IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JULIO BONILLA, Petitioner, vs. **IOWA BOARD OF PAROLE**, Respondent.	Civil Case No. CVCV052692 PETITIONER'S BRIEF ON JUDICIAL REVIEW

COMES NOW Petitioner Julio Bonilla, by and through his undersigned counsel, and submits this Brief on the Merits in their 17A Judicial Review Action:

TABLE OF CONTENTS

STATEMENT OF THE CASE & PROCEDURAL HISTORY

Petitioner filed this judicial review pursuant to Iowa Code §17A.19 (2017) of agency action taken by the Iowa Board of Parole ("Board"). In 2005, Petitioner was convicted of Kidnapping in the First Degree for a crime committed in 2002, when he was only sixteen years old. Petitioner was initially sentenced to life incarceration without the possibility of parole ("LWOP"). *See State v. Bonilla*, No. 05-0596, 2006 WL 3313783 (Iowa Ct. App. Nov. 2006).

Following the elimination of mandatory LWOP for juvenile offenders convicted of non-homicide offenses in *Graham v. Florida*, 132 S.Ct. 2455 (2010), and *Bonilla v. State*, 791 N.W.2d 697 (Iowa 2010), applying *Graham* retroactively to Petitioner, he was resentenced in 2011 to life incarceration *with* the possibility of parole. Thus, Petitioner is now eligible for parole. Throughout his term of incarceration, Petitioner has had a number of successes in rehabilitating and has had minimal recent disciplinary issues. Petitioner has also participated in programming when it has been made available to him, such as the "Alternative to Violence" program, where he has serve as a group facilitator. Petitioner desires to enroll in additional programming, but has not been able to do so.

The Board has granted Petitioner some procedural allowances not required by current Board regulations, such as permitting counsel to assist at parole proceedings (albeit pro bono, and not at state expense, and only to a limited to degree). However, there is no guarantee such a procedure will be provided in future proceedings; and further, that procedure was itself deficient,

and there remain various additional constitutional deficiencies in the current parole review procedure for juvenile offenders that deprived Petitioner of a meaningful opportunity for release.

Importantly, this Petition does not advance the right of Petitioner, or any particular inmate to actually be paroled, nor does it ask the Court to find the Board erred in denying release in this case. Rather, it seeks constitutionally necessary changes in the process that the Board uses to evaluate inmates who were convicted as children.

Petitioner sought nine procedural and substantive rights prior to or as part of his parole review case on June 17, 2016, each of which is necessary to ensure him a meaningful opportunity for release as constitutionally required. These were as follows:

(1) motion for the appointment of counsel;

(2) motion for an independent psychological evaluation;

(3) motion for an in-person parole review hearing;

(4) motion to present evidence of rehabilitation;

(5) motion for access to all information to be used by the Board in making its decision and to challenge such information;

(6) motion to exclude any information in support of continued incarceration that is not verifiable and was not subjected to a fact-finding procedure at the time it was obtained;

(7) motion for the proper consideration of mitigating factors;

(8) motion for access to treatment and programming; and

(9) motion for procedures to ensure future meaningful review in the event of denial.

At the July 28, 2016 paper file review, the Board stated that there was no motion practice before the Board within the context of parole release deliberations, and subsequently refused to consider all nine of the pending motions. The motions were instead logged and considered by the

Board as correspondence supporting Petitioner's release. Petitioner appealed the denial to the Board, and the Board issued its final agency action on August 24, 2016, denying Petitioner's appeal, indicating "parole eligibility reviews are not adversarial proceedings and the Board does not engage in motion practice during such reviews." Appeal Response, August 24, 2016. Thus, the Board's parole practices and regulations remain constitutionally inadequate.

Petitioner filed this petition for judicial review on September 14, 2016. Petitioner challenges the parole review practices and formal regulations (collectively "procedures") used by the Board in making its parole determinations on the basis that they violate article 1, sections 9, 10, and 17 of the Iowa Constitution and the Eighth and Fourteenth Amendments to the United States Constitution. The Board filed a pre-answer motion to dismiss on October 2, 2016, which, following briefing and oral argument on November 15, 2016, this Court denied on January 5, 2017. The Board subsequently filed its answer in this matter on January 17, 2017.

SCOPE AND STANDARDS OF REVIEW

On judicial review of agency action, the district court functions in an appellate capacity. *Iowa Planners Network v. Iowa State Commerce Comm'n*, 373 N.W.2d 106, 108 (Iowa 1985). Petitioner alleges five grounds for reversal and other relief requested under Iowa Code section 17A.19(10) as applied to nine separate actions or deprivations by the Board, for which various standards of review apply as follows:

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. *ABC Disposal Systems v. Iowa Dept. of Natural Resources*, 681 N.W.2d 596, 605 (Iowa 2004); *Gartner v. Iowa Dept. of Public Health*, 830 N.W.2d 335 (Iowa 2013), *and NextEra Energy Resources, LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30 (Iowa 2012). Thus, no deference is

appropriate to the Board by this Court on the substantive question of whether each of Petitioner's nine motions must have been granted pursuant to his constitutional right to be free from cruel and unusual punishment, and for which, because he was a child at the time of his offense, a meaningful opportunity for release upon demonstrated rehabilitation is required.

2. Iowa Code §17A.19(10)(c) (based upon an 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 it's ow 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.

The 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) (quoting *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 14 (Iowa 2010)). 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). In making this determination, the court

> [does] not focus our inquiry on whether the agency does or does not have the broad authority *to interpret the act as a whole*. Instead, when determining whether the legislature has clearly vested the agency with authority to interpret, each case requires a careful look at the specific language the agency has interpreted as well as the specific duties and authority given to the agency with respect to enforcing particular statutes.

Burton, 813 N.W.2d at 257 (emphasis added) (internal quotation marks omitted). The grant of authority must be "clearly vested" with the agency, whether impliedly or expressly. *See id.*

3. Iowa Code §17A.19(10)(d) (based on procedure or decision-making prohibited by law or without following the prescribed procedure or decision-making process))

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) (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)

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). While there is no succinct pronunciation of the standard of review used in section 17A.19(10)(j) claims in any reported case, 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]." *See, e.g., Hagen v. Iowa Dental Bd.*, 839 N.W.2d 676, 2013 WL 4769330, *5 (Iowa Ct. App. 2013) (unpublished opinion). The court examines the question of the adequacy of a decision-making process "under the circumstances of [the] case and in view of the evidence as a whole." *Klein v. Dubuque Human Rights Com'n*, 829 N.W.2d 190, 2013 WL 531128, *5 (Iowa Ct. App. 2013) (unpublished opinion). 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) (otherwise 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, State Health Facilities Council*, 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.*

ARGUMENT

I. The denial of the essential substantive and procedural rights requested by Petitioner by the Board violated his state and federal constitutional rights to due process and to be free from cruel and unusual punishment, reversible under Iowa Code section 17A.19(10)(a) as unconstitutional, and otherwise is reversible under 17A.19(10) (c), (d), (j), and (n).

Both the Eighth Amendment of the U.S. Constitution and article I, section 17 of the Iowa Constitution prohibit the imposition of "cruel and unusual punishments." "[B]ecause 'children are constitutionally different from adults,' they ordinarily cannot be held to the same standard of culpability as adults in criminal sentencing." *State v. Null*, 836 N.W.2d 41, 74 (Iowa 2013) (quoting *Miller v. Alabama*, 132 S.Ct. 2455, 2464 (2012)).

Both the United States Supreme Court and Iowa Supreme Court have interpreted these protections against cruel and unusual punishments to not only prohibit mandatory life without parole sentences for juveniles, but also to require that juveniles be afforded a "meaningful opportunity" for release on parole if they are eligible. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 75 (2012) ("What the State must do . . . is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."); *Miller*, 132

S.Ct. at 2469 (same); *Null*, 836 N.W.2d at 71 ("The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society . . . ."). In *State v. Louisell*, the Iowa Supreme Court reiterated "that under both the United States Constitution and the Iowa Constitution, juveniles convicted of crimes must be afforded a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'—if a sentencing judge, exercising discretion, determines parole should be available." 865 N.W.2d 590, 602 (Iowa 2015). "To be sure," the court continued, "a meaningful opportunity must be realistic." *Id.*

The United States Supreme Court's decisions in *Roper*, *Graham*, and *Miller* have led to the recognition of a special sentencing scheme for juveniles, required by the Eighth Amendment, under which all juveniles facing life sentences must be accorded an individualized sentencing procedure that accounts for the hallmark factors of minority to ensure the resulting punishment is not disproportionate to the crime. *See Miller*, 132 S.Ct. at 2463–69. This special procedure is not unlike the special sentencing protections afforded defendants in the capital context as required by the Eighth Amendment. *See id.*

Since *Miller*, the Iowa Supreme Court has recognized not only these same protections under article I, section 17 of the Iowa Constitution, *see Null*, 836 N.W.2d at 68–76, but has also recognized even more robust protections under the Iowa Constitution, *see State v. Lyle*, 854 N.W.2d 378 (Iowa 2014) (extending the application of the special, individualized sentencing scheme devised under *Roper*, *Graham*, and *Miller* to all mandatory sentences for juveniles under article I, section 17). As the Iowa Supreme Court recognized at the time in *Null*:

> it is unclear what the Supreme Court precisely meant in *Graham* by requiring the state to provide "some meaningful opportunity to

> obtain release based on demonstrated maturity and rehabilitation." It did not indicate when such an opportunity must be provided or provide guidance regarding the nature or structure of such a second-look or back-end opportunity. Instead, the Court left it to the states "to explore the means and mechanisms for compliance."

Null, 836 N.W.2d 41, 67–68 (Iowa 2013) (internal citations and footnote omitted).

As the Iowa Supreme Court has already recognized, a sentence of life *with* parole for a juvenile offender may itself become a *de facto* LWOP sentence if the Board does not have the ability to parole that offender once they have demonstrated rehabilitation sufficient to warrant parole:

> [T]he rationale of *Miller*, as well as *Graham*, reveals that 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. . . . While [a proper] review process might still permit a life-without-parole sentence to be imposed in a murder case, it might also result in a sentence far less than life without parole.

State v. Ragland, 836 N.W.2d 107, 121–22 (Iowa 2013). Similarly, as Chief Justice Cady reiterated *State v. Pearson*:

> An obvious correlation exists between the life-without-parole context of *Miller* and *Graham* and sentences that effectively deprive offenders of a meaningful opportunity for release in their lifetime. It comes as no surprise, then, that our decisions today recognize de facto life sentences very clearly exist. Yet, applying the teachings of *Roper*, *Graham*, and *Miller* only when mortality tables indicate the offender will likely die in prison without ever having the opportunity for release based on demonstrated maturity inadequately protects the juvenile's constitutional rights.

836 N.W.2d 88, 98 (Iowa 2013) (Cady, C.J., concurring specially) (internal footnote and citations omitted).

In its most recent decision on this issue, the United States Supreme Court in *Montgomery v. Louisiana* acknowledged that parole, like sentencing, falls within the ambit of the Eighth

Amendment for juvenile offenders. 136 S.Ct. 718, 736 (2016). "Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Id.* The Court linked the mandates of *Miller* not only to the mandatory nature of the sentence, but 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. *See id.* In *State v. Sweet* the same year, the Iowa Supreme Court recognized the "likely impossible" task before district courts when life without parole was preserved as a sentencing 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. 879 N.W.2d 811, 836–37 (Iowa 2016). The Court explained that even a trial and sentencing structure for juvenile offenders that tracks the current framework utilized in the death penalty context is insufficient because "the trial court simply will not have adequate information and the risk of error is unacceptably high." *Id.* at 837. Rather, the Court continued, "[t]here is . . . plenty of time to make such determinations later for juvenile offenders . . . who are sentenced to life in prison." *Id.* at 838.

Defendants convicted as juveniles require not only individualized sentencing procedures at the front end, but also additional protections and procedures at the back end surrounding the parole process, including access to rehabilitative programs while incarcerated that are required to be completed for parole, to ensure their right to a "meaningful opportunity for release." State legislatures across the country are beginning to enact parole reforms in the wake of these case developments to ensure that parole procedures are constitutionally adequate. These reforms reflect the "evolving standards of decency that mark the progress of a maturing society." *Atkins*

v. Virginia, 536 U.S. 304 (2002); *Trop v. Dulles*, 356 U.S. 86, 101 (1958). In Iowa, however, parole procedures for juvenile offenders remain largely unchanged.

Importantly, in *Sweet* the Court directed the Board of Parole to accept this responsibility: "The parole board will be better able to discern whether the offender is irreparably corrupt after time has passed, after opportunities for maturation and rehabilitation have been provided, and after a record of success or failure in the rehabilitative process is available." *Id.* at 839. In so doing, the Court recognized that "[t]here is . . . plenty of time to make . . . determinations later for juvenile offenders" about whether they have reached a level of maturity and rehabilitation warranting parole. *Id.* at 838–39.

As other courts—including the U.S. District Court for the Southern District of Iowa—have recognized, *Graham*'s and *Miller*'s protections apply not only to sentencing courts, but to the agencies entrusted with administering parole:

> 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. . . . Thus, it appears clear that . . . 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.

Greiman v. Hodges, 79 F.Supp.3d 933, 945 (S.D. Iowa 2015); *See also* Order Requiring Immediate Compliance with *Miller*, *Hill v. Snyder*, No. 10-14568 (E.D. Mich. Nov. 26, 2013), *available at* http://www.aclumich.org/sites/default/files/file/HillOrderRequiringParoleProcess.pdf, vacated and remanded on other grounds by *Hill v. Snyder*, No. 15–2607, 2016 WL 2731706 (6th Cir. May 11, 2016).

Because "a 'meaningful opportunity to obtain release' must encompass the concept that states provide meaningful consideration of a prisoner's suitability for release," it necessarily follows that "a state's existing parole system will comply with the Eighth Amendment only if it actually uses a meaningful process for considering release. In other words, the parole board must provide more than pro forma consideration." Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment* (hereinafter "*Review for Release*"), 89 Ind. L.J. 373, 415 (2014).

Under the Eighth Amendment framework developed in *Atkins v. Virginia*, the constitutional guarantees against cruel and unusual punishment are given meaning by looking to "evolving standards of decency that mark the progress of a maturing society." 536 U.S. 304; *Trop v. Dulles*, 356 U.S. 86, 101 (1958). To understand those evolving standards, the Court looks to "objective factors to the maximum possible extent." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). These factors include state legislation and regulations, sentencing decisions, and the views of entities with relevant expertise. *Atkins*, 536 U.S. at 312. The Court also brings its own judgment to bear on the acceptability of any punishment challenged as cruel and unusual. *Id.* The Iowa Supreme Court has repeatedly adopted this approach in the juvenile sentencing context under article 1, section 17 of the Iowa Constitution. *See, e.g., State v. Roby*, 897 N.W.2d 127, 138-140 (Iowa 2017) (discussing recent legislative and judicial developments of other states in juvenile sentencing jurisprudence as relevant to its inquiry into evidence of a national consensus.)

Notably, as states implement legislation and regulations across the country in the wake of *Miller*, many recognize the importance of special and greater rights and procedures around parole proceedings for inmates convicted as juveniles. *See, e.g.,* S.B. 796, Jan. Sess. (Conn.

2015) (amending Conn. Gen. Stat. §§ 54-125a, 46b-127, 46b-133c, 46b-133d, 53a-46a, 53a-54b, 53a-54d, 53a-54a and enacting new sections) (effective Oct. 1, 2015), http://www.cga.ct.gov/2015/ACT/pa/pdf/2015PA-00084-R00SB-00796-PA.pdf; S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013) (amending Del. Code Ann. tit. 11, §§ 636(b), 4209, 4209A, 4204A), http://legis.delaware.gov/LIS/lis147.nsf/EngrossmentsforLookup/SB+9/$file/Engross.html?open; H. 4307, 188th Gen. Court (Mass. 2014) (amending Mass. Gen. Laws ch. 27, § 4; ch. 119, § 72B; ch. 127 §§ 133A, 133C; ch. 265, § 2; ch. 279, § 24 and enacting new sections), https://malegislature.gov/Laws/SessionLaws/Acts/2014/Chapter189; H.B. 4210, 81 Leg., 2d Sess. (W.Va. 2014) (enacting W. Va. Code §§ 61-11-23, 62-12-13b), http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=HB4210%20SUB%20ENR.htm&yr=2014&sesstype=RS&i=4210; S.B. 260 (Cal. 2013) (amending Cal. Penal Code §§ 3041, 3046, 4801 and enacting § 3051), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB260.

Additionally, the protections of the Due Process Clause of the Fourteenth Amendment are triggered whenever state action infringes on a constitutionally protected liberty interest. *See generally Vitek v. Jones*, 445 U.S. 480 (1980). As the Iowa Supreme Court has made clear, our due process guarantee provides at least as much protection as its federal counterpart. *See State v. Baldon*, 829 N.W.2d 785, 813 (Iowa 2013) (stating that the "incorporation of the provisions of the Bill of Rights of the United States Constitution against the states through the Due Process Clause of the Fourteenth Amendment established a federal floor related to civil liberties."). The United States Supreme Court has not exhaustively addressed the specific due process requirements necessary with respect to every liberty interest, but it *has* approved of procedural

protections that are sufficient in other contexts, including: timely notice of the 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 Supreme Court has previously held that a convicted person usually has no protected liberty interest in conditional release before the end of a valid sentence so as to trigger due process protections. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979) (abrogated on other grounds by *Sandin v. Conner*, 515 U.S. 472, 479–84 (1995)). In *Greenholtz*, the Court concluded that to have a protected liberty interest, a person must have "more than an abstract need or desire for" or "more than a unilateral expectation of" that interest. *Id.* Rather, a person must have a "legitimate claim of entitlement to it." *Id.*

Since *Miller* however, courts have acknowledged that a juvenile's expectation of parole is materially more substantive than the mere expectation of parole for non-juvenile offenders. For example, in *Greiman v. Hodges*, 79 F.Supp.3d 933, 945 (S.D. Iowa 2015), the United States District Court for the Southern District of Iowa denied the Iowa Board of Parole's motion to dismiss a lawsuit by a juvenile offender claiming a due process violation. *Id.* The court recognized, 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 *Greenholtz* to trigger due process protections:

> Plaintiff is not, as Defendant seems to presume, claiming that Defendants applied fair and appropriate parole policies to him and

> reached the wrong conclusion on whether to grant parole. Rather, Plaintiff asserts that *Graham* guarantees him a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," and that Defendants' existing procedures and policies deprive him of the "meaningful opportunity" to which he is entitled. Though subtle, the distinction is important. . . . [A]lthough *Graham* stops short of guaranteeing parole, it does provide the juvenile offender with substantially more than a possibility of parole or a "mere hope" of parole; it creates a categorical entitlement to "demonstrate maturity and reform," to show that "he is fit to rejoin society," and to have a "meaningful opportunity for release."

Greiman, 79 F.Supp.3d at 945. *See also Morrissey v. Brewer*, 408 U.S. 471, 481–82 (1972) (recognizing, in the similar context of parole revocation, that inmates are entitled to due process protections because the threat of additional incarceration for a parolee—despite no increase in sentence). The resulting legal mandate of these cases require that the Board, in carrying out its duties, must do so in a way that affords juvenile offenders their right for those parole considerations to be *meaningful* as required by the United States Constitution and article I, sections 9, 10, and 17 of the Iowa Constitution. In contrast to the mere hope or possibility of parole considered in *Greenholtz*, 442 U.S. at 7, recent decisions of the United States Supreme Court and Iowa Supreme Court have recognized a heightened expectation of parole for juvenile offenders. Taken together, the decisions of both courts establish "a legitimate claim of entitlement" to—indeed, they mandate—meaningful parole review hearings and a meaningful opportunity for release for such offenders.

In light of the required protections afforded juvenile offenders under article 1, sections 9, 10, and 17 of the Iowa Constitution and the Eighth and Fourteenth Amendments to the U.S. Constitution, Petitioner filed nine separate motions on June 17, 2016, each pertaining to a separate procedural protection which were subsequently denied but which are necessary to ensure him a meaningful opportunity for release. These were as follows:

(1) motion for the appointment of counsel;

(2) motion for an independent psychological evaluation;

(3) motion for an in-person parole review hearing;

(4) motion to present evidence of rehabilitation;

(5) motion for access to all information to be used by the Board in making its decision and to challenge such information;

(6) motion to exclude any information in support of continued incarceration that is not verifiable and was not subjected to a fact-finding procedure at the time it was obtained;

(7) motion for the proper consideration of mitigating factors;

(8) motion for access to treatment and programming; and

(9) motion for procedures to ensure future meaningful review in the event of denial.

Because the denial of these rights violates Petitioner's right to due process and the right to be free from cruel and unusual punishment, the Board's actions and regulations in question are challenged under Iowa Code §17A.19(10)(a) (unconstitutional on its face or as applied). Furthermore, because the Board's process for considering the parole eligibility of juvenile offenders fails to afford them a meaningful opportunity for release, Petitioner challenges it under Iowa Code §17A.19(10)(d) (based on procedure or decision-making prohibited by law or without following the prescribed procedure or decision-making process)). Because the Board, in evaluating juvenile offenders, including Petitioner, misinterprets the *Miller/Lyle* factors, and the safeguards that it must provide to in order to afford them a meaningful opportunity for release, it is also challenged in this judicial review action under Iowa Code §17A.19(10)(c) (based upon an erroneous interpretation of law not clearly vested in the discretion of the agency).

Likewise, the Board's error in failing to consider relevant evidence is grounds for relief pursuant to Iowa Code section 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). This relevant evidence includes the unavailability of an independent psychological evaluation, information excluded based on the denial of an in-person parole review hearing allowing Petitioner to be present, denial of his request to present evidence of his rehabilitation, and improper and inadequate consideration of mitigating factors.

Finally, the Board's practices and regulations is challenged under Iowa Code §17A.19(10)(n) (otherwise unreasonable, arbitrary, capricious, or an abuse of discretion). Here, Petitioner alleges that any decision-making process engaged in by the Board which fails to provide due process and a meaningful opportunity for release is arbitrary and capricious, because it is made both without regard to underlying law, and essential facts, especially regarding factors which would be mitigating or evidence rehabilitation as required for juvenile offenders.

The denial of each of these rights is discussed in turn below.

a. Denial of Appointment of Counsel, Appointed at State Expense

As part of the special protections afforded juvenile offenders, the assistance of counsel in preparation for and during any parole review is necessary for Petitioner to be assured that his parole review hearing is "meaningful" under article I, section 17 of the Iowa Constitution and the Eighth Amendment to the U.S. Constitution. The legal doctrine ensuring the protection from cruel and unusual punishment for persons convicted as juveniles under both the Iowa and United States Constitutions necessarily draws on those procedural safeguards long recognized as necessary in our legal system beyond the context of the Eighth Amendment and article I, section

17, including under due process analysis.[1] *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)). Simultaneously, these same procedural protections may be independently provided by other constitutional provisions.

In this case, Petitioner asserts his right to counsel in Board of Parole proceedings pursuant not only to article I, section 17 of the Iowa Constitution and the Eighth Amendment of the U.S. Constitution by virtue of his status as having been convicted as a juvenile, but also under the Due Process clauses of the Fourteenth Amendment to the U.S. Constitution and article I, section 9 of the Iowa Constitution, and the right to counsel under article I section 10 of the Iowa Constitution.

Petitioner's paper file review hearing took place on June 22, 2016. Petitioner is indigent, and cannot afford counsel to assist him with preparing for his parole review hearing and during

[1] *See* Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment* (hereinafter "*Review for Release*"), 89 Ind. L.J. 373, 415–19 (2014) (discussing the development of these procedural protections as stemming from the Eighth Amendment itself, but incorporating "procedural" requirements akin to due process protections under the Fourteenth Amendment, such as in the context of capital punishment protections); Richard A. Bierschbach, *Proportionality and Parole*, 160 U. Pa. L. Rev. 1745, 1766 (2012) ("Many of the problems [with the application of Eighth Amendment protections to parole] stem from a confluence of substance and procedure. Because parole guarantees no substantive outcomes, injecting parole into sentencing does not prohibit actual punishment. Instead, it provides a procedural mechanism for fine-tuning sentences on a case-by-case basis over time. In that sense, parole's Eighth Amendment significance is at least as much structural and systemic as it is substantive. . . . Parole thus conceptually severs *Graham* from *Roper*, *Atkins*, and other classic proportionality cases on which it relied for much of its doctrinal support. Despite their obvious similarities, none of those cases linked the constitutionality of punishment to a procedural rule. When it came to punishment, those cases drew hard and fast substantive lines." (internal footnotes omitted)); *see also Miller*, 132 S.Ct. at 2463–64 (explaining that the conclusion reached in *Miller* is the result of the "confluence of . . . two lines of precedent"—those prohibiting patently disproportionate punishment and those demanding heightened *procedural* safeguards in the death penalty context).

said hearing. Attached to the motion filed with the Board requesting the appointment of counsel at state expense was a financial affidavit submitted on Mr. Bonilla's behalf. (R. at 497.)

As French Russell has noted, "[a]ppointing counsel for indigent juvenile offenders would go a long way toward ensuring a meaningful hearing for juvenile offenders." *Review for Release*, 89 Ind. L.J. at 425. "Counsel 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.

Demonstrating the "evolving standards of decency that mark the progress of a maturing society," *Atkins v. Virginia*, 536 U.S. 304, 312 (2002); *Trop v. Dulles*, 356 U.S. 86, 101 (1958), a number of states have passed legislation explicitly requiring the appointment of counsel in varying circumstances for juvenile offenders eligible for parole. *See, e.g.*, Conn. Gen. Stat. § 54–125a(f)(1)(B) (requiring the appointment of counsel for indigent juveniles for assistance in 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."). These legislative developments represent evolving standards

to provide counsel as a necessary safeguard of a meaningful opportunity for a juvenile offender to demonstrate rehabilitation in a truly meaningful way.

State courts have also been following this trend. The Massachusetts Supreme Court explicitly found that the appointment of counsel was necessary to provide certain juvenile offenders a meaningful opportunity for release. *See Diatchenko v. Dist. Attorney for Suffolk Dist.*, 27 N.E.3d 349 (2015) ("The question the board must answer for each inmate seeking parole, namely, whether he or she is likely to reoffend, requires the board to weigh multiple factors and consider a wide variety of evidence. In the case of a juvenile homicide offender—at least at the initial parole hearing—the task is probably far more complex than in the case of an adult offender because of 'the unique characteristics' of juvenile offenders. A potentially massive amount of information bears on these issues, including legal, medical, disciplinary, educational, and work-related evidence. In addition, although a parole hearing is unlike a traditional trial in that it does not involve direct and cross-examination of witnesses by attorneys, because the inmate's parole application may well be opposed by both the victim's family and public officials, it would be difficult to characterize this as an uncontested proceeding . . . .[A] parole hearing for a juvenile homicide offender serving a mandatory life sentence involves complex and multifaceted issues that require the potential marshalling, presentation, and rebuttal of information derived from many sources. 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 by art. 26 without access to counsel." (internal citations omitted)).

In the context of state constitutional due process and right-to-counsel jurisprudence, the Iowa Supreme Court has required the assistance of counsel for defendants being prosecuted for simple misdemeanors because the threat of incarceration, however minimal it may be, implicates the potential deprivation of a liberty interest of a constitutional magnitude. *State v. Young*, 863 N.W.2d 249, 278 (Iowa 2015). Iowa Const. art. I, § 9 (due process), § 10 (right to counsel). The court reasoned that article I, section 10 of the Iowa Constitution provides broader protections than does the Sixth Amendment to the United States Constitution. *State v. Young*, 863 N.W.2d 249, 256–67 (Iowa 2015). "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.

> Not only does the Iowa Constitution expressly apply in 'all criminal prosecutions,' it also applies in 'cases involving the life, or liberty of an individual. Unlike the 'all criminal prosecutions' language, *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) (emphasis added). "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 under article I, section 10 in all cases in which a liberty interest is at stake.

The *Young* court 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. The 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. In *Young*, the Court also

recognized Iowa's broad and expansive right to counsel in cases where the accused was subject to the *possibility* of incarceration, quoting Justice Sutherland's "inspiring language in [*Powell* v. *State of Ala.*] that '[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'" *Id.* at 279–80 (quoting *Powell*, 287 U.S. 45, 68–69 (1932)).

As in the parole revocation process, juvenile offenders in parole hearings are entitled to due process. *See Morrissey v. Brewer*, 408 U.S. at 481–82 ("[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others."). In Iowa, parolees 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). Similar to the threat of losing freedom once it is granted, juvenile offenders face a deprivation of liberty when entitled to meaningful opportunity for release. 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 "meaningful" and "realistic" parole review hearing; and under *Young*, this entitles Petitioner the assistance of counsel in preparation for and during any such hearing. 863 N.W.2d at 250.

In sum, article I, section 17 of the Iowa Constitution and the Eighth Amendment to the U.S. Constitution mandate special procedural protections during parole review hearings for juvenile offenders to effectuate a meaningful opportunity for parole, including the right to the assistance of counsel prior to and during any parole review hearings. By denying Mr. Bonilla the appointment of counsel at state expense, the Board's actions violated his constitutional rights to a meaningful opportunity for release; while counsel appeared pro bono in his case and was permitted the opportunity to make oral arguments in his parole review case, this decision was

made pursuant to no requirement that it similarly be provided in the future, nor is there any provision of counsel in the absence of the availability of attorneys willing and able to volunteer to assist him or other juvenile offenders in their annual reviews. Furthermore, access to counsel, is itself constrained if the counselor cannot marshal evidence of rehabilitation or challenge the inclusion of evidence which lacks indicia of reliability such as informal notes or accusations by other offenders, which in some cases date back years or even decades. Iowa Code section 906.7 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 . . . ." To the extent this provision, and the practice of denying juvenile offenders court appointed counsel upon a demonstration of indigency, prevents counsel from effectively representing juvenile offenders at parole review hearings, it is an unconstitutional violation of article I, sections 9, 10, and 17 of the Iowa Constitution and the Eighth and Fourteenth Amendments to the U.S. Constitution.

b. Denial of independent psychological evaluation

An independent psychological evaluation is necessary under article I, section 17 of the Iowa Constitution and the Eighth Amendment of the U.S. Constitution to assess the "hallmark characteristics of youth" that contribute to a juvenile offender's criminal activity and the extent to which the offender has since mentally matured and learned to conform his behavior to the requirements of the law, including an assessment of mental illness or behavioral issues that require treatment and the extent to which any such treatment has been successful.

Here, in addition to seeking the appointment of counsel at state expense, Mr. Bonilla sought but was denied the appointment of independent psychological evaluation at the state's expense. (R. at 20-40; 497.) 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." However, there is no provision for an independent evaluation that takes into account the special circumstances of juvenile offenders and need to consider the juveniles maturity and rehabilitation as it changes over time.

In Petitioner's case, psychologist Mark D. Cunningham had agreed to provide Petitioner with a psychological evaluation prior to his parole review hearing. (R. at 40). 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. (*Id.*) Attached to the Motion filed with the Board by Petitioner was the copy of Dr. Cunningham's Curriculum Vitae and proof of licensure in the State of Iowa. (R. at 498-511.)

While Petitioner has been evaluated at various points, these evaluations have simply not been independent, expert-driven, or comprehensive enough to provide the Board with the information it needs to assess his rehabilitation in light of the constitutional mandate. For example, the record shows that the Board had available summary, fill-in-the-blank type "Offender Performance Evaluation Form[s]", (R. at 254-261), as well as very short "Parole Board Psychological Evaluation[s]" by Joy Kuper in 2016 and 2017. (R. 352-54; 431-433.) 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 2016 and 2017 evaluations state "Defendant stated he has not spoken with his father since he left El Salvador 8 years ago." Two "Psychiatric encounter" reports compiled by Dr. Pressler also were logged in 2016 and 2017, which do not consider rehabilitation or maturity in accordance with the *Miller/Lyle* factors to assist the Board in its

evaluation. (R. at 355-56; 434-36.) Aside from these brief summary psychological evaluations, Petitioner has not been afforded an independent comprehensive psychological evaluation by a licensed psychologist. (*Id.*) While Petitioner has been seen by mental health professionals staffed by the Department of Corrections in 2015 and 2016, these evaluations did not address developmental maturity from the commission of the offense and other necessary psychological information relevant to assessing the *Miller/Lyle* factors. (*Id.*) Therefore, Petitioner 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 the 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 ability to experience rehabilitation as they enter adulthood entitles them to special consideration in punishment:

> [Juveniles'] lack of maturity and underdeveloped sense of responsibility lead to recklessness, impulsivity, and heedless risk-taking. They are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited contro[l] over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And because a child's character is not as well formed as an adult's, his traits are less fixed and his actions are less likely to be evidence of irretrievabl[e] deprav[ity].

Miller, 132 S.Ct. at 2458 (internal citations and quotation marks omitted); *see also id.* at n.5 (discussing the "ever-growing body of research in developmental psychology and neuroscience" confirming the psychological deficiencies of juveniles). Procedures which systematically deny juvenile offenders access to independent, qualified psychological evaluation that takes into account the brain science undergirding the constitutional right to a meaningful opportunity to demonstration rehabilitation and maturity as the offender ages thus deprives him of that right and

becomes 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 *Roby,* the 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 toward juvenile offenders. *Roby*, 897 N.W.2d at 143-48. Further, 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) ("describing use of validated assessment methods, review of the youth's facility under real-life conditions, and an expert's developmental and clinical knowledge and experience to integrate the information") (internal quotations omitted).).

Given the complexity of juvenile brain development, only licensed psychologists with specific expertise in this area possess the ability to adequately assess juvenile offenders' mental states, present dangerousness to society, and the extent to which they have been rehabilitated since the commission of the crime 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. C.R.-C.L. L. 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.

As French Russel has noted with respect to juvenile offenders:

> Extensive investigation of a person's background is necessary to present an accurate picture to the releasing authority, and usually an evaluation by a mental health expert will be required. A psychiatrist or psychologist could provide insight about the ways in which the inmate's youth or mental illness may have contributed to the crime, could speak to how an inmate has changed over the years, and could assess the degree of risk he or she currently presents to the community. Yet 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.

French Russell, *Review for R*elease, 89 Ind. L.J. at 420–21. (footnotes omitted).

Demonstrating evolving standards in the context of juvenile parole, a number of states have passed legislation recognizing the utility of psychological evaluations by licensed psychologists for juvenile offenders eligible for parole in varying circumstances. *See, e.g.*, Cal. Penal Code § 3051(b)(3)(f)(1) (requiring that any psychological or risk assessment instruments considered by the board must be performed by a licensed psychologist); W. Va. Code, § 62-12-13(l)(1)(D) (providing that the board may consider psychological evaluations of an inmate); La. Rev. Stat. § 15:574(D)(2), (E)(2) ("For each offender eligible for parole consideration pursuant to the provisions of this Subsection, the committee shall meet in a three-member panel and each member of the panel shall be provided with and shall consider a written evaluation of the offender by a person who has expertise in adolescent brain development and behavior and any other relevant evidence pertaining to the offender."). These legislative developments represent evolving standards of decency governing parole for those who were children at the time of their offenses, and address a recognized need to provide for an independent psychological evaluation to ensure the ability to demonstrate rehabilitation in a truly meaningful way.

The courts are already attuned to the need for *independent* psychological evaluations as necessary due process protections against the imposition of cruel and unusual punishment. The

United States 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, both the State *and* the accused were entitled to present their own psychological experts:

> Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party. . . . It is for this reason that States rely on psychiatrists as examiners, consultants, and witnesses, and that private individuals do as well, when they can afford to do so. In so saying, we neither approve nor disapprove the widespread reliance on psychiatrists *but instead recognize the unfairness of a contrary holding in light of the evolving practice*.

Id. at 81–82 (footnote omitted) (emphasis added).

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 under article I,

section 17 arise when the decision to ever release a juvenile offender rests solely within the hands of the Board. Parole review, in essence, acts as an extension of the sentencing process, and the Board acts with the mandate from the district court that it must continually consider whether the offender should be paroled. *See Greiman*, 79 F.Supp.3d at 945. The only evaluations Petitioner was provided were by employees of the Department of Corrections. (R. at 460-70). It is notable that at times he is referred to by his treating psychologist as "defendant" and not "patient" or simply by his name. (R. at 353; 433.)

More recently, the Iowa Supreme Court issued a categorical ban on sentencing juveniles to life without the possibility of parole because doing so without the aid of an expert in psychiatry would require the fact finder to complete an impossible task:

> In reviewing the caselaw development, we believe, in the exercise of our independent judgment, that the enterprise of identifying which juvenile offenders are irretrievable at the time of trial is simply too speculative and likely impossible given what we now know about the timeline of brain development and related prospects for self-regulation and rehabilitation. . . . a district court at the time of trial cannot apply the *Miller* factors in any principled way to identify with assurance those very few adolescent offenders that might later be proven to be irretrievable depraved. 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.

State v. Sweet, 879 N.W.2d 811, 837 (Iowa 2016).

When the Board attempts to assess rehabilitation without the aid of an independent psychological evaluation, it (much like district courts in the context of sentencing), is being asked "to do the impossible," insofar as it must attempt to determine whether or not an individual had 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, Petitioner was denied his constitutional right to a meaningful parole hearing.

c. Denial of in-person parole hearing

Petitioner was not permitted to attend his paper file parole reviews, and was not interviewed by the Board prior to the hearings or given an opportunity to engage in a colloquy with the Board about the extent of his rehabilitation. (R. at 359-66; 471-75) 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, which provide that "[t]he board or board panel shall interview the inmate and consider the inmate's records with respect to history, current situation, parole and work release prospects, and other pertinent matters" and "shall give the inmate ample opportunity to express views and present materials." Iowa Admin. Code. rs. 205-8.8(906), 205-8.12(906). The rules currently do not require in-person interviews nor in-person parole review hearings for juvenile offenders.

Without an in-person interview and parole review hearing, Petitioner has been hindered from being able to meaningfully demonstrate the extent of his rehabilitation and is therefore deprived of a meaningful opportunity for parole. Paper review hearings are wholly inadequate because they neither provide juvenile offenders a meaningful opportunity to be heard before the Board nor do they provide an effective way to demonstrate and display the extent they have been rehabilitated in a truly interpersonal and meaningful way.

In other contexts, the United States 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 presented to decision makers. *Goldberg*, 397 U.S. at 269.

As French Russel noted:

> [J]uvenile offenders face unique challenges in seeking release at parole hearings. 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. In addition, under *Graham*, the parole board must determine the extent of a juvenile offender's rehabilitation. Assessing the character and credibility of the prisoner is central to determining if he or she has truly rehabilitated. A written submission by the prisoner, or a second-hand summary from a third party, simply cannot convey the same amount of information as a direct interaction.

French Russell, *Review for R*elease, 89 Ind. L.J. at 423. (footnote omitted). French Russell further argues that telephone or video-conference hearings are similarly deficient, and may not truly provide a meaningful parole review hearing. *See id* at 423–24.

Demonstrating evolving standards regarding meaningful, in-person parole hearings for juvenile offenders, a number of states have passed legislation explicitly requiring face-to-face

interviews and parole review hearings for juvenile offenders. *See, e.g.*, Conn. Gen. Stat. §§ 54a-125a(f)(3) (stating that "the board shall permit (A) such person to make a statement on such person's behalf" at the parole review hearing). Other jurisdictions have entitled even non-juvenile offenders to face-to-face interviews and to be present at hearings even prior to *Miller*. *See, e.g.*, Mo. Ann. Stat. §217.690(2) ("[T]he board shall have the offender appear before a hearing panel and shall conduct a personal interview with him, unless waived by the offender."); Ariz. Rev. Stat. Ann. §31-411(B) ("A prisoner who is eligible for parole or absolute discharge from imprisonment shall be given an opportunity to be heard either before a hearing officer designated by the board or the board itself, at the discretion of the board."); Kan. Stat. Ann. §22-3717(j)(1) (2007) ("Before ordering the parole of any inmate, the prisoner review board shall have the inmate appear either in person or via a video conferencing format and shall interview the inmate unless impractical because of the inmate's physical or mental condition or absence from the institution."); 9 NYCRR § 8002.2 ("Each inmate shall be scheduled for a parole release interview at least one month prior to the expiration of the minimum period of imprisonment or parole eligibility date . . . ."); West's Ann. Cal. Penal Code §§ 3041, 3051(c) (requiring that the board meet with the offender various times throughout his or her incarceration, gradually increasing as the offender approaches the period of parole eligibility, and then requiring the board to meet with the offender for parole determinations).

Importantly, *Greenholtz* identified the minimum necessary due process protections that must be afforded to inmates with a due process liberty interest in parole—the opportunity to be heard. *Greenholtz*, 442 U.S. at 16. Decisions since *Greenholtz* have expanded on the specific ability to meet personally with parole boards. The United States Court of Appeals for the Seventh Circuit commented on the importance of allowing an inmate the ability to communicate

with at least one member of board during a parole review hearing. *See Newbury v. Prisoner Review Bd.*, 792 F.2d 81, 86–87 (7th Cir. 1986) ("[T]he parole candidate's appearance before the Board afforded the parole applicant the opportunity to ascertain if the records before the Board are in fact his records and the opportunity to present any other special considerations demonstrating why he is an appropriate candidate for parole. . . . [the inmate] had a full opportunity to be heard by two members of the panel (even though only one is required by statute and regulation) to present any special considerations concerning his application for parole and to ensure that the Board was considering the proper records.").

More recently, in 2011 the United States Supreme Court found that due process requirements during parole were satisfied when inmates serving life sentences were afforded the ability to be present at parole review hearings and speak to the decision makers in support of their release. *See Swarthout v. Cooke*, 562 U.S. 216, 220–21 (2011). The Montana Supreme Court has also explicitly found that an inmate has a due process right to appear personally at his parole hearing. *Sage v. Gamble*, 929 P.2d 822 (Mont. 1996). The *Sage* court recognized that, pursuant to existing due process precedent, "the opportunity of a parole applicant to appear before those entrusted with the subjective responsibility of passing judgment on his or her application is an important element of the due process to which the applicant is entitled." *Id.* at 826.

Current Iowa law reflects the usefulness of interviews with inmates to the parole determination process by affording a *right* to an interview for most offenders; but current law does not extend that right to all juvenile offenders. *See* Iowa Code § 906.5(1)(a)–(b). The Board's essential duties include "[r]eviewing and interviewing inmates for parole." Iowa Amin. Code r. 205-1.2(904A). The Board has further recognized the "right" to such interviews, and has

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). Clearly, in enacting these provisions, both the General Assembly and the Board agree that interviewing an inmate provides a great deal of relevant information to the Board when making a parole determination. To not extend this right to all juvenile offenders denies them access to an already-established and easily administrable component of assessing rehabilitation in a meaningful way.

Relatedly, in Iowa criminal defendants have the right to be present at their sentencing following conviction for a crime and the right to allocution—the ability to speak directly to the court at the time of sentencing to present information in mitigation of punishment. Iowa R. Crim. Pro. 2.23(3)(a) ("When the defendant appears for judgment, the defendant must be informed by the court or the clerk under its direction, of the nature of the indictment, the defendant's plea, and the verdict, if any thereon, and be asked whether the defendant has any legal cause to show why judgment should not be pronounced against the defendant."). The same principles should apply equally to the Board in light of the special protections afforded to juveniles through article I, section 17—in-person presence before the Board and the ability to engage in a colloquy with the decision maker is necessary for any hearing to be "meaningful."

The opportunity to be interviewed either prior to or during the parole review hearing about an inmate's own person account of his rehabilitation and the opportunity to be present during a parole review hearing are essential to ensuring the offender's right to be heard. Without these rights, Petitioner was denied his right to a meaningful parole hearing in violation of article I, section 17 of the Iowa Constitution and the Eighth Amendment to the U.S. Constitution. To the extent Iowa Code section 906.5(1) prevents any juvenile offender eligible for parole from both being interviewed and having an in-person parole review hearing, it is unconstitutional in

violation of article I, sections 9 and 17 of the Iowa Constitution and the Eighth and Fourteenth Amendments to the U.S. Constitution.

d. Denial of opportunity to present evidence of rehabilitation

Petitioner requested and was denied the opportunity to present evidence of rehabilitation to the Board. Iowa Administrative Code rule 205-8.8(906) provides that, with respect to inmates granted interviews, "[t]he board or board panel shall interview the inmate and 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." Importantly, juvenile offenders incarcerated for certain offenses are not granted the right to an interview and its attendant requirements. *See* Iowa Code § 906.5(1)(a). Petitioner's inability to present to the Board all evidence of his rehabilitation deprives him of a meaningful parole review hearing in violation of article I, section 17 of the Iowa Constitution and the Eighth Amendment of the U.S. Constitution and the Due Process clauses of the Fourteenth Amendment to the U.S. Constitution and article I, section 9 of the Iowa Constitution. Quite simply, parole review proceedings that do not allow juvenile offenders to submit all information they believe is relevant to demonstrate that they have been rehabilitated do not comply with the commands of *Graham* and its progeny.

In capital sentencings—whereby procedural safeguards mandated by the Eighth Amendment are specially afforded to defendants facing the death penalty—it has long been true that the right to present mitigating evidence to the jury is a core fundamental right. *Boyde v. California*, 494 U.S. 370, 377–78 (1990) ("The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by petitioner.")

Relatedly, the State may not interfere with a capital sentencer's consideration of any such mitigating evidence:

> [T]he Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence. [T]he sentencer . . . [cannot] be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. 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.

McCleskey v. Kemp, 481 U.S. 279, 305–06 (1987) (internal citations, footnotes, and quotation marks omitted).

"Equally clear," the 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) (internal citation and quotation marks omitted).

French Russell has noted:

> [M]any states deny prisoners the chance to present the case for release in person before the decision maker . . . . Given the special challenges facing juvenile offenders in presenting an effective case for release, these procedures threaten to deny meaningful hearings for these prisoners.

*Review for R*elease, 89 Ind. L.J. at 421. (footnote omitted).

Demonstrating the "evolving standards" to allow juvenile offenders to present mitigating evidence, *Atkins v. Virginia*, 536 U.S. at 312; *Trop v. Dulles*, 356 U.S. at 101, some states have passed legislation explicitly permitting juvenile offenders to present evidence in their favor at parole review hearings. *See, e.g.*, Neb. Rev. Stat. § 83-1,110.04 (expressly requiring that "[d]uring each hearing before the Board of Parole for the offender, the board shall consider and review, at a minimum . . . (i) [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.").

Furthermore, without the ability to engage the Board with direct evidence of his rehabilitation outside of what the Board may otherwise consider, Petitioner has no meaningful opportunity to be heard as required as a necessary, minimum assurance of due process in parole hearings where a liberty interest is recognized. *See Greenholtz*, 442 U.S. at 16. Here, the Board's consideration of Bonilla took all of 17 minutes in 2016, and was limited to information provided by counselors and in his DOC records (R. at 359-66.) Because the Board denied his request for an independent psychological evaluation by Dr. Cunningham, relevant, expert information to assist it in applying the *Miller/Lyle* factors, cautioned as necessary in *Roby* and *Sweet*, was unavailable.

This court should find that because Petitioner was denied the ability to present all evidence at his parole hearing that he believes demonstrates rehabilitation, he has been denied his right to a meaningful parole review hearing, as required by article I, section 17 of the Iowa Constitution and the Eighth Amendment to the U.S. Constitution and the Due Process clauses of the Fourteenth Amendment to the U.S. Constitution and article I, section 9 of the Iowa Constitution.

e. Denial of access to all information to be used by the Board in making its decision and to challenge such information

In tandem with his Motion to appear in person at his parole review hearing and to be interviewed, Petitioner 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 Petitioner while incarcerated that the Board will use in makings its parole determination and that he be given an opportunity to rebut, explain, or challenge consideration of any such information at his parole review. (R. at 78). This request was never granted. (R. at 188). Importantly, Petitioner requested access to all such information well enough in advance of his hearing so that he might have had a meaningful opportunity to review the information. (R. at 78-79). Petitioner further requested but was not granted that the Board, in making its parole determination, refuse to consider any information not provided to Petitioner for his review prior to the hearing. (R. at 97, 188).

Iowa Administrative Code rule 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.*" (emphasis added). The rule then provides that the inmate shall be provided "factual" information, but is expressly prohibited from having access to "opinion" information, psychological or psychiatric test results or diagnoses, and any other information the Board desires to keep confidential so as to protect "confidential sources." *See generally id.* The rules do not indicate when the offender shall be given this information.

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 given an opportunity to demonstrate one's 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. "[T]he 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 v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 33 n. 15 (1979) (abrogated on other grounds by *Sandin v. Conner*, 515 U.S. 472, 479–84 (1995)), 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 (ND Miss.1974), rev'd, 509 F.2d 820 (CA5), cert. denied, 423 U.S. 998, 96 S.Ct. 428, 46 L.Ed.2d 373 (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 (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 (1960) (files erroneously showed that prisoner was under a life sentence in another jurisdiction)").

In capital sentencings—which are analogous to parole hearings for juvenile offenders in that the Eighth Amendment also specially mandates the provision of procedural safeguards to defendants facing the death penalty—courts have long recognized that the ability to access and challenge evidence against the defendant is a core, fundamental procedural right. In *Gardner v. Florida*, the Supreme Court considered a challenge to a capital sentencing judge's consideration of a "confidential" presentence investigation report that was 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:

> [C]onsideration must be given to the quality, as well as the quantity, of the information on which the sentencing judge may rely. Assurances of secrecy are conducive to the transmission of confidences which may bear no closer relation to fact than the average rumor or item of gossip, and may imply a pledge not to attempt independent verification of the information received. The 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. 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 Supreme Court has yet to go as far as to require the right to confrontation at capital sentencings, defendants must be given 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) ("[W]e agree with the Seventh Circuit that hearsay evidence is admissible at a capital sentencing. This proposition does contain one caveat: that the state statute protect a defendant's rights by giving him/her the opportunity to rebut any hearsay information." (internal citation omitted)); *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. Del Vecchio was given this opportunity. *He had access to the contested hearsay reports*; he could have cross-examined Drs. Rogers and Cavanaugh about the reports; he could have called his own experts. Because he was

given the opportunity to be heard, he cannot now succeed on this constitutional claim." (internal citation omitted) (emphasis added)).[2]

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. As French Russell has noted:

> The ability to see and rebut information relied upon by a decision maker is a crucial part of ensuring a fair hearing. Without knowledge of the information relied upon by the parole board, the prisoner cannot dispute its accuracy or provide an alternative account. A bar on information provided by the victim and prosecutor prevents the prisoner from rebutting descriptions of the crime or other adverse information that may be crucially important to the decision maker. Moreover, mental health evaluations could contain erroneous information that has a major influence on the release decision. Finally, virtually all boards rely on summaries of information regarding the prisoner compiled for the hearing by either department of correction or board employees. This information too might contain inaccuracies. Giving prisoners access to the information on which the decision makers rely is an important component of ensuring a meaningful hearing.

French Russell, *Review for R*elease, 89 Ind. L.J. at 424. (footnote omitted). Without the ability to know what information may be used against him during his hearing and the ability to challenge

[2] Importantly, the rationale underpinning the Court's refusal to require confrontation at capital sentencings is often due to the fact that the defendant already had the opportunity to attack the credibility of witnesses against him at trial. *See Chandler*, 240 F.3d at 918 ("The Sixth Amendment guarantees a defendant an adequate opportunity to cross-examine adverse witnesses. Chandler had this opportunity and capitalized on it during trial but chose not to during his re-sentencing phase. At trial, Chandler's counsel vigorously cross-examined the State's witnesses to whom Officer Redstone referred at the re-sentencing when he gave his recitation of the evidence of guilt. The State did not do anything to prevent Chandler from rebutting this hearsay evidence. The fact that Chandler chose not to rebut any hearsay testimony does not make the admission of such testimony erroneous." (internal citation omitted)). 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.

that information, Petitioner has no meaningful opportunity to be heard, and is thus deprived of due process. *Greenholtz*, 442 U.S. at 16.

The ability to access all information the Board will use in making its determination prior to the hearing, and the ability to challenge such information at the hearing, is necessary to afford Petitioner a meaningful parole review hearing, as required by article I, section 17 of the Iowa Constitution and the Eighth Amendment to the U.S. Constitution. By denying Petitioner access to those materials and allowing him to challenge their consideration by the Board, the Board violated those constitutional rights. Likewise, to the extent Iowa Administrative Code rule 205-8.11(906) or any other code provisions or regulations limit access to any information the Board will consider in making its parole determination, or otherwise prevent Petitioner from challenging such information, they are also unconstitutional in violation of article I, sections 9 and 17 of the Iowa Constitution, and the Eighth and Fourteenth Amendments to the U.S. Constitution.

f. Consideration of information in support of continued incarceration that is not verifiable and was not subjected to a fact-finding procedure at the time it was obtained

Closely related to the right of juvenile offenders to access information the Board will consider ahead of any parole review, the Board should refuse to consider and otherwise exclude from its consideration all documents, reports, logs, files, and other information obtained about Petitioner while incarcerated. This includes "generic notes" and behavior logs that the Board uses in makings its parole determination that are not subject to an independent process for ensuring veracity (referred to collectively as "non-verifiable information")

Iowa Administrative Code rule 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 exist no independent procedures for determining whether any such "opinion" information has a factual basis and is otherwise verifiable.

In Petitioner's case, the Board considered materials which as a category are inadequately reliable. Specifically, the Board's records for parole applicants always include all "generic notes", (e.g., R. at 377-78; 406-424; 429). These are not reflective of a neutral fact-finder or subject to refutation by an offender at the time they are generated. For some offenders, these may include accusations by cellmates or unnamed "staff." (R. 378.) The use of one-sided, subjective, non-verifiable information that Petitioner had no opportunity to challenge or appeal deprives Petitioner of a meaningful parole review hearing. 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. 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.

The reality that prisoner records may contain mistakes is indisputable. "[T]he 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. 1, 33 n. 15 (abrogated on other grounds by *Sandin v. Conner*, 515 U.S. 472, 479–84 (1995)), 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 (ND Miss.1974), rev'd, 509 F.2d 820 (CA5), cert. denied, 423 U.S. 998, 96 S.Ct. 428, 46 L.Ed.2d 373 (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 (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 (1960) (files erroneously showed that prisoner was under a life sentence in another jurisdiction)").

In the jurisprudentially analogous context of capital sentencings, courts have long recognized that the ability to challenge evidence against the defendant is a fundamental procedural right. *See Gardner v. Florida*, 430 U.S. at 362 ("[P]etitioner 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."). As part and parcel of the juvenile offender's right to access all information the Board will consider, (*see* subsection e, above), he must also have the ability to challenge accusations against him is a necessary due process requirement. Only permitting the Board to consider verifiable information about a prisoner that is subject to a fact-finding and appeals process not only ensures that the Board's review will be meaningful, but systematically increases the reliability and legitimacy of the entire process. Permitting the Board to consider non-verifiable information also fails to comport with procedural due process requirements. *See Greenholtz*, 442 U.S. at 7. 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 the right proper 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 must be supported by "some evidence," including "specific details of the activity at issue." *Id.* at 709. As demonstrated by *Backstrom*, disciplinary proceedings also provide the right of appeal to a non-corrections tribunal to ensure impartiality. *See generally id.*

Because juvenile offenders are necessarily entitled to a more thorough parole review process that afford them a meaningful opportunity for release, any information considered by the Board must at least be subject to minimal review requirements. Petitioner does not contest the Board's use of properly executed prisoner disciplinary proceedings that protect a prisoner's due process interests, however minimal. *See id.* at 710. ("Thus, the justification of the 'some evidence' rule rests on the need to balance the prisoners' due process interests against the government's interest in 'assuring the safety of inmates and prisoners [and] avoiding burdensome administrative requirements that might be susceptible to manipulation.'"). The use of non-verifiable information that is largely based off opinions and subjective impressions of prison staff, however, plainly fails to meet even this minimal procedural standard.

Requiring that any information considered by the Board be subjected to at least minimal due process protections is necessary to afford Petitioner a meaningful parole review hearing, as required by article I, section 17 of the Iowa Constitution and the Eighth Amendment to the U.S. Constitution. To the extent that the practices of the Board or the formal regulations--Iowa Administrative Code rule 205-8.11(906) or any other code provisions or regulations--permit the consideration of non-verifiable information, they are unconstitutional in violation of article I, sections 9 and 17 of the Iowa Constitution, and the Eighth and Fourteenth Amendments to the U.S. Constitution.

g. Failure to properly consider mitigating factors

The Board's failure to properly consider necessary mitigating factors, to consider those factors as *only* mitigating factors, or to expressly exclude the consideration of factors deemed unconstitutionally vague also deprives Petitioner of a meaningful parole review hearing. The relevant administrative rules currently permit the Board to consider essentially any factors it deems appropriate in 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*." (emphasis added)). 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. Importantly, the regulations fail to require the Board to consider the specific factors required by recent case law on juvenile offenders that embody the "hallmark characteristics of youth," and the extent to which the offender has matured and been rehabilitated. Additionally, the regulations fail to indicate which factors may be aggravating and

which may be mitigating. *Miller* identified those "hallmark" characteristics of youth warranting special consideration by sentencing courts:

> [Juveniles'] lack of maturity and underdeveloped sense of responsibility lead to recklessness, impulsivity, and heedless risk-taking. They are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited contro[l] over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And because a child's character is not as well formed as an adult's, his traits are less fixed and his actions are less likely to be evidence of irretrievabl[e] deprav[ity].

Miller, 132 S.Ct. at 2458 (internal citations and quotation marks omitted).

In a string of Iowa Supreme Court cases following *Miller*, the Court has continually recognized that the hallmark factors of youth developed in *Miller* and *Graham* must be considered in mitigation of punishment. *See Null*, 836 NW 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 at 95 ("[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.

In the recent decision *State v. Seats*, the Court again reaffirmed this mandate: "[t]he 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." 865 N.W.2d 545, 556 (Iowa 2015). Key to the court's decision to reverse the defendant's conviction was that "the district court appeared to use Seats's family and home environment vulnerabilities together with his lack of maturity, underdeveloped sense of responsibility, and vulnerability to peer pressure as aggravating, not

mitigating, factors." *Id.* at 557. *See also Roby*, 897 N.W.2d at 143-48 (applying the *Miller/Lyle* sentencing factors as mitigating, and not aggravating, and emphasizing important role of expert analysis in evaluating juveniles, and guiding district courts away from generalized attitudes of criminal behavior when sentencing juvenile offenders). In *Roby*, the Iowa Supreme Court reversed the district court and remanded for resentencing again, 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.") *Roby*, 897 N.W.2d at 148. Thus the Parole Board, too, when evaluating juvenile offenders' rehabilitation, must do more than provide a rote recitation of the factors, and with reference to experts as appropriate, should engage in a meaningful evaluation.

Relevant to the *Atkins v. Virginia* and *Trop v. Dulles* "evolving standards" analysis, as also used by the Iowa Supreme Court when assessing community standards under article 1, section 17 of the Iowa Constitution, *see Roby*, 897 N.W.2d at 138-41, states have passed statutes requiring that parole boards consider the *Graham* and *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."); 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."); Wash Rev. Stat. § 10.95.030(3)(b) ("In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S.Ct. 2455 (2012) including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.").

To have a full appreciation of the problems created by requiring the parole board to consider a list of factors without distinction as to the nature of each, it is helpful to understand the federal death penalty constitutional jurisprudence that lays the foundation for the *Miller* and *Graham* decisions, as well as the *Ragland*, *Null*, and *Pearson* cases decided by the Iowa Supreme Court which adopts its analysis. In capital sentencings—whereby procedural safeguards mandated by the Eighth Amendment are specially afforded to defendants facing the death penalty—the Supreme Court has placed stringent restrictions on what aggravating factors may be presented to the factfinder. Any aggravating factors must 1) be specifically enumerated by the legislature; 2) increase the culpability of the crime; 3) not overlap with mitigating factors; and 4)

be precise and easily determinable. *See Zant v. Stephens*, 462 U.S. 862, 877 (1983); *Lewis v. Jeffers*, 497 U.S. 746, 774 (1990); *Greg v. Georgia*, 428 U.S. 153, 198 (1976); *Lankford v. Idaho*, 500 U.S. 110 (1991); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). Importantly, factors such as "the crime was especially brutal, heinous, cruel, or depraved" were stricken as unconstitutionally vague, and only very exact, easily determined standards such as "there were multiple victims," "the victim was tortured," or "the victim was a child" survived the constitutional requirement. *See Godfrey*, 446 U.S. at 432–33 (1980); *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Walton v. Arizona*, 497 U.S. 639, 654 (1990).

Here, in the absence of judicial or regulatory guidance, the Board has developed a practice of beginning each parole board review hearing of a juvenile offender with a rote recitation of what it believes are the relevant inquiries required under the Iowa Constitution. (R. at 471.) After giving lip service to the constitutional requirement to treat juveniles offenders differently, the Board failed to adequately do so. (*Id.*) After spending just a few minutes in discussion, the Board failed to actually address the *Miller/Lyle* mitigating factors or engage in a meaningful or systematic consideration of Petitioner's rehabilitation. (*Id.*) Unfortunately, these deficiencies are almost inevitable given the inability of the Petitioner to introduce independent evidence of his rehabilitation or challenge unverifiable evidence.

The Board's appropriate consideration of all mitigating evidence, and its refusal to consider mitigating factors as aggravating factors or to consider otherwise inappropriate or unconstitutional factors is essential to ensuring that Petitioner will have a meaningful parole review hearing, as required by article I, section 17 of the Iowa Constitution and the Eighth Amendment to the U.S. Constitution. The Board's failure to provide a meaningful parole review hearing in this way deprives Petitioner of those constitutional guarantees. To the extent Iowa

Admin. Code r. 205-8.10(1) (906) or any other code provisions or regulations permit the Board to consider inappropriate or unconstitutional factors or to otherwise consider mitigating factors as aggravating factors when making is parole determination, they are likewise unconstitutional in violation of article I, sections 9 and 17 of the Iowa Constitution, and the Eighth and Fourteenth Amendments to the U.S. Constitution.

h. Denial of access to treatment and programming

Petitioner's inability to have immediate access to any and all programming and treatment that will aid in his rehabilitation also deprives him of a meaningful parole review hearing in violation of his rights to due process and to be free from cruel and unusual punishment. Significantly, in Iowa, 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). A juvenile offender will only be able to meaningfully participate in such programing if it is actually offered to them.

Petitioner currently participates in some programming, including the Alternative to Violence Program. (R. at 360.) However, Petitioner has not been afforded all treatment and programming opportunities available at the Iowa State Penitentiary since he was incarcerated, and prior to 2017 was systematically prohibited from partaking in certain treatment programs and opportunities due to the length and nature of his sentence. (R. at 361.) Specifically, Petitioner was instructed by his counselor to participate in Thinking for Change and Sex Offender Treatment, but was originally denied access to these programs despite the recommendation. (R. at 361.) In 2017, Petitioner was allowed to transfer institutions and then successfully completed Thinking for Change. The board has indicated that Petitioner needs to

take Sex Offender Treatment before it will seriously entertain the possibility of parole, but because the Board had denied him access to the training for so long, he still has not been able to take the course. (R. at 473.) No other treatment programs or opportunities have been made available to or recommended to Petitioner. (R. at 361.)

It is widely accepted that prison rehabilitation programs, including educational and treatment programs, are effective at reducing recidivism and prepare 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 the reduce recidivism, increase prisoner skills, and improve prisoners' self-improvement and self-confidence). With to access to such programming for juvenile offenders, French Russel has noted:

> [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.

*Review for R*elease, 89 Ind. L.J. at 432 (footnote omitted). Another scholar notes the particular harms that may result from denying juveniles access to programming:

> In support of its holding, the court in *Miller* reiterates *Graham*'s reasoning regarding the role of the rehabilitation. Yet in many ways the nature and operation of prison run counter to any reformative or rehabilitative potential and may be to blame for recidivism or return to prison upon release. Rehabilitative opportunities for the thousands of youth who are confined to adult prisons may range from limited to non-existent. In these adult prisons, youth face a high risk of suicide, are subject to physical and sexual abuse, and are not accessing programs or education tailored to juveniles. For the high percentage of imprisoned people

> suffering mental illness, behavior associated with their mental illness may lead to disciplinary action, including "segregation," which may dramatically worsen their mental health.

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 juvenile offenders must be provided immediate access to programming otherwise unavailable to persons serving life sentences. *See* Order Requiring Immediate Compliance with Miller, *Snyder*, No. 10-14568, *available at* http://www.aclumich.org/sites/default/files/file/HillOrderRequiringParoleProcess.pdf ("[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.").

As relevant to "evolving standards" analysis, *Atkins v. Virginia*, 536 U.S. 304; *Trop v. Dulles*, 356 U.S. 86, *Roby*, 897 N.W.2d 127, some states have explicitly recognized inmates' right to rehabilitative programming in prison under their state constitutions, signaling the importance of rehabilitative programming in the eyes of the courts. 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 inmates the right to access rehabilitative programming. 298 S.E.2d 781, 789 (W.Va. 1981); *Cf. Abraham v. State*, 585 P.2d 526, 533 (Ak. 1978) (holding, under Alaska's unique cruel and unusual punishments provision (which explicitly enshrines the principle of offender "reformation" as a constitutional right) that

access to rehabilitative treatment for offenders with addiction is "essential to [a defendant's] reformation as a noncriminal member of society, and to the protection of the public").

Other states explicitly require their parole boards to determine exactly what programs will aid in an offender's rehabilitation and to provide it to the offender. *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." Cal. Penal Code § 3041(a). Importantly, numerous states now require that Boards consider an offender's participation in rehabilitative and educational programs when making parole determinations for juveniles. *See, e.g.*, W. Va. Code § 62-12-13b(b)(2); Neb. Rev. Stat. § 83-1,110.04(2)(b). These legislative developments represent evolving standards of decency governing parole for those who were children at the time of their offenses. Those states recognize already what Iowa courts should, that this additional substantive and procedural safeguard is essential to ensure the ability to demonstrate rehabilitation in a truly meaningful way.

Finally, in *Roby*, the Iowa Supreme 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--with evidence that Roby never admitted his criminal actions and has continued to

> deny committing a crime. It concluded this attitude did not make him amenable to rehabilitation. While this evidence is relevant, 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. The state has an affirmative duty to provide opportunities to further rehabilitation to juvenile offenders, and where it fails to do so, it has denied them the meaningful opportunity for release that must be provided under the Iowa Constitution.

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 opportunity for parole, the State must provide offenders access to programming that will actually further their rehabilitation. Impeding the ability of Petitioner to participate in any and all programming and treatment that may aid in his rehabilitation deprives him of his right to a meaningful parole review hearing, as required by article I, section 17 of the Iowa Constitution and the Eighth Amendment to the U.S. Constitution.

i. Denial of procedures to ensure future meaningful review in the event of denial

Iowa Administrative Code rule 205-8.16(1) (906) provides that, in the event it 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." However, that notice is constitutionally insufficient for juvenile offenders.

To ensure that he has a meaningful opportunity to be paroled and demonstrate rehabilitation at any subsequent parole reviews, Petitioner must receive a timely, comprehensive written decision of the Board detailing the reasons for denial, including consideration of all of the appropriate mitigating *Miller*/*Lyle* factors and specific guidelines and recommendations for

programming and treatment that will assist in his rehabilitation. Having this information is necessary to afford Petitioner adequate time to take advantage of the Board's recommendations and prepare for the next annual hearing. Failure to institute such procedures denies Petitioner his right to a meaningful opportunity for parole in violation of article I, section 17 of the Iowa Constitution the Eighth Amendment of the U.S. Constitution, the Due Process clauses of the Fourteenth Amendment to the U.S. Constitution and article I, section 9 of the Iowa Constitution.

As discussed at length above, the juvenile offender case law recognizes that juveniles possess an inherently greater capacity for rehabilitation than do adults. It follows that juveniles should be afforded the ability to appear before the Board at regular intervals--at least annually--to demonstrate the extent of their rehabilitation. And further direction from the Board is necessary as to what programs, treatment, and efforts the offender should take advantage of to achieve rehabilitation as quickly and meaningfully as is practical for each individual offender.

As French Russell has noted:

> [S]everal . . . procedures are important to ensuring meaningful hearings. First, releasing authorities should provide 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. Notice, recording, and a statement of reasons are core requirements of a meaningful hearing recognized by courts in many other contexts.

*Review for R*elease, 89 Ind. L.J. at 427. (footnote omitted). With respect to the need for written decisions, another scholar has observed that "recorded decisions—whether judicial or administrative—can contribute to better decision making. 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).

At least one federal district court has explicitly required, in addition to notice, that the board must issue a decision explaining the parole decision. *See* Order Requiring Immediate Compliance with Miller, *Snyder*, No. 10–14568, *available at* http://www.aclumich.org/sites/default/files/file/HillOrderRequiringParoleProcess.pdf ("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").

Recognizing this constitutional mandate for juvenile offenders, some states have passed legislation explicitly requiring written decisions of the board, that the board consider the appropriate factors, and advance notice of parole hearings for offenders. *See, e.g.*, Neb.Rev.St. § 83-1,110.04(1) ("Any offender who was under the age of eighteen years when he or she committed the offense for which he or she was convicted and incarcerated shall, if the offender is denied parole, be considered for release on parole by the Board of Parole every year after the denial."); Haw. Admin. Rules § 23-700-31(b) ("When parole is denied, another parole hearing shall be scheduled to take place within twelve months of the last parole hearing date."); Haw. Admin. Rules §23-700-32(f) ("When parole is denied, the decision shall state the reasons for denial and the next parole hearing date."); 120 CMR 301.01(2) ("If parole is not granted at the initial parole release hearing, a parole review hearing occurs one year thereafter, and annually thereafter" unless earlier or postponed); 120 CMR 301.08 ("When release on parole is denied, the Parole Board Members shall provide the inmate with a written summary of the reasons supporting the decision of the Full Board or parole hearing panel. The Parole Board Members shall provide the inmate such written notice within 21 calendar days after a decision has been rendered."); W. Va. Code § 62-12-13 (e) ("If, upon consideration, parole is denied, the board

shall promptly notify the inmate of the denial. The board shall, at the time of denial, notify the inmate of the month and year he or she may apply for reconsideration and review. The board shall at least once a year reconsider and review the case of every inmate who was denied parole and who is still eligible: *Provided*, That the board may reconsider and review parole eligibility any time within three years following the denial of parole of an inmate serving a life sentence with the possibility of parole."). In California, the 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." Cal. Penal Code § 3041(a). These legislative developments represent evolving standards of decency governing parole for those who were children at the time of their offenses.

Importantly, in both *Greenholtz* and a later decision reaffirming due process rights in the parole context, *Swarthout v. Cooke*, inmates were given both notice and a written decision explaining the board's reasons for denial. *Greenholtz*, 442 U.S. at 15; *Swarthout*, 131 S.Ct. 859, 862 (2011). Although notice issue was not before the Court in *Swarthout*, the Court implied that notice was necessary where due process rights attached to the hearing. *See Swarthout*, 131 S.Ct. at 862 (Stating that, where "a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication," and holding that the parole procedure in question met those requirements 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). In other contexts—for example, the termination of public assistance—the Supreme Court has found that due process requires notice and a written decision detailing the reason for the termination. *See, e.g.*, *Goldberg v. Kelly*, 397

U.S. 254, 267 (1970) (holding that public assistance recipients were entitled to "timely and adequate notice" prior to termination and for the decision maker to "state the reasons for his determination and indicate the evidence he relied on"). In parole revocation hearings, due process requires written notice and written statements that include the reasons for and evidence relied on in making the decision. *See Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

The current notices of parole denial provided to Petitioner by the Board fall short of either adequately addressing the *Miller/Lyle* factors or providing Petitioner with meaningful information about he could best improve his opportunity to demonstrate his rehabilitation and maturity in order to be paroled. For instance, in his 2015, 2016, and 2017 denials, the Board informs Petitioner 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." (R. at 189, 425, 512.) This does nothing more than give lip service to the governing case law, without actually following it.

Indeed, with the sole exception of the date, the entire text of the Board's 2017 denial notice is verbatim from the Board's 2016 notice. (*Compare* R. at 425 *with* R. at 512.) This provides Petitioner with literally no information about whether his efforts at rehabilitation in the interim year helped or hurt his case for parole, let alone the kind of feedback necessary to afford him a "meaningful" opportunity to demonstrate his rehabilitation and earn parole.

During his 2016 parole hearing, the Board indicated that it would like to see Petitioner complete Sex Offender Treatment Programing (SOTP) before it would seriously consider him for work release or parole. (R. at 363) ("Sex Offender treatment, is probably what, is things that he needs at this moment, whether progressing through the system or not. I think I have to see

what he does when we try to get those things to him and that he receives them."). Petitioner would like nothing more than to avail himself with this treatment. Yet moments later, the Board states that it will not ensure that he can access the program, and will rather leave that decision up to the DOC. (R. at 363) ("[W]e have to be careful though because we've always said as a board, DOC needs to determine when the programming is appropriate. Because as we always know, for example, Sex Offender treatment, there is an appropriate timing for that program."). Thus, the Board has put Petitioner in a "catch-22": he cannot be seriously considered for parole until he completes Sex Offender treatment, and he cannot access Sex Offender treatment until he is being seriously considered for parole. Moreover, even though the Board stated that the programming decision was up to the DOC during the 2016 hearing, it also indicated that it had the ability to direct the DOC to move Petitioner and provide him with programming whenever it wanted, but instead had elected not to get involved "with that step-down in security continuum until they've really got to that medium level." (R. at 364.) This election was further evidenced in Petitioner's 2017 hearing, where the Board stated that it had no "*desire* to even ask for a step down from maximum where he's at ISP to medium." (R. at 472.) Again acknowledging that Petitioner would need to compete Sex Offender treatment before being seriously considered for parole, the Board indicated that it *did* have the authority to either direct or expressly request that the DOC provide Petitioner with the program, but was electing not to do so. (R. at 472) ("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.").

Without a timely decision explaining why the Board denied parole, including a comprehensive discussion of the *Miller*/*Lyle* factors and any other mitigating factors and programming and treatment suggestions to enable rehabilitation, as well as a specific date at which the subsequent hearing will occur in the event of denial, Petitioner will be denied his right

to a meaningful parole hearing in violation of the state and federal constitutional requirements to be free from cruel and unusual punishment and to due process.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the Court enter a declaratory ruling that the procedural and substantive rights he sought before the Board constitute the minimum necessary rights guaranteed to juvenile offenders eligible for parole, including Petitioner, under article 1, sections 9, 10, and 17 of the Iowa Constitution and the Eighth and Fourteenth Amendments to the U.S. Constitution to ensure such inmates a meaningful opportunity for parole, that the Board's failure to provide them to Petitioner therefore denied him of a meaningful opportunity; and that any Board rules, regulations, or policies that conflict with or fail to provide for these rights are likewise unconstitutional under section 1, sections 9, 10, and 17 of the Iowa Constitution and the Eighth and Fourteenth Amendments to the U.S. Constitution as applied to juvenile offenders, challenged under Iowa Code section 17A.19(10)(a), as well as the four other bases for challenge asserted under section 17A.19.

Petitioner respectfully seeks an order remanding this matter back to the Board and requiring that the Board provide Petitioner with the nine rights requested in the motions filed before the Board.

Petitioner also respectfully asks this Court to award him the costs of this suit, including reasonable attorneys' fees; and such other and further relief as this Court may deem just and proper.

Respectfully submitted,

/s/ Rita Bettis
Rita Bettis, AT0011558
ACLU OF IOWA FOUNDATION, INC.

505 Fifth Ave., Ste. 901
Des Moines, IA 50309–2316
Telephone: 515.207.0567
Fax: 515.243.8506
Email: Rita.Bettis@aclu-ia.org

/s/ Angela Campbell
Angela L. Campbell, AT0009086
DICKEY & CAMPBELL LAW FIRM, P.L.C.
301 East Walnut, Suite 1
Des Moines, Iowa 50309
Telephone: 515.288.5008
Fax: 515.288.5010
Email: Angela@dickeycampbell.com

/s/ Gordon Allen
Gordon E. Allen, AT0000406
6835 NW 100th St.
Johnson, IA 50131
Telephone: 515.249.6777
Email: Allen.gordy@gmail.com

Date: November 20, 2017