

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

APR 02 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CONRAD LAMONT SLOCUMB,

APPELLANT

APPELLATE CASE NO. 2013-000933

Appeal from Richland County

DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 5303

PETITION FOR REHEARING

The Appellant, Conrad Lamont Slocumb, respectfully petitions the Court for a rehearing of its Opinion No. 5303 pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by the Court:

On appeal, Appellant argued that he was entitled to resentencing where his aggregate 130 year sentence, for non-homicide offenses committed as a juvenile, is the functional equivalent of life without parole because it does not afford him any "meaningful opportunity to obtain release" within his lifetime as required under Graham v. Florida, 130 S. Ct. 2011 (2010).

Issue No. 1

This Court misapprehended the facts and record where the trial court did have jurisdiction to resentence Appellant on all counts despite the federal court's vacating only his burglary conviction and remanding for resentencing on that count "in compliance with Graham" because Appellant's motion counsel filed a timely motion for resentencing in light of the Supreme Court's constitutional decision in Graham and fully argued that motion to the trial court. Though this Court found that the resentencing judge made no error "in refusing to entertain Slocumb's request to reconsider sentencing on all of his convictions," Appellant submits that the resentencing judge did not refuse to entertain the request to resentence Appellant on all counts but rather denied the request.

Traditionally, the two exceptions providing a trial judge with jurisdiction to consider a criminal matter beyond the term of court in which judgment was entered are timely post-trial motions or a motion for new trial based on after-discovered evidence. State v. Campbell, 376 S.C. 212, 215, 656 S.E.2d 371, 373 (2008). Campbell involved the State's attempt to have the defendant resented for non-compliance with his plea agreement, a matter far distinguishable from the subsequent constitutional decision applicable in Appellant's case, which was the basis for his Motion for Resentencing. Id. Here, a motion regarding the unconstitutionality of Appellant's sentence in light of Graham could not be filed within ten days of Appellant's conviction because Graham was not finally decided until July 6, 2010. The constitutional decision in Graham also does not fall squarely within the framework of after discovered evidence because it does not raise any matter material to guilt or innocence. Rather, application of Graham requires Appellant's resentencing because his current sentence is cruel and unusual punishment.

The South Carolina Supreme Court's recent decision in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), is instructive. There, the Court determined that the United States Supreme

Court holding in Miller v. Alabama, 132 S.Ct. 2455 (2012), that mandatory life sentences for juvenile offenders violate the Eighth Amendment ban against cruel and unusual punishment, applies retroactively. 410 S.C. at 538, 765 S.E.2d at 574. The Court noted the two exceptions to the general rule that a new constitutional rule of criminal procedure does not apply to a case that becomes final before the new rule is announced – (1) the new rule is substantive, or (2) the new rule is a “watershed rule” of criminal procedure. Id. at 539-40, 765 S.E.2d at 575. In concluding that Miller created a new, substantive rule, the Court found that “[t]he rule plainly excludes a certain class of defendants—juveniles—from specific punishment—life without parole absent individualized considerations of youth.” Id. at 540-41, 765 S.E.2d at 575-76.

The Aiken Court then further determined that the constitutional principles set forth in Miller v. Alabama, 132 S.Ct. 2455 (2012), are applicable to South Carolina even though Miller itself held only that *mandatory* life sentences for juvenile offenders violate the Eighth Amendment ban against cruel and unusual punishment. Id. at 542-43, 765 S.E.2d at 576-77. Even though South Carolina law permits rather than mandates life without parole for some offenses regardless of age, the Court held that “before a life without parole sentence is imposed upon a juvenile offender, he must receive an individualized hearing where the mitigating hallmark features of youth are fully explored.” Id. at 545, 765 S.E.2d at 578. The Court held that because Miller applies retroactively, other similarly situated offenders can file for resentencing consistent with the Aiken opinion within one year of its filing on November 14, 2014. Id.; see also Dodd v. United States, 545 U.S.353, 125 S.Ct. 2478 (2005) (holding that Title 28 U.S.C.A. § 2255 (f)(3) provides defendants the opportunity to attack their sentence within one year of “the date on which the right asserted was initially recognized by the Supreme Court.”).

While the South Carolina appellate courts have not yet had an opportunity to rule on the retroactivity of Graham, the Aiken Court’s reasoning for finding that Miller should apply retroactively certainly points to Graham’s retroactivity also. Graham announced a similar constitutional rule, declaring that “[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.” 560 U.S. at 82, 130 S.Ct. at 2034. The Court further stated that “[a] State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.” Id. Thus, the rule announced in Graham excludes a certain class of defendants – juvenile offenders who did not commit homicide – from specific punishment – life imprisonment without a meaningful opportunity for parole, such that it created a new, substantive rule that should apply retroactively. See Aiken, 410 S.C. at 540, 765 S.E.2d at 540 (“A rule is substantive if it prohibits the States from criminalizing certain conduct or prohibits ‘a certain category of punishment for a class of defendants because of their status or offense.’ New substantive rules apply retroactively on collateral review because they ‘necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him.’”) (internal citations omitted); see also Danforth v. Minnesota, 552 U.S. 264, 282, 128 S.Ct. 1029, 1042 (2008) (holding that state courts can give broader effect to a new rule of criminal procedure even if such would be deemed “non-retroactive” under Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989)).¹

¹ The South Carolina Supreme Court noted in Aiken that it has not yet addressed whether it should employ a more expansive analysis for determining retroactivity in light of Danforth. 410 S.C. 534, 539 n. 4, 765 S.E.2d 572, 575 n. 4. The Court did not find it necessary to decide in Aiken because they found that “Miller is clearly retroactive under Teague.”

In the present case, while the State suggested that consideration of Appellant's aggregate sentence is not proper on appeal because the circuit court judge only resentenced Appellant on his vacated first-degree burglary conviction, a review of the resentencing hearing transcript reveals that the motion for resentencing on *all offenses* was fully argued to the sentencing court and denied. The argument in the State's Brief ignores Appellant's motion for resentencing in light of Graham filed on January 28, 2011, approximately six and a half months after the United States Supreme Court's decision. Resp't Brief, 25-27; see R. 30. On April 25, 2013, Appellant's counsel filed a Bench Brief in Support of a Reduced Sentence in Light of Graham v. Florida and Implications of De Facto Life Sentences, asking the Court to rule upon her January 28, 2011 motion for resentencing along with the resentencing on the first degree burglary conviction that was vacated and remanded by the federal court following Appellant's *pro se* habeas petition. R. 33. At the resentencing hearing, motion counsel acknowledged that the United States District Court vacated only the first degree burglary sentence of life without parole, but asked the resentencing court to vacate the remaining sentences and to resentence Appellant on all counts "in keeping with the spirit and intent of Graham v. Florida and Miller v. Alabama." R. 7, ll. 1-9; R. 11, l. 17 – 12, l. 13; R. 24, l. 21 – 25, l. 3. The solicitor's initial recitation of the procedural posture of the case stated that they were there "to resentence this Defendant for the charge of burglary in the first degree" pursuant to Graham v. Florida. R. 5, ll. 16-23. However, the State never presented any argument against the propriety of motions counsel's subsequent argument that in order to comply with Graham, the court must vacate the remaining sentences so that the aggregate sentence does not violate Graham.

Instead, the solicitor contended that Appellant's projected parole date is 2046 based on his then current sentences.² R. 12, l. 23 – 13, l. 5. She then gave the factual basis for all of Appellant's 1996 convictions, including the first burglary, criminal sexual conduct, kidnapping, escape, and robbery offenses. R. 14, l. 4 – 17, l. 6. In response to the discussion of Graham by motion counsel, the solicitor only emphasized that Graham does not require that a juvenile non-homicide offender be guaranteed release during his life and that some juveniles may be irredeemable. R. 17, l. 7 – 18, l. 17. The solicitor then described Appellant's many infractions while in the Department of Corrections. R. 19, l. 11 – 20, l. 24.

In response, motion counsel argued that even if her calculations regarding parole eligibility were incorrect due to the different classifications of the offenses, a conservative estimate reveals that Appellant's sentences on the non-burglary offenses require the service of at least sixty-one years prior to parole eligibility. R. 22, ll. 9-24. Thus, those sentences alone put Appellant over his life expectancy prior to parole eligibility. R. 22, l. 24 – 23, l. 2. She also acknowledged that Appellant's misconduct to date is such that he would not likely be granted parole were he eligible that day, but that he may be able to demonstrate the required rehabilitation within his lifetime. However, she emphasized that under his current sentence, Appellant will never have that opportunity. R. 23, l. 3 – R. 24, l. 20.

The Court then heard from the victim and the former solicitor who prosecuted the case in 1996. R. 26, l. 1 – 27, l. 23. The State presented no further argument or testimony. R. 27, l. 15 – R. 28, l. 1. The resentencing judge issued her decision, stating:

² The solicitor provided no documentation to support this contention, which seems unlikely since at the time of resentencing Petitioner was sentenced to consecutive terms of life for first degree burglary; thirty (30) years for kidnapping; thirty (30) years for criminal sexual conduct; fifteen (15) years for robbery; and five (5) years for escape. Regardless, if the court accepted this averment, Appellant would be eligible for parole at age sixty-six.

All right. On Indictment Number 1996-GS-40-11974, sir, you will be sentenced to the State Department of Corrections for 50 years. The sentence will run consecutive to the other sentences. I am not going to remand as to the burglary, *and that is the only one that I am going to entertain today. All sentences will run consecutive.* And of course he will be given credit for the time he has spent in jail. All right, thank you.

R. 28, ll. 2-11 (emphasis added). The court's statement "that is the only one that I am going to entertain today" is not indicative of a failure to rule on Appellant's motion for resentencing such that it is still available for adjudication today. Rather, it was a denial of Appellant's motion for resentencing on the offenses other than burglary. Notably, the court then stated "*all* sentences will run consecutive," indicating her disinclination to change them to run concurrent, which would have brought the aggregate sentence closer to compliance with Graham. Moreover, the court did not mention any inability to consider the motion, and heard argument on the motion repeatedly throughout the resentencing hearing.

Therefore, the trial court did have jurisdiction to resentence Appellant on all counts based on the January 26, 2011 Motion for Resentencing, and the resentencing judge's ruling was a denial of that Motion such that appellate review of the constitutionality of Appellant's aggregate sentence is proper.

Issue No. 2

Contrary to this Court's notation in footnote 1 of its opinion, Appellant did not contend that no court has ruled on the Motion for Resentencing filed January 26, 2011. As explained supra, the motion was fully argued by motions counsel at the resentencing hearing. Nowhere in Appellant's brief does he ever indicate that this motion remains outstanding. Further, appellate counsel never conceded that the motion was not ruled upon by the trial court at oral argument. Audio: Oral Argument, Jan. 6, 2015 (6:15-13:28; 31:35-31:57) ("He never had a separate hearing under her

[motion counsel's] separate motion for resentencing, so I would argue that that hearing was really on both of those, both the federal court's order and on her motion for resentencing that day."'). Rather, appellate counsel argued that the motion was fully heard by the resentencing court and that the statement ". . . that is the only one that I am going to entertain today. All sentences will run consecutive" was a denial of the Motion for Resentencing. See R. 28, ll. 2-9. Even if the Court disagrees with Appellant's position, Appellant argued that the Motion for Resentencing was denied and did not "allege[] no court has yet ruled on this motion." Therefore, Appellant respectfully requests that this Court remove footnote 1 from its opinion because it is factually inaccurate.

Issue No. 3

This Court overlooked the fact that even assuming *arguendo* that Appellant could only be resentenced on the burglary count, his fifty-year sentence alone is the functional equivalent of life without parole and affords no meaningful opportunity to obtain release. However, Appellant's sentence cannot be considered in a vacuum because the consecutive nature of his sentences prolong his eligibility for parole even further past his life expectancy to the point that there can be no question that Appellant will die in prison for non-homicidal offenses committed as a juvenile.³

Appellant is currently thirty-five years old, having a birthdate of June 11, 1979. Though he has been incarcerated since age thirteen, he committed the instant offenses on March 6, 1996, at age sixteen, during an escape from custody. Even ignoring the other sentences imposed and looking at only at the fifty year sentence for first degree burglary, such a sentence is still a de facto sentence of life without parole, because Appellant would not be eligible for release until age fifty-eight and a

³ The calculations presented in the State's Brief indicate that as resentenced, Appellant must serve 56 years on the non-burglary offenses and 42.5 years on the burglary offense, a total of 98.5 years before he is eligible for parole. Resp't Brief 29-30. Thus, in light of the reality of his aggregate sentences, Appellant will be eligible for parole at 114.5 years old.

half. However, the other consecutive sentences cannot be legitimately ignored because of their significant impact on Appellant's parole eligibility. According to the Department of Corrections, Appellant is not eligible for parole and his projected release date is November 17, 2109, at which point he will be one hundred thirty years old. Statutory calculations indicate that Appellant will be at least one-hundred ten years old before he is eligible for parole. See supra footnote 2.

Long ago, this Court recognized in State v. Kimbrough, 212 S.C. 348, 357, 46 S.E.2d 273, 277 (1948), that the trial judge imposed a thirty year sentence that was "to all intents and purposes the equivalent of a life sentence." Where the record revealed nothing to justify the trial court's disregarding the jury's recommendation of mercy, this Court held that "[n]o one doubts that the able trial judge conscientiously endeavored to fix a sentence which he thought was fair and just, but under all the circumstances we are constrained to hold that the sentence imposed is manifestly too severe." Id.

The Fourth Circuit recognized de facto life sentencing in United States v. Pileggi, 703 F.3d 675, 678 (4th Cir. 2013), in which it referenced its prior remand for resentencing of Pileggi where the government recommended and the district court imposed "a de facto life sentence" of fifty years contrary to the extradition agreement with Costa Rica. The Seventh Circuit has likewise recognized de facto life sentences. See United States v. Garcia, 754 F.3d 460, 474 (7th Cir. 2014) (stating that the Court is "wary of a de facto life sentence when it was imposed without any explanation despite the district court's rejection of an actual life sentence").

Additionally, other state courts have also recognized that one or multiple term of years sentences can constitute a de facto life sentence. See People v. Caballero, 282 P.3d 291, 295 (Cal. 2012) (considering defendant's total sentence of 100 years for multiple offenses and holding "that sentencing a juvenile offender for a nonhomicide offense to a term of years with a

parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment"); People v. Mendez, 114 Cal.Rptr.3d 870 (Ct. App. 2010) (applying the principles of Graham and traditional proportionality review in finding aggregate sentence of 84 years "is the equivalent of LWOP" and that is cruel and unusual punishment); Floyd v. State, 87 So.3d 45 (Fla. Dist. Ct. App. 2012) ("In this case, common sense dictates that Appellant's [combined] eighty-year sentence, which, according to the statistics cited by Appellant, is longer than his life expectancy, is the functional equivalent of a life without parole sentence."); State v. Ragland, 836 N.W.2d 107, 121-22 (Iowa 2013) (holding "Miller applies to sentences that are the functional equivalent of life without parole" because "[f]or all practical purposes, the same motivation behind the mandates of Miller applies to . . . any sentence that is the practical equivalent to life without parole"); State v. Null, 836 N.W.2d 41 (Iowa 2013) (noting that while the aggregate "52.5 years imprisonment is not technically a life-without-parole sentence, such a lengthy sentence imposed on a juvenile is sufficient to trigger Miller-type protections.").

In February 2014, the United States Sentencing Commission issued a report titled "Life Sentences in the Federal System" in which it compiled statistical data on the imposition of explicit life sentences, de facto life sentences, and sentences for a term beyond the inmate's life expectancy in the federal courts. Patti B. Saris, et al., U.S. Sent. Comm'n, Life Sentences in the federal system (Feb. 2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf. In its discussion of de facto life imprisonment sentences, the Commission described these sentences as being "extremely long specific terms of imprisonment" that is, "for all practical purposes, a life sentence and likely was intended to be such by the judge who imposed it." Saris, supra p. 10.

For the purposes of this and any other statistical analysis, the Commission uses a sentence of 470 months (39 years and two months) to identify cases in which a de facto life sentence was imposed, which is consistent with the average life expectancy of federal criminal offenders. Saris, supra p. 10, n. 52 (citing U.S. SENT. COMM'N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS S-170 (2014)). Clearly Appellant's 600 month sentence for first degree burglary alone, and even more so his aggregate sentence of 1560 months, would qualify as a de facto life sentence under the United States Sentencing Commission's parameters. Appellant's parole eligibility at age 58.5 for first degree burglary and at age 110 for his aggregate offenses are also both well beyond the average life expectancy of a federal prisoner.

South Carolina's actuarial table indicates that the life expectancy for a thirty-five year old male is 43.05 years, such that he will live to age 78.05. S.C. Code Ann. § 19-1-150. However, it is notable that the statute's table is based on 2001 data and does not account for Appellant's race, incarceration, or age at incarceration. In Bearcloud v. State, 334 P.3d 132, 142 n.7 (Wyo. 2014), the defense presented an ACLU report analyzing life expectancy data obtained regarding youth serving natural life sentences in Michigan's state prisons. The April 2013 report indicates that "life in prison, with its stressors, violence and disease in and of itself significantly shortens one's life expectancy." ACLU of Michigan, Michigan Life Expectancy Data for Youth Serving Natural Life Sentences 1 (April 2013), <http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf>. The report indicated that the average life expectancy for an unincarcerated African-American male is 71.1 years. ACLU of Michigan, supra 2 n.2. However, life expectancy drops to an average of 64 years for incarcerated persons and to 58.1 years for those incarcerated for their natural life. ACLU of Michigan, supra 1-2. Then adjusting for race, the average life expectancy of an African-

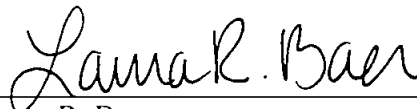
American male incarcerated for his natural life is 56 years. ACLU of Michigan, supra 2. Without regard to race, juvenile offenders incarcerated for their natural lives have the lowest life expectancy, 50.6 years. ACLU of Michigan, supra 2. This is approximately eight years earlier than Appellant's potential release date based on a fifty year sentence alone, and it is approximately sixty years prior to Appellant's potential release date based on his aggregate sentence.

It is undeniable that Appellant's race, incarceration, and age at sentencing will result in a lower life expectancy than that of an unincarcerated African-American male. He is unlikely to reach the age of fifty, much less fifty-eight, and will certainly die in prison due to his aggregate sentence. Therefore, his sentence of fifty years, and even more so his aggregate sentence of one-hundred thirty years, constitutes a de facto life sentence without parole such that the principles of Graham are applicable.

CONCLUSION

For the reasons set forth herein, Appellant Conrad Lamont Slocumb respectfully requests that the Opinion of the Court of Appeal be withdrawn and his case be remanded for resentencing in accordance with Graham v. Florida,

Respectfully submitted,



Laura R. Baer
Appellate Defender

This 2nd day of April, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

APR 02 2015

Appeal from Richland County

SC Court of Appeals

DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

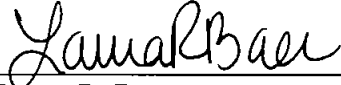
CONRAD LAMONT SLOCUMB,

APPELLANT

APPELLATE CASE NO. 2013-000933

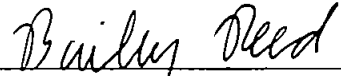
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Conrad Slocumb, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210 this 2nd day of April, 2015.



Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 2nd day
of April, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.