No. SC93487

In the Supreme Court of Missouri

STATE OF MISSOURI EX REL. JASON CLAY CARR,

Petitioner,

v.

JASON LEWIS, WARDEN, SOUTHEAST CORRECTIONAL CENTER,

Respondent.

On Petition for Writ of Habeas Corpus

RESPONDENT'S BRIEF

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Statement of the Case

This litigation is a petition for writ of habeas corpus by a person in the custody of the Missouri Department of Corrections. Jason Clay Carr was convicted of three counts of capital murder, § 565.001, RSMo. 1978, and was sentenced to three concurrent terms of life without parole for fifty years for killing Patricia Carr, his stepmother, Emma Downey, his stepsister, and Andrew Carr, his brother. Carr has served over thirty-three years of this sentence, and he becomes parole eligible in 2033.

The question presented is whether Carr's parole eligibility at age sixty-six allows the meaningful opportunity for parole that the Supreme Court requires for juvenile homicide offenders under *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

Jason Lewis, Warden of the Southeast Correctional Center is the respondent. Missouri Supreme Court Rule 91.01, .04, .07.

Statement of Facts

The Missouri Department of Corrections confines Jason Clay Carr because of concurrent sentences imposed by the Wright County Circuit Court, arising from Carr's conviction for three counts of capital murder. Section 565.001, RSMo. 1978. The Missouri Court of Appeals described Carr's murders as follows:

> On March 15, 1983, defendant was 16 years of age and lived east of Hartville in Wright County with his father, his brother, his stepmother, and her daughter. Defendant was enrolled in high school and that was a regular school day, but he did not attend. He had stayed with his grandmother the night before and then returned to the house where he lived after the others had left. The record indicates that defendant had not previously been in serious trouble and that he was a good high school student, generally getting "A's and B's".
>
> At approximately 4:15 p.m. defendant's brother, Andrew Carr, and his stepsister, Emma Downey, got off a school bus near their home. After they entered the house defendant shot Andrew in the left side of the back of his head and in front of his right ear. Gunpowder residue indicated that the shot to the right ear occurred at close range. Emma was shot in the back and in the

left eye. After Patricia Carr arrived home from work at approximately 4:35 p.m., defendant shot her above the right eye and in the right temple. The wound to the temple indicated the shot was from close range.

Aaron Carr, defendant's father, came home at approximately 5:10 p.m. He saw a shovel in the front yard which had not been there when he had left that morning and the front curtains of the house were closed. Normally they were open. After Aaron Carr entered the house, defendant attempted to shoot him with a single shot .22 caliber rifle but it did not fire. As defendant tried to insert a different shell in it, his father took the rifle from him. The others had been shot with that rifle. After defendant was disarmed he cried and told his father, "I killed them all". He said he killed his brother, even though he loved him.

A psychiatrist employed by plaintiff at the State Hospital in Farmington was called as a witness by defendant. He testified that defendant did not suffer from a mental disease or defect excluding criminal responsibility. He said defendant "saw his father as an extremely evil force in his environment" and "as patronizing his stepmother, stepsister and his brother". The psychiatrist said defendant killed them "to get back at his

father". The psychiatrist testified that defendant thought his father was evil because he placed restrictions on him.

Defendant's parents were divorced "about 10 or 11 years" before the trial. For some time defendant's father had a "problem with drinking" and in 1965 was sent to the penitentiary for statutory rape. Ten years before the trial he quit drinking alcoholic beverages and became a devout member of a Jehovah's Witnesses congregation. Apparently because of his religious beliefs he placed restrictions on defendant about which they conflicted. Defendant, who was six foot seven inches tall, was not allowed to play on the high school basketball team because its schedule conflicted with the family's "home bible study". He was prohibited from playing video games or from watching certain television programs.

Defendant was not allowed to date a girl who did not go to the same church. There was evidence that when his father learned of defendant's fondness for the girl he made him renounce her in church and that on the night prior to the shooting defendant was "rebuked and ridiculed by his father during church services because of his failure to recite a passage from the Bible". The

> evidence indicated that defendant was hostile toward his brother because his conduct received approval from their father.

State v. Carr, 687 S.W.2d 606, 608-09 (Mo. App. S.D. 1985). The jury convicted Carr of three counts of capital murder, § 565.001, RSMo. 1978, and the trial court sentenced him to three concurrent terms of life without parole for fifty years. Carr becomes parole eligible when he is sixty-six years old.

Carr filed a petition for writ of habeas corpus in this Court on June 24, 2013. He contended that parole ineligibility for fifty years was the same thing as permanent parole ineligibility (Petition, p. 1, para. 1); thus, his sentence violated the Eighth Amendment's prohibition against cruel and unusual punishments (Petition, p. 1, *citing Miller v. Alabama*, 132 S.Ct. 2455 (2012)). On March 15, 2016, the Court granted the writ, concluding that "in order to comply with the constitutional requirements of *Miller* and *Montgomery*, [the Court] hereby orders that this petition be sustained in part. This petitioner shall be eligible to apply for parole after serving 25 years' imprisonment on his sentence of life without parole unless his sentence is otherwise brought into conformity with *Miller* and *Montgomery* by action of the governor or enactment of necessary legislation. All other claims alleged in the petition and pending motions are denied without prejudice." Order of March 15, 2016, p. 2.

Respondent filed a timely motion for rehearing. On July 20, 2016, the Court set aside its March 15, 2016 order, and overruled the motion for rehearing as moot. The Court established a briefing schedule and docketed the case for oral argument on October 6, 2016.

Argument

I. Carr's sentence for the 1983 triple murder of his family comports with the Eighth Amendment (Responds to Points I and II).

A. Standard of Review for Habeas

Habeas corpus relief is the final judicial inquiry into the validity of a criminal conviction and functions to relieve defendants whose convictions violate fundamental fairness. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 545 (Mo. banc 2003). A habeas petitioner has the burden of showing that the petitioner is entitled to habeas corpus relief. *State ex rel. Winfield v. Roper*, 292 S.W.3d 909, 910 (Mo. banc 2009). "[A] writ of habeas corpus may be issued when a person is restrained of his or her liberty in violation of the constitution or laws of the state or federal government." *State ex rel. Woodworth v. Denney,* 396 S.W.3d 330, 337 (Mo. banc 2013).

B. Standard of review for Eighth Amendment claims.

In *Miller v. Alabama*, the Supreme Court determined that a mandatory life without parole sentence violated the offender's Eighth Amendment rights when the offender was under the age of eighteen when he murdered. 132 S.Ct. 2455, 2460 (2012). In *Miller*, each offender had been convicted of one count of murder. *Id*. at 2461-62. The trial courts sentenced each offender to life without parole. *Id.* at 2461, 2462. The Supreme Court determined that

the length of the sentences did not violate the Constitution; thus, it did not announce a categorical bar on life-without-parole sentences. *Id.* at 2469. But the Court did hold that the "Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* Citing *Graham v. Florida*, 560 U.S. 48, 75 (2010), the Court emphasized that Eighth Amendment did not require a State to guarantee eventual freedom for the offender; instead, the State must provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. *Id. citing Graham*, 560 U.S. at 75.

Four years later, in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), the Supreme Court determined that the *Miller* decision was a substantive constitutional rule that courts should apply retroactively to cases on collateral review. *Id.* at 726-32. In its discussion, the Court wrote that the decision's impact on the States was minimal because a State did not have to relitigate the conviction and sentence if the State chose to extend to a juvenile homicide offender a chance for parole consideration.

> Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by

> resentencing them. … Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.

Id. at 736. The Court emphasized that the juvenile offender did not have to be released. "Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller's* central intuition—that children who commit even heinous crimes are capable of change." *Id*.

Justice Scalia's dissent emphasized the parole-opportunity alternative to resentencing. From Justice Scalia's perspective, the language of the *Montgomery* majority decision was designed to effectively end life-without-parole sentences for juvenile killers. And one of the options given to the States was to end the sentencing practice itself by providing for parole eligibility to affected offenders.

> What the majority expects (and intends) to happen is set forth in the following not-so-subtle invitation: "A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."

Id. at 744 (Scalia, J. dissenting).

C. Carr's concurrent sentences of life-without-parole-for-fifty-years allows him meaningful opportunity for parole.

Under *Miller* and *Montgomery*, the legal question becomes whether Carr's parole eligibility at age sixty-six allows the meaningful opportunity for parole that the Supreme Court requires.

On March 15, 1983, Carr was sixteen years old when he killed his stepmother, brother and stepsister. After conviction, the trial court sentenced him to concurrent terms of life without parole for fifty years. (Resp. App. A-1). Carr becomes parole eligible in 2033, when he is sixty-six years old. On July 3, 2001, the Parole Board informed Carr that he would have a parole hearing in March 2031, two years before he becomes parole eligible. (Resp. App. A-2). Missouri has complied with *Miller* and *Montgomery* because Carr will have a meaningful opportunity for parole.

Carr contends that his parole eligibility is lacking because he does not become parole eligible until after he has served fifty years of his sentence (Petitioner's Brief, pp. 32-43). Carr implicitly concedes, as he must, that a sentence of life imprisonment without parole is not the same as a sentence of life without parole for fifty years (Petitioner's Brief, p. 32). Instead, he contends that his sentence is the "functional equivalent" of life without parole (Petitioner's Brief, p. 32). He does not define what "functional equivalent" might be or how the Court determines if a sentence is the "functional

equivalent" of another sentence. When the Missouri Department of Corrections receives an offender, it records the offender's sentence, not the "functional equivalent" of the sentence. *See* § 217.305.2(1), RSMo. 2000. Under Illinois law, a natural life sentence runs for the natural life of the offender; thus, Illinois law prohibits consecutive life sentences because the consecutive sentence cannot be served. In Illinois, consecutive life sentences are not the functional equivalent of a life sentence. *See People v. Wuebbels*, 919 N.E.2d 1122, 1124-25 (Ill. Ct. App. 2009). In practice, one sentence is not a "functional equivalent" of another.

With Carr, his life-without-parole-for-fifty-years sentence is not the functional equivalent of a life-without-parole sentence. With his life-without-parole-for-fifty-years sentence, Carr becomes parole eligible in 2033. He has a parole hearing scheduled for March 2031. These are not the features of a life-without-parole sentence. If Carr had a life-without-parole sentence, then he would never be eligible for parole. He would never have a parole hearing scheduled. The two sentences are different.

But if the Court were inclined to review the "functional equivalence" of Carr's sentence, then the overwhelmingly important characteristic of Carr's offense is that he killed three victims, resulting in the "functional equivalent" of three life without parole for 16 2/3-year sentences for each victim (if they ran consecutively), sentences Carr does not contend violates the Eighth

Amendment. In contrast, in *Miller* and *Montgomery*, the offenders killed one victim.

But even Carr's "functional equivalent" analysis inevitably leads to the conclusion that a life-without-parole-for-fifty-years sentence is not the functional equivalent of a life sentence. Citing *Casiano v. Comm'r of Corrections*, 115 A.3d 1031 (Conn. 2015), Carr concedes that he will become parole eligible ten years before the statistical conclusion of his life (Petitioner's Brief, pp. 33-34). Parole eligibility within the offender's natural lifetime does not violate the Eighth Amendment. Such parole eligibility gives an offender a meaningful opportunity to obtain release. *State v. Terrell*, 2016 WL 3442917, at *5 (Ohio Ct. App. 2016)(trial court's sentence was constitutional where offender will receive release consideration after twenty-one years); *People v. Lehmkuhl*, 369 P.3d 635, 638 (Colo. App. 2013) *cert. dismissed*, *Lehmkuhl v. People*, 2014 WL 7331019 (Colo. 2016); *State v. Zuber*, 126 A.3d 335 (N.J.Super.Ct.App.Div. 2015)(finding that parole eligibility during life expectancy fulfills Eighth Amendment guarantee), *citing Smith v. State*, 93 So.3d 371, 374-75 (Fla.Dist.Ct.App. 2012) and *Thomas v. State*, 78 So.3d 644, 646 (Fla.Dist.Ct.App. 2011)(release when offender is in his late sixties is constitutional); *People v. Sanchez*, 2013 WL 3209690, at *6 (Cal. Ct. App. 2013)(upholding fifty-years-without-parole sentence for juvenile).

In a post-conviction proceeding, one should determine life expectancy from the life expectancy table for today, not the date of sentencing. *State v. Zuber*, 126 A.3d at 345. The post-conviction court should use the most current and accurate data available at the time the newly-raised constitutional claim is adjudicated, rather than try to turn back the clock to apply outdated data to a hypothetical and outmoded "original sentencing." Using the Centers for Disease Control and Prevention data, Carr's life expectancy is eighty-one years of age, not seventy-eight. Under Table A, being fifty years old, Carr can expect statistically another thirty-one and a half years of life. (Resp. App. A-5). And with parole eligibility at age sixty-six, he becomes parole eligible fifteen years before his life expectancy concludes.

But Carr speculates that he may not live that long in prison because it is dangerous (Petitioner's Brief, p. 34). Living outside of prison can be dangerous too. *See State v. Carr* (Carr's murders occurring at home); *State v. Bivens*, 639 S.W.2d 102 (Mo. App. E.D. 1982)(juvenile homicide offender sentenced to life without parole for fifty years) (murder occurring in automobile); *State v. Scott*, 651 S.W.2d 199 (Mo. App. W.D. 1983) (juvenile homicide offender sentenced to life without parole for fifty years) (murder occurring at home of elderly victim). Further, Carr's assertions are mere speculation. For example, Carr suggests that there is a two year decline in life expectancy for every year incarcerated. (Petitioner's Brief, p. 34). Carr

has spent over thirty-three years incarcerated; thus, according to his assertion, his life expectancy should have been to age ten, forty years ago. Additionally, there is nothing in Supreme Court precedents that dictates different sentences for those who are long-lived and those who are genetically predisposed to disease. Nothing in the precedents require a sentencing court to predict whether a defendant will live in a dangerous prison or a less dangerous prison, whether a defendant will adapt to a prison's social structure, and the like. *See Bunch v. Smith*, 685 F.3d 546, 552 (6th Cir. 2012)(declining to inject race, gender or socioeconomic status into life expectancy calculation).

Carr suggests that the opportunity for parole has little value for him because he will not be able to get a job, marry, raise a family or vote (Petitioner's Brief, p. 34-35). Carr's inability to have a non-prison life is more attributable to his offenses. Carr also suggests that the quality of life for a person older than sixty-six is low because he will not have "productive employment prospects" and will be at risk for disease and disorders (Petitioner's Brief, p. 35). To state Carr's suggestions is to refute them. *See* http://www.aarp.org.

But the Court does not need to go into a factual or philosophical inquiry about the quality of life for those over age sixty-five[1]. All that the Eighth Amendment now requires is that the juvenile offenders have a meaningful opportunity to obtain release. *Graham v. Florida*, 560 U.S. at 75; *Miller v. Alabama*, 132 S.Ct. at 2469; *see State v. Zuber*, 126 A.3d at 346. "The *Zuber* opinion is consistent with the recent case of *Mongomery v. Louisiana*, 136 S.Ct. 718, 737 (2016), in which the Court characterized the period after release on parole not in terms of the quality of life but of consisting merely of 'some years of life outside prison walls.'" *State v. Cardeilhac*, 876 N.W.2d 876, 889 (Neb. 2016). Carr's contention is factually and legally meritless. Carr has "hope for some years of life outside of prison walls." *Montgomery,* 136 S.Ct. at 736-7.

Carr describes his parole eligibility at age sixty-six as a form of "geriatric release" (Petitioner's Brief, p. 36, *citing State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013)). Such parole comforms to the requirements of the Eighth Amendment. The Virginia Supreme Court upheld a life without parole

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[1] Counsel for respondent understands from the Missouri Department of Corrections that there are about five hundred incarcerated offenders who are at least sixty-seven years of age. Carr does not suggest that each of these offenders sees no purpose in his or her parole.

sentence from Eighth Amendment challenge because the offender had a meaningful opportunity for release when he reaches age sixty-five, having served five years of his sentence, or age sixty, having served ten years of his sentence. *Angel v. Commonwealth*, 704 S.E.2d 386 (Va. 2011) (quoting Va. Code Ann. section 53.1-40.01).

Carr also contends that since life-without-parole is now an unconstitutional sentence after *Miller*, a life-without-parole-for-fifty-years sentence should be the next sentence a court declares unconstitutional (Petitioner's Brief, p. 42). Carr suggests that the State with the longest term of incarceration for juvenile homicide offenders is also the State with an unconstitutional punishment. (Petitioner's Brief, pp. 42-44). Carr suggests no principled way to draw a line between lawful and unlawful punishment because, under his theory, the length of sentence is always ratcheted downward. But the Supreme Court implicitly rejected Carr's "slippery slope" argument in *Graham* and *Montgomery*. As noted earlier, those cases hold that the constitution requires a meaningful opportunity for parole, not actual parole or parole consideration after a specific period of time; be it ten, thirty, or fifty years.

Lastly, Carr claims that his sentence is disproportionately severe for his three murder convictions (Petitioner's Brief, pp. 50-61). He did not present a proportionality claim in his petition, only a claim that his sentence

violated *Miller*. (Petition, p. 15, para. 30). The proportionality claim is not properly before the Court. Carr also defaulted the proportionality claim because Carr should have brought that claim to the attention of the appellate court on direct appeal. *See State v. Pribble*, 285 S.W.3d 310 (Mo. banc 2009)(claim raised on direct appeal). Carr's failure to raise the proportionality claim on direct appeal constitutes default that precludes review in habeas. *State ex rel. Strong v. Griffith*, 462 S.W.3d 732, 733 (Mo. banc 2015).

Alternatively, the proportionality claim is meritless. Carr does not contend that any of the three capital murders were not serious (Petitioner's Brief, pp. 54-55). For capital murder, the Legislature provided for two punishments: death and life without parole for fifty years. § 565.008.1, RSMo. 1978. Carr received the minimum punishment. The trial court ran the sentences concurrently. Carr received the minimum sentence for his crimes, but a minimum authorized by the Legislature.

Carr argues he should receive the benefit of Senate Bill 590 (Petitioner's Brief, p. 58). But that Bill was designed to provide relief for juvenile homicide offenders convicted of first-degree murder and sentenced to life-without-parole. Carr is not a member of that group because he was convicted of capital murder (not first-degree murder) and sentenced to life-

without-parole-for-fifty-year (not life without parole). Accordingly, Carr should not receive benefit from Senate Bill 590.

Conclusion

The Court should deny relief to Carr.

Respectfully submitted,

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Certificate of Compliance and Service

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 3,884 words, excluding the cover and certification, as determined by Microsoft Word 2010 software, and that a copy of this brief was sent through the electronic filing system on September 14, 2016 to:

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