No. 19-2910; 19-3019

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NORMAN BROWN, et al.,

Appellees/Cross-Appellants,

v.

ANNE PRECYTHE, et al.,

Appellants/Cross-Appellees.

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

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS

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Argument

The State's response to the Juvenile Class's cross-appeal has three critical weaknesses: it ignores key undisputed facts in the record, it turns a blind eye to Supreme Court precedent dictating what fundamental fairness requires in the parole context, and it concedes the Parole Board is incapable of conducting the complex analysis required by *Miller v. Alabama*. The District Court properly found that the State's juvenile parole process violates the Juvenile Class's due process rights in myriad ways. The assistance of counsel is indispensable to a practical realization of due process. Because the undisputed facts warrant the provision of counsel as a matter of due process and fundamental fairness, this Court should reverse that portion of the District Court's final order denying the class the opportunity for state-appointed counsel in the parole hearing.

A. The State concedes that the Parole Board is incapable of conducting complex *Miller* analyses.

In its reply brief, the State concedes that the Parole Board is incapable of conducting the complex analysis required by *Miller v. Alabama*: "None of the Board members is an attorney, and **the Board does not have the capacity or authority to consider legal**

arguments or make judicial determinations during parole hearings." Reply Br. at 19 (emphasis added). This admission underscores the necessity for counsel.

The nature of the Eighth Amendment inquiry demanded by S.B. 590 and *Miller* is complex. *See* Juvenile Class Br. at 52-57. Among other things, the Parole Board must meaningfully consider "youth and its attendant characteristics" and "hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences," *Miller v. Alabama*, 567 U.S. 460, 477-78 (2012), and must analyze whether a youth's crime reflected "transient immaturity" or "irreparable corruption." *Montgomery*, 136 S. Ct. 718, 735 (2016). This analysis is difficult even for attorneys or experts, let alone people who have been incarcerated their entire adult lives. *Graham v. Florida*, 560 U.S. 48, 68 (2010) ("These salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'") (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)). And in its reply brief, the State concedes it is an impossible task for the Parole Board.

The Juvenile Class must have counsel at these parole reviews to identify what evidence is required by *Miller*, and gather and present that evidence to the Parole Board to assist in its decision-making process.[1] Without counsel, the Parole Board admits it is unqualified to make *Miller*-compliant release decisions for Juvenile Class members.

B. Supreme Court precedent warrants the right to counsel.

The State makes no attempt to distinguish Supreme Court precedent finding a right to counsel rooted in due process. *See, e.g., Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (finding that, in the parole revocation context, there will be cases in which "fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees."); *In re Gault*, 387 U.S. 1, 40 (1967) (state-provided counsel necessary for juvenile delinquency hearing because "counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper

[1] The complexity of these parole reviews was discussed in detail by the Juvenile Class's expert witness. *See* J.A. A-689-702, A-901-902, A-917-920.

orders of disposition"); *Vitek v. Jones*, 445 U.S. 480, 497 (1980) (state-provided counsel necessary for involuntary mental health treatment because "such a prisoner is more likely to be unable to understand or exercise his rights").

Discussion of *Gault*—a landmark case finding a due process right to counsel for juvenile offenders—is markedly absent from the State's response, perhaps because application of *Gault*'s reasoning supports the Juvenile Class's right to counsel at their parole hearings. Juvenile parole reviews are necessarily complex. As noted in the Juvenile Class's opening brief, the hearings require the investigation and compiling of voluminous historical evidence, as well as analysis of multiple complex factors related to the Juvenile Class member's youth and development. Juvenile Class Br. at 13-14 and 52-57. Here, as in *Gault*, "[t]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings," and to ascertain whether they have mitigating evidence regarding youth at the time of the offense, and how to submit it. *Gault*, 387 U.S. at 36. Indeed, the Supreme Court noted complexity of proceedings, including potential mitigating evidence, as a critical factor in determining whether

parolees are entitled to state-funded counsel in the revocation context. *Gagnon*, 411 U.S. at 790 (counsel should be provided in different instances, including where there are substantial mitigating circumstances making revocation appropriate, and those reasons "are complex or otherwise difficult to develop or present"). Having an attorney in the parole hearing room also would alleviate the inherent tension between demonstrating remorse for the crime and demonstrating maturity or change over time. *See* J.A. A-697.

While the State argues there is no evidence of a disparity between those who can hire counsel and those who cannot, Reply Br. at 19, there is clear evidence in the record that most class members are not likely to effectively present their cases for release without the aid of counsel. This evidence comes, in part, from Heidi Rummel's expert testimony. *See* J.A. A-689-690, A-695-700, A-707, A-791-792; *see also* Section C, *infra*. Although the State takes issue with the Juvenile Class's characterization of this evidence as undisputed, Reply Br. at 16, it fails to identify any facts in the record which dispute or even call into question those presented by the Juvenile Class.

Even without the aid of expert testimony, the adversarial nature of parole proceedings is evidenced in the record, and the State's wishful casting off of this argument as a "misunderstand[ing] of the nature of parole proceedings," Reply Br. at 20, cannot dispel this fact. Prosecutors are routinely notified of parole hearings and regularly attend—sometimes offering accounts of the offense or statements in opposition to release outside the inmate's presence. J.A. A-318-319; J.S.A. SA-27-28, SA-799-857, SA-863-866, SA-891-957, SA-958-1019, SA-1029-1073.[2] Law enforcement are invited to participate in parole hearings as well. J.A. A-121, A-793, A-808. At one class member's hearing, a surviving victim made legal arguments in response to court documents, and suggested the class member was armed despite the fact that evidence adduced at trial demonstrated they were an unarmed accomplice. J.A. A-317-318.

This asymmetry between the State and Juvenile Class makes the proceedings less fair overall, and warrants the provision of counsel. *See Gault*, 387 U.S. at 35-36; *Turner v. Rogers*, 564 U.S.

[2] While delegates for the class member are told the hearing panel is not there to "retry the case," prosecutors receive no such limiting warning. *Id.*

431, 447 (2011); *see also Diatchenko v. District Attorney of Suffolk Dist*, 27 N.E.3d 349, 360 (Mass. 2015) (in light of likely opposition to parole, juvenile parole hearings can hardly be characterized as "uncontested"). Even accepting the State's version of parole proceedings as informal in nature, the lack of technical rules of procedure or evidence does not eliminate the need for counsel in order ensure the parole consideration is meaningful. *Gagnon*, 411 U.S. at 786-87; *accord Gault*, 387 U.S. at 40. In fact, the Supreme Court has historically recognized that informality can present a danger. *See, e.g., Gault*, 387 U.S. at 33 n52 (discussing the issue of formality at length, and commenting there is an unfairness in too much informality).

If class members were resentenced after *Miller*, they would see circuit court judges in open court, subject to the rules of evidence and criminal procedure. Instead, they receive "purely subjective appraisals" of Board members whom the State concedes are unqualified to make *Miller* decisions. Reply Br. at 19. In *Gault*, the Supreme Court concluded that the once-celebrated informality of juvenile courts actually warranted the right to counsel given the potential severity of punishment at stake. *See*, *generally*, *Gault*, 387

U.S. 1. So too, here, the evidence in the record demonstrates that the provision of counsel for the Juvenile Class is "indispensable to a practical realization of due process of law," *Gault*, 387 U.S. at 40, and necessary to ensure the rights noted by the District Court are implemented in a meaningful way.

The cases the State does cite, *Dorado v. Kerr*, 454 F.2d 892 (9th Cir. 1972) and *Ganz v. Besinger*, 480 F.2d 88 (7th Cir. 1973), are distinguishable because they predate *Miller* by 40 years, focus primarily on a Sixth Amendment right to counsel, and do not entail claims brought by juvenile offenders. In *Dorado*, for example, a California adult prisoner argued the state violated his constitutional rights by denying him assistance of counsel at annual parole hearings. 454 F.2d at 897. The Ninth Circuit affirmed dismissal of the claims because the plaintiff "has no vested right to…parole." *Id.* *Dorado* is inapposite; he Supreme Court has told states they must treat children differently. *Miller*, 567 U.S. 460, 474 (2012) (Mandatory penalty schemes for juvenile offenders contravene *Roper* and *Graham*'s "foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."). Unlike the typical adult offender, members of

the Juvenile Class do have a liberty interest in a meaningful parole review. Juvenile Class Br. at 26-27. And unlike the plaintiffs in both *Dorado* and *Ganz*, members of the Juvenile Class are not serving valid sentences. *See* Juvenile Class Br. at 23 and 30. Thus, *Dorado* and *Ganz*—like *Greenholtz*—are inapplicable here.

The State's reliance on these decades-old cases ignores Supreme Court precedent on extreme juvenile sentencing and ignores the true nature of these juvenile parole hearings. The State could have resentenced the Juvenile Class after *Miller* and *Montgomery* invalidated their mandatory life without parole sentences. Instead, the Parole Board determines the time they will serve. These parole hearings are a substitute for resentencing; they are the only thing that makes the class members' sentences constitutional. The Juvenile Class would have the due process right to counsel at sentencing[3]; they should have the same right at what amounts to a resentencing.

Montgomery v. Louisiana, 136 S.Ct. 718 (2016), does not foreclose the Juvenile Class's right to counsel. To the contrary,

[3] *Mempa v. Rhay*, 389 U.S. 128, 136 (1967); *State v. Kelly*, 217 So.3d 576, 585 (La. App. 2017).

Montgomery weighs in favor of the right to counsel because, along with *Graham* and *Miller*, it requires the Juvenile Class be given a meaningful and realistic opportunity for release based on demonstrated maturity and rehabilitation. Here the Juvenile Class has presented evidence warranting the right to counsel, deriving from the due process clause, because the proceedings are complex, class members are generally not equipped to effectively advocate for themselves, and the liberty interest at stake is significant.

C. The undisputed facts in the record demonstrate the need for state-appointed counsel.

The State erroneously argues that there is no evidence in the record of the need for counsel. After the District Court found that the State's parole process for the Juvenile Class violated due process in multiple ways, it conducted an evidentiary hearing on the parties' respective compliance plans. At that hearing, the Juvenile Class presented undisputed expert testimony evidencing the need for counsel. *See, e.g.,* J.A. A-693-702 (Juvenile Class' expert testifying about the many critical functions performed by counsel in a JLWOP parole process). As noted above and in the Juvenile Class's opening brief, this testimony addressed the complex nature of juvenile parole

proceedings as well as the unique challenges class members face in navigating that process due to their youth at the time of the offense and lengthy period of incarceration. Juvenile Class Br. at 13-14 and 52-57.

For example, the assistance of counsel is necessary to understand *Miller* and what it requires, and identifying what evidence is relevant to assessing someone's growth and maturity decades after the crime. J.A. A-690. Even locating this evidence can be difficult given the passage of time and the fact that most who are witness to the crime or the inmate's rehabilitation may not want to openly discuss such sensitive topics. J.A. A-694. All class members benefit from an attorney advising them of their rights in the parole process, but that is especially true for people with intellectual disabilities or a background of trauma, or who are at a disadvantage simply because they grew up behind bars, as members of the Juvenile Class have. J.A. A-695-697.In sum, the Juvenile Class's expert witness testified that, in her extensive experience representing juvenile offenders, including at parole proceedings, "effective counsel is the most critical difference in someone being granted or denied parole." J.A. A-693. The State is either gaslighting this Court or ignoring the record when

it argues "there is no reason to believe from the record that counsel is necessary to protect" the Juvenile Class's due process interests.[4]

D. The District Court did not have to accept the State's compliance plan in whole cloth.

Finally, the State's contention that the District Court could not have found a right to state-funded counsel here because doing so would extend beyond the confines of the constitutional violations it found reflects a misinterpretation of the Juvenile Class's claim. As noted above, the Juvenile Class has argued—and presented evidence demonstrating—that the provision of counsel is necessary to ensure the opportunity for parole provided is meaningful. In other words, and as noted above, the provision of counsel at juvenile parole hearings is necessary to ensure due process is provided. For this reason, had the District Court found the Juvenile Class had a right

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[4] The Juvenile Class does not dwell on the State's argument that the Juvenile Class did not raise the right to counsel in its Complaint or summary judgment briefing below because that argument is swiftly dispelled by the record, including the State's own characterization of the relief sought. *See, e.g.,* J.A. A-101-103 (prayer for relief in First Amended Complaint, which includes *inter alia* "[t]he right to meaningful representation by counsel at parole hearings"); A-121-122 (State's motion to dismiss, characterizing the Juvenile Class's complaint "that they are not guaranteed an attorney in addition to their hearing delegate"); A-153 (State's reply in support of motion to dismiss, stating: "Plaintiffs actually seek…a right to counsel").

to counsel at their parole hearings, it would not have gone beyond its jurisdiction under the PLRA or violated concepts of federalism.

Even more fundamentally, the State conflates deference with abdication. The District Court did defer to the State in proposing, in the first instance, a plan for remedying its due process violations. But it also allowed the class to comment on the State's proposal and to offer expert opinion about it. That is entirely consistent with the PLRA. *See, e.g., Ginest v. Board of County Commissioners*, 333 F.Supp. 2d 1190, 1209-10 (D. Wyo. 2004). And the District Court did not have to accept the State's proposed compliance plan in whole cloth. Nor could it. As this Court has affirmed, "[i]f the defendant fails to respond or responds with a legally unacceptable remedy, the court must fashion its own remedy or adopt a remedial plan proposed by the plaintiffs." *Missouri State Conference of the NAACP v. Ferguson-Florissant School Dist.*, 219 F.Supp. 3d 949, 953 (E.D. Mo. 2016), *aff'd*, 894 F.3d 924 (8th Cir. 2018), *cert. denied,* 139 S.Ct. 826 (2019).

Conclusion

For these reasons, the Juvenile Class respectfully submits that the Court should reverse that portion of the relief denying the class the opportunity for state-appointed counsel in the parole hearing.

Respectfully submitted,

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