Criteria and Procedures for a "Meaningful Opportunity to Obtain Release" under *Graham*, *Miller*, and *Montgomery*

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Myth: The mere possibility of parole or early release satisfies the Eighth Amendment.

Reality: *Graham*, *Miller*, and *Montgomery* require that the criteria and procedures used by parole boards and similar entities provide a *realistic* and *meaningful* opportunity to obtain release *based on demonstrated maturity and rehabilitation*.

The United States 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." 560 U.S. 48, 74-75 (2010). *Miller v. Alabama* and *Montgomery v. Louisiana* establish that children must have this meaningful opportunity for release even in homicide cases—except in the rarest of cases where the sentencer determines that the particular child "exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 136 S. Ct. 718, 733 (2016); *Miller*, 567 U.S. 460, 472-73 (2012).

A sentence may violate the Eighth Amendment even if it technically provides for parole or some other form of early release. Courts have determined that a life-*with*-parole or similar sentence may run afoul of the Eighth Amendment for several reasons. A sentence fails to provide the requisite realistic and meaningful opportunity for release if, for example, parole is not available for many years. Indeed, the Florida Supreme Court held that a "presumptive parole release date set decades beyond a natural lifespan" rendered a life-with-parole sentence unlawful. *See Atwell v. State*, 197 So. 3d 1040, 1048 (Fla. 2016) (explaining that parole must restore "hope for some years of life outside prison walls") (citing *Montgomery*, 136 S. Ct. at 737); *see also People v. Contreras*, 411 P.3d 445 (Cal. 2018) (holding that *Graham* requires more than a de minimis quantum of time outside prison but rather an opportunity to participate as a productive member of society). For more on cases discussing the timing of meaningful opportunity for release, see our memo "Timing of a Meaningful Opportunity for Release under *Graham*, *Miller*, and *Montgomery*." Moreover, even if release is available at a meaningful time, a sentence might nonetheless fail to meet constitutional requirements if the criteria and procedures used by the parole board (or other releasing entity) fail to provide a meaningful and realistic opportunity for release based on demonstrated maturity and

rehabilitation.[1] This memo discusses cases that consider whether a releasing entity's criteria and procedures comply with the Eighth Amendment.

A sentence may fail to provide a realistic and meaningful opportunity for release if the possibility of release is remote or uncertain in light of a releasing entity's unguided discretion. A federal district court in Maryland denied in part a motion to dismiss a challenge to the state's parole system on this basis, finding that the plaintiffs had sufficiently alleged that Maryland's parole system operates as a system of executive clemency, in which opportunities for release are remote, rather than a true parole system in which opportunities for release are meaningful and realistic as required. *Maryland Restorative Justice Initiative v. Hogan*, No. ELH-16-1021, 2017 WL 467731 (D. Md. Feb. 3, 2017) (citing the Governor's "unfettered discretion to deny every parole recommendation for *any* reason whatsoever or for no reason at all" and plaintiffs' allegation that, between 1995 and 2014, every recommendation that parole be granted to a lifer was denied). The North Carolina Supreme Court likewise rejected the argument that statutory sentence review offered a meaningful opportunity for release under *Graham*, *Miller*, and *Montgomery*, explaining that: "the possibility of alteration or commutation . . . is deeply uncertain and rooted in essentially unguided discretion." *State v. Young*, 794 S.E.2d 274, 279 (N.C. 2016); *see also Funchess v. Prince*, No. 142105, 2016 WL 756530 (E.D. La. Feb. 25, 2016) (holding that Louisiana's former "two-step parole procedure," which would require commutation of a sentence by the governor, failed to provide a meaningful opportunity for release). Such unfettered discretion violates the Eighth Amendment's requirement of a *realistic* opportunity to obtain release *based on demonstrated maturity and rehabilitation*.

In addition, the release decision must be based on maturity and rehabilitation, rather than on the seriousness of the offense or victim impact. *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, 2017 WL 4980872, at *9 (W.D. Mo. Oct. 31, 2017) (denying motion to dismiss challenge to parole system citing, *inter alia*, allegations that parole is usually denied based on seriousness of the offense and that parole hearings focus mostly on the crime rather than youth-related mitigation or maturity and rehabilitation); *Atwell*, 197 So.3d at 1048 (noting disapprovingly that Florida "requires primary weight in the consideration of parole be given to the seriousness of the offender's present offense . . . and the offender's past criminal record") (internal quotation marks omitted); *Johnson v.*

[1] For more about how state parole systems function in this context, see Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L.J. 373 (2014); American Civil Liberties Union, *False Hope: How Parole Systems Fail Youth Serving Extreme Sentences* (2016), https://www.aclu.org/report/report-false-hope-how-parole-systems-fail-youth-serving-extreme-sentences; Nazgol Ghandnoosh, The Sentencing Project, *Delaying a Second Chance*: *The Declining Prospects for Parole on Life Sentences* (2017), http://www.sentencingproject.org/publications/delaying-second-chance-declining-prospects-parole-life-sentences/.

State, 215 So. 3d 1237, 1242 (Fla. 2017) (concluding that 100-year sentence with eligibility for "gain time" credit did not provide a meaningful opportunity for early release because "gain time, generally, is not based on a demonstration of maturity and rehabilitation").[2] The nature of a child's particular crime should be irrelevant to the parole board's decision, except to the extent that the circumstances of the crime provide a baseline for assessing how an individual has matured and changed since the time of the crime. Assuming that irreparable corruption is not established at sentencing, the child must be given a chance to later show rehabilitation; if the showing is made, he or she should be released. If, instead, the severity of the crime trumps rehabilitation, then the sentence is equivalent to a life-without-parole sentence for Eighth Amendment purposes, as it denies a meaningful opportunity for release *based on demonstrated maturity and rehabilitation.*[3]

Moreover, the releasing entity must account for youth when making the release decision and must treat cases involving juvenile offenders differently than those involving adult offenders. One New York court described this focus on youth-related mitigating factors as "the minimal procedural requirement necessary" under the Eighth Amendment, explaining: "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." *Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 140 A.D.3d 34, 36 (N.Y. App. Div. 2016) (holding that petitioner was entitled to a *de novo* parole release hearing). A District Court for the Eastern District of North Carolina similarly determined that the 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. *Hayden v. Keller*, 134 F. Supp. 3d 1000, 1009 (E.D.N.C. 2015). *See also, e.g.*, *Young*, 794 S.E.2d at 279 (explaining that the sentence review statute at issue failed to address the "central concern" of *Miller*, that a sentencing court cannot treat minors like adults, because, *inter alia*, nothing in the statute required consideration of

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[2] Challenges to the Iowa parole process have also been filed in state court in Iowa. The case, *Bonilla v. Iowa Bd. of Parole*, challenges various aspects of the parole procedures in place for juvenile offenders and asserting, *inter alia*, denial of opportunity to present evidence of rehabilitation. *See* Pet. Br. on Jud. Rev., *Bonilla v. Iowa Board of Parole*, No. CVCV052692 (Iowa Dist. Ct. Nov. 20, 2017). The challenge was dismissed by the trial court and is now pending before the Iowa Supreme Court. *See* Ruling Denying Petition for Judicial Review, *Bonilla v. Iowa Board of Parole*, No. CVCV052692 (Iowa Dist. Ct. Mar. 14, 2018). A lawsuit recently filed in the Southern District of New York similarly challenges New York's parole process for juvenile offenders serving life sentences asserting, *inter alia*, that such offenders are routinely denied parole on the basis of juvenile criminal history and the nature of the crime of conviction, notwithstanding subsequent rehabilitation and reform. *See* Class Action Complaint, *Flores v. Stanford*, No. 7:18-cv-02468 (S.D.N.Y. Mar. 20, 2018).

[3] For more on this topic, see Sarah French Russell, *The Role of the Crime at Juvenile Parole Hearings: A Response to Beth Caldwell's* Creating Meaningful Opportunities for Release, 41 N.Y.U. Rev. L. & Soc. Change Harbinger 227 (2016), https://socialchangenyutest.files.wordpress.com/2016/12/russell-response-to-caldwell_12-08-16.pdf.

maturation or other youth-related factors); *see also Greiman*, 79 F. Supp. 3d at 944 (denying motion to dismiss based in part on allegation that board of parole failed to take into account plaintiff's youth and demonstrated maturity and development); *Atwell*, 197 So.3d at 1049 (noting, in remanding for resentencing, that "unlike other states, there are no special protections expressly afforded to juvenile offenders and no consideration of the diminished culpability of the youth at the time of the offense"); *Brown*, 2017 WL at *9-10 (denying motion to dismiss challenge to parole system in part based on allegations that parole board limits presentation of youth-related mitigating factors, concluding: "[p]laintiffs very well could convince a reasonable factfinder that they have not had a meaningful opportunity consistent with Supreme Court teachings to demonstrate maturity and rehabilitation").

Finally, under the Eighth Amendment, parole procedures must ensure for juvenile offenders a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Ordinary parole board procedures may fail to comply with this constitutional requirement. Indeed, several courts have recognized that juvenile offenders are entitled to particular procedural protections at parole hearings. In *Diatchenko v. District Attorney for Suffolk Dist.*, 27 N.E.3d 349 (Mass. 2015), for example, the Supreme Judicial Court of Massachusetts held that juveniles serving life sentences are entitled to representation by counsel at their initial parole hearings, access to funding for experts, and judicial review of parole board decisions. And in *Hayden v. Keller*, the District Court for the Eastern District of North Carolina explained that North Carolina's parole process denied a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation because, *inter alia*, "there is no advance notice or opportunity for juvenile offenders to be heard on the question of maturity and rehabilitation—either in writing or in person." 134 F. Supp. 3d at 1011. These and other procedural protections are required to ensure that juvenile offenders receive the realistic and meaningful opportunity to obtain release to which they are constitutionally entitled.[4]

[4] In response to the Supreme Court decisions, some states have enacted legislation ensuring certain procedural protections for juvenile offenders at parole hearings. *See, e.g.*, Conn. Gen. Stat. § 54-125a(f)(3) (counsel shall be appointed to assist indigent juvenile offenders serving sentences of more than 10 years with parole hearings).

APPENDIX

Summaries of Recent Positive Cases Addressing Criteria and Procedures for a Meaningful Opportunity for Release

***Brown v. Precythe*, No. 2:17-cv-04082-NKL, 2017 WL 4980872 (W.D. Mo. Oct. 31, 2017) (Post-*Montgomery*) (§ 1983 Action) –** Plaintiffs, all convicted of first-degree murder offenses and originally sentenced to LWOP, were permitted by state statute post-*Miller* to petition for parole after serving 25 years in prison. Each of the plaintiffs petitioned for, but was denied, parole. Each is scheduled for reconsideration of the parole determination in five years. In this action, plaintiffs alleged that Missouri's parole policies and practices violate their rights to be free from cruel and unusual punishment and their rights to due process under the state and federal constitutions. They asserted that they were denied: a meaningful opportunity for release upon demonstration of their maturity and rehabilitation; the right to review and rebut evidence against them at parole hearings; and sufficient notice of and explanation about the basis for their denials. In particular, they alleged that the Parole Board and Missouri Director of Corrections deprived them of a meaningful opportunity for release because, *inter alia*, the Board is a political body that lacks transparency, the Board presides over too many hearings to fairly consider plaintiff's applications, the Board has broad discretion and its decisions are unreviewable. Moreover, parole hearings for youthful offenders are generally treated no differently than typical parole hearings. Prisoners are not permitted access to their parole files so they cannot challenge or correct much of the information that the Board considers. Prisoners are not entitled to assistance of counsel during or prior to the hearing. And the information that prisoners are permitted to present at the hearing and their time for speaking is severely limited, even though victims are not so limited. In addition, plaintiffs cited evidence suggesting that the Board did not take parole decisions seriously, with some members failing to read files before voting and some turning parole hearings into games. Finally, the parole grant rate for juveniles originally sentenced to life without parole was, as of June 2017, only two out of twenty. Each denial cited the circumstances of the offense as the reason for the denial. In denying defendants' motion to dismiss, the court confirmed that the "failure to provide a juvenile offender eligible for parole with a meaningful opportunity to demonstrate maturity and reform violates the prohibition against excessive punishment." It distinguished the U.S. Supreme Court's decision in *LeBlanc*, explaining that that case dealt with the special rules applicable only to habeas actions and that the Court expressly did not decide whether the Eighth Amendment required more than normal parole procedures. Instead, looking to *Greiman*, *Hogan*, and related decisions, it reasoned that *Graham*, *Miller*, and *Montgomery* require states to provide juvenile offenders with an opportunity to demonstrate maturity and rehabilitation. Looking to plaintiffs' allegations, it concluded, if proven, the allegations could convince a reasonable factfinder that the plaintiffs did not have a meaningful opportunity to demonstrate maturity and rehabilitation as required. The court further determined that, under *Graham*, *Miller*, and *Montgomery*, a juvenile offender has a liberty interest in meaningful parole review. It reasoned that the decisions demand more than a *possibility* of parole, but rather a meaningful and realistic opportunity for release. As above, the plaintiffs' allegations, if proven, could warrant a finding that such an

opportunity for release had been denied. Accordingly, the defendants' motion to dismiss was denied.

***Atwell v. State*, 197 So. 3d 1040 (Fla. 2016) (Collateral Appeal) (Post-*Montgomery*) –** Juvenile defendant (age 16 at time of crimes) was convicted of armed robbery and first-degree murder in 1992. He was originally sentenced to mandatory life *with* the possibility of parole after 25 years (murder) and LWOP (armed robbery). In 2013, Atwell moved for postconviction relief, arguing his life sentence was cruel and unusual punishment under *Miller*. The trial court summarily denied Atwell's motion. The appellate court affirmed, holding *Miller* was inapplicable because it only applied to mandatory LWOP sentences. The Florida Supreme Court granted cert. While the case was pending, the Commission on Offender Review conducted Atwell's parole hearing—which was 25-years after Atwell had been sentenced—and set a presumptive parole release date of December 27, 2130, with another review in February 2022 (however, in 2022, Atwell's presumptive release date would only be changed for "reasons of institutional conduct or the acquisition of new information." See Fla. Stat. § 947.16(5)). The Florida Supreme Court noted that "[b]ecause static factors, such as the crime he committed and his other crimes . . . account for all but 84 of the 1,686 months (140.5 years), there is no realistic chance of a change in the presumptive parole release date." And clearly, the court reasoned, a release date in the year 2130 (i.e. 140.5 years) far exceeds Atwell's life expectancy. The court noted that "throughout this Court's post-*Graham* and *Miller* juvenile sentencing jurisprudence, we have consistently followed the spirit of *Graham* and *Miller* rather than a narrow, literal interpretation." Thus, the court emphasized that it is "evident from our case law that this Court has—and must—look beyond the exact sentence denominated as unconstitutional by the [U.S.] Supreme Court and examine the practical implications of the juvenile's sentence, in the spirit of the [U.S.] Supreme Court's juvenile sentencing jurisprudence." After discussing how the parole system operates in Florida,[5] the court concluded that

[5] In Florida, an inmate who is eligible for parole has an initial interview with a hearing examiner, where the examiner uses a "salient factor score" (i.e. a numerical score based on the offender's present and prior criminal behavior and related factors found to be predictive in regard to parole outcome—as well as the statutory severity of the inmate's offense) to determine a range of months on a matrix that automatically indicates a range of presumptive parole release dates. The presumptive parole release dates are the earliest dates an offender may be released from prison. Under Florida statute, the objective parole criteria applied by the Commission must "give primary weight to the seriousness of the offender's present criminal offense and the offender's past criminal record." Fla. Stat. § 947.002 (2015). "The hearing examiner may consider the aggravating and mitigating circumstances . . . that warrant a decision outside the given matrix time range, but must provide written justification for altering the presumptive parole release date." *See* Fla. Stat. § 947.172(3) (2015). The hearing examiner then makes a recommendation to the Commission of a presumptive parole release date, which is then reviewed by a panel of at least two commissioners. *See id*. -.172(2). "Subsequent parole interviews are conducted to determine whether information has been gathered that could affect the presumptive parole release date." Fla. Stat. § 947.174 (2015). "When the inmate's presumptive parole release date nears and if the inmate's institutional conduct and parole release plan are satisfactory, the presumptive parole release date becomes the effective parole release date." Fla. Stat. § 947.1745 (2015). "The

"[i]n most respects, a sentence of life with the possibility of parole for first-degree murder . . . actually resembles a mandatory [LWOP sentence] that is not 'proportionate to the offense and the offender.'" (citation omitted). Based on Florida's "objective parole guidelines," an individual convicted of an offense under Fla. Stat. § 775.082, like Atwell, will have a presumptive parole release date between 300-9,998 months in the future. Additionally, Florida's parole process requires that "primary weight" be given to the "seriousness of the offender's present offense" and "past criminal record." If an offender convicted of first-degree murder has a high "salient score," then the presumptive parole release date could be hundreds of years away. Further, this span "could be lawfully imposed without the Commission on Offender Review even considering mitigating circumstances," because the "Commission is only required to consider mitigating and aggravating circumstances if it wishes to impose a presumptive parole release date that falls outside the given range of months." Even then, "the enumerated mitigating and aggravating circumstances" in the Florida Administrative Code "do not have specific factors tailored to juveniles." Thus, "they completely fail to account for *Miller*." The court therefore concluded that "[u]sing Florida's objective parole guidelines . . . a sentence for first-degree murder under the pre-1994 statute is virtually guaranteed to be just as lengthy as, or the 'practical equivalent' of, [an LWOP sentence]." Indeed, Atwell's presumptive parole release date was set to 140 years in the future. "A presumptive parole release date set decades beyond a natural lifespan is at odds" with *Montgomery*. Although a state may remedy *Miller* violations with parole, "the parole system would nevertheless still have to afford juvenile offenders individualized consideration and an opportunity for release." Here, "[e]ven a cursory examination of the statutes and administrative rules governing Florida's parole system demonstrates that a juvenile who committed a capital offense could be subject to one of the law's harshest penalties without the sentencer, or the Commission, ever considering mitigating circumstances." The court noted that although some states have chosen parole as a remedy for *Graham* and *Miller* issues, Florida's parole procedures differ in very significant ways. For example, "there are no special protections expressly afforded to juvenile offenders and no consideration of the diminished culpability of youth at the time of the offense. The *Miller* factors are simply not part of the equation." Moreover, the court recognized "in Horsley that the Florida Legislature did not choose a parole-based approach to remedy sentences that are unconstitutional under *Graham* and *Miller*." Instead, the Legislature enacted chapter 2014-220, Laws of Florida which uses criteria specifically tailored to juveniles based on the *Miller* factors, plus judicial sentence review. "Parole is, simply put, 'patently inconsistent with the legislative intent' as to how to comply with *Graham* and *Miller*." (quoting Horsley). Atwell's current parole date leaves him no "hope for some years of life outside prison walls." (quoting *Montgomery*). "The Supreme Court has emphasized—and this Court's own case law has followed—that the Eighth Amendment requires a trial court to 'take into account the differences among defendant's and crimes' before imposing a sentence that is, in effect, a sentence to a lifetime in prison." (citing to *Miller*, Horsley, and Falcon). "Atwell's sentence effectively resembles a mandatorily imposed [LWOP] sentence, and he did not receive the type of individualized sentencing consideration *Miller* requires. The only way to correct Atwell's

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Commission then engages in a final review process to determine if release is still appropriate and will authorize or modify the effective parole release date accordingly."

sentence . . . is to resentence Atwell in conformance with chapter 2014-220, Laws of Florida." Quashed decision upholding life sentence for first-degree murder and remanded for resentencing on that count. ***NOTE:** The court recognized in a footnote that Atwell's mandatory LWOP sentence for armed robbery "is clearly unconstitutional under *Graham*." Because this issue was not raised in this appeal, however, the Florida Supreme Court did not consider that sentence. The court noted that Atwell "may file the proper motion in the trial court . . . to seek correction of this sentence."

***State v. Young*, 794 S.E.2d 274 (N.C. 2016) (Appeal from Resentencing Order) (Post-*Montgomery*) –** Defendant, age 17 at the time of the crime, was convicted after a jury trial of first degree murder under the felony murder doctrine and given a mandatory life-without-parole sentence. After *Miller*, defendant filed a motion for relief with the Superior Court; the Superior Court determined that *Miller* applied retroactively to defendant's mandatory LWOP sentence and required vacatur of the original sentence and resentencing. The State appealed, challenging both the determination that *Miller* applied retroactively and that defendant's life-without-parole sentence fell within the decision's ambit. While the appeal was pending, the U.S. Supreme Court confirmed in *Montgomery* that *Miller* has retroactive effect. Nevertheless, the State contended before the N.C. Supreme Court that defendant was not entitled to resentencing under *Miller* and *Montgomery* because his sentence was not a true life-without-parole sentence but rather a sentence of life imprisonment with a meaningful opportunity to obtain release. In particular, it argued that N.C.G.S. § 15A-1380.5, which was effective for a brief period in the mid-90s during which defendant committed his offenses, provided a meaningful opportunity for release. Section 15A-1380.5 provides, in relevant part, that a defendant sentenced to life without parole "is entitled to review" by a resident superior court judge after serving 25 years; the judge may, in his or her discretion, recommend that the governor or an executive agency consider altering or commuting the sentence. The North Carolina Supreme Court rejected the state's argument that § 15A-1380.5 provided a meaningful opportunity for release under *Graham*, *Miller*, and *Montgomery*. It explained that, under the statute, "the possibility of alteration or commutation . . . is deeply uncertain and rooted in essentially unguided discretion." Sentence review "guarantees no hearing, no notice, and no procedural rights," and requires only that the judge "consider the trial record" while according discretion to review other information. Accordingly, the statute does not "reduce to any meaningful degree the severity of a sentence of life imprisonment without the possibility of parole." Nor does the statute address the "central concern" of *Miller*, that is, that a sentencing court cannot treat minors like adults when imposing an LWOP sentence. Nothing in the statute requires consideration of maturation or other youth-related factors. Thus, "[a]lthough section 15A-1380.5 might increase the chance that this sentence will be altered or commuted, it does not provide a sufficiently meaningful opportunity to reduce the severity of the sentence to constitute something less than life imprisonment without the possibility of parole." Accordingly, defendant's LWOP sentence violated *Miller* and the Eighth Amendment. Vacatur of sentence affirmed; case remanded for resentencing.

***Funchess v. Prince*, No. 142105, 2016 WL 756530 (E.D. La. Feb. 25, 2016) (Post-*Montgomery*) (§ 2254) –** Defendant, age 16 at the time of the crimes, pleaded guilty to second-degree murder and received a mandatory sentence of life in prison. More than thirty years later, after *Miller*, defendant filed in state court a motion to correct his illegal sentence. The motion was denied on the ground that *Miller* does not apply retroactively. Defendant thereafter filed a petition for federal habeas corpus relief, asserting that his mandatory life sentence violated *Miller*. While his federal habeas petition was pending, the U.S. Supreme Court made clear in *Montgomery* that *Miller* applies retroactively. Thus, the issue central to defendant's federal habeas petition became whether his life sentence fell within the ambit of *Miller*: defendant urged that his sentence was effectively a life without parole sentence, but the government contended that the defendant would be eligible for parole after serving 40 years. Although not entirely clear from the record, the district court ultimately determined that the defendant had been sentenced under the state's former "two-step parole procedure." At the time the defendant's sentence was imposed, in 1979, two statutes were in effect that, in combination, meant that his "guilty plea to second degree murder required that he receive a sentence of life in prison without eligibility for parole for a period of 40 years and that, if he ever actually hoped to receive parole after 40 years, the governor commute his sentence" upon favorable recommendation from the Board of Pardons. That is, he would only be eligible for parole after his life sentence was commuted to a term-of-years sentence carrying parole eligibility. Parole under this system is rare: in 2014, only 64 of 931 applications garnered favorable recommendations from the Board of Pardons, and the state's most recent governor granted clemency to only 83 persons during his 8 years in office. Thus "a life sentence under Louisiana's 'two-step parole procedure' is—for all intents and purposes—a life sentence, regardless of whether the prisoner received a parole eligibility date." Thus, the court concluded, Louisiana's former two-step parole procedure did not provide a meaningful opportunity for release. It further held that the state court was unreasonable in failing to apply *Miller* and its progeny to defendant's case. "The 'two-step parole procedure' clearly violates *Miller* in its application to juvenile offenders, and therefore, regardless of whether or not [defendant's] record indicates that he is 'eligible' for parole, his sentence was unconstitutional." In sum, because youth was not considered at sentencing and the court imposed what amounted to a mandatory life sentence with no meaningful opportunity to obtain release, *Miller* warranted habeas relief. Additional briefing ordered to determine relief warranted.

***Diatchenko & Roberio v. Dist. Attorney for Suffolk Dist*., 471 Mass. 12 (2015) (Diatchenko II) (Collateral Appeal) (Consolidated Cases) –** Two juvenile defendants (age 17 at time of crimes) were both convicted of first-degree murder in separate cases. Each defendant was sentenced to mandatory LWOP. In 2013, the Massachusetts Supreme Judicial Court held "that any juvenile offender previously convicted of [first-degree murder] . . . became eligible for parole after serving fifteen years of his or her sentence." Thus, both Diatchenko and Roberio, having each served more than fifteen years in prison, were immediately eligible for parole. In 2015, the Supreme Judicial Court of Massachusetts added more procedural protections to juvenile homicide offenders' initial parole board hearings and decisions:

Right to Counsel at Initial Parole Hearing. First, the court held that a juvenile homicide offender must be afforded the assistance of counsel in connection with his or her initial parole hearing. The court reasoned: "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. 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 evidence. In addition, although a parole hearing is unlike a traditional trial in that it does not involve direct and cross-examination of witnesses by attorneys, because the inmate's parole application may well be opposed by both the victim's family and public officials, it would be difficult to characterize this as an uncontested proceeding." (citation omitted). Thus, "a parole hearing for a juvenile homicide offender serving a mandatory life sentence involves complex and multifaceted issues that require the potential marshaling, presentation, and rebuttal of information derived from many sources. An unrepresented, indigent juvenile homicide offender will likely lack the skills and resources to gather, analyze, and present this evidence adequately." (citation omitted). The court further reasoned that "the juvenile homicide offender seeking parole is likely to be required to overcome arguments by both victims' family members and government officials opposed to the offender's release; the former of these parties may present as particularly sympathetic, while the latter will likely have greater advocacy skills than the offender seeking parole." The court concluded, therefore, that the opportunity to obtain release is not meaningful without access to counsel for the initial parole board hearing.

Access to Funds for Expert Witnesses. The Supreme Judicial Court of Massachusetts also held that in order to secure a meaningful opportunity for release, it is necessary "to authorize a Superior Court judge, upon motion of a parole-eligible, indigent juvenile homicide offender, to allow for the payment of fees to an expert witness to assist the offender in connection with his or her initial parole proceeding in certain limited contexts—specifically, where it is shown that the juvenile offender requires an expert's assistance in order effectively to explain the effects of the individual's neurobiological immaturity and other personal circumstances at the time of the crime, and how this information relates to the individual's present capacity and future risk of reoffending." The court further held that "[t]he judge may exercise discretion to do so when the judge concludes that the assistance of the expert is reasonably necessary to protect the juvenile homicide offender's meaningful opportunity for release."

Availability of Judicial Review. Finally, the Supreme Judicial Court of Massachusetts held that there is a right to limited judicial review of a parole board's denial of a juvenile homicide offender's release. The responsibility of the court in this capacity is to ensure that constitutional requirements are met. "[T]he parole hearing acquires a constitutional dimension for a juvenile homicide offender because the availability of a meaningful opportunity for release on parole is what makes the juvenile's mandatory life sentence constitutionally proportionate. In this particular context, judicial review of a parole

decision is available solely to ensure that the board exercises its discretionary authority to make a parole decision for a juvenile homicide offender in a constitutional manner, meaning that the art. 26 right of a juvenile homicide offender to a constitutionally proportionate sentence is not violated." The court reasoned that "judicial review is limited to the question whether the board has carried out its responsibility to take into account the attributes or factors [described in *Miller* and *Diatchenko I*] in making its decision." The court will review the parole board decision to deny release using an abuse of discretion standard: "The question for the reviewing judge will be whether the board abused its discretion in the manner in which it considered and dealt with 'the distinctive attributes of youth [that] diminish the penological justifications for imposing the harshest sentences on juvenile offenders,' as they relate to the particular circumstances of the juvenile homicide offender seeking parole. In this context, a denial of a parole application by the board will constitute an abuse of discretion only if the board essentially failed to take these factors into account, or did so in a cursory way. A judge may not reverse a decision by the board denying a juvenile homicide offender parole and require that parole be granted. Rather, if the judge concludes that the board's consideration of the juvenile offender's status as a juvenile and the distinctive attributes of his or her youth did constitute an abuse of discretion—was arbitrary and capricious—a remand to the board for rehearing would be appropriate." (citation omitted). The court noted that "the limited judicial review provided here does not authorize judges to substitute their judgment with respect to the parole release decision for the board's."

The court noted that these procedural protections apply only to juvenile offenders convicted of murder. The court remanded the case to the county court for entry of judgment consistent with this opinion.

***Maryland Restorative Justice Initiative v. Hogan*, No. ELH-16-1021, 2017 WL 467731 (D. Md. Feb. 3, 2017) (Section 1983 Action) (Post-*Montgomery*)-** Plaintiffs in this Section 1983 action – all Maryland inmates serving life-with-parole sentences for homicides committed when they were juveniles – allege, *inter alia*, denial of a meaningful opportunity for release in violation of the Eighth Amendment and Article 25 of the Maryland Declaration of Rights. They claim that although Maryland purports to provide parole eligibility for juvenile offenders serving life sentences, in practice the state's parole system converts life sentences to unconstitutional life-without-parole sentences. This is because not a single parole-eligible juvenile lifer in Maryland has been paroled in the last twenty years. Addressing defendants' motion to dismiss, the District Court determined that plaintiffs stated a plausible Eighth Amendment and Declaration of Rights claim and denied the motion in part. In particular, the court determined that plaintiffs had sufficiently alleged 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 required by *Graham*. In Maryland, parole is a discretionary system of conditional release administered by the Maryland Parole Commission (the "MPC"). Inmates like plaintiffs, serving life with parole sentences, may be eligible for parole after serving fifteen years or twenty-five years, depending on the circumstances. The MPC is directed to consider

several factors in determining whether to grant parole, including the circumstances of the crime and the inmate's progress during confinement. It is also required to consider special factors for juvenile offenders, including age, maturity, peer pressure, background, subsequent character development, and other factors or circumstances unique to juvenile offenders. By law, the Governor must approve a decision of the MPC to grant parole to an inmate who has served fewer than twenty-five years of a life sentence. Although such approval is not required if the Commission decides to parole an inmate who has served twenty-five years or more, the Governor may nonetheless "disapprove" the decision. There are no statutory or regulatory provisions governing the Governor's exercise of discretion. According to plaintiffs' allegations, although Maryland's governors have in the last two decades received recommendations for parole of 24 individuals serving life sentences, they have rejected every recommendation without explanation. The District Court first rejected defendants' argument that *Graham*, *Miller*, and *Montgomery* do not apply because plaintiffs did not receive sentences of life without parole and instead bring this challenge against the state's parole system. Citing Greiman, the court explained that, here, the responsibility for ensuring that plaintiffs received their constitutionally mandated "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" lies squarely with the state's parole process. It reasoned that, in light of the promise in *Graham* and *Montgomery* that a meaningful opportunity for release extends to all juvenile offenders except for those whose crimes reflect permanent incorrigibility, "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." Noting the U.S. Supreme Court's references to *later* opportunities to demonstrate this required change, the district court explained that it is unlikely the requisite maturity and rehabilitation would be evident at sentencing; instead, the vehicle to recognize it is the parole system. Ultimately, citing the Fourth Circuit's recent decision in *LeBlanc*, the court determined that *Graham* and its progeny are not inapplicable to challenges to a system of parole or early release, concluding that "the rationale of *Graham*, *Miller*, and *Montgomery* applies to a Juvenile Offender sentenced to life with parole for a homicide offense." Next, the district court concluded that plaintiffs plausibly alleged denial of a meaningful opportunity for release. Again citing *LeBlanc*, it explained that the Governor" possesses unfettered discretion to deny every parole recommendation for *any* reason whatsoever or for no reason at all." This absence of any governing standards "flies in the face of *LeBlanc*," functioning as a system of executive clemency that does not constitute a meaningful opportunity to obtain release for juvenile offenders. Moreover, plaintiffs allege that they have been impermissibly denied parole due to the nature of their offenses or their status as lifers, and that juvenile offenders are treated worse by the Maryland parole system due to the risk assessment tools used. This, too, supports their claim of denial of a meaningful opportunity to obtain release. Accordingly, defendants' motion to dismiss was denied (in relevant part).

***Hawkins v. N.Y. DOC*, 30 N.Y.S. 3d 397 (N.Y. App. Div. 2016) (Collateral Appeal) (Post-*Montgomery*) –** Juvenile defendant (age 16 at time of crime) was convicted of

second-degree murder. He was sentenced to a term of 22-years-to-life in prison. Hawkins has been denied parole nine times since becoming eligible for parole in 2000. At the time of his last hearing, he was 54 years-old and had served 36 years of his sentence. One of the reasons for the Board's denial was that granting Hawkins' release "would so deprecate the seriousness of [his] offense as to undermine respect for the law." Hawkins filed an appeal to annul the parole board's decision. The court agreed with Hawkins that "as a person serving a sentence for a crime committed as a juvenile, [Hawkins] has a substantive constitutional right not to be punished with a life sentence if the crime reflects transient immaturity and that [he] was denied his constitutional right to a meaningful opportunity for release when the Board failed to consider the significance of [his] youth and its attendant circumstances at the time of the commission of the crime." The court further reasoned: "The Board, as the entity charged with determining whether [Hawkins] will serve a life sentence, was required to consider the significance of [Hawkins'] youth and its attendant circumstances at the time of the commission of the crime before making a parole determination. That consideration is the minimal procedural requirement necessary to ensure the substantive Eighth Amendment protections set forth in *Graham*, *Miller*, and *Montgomery*." (internal citations omitted). As the *Montgomery* Court clarified: "life without parole is an excessive sentence for children whose crimes reflect transient immaturity." The court reasoned that the U.S. Supreme Court has "given some guidance as to the promise that a parole determination represents." First, "[t]he Court has clarified that the relevant distinction between a constitutional and unconstitutional life sentence for a juvenile homicide offender—for all but the rare case of an irreparably corrupt juvenile—is that a constitutional sentence guarantees, at some point, a 'meaningful opportunity to obtain release.'" The court went on: "Although the Court has not specifically reviewed a case regarding a parole determination for a juvenile homicide offender, it is axiomatic that such an offender still has a substantive constitutional right not to be punished with life imprisonment for a crime 'reflect[ing] transient immaturity.'" (citing *Montgomery*). "Further, the Court has made abundantly clear that the 'foundational principle' of the Eighth Amendment jurisprudence regarding punishment for juveniles is 'that [the] imposition of a[s]tate's most severe penalties on juvenile offenders cannot proceed as though they were not children.'" (citing *Miller*). Thus, "[a] parole board is no more entitled to subject an offender to the penalty of life in prison in contravention of this rule than is a legislature or a sentencing court." The court reasoned that *Miller* and *Montgomery* have determined what a juvenile homicide offender is procedurally entitled to at sentencing. The court noted that "an analogous procedural requirement is necessary at the parole release hearing stage." This is because, "[f]or those persons convicted of crimes committed as juveniles who, but for a favorable parole determination will be punished by life in prison, the Board must consider youth and its attendant characteristics in relationship to the commission of the crime at issue." (citing generally to *Hayden v. Keller* and *Greiman v. Hodges*). "Here, neither the hearing transcript nor the Board's written determination reflects that the Board met its constitutional obligation to consider [Hawkins'] youth and its attendant characteristics in relationship to the commission of the crime." (footnote omitted). "Because [Hawkins] was entitled to a meaningful opportunity for release in which his youth, and its attendant characteristics, were considered by the Board, we agree with [the] Supreme Court that [Hawkins] is entitled to a de novo parole release hearing."

***Greiman v. Hodges*, 79 F. Supp. 3d 933, 936 (S.D. Iowa 2015) (Decision on Motion to Dismiss) –** A juvenile offender convicted of a nonhomicide offense, committed at age 16, brought a § 1983 action against the Iowa parole board and other state defendants alleging that his federal and state constitutional rights were violated because the board denied him a meaningful opportunity to obtain release. Plaintiff was initially sentenced to mandatory LWOP. Following *Graham*, however, he was resentenced to life *with* the possibility of parole after 25 years and "[b]ecause Plaintiff had already spent more than twenty-five years in custody, he was eligible for parole immediately upon his resentencing." The plaintiff alleged, *inter alia*, that the board "failed to provide him a 'meaningful opportunity for parole'" by "summarily den[ying] him parole based solely on the seriousness of his offense," and by failing "to 'take into account [plaintiff's] youth and demonstrated maturity and rehabilitation as required under the new constitutional and statutory mandates.'" The plaintiff also alleged that the Department of Corrections "has a policy that requires him to take sex offender classes before he can be released on parole but only permits inmates with less than two years before discharge to take such classes." Because the plaintiff does not have a defined discharge date, he alleged he had been denied permission to enroll in sex offender classes and thus could not take the steps necessary to become eligible for parole. As relief, the plaintiff sought an order requiring the Department of Corrections to permit him to enroll in the necessary prison programs to become parole eligible, requiring the parole board to consider plaintiff's youth at the time of the offense and his demonstrated maturity and rehabilitation, and ordering the board to recognize the distinctions between children and adults. A federal district court in Iowa denied the defendants' motion to dismiss, reasoning, *inter alia*, that *Graham* has "applicability outside the context of a juvenile's initial sentencing" because "*Graham* explicitly held that . . . the State *must* . . . give [juvenile nonhomicide offenders] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (emphasis in original). Because the plaintiff was resentenced to life *with* parole, the court reasoned, "the ultimate length of Plaintiff's prison sentence will be determined by the [Iowa Board of Parole], because it alone has the authority to grant Plaintiff release." The court therefore concluded that it is clear that "the responsibility for ensuring that Plaintiff receives his constitutionally mandated 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' lies squarely with [the Iowa Board of Parole] and the other State-actor Defendants." The court reasoned: "Accepted as true, these allegations state a plausible § 1983 claim that Defendants, acting under color of state law, have wrongfully deprived and continue to deprive Plaintiff of a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,' thereby violating his right to be free from cruel and unusual punishment under the Federal and State Constitutions." The court therefore held that the plaintiff presented a plausible § 1983 claim and denied the defendants' motion to dismiss.

***Hayden v. Keller*, 134 F. Supp. 3d 1000 (E.D.N.C. 2015) (§ 1983 Action) -** A federal district court in North Carolina held that the parole process provided for juvenile

offenders serving life with parole in North Carolina failed to provide a meaningful opportunity to obtain release under *Graham*. The plaintiff was sentenced to natural life for various nonhomicide offenses. He became eligible for parole after serving 20 years, and would be considered for parole every year thereafter under the normal adult offender parole provisions. He was denied parole each year. Hayden had been in custody since 1983; he was 48 years old at the time he filed suit in federal court. Hayden's claim of an Eighth Amendment violation was brought in federal court under 42 U.S.C. § 1983. The court found several procedural problems with the North Carolina parole process for juveniles.

First, "[t]here is no differentiation between adult and juvenile offenders in North Carolina's parole scheme." "Throughout this process, every felony offender—adult or juvenile—is reviewed in the same way. The Parole Commission gives no consideration to an offender's age at the time of the offense." (citations omitted). The court noted: "[t]he commissioners and their case analysts do not distinguish parole reviews for juvenile offenders from adult offenders, and thus fail to consider 'children's diminished culpability and heightened capacity for change' in their parole reviews." The court explained: "Although Hayden's parole case file explicitly states that he was fifteen when he committed his offense, it is difficult for this court to believe that a parole commissioner can fully take into consideration [Hayden']s chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences [,] when reading Hayden's case file along with 90 others in a single day. Indeed, if anything, defendants have demonstrated that North Carolina's juvenile offenders face *harsher* treatment during parole reviews because the young age at which the crime is committed may actually be used as a negative factor in parole consideration by the case analyst preparing the report for the voting commissioners." (citation and quotation marks omitted). When a case is reviewed, an analyst prepares a written report and recommendation. In the report, "[t]here is no information about one's status as a juvenile offender. There is no specific information about maturity or rehabilitative efforts[,]" [and] "[t]here is no special process for one convicted as an adult before the age of 18." Indeed, "[c]ommissioner[s] are unaware" of an inmate's status as a juvenile offender and "[a]bsolutely no consideration is to be given for that status by the commissioners." The Court observed that the failure to consider juvenile status also prevents the board members from putting inmate's disciplinary history into context.

The court noted the other procedural problems with North Carolina's parole system. In particular, there is no notice given to prisoners in advance of the review, no opportunity for the prisoner to be heard on the question of maturity or rehabilitation (either in writing or in person), and no actual hearing or meeting. Instead, four commissioners vote electronically without consulting the offender or each other.[6]

[6] In North Carolina, the Parole Commission consists of four commissioners and employs a staff of thirty-six people including a psychologist, two lead parole case analysts, and sixteen parole case analysts. "For each case, the assigned analyst researches the record and the inmate file, including using such specific criteria that the Commission has said they wanted to know about the case, and then prepares a written report and recommendation. . . . Special weight is given to the 'brutality of the crime.'" Parole is a two-step process in North Carolina. First, is the "review"

The court further observed that "caseloads are enormous and each parole case analyst is responsible for approximately 4,338 offenders." The commissioners vote on approximately 2,000 cases every month, and approximately 91 in a "typical day." (internal citations omitted). In the court's view, "[t]he sheer volume of work may itself preclude any consideration of the salient and constitutionally required meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." In addition, the court stated that the data showing that juvenile offenders are rarely paroled—none in four of the past five years—raises "questions about the meaningfulness of the process as applied to juvenile offenders."

Based on these procedural shortcomings, the court concluded "that the North Carolina parole process violates the Eighth Amendment as outlined in *Graham*." The court gave the parties 60 days to present a plan for compliance with the decision.

Note that the district court's decision was initially stayed pending an appeal to the Fourth Circuit. The Fourth Circuit, however, dismissed the appeal for lack of jurisdiction. *See Hayden v. Keller*, 667 F. App'x 416 (4th Cir. 2016). It concluded that the district court's order was not appealable because it was not a final order, an immediately appealable injunction, or an appealable collateral order. Thus, the district court lifted the stay on August 25, 2016. *See* Order [ECF No. 72], *Hayden v. Keller*, No. 5:10-ct-03123-BO (Aug. 25, 2016).

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stage, "where the parole case analyst relies on psychological evaluations contained in the offender's prison file. After writing a summary of the prison file and making a written recommendation for or against granting parole, the parole case analyst provides the information to a commissioner." The commissioners then review the report and make independent electronic votes—they do not consult with one another in casting their votes. The commissioners' "usual vote is 'no' on felony parole at the 'review' stage." If the commissioners, however, vote "yes" at the review stage, then the file will go into the second stage—the "investigation" stage. At the 'investigation' stage, the parole case analyst notifies the offender, the offender's prison facility, the victim, the prosecuting district attorney, and law enforcement. It is normal practice for the commission to order a psychological report to be conducted on the offender at this second level of review." Hayden never reached the level-two investigation because he was denied parole at the review stage each year since 2002.