

Appeal Nos. 19-2910 & 19-3019

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UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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*Norman Brown, et al.,*

Plaintiffs-Appellees/Cross-Appellants,

v.

*Anne L. Precythe, et al.,*

Defendants-Appellants/Cross-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
THE HONORABLE NANETTE K. LAUGHREY, JUDGE  
CASE NO. 17-cv-04082

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**BRIEF OF AMICI CURIAE JUVENILE LAW CENTER, CHILDREN AND FAMILY  
JUSTICE CENTER, AND THE FRED T. KOREMATSU CENTER FOR LAW AND  
EQUALITY IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS AND FOR  
AFFIRMANCE IN PART AND REVERSAL IN PART**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel certifies that *Amici Curiae*, Juvenile Law Center, Children and Family Justice Center, and the Fred T. Korematsu Center for Law and Equality, are not subsidiaries of any other corporation and no publicly held corporation owns 10 percent or more of *Amici Curiae's* stock.

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## **IDENTITY AND INTEREST OF AMICI CURIAE**<sup>1</sup>

**Juvenile Law Center** advocates for rights, dignity, equity, and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy, and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children’s unique developmental characteristics, and reflective of international human rights values. Juvenile Law Center has represented hundreds of young people and filed influential amicus briefs in state and federal cases across the country.

The **Children and Family Justice Center** (“CFJC”) is a comprehensive children’s law office that has represented young people in conflict with the law for over 25 years. In addition to its direct representation of youth and families in matters relating to delinquency and crime, immigration/asylum and fair sentencing practices, the CFJC also collaborates with community members and

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<sup>1</sup> All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from *Amici* or its respective counsel made a monetary contribution to the preparation or submission of this brief.

other advocacy organizations to develop fair and effective strategies for systemic reform.

The **Fred T. Korematsu Center for Law and Equality** (“Korematsu Center”), based at Seattle University School of Law, advances justice through research, advocacy, and education. The Korematsu Center has a special interest in ensuring that youth receive sentences that reflect the widely-accepted body of scientific literature demonstrating that youth are less culpable and have a greater capacity for reformation; in this vein, the Korematsu Center has contributed amicus briefs and has directly represented individuals in cases relating to youth sentencing in state and federal appellate courts. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

### **ARGUMENT**

The U.S. Supreme Court has long recognized that children differ from their adult counterparts. In the criminal justice context, they are less culpable and more amenable to rehabilitation based on their developmental immaturity and capacity for change. The Court has repeatedly affirmed that the U.S. Constitution grants juvenile offenders<sup>2</sup> additional protections, including a

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<sup>2</sup> In this brief, “juvenile offender” refers to individuals who were sentenced for crimes committed under the age of 18. Though an individual may be over the age of 18 at the time of consideration for parole, he or she remains categorized as a juvenile offender. Here, all Appellees fit the definition of “juvenile offender.”

“meaningful opportunity for release” for individuals sentenced to life in prison for crimes committed when they were children. The Court’s recognition of additional protections for juvenile offenders creates a legitimate expectation of parole. This means Appellees, like all juvenile offenders, have a constitutionally protected liberty interest at stake in the parole process. That liberty interest must be afforded due process protections.

When an identifiable liberty interest is at stake, due process requires states to employ procedural protection sufficient to safeguard it. Parole hearings for juvenile offenders are necessarily more complex than adult offenders’ hearings. Parole boards must consider the unique characteristics of juvenile offenders; therefore, the process requires reviewing complex documents and marshalling evidence. Given the complex nature of these proceedings, due process requires that juvenile offenders are appointed counsel in their parole hearings. Appointed counsel also safeguards other procedural protections in juvenile offenders’ parole hearings, including the fundamental right to be heard, which is necessary to ensure the parole hearing provides a meaningful opportunity for release. Refusing juvenile offenders the right to appointed counsel at this critical and complex juncture in their interaction with the criminal justice system denies them the “meaningful opportunity for release” that the U.S. Constitution requires.

## **I. DUE PROCESS REQUIRES PROCEDURAL PROTECTIONS WHEN AN IDENTIFIABLE LIBERTY INTEREST IS AT STAKE**

The U.S. and Missouri Constitutions guarantee that no person may be deprived of liberty without due process of law. U.S. Const. amend. V, XIV, § 1; Mo. Const. art. I, § 10. The Supreme Court of Missouri has held that the Missouri Constitution’s Due Process Clause mirrors the federal due process inquiry. *E.g.*, *Jamison v. State, Dep’t of Soc. Servs.*, 218 S.W.3d 399, 405 n.7 (Mo. 2007). The Due Process Clause safeguards more than an individual’s right to procedural protections at a criminal trial. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 333–35 (1976). It protects a panoply of rights across civil and criminal proceedings. *See id.* Due process rights attach when state action threatens an identifiable liberty interest. *See Lassiter v. Dep’t of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 25 (1981) (“[I]t is the defendant’s interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel. . . .”). If a cognizable liberty interest exists, then the state must protect that interest by adhering to procedures designed to prevent an unwarranted deprivation.

This Court has recognized that the Supreme Court’s due process jurisprudence requires a two-step analysis. *Jenner v. Nikolas*, 828 F.3d 713, 716 (8th Cir. 2016) (citing *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011)). First, a court must consider whether an individual has a liberty or property interest of

which they have been deprived. *Id.* Second, the court considers whether the procedures the state uses before depriving the individual of their liberty interest are constitutionally sufficient. *Id.*

The Supreme Court has held that due process is “flexible and calls for such procedural protections as the particular situation demands.” *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). Due process requires careful consideration of the importance of the liberty interest at stake. *See id.* Indeed, certain liberty interests are so important that they must be protected by the assistance of counsel. *See In re Gault*, 387 U.S. 1, 41 (1967). Rights may rise to this level of importance even if they do not involve or concern a criminal trial. *Id.* (holding that the Due Process Clause of the Fourteenth Amendment requires appointment of counsel in certain delinquency proceedings even though the proceedings are not strictly criminal in nature).

## **II. THE SUPREME COURT’S MANDATE THAT CHILDREN SENTENCED TO LIFE IN PRISON HAVE A MEANINGFUL OPPORTUNITY FOR RELEASE CREATES A LIBERTY INTEREST IN PAROLE THAT THE DUE PROCESS CLAUSE PROTECTS**

### **A. A Liberty Interest Exists When A Party Has A “Legitimate Entitlement” To A Particular Benefit, Even If The Entitlement Is Conditional**

As this Court has recognized, the first question in any due process inquiry is whether a liberty interest exists. *Jenner*, 828 F.3d at 716. A liberty interest exists when a person’s interest in a particular benefit is “more than an abstract need or

desire.” *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). An individual is entitled to due process protection if he has “a legitimate claim of entitlement to [the benefit].” *Id.* If there is a “substantive limit[] on official discretion,” then a liberty interest exists insofar as officials must comply with that limitation. *See Kentucky Dep’t of Corr. v. Thompson*, 490 U.S. 454, 462 (1989) (quotation omitted).

Further, the Supreme Court has previously held that liberty interests may be conditional. For example, in *Morrissey v. Brewer*, the Court recognized that even if an interest in continued parole is conditional, a parolee’s “liberty is valuable and must be seen as within the protection of the Fourteenth Amendment.” 408 U.S. 471, 482 (1972). Therefore, when individuals have a “legitimate claim” that they are entitled to a benefit (*e.g.*, parole), even if that claim is dependent upon other considerations, they have a liberty interest in that benefit. *See Thompson*, 490 U.S. at 460.

**B. The Supreme Court’s Requirement That States Provide Juvenile Offenders With A “Meaningful Opportunity” To Obtain Parole Creates A Liberty Interest Because The Interest Is Concrete**

“To have a protectable liberty interest in parole, a prisoner must have more than a hope or a unilateral expectation of release. He must, instead, have a legitimate claim of entitlement to it.” *Flores v. Stanford*, 18 CV 2468 (VB), 2019

WL 4572703, at \*10 (S.D.N.Y. Sept. 20, 2019) (quoting *Victory v. Pataki*, 814 F.3d 47, 59 (2d Cir. 2016)). Based on the Supreme Court’s recognition that juvenile offenders represent a distinct class, the question this Court must consider here is not whether incarcerated persons have a liberty interest in parole, but rather whether *juvenile offenders* have a liberty interest in parole. See *Mathews*, 424 U.S. at 334. Although Appellants claim otherwise, juvenile offenders’ interest in parole cannot be viewed identically to adults. Appellants Br. 26.

**1. The Constitution Treats Juvenile Offenders Differently than Adult Offenders**

It is well established that criminal laws that fail to take account of youth are flawed. *E.g.*, *Graham v. Florida*, 560 U.S. 48, 76 (2010). This constitutional principle, based on scientific research concerning the lesser moral culpability of children compared to adults, compels a different analysis of juvenile offenders’ legal interest in parole. See *Miller v. Alabama*, 567 U.S. 460, 471–72 (2012). In the Court’s own words: “[scientific] findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessen[] a child’s ‘moral culpability’ and enhance[] the prospect that, as the years go by and neurological development occurs, his ‘deficiencies will be reformed.’” *Miller*, 567 U.S. at 472 (quoting *Graham*, 560 U.S. at 68); see also *Roper v. Simmons*, 543 U.S. 551, 570 (2005).



*Roper, Graham, Miller, and Montgomery* recognize that juvenile offenders are categorically different from adults who commit crimes. *Montgomery v. Louisiana*, 136 S. Ct. 718, 732–33 (2016); *Miller*, 567 U.S. at 489; *Graham*, 560 U.S. at 75; *Roper*, 543 U.S. at 578–79. These well-established differences require sentencing courts to take into account a juvenile offender’s “lessened culpability,” “greater ‘capacity for change,’” and individual characteristics to ensure life without parole is imposed rarely. *Miller*, 567 U.S. at 465 (quoting *Graham*, 560 U.S. at 68, 74). And if a state has a parole system, it must afford a juvenile offender a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Graham*, 560 U.S. at 75.

## **2. Juvenile Offenders Have a Legitimate Expectation of Parole**

Unlike adult offenders, juvenile offenders have a materially different interest in parole; they have a constitutional entitlement to a meaningful chance to “demonstrate that [they are] fit to rejoin society. . . .” *Id.* at 79. The Supreme Court’s juvenile sentencing cases unquestionably provide that juvenile offenders have a legitimate expectation they will be able to obtain parole based on “demonstrated maturity and rehabilitation.” *See Flores*, 2019 WL 4572703, at \*9 (quoting *Miller*, 567 U.S. at 479); *see also Montgomery*, 136 S. Ct. at 736; *Graham*, 560 U.S. at 75.

Appellants wrongly contend that the *Greenholtz* opinion forecloses Appellees' claims because they state that Appellees' have no protectable right to be released from prison. Appellants Br. 41, 47 (citing *Greenholtz*, 442 U.S. at 7). Appellants' reliance on *Greenholtz* erroneously conflates adult offenders with juvenile offenders, even though the Supreme Court has repeatedly recognized that juvenile offenders differ from adults and that our law and practices must reflect those differences. Compare Appellants Br. 47 with *Graham*, 560 U.S. at 75. In *Greenholtz*, the Court held that the Constitution does not grant individuals convicted of their crimes as *adults* a freestanding liberty interest in parole. 442 U.S. at 7–8. *Greenholtz*, decided decades before the *Graham-Miller-Montgomery* line of cases, is narrowly targeted to adult offenders. At most, *Greenholtz* may foreclose a claim that the Constitution creates a freestanding liberty interest in parole for *adults*. It has no bearing on Appellees' claims in this case.

Moreover, the *Greenholtz* Court acknowledged that if a prisoner can identify a source of law (*e.g.*, state law) that creates a legitimate expectation of release, then a liberty interest *does* exist. *See id.* at 11–12. Indeed, the Court held that the Nebraska statute at issue in *Greenholtz*, which provided for discretionary parole when the minimum term had been served, *did* create an expectation of parole. *Id.* at 12 (“We can accept respondents’ view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection.”). As set forth

above, Appellees’ interest in parole rises to this level and is entitled to constitutional protection. Appellees’ expectation of parole is substantial, definite, and, most importantly, guaranteed by the U.S. Constitution. *See Graham*, 560 U.S. at 75; *see also Flores*, 2019 WL 4572703, at \*10. Unlike their adult counterparts, juvenile offenders are wholly justified in their expectation that they will be able to secure release if they can demonstrate “maturity and reform.” *Graham*, 560 U.S. at 78-79; *Greiman v. Hodges*, 79 F. Supp. 3d 933, 945 (S.D. Iowa 2015).

The Court’s rulings in *Roper*, *Graham*, and *Miller* create precisely the “legitimate expectation” of parole that the *Greenholtz* Court recognized would give rise to a liberty interest. *See Greenholtz*, 442 U.S. at 11–12. *See also Flores*, 2019 WL 4572703, at \*10–11. Unlike the adult offenders in *Greenholtz*, juvenile offenders in Missouri are constitutionally entitled to a **meaningful** chance to obtain parole. *Graham*, 560 U.S. at 75. An offender who demonstrates “maturity and reform” should be released. *See id.* at 79. This entitlement to a meaningful opportunity to obtain parole is sufficiently concrete to create a “legitimate expectation” of parole because it suggests only a small number of individuals should be categorically denied the opportunity to rejoin society. *Miller*, 567 U.S. at 479–80. “[A]lthough *Graham* stops short of guaranteeing parole, it does provide the juvenile offender with substantially more than a possibility of parole or

a ‘mere hope’ of parole.” *Greiman*, 79 F. Supp. 3d at 945 (quoting *Graham*, 560 U.S. at 79).

The assumption that a juvenile offender will be released unless he is irredeemable goes even further than the language in the Nebraska statute in *Greenholtz*. See 442 U.S. at 11. There, the state statute required release but allowed the parole board to refuse if they determined the offender was unlikely to abide by conditions of parole, his release would depreciate the seriousness of the crime, his release would reduce institutional discipline, or his continued rehabilitation increased the likelihood of a law-abiding life at his eventual release date. *Id.* The Court held that the statute created a sufficient expectation of release to create a liberty interest, even though the potential for release was conditional. *Id.* at 11–12.

Conversely, as set forth in *Graham*, parole may be denied *only* if an individual has not adequately demonstrated his reform; the *Greenholtz* factors cannot preclude release for juvenile offenders. See *Graham*, 560 U.S. at 78-79. It is of no consequence that a juvenile offender’s interest in parole is conditioned on his ability to demonstrate “maturity and reform,” *id.* at 79; once this threshold is met, juvenile offenders’ expectation of parole becomes concrete, not conditional, and accordingly is similarly entitled to constitutional protection. Compare *id.* at 75 with *Greenholtz*, 442 U.S. at 11–12.

Further, the Court’s holding in *Morrissey* plainly recognizes that conditional entitlements are liberty interests protected by the Due Process Clause. 408 U.S. at 480. There, the conditional interest in continuing release on parole was held to be a liberty interest protected by the Due Process Clause. *Id.* And as the Court held in *Gagnon v. Scarpelli*, this conditional liberty interest in continued release is of sufficient importance to sometimes require the appointment of counsel for a revocation hearing. 411 U.S. 778, 790 (1973). Juvenile offenders’ liberty interest in parole is closely analogous to the liberty interests recognized in *Morrissey* and *Gagnon*.

Therefore, the district court correctly held that juvenile offenders have a protectable liberty interest in parole. *Brown v. Precythe*, No. 2:17-cv-04082-NKL, 2018 WL 4956519, at \*8 (W.D. Mo. Oct. 12, 2018) (reaffirming that juvenile offenders have a constitutional right to a “meaningful opportunity” to secure release).

### **III. JUVENILE OFFENDERS’ LIBERTY INTEREST IN PAROLE REQUIRES THE APPOINTMENT OF COUNSEL IN PAROLE HEARINGS**

#### **A. Because Parole Hearings Are The Only Vehicle Through Which Juvenile Offenders May Vindicate Their Liberty Interest In Parole, Appointment Of Counsel Is Constitutionally Required**

The importance of the liberty interest at issue dictates the procedures that must be used to protect it. *See Mathews*, 424 U.S. at 334–35. Juvenile offenders’

interest in parole is sufficiently important that it must be safeguarded by the appointment of counsel. Absent the appointment of counsel, Missouri's procedures are constitutionally inadequate because they do not grant juvenile offenders a "meaningful opportunity" to vindicate their interest in parole. *See Graham*, 560 U.S. at 75. As set forth above, the Supreme Court has continued to reiterate that the protections for juvenile offenders are of immense importance. *See* Section II.B, *supra*; *Montgomery*, 136 S. Ct. at 736; *Miller*, 567 U.S. at 477. The "meaningful opportunity" to secure parole is no different from the protections the Supreme Court has repeatedly recognized as vital.

The question in the instant case is whether Missouri's procedures adequately protect juvenile offenders' liberty interest in securing parole. They do not because they do not afford juvenile offenders appointed counsel during parole hearings, the only mechanism in Missouri for enforcing juvenile offenders' constitutional rights. *Cf. Flores*, 2019 WL 4572703, at \*9 (recognizing that parole boards are the vehicle through which the rights in *Graham*, *Miller*, and *Montgomery* are delivered); *Md. Restorative Justice Initiative v. Hogan*, No. 16-1021, 2017 WL 467731, at \*21 (D. Md. Feb. 3, 2017) ("It is difficult to reconcile the Supreme Court's insistence that juvenile offenders with life sentences must be afforded a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' if the precept does not apply to the parole proceedings that govern the opportunity for release.")

(citations and quotations omitted); *Wershe v. Combs*, No. 1:12-CV-1375, 2016 WL 1253036, at \*3 (W.D. Mich. Mar. 31, 2016) (“*Graham* imposed a categorical rule that prohibits states from deciding, at the time of sentencing, that a juvenile offender will necessarily spend the rest of his life in prison. The Court’s discussion of a meaningful opportunity to obtain release, however, suggests that the decision imposes some requirements after sentencing as well.”); *Hayden v. Keller*, 134 F. Supp. 3d 1000, 1009 (E.D.N.C. 2015) (“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 based on demonstrated maturity and rehabilitation’ that the Eighth Amendment demands.”) (quotation omitted). At least one other District Court within the Eighth Circuit has recognized that Missouri’s parole procedures are deficient and require changes to meet constitutional muster. *See, e.g., Wolf v. Cassady*, No. 16-3334-CV-S-MDH, 2019 WL 1089125, at \*3 (W.D. Mo. Mar. 7, 2019) (acknowledging the constitutional deficiencies in Missouri’s parole procedures and assuming that the Missouri government would correct those deficiencies). As discussed below, for these juvenile offenders, many of whom lack the skills required to make an effective presentation, assistance from counsel may represent the only way they can present

or demonstrate the factors that the parole board is required to consider.<sup>3</sup> *See* Section III.B., *infra*.

Appellants do not dispute that for these juvenile offenders, the only opportunity for release is the parole hearing. Nor can Appellants dispute that, at the time of sentencing, the sentencer did not meaningfully assess the *Miller* factors that are central to the sentencing of juvenile offenders today. Finally, Appellants cannot contest that juvenile offenders sentenced to life without parole must receive a hearing in which they are given a meaningful opportunity to demonstrate their entitlement to release; a parole process that fails to require the appointment of counsel does not sufficiently protect juvenile offenders' due process rights, despite Appellants' contrary assertion. *See* Appellants Br. 28.

The Constitution requires that parole hearings must provide this particular group of individuals a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Graham*, 560 U.S. at 75. But without

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<sup>3</sup> It is especially troubling that attorneys who serve as juvenile offenders' delegates at parole hearings in Missouri are not allowed to argue legal issues at the hearing. Rather, their presentation is limited to issues related to “transition in the community,” such as future employment, a support system, and the home. These limitations prevent delegates from discussing the very factors that the Supreme Court has mandated sentencing authorities to consider. *See Precythe*, 2018 WL 4956519, at \*8.



the assistance of counsel, it is exceedingly unlikely that a prisoner's opportunity to demonstrate they are entitled to parole will be meaningful.

**B. Appointed Counsel Safeguards Other Procedural Protections And Is Essential To Ensuring That Juvenile Offenders' Parole Hearings Comport With Due Process Requirements**

The right to counsel for juvenile offenders at parole hearings serves as the mechanism for ensuring all other procedural rights that due process requires. Of all the due process rights, “the right to be represented by counsel is by far the most pervasive, for it affects [the offender’s] ability to assert any other rights he may have.” Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956). The Supreme Court, on numerous occasions, has recognized the elevated importance of the right to counsel for ensuring fair procedure and the preservation of all other due process protections. In *Powell v. Alabama*, the Court found that “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.” 287 U.S. 45, 68–69 (1932). The Court recognized that the complexities of legal proceedings are such that “[e]ven the intelligent and educated layman” unrepresented by counsel is without the skill to fairly or adequately assert and defend his rights. *Id.* This sentiment has been echoed in a multitude of opinions following *Powell*. See *Maine v. Moulton*, 474 U.S. 159, 169 (1985) (“[T]he right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding.”); *Argersinger*

*v. Hamlin*, 407 U.S. 25, 31 (1972) (“The assistance of counsel is often a requisite to the very existence of a fair trial”).

The reasoning underpinning these decisions applies with greater force for juvenile offenders. The parole process is riddled with complexities and procedural rules, particularly for juvenile offenders who must also demonstrate their maturity and rehabilitation under the requirements of *Graham*. Presenting a case in a parole proceeding poses challenges for these juvenile offenders. Sarah F. Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L. J. 373, 419 (2014). Because many of these juvenile offenders have been incarcerated since they were teenagers, they most likely have had limited education programming. *Id.* at 419–20. Without that educational programming, they may lack the skills required to make a persuasive presentation for release. *Id.* at 419. They also may not have access to relevant mitigating information to build their presentation before the parole board. *Id.* at 420.

Counsel would have the training and expertise to present an effective case for release, including the ability to demonstrate the individual’s maturity and rehabilitation and re-entry plans to the parole board. *Id.* at 420, 426. Additionally, counsel could help a juvenile offender “navigate the difficulty one encounters in simultaneously expressing remorse and mitigation.” *Id.* at 426. For example, in its presentation before the parole board, counsel could focus on the circumstances of

the offense and how a juvenile offender's youth and other factors at the time of the crime mitigate culpability. The juvenile offender, on the other hand, could focus on expressing remorse and the desire for atonement. *Id.*

This is not a novel proposition. Courts have recognized that a juvenile offender must be appointed counsel in other post-conviction proceedings. *L.H. v. Schwarzenegger*, No. CIV.S-06-2042 LKK/GGH, 2008 WL 268983, at \*7–8 (E.D. Cal. Jan. 29, 2008). As the court in *L.H.* recognized, juvenile offenders in parole revocation hearings are more likely to require special procedures to protect them because their lack of education would make presenting a defense difficult and therefore, appointment of counsel is “always appropriate.” *Id.* at \*7-8. The court's reasoning in *L.H.* is likewise applicable here. Like probationers at revocation hearings, juvenile offenders at parole hearings are taking part in a process related to but outside the confines of a criminal case. The same hindrances juvenile offenders face in preparing for a revocation hearing are equally present in the parole hearing.

### **C. Other States Afford Juvenile Offenders Appointed Counsel In Parole Hearings**

Several states recognize that juvenile offenders are entitled to appointed counsel in parole hearings and have taken steps to protect this right. These states' parole hearing practices can inform this Court's decision-making on this issue.

The Supreme Judicial Court of Massachusetts held that certain juvenile offenders must be appointed counsel at parole hearings to ensure they have a meaningful opportunity for release through parole as required by the state constitution. *See, e.g., Diatchenko v. Dist. Attorney for Suffolk Dist.*, 27 N.E.3d 349, 361 (Mass. 2015). The *Diatchenko* court found that the initial parole hearing of a juvenile offender is “more complex” than that of an adult offender because of the “unique characteristics” of juvenile offenders. *Id.* at 360. Relying on a prior ruling that recognized the importance of counsel when indigent parents face losing their parental rights, the court explained that juvenile offenders seeking parole would not have the opportunity to be heard without the right to counsel. *Id.* The court reasoned that “[a]n unrepresented, indigent juvenile homicide offender will likely lack the skills and resources to gather, analyze, and present this evidence adequately.” *Id.* In light of these challenges, the court found that access to counsel was necessary to ensure a meaningful opportunity for release as required by Article 26 of the Massachusetts state constitution, which prohibits cruel and unusual punishment. *Id.*

Although the Massachusetts court decided the case under the state constitution, the concerns raised by the *Diatchenko* court apply with equal force here. Similar to the *Diatchenko* plaintiffs, Appellees and all juvenile offenders

subject to Appellants' parole hearings face a "more complex" process than adult offenders in parole because their status as juvenile offenders make it more difficult to undertake tasks such as reviewing complex documents and marshalling evidence to present their cases. Without counsel, Appellees and similarly situated juvenile offenders will be severely disadvantaged.

In addition to Massachusetts, at least five other states—Connecticut, Florida, Illinois, Hawaii, and California—have codified a requirement for appointed counsel at parole hearings. Florida and Connecticut recognize the unique needs of juvenile offenders and appoint counsel during parole hearings for certain individuals who were sentenced for an offense committed prior to turning 18 years old. *See, e.g.*, Conn. Gen. State Stat. § 54-125a(f)(3) (requiring the appointment of counsel for indigent juveniles in order to assist with parole hearing preparation); Fla. Stat. Ann. § 921.1402(5) ("A juvenile offender who is eligible for a sentence review hearing under this section is entitled to be represented by counsel, and the court shall appoint a public defender to represent the juvenile offender if the juvenile offender cannot afford an attorney."). Illinois likewise appoints counsel to certain individuals sentenced for an offense committed prior to turning 21 years old a full year before they become eligible for parole to aid in preparation for their petition for release. *See* 730 Ill. Comp. Stat. Ann. 5/5-4.5-115(e).

Hawaii and California have codified an even broader right. California appoints counsel for adults and children in proceedings for “setting, postponing, or rescinding a parole release date of an inmate under a life sentence.” Cal. Penal Code § 3041.7; *see also* 15 CCR § 2256. California’s regulations specifically incorporate this right to counsel for youth offender parole hearings. 15 CCR § 2445(a). And Hawaii requires “reasonable aid to the prisoner in the preparation of the prisoner’s [parole] plan and in securing information for submission to the authority” which includes appointing counsel “to represent and assist the prisoner if the prisoner so requests and cannot afford to retain counsel.” Haw. Rev. Stat. § 706-670(3)(c).

This Court should likewise ensure the right to a “meaningful opportunity to obtain release” by similarly requiring the appointment of counsel for juvenile offenders at parole hearings.

### **CONCLUSION**

For the foregoing reasons, *Amici* respectfully requests that the Court affirm the District Court’s order granting Appellees’ motion for summary judgment and reverse in part the provisions of the relief that deny the class state-appointed counsel in a parole hearing.

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