Circuit Court for Anne Arundel County
Case No. C-02-CV-15-002710

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2167

September Term, 2016

JODY LEE MILES

v.

LAWRENCE JOSEPH HOGAN, ET AL.

Meredith,
Arthur,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: February 12, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In 2013 Maryland abolished the death penalty. As a consequence, it became impossible to carry out the sentences that had been imposed on the four men who remained on death row. One of those four was appellant Jody Miles.

In the legislation that abolished the death penalty, the General Assembly amended Md. Code (1999, 2008 Repl. Vol.), § 7-601(a) of the Correctional Services Article to authorize the Governor to change a sentence of death into a sentence of life without the possibility of parole. *See Miles v. State*, 435 Md. 540, 543 n.2 (2013). Miles challenged that amendment, contending that it restricted the Governor's constitutional power to grant pardons and reprieves (*see* Md. Const., art. II, § 20) by limiting his or her discretion to commute a death sentence into anything other than a sentence of life without parole.

The Circuit Court for Anne Arundel County rejected Miles's contention, and he appealed. Although the circuit court reached the correct conclusion on the merits, we vacate the judgment with directions to embody that conclusion in a declaratory judgment.

FACTUAL AND PROCEDURAL HISTORY

On March 19, 1998, Miles was sentenced to death in the Circuit Court for Queen Anne's County following his convictions for felony murder, robbery with a deadly weapon, robbery, and the use of a handgun in the commission of a crime of violence. The Court of Appeals, on direct appeal, affirmed the conviction and death sentence. *See Miles v. State*, 365 Md. 488 (2001), *cert. denied*, 534 U.S. 1163 (2002). Since then, Miles has unsuccessfully pursued a number of post-conviction remedies. *Miles v. State*, 397 Md. 352 (denying leave to appeal from denial of petition for post-conviction relief),

cert. denied, 552 U.S. 883 (2007); *Miles v. State*, 421 Md. 596, 597 (2011) (affirming denial of first motion to correct illegal sentence), *cert. denied*, 565 U.S. 1263 (2012); *Miles v. State*, 435 Md. 540, 545 (2013) (affirming denial of second motion to correct illegal sentence).[1]

In 2013, while Miles was appealing the denial of his second motion to correct an illegal sentence, Maryland abolished the death penalty. 2013 Md. Laws ch. 156, § 3. At the same time, the General Assembly amended § 7-601(a)(1) of the Correctional Services Article to state that the Governor "may . . . change a sentence of death into a sentence of life without the possibility of parole." That statute had previously said that the Governor may "commute or change a sentence of death into a period of confinement that the Governor considers expedient." http://mgaleg.maryland.gov/2013RS/Chapters_noln/CH_156_sb0276t.pdf.

On September 30, 2013, the day before the effective date of the legislation abolishing the death penalty, Miles filed a third motion to correct illegal sentence in the Circuit Court for Queen Anne's County. In his motion he argued that his death sentence was illegal because it could no longer be carried out. The circuit court denied the motion on October 18, 2013, and Miles noted a timely appeal from that ruling.

[1] In addition to the post-conviction remedies that he has pursued in state court, Miles filed a petition for writ of habeas corpus in the United States District Court for the District of Maryland in 2007. Those proceedings have been stayed, pending the exhaustion of all relevant remedies in state court.

While that appeal was pending in this Court, Miles received word that Governor O'Malley was considering commuting his sentence of death to a sentence of life without the possibility of parole. On November 25, 2014, Miles sent a letter to the Governor, requesting that his sentence not be commuted.

On December 8, 2014, this Court heard argument in Miles's appeal from the denial of his third motion to correct an illegal sentence. Miles and the State stipulated that the circuit court had erred in denying the motion, but they disagreed about the consequences of the error: Miles contended that he was entitled to be resentenced (and to argue for a sentence of something less than life without parole), while the State contended that his death sentence automatically became a sentence of life without parole. Before this Court decided the appeal, however, the Governor announced his intention to commute Miles's death sentence to a sentence of life without parole.

On January 20, 2015, the Governor formally commuted Miles's sentence to a sentence of life without parole by issuing Executive Order 01.01.2015.06.[2] In light of the executive order, this Court dismissed Miles's appeal as moot. *Miles v. State*, No. 2155, Sept. Term, 2013. The Court of Appeals denied Miles's petition for a writ of certiorari. *Miles v. State*, 443 Md. 236 (2015).

On September 16, 2015, Miles attacked the commutation of his death sentence by filing this declaratory judgment action in the Circuit Court for Anne Arundel County.

[2] *Available at* http://mgaleg.maryland.gov/Pubs/LegisLegal/2015-executive-orders.pdf (last visited Jan. 28, 2018).

Among other things, Miles contended that the General Assembly had violated the doctrine of separation of powers, because, he said, it had limited the Governor's discretion to transform his death sentence into anything other than a sentence of life without parole.[3]

After some procedural skirmishing,[4] the State moved to dismiss Miles's pleading. In its motion the State argued that Miles could present his contentions only in a motion to correct an illegal sentence in Queen Anne's County (where he had been sentenced), and not in a complaint for a declaratory judgment in Anne Arundel County.

On November 29, 2016, the circuit court signed an order that purported to dismiss the complaint for a declaratory judgment. In explaining the reason for its decision, however, the circuit court wrote that "Governor O'Malley's commutation of Plaintiff's sentence of death to life without the possibility of parole was lawful." Hence, it appears that the court did not accept the State's contention that it should dismiss the case because

[3] Miles also contended that the commutation of his sentence was illegal because he "did not submit the required application for a change in sentence to the Governor" and "did not accept the Governor's change in [his] sentence from death to life without parole . . . ." He has abandoned that avenue of attack on appeal. *See Ochoa v. Dep't of Pub. Safety & Corr. Servs.*, 430 Md. 315, 328 (2013) ("arguments not presented in a brief or not presented with particularity will not be considered on appeal"). If he had not abandoned it, we would reject it in light of the recent decision in *Grandison v. State*, 234 Md. App. 564, 586 (2017), which held that the Governor's "plenary" power to pardon "does not depend upon a request by the grantee."

[4] Miles amended his complaint to add federal claims; the State removed the case to federal court; Miles responded by amending his complaint to delete the federal claims and asking the federal court to remand the case to state court; and the federal court remanded the case to Anne Arundel County.

Miles had used the wrong procedural tool; rather it reached the merits and rejected Miles's contentions.

Miles noted his appeal.

QUESTIONS PRESENTED

Miles presents three questions for review:

1. Did the Circuit Court properly dismiss Mr. Miles' Second Amended Petition on the merits?

2. Since the Circuit Court ruled on the merits of Mr. Miles' Petition, is the State's claim that a declaratory judgment action, pursuant to Md. Code Ann., Cts. & Jud. Proc. § 3-401 *et seq.*, does not lie against the Governor for changing Mr. Miles' sentence to [life without parole] pursuant to an unconstitutional statute now moot?

3. If the procedural challenge is not moot, is a declaratory judgment action, pursuant to Md. Code Ann., Cts. & Jud. Proc. § 3-401 *et seq.*, against the Governor for changing Mr. Miles' sentence to [life without parole] the proper procedural vehicle to bring this action, rather than a motion to correct illegal sentence pursuant to Rule 4-345(a)?

We need not reach the second and third questions, because the State no longer contends that Miles was required to assert his challenges in a motion to correct an illegal sentence. In response to the first question, we conclude that the circuit court properly rejected Miles's contentions on the merits, but that it should have embodied its ruling in a formal declaratory judgment and should not have purported to dismiss the complaint. Accordingly, we shall vacate the judgment of dismissal and remand for the entry of a declaratory judgment consistent with this opinion.

DECLARATORY JUDGMENTS

"[A] court may grant a declaratory judgment . . . if it will serve to terminate the uncertainty or controversy giving rise to the proceeding," and if the assertion of a "legal relation, status, right, or privilege . . . is challenged or denied by an adversary party . . . ." Md. Code (1957, 2013 Repl. Vol.), § 3-409 of the Courts and Judicial Proceedings Article. "In an action properly brought under the Declaratory Judgments Act, the court ordinarily must declare the rights of the parties in light of the issues raised." *Jennings v. Gov't Emps. Ins. Co.*, 302 Md. 352, 355 (1985).

"'[D]ismissal is rarely appropriate in a declaratory judgment action.'" *Hanover Invs., Inc. v. Volkman*, 455 Md. 1, 17 (2017) (quoting *Christ ex rel. Christ v. Md. Dep't of Nat. Res.*, 335 Md. 427, 435 (1994)); *accord Glover v. Glendening*, 376 Md. 142, 154-55 (2003); *see also Allied Inv. Corp. v. Jasen*, 354 Md. 547, 556 (1999) ("[g]ranting a motion to dismiss a declaratory judgment action without declaring the rights of the parties rarely is appropriate"); *Broadwater v. State*, 303 Md. 461, 465-66 (1985) ("[l]egions of our cases hold that a demurrer, the type of motion to dismiss here involved, is rarely appropriate in a declaratory judgment action").

In general, a circuit court may dismiss a complaint for declaratory judgment only if the plaintiffs are not entitled to a declaration of their rights. For example, "if there were no justiciable controversy a motion to dismiss would lie." *Broadwater v. State*, 303 Md. at 467. A motion to dismiss may also lie when the case is moot (*see, e.g.*, *id.* at 468), when the plaintiffs lack standing (*Christ ex rel. Christ v. Md. Dep't of Nat. Res.*, 335 Md.

at 435), when the plaintiffs have failed to join a necessary party (*Broadwater v. State*, 303 Md. at 469), or when the same issues are awaiting decision in another common-law proceeding. *See, e.g.*, *Haynie v. Gold Bond Bldg. Prods.*, 306 Md. 644, 650-54 (1986).

In short, a court ordinarily may dismiss a complaint for a declaratory judgment only when the plaintiffs have no right to a declaration at all – even a declaration that they are wrong. *Allied Inv. Corp. v. Jasen*, 354 Md. at 556 ("'[t]he test of the sufficiency of the [complaint for declaratory judgment] is not whether it shows that the plaintiff is entitled to the declaration of rights or interest in accordance with his theory, but whether he is entitled to a declaration at all; so, even though the plaintiff may be on the losing side of the dispute, if he states the existence of a controversy which should be settled, he states a cause of suit for a declaratory decree'" (quoting *Shapiro v. Bd. of Cnty. Comm'rs*, 219 Md. 298, 302-03 (1959))); *see also Christ ex rel. Christ v. Md. Dep't of Nat. Res.*, 335 Md. at 436 ("'where a plaintiff seeks a declaratory judgment that a particular legal provision is valid (or invalid), and the court's conclusion regarding the validity of the provision is exactly opposite from the plaintiff's contention, nevertheless the court must, under the plaintiff's prayer for relief, issue a declaratory judgment setting forth the court's conclusion as to validity'") (quoting *East v. Gilchrist*, 293 Md. 453, 461 n.3 (1982))).

In this case, the circuit court implicitly rejected the State's contention that Miles had no right to declaratory relief when it reached the merits and resolved them against him. The court, therefore, should not have purported to "dismiss" the complaint for a

declaratory judgment in this case. Instead, it should have embodied its resolution of the merits in a written declaration.

Although the circuit court discussed the merits in a written memorandum, it has not been "permissible for the declaratory judgment to be part of a memorandum" since the 1997 amendments to Rule 2-601(a). *Allstate Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 363 Md. 106, 117 n.1 (2001). Rule 2-601(a) "requires that '[e]ach judgment shall be set forth on a separate document.'" *Allstate Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 363 Md. at 117 n.1 (quoting Rule 2-601(a)). Therefore, "[w]hen entering a declaratory judgment, the court must, in a separate document, state in writing its declaration of the rights of the parties, along with any other order that is intended to be part of the judgment." *Id.*

The circuit court erred by not properly declaring the rights of the parties to this case. The error, however, is procedural, and not jurisdictional. *See, e.g.*, *Baltimore County v. Balt. Cnty. Fraternal Order of Police Lodge No. 4*, 439 Md. 547, 566 (2014). In our discretion, we may review the merits and remand for the entry of an appropriate declaratory judgment. *Id.* Accordingly, we shall proceed to the merits.

SECTION 7-601(a)(1) OF THE CORRECTIONAL SERVICES ARTICLE

Miles's declaratory judgment action is but step one in a process that, according to his plan, ends with his resentencing to something less than life imprisonment without the possibility of parole. In this declaratory judgment action, Miles contends that § 7-601(a)(1) of the Correctional Services Article unconstitutionally limits the Governor's

pardon powers by allegedly requiring him to commute a death sentence to a sentence of life without parole. If the statute is unconstitutional, according to Miles, the commutation of his sentence is likewise invalid. His sentence would therefore revert to a sentence of death, which, the State has stipulated, is illegal. Miles asserts that he would thus be entitled to resentencing, where he hopes to receive a sentence less onerous than life without the possibility of parole.[5]

At the core of Miles's challenge lies the separation of powers doctrine, which is embodied in Article 8 of the Maryland Declaration of Rights. Article 8 "'explicitly prohibits one branch of government from assuming or usurping the power of any other branch.'" *State v. Falcon*, 451 Md. 138, 160 (2017) (quoting *State v. Callahan*, 441 Md. 220, 235 (2015)). The doctrine, however, does not require "'absolute separation' or 'strict lines of demarcation' among the three branches of government." *Id.* at 160-61 (quoting *Merchant v. State*, 448 Md. 75, 96-97 (2016)). Rather, the concept "may constitutionally encompass a sensible degree of elasticity[,]" though that elasticity "cannot be stretched to a point where, in effect, there no longer exists a separation of

[5] When explaining his requested relief to the circuit court, Miles suggested that a resentencing would require the empaneling of a jury to decide whether to impose a sentence of life imprisonment without the possibility of parole or to impose some lesser sentence. Since the hearing in question, however, the Court of Appeals decided *Bellard v. State*, 452 Md. 467 (2017). The *Bellard* Court held that neither the United States Constitution nor the Maryland Declaration of Rights give a defendant the right to have a jury (as opposed to a judge) decide whether he or she should be sentenced to life imprisonment without the possibility of parole. *Id.* at 512. Thus, even if Miles were entitled to resentencing, it would occur before the circuit court judge, and not a jury.

governmental power[.]" *Dep't of Nat. Res. v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 220 (1975).

According to Miles, by amending § 7-601(a) in connection with the abolition of the death penalty, the General Assembly infringed upon the Maryland Constitution's broad grant of authority to the Governor to give pardons and commute sentences. While we agree that the Governor's powers of pardon and commutation are broad,[6] we do not read § 7-601(a) to place any material constraints on them. For that reason, we do not reach the constitutional question.

Article II, § 20, of the Maryland Constitution concerns the Governor's power to grant pardons:

> [The Governor] shall have power to grant reprieves and pardons, except in cases of impeachment, and in cases, in which he is prohibited by other Articles of this Constitution; and to remit fines and forfeitures for offen[s]es against the State; but shall not remit the principal or interest of any debt due the State, except in cases of fines and forfeitures; and before granting a *nolle prosequi*, or pardon, he shall give notice, in one or more newspapers, of the application made for it, and of the day on, or after which, his decision will be given; and in every case, in which he exercises this power, he shall report to either Branch of the Legislature, whenever required, the petitions, recommendations and reasons, which influenced his decision.

Because "the gubernatorial pardon power is derived from the Maryland Constitution itself, not from any legislative enactment," it "may be exercised independently of legislative control, so long as the Governor, in exercising that power,

[6] *See Grandison v. State*, 234 Md. App. 564, 584-85 (2017) (citing Alfred S. Niles, *Maryland Constitutional Law* 122 (1915); Dan Friedman, *The Maryland State Constitution* 119 (2011); *Jones v. State*, 247 Md. 530, 534 (1967)).

does not violate federal constitutional provisions or their Maryland cognates." *Grandison v. State*, 234 Md. App. 564, 586 (2017); *see also Schick v. Reed*, 419 U.S. 256, 267 (1974) (holding that the analogous presidential pardon power[7] "is an enumerated power of the Constitution and that its limitations, if any, must be found in the Constitution itself").

The Governor has the power to commute sentences of death. *See Jones v. State*, 247 Md. 530, 534 (1967). Similarly, the Governor has the power to attach any condition to a pardon, so long as the condition does not violate the State or federal Constitution. *See Grandison v. State*, 234 Md. App. at 585 (stating that, despite the "plenary" gubernatorial pardon power, the Governor "may not impose a reduced sentence that, itself, constitutes, 'cruel and unusual punishment'") (citing *Schick v. Reed*, 419 U.S. at 266); *see also State ex rel. Murray v. Swenson*, 196 Md. 222, 231 (1950) ("[t]he grant of a conditional pardon is an act of grace which may be coupled with such conditions as the Governor may impose").

The question thus becomes, does § 7-601(a)(1) limit the Governor's constitutional authority and, if so, does the limitation rise to the level of a violation of the constitutional principle of separation of powers?

In full, § 7-601(a)(1) provides as follows:

> On giving the notice required by the Maryland Constitution, the Governor may: (1) change a sentence of death into a sentence of life without the

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[7] *See* U.S. Const. art. II, § 2, cl. 1 (providing, among other things, that the President "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment").

> possibility of parole; (2) pardon an individual convicted of a crime subject to any conditions the Governor requires; or (3) remit any part of a sentence of imprisonment subject to any conditions the Governor requires, without the remission operating as a full pardon.

It is not at all clear how the permissive language of § 7-601(a)(1) ("the Governor *may* . . . change a sentence of death into a sentence of life without the possibility of parole") imposes any kind of restriction on the Governor's power. Indeed, in one of Miles's earlier appeals, the Court of Appeals observed, in passing, that the 2013 legislation amended "§ 7-601(a)(1) of the Correctional Services Article by *authorizing* the Governor to 'change a sentence of death into a sentence of life without the possibility of parole[.]'" *Miles v. State*, 435 Md. at 543 n.2 (emphasis added). On its face, § 7-601(a)(1) does not seem to restrict the Governor's power in any way, but to describe one of the powers that he or she already had by virtue of the plenary power to grant pardons and reprieves in Article II, § 20, of the Maryland Constitution. The language does not obligate the Governor to do anything, except to give the notice required by the Constitution (which he or she would already be required to do).

In explaining why he thinks that § 7-601(a)(1) restricts the Governor's pardon power, Miles does not look to the language of the current statute alone. Instead, he compares the language of the statute, as amended in 2013, with the language that predated the 2013 amendment. Before the amendment, he observes, § 7-601(a)(1) stated that "the Governor may . . . commute or change a sentence of death *into a period of confinement that the Governor considers expedient*." (Emphasis added.) As a result of the 2013 amendment, by contrast, § 7-601(a)(1) states that "the Governor may . . . change

a sentence of death *into a sentence of life without the possibility of parole*." (Emphasis added.) Because the statute no longer authorizes the Governor to "commute or change a sentence of death into a period of confinement that the Governor considers expedient," but purportedly allows him (or her) only to "change a sentence of death into a sentence of life without the possibility of parole," Miles concludes that the General Assembly has restricted the Governor's power.

In our view, if the 2013 amendment restricts the gubernatorial pardon power in any way, the restriction is, for two related reasons, immaterial.

First, both in its brief and at oral argument, the State agreed that under § 7-601(a)(2) the Governor has the ability to pardon a person who had been sentenced to death. Hence, in the case of a person who had been sentenced to death, the State agrees that Governor has statutory choices other than merely changing the sentence into a sentence of life without parole. It follows that, when Governor O'Malley decided to grant some form of reprieve to Miles, he was not required to commute Miles's sentence to a sentence of life without parole.

Second, at oral argument, the State agreed that a sentence of life without the possibility of parole is a "a sentence of imprisonment" within the meaning of § 7-601(a)(3). Under § 7-601(a)(3), however, the Governor may "remit any part of a sentence of imprisonment subject to any conditions the Governor requires, without the remission operating as a full pardon." Therefore, the Governor may "remit" a sentence of life without the possibility of parole to some other sentence, such as life with the

possibility of parole or imprisonment for a term of years. In other words, the Governor may transform a death sentence into something other than a sentence of life without parole, as long as he or she proceeds in two steps – first, by changing the death sentence into a sentence of life without parole; and second, by changing the sentence of life without parole into some lesser sentence. Even though Governor O'Malley did not take the second step, nothing prohibited him, and nothing prohibits any of his successors, from taking it.

In summary, § 7-601(a)(1) of the Correctional Services Article does not materially limit the Governor's constitutional authority to grant pardons and reprieves. For that reason, § 7-601(a)(1) does not violate the constitutional principle of separation of powers. Although the circuit court correctly rejected Miles's assertion to the contrary, we vacate the judgment of dismissal and remand the case so that the court can enter a declaratory judgment consistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY FOR THE PURPOSE OF ENTERING A DECLARATORY JUDGMENT CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY.