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

ROBERT EARL HOWARD, ET AL.,

PLAINTIFFS,

V. CASE NO. 6:21-CV-62-PGB-EJK

MELINDA N. COONROD, ET AL.,

DEFENDANTS.
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DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56, Federal Rules of Civil Procedure, and Local Rule 3.01, Defendants move for entry of final summary judgment in their favor for the following reasons: this action is barred by 42 U.S.C. § 1983 and the availability of adequate remedies, the Plaintiffs' Eighth Amendment justification misapplies the Supreme Court's doctrine, there are no Procedural Due Process Rights in Parole and sufficient process is nevertheless provided, and this action is barred by the *Heck* Doctrine.

SUPPORTING MEMORANDUM

1. Introduction

Plaintiffs, on behalf of themselves and others similarly situated, filed their Complaint against Melinda N. Coonrod, Richard D. Davison, and David A. Wyant, in their official capacities as Chair, Vice Chair, and Secretary, respectively, of the Florida Commission on Offender Review (**"FCOR"**). Doc. 1. Plaintiffs brought claims against the Commissioners for declaratory and injunctive relief under 42 U.S.C.

§1983, asserting (1) violation of the Eighth Amendment, (2) violation of the Fourteenth Amendment's protection of Procedural Due Process, (3) violation of the Fourteenth Amendment's Equal Protection Clause, and (4) Violation of the Sixth Amendment. Plaintiffs also brought a separate claim for (5) declaratory judgment that Florida's parole statutes and corresponding administrative code rules are unconstitutional. *Id*. This Court dismissed Counts 3 and 4 with prejudice. Doc. 43. This Court later certified a Rule 23 class, comprised of (1) juvenile offenders that (2) were sentenced to over 470 months in prison and (3) are incarcerated in Florida, (4) and have never been paroled. *See* Doc. 58 at 18.

The gist of Plaintiffs' claims is that Florida inmates serving parole eligible life sentences—which they define to include not only life sentences, but also sentences of 470 months or more—for serious offenses committed when they were juveniles are being denied "some meaningful opportunity" to obtain early release by demonstrating their subsequent maturity and rehabilitation to the Commission.[1] This group of people is discussed as "Juvenile Lifers with Parole" (**"JLWPs"**). In effect, Plaintiffs seek to import whatever procedural benefits may apply to sentencing and re-sentencing hearings into the parole system, and thereby to transform the parole process for themselves and the class.

[1] FCOR is used to describe the entire agency, while "the Commission" is a term used when dealing with the agency's leading body, a tribunal of three Commissioners that adjudicates parole determinations.

2. Statement of Undisputed Material Facts

A. Parole Process Overview

Florida has not had a sentencing scheme that contemplates or permits parole as a sentencing component for any misdemeanors and for most felonies since 1983, for most capital felonies since 1994, and for all remaining offenses since 1995.There are no incarcerated JLWPs whose juvenile offenses were after 1994. The continued parole of JLWPs and the lack of new JLWPs has led to the continual shrinking of Florida's parole eligible inmates. See Ch. 1984–328, Laws of Florida.

FCOR's operational imperative is set by statute:

> No person shall be placed on parole until and unless the commission finds that there is reasonable probability that, if the person is placed on parole, he or she will live and conduct himself or herself as a respectable and law-abiding person and that the person's release will be compatible with his or her own welfare and the welfare of society.

Fla. Stat. § 947.18.

Florida's parole process is highly detailed and considers if inmates were juveniles when they committed their crimes, as well their current level of maturity and rehabilitation. *See* Rule 23-21.010, Florida Administrative Code (**"F.A.C."**). The Commission's Investigators conduct multiple interviews of the inmates and provide case analyses and recommendations to the Commissioners. *See* Rule 23-21.002, F.A.C. Commissioners then individually evaluate the files and later confer as a tribunal at the Commission Meeting to adjudicate the parole status of an inmate. *See id.* (listing various meetings and duties of Commissioners). After these meetings, inmates will receive a Presumptive Parole Release Date (**"PPRD"**), a tentative date

for parole. *Id.* Inmates may seek judicial review of the Commission's determinations. Ex. 1 at 158-59; *see State v. Michel*, 257 So. 3d 3, 7 (Fla. 2018); *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); *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 PPRD).

Upon incarceration, Florida Department of Corrections (**"FDC"**) transmits the sentencing documents to FCOR staff, who review the documents to determine the **"Initial Interview"** date based upon the sentence structure, e.g., within eighteen months of the expiration of a mandatory minimum sentence. 23-21.006 F.A.C. An assigned **"Investigator"** meets with the JLWP for their Initial Interview after collecting bringing background information on the inmate, e.g., all the official records of the inmate since sentencing. Ex. 1 at 57-65. The Investigator prepares a preliminary **"Salient factor"** score, "indices of the offenders' present and prior criminal behavior and related factors found by experience to be predictive in regard to parole outcomes." 23-21.002(43) F.A.C. The score includes the number of (1) prior convictions, (2) prior incarcerations, (3) years sentenced, (4) parole/probation/MCR revocations, (5) prior escape and attempt conviction, and (6) whether burglary, breaking and entering, or robbery are part of the conviction, all scored between 0 and either 1 or 2. *See* Exhibit B, Initial Interview Form; 23-21.007 F.A.C. (explaining how the scoring works).

The Investigator explains that they are at an Initial Interview, the Salient factor scoring process, and the investigator's preliminary Salient factor score so that the inmate has an opportunity to correct any errors. Ex. 1 at 58:13-60:6. Inmates are informed how the initial offense, Salient factor score, mitigations, and aggravations are used alongside either the "Matrix" or the much less severe **"Youthful Offender Matrix"**—JLWPs use the latter. *Id.*, *see* 23-21.009 F.A.C.

Additionally, the Investigator asks the inmate if he has comments or documents to be provided to the Commissioners and asks if individuals might submit statements on the inmate's behalf. The inmate is apprised of how such persons may arrange to speak on the inmate's behalf. *Id.*

After the Initial Interview, the Investigator prepares a **"Rationale"** for the Commission, which is available to the inmate upon request and provided to them automatically upon receipt of the Commission's decision. The Rationale includes the inmate's comments for the commission, the Investigator's Salient factor score, recommended aggravating and mitigating circumstances, and a recommended PPRD for the inmate. Ex. 1 at 57–65; Rule 23-21.009 F.A.C. It also summarizes the information collected from the record and FDC. The Rationale includes the sentence structure; circumstances of the offense; disciplinary reports; the inmate's participation in programs, e.g., Alcoholics Anonymous or other programming offered by FDC, and FDC staff comments. Ex. 1 at 69; Rule 23-21.006(9) F.A.C. Aggravating and mitigating factors may be considered, including factors set forth in Rule 23-21.010

which explicitly include: "The **inmate committing the crime was of such a young age as to diminish his capacity** to fully understand the seriousness of his action and its direct consequences." *Id.* (emphasis added). Other subparagraphs of the Rule similarly relate to considerations of immaturity, *see* Rule 23-21.010(5)(b)1. a., b. & d.-g., F.A.C.

The individual Commissioners receive additional information. Ex. 1 at 194:3-195:20. They have analysts who examine the conduct of the inmates, in addition to the Investigator, and may collect additional information. Ex. 1 at 12:13-23. The file contains information that the Investigators did not have, e.g., autopsy reports, police reports, pre-sentencing investigations, letters sent by inmates to the Commissioners or their victims. Ex. 1 at 194:3-195:20. The complete file is reviewed by each Commissioner before their Meeting. Ex. 1 at 43:6-11, 190:12-193:5.

The Commission then holds an open, public meeting that is noticed—as are all of their meetings—where they adjudicate parole determination. Ex. 1 at 92:8-9. Anyone may appear and submit documents or speak to the Commission regarding the inmate in question. *Id.* at 91–96, 140. Each side—both the inmate's and the victim's side—is allotted 10 minutes, but the Commissioners expand it upon request to as much as 45 minutes. *Id.* at 190. There, Commissioners consider any new information presented to add to their already substantial knowledge of the situation, stemming from their previous review of materials compiled through as much as "hours and hours" spent by analysts and Commissioners in examining the case. Ex. 1 at 30:1–17, 31:8–12, 190-92. Included in their review, Commissioners examine any letters or other documents sent to them by the inmate in question. Ex. 1 at 34:2–21.

The Commission then makes their decision and establishes a PPRD. The PPRD is adjusted up and down with changing circumstances and new information. In dealing with JLWPs, it is the consistent practice of the Commission to amend PPRDs downward as the inmate shows signs that they will be able to successfully reintegrate into society, which inherently includes signs of maturation and rehabilitation. *See* Ex. 2.

The Commission establishes the PPRD by first cross-referencing the Salient factor score with the Youthful Offender Matrix to get the statutorily recommended (reduced) range of months until parole for the inmate, then reviewing the evidence before them and using their own judgment to determine where to set the PPRD within that range of months or whether to go outside of that range. *See* Rule 23-21.010, F.A.C.; Ex. 1 at 27:7-28:1. The Commission may go outside the Matrix based upon the evidence of aggravating and mitigating circumstances, which include the youth of the offender. *Id.* The amount of aggravation or mitigation is discretionary and need not bear any relationship with the Matrix time range. *See Spaziano v. Fla. Parole Comm'n*, 46 So. 3d 576, 581-82 (Fla. 1st DCA 2006); Ex. 1 at 27:7–28:1.

"Subsequent interviews" are scheduled at intervals of 1 to 7 years by the Commissioners, which can result in changes to the PPRDs. Ex. 1 at 149-50. These primarily consider any changed circumstances since the last interview, including program participation and processed disciplinary reports.[2] Ex. 1 at 153:21-154:12.

[2] Processed reports are FDC misconduct reports that resulted in FDC placing the inmate in administrative confinement or loss of gain time. Ex. 1 at 73:8-12.

There are also "Extraordinary" and "Effective" interviews. *Id.* at 159. At each of these interviews and the resulting consideration by the Commission, the investigator will include new information that may bear on maturity and rehabilitation. At any time, inmates, their families, their attorneys, or anyone else may submit information in writing to the Commission. *Id.* at 95. These can include rebuttals regarding anything said at Meetings. Ex. 1 at 93–94.

An inmate may also be granted a special interview for any of a series of enumerated reasons, including good cause in exceptional circumstances, and FDC may recommend that an inmate receive a special interview. Rule 23-21.014, F.A.C.

The Commissioners begin their consideration of the file well before the Meeting, working with staff analysts who review all available information and make recommendations regarding aggravation, mitigation, and more. Ex. 1 at 11-13.

Inmates may obtain copies of relevant materials through public records requests, *id.* at 93-94, and they may submit rebuttals to the Commission regarding anything that was stated at a Meeting or sent to the Commission, *id.* at 95.

B. Parole Outcomes

FCOR keeps its own records through a system they share with FDC. According to those records, aside from the current 179 JLWP Class Members (10 of whom have not completed their mandatory minimum), there are another 49 incarcerated JLWPs who were previously paroled and are therefore excluded from the class. Ex. 5. Looking back, FCOR has cumulatively paroled 246 individual JLWPs, including 23 in the last decade and 66 of whom were paroled between 2 and 4 times. Ex. 3. Figure 1 shows,

by year of offense, the cumulative population of JLWPs and juveniles with sentences over 470 months along with, by year of parole, the cumulative population of the persons in that group who were paroled at least once (based on the data in Exhibit 3, 4, and 5). Figure 2 shows the population age distribution of Class Members today (based on the data in Exhibit 5).

Figure 1. Cumulative Outcome for Class Members (including those paroled)

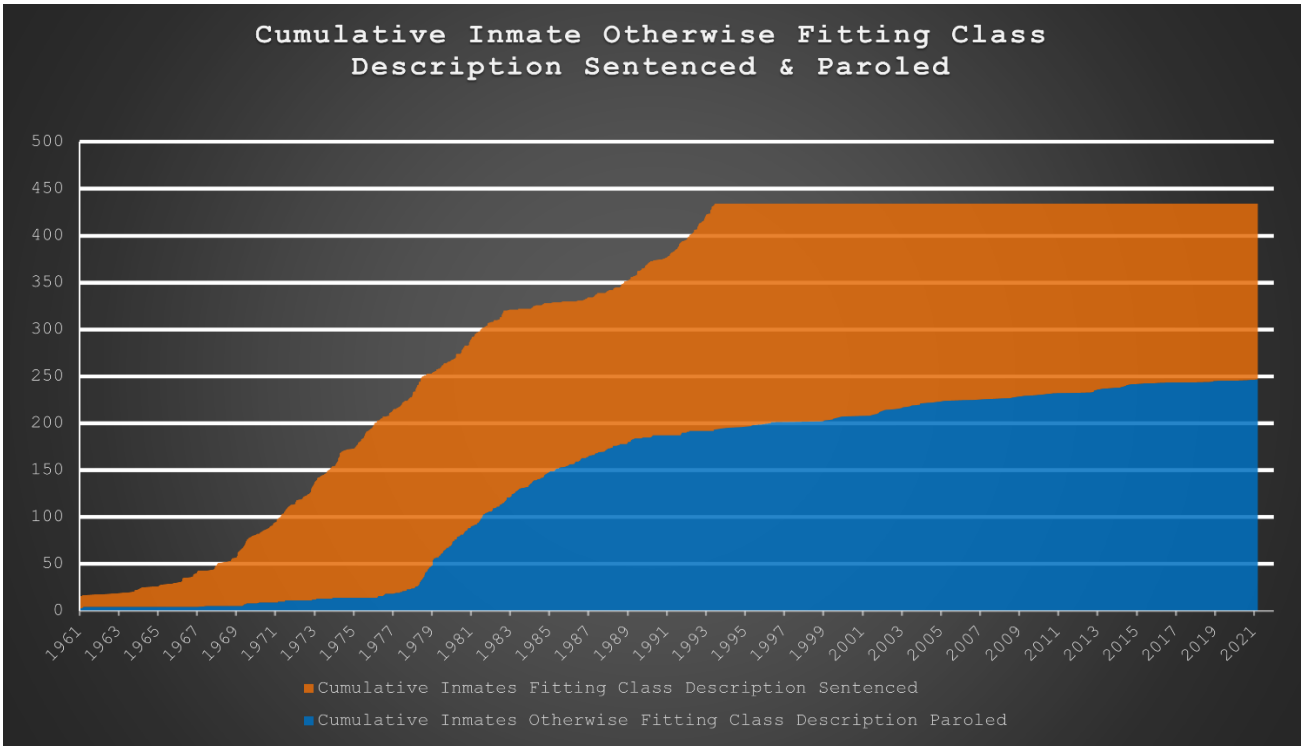
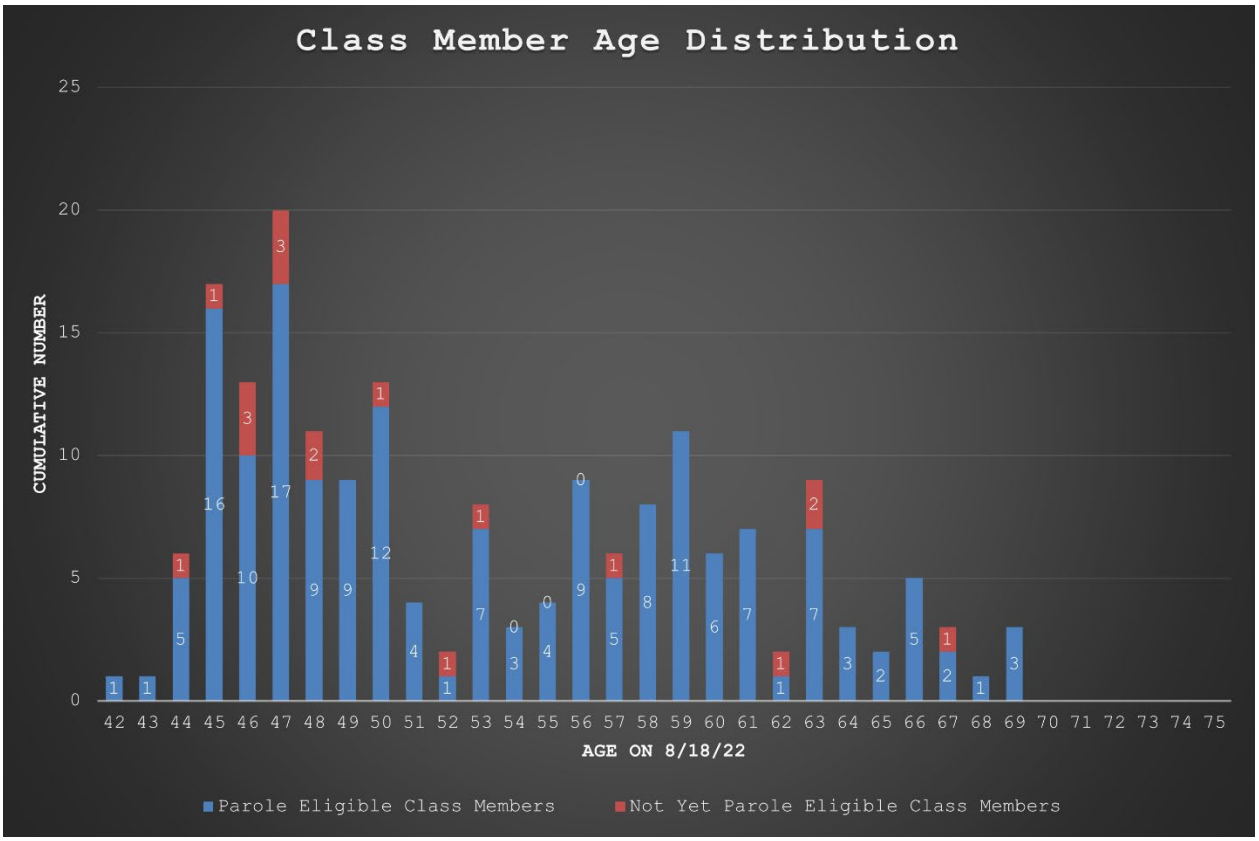


Figure 2. Class Member Age Distribution



3. Argument

a. Injunctive and Declaratory Relief are Barred by §1983 and the Availability of Adequate Remedies.

Plaintiffs bring their claims pursuant to 42 U.S.C. § 1983 and request declaratory and injunctive relief. However, section 1983 provides that:

> Every person who, under color of [law] subjects, or causes to be subjected, any [person] to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress, **except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.**

42 U.S.C. § 1983 (emphasis added).

It is established law that parole boards are entitled to quasi-judicial immunity because they engage in adjudicative functions in deciding whether to grant, deny, or revoke parole. *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). Since Plaintiffs challenge the Defendants' judicial acts – i.e., their parole-related determinations and their exercise of discretion in weighing class members' maturity and rehabilitation – rather than non-judicial acts, Plaintiffs must establish that Defendants violated a declaratory decree or declaratory relief was unavailable to utilize § 1983, which they have neither alleged nor provided evidence to support.

"In order to receive declaratory or injunctive relief, plaintiffs must establish . . . the absence of an adequate remedy at law." *Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir. 2000) (citation omitted). Plaintiffs cannot do so because the decisions of the Commissioners are subject to judicial review and a state's appellate process is an adequate remedy at law. *Sibley v. Lando*, 437 F.3d 1067, 1074 (11th Cir. 2005).

b. <u>Eighth Amendment Jurisprudence Forecloses this Action.</u>

In their Complaint, Plaintiffs allege that "Florida's parole system… directly contradicts the mandates of the U.S. Supreme Court cases that establish juvenile lifers have a constitutional right to be released from prison upon demonstration of maturity and rehabilitation." (Comp. at 5). This argument relies on a misunderstanding of *Graham v. Florida*, 560 U.S. 48 (2010) and its progeny: *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. Louisiana*, 577 U.S. 190 (2016), *as revised* (Jan. 27, 2016); *Virginia*

v. LeBlanc, 137 S. Ct. 1726 (2017); *Jones v. Mississippi* 141 S. Ct. 1307 (2021)—the ***"Graham* Cases"**. Plaintiffs offer no other justification for their claims.

Plaintiffs' claims rely upon broadly rejected or anachronistic interpretations of the *Graham* Cases from district courts and vacated circuit court decisions. Meanwhile, Defendants are supported by solid circuit court decisions in *United States v. Sparks*, 941 F.3d 748 (5th Cir. 2019) (rejecting claims that the *Graham* Cases created Eighth Amendment protections or Procedural Due Process rights that extend (1) to JLWPs, (2) to inmates serving terms of years, (3) or beyond sentencing), and *Bowling v. Dir., Virginia Dep't of Corr.*, 920 F.3d 192 (4th Cir. 2019) (rejecting claims that the *Graham* Cases created Eighth Amendment protections or procedural due process rights that (1) disallow life sentences without parole or (2) apply to JLWPs or term of years sentences).*See also United States v. Morgan*, 727 Fed. Appx. 994 (11th Cir. 2018) (finding that *Miller* does not apply to term of years sentences); *Lucero v. People*, 394 P.3d 1128 (Colo., 2017) (holding the *Graham* Cases did not apply to term of years sentences).

Further, most of the aforementioned cases predated *Jones*, which provides a binding framework for a limited reading of the other *Graham* Cases. The Court in *Jones*, "while expressly disclaiming that it was overruling either Miller or Montgomery, narrowed the potential sweep of those decisions." *Crespin v. Ryan*, — F.4th —, 2022 WL 3570431, at *4 (9th Cir. 2022).

i. Plaintiffs' predicate for their claim is a set of doctrines and justifications that deal with sentencing, which they incorrectly seek to bootstrap into their parole proceedings.

Plaintiffs demand satisfaction from this Court on the grounds that Florida is in violation of the Eighth Amendment. The doctrines used as a vehicle to bring this challenge relate to sentencing. As Plaintiffs did not bring this as a habeas action, they cannot use the doctrines from the *Graham* Cases to support their terms of confinement claim. What Plaintiffs are attempting to accomplish is to avoid habeas proceedings by asserting they are only attacking their terms of confinement and then use the *Graham* Cases' justifications in a new context. In fact, what Plaintiffs allege is that they are not receiving some meaningful chance at parole, which means that their sentences may include parole, but they are actually being sentenced to life without parole, or something close to it. They then seek to use a line of cases that never dealt with JLWP sentences, terms of years sentences, or parole systems to show that Florida's parole system is inadequate. If they seek to use the *Graham* Cases, they must show that they are actually facing life without parole sentences and bring the action in habeas proceedings because they would be attacking their sentence. If they want to avoid habeas proceedings, they must use a different justification than the *Graham* Cases.

It is clear that the Supreme Court's decisions in the *Graham* Cases exclusively deal with the sentencing component of the justice system. Any decision in favor of the Plaintiff would require an extension of the Eighth Amendment to an entirely new realm. *See Bowling*, 920 F.3d at 197 ("Granting that request would require us to extend the legacy of Roper, Graham, and Miller in two ways. . . . And second, we would have

to find that those protections extend beyond sentencing proceedings."). These cases do not deal with any proceeding beyond sentencing as a violation of the Eighth Amendment. The holdings cumulatively state that a mandatory life without parole sentence for juveniles is unconstitutional, but that they are allowed so long as the court has discretion. *Jones*, 141 S.Ct. at 1311–13. The Courts offer "some meaningful chance" as a mechanism of ameliorating past rulings where mandatory sentences were handed down, which could be resentencing, being "considered" for parole, automatic release upon a certain age, or many other alternatives available to the states to figure out. *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."). Yet, the core holdings, issues before the court, and justifications in the analysis all revolve around sentencing. *Id.* at 1316 ("Stated otherwise, the Miller Court mandated only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a life-without-parole sentence").

In *Graham*, the Court emphasized the decision's application to the sentencing of youthful offenders by stating, "[the Eighth Amendment] does prohibit the States from making the judgment at the outset that those offenders never will be fit to reenter society." 560 U.S. at 75 (2010). The Court's justification in *Graham* relied upon a comparison among the States' sentencing practices, not their parole practices. *Id.* at 67 ("The sentencing practice now under consideration is exceedingly rare. And it is fair to say that a national consensus has developed against it.").

In *Miller*, the Court names *Graham*, *Roper*, and other cases as the "sentencing decisions" and emphasize that those decisions "make clear that a judge or jury must have the opportunity to consider mitigating circumstances" when sentencing. *Miller*, 567 U.S. at 489. The Court points out that it implicates "two strands of precedents": "[t]he first has adopted categorical bans on sentencing practices" and "[the second] prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant." *Id.* at 470.

Likewise, the Court in *Montgomery* again was clear that, under their precedents, it was "required that sentencing courts consider" youth and the unique traits of juvenile offenders. 577 U.S. at 195. The Court stated, multiple times, that the decisions specifically apply to sentencers. For example, the Court stated, "*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 208. Furthermore—after stating again that "*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics"— the Court explained that the way to prevent a *Miller* violation is a sentencing hearing where youthfulness is taken into consideration. *Id.* at 209–10.

Additionally, the *Graham* Cases never dealt with the issue of JLWPs. Each **focused on cases of juveniles sentenced to life without parole**. Life with parole was only ever among the possible benefits of the newly formulated doctrine. *See Bowling*,

920 F.3d at 197 ("Granting that request would require us to extend the legacy of Roper, Graham, and Miller in two ways. First, we would have to find that juvenile-specific Eighth Amendment protections extend to juvenile homicide offenders sentenced to life with parole. . . . We decline to go so far."); *United States v. Sparks*, 941 F.3d 748, 754 (5th Cir. 2019) ("Miller has no relevance to sentences less than [Life Without Parole]."); *Montgomery*, 577 U.S. at 195 ("*Miller* held that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on 'cruel and unusual punishments"). In *Miller*, the Court emphasized the unique characteristics of life without parole and death sentences and described the two as special because they hold characteristics that "are shared by no other sentences," i.e., they alter "the remainder of his life by a forfeiture that is irrevocable." 567 U.S. at 474–75. Term of years inmates and JLWPs on the other hand do not share those unique traits. They are also not marked by the "special severity," discussed in *Graham*, that made life without parole cruel and unusual because it denied the juvenile "a chance to demonstrate growth and maturity." 560 U.S. at 73–74.

Here, Plaintiffs seek to have the language used for justifying a set of rulings that dealt with the sentencing of life without parole of juvenile offenders to other sentences and to other stages of the criminal justice process. In doing so, they have argued themselves into a Catch-22. On the one hand, they are adamant that they are not challenging their sentences, thereby circumnavigating the requirements of habeas proceedings. On the other hand, they are attempting to use doctrines uniquely formulated for sentences. The "some meaningful chance" solution acts as a

mechanism of changing the underlying sentence of previous life without parole sentences into something new—e.g., resentencing with the proper sentencing procedures used, allowing parole eligibility, etc. By challenging the parole process as not adequately providing "some meaningful chance" and using these doctrines, Plaintiffs are actually alleging the parole process is illusory and that they are actually relegated to life without parole, despite what their sentences actually read. This is inappropriate because they have not brought this action under habeas review and therefore cannot challenge their sentence.

ii. Nevertheless, FCOR certainly provides "some meaningful chance."

FCOR most certainly provides some meaningful chance for parole for JLWPs. Despite the fact that the *Graham* Cases explicitly disclaim oversight of the mechanisms of remedying a *Miller* violation, the robust parole system in Florida forecloses any possibility Plaintiffs' prevailing in this action.

Throughout the *Graham* Cases, the Supreme Court has been clear that it is for the States to determine how early release may work. While acknowledging the Eighth Amendment right to have youth taken into account during sentencing, they did not envision federal courts intruding into the nature of the state's early release programs; "[w]hen a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Montgomery*, 577 U.S. at 211. *Graham* specifically states:

> 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.

560 U.S. at 75.

Nevertheless, FCOR provides Plaintiffs with a robust process and a high likelihood of release which belies Plaintiffs assertions that they do not receive "some meaningful chance." FCOR's adjudication is discretionary and explicitly incorporates maturation and rehabilitation into its list of mitigating factors, as well as in its use of the Youthful Offender Matrix. *See* Rule 23-21.010, F.A.C. In explaining what is required of courts to satisfy the Eighth Amendment, the Supreme Court stated, "*Miller* repeatedly described youth as a sentencing factor akin to a mitigating circumstance," *Jones*, 141 S.Ct. at 1315, and then enumerated what is required to satisfy *Miller*:

> The key assumption of both Miller and Montgomery was that discretionary sentencing allows the sentencer to consider the defendant's youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's. . . . First, and most fundamentally, an on-the-record sentencing explanation is not necessary to ensure that a sentencer considers a defendant's youth. Jones's argument to the contrary rests on the assumption that meaningful daylight exists between (i) a sentencer's discretion to consider youth, and (ii) the sentencer's actual consideration of youth. But if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily will consider the defendant's youth, especially if defense counsel advances an argument based on the defendant's youth. Faced with a convicted murderer who was under 18 at the time of the offense and with defense arguments focused on the

> defendant's youth, it would be all but impossible for a sentencer to avoid considering that mitigating factor. . . . But the key point remains that, in a case involving a murderer under 18, a sentencer cannot avoid considering the defendant's youth if the sentencer has discretion to consider that mitigating factor. . . . Under our precedents, this Court's more limited role is to safeguard the limits imposed by the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Court's precedents require a discretionary sentencing procedure in a case of this kind. The resentencing in Jones's case complied with those precedents because the sentence was not mandatory and the trial judge had discretion to impose a lesser punishment in light of Jones's youth.

141 S.Ct. 1318–22 (citations and quotations omitted). FCOR meets *Jones'* requirements.

Further, FCOR provides a robust process. This process includes many rounds of interviews with a team of experienced civil servants whose duty is to both explain the process to and gather pertinent information from the inmate. *See supra* Part 2A. The Commissioners undergo thorough review, supported by their analysts, of the cases before them and hold public meetings where people are allowed to speak for and against the inmate. *Id.* This process has ensured beneficial outcomes for the inmates, outcomes that far surpass "some meaningful chance." **Over 50% of JLWPs have been paroled at least once, many multiple times.** *See supra* Part 2B. Whatever "some meaningful chance" means—1%, 5%, 10%, 25%—any rational person would find it hard to possibly consider an over 50% chance of receiving parole something less than a meaningful chance. Additionally, despite Plaintiffs' expert's allegations of an expected release age of over 90, there are **zero inmates over 70 that have not been paroled**. *Id.* FCOR goes beyond some meaningful chance and seems to have ensured

that no person spends their natural life (measured by U.S. life expectancy ~80 years) incarcerated if they committed their crimes as a juvenile. The numbers conclusively refute any claim that FCOR fails to provide some meaningful chance.

Plaintiffs may point out that the rate of release seems to have diminished, but has not accounted for the fact that there may be an element of "cream skimming" going on in the process. The Supreme Court is clear that some fraction of juvenile offenders are permanently incorrigible and should never be released to join the public. It follows that over the years of continuing the parole process, FCOR has consistently released the most promising inmates, leaving behind the closer cases and the group of people that will always be a threat to society, which would explain any slowdown. Nevertheless, such a slowdown would not supersede the mathematical fact that there is no indication of JLWPs dying of old age because they were never paroled.

It is important to note that Plaintiffs argue averages rather than specifics. Plaintiffs argue the number of juvenile offenders released to parole versus the number of parole eligible juvenile offenders still incarcerated have meaning. Such statistics have no legal meaning because Plaintiffs have failed to present, structure, or demonstrate any analytical foundation of other relevant information.

As the Eleventh Circuit has explained in rejecting bare statistics in a failure-to-promote employment case,

> The statistical evidence presented by Wilson does not have any probative value in establishing a prima facie case of disparate treatment. This statistical evidence is not even probative of pretext because Wilson has not provided any other relevant information, including the number of women who expressed interest in vice president positions. See, e.g.,

> Howard v. B.P. Oil Co., Inc., 32 F.3d 520, 524 (11th Cir. 1994). "Statistics without any analytical foundation are 'virtually meaningless.'" Evans v. McClain of Ga., Inc., 131 F.3d 957, 963 (11th Cir. 1997) (quoting Brown v. Am. Honda Motor Co., 939 F.2d 946, 952-53 (11th Cir.), cert. denied, 502 U.S. 1058, 112 S. Ct. 935, 117 L. Ed. 2d 106 (1992)).

Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1089 (11th Cir. 2004).

Inmates are not a fungible commodity. Each inmate is different and each crime is different. The crimes Plaintiffs have been convicted of are not "average" crimes. It is improper reasoning to lump all inmates together and make conclusions based on overall averages. As a related example, Plaintiffs have argued that Commissioners do not give adequate time of consideration to Plaintiffs' cases. This conclusion was based on a flawed analysis of the facts. Plaintiffs looked at the total time of the actual Commission meetings averaged over the total number of cases considered. This is like the old fallacy that one cannot drown in a lake that is only 3 feet deep "on the average." It is obvious to any person that some parole matters take far less than the mean time, perhaps only seconds, while others will take longer than the mean time. Also, Plaintiffs ignored the obvious fact, brought out in depositions (but Plaintiffs do not appear to have abandoned their argument), that Commissioners spend a significant amount of time before Commission meetings reviewing the cases of the inmates whose parole matters will come before them.

c. Plaintiffs Possess No Procedural Due Process Rights in Parole and, Even if they Did, the Process Provided is Sufficient.

Plaintiffs' due process claims are, in fact, simply a rehashing of their Eighth Amendment claims bootstrapped into a new vehicle by which they seek vindication. No evidence supporting a Due Process violation has been shown that would allow the claim to survive summary judgment. "[Considering] the Due Process Clause, standard analysis under that provision proceeds in two steps: We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient." *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011). Here, the lack of a liberty interest and the existence of sufficient process are fatal to Plaintiffs' claim of a violation of procedural due process.

i. There is no liberty interest in parole.

Plaintiffs have not shown that a liberty interest actually exists in parole proceedings for JLWPS. Absent a liberty or property interest, an individual can have no constitutional right to due process. *See Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). A prisoner can identify a cognizable liberty interest in one of two ways: those arising from the Constitution itself or those created by States through their own rules. *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011). There are no allegations of the later sort of liberty interest here.

Parole is not considered a liberty interest because it is seen as a mechanism of leniency, offering additional benefits that the person is not entitled to; "**[t]here is no**

right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners." *Swarthout*, 562 U.S. at 220; *see also Greenholtz*, 442 U.S. at 7, 9 (stating that there exists "no constitutional or inherent right" to parole proceedings).

Plaintiffs encourage this Court to extend *Graham* and *Miller* by determining that the decisions imply a liberty interest in parole for JLWPs. They can find no binding precedents to convince the Court and are relegated to citing to the six opinions around the country from district courts and circuit court opinions that are either vacated or not on point. *See* Pltfs' Supp. Resp. to Interrogatories at 10. The Fourth Circuit, however, dismissed the concept of a liberty interest in parole for the juveniles impacted by the *Graham* Cases, because those cases don't apply to life with parole sentences. *Bowling*, 920 F.3d at 199.

The flimsy authority and assurances that the Supreme Court was, in fact, creating a liberty interest—even though they chose not to clarify such an essential holding in any of their voluminous opinion on the matter—hardly supersedes the Supreme Court's statements and indications to the contrary. *See Swarthout*, 562 U.S. at 220 ("There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence.").

It is worth noting that, for over fifty years, the Supreme Court has consistently used the term "liberty interest" throughout opinions that deliberate or create one. *See e.g., Vitek v. Jones*, 445 U.S. 480 (1980) (where the majority used "liberty interest"

thirteen times while determining that a state statute created one). Meanwhile, throughout *Miller*, *Graham*, *Montgomery*, and *LeBlanc*, the court uses the term "liberty interest" once but only to discuss another case's findings, and any version of "liberty" five times, never in a manner that would indicate the creation of a "liberty interest." *See Montgomery*, 577 U.S. at 212 ("*Teague* sought to balance the important goals of finality and comity with the liberty interests."). The utter dearth of the use of the universally accepted phrase, especially given the context of cases about the incarceration of persons and the application of their Due Process Clause's protection "of life, liberty, or property," seems so bizarre that the only plausible conclusion is that the Justices were intentionally avoiding the word to prevent this precise kind of action. To the contrary, the Supreme Court has expressly stated that JLWPs "who have shown an inability to reform will continue to serve life sentences." *Montgomery*, 136 S. Ct. at 736. "That the state holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained." *Greenholtz*, 442 U.S. at 11.

The straightforward reading of *Miller*, *Graham*, and *Montgomery*, alongside *Greenholtz* and myriad other Supreme Court determinations on the issue is that the **sentence** received by JLWPs should include some real chance of getting out before they expire—i.e., the chance cannot be utterly illusory—but that is hardly the same as going to the lengths of creating a liberty interest.

ii. Nevertheless, Florida provides sufficient process.

If there were a liberty interest, that liberty interest would be minimal and FCOR's procedures would more than satisfy them. While none of the available cases have reached their conclusions or are very persuasive, a handful of novel orders and decisions have extended the doctrine and found **minimal** procedural due process rights relating to parole exclusively for JLWPs, as an implication of *Graham*, *Miller*, and *Montgomery*. The Judges approach the issue of procedural due process rights with caution, extending the minimum due process right of "the opportunity to be heard at a meaningful time and in a meaningful manner." *See Brown v. Precythe*, 2:17-CV-04082-NKL, 2017 WL 4980872, at *11 (W.D. Mo. Oct. 31, 2017) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). "At a minimum, the Due Process Clause requires notice and the opportunity to be heard incident to the deprivation of life, liberty or property at the hands of the government." *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). Yet—were the Court to follow in the extension of *Graham*—these cases warrant comment due to the stark differences in their parole system. *Brown v. Precythe*—now vacated pending a hearing *en banc* by the Eighth Circuit—dealt with Missouri's parole system, where JLWPs were not able to communicate with the parole board through writing, review or respond to misinformation, or ensure the parole board members making the determination attended the meeting and only a limited universe of

information could be presented at the meeting. 2017 WL 4980872, at *12 (W.D. Mo. Oct. 31, 2017).

The distinction between FCOR's rather robust process and Missouri's are pronounced. In Florida, JLWPs are offered a litany of protections when they seek early release: ability to write to Commissioners and have their comments heard, to quickly appeal the parole decision back to the Commission, to appeal the Commission's decision to the court system, to have anyone come and advocate on their behalf at the meetings, etc. *See supra* Part 2A. It is difficult to see this system as an analog to Missouri's or as one that fails to give JLWPs the "opportunity to be heard." Given the severity of many of the JLWPs' offenses, the robustness of the protections offered is most manifest by examining the outcomes for JLWPs, who are consistently paroled by the Commission. *See supra* 2B.

Regarding whether the Commissioners sufficiently consider the youthfulness of the offender and their maturation and rehabilitation, Plaintiffs contentions are direct contradictions of the Supreme Court's clear position on the matter. While discussing the issue of juvenile life sentencing at resentencing that derives from claims regarding *Miller* and *Graham*, the Court explained "a sentencer cannot avoid considering the defendant's youth if the sentencer has discretion to consider that mitigating factor." *Jones*, 141 S. Ct. 1307, 1319–20 (2021). The Court later concluded, '[i]t does not matter whether the sentencer meaningfully considers youth: The Court assumes it will, but ultimately, the mere existence of "a discretionary sentencing procedure suffices." 141 S. Ct. at 1330 (2021). It follows exactly that if all a court needs to satisfy any procedural

requirements in *Miller* and *Graham* is a "discretionary procedure," then the discretion to consider aggravators and mitigators that is afforded the Commission is automatically sufficient.

iii. <u>There is no procedural due process violation because state alternatives are available.</u>

Plaintiffs' claims for procedural due process violations are not valid because the violations are not complete. The Class JLWPs have not availed themselves of the state remedies for any procedural deficiency, meaning they have not given the state the chance to remedy the issue and the violations are incomplete.

As distinct from substantive rights—where the violation is complete as soon as the government action takes place—procedural due process violation is not complete, "unless and until the State fails to provide due process." *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (quoting *Zinermon v. Burch*, 494 U.S. 113, 123 (1990)). "[T]he state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." *Id.* Therefore, "procedural due process violations do not even exist unless no adequate state remedies are available." *Ogburia v. Cleveland*, 380 Fed. Appx. 927, 929 (11th Cir. 2010) (quoting *Cotton v. Jackson*, 216 F.3d 1328, 1331 n. 2 (11th Cir. 2000)). Only "the state's failure to provide adequate procedures to remedy the otherwise procedurally flawed deprivation of a protected interest that gives rise to a federal procedural due process claim." *Cotton*, 216 F.3d at 1331 (citations omitted).

If a plaintiff has shown a deprivation of a protected liberty interest, courts turn to "whether the available state procedures were adequate to correct the alleged procedural deficiencies." *Id.* If adequate state remedies were available but the plaintiff failed to take advantage of them, the plaintiff cannot claim he was deprived of procedural due process. *Id.* To be adequate, "the state procedure must be able to correct whatever deficiencies exist and to provide plaintiff with whatever process is due." *Id.* An ability to appeal to a state court is an established adequate procedure. *See Narey v. Dean*, 32 F.3d 1521, 1527 (11th Cir. 1994) (appeal to Georgia superior courts with the power to "reverse the decision or order of the board" when their conduct or ruling violates the Constitution is an adequate procedural remedy); *Cotton*, 216 F.3d at 1331 ("[C]ertiorari is generally an adequate state remedy."); *McKinney*, 20 F.3d at 1562–63 (holding that available review in the Florida courts for due process violations "more than satisfies" that adequacy.).

Florida's parole system allows all decisions by the Commission to be appealed to the Commission or reviewed by Florida courts. This is certainly an adequate process. If the process at FCOR was deficient for JLWPs, then the decisions should have been dealt with in Florida's system. From FCOR to Florida courts, the case could have continued up the latter until the deficiency was remedied. Without having done so, the claim for a violation of procedural due process is improper, as Florida has yet to have a chance to remedy the supposed deficiency. Therefore, any claim that did not go through the review process in the Florida courts are not completed violations.

There is no indication that the Plaintiffs have attempted to remedy the alleged violation of procedural due process within the Florida court system. Defendants are entitled to summary judgment on this § 1983 action on that basis alone. *See McKinney*, 20 F.3d at 1567 ("McKinney could have availed himself of state court procedures that not only could have provided him with adequate relief, but also would have satisfied his interest in due process. McKinney chose not to utilize those procedures, however; we therefore hold that there was no due process violation and, as a result, no section 1983 claim.")

d. <u>This Action is Barred by the *Heck* Doctrine.</u>

Plaintiffs' assertions clearly have the ambition of altering their current parole sentence into one that includes resentencing. Ruling for Plaintiffs implicitly means FCOR should adopt processes designed to increase the release rate (a speedier release) and effectively renders the Plaintiffs sentences as including resentencing; such a conclusion is barred under *Heck v. Humphrey*, 512 U.S. 477 (1994). *Heck* explains that *Preiser v. Rodriguez*, 411 U.S. 475 (1973), ruled "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release." 512 U.S. at 481. In effect, they are challenging their sentence, which is only properly brought under habeas corpus proceedings. The only conclusion that would vindicate Plaintiffs' claims, that Florida's parole system does constitute some meaningful opportunity for parole, necessarily invalidates their sentence.

4. Conclusion

WHEREFORE, Defendants respectfully move for summary judgment on all of Plaintiffs remaining claims because they are barred by § 1983 and the availability of adequate remedies, lack support for their interpretation of the Eighth Amendment, and lack support for their Fourteenth Amendment Claim, and are barred by the *Heck* Doctrine.

Respectfully submitted,

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