PAROLE BOARD HEARINGS FOR JUVENILE OFFENDERS

Juvenile Sentencing Project
Quinnipiac University School of Law

January 2020

This memo addresses the criteria and procedures that parole boards should use in considering the release of juvenile offenders serving lengthy sentences. We provide model provisions that states could adopt though legislation or regulations.

I. BACKGROUND: PAROLE HEARINGS FOR JUVENILE OFFENDERS

The U.S. Supreme Court has placed Eighth Amendment limits on the sentences that may be imposed on children. *Graham v. Florida* held that children convicted of nonhomicide offenses cannot be sentenced to life without parole and must have a "realistic" and "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[1] *Miller v. Alabama* and *Montgomery v. Louisiana* require sentencers to give mitigating effect to the characteristics and circumstances of youth when a child faces the possibility of a life-without-parole sentence. In the vast majority of homicide cases, sentences imposed on children must provide a meaningful opportunity for release—except in the rarest of cases where the sentencer determines that the particular child "exhibits such irretrievable depravity that rehabilitation is impossible."[2]

Courts have concluded that sentences may violate the Eighth Amendment even if they are not technically labeled "life without parole." The relevant inquiry is whether the sentence provides a realistic and meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. A sentence fails to provide such an opportunity for release within the meaning of the Eighth Amendment if: (1) the sentence does not provide a chance for release at a meaningful point in time in an individual's life, or (2) the procedures and criteria used by a state parole board (or other releasing entity) fail to provide a meaningful and realistic opportunity for release based on an individual's maturity and rehabilitation. As described below, to provide a meaningful opportunity for release, the parole board must give great mitigating weight to youth and base its release decision on rehabilitation rather than the severity of the offense. The parole process should result in most juvenile offenders actually obtaining release.

---

[1] *Graham v. Florida*, 560 U.S. 48, 74-75 (2010).
[2] *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016); *Miller v. Alabama*, 567 U.S. 460, 472-73 (2012).

II. CRITERIA AND PROCEDURES FOR JUVENILE PAROLE HEARINGS

A. Criteria for Release Decision

The U.S. Supreme Court decisions in *Graham, Miller*, and *Montgomery* require that juvenile offenders have a "meaningful opportunity to obtain release *based on demonstrated maturity and rehabilitation*."[3] Thus, to meet constitutional requirements, the parole board must base its release decision on an assessment of a juvenile offender's maturity and rehabilitation since the time of the crime.[4] Mere consideration of youth as one of many factors does not satisfy the Eighth Amendment. Rather, parole boards should give significant mitigating weight to youth and apply a presumption in favor of release.

- *Rehabilitation Rather than Crime Severity*: The parole board must focus its inquiry on assessing an individual's post-crime maturation and rehabilitation and not the nature of the offense—except as relevant to establishing a baseline from which to determine post-crime change. The board may not deny release based on the severity of the offense or the impact of the crime on the victim.[5] Most cases involving juveniles serving lengthy sentences involve serious crimes that caused substantial harm to victims. The lengthy prison sentence imposed reflects the harm. Once the date for parole eligibility is reached, the sentence has served its

[3] *Graham*, 560 U.S. at 75.

[4] Arkansas recently passed legislation requiring its parole board to ensure "a meaningful opportunity to be released on parole based on demonstrated maturity and rehabilitation" and directing consideration of, *inter alia*, "[i]mmaturity . . . at the time of the offense" and "[s]ubsequent growth and increased maturity . . . during incarceration," as well as participation in rehabilitative and educational programs. *See* Ark. Code § 16-93-621(b). Similarly, Oregon law provides that if "based on the consideration of the age and immaturity of the person at the time of the offense and the person's behavior thereafter, the person has demonstrated maturity and rehabilitation, the board *shall release the person*." *See* Or. Rev. Stat. § Ch. 634, § 25-7 (emphasis added). West Virginia and California similarly require parole boards to consider post-crime growth and increased maturity. *See* W. Va. Code § 62-12-13b(b); Cal. Penal Code § 4801(c). In addition, the Rhode Island Parole Board recently updated its guidelines for juvenile offenders to require consideration of "any subsequent growth and increased maturity of the prisoner during incarceration," including "[p]articipation in available rehabilitative and education programs" and "[e]fforts made toward rehabilitation." R.I. Parole Board, 2018 Guidelines § 1.5(F)(2), http://www.paroleboard.ri.gov/guidelines/2018%20PB%20Guidelines%20as%20AMENDED%20and%20FINAL.pdf.

[5] Courts have emphasized that the parole board's decision must be based on rehabilitation rather than the severity of the offense. *See, e.g.*, *Greiman v. Hodges*, 79 F. Supp. 3d 933, 944 (S.D. Iowa 2015) (denying defendants' motion to dismiss based in part on plaintiff's allegation that the parole board denied parole based solely on the seriousness of the offense, thus depriving him of a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation); *Brown v. Precythe*, No. 2:17-cv-04082-NKL, 2018 WL 4956519, at 9 (W.D. Mo. Oct. 12, 2018) (granting in part plaintiffs' motion for summary judgment—finding that the state's parole board policies, procedures, and customs for parole review for those serving juvenile life without parole sentences were unconstitutional—citing, *inter alia*, the ability of the Board to base a denial of parole on the "circumstances of the offense" alone, which impermissibly authorizes it to disregard evidence of subsequent rehabilitation and maturity); *Bonilla v. Iowa Board of Parole*, 930 N.W.2d 751, 772 (Iowa 2019) ("[i]nstead of focusing on the underlying crime, parole authorities must focus on the dynamic factors of the development of youth and the high likelihood of maturity and rehabilitation.").

retributive purpose and the focus should be on whether the individual has rehabilitated and can contribute in a positive way to society. This focus on rehabilitation rather than crime severity is necessary to comply with the Eighth Amendment's requirement of a "meaningful opportunity to obtain release *based on demonstrated maturity and rehabilitation*."

In assessing rehabilitation, parole boards should consider an individual's participation in education, treatment, and rehabilitative programs—to the extent these opportunities have been made available. An individual's ability to progress to and succeed at lesser security levels (if the ability to progress is available) is a useful means for demonstrating maturity and rehabilitation. Parole boards should consider an individual's ability to avoid disciplinary tickets in the prison but give greater weight to more recent conduct. Many children facing long sentences receive tickets early in their incarceration while they are still maturing and adjusting to life in adult prison.

- *Youth Matters:* The parole board must understand the circumstances and characteristics of the juvenile at the time of the offense. The board must give mitigating effect to the diminished culpability of children as compared to adults, and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate risks and consequences. At the parole hearing, youth must be accounted for—both to set a baseline for measuring post-crime growth and change, and to provide context for the individual's behavior before, during, and after the crime.[6]

- *Presumption of Release*: Crimes committed by children are typically the result of transient immaturity rather than irreparable corruption. Ordinary adolescent development diminishes the likelihood that a juvenile offender will be a danger as an adult. Over time, most individuals who commit crimes as children will mature

[6] *See, e.g.*, Ark. Code § 16-93-621(b)(2) (directing the parole board to consider "[t]he diminished culpability of minors," "[t]he hallmark features of youth," and certain other mitigating factors of youth); Cal. Penal Code § 4801(c) (same); W. Va. Code § 62-12-13b(b) (same); see also R.I. Parole Board, 2018 Guidelines § 1.5(F)(2) (same); Or. Rev. Stat. § Ch. 634, §25-5-(a)-(g) (requiring similar consideration of mitigating factors of youth); 730 Ill. Comp. Stat. 5/5-4.5-115(j) (same). Oregon law makes clear that "under no circumstances may the board consider the age of the person as an aggravating factor." *See* Or. Rev. Stat. § Ch. 634, §25-6.

Courts have stressed the need for parole boards to give mitigating weight to youth. *See, e.g., Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 140 A.D.3d 34, 36 (N.Y. App. Div. 2016) ("The Board [of Parole], as the entity charged with determining whether petitioner will serve a life sentence, was required to consider the significance of petitioner's youth and its attendant circumstances at the time of the commission of the crime before making a parole determination."); *Atwell v. State*, 197 So. 3d 1040, 1049 (Fla. 2016) (noting, in remanding for resentencing, that "unlike other states, there are no special protections expressly afforded [by the parole board] to juvenile offenders and no consideration of the diminished culpability of the youth at the time of the offense"); *Hayden v. Keller*, 134 F. Supp. 3d 1000, 1009 (E.D.N.C. 2015) (holding that failure to distinguish parole review for juvenile offenders and to consider children's diminished culpability and heightened capacity for change "wholly fails to provide [petitioner] with any 'meaningful opportunity'" for parole).

and change.[7] Thus, parole boards should apply a presumption of release when a juvenile offender becomes eligible for parole. This presumption can be rebutted by evidence that the individual has not rehabilitated.

B. Procedures for Release Decision

The U.S. Supreme Court decisions require parole boards to provide a "realistic" and "meaningful" opportunity for release based on rehabilitation. Certain procedures must be in place to ensure that parole boards can make a meaningful assessment of an individual's rehabilitation and provide a realistic opportunity for release.

- *Access to Rehabilitative Programs:* Procedures must exist to ensure that parole-eligible juvenile offenders are aware of and have access to the programming necessary to their rehabilitation and release. Parole boards and departments of correction should ensure that juvenile offenders are given guidance about and access to programs and services that support rehabilitation and permit parole boards to meaningfully access whether rehabilitation has been achieved.[8]

- *Appointment of Counsel:* Counsel is essential to providing meaningful parole hearings for juvenile offenders. Effective preparation for parole hearings is especially challenging for individuals who have been incarcerated since they were children and counsel is particularly important in contextualizing the role of youth in the underlying offense. Counsel can ensure that all relevant evidence is presented to the parole board and that inaccurate information is rebutted.[9]

---

[7] *See, e.g.*, Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014-1016 (2003).

[8] In certain cases involving juveniles serving lengthy sentences, Washington requires the department of correction, at least five years prior to a hearing, to "conduct an assessment of the offender and identify programming and services that would be appropriate to prepare the offender for return to the community." Wash. Rev. Code § 10.95.030(3)(e). "To the extent possible, the department shall make programming available as identified by the assessment." *Id.* California directs its parole board in juvenile cases to meet with the prospective parolee six years prior to the hearing and provide the individual with "information about the parole hearing process, legal factors relevant to his or her suitability or unsuitability for parole, and individualized recommendations for the inmate regarding his or her work assignments, rehabilitative programs, and institutional behavior." Cal. Penal Code § 3041(a)(1). And the Iowa Supreme Court has held that if the state, through the parole board, wishes to condition release upon completion of certain programming, the department of corrections cannot unreasonably withhold such programming from a juvenile offender. *Bonilla v. Iowa Board of Parole*, 930 N.W.2d 751, 786 (Iowa 2019).

[9] Some states such as Connecticut, Massachusetts, Oregon, and Illinois require the appointment of counsel for parole hearings for juvenile offenders serving lengthy sentences. *See, e.g.*, Conn. Gen. Stat. § 54-125a(f)(3) (requiring the appointment of counsel to assist indigent juveniles serving more than 10 years with parole hearings); *Diatchenko v. Dist. Attorney for Suffolk Dist*., 27 N.E.3d 349, 361 (Mass. 2015) (requiring the appointment of counsel to assist juvenile offenders serving life sentences with parole hearings); Or. Rev. Stat. § 634, § 25-12 (providing a right to counsel, including counsel appointed at board expense, at parole board hearings for juvenile offenders); 730 Ill. Comp. Stat. 5/5-4.5-115(e) (requiring that counsel be appointed by the Prisoner Review Board upon a finding of indigency one year prior to the person being eligible for parole).

- *Notice of Hearing, Ability to Submit Materials, and Access to File:* The parole board must provide adequate notice of when the hearing will be held and permit juvenile offenders to gather and submit evidence relevant to maturity and rehabilitation. In addition, juvenile offenders and their counsel must have access to all information used by the board and an ability to correct or challenge that information. Without knowledge of the information upon which the board is relying, prospective parolees cannot dispute or correct inaccuracies or provide alternative accounts of reports that may be essential to the release decision. Permitting access to and opportunity to correct the record helps ensure that the board bases its decision on accurate information.[10]

- *In-Person Hearing Before Decisionmakers:* In-person parole hearings, permitting real-time exchange between prospective parolees and decisionmakers, help the parole board to more accurately assess a juvenile offender's level of insight and maturity. In addition, such hearings allow prospective parolees the opportunity to address the board's questions and to correct or rebut inaccurate information that has been presented to the board. Prospective parolees and their counsel should be permitted to speak at such hearings.[11]

- *Recording, Statement of Reasons for Decision, and Judicial Review:* Meaningful judicial review of decisions to deny parole is essential to a constitutionally adequate parole process. To ensure review is meaningful, parole release hearings must be recorded and retained, and parole boards must provide a statement of reasons for the denial that provides meaningful guidance to the prospective parolee and third parties about the basis for the denial decision and what can be done to improve the likelihood of parole at subsequent hearings. Rote recitation of factors considered does not satisfy this requirement.[12]

- *Subsequent Hearings:* Parole boards must periodically assess whether a juvenile offender has demonstrated maturity and rehabilitation and can be released. Denying subsequent hearings could result in the incarceration of a juvenile offender who has rehabilitated. Such incarceration renders the sentence disproportionate in violation of the Eighth Amendment. Parole boards should provide an opportunity for a hearing at least every three years.

---

[10] Many states have provisions explicitly providing that juveniles may submit evidence of rehabilitation and giving them access to review their parole files in advance of the hearing. *See, e.g.*, Cal. Penal Code §§ 3041.5(a)(1), 3051(f)(2); 730 Ill. Comp. Stat. 5/5-4.5-115(f) (requiring, with limited exception, the Prisoner Review Board to send the eligible individual, and counsel, any written documents and materials it will be considering). The Supreme Court of Iowa recently found that "with respect to annual parole reviews, a juvenile offender has a due process right to access the file considered by the Board and an opportunity to present additional relevant information to the Board." *Bonilla v. Iowa Board of Parole*, 930 N.W.2d 751, 780, 781 (Iowa 2019).

[11] Most states provide for in-person hearings before decisionmakers, and some states have enacted provisions specifically providing that juveniles may speak at their hearings. *See, e.g.*, Cal. Penal Code § 3041.5(a)(2); Conn. Gen. Stat. § 54-125a(f)(3).

[12] The Massachusetts Supreme Judicial Court requires judicial review of parole hearings for juveniles serving life sentences. *Diatchenko*, 27 N.E.3d at 366.

- *Maintaining Data and Improving Processes:* Parole boards should maintain data about outcomes and put in place structures for reviewing and improving their processes.

III. MODEL LEGISLATION/REGULATIONS GOVERNING JUVENILE PAROLE HEARINGS

The following language could be adopted by legislation or regulation to govern parole hearings for juvenile offenders serving lengthy sentences:

> *(a) When a person who is serving a sentence imposed as the result of an offense or offenses committed when he or she was less than eighteen years of age becomes eligible for parole pursuant to applicable provisions of law, the parole board shall ensure that the person has a meaningful opportunity for release based on demonstrated maturity and rehabilitation.*
>
> *(b) Within the first year of such person's incarceration, the department of correction shall conduct an assessment of the person and identify programming and services that would be appropriate to prepare the person for return to the community. After five years of incarceration, a representative from the parole board should meet with the person to provide information about the parole hearing process and individualized recommendations regarding work assignments, rehabilitative programs, and institutional behavior. Such meetings shall be conducted at least every five years. The department of correction shall make the programming that has been identified available in advance of the person's parole hearing.*
>
> *(c) At least six months before a person becomes eligible for parole pursuant to this subsection, the board shall hold a hearing to determine such person's suitability for parole release. At least twelve months prior to such hearing, the board shall notify the office of Chief Public Defender, the appropriate state's attorney, and the Office of Victim Services of such person's eligibility for parole release pursuant to this subsection. The office of Chief Public Defender shall assign counsel for such person if such person is indigent.*
>
> *(d) In advance of the parole hearing, the board shall permit the person to review information that the board will consider in determining such person's suitability for release, including any statements concerning the circumstances of the offense and any risk or psychological assessment conducted. In advance of the hearing, the board shall permit such person to submit materials to the board including, but not limited to, letters of*

support, court records, expert reports, and records relating to the person's childhood and efforts at rehabilitation.

(e) At the hearing, the board shall permit the person eligible for parole and his or her counsel to make statements. The person shall answer the board's questions relating to growth, maturity, rehabilitation, and plans upon release. The hearing shall be conducted in person and before more than one member of the board. For release to be ordered, a majority of the members presiding over the hearing must vote in favor of release. The hearing shall be recorded and the recording retained by the board.

(f) The board shall order release if it determines that a person has demonstrated maturity and rehabilitation since the time of the offense and there is a reasonable probability that he or she will live and remain at liberty without violating the law. The board shall apply a presumption that a person should be released at the time of parole eligibility. This presumption may be rebutted by evidence that such person has not rehabilitated. The board shall not deny parole based on the severity of the offense or the impact of the offense on the victim.

(g) In assessing the person's overall maturity and rehabilitation since the time of the offense, the board shall consider:

(1) the person's participation in rehabilitative, treatment, and educational programs while in prison, if those programs have been made available, and use of self-study for self-improvement;

(2) the person's history of employment in the prison, if opportunities have been available;

(2) the person's contributions to the welfare of other persons;

(3) the person's efforts to overcome substance abuse, addiction, trauma, poverty, and lack of education;

(4) obstacles that such person may have faced as a child entering the adult correctional system.

(5) the person's record of discipline in the prison, with greater weight given to more recent conduct occurring after the person has had time to mature and adjust to prison;

(6) the person's ability to progress to and succeed at lesser security levels, if the ability to progress is available; and

(7) any other information relevant to the person's maturity and rehabilitation.

(h) In reaching a release decision, the board shall give great mitigating weight to the following factors:

(1) the diminished culpability of juveniles as compared to that of adults;

(2) the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate risks and consequences;
(3) the young age of the person at the time of the offense;
(4) the immaturity of the person at the time of the offense; and
(5) the person's family and community circumstances at the time of the offense, including any history of abuse, trauma, poverty, and involvement in the child welfare system.

(i) If the board denies release, the board shall provide a statement of reasons supporting its decision and guidance as to what will improve the person's likelihood of release at subsequent hearings. If the board determines that continued confinement is necessary, the board shall reassess a person's suitability for parole at a hearing no more than three years after any decision denying parole.

(j) Decisions of the board shall be subject to judicial review.