UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ROBERT EARL HOWARD ET AL.,

Plaintiffs,

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

MELINDA N. COONROD, ET AL.

Defendants.
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PLAINTIFFS' AMENDED MOTION FOR SUMMARY JUDGMENT

Plaintiffs move for entry of summary judgment in their favor on all counts for the reasons stated below.

Introduction

Named Plaintiffs and the Class they represent are 170 persons sentenced to life in prison with the possibility of parole for crimes committed when they were under 18 ("JLWPs" or "Juvenile Lifers"). Rather than the "vast majority" of JLWPs being released upon serving a constitutionally appropriate length of time, as social science and U.S. Supreme Court precedent expect, in Florida the vast majority of Juvenile Lifers will die in prison because of the deficiencies of Florida's parole process. A review of every Class Member's current Presumptive Parole Release Date shows they will be in their nineties if parole is even granted on that date (should they live that long). Defendants have paroled only 24 JLWPs out of hundreds (a 3-5% release rate) since *Miller* required that Juvenile Lifers be given

a meaningful opportunity for release. This stands in sharp contrast to the 98 out of 125 JLWPs released by the courts (a 78% release rate) in constitutional resentencings during the two years the *Atwell* Window was open. By their policies and practices, Defendants have not only denied Plaintiffs their constitutional right to a meaningful opportunity to demonstrate their maturity and rehabilitation to earn release, but have transformed their JLWP sentences into *de facto* and unconstitutional juvenile life without parole ("JLWOP") sentences.

I. STATEMENT OF UNDISPUTED MATERIAL FACTS[1]

While Florida's parole system dates back to 1941, the current system applicable to the Class of establishing a Presumptive Parole Release Date ("PPRD") began in 1996.[2] For Juvenile Lifers, there are essentially four stages in the parole process. After serving a mandatory minimum of twenty-five years in prison, there are: 1) the Initial Interview to establish a future potential parole date, or PPRD; 2) Subsequent Interviews to determine if any change should be made to the PPRD; 3) an Effective Interview near the expiration of the PPRD to determine if an inmate should be paroled; and 4) an Extraordinary Review to outline reasons if parole was denied.[3] The Florida parole statute requires Defendants to design and apply

[1] For the convenience of the Court and Defense Counsel, the footnotes in this section identify and number each Statement of Fact ("SOF") discussed, followed by the citation of support for that fact. Later in the legal argument portion of this brief, we reference any facts discussed with a cite to the SOF number identified in this section.

[2] SOF 1, Ex. 1, FCOR 2021 Annual Report at p. 4. Parole practices and release rates have changed substantially over time. In FY1978. for example, FCOR paroled 4,324 individuals. SOF 2, http://edocs.dlis.state.fl.us/fldocs/commissions/parole/ar/1970-1988/39_1978-1979.pdf at p. 15 (last visited 9/16/2022).

[3] SOF 3, Fla. Stat. §947.16, 947.172, 947.174, 947.1745.

objective parole criteria that will "give primary weight to the seriousness of the offender's present criminal offense and the offender's past criminal record." Further, the Legislature specified its intent that the decision to parole an inmate "is an act of grace of the state and shall not be considered a right."[4]

A. Initial Interview to determine PPRD

The Initial Interview is held near the end of the 25-year mandatory minimum sentence to set a future PPRD when an inmate may actually be considered for parole.[5] PPRDs are calculated using a matrix scoring process to determine a baseline number of months and then Defendants may go outside the matrix based on aggravating or mitigating factors.[6] Defendants' PPRD decisions are recorded on a pre-printed 2-page form in which Defendants agree to a number of months based on the matrix and additional months based on enumerated aggravating factors.[7] The FCOR form usually notes that Defendants considered mitigation but Defendants ***never*** assign specific months to any mitigation factor

[4] SOF 4, Fla. Stat. §947.002 (2),(5).
[5] SOF 5, Fla. Stat. §947.16.
[6] SOF 6, Fla. Admin. Code Ann. 23-21.001- 23.21.0161. Rule 23-21.010 specifically addresses when Defendants may set a PPRD outside the matrix range "based on any competent and persuasive evidence relevant to aggravating or mitigating circumstances if the inmate is furnished a written explanation." *Id.* at 23-21.010(1). The Rule permits Defendants to reject their Investigator's recommendation in setting the PPRD "as long as the inmate receives in writing an explanation of such decision with individual particularity." Plaintiffs' expert, Prof. Cauffman, noted that "FCOR generally never accepted the FCOR staff Investigator's recommended PPRD, with 42% of Class Members receiving an earlier PPRD and 58% receiving a later PPRD. SOF 7, Ex. 2, Dec. of Prof. Cauffman attaching Expert Report dated 6/1/2022 ("Cauffman Exp. R.") and Rebuttal Report dated 9/19/2022 ("Cauffman Rebuttal Rep."), Cauffman Exp. R. at p.18, para. 15. The two-page action forms reflecting Defendants' actions do not contain any explanation by Defendants for the deviation from the baseline matrix. SOF 8, *See, e.g.* Ex. 3, Carl Brown 2016 Rationale and Initial Interview.
[7] SOF 9, Ex. 3 at 1RFP17 -1324 - 1326.

nor describe any mitigation Defendants actually considered nor what, if any, weight it was given.[8] There is no narrative explanation recorded on the form for the basis or rationale of the Defendants' decisions.[9]

B. Prior to 2014, FCOR's Matrix Penalized Juvenile Offenders

Defendants and their staff admit that the parole process treats Juvenile Lifers the same as adult offenders and that no internal FCOR rules, policies, or practices were changed following *Miller* except changes to the matrix that Defendants use at the Initial Interview to set a baseline for the PPRD.[10] Prior to 2014, FCOR used the same matrix for both adult and juvenile offenders and that matrix assigned two additional points to juvenile offenders,[11] which could add up to five more years to the PPRD.[12] In 2014, the extra points were dropped when a Youthful Offender Matrix was introduced.[13] However, FCOR never retroactively applied the Youthful Offender matrix to correct the PPRDs for those JLWPs who

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[8] SOF 10, *Id.* (representative example of completed Initial Interview Commission Action Form).
[9] SOF 11, Ex. 2, Cauffman Rep. p. 17-18, para. 13. Plaintiffs' expert examined PPRD records for each Class Member and determined that Defendants, on average, assigned 13 years under the matrix as a baseline and added 47 additional years for aggravating factors relating to the original offense in setting the PPRD. SOF 12, *Id.* at p. 17, para. 12.
[10] SOF 13, Ex. 4, Defendant Coonrod Depo. Tr. 30:2-16, 54:19-55:2; Ex. 5, Laura Tully Depo. Tr. 19:18-20:11, 27:10-28:1
[11] SOF 14, Ex. 6, O'Donnell Depo. Tr. 22:22-24:12.
[12] SOF 15, *See, e.g.,* Ex. 7, Composite of PPRD Commission Action Forms for Plaintiff Robert Howard, at 1 FRP17-1697 (setting PPRD). Mr. Howard had a salient factor score of 3, with two of those points coming from being a juvenile at the time of his offense. This put him in the range of 180-240 months under the matrix. Without the two points, he would have been in a lower category where the range was 120-180 months. He was scored at the top of the range (240 months) which amounts to 5 more years than the top of the range one tier down (180 months).
[13] SOF 16, Ex. 5, Tully Depo. Tr. 19:18-20:11.

had been evaluated under the pre-2014 matrix.[14] Plaintiffs' expert determined that over half of the Class Members (93 individuals) had PPRDs set under the old version of the matrix.[15] This means that over half the Class has been ***penalized*** for their youth and received a ***longer*** PPRD than an adult convicted of a similar crime.

C. FCOR's Process is the Same for JLWPs and Adult Offenders

For all four types of FCOR interviews, the process for Juvenile Lifers is the same as for adult offenders (with the exception of the Youthful Offender Matrix applied after 2014).[16] It begins with an FCOR Investigator meeting with the Class Member and sometimes speaking with the Classification Officer at the prison.[17] The Investigator orally discusses with the inmate the recommendation he intends to convey to Defendants on setting or amending the PPRD, but does not share a copy of his written Rationale, which is the only narrative prepared by an FCOR employee describing the underlying offense and the Class Member's institutional conduct and program participation.[18] The only avenue for a Class Member to know

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[14] SOF 17, Ex. 5, Tully Depo. Tr. 20:12-21; Ex. 8, Defendant Davison Depo. Tr. 33:6-11; Ex. 4, Coonrod Depo. Tr. 67:14-21.
[15]SOF 18, Ex. 2, Cauffman Exp. R. p. 17, para. 10.
[16] SOF 19, Ex. 5, Tully Depo. Tr. 19:18-20:11, 27:10 - 28:1; Ex. 4, Coonrod Depo. Tr. 30:2-16, 54:19-55:2, Ex. 8, Davison Depo. Tr. 22:12-16.
[17] SOF 20, Ex. 6, O'Donnell Depo. Tr. 13:19 to 15:15. The Investigator is the only FCOR employee to ever meet with a Class Member. *Id.*
[18] SOF 21, *Id.* While a Class Member is forced to make a public records request to review a Rationale before an FCOR meeting, the Rationale is given to prosecutors and victims without the need for a request. SOF 22, Ex.1 at p.11 (FCOR Annual report describing that "Victim Services staff has worked diligently to provide rational/interview recommendations to victims and state attorneys prior to the Commission meeting.").

what information is being submitted to the Defendants is to make a public records request; however, FCOR's response to that request will not include all information Defendants consider before they make their decisions.[19] Even if a public records request were made in time to receive it before an FCOR meeting, the Class Member is not given a copy of all the information Defendants review in preparing for their meeting.[20] Defendants receive information up to and at the parole hearing before making their decisions,[21] but Class Members are not allowed to attend those FCOR hearings (either in person, by phone or by video) or receive a recording of the hearings.[22] Defendants never meet with or speak to a Class Member at any time throughout the parole process.[23]

No counsel, mitigation experts or psychologists are provided to Class Members to assist in the parole process.[24] Defendants can only discuss a case with each other at their publicly-noticed parole hearings, at which each side is permitted only ten minutes to present unsworn testimony.[25] Defendants generally hold these public hearings weekly and consider over 200 cases in each meeting, of which

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[19] SOF 23, Ex. 5, Tully Depo. Tr. 92:22-93:1; Ex. 4 Coonrod Depo. Tr. 80:25-81:5.
[20] SOF 24, Ex. 5, Tully Depo. Tr. 125:12-126:1.
[21] SOF 25, Ex. 4, Coonrod Depo. Tr. 81:11-13.
[22] SOF 26, Ex. 4, Coonrod Depo. Tr. 81:14 -20. The only recording of FCOR meetings is made on a CD which is not available to a Class Member because it is considered prison contraband. *Id*. at 89:13-15.
[23] SOF 27, Ex. 4, Coonrod Depo. Tr. 81:11-13, Ex. 8, Davison Depo. Tr. 65:4-11; Ex. 9, Wyant Depo. Tr. 51:19-52:17.
[24] SOF 28, Ex. 5, Tully Depo. Tr. 35:8-36:19, Ex. 10, Lander Depo. Tr. 32:14-33:14, Ex. 4, Coonrod Depo. Tr. 103:14-20. If a Class Member could afford counsel, that counsel would be limited to ten minutes to speak and is not permitted to cross-examine or rebut statements made by others. SOF 29, Tully Depo. Tr. 96:4-7.
[25] SOF 30, Fla. Admin Code R. 23-21.004 (5)

about 20-40 relate to parole interviews.[26] Frequently, the discussion among Defendants in setting the PPRD lasts only a few minutes.[27]

D. No Psychological Evaluations or Mitigation Assessments

In the past FCOR received comprehensive psychological evaluations prepared by staff psychologists at the Florida Department of Corrections, but that practice stopped in 2009.[28] In 2012, FCOR asked the Florida Legislature to provide funding for three psychologists to resume this practice (which required about 32 hours for each evaluation),[29] stating that "it is critical that Commissioners be provided a detailed and thorough mental health status report prior to making a risk assessment and parole decision."[30] Those positions were never funded. As a result, the ***only*** information Defendants now receive relating to a Class Member's current mental health status is a number -- ranging from 1 to 5 and nothing else.[31] The unrebutted testimony of Plaintiffs' expert is that a comprehensive psychological assessment by a trained clinician is critical to assessing whether a

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[26] SOF 31, Ex.8, Davison Depo. Tr. 76:21-25 and 77:1 -22; Answer ¶ 10. The other matters involve supervision of parolees, conditional medical release and addiction recovery release. *Id.*

[27] SOF 32, Answer ¶¶ 10, 83 (admitting that some parole cases take "much less than 10 minutes, and others take 20 minutes or longer.").

[28] SOF 33, Ex. 5, Tully Depo. Tr. 36:25-37:24, 106:17-107:15, 118:1-25

[29] SOF 34, Ex. 11, example of Psychological Evaluation FCOR previously received. The Ass't Chief of Mental Health for the Dep't. of Corrections ("DOC") testified that if FCOR today would request a comprehensive psychological evaluation of the type DOC psychologists previously performed, DOC would comply but there has been no such request in the past six years. Ex. 10, Lander Depo.Tr. 31:11-36:12.

[30] SOF 35, Ex. 12 FCOR Proposal Analysis dated 8/1/2012 re: Mental Health Evaluations.

[31] SOF 36, Ex. 5, Tully Depo. Tr. 36:25-37:10. Defendants get only a score and no information explaining how the score was derived or by whom. SOF 37, Ex. 10, Lander Depo. Tr. 26:5 to 27:23. Defendant Davison admitted that he does not know what the score represents, how it is derived or who prepares it. SOF 38, Ex. 8, Davison Depo. Tr. 84:14 - 85:17.

youthful offender has achieved the maturation and rehabilitation necessary to be successfully reintegrated into society.[32]

E. FCOR Policies, Manuals and Training Do not Address How to Apply the Miller Factors

Other than the adoption of the Youthful Offender matrix in 2014 (applied to less than half the Class), FCOR has not modified any of its existing policies, manuals or training of Defendants, investigators and staff to educate them on why children are constitutionally different than adults and how to apply the *Miller* factors to provide a meaningful opportunity for Class Members to demonstrate maturity and rehabilitation.[33] To the contrary, the forms and policy directives focus on how to assess aggravating factors, contain no discussion on how to evaluate maturity and rehabilitation, and reflect the parole statute's mandate that the focus and primary emphasis should be on the seriousness of the crime.[34] While Defendants claim that they consider factors relating to youth when setting or modifying the PPRD, there is nothing in their rules, policies or manuals that require them to do so.[35]

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[32] SOF 39, Ex. 2, Cauffman Rep. at p. 26.

[33]SOF 40, Ex. 5, Tully Depo. Tr. 70:1-22; Ex. 13, PPRD Training for Parole Examiners dated April 2009, Table of Contents (with section on how to assess aggravating factors; no similar section for mitigation); Ex. 14, Procedure Directive No. 3.03.02.02, "Initial Presumptive Parole Release Date Interview" (June 29, 1984). The manual and directives are still in use today. Ex. 5, Tully Depo. Tr. 61:15-25. *See also* Ex. 5, Tully Depo. Tr. 88:14-89:13.

[34] SOF 41, The internal training manuals have not been updated to instruct on how to evaluate the *Miller* factors for JLWPs. Ex. 5, Tully Depo. Tr. 61:15-25.

[35]SOF 42, Ex. 5, Tully Depo. Tr. 19:13-17; Ex. 4, Coonrod Depo. Tr. 51:10-13, 54:19-55:2, 56:3-20; Ex. 8, Davison Depo. Tr. 29:13-16. While Defendants all claimed that even though they are not required to consider factors such as those in the 2014 Juvenile Sentencing Statute, they do in fact consider them. However, they refused to answer any questions about what weight they give, what standards they apply and how it impacts their parole decisions, claiming judicial immunity.

F. Initial Interviews of Plaintiffs Brown and Peterson

The FCOR meeting at which Defendants set Named Plaintiff Carl Tracy Brown's initial PPRD is a typical example of how Commissioners go about this important decision.[36] Their discussion and decision-making lasted slightly over 3 minutes.[37] Defendants first agreed on the matrix score and then agreed on the number of months to add for aggravating factors based solely on the original offense.[38] There was no discussion of Mr. Brown's age, maturity and psychological development at the time of the offense, whether he had shown sincere and sustained remorse for his offense, the results of any mental health assessment (none was done), that his classification officer reported he "was not a problem," that he had held several jobs in prison for which he received above-average ratings, that he had no tattoos or gang affiliations, and that he had completed several programs.[39]

The Commissioners did not discuss the fact that Mr. Brown had not received a single disciplinary report during his 27 years in prison, a remarkable feat. All three Defendants recently testified that they do not consider the absence of

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[36] SOF 43, Ex,9 Wyant Depo. Tr. 79:13 to 84:15; Ex.3, Initial Interview for Carl Brown, 1RFP17-1324 - 1326.
[37] SOF 44, Ex. 9, Wyant Depo. Tr. 79:13 to 84:15 (transcript of 3-minute FCOR meeting to set Brown's PPRD).
[38] SOF 45, Ex. 3, Initial Interview for Carl Brown, 1RFP17- 1324 - 1326. Based solely on the circumstances of Mr. Brown's original offense, Defendants added 16 years to Mr. Brown's period of incarceration, thereby rejecting their investigator's recommendation of a 7-year increase. The Commissioners added five of the 16 years because the 16-year old Carl had been drinking at the time of the offense, yet failed to note that for the past 27 years there had been no incidence of drug or alcohol abuse. *Id*.
[39] SOF 46, Ex. 3, Initial Interview for Carl Brown, 1RFP17- 1324 - 1326.

disciplinary reports to be a mitigating factor. Defendant Chairman Coonrod said: "Good conduct is not a reason to reduce the PPRD date. . . they are expected to have good conduct." Defendant Davison testified: "I don't see following the rules as mitigation." And Defendant Wyant said: "I can't say [satisfactory institutional conduct] would be a mitigator. It could be, but they're supposed to obey the- or the rules of law."[40] Defendants, however, add time to a PPRD for a disciplinary report, including a minor one such as a phone violation.[41]

The Initial Interview of Plaintiff Peterson followed a similar course. The Investigator recommended a PPRD of April 2027, but Defendants rejected that recommendation and set the PPRD at 2060 when Mr. Peterson will be 84.[42] There was no discussion about Mr. Peterson's work history, program participation and limited disciplinary record.[43] Defendants spent about ten minutes in total at the FCOR hearing to discuss and set his PPRD.[44]

[40]SOF 47, Ex. 4, Coonrod Depo. Tr. 139:12-21; Ex. 8, Davison Depo. Tr. 80:3-6; Ex. 9, Wyant Depo. Tr. 100:12-21
[41]SOF 47(a),Ex. 4, Coonrod Depo. Tr. 61:1-17
[42]SOF 48, Ex. 15, Rationale and Commission Action form for Damon Peterson. Applying the Youthful Offender matrix, Defendants came up with a baseline of 11.25 years. They added another 56 years based on aggravating factors relating solely to the offense, and 5 years for unsatisfactory institutional conduct. *Id.*
[43] SOF 49, *Id.*
[44] SOF 50, Ex. 9, Wyant Depo. Tr. 90:11 to 98:7 (transcript of Peterson's Initial Interview FCOR meeting).

G. After Initial Interview, Defendants Generally Increase the PPRD

After the Initial Interview, Defendants have the ability to reduce or extend a PPRD based on conduct since the last interview.[45] Plaintiffs' expert examined the records for each of the Class Members and found that Defendants extended the PPRD in over half of the cases (for an average of 4.3 years) and only reduced it in 7.7% of the cases (for an average of 2.3 years).[46]

Plaintiff Howard has had three subsequent interviews since his PPRD was set in 2005 (when FCOR rejected their Investigator's recommendation to set his PPRD in 2015 and instead set it for 2062).[47] Mr. Howard has completed his GED, participated in over 18 programs, received above satisfactory work ratings, and has not received a disciplinary report in over 35 years.[48] Beginning in 2010, his classification officer recommended he be paroled.[49] In each subsequent interview,

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[45] SOF 51, Fla. Stat. §947.174.

[46] SOF 52, Ex. 2, Cauffman Rep. at p. 24-25 n.1. Prof. Cauffman found that Defendants reduced the PPRD of only 7 individuals during the Subsequent Interview process at an average reduction of 2.3 years. She also found that Defendants extended the PPRD for 35 individuals at an average of 4.3 years. *Id.* at p. 19, para. 21.

[47] SOF 53, Ex. 7. In setting Mr. Howard's PPRD, FCOR used the old matrix which added two points (and 5 years) because he was a juvenile offender. SOF 54, Ex. 7 at 1RFP17-1697. After setting the baseline from the matrix at 20 years, Defendants added another 61 years due to aggravating factors relating solely to the offense. No time was noted for mitigation despite the lack of disciplinary reports and program participation. *Id.* at 1RFP17-1696.

[48] In *Howard v. State*, 180 So. 2d 1135 (Fla. 2d DCA 2015), Judge Altenbernd acknowledged that Plaintiff Howard had committed some terrible crimes. But he then focused on his subsequent growth and maturity, noting Howard had not received a single disciplinary report in 25 years. As the judge stated, "[f]or those unfamiliar with prison discipline, that is an extraordinary feat. I confess that I probably could not achieve that record if imprisoned for twenty-five years." *Id.* at 1136.

[49] SOF 55, Ex. 7 at 1RFP17-1764 (2010) and Ex. 16, Letter from same Classification Officer in 2017 again recommending parole for Mr. Howard, stating "I have absolutely no doubt that he has been rehabilitated and will do well once released."

Defendants have denied parole and have rejected the recommendation of their Investigator.[50] At his current PPRD, Mr. Howard will be 91 when paroled, well past his life expectancy.[51]

H. Once the PPRD is Reached, Defendants Routinely Deny Parole and Suspend the PPRD

Twenty-one Class Members have reached or exceeded their PPRDs.[52] But al 21 remain in prison today because Defendants placed all 21 in "suspended" status, even though FCOR's investigators recommended that 5 of the 21 receive parole.[53] These 21 Class Members have a mean average of being 15-22 years ***past*** the date of their initial PPRDs.[54] Just as they do at every other stage of the parole process, at the Effective Interview, Defendants give "primary weight" to the circumstances of the original offense and ignore evidence of maturity and rehabilitation.[55]

I. Plaintiff Willie Watts Experienced a Judicial Resentencing and Parole Reviews with Starkly Different Results

Plaintiff Willie Watts is one of 26 Class Members who are serving sentences for non-homicide offenses.[56] He had no prior offenses when he was convicted of crimes occurring in Putnam and St. Johns counties in 1980. Many years later,

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[50] SOF 56, Ex. 7.
[51] SOF 57, Ex. 7 at 1RFP17-1717.
[52]SOF 58, Ex. 2, Cauffman Exp. R. p. 19, para. 23; p. 20 para. 32.
[53]SOF 59, *Id.*, p. 20, para. 26; p. 21, para. 34.
[54] SOF 60, *Id.*, p. 22 (chart); p. 20, para. 32.
[55] SOF 61, *Id.*, p.20, para. 27 (reasons for rejecting parole for four Class Members did not include poor institutional conduct but instead cited the need to complete programming, judicial objection and unsatisfactory release plan); *see also Id.* p.21, para 34. (rejecting parole recommendation for another Class Member who had no disciplinary reports in last 20 years; Defendants citing instead disciplinary reports from 1977 - 2000).
[56] SOF 62, Ex. 17, Report of Defendants' Expert, Prof. David Banks with Ex. B, tab 1 (list of Class Members and offenses).

when the *Atwell* Window was open, he was resentenced by the judge in Putnam county. At that resentencing, he was represented by counsel, had a 2-day hearing in which the court heard testimony from him, his family, an examining psychologist, and a volunteer familiar with his work in prison. The court learned that Mr. Watts earned his GED in prison, participated in the PRIDE work program, became a leader in that program, and earned almost every certificate of achievement the prison had to offer. The court reduced his two 99-year sentences to 40 years and time served, finding him to be sufficiently mature and rehabilitated to deserve release. However, because of a separate 75-year sentence in St. Johns county, Mr. Watts was not released and instead had to file for resentencing in that court as well. That resentencing did not, however, go forward after the *Franklin/Michel* rulings and the closure of the *Atwell* Window.[57]

Defendants recently considered whether to modify Mr. Watts' PPRD date of 2064 (by which time he would be 104 years of age). The FCOR investigator recommended reducing his PPRD but Defendants refused to modify it.[58] Defendants did not give any deference to the judicial finding in Putnam County (even though they were aware of it) that Mr. Watts had shown sufficient maturity

[57] SOF 63, Ex. 18, Declaration of Willie Watts, paras. 2- 8.
[58] SOF 64, Ex. 19, Composite Exhibit of Subsequent Interviews for Mr. Watts from 2006 to 2015. The victim in Mr. Watts case (whom he was convicted of shooting but who survived) later became a Victim's Advocate in the Prosecutor's Office. At most parole meetings, a prosecutor from that office attended and advocated against release. At the most recent FCOR meetings, even though the victim had died of natural causes years earlier, the prosecutor attended and read a letter the victim had written earlier. SOF 65, Ex. 18, Declaration of Willie Watts, para. 15.

and rehabilitation to earn a reduction of his two 99-year sentences to time served.[59] Defendants' and their Investigator's notes indicated they mistakenly believed that Mr. Watts had been convicted of rape (when he had not been).[60] Mr. Watts' current release date, reflecting his remaining sentence and gain time, is 2034.[61] In other words, under his current sentence, Mr. Watts is scheduled to be released in 2034 which is 30 years ***earlier*** than his current PPRD of 2064.

J. No Class Member Has Had a Sentencing Where Factors Attendant to Youth Were Considered

Florida abolished parole for first degree murder on or after May 25, 1994.[62] Prior to that, there were only two possible penalties for juvenile offenders convicted of capital murder: the death penalty or LWP after 25 years.[63] Because all Class Members were sentenced prior to 1994, no judges (nor Defendants) have ever taken into account in determining a constitutionally proportionate sentence the factors attendant to youth that *Miller* requires.[64]

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[59] SOF 66, Ex. 20, FCOR Notes on Willie Watts, 1RFP17-1380 (handwritten note that "Ct. reduced 99 year to 40 & it expired.").
[60] SOF 67, Ex. 20, handwriting circling the Investigator's Rationale stating that victim was "raped and robbed" but not clarifying that it was a co-defendant not Mr. Watts who raped the victim. *Id.*
[61] SOF 68, Florida Department of Corrections, Corrections Offender Network (last visited Aug. 31, 2022), http://www.dc.state.fl.us/offenderSearch/detail.aspx?Page=Detail&DCNumber=077538&TypeSearch=AI (showing current release date of Mr. Watts).
[62] SOF 69, 1994 Fla. Sess. Law. Serv. Ch. 94-228 (S.B. 158).
[63] SOF 70, Fla. Stat. § 775.082 (1994).
[64] SOF 71, *Id.* The *Miller* factors are those set forth now in the 2014 Juvenile Sentencing Statute at Fla. Stat. §941.1401.

K. FCOR has Paroled Only 24 JLWPs (a release rate of 3-5%) since Miller was Decided in 2012

Since *Miller* was decided in 2012, Defendants have paroled only 24 Juvenile Lifers.[65] This is from a total population of several hundred potential Class Members, equating to a 3-5% release rate for all potential Class Members.[66] Last year, Defendants granted parole to 22 individuals (mostly adult offenders) out of the entire parole-eligible population of 3,789 inmates, which is a parole rate of 0.58% of the total eligible population.[67]

L. Courts Released 98 JLWPs (78% Release Rate) During the Two-Year Atwell Window

In its 2016 decision, the Florida Supreme Court in *Atwell* determined that the 2014 Juvenile Sentencing Statute[68] should also apply to JLWPs.[69] Two years later, the *Atwell* Window closed when the Florida Supreme Court reversed itself.[70] During the *Atwell* Window, many of those JLWPs who otherwise would have been

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[65] SOF 72, Ex. 17, Banks Report, Ex. B, tab 3 (Paroled 1.1.12 - 11.12.21).

[66] To determine what percentage of Class Members have been paroled since *Miller*, Plaintiffs' expert, Professor Elizabeth Cauffman, Ph.D., started with the 24 Class Members released to parole since 2012 as the numerator. As the denominator, she calculated the total potential population of Juvenile Lifers who were available to be paroled in 2012. To do that, she added the 170 Class Members currently incarcerated + the 98 Class Members who were released during the *Atwell* window (who would have been Class Members) + the 24 Class Members released to parole. If looking at the percentage of Class Members paroled from 2012 -2016, Prof. Cauffman calculated the release rate from 2012 to 2016 to be 5.3% and the release rate from 2017 to 2022 to be 3.25%. SOF 73,Ex. 2, Cauffman Reb. R. pp. 7, Table 4B.

[67] SOF 74,Ex. 1, FCOR 2021 Annual Report at p. 8.

[68] Fla. Stat. §941.1401-.1402.

[69] *Atwell v. State*, 197 So. 3d 1040, 1050 (Fla. 2016).

[70] *State v. Michel*, 257 So. 3d 3 (Fla. 2018); *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018). As this Court has already properly determined, the Defendants' reliance on the holdings in *Michel* and *Franklin* is "misplaced because the Florida Supreme Court was not tasked with determining whether Florida's parole system actually *does* provide inmates with the required meaningful opportunity for release" and the Court "was discussing the propriety of the inmate's sentence, not whether the parole system was fundamentally flawed." D.E. No. 43, Order at p. 14, n.9.

members of this Class filed petitions for resentencing.[71] Of the 125 cases that were heard and decided during the *Atwell* Window, 98 JLWPs were released (78%), 6 were given a delayed release, and only 3 were resentenced to life sentences.[72] The Juvenile Lifers released had been, on average, incarcerated for 35 years and were 52 years old at release.[73]

M. Class Members will be in their 90s at their Current PPRDs

Plaintiffs' expert, Prof. Cauffman, made a detailed analysis[74] of the time all Class Members have already served and examined their current PPRDs.[75] She determined that, on average, the Class Members are currently 53 years of age (range 42 to 69 years) and have been incarcerated 35 years.[76] Almost one-third of the Class has already served at least 40 years in prison.[77] Most importantly, however, Prof. Cauffman found that:

> If all Class Members were to be released on the PPRD that was set by FCOR during their most recent interviews, ***the Class Members will have served approximately [75] years . . . and they will***

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[71] SOF 75, Ex. 21, Declaration of Roseanne Eckert, J.D. (Coordinating Attorney for FIU Resentencing Project) who monitored and maintained a list of resentencings of *Atwell* JLWP defendants. Her unrebutted testimony is that during the *Atwell* Window, there "was no concerted effort to 'cherry pick' the cases with the best evidence to go to resentencing first." *Id.* at para. 8.

[72] SOF 76, Ex. 2, Cauffman Exp. R. p. 24, para. 3.

[73] SOF 77, *id.* at p. 24, para. 3.

[74] SOF 78, *id.* at p. 16, para. 5 (describing records reviewed for the 170 Class Members).

[75] Defendants retained a statistician as an expert who did not review Class Members' records to determine how much time was left before they could even be considered for parole. Ex. 22, Banks Depo. Tr. 55:10-21.

[76] SOF 79, Ex. 2 Cauffman Exp. R. p. 16, para. 6.

[77] SOF 80, *Id.* According to the most recent annual report by the Florida Department of Corrections, the average sentence for murder (primarily adult offenders) is 36.9 years and the average age at release is 65 years. DC annual report 2021 at p. 21, https://www.fcor.state.fl.us/docs/reports/Annual%20Report%202021.pdf,last accessed Aug. 31, 2022.

be approximately 92.6 years old at the time of release (if they were to live that long).[78]

LEGAL MEMORANDUM

I. THE EIGHTH AMENDMENT REQUIRES DEFENDANTS TO PROVIDE CLASS MEMBERS A MEANINGFUL OPPORTUNITY FOR RELEASE BASED ON DEMONSTRATED MATURITY AND REHABILITATION

This Court has already properly found that "it agrees with other courts that have found that 'the constitutional protections recognized by *Graham, Miller,* and *Montgomery* apply to parole proceedings for juvenile offenders serving a maximum term of life imprisonment.'"[79] As discussed below, the Court's finding is grounded in the Supreme Court's precedent of the last two decades recognizing that children are constitutionally different from adults and that condemning a juvenile offender to a lifetime in prison is disproportionate and unconstitutional punishment "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."[80]

A. The U.S. Supreme Court has Long Recognized that Imposing Certain Punishments on Juvenile Offenders Violates the Proportionality Principles of the Eighth Amendment

Plaintiffs' Eighth Amendment claim is based on two firmly established constitutional precepts: (1) that "[t]he concept of proportionality is central to the Eighth Amendment," *Graham v. Florida*, 560 U.S. 48, 59 (2010); and (2) that "children are constitutionally different from adults." *Miller v. Alabama*, 567 U.S. 460, 470–71 (2012). Time and again, the Supreme Court has held that "less

[78]SOF 81, Ex. 2, Cauffman Exp. R. p. 16, para. 7 (emphasis added).
[79] D.E. No. 43 (Order on Defendants' Motion to Dismiss, at 15).
[80] *Montgomery*, 577 U.S. at 208.

culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988).

In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court outlined characteristics of juvenile offenders which prevent them from "[be]ing classified among the worst offenders" for whom the death penalty is a proportional punishment. *Id.* at 569. "First, as any parent knows and as scientific and sociological studies ... confirm," juveniles more often than adults exhibit a "lack of maturity and an underdeveloped sense of responsibility" that often results in "impetuous and ill-considered actions and decisions." *Id.* (quotes and citations omitted). Second, juveniles are "more vulnerable or susceptible to negative influences and outside pressures...." *Id.* Third, their characters are "not as well formed" as those of adults, and their personality traits "are more transitory, less fixed." *Id.* at 570. Taken together, these characteristics instruct that the "susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Id.*

Several years after *Roper*, the Supreme Court in *Graham v. Florida*, 560 U.S. 48 (2010) again relied on these factors showing why children are constitutionally different from adults when it held that the Eighth Amendment bars sentencing a juvenile offender to life without parole for a non-homicide offense. *Id.* at 74. In the Court's view, sentencing a child to life without parole assumes that person "forever will be a danger to society," which "requires the sentencer to make a judgment that the juvenile is incorrigible." *Id.* at 72.

Accordingly, the Court held that the Eighth Amendment ***categorically*** prohibits imposing a life without parole sentence on a juvenile offender who did not commit homicide. *Id.* at 48. Non-homicide juvenile offenders, said the Court, must be afforded a "meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation." *Id.* at 75.

Two years later, the Supreme Court extended the principles of *Graham* by holding in *Miller v. Alabama,* 567 U.S. 460 (2012) that the Eighth Amendment bars mandatory life sentences without parole for juvenile homicide offenders. *Id.* at 479. Following *Graham* and *Roper*'s "foundational principle" that "imposition of the State's most severe penalties on juvenile offenders cannot proceed as though they were not children," the *Miller* Court held that mandatory LWOP sentences are unconstitutional because they "make youth (and all that accompanies it) irrelevant."[81] To comport with the Eighth Amendment, sentencing schemes -- even for those youths who commit heinous crimes -- must distinguish "between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the ***rare*** juvenile offender whose crime reflects irreparable corruption.'"[82] The Court further observed that "***only a relatively small proportion*** of adolescents who engage in illegal activity develop entrenched patterns of problem behavior."[83] While the Court recognized that a sentencer has discretion -- after considering the hallmark characteristics of youth -- to impose LWOP sentences on

[81] *Id.* at 474, 479.
[82] *Id.* at 479-80 (quoting *Roper*, 543 U.S. at 573) (emphasis added).
[83] *Id.* at 471 (quotation marks and citation omitted) (emphasis added).

juvenile offenders convicted of homicide offenses, the Court opined that such sentences would be "uncommon." 567 U.S. at 479. Accordingly, *Miller* held that courts may impose LWOP on juveniles only if they first engage in individualized sentencing that specifically considers an offender's youth as a mitigating factor. *Id.* at 477-78.

In 2016, the Court in *Montgomery* concluded that *Miller* announced a substantive rule of constitutional law that must be applied retroactively. *Montgomery v. Louisiana,* 577 U.S. 190, 206 (2016). The Court again emphasized that a life without parole sentence is disproportionate and unconstitutional "for all but the ***rarest*** of juvenile offenders whose crimes reflect the transient immaturity of youth." *Id.* at 208 (emphasis added). The Court held that juvenile offenders "***must*** be given the opportunity to show their crime did not reflect irreparable corruption; and if it did not, their hope for some years of life outside prison walls *must* be restored." *Id.* at 212 (emphasis added). While the *Montgomery* Court held that *Miller* must be applied retroactively, it also opined that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Id.* at 212.

Recently, the Supreme Court held in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) that *Miller* does not require a sentencer to make a formal, on-the-record, finding of "permanent incorrigibility" before sentencing a juvenile convicted of a homicide to life without parole. *Id.* at 1311. That holding was predicated on an assumption that in ***discretionary*** sentencing schemes, "the sentencer ***will***

consider the [youthful] murderer's 'diminished culpability and heightened capacity for change,'" because: (a) *Miller* requires "'a hearing where youth and its attendant characteristics are considered as sentencing factors,'" and (b) "defense counsel will advance arguments based on youth." *Id.* at 1316–17, 1319 (citing *Miller*) (emphasis added). *Jones* explicitly left undisturbed the Court's prior holdings regarding proportionality in punishment for juveniles, writing: "[t]oday's decision does not overrule *Miller* or *Montgomery*." *Id.* at 1321. On the contrary, the majority opinion stated that it was "carefully following both *Miller* and *Montgomery*." *Id.*

B. The Eighth Amendment Applies to Parole Proceedings

It is clear from the seminal cases of *Graham*, *Miller* and *Montgomery* that in setting forth principles of Eighth Amendment jurisprudence to proscribe mandatory JLWOP sentences, the Supreme Court contemplated that a state parole process could, if properly done, provide a so-called "*Miller* fix" -- that is, give Juvenile Lifers a meaningful opportunity for release based upon demonstration of maturity and rehabilitation. The Court in *Montgomery* underscored the substantive role that a parole process should fulfill:

> A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them . . . . Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity -- and who have since matured -- will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.

577 U.S. at 212.

After *Montgomery*, numerous courts, including this one, have concluded that the meaningful opportunity for release upon a showing of maturity and rehabilitation necessarily applies not only to sentencing but to the parole process as well.[84] This makes sense given that the best way to evaluate maturity and rehabilitation is to examine a juvenile's 25-year post-offense history rather than trying to predict what that trajectory might be at a youth's sentencing.[85]

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR 8TH AMENDMENT CLAIM BECAUSE DEFENDANTS DO NOT PROVIDE CLASS MEMBERS A MEANINGFUL OPPORTUNITY FOR RELEASE

While a State is not required to guarantee JLWPs eventual freedom,[86] the Eighth Amendment requires that the State consider the "distinctive attributes of

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[84] D.E. 43, Order on Motion to Dismiss; *see also Wershe v. Combs*, 763 F.2d 500, 506 (6th Cir. 2010) (vacating district court's dismissal of Eighth Amendment claim alleging a parole board's denial of a meaningful and realistic opportunity for release); *Flores v. Stanford*, 18 CV 246B (VB), 2019 WL 457 2703 at *9 (S.D.N.Y. Sept. 20, 2019) ("[T]he Eight Amendment right in question attaches at the parole stage."); *Funchess v. Prince,* No. 142105, 2016 WL 756530 (E.D. La. Feb. 25, 2016) (observing that the low rate of favorable recommendations for parole and clemency do not provide a meaningful opportunity for release); *Greiman v. Hodges*, 79 F. Supp. 3d 933, 943-44 (S.D. Iowa 2015) (finding *Graham* applied outside the sentencing context because State "must" give juvenile offenders a meaningful opportunity to obtain release through demonstrated maturity and rehabilitation and that could only be determined by the parole board who alone had authority to grant release); *Diatchenko v. Dist. Att'y for Suffolk Dist,* 27 N.E. 3d 349, 365 (Mass. 2015) ("the parole hearing acquires a constitutional dimension for a juvenile homicide offender because the availability of a meaningful opportunity for release on parole is what makes the juvenile's mandatory life sentence constitutionally proportionate."); *Hayden v. Keller*, 134 F. Supp. 3d 1000, 1009 (E.D.N.C. 2015) (failure to consider children's diminished culpability and heightened capacity for change during parole process wholly fails to provide petitioner with any meaningful opportunity for release).

[85] *See, e.g., Maryland Restorative Justice Initiative v. Hogan*, No. ELH-16-1021, 2017 WL 467731 at *21 (D. Md. Feb. 3, 2017) ("[I]t is quite unlikely that the requisite 'demonstrated maturity and rehabilitation' needed for release would be evident at sentencing. To the contrary, such change would occur, if at all, after sentencing and during incarceration. And, to the extent that such change occurs, the vehicle to recognize it would be parole.").

[86] The Supreme Court in *Graham* categorically barred lifetime sentences without parole for those juveniles, such as Plaintiff Watts, who committed non-homicide offenses. *Graham*, 560 U.S. 48 (2010).

youth" in making parole decisions about Juvenile Lifers. *Montgomery*, 577 U.S. at 208. Florida's parole review process wholly fails to do that. Nowhere in the Florida parole statute or administrative rules is there a requirement that Defendants consider the *Miller* factors in making parole decisions about JLWPs as there is in the 2014 Florida Sentencing Statute that requires judges to consider them. To the contrary, the parole statute and FCOR rules ***require*** Defendants to focus primarily on the offense and treat parole as a matter of grace, not a right. SOF 3. Defendants' practices, training and policies likewise fail to outline how the distinctive attributes of youth should be considered for Juvenile Lifers. SOF 40-42. Most notably, for half the Class, they were actually ***penalized*** for being children when their PPRDs were set before 2014. SOF 13-18.

The Florida parole process denies Class Members access to information and hamstrings their ability to effectively demonstrate their maturity and rehabilitation. Unlike the JLWPs who made it through when the *Atwell* Window was open, these JLWPs are not entitled to counsel, mitigation specialists or psychologists to assist them in presenting the critical information necessary to demonstrate their maturation and rehabilitation. SOF 28. Without lawyers to assist in gathering critical information about their childhood and whether their crime was the unfortunate result of transient youthful immaturity, the imprisoned Class Members are left to their own devices to make their case to Defendants (whom they never meet). Unlike the judicial process, Plaintiffs do not have access to all information presented to the decision-makers and no opportunity to cross-

examine witnesses or rebut information. SOF 21-27. The fact that their only route to receive written information is the cumbersome (and costly) process of a public records request does not ensure that a Class Member will get any information in time to send in written corrections or rebuttal prior to the FCOR hearing and does not, in any event, give them all the information Defendants consider. SOF 24. Because Plaintiffs do not receive the Investigator's Rationale, and cannot attend or participate in the FCOR hearing, they are unable to rebut serious fact errors such as Named Plaintiff Watts could have done to correct Defendants' mistaken belief that he (not a co-defendant) was the person convicted of rape. SOF 67.

Whatever time Defendants and their staff spend preparing for the meeting is of little consequence because the information they review is primarily focused on the original offense and not on the distinctive attributes of youth. SOF 40-42, 61. Parole decisions must be made collectively by the three Defendants and their only deliberations can occur in public meetings on a crowded agenda to decide several hundred matters, reducing the time for parole decisions to mere minutes. SOF 31-2, 43-50. Moreover, without comprehensive psychological assessments -- the information Plaintiffs' expert has said is critical to evaluating maturity and rehabilitation, SOF 39, and which FCOR agreed when it made the request to the Florida legislature to resume funding such assessments -- there is no chance for Plaintiffs to present professional confirmation of their maturity and rehabilitation. SOF 33-35. A single digit mental health "score" put on by some unknown person pursuant to an unknown standard is hardly a substitute. SOF 36.

Even when the institutional conduct of a Plaintiff shows maturity and rehabilitation -- as the decades long records of Plaintiffs Brown and Howard who remained disciplinary report free show -- that conduct is ignored. SOF 43-8, 53-7. Incredibly, all three Defendants admitted that they do not consider "following the rules" as worthy of any consideration and certainly do not view it as a sign of maturity and rehabilitation. SOF 47. Even when a Juvenile Lifer's record shows stellar program participation, completing a GED, above satisfactory work ratings, and recommendations from the classification officer who knows the person best that he deserves parole (such as in Plaintiff Howard's case), Defendants ignore this evidence and set the PPRD long after an inmate's life expectancy. SOF 57.

FCOR's opaque parole process does not give a Class Member any indication of what steps to take in the future to earn release. The Investigator -- the only person who actually meets with a JLWP -- does not attend the parole hearings or speak with Defendants, so his and the Class Member's only window into the Defendants' basis for their decision is the two-page, barebones, boilerplate form which contains no explanation of how or why Defendants made their decisions. SOF 9-10. The primary focus of the FCOR process -- from reviewing autopsy and pre-sentence investigation reports, and considering statements from victims, prosecutors and judges -- is in line with the parole statute's mandate to focus on the static factor of the Juvenile Lifer's offense instead of the dynamic factors of maturity and rehabilitation. SOF 13. While Defendants are careful to say for the record that "they considered mitigation" and their forms likewise include that

assertion, the absence of any months assigned to mitigation or the failure to describe what mitigating factors were considered and what impact they had make those boilerplate statements useless to a Class Member trying to understand what to do in the future to earn release. SOF 10-11.

In Florida, because of the unusual circumstance of having the resentencing process available to Class Members for a two-year period during the *Atwell* Window, there is unrefuted data showing the impact of a constitutional judicial process compared to the unconstitutional process of Florida's parole system. When given lawyers, mitigation specialists, and psychologists to assist in presenting evidence in hearings to a judge who is required to consider the *Miller* factors, 98 of the 125 JLWP cases heard resulted in release, ***a 78% release rate***. SOF 75-7. This outcome is consistent with the U.S. Supreme Court's consistent admonition that the vast majority of Juvenile Lifers will be able to earn their right to release. But in the Florida parole process, the opposite is true: an average of just two class members have been paroled each year since *Miller*, showing that the vast majority of JLWPs will die in prison. SOF 72-4.

No one -- neither a judge at their original sentencing nor the Defendants during their cursory parole reviews -- has ever weighed the factors that make youth less culpable and determined whether any of the Class Members is one of the "rare" or "uncommon" juvenile offenders who should serve a life without parole

sentence.[87] SOF 69-71. Because Class Members will not even be ***considered*** for parole until they are in their 90s, SOF 78-81, Defendants have effectively "resentenced" Class Members to unconstitutional *de facto* life ***without*** parole sentences and condemned the vast majority of Juvenile Lifers to die in prison.[88] This constitutes disproportionate and unconstitutional punishment meriting declaratory relief that Class Members be afforded the process the State has accorded Juvenile Lifers sentenced to LWOP in Florida. The legislature of the State of Florida sanctioned the means by which Florida would remedy *Miller* violations such as those currently afflicting Class Members when it enacted the 2014 Juvenile Sentencing Statute. That remedy should now, accordingly, be made available to the Plaintiff Class.

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[87] Prior to the abolition of parole in Florida, there were only two possible penalties for juvenile offenders convicted of capital murder: the death penalty or life with the possibility of parole after no fewer than 25 years. § 775.082, Fla. Stat (Supp. 1994); 1994 Fla. Sess. Law Serv. Ch. 94-228 (S.B. 158).

[88] *Gridine v. State*, 175 So. 3d 672 (Fla. 2015) (finding 70-year prison sentence for juvenile offender was unconstitutional because it failed to provide him a meaningful opportunity for release); *Peterson v. State,* 193 So. 3d 1034 (Fla. 5th DCA 2016)(56-year sentence for juvenile offender equated to *de facto* life sentence in violation of Eighth Amendment; *State v. Conner,* 873 S.E.2d 339 (N.C. 2022) ("Many courts have concluded that a sentence of a term of years that precludes parole consideration for half century or more is equivalent to a sentence of life without parole") (quoting *Carter v. State,* 192 A.3d 695, 728 (Md. 2018) and citing to U.S. Sent'g Comm'n, Life Sentences in the Federal System 10, 23 n. 52 (Feb. 2015) (defining *de facto* life sentence as beginning at 470 months -- 39 years and two months -- because such a sentence is "consistent with the average life expectancy of federal criminal offenders").

III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR DUE PROCESS CLAIMS

This Court properly found that "Plaintiffs have a cognizable liberty interest in meaningful parole review." D.E. 45, Order at p.17.[89] As described above, the undisputed facts show that Defendants' parole policies, procedures and practices have denied Plaintiffs their Eighth Amendment liberty interest to have a meaningful opportunity for release through a parole process that gives due process to that liberty interest. Therefore, Plaintiffs are entitled to summary judgment on the due process claim as well.[90]

Plaintiffs' substantial interest in securing freedom upon the requisite showing is balanced along with a state's interest in ensuring it is not releasing dangerous individuals back into the community. Balancing these factors is analogous to balancing the conditional liberty interest of a parolee facing

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[89] *See also Flores,* 2019 WL 4572703, at *10; *Bonilla v. Iowa Bd. of Parole,* 930 N.W. 2d 751, 777 (Iowa 2019) (parole board can be applied in constitutional manner "if the Board incorporates into its parole review the *Graham-Miller* lodestar of "demonstrated maturity and rehabilitation," does not unduly emphasize the heinous nature of the crime, and provides a meaningful opportunity to demonstrate maturity and rehabilitation."); *Greiman v. Hodges*, 79 F. Supp. 3d 933, 945 (S.D. Iowa 2015) ("[A]lthough *Graham* stops short of guaranteeing parole, it does provide the juvenile offender with substantially more than a *possibility* of parole or a mere hope of parole, it creates a categorical entitlement to demonstrate maturity and reform, to show that he is fit to rejoin society, and to have a meaningful opportunity for release."); *Maryland Restorative Justice Initiative v. Hogan*, No. 16-1021, 2017 WL 467731, at *21 (D. Md. Feb. 3, 2017) ("It is difficult to reconcile the Supreme Court's insistence that juvenile offenders with life sentences must be afforded a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation if the precept does not apply to the parole proceedings that govern the opportunity for release.").

[90] The traditional test to determine "what process is due" arises from *Mathews v. Eldridge*, which sets forth three considerations: 1)"the private interest that will be affected by the official action;" 2) "the Government's interest," and 3) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards." 424 U.S. 319, 321, 335 (1976).

revocation, which the Supreme Court addressed in *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Unlike adult offenders who do not have "a *Morrissey*-type conditional liberty interest," *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 11 (1979), Plaintiffs here do have a conditional liberty interest in a parole decision that is based upon a factual demonstration of maturity and rehabilitation. *Morrissey* sets out the minimal procedural protections due to those with conditional liberty interests.[91] *Morrissey*, 408 U.S. at 489 (applying procedural safeguards in context of parole revocation). The undisputed facts show that these protections are not afforded to the Class by Defendants and their failure to do so amounts to a violation of Plaintiffs' conditional liberty interest in parole.[92]

CONCLUSION

Plaintiffs respectfully request that the Court issue an Order granting their motion for summary judgment and enter a judgment declaring (1) that Defendants are violating the Eighth Amendment by failing to afford the Class a meaningful opportunity for release based on demonstrated maturity and rehabilitation; (2)

[91] These protections include: advanced written notice of the hearing, including a list of facts on which basis an individual may be deprived of the liberty interest; disclosure of evidence against the person; opportunity to be heard in person and to present witnesses and documentary evidence; right to confront and cross-examine adverse witnesses (absent a showing of why such confrontation should not be permitted); written statement by factfinders as to the evidence relied on; and presumptive appointment or assistance of counsel upon disputed facts or complex circumstances.

[92] In addition to their constitutionally-protected liberty interest based on the Eighth Amendment, Plaintiffs who are now serving *de facto* life without parole sentences also have a state-created liberty interest arising from rights given to Juvenile Lifers in the 2014 Juvenile Sentencing Statute. *Wolff v. McDonnell*, 418 U.S. 539, 556-58 (1974) (finding state-created system of time-served credit for good behavior gives rise to a liberty interest in that reduction).

that Defendants are violating the Fourteenth Amendment by failing to provide them with the due process safeguards necessary to ensure a meaningful opportunity for release based on demonstrated maturity and rehabilitation; and (3) that Defendants are violating Plaintiffs' constitutional rights by transforming their life with parole sentences into *de facto* life without parole sentences and Plaintiffs are therefore entitled to the procedures and protections of the 2014 Juvenile Sentencing Statute.

Dated: September 19, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 19, 2022, I electronically filed the foregoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/Tracy A. Nichols
Tracy A. Nichols