STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Hon. Daniel D. Hall, Circuit Court Judge
Appellate Case Tracking No. 2018-000410

Conrad Antonio Allen, Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Procedural History

The Greenville County Grand Jury indicted Petitioner on charges of murder, armed robbery, conspiracy, and possession of a weapon, based on crimes occurring November 8, 2013.[1] On October 12, 2015, Petitioner pled guilty as charged before the Honorable Perry H. Gravely. He sentenced Petitioner to forty years imprisonment for murder; fifteen years, consecutive, for armed robbery; and five years, concurrent, each for conspiracy and the weapons charge. In total, Judge Gravely affirmed he intended to sentence Petitioner to fifty-five years imprisonment. Petitioner filed no direct appeal.

On January 27, 2016, Petitioner filed his application for Post-Conviction Relief. The State filed its Return on or about January 12, 2017. On April 25, 2017, R. Mills Ariail, Jr., after being appointed counsel, submitted a handwritten letter from Petitioner indicating other issue to be brought before the court. On June 28, 2017, The Honorable Daniel D. Hall held a hearing on Petitioner's PCR application. DeShawn Mitchell represented the State and Mr. Ariail represented Petitioner. Judge Hall denied the application and filed a written Order of Dismissal on March 2, 2018. Petitioner filed a Petition for Writ of Certiorari and this Return follows.

Factual Background

Petitioner pled guilty as charged to the murder of Edwardo Campos, which occurred as part of a planned armed robbery. The events began on the night of November 8, 2013. According to the statements of Petitioner and his co-defendant, they were looking to "hit a lick" or conduct a "house lick" meaning breaking into someone's house. Petitioner explained in his

[1] The conspiracy indictment lists November 2014 instead of November 2013 as the date.

statement he usually did not "hit licks in the Mexican world because of the high risk of being caught" but it was "Friday in Mexican world, people might have some money." (App.24-25).

Petitioner and his co-defendant saw the victim and his family pull into their driveway. They then pulled hoodies over their heads and placed bandanas over their faces. Petitioner either took the gun or was given the gun from his co-defendant. The men approached Mr. Campos as he was getting his daughter out of the car. The victim's fiancé and other daughter had already exited the vehicle and headed to the house. (App. 25-26).

Petitioner pointed the weapon at Mr. Campos and demanded he "give it up." The victim stated he would call the police and Petitioner responded: "I don't care what you do. Give it up." Petitioner then shot Mr. Campos in the chest. The bullet passed through the upper and lower areas of the right lung and became lodged in the lower left lung. The medical evidence showed the path could have been caused by Mr. Campos bending over as if to shield his daughter. (App. 26-27).

STANDARD OF REVIEW

An appellate court must give deference to the PCR court's factual findings, and must uphold them if there is any evidence of probative value to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). "We do not defer to a PCR court's rulings on questions of law. 'Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law.'" Mangal v. State, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017) (internal citations omitted)(quoting Sellner, 416 S.C. at 610, 787 S.E.2d at 527).

ARGUMENT

I. This Court should not use its discretion to excuse or overlook a procedural default because petitioner's case is not such a rare case that the interest of justice mandates consideration of his issue. Petitioner has other means of redress including, inter alia, a petition for an original writ with this Court. Additionally, the fifty-five year sentence imposed on Petitioner for murder and armed robbery convictions were proper and imposed after proper consideration of all relevant factors expressed by this Court and the United States Supreme Court.

Petitioner has failed to provide this Court with a proper basis upon which to excuse and overlook the clear procedural bar regarding his claims of an unconstitutional sentence. First, he has other means of obtaining relief if he can support his claims. Second, the sentence imposed on Petitioner was an entirely proper sentence in light of his plea of guilty to murder and armed robbery. The plea court properly considered all relevant factors in imposing the forty year and consecutive fifteen year sentences. Finally, Petitioner has failed to provide any evidence to this Court that further information could or should have been presented to the sentencing court or that the information was such that it would have altered the discretionary sentenced imposed by the court.

In Mangal, this Court discussed in great detail circumstances in which this Court would consider excusing a procedural default and allowing review of a post-conviction relief claim. It noted: "There have been **rare cases** in which we have excused PCR applicants from procedural failures . . . ." Mangal v. State, 421 S.C. 85, 96, 805 S.E.2d 568, 573 (2017) (emphasis added). This Court noted the excusal of a procedural default is an "extraordinary action." Id. at 96, 805 S.E.2d at 574. Significantly, Mangal is one of many cases in which the "extraordinary action" was not taken even though the issue was minimally addressed at the PCR hearing. The Court

found the evidence presented by Mangal in support of excusing the procedural default did not justify the extraordinary relief. See Id. at 101, 805 S.E.2d 576.

In the cases in which this Court has granted the "extraordinary action" of excusing a procedural default, the issue was generally presented to the PCR court and a ruling was not obtained. For example, in Simmons v. State, 416 S.C. 584, 788 S.E.2d 220 (2016), the State presented improper DNA evidence to the jury which in part led to Simmons conviction. This issue was raised to the PCR court and fully addressed at the hearing. The Court summarily dismissed the issue and Simmons failed to file a Rule 59(e), SCRCP, motion to obtain findings of fact and rulings by the PCR court. The Court found remand to obtain those rulings was appropriate in the interest of justice. Id. at 591, 788 S.E.2d at 224. This is clearly distinguishable from the instant case in which Petitioner never raised his issue to the PCR court, and is instead seeking to raise it for the first time on appeal without giving the PCR court any opportunity to consider the issue and make any findings of fact.

In Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992), the applicant attempted to raise an issue of burden-shifting for the first time on appeal based on trial counsel's failure to object to the trial court's malice charge. Id. at 409, 424 S.E.2d at 478. Even though this Court found "the malice charge . . . is so diseased with burden-shifting presumptions that it violates Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)," this Court affirmed the denial of PCR, holding: "Since this issue was neither raised at the PCR hearing nor ruled upon by the PCR court, it is procedurally barred." Id.

Petitioner's case is much more similar to Mangal or Plyler than Simmons. The Petitioner seeks to have the Court address was never raised to the PCR court. He seeks to raise it for the first time in this appeal. Petitioner raised several issues which were fully considered by the PCR

court, just not the issue appellate counsel wishes to address. As a result this Court should deny the Petition for Writ of Certiorari and not excuse the clear procedural default in this case. It is not one of the "rare cases" justifying "extraordinary action."

Additionally, Petitioner is not permanently foreclosed from raising this issue through other avenues. He can raise the issue to this Court as part of a Petition in this Court's Original Jurisdiction, as was recently done in the case of Conrad Lamont Slocumb. This Court denied a Petition for Writ of Certiorari because it did not have jurisdiction, but instead found the case could proceed in its Original Jurisdiction. See Order date September 24, 2015 (found in the South Carolina Appellate Case Management System with case number 2015-001127). Additionally, one of the main cases relied on by Petitioner, Aiken v. Byars. 410 S.C. 534, 765 S.E.2d 572 (2014), was filed in this Court's original jurisdiction. See Aiken, 410 S.C. at 536-537, 765 S.E.2d at 573 (granting relief following a constitutional challenge raised through a petition for original jurisdiction); see generally S.C. Const. art. V, § 5 ("The Supreme Court shall have power to issue writs or orders of injunction, mandamus, *quo warranto*, prohibition, certiorari, habeas corpus, and other original and remedial writs."). Finally, Petitioner would also have federal habeas as a means of challenging his sentence. As a result, he is not without remedies, and given his sentence—and any possible sentence he can receive for murder and armed robbery—it is not likely time is of the essence mandating the issue be addressed immediately by this Court.

Finally, even if this Court were inclined to excuse the clear procedural default, Petitioner has failed to demonstrate his entitlement to relief. Both the United States Supreme Court and this Court have recognized a sentence of life without parole is constitutionally permissible for a juvenile convicted of homicide. See Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016)

(recognizing a sentencing judge may encounter a rare juvenile offender for whom a life without parole sentence is justified); Miller v. Alabama, 567 U.S. 460, 479-480 (2012) (instructing a sentencing judge is not constitutionally foreclosed from sentencing a juvenile homicide offender to a life sentence while cautioning the "appropriate occasions for sentencing juveniles to the harshest possible penalty will be uncommon"); Aiken v. Byars, 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014) (recognizing a sentencing judge "[w]ithout question" could still properly determine life without parole was an appropriate sentence for a juvenile murderer following an individualized hearing in which "the mitigating hallmark features of youth" were fully explored and noting the legislature's decision authorizing life without parole sentences for juveniles who committed murder would be honored on appeal). In the case at bar, Petitioner, at the age of 16 or 17, was convicted of murdering a father likely shielding his three-year-old daughter during the commission of a planned armed robbery and did **not** receive a life without parole sentence even though one was constitutionally permissible for his crime. Instead, Petitioner received a forty year sentence for murder and a fifteen year sentence for armed robbery for a total fifty-five-year sentence. This sentence should not be considered a *de facto* life sentence, especially in light of the seriousness and circumstances of the crimes for which he was charged. See People v. Applewhite, 409 Ill. Dec. 849, 855, 68 N.E.3d 957, 963 (Ill. Ct. App. 2016) ("[H]is 45-year sentence **does not** amount to a *de facto* life sentence, as he will be eligible for release at the age of 62." (emphasis added)); see also S.C. Code Ann. § 19-1-150 (listing the projected life expectancies of men and women of different ages in a table that can be used "to establish the life expectancy of a person from any period in his life").

Moreover, even if Petitioner's fifty-five-year aggregate sentence could be considered a "*de facto*" life sentence, the sentencing judge—before imposing that sentence—conducted a

thorough sentencing hearing that fully complied with the constitutional requirements for juvenile sentencing. It should be noted, Petitioner's sentencing occurred after this Court's decision in Aiken v. Byers, and the sentencing court should be presumed to be aware of the requirements and factors for consideration prior to his imposition of the sentence for a juvenile.

Petitioner's plea counsel presented the sentencing court with a great deal of evidence regarding his background and upbringing. Plea counsel expressed concerns that Petitioner was merely going along or being manipulated by older co-defendants, thereby addressing peer pressure and its effects. He explained Petitioner's behavior both before and after the killing. The sentencing court was able to fully evaluate that evidence, along with the relevant factors identified by the United States Supreme Court and the South Carolina Supreme Court, in fashioning an appropriate sentence for Petitioner, who callously killed his victim as part of a planned "house lick" or "hit a lick." See Miller, 567 U.S. at 476-477 (recognizing there is a difference between the culpability level of a fourteen-year-old offender versus a seventeen-year-old offender and criticizing mandatory sentencing schemes for failing to take that difference into account for sentencing purposes); cf. People v. Willover, 248 Cal. App. 4th 302, 324, 203 Cal. Rptr. 3d 384, 399 (Cal. Ct. App. 2016) ("While Miller did recognize that juveniles are generally immature, impetuous, and unable to appreciate risks and consequences, here defendant was nearly 18 years old at the time of his offenses, so the trial court could reasonably determine that defendant's age did not weigh strongly in favor of resentencing.").

Under these circumstances, the sentencing judge took the appropriate actions to ensure he properly exercised his discretion in sentencing Petitioner for murder, and the sentence he imposed was constitutionally proper regardless of whether Petitioner now disagrees with the sentencing judge's discretionary sentencing decision. See Miller, 567 U.S. at 483 ("Our decision

does not categorically bar a penalty for a class of offenders or type of crime . . . . Instead it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty."). This Court should deny the Petition for Writ of Certiorari because the sentencing judge was presented all relevant mitigating factors regarding Petitioner's status as a juvenile, was able to consider the information presented to him, and crafted an appropriate and constitutionally permissible sentence.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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January 23, 2019

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PROOF OF SERVICE

I, Judy A.C. Carey, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.
This 23rd day of January, 2019.

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