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,

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

Defendants.
_____/

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

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

I. DEFENDANTS' PAROLE SYSTEM VIOLATES PLAINTIFFS' EIGHTH AMENDMENT RIGHT TO A MEANINGFUL OPPORTUNITY FOR RELEASE

Defendants' argument that the Eighth Amendment Cases[1] do not apply to parole, and that Florida's parole system therefore does not violate the Eighth Amendment, is disingenuous, illogical, and wrong. FCOR has long conceded that the Eighth Amendment Cases apply to parole. It is an undisputed fact that in 2014, in the wake of *Miller*, FCOR amended its objective parole guidelines[2] in recognition of the foundational principle that children are constitutionally different from, and less culpable than, adults. *Miller*, 567 U.S. at 472, *Graham*, 560 U.S. at 72. In this regard, FCOR acknowledges that the manner in which they enforce a JLWP sentence is as much bound by the Eighth Amendment and the Supreme Court's jurisprudence as the trial court's process in setting it.

Defendants deny however that FCOR is similarly bound by *Miller's* holding "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." Cf. *Graham,* 560 U.S., at 75; *Miller*, 567 U.S. at 479. The Supreme Court made clear that the difference between an unconstitutional life sentence and a constitutional one is the

[1] *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. Louisiana*, 577 U.S. 190 (2016), *Jones v. Mississippi*, 141 S. Ct. 1307 (2021).

[2] FCOR made two changes to its parole guidelines for JLWPs in response to *Miller*. First, it stopped penalizing JLWPs with additional saliency points. However, it is an undisputed fact that FCOR has not retroactively applied those changes to over half the Class (93 individuals) whose PPRDs were based on a matrix and saliency factor scoring system that held them more culpable and subjected them to longer terms of incarceration. D.E. 113 at 19; D.E. 104, SOF18. Second, FCOR adopted a youthful offender matrix to set PPRDs. D.E. 113 at 17, 18. This change had no real impact because of Defendants ability to extend PPRDs with aggravating factors.

possibility for parole, comparing parole to the Eighth Amendment requirement that non-homicide JLWP's be afforded a meaningful opportunity for release based on demonstrated maturity and rehabilitation. Defendants do not agree that their parole system must provide JLWPs such an opportunity and they of course do not provide one.

Nor do Defendants and FCOR feel bound by *Montgomery*'s finding "that *Miller* announced a substantive rule of constitutional law" requiring "retroactive effect." *Montgomery*, 577 U.S. at 212. Defendants deny the application of *Montgomery* to parole despite the Court expressly recognizing the two ways to remedy an unconstitutional life without parole sentence, either (1) by resentencing or (2) by affording JLWOPs an opportunity for parole release.[3] Either remedy, the Court stated, must ensure that "juveniles whose crimes reflected only transient immaturity – and have since matured – will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Id.*

Nevertheless, the Defendants argue that a sentence of life with the possibility of parole is facially constitutional and neither the Eighth Amendment, by its terms, nor U.S. Supreme Court precedent interpreting the Eighth Amendment Cases are relevant to how parole release is actually administered. This argument, that the magical words "with parole" transform an unconstitutional life sentence into a constitutional one without imposing any affirmative obligations on

[3] "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)."

the parole process itself, is both illogical and wrong.

What if FCOR amended its parole guidelines to set PPRDs for all homicide offenders, including JLWPs, at 100 years? Or if FCOR allowed one prisoner to be released every ten years, based on a random lottery drawing? The Eighth Amendment would be neither silent nor blind in these situations. The only question would be what does the Eighth Amendment require? For JLWPs, the Eighth Amendment Cases make the answer clear –a meaningful opportunity for release based on demonstrated maturity and rehabilitation.

This question of what the Eighth Amendment requires in considering parole of JLWPs is one that neither Defendants nor the cases they cite actually answer. D.E. 112 at 5, 6. The Supreme Court has not actually decided a JLWP parole case. The Circuit Courts that have wrongly signed onto the magical words theory have not had to seriously consider it because in each of those cases the appellant had either received the resentencing remedy[4] or had an opportunity for parole under a system that – unlike Florida's system – actually provided a meaningful opportunity for release.

In *Bowling v. Dir., Virginia Dep't of Corr.,* 920 F.3d 192 (4th Cir. 2019), the Fourth Circuit found the appellant had been considered for release every year

[4] In both *United States v. Sparks*, 941 F.3d 748, 754 (5th Cir. 2019) and *United States v. Morgan*, 727 Fed. Appx. 994 (11th Cir. 2018), the Fifth and Eleventh Circuits recognized that the appellants had received constitutionally sufficient resentencing hearings where their youth and its attendant characteristics were carefully examined and incorporated into each new sentence. *Sparks*, 941 F.3d at 753; *Morgan*, 727 Fed. App'x. 994 at 995-6. Here, no Class Member has had a sentencing in which the judge was required to consider the *Miller* factors.

since 2005 based on existing factors that "allowed the Parole Board to fully consider the inmate's age at the time of the offense, as well as any evidence submitted to demonstrate maturation since then." *Bowling*, 920 F.3d at 198. In *Brown v. Precythe,* Nos. 19-2910 & 19-3019, 2022 WL 3725235, — F.4th —(8th Cir. August 30, 2022)), the Eighth Circuit found that Missouri's parole review process, that was enacted in 2016 to comply with *Miller* and *Montgomery*, satisfied constitutional scrutiny. It not only provided former JLWOPs an opportunity for parole release at the end of 25 years (as opposed to the Florida system of setting a PPRD at the end of 25 years), it extended hearings to 45 minutes, and required that the Board base its decisions on fifteen factors tailored to the inmate's youthful judgment, subsequent emotional and intellectual development, and rehabilitation efforts. *Brown*, 2022 WL 3725235 at *1, 4.

The notion that *Jones* somehow narrowed *Miller* and *Montgomery* is belied by the fact that the Supreme Court expressly stated that it was doing no such thing.[5] The Court merely found that *Miller* does not require a judge to make a formal, on the record finding because *Miller* and *Montgomery* already require the sentencer "to consider the murderer's 'diminished culpability and heightened capacity for change" in "a hearing where youth and its attendant characteristics are considered as sentencing factors." *Id.* at 1316-17, 1319.

Unlike *Bowling* and *Brown*, the Florida parole process for JLWPs is neither

[5] "Today's decision does not overrule *Miller* or *Montgomery*," to the contrary, it was "carefully following [them]." *Jones*, 141 S. Ct. at 1321.

meaningful nor is it based on maturity and rehabilitation. It is an undisputed fact that there are some 170 Class Members and that in the last ten years only 24 JLWPs have been authorized for parole release. D.E. 113 at 45. By comparison, when granted access to resentencing during the two-year *Atwell* window, of 125 cases heard and decided, 98 JLWPs were released (78%). D.E. 104, SOF 75-77. It is an undisputed fact that based on the most recent PPRDs for Class Members, they will have served approximately 75 years and be approximately 92.6 years old at the time of their release (if they live that long). *Id.* at SOF 79-81. It is an undisputed material fact that only 7.7% of Class Members have had their PPRDs reduced in subsequent interviews. *Id.* at SOF 52.[6] Defendants' counter argument that no Class Member is in their seventies is a red herring because if all of the matured and rehabilitated JLWPs had already been paroled, and only the irreparably corrupt remained, Class Members should actually be older than they currently are.[7] Defendants ignore that these sentencing and parole decisions would have taken place in an entirely different era – a time period so distant not even Defendants' own expert thought it was relevant to consider. D.E. 103, Ex. 3 at 12. In contrast, the current system applicable to the Class of establishing a PPRD did not even begin until 1996. D.E. 104, SOF 1. If JLWPs once had a meaningful opportunity for parole in Florida, they no longer do today. Nor do they have one

[6] Defendants identification of three JLWPs who had their PPRDs reduced (D.E. 96, Ex. 2), including the example they make of Mr. Lusunariz (D.E. 112 at 14-15), does not refute this fact.
[7] It is an undisputed material fact that, on average, the Class Members are currently 53 years of age (range 42 to 69 years) and have been incarcerated 35 years (which is only 10 years beyond when their PPRDs were set).

based on maturity and rehabilitation. Defendants are statutorily obligated – and do – treat parole as an "act of grace" rather than an Eighth Amendment obligation, and parole decisions are based primarily on the seriousness of the underlying offense. D.E. 113, at 9.[8] Florida's PPRD system is utterly unique among parole systems in this Country. It is undisputed that under Florida's system, after 25 years of incarceration, rather than evaluate a Class Member for release, FCOR sets another lengthy term of incarceration before parole will even be considered. It is also undisputed that Defendants do not consider "following the rules" and having a clean record as a basis to reduce a PPRD on review. And the statutorily-required focus on the seriousness of the offense ensures the very outcome that has occurred: the vast majority of JLWPs will serve *de facto* LWOP sentences because no court nor FCOR has ever determined which Class Members are among the vast majority of youth whose crimes reflect transient immaturity and have the capacity to and have in fact changed. Also for a substantial portion of the class, youth was used *as a penalizing factor* that resulted in extended PPRDs. This fact alone establishes a clear violation of *Miller* and the Eighth Amendment and distinguishes this case from those relied on by Defendants.

II. PLAINTIFFS ARE ENTITLED TO RELIEF ON THEIR DUE PROCESS CLAIM AS WELL

Defendants continue to assert – contrary to this Court's finding – that

[8] Defendants argue that Plaintiffs have conceded the relevance of the original offense to parole determinations by their Interrogatory Responses. D.E. 112 at 13-14. They have not. *See* Ex. 1 [Supplemental Interrogatory Responses to Requests 11 & 12]

Plaintiffs possess no liberty interest in a meaningful parole review. D.E. 112 at 16; D.E. 43 at 17. This argument ignores that the Eighth Amendment Cases created more than a "mere hope" of parole for Class Members, but rather established a substantive right to a meaningful opportunity for release based on demonstrated maturity and rehabilitation.[9] As stated in *Montgomery*, "the opportunity for release [of parole-eligible offenders] will be afforded to those who demonstrate the truth of Miller's central intuition – that children who commit even heinous crimes are capable of change." 577 U.S. at 212. This necessarily requires a meaningful process that allows young offenders to demonstrate they have changed and deserve release.

The undisputed facts show that Florida's parole process falls far short of protecting this liberty interest.[10] As detailed in Section I *supra* and Plaintiffs Amended Motion for Summary Judgment, Florida's parole process not only "risks" that young offenders will be deprived of their liberty interest – it mandates such deprivation.[11]

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[9] *See Graham*, 560 U.S. at 75; *Montgomery*, 577 U.S. at 209-10; *Flores v. Stanford*, 18 CV 246B (VB), 2019 WL 457 2703 at *10 (S.D.N.Y. Sept. 20, 2019); *Bonilla v. Iowa Bd. of Parole*, 930 N.W. 2d 751, 776-77 (Iowa 2019)

[10] The traditional test for determining what process is due comes from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), which balances: 1) the private interest; 2) the Government's interest, and 3) "the risk of an erroneous deprivation" of the interest through the procedures used. Defendants' argument that *Mathews* is not applicable to cases involving liberty interests (D.E. 112 at 17) is incorrect. *See e.g. Wilkinson v. Austin*, 545 U.S. 209 (2005) (applying *Mathews* to a liberty interest in avoiding placement at a supermax facility). *See also Greenholtz*, 442 U.S. at 14; *Flores*, WL 4572703 at *11; *Bonilla*, 930 N.W.2d at 775, 778.

[11] As one example, Defendants are statutorily required to give "primary weight" to the seriousness of the offense and past criminal conduct, prohibiting any focus on maturity and rehabilitation. D.E. 113 at 2; Fla. Stat. § 947.002(2).

Defendants argue the Court was careful in *Montgomery* not to add more procedural requirements than "necessary." 577 U.S. at 211. Florida's parole system is missing "necessary" procedures – namely the opportunity for young offenders to have a meaningful hearing in which youth is considered and they can demonstrate maturity and rehabilitation – are necessary.[12]

III. DEFENDANTS ARE NOT ENTITLED TO QUASI-JUDICIAL IMMUNITY

In their response, Defendants again fail to address the factors outlined in *Cleavinger v. Saxner*, 47 U.S. 193, 202 (1985). D.E. 112 at 18-19.[13] Instead, Defendants suggest that parole board officials are categorically protected by quasi-judicial immunity. That is not the case. It is not a person's position or job title that determines if quasi-judicial immunity applies; rather, it is the nature of the acts being challenged. *Cleavinger*, 474 U.S. at 201 (explaining that immunity "flows not from rank or title or location within the Government, but from the nature of the [official's] responsibilities") (internal quotations and citations omitted). Defendants' cited cases are inapposite. Each case is centered on a specific parole decision related to an individual inmate or parolee. D.E. 112 at 18. Plaintiffs, however, challenge Defendants unconstitutional policies, practices, and procedures, which does not entitle them to quasi-judicial immunity. Further,

[12] Defendants reliance on *McKinney v. Pate,* 20 F.3d 1550, 1561, 1563 (11th 1994) is inapposite because that case involved a "facially adequate procedure," whereas Plaintiffs here challenge the parole process and procedures. Moreover, any adequate state remedies in this case have been foreclosed by *State v. Michel*, 257 So. 3d 3 (Fla. 2018) and *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018). *See also* D.E. 108 at 18-19.

[13] The party asserting immunity bears the burden of establishing that it is justified. *See Butz v. Economou*, 438 U.S. 478, 506 (1978).

Defendants repeatedly distinguish parole from sentencing, thereby admitting their role is substantially different from that of a sentencing judge D.E. 96 at 13-15; D.E. 112 at 5-6.

Regardless of *Cleavinger*, Defendants are not entitled to quasi-judicial immunity because they are sued in their official capacities for prospective equitable relief. As the Supreme Court has stated, "[w]hen it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objectively reasonable reliance on existing law . . . [but] [i]n an official-capacity action, these defenses are unavailable." *Kentucky v. Graham*, 473 U.S. 159, 166–67 (1985) (internal citations omitted); *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017); *Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("[T]he only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses.").

Moreover, even if Defendants are entitled to quasi-judicial immunity[14] – which they are not – as recognized by the Eleventh Circuit, and others,[15] Plaintiffs are still entitled to declaratory relief. *See, e.g.*, *Daker v. Keaton*, No. 20-10798, 2021 WL 3556921, at *2 (11th Cir. Aug. 12, 2021) (reversing and remanding where district court failed to evaluate plaintiff's § 1983 claims seeking declaratory and

[14] Defendants have also waived their right to assert quasi-judicial immunity by failing to raise it in a timely manner. *See* D.E. 108 at 4-5.

[15] *See, e.g.*, *Severin v. Parish of Jefferson*, 357 F. App'x 601, 605 (5th Cir. 2009) (per curiam) ("[J]udicial immunity does not bar declaratory relief . . . ."); *Top Flight Ent., LTD v. Schuette*, 729 F.3d 623, 634 (6th Cir. 2013) finding injunctive and declaratory relief are not barred by quasi-judicial immunity; *Andrews v. Hens-Greco*, 641 F. App'x 176, 180 (3d Cir. 2016) (finding claims seeking prospective injunctive or declaratory relief against a state official are not barred.).

injunctive relief from judicial officers).[16] Defendants are entitled to declaratory relief because they can show "a [constitutional] violation, that there is a serious risk of continuing irreparable injury if the relief is not granted, and the absence of an adequate remedy at law." *Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir. 2000) (citing *Newman v. State of Ala.*, 683 F.2d 1312, 1319 (11th Cir. 1982)). Plaintiffs have no adequate remedy at law because the only vehicle for challenging parole decisions is through a writ of mandamus, which cannot provide systemic relief,[17] and regardless, a meaningful state court challenge has been foreclosed by *State v. Michel*, 257 So. 3d 3 (Fla. 2018) and *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018).

IV. THE HECK DOCTRINE DOES NOT BAR PLAINTIFFS' CLAIMS

Plaintiffs' claims are not barred by *Heck v. Humphrey*, 512 U.S. 477, 487 (1994) because Plaintiffs do not challenge their underlying convictions or sentences.[18] Rather, they assert Florida's parole process denies them a meaningful opportunity for release upon demonstrated maturity and rehabilitation. The relief Plaintiffs seek – either relief pursuant to the 2014 Juvenile Sentencing statute or a parole system that has been modified to meet constitutional mandates – may or may not secure an earlier release and any earlier release is not guaranteed.[19]

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[16] This conclusion is clearly in harmony with the Congressional intent behind the statute. As clearly noted in the Senate Report accompanying the passage of the Federal Courts Improvement Act, "This section ***does not provide absolute immunity for judicial officers*** . . . ***litigants may still seek declaratory relief*** . . . ." S. Rep. 104-366, at *37 (1996). (emphasis added).

[17] See D.E. 108 at 18-19.

[18] *See also supra* Section III, regarding Defendants' assertion that they have no sentencing role and that nothing they do affects the sentence; clearly Plaintiffs' challenge to their policies and practices can have no bearing on their underlying sentence either.

[19] *See* D.E. 108 at 19-20.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 25, 2022, I electronically filed the foregoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/Tracy Nichols
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