IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2017

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DANIEL CARTER v. STATE OF MARYLAND

JAMES E. BOWIE v. STATE OF MARYLAND

MATTHEW TIMOTHY MCCULLOUGH v. STATE OF MARYLAND

STATE OF MARYLAND v. PHILLIP JAMES CLEMENTS

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF AMICI CURIAE CALVIN MCNEILL, NATHANIEL FOSTER, KENNETH TUCKER, MARYLAND RESTORATIVE JUSTICE INITIATIVE AND ACLU OF MARYLAND

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INTRODUCTION

Amici Calvin McNeil, Nathaniel Foster and Kenneth Tucker are three Maryland men who are now in their 50s and 60s who were convicted of their crimes decades ago as teenagers and sentenced to life in prison, purportedly with the opportunity for parole. But they and more than 200 other men and women sentenced to life "with parole" as youth are denied any meaningful opportunity for release, subjected instead to a cruel system in which people who have done everything possible to turn their lives around are just as likely to die in prison as those who have made no effort at all. Amici write to provide insight into how Maryland's parole scheme for juvenile lifers fails to meet constitutional standards based on their experience as juvenile lifers seeking parole and as counsel in *Maryland Restorative Justice Initiative v. Hogan*, a federal lawsuit before Judge Ellen Hollander arguing that Maryland's scheme violates the Eighth Amendment because it fails to afford juvenile lifers a meaningful and realistic opportunity for release. No. CV ELH-16-1021, 2017 WL 467731 (D. Md. Feb. 3, 2017) ("*MRJI*"). The *MRJI* case is brought on behalf of the three individuals named above and the Maryland Restorative Justice Initiative, a grassroots criminal justice reform organization headed by Walter Lomax, on behalf of its members, many of whom are juvenile lifers.

Recent holdings of the Supreme Court have drawn bright-line rules and established new, robust liberty interests in parole for juveniles using stronger language than ever used before. Most critically, the Court's decisions have established that for all but the rarest juvenile offender, a lifetime of incarceration is unconstitutionally disproportionate. A scheme – like Maryland's – that systematically denies individuals opportunities to develop and demonstrate maturity and rehabilitation and fails to release individuals who have nevertheless done so, violates the Eighth Amendment.

In its jurisprudence on juveniles, the Court places great weight on outcomes and practical considerations—not legal fictions or acrobatics of the sort that would be necessary to conclude that Maryland's scheme satisfies the Eighth Amendment. In essence, the Court has created a presumption that most youth offenders will be able to work their way out of prison, and that they must be treated with the expectation that they will one day earn release by demonstrating maturity and rehabilitation.

Maryland's practices fly in the face of this controlling law. Maryland's parole scheme for lifers was effectively abolished in 1995. For more than two decades, *no juvenile lifer has been paroled outright*. Rather, Maryland's system has morphed into one of clemency, and this is what Amici challenge in *MRJI v. Hogan*. In denying the State's Motion to Dismiss there, Judge Hollander concluded that plaintiffs have articulated a viable legal claim that Maryland's parole system operates as a system of executive clemency in which opportunities for release are "remote," rather than a true parole scheme in which opportunities for release are "meaningful" and "realistic," as the Constitution requires. *MRJI* at *27 (D. Md. Feb. 3, 2017).

The trajectory of the Supreme Court's jurisprudence reflects an intent to be categorical and substantive. It would be absurd and, arguably, *more* cruel to conclude that, despite the hallmark attributes of youth that reflect diminished culpability and greater capacity for rehabilitation, the State can work around the Constitutional prohibition against life without parole sentences by technically promising parole, but never actually releasing anyone.

Among the many pages this Court will read in these cases, one fact must stand out and this fact is enough to resolve the core constitutional question: *In the last two decades, out of hundreds of parole-eligible juvenile lifers, no juvenile lifer has been paroled in Maryland.* A handful of individuals who have obtained

release have done so only through explicit acts of clemency.[1] Amici should not have to wait until they actually die in prison to prove that they are denied a meaningful opportunity for release.

[1] Based on Amici's investigation, only two non-juvenile lifers out of 2,000 have been paroled in the last twenty-plus years.

INTEREST OF AMICI

Nathaniel Foster is 52 years old. He was sent to prison at age 17 for a robbery in which a man was killed. Despite never having known his father and losing his mother as a child, at the time of the offense Mr. Foster was college-bound. He had never before had any serious brush with the law until the night he went out with his sister's boyfriend, who was eight years his senior and had a lengthy criminal record. Mr. Foster has had only two infractions during his entire, 30+year incarceration and has earned exceptionally strong work evaluations. After repeatedly being denied parole due to the nature of his offense, and after seven parole hearings, Mr. Foster learned that he has earned a recommendation of clemency. Mr. Foster wishes desperately to return to the loved ones who have survived his long incarceration.

Kenneth Tucker is 62 years old. He grew up in a devoutly Christian home, but, as an adolescent, began taking risks. In 1974, at age 17, he was involved in a robbery in which his co-defendant, another teenage boy, shot and killed someone. Mr. Tucker accepted a plea that resulted in a life sentence. His co-defendant took the case to trial, was sentenced to 50 years, and was paroled in the 1990s. It is nearly impossible to summarize the ways Mr. Tucker has improved himself over the four decades of his incarceration – earning a college degree, providing hospice care to ailing prisoners, and maintaining a long infraction-free record. Despite his having spent nearly half a century in prison, Mr. Tucker was told at his 2017 "juvenile" parole hearing that no action was being taken and he would have to appear for his eighth parole hearing in 2020, crushing his hope that he would soon return to live with and help care for his elderly mother.

Calvin McNeill is 53 years old. He grew up in a strong, supportive family, but, as is common with teenagers, became increasingly influenced by his peers. His approval-seeking led to his involvement, at age 17, in a robbery of a dice game that resulted in a man's death. He has regretted this ever since. Mr. McNeill has not had a single infraction in more than a quarter of a century and has earned numerous commendations from prison staff. He was first recommended for clemency in 2008 and denied without explanation in 2011. He has since been again recommended for clemency. During his incarceration, Mr. McNeill has seen other individuals be recommended for clemency and repeatedly denied. Mr. McNeill wishes to come home and continue the anti-violence work he has championed behind prison walls.

The **Maryland Restorative Justice Initiative** ("MRJI") is a grassroots membership organization dedicated to advocating for individuals serving long-term prison sentences. MRJI was founded by Walter Lomax while he was incarcerated in the Division of Correction (DOC) with a life sentence for a crime he did not commit and for which he has since been exonerated. The organization's membership consists of individuals impacted by the criminal justice system, including individuals serving life sentences who were juveniles at the time of their offenses, parents and other family members of these individuals, "lifers groups" made up of individuals serving life sentences at various Maryland prisons, and individuals serving life sentences who obtained release through court proceedings correcting legal errors in their cases. For the last decade, MRJI has advocated with a singular focus on changing the policies and practices that deny its lifer members a meaningful opportunity for release.

The **ACLU of Maryland** has advocated for changes to Maryland's parole scheme for lifers for the better part of the last decade, representing individuals seeking parole in administrative and criminal proceedings, meeting with both juvenile and

non-juvenile lifers and their families seeking legal assistance, and, most recently, by filing suit in *MRJI v. Hogan* on behalf of the other Amici. The ACLU routinely appears before this and other courts on questions of constitutional law like the Eighth Amendment issues presented in the cases presently before this Court.

ARGUMENT

I. Maryland's parole scheme, which has failed to parole any juvenile lifer in 20 years even after enactment of purported fixes, denies any meaningful or realistic opportunity for release

By any measure, Maryland fails to afford juvenile lifers – nor any lifer – a "meaningful" and "realistic" opportunity for release.

In April 2016, Amici MRJI and members Calvin McNeill, Kenneth Tucker and Nathaniel Foster (collectively, "Plaintiffs") filed suit challenging the state's operation of a parole system that fails to afford individuals serving parole-eligible life sentences for offenses committed as youth a meaningful and realistic opportunity for release as required by the Eighth Amendment. The suit argues that Maryland maintains a scheme called "parole," but which operates in practice as a system of executive clemency in which opportunities for release are extremely rare, unpredictable, and shrouded in secrecy, and in which no one is ever actually paroled. Plaintiffs contend that this scheme runs afoul of recent landmark decisions of the United States Supreme Court establishing new Eighth Amendment limits barring life without parole ("LWOP") for all but the rarest youth. As of the filing of suit, out of more than 200 parole-eligible juvenile lifers in Maryland, no one had been paroled outright since 1995. Indeed, out of the entire population of 2,000 people serving parole-eligible life sentences in Maryland, only 24 had even been recommended to the Governor for parole during this 20-year period, and, of those, every person but one was denied without explanation.[2]

Amici contend this is so largely because only the Governor may parole any lifer and the Governor may deny parole for any reason, without any standards,

[2] One additional non-juvenile lifer was paroled after *MRJI* was filed.

explanation, or opportunity for review. Moreover, after Governor Glendening announced in 1995 that he would not parole any lifer, and after other Governors followed suit, various practices of the Maryland Parole Commission ("Commission"), responsible for recommending individuals for parole, and the Division of Correction ("DOC"), responsible for rehabilitating individuals to prepare them for release, morphed into a support system for Maryland's de facto scheme of executive clemency by creating barriers to any parole opportunity juvenile lifers may have in theory.

Nonetheless, even within this broken system, juvenile lifers including the Messrs. Foster, McNeil and Tucker, who have now each spent three or four *decades* incarcerated for offenses committed as teenagers, have, as they matured to adulthood and middle age, made heroic efforts to demonstrate their rehabilitation. At various points, they lost all hope because of the apparent futility of parole. For decades, they and other youth offenders have earned notations in their files that they deserve to progress to lesser security, that they are excellent candidates for release, and that they have demonstrated exceptional character within prison walls. Yet, they have been denied any hope of release except through extraordinarily rare grants of clemency. This is precisely what the Eighth Amendment forbids.

After the *MRJI* suit was filed, the State moved for summary judgment, urging the Court to consider new regulatory language submitted by the Commission as well as arguing that, since 1999, five juvenile lifers had been released after their sentences were commuted. After substantial briefing and a hearing, Judge Ellen Hollander rejected the State's request. She found that the State's position that the Supreme Court cases do not apply to life with parole sentences lacked merit. *See, e.g., MRJI* at *21 ("It is difficult to reconcile the Supreme Court's insistence that juvenile offenders with life sentences must be afforded a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation if the precept does not apply to the parole proceedings

that govern the opportunity for release.") (quotation and citation omitted). In so ruling, the Court plainly rejected the State's contention that "consideration for parole, rather than parole itself, is what should be the normal expectation in the vast majority of cases." *Id.* at *24.

In her opinion, Judge Hollander briefly recounted each Plaintiff's experiences as described in the Complaint:

> Calvin McNeill "was sentenced to life with parole under Maryland's mandatory sentencing scheme for felony murder" for "his role in a fatal robbery of a dice game that occurred in 1981, the day he turned 17 years old." McNeill is now 51 years old. He has earned "an exceptional institutional record in the DOC", and has "taken advantage of every program available to him, earned positions of trust in employment, and taken leadership roles in programs to promote alternatives to violence within and outside DOC." He was recommended for "commutation" in 2008, "[i]n recognition of this strong record...." In 2011, "Governor O'Malley rejected this recommendation without explanation."

MRJI at *109 (citations omitted). Mr. McNeill did not have another parole hearing until 2015, after a new Governor had taken office. Subsequently, and only through discovery in the *MRJI* litigation, Mr. McNeill learned that he had again been recommended to the Governor for possible commutation. Because this is a recommendation for clemency rather than parole, the State forbids him from knowing even *when* he was recommended.

As to Mr. Foster, Judge Hollander wrote:

> In 1983, "Nathaniel Foster was involved in a botched robbery attempt along with his co-defendant," during which "the victim was killed." He was seventeen years old at the time. Because Foster's case "involved a homicide that occurred during a robbery, Mr. Foster was charged with first-degree murder and subjected to a mandatory penalty of life imprisonment without adequate

> consideration of his youth status." Foster has been incarcerated for 32 years.
>
> While incarcerated, Foster has maintained "an exemplary institutional record" with "only two minor infractions in the last three decades" and no "infraction of any kind in the last 16 years...." Foster has also "pursued his education" and has "held a number of jobs while incarcerated including working in the canteen and cooking for the Officer's Dining Room." Foster "has been entrusted with extraordinary responsibilities in these jobs", and has also "served as a volunteer helping to care for men who are gravely and terminally ill at the prison hospital."
>
> According to plaintiffs, Foster has had numerous parole hearings in the last twenty years, including in 1995, 2000, 2005, 2008, 2011, and 2013. During the 2013 hearing, parole commissioners noted: "Offender presented well, has excellent job evaluations and mentors younger prisoners. After considering all factors, a rehear for 1/2015 is suitable given nature & circumstances of offense." However, plaintiffs state that, "[a]t the beginning of 2015, disheartened by his sense of futility in the parole process as he was repeatedly recognized for having an excellent record but then denied release due to the offense itself, without regard for his juvenile status, Mr. Foster declined a parole hearing." Thereafter, during a 2016 parole hearing, Foster was "advised that he will be sent to Patuxent for a psychological evaluation."

MRJI at 109-110 (citations omitted). Mr. Foster learned in *MRJI* discovery that his name has been recommended by the Commission for clemency, but knows nothing more.

Judge Hollander reviewed Mr. Tucker's record, as follows:

> Kenneth Tucker "was sentenced to life with parole in 1974 at age 17 under Maryland's mandatory sentencing scheme...for participating in a robbery-murder with another teenager." According to plaintiffs, in the commission of the robbery, "Mr. Tucker's co-defendant killed the victim." And, "[b]ecause the case involved a homicide that occurred during the course of a robbery, Mr. Tucker was charged with felony murder and faced a mandatory penalty of life in prison." Tucker has been incarcerated for 42 years.

> Plaintiffs maintain that Tucker "began turning his life around almost immediately upon his incarceration, earning his high school equivalency in 1975, an associate's degree in 1989, and a bachelor's degree in psychology in 1994." Tucker has "obtained certification or training in several professions" and "is currently an observation aide in the prison hospital, where he provides consolation and coping strategies to terminally ill and mentally distressed peers." Tucker also belongs to the prison's "Scholars program" and serves as a volunteer mentor. Plaintiffs aver that as early at 1987, "case management recommended [Tucker's] transfer to preferred trailer housing and medium security because of his good institutional adjustment and infraction-free record...." Tucker has received consistently positive reviews and participated in numerous parole hearings.
>
> Tucker had his sixth parole hearing in 2014. "Commissioners who heard his case recommended that he progress to the next step, which is the risk assessment...." However, "[a]fter the evaluation was completed, the parole commission denied parole and set his next hearing for 2017." Plaintiffs contend that "[n]o additional information was provided about which aspects of the assessment caused concern nor what [Tucker] might do to demonstrate his readiness at his next parole hearing ...."

MRJI at 3-4. In March 2017, Mr. Tucker had his seventh parole hearing, which the State characterizes as a "juvenile" hearing purportedly incorporating consideration of youth. Notwithstanding that Mr. Tucker has now served more than 43 years for a teenaged offense in which he was not the principal, the commission refused to advance him, setting him instead for his eighth parole hearing in 2020. The only rationale given was: "All factors having been considered including juvenile brain development at time of offense [sic] allow for a rehear date of 3/20."

To summarize, two of the three individual *MRJI* plaintiffs have learned through discovery that they are among the handful of juvenile lifers recommended for clemency to Maryland Governors in the last 20 years. One, Mr. McNeill, was already recommended– and denied, three years later –nearly a decade ago, during which period he has lost both his wife and mother. The second, Mr. Foster, despite

having virtually no juvenile record and an almost perfect, infraction-free record for three decades, was repeatedly told that he was not suitable for parole due to the nature of his offense—a death that occurred in the course of a robbery—until, unpredictably, he suddenly became suitable for a recommendation of *clemency* in 2017. Neither Mr. McNeill nor Mr. Foster has been considered for parole with the Commission's "youth factors," presumably because they are being considered for clemency. While they await the Governor's decision they are in a holding pattern, with no sense of what might help win the Governor's approval, no transparency, and no end in sight.

The third, Mr. Tucker, awaits his eighth parole hearing – by which he will have served nearly half a century for an offense in which another teen was the shooter – with zero information about what it might be that would help him win a clemency recommendation at his next hearing. The "parole" hearing that the State contends avoids his constitutionally-disproportionate sentence—in which commissioners including, here, the Chair himself, are to consider youth; in which Mr. Tucker cannot have counsel present; and of which there is no record or transcript—was, like every hearing before, an exercise in futility.

Nor is there any review, appeal, or other remedy for juvenile lifers in this process.

By example, these three men demonstrate that, as a matter of practice, Maryland does not operate a system of parole. It operates a system of clemency. Juvenile lifers are subjected to repeated cursory denials of parole regardless of how thoroughly they have demonstrated their rehabilitation. ACLU Amici represent that, based on conversations with juvenile lifers across the state, parole is understood as a hollow formality. It has not been uncommon for lifers to give up on parole altogether, foregoing participation in the process because it seems pointless. This itself shows that the system fails the Eighth Amendment analysis in exactly the way the Supreme Court has forbidden: the denial of hope.

This hopelessness is not unfounded. Based on information provided by the State in *MRJI*, the Commission has not even *recommended* a single juvenile lifer for parole since at least 2004 (the earliest date for which such information has been provided).[3]

The State's defense in *MRJI* is that between 1999 and 2017 five juvenile lifers were recommended for commutation and released.[4] None involved non-homicide offenses. Amici know of no instance in which a non-homicide juvenile lifer has been released *at all* since 1995.

Setting aside that the State's parole grant rate is about one person every three or four years, in every case, the sentence was first commuted to a different sentence, which then allowed subsequent release.[5] The State has not identified any juvenile released without a prerequisite act of clemency. The Commission Chair himself has noted that releases of lifers by the Commission was "'only possible by the commutations of the governors.'" Alison Knezevich, *Number of U.S. prisoners serving life sentences has quadrupled*, Balt. Sun, Feb. 1, 2017.

These commutations, and any recommendations for commutation, are not merely parole by another name. They are expressly acts of clemency. C.S. § 7-101(d) ("'Commutation of sentence' means an act of clemency in which the Governor, by order, substitutes a lesser penalty for the grantee's offense for the penalty imposed by the court … ."). The paperwork signed by Governors references statutory authority for clemency. Recommendations are not governed by the six-month time limit in which the Governor must act on parole recommendations, enacted by the legislature in 2011 to compel Governors to stop

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[3] Defendants' Answers to Plaintiff MRJI's Interrogatories (July 10, 2017). Plaintiffs' request for pre-2004 records was rejected. *See MRJI v. Hogan*, No. CV ELH-16-1021, 2017 WL 4280779 at *1 (D. Md. Sept. 27, 2017).

[4] *Id.; see also MRJI*, Docket No. 23-1, Defendants' Memorandum in Support of Motion to Dismiss or, in the Alternative for Summary Judgment at 11-15 (citing exhibit Declaration of Commission chair David Blumberg).

[5] *Id.*

allowing recommendations to linger indefinitely, often for years. The Commission and the Governor contend that, unlike parole recommendations, recommendations for clemency are protected by executive privilege even as to the person being recommended. Their position is that the *fact* of a commutation recommendation is itself privileged and that disclosure that an individual has been recommended waives this privilege. Indeed, in response to a Public Information Act request submitted by the ACLU prior to the *MRJI* lawsuit, the Commission refused to disclose even the number of individuals recommended for clemency.

Moreover, it cannot be disputed that release is extraordinarily rare and that this fact has constitutional significance. Even assuming, arguendo, that the five individuals whose sentences were commuted could be classified as "paroles," the prospects for release remain infinitesimally low. Individual lifers are not quibbling about whether Maryland's parole system got it exactly right. They are systematically denied opportunities for release.

Indeed, while Maryland's scheme once prepared lifers for release, it has over the last two decades turned into something completely different. It is now a massive scheme for executive clemency in which it is assumed that no lifer– even those who have earned the rare recommendation for clemency – will go home except in a casket or through an extraordinary, random stroke of luck. Case managers and other officials presume that lifers will die in prison and treat them that way from the moment a young person walks through their doors. They have no reason to think otherwise, as they see cursory denial after cursory denial for even the most exceptional individuals. *See e.g.*, Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, The Atlantic, Oct. 2015, https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/ (Describing the plight of ACLU client and juvenile lifer Odell Newton, convicted of felony murder in a robbery in 1974, recommended for release three times since 1992 and denied each time despite not having a single infraction in 36 years).

For example, Maryland lifers cannot progress to lesser security in preparation to gradually re-enter society. Calvin McNeil, Kenneth Tucker and Nathaniel Foster have been stuck at medium security for upwards of 30 years despite earlier recommendations that they progress. It is reported to the ACLU that many Maryland prisons exclude lifers from cognitive programs, and at maximum security facilities such as North Branch Correctional Institution where many youth offenders begin their sentences, wait lists for programs may be five years or longer. Lifers are routinely "bumped" for individuals who officials actually expect to be released.

And even when individuals are recommended for clemency, they are almost always denied, and without explanation. Their inability to obtain release, nor even an explanation for denial, reinforces the entire scheme's operation as clemency. What happens to those who are recommended for release shapes what happens to individuals long before that point, because bureaucracies and the officials who run them base their practices on actual likelihood of release. That the Calvin McNeills and Nathaniel Fosters in the DOC cannot earn release thus affects opportunities for progression to lesser security, access to cognitive and vocational programs, what case managers do for other lifers, how risk assessments are conducted, and what parole commissioners do. No one gives lifers real chances because no one believes lifers will ever go home. This is exactly what the Constitution prohibits. *See Graham v. Florida*, 560 U.S. 48, 79 (2010) ("Terrance Graham's sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes.")

II. A parole scheme that fails to actually release youth offenders violates the Eighth Amendment

"In the past few decades, the Supreme Court has issued several decisions recognizing that 'the Eighth Amendment dramatically limits the imposition of the harshest sentences on juvenile offenders.'" *MRJI v. Hogan* at *12 (quoting *Greiman v. Hodges*, 79 F. Supp. 3d 933, 939 (S.D. Iowa 2015)). Relying on carefully researched findings about the diminished culpability of youth, the Supreme Court has outlawed the death penalty and categorically barred, prospectively and retroactively, punishments that condemn youth to die in prison without a "meaningful" and "realistic" opportunity for release except in the "rarest" cases where there are factual findings that the youth is "irreparably corrupt." *See generally Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. Louisiana*, —— U.S. ——, 136 S. Ct. 718 (2016). The Court forbids such punishments as unconstitutionally disproportionate for youth.

The Court's decisions have been categorical and sweeping. In holding that *Miller* announced a substantive rule of constitutional law that is retroactive, the Court observed that substantive rules "set forth categorical constitutional guarantees that *place certain criminal laws and punishments altogether beyond the State's power to impose*." *Montgomery,* 136 S. Ct. at 729 (emphasis added). Punishments are "no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids." *Id.* at 731.

Moreover, the Court has taken great care to ensure that the constitutional rules for youth are given practical effect. *Graham*'s "clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment." *Graham*, 560 U.S. at 75. *Miller* must be retroactive, or else "the vast majority of juvenile offenders" would be subjected to "a punishment that the law cannot impose upon [them]." *Montgomery,* 136 S. Ct. at 734 (quotations omitted).

The defining line is whether the sentence ensures a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham,* 560 U.S. at 75 ("A State need not guarantee the offender eventual release, but … it must provide him or her with some *realistic opportunity to obtain release* before the end of that term.") (emphasis added); 82. This is because "[t]he severity of the sentence and its constitutional significance is defined by the impossibility of release and the 'denial of hope.'" *Id.* at 70 (*quoting Naovarath v. State,* 105 Nev. 525, 526, (1989)).

Conversely, the "meaningful" and "realistic" opportunity for release relieves the sentence of the disproportionality that violates the Eighth Amendment. For juvenile lifers, a "meaningful" and "realistic" opportunity for release has constitutional significance—it protects them from "be[ing] forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Montgomery*, 136 S. Ct. at 736; *see also Diatchenko v. District Attorney for Suffolk Dist.*, 471 Mass. 12, 29 (2015) ("The parole hearing acquires a constitutional dimension … because the availability of a meaningful opportunity for release on parole is what makes the juvenile's mandatory life sentence constitutionally proportionate").

In effect, the Supreme Court has created a new, clear liberty interest in a "meaningful opportunity for release upon demonstrated maturity and rehabilitation," for juvenile lifers who have not been found irreparably corrupt.[6] This interest is not merely entitlement to *consideration* for parole. It is a much stronger constitutional mandate, as explained by one federal judge:

> [T]he Supreme Court [has] determined that when a state "holds out the *possibility* of parole" it "provides no more than a mere hope that the benefit will be obtained"; such a "general interest" is "no more substantial than the inmate's hope that he will not be transferred to another prison, a hope which is not protected by due process." The present case is distinguishable because although *Graham* stops short of guaranteeing parole, it does provide the juvenile offender with

[6] This brief focuses on the rights of the vast majority of juvenile lifers who have not been found to be "irreparably corrupt."

> substantially more than a *possibility* of parole or a "mere hope" of parole; it creates a categorical entitlement to "demonstrate maturity and reform," to show that "he is fit to rejoin society," and to have a "meaningful opportunity for release."

Greiman, 79 F.Supp.3d at 945 (citations omitted); *see also, e.g., MRJI* at * 21 ("It is difficult to reconcile the Supreme Court's insistence that juvenile offenders with life sentences must be afforded a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation if the precept does not apply to the parole proceedings that govern the opportunity for release.") (quotation and citation omitted).

The Supreme Court has also provided guidance about how lower courts should assess a "meaningful" opportunity for release. Contrary to the State's position, a "meaningful opportunity for release" requires more than a showing that release is not utterly impossible.

As a matter of law, and of particular relevance here, the Supreme Court explicitly concluded that the "remote" possibility of clemency fails the standard, citing *Solem v. Helm,* 463 U.S. 277 (1983). *Graham*, 560 U.S. at 70. *Solem* explained that "[p]arole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases." *Id.* at 300-301. Commutation, in contrast, is unpredictable, rare, and "[a] Governor may commute a sentence at any time for any reason without reference to any standards." *Id.* Like the *MRJI* court, *see MRJI* at * 25-26, courts around the country have uniformly held that systems conditioning release upon clemency fail as a matter of law. *See, e.g., Funchess v. Prince*, No. CV 14-2105, 2016 WL 756530, at *4–5 (E.D. La. Feb. 25, 2016) (concluding that Louisiana fails to provide a meaningful opportunity for release where individual may not be released by Board of Pardons unless Governor commutes sentence based on favorable recommendation); *State v. Castaneda*, 287 Neb. 289, 311–14 (2014) (rejecting argument that "possibility" of parole was sufficient in scheme where parole

required commutation of sentence by Governor); *Bear Cloud v. State*, 2013 WY 18, at ¶¶ 33-34 (Wyo. 2013) (framework requiring Governor to commute life sentences before individuals could be considered for parole was system of clemency violating Eighth Amendment) (the "Supreme Court has refused to equate the hope of executive clemency and subsequent parole to the realistic possibility of parole"); *see also Parker v. State*, 119 So. 3d 987, 997 (Miss. 2013), *reh'g denied* (Sept. 5, 2013) (statute providing opportunity for release beginning at 65 was akin to clemency and thus failed to provide meaningful opportunity for release).

But it is not only clemency schemes that fail Eighth Amendment scrutiny. By its explicit terms and of necessity, a "meaningful opportunity for release" as laid out by the Supreme Court incorporates both qualitative and quantitative components. Standards for determining parole suitability must accord due weight to youth. And there must also be actual releases on a scale sufficient to view opportunities for release as "meaningful" and "realistic." A parole scheme that fails to discern youth offenders who have demonstrated maturity and rehabilitation and to actually release those individuals violates the Eighth Amendment. For these reasons, federal courts have found cognizable legal claims where opportunities for release are not meaningful in "life with parole" sentences. *See, e.g., MRJI* at 19-21 (examining federal cases recognizing applicability of standard to sentences of life with parole where individual asserted release was unattainable in practice); *Greiman v. Hodges*, 79 F. Supp. 3d 933 (S.D. Iowa 2015); *Hayden v. Keller*, 134 F. Supp. 3d 1000 (E.D.N.C. 2015) appeal dismissed sub nom. *Hayden v. Butler*, 15-7676, 2016 WL 4073275 (4th Cir. Aug. 1, 2016); *Brown v. Precythe*, 17–cv–04082–NKL, 2017 WL 4980872 at *4, *9-10 (W.D. Mo. 2017).

The Supreme Court's rejection of clemency as an adequate opportunity for release reflects these principles. Without actual releases, the opportunity for release is very certainly *not* meaningful and the protection against disproportionality collapses. The Supreme Court's jurisprudence has created a

standard in which, assuming good behavior, juvenile lifers will be released in "the vast majority of cases." Thus, notwithstanding judicial deference to the executive, courts have looked to actual outcomes to determine whether a particular scheme affords a meaningful opportunity for release. *See, e.g., Hayden,* 134 F. Supp. 3d at 1005, 1010 (relying on data that only seven juveniles were paroled between 2010-2015 as evidence of lack of meaningful opportunity for release); *Funchess*, supra, 2016 WL 756530, at *4–5 (noting Board of Pardons recommended favorably only 64 of 931 applications in 2014 and Governor had granted clemency to only 83 people over eight years, to conclude that Louisiana fails to provide a meaningful opportunity for release); *State v. Louisell*, 865 N.W.2d 590 (Iowa 2015) (Without reaching the question, highlighting that only one out of 38 juvenile LWOP cases were granted parole after changes to the law and questioning whether "repeated cursory denials of parole deprive juvenile offenders who have shown demonstrable rehabilitation and maturity of a meaningful or realistic opportunity for release"); *Brown v. Percythe*, supra, 2017 WL 4980872 at *4, *9-10 (Citing grant rate for juvenile lifers of four out of 14 in 2015 and two out of 20 since passage of new laws, in concluding that Plaintiffs had alleged Eighth Amendment violation).

Amici do not claim some magic number of people must be released to render a parole scheme constitutional. But *Graham*, *Miller* and *Montgomery* establish a presumption that juvenile lifers should be released with some regularity based on their demonstrated rehabilitation and maturity—because there are not penological justifications for the alternative. *See, e.g., Montgomery,* 136 S. Ct. at 736 (*Miller* "did more than require a sentencer to consider a juvenile offender's youth …; it established that *the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth*.'" (citation omitted) (emphasis added).

Such a presumption does not make everything else irrelevant, nor guarantee release. But it does mean that once an individual has demonstrated maturity and

rehabilitation, the balance has shifted. Otherwise, the prospect of release that avoids the constitutionally-disproportionate lifetime in prison is meaningless. *See, e.g., id.* at 734 ("Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'").

This presumption operates in two ways. First, the Court's reasoning and language presume that a youth offender who has "demonstrated maturity and rehabilitation" enjoys a strong likelihood of release. *See, e.g., Graham*, 560 U.S. at 75 (The State must give juveniles "some meaningful opportunity to obtain released based on demonstrated maturity and rehabilitation."); 82 ("…if [the state] imposes a sentence of life it must provide [the youth offender] with some *realistic opportunity to obtain release* before the end of that term."); *Montgomery,* 136 S. Ct. at 736 ("The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition – that children who committed even heinous crimes are capable of change.").

Second, the Court's reasoning and language assume that, with rehabilitative opportunities, most youth will likely demonstrate this maturity and rehabilitation over time. The entire premise of the Court's cases flows from "children's diminished culpability and greater prospects for reform," associated with lack of maturity, lack of control over their environment, and universal recognition that, by definition, youth are still developing. *Montgomery,* 136 S. Ct. at 733. Thus, a youth offender's "actions [are] less likely to be evidence of irretrievable depravity." *Id.* (internal quotation marks and citations omitted); *see also id.* ("The need for incapacitation is lessened, too, because ordinary adolescent development diminishes the likelihood that a juvenile offender forever will be a danger to society.") (quotation omitted). States must avoid the "perverse consequence" in which "the system itself becomes complicit in the lack of development" by "withhold[ing] counseling, education, and rehabilitation programs" from youth on the grounds that they will never leave prison. *Graham,* 560 U.S. at 79; 73-74.

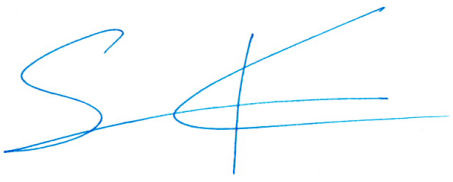
Thus, standards for release that fail to give due weight to youth (as opposed to mere consideration of youth) in determining maturity and rehabilitation, and schemes that fail to release youth on a scale sufficient to afford a "realistic" prospect of release to those who have demonstrated maturity and rehabilitation, fail to satisfy the Eighth Amendment. *Cf. Montgomery* at 736 ("*Miller's* conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution."). Without these requirements, the promise of release is illusory, and parole proceedings in Maryland will remain an empty formality.

For a juvenile lifer, an opportunity for parole is not an opportunity for "early release" involving mercy. It is the only protection against a sentence condemning him to die in prison, which is unconstitutionally disproportionate in the vast majority of cases. The term "early release" can imply that release is in some way premature. That is altogether different from what the Supreme Court has done in this context. Here, the Court has created an *expectation*. It is not "early" to release a youth offender from prison before he or she dies there– it is *expected* that in the vast majority of cases where an individual has demonstrated maturity and rehabilitation she will be able to return to the outside world.

CONCLUSION

Amici respectfully urge this Court to make clear that, until and unless Maryland begins affording a meaningful and realistic opportunity for release, a "life with parole" sentence under Maryland's current scheme is unconstitutional for those who offend as youth.

Respectfully submitted,



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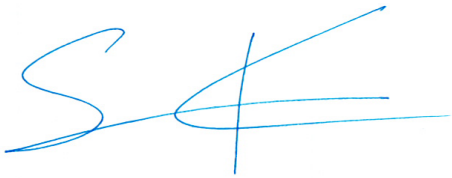

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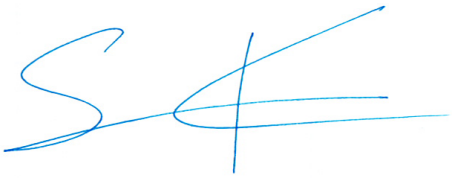
I hereby certify that copies of the foregoing brief was served via MDEC on Brian Saccenti, Assistant Public Defender, bsaccenti@opd.state.md.us, and Robert Taylor, Jr., Assistant Attorney General, rtaylor@oag.state.md.us.



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