

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Greenville County
Honorable Daniel D. Hall, Circuit Court Judge

RECEIVED

AUG 31 2018

S.C. SUPREME COURT

CONRAD ANTONIO ALLEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000410

PETITION FOR WRIT OF CERTIORARI

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This Court should use its discretion to find that petitioner’s case is the rare case where, in the interests of justice, a procedural default may be excused, to remand petitioner’s case to the PCR court for a determination of whether plea counsel provided ineffective assistance of counsel, violating petitioner’s rights under the Sixth Amendment, when he failed to object to petitioner’s fifty-five (55) year de facto life sentence under the Eighth Amendment because petitioner was a juvenile at the time of the offense; and PCR counsel also failed to recognize and raise this claim to the PCR court. 4

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ISSUE PRESENTED

Whether this Court should use its discretion to find that petitioner's case is the rare case where, in the interests of justice, a procedural default may be excused, to remand petitioner's case to the PCR court for a determination of whether plea counsel provided ineffective assistance of counsel, violating petitioner's rights under the Sixth Amendment, when he failed to object to petitioner's fifty-five (55) year de facto life sentence under the Eighth Amendment because petitioner was a juvenile at the time of the offense; and PCR counsel also failed to recognize and raise this claim to the PCR court?

STATEMENT

On August 25, 2015, petitioner Conrad Antonio Allen was indicted in Greenville County for murder, attempted armed robbery, conspiracy, and a weapons charge. App. 109-22. According to the indictments, the date of the offense was November 8, 2014. App. 109-22. Petitioner's birth year is listed on the sentencing sheet as 1997, which means he could have been no older than seventeen (17) on the date the crime was committed. App. 109-22.

On October 12, 2015, petitioner pled guilty before the Honorable Perry H. Gravely. App. 1. Sloan Ellis and William Timmons represented the State. App. 1. Michael D. Brown of Spartanburg represented petitioner. App. 1. Judge Gravely sentenced petitioner to a total of fifty-five years' imprisonment: forty years for murder, five years for conspiracy, and five years for the weapons charge, to run concurrent; a consecutive fifteen year sentence for attempted armed robbery. App. 44, ll. 4 – 24. Petitioner filed no appeal.

On January 27, 2016, petitioner filed a PCR application. App. 46. Almost a year later, on January 9, 2017, the Greenville County Clerk of Court sent petitioner a letter telling him that he had not yet been appointed an attorney. App. 67. On April 25, 2017, R. Mills Ariail, Jr. filed a letter handwritten by petitioner which Ariail described as raising "issues he would like for me to bring before the Court." App. 70-72. On June 28, 2017, the Honorable Daniel Dewitt Hall held a hearing on petitioner's PCR application. App. 73. Mr. Ariail represented petitioner and DeShawn Mitchell represented the State. App. 73. Judge Hall denied petitioner's application from the bench. App. 98, ll. 1 – 6. On March 2, 2018, Judge Hall entered a written order denying petitioner's application. App. 101. This petition for certiorari follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the Court. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. The Court reviews questions of law without deference to trial courts. Id. See also Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

This Court should use its discretion to find that petitioner's case is the rare case where, in the interests of justice, a procedural default may be excused, to remand petitioner's case to the PCR court for a determination of whether plea counsel provided ineffective assistance of counsel, violating petitioner's rights under the Sixth Amendment, when he failed to object to petitioner's fifty-five (55) year de facto life sentence under the Eighth Amendment because petitioner was a juvenile at the time of the offense; and PCR counsel also failed to recognize and raise this claim to the PCR court.

Summary of Petition

Petitioner Conrad Antonio Allen ("Allen") seeks mercy from this Court. Allen's crimes were committed when he was a juvenile. He is serving a fifty-five (55) year sentence. The Department of Corrections' website lists Allen's release date as November 18, 2071. Miller v. Alabama, 567 U.S. 460 (2012) and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), were decided **before** petitioner was even indicted, yet neither his attorney at the guilty plea nor his attorney at PCR recognized that Allen had a substantial constitutional claim that his de facto life sentence violates the Eighth Amendment. Allen's Eighth Amendment claim is now procedurally defaulted in state court. See Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017). Mangal recognized that in rare cases where the interests of justice require it, this Court will excuse procedural default and remand cases for further consideration. Id. at 99-100, 805 S.E.2d at 575-76. Allen submits his case warrants the extraordinary exercise of this Court's discretion to grant a remand so that he may have his first "bite at the apple" on his substantial Eighth Amendment claim.

Allen's Eighth Amendment Claim

Allen's claim that his fifty-five year sentence violates the Eighth Amendment has now been recognized as valid by multiple state and federal courts. The substance of Allen's Eighth Amendment claim arises from a series of cases from the United States Supreme Court dealing with juvenile sentencing that began in 2005 (when Allen was eight years old), with Roper v. Simmons, 543 U.S. 551 (2005). Roper held that the Eighth Amendment prohibits capital punishment for juveniles. In 2010, when Allen was thirteen years old, the Supreme Court decided Graham v. Florida, 560 U.S. 48 (2010), which held that the Eighth Amendment forbids life without parole sentences for juveniles who did not commit homicide and that juvenile nonhomicide offenders must have a meaningful opportunity for release. In 2012, when Allen was fifteen years old, the Supreme Court decided Miller v. Alabama, 567 U.S. 460 (2012), which held that mandatory life without parole sentences for juveniles violated the Eighth Amendment. In Miller, the Court also required sentencers to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison before imposing a penalty of life in prison without parole. Miller, 567 U.S. at 480.

When Allen was seventeen years old, and just four days after this crime was committed, this Court decided Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (Nov. 12, 2014). The Aiken Court determined that Miller applied retroactively. Aiken at 540, 765 S.E.2d at 575. The majority reasoned that "Miller is clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution." Id. at 543, 765 S.E.2d at 576-77. The Court stated the factors that the sentencing court must consider. Id. at 544, 765 S.E.2d at 577. The requisite factors include:

- (1) the chronological age of the offender and the hallmark features of youth, including immaturity, impetuosity, and failure to

appreciate the risks and consequence; (2) the family and home environment that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the incompetencies associated with youth—for example, the offender's inability to deal with police officers or prosecutors (including on a plea agreement) or the offender's incapacity to assist his own attorneys; and (5) the possibility of rehabilitation.

Id. (citing Miller). While the Court did not specifically require that the sentencing hearing mirror the penalty phase of a capital case, it stated that “the type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings, in addition to the factors illustrated above.” Id. at 544-45, 765 S.E.2d at 577.

Relying on Roper, Graham, and Miller, multiple state and federal courts have recognized that there is no functional difference between a term-of-years sentence that means the juvenile will die in prison and a life without parole sentence. See, e.g. United States v. Grant, 887 F.3d 131 (3rd Cir. 2018); State ex rel. Carr v. Wallace, 527 S.W.3d 55 (Mo. 2017); State v. Zuber, 152 A.3d 197 (N.J. 2017); People v. Reyes, 63 N.E.3d 884 (Ill. 2016); State ex rel. Morgan v. State, 217 So. 3d 266 (La. 2016); State v. Riley, 110 A.3d 1205 (Conn. 2015); United States v. Garcia, 754 F.3d 460, 474 (7th Cir. 2014); United States v. Pileggi, 703 F.3d 675, 678 (4th Cir. 2013); State v. Null, 836 N.W.2d 41 (Iowa 2013); People v. Caballero, 282 P.3d 291, 295 (Cal. 2012); People v. Mendez, 114 Cal.Rptr.3d 870 (Ct. App. 2010). But see, e.g., State v. Kasic, 265 P.3d 410 (Ariz. Ct. App. 2011). In Zuber, the New Jersey Supreme Court determined that an effective sentence of fifty-five years—the same sentence as Allen's—was a de facto life sentence and violated the Eighth Amendment. Zuber, 152 A.3d at 201-02. Many of these cases were decided before Allen's PCR hearing in 2017. App. 73.

The Failure of Allen's Attorneys to Raise His Eighth Amendment Claim

At Allen's sentencing hearing, the solicitor asked for a lengthy sentence because the term "hit a lick" drove him "up the wall." App. 42, l. 21 – 43, l. 2. He told Judge Gravely, "There's something that needs to be done in our society where we deter future instances of hitting a lick. I think a lengthy sentence will send a message." App. 43, ll. 2 – 5. Plea counsel Brown told the court he'd originally discussed a forty-year sentence with the solicitor, but he "would argue for something much less—but it was never a solid recommendation." App. 43, ll. 13 – 18. After the plea judge sentenced Allen to a total of fifty-five years, the solicitor confirmed the judge intended consecutive sentences and plea counsel said nothing. App. 44, ll. 2 – 25.

At the hearing's outset, plea counsel did ask for a mental health evaluation based on "some mental issues that have never been brought to my attention." App. 5, ll. 3 – 8. Plea counsel told the court that he had spoken with Allen's family members "this past weekend" and learned Allen had been treated for mental health problems. App. 5, ll. 10 – 17. Finally, plea counsel told the court, "I did find out this morning that as he relates to me he's on a number of medications, psychotropics that include, but not limited to Seroquel, Prozac, and he said he's also been taking depression medication. That has never been brought to my attention." App. 5, ll. 18 – 25. Plea counsel presented no testimony, affidavits, or medical records and Judge Gravely denied the request for an evaluation. App. 4, l. 16 – 8, l. 2. Plea counsel spoke on Allen's behalf and asked for leniency, but again presented no doctors or family members to offer any information to the court. App. 33, l. 1 – 40, l. 13.

In his PCR application, Allen wrote, "My allegation is it wasn't justifiable to sentence me to 55 years because Murder is 30 years and a weapon poss. is 5 to 15 years that they oversentence me an I'm trying to give some of this time back." App. 47. In an attachment to the PCR application,

Allen couches his claim about the length of his sentence as that he was misled about the length of the sentence he was going to receive. App. 54 – 59. He does not mention the Eighth Amendment. App. 54-59.

A year passed before Allen was appointed a PCR lawyer. App. 67. On April 7, 2017, his attorney, Mills Ariail, filed handwritten claims from Allen along with Ariail's own typewritten cover letter. App. 70-72. Among the handwritten claims, Allen wrote, "I contend that my sentence of 55 yrs. Constitutes Cruel & Unusual Punish." App. 71.

At the PCR hearing, Ariail made no opening statement before putting Allen on the stand. App. 76, ll. 3 – 15. Ariail asked him questions about plea counsel's preparation, how many times he saw plea counsel, and the medication Allen was taking. App. 76, l. 16 – 79, l. 10. Ariail asked Allen if he had been diagnosed with any mental health disorders. App. 79, ll. 11 – 12. Allen replied, "ADHD. AD—ADHD and schizophrenic, right?" App. 79, ll. 11 – 12. Ariail responded, "Okay. You're schizophrenic?" App. 79, l. 14. Allen said, "Yeah. A little bit." App. 79, l. 15.

When he addressed the topic of Allen's sentence, Ariail asked, "Now, as a part of that, you said that there was some issue you had in regards to the sentence you received, correct?" App. 81, ll. 10 – 16. Confirming that Allen received a fifty-five year sentence, Ariail then conducted the following examination of his client:

Q. Okay. Now, tell me, understanding the sentence you received, what is the issue that you had, I guess, with receiving the amount of time that you got?

A. You said—can you repeat that?

Q. Well, basically, what I'm asking is I think you got a total of 55 years—actually, 55 and there was a concurrent five years for the possession of a weapon, another five years for conspiracy. I think you told me that there was an issue you had with receiving 40 years for the murder charge.

A. Due to—yeah. Because Mr. Brown never told me the minimum of the murder charge. He didn't tell me I could have got 30 years for murder, so I didn't know I could get 30 years for the murder charge. So—

Q. What did you think you could get for the murder charge?

A. A lot of time. That's all I understood at the time. But to—I really just went to the law library and really just started studying, and then I found out the cases and stuff like that.

Q. Right. But you understand you could have gotten life for the murder charge?

A. Yeah. 30 to life.

Q. Okay. Well, you got 40, and you're saying he didn't explain to you the minimum and maximums of those charges?

A. Yes, sir.

Q. Okay. And you understand you got 40 and didn't get life.

A. Right.

Q. Okay. So what are you saying he did wrong in regards to that?

App. 81, l. 17 – 82, l. 22 (emphasis added). Allen then explained he thought he could only get thirty years or a life sentence, but nothing in between. App. 82, l. 23 – 83, l. 6.

At no point in the PCR hearing did Ariail mention the Eighth Amendment, juvenile sentencing, or any of the already existing jurisprudence indicating Allen's sentence is unconstitutional. Judge Hall denied Allen's PCR application from the bench. App. 99, ll. 1 – 5. Judge Hall's written order addresses the argument that Allen's sentence "was too harsh," but does not mention the Eighth Amendment as applied to juveniles. App. 105.

This Court Should Excuse the Procedural Default and Remand Allen's Case to the PCR Court

Because of the abysmal performance of both Allen's plea counsel and his PCR counsel, Allen's claim that his de facto life sentence for a crime he committed as a juvenile violates the Eighth Amendment is procedurally defaulted. Mangal at 92-93, 805 S.E.2d at 571-72. Mangal left open that a procedural default can be excused in "rare cases" and "situations where the interest of justice require PCR courts to be flexible with procedural requirements *before* PCR applicants suffer procedural default on substantial claims." Id. at 96, 99-100, 805 S.E.2d at 573, 575-76. Citing Martinez v. Ryan, 566 U.S. 1 (2012), this Court recognized "the tension between the rights at stake in PCR proceedings and the application of traditional procedural requirements for the presentation and preservation of issues." Id. at 97, 805 S.E.2d at 574. While this Court was discussing the excusal of procedural default before the PCR courts, the same reasoning applies to whether this Court should remand Allen's Eighth Amendment claim and give the PCR court the chance to cure any procedural default.

When determining whether to excuse Mangal's procedural default, this Court examined the merits of his claim and found them lacking. Id. at 100-01, 805 S.E.2d at 576. The Mangal Court noted that the substance of the claim was not presented at the PCR hearing and that it was likely that trial counsel had a valid strategy for eliciting the doctor's testimony that supposedly constituted improper bolstering. Id.

Here, no valid strategy could exist at either the plea or the PCR hearing for not raising Allen's Eighth Amendment claim. Allen should have been able to present the sentencing court the relevant information about his individualized circumstances and have the judge consider the Aiken factors. The record at the plea hearing and at the PCR hearing indicates that Allen, at a

minimum, likely has mental health issues that warrant full investigation and consideration by a sentencing judge. But no record has been made.

The lack of such a record at the plea and at the PCR hearing in this case speaks for itself. This Court should excuse Allen's procedural default and remand this case to the PCR court. With a proper record, the PCR court could determine whether Allen is entitled to an individualized sentencing under Aiken. This Court should exercise its ability to remand extraordinary cases to allow Allen to have his one bite at the apple.

CONCLUSION

For the foregoing reasons, this Court should remand petitioner's case to the PCR court so that he may raise his Sixth and Eighth Amendment claims.

A handwritten signature in black ink, appearing to read 'D. Alexander', is written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of August, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Honorable Daniel D. Hall, Circuit Court Judge

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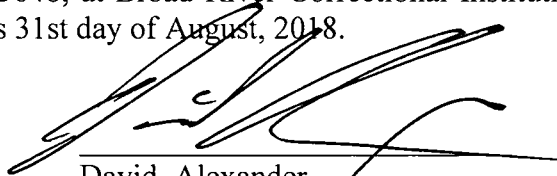
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Conrad Antonio Allen, #365648, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 31st day of August, 2018.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 31st day of August, 2018.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.