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
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

MELINDA N. COONROD, RICHARD D. DAVISON, and DAVID A. WYANT
in their official capacities

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rules 26.1-1 and 26.1-2 of the Rules of the United States Court of Appeals for the Eleventh Circuit, undersigned counsel for Appellants Robert Earl Howard, Damon, Peterson, Carl Tracy Brown, and Willie Watts on behalf of themselves and all others similarly situated certifies that the following is a list of persons and entities omitted from the certificates contained in appellants' initial brief and appellees' initial brief.

Jeffrey Paul DeSousa, Counsel for Appellees

This certificate, combined with the certificates contained in appellants' initial brief and appellees' initial brief, comprises a complete list of the persons or entities that have an interest in the outcome of this appeal.

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

/s/ *Christopher N. Bellows*
Christopher N. Bellow

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ARGUMENT

The factual record presented on summary judgment and now before this Court proves that Defendants have converted Class Members' presumptively constitutional JLWP[1] sentences into unconstitutional *de facto* JLWOP sentences. In defending the District Court's summary judgment ruling that Florida's parole system provides Class Members with a meaningful opportunity for release based on maturity and rehabilitation, Defendants' opposition strikingly offers very little discussion of the undisputed facts presented by Plaintiffs on that question. While the omission is glaring, it is not surprising. The record shows that the opportunity for release for all Class Members is virtually non-existent. Under Florida's PPRD system, Class Members will serve approximately 75 years before they are even considered for release; if any of them actually survive those 75 years of incarceration, they will be in their nineties. (Plaintiffs' Br. at 26 (citing Doc. 104-3, p. 20 [A2371])).[2] Those facts are based on the parole decisions Defendants have already made. They are not hypotheticals. Those decisions and the PPRD system they are based on fail to spare those Juvenile Lifers

[1] Capitalized terms, not otherwise defined herein, have the same definition and meaning ascribed to them in Plaintiffs' opening brief.

[2] Citations to the lower court record are made using the following format: (Doc. __, p. ___ [A__]). The "Doc." citation refers to the document entry number from the electronic docket of 6:21-cv-00062-PGB-EJK in the Middle District of Florida, as well as the page number generated by the district court's electronic filing system. The "[A__]" citation refers to the pagination of the Appellants' Appendix to Initial Brief, where available.

whose crimes reflect transient immaturity and are entitled to a meaningful opportunity for release from this unconstitutional sentence of death in prison. Apparently unable to rebut these facts, Defendants pivot to legal arguments, asserting that Juvenile Lifers simply have no Eighth Amendment right to a meaningful opportunity for release. Their legal analysis however is flawed, and when forced to confront the factual record, their meager efforts to prop up the PPRD system that treats Juvenile Lifers largely the same as adult offenders fail to pass constitutional scrutiny.

I. THE DEFENDANTS ARE WRONG: THE EIGHTH AMENDMENT AFFORDS ALL CLASS MEMBERS A MEANINGFUL OPPORTUNITY FOR RELEASE BASED ON MATURITY AND REHABILITATION

A. The Supreme Court Has Held That The Right To A Meaningful Opportunity For Release Applies To Both Non-Homicide And Homicide Offenders

While the Supreme Court's decisions in *Graham*, *Miller*, and *Montgomery* were focused on the constitutionality of life *without* parole sentences imposed on juvenile offenders, the extensive reasoning and discussion on why the constitutionally relevant developmental differences between children and adult offenders prohibit condemning these children to die in prison apply regardless of the underlying offense. Under the Eighth Amendment, Juvenile Lifers whose crimes reflect transient immaturity are constitutionally barred from incarceration for the duration of their life sentences. *See Montgomery v. Louisiana*, 577 U.S. 190, 195 (2016). To the extent Defendants argue that this right to a meaningful opportunity for release extends only to individuals

serving JLWP for *non-homicide* offenses, their reasoning is deeply flawed.

First, Defendants rely almost exclusively on the Supreme Court's decision and reasoning in *Graham*, in which the Court distinguished between *non-homicide* and *homicide* offenders to proscribe JLWOP for the former. However, this distinction between *homicide* and *non-homicide* offenses became irrelevant five years later in *Miller*, when the Supreme Court extended the Eighth Amendment right and its related jurisprudence to *homicide* offenders. *Miller v. Alabama*, 567 U.S. 460, 476-78 (2012); *see also Montgomery*, 577 U.S. at 195, 206-08.

Indeed, in *Miller*, the Supreme Court expressly incorporated *Graham*'s right to a meaningful opportunity for release to juveniles convicted of *homicide*:

> We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. Cf. *Graham,* 560 U.S., at 75, 130 S.Ct., at 2030 ***("A State is not required to guarantee eventual freedom," but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"***).

Miller, 567 U.S. at 479 (emphasis added) (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)). Defendants conveniently ignore the Court's explicit citation to *Graham* directly incorporating the right to a meaningful opportunity for release. Further, in extending the Eighth Amendment standard to *homicide* in *Miller*, the Supreme Court found the moral distinctions it had previously articulated in *Graham,* that are exclusively relied on by Defendants, (Defendants' Br. at 19-20), were insufficient to

justify JLWOP for *homicide* because "none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific," *Miller*, 567 U.S. at 473. Thus, the Court in *Miller* required a sentencer to consider the unique attributes of youth to determine if the underlying homicide reflected only transient immaturity, and if it did the youth was entitled to a meaningful opportunity for release. *Id.* at 479-80.

Any doubt about the exact scope of *Miller* was resolved in *Montgomery*, where the Supreme Court found that *Miller* established a substantive sentencing right rather than merely a procedural right. As the Supreme Court stated, "*Miller* . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Montgomery*, 577 U.S. at 208 (quoting *Miller*, 567 U.S. at 472). The Court explained that "[a]lthough *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile," it recognized that "***a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption***.'" *Id.* at 195 (emphasis added) (quoting *Miller*, 567 U.S. at 479-80). Thus, "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, ***that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity***.'" *Id.* (emphasis added) (quoting *Miller*, 567 U.S. at 479). While the Court

found that "a State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole," the Court cautioned that the state's parole system must "ensure[] 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." *Id.* at 212. In other words, the Court found that even those juveniles sentenced to life with parole for homicide have Eighth Amendment rights to *proportionate* sentences that allow for a meaningful opportunity for release when their crimes reflected transient immaturity.

When the Supreme Court again addressed the Eighth Amendment standard in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), the only issue before it was whether *Miller* and *Montgomery* required trial courts to make a finding of fact regarding a child's permanent incorrigibility before it could issue a JLWOP sentence. While the Court held that a sentencer need not make a specific finding of incorrigibility before imposing a JLWOP sentence so long as they considered the mitigating attributes of youth, which the sentencing judge is constitutionally required to do, the Court also explicitly affirmed the continuing viability of its holdings in *Miller* and *Montgomery*. *Jones*, 141 S. Ct. at 1307 ("The Court's decision today carefully follows both *Miller* and *Montgomery* . . . [and] does not disturb that holding."). Thus, the Supreme Court's decision in *Jones* did nothing to relieve Defendants of their duty to ensure that Class Members do not serve unconstitutional life sentences.

B. The Circuit Court Decisions In *Bowling* And *Brown* Have No Bearing On This Case

As with their misinterpretation of *Graham* and *Jones*, the Defendants' reliance on the Fourth and Eighth Circuits' decisions in *Bowling* and *Brown*, (Defendants' Br. at 21-25), is also flawed. Defendants seem to argue that this Court should find as a matter of law that Eighth Amendment protections from disproportionate punishment simply do not apply to juvenile offenders sentenced to life with parole. But neither the *Bowling* nor *Brown* courts rested their opinions solely on that flawed legal analysis; both closely examined whether the state's parole system offered Eighth Amendment protections.[3]

In *Bowling*, the Fourth Circuit found that under Virginia's parole system, Juvenile Lifers received parole consideration *every year* after reaching the mandatory minimum, and that the existing parole factors "allowed the Parole Board to fully consider the inmate's age at the time of the offense, as well as any evidence submitted to demonstrate his maturation since then*." Bowling v. Dir., Va. Dep't of Corr.*, 920 F.3d 192, 198 (4th Cir. 2019). While the *Bowling* court recognized that plaintiff's initial parole denials were linked to the severity of the underlying offense, because

[3] To the extent the Fourth and Eighth Circuits denied that Juvenile Lifers have *any* Eighth Amendment rights to a meaningful opportunity for release, not only are those decisions inaccurate interpretations of *Miller* and *Montgomery,* they also must be read against the backdrop of the robust parole systems before them that, unlike Florida's system, arguably provide Juvenile Lifers a meaningful opportunity for release.

Juvenile Lifers receive yearly consideration for parole, the court recognized that "there is a possibility that in time, [Appellant's] conduct and positive adjustment while in prison, when considered with all other factors, will outweigh the concerns that the Board has for the offense." *Id.* (alteration in original).

In *Brown*, the Eighth Circuit also examined Missouri's parole system. *Brown v. Precythe*, 46 F.4th 879 (8th Cir. 2022). There the *Brown* court found that Missouri's parole system afforded Juvenile Lifers a meaningful opportunity for release upon reaching their twenty-five-year mandatory minimum, and it afforded them the same meaningful opportunity to be released every five years thereafter. *Id.* at 883-84, 887. The Eighth Circuit also recognized that Missouri's parole statute for Juvenile Lifers *affirmatively requires* "the board to consider fifteen factors in making its parole decision" that "bear generally on the inmate's youthful judgment, subsequent emotional and intellectual development, and efforts toward rehabilitation." *Id.* at 884 (citing Mo. Rev. Stat. §§ 565.033.2, 558.047.5).

Unlike the parole systems in *Bowling* and *Brown*, Florida's PPRD-based parole scheme does not provide Class Members an opportunity for release when they reach the end of their twenty-five-year minimum, nor does it provide Class Members an opportunity for release at their Subsequent Review hearings every seven years thereafter. Instead, Defendants evaluate Class Members after they have served their 25-year minimums and then impose decades more incarceration before they ultimately

have their first consideration for release. (*See* Plaintiff's Br. at 26 (citing Doc. 104-3, p. 21-22 [A2372-73])). And unlike Missouri's system, Florida's parole decisions are based almost entirely on the underlying offense and criminal record, not the *Miller* factors designed to determine whether the crime reflected transient immaturity or irreparable corruption. *See infra* Section II. The Defendants' Subsequent Reviews, with barely a handful of exceptions, *add* time rather than subtract it from the first parole eligibility date. (Plaintiffs' Br. at 26 (citing Doc. 104-3, p. 29 [A2380])). The unrebutted factual record before this Court details that under Defendants' PPRD system, Class Members will be in their nineties (if they live that long) before they are considered for release. (*Id*. (citing Doc. 104-3, p. 20 [A2371])). Not one person—neither the sentencing judge nor the parole board members—has ever considered whether a Class Member's crimes reflect the transient immaturity of youth. *See infra* Section II. The plight of Class Members in Florida is far more dire than that of the individuals awaiting parole eligibility in *Bowling* and *Brown,* who were afforded substantially more generous and constitutionally appropriate parole opportunities and practices.

II. DEFENDANTS FAIL TO REBUT THE FACTUAL RECORD THAT PROVES FLORIDA'S PAROLE SYSTEM DENIES CLASS MEMBERS THEIR CONSTITUTIONAL RIGHT TO A MEANINGFUL OPPORTUNITY FOR RELEASE BASED ON MATURITY AND REHABILITATION

Without meaningfully addressing the record presented by Plaintiffs, Defendants offer a half-hearted argument that their parole system nonetheless meets constitutional scrutiny. But none of their arguments rebut the fact that Defendants have converted Class Members' presumptively constitutional JLWP sentences into unconstitutional *de facto* JLWOP sentences. As the record establishes, Class Members will be imprisoned into their nineties and beyond before the state of Florida even offers them the *chance* to be released. Through their PPRD system, Defendants have effectively ensured that Class Members will be "forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Montgomery*, 577 U.S. at 212.

First, Defendants wrongly suggest that the Supreme Court found in *Virginia v. LeBlanc*, 582 U.S. 91 (2017), that a state's "normal parole factors" satisfy the Eighth Amendment requirement for a meaningful opportunity for release. (Defendants' Br. at 25-26). While that was indeed Virginia's argument for why its geriatric release program satisfied *Graham*, the Supreme Court actually found that "there are reasonable arguments on both sides." *Leblanc*, 582 U.S. at 95 (quoting *White v. Woodall*, 572 U.S. 415, 427 (2014)). But the Court ultimately held that "[t]hese arguments cannot be resolved on federal habeas review," and thus the Court "'express[ed] no view on the

merits of the underlying' Eighth Amendment claim." *Id.* (quoting *Woods v. Donald*, 575 U.S. 312, 319 (2015)).

Relying on *Leblanc*, Defendants argue their use of "normal parole factors" for *all* parole eligible inmates satisfies the constitutional duty owed to Class Members. (Defendants' Br. at 26). Contrary to Defendants' assertion, the record does not establish that FCOR uses "normal parole factors" to make parole release decisions. While Plaintiffs do not even know what Defendants mean by "normal parole factors," FCOR certainly does not apply the numerous factors centered on the unique attributes of youth that were found constitutional in *Brown*. Nor does FCOR apply the type of *Miller*-specific factors contained in Florida's 2014 Juvenile Sentencing Statute which trial courts are required to apply. *See* (Plaintiffs' Br. at 13-17; Doc. 113, p. 2 [A3375]); Fla. Stat. Ann. § 921.1402(6). Consideration of those statutory factors has resulted in 98 out of 125 Juvenile Lifers being released when a meaningful opportunity for release was given to them through the judicial process. (Plaintiffs' Br. at 16 (citing Doc. 104-3, p. 28 [A2379])). Meanwhile, the factors listed by Defendants and prescribed in Rule 23-21.010, are only used to calculate a Class Member's PPRD—the date when a Class Member may ultimately be considered for parole release. Fla. Admin. Code R. 23-21.010. Indeed, the vast majority of Florida's parole rules and procedures are directed to setting the PPRD. (*See* Plaintiffs' Br. at 17-19; Doc. 113, pp. 2-5 [A3375-78]). It is actually unclear whether there are any standard factors that Defendants must apply

when making parole release decisions, and there is no statute or regulation that requires Defendants to consider the *Miller* factors when evaluating parole for Juvenile Lifers. The limited handful of Juvenile Lifers released to parole by FCOR confirms that Defendants' decisions are driven by the statutory requirement that Defendants "give primary weight to the seriousness of the offender's present criminal offense and the offender's past criminal record" and that parole should be treated as "an act of grace of the state." Fla. Stat. Ann. § 947.002.

Second, the Youthful Offender Matrix, which Defendants and the District Court assert support the contention that Defendants adequately consider the *Miller*-factors, (Defendants' Br. at 27-28; Doc. 136, p. 21 [A3420]), provides no such support. The Youthful Offender Matrix does not require consideration of a different set of criteria to evaluate Juvenile Lifers for parole release. Instead, the matrix relies on the same factors used to calculate an adult offender's PPRD, but it allows a few years to be shaved off for the starting point to set a PPRD for Juvenile Lifers. Fla. Admin. Code R. 23-21.009. As a matter of unrebutted fact, however, this apparent lessening of time under the Youthful Offender Matrix has had little impact because Defendants simply add decades of incarceration on top of the time allocated by the Youthful Offender Matrix based on aggravating factors tied to the original offense. (Plaintiffs' Br. at 43-44 (citing Doc. 104-3, p. 21 [A2372])). Moreover, Defendants do not even dispute that this Youthful Offender Matrix which the District Court placed a fair amount of weight

on, was never applied to half the Class. (Defendants' Br. at 27-28). Nor do Defendants dispute that under the prior matrix (which applied to half the Class), Juvenile Lifers actually received more time and were penalized for their youth. (Plaintiffs' Br. at 19 (citing Doc. 113, p. 3 [A3376])). Whether the Youthful Offender Matrix was used or not, the unrebutted facts are that Class Members on average will be imprisoned approximately 75 years before they have an opportunity to even be considered for parole release. (*Id*. at 26 (citing Doc. 104-3, p. 20 [A2371])).

Third, while Defendants correctly note that FCOR may consider one mitigating factor—the individual's youthful attributes—in calculating a Juvenile Lifer's PPRD, (Defendants' Br. at 26-27), this is purely discretionary; there is no requirement that youth actually be considered, Fla. Admin. Code R. 23-21.010(5). This is contrary to fifteen years of Supreme Court case law, which unequivocally requires the consideration of the mitigating factors of youth. *Jones*, 141 S. Ct. at 1316; *Miller*, 567 U.S. 480; *Montgomery*, 577 U.S. at 208. Moreover, while youth may be a discretionary factor for calculating the PPRD, like the Youthful Offender Matrix, there is nothing in the record to indicate it has any role to play in parole release decisions.

Fourth, Defendants testimony that they considered youth in making PPRD decisions should not receive any weight from this Court. Other than just saying they "consider youth," Defendants refused to answer any questions in their depositions about *how* youth is considered in their decision-making based on claims of quasi-

judicial immunity, (*see, e.g.*, Doc. 104-5, pp. 9, 18 [A2721, 2730]; Doc. 104-9, pp. 10-11, 14, 19-25 [A2899-2900, 2903, 2908-14]; Doc. 104-10, pp. 7-17 [A2984-94]), despite the Magistrate Judge ruling that Defendants were not entitled to such immunity, (Doc. 73, p. 5.) Moreover, while saying they considered "youth," Defendants acknowledged they were unfamiliar with the Supreme Court decisions outlining why youthful offenders must be treated differently from adult offenders and what the key developmental differences between youth and adults were. (Doc. 113, p. 6 [A3379]). They acknowledged they were unfamiliar with either the social science or neuroscience research upon which these decisions were based. (*Id.*) Unlike before a sentencing court, the Juvenile Lifers have no Sixth Amendment right to adequate representation to ensure that Defendants have the information and evidence necessary to properly evaluate whether a Class Member is one whose crime reflects transient immaturity and who has demonstrated maturity and rehabilitation to earn a right to reenter society and live some part of life outside prison walls. A statement that they "consider youth" therefore is meaningless.

Fifth, Defendants' release of just 23 out of 318 potential Class Members (170 current Class Members, plus 23 individuals who received parole post-*Miller,* plus 125 individuals who received resentencing under the 2014 Juvenile Sentencing Statute) does not demonstrate the constitutionality of their parole system. (*See* Defendant's Br. at 28; Doc. 104-3, p. 28 [A2379]). Class Members' constitutional rights do not turn on

whether any one Juvenile Lifer is ever released; their Eighth Amendment rights are violated whenever a Juvenile Lifer whose crime reflects transient immaturity is made to spend his or her entire life in prison. Florida's parole system fails to ensure that this assessment is ever undertaken. Instead, the PPRD system actually ensures that the vast majority of Class Members will ultimately die in prison — as the record below clearly shows.

III. FLORIDA'S PAROLE PROCESS DOES NOT PROVIDE CLASS MEMBERS DUE PROCESS UNDER THE FOURTEENTH AMENDMENT

A. Class Members Have A Liberty Interest In Parole

The District Court correctly held that youth offenders have "a constitutionally protected liberty interest in meaningful parole review." (Doc. 136, p. 24 [A3423] (quoting *Flores v. Stanford*, 18 CV 2468 (VB), 2019 WL 4572703, at *10 (S.D.N.Y. Sept. 20, 2019))). "[T]he constitutional protections recognized by *Graham*, *Miller*, and *Montgomery* apply to parole proceedings for juvenile offenders serving' imprisonment for life because the same logic applies with equal force even though the line of cases following Graham primarily dealt with sentencing." (*Id.* at 19 [A3418] (quoting *Flores*, 2019 WL 4572703, at *8)). In *Flores*, the court recognized that "a parole board is the vehicle through which the rights recognized in Graham, *Miller* and *Montgomery* are delivered" because "parole boards are uniquely empowered to deliver a juvenile lifer's 'categorical entitlement to 'demonstrate maturity and reform,' to show that 'he is fit to rejoin society,' and to have a 'meaningful opportunity for release.'" *Flores*,

2019 WL 4572703, at *9 (quoting *Greiman v. Hodges*, 79 F. Supp. 3d 933, 945 (S.D. Iowa 2015)). While states do not have to guarantee release, they must give youth offenders a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75; *Miller*, 567 U.S. at 479 (quoting *Graham*, 560 U.S. at 75).[4]

The "prior panel precedent rule" and prior Eleventh Circuit case law discussing the "right to parole" that Defendants rely on, (Defendants' Br. at 33-34), are not applicable in this case. The Eleventh Circuit has not directly ruled on whether Juvenile Lifers specifically have a liberty interest in a meaningful opportunity for release based upon demonstrated maturity and rehabilitation.[5] The District Court and several other courts have, however, recognized that youth offenders have a liberty interest in parole upon a showing of maturity and rehabilitation. *See Bonilla v. Iowa Bd. of Parole*, 930

[4] Defendants repeated reliance on *Jones* does not support the denial of Class Members' constitutional right to a meaningful opportunity for release. Again, *Jones* only ruled that courts do not have to make a specific finding of permanent incorrigibility before sentencing youth to life without parole. 141 S. Ct. at 1316. *Jones* did not, however, overrule the categorical entitlement to demonstrate maturity and rehabilitation given to youth in *Graham*, *Miller* and *Montgomery*. *See id.* at 1321.

[5] All cases cited by Defendants in support of their argument that class members do not have a liberty interest in parole are distinguishable from the case at hand as they all involve individuals who were adults at the time of their offense(s). *See Jones v. Ray*, 279 F.3d 944, 946 (11th Cir. 2001); *Damiano v. Fla. Parole & Prob. Comm'n*, 785 F.2d 929, 932 (11th Cir. 1986); *Cook v. Wiley*, 208 F.3d 1314, 1322 (11th Cir. 2000) (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983)); *Harrell v. Fla. Parole Comm'n*, 479 F. App'x 234, 236 (11th Cir. 2012) (citing *Damiano*, 785 F.2d at 931–32); *Hunter v. Fla. Parole & Prob. Comm'n*, 674 F.2d 847, 848 (11th Cir. 1982); *Staton v. Wainwright*, 665 F.2d 686, 688 (5th Cir. Unit B 1982).

N.W. 2d 751, 777 (Iowa 2019) (parole review 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*, 79 F. Supp. 3d at 94 ("[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.'" (quoting *Graham*, 560 U.S. at 79)); *Md. Restorative Just. Initiative v. Hogan*, No. ELH-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."); *see also Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 19 (1979) (Powell, J., concurring) ("I am convinced that the presence of a parole system is sufficient to create a liberty interest, protected by the Constitution, in the parole-release decision."); *Greenholtz,* 442 U.S. at 22 (Marshall, J., dissenting) ("[A]ll prisoners potentially eligible for parole have a liberty interest of which they may not be deprived without

due process, regardless of the particular statutory language that implements the parole system.").

Given their liberty interest in Parole, Class Members are entitled to relief under the due process clause of the Fourteenth Amendment.

B. Florida's Parole System Is Constitutionally Inadequate

At the outset, Defendants rely on *Swarthout* and *Greenholtz* to determine what process is due despite those cases being limited to whether adult offenders have state-created liberty interests in meaningful parole review, (Defendants' Br. at 36-39 (citing *Swarthout v. Cooke*, 562 U.S. 216, 220-21 (2011) and *Greenholtz*, 442 U.S. at 15-16)), while Plaintiffs rely on *Matthew v. Eldridge*, 424 U.S. 319 (1976), which properly applies to constitutionally created liberty interests. Regardless of the distinction, the legal standard applied to access due process in *Swarthout* and *Greenholtz* are not in conflict with *Eldridge*. The Supreme Court in *Eldridge* and *Greenholtz* recognized that due process is "flexible and calls for such procedural protections as a particular situation demands." *Eldridge*, 424 U.S. 319 at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481(1972)); *see also Greenholtz*, 442 U.S. at 12. The Court in *Eldridge*, *Greenholtz* and *Swarthout* recognized that the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time in a meaningful manner.'" *Eldridge*, 424 U.S. 319 at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *see Greenholtz*, 442 U.S. at 16; *Swarthout*, 562 U.S. 216 at 220.

Eldridge set forth factors that are "generally require[d]" to help "identify the specific dictates of due process." *Eldridge,* 424 U.S. at 334-35. *Greenholtz* cites to and echoes the *Eldridge* factors in stating that the "function" of due process is "to minimize the risk of erroneous decisions," that "flexibility is necessary to gear the process to the particular need, and that "the quantum and quality of the process due . . . depends upon the need to serve the purpose of minimizing the risk of error." *Greenholtz*, 442 U.S. at 13 (citing *Eldridge*, 424 U.S. 335); *cf. Eldridge*, 424 U.S. at 334-35. *Greenholtz* also based its analysis on whether the Court of Appeals mandated procedures were "required under the standards set out in *Matthews v. Eldridge* and *Morrissey v. Brewer*." 442 U.S. at 14 (citations omitted).

As demonstrated in Plaintiffs' initial brief, (Plaintiffs Br. at 46-47), the Florida parole system fails after considering the *Eldridge* factors. Even if, *arguendo*, *Swarthout* and *Greenholtz* were applied here, Florida's parole system still does not pass constitutional muster. In *Swarthout*, the Court found due process was adequate because Plaintiffs "were allowed to speak at their parole hearings and to contest evidence against them, were afforded access to their records in advance, and were notified as to the reasons why parole was denied." *Swarthout*, 562 U.S. at 220. In *Greenholtz,* the Court found that due process was adequate where parolees had an opportunity be heard and "when parole [was] denied it inform[ed] the inmate in what respects he f[ell] short of qualifying for parole." *Greenholtz*, 442 U.S. at 16. The

Greenholtz parolees also had yearly parole review hearings, and an interview with the parole board (versus a third-party investigator). *Id.* at 4-5. In the event the board scheduled a final hearing, parolees had the opportunity to appear, present evidence, call witnesses, be represented by counsel, and, if parole was denied, given a written statement of the reasons for denial. *Id.*

In contrast, under Florida's parole system, Class Members do not have an opportunity to be heard. While they can provide comments, documents and other statements to a third-party investigator, they cannot appear before the parole board to speak on their own behalf. (Doc. 113, p. 4 [A3377]). They do not receive their record before a parole hearing, thus they do not know the contents of their files and cannot "correct any errors." (*Id.*) FCOR does not interview Class Members but relies on statements presented by the investigator, which are often ignored and are not binding on the parole board. (*Id*. at 3-4 [A3376-77]).

Class Members also do not know why parole is denied. The boilerplate forms used by the Defendants simply list offenses and an ambiguous salient factor score that is also largely based on the underlying offense. (*Id*. at 2-4 [A2275-77]). Unlike in *Greenholtz*, Class Members are not given a reason for denial, outside of the weight of their prior offenses, nor are they given recommendations for improvement. Thus, even if *Swarthout* and *Greenholtz* were applicable, Florida's parole process falls well short of the process deemed adequate in those cases.

As individuals who were youths at the time of their offenses, Class Members are entitled to a meaningful opportunity for release and the opportunity to demonstrate maturity and rehabilitation. Since Florida's parole process denies Class Members these rights, it violates their due process rights under the Fourteenth Amendment.

CONCLUSION

Florida's parole system is unconstitutional as applied to Class Members. Requiring that they serve approximately 75 years in prison before they may even be considered for parole release is disproportionate punishment that unmistakably violates the Eighth and Fourteenth Amendments. The District Court's decision should therefore be reversed and the case remanded to allow the Court to fashion a remedy that ensures Class Members' constitutional rights are preserved.

Date: October 31, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(ii) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Eleventh Circuit Rule 32-4, this document contains 4,893 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: October 31, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2023, I electronically filed the foregoing with the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

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