IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAY CURTIS GRAHAM,
Plaintiff,

-vs- **Case No. A-08-CA-006-SS**

RISSIE OWENS, Individually and in Her Official Capacity as Chairperson of the Texas Board of Pardons and Paroles; STUART JENKINS, Individually and in His Official Capacity as Director of the Parole Division of the Texas Board of Pardons and Paroles; JOSE ALISEDA JR., CHARLES AYCOCK, CONRITH DAVIS, JACKIE DENOYELLES, LINDA GARCIA, JUANITA M. GONZALEZ, THOMAS G. FORDYCE, PAMELA D. FREEMAN, TONY GARCIA, ELVIS HIGHTOWER, JAMES PAUL KIEL JR., EDGAR MORALES, JAMES C. POLAND, LYNN RUZICKA, CHARLES SHIPMAN, CHARLES C. SPEIER, and HOWARD A. THRASHER, SR.,
Defendants.

ORDER

BE IT REMEMBERED on the 4th, 5th, and 6th of August, 2009, this Court held a trial in the above-styled cause and the parties appeared in person and through counsel. In commemoration of the oral orders issued during the course of the trial, the Court enters the following.

During the course of the trial the Court made the express oral finding that, based on the undisputed evidence, Mr. Graham's constitutional right to procedural due process was violated when sex offender conditions were imposed upon him in December of 2007. That order was made for the following reasons.

Section 1983 of Title 42 of the United States Code provides that any citizen may seek redress in court by way of damages against any person who, under color of state law or custom, intentionally deprives that citizen of any rights, privileges, or immunities secured or protected by the constitution or laws of the United States. Graham bases his procedural due process claim in this case on *Coleman v. Dretke*, 395 F.3d 216, 219 (5th Cir. 2004). In *Coleman*, the Fifth Circuit determined parolees who have never been convicted of a sex offense have a liberty interest created by the Due Process clause in not having sex offender conditions placed upon their parole, because "due to its highly invasive nature, Texas's sex offender therapy program is 'qualitatively different' from other conditions which may attend an inmate's release." *Id.* at 222-23 (analogizing to *Vitek v. Jones*, 445 U.S. 480 (1980)). Accordingly, the Fifth Circuit determined the State is "required to provide procedural protections before imposing such conditions." *Id.* at 223. Specifically, the Fifth Circuit held the State may impose sex offender conditions on a parolee "only if he is determined to constitute a treat to society by reason of his lack of sexual control." *Id.* at 225. The *Coleman* court concluded, "[a]bsent a conviction of a sex offense, the Department must afford [a parolee] ***an appropriate hearing*** and ***find that he possesses this offensive characteristic*** before imposing such conditions." *Id.* (emphasis added).

In the present case, the undisputed evidence at trial established that neither of the foregoing conditions has ever been met in Mr. Graham's case. A review of whether sex offender conditions should be imposed was initially recommended for Mr. Graham by the Parole Division of the Texas Department of Criminal Justice (the "Parole Division"), which has the authority to recommend the imposition of sex offender conditions on a parolee. The Parole Division thereafter compiled and forwarded to the Board of Pardons and Paroles (the "Board") a packet of information containing all

of the information the Board would consider in making its determination as to whether sex offender conditions should be imposed on Mr. Graham. The packet of information was accompanied by a written summary of the information, prepared by a representative of the Parole Division. The representative, as was the Parole Division's well-established custom, was also sent to the *Coleman* review[1] conducted by the Board to deliver the summary and personally answer questions.

The Parole Division, under the supervision of Mr. Jenkins, undisputedly followed a procedure under which Mr. Graham and his counsel were precluded from reviewing whatever information was forwarded to the Board. Specifically, Mr. Graham was not allowed to view the evaluation done of him at the Parole Division's order by Mr. Stebbins, a licensed sex offender treatment provider, nor was he allowed to view the summary of the information composed by the Parole Division representative of the actual information presented. This was despite the fact that Mr. Graham's lawyers repeatedly requested access to this information.

The Board, under Chairperson Owens, was responsible for conducting the *Coleman* review. The evidence at trial showed Mr. Graham's *Coleman* review was conducted by two Commissioners of the Board, Mr. Thrasher and Mr. Hightower, and was attended by the representative of the Parole Division. But, pursuant to well-established Board policy, neither Mr. Graham nor his counsel were given notice of any hearing or review, nor the opportunity to appear before the Commissioners who made the determination. The testimony established it is common practice for 30 to 40 cases to be

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[1]The review conducted by the Board was referred to at times during the trial as the "*Coleman* hearing." But it is undisputed the Board did not at that time conduct a "hearing" to determine whether to impose sex offender conditions on a parolee, but instead conducted what amounts to a closed administrative review of a parolee's file. Thus, the Court will refer to the procedure as a *Coleman* review.

reviewed in one work day—an amount that indicates each review takes approximately12 minutes, assuming the Commissioners conduct an uninterrupted 8-hour workday.

Mr. Graham received a letter before the *Coleman* review giving him 30 days to respond in writing to a notice that informed him the Board was considering imposing sex offender restrictions on him. But because neither the Parole Division nor the Board disclosed to Mr. Graham the evidence the Board would rely upon in making their determination, it was impossible for Mr. Graham to present any meaningful defense or objections to the evidence compiled by the Parole Division. Because neither Mr. Graham nor his counsel were allowed to personally appear before the Board, neither they nor anyone else would ever know the basis for the Board's ultimate determination, or that Mr. Graham's objections and defenses had been received, much less reviewed, by the voting Commissioners in his case.

As stated by the United States Supreme Court, the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The review conducted in Mr. Graham's case was devoid of even this most basic and fundamental procedural protection, as he was given no meaningful opportunity to object to the proposed imposition of sex offender conditions and therapy. In short, the review did not comport with even the most minimal requirements of due process and it cannot be called an "appropriate hearing," such as is expressly required by the Fifth Circuit.[2]

[2]This Court is cognizant of the difficulties faced by the State in balancing its fiscal and administrative burdens with the rights of the parolees under its supervision. But not a single witness for the Defendants could deny that the expense of making one additional copy of the evidence reviewed by the Board for the parolee, or of allowing a parolee and/or his counsel to make a short, 20-minute presentation of their objections in a *Coleman* case, would pose more than a minimal expense.

Furthermore, the undisputed evidence establishes (unbelievably) that ***never*** in the entire *Coleman* process was a knowing, explicit finding made by anybody that Mr. Graham "constituted a threat to society by reason of his lack of sexual control," as is expressly required under the federal law of this Circuit. Mr. Thrasher, one of the two voting Commissioners in Mr. Graham's case and the only one to testify, initially testified—to the Court's stunned disbelief—that he did not know who, if anyone, was to make this finding. He testified that he was not sure whether the licensed treatment provider was (and is) supposed to make the determination, but concluded "well, it's not the Board [that is supposed to make the finding]." Although he was later recalled to the stand and stated he had been confused on this point (which the Court does not doubt), his recantation showed—at best—that he was substantially confused about the standard he was supposed to apply and the finding he was supposed to make. Perhaps even more importantly, the document which he and Mr. Hightower initialed at the conclusion of the *Coleman* process and which ultimately imposed the sex offender conditions on Mr. Graham does not set forth the correct standard. The document only states the Commissioners found Mr. Graham had engaged in unlawful sexual conduct and ***could*** "pose a threat to society." This is an incorrect, and drastically lower, standard than the one that the Fifth Circuit has set forth as the law.

In short, the undisputed evidence established no official involved in the *Coleman* process has ever made the necessary finding that Mr. Graham constituted a threat to society by reason of his lack of sexual control. It is undisputed the Parole Division did not make such a finding when it recommended imposition of the sex offender conditions. Bryan Collier, the former Director of the Parole Division, testified he "never knew that a specific finding had to be made." Furthermore, the evaluation of Mr. Graham by Mr. Stebbins undisputedly did not make such a finding—in fact, the

evaluation specifically stated it did not purport to predict future risk. In short, the Court is forced to reach the obvious conclusion that there has ***never*** been a considered determination by any official that Mr. Graham constitutes a "threat to society by reason of his lack of sexual control."

Based on all of the foregoing, the Court determines as a matter of law that the Defendants, while acting under color of the law of the State of Texas, violated the Plaintiff's constitutional right to procedural due process of law when they imposed sex offender conditions on him without affording him an "appropriate hearing," or making the explicit and considered finding that he constituted a threat to society by reason of his lack of sexual control.

Conclusion

In accordance with the foregoing,

IT IS ORDERED that the *Coleman* hearing set for Mr. Graham by the Board of Pardons and Paroles on August 11, 2009 is hereby CANCELLED.

IT IS FURTHER ORDERED that a *Coleman* hearing shall be held on **August 10, 2009** pursuant to this Court's order. Counsel for Mr. Graham shall have TWENTY (20) MINUTES to make an oral presentation of Mr. Graham's defense to the allegations against him. Each of the Commissioners or Board Members who are voting in Mr. Graham's case shall be present at the hearing. Likewise, a court reporter shall be present at the hearing to record the proceedings.[3] The Court also specifically instructs that if the Plaintiff subsequently prevails in this case, attorneys' fees and costs under 42 U.S.C. § 1988 may be assessed on the basis of this Order, rather than on the notion that the Defendants voluntarily changed their procedures with respect to Mr. Graham. Mr. Jenkins' candid testimony on

[3]However, there shall be no transcription without Court order.

August 5, 2009—that the changes that have been or will be made with respect to Mr. Graham are the result of this Court's order and this case—supports this decree.

SIGNED this the 6th day of August 2009.

SAM SPARKS
UNITED STATES DISTRICT JUDGE