IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

DENNIS LEBLANC,

Petitioner,

vs.

RANDALL MATHENA,

Chief Warden, Red Onion State Prison, Pound, Virginia,
COMMONWEALTH OF VA,
Respondent(s)

Case No. 2:12cv340

PETITION FOR WRIT OF HABEAS CORPUS BY PRISONER IN STATE CUSTODY

Petitioner Dennis LeBlanc, now incarcerated at the Red Onion State Prison in Pound, Virginia, respectfully petitions this Court for relief from his unconstitutional sentence under 28 U.S.C. § 2254.

I. INTRODUCTION

1. Mr. LeBlanc is currently serving two sentences of life imprisonment for two nonhomicide offenses that occurred out of a single course of conduct committed on July 6, 1999, when he was 16 years old. Because the offenses Mr. LeBlanc was convicted of occurred after January 1, 1995, he is ineligible for parole. Va. Code Ann. § 53.1-165.1 (eliminating parole eligibility for individuals convicted of felonies committed on or after January 1, 1995). In Graham v. Florida, 130 S. Ct. 2011 (2010), the United States Supreme Court clearly established a categorical

rule that juveniles convicted of nonhomicide offenses cannot be sentenced to life without parole. Id. at 2034.

2. Despite the fact that Mr. LeBlanc's sentence is unconstitutional under Graham, the Virginia courts summarily denied Mr. LeBlanc's request for relief, finding that Virginia's geriatric statute renders Mr. LeBlanc's sentence compliant with Graham. This decision is an unreasonable application of, and is contrary to, United States Supreme Court precedent. See 28 U.S.C. § 2254(d)(1). The state courts' failure to grant Mr. LeBlanc relief from his unconstitutional sentence warrants habeas relief from this Court.

II. PROCEDURAL HISTORY

3. On July 15, 2002, Dennis LeBlanc was found guilty of rape and abduction for an offense that occurred on July 6, 1999, after a one-day bench trial in the Virginia Beach Circuit Court (case number CR02-1515).

4. On March 4, 2003, Dennis LeBlanc received two sentences of life imprisonment. Because the offenses occurred after January 1, 1995, he is ineligible for parole. Va. Code Ann. § 53.1-165.1. Mr. LeBlanc did not appeal his conviction and sentence.

5. On May 17, 2010, the United States Supreme Court held in Graham v. Florida, 130 S. Ct. 2011 (2010), that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." Id. at 2034.

6. In light of Graham, Mr. LeBlanc filed a Motion to Vacate Invalid Sentence on May 11, 2011, in the Virginia Beach Circuit Court. On August 9, 2011, after an evidentiary hearing, the circuit court denied Mr. LeBlanc's motion and concluded that Virginia's geriatric statute, which permits inmates to apply for conditional release at age sixty, provides "an appropriate mechanism"

for compliance with Graham.

7. On November 9, 2011, Mr. LeBlanc filed a petition for appeal in the Supreme Court of Virginia. The Supreme Court of Virginia held oral arguments on April 3, 2012, and issued an order refusing Mr. LeBlanc's petition for appeal on April 13, 2012. Mr. LeBlanc filed a petition for rehearing at the Supreme Court of Virginia on April 26, 2012, and the court denied rehearing on June 15, 2012.

8. This petition is Mr. LeBlanc's first and only application for federal habeas corpus relief.

III. GROUNDS SUPPORTING THE PETITION FOR RELIEF

9. Mr. LeBlanc is entitled to habeas relief because the circuit court's denial of relief was contrary to, and involved an unreasonable application of, federal law clearly established by United States Supreme Court's decision in Graham v. Florida, 130 S. Ct. 2011 (2010) and the Eighth Amendment. See 28 U.S.C. § 2254(d)(1).

A. *Graham v. Florida* Requires that Mr. LeBlanc Be Afforded a Realistic and Meaningful Opportunity for Release.

10. In Graham, the Supreme Court held that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." Id. at 2030. The Court in Graham reaffirmed the principle that there are "fundamental differences between juvenile and adult minds." Id. at 2026. The Court reasoned that because of their lack of maturity, vulnerability to negative outside influences, and undeveloped characters, children under the age of eighteen possess an inherently "lessened culpability." Id. (citing Roper v. Simmons, 543 U.S. 551, 569-70 (2005)). Therefore, the Court found that these children "are less deserving of the most severe

punishments." Id.

11. The Court further recognized that "[t]here is a line 'between homicide and other serious violent offenses against the individual.' Serious nonhomicide crimes . . . cannot be compared to murder in their 'severity and irrevocability.'" Id. at 2027 (quoting Kennedy v. Louisiana, 554 U.S. 407, 438 (2008)). Both the "age of the offender and the nature of the crime" support the conclusion that life imprisonment without parole is an unreasonably harsh sentence for a juvenile nonhomicide offender. Graham, 130 S. Ct. at 2027-28 ("[T]he sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restitution.").

12. Moreover, the Court found that a life in prison without parole sentence for a juvenile nonhomicide offender cannot be justified by the penological theories of retribution, deterrence, incapacitation, or rehabilitation. Id. at 2028-30. Instead, the Court stated that this "perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term" could only be avoided by a "categorical rule against life without parole for juvenile nonhomicide offenders." Id. at 2033.

13. In noting that life without parole is the "second most severe penalty permitted by law," the Court further recognized that a life without parole sentence is *more* severe when imposed on a juvenile as compared to an adult because a juvenile offender will "serve more years and a greater percentage of his life in prison than an adult offender." Id. at 2028. "A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only," and this reality was relevant to the Court's determination that life without parole is unconstitutional for juvenile nonhomicide offenders. Id.

14. Therefore the Court held that teenagers who commit nonhomicide offenses must be afforded "some *realistic* [and meaningful] opportunity to obtain release." Id. at 2030, 2034 (emphasis added).

B. Virginia's Geriatric Provision Does Not Provide Mr. LeBlanc the Realistic and Meaningful Opportunity for Release Required by *Graham*.

15. The Virginia Supreme Court held that the circuit court did not err in ruling that Mr. LeBlanc's life without parole sentences are not in violation of the rule announced in Graham because Virginia law allows for the conditional release of prisoners who are over the age of 60 and have served at least 10 years of their sentence under Virginia Code § 53.1-40.01. See Angel v. Commonwealth, 704 S.E.2d 386, 401-02 (Va. 2011). However, the remote possibility of release under this provision, which is akin to executive clemency, does not render Mr. LeBlanc's unconstitutional life without parole sentences compliant with the requirements of Graham.

16. In Graham, the Court held that the "remote possibility" of release through executive clemency does not "mitigate the harshness of the sentence." 130 S. Ct. at 2027 (citing Solem v. Helm, 463 U.S. 277, 300-01 (1983)). Clemency is an "*ad hoc* exercise," untethered to any meaningful standards and inconsistently granted. Solem, 463 U.S. at 301. Similarly, a prisoner seeking conditional release under the geriatric provision must satisfy the undefined requirement of demonstrating "compelling reasons for release," a burden that does not fall on other parole applicants. Va. Parole Bd. Admin. P. No. 1.226. What constitutes a "compelling reason" is never defined.

17. According to Virginia's Criminal Sentencing Commission, 95.4% of applications under Virginia's geriatric provision are denied only because of the seriousness of the offense.

Virginia Criminal Sentencing Commission, Virginia's Geriatric Release Provision, at 10 (Nov. 10, 2008). Denying a juvenile nonhomicide offender release based on the seriousness of the offense contravenes the rationale in Graham that teens engage in conduct they might not have undertaken as adults. Additionally, the Parole Board's Policy Manual explains that the board is not required to consider an offender's rehabilitation and cannot consider the offender's young age at the time of the offense. Va. Parole Bd. Policy Manual, Sec. I.

18. Furthermore, like executive clemency, this provision is almost never utilized. Hundreds of inmates have submitted applications under this provision but since its enactment in 1995, only twenty inmates, or one percent of applicants, have been released under it. Virginia Criminal Sentencing Commission, 1/14/11 Presentation, at 26 (Jan. 14, 2011); Meredith Farrar-Owens, Virginia Criminal Sentencing Commission, Geriatric Inmates in Virginia Prisons, at 28 (2010).

19. Indeed, the geriatric provision is more akin to executive clemency rather than parole because it was passed as a part of Virginia's decision to abolish parole. S.B. 3001, 1994 Leg., Spec. Sess. II (Va. 1994). The Virginia Criminal Sentencing Commission has explained that the rationale for the geriatric statute is the release of older inmates who, "by virtue of their age and physical condition, are unlikely to pose a threat to public safety." Farrar-Owens, supra, at 14. Conditional release of these geriatric prisoners was designed to help the Department of Corrections save money, especially with regard to medical expenses for its oldest and most infirm inmates. Id. at 15. Thus, Virginia Code § 53.1-40.01 was never intended to provide the kind of remedy contemplated under Graham.

C. The Virginia Courts' Determination that the Geriatric Provision Renders Mr. LeBlanc's Life Without Parole Sentence Compliant with *Graham* is an Unreasonable Application of Federal Law.

20. Because the possibility for release under Virginia's geriatric provision is no more meaningful or realistic than the possibility of release by executive clemency, which was rejected by the Court in Graham, 130 S. Ct. at 2027, the Virginia courts' ruling that this statute saves Mr. LeBlanc's unconstitutional sentence is an unreasonable application of federal law. See 28 U.S.C. § 2254(d)(1).

21. Moreover, because this statute ignores a person's growth and instead affords an opportunity for freedom only to those who are at the end of their life, it is diametrically opposed to the reasoning of Graham: that juveniles often mature out of their impulsive states and they should be given a meaningful opportunity of release based on that development. See Graham, 130 S. Ct. at 2030 (incarcerating juveniles for their entire lives "forswears altogether the rehabilitative ideal").

22. In addition, because Mr. LeBlanc was 16 at the time of the offense, he will have to serve nearly 44 years before he reaches the age of 60 and becomes eligible to apply for relief under this statute. Consequently, this provision creates harsher sentences for juvenile offenders than for adult offenders with the same convictions and sentences, and Mr. LeBlanc will have to serve more time than any similarly situated adult offender before being eligible for relief. The disproportionate harshness imposed on juveniles is precisely one of the factors considered by the Graham Court in finding life without parole unconstitutional for juvenile nonhomicide offenders. Id. at 2028.

23. Mr. LeBlanc was only 16 at the time of his offense, and he did not commit homicide. Yet under Virginia law Mr. LeBlanc is ineligible for parole consideration on his life sentence. Va. Code Ann. § 53.1-165.1. By any reasonable application of Graham, Mr. LeBlanc's parole-ineligible

life sentence violates the Eighth Amendment's prohibition against cruel and unusual punishments. See Graham, 130 S.Ct. at 2027.

24. The state courts' decisions denying relief is contrary to, and involves an unreasonable application of, the United States Supreme Court's decision in Graham and the Eighth Amendment. Mr. LeBlanc is therefore entitled to habeas relief. See 28 U.S.C. § 2254(d)(1).

PRAYER FOR RELIEF

For all the above stated reasons, and any other such reasons as may be made upon amendment of this petition, Dennis LeBlanc respectfully asks this Honorable Court to grant him the following relief:

(A) Issue a writ of habeas corpus granting petitioner relief from his unconstitutional sentence;

(B) If the Court determines there is a need for further factual development, grant petitioner an evidentiary hearing on the claims presented in this petition;

(C) Permit petitioner an opportunity to brief and argue the issues presented in this petition;

(D) Afford petitioner an opportunity to reply to any responsive pleading filed by respondent;

(E) Grant such further and other relief as may be appropriate.

Respectfully submitted,

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* *Applying for pro hac vice admission*

ATTORNEY'S VERIFICATION

I affirm under penalty of perjury that, upon information and belief, this Petition for Writ of Habeas Corpus is true and correct. Executed on 6.19 ____, 2012.

Jennifer T. Stanton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 6.19 ___, 2012, a copy of the foregoing was served by first class mail on:

Kenneth T. Cuccinelli, II
Susan M. Harris
Office of the Attorney General
900 East Main Street
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Jennifer T. Stanton