Circuit Court for Prince George's County
Case No. CT06-1010X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 885

September Term, 2016

JAFET L. HERNANDEZ

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Beachley,
Shaw Geter,

JJ.

Opinion by Beachley, J.

Filed: August 11, 2017

Following a four-day trial in March 2007, a jury in the Circuit Court for Prince George's County convicted appellant, Jafet Hernandez, of first-degree rape, first-degree sexual offense, kidnapping, and robbery. In September 2007, the trial court sentenced appellant to life imprisonment for first-degree rape, and life for first-degree sexual offense, to run concurrent.[1] Almost nine years later, in May 2016, appellant filed a motion to correct illegal sentence in the circuit court, arguing that recent United States Supreme Court precedent rendered his sentence unconstitutional. The circuit court denied appellant's motion without a hearing. Appellant timely appealed, and presents the following issue for our review: Did the trial court err in denying appellant's motion to correct illegal sentence? The State moved to dismiss, arguing that appellant's appeal is not ripe for review. We agree with the State.

BACKGROUND

A panel of this Court previously established the lurid nature of the events that led to appellant's convictions in *Hernandez v. State*, No. 2119, Sept. Term, 2007. There, the panel noted that appellant committed the abovementioned offenses as a juvenile at the age of seventeen years and nine months. *Id*., slip op. at 2. Nearly three years after appellant received his life sentence, 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

[1] The court also sentenced appellant to separate ten-year concurrent sentences for kidnapping and robbery.

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.*

DISCUSSION

Appellant argues that Maryland's parole system functions merely as a form of *ad hoc* executive clemency and fails to provide the constitutionally required meaningful opportunity to obtain release. This is so, appellant contends, because of the nature of parole eligibility for those sentenced to life in Maryland. According to appellant, by vesting the Governor with unfettered discretion in deciding whether to grant parole to juvenile nonhomicide offenders, Maryland's parole system is unconstitutional as applied to him.

Maryland's Parole System

We begin our analysis with a brief overview of the parole process for nonhomicide offenders sentenced to life. In Maryland, the Maryland Parole Commission (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 or administrative release 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."[2] CS § 7-301(d)(1). Parole for such an inmate 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 nonhomicide offender sentenced to life has served fifteen years (or the equivalent period with applicable diminution credits), that offender becomes eligible for parole.[3] If the Commission recommends parole for such an offender, the Governor has the exclusive power to decide whether to grant or deny parole.[4]

Appellant's Claim

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

[2] We note that different rules apply to those inmates sentenced to life imprisonment for committing homicide crimes. *See* Md. Code (1999, 2008 Repl. Vol., 2016 Supp.), § 7-301(d)(2), (3) of the Correctional Services Article ("CS").

[3] In a footnote in its brief, the State asserts that it contacted the Department of Public Safety and Correctional Services, and confirmed that appellant was to become eligible for parole no sooner than February 27, 2017. The record, however, does not indicate whether appellant is now eligible.

[4] If the Commission recommends parole for an inmate sentenced to life who has served twenty-five years, 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).

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 as applied to him.

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,

> 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.

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).[5] 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.

Although the Commission must consider these factors in determining whether to recommend parole, no existing statute or regulation confines the Governor to the same

[5] 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).

analysis. Appellant claims that his life sentence is unconstitutional under *Graham* because the Governor could hypothetically choose not to consider *Graham's* standards in denying parole. According to appellant, the Governor's unfettered discretion resembles executive clemency, and renders his sentence the equivalent to life without parole.[6]

Appellant's Claim is Premature

Because appellant cannot show that he has suffered any legally cognizable harm, his complaint is premature. 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

[6] Appellant, in his reply brief, argues that "when a juvenile nonhomicide offender is sentenced to life in prison, an Eighth Amendment challenge to the sentence requires a court to examine whether there are provisions that make early release sufficiently likely and predictable to mitigate the severity of the sentence." We note that *Graham v. Florida*, 560 U.S. 48, 75 (2010), does not require a sentence to guarantee "sufficiently likely and predictable" release. *Graham* requires the State to give juvenile nonhomicide offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. at 75.

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, has not sustained any legally cognizable harm.

Finally, in urging us to consider his appeal despite the Commission not yet having recommended parole, appellant argues that the Supreme Court permitted Graham to challenge his life sentence after serving less than five years. We conclude that *Graham* is distinguishable from the instant case.

In *Graham*, Graham received a life sentence in Florida, a state which had abolished its parole system. 560 U.S. at 57. Pursuant to Florida's statutory scheme at that time, "a life sentence [gave] a defendant no possibility of release unless he [was] granted executive clemency." *Id*. After receiving his sentence, Graham's only opportunity to be released from prison during his lifetime was through executive clemency. The same cannot be said for appellant. Maryland, unlike Florida, has not abolished its parole system. Moreover, the Commission has articulated factors as set forth in COMAR 12.08.01.18A(3) in an apparent attempt to comply with *Graham*, factors which the Commission has not yet applied to appellant's case.

CONCLUSION

For the reasons stated, we decline to decide whether Maryland's parole system is unconstitutional. Until the Commission recommends appellant for parole, the constitutional defect he alleges will be purely hypothetical. Accordingly, we grant the State's motion to dismiss the appeal.

STATE'S MOTION TO DISMISS APPEAL IS GRANTED. COSTS TO BE PAID BY APPELLANT.