

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CASE NO.: 5:20-ct-03231-M**

BRETT ABRAMS,

Plaintiff,

v.

WILLIS J. FOWLER,

Defendant.

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

Plaintiff Brett Abrams, through undersigned counsel, respectfully submits this Memorandum in support of his motion for summary judgment.

SUMMARY OF THE CASE

This lawsuit alleges that the North Carolina Post-Release Supervision and Parole Commission (“Parole Commission”), which determines whether someone sentenced to prison for a crime they committed when they were younger than 18 years (hereinafter referred to as a “juvenile offender”) receives parole, has repeatedly violated Abrams’ federal constitutional rights. The Parole Commission’s process is rife with standardless and unconstrained discretion; lacks adequate safeguards to protect against serious risks of error; and permits material misrepresentations and omissions to undermine the integrity of the Parole Commission’s ultimate determinations. Consequently, the Parole Commissions’ process fails “to provide a meaningful

opportunity for [Abrams] to obtain release based on demonstrated maturity and rehabilitation.”
Hayden v. Keller, 134 F. Supp. 3d 1000, 1010 (E.D.N.C. 2015).

Brett Abrams has been in prison for over 40 years for a crime he committed when he was 14 years old. Since 1993, when he first became statutorily eligible for parole, Abrams has been repeatedly denied parole by the Parole Commission.

In 2015, Judge Terrence W. Boyle of the Eastern District of North Carolina found that the Parole Commission’s then-existing parole review process for juvenile offenders serving a life sentence (like Abrams) violated the Eighth Amendment. *See Hayden*, 134 F. Supp. 3d at 1010. On November 2, 2017, the *Hayden* court adopted the Parole Commission’s proposed plan (hereinafter referred to as the “*Hayden Plan*”) to remedy the constitutional violation and come into compliance.

Starting in 2018, the Parole Commission began reviewing juvenile offender cases under the *Hayden Plan*. Since then, Abrams has been reviewed for parole on three different occasions: 2018, 2020, and 2022. He was denied parole following the 2018 and 2020 reviews. His 2022 review remains undecided.

Abrams filed his initial complaint *pro se* on July 21, 2020, later amending his complaint on December 22, 2021. [D.E. 1, 7]. The crux of Mr. Abrams’ claim is that the Parole Commission has violated his Eighth Amendment rights under the U.S. Constitution by failing to provide a meaningful opportunity for parole. The Parole Commission filed an Answer on July 14, 2022. [D.E. 18]. With the assistance of N.C. Prisoner Legal Services, Abrams thereafter engaged in discovery with the Parole Commission. Undersigned counsel took over representation of Abrams on August 11, 2023, completed discovery, and now seeks summary judgment on Abrams’ behalf.

Because there are no genuine issues of material fact concerning Abrams' claim that the Parole Commission has violated his constitutional rights under the Eighth Amendment, he is entitled to judgment as a matter of law. Abrams seeks declaratory and injunctive relief, and requests that the Court retain jurisdiction over this action until such time as it is satisfied that the unlawful policies, practices, rules, acts, and omissions complained of have been satisfactorily remedied.

STATEMENT OF THE FACTS¹

A. Brett Abrams Went to Prison for a Crime he Committed as a 14-Year-Old; he has Been Repeatedly Denied Parole Since 1993

On May 22, 1984, Brett Abrams pleaded guilty to Second Degree Murder, a Class C offense under North Carolina's Fair Sentence Act, for stabbing and killing his neighbor on July 11, 1983. Abrams was 14 years old when he committed the crime, and was 15 years old when he was given a life sentence of imprisonment with the possibility of parole. (56.1 Statement ¶ 1)

Since 1999, Abrams has been held in minimum custody, which is the lowest custody level within the state prison system. He has had a total of 11 infractions during his 40-plus years of incarceration, the most recent one occurring in 2005. (*Id.* ¶¶ 7-8) In April 2020, Abrams' case manager at Orange Correctional Center in Hillsborough, North Carolina, noted that Abrams had held his then-current work release job since 2016, working over 8100 hours without incident; had held other work release positions since 2008, as well as other jobs at the prison; had completed several educational programs (including human resources, education and reentry soft skills training, and landscape and construction) and taken aggression replacement training; had been assigned to the "community leave" program and had logged over 600 hours without

¹ Plaintiff Abrams respectfully refers the Court to his Local Civil Rule 56.1 Statement of Material Facts ("56.1 Statement"), and appendix thereto, filed contemporaneously with this memorandum.

incident; had a devoted sponsor who took him to church; had been active in the unit substance abuse programs; and had a supportive family and planned to live with his mother upon release.

(*Id.* ¶ 12)

By statute, Abrams became eligible for parole in 1993. He has been repeatedly denied parole by the Parole Commission. (*Id.* ¶ 4) In addition to being denied parole, Abrams has also been denied a “MAPP contract,” which former Parole Commissioner Willis Fowler testified was “a pathway to parole.” (*Id.* ¶ 93) During the *Hayden* litigation, the Honorable U.S. District Court Judge Terrence W. Boyle found that “[t]he MAPP contract is ordinarily a mandatory step toward felony parole.” (*Id.* ¶ 94)

B. The Parole Commission

The Parole Commission has four commissioners who are appointed by the North Carolina governor. One commissioner is designated by the governor as the chair. (*Id.* ¶ 14) In addition to reviewing and voting on case files of people eligible for parole, commissioners have a number of other responsibilities, including, but not limited to, reviewing paperwork from preliminary hearings; attending meetings with the general public on Tuesdays; presiding over revocation hearings on Wednesdays; MAPP negotiations on Thursday mornings; and weekly meetings to review requests from probation officers to reduce post-release supervision terms through reintegrative credits. (*Id.* ¶ 16)

For either parole or a MAPP agreement to be granted, three of four commissioners must vote to approve. (*Id.* ¶ 17)

C. *Hayden v. Keller* and the Determination that the Commission’s Parole Process for Juvenile Offenders Violated the Eighth Amendment

In 2015, Judge Boyle of the Eastern District Court of North Carolina found that the Parole Commission’s parole process for juvenile offenders like Abrams violated the Eighth Amendment.

[I]t is evident that North Carolina has implemented a parole system which wholly fails to provide [juvenile offenders] any “meaningful opportunity” to make his case for parole. The commissioners and their case analysts do not distinguish parole reviews for juvenile offenders from adult offenders, and thus fail to consider “children’s diminished culpability and heightened capacity for change” in their parole reviews.

Hayden, 134 F. Supp. 3d at 1009 (citations omitted). The court noted that although the plaintiff’s age at the time of the underlying offense—in Hayden’s case, 15 years old—was stated within his parole case file, it was “difficult for this court to believe that a parole commissioner can fully take into ‘consideration [Hayden’s] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences [.]’ when reading Hayden’s case file along with 90 others in a single day.” *Id.* at 1009 n. 5 (citations omitted).

After the court denied the Parole Commission’s motion for summary judgment, and granted in part, and denied in part, the plaintiff’s motion for summary judgment, the Parole Commission submitted a proposed plan to remedy the identified failures and ensure meaningful review for juvenile offenders (“the *Hayden* Plan”). (*Id.* ¶ 21) The court subsequently adopted the Parole Commission’s proposed plan, finding that it was “narrowly drawn, extends no further than necessary to correct the violation of a federal right, and is the least intrusive means necessary to correct the violation of the federal right.” (*Id.* ¶ 22)

D. The *Hayden* Plan and Implementation

In late July 2018, the Parole Commission implemented the *Hayden* Plan. *See Hayden v. Keller*, No. 5:10-CT-3123-BO (E.D.N.C. Mar. 19, 2018) (D.E. 113) (granting parties' joint motion for extension of time to implement the remedial plan by July 28, 2018). The plan included appointing a dedicated *Hayden* parole case analyst who would "prepare, on a biennial basis, a summary of the offender's file, including a summary of any written materials submitted by or on behalf of the offender"; sending written notice to the juvenile offender at least 180 days in advance of any parole review hearing; affording juvenile offenders a 30 minute "hearing" before a Parole Commissioner and the *Hayden* parole case analyst; allowing an attorney, expert witness, advocate, and/or witness on behalf of the juvenile offender to separately present information to the presiding Parole Commissioner; and, in the event parole is denied, sending a letter to the juvenile offender specifying the reasons for denial as well as recommended steps for "improv[ing] his or her future chances for parole release. (*Id.* ¶ 23)

Prior to the implementation of the *Hayden* Plan, the Parole Commission anticipated that these new procedures would "significantly increase" the workload of the commissioners, the commission's case analysts, and other staff. (*Id.* ¶ 24) At the time of implementation, the commission was operating with fewer than its full complement of four full-time commissioners, thereby compounding the workload concerns. (*Id.* ¶ 25) In order to mitigate the commissioners' "very heavy caseload," the Parole Commission "asked the North Carolina General Assembly to create several new positions to help the commission comply with the new procedures for juvenile offenders," including the creation of a fifth commissioner seat. That request of the legislature was denied. (*Id.* ¶¶ 27-28)

E. Post-*Hayden*, the Volume of Work for Parole Commissioners has Only Increased

At the time that the court in *Hayden* warned that the “sheer volume of work may itself preclude any consideration of the salient and constitutionally required meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,” *Hayden*, 134 F. Supp. 3d at 1009, commissioners were voting on approximately 90 cases each day in addition to their other responsibilities. *Id.* at 1009 n.5. Since the implementation of the *Hayden* Plan, the volume of work has *increased*; commissioners currently vote on at least 100 cases per day in addition to their other work. (*Id.* ¶ 32) In addition to the increased volume of voting, post-*Hayden*, commissioners now also preside over 30-minute “Life Sentence Interviews” and hearings on requests to reduce post-release supervision terms through reintegrative credits. (*Id.* ¶ 16)

F. The Part-Time *Hayden* Parole Case Analyst

The *Hayden* Plan called for a designated parole case analyst who would prepare a summary of a juvenile offender’s file for the commissioners to review. (*Id.* ¶ 23) Parole commissioners are very reliant on the *Hayden* parole case analyst, “who [is] gathering, organizing, and packaging the material for the Parole Commission.” (*Id.* ¶ 33)

Current *Hayden* parole case analyst Joy Smith started working with the state prison system in 1977 before transferring to the Parole Commission in 1991 as a parole analyst. She retired in 2013. From 1991 until she retired in 2013, Smith handled only two juvenile offender cases (including Abrams); the rest were adult offenders. Smith later returned to the Parole Commission in a part-time capacity in 2016. In 2018, Mary Stevens, the chief administrator for the Parole Commission, asked Smith to become the designated *Hayden* parole case analyst on a part-time basis. (*Id.* ¶¶ 34-36)

The Parole Commission did not require any particular qualifications for its part-time *Hayden* case parole analyst. Smith received no training on issues specific to juvenile offenders, such as “brain development and the implications of a youth’s brain maturing over time.” (*Id.* ¶¶ 37-38) According to Smith, her new part-time role was “just like a regular case analyst, except as part of the parole review process, we would have videoconferences at the time of the [juvenile] offender’s scheduled parole review.” (*Id.* ¶ 40)

Despite the expectation that Smith would use and follow the Parole Commission’s policies and procedures that were updated in light of *Hayden*, Smith has not done so. Smith testified that she was not familiar with the fact that the Parole Commission’s training and standard operating procedures manuals had been updated to include sections or references to *Hayden*. (*Id.* ¶¶ 43-45)

In *Hayden*, the court criticized the Parole Commission’s then-existing process for how case analysts would research and prepare summaries of juvenile offender cases to be reviewed by the commissioners:

The most important information found in the summaries has been noted as: the official crime version (narrative of events of crime of conviction; prison infraction history; gang membership; psychological evaluations; custody level history; visitation history; and a home plan. There is no information about one’s status as a juvenile offender. There is no specific information about maturity or rehabilitative efforts.

Hayden, 134 F.Supp.3d at 1009.

Despite the *Hayden* court’s criticism of the previous process, Smith does not pull together the juvenile offender files or write them up in any different way than what occurred before *Hayden*. Specifically, “with respect to the Parole Commission’s assessment of a juvenile offender’s heightened capacity for change compared with adults,” the Parole Commission has

never asked Smith to provide them with any different information than she provided pre-*Hayden*. (*Id.* ¶¶ 41-42)

The Parole Commissioners relies on Smith and assumes that the information she provided them is accurate and credible. (*Id.* ¶ 59) Yet there are no standards with respect to the information Smith includes within a juvenile offender's file. (*Id.* ¶ 49) Further, Smith has never received training or guidance about how to assess the credibility of information to include in a juvenile offender's file. (*Id.* ¶ 39)

The Parole Commission does not engage in any annual audit or review of how the *Hayden* processes are working, and Smith is the only case parole analyst that does not receive any annual review. (*Id.* ¶¶ 46-47)

The parole commissioners relied on Joy Smith and assumed that the information she provided them was accurate and credible. (*Id.* ¶ 59) Yet on multiple occasions during Abrams' parole reviews since *Hayden*, Smith included information in his parole summaries that was erroneous and which could mislead and misinform a commissioner. (*Id.* ¶ 60)

For example, Smith repeatedly included allegations that Abrams was criminally culpable for a separate and unrelated death. (*Id.* ¶ 52) On Easter Sunday in 1982, Abrams' younger brother was killed in a camper fire after a portable heater fell over. (*Id.* ¶ 2) In 1984, Detective Miller of the Iredell County Sheriff's Office reported that Abrams' brother's death "had been ruled accidental." That information is included within Abrams' larger parole file. (*Id.* ¶ 54)

During Abrams' 2018 parole review process, however, Smith wrote in a summary provided to the parole commissioners that Abrams, was in fact, criminally culpable and that his brother's death remained an open case.

Abrams was adopted at the age of 10 weeks. His adoptive family had already adopted a daughter. Several years later they had their own son. It appears that Abrams was jealous of him. This child was killed in a camper fire in 1982. *It was said that Abrams locked his brother in the camper and then set it on fire. Law enforcement were investigating this when Abrams committed the murder that resulted in his prison term. The other case remains 'open.'*

(*Id.* ¶ 52) (emphasis added) Smith wrote almost the exact same allegation in a summary used during Abrams' 2020 review. (*Id.*)

Former Commissioner Angela Bryant, who presided over Abrams' first post-*Hayden* review in 2018, testified that it would "definitely" be "significant" "[i]f somebody has an open case against them and they're up for parole[.]" (*Id.* ¶¶ 10, 53) When informed that the summaries provided by Smith omitted the fact that the Iredell County Sheriff's Office previously reported that Abrams' brother's death "had been ruled accidental," Bryant confirmed that "it would have been important that this information be included as well." (*Id.* ¶ 55)

Another example of misinformation being included in the summaries prepared by Smith and relied upon by commissioners occurred during Abrams 2018 parole review. In a summary provided to the commissioners, Smith wrote that if Abrams were to be paroled, he would live with his mother *who lived on the same block as the victim's mother*. Under deposition, Smith confirmed that this allegation she included in her summary was not true. (*Id.* ¶¶ 56-58)

Smith also failed to include information in summaries for the parole commissioners that demonstrated Abrams' growth, maturation, and rehabilitation. For example, during Abrams' 2020 parole review, the Parole Commission received a lengthy submission from Abrams' lawyers at North Carolina Prisoner Legal Services, which included, *inter alia*, detailed information about Abrams' background, letters of support, a detailed "home plan," and education and work information. None of this information was included in Smith's 2020 write-up about

Abrams' case. Under deposition, former Chairman Fowler, who voted to deny Abrams a MAPP agreement or parole following his 2020 review, said "it would be a concern" if such information had not been included. (*Id.* ¶ 61)

G. Post-Hayden Notice and "Life Sentence Interview"

The *Hayden* court found it problematic that the "offender is an entirely passive participant in North Carolina's parole review process." *Hayden*, 134 F. Supp. 3d at 1011. Thus, the *Hayden* plan calls for providing a notice letter 180 days in advance of a juvenile offender's parole review, and also holding a 30-minute videoconference between the juvenile offender and one commissioner ("Life Sentence Interview"). (*Id.* ¶ 23) The Parole Commission does not permit a juvenile offender to have counsel present during their "Life Sentence Interview." (*Id.* ¶ 68)

While juvenile offenders, like Abrams, are provided notice that their cases will be reviewed by the Parole Commission, they have no access to their own parole records or the materials that the commissioners will be reviewing. Thus, juvenile offenders do not know what information the Parole Commission may or may not have during the review process. Further, the *Hayden* parole case analyst does not have access to all relevant records pertaining to a juvenile offender. For example, Smith testified that she does not have access to a juvenile offender's psychological records from the prison system. Yet a juvenile offender is not informed that they may need to somehow request their own prison psychological records and have those submitted to the commission in order for them to be considered during a parole review. (*Id.* ¶¶ 62-64)

According to Smith, the interviews are the only material difference between how the Parole Commission reviews a juvenile offender case for parole since the implementation of *Hayden*. Although the goal of the interviews is to "spark a conversation" between the presiding

commissioner and juvenile offender, neither the commissioners nor the *Hayden* parole case analyst (who attends, as well) have had any training on techniques or tactics for engaging people in conversation. During the *Hayden* litigation, the Parole Commission informed Judge Boyle that “none of the commissioners have experience presiding over parole-review hearings that require soliciting information about the inmate’s efforts at self-improvement,” and that the commission was planning “to conduct training on motivational interviewing techniques for all of the commissioners.” (*Id.* ¶¶ 66-67, 69)

According to former Chairman Fowler, “[i]f it was the first time [interviewing a juvenile offender,] I would not have reviewed anything. If it was the first time he became eligible, and -- and the analyst sent it up for us to vote on it, I would not have reviewed that file.” Fowler admitted, however, that he would have reviewed a summary of the crime before the life sentence interview. (*Id.* ¶ 70)

H. Post-*Hayden* Lack of Standards

Despite the underlying decision in *Hayden*, the Parole Commission does not instruct its commissioners to “consider youth and its various characteristics when assessing the nature or brutality of the underlying crime in juvenile offender cases.” (*Id.* ¶ 71) It does not identify anywhere in its manuals, or elsewhere, how its commissioners might evaluate or consider a juvenile offender’s age at the time of the underlying crime in the context of a parole review. (*Id.* ¶ 72) The Parole Commission, under deposition, was unable to confirm as a matter of policy or procedure whether it believes that juvenile offenders have diminished culpability compared with adults who may have committed the same underlying criminal acts, or whether it agrees, as exhibited through its policies or procedures and operations, that juvenile offenders have a heightened capacity for change compared with adults. (*Id.* ¶¶ 73-74) While the Parole

Commission confirmed that it “consider[s] the nature of [sic] brutality of the crime when it’s deciding parole,” it could not answer how, if at all, it considers youth when assessing the nature or brutality of the crime in juvenile offender cases. (*Id.* ¶ 75)

The Parole Commission does not use any objective measures for whether a juvenile offender has demonstrated rehabilitation or maturation. (*Id.* ¶ 76) Former Chairman Fowler testified that he left it up to the staff psychologists to determine whether juvenile offenders had “matured or rehabilitated themselves.” (*Id.* ¶ 77) Fowler also confirmed that “there were no instructions or particular directives given to the staff psychologists to consider the issues raised in *Hayden*[.]” (*Id.* ¶ 78) Despite the Parole Commission going through a hiring process for a staff psychologist after the implementation of *Hayden*, neither “Hayden” nor “juvenile offender” was discussed during those interviews. (*Id.* ¶ 79)

I. Post-*Hayden* Parole Denial Letters

Pursuant to the *Hayden* Plan, the Parole Commission is required to send a letter specifying the reasons for denial and recommendations for steps the individual could take to improve his chances of release at a future parole review. (*Id.* ¶ 80) According to the Parole Commission, “the purpose of providing recommendations to a juvenile offender after they’ve been denied parole [is] so that they may one day possibly be paroled[.]” (*Id.* ¶ 81) According to former Commissioner Angela Bryant, parole commissioners expect that during a subsequent parole review, a juvenile offender’s file will include and/or reflect information about whether they followed through on the recommendations included in the previous denial letter. (*Id.* ¶ 82) The Parole Commission does not have any policies or procedures “that provide a framework for measuring objectively whether a juvenile offender has successfully followed recommendations provided by the Parole Commission.” (*Id.* ¶ 84)

In April 2019, the Parole Commission denied Abrams a MAPP agreement or parole. They recommended that he engage in psychological counseling and treatment, complete any correctional programming to “increase your self-awareness,” and continue with work release and community volunteer passes. (*Id.* ¶ 85) Abrams subsequently followed through on those recommendations. (*Id.* ¶ 86) Part of Abrams’ follow through on the Parole Commission’s recommendations included psychological counseling with Dr. Michael Conley, a psychologist with the North Carolina Department of Public Safety. Dr. Conley’s records noted his professional concerns that the treatment goals identified by the Parole Commission were “very general and, therefore, would be difficult to assess objectively.” Dr. Conley noted, “[Abrams] has been infraction free for 13 years ... so just how improving his ‘emotional regulation’ would be measured is not clear.” Abrams worked with Dr. Conley from May 2, 2019, through June 24, 2020. Dr. Conley’s notes indicate that Abrams accomplished his goal to “cover issues related to his emotions and to help develop insight about his crime and past behavior.” (*Id.* ¶¶ 87-88)

When Abrams came up for review again in 2020, Smith, on behalf of the Parole Commission, never saw or obtained Dr. Conley’s records concerning Abrams. According to former Chairman Fowler, who presided over Abrams’ Life Sentence Interview and voted on his case in 2020, Abrams’ other (older) psychological records played a part in his consideration. Neither Fowler nor other commissioners who voted on Abrams’ parole review in 2020, however, ever saw Dr. Conley’s counseling records or a detailed summary of them, and were not in a position to know whether Abrams had, in fact, followed through on any of their earlier recommendations. Fowler confirmed that he and the other commissioners were not in a position to review “the full range of psychological assessments of Mr. Abrams from the time he was a

child, teenager, until 2020 ... that full spectrum of change in development because of the absence of those records.” (*Id.* ¶¶ 89-92)

J. The Significance of MAPP Agreements *Post-Hayden*

As noted above, a MAPP agreement is “a pathway to parole,” especially for major crimes like murder and first-degree sex offenses. (*Id.* ¶ 93) It indicates that “the commission’s agreeing to parole someone, but wants them to do a specific, maybe, programs, that they haven’t been exposed to yet.” (*Id.* ¶ 6) Moreover, during the *Hayden* litigation, the court found that “[t]he MAPP contract is ordinarily a mandatory step toward felony parole.” *Hayden*, 134 F.Supp.3d at 1003 (citing deposition testimony of Parole Commission Chief Administrator Mary Stevens and former Parole Commission Chairman Paul G. Butler).

Since *Hayden*, juvenile offenders must receive a MAPP contract in order to have any practical chance of being paroled, standing alone as well as when compared with adult offenders.

- During a three-year period from 2018 through 2020, the Parole Commission reviewed 228 juvenile offenders for parole; 18 juvenile offenders were granted parole (or 8%). Of the 18 juvenile offenders granted parole, one was granted parole without a MAPP (or 6%). (*Id.* ¶ 95)
- During a three-year period from 2018 through 2020, the Parole Commission reviewed 1,904 adult offenders for parole; 207 adult offenders were granted parole (or 10%). Of the 207 adult offenders granted parole, 78 of them were granted parole without a MAPP (or 38%). (*Id.* ¶ 96)
- During a five-year period from 2018 through 2022, the Parole Commission reviewed 362 juvenile offenders for parole; 34 juvenile offenders were granted parole (or 9%). Of the 34 juvenile offenders granted parole, two were granted parole without a MAPP (or 6%). (*Id.* ¶ 97)
- During a five-year period from 2018 through 2022, the Parole Commission reviewed 3,244 adult offenders for parole; 372 adult offenders were granted parole (or 11%). Of the 372 adult offenders granted parole, 147 of them were granted parole without a MAPP (or 40%). (*Id.* ¶ 98)

K. The Parole Commission's Refusal to Offer a MAPP Agreement to Abrams Post-Hayden

At least as far back as 2007, the Parole Commission began noting that Abrams “would be a good one for MAPP (no prior adult record, has been in custody since the age of 14, has strong family support, has progressed to Min-2, good prison conduct)[.]” (*Id.* ¶ 99) By 2012, however, parole case analyst Smith wrote in Abrams’ file, “I do not recommend MAPP. *This inmate is already doing everything that a MAPP could provide for him to do.*” (*Id.* ¶ 100) (emphasis added) In 2018, during Abrams’ first post-*Hayden* parole review, Smith noted in his file that “[t]here is nothing to be gained from MAPP as [Abrams] is already doing everything that MAPP would provide.” (*Id.* ¶ 100)

In 2020, during Abrams’ second post-*Hayden* parole review, his prison case manager, the Warden of Orange Correctional Center, the Central Region Office, and the MAPP Director for Division of Adult Corrections all recommended that Abrams be afforded a MAPP agreement. (*Id.* ¶ 102) During that review process, however, former Chairman Fowler noted that a MAPP would not do Abrams “any good.” (*Id.* ¶ 103) Fowler explained that “[Abrams] had already been out of the institution, and he was on work release and/or home leaves and had access to whatever in the community.” (*Id.* ¶ 106) According to Fowler, the only way a MAPP “would help” Abrams would be if Abrams had “fallen back, so to speak, had violated a rule, or had not been as successful as he previously had been.” As long as Abrams continued to do as well as he had been doing during his incarceration, “a MAPP still did not make sense.” (*Id.* ¶ 105) Fowler voted against a MAPP agreement for Abrams in 2020 despite the fact that he could not think of anything else Abrams could have done “to demonstrate his ... ability to reintegrate.” (*Id.* ¶ 106)

ARGUMENT

Summary judgment should be granted because “there is no genuine dispute as to any material fact” and Abrams is “entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Tom v. Hosp. Ventures LLC*, 980 F.3d 1027, 1037 (4th Cir. 2020).

I. The Parole Commission’s Procedures Violate Brett Abrams’ Constitutional Rights

As it existed in 2015, “the North Carolina parole review process for juvenile offenders serving a life sentence violate[d] the Eighth Amendment” because it failed to provide a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” 134 F.Supp.3d at 1011; *id.* at 1009. (“In the case before this court, it is evident that North Carolina has implemented a parole system which wholly fails to provide Hayden with any ‘meaningful opportunity’ to make his case for parole.”). Despite apparent efforts by the Parole Commission to rectify the identified problems with its parole review process for juvenile offenders like Abrams, the constitutional infirmities with the process persist.

A. The Parole Review Process for Abrams Must Comport with the Constitution

While Abrams is not entitled to the guarantee of release by way of parole, *Gaston v. Taylor*, 946 F.2d 340, 344 (4th Cir. 1991) (en banc) (holding that because the decision whether to grant parole is a discretionary one, “a prisoner cannot claim entitlement and therefore a liberty interest in the parole *release*”) (emphasis added), he is entitled to some degree of *process* grounded in and protected by the constitution. *See Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). That entitlement arises from the Eighth Amendment itself as well as “from an expectation or interest created by state laws or policies.” *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

Abrams, as a juvenile offender being reviewed for parole under the *Hayden* Plan, has a protectable interest under the Eighth Amendment in a review process that provides a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Hayden*, 134 F.Supp.3d at 1010.

Abrams’ protectible interest also arises under North Carolina’s constitution, its laws, and policies. First, when Abrams was sentenced in 1984 for a crime he committed as a 14-year-old, he was sentenced under North Carolina’s Fair Sentencing Act. (56.1 Statement ¶ 1) That sentencing legislation, enacted in 1979, was passed in “response to a perceived need for certainty in sentencing, to a perceived evil of disparate sentencing, and to a perceived problem in affording trial judges and parole authorities unbridled discretion in imposing sentences.” *State v. Ahearn*, 307 N.C. 584, 594, 300 S.E.2d 689, 695 (1983); *see also State v. Allen*, 359 N.C. 425, 430–31 (2005), *opinion withdrawn*, 360 N.C. 569, 635 S.E.2d 899 (2006) (reviewing history of North Carolina sentencing legislation). Thus, the very legislation under which Abrams was sentenced created a liberty interest in the parole context, to wit: protection from parole authorities exercising “unbridled discretion.” To the extent the Parole Commission’s review of juvenile offender cases operates without “adequate standards to guide the [commissioners’] discretion,” it does so with “unbridled discretion.” *Chesapeake B & M, Inc. v. Harford County*, 58 F.3d 1005, 1009-1010 (4th Cir. 1995) (within the context of the First Amendment, “[u]nbridled discretion naturally exists when a licensing scheme does not impose adequate standards to guide the licensor's discretion.”).

Second, the North Carolina Supreme Court held in *State v. Conner* that “[a] juvenile offender’s opportunity for parole, in light of the sentencing authority’s determination that the defendant is neither incorrigible nor irredeemable but is instead worthy to have a chance for

release to parole, *must be an opportunity which is realistic, meaningful, and achievable.*” 381 N.C. 643, 670, 873 S.E.2d 339, 356 (2022) (emphasis added). The Court stressed that “[t]he opportunity must be implementable, instead of amounting to a mere formal announcement of a juvenile sentence allowing the possibility of parole, but which in reality is illusory and only elevates form over substance.” *Id.* (citations omitted). The Court in *Conner* further admonished: “We do not authorize an empty opportunity for parole which is more akin to a mirage in its attainability than a realistic occasion for a redeemable juvenile to be rehabilitated as contemplated by the Supreme Court of the United States in its series of opinions addressing juvenile punishments which we have cited and applied.” *Id.* at 670-671, 873 S.E.2d at 356-357 (citation omitted).

On the same day as its decision in *Conner*, the North Carolina Supreme made clear that the state constitution requires that a juvenile offender must “have a realistic hope of a meaningful opportunity for reentry” after 40 years of incarceration. *State v. Kelliher*, 381 N.C. 558, 592, 873 S.E.2d 366, 390 (2022). The *Kelliher* Court found that due to the “unique attributes that define childhood”—“among them, immaturity, impetuosity, and failure to appreciate risks and consequences”—“both the North Carolina and United States Constitutions impose limits on the use of our most severe punishments for juvenile offenders, even for those children who have committed the most egregious crimes imaginable.” *Id.* at 559, 873 S.E.2d at 370 (cleaned up). Those “limits,” as found by the North Carolina Supreme Court, include a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Id.* at 577, 873 S.E.2d at 381 (“We agree with *Kelliher* and the Court of Appeals that the Eighth Amendment requires courts to afford redeemable juvenile offenders ‘some meaningful opportunity to obtain

release based on demonstrated maturity and rehabilitation”’) (citing *Graham v. Florida*, 560 U.S. 48, 75 (2010)).

Thus, Abrams has a clear liberty interest in a parole review process that is grounded not only in the federal constitution under the *Hayden* Plan, but pursuant to the state constitution and sentencing regime under which he was originally sentenced. Once a state has “create[d] a liberty interest, the Due Process Clause requires fair procedures for its vindication.” *Swarthout v. Cooke*, 131 S.Ct. 859, 862 (2011) (per curiam). Thus, although North Carolina is under no obligation to offer parole, once it has done so, courts must “review the application of [these] constitutionally required procedures.” *Id.*

B. The Parole Process Fails to Provide Abrams a “Meaningful Opportunity” Because the Process is Standardless and Marked by Unbridled Discretion

In 2015, the court in *Hayden* emphasized that its analysis of the Parole Commission’s then-existing process necessarily “start[ed] with the Supreme Court’s holding that in fact ‘children are different.’” *Hayden*, 134 F.Supp.3d at 1007 (quoting *Miller v. Alabama*, 132 S.Ct. 2455, 2470 (2012)). The court went on to find that the Parole Commission’s process for juvenile offenders violated the Eighth Amendment because it “fail[ed] to consider ‘children’s diminished culpability and heightened capacity for change’ in their parole reviews.” *Hayden*, 134 F.Supp.3d at 1009 (quoting *Miller*, 132 S.Ct. at 2469, citing *Greiman v. Hodges*, 79 F.Supp.3d 933, 943 (S.D. Iowa 2015)). The undisputed material facts here establish that the Parole Commission still fails to take any of these issues into meaningful consideration.

It is undisputed that the Parole Commission operates without any standards or guidance when it comes to considering the “chronological age and its hallmark features” of juvenile offenders being reviewed for parole. *Hayden*, 134 F.Supp.3d at 1009 n.5 (quoting *Miller*, 132 S.Ct. at 2468). The myriad features of youth that support the Supreme Court’s holding that

“children are different” are not incorporated whatsoever into the Parole Commission’s process. The Parole Commission admits that its commissioners do not follow any standards when deciding juvenile offender parole cases. Its commissioners are not required to consider the age of the juvenile offender when the underlying crime was committed when voting on parole or a MAPP. The Parole Commission does not instruct its commissioners to “consider youth and its various characteristics when assessing the nature or brutality of the underlying crime in juvenile offender cases.” It does not identify or suggest how its commissioners *might* evaluate or consider a juvenile offender’s age at the time of the underlying crime in the context of a parole review. (*Id.* ¶¶ 71-76)²

It is further undisputed that, within this standardless process as applied to Abrams, the Parole Commission does not expressly accept the underlying Eighth Amendment principles that informed the earlier *Hayden* opinion. For example, the Parole Commission was unable to confirm whether, in fact, any juvenile offender has diminished culpability compared with adults who may have committed the same underlying criminal acts, or whether any juvenile offender has a heightened capacity for change compared with adults. (*Id.* ¶¶ 73-74)

To the extent the Parole Commission recognizes that a juvenile offender’s maturation or rehabilitation must be considered in a post-*Hayden* world, it fails to identify any measures—objective or otherwise—for whether a juvenile offender could demonstrate such growth. (*Id.* ¶ 76). While Chairman Fowler claims to leave it up to staff psychologists to determine whether

² Notably, in March 2018, a few months before the *Hayden* Plan was implemented, the Parole Commission, through Chief Administrator Mary Stevens, filed a declaration with the *Hayden* court to explain the then-current status of the commission’s preparedness to successfully implement the new procedures. Stevens noted that the commission was seeking authorization from the General Assembly to hire a staff attorney, which was never granted. According to Stevens, “The new staff attorney’s duties would include advising the commissioners on compliance with the procedures set forth in the Court’s injunction order, and monitoring the legal landscape to ensure the commission is proactive in satisfying legal obligations to both juvenile and adult offenders going forward.” (*Id.* ¶ 29) No such staff attorney exists.

juvenile offenders had “matured or rehabilitated themselves,” the staff psychologists are not instructed about any such responsibility. (*Id.* ¶¶ 77-79).

While the Parole Commission possesses discretionary authority to grant or deny parole, *see* N.C.G.S. § 143B-1490 (authority of Parole Commission), and “may refuse to release on parole a prisoner it is considering for parole” pursuant to four statutory criteria, N.C.G.S. § 15A-1371(d), the existence of this statutory framework alone does not change the undisputed fact the Parole Commission has operated with unbridled discretion when reviewing and considering Abrams’ case for parole. The Parole Commission operates without *any* standards with respect to considering “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” *Miller*, 132 S.Ct. at 2468. This standardless process, standing alone but also in combination with the Parole Commission’s clear failure to demonstrate an acceptance of the Supreme Court’s Eighth Amendment jurisprudence and the *Hayden* court’s holding, has proven to be incapable of providing Abrams with the “meaningful opportunity” he is ensured. Simply put, the Parole Commission’s arbitrary and boundless procedure, with no safeguards against the unlawful use of discretion, is unconstitutional. *See United States v. Black*, 707 F.3d 531, 541 (4th Cir. 2013) (within the context of the Fourth Amendment, holding that there must be “safeguards against the unlawful use of discretion”); *Chesapeake B & M, Inc. v. Harford County*, 58 F.3d 1005, 1009 (4th Cir. 1995) (within the context of the First Amendment, “[u]nbridled discretion naturally exists when a licensing scheme does not impose adequate standards to guide the licensor’s discretion.”). *See also Gregg v. Georgia*, 428 U.S. 153, 188-89 (1976) (plurality opinion) (describing the basis for the Court’s decision in *Furman v. Georgia*, 408 U.S. 238 (1972), in which a plurality found that unbridled discretion allowed capital juries to set their own standards

for making the decision on punishment, thereby rendering the entire process so arbitrary and capricious as to violate the Eighth Amendment's prohibition on cruel and unusual punishment; "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action").

C. The Parole Process Fails to Provide a "Meaningful Opportunity" to Abrams Because the Process is Rife with Volume Issues, Material Misrepresentations, and Material Omissions

The Parole Commission has failed to mitigate the *Hayden* court's concerns about how the "sheer volume of work may itself preclude any consideration of the salient and constitutionally required meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Hayden*, 134 F. Supp. 3d at 1009. As predicted by the Parole Commission before the *Hayden* plan was implemented, the new procedures would "significantly increase" the workload of the commissioners. (*Id.* ¶ 24) Indeed, the volume of cases being handled and voted upon by commissioners has increased since before the *Hayden* plan was implemented. *Compare id.* at 1009 n.5. (noting that commissioners were voting on approximately 90 cases each day in addition to their other work) *with* (Rule 56.1 ¶ 32: "Since the implementation of the *Hayden* Plan, commissioners vote on at least 100 cases per day in addition to their other work.") On top of that workload increase, there have been periods of time when the Parole Commission has operated with fewer than four full-time commissioners. (*Id.* ¶ 28)

One of the Parole Commission's apparent attempts to address its volume problem was the creation of the "designated parole analyst" to "prepare, on a biennial basis, a summary of the offender's file." (*Id.* ¶ 23) The record makes clear, however, that this designated parole analyst does not consider her role to be any different than it was before *Hayden*. As Joy Smith described,

juvenile offender parole cases are treated the same as before (except for the addition of a 30 minute Life Sentence Interview). (*Id.* ¶ 40) The Parole Commission never asked Smith to provide it with any different information about a juvenile offender than she did pre-*Hayden*. (*Id.* ¶ 42) Unsurprisingly, Smith admits she does not prepare a juvenile offender’s file or write it up in any different way than she did before *Hayden*. (*Id.* ¶ 41)

Furthermore, that which Smith did prepare for the commissioners during Abrams’ reviews contained material misrepresentations and omissions which undermined Abrams’ constitutional right to a “meaningful opportunity.” Smith repeatedly included allegations that Abrams was criminally responsible for his younger brother’s death, and that the case remains “open,” (*Id.* ¶ 52) Not once during any of Abrams’ parole reviews did Smith include the fact that his parole file included a 1984 report from the Iredell County Sheriff’s Office that Abrams’ brother’s death “*had been ruled accidental.*” (*Id.* ¶ 54) (emphasis added) Smith also included highly prejudicial information in her 2018 summary that Abrams, if granted parole, would live with his mother who lives on the same block as the victim’s mother. That allegation was also not true. (*Id.* ¶¶ 56-58)

Smith also failed to include accurate—and critically important—information about Abrams’ yearslong therapy with Dr. Michael Conley during his 2020 parole review process. Despite the Parole Commission’s claim that a juvenile offender’s psychological information is critically important, Smith failed to seek, much less obtain, those records. (*Id.* ¶ 89) Consequently, the Parole Commission did not—because it could not—provide Abrams with anything close to a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” 134 F.Supp.3d at 1011. As former Chairman Fowler conceded, he and the other commissioners were not in a position to review “the full range of psychological

assessments of Abrams from the time he was a child, teenager, until 2020 ... that full spectrum of change in development because of the absence of those records.” (*Id.* ¶ 92)

Because Abrams has no access to his parole file or the right to the assistance of counsel during his one meeting with a parole commissioner, he was never able to address the defects in what the commissioners were reviewing and relying upon. *See Townsend v. Burke*, 334 U.S. 736, 741 (1948) (“[W]hile disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand. *Id.*”)

These defects in the parole review process are the responsibility of the Parole Commission to prevent, yet it offers no direction, guidance, or standards to Smith about how to assess the credibility of information to include in a juvenile offender’s file. (*Id.* ¶ 39) It has no standards or mechanisms to reasonably ensure that the information its commissioners rely on is accurate. The Parole Commission’s failure to audit, assess, oversee, and/or review Smith’s work only allows these problems to persist. (*Id.* ¶¶ 46-47) Furthermore, Abrams has no opportunity to refute these errors and omissions because he is unaware of their existence; North Carolina does not allow incarcerated individuals to have access to their parole records. (*Id.* ¶ 63) *See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 14-15, 15 n.7 (1979) (identifying various procedures that “adequately safeguards against serious risks of error and thus satisfies due process,” including the “discretion to make available to the inmate any information” to be used against the inmate during the hearing, apparently satisfying any concerns about inmates’ access to their own files). *Cf. United States v. Stephens*, 699 F.2d 534, 537 (11th

Cir. 1983) (opportunity to refute perceived discrepancies in presentence investigation report fulfilled due process requirements).

Both Abrams and the State, which “has a stake in whatever may be the chance of restoring [Mr. Abrams] to normal and useful life within the law,” have a strong interest in Abrams being reviewed by a process that is not infected by such significant errors and omissions. *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972) (holding that minimal due process requirements for parole revocation include “an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee’s behavior”). Yet that is not the case here.

D. The Parole Process Fails to Provide a “Meaningful Opportunity” to Abrams Because it Will Not Consider Him for a MAPP Contract

As a juvenile offender, Abrams needs a MAPP contract to one day receive parole. *See Hayden*, 134 F.Supp.3d at 1003 (finding that “[t]he MAPP contract is ordinarily a mandatory step toward felony parole”). As former Chairman Fowler explained, it would be “very unusual” for a juvenile offender to be paroled without MAPP. (*Id.* ¶ 104) The Parole Commission’s post-*Hayden* statistics make clear just how stark this reality is for juvenile offenders, particularly when compared with adult offenders. Ninety-four percent of juvenile offenders who have been paroled since *Hayden* had received a MAPP agreement; only 6% were paroled without one. By stark comparison, over 38% of adult offenders were parole without a MAPP during the same time period.

Although a MAPP is an essential element of being paroled for a juvenile offender, the Parole Commission’s process, as applied to Abrams, has effectively ruled out the possibility of him receiving a MAPP contract—not because he has failed to demonstrate his worthiness, but perversely and arbitrarily, perhaps because he is too qualified. (*Id.* ¶¶ 99-103) According to

Fowler, the only way a MAPP “would help” Abrams would be if Abrams had “fallen back, so to speak, had violated a rule, or had not been as successful as he previously had been.” (*Id.* ¶ 105) Foreclosing the only realistic pathway Abrams has toward obtaining felony parole because he had, in fact, “demonstrated maturity and rehabilitation,” is an object lesson in an arbitrary and capricious process. *See Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (“The touchstone of due process is protection of the individual against arbitrary action of government.”).

CONCLUSION

For the reasons set forth herein, Plaintiff Brett Abrams respectfully requests:

1. That the Court grant Plaintiff’s Motion for Summary Judgment and enter judgment for Plaintiff on his Eighth Amendment claim;
2. That the Court declare the North Carolina Post-Release Supervision and Parole Commission’s current parole regime unconstitutional as applied to Plaintiff;
3. That the Court enjoin the North Carolina Post-Release Supervision and Parole Commission from using its current parole regime with respect to Plaintiff Abrams;
4. That the Court schedule briefing and/or set a hearing for the parties to submit respective plans for the means and mechanism for the North Carolina Post-Release Supervision and Parole Commission to come into compliance.

Dated: March 4, 2024

By: /s/ Jacob H. Sussman

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing pleading with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

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Dated: March 4, 2024

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