IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISON

ROBERT EARL HOWARD,
et al.,

Plaintiffs,

vs. CASE NO. 6:21-cv-62-Orl-40EJ

MELINDA N. COONROD, et al.,

Defendants.
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DEFENDANTS' MOTION TO DISMISS AND INCORPORATED MEMORANDUM IN SUPPORT

Pursuant to Rules 12(b)(1) and 12(b)(6), Fed. R. Civ. P., Defendants, Melinda N. Coonrod, Richard D. Davison, and David A. Wyant, sued in their official capacities as Chair, Vice Chair, and Secretary, respectively, of the Florida Commission on Offender Review ("Commission"), move to dismiss the Class Action Complaint for declaratory and injunctive relief ("Cmplt.").

Plaintiffs are inmates serving life sentences with parole ("LWP") in state prisons in Florida for serious offenses committed when they were juveniles. Plaintiffs contend that they are systematically denied a meaningful opportunity to demonstrate their maturity and rehabilitation comparable to that afforded to juveniles serving life sentences without parole ("LWOP") in Florida.

As shown below, Plaintiffs' stated causes of action, all brought under 42 U.S.C. § 1983, are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), because Plaintiffs in effect

claim that their sentences are *de facto* imposed for life without parole and thus are unconstitutional, as LWOP sentences for juveniles have been held to be, and because habeas corpus is the exclusive path available for such claims.

In addition, Plaintiffs' claims for resentencing (or for sentence review) by law must be addressed to the courts that sentenced them—not to the Commission—and accordingly should be dismissed for want of standing, traceability, and redressability.

As for claims against the Commission for administrative relief, Plaintiffs have failed to exhaust administrative remedies, warranting dismissal under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e.

Moreover, should the Court reach the substance of Plaintiffs' allegations, the Complaint fails to state a cause of action. Plaintiffs' claims depend on mischaracterizations of earlier Supreme Court precedent and flawed statistics. Plaintiffs conspicuously ignore *State v. Michel*, 257 So. 3d 3 (Fla. 2018), and *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018) (per curiam), in which the Florida Supreme Court properly assessed Florida's parole system and held that it passes constitutional muster. The Complaint should be dismissed, obviating the need to consider class certification objections.

Memorandum in Support

I. PLAINTIFFS' CLAIMS ARE BARRED BY *HECK V. HUMPHREY*.

At the outset, Plaintiffs' claims do not properly sound in § 1983 because, under *Heck v. Humphrey*, 512 U.S. at 487, they can only be brought in a federal habeas

petition. "*Heck* specifies that a prisoner cannot use § 1983 … where success would necessarily imply the unlawfulness of a (not previously invalidated) conviction or sentence." *Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005) (emphasis omitted).

Here, it is clear that Plaintiffs, having been given LWP sentences as juveniles, deem their situations to be equivalent to those of juvenile LWOP inmates, whose sentences were held to be in violation of the Eighth Amendment in *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012). Pursuing that false equivalency, Plaintiffs place great weight on the Florida Supreme Court's later-overruled decision in *Atwell v. Florida*, 197 So. 3d 1040 (Fla. 2016), in which the Court, misapprehending the limited holdings in *Graham* and *Miller*, stated:

> We conclude that Florida's existing parole system, as set forth by statute, does not provide for individualized consideration of Atwell's juvenile status at the time of the murder, as required by *Miller,* and that his sentence, which is virtually indistinguishable from a sentence of life without parole, is therefore unconstitutional.

Atwell, 197 So. 3d at 1041. There, based upon its erroneous reading of *Graham* and *Miller*, the Court ordered resentencing, *id.* at 1042-43.

Plaintiffs likewise seek resentencing under the same flawed rationale. Significantly for *Heck* purposes, *Atwell* did not involve a § 1983 claim, but rather an appeal within the state court system from a judicial denial of a motion for postconviction relief. Plaintiffs seek, in the alternative, two ultimate remedies: *First*, that they each "receive the judicial resentencing protections provided and guaranteed by Florida Statutes §§ 921.1401 and 921.1402"; or *second*, that Defendants be

compelled to amend the parole procedures to include "relevant criteria that assess [Plaintiffs'] degree of maturity and rehabilitation." Cmplt. at 60 ¶ E. As to the first, Plaintiffs ask that they be resentenced or that their sentences be reviewed by a judge who is bound to consider certain statutory factors inclusive of their youth and immaturity at the time of the offense—in effect, the relief granted in *Atwell*. Cmplt. at 60 ¶ C, E; *see also id.* ¶ 17.

That is precisely what *Heck* bars. To order Plaintiffs resentenced under Chapter 921, Florida Statutes—which requires a sentencing judge to consider numerous factors before imposing a life sentence on a juvenile offender, *see* Fla. Stat. § 921.1401(2)—this Court must first conclude that Plaintiffs' LWP sentences are illegal. But *Heck* says such a finding can be made solely via 28 U.S.C. § 2254.[1]

Even to the extent Plaintiffs seek only judicial review under Chapter 921, and not full resentencing, that claim also fails *Heck*. *See* Fla. Stat. § 921.1402(2) (authorizing judicial review proceedings for certain offenders at specified time intervals). By its terms, Plaintiffs do not qualify for relief under Chapter 921. Accordingly, their claims for a judicial decree to expand the statutory ambit for their benefit implicitly depend on a determination that their sentences are constitutionally

[1] *See Hill v. Snyder*, 878 F.3d 193, 208–09 (6th Cir. 2017) (*Heck* bars challenge to state sentences under *Graham* and *Miller* because "Count II functionally asks us to declare sentences of life without parole for juvenile offenders unconstitutional"); *Md. Restorative Justice Initiative v. Hogan*, No. ELH-16-1021, 2017 WL 467731, at *15 (D. Md. Feb. 3, 2017) (*Heck* required dismissal of claim alleging a state statute was "unconstitutional as applied to individuals who were juveniles at the time of their offenses, because it mandates life sentences in all cases of first-degree murder").

infirm.

Plaintiffs' alternative prayer for relief is likewise subject to dismissal. Though some courts in other jurisdictions have concluded that challenges to parole procedures for juvenile offenders are not barred by *Heck*, *see King v. Landreman*, No. 19-cv-338-jdp, 2019 WL 2355545, at *1 (W.D. Wis. June 4, 2019); *Hogan*, 2017 WL 467731, at *15, it is clear from Plaintiffs' reliance on *Atwell* and the broad scope of procedural remedies requested by them—whether for rehearing or a parole hearing—that they challenge the underlying validity of their initial sentences, and this interpretation is the sounder approach. That is because, under *Graham v. Florida*, a life sentence for a juvenile is permissible only if that sentence nonetheless affords the offender "some meaningful opportunity for release based on demonstrated maturity and rehabilitation." 560 U.S. 48, 75 (2010). In Florida, the legality of an LWP sentence assumes that the parole system offers that meaningful opportunity for release. If it does not, Plaintiffs' position in following *Atwell* would be that the sentence is illegal. Thus, Plaintiffs' request that the Court "[d]eclare that the actions and inactions of the Defendants are unlawful and unconstitutional" (Cmplt. at 60 ¶ C) is an assault on the constitutionality of their sentences. *Heck* bars such an attack under § 1983. Hence, all claims must be dismissed.

II. PLAINTIFFS LACK STANDING TO ASSERT CLAIMS AGAINST DEFENDANTS RELATING TO SENTENCE REVIEW OR RESENTENCING.

Plaintiffs request relief not only as to parole proceedings, but also as to judicial review of their sentences. *See* Cmplt. at 60 ¶ E (requesting court order to compel

judicial "resentencing" protections of Fla. Stat. §§ 921.1401 & 921.1402). Plaintiffs lack standing to seek sentence review relief against the Commissioners, who play no role in that process. *See, e.g.,* Fla. Stat. § 921.1402(6) (sentence review to be sought in "the court of original sentencing jurisdiction"). *See Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1253-58 (11th Cir. 2020) (finding no standing when plaintiffs could not trace their injury to the Florida Secretary of State, who also lacked authority to redress the injury); *Lewis v. Governor of Alabama*, 944 F.3d 1287, 1296-1306 (11th Cir. 2019) (finding employees lacked standing to sue state attorney general when their employers were responsible for unpaid wages, not the attorney general).

Hence, all claims for sentence review or resentencing relief must be dismissed for want of traceability and redressability.

III. PLAINTIFFS' FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES WARRANTS DISMISSAL OF THEIR CLAIMS.

As for Plaintiffs' parole-based claims, the PLRA provides:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

PLRA, 42 U.S.C. § 1997e(a).

The term "prison conditions" is not defined in the PLRA. But it is defined in 18 U.S.C. § 3626(g)(2), and the Eleventh Circuit used that definition for purposes of the PLRA in *Johnson v. Breedon*, 280 F.3d 1308 (11th Cir 2002), stating:

> [T]he term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government

> officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.

Id. at 1324.

The mandatory nature of the PLRA's exhaustion requirement, and the broad scope of possible remedies swept within that requirement, were underscored in *Porter v. Nussle*, 534 U.S. 516 (2002). There, the Supreme Court stated:

> The current exhaustion provision differs markedly from its predecessor. Once within the discretion of the district court, **exhaustion in cases covered by § 1997e(a) is now mandatory. All "available" remedies must now be exhausted;** those remedies need not meet federal standards, nor must they be "plain, speedy, and effective." Even when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit. And unlike the previous provision, which encompassed only § 1983 suits, **exhaustion is now required for all "action[s] … brought with respect to prison conditions," whether under § 1983 or "any other Federal law."**

Porter, 534 U.S. at 524 (emphasis added; citations omitted).

In *Martin v. Iowa*, 752 F.3d 725 (8th Cir. 2014), the Eighth Circuit held that challenges to parole procedures are governed by the PLRA.

Thus, the PLRA's exhaustion requirement is mandatory and applies to all federal claims (other than habeas corpus)—including parole claims—brought by any inmate. *See Woodford v. Ngo*, 548 U.S. 81, 93 (2006); *Martin v. Iowa* (dismissing claims against parole board); *Owens v. Robinson,* 356 F. App'x 904, 904 (8th Cir. 2009) (per curiam) (affirming dismissal of similar challenge to Iowa's parole review procedure for failure to exhaust administrative remedies); *Castano v. Neb. Dep't of Corr.,* 201 F.3d 1023, 1024–25 (8th Cir. 2000) (§ 1983 action alleging defendants' failure to provide

qualified interpreters at disciplinary hearings and institutional programs bearing on eligibility for parole was subject to exhaustion requirements). *See also O'Connor v. Carnahan*, No. 3:09CV224/WS/EMT, 2012 WL 2201522, at *14 (N.D. Fla. Mar. 27, 2012), report and recommendation adopted, No. 3:09CV224-WS, 2012 WL 2317546 (N.D. Fla. June 15, 2012).

Exhaustion of administrative remedies means "proper" exhaustion, i.e., that the prisoner used the available administrative procedures, and did not allow his allotted time to expire, prior to filing suit. *Woodford v. Ngo*, 548 U.S. at 93.

Administrative remedies include, but are not limited to, grievances with respect to prison conditions directed to the DOC, as well as requests for rulemaking. See § 120.54(7), Fla. Stat. The Commission has rulemaking authority. See §§ 947.07 & 947.071, Fla. Stat.

Exhaustion of administrative remedies serves two main purposes. First, it protects "administrative agency authority" by giving an agency "an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court," and by discouraging "disregard of [the agency's] procedures." Second, exhaustion promotes efficiency, because claims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court. *Woodford v. Ngo*, 548 U.S. at 89.

Plaintiffs have not pleaded that they pursued any remedies before filing suit. While exhaustion is not required to be alleged in inmates' pleadings, "[i]f the allegations in the complaint, taken as true, demonstrate that a prisoner's claims are

barred by an affirmative defense, however, the complaint is subject to dismissal for failure to state a claim upon which relief can be granted." *Jones v. Bock*, 549 U.S. 199, 215 (2007).

Failure to exhaust administrative remedies qualifies as such an affirmative defense. *Clark v. Georgia Bd. of Pardons & Paroles*, 915 F.2d 636, 640–41 (11th Cir.1990) (district court may dismiss prisoner's complaint "if [it] sees that an affirmative defense would defeat the action," including prisoner's failure to exhaust "alternative remedies").

Here, exhaustion requires that a specific requested review be sought by Plaintiffs, *see Jones v. Bock*, 549 U.S. 199, 219–20 (2007) (no unexhausted claim may be considered); *Dodd v. Fla. Parole & Prob. Comm'n*, 380 So. 2d 556, 557 (Fla. 1st DCA 1980) (inmate's petition for mandamus relief denied where "it is not alleged that such review was ever requested as to the issue now presented"). However, Plaintiffs have not even undertaken, much less exhausted, administrative remedies with respect to their claim for relief as to parole-related issues. *See* Declaration of Alex A. Christiano, Assistant General Counsel for the Commission, attached as **Exhibit A** (Plaintiffs sought no administrative remedies, including rulemaking, from the Commission).[2]

Plaintiffs' failure to exhaust is especially significant because they specifically

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[2] It is appropriate for the Court to consider extrinsic declarations on a Rule 12(b)(1) motion. *See, e.g., Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (where subject-matter jurisdiction turns on facts, "matters outside the pleadings, such as testimony and affidavits, are considered.").

plead (in the alternative to resentencing claims) for relief from the Commission, which possesses rulemaking authority and could fashion a remedy—were one constitutionally required (as shown below, it is not). Regardless, even if such relief were otherwise appropriate, Plaintiffs' failure to exhaust—taken together with the unavailability of relief on their resentencing claims—requires complete dismissal of this action.[3]

IV. PLAINTIFFS' CLAIMS ARE SUBJECT TO DISMISSAL AS UNTIMELY UNDER THE STATUTE OF LIMITATIONS.

The statute of limitations bars the claims at issue. Under 42 U.S.C. § 1988, district courts select and apply the most appropriate or analogous state statute of limitations to claims asserted under 42 U.S.C. § 1983. *See* 42 U.S.C. § 1988(a). *See also Ealy v. GEO Grp., Inc.*, 667 F. App'x 739, 740 (11th Cir. 2016); *Graham v. Florida*, No. 3:20CV3681/MCR/EMT, 2020 WL 6828843, at *3 (N.D. Fla. Oct. 15, 2020), report and recommendation adopted, 2020 WL 6826205 (N.D. Fla. Nov. 19, 2020).

Florida's limitations provisions are generally set forth in section 95.11, Florida Statutes. It is unclear precisely which provision would govern here. Petitions for extraordinary writs, which can be the basis for appealing adverse parole decisions, *see*

[3] While Plaintiffs may file complaints with the Florida Department of Corrections to raise grievances with respect to the conditions of their confinement, that process is irrelevant to the parole-related issues here, including Plaintiffs' failure to exhaust administrative remedies. Section 33-103.001, Florida Administrative Code, dealing with inmate grievances, expressly provides: "(5) Inmates cannot file complaints regarding the following matters: (a) The substance of State and federal court decisions; (b) The substance of State and federal laws and regulations; (c) Parole decisions; (d) Other matters beyond the control of the department."

State v. Michel, 257 So. 3d 3, 7 (Fla. 2018), are subject to a one-year period. Fla. Stat. § 95.11(3)(f) (excluding writs challenging criminal convictions). Likewise, actions brought by or on behalf of prisoners relating to the conditions of their confinement must be brought within one year. Fla. Stat. § 95.11(3)(g) (excluding actions challenging correctional disciplinary proceedings, which are subject to a 30-day time limit). In an action brought under the Rehabilitation Act by a blind inmate for abuses suffered in prison, the Eleventh Circuit applied the four-year limitations period, stating: "This Court has on several occasions applied the four-year residual limitations period under Florida's personal injury statute, Florida Statutes § 95.11(3)(p), to 42 U.S.C. § 1983 claims." *Ealy v. GEO Grp., Inc.*, 667 F. App'x at 740 (citations omitted). Section 95.11(3)(p) is Florida's catch-all provision, making the four-year limitations period applicable to "any action not provided for in these statutes."

In the case at bar, it does not matter whether the proper limitations period is one year or four: either way, Plaintiffs' time has expired.

The operative date for determining when a cause of action accrued, and thus when the applicable limitations period began to run, is when Plaintiffs knew, or should have known, of the facts forming the basis for their claims. *Brown v. Georgia Bd. Of Pardons and Paroles*, 335 F.3d 1259, 1261 (11th Cir. 2003) (statute of limitations runs from the date when the facts supporting a cause of action become apparent or should be apparent to a person with a reasonably prudent regard for his rights).

Plaintiffs and the members of their putative class were all sentenced, at the latest, in 1994, Cmplt. ¶ 48, and thus have been incarcerated since before Florida

eliminated parole decades ago. The question arises as to when Plaintiffs knew, **or should have known**, of the facts forming the basis for their claims. Arguably, that date arrived decades ago. But it cannot credibly be claimed that it postdated the decisions in *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012), upon which Plaintiffs place such heavy reliance in their pleading.

However, this action was not filed until January 2021, more than a decade after *Graham* and nearly eight years after *Miller*. Plaintiffs cannot offer a valid excuse for waiting so long to bring this action. No facts alleged in the Complaint, or hypothetically conceivable, can give rise to a plausible theory (e.g., equitable estoppel or fraudulent concealment) by which the running of limitations period was tolled.

Nor did each day that Plaintiffs went without the chance to demonstrate their maturity and rehabilitation constitute a new and continuing wrong. *See, e.g., Brown v. Georgia Bd. of Pardons and Paroles*, 335 F.3d 1259, 1261 ("Each time Brown's parole reconsideration hearing is set, it does not amount to a distinct and separate injury.").

This action should be dismissed under the statute of limitations.

V. FLORIDA ALREADY SATISFIES CONSTITUTIONAL REQUIREMENTS FOR TAKING INTO ACCOUNT MATURITY AND REHABILITATION OF INMATES WITH RESPECT TO PAROLE.

In their Complaint, Plaintiffs, in an effort to portray Supreme Court jurisprudence as supportive of their claims, misplace emphasis on *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012). In *Graham*, the Court, assessing a state-court appeal from a sentencing hearing by a juvenile sentenced to life

without parole for a nonhomicide crime, stated in pertinent part:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives.

Id., 560 U.S. at 75. Thus, the Court's holding is limited and qualified: States must give juvenile nonhomicide offenders sentenced to life without parole a meaningful opportunity to seek release from prison based upon a showing of maturity and rehabilitation. But it is for the States to decide when and by what means such an opportunity will be provided. Most significantly, the Court underscored that the net result might well be no reduction in sentence: "The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life." *Id.*

In *Miller*, the Court held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479. The Court noted, however:

> Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* [*v. Simmons*, 543 U.S. 551 (2005),] or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty.

Id. at 483. Again, the Court required the consideration of factors such as maturity

while acknowledging that offenders may be subject to serving the entirety of lifetime sentences.

Plaintiffs also misplace reliance on *Atwell v. Florida*, 197 So. 3d 1040 (Fla. 2016). There, the Florida Supreme Court, misapprehending the limited holdings in *Graham* and *Miller*, erroneously held that life sentences **with parole** for juvenile offenders violate the Eighth Amendment. In 2018, the Court would overturn its *Atwell* decision based upon its independent review of Florida's parole scheme and the U.S. Supreme Court's decision in *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017).

LeBlanc involved an inmate who had committed rape while a 16-year-old juvenile. He was sentenced to life in prison in Virginia, where parole had been abolished in favor of a "geriatric release" program, under which the offender faced decades of incarceration before he could be eligible for release. *Id.* at 1727. The Supreme Court held that it was not "objectively unreasonable" for a state court to conclude that Virginia's "geriatric release program employ[ing] normal parole factors" complied with *Graham*. *Id.* at 1729.

The following year, the Florida Supreme Court overturned *Atwell* in *State v. Michel*, 257 So. 3d 3 (Fla. 2018), and *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018) (per curiam).[4]

In *Michel*, the inmate, convicted of first-degree premeditated murder and armed

[4] While *Michel* is a plurality decision, its holding and reasoning are expressly embraced in *Franklin*, 258 So. 3d at 1241, a majority decision.

robbery committed when he was age 16, was sentenced to life imprisonment with the possibility of parole after 25 years. 257 So. 3d at 4. In assessing his claim for postconviction relief, the Florida Supreme Court, considering *Leblanc* and Virginia's parole process, stated:

> **Michel is eligible for parole after serving 25 years of his sentence, which is certainly within his lifetime**. The United States Supreme Court's precedent states that the "Eighth Amendment ... does not require the State to release [a juvenile] offender during his natural life." *Graham*, 560 U.S. at 75[.] It only requires states to provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* And **Michel will receive a "meaningful opportunity" under Florida's parole system after serving 25 years in prison and then (if applicable) every 7 years thereafter**. *See* §§ 947.16-.174, Fla. Stat.

Michel, 257 So. 3d at 7 (emphasis added).

Focusing closely on parole processes, *Michel* in effect rejects Plaintiffs' claims in this case, stating:

> Florida's statutorily required initial interview and subsequent reviews before the Florida Parole Commission include the type of individualized consideration discussed by the United States Supreme Court in *Miller*. For example, **under section 947.174(3), Florida Statutes, the presumptive parole release date is reviewed every 7 years in light of information "including, but not limited to, current progress reports, psychological reports, and disciplinary reports." This information, including these individualized reports, would demonstrate maturity and rehabilitation as required by *Miller* and *Graham*.** Moreover, there is no evidence in this record that Florida's preexisting statutory parole system (i) fails to provide Michel with a "meaningful opportunity to obtain release," *Graham*, 560 U.S. at 75[,] or (ii) otherwise violates *Miller* and *Graham* when applied to juvenile offenders whose sentences include the possibility of parole after 25 years. **And these parole decisions are subject to judicial review**. *See Johnson v. Fla. Parole Comm'n*, 841 So. 2d 615, 617 (Fla. 1st DCA 2003) (recognizing that the **Parole Commission's final orders are reviewable**

> **in circuit court through an extraordinary writ petition**); *see also Parole Comm'n v. Huckelbury*, 903 So. 2d 977, 978 (Fla. 1st DCA 2005) (reviewing a circuit court's order on an inmate's petition challenging the suspension of a presumptive parole release date).

Michel, 257 So. 3d at 7 (emphasis added).

Based on these factors, the Florida Supreme Court rejected Michel's Eighth Amendment challenge to his LWP sentence. *Id.*, 257 So. 2d at 6-8.

Within months, the Court handed down its ruling in *Franklin*. There, Franklin, convicted of armed kidnapping, kidnapping, armed sexual battery, sexual battery, armed robbery, robbery, and aggravated assault committed when he was age 17, was sentenced to three 1000-year concurrent sentences with parole. 258 So. 3d at 1240. In rejecting his claim for postconviction relief, the Florida Supreme Court followed its holding in *Michel*, stating:

> **Florida's statutory parole process fulfills *Graham*'s requirement that juveniles be given a "meaningful opportunity" to be considered for release during their natural life based upon "normal parole factors,"** *LeBlanc*, 137 S. Ct. at 1729, as **it includes initial and subsequent parole reviews based upon individualized considerations before the Florida Parole Commission that are subject to judicial review**, *Michel*, 257 So. 3d at 6 (citing §§ 947.16-.174, Fla. Stat.).
>
> As in *Michel*, because Franklin's sentences include eligibility for parole there is no violation of the categorical rule announced in *Graham*.

Franklin, 258 So. 3d at 1241 (emphasis added).

Michel and *Franklin* establish: (1) that inmates such as Plaintiffs—whose sentences did not foreclose parole—will be eligible for parole within their expected lifetimes; (2) that the presumptive parole release dates ("PPRDs") are subject to

periodic reviews and adjustments; (3) that these reviews account for maturity and rehabilitation; and (4) that parole decisions are subject to judicial review. Accordingly, *Michel* and *Franklin* establish that Florida's parole process meets the *Graham* test by providing "some meaningful opportunity" for inmates sentenced as juveniles to show maturity and rehabilitation.

Michel and *Franklin* and their reasoning foreclose Plaintiffs' claims, regardless of which provision of the U.S. Constitution is invoked. The Constitution does not dictate how the parole process is to work (*Graham* merely requires "*some* meaningful opportunity"), how frequently it can be invoked, or precisely which officials an inmate gets to address.

Plaintiffs' resort to statistics fares no better. While they make much of the time allotted for hearings before the Commission, they ignore the totality of the process, in which most tasks preceding parole hearings are undertaken by investigators on the Commission's behalf—somewhat analogous to appellate processes, in which the oral argument is the proverbial tip of the iceberg. Thus, the time limits for presentations before the Board do not support a claim that inmates are systematically deprived of the opportunity to show that they have achieved sufficient maturity and rehabilitation to warrant parole. Moreover, Plaintiffs overlook that they fall within the class of the very worst juvenile offenders—those whose offenses and circumstances justified the imposition of a life sentence. That they are less likely to be granted parole is hardly

surprising.[5]

Plaintiffs invoke as alternative bases for their parole review claims the Eighth Amendment, the Fourteenth Amendment (due process and equal protection), and the Sixth Amendment. But no matter the source, their claims must be dismissed as a matter of law.

Eighth Amendment. *Graham, Miller*, *Michel*, and *Frankin* all involved Eighth Amendment challenges. As the above discussion conclusively demonstrates, the reasoning of those decisions forecloses any claim of cruel and unusual punishment on Plaintiffs' part.

Due Process. Plaintiffs are not clear as to whether they are asserting claims of substantive or procedural due process deprivation. Regardless, their claims merit dismissal. "Substantive due process analysis must begin with a careful description of the asserted [fundamental] right." W*orthy v. City of Phenix City*, 930 F.3d 1206, 1222 (11th Cir. 2019) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). But no fundamental right is at stake. Having been convicted of especially serious felonies and given lengthy prison sentences, Plaintiffs' liberty interests are highly restricted. As the cases

[5] In addition, while Plaintiffs seek only prospective equitable relief, they place undue emphasis on statistics that predate *Michel* and *Franklin*. In any event, Plaintiffs' claim that Florida is harsher than other states in granting parole is of no constitutional moment. Even if true, the likely explanation is that Florida's gatekeepers are simply more determined to protect the public from harm (recidivism rates being well-established) than are authorities in numerous other jurisdictions in these troubled times. Regardless, while differences in group measures may be attributable to a wide host of factors, differences in outcome not shown to result from constitutional deprivations are meaningless.

discussed above indicate, Plaintiffs have no entitlement to parole or any other form of early release. *See also Thorne v. Chairperson Fla. Parole Comm'n*, 427 F. App'x 765, 771–72 (11th Cir. 2011) ("As we have explained, Florida's parole system does not give rise to a protected liberty interest because the decision on whether to grant parole is left to the discretion of the Parole Commission."). Plaintiffs have only a limited right to some opportunity to demonstrate their maturity and rehabilitation, but that opportunity may be as much as decades away, reflecting the severity of their crimes and the length of their sentences. In any event, "if a constitutional claim is covered by a specific constitutional provision"—here, for instance, "the … Eighth Amendment"—then "the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997).

Likewise, no claim of denial of procedural due process has been or can be shown. "In this circuit, a § 1983 claim alleging a denial of procedural due process requires proof of three elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." *Graydon v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003). Here, Plaintiffs cannot show either a constitutionally-protected liberty interest or a constitutionally-inadequate process. They will have opportunities to demonstrate maturity and rehabilitation, as well as opportunities to seek judicial review of adverse decisions. So long as remedies are available through the state court system, no cause of action for procedural due process can lie. *See Ogburia v. Cleveland*, 380 F. App'x 927, 929 (11th

Cir. 2010) ("procedural due process violations do not even exist unless no adequate state remedies are available."). This rule is not an exhaustion requirement, but a requirement for stating a cause of action. *Id. See also Cotton v. Jackson*, 216 F.3d 1328, 1331 n.2 (11th Cir. 2000) (same).

Equal Protection. In *Sweet v. Secretary, Department of Corrections*, 467 F.3d 1311 (11th Cir. 2006), the Eleventh Circuit, affirming dismissal of a post-conviction petition, stated:

> To establish an equal protection claim, a prisoner must demonstrate that (1) he is similarly situated to other prisoners who received more favorable treatment; and (2) the state engaged in invidious discrimination against him based on race, religion, national origin, or some other constitutionally protected basis.

Id. at 1318-19. Dismissal was based not only upon the inmate's failure to show that he was treated differently from other prisoners, but also on his failure to allege and factually support "that he was treated differently on account of some form of *invidious discrimination* tied to a constitutionally protected interest. He has not even claimed that he was treated differently from others because of race, religion, or national origin." *Id.* at 1319 (emphasis in original; citations omitted). *See also Snowden v. Hughes,* 321 U.S. 1, 8 (1944) ("The unlawful administration ... of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.").

Here, Plaintiffs, as convicted felons, do not fall within any recognized suspect classification. While Plaintiffs complain that the Florida statutes pertaining to

sentence review discriminate against them because their convictions predate the statutes' eligibility period—an issue not properly raised in this action against the Commission, which as noted plays no role in judicial sentence reviews—they make no such claim of discrimination with respect to avenues for seeking parole through demonstration of maturity and rehabilitation. But even if such discrimination were somehow alleged, the facts described in the Complaint in no way satisfy the required showing of invidious discrimination. There is simply no basis for any reasonable inference of "intentional or purposeful discrimination." That Plaintiffs are subject to life sentences, with an expectation of serving lengthy sentences regardless of the availability of parole, reflects the heinous nature of their crimes, not invidious discrimination.

Moreover, insofar as Plaintiffs allege they are treated differently from juvenile offenders serving *LWOP* sentences who have been resentenced under Chapter 921, Cmplt. ¶¶ 170-71, there is a rational basis for that policy: Under *Graham*, an LWOP sentence for non-homicide juvenile offenders violates the Eighth Amendment and must be rectified; whereas LWP sentences are constitutional and, because they are final, should be left in place. Plaintiffs' equal protection claim must be dismissed.

Sixth Amendment. While the Sixth Amendment includes several provisions, such as the rights to counsel and to confront witnesses, Plaintiffs' Sixth Amendment claim addresses only sentence reviews before courts. *See* Cmplt. ¶¶ 16, 151.B.(5), 174. Because that claim does not lie against Defendants, as shown above, it must be dismissed.

In addition, dismissal is in order because, even if Plaintiffs' claim had been directed to parole processes, it would fail to state a cause of action. In *United States v. Reese*, 775 F.3d 1327 (11th Cir. 2015), the Eleventh Circuit, affirming the revocation of plaintiff's parole, stated:

> **The Sixth Amendment applies only to "criminal prosecutions," which does not include parole revocation hearings**. And not only is it "apparent to this court that Congress equated supervised release revocation with probation revocation," but "courts treat revocations the same whether they involve probation, parole, or supervised release." To top it off, eight other circuits have held that the Sixth Amendment does not apply in hearings for the revocation of supervised release, probation, or parole. We make it nine.

Id. at 1329 (emphasis added; citations omitted). For Sixth Amendment purposes, there is no basis for distinguishing between parole revocation proceedings, at issue in *Reese*, and alleged denial of opportunities to obtain hearings for showing maturity and rehabilitation to gain parole, at issue here (albeit in the context of claims outside the Sixth Amendment). If anything, one would expect the former context to provide a stronger justification for Sixth Amendment protections; that no such protections are available *a fortiorari* dooms any claim addressed to the latter context. Plaintiffs' Sixth Amendment claim should be dismissed.[6]

[6] That Plaintiffs have sought to posture this as a class action cannot spare their case from dismissal. The infirmities noted above, from the failure to exhaust administrative remedies to the running of the statute of limitations to the failure to state a claim, apply not just to Plaintiffs but to all inmates who are claimed to be "similarly situated." They are indeed similar, but only for purposes of extending the dismissal to any claims asserted on their behalf.

Conclusion

For all the reasons stated above, the Complaint should be dismissed with prejudice.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

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LOCAL RULE 3.01 CERTIFICATION

I certify that on this 9th day of March, 2021, I conferred by telephone with Tracy Nichols, counsel of record for all Plaintiffs, who confirmed that Plaintiffs oppose this motion.

Blaine H. Winship
Blaine H. Winship

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed with the Court's CM/ECF system, and thereby was served upon all parties through their counsel of record, on this 9th day of March, 2021.

Blaine H. Winship
Blaine H. Winship

**IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISON**

ROBERT EARL HOWARD,
et al.,

Plaintiffs,

vs. CASE NO. 6:21-cv-62-Orl-40EJ

MELINDA N. COONROD, et al.,

Defendants.
_________________________________/

DECLARATION OF ALEX A. CHRISTIANO

Pursuant to 28 U.S.C. § 1746, I, Alex A. Christiano, declare the following:

1. My name is Alex A. Christiano. I am over the age of eighteen, of sound mind, and otherwise fully competent to testify to the matters described in this declaration. I am currently employed by the Florida Commission on Offender Review (the "Commission") as Assistant General Counsel. I have held that position since January 2020. The statements made by me in this Declaration are based upon my personal knowledge and my review of the Commission's records, and they are true to the best of my knowledge.

2. I am aware that the following inmates, currently in the custody of the Florida Department of Corrections, have brought the above-caption

lawsuit: Robert Earl Howard, DC # 082581; Damon Peterson, DC # 196657; Carl Tracy Brown, DC # 187363; Willie Watts, DC # 077538.

3. The Commission has no authority as to resentencing or sentence reviews, which are matters for sentencing courts to address. In reference to this case, it is only with respect to parole-related matters that the Commission has authority.

4. With respect to seeking parole-related relief from the Commission, none of the Plaintiffs exhausted his administrative remedies in a timely and meaningful fashion prior to the filing of this lawsuit in January 2021. Of the four Plaintiffs, only Robert Earl Howard sought any relief with respect to their initial presumptive parole release dates ("PPRD"). However, he failed to challenge the Commission's decision not to change his PPRD by filing an action seeking an extraordinary writ in the circuit court. Florida law requires this process for exhaustion of remedies. *See Dodd v. Fla. Parole & Prob. Comm'n*, 380 So. 2d 556 (Fla. 1st DCA 1980). Inmates frequently avail themselves of this option for review. The Commission employs two attorneys whose primary responsibility is to respond to such actions. I am one of those attorneys.

5. None of the Plaintiffs has sought any remedy with respect to the Commission's rulemaking authority.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed at Tallahassee, Florida, this 9th day of March, 2021.

/s/ Alex A. Christiano
Alex A. Christiano
Assistant General Counsel
Florida Commission on Offender Review