IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ROBERT EARL HOWARD, et al.,
Plaintiffs,

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

MELINDA N. COONROD, et al.,
Defendants.
_____ /

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, by and through undersigned counsel Reply to Plaintiffs' Opposition to Defendants' Motion For Summary Judgment (hereinafter "Response").

I. Introduction

This case hinges on language from *Graham v. Florida*, 560 U.S. 48 (2010), where the Supreme Court held that states are not required to guarantee eventual freedom juvenile offenders, but that states must give "**some** meaningful opportunity to obtain release **based on demonstrated** maturity and rehabilitation." Id. at 75. This is often misquoted as a requirement to give "a" meaningful opportunity. There is a nuanced difference between the two words, and "some" is a lesser standard than "a" in the context of that sentence. The provision of "some meaningful opportunity," however, is only implicated if it applies to paroles, and only if the inmate has *demonstrated* maturity and rehabilitation. Moreover, "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance." Id.

Contrary to Plaintiffs' interpretation of *Montgomery v. Louisiana*, 577 U.S. 190, 211 (2016), the Supreme Court never stated that a *parole system* must ensure that juvenile offenders do not serve disproportionate sentences. Instead,

> A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, e.g., Wyo. Stat. Ann. § 6–10–301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). *Allowing those offenders to be considered for parole ensures* that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.

Id. (Referring to *Miller v. Alabama*, 567 U.S. 460 (2012))(emphasis added). The Supreme Court, then, did not pronounce a requirement for how state parole systems would operate, but instead assumed that merely allowing juvenile offenders to be considered for parole would satisfy the Constitution. The Supreme Court's citation to the Wyoming statute was merely provided as an example, not a mandate to other states. Again, contrary to the way Plaintiffs word their response, the Wyoming statute merely provides that after twenty-five (25) years, an inmate is "eligible for parole," which does not mean that an inmate is likely to be released at that point.

Plaintiffs cast Defendants' actions as increasing Plaintiffs' sentences and as "operating an extra-judicial sentencing scheme." This is never an accurate statement. There is no dispute that Defendants have no authority to modify a sentence, and that Defendants have never done so. Additionally, much of Plaintiffs' Response is merely argument that the number of juvenile offenders paroled "proves" that the parole system does not provide some meaningful opportunity for release. This entire argument is based on cherry-picked statistics and is fatally flawed. First, Plaintiffs have

do not acknowledge or factor into their statistical analysis the undisputed fact that in 1983, the Legislature effectively eliminated parole for all but a handful of offenses, and for all offenses by October 1, 1995. No class member is serving a parole eligible sentence for a crime committed after 1994. Florida has not imprisoned any inmate eligible for parole for an offense committed in the past nearly thirty years. Further, each inmate is a unique individual, each set of circumstances of the offense(s) is unique, and each inmate demonstrates maturity and rehabilitation differently. Only by review of the entire file of each inmate, at each point that the Commission makes a parole decision, can the Court attempt to determine whether the process provided an inmate "some meaningful opportunity" to demonstrate maturity and rehabilitation.

Plaintiffs state that class members are not provided all the materials and information upon which Defendants base their parole decisions, but at the same time do not dispute that inmates may, upon request, get copies of these documents and that inmates may send documents on any subject, as often as desired, to the Commission. Inmates may secure their own counsel, psychologists, investigators, and experts of any kind, at their own expense. An inmate may have any individual in support or any expert of his choosing attend and speak to the Commission at a public meeting. Both the inmate and victim representatives are each allotted ten (10) minutes to present, and the Commission may expand this time. While stating that an inmate's parole hearing may only take minutes, Plaintiffs do not dispute Defendants review the entire file for each inmate prior making a parole decision, and that this review and preparation can take multiple hours for a single case.

Defendants object to Plaintiff's Response incorporating, in footnotes, parts of their other motions by reference.[1] In the interests of fairness, this Court should disregard these references as an attempt to improperly exceed this Court's page limitations.

II. Plaintiff's Arguments Disputing Quasi-Judicial Immunity Are Flawed

Plaintiffs argue Defendants did not show that the *Cleavinger v. Saxner*, 47 U.S. 193, 202 (1985), immunity factors apply to Defendants. However, as Defendants explained in their motion for summary judgment—and Plaintiffs do not dispute—no such analysis is necessary because the Eleventh Circuit has already held that parole commissioners are quasi-judicial officers. See e.g., *Fuller v. Georgia State Bd. of Pardons & Paroles*, 851 F.2d 1307, 1310 (11th Cir. 1988); *Holmes v. Crosby*, 418 F.3d 1256, 1258 (11th Cir. 2005). Plaintiffs merely argue that Defendants may be removed from their positions for cause. Although this is also true for judges, Plaintiffs, with no elaboration or citation to any authority, propose that this is a dispositive difference between Defendants and judges.

Plaintiffs argue that Defendants claim not to be bound by precedent. As support for this assertion, Plaintiffs cite to responses to deposition questions posed without any context as to how that term might apply to paroles. Commission Chairman Melinda

[1] See, inter alia, Response at fn. 2, incorporating arguments from DE 69 and 88 (discovery motions); Response at 4, referring to DE 96 (Plaintiffs' stricken Motion for Summary Judgment); Response at 5, incorporating pp 18-22 of DE 104 (Plaintiffs' Amended Motion for Summary Judgment); fn. 12, referring to arguments from DE 104 (Plaintiffs' Amended Motion for Summary Judgment); Response at 14, incorporating part of DE 96 (Plaintiffs' stricken Motion for Summary Judgment); Response at 14, referring to arguments in DE 104 (Plaintiffs' Amended Motion for Summary Judgment).

Coonrod testified at deposition that each time the Commissioners vote, the vote is based on the record before them, and that every case is different and unique, as is every individual. Response, Ex. 3 159-60. Plaintiffs imply that this statement defeats immunity, but include no supporting argument or citation to authority.

The language of 42 U.S.C. § 1983 must apply to immunize Defendants. Plaintiffs argue that they are not challenging the specific acts of Defendants. Plaintiffs are, indeed and of course challenging these actions, as a group. Nothing in the wording of the statute tends to support Plaintiffs' restrictive interpretation and, again, Plaintiffs do not cite to any authority. Plaintiffs are also caught in a Catch-22 when they argue that the language of 42 U.S.C.§. 1983, applies only to the individual decisions of Defendants. Plaintiffs argue at length that the past decisions of Defendants resulted in too few—in Plaintiffs' opinion—inmates paroled. Plaintiffs present many statistics regarding the numbers of juvenile offenders paroled, and of the results of other of Defendants' parole decisions. Plaintiffs rely upon statistics that result directly from Defendants' decisions, and Plaintiffs are, then, directly challenging those individual decisions. Plaintiffs are necessarily arguing that past decisions of Defendants were wrongly decided, because Plaintiffs' opinion is that if Defendants took demonstrated maturity and rehabilitation into account in a "better" way, Defendants would have paroled more juvenile offenders. This, yet again, highlights the inherent impropriety of attempting to prove any case through statistics without a complete record of the underlying facts. Since Plaintiffs chose to litigate the case using the history of Defendants' decisions, Plaintiffs cannot also claim that they are not

litigating over Defendants' decisions. This reasoning also supports Defendants' *Heck v. Humphrey*, 512 U.S. 477 (1994), argument.

Plaintiffs argue that Defendants are not entitled to quasi-judicial immunity due to waiver by not including this in the Answer. As support, Plaintiffs inappropriately cite to two cases—*Skrtich v. Thornton*, 280 F.3d 1295 (11th Cir. 2002), and *Kennedy v. City of Cleveland*, 797 F.2d 297, 300 (6th Cir. 1986)—which both relate to qualified immunity, which is an affirmative defense, and thus inapplicable here. Plaintiffs also inappropriately cite to *Singleton v. Merrill*, No. 21-cv-1291, 2021 WL 5979516, at *7–8 (N.D. Ala. Dec. 16, 2021)(a waiver of legislative immunity can occur through the legislature's affirmative acts in litigation).

III. Plaintiffs Did Not Rebut Defendants' Eighth Amendment Arguments

Plaintiffs inaccurately argue that *Montgomery* mandated a method for parole commissions. As discussed above, *Montgomery* did not set out any mandate for states regarding their parole systems.

Plaintiffs inaccurately assert that Florida's subsequent reviews *will be* conducted in seven (7) year increments. Rather, they can be in *up to* seven (7) year increments, but can be as short as one (1) year. For any interview Defendants set out more than two (2) years, Defendants must make certain and particular findings as set out my statute. DE 95, Ex. 1 at 149-50.

Plaintiffs erroneously state that Defendants "assert" the words "life 'with parole'" are simply "magical words" with no real meaning (Response at 7) and instead

is a phrase Defendants use to make long sentences *de facto* life sentences. First, Defendants have never asserted this. Second, Defendants do not agree that any term of years sentence is a *de facto* life sentence. Plaintiffs' citation to *Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017), quoted only dicta and omitted the fact that the plaintiff there would have had to serve 131.75 years in prison before he would be eligible to be considered for parole. Thus, it does not apply here.

Defendants cited to *United States v. Sparks*, 941 F.3d 748 (5th Cir. 2019), as holding that *Graham* Cases created did not create Eighth Amendment protections or Procedural Due Process rights to those with parole eligibility, or to inmates serving terms of years, or beyond sentencing. Plaintiffs argue an irrelevant fact that Sparks received a resentencing hearing. The *Sparks* court presented that fact as an additional reason for denying constitutional protections, *as well the fact that Sparks did not receive a mandatory life sentence without parole.* The issues Defendants cited were correct.

Plaintiffs argue that Defendants' cite to *Bowling v. Dir., Virginia Dep't of Corr.*, 920 F.3d 192 (4th Cir. 2019) was inapposite. But Plaintiff's quote from that case shows that *Bowling* supported Defendants' motion. Plaintiffs quote that the system in *Bowling* was satisfactory since it "allowed" (not mandated) consideration of the inmate's age as well as any evidence of maturation since. Florida's system does the same.

As held this year in *Brown v. Precythe*, 46 F.4th 879, 886 (8th Cir. 2022), the Eighth Circuit held that Miller applies only in sentencing, and that *Miller* and *Montgomery* did not suggest that federal courts should review parole procedures.

> The *Miller* factors, however, apply as a constitutional matter only to a judge's decision at sentencing whether to impose a term of life imprisonment without parole for a juvenile homicide offender. *Montgomery*, 577 U.S. at 209-10, 136 S.Ct. 718. … By operation of Missouri law, the inmates here were resentenced to life with the possibility of parole. *Hicklin*, 613 S.W.3d at 787-88. *Miller* and *Montgomery* did not purport to go further and direct federal courts to scrutinize in a civil rights action whether a State's parole procedures afford "some meaningful opportunity" for release of a juvenile homicide offender. As the Fourth Circuit observed, accepting the inmates' argument here would require this court to conclude (1) that the Supreme Court's juvenile-specific Eighth Amendment protections extend to juvenile homicide offenders sentenced to life with the possibility of parole, and (2) that those protections extend beyond sentencing proceedings. *Bowling v. Dir., Va. Dep't of Corr.*, 920 F.3d 192, 197 (4th Cir. 2019). Like the Fourth Circuit, we decline to go that far.

Id. Even regarding sentencing, as distinct from parole, *Jones v. Mississippi*, 209 L. Ed. 2d 390, 141 S. Ct. 1307, 1321 (2021), states that youth is just a factor and that the impact of youth will vary ("[i]t is true that one sentencer may weigh the defendant's youth differently than another sentencer or an appellate court would, given the mix of all the facts and circumstances in a specific case. Some sentencers may decide that a defendant's youth supports a sentence less than life without parole."). 141 S.Ct. at 1320

Consideration of the inmate for parole is sufficient. *Montgomery* 577 U.S. at 212 ("A State may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."); *Jones*, 141 S. Ct. at 1323 (naming ways the states can solve the *Miller* violations, which is theirs to elect.).

Plaintiffs argue that Plaintiffs *will not* (rather than might not), be released until they are in their 90s. This is based on the false premise that every inmate will serve out until the current PPRD. This is demonstrably false since no Class member is older than 69. Plaintiffs also misstate parole rates by including a large group of inmates

who were already released due to resentencing and assuming that none of them would have been released to parole. There is no factual basis for such as assumption.

If the Supreme Court cases apply to the parole process, then the central elements of *Jones* for sentencing must offer states at least as much leeway as it offers to sentencing judges. Thus, Defendants must have discretion, and they need not state their reasoning on the record. 141 S.Ct. at 1322.

Plaintiffs inaccurately argue that it is "undisputed" that Defendants do not consider even exemplary behavior. Yet all three Defendants testified without rebuttal that they consider the entire record of each case. Here, Plaintiffs wish to substitute their opinions for the judgment of Defendants regarding what constitutes "exemplary" behavior that *demonstrates* maturity and rehabilitation.

IV. Plaintiffs Are Not Entitled To Due Process, But Have Sufficient Process

Plaintiffs refer this Court back to its ruling on Defendants' motion to dismiss. The statement by this Court regarding due process was not a "holding", because the Court was merely determining whether the case was sufficient to proceed. Moreover, that ruling on the motion to dismiss was prior to the Supreme Court's decision in *Jones*, and also prior to the informative decision of the Eighth Circuit in *Brown*.

Jones recognized that federal courts should "avoid intruding more than necessary" upon the States, and thus did not add a requirement to make findings on the record even at *sentencing*, and even for a life *without* parole sentence for a juvenile. Jones at 1321. Further, the Supreme Court explained that "because a discretionary

sentencing procedure suffices to ensure individualized consideration of a defendant's youth, we should not now add still more procedural requirements." Id.

Plaintiffs downplay the multiple rights they have in the parole process. They claim more rights are required, but do not cite to authority. They have no evidence that any limitations have adversely affected any Class member.

Plaintiffs disagree that *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994), forecloses their due process claim. However, the cases they cite were all pre-*McKinney*, and *McKinney* itself quoted from *Zinermon v. Burch*, 494 U.S. 113, 123 (1990)), one of the cases Plaintiffs cite for a contrary result.

Respectfully submitted,
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