Circuit Court for Frederick County
Case No. 10-K-90-012678

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 225

September Term, 2017

BYRON A. BOWIE

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Beachley,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: September 15, 2017

On July 3, 1991, in the Circuit Court for Frederick County, appellant Byron Bowie pleaded not guilty pursuant to an agreed statement of facts. After the State read the agreed facts to the court, the court found appellant guilty of first-degree murder, assault with intent to murder, and use of a handgun in the commission of a crime of violence. On January 23, 1992, the court sentenced appellant to life in prison for first-degree murder, fifteen years concurrent for assault with intent to murder, and ten years concurrent for the handgun count. On February 3, 2017, appellant filed a Motion to Correct Illegal Sentence and Request for Hearing, arguing that recent United States Supreme Court precedent rendered his sentence unconstitutional. The circuit court denied appellant's motion without a hearing. Appellant presents the following issue for our review: Did the circuit court err in denying appellant's motion to correct illegal sentence? We affirm the circuit court's decision.

BACKGROUND

According to the agreed statement of facts, on the night of September 28, 1990, appellant shot and killed one man, and wounded another man. Approximately twenty years after appellant received his life sentence for first-degree murder, the United States Supreme Court held it unconstitutional for a state to sentence a juvenile nonhomicide offender to life without the possibility of parole, depriving that juvenile of a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham v. Florida*, 560 U.S. 48, 75 (2010). The Supreme Court made clear, however, that a state need not guarantee eventual freedom to such an offender. *Id*. Two years later, the Supreme Court

extended *Graham* and held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Miller v. Alabama*, 567 U.S. 460, 465 (2012). Although *Graham* addressed a juvenile nonhomicide offender's sentence, the Supreme Court in *Miller* explained that "*Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." *Id.* at 473. Finally, four years after *Miller*, the Supreme Court announced that *Miller* constitutes a substantive rule and applies retroactively. *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718, 734 (2016).

DISCUSSION

Appellant argues that we must vacate his sentence for several reasons. First, he contends that his sentence violates the Eighth Amendment because Maryland's parole system does not afford him a meaningful opportunity to obtain release, rendering his life sentence the equivalent of life without parole. Second, appellant argues that the regulations promulgated by the Maryland Parole Commission (the "Commission") do not comply with the mandates of the Eighth Amendment and *Graham* and its progeny, also rendering his life sentence the equivalent of life without parole. Third, he argues that the sentencing court erred by not considering his youth as a mitigating factor in violation of *Miller*. Finally, appellant argues that the Maryland Declaration of Rights provides him with additional protections not provided by the Eighth Amendment.

I.

Appellant first argues that his parolable life sentence functions as life without the possibility of parole because the Governor's role in the parole system does not afford him a meaningful opportunity to obtain release. This is so, appellant argues, because in Maryland, the Governor "has unfettered authority to approve or deny parole to an inmate serving a life sentence and is not bound to consider appellant's demonstrated maturity and rehabilitation or the distinctive attributes of youth." As we shall explain, appellant's claim is premature.

In Maryland, the Commission "has the exclusive power to . . . authorize the parole of an individual sentenced under the laws of the State to any correctional facility in the State" as well as to "hear cases for parole in which . . . the inmate is serving a sentence of life imprisonment[.]" Md. Code (1999, 2008 Repl. Vol., 2016 Supp.), § 7-205(a)(1), (3)(iii) of the Correctional Services Article ("CS"). "[A]n inmate who has been sentenced to life imprisonment is not eligible for parole consideration until the inmate has served 15 years or the equivalent of 15 years considering the allowances for diminution of the inmate's term of confinement." CS § 7-301(d)(1). A homicide offender such as appellant, however, is not eligible for parole until he serves twenty-five years (or the equivalent period with applicable diminution credits). CS § 7-301(d)(2), (3). Parole for an inmate sentenced to life is governed by CS § 7-301(d)(4), which provides that, "if eligible for parole under this subsection, an inmate serving a term of life imprisonment may only be paroled with the approval of the Governor." For those serving life sentences, the

Commission can only review and make recommendations to the Governor. CS § 7-206(3)(i).

Put simply, once a homicide offender sentenced to life has served twenty-five years (or the equivalent period with applicable diminution credits), that offender becomes eligible for parole. If the Commission recommends parole for such an offender, the Governor has the exclusive power to decide whether to grant or deny parole.[1]

Appellant argues that CS § 7-301(d)(4) does not require the Governor to consider demonstrated maturity, rehabilitation, and the distinctive attributes of youth—standards the Supreme Court in *Graham* required the States to explore when considering parole for juvenile nonhomicide offenders. Appellant correctly notes that there is no statutory provision that requires the Governor to consider any particular factors in deciding whether to grant parole. This unfettered discretion to deny parole, appellant argues, renders CS § 7-301(d)(4) unconstitutional.

In *Graham*, the State of Florida sentenced Graham, a juvenile nonhomicide offender, to life in prison. 560 U.S. at 52-53, 57. Because Florida had abolished its parole system, Graham's life sentence effectively became life without the possibility of parole—his only opportunity for release was through executive clemency. *Id*. at 57. In holding that sentence unconstitutional, the Supreme Court stated,

[1] If the Commission chooses to recommend parole for an inmate sentenced to life who has served twenty-five years (as appellant has, here), and the Governor does not disapprove of the Commission's decision within 180 days of receiving that decision, the parole decision "becomes effective." CS § 7-301(d)(5).

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.

560 U.S. at 75.

Pursuant to Maryland's parole procedures, the Commission must first recommend appellant for parole before the Governor can consider whether to ultimately grant parole. Appellant does not claim that the Commission has recommended him for parole, nor can he claim that his parole status now depends exclusively on the actions of the Governor. In short, the Governor has no duty, at this juncture, to consider appellant's parole status.

The Court of Appeals "has emphasized, time after time, that [its] strong and established policy is to decide constitutional issues only when necessary." *VNA Hospice of Md. v. Dep't of Health and Mental Hygiene*, 406 Md. 584, 604 (2008) (internal quotation marks omitted) (quoting *Burch v. United Cable*, 391 Md. 687, 695-96 (2006)). The United States Supreme Court has stated that, "As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations." *Cty. Court of*

Ulster Cty. v. Allen, 442 U.S. 140, 155 (1979). The Supreme Court has explained that, to have constitutional standing, a party "must have suffered an 'injury in fact'—an invasion of a legally protected interest which is . . . actual or imminent, not 'conjectural' or 'hypothetical[.]'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotation marks omitted). Here, in the absence of a recommendation for parole by the Commission, there is no need to decide a constitutional issue regarding the Governor's alleged unfettered discretion in the parole process. Appellant's claim, in the parlance of *Lujan*, is "conjectural" or "hypothetical."

We find support for our conclusion in the relevant case law. In *People v. Franklin*, 370 P.3d 1053, 1054 (Cal. 2016), the Supreme Court of California addressed an appeal pursuant to *Graham* and its progeny regarding a juvenile homicide offender. There, in addition to addressing other issues, the *Franklin* court considered an argument by amicus curiae that the parole board's regulations concerning a juvenile offender's suitability for parole did not effectively provide those offenders a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" as required by *Graham*. *Id*. at 1065. Declining to address the issue, the *Franklin* court held,

> As of this writing, the Board [of Parole Hearings] has yet to revise existing regulations or adopt new regulations applicable to youth offender parole hearings. In advance of regulatory action by the Board, and *in the absence of any concrete controversy in this case* concerning suitability criteria or their application by the Board or the Governor, it would be *premature* for this court to opine on whether and, if so, how existing suitability criteria, parole hearing procedures, or other practices must be revised to conform to the dictates of applicable statutory and constitutional law.

Id. at 1066 (emphasis added).

Like the California Supreme Court, many appellate courts, including the Supreme Court of the United States, have routinely declined to consider premature allegations of constitutionally recognized harm in a variety of contexts. *See Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 186 (1985) (declining to consider constitutional issue, stating that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue"); *Hodel v. Indiana*, 452 U.S. 314, 335-336 (1981) (dismissing a due process challenge as premature because "appellees [had] made no showing that they were ever assessed civil penalties under the [Surface Mining] Act, much less that the statutory prepayment requirement was ever applied to them or caused them any injury"); *U.S. v. Foundas*, 610 F.2d 298, 301 (5th Cir. 1980) (declining to consider whether application of the Federal Parole Commission guidelines was invalid where defendant had not yet begun to serve her sentence, and it was possible that the guidelines could change before she became eligible for parole); *Pyles v. State*, 25 Md. App. 263, 269 (1975) (rejecting as premature appellant's due process claim regarding post-sentencing procedures when "it [would] be a long time before the appellant's sentence expire[d] and the principle [complained of] . . . [would come] into play").

We find this authority persuasive. Because the Commission has not recommended appellant for parole, the Governor need not take any action. Appellant, therefore, lacks

standing to allege that his life sentence functions as life without parole and, concomitantly, cannot presently allege that he has been deprived of a meaningful opportunity for release.

II.

In the wake of *Graham* and its progeny, the Commission, in an apparent attempt to comply with *Graham*'s mandate, amended COMAR 12.08.01.18A(3) (amended October 24, 2016).[2] COMAR 12.08.01.18A(3) now provides the following:

> In addition to the factors contained under §A(1)-(2) of this regulation, the Commission considers the following factors in determining whether a prisoner who committed a crime as a juvenile is suitable for release on parole:
>
> (a) Age at the time the crime was committed;
>
> (b) The individual's level of maturity and sense of responsibility at the time of [sic] 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.

[2] The legislature has delegated to the Commission the authority to "adopt regulations governing its policies and activities under [the Correctional Services] title." CS § 7-207(a)(1).

According to appellant, although these factors attempt to address age and its related circumstances, "the regulation does not require the Commission to treat these factors or the inmate's youth at the time of the offense as mitigating." Appellant also alleges that the factors in COMAR fail to require the Commission to consider whether the juvenile has reformed. Both contentions lack merit.

First, appellant cannot argue that the Commission has failed to treat the factors in COMAR 12.08.01.18A(3) as mitigating because there is no indication that the Commission has applied the factors to appellant. The injury appellant complains of is, at this moment, merely conjectural or hypothetical. Accordingly, appellant lacks standing to allege that the Commission has unconstitutionally applied COMAR 12.08.01.18A(3). *Lujan*, 504 U.S. at 560. Appellant's complaint that COMAR 12.08.01.18A(3) does not require the Commission to consider whether the offender has reformed, is likewise hypothetical. Because the Commission has not applied the factors, we cannot determine whether the Commission has adequately considered whether the offender has reformed.

III.

Appellant's third argument is that the sentencing court erred pursuant to *Miller* and *Montgomery* by failing to consider whether appellant was irreparably corrupt at the time of sentencing. We readily distinguish *Miller* from this appeal.

In *Miller*, two fourteen-year-old offenders were convicted of murder and sentenced to life without the possibility of parole. 567 U.S. at 465. There, "State law mandated that each [juvenile homicide offender] die in prison even if a judge or jury would have thought

that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life *with* the possibility of parole) more appropriate." *Id*. The Supreme Court noted that these mandatory schemes prevented sentencing judges from considering the juvenile's lessened culpability and greater capacity for change as enumerated in *Graham*, and held that "mandatory life without parole for those under the age of 18 at the time of the crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Id*.

Miller would apply here if the sentencing court sentenced appellant to life without the possibility of parole. This is not the case; appellant received a sentence of life *with* the possibility of parole. Appellant alleges that, because of Maryland's parole system, his life sentence functions as life without parole. As we explained above, however, appellant currently lacks standing to allege that he has received an *ad hoc* life without parole sentence. Because appellant lacks standing to argue that he has been sentenced to the equivalent of life without parole, appellant's argument that the sentencing court violated the strictures of *Miller* and *Montgomery* is premature. *Lujan*, 504 U.S. at 560.

IV.

Finally, appellant argues that Article 25 of the Maryland Declaration of Rights affords him even greater protections than the Eighth Amendment of the Constitution. Appellant relies on the fact that whereas the Eighth Amendment prohibits "cruel *and* unusual punishments," Article 25 prohibits "cruel *or* unusual punishments." (Emphasis added). To support this contention, appellant relies on the following language:

> The defendant's argument that we should afford greater protection under Article 25 of the Maryland Declaration of Rights than is afforded by the Eighth Amendment to the United States Constitution, based upon the disjunctive phrasing "cruel or unusual" of the Maryland protection, is not without support. *See People v. Bullock*, 440 Mich. 15, 485 N.W.2d 866, 870–72 (1992) (phrasing of "cruel or unusual" in Michigan Constitution not accidental or inadvertent, and may constitute a compelling reason for broader interpretation of state constitution provision than that given Eighth Amendment clause).

Thomas v. State, 333 Md. 84, 103 n.5 (1993) (*abrogated on other grounds by statute* as noted in *Robinson v. State*, 353 Md. 583, 700-01 (1999)). The rest of this footnote, however, reads as follows:

> Our cases interpreting Article 25 of the Maryland Declaration of Rights have generally used the terms "cruel and unusual" and "cruel or unusual" interchangeably. The Court of Special Appeals has suggested that "the adjective 'unusual' adds nothing of constitutional significance to the adjective 'cruel' which says it all, standing alone." *Walker, supra*, 53 Md. App. at 193 n. 9, 452 A.2d 1234. *Because the prevailing view of the Supreme Court recognizes the existence of a proportionality component in the Eighth Amendment, we perceive no difference between the protection afforded by that amendment and by the 25th Article of our Declaration of Rights.*

Id. (emphasis added). Because the Court of Appeals perceived no difference between the protection afforded by the Eighth Amendment and the Maryland Declaration of Rights, we reject appellant's assertion that the Maryland Declaration of Rights affords him greater constitutional protection than the Eighth Amendment.

CONCLUSION

For the reasons stated above, we affirm the decision of the trial court denying appellant's motion to correct illegal sentence.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.