No. 21-6011

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DWAIN EDWARD THOMAS,
Plaintiff-Appellant,

v.

KEVIN STITT, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Oklahoma,
Judge Timothy D. DeGiusti, No. 5:20-cv-00944-D

PLAINTIFF-APPELLANT'S OPENING BRIEF

EASHA ANAND
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
2443 Fillmore Street, #380-15875
San Francisco, CA 94115
(510) 588-1274
easha.anand@macarthurjustice.org

C. HARKER RHODES IV
LAUREN N. BEEBE
Counsel of Record
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 879-5000
harker.rhodes@kirkland.com
lauren.beebe@kirkland.com

Counsel for Plaintiff-Appellant Dwain Edward Thomas

ORAL ARGUMENT REQUESTED

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STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals in this Court. Thomas previously pursued post-conviction relief in the Oklahoma state courts, which the Oklahoma Court of Criminal Appeals denied in September 2019. Order Affirming Denial of Post-Conviction Relief, *Thomas v. State of Okla.*, No. PC-2019-116 (Okla. Crim. App. Sept. 6, 2019).

GLOSSARY

Abbreviation	Definition
BOC	Oklahoma Board of Corrections
DOC	Oklahoma Department of Corrections
JCAP	[Colorado's] Juveniles Convicted as Adults Program
OP	Operations Procedure
Parole Board or Board	Oklahoma Pardon and Parole Board

INTRODUCTION

The Eighth Amendment's prohibition on "cruel and unusual punishments" prohibits imposing a mandatory sentence of life imprisonment without parole on an individual convicted of crimes committed as a juvenile. In 1997, Dwain Edward Thomas was sentenced—pursuant to Oklahoma's mandatory sentencing scheme and without an individualized sentencing decision—to three sentences of life imprisonment for crimes committed when he was 15 years old. It is undisputed that if Thomas received a mandatory sentence of "life without parole," he would be entitled to relief under *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016). The question in this appeal is whether the state can circumvent those constitutional protections and avoid being held responsible under 42 U.S.C. §1983 by purporting to make Thomas and others like him nominally eligible for "parole," but then relegating them to a system that operates not as parole but as an *ad hoc* system of executive clemency, untethered from any substantive, enforceable standards and offering no meaningful opportunity for juvenile offenders to obtain release based on demonstrated maturity or rehabilitation.

The Supreme Court's juvenile-sentencing precedents compel the conclusion that Oklahoma's "parole" system—which operates as a *de facto* system of life without parole for juvenile offenders—is unconstitutional. As the Supreme Court's precedents make clear, curing a *Miller* violation requires either resentencing (with

an individualized sentencing decision based on consideration of the individual's youth and attendant characteristics), or else affording "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham v. Florida*, 560 U.S. 48, 75 (2010); *Miller*, 567 U.S. at 479. Applying these teachings, this Court has already recognized that the Constitution's protections—particularly in this context—"do not depend upon a legislature's semantic classifications" and cannot be circumvented "merely because the state does not label [a particular life sentence] as 'life without parole.'" *Budder v. Addison*, 851 F.3d 1047, 1056 (10th Cir. 2017). And both this Court and the Oklahoma Court of Criminal Appeals (the state's court of last resort for criminal matters) have recognized that a system of "executive clemency," which is all Oklahoma effectively affords, is constitutionally "inadequate" to remedy a *Miller* violation. *Rainer v. Hansen*, 952 F.3d 1203, 1209 (10th Cir. 2020); *Luna v. State*, 387 P.3d 956, 962 (Okla. Crim. App. 2016). Federal and state courts across the country have agreed, holding that mandatory life sentences for juveniles still implicate *Graham*, *Miller*, and *Montgomery*, even if the state avoids describing them as "life without parole."

In short, Thomas has plausibly alleged severe constitutional flaws with the Oklahoma parole system. In light of those allegations, the district court erred by dismissing his suit at the 28 U.S.C. §1915A "screening" stage. This Court should reverse the district court's decision and allow Thomas's claims to proceed.

JURISDICTIONAL STATEMENT

Thomas timely appealed from the district court's December 21, 2020 dismissal of his complaint for failure to state a claim upon which relief can be granted. *See* 12/21/2020 Order Adopting Suppl. R. & R. ("Order"), App.107-113; *Thomas v. Stitt*, 2020 WL 7489763 (W.D. Okla. Dec. 21, 2020); 12/21/2020 Judgment, App.114; 01/25/2021 Notice of Appeal, App.115-116.[1] The district court had jurisdiction under 28 U.S.C. §§1331, 1343, 1367, and 2201, and this Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether a state may circumvent the Eighth Amendment by purporting to make individuals serving mandatory life sentences for crimes committed as juveniles eligible for "parole," when the state's parole system operates as an *ad hoc* system of executive clemency that is untethered from any substantive, enforceable standards and offers no meaningful opportunity for juvenile offenders to obtain release based on demonstrated maturity and rehabilitation.

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[1] Record citations include a description of the document and the Appendix page number and, where relevant, the paragraph number—*e.g.*, "Document, App.__ (¶__)." *See* 10th Cir. R. 28.1(A).

STATEMENT OF THE CASE

A. Legal Background

1. The Eighth Amendment's Prohibition on "Cruel and Unusual Punishments" and the Corresponding Constitutional Protections for Juvenile Offenders

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII; *see Wilson v. Seiter*, 501 U.S. 294, 296-97 (1991). Over the past two decades, the Supreme Court has made clear that the Eighth Amendment's prohibition on cruel and unusual punishments provides specific protections for juvenile offenders, meaning those convicted of crimes committed when they were under the age of 18. In particular, the Eighth Amendment prohibits sentencing a juvenile offender to a mandatory sentence of life without parole—that is, a mandatory sentence that requires the juvenile to remain in prison for the rest of his natural life, with no meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. These principles have developed across a series of cases involving juvenile offenders.

In *Roper v. Simmons*, the Court articulated three critical "differences between juveniles under 18 and adults" that make juvenile offenders "categorically less culpable than the average criminal." 543 U.S. 551, 567, 569 (2005). First, "as any parent knows and as the scientific and sociological studies … tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young,'" and these

"qualities often result in impetuous and ill-considered actions and decisions." *Id.* at 569. Indeed, "adolescents are overrepresented statistically in virtually every category of reckless behavior," and, in "recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." *Id.* Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," which "is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment." *Id.* Third, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* at 570. Because juveniles are "categorically less culpable than the average criminal" and "cannot with reliability be classified among the worst offenders," the Court held that Eighth Amendment prohibits the execution of individuals who were under 18 years of age at time of their capital crimes. *Id.* at 567-69.

The lesser culpability of juvenile offenders not only means that the death penalty is always a "disproportionate punishment" (and thus is categorically prohibited) for juvenile offenders, *id.* at 575, but it also has implications for other severe punishments. One of those punishments is a sentence of life without parole, defined as a sentence of life imprisonment without "some meaningful opportunity

to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. Five years after *Roper*, the Court held in *Graham* that the Eighth Amendment prohibits sentencing juvenile offenders convicted of nonhomicide offenses to life without parole. The Court explained that a "sentence of life imprisonment without parole … cannot be justified by the goal of rehabilitation," because it "forswears altogether the rehabilitative ideal." *Id.* at 74. And it determined that the categorical denial of "the right to reenter the community" is "not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability." *Id.* *Graham* also recognized that "the remote possibility" that a juvenile offender sentenced to life imprisonment may be able to obtain release at some point "by executive clemency … does not mitigate the harshness of the sentence." *Id.* at 70 (citing *Solem v. Helm*, 463 U.S. 277, 300-01 (1983)).

Two years after *Graham*, the Court held in *Miller* that the Eighth Amendment prohibits imposing a mandatory sentence of life imprisonment without parole on any juvenile offenders, including one convicted of homicide. 567 U.S. at 470, 479. Relying on *Roper* and *Graham*, the Court emphasized that "children are constitutionally different from adults for purposes of sentencing," reaffirming the "three significant gaps between juveniles and adults" from *Roper*. *Id.* at 471. The Court reiterated that "children 'are more vulnerable … to negative influences and outside pressures,' including from their family and peers," "have limited 'contro[l]

over their own environment,'" and "lack the ability to extricate themselves from horrific, crime-producing settings." *Id.* (alterations in original). Overall, the Court "emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* at 472. And while the Court recognized that "*Graham*'s flat ban on life without parole applied only to nonhomicide crimes," it also underscored that "none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." *Id.* at 473. Instead, those same "features are evident in the same way, and to the same degree," across all offenses committed by juveniles. *Id.* In short, "*Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." *Id.* For that reason, the Court held that "mandatory penalty schemes" that "remov[e] youth from the balance" and "prevent the sentencer from taking account of these central considerations" are unconstitutional. *Id.* at 473-74.

Montgomery subsequently held that the rule announced in *Miller* was a new substantive rule that, under the Constitution, must apply retroactively. 577 U.S. at 206-12. The Court explained that the "'foundation stone' for *Miller*'s analysis was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles." *Id.* at 206. And it reaffirmed the "central intuition" of *Miller*:

"that children who commit even heinous crimes are capable of change." *Id.* at 212. Based on the recognition that "children are constitutionally different from adults in their level of culpability," it reiterated that those who were convicted as juveniles "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id.* at 213.

Most recently, the Supreme Court considered whether a court sentencing a juvenile homicide offender under a discretionary (and not mandatory) sentencing scheme must make a specific factual finding of "permanent incorrigibility" before it may impose a sentence of life without parole. The Court held that a specific factual finding of "permanent incorrigibility" is not required because *Miller* "mandate[s] 'only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence," and *Montgomery* "flatly stated that '*Miller* did not impose a formal factfinding requirement' and added that 'a finding of fact regarding a child's incorrigibility … is not required.'" *Jones v. Mississippi*, 141 S.Ct. 1307, 1311 (2021). It is enough if the sentencer who "acknowledge[s] his sentencing discretion under *Miller* … consider[s] an offender's youth and attendant characteristics." *Id.* Notably, *Jones* did not overrule any of the Court's prior cases in this area; it simply enforced *Miller*'s and *Montgomery*'s rejection of a formal factfinding requirement.

See id. at 1313-15, 1317; *id.* at 1321 ("Today's decision does not overrule *Miller* or *Montgomery*.").

2. Oklahoma's Corollary Constitutional Prohibition on "Cruel or Unusual Punishments"

Similar to the Eighth Amendment of the U.S. Constitution, Article II, §9 of the Oklahoma Constitution prohibits "cruel or unusual punishments." Okla. Const. art. II, §9 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."). The Oklahoma Constitution's use of the disjunctive "or" (rather than the conjunctive "and") suggests, as a textual matter, that its prohibition on "cruel *or* unusual punishments" is broader in scope than the U.S. Constitution's prohibition on "cruel *and* unusual punishments." *Compare* Okla. Const. art. II, §9, *with* U.S. Const. amend. VIII. A legislature's (or constitutional convention's) "specific choice of … words … is noteworthy," *United States v. Burkholder*, 816 F.3d 607, 614 (10th Cir. 2016), and the use of "different language … strongly suggests a different meaning at work," *Elwell v. Okla. ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1307 (10th Cir. 2012). As relevant here, the disjunctive "or" shows that the Oklahoma Constitution prohibits punishments that are *either* "cruel" *or* "unusual," whereas the U.S. Constitution prohibits only punishments that are *both* "cruel" *and* "unusual."

State courts interpreting similar state constitutional prohibitions on "cruel or unusual" punishments have reached the commonsense conclusion that the "textual

difference does not appear to be accidental or inadvertent" and "might well lead to different results" because "a 'significant textual difference [ ] between parallel provisions of the state and federal constitutions' may constitute a 'compelling reason' for a different and broader interpretation of the state provision." *People v. Bullock*, 485 N.W.2d 866, 872 (Mich. 1992). After all, "it seems self-evident that any adjectival phrase in the form 'A *or* B' necessarily encompasses a broader sweep than a phrase in the form 'A *and* B,'" and so the "set of punishments which are *either* 'cruel" *or* 'unusual' would seem necessarily broader than the set of punishments which are *both* 'cruel' *and* 'unusual.'" *Id.* at 872 n.11; *see also, e.g.*, *People v. Esver*, 2015 WL 5698520, at *6 n.5 (Cal. Ct. App. Sept. 29, 2015) ("California's constitutional prohibition [on cruel or unusual punishment] is, thus, even broader than the federal prohibition against cruel and unusual punishment."); *cf. State v. Vestal*, 2006 WL 1075474, at *7 (Wash. Ct. App. Apr. 25, 2006) ("The Washington constitutional provision barring cruel punishment provides more protection than the federal constitution's prohibition against cruel and unusual punishment.") (citing *State v. Thorne*, 921 P.2d 514, 531 (Wash. 1996)).

To be sure, Oklahoma courts have generally treated the federal and state constitutional analyses as one and the same. *See, e.g.*, *Davison v. State*, 478 P.3d 462, 469-70 (Okla. Crim. App. 2020); *Brown v. State*, 422 P.3d 155, 177 (Okla. Crim. App. 2018). This apparent parallelism includes cases arising in the juvenile-

sentencing context. *See, e.g.*, *Luna*, 387 P.3d 956. At the same time, at least some Oklahoma judges have suggested that Oklahoma's constitutional protection against cruel or unusual punishments may indeed be broader than its federal counterpart: "Oklahoma's corollary clause offers more protection [than the Eighth Amendment] as evidenced by the fact that it is written in the disjunctive instead of the conjunctive. Thus, a sentence need only be cruel *or* unusual to offend the Oklahoma Constitution." *Paxton v. State*, 867 P.2d 1309, 1333 n.5 (Okla. Crim. App. 1993) (Chapel, J., dissenting); *see also, e.g.*, *Lambert v. State*, 984 P.2d 221, 244 & n.30 (Okla. Crim. App. 1999) (Chapel, P.J., concurring in part and dissenting in part); *Dodd v. State*, 879 P.2d 822, 828-30 (Okla. Crim. App. 1994) (Chapel, J., concurring in part and dissenting in part, joined by Strubhar, J.). The Oklahoma Court of Criminal Appeals, meanwhile, has declined to specifically take a position on the issue. For example, one litigant challenging Oklahoma's lethal-injection scheme specifically "invoke[d]" the federal and state "constitutional provisions separately, contending that Oklahoma's ban on 'cruel *or* unusual' punishment provides more protection than the federal constitution's ban on 'cruel *and* unusual' punishment"; but the Court of Criminal Appeals avoided the issue by holding that Oklahoma's lethal-injection procedure was acceptable under either measure. *Smith v. State*, 306 P.3d 557, 579 n.23 (Okla. Crim. App. 2013). Whether Oklahoma's constitutional prohibition on "cruel or unusual punishments" is broader than the U.S.

Constitution's prohibition on "cruel and unusual punishments" thus remains an open question under Oklahoma law.[2]

3. The Oklahoma "Parole" System

On paper, Oklahoma permits juveniles convicted of homicide and sentenced to life imprisonment to become eligible for parole after serving a certain percentage of their life sentence. *See* Okla. Stat. tit. 57, §332.7. That paper promise, however, is implemented by a flawed system that acts as a *de facto* system of life without parole subject only to the whims of *ad hoc* executive clemency.

As relevant here, individuals whose crimes were committed before July 1, 1998 become eligible for parole consideration either after serving one-third of the actual sentence imposed, *id.* §332.7(A)(1), or after reaching a certain percentage of the mid-point of a sentencing matrix for the crime, *id.* §332.7(A)(2)-(4), whichever comes first. *See also* Okla. Admin. Code §515:3-3-1(a).[3] Because a "life" sentence is not a term of years from which it is possible to readily "deduce one-third of its

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[2] For the reasons set forth in this brief, Thomas's complaint states a claim under the Eighth Amendment. To the extent this Court determines that the Eighth Amendment claim presents a close question, however, it may be appropriate to certify the state constitutional question to the Oklahoma Court of Criminal Appeals pursuant to Okla. Stat. tit. 20, §1602.

[3] There are different classes of eligibility criteria for crimes committed between July 1, 1998 and November 1, 2018, Okla. Stat. tit. 57, §332.7(B), or after November 1, 2018, *id.* §332.7(C). *See also* Okla. Admin. Code §515:3-3-2.

passage," the Oklahoma Pardon and Parole Board ("Parole Board" or "Board") uses 45 years as its benchmark to calculate when an individual sentenced to life imprisonment becomes eligible for parole consideration. *See* 10/30/2020 Suppl. R. & R. ("R. & R."), App.65; *Thomas v. Stitt*, 2020 WL 7702180, at *2 (W.D. Okla. Oct. 30, 2020) (collecting cases). This means that an individual sentenced to life imprisonment becomes eligible for parole consideration after serving 15 years (one-third of 45 years).

In practice, however, Oklahoma's parole system operates as a system of *ad hoc* executive clemency. The Parole Board makes recommendations only, and the governor must sign off on any parole decisions. *See* Okla. Stat. tit. 57, §332; *see also* Okla. Const. art. VI, §10. The statutory text contemplates that the governor's parole power may be constrained by "regulations prescribed by law and the provisions of Section 10 of Article VI of the Oklahoma Constitution." Okla. Stat. tit. 57, §332. But while the Board has enacted certain provisions involving clemency hearings, commutation procedures, and pardon procedures, *see* Okla. Admin. Code §515 *et seq.*, there are no meaningful constraints or enforceable standards for parole procedures or the Governor's exercise of his clemency powers.

As to parole procedures, the regulations only govern "the establishment of initial parole docket dates" and "dates for the reconsideration of persons denied

parole." *See id.* §515:3-1-1(b). The sole regulation concerning the consideration process simply provides:

> (a) Timing. Offender convicted of a violent offense shall have the first stage of their parole hearing conducted during the regular meeting of the Pardon and Parole Board two months prior to the offender's initial eligibility date.
>
> (b) Two-stages. Parole hearings for offender convicted of a violent offense shall be conducted in two stages.
>
> > (1) During stage one the Pardon and Parole Board will vote on whether or not to pass the offender to stage two for parole consideration.
> >
> > (2) During stage two the Pardon and Parole Board will vote to determine whether parole is recommended for the offender.

Id. §515:3-5-2. The first stage is referred to as a "jacket review." *Id.* §515:3-1-2 ("'Jacket Review' means the review of the investigative report for the offender, as well as other material sent to the members of the Board, and is applied to those offenders that do not meet personal appearance criteria as determined by the Policy and Procedures Manual."); 09/17/2020 Civil Compl. for Declaratory & Injunctive Relief ("Compl."), App.28 (¶83 & n.4).

The Board's evaluation and recommendation process provides no evidentiary rules, no right to obtain expert assistance or testimony, no cross-examination, no compulsory process, and no assistance of counsel. *See* Compl., App.28 (¶83). No specific factors must be considered, the inmate has no right to challenge the accuracy

of any information in the Board's file, and the Board is not required to provide any verbal or written explanation of its decision. Indeed, Board policies *prohibit* inmates from obtaining key information in their own files, including recommendations of the sentencing judge, state attorney, or case manager; Board member notes; victim statements; or risk assessments. *Id.*, App.28-29 (¶¶83-84); *see* Okla. Admin. Code §515:1-3-2(a)-(d).

There are no distinctions or accommodations in the parole process for individuals who committed crimes as juveniles. Instead of making special allowances for juvenile offenders that recognize their capacity for growth, the Board's practices penalize juvenile offenders by relying on "risk-assessment tools" that assess the individual as if frozen in time upon their arrival to DOC and take no account of juvenile offenders' maturation over time, accomplishments, or institutional record. Compl., App.13, 22, 29-30, 36-37, 39-42 (¶¶17, 58, 86, 107, 119, 124, 131).

The governor's discretion is even more unconstrained. As a matter of Oklahoma law, the authority to parole any person sentenced to life imprisonment lies exclusively in the hands of the governor. Okla. Stat. tit. 57, §332; Okla. Const. art. VI, §10; Compl., App.13, 19-20, 22 (¶¶17, 47, 57). There are no constraints whatsoever on the governor's discretion. Even if the Board recommends a specific individual for release, the governor can reject it for any reason, without any

explanation, and without any opportunity for review. *See* Compl., App.38 (¶112). There are no factors or guidelines that the governor must consider in making his decisions, nor any criteria that the governor is even urged to consider, and his decisions are masked from view by blanket assertions of executive privilege. *See id.*, App.13, 19-20, 30, 40, 42 (¶¶17, 47, 87, 122, 129).

In short, there are no statutory provisions or regulations that establish any substantive, enforceable standards to govern the parole consideration process, and no meaningful limits or constraints on the governor's authority, nor factors or guidelines that the governor must consider. As a result of this system, grants of release are exceptionally rare, especially for those who were convicted of violent offenses. Inmates who were convicted of violent offenses are routinely denied parole based on the circumstances of their underlying offense(s)—*i.e.*, the "aggravating factors associated with the original crime"—regardless of their subsequent conduct. *See, e.g.*, Compl., App.36 (¶107); 12/02/2020 Pl.'s Obj. to Magistrate Judge's Suppl. R. & R. ("Obj. to R. & R."), App.82 (¶11). That is true even for inmates who were juveniles at the time of the original crime, even for those with an unblemished institutional record while imprisoned, and regardless of any demonstrated maturity or rehabilitation.

Unsurprisingly, the Prison Policy Initiative gave Oklahoma's parole system an "F' grade, specifically noting that Oklahoma does not have any "presumptive

parole policies at all," is "completely discretionary," lacks any "guidelines," and has no meaningful appeal process. *See* Jorge Renaud, Prison Policy Initiative, *Grading the Parole Release Systems of All 50 States* (Feb. 26, 2019), https://bit.ly/3bCNZfJ; *see also id.* at Appendix A, https://bit.ly/2S82qkS.

B. Factual Background

Nearly 25 years ago—long before the Supreme Court began to clarify the contours of the Eighth Amendment as applied to juvenile offenders—Thomas pleaded guilty to three counts of first-degree murder.[4] Under the mandatory sentencing scheme applicable at the time, he was sentenced to three sentences of life imprisonment. Compl., App.6-7 (¶1); Obj. to R. & R., App.79 (¶1). The sentencing options under Oklahoma law for first-degree murder require a mandatory sentence of (1) "death," (2) "life imprisonment without parole," or (3) "life imprisonment." Okla. Stat. tit. 21, §701.10(A); *see also id.* §701.9 ("A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death, by imprisonment for life without parole or by imprisonment for life.").

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[4] Thomas's guilty plea did not knowingly or voluntarily waive his later-recognized Eighth Amendment rights under *Graham*, *Miller*, or *Montgomery*. *See Stevens v. State*, 422 P.3d 741, 747-48 (Okla. Crim. App. 2018) ("We refuse to find that Petitioner waived his rights under *Miller* when he entered his guilty plea. Petitioner could not have been aware that he had the right to an individualized sentencing hearing because this right was not recognized until the Supreme Court announced it in *Miller*.").

Thomas was 15 years old at the time of the crimes and had no prior criminal record. *See* Compl., App.38 (¶113). He was sentenced to a mandatory sentence of life imprisonment without any kind of individualized sentencing decision based on consideration of his youth and attendant characteristics. *Id.*, App.7, 38 (¶¶1, 113); *see also* Obj. to R. & R., App.80 (¶2). Nothing in Thomas's record suggests, nor was any finding ever made, that his crime reflected that he was among the "rarest juvenile[s] whose crime reflects permanent incorrigibility." Compl., App.37 (¶110).

Thomas has now spent more than 25 years—more than half of his entire life to date—incarcerated for crimes committed when he was 15 years old. *Id.*, App.37 (¶109). While incarcerated, Thomas has demonstrated good behavior and been a model citizen. Indeed, throughout the past two decades, Thomas has received "Excellent" or "Outstanding" ratings in all aspects of the "current patterns of behavior" section of his periodic Department of Corrections ("DOC") "Adjustment Review." *Id.*, App.39 (¶¶117-18). These aspects include "relationships with staff, participation in assigned programs, job performance, relationships with other inmates, maintenance of personal hygiene, maintenance of living quarters, and program job performance." *Id.*, App.39 (¶118). Since at least 2003, Thomas has maintained "Level IV" privilege status—the highest level an inmate may achieve in accordance with Operations Procedure ("OP")-060107. *Id.*, App.7 (¶1). He also has maintained an "Outstanding" evaluation average for his Monthly Inmate Evaluation

Time Credit Report—the highest rating an inmate may receive in accordance with OP-060211. *Id.* An "Outstanding" rating is achieved by receiving an evaluation of 45-50 points. Not only has Thomas received an "Outstanding" rating, but he has done so by receiving a 50-point score average. *Id.* Thomas works as a technician for the facility maintenance department; a position he has held for more than 18 years. *Id.* He has also completed or achieved significant certifications and programs. *See id.*

Because he is serving a life sentence, Thomas was automatically designated as "maximum" security when he first arrived in the DOC. *See id.*, App.38 (¶113). Since then, Thomas has progressed to "medium" security based on his demonstrated good behavior, but he is categorically prohibited from progressing to a lower security level because of his life sentence. *See id.*, App.38-40 (¶¶114-16, 119). Thomas has been identified as a strong candidate for progression to lesser security, but has been denied this opportunity solely because of his life sentence. *See id.*; Obj. to R. & R., App.79. If Thomas were able to progress to a lower security level commensurate with his impeccable institutional record and steady employment, he would be able to demonstrate further his rehabilitation and maturity by participation in community-corrections, work-release, and family-leave programs. Compl., App.39-40 (¶¶116, 119).

As a result of this demonstrated good behavior, Thomas's parole investigator has given favorable recommendations to the Parole Board. *See id.*, App.37 (¶111). Year after year, DOC classification counselors assessing Thomas's readiness for parole have noted his "excellent" record and have observed that "the only issue hindering his release is the State's parole system." *Id.*, App.38 (¶114); Obj. to R. & R., App.79. To date, Thomas has been considered for parole on four occasions, Obj. to R. & R., App.82 (¶11), and he is scheduled to be considered again in October 2022. Despite his excellent record and favorable recommendations, Thomas has never progressed past the first stage of "jacket review." The (limited) information he has received about the Board's decision indicates that he has been denied parole each time due solely to the "aggravating factors associated with the original crime." *See* Compl., App.13, 26, 36 (¶¶16, 73, 107); Obj. to R. & R., App.82 (¶11).

C. Procedural History

In September 2020, Thomas filed a *pro se* civil complaint against the Governor of Oklahoma, the Executive Director of the Oklahoma Pardon and Parole Board, the chair of the Oklahoma Board of Corrections, and the director of the Oklahoma Department of Corrections. Compl., App.8-10 (¶¶2-5). His three-count complaint challenges the constitutionality of his mandatory life sentence in light of Oklahoma's inadequate parole system, and seeks declaratory and injunctive relief. In particular, Thomas: (1) asserts a §1983 claim based on the Eighth Amendment;

(2) asserts an analogous state-law claim based on Article II, §9 of the Oklahoma Constitution, which prohibits "cruel or unusual punishments"; and (3) seeks a declaratory judgment that, *inter alia*, Okla. Stat. tit. 57, §332.7 is unconstitutional as applied to persons who were juveniles at the time of their offenses. Compl., App.43-45. The core of Thomas's complaint is that "Oklahoma's parole scheme functions as a system of *ad hoc* executive clemency in which grants of release are exceptionally rare, are governed by no substantive, enforceable standards, and are masked from view by blanket assertions of executive privilege," and that the system thus operates as a *de facto* system of life without parole for juveniles convicted of homicide. *See id.*, App.13-14 (¶¶17-18).[5]

Under 28 U.S.C. §1915A(a), a district court "shall review" any "complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity," and, on review, may dismiss the complaint (or any portions thereof) if it "is frivolous, malicious, or fails to state a claim upon which relief may be granted," *id.* §1915A(b)(1). At the §1915A screening stage, the district court referred the case to a magistrate judge in accordance with 28 U.S.C.

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[5] When Thomas filed his complaint, he also moved to proceed in forma pauperis. 09/17/2020 Appl. for Leave to Proceed In Forma Pauperis, App.48-52. The district court referred the case to a magistrate judge, 09/18/2020 Order Referring Case to Magistrate Judge Gary M. Purcell, App.53, who recommended that the district court deny Thomas's motion, 09/22/2020 R. & R., App.54-55, and the district court denied Thomas's motion on October 7, 2020, 10/07/2020 Order Adopting R. &. R., App.56.

§636. 10/16/2020 Order Referring Case to Magistrate Judge Gary M. Purcell, App.58.

Just two weeks later, the magistrate judge released a 12-page report and recommendation recommending that Thomas's complaint be dismissed in its entirety. *See* R. & R., App.59-70; *Thomas*, 2020 WL 7702180. The magistrate judge determined that the constitutional guarantees set forth in cases like *Graham*, *Miller*, and *Montgomery* were inapplicable to Thomas because he was not sentenced to life without parole, relying on the fact that Thomas's complaint discussed "multiple instances of being considered for parole." R. & R., App.64-65; *Thomas*, 2020 WL 7702180, at *2-3. The magistrate judge entirely failed to grapple with the heart of Thomas's complaint, which is that Oklahoma's parole system—while on paper permitting parole—operates in practice as a *de facto* system of life without parole, and fails to afford juveniles sentenced to life imprisonment with any meaningful opportunity to obtain release by demonstrating rehabilitation. After concluding that Thomas "cannot establish an Eighth Amendment violation," the magistrate judge recommended that the district court "decline to exercise its jurisdiction" to resolve Thomas's declaratory-judgment claim, and that it should also decline to exercise supplemental jurisdiction over Thomas's state-law claim. R. & R., App.66-69; *Thomas*, 2020 WL 7702180, at *3-5.

Still proceeding *pro se*, Thomas filed objections to the magistrate judge's report and recommendation. Obj. to R. & R., App.77-106. He objected to the report "overall and its conclusion that, 'on screening,' and pursuant to 28 U.S.C. § 1915A, his Complaint fails to state a valid claim for relief." *Id.*, App.77. Thomas explained how the report failed to "address the merits or substance of [the] claims presented in his Complaint," and reiterated his contention that Oklahoma's "parole scheme … fails to afford him, as well as all those serving parole-eligible life sentences for offenses committed as youth, a meaningful and realistic opportunity for release as required by the Eighth Amendment." *Id.*, App.78. He explained: "The thrust of Plaintiff's Complaint is that Defendants are responsible for a scheme that calls itself 'parole,' but that operates in practice as a system of executive clemency in which opportunities for release and the grant of parole are extremely rare." *Id.* The Oklahoma parole system, Thomas explained, cannot be reconciled with Supreme Court precedents interpreting the Eighth Amendment to prohibit a "sentence that, in effect, is the functional equivalent of life without parole" for "all but the rarest youth." *Id.*

The district court overruled Thomas's objections and adopted the magistrate's report and recommendation "in its entirety," and also provided a short, 7-page decision of its own. Order, App.112; *Thomas*, 2020 WL 7489763, at *3. Unlike the magistrate judge, the district court at least recognized "[t]he crux of [Thomas's]

objection," which it characterized as an argument "that, as a juvenile offender, *Graham*, *Miller*, and *Montgomery* require that he receive more than just parole consideration—he must receive a meaningful opportunity to obtain release," and that "Oklahoma's parole system … fails to provide him a meaningful opportunity because it functions like an arbitrary system of executive clemency and relies on unfair assessment tools." Order, App.110; *Thomas*, 2020 WL 7489763, at *2. But the district court nonetheless held that Thomas "failed to state a viable Eighth Amendment claim" because the constitutional requirements articulated in *Graham* "do not extend to juvenile homicide offenders," and neither *Miller* nor *Montgomery* "expanded existing parole procedures for persons convicted as juveniles." Order, App.110-11; *Thomas*, 2020 WL 7489763, at *2-3. That is, the district court held that as long as a state on paper offers a purported "parole" system for juvenile homicide offenders, that state has satisfied its constitutional obligations even if that system operates as a wholly arbitrary system of *ad hoc* executive clemency that provides no meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. The district court then declined to exercise jurisdiction over Thomas's declaratory-judgment or state-law claims, and dismissed his complaint. Order, App.111-12; *Thomas*, 2020 WL 7489763, at *3.

SUMMARY OF THE ARGUMENT

The Supreme Court's juvenile-sentencing precedents make clear that the Eighth Amendment's prohibition on "cruel and unusual punishments" means that the Constitution "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 567 U.S. at 479. Accordingly, all juvenile offenders—including those convicted of homicide offenses—are constitutionally entitled to individualized sentencing decisions based on consideration of the offender's youth and attendant characteristics. *See id.* at 465, 476-78; *Montgomery*, 577 U.S. at 209-11.

When Thomas was sentenced in 1997 for crimes committed when he was 15 years old, he was sentenced to three life sentences pursuant to Oklahoma's mandatory sentencing scheme, Okla. Stat. tit. 21, §701.9. It is clear that Thomas did not receive the individualized sentencing decision based on consideration of his youth and attendant characteristics that the Supreme Court has since held is required. It is equally clear, even after *Jones*, that such mandatory sentences violate the Eighth Amendment, and that the ban on mandatory sentences applies retroactively. Accordingly, it should be clear that, if Oklahoma's parole system operates in a way that subjects Thomas to the functional equivalent of a mandatory sentence of life without parole, he is entitled to relief.

In particular, *Montgomery* requires that juvenile offenders "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." 577 U.S. at 213. The remedy for a *Miller* violation is thus either (1) resentencing, or (2) "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75; *see also Miller*, 567 U.S. at 479; *Montgomery*, 577 U.S. at 213. The dispositive question in this appeal is whether the state can bypass that constitutional framework by deeming juvenile offenders sentenced to life imprisonment "eligible" for "parole" even though the state's "parole" system operates as an *ad hoc* system of executive clemency that vests the Parole Board and governor with complete and unfettered executive discretion, is untethered from any substantive, enforceable standards, and offers no meaningful opportunity for juvenile offenders like Thomas to obtain release based on demonstrated maturity and rehabilitation.

The district court's holding endorses precisely that result, proclaiming that individuals sentenced to mandatory life sentences for crimes committed as juveniles do not come within the ambit of the Eighth Amendment protections articulated in *Graham*, *Miller*, and *Montgomery* so long as the state purports to extend even a wholly illusory "eligibility" for "parole." As this Court has made clear, the Constitution's protections "are not so malleable." *Budder*, 851 F.3d at 1056.

Thomas's complaint plausibly alleges myriad deficiencies with Oklahoma's parole system that, if proven, demonstrate that "parole" eligibility or consideration exists in name only for juveniles convicted of homicide offenses. Because Thomas's complaint alleges facts plausibly showing that the Oklahoma parole system operates as a *de facto* system of life without parole for juveniles convicted of homicide, the district court was wrong to conclude—at the preliminary 28 U.S.C. §1915A "screening" stage—that Thomas's extensive allegations fail to state a viable Eighth Amendment claim. Order, App.111; *Thomas*, 2020 WL 7489763, at *3.

Taking Thomas's allegations as true, he has plausibly alleged that Oklahoma's parole system operates in a way that subjects juvenile offenders sentenced to mandatory life sentences to *de facto* (and unconstitutional) mandatory sentences of life without parole. The Supreme Court, this Court, and the Oklahoma Court of Criminal Appeals have all recognized that the "remote possibility" of release "by executive clemency," *Graham*, 560 U.S. at 70, is constitutionally "inadequate" to remedy a *Miller* violation "because it affords the governor complete discretion to approve or deny an offender's application," *Rainer*, 952 F.3d at 1209; *see also Luna*, 387 P.3d at 962. Thomas's factual allegations are more than sufficient to survive dismissal on the pleadings and entitle him to an opportunity to prove his claims. Instead, based on a misunderstanding of Thomas's claims and an exceedingly narrow misapplication of the Supreme Court's juvenile-sentencing precedents that

is inconsistent with this Court's decisions in *Budder* and *Rainer*, the district court wrongly denied Thomas any opportunity to demonstrate the significant and unconstitutional failings in the Oklahoma parole system as applied to juveniles sentenced to mandatory life imprisonment. This Court should reverse the district court's decision and remand with instructions to allow Thomas's claims to proceed.

STANDARD OF REVIEW

This Court "review[s] de novo an order dismissing a prisoner's case for failure to state a claim" under 28 U.S.C. §1915A. *McBride v. Deer*, 240 F.3d 1287, 1289 (10th Cir. 2001); *see also, e.g.*, *Requena v. Roberts*, 893 F.3d 1195, 1204 (10th Cir. 2018). In conducting that review, the Court must take as true all well-pleaded facts in the complaint, and must also take as true the allegations in the appellant's objections to the magistrate judge's report and recommendation. *McBride*, 240 F.3d at 1289. These facts and allegations, as well as "any reasonable inferences that might be drawn from them," must be construed in the light most favorable to the appellant. *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 806 (10th Cir. 1999). In addition, because Thomas appeared *pro se*, this Court will "liberally construe his pleadings." *Requena*, 893 F.3d at 1205.

ARGUMENT

I. A State Cannot Avoid A *Miller* Violation By Extending Parole Eligibility In Name Only.

A. The Constitutionality of an Individual's Sentence or a State's Parole System Turns on Substance and Not Form.

The Supreme Court's juvenile-sentencing precedents create a specific constitutional framework for juvenile offenders. That framework not only prohibits sentencing a juvenile offender to a mandatory sentence of life without parole, but also instructs states how to cure violations of that mandatory-sentencing prohibition, which applies retroactively to juvenile offenders sentenced before *Graham*, *Miller*, and *Montgomery*. Specifically, the Constitution requires a state to cure a *Miller* violation either by (1) resentencing the juvenile offender (with an individualized sentencing decision based on consideration of the individual's youth and attendant characteristics at the time of the offense), or (2) affording "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75; *see also Miller*, 567 U.S. at 479. The question presented here is whether a state can circumvent those constitutional requirements by elevating form over substance: in particular, by nominally providing a juvenile offender with "eligibility" for "parole" while in fact imposing a *de facto* sentence of life without parole. The answer to that question is no. A state cannot escape its constitutional obligations by satisfying them in name only.

That conclusion is compelled by this Court's precedents, and in particular by its application of substance-over-form principles in *Budder* in the specific context of the Eighth Amendment's protections for juvenile offenders. In *Budder*, petitioner-appellant Keighton Budder had been convicted by an Oklahoma jury of several violent (but nonhomicide) crimes committed when he was sixteen years old, and had received three consecutive life sentences and an additional consecutive sentence of twenty years. 851 F.3d at 1049. The regulations applicable to his sentences meant that Budder would not be eligible for parole under Oklahoma law until he had served 131.75 years in prison. *See id.* Budder filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, arguing that his sentence violated the Eighth Amendment as interpreted in *Graham*. *Id.* After the district court denied the petition but granted a certificate of appealability, Budder appealed to this Court, which reversed and remanded with instructions to grant Budder's petition, vacate his sentence, and direct the state to resentence him within a reasonable period. *Id.* Even in the context of stringent appellate review "circumscribed by § 2254(d) of the Antiterrorism and Effective Death Penalty Act of 1996," this Court held that Budder was entitled to relief under clearly established federal law pursuant to *Graham*, *Miller*, and *Montgomery*. *Id.* at 1050, 1052-60.

In particular, even though Budder was not nominally sentenced to "life without parole"—he was theoretically entitled to be considered for parole after

131.75 years in prison—the Court held that the "sentencing practice" prohibited by *Graham* "includes any sentence that would deny the offender a realistic opportunity for release in the offender's lifetime." *Id.* at 1055. The Court explained:

> The Court in *Graham* considered all "sentences that deny convicts the possibility of parole." The Court repeatedly referred to these sentences as "life without parole sentences," but a sentencing court need not use that specific label for a sentence to fall within the category considered by the Court. In fact, it is important to note that Graham himself was not sentenced to "life without parole"; he was sentenced to "life." It was only because the State of Florida had abolished its parole system that Graham would have no opportunity to obtain release. The Court in *Graham* focused, not on the label attached to the sentence, but on the irrevocability of the punishment. In this context, there is no material distinction between a sentence for a term of years so lengthy that it "effectively denies the offender any material opportunity for parole" and one that will imprison him for "life" without the opportunity for parole—both are equally irrevocable.

Id. at 1055-56 (citations omitted). Because Budder committed his crimes as a juvenile, did not commit homicide, and received a sentence that "does not provide him a realistic opportunity for release," his sentence violated the Eighth Amendment. *Id.* at 1059.

The same reasoning applies here. To be sure, Thomas has not been forced to wait more than a century before being even nominally considered for parole. But the purported parole hearing that Oklahoma provides, which offers no meaningful opportunity to obtain release based on demonstrated rehabilitation, is the functional

equivalent of affording Thomas no parole hearing at all. Notably, *Budder* expressly considered and rejected the argument that *Graham*'s "categorical rule" "exclude[s] juvenile offenders who will be imprisoned for life with no hope of release for nonhomicide crimes merely because the state does not label this punishment as 'life without parole.'" *Id.* at 1056. Instead, it recognized that the "Constitution's protections do not depend upon a legislature's semantic classifications." *Id.*; *see also id.* at 1056 n.6 (collecting cases). And it concluded that "the sentencing practice that was the Court's focus in *Graham* was any sentence that denies a juvenile nonhomicide offender a realistic opportunity to obtain release in his or her lifetime, whether or not that sentence bears the specific label 'life without parole.'" *Id.* at 1057.

So too here. Like Budder and Graham, Thomas was not formally sentenced to "life without parole"; he was sentenced to life imprisonment (specifically, three life sentences, with two running concurrently and the third consecutively). *See* Compl., App.6-7 (¶1); Obj. to R. & R., App.79 (¶1). But because Oklahoma's parole system denies any meaningful opportunity for juvenile offenders convicted of homicide to obtain release, regardless of any demonstrated maturity or rehabilitation, Thomas's life sentence is the functional equivalent of a sentence of life without parole. The functional approach required by the Supreme Court's and this Court's precedents thus compels the conclusion that the state cannot bypass *Miller* and

Montgomery merely because the state extends "eligibility for parole" in name only. "The Constitution's protections are not so malleable." *Budder*, 851 F.3d at 1056.

This analysis is also consistent with other guidance from the Supreme Court, which has encouraged courts not to "rely simply on the existence of some system of parole," but to instead "look[]to the provisions of the system presented." *Solem*, 463 U.S. at 301 (citing *Rummel v. Estelle*, 445 U.S. 263, 280 (1980)). It likewise comports with numerous federal and state courts across the country that have held that *Miller* and *Graham* apply to juvenile sentences that, even if not labeled "life without parole," are "the functional equivalent of a life sentence without parole" as a result of constitutionally defective "parole" procedures. *Hayden v. Keller*, 134 F. Supp. 3d 1000, 1009 (E.D.N.C. 2015) ("If a juvenile offender's life sentence, while ostensibly labeled as one 'with parole,' is the functional equivalent of a life sentence without parole, then the State has denied that offender the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' that the Eighth Amendment demands."), *appeal dismissed*, 667 F. App'x 416 (4th Cir. 2016); *see also, e.g.*, *Moore v. Biter*, 725 F.3d 1184, 1191-92 (9th Cir. 2013); *Bear Cloud v. State*, 334 P.3d 132, 141-44 (Wyo. 2014); *Brown v. State*, 10 N.E.3d 1, 6-8 (Ind. 2014); *State v. Null*, 836 N.W.2d 41, 70-73 (Iowa 2013); *People v. Caballero*, 282 P.3d 291, 294-96 (Cal. 2012).

This analysis is just a specific application of the broader principle that substance governs rather than form. It is a basic tenet of our legal system that what matters is not a particular form, label, or name; instead, what matters is the underlying substance.[6] This general substance-over-form principle applies with particular force in areas that touch on constitutional protections. Time and again, the Supreme Court has made clear that courts should not "attach[] constitutional significance to a semantic difference," *Complete Auto Transit, Inc. v. Brady*, 430

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[6] To take a handful of illustrative examples: In the administrative-law context, "courts have long looked to the *contents* of the agency's action, not the agency's self-serving *label*, when deciding whether statutory notice-and-comment demands apply." *Azar v. Allina Health Servs.*, 139 S.Ct. 1804, 1812 (2019). In the criminal-law context, the "the legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character." *Dep't of Rev. of Mont. v. Kurth Ranch*, 511 U.S. 767, 777 & n.15 (1994). The reverse also applies: "The location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one." *Smith v. Doe*, 538 U.S. 84, 94 (2003). And in the securities context, "courts inquiring into an instrument's status as a 'security' are not 'bound by legal formalisms,' but instead must 'take account of the economics of the transaction under investigation' in order to capture and effectuate the regulation of '*investments*, in whatever form they are made and by whatever name they are called.'" *SEC v. Thompson*, 732 F.3d 1151, 1158 (10th Cir. 2013). "Indeed, 'form should be disregarded for substance and the emphasis should be on economic reality.'" *Id.*; *see also, e.g.*, *Hill v. Kemp*, 478 F.3d 1236, 1247 (10th Cir. 2007) ("[H]ow a state labels an assessment does not resolve the question whether or not it is a tax…."); *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1232 n.5 (10th Cir. 1999) ("Though the name of the school includes the word 'State,' mere labeling of a governmental entity is not sufficient to find it an 'arm of the state.'"); *McCloskey v. Keisler*, 248 F. App'x 915, 918 n.1 (10th Cir. 2007) (unpublished) ("We follow a substantive view of jurisdiction, in which we look beyond mere labels or form.").

U.S. 274, 285 (1977), and that "a State cannot foreclose the exercise of constitutional rights by mere labels," *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) (quoting *NAACP v. Button*, 371 U.S. 415, 429 (1963)); *see also Brotherhood of R.R. Trainmen v. Va. ex rel. Va. State Bar*, 377 U.S. 1, 6 (1964) (same). Mere labels are "far too fine a distinction to be meaningful," and courts must "reject the notion that a defendant's constitutional rights would turn on the happenstance of," for example, "how an appellate court chooses to describe a trial court's error." *Evans v. Michigan*, 568 U.S. 313, 322-23 (2013); *see also id.* at 325 ("Here we know the trial court acquitted Evans, not because it incanted the word 'acquit' (which it did not), but because it acted on its view that the prosecution had failed to prove its case."). Oklahoma cannot escape the substance of its Eighth Amendment obligations by offering juvenile offenders a system that it calls parole but that provides no meaningful opportunity for release based on demonstrated rehabilitation.

B. Thomas's Complaint Adequately Pleads that Oklahoma's "Parole" System Operates as an *Ad Hoc* System of Executive Clemency that Cannot Cure or Avoid a *Miller* Violation.

Applying the proper, substance-focused analysis, the factual allegations in Thomas's complaint plausibly show that Oklahoma's system—despite its "parole" label—operates as an *ad hoc* system of executive clemency that subjects juvenile offenders like Thomas to *de facto* sentences of life without parole. The Supreme Court in *Graham* specifically rejected executive clemency as an adequate alternative

to parole based on demonstrated maturity or rehabilitation, noting that "the remote possibility" that a juvenile offender sentenced to life imprisonment may be able to obtain release at some point "by executive clemency … does not mitigate the harshness of the sentence." 560 U.S. at 70 (citing *Solem*, 463 U.S. at 300-01). A "parole" system that operates as a system of executive clemency therefore is constitutionally inadequate to remedy a *Miller* violation, and the question whether Oklahoma's system is properly characterized as a true parole system, or is instead functionally akin to an *ad hoc* system of executive clemency, is dispositive under the Eighth Amendment. Here, Thomas's allegations that Oklahoma offers nothing more than an *ad hoc* system of executive clemency are more than sufficient to state a claim and survive dismissal on the pleadings, and Thomas is entitled to an opportunity to prove his allegations.

For starters, the Supreme Court has long recognized the fundamental and important differences between a "parole" system and a system of executive clemency or commutation. "As a matter of law, parole and commutation are different concepts, despite some surface similarities." *Solem*, 463 U.S. at 300. Specifically, "[p]arole is a regular part of the rehabilitative process" and, "[a]ssuming good behavior, it is the normal expectation in the vast majority of cases." *Id.* The parole process is also meant to be transparent and relatively predictable: "The law generally specifies when a prisoner will be eligible to be

considered for parole, and details the standards and procedures applicable at that time. Thus it is possible to predict, at least to some extent, when parole might be granted." *Id.* at 300-01. Likewise, *Montgomery* frames parole eligibility as a concrete expectation for juvenile offenders: "The opportunity for release *will be afforded* to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." 577 U.S. at 212 (emphasis added). Legal dictionary definitions similarly tie the concept of "parole" to demonstrated good behavior. Black's Law Dictionary, for example, defines "parole" as the "conditional release of a prisoner from imprisonment before the full sentence has been served," noting that parole is usually "*granted for good behavior* on the condition that the parolee regularly report to a supervising officer for a specified period." *Parole*, Black's Law Dictionary (11th ed. 2019) (emphasis added).

Executive clemency or commutation, on the other hand, is characterized by "an *ad hoc* exercise" of executive discretion. *Solem*, 463 U.S. at 301. It lacks the transparency or predictability of parole because a governor "may commute a sentence at any time for any reason without reference to any standards." *Id.*; *see also, e.g.*, *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981) ("[T]here is a vast difference between a denial of parole … and a state's refusal to commute a lawful sentence."); *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) ("Rather than

being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals."); *Clemency*, Black's Law Dictionary (11th ed. 2019) ("Mercy or leniency; esp., the power of the President or a governor to pardon a criminal or commute a criminal sentence."); *Commutation*, Black's Law Dictionary (11th ed. 2019) ("The executive's substitution in a particular case of a less severe punishment for a more severe one that has already been judicially imposed on the defendant. Commutation may be based on … the executive's statutorily or constitutionally granted discretion, regardless of the facts.").

Thomas's complaint details how Oklahoma's system functions as an *ad hoc* system of executive clemency, rather than a true "parole" system because it: (1) is untethered from any substantive, enforceable standards, and vests complete and unfettered discretion with the Parole Board and the governor to deny parole for any reason or no reason at all; (2) fails to consider juvenile offenders' demonstrated rehabilitation or maturity, and instead uses "risk-assessment" tools that punish them for the nature of crimes committed in their youth; and (3) lacks meaningful procedural protections. Individually and collectively, those glaring flaws make Oklahoma's system insufficient to provide juvenile offenders sentenced to mandatory life imprisonment the meaningful opportunity to obtain release that the Constitution demands.

1. Oklahoma's "parole" system vests the governor with complete discretion.

This Court has already recognized that the same problems that are present in the Oklahoma parole system may well give rise to a viable Eighth Amendment claim. In *Rainer*, habeas petitioner Attorus Rainer argued that Colorado's parole system was unconstitutional as applied to juvenile offenders convicted of nonhomicide crimes. *See* 952 F.3d at 1205. This Court agreed with the premise that a "parole" system that "resembles executive clemency" would be constitutionally "inadequate because it affords the governor complete discretion to approve or deny an offender's application." *Id.* at 1209. However, it held that Colorado's parole system, which includes both a general parole program and also a "specialized parole program for juvenile offenders" called the "Juveniles Convicted as Adults Program" ("JCAP"), does not operate as a system of executive clemency and instead gives juvenile offenders like Rainer "a meaningful opportunity for early release based on demonstrated maturity and rehabilitation." *Id.* at 1208, 1211. JCAP is available to juvenile offenders who have served twenty years of their prison term and have participated in programs offered by the Colorado Department of Corrections, shown responsibility and commitment in these programs, accepted responsibility for the criminal behavior underlying their offenses, and demonstrated growth and change through developmental maturity and quantifiable good behavior during the course of their incarceration. *See id.* at 1209-10; Colo. Rev. Stat. §17-34-101(1)(a)(I).

Rainer argued that "JCAP does not provide a meaningful opportunity for release because the governor must ultimately grant the offender's parole application upon completion of the program," and so "this program resembles executive clemency, which *Graham* regarded as inadequate." *Rainer*, 952 F.3d at 1209 (citing *Graham*, 560 U.S. at 70). This Court expressly recognized that "[e]xecutive clemency is inadequate because it affords the governor complete discretion to approve or deny an offender's application." *Id.* (citing Executive Order B-002-99 §3(A) (Feb. 16, 1999) (Colorado's executive clemency program)). On the facts, however, the Court distinguished executive clemency from Colorado's JCAP program, which is a "specialized parole program for juvenile offenders." *Id.* at 1208. "Unlike executive clemency, JCAP constrains this discretion by requiring the governor to consider (1) the existence of extraordinary mitigating circumstances and (2) the compatibility of early release with societal safety and welfare. Moreover, JCAP creates a presumption in favor of early parole if the offender has completed the program and served at least twenty-five years of the sentence." *Id.* at 1209. The Court determined that Rainer "could qualify for this presumption by age 44" and that "JCAP thus provides Mr. Rainer an opportunity for early release despite the need for the governor's approval." *Id.* Moreover, the Court explained that, even if Rainer "does not obtain early release through JCAP, he could become eligible for the state's general parole program at 60 if he earns all available good-time credits," giving him

an additional "opportunit[y] for early release beyond the opportunities available under JCAP." *Id.* at 1210-11. The Court thus denied relief and upheld Colorado's parole system, holding that, in combination, "JCAP and the general parole program supply Mr. Rainer with a meaningful opportunity for early release based on demonstrated maturity and rehabilitation." *Id.* at 1211.

Oklahoma's parole system lacks any of the constraining factors identified in *Rainer*. Unlike Colorado, Oklahoma does not require the Parole Board or the governor to consider any specific factors, makes no special distinctions or accommodations for juvenile offenders (let alone a specialized program for juvenile offenders), does not create any presumption in favor of early parole even for juvenile offenders with excellent institutional records, and permits the Parole Board and the governor to deny parole for any reason or for no reason at all. In Oklahoma, there are no constraints on the Board's or the governor's executive discretion. As a result, Oklahoma's system—despite the "parole" label—is substantively indistinguishable from the system of executive clemency that *Rainer* recognized would be constitutionally "inadequate because it affords the governor complete discretion to approve or deny an offender's application." *Id.* at 1209.

Other courts have similarly recognized that defective parole procedures may give rise to a cognizable Eighth Amendment claim. In *Maryland Restorative Justice Initiative v. Hogan*, for example, a federal district court denied a motion to dismiss

in a case challenging the constitutionality of Maryland's parole system "as applied to individuals who received sentences of life imprisonment, with parole, for homicide offenses they committed as juveniles." 2017 WL 467731, at *1 (D. Md. Feb. 3, 2017). The plaintiffs asserted an Eighth Amendment claim predicated on §1983, as well as a corresponding state-law claim predicated on Article 25 of the Maryland Declaration of Rights. *See id.* at *8. In particular, the plaintiffs argued that "rather than a system of parole," Maryland "operate[s] a system that functions in practice as a system of clemency which denies juvenile lifers a meaningful opportunity for release," based in large part on the facts that the governor "possesses unfettered discretion to deny every parole recommendation for *any* reason whatsoever or for no reason at all," and that there are no "standards governing the Governor's exercise of discretion." *Id.* at *19, *24-26. The court denied the defendants' motion to dismiss, holding that the "plaintiffs have sufficiently alleged that Maryland's parole system operates as a system of executive clemency, in which opportunities for release are 'remote'" and hinge on executive discretion, "rather than a true parole scheme in which opportunities for release are 'meaningful' and 'realistic'" and based on a juvenile offender's post-conviction behavior "as required by *Graham*." *Id.* at *27. Those exact same fatal flaws exist in equal measure in the Oklahoma parole system, and the district court plainly erred in *sua sponte* dismissing Thomas's challenge to that system at the screening stage.

2. Oklahoma's "parole" system denies juvenile offenders the opportunity to obtain release based on demonstrated maturity and rehabilitation.

Making matters worse, Oklahoma's system denies juvenile offenders precisely what *Graham* requires: a "meaningful opportunity to obtain release *based on demonstrated maturity and rehabilitation*." *Graham*, 560 U.S. at 75 (emphasis added); *see also Miller*, 567 U.S. at 479. This comports with the plain meaning of "parole," which "is a regular part of the rehabilitative process" and depends on an inmate's "good behavior" in prison. *See Solem*, 463 U.S. at 300; *supra* pp.36-38. The Supreme Court made clear in *Graham* that a juvenile offender must be given an opportunity "to demonstrate that the bad acts he committed as a teenager are not representative of his true character," and to "demonstrate that he is fit to rejoin society." *Graham*, 560 U.S. at 79. And *Montgomery* likewise reaffirms that all juvenile offenders—including those convicted of homicide offenses—"must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." 577 U.S. at 213; *see also id.* at 212 ("The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change.").

Oklahoma's system, however, does not account for juvenile offenders' rehabilitation or maturity. Thomas has alleged in detail that the system takes no

account of juvenile offenders' maturation over time, accomplishments, or institutional record, and thus fails altogether to consider juvenile offenders' subsequent rehabilitation or maturity. *See* Compl., App.13, 22, 29-30, 36-37, 39-42 (¶¶17, 58, 86, 107, 119, 124, 131). Thomas himself, for example, has never been permitted to progress past the Parole Board's initial "jacket review," and has been denied any opportunity for parole based solely on the "aggravating factors associated with the original crime." *See* Compl., App.13, 26, 36 (¶¶16, 73, 107); Obj. to R. & R., App.82 (¶11). That is, the Oklahoma system "has denied [Thomas] any chance to later demonstrate that he is fit to rejoin society based solely on a … crime that he committed while he was a child in the eyes of the law." *Graham*, 560 U.S. at 79. "This the Eighth Amendment does not permit." *Id.* Indeed, the Oklahoma system is a direct affront to *Graham*'s description of how the parole process must work for juvenile offenders. *See, e.g.*, *Brown v. Precythe*, 2018 WL 4956519, at *9 (W.D. Mo. Oct. 12, 2018) ("Permitting the Board to base a denial of parole to a *Miller*-impacted individual on the 'circumstances of the offense' alone necessarily authorizes the Board to disregard evidence of the inmate's subsequent rehabilitation and maturity—in contravention of the Supreme Court's edict."); *Greiman v. Hodges*, 79 F. Supp. 3d 933, 943-44 (S.D. Iowa 2015) (plaintiff stated Eighth Amendment claim by pleading that Iowa Board of Parole "'fail[ed] to take account of [plaintiff's]

youth and demonstrated maturity and rehabilitation' when it 'summarily denied his parole' … based solely on the 'seriousness of the offense'").

In fact, Thomas's allegations demonstrate that the Oklahoma system treats juvenile offenders *worse* than adult offenders. The Oklahoma system relies on "risk-assessment tools" that assess the individual as if frozen in time upon their arrival to DOC. As a result, those tools punish juvenile offenders for the nature of crimes committed in their youth, "discriminate against those who were minors at the time of [their] offense," and "penalize those who[] were youth upon arrival to DOC by assessing them as they were when they were most risky and too young to have developed factors that the tools deem 'protective' against recidivism" (*e.g.*, having a stable job, a spouse, or children). *See* Compl., App.13, 29-30 (¶¶17, 86). Other courts across the country have recognized that state parole systems are particularly problematic if "juvenile offenders face *harsher* treatment during parole reviews because the young age at which the crime is committed may actually be used as a negative factor in parole consideration by the case analyst preparing the report for the voting commissioners." *Hayden*, 134 F. Supp. 3d at 1009 n.5. That is precisely the case here: Instead of recognizing juvenile offenders' unique capacity for growth and affording them a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *Graham*, 560 U.S. at 75, Oklahoma's system relies on risk-assessment tools that tip the scales *against* juvenile offenders

because of their youth at the time of their offense, and that fail to take account of their subsequent maturation over time, accomplishments, or institutional record. *See* Compl., App.13, 22, 29-30, 36-37, 39-42 (¶¶17, 58, 86, 107, 119, 124, 131).

3. Oklahoma's "parole" system lacks meaningful procedural protections.

Completing the trifecta of constitutional infirmities, Oklahoma's system also lacks meaningful procedural protections to ensure that juvenile offenders receive a fair and adequate opportunity to obtain release through the parole process. Notably, the Oklahoma Court of Criminal Appeals relied on the importance of meaningful procedural protections in agreeing with the Supreme Court and this Court that "the executive commutation process" cannot "serve as an adequate remedy when *Miller* error occurs." *Luna*, 387 P.3d at 962-63. Its reasoning confirms that the existing Oklahoma parole process is equally inadequate.

In *Luna*, Chancey Allen Luna was convicted of first-degree murder for crimes committed when he was 16 years old, and sentenced to life imprisonment without the possibility of parole. *Id.* at 957. Luna appealed, arguing that his sentence was unconstitutional under the Eighth Amendment because neither the jury nor the trial court considered his youth with its attendant characteristics or his chances for rehabilitation. *Id.* at 957-58, 962. The Oklahoma Court of Criminal Appeals agreed, concluding that Luna's sentence of life without parole "is constitutionally infirm under *Miller*." *Id.* at 962.

In determining "the appropriate remedy for this sentence infirmity," the court considered and expressly rejected the State's argument "that the executive commutation process may serve as an adequate remedy when *Miller* error occurs." *Id.* at 962-63. As the court explained, "the opportunity to seek a sentence commutation through a procedure largely without evidentiary rules, with no right to obtain expert assistance or testimony, no cross-examination, compulsory process, or the assistance of counsel cannot meaningfully enforce *Miller*'s prohibition." *Id.* at 963. Instead, the court concluded that Luna was entitled to "a sentencing trial procedure conducted before the imposition of the sentence, with a judge or jury fully aware of the constitutional 'line between children whose crimes reflect transient immaturity and those *rare* children whose crimes reflect irreparable corruption.'" *Id.* (quoting *Montgomery*, 577 U.S. at 209). The court therefore vacated Luna's life sentence and remanded for resentencing consistent with *Miller* and *Montgomery*. *See id.* at 958, 963.

Luna makes clear that a state cannot cure a *Miller* violation by "the executive commutation process" because that process lacks manifold important procedural protections. *Id.* at 962-63. Other courts have likewise recognized that certain procedural protections attach to juvenile-offender parole proceedings under the Due Process Clause. *See, e.g.*, *Bonilla v. Iowa Bd. of Parole*, 930 N.W.2d 751, 778-92 (Iowa 2019) (right to access parole board file and an opportunity to present

additional relevant information to board and provision of sufficient reasons to facilitate appellate review); *Brown*, 2018 WL 4956519, at *8-10 (right to access parole files and victim and prosecutor statements and right for delegate to advocate on their behalf); *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 27 N.E.3d 349, 358-67 (Mass. 2015) (access to counsel, including appointment of counsel for indigent juvenile homicide offenders; access to funds for expert witnesses on motion to a superior court judge; and at least limited judicial review).

While *Luna* does not directly address the adequacy of Oklahoma's parole system, that system likewise lacks all of the important procedural protections identified by the Oklahoma Court of Criminal Appeals. Like the executive-commutation process that *Luna* deemed an inadequate *Miller* remedy, Oklahoma's parole system provides no evidentiary rules, no right to obtain expert assistance or testimony, no cross-examination, no compulsory process, and no assistance of counsel. *See* Compl., App.28-29 (¶83). More important, Oklahoma's system also lacks any of the basic procedural protections identified by other courts as necessary as a matter of due process in the parole context, including a juvenile offender's right to access his parole file, to correct or supplement the information in that file, and to receive more than a "boilerplate" explanation of denial. *See Bonilla*, 930 N.W.2d at 778-92; *Brown*, 2018 WL 4956519, at *8-10. Those flaws confirm that Oklahoma's "parole" system cannot be an "adequate remedy" for a *Miller* violation. Thomas's

complaint outlining these flaws is thus more than sufficient to state an Eighth Amendment claim on the basis that Oklahoma's parole system denies juvenile offenders any meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, and thus operates as an unconstitutional *de facto* system of life without parole.

* * *

Thomas's own experience is proof positive of how Oklahoma's parole system systematically fails juvenile offenders. While incarcerated, Thomas has been a model citizen with an excellent institutional record. He has held steady employment for more than 18 years as a technician for the facility maintenance department, has consistently received "excellent" and "outstanding" behavioral marks, and has demonstrated an incredible amount of personal and professional development through a number of certifications and programs. While his life sentence means that he is categorically prohibited from progressing to a lower security level that would enable him to participate in community-corrections, work-release, and family-leave programs, Thomas has maintained his status at the lowest security level available to him and has been identified as a strong candidate for progression to lesser security but for the prohibition.

Despite all this, and despite Thomas's nominal "eligibility" for "parole" consideration, the Parole Board has never permitted Thomas to progress past the first

stage of "jacket review," and has denied him the opportunity to progress further due solely to the "aggravating factors associated with the original crime." *See* Compl., App.13, 26, 36 (¶¶16, 73, 107); Obj. to R. & R., App.82 (¶11). Thomas has already spent more than 25 years in prison for crimes committed when he was 15 years old, and Oklahoma's current unconstitutional parole system effectively guarantees that is where he will spend the rest of his life.

Because Thomas was sentenced for a crime committed as a juvenile pursuant to Oklahoma's mandatory sentencing scheme, Okla. Stat. tit. 21, §701.9, and without an individualized sentencing decision, he cannot be sentenced to life without parole. And while Thomas was nominally sentenced to "life," Oklahoma's parole system subjects him to the functional equivalent of life without parole. The Constitution requires that states cure such a violation by (1) resentencing (with an individualized sentencing decision based on consideration of the individual's youth and attendant characteristics at the time of the offense), or (2) affording a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75; *see also Miller*, 567 U.S. at 479. Oklahoma has failed to do either.

At bottom, Thomas's factual allegations show that Oklahoma's purported "parole" system is nothing more than a system of unfettered executive clemency, providing no meaningful opportunity for juvenile offenders to obtain release based on demonstrated maturity and rehabilitation, and so is constitutionally infirm for all

the reasons *Rainer* and *Luna* have recognized. His well-pleaded allegations regarding the glaring flaws in the Oklahoma parole system are more than enough to state an Eighth Amendment claim and survive dismissal on the pleadings. If the Eighth Amendment restrictions on mandatory life sentences for juvenile offenders mean anything, they mean that Thomas is entitled to a meaningful opportunity to demonstrate that his maturity and rehabilitation show he should not be condemned to die in prison. Because the Oklahoma parole system instead affords him only an *ad hoc* and unconstrained system of executive clemency, it is unconstitutional.

II. This Court Should Reverse The District Court's Decision And Reinstate Thomas's Claims In Full.

The district court's decision dismissing Thomas's claims at the pleading stage is unsustainable. Placing form above substance, the district court refused to acknowledge that the constitutional protections recognized in *Graham*, *Miller*, and *Montgomery* require a parole system that affords juvenile offenders a meaningful opportunity to prove that their rehabilitation warrants release, not a parole system that exists in name only. The decision below gives states *carte blanche* to circumvent the Eighth Amendment's protections so long as they pay lip service to what those protections require. As this Court recently reaffirmed, the Constitution's guarantees "are not so malleable." *Budder*, 851 F.3d at 1056.

The district court's conclusion that the constitutional framework set forth in *Graham*, *Miller*, and *Montgomery* does not apply so long as a juvenile offender "was

not sentenced to life without parole" as such, Order, App.111; *Thomas*, 2020 WL 7489763, at *3, would permit a state to sentence juvenile offenders to life imprisonment as a matter of course, and with no regard for their individual characteristics, so long as it also offers any kind of system that it dubs a "parole" system. That would hold true even if the state's "parole" system in practice consists of rolling dice to see who gets out, or a pure lottery system, or any other manner of *ad hoc* process untethered from what "parole" is meant to be. That cannot be the case. The Supreme Court has characterized parole as "a regular part of the rehabilitative process" that, "[a]ssuming good behavior, … is the normal expectation in the vast majority of cases," and should be governed by transparent and predictable standards. *Solem*, 463 U.S. at 300-01. As to juvenile offenders in particular, parole must offer a "meaningful opportunity to obtain release *based on demonstrated maturity and rehabilitation.*" *Graham*, 560 U.S. at 75 (emphasis added); *Miller*, 567 U.S. at 479. That plainly demands a merit-based system that considers whether the offender has shown maturity and rehabilitation by his post-incarceration conduct, not an arbitrary system based solely on executive whim and with no constraints in place to ensure that the executive considers all the relevant factors.

Because the district court wrongly held that Thomas failed to state a viable Eighth Amendment claim, the court additionally declined to exercise jurisdiction over his remaining two claims. *See* Order, App.111-12; *Thomas*, 2020 WL 7489763,

at *3. This Court should reverse the district court's decision and reinstate Thomas's complaint in full. For the same reasons that Thomas states a viable Eighth Amendment claim, he also states a viable state-law claim under Oklahoma's corollary prohibition on "cruel or unusual punishments." Okla. Const. art. II, §9. Supplemental jurisdiction over Thomas's corollary state-law claim is appropriate because it plainly is "so related to" his Eighth Amendment claim and "form[s] part of the same case or controversy under Article III of the United States Constitution," 28 U.S.C. §1367(a), and "derive[s] from a common nucleus of operative fact," *Price v. Wolford*, 608 F.3d 698, 702-03 (10th Cir. 2010) (alteration in original).

Reinstating Thomas's state-law claim is particularly appropriate here because the use of the disjunctive "or" in the state constitutional provision (rather than the conjunctive "and" in the Eighth Amendment) indicates that Oklahoma's state constitutional protections are broader—and more expansive—than their federal counterparts. *See supra* pp.9-12. To the extent this Court determines that the Eighth Amendment claim presents a close question or that the state-law claim "raises a novel or complex issue of State law," 28 U.S.C. §1367(c)(1), it may be appropriate to certify the state constitutional question to the Oklahoma Court of Criminal Appeals pursuant to Okla. Stat. tit. 20, §1602.

Thomas also states a viable claim under the federal Declaratory Judgment Act, 28 U.S.C. §2201. The magistrate judge recommended that the district court "decline

to exercise jurisdiction over this claim as it could increase friction between federal and state courts," and the district court agreed. *See* Order, App.112; *Thomas*, 2020 WL 7489763, at *3. Specifically, the district court opined that "[i]ssuing judgment as to the constitutionality of Oklahoma's parole procedure could improperly encroach upon state jurisdiction given their practice of remedying *Miller* violations through post-conviction procedures." *Id.*; *see also* R. & R., App.67-69; *Thomas*, 2020 WL 7702180, at *3-5. But the fact that a federal-court decision may encroach on Oklahoma's existing "practice of remedying *Miller* violations" when that existing practice is demonstrably inadequate (and has failed to give Thomas any relief) is a feature, not a bug. Indeed, the "very purpose" of §1983 is "to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

Thomas has asserted well-pleaded allegations identifying how Oklahoma's parole system is constitutionally insufficient as applied to juvenile offenders convicted of homicide. The Supreme Court in *Graham* recognized that the "remote possibility" of executive clemency does nothing to "mitigate the harshness" of a sentence of life without parole, 560 U.S. at 70, and both this Court and the Oklahoma Court of Criminal Appeals have indicated that an executive-clemency "remedy" for a *Miller* violation is no remedy at all. At the end of the day, the federal courts "are

'the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.'" *Hicks v. Miranda*, 422 U.S. 332, 354 (1975) (Stewart, J., dissenting) (quoting F. Frankfurter & J. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 65 (1927)); *see also Harris v. Reed*, 489 U.S. 255, 267 (1989) (Stevens, J., concurring) ("[T]he federal courts … have a primary obligation to protect the rights of the individual that are embodied in the Federal Constitution."). In this context, and given the serious constitutional liberties at stake, it would be a grave miscarriage of justice for the federal courts to abdicate their duties to uphold the Constitution simply because enforcing the federal Constitution to declare a state parole system unconstitutional may produce some "friction" with states and state courts that have perpetuated that unconstitutional system for far too long.

CONCLUSION

The Court should reverse the district court's decision and reinstate Thomas's complaint.

STATEMENT REGARDING ORAL ARGUMENT

Thomas respectfully requests oral argument. He believes that oral argument may assist the Court in fully considering the issue presented in this case, which involves complex questions of constitutional law that are of paramount importance not only to Thomas, but also to others in Oklahoma who have served long sentences

for crimes committed as juveniles and have been denied a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

Respectfully submitted,

/s/ Lauren N. Beebe

EASHA ANAND
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
2443 Fillmore Street, #380-15875
San Francisco, CA 94115
(510) 588-1274
easha.anand@macarthurjustice.org

C. HARKER RHODES IV
LAUREN N. BEEBE
Counsel of Record
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 879-5000
harker.rhodes@kirkland.com
lauren.beebe@kirkland.com

Counsel for Plaintiff-Appellant Dwain Edward Thomas

June 28, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the tables of contents and authorities, statement of prior or related appeals, glossary, statement regarding oral argument, and certificates of compliance and service, but including footnotes) contains 12,991 words as determined by the word counting feature of Microsoft Word 2016.

Pursuant to Tenth Circuit Rule 28A(h), I also hereby certify that electronic files of this brief and accompanying addendum have been submitted to the Clerk via the Court's CM/ECF system. The files have been scanned for viruses and are virus-free.

June 28, 2021

/s/ Lauren N. Beebe
Lauren N. Beebe

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Lauren N. Beebe
Lauren N. Beebe

ATTACHMENT

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

DWAIN EDWARD THOMAS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-20-944-D
	)	
KEVIN STITT, Governor, *et al.*,	)	
	)	
Defendants.	)	

O R D E R

Upon filing of the Clerk's receipt [Doc. No. 10] for the payment required by the Order of October 7, 2020, the Court finds that Plaintiff has timely paid the full filing fee for this action and that the case should be re-referred to the assigned magistrate judge.

IT IS THEREFORE ORDERED that this case is referred to Magistrate Judge Gary M. Purcell for further proceedings consistent the initial referral order [Doc. No. 6].

IT IS SO ORDERED this 16th day of October, 2020.

TIMOTHY D. DeGIUSTI
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

DWAIN EDWARD THOMAS,	)	
	)	
Plaintiff,	)	
	)	CIV-20-944-D
v.	)	
	)	
KEVIN STITT, et. al..	)	
	)	
Defendants.	)	

SUPPLEMENTAL REPORT AND RECOMMENDATION

Plaintiff, a state prisoner appearing *pro se*, filed this action pursuant to 42 U.S.C. § 1983 and the Federal Declaratory Judgment Act. The matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). Having reviewed the sufficiency of the Complaint pursuant to 28 U.S.C. § 1915A, the undersigned recommends Plaintiff's action be dismissed.

I. Background

On March 20, 1997, Plaintiff entered a plea of guilty to three counts of Murder in the First Degree. Order Affirming Denial of Post-Conviction Relief, *Thomas v. State of Okla.*, No. PC-2019-116 (Okla. Crim. App. Sept. 6, 2019). "He was sentenced to life imprisonment on each count, with two counts to run concurrently with each other but consecutively to the third count. [He] was fifteen

years old when the crimes were committed." *Id.* at 1. Relevant to the current case, the Oklahoma Court of Criminal Appeals ("OCCA") explained, in affirming the state court's denial of Plaintiff's request for post-conviction relief,

> Petitioner's crimes in this case were committed in 1995 before the statute was enacted requiring service of a minimum percentage of his sentences. *See* 21O.S.Supp.1999, § 13.1 (enacted eff. July 1, 1999). Petitioner is eligible for parole consideration after serving fifteen years of each of his consecutive life sentences. *See* 57 O.S.Supp.2013, § 332.7; *see also Fields v. State*, [] 501 P.2d 1390, 1394 [(Okla. Crim. App. 1972)]. Petitioner thus has a material opportunity to obtain release on parole during his natural lifetime . . . .

Id. at 2.

In this action, Plaintiff alleges that because he was a juvenile when his underlying crimes were committed and he is not afforded a meaningful opportunity for release through Oklahoma's parole system, his sentences violate the Eighth Amendment pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718 (2016). Doc. No. 1 at 38-39. He also asserts his sentence violates the Oklahoma Constitution's prohibition against cruel or unusual punishment. *Id.* at 39-40. Finally, Plaintiff asks the Court to declare Okla. Stat. tit. 57, § 332.7 unconstitutional as violative of the Eighth Amendment. *Id.* at 41.

II. Screening of Prisoner Complaints

A federal district court must review complaints filed by prisoners seeking relief against a governmental entity or an officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). After conducting an initial review or at any time during the proceeding, the court must dismiss a complaint or any portion of it presenting claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b).

In conducting this review, the reviewing court must accept the plaintiff's allegations as true and construe them, and any reasonable inferences to be drawn from the allegations, in the light most favorable to the plaintiff. *Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007). Although a *pro se* litigant's pleadings are liberally construed, *Haines v. Kerner*, 404 U.S. 519, 520 (1972), "[t]he burden is on the plaintiff to frame a 'complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247-48 (10th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). The allegations in a complaint must present "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Further, a claim is frivolous "where it lacks an arguable basis either in law or in

fact" or is "based on an indisputably meritless legal theory." *Neitzke v. Williams*, 490 U.S. 319, 325, 327 (1989).

III. Eighth Amendment Claim (Claim One)

Relying on the Supreme Court's decision in *Miller*, Plaintiff contends that his life sentences for crimes committed when he was fifteen years old violate the Eighth Amendment. In *Miller*, the Supreme Court considered the constitutionality of a sentencing scheme that required life-without-parole sentences for juvenile offenders convicted of homicide. *Miller*, 567 U.S. at 479. The Court determined that the sentencing scheme violated the Eighth Amendment by making an offender's youth "irrelevant to imposition of that harshest prison sentence." *Id.* The Supreme Court held that a law mandating life imprisonment without the possibility of parole for a homicide offense is unconstitutional as applied to juveniles. *Id.* at 480.

In so holding, the Supreme Court observed:

> State law mandated that each juvenile [convicted of homicide] die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate. Such a scheme prevents those meting out punishment from considering a juvenile's "lessened culpability" and greater "capacity for change," *Graham v. Florida*, 560 U.S. 48, 68, 74 [] (2010), and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties.

Id. at 465 (citation omitted). The Court explained that these circumstances "implicate two strands of precedent reflecting our concern with proportionate punishment": (1) cases in which the Court has "adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty," including cases "specially focused on juvenile offenders, because of their lesser culpability"; and (2) cases in which the Court has "prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." *Id.* at 470.

Thus, the Supreme Court determined that a sentencing scheme that mandates life imprisonment without parole for a homicide offense is unconstitutional as applied to juvenile offenders because such scheme precludes the sentencing court from considering proportionality-related factors such as the characteristics of youth, the offender's own circumstances, and circumstances of the crime itself. *Id.* at 477-80. The Court noted that its ruling did "not foreclose a sentencer's ability to [sentence juvenile offenders to life without parole] in homicide cases." *Id.* at 480.

Additionally, *Miller* may be read to extend beyond mandatory sentencing schemes. In *Miller*, the Supreme Court stated that a sentencing court is required

to "follow a certain process-considering an offender's youth and attendant characteristics-before imposing [a life-without-parole sentence upon a juvenile offender]." *Id.* at 483. This and other discussion in *Miller* could be read as requiring all jurisdictions, including those with discretionary sentencing schemes, to specifically consider a juvenile offender's youth and attendant characteristics prior to imposing a sentence of life imprisonment without parole. *See also, cf.*, *Budder v. Addison*, 851 F.3d 1047, 1059 (10th Cir. 2017) (holding the Supreme Court's ruling that the Eighth Amendment prohibits life without parole sentences against non-homicide juvenile offenders applied to the petitioner's sentence, though not labeled "life without parole," because he was required to serve 131.75 years in prison before he would be eligible for parole).

The undersigned concludes that here, Plaintiff's sentence does not implicate the Supreme Court's decision in *Miller*. Plaintiff was not sentenced to life without parole and more significantly, neither was he sentenced to the functional equivalent thereto. Plaintiff was originally sentenced to essentially two consecutive life sentences. *See supra.* As applied to offenders like Plaintiff whose crimes were committed before July 1, 1998, the Truth in Sentencing Act sets initial docket dates for parole consideration at either a percentage of the mid-point of a sentencing matrix for the crime or at one-third of the actual sentence,

whichever is earlier. Okla. Stat. tit. 57, § 332.7(A). Because a life sentence is not a term of years from which to deduce one-third of its passage, the Pardon and Parole Board uses 45 years as its benchmark to calculate when a prisoner sentenced to life imprisonment is eligible for parole consideration. *Landes v. McCollum*, No. CIV–14–190–R, 2014 WL 6455483, at *3 (W.D. Okla. Nov. 13, 2014) (citing *Roy v. State*, 152 P.3d 217, 225 n.28 (Okla. Crim. App. 2006); *Anderson v. State*, 130 P.3d 273 (Okla. Crim. App. 2006)). Thus, Plaintiff should be entitled to his initial parole review after serving thirty years.

Once denied parole, inmates, such as Plaintiff, convicted of a violent crime are eligible for reconsideration in three years. Okla. Stat. tit. 57, § 332.7(E)(1) [1]; *see Traylor v. Jenks*, 223 F. App'x 789, 790 (10th Cir. 2007) ("Under the Truth in Sentencing Act, a person who committed a violent crime before July 1, 1998, and has been denied parole, is eligible for reconsideration at least once every three years."). In the present case, however, Plaintiff refers to multiple instances of being considered for parole, *see* Doc. No. 1 at 19, 24, 35, 36, 37-38. even though he has served less than thirty years of his sentences.

In any event, it is clear Plaintiff's sentences did not implicate *Miller*

[1] First degree murder is classified as a violent crime. Okla. Stat. tit. 57, § 571(2)(i).

because he was never sentenced to mandatory life without parole, nor was he sentenced to the equivalent of life without parole. Plaintiff is eligible to be considered for parole within thirty years of his imprisonment and may have already been considered for the same. *See supra*. Thus, Plaintiff cannot establish an Eighth Amendment violation pursuant to *Miller*. *See Lewis v. Okla. Pardon and Parole Bd.*, No. CIV-18-1205-G, 2019 WL 1500671, at *1 (W.D. Okla. April 5, 2019) (dismissing the plaintiff's § 1983 action in which he relied on *Miller* because he was not sentenced to mandatory life without parole and had been considered for parole on six occasions).

IV. Claim for Declaratory Judgment (Claim Three)

In his third claim, Plaintiff seeks declaratory judgment that Okla. Stat. tit. 57, § 332.7 is unconstitutional. *Id.* at 41. This statute sets forth Oklahoma's parole procedures and Plaintiff contends it is unconstitutional because it does not specifically require the Parole Board to consider the youth of an offender at the time the underlying crime was committed. *Id.* Plaintiff contends this Court has jurisdiction over this claim pursuant to the Federal Declaratory Judgment Act. *Id.* at 8.

The Federal Declaratory Judgment Act, 28 U.S.C. § 2201, provides that:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may

> declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

The Act confers "on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995); *see also United States v. City of Las Cruces*, 289 F.3d 1170, 1179–80 (10th Cir. 2002). The Tenth Circuit has stated that "[i]n determining whether to exercise their discretion, district courts should consider the following factors:

> [1] whether a declaratory action would settle the controversy; [2] whether it would serve a useful purpose in clarifying the legal relations at issue; [3] whether the declaratory remedy is being used merely for the purpose of procedural fencing or to provide an arena for a race to *res judicata*; [4] whether use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and [5] whether there is an alternative remedy which is better or more effective.

Mid–Continent Cas. Co. v. Village at Deer Creek Homeowners Ass'n, Inc., 685 F.3d 977, 980-81 (10th Cir. 2012) (quoting *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 983 (10th Cir. 1994)).

Presuming without deciding that an actual controversy exists between the parties, the Court should decline to exercise its jurisdiction. Plaintiff is essentially asserting Oklahoma should use its parole procedures to alleviate *Miller* violations. The Court's consideration of Plaintiff's contention would "increase friction between our federal and state courts and improperly encroach upon state

jurisdiction." *Mid-Continent Cas. Co.*, 685 F.3d at 980-81. As this Court recently explained:

> [I]n *Montgomery*, the [Supreme] Court held that the substantive rule from *Miller* applies retroactively to cases on collateral review in state court and found that States "may remedy a *Miller* violation [either] by permitting juvenile homicide offenders to be considered for parole . . . [or] by resentencing them." *Id.* at 732–34, 36. In the aftermath of these cases, the States have taken various measures to remedy *Miller* violations. . . . [For example], the State of Oregon has enacted a statute creating a mechanism by which its Board of Parole and Post-Prison Supervision may conduct a *Miller* hearing, thereby considering parole for offenders sentenced to life without parole as a juvenile. [*See* Or. Rev. Stat. § 144.397.] Thus far, however, the Oklahoma Legislature has not enacted a similar statute, nor has the Oklahoma Pardon and Parole Board promulgated any rules on its own. In fact, legislation that would have given the Oklahoma Pardon and Parole Board authority to conduct *Miller* hearings was vetoed in 2018 by then-Governor Mary Fallin. Because there is no legislative solution for *Miller* hearings, Oklahoma courts have been remedying *Miller* violations by granting post-conviction relief in the form of vacature of the life without parole sentence and resentencing under the guidelines in *Miller*.

Order, *Rodgers v. Whitten, et. al.*, No. 20-839-PRW (W.D. Okla. Sept. 9, 2020), Doc. No. 7 at 4-5 (footnotes omitted).[2] In light of the legislative history and Oklahoma's practice of remedying *Miller* violations through the State's post-

[2] Indeed, Plaintiff filed an application for post-conviction relief based on *Miller* with the state district court. However, as previously discussed, the state district court denied such relief and the OCCA affirmed the same, explaining that Plaintiff was eligible for parole after serving thirty years and therefore, his sentences never constituted an Eighth Amendment violation under *Miller*. *See supra*.

conviction procedure, the Court should abstain from issuing judgment regarding Plaintiff's contention that Oklahoma should use its parole process to address *Miller* violations.

V. State Law Claim (Claim Two)

In his second claim, Plaintiff contends that Okla. Const. Art. II, § 9's prohibition against cruel or unusual punishment is violated by his sentences and/or Oklahoma's parole process. Doc. No. 1 at 39-40. Because Plaintiff has not asserted a viable federal claim herein and has not alleged or established any basis for jurisdiction for this claim other than supplemental jurisdiction, *see id.* at 8, this Court should decline to exercise supplemental jurisdiction over Plaintiff's state-law claim. *See* 28 U.S.C. § 1367(c)(3); *cf., Smith v. City of Enid ex rel. Enid City Comm'n*, 149 F.3d 1151, 1156 (10th Cir. 1998) ("When all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims.").

RECOMMENDATION

Based on the foregoing findings, the undersigned recommends Petitioner's action be dismissed. Petitioner is advised of his right to file an objection to this Supplemental Report and Recommendation with the Clerk of this Court by _November_ 19th, 2020, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P.

72. The failure to timely object to this Supplemental Report and Recommendation would waive appellate review of the recommended ruling. *Moore v. United States*, 950 F.2d 656 (10th Cir. 1991); *cf. Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996) ("Issues raised for the first time in objections to the magistrate judge's recommendation are deemed waived.").

This Supplemental Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter, and any pending motion not specifically addressed herein is denied.

Dated this 30th day of October , 2020.

GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

DWAIN EDWARD THOMAS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-20-944-D
	)	
KEVIN STITT, et. al.,	)	
	)	
Defendants.	)	

ORDER

This matter comes before the Court for review of the Supplemental Report and Recommendation [Doc. No. 12] issued by United States Magistrate Judge Gary M. Purcell pursuant to 28 U.S.C. § 636(b)(1)(B) and (C). In this action brought pursuant to 42 U.S.C. § 1983, Plaintiff, a state prisoner appearing pro se, alleges that Oklahoma's parole system violates his state and federal constitutional rights.

Judge Purcell recommends that Plaintiff's action be dismissed on screening for failure to state a claim upon which relief can be granted. Plaintiff filed a timely objection [Doc. No. 15] to the Supplemental Report and Recommendation. Accordingly, the Court must make a *de novo* determination of issues specifically raised by the objection, and may accept, modify, or reject the recommended decision. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

I. Background

At the age of fifteen, Plaintiff entered a plea of guilty to three counts of Murder in the First Degree and was "sentenced to life imprisonment on each count, with two counts

to run concurrently with each other but consecutively to the third." *Thomas v. State*, No. PC-2019-116 (Okla. Crim. App. Sept. 6, 2019). Although sentenced to "life imprisonment," under applicable Oklahoma law, Plaintiff is "eligible for parole consideration after serving fifteen years of each of his consecutive sentences." *Id.* In fact, Plaintiff has already been considered for parole on several occasions. *See* Compl. at ¶ 111. Plaintiff does not dispute these facts, but asserts that, as a juvenile offender, Oklahoma's parole system denies him a "meaningful and realistic opportunity for release" in violation of *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). *See* Pl.'s Obj. at 3, 8-9, 11.

In *Graham*, 560 U.S. at 74, the Supreme Court held "that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." The Court reasoned that the distinctive and transitory attributes of youth undermine the penological justifications for imposing a life without parole sentence on nonhomicide juvenile offenders. *Id.* at 74. Nevertheless, the Court explained that

> [a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give [juvenile nonhomicide offenders] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.

Id. at 75.

In *Miller*, 567 U.S. at 471, which involved two juvenile homicide offenders, the Supreme Court reiterated *Graham's* reasoning that "children are constitutionally different from adults for purposes of sentencing." The Court then held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 479. Thus, before determining that life without parole is a proportionate sentence for a juvenile offender, a sentencer is "require[d] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480. *Miller's* ban on mandatory life without parole sentences for juvenile offenders was given retroactive effect in *Montgomery*, where the Court instructed that *Miller* violations could be remedied "by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Montgomery*, 136 S.Ct. at 736.

Relying on this trilogy of cases, Plaintiff asserts that he has been subjected to cruel and unusual punishment in violation of the Eighth Amendment and the Oklahoma Constitution. He also seeks a declaratory judgment that Okla. Stat. tit. 57, § 332.7, which sets forth certain parole procedures, is unconstitutional. For the reasons explained below, the Court agrees with Judge Purcell that Plaintiff has failed to state a claim upon which relief can be granted.

II. Eighth Amendment Claim

Plaintiff's first claim asserts that Oklahoma's parole system violates the Eighth Amendment by denying him a meaningful opportunity to obtain release. *See* Compl. at ¶¶

121-126. In rejecting this claim, Judge Purcell concluded that Plaintiff's reliance on *Miller* is misplaced because he was not sentenced to mandatory life without parole or its equivalent. *See* Supp. R&R at 8. The crux of Plaintiff's objection is that, as a juvenile offender, *Graham*, *Miller*, and *Montgomery* require that he receive more than just parole consideration – he must receive a meaningful opportunity to obtain release. *See* Pl.'s Obj. at 8-10. Oklahoma's parole system, he argues, fails to provide him a meaningful opportunity because it functions like an arbitrary system of executive clemency and relies on unfair assessment tools. *Id*. at 8.

Graham indeed held that juvenile nonhomicide offenders must be afforded "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." But "*Graham's* holding is limited to offenders convicted of non-homicide offenses." *Rainer v. Hansen*, 952 F.3d 1203, 1207 (10th Cir. 2020); *see also Miller*, 567 U.S. at 473 (noting that the *Graham* court "took care to distinguish [nonhomicide] offenses from murder…"). Thus, to the extent *Graham* imposes certain requirements on a state's parole system, those requirements do not extend to juvenile homicide offenders such as Plaintiff. *See Lewis v. Oklahoma Pardon & Parole Bd.*, No. CIV-18-1205-G, 2019 WL 1500671, at *2 (W.D. Okla. Apr. 5, 2019) (finding that "because Plaintiff was convicted of homicide, he does not fall within the category of juvenile offenders entitled to a 'meaningful opportunity for release' under *Graham*.").

As for *Miller*, it prohibits mandatory life-without-parole sentences for juvenile offenders. *Miller,* 567 U.S. at 479. *Montgomery* made this holding retroactive, and specifically provided that a *Miller* violation could be remedied by permitting juvenile

homicide offenders to be considered for parole. *Montgomery*, 136 S. Ct. at 736. Neither of these cases, however, expanded existing parole procedures for persons convicted as juveniles. And while *Miller's* holding included a procedural component in that it "requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence," *id.* at 734 (citing *Miller*, 567 U.S. at 483), that procedure was not violated here because Plaintiff was not sentenced to life without parole. Accordingly, the Court finds that Plaintiff has failed to state a viable Eighth Amendment claim.

III. Claim for Declaratory Judgment

Plaintiff additionally seeks declaratory judgment that the parole procedures outline in Okla. Stat. tit. 57, §332.7 are unconstitutional because they do not require the parole board to consider an offender's youth at the time of the crime. *See* Compl. at ¶¶ 134-137. Plaintiff brings this claim under the Declaratory Judgment Act, 28. U.S.C. § 2201, which provides that "[i]n a case of actual controversy within its jurisdiction…any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." The Act gives "federal courts competence to make a declaration of rights," but it does "not impose a duty to do so." *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 982 (10th Cir. 1994) (internal quotation omitted).

As explained in the Supplemental R&R, Oklahoma has chosen to remedy *Miller* violations – meaning juvenile homicide offenders who were sentenced to life without parole – through the State's post-conviction procedure rather than the parole process. *See*

Supp. R&R at 9-10. Given this practice, Judge Purcell recommends that the Court decline to exercise jurisdiction over this claim as it could increase friction between federal and state courts. *Id*. Plaintiff objects to this recommendation and points to the fact that there are no pending parallel state court proceedings. *See* Pl.'s Obj. at 27-28.

The Court agrees with Judge Purcell's analysis on this issue. Issuing judgment as to the constitutionality of Oklahoma's parole procedure could improperly encroach upon state jurisdiction given their practice of remedying *Miller* violations through post-conviction procedures. Further, as explained *supra*, Plaintiff's claim that Oklahoma's parole procedures are unconstitutional fails because neither *Miller* nor *Montgomery* expanded existing parole procedures for persons convicted as juveniles. Accordingly, the Court declines to exercise jurisdiction over Plaintiff's declaratory judgment claim.

IV. State Law Claim

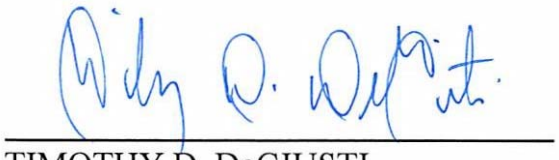
Plaintiff's final claim asserts that Oklahoma's parole system violates Okla. Const. Art II, § 9 by denying him a meaningful opportunity to obtain release. *See* Compl. at ¶¶ 127-131. As Plaintiff has not alleged a viable federal claim, the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims. *See* 28 U.S.C. § 1367(c)(3); *Smith v. City of Enid ex rel. Enid City Comm'n*, 149 F.3d 1151, 1156 (10th Cir. 1998).

CONCLUSION

IT IS THEREFORE ORDERED that the Supplemental Report and Recommendation [Doc. No. 12] is ADOPTED in its entirety. Plaintiff's Complaint is

dismissed without prejudice. A separate judgment shall be entered.

IT IS SO ORDERED this 21st day of December, 2020.



TIMOTHY D. DeGIUSTI
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

DWAIN EDWARD THOMAS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-20-944-D
	)	
KEVIN STITT, et. al.,	)	
	)	
Defendants.	)	

ORDER

Pursuant to the Order entered this same date adopting Magistrate Judge Gary Purcell's Supplemental Report and Recommendation, judgment is entered as follows:

Plaintiff's claims against all defendants are dismissed without prejudice to refiling.

IT IS SO ORDERED this 21st day of December, 2020.

TIMOTHY D. DeGIUSTI
Chief United States District Judge