No. 19-2910; 19-3019

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NORMAN BROWN, et al.,

Appellees/Cross-Appellants,

v.

ANNE PRECYTHE, et al.,

Appellants/Cross-Appellees.

Appeal from the United States District Court
Western District of Missouri
Hon. Nanette Laughrey
United States District Judge

BRIEF OF APPELLEES/CROSS-APPELLANTS

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Summary and Request for Oral Argument

All parties agree that the Class' life without parole sentences violate the Eighth Amendment. The State chose to rectify those unconstitutional sentences by allowing the class to seek parole. The Supreme Court has held that such a remedy cures the violation only if it offers a meaningful opportunity for release based on demonstrated maturity and rehabilitation.

Missouri does not offer such an opportunity, because: (1) class members are denied their parole files, depriving them of any opportunity to challenge the contents; (2) they are limited to a one delegate, who cannot present legal argument or mitigating evidence; (3) the decision form provides only a boilerplate explanation for the decision and always cites the seriousness of the offense as a basis for denial; and (4) the State relies entirely on subjective criteria.

The District Court refused to order the State to pay for counsel. An inmate jailed as a teenager is unlikely to have the legal knowledge, evidence gathering, or communication skills necessary to effectively present a case for release. Thus, state-funded counsel is essential to satisfying the Supreme Court's mandate. The Class agrees with the State that a 20-minute argument is proper.

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Jurisdictional Statement

The Juvenile Class agrees with the State's jurisdictional statement.

Statement of the Issues

I. Whether the State must offer the Juvenile Class a meaningful opportunity for release based on maturity and rehabilitation in order to cure the constitutional error in a life sentence without parole for a juvenile?

- *Greiman v. Hodges*, 79 F.Supp. 3d 933, 945 (S.D. Iowa 2015)
- *Hayden v. Keller*, 134 F.Supp. 3d 1000 (E.D.N.C. 2015), *appeal dismissed*, 667 Fed. Appx. 416 (4th Cir. 2016)
- *Maryland Restorative Justice Institute v. Hogan*, No. ELH-16-1021, 2017 WL 467731 (D. Md. Feb. 3, 2017)
- *Bonilla v. Iowa Board of Parole*, 930 N.W.2d 751 (Iowa 2019)

II. Whether the State's parole procedures offer the Juvenile Class that meaningful opportunity?

- *Williams v. Missouri Board of Probation & Parole*, 661 F.2d 697 (8th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982)
- *Parker v. Corrothers*, 750 F.2d 653 (8th Cir. 1984)
- *Greiman v. Hodges*, 79 F.Supp. 3d 933 (S.D. Iowa 2015)
- *Hawkins v. New York State Dep't*, 30 N.Y.S. 3d 397 (App. Div. 2016)

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III. Whether the District Court correctly held that the Ohio Risk Assessment System was too biased against juvenile offenders to produce reliable results?

- *Lewis v. Casey*, 518 U.S. 343 (1996)
- *Brown v. Plata*, 563 U.S. 493 (2011)
- *Missouri State Conference of the NAACP v. Ferguson-Florissant School Dist.*, 219 F.Supp. 3d 949 (E.D. Mo. 2016), *aff'd*, 894 F.3d 924 (8th Cir. 2018), *cert. denied,* 139 S.Ct. 826 (2019)

IV. Whether the District Court erred in holding that state-provided counsel were unnecessary to give Juvenile Class members a meaningful opportunity of release?

- *In re Gault*, 387 U.S. 1 (1967)
- *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)
- *Graham v. Florida*, 560 U.S. 48 (2010)
- *Diatchenko v. District Attorney*, 27 N.E.3d 349 (Mass. 2015)

Statement of the Case

1. The Parties.

The plaintiff class (the "Juvenile Class") in this case consists of fewer than 100 persons who share one common characteristic: they were given mandatory sentences of life without parole ("life without") for first-degree murder convictions. Add. 34; J.A. A-302, A-407, A-530.[1]

After *Miller v. Alabama,* 567 U.S. 460 (2012), and *Montgomery v. Louisiana,* 136 S.Ct. 718 (2016), the Missouri legislature amended the sentencing statute for first-degree murder. Today, a life without sentence for a juvenile is permissible only after a judge or a jury has determined, based on certain youth-based factors, that the defendant is so irreparably depraved that such a sentences is appropriate. §§ 565.033; 565.034, R.S.Mo (2016).[2] As a result, there will never be any more members of this Juvenile Class.

[1] Throughout this brief, the Joint Appendix is cited as "J.A." and the Joint Sealed Appendix is cited as "J.S.A."

[2] Even then, such punishment is available only if the defendant personally inflicted the injuries and the State has proven at least one of nine aggravating factors beyond a reasonable doubt. § 565.034.6, R.S.Mo.

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The defendants are current and former members of the Missouri Parole Board and the director of the Missouri Department of Corrections (the "State"). J.A. A-195-235, A-530. They are sued in their official capacities only.

2. *Miller* and *Montgomery*.

Miller held that the Eighth Amendment prohibits mandatory life without sentences for persons convicted of homicide when they were juveniles at the time of the underlying offense, because "children who commit even heinous crimes are capable of change." 567 U.S. at 479. "[C]hildren are different," the Court declared, and "those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480. The Court held that the judicial system had to distinguish between a child whose crime "reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 479-80. For the former, a life without sentence is disproportionately harsh and unconstitutional.

To that end, sentencing courts must consider a number of "*Miller* factors," including:

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- "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences";
- "family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal and dysfunctional";
- "circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him";
- "incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors . . . or his incapacity to assist his own attorneys"; and
- "the possibility of rehabilitation."

567 U.S. at 477-78.

The Court required a state to provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 479 (quoting *Graham*, 560 U.S. at 75). *See also Montgomery*, 136 S.Ct. at 736 ("given . . . children's diminished culpability and heightened capacity for change . . . appropriate

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occasions for sentencing juveniles to this harshest possible penalty" are supposed to "be uncommon").

In *Montgomery*, the Court held that *Miller* announced a substantive rule of law that applied retroactively, because it barred a category of punishment (life without) "for a class of defendants because of their status or offense" (juvenile offenders whose crimes reflect immaturity). 136 S.Ct. at 736. *Montgomery* also noted that, in some instances, states could cure a *Miller* violation by providing a meaningful opportunity for parole release:

> 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. In light of what this Court has said in *Roper*, *Graham* and *Miller* about how children are constitutionally different from adults in their level of culpability, . . . prisoners like Montgomery **must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.**

Id. at 736-37 (emphasis added).

3. S.B. 590.

In 2016, the Missouri legislature responded to *Miller* and *Montgomery* by enacting S.B. 590. Among other things, S.B. 590

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created a mechanism through which juvenile offenders serving unconstitutional life without sentences could "petition for a review of [their] sentence . . . after serving twenty-five years of incarceration on the sentence of life without parole." § 558.047.1, R.S.Mo. (2016)

S.B. 590 further provides that, at a "parole review hearing" under § 558.047, the State must consider the following factors:

> (1) Efforts made toward rehabilitation since the offense or offenses occurred, including participation in educational, vocational, or other programs during incarceration, when available;
>
> (2) The subsequent growth and increased maturity of the person since the offense or offenses occurred;
>
> (3) Evidence that the person has accepted accountability for the offense or offenses, except in cases where the person has maintained his or her innocence;
>
> (4) The person's institutional record during incarceration; and
>
> (5) Whether the person remains the same risk to society as he or she did at the time of the initial sentencing[;]

as well as:

> (1) The nature and circumstances of the offense committed by the defendant;
>
> (2) The degree of the defendant's culpability in light of his or her age and role in the offense;
>
> (3) The defendant's age, maturity, intellectual capacity, and mental and emotional health and development at the time of the offense;

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> (4) The defendant's background, including his or her family, home, and community environment;
>
> (5) The likelihood for rehabilitation of the defendant;
>
> (6) The extent of the defendant's participation in the offense;
>
> (7) The effect of familial pressure or peer pressure on the defendant's actions;
>
> (8) The nature and extent of the defendant's prior criminal history, including whether the offense was committed by a person with a prior record of conviction for murder in the first degree, or one or more serious assaultive criminal convictions;
>
> (9) The effect of characteristics attributable to the defendant's youth on the defendant's judgment; and
>
> (10) A statement by the victim or the victim's family member as provided by section 557.041 until December 31, 2016, and beginning January 1, 2017, section 595.229.

§§ 558.047.5, 565.033.2, R.S.Mo (2016). Because § 565.033 changed the process for sentencing juveniles to life without in the future, the Juvenile Class is finite and can never be expanded.

4. Missouri's Parole System In Practice.

In practice and for a variety of reasons, § 558.047.5 does not provide a meaningful opportunity for a Juvenile Class member to obtain parole. The Parole Board has historically been criticized for being highly secretive and making arbitrary decisions based solely on

the circumstances of the offense. J.A. A-331, A-490. The same is true for S.B. 590 parole hearings.

State regulations indicate that one of the purposes of a parole hearing is to give the inmate an opportunity to "[p]resent and discuss any other matters that are appropriate for consideration including challenging allegations of fact that they perceive to be false." Add. 20; J.A. A-332, A-343. But the State does not allow inmates access to their parole files. Add. 20; J.A. A-332, A-491.

The basic document on which the State relies is a prehearing report prepared by an institutional parole officer. Add. 20; J.A. A-308-311, A-421-431. The inmate never sees it, or any other materials in their parole file. Add. 20; J.A. A-332, A-491. Without access to the parole file, an inmate cannot challenge false or misleading information. Add. 20; J.A. A-332-334, A-491-496, J.S.A.-113-121.

Missouri allows only one delegate to speak on behalf of the inmate. Add. 20-21; J.A. A-316-317, A-446-447, J.S.A.-131-132. That delegate may be an attorney, but they are prohibited from making legal arguments. J.A. A-317-318, A-448-449, A-453-454, J.S.A.-132. Thus, the delegate cannot argue about the presence of *Miller* factors or the other factors set forth in the statutes. J.A. A-317,

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A-448-449. Nor can they correct misstatements made by prosecutors or victim representatives. J.A. A-317-318, A-450-453, J.S.A.-132.

The notices that the State uses to notify inmates of the ruling are bare-bones and use boilerplate language. Add. 11; J.A. A-327-331, A-335, A-496-498, A-858-866, A-890-891. The Board is limited to two reasons for denying parole: the seriousness of the underlying offense and the inmate's perceived inability to be at large without violating the law. Add. 22; J.A. A-327-331, A-335, A-496-498, J.S.A.-133. There is no opportunity for the Board to discuss the *Miller* factors or the other factors set forth in the statutes. Add. 22-23; J.A. A-327-331, A-335, A-496-498, J.S.A.-133. And there is no way for the Juvenile Class member to appeal or otherwise seek review of the Parole Board's decision. Add. 11; J.A. A-321, A-464-465.

Finally, the State does not rely on any objective, verifiable data concerning rehabilitation of juvenile inmates. Add. 23; J.A. A-320-321, A-460-464. While the Board relies on such data in evaluating adult inmates, its approach to members of this class is entirely subjective. Add. 23; J.A. A-320-321, A-460-461.

The record shows that these problems in practice have resulted in the denial of parole for the vast majority of the Juvenile Class. Only

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four out of 28 class members—less than 15%—have received any relief. Add. 10; J.A. A-319, A-456-457. The "relief" is limited to setting a release date years in the future, a release date that may or may not happen. Add. 10; J.A. A-320, A-457. And, again, those decisions are arbitrary and based on the seriousness of the offense rather than the Class member's maturity and rehabilitation. J.A. A-320-331, A-460-489.

All of this evidence is uncontested. The District Court held that, taken together, these problems deprive a juvenile lifer of any realistic, meaningful opportunity to demonstrate rehabilitation and hence S.B. 590 does not cure the constitutional violation. Add. 23. The limited relief that a few Juvenile Class members have been able to obtain confirms that Missouri does not offer the required meaningful opportunity.

5. The Ohio Risk Assessment System (ORAS).

Having found a constitutional violation, the District Court quite properly directed the State to propose a remedy that would permit juvenile inmates a meaningful and realistic opportunity to obtain parole. Add. 27. As the State's brief acknowledges, counsel negotiated the terms of the proposed remedy, Br. at 68, and the end product

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was, with two exceptions, acceptable to both sides. Indeed, much of the remedy ordered by the District Court came directly from the State's proposed compliance plan.

The first exception is ORAS. ORAS purports to determine the likelihood of a parolee reoffending based on objective criteria. J.A. A-980-981. The record shows that, when it comes to juvenile offenders, ORAS is not a reliable means of measuring that risk. J.A. A-591-592, A-979-983. The class presented the affidavit of Dr. Todd Clear, and the testimony of Professor Heidi Rummel, on that issue. J.A. A-663-776, A-979-1020. The State presented no evidence.

The central problem with ORAS, as applied to juveniles, is that it systematically treats mitigating factors under *Miller* as aggravating factors. J.A. A-691-693, A-979-984. For example, ORAS considers incomplete education and lack of job history or marriage as significant risk factors in predicting the likelihood of reoffending. *Id.* A person incarcerated at age 15 will necessarily score badly on those counts. *Id.* So the very characteristic that *Miller* holds to be mitigating—youth—is an ORAS aggravator. Add. 47-48.

Both Dr. Clear and Professor Rummel testified that this distortion means that the accuracy of ORAS as it relates to juvenile

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offenders is, at best, unknown. J.A. A-691-693, A-979-984. Dr. Clear also testified that it is unknown whether ORAS accurately accounts for racial differences. J.A. A-979-984. As applied to juveniles, therefore, ORAS is unreliable.

6. The Need For State-Provided Counsel.

The second exception is state-funded counsel for indigent Juvenile Class members. The District Court acknowledged that the only post-*Miller* case to address the issue held that the state had to provide such counsel. Add. 49. It also acknowledged that four state legislatures had enacted statutes requiring the same. *Id.* Without explanation, however, the District Court denied that relief "at this time." *Id.*

The class relied on the testimony of Professor Rummel on this issue.[3] Juvenile parole reviews are complex, involving the marshalling and presentation of complicated social histories and psychological expertise. J.A. A-689-702, A-901-902, A-917-920. Professor Rummel explained that an inmate incarcerated from their

[3] The District Court stated that it had not relied on Professor Rummel's testimony in formulating its relief. Add. 39 n.5. It did not explain why.

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teen years is unlikely to have either the legal knowledge as to what evidence is relevant to the *Miller* factors or the ability to obtain it. *Id.* By the time a Juvenile Class member is eligible for parole—after at least 25 years in prison—relevant records and support systems will likely have vanished. J.A. A-694-695, A-917. Professor Rummel also explained that much of that evidence likely stems from traumatic childhood experiences, which the Class member mistakenly believes will hurt rather than help. J.A. A-694-695, A-917-918.

Professor Rummel also testified that a juvenile offender locked up for decades is unlikely to possess the social or life skills to effectively communicate with the Parole Board. J.A. A-695-696, A-699-708, A-917-920. Yet prosecuting attorneys regularly appear at S.B. 590 hearings opposing release, creating an adversarial setting. J.A. A-696, J.S.A.-132. Finally, she testified that there is an inherent tension between accepting responsibility for an offense and arguing for mitigation, a tension that only a trained advocate can relieve. J.A. A-697.

7. The Juvenile Class Representatives' Parole Reviews.

Like the Juvenile Class they represent, each named plaintiff is serving an unconstitutional life without sentence. J.A. 302, 530. And

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each was denied parole based on the seriousness of the underlying offense. J.A. 327-329, 331, 481, 483, 486, 488-489, 530, 532.

Norman Brown is, by the Parole Board's own standards, a model inmate. J.A. A-530, J.S.A.-113. Mr. Brown was only 15 years old at the time of the underlying offense. J.A. A-531, J.S.A.-113-114. In advance of his parole hearing, Mr. Brown's attorneys submitted various materials to the Parole Board, including a report of a forensic psychological evaluation conducted by Brooke Kraushaar, Psy.D. J.A. A-531, J.S.A.-113-115, J.S.A.-1433-1446. Dr. Kraushaar concludes that Mr. Brown's involvement in the underlying offense "was the product of a vulnerable adolescent being manipulated by a powerful adult rather than the product of bad character." *Id.* Dr. Kraushaar further concludes that Mr. Brown has "long since outgrown the antisocial behavior of his youth, that his "psychological risk factors for future violence and criminality are low," and that "he has developed a skill set that would allow him to be a viable and productive member of society should he be granted parole." *Id.* Mr. Brown had a parole hearing on May 24, 2017. J.A. A-532, J.S.A.-115. He was denied parole based on the circumstances of the offense and given a four-year setback. *Id.*

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Ralph McElroy has always maintained his innocence. J.A. A-533, J.S.A.-116. He was 17 years of age when the offense for which he was convicted took place. J.A. A-533, J.S.A.-115-116. Materials submitted to the Board by Mr. McElroy's *pro bono* attorneys demonstrate his rehabilitation over his 30 years of incarceration and discuss the difficult circumstances in which he was raised in inner-city St. Louis. J.A. A-327, J.S.A.-115-116, J.S.A.-1447-1468. Mr. McElroy had a parole hearing on December 13, 2016. J.A. A-533, J.S.A.-116. He was denied based in part upon the circumstances surrounding the underlying offense and given a five-year setback. J.A. A-328, J.S.A.-116.

Sidney Roberts was 17 years old when he committed the offense at issue. J.A. A-535, J.S.A.-116-119. Dr. Kraushaar conducted a forensic psychological evaluation of Mr. Roberts, and concluded that "he has no current problems with impulsivity, aggression, or behavioral disconstraint . . . ." J.A. A-328, A-535, J.S.A.-607-620. Dr. Kraushaar also notes that Mr. Roberts' conduct violations have declined throughout his incarceration, indicating he has had no problems with aggression for the past 15 years:

> This is the typical trajectory for most people who commit a violent crime at a young age; aggressive behavior peaks in adolescence and early adulthood, and then declines with age and maturity. Therefore, at the age of 45, the likelihood that Mr. Roberts will continue to abstain from violent behavior is greater than the likelihood that he will commit another violent offense.

J.A. A-329, A-535, J.S.A.-620. Mr. Roberts had a parole hearing on March 9, 2017. J.A. A-535, J.S.A.-118. The Board member who ran Mr. Roberts' parole hearing could not say whether he considered Dr. Kraushaar's expert opinion in arriving at his decision to deny parole. J.A. A-536, J.S.A.-118-119. Mr. Roberts was denied based on the circumstances of the underlying offense alone and given a four-year setback. *Id.*

Theron "Pete" Roland has been incarcerated since he was 17 years old. J.A. A-228, A-257, J.S.A.-119. At the time of his parole hearing in January 2017, he had not had a conduct violation in at least 15 years, had lived in honor dorm for 13 years, and worked in factory or warehouse areas for at least 15 years. J.A. A-536, J.S.A.-119-121. Mr. Roland had a parole hearing on January 3, 2017. J.A. A-537, J.S.A.-120. He was denied based on the circumstances of the underlying offense alone and given a five-year setback. J.A. A-538, J.S.A.-121.

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8. Proceedings Below.

In 2017, the plaintiffs filed suit in the United States District Court for the Western District of Missouri. The action alleged that the State failed to provide a parole system that gave them a meaningful opportunity for release and that this failure violated the Eighth Amendment, federal due process and their state counterparts. The District Court granted plaintiffs' motion for class certification and certified a class of approximately 95 members. Add. 34, n1.

In 2018, the parties filed cross-motions for summary judgment on liability, which the District Court granted in part and denied in part on October 12, 2018. More specifically, the Court granted the Juvenile Class' motion as to the constitutional claims (Counts I-IV) and granted the State's motion for summary judgment on the state declaratory judgment action (Count V). Add. 1-27. The District Court directed the State to propose a remedy within 60 days. Add. 27.

The parties negotiated over the proper remedy and, with two principal exceptions, reached agreement. The two exceptions were the availability of ORAS and the provision of state-funded counsel for indigent inmates. J.A. A-636-646, A-787-798.

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The District Court agreed with plaintiffs on ORAS and with the State on state-funded counsel. Add. 47-49. This timely appeal and cross-appeal followed.

Summary of Argument

The Juvenile Class in this case comprises fewer than 100 inmates who, as juveniles, were given mandatory life without sentences before the Supreme Court held that practice violated the Eighth Amendment in *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). After *Montgomery*, the Missouri legislature enacted S.B. 590 in an attempt to conform Missouri's sentencing of juveniles to comply with *Miller*. As a result, there will never be any more members of the class.

Montgomery noted that, in some instances, states could cure the constitutional error by offering *Miller*-impacted juvenile offenders a meaningful opportunity for parole. 136 S.Ct. at 736-37 ("prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored"). The Missouri legislature accepted that invitation in enacting S.B. 590.

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Unlike parole for adult offenders, however, parole for members of the Juvenile Class is not a matter of mere legislative grace. Rather, it is necessary to cure a clear constitutional defect in the sentence. The Supreme Court has made it clear that, to cure that defect, juvenile parole must offer the inmate a meaningful opportunity for release based on demonstrated maturity and rehabilitation. Every court to address the issue after *Montgomery* has so held.

Based on the undisputed facts in the record, the District Court held that Missouri's parole system does not provide that meaningful opportunity because of the collective effect of a number of flaws. First, the State severely limits an inmate's access to information, including the prehearing report that largely guides the Parole Board's deliberations and statements by a prosecuting attorney or victim representative. If the inmate does not know what information is in the parole file, they cannot possibly challenge it as false or misleading.

Second, the State severely limits the inmate's opportunity for advocacy. The inmate is allowed only one delegate and that delegate is prohibited from making a legal argument. Thus, the inmate cannot even mention the *Miller* factors, let alone argue that they have

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satisfied them. By contrast, the advocacy rights of the prosecution and the victim or victim's family are unlimited.

Third, the form that the Parole Board uses to communicate its decisions is bare-bones boilerplate, limited to the seriousness of the underlying offense or a perceived inability to remain at large without violating the law. Once again, the *Miller* factors are entirely ignored.

Fourth, unlike adult parole proceedings, the Parole Board relies on no objective criteria in assessing class members' eligibility for parole. The result is an entirely subjective determination, usually based on the seriousness of the underlying offense. The *Miller* factors are ignored. Fifth, the process and parole decisions rest primarily on the seriousness of the offense, not the Class member's maturity and rehabilitation over time.

The results of these proceedings make clear that Missouri does not offer a meaningful opportunity of release to juvenile offenders. While the State brags that upwards of 90% of adult offenders gain early release, less than 15% of class members have received any form of relief. And that "relief" is a projected release date several ***years*** down the road, which may or may not be kept. This data point is just one piece of a puzzle which demonstrates that the State is making

arbitrary parole decisions for the Juvenile Class, focusing improperly on the crime rather than the Class member's maturity and rehabilitation. Indeed, overall, the Missouri parole system is arbitrary, governed by unbridled discretion, and provides no transparency or accountability.

The District Court correctly barred the State from using ORAS in its deliberations on parole for class members. *Miller* holds that factors associated with youth, such as spotty employment, low education and lack of marriage, all should favor parole. ORAS treats them as risk factors for reoffending. As a result, ORAS does not provide reliable evidence about juvenile offenders.

On the cross-appeal, the District Court erred in refusing to require state-funded counsel for indigent class members. An inmate incarcerated as a juvenile is unlikely to have the ability to uncover evidence relevant to the *Miller* factors or the legal knowledge as to what they are. They likely have not developed sufficient social skills to communicate effectively with the Parole Board. And there is an inherent tension between accepting responsibility for a crime while simultaneously arguing that the *Miller* factors warrant relief.

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The record is undisputed that the presence of counsel is the single most important factor in obtaining parole. The only court to address the issue based on due process agrees that state-funded counsel is essential to give inmates a meaningful opportunity for parole.

Argument

I. The District Court Correctly Entered Summary Judgment For The Class, Because:

A. The Eighth Amendment Requires The State To Provide A Meaningful Opportunity For Release Based On Demonstrated Maturity And Rehabilitation; and

B The Undisputed Evidence In The Record Establishes That Missouri's Standard Parole Policies Do Not Provide That Meaningful Opportunity.

The premise of the State's appeal is that the Juvenile Class has no constitutional rights in the parole process, because it has no right to release before the expiration of a ***valid*** sentence. The premise is false, because the sentence actually imposed upon the members of the Juvenile Class—mandatory life without—is not valid. There is no dispute that such a sentence imposed upon a juvenile violates the Eighth Amendment. Br. at 33. To rectify that unconstitutional sentence, the State must offer juvenile inmates a meaningful

opportunity to obtain release. The uncontradicted facts in the record demonstrate that the State has not done so.

Standard of Review

The Juvenile Class agrees with the State that it is entitled to de novo review of the District Court's ruling against it on summary judgment.

Argument

A. The Eighth Amendment Requires The State To Provide A Meaningful Opportunity For Release Based On Demonstrated Maturity And Rehabilitation.

In *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme Court held that the Eighth Amendment "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. at 82. The Court reasoned that such a sentence "improperly denies the juvenile offender a chance to demonstrate growth and maturity." *Id.* at 73. While a state need not guarantee release, it must provide a "realistic" and "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75; 82.

In *Miller*, the Court expanded on *Graham*, holding that "mandatory life-without-parole sentences for juveniles" convicted of

homicide "violate the Eighth Amendment." 567 U.S. at 470. The Court repeated *Graham's* injunction that states must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 479. And it emphasized that "appropriate occasions for sentencing juveniles" to life without "will be uncommon." *Id.*

In *Montgomery*, the Court held that *Miller* applied retroactively. 136 S.Ct. at 736. The Court reiterated its belief that life without sentences for juveniles should be "the rarest" of occasions, inapplicable to the "vast majority of juvenile offenders." *Id.* at 734. States must allow the vast majority the "opportunity to show their crime did not reflect irreparable corruption," in which case "their hope for some years of life outside prison walls must be restored." *Id.* at 736-37.

Montgomery also noted that redress of that constitutional violation did not necessarily require a resentencing. Rather:

> [A] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole . . . . The opportunity for release will be afforded to those who demonstrate the truth of *Miller's* central intuition – that children who commit even heinous crimes are capable of change.

136 S.Ct. at 736.

In using parole to cure the Eighth Amendment violation, the State has done more than create a mere possibility of parole for the Juvenile Class. It has created 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 v. Hodges*, 79 F.Supp. 3d 933, 945 (S.D. Iowa 2015), *quoting Graham*, 560 U.S. at 79. As the District Court held, this creates a "liberty interest in a meaningful parole review" protected by due process. *Brown v. Precythe*, No. 2:17-cv-04082-NKL, 2017 WL 4980872 at *12 (W.D. Mo. Oct. 31, 2017).

As a result, a parole opportunity for juvenile offenders is qualitatively different from parole for adult offenders. The latter is a matter of legislative grace; the former a legal requirement to conform to the Eighth Amendment:

> In this context, where the meaningful opportunity for release through parole is necessary in order to conform the juvenile homicide offender's mandatory life sentence to the requirements of art. 26 [the Massachusetts counterpart to the Eighth Amendment], the parole process takes on a constitutional dimension that does not exist for other offenders whose sentences include parole eligibility.

Diatchenko v. District Attorney, 27 N.E.3d 349, 357 (Mass. 2015).

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Contrary to the State's argument, Br. at 25, this is not a "drastic expansion of Supreme Court case law." Rather, it is a necessary consequence of the Court's insistence that juvenile offenders have a meaningful opportunity for release, as numerous state and federal cases agree.

In *Greiman*, plaintiff alleged that the Iowa procedures for parole denied him the meaningful opportunity that *Graham* and its progeny promised. The District Court denied the state's motion to dismiss because, as previously stated, the state had created a "categorical entitlement" to "have a meaningful opportunity for release." 79 F.Supp. 3d at 945 (internal punctuation omitted).

In *Bonilla v. Iowa Board of Parole*, 930 N.W.2d 751 (Iowa 2019), the Supreme Court of Iowa followed *Greiman*:

> [U]nlike a prisoner who is entitled to parole only as a matter of legislative grace, a juvenile offender under *Graham-Miller* is constitutionally entitled to receive the meaningful opportunity to demonstrate maturity and rehabilitation.

930 N.W.2d at 776.

In *Hayden v. Keller*, 134 F.Supp. 3d 1000 (E.D.N.C. 2015), *appeal dismissed*, 667 Fed. Appx. 416 (4th Cir. 2016), the Court agreed with plaintiff's argument that, "as a juvenile offender

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sentenced to a life sentence with parole, he is owed something that adult offenders are not: a meaningful opportunity to gain release." 134 F.Supp. 3d at 1001:

> If a juvenile offender's life sentence, while ostensibly labeled as one with parole, is the functional equivalent of a life sentence without parole, then the State has denied that offender the meaningful opportunity to obtain release . . . that the Eighth Amendment demands.

Id. at 1009 (internal punctuation omitted). *Accord*, *Maryland Restorative Justice Institute v. Hogan*, No. ELH-16-1021, 2017 WL 467731 at *21 (D. Md. Feb. 3, 2017) ("Court's discussion of a meaningful opportunity to obtain release, however, suggests that *the decision imposes some requirements after sentencing*" such as the "parole requirements that govern the opportunity for release") (emphasis original); *Hawkins v. New York State Dep't*, 30 N.Y.S. 3d 397, 398 (App. Div. 2016) ("as a person serving a sentence for a crime committed as a juvenile, petitioner has a substantive constitutional right not to be punished with a life sentence" and he was "denied his constitutional right to a meaningful opportunity for release when the Board failed to consider the significance of petitioner's youth and its attendant circumstances at the time of the commission of the crime"); *Flores v. Stanford*, No. 18-CV-2468 (VB), 2019 WL 4572703 at *10

(S.D.N.Y. Sept. 20 2019) ("*Graham*, *Miller*, and *Montgomery* therefore confer on juvenile offenders a constitutionally protected liberty interest in a meaningful parole review").[4]

These cases directly contradict the State's assertion that there is "no authority for the district court's conclusion that Missouri officials are required to give juvenile murderers special treatment, beyond that given to other adult offenders." Br. at 32. Indeed, even the cases rejecting these kinds of claims on the merits recognize that parole procedures do not comply with *Miller* and *Montgomery* if they do "not provide a meaningful opportunity for release." *People v. Davis*, 429 P.3d 82, 94 (Col. App. 2018), *cert. denied,* No. 18SC848, 2019 WL 670636 (Colo. Feb. 19, 2019).

The State attempts to distinguish the cases on which the District Court relied on the theory that those states did not allow inmates to participate meaningfully in the parole process, giving

[4] Indeed, the *Montgomery* Court discussed the type of evidence a prisoner might use to demonstrate rehabilitation, such as maintaining work in prison and mentoring other inmates. 136 S.Ct. at 736. It would not have done so, the District Court properly noted, "had it not contemplated that some process for providing meaningful evidence would be afforded the juvenile inmate seeking parole." J.A. A-187.

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them only fleeting hope of parole; whereas Missouri allegedly does allow such participation. Br. at 28-29. This argument conflates the legal issue—whether class members have a right to a meaningful opportunity for release, as *Graham* and *Miller* hold—with the factual question of whether Missouri's procedures do provide such an opportunity. The fact that those state parole systems fail in different ways distinct from Missouri's failures is irrelevant to the legal issue. In each of those cases the court concluded, as the District Court did here, that juvenile offenders have constitutional rights in the parole process.

The State argues at length that inmates have no constitutional right to parole. Br. at 32-49. That rule applies only to ***valid*** sentences. The life without sentences imposed on the members of this Juvenile Class plainly violate *Miller* and *Montgomery*.

The State places principal reliance on *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). Br. at 36, 42, 47. *Greenholtz* not only predated *Graham* and its progeny by more than a quarter of a century; it dealt with the process due to ***adult*** inmates. Using adult parole as the model for what process is due to the Juvenile Class is a red herring. The State cannot proceed

as if the Juvenile Class members were not children at the time they were convicted and sentenced. *Miller*, 567 U.S. at 474 (Mandatory penalty schemes for juvenile offenders contravene *Roper* and *Graham*'s "foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."). The rationale of *Greenholtz* was that the "*possibility* of parole provides no more than a mere hope . . . , a hope which is not protected by due process." 442 U.S. at 11 (emphasis original). As previously explained, *Miller* and *Montgomery* create an entitlement to "substantially more than a possibility of parole or a 'mere hope' of parole." *Greiman*, 79 F.Supp. 3d at 945.

Most of the State's other cases also predate *Miller* and *Montgomery*, and only one addresses juvenile offenders. In that one case, *Virginia v. LeBlanc*, 137 S.Ct 1726 (2017), the "Supreme Court expressly stated that it was not deciding that issue." *Precythe*, 2017 WL 4980872 at *8.

LeBlanc dealt with Virginia's geriatric release program, which allowed some older inmates an early release. The Supreme Court of Virginia held that the program complied with *Graham*. LeBlanc then sought habeas relief from the federal courts.

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The Supreme Court of the United States reversed a judgment favorable to LeBlanc, but only because the federal habeas statute required the Court to defer to Virginia. The Court acknowledged that LeBlanc's arguments were "reasonable," but held that they "cannot be resolved on federal habeas review." 137 S.Ct. at 1729:

> Because this case arises only in that narrow context, the Court expresses no view on the merits of the underlying Eighth Amendment claim. Nor does the Court suggest or imply that the underlying issue, if presented on direct review, would be insubstantial.

Id. As noted, the District Court distinguished *LeBlanc* on those very grounds.

The State suggests that *Montgomery* contemplates only a process that considers the inmate's youth and that a remedy labeled "parole" "completely remedies" a *Miller* violation, no matter how ineffective, arbitrary, or remote that remedy is. Br. at 34. As the cases we have cited demonstrate, *Graham* and *Miller* require more than a label. They require a meaningful opportunity for release.

B The Undisputed Evidence In The Record Establishes That Missouri's Standard Parole Policies Do Not Provide That Meaningful Opportunity.

The District Court identified five specific policies of Missouri's parole system that, collectively, violate the Juvenile Class members'

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due process rights and deny them a meaningful opportunity for release. The low rate of class members' success proves that these barriers are real and substantial. The District Court's remedial order directly addresses these problems and, notably, the State does not complain about any of the remedies except one.

First, it is uncontested that the State does not allow an inmate access to their parole file, including the prehearing report that is the basic building block of the parole hearing. Add. 20; J.A. A-332, A-491. This makes it impossible for an inmate to respond to or challenge false, incomplete, or misleading information in the file—including statements made by the prosecuting attorney or victim representative. This alone violates due process:

> We are convinced that as a minimum due process requires that an inmate in Missouri seeking parole be advised of adverse information in his file. In order for an inmate to have a meaningful consideration of his application for parole it is essential that he be apprised of such adverse information and given an opportunity to rebut or explain the parts he believes are incorrect.

Williams v. Missouri Board of Probation & Parole, 661 F.2d 697, 700 (8th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982).[5] *Accord*, *Evans v.*

[5] The Missouri legislature subsequently amended the statute to eliminate the basis on which this Court relied in finding an

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Dillahunty, 662 F.2d 522, 526 (8th Cir. 1981); *Bonilla*, 930 N.W.2d at 780 ("basic procedural rights of access to the file" represent "the minimum due process protections"). The State has no meaningful response.

The Board's own regulations state that one of the purposes of the parole hearing is to allow inmates to "challeng[e] allegations of fact that they perceive to be false." 14 C.S.R. § 80-2.010(3)(A)(6). Without access to an inmate's parole file, this procedural right is meaningless.

Moreover, if Juvenile Class cannot access their parole file, they cannot know what is ***not*** contained therein, thus depriving them of an opportunity to provide meaningful supplementation to adequately address the *Miller* factors. Meaningful review requires the State to "consider all of the relevant evidence." *Proctor v. Leclaire*, 846 F.3d 597, 614 (2nd Cir. 2017) (due process for solitary confinement).

Second, the State provides very limited opportunities to inmates to offer evidence and advocacy on their own behalf, in contrast to the

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entitlement to due process. *Maggard v. Wyrick*, 800 F.2d 195 (8th Cir. 1986), *cert. denied,* 479 U.S. 1068 (1987). The holding on what process is due, if required, remains good law.

essentially unlimited opportunity given to the prosecutor and the victims. Add. 20-21. The inmate is allowed only one "delegate" at the hearing. J.A. Add. 20-21; J.A. A-316-317, A-446-447, J.S.A.-131-132. The Board's hearing procedures permit the delegate to address "only issues related to the transition to the community, which could include offender growth, support system, home and employment." J.A. A-549, A-819, A-850-853. If the delegate is a lawyer they are told the hearing is "not a lawyering moment" and are not permitted to argue legal issues. Add. 21; J.A. A-84, A-247, A-849.

The Parole Board refuses to accept either evidence or argument about any of the *Miller* factors, such as "immaturity, impetuosity, and failure to appreciate risks and consequences" or the "family and home environment . . . no matter how brutal or dysfunctional." 567 U.S. at 477. How, then, can the State provide a meaningful opportunity for relief based on *Miller* factors it will not even allow presented at the hearing, much less consider?

In *Greiman*, the complaint alleged that the parole board "failed to take account of Plaintiff's youth and demonstrated maturity and rehabilitation" and denied parole "based solely on the seriousness of the offence." 79 F.Supp. 3d at 944 (internal punctuation omitted).

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The Court held that that allegation, if proven, would clearly deprive plaintiff of a meaningful opportunity for release. *Id. Accord*, *Hawkins*, 30 N.Y.S. 3d at 401 ("[b]ecause petitioner was entitled to a meaningful opportunity for release in which his youth, and its attendant characteristics, were considered by the Board, we agree with Supreme Court that petitioner is entitled to a de novo parole release hearing"); *Hayden*, 134 F.Supp. 3d at 1010 ("without notice of one's status as a juvenile prior to review, the record upon which each commissioner relies is unable to convey or demonstrate maturity or rehabilitation").

The State's argument on this point is both conclusory and self-contradictory. On the one hand, the State acknowledges that inmates "must have the opportunity to show the Board that they have changed." Br. at 55. The State argues that "the evidence"—none of which it identifies—shows they have that opportunity, but it never responds to the District Court's explanation of why that is incorrect. And it openly concedes that the Board ***does not and cannot*** answer the same question posed to a *Miller* sentencing court. Br. at 55. That admission alone proves that Missouri's parole system does not provide the required meaningful opportunity.

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These limits stand in stark contrast to the rights of prosecutors and the victims. Victims can have as many delegates as they want, and there is no limitation on the length of time or the topics they can discuss. J.A. A-317-318, A-447-453, A-850-853, J.S.A.-26-27, J.S.A.-267-268, J.S.A.-303-306, J.S.A.-457-458, J.S.A.-904-906. If victims want to argue that the Board should ignore *Miller*, they are free to do so, J.A. A-317-318, A-450-451, J.S.A.-26, and the inmate is not permitted to respond. Indeed, the victim may speak outside the inmate's presence and without the inmate's knowledge. J.A. A-317, A-450, J.S.A.-26, J.S.A.-215-216.

The State argues that continued adversarial proceedings between the State and the inmate interfere with rehabilitation. Br. at 54. But the Board's procedures specifically authorize such adversarial proceedings. They just don't allow the inmate to participate in a meaningful way. For example, prosecuting attorneys and victim representatives regularly appear at parole hearings to oppose release, sometimes presenting legal arguments to which Juvenile Class members cannot respond. Add. 21, 38; J.A. A-317-318, A-450-453, A-696 (parole hearing "is by nature . . . an adversarial process"). But Juvenile Class members are told the

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hearings are not a "lawyering moment." Add. 21; J.A. A-84, A-247, A-849. Sauce for the goose is sauce for the gander.

Contrary to the State's argument, Br. at 34, the Juvenile Class is not seeking "adversarial procedures to tilt parole consideration in their favor." It is seeking an even playing field in which it has a fair opportunity to demonstrate maturity and rehabilitation and hence a meaningful prospect of relief.

Third, the District Court held that the notices the Board issues are bare-bones boilerplate that do not even pretend to consider the *Miller* factors. Add. 22. The notices allow the board to specify only two reasons for denial: the seriousness of the underlying offense or the inability to remain at liberty without re-offending. Add. 22; J.A. A-327-331, A-335, A-496-498, J.S.A.-133. The Board has admitted that these notices are deficient. Add. 11; J.A. A-335, A-497, J.S.A.-229.

This Court has expressly held that boilerplate denials of parole violate due process. A parole board "must explain in more than boilerplate generalities why the severity of her particular offense and sentence requires deferral of parole." *Parker v. Corrothers*, 750 F.2d

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653, 662 (8th Cir. 1984).[6] *Accord*, *Bonilla*, 930 N.W.2d at 785, and cases there cited ("[r]epeated use of boilerplate generalities will not suffice").[7]

The reason for this requirement should be obvious to any experienced lawyer or judge. The process of reducing the reasons for a ruling to writing requires the writer to think through the issues, in much the same way that notice-and-comment rulemaking requires an administrative agency to think through the implications of a proposed regulation. "The whole rationale of notice and comment rests on the expectation that the final rules will be somewhat different and improved from the rules originally proposed by the agency."

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[6] As with *Williams*, Arkansas subsequently changed the basis on which this Court found an entitlement to due process but the holding on what process is due, if required, remains good law.

[7] See also *Olds v. Norman*, No. 4:09CV-1782 CAS/TCM, 2013 WL 316017 at *5 (E.D. Mo. Jan. 8, 2013), *report and recommendation adopted*, No. 4:09-CV-1782 CAS, 2013 WL 315974 (E.D. Mo. Jan. 28, 2013) ("A parole board may deny release to an inmate based on the severity of the inmate's criminal act and sentence, but, where a liberty interest is involved, the parole board must explain in more than boilerplate generalities why the severity of the particular offense and sentence requires a deferral of parole.") (citing *Cooper v. Missouri Bd. of Prob. & Parole*, 866 S.W.2d 135, 138 (Mo. banc 1993)); U.S. *ex rel. Richerson v. Wolff*, 525 F.2d 797, 800 (7th Cir. 1975) ("We conclude that due process includes as a minimum requirement that reasons be given for the denial of parole release.").

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Trans-Pacific Freight Conference v. Federal Maritime Com'n, 650 F.2d 1235, 1249 (D.C. Cir. 1980), *cert. denied,* 451 U.S. 984 (1981). By operating behind doors, without issuing substantive written decisions, and without providing the Juvenile Class an opportunity to appeal, the State perpetuates an arbitrary parole review system that provides the Parole Board numerous opportunities to deny Class members parole despite demonstrated maturity and rehabilitation, and without documenting a factual basis for its decisions.

Fourth, as the District Court found, the Board uses wholly subjective criteria to determine parole for members of the class, instead of the objective standards it applies to other inmates. Add. 23. The State admits as much. Br. at 54. Basing parole denial on a "subjective judgment that the defendant's crimes demonstrate an 'irretrievably depraved character' . . . is inconsistent with the Eighth Amendment." *Graham*, 560 U.S. at 76.

Fifth, the parole process and the Board's decisions focus primarily on the circumstances of the underlying offense. J.A. A-466, J.S.A.-31, J.S.A.-414, J.S.A.-582-583. At the hearings on each Juvenile Class members' request for release, the majority of the questions focused on the underlying offence. J.A. A-466-473, J.S.A.-

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31-32, J.S.A.-799-857, J.S.A.-943; J.S.A.-958-1073. In each case, the Board denied release based solely on the seriousness of the offense. J.A. A-327-331, A-481, A-483, A-486, A-488-489, J.S.A.-775-777, J.S.A.-1076-1084. A denial on that basis is "tantamount to no reason" at al. *Craft v. Attorney General*, 379 F.Supp. 538, 540 (M.D. Pa. 1974). Indeed, it is "in direct contravention of the Supreme Court's edict." Add. 39.

A final factor on which the District Court did not rely, but which supports its judgment, is the Board's workload—over 15,000 cases a year. J.A. A-311, A-432. "The sheer volume of work may itself preclude any consideration of the salient and constitutionally required meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Hayden*, 134 F.Supp. 3d at 1009.

The State acknowledges these concerns, Br. at 53-54, but does nothing to refute their existence or the burden that they place on a class member. Instead, it touts notice and opportunity for a class member to be heard by the Board, Br. at 50-51, while ignoring the very real limitations placed upon those procedural rights.

The State argues in general terms that inmates "get early release at a high rate, including a significant number of the class members." Br. at 53. The actual numbers tell a different story. It may be that over 90% of all Missouri inmates receive some form of early release. J.A. A-272. Only four of the 28 class members who have applied—less than 15%—have received any form of early release. J.A. A-319-320, A-457, J.S.A.-1074-1075. And that relief is limited to setting a prospective "out date," which may or may not be honored, years in the future. Add. 34.

In *Hayden*, between 2010 and 2015, 55 general category inmates received parole but only 7 juveniles serving life without. 134 F.Supp. 3d at 1005. In granting summary judgment to the plaintiff, the Court held that those numbers were "relevant only in that it raises questions about the meaningfulness of the process as applied to juvenile offenders." *Id.* at 1010.

The actual numbers make clear that the procedural deficiencies identified by the District Court in practice lead to a systematic refusal to apply the *Miller* factors and hence a systematic denial of parole to members of the class. The remedial measures that the District Court

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ordered will cure this constitutional deficiency and the Court must affirm the judgment on liability.

II. The District Court Properly Prohibited The State From Using ORAS, Because ORAS Systematically Treats Most *Miller* Factors As Aggravating Rather Than Mitigating.

Of the 23-paragraph remedy the District Court ordered, the State complains about only one: the prohibition against using ORAS in considering parole for members of the Juvenile Class. All of the evidence in the record establishes that, whatever the value of ORAS for the general inmate population, it is quite misleading with respect to juvenile offenders.

Standard of Review[8]

The District Court found that ORAS treats "most youth-related *Miller* factors as aggravating rather than mitigating" and hence was not reliable for Juvenile Class members. Add. 47. That is a finding of fact and this Court reviews factual findings for clear error. *Kaplan v. Mayo Clinic*, 847 F.3d 988, 992 (8th Cir. 2017), *cert. denied,* 138 S.Ct. 203 (2017). Clear error means "more than just maybe or probably

[8] Contrary to FED. R. APP. P. 28(a)(8)(B), the State's brief provides no standard of review for this issue.

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wrong." *Id.* It must "strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *Id.* internal punctuation omitted).

Argument

Graham, *Miller* and *Montgomery* all require youth to be treated as a mitigating factor. *See*, *e.g.*, 567 U.S. at 476 (youth is a "mitigating factor of great weight") (internal punctuation omitted). But several of the ORAS factors treat characteristics associated with youth as ***aggravating factors***.

ORAS asks whether an inmate had a stable marriage, steady employment, and a complete education before incarceration. And it treats the absence of any of these factors as increasing the risk of recidivism. J.A. A-691-693, A-979-984. A youth incarcerated at age 15 is unlikely to have much education or job history and extremely unlikely to be married.

All of the evidence in the record establishes that, as to juvenile offenders, ORAS is completely unreliable. Dr. Clear's affidavit states that juvenile offenders "have less extensive education, employment and personal relationship histories" and the inclusion of such factors may distort the application of the assessment." J.A. A-979-983. He also states that it is "unknown" whether ORAS accurately assesses

potential differences in race or exacerbates racial disparities. *Id.* As a result, ORAS "may produce unreliable results." *Id.*

Similarly, Professor Rummel testified that it is, at best unknown whether ORAS accurately assesses juveniles. J.A. A-691. She also testified that "most risk assessment tools"—necessarily including ORAS—"aggregate risk based on factors that *Miller* now require [sic] to be mitigating." J.A. A-692:

> For example, a juvenile – criminal juvenile history, an unstable childhood or exposure to trauma as a child, you know, and just certain social milestones. Graduation from high school, a driver's license, long-standing employment, marriage, those are factors that can be used in these risk assessment tools to aggregate risk; whereas *Miller* counsel . . . those things shouldn't be held against them in this context.

Id. The State presented no evidence to the contrary. It was thus well within the District Court's discretion to accept the uncontradicted evidence that ORAS is not reliable when applied to juvenile offenders and to prohibit its use.

The State's principal argument to the contrary is that, instead of deferring to the State's judgment, the District Court imposed its own policy preference with respect to ORAS. Br. at 57-63. But the State has no problem with 22 of the 23 remedial paragraphs in the

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District Court's order, most of which the State itself proposed. That suggests a substantial amount of deference to the State.

In any event, the State has significantly exaggerated the degree of deference required. The State's primary authority, *Lewis v. Casey*, 518 U.S. 343 (1996), requires only that states have "the first opportunity to correct the errors made in the internal administration of their prisons." 518 U.S. at 362. The District Court complied with that directive, ordering the State to present "a plan for compliance with applicable statutory and constitutional requirements." Add. 27.

This is far from an example of a district court micromanaging prison administration. Indeed, it is a stark contrast to *Lewis*, where the district court did not give prison officials the first bite at proposing a remedy. Instead, it appointed a special master and went on to severely limit the remedies the master could choose. 518 U.S. at 363. The resulting injunction ordered systemwide reform for what the Supreme Court later identified as only two discrete constitutional violations. *Id.* at 360.

Here, the District Court followed the *Bounds* protocol in remedying the systemwide constitutional violations it found. The court did not appoint a special master. In fact, it wholly rejected the

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Juvenile Class' request for an independent monitor. Instead, like the court in *Bounds* and unlike the court in *Lewis*, the District Court gave the Parole Board the first opportunity to present "a plan for compliance with applicable statutory and constitutional requirements." Add. 27. And it entered that plan with minimal changes. The order did not impose relief broader than necessary to cure the constitutional violations which, unlike in *Lewis*, were found to be systemwide.

At the end of the day, however, it is the District Court's responsibility to order relief that cures a constitutional violation. "Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Brown v. Plata*, 563 U.S. 493, 511 (2011). "If the defendant fails to respond or responds with a legally unacceptable remedy, the court must fashion its own remedy or adopt a remedial plan proposed by the plaintiffs." *Missouri State Conference of the NAACP v. Ferguson-Florissant School Dist.*, 219 F.Supp. 3d 949, 953 (E.D. Mo. 2016), *aff'd*, 894 F.3d 924 (8th Cir. 2018), *cert. denied,* 139 S.Ct. 826 (2019). And "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs

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is broad, for breadth and flexibility are inherent in equitable remedies." *United States v. Paradise*, 480 U.S. 149, 183–184 (1987) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971)).

The balance of the State's arguments about ORAS simply pick at nits. For example, the State argues that, having found ORAS to be unreliable, the District Court could only say why and could not impose its own order without first consulting the State. Br. at 64. The District Court gave the State ample opportunity to either defend ORAS or propose an alternative, but the State declined to do so.

The State claims that the District Court lacked "authority to prohibit Missouri from using the Ohio system." Br. at 65. To repeat, a state relying on parole to cure the constitutional defect must provide a meaningful opportunity for relief. In that context, the notion that a court cannot enjoin a parole board from using an unreliable method of assessing the risks of parole—one which does not comply with *Miller*—is unsupported by any authority.

The State argues that the District Court improperly required it to adopt best practices. Br. at 65. The District Court did nothing of the sort. It prohibited the State from using a risk assessment tool

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"unless it has been developed to address inmates affected by *Montgomery*." Add. 47. It held that order was justified because it would, as a factual matter, be relatively inexpensive in light of best practices. Add. 48.

The State complains that Dr. Clear's affidavit is hearsay. Br. at 68-69. The State never objected to the use of that affidavit in the District Court and hence has waived the issue. *United States v. Harris-Thompson*, 751 F.3d 590, 602 (8th Cir. 2014), *cert. denied,* 574 U.S. 965 (2014). The State also ignores the testimony of Professor Rummel.

The State finally claims that Missouri statutory law now requires it to use a risk-based assessment before paroling nay inmate, so that its inability to use ORAS prevents it from paroling any of the class members. Br. at 69-70. The State does not explain why it could not use valid risk data about juveniles from another state whose demographics mirror that of Missouri. If the State is serious about using this excuse as a basis for evading the District Court's order, the short answer is that due process and the Eighth Amendment trump any contrary state statute.

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III. The District Court Erred In Denying Class Members Access To State-Funded Counsel, Because Counsel Is Necessary To Address Complex *Miller* Factors And Ensure A Meaningful Opportunity For Release.

Without explanation, the District Court denied "at this time" plaintiffs' request for state-funded counsel at parole hearings. Add. 49. This was error. A thorough presentation of the *Miller* factors is a complex process that inmates cannot possibly be expected to accomplish on their own. The State has the right to legal counsel at any parole hearing; the gander rule requires that it provide the same assistance to class members.

Standard of Review

What process is due in the context of a parole hearing is a pure question of federal law. *Board of Pardons v. Allen*, 482 U.S. 369, 372 (1987). This Court reviews questions of law de novo. *United States v. Jepsen*, 944 F.3d 1019, 1021 (8th Cir. 2019).

Argument

The Supreme Court has held that due process requires state-appointed counsel at a sentencing hearing, whatever the label might be. *Mempa v. Rhay*, 389 U.S. 128, 136 (1967). That right includes a resentencing hearing. *State v. Kelly*, 217 So.3d 576, 585 (La. App.

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2017). Here, the State has chosen to use a parole hearing as a proxy for correcting an unconstitutional sentence. It logically follows that the State must appoint counsel for that hearing.

Basic principles of due process also support the provision of counsel. As a general matter, when the issue is whether due process requires the appointment of counsel, the Supreme Court looks to two issues: (1) whether the proceeding is sufficiently complex that an individual may have difficulty presenting the case; and (2) whether the individual is equipped to effectively advocate for himself or herself.

In the closely-related field of parole revocation, the Supreme Court has held a case-by-case evaluation determines whether a state must provide indigent inmates with counsel. *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). There will be cases in which "fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees." *Id.*:

> Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or

> cross-examining of witnesses or the offering or dissecting of complex documentary evidence.

Id. at 786-87. *Accord*, *In re Gault*, 387 U.S. 1, 40 (1967) (state-provided counsel necessary for juvenile delinquency hearing because "counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition"); *Vitek v. Jones*, 445 U.S. 480, 497 (1980) (state-provided counsel necessary for involuntary mental health treatment because "such a prisoner is more likely to be unable to understand or exercise his rights").

The complex nature of the Eighth Amendment inquiry presented by S.B. 590 parole reviews requires assistance of counsel in order for the process, and the resulting opportunity for release, to be meaningful. *See generally* Doc. 175 at 50:6-16 (Juvenile Class' expert testifying about the many critical functions performed by counsel in a JLWOP parole process). *Miller* and S.B. 590 require the decision-maker to meaningfully consider "youth and its attendant characteristics" and "hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences," as well as the Juvenile Class member's "family and home environment .

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. . from which he could not extricate himself – no matter how brutal and dysfunctional," "the circumstances of the offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him," and whether "he might have been charged and convicted of a lesser offense if not for in competencies associated with youth." 567 U.S. at 477-78. Perhaps most challenging, the hearing requires an analysis of whether a youth's crime reflected "transient immaturity" or "irreparable corruption." *Montgomery*, 136 S. Ct. at 735; *see also Graham*, 560 U.S. at 68 ("These salient characteristics mean 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.'") (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)).

The undisputed facts also demonstrate that most class members are unlikely to be able to effectively present their cases for parole without benefit of counsel. First, an inmate who has been incarcerated since their teen years is unlikely to have the ability to obtain evidence relevant to the *Miller* factors. As Professor Rummel testified, such "evidence can be very difficult to locate." J.A. A-694. It

is also difficult for a lay person to "understand how that evidence relates to the question of meaningful opportunity for release, maturity and rehabilitation." *Id.* It may be especially difficult for an inmate to establish a satisfactory reentry plan, simply because lengthy incarceration severs their connection with the community.

Second, uncovering much of the evidence necessary for a successful *Miller* application relates to "traumatic childhood experiences" that the inmate may be reluctant to air, or simply unaware of their severity and impact. J.A. A-689-690. All people are poor historians of their own trauma, especially childhood trauma, because of the psychological self-protective reactions, including normalization. J.A. A-690, A-707, A-791. The Class member is unlikely to understand that such traumatic experiences will be helpful rather than hurtful and it requires an attorney to explain why. J.A. A-689-690, A-695-700, A-707, A-791-792.

Third, an inmate incarcerated since their childhood is unlikely to develop the cognitive, social or life skills to be able to communicate effectively. This is especially true because trauma, mental illness, learning disorders, social disorders, cognitive disabilities, and other disorders that increase vulnerability are common among juveniles

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sentenced to life without. J.A. A-703-707, A-791-792. Such persons present as "lying or not credible or minimizing when really there's just a fundamental inability to establish effective communication." J.A. A-700.

Fourth, there is "an inherent tension" between offering mitigating evidence and "taking responsibility for a crime you've committed." J.A. A-697, A-792. It is much easier for an inmate to accept meaningful responsibility for and remorse about a crime if the lawyer can handle the mitigating *Miller* factors.

Fifth, there is a profound asymmetry between the parties when the inmate is unrepresented by counsel. The State always has the right to counsel and almost always exercises that right. Parole staff do not protect the juvenile offender's interests and thus "cannot act as counsel." *Gault*, 387 U.S. at 36; *see id.* at 35 (rejecting the idea that probation officers protect the juvenile's interests, and is instead an arresting officer and witness against the child, leaving the unrepresented juvenile without any counsel in a proceeding against the State); *see also Turner v. Rogers*, 564 U.S. 431, 447 (2011) (counsel not required to represent the noncustodial parent in child support cases where the opposing party is the unrepresented

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custodial parent because it "could create an asymmetry of representation" and thus "make the proceedings less fair overall"). That asymmetry was one of the principal reasons that *Gault* held the juvenile had a right to state-provided counsel.

As Professor Rummel testified, these factors collectively make it "critical" to have counsel to provide a meaningful opportunity for parole. J.A. A-694-696:

> Whether or not you have an effective attorney in the room, preparing you ahead of time, marshaling the evidence in your favor and arguing it to the parole board and then protecting your rights in the hearing is the biggest difference in the process of granting parole to people who are deserving of it or not.

J.A. A-694. The State offered no evidence in rebuttal.

To the best of the class' knowledge, the only case to address whether due process requires state-funded attorneys in the *Miller-Montgomery* context is the Massachusetts Supreme Judicial Court's opinion in *Diatchenko*.

That Court recognized that, in light of likely opposition to parole, the hearing can hardly be characterized as "uncontested." *Diatchenko*, 27 N.E.3d at 360. It also recognized that the hearing "involves complex and multifaceted issues that require the

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marshaling, presentation, and rebuttal of information derived from many sources," which the inmate "will likely lack the skills and resources" to supply. *Id.*:

> In sum, given the challenges involved for a juvenile homicide offender serving a mandatory life sentence to advocate effectively for release on his or her own, and in 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.

Id. at 361.[9]

The District Court's cryptic order denying the class this aspect of the requested relief provides no reason why state-funded counsel is not, as Professor Rummel testified, critical to a meaningful opportunity for parole. The order stated that the District Court had not relied on Professor Rummel's testimony but it did not explain why. Add. 39 n.5. Nor did it explain why the denial was limited to "at

[9] Legislatures in California, Connecticut, Florida and Hawaii have authorized state-funded counsel in these cases. Add. 49. In *State v. Finley*, 831 S.E.2d 158 (S.C. App. 2019), the State argued that Finley could have a meaningful opportunity for release, in part because he "could be appointed counsel for his parole hearings on request. 831 S.E.2d at 160.

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this time." Because the evidence on this point was undisputed, it is hard to understand why the Court denied relief.

That is especially true given the deprivation of liberty at risk in these parole proceedings. Short of death, it is hard to imagine a more significant loss of liberty than that at stake here. As discussed at length throughout this brief, the Juvenile Class continues to serve unconstitutional life without sentences. Absent a meaningful opportunity for release based upon demonstrated maturity and rehabilitation, there is "a significant risk that…the vast majority of juvenile offenders…face[] a punishment that the law cannot impose upon [them]." *Montgomery*, 136 S.Ct. at 724 (quoting *Schriro*, 542 U.S. at 352 (quotations omitted)). In addition to the complexity of the proceedings and the Juvenile Class' inability to effectively advocate for themselves, the significance of the liberty interest at stake warrants the provision of state-funded counsel.

Conclusion

For these reasons, the class respectfully submits that the Court should affirm the District Court's entry of summary judgment on liability and that portion of the relief denying use of ORAS. The Court

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should reverse that portion of the relief denying the class the opportunity for state-appointed counsel in the parole hearing.

Respectfully submitted,

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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 12, 2020.

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