

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

September 15, 2021

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

JOHNNY LEE,

Petitioner - Appellant,

v.

LOU ARCHULETA, Warden, F.C.F.; THE
ATTORNEY GENERAL OF THE STATE
OF COLORADO,

Respondents - Appellees.

No. 15-1346
(D.C. No. 1:15-CV-00700-LTB)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HARTZ**, **BALDOCK**, and **MORITZ**, Circuit Judges.

Johnny Lee is a state prisoner in Colorado who was sentenced to a term in prison longer than his life expectancy for crimes that he committed as a juvenile. He has sought review by this court of the denial by the United States District Court for the District of Colorado of his application under 28 U.S.C. § 2254 for a writ of habeas corpus on the ground that his sentence is unconstitutional under *Graham v. Florida*, 560 U.S. 48 (2010). We granted Mr. Lee a certificate of appealability in December 2015 and abated

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

this appeal while he sought to exhaust his remedies in Colorado state court. He has now done so, but without obtaining any relief. Although the State prevailed in the Colorado courts, it now concedes that circuit precedent requires this panel to hold that Mr. Lee's sentence is unconstitutional. *See Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017).¹ Exercising jurisdiction under 28 U.S.C. §§ 1291 & 2253, we reverse the district court and order it to grant a writ of habeas corpus unless Colorado resentences Mr. Lee in a constitutionally permissible manner within a reasonable period of time.

In 1999 when he was 17 years old, Mr. Lee and five other gang members abducted and raped a woman in Boulder, Colorado. Mr. Lee was tried as an adult in Colorado state court, and a jury convicted him of kidnapping (Count 1), two counts of sexual assault (Counts 3 and 4), and conspiracy to commit sexual assault (Count 6). He received a 36-year sentence for the kidnapping conviction, indeterminate sentences of 36 years to life for each sexual-assault conviction, and a 16-year sentence for the conspiracy conviction. The sentences on Counts 1, 3, 4 were to run consecutively, and the conspiracy sentence was to run concurrently with the sentence on Count 4. Thus, Mr. Lee's sentence was effectively 108 years to life. As the State concedes, accounting for all possible good-behavior credits, Mr. Lee would not be eligible for parole during his life expectancy.

Since sentencing in 2001, Mr. Lee has pursued a direct appeal in state court and collateral review in both Colorado and federal courts. In the interim the Supreme Court decided *Graham*. Holding that the Eighth Amendment "prohibits the imposition of a life

¹ Mr. Lee's § 2254 application also raised nine other claims, but he is not pursuing any of them in this appeal.

without parole sentence on a juvenile offender who did not commit homicide,” the Court said that a State must provide a juvenile offender “with some realistic opportunity to obtain release.” *Graham*, 560 U.S. at 82. Seven years later in *Budder*, this court held that *Graham*’s categorical rule “must be read to apply to all sentences that are of such length that they would remove any possibility of eventual release . . . whether or not that sentence bears the specific label ‘life without parole.’” 851 F.3d at 1057.

Recognizing that this panel is bound by circuit precedent,² the State concedes that we must hold that Mr. Lee is entitled to a writ of habeas corpus. The parties further agree that the writ must be conditional on Colorado’s failure to revise Mr. Lee’s sentence to one consistent with *Graham* and *Budder*. The only remaining controversy concerns two specifics regarding the content of the conditional writ.

First, Mr. Lee wants us to require Colorado to resentence him within six months. The State prefers that the deadline be only a “reasonable time” for resentencing. We see no reason to depart from the common practice of requiring only that resentencing be within a reasonable time. *See Richmond v. Lewis*, 506 U.S. 40, 52 (1992) (instructing that the writ issue unless the State corrects its sentencing error “within a reasonable period of time”); *Budder*, 851 F.3d at 1060 (within a “reasonable period”); *Wood v. Milyard*, 721 F.3d 1190, 1198 (10th Cir. 2013) (within a “reasonable time”).

The second disagreement concerns what should happen if the State fails to resentence Mr. Lee within a reasonable time. The State urges us to say that if no

² The State, however, continues to maintain that *Budder* incorrectly interpreted *Graham*, and it preserves its option to seek Supreme Court review of that issue.

resentencing occurs, one of Mr. Lee’s consecutive 36-year sentences for sexual assault will be deemed to run concurrently with his other sentences. Mr. Lee argues that the conditional writ should require his release if he is not timely resentenced. We agree with Mr. Lee. “Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner.” *Fay v. Noia*, 372 U.S. 391, 430–31 (1963), abrogated on other grounds by *Coleman v. Thompson*, 501 U.S. 722 (1991); see *Brown v. Vanihel*, 7 F.4th 666, 670 (7th Cir. 2021) (same).

We **REVERSE** the judgment of the district court and **REMAND** with instructions to grant Mr. Lee’s application for a writ of habeas corpus unless the State of Colorado resentences him to a constitutionally permissible sentence within a reasonable period of time.

Entered for the Court

Harris L Hartz
Circuit Judge