IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ROBERT EARL HOWARD, et al.,

Plaintiffs,

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

MELINDA N. COONROD, et al.,

Defendants.

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DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56, Fed. R. Civ. P., and Local Rule 3.01, Defendants respond in opposition to Plaintiffs' Motion For Summary Judgment (Doc. 104).[1]

I. Introduction

Plaintiffs have two surviving operative counts in the case: Count I, Florida's parole process violates the Eighth Amendment per the *Graham* Cases,[2] and Count II, Florida's parole process violates the Plaintiffs' rights under the Fourteenth

[1] In the interest of efficiency and with due consideration of the temporal requirements of this Court, Defendants have not moved to strike Plaintiffs' Motion for Summary Judgment for failing to comply with Local Rule 3.01, yet request the Court to disregard Plaintiffs' footnotes. All of Plaintiffs' citations to authority are within footnotes, which are frequently lengthy string cites. This violates the spirit of the Court's page limitations. See *Ohio Head Start Ass'n, Inc. v. U.S. Dept. of Health & Human Services*, 873 F. Supp. 2d 335, 344–45 (D.D.C. 2012), aff'd, 510 Fed. Appx. 1 (D.C. Cir. 2013) ("[s]econd, the Court would like to address the parties' excessive use of footnotes. The briefing of the parties' cross-motions demonstrates that counsel in this case is highly skilled, and counsel for both sides artfully presented complex legal arguments. However, the parties' tendency to respond to important substantive issues in footnotes frustrates the overall effectiveness of their briefs, **and overall appears to be an attempt to circumvent the page limits set forth in the Local Civil Rules.**" (emphasis added).

[2] The "*Graham* Cases" include *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).

Amendment's Procedural Due Process Clause.[3] In Count I, Plaintiffs must prove that the mandate from the *Graham* Cases applies to the parole process and that Florida's process does not provide "some meaningful opportunity to demonstrate maturity and rehabilitation." To prevail on Count II, Plaintiffs must prove that the *Graham* Cases create a liberty interest in parole and that Florida's parole process fails to satisfy the liberty interest.

Plaintiffs' claims—once a plausible view entertained by courts—require this Court to rely on dicta and non-final opinions in less persuasive courts, while ignoring what now amounts to the vast weight of directly on point opinions from the nation's circuit courts. Despite the weight of cases directly contravening their position, Plaintiffs have not distinguished those cases and have failed to show they are entitled to judgment in their favor.

In lieu of distinguishing the present case from the federal cases finding none of the constitutional protections in parole that Plaintiffs demand, Plaintiffs simply rely on their own *ipse dixit* that there is extensive support. None of the cases Plaintiffs rely upon come from a federal appellate court and all of them were decided before the Supreme Court's decision in *Jones*, which heavily cuts against Plaintiffs' claims. The *Jones* opinion undercuts Plaintiff's legal theories; the *Brown* decision is directly contrary to Plaintiffs' arguments. Notably, the strongest opinion favoring Plaintiffs' argument, an Eighth Circuit opinion which was previously cited extensively, now disappears

[3] Defendants do not consider Count V to be operative. It is simply a request for declaratory judgment on the other counts and has no independent standing.

from Plaintiffs' motion without mention or discussion of the fact that the Eighth Circuit overturned the previous holding in a very recent en banc opinion in *Brown v. Precythe*, 46 F.4th 879, 886 (8th Cir. 2022).

Plaintiffs' factual arguments are similarly shallow. Plaintiffs' argument on both counts is essentially that the Florida parole process is insufficient to guarantee some meaningful chance at successfully receiving parole. They believe their sentences effectively amount to life without parole, asserting "Class Members . . . will be approximately 92.6 years old at the time of release." Doc. 104 at 16–17. This conclusory assertion begs the question, where are all of these nonagenarian inmates? Since Florida has had the parole system operating for almost 100 years, Plaintiffs' pseudo-predictive model should bear some resemblance to the factual reality. Peculiarly, no Class Member has reached 70.

II. Argument

Plaintiffs must prove four points to prevail on their Motion. Plaintiffs' Eighth Amendment claim requires them to prove: (1) that the *Graham* Cases are correctly interpreted as applying to parole; and (2) that Florida's parole process does not satisfy the requirements. Plaintiffs' Fourteenth Amendment claim requires Plaintiffs to prove: (3) the *Graham* Cases created a liberty interest in parole; and (4) that the process available does not satisfy procedural due process. They fail to accomplish any one of these tasks. Many of their arguments about the nature of the parole process rely upon a misunderstanding of how Florida's parole process works.

A. Plaintiffs Have Not Establish An Eighth Amendment Violation.

1. The *Graham* Cases Do Not Apply To The Parole Process.

Plaintiffs' entire argument rests on a mistaken interpretation that the *Graham* Cases apply to the parole process. This has become clearer as this litigation progressed and the jurisprudence on the Eighth Amendment has clarified the *Graham* Cases.

The *Graham* cases stated that a State satisfies *Miller* by allowing juvenile homicide offenders to be *considered* for parole. Nothing more.

> A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, e.g., Wyo. Stat. Ann. § 6–10–301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). *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.

Montgomery, 577 U.S. at 211 (referring to *Miller v. Alabama*, 567 U.S. 460 (2012))(emphasis added). Thus, allowing juvenile offenders to be considered for parole satisfies the Constitution. This is the same assumption that the Court made in *Jones*, for sentencing, that judges need not make specific findings to support life *without* parole sentences. 141 S.Ct. at 1322.

Plaintiffs offer dicta from the *Graham* Cases and a handful of cases that have adopted Plaintiffs' extreme position: *Wershe v. Combs*, 763 F.[3]d 500, 506 (6th Cir. 2010); *Flores v. Stanford*, 18 CV 246B (VB), 2019 WL 457 2703 at *9 (S.D.N.Y. Sept. 20, 2019); *Funchess v. Prince*, No. 142105, 2016 WL 756530 (E.D. La. Feb. 25, 2016); *Greiman v. Hodges*, 79 F. Supp. 3d 933, 943-44 (S.D. Iowa 2015); *Diatchenko v. Dist. Att'y for Suffolk Dist*, 27 N.E. 3d 349, 365 (Mass. 2015); *Hayden v. Keller*, 134 F. Supp.

3d 1000, 1009 (E.D.N.C. 2015). Plaintiffs' cases are distinguishable or have been superceded.

As the Eighth Circuit held this year in *Brown v. Precythe*, 46 F.4th 879, 886 (8th Cir. 2022), *Miller* applies only in sentencing. *Brown* also held that *Miller* and *Montgomery* did not suggest that federal courts should review parole procedures.

> The *Miller* factors, however, apply as a constitutional matter only to a judge's decision at sentencing whether to impose a term of life imprisonment without parole for a juvenile homicide offender. *Montgomery*, 577 U.S. at 209-10, 136 S.Ct. 718. … By operation of Missouri law, the inmates here were resentenced to life with the possibility of parole. *Hicklin*, 613 S.W.3d at 787-88. *Miller* and *Montgomery* did not purport to go further and direct federal courts to scrutinize in a civil rights action whether a State's parole procedures afford "some meaningful opportunity" for release of a juvenile homicide offender. As the Fourth Circuit observed, accepting the inmates' argument here would require this court to conclude (1) that the Supreme Court's juvenile-specific Eighth Amendment protections extend to juvenile homicide offenders sentenced to life with the possibility of parole, and (2) that those protections extend beyond sentencing proceedings. *Bowling v. Dir., Va. Dep't of Corr.*, 920 F.3d 192, 197 (4th Cir. 2019). Like the Fourth Circuit, we decline to go that far.

Id.

Similarly, the Fifth Circuit held that the *Graham* Cases cannot be read as creating Eighth Amendment protections or Procedural Due Process rights that extend: (1) to JLWPs; (2) to inmates serving terms of years; or (3) beyond sentencing. *United States v. Sparks*, 941 F.3d 748 (5th Cir. 2019). Similarly, the Fourth Circuit rejected 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. *Bowling v. Dir., Virginia Dep't of Corr.*, 920 F.3d 192 (4th Cir. 2019). Further, the Eleventh Circuit and the Colorado Supreme Court found

that *Miller* does not apply to term of years sentences (which many Class members have). *United States v. Morgan*, 727 Fed. Appx. 994 (11th Cir. 2018); *Lucero v. People*, 394 P.3d 1128 (Colo., 2017).

As the Ninth Circuit recognized, *Jones* "narrowed the sweep" of the prior *Miller* and *Montgomery* decisions. *Crespin v. Ryan*, 46 F.4th 803, 808 (9th Cir. 2022). *Jones* explained that the "key assumption" in both *Miller* and *Montgomery*, related to *sentencing*, and to a life *without* parole sentence. *Crespin* at 808, citing to *Jones* at 1318. This assumption "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 age." *Jones*, at 1318.

None of the *Graham* Cases dealt with the issue of JLWPs. Each case dealt with juveniles sentenced to life, and without parole. Life *with* parole was only ever among the possible options of the newly formulated doctrine. See *Bowling*, 920 F.3d at 197 ("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]."); *Miller* 567 U.S. at 474– 75 ("unique characteristics of life without parole and death sentences… are shared by no other sentences."); *Graham* 560 U.S. at 75 (life without parole is improper for nonhomicide offenses,

The only mention in the *Graham* Cases of parole was in discussion of one of several ways a state could ameliorate a juvenile's nonhomicide life sentence without

parole, i.e., that if the State allowed these inmates to be considered for parole, then the parole system was a proper remedy. *See Graham*, 560 U.S. at 75 ("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."); *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."); *Jones*, 141 S. Ct. at 1323 ("States may categorically prohibit life without parole for all offenders under 18. Or States may require sentencers to make extra factual findings before sentencing an offender under 18 to life without parole. Or States may direct sentencers to formally explain on the record why a life-without-parole sentence is appropriate notwithstanding the defendant's youth. States may also establish rigorous proportionality or other substantive appellate review of life-without parole sentences.").

Wershe v. Combs, 763 F.3d 500 (6th Cir. 2014), did not hold that the *Graham* decisions regulate parole, but instead held that the lower court failed to mention *Graham* in its *sua sponte* dismissal of plaintiff's claims and they believed it was premature to have such a holding. They remanded for further consideration. *Id.* at 505–06 ("Given the novelty of Wershe's claim and the fact that the parties have not had an opportunity to present briefing, we think it best to permit the parties to further develop their arguments for consideration by the district court in the first instance.") Later, the district court granted summary judgment for defendants, rejecting the

Eighth Amendment arguments on the grounds that the plaintiff was not facing a life without parole sentence—implicitly adopting a position that the Eighth Amendment does not extend into the parole process—*Wershe v. Combs*, 1:12-CV-1375, 2016 WL 1253036 (W.D. Mich. Mar. 31, 2016). The appeal of the final decision was dismissed by the Sixth Circuit, *Wershe v. Combs*, 16-1453, 2017 WL 4546625 (6th Cir. Aug. 21, 2017). Further, the Sixth Circuit has subsequently ruled that *Graham* Cases only apply to life without parole sentences and that they do not extend protections for those receiving parole consideration. *Atkins v. Crowell*, 945 F.3d 476, 477 (6th Cir. 2019) (explaining that *Miller* only discussed sentences of life without parole, "[w]hether read broadly or narrowly *Miller* creates a legal rule about life-without-parole sentences.").; *see also Pinchon v. Byrd*, 21-5356, 2021 WL 6101398, at *3 (6th Cir. Dec. 21, 2021), cert. denied, 212 L. Ed. 2d 589 (2022); *Goins v. Smith*, 556 Fed. Appx. 434, 440 (6th Cir. 2014).

Flores v. Stanford, 18 CV 246B (VB), 2019 WL 457 2703 at *9 (S.D.N.Y. Sept. 20, 2019), *Funchess v. Prince*, No. 142105, 2016 WL 756530 (E.D. La. Feb. 25, 2016), *Greiman v. Hodges*, 79 F. Supp. 3d 933, 943-44 (S.D. Iowa 2015), were all opinions rendered at the motion to dismiss stage, rather than final orders that were subject to appeal, and did not make absolute findings of law. None of these cases have reached a final result. Additionally, the result of *Greiman* is now superseded by the Eighth Circuit Court of Appeals in *Brown v. Precythe*, 46 F.4th 879, 886 (8th Cir. 2022) (en banc), which found that the *Graham* Cases do not extend into the parole process. The

result of *Funchess* was likewise superseded by *United States v. Sparks*, 941 F.3d 748, 754 (5th Cir. 2019), where the Fifth Circuit determined "*Miller* has no relevance to sentences less than [life without parole]."

Similarly, *Hayden v. Keller*, 134 F. Supp. 3d 1000 (E.D.N.C. 2015), was not a final order, but was an order on summary judgment that was ineligible for appellate review. *Hayden v. Butler*, 667 Fed. Appx. 416, 416–17 (4th Cir. 2016). The Fourth Circuit declined to exercise jurisdiction for review. *Id.* Yet, the Fourth Circuit's subsequent opinions would have superseded this decision even if it had been final. See *United States v. Friend*, 2 F.4th 369, 378 (4th Cir. 2021), cert. denied, 211 L. Ed. 2d 407 (2021); *Bowling v. Dir., Virginia Dep't of Corr.*, 920 F.3d 192, 198 (4th Cir. 2019) ("Given this disagreement about the application of the protections announced in Miller and its lineage to sentences that are practically equivalent to life without parole, we are satisfied that those protections have not yet reached a juvenile offender who has and will continue to receive parole consideration.")

Finally, *Diatchenko v. Dist. Att'y for Suffolk Dist*, 27 N.E. 3d 349 (Mass. 2015), did not interpret the Eighth Amendment, but rather dealt with the requirements of the Massachusetts Constitution. *Id.* at 18–19. The mentions of the Eighth Amendment are dicta.

Therefore, the Eighth Amendment simply does not apply to life sentences *with* parole, or to term of years sentences, or beyond sentencing to releases to parole, or the related PPRDs.

2. Even If The Eighth Amendment Applies To The Parole Process, Florida's Parole Process Satisfies The Requirements.

If the *Graham* Cases for sentencing also apply to the parole process, then the procedures mandated by the Constitution would not be greater for parole than for sentencing. Even for sentencing, *Jones* is clear that the exclusive requirement is that the sentencer has discretion. "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." 141 S.Ct. at 1318-19. It is incontrovertible that FCOR may consider youth in establishing the PPRDs. See 23-21.010(5)(b), F.A.C.

Even if Plaintiffs' erroneous assertions that not only sentencing but also the parole process must provide "some" meaningful opportunity is correct, FCOR certainly satisfies it. For subsequent interviews of the inmate, FCOR *will* consider a variety of issues which could relate to maturity and rehabilitations.

> The Commission investigator *shall* review the inmate's institutional file to determine if there is new information since the previous interview. New information *shall* include new court actions; successful appeals of court actions; prison progress reports; disciplinary reports; psychological or psychiatric reports; gain-time and extra gain-time awards; vocational training or treatment programs successfully completed, in progress or abandoned; educational accomplishments or abandonments; work release or terminations of work release; pardons, sentence commutations, or expunctions of record, and any other aggravating or mitigating factors which were not included in the institutional file at the time of the previous interview.

Rule 23-21.013(2), F.A.C. (emphasis added).

Plaintiffs may obtain copies of their FCOR file as public records. Tully at 93-94. The only information withheld would have no bearing on Plaintiffs'

demonstrations of maturity and rehabilitation. Confidential information, such as the addresses of victims, would not assist Plaintiffs in their cases. Tully at 93-94.

Plaintiffs may correspond with FCOR at any time, on any matter. Tully at 34, 68-69, 95. Prior to the FCOR Meetings, Defendants might meet with people in support of or opposed to, parole. Coonrod at 107. At FCOR Meetings that consider Plaintiffs' cases, any person may attend on Plaintiffs' behalf, and these supporters have no limitations on the substance of their statements. Tully at 39-40, 92.

An FCOR Meeting is a public forum. Tully at 92. There is no "testimony" as in sworn testimony with "direct examination." People who make statements at FCOR Meetings provide their opinions. Plaintiffs seek to be able to "cross examine witnesses" which is not applicable to FCOR Meetings.

Plaintiffs may, through others, obtain copies of the recorded FCOR Meetings.[4] Tully at 93. If Plaintiffs want to rebut a person's opinion, Plaintiffs may do so. Plaintiffs receive copies of every Commission action form without requesting them. Tully at 66.

Inmates have a right to challenge their initial PPRD through the Commission. Tully at 158. Inmates may challenge subsequent reviews through the court system. Tully at 158-59. The Department of Corrections may recommend a special interview

[4] The Florida Dept. of Corrections limits incoming mail to inmates and they may not receive CD-ROMs or flash drives for security reasons. But others may obtain the recordings, transcribe them, and send the transcript.

or mitigation of an inmate's presumptive parole release date. If so, FCOR will docket that recommendation for consideration. Rule 23-21.014 (4), F.A.C.

Plaintiffs argue that they are entitled to free expert psychologists, investigators, and attorneys, and mitigation experts, at State expense. Plaintiffs may engage any of these assistants at Plaintiffs' own expense, or pro bono, as in this case, and all of these may speak on Plaintiffs' behalf at FCOR Meetings – just not paid for by the taxpayers.

All of the foregoing provide Plaintiffs with some meaningful opportunity to demonstrate their maturity and rehabilitation for eventual release to parole. Nevertheless, Plaintiffs incorrectly portray the parole system as futile. They attempt to support this by asserting that too few Class members are being released to parole.

There is no Constitutional standard for a number of inmates that must be released to parole. It is Plaintiffs' mere opinion that the numbers are too low. But Class members are not a fungible commodity. Each is different and each crime is different. The crimes Plaintiffs have been convicted of are not "average" crimes—they are murder, sexual battery, and other violent crimes. Plaintiffs each have different kinds and amounts of information regarding their maturity and rehabilitation after commission of these crimes. One cannot draw conclusions at how individuals have been treated by looking only at the end results without knowing the facts that led to those results.

Moreover, since those who have demonstrated maturity and rehabilitation have been released, no new juvenile offenders have been added to the parole system over

the past 25 years due to changes in Florida law ceasing parole. Thus, over time, the proportion of Class members who are incorrigible offenders necessarily increases.

Regardless, the numbers of Class members released to parole, even if correct, have no meaning regarding the overall system without the full context. Even with context (which would consist of every parole file as of the date of every past FCOR decision on release to parole or PPRDs), Plaintiffs would be asking this Court to second-guess a decade or more of parole decisions, not only regarding release, but also every decision setting, changing, or retaining a PPRD. Asking this Court to sit as a super-parole commission is improper.

Plaintiffs' psychologist expert asserted that a thorough psychological assessment is necessary to evaluate an inmate for maturity and rehabilitation. Respectfully, although more information is always helpful, psychologists are not human lie detectors and their opinions should never supplant the statutory duties of Defendants. Moreover, Plaintiffs' expert testified that the offenses committed would be a part of the analysis. Cauffman Depo. at 147-48.

Plaintiffs argue that giving primary weight to the underlying crimes is improper. Instead, they wish that the underlying offense be ignored and that Defendants consider only maturity and rehabilitation since the crimes. This has no support in law or common sense and even Plaintiffs' expert would consider the offenses. Plaintiffs' responses to Interrogatories No. 11 and 12 inherently concede that the underlying offenses have relevance. In response to the questions asking if the nature of Plaintiffs' crimes are irrelevant to parole (No. 11) or to setting of PPRDs (No. 12), Plaintiffs

answered for each, in part, that the requirement for a factfinder to determine whether the juvenile offender remains at the same level of risk to society as he or she did at the time of initial sentencing is relevant to parole consideration. Defendants have a duty and responsibility to protect Florida citizens. Although the law does not impose a duty upon them to apply the *Graham* Cases, Defendants review the entire file for each Class member each time there is a decision to be made. This review inherently considers all maturity and rehabilitative factors in the record, which will include youth and any related factors in the record from the courts, the prison, or the Class members.

No facts support a statement that PPRDs are "sentences." Nor can any of FCOR's actions be extensions of sentences. A parole eligible inmate will receive an initial PPRD from FCOR. At intervals of at most 7 years, they have Subsequent Interviews when FCOR can revise the PPRD. The PPRD is up to the discretion of FCOR but the initial PPRD is determined differently for juvenile offenders than for adult offenders. If an inmate shows progress towards rehabilitation, the PPRD is reduced. FCOR can revise PPRDs rapidly. Of course, any prior juvenile offenders who had rapid reductions of PPRDs and who were then released to parole would not be part of the Class since the Class only includes inmates who are still incarcerated. This explains why Plaintiffs have found few examples of PPRDs getting revised lower as those who receive a lowered PPRD are frequently released expeditiously as their PPRD begins to come down.

For example, in the span of three years, one Juan Lusanariz went from having a PPRD that was 22 years away to being released from prison. Juan Lusanariz, DC

082090, committed first degree murder at the age of 17 and was sentenced to life with parole. *See* Doc. 100-2 at 1 (Mr. Lusanariz's Parole Records). On 12/15/2010, Mr. Lusanariz's subsequent interview resulted in a PPRD date estimating a release in 2032. *Id.* At his next subsequent interview on 2/23/2011, his PPRD was revised down to 2027. *Id.* This pattern continued: in his 2012 subsequent interview he received a new PPRD of 2022; in his first 2013 subsequent interview the PPRD remained constant at 2022; in his second 2013 subsequent interview his PPRD was revised to later in the year of 2013. *Id.* On July 31, 2013, Mr. Lusanariz received his effective interview and was granted parole. *Id.* This is just one example of how the PPRDs actually a operate. *See id.* 1–4 (showing several more examples of similar patterns).

Further, there are no Class Members 70 or older, despite Plaintiffs' argument that "Class Members . . . will be approximately 92.6 years old at the time of release." Doc. 104 at 16–17.

In *Jones*, the Supreme Court expressly stated that youth is just a factor and that various bodies may weigh it heavier or lighter, yet it is sufficient as long as youth is weighed. *See* 141 S.Ct. at 1320 ("It is true that one sentencer may weigh the defendant's youth differently than another sentencer or an appellate court would, given the mix of all the facts and circumstances in a specific case. Some sentencers may decide that a defendant's youth supports a sentence less than life without parole.").

The Supreme Court specifically states that the States should be the ones to figure out how to precisely ameliorate the fact that some set of juveniles were sentenced to

mandatory life without parole sentences. *See Graham*, 560 U.S. at 75 ("It is for the State, in the first instance, to explore the means and mechanisms for compliance." *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."); *Jones*, 141 S. Ct. at 1323 (naming many ways the states can choose to solve the *Miller* violations, which is theirs to elect.).

B. Plaintiffs Do Not Have Due Process Rights in Parole.

1. The *Graham* Cases Did Not Create A Liberty Interest In Parole.

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 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).

The *Brown* court "declined to go that far" as to find a liberty interest in parole, agreeing with the Fourth Circuit in *Bowling*. *Brown* at 889. *Bowling*, 930 F.3d at 199 (finding that, because juvenile-specific Eighth Amendment protections did not apply to the life with parole sentence, they need not decide whether the rights articulated

by *Miller* and its lineage trigger liberty interests.) The Fourth Circuit in *Wershe* rejected that plaintiff's due process claims because there was no property interest in parole and the plaintiff did not present a liberty interest claim. 763 F.3d at 506. The Supreme Court has avoided creating a liberty interest in parole in the *Graham* Cases. The Court was "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. Further, as the Supreme Court clearly announced it "did not foreclose a sentencer's ability to impose life without parole" on a discretionary basis. *Montgomery*, 577 U.S. at 195; *see also Miller*, 567 U.S. at 483.

Plaintiffs argue that *Mathews v. Eldridge*, 424 U.S. 319 (1976), controls for due process, but that case was a property interest due process case, not liberty interest. *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), is the proper analysis for a liberty interest claim. Plaintiffs also assert, without support, that a parolee who faces revocation of parole and return to prison has the same right as inmates who seek release to parole. The rights are entirely different.

2. Even If There Is A Liberty Interest, Florida Provides Sufficient Process.

Because of the above description of all the procedures that FCOR has to allow Plaintiffs to acquire records, respond, and communicate with FCOR, Plaintiffs already have every avenue that could be required for an inmate seeking parole. Plaintiffs also wish for FCOR to provide counsel, experts, psychologists, and investigators for all of the reviews for PPRDs and ultimately release to parole – at FCOR's expense. No

court has held that these are necessary, and this Court has already dismissed Plaintiffs' claim to a right to counsel. DE 43.

C. Defendants Have Quasi-Judicial Immunity And 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 actions brought against judicial officers for acts or omissions taken in their judicial capacity, cannot receive injunctive relief 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 quasi-judicial officers 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). Plaintiffs challenge the Defendants' judicial acts – i.e., their parole-related determinations and their exercise of discretion in weighing class members' maturity and rehabilitation. Plaintiffs attempt to evade this by arguing that they are attacking the system, but their arguments about all of the results of the system. Plaintiffs' lengthy arguments based on statistics are clearly arguments based on the many individual decisions of Defendants – rather than non-judicial acts. Thus, 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).

D. This Action is Barred by the *Heck* Doctrine.

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 modifies the Plaintiffs' sentences to include 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, Plaintiffs are challenging their sentence, which is only properly brought under habeas corpus proceedings. The only conclusion that could vindicate Plaintiffs' claims, that Florida's parole system does not constitute some meaningful opportunity for parole, necessarily invalidates their sentence.

III. Defendants Object to the Declarations of Watts and Eckert, And Object To Use Of Cauffman's Report Regarding Florida's Parole System

Defendants object to the statement of Watts, as well as all argument related to Watts, because he is no longer a member of Plaintiffs' Class. Defendants object to the declaration of Eckert because it is based on hearsay and Eckert lacks personal

knowledge of the facts therein. Defendants object to the use of any expert analysis or conclusions regarding Florida's parole system, as stated in Defendants' Daubert motion, DE 109. If the Court grants that motion, such references should be stricken.

IV. Conclusion

Wherefore, Defendants request that this Court deny Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,
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