No. 23-10858

In the United States Court of Appeals for the Eleventh Circuit

ROBERT EARL HOWARD, DAMON PETERSON, CARL TRACY BROWN, AND WILLIE WATTS,

Plaintiffs/Appellants,

v.

MELINDA N. COONROD, RICHARD D. DAVISON, AND DAVID A. WYANT,

Defendants/Appellees.

APPELLEES' BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
NO. 6:21-CV-62

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No publicly traded company or corporation has an interest in the outcome of this case or appeal.

Dated: October 10, 2023

/s/ Christopher J. Baum
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STATEMENT REGARDING ORAL ARGUMENT

Appellees respectfully suggest that oral argument is unnecessary to resolve this straightforward appeal. The district court correctly rejected Plaintiffs' Eighth and Fourteenth Amendment challenges under existing precedent.

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STATEMENT OF THE ISSUES

1. Whether the Eighth Amendment applies to parole proceedings for juvenile offenders sentenced to life with parole and, if it does, whether Florida's parole system satisfies the Eighth Amendment as to those offenders.

2. Whether juvenile offenders sentenced to life with parole have a cognizable liberty interest under the Due Process Clause of the Fourteenth Amendment in parole proceedings and, if they do, whether Florida's parole system provides them the process that is due.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

Supreme Court precedent. Starting with *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court has issued a series of rulings regarding the constitutionality of certain sentences (and the procedures for meting out those sentences) for juvenile offenders. In *Roper*, the Court held that the Eighth Amendment barred sentencing juvenile offenders to death. 543 U.S. at 567. In *Graham v. Florida*, the Court held that juvenile *nonhomicide* offenders cannot be sentenced to life without parole, but instead must receive "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 560 U.S. 48, 75 (2010). In *Miller v. Alabama*, the Court held that juvenile *homicide* offenders can be sentenced to life without parole, but only if the sentence is not

mandatory and the sentencer has discretion to consider the offender's youth and impose a lesser punishment. 567 U.S. 460, 489 (2012). And in *Montgomery v. Louisiana*, the Court held that *Miller* applies retroactively on collateral review. 577 U.S. 190, 213 (2016).

The Court most recently addressed the issue in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). There, petitioner argued that to sentence a juvenile homicide offender to life without parole, the sentencer must make a finding of permanent incorrigibility. The Court rejected that argument. In doing so, the Court explained that for juvenile homicide offenders, "a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." *Id.* at 1313. In other words, if a juvenile homicide offender receives a life-without-parole sentence from a sentencer with "discretion to 'consider the mitigating qualities of youth' and impose a lesser punishment," the Eighth Amendment is satisfied. *Id.* at 1314. The Court also stressed in *Jones* that courts should "rely on what *Miller* and *Montgomery* said—that is, their explicit language addressing the precise question before" them, rather than "draw[ing] inferences about what [they] 'must have done' in order for the decisions to 'make any sense.'" *Id.* at 1321–22.

The Court has not, however, set forth any constraints for courts sentencing juvenile *homicide* offenders to life *with* parole or held that the Eighth Amendment contains any procedural or substantive requirements for those offenders' parole

proceedings. Indeed, as the Court explained in *Montgomery*, any Eighth Amendment violation resulting from a juvenile homicide offender's life without parole sentence can be cured "by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." 577 U.S. at 212. And under the Due Process Clause of the Fourteenth Amendment, "[i]n the context of parole, . . . the procedures required are minimal." *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011).

History of parole in Florida. In 1983, Florida abolished parole for nonhomicide offenses. Before 1994, juvenile homicide offenders could be sentenced either to the death penalty or to life with the possibility of parole after 25 years. Fla. Stat. § 775.082 (1994). In 1994, Florida abolished parole for all homicide offenses as well. Fla. Stat. § 775.082(1) (1994). But because the abolition of parole was not retroactive, a number of individuals remain sentenced to life with parole—either because they were homicide offenders before 1994 or nonhomicide offenders before 1983. Some of those individuals were juveniles when they committed their parole-eligible offenses.

In response to the line of Supreme Court cases discussed above, in 2014 Florida adopted new sentencing procedures. Fla. Stat. § 921.1401. Under that statute, juvenile offenders must receive an individualized sentencing hearing to consider a number of factors, including the offense committed and the defendant's youth, before a court may impose a life sentence.

In 2016, the Florida Supreme Court held that, as applied to juveniles sentenced to life *with* parole whose presumptive parole release date was outside their normal life expectancy, Florida's parole system was unconstitutional because it was inconsistent with "the spirit of the United States Supreme Court's recent juvenile sentencing jurisprudence," *i.e.*, *Graham* and *Miller*. *Atwell v. State*, 197 So. 3d 1040, 1041 (Fla. 2016). As a result, those inmates were entitled to resentencing under the 2014 Juvenile Sentencing Statute. *Id.* at 1050. Two years later, however, the Florida Supreme Court receded from *Atwell*, holding in *State v. Michel* that sentencing a juvenile offender to life with parole "does not violate *Graham* or *Miller*" and so those inmates are "not entitled to resentencing" under the 2014 Juvenile Sentencing Statute. 257 So. 3d 3, 7, 8 (Fla. 2018) (plurality op.); *see also Franklin v. State*, 258 So. 3d 1239, 1241 (Fla. 2018). As the Court explained, juvenile offenders sentenced to life with parole "receive a 'meaningful opportunity' under Florida's parole system after serving 25 years in prison and then (if applicable) every 7 years thereafter." *Michel*, 257 So. 3d at 7.

But while *Atwell* remained good law, many juveniles sentenced to life with parole filed petitions for resentencing and were released, while a few were resentenced to life.

Florida's parole system. Generally, Florida's parole process has four stages. *First*, an inmate receives an Initial Interview, held near the end of the inmate's

mandatory minimum sentence. Dkt. 136 at 7. An Investigator from the Florida Commission on Offender Review (FCOR) evaluates the inmate's records and meets with the inmate. Dkt. 136 at 8. During the interview, the Investigator explains the process and the reasons for the Investigator's preliminary score recommendation—based on the initial offense, a scoring matrix, aggravators, and mitigators—to provide the inmate the opportunity to dispute any errors. Dkt. 136 at 8. The Investigator also discusses the recommendation to be conveyed to Commissioners. Dkt. 136 at 8. That recommendation is then reported along with a rationale for the recommendation. Dkt. 136 at 9.

The recommendation is not binding on Commissioners. Dkt. 136 at 9. The Commissioners review the inmate's files, including files that contain significant additional information not available to the Investigator. Dkt. 136 at 9. At a meeting open to the public, the Commissioners consider the recommendation, rationale, and other information—including information from the inmate—and hear from members of the public, including an inmate's counsel if he has any, as well as victims, law enforcement, and prosecutors. Dkt. 136 at 9. The Commissioners then set the inmate's presumptive parole release date and record it on a form that explains how they reached that date based on the scoring matrix and any aggravating or mitigating factors. Dkt. 136 at 10.

Second, the Commissioners schedule a Subsequent Interview, set one to seven years in the future. Pursuant to a Subsequent Interview, the Commissioners can change an inmate's presumptive parole release date based on new information or good cause in exceptional circumstances, including prison program participation and disciplinary reports. Dkt. 96-1 at 153–54. Inmates can also receive a Special Interview if special or exceptional circumstances arise. Fla. Admin. Code R. 23-21.014.

Third, when the inmate's presumptive parole release date approaches, he receives an Effective Interview, during which the Commissioners determine whether to authorize an actual parole date, known as an effective parole release date.

Fourth, if the Commissioners decline to authorize an effective parole release date, the inmate receives an Extraordinary Review during which the Commissioners outline the reasoning behind their decision. Inmates may challenge the Commissioners' compliance with FCOR rules and procedures in state court via mandamus or habeas, depending on the nature of the challenge.

Juvenile offenders receive additional consideration of their youth, maturity, and rehabilitation during the parole process. Since 2014, in recognition that juvenile offenders are different, FCOR has used a new scoring matrix for juvenile offenders at Initial Interviews to set a baseline presumptive parole release date that is lower than those who committed their offenses as adults. *Compare* Fla. Admin. Code R.

23-21.009(5) *with* Fla. Admin. Code R. 23-21.009(6); *see also* Fla. Admin. Code R. 23-21.009(6) n.1. FCOR's rules, moreover, expressly provide that the Commissioners can consider as a mitigating factor that "[t]he inmate committing the crime was of such a young age as to diminish his capacity to fully understand the seriousness of his action and its direct consequences." Fla. Admin. Code R. 23-21.010(5)(b)1.b. And the Commissioners all consider factors relating to youth when setting or modifying the presumptive parole release date. Dkt. 113 at 5.

II. PROCEDURAL HISTORY

The named Plaintiffs are four inmates incarcerated in Florida for crimes committed when they were juveniles. Three of them are juvenile homicide offenders, while the fourth (Willie Watts) is a juvenile nonhomicide offender. Each is serving a life sentence *with* the possibility of parole;[1] they were sentenced before Florida abolished parole. And none of them were resentenced between *Atwell* and *Michel*. Plaintiffs filed a class action complaint in the Middle District of Florida against the FCOR Commissioners, alleging (as relevant here) that Florida's parole procedures violate the Eighth and Fourteenth Amendments as to juvenile offenders sentenced

[1] The class includes inmates not sentenced to life with parole but sentenced to "a term of years exceeding their life expectancy (defined as greater than 470 months)" with parole; for convenience, the Commissioners refer to those inmates as having been sentenced to life with parole.

to life with parole. The district court certified a class of approximately 170 individuals under Rule 23(b)(2), defined as:

> All persons who (i) were convicted of a crime committed when they were under the age of eighteen; (ii) were sentenced to life in prison or a term of years exceeding their life expectancy (defined as greater than 470 months); (iii) are currently in the custody of the Florida Department of Corrections; (iv) have never been paroled; and (v) are or will become eligible for release to parole supervision but only through the parole process.

Dkt. 58 at 5–6.

Plaintiffs' claims were narrowed at the motion-to-dismiss stage and, following discovery, the parties filed cross-motions for summary judgment on Plaintiffs' remaining two claims—the only claims at issue in this appeal. The district court granted summary judgment for the Commissioners. Dkt. 136 at 26.

As to Plaintiffs' Eighth Amendment claim, the district court held that "Florida's parole system as enacted by the FCOR meets the irreducible constitutional floor." Dkt. 136 at 17. The court first extended the Supreme Court's Eighth Amendment precedents to the parole process, believing that "parole systems must afford juveniles sentenced for life with the possibility of parole at least some minimally meaningful opportunity to demonstrate the gravamen of" *Graham*, *Miller*, and *Montgomery*. Dkt. 136 at 20. But, applying that standard, it concluded that "a thorough review of the undisputed record" establishes that FCOR provides class members with "some meaningful opportunity for release based on

demonstrated maturity and rehabilitation as a matter of law." Dkt. 136 at 21. In so holding, the district court relied on FCOR's Youthful Offender Matrix; the Commissioners' consideration of demonstrated signs of maturity and rehabilitation; FCOR's rule expressly providing for the consideration of youth; instances where class members' presumptive parole release dates have been adjusted downward based on demonstrated maturity and rehabilitation; and the historical number of individuals who would be eligible for class treatment but for the fact that they have been paroled. Dkt. 136 at 21–23.

As for Plaintiffs' Fourteenth Amendment Procedural Due Process claim, the district court held that the class members have a cognizable liberty interest in meaningful parole review. Dkt. 136 at 24–25. But, it concluded, the class members already receive all of the process that is due because of the "availability of state remedies to ensure compliance with [FCOR's] rules and regulations on an individualized basis." Dkt. 136 at 25. As a result, the Commissioners were entitled to summary judgment on that claim as well. Dkt. 136 at 26.

This appeal followed.

III. STANDARD OF REVIEW

The Court "review[s] de novo" the district court's order granting summary judgment for the Commissioners, "applying the same legal standards applied by the district court in the first instance." *Khoury v. Miami-Dade Cty. Sch. Bd.*, 4 F.4th

1118, 1124 (11th Cir. 2021). "Summary judgment should be granted only if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (citing Fed. R. Civ. P. 56(a)). The Court also reviews de novo the district court's denial of Plaintiffs' motion for summary judgment. *Carter v. City of Melbourne*, 731 F.3d 1161, 1166 (11th Cir. 2013).

SUMMARY OF THE ARGUMENT

I. The class members who are juvenile homicide offenders are not entitled to any relief under the Eighth Amendment because they all received sentences of life *with* parole. Nothing in the Supreme Court's Eighth Amendment jurisprudence requires anything more; indeed, the Court has instructed that States can remedy *Miller* violations simply by resentencing a juvenile homicide offender to life *with* parole. The only two courts of appeal to have considered Plaintiffs' argument that juvenile homicide offenders are instead entitled to "some meaningful opportunity" for release have rejected it, and this Court should follow suit.

Even if the juvenile homicide offender class members were entitled to parole procedures that afford them some level of "meaningful opportunity" for release, Florida's parole system more than meets that requirement. The Commissioners consider normal parole factors; they consider the offenders' youth, as FCOR's rules allow; the Youthful Offender Matrix has been applied to many class members; and the number of those paroled historically shows that Florida's system is not a sham.

Plaintiffs thus have an ample opportunity for release based on demonstrated maturity and rehabilitation.

So too with the juvenile nonhomicide offender class members. For the same reasons that the juvenile homicide class members receive ample opportunity for release, so do the juvenile nonhomicide offenders.

II. Plaintiffs' procedural due process claim is even less meritorious. This Court has long held that Florida's parole system does not create any cognizable liberty interest. Those cases have not been overruled or even called into doubt, particularly in light of *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), which makes clear that even a juvenile homicide offender who has actually demonstrated maturity and rehabilitation is *not* entitled to parole. Even if Plaintiffs had a cognizable liberty interest, though, the Supreme Court has set forth the only process that is due in the parole context: an opportunity to be heard and a statement of the reasons why parole was denied. Florida provides that minimal process and more.

This Court should affirm.

ARGUMENT

I. PLAINTIFFS' EIGHTH AMENDMENT CLAIMS ARE MERITLESS.

Plaintiffs committed serious offenses as juveniles, for which they are serving life or de facto life sentences *with* the possibility of parole. They insist that their sentences violate the Eighth Amendment because Florida's parole system fails to

afford them a meaningful opportunity for release based on demonstrated maturity and rehabilitation. Plaintiffs are incorrect. At the outset, however, one important point regarding Plaintiffs' Eighth Amendment claim bears mention: Whether Florida's parole system violates the Eighth Amendment cannot be determined on a class-wide basis. *Graham* specifically holds that juvenile *nonhomicide* offenders can be sentenced to life with parole only if they receive "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 560 U.S. at 75. But the Supreme Court has never set forth any constraints on sentencing a juvenile *homicide* offender to life with parole. In other words, the question for class members who are nonhomicide offenders is whether Florida's parole system provides them with "some meaningful opportunity" for release, while the question for *homicide* offenders is different, as explained below.

It is unclear how many current members of the class are juvenile *nonhomicide* offenders, and the district court did not analyze them separately or mention any juvenile nonhomicide offenders.[2] Although the class definition does not distinguish between them, it is difficult to ascertain based on Plaintiffs' brief how many juvenile

[2] In its order on summary judgment, the district court stated that it would "not consider information specifically related to Named Plaintiff Willie Watts as the Commissioner Defendants assert he is no longer a member of the Class," and that "factual assertion went undisputed in Plaintiff's relevant reply." Dkt. 136 at 1 n.1. Plaintiffs now take issue (Init. Br. 10 & n.3) with the district court's factual finding, but point to nothing in the record showing that it was clearly erroneous.

nonhomicide offenders are class members—in fact, they appear to assert that "[i]mportantly, all of the Class Members and *Atwell* JLWPs were convicted of homicide." Init. Br. 39; *but see* Dkt. 1 (discussing both nonhomicide offenders and homicide offenders). Any nonhomicide offender class members must have been sentenced before October 1, 1983—40 years ago—when parole was abolished in Florida for most non-capital crimes.

At the very least, it appears that the majority of the class is composed of juvenile homicide offenders. The Commissioners therefore focus on Plaintiffs' Eighth Amendment claims as to that implicit subclass before turning to juvenile nonhomicide offenders. What is clear is that, whatever the status of each class member, none is entitled to Eighth Amendment relief.

A. The juvenile homicide offender class members are not entitled to relief under the Eighth Amendment.

No member of the Class who committed a homicide offense can make out an Eighth Amendment claim. Whereas *Graham* entitles juvenile nonhomicide offenders to a meaningful opportunity for release sometime in their lifetimes based on demonstrated maturity and rehabilitation, *Miller* offers juvenile homicide offenders a lesser protection: They simply cannot receive mandatory life without parole sentences. Plaintiffs are thus wrong to suggest that juvenile homicide offenders—with their far greater moral culpability—receive the same protections as their nonhomicide counterparts in *Graham*. But even if *Graham* applies to those

class members, Florida's parole system provides a meaningful opportunity for release.

1. *The Eighth Amendment is satisfied when a juvenile homicide offender is sentenced to life with parole.*

None of the Supreme Court's cases "addres[s] the precise question" of the constitutionality of life *with* parole for the Plaintiffs who are juvenile homicide offenders. *Jones*, 141 S. Ct. at 1322. But the import of those cases is that juvenile homicide offenders do not receive the same protections as nonhomicide offenders. *See Bowling v. Dir., Virginia Dep't of Corr.*, 920 F.3d 192, 197 (4th Cir. 2019). Indeed, in *Montgomery*, the Court explained that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." 577 U.S. at 212. Put another way, if a juvenile homicide offender is sentenced to life *with* parole, there is no *Miller* violation at all. Plaintiffs' theory would thus work a significant expansion of the Eighth Amendment principles recognized by the Supreme Court.

The differences between juvenile homicide offenders and juvenile nonhomicide offenders in the Supreme Court's Eighth Amendment jurisprudence result from the difference in the severity of their offenses. "[D]efendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Graham*, 560 U.S. at 69. That is because "[t]here is a line between homicide and other serious violent

offenses against the individual." *Id.* (quotation omitted). Nonhomicide offenses simply "cannot be compared to murder in their severity and irrevocability"—they "differ from homicide crimes in a moral sense." *Id.*

This difference, the Supreme Court explained in *Graham*, justifies a heightened sentencing safeguard for juvenile nonhomicide offenders: They cannot be required to serve life in prison without "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75. Parole is one potential avenue to afford a meaningful opportunity for release, but it "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance." *Id.* By contrast, as to juvenile *homicide* offenders, the Supreme Court held in *Miller* that the Eighth Amendment provides a lesser guarantee: It merely "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479.

Critically, nothing in *Graham* and *Miller* purports to require that juvenile homicide offenders receive some meaningful opportunity for release. Because of the serious nature of their crime, the Eighth Amendment requires only that "a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a life-without-parole sentence" on them. *Jones*, 141 S. Ct. at 1314 (quotation omitted). And a sentence with any possibility of parole remedies any *Miller* violation. *Montgomery*, 577 U.S. at 212.

As a result, *Graham*, *Miller*, and their progeny are not implicated here. *See United States v. Sparks*, 941 F.3d 748, 754 (5th Cir. 2019) ("*Miller* has no relevance to sentences less than LWOP," so "sentences of life *with* the possibility of parole . . . do not implicate *Miller*"); *United States v. Morgan*, 727 F. App'x 994, 997 (11th Cir. 2018) (*Graham* does not apply to homicide offenders and *Miller* does not apply to non-life sentences). In *Jones*, the Supreme Court cautioned that courts interpreting this line of precedents must rely on "their explicit language," rather than "dra[w] inferences" about what the decisions "must have done." 141 S. Ct. at 1321–22. The district court was thus wrong to suggest that the authority on which the Commissioners relied below "read *Graham* and its progeny far too formalistically and narrowly" (Dkt. 136 at 21 n.11)—the Supreme Court has instructed courts to read *Graham* and its progeny in precisely that manner. That alone is enough to affirm as to all juvenile homicide offender class members: The Eighth Amendment does not entitle them to a meaningful opportunity for release based on maturity and rehabilitation—only to "*any* possibility of parole"—and Plaintiffs have never argued that Florida's parole system is not at least *an* opportunity for parole.

Given all this, the only two courts of appeals that have addressed the arguments Plaintiffs raise here have rejected them on that basis. *Brown v. Precythe*, 46 F.4th 879, 886 (8th Cir. 2022) (en banc); *Bowling*, 920 F.3d at 197. This Court should follow their lead.

Both courts first rejected the underlying premise of Plaintiffs' argument: that the Eighth Amendment contains procedural or substantive guarantees during parole consideration for juvenile homicide offenders. In *Bowling*, the Fourth Circuit explained that "the Supreme Court has placed no explicit constraints on a sentencing court's ability to sentence a juvenile offender to life with parole." *Id.* at 197. After all, the Supreme Court has not even "gone so far as to require that juvenile offenders be released from prison during their lifetime." *Id.* ("A State is not required to guarantee eventual freedom to a juvenile offender" (quoting *Graham*, 560 U.S. at 75)). Thus, the Fourth Circuit concluded in *Bowling*, the Eighth Amendment's protections "announced in *Miller* and its lineage . . . have not yet reached a juvenile offender who has and will continue to receive parole consideration." *Id.* at 198. In *Brown*, the en banc Eighth Circuit agreed, noting that in *Montgomery*, the Supreme Court said that consideration for parole would remedy a *Miller* violation. 46 F.4th at 885. The court therefore rejected the plaintiff's argument that *Graham* and *Miller*'s protections extend to parole procedures.

Similarly, *Bowling* and *Brown* rejected the notion that a juvenile homicide offender is guaranteed the right to "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"—Plaintiffs' theory here. Init. Br. 31. As the en banc Eighth Circuit pointed out, the right to a meaningful opportunity for release based on demonstrated maturity and rehabilitation belongs exclusively to

juvenile *nonhomicide* offenders. *Brown*, 46 F.4th at 886. Indeed, that requirement is predicated on "language . . . drawn from a decision in which the Supreme Court held that a State may not sentence a juvenile *non*-homicide offender to life without the possibility of parole, and must provide the offender 'some meaningful opportunity to obtain release.'" *Id.* (quoting *Graham*, 560 U.S. at 75); *see Bowling*, 920 F.3d at 198; *Atkins v. Crowell*, 945 F.3d 476, 479 (6th Cir. 2019) (rejecting argument that the "some meaningful opportunity" requirement from *Graham* applied to sentences other than life *without* parole, and applying it to such sentences would "dramatically expand *Miller*'s scope and create significant uncertainty to boot"). In neither *Miller* nor *Montgomery* did the Supreme Court "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." *Brown*, 46 F.4th at 886 (emphasis added). And as explained above, the Supreme Court has acknowledged that juvenile homicide and nonhomicide offenders, by virtue of the differing severity of their crimes, are treated differently under the Eighth Amendment. The "some meaningful opportunity" standard is thus inapplicable here.

To sum up, the Supreme Court has never held (1) that to sentence a juvenile homicide offender to life *with* parole, a court must consider the offender's youth; (2) that the parole process for juvenile homicide offenders must provide for consideration of youth; or (3) that a juvenile homicide offender's life *with* parole

sentence must provide for "some meaningful opportunity" for release. Plaintiffs' claims thus fail at the threshold.

Plaintiffs brush aside *Bowling* and *Brown* in a footnote, arguing that they involved "parole systems that focused their evaluations on maturity, rehabilitation and youth specific factors, and provided the opportunity for release starting between 15-25 years and offering parole review every year." Init. Br. 34 n.11. But in both cases, the courts *first* categorically rejected the argument that the Eighth Amendment extends to parole proceedings for juvenile homicide offenders. *Brown*, 46 F.4th at 886; *Bowling*, 920 F.3d at 197–99. They addressed the specifics of the parole systems only in alternative holdings reached by *assuming* that the Eighth Amendment—counter to what the courts had just held—did apply. In other words, even if *Bowling* and *Brown* could be distinguished based on the specifics of the parole systems under review, Plaintiffs have nothing to say about their core holdings that the Eighth Amendment does not even apply to parole proceedings for juvenile homicide offenders.

Instead of addressing *Bowling* and *Brown* head on, Plaintiffs rely on a smattering of district court decisions issued before *Jones* that apply the Eighth Amendment to parole proceedings. Init. Br. 33–34. As explained below, *Jones* rebuts the logic of those decisions, as it makes clear that a juvenile homicide offender is not entitled to parole upon demonstrating maturity and rehabilitation. *See infra* at

35–36. In short, the premise of Plaintiffs' argument—that juvenile homicide and nonhomicide offenders are equally guaranteed a meaningful opportunity for release based on maturity and rehabilitation—elides the difference between the severity of the offenses they committed.

Thus, the Eighth Amendment provides no relief to any juvenile homicide member of the class.

2. *Even if juvenile homicide offenders were entitled to some meaningful opportunity for release, Florida's parole system satisfies that requirement.*

Even "assum[ing] . . . that the Eighth Amendment applies to parole proceedings for juvenile homicide offenders," *Brown*, 46 F.4th at 886–87; *see Bowling*, 920 F.3d at 198–99; Florida's parole system does not come close to falling below any Eighth Amendment floor.

Both the *Bowling* and *Brown* courts, in upholding the parole systems at issue, pointed to the fact that the parole boards considered factors addressing the inmate's youth, maturity, and rehabilitation. *Bowling*, 920 F.3d at 198; *Brown*, 46 F.4th at 887. And the Supreme Court has at least suggested, albeit in the habeas context, that whether a State's parole system comports with the Eighth Amendment as to juvenile *nonhomicide* offenders depends on whether it "employ[s] normal parole factors." *Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017). In *LeBlanc*, the Court concluded on habeas review that it was not objectively unreasonable for a state court to conclude

that a geriatric release program that employed normal parole factors "satisfied *Graham*'s requirement that juveniles convicted of a nonhomicide crime have a meaningful opportunity to receive parole." *Id.* at 94–95. The parole board was required to "consider factors like" the offender's history and conduct during incarceration, his relationships with staff and inmates, and his changes in attitude, all of which could allow release "in light of . . . demonstrated maturity and rehabilitation." *Id.* at 95 (quotation omitted). At the very least, then, it would not be unreasonable for a court to conclude that a parole system employing normal parole factors when considering juvenile *homicide* offenders passes muster.

Plaintiffs do not dispute that FCOR employs normal parole factors.[3] Among other things, the Commissioners consider the seriousness of an inmate's offense; prior convictions; prior incarcerations; years sentenced; parole and probation revocations; prior escape and attempt convictions; whether burglary, breaking and entering, or robbery are part of the conviction; disciplinary reports; and many other aggravating and mitigating circumstances. Dkt. 113 at 2; Fla. Admin. Code R. 23-21.010.

What is more, FCOR's rules expressly provide the Commissioners with discretion to consider factors relating to youth as a mitigating factor. One such

[3] To the contrary, their complaint (Init. Br. 19) is that it does employ normal parole factors, but that juveniles should receive additional consideration.

mitigating factor is that "[t]he inmate committing the crime was of such a young age as to diminish his capacity to fully understand the seriousness of his action and its direct consequences." Fla. Admin. Code R. 23-21.010(5)(b)1.b.[4] Others also relate to considerations of immaturity. *E.g.*, Fla. Admin. Code R. 23-21.010(5)(b)1.a., d.–g. And the Commissioners "all testified that they consider factors relating to youth when setting or modifying the potential parole date." Dkt. 136 at 6. Those factors allowed the Commissioners "to fully consider the inmate's age at the time of the offense," *Bowling*, 920 F.3d at 198, and their consideration provides "'some meaningful opportunity' for an offender to obtain release based on demonstrated maturity and rehabilitation," *Brown*, 46 F.4th at 887.

For many of the class members, moreover, the Commissioners have an additional procedure for considering their youth. For Initial Interviews conducted after 2014, the Commissioners apply a Youthful Offender Matrix. Fla. Admin. Code R. 23-21.009(6) n.1. The Youthful Offender Matrix "makes across the board guideline recommendations of dramatically earlier potential parole dates." Dkt. 136 at 6 (comparing Fla. Admin. Code R. 23-21.009(5) with Fla. Admin. Code R. 23-21.009(6)). And while "[a]round ninety-three Class Members' [out of 170 total]

[4] Plaintiffs counter that under state law there is "no requirement" that this factor be considered. But they do not dispute that all Commissioners testified that they do consider it. And under *Jones*, that the Commissioners have *discretion* to *consider* youth is all that could be required. 141 S. Ct. at 1316.

initial potential parole dates were not set using the Youthful Offender Matrix as their Initial Interview occurred prior to 2014," seventy-seven class members' presumptive parole release dates were set using the Youthful Offender Matrix. Dkt. 136 at 11. To the extent that some members of the class have not benefited from the Youthful Offender Matrix, that is an individualized issue inappropriate for classwide consideration. *See* Dkt. 136 at 21 n.12. And as explained, even without the Youthful Offender Matrix, Florida's parole system allows for ample consideration of youth as a mitigating factor.

In *Brown*, the en banc Eighth Circuit also relied on a record "show[ing] that the Missouri parole process is not a sham," because four out of twenty-eight juvenile homicide offenders considered for parole were scheduled for release after their first hearing. 46 F.4th at 887. Here, the record likewise shows that the Florida parole process is not a sham. "FCOR has historically paroled over 246 individuals who would otherwise be eligible for class treatment," including, since *Miller* was decided in 2012, "at least twenty-three juveniles sentenced to life with the possibility of parole who would otherwise be members of the class." Dkt. 136 at 13.[5] By

[5] Plaintiffs contend (Init. Br. 39 n.15) that only the twenty-three post-*Miller* parolees are relevant here. But as the district court found, the other 200-plus parolees would "otherwise be eligible for class treatment," Dkt. 136 at 22, so their being paroled helps to establish that the process is not a "sham." Even if only the post-*Miller* parolees were relevant, though, 23 parolees out of 193 (170 class members plus 23 parolees) is a significant percentage in light of the seriousness of these offenders' crimes. *E.g.*, *Brown*, 46 F.4th at 887 (4 out of 28). And even that figure

comparison, the class includes only "about 170" individuals. Dkt. 136 at 2. And in several instances, FCOR "amended potential parole dates downward for Class Members (or for individuals who would otherwise be eligible for class treatment if they had not been paroled)." Dkt. 136 at 14.

So just like the parole systems upheld in *Bowling* and *Brown*, Florida's parole system meets any constitutional floor even if the Court were to conclude that the Eighth Amendment requires juvenile homicide offenders sentenced to life with parole to have "some meaningful opportunity" for release.

Plaintiffs attempt (Init. Br. 34 n.11) to distinguish *Bowling* and *Brown*, but their distinctions are unpersuasive. Virginia's parole board considered a whole host of factors rather than "focus[ing]" on youth, maturity, and rehabilitation as Plaintiffs contend—and it relied heavily on the severity of the plaintiff's crime. 920 F.3d at 198–99. So too with Missouri's parole board. 46 F.4th 887–88. Moreover, the inmates in *Brown*, who received parole consideration after twenty-five years, were *not* entitled to "parole review every year," Init. Br. 34 n.11; each was scheduled for reconsideration within five years. *Id.* at 884. And in any event, Plaintiffs do not identify any authority suggesting that juvenile homicide offenders must be considered for parole every year.

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fails to take into account that many of those resentenced while *Atwell* was good law might have been paroled instead, which would have added to that number.

Plaintiffs next counter that the Commissioners' statutorily required consideration of the seriousness of their offenses and prior criminal records deprives them of a meaningful opportunity for release. Init. Br. 41–43. But as the district court correctly noted, that consideration "does not foreclose that the Commissioner Defendants also consider demonstrated signs of maturity and rehabilitation." Dkt. 136 at 22. As the court explained, "as in sentencing, parole is not a one-size-fits-all process, and it necessarily must take into account the seriousness of the particular offense(s) in question in order to gauge maturation and rehabilitation from that baseline." Dkt. 136 at 22. Other courts agree. *E.g.*, *Brown*, 46 F.4th at 887 (explaining that "the seriousness of the inmate's homicide offense . . . [is] appropriate for consideration in a parole proceeding"); *Bowling*, 920 F.3d at 198–99 (noting that while plaintiff's parole denials had been "linked to the severity of his crime," that factor could be outweighed by subsequent maturation).

Moreover, the notion that the Eighth Amendment requires a juvenile homicide offender's youth, maturity, and rehabilitation to be the central focus of a sentencing or parole determination is belied by *Jones*, which held that a sentencer need only have the discretion to *consider* those factors. *Jones*, 141 S. Ct. at 1316. Plaintiffs are thus wrong to suggest that "[t]he Eighth Amendment requires that maturity and rehabilitation and the defining characteristics of youth drive the parole process for juvenile offenders, including those convicted of homicide." Init. Br. 42; *see Jones*,

141 S. Ct. at 1330 (Sotomayor, J., dissenting) ("It does not matter whether the sentencer meaningfully considers youth: The Court assumes it will, but ultimately, the mere existence of 'a discretionary sentencing procedure suffices.'" (citations omitted)).

Finally, Plaintiffs misleadingly state that class members "will first be considered for parole" after "approximately 75 years" in prison. Init. Br. 36; *see also* Init. Br. 5, 24. In making this argument, Plaintiffs ignore that they were first considered for parole after only twenty-five years, as required by statute. *See* Fla. Stat. § 775.082 (1994). They received an Initial Interview and the Commissioners set a presumptive parole release date at that time. That presumptive parole release date could have been "set in the future or the past; if set in the past," they would have "immediately receive[d] an effective parole release date." Dkt. 136 at 5. In other words, Plaintiffs each received parole consideration, during which their youth, maturity, and rehabilitation were considered, long before the 75-year figure to which they point, and they receive consideration at Subsequent Interviews within seven years thereafter. So even if juvenile *homicide* offenders are entitled to some meaningful opportunity for release based on maturity and rehabilitation—which they are not—the class members all received that review here after only twenty-five years. That is more than they are entitled to receive under the Eighth Amendment.

B. The juvenile nonhomicide offender class members are not entitled to relief under the Eighth Amendment.

For the reasons discussed above, to the extent the Class contains juvenile *nonhomicide* offenders, Florida's parole system also satisfies *Graham*'s command that those offenders receive "some meaningful opportunity" for release. The Commissioners consider normal parole factors, *see supra* at 25–26; FCOR's rules expressly provide the Commissioners with discretion to consider factors relating to youth as a mitigating factor, and the Commissioners all testified that they in fact do so, *see supra* at 26–27; the Youthful Offender Matrix has been applied to many class members, *see supra* at 27–28; and the facts show that Florida's parole system is not a sham, *see supra* at 28–29. Plaintiffs' quarrel is instead with the Supreme Court's explanation in *Graham* that "[a] State is not required to guarantee eventual freedom" even "to a juvenile offender convicted of a *nonhomicide* crime," 560 U.S. at 75 (emphasis added).

II. PLAINTIFFS' DUE PROCESS CHALLENGE LIKEWISE FAILS.

Plaintiffs' procedural due process claim is likewise meritless. The Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV, § 1. To establish a due process claim, Plaintiffs must show: (1) the deprivation of a constitutionally protected liberty interest; (2) state action; and (3) constitutionally inadequate process. *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003). Here, Plaintiffs

lack any liberty interest; even if they had one, Florida provides more than what is due.

A. Plaintiffs do not have a cognizable liberty interest in parole in Florida.

Plaintiffs "have no liberty interest in release from prison before expiration of their valid sentences," *Brown*, 46 F.4th at 890, because there is "no constitutional or inherent right" to parole proceedings, *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). *See Graham*, 560 U.S. at 75, 82 (the State "need not guarantee the offender eventual release" and the Eighth Amendment "does not require the State to release that offender during his natural life"). After all, "[t]hat the state holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained, . . . a hope which is not protected by due process." *Greenholtz*, 442 U.S. at 11.

"Only when a state maintains a parole system that creates a legitimate expectation of parole does it establish a liberty interest in parole that is subject to the protections of the Due Process Clause." *Jones v. Ray*, 279 F.3d 944, 946 (11th Cir. 2001). "Such an interest arises only when a parole statute provides that specific conditions mandate release." *Damiano v. Fla. Parole & Prob. Comm'n*, 785 F.2d 929, 932 (11th Cir. 2001). But "if the relevant statute 'places no substantive limitations on official discretion' in granting an early release from a valid sentence, no constitutionally protected liberty interest is implicated." *Cook v. Wiley*, 208 F.3d

1314, 1322 (11th Cir. 2000) (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983)).

This Court has thus long held that "Florida's parole statutes do not create a liberty interest because the Florida Parole Commission retains discretion over whether to grant or deny parole." *Harrell v. Fla. Parole Comm'n*, 479 F. App'x 234, 236 (11th Cir. 2012) (citing *Damiano*, 785 F.2d at 931–32); *see Hunter v. Fla. Parole & Prob. Comm'n*, 674 F.2d 847 (11th Cir. 1982); *Staton v. Wainwright*, 665 F.2d 686, 688 (5th Cir. Unit B 1982).

Plaintiffs do not suggest that any of this binding authority has been overruled or otherwise abrogated—in fact, they do not acknowledge *any* of it—nor do they grapple with this Court's prior panel precedent rule. *E.g.*, *United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019) ("To overrule or abrogate a prior panel's decision, the subsequent Supreme Court or en banc decision 'must be clearly on point' and must 'actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel.'"). Instead, they rely on the district court's holding that they have a cognizable liberty interest in parole review. *See* Init. Br. 45; Dkt. 136 at 24–25. But as well as being contrary to this Court's precedent, that holding was erroneous on its own terms.

The district court based its conclusion on *Flores v. Stanford*, No. 18-cv-2468, 2019 WL 4572703, at *10 (S.D.N.Y. Sept. 20, 2019), which held that *Graham*,

Miller, and *Montgomery* "confer on juvenile offenders a constitutionally protected 'liberty interest in a meaningful parole review.'" 2019 WL 4572703, at *10 (quotation omitted). In the *Flores* court's view, under those cases, "[i]f [a parole b]oard determines that a juvenile offender has demonstrated maturity and rehabilitation, parole or work release is required as a matter of law." 2019 WL 4572703, at *10 (quotation omitted); *see* Init. Br. 45. As a result, Plaintiffs maintain, parole is mandatory under *Graham*, *Miller*, and *Montgomery* upon such a demonstration, meaning that Plaintiffs have a cognizable liberty interest.

But *Flores*—an unreported case from the Southern District of New York—was decided before *Jones*, and in *Jones* the Supreme Court made clear that the only thing a juvenile homicide offender is entitled to before being sentenced to life without parole is a sentencer with "discretion to '*consider* the mitigating qualities of youth' and impose a lesser punishment." 141 S. Ct. at 1314 (emphasis added). Contrary to *Flores*, *Jones* establishes that juvenile homicide offenders are *not* entitled to parole upon demonstrating maturity and rehabilitation. *See id.*; *see also id.* at 1328 (Sotomayor, J., dissenting) (Under *Jones*, "a sentencer never need determine, even implicitly, whether a juvenile convicted of homicide is one of 'those rare children whose crimes reflect irreparable corruption.' *Montgomery*, 577 U.S. at 209. Even if the juvenile's crime reflects 'unfortunate yet transient immaturity,' *Miller*, 567 U.S. at 479, he can be sentenced to die in prison."). Put differently, even

if *Graham*, *Miller*, and *Montgomery* could somehow be read to have implicitly overruled this Court's precedents holding that Florida inmates have no liberty interest in parole, any such implication was withdrawn in *Jones*.[6] Those precedents control here. *See also Brown*, 46 F.4th at 890 (rejecting argument that juvenile homicide offenders have liberty interest in "meaningful parole review").

B. Even if Plaintiffs have a liberty interest, they received all of the process that was due.

Moreover, as the district court recognized, even if Plaintiffs were deprived of a cognizable liberty interest, they received all the process that was due. "In the context of parole, . . . the procedures required are minimal." *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011). In *Swarthout*, the Supreme Court explained that "the minimum procedures adequate for due process protection" of a liberty interest in receiving parole "are those set forth in *Greenholtz*." *Id.* at 221. There, the Court "found that a prisoner subject to a parole statute . . . received adequate process when he was allowed an opportunity to be heard and was provided a statement of the reasons why parole was denied." *Id.* at 220; *see also Bloodgood v. Garraghty*, 783 F.2d 470, 473 (4th Cir. 1986) ("In the parole setting, procedural due process requires

[6] The *Flores* court also erred in reading *Graham*, *Miller*, and *Montgomery* to establish such a liberty interest to begin with. After all, in *Jones* the Court cautioned that those cases should be read as reaching only the "precise question[s]" before them, and courts should not draw broad inferences from their narrow holdings. *Jones*, 141 S. Ct. at 1322.

no more than a statement of reasons indicating to the inmate why parole has been denied.").

Plaintiffs counter that the Court should instead apply *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) to determine "what process is due." Init. Br. 46–47. The Supreme Court, however, has already determined what process is due in the context of parole. *Swarthout*, 562 U.S. at 220; *Greenholtz*, 442 U.S. at 16. Plaintiffs fail to even cite these cases, and nothing in *Graham*, *Miller*, or *Montgomery* even purported to address the issue. *See, e.g.*, *Tenet v. Doe*, 544 U.S. 1, 10–11 (2005) (if "precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

Plaintiffs next dispute (Init. Br. 47) that they have an adequate opportunity to be heard. Plaintiffs are incorrect. During the Initial Interview, the inmate can provide comments, documents, and other individuals' statements on the inmate's behalf to be given to the Commissioners, and they have the "opportunity to correct any errors." Dkt. 113 at 2; Dkt. 96-1 at 60. Indeed, they "may send documents at any time to FCOR for Defendants to consider." Dkt. 113 at 3. During the Commission's parole adjudication meeting, an inmate's advocate has the right to speak on his behalf. Dkt. 113 at 4; Dkt. 96-1 at 91–96, 140. And they can submit rebuttals to the

Commission regarding anything stated at a meeting or sent to the Commission. Dkt. 96-1 at 95. Finally, they may seek judicial review of the Commission's determinations. Dkt. 113 at 3; *see State v. Michel*, 257 So. 3d 3, 7 (Fla. 2018) (plurality opinion); *Johnson v. Fla. Parole Comm'n*, 841 So. 2d 615, 617 (Fla. 1st DCA 2003) (recognizing that the Parole Commission's final orders are reviewable in circuit court through an extraordinary writ petition). Plaintiffs are therefore "provided with an effective opportunity, first, to insure that the records before the Board are in fact the records relating to [their cases]; and, second, to present any special considerations demonstrating why [they are] an appropriate candidate for parole." *Greenholtz*, 442 U.S. at 15.

Plaintiffs also dispute that they are provided with an adequate statement of reasons why parole was denied. But the Commissioners' decisions "are recorded on a standard form in which [they] agree to a number of months based on the matrix and additional months based on aggravating or mitigating factors that the Commission specifically identifies on the form." Dkt. 113 at 3. Plaintiffs insist that this "boilerplate Commission action form" is insufficient because it "does not include all the information relied upon in a parole decision," Init. Br. 47, but "nothing in the due process concepts as they have thus far evolved . . . requires the Parole Board to specify the particular 'evidence' in the inmate's file or at his interview on which it rests the discretionary determination that an inmate is not ready

for conditional release." *Greenholtz*, 442 U.S. at 15. Plaintiffs receive an opportunity to be heard and are notified of the reasons why parole was denied; "this affords the process that is due under these circumstances. The Constitution does not require more." *Id.* at 16.[7]

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment.

Respectfully submitted.

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[7] As a result, this Court need not delve into whether the *additional* procedural due process that Plaintiffs are afforded by the "availability of state remedies to ensure compliance with [FCOR's] rules and regulations on an individualized basis" also satisfies due process. Dkt. 136 at 25; *see* Init. Br. 48–51.

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limits of Fed. R. App. P. 32 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 8,031 words.

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2023, I electronically filed the foregoing brief with the Clerk of Court by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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