mandatory life-without-parole sentences) *with Moore v. Biter,* 725 F.3d at 1191–92 (aggregate sentence of 254 years for a juvenile non-homicide offender is materially indistinguishable from life without parole). That split of authority does not matter here because the undisputed facts show that the inmate class will be eligible for parole well within their lifetimes, and many have already received parole consideration. J.A. at 273–74, 303, 312,–13, 327, 328, 329, 331.

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consideration." *Bowling,* 920 F.3d 192. Yet the district court's order has expanded *Miller* and *Graham* to do just that.

The inmates and the district court mistakenly insist that dicta in *Miller* and *Graham* supports this expansion because, as they claim, "children are different." (Inmates' Br. at 4); (J.A. at 542). But the district court's quotations from those cases ignore their context: both *Miller* and *Graham* held that "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Miller,* 567 U.S. at 473. That is not to say that States should ignore social science research about adolescent development in other areas of the law. But whether and to what extent that research should impact state parole procedures is a question of legislative policy—not constitutional mandate. *See Graham v. Florida,* 560 U.S. 48, 76 (2010).

B. The district court erred in finding that *Miller* applies in parole proceedings.

Miller was an Eighth Amendment case. *Miller,* 567 U.S. at 489. Under its holding, either the inmates' sentences are constitutionally sound or they are not. *Id.* But neither outcome would require Missouri to give these inmates special treatment during parole procedures.

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Montgomery, 136 S.Ct. at 736. Under *Montgomery,* States were given the option to extend parole eligibility as a remedy for *Miller* error. *Id.* But it was *the States'* option. If a State's legislative *Miller* remedy did not bring an inmates' sentence into constitutional conformity, that inmate could seek collateral relief from their sentence, but it would not give federal courts the authority to rewrite a state's parole statutes, because the Eighth Amendment does not apply to parole proceedings. *Id. Stewart v. U.S.,* 325 F.2d 745, 746 (8th Cir. 1964); *Baumann v. Ariz. Dept. of Corr.,* 754 F.2d 841, 846 (9th Cir. 1985).

In arguing for special parole procedures instead of seeking collateral relief, the inmates have failed to meaningfully address the inconsistency between their substantive claims and the relief they seek. That is likely because it is clear that, in the proper forum, the inmates would not be entitled to the relief from their sentences. *Virginia v. Leblanc,* 137 S.Ct. 1726, 1728–29 (2017).

In *Leblanc,* the Supreme Court made clear that its Eighth Amendment case law requires only normal parole eligibility—not any special procedures—to remedy a *Miller* or *Graham* violation. The inmates' attempt to distinguish *Leblanc* rests solely on the fact that it

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was decided under the standards for federal habeas cases. Although those standards require deference to state court decisions, they do not deprive a reviewing court of its powers of legal reasoning. 28 U.S.C. § 2254(d). If *Miller, Graham,* or *Montgomery* had any language that required states to use a heightened parole process for juvenile offenders, the Supreme Court could have overturned Virginia's decision to remedy *Miller* violations with geriatric parole eligibility. But the language of *Miller* and *Graham* allows states to remedy erroneous juvenile sentences by providing parole review "in the normal parole consideration process" considering the "normal parole factors," which necessarily include rehabilitation and maturation. *Leblanc,* 137 S.Ct. at 1729; *see also Leblanc,* 137 S.Ct. 1730 (Ginsburg, J., concurring).

The inmates' brief shows the difficult position *Leblanc* puts them in. On one hand, the inmates insist their sentences are "not valid." (Inmates' Br. at 23) (citing *Greenholtz v. Inmates of Nebraksa Penal and Corr. Complex,* 442 U.S. 1 (1979)). On the other hand, the inmates do not seek relief from their sentences because they know they are not entitled to that relief. *Leblanc,* 137 S.Ct. at 1729–30. Instead, the inmates maintain that their sentences are invalid, without seeking relief from

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them, so that they can receive special treatment in parole proceedings. (Inmates' Br. at 23–24).

But federal law does not allow the inmates to use 42 U.S.C. § 1983 as an end-around binding Supreme Court precedent that holds their sentences have been remedied. *Preiser v. Rodriguez,* 411 U.S. at 489. If the inmates' argument requires this Court to hold that their sentences are invalid, this Court *cannot* find in their favor. *Id.* A challenge to the legality of a prisoner's sentence is at "the core of habeas corpus." *Id.* To make that challenge, Congress requires the inmates to first exhaust their claims in state court and requires this Court to defer to Missouri's reasonable application of federal law. 28 U.S.C. § 2254(b), (d).

The rule of *Preiser* explains why the inmates did not argue that their sentences were not valid when they filed their complaint in the district court. If the inmates had claimed below that their sentences were invalid and sought a remedy under § 1983, that claim would necessarily have failed. *Preiser v. Rodriguez,* 411 U.S. at 489. But that was not the claim below, where the inmates challenged only the "policies, procedures, and customs" of the Missouri Parole Board and argued that either the

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Eighth Amendment or the Due Process Clause gives rise to independent rights at parole proceedings. (J.A. at 100–103).

But the inmates' new challenge to their sentences cannot save them because there are only two possible outcomes under federal precedent: 1) The Court can find the inmates' sentencing error was remedied by Missouri's legislative action and deny their Eighth Amendment claims; or 2) The Court can find the inmates have impermissibly raised a challenge to their sentence under 42 U.S.C. § 1983 and dismiss their claims. Neither outcome would allow this Court to uphold the district court's decision to apply the Eighth Amendment to impose changes on Missouri's parole process.

C. The district court failed to identify a liberty interest that would support the inmates' due process claims.

The inmates' brief similarly fails to defend the district court's inability to identify a liberty interest that would support the inmates' due process claims. (Inmates' Br. at 23). The inmates argue that they are entitled to special parole procedures, but the inmates have no protectable interest in *procedures* themselves. *Olim v. Wakienoka,* 461 U.S. 238, 250 n. 12 (1983). Instead, clear federal precedent requires them to first show

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"a legitimate claim of entitlement" to release on parole before the Constitution can require Missouri to provide procedures necessary to protect that entitlement. *Kentucky Dept. of Corr. v. Thompson,* 490 U.S. 454, 462 (1989). But, as the inmates admit, they have no right to be released before the expiration of a valid sentence. *Greenholtz v. Nebraska Inmates,* 442 U.S. at 7. (Inmates' Br. at 23, 30).

Neither the district court nor the inmates attempts to describe the liberty interest that forms the basis of their claims. (J.A. at 519–521). Instead, the inmates attempt to distinguish *Greenholtz* by arguing that their sentences are not valid, because they violate *Miller* and *Montgomery*. For the reasons discussed above, that argument must fail. The inmates cannot use 42 U.S.C. § 1983 to raise a challenge to their sentences, especially when that challenge would clearly fail in the proper forum. *Preiser v. Rodriguez,* 411 U.S. at 489; *Leblanc,* 137 S.Ct. at 1729. If the inmates' sentences are not valid, they must seek habeas relief, and if their sentences are valid, *Greenholtz* controls. That is, if the inmates are serving paroleable life sentences that do not violate *Miller,* then *Miller* cannot apply to create a liberty interest in parole. *Bowling,* 920 F.3d at 200.

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The inmates also appear to argue that some combination of *Miller, Montgomery,* and *Graham* silently overruled decades of federal case law governing due process claims. (Inmates' Br. at 30–31). Because *Greenholtz* and other due process cases "predate[ ] *Graham* and its progeny by more than a quarter century . . . [and] dealt with adult inmates," the inmates argue this Court should disregard centuries of due process case law. (Inmates' Br. at 30–31).

The Supreme Court does not normally overturn or dramatically limit early authority *sub silentio,* and this Court should decline the inmates' invitation to assume it has done so here. *Shalala v. Council on Long Term Care, Inc.,* 529 U.S. 1, 18 (2000). Quite the contrary, the Supreme Court has confirmed *Greenholtz* is still good law since *Graham* was decided in 2010. *Swarthout v. Cook*e, 562 U.S. 216, 220 (2011). Nor did *Graham* or *Miller* give any indication that juveniles have more entitlement to release than adult offenders. Instead, the clear language of *Graham* reaffirms that "[a] State is not required to guarantee eventual freedom to a juvenile offender. . ." *Graham,* 560 U.S. 48, at 75. To find a protectable liberty interest in the holdings of *Graham, Miller,* and *Montgomery,* this Court would need to presume that the Supreme Court

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overturned not just *Greenholtz*, but an unbroken line of due process cases that require litigants to demonstrate a liberty interest before receiving due process protection. *Graham* and *Miller* give no guarantees of release to juvenile offenders, so they cannot be entitled to additional procedural protections during parole consideration hearings.

II. The inmates are not entitled to state-funded attorneys during parole hearings (responds to the inmates' sole cross-appeal claim).

On cross-appeal, the inmates argue that the district court was required to order Missouri to provide them with state-funded attorneys to represent them at parole hearings. Of course, this Court need not reach the cross-appeal claim if it finds that the district court erred in granting the inmates summary judgment on their constitutional claims. If the inmates' Eighth Amendment and Due Process claims fail, they are not entitled to any prospective relief, much less state-funded counsel.

But even if the inmates have some constitutional right to the revised parole procedures ordered by the district court, the district court correctly found that the inmates are not entitled to state-funded attorneys. The inmates' claim fails for at least two reasons.

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First, the inmates ignore the district court's role in ordering prospective relief under 18 U.S.C. § 3626. The district court is limited to granting relief that is necessary to correct a violation of federal rights, using the least intrusive means, and giving substantial weight to the State's policy judgment. Under that standard, the district court could not find that Missouri is required to provide state-funded counsel.

Second, the inmates misunderstand the function of a parole hearing. Well-settled precedent holds that there is no right to counsel, whether under the Sixth Amendment or the Due Process Clause, at a parole consideration hearing. The inmates claim that they are entitled to state-funded counsel because parole hearings for their class are essentially *resentencing* hearings, but *Montgomery* contradicts that reasoning. The Supreme Court clearly provided that States can provide parole eligibility to *Miller* offenders "*rather than*" resentencing them. *Montgomery,* 136 S.Ct. at 736. In other words, continuing parole review eliminates the need for the sentencing proceeding contemplated by *Miller*.

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A. Under 18 U.S.C. § 3626, the district court was required to accept the State's plan for compliance because the State's plan remedied the constitutional violations the district court found.

The inmates contend that the district court's remedy was a "pure question of federal law." Not so. Federal law required the district court to carefully balance the scope of the relief against the scope of the violation and to narrow tailor its order to extend no further than necessary to remedy the violation. *Native American Council of Tribes v. Weber,* 750 F.3d 742, 753–54 (8th Cir. 2014); 18 U.S.C. 3626(a)(1)(A).

In the summary judgment proceedings, the inmates did not allege—and the district court did not find—any constitutional violation related to the lack of state-funded counsel at parole hearings. (J.A. at 100–104); (J.A. at 547–552). In its summary judgment order, the district court found that the combination of several factors gave rise to a constitutional violation:

- The inmates' limited ability to review information in the Board's files before a parole hearing

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- The restrictions on inmate delegates[3]
- The comparative lack of restrictions on victims, their representatives, and prosecuting attorneys
- The lack of focus on *Miller* factors during parole hearings
- The denial of parole based solely on circumstances of the offense
- The lack of explanation as to the Board's decision to deny parole
- The lack of objective measures in evaluating inmates for parole.

(J.A. at 551). The Court did not find any constitutional violation based on the inmates' lack of state-funded counsel at parole hearings.

After the district court issued its order, the Board proposed a plan to address the constitutional violations found by the district court and the inmates submitted a competing plan. (J.A. at 28, 556, 572). After a court-ordered settlement conference, Missouri submitted an amended plan, followed by the inmates' amended response. (J.A. at 28, 607, 636). The district court held a hearing "regarding the proposed plan of

[3] Part of this claim related to restrictions on the ability of an inmate's private counsel to make legal arguments during parole hearings, but that claim does not include the right to state-funded counsel.

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compliance," and the parties submitted a final round of briefing following the hearing. (J.A. at 28–29, 653, 777, 779).

After reviewing the State's plan and the inmates' arguments against it, the district court entered an injunctive order on twenty-three items of relief addressing all of the putative constitutional violations identified in the summary judgment order. (J.A. at 823–32). The district court accepted the Board's amended plan on nearly every item except for the Board's proposed use of the Ohio Risk Assessment System. (J.A. at 829–30).

Given that the State's plan addressed all of the constitutional violations found in the district court's order, the court was required to accept it and extend its order "no further than necessary." The district court properly adhered its order to the confines of the constitutional violations it found.

The inmates mistake the limited evidence presented during the remedy proceedings as "undisputed facts." (Inmates Br. at 53–54). The inmates did not allege the need for state funded counsel in their petition, did not introduce evidence during the summary judgment proceedings about the necessity or feasibility of state-funded counsel, and did not

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secure any admissions from the Missouri Officials on that topic. When the district court issued its summary judgment order, there were no facts before the court about state-funded counsel, and the court did not find any constitutional violation on that point. (J.A. at 551).

While the inmates submitted a competing plan for compliance during the remedy litigation, the State was not required to respond to their plan and the district court was not permitted to weigh which one it would prefer. *Cepulonis v. Fair,* 732 F.2d 1, 6 (1st Cir. 1984). The district court was required to accept the State's plan as long as it remedied the constitutional violations found on summary judgment. *Id.*; 18 U.S.C. 3626(a)(1)(A).

Even if the district court had found that the State's plan was not sufficient to remedy the constitutional violations it found on summary judgment, the district court could not have ordered the State to provide the inmates with counsel. *Id*. Instead, the court would have been required to explain the insufficiencies in the State's plan and consult with state officials to find an adequate solution. *Id*. Given that the district court found no constitutional violations related to the inmates' lack of state-

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funded counsel, the court correctly declined to grant that relief under 18 U.S.C. 3626(a)(1)(A).

B. The inmates have no right to counsel at parole hearings.

The inmates fail to cite any case that has held the Constitution requires States to provide inmates with counsel at parole consideration hearings. The inmates rely heavily on one Massachusetts case, *Diatchenko v. District Attorney for Suffolk Dist.,* 471 Mass. 12 (2015), but even that case did not find a constitutional right to state-funded counsel. *Diatchenko,* 471 Mass. 12, 24 (2015). There, the Supreme Judicial Court of Massachusetts found that *Miller* offenders were entitled to *access* to counsel at their parole hearings. *Id.* Then, the court found that Massachusetts state law provided that the state must appoint counsel to indigent offenders in any proceeding where the Supreme Judicial Court has determined that the offender must have access to counsel. *Id.*

The clear general rule, even where offenders have a due process interest in parole release, is that there is no right to state-funded counsel at parole hearings. *Greenholtz,* 442 U.S. at 16 (due process in Nebraska parole proceedings required "nothing more" than notice and opportunity

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to be heard); *Dorado v. Kerr,* 454 F.2d 892, 896–97 (9th Cir. 1972) (Sixth Amendment right to counsel does not apply in parole hearings); *Ganz v. Besinger,* 480 F.2d 88, 90 (7th Cir. 1973).

Even if the inmates had a due process interest in parole release, the record does not reflect the need for counsel. None of the Board members is an attorney, and the Board does not have the capacity or authority to consider legal arguments or make judicial determinations during parole hearings. During parole consideration, the Board evaluates whether a parole is in "the best interests of society" and whether the applicant can be "supervised under parole supervision and successfully reintegrated into the community." Mo. Rev. Stat. § 217.690. Courts have long recognized that parole release decisions depend on "an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task evaluating the advisability of parole release." *Greenholtz,* 442 U.S. at 14.

There is simply no evidence in the record that Missouri's parole process creates a disparity between inmates who can hire counsel for their parole hearings and those who cannot. In general, Missouri grants

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early release to nearly all adult inmates—including violent offenders—despite the fact that there is no process for providing them with counsel. (J.A. at 272, Doc. 134–22 at 67, Table 7.1). Courts have long recognized that parole hearings do not "make lack of means an effective bar to the exercise." *Ganz v. Besinger,* 480 F.2d at 90 (citing *Griffin v. Illinois,* 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring)). Especially given the breadth of procedures ordered in remedy by the district court, there is no reason to believe from the record that counsel is necessary to protect any interest the inmates have in being released on parole. There is no reasonable argument that the inmates' chance at parole release will be "meaningless" or "unrealistic" without appointed counsel.

The inmates' argument to the contrary fundamentally misunderstands the nature of parole proceedings. The inmates insist that their parole consideration is just a "proxy" resentencing hearing. (Inmates' Br. at 50–51). *Montgomery* forecloses their argument. *Montgomery,* 136 S.Ct. at 736. The Supreme Court held that its retroactive application of *Miller* "does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole." *Id.* "A State may remedy

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a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, *rather* than by resentencing them." *Id.* (emphasis added).

The inmates' argument turns *Montgomery* on its head and insists that Missouri must relitigate each inmate's sentence before the parole board. That cannot be the law. *Miller* and *Graham* discussed the constitutional principles at issue when a sentencing court is "making the judgment at the outset that [juvenile] offenders never will be fit to reenter society." *Graham,* 560 U.S. at 75. Those principles are simply inapplicable to "a juvenile offender who has and will continue to receive parole consideration." *Bowling,* 920 F.3d 192.

Missouri's decision to provide the inmates with regular parole consideration avoided the need for adversarial resentencing where the State must appoint counsel. *Montgomery,* 136 S.Ct. at 736. The Court should deny the inmates' claim on cross-appeal.

Conclusion

For these reasons, the Court should reverse the district court's order and judgment granting summary judgment and injunctive relief.

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/s/ Andrew J. Crane
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was electronically filed by using the CM/ECF system. Counsel for petitioner will receive a copy of the foregoing document through the CM/ECF system this 5th day of May, 2020.

/s/ Andrew J. Crane
ANDREW J. CRANE
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