No. 17-5066

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 17, 2017
DEBORAH S. HUNT, Clerk

In re: JASON B. BRYANT,

Movant.

O R D E R

Before: KEITH, CLAY, and McKEAGUE, Circuit Judges.

Jason B. Bryant, a Tennessee prisoner proceeding through counsel, moves this court for an order authorizing the district court to consider a second or successive habeas corpus petition challenging his sentence under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(b).

Bryant pleaded guilty, along with five others, in Tennessee state court to three counts of first-degree murder, one count of attempted first-degree murder, two counts of especially aggravated kidnapping, two counts of aggravated kidnapping, and one count of theft over $1,000. He was sentenced to a term of life imprisonment without the possibility of parole for each of the three first-degree murder convictions, to be served consecutively to a twenty-five year term of imprisonment for the attempted murder conviction. He also received concurrent sentences of twenty-five years for the especially aggravated kidnapping convictions, twelve years for the aggravated kidnapping convictions, and four years for the theft conviction. At the time of his sentencing hearing, Bryant was fifteen years old. The Tennessee Court of Criminal Appeals affirmed his sentence on direct appeal, *State v. Howell*, 34 S.W.3d 484 (Tenn. Crim. App. 2000), and the Tennessee Supreme Court denied him leave to appeal. Bryant sought post-conviction relief in the Tennessee state court system, ultimately to no avail. The Supreme Court denied his petition for a writ of certiorari, filed in response to the Tennessee Supreme Court's rejection of his state post-conviction petition. *Bryant v. Tennessee*, 543 U.S. 1149 (2005).

In 2005, Bryant filed a § 2254 petition, arguing that: 1) his guilty pleas were unlawfully induced, involuntary, and unknowing; 2) counsel was ineffective; 3) he was denied due process and a fair trial because his case was joined with those of adults who were death penalty-eligible even though, as a juvenile, he was ineligible; and 4) he was denied due process by an "all or nothing" plea bargain offer, which required him to plead guilty before the state would accept the plea bargains of his co-defendants. The district court dismissed the petition as time-barred, and declined to issue a certificate of appealability. *Bryant v. Carlton*, No. 2:05-CV-151, 2006 WL 44269 (E.D. Tenn. Jan. 6, 2006). Bryant appealed but then sought and obtained a voluntary remand from this court so that he could file a Federal Rule of Civil Procedure 59(e) motion in the district court. On remand, the district court granted Bryant's Rule 59(e) motion, finding now that his petition was timely, but later granted the respondent's motion to dismiss, finding that the Supreme Court's decision in *Lawrence v. Florida*, 549 U.S. 327 (2007), acted to render Bryant's petition untimely again. *Bryant v. Carlton*, No. 2:05-CV-151, 2007 WL 2263067 (E.D. Tenn. Aug. 3, 2007). We declined to issue a certificate of appealability.

In 2017, Bryant filed the current motion, in which he argues that the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460, __, 132 S. Ct. 2455 (2012), made retroactively applicable by *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), renders his life-without-parole sentences unconstitutional.

A petitioner must seek authorization from this court to file a second or successive habeas petition under § 2254 in the district court. 28 U.S.C. § 2244(b)(3)(A). The determination of a prior petition "on its merits" triggers the restrictions on second or successive applications. *See Slack v. McDaniel*, 529 U.S. 473, 485-86 (2000). If the first habeas petition was dismissed as procedurally barred, as is the case here, that dismissal is "on the merits," and the movant must obtain authorization from this court to file another § 2254 petition. *In re Cook*, 215 F.3d 606, 607-08 (6th Cir. 2000).

A second or successive § 2254 petition containing new claims must satisfy at least one of the two prongs in 28 U.S.C. § 2244(b)(2): (1) "the applicant shows that the claim relies on a new

rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"; or (2) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," and "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." The petitioner must make a "prima facie showing" that the applicable criteria are satisfied. 28 U.S.C. § 2244(b)(3)(C).

Bryant has made a prima facie showing. In *Miller*, the Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Miller*, 132 S. Ct. at 2460. In *Montgomery*, the Supreme Court held that *Miller* created a new substantive rule of constitutional law retroactively applicable on collateral review. *Montgomery*, 136 S. Ct. at 736. When Bryant's original § 2254 petition was filed in 2005, neither *Miller* nor *Montgomery* was law, and the rule now relied upon was therefore unavailable. *See* 28 U.S.C. § 2244(b)(2). It is unclear from the record if Bryant was sentenced under a mandatory framework as outlined by *Miller*, but Bryant has alleged enough facts to "warrant a fuller exploration in the district court." *In re Lott*, 366 F.3d 431, 433 (6th Cir. 2004) (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)).

Accordingly, Bryant's motion for an order authorizing a second or successive habeas petition is **GRANTED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk