UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ROBERT EARL HOWARD,
DAMON PETERSON,
CARL TRACY BROWN, and
WILLIE WATTS on behalf of themselves and
all others similarly situated,

Plaintiffs,

Case No. 6:21-cv-00062-PGB-EJK

v.

MELINDA N. COONROD,
RICHARD D. DAVISON, and
DAVID A. WYANT in their official capacities,

Defendants.
_____/

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Defendants' Opposition [ECF No. 52] does not contest Plaintiffs' adequate showing of Rule 23's class certification requirements. Defendants instead assert improper merits arguments and a nonexistent "need requirement." Their arguments do not withstand scrutiny; the Court should certify the Proposed Class.[1]

I. Defendants' Merits Arguments Are Improper

Defendants dedicate the vast majority of their Opposition to arguing the merits—14 of 20 pages are almost exclusively a rehashing of their unsuccessful motion to dismiss arguments or a preview of their potential arguments to survive summary judgment. Essentially, Defendants claim class certification is not appropriate because they believe they will prevail on the merits.

That is not how class certification works. "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the [class] certification stage." *Amgen Inc. v. Conn. Retirement Plans & Tr. Funds,* 568 U.S. 455, 466 (2013). Instead, at class certification, "the question is not whether the . . . plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."[2] Thus, the Court should reject Defendants' merits-based arguments and focus on whether the Rule 23 requirements have been satisfied.

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[1] All capitalized terms have the same meaning as in Plaintiffs' Motion For Class Certification (the "Motion") [ECF No. 51].

[2] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974); *see also Amgen*, 568 U.S. at 466 ("Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."); *G.H. v. Tamayo*, 2021 WL 5150050, at *3 (N.D. Fla. Oct. 22, 2021) ("[P]arties seeking class certification need not establish at the outset that they will ultimately prevail on the merits.").

Plaintiffs' Motion demonstrates that each of the Rule 23 requirements are satisfied for the over 270 putative class members and cites multiple cases where district courts have certified similar classes. Defendants neither address these cases nor point to one case where class certification for juvenile lifers has been denied. Instead, their only arguments directed to the Rule 23(a) requirements are made in the last two paragraphs of their opposition where they suggest that commonality and typicality are lacking. Their conclusory arguments on these points miss the mark.

According to Defendants, class certification is improper because there is a purported lack of commonality between juvenile offenders serving a term of years and juveniles serving a life sentence. But as Plaintiffs made clear in the Motion, the commonality component does not require that common questions of law and fact predominate over individual issues. *See* Mot. 12–16. Instead, Plaintiffs must only demonstrate that Defendants have engaged in a standardized course of conduct that affects all Class Members. *Id.*

That is what Plaintiffs have done. Regardless of whether Class Members are serving life with parole sentences or a term of years equating to a *de facto* life sentence, all have been subjected to, and injured by, Defendants' unlawful parole review policies and practices. All Class Members were sentenced for crimes when they were under eighteen years of age. All are subject to the same parole process. As this Court has properly held, all such Juvenile Lifers have an Eighth Amendment and procedural due process right to a meaningful opportunity for

release based on demonstrated maturity and rehabilitation. All have been denied that opportunity. The differences in a term of year sentence or life sentence are meaningless when the parole process largely condemns the vast majority of Juvenile Lifers to die in prison,[3] converting all their sentences to unconstitutional *de facto* life without parole sentences. The commonality requirement is satisfied.

As to typicality, Defendants argue it is absent "because putative class members may differ from Plaintiffs and one another in significant respects in terms of the extent to which they have availed—or failed to avail—themselves of the numerous existing procedural opportunities provided to them to advance their requests for parole . . . ." Opp. 20. Contrary to Defendants' claim, whether Class Members utilize or fail to utilize purported "procedural opportunities . . . [in] advance [of their] requests for parole" does not create factual differences defeating typicality. *See* Opp. 20. It is well-settled law that typicality is satisfied if the proposed class representatives' claims arise from the same pattern or practices that give rise to the other class members' claims and are based on the same legal theory.[4] Minor factual variations, such as those raised by Defendants, do not defeat typicality where, as here, Plaintiffs' claims of unconstitutional parole review practices and policies could be raised by any member of the Class, and all Class Members share the common injury of being subjected to the same unlawful

[3] Since 2014, only 17 out of over 300 Juvenile Lifers have been paroled. Mot. 6.
[4] *See, e.g.*, *Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012).

practices and policies. *See id.* Plaintiffs satisfy typicality, as well as the other Rule 23 requirements.

II. Defendants' Necessity Argument Is Misplaced as a Matter of Law and Fact

Defendants argue that the Court should add a "need requirement" to Rule 23 and that certification is not warranted because any injunctive "relief granted to [an] individual [Plaintiff] would inure to the benefit of all potential class members." Opp. 16. This argument is wrong as a matter of law and fact.

"Necessity" is not mentioned in Rule 23(b)(2) and, as made clear in one of the primary cases relied on by Defendants, the Eleventh Circuit has never "recognize[d] a necessity requirement in the Rule 23(b)(2) analysis."[5] Indeed, "[m]any courts have rejected the necessity doctrine outright as being nontextual, noting that a need requirement finds no support in Rule 23 and, if applied, would entirely negate any proper class certifications under Rule 23(b), a result hardly intended by the Rules Advisory Committee."[6] And the modern trend is to reject such a purported requirement as incompatible with the text of Rule 23(b)(2). *See,*

[5] *M.R. v. Bd. of Sch. Comm'rs of Mobile Cnty.*, 286 F.R.D. 510, 519 (S.D. Ala. 2012) (cited in Opposition at 16-17).

[6] 2 NEWBERG ON CLASS ACTIONS § 4:35 (5th ed.) (footnote omitted); *see, e.g.*, *Brown v. Scott*, 602 F.2d 791, 795 (7th Cir. 1979) ("In a number of cases this court has held that if the requirements of Rule 23 are satisfied class certification should not be refused because of lack of need."), *judgment aff'd sub nom. Carey v. Brown*, 447 U.S. 455 (1980); *G.H.*, 2021 WL 5150050, at *5 (noting that "Rule 23 does not refer to necessity" and finding that "the [defendants'] position on necessity, if adopted, would render Rule 23(b)(2) a dead letter"); *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 349 (N.D. Cal. 2008) (holding that a necessity "requirement would effectively eviscerate Rule 23(b)(2), which was specifically designed with the benefits of collective action in mind"); *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 239 F.R.D. 9, 23 (D.D.C. 2006) ("As numerous courts have observed, whether certification is 'necessary' is not a question Rule 23 directs the courts to consider.").

e.g., *Harris v. Rainey*, 299 F.R.D. 486, 492 (W.D. Va. 2014).

The cases cited by Defendants (Opp. 16–17 & n.4) are contrary to the modern trend to adhere to the plain text of Rule 23(b)(2); they should not be followed here. As the Supreme Court explained, Rule 23 "[b]y its terms [] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action."[7] The Court should reject Defendants' invitation to disregard both the plain text of Rule 23 and the Supreme Court's interpretation of it.

Even if necessity were an appropriate consideration, certification *is* necessary to avoid potential mootness and because Defendants assert Plaintiffs' claims are time-barred.[8] While Plaintiffs dispute that defense, if the defense succeeds or Plaintiffs are suddenly granted release—rendering their claims moot—the claims on behalf of similarly situated persons would need to start anew. And Defendants will certainly attempt to assert a statute of limitations defense against any future plaintiffs. Class certification is necessary.[9]

In addition, the necessity doctrine is inapplicable where, as here, there is uncertainty whether Defendants would apply any awarded relief to the Proposed

[7] *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 398 (2010).
[8] Defendants contend that Plaintiffs' claims are time barred. *See* Answer 27. It is reasonable to assume they will pursue this defense as the case progresses.
[9] *See Ollier v. Sweetwater Union High Sch. Dist.*, 251 F.R.D. 564, 566 (S.D. Cal. 2008) (rejecting necessity argument and finding that class certification was warranted to, among other things, suspend the applicable statute of limitations and allow the case to proceed on the merits); *see also Johnson v. City of Opelousas*, 658 F.2d 1065, 1070 (5th Cir. Unit A Oct. 1981) (holding that possibility of mootness weighed in favor of class certification and against defendant's necessity argument); *Lebron v. Wilkins*, 277 F.R.D. 664, 666 (M.D. Fla. 2011) (same).

Class in the absence of a class-wide injunction.[10] Defendants have taken the position that "parole is a highly individualized, fact-intensive process that does not lend itself to class-wide treatment." Opp. 20. Given this position by the term-limited civil servant Defendants and the history of Florida officials insisting that individual injunctions favor only the individual plaintiffs, class certification is necessary because there is no certainty Defendants or their successors would apply injunctive relief to all Juvenile Lifers in the absence of a class-wide injunction.[11]

Additionally, certification is necessary to give Plaintiffs the merits-based evidence they need to demonstrate that the parole process—which Defendants claim is perfectly fine—is unconstitutional. Defendants are already resisting producing discovery regarding putative class members. Obtaining discovery that will permit Plaintiffs to prove that Defendants consistently apply unconstitutional

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[10] *See, e.g.*, *G.H.*, 2021 WL 5150050, at *5 (rejecting necessity argument and exercising discretion to certify a class because Florida officials have a history of insisting that individual injunctions favor only the individual plaintiffs and that its "officials remain free, in dealing with others, to continue the conduct held unconstitutional"); *Brown v. Precythe*, No. 17-CV-04082, 2018 WL 3118185, at *8 (W.D. Mo. June 25, 2018) (rejecting the defendant's necessity argument "[b]ecause there is a risk that Defendants will not treat all inmates serving JWLOP sentences as being bound by any decision by the Court concerning named plaintiffs' claims").

[11] None of the Opposition's cited authorities deal with prison-related civil rights litigation—such as Plaintiffs' as-applied constitutional challenges to Florida's parole process—a type of litigation well-suited for class treatment owing to the difficulties faced by incarcerated persons seeking to vindicate their rights. Instead, each of Defendants' cited authorities denied certification on significantly different facts than presented by Plaintiffs: (1) denying certification because the plaintiffs failed to provide any reasons why class treatment was appropriate (*M.R.*, 286 F.R.D. at 519); (2) denying certification where the risk of mootness was not present (*Ruiz v. Robinson*, No. CV-23776, 2012 WL 3278644, at *3 (S.D. Fla. Aug. 9, 2012)); and (3) denying certification because there was near-absolute certainty individual injunctive relief would benefit the proposed class (*Mills v. D.C.*, 266 F.R.D. 20, 22–23 (D.D.C. 2010); *Access Now, Inc. v. Walt Disney World Co.*, 211 F.R.D. 452, 455 (M.D. Fla. 2001); and *Davis v. Smith*, 607 F.2d 535 (2d Cir. 1978)). Defendants' reliance on *Markel v. Blum* is misplaced, as the *Markel* court *certified* the class. *See* Opp. 17 (citing 509 F. Supp. 942, 949 (N.D.N.Y. 1981)).

policies to all of the nearly 300 Juvenile Lifers—not just these four named plaintiffs—is critical to substantiating Plaintiffs' claims.[12] For these reasons, this Court should exercise its discretion to certify the Proposed Class.[13]

III. Certifying the Proposed Class Under Rule 23(b)(1)(A) is Efficient

Defendants shrug off Plaintiffs' alternative Rule 23(b)(1)(A) showing, claiming they are not worried about inconsistent judgments because they believe they will prevail on the merits. They miss the point. Defendants' proposed scenario of incarcerated individual Plaintiffs filing their own separate actions—actions which would (possibly) be transferred and consolidated, with conflicting judgments from other courts resolved in one or more appeals[14]—flies in the face of basic principles of judicial economy and the underlying rationale for class certification in civil rights prison litigation. Obviously, inmates have limited means to hire counsel or litigate individual cases. Class certification is the most judicially efficient means to ensure appropriate injunctive relief for Plaintiffs and Class Members. Accordingly, Plaintiffs respectfully request the Court certify the Proposed Class.

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[12] Moreover, proving the individual plaintiffs' rights were violated by an unconstitutional system would require much of the same evidence as proving over 270 people's rights were violated, so Defendants' "burden of discovery" argument is misplaced as well.

[13] *See, e.g., G.H.*, 2021 WL 5150050, at *5 (holding that "class treatment is not unnecessary, and in any event, the better exercise of any such discretion is to certify a class"); *Ollier,* 251 F.R.D. at 566 (noting that in the absence of a certified class, key evidence could be excluded and this possibility weighed in favor of certification).

[14] *See* Opp. 17 (describing the above scenario and inexplicably stating "the Commission is not concerned about inconsistent and incompatible injunctions").

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Respectfully submitted,

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