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September 2, 2016

David Blumberg, Chairman
Parole Commission
Department of Public Safety and Correctional Services
6776 Reisterstown Road
Baltimore, MD 21215

Re: Proposed amendments to COMAR 12.08.01

Dear Mr. Blumberg:

The Office of the Public Defender (OPD) submits this comment regarding the proposed action on Md. Code Reg. ("COMAR") 12.08.01, General Regulations of the Parole Commission, as well as Executive Directive OPS.100.0004, related to COMAR 12.02.12, Work Release. These proposed changes respond to established and emerging U.S. Supreme Court caselaw requiring that individuals sentenced to life imprisonment as a juvenile have a meaningful opportunity for release.

OPD supports the efforts of the Parole Commission in seeking to bring Maryland policies and practices up to date. While these proposals are a promising start, greater reforms both within these regulations and in the broader legal landscape are needed if the objective is to remedy the systemic failure of the Maryland parole system to provide a meaningful opportunity for the release of individuals sentenced to life imprisonment as juveniles. Unless comprehensive reforms are implemented, the Maryland parole system will continue to function in violation of the Eighth and Fourteenth Amendments of the U.S. Constitution and Articles 25 and 26 of the Maryland declaration of rights.¹

I. Proposed Amendments to COMAR 12.08.01.17, Preparation for Parole Consideration

Proposed amendments to 12.08.01.17 provide an inmate or inmate's representative with expanded access to documents relied upon by the Commission in parole release decisions. OPD supports this, but the provision would be further aligned with Supreme Court precedent and

¹ For more information as to the legal and legislative landscape that informs our recommendations, please see the attached summary.

emerging case law if it: (i) provided full access to the risk assessment, including diagnostic opinions and psychological assessments, (ii) mandated an evaluation and assessment by someone with expertise in adolescent development, (iii) provided a means for individuals serving life sentences to secure independent psychosocial and risk assessments, and (iv) allowed inmates serving juvenile sentences to have counsel at their parole hearing and other basic due process protections.

Access to the information underlying the Commission's review is vital to effectively prepare for one's parole hearing. Without the materials, an inmate does not know what information may warrant rebuttal, additional context, or further clarification. For inmates serving juvenile sentences, additional scrutiny is particularly warranted, to ensure that youth and its attendant characteristics are considered as constitutionally required.

While Corrs. Svcs. Art. § 7-303(b) limits an inmate or inmate representative's access to some of the documents presented to the Commission (and both the current regulation and the proposed amendments comply with this mandate), proposed COMAR 12.08.01.17(C)(5)(d) denies access to the risk assessment beyond what the statute requires. Review of all information regarding the risk assessment, including the method, validation, raw data, calculation, and conclusions reached, is essential to a meaningful opportunity for release. This is particularly important for people serving juvenile sentences because risk assessment instruments may not be validated for specific populations, such as juvenile offenders.

The risk assessment, as well as the psychiatric or psychological reports and counselor recommendations should further assist with the inmate's maturation and rehabilitation. With access to these materials, an inmate can achieve a greater self-awareness, learn what deficiencies must be overcome and develop a plan for their rehabilitation and development. Some states require that an assessment and plan be created in advance of parole consideration, so that there is a clear path toward rehabilitation and release. See, e.g. Haw. Rev. State. § 706-669; Wash Rev. Stat., § 10.95.030(3)(e). Denying access to these key documents prevents the inmate's engagement in any such planning.

While the regulation and proposed amendments improve access to the information available, they do not address what documents must be prepared. COMAR 12.08.01.12 allows for a psychiatric or psychological evaluation in the Commission's discretion. To best assess maturity and rehabilitation, not only should such an evaluation be required in all juvenile cases but the evaluation should consider "the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual." Cal. Penal Code § 3051(f)(1).

Finally, while the regulation allows for the inmate's representative to have access to these documents, the efficacy of this access is limited since the representative cannot appear at the parole hearing. As discussed in Subsection C.1 below, the parole process has constitutional implications for inmates serving juvenile life sentences and therefore basic due process protections, such as the right to counsel, should be implicated. This is particularly important in parole hearings, which have numerous factors to consider on complex issues, such as adolescent development and indicia of rehabilitation.

II. Proposed Amendments to COMAR 12.08.01.18: Consideration for Parole

Proposed changes to COMAR 12.08.01.18 seek to address the substantive considerations required by the Supreme Court's decisions in Graham, Miller, and Montgomery by adding seven factors to be considered for parole hearings: age, maturity at the time of the crime, peer pressure, character development since the crime, home and family environment at the time of the crime, educational background at the time of the crime, and any other factors related to the child's juvenile status at the time of the crime. These factors are added to the eight already required for all parole hearings.

Most problematically, all but one of the proposed criteria fail to address and measure any maturation and or rehabilitation, the very focus of the caselaw. Rather, they keep the juvenile offender stuck in time – continually assessed based on their development and status at the time of the crime. OPD recommends that at a minimum, proposed subsection (A)(3) to COMAR 12.08.01.18 be amended as follows:

(3) In addition to the factors contained under §§A(1) — (2) of this regulation, the Commission ~~considers~~ SHALL CONSIDER AND GIVE SUBSTANTIAL WEIGHT TO the following factors in determining whether a prisoner who committed a crime as a juvenile is suitable for release on parole:

(a) THE DIFFERENCE BETWEEN THE INDIVIDUAL'S CURRENT AGE AND THE Age at the time the crime was committed;

(b) The DIFFERENCE BETWEEN THE individual's CURRENT level of maturity and sense of responsibility AND THEIR MATURITY AND RESPONSIBILITY at the time of the crime was committed;

(c) Whether influence or pressure from other individuals contributed to the commission of the crime AND WHETHER THE INDIVIDUAL CURRENTLY EXHIBITS APPROPRIATE INDEPENDENCE FROM INFLUENCE OR PRESSURE;

(d) Whether the ~~prisoner's~~ INDIVIDUAL'S character developed since the time of the crime in a manner that indicates the ~~prisoner~~ INDIVIDUAL will comply with the conditions of release;

(e) The home environment and family relationships at the time the crime was committed AND HOW THAT COMPARES TO THE ENVIRONMENT AND FAMILY RELATIONSHIPS THE INDIVIDUAL WILL MOST LIKELY RETURN TO;

(f) The DIFFERENCE BETWEEN THE individual's CURRENT educational background and achievement AND THEIR EDUCATION AND ACHIEVEMENT at the time the crime was committed; and

(g) Other factors or circumstances unique to prisoners who committed crimes at the time the individual was a juvenile that the Commissioner determines to be relevant.

Other changes are advisable as well. Connecticut's revised statute is a good model, requiring consideration of whether:

[S]uch person has demonstrated substantial rehabilitation since the date such crime or crimes were committed considering such person's character, background and history, as demonstrated by factors, including, but not limited to, such person's correctional record, the age and circumstances of such person as of the date of the commission of the crime or crimes, whether such person has demonstrated remorse and increased maturity since the date of the commission of the crime or crimes, such person's contributions to the welfare of other persons through service, such person's efforts to overcome substance abuse, addiction, trauma, lack of education or obstacles that such person may have faced as a child or youth in the adult correctional system, the opportunities for rehabilitation in the adult correctional system and the overall degree of such person's rehabilitation considering the nature and circumstances of the crime or crimes.

Conn. Gen. Stat. 54-125a(f)(4). Beyond providing additional relevant criteria, such as remorse, welfare to others, and efforts to overcome abuse, this language again provides the critical context for how to view these criteria – demonstration of substantial rehabilitation since the time of the crime.

The regulations should also ward against the risk that parole will continually be denied based solely on the “circumstances surrounding” or “seriousness of” the crime. COMAR 12-08-01-18 subsections (A)(1)(a) and (A)(2)(b). Rather than a general requirement to “consider” additional factors for inmates serving juvenile sentences, the Parole Commission should be required to document due regard for each factor and the weight given to each factor in its decision.

III. Procedural Deficiencies Unaddressed by the Proposed Amendments

Because the constitution requires a meaningful opportunity for release for juvenile offenders, “the parole process takes on a constitutional dimension [for juvenile lifers] that does not exist for other offenders whose sentences include parole eligibility.”² Diatchenko, 471 Mass. at 19. This clear direction of the law suggests that fundamental due process protections are necessary to the parole process.

A. Due Process

Recognizing that youth serving juvenile life sentences are entitled to greater due process protections, OPD recommends that they be given: (i) a right to counsel at their hearing, (ii) access to experts, (iii) an automatic review of any parole denial within five years, and (iv) judicial review.

i. Counsel

COMAR 12.08.01.18(C) prohibits an attorney from appearing at a parole hearing on behalf of an inmate. While intended to promote the “informal manner” of these proceedings and to “allow[] the prisoner the opportunity to give free expression to his views and feelings relating to his

² The Court in Diatchenko was focused on its state constitution, but relied upon the identical language and analysis of the U.S. Supreme Court precedents.

case,” id., the prohibition of counsel often impedes an inmate from sufficiently addressing the relevant considerations with the Commission. This is particularly true for an inmate who has been incarcerated since childhood, has likely had limited education, and may have developmental, intellectual and/or mental disabilities.

In light of the constitutional considerations, inmates serving juvenile sentences should have a right to counsel at their parole hearings. Conn. Gen. Stat. § 54-125a(f)(3) (appointing counsel for indigent prisoners one year prior to their parole hearing to help prepare for and provide representation at the hearing); Diatchenko v. Dist. Attorney for Suffolk Dist., 471 Mass. 12, 23 (2015). In Diatchenko, the Massachusetts court likened a juvenile homicide parole hearing to a termination of parental rights proceeding, for which counsel is provided as a matter of right. The court in Diatchenko noted that both “involve[] complex and multifaceted issues that require the potential marshalling, presentation and rebuttal of information derived from many sources” Id. at 23. Maryland should adopt a similar approach and provide inmates being considered for parole on a juvenile sentence with the right to counsel at their parole hearing.

ii. Experts

Beyond the right to counsel, a juvenile offender’s attorney should have access to the resources needed to effectively represent their client. Given the constitutionally mandated considerations of distinguishing transient immaturity from irreparable corruption and of demonstrating rehabilitation and maturity, expert opinions related to neurological immaturity, culpability, and adolescent development are needed. In Diatchenko, the court held that, because assessing the proportionality of the sentence is constitutionally mandated in juvenile life sentences, a judge may authorize expert witness fees for an indigent parole-eligible juvenile homicide offender. Id. at 27.

iii. Automatic Review

Maturity and rehabilitation are ongoing processes, and the denial of parole at the initial appearance (or any specific subsequent consideration) does not mean that the person will never demonstrate rehabilitation and maturity such that the continued denial of parole will not amount to a disproportionate punishment in violation of the Eighth Amendment. The parole review process should factor in this fluidity by requiring a rehearing for someone serving a juvenile sentence within five years of the last denial of parole. Five years is a reasonable period of time to establish progress in rehabilitation and maturity with minimal risk that the sentence has become unconstitutionally disproportionate.

iv. Judicial Review

Finally, to ensure that the constitutional requirements are met, the Diatchenko court held an inmate serving a juvenile life sentence has the right to judicial review to ensure that the board appropriately exercised its discretion, i.e. that the “right of a juvenile homicide offender to a constitutionally proportionate sentence is not violated.” Id. at 29. Providing inmates with judicial review of whether the Board met its constitutional obligation could help insulate the state from some due process challenges, as this review should provide some protections that are

required for these uniquely constitutionally mandated hearings that are not otherwise mandated for discretionary administrative proceedings.

B. Rehabilitation

The cases make clear that the vast majority of juvenile offenders should not be sentenced to die in prison. The meaningful opportunity for release requires that there be an opportunity to demonstrate rehabilitation and maturity. When the Commission denies parole release or a lower security status, it should provide the inmate with guidance on the basis for its decision and what would be required for a more favorable result in the future. Such guidance will encourage rehabilitation, by providing a clear outline of what is needed, and will simplify subsequent parole hearings, which will have established individualized criteria for review.

Finally, we do not believe that that the Governor should play a role in parole determinations, and the parole eligibility of per people serving life sentences should be at the discretion of the Parole commission as it is for other inmates. However, to the extent that this authority continues, the regulations should be held the Governor to standards that conform to the constitutional obligations and provide individuals serving juvenile life sentences with a meaningful opportunity for release. Specifically, when the Parole Commission recommends release for someone serving a juvenile life sentence, the Governor should be required to adopt the recommendation unless there is substantial evidence that the individual has not sufficiently demonstrated maturity and rehabilitation, or is otherwise among the exceptionally rare category of irreparably corrigible individuals. Any such finding by the Governor should then have a right to judicial review, as such a finding by the Governor raises an increased risk that the individual will never be afforded an opportunity for release.

IV. Proposed Revisions to Executive Directive OPS.100.0004

In conjunction with its proposed amendments to COMAR, the Commission also amended Executive Directive OPS.100.0004.³ The proposed amendments to the Directive would allow for inmates serving a juvenile life sentence to potentially have their security status decreased and to be eligible for work release or outside testing, upon the recommendation of the Commission.

Since 1994, inmates serving life sentences – including those serving juvenile life sentences – have been prohibited from this eligibility. See Division of Corrections Directive 100–508, as cited in *Watkins v. Secretary, Dept. of Public Safety and Correctional Services*, 377 Md. 34831 (2003). The proposed changes to the Directive begins to address a significant barrier to parole for individuals sentenced to life as juveniles: with no meaningful access to programs, how can rehabilitation be demonstrated? Access to work release and outside testing is beneficial for the rehabilitation of all inmates, especially those sentenced as juveniles.

³ It is our understanding that the Directive as amended has not yet been implemented.

OPD supports providing individuals serving juvenile life sentences with access to work release and outside testing, but is also concerned that individuals who lack eligibility or access to these programs through no fault of their own will have their parole consideration negatively impacted by the lack opportunity. “In some prisons ... the system itself becomes complicit in the lack of development [through policies] to withhold counseling” Graham, 560 U.S. at 79. OPD recommends that the Directive include a provision that no negative inference may be drawn from the lack of participation in programs that were not provided.

Recognizing that sufficient maturation is a gradual process, the denial of work release, like the denial of parole, should also be automatically reconsidered at specified intervals. Regular reconsideration provides an incentive toward rehabilitation, which ultimately will encourage parole release.

Conclusion

“[A] lifetime in prison is a disproportionate sentence for all but the rarest of juveniles” Montgomery, 136 S.Ct. at 726. The proposed changes are a promising first step in the Commission’s efforts to address the constitutional deficiencies of Maryland’s juvenile life sentences. Our recommendations strengthen these proposals and proactively address emerging issues which directly relate to relevant Supreme Court mandates. Accordingly, we urge that these recommendations be fully adopted and implemented.

Thank you for your consideration.

Sincerely,



Paul DeWolfe
Public Defender

ATTACHMENT

I. Background on Legal and Legislative Framework for Juvenile Life Sentences

In emerging jurisprudence – Montgomery v. Louisiana, 136 S.Ct. 718 (2016); Miller v. Alabama, 132 S.Ct. 2455 (2012); Graham v. Florida, 560 U.S. 48 (2010); and Roper v. Simons, 543 U.S. 551 (2005) – the U.S. Supreme Court has emphasized the “diminished culpability and greater prospects for reform” of children, Montgomery, 136 S.Ct. at 724; Miller, 132 S.Ct. at 2464, and has held that when a state imposes a juvenile life sentence, it must provide the child “with some realistic opportunity to obtain release before the end of that term” to comply with the Eighth Amendment. Graham, 560 U.S. at 82. While those cases concerned life without parole sentences, any juvenile sentence that lacks a meaningful opportunity for release is subject to the same constitutional scrutiny. See Graham, 560 U.S. at 79 (finding Graham’s sentence unconstitutional because it “guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes”).

The Supreme Court’s cases make clear that juvenile crime – regardless of the seriousness of the offense or especially heinous or gruesome circumstances of the crime, must be considered in the context of the individual’s transient immaturity. As a result, a child may not be sentenced to die in prison without consideration of the “juvenile offender’s youth and attendant characteristics.” Montgomery, 136 S.Ct. at 734; Miller, 132 S.Ct. at 2471.

In Montgomery, the Court noted that legislatures could remedy potential Eighth Amendment violations by enacting laws to ensure that juvenile offenders are eligible for release. 136 S.Ct. at 736. Many states have passed such legislation in the wake of Miller and Montgomery to preclude juvenile life without parole sentences. See, e.g., H.B. 2593, 51st Leg., 2nd Reg. Sess. (Ariz. 2014); S.B. 9 (Cal 2012); S.B. 260 (Cal. 2013); S.B. 796, Jan. Sess. (Conn. 2015) (amending Conn. Gen. Stat. § 54-125a); S.B. 16-181, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016); S.B. 9, 147th Gen. Assemb, Reg. Sess. (Del. 2013); H.B. 7035, 2014 Reg. Sess. (Fl. 2014); H.B. 2116, 27th Leg. Sess. (Haw. 2014); S.B. 31 228, 86th Gen. Assemb., 1st Sess. (Iowa 2015); H. 4307, 188th Gen. Court (Mass. 2014); A.B. 267, 78th Reg. Sess. (Nev. 2015); S.B. 563, 2011 Gen. Assemb. Reg. Sess. (N.C. 2012); S.B. 140, 2016 S.D. Sess. Laws (S.D. 2016); S.B. 2, 83rd Leg. Special Sess. (Texas 2013); H.B. 405 (Utah 2016); H. 62, 73rd Sess. (Vt. 2015); H.B. 4210, 81 Leg., 2d Sess. (W. Va. 2014); H.B. 23, 62nd Leg., Gen., Sess. (Wyo. 2013).

Several states have further enacted legislation specifying additional criteria the parole board must consider in juvenile cases, to address the factors pertaining to ‘youth and its attendant characteristics.’ For example:

- In Connecticut, the parole board must assess whether inmate has “demonstrated substantial rehabilitation since the date such crime or crimes were committed considering such person’s character, background and history” based on various delineated factors. Conn. Gen. Stat. § 54-125a(f)(4).

- Under California law, the parole board “shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.” Cal. Penal Code § 4801(c).
- Nevada requires consideration of educational and court documents, participation in programs while incarcerated, age at the time of arrest; level of maturity; ability to appreciate conduct; intellectual capacity; level of participation in the offense; efforts toward rehabilitation; any other mitigating factors submitted. Nev. Rev. Stat. § 83-1, 110.04.
- West Virginia requires the parole board to consider “the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner during incarceration.” W. Va. Code, § 62-12-13b(b).

Merely providing for a parole hearing is insufficient. Consideration for release must be meaningful. “[P]risoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and if it did not, their hope for some years of life outside prison walls must be restored.” Montgomery, 136 S.Ct. at 736-737. This consideration requires a continual assessment of maturity and rehabilitation that cannot be predicted at the onset of a sentence or at a specific parole hearing. Recognizing the fluid nature of these factors, several states have established a period of time for reconsideration that is shorter than what the law otherwise provided. See, e.g., Del. Code Ann. Tit. 11 § 2404A(d) (review of modification requests every five years, with discretion to lengthen); Haw. Admin. Rules § 20-700-31(b) (parole review every 12 months); Neb. Rev. Stat. § 83-1, 110.04 (reconsideration 1 year after denial of parole); W. Va. Code § 62-12-13(e) (parole review every three years for life sentence, one year for other sentences).

Some states have further recognized that, for the opportunity for release to be meaningful, the parole process must include due process protections, such as access to counsel and the right to appeal. See, e.g., Conn. Gen. Stat. § 54-125a(f)(3) (appointing counsel for indigent prisoners one year prior to their parole hearing to help prepare for and provide representation at the hearing); Diatchenko v. Dist. Attorney for Suffolk Dist., 471 Mass. 12, 23 (2015) (holding that inmates serving life sentences for murder committed as a juvenile were entitled to representation by counsel, payment of expert fees, and limited judicial review).

Other states have mandated assessment and guidance to encourage parole rehabilitation and release. E.g., Cal. Penal Code § 3041(a)(1) (consultation with parole board 6 years prior to eligibility date to provide inmate with information and individualized recommendations); Haw. Rev. Stat. § 706-669 (1),(2) (rehabilitation plan and parole eligibility state set after initial parole hearing); La. Rev. Stat. § 15:574(E)(2) (requiring the parole board to consider “an evaluation of the offender by a person who has expertise in adolescent brain development and behavior”); Wash. Rev. Stat. § 10.95.030(3)(e) (requiring assessment of juvenile five years before eligibility date that identifies of programs and services appropriate to prepare for return to community).

Constitutional law related to juvenile life sentences is still developing, particularly with respect to ensuring that youth have a meaningful opportunity for release. States that have already taken action can provide useful guidance for Maryland as it navigates these issues.

II. Maryland Juvenile Life Sentences

Maryland's sentencing and parole scheme does not account for the emerging Supreme Court caselaw, both with respect to the factors pertaining to youth that must be weighed in favor of release, as well as the mechanisms that must be in place for the review to be meaningful, and the opportunities that must be present to demonstrate maturation and rehabilitation.

There are currently 16 individuals serving life without parole sentences for crimes committed as juveniles and approximately 270 individuals serving other life terms, about 40 of whom were convicted of non-homicide offenses. As these cases are being litigated to assess the application of Graham, Miller, and Montgomery to their specific circumstances, the sentencing and parole schemes are likewise being scrutinized to assess their ability to overcome systemic constitutional violations.

Under current regulations and law, the Parole Commission considers ten factors when determining whether to grant parole.⁴ The proposed changes to COMAR 12.08.01.18 seek to include seven additional factors crimes committed as a juvenile. As in Section III.B, infra, OPD agrees that special considerations are needed in juvenile sentences, but that greater guidance is needed to ensure review that conforms to Miller.

In the context of life sentences, including juvenile life sentences, the Commission's review is only advisory. The Governor must approve parole for anyone serving a life term. Corr. Law § 7-301(d)(4)-(5). The Governor has complete discretion on whether to grant parole, bound only by the requirement that, for an inmate who has already served 25 years, he must make his determination within 180 days. § 7-301(d)(5); see also Lomax v. Warden, 356 Md.569, 578 (1999)(noting that the statute "contains no factors or guidelines for the Governor's exercise of discretion"). While a very small handful of individuals have had life sentences commuted to a definite term, in the past 20 years, no governor has authorized the parole release of someone with a life sentence with the exception of those who are terminally ill.

Procedurally, Maryland's parole system has several features that further impede upon the meaningful opportunity for release. In particular, people seeking release through parole have no right to an attorney, parole grant hearings are usually not open to the public, yield no record, and are not subject to appeal. The proposed regulations do not address the deficiencies.

⁴ The factors considered by the Commission are (1) the circumstances surrounding the crime; (2) the physical, mental, and moral qualifications of the inmate; (3) the progress of the inmate during confinement; (4) a report on a drug or alcohol evaluation that has been conducted on the inmate; (5) whether there is a reasonable probability that the inmate, if released on parole, will remain at liberty without violating the law; (6) whether release of the inmate on parole is compatible with the welfare of society; (7) an updated victim impact statement; (8) any recommendation made by the sentencing judge at the time of sentencing; (9) any information that is presented to a commissioner at a meeting with the victim; and (10) any testimony presented to the Commission by the victim or the victim's designated representative. Corr. Servs § 7-305; COMAR § 12.08.01.18 (1995).

A bill introduced in the 2016 Legislative Session sought to remedy some of these deficiencies by allowing individuals serving sentences greater than 20 years for an offense committed as a juvenile to have their sentence reviewed by a three-judge panel every five years, after serving 15 years. 2016 H.B. 1323. While this bill did not pass, it highlights the gap between due process protections that may be needed in juvenile parole hearings and are available in court proceedings, with the informal nature of the current parole process and its detriment of juvenile lifers.

While the proposed amendments potentially help encourage a more meaningful opportunity for parole, both legislative reform and further regulatory change are needed to shield Maryland from Eighth Amendment violations regarding its juvenile life sentences.