

# QUINNIPIAC UNIVERSITY

SCHOOL OF LAW

Legal Clinics

November 11, 2016

Mujahid Farid  
Correctional Association of New York  
2090 Adam Clayton Powell Jr. Blvd., #200  
New York, NY 10027

**Re: Comments on Proposed Amendments of § 8002.1, 8002.2 and 8002.3 of Title 9 NYCRR**

Dear Mr. Farid,

We write to provide comments on the proposed amendments of § 8002.1, 8002.2 and 8002.3, and, in particular, to urge you to revise the proposed regulations under § 8002.2(c) to provide a right to counsel and other vital procedural protections for juvenile offenders at parole hearings.

The U.S. Supreme Court has made clear that in all but the most extraordinary cases, life-sentenced juvenile offenders are entitled to a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”<sup>1</sup> Access to counsel—among other procedural protections—is essential to ensure that juvenile offenders, who face special challenges in preparing for parole hearings, receive the meaningful opportunity to obtain release to which they are constitutionally entitled.

Juvenile offenders may find it especially difficult to navigate the parole process without the assistance of counsel. Juvenile offenders have often entered prison with little education and may have been denied access to educational programs while in prison. They may have few remaining ties to the community after spending decades behind bars and thus will need help in developing a release plan. An extensive investigation of the client’s childhood and experiences while in prison is necessary to develop mitigating information and to present a case for release. An individual who has grown up in prison will almost certainly not have the capacity or resources to undertake this kind of comprehensive effort.

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<sup>1</sup> Graham v. Florida, 560 U.S. 48, 75 (2010)); Miller v. Alabama, 132 S.Ct. 2455, 2469 (2012).

Other states in the region have recognized the necessity of counsel for juvenile offenders during the parole process. Connecticut passed a statute in 2015 that retroactively eliminated life-without-parole sentences for juvenile offenders and granted parole eligibility, after statutorily specified periods, to all juveniles serving sentences of more than 10 years.<sup>2</sup> Under the statute, the Chief Public Defender must appoint counsel for indigent individuals one year in advance of the hearing to help them prepare, and counsel is permitted to submit reports and other documents to the Board of Pardons and Paroles in advance of the hearing.<sup>3</sup> Moreover, the Board permits counsel for the prisoner to make a closing statement at the hearing.

In Massachusetts, juvenile homicide offenders are similarly entitled to counsel during the parole process as a matter of state constitutional law. In 2015, the Massachusetts Supreme Judicial Court held that juveniles convicted of both first- and second-degree murder are entitled to representation by counsel in connection with their initial application for parole.<sup>4</sup> The Court reasoned that although this procedural protection is not constitutionally required in adult cases, it is necessary in juvenile cases (along with other protections) in light of the constitutional mandate to provide such inmates with a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”<sup>5</sup> The court reasoned that the role of counsel is particularly important in these juvenile cases where “the question the board must answer for each inmate seeking parole, namely, whether he or she is likely to reoffend, requires the board to weigh multiple factors and consider a wide variety of evidence.”<sup>6</sup> This task is likely to be more complex for a juvenile homicide offender, the court explained, because of the unique characteristics of such offenders, for whom “[a] potentially massive amount of information bears on these issues, including legal, medical, disciplinary, educational, and work-related evidence. . . . An unrepresented, indigent juvenile homicide offender will likely lack the skills and resources to gather, analyze, and present this evidence adequately.”<sup>7</sup>

Moreover, numerous states, including California, Colorado, Hawaii, Montana, Oregon, and Washington, provide attorneys to represent indigent inmates in the parole release process—including juvenile *and* adult offenders—in at least some cases at no cost to the inmate.<sup>8</sup> These states recognize that access to counsel is among the most important safeguards for meaningful parole hearings.

Although access to counsel is essential, it is not enough on its own to safeguard the right of juvenile offenders to a meaningful opportunity to obtain release. We therefore strongly encourage amending the proposed regulations to include additional necessary protections for juvenile offenders in parole hearings. Among other protections: hearings should be conducted in

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<sup>2</sup> S.B. 796, Jan. Sess. (Conn. 2015) (amending Conn. Gen. Stat. §§ 54-125a, 46b-127, 46b-133c, 46b-133d, 53a-46a, 53a-54b, 53a-54d, 53a-54a and enacting new sections), <http://www.cga.ct.gov/2015/ACT/pa/pdf/2015PA-00084-R00SB-00796-PA.pdf>.

<sup>3</sup> Conn. Gen. Stat. § 15-125(a)(f)(3).

<sup>4</sup> *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 27 N.E.3d 349 (Mass. 2015).

<sup>5</sup> *Id.* at 358 (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)).

<sup>6</sup> *Diatchenko*, 27 N.E. 3d at 360.

<sup>7</sup> *Id.*

<sup>8</sup> See Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L.J. 373, 403 (2014).

person, and counsel should be permitted to make opening and closing remarks; funds should be made available for psychological assessments, social history investigations, and other necessary preparation; the Board must provide, in writing, specific, exhaustive reasons for parole denials; and those denied parole must be provided meaningful opportunity for timely appeal. In addition, consistent with the Eighth Amendment, release decisions must be based on an individual's "demonstrated maturity and rehabilitation"—not on the severity of the offense.<sup>9</sup> Without safeguards such as these, the proposed regulations do not provide juvenile offenders a meaningful opportunity to obtain release as required.

Lawsuits pending across the country challenge parole boards' asserted failure to provide juvenile offenders with a meaningful opportunity for release, citing, among other concerns, inadequate procedural protections. For example, juvenile offenders in Iowa recently filed petitions for judicial review alleging that the Iowa Board of Parole denied them a meaningful opportunity for release by, *inter alia*, failing to guarantee access to counsel during parole proceedings.<sup>10</sup> In addition, a recent challenge to Maryland's parole process for juveniles asserts that the failure to provide counsel and a ban on participation of counsel in parole hearings, among other practices, impedes juvenile offenders from vindicating their right to a meaningful opportunity for release by undermining their ability to prepare for parole hearings.<sup>11</sup> Indeed, courts have not hesitated to require resentencing or modifications to parole processes that fail to pass constitutional muster.<sup>12</sup> Amending the proposed regulations under § 8002.2(c) to provide counsel for juvenile offenders at parole hearings and other robust procedural protections will

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<sup>9</sup> Graham, 560 U.S. at 75 (2010); LeBlanc v. Mathena, No. 15-7151, 2016 WL 6575077, \*10 (4th Cir. Nov. 7, 2016) (holding that the Virginia Parole Board's geriatric release program fails to comply with Graham's requirement that juvenile offenders have the opportunity to obtain release "based on demonstrated maturity and rehabilitation" because, *inter alia*, "it allows for the lifetime incarceration of a juvenile nonhomicide offender based solely on the heinousness or depravity of the offender's crime").

<sup>10</sup> See Petition for Judicial Review of Agency Action Pursuant to Iowa Code § 17A.19, Lockheart v. Iowa Bd. of Parole (Sept. 14, 2016), available at <http://www.aclu-ia.org/iowa/wp-content/uploads/2016/09/09-14-2016-Lockheart-Stamped-Petition.pdf>; Petition for Judicial Review of Agency Action Pursuant to Iowa Code § 17A.19, Bonilla v. Iowa Bd. of Parole (Sept. 14, 2016), available at <http://www.aclu-ia.org/iowa/wp-content/uploads/2016/09/09-14-2016-Bonilla-Stamped-Petition.pdf>.

<sup>11</sup> See Complaint, Maryland Restorative Justice Initiative et al. v. Hogan et al. (April 6, 2016), available at [http://www.aclu-md.org/uploaded\\_files/0000/0768/mrji\\_complaint\\_040616.pdf](http://www.aclu-md.org/uploaded_files/0000/0768/mrji_complaint_040616.pdf).

<sup>12</sup> As in New York earlier this year, where the Appellate Division of the Supreme Court ordered a *de novo* parole hearing after determining that a juvenile offender was denied his constitutional right to a meaningful opportunity for release when the Board of Parole failed to consider the significance of his youth and its attendant circumstances at the time of the crime. Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision, 140 A.D.3d 34, 35 (3rd Dep't 2016). See also LeBlanc v. Mathena, No. 15-7151, 2016 WL 6575077 (4th Cir. Nov. 7, 2016) (determining that Virginia's standardless Geriatric Release program failed to provide meaningful opportunity to obtain release for juvenile offenders); Atwell v. State, 197 So.3d 1040 (Fla. 2016) (holding that Florida's parole process failed to provide meaningful opportunity to obtain release because it did not require individualized consideration of the mitigating characteristics of youth and because presumptive parole release dates were decades after the end of natural life expectancy); Hayden v. Keller, 134 F. Supp. 3d 1000 (E.D.N.C. 2015) (finding that North Carolina's parole process failed to provide meaningful opportunity to obtain release based on maturity and rehabilitation where, *inter alia*, juvenile offenders received no notice in advance of parole review, had no opportunity to be heard, and reasons for parole denial remained confidential).

strengthen New York's parole process and help guarantee a meaningful opportunity for release without resort to litigation.

In sum, we urge you to amend the proposed regulations under § 8002.2(c) to provide a right to counsel for juvenile offenders at parole hearings and other essential procedural protections. Absent these protections, the proposed regulations are inadequate to ensure that juvenile offenders receive the meaningful opportunity to obtain release to which they are constitutionally entitled.

Sincerely,



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