

RECORD NO.

21-7108

ORIGINAL

Supreme Court, U.S.
FILED

FEB 01 2022

OFFICE OF THE CLERK

In the Supreme Court of the United States

BRIAN ARTHUR TATE,

Petitioner,

v.

GOVERNOR LARRY HOGAN, *ET AL.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Brian Arthur Tate
DOC ID No. 229-385/ SID No. 1403719
Eastern Correctional Institution-Annex
30420 Revells Neck Road
Westover, Maryland 21890
(410) 571-3731

Pro se

QUESTIONS PRESENTED

Whether the Eighth Amendment of the United States Constitution, applicable to the States through the Fourteenth Amendment, extends beyond a juvenile offender's adult sentencing proceeding to include other forms of governmental release systems for this class of prisoner?

Whether Brian Tate's Maryland juvenile offender parole hearing was sufficient to conclude he received his "meaningful and realistic opportunity" for release, pursuant to the Eighth Amendment of the United States Constitution, despite the fact he was denied his application for parole based solely upon the nature of his offense and where this static factor is directly at odds with the "meaningful and realistic opportunity for release" standard of review?

Whether the United States Supreme Court's juvenile jurisprudence has created a "liberty interest" for juvenile offenders who were convicted as adults, and should their "crime not reflect irreparable corruption," must the states restore "some years of life outside prison walls" to those who demonstrate the required growth, maturity, and rehabilitation detailed by that jurisprudence?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. The following additional Defendants are part of this action and are listed as follows:

Governor Larry Hogan
100 State Circle
Annapolis, MD 21401

David Blumberg, Chairman
Maryland Parole Commission
300 E. Joppa Road, Suite 1000
Towson, MD 21286

Stephen Moyer, Secretary
Dept. Of Pub. Safety & Corr. Servs.
300 E. Joppa Road, Suite 1000
Towson, MD 21286

O. Wayne Hill, Commissioner
Dept. Of Pub. Safety & Corr. Servs.
300 E. Joppa Road, Suite 1000
Towson, MD 21286

Brian Frosh, Maryland Attorney General
Office of the Attorney General for Md.
200 St. Paul Place
Baltimore, Maryland 21202

Casey Campbell, Warden
Roxbury Correctional Institution
18701 Roxbury Road
Hagerstown, MD 21746

Susan Howe Baron, Asst. Attorney General
Counsel of Record
Office of the Attorney General for Md.
Dept. Of Pub. Safety & Corr. Servs.
6776 Reisterstown Road, Suite 311
Baltimore, MD 21215¹

¹ The original state habeas corpus filed to the circuit court in 2019 listed Maryland's Governor as well as the Defendants described above. Defendants Stephen Moyer, Secretary, and O. Wayne Hill, Commissioner, are no longer employed in these positions. Their names are only repeated here as original Defendants listed in the case.

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OPINION BELOW

On November 22, 2021, the Maryland Court of Appeals denied Petitioner's Petition for Writ of Certiorari on the issues presented herein. *See* Petition Docket No. 241, September Term 2021. The Order of the Court of Appeals is attached to this Petition in the Appendix. (A: 1).

On July 12, 2021 in an unreported opinion and order, Maryland's intermediate appellate court, the Court of Special Appeals, denied Petitioner's direct appeal adjudicating only some of the claims, rights and liabilities of all parties to the action, affirming the decision of the Circuit Court for Howard County. *Tate v. Hogan, et al.*, (Sept. Term 2020, No. 0537). The mandate in that case issued on August 12, 2021 and is attached in the Appendix. (B: 1-13).

On February 28, 2020 the Circuit Court for Howard County, Maryland denied Petitioner's habeas corpus petition in a 14-page opinion of the court. The circuit court did not adjudicate all claims in their entirety, the rights and liabilities of all parties to the action. *Tate v. Hogan, et al.*, Civil Case No. C-13-CV-19-000237. (C: 1-14).

JURISDICTION

This Honorable Court has jurisdiction under 28 U.S.C. § 1257(a). The judgment of the Maryland Court of Appeals was issued on November 22, 2021. *See* Appendix A: 1.

STATUTES INVOLVED IN THIS CASE

This case presents the question whether MARYLAND CODE ANNOTATED, CORRECTIONAL SERVICES ARTICLE ("CS") § 7-305 and CODE OF MARYLAND ADMINISTRATIVE REGULATION ("COMAR") 12.08.01.18A, where a juvenile offender charged and convicted as an adult is petitioning for their "meaningful and realistic opportunity for release" and demonstrates the required growth, maturity, and rehabilitation necessary for some years of life outside prison walls, is in accord with United States Constitution Eighth Amendment (prohibition against cruel and unusual punishment) and United States Constitution Fourteenth Amendment (due process), requiring a state to provide that juvenile offender with release from incarceration by means of a "liberty interest" -- with a focus on the juvenile's growth, maturity, and rehabilitation discussed by the Court in its jurisprudence as the crucial factors.

STATEMENT OF THE CASE

Petitioner Brian Tate (hereinafter "Mr. Tate") has been incarcerated since February 25, 1992 for first-degree murder. At age 16, he stabbed to death 19-year-old Jerry Haines over an ex-girlfriend of Tate's, Tammi Heath, whom Mr. Haines had become involved with. An autopsy revealed that the victim had 24 stabbing and slashing wounds. Mr. Tate was sentenced on January 18, 1993 to life with the possibility of parole under then-Maryland state law.

On June 6, 2017 Mr. Tate appeared before the Maryland Parole Commission for his first parole hearing.¹ Commissioners Stephen DeBoy and Christopher Reynolds were in attendance. During the parole interview both commissioners initially praised Tate's progress and intimated that his release was imminent pending a psychological risk-assessment. That interview came with the following rationale/remarks:

"Mr. Tate presents well and accepts responsibility for his actions in this offense. He has completed a plethora of cognitive programs and has received numerous letters of recommendation. He has undergone years of psychotherapy to rebuild his personality to become more mature. Juvenile brain development factors were fully considered."

Shortly before Mr. Tate's psychological risk-assessment was performed in October 2018 at the behest of the Maryland Parole Commission, the Maryland Court of

¹ Pursuant to Md. Code Ann., CS § 7-301(d)(1), an inmate sentenced to life imprisonment with the possibility of parole is not eligible for parole consideration until the inmate has served 15 years (or the equivalent of 15 years taking into account diminution credits). See also COMAR 12.08.01.17A(7). Mr. Tate had postponed his parole hearing indefinitely in 2003 due to the then-political atmosphere surrounding former Maryland Governor Parris Glendinning's "life means life" policy announced in 1995. See *Lomax v. Warden, Md. Corr. Training Center*, 356 Md. 569; 741 A.2d 476 (Md. 1999).

Appeals issued its opinion in *Carter v. State*, 461 Md. 295; 192 A.3d 695 (Md. 2018) where a Majority of that court in a 4-3 decision found that there was nothing unconstitutional regarding a juvenile offender receiving an indeterminate life term under state law. Thereafter Dr. Robert Ott performed the exam, and upon completion and transmittal of the very positive psychological findings to the Maryland Parole Commission, Mr. Tate's application for parole was denied a mere four days later in November 2018 by lead Commissioner DeBoy. Commissioner Reynolds took significantly longer and eventually concurred in January 2019. The commissioners' rationale/remarks for rehearing were:

"Psychological risk-assessment completed in October 2018. After consideration of all factors, and the nature and circumstances of this horrific murder, a rehearing for November 2021 is warranted."²

In March 2019, Mr. Tate filed a *pro se* petition in the Circuit Court for Howard County requesting habeas corpus relief pursuant to Maryland Rule 15-301 *et seq.* Tate argued that the commissioners did not consider his "juvenile lifer status," thus denying him a "meaningful opportunity for release based on demonstrated growth and maturity" articulated by this Court in *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016).

² It should be noted that this simple finding was not sufficient pursuant to the settlement between the ACLU and the Maryland Board of Public Works in *Md. Restorative Justice Initiative v. Hogan*, ELH-16-102, 2017 U.S. Dist. LEXIS 15160, 2017 WL 467731 (D. Md. Feb. 3, 2017). Mr. Tate is a part of that class-action lawsuit and has argued these same issues at all levels of appeal before Maryland's courts.

Mr. Tate further argued that Maryland's parole scheme requiring the approval of the Governor in "lifer cases" under COMAR and Correctional Services Article ("CS") § 7-301(d)(4), as well as the Maryland Parole Commission's authority pursuant to COMAR and CS § 7-305, are unconstitutional as applied to juvenile offenders. Finally, Mr. Tate argued that the State of Maryland created a Fourteenth Amendment "liberty interest" in parole release for prisoner's such as Tate, by their juvenile status alone, when combining the Maryland Court of Appeals' *Carter* finding of a U.S. Const. Eighth Amendment protection in a parole hearing for juvenile offenders alongside the applicable COMAR and Md. Code Ann., Correctional Services Articles, required state officials to release him on parole upon a demonstration of growth, maturity, and rehabilitation under the "factors-to-be-considered" analysis.³

The State of Maryland, in its Answer, asserted that the parole commissioners fully considered all of the statutory and regulatory factors applicable to parole consideration of a juvenile lifer before determining that Tate was not a suitable candidate for parole at that time. The State suggested that the circuit court adopt the reasoning of the U.S. District Fourth Circuit Court of Appeals in *Bowling v. Director, Virginia Department of*

³ Since the date of the Maryland Court of Appeals' decision to deny Mr. Tate's Petition for Writ of Certiorari on November 22, 2021, Maryland's Legislature, over gubernatorial veto, has since repealed those parts of Md. Code Ann., CS §§ 7-206(3)(i); 7-301(d)(4)-(5) that required the Governor to approve recommendations for parole release made by the Maryland Parole Commission. While this most certainly is a positive endeavor in the right direction for juvenile constitutional rights in Maryland, it does not change the calculus surrounding the State of Maryland and other jurisdictions' failure to provide juveniles a meaningful opportunity for release as those constitutional rights continue to be infringed upon.

Corrections, 920 F.3d 192 (CA4 2019), where that court rejected arguments purportedly similar to those of Mr. Tate's.⁴

In addition, the State argued that *Carter v. State*, 461 Md. 295; 192 A.3d 695 (Md. 2018), had already addressed Mr. Tate's argument that the Maryland parole scheme is unconstitutional, and found that it is not. Rather, according to the State, Maryland's parole process complies with the Eighth Amendment and the holdings in *Graham* and *Miller* because it provides the proper means and mechanisms to afford inmates serving sentences for crimes committed as juveniles "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." See *Miller v. Alabama*, 567 U.S. at 479 (citations omitted).

On July 16, 2019, Mr. Tate appeared before the Honorable Judge John J. Kuchno in the Circuit Court for Howard County for oral arguments on the *habeas* petition. At the conclusion of the hearing, the circuit court held the case *sub curia*. On February 28, 2020 Mr. Tate's habeas petition was denied in a 14-page opinion of the court. The circuit court did not address the "liberty interest" argument in its memorandum of law denying Tate

⁴ Shortly after the Fourth Circuit Court of Appeals issued its decision in *Bowling*, the Petitioner in that case petitioned this Court for certiorari, which the Court granted, arguing many of the points Mr. Tate now raises. However, before *Bowling*'s case appeared before the Court for oral arguments, the State of Virginia released Mr. Bowling on parole. The *Bowling* certiorari case was then rendered moot, and dismissed, as the relief being sought had been granted, *i.e.*, release on parole. After this both the Attorney General for Virginia and *Bowling*'s counsel of record filed a joint motion requesting that the Fourth Circuit Court of Appeals reconsider its *Bowling* decision in light of his release, and further requesting the Court of Appeals withdraw its published opinion. The Fourth Circuit Court of Appeals denied the joint motion for reconsideration and left its opinion standing as was.

habeas relief. This argument was, however, preserved for appellate review and presented to the Maryland Court of Special Appeals. *See* Maryland Rule 8-202.⁵

A timely *pro se* appeal to Maryland's Court of Special Appeals followed, and on July 12, 2021 that court issued a 13-page opinion denying Mr. Tate's appeal affirming the lower court's ruling. Once again Mr. Tate's "liberty interest" argument under the Due Process Clause of U.S. Const. Fourteenth Amendment was not addressed and the Court of Special Appeals failed to rule upon the merits of that Claim. The Court of Special Appeals' mandate issued on August 12, 2021.

Mr. Tate, *pro se*, timely petitioned the Maryland Court of Appeals for certiorari. *See* Maryland Rule 8-302. Among the questions asked, Mr. Tate asked the Court grant certiorari to address the care that needed to be taken during a juvenile offender's parole hearing before the Maryland Parole Commission and Maryland Governor when a child, particularly one who has demonstrated the growth, maturity, and rehabilitation needed to obtain a second chance, is convicted as an adult. Tate argued that the matter was an issue of first impression in Maryland, and involved an area of the law - a juvenile offender's

⁵ Mr. Tate also argued that he had been incorrectly classified to medium security, and sought reclassification to minimum security in order to work and demonstrate his maturity and rehabilitation through the gradual earning of additional privileges and the ability to succeed in lower-security settings. The argument was summarily denied by the circuit court for failure to fulfill the requirements of the Prison Litigation Reform Act. However, this argument was not presented for appellate review to the Maryland intermediate appellate court and would have been moot anyway as Mr. Tate is currently housed at a minimum security facility on Maryland's lower Eastern Shore. However, to demonstrate Tate's point, he currently is the *only* "juvenile lifer" currently housed at minimum security in the entire State of Maryland and was only transferred to minimum security due to litigation against Maryland's Executive in these proceedings.

Eighth Amendment protection in a meaningful and realistic opportunity for parole release at his or her parole hearing.

Additionally, Tate argued another matter of first impression in Maryland and involved an area of the law - a juvenile offender's Fourteenth Amendment right to Due Process, *i.e.*, "liberty interest" in a parole hearing and how it was to be applied. Tate argued that guidance was needed because the Maryland Parole Commission and Maryland Governor, when deciding these juvenile offenders applications for parole, needed to be given direction on what it means to "consider" those factors delineated pursuant to the Correctional Services Article and COMAR under the cloak of the Eighth Amendment.

Finally Tate argued that guidance is needed because the Maryland Parole Commission and Maryland Governor, when weighing those "factors" they must consider pursuant to the Maryland Correctional Services Article and COMAR, must be given guidance on the U.S. Const. Fourteenth Amendment's Due Process Clause requirement where a juvenile demonstrates the necessary growth, maturity and rehabilitation this Court and the Maryland Court of Appeals have found requires a second lease on life and liberty. In other words, should a juvenile demonstrate that his or her "crime did not reflect irreparable corruption," "some years of life outside prison walls *must* be restored." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 736-737 (emphasis added).

As the number of juveniles convicted as adults in the United States is increasing, guidance from this Court will lead to greater awareness about the special care that needs to be taken during a juvenile offender's application for parole release, or other methods

of release used across the country. Mr. Tate's petition for writ of certiorari filed in the Maryland Court of Appeals was denied on November 22, 2021.

REASONS FOR GRANTING THIS PETITION

1. A Question of First Impression

This case presents the opportunity to address, on first impression in the United States, issues that are of national importance:

When a juvenile offender charged and convicted as an adult petitions for their "meaningful and realistic opportunity for release," what degree of protection does the Eighth Amendment of the United States Constitution provide them in a parole hearing to ensure the offender's constitutional rights are not being infringed upon by those whose responsibility it is to provide that opportunity for release -- with a focus on the juvenile's growth, maturity, and rehabilitation as the crucial factor?

When a juvenile offender demonstrates they are not irreparably corrupt and deserving of "some years of life outside prison walls" based on growth, maturity, and rehabilitation, does a liberty interest in being released from incarceration attach under the Due Process Clause of the Fourteenth Amendment of the United States Constitution -- with a focus on this Court's juvenile jurisprudence as the crucial factor?

Whether the State of Maryland continues to remain a system of *ad hoc* executive clemency instead of a true system of parole for juvenile offenders convicted as adults, where opportunities for release are 'remote' rather than 'meaningful,' due to that state's misinterpretation of Supreme Court juvenile jurisprudence -- with a focus on Maryland jurisprudence and the state laws that were created thereof as the crucial factor?

There is a split on precedent within the state courts and federal circuits regarding this Court's *Graham*, *Miller*, and *Montgomery* opinions. Specifically relevant to this case, under Maryland state law, the Maryland Court of Appeals has found that a "meaningful opportunity to obtain release based on demonstrated maturity or rehabilitation - by parole or otherwise - is not simply a 'matter of grace' for juvenile

offenders serving life sentences[,] [i]t is required by the Eighth Amendment.” *Carter v. State*, 461 Md. 295, 340; 192 A.3d 695, 720 (Md. 2018). On the other hand, the United States Fourth Circuit Court of Appeals in *Bowling v. Director, Virginia Department of Corrections*, 920 F.3d 192 (CA4 2019) had specifically found there is no Eighth Amendment protection in a parole hearing, and declined to extend the Eighth Amendment beyond sentencing as, in their view, this Court also did not extend the Eighth Amendment to include different types of release systems beyond criminal sentencing schemes.

Importantly, there is no precedent from this Honorable Court discussing how the states are to apply this Court’s Eighth Amendment juvenile jurisprudence except for that the states are to create the “means and mechanisms for compliance” in the first instance. *Graham*, 560 U.S. at 75. This is an unresolved question, and as a result different levels of protection are being applied (some bare minimal while others more robust) and understandably so. Additionally, deciding some of the issues in this case does not require any change in pre-existing law. The law in all states, and specific to Maryland, already provides that those responsible for carrying out the function of the Executive must “take care that the laws are faithfully executed.” Maryland Constitution, Article II, §9; Article II, § 24. As such Maryland’s interpretation of this Court’s precedent already supports the *assumption* that when a juvenile offender participates in a state-established prison release system, the applicable state and federal laws are being faithfully executed and that juvenile offender is being provided a “meaningful and realistic opportunity” for parole release. *See, e.g., Carter v. State*, 461 Md. 295, 344; 192 A.3d 695, 723 (Md.

2018). Unfortunately, however, Maryland's Executive has proven true former Maryland Court of Appeals Chief Justice Barbera's prediction, "lip service." *Id.* at 346 n.34; 724 n.34 (concurring in part; dissenting in part).

While pre-existing laws generally supports the conclusion that a meaningful and realistic opportunity for release will be provided to a juvenile offender convicted as an adult, the principles underlying them have not been applied in a published decision from this Court involving how the states must apply those laws and statutes outlined within those rules and regulations states have created to come into compliance with the Court's rulings on juvenile jurisprudence. As explained below, guidance is needed to raise awareness and improve the quality of these juvenile offender release systems where children are involved.

2. A Question of Great Public Importance

The question whether children charged and convicted as adults needs special attention when petitioning for their meaningful and realistic opportunity for release from incarceration is of great and increasing public importance. It's important because it stands at the crossroads of advancing medical science, and constitutional due process. Neuroscience researchers have increasingly documented that adolescents make decisions, and understand legal concepts, in ways that differ from adults.

Additionally, there are significant due process concerns. While the Court stressed that "[a] State is not required to guarantee eventual freedom" because some "who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives," *Graham*, 560 U.S. at 75, the Court left

open the question as to when due process is offended in those instances where release is denied a juvenile offender even though they demonstrate the required growth, maturity, and rehabilitation discussed by the Court and its conclusion that “some years of life outside prison walls *must* be restored.” *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 736-737 (emphasis added).

This Court has consistently recognized that constitutional importance attaches to the biological fact that adolescent brains are different. *See J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (collecting precedent discussing the common ‘nature of juveniles’). Additionally, other jurisdictions have already found that based on the type of evidence set forth in a parole hearing (in which offenders have no right to counsel) and the idiosyncratic biases of individual commissioners, parole decisions are highly inconsistent among the population of juvenile offenders. *See, e.g., Brown v. Precythe*, No. 2:17-cv-04082-NKL, 2018 U.S. Dist. LEXIS 176272, at *24-30 (W.D. Mo. Oct. 12, 2018).⁶

⁶ On March 10, 2021 the ACLU-Md. and Maryland Board of Public Works approved a legal settlement in *Maryland Restorative Justice Initiative v. Hogan, et al.*, ELH-16-102, 2017 U.S. Dist. LEXIS 15160, 2017 WL 467731 (D. Md. Feb. 3, 2017) that requires the Maryland Parole Commission, the Division of Correction and Maryland’s Governor to consider in parole requests how old someone was when they committed their offense. The settlement also requires the state to improve transparency, giving parole candidates access to information used in decisions about their release, and reaffirms their right to written explanations about those rulings.

The new regulations are designed to remove controversial barriers to parole and encourage coordination between the prison system and Maryland Parole Commission to better prepare people as they return to society. The settlement further requires the Commission and prison staff to make recommendations about whether a person should be released and removes a regulation that banned prisoners sentenced to parolable life terms from getting transferred to prison facilities below medium security to allow them the opportunity to gradually readjust to society. The settlement stopped short of removing the governor’s control over parole decisions entirely although Maryland’s legislature

Because the case for retribution is not as strong due of the lesser culpability of children, harsh sentences are unlikely to deter other juveniles because “the characteristics that make juveniles more likely to make bad decisions also make them less likely to consider the possibility of punishment, which is a prerequisite to a deterrent effect.” *Graham*, 560 U.S. at 72. The need to incapacitate the wrongdoer to protect public safety diminishes and disappears as children mature and become rehabilitated. Simply put, a “meaningful possibility of release based on demonstrated maturity and rehabilitation,” *Graham*, 560 U.S. at 75, incentivizes and thereby promotes rehabilitation. Granting certiorari will help raise awareness about these issues and improve the quality of those particular penological theories legislatures have adopted across the country, as well as those legislatures who have not adopted any theory at all.

These research-based and due process concerns are especially important and directly applicable here because it was Tate’s “meaningful and realistic opportunity for

finally did by overriding a recent gubernatorial veto surrounding the matter in December 2021. Unfortunately, however, this does not change the calculus for those juvenile offenders who have languished within Maryland’s penal system prior to the settlement as these changes do nothing to correct past-decisions by the Governor and Parole Commission. Most importantly, however, is nothing has changed as a meaningful and realistic opportunity for release continues to be denied due to a broadly construed reading and interpretation of this Court’s Eighth Amendment substantive guarantee. Because the Court did not require legislatures to adopt any particular penological theory from its *Graham* and *Miller* decisions, 560 U.S. at 71, those whose responsibility it is to ensure that the laws are being faithfully executed continue to interpret the Court’s judicial intent in a manner that is greatly inconsistent.

The inconsistencies within Maryland’s “meaningful and realistic opportunity for release” system clearly demonstrates the highly politicized nature of juvenile offender parole hearings which supports the conclusion that these idiosyncratic biases discussed above continue to contaminate the quality of these juvenile offender parole hearings due to a flawed interpretation of this Court’s juvenile jurisprudence.

release” that was denied him merely because of the crime itself - a static factor the passage of time can never change - although the Maryland Parole Commission readily admitted Tate had fulfilled the necessary requirements of growth, maturity, and rehabilitation. Simply put, after 30 years of active incarceration, there was no further penological justification in keeping Tate incarcerated any longer except for the sake of incarceration itself. Clearly this is not the correct litmus test.

In Maryland, the population of juveniles charged as adults with extremely serious felonies is increasing.⁷ Hundreds of juveniles are charged with these crimes in our circuit courts every year. More frequently, especially in the context of juveniles like Mr. Tate who received life sentences, courts and legislatures across the country are being asked to re-review proceedings from years ago in light of more recent precedent. Many courts and legislatures are left guessing, based upon their own idiosyncratic biased interpretation of this Court’s intent, on how to fulfill their Eighth Amendment obligation based on the Court’s decisions to leave open the “means and mechanisms for compliance” question in the first instance. *Graham*, 560 U.S. at 75. Courts and legislatures handling these cases do not have much specific guidance. These are topics of public importance, and granting certiorari will assist legal professionals confronting these issues.

⁷ See Maryland Governor’s Office of Crime Control & Prevention, *Juveniles Charged as Adults and Held in Adult Detention Facilities: Trend Analysis and Population Projections*, 20 (2016).

3. This Case Is Well-Suited To Provide the Guidance Needed Because This Juvenile Offender Was Denied His “Meaningful and Realistic Opportunity For Release” Based On His Crime Standing Alone, Which Is Directly At Odds With The Court’s Findings On Growth, Maturity, and Rehabilitation.

A review of the ACLU-Md. and Maryland’s Board of Public Works post-*Maryland Restorative Justice Initiative v. Hogan, et al.*, ELH-16-102, 2017 U.S. Dist. LEXIS 15160, 2017 WL 467731 (D. Md. Feb. 3, 2017) settlement, and cases from other jurisdictions, proves the fact pattern presented here is well-suited to provide the guidance needed.⁸ The one issue that causes the most confusion in a juvenile offender parole hearing, and arguably other proceedings where a juvenile offender’s sentence is being reviewed in light of new precedent, is the nature or circumstances of the crime as a “factor” to be considered in determining suitability for release.

Part of the settlement discussed, *supra*, mandates the Maryland Parole Commission afford a juvenile offender’s nature or circumstances of their crime less and less weight with each subsequent parole hearing the juvenile participates in. Clearly the ACLU-Md./Md. Board of Public Works settlement recognized the Defendants in *Maryland Restorative Justice Initiative v. Hogan, et al.*, *supra*, routinely used this “static factor” as a tool to deny a juvenile offender their meaningful and realistic opportunity for release and had no true value when determining a juvenile offender’s measure of growth, maturity, and rehabilitation now. However, this static factor the passage of time can never change is still being utilized as a default mechanism to deny juvenile offender’s

⁸ See Footnote 5, *supra*.

their meaningful opportunity for release just as was done in Tate's case. (*See* Appendix D: Maryland Parole Commission Worksheets).

In cases where the Maryland Parole Commission is left to infer what is to be understood from the jurisprudence of this Court and other sources -- and a juvenile offender's crime is deemed horrific as clearly all murders are -- parole commissioners and judges that review the same case are repeatedly reaching opposite conclusions without fully accounting for the growth, maturity, and rehabilitation the juvenile offender, who is now an adult, has truly attained. They are worthy of having restored some years of life outside prison walls, but because of the idiosyncratic biases of individual parole commissioners and judges the juvenile offender is denied because of the crime they committed and nothing more.

If a meaningful and realistic opportunity for release is to be based upon a juvenile offender's growth, maturity, and rehabilitation, the use of that offender's crime cannot be the litmus test that is the driving force behind a reviewing body's decision to deny release. To find the contrary would render this Court's juvenile jurisprudence inconsequential as state executive and legislative bodies can utilize the juvenile offender's crime to deny the restoration of some years of life outside prison walls until the death of the prisoner despite the necessary growth, maturity, and rehabilitation required to regain their freedom. Without more specific guidance, these cases, and others throughout the United States, will continue to draw attention and judges and parole commissioners will routinely continue to reach contradictory conclusions in the case.

4. Granting Certiorari Will Raise Awareness About How Judges And Parole Commissioners Will Always Be Able To Make Informed Decisions About What Due Process Requires Where A Juvenile Offender Demonstrates The Necessary Growth, Maturity, And Rehabilitation Needed To Regain Some Years Of Life Outside Prison Walls.

The United States Fourth Circuit Court of Appeals and Maryland Court of Appeals raises concern that federal and state courts need more guidance on how to weigh what this Court called “growth, maturity, and rehabilitation,” as well as how the “personal characteristics” of the juvenile offender are to be factored into when the prisoner petitions for their “meaningful and realistic opportunity for release” to regain “some years of life outside prison walls” under the Eighth and Fourteenth Amendments.

A review of Maryland’s post-*Montgomery* opinions reveals that when a juvenile offender petitions for their meaningful and realistic opportunity for release, the nature or circumstances of the crime has been the driving force behind denying release even though the juvenile, who is now an adult, demonstrates the required growth, maturity, and rehabilitation necessary to regain some years of life outside prison walls. *See, e.g.,* Maryland Parole Worksheet and Gubernatorial Report, Inmate Gregory Garnes (attached as Appendix E). This is so even though the Maryland Court of Appeals in *Carter v. State*, 461 Md. 295; 192 A.3d 695 (Md. 2018) had specifically found, based upon their interpretation of this Court’s jurisprudence, that an United States Constitution Eighth Amendment protection attaches to a Maryland juvenile offender’s parole hearing. *Id.* at 340; 720.

On the other hand, the United States Fourth Circuit Court of Appeals in *Bowling v. Director, Virginia Department of Corrections*, 920 F.3d 192 (CA4 2019), found there is

no Eighth Amendment protection for a juvenile offender in a parole hearing, and declined to find so because in their view, based upon their interpretation of the same jurisprudence discussed in Maryland's *Carter* decision, this Court extended the Eighth Amendment to sentencing only and not to other collateral forms of release. Other jurisdictions have had to grapple with how to ensure the legality of existing and future sentences of juvenile offenders under the laws of their respective states as well in the wake of *Graham* and *Miller* while not intruding on the legislature's role in defining offenses and punishments.⁹

Some courts, expressing discomfort, have assumed the role of temporary legislator in directing trial courts how to comply with the Eighth Amendment with respect to post conviction reviews and future sentencing. *See, e.g., Stevens v. State*, 2018 OK CR 11, 422 P.3d 741, 749 (Okla. Crim. App. 2018) (in the course of granting relief to a juvenile offender serving life without parole sentence, court outlined "interim rules of procedure" for trial courts to comply with *Miller* "[u]ntil such time as the Legislature addresses this

⁹ In some states in which the legislature has already amended the statutes governing the parole system in light of this Court's *Graham*, *Miller* & *Montgomery* trilogy, courts have refrained from addressing the adequacy of those measures until they were implemented. *People v. Franklin*, 63 Cal. 4th 261, 202 Cal. Rptr. 3d 496, 370 P.3d 1053, 1065-67 (Cal.), *cert. denied*, 137 S. Ct. 573, 196 L. Ed. 2d 450 (2016); *see also State v. Zarate*, 908 N.W.2d 831, 847-48 (Iowa 2018). Ironically, when the Maryland Court of Appeals issued its opinion in *Carter v. State*, 461 Md. 295; 193 A.3d 695 (Md. 2018), it had before it a wealth of data from other jurisdictions only to fail in the end as the Majority of that court failed to fully address the reasoning behind this Court's retroactivity finding in *Montgomery* and, as a result, inaccurately identified the Court as having imposed a procedural right for juvenile offenders to have a nebulous "meaningful opportunity" for release rather than a substantive right to actually be released upon a showing of rehabilitation. *Id.* at 317-318; 708. In short, due to the Maryland Court of Appeals' nebulous finding in *Carter*, *supra*, Maryland's Executive has incorrectly identified judicial intent as providing the decision-maker with what continues to be unlimited discretion. In other words: How much discretion is too much, and where in the sand is the line drawn?

matter”); *Commonwealth v. Batts*, 640 Pa. 401, 163 A.3d 410, 450-51 (Pa. 2017) (“The General Assembly has not taken any appreciable steps to create a separate sentencing statute or to revise the existing law so that it applies to juveniles ... Therefore ... we will exercise our constitutional power of judicial administration to devise a procedure for the implementation of the *Miller* and *Montgomery* decisions...” (internal quotes and citations omitted); *State v. Dyer*, 77 So.3d 928, 931 n.6 (La. 2011) (“Thus, our decision in realtors’ cases is an interim measure (based on the legislature’s own criteria) pending the legislature’s response to *Graham*”); *Bear Cloud v. State*, 2013 WY 18, 294 P.3d 36, 45 (Wyo. 2013) (acknowledging that it is the legislature’s role to determine penalties for offenses, but outlining procedures for trial courts to follow and criteria to be considered in sentencing juvenile offenders to comply with *Graham* and *Miller* “at least until the Legislature amends the sentencing scheme for juveniles”); *Parker v. State*, 119 So.3d 987, 998 (Miss. 2013) (vacating sentence of juvenile offender for non-compliance with *Miller* and outlining sentencing options for trial courts as “stopgap measure” pending action by state legislature). As discussed, *supra*, the Maryland Court of Appeals had a wealth of data from which to draw before rendering its *Carter* decision, but in the end decided “[w]e need not follow that path.” *Carter*, 461 Md. at 343; 193 A.3d at 722.

The use of a prisoner’s crime as a “factor” when determining if some years of life outside prison walls shall be restored is contradictory at best since this factor is a static one the passage of time may never change. As indicated the data suggests that courts and parole commissioners have much less experience applying that special care and scrutiny when evaluating a juvenile offender’s growth, maturity, and rehabilitation, or how these

factors are to be interpreted under the Eighth & Fourteenth Amendment's "factors-to-be-weighed" analysis. Granting certiorari will help ensure these factors are always weighed correctly when that juvenile offender petitions for his or her meaningful opportunity for release whenever they appear before a judge or parole commission.

5. Requirements Of Constitutional Due Process Necessitate A Release From Incarceration Upon A Juvenile's Demonstration Of Growth, Maturity, And Rehabilitation.

The Eighth Amendment of the United States Constitution prohibits "cruel and unusual punishments." U.S. Const. Amend. VIII. That prohibition applies to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666 (1962). The Fourteenth Amendment of the United States Constitution provides that States may not "deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. XIV. Maryland's Declaration of Rights has similar proscriptions to the Eighth and Fourteenth Amendments of the U.S. Constitution. See Maryland Declaration of Rights: Article 16 ("no Law to inflict cruel and unusual penalties ought to be made in any case, or at any time, hereafter."), Article 19 ("That every man, for any injury done to him in his person [], ought to have remedy by the course of the Law of the Land..."), Article 25 ("cruel and unusual punishment [ought not to be] inflicted, by the Courts of Law."), Article 44 ("That the provisions of the Constitution of the United States, and of this State, apply").

An examination of a procedural due process claim under the Fourteenth Amendment proceeds in two steps. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). First, the court must determine whether there exists a liberty or property

interest which has been interfered with by the state. *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) (citing *Board of Regents, id.*) Second, and if and only if a petitioner establishes the existence of a protected interest, the court must examine whether the procedures attendant upon that deprivation were constitutionally sufficient. *Id.* (citing *Hewitt v. Helms*, 459 U.S. 460, 472 (1983)).

In general, “[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.” *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979). Parole in some states has been described as “a matter of grace” that “may be denied for any reason (except, of course, an unlawful one such as race), or for no reason.” *Garner v. Jones*, 529 U.S. 244, 258-259 (2000); *see also Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (“the States are under no duty to offer parole to their prisoners.”)

As discussed, *supra*, this Court stressed that “[a] State is not required to guarantee eventual freedom” because some “who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives.” *Graham*, 560 U.S. at 75. *See also Carter*, 461 Md. at 311; 192 A.3d at 704 (quoting *Graham, id.*). To guarantee eventual freedom for every juvenile offender without criteria or a system of scales to weigh that criteria would force states to release otherwise dangerous children who are now dangerous adults. But the Court left open this question for when due process is offended in those instances where release is denied a juvenile offender even though they demonstrate the required growth, maturity, and rehabilitation this Court discussed in its *Montgomery* conclusion that “some years of life

outside prison walls *must* be restored.” *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 736-737 (emphasis added). It begs the question: Does parole, and other forms of equitable release from incarceration, continue to remain a simple ‘matter of grace’ for juvenile offenders convicted as adults, or does due process mandate they be released upon a showing of the required growth, maturity, and rehabilitation discussed by the Court in *Graham* and its progeny? Indicia of national consensus on the subject now looks to this Court for an answer.

Because the Maryland Court of Appeals in *Carter v. State*, 461 Md. 295; 193 A.3d 695 (Md. 2018) interpreted this Court’s Eighth Amendment juvenile jurisprudence as substantively altering the legal parameters for juvenile offenders seeking to obtain a meaningful opportunity for release in the State of Maryland (“[P]arole or otherwise - is not simply a ‘matter of grace’ for juveniles serving life sentences[,] [i]t is required by the Eighth Amendment.” *Id.* at 340; 720), logically a liberty interest in actually being released from incarceration now attaches under the Due Process Clause where that juvenile offender demonstrates the required growth, maturity, and rehabilitation needed to regain some years of life outside prison walls. The Fourth Circuit Court of Appeals has determined that it is well established that “a [state] statute may create a liberty interest in parole release that is protected by the Due Process Clause of the Fourteenth Amendment where the statute gives rise to a legitimate ‘expectation of parole.’” *Hill v. Jackson*, 64 F.3d 163, 170 (CA4 1994) (quoting *Bd. of Pardons v. Allen*, 482 U.S. 369, 373 (1987)). Clearly the State of Maryland, albeit probably inadvertently when it tried to salvage an otherwise unconstitutional parole scheme due to the Maryland Governor’s

involvement with “juvenile lifer” parole (*see* Md. Code Ann., CS § 7-301(d)); *see also* *Carter v. State*, 461 Md. at 343-44; 192 A.3d at 722-23), has given a rise to a legitimate expectation of parole release through the adoption of its regulations, statutes, and caselaw. And this is rightfully so.

In light of *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), the Maryland Governor and Parole Commission adopted new regulations pursuant to COMAR 01.01.2018.06 and COMAR 12.08.01.18A for prisoners sentenced to parolable life terms received as children. *See also* Maryland Code Annotated, Correctional Services Article (“CS”) § 7-305; *Carter*, 461 Md. at 321 n.14; 192 A.3d at 710 n.14. As the language regarding these regulations and statutes are specifically designed to incorporate the *Graham* and *Miller*-factors, as well as the Maryland *Carter* court extending an Eighth Amendment substantive guarantee in a parole hearing for juvenile offenders, a liberty interest in receiving parole has been created by the State of Maryland upon that juvenile’s demonstration of the growth, maturity, and rehabilitation detailed by the Court. If the opposite were to hold true, opportunities for release will continue to be ‘remote’ rather than ‘meaningful’.

Arguably this Court through its juvenile jurisprudence in *Graham*, *Miller*, and *Montgomery* has already created a liberty interest for juvenile’s to be released from incarceration where the juvenile was able to demonstrate the required growth, maturity, and rehabilitation. However, the inherent problem lies within the Court’s decision to leave the states to create the “means and mechanisms for compliance” in the first instance. *Graham*, 560 U.S. at 75. As a result jurisdictions from across the country have

erred in its interpretation of this Court's jurisprudence, as has Maryland. As former Chief Justice to the Maryland Court of Appeals Ellen Barbera dissented in *Carter v. State*, 461 Md. at 368-69; 192 A.3d at 738, "mere consideration of those factors falls short of the federal constitutional benchmark. If 'demonstrated maturity and rehabilitation' is a factor only to be 'considered' rather than a necessary and sufficient condition of release, then the [Maryland Parole] Commission remains free, in the exercise of unfettered discretion, to decline even to forward a recommendation of parole..."

It is not justice to have on the books the "possibility of parole" yet provide a protocol for granting or denying release that is without standards to guide those who are the decision-makers: judges, parole commissions, and governors. Under the United States Constitution, a meaningful opportunity for release cannot exist in name only, as it continues to remain in many states. Constitutional due process requires more.

Granting certiorari will ensure that every jurisdiction will interpret this Court's *Montgomery* jurisprudence correctly when the Court found that: Should a juvenile demonstrate that his or her "crime did not reflect irreparable corruption," "some years of life outside prison walls *must* be restored." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 736-737 (emphasis added). Indicia of national consensus is clearly mystified on the subject as states continue to fall woefully short of the federal benchmark.

6. The Brain Science

Scientists continue to better understand the ways in which the structural immaturity of the brain in teens and young adults affects their behavior. The National Academies of Sciences, Engineering, and Medicine has recognized that "although

adolescents may develop some adult-like cognitive abilities by late adolescence (roughly age 16), the cognitive control capacities needed for inhibiting risk-taking behaviors continue to develop through young adulthood (age 25).” See The National Academies of Sciences, Engineering, and Medicine, *The Promise of Adolescence: Realizing Opportunity for All Youth*, p. 296 (The National Academies Press, 2019) (<https://doi.org/10.17226/25388>).¹⁰ “The neuroscientific evidence, rather, bolsters the argument that adolescents -- including young adults in their 20s -- are neurologically less mature than adults,” which “adds strength to the understanding that adolescent wrongdoing is unlikely to reflect irreparable depravity.” *Id.* at 301.

The report notes that “[w]hile older adolescents (or young adults) differ greatly in their social roles and tasks from younger adolescents, it would be developmentally arbitrary in developmental terms to draw a cut-off line at age 18.” *Id.* at 23. Rather, there is broad agreement that the age at which brain development is “complete” is approximately 25 years old. See, generally, Kayt Sukel, *When is the Brain “Mature”?*, Dana Foundation (April 4, 2017), <https://www.dana.org/article/when-is-the-brain-mature/> (interviewing Martha Denckla, director of development cognitive neurology at the Kennedy Krieger Institute at Johns Hopkins University, who says “the dorsolateral prefrontal cortex, responsible for cognitive control and executive function, is pretty much

¹⁰ This document is a Consensus Study Report. Such reports “document the evidence-based consensus on the study’s statement of task by an authoring committee of experts,” and “typically include findings, conclusions, and recommendations based on information gathered by the committee’s deliberations.” *Id.* at iv. “Each report has been subjected to a rigorous and independent peer-review process and it represents the position of the National Academies on the statement of task.” *Id.*

myelinated by 25,”); Lucy Wallis, *Is 25 the new cut-off point for adulthood?*, BBC News, (Sept. 23, 2013), <https://www.bbc.com/news/magazine-24173194>, (noting that “child” psychologists are now being directed to serve populations 0-25 years old instead of 0-18); Tony Cox, *Brain Maturity Extends Well Beyond Teen Years*, “Tell Me More” NPR (Oct. 10, 2011), <https://www.npr.org/templates/story/story.php?storyId=141164708>, (the brain is not finished developing until “about age 25”).

The brain science that underlies this conclusion is well-accepted. *See, e.g.*, Marian Arain *et al.*, *Maturation of the Adolescent Brain*, *Neuropsychiatric Disease Treatment* 9 (April 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/>; Kersten Konrad *et al.*, *Brain Development During Adolescence*, *Deutsches Ärzteblatt* (June 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3705203/>; Office of Juvenile Justice and Delinquency Program, *Pathways to Desistance Bulletin Series*, at pp. 182-183 (2015) (“Recent research indicates that youth experience protracted maturation, into their midtwenties, of brain systems responsible for self-regulation.”). While much brain development occurs during gestation and childhood, that which continues into one’s twenties is still quite significant. *See Brain Development During Adolescence, supra.* The relevant processes are “synaptic pruning,” which removes extraneous synapses, and myelination, which develops the communication infrastructure of the brain. *See id.* Myelin forms a sheath around neurons, insulating them. *See Myelin*, Medline Plus, <https://medlineplus.gov/ency/article/002261.htm#:~:text=Myelin%20is%20an%20insulating%20layer,damaged%2C%20these%20impulses%20slow%20down>. This facilitates

faster communication between the neurons, and therefore significantly different activity in the newly-myelinated region. *See id.*

The region of the brain that continues to be myelinated into one's twenties is the prefrontal cortex. *See Brain Development During Adolescence, supra.* This region is responsible for the functions that would help a person to make unemotional, rational decisions. *See id.* This is not to say, of course, that juveniles are unable to make rational decisions. To quote from one study:

The main premise of this model, based on neuroanatomical findings and data from functional imaging studies, is that adolescence is a period of neural imbalance caused by the relatively early maturation of subcortical brain areas and the relatively delayed maturation of prefrontal control areas, with the result that, in emotional situations, the more mature limbic and reward systems gain the upper hand, so to speak, over the still relatively immature prefrontal control system. This should not be taken to imply that adolescents are by nature unable to make rational decisions. Rather, in situations that are particularly emotionally laden (*e.g.*, in the presence of other adolescents or when there is the prospect of a reward), the probability rises that rewards and emotions will affect behavior more strongly than rational decision-making processes. This model has been tested in a series of experimental studies. *Id.*

As one article explains:

Adolescents are not as mentally or emotionally developed as adults. Brain development research shows that juveniles' prefrontal cortexes (the part of the brain primarily responsible for judgment and impulse control) are less effective than those of adults. The prefrontal cortex does not normally develop until an individual reaches his or her twenties. Adolescent brains have high levels of dopamine in the prefrontal cortex, which increases the likelihood of engaging in risky or "novelty-seeking" behavior. In addition to the prefrontal cortex, juveniles' limbic systems -- responsible for emotional and reward-seeking behaviors -- are more active than those of adults. Adolescents place less weight on risk than adults and are "vulnerab[le] to risky behavior, because sensation-seeking is high and self-regulation is still

immature.” As a result, adolescents are more likely than adults to take risks and make poor decisions.

In addition to issues related to the prefrontal cortexes and limbic systems, the white matter in the brain of a juvenile is not fully developed. This impedes that part of the brain that handles judgment and decision-making -- the prefrontal cortex -- from effectively communicating with the part that controls emotions and thrill seeking. As an adolescent matures, the white matter increases in the brain through the process of myelination, and information processing improves. At the same time, gray matter in the brain, which causes information processing inefficiencies, is pruned away. Simply put, the part of the teen brain that is responsible for judgment and impulse control and the part of the brain that controls emotions and reward seeking become better able to communicate as a teen matures; as this communication improves, youths become better decision-makers.

In addition to the neurological, adolescents are not fully developed in the psychosocial realm. The most extreme increase in psychosocial development occurs between ages sixteen and nineteen. As they develop psychosocial competencies, juveniles increase their “capacity to resist the pull of social and emotional influences and remain focused on long-term goals.” Until early adulthood, young people lack the ability to efficiently process social and emotional cues, leading to increased susceptibility to outside negative influences. Juveniles are especially susceptible to peer influences and are more likely to engage in “antisocial behavior” to conform to peer expectations or build status in a group.

** Amy E. Holbrook, *Juvenile Pariahs*, 65 Hastings L.J. 1, 8-10 (2013) (internal footnotes omitted).

As discussed, in Maryland the population of juveniles charged as adults with extremely serious felonies is increasing.¹¹ Hundreds of juveniles are charged with these crimes in our circuit courts every year. More frequently, especially in the context of juveniles like Mr. Tate who received life sentences, courts across the country are being asked to re-review proceedings from years ago in light of more recent precedent. Over

¹¹ See Footnote 6.

fifty years of research had demonstrated that the commonsense conclusions of this Court have strong basis in medical, psychological, and scientific fact: Adolescents like Mr. Tate continue languish within prisons from across the country due to idiosyncratic biases and misinterpreted jurisprudence. Granting certiorari will help remove these biases and provide juvenile offenders a true “meaningful and realistic opportunity for release.”

7. Mr. Tate’s Case

The decisions of this Court, borne out by current social science research and indicia of national consensus, strongly argues that when a child criminally charged and convicted as an adult petitions for release years (and sometimes decades) later, the need to incapacitate the wrongdoer to protect public safety diminishes and disappears as these children mature and become rehabilitated. This Court has consistently recognized that constitutional importance attaches to the biological fact that adolescent brains are different. *See J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (collecting precedent discussing the common ‘nature of juveniles’). Simply stated, we all were once children.

Mr. Tate appeared before the Maryland Parole Commission in June 2017 after serving more than 25 years of active incarceration. Psychological test after test indicates Tate has developed into a fully-functioning adult with none of the neurological impairments that were present when he was a child. *See* Appendix (F: 1-13) (Psychological Risk-Assessment of Brian Tate dated October 22, 2018). In fact, he was able to demonstrate his “crime did not reflect irreparable corruption” and “some years of life outside prison walls *must* be restored.” *Montgomery*, 577 U.S. at ___, 136 S. Ct. at

736-737 (emphasis added). He clearly made a showing of the required growth, maturity, and rehabilitation discussed by this Court needed to regain his freedom.

However, when analyzing the decision of the Maryland Parole Commission to keep him incarcerated, as well as other Marylander children like Tate, those decisions were based upon "the nature and circumstances of the crime" and not on those juvenile factors the Court deemed vital and relevant in making a decision to provide a meaningful and realistic opportunity for release. *See, e.g., Maryland Parole Commission Worksheets and Gubernatorial Report* (attached as Appendices D & E). In these cases presented to the Court, and many others should the Court request all of the Maryland Parole Commissions decisions related to juvenile offenders to date, it becomes clear that the parole commissioners utterly failed to focus on this Court's analysis of the "crucial factors" discussed by *Graham, Miller, and Montgomery*. Actions speak louder than words, and when reviewing Maryland's juvenile population serving adult indeterminate and lengthy terms of confinement, a disparaging imbalance to the equation is evident. Opportunities for release in Maryland remain 'remote' rather than 'meaningful.' If opportunities were meaningful, Mr. Tate would not be the only juvenile offender in Maryland serving an indeterminate life sentence to be classified below medium security.¹²

¹² Maryland's classification system has essentially five (5) different levels of security classification. In descending order from highest to lowest, there are maximum, medium, minimum, pre-release, and work-release statuses. With the exception to Mr. Tate who has been classified as minimum, every Maryland juvenile offender in Maryland serving an indeterminate sentence still languishes at medium security or higher.

Md. Code Ann., Correctional Services Art. § 7-305 and Code of Maryland Administrative Regulation 12.08.01.18A, as well as other statutes, policies, and procedures from other jurisdictions regarding the Court's juvenile jurisprudence, must reflect a focus on a juvenile's growth, maturity, and rehabilitation as the crucial factors when rendering their otherwise difficult decisions. Indicia of national consensus demonstrates a dismal lack of comprehension regarding the Court's juvenile jurisprudence on the subject. It's for this very reason why the Maryland Parole Commission continues to use a juvenile offender's crime as a crucial factor instead of a juvenile's growth, maturity, and rehabilitation instead. It's precisely why Maryland's Legislature, over yet another gubernatorial veto, passed the Juvenile Restoration Act pursuant to Md. Code Ann., Criminal Procedure § 8-110.¹³

¹³ Earlier this year Maryland's Legislature, over gubernatorial veto, resoundingly passed two new statutes that authorize a reviewing court, when sentencing a minor convicted as an adult, to impose a sentence less than the mandatory minimum term required under law. *See* Maryland Senate Bill 494/Maryland House of Delegates Bill 409, 2021 Legislative Session (effective October 1, 2021). The first part of the bill prohibits a court from imposing a sentence of life imprisonment without the possibility of parole or release on a minor convicted as an adult. *See* Md. Code Ann., Criminal Procedure Article § 6-235. As pertinent to the case at hand, the second part of the bill also allows a minor convicted as an adult to file a motion with the court to reduce the duration of his or her sentence imposed years before. Md. Code Ann., Criminal Procedure Article § 8-110. However, it must be noted that CP § 8-110 is only applicable to those prisoners who were sentenced prior to October 1, 2021. The new law has a shelf life and will not provide potential relief for future juvenile offenders.

Maryland's Legislature recognized the broken nature of the state's Executive responsible for parole decisions in juvenile offender cases. Unfortunately the newly passed legislation is still too new to provide any significant data to indicate if this method of petitioning for a juvenile's meaningful and realistic opportunity for release is sufficient to provide the "means and mechanisms" for compliance with this Court's Eighth Amendment finding. It bears mentioning, however, that a reviewing court in Maryland

Evidence that Mr. Tate introduced before his parole hearing, as well as a psychological risk-assessment performed at the behest of the Maryland Parole Commission, demonstrate Tate has provided the necessary growth, maturity, and rehabilitation needed to regain some years of life outside prison walls. Mr. Tate has the physical, mental, and moral qualifications to justify a favorable decision from any reviewing body authorized to provide him his meaningful and realistic opportunity for release. There is no evidence whatsoever to suggest that Mr. Tate would present any risk if he is released. To the contrary, if anything has been proven by Mr. Tate today, releasing him from prison is in the best interests of society as he has so much to offer.

The standard of review currently being used in Maryland based upon an interpretation of this Court's juvenile jurisprudence is fatally flawed. Md. Code Ann., Correctional Services Art. § 7-305 and Code of Maryland Administrative Regulation 12.08.01.18A allows the decision-maker with what continues to be unlimited discretion. The statutes do not provide a true meaningful and realistic opportunity for release but only the illusion of such. Former Chief Justice to the Maryland Court of Appeals in *Carter v. State*, 461 Md. 295; 192 A.3d 695 (Md. 2018) got it right and recognized this as nothing more than "lip service." *Id.* at 346 n.34; 724 n.34 (concurring in part; dissenting in part).

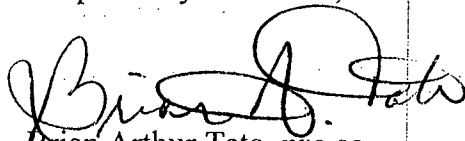
pursuant to the new law is still permitted to use a juvenile's crime as a 'crucial factor' in its decision as arguably it should not. *See* Md. Code Ann., Criminal Procedure Article § 8-110(d)(2).

Based upon this Court's decisions in *Graham*, *Miller*, and *Montgomery*, arguably a liberty interest in being released from prison is found where a juvenile offender like Tate demonstrates the required growth, maturity, and rehabilitation to regain some years of life outside prison walls. See *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 736-737. The Maryland Court of Special Appeals erred in interpreting this Court's juvenile jurisprudence and erred in finding Mr. Tate was provided a "meaningful and realistic opportunity for release" by the Maryland Parole Commission even though he was denied release because of his crime alone. This is a static factor the passage of time may never cure and arguably has no place under any standard of review related to juvenile offenders. Simply put, by allowing the decision-maker to use the juvenile offender's crime as its rationale for denying release will permit those responsible for providing that meaningful opportunity to withhold release until the death of the prisoner from natural causes. This cannot be the correct litmus test.

CONCLUSION

For these reasons Petitioner respectfully prays a Writ of Certiorari issue to the Maryland Court of Special Appeals to review this case, and that it is respectfully requested that the Court afford Tate's pleadings liberal construction. *Estelle v. Gamble*, 429 U.S. 97 (1976).

Respectfully submitted,



Brian Arthur Tate, *pro se*

DOC ID No. 229-385/SID No. 1403719
Eastern Correctional Institution-Annex
30420 Revells Neck Road
Westover, Maryland 21890

Font: 13 pt. Times New Roman