

No. 19-2910

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Norman Brown, et al.,

Appellees,

v.

Anne Precythe, et al.,

Appellants.

On Appeal from the United States District Court
for the Western District of Missouri

**Brief of *Amici Curiae* American Academy of Child and Adolescent
Psychiatry and Individual Mental Health Professionals
in Support of Appellees and Affirmance**

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INTERESTS OF *AMICI CURIAE*¹

The **American Academy of Child and Adolescent Psychiatry** (“AACAP”) is a medical membership association established by child and adolescent psychiatrists in 1953. Now over 9,600 members strong, AACAP is the leading national medical association dedicated to treating and improving the quality of life for the estimated 7-15 million American youth under 18 years of age who are affected by emotional, behavioral, developmental and mental disorders. AACAP’s members actively research, evaluate, diagnose, and treat psychiatric disorders, and pride themselves on giving direction to and responding quickly to new developments in addressing the health care needs of children and their families.

Dr. Jeffrey Aaron, clinical and forensic psychologist, is the facility director at the Commonwealth Center for Children & Adolescents, of the Virginia Department of Behavioral Health & Developmental Services. He holds multiple faculty appointments at the University of Virginia, including Assistant Clinical Professor of Psychiatry & Neurobehavioral Sciences at the University of Virginia Medical School. He has published in the areas of coping with stress, trauma, and forensic psychological evaluation, provided invited testimony before the Virginia

¹ No party’s counsel authored this brief in whole or in part, nor did any party, party’s counsel, or other person contribute money to fund preparing or submitting the brief. Pursuant to Fed. R. App. P. 29(a)(2), *amici* state that all parties have consented to the filing of this amicus brief.

House and Senate, and served as consultant to the United States Department of Justice. In his private practice, he conducts forensic psychological evaluations of adolescents and adults, specializing in, among other things, adolescent decision-making and posttraumatic stress.

Dr. Karen Abram is a licensed clinical psychologist and a Professor of Psychiatry and Behavioral Sciences at the Feinberg School of Medicine, Northwestern University, where she is also the Associate Director of the Program in Health Disparities and Public Policy. She is a co-investigator on *the Northwestern Juvenile Project*, the first large scale, longitudinal study of mental health needs (including PTSD, trauma, and adverse childhood experiences) and outcomes of juvenile detainees. For the past 30 years, the Program in Health Disparities and Public Policy has conducted comprehensive studies of the criminalization of the mentally ill, the mental health needs and service use of jail detainees and correlates of violence and risky behavior. Their findings have been used as the basis for changing public health policy nationwide. In addition to publishing papers in widely disseminated journals, their work has been cited in reports of the Surgeon General, used in amicus briefs to the Supreme Court, presented in congressional hearings, and widely disseminated by federal agencies and advocacy groups.

Dr. Julian Ford is a clinical psychologist, tenured professor of psychiatry and law, and faculty member of the University of Connecticut School of Medicine. A distinguished fellow of the American Psychological Association and past president of the International Society for Traumatic Stress Studies, Dr. Ford has treated hundreds of children and adolescents, authored or edited 10 books, and published more than 250 peer-reviewed articles and book chapters on trauma. He is the principal investigator and director of two treatment centers in the National Child Traumatic Stress Network, one of which is the Center for Trauma Recovery and Juvenile Justice.

Dr. Gene Griffin is a clinical psychologist and attorney who retired from Northwestern University's Feinberg School of Medicine, where he was co-director of a National Child Traumatic Stress Network research grant. Dr. Griffin has published multiple articles regarding traumatized youth in the juvenile justice system and received the MacArthur Foundation Champion for Change Award in Mental Health and Juvenile Justice for his work as lead developer of a national curriculum on adolescent development, mental health, and child trauma.

Dr. Lucy Guarnera is a clinical psychologist who conducted her doctoral research about juvenile violence and justice system involvement under Dr. N. Dickon Reppucci. During her clinical internship within the National Crime Victims Research and Treatment Center at the Medical University of South Carolina, she

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Dorothy Haskell, MSW is a licensed clinical social worker specializing in children and adolescents with trauma histories, instructor at the University of Missouri-St. Louis, faculty member for the Missouri Academy of Child Trauma Studies, and contributing member of the National Child Traumatic Stress Network. She is also the project director for a federally funded SAMHSA grant program through which providers are trained in trauma-informed care.

Dr. Antoinette Kavanaugh is a forensic psychologist certified by the American Board of Professional Psychology and former Clinical Director of the Cook County Juvenile Court Clinic, where, among other things she developed juvenile evaluation protocols. She is a lecturer at Northwestern University's Feinberg School of Medicine. Her specialties include disputed confessions, *Miranda* evaluations, competency, capital litigation, and *Miller* resentencing evaluations.

Dr. Brooke Kraushaar is a licensed clinical psychologist and forensic psychologist who has treated hundreds of adolescents throughout her clinical

career, as well as evaluated hundreds more for competency to stand trial, capacity to waive Miranda, trustworthiness of confession, and sentencing mitigation.

Dr. Rahn Minagawa has been a practicing forensic psychologist for more than 25 years. He has a doctorate in clinical psychology and is a former commander in the United States Navy. He has been invited to present on issues relating to juvenile development and juvenile involvement in the criminal justice system at multiple professional conferences for juvenile-court judges.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 8th Cir. R. 26.1A, *Amicus Curiae*

American Academy of Child and Adolescent Psychiatry hereby states that it has no parent corporation and no wholly owned subsidiaries and that no publicly held corporation owns ten percent or more of its stock.

SUMMARY OF ARGUMENT

In *Graham v. Florida*, the United States Supreme Court held that sentencing juveniles to life without parole for non-homicide offenses constitutes cruel and unusual punishment. 560 U.S. 48 (2010). The Court reasoned that youth are less culpable than adults because of biological difference in brain development that render youth more immature, more likely to engage in risky behavior, and more vulnerable to external influences like peer pressure. *Id.* at 91–92. Additionally, because children’s brains are still developing well into late adolescence, the Court determined that their personality traits are more transient and capable of change than adult personalities. *Id.* at 68–69. The undisputed scientific data confirms that youth cannot be expected to act as mature adults. *See, e.g., infra*, note 2.

The Supreme Court clarified and extended the *Graham* decision in *Miller v. Alabama*, 567 U.S. 460 (2012). There, the Court found that because youth offenders were less culpable because of the characteristics described in *Graham*, imposing mandatory life sentences without the possibility of parole for juvenile homicide offenders constituted cruel and unusual punishment. Taken together, the Court’s decisions in *Graham* and *Miller* command that when sentencing youth offenders, a court must consider as mitigating factors the characteristics that make youth offenders different.

Missouri's parole practices are constitutionally deficient as applied to the Appellees, who are all youth offenders. These practices must be revamped because, under the *Graham* and *Miller* framework, youth offenders are less culpable and are therefore entitled to a meaningful opportunity for release. As the district court appropriately determined, Missouri has not yet provided this opportunity. Providing this constitutionally mandated opportunity is especially important here, where Appellees' early lives were scarred by trauma and despair. Scientific research into trauma responses makes clear that trauma can, and often does, cause lifelong impacts that interfere with a person's ability to communicate about what he has experienced. Appellees therefore have a stark and particular need for counsel.

ARGUMENT

I. Research on brain development confirms that youthful offenders are categorically different from adult offenders with regard to culpability, vulnerability to peer pressure, susceptibility to deterrence, and capacity to change.

Children are different. Science, law, and social values have all recognized this essential fact. In *Roper v. Simmons*, *Graham*, and *Miller*, the Court recognized that a youth's culpability "is diminished, to a substantial degree" based on biological differences between a youth's brain and an adult's brain. *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (emphasis added). These biological distinctions have long been recognized by common sense and ratified by our society's laws which "recognize[] a host of distinctions between the rights and duties of children and those of adults." *New Jersey v. T.L.O.*, 469 U.S. 325, 350 n.2 (1985) (Powell, J., concurring).

These judicially and legislatively recognized distinctions are based on three categorical differences that separate youths from adults: (1) deficits in executive functions like judgment, planning, and perspective-taking, which lead to a propensity to engage in risky behavior; (2) a susceptibility to external pressures; and (3) a personality not yet formed. *Graham*, 560 U.S. at 68. "Juveniles' susceptibility to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Roper*, 543 U.S. at 570 (citation omitted). Science now verifies what law and common sense have

always known to be true: because youth minds are different, youth offenders must be treated differently than adult offenders.²

A. Because youth brains are structurally hardwired in ways that promote risky and impulsive behavior, adult sanctions are less likely to deter youth misconduct, and developmental timelines make youth particularly vulnerable to trauma, complicating mental health issues, and peer / external pressures.

The notion that youth, as a group, are prone to impulsive behavior is not simply a stereotype. Indeed, studies have confirmed that youth “exhibit a disproportionate amount of reckless behavior, sensation seeking and risk taking.”³ In fact, across cultures, developmental psychologists have found that reckless and sensation-seeking behavior peaks during adolescence.⁴ This behavior often involves criminal activities such as drunk driving and drug use, as well as reckless conduct such as unprotected sex.⁵ In particular, violent crimes “peak sharply” in

² Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1011-13 (2003).

³ Linda Patia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REVS. 417, 421 n.1 (2000).

⁴ Beatrice Luna, *The Maturation of Cognitive Control and the Adolescent Brain*, in FROM ATTENTION TO GOAL-DIRECTED BEHAVIOR 250 (Francisco Aboitiz & Diego Cosmelli, eds.) (2009).

⁵ “[I]n laboratory experiments and studies across a wide range of adolescent populations, developmental psychologists [have shown] that adolescents are risk takers who inflate the benefits of crime and sharply discount its consequences,

late adolescence (ages 16 and 17).⁶ This occurs, in part, because youth overvalue rewards and minimize risks,⁷ thereby skewing their cost calculus when making decisions.⁸ The overvaluing of rewards has been observed to be particularly pronounced when youth are interacting with other adolescents.⁹

Brain imaging studies have found a biological link between risk-taking behavior and prefrontal brain development.¹⁰ In particular, youth brains show increased neural activity in parts of the brain linked to risky behavior,¹¹ and less

even when they know the law.” Jeffrey Fagan, *Why Science and Development Matter in Juvenile Justice*, THE AMERICAN PROSPECT, Aug. 14, 2005, at 2.

⁶ Terrie Moffit, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 685–86 (1993).

⁷ Marc D. Rudolph et al., *At risk of being risky: The Relationship between “brain age” under emotional states and risk preference*, 24 DEVELOPMENTAL COGNITIVE NEUROSCIENCE 93, 103 (2017).

⁸ Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 16:3 ANN. REV. CLINICAL PSYCHOL. 47, 57 (2009) [hereinafter “Steinberg 2009”]; Julie Maslowsky et al., *Adolescent Risk Behavior: Differentiating Reasoned and Reactive Risk-taking*, 48 J. YOUTH & ADOLESCENCE 243, 244 (2019).

⁹ Laurence Steinberg, *Does Recent Research on Adolescent Brain Development Inform the Mature Minor Doctrine?* 38.3 J. MED. & PHIL. 256, 260 (2013).

¹⁰ James Bjork et al., *Developmental Differences in Posterior Mesofrontal Cortex Recruitment by Risky Rewards*, 27 J. NEUROSCI. 4839 (2007).

¹¹ Robert Shepherd, *The Relevance of Brain Research to Juvenile Justice*, 19 CRIM. JUST. 51, 52 (2005) (“[T]here are clear neurological explanations for the

activity in the prefrontal cortex, which continues to mature through late adolescence.¹² Prefrontal cortex maturation is especially important when gauging youth culpability because that part of the brain is associated with decision-making generally,¹³ including making moral judgments¹⁴ and evaluating future consequences.¹⁵ Moreover, the ability to regulate one's emotions—a crucial element of behavior control¹⁶—does not fully develop until post-adolescence.¹⁷

difficulties adolescents have in cognitive functioning, in exercising mature judgment, in controlling impulses, in weighing the consequences of actions, in resisting the influence of peers, and in generally becoming more responsible.”).

¹² B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 68 (2008).

¹³ Samantha B. Wright et al., *Neural Correlates of Fluid Reasoning in Children and Adults*, 1:8 FRONTIERS HUM. NEUROSCI. 7 (2008) (prefrontal cortex controls reasoning).

¹⁴ Jorge Moll et al., *Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task: Preliminary Functional MRI Results in Normal Subjects*, 59 ARQ. NEURO-PSQUIATR. 657 (2001).

¹⁵ Antoine Bechera et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 BRAIN 2189, 2189-99 (2000).

¹⁶ Sang Hee Kim & Stephan Hamann, *Neural Correlates of Positive and Negative Emotion Regulation*, 19:5 J. COGNITIVE NEUROSCI. 776 (2007).

¹⁷ Casey, *supra* note 12, at 65.

As a result, youth brains develop with a structural imbalance that effectively promotes poor decision making: the areas that motivate reckless behavior mature sooner than the areas that regulate such behavior.¹⁸ Put simply, the youth brain is literally hard-wired to promote poor decision-making. Because youth brains are biologically less “capable” of regulating their behavior,¹⁹ impulsive, risk-taking behavior is common during adolescence. In fact, “[i]t is statistically aberrant to refrain from [risk-taking] behavior during adolescence.”²⁰ Outrageous rule-violating behaviors are best understood as extreme versions of more common risk-taking behaviors.

As such, experience and scientific research confirm that long sentences do nothing to deter youth offenders at the outset because their limited life experiences make it difficult for them to weigh consequences and perceive long stretches of time—for example, one study determined that the threat of adult sanctions had no

¹⁸ Steinberg 2009, *supra* note 8, at 54.

¹⁹ Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 742 (2000).

²⁰ Spear, *supra* note 3. See also Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 344 (1992) (noting that over half of youth reported driving drunk, using drugs, engaging in other criminal acts).

deterrent effect whatsoever on youth crime.²¹ In sum, there is a strong biological basis for the notion that youth offenders are less culpable than their adult counterparts.

- 1. The class of people who commit juvenile offenses tend to face challenges caused by mental health problems and exposure to traumatic stressors, which are intensified by the incomplete development of the adolescent brain.**

Juvenile offenders, as a class, tend to be especially vulnerable to external pressures.²² In particular, youth are “dependent on living circumstances of their parents and families and hence are vulnerable to the impact of conditions well beyond their control.”²³ Put differently, youth are not old enough to “extricate themselves from a criminogenic setting.” *Roper*, 543 U.S. at 569; *see also id.* at

²¹ Eric L. Jensen & Linda Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violence Juvenile Crime*, 40 CRIME & DELINQ. 96, 100-02 (1994).

²² Lauren E. Sherman et al., *The Power of the Like in Adolescence: Effects of Peer Influence on Neural and Behavioral Responses to Social Media*, 27 PSYCHOLOGICAL SCI. 1027, 1028 (2016); Ashley R. Smith, Jason Chein, & Laurence Steinberg, *Peers Increase Adolescent Risk Taking Even When the Probabilities of Negative Outcomes Are Known*, 50 DEVELOPMENTAL PSYCHOLOGY 1564, 1567 (2014).

²³ Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision making of Delinquent Youths*, in YOUTH ON TRIAL 33 (Thomas Grisso & Robert G. Schwartz, eds., 2000).

553 (noting that “juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment”).

Youth growing up in areas suffering chronic community violence are more prone to mental health challenges such as depression and post-traumatic stress disorder.²⁴ The cognitive patterns this creates can encourage youth to seek involvement in gangs and other high risk behaviors for protection.²⁵ Involvement in such activities perpetuates the cycle of challenges that encourages additional violence and youth offending.²⁶

The mental health disorders (whose genesis is often rooted in childhood trauma, as discussed below) experienced by the class members have a direct correlation to youthful offending. Approximately 65% to 70% of youth in juvenile

²⁴ D. Finkelhor et al., *Polyvictimization: Children’s exposure to multiple types of violence, crime, and abuse*, in JUVENILE JUSTICE BULLETIN (2011); Amy Garrett et al., *Longitudinal changes in brain function associated with symptom improvement in youth with PTSD*, 114 J. PSYCHIATRIC RESEARCH 161, 163 (2019).

²⁵ J. Garbarino et al., *Community violence and children: Preventing exposure and reducing harm*, in INVESTING IN CHILDREN, YOUTH, FAMILIES, AND COMMUNITIES: STRENGTHS-BASED RESEARCH AND POLICY 303-20 (K. I. Maton, C. J. Schellenbach, B. J. Leadbeater, & A. L. Solarz, eds. 2004).

²⁶ Isaiah B. Pickens et al., *Victimization and Juvenile Offending*, NAT’L CHILD TRAUMATIC STRESS NETWORK 3 (2016), https://www.nctsn.org/sites/default/files/resources/victimization_juvenile_offending.pdf [<https://perma.cc/G6WW-UBS8>].

justice detention, correctional, or community-based facilities have a diagnosable mental disorder relating to their crimes and 17% to 27% have a serious mental disorder that significantly impairs their ability to function.²⁷ Consistent exposure to adverse childhood experiences (ACEs) feeds and amplifies the mental health struggles of at-risk youth, and courts across the country have begun to recognize and respond to these factors in sentencing and addressing juvenile criminal activity.²⁸

2. More than 90% of the children who enter the justice system have serious trauma histories, which makes them particularly vulnerable to external pressures and ill-equipped to advocate for themselves during their parole hearing.

Since first being identified, over time the links between childhood trauma, mental health, and juvenile offending have only been shown to be stronger.

²⁷ Kathleen R. Skowrya & Joseph J. Coccozza, *Blueprint for Change: A Comprehensive Model for the Identification and Treatment of Youth with Mental Health Needs in Contact with the Juvenile Justice System*, NATIONAL CENTER FOR MENTAL HEALTH AND JUVENILE JUSTICE 8 (2006) available at ncmhjj.com/wp-content/uploads/2013/12/Blueprint.pdf.

²⁸ Ed Finkel, *Trauma-informed judges take gentler approach, administer problem-solving justice to stop cycle of ACEs*, ACES TOO HIGH NEWS (2014) available at <https://acestoohigh.com/2014/09/24/trauma-informed-judges-take-gentler-approach-administer-problem-solving-justice-to-stop-cycle-of-aces/> (citing Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTIVE MED. 245 (1998)).

Research shows that early childhood trauma often leads to survival responses, which can take the form of depression, anxiety, social isolation, and conflicted relationships.²⁹ Certain responses to trauma, such as emotional reactivity, aggression in the face of perceived threats, disengagement from others due to lack of trust, or even association with delinquent peers, can lead directly to increased risk of conflict and aggression. This can be the case when the traumatized child or adolescent has no wish for such conflict but misperceives a threat.³⁰ Similarly, some efforts at managing distress, such as substance use or social isolation, may lead directly or indirectly to additional coping problems and even an increased risk of rule-violating behavior.³¹

²⁹ Julian D. Ford et al., *Pathways from Traumatic Child Victimization to Delinquency: Implications for Juvenile and Permanency Court Proceedings and Decisions*, 57 JUV. & FAM. CT. J. 13 (2009).

³⁰ *Id.*

³¹ L. Khoury et al., *Substance use, childhood traumatic experience, and Posttraumatic Stress Disorder in an urban civilian population*, 27 DEPRESSION AND ANXIETY 1077 (2010); Bessel A. van der Kolk et al., *Childhood abuse and neglect and loss of self-regulation*, 58 BULL. MENNIGER CLINIC 145 (1994); M. Altintas et al., *Evaluation of childhood trauma with respect to criminal behavior, dissociative experiences, adverse family experiences and psychiatric backgrounds among prison inmates*, 82 COMPREHENSIVE PSYCHIATRY 100 (2018).

Moreover, traumatic experiences, particularly when the trauma involves the perception of threat, can also lead directly to post-traumatic hypervigilance and misperception of threat, that—while not indicative of desire or intent to be aggressive—can cause an adolescent to react with violence.

Within groups of adolescents who have been exposed to childhood trauma, a subset includes those who have experienced several types of traumatic victimization (“poly-victims”), including assault, family / community violence, and physical or sexual abuse.³² A sample of youth in a large juvenile detention center reported more than 90% with a history of at least one—and often multiple—traumatic psychological experiences (as defined in the DSM-IV-TR for PTSD).³³ Current estimates of lifetime PTSD incidence in juvenile justice populations range from 25% to 50%.³⁴

In addition, exposure to significant childhood adversity, including ACEs, can cause significant and lasting distress. A recent study found that the greater exposure to increasing amounts of ACEs in different developmental periods

³² Julian D. Ford et al., *Poly-victimization among juvenile justice-involved youths*, 37 CHILD ABUSE & NEGLECT 788-89 (2013) [hereinafter “Ford 2013”].

³³ *Id.*

³⁴ *Id.*

increased the severity of PTSD, externalizing and internalizing disorders, and school or legal problems.³⁵ Studies have found direct correlation between childhood traumatic stressors / poly-victimization and juvenile justice-involved youth across race and ethnic groups (White, Hispanic, and African-American), though the instance and severity of such poly-victimization can vary significantly.³⁶

Consistent with juvenile propensity for high-risk behaviors (as discussed above), poly-victimized juveniles reported higher incidences of PTSD, depression/anxiety, suicidal ideation, and substance abuse.³⁷ Poly-victimized youth show increased risk of aggressive and destructive behavior compared to counterparts who have not been poly-victimized, even controlling for age, gender, ethnicity, and existing psychiatric disorders.³⁸ The effects of poly-victimization make youth especially vulnerable to other pressures.

³⁵ Carly B. Dierkhising et al., *Developmental timing of polyvictimization: Continuity, change, and association with adverse outcomes in adolescence*, 87 CHILD ABUSE & NEGLECT 40, 47-48 (2019).

³⁶ Ford 2013, *supra* note 32, at 789, 796.

³⁷ *Id.* at 790.

³⁸ Pickens, *supra* note 26, at 3.

Traumatized juveniles are also more sensitive to certain emotional triggers, such as fear, rejection, and the desire to “fit in,” making them particularly vulnerable to peer pressure.³⁹ In fact, there are brain-level differences in traumatized people: the brain functions that help people resist peer influence are still developing well into late adolescence,⁴⁰ and trauma affects teenagers’ ability to resist peer pressure.⁴¹ One study found that peer pressure doubles the chance of risky behavior, including criminal behavior, among youth.⁴² Peer pressure can be especially pronounced in the gang context, where the data indicate enormous group pressure exists to engage in self-destructive behavior.⁴³ Indeed, the mere presence

³⁹ Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Pressure*, 43 DEVELOPMENTAL PSYCHOL. 1531, 1536-38 (2007).

⁴⁰ Steinberg 2009, *supra* note 8, at 54.

⁴¹ Smith, *supra* note 22.

⁴² Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking. Risk Preference and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 626-34 (2005).

⁴³ See Michele Mouttapa et al., *I’m Mad and I’m Bad: Links Between Self-Identification as a Gangster, Symptoms of Anger, and Alcohol Use Among Minority Juvenile Offenders*, 8 YOUTH VIOLENCE & JUV. J. 71 (2010) (finding that identifying with a “gang member peer group” increases the likelihood of destructive behavior such as heavy alcohol use).

of other teens can directly influence adolescents' decisions and actions.⁴⁴ It is no coincidence that most youth crime is group youth crime,⁴⁵ including many of the crimes committed by the Class Members in this case.

B. Because juveniles are particularly vulnerable to trauma and other external factors but are also more capable of change, sentencers have a duty to consider juvenile offenders' lessened culpability and greater capacity to rehabilitate.

The vulnerabilities of youth—an inability to control their external environment, childhood and community trauma, and a susceptibility to peer pressure—combine to make youth less culpable. These pressures were particularly salient for the Class Members. By way of example, Plaintiff Ralph McElroy grew up in a violent environment of gangs and suffered from abuse at home. Long before the Class Members became prisoners in the Missouri Department of Corrections, they were trapped in traumatic environments they could not shape or escape. Such environments profoundly affect the calculus of culpability.

⁴⁴ Alexandra O. Cohen & B. J. Casey. *Rewiring Juvenile Justice: The Intersection of Developmental Neuroscience and Legal Policy*, 18.2 TRENDS COGNITIVE SCI. 63, 65 (2014).

⁴⁵ Franklin Zimring, *Penal Proportionality for the Young Offender*, in YOUTH ON TRIAL 281 (2000) (“No matter the crime, if a teenager is the offender, he is usually not committing the offense alone.”); Moffit, *supra* note 6, at 686–88 (finding a strong correlation between a youth’s propensity to commit a crime and peer delinquency).

“[I]ncorrigibility is inconsistent with youth.” *Graham*, 560 U.S. at 73 (internal citation omitted). Adolescence is a time of remarkable change and transience, when youth are still struggling to form a basic identity. *Roper*, 543 U.S. at 570 (noting that “[t]he personality traits of juveniles are more transitory, less fixed” than those of adults). Youth crime reflects this transient period and is one of the “qualities of youth” itself, rather than a sign of an intractably bad character. *Id.* Although violent crime peaks around 16 and 17 years, it “drop[s] precipitously in to young adulthood.”⁴⁶ In fact, developmental psychiatrists have found that the vast majority of youth offenders will stop committing crime once they are adults, and very few youth offenders develop intractable or long term problems with criminality.⁴⁷ Indeed, youthful offenders are statistically more likely to change than they are to stay the same.⁴⁸ This capacity for change is a crucial distinction between youth offenders and adult offenders. “[F]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” *Graham*,

⁴⁶ Moffit, *supra* note 6, at 675.

⁴⁷ Steinberg & Scott, *supra* note 2, at 1015.

⁴⁸ Stephanie M. Cardwell & Alex R. Piquero, *Does Violence in Adolescence Differentially Predict Offending Patterns in Early Adulthood?*, 62 INT’L. J. OFFENDER THERAPY & COMP. CRIMINOLOGY 1603, 1622 (2018).

560 U.S. at 68 (quoting *Roper*, 543 U.S. at 570). Because of the causation and reform considerations involved in youth offenders, the rationales of retribution and deterrence within the justice system are considerably weaker for juvenile offenders.⁴⁹

Youth characteristics are so malleable that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 573). Researchers have found that youth offenders who change and those who continue committing crimes exhibit identical behavior at the outset, making it impossible to identify incorrigible offenders.⁵⁰ The Court made clear in *Graham* and *Miller* that there is no reliable way—either for a prosecutor or a sentencing judge—to determine when a youth offender’s crimes are the result of “irreparable corruption,” and no reliable way to conclude that a youth offender ought to die in prison.

⁴⁹ John R. Mills, Anna M. Dorn, & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 Am. U. L. Rev. 535, 548–49 (2016).

⁵⁰ Edward Mulvey & Elizabeth Cauffman, *The Inherent Limits of Predicting School Violence*, 56 AM. PSYCHOLOGIST 797, 799 (2001).

Under the Court’s prescription, the Class Members are entitled to a fulsome review of their rehabilitation *that neither allows unfettered discretion nor magnifies the seriousness of the original, youthful offense* when evaluating whether the juvenile offender is suitable for parole as a fully developed adult. The factors and childhood trauma that facilitate juvenile offenders also necessitate clear legal guidance (set forth by the courts) for parole standards. Without clear direction about *how* to consider the key “mitigating qualities of youth,” the Class Members will not actually receive an individualized consideration for parole as mandated by the factors that have been critical to the Supreme Court’s analysis. *See Miller*, 567 U.S. at 476, 481.

Childhood trauma must especially be considered in the parole processes. The high incidence of trauma caused by ACEs detailed above often goes underreported and untreated for years when juvenile offenders first encounter the justice system.⁵¹ Once efforts are undertaken to diagnose and treat the issues arising out of childhood trauma (including substance abuse and mental health disorders), trauma-informed clinicians can actually address the root causes of juvenile delinquency and ultimately lead to more successful outcomes for juvenile offenders, who are able to abandon negative behaviors, risk seeking, and adverse

⁵¹ Pickens, *supra* note 26, at 3.

responses to PTSD as adults.⁵² Standards for parole evaluations should therefore include clear guidelines assessing whether childhood trauma has been evaluated and identified for a youthful offender as well as clinical assessments of treatment for that trauma.⁵³

II. The revised parole processes ordered by the district court, along with state-funded counsel, are necessary to address the vulnerabilities and potential for rehabilitation of youthful offenders.

In crafting a remedy for Missouri’s deficient parole processes that will offer the Class Members a meaningful opportunity for release, the district court correctly identified that to marshal the underlying issues and argument above, Class Members should have the ability to use counsel when addressing the Parole Board. The district court also correctly concluded that the seriousness of the youthful offense should not be the sole reason for denial of parole. The remedies enumerated by the district court address the requirements of *Graham* and *Miller* in ways that consider the trauma and lessened culpability of youth with the exception

⁵² *Id.* at 7.

⁵³ In particular, researchers have discovered that youthful offenders are often capable of “emergent resilience,” a capacity for stability that emerges once a juvenile is removed from chronically stressful, traumatic circumstances that may have contributed to his criminal behavior. *See, e.g.,* G. Bonanno et al., *Annual Research Review: Positive adjustment to adversity—trajectories of minimal–impact resilience and emergent resilience*, 54 J. CHILDHOOD PSYCHOL. & PSYCHIATRY 378, 379 (2013).

of state-funded counsel, which is necessary for Class Members to articulate and communicate the salient facts about their lived experiences.

The lack of state-funded counsel is fatal to the vindication of the issues inherent to youthful offenders seeking a meaningful opportunity for release. Due to their incarceration, Class Members will be unable to access full medical records and other materials needed to demonstrate histories of childhood trauma as well as the long road they have undertaken (which will be present for successful parole applicants) for treating childhood trauma and repairing the damage caused by external forces in their youth.⁵⁴ In addition, without state-funded counsel, indigent Class Members—who have spent their entire adolescent and adult lives in correctional facilities—likely will be unable to advocate for themselves due to the lifelong effects of childhood trauma⁵⁵ and significant mental health issues.⁵⁶

⁵⁴ See David Siegel, *What Hath Miller Wrought: Effective Representation of Juveniles in Capital-Equivalent Proceedings*, 39 N.E. J. ON CRIM. & CIV. CONFINEMENT 701, 715 (2013).

⁵⁵ See C. B. Nemeroff, *Neurobiological consequences of childhood trauma*, 65 THE JOURNAL OF CLINICAL PSYCHIATRY 18 (Supp. 1) (2004).

⁵⁶ See J. G. Green et al., *Childhood adversities and adult psychiatric disorders in the national comorbidity survey replication I: Associations with first onset of DSM-IV disorders*, 67 ARCHIVES OF GEN. PSYCHIATRY 113 (2010).

In short, a meaningful opportunity for release (which the Supreme Court has made clear should be accessible for those deserving of it) cannot actually occur if Class Members are left on an island and unable to address the issues above. Providing state-funded counsel rectifies this and makes the parole opportunity *meaningful*, as numerous state legislators and other courts have recognized.⁵⁷ “[G]iven the importance *Miller* places on the juvenile’s family and social history, and the fact that some types of analogous mitigation evidence in adult capital cases will not be available...the investigative burden should be reduced and development of a comprehensive life history, with resources to prepare it, should be available in all capital-equivalent cases.”⁵⁸

Without state-funded counsel and oversight of the Parole Board’s analysis (through the application of rigorous and clear legal standards that do not allow

⁵⁷ See H.B. 2116, 27th Leg., Reg. Sess. (Haw. 2014) (amending HAW. REV. STAT. ANN. §§ 706-656(1), 657 (LexisNexis Supp. 2014)); § 706-670 (providing for appointed counsel in annual parole hearings and a presumption in favor of parole upon finding a low risk of reoffending); *Diatchenko v. Dist. Att’y (Diatchenko II)*, 27 N.E.3d 349, 356–57 (Mass. 2015) (finding juvenile offenders sentenced to life without parole entitled to counsel and expert services related to their parole hearing); CONN. GEN. STAT. § 54-125a (West 2015) (entitling indigent prisoners sentenced as juveniles to counsel to assist in preparation for parole hearings).

⁵⁸ Siegel, *supra* note 54, at 715.

arbitrary reliance on the seriousness of the offense), the promises of *Graham* and *Miller* are entirely illusory.

CONCLUSION

“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.” *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). Thirty-eight years after *Eddings*, scientific research confirms that youth offenders cannot be expected to think or behave like adults. Recognizing these differences, the Supreme Court articulated a rule that youth offenders must receive an individualized sentencing that considers the factors explored in *Miller*.

The State of Missouri has continued to refuse to provide the individualized assessment with all necessary protections for youthful offenders who have undergone significant rehabilitation. This Court should ensure that the Class Members receive a meaningful opportunity for an impartial board to consider their release, and that a full presentation of the merits of the individual’s rehabilitation actually occurs—taking into consideration the scientific consensus about juvenile minds and development in the face of significant childhood trauma.

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on February 24, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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