IN THE SUPREME COURT OF IOWA

NO. 18-0477

JULIO BONILLA,

Petitioner - Appellant,

vs.

IOWA BOARD OF PAROLE,

Respondent - Appellee.

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

APPELLEE IOWA BOARD OF PAROLE'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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II. WHETHER BONILLA IS ENTITLED TO RELIEF UNDER IOWA CODE SECTION 17A.19(10) WHEN HIS SUBSTANTIAL RIGHTS WERE NOT PREJUDICED BY THE BOARD'S FAILURE TO RULE UPON HIS PROCEDURAL MOTIONS?

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ROUTING STATEMENT

While the validity of Iowa's parole review procedures has long been recognized, the question of whether those procedures are adequate on their face to protect the constitutional rights of juvenile offenders sentenced to life imprisonment with the possibility of parole has yet to be addressed by an Iowa appellate court. Because this case presents a substantial issue of first impression, retention by the Supreme Court is appropriate. Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of the Case: Petitioner-Appellant Julio Bonilla [Bonilla] appeals from a ruling on Iowa Code chapter 17A judicial review entered by the Iowa District Court for Polk County. In denying Bonilla relief, the Honorable Douglas F. Staskal ruled that the current statutory and regulatory parole system in Iowa, on its face, does not deny juvenile offenders like Bonilla a meaningful opportunity for parole release. (Ruling at 14; App. 193).

Course of Proceedings and Disposition: On June 17, 2016, the Iowa Board of Parole [Board] received on Bonilla's behalf nine separate "motions" seeking certain procedural accommodations at his upcoming parole status review. (*See* Stipulated Certified Record on Appeal [hereafter

"R."] at 1-175, 497-511; App. 235-409, 731-745). The Board docketed the motions as correspondence in support of Bonilla's release to be considered as part of its review of Bonilla's case. (R. at 176; App. 410). Because parole release deliberations are not adversarial proceedings subject to motion practice, Bonilla's counsel was informed that the Board would not be issuing a formal ruling on the motions. (R. at 176; App. 410); *see* Iowa Code § 906.3 ("The grant or denial of parole or work release is not a contested case").

Prior to his scheduled case file review, Bonilla appealed through the Board's administrative appeal process the Board's refusal to rule on his procedural motions. (R. at 177-80 – 7/6/2016 Appeal of Agency Action / Rulings on Motions; App. 411-414); *see* 205 Iowa Admin. Code ch. 15 (Appeals of Decisions). The Board issued an appeal response on August 24, 2016 through which it again declined to issue formal rulings on Bonilla's nine procedural motions. (R. at 188 – 8/24/2016 Appeal Response; App. 429). To date, Bonilla has never filed an administrative appeal following the conduct of any particular parole release review or otherwise contested the actual procedures used by the Board at any such review.

Bonilla subsequently filed for Iowa Code chapter 17A judicial review alleging that the Board's declination to rule upon his nine procedural

motions amounted to a failure to provide him a "meaningful opportunity" for parole release as contemplated by *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 567 U.S. 460 (2012). *See generally* Petition; App. 6-20). The Board's motion to dismiss the petition on grounds that Bonilla's failure to contest the actual result of any allegedly deficient review process precluded his showing of the requisite prejudice to obtain relief under Iowa Code section 17A.19 was overruled by the District Court. (Motion to Dismiss; Ruling on Motion to Dismiss; App. 21-25; 62-67). On March 14, 2018, the District Court issued a ruling denying Bonilla's petition on the merits. (*See generally* Ruling; App. 180-194). Bonilla now appeals. (Notice of Appeal; App. 195-197).

Statement of Facts: Bonilla was found guilty following a bench trial in February 2005 of committing kidnaping in the first degree. *See State v. Bonilla*, No. 05-0596, 2006 WL 3313783 at *1 (Iowa Ct. App. Nov. 16, 2006). Having been convicted of a class "A" felony, Bonilla was sentenced to a mandatory life prison term without the possibility for parole. (R. at 209-10 – Order Imposing Sentence; App. 443-444); *see* Iowa Code §§ 710.2, 902.1 (2003). Bonilla was 16 years old when he committed his criminal offense. *Bonilla v. State*, 791 N.W.2d 697, 698-99 (Iowa 2010). Bonilla is

presently serving his prison sentence at the Newton Correction Facility (NCF). (R. at 430 – Offender Movement Summary; App. 670).

Bonilla's Resentencing

Bonilla subsequently sought to set aside his sentence on grounds that it constituted cruel and unusual punishment to sentence juveniles who have committed nonhomicide offenses – such as himself – to life in prison without the possibility of parole. This Court vacated his sentence and remanded the case to the District Court for entry of a new sentence of life with the possibility of parole as mandated by the United States Supreme Court's then recently released ruling in *Graham v. Florida*, 560 U.S. 48 (2010). *See Bonilla*, 791 N.W.2d at 703. Bonilla was resentenced on April 29, 2011 to a life prison term with the possibility of parole. (*See* R. at 206-08 – 4/29/2011 Prison Sentencing Order; App. 440-442). Bonilla is facing a federal immigration detainer with possible deportation should he ever be released from state custody. (R. at 202-03; App. 436-437).

Parole In Iowa

The grant of parole is governed by Iowa Code chapter 906. *See State v. Propps*, 897 N.W.2d 91, 97-98 (Iowa 2017) (describing parole review process). The Board shall release a person when "in its opinion there is reasonable probability that the person can be released without detriment to

the community or to the person." Iowa Code § 906.4. A person's release is not a detriment to the community or to the person "if the person is able and willing to fulfill the obligations of a law-abiding citizen, in the board's determination." Iowa Code § 906.4; *see generally* Iowa Code § 906.5; 205 Iowa Admin. Code r. 8.10.

To facilitate its statutory charge, the Board shall establish and implement a plan by which it "systematically reviews the status of each person who has been committed to the custody of the director of the Iowa department of corrections and considers the person's prospects for parole or work release." Iowa Code § 906.5(1); *see Garner v. Jones*, 529 U.S. 244, 252 (2000) ("The States must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release."). Except in certain enumerated circumstances, the Board is to conduct this review at least annually for all inmates who are not serving a mandatory minimum sentence. Iowa Code § 906.5(1).

This review may be based solely upon an examination of an inmate's case file. 205 Iowa Admin. Code r. 8.6(1). The Board, in its discretion, may also choose to interview an inmate at any time. 205 Iowa Admin. Code r. 8.6(2). Iowa Code section 906.5 delegates to the Board of Parole the sole discretion to determine how and when personal interviews are to be

conducted. Thus, the Board of Parole is under no legal compulsion to interview any inmate at any specific time so long as each eligible inmate is annually reviewed for parole through a case file review. Iowa Code § 906.5; 205 Iowa Admin. Code r. 8.6(3). No inmate has a mandatory right to an in-person parole hearing. Iowa Code § 906.5(1); 205 Iowa Admin. Code § 8.6(2). Regardless of the method through which parole status reviews are conducted, the Board may order an inmate's release on parole or work release upon expiration of any applicable mandatory minimum sentence. *See* Iowa Code § 906.5(1); 205 Iowa Admin. Code r. 8.2(1).

In conducting its parole reviews, the Iowa Code instructs that the Board shall consider all pertinent information regarding an inmate, including:

> the circumstances of the person's offense, any presentence report which is available, the previous social history and criminal record of the person, the person's conduct, work, and attitude in prison, and the reports of physical and mental examinations that have been made.

Iowa Code § 906.5(3); *see also Propps*, 897 N.W.2d at 98; 205 Iowa Admin. Code r. 8.10(1) (Factors considered in parole and work release decisions). Unlike a sentencing court, the Board "has the benefit of seeing the individual offender's actual behavior, rather than having to attempt to predict chances

at maturity and rehabilitation based on speculation." *Propps*, 897 N.W.2d at 102.

Once a parole status review has occurred, the Board shall either "give notice of a decision to grant parole by issuing an order for parole to the facility where the inmate in question is incarcerated" or "give notice of a decision to deny parole or work release by issuing a notice of parole or work release denial to the facility where the inmate in question is incarcerated." 205 Iowa Admin. Code r. 8.16; *see Johnson v. Department of Corr.*, 635 N.W.2d 487, 489 (Iowa 2001). A decision of the Board to deny an inmate parole or work release can then be appealed through the Board's administrative appeals process. *See* 205 Iowa Admin. Code ch. 15. Upon exhausting all available administrative remedies before the Board, an inmate is entitled to seek judicial review under the Iowa Administrative Procedure Act, Iowa Code chapter 17A. Iowa Code § 17A.19; *see Johnson*, 635 N.W.2d at 489.

The Board has considered Bonilla for parole annually since his 2011 resentencing. (R. at 182-83 – Parole Docket Sheet: Decisions Summary; App. 416-417). Although the Board may have denied him parole following each of its reviews to date, Bonilla remains eligible for parole and he can be

released at any time upon the requisite finding by the Board that his release will not pose a risk to himself or the public. *See* Iowa Code § 906.5(1).

Bonilla's 2016 Parole Review

In anticipation of his 2016 annual parole review, Bonilla through attorney Angela Campbell, submitted nine separate procedural motions to the Board. (*See* R. at 1-175, 497-511; App. 235-409, 731-745). Among the accommodations Bonilla sought through these motions were: the appointment of counsel at state expense (R. at 1-19, 497; App. 235-253, 731); access to an independent psychological evaluation (R. at 20-40, 498-511; App. 254-274, 732-745); an in-person parole hearing (R. at 41-60; App. 275-294); the ability to present evidence at the parole hearing (R. at 61-77; App. 295-311); access to Board and DOC information (R. at 78-97; App. 312-331); and, exclusion from the Board's consideration of all disciplinary and behavioral information that had not been subject to a formal adjudication (R. at 98-117; App. 332-351). Ms. Campbell was notified that the Board would not formally rule upon the motions because parole release deliberations are not adversarial proceedings subject to typical courtroom motion practice. (R. at 176; App. 410); *see* Iowa Code § 906.3.

Instead, the Board docketed the motions as correspondence in support of Bonilla's release to be considered as part of its review of Bonilla's case. (R. at 176; App. 410). On July 6, 2016, Bonilla appealed the Board's refusal to formally rule upon his procedural motions through the Board's administrative appeal process. (R. at 177-80; App. 411-414). The Board issued a response to Bonilla's appeal on August 24, 2016 in which it reiterated that the Board did not engage in motion practice as part of its release deliberations and that "[n]o formal ruling is required nor will be made" concerning his procedural motions. (R. at 188 – 8/24/2016 Appeal Response; App. 422). The Board's refusal to formally rule upon the motions did not mean that the requested relief was denied or otherwise withheld because, as noted in the Board's appeal response, many of the procedural accommodations Bonilla sought were already subsumed within existing Board policies and procedures. (R. at 188; App. 422).

With the consent of counsel, Bonilla's 2016 parole review was postponed to facilitate Ms. Campbell's access to Bonilla's parole file. (R. at 176, 188; App. 410, 422). The Board forwarded the records pertaining to Bonilla's case to Ms. Campbell on July 13, 2016. (R. at 186-358; App. 420-592). Included among these records were the latest Board docket summary, prison disciplinary rulings, general behavioral observations, parole release

plans, and psychological and psychiatric evaluations for Bonilla. (*Id*.; App. 420-592). The legal basis for redacting information or otherwise withholding any records was communicated to Bonilla through counsel. (R. at 186-87; App. 420-421).

Also in preparation for Bonilla's 2016 annual parole review, the Iowa Department of Corrections [DOC] submitted a parole release plan to the Board that included its recommendation that Bonilla complete sex offender treatment programming [SOTP] and thinking for a change [T4C]. (R. at 194 – 5/5/2016 BOP Release Plan; App. 428). The DOC further recommended that Bonilla undergo a "significant period of gradual release" prior to parole. (R. at 194; App. 428). Unlike the prior year when Bonilla had been the subject of a major disciplinary report for running a gambling pool, DOC noted that his "[r]ecent adjustment had been outstanding." (R. at 194; *see* R. at 195 – 6/1/2015 BOP Parole Release Plan; App. 428, 429). Lastly, DOC completed both a psychological and psychiatric evaluation for Bonilla at the Board's request. (*See* R. at 352-54, 355-56; App. 580-588, 589-590).

A three-member Board panel subsequently conducted a case file review for Bonilla on July 28, 2016. (R. at 359-66 – Transcript of 7/28/2016 Parole Review; App. 593-600). Prior to the review, Ms. Campbell submitted written comments to the Board in support of Bonilla's release. (*See* R. at

188, 359; App. 422, 593). Ms. Campbell was further allowed to address the Board panel in person during the case file review. (R. at 188, 360-61; App. 422, 594-595). The Board denied Bonilla parole after finding that Bonilla had not yet displayed adequate rehabilitation and maturity to convince the Board that he could safely be released. (R. at 512-13 – 7/28/2016 Parole Denial; App. 746-747).

Particularly concerning to the Board panel was the nature and extent of Bonilla's prison disciplinary record and his lack of completed programming and treatment. (R. at 512; *see generally* R. at 359-66; R. at 318-51 – Disciplinary Notices, Hearing Decisions, and Appeal Responses; App. 746, 593-600). Bonilla was urged to participate in available interventions to address those deficiencies and to better prepare himself for a future transition to lower levels of security supervision. (R. at 512; *see generally* R. at 359-66; App. 746, 593-600). The Board did acknowledge and commend Bonilla for his positive efforts and he was encouraged to continue his recent trend of good behavior. (*Id*.; App. 746, 593-600). In closing the Board urged Bonilla to continue to strive for lower security and higher privilege levels within the DOC. (*Id*.; App. 746, 593-600). Bonilla did not appeal the Board's July 28, 2016 parole denial decision.

Bonilla's 2017 Parole Review

On July 27, 2017, the Board again took up Bonilla's case. (*See generally* R. at 471-75 – Transcript of 7/27/2017 Parole Review; App. 705-709). In preparation for this review, the Board requested an updated release recommendation from the DOC and another psychological and psychiatric evaluation of Bonilla was conducted. (R. at 405 – 7/12/2017 BOP Release Plan; R. at 431-33 – 5/242017 Psychological Evaluation; R. at 434-36 – 5/24/2017 Psychiatric Evaluation; App. 639; 665-667; 668-670). Despite being notified of the scheduling of Bonilla's July 2017 case file review, counsel for Bonilla did not appear at the review nor were any additional written materials submitted in advance. (R. at 471-72; App. 705-706).

The Board panel again noted that Bonilla's prison disciplinary record is replete with serious incidents of misconduct and violence, including many that occurred after his 25th birthday and his 2011 resentencing. (*See generally* R. at 471-75; App. 705-709). The Board was encouraged, however, at Bonilla's continuing positive efforts including completing the T4C course and his lack of recent disciplinary reports. (*See generally* R. at 471-75; App. 705-709). The Board ultimately determined that a longer period of successful institutional adjustment was necessary before it could endorse the initiation of gradual release for Bonilla. (R. at 425-26 –

7/27/2017 Parole Denial; R. at 427-28 – 8/2/2017 Correspondence of John Hodges; *see generally* R. at 471-75; App. 659-660; 661-662; 705-709). The Board further observed that Bonilla would benefit from SOTP and interventions to develop life and vocational skills. (R. at 425-26; R. at 427-28; *see generally* R. at 471-75; App. 659-660; 661-662; 705-709). Noting these concerns, the Board panel voted to deny Bonilla release for another year. (R. at 425-26; R. at 427-28; App. 659-660; 661-662). Bonilla did not appeal the Board's July 27, 2017 parole denial decision.

Additional facts will be mentioned in the course of the Board's argument as necessary.

ARGUMENT

I. THE IOWA BOARD OF PAROLE'S CASE REVIEW PROCEDURES CONSTITUTIONALLY OFFER JUVENILE OFFENDERS LIKE BONILLA A MEANINGFUL OPPORTUNITY FOR PAROLE RELEASE.

Standard of Review: The Court's standard of review is to correct errors of law committed by the district court. *E.g.*, *Houck v. Iowa Bd. of Pharmacy Exam'rs*, 752 N.W.2d 14, 16 (Iowa 2008); *Greenwood Manor v. Iowa Dep't of Pub. Health*, 641 N.W.2d 823, 830 (Iowa 2002). When scrutinizing the propriety of a district court's judicial review ruling, the Court applies the standards of Iowa Code section 17A.19(10) to the

challenged agency action to determine whether its conclusions are the same as those of the district court. *Litterer v. Judge*, 644 N.W.2d 357, 360-61 (Iowa 2002); *see Greenwood Manor*, 641 N.W.2d at 830. Because parole release deliberations are not "contested cases" within the context of Iowa Code chapter 17A, the Court is to apply the standard of review applicable to "other agency action" to Bonilla's claims. *See* Iowa Code § 906.3; *Johnson*, 635 N.W.2d at 489; *see also Greenwood Manor*, 641 N.W.2d at 834.

Constitutional claims brought under Iowa Code chapter 17A are reviewed *de novo*. *Houck*, 752 N.W.2d at 17. As the party making a facial challenge to Iowa's statutorily defined parole procedures, Bonilla bears a heavy burden because he must prove the unconstitutionality beyond a reasonable doubt. *E.g.*, *State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005); *State v. Hernandez-Lopez*, 639 N.W.2d 226, 233 (Iowa 2002). Statutory enactments are cloaked with a presumption of constitutionality. *Id*. Bonilla must refute every reasonable basis upon which the parole statute could be found to be constitutional. *Id*. If the statute is capable of being construed in more than one manner, one of which is constitutional, a reviewing court must adopt that construction. *Id*.

Finally, as in any Iowa Code chapter 17A judicial review proceeding, "[t]he burden of demonstrating the required prejudice and the invalidity of

agency action is on the party asserting invalidity." Iowa Code § 17A.19(8)(a). Consequently, it is Bonilla's burden to demonstrate that the Board's case review procedures violated applicable law and prejudiced his rights. *See Hill v. Fleetguard, Inc.*, 705 N.W.2d 665, 671 (Iowa 2005).

Preservation of Error: The question of whether Iowa's parole review procedures on their face constitutionally provide juvenile offenders serving life sentences with the possibility of parole – like Bonilla – their "meaningful opportunity" for parole release based upon demonstrated rehabilitation and maturity was raised below following exhaustion of applicable administrative remedies[1] and ultimately decided by the District Court. (*See* R. at 1-175, 497-511 – Procedural Motions; 177-80 – 7/6/2016 Appeal of Agency Action / Rulings on Motions; 188 – 8/24/2016 Appeal Response; Petition; Ruling; App. 235-409, 731-745; 411-414; 422; 6-20; 180-194). Error on this question was accordingly preserved for appellate review.

To the extent that Bonilla now seeks appellate review of the constitutionality of the Board's actual application of its parole review procedures to his specific facts and circumstances, error was not preserved,

[1] Regardless, this Court has ruled that exhaustion of administrative remedies is not required where a petitioner is solely challenging the facial constitutional validity of a statute under which an agency is proceeding. *See Tindal v. Norman*, 427 N.W.2d 871, 872-73 (Iowa 1988).

and review is foreclosed due both to Bonilla's failure to exhaust applicable administrative remedies before the Board and the District Court's failure to rule upon any such claim. Timely exhaustion of the Board's administrative appeal process and specific presentation of an alleged error is required before a court acquires authority to hear that claim on judicial review. *E.g.*, *Ghost Player, L.L.C. v. State*, 860 N.W.2d 323, 326 (Iowa 2015); *Johnson*, 635 N.W.2d at 489 ("it is implicit in the Iowa Administrative Code that the administrative remedy must be exhausted before further appeal"). The only administrative appeal brought by Bonilla in this matter predated his July 28, 2016 parole review and only addressed the Board's failure to enter a ruling on his nine procedural motions. (*See* R. at 177-80; App. 411-414). Bonilla has not appealed the Board's conduct of any specific parole review or the results thereof through the Board's administrative appeal process.

Furthermore, the District Court's ruling was limited solely to answering whether "the current statutory and regulatory parole system in Iowa, *on its face*, denies juvenile offenders a meaningful opportunity for release." (Ruling at 14 (emphasis added); App. 193). Bonilla did not seek to expand or enlarge the District Court's findings through a Rule 1.904 motion or other means. Consequently, any constitutional challenge that the Board misapplied its otherwise valid parole review procedures to him

individually is not preserved for appellate review. *See, e.g., Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.").

Argument: The Board is not violating the constitutionally protected rights of any juvenile offender serving a life prison term with the possibility of parole – including Bonilla's – by using the statutorily defined review process and eligibility criteria to evaluate their present suitability for parole release. The Board's parole review procedures fairly afford all such juvenile offenders a realistic and meaningful opportunity to obtain parole based upon their demonstrated maturity and rehabilitation. While the additional procedural accommodations Bonilla now seeks may reflect idealized best practices for all parole reviews conducted by the Board, none are constitutionally compelled. The District Court's ruling that "there is no basis on this record to conclude that the current statutory and regulatory parole system in Iowa, on its face, denies juvenile offenders a meaningful opportunity for release" should accordingly be affirmed. (Ruling at 14; App. 193).

Meaningful Opportunity

"[U]nder both the United States Constitution and the Iowa Constitution, juveniles convicted of crimes must be afforded a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'" if parole is available to that offender. *State v. Louisell*, 865 N.W.2d 590, 602 (Iowa 2015) (citing *Graham v. Florida*, 560 U.S. 48, 75 (2010); *see State v. Propps*, 897 N.W.2d 91, 100 (Iowa 2017). While initially unclear what the United States Supreme Court precisely meant in *Graham* by requiring states to provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," it held in *Montgomery v. Louisiana* that the mere act of allowing juvenile 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." *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 736 (2016); *see also Diatchenko v. District Attorney for Suffolk Dist.*, 27 N.E.3d 349, 370 (Mass. 2015) (Spina, J. dissenting) ("The Supreme Court specifically identified traditional parole hearings as capable of providing that 'meaningful opportunity to obtain release.'").

This Court has posited that at a minimum, "a meaningful opportunity must be *realistic*." *Louisell*, 865 N.W.2d at 602 (citing *Graham*, 560 U.S. at

82); *see, e.g.*, *State v. Graham*, 897 N.W.2d 476, 488 (Iowa 2017). The Court has further counseled that "[t]he prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by *Graham*." *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013); *see Propps*, 897 N.W.2d at 99. As the entity responsible for administering Iowa's indeterminate sentencing scheme, the Board indisputably plays a part in ensuring that a juvenile offender's "meaningful opportunity" for release based on demonstrated maturity and rehabilitation can in fact be timely realized. *See* Iowa Code § 904A.4.

Yet, only a realistic and meaningful *opportunity* to demonstrate maturity and rehabilitation is required. *Propps*, 897 N.W.2d at 101-02. A sentence of life in prison with parole does not guarantee actual release on parole. *E.g., State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016); *Seats v. State*, 865 N.W.2d 545, 557 (Iowa 2015). Nor must release on parole be immediate. *See Propps*, 897 N.W.2d at 101. "Once the court sentences a juvenile to life in prison with the possibility of parole, the decision to release the juvenile is up to the parole board. Iowa Code § 904A.4. If the parole board does not find the juvenile is a candidate for release, the juvenile may

well end up serving his or her entire life in prison." *Seats*, 865 N.W.2d at 557; *see also Sweet*, 879 N.W.2d at 841-42; *Graham*, 560 U.S. at 75 ("It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life."). Ultimately, "the juvenile defendant's behavior in prison dictates when parole will be available – with the potential for immediate parole if rehabilitation, maturity, and reform have been demonstrated." *Propps*, 897 N.W.2d at 102; *see, e.g.*, *Sweet*, 879 N.W.2d 839 ("[T]hose who over time show irredeemable corruption will no doubt spend their lives in prison.").

Given its statutory charge that it shall release all who, in the Board's informed opinion can be released without detriment to the community or to themselves, immediate eligibility for parole upon the parameters outlined in Iowa Code section 906.5 has been deemed "both realistic and meaningful." *Propps*, 897 N.W.2d at 102 (majority opinion); *see also Sweet*, 879 N.W.2d at 841-42 (Wiggins, J. concurring specially); *Louisell*, 865 N.W.2d at 602 n.11. Once a juvenile offender sentenced to a life term with the possibility of parole discharges any applicable mandatory minimum term of incarceration imposed by the sentencing court, that offender is immediately

eligible for parole release and is scheduled to commence regular Board reviews. *See* Iowa Code §§ 906.4(1), 906.5(1). Accordingly, the Board has reasonably applied to those juvenile offenders who, like Bonilla, have been resentenced under *Graham* and *Miller* to life terms with parole eligibility, the statutorily prescribed procedures and standard for granting parole release delineated in Iowa Code chapter 906.

Sentencing versus Parole

By demanding that the Board provide juvenile offenders serving life sentences the procedural equivalent of a capitol sentencing hearing at each and every parole review, Bonilla unreasonably conflates the purposes and objectives of sentencing with the grant of parole. Unlike sentencing, which falls within the power of the judiciary, "parole decisions are legitimately within the discretion of the executive branch." *Doe v. State*, 688 N.W.2d 265, 271 (Iowa 2004). For those juveniles serving life sentences with parole eligibility, the Board is not donning the mantle of sentencing court. As the District Court concisely noted, "sentencing and parole are different." (Ruling at 13; App. 192). While the Board has an important part in ensuring that the ideals of *Graham* and *Miller* are realized in Iowa for those juvenile offenders serving life sentences who truly mature and rehabilitate, the standards applicable to the Board's identification of worthy release

candidates and the information available to it when doing so differs greatly from that of a criminal sentencing court.

This Court found in *Sweet* that a sentencing court is tasked under *Miller* with the near impossible undertaking of *predicting* future behavior in an effort to accurately detect those young offenders who truly are irredeemably depraved and undeserving of ever having an opportunity for release. *See Sweet*, 879 N.W.2d at 837 ("[W]e are asking the sentencer to do the impossible, namely, to determine whether the offender is 'irretrievably corrupt' at a time when even trained professionals with years of clinical experience would not attempt to make such a determination."). The procedural protections owed to a juvenile offender when that offender is facing the possibility of life imprisonment without the possibility of parole at sentencing is understandably great given that that single sentencing hearing has the potential to foreclose forever that offender's possibility of a future release. *See Sweet* 879 N.W.2d at 831 ("Life without the possibility of parole is 'a forfeiture that is irrevocable,' depriving the convict of the most basic liberties without hope of restoration except in the remote possibility of executive clemency.").

The Board, however, is charged with identifying those persons who through their *actual* behavior and actions in prison have demonstrated

sufficient maturity and rehabilitation as to convince the Board they can be released without posing a danger to themselves or the public. *See* Iowa Code § 906.4(1). Rather than engage in the speculative up-front decision making demanded of a sentencing court, any Board determination of irredeemable corruption will be based upon concrete and long-term observations and known data collected after the time the juvenile character is no longer a work in progress. *See Sweet*, 879 N.W.2d at 839 ("The parole board will be better able to discern whether the offender is irreparably corrupt after time has passed, after opportunities for maturation and rehabilitation have been provided, and after a record of success or failure in the rehabilitative process is available."). Consequently, "the parole board, not the sentencer, is in the best position to determine whether the offender is incorrigibly corrupt." *State v. Zarate*, 908 N.W.2d 831, 842 (Iowa 2018).

A sentencing court is only given one opportunity to gather the information needed to render its final, irreversible sentence. Conversely, the Board conducts parole reviews at least annually commencing upon the expiration of any applicable minimum sentence. *See* Iowa Code § 906.5(1). In doing so, the Board affords offenders repeated opportunities to demonstrate their evolving maturity and rehabilitation and to present new information to the Board as it becomes available.

A parole review in Iowa therefore does not require the same degree of precision – and therefore the procedural protections – of a *Miller* sentencing hearing because the Board is not being called upon through a single hearing to correctly predict an offender's likely growth and maturity. Instead, the Board will have repeated individualized opportunities to review and track an offender's actual behavior and actions to inform its decision making. *See, e.g., Propps*, 897 N.W.2d at 102. Thus, the Board need not speculate as to which juvenile offenders may mature and achieve rehabilitation, it can observe firsthand who truly has. *See Zarate*, 908 N.W.2d at 857 (Hecht, J. concurring) ("The timing of [an offender's] parole, if any, from [a] life sentence should be left to the board of parole, the entity in the best position to discern whether [the offender] has shown maturation and rehabilitation."); *Propps*, 897 N.W.2d at 102.

Miller Sentencing Factors Respected

Bonilla urges the Court to require the Board to individually address in its parole denial orders each of the sentencing factors espoused in *Miller v. Alabama*, 567 U.S. 460 (2012), and to treat each as mitigation favoring parole release. Yet, as correctly discerned by the District Court, the *Miller* factors are not necessarily relevant in the same way during a parole release review as they would be within the context of a juvenile's initial sentencing.

(Ruling at 13; App. 192). For example, should mitigating sentencing factors such as immaturity, an underdeveloped sense of responsibility, and vulnerability to peer pressure persist beyond youth, parole release is likely not in the best interests of society or the offender and parole should be denied. (*See* Ruling at 13 ("While the characteristics of youth may have some relevance in the parole process, the main focus is on post-crime maturation and behavior."); App. 192). The above factors may diminish a juvenile's criminal culpability and justify a chance for a future release, but they also raise legitimate public safety concerns should they remain unremedied at the time of release.[2] *See Propps*, 897 N.W.2d at 102 ("If rehabilitation has not yet occurred, the parole board may make the decision to continue incarceration until the juvenile has demonstrated through his or her own actions the ability to appreciate the severity of the crime."). The failure of an offender to treat and rectify such concerns can fairly be characterized as factors militating against a showing that sufficient maturity

[2] When read in full context, the comment of Board Chairperson John Hodges that some of the *Miller / Seats* sentencing factors may be perceived as aggravating factors for parole purposes "if those still exist" at the time of the review is correct and should not be read as evidence of the Board's misunderstanding or misapplication of *Miller* / *Seats* as Bonilla now alleges. (*See* R. at 360, ll. 4-8; App. 594). Rather, as Chairman Hodges later noted, "the most important thing when we're reviewing these cases isn't the crime they've committed, it's what they've done since then. And are they showing us that they have been rehabilitated to a point where they can be released to the community." (R. at 360, ll. 17-19; App. 594).

and rehabilitation has been achieved to warrant a parole release now. *See Propps*, 897 N.W.2d at 102; *Sweet* 879 N.W.2d at 839. The Board is not required to abdicate its duty to limit parole to only those persons who can be released without posing a detriment to the public or themselves simply because the person under review was a juvenile offender. (Ruling at 10 ("the issue for the parole board is whether or not a person has matured and been rehabilitated"); App. 189); *see, e.g.*, *Zarate*, 908 N.W.2d at 848 ("offenders who show signs of recidivism [] may require incapacitation until a parole board determines the offender's rehabilitation"); *Null*, 836 N.W.2d at 41 ("while youth is a mitigating factor in sentencing, it is not an excuse").

Nonetheless, to the extent applicable the *Miller* considerations are generally subsumed within the Board's release criteria. "The analysis undertaken by the parole board for parole eligibility is an individualized analysis that considers the juvenile's past, in addition to current psychiatric and psychological evaluations, the time already served on the sentence, any reports of misconduct or good behavior, and the inmate's attitude and behavior while incarcerated." *Propps*, 897 N.W.2d at 102; *see generally* Iowa Code § 906.5(3); 205 Iowa Admin. Code r. 8.10(1). It is through this individualized review of each offender's unique circumstances that the

Board can account for the fact that "children are constitutionally different from adults." *See, e.g., Sweet*, 879 N.W.2d at 833. Such review also allows the Board to directly observe the truth of and act upon the maxim that "juveniles are normally more malleable to change and reform in response to available treatment." *See e.g., State v. Roby*, 897 N.W.2d 127, 147 (Iowa 2017).

Factors such as treatment, education, and exhibited prison conduct and behaviors are exactly the things the Board should be considering when it examines whether Bonilla and similar juvenile offenders have sufficiently grown and matured since committing their criminal offenses so as to give the Board confidence that they have been rehabilitated to the point that they can "fulfill the obligations of a law-abiding citizen." *See* Iowa Code § 906.4(1); 205 Iowa Admin. Code r. 8.10(1)(e), (h), (n) *see also Sweet*, 879 N.W.2d at 839 (Recognizing that the Board is better able to exercise its review "after a record of success or failure in the rehabilitative process is available"). Examination of the facts of an offender's offense allows the Board to identify whether appropriate programming and treatment – such as SOTP for sex crimes – have been completed in furtherance of rehabilitation. *See* 205 Iowa Admin. Code r. 8.10(1)(b), (e). The nature and circumstances of the offense are also relevant to the extent that proper attention is given to

a juvenile offender's "actual role and the role of various types of external pressure" that come to bear on the offender, particularly peer pressure and the interplay of group dynamics. *See Roby*, 897 N.W.2d at 146. Reliance on available psychiatric and psychological evaluations and validated risk assessments assist in diagnosing behavioral issues to resolve and measuring progress achieved. *See Roby*, 987 N.W.2d at 145; 205 Iowa Admin. Code r. 8.10(1)(f), (o). The Board's release criteria and procedures accordingly provide for an appropriately individualized review of each offender coming before it. *See Propps*, 897 N.W.2d at 102.

To the extent a conflict with *Miller* may arise, the Board's release criteria are not constitutionally infirm given that Iowa law does not dictate how the Board is to weight the various statutory and regulatory factors when making parole decisions. *See Zarate*, 908 N.W.2d at 854 ("the statute's failure to explicitly state that these factors must be treated as mitigating does not render the sentencing factors unconstitutional"). All parole criteria need not be given equal consideration. Thus, the Board has discretion to give more weight to those factors identified in *Miller* as deserving of extra consideration, such as achieved maturity and rehabilitative progress as demonstrated through an inmate's recent conduct, work, and attitude in prison; and to discount other factors such as the seriousness of the inmate's

criminal offense. S*ee generally* Iowa Code § 906.5; 205 Iowa Admin. Code r. 8.10.

When applying its present release criteria, the Board likely would abuse its discretion should it place undue emphasis upon the facts and circumstances of a juvenile offender's crime such that demonstrated rehabilitation and maturation is unreasonably marginalized. *See Zarate*, 908 N.W.2d at 854 ("the consideration of any potential aggravating factors, including the circumstances of the crime, cannot overwhelm the sentencing court's analysis"). However, the mere possibility that Board members can misuse the statutory release criteria does not render the standards themselves unconstitutional. A proper weighting of these factors can easily be done within applicable constitutional parameters. *See Zarate*, 908 N.W.2d at 848 ("Parole decisions are subject to legal standards."). The availability of both intra-agency appeal and judicial review to all offenders to challenge and remedy any misapplication of relevant parole release criteria help safeguard against any true abuses of discretion or other errors of law.

Not Cruel and Unusual Punishment

Under both the United States and Iowa constitutions the right to be free from cruel and unusual punishment "flows from the basic 'precept of

justice that punishment for crime should be graduated and proportioned' to both the offender and the offense." *Zarate*, 908 N.W.2d at 840 (*quoting Roper v. Simmons*, 543 U.S. 551, 560 (2005). As noted above, the provision of parole eligibility provides the proportionality constitutionally demanded for those offenders whose youth and immaturity diminishes their criminal culpability. *See Montgomery*, 136 S. Ct. at 736.

Nonetheless, Bonilla argues parole eligibility alone in the absence of his demanded procedural accommodations will still categorically render his sentence cruel and unusual. When considering whether to adopt a categorical approach to a class of offenders or offenses under the cruel and unusual punishment clause of the Iowa Constitution, this Court has applied a two-part test. *E.g.*, *Sweet*, 879 N.W.2d at 835; *State v. Lyle*, 854 N.W.2d 378, 386 (Iowa 2014). First, the court looks to "whether there is a consensus, or at least an emerging consensus, to guide the court's consideration of the question." *Lyle*, 854 N.W.2d at 386; *see also Sweet*, 879 N.W.2d at 836. Second, even if an emerging national consensus is lacking, the court may "exercise [its] independent judgment to determine whether to follow a categorical approach." *Lyle*, 854 N.W.2d at 386; *see also Sweet*, 879 N.W.2d at 836.

As detailed in Bonilla's and Amicus' briefing, a limited number of states have chosen through legislation or regulation to provide the assistance of legal counsel to juvenile offenders serving life prison terms during parole reviews. Yet, only one state, Massachusetts, is identified as having required counsel through application of its constitutional prohibition against cruel and unusual punishment. *See Diatchenko*, 27 N.E.3d at 361.[3]

In examining whether such legislative enactments constitute an emerging trend, it is necessary to note that each individual state's parole system is unique with procedures and eligibility criteria specific to that state. For example, some states authorize the chief executive or sentencing judges to veto or seek additional review of recommendations of parole release for persons serving life sentences. *See, e.g.*, Cal. Penal Code §§ 3041.1, 3041.2. Others defer parole reviews until a lengthy period has elapsed after the commencement of incarceration – fifteen years or longer in some instances. *See, e.g.,* Cal. Penal Code § 3051; Conn. Gen. Stat. Ann. § 54-125a(f)(1). Follow-up reviews before the parole board after an initial hearing may then be delayed up to five years. *See, e.g.*, Conn. Gen. Stat. Ann. § 54-125a;

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[3] Effective April 13, 2018, the State of Massachusetts codified the *Diatchenko* Court's mandate of appointed legal counsel and paid experts at parole hearings for juvenile offenders serving life sentences. *See* Mass. Gen. Laws Ann. ch. 127, § 133A.

Wash. Rev. Code Ann. § 10.95.030(3)(f); 120 Mass. Code Regs. 301.01. Unlike Iowa, judicial review of parole decisions may be limited in some jurisdictions, enhancing the need for the participation of legal counsel to reduce the chances of errors. *See Diatchenko*, 27 N.E.3d at 359.

Iowa provides no less than annual reviews to all parole eligible offenders – including juveniles – starting immediately upon the expiration of any mandatory minimum sentence. *See* Iowa Code § 906.5(1). Unlike those other states with lengthy intervals between hearings, Iowa's regular scheduling of parole reviews allows the Board to more easily track an offender's progress toward maturation and rehabilitation through a continually updated series of contemporaneous observations and staff recommendations. A full evidentiary hearing complete with independent experts and appointed attorneys may be justified to help recreate a similar record of offender history fifteen or twenty years after the fact. But, as detailed below, Iowa's existing parole procedures already effectively allow juveniles serving life terms a fair and realistic opportunity to demonstrate the requisite maturity and rehabilitation to attain a parole release. Given these deviations in state parole schemes, an across the board survey of allotted procedural allowances is likely to be suspect in consistently identifying true emerging trends of consensus. Ultimately, deference is owed to the

Legislature's chosen parole mechanics as "the legislature is in the best position to identify and adopt legal protections that advance our constitutional recognition that 'children are different.'" *Zarate*, 908 N.W.2d at 851 (*quoting Seats*, 865 N.W.2d at 555).

The Court should respect at this time the informed judgment of the Board as to how best to identify worthy release candidates. In the absence of recurring abuses of discretion by the Board in its evaluation of juveniles serving life terms, the Court should refrain from imposing its own categorical dictates through the exercise of its independent judgment. Restraint in expanding Iowa's constitutional standards is warranted until the Board demonstrates through its ongoing actions an inability to properly account for juvenile brain and personality development over time or empirical data evidences the existence of structural barriers that unreasonably preclude juvenile offenders from accurately communicating their individual facts and circumstances to the Board under existing procedures. *See Propps*, 897 N.W.2d at 105 (Cady, C.J. concurring specially) ("Our constitutional standards need to grow along with our greater understanding, but no further.").

Due Process Provided

In view of Iowa's categorical constitutional prohibition on life sentences without parole for juvenile offenders, the Board's role in ensuring that juvenile offenders convicted of class "A" felonies receive appropriate, individualized release consideration takes on greater prominence. *See Propps*, 897 N.W.2d at 105 (Cady, C.J. concurring specially) ("the constitutional protection plays out within the process of parole"). Understandably, Bonilla now invites more exacting scrutiny of the Board's existing practices and procedures. Nonetheless, to the extent not already encompassed within existing processes, the procedural accommodations demanded by Bonilla are not constitutionally compelled. "Just because another procedure may seem fairer or wiser, does not mean the procedure provided violates due process." *Ghost Player, L.L.C. v. State*, 860 N.W.2d 323, 330 (Iowa 2015) (*quoting Bowers v. Polk Cnty. Bd. of Supervisors*, 638 N.W.2d 682, 691 (Iowa 2002).

The United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), derived a three-part test to determine what process, if any, a person was entitled when faced with government action. *E.g.*, *State v. Hernandez-Lopez*, 639 N.W.2d 226, 240 (2002). The three factors to be balanced are:

> (1) the private interest that will be affected by the government action; (2) the risk of the erroneous

> deprivation of the interest, and the probable value of additional procedures; and (3) the government interest in the regulation, including the burdens imposed by additional procedures.

Hernandez-Lopez, 639 N.W.2d at 240. "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); *see Hernandez-Lopez*, 639 N.W.2d at 240 ("we must remember the flexible nature of due process").

Due process mandates minimum procedural protections only in those cases where a protected liberty interest is at risk. *E.g.*, *Sanford v. Manternach*, 601 N.W.2d 360, 364 (Iowa 1999) ("In order to establish that he has suffered a deprivation of his due process rights, however, a plaintiff must first establish that he has a liberty interest of constitutional dimension."). Bonilla has no guaranteed right to a parole. *E.g.*, *Sweet*, 879 N.W.2d at 839. Juvenile offenders like Bonilla, however, must be given a realistic and meaningful opportunity to demonstrate maturity and rehabilitation. *E.g.*, *Propps*, 897 N.W.2d at 101-02. As discussed above, Iowa's present parole review system already provides this mandated opportunity. *See Propps*, 897 N.W.2d at 102. Therefore, any additional procedures urged by Bonilla must have a measurably true impact on

improving the Board's decision-making process to justify the added burdens those procedures would impose upon the Board and the State of Iowa.

As an initial matter, while the evolution of today's jurisprudence on juvenile sentencing may have originated in cases questioning the application of the death penalty to juvenile offenders, it is a false equivalency to argue that the procedural protections due at a yearly parole review should be identical to those mandated for a capitol sentencing hearing. It has long been recognized that the degree or amount of process constitutionally due someone is proportionate to the liberty or property interest placed at risk by government action. *See, e.g., State ex rel. Hamilton v. Snodgrass*, 325 N.W.2d 740, 741-42 (Iowa 1982). Imposition of the death penalty implicates the deprivation of the ultimate liberty interest – one's own life. It is only appropriate that the highest degree of procedural protections be afforded someone who is facing the death penalty.[4] The mere act of allowing parole consideration, however, significantly diminishes the severity of the liberty deprivation associated with the imposition of a life sentence. *See Propps*, 897 N.W.2d at 99 ("the opportunity for parole lessens the

[4] Similar procedural protections have justifiably been extended to those cases where imposition of a sentence of life without parole [LWOP] is a possibility for a juvenile offender because "[i]mposition of life in prison without parole shares some of the characteristics with death sentences that are shared by no other sentences." *Sweet*, 879 N.W.2d at 831.

severity of a sentence"); *Sweet*, 879 N.W.2d at 830 (*citing Montgomery*, 36 S. Ct. at 736).

Likewise, Bonilla's insistence on equating his situation to that of a parole revocation hearing is similarly misplaced. The United States Supreme Court has recognized that "parole *release* and parole *revocation* are quite different. There is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires." *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 9 (1979) (*distinguishing Morrissey v. Brewer*, 408 U.S. 471 (1972)). "It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom." *Greenholtz*, 442 U.S. at 10 (*quoting United States ex rel. Bey v. Connecticut Bd. of Parole*, 443 F.2d 1079,1086 (2d Cir. 1971). An inmate who has gained his freedom through parole is entitled to much greater due process protection than one who only has a mere expectancy of someday gaining a parole release. *Greenholtz*, 442 U.S. at 10-11.

Miller's extension of parole eligibility to juvenile offenders was not intended to impose onerous burdens on the states. *See Montgomery*, 136 S. Ct. at 736. Thus, far less procedures are necessary to ensure that a

juvenile offender receives a meaningful and realistic opportunity for a parole release than is required for either a death penalty / LWOP sentencing or a parole / probation revocation hearing. The present regulatory framework governing parole reviews in Iowa meets that bar by providing regularly scheduled, individually tailored reviews for each parole eligible juvenile offender. *See Propps*, 897 N.W.2d at 102.

This Court has found that the Board is best situated "to discern which juvenile homicide offenders have benefited from opportunities for maturation and rehabilitation." *Propps*, 897 N.W.2d at 102 (*citing Sweet*, 879 N.W.2d at 839). This is due to the Board having "the benefit of seeing the individual offender's actual behavior, rather than having to attempt to predict chances at maturity and rehabilitation based on speculation." *Propps*, 897 N.W.2d at 102. Yet, Bonilla now seeks to undermine the Board's ability to conduct such an assessment by categorically eliminating the Board's access to Iowa Corrections Offender Network [ICON] generic notes and other "unverified" contemporaneous observations of his and others' behaviors.

Nothing in the Board's rules or statutes preclude the Board from reviewing inmate behavioral logs and ICON generic notes to shed light on an inmate's general attitude and behavior while incarcerated. *See* 205 Iowa

Admin. Code r. 8.10(1)(n). Rather, in conducting its parole reviews, the Board is charged with reviewing "*all* pertinent information" including the circumstances of the offender's offense and sentence, the presentence report, social and criminal history, prison disciplinary records, employment history, and reports of the offender's mental and physical condition." Iowa Code § 906.5 (emphasis added). Integral to the parole review process is consideration of an offender's participation in institutional programs, evidence of habitual institutional misconduct, and drug or alcohol use. *See* 205 Iowa Admin. Code r. 8.10(1) (factors to be considered by IBOP).

The ability to positively interact with correctional officers and fellow inmates in a structured prison setting is unquestionably relevant to determining whether someone is ready to confront others outside prison walls. But not all relevant behavioral issues rise to the level of necessitating formal discipline in the prison system. Nor are pats on the back and other informal commendations verified through adjudicatory proceedings. Because both positive as well as negative interactions are logged, the Board's review of generic notes and behavioral logs can provide a more robust and complete picture of an inmate's maturation and rehabilitation. Consequently, elimination of this source of information can, in some cases,

hinder an offender's efforts to present an accurate accounting of their true growth and development.

The use of generic notes is not as arbitrary as Bonilla may believe as their entry into ICON is governed by established DOC policies and procedures. *See* Iowa DOC Policy AD-IS-05 (Effective May 2016) *available at*: https://doc.iowa.gov/sites/default/files/ad-is-05_icon_generic_notes.pdf. Such notes are intended to "provide for a consistent system of maintaining comprehensive, current and concise documentation of significant events which occur during [incarceration]." *Id.* at § I. Generic notes are to be objective and based on professional judgment, not personal opinion. *Id.* at § IV. Information is to be marked as "alleged" if not verified. *Id.* Only trained staff possessing information relevant to the subject offender are authorized to enter information. *Id.*

Bonilla's proposed categorical bar on the use of such observations is overly broad and unnecessary as the Board's rules and procedures afford inmates an adequate opportunity to contest and correct the information used by the Board to render its parole release decisions. In conducting a parole status review, whether through a case file review or a personal interview, the Board "shall normally consider only information that has been reviewed by the inmate" and "the inmate shall be given the opportunity to respond to

information." 205 Iowa Admin. Code r. 8.11. To safeguard the accuracy of the information reviewed by the Board during its release deliberations and to facilitate the inmate's opportunity to meaningfully respond, the "staff of the department of corrections shall discuss the information with the inmate and disclose to the inmate any factual allegations if the disclosure can be done in a manner that protects confidential sources" including any allegations of antisocial behavior. 205 Iowa Admin. Code r. 8.11. Like other information relayed to the Board, ICON generic notes can be reviewed by an inmate upon request. *See* Iowa DOC Policy AD-IS-05. Finally, the Board's administrative appeal process provides another avenue to contest the information relied upon to render the Board's findings. *See* 205 Iowa Admin. Code r. 15.2(6). Nothing in the record before the Court establishes that the Board is somehow systematically undermining in violation of these rules any offender's right to effectively review, respond to, or supplement the information presented to the Board.

DOC's classification process also permits inmates to discuss the contents of their parole release plans, including treatment recommendations, with their prison counselors and present their reasons for modification if they disagree with the findings. *See* Iowa DOC Policy IS-CL-02 (effective April 2018) *available at*: https://doc.iowa.gov/sites/default/files/is-cl-

02_offender_classification_1.pdf; Iowa DOC Policy IS-CL-03 (effective December 2015) *available at*: https://doc.iowa.gov/sites/default/files/is-cl-03_case_management.pdf. Through this process, an inmate receives notice of the DOC's proposed recommendations; those recommendations and the information used to formulate them are reviewed in person with DOC staff; and lastly, a staff refusal to effectuate requested changes may be appealed to the warden or other designated administrator for an impartial final adjudication. *Id.* These steps exhibit all the hallmarks of due process required of DOC when it exercises discretionary functions that implicate an inmate's protected liberty interests. *See Reilly v. Iowa Dist. Court for Henry Cnty.*, 783 N.W.2d 490, 497 (Iowa 2010).

Through the formulation of a proposed parole release plan and the corresponding DOC classification process, inmates directly interact in person with their prison counselors and can seek assistance in accurately communicating their own individual circumstances and information to the Board. Before each scheduled parole review, all offenders will have had numerous opportunities to personally scrutinize their case files and to identify and address with DOC staff outstanding programming needs and other relevant concerns.

In addition to the above formal procedures, inmates may submit to the Board in advance of any parole review or interview such documents or other written information and statements as they may deem appropriate to correct any perceived misstatements or to simply supplement their records. Other interested persons, including legal counsel and prison officials, may also assist or provide written statements and documents of their own to the Board at any time.

Thus, no appreciable benefit is likely to be derived from mandatory in-person parole hearings, especially when, as in this case, an inmate's disciplinary and treatment record is not contested. The Board's choice to implement a plan to conduct parole release deliberations mostly through case file reviews reasonably and constitutionally allows the Board to concentrate its time and resources on scheduling personal interviews in those cases most deserving of the Board's extra attention. *See Garner*, 529 U.S. at 252 ("The States must have due flexibility in formulating parole procedures"). Even in the absence of a personal appearance before the Board, the above avenues of communication more than allow offenders a fair opportunity to present substantive evidence to the Board of their maturation and rehabilitation.

Additionally, no statutory authority exists under Iowa law for the provision of legal counsel or independent experts at state expense during a parole interview or case file review. *See Roby*, 897 N.W.2d at 159 (Zager, J. dissenting) ("there is no right to counsel at parole hearings as there was at sentencing."); *see also* Iowa R. Crim. P. 2.28(1). A parole release deliberation is not a criminal proceeding. The Board is not required to take oral statements or arguments from attorneys during the conduct of release deliberations. *See* Iowa Code § 906.7.

This Court has recognized that the right to counsel "has more to do with a person's stake in the proceeding and the practical effect of the outcome" than the labeling of a proceeding as civil or criminal. *Snodgrass*, 325 N.W.2d at 742. Iowa's constitutionally protected right to counsel does extend to persons *charged* with misdemeanor criminal offenses who face the possibility of imprisonment under the applicable criminal statute. *State v. Young*, 863 N.W.2d 249, 281 (Iowa 2015). Yet, inmates facing prison disciplinary proceedings have no right to either retained or appointed counsel, even if the accrual of good time is jeopardized. *Giles v. State*, 511 N.W.2d 622, 627 (Iowa 1994). Juvenile offenders serving life terms like Bonilla have already had their liberty interests curtailed though their criminal trials and subsequent sentencings. Their situation is accordingly

more akin to inmates facing discipline and continuation of their lawful sentences than the defendants facing the potential deprivation of freedom through a pending criminal prosecution. The law does not provide Bonilla and similar juvenile offenders any heightened expectation of receiving a parole release. (Ruling at 9-10; App. 188-189). While care must be taken to permit juvenile offenders serving life terms a meaningful opportunity to demonstrate their rehabilitation and maturity, existing parole procedures – where a right to counsel generally does not apply – more than accommodate this goal. *See e.g., Ganz v. Bensinger*, 480 F.2d 88 (7th Cir. 1973).

Likewise, offenders such as Bonilla are repeatedly evaluated by mental health professionals commencing upon entry into the corrections system, including for the preparation of a presentence investigation report [PSI], the compilation of a reception report at Iowa Medical Classification Center, and finally at the request of the Board in anticipation of a parole review. *See* Iowa DOC Policy IS-CL-03. Such detailed evaluations provide a more than adequate baseline from which the Board can measure a juvenile offender's development of maturity and rehabilitative growth. Expert speculation as to a juvenile offender's future growth potential is not a replacement for real-time observations of contemporary behavior and conduct. *E.g., Sweet*, 879 N.W.2d at 838-39. For these reasons, Bonilla's

proposed use of independent experts at state expense is unlikely to meaningfully bolster the Board's parole review process.

Bonilla's demand for outside experts also overlooks the Board's required composition and inherent expertise. *See* Iowa Code §§ 904A.1, 2; *see also Zarate*, 908 N.W.2d at 848 ("parole board members must meet certain qualifications and are appointed for fixed terms"). By mandating that membership include a lawyer, social worker, and others knowledgeable in "correctional procedures and issues," the Iowa Code ensures that a wide range of relevant expertise is always available to evaluate each parole eligible offender's maturity and rehabilitation. *See* Iowa Code § 904A.2 (Composition of board).

Bonilla further alleges a due process violation arises from DOC's inability to immediately place him into sex offender treatment and other classes. For this reason, he seeks from the Board immediate access to relevant programming for himself and similar juvenile offenders serving life prison terms. Bonilla's assertion fails to recognize that he has no constitutional right to participate in any specific treatment program while in prison. *See Stewart v. Davies*, 954 F.2d 515, 516 (8th Cir. 1992) (no constitutional right to participate in rehabilitation program even if participating affected parole eligibility); *Wishon v. Gammon*, 978 F.2d 446,

450 (8th Cir. 1992) (no constitutional violation for denial of educational and vocational opportunities); *but see Belk v. State*, 905 N.W.2d 185 (Iowa 2017) (allowing an inmate to proceed under Iowa Code § 822.(1)(e) on a claim that a delay in providing sex offender treatment unconstitutionally deprived him of a protected liberty interest in accessing parole). More importantly, any such complaint against the Board is misplaced as the scheduling of inmates for SOTP and other interventions is solely within the purview of the DOC, not the Board. *See Belk*, 905 N.W.2d at 192 ([The offender's] complaint is really with the IDOC rather than the IBOP.). While the Board may request that an offender participate in specific interventions and programming, it has no means to actually compel DOC to act upon those requests. Because the DOC is not a named party to this case, its actions are not subject review at this time.[5] Nonetheless, Bonilla was transferred to the Newton Correctional Facility in October 2017 in anticipation of his placement into SOTP. (R. at 430; App. 664).

Once a parole status review has occurred, the Board shall either "give notice of a decision to grant parole by issuing an order for parole to the

[5] Even so, under the Court's *Belk* ruling, Bonilla's remedy against the DOC for failing to provide programming deemed necessary for achieving a parole release now appears to be through an application for Iowa Code chapter 822 postconviction relief, not chapter 17A judicial review. *See Belk* 905 N.W.2d at 192.

facility where the inmate in question is incarcerated" or "give notice of a decision to deny parole or work release by issuing a notice of parole or work release denial to the facility where the inmate in question is incarcerated." 205 Iowa Admin. Code r. 8.16. A detailed written ruling is not required to inform Bonilla and similar offenders of the reasons why they were denied release. *See Greenholtz*, 442 U.S. at 15-16 ("To require the parole authority to provide a summary of the evidence would tend to convert the process into an adversary proceeding and to equate the Board's parole-release determination with a guilt determination."); c*f. Johnson v. Iowa Bd. of Parole*, No. 02-1320, 2003 WL 1970475 (Iowa Ct. App. April 30, 2003).

The primary inquiry for the Board in these types of cases remains whether the offender has demonstrated sufficient maturity and rehabilitation to justify release. Bonilla, like all offenders, was given written notice of the Board's parole determinations complete with reasons and was informed of his opportunity to appeal. (R. at 189-90; R. at 425-26; R. at 427-28; R. at 512; App. 429-430; 659-660; 661-662; 746). These orders also offered guidance as to how he could demonstrate improvement. (*Id*.; App. 429-430; 659-660; 661-662; 746). Neither due process nor Iowa law require anything more of the Board. *See Greenholtz*, 442 U.S. at 16; *Johnson*, 635 N.W.2d at 489-90.

Lastly, the Board's administrative appeal process and the availability of judicial review provides juvenile offenders like Bonilla a more than adequate procedural remedy to protect their rights and to correct any errors committed by the Board during its parole release deliberations. *See* Iowa Code § 17A.19 (Judicial Review); 205 Iowa Admin. Code ch. 15 (Appeals of Decisions); *see also Johnson*, 635 N.W.2d at 489. "The right to a judicial hearing is the classic protection provided by the Due Process Clause against arbitrary deprivations of life, liberty, or property." *Larson v. City of Fergus Falls*, 229 F.3d 692, 697 (8th Cir. 2000). Although there is an expectation that the Board will comply with its statutory mandates and render its parole release decisions consistently with applicable legal standards, should it fail to do so for any given offender, the courthouse provides a more than adequate venue to seek correction of all prejudicial Board errors. *See Zarate*, 908 N.W.2d 848.

Any assertion that the Board only gave Bonilla or any other juvenile lifer cursory or superficial consideration is not supportable. Examination of the transcripts from the case file reviews conducted for Bonilla demonstrate that the respective Board members seriously undertook their duty to determine whether Bonilla could safely be released without posing a detriment to himself or others. (*See generally* R. at 359-66; R. at 471-75;

App. 593-600; 705-709). The Legislature has long entrusted the Board with the duty to identify and release those individuals who can be paroled without posing a danger to society and themselves. *See* Iowa Code §§ 906.4(1), 904.5. The competency, impartiality, and fairness of the Board has not been seriously questioned for its review of adult offenders. There is no reason to believe the Board will abdicate its responsibilities to do the same for those who committed class "A" felonies as juveniles. *See Zarate*, 908 N.W.2d at 848.

Nothing in the record now before the Court establishes that the procedural accommodations urged by Bonilla will appreciably improve the accuracy of the Board's present determinations as to whether certain juvenile offenders have sufficient maturity and rehabilitation to be safely released. Mere speculation is not adequate to meet Bonilla's heavy burden to declare Iowa's parole scheme facially unconstitutional for juvenile offenders serving life terms.

The Process is Working

In *State v. Louisell*, this Court left "for another day the question whether repeated cursory denials of parole deprive juvenile offenders who have shown demonstrable rehabilitation and maturity of a meaningful or realistic opportunity for release." *Louisell*, 865 N.W.2d at 602. The Court's

forbearance was justified as Yvette Louisell's fears that the Board's established case review process would render her eligibility for parole illusory ultimately proved unfounded.

Ms. Louisell is now among ten of forty parole eligible juvenile offenders who have in fact received a parole release. (*See* R. at 478-79; App. 712-713).[6] Blair Greiman voluntarily dismissed his federal lawsuit

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[6] Since the submission of Bonilla's case to the District Court, John Mulder was resentenced on July 5, 2018 to life with the possibility of parole and is awaiting his first Board review; Anthony Hoeck and Sean Rhomberg were released on parole; Ryan Wedebrand has received a future work release upon his successful completion of a minimum outs program (DR-26); and Matthew Payne, Thomas Bennet, and Juan Astello have each been referred for commencement of a gradual release via minimum security (DR-5). *See Salsbury Labs. v. Iowa Dep't of Envtl. Quality*, 276 N.W.2d 830, 835-36 (Iowa 1979) (Authorizing a court to take judicial notice of public documents issued by a state agency in furtherance of its conduct of chapter 17A judicial review).

It is acknowledged that two of the ten offenders released – Kristina Fetters and Robert Winfrey – received humanitarian paroles due to health issues. (*See* R. at 478-79; App. 712-713). The Board, however, had already granted Mr. Winfrey a future work release (DR-26) on June 8, 2017, prior to the diagnosis of his illness.

In all, forty-three juvenile offenders convicted of class "A" felonies have been resentenced in Iowa to life terms with eventual parole eligibility. Of the three who are not presently eligible for parole release: Heath Vance is scheduled to discharge his mandatory minimum in August 2020; Rene Zarate is awaiting resentencing after his mandatory minimum was overturned in March 2018, s*ee State v. Zarate*, 908 N.W.2d 831 (Iowa 2018); and, Christopher Langley passed away at age 28 prior to discharging his mandatory minimum for an additional first-degree robbery conviction.

after he too was released on parole without the need for court intervention after completing SOTP and a prolonged period of gradual release. (R. at 479, 484; App. 713; 718); *see* Dismissal Order – Docket No. 44, *Grieman v. Hodges, et al.*, SDIA No. 4:13-cv-00510-RP-CFB (filed 10/4/2017). Two of these forty juvenile offenders are presently awaiting a future work release upon their successful completion of a minimum outs program, while another four are commencing gradual release via minimum security. Thus, even excepting Kristina Fetters, over a quarter of all parole eligible juvenile offenders serving life terms have now earned a parole or a future work release from the Board since 2016.[7] (*See* R. at 478-79; App. 712-713). An additional ten percent have been slated for gradual release through minimum security. In total, forty percent of all parole eligible juveniles serving life sentences have achieved release or have been slated for a future release.

It is not surprising that there was a lag in the wake of the *Graham* and *Miller* decisions between juvenile offenders first becoming eligible for parole release consideration and the Board granting any such releases. Once

[7] In contrast, as of July 2017, ten out of sixty-two juvenile offenders serving life sentences have been paroled in Massachusetts despite the availability of state appointed counsel and paid independent experts. *See A State-By-State Look At Juvenile Life Without Parole*, Seattle Times (updated July 31, 2017) *available at*: https://www.seattletimes.com/nation-world/a-state-by-state-look-at-juvenile-life-without-parole/. Unlike in Iowa where annual parole reviews are mandatory, many in Massachusetts are still awaiting their first parole hearing. *Id.*

these individuals became eligible for parole release for the first time, the DOC initiated previously unnecessary counseling and treatment interventions to help these individuals prepare for a heretofore unobtainable life outside of prison. Further delay arose from the fact that many juvenile offenders have only recently been resentenced to a life term with parole eligibility. It has only been since 2015 that the majority of all parole eligible juvenile offenders – twenty-two in all – been resentenced to life with the possibility of parole. (R. at 478-79). Given the lengthy period of incarceration many of these offenders have served, a gradual step down in security supervision is not only desirable, but necessary to help them successfully transition from institutional confinement to parole release.

Although this transition period inevitably prolonged the gradual release process for some offenders, it can no longer be credibly argued that the Board is either unwilling or unable to initiate the release process for those meritorious juvenile offenders who have exhibited sufficient maturity and rehabilitation. Given the fact of the above released offenders, the Board's parole review practices unquestionably offer juvenile offenders serving life prison terms a real and meaningful opportunity for parole release.

I. BONILLA IS NOT ENTITLED TO RELIEF UNDER IOWA CODE SECTION 17A.19(10) BECAUSE HIS

SUBSTANTIAL RIGHTS WERE NOT PREJUDICED BY THE BOARD'S FAILURE TO RULE UPON HIS PROCEDURAL MOTIONS.

Standard of Review: Judicial review of final agency action under Iowa Code chapter 17A is for corrections of errors at law. *E.g.*, *Houck*, 752 N.W.2d at 16. It is Bonilla's burden to demonstrate that any challenged Board action not only violated applicable law, but that it also prejudiced his substantial rights. Iowa Code § 17A.19(8)(a); s*ee, e.g.*, *Hill*, 705 N.W.2d at 671.

Preservation of Error: The Board repeatedly sought dismissal of Bonilla's petition for judicial review due to his inability to demonstrate required prejudice. (*See* Motion to Dismiss; Respondent's Brief in Resistance to Petition for Judicial Review at 12 n.2; App. 21-25; 150). Although the District Court denied the Board's request for dismissal on this ground, this Court may affirm for any reason urged below. (*See* Ruling on Motion to Dismiss; Ruling at 3-4); App. 62-67; 182-183); e.*g.*, *King v. State*, 818 N.W.2d 1, 11 (Iowa 2012) ("[W]e will uphold a district court ruling on a ground other than the one upon which the district court relied provided the ground was urged in that court.").

Argument: A reviewing court is empowered to reverse, modify, or grant other appropriate relief to a petitioner under Iowa Code section 17A.19

only if that petitioner's substantial rights have been prejudiced by an agency action taken in violation of law. Iowa Code § 17A.19(10). Contrary to the District Court's characterization of the Board's argument, "the 'substantial rights' language of § 17A.19[(10)] has no bearing on a person or party's standing to obtain judicial review. It is, instead, merely a provision analogous to a harmless error rule." *City of Des Moines v. Public Emp't Relations Bd.*, 275 N.W.2d 753, 759 (Iowa 1979); (*see* Ruling at 4; App. 183). Thus, absent a showing that Bonilla's substantial rights were in fact prejudiced, any error on the Board's part in failing to rule upon his procedural motions is harmless and Bonilla is not entitled to any relief as a matter of law. *City of Des Moines*, 275 N.W.2d at 759 ("It is a direction to the court that an agency's action should not be tampered with unless the complaining party has in fact been harmed."); *see also Hill*, 705 N.W.2d at 671 ("This form of analysis is appropriate because it would be inefficient for us to provide relief from invalid agency action when the particular invalidity has not prejudiced the substantial rights of the petitioner.").

Bonilla could have brought an intra-agency appeal challenging any of his actual parole reviews on grounds that the Board's decision was rendered in violation of constitutional or statutory provisions or otherwise made upon

unlawful procedures.[8] *See* 205 Iowa Admin. Code r. 15.2(2), (4), (5). He did not. Bonilla failed to appeal any one of the Board's parole release denials. While Bonilla may have asked in advance of his July 2016 parole review that the Board use alternative procedures, in the end he never complained about the procedures the Board actually used nor the result the Board derived through those procedures.

By forgoing all challenges to the Board's conduct of his own parole release deliberations, Bonilla necessarily concedes that the Board arrived at a correct result regardless of any deficient review procedures. Because the Board's procedures resulted in the appropriate decision, Bonilla was not prejudiced by the Board's alleged failure to provide the requested procedural accommodations. Thus, Bonilla is not entitled to any relief under Iowa Code section 17A.19(10) as any purported legal errors by the Board were harmless. *See, e.g.*, *City of Des Moines*, 275 N.W.2d at 759; *Belle of Sioux City, L.P. v. Iowa Racing & Gaming Comm'n*, No. 14–1158, 2016 WL 1129935 at *9, (Iowa Ct. App. March 23, 2016).

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[8] This Court has instructed that "[e]ven facial constitutional issues are more effectively presented for adjudication based upon a specific factual record" that is developed through the full exhaustion of available proceedings before the agency entrusted with the determination of the adjudicative facts. *Shell Oil Co. v. Bair*, 417 N.W.2d 425, 430 (Iowa 1987). Thus, "[e]fficient and effective judicial administration is therefore better served by having the entire proceeding first determined by the agency." *Id*.

CONCLUSION

For the above-stated reasons, the District Court's ruling upholding the Board's procedures and practices should accordingly be affirmed.

REQUEST FOR ORAL ARGUMENT

Appellee Iowa Board of Parole requests that it be heard at the time of final submission of this matter.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*d*) and 6,903(1)(*g*)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font size and contains 12,257 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

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