Circuit Court for Howard County
Case No. C-13-CV-19-000237

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 537

September Term, 2020

BRIAN ARTHUR TATE

v.

GOVERNOR LARRY HOGAN, *et al.*

Kehoe,
Leahy,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: July 12, 2021

Appellant Brian Arthur Tate appeals the denial, by the Circuit Court for Howard County, of his petition for writ of *habeas corpus*. In his timely appeal, Tate, representing himself, argues that States must provide "juvenile lifers," like himself, a meaningful opportunity to obtain release from prison based on demonstrated maturity and rehabilitation. Tate argues that Maryland's parole system does not provide him that meaningful opportunity and is therefore unconstitutional.[1] For the reasons that follow, we affirm the circuit court's denial of Tate's petition for writ of *habeas corpus*.

BACKGROUND

In November 1992, Tate, then aged 16, pleaded guilty to first-degree murder in the stabbing death of a 19-year-old rival for his ex-girlfriend's affection.[2] He was sentenced to life in prison with the possibility of parole, becoming what is known as a "juvenile lifer."

Tate became eligible for parole in 2002. Although a parole hearing was scheduled for August 2003, Tate requested a postponement because he believed he had no chance of having his parole application approved. The hearing was postponed indefinitely.

In 2016, the Maryland Parole Commission ("the Parole Commission") amended its regulations to require the consideration of additional factors specific to juvenile lifers in

[1] There is no constitutional or common law right to appeal a circuit court's denial of a petition for writ of *habeas corpus*. Maryland's General Assembly, however, has provided a statutory right of appeal in four categories of cases. *Gluckstern v. Sutton*, 319 Md. 634, 652 (1990). As relevant here, appeals are permitted in *habeas corpus* cases "on the ground that the law under which the person was convicted is unconstitutional, in whole or in part[.]" MD. CODE, CTS. & JUD. PROC. ("CJ") § 3-706(b).

[2] Tate was convicted in the Circuit Court for Anne Arundel County. For reasons that are unexplained in this record, the matter was eventually transferred to the Circuit Court for Howard County.

parole determinations. *See* CODE OF MARYLAND REGULATIONS ("COMAR") 12.08.01.18A(3). The Parole Commission offered Tate a parole hearing, during which the new factors would be considered.

By all accounts, Tate had worked hard in prison to continue his education and rehabilitate himself. He was given jobs with increasing degrees of responsibility, he did not commit any major disciplinary infractions, and he avoided involvement with drugs and gangs. Thus, finally believing he had an opportunity to prevail, Tate appeared for his first parole hearing on June 6, 2017.

Commissioners Steven DeBoy and Christopher Reynolds praised Tate's increased maturity and progress in therapy, and referred his case to the Parole Commission's psychologist for a risk assessment, leading Tate to believe that if the assessment came back positively, he would be recommended for parole before the entire Parole Commission.[3] Based on the risk assessment and "consideration of all factors, and the nature and circumstances of this horrific murder," however, the commissioners determined Tate was a "moderate risk," denied his application for parole, and determined that "a rehearing for November 2021 is warranted."

[3] In 2014, the circuit court granted Tate post-conviction relief by vacating his guilty plea and ordering a new trial. This Court, however, reversed the post-conviction court's order, a decision that was affirmed by the Court of Appeals. *Tate v. State*, 459 Md. 587 (2018). Following the post-conviction court's decision, Tate became ineligible for parole and the Parole Commission's decision was invalidated pending appellate review. After the Court of Appeals affirmed this Court's reversal of the post-conviction court's decision, the Parole Commission psychologist completed his risk assessment in October 2018.

In March 2019, Tate filed a petition for writ of *habeas corpus*. Therein, he argued that the commissioners had not properly considered his "juvenile lifer status," and had denied him a "meaningful opportunity for release based on demonstrated growth and maturity," as articulated by the United States Supreme Court in three recent cases: *Montgomery v. Louisiana*, 577 U.S. 190 (2016); *Miller v. Alabama*, 567 U.S. 460 (2012); and *Graham v. Florida*, 560 U.S. 48 (2010). He also took the position that Maryland's parole scheme for juvenile lifers is unconstitutional.[4]

Appellees,[5] in their answer to Tate's petition, responded that the commissioners had fully considered all the required factors applicable to parole consideration before determining that Tate was "not a suitable candidate for parole at this time." Appellees suggested that the *habeas* court adopt the reasoning set forth in *Bowling v. Director, Virginia Dep't. of Corrections*, 920 F. 3d 192 (4th Cir. 2019), in which the United States Court of Appeals for the Fourth Circuit rejected arguments similar to Tate's. Appellees also argued that the Maryland Court of Appeals had already found the State's parole scheme for juvenile lifers to be constitutional in *Carter v. State*, 461 Md. 295 (2018).

[4] Tate also contended that he had been incorrectly classified as medium-security and sought reclassification to minimum-security. The *habeas* court denied the request, on the ground that Tate had not exhausted his administrative remedies. Tate has abandoned this issue on appeal, stating that it is moot in any event, because he is currently housed in a minimum-security facility.

[5] Appellees include: Governor Lawrence J. Hogan; David Blumberg, Chairman of the Maryland Parole Commission; Robert Green, Secretary of Public Safety and Correctional Services; Wayne Hill, Commissioner of Correction; Casey Campbell, Warden of Roxbury Correctional Institution; and Brian Frosh, Attorney General of Maryland.

At a hearing on his petition, Tate acknowledged that the Court of Appeals in *Carter* had determined that Maryland's parole scheme is constitutional, but he argued that it was Chief Judge Mary Ellen Barbera, in her partial dissent, who "got it right" because "[n]ot a single juvenile lifer in this State has been granted parole since the [e]naction of Governor Hogan's Executive Order" in 2018. In denying him parole based solely on the nature of his offense, rather than his positive risk assessment and other attributes, Tate continued, the Parole Commission had not employed a fair test that gave a true measure of a juvenile offender's rehabilitation and maturity. In other words, despite doing everything he possibly could have done to prove he was no longer "that monster who committed that crime [at] 16," he was deemed not worthy of a second chance because all the commissioners saw in denying his application for parole was the "horrific murder" he had committed decades before. That, in his view, was "constitutionally impermissible." In addition, Tate concluded, the Governor's 2018 executive order provides "a type of purely executive clemency," which fails to provide a realistic means to obtain release on parole and is tantamount to life without parole.

The *habeas* court questioned whether Tate's argument would have been stronger if he had been denied parole several times. If he had been, then he could have argued that, despite having done everything asked of him, the system was rigged against him. That, however, was difficult to prove after a single parole hearing. Moreover, the court pointed out, Tate had not been denied parole on a permanent basis, although it was within the power of the Parole Commission to do so.

In response to a question by the court, appellees' counsel acknowledged that no lifer in her memory had been paroled at his or her first parole hearing, but she denied that the State had enacted a policy of not approving parole for a lifer at the first hearing. In Tate's case, the Parole Commission had considered all the relevant factors—including, but not limited to, the nature of the crime he committed—and granted him another hearing in three years. Because the Parole Commission's decision was not unconstitutional, nor did it comprise an abuse of discretion, appellees asked the court to deny Tate's petition.

The *habeas* court denied Tate's petition for writ of *habeas corpus*, noting that Tate was challenging "the result of his first and only parole hearing," and declined to find that the process had not granted him a meaningful opportunity to obtain release. The court further found that the parole commissioners properly exercised their discretion and considered *all* the relevant factors—not just the nature of his crime—in denying Tate parole.

The court pointed out that if Tate continued in his cognitive programs and remained infraction-free, the Parole Commission might well come to a different conclusion about his suitability for release at his next hearing. Moreover, the *habeas* court said that if Tate were then denied parole based only on the nature of his offense, or an unchanged risk assessment, "he may have a cognizable *habeas* claim." But to argue that his Eighth and Fourteenth Amendment rights had been violated after only one hearing "represents an exaggeration of [his] circumstances." And, to the extent that Tate had argued that the parole system operates as one of executive clemency, the argument failed because that claim had been settled in *Carter*.

DISCUSSION

Pursuant to Maryland Rule 8-131(c), we review a denial of an application for writ of *habeas corpus* on both the law and the evidence, and we will not set aside the judgment unless it is clearly erroneous. *Simms v. Maryland Dep't of Health*, 240 Md. App. 294, 311 (2019) *aff'd*, 467 Md. 238 (2020). "'Under the clearly erroneous standard, [we do] not sit as a second trial court, reviewing all the facts to determine whether an appellant has adequately proven his [or her] case.'" *Id*. (quoting *Liberty Mutual Ins. Co. v. Maryland Auto. Ins. Fund*, 154 Md. App. 604, 609 (2004)). Our review is limited to deciding whether the *habeas* court's factual findings were supported by "substantial evidence" in the record. *GMC v. Schmitz*, 362 Md. 229, 233-34 (2001) (quoting *Ryan v. Thurston*, 276 Md. 390, 392 (1975)). In so doing, we view all the evidence "in a light most favorable to the prevailing party." *Id.*

Over the last ten years, the United States Supreme Court issued a series of decisions addressing the constitutionality of sentencing a juvenile offender to life without the possibility of parole. In *Graham v. Florida*, the Supreme Court held that the Eighth Amendment prohibition on cruel and unusual punishment prohibits a sentence of life without the possibility of parole for a juvenile offender convicted of a crime other than homicide. 560 U.S. 48, 74 (2010). The Court noted that life without parole is an "especially harsh" sentence for a juvenile defendant, as it condemns the juvenile to a larger percentage of the individual's life in prison than an older adult who receives the same sentence. *Id.* at 70. Importantly, though, the Court stressed that, although "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime[,]"

the sentence imposed must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75. The Court did not purport to dictate how a state must provide that opportunity, stating that "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance." *Id.*

Two years later, the Supreme Court applied some of the same reasoning to hold that the Eighth Amendment prohibits a State sentencing scheme that mandates a sentence of life without parole for a juvenile offender who had been convicted of a homicide crime. *Miller v. Alabama*, 567 U.S. 460, 479 (2012). The Court clarified that it was not "foreclos[ing] a sentencer's ability" to make a judgment, in a homicide case, that a juvenile offender's crime "reflects irreparable corruption[,]" but was requiring the sentencing court to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 479-80.

Then, in 2016, the Supreme Court held that *Miller* applies retroactively. *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016). Accordingly, convictions that were already final were subject to the principle that a sentence of life without parole is prohibited by the Eighth Amendment "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id*. at 209.

In response to the Supreme Court's jurisprudence concerning juvenile offenders, in 2016, the Parole Commission adopted COMAR 12.08.01.18A(3), which requires it to consider several additional factors when deciding whether or not to grant parole for a juvenile offender:

(a) Age at the time the crime was committed;

> (b) The individual's level of maturity and sense of responsibility at the time … the crime was committed;
>
> (c) Whether influence or pressure from other individuals contributed to the commission of the crime;
>
> (d) Whether the prisoner's character developed since the time of the crime in a manner that indicates the prisoner will comply with the conditions of release;
>
> (e) The home environment and family relationships at the time the crime was committed;
>
> (f) The individual's educational background and achievement at the time the crime was committed; and
>
> (g) Other factors or circumstances unique to prisoners who committed crimes at the time the individual was a juvenile that the Commissioner determines to be relevant.

COMAR 12.08.01.18A(3). The Governor also re-considered how parole decision would be made. Pursuant to CS § 7-301(d)(4), "an inmate serving a term of life imprisonment may only be paroled with the approval of the Governor." On February 9, 2018, Governor Hogan issued an Executive Order (the "2018 Executive Order"), setting out how he would exercise his discretion pursuant to CS § 7-301(d)(4). 45:5 Md. Reg. 261 (March 2, 2018), *codified at* COMAR 01.01.2018.06.[6] In the 2018 Executive Order, the Governor stated

[6] Like the Parole Commission's regulations, the 2018 Executive Order was apparently issued, at least in part, in recognition of the Supreme Court decisions concerning parole of juvenile offenders. *Carter*, 461 Md. at 323 n.16. It was an explicit reversal of former Governor Parris Glendenning's policy of not granting parole to any inmate serving a life sentence for a violent crime unless he or she was very old or ill. *Id*. at 323, 325.

that, in addition to the factors considered by the Parole Commission, he would also specifically consider:

> i. The juvenile offender's age at the time the crime was committed and the lesser culpability of juvenile offenders as compared to adult offenders;
>
> ii. The degree to which the juvenile offender has demonstrated maturity since the commission of the crime; and
>
> iii. The degree to which the juvenile offender has demonstrated rehabilitation since the commission of the crime.

COMAR 01.01.2018.06

In 2018, a challenge was mounted to Maryland's system of parole for juvenile lifers. *Carter v. State*, 461 Md. 295 (2018). In *Carter*, the Court of Appeals considered two cases in which the appellants—juveniles when they committed their crimes—had been sentenced to life with the possibility of parole.[7] Both appellants asserted that they were effectively serving a sentence of life without parole because the laws governing parole in Maryland did not provide them with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," as articulated in *Graham*. *Id*. at 307. The Court of Appeals in *Carter* rejected that theory and held "that their sentences are legal as the laws governing parole of inmates serving life sentences in Maryland, including the parole statute, regulations, and a recent executive order adopted by the Governor,[8] on their face

[7] The *Carter* decision also discussed a third appellant who was sentenced to 100 years' incarceration. The facts of his term-of-years case are not pertinent to our discussion.

[8] The Governor's 2018 Executive Order was issued three days after the Court of Appeals heard oral arguments in *Carter*, but before the Court rendered a decision.

allow a juvenile offender serving a life sentence a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Id*.

The *Carter* Court explained that when the Parole Commission determines whether an inmate is suitable for parole, it considers a long list of factors, such as: "the circumstances of the offense; the 'physical, mental, and moral qualifications' of the inmate; the progress of the inmate during confinement; any drug or alcohol evaluation of the inmate (including the inmate's amenability to treatment); whether, if released, the inmate will be law-abiding; an updated victim impact statement and any victim-related testimony; any recommendations of the sentencing judge; and whether there is a substantial risk that the inmate will not abide by the conditions of parole." *Id*. at 320-21. *See* MD. CODE, CORR. SERVS. ("CS") § 7-305; COMAR 12.08.01.18A(1)-(2).

In *Carter*, the appellants' argument that their sentences were illegal was "rooted in the fact that CS § 7-301(d) does not require the Governor to consider any particular criteria in deciding whether to approve parole for an inmate serving a life sentence." 461 Md. at 339. In other words, they argued that "[t]he absence of criteria in the statute for the Governor's decision whether to approve or disapprove a parole recommendation … reduces the Maryland parole system for an inmate serving a life sentence to an executive clemency system that is not equivalent to parole." *Id*. at 340.

The *Carter* Court rejected the argument. The Court explained that

> [w]hile the general statutory standards that govern the Parole Commission's decisions already arguably take into account demonstrated maturity and rehabilitation, the Parole Commission has exercised the authority delegated by the General Assembly and has adopted regulations that incorporate factors specific to juvenile offenders. Those regulations have the force of law.

> Moreover, the Governor has adopted an executive order concerning parole recommendations related to juvenile offenders that is clearly designed to comply with *Graham* and *Miller* and to make transparent the Governor's consideration of those factors. That also has the force of law.

Id. at 345-46. As such, "the Maryland law governing parole, including the statutes, regulations, and executive order, provides a juvenile offender serving a life sentence with a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'"[9] As a result, the Court held that Maryland's parole scheme does not violate the Eighth Amendment and is not illegal. *Id*. at 365.[10]

This Court interpreted *Carter* in *Hartless v. State*, 241 Md. App. 77, *cert. granted*, 465 Md. 664 (2019). There, relying on *Carter*, we expressly rejected the propositions that "a life sentence in Maryland is effectively a sentence of life without parole because the laws governing parole in Maryland do not provide a meaningful opportunity to obtain

[9] Tate argues that the 2018 Executive Order is problematic because the Governor—current or future—can rescind it at any time. While this is true, it was also the case when the Court of Appeals decided *Carter*, and, critically, that fact failed to persuade the majority to render a different decision. *Carter*, 461 Md. at 346 ("It might be argued that an executive order is subject to amendment or rescission with minimal process and therefore should not be given the same weight that might be accorded an amendment of the parole statute by the General Assembly. That may be true, but, nonetheless, the 2018 Executive Order does have the force of law. We cannot pretend that it does not exist.") (cleaned up).

[10] Tate contends that *Carter* was wrongly decided and relies upon Chief Judge Barbera's partial dissent, in which she disagreed with the majority's holding that "the Governor's 2018 Executive Order together with the Maryland Parole Commission's … regulation concerning parole for juvenile offenders, COMAR 12.08.01.18A(3), make an otherwise unconstitutional Maryland parole system compliant with the dictates of the Eighth Amendment." *Carter*, 461 Md. at 367-68 (Barbera, C.J., dissenting in part and concurring in part). In Chief Judge Barbera's view, the majority applied the Supreme Court's cases to Maryland's parole process "in an aspirational rather than a realistic manner." *Id*. at 368. Regardless of the merits of Tate's argument, or Chief Judge Barbera's partial dissent, this Court is bound by the majority opinion in *Carter*.

release based on demonstrated maturity and rehabilitation" and that all juvenile homicide offenders have the right to an individualized sentencing process that takes into account the offender's youth. *Id*. at 84.[11]

In the matter now at hand, the central issue is whether the *habeas* court correctly found that the Parole Commission afforded Tate a meaningful opportunity to obtain release during his first parole hearing in 2017. We conclude that it did.

Despite Tate's claim that the Parole Commission only considered the nature of his crime in denying his application for parole, the Parole Commission made clear, and the *habeas* court found, that it had based its decision not just on the circumstances surrounding Tate's horrific juvenile crime but also on "all the factors" in CS § 7-305, including whether his risk assessment indicated he was likely to recidivate if released. After doing so, the Parole Commission concluded that the totality of the circumstances warranted a denial of his application for parole at that time.

The Parole Commission did not, however, permanently deny Tate the possibility of parole, although it was within its power to do so. Instead, it granted him another parole

[11] Since *Carter* and *Hartless* were decided, things have changed for the better for Maryland juvenile lifers. Senate Bill 494, also known as the Juvenile Restoration Act (gubernatorial veto overridden April 10, 2021), will allow anyone who has served 20 years for a crime committed when he or she was a minor, to petition for a sentence reduction, even if sentenced to life without the possibility of parole. In addition, the Standing Committee on Rules of Practice and Procedure has proposed changes to Maryland Rule 4-345, which would permit a trial court to revise long prison terms imposed on people who were juveniles when they committed the crime for which they were imprisoned or who have served a significant portion of their sentence and reached a certain age. Although the Court of Appeals returned the proposed amendment to Rule 4-345 to the Rules Committee to consider harmonizing the proposal with SB 494, discussed above, there is no indication that the Court is unwilling to amend the rule to the benefit of juvenile lifers.

hearing in November 2021. If Tate continues to do well in prison and exhibits further maturity and rehabilitation at the next parole hearing, he will have another meaningful opportunity to obtain release.

In addition, we agree with the *habeas* court's statement that Tate's argument that his Eighth and Fourteenth Amendment rights have been violated after only one hearing "represents an exaggeration of [his] circumstances." It is impossible to infer a lack of meaningful opportunity for release on parole from a single denial.[12]

For all these reasons, we affirm the *habeas* court's denial of Tate's petition for writ of *habeas corpus*.

ORDER OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

[12] In arguing that "the *habeas* court was in error for finding that because this was Mr. Tate's first parole hearing he must be denied *habeas* relief," Tate misunderstands the *habeas* court's statement. The court did not determine that parole must be denied during an applicant's first hearing. Instead, the court explained that one instance of denial does not create a pattern from which a court can determine the applicant was, and will be, denied a meaningful opportunity for release.