FILED
United States Court of Appeals
Tenth Circuit

September 9, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

HARABIA JABBAR JOHNSON,

Petitioner - Appellant,

v.

JEFF ZMUDA, Secretary of Kansas Department of Corrections,

Respondent - Appellee.

No. 21-3010
(D.C. No. 5:19-CV-03173-EFM)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ**, **KELLY**, and **McHUGH**, Circuit Judges.

Applicant Harabia Jabbar Johnson, a state prisoner proceeding pro se, requests a certificate of appealability (COA) to challenge the denial by the United States District Court for the District of Kansas of his application for relief under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2253(c)(1)(A) (requiring COA to appeal final order in a habeas proceeding in which the detention complained of arises out of process issued by a state court). We deny his request and dismiss the appeal.

In February 1991 Applicant pleaded guilty to nine charges—including first-degree murder, rape, aggravated kidnapping, and aggravated arson—arising from incidents on

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

July 21, 1990; July 31, 1990; and October 16, 1990. He turned 18 on September 7, 1990. The sentences imposed in March 1991 are fully described by the opinion of the federal district court. *See Johnson v. Zmuda*, No. 19-CV-3173-EFM, 2020 WL 7353864, at *1 (D. Kan. Dec. 15, 2020) (unpublished) (*Johnson II*) (brackets omitted). For our purposes, suffice it to say (1) that the sentences for the offenses committed on July 31 included a life sentence for first-degree murder, which was to be served consecutively to two concurrent life sentences for aggravated kidnapping committed on the same date and (2) his sentence for the only crime committed after he was 18 was a sentence of 15 years to life for aggravated arson, to run consecutively to all other sentences.

In 2010 the Supreme Court in *Graham v. Florida* held that the Eighth Amendment categorically forbids sentencing "a juvenile offender who did not commit homicide . . . [to] life without parole." 560 U.S. 48, 74 (2010). Although "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime[,] . . . [it] must . . . give [such] defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75. Two years later, in *Miller v. Alabama*, the Court extended *Graham* to hold that even when the offense *is* homicide, "the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders." 567 U.S. 460, 479 (2012) (emphasis added). Four years after that, in *Montgomery v. Louisiana*, the Court declared that "*Miller* announced a substantive rule that is retroactive in cases on collateral review." 577 U.S. 190, 206 (2016).

In February 2016 Applicant filed a motion with the Kansas state district court seeking postconviction relief on several grounds, including that his sentence violated *Graham*. The district court denied relief, and he appealed to the Kansas Court of Appeals, also invoking *Miller*. That court affirmed, explaining that the motion was untimely and that, in any event, *Miller* did not apply to Applicant's sentence because he was not sentenced to life in prison *without the possibility of parole*. *See Johnson v. State*, No. 116,702, 2017 WL 4700131, at *3–4 (Kan. Ct. App. Oct. 20, 2017) (unpublished), abrogated by *White v. State*, 421 P.3d 718 (Kan. 2018) (*Johnson I*). The Kansas Supreme Court denied Applicant's petition for review.

In September 2019 Applicant filed for relief under § 2254, renewing his argument that "his sentence violates the Supreme Court's decision in Miller and must be reversed." Dist. Ct. Doc. 2 at 3. Applicant also argued that the Kansas state district court had improperly denied him an evidentiary hearing as part of the state postconviction proceedings. The federal district court rejected both arguments, explaining that because Applicant "will be first eligible for parole when he is approximately 62 years old[,] . . . [his] assertion that his sentence is tantamount to life without the possibility of parole is without merit," and that no hearing was warranted since his claim could be resolved on the record. *Johnson v. Zmuda*, No. 19-CV-3173-EFM, 2020 WL 7353864, at *4 (D. Kan. Dec. 15, 2020) (unpublished) (*Johnson II*). The district court also denied Applicant's request for a COA. He now seeks a COA from this court.

A COA will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires "a

demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). In other words, the applicant must show that the district court's resolution of the constitutional claim was either "debatable or wrong." *Id.*

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides that when a claim has been adjudicated on the merits in a state court, a federal court can grant habeas relief only if the applicant establishes that the state-court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). As we have explained:

> Under the "contrary to" clause, we grant relief only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Court has on a set of materially indistinguishable facts.

Gipson v. Jordan, 376 F.3d 1193, 1196 (10th Cir. 2004) (brackets and internal quotation marks omitted). Relief is provided under the "unreasonable application" clause "only if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* (brackets and internal quotation marks omitted). Thus, a federal court may not issue a habeas writ simply because it concludes in its independent judgment that the relevant

state-court decision applied clearly established federal law erroneously or incorrectly. *See id.* Rather, "[i]n order for a state court's decision to be an unreasonable application of this Court's case law, the ruling must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728 (2017) (per curiam) (internal quotation marks omitted). To prevail, "a litigant must show that the state court's ruling was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* (ellipsis and internal quotation marks omitted). Further, the Supreme Court has held that review under § 2254(d)(1) and (2) "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011); *see id.* at 185 n.7. "AEDPA's deferential treatment of state court decisions must be incorporated into our consideration of a habeas petitioner's request for COA." *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004).

In this court Applicant again asserts two grounds for relief. He first contends that the district court erred in failing to grant an evidentiary hearing on his claim that his sentence violated the Eighth Amendment. He contends that an evidentiary hearing was required to "consider the [effect of the] COVID 19 crisis on African American prisoners and to adjust the lowered life expectancy of prisoners in general." Mot. for COA at 14. He suggests that because the COVID-19 pandemic has lowered life expectancy for prisoners such as himself, a sentence under which he is first eligible for parole at 62 is de facto a sentence to life without the possibility of parole, and thus violated *Miller* and *Graham*. But, as noted above, *Pinholster* restricts federal-court review under

§ 2254(d)(1) and (2) to the record that was before the state court. *See* 563 U.S. at 181, 185 n.7. And to the extent that Applicant is arguing that the *state* court should have conducted an evidentiary hearing on the lowered-life-expectancy issue, he has failed to point to where he had argued that issue in state court; so the state court can hardly be faulted for not conducting a hearing on the matter.

Turning to the substance of Applicant's Eighth Amendment claim, it was adjudicated on the merits by the Kansas Court of Appeals, *see Johnson I*, 2017 WL 470131, at *4, so his burden is, in essence, to show that Supreme Court precedent made it unreasonable for the state court to reject the argument he made to that court. This he has failed to do. He did not make the lowered-life-expectancy argument to the state court (the case was resolved well before the Covid pandemic). He argued simply that his state-court sentence was the equivalent of a life sentence without parole. But he does not dispute that he will become eligible for parole at the age of 62. Nor does he dispute that the grant or denial of parole would be decided on the basis of normal parole factors.

Our conclusion is supported by the Supreme Court decision in *Virginia v. LeBlanc*, where a state prisoner challenged the Virginia state court's determination that his eligibility for possible release as part of the state's "geriatric release program" satisfied *Graham*'s "meaningful opportunity" requirement. *LeBlanc*, 137 S. Ct. at 1728 (internal quotation marks omitted). Under that program a prisoner who had served more than 10 years in prison became eligible for parole at age 60. *See id.* Reversing the Fourth Circuit, which had affirmed the district-court order granting the prisoner's application under § 2254, the Court emphasized the importance of AEDPA deference:

> The Court of Appeals for the Fourth Circuit erred by failing to accord the state court's decision the deference owed under AEDPA. *Graham* did not decide that a geriatric release program like Virginia's failed to satisfy the Eighth Amendment because that question was not presented. And it was not objectively unreasonable for the state court to conclude that, because the geriatric release program employed normal parole factors, it satisfied *Graham*'s requirement that juveniles convicted of a nonhomicide crime have a meaningful opportunity to receive parole.

LeBlanc, 137 S. Ct. at 1728–29.

We conclude that no reasonable jurist could debate the correctness of the district court's denial of Applicant's application for relief under § 2254.

We **DENY** a COA and **DISMISS** the appeal. We **GRANT** Applicant's motion to proceed *in forma pauperis*.

Entered for the Court

Harris L Hartz
Circuit Judge