SUPREME COURT NO. 18-0477
POLK COUNTY DISTRICT COURT NO. CVCV5269

IN THE SUPREME COURT OF IOWA

JULIO BONILLA,
Petitioner-Appellant,

v.

IOWA BOARD OF PAROLE,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE DOUGLAS F. STASKAL

FINAL BRIEF OF AMICI CURIAE:
JUVENILE SENTENCING PROJECT AND
CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH
IN SUPPORT OF PETITIONER-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

Human Rights Watch, *Against All Odds: Prison Conditions for Young Offenders Serving Life without Parole Sentences in the United States* (Jan. 3, 2012), https://www.hrw.org/report/2012/01/03/against-all-odds/prison-conditions-youth-offenders-serving-life-without-parole ---------- 38

Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of* Miller v. Alabama *and* Graham v. Florida, 35 Cardozo L. Rev. 1031 (2014) ------ 24

Lee Underwood & Aryssa Washington, *Mental Illness and Juvenile Offenders*, 13 Int. J. Environ. Res. & Pub. Health 228 (2016) ---------- 31

New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings* (Cardozo Law Review, 2011), http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf 39

R.I. Parole Board, 2018 Guidelines § 1.5, http://www.paroleboard.ri.gov/guidelines/2018%20PB%20Guidelines%20as%20AMENDED%20and%20FINAL.pdf ---------- 19

Respondent's Brief, *Bonilla v. Iowa Bd. of Parole*, No. CVCV052692 (Iowa Dist. Ct. Dec. 28, 2017) ---------- 25

Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L.J. 373 (2014) ------ 35, 38

INTEREST OF AMICI CURIAE

The Juvenile Sentencing Project (JSP) is a project of the Legal Clinic at Quinnipiac University School of Law. JSP focuses on issues relating to long prison sentences imposed on children. In particular, it researches and analyzes responses by courts and legislatures nationwide to the U.S. Supreme Court's decisions in *Graham v. Florida*, *Miller v. Alabama,* and *Montgomery v. Alabama,* and produces reports and memoranda for use by policymakers, courts, scholars, and advocates. JSP is headed by Professor Sarah French Russell and Tessa Bialek, who focus their research on criminal law and, more specifically, the "meaningful opportunity for release" standard applicable to juvenile offenders. Because of its dedication to pursuing research in this area of the law, JSP has an interest in assisting courts to develop an accurate understanding of the legal issues surrounding the "meaningful opportunity for release" standard.

The Campaign for the Fair Sentencing of Youth (CFSY) is a national coalition and clearinghouse that coordinates, develops and supports efforts to implement just alternatives to the extreme sentencing of America's youth with a focus on abolishing life without parole sentences for all youth. The CFSY's vision is to help create a society that respects the dignity and human rights of all children through a justice system that operates with

consideration of the child's age, provides youth with opportunities to return to community, and bars the imposition of life without parole for people under age eighteen. They are advocates, lawyers, religious groups, mental health experts, victims, law enforcement, doctors, teachers, families, and people directly impacted by this sentence, who believe that young people deserve the opportunity to give evidence of their remorse and rehabilitation. Founded in February 2009, the CFSY uses a multi-pronged approach, which includes coalition-building, public education, strategic advocacy and collaboration with impact litigators—on both state and national levels—to accomplish its goal.

RULE 6.906(4)(D) STATEMENT

No party's counsel authored this brief in whole or in part nor contributed money to fund the preparation or submission of this brief. No person other than the *amici* have contributed anything to fund the preparation or submission of this brief.

ARGUMENT

I. Introduction: The Iowa Board of Parole Must Provide a "Meaningful Opportunity to Obtain Release Based on Demonstrated Maturity and Rehabilitation"

Under the U.S. and Iowa Constitutions, the Iowa Board of Parole ("Board") must provide juvenile offenders sentenced to life-long sentences with a meaningful opportunity for release based on demonstrated maturity and rehabilitation. To meet this standard, the Board must ground its release decision in an assessment of an individual's rehabilitation and must have in place procedures to ensure that it has full and accurate information necessary to its decision.

In a series of recent decisions, the U.S. Supreme Court has placed Eighth Amendment limits on the sentences that may be imposed on children. *Graham v. Florida* held that children convicted of nonhomicide offenses cannot be sentenced to life without parole and must instead have a "realistic" and "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 560 U.S. 48, 74-75, 82 (2010). *Miller v. Alabama* and *Montgomery v. Louisiana* establish that children must have this meaningful opportunity for release even in homicide cases—except in the rarest of cases where the sentencer determines, after giving mitigating effect to the characteristics and circumstances of youth, that a child "exhibits

such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 136 S. Ct. 718, 733 (2016); *Miller*, 567 U.S. 460, 472-73 (2012). Following *Montgomery*, this Court held that life-without-parole sentences are unconstitutional for *all* children under the Iowa Constitution. *See State v. Sweet*, 879 N.W.2d 811 (Iowa 2016).

Significantly, a sentence may violate the Eighth Amendment and Iowa Constitution even if it technically provides for parole or some other form of early release. Courts have determined that a life-*with*-parole or similar sentence may run afoul of the Eighth Amendment if the sentence does not provide a chance for release at a meaningful point in time in an individual's life. *See, e.g.*, *People v. Contreras*, 411 P.3d 445, 454 (Cal. 2018) (holding that *Graham* requires more than a de minimis quantum of time outside prison but rather an opportunity to participate as a productive member of society). In addition, even if release is available at a meaningful time, a sentence will not meet constitutional requirements if the criteria and procedures used by the parole board fail to provide a realistic and meaningful opportunity for release based on demonstrated maturity and rehabilitation. *See, e.g.*, *Brown v. Precythe*, No. 2:17-cv-04082-NKL, 2017 WL 4980872, at *9-*10 (W.D. Mo. Oct. 31, 2017) (denying motion to dismiss challenge to Missouri's parole system, citing, *inter alia*, allegations

that parole is often denied based on the seriousness of the offense and that hearings focus on the crime rather than maturity and rehabilitation or youth).

Indeed, courts and legislatures across the country now recognize that youth matters to parole—that juvenile offenders are entitled to special consideration and procedural protections to guarantee their constitutional right to a meaningful opportunity for release. To comply with the U.S and Iowa Constitutions, in line with these evolving national standards, the Board must base its release decision on an assessment of a juvenile offender's maturity and rehabilitation since the time of the crime. Youth must be accounted for—both to set a baseline for measuring post-crime growth and change, and to provide context for behavior before, during, and after the crime. The Board may not deny release based on the severity of the offense or victim impact, as such a decision would be inconsistent with the constitutional mandate to base the release decision on maturity and rehabilitation. Moreover, to provide a *meaningful* opportunity for release, the Board's procedures must ensure that it has comprehensive and accurate information so that it can fully and fairly assess a juvenile offender's maturity and rehabilitation.

II. The Board's Decision Must be Based on an Assessment of Maturation and Rehabilitation Since the Time of the Offense

To meet constitutional requirements, the parole release decision must be grounded in an analysis of maturity and rehabilitation—whether and how a juvenile offender has changed since the time of the crime. Thus, the Board must understand the circumstances and characteristics of the juvenile at the time of the offense and consider the mitigating effects of youth.

A. The Board's Decision Must Focus on Rehabilitation—Not the Severity of the Offense

To ensure that a juvenile offender receives his or her constitutional right to a meaningful opportunity for release, the Board must focus its inquiry on post-crime maturation and rehabilitation and *not* on the nature of the offense—except as relevant to establishing a baseline from which to determine post-crime change. If the severity of the crime trumps rehabilitation, then the sentence is equivalent to a life-without-parole sentence for Eighth Amendment purposes, as it denies a meaningful opportunity for release *based on demonstrated maturity and rehabilitation.*

This Court in *Sweet* recognized that a life-without-parole sentence *cannot* be imposed by the sentencing court. Life imprisonment is appropriate only for the rarest, "irreparably corrupt" juvenile offender, and sentencing courts are ill-suited "to identify with assurance those very few

adolescent offenders that might later be proven to be irretrievably depraved," even after consideration of the crime and the *Miller* factors. 879 N.W.2d at 837. Instead, "[t]he parole board will be better able to discern whether the offender is irreparably corrupt after time has passed, after opportunities for maturation and rehabilitation have been provided, and after a record of success or failure in the rehabilitative process is available." *Id.* at 839. Thus, per *Sweet*, the Board must assess a juvenile offender's post-crime maturity and rehabilitation to determine whether release is required (as it will be, at some point, for all but the rare juvenile offender who does not reform). *See also Greiman v. Hodges*, 79 F. Supp. 3d 933, 943 (S.D. Iowa 2015) (reasoning that the Board has the responsibility for ensuring a meaningful opportunity for release based on demonstrated maturity and rehabilitation and holding that it could not determine at the motion-to-dismiss stage whether the Board's procedures sufficed).

Courts considering parole systems in other states have similarly emphasized that the release decision must focus on rehabilitation, and not on the severity of the offense or victim impact. For example, the Florida Supreme Court determined that a 100-year sentence with the opportunity for earlier release based on "gain time" failed to pass constitutional muster, explaining that "gain time, generally, is not based on a demonstration of

maturity and rehabilitation." *Johnson v. State*, 215 So.3d 1237, 1242 (Fla. 2017). A federal district court in Maryland similarly concluded that allegations about Maryland's parole system—that it did not require assessment of maturity and rehabilitation but rather permitted the governor to deny parole for any reason and without any governing standards—sufficed to state an Eighth Amendment claim. *Maryland Restorative Justice Initiative v. Hogan*, No. ELH-16-1021, 2017 WL 467731, at *2, *25-*26 (D. Md. Feb. 3, 2017) (denying motion to dismiss in relevant part); *see also Brown*, 2017 WL 4980872, at *9-10 (citing allegations that parole hearings focus on the crime rather than maturity and rehabilitation and that the board often cites seriousness of the offense only in denying parole).

B. The Board Must Consider the Mitigating Circumstances of Youth

The required focus on post-crime maturation and change does not negate the importance of considering *the mitigating circumstances of a juvenile offender's youth* at the time of the crime. Youth matters for parole. It is relevant to assessing the baseline—to understanding who the person was at the time of the crime in order to discern if and how he or she has changed—and to contextualizing the crime and the institutional record. Ultimately, the diminished culpability of juveniles and their enhanced capacity for reform must guide the parole release decision.

Several courts have held that a parole board's failure to treat juvenile cases differently from adult cases—and to consider the mitigating circumstances of youth—violates the Eighth Amendment. *See, e.g.*, *Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 140 A.D.3d 34, 36 (N.Y. App. Div. 2016) (granting a *de novo* parole hearing because the parole board "failed to consider the significance of petitioner's youth and its attendant circumstances at the time of the commission of the crime," which is "the minimal procedural requirement necessary to ensure the substantive Eighth Amendment protections"); *Hayden v. Keller*, 134 F. Supp. 3d 1000, 1009 (E.D.N.C. 2015) (explaining that North Carolina's parole process is inadequate for juvenile offenders because, *inter alia*, no consideration is given to age at the time of the crime or to children's diminished culpability and heightened capacity for change); *Atwell v. State*, 197 So. 3d 1040, 1041 (Fla. 2016) (holding life-*with*-parole sentence unconstitutional because Florida's parole system, *inter alia*, failed to provide individualized consideration of youth at the time of the crime); *see also State v. Young*, 794 S.E.2d 274, 279 (N.C. 2016) (rejecting the state's sentence review procedures as constitutionally insufficient for juvenile offenders because of failure to consider youth and maturation).

C. Many States Have Statutes or Regulations Directing Parole Boards to Treat Juvenile Cases Differently

Many states that have enacted legislation or promulgated regulations implementing *Graham* and *Miller* explicitly require parole boards to treat juvenile offenders differently—to focus on post-crime maturity and rehabilitation (rather than on the nature of the offense) and/or to account for youth at the time of the crime.

Arkansas, for example, recently passed legislation requiring its parole board to ensure "a meaningful opportunity to be released on parole based on demonstrated maturity and rehabilitation" and directing consideration of, *inter alia*, "immaturity . . . at the time of the offense" and "subsequent growth and increased maturity . . . during incarceration," as well as participation in rehabilitative and educational programs. *See* Ark. Code § 16-93-621(b). West Virginia and California similarly require parole boards to consider post-crime growth and increased maturity. *See* W. Va. Code § 62-12-13b(b); Cal. Penal Code § 4801(c); *see also* D.C. Code § 24-403.03(c)(5) (requiring courts in sentence-modification proceedings for juvenile offenders to consider "[w]hether the defendant has demonstrated maturity, rehabilitation, and a fitness to reenter society"); N.D. Cent. Code § 12.1-32-13.1(3)(e) (requiring consideration of whether a juvenile offender "has demonstrated maturity, rehabilitation, and a fitness to re-enter society

sufficient to justify a sentence reduction"). In addition, the Rhode Island Parole Board recently updated its guidelines for juvenile offenders to require consideration of "any subsequent growth and increased maturity of the prisoner during incarceration," including "[p]articipation in available rehabilitative and education programs" and "[e]fforts made toward rehabilitation." R.I. Parole Board, 2018 Guidelines § 1.5(F)(2), http://www.paroleboard.ri.gov/guidelines/2018%20PB%20Guidelines%20as%20AMENDED%20and%20FINAL.pdf.

As states require focus on maturity and rehabilitation, they also direct parole boards to account for youth—often through consideration of the factors enumerated by the U.S. Supreme Court in *Miller*. *See, e.g.*, Ark. Code § 16-93-621(b)(2) (directing consideration of "[t]he diminished culpability of minors," "the hallmark features of youth," and certain mitigating factors of youth); W. Va. Code § 62-12-13b(b) (same); Cal. Penal Code § 4801(c) (same); *see also* R.I. Parole Board, 2018 Guidelines § 1.5(F)(2) (same). States providing sentence reduction opportunities for juvenile offenders similarly require consideration of youth. *See, e.g.*, D.C. Code § 24-403.03(c)(8), (10) (directing courts to consider age, diminished culpability, the hallmark features of youth, and certain youth-related

factors); N.D. Cent. Code § 12.1-32-13.1(3)(c), (j) (requiring consideration of youth and related characteristics).

D. The Iowa Board of Parole Should be Directed to Base its Decisions in Juvenile Cases on Rehabilitation and to Consider the Mitigating Circumstances of Youth

The statutes and regulations governing Iowa's parole process do not ensure a meaningful opportunity for release based on demonstrated maturity and rehabilitation as is constitutionally required for juvenile offenders. The Board is nowhere required to treat cases involving juvenile offenders differently, to account for youth at the time of the crime or, critically, to base its decision on post-crime maturity and rehabilitation. *See* Iowa Code §§ 906.4, 906.5; Iowa Admin. Code r. 205-8.10. Moreover, the Board is directed to consider the nature and circumstances of the crime without any related, necessary consideration of the mitigating circumstances of youth, and despite the fact that the crime should not, as a constitutional matter, drive the release decision. *See id.* r. 205-8.10(1)(b).

The characteristics of youth render certain aspects of Iowa's parole process—calibrated to adult offenders—especially improper and inadequate to assess a juvenile offender's suitability for parole. For example, the Board is directed to consider "[p]revious criminal record," the "[n]ature and circumstances of the offense," and recidivism, Iowa Admin. Code r. 205-

8.10(1)(a)-(c), even though adolescent criminal history is an inaccurate measure of irreparable corruption. A juvenile offender's criminal history is unlikely to be a helpful metric to determine suitability for release—most juvenile offenders outgrow their criminal behavior, and it is impossible to discern from the crime the rare juvenile offender that will continue to offend. *See, e.g.*, Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014-1016 (2003). In addition, any focus on institutional behavior, as also required here, Iowa Admin. Code r. 205-8.10(1)(h), (n), should ensure the Board accounts for youth, which provides important context for a record of disciplinary tickets that skews toward misbehavior early in a juvenile offender's incarceration. *See Hayden*, 134 F. Supp. at 1010 (noting that examining a history of disciplinary infractions through the lens of youth "gives meaningful insight into gaining, or failing to gain, maturity and rehabilitation;" whereas without consideration of youth, the same record might "simply illustrate[] a high number of disciplinary infractions, which are statistically damaging to one's chance for parole"); Elizabeth P. Shulman and Elizabeth Cauffman, *Coping while Incarcerated: A Study of Male Juvenile Offenders*, 21 J. of Res. on Adolescence 818, 826 (2011) (finding that despite attempts to cope, youth

exhibit high levels of misconduct during early incarceration). Thus, absent adequate consideration of youth and its effects, Iowa's adult-focused parole criteria may inadvertently make youth an aggravating factor, rather than a mitigating one.

This Court should require the Board to base its release decision on maturity and rehabilitation and should direct the Board to fully consider the mitigating circumstances of youth at the time of the offense and how youth may affect institutional behavior.

III. Certain Procedures Must Exist to Ensure the Board Can Make a Meaningful Assessment of a Juvenile's Rehabilitation

As courts and legislatures across the country have recognized, certain procedures are necessary to ensure that parole boards fulfill their constitutional duty to base the parole decision on demonstrated maturity and rehabilitation with a sensitivity to the particular histories and vulnerabilities of juvenile offenders. Ultimately, the Board must have before it comprehensive and reliable evidence so that it can make an informed decision about suitability for parole and discharge its constitutional duty to release all but the rarest, "irreparably corrupt" juvenile offender who does not demonstrate post-crime maturity and rehabilitation.

Juvenile offenders are an especially vulnerable prison population—more likely than adult offenders to have experienced abuse and trauma, to

require psychological and other professional services, to be uneducated, and to lack connections and support outside prison, among other vulnerabilities. *See, e.g.*, Ashley Nellis, *The Lives of Juvenile Lifers*: *Findings from a National Survey*, (The Sentencing Project 2012), at 2-3 [hereinafter *The Lives of Juvenile Lifers*] (concluding from survey results that juvenile lifers experienced high levels of exposure to violence in their homes and their communities and faced significant educational challenges), https://sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf; American Civil Liberties Union, *False Hope: How Parole Systems Fail Youth Serving Extreme Sentences* (2016), at 26 [hereinafter *False Hope*] ("Several studies show that [juvenile offenders] tended to be raised in poor neighborhoods, had limited education, had mental disabilities, and were themselves subject to physical and sexual violence."), https://www.aclu.org/report/report-false-hope-how-parole-systems-fail-youth-serving-extreme-sentences. Thus, certain procedures are required to ensure a realistic and meaningful opportunity for release—that is, to enable juvenile offenders to navigate the parole process, to adequately present themselves to the Board, and to prepare for successful release. *See, e.g.*, Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of* Miller v. Alabama *and* Graham v. Florida, 35 Cardozo L. Rev. 1031, 1079

(2014) ("When they finally near their first parole hearings, many [juvenile offenders] have few contacts in the outside world, no job prospects, and no previously-forged relationships; in other words, they are even less prepared for reentry than their adult counterparts. They thus come before the Board in a high 'risk state,' unlikely candidates for release unless their circumstances are considered from an appropriate developmental perspective.").

A. Procedures Are Necessary to Ensure that the Board Has Comprehensive Evidence Relevant to Maturity and Rehabilitation

To ensure that the Board has before it all of the evidence relevant to post-crime maturity and rehabilitation, procedures must exist to permit juvenile offenders to submit such evidence, to access rehabilitative programs, and to be evaluated by trained professionals.

1. Permitting Submission of Evidence of Rehabilitation

Perhaps most obviously, parole boards must have procedures in place permitting juvenile offenders to submit evidence relevant to maturity and rehabilitation.

Here, the Board is responsible for the constitutionally required determination of irreparable corruption, based on assessment of maturity and rehabilitation. Such a decision cannot be meaningful or accurate without

input from the juvenile offender. But Iowa permits the parole release decision to be made based solely on examination of the person's file, without any input or submissions from the prospective parolee or counsel. *See* Respondent's Brief, *Bonilla v. Iowa Bd. of Parole*, No. CVCV052692, at *4 (Iowa Dist. Ct. Dec. 28, 2017).

In this regard, Iowa is an extreme outlier; most states recognize that offender participation and input is essential to meaningful parole consideration, especially for juvenile offenders. A recent national survey of state parole practices found that the vast majority of states—37 of 38 state respondents—permitted prospective parolees to be present and to speak at parole hearings; 24 permitted attorneys to be present and to speak, and 17 permitted prospective parolees' family members to be present and to speak (36 permit some form of input from family members). *See* Ebony L. Ruhland et al., Robina Inst. of Crim. Law & Crim. Just., *The Continuing Leverage of Releasing Authorities: Findings from a National Survey*, at 28-29 (2017) [hereinafter *Continuing Leverage*], https://robinainstitute.umn.edu/publications/continuing-leverage-releasing-authorities-findings-national-survey.[1] With respect to juvenile offenders in

[1] Examples of state practices include: N.H. Code Admin. R. Par 203.06(a) (allowing prospective parolees to "have family members, friends, professional persons, employers, or other witnesses present [at parole

particular, California allows "[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime" to "submit statements for review by the board," in advance of youth offender parole hearings. Cal. Penal Code § 3051(f)(2). And such submissions are regularly part of the "reports and other documents" submitted by counsel for consideration by the parole board in Connecticut. *See* Conn. Gen. Stat. § 54-125a(f)(3); *see also* D.C. Code § 24-403.03(b)(2) (requiring a hearing at which the defendant and counsel may speak and introduce evidence). These states recognize that meaningful assessment of maturity and rehabilitation requires a more

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hearings] to discuss the case with the board"); Alexis Lee Watts et al., Robina Inst. of Crim. Law & Crim. Just., *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: Wyoming*, at 6 (2018) (explaining that prospective parolees in Wyoming participate in a hearing at which they and up to five supporters, including an attorney, may give testimony at the board's discretion), https://robinainstitute.umn.edu/publications/profiles-parole-release-and-revocation-wyoming; Alexis Lee Watts et al., Robina Inst. of Crim. Law & Crim. Just., *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: Alaska*, at 7 (2017) [hereinafter *Profiles: Alaska*] (noting that applicants for parole can present "any relevant written information from any interested person, group, or agency"), https://robinainstitute.umn.edu/publications/profiles-parole-release-and-revocation-alaska.

thorough examination of progress and character than is possible from mere file review.

The Board is permitted to consider participation in institutional programs. *See* Iowa Admin. Code r. 205-8.10(1)(e). But examination of institutional programming alone will provide an incomplete picture of growth and change. Such review will miss any self-study or other efforts toward rehabilitation that may fill crucial gaps for juvenile offenders otherwise unable to access institutional programming. *See, e.g. False Hope* at 85-88 (describing numerous barriers preventing access to rehabilitative programming for many juvenile offenders). More fundamentally, without input from the juvenile offender or those who know him, mere review of programming will not provide meaningful insight into actual maturation or rehabilitation.

Several courts have found parole processes insufficiently meaningful when juvenile offenders are limited in their ability to present information about maturity and rehabilitation. *See, e.g.*, *Brown*, 2017 WL 4980872, at *4 (citing allegations that most time at parole hearings is spent discussing the circumstances of the offense and that information and presentation from the offender "is severely limited"); *Hayden*, 134 F. Supp. 3d at 1009–10 (finding that insufficient notice is provided "to the offender, his/her family

members, or others who may be able to provide relevant information about the offender's rehabilitation and maturity efforts," denying a chance to demonstrate maturity and reform).

2. Access to Rehabilitative Programming

Procedures must also exist to ensure that parole-eligible juvenile offenders are aware of and have access to the programming necessary to their rehabilitation and release. As discussed above, the Board is directed to—and should—consider juvenile offenders' participation in various institutional programs. But juvenile offenders, especially those serving long or life sentences, may be unable to avail themselves of necessary programming without procedures in place to facilitate access. *See False Hope* at 86 (noting that "[m]any parole boards . . . do not appear to recognize the limited availability of programming for these prisoners and hold it against [them] that they did not complete programming prior to their parole eligibility date").

To ensure that juvenile offenders can access necessary rehabilitative opportunities, parole boards and related entities ought to assist individuals in identifying programming and treatment that will aid rehabilitation and preparation for release. California, for example, directs its parole board in juvenile cases to provide prospective parolees with "individualized

recommendations . . . regarding his or her work assignments, rehabilitative programs, and institutional behavior." Cal. Penal Code § 3041(a)(1).

But, as here, merely recommending relevant programs may not suffice if the person cannot access them. Denied access, a juvenile offender may improperly become ineligible for release—not because of irreparable corruption or failure to rehabilitate, but simply because of inability to access particular classes or services. Moreover, it will be difficult for parole boards to meaningfully determine maturation and change, or to predict success upon release, if a person has not had access to the kinds of programs that facilitate and assess rehabilitation. To that end, Washington has tasked its department of corrections with helping juvenile offenders prepare for parole by making relevant programming available, requiring that "[n]o later than five years prior to the expiration of the person's minimum term, the department of corrections shall conduct an assessment of the offender and identify programming and services that would be appropriate to prepare the offender for return to the community." Wash. Rev. Code § 10.95.030(3)(e). "To the extent possible, the department shall make programming available as identified by the assessment." *Id.*

Iowa must similarly ensure that juvenile offenders are given guidance about and access to the programs and services necessary to allow meaningful assessment of maturity and rehabilitation.

3. Access to Psychological Evaluations

In many instances, independent psychological evaluations and reports from experts with special training in adolescence are crucial to ensuring that the parole board is adequately able to account for youth and to assess maturation, rehabilitation, and fitness for release.

Experts trained in juvenile psychology, for example, can help the Board understand an individual's circumstances and motivations at the time of the crime, post-crime development, and conduct in prison. Trained experts may also be better positioned to assess likelihood of recidivism, which can be a difficult determination in the case of a juvenile offender for whom past criminal conduct is unlikely to be a reliable indicator of future criminality and as to whom there will not be evidence of past performance on probation or parole *as an adult*. Access to specially trained psychological experts is also essential because there is a higher prevalence of mental impairments among juvenile offenders than among those not involved with the justice system; lack of access to experts increases the risk that parole is denied based on undiagnosed psychiatric or cognitive impairments, which

may go untreated in prison. *See generally* Lee Underwood & Aryssa Washington, *Mental Illness and Juvenile Offenders*, 13 Int. J. Environ. Res. & Pub. Health 228 (2016); Equal Justice Initiative, *All Children Are Children: Challenging Abusive Punishment of Juveniles*, at 12 (2017), https://eji.org/sites/default/files/AllChildrenAreChildren-2017-sm2.pdf.

Just as typical parole procedures may be ill-suited to juvenile offenders, so, too, may typical experts—untrained in adolescent brain development or mental health—be unable to sufficiently evaluate the particular characteristics and needs of these individuals. To that end, several states require parole boards in cases involving juvenile offenders to consider reports from experts in adolescence. *See*, *e.g.*, Ark. Code § 16-93-621(b)(2)(I) (directing consideration of "[t]he results of comprehensive mental health evaluations conducted by an adolescent mental health professional . . . at the time of sentencing and at the time the person becomes eligible for parole"); La. Rev. Stat. § 15:574.4(D)(2) (requiring that "each member of the panel . . . be provided with and . . . consider a written evaluation of the offender by a person who has expertise in adolescent brain development and behavior"). Massachusetts's highest court has reasoned that the assistance of a psychologist or other expert witness "may be crucial to [a] juvenile's ability to obtain a meaningful chance of release," and,

therefore, has construed a relevant statute to authorize a court, "upon motion of a parole-eligible, indigent juvenile homicide offender, to allow for the payment of fees to an expert witness to assist the offender in connection with his or her initial parole proceeding in certain limited contexts—specifically, where it is shown that the juvenile offender requires an expert's assistance in order effectively to explain the effects of the individual's neurobiological immaturity and other personal circumstances at the time of the crime, and how this information relates to the individual's present capacity and future risk of reoffending." *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 27 N.E.3d 349, 362-363 (Mass. 2015). And in Connecticut, appointed counsel regularly retain experts in adolescence to evaluate juvenile offenders in advance of the parole hearing, submit reports to the board, and make themselves available for questioning at the hearing. *See, e.g.*, Bd. of Pardons and Parole Hrg. for Inmate Michael McClean & William Heredia who were Sentenced as Juvenile Offenders, Connecticut Television Network (July 11, 2016) at 2:09:07, http://www.ctn.state.ct.us/ctnplayer.asp?odID=13056.

B. Procedures Are Necessary to Ensure that Parole Review is Based on Accurate and Reliable Information

Parole procedures must also ensure that the Board's decision is based on accurate and reliable information by permitting access to all information

used by the Board and an opportunity to correct or challenge that information, providing for in-person parole review, and excluding unverifiable and unreliable evidence.

1. Permitting Access to All Information Used by the Board and an Opportunity to Correct or Rebut It

Juvenile offenders must have access to all information used by the Board and an ability to correct or challenge that information. Without knowledge of the information upon which the Board is relying, prospective parolees cannot dispute or correct inaccuracies or provide alternative accounts of reports that may be essential to the release decision. Permitting access and opportunity to correct the record helps ensure that the Board bases its decision on accurate information.

Indeed, in other contexts, the U.S. Supreme Court has held that due process requires the chance to rebut adverse information (and, therefore, to access it in the first place). *See, e.g.*, *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 264 (1987) ("We conclude that minimum due process . . . in this context requires notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses."); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (stating that due process requires "disclosure to the parolee of

evidence against him" at a parole revocation proceeding and the chance to confront witnesses).

Other states, too, have recognized that the ability to access and rebut information relied upon by the board is an essential component of fair and meaningful parole review for juvenile offenders. California, for example, permits prospective parolees, at least ten days before a hearing, to review the file and to enter a written response. Cal. Penal Code § 3041.5(a)(1). *See also, e.g.*, Watts et al., *Profiles: Alaska*, at 7 (noting that, in Alaska, "an inmate has access to their parole file and to input given by others"). And a federal court in Missouri has denied a motion to dismiss a challenge to the state's parole processes for juveniles, reasoning that allegations that "[p]risoners are not permitted access to their parole files, so they do not know—and cannot challenge or correct—much of the information the Board considers" suggested that parole procedures were inadequate. *Brown*, 2017 WL 4980872, at *4.

2. In-Person Parole Review

In-person parole review hearings, permitting real-time exchange between prospective parolees and decisionmakers, help the Board to more accurately assess a juvenile offender's level of insight and maturity. In addition, such hearings allow prospective parolees the opportunity to address

the Board's questions and to correct or rebut inaccurate information that has been presented to the Board. Written submissions may be especially ill-suited to this purpose for juvenile offenders who "will often lack the educational attainment necessary to write effectively, and are likely to be much more capable of expressing themselves orally." Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L.J. 373, 423 (2014) [hereinafter *Review for Release*] (internal citation and quotation marks omitted); *see also* Nellis, *The Lives of Juvenile Lifers* at 3 (noting that two in five respondents had been enrolled in special education classes and that fewer than half had been attending school at all at the time of the offense).

The majority of states permit prospective parolees to participate at the parole hearing. *See* Ruhland et al., *Continuing Leverage*, at 29 (37 of 38 states responding to survey permit prospective parolees to be present and to speak at parole release hearings). Indeed, some states have special in-person parole or sentence review procedures for juvenile offenders. *See, e.g.*, Ark. Code § 16-93-621(b)(1); Cal. Penal Code § 3041.5(a)(2) (providing for a hearing to review parole suitability and permitting the juvenile offender "to be present, to ask and answer questions, and to speak on his or her own behalf"); Conn. Gen. Stat. § 54-125a(f)(3) (permitting, *inter alia*, juvenile

offenders to make statements on their own behalf at parole review hearings); D.C. Code § 24-403.03(b)(2)-(3) (requiring a hearing at which the juvenile offender and counsel may speak and introduce evidence); Fla. Stat. § 921.1402(6) (requiring courts to hold juvenile sentence review hearings); *see also Diatchenko* 27 N.E.3d at 359-361.

3. Exclusion of Unverifiable Information

Finally, to ensure that the evidence considered is accurate and reliable, the Board will need to exclude certain information that is not verifiable and was not subject to fact-finding at the time it was obtained. For example, the Board should decline to consider information in logs or reports alleging misconduct that was not adjudicated through the prison disciplinary process. Such information—which the juvenile offender may not have the opportunity to review, much less rebut, *see* Iowa Admin. Code r. 205-8.11—might misinform the Board about the juvenile's character, behavior, and suitability for release. This is especially problematic for juvenile offenders because *Sweet* and its progeny entrust the parole board to make a constitutionally required determination about maturity and rehabilitation—a decision that the sentencing court cannot make because the juvenile's brain and character are not yet fully developed. That this essential inquiry is now the province of the Board must not deprive the juvenile offender of the

opportunity to ensure that the decision is based on verifiable, reliable information and to rebut inaccuracies.

C. Indigent Juvenile Offenders Are Entitled to Appointed Counsel to Assist with Parole Hearings

Counsel is essential to providing meaningful parole hearings for juvenile offenders. Prospective parolees must have assistance of counsel to ensure that all relevant evidence of rehabilitation and the mitigating factors of youth is presented to the Board and that inaccurate information is rebutted. Indeed, effective preparation for parole hearings and eventual release may be especially challenging for juvenile offenders serving lengthy sentences to do on their own. Thus, indigent juvenile offenders must be appointed counsel to assist and represent them during the parole process.

Juvenile offender parole hearings—which require inquiry into the circumstances of the offender's youth and subsequent efforts toward rehabilitation—necessitate "a potentially massive amount of information . . . including legal, medical, disciplinary, education, and work-related evidence." *Diatchenko*, 27 N.E.3d at 360 (explaining that "[a] parole hearing for a juvenile homicide offender . . . involves complex and multifaceted issues that require the potential marshalling, presentation, and rebuttal of information derived from many sources"). Counsel is essential to ensuring that the Board is presented with all relevant information, which

may require extensive investigation into the offender's background, evaluations from mental health experts, and procurement of other records and testimonies. *See generally* Russell, *Review for Release* at 420-421.

Juvenile offenders serving lengthy sentences "will likely lack the skills and resources to gather, analyze, and present this evidence adequately." *Diatchenko* 27 N.E.3d at 360. Such individuals, incarcerated since childhood, are likely to have limited education without opportunity to develop critical skills in prison, may lack access to crucial information about their childhoods, and are unlikely to have connections or support within the community. *See* Russell, *Review for Release* at 419-21; *see also* Human Rights Watch, *Against All Odds: Prison Conditions for Young Offenders Serving Life without Parole Sentences in the United States* (Jan. 3, 2012) (noting that many juvenile offenders serving long sentences lose social support and family connections), https://www.hrw.org/report/2012/01/03/against-all-odds/prison-conditions-youth-offenders-serving-life-without-parole.

Counsel is necessary to ensure adequate presentation of relevant evidence so the Board can make an informed, accurate assessment of a juvenile offender's maturity and rehabilitation. Indeed, without assistance of counsel in the parole process, it is possible that the Board will erroneously

continue to detain juvenile offenders who are not irreparably corrupt simply because necessary information about the mitigating factors of youth and post-crime growth and change has not adequately been presented. *See, e.g.*, New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, at 3 (Cardozo Law Review, 2011) (finding in the context of removal proceedings that counsel was one of the two most important variables affecting outcome), http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf; Frankel et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 Law & Soc'y Rev. 419 (2001) (finding that tenants with representation did "significantly better" in housing court than tenants that did not have representation).

To this end, some states provide for the appointment of counsel to assist indigent juvenile offenders with parole hearings. *See, e.g.*, Conn. Gen. Stat. § 54-125a(f)(3) ("The office of Chief Public Defender shall assign counsel . . . if such person is indigent."); *Diatchenko*, 27 N.E.3d at 361 (requiring appointment of counsel for indigent juvenile homicide offenders as a matter of state constitutional law); Haw. Rev. Stat. § 706-670(3)(c)

(providing, in all parole hearings, that the offender shall "[h]ave counsel appointed to represent and assist the prisoner if the prisoner so requests and cannot afford to retain counsel"); Cal. Penal Code § 3041.7 (providing that at any hearing to consider parole release of a person serving a life sentence, "the inmate shall be entitled to be represented by counsel"); *see also* Fla. Stat. § 921.1402(5) (entitling juvenile offenders eligible for sentence review to counsel and requiring the court to appoint a public defender when needed). These states recognize that access to counsel is a base procedural requirement necessary to ensure a meaningful opportunity for release. In contrast, in denying a motion to dismiss a challenge to the state's juvenile parole processes, a federal court in Missouri has noted that "[p]risoners are permitted just one delegate at a hearing, and if the delegate is an attorney, she is not permitted to act as a lawyer in a hearing or even to meet with the prisoner beforehand." *Brown*, 2017 WL 4980872, at *4.

D. Meaningful Review of the Board's Decision

Meaningful review of parole release decisions is essential to a constitutionally adequate parole process. *See, e.g.*, *Diatchenko*, 27 N.E.3d at 365 ("[J]udicial review of a parole decision is available solely to ensure that the board exercises its discretionary authority to make a parole decision for a juvenile homicide offender in a constitutional manner, meaning that the

[state constitutional] right . . . to a constitutionally proportionate sentence is not violated."). Direct review of parole board decisions helps guarantee a meaningful opportunity for release, permitting review and reversal of decisions made based on inaccurate, incomplete, or improper information. Moreover, appellate review promotes consistency in release decisions and provides further opportunity to define the contours of the "meaningful opportunity" requirement. Certain procedures are necessary to ensure *meaningful* review.

As discussed above, a parole-eligible juvenile offender must be able to make a sufficient record of his or her post-crime maturity and rehabilitation so that the reviewing entity may comprehensively and accurately assess whether release is warranted. In addition, the Board must provide a timely, comprehensive written statement setting forth the reasons for its decision. A statement of reasons for parole denial is crucial to permitting meaningful review—to ensuring that the Board gave mitigating effect to youth and full and fair consideration of maturity and rehabilitation as required. And a statement of reasons may also ready the juvenile offender for future parole review by pointing to programs or treatments that could best prepare him for release.

Indeed, numerous states require parole boards to make a record of their decisions and the reasons for parole denial, at least for juvenile offenders. *See, e.g.*, Cal. Penal Code § 3041.5(b)(2) ("[T]he board shall send the inmate a written statement setting forth the reason or reasons for denying parole, and suggest activities in which he or she might participate that will benefit him or her."); Conn. Gen. Stat. § 54-125a(f)(5) ("[T]he board shall articulate for the record its decision and the reasons for its decision."); Haw. Rev. Stat. § 706-670(4) (directing the board in all cases of parole denial to "state its reasons in writing;" requiring, too, that "[a] verbatim stenographic or mechanical record of the parole hearing . . . be made and preserved"); La. Rev. Stat. § 15:574.4(D)(3) (requiring the panel to render "specific findings of fact in support of its decision"); *see also* D.C. Code § 24-403.03(b)(4) (requiring the court to issue a written opinion stating reasons for its decision); Fla. Stat. § 921.1402(7) (same).

Again, because *Sweet* defers from sentencing to parole the essential constitutional consideration—whether the juvenile offender is irreparably corrupt or whether he or she has demonstrated maturity and rehabilitation warranting release—the parole decision *must* maintain the procedural safeguards it would have if made at the time of sentencing. Creating a

record for meaningful appellate review is chief among these foundational requirements.

CONCLUSION

For these reasons, this Court should require the Board to adopt the criteria and procedures necessary to ensure that juvenile offenders receive the realistic and meaningful opportunity for release based on demonstrated maturity and rehabilitation to which they are constitutionally entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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