

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES LEWIS,

Petitioner,

CASE NO. 2:15-cv-10766

v.

HON. NANCY G.
EDMUNDS

BONITA HOFFNER, WARDEN,

MAG. MONA K. MAJZOUB

Respondent.

Respondent's Motion to Dismiss and Brief in Support

Motion

Respondent, Bonita Hoffner, through attorneys Bill Schuette, Attorney General for the State of Michigan, and Bruce H. Edwards, Assistant Attorney General, moves this Honorable Court to dismiss Charles Lewis' habeas petition and further requests that Lewis be denied any relief regarding his claim that his conviction was dismissed by an April 3, 2000 order, for the reasons stated in the accompanying brief.

Brief in Support of Motion to Dismiss

Almost 40 years ago, on July 31, 1976, at around 1:30 a.m., then 17-year-old Petitioner Charles Lewis shot and killed an off-duty police officer in Detroit. A Wayne County jury convicted Lewis of first-degree murder, Mich. Comp. Laws § 750.316. As a result of that conviction, the State now holds Lewis in custody in the Michigan Department of Corrections. Lewis is currently serving a life without parole sentence.

In 1988 the district court denied Lewis relief regarding a habeas petition he filed challenging his first-degree murder conviction. A panel of the Sixth Circuit affirmed the district court's order as to 17 of the 18 grounds for relief. *See Lewis v Jabe*, 891 F.2d 291 (Table), No. 88–1522, 1989 WL 145895 (6th Cir. Dec. 4, 1989) (per curiam). After further proceedings, the Sixth Circuit affirmed the district court's denial of relief to Lewis. *See Lewis v. Jabe*, 959 F.2d 234 (6th Cir. Apr 10, 1992) (Table).

Recent procedural history

On June 25, 2012, the United States Supreme Court decided *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which held that a mandatory life without parole sentence for those under the age of 18 at the time of

their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments.

Soon thereafter Lewis filed a motion for relief from judgment in the Wayne Circuit Court seeking relief from his mandatory life sentence. The trial court granted the motion, but the Michigan Court of Appeals reversed on the basis of *People v Carp*, 298 Mich App 474, 537; 828 NW2d 685 (2012), which had held that *Miller* was not to be applied retroactively to those cases on collateral review. *People v. Lewis*, No. 315520 (Order, Aug. 29, 2013).

After affirming the Court of Appeals opinion in *People v. Carp*, see 852 N.W.2d 801 (Mich. 2014), the Michigan Supreme Court denied leave to appeal. *People v. Lewis*, 857 N.W.2d 24 (Mich. Dec. 30, 2014).

On March 2, 2015, Lewis file a habeas petition which raised only his claim that under *Miller* his mandatory sentence of life imprisonment without the possibility of parole for a crime that he committed at the age of seventeen was cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

On March 30, 2015, Lewis also filed a petition for certiorari in the United States Supreme Court seeking review of the Michigan Supreme Court's December 30, 2014, order denying relief.

On August 25, 2015, the State moved to transfer Lewis' habeas petition to the United States Court of Appeals for the Sixth Circuit because it was a second or successive petition under 28 U.S.C. § 2244(b).

On October 19, 2015, this Court denied the State's motion and stayed this case pending the Supreme Court's anticipated decision in *Montgomery v. Louisiana*, which was to decide whether *Miller* was retroactive.

On January 25, 2016, the Supreme Court held that "*Miller* announced a substantive rule of constitutional law" and "is retroactive because it necessarily carry[s] a significant risk that a defendant – here, the vast majority of juvenile offenders – faces a punishment that the law cannot impose upon him." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (quotations marks and end citations omitted).

On February 11, 2016, Lewis asked the Court to lift its stay of his case. Lewis also asked the Court to expand the record and to release

him from custody on the basis that his conviction was dismissed fifteen years ago when the state trial court dismissed his conviction in an order dated April 3, 2000. (ECF No.'s 8 and 9).

On April 26, 2016, this Court entered an order lifting the stay and directed the State to respond to Lewis' claim that his conviction was dismissed by a Wayne County Circuit Judge on April 3, 2000. (Doc. #11).

1. Lewis' petition must be dismissed because his *Miller/Montgomery* claim has not been fully exhausted in state court

This Court should dismiss Lewis' *Miller/Montgomery* claim because it has not yet been fully exhausted in state court.

While the Michigan Supreme Court denied Lewis relief under *Miller* on December 30, 2014, Lewis filed a petition for certiorari with the Supreme Court, and that Court on March 7, 2016, vacated the judgment of the Michigan Supreme Court and remanded the case to the Supreme Court of Michigan for further consideration in light of *Montgomery v. Louisiana*. See *Lewis v. Michigan*, 136 S. Ct. 1357 (March 7, 2016).

Lewis' *Miller/Montgomery* claim therefore remains pending in the Michigan Supreme Court and it will not have been fully exhausted unless or until the Michigan Supreme Court denies him relief.

It appears Lewis may obtain relief given the Michigan Supreme Court's order entered in *People v. Carp*, __N.W.2d __, 2016 WL 1637709 (Mich. April 25, 2016):

[I]n conformity with the mandate of the Supreme Court of the United States, we REVERSE the November 15, 2012 judgment of the Court of Appeals, we VACATE the defendant's sentence for first-degree murder, and we REMAND this case to the St. Clair Circuit Court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Montgomery v. Louisiana*, 577 U.S. ____; 136 S Ct 718; 193 L.Ed.2d 599 (2016), and *Miller v. Alabama*, 567 U.S. ____; 132 S Ct 2455; 183 L.Ed.2d 407 (2012). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

Upon entry of such an order in Lewis' favor by the Michigan Supreme Court Lewis' habeas petition will immediately be mooted.

The state courts must first be given a full and fair opportunity to rule upon Lewis' sentencing claim under *Miller* and *Montgomery* after remand from the United States Supreme Court before Lewis can present the claim in federal court. Thus, Lewis' *Miller/Montgomery* claim is unexhausted under 28 U.S.C. § 2254(b)(1).

Response to Lewis' claim that his conviction was dismissed in an April 3, 2000 order

Lewis has sought to expand the record to include a purported April 3, 2000 order and a register of actions, and on the basis of that expanded record, he argues that the state trial court dismissed his murder conviction in 2000, and that therefore he is being held in state prison without a valid conviction or sentence.

First, this argument was not included in Lewis' habeas petition and he has not filed or sought permission to file an amended petition to include such a claim.

Second, such a claim would surely be barred by the statute of limitations since it has been more than a year since the purported April 3, 2000 order on which he relies was supposedly issued.¹

Third, Lewis has not obtained permission from the Sixth Circuit to assert this claim as would be required by 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate

¹ 28 U.S.C. § 2244(d)(1)(D) provides the limitations period shall run from the latest of "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

court of appeals for an order authorizing the district court to consider the application.”)

But, most importantly, the April 3, 2000 order on which Lewis relies has been declared fraudulent by the state trial court. When Lewis filed a copy of this 2000 order in state court, the alleged signatory of the order, Judge Gershwin A. Drain, asked the prosecutor’s office to file a response. Attached as Exhibit A is the response the prosecutor’s office filed.² The prosecutor argued that the April 3, 2000 order was a fraud.

Thereafter, on January 18, 2012, Judge Drain issued an order, attached as Exhibit B, giving some of the history of the case and denying relief because the “order” was fraudulent. The final paragraph of Judge Drain’s order provides:

This Court believes that the signature on the order submitted by Mr. Lewis is a forgery. More importantly, if in fact this Court had ordered his release back in 2000, why would Defendant have waited 12 years to be released pursuant to that order. It just doesn’t add up. Additionally, a fraudulent register of actions has been prepared or someone has entered our computer system and manipulated entries.

² It should be noted that the very last sentence of this letter contains a typographical error as it says “2010” when it clearly meant to say “2000” as it did earlier in the letter.

This Court should not allow Lewis to expand the record to include an order or a register of actions entry that the state trial court has declared to be fraudulent.

RELIEF SOUGHT

Respondent respectfully requests that the petition be dismissed because it has not been fully exhausted in State court. The State further requests that this Court deny Lewis' request to expand the record and to deny any relief regarding the forged documents Lewis has filed with this Court.

Respectfully submitted,

Bill Schuette
Attorney General

s/Bruce H. Edwards

Assistant Attorney General
Criminal Appellate Division
P.O. Box 30217
Lansing, MI 48909
(517) 373-4875
P34983

Dated: May 4, 2016

Certificate of Service

I hereby certify that on May 4, 2016, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

HONORABLE NANCY G. EDMUNDS
MAGISTRATE JUDGE MONA K. MAJZOUN

and I hereby certify that Kathy Land has mailed by United States Postal Service the papers to the following non-ECF participant:

Charles Lewis, #150709
Lakeland Correctional Facility
141 First Street
Coldwater, MI 49036

Respectfully submitted,

Bill Schuette
Attorney General

s/Bruce H. Edwards

Assistant Attorney General
Criminal Appellate Division
P.O. Box 30217
Lansing, MI 48909
(517) 373-4875
P34983