Appendix A

BRIAN ARTHUR TATE	*	**IN THE**
	*	**COURT OF APPEALS**
	*	**OF MARYLAND**
	*	**Petition Docket No. 241 September Term, 2021**
v.	*	
	*	**(No. 537, Sept. Term, 2020 Court of Special Appeals)**
	*	**(No. C-13-CV-19-000237, Circuit Court for Howard County)**
LARRY HOGAN, et al.		

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above-captioned case, it is this 22nd day of November, 2021

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, DENIED as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Joseph M. Getty
Chief Judge

Appendix B

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

*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.

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.

Appendix C

E-FILED; Howard Circuit Court
Docket: 3/2/2020 3:08 PM; Submission: 3/2/2020 3:08 PM

BRIAN TATE	*	IN THE
Petitioner	*	CIRCUIT COURT
v.	*	FOR
GOVERNOR HOGAN, *et al.*,	*	HOWARD COUNTY
Respondents	*	Case No. C-13-CV-19-000237

* * * * * * * * * * * * *

MEMORANDUM AND ORDER

This matter comes before the Court upon consideration of Petitioner Brian Tate's Petition for Habeas Corpus, filed March 18, 2019, pursuant to section 15-301 of the Maryland Annotated Code. Petitioner and Susan Howe Baron, Assistant Attorney General, on behalf of Respondent, appeared on July 16, 2019, for oral argument on Petitioner's Habeas Corpus petition. At the conclusion of the hearing, the Court held the case *sub curia*. For the reasons that follow, the Court will deny Petitioner's Petition for Habeas Corpus.

I. FACTS AND PROCEDURAL HISTORY

Petitioner has been incarcerated since January 2, 1992, when he pleaded guilty to first-degree murder in the Circuit Court for Anne Arundel County. He freely admits the seriousness of the offense. At age 16, he stabbed a 19-year-old peer to death. An autopsy revealed that the victim had 24 stab and slash wounds. A juvenile at the time of the offense, Petitioner was sentenced on January 18, 1993, to life with the possibility of parole. The Circuit Court for Anne Arundel County vacated Mr. Tate's guilty plea during postconviction proceedings, but on June 25, 2018, the Court of Appeals affirmed the Court of Special Appeals' reversal of that trial court decision.

Petitions for habeas corpus lie when a petitioner challenges the legality of his confinement. Md. Rule 15-301. In his Petition for Habeas Corpus, Mr. Tate challenges the result of his first parole hearing, held June 6, 2017, and requests immediate release. During that first parole hearing, while Commissioners DeBoy and Reynolds initially praised his progress and intimated that release was imminent, they denied his petition following receipt of the results of his psychological examination with Dr. Robert Ott, and set a rehearing date for November 2021. Petitioner argues that the commissioners did not consider his "juvenile lifer status," denying him a "meaningful opportunity for release based on demonstrated maturity and growth..." Pet. at 2 (referencing *Graham v. Florida*, 560 U.S. 48, 75 (2010)). He also argues that Maryland's parole scheme, which requires the approval of the Governor in certain cases, is unconstitutional. Last, Petitioner asserts that he has been incorrectly classified to medium security, and he seeks a reclassification to minimum security in order to work and demonstrate his "maturity and rehabilitation through the gradual earning of additional privileges and the ability to succeed in lower-security settings." Pet. at 10.

The State of Maryland, in its Answer, asserts that the commissioners fully considered "all of the statutory and regulatory factors applicable to parole consideration of a juvenile lifer" before determining that Petitioner "is not a suitable candidate for parole at this time." State's Answer at 9. The State suggests that the Court should adopt the reasoning of a recent case, *Bowling v. Director, Virginia Department of Corrections*, 920 F. 3d 192 (4th Cir. 2019), where the Fourth Circuit rejected arguments purportedly similar to Petitioner's.

Further, the State argues that *Carter v. State,* 461 Md. 295 (2018), already has addressed Petitioner's argument that the Maryland parole scheme is unconstitutional, and found that it is not. Rather, according to the State, "Maryland's parole process complies with the Eighth Amendment, and the holdings in *Graham* and *Miller,* because it provides the proper 'means and mechanisms' to afford inmates serving sentences for crimes committed as juveniles 'a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" State's Answer at 19, citing *Miller v. Alabama,* 567 U.S. 460, 479 (2012) (citations omitted). The State argues that Petitioner's claim related to his security classification is improperly asserted in his petition, because he must exhaust his administrative remedies in accordance with section 10-206(a) of the Correctional Services Article and the Prisoner Litigation Act, section 5-1001 of the Courts and Judicial Proceedings Article *et seq.*

As Mr. Tate has challenged the result of his first and only parole hearing, the Court cannot conclude that the process did not grant him a "meaningful opportunity to obtain release." *Graham v. Florida,* 560 U.S. 48, 75 (2010). As stated in *Carter,* 461 Md. at 365, the Maryland parole system is facially constitutional. The Court finds that the parole commissioners properly exercised their discretion and considered the relevant factors in denying his application for parole. The Court further finds that the Petition for Habeas Corpus is not the appropriate vehicle to challenge Petitioner's security classification, as Mr. Tate has not exhausted his administrative remedies.

II. APPLICABLE LAW

A. *Parole Process in General*

The possibility of parole release does not create a liberty interest, protected by the Due Process Clause of the Fourteenth Amendment. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 11 (1979). Where a statute gives rise to a legitimate expectation of parole, a liberty interest may be created, but Maryland inmates lack such an interest until they are granted parole by the Parole Commission and accept the terms and conditions of their release. *Patuxent Inst. Bd. of Review v. Hancock*, 329 Md. 556, 584 (1993); *McLaughlin-Cox v. Maryland Parole Comm'n*, 200 Md. App. 115, 124-25 (2011). The parole process has evolved across states from a character-based "synthesis of record facts and personal observation" of decisionmakers to a mechanistic practice that includes risk assessment instruments. *Greenholtz*, 442 U.S. at 8; Kimberly Thomas & Paul Reingold. FROM GRACE TO GRIDS: RETHINKING DUE PROCESS PROTECTION FOR PAROLE, 107 J. CRIM. L. AND CRIMINOLOGY 213, 215, 244-48 (2017).

B. *Evolution of Law – Lifers Sentenced as Juveniles*

In the Supreme Court, protections for inmates as juveniles have evolved in the last 20 years to be consistent with psychological findings about teenaged brains and behavior. The right Mr. Tate argues he has been denied, a "meaningful opportunity to obtain release," comes from a series of Supreme Court opinions that have set out a new standard for inmates seeking parole for offenses committed as juveniles. On its way to its eventual holding in *Miller v. Alabama*, 567 U.S. 560 (2012), that all but the most incorrigible juveniles sentenced to life must be eligible for parole, the Court first noted in *Roper v. Simmons* that

psychological and sociological data show that the minds of teenagers differ markedly from adults. 543 U.S. 551 (2005). Juveniles under 18 tend to have "a lack of maturity and an underdeveloped sense of responsibility," are "more vulnerable or susceptible to negative influences and outside pressures," have "less fixed" personalities, and are more capable of change than adults. *Id.* at 569-70. The Supreme Court held in *Roper* that the "diminished culpability" of juveniles made capital sentences a violation of the Eighth Amendment. *Id.* at 570-71. Five years later in *Graham v. Florida,* 560 U.S. 48 (2010), the Court restated these findings about juvenile development and found that this data, along with "evolving standards of decency" among state legislatures, meant that sentencing juveniles convicted of non-homicide offenses to life without parole constitutes cruel and unusual punishment. Finally, *Miller v. Alabama,* 567 U.S. 460 (2012), broadened the holding of *Graham* to apply to all juveniles sentenced to life without the possibility of parole. Thus was born the new standard: "'[a] state is not required to guarantee eventual freedom to a juvenile offender...what the State must do, however, is give defendants...some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Miller,* 567 U.S. at 479 (citing *Graham,* 560 U.S. at 75).

C. Maryland's Parole Process and Juvenile Offenders

In the wake of *Miller,* several states amended their parole statutes to attempt to conform to this "meaningful opportunity" standard. *See, e.g.,* Cal. Penal Code §4801(c); Conn. Gen. Stat. §54-125(a)(f)(2-4)(2015); Neb. Rev. Stat. §83-1,110.04. In 2016, the Maryland Department of Public Safety and Correctional Services, in cooperation with the Parole Commission, amended state regulations governing factors to be considered when

determining an inmate's suitability for parole, adding special considerations for those who committed offenses as juveniles. Dep't of Public Safety & Corr. Serv., Proposed Actions on Regulations, COMAR 12.08.01.17, 18 (Aug. 5, 2016).

Maryland inmates who are approved for parole after being sentenced to life face an additional hurdle: the Governor must approve the parole applications of those sentenced to life after a positive recommendation from the Parole Commission. Md. Code Ann., Corr. Serv. § 7-301(d)(4)-(5) (providing that the decision of the Commission to parole a lifer who has served 25+ years shall be transmitted to the governor). The Maryland Restorative Justice Coalition brought suit in the U.S. District Court for the District of Maryland to challenge this state's parole procedures. Like Mr. Tate, the named plaintiffs in *Maryland Restorative Justice Initiative v. Hogan*, Civil Action ELH-16-1021 (D. Md. filed April 6, 2016), are sentenced to life imprisonment, with the possibility of parole, for homicide offenses committed as juveniles. Litigation is still ongoing. When the case commenced, the Governor had not yet issued an executive order setting criteria for review of parole applications. The federal district court declined to grant summary judgment to defendant, the State, concluding that "at this stage of the proceedings, plaintiffs have sufficiently alleged that Maryland's parole system operates as a system of executive clemency, in which opportunities for release are "remote," rather than a true parole scheme in which opportunities for release are "meaningful" and "realistic," as required by *Graham*. *Maryland Restorative Justice Initiative v. Hogan*, Civil Action ELH-16-1021 (D. Md. February 3, 2017) (Memorandum Opinion granting in part and denying in part Defendants' Motion to Dismiss).

Maryland's parole system has changed since that interlocutory order in *Restorative Justice.* On March 2, 2018, Governor Larry Hogan issued an executive order that outlined how he would use the discretion awarded to him by section 7-301(d)(4)-(5) of the Correctional Services Article. 45:5 Md. Reg. 261 (March 2, 2018), *codified at* COMAR 01.01.2018.06. The order listed criteria related to youth and maturity that the Governor must assess when reviewing parole decisions, and provided that the Governor must issue a written decision if he disapproves the Parole Commission's recommendation. *Id.* Governor Hogan recently granted parole to three individuals sentenced to life for offenses they committed as juveniles. He approved the recommendation of the Maryland Parole Commission for two of the men, and took no action on the third recommendation, which acts as an effective approval. Hannah Gaskill, *Larry Hogan grants parole to juvenile lifers, the first time a Maryland governor has done so in decades,* BALTIMORE SUN, Nov. 23, 2019.

Carter v. State, 461 Md. 295 (2018), found that this executive order cured constitutional deficiencies in Maryland's parole system. Absent the order, the Court of Appeals would have found that Maryland's parole system "was an executive clemency system that is not equivalent to parole," and thus, unconstitutional as applied to juvenile offenders under the Eighth Amendment. *Id.* at 341. The 2018 Executive Order, however, cabins the Governor's discretion in parole approvals, and along with the statutes and regulations listing factors for parole consideration of offenders sentenced as juveniles, the Court found that Maryland's parole system *does* demonstrate a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 365 (quoting

Graham v. Florida, 560 U.S. 48, 75 (2010)). The Court was careful to note that this ruling did not examine whether the parole system was constitutional *as applied*. "Whether the officials involved in the parole system actually carry out their duties in accordance with the applicable laws is not before us." *Carter*, 461 Md. at 365. That question "may be litigated in the future." *Id.* at 306.

III. DISCUSSION

A. *Maryland Parole System as Executive Clemency*

To the extent that Mr. Tate argues that the parole system acts as executive clemency, this argument fails, because the matter was settled in *Carter*. Petitioner's argument that the parole system as applied does not guarantee him a meaningful opportunity for release fits squarely in that question left unaddressed by the Court of Appeals, however: was the parole system constitutional as applied to him? Petitioner highlights Chief Judge Barbera's dissent in *Carter*, 461 Md. at 366. Judge Barbera does not view Maryland's parole scheme as satisfying the dictates of the "*Graham, Miller,* and *Montgomery* trilogy." *Id.* at 369.

B. *The Fourth Circuit and Bowling*

The State, by contrast, draws this Court's attention to persuasive authority that does address a state's parole system as applied. Both the State in this case and in the U.S. District Court in *Restorative Justice* cited *Bowling* and urged the respective courts to adopt its reasoning. At first blush, the case seems similar to Petitioner's. 920 F.3d 194 (4th Cir. 2019), *petition for cert. filed*, (U.S. Nov. 18, 2019) (No. 19-6710).

The Fourth Circuit ruled in *Bowling* that Virginia's yearly denial of parole of an inmate who had committed homicide as a juvenile did constitute a sufficiently meaningful

opportunity for release, when the parole board referenced various statutory factors, including the seriousness and the circumstances of the offense, with each denial. *Id.* at 195. Further, *Bowling* held that juvenile-specific factors must be considered at sentencing, but not during parole hearings. The State of Maryland has already incorporated juvenile-specific considerations into its statutes and regulations governing parole, but under *Bowling's* interpretation of the Supreme Court decisions on juveniles sentenced to life, it was not obligated to do so.

This Court will decline to analogize to *Bowling*. In August 2019, the federal district court rejected the State's argument that *Bowling* conclusively resolves all claims in the *Restorative Justice* case. *Maryland Restorative Justice Initiative v. Hogan,* Civil Action ELH-16-1021 (D. Md. August 5, 2019) (order denying Defendant's motion for leave to file a motion for summary judgment). The Virginia defendant in *Bowling* was eligible for parole beginning in 2005 and was assessed yearly for eligibility of parole until 2019, when he was released shortly after the Fourth Circuit's decision. Inmates eligible for parole in Maryland, by contrast, are not assessed every year. Mr. Tate is not scheduled for a rehearing until 2021. As the federal district court has not yet decided if it is bound by *Bowling,* and the Fourth Circuit does not control this jurisdiction, this Court will not attach undue weight to that case.

C. *Petitioner's Parole Hearing*

Petitioner challenges the result of his parole hearing held on June 6, 2017. He now maintains that his main goal was to seek the decrease of his security and work-release eligibility, and asserts that the parole commissioners were very impressed with him and all

but assured him release on parole, pending a risk assessment. Mr. Tate claims that after he inquired as to the possibility of a decrease of his security, the two commissioners overseeing his hearing told him that that they would be recommending him for parole and a vote before the full Parole Commission.

After the hearing, the commissioners wrote that "Mr. Tate presented well and accepts responsibility for his actions in this offense. He has completed a plethora of cognitive programs and has received numerous letters of recommendation. He has undergone years of psychotherapy to rebuild his personality to become more mature. Juvenile factors were also considered." Mr. Tate was understandably optimistic following this comment.

Petitioner completed the risk assessment with Dr. Robert Ott one year later, his comprehensive interview spanning three days in October 2018. Three days after Dr. Ott reported his findings, one of the commissioners from Mr. Tate's hearing denied his request for parole and scheduled a rehearing date for November 2021. In January, the other commissioner agreed: "Psychological risk assessment completed in October 2018. After consideration of all factors, and the nature and circumstances of this horrific murder, a rehearing for November 2021 is warranted."

The "factors" the commissioner was referring to are codified in section 7-305 of the Correctional Services Article and COMAR 12.08.01.18 §A(1)-(2). For those sentenced as juveniles, parole commissioners must consider factors set out in COMAR 12.08.01.18 §A(3)-(4).

Petitioner argues that the test results were "extremely positive," and he later concludes that he performed "extremely well" on the evaluation. Pet. at 20, 23. While this assessment of the evaluation's results is perhaps too confident, it is indisputable that throughout his incarceration, Mr. Tate appears to have changed markedly since his commitment of his offense at age 16. Personality assessments over his years of incarceration show that he no longer is diagnosed with narcissistic personality disorder, a mental health condition that results in "pronounced self-absorption and an inflated an exaggerated self-image," according to Mr. Tate, and caused him to live "in a fantasy world with little reference to objective reality and social norms" with "distorted" thinking. Pet. at 25. In this most recent diagnostic test, Petitioner scored in the "low range" on the Hale Psychopathy Checklist-Revised (PCL-R). Petitioner has had no infractions in the past 13 years.

Petitioner's potential to recidivate was assessed with two instruments: the Violence Risk Appraisal Guide (VRAG) and Lifestyle Criminality Screening Form-Revised (LCSF-R). Risk assessments have been incorporated into many states' parole procedures so that the process is more standardized and evidence-based. Thomas & Reingold, 107 J. CRIM. L. AND CRIMINOLOGY at 244. The VRAG predicts the likelihood that a person will be arrested for a violent act within seven years and 10 years of being released. Petitioner's score on the VRAG was consistent with a 17% chance of arrest within seven years of release, and a 31% chance of arrest in 10 years. The LCSF-R "predicts the likelihood that an individual on parole or probation will have a "poor outcome," e.g. re-arrest, violation of conditional release status, or drug relapse." Pet. at 12. Petitioner received a score indicating a Moderate

category of risk. Factor number five of section 7-305 of the Correctional Services Article asks "whether there is a reasonable probability that the inmate, if released on parole, will remain at liberty without violating the law." The Commissioners may well have decided that Mr. Tate's risk of recidivism, based on the VRAG and LCSF-R, is not insignificant.

Mr. Tate argues that certain factors in forming the assessment, like the severity of the offense, are immutable, and will always result in a negative risk assessment. The psychologist who administered the test, Dr. Ott, appears to echo this. In describing the Violence Risk Appraisal Guide (VRAG) and Lifestyle Criminality Screening Form-Revised (LCSF-R), Dr. Ott states that "an individual's score [on these assessments] is based on unchanging historical variables; no adjustment is made for an inmate's current circumstances, the setting to which he will be released, his record of participation in treatment or vocational programs, or significant developments that have occurred while he was incarcerated. Also, neither instrument incorporates age at release as an item, so aging also is not taken into account." Risk Assessment at 11.

Mr. Tate may be correct that his risk assessment will remain the same each time he takes it, but the Court cannot say as a matter of law that Petitioner did not receive meaningful parole consideration – this was his *first hearing*. Petitioner argues that "the nature of Mr. Tate's crime will never change, and for the Commissioners to deny Tate for this sole reason violates the Eighth Amendment after all he has demonstrated." Pet. at 20. This statement mischaracterizes the import of his offense in the Parole Commission's eventual finding. The commissioners wrote that they considered all the factors. During this first hearing, the commissioners had the discretion to decide that the nature of the offense

and the result of the risk assessment weighed more in favor of Mr. Tate's continued incarceration rather than release. In future hearings, with Petitioner's continued involvement in cognitive programs and should he remain infraction-free, the Parole Commission may come to a different conclusion about his suitability for release. Should Petitioner continue to be denied parole by reference to the nature of the offense only, or should his risk assessment result never change, he may have a cognizable habeas claim. But to argue that his Eighth Amendment rights have been violated after one hearing represents an exaggeration of Mr. Tate's circumstances.

Mr. Tate laments that the parole system as applied to him amounts to a de facto life sentence, but this is simply impossible to conclude at this stage. Accordingly, Court finds that the parole commissioners did not violate the Eighth and Fourteenth Amendments when they rejected Mr. Tate's first application for parole.

D. *Petitioner's Security Classification*

Petitioner also contests his medium-security classification and argues that the opportunity to be considered minimum-security would demonstrate his ability to successfully re-enter society and better his chances for parole, but the Division of Corrections scheme of classification will never allow him to progress below medium-security due to his mandatory life sentence. Pet. at 10. The State argues that he is incorrect: a revised policy effective February 1, 2018, and promulgated as OPS.100.0004.05D, provides that inmates in Petitioner's position – those serving life sentences for offenses committed as juveniles – may be eligible for security status reduction "if approved by the Commissioner, or a designee."

Additional material from this filing is available in the Clerk's Office.