

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LANCASTER COUNTY
Court of Common Pleas

The Honorable Brooks P. Goldsmith, Circuit Court Judge

RECEIVED

MAR 26 2014

S.C. Supreme Court

BRIAN ANSELM DIGGS, PETITIONER,

v.

STATE OF SOUTH CAROLINA,RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Does evidence support the PCR court's ruling that Petitioner's third PCR application is successive and barred by the one-year statute of limitations?

STATEMENT OF THE CASE

Petitioner was indicted for murder (1995-GS-29-0189) and attempted armed robbery (1995-GS-29-0191). (App. pp. 152-153; pp. 155-156.) The indictments arose from an incident which occurred on May 16, 1994. Leon Banks, Esquire, and Jerry Screen, Esquire, represented him. At the outset of trial, the solicitor informed the court:

[Petitioner] has elected to enter into a plea deal that was proposed by the State sometime back whereupon upon [sic] the acceptance of the pleas of guilty to murder in attempted armed robbery, that being an aggravating circumstance under the law of the State of South Carolina, the State would ask the Court not sentence Mr. Diggs to death, but rather to a life sentence provided by law.

(App. p. 3, lines 17-23.) Petitioner was sentenced to life imprisonment for murder and to a consecutive term of ten (10) years for attempted armed robbery. (App. p. 44, lines 16-25.)

Applicant filed his first PCR application on April 7, 1999 (1999-CP-29-0187).

Applicant filed a second PCR application on May 1, 2009 (2009-CP-29-0641).

Applicant filed his current PCR application on June 7, 2011. (App. pp. 47-72.) A Conditional Order of Dismissal was signed by the Honorable Brooks P. Goldsmith on June 29, 2012. (App. pp. 82-88.) Applicant submitted a response to the Conditional Order of Dismissal dated August 7, 2012, requesting an evidentiary hearing and arguing:

- Petitioner received ineffective assistance of counsel and is now entitled to a new sentencing hearing.
 - o “First, he is entitled to have a judge consider the substantial mitigating evidence that exists in his case and to use his or her discretion in rendering a sentence that fairly accounts for his life and character, and the circumstances of his crime, under the recent United States Supreme Court decision, Miller v. Alabama, 132 S.Ct. 2455 (June 25, 2012).” (App. p. 90.)
 - o “...counsel’s discharge of their obligations in seeking an alternative sentence, other than life, was so woefully inadequate that he is also entitled to a new sentencing hearing under the recent United States Supreme Court cases, Lafler v. Cooper, 132 S.Ct. 1376 (March 21, 2012) and Missouri v. Frye, 132 S.Ct. 1399 (March 21, 2012).

(App. pp. 89-98.) Applicant thereafter submitted an amended PCR application, filed November 30, 2012, in which he alleged:

1. Unconstitutionality of juvenile life sentence.
2. Ineffective assistance of counsel during plea negotiations in failing to conduct a meaningful background investigation and using such information to attempt to persuade the solicitor to consent to an alternate disposition.
3. Ineffective assistance of post-conviction relief counsel.

(App. pp. 107-113.) Petitioner also moved to hold his case in abeyance due to another matter pending before the the South Carolina Supreme Court, Aiken et. al. v. Byars, and the motion was denied. (App. pp. 114-129; p. 134.) A Final Order of Dismissal was signed and filed on December 20, 2012, by the Honorable Brooks P. Goldsmith. (App. pp. 130-135.) A Motion to Reconsider was filed, and Judge Goldsmith denied the Motion in an order dated January 31, 2013. (App. pp. 136-151.) The Petition for Writ of Certiorari followed.

ARGUMENT

Evidence supports the PCR court's ruling that Petitioner's third PCR application is successive and barred by the one-year statute of limitations.

Petitioner's reliance on the recent decisions in Miller v. Alabama, 132 S.Ct. 2455 (2012) and Graham v. Florida, 560 U.S. 48 (2010) is misplaced as the cases are inapplicable in this matter. The claims which he now advances – that his attorneys failed to present an adequate mitigation case and failed to argue that a life sentence was not required in the case – could have been raised at any time after his conviction. Therefore, the PCR court correctly dismissed the case summarily based on the statute of limitations and successiveness.

In order to overcome the statute of limitations and successiveness hurdles, Petitioner attempts to rely upon Miller v. Alabama, 132 S.Ct. 2455 (2012) and Graham v. Florida, 560 U.S. 48 (2010). S.C. Code §17-25-45(B) provides:

When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

Even assuming the cases are intended to be applied retroactively, neither case imposes a substantive standard not previously recognized applicable to Petitioner's case.¹ Petitioner's application was not timely filed within one year of the Graham v. Florida decision on May 10, 2010. The PCR correctly found that Petitioner's application on June 7, 2011, was not timely. In any event, Graham v. Florida, 560 U.S. at 82, held that the "Constitution prohibits the imposition of a life without parole sentence on a juvenile offender *who did not commit homicide.*"

¹ The State maintains that the cases are not to be applied retroactively. Teague v. Lane, 489 U.S. 288 (1989).

[Emphasis supplied.] Graham emphasized the lack of hope associated with a sentence for which there is “no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.” Id. at 2032. Petitioner’s case is distinguishable from Graham in that Petitioner was convicted of homicide. Moreover, Petitioner’s case differs from the case of one incarcerated without hope for life outside of prison as he is eligible for parole.² Miller v. Alabama, supra., held that the Eight Amendment forbids a sentencing scheme that mandates life *without possibility of parole* for juvenile offenders. Petitioner, however, was not sentenced to life without the possibility of parole. Pursuant to S.C. Code §16-3-20 (A) (1993), the provision applicable at the time of Petitioner’s crime, murder was punishable only by death, life imprisonment (with eligibility for parole after twenty years), or life imprisonment (with eligibility for parole after thirty years).³ Therefore, Graham v. Florida and Miller v. Alabama are inapplicable to his case and cannot be used to overcome the successiveness and statute of limitations bars.

Moreover, Petitioner attempts to use Graham v. Florida and Miller v. Alabama as a key to open the door for entirely different arguments: that his attorneys failed to adequately develop mitigating evidence which could have benefitted him at sentencing and failed to object to the

² According to the Department of Corrections web site, as of the date of this writing, Petitioner is projected to be eligible for parole on January 20, 2025. His current age is listed as 36. (<http://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=00248964>) Petitioner would be eligible for parole in eleven years, or at approximately age 47.

³ Further, as previously noted, Petitioner is eligible for parole. To the extent that Petitioner argues that Miller v. Alabama mandates consideration of each individual case and his sentence fails to encompass his particular case, the unique aspects of his case are considered by the parole board. S.C. Code §24-21-640 (“The board must carefully consider the record of the prisoner before, during, and after imprisonment, and no such prisoner may be paroled until it appears to the satisfaction of the board: that the prisoner has shown a disposition to reform; that in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interest of society will not be impaired thereby; and that suitable employment has been secured for him.”) See also http://www.dppps.sc.gov/ppp_faq.html (The Parole Board considers “several factors, such as: sentence date; present offense and prior criminal record; personal and social history; institutional experience, etc. and applies a set of criteria in making their sole judgment.”)

trial judge's assumption that a life sentence was mandatory.⁴ These arguments could have been made at any time prior to the Graham v. Florida and Miller v. Alabama decisions. Therefore, Petitioner's claims are clearly successive and barred by the one-year statute of limitations. S.C. Code §17-27-90; Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991) (any new ground raised in a subsequent application is limited to those grounds that "could not have been raised... in the previous application."); S.C. Code §17-27-45.

⁴ At the time of Petitioner's offense, committed in 1994, §16-3-20 read,

A person who is convicted of or pleads guilty to murder must be punished by death or by imprisonment for life and is not eligible for parole until the service of twenty years; provided, however, that when the State seeks the death penalty and an aggravating circumstance is specifically found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the court must impose a sentence of life imprisonment without eligibility for parole until the service of thirty years.

The statute was amended in 1995 to permit punishment "by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years." The 1995 amendments were enacted on January 1, 1996, and expressly applied prospectively to all crimes committed on or after that date.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's Final Order of Dismissal. However, if this Court grants certiorari, the Respondent asks permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

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ATTORNEYS FOR THE RESPONDENT

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STATE OF SOUTH CAROLINA
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Appeal from Lancaster County
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STATE OF SOUTH CAROLINA,

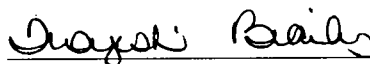
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

David Alexander
Office of Appellate Defense
1330 Lady St; Ste. 401
Columbia, SC 29201

This 26th day of March, 2014



Troyeshi Brailey
LEGAL ASSISTANT for the Respondent



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

MAR 26 2014

S.C. Supreme Court

March 26, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211-1330

RE: Brian Anselm Diggs v. State of South Carolina
Appellate Case No.: 2013-00285

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

Mary S. Williams
Assistant Attorney General

MSW/tb
Enclosures

cc: David Alexander, Esq. (2 copies)