Circuit Court for Anne Arundel County
Case No. C-02-CV-22-001381

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1679

September Term, 2022

BRIAN ARTHUR TATE

v.

GOVERNOR WES MOORE, ET AL.

Leahy,
Shaw,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: February 8, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

Brian Tate, appellant, a "juvenile lifer," challenges the summary denial of his habeas corpus petition by the Circuit Court for Anne Arundel County.[1] Appellant raises three issues for our review:

> I. Whether the circuit court erred in summarily denying Mr. Tate's habeas corpus petition, as he continues to be denied "meaningful opportunity for release based on demonstrated growth, maturity, and rehabilitation," in violation of the Eighth Amendment of the United States Constitution, despite having clearly demonstrated he has fulfilled the United States Supreme Court's "*Miller* factors."
>
> II. Whether the circuit court erred in failing to address whether the State of Maryland has created a liberty interest in parole release for juvenile offenders that is protected by the Due Process Clause of the Fourteenth Amendment, as the Maryland statute gives rise to a legitimate expectation of parole.
>
> III. Whether the circuit court erred in failing to address appellees' continued violation of the settlement agreement in *Maryland Restorative Justice Initiative v. Hogan, et al.*, through their intentional withholding of privileges that would provide Mr. Tate the ability to demonstrate further growth, maturity, and rehabilitation.

Finding no error, we shall affirm.

[1] At the time the habeas petition in this case was filed, the named appellees were Lawrence J. Hogan, Jr., Governor of Maryland; David R. Blumberg, Chairman of the Maryland Parole Commission; Robert L. Green, Secretary of the Department of Public Safety and Correctional Services; Annie D. Harvey, Commissioner of Correction; and Monika Brittingham, Facility Administrator at the Eastern Correctional Institution-Annex. Subsequently, Brian Frosh, Attorney General of Maryland, was added as a party. Thereafter, Governor Wes Moore was substituted as a party for former Governor Hogan; Secretary of the Department of Public Safety and Correctional Services Carolyn J. Scruggs for former Secretary Mr. Green; Facility Administrator John Milligan for former Facility Administrator Ms. Brittingham; Attorney General Anthony G. Brown for former Attorney General Frosh; and Commissioner of Correction Phil Morgan for former Commissioner of Correction Ms. Harvey. Throughout this opinion, we shall refer to these parties collectively as appellees.

BACKGROUND

In February 1992, appellant, then sixteen years old, murdered Jerry Lee Haines, apparently in a fit of jealous rage because Haines "had been dating Tate's former girlfriend[.]" *Tate v. State*, 459 Md. 587, 594 n.1 (2018) ("*Tate I*"). According to the autopsy of the victim, he had been stabbed twenty-four times, and also sustained blunt force trauma to his head. *Id.* at 593 n.1. There was evidence that appellant had planned the attack against the victim as an "ambush[.]" *Id.*

In November 1992, appellant pleaded guilty, in the Circuit Court for Anne Arundel County, to first-degree murder. *Id.* at 592. In exchange, the State entered a *nolle prosequi* to several other charges, both in that case and in an unrelated case, including "several counts of attempted murder, arson, burning the personal property of another, and reckless endangerment." *Id.* In addition, the State agreed to withdraw its notice of intent to seek a sentence of life imprisonment without the possibility of parole. *Id.* Pursuant to the plea agreement, the court sentenced appellant to life imprisonment. *Id.* at 602.

In 2005, appellant filed a postconviction petition, alleging that he had not entered his guilty plea knowingly and voluntarily. *Id.* Initially the circuit court[2] denied his petition in relevant part.[3] *Id.* at 603. Subsequently, appellant filed a motion to reopen, which the

[2] "For reasons not entirely clear from the record, the case was transferred to the Circuit Court for Howard County[,]" *Tate I*, 459 Md. at 602, which issued the ruling on appellant's postconviction petition. *Id.* at 603.

[3] By the time the court ruled on appellant's postconviction petition, it had been amended to include a claim of ineffective assistance of trial counsel for failure to request sentence review by a three-judge panel. *Tate I*, 459 Md. at 602 & n.3. The postconviction (continued…)

circuit court granted. *Id.* at 604. The State filed an application for leave to appeal, which was granted, *id.* at 606, and both this Court and the Supreme Court of Maryland held that appellant had entered his guilty plea knowingly and voluntarily. *Id.* As a result, his conviction and life sentence remained in effect.

During the pendency of appellant's postconviction proceeding, the Maryland Parole Commission, in reaction to evolving jurisprudence in the United States Supreme Court regarding life sentences imposed on juvenile offenders, "amended its regulations to require the consideration of additional factors specific to juvenile lifers in parole determinations." *Tate v. Hogan*, No. 537, Sept. Term, 2020, slip op. at 1-2 (filed Jul. 12, 2021) ("*Tate II*"), *cert. denied*, 476 Md. 428 (2021), *cert. denied*, 596 U.S. __, 142 S. Ct. 1683 (2022). Thereafter, the Parole Commission offered appellant a parole hearing applying the new standards.[4] *Id.* at 2.

There was substantial evidence that appellant "had worked hard in prison to continue his education and rehabilitate himself." *Id.* Following his first parole hearing, in 2017, two Commissioners referred his case to the Parole Commission psychologist for a risk assessment. *Id.* Ultimately, the *en banc* Parole Commission determined that appellant

court granted relief on that claim. *Id.* at 603. The panel ultimately left appellant's sentence unchanged. *Id.* at 604.

[4] Appellant first became eligible for parole in 2002, and a parole hearing had been scheduled for August 2003. *Tate II*, slip op. at 1. At that time, however, he "requested a postponement because he believed he had no chance of having his parole application approved[,]" and the hearing was postponed indefinitely. *Id.*

"was a 'moderate risk,' denied his application for parole, and determined that 'a rehearing for November 2021 [was] warranted.'" *Id.*

In March 2019, appellant filed a habeas petition, in the Circuit Court for Howard County, claiming that he "continues to be denied a 'meaningful and realistic opportunity for release based on demonstrated maturity and rehabilitation' in violation of the Eighth Amendment of the United States Constitution despite having clearly demonstrated he has matured and has been rehabilitated." Following a hearing, the circuit court denied appellant's petition. *Tate II*, slip op. at 4-5. In an unreported opinion, we affirmed the denial of appellant's 2019 petition. *Id.* at 13. Appellant unsuccessfully sought further review in the Supreme Court of Maryland and the United States Supreme Court.

A second parole hearing was held in November 2021 before Commissioners Keckler and Vronch. The two commissioners referred the matter to the *en banc* Parole Commission with a recommendation to approve appellant for delayed release in November 2022. In April 2022, the *en banc* Parole Commission denied that recommendation, instead granting a rehearing in November 2024.

In August 2022, appellant filed another habeas petition, in the Circuit Court for Baltimore City, raising claims similar to those he had raised in his previous petition and additionally asserting that he was not provided "any rationale whatsoever explaining: (1) why [he] was denied parole; (2) what [he] needed to do to improve his chances for success at his next parole hearing; (3) why a 3-year rehearing was warranted after a recommendation for 6-month delayed release for November 2022 was requested, and; (4) how serving an additional 3-years of incarceration would protect and serve public safety

or provide any penological justification that necessitates keeping [him] incarcerated for those additional years as it relates to his juvenile lifer status under federal and/or State law." Thereafter, that petition was transferred to the Circuit Court for Anne Arundel County, which summarily denied it. This timely appeal ensued.

DISCUSSION

Standard of Review

Maryland Rule 15-303(e)(3)(B) codifies a venerable common law rule which generally bars successive habeas petitions[5] and provides: "If the petition complies with the provisions of Rule 15-302, the judge shall grant the writ unless . . . the petition is made by or on behalf of an individual confined as a result of a sentence for a criminal offense, of an order in a juvenile proceeding, or of a judgment of contempt of court, **the legality of the confinement was determined in a prior habeas corpus or other post conviction proceeding, and no new ground is shown sufficient to warrant issuance of the writ**[.]" (Emphasis added.)

To the extent a court denies a habeas petition without a hearing on the basis of that provision, we review for abuse of discretion. *See Hines v. Warden*, 236 Md. 406, 409 (1964) (observing that, under former Maryland Rule Z44 (now Rule 15-303(e)(3)(B)), a habeas court, "in its discretion, could deny the writ under Rule Z 44, if 'the legality of the

[5] *See*, *e.g.*, *Hobbs v. Warden*, 197 Md. 692, 693 (1951) (declaring that "[t]he application alleges the same grounds of complaint as his prior application, and therefore it will be denied" (citing Md. Code (1939, 1947 Supp.), Art. 42, § 3c)). *See also Jones v. Hendrix*, 599 U.S. 465, 469 (2023) (noting that, under federal law, "second or successive [habeas] motions are barred" unless they rely upon either newly discovered evidence or a new rule of constitutional law).

confinement was determined upon a prior application for the writ * * * and *no new ground* is shown'"). To the extent a court denies a habeas petition without a hearing, and that petition alleges new grounds for relief, we review for legal error.[6]

I.

Parties' Contentions

Appellant contends that the circuit court erred in summarily denying his habeas petition, as he continues to be denied "meaningful opportunity for release based on demonstrated growth, maturity, and rehabilitation," in violation of the Eighth Amendment of the United States Constitution, despite having clearly demonstrated he has fulfilled the United States Supreme Court's "*Miller* factors." According to appellant, he, in preparation for the parole interview in November 2021, provided the Maryland Parole Commission with "comprehensive proof of the growth, maturity, and rehabilitation he needed to demonstrate to obtain parole release, as well as demonstrating he had the physical, mental, and moral qualifications to justify a favorable decision."[7] But, according to appellant, the *en banc* Parole Commission provided "**absolutely no reason**" for its decision to deny him parole, which, he claims, violates due process. Appellant further claims that the mandate of the Supreme Court of Maryland in *Carter v. State*, 461 Md. 295 (2018), which (in appellant's words) "purported to provide constitutional protections to all of Maryland's

[6] Because there was no hearing below, we cannot apply the standard of review set forth in Rule 8-131(c). In that respect, this case is distinguishable from *Wilson v. Simms*, 157 Md. App. 82 (2004), cited in appellees' brief, in which the circuit court held a hearing on the habeas petition before denying it. *Id.* at 88-89.

[7] Appellant sets forth his evidence in detail in his brief.

juvenile offenders[,]" "is largely being ignored, and at the very least misinterpreted." In support of that claim, appellant points to the Parole Commission's denial of his application, which, he asserts, was "for no reason at all[.]"

Appellees counter that the Supreme Court of Maryland, in *Carter*, "considered and rejected the same constitutional challenge to the legality of Maryland's parole system that [appellant] raises here as to juvenile offenders serving parole-eligible life sentences." Specifically, according to appellees, our highest Court "determined that, on its face, Maryland's current parole system meets" constitutional requirements imposed by the United States Supreme Court in *Graham*, *Miller*, and *Montgomery*. In addition, appellees assert that the Parole Commission, having considered all "the required statutory and regulatory factors, . . . properly exercised its discretion in determining that [appellant] should be considered for parole again in November 2024."

Analysis

Life Sentences for Juvenile Offenders

We begin by retracing (briefly) ground we covered in *Tate II*, setting forth the development of decisional law addressing legal challenges to life sentences for juvenile offenders. This line of decisions began with constitutional challenges to life sentences without the possibility of parole for juvenile offenders who had committed crimes other than homicide, a practice which the United States Supreme Court abolished in *Graham v. Florida*, 560 U.S. 48, 74 (2010), on the ground that it violated the Eighth Amendment prohibition against cruel and unusual punishment. The Supreme Court declared that, although a state "is not required to guarantee eventual freedom to a juvenile offender

convicted of a nonhomicide crime[,]" it must provide such an offender "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. The Supreme Court left it up to the individual states "to explore the means and mechanisms for compliance" with its mandate. *Id.*

In *Miller v. Alabama*, 567 U.S. 460, 479 (2012), the Supreme Court extended the rationale of *Graham* to juveniles convicted of homicide offenses, and it subsequently held, in *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016), that *Graham* and *Miller* apply retroactively. As a result, all convictions of juvenile offenders, even those already final prior to *Graham* and *Miller*, must comply with the rule that a sentence of life without the possibility of parole is prohibited by the Eighth Amendment "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 577 U.S. at 209.

From there, it was a short leap to claims that life sentences for juvenile offenders, even with the possibility of parole, are prohibited by the Eighth Amendment. That category of cases turns on whether a state's parole system provides a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. In *Carter*, *supra*, 461 Md. 295, the Supreme Court of Maryland addressed that issue and held that Maryland's parole scheme is presumptively valid. Specifically, our highest Court rejected the petitioners' claims that they were, effectively, serving sentences of life without the possibility of parole because Maryland's parole scheme denied them that meaningful opportunity, declaring 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, on their face allow a juvenile offender serving a life sentence a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

Id. at 307.

Merits of the Claim

Generally, "the Parole Commission must apply the pertinent statutory factors" in determining whether an inmate should be granted parole. *Herrera v. State*, 357 Md. 186, 188 (1999) (per curiam). Likewise, the Parole Commission must apply the pertinent regulatory factors, including those specifically applicable to juvenile offenders, in making such a determination. COMAR 12.08.01.18.A(3)-(4). Ultimately, the Parole Commission, applying those factors, "must exercise the discretion which the law vests" in it. *Lomax v. Warden, Maryland Corr. Training Ctr.*, 356 Md. 569, 580 (1999).

"Whether an inmate is eventually paroled is ordinarily not a judicial determination." *Sucik v. State*, 344 Md. 611, 615 (1997). *See State v. Parker*, 334 Md. 576, 596 n.9 (1994) (declaring that "[u]nless a statute provides to the contrary, courts are not empowered to determine whether or when a prisoner should be released on parole"). Rather, that power rests "with the Maryland Parole Commission, under procedures and criteria established by" the General Assembly. *Sucik*, 344 Md. at 616.

Simply put, under the enormous deference we must give to the Parole Commission, we cannot say that it failed to follow the required statutory and regulatory factors applicable to juvenile lifers in denying appellant immediate release from custody. That is especially

so given that the Commission did not deny appellant permanently any possibility of parole but, granted rehearing in November 2024, holding open the possibility of future release.

In summary, to the extent appellant raised the same claims he raised in his previous habeas petition, the circuit court did not abuse its discretion in denying his ensuing petition without a hearing. *Hines*, 236 Md. at 409; Md. Rule 15-303(e)(3)(B). To the extent his ensuing petition challenges the subsequent actions of the Maryland Parole Commission, we hold that appellant has failed to demonstrate that the Commission did not follow the required statutory and regulatory factors.

II.

Parties' Contentions

Appellant contends that the circuit court erred in failing to address whether the State of Maryland has created a liberty interest in parole release for juvenile offenders that is protected by the Due Process Clause of the Fourteenth Amendment, as the Maryland statute gives rise to a legitimate expectation of parole.

Appellees counter that appellant "possesses no Fourteenth Amendment liberty interest in being paroled from his life sentence." According to the State, "Maryland prisoners, including juvenile lifers like [appellant], do not have a liberty interest in parole until they are served with a formal parole order and sign it, thereby accepting the terms and conditions of their release."[8] And specifically, assert appellees, because appellant

[8] In support, appellees cite *Patuxent Inst. Bd. of Rev. v. Hancock*, 329 Md. 556 (1993), and *McLaughlin-Cox v. Maryland Parole Comm'n*, 200 Md. App. 115 (2011).

indisputably has not been served with a parole order, "he has no interest protected by due process in being paroled."

Analysis

In *Holly v. State*, 241 Md. App. 349 (2019), we considered a claim that a juvenile offender, subject to a sentence of life imprisonment, "has a liberty interest in a meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation that implicates the Due Process Clause of the Fourteenth Amendment and that due process requires" procedural rights including "a right to state-furnished counsel at parole hearings, public funds for experts, [and] judicial review of parole decisions." *Id.* at 352, 358. We rejected that claim after examining *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1 (1979), *Swarthout v. Cooke*, 562 U.S. 216 (2011) (per curiam), and *Bowling v. Director, Virginia Department of Corrections*, 920 F.3d 192 (4th Cir. 2019), concluding that the "parole system in Maryland provides far more procedural protections than the 'minimal' protections held to be sufficient for compliance with the Fourteenth Amendment by the [United States] Supreme Court." *Holly*, 241 Md. App. at 361.

We further observed that in *Greenholtz*, the United States Supreme Court had addressed the specific claim appellant attempts to raise here: what due process implications arise from "a state parole statute that create[s] an 'expectancy of release' upon the fulfillment of certain conditions." *Holly*, 241 Md. App. at 359-60. In a footnote, we observed that "[i]nmates generally have no such liberty interest in parole in Maryland." *Id.* at 360 n.5. In support, we cited our decision in *McLaughlin-Cox*, *supra*, 200 Md. App. 115, where we declared that parole in Maryland "is not explicitly conditioned on some

particular combination of findings" and that, consequently, "the Maryland statutory scheme governing the [Maryland Parole Commission's] consideration of parole does not create a liberty interest protected by the Fifth and Fourteenth Amendments." *Id.* at 124-25.

Nothing in more recent developments in this subject matter convinces us that our prior decisions in *Holly* and *McLaughlin-Cox* do not retain their effect, thus we continue to be bound by those decisions. We therefore reject appellant's claim based upon a purported liberty interest in parole afforded to juvenile homicide offenders serving sentences of life with the possibility of parole.

III.

Parties' Contentions

Appellant contends that the circuit court erred in failing to address appellees' continued violation of the settlement agreement in *Maryland Restorative Justice Initiative v. Hogan, et al.*, No. 1:16-cv-01021-ELH, 2017 WL 467731 (D. Md. Feb. 3, 2017) ("*MRJI*") (unpublished), through their intentional withholding of privileges that would provide him the ability to demonstrate further growth, maturity, and rehabilitation. According to appellant, "[p]ursuant to the settlement in [*MRJI*, he] must be afforded an opportunity to participate in lesser security statuses, *i.e.*, work release, to demonstrate additional growth, maturity, and rehabilitation so that he may be 'tested' in order to prove that he is worthy of a second chance." Appellant further alleges that he is denied that opportunity because, according to appellees, the "only way" for him to "participate in work release" is to be issued "a delayed parole release date." Appellant, in effect, contends that

appellees have placed him in a "Catch-22" situation, effectively denying him the opportunity to demonstrate his fitness for release.

Appellees do not directly address this claim. In fact, they do not even mention *MRJI* in their brief. Even though the issue is not before us in this appeal, we address it briefly for completeness.

Analysis

MRJI was a civil action brought in the United States District Court for the District of Maryland by Maryland Restorative Justice Initiative and several named plaintiffs,[9] who were juvenile homicide offenders serving life sentences in Maryland, against Governor Hogan; Mr. Blumberg; Stephen Moyer, Secretary of the Department of Public Safety and Correctional Services; and Dayena M. Corcoran, Commissioner of the Maryland Division of Correction. *MRJI*, 2017 WL 466731 at *1. In that lawsuit, the plaintiffs alleged that Maryland's parole system was unconstitutional as applied to them because it denied them a "'meaningful opportunity for release,"' resulting in "unconstitutional 'de facto' sentences" of life without the possibility of parole. *Id.* "In addition, [the] plaintiffs challenge[d] the policies and practices implemented by" the Maryland Parole Commission. *Id.* at *2.

The case ultimately was settled, and as a result, Maryland's parole procedures were amended to ensure conformance with *Miller* and its progeny. Settlement Agreement, No.

[9] The named plaintiffs were Calvin McNeill, Nathaniel Foster, and Kenneth Tucker. *MRJI*, 2017 WL 466731 at *1.

1:16-cv-01021-ELH, at 2-3.[10] Paragraph 13a of the Settlement Agreement provides in relevant part:

> Any action by the Parties to enforce the terms of this Settlement Agreement shall be brought in the United States District Court for the District of Maryland, as permitted by law.

Settlement Agreement at 4.

Appellant's claim is, effectively, an attempt to enforce the Settlement Agreement in *MRJI*. Even were we to assume that appellant had standing to enforce that agreement,[11] in a case to which he was not a party, the circuit court plainly was not the proper forum in which to raise this claim, and the circuit court did not err in not addressing it.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.

[10] The Settlement Agreement is not part of the record in this case. We may, however, judicially notice a judgment of a federal court, Md. Rule 5-201(b), (c), and we do so here.

[11] Indeed, Paragraph 2 of the Settlement Agreement provides:

> Third parties. The parties to this Settlement Agreement are Plaintiffs and Defendants. Nothing in this Settlement Agreement shall be construed to make any other person or entity not released by or executing this Settlement Agreement a third-party beneficiary to this Settlement Agreement.

Settlement Agreement at 1. The record is unclear as to whether appellant is a party to *MRJI*, to have standing to enforce the Settlement Agreement. But even were we to assume that he is, the Settlement Agreement by its own terms cannot be enforced in a state court.