

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID R. MCGINLEY – PETITIONER
VS.
COMMONWEALTH OF PENNSYLVANIA, et. al. – RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

DAVID R. MCGINLEY CX-1921
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PHONE: N/A

QUESTION PRESENTED

IS IT A CONSTITUTIONAL ERROR THAT CONFLICTS WITH UNITED STATES SUPREME COURT HOLDINGS WHERE STATE COURTS FOUND A MANDATORY MINIMUM SENTENCING STATUTE UNCONSTITUTIONAL BUT DID NOT DECLARE THE DECISION RETROACTIVELY APPLICABLE TO CASES ON COLLATERAL REVIEW AS IS REQUIRED OF NEW SUBSTANTIVE RULES OF CONSTITUTIONAL LAW?

Suggested answer: YES

LIST OF PARTIES

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Clerk

Supreme Court of the United States

Washington, DC 20543

Office of the Attorney General

Commonwealth of Pennsylvania

Strawberry Square

Harrisburg, PA 17120

Office of the District Attorney

Dauphin County Courthouse

101 Market Street, Room 205

Harrisburg, PA 17101

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Dauphin County Common Pleas Court

Pennsylvania Superior Court

Pennsylvania Supreme Court

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix A and is unpublished.

The order of the Pennsylvania Superior Court denying the Application For Reargument appears at Appendix B and is unpublished.

The opinion of the Dauphin County Common Pleas Court appears at Appendix C and is unpublished.

The order of the Pennsylvania Supreme Court denying discretionary review of the Petition For Allowance Of Appeal appears at Appendix D and is unpublished.

The order of the Pennsylvania Supreme Court denying the Application For Reconsideration appears at Appendix E and is unpublished.

Docketing statements for the above courts appear at Appendix J.

JURISDICTION

For cases from state courts:

The date on which the Pennsylvania Supreme Court denied discretionary review of the Petition For Allowance Of Appeal was March 12, 2018.

A timely Application For Reconsideration was denied by the Pennsylvania Supreme Court on April 12, 2018.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

The notification required by Rule 29.4(c) to the Pennsylvania Attorney General has been met (see PROOF OF SERVICE).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

United States Constitution, Fifth Amendment – text appears a Appendix H.

Unitd States Constitution Fourteenth Amendment – text appears at Appendix I.

42 Pa.C.S. § 9545 – text appears at Appendix G.

42 Pa.C.S. § 9718 – text appears at Appendix F.

STATEMENT OF THE CASE

At the conclusion of a jury trial on October 11, 1995, in the Common Pleas Court of Dauphin County, Pennsylvania, Docket No. 1634 CR 1994, the petitioner was found guilty of one count each of Corruption of a Minor [18 Pa.C.S. § 6301], Indecent Exposure [18 Pa.C.S. § 3127], Indecent Assault [18 Pa.C.S. § 3126(a)(6)], Aggravated Indecent Assault [18 Pa.C.S. § 3125(a)(6)], and Involuntary Deviate Sexual Intercourse [18 Pa.C.S. § 3123(a)(5)].

Pursuant to a state mandatory minimum sentencing statute, 42 Pa.C.S. § 9718, the petitioner was sentenced to an aggregate term of ten (10) to thirty (30) years imprisonment on December 7, 1995. He began serving the sentence on that date.

The Pennsylvania Supreme Court declared the mandatory minimum sentencing statute under which the petitioner had been sentenced unconstitutional, non-severable, and void on June 20, 2016.

The petitioner filed a Post-Conviction Relief Act (PCRA) petition on July 29, 2016, within the 60-day window to claim and exception to the PCRA's one-year time limit. The petition was deemed untimely and denied by the trial court without addressing the core issue on October 27, 2016 (Appendix C).

The petitioner filed a timely appeal to the Pennsylvania Superior Court under Docket No. 1940 MDA 2016, which was denied on June 6, 2017, in agreement with the lower court's determination that the petition was untimely, again without

addressing the core issues (Appendix A). An Application For Reargument was denied on August 24, 2017 (Appendix B).

The petitioner filed a timely Petition For Allowance Of Appeal in the Pennsylvania Supreme Court under Docket No. 657 MAL 2017. Discretionary review was denied on March 12, 2018 (Appendix D). An Application For Reconsideration was denied without discretionary review on April 12, 2018 (Appendix E).

This timely appeal follows.

REASONS FOR GRANTING THE PETITION

NOW COMES the *pro se* petitioner, David R. McGinley, an inmate in a state correctional facility, who seeks the determination of an important constitutional question left unaddressed by state courts which raises an issue that conflicts with relevant decisions made by the United States Supreme Court and which affects many other similarly situated defendants:

IS IT A CONSTITUTIONAL ERROR THAT CONFLICTS WITH UNITED STATES SUPREME COURT HOLDINGS WHERE STATE COURTS FOUND A MANDATORY MINIMUM SENTENCING STATUTE UNCONSTITUTIONAL BUT DID NOT DECLARE THE DECISION RETROACTIVELY APPLICABLE TO CASES ON COLLATERAL REVIEW AS IS REQUIRED OF NEW SUBSTANTIVE RULES OF CONSTITUTIONAL LAW?

On October 11, 1995, the petitioner was convicted of one count each of Involuntary Deviate Sexual Intercourse, Aggravated Indecent Assault, Indecent Assault, Indecent Exposure, and Corruption of a Minor.

On December 7, 1995, the petitioner was sentenced to an aggregate term of ten to thirty years imprisonment, part of which included mandatory minimum sentences imposed pursuant to state statute 42 Pa.C.S. § 9718. At that time, § 9718 mandated a minimum sentence of five years for Involuntary Deviate Sexual Intercourse and two and one-half years for Aggravated Indecent Assault. The petitioner began serving the sentence on that date.

On January 25, 2016, this Court issued a decision and opinion in the case of *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). Pennsylvania courts had notice of

this decision before the Pennsylvania Supreme Court considered the constitutionality of the mandatory minimum sentencing statute, § 9718. As shall be explained below, the definitions and holdings expressed in *Montgomery*, which reflect numerous prior decisions by this Court, form the basis of the petitioner's argument.

On June 20, 2016, in the case of *Commonwealth v. Wolfe*, 140 A.3d 651 (Pa. 2016), the Pennsylvania Supreme Court ruled that "section 9718 was irremediably unconstitutional on its face, non-severable, and void." That decision was based upon the court's analysis of the United States Supreme Court's holding in *Alleyne v. United States*, 133 S.Ct. 2151 (2013), the *ex post facto* clauses of both the Pennsylvania and United States Constitutions, and other constitutional factors.

On July 29, 2016, the petitioner filed a Post-Conviction Relief Act (PCRA) petition pursuant to 42 Pa.C.S. § 9545(b)(2), which provides:

Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

The petitioner's PCRA petition invoked an exception to the PCRA's one-year time limit based on § 9545(b)(1)(iii), which states:

The right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time provided in this section and has been held by that court to apply retroactively.

The petitioner assumed that the *Wolfe* decision would be automatically retroactive

through the action of the *ab initio* doctrine, if not the Supreme Court's ruling in *Montgomery*, which held that new substantive rules of constitutional law must be given retrospective effect regardless of when a sentence was imposed. However, the Pennsylvania Supreme Court did not hold *Wolfe* to apply retroactively to cases on collateral review, resulting in the petitioner's PCRA petition being dismissed as untimely. That dismissal was upheld by the Pennsylvania Superior Court. A discretionary hearing was denied in a subsequent appeal to the Pennsylvania Supreme Court.

The *Montgomery* Court provided a clear definition of new substantive rules of constitutional law:

"Substantive rules include rules forbidding criminal punishment of certain primary conduct, as well as rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. Substantive rules set forth categorical guarantees that place certain criminal laws and punishments altogether beyond a state's power to impose" (emphasis added).

Although the *Montgomery* Court's focus was on the retroactive applicability of the prohibition against juvenile life sentences without the possibility of parole, the above definition is not specific to one particular case, but applies to any case where a category or form of punishment is prohibited by a new rule of constitutional operation. The petitioner respectfully submits that the *Wolfe* decision constitutionally prohibits a certain category of punishment (mandatory minimum sentences), and prohibits it for a class of defendants (sex offenders) because of their offenses (the crimes enumerated by the statute); thus, the *Wolfe* decision meets the

criteria to be a new substantive rule of constitutional law.

The *Montgomery* Court stated how all courts must act with regard to new substantive rules: "...courts must give retroactive effect to new substantive rules of constitutional law" (emphasis added). Again, the Court did not single out one particular new substantive rule, but indicated that all new substantive rules (plural) must be given retroactive effect. The Court explained how this is allowed under *Teague v. Lane*, 109 S.Ct. 1060 (1989):

"The plurality in *Teague v. Lane* sets forth a framework for retroactivity in cases on federal collateral review. Under *Teague*, a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced. *Teague* recognizes, however, two categories of rules that are not subject to its general retroactivity bar" (emphasis added).

Those two categories of rules are new substantive rules of constitutional law and new watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. This instant matter invokes the first *Teague* exception.

While *Teague* applies primarily to federal courts, the *Montgomery* Court warned what state courts may expect with regard to new substantive rules of constitutional law:

"If the Constitution establishes a rule and requires that the rule have retroactive application, then a state court's refusal to give the rule retroactive effect is reviewable by the United States Supreme Court. States may not disregard a controlling, constitutional command in their own courts" (emphasis added).

And which state courts must apply retroactivity to new substantive rules:

“When a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires **state collateral review courts** to give retroactive effect to that rule” (emphasis added).

And regarding punishments barred by the Constitution specifically:

“A conviction under an unconstitutional law is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it, but if the laws are unconstitutional and void, the circuit court acquires no jurisdiction of the causes [subject matter jurisdiction]. The same logic governs a challenge to a punishment that the Constitution deprives the states of authority to impose. A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law, and, as a result, void. It follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of when the conviction or sentence became final after the rule was announced” (emphasis and clarification added).

“An unconstitutional law is void, and is as no law. A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner’s sentence became final before the new law was held unconstitutional. **There is no grandfather clause that permits states to enforce punishments the Constitution forbids.** To conclude otherwise would undercut the Constitution’s substantive guarantees. No circumstances call more for the invocation of complete retroactivity than when the conduct being penalized is constitutionally immune from punishment. The same principle should govern the application of substantive rules on collateral review. Where a state lacks the power to proscribe a habeas petitioner’s conduct, it cannot constitutionally insist that he remain in jail” (emphasis added).

“If a state may not constitutionally insist that a prisoner remain in jail on federal habeas review, it may not constitutionally insist on the same result in its own postconviction proceedings. **Under the Supremacy Clause of the Constitution, state collateral courts have no greater power than federal courts to mandate a prisoner continue to suffer punishment barred by the Constitution.** If a state collateral proceeding is open to a claim controlled by federal law, the state court has a duty to grant the relief that federal law

requires. Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, states cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge” (emphasis added).

Under Pennsylvania law, collateral review (PCRA) courts are open to the claim that an unconstitutional sentence must be vacated through section 9545(b)(1)(iii) and (b)(2), thus permitting prisoners to challenge the lawfulness of their confinement and establishing a Due Process right under the Fifth and Fourteenth Amendments to have the proceedings conducted in conformance to constitutional standards. Moreover, the Fourteenth Amendment’s right to Equal Protection of the Law would seem to be invoked; when the Constitution prohibits a specific form of punishment and that prohibition is deemed to apply retroactively to all related cases regardless of when a particular case became final, then the prohibition of ALL punishments barred by the Constitution should equally be deemed to apply retroactively to related cases. Since the outcome of this instant challenge will be determined by the substantive constitutional right of not being sentenced to and made to serve a sentence that includes a mandatory minimum term imposed pursuant to a void statute, the Pennsylvania Supreme Court and its subsidiaries have erred as a matter of law by refusing to give retrospective effect to the *Wolfe* decision.

Despite the fact that *Montgomery* addresses juvenile life-without-parole sentences, claims that *Montgomery* does not apply to this instant case are specious. It is the **DEFINITIONS** in *Montgomery* that apply, definitions that echo and clarify those in *Teague*, and which are the result of decisions made in prior cases

dating back as far as 1880. It would appear that Pennsylvania's courts are following the path of *Miller v. Alabama*, 132 S.Ct. 2455 (2012), in that the Louisiana Supreme Court, like Pennsylvania's Supreme Court, initially held that *Miller* did not have retroactive effect in cases on collateral review. This holding, like the one in *Wolfe*, seems intended to force review by this Court to clarify and correct constitutional misinterpretation.

It is apparent from the above that:

1. The *Wolfe* decision constitutionally prohibits a certain category of punishments, mandatory minimum sentences mandated by § 9718, to a class of defendants because of their status as sex offenders who have committed the crimes enumerated by the statute, and places the authorization and jurisdiction to impose a sentence on the statute's basis altogether beyond the power of Pennsylvania's courts;
2. The *Wolfe* decision meets the definition and criteria of a new substantive rule of constitutional law;
3. Pennsylvania collateral review (PCRA) courts are therefore required to give the *Wolfe* decision retroactive effect regardless of when the sentence was imposed;
4. The failure of Pennsylvania's courts to declare the *Wolfe* decision retroactive as required by this Court's definitions and holdings deprives the petitioner and other similarly situated defendants of their Due Process rights under the Fifth and Fourteenth Amendments;

5. The Fourteenth Amendment's Equal Protection of the Laws would seem to compel the conclusion that all decisions finding any punishment barred by the Constitution must be given retroactive effect regardless of when the case became final; and

6. The failure of Pennsylvania's courts to declare the *Wolfe* decision retroactive is in clear opposition to both the *Montgomery* Court's holdings and prior holdings by the United States Supreme Court, subjecting this matter to review by this Court.

The petitioner asserts that by virtue of the above reasoning he is serving a sentence rendered unconstitutional, illegal and void. He further asserts that his current sentence should be vacated and that he should either be resentenced or discharged from confinement. He therefore respectfully asks that the Court consider this instant matter and issue an Opinion as to whether the declaration that the mandatory minimum sentencing statute identified herein is unconstitutional should be given retrospective effect for cases on collateral review.

CONCLUSION

The petitioner humbly prays that the petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a horizontal line and a large, stylized 'D'.

Date: June 25, 2018