SUPREME COURT NO. 18-0477
POLK COUNTY DISTRICT COURT NO. CVCV052692

**IN THE SUPREME COURT OF IOWA**

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**Julio Bonilla,**
Petitioner-Appellant,

v.

**Iowa Board of Parole,**
Respondent-Appellee.

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

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# FINAL BRIEF OF APPELLANT

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## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

**1. Whether the district court erred in ruling that the protections against cruel and unusual punishment, due process, and right to counsel categorically do not apply to juvenile offenders before the Board of Parole.**

### Authorities

*State v. Louisell,* 865 N.W. 590 (Iowa 2015)

Iowa Code §17A.19 (2018)

*State v. Sweet*, 879 N.W.2d 811 (Iowa 2016)

Iowa Constitution, article I, section 9

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*State v. Bonilla*, No. 05-0596, 2006 WL 3313783 (Iowa Ct. App. Nov. 2006)

*Graham v. Florida*, 560 U.S. 48 (2010)

*Bonilla v. State*, 791 N.W.2d 697 (Iowa 2010)

*Miller v. Alabama*, 567 U.S. 460 (2012)

*State v. Lyle*, 854 N.W. 378, 398 (Iowa 2014)

*State v. Null*, 836 N.W.2d 41 (Iowa 2013)

*State v. Propps*, 897 N.W.2d 91 (Iowa 2017)

*Gartner v. Iowa Dept. of Public Health*, 830 N.W.2d 335 (Iowa 2013)

*NextEra Energy Resources, LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30 (Iowa 2012)

*State v. Ragland*, 836 N.Ws.2d 107 (Iowa 2013)

*Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250 (Iowa 2012)

*Klein v. Dubuque Human Rights Comm'n*, 829 N.W.2d 190 (Iowa Ct. App. 2013 (unpublished decision)

*Baker v. City of Wellman*, 870 N.W.2d 273, 2015 WL 2393450 (Iowa Ct. App. 2015)

*Harrison v. Employment Appeal Bd.*, 659 N.W.2d 581 (Iowa 2003)

*Hicok v. Iowa Employment Appeal Bd.*, 808 N.W.2d 755, 2011 WL 5391652 (Iowa Ct. App. 2011)

*Birchansky Real Estate, L.C. v. Iowa Dept. of Public Health,* 737 N.W.2d 134 (Iowa 2007)

*Norland v. Iowa Dep't of Job Serv.,* 412 N.W.2d 904 (Iowa 1987)

*Roper v. Simmons*, 543 U.S. 551 (2005)

*Montgomery v. Louisiana*, 136 S. Ct. 718, ___ U.S. ___, ___ (2016), *as revised* (Jan. 27, 2016)

*Greiman v. Hodges*, 79 F.Supp.3d 933 (S.D. Iowa 2015)

Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L. J. 373, 406-27 (2014)

*Hill v. Snyder*, No. 10-14568 (E.D. Mich. Nov. 26, 2013)

*Solem v. Helms*, 463 U.S. 277 (1983)

*State v. Roby*, 897 N.W.2d 127 (Iowa 2017)

**2. Whether the district court erred in ruling that the specific procedural and substantive due process safeguards articulated in Bonilla's nine motions to the Board were not necessary to ensure that he was afforded a realistic and meaningful opportunity for release on parole.**

**Authorities**

*Graham v. Florida*, 560 U.S. 48 (2010)

*Miller v. Alabama*, 567 U.S. 460 (2012)

Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L. J. 373, 406-27 (2014)

*Greiman v. Hodges*, 79 F.Supp.3d 933 (S.D. Iowa 2015)

*Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1 (1979)

*Vitek v. Jones*, 445 U.S. 480 (1980)

*State v. Baldon*, 829 N.W.2d 785 (Iowa 2013)

*Mathews v Elridge*, 424 US 319 (1976)

*Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532 (1985)

Iowa Constitution, article I, section 9

Iowa Constitution, article I, section 10

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*State v. Sweet*, 879 N.W.2d 811 (Iowa 2016)

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*State v. Young*, 863 N.W.2d 249 (Iowa 2015)

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*Morrissey v. Brewer*, 408 U.S. 471 (1972)

*State v. Ragland*, 836 N.W.2d 107 (Iowa 2013)

*State v. Roby,* 897 N.W.2d 127 (Iowa 2017)

Elizabeth Scott et al., *Juvenile Sentencing Reform in a Constitutional Framework,* 88 Temp. L. Rev. 675 (2016)

Jamie Fellner, Essay, *a Corrections Quandary: Mental Illness and Prison Rules*, 41 Harv. Law Rev. 391 (2006)

*Ake v. Oklahoma*, 470 U.S. 68 (1985)

*Tuggle v. Netherland*, 516 U.S. 10 (1995)

Iowa Code section 906.5 (2018)

Iowa Admin. Code. R. 205-8.8

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*Goldberg v. Kelly*, 397 U.S. 254 (1970)

*Califano v. Yamasaki*, 442 U.S. 682 (1979)

Iowa Admin. Code R. 205-1.2

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Iowa Admin. Code R. 205-8.8

*Boyde v. California*, 494 U.S. 370 (1990)

*Mccleskey v. Kemp*, 481 U.S. 279 (1987)

*Skipper v. South Carolina*, 476 U.S. 1 (1986)

Neb. Rev. Stat. § 83-1,110.04

Haw. Admin. Rules § 23-700-32(b)

*Walker v. Prisoner Review Bd.*, 694 F.2d 499 (7th Cir. 1982)

*Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1 (1979)

*Leonard v. Mississippi State Probation and Parole Board*, 373 F.Supp. 699 (N.D. Miss. 1974), Rev'd, 509 F.2d 820 (C.A.5), cert. denied, 423 U.S. 998 (1975)

*In re Rodriguez*, 14 Cal.3d 639, 122 Cal.Rptr. 552, 537 P.2d 384 (Cal. 1975)

*State v. Pohlabel*, 61 N.J.Super. 242, 160 A.2d 647 (N.J. 1960)

*Gardner v. Florida*, 430 U.S. 349 (1977)

John G. Douglas, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967 (2005)

*Chandler v. Moore*, 240 F.3d 907 (11th Cir. 2001)

*Del Vecchio v. Ill. Dep't. of Corrections*, 31 F.3d 1363 (7th Cir. 1994)

Iowa Admin. Code R. 205-8.11

Iowa Admin. Code R. 205-8.10

*Backstrom v. Iowa Dist. Ct. For Jones Cnty.*, 508 N.W.2d 705(Iowa 1993)

*State v. Null*, 836 N.W.2d 41 (Iowa 2013)

*State v. Ragland*, 836 N.W.2d 107 (Iowa 2013)

*State v. Pearson*, 836 N.W.2d 88 (Iowa 2013)

*State v. Lyle*, 854 N.W. 378 (Iowa 2014)

*State v. Seats*, 865 N.W.2d 545 (Iowa 2015)

*State v. Roby,* 897 N.W.2d 127 (Iowa 2017)

Conn. Gen. Stat. § 54-125a(f)(4)

W. Va. Code § 62-12-13b(b)

Ann. Cal. Penal Code § 4801(c)

Emily A. Whitney, Note, *Correctional Rehabilitation Programs and the Adoption of International Standards: How the United States Can Reduce Recidivism and Promote the National Interest*, 18 Transnat'l L. & Contemp. Probs. 777 (2009)

J.M. Kirby, Note, *Graham, Miller, & The Right to Hope*, 15 CUNY L. Rev. 149 (2011)

*Cooper v. Gwinn*, 298 S.E.2d 781 (W.Va. 1981)

*Abraham v. State*, 585 P.2d 526 (Ak. 1978)

Wash. Rev. Stat. § 10.95.030(3)

Ann. Cal. Penal Code § 3041(a)

Iowa Admin. Code R. 205-8.16

Megan Annitto, *Graham's Gatekeeper and Beyond*, 80 Brook. L. Rev. 119 (2014)

*Swarthout v. Cooke*, 562 U.S. 216 (2011)

### 3. Whether the district court improperly applied the reasoning in *Zarate* to dismiss Bonilla's claims.

## Authorities

*State v. Zarate*, 908 N.W.2d 831 (Iowa 2018)

## ROUTING STATEMENT

The Iowa Supreme Court should retain this case because it presents "substantial constitutional questions as to the validity of" the procedures used by the Iowa Board of Parole ("Board") when reviewing juvenile offenders, as well as "substantial questions of enunciating or changing legal principals." Iowa R. App. P. 6.1101(2)(a), (f).

## STATEMENT OF THE CASE

### A. Nature of the Case

In *State v. Louisell*, this Court was asked but declined to decide whether a sentence of life-with-the-possibility-of-parole imposed on a juvenile offender became a *de facto* life-without-parole ("LWOP") sentence if Board procedures did not provide such an applicant with a realistic and meaningful opportunity for release based upon their demonstrated maturity and rehabilitation. 865 N.W. 590, 602 (Iowa 2015). While recognizing that Board procedures do not "account for the mitigating attributes of youth that are constitutionally required sentencing considerations," the procedural posture of the case did not require

that the Court address the constitutionality of Board procedures as applied to juvenile offenders. *Id.*

In this appeal, Bonilla properly and squarely presents those issues. He asks this Court to find that the Board must provide him with a parole review process that affords him a realistic and meaningful opportunity for release based on his demonstrated maturity and rehabilitation, and to elaborate on the specific procedures the Board must follow to guarantee Bonilla and other juvenile offenders like him a constitutionally compliant parole review process.[1]

**B. Procedural History**

Bonilla filed this Petition for Judicial Review on September 14, 2016, pursuant to Iowa Code §17A.19 (2018). He challenges

[1] While Bonilla is a juvenile offender who committed a nonhomicide offense, this Court should find that Board procedures should apply equally to juvenile offenders who commit homicide offenses. This would be consistent with this Court's holding in *State v. Sweet*, where the Court categorically prohibited LWOP sentences under article I, section 17 for juvenile offenders who commit homicide offences. 879 N.W.2d 811, 839 (Iowa 2016). In so doing, this Court removed from the district court the responsibility of determining whether a juvenile offender is capable of rehabilitation or is "irretrievably corrupt," and instead placed that responsibility solely with the Board. *Id.* at 837.

the parole review practices and formal regulations (collectively "procedures") used by the Board in reviewing juvenile offenders because they violate article 1, sections 9, 10, and 17 of the Iowa Constitution and the Eighth and Fourteenth Amendments to the U.S. Constitution. App. 6-19. The Board filed a pre-answer Motion to Dismiss on October 2, 2016, App. 21-25, which, following briefing and oral argument on November 15, 2016, the district court denied on January 5, 2017. App. 62-66. On March 14, 2018, the district court denied Bonilla's petition for judicial review on the merits and dismissed this action. App. 180-93. Bonilla timely filed a Notice of Appeal on March 19, 2018. App. 195-96.

## STATEMENT OF THE FACTS

In 2005, Bonilla was convicted of kidnapping in the first degree for a crime he committed in 2002, when he was sixteen years old. Bonilla was initially punished with an LWOP sentence. *See State v. Bonilla*, No. 05-0596, 2006 WL 3313783 (Iowa Ct. App. Nov. 2006). Then, following the elimination of LWOP for juvenile offenders convicted of nonhomicide offenses in *Graham v. Florida*, 560 U.S. 48 (2010), Bonilla was resentenced in 2011 to

life imprisonment *with* the possibility of parole. *Bonilla v. State*, 791 N.W.2d 697 (Iowa 2010) (applying *Graham* retroactively to Bonilla).

While incarcerated, Bonilla has taken significant steps toward his rehabilitation and has had minimal recent disciplinary issues. He has completed numerous rehabilitative programs, such as the "Alternative to Violence" program, where he served as a group facilitator. He would like to enroll in additional programming—for example, sex offender treatment and the Grinnell college program—but the state has refused to permit his participation.

At his annual parole hearing on June 17, 2016, Bonilla sought nine procedural and substantive rights, each of which is necessary to ensure his constitutionally protected right to a parole review process; one that provides him with a realistic and meaningful opportunity to demonstrate his maturity and rehabilitation. Specifically, Bonilla sought: (1) the appointment of counsel; (2) an independent psychological evaluation; (3) an in-person parole review hearing; (4) an opportunity to present

evidence of rehabilitation; (5) access to all information used by the Board in making its decision and an opportunity to challenge such information; (6) exclusion of any information in support of his continued incarceration that is not verifiable and was not subjected to a fact-finding procedure at the time it was obtained; (7) proper consideration mitigating factors established by the U.S. Supreme Court in *Miller v. Alabama*, 567 U.S. 460 (2012); (8) access to treatment and programming; and (9) procedures to ensure future meaningful review in the event of his being denied release on parole. App. 235-414.

At Bonilla's July 28, 2016 paper-file review, the Board stated that there was no motion practice before it for Bonilla to assert these nine rights, and subsequently refused to grant (by refusing to even consider) any of the motions. App. 410, 422. Instead, the Board logged them as correspondence in support of Bonilla's release by the Board. App. 410. Bonilla appealed the summary denial of his motions to the Board, and the Board issued its final agency action on August 24, 2016, denying Bonilla's appeal. Appeal Response (Aug. 24, 2016); App. 411-14; 422.

While the Board has taken the position that "many of the procedural accommodations Bonilla seeks were already subsumed within existing Board policies and procedures," Appellee Br. at 21, as discussed below in turn, the Board provided Bonilla with none of the nine safeguards he sought, thus depriving him of a constitutionally compliant parole review process.

To be clear, in this appeal, Bonilla does not assert that the Board should have released him. Rather, Bonilla seeks constitutionally required changes to Board procedures to ensure that the process the Board uses to evaluate him and other juvenile offenders who appear before it is both realistic and meaningful as required by the U.S. and Iowa Constitutions.

## ARGUMENT

### A. Introduction

The State continues to subject Bonilla to disproportionate punishment and to deprive him of due process of law and his right to counsel because the current Board procedures deny him a realistic and meaningful opportunity for release on parole based upon his demonstrated maturity and rehabilitation.

The district court erred in dismissing Bonilla's petition for judicial review because it determined that the protections Bonilla sought were not constitutionally required. App. 193. The district court further erred by interpreting this Court's decision in *Propps* to mean that, once a juvenile had been sentenced, the Board did not need to consider the mitigating attributes of youth. App. 192. In so doing, the district court drew an artificial distinction between sentencing and parole procedures for juvenile offenders, finding that the holdings in *Graham, Miller,* and *Montgomery* only govern juvenile sentencing, not parole procedures. But the protections of the Eighth Amendment to the U.S. Constitution and article I, section 17 of the Iowa Constitution govern all forms of punishment, including sentences with or without the possibility of parole. *See Miller* 567 U.S. at 465 ("hold[ing] … mandatory life without parole for those under age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual *punishments*.'" (emphasis added)). As this Court's recent decisions addressing juvenile punishment make clear, juvenile offenders must receive individualized punishments that take into

consideration the mitigating attributes of youth. *See State v. Lyle*, 854 N.W. 378, 398, 340 (Iowa 2014) *(*holding that all statutorily-imposed mandatory minimum sentences for juveniles who commit both nonhomicide and homicide offenses are unconstitutional under article I, section 17); *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (finding *Miller* principles are independently rooted in the Iowa Constitution, and are applicable to all lengthy sentences for juvenile offenders who commit nonhomicide offenses or homicide offenses.)

Despite these rulings, post-*Graham*, *Miller*, *Null*, and *Lyle* Iowa's parole procedures for juvenile offenders remain substantially unchanged and thus unconstitutional.

Moreover, in *Sweet*, this Court recognized that the Board was better suited than the district court to determine if juvenile offenders had matured and rehabilitated to the point that they were fit for release; because the Board "has the benefit of seeing the individual offender's actual behavior." *State v. Propps*, 897 N.W.2d 91, 102 (Iowa 2017) (describing the holding of *Sweet*, 879 N.W.2d at 837). Thus, the district court erred by interpreting

*Sweet* and *Propps* to mean that the Board can ignore the fact that Bonilla was a juvenile when he committed his offense and instead simply review him as it would an adult offender. App. 192. *Sweet* requires the opposite: the Board must treat juvenile offenders differently from their adult counterparts, by providing them with a parole review process that provides them with a realistic and meaningful opportunity to obtain release based on their demonstrated maturity and rehabilitation.

Bonilla challenges the agency action under Iowa Code §17a.19(10)(a) (unconstitutional on its face or as applied); §17A.19(10)(d) (based on procedure or decision-making prohibited by law or without following the prescribed procedure or decision-making process); §17A.19(10)(c) (based upon an erroneous interpretation of law not clearly vested in the discretion of the agency); 17A.19(10)(j) (product of decision-making process in which the agency did not consider a relevant and important matter related to the propriety or desirability of the action in question); and §17A.19(10)(n) (otherwise unreasonable, arbitrary, capricious, or an abuse of discretion).

### B. Error Preservation

Bonilla preserved error on each of his 17A claims before the Board and on judicial review to the district court, which denied them. App. 80-83; App. 180-93.

### C. Standards of Review

The relevant standards of review differ for the asserted bases for review asserted under 17A:

#### 1. Iowa Code §17A.19(10)(a) (unconstitutional on its face or as applied)

Review on constitutional questions raised in agency proceedings is *de novo*. *Gartner v. Iowa Dept. of Public Health*, 830 N.W.2d 335 (Iowa 2013); *NextEra Energy Resources, LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30 (Iowa 2012). *See also State v. Ragland*, 836 N.W.2d 107, 113 (Iowa 2013) (allegedly unconstitutional sentence reviewed *de novo*.). Thus, no deference is due to the Board by this Court on the substantive question of whether the Board must provide Bonilla with realistic and meaningful opportunity for release or whether the nine specific procedural safeguards Bonilla sought and which the Board

denied are required to ensure the parole review process meets that constitutional demand.

### 2. Iowa Code §17A.19(10)(c) (erroneous interpretation of law not clearly vested in discretion of agency)

When the agency is not vested with the authority to interpret the law, then the agency's action based on its own interpretation is not entitled to deference; section 17A.19(10)(c) applies, and review is for correction of errors at law. *NextEra*, 815 N.W.2d at 36–37.

A court determines whether an agency possesses legislative interpretive authority on a case-by-case, phrase-by-phrase basis, and does not make "broad articulations of an agency's authority." *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 256 (Iowa 2012). Moreover, on judicial review, a court "[s]hall not give any deference to the view of the agency with respect to whether particular matters have been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19(11)(a). The grant of authority must be "clearly vested" with the agency, whether impliedly or expressly. *See id.*

### 3. Iowa Code §17A.19(10)(d) (decision-making prohibited by law)

The Court reviews the final agency action challenged for the procedure or decision-making process used under Iowa Code 17A.19(10)(d) for correction of errors at law. *Klein v. Dubuque Human Rights Comm'n*, 829 N.W.2d 190 (Iowa Ct. App. 2013) (unpublished opinion).

### 4. Iowa Code §17A.19(10)(j) (agency did not consider a relevant and important matter)

In cases in which section 17A.19(10)(j) is raised as a ground for reversal, the court "review[s] the case to correct errors of law on the part of the agency when 'the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action.'" *See, e.g., Baker v. City of Wellman*, 870 N.W.2d 273, 2015 WL 2393450, *2 (Iowa Ct. App. 2015) (citing *Harrison v. Employment Appeal Bd.*, 659 N.W.2d 581, 586 (Iowa 2003) (on a different provision of 17A). The court engages in a "close reading of the board's findings of fact" to determine "its

consideration of [the asserted relevant and important matter]." The court considers whether the board or agency "overlooked" the matter asserted as relevant or important. *See, e.g., Hicok v. Iowa Employment Appeal Bd.*, 808 N.W.2d 755, *7, 2011 WL 5391652 (Iowa Ct. App. 2011).

### 5. Iowa Code §17A.19(10)(n) (unreasonable, arbitrary, capricious, or an abuse of discretion)

In the context of a contested case, the Court will reverse an agency decision if it was unreasonable, arbitrary, or an abuse of discretion. *Birchansky Real Estate, L.C. v. Iowa Dept. of Public Health*, 737 N.W.2d 134, 140 (Iowa 2007). A decision is "arbitrary" or "capricious" when it is made without regard to the law or underlying facts. *Norland v. Iowa Dep't of Job Serv.,* 412 N.W.2d 904, 912 (Iowa 1987). A decision is "unreasonable" if it is against reason and evidence "as to which there is no room for difference of opinion among reasonable minds." *Id.*

## I. Bonilla Is Entitled To A Parole Review Process That Provides Him With A Realistic And Meaningful Opportunity To Obtain Release Based On His Demonstrated Maturity And Rehabilitation Under The U.S. And Iowa Constitutions.

The district court based its dismissal on its determination that "there is no authority compelling the [conclusion] that the matters requested in Bonilla's nine motions to the Board are constitutionally mandated." App. 193. But article 1, section 17 of the Iowa Constitution and the Eighth Amendment to the U.S. Constitution categorically prohibit Iowa from punishing juveniles with a life-with-the-possibility-of-parole sentence absent a process that provides them with a realistic and meaningful opportunity for release based on their demonstrated maturity and rehabilitation.

The U.S. Supreme Court has recognized the constitutional significance of childhood by placing limits on the punishment of juveniles. It was the characteristics of youth informed by science and social science that formed the basis of the Court striking down the juvenile death penalty in *Roper v. Simmons*, 543 U.S. 551 (2005), and life imprisonment without the possibility of parole for

children who commit nonhomicide offenses in *Graham v. Florida*, 560 U.S. at 62. More recently, in *Miller*, the Court held that mandatory LWOP sentences for juvenile offenders violate the Eighth Amendment's prohibition on cruel and unusual punishment. *Miller*, 567 U.S. at 479. Although the Court did not absolutely prohibit a state from imposing the punishment in homicide cases, procedures must "take into account how children are different, and how these differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 479-80. The Court reasoned that by making youth irrelevant to the imposition of a LWOP sentence, a mandatory juvenile sentencing scheme poses too great a risk of disproportionate punishment. *Id.*

To satisfy Eighth Amendment requirements states "must provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Miller*, 567 U.S. at 479 (quoting *Graham*, 560 U.S. at 75 (internal quotation marks omitted)). In addition, where a state "imposes a sentence of life it must provide [the offender] with some realistic opportunity to obtain release before the end of that term." *Graham*, 560 U.S. at

82. *Miller* also requires consideration of a juvenile offender's "mitigating qualities of youth" as a prerequisite to determining eligibility for release. *Miller*, 567 U.S. at 477-78; (citing *Roper*, 543 U.S. at 569, and listing characteristics of youth that must be considered before a determination is made not to release a juvenile). In short, *Graham* and *Miller* establish certain procedural guarantees that are a constitutionally indispensable part of any state process that may result in a juvenile spending a lifetime behind bars.

To be clear, *Graham* and *Miller* are different from one another in that *Graham* requires that all youth imprisoned for a nonhomicide crime be provided meaningful opportunities for release, whereas *Miller* does not necessarily require this in homicide cases where (a) life without parole is not mandatory and (b) individualized consideration is given to mitigating youth-related factors at the time of sentencing.[2] Neither *Graham* nor

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[2] Those factors are: (1) The youth's "chronological age and its hallmark features—among them, immaturity, impetuosity, and the failure to appreciate risks and consequences"; (2) The family and home environment that surrounds [the child], and from which he cannot usually extricate himself—no matter how brutal or

*Miller* guarantees a juvenile offender's eventual release, but both require that states provide them with opportunities for release that are realistic and meaningful.

Although *Miller* arose in the context of sentencing at the trial court, *Miller*'s protections under the Eighth Amendment govern all phases of punishment for juvenile offenders more generally. *Miller*, 567 U.S. at 479. Most recently in *Montgomery v. Louisiana*, the U.S. Supreme Court made clear that *Graham* and *Miller* and the Eighth Amendment apply equally to sentencing and parole procedures. 136 S.Ct. 718, 736, ___ U.S. ___, ___ (2016), *as revised* (Jan. 27, 2016) ("Allowing [juvenile] offenders to be considered for parole ensures that juveniles whose crimes

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dysfunctional"; (3) "[T]he circumstances of the [offense], including the extent of [the child's] participation in the conduct and the way familial and peer pressures may have affected him"; (4) The possibility that the child might have been "charged and convicted of a lesser offense if not for the incompetencies associated with youth—for example, [the] inability to deal with police officers or prosecutors (including in a plea agreement) or [the] incapacity to assist his own attorneys"; and (5) Any evidence or other information in the record bearing on "the possibility of rehabilitation." And, of particular relevance here, are the facts that "a child's character is not as 'well formed' as an adult's' his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity]"; and the extent or absence of "past criminal history." *Miller*, 567 U.S. at 477-78.

reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.") In *Montgomery*, therefore, the Court linked *Miller* to the mandatory nature of the LWOP sentence imposed in that case, and to the expected *length* of that sentence; the actual time served must not be "disproportionate" to both the offender and the extent to which they have demonstrated maturity and rehabilitation. *Id.*[3]

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[3] U.S. Courts have recognized that *Graham's* and *Miller*'s protections apply to govern parole procedures. *See e.g.*, *Greiman v. Hodges*, 79 F.Supp.3d 933, 945 (S.D. Iowa 2015):

> It is axiomatic that a juvenile offender could only prove increased maturity and rehabilitation warranting release from custody at some time well after a sentence is imposed. . . .
>
> The responsibility for ensuring that plaintiff receives his constitutionally mandated 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' lies squarely with IBOP and the other state-actor defendants.

*See also* Order requiring immediate compliance with *Miller*, *Hill v. Snyder*, No. 10-14568 (E.D. Mich. Nov. 26, 2013) ["Hill Order"], *available at* https://www.aclu.org/legal-document/hill-v-snyder-order-requiring-immediate-compliance-miller, (vacated and

Three distinct components of a constitutionally compliant parole process can be readily discerned from *Graham* and *Miller*. *See generally* Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L. J. 373, 383, 406-27 (2014) (identifying and analyzing three components of the "meaningful opportunity for release" requirement).

First, the opportunity for release must come at some meaningful point in time. Especially given a child's "heightened capacity for change," *Miller*, 567 U.S. at 479, states must provide juvenile offenders with an opportunity to obtain release that allows them sufficient time to reintegrate back into their communities and to become contributing members of society. *See Graham*, 560 U.S. at 79 ("life in prison without the possibility of parole gives no chance of fulfillment outside prison walls, no chance for reconciliation with society, no hope.").

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remanded on other grounds, *Hill v. Snyder*, No. 15–2607, 2016 WL 2731706 (6th Cir. May 11, 2016)).

Second, the possibility of release must be realistic. *Graham* explicitly recognizes this component of the process, *Graham*, 560 U.S. at 82 ("A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some *realistic* opportunity to obtain release before the end of that term." (emphasis added)), as has previous case law on the constitutionality of parole procedures, *see Solem v. Helms*, 463 U.S. 277, 300-03 (1983) (examining the operation of state parole procedures to determine the likelihood of actual release on parole in Eighth Amendment challenges to life sentences for adult prisoners). Therefore, states must provide juveniles who are able to demonstrate that they have matured and have rehabilitated with a realistic likelihood of release at some meaningful point in time. Parole procedures that do not allow the prospect of release to be realistic will be constitutionally deficient.

Third, the procedures that States develop to consider release must be fair and allow for meaningful consideration of the individual's suitability for release, an assessment based on "demonstrated maturity and rehabilitation." *Miller*, 567 U.S. at

479 (citing *Graham*). Absent each of these three components, any state scheme for reviewing parole eligibility violates the Eighth Amendment.

This Court has embraced the U.S. Supreme Court's reasoning in *Graham* and *Miller*, explicitly extending it to strike down all statutorily-imposed mandatory minimum sentences for juvenile offenders under the article I, section 17, categorically prohibiting LWOP sentences, and applying it in the context of parole procedures for juveniles. In *Lyle*, this Court struck down all statutorily-imposed mandatory minimum sentences for juveniles in Iowa as unconstitutional. 854 N.W.2d at 400 (overturning a mandatory minimum sentence of seven years for conviction of second-degree robbery). *Lyle* also held that *Miller* protections apply equally to juvenile offenders who commit nonhomicide and homicide offenses. *Id.* at 398.

And, in *Sweet*, although this Court held that article 1, section 17 does not require that the Board release all juvenile offenders, *Sweet*, 879 N.W.2d at 839 ("those who over time show irredeemable corruption will no doubt spend their lives in prison"),

it held that the Board, rather than the district court, must determine a juvenile offender's capacity for rehabilitation. *See also Louisell*, 865 N.W.2d at 602 (holding "a meaningful opportunity must be *realistic*" and noting, without determining whether they are constitutionality required, that the Board procedures fail to comply with *Miller*.) In categorically banning LWOP sentences for juveniles convicted of homicide offenses, *Sweet* placed the burden of determining a juvenile's capacity for rehabilitation with the Board because "[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." 879 N.W.2d at 836–39. *Sweet* recognizes the "likely impossible" task for district court judges when a LWOP sentence was preserved as a punishment option for juveniles: determining at an initial sentencing hearing, while the offender is still so young, whether he or she might be incapable of rehabilitation. *Id* at 839. As this Court explained: "the trial court

simply will not have adequate information and the risk of error is unacceptably high." *Id. at* 837.

Thus, taken together, these cases require the Board to provide juvenile offenders a parole review process that ensures they have a realistic and meaningful opportunity for release. And they obligate the Board to consider the three components detailed above, including in particular the *Miller* factors, during juvenile parole review processes regardless of whether the offender was convicted of a nonhomicide or a homicide offense. To be sure, *Miller* (in requiring the *Miller* factors to be considered prior to the imposition of a LWOP sentence for juvenile offenders who commit homicide offenses) and *Graham* (requiring a realistic and meaningful opportunity for release for juvenile offenders who commit nonhomicide offenses) are distinct. However, in *Lyle*, this Court recognized that under the Iowa Constitution, the requirement to weigh the *Miller* factors applies to all statutorily-imposed mandatory minimum sentences for juveniles—not just to those sentences for those who commit homicide offenses. *Lyle*, 854 N.W.2d at 404; *c.f. State v. Roby*, 897 N.W.2d 127 (Iowa 2017)

(allowing judicially-imposed mandatory minimum prior to parole eligibility, but only following individualized *Miller/Lyle* hearing).[4] In Iowa, all juvenile offenders are now eligible for parole, but as this Court has recognized, "the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole." *See also Ragland*, 836 N.W.2d 107, 121 (Iowa 2013) (holding that a juvenile LWOP sentence, even if commuted to a mandatory sixty-year term, violated the *Roper-Graham-Miller* principles under the Eighth Amendment and article I, section 17.) And as *Sweet* removes this consideration of a homicide juvenile offender's rehabilitation from the district court, instead making these considerations the

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[4] Indeed, for juvenile offenders like Bonilla who never had the *Miller* factors considered by the district court at the time of their sentencing, or resentencing to life-with-parole, the Board's role in weighing those factors is singular. Because Bonilla was convicted of a nonhomicide offense, on resentencing he never faced the possibility of a LWOP sentence, and as such none of the *Miller* factors were considered before he was punished. *See Bonilla v. State*, 791 N.W.2d at 702 (severing the portion of Iowa's old sentencing scheme allowing juvenile offenders convicted of nonhomicide offenses to be sentenced to LWOP, converting his sentence to life-with-parole).

Board's, the Board must weigh them during any parole review processes involving juvenile offenders who have committed nonhomicide or homicide offences.

In sum, the U.S. and Iowa Constitutional protections against cruel and unusual punishments compel the Board to provide all juvenile offenders who appear before it with a realistic and meaningful opportunity for release based on their demonstrated maturity and rehabilitation.

## II. Bonilla Is Entitled To A Realistic And Meaningful Opportunity For Release Under The Due Process Clauses Of The Fourteenth Amendment And The Iowa Constitution.

The district court also erred in failing to recognize that the due process protections afforded juvenile offenders before they are punished are also applicable to their parole review proceedings. App. 192-93. As well as establishing substantive Eighth Amendment limitations on punishment that states can impose on juveniles, *Graham* and *Miller* establish that regardless of whether a state's laws or policies create a liberty interest in parole generally, the substantive constitutional limitations on juvenile LWOP punishments create a liberty interest in release for

juveniles who are either convicted of nonhomicide offenses (*Graham*) or serving mandatory life sentences (*Miller*). *See also* Russell, *supra*, 89 Ind. L. J. 373 at 417.

Although not guaranteed release, juveniles are entitled to a meaningful chance of release if they demonstrate maturity and rehabilitation. *Miller*, 567 U.S. at 481 (citing *Graham*). Thus, unlike adult offenders, juveniles have a constitutionally protected liberty interest in a parole review process that affords them a meaningful opportunity to obtain release and demonstrate maturation and rehabilitation. In *Greiman*, a federal district court in Iowa recognized these due process protections in prohibiting the Board's motion to dismiss a lawsuit brought by a juvenile offender who appeared before the Board claiming that the Board had violated his due process rights. 79 F.Supp.3d at 945. The Court assumed, without deciding, that recent case law on the rights of juvenile offenders establishes that the right to a meaningful opportunity for parole is a liberty interest sufficient under the U.S. Supreme Court's *Greenholtz* decision:

> Although *Graham* stops short of guaranteeing parole, it does provide the

> juvenile offender with substantially more than a possibility of parole or a "mere hope" of parole; it creates a categorical entitlement to "demonstrate maturity and reform," to show that "he is fit to rejoin society," and to have a "meaningful opportunity for release."

*Greiman*, 79 F.Supp.3d at 945 (citing *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1 (1979)). Thus, Bonilla has a constitutionally protected liberty interest to a realistic and meaningful opportunity to obtain release through the parole process.

Due process protections are necessary whenever state action infringes on a constitutionally protected liberty interest. *See generally Vitek v. Jones*, 445 U.S. 480 (1980). As this Court has made clear, the due process guarantee under the Iowa Constitution provides at least as much protection as its federal counterpart. *See State v. Baldon*, 829 N.W.2d 785, 813 (Iowa 2013) ("the Due Process Clause of the Fourteenth Amendment established a federal floor related to civil liberties."). Procedural protections required when a liberty interest is at stake include *inter alia*: timely notice of action and an accompanying hearing

with sufficient time to permit the individual to prepare; disclosure and copies to the individual of all information relied on; the opportunity to present testimony of witnesses and to cross examine those against him; an independent decision maker; a written decision detailing the reasons and evidence relied on in reaching the decision; and the assistance of counsel. *Vitek v. Jones*, 445 U.S. at 494–95 (approving of the district court's consideration of these factors as sufficient in the context of prisoner transfer to a mental institution).

The constitutional requirement that a juvenile offender's opportunity for release must be "realistic" and "meaningful" means that the Board must adopt a procedurally fair system for determining periodically whether each individual sentenced as a child is suitable for release and any decision to deny release must be based on a failure to demonstrate maturity and rehabilitation. Although neither *Graham* nor *Miller* establish the exact nature of the procedural protections to achieve this end, *see Mathews v Elridge*, 424 U.S. 319, 335 (1976) ("Due process is flexible and calls for such procedural protections as the particular situation

demands." (internal citations and quotations omitted)) and although the state is initially assigned responsibility for crafting procedures, *Graham*, 560 U.S. at 75, ultimately it is for the courts to decide whether they are constitutionally compliant. *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 542-42 (1985) (holding that the nature of the procedures required by due process is a constitutional question to be answered by the judiciary).

Due process protections established by the Eighth and Fourteenth Amendments, and article I, sections 9, 10, and 17 require that the Board provide juvenile offenders, like Bonilla, parole consideration that is realistic and meaningful based on their demonstrated maturity and rehabilitation. The Board's existing procedures do not meet these exacting requirements and thus violate Bonilla's constitutionally protected rights to due process.

## III. The Specific Safeguards Articulated In Bonilla's Nine Motions To The Board Are Necessary To Ensure That The Board Affords Him A Realistic And Meaningful Opportunity For Release.

Having established that Board procedures must provide Bonilla with a realistic and meaningful opportunity for release

under the U.S. and Iowa Constitutions, and that under *Sweet*, the Board must assess whether Bonilla has rehabilitated, this Court must next establish the procedures necessary to give effect to these constitutional mandates. *See Graham*, 560 U.S. at 75 ("It is for the State, in the first instance, to explore the means and mechanisms for compliance [with the Eighth Amendment]." *Hutto v. Finney*, 437 U.S. 678, 687 n. 9 (1987) ("[S]tate and local authorities have primary responsibility for curing constitutional violations. If, however, those authorities fail in their affirmative obligations . . . judicial authority may be invoked." (internal citations and quotations omitted)). In this appeal, Bonilla seeks recognition that the nine specific rights that the Board denied him—independently and cumulatively—would comprise such a realistic and meaningful opportunity for release.

**A. Right to counsel**

As part of the special protections afforded juvenile offenders, the assistance of counsel in preparation for and during any parole review is necessary for Bonilla to ensure that his parole review hearing is "meaningful." *See Herrera v. Collins*, 506 U.S. 390, 405

(1993) ("we have, of course, held that the Eighth Amendment requires *increased reliability of the process* by which capital punishment may be imposed.") (emphasis added)). These same procedural protections may also be independently provided by other constitutional provisions. Thus, Bonilla further asserts his right to counsel in Board proceedings under the Eighth and Fourteenth Amendments of the U.S. Constitution, and article I, sections 9, 10, and 17 of the Iowa Constitution.

The governing Iowa statute provides: "the Board shall not be required to hear oral statements or arguments either by attorneys or other persons. All persons presenting information or arguments to the Board shall put their statements in writing." Iowa Code § 906.7 (2018). Bonilla's paper-file review hearing took place on July 28, 2016. App. 593. He sought and was denied appointment of counsel at state expense on the merits of his parole review. App. 235-53; 410, 422.[5] Bonilla was and remains indigent, and cannot

[5] At times below, the Board has attempted to obfuscate this case, and has argued that because Bonilla was represented by counsel in his 2016 hearing, he "was not prejudiced by the lack of state subsidized legal assistance." App. 161. As made clear throughout this case, Bonilla was not represented on the merits of

afford counsel to assist him with preparing for his parole review hearing or during said hearing. App. 731.

As Russell notes, "[a]ppointing counsel for indigent juvenile offenders would go a long way toward ensuring a meaningful hearing for juvenile offenders." Russell, *Review for Release*, 89 Ind. L.J. at 425. "[C]ounsel could play an important role in investigating, collecting, and presenting factual information so that the release decision is based on a full presentation of the relevant evidence. The prisoner could focus on a personal statement for the Board." *Id. at* 426.

Other states have already acted to ensure that their parole review procedures comply with *Graham*. A number of states have passed legislation explicitly requiring the appointment of counsel in varying circumstances for parole-eligible juvenile offenders. *See, e.g.*, Conn. Gen. Stat. § 54–125a(f)(1)(b) (requiring the appointment of counsel for indigent juveniles for assistance in

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his parole claim in 2016 by an attorney, court appointed or otherwise, as this case has always been about the denial of constitutional safeguards to ensure a meaningful opportunity for parole, and not whether any particular offender should be paroled.

preparation for parole review hearings); Code of Mass. Regs. § 300.08 (inmates serving a life sentence with parole eligibility may be represented by an attorney at initial release hearings); Ann. Cal. Penal Code § 3041.7 (entitling inmates to representation by counsel "[a]t any hearing for the purpose of setting, postponing, or rescinding a parole release date of an inmate under a life sentence"). Other states require that all inmates receive the assistance of counsel at parole hearings. *See, e.g.*, Haw. Admin. Rules § 23-700-32(b) ("the authority shall inform the inmate in writing of the inmate's right to: . . . (2) representation and assistance by counsel at the parole hearing; (3) have counsel appointed to represent and assist inmate if the inmate so requests and cannot afford to retain counsel.").

In Massachusetts, the Supreme Court held that the appointment of counsel was necessary to provide certain juvenile offenders a meaningful opportunity for release under its state constitution. *See Diatchenko v. Dist. Attorney for Suffolk Dist.*, 27 N.E.3d 349 (2015). In *Diatchenko*, the Court reasoned that the task of weighing likelihood of re-offense and rehabilitation is "far

more complex than in the case of an adult offender because of 'the unique characteristics' of juvenile offenders." *Id.* The information bearing on these issues is "potentially massive" and includes "legal, medical, disciplinary, educational, and work-related evidence." *Id.* Parole hearings for a juvenile offender involve "complex" procedures and "require the potential marshalling, presentation, and rebuttal of information derived from many sources." *Id.* "An unrepresented, indigent juvenile homicide offender will likely lack the skills and resources to gather, analyze, and present this evidence adequately. . . . [i]n light of the fact that the offender's opportunity for release is critical to the constitutionality of the sentence, we conclude that this opportunity is not likely to be 'meaningful' as required . . . without access to counsel." *Id.* (internal citations omitted)).

The Iowa Constitution, like that of Massachusetts, provides greater protection of the right to counsel and due process than its federal counterpart. This Court has required the assistance of counsel for defendants who the state prosecutes for simple misdemeanors because the threat of incarceration, however

minimal, implicates the potential deprivation of a liberty interest. *State v. Young*, 863 N.W.2d 249, 278 (Iowa 2015). Iowa Const. Art. I, §§ 9, 10.

This Court reasoned that article I, section 10 provides broader protections than the Sixth Amendment. *Young*, 863 N.W.2d at 256–67. "Unlike its federal counterpart, the Iowa provision is double breasted. It has an 'all criminal prosecutions' clause and a 'cases' clause involving the life or liberty of an individual." *Id. at* 257. *Young* recognized that "[u]nlike the 'all criminal prosecutions' language [of the U.S. Constitution], the liberty language of the 'cases' clause is directed toward a limited category of cases involving a person's interest in physical liberty." *Id.* at 278 (internal citation omitted). "What is apparent, therefore, is that one of the purposes of the 'cases' language was to guarantee the protections of article I, section 10 to those whom no formal criminal prosecution was or could be instituted, thereby providing broader protections than the United States Constitution." *Id. at* 279. In short, *Young* reaffirms the right to counsel in all cases in which a liberty interest is at stake.

*Young* recognized that while the case at issue involved the separate rights to counsel and to due process under the Iowa Constitution, "the issues tend to merge." *Id.* at 256. This Court ultimately concluded that where counsel was not afforded to the accused in a case where a liberty interest was at stake, due process prevented the initial defective proceeding from enhancing the punishment in a subsequent proceeding. *Id.* at 258. That same analysis applies to parole reviews of juvenile offenders in Iowa.[6]

In Iowa, parolees without the resources to retain private attorneys are entitled to appointed counsel during parole revocation hearings in recognition of the significant liberty interest at stake. *See* Iowa Admin. Code. R. 205-11.7(1)(c)(2); *see Morrissey v. Brewer*, 408 U.S. 471, 481–82 (1972) (recognizing that due process attaches to the parole review process under the Fourteenth Amendment.) In light of the juxtaposition of Iowa's state constitutional right to counsel, due process, and the requirement to provide a realistic and meaningful opportunity for

[6] The juvenile parole process falls under both the "life" and "liberty" prongs of Iowa's constitutional right to counsel clause, because in Iowa, after *Sweet*, the Board process as applied to juveniles is an extension of sentencing.

release, indigent juvenile offenders in parole hearings are entitled to at least the safeguards provided to adult offenders in the revocation context. Similar to the threat of losing freedom at revocation hearings, juvenile offenders face a deprivation of liberty following parole review. An offender convicted as a juvenile and serving a term of incarceration with parole eligibility has a liberty interest in, at the very least, having a realistic and meaningful parole review hearing; and under *Young*, this entitles Bonilla to the assistance of counsel, at state expense if he is unable to afford to hire an attorney, in preparation for and during any such parole eligibility review hearing. 863 N.W.2d at 250.

By denying Bonilla the appointment of counsel at state expense, the Board's actions violated his constitutional right to a realistic and meaningful opportunity for release.

**B. Independent psychological evaluation**

An independent psychological evaluation is also necessary under due process and article I, section 17 and the Eighth Amendment to assess the "hallmark characteristics of youth" that contributed to a juvenile offender's crime and the extent to which

that offender has since mentally matured and learned to conform his behavior to the requirements of the law. This evaluation should include an assessment of mental illness or behavioral issues that require treatment and the extent to which any such treatment has been successful.

In this case, psychologist Mark D. Cunningham had agreed to provide Bonilla with a psychological evaluation prior to his parole review hearing. App. 274. Dr. Cunningham is a nationally recognized expert in forensic psychology and possesses particular expertise in the area of juvenile psychological development in the context of criminal law. App. 732-45. Bonilla sought but was denied the appointment of independent psychological evaluation at the state's expense. App. 254-74; 731. Iowa Admin. Code R. 205-8.10(2) (906) provides that the Board may, at its discretion, "request a complete psychiatric or psychological evaluation of an inmate whenever, in the opinion of the Board, it would be beneficial to the Board's decision." There is no provision for an independent evaluation that takes into account the special circumstances of juvenile offenders and the need to consider the

juvenile's maturation and rehabilitation. The only evaluations of Bonilla ever considered by the Board were completed by employees of the state within the Department of Corrections.[7] App. 694-704.

While the Department of Corrections has evaluated Bonilla, these evaluations were not independent, expert-driven, or sufficiently comprehensive to provide the Board with the information it needed to assess his rehabilitation in light of the constitutional recognition that juvenile offenders must be treated differently from adult offenders. For example, the record shows that the Board had available a summary, fill-in-the-blank "offender performance evaluation form[s]", App. 458-95, as well as very short "Parole Board psychological evaluation[s]" in 2016 and 2017. App. 589-90; 668-70. However, comparing the 2016 and 2017 "psychological evaluations" shows outdated items and inaccuracies due to an apparent failure to update what had already existed in the computer system. For example, both the

[7] Notably, these state psychologists continually refer to Bonilla as "defendant" rather than as "patient" or by his name. App. 587; 667.

2016 and 2017 evaluations provide: "defendant stated he has not spoken with his father since he left El Salvador 8 years ago." Two "psychiatric encounter" reports also were logged in 2016 and 2017, which do not consider rehabilitation or maturity in accordance with the *Graham*/*Miller*/*Lyle* factors necessary to assist the Board in its evaluation. App. 589-90; 668-70. At no time during his incarceration has Bonilla been afforded an independent comprehensive psychological evaluation by a licensed psychologist. *Id.* Therefore, Bonilla has not had an adequate opportunity to demonstrate that he has been rehabilitated with respect to his current mental state and how he has developed and changed since the commission of the crime.

The cornerstone of juvenile offender jurisprudence rests in the reality that juvenile offenders are less psychologically developed than adults, and that juveniles' uniquely underdeveloped awareness and mental processes, combined with their enhanced ability to benefit from rehabilitation as they enter adulthood entitles them to special consideration in determining a constitutional punishment. *Miller*, 567 U.S. at 471-72; *see also id.*

n.5 (discussing the "ever-growing body of research in developmental psychology and neuroscience" confirming the psychological deficiencies of juveniles). Procedures which systematically deny Bonilla access to independent, qualified psychological evaluations taking into account the brain science that undergirds the constitutional right to a meaningful opportunity to demonstrate rehabilitation and maturity deprives him of that right and facilitate a *de facto* LWOP sentence. *See, e.g., State v. Ragland*, 836 N.W.2d at 121–22; 98 (Cady, C.J., concurring specially).

In *State v. Roby,* this Court gave guidance to district courts in resentencing juvenile offenders, emphasizing the essential role that experts play in evaluating juveniles, and cautioning them against applying past, generalized attitudes about criminal behavior. 897 N.W.2d 127, 143-48 (Iowa 2017). The Court emphasized that the factors are "most meaningfully applied when based on qualified professional assessments of the offender's decisional capacity." *Id. at* 145 (citing Elizabeth Scott et al.,

*Juvenile Sentencing Reform in a Constitutional Framework,* 88 Temp. L. Rev. 675, 696-97 (2016)).

Leading scholarship recognizes the necessity of an independent psychological evaluation to a meaningful review. *See* Russell, *Review for Release*, 89 Ind. L.J. at 420–21. ("[a] prisoner detained since childhood cannot be expected to muster the resources for a thorough investigation and mental health evaluation on his or her own.") Given the complexity of juvenile brain development, only licensed psychologists with specific expertise possess the ability to adequately assess the mental states of those who were convicted as children and grew up in the prison system, and gauge their present dangerousness to society and the extent to which they have been rehabilitated so as to meaningfully advise the Board. Importantly, mental illness is pervasive among prisoners; untreated mental illness may contribute greatly to criminal activity leading to imprisonment, and deteriorating mental illness strongly reduces the effectiveness of other rehabilitative efforts and often leads to increased disciplinary action against the prisoner. *See generally* Jamie

Fellner, Essay, *a Corrections Quandary: Mental Illness and Prison Rules*, 41 Harv. Law Rev. 391, 392–95 (2006). It follows that juveniles are deprived of a meaningful parole review hearing when the Board is not given the necessary tools to properly measure and evaluate these characteristics.

U.S. courts have long recognized the need for *independent* psychological evaluations as necessary due process protections against the imposition of cruel and unusual punishment. The U.S. Supreme Court held in the context of a capital sentencing proceeding that where the state introduces evidence of an accused's future dangerousness, due process entitles a defendant to an independent psychological evaluation. *Ake v. Oklahoma*, 470 U.S. 68, 105 (1985); *see also Tuggle v. Netherland*, 516 U.S. 10, 11 (1995) ("[w]hen the prosecutor presents psychiatric evidence of an indigent defendant's future dangerousness in a capital sentencing proceeding, due process requires that the state provide the defendant with the assistance of an independent psychiatrist."). The *Ake* court further recognized that an evaluation solely within the state's control was insufficient; because psychologists and

their evaluative techniques, perspectives, and conclusions vary so widely, the accused is entitled to present his own psychological expert. *Id. at* 81–82.

While *Ake* was decided in the context of the accused's ability to present evidence on insanity during a capital sentencing proceeding, the same procedural concerns arise when the decision to release a juvenile offender rests solely in the hands of the Board. As discussed in Section I of this argument, parole review in Iowa acts as an extension of the sentencing process for juvenile offenders and the Board acts with the mandate to continually consider whether the offender should be released on parole. *See Greiman*, 79 F.Supp.3d at 945.

In categorically banning LWOP sentences for juveniles, this Court recognized the role that highly trained psychological experts have in assessing rehabilitation:

> A district court at the time of trial cannot apply the *Miller* factors in any principled way . . . In short, we are asking the sentencer to do the impossible, namely, to determine whether the offender is "irretrievably corrupt" at a time when even trained professionals with years of clinical

> experience would not attempt to make such a determination.

*Sweet*, 879 N.W.2d at 837. Because of this, the task of applying the *Miller* factors in a principled way is necessarily left to the Board.

When the Board attempts to assess rehabilitation without the aid of an independent psychological evaluation, it is also being asked "to do the impossible," insofar as it must attempt to determine whether or not an individual has proven themselves to be "irretrievably corrupt," a determination that is difficult for "even trained professionals with years of clinical experience." *Id. at* 837. The Board and courts alike are ill equipped to resolve this question without the expertise of licensed, independent psychologists who are specially trained to assess juvenile offenders.

Without a meaningful assessment of his mental state, psychological maturity, and rehabilitation by an independent licensed professional prior to his parole review hearing, Bonilla was denied his constitutional right to a realistic and meaningful opportunity for release.

### C. In-person parole hearing

The Board refused to permit Bonilla to attend his reviews, and the Board did not interview him before the hearings or give him an opportunity to engage in a colloquy about the extent of his rehabilitation. App. 593-600, 705-09.[8] Iowa Code section 906.5(1) requires the Board to interview inmates convicted of certain class B and lesser felonies in preparation for their parole review. The Board has adopted regulations governing the right to an interview for all eligible inmates, Iowa Admin. Code. Rs. 205-8.8 (906), 205-8.12 (906). But these regulations do not require interviews to be in-person, nor do they provide for in-person parole review hearings for juvenile offenders.

Without an in-person interview and hearing, Bonilla has been denied the ability to meaningfully demonstrate the extent of his rehabilitation. Paper-review hearings are wholly inadequate because they neither provide juvenile offenders a meaningful opportunity to be heard nor do they provide an effective way to

[8] Bonilla's next annual review was scheduled for July 2018, and was also a paper-only review.

demonstrate and display the extent they have been rehabilitated in a truly interpersonal and meaningful way.

In other contexts, the U.S. Supreme Court has stated that "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard"; impersonal assessments, such as written submissions, are an "unrealistic option" for people "who lack the educational attainment necessary to write effectively." *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970). "[W]ritten submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue . . . Written submissions are a wholly unsatisfactory basis for decision." *Id. at* 269; *see also Califano v. Yamasaki*, 442 U.S. 682, 697 (1979) ("[W]ritten submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale."). Equally as inadequate are second-hand accounts by third parties. *Goldberg*, 397 U.S. at 269. *See also* Russell, *Review for Release*, 89 Ind. L.J. at 423 (Denial of an in-

person hearing is particularly problematic for juvenile offenders since prisoners detained since childhood will often "lack the educational attainment necessary to write effectively," and are likely to be much more capable of expressing themselves orally.")

Iowa law reflects the expectation that those being considered seriously for parole be interviewed. *See* Iowa Code § 906.5(1)(b) (2018). Likewise, the Board's essential duties include "[r]eviewing and interviewing inmates for parole." Iowa Admin. Code R. 205-1.2 (904a). The Board has further implemented a process for conducting such interviews. Iowa Amin. Code Rs. 205-8.8 (906), 205-8.12 (906), 205-8.14 (906)(e)–(f). By enacting and executing these provisions, both the general assembly and the Board implicitly affirm that interviewing an inmate provides important information to the Board when making a parole determination. Thus, the Board has denied Bonilla an already-established and easily administrable component of assessing rehabilitation in a meaningful way, even though unlike the adult offenders provided interviews, Bonilla as a juvenile offender has a constitutionally recognized liberty interest in a meaningful and realistic

opportunity to obtain release. As such, he is entitled to greater due process than those adult offenders, and the Board's policy of denying in person interviews to juvenile offenders offends both the U.S. and Iowa Constitutions.

**C. Opportunity to present evidence of rehabilitation**

The Board also denied Bonilla's request to be given an opportunity to present evidence of his rehabilitation. Iowa Administrative Rule 205-8.8 (906) provides that, *with respect to inmates granted interviews*, "[t]he Board or Board panel shall . . . consider the inmate's records with respect to history, current situation, parole and work release prospects, and other pertinent matters. The Board or Board panel shall give the inmate ample opportunity to express views and present materials." *Id.* Paper parole review, by contrast, does not allow juvenile offenders to marshal evidence to demonstrate their rehabilitation.

In capital sentencings, it has long been true that the ability to present mitigating evidence to the jury is a fundamental right under the Eighth Amendment. *Boyde v. California*, 494 U.S. 370, 377–78 (1990). Relatedly, the state may not interfere with a

capital sentencer's consideration of any such mitigating evidence. *Mccleskey v. Kemp*, 481 U.S. 279, 305–06 (1987) ("Any exclusion of the compassionate or mitigating factors stemming from the diverse frailties of humankind that are relevant to the sentencer's decision would fail to treat all persons as uniquely individual human beings."). "Equally clear," the U.S. Supreme Court has further held, "is the corollary rule that the sentencer may not refuse to consider . . . Any relevant mitigating evidence." *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986).

Some states have passed legislation explicitly permitting juvenile offenders to present evidence in their favor at review hearings. *See, e.g.*, Neb. Rev. Stat. § 83-1,110.04 (requiring the Board to consider "[a]ny other mitigating factor or circumstance submitted by the offender."). Other states allow all inmates being considered for parole to appear and present evidence on their behalf. *See, e.g.*, Haw. Admin. Rules § 23-700-32(b) ("the authority shall inform the inmate in writing of the inmate's right to: . . . (4) be heard and to present any relevant information.").

Because the Board denied Bonilla an in-person interview and hearing, compromising his ability to present evidence demonstrating rehabilitation, this Court should find that Bonilla was denied his right to a realistic and meaningful parole process.

### D. Opportunity to review and attempt to rebut evidence

Bonilla requested that the Board give him copies of any and all documents, reports, logs, files, and other information (referred to collectively as "information") obtained about him while incarcerated that the Board would use in makings its parole determination and that he be given an opportunity to rebut, explain, or challenge consideration of any such evidence at his hearing. App. 312. The Board never granted this request. App. 420-21, 422. Bonilla also requested access to all such information well in advance of his hearing, so that he might have a meaningful opportunity to review the information. App. 312-13. Bonilla further requested that the Board, in making its parole determination, refuse to consider any information not provided to him for his review prior to the hearing. App. 331, 422.

A juvenile offender's ability to ensure the accuracy of information that may be used to deny him parole is an indispensable component of a meaningful parole review system. The ability to be heard and to demonstrate rehabilitation necessarily incorporates the ability to know exactly what information will be used in assessing the extent of rehabilitation and the ability to refute information that may be inaccurate, misleading, or incomplete. "The danger posed to a parole candidate by the risk that his records contain incorrect information is clearly not insignificant. . . . [o]n occasion, researchers and courts have discovered many substantial inaccuracies in prisoner records." *Walker v. Prisoner Review Bd.*, 694 F.2d 499, 503 (7th Cir. 1982) (internal citations and quotation marks omitted); *see also Greenholtz*, 442 U.S. at 33 n. 15 (Marshall, J., dissenting in part) ("[e]rrors in parole files are not unusual."); *E. G.*, *Kohlman v. Norton*, 380 F.Supp. 1073 (D. Conn. 1974) (parole denied because file erroneously indicated that applicant had used gun in committing robbery); *Leonard v. Mississippi State Probation and Parole Board*, 373 F.Supp. 699

(N.D. Miss. 1974), Rev'd, 509 F.2d 820 (C.A.5), cert. denied, 423 U.S. 998 (1975) (prisoner denied parole on basis of illegal disciplinary action); *In re Rodriguez*, 14 Cal.3d 639, 122 Cal.Rptr. 552, 537 P.2d 384 (Cal. 1975) (factually incorrect material in file led parole officers to believe that prisoner had violent tendencies and that his "family reject[ed] him"); *State v. Pohlabel*, 61 N.J.Super. 242, 160 A.2d 647 (N.J. 1960) (files erroneously showed that prisoner was under a life sentence in another jurisdiction)").

In capital sentencings—which are doctrinally analogous under the Eighth Amendment—courts have long recognized that the ability to access and challenge evidence against the defendant is a fundamental procedural right. In *Gardner v. Florida*, the U.S. Supreme Court considered a challenge to a judge's consideration of a "confidential" presentence investigation report that the state had withheld from the offender and defense counsel. 430 U.S. 349, 352–51, 358–62 (1977). The court considered and rejected an array of arguments furthered by the state in support of keeping the information hidden: any resulting delay was inconsequential; turning over psychological reports would further rehabilitation,

not hinder it; and confidentiality was no excuse where the decision-maker relied on the information. *Id. at* 358–62. As the court soundly reasoned that "[t]he risk that some of the information accepted in confidence may be erroneous, or may be misinterpreted, by the investigator or by the sentencing judge, is manifest." *Id. at* 359. However, the court held that "petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id. at* 362.

While the U.S. Supreme Court has yet to go as far as to require the right to confrontation during capital sentencings, the state must give defendants the opportunity to rebut hearsay evidence. John G. Douglas, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 1980 (2005); *see also Chandler v. Moore*, 240 F.3d 907, 918 (11th Cir. 2001); *Del Vecchio v. Ill. Dep't. of Corrections*, 31 F.3d 1363, 1388 (7th Cir. 1994) ("the Constitution . . . requires that the defendant be given the opportunity to rebut evidence which makes its way

into the sentencing hearing because of the lax evidentiary standards.").[9]

Giving juvenile offenders access to this information and permitting them to challenge such flaws that would otherwise go uncontested not only ensures that the Board's review would be meaningful, but also systematically increases the reliability and legitimacy of the entire process. *See* Russell, *Review for Release*, 89 Ind. L.J. at 424 (explaining how crucial it is for juvenile offenders to be able to correct inaccuracies in descriptions of the crime, mental health evaluations, and in summaries prepared by the department of corrections that are often dispositive to decision-makers). Without the ability to know what information the Board may use against him during his hearing, and the ability to challenge that information, the Board deprives Bonilla of a realistic and meaningful opportunity for release.

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[9] Importantly, the rationale underpinning the Court's refusal to require confrontation at capital sentencings is often because the defendant already had the opportunity to attack the credibility of witnesses against him at trial. *See Chandler*, 240 F.3d at 918. But the same protections do not exist in the parole context, where new, potentially damaging evidence is gathered from year to year, sometimes over the course of decades, with no trial-like process or appeal to confirm its veracity.

**E. Exclusion of unverified information**

Closely related to the right of juvenile offenders to access information the Board will consider ahead of any parole review is the right of Bonilla to require the exclusion from the Board's consideration any documents, reports, logs, files, and other information obtained about him while he was incarcerated that are not verifiable or subjected to a fact-finding procedure at the time the documents were created. These documents would include "generic notes" and behavior logs that the Board uses in making its parole determination that are not subject to an independent process for ensuring veracity (referred to collectively as "non-verifiable information.")

Iowa Administrative Code R. 205-8.11 (906) provides that "[t]he Board shall normally consider only information that has been reviewed by the inmate, except when the Board deems such review not feasible." The rule further provides that the inmate shall be provided "factual" information, but is expressly prohibited from having access to "opinion" information and any other information the Board desires to keep confidential so as to protect

"confidential sources." *See generally Id.* There are no independent procedures for determining whether any such "opinion" information has a factual basis and is otherwise verifiable.

In Bonilla's case, the Board considered materials that were not adequately reliable. Specifically, the Board's records for parole applicants always include all "generic notes", e.g., App. 611-12; 640-58; 663.[10] Generic notes are not subject to a neutral fact-finding process or refutation by an offender at the time they are generated. For some offenders, these may include accusations by cellmates or unnamed "staff." App. 612.

The use of one-sided, subjective, non-verifiable information that Bonilla had no opportunity to challenge or appeal deprives him of a realistic and meaningful opportunity to be released on parole. A juvenile offender's ability to ensure the accuracy of information that may be used to deny him parole is an indispensable component of a constitutional parole review system.

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[10] Generic notes are the notes that correctional officers take on inmates comprising general observations, conversations, or comments. They are not provided to inmates unless they result in discipline; typically, inmates are not informed that generic notes are made.

When the Board is permitted to consider non-verifiable information in making its determination, there is a strong danger that the information may be inaccurate, misleading, or incomplete, violating basic tenets of due process, *see Greenholtz*, 442 U.S. at 7, and his right to a realistic and meaningful opportunity to be released.[11]

### F. Proper consideration of the mitigating attributes of youth

As already established in Section I, the Board must consider the five *Miller* factors during the parole review process, and the Board's failure to do so deprived Bonilla of a meaningful hearing. The relevant administrative rules currently permit the Board to consider essentially any factors it deems appropriate in

[11] Bonilla does not contest the Board's use of properly executed prisoner disciplinary proceedings. Unlike non-verifiable information such as generic notes, the prison disciplinary process affords at least minimal procedural protections and assurances of reliability. In prison disciplinary proceedings, inmates are, for example, entitled to notice of the charges against them and the right to "counsel substitute" to assist them in the proceedings. *Backstrom v. Iowa Dist. Ct. For Jones Cnty.*, 508 N.W.2d 705, 708–09 (Iowa 1993). Importantly, all prisoner disciplinary proceedings (unlike non-verifiable information the Board considers) must be supported by "some evidence," including "specific details of the activity at issue," and are subject to appeal to a non-corrections tribunal to ensure impartiality. *Id. at* 709.

determining whether to grant or deny parole. *See* Iowa Admin. Code R. 205-8.10(1) (906) ("the Board may consider the following factors *and others deemed relevant to the parole and work release decisions.*"). Specifically, the Board is instructed to consider an inmate's:

> A. Previous criminal record;
> B. Nature and circumstances of the offense;
> C. Recidivism record;
> D. Convictions or behavior indicating a propensity for violence;
> E. Participation in institutional programs, including academic and vocational training;
> F. Psychiatric and psychological evaluations;
> G. Length of time served;
> H. Evidence of serious or habitual institutional misconduct;
> I. Success or failure while on probation;
> J. Prior parole or work release history;
> K. Prior refusal to accept parole or work release;
> L. History of drug or alcohol use;
> M. A parole plan formulated by the inmate;
> N. General attitude and behavior while incarcerated;
> O. Risk assessment.

Iowa Admin. Code R. 205-8.10(2) (906).

Many of these factors focus exclusively on past actions of the inmate, including the originating offense. The regulations fail to comport with *Miller*.

In the face of this clear deficiency in the regulation itself, the Board has developed a practice of beginning each review hearing of a juvenile offender with a rote recitation of what it believes are the relevant inquiries required under the Iowa Constitution. App. 705. However, after giving lip service to the constitutional requirement to treat juvenile offenders differently, the Board failed to adequately do so. *Id.* In its consideration of Bonilla's suitability for parole, the Board failed to actually address the *Miller/Lyle* mitigating factors of the culpability of the underlying offense, or engage in a meaningful or systematic consideration of his rehabilitation since his incarceration. *Id.* Instead, the Board uses for the *Miller* factors as "aggravating" in the sense that it weighs them against rehabilitation. For example, at Bonilla's 2016 parole review, the Board Chair explained:

> Some of those factors the court discussed were a lack of maturity, underdeveloped sense of responsibility, family and peer pressures that they had no control over that

> would lessen their culpability and make it more likely that they would be susceptible to a period of rehabilitation in the future. However, they did discuss those as sentencing factors. And when we view those factors, if those still exist, I believe we would view those as aggravating factors. If the individual continues to be immature at the time we're reviewing, that's an aggravating factor. Susceptible to peer pressures, that's an aggravating factor. Lack of support in the community, that can be an aggravating factor, though not necessarily determinative, as we found. As well as susceptibility to outside influences, and a continued impulsivity, if you will, in behavior.

App. 593-600.

Consistent with *Miller*, this Court has repeatedly recognized that the hallmark factors of youth must be considered in mitigation of punishment. *See Null*, 836 N.W.2d at 75 ("[t]he typical characteristics of youth . . . are to be regarded as mitigating, not aggravating factors."); *Ragland*, 836 N.W.2d at 121 ("*Miller* requires an individualized consideration of youth as a mitigating factor at a sentencing hearing."); *Pearson*, 836 N.W.2d 88, 95 (Iowa 2013) ("[t]he typical characteristics of youth, such as immaturity, impetuosity, and poor risk assessment, are to be

regarded as mitigating instead of aggravating factors."); *Lyle*, 854 N.W.2d 378, 404 n.10; *State v. Seats*, 865 N.W.2d 545, 557 (Iowa 2015) ("The sentencing judge should consider these family and home environment vulnerabilities together with the juvenile's lack of maturity, underdeveloped sense of responsibility, and vulnerability to peer pressure as mitigating, not aggravating, factors.") *See also Roby*, 897 N.W.2d at 148 (reversing the district court, finding that it had applied the *Miller/Lyle* factors, "but not in the manner required to protect the juvenile offender from cruel and unusual punishment.")

Thus, while the Board should give robust and careful consideration to the rehabilitation and maturity that the juvenile offender demonstrates—through evidence presented with the assistance of counsel, it should also consider the *Miller* factors in considering the diminished culpability of the juvenile offender at the time of the underlying offense, and this should mitigate, not aggravate, the length of the sentence.

For example, other states, looking to bring their parole review process in line with the requirements of *Graham* and

*Miller*, have passed statutes guiding their parole boards to consider the *Miller* factors explicitly and appropriately. *See, e.g.*, Conn. Gen. Stat. § 54-125a(f)(4) (requiring special considerations for juvenile offenders at parole hearings, including that "such person has demonstrated substantial rehabilitation since the date such crime or crimes were committed considering such person's character, background and history, as demonstrated by factors, including, but not limited to, such person's correctional record, the age and circumstances of such person as of the date of the commission of the crime or crimes, whether such person has demonstrated remorse and increased maturity since the date of the commission of the crime or crimes, such person's contributions to the welfare of other persons through service, such person's efforts to overcome substance abuse, addiction, trauma, lack of education or obstacles that such person may have faced as a child or youth in the adult correctional system, the opportunities for rehabilitation in the adult correctional system and the overall degree of such person's rehabilitation considering the nature and circumstances of the crime or crimes."); W. Va. Code § 62-12-

13b(b) ("[t]he parole Board shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner during incarceration."); Ann. Cal. Penal Code § 4801(c) ("when a prisoner committed his or her controlling offense . . . Prior to attaining 23 years of age, the Board, in reviewing a prisoner's suitability for parole . . . Shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.").

The Board's existing procedures and practices fail to appropriately consider the *Miller* factors as mitigating in its consideration of Bonilla's underlying crime and in so doing, fail to provide him with a realistic and meaningful opportunity for release.

### G. Access to programming and treatment the Board deems necessary for rehabilitation

Bonilla's inability to access programming and treatment that will aid in his rehabilitation also deprives him of a meaningful

opportunity to obtain release in violation of his rights to due process and to be free from cruel and unusual punishment. The Board's regulations recognize that an offender's "[p]articipation in institutional programs, including academic and vocational training," are important factors the Board may consider in making a parole determination. Iowa Admin. Code R. 205-8.10(1)(e) (906). Yet Bonilla can only meaningfully participate in such programing if the State offers it to him.

Bonilla currently participates in some programming, including the alternative to violence program. App. 372, 429, 594. However, the state did not provide Bonilla all treatment and programming opportunities available at the Iowa state penitentiary throughout his incarceration there. Indeed, prior to 2017, the state prohibited him from certain treatment programs and opportunities necessary for him to obtain release by the Board, basing its denial on the length and nature of his sentence. App. 595. Specifically, Bonilla's counsellor instructed him to participate in thinking for change and sex offender treatment program ("SOTP"), but the state denied him access to these

programs despite the recommendation. App. 595. During his 2016 parole hearing, the Board also indicated that it would like to see Bonilla complete SOTP before it would seriously consider him for parole. App. 597. Bonilla is in a "catch-22": he cannot be seriously considered for parole until he completes SOTP, yet he cannot access SOTP until he is being seriously considered for parole. In 2017, the state transferred Bonilla to the Newton Correctional Facility where he successfully completed thinking for change.[12] To date, however, the State has not allowed Bonilla to take SOTP. App. 707.[13]

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[12] Since filing this appeal, Bonilla has also completed the Health Relationships for Work and Home program, completed and then even co-facilitated the Alternatives to Violence Training Workshop, the NAMI Peer-to-Peer program, and math tutoring.

[13] At this time, Bonilla still has not been able to enroll in the Sex Offender Treatment Program at Newton Correctional facility. In addition, having identified the "Liberal Arts in Prison Program" offered by Grinnell College at Newton, Bonilla submitted an essay, was granted an interview by an admissions committee of Grinnell professors, and was accepted into the program. However, Newton refused to allow him to participate in the program because of a rule prohibiting college attendance for anyone serving a life sentence.

The Board has the power to request that the DOC provide offenders with programing it deems necessary to their

In *Roby*, this Court implicitly recognized that without the chance to engage in treatment opportunities in prison, juvenile offenders' ability to be rehabilitated cannot fairly be assessed:

> [T]he court addressed the fifth factor—rehabilitation. . . . no evidence was presented that Roby ever received any treatment to aid in rehabilitation. Overall, the evidence at sentencing was insufficient to support a conclusion that Roby was within the small group of juvenile offenders that never aged out of his delinquent conduct or was not amenable to rehabilitation.

897 N.W.2d at 148. Indeed, it is widely accepted that prison rehabilitation programs, including educational and treatment programs, are effective at reducing recidivism and prepare

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rehabilitation and parole, although it has refused to do so in Bonilla's case. At the 2016 review, the Board stated that the programming decision was up to the DOC, while also indicating that it had the ability to direct the DOC to move Bonilla and provide him with programming whenever it wanted. App. 598. This pattern continued in Bonilla's 2017 hearing, when the Board stated that it had no "desire to even ask for a step down from maximum where he's at ISP to medium." App. 706. Again, acknowledging that Bonilla would need to complete SOTP before the Board would consider him for parole, the Board indicated that it did have the authority to either direct or expressly request that the DOC provide Bonilla with the program, but was electing not to do so. App. 706 ("I don't want to require DOC to put him at the front of the class waiting list. That's not what I'm asking.").

inmates for reintegration into society. *See* Emily A. Whitney, Note, *Correctional Rehabilitation Programs and the Adoption of International Standards: How the United States Can Reduce Recidivism and Promote the National Interest*, 18 Transnat'l L. & Contemp. Probs. 777, 795–96 (2009) (observing the wide public support for prison rehabilitative programs and citing evidence that they reduce recidivism, increase prisoner skills, and improve prisoners' self-improvement and self-confidence). "A prisoner's ability to demonstrate rehabilitation may be heavily dependent on the availability of programming within prisons. Indeed, many of the juvenile offenders serving LWOP sentences were excluded from participation in programming because they had no chance of ever being released." Russell, *Review for Release*, 89 Ind. L.J. at 432 (footnote omitted). Another scholar notes the particular harms that may result from denying juveniles access to programming include a high risk of suicide, physical and sexual abuse, denial of education, increased mental illness, and segregation, which dramatically worsens the problem. J.M. Kirby, Note, *Graham, Miller, & The Right to Hope*, 15 CUNY L. Rev. 149, 152 (2011)

(internal footnotes omitted). Kirby further observes that access to educational programs in prison greatly reduces inmate recidivism. *Id. at* 162–64.

At least one federal district court has already explicitly required that state authorities provide juvenile offenders immediate access to programming otherwise unavailable to persons serving life sentences. *See Hill Order* at 2 ("[N]o prisoner sentenced to life imprisonment without parole for a crime committed as a juvenile will be deprived of any educational or training program which is otherwise available to the general prison population.").

Some states have explicitly recognized inmates' right to in-prison rehabilitative programming under their constitutions, signaling the importance of rehabilitative programming. In *Cooper v. Gwinn*, for example, the West Virginia Supreme Court of Appeals found that the West Virginia Constitution's substantive due process provisions guarantee adult inmates the right to access rehabilitative programming. 298 S.E.2d 781, 789 (W.Va. 1981). Likewise, in *Abraham v. State*, 585 P.2d 526, 533 (Ak. 1978), the

Alaska Supreme Court held that access to rehabilitative treatment for adult offenders with addictions is "essential to [a defendant's] reformation as a noncriminal member of society, and to the protection of the public".

A number of state legislatures have also concluded that in order to comply with *Graham* and *Miller*, they must explicitly require their prisons or parole boards to determine exactly what programs will aid in an offender's rehabilitation and to provide them where appropriate. *See, e.g.*, Wash. Rev. Stat. § 10.95.030(3)(e) ("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. To the extent possible, the department shall make programming available as identified by the assessment."). In California, the board must provide juvenile offenders with "information about the parole hearing process, legal factors relevant to his or her suitability or unsuitability for parole, and individualized recommendations for the inmate regarding his or

her work assignments, rehabilitative programs, and institutional behavior." Ann. Cal. Penal Code § 3041(a).

Recognizing the heightened due process protections afforded juvenile offenders, and considering the mandates from *Graham* and *Miller* that juveniles' capacity for rehabilitation must entitle them to a meaningful and realistic opportunity for release, the state must provide offenders access to programming that will actually further their rehabilitation. By impeding the ability of Bonilla to participate in programming and treatment that may aid in his rehabilitation, the State deprives him of his right to a realistic and meaningful parole review hearing.

### H. Adequate notice of future hearings and written guidance to work toward rehabilitation if the Board denies parole

Iowa Admin. Code R. 205-8.16(1) (906) provides that, if the Board denies parole, "[t]he Board shall give notice . . . By issuing a notice of parole . . . denial to the facility where the inmate in question is incarcerated." But this notice is constitutionally insufficient for juvenile offenders like Bonilla.

To ensure that Bonilla has a meaningful opportunity to demonstrate rehabilitation during subsequent reviews, the Board must provide him with a timely, comprehensive written decision from the Board detailing the reasons for denying him release, including consideration of all of the appropriate mitigating *Miller*/*Lyle* factors as applied to his underlying offense (as opposed to its current use of the *Miller* factors as "aggravating" to counter evidence of current rehabilitation) and specific guidelines and recommendations for programming and treatment that will assist in his rehabilitation. This information is necessary for Bonilla to prepare for his next annual hearing.

Meaningful hearings must at minimum include "adequate notice to prisoners of the date of a hearing so that prisoners and their attorneys can adequately prepare. Second, to enable review of the decision, parole Boards should record hearings and provide a statement of reasons for the decision." Russell, *Review for Release*, 89 Ind. L.J. at 427. Research has shown that requiring explanations of decisions can diminish some forms of cognitive

bias." Megan Annitto, *Graham's Gatekeeper and Beyond*, 80 Brook. L. Rev. 119, 166 (2014).

In the *Hill* case, a federal district court explicitly required, in addition to notice, that a parole board issue a decision explaining its decision. *See Hill Order* at 2 ("The parole Board will, in each case, issue its decision and explain its decision determining the appropriateness *vel non* of parole. It will not issue a 'no interest' order or anything materially like a 'no interest' order").

Other states have passed legislation explicitly requiring written decisions of their boards and advance notice of parole hearings for offenders. In California, for example, the parole board must provide the inmate with "information about the parole hearing process, legal factors relevant to his or her suitability or unsuitability for parole, and individualized recommendations for the inmate regarding his or her work assignments, rehabilitative programs, and institutional behavior." Ann. Cal. Penal Code § 3041(a).

Although the notice issue was not before the court in *Swarthout*, the court implied that notice and a written account of reasons in the case of denial was necessary where due process rights attached to the hearing. *See Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (where "a state creates a liberty interest [in parole], the due process clause requires fair procedures for its vindication"). In *Swarthout*, the Court held that the parole procedure in question satisfied due process because the inmates "were allowed to speak at their parole hearings and to contest the evidence against them, were afforded access to their records in advance, *and were notified as to the reasons why parole was denied*.") (emphasis added). *Id. Swarthout* governed adult offenders, and as such the concerns raised by it are even greater in the context of juvenile offenders.

In parole-revocation hearings, due process requires that parole boards provide adult offenders with written notice and written statements that include the reasons for and evidence relied on in making the decision. *See Morrissey*, 408 U.S. at 489. In other contexts where due process is required—for example, the

termination of public assistance—the U.S. Supreme Court requires notice and a written decision detailing the reason for the termination. *See, e.g.*, *Goldberg*, 397 U.S. at 267. In light of the U.S. Supreme Court's decisions in *Graham*, *Miller*, and *Lyle*, notification requirements for juvenile should be even greater than those for adults.

The current notices of parole denial provided to Bonilla by the Board fell short of this requirement. For instance, in his 2015, 2016, and 2017 denials, the Board informed Bonilla that it "acknowledges you were a juvenile at the time of offense," but rather than discuss the *Miller/Lyle* factors in his case, the Board simply states that "your release at this time would not be in the best interest of society in that you have not yet displayed adequate rehabilitation and maturity." App. 429, 659, 746. Such a statement does nothing more than pay lip service to the governing case law.

Indeed, with the sole exception of the date, the entire text of the Board's 2017 denial notice is an exact copy from the Board's 2016 notice. *Compare* App. 659 *with* App. 746. This provides

Bonilla with no information about how his behavior and his efforts at rehabilitation in the interim year impacted his case for parole, nor does it provide him with the kind of feedback necessary to afford him a realistic and meaningful opportunity to demonstrate his rehabilitation.

## IV. The District Court Improperly Applied *Zarate* Dicta To Dismiss Bonilla's Claims.

Finally, the district court's reliance on the dicta in *Zarate* as a basis for dismissing Bonilla's claims was in error. App. 188-89.

In *State v. Zarate*, this Court declined to consider Board procedures, finding Zarate's claims were not ripe, and because "Zarate [had] provided no basis . . . to conclude that the parole Board will fail to follow the law in a case that is presented to it." 908 N.W.2d 831, 848 (Iowa 2018). Zarate had claimed that his sentence was a *de facto* life sentence because "the legislature and Governor have an improper motive and intent to keep juvenile homicide offenders incarcerated." *Id.*

Unlike in *Zarate*, Bonilla has not asserted bad faith on the part of the Board, but rather contends that the current procedures of the Board render any decision it makes constitutionally infirm

with respect to juvenile offenders, because the process itself fails to offer a realistic or meaningful opportunity of parole. Unlike Zarate, Bonilla's claim is ripe, and he has shown that the Board has failed "to follow the law in a case that [was] presented to it." *Id*. Specifically, Bonilla is eligible for parole, and has been denied release on parole on multiple occasions.

While Bonilla does not speculate as to the intentions of the Board members, he also does not need to speculate as to the procedures he might be subjected to during his review process. As discussed *supra*, the actual procedures used to evaluate Bonilla were constitutionally infirm, as they will continue to be in subsequent reviews absent relief from this Court.

## CONCLUSION

For the foregoing reasons, Bonilla respectfully seeks an order reversing and remanding this matter back to the Board and requiring that the Board provide him with the nine rights requested in the motions filed with the Board.

## STATEMENT ON ORAL ARGUMENT

Petitioner respectfully requests oral argument.

Respectfully submitted,

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