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Realizing "Meaningful" In Maryland: A Call For Reforming Maryland's Parole System In Light Of Graham, Miller, & Montgomery

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ARTICLE

REALIZING "MEANINGFUL" IN MARYLAND: A CALL FOR REFORMING MARYLAND'S PAROLE SYSTEM IN LIGHT OF *GRAHAM, MILLER, & MONTGOMERY*

By: Lila Meadows[1]

Since 1995, various governors in Maryland have adopted a "life means life" policy and have refused to exercise their discretion to grant parole to individuals serving life sentences, including those sentenced to life as juveniles. The result is that many juvenile lifers who can demonstrate rehabilitation, express remorse, and have won the support of the Maryland Parole Commission languish in prison without any realistic opportunity for release. While technically eligible for parole, juvenile offenders serving life sentences in Maryland are more likely to die in prison than to gain release through parole or commutation.

This article explores Maryland's obligation to provide a meaningful opportunity for release for juvenile offenders serving life sentences in light of recent United States Supreme Court decisions in *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana*. While reform efforts have traditionally focused on the governor's role in the parole process, broader reforms to Maryland's parole system are necessary to ensure that juveniles sentenced to life in prison have a realistic chance to rejoin society if they can demonstrate rehabilitation. Without a standard that binds the Maryland Parole Commission and the Governor to consider the characteristics attendant to youth and to give due weight to those characteristics, Maryland's parole system cannot comply with the Supreme Court's mandate in *Graham*, *Miller*, and *Montgomery*.

I. MEANINGFUL OPPORTUNITY FOR RELEASE

In 2010, the United States Supreme Court held that sentencing juveniles to life without the possibility of parole for non-homicide offenses violated the Eighth Amendment's ban on cruel and unusual punishment.[2] The Court held that because juveniles are less culpable than their adult counterparts and also have a greater capacity for change and rehabilitation, states must provide juveniles with a "meaningful opportunity to obtain release based on

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[2] *Graham v. Florida*, 560 U.S. 48 (2010).

demonstrated maturity and rehabilitation," categorically barring both mandatory and discretionary life without parole sentences for non-homicide juvenile offenders.[3] Two years later the Court addressed juvenile homicide offenders in *Miller v. Alabama*, striking down mandatory life without the possibility of parole sentences but maintaining a state's ability to impose a discretionary life without parole sentence only in rare the case of a juvenile who the court determines is "incorrigible" or "irreparably corrupt."[4,5] Under *Miller*, juvenile offenders must receive individualized sentencing where youth and its attendant characteristics are taken into account before imposing a sentence.[6] *Montgomery v. Louisiana* applied *Miller* retroactively in 2016, clarifying that its decision in *Miller* was both procedural and substantive in nature, opening the door for juvenile offenders already serving life without the possibility of parole to challenge the basis for their sentences.[7]

While the Supreme Court made clear in *Graham* and *Miller* that juvenile offenders must have a meaningful opportunity for release, the Court declined to enumerate how states might fulfill that requirement, stating only that parole might be one way to satisfy its obligation. The Court notes in *Montgomery*:

> "A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, *e.g.*, Wyo. Stat. Ann. § 6–10–301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). Allowing those 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."[8]
>
> The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change.

Historically, state parole boards have acted with broad discretion as to how decisions related to release are made.[9] In the past, the Supreme Court

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[3] *Id.* at 75.
[4] *Id.* at 479-80, quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005).
[5] *Miller v. Alabama*, 567 U.S. 460 (2012).
[6] *Id.*
[7] *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).
[8] *Id.* at 736.
[9] *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (per curiam) ("There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence") (citations omitted).

has deferred to the state's discretion in release decisions, noting that parole boards are free to consider a number of elements, but also to rely on "their experience with the difficult and sensitive task of evaluating the advisability of parole release."[10] *Graham, Miller* and *Montgomery* shifted the legal landscape with respect to juvenile offenders and imposed constitution burdens on the state to ensure that juveniles are afforded the opportunity to demonstrate change.

As the Supreme Court noted in *Montgomery*, the mandate in *Miller* has both a procedural and substantive requirement.[11] The procedural component requires a sentencing judge or parole commission "to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence."[12] A parole hearing "does not replace but rather gives effect to *Miller's* substantive holding that life without parole is an excessive sentence" except for the rare juvenile offender for who "rehabilitation is impossible."[13] Because of this substantive holding, simply making a juvenile eligible for parole under an existing state parole system does not comply with the Eighth Amendment. While the state may remedy a *Graham* or *Miller* sentencing violation by offering a juvenile serving a life sentence the opportunity for parole, every parole system does not automatically constitute a meaningful opportunity for release as required by *Graham* and *Miller*. Instead, if a state chooses to meet its obligation under *Graham* and *Miller* through parole, there must be a standard for release that allows a juvenile offender to predict their likelihood of release based on their demonstrated rehabilitation.

Maryland has less than 20 juvenile offenders who are serving life without the possibility of parole sentences. Yet, because governors have routinely refused parole to any lifer since 1995, including those sentenced as juveniles, the more than 300 juveniles who are serving parole-eligible life sentences in Maryland have little hope for release. The executive's blanket policy to deny parole without regard for individual circumstances or evidence of rehabilitation denies juvenile lifers individualized consideration and has converted those sentences to *de facto* life without parole sentences. Because Maryland operates a highly politicized system that articulates no standard for release, it fails to guarantee the meaningful opportunity for release required under *Graham* and *Miller*.

II. HISTORICAL PERSPECTIVE ON THE PAROLE OF LIFERS IN MARYLAND

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[10] *Greenholtz v. Inamtes of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 10 (1979).
[11] *Montgomery*, 136 S. Ct. 718, 734-35 (2016).
[12] *Id.* at 734.
[13] *Id.* at 735.

Parole is an executive function carried out by the Maryland Parole Commission, whose mission is "determining on a case-by-case basis whether inmates serving sentences of six months or more in state or local facilities are suitable for release into the community under certain conditions or supervision by the Division of Parole and Probation."[14] In order for those serving a life sentence to be paroled, individuals must also secure the approval of the governor.[15] Maryland is one of only three states that imposes this additional requirement for release.[16] Historically, and despite requiring action from the executive, lifers who could demonstrate a record of good conduct in prison were routinely paroled after serving a significant amount of time on their sentence.[17]

Attitudes towards parole of violent offenders began to change in the late 1980s as the "tough on crime" and "truth in sentencing" movements took hold. Maryland ended its practice of allowing lifers to participate in work release in 1993 after Rodney Stokes murdered his girlfriend while participating in Maryland's work release program. On September 21, 1995, responding to the Stokes incident and seeking a "tough on crime" reputation, Governor Parris Glendenning declared a "life means life" policy, essentially ending parole for individuals serving life sentences. In his announcement, the Governor instructed the Maryland Parole Commission "not to even recommend-to not even send to [his] desk-a request for parole for murderers and rapists."[18] The Maryland Parole Commission heeded Glendenning's instructions and ceased holding parole hearings for individuals serving life sentences.[19]

In 1999, Governor Glendenning's policy was scrutinized in *Lomax v. Warden*.[20] *Lomax* challenged the Maryland Parole Commission's refusal to hold parole hearings for lifers and the Governor's refusal to grant parole as a blanket policy.[21] The Maryland Court of Special Appeals held that Glendenning's statement in 1995 "was simply an announcement of

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[14] Maryland Parole Commission Agency Mission Statement, Dep't of Pub. Safety and Correctional Services, https://www.dpscs.state.md.us/agencies/mpc.shtml (last visited Mar. 1, 2018).

[15] MD. CODE ANN., CORR. SERVS. §4-305(b)(3) (West 2013).

[16] WALTER LOMAX & SONIA KUMAR, STILL BLOCKING THE EXIT, AMERICAN CIVIL LIBERTIES UNION OF MARYLAND (2015), https://www.abell.org/sites/default/files/publications/afr-stillblockingexit215.pdf (last visited Mar. 10, 2018).

[17] Between 1969 and 1994, 181 lifers were paroled by Governors Mandel, Hughes, and Schaefer. *See* Maryland Restorative Justice Initiative v. Governor Hogan et al, 2016 EL 1403172 (D.Md.) (Trial Pleading) United States District Court, D. Maryland, No. 1:16-cv-01021-ELH, April 6, 2016.

[18] *Lomax v. Warden*, 356 Md. 569, 573 (1999).

[19] *Id.*

[20] *Lomax*, 356 Md. 569 (1999).

[21] *Id.*

guidelines as to how the Governor would exercise the discretion which he has under the law."[22] The court went on to explain that the Governor was free to adopt a different policy stance at any point, but that such policies informing how discretion is exercised do not constitute laws.[23] Critically, the court noted that the Maryland General Assembly had not set forth any factors that the Governor must consider when exercising discretion to grant or deny parole.[24] While the court upheld the Governor's right to exercise unfettered discretion, it found that the Maryland Parole Commission was required to fulfill its statutory obligation by continuing to hold parole hearings for individuals serving life sentences and making recommendations to the Governor in suitable cases.[25]

After *Lomax*, the Maryland Parole Commission resumed holding parole hearings for lifers and in some cases, making recommendations for parole to the governor, but the Governor routinely denied those recommendations and in some cases left recommendations unanswered. The Maryland Legislature responded in 2011 by amending the statute to require the Governor to take action on a parole recommendation within 180 days.[26] If the Governor fails to act within that time, the parole commission's recommendation becomes final.[27] In response, Governor O'Malley began denying all recommendations for parole within the 180 day window, causing the Maryland Parole Commission to cease recommending lifers for parole, and instead begin sending them to the governor as requests for a commutation.[28] Because no time bar applies to a commutation request, cases once again languished on the governor's desk without action.[29]

III. SUBSTANTIVE AND PROCEDURAL DEFICIENCIES IN MARYLAND'S PAROLE SYSTEM

While critics of Maryland's parole system have typically focused on the governor's role in the process, the deficiencies that render the system unconstitutional in light of *Graham* and *Miller* begin long before a case reaches that final layer of review. Data from the Maryland Parole Commission suggests that relatively few lifers ever make it to the stage of the parole process where the Maryland Parole Commission makes a recommendation for release to the Governor. According to the most recent data available, between 2004 and July 2017, the Maryland Parole

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[22] *Id.* at 481.
[23] *Id.* at 481 (citing *Gluckstern v. Sutton*, 319 Md. 634, 672 (1987)).
[24] *Id.* at 581.
[25] *Id.* at 580.
[26] MD. CODE ANN., CORR. SERVS. §7-301(5)(iii) (West 2013).
[27] *Id.*
[28] S. 249, 438th Cong. (2018) (revised fiscal and policy note).
[29] *See* Lomax and Kumar, *supra* note 17, at 8.

Commission recommended 14 lifers for parole out of a population of over 2,100 individuals serving life sentences.[30] Only two of those individuals were approved for release, both by the Hogan administration.[31] In that same period, the Commission recommended 100 individuals for sentence commutations, but various governors granted only 12 recommendations.[32] Taken together, only 114 individuals received a recommendation for parole or commutation over a thirteen-year period, constituting roughly .54 percent of the lifer population. Of the few individuals recommended, only 14 individuals, or 12.2 percent, were eventually released through the parole process.[33]

While the Supreme Court left open the possibility that some juvenile offenders may indeed spend the remainder of their lives in prison despite being eligible for parole, the Court made it clear that it would be a rare circumstance and occur only in the instance that a juvenile offender could not demonstrate maturity and rehabilitation.[34] In Maryland the inverse is true. It is only the rare individual serving a life sentence who the Maryland Parole Commission recommends for parole. It is even rarer that the Commission's recommendation results in release. While the Court's decisions in *Graham*, *Miller*, and *Montgomery* do not set quotas for release, a system that so rarely paroles lifers cannot comply with the Court's substantive holdings in those cases without a finding that lifers in Maryland are incorrigible and do not warrant release.

In addition to the significant substantive deficiencies reflected in parole release outcomes, parole hearings in Maryland lack any of the due process protections that would render them a meaningful opportunity for release. Procedurally, parole hearings for juvenile lifers and adult offenders in Maryland are identical. Although there is no statutory right to counsel for parole hearings in Maryland, an individual may retain an attorney to help prepare for parole, but the MPC severely restricts the role of attorneys in parole proceedings.[35] Attorneys cannot attend their client's parole hearing unless a victim representative requests that the hearing be open, and even in those cases, cannot make statements on their client's behalf or challenge factual assertions made by parole commissioners that may be incorrect.[36]

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[30] Defendants' Answers to Plaintiff Maryland Restorative Justice Initiative's Interrogatories, Interrogatory No.3 – No.5, dated July 7, 2017 in Maryland Restorative Justice Initiative v. Governor Hogan, et al, No. 1:16-cv-01021-ELH.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Montgomery*, 136 S.Ct. at 726 (citing *Miller*, 132 S. Ct. at 2469; *Roper v. Simmons*, 543 U.S. at 573).

[35] MD. CODE ANN., CRIM. PROC. §16-204(2)(i) (West 2012); COMAR § 12.08.01.08(A) (2017); COMAR § 12.08.01.18(C)(1) (2016).

[36] *Id.*

In October 2016, the Maryland Parole Commission amended the regulations related to factors it considers during parole hearings for juveniles serving life sentences to include the following factors:
(a) Age at the time the crime was committed;
(b) The individual's level of maturity and sense of responsibility at the time the crime was committed;
(c) Whether influence or pressure from other individuals contributed to the commission of the crime;
(d) Whether the prisoner's character developed since the time of the crime in a manner that indicates the prisoner will comply with the conditions of release;
(e) The home environment and family relationships at the time the crime was committed;
(f) The individual's educational background and achievement at the time the crime was committed; and
(g) Other factors or circumstances unique to prisoners who committed crimes at the time the individual was a juvenile that the Commissioner determines to be relevant.[37]

While those factors loosely track the language in *Miller*, the regulation offers no guidance as to how parole commissioners must weigh those factors in light of other considerations such as the underlying nature of the crime, and fails to instruct that commissioners view youth-related factors as mitigating.[38] Juvenile lifers are at an increased disadvantage in Maryland as there is no right to judicial review of the Maryland Parole Commission's or Governor's decision other than a writ of mandamus. The Maryland Parole Commission's failure to create a record or transcript of parole hearings for individuals serving a life sentence renders a writ of mandamus a non-viable avenue for relief for juveniles who feel that the commission or governor did not give their juvenile status due consideration.[39]

Other states have recognized the importance of due process protections for juvenile lifers in light of *Graham* and *Miller*. In *Diatchenko v. Dist. Attorney for Suffolk District*, the Massachusetts Supreme Court emphasized the importance of counsel in ensuring that juveniles receive a meaningful opportunity for release in the context of a parole hearing:

> "In the case of a juvenile homicide offender-at least at the initial parole hearing-the task is probably far more complex than in the case of an adult offender because of "the unique characteristics" of juvenile offenders. A potentially massive amount of information bears on these issues, including legal, medical, disciplinary, educational, and work-related

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[37] COMAR 12.08.01.18
[38] *Id.*
[39] COMAR § 12.08.01.18(C)(2); COMAR 12.08.01.19(A)(3).

> evidence ... An unrepresented, indigent juvenile homicide offender will likely lack the skills and resources to gather, analyze, and present this evidence adequately."[40]

Like Maryland, California is one of the three states that require the governor's approval for release on parole. Yet, California allows juvenile offenders a meaningful right to counsel and grants a right of judicial review if the governor overturns the parole board's recommendation for parole.[41] In 2013, the California legislature enacted the "Youthful Offender Act" that required the parole board to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."[42] Unlike Maryland's regulation, the California statute directs the parole board to weigh youth-related factors more heavily than other considerations.

IV. RECENT EFFORTS TO CHALLENGE AND REFORM MARYLAND'S PAROLE SYSTEM

A. LEGISLATIVE REFORM EFFORTS

Legislative efforts to reform Maryland's parole system have focused squarely on the governor's role in the process. Beginning in 2009, advocates have introduced legislation in the Maryland General Assembly every year to remove the Governor from the parole process. Each year the bills have focused on striking the language of MD Code, Correctional Service §7-301(5)(iii) that gives the governor authority to approve or deny parole decisions with respect to lifers.[43] In 2017, House Bill 732 passed in the House of Delegates, but the cross filed version in the Senate failed to make it out of the Senate Judicial Proceedings Committee.[44] In the 2018 legislative session, the bill once again stalled in the Senate committee.[45] While recognizing the problems with an overly politicized parole process, legislators are hesitant to remove a layer of review for lifers seeking release. With the election of a Republican governor, the issue has also taken on a partisan angle, with Republicans hesitant to support legislation that would

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[40] *Diatchenko v. Dist. Attorney for Suffolk District*, 27 N.E. 3d 349, 360 (Mass. 2015).
[41] Cal. Penal Code § 3051, 4801 (West 2013).
[42] *Id.*
[43] Monique Dixon, Tracy Velazquez, et al. Parole Reform in Maryland, 44-DEC Md. B.J. 50, 57 (2011).
[44] H.D. 723, 2017 Leg., 437th Sess. (Md. 2017), S. 694, 2017 Leg., 437th Sess. (Md. 2017).
[45] S. 249, 2018 Leg., 438th Sess. (Md. 2018).

strip Governor Hogan of authority and that the Governor has publicly opposed.[46] To date, the Maryland General Assembly has not considered any legislation that would reform Maryland's parole process given the Court's holdings in *Graham*, *Miller* and *Montgomery*.

B. JUDICIAL CHALLENGES

In 2016, the Maryland Restorative Justice Initiative and the American Civil Liberties Union of Maryland brought suit in the Federal District Court of Maryland against the state, arguing that "life means life" violates the 8th Amendment rights of juvenile lifers in Maryland under *Graham* and *Miller*.[47] The suit is currently in settlement negotiations.

In February 2018, the Maryland Court of Appeals heard the cases of two juvenile lifers, Daniel Carter and James Bowie, who challenged the legality of their sentences of life with the possibility of parole given the executive branch's failure to grant parole to any juvenile lifer since 1995. Both Carter and Bowie challenged the Governor's unfettered discretion under *Lomax* to grant or deny parole for any reason at all absent statutory standards. Less than a week after oral arguments in Bowie and Carter, Governor Hogan issued an executive order announcing that he will make parole decisions in accordance with the same standards that bind the Maryland Parole Commission, and in cases where he disapproves parole, he will issue a written decision to the Maryland Parole Commission.[48] While the executive order is a step forward in constraining the Governor's discretion, Governor Hogan or subsequent governors can rescind the order at any time. Further, the order does not address the central deficiency in Maryland's parole system: the fact that parole authorities are not required to give great weight to the mitigating attributes of youth. In light of the Supreme Court's mandate in *Graham* and *Miller*, the Court of Appeals should accept the invitation to revisit its decision in *Lomax* in so far as juveniles are concerned by recognizing that the state must adopt some cognizable standard for release.

CONCLUSION

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[46] *See* Wiggins, O. and Marimow, A. (2018). Hogan Issues Executive Order on Juvenile Offenders Serving Life Sentences, The Washington Post. [online] Available at: https://www.washingtonpost.com/local/md-politics/hogan-issues-executive-order-on-juvenile-offenders-serving-life-sentences/2018/02/09/fa931956-0dd3-11e8-95a5-c396801049ef_story.html?utm_term=.ae45f80bae7d [Accessed 21 May 2018], quoting Governor Hogan's chief legal counsel Robert Scholz that there is no "reasonable justification for removing gubernatorial oversight."

[47] Maryland Restorative Justice Initiative v. Governor Hogan et al, 2016 EL 1403172 (D.Md.) (Trial Pleading) United States District Court, D. Maryland, No. 1:16-cv-01021-ELH, April 6, 2016.

[48] Executive Order 01.01.2018.06, issued 9 February 2018.

Recognizing that *Graham*, *Miller*, and *Montgomery* have added a constitutional dimension to parole for juvenile lifers, many states have reformed their parole systems to incorporate due process protections and articulate a standard for review that recognizes the significance that youth-related factors must play in parole decision. While Maryland has adopted regulations that roughly correspond with the factors outlined in *Miller*, the statutes and regulations governing parole for juvenile lifers provide no discernable standard for how the Maryland Parole Commission or Governor should weigh those factors in parole determinations.

Facial consideration of youth-related factors without an emphasis on a juvenile offender's rehabilitation does not fulfill the obligations of *Graham* and *Miller*. Maryland's parole system must have procedures to ensure that juvenile lifers are able to adequately present information related to the mitigating circumstances of youth and must also adopt a standard that gives those circumstances sufficient weight. Without that, parole in Maryland does not provide juvenile offenders with a meaningful and realistic opportunity for release. Both the Maryland Court of Appeals and the United States District Court for the District of Maryland have an opportunity to impose those standards on the state through pending litigation. In the absence of judicial action, advocates should adopt a broader legislative agenda that focuses not just on removing the governor from the parole process, but on amending the law to ensure juvenile offenders are given a meaningful opportunity for release throughout the process.