

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DOIATAH GRAY — PETITIONER
(Your Name)

vs.

STEPHANIE DORETHY — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Seventh Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Doiakah Gray - K70323
(Your Name)

P.O. Box 1700
(Address)

Galesburg, IL 61402
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Are state prisoners governed by *Dodd v. United States*, 545 U.S. 353 (2005) (which governs the activation of the limitations period for newly recognized rights by the United States Supreme Court for federal prisoners). Or, are state prisoners governed by *Tyler v. Cain*, 533 U.S. 656 (2001) (which starts the limitations period for state prisoners after the United States Supreme Court has determined the newly recognized right applies retroactively)?

2. Is the one-year time limitation period activated at the same time for state and federal prisoners? Where federal prisoners have direct access to the federal courts; while state prisoners must first exhaust their state remedies first before they can access the courts (No Circuit or Court of Appeals have answered this question).

3. Is 28 U.S.C. § 2244 (d)(1)(C) unconstitutionally vague or inapplicable to state prisoners who file successive collateral proceeding that do not toll the time limitations period under Section 2244 (d)(1)(C) and 28 U.S.C. § 2254?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ 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:

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OTHER

Seventh Circuit Court of Appeals Circuit Rule 22.2(a)(3)

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

- ☐ reported at Gray v. Dorethy, Appellate No. 17-3148; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

- ☐ reported at Gray v. Dorethy, District Court No. 17C 258; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was July 12, 2019.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Sixth Amendment to the United States Constitution
2. Eighth Amendment to the United States Constitution
3. Fourteenth Amendment to the United States Constitution
4. 28 U.S.C. § 2244 (d)(1)
5. 28 U.S.C. § 2244 (d)(1)(C)
6. 28 U.S.C. § 2244 (d)(1)(A)
7. 28 U.S.C. § 2244 (b)(3)(A)
8. 28 U.S.C. § 2244 (b)(3)(C)

STATEMENT OF THE CASE

The petitioner was convicted of first degree murder in the State of Illinois, Cook County. At the time of the offense, the petitioner was a 17 year old juvenile. He was given an extended term 80 year de facto life sentence without the trial Court considering his age and related factors.

On September 13, 2013, the petitioner filed a successive post conviction petition¹ in the Circuit Court of Cook County, alleging his 80 year de facto life sentence violated Miller v. Alabama, 132 S.Ct. 2455 (2012).

The petition for leave to file a successive post conviction petition was denied.

On November 9, 2016, the Illinois Appellate Court affirmed the Circuit Court's denial of the petitioner's request to file a successive post conviction petition. (Appendix-D)

1. See 725 ILCS 5/5-122(f) (requiring offenders to file a petition for leave to file a successive post conviction petition - meeting the Cause and Prejudice test).

On December 23, 2016, the petitioner filed an application to file a second or successive federal habeas corpus petition, 28 U.S.C. § 2244(b)(3), alleging a Miller violation.

On January 12, 2017, the Seventh Circuit Court of Appeals granted the petitioner leave to file a successive habeas petition (Appendix B).

On May 2, 2017, the respondent filed a motion to dismiss the petitioner's habeas petition as time-barred (Doc #22).

On May 12, 2017, the petitioner filed a reply to the respondent's motion (Doc #23).

On June 13, 2017, the respondent filed a reply in support of her motion (Doc #22).

In the respondent's motion, she argued that the petitioner was time-barred because he had one year from the ruling of *Miller v. Alabama*, 132 S. Ct. 2455 (2012), decided June 25, 2012. Her argument rested on *Dodd v. United States*, 545 U.S. 353, 357 (2005) (the limitations period begins to run for federal prisoners

On the date the right is initially recognized rather than the date that right is held to be retroactively applicable). The respondent went on to argue that although *Dodd* was decided for federal prisoners, the Seventh Circuit has held the limitations period applies to state prisoners. *Johnson v. Robert*, 431 F.3d 992, 993 (7th Cir. 2005) (per curiam).

However, the petitioner argued that *Dodd* cannot apply to state prisoners who files a successive state post conviction petition pursuant to 725 ILCS 5/5-122(f) (West 2013). Because Section 5-122(f) does not allow a state prisoner to file the post conviction petition to be docketed, but first requires the inmate to file a petition for leave to file the successive petition after meeting the Cause and prejudice test.

If the petition for leave to file is denied, the post conviction petition cannot be filed, the inmate must then move along to the Illinois appellate process.

During this petition for leave to file and appellate process, the federal habeas corpus petition time limit is not tolled. See *Martinez v. Jones*, 556 F.3d 637, 638-39 (7th Cir. 2009) (the state courts denied

leave to file the successive post conviction petitions, they were not properly filed for tolling purposes). Therefore, if a state prisoner files a successive post-conviction - leave to file post-conviction petition (see Section 5-122(f)), exactly what the petitioner filed - the time limit under 2244(d)(1) does toll.

This becomes even more problematic when, like the petitioner, the state prisoner has already filed a habeas petition and must now file leave to file a second or successive habeas petition. 28 U.S.C. § 2244(b)(3), which the petitioner did and was granted leave (Appendix-B).

However, the petitioner's leave for post conviction relief never tolled the time for his successive habeas petition, although it took him three years to exhaust his state remedies (see Appendix-D).

Under Dodd a state prisoner who is denied leave to file a successive post-conviction petition cannot toll his time under 2244(d)(1) and 28 U.S.C. § 2254 because he still has to go through the state's court appellate process - which takes years.

The petitioner contends that state prisoners are still governed by *Tyler v. Cain*, 533 U.S. 656, 662 (2001), which was not overturned by *Dodd*. *Tyler* was decided in the context of state prisoners and considered lengthy process that state prisoners must undergo before they can access the federal courts. *Tyler* also considered state inmates who already filed a federal habeas petition and had to seek leave under "2244(b)(3)".

Tyler should govern the start of the one year limitation period to file a federal habeas petition after the United States Supreme Court rules on a newly recognized right such as *Miller* (see Section 2244(d)(1) and 2244(d)(1)(C)); and only federal prisoners should be governed by *Dodd*.

REASONS FOR GRANTING THE PETITION

1) To determine if State prisoners are governed by Tyler v. Cain that restarts the one-year time limitations period for new recognized rights by the United States Supreme Court; or are State prisoners governed by Dodd v. United States that starts the one-year time limitations for federal prisoners.

In the appellee's motion to dismiss (Doc #22), she argues that "[U]nder" 2244(d)(1)(c), the limitations period begins to run on "the date on which the constitutional right asserted was initially recognized by the Supreme Court..." (Doc #22, pg. 9), and that "the Supreme Court has confirmed that the limitations period begins to run on the date the right is initially recognized rather than the date that right is held to be retroactively applicable. Dodd v. United States, 545 U.S. 353, 357 (2005). Citing Dodd as addressing "materially identical" language, the Seventh Circuit has held that the limitations period

for section 2254 habeas petitions under Section 2244(d)(1)(c) similarly begins to run on the date the right was initially recognized, not on the date the right was made retroactive.

Johnson v. Robert, 431 F.3d 992, 992-93 (7th Cir. 2005) (per curiam)... (Id).

In responses to the appellee's motion to dismiss, the appellant argued "Johnson was decided in the context of an application to file a second or successive federal habeas corpus petition (...), and Dodd was decided in the context of a federal prisoner under '2255.'" (Petitioner's Respond To The Respondent's Motion To Dismiss: hereafter "Pet R." pg. 15).

The district Court agreed with the appellee and ruled the appellant was time-barred because "the Seventh Circuit extended Dodd to '2254 petitioners like Gray, whose claim arises from a state court judgment." (Appendix-C, pg. 5)

"Thus it is Miller, not Montgomery, that started the one-year clock on Gray's petition.

Miller was decided on June 25, 2012, and therefore the time for Gray to file a federal habeas corpus petition ran out on June 25, 2013" (Id).

The appellant filed his Miller Claim in a successive post-conviction petition ("SPC"), September 4, 2013.

In the petitioner's Pet.R, he argued Dodd is inapplicable to state prisoners, because unlike federal prisoners, for a state prisoner "[t]o even raise any claim of error in habeas, state remedies must be exhausted." *Conner v. McBride*, 375 F.3d 643, 648 (7th Cir. 2004).

Therefore, before the appellant could press his Miller claim he had to first present this claim in the Circuit Court; then the appellate court; and finally the Illinois Supreme Court, which the appellant did.

Although the appellant filed his SPC September 4, 2013, it was not until November 9, 2015 that the appellate court affirmed the Circuit Court's ruling (see *People v. Gray*, 2015 IL App (1st) 133515; and November 23, 2016,

that the Illinois Supreme Court denied the appellant's petition for leave to appeal ("PLA") (See *People v. Gray*, 65 NE.3d 844 (Table) (Ill. 2016)).

Although it took the appellant three years to exhaust his state remedies, he could not toll the clock under 2244 (d)(1)(c) because he filed a successive post-conviction under 725 ILCS 5/122-1(f) (West 2013), which "requires pre-filing authorization - such as an application for permission to file a successive petition" - [and] "simply taking steps to fulfill this requirement does not toll the statute of limitations." *Martinez v. Jones*, 556 F.3d 637, 638 (7th Cir. 2009)

"Instead the second petition tolls the limitations period only if the state court grants permission to file it***" (*Id.*, at 639).

The appellant's SPC was denied; therefore, there was nothing that could toll the clock under 2244(d)(1)(c) according to *Martinez*.

The district court believed that this was "a misunderstanding of how the habeas

corpus statute of limitations works" (Appendix-C, p55), and "[I]f Gray had filed his State post-conviction petition within one year after the Supreme Court's decision in Miller, that would have stopped the clock, and once the State Courts had completed their review, he still would have had time to file a federal habeas corpus petition" (Id. p55-6).

Martinez disputes the district Court's understanding the tolling of time when an application is denied. "[B]ecause Martinez was denied permission to file a successive petition, his request was not a properly filed postconviction action." Martinez, 556 F3d at 639. As a result, a State prisoner cannot toll his time if he has already filed a post conviction petition, and a new rule, such as Miller, is issued by the Supreme Court, and the State Court has denied the petitioner leave to file his successive petition, such as what happened in the appellant's case.

In addition, the appellant had already filed a federal habeas corpus petition. *United States ex rel. Gray v. McCann*, No. 06 C 6058, 2007 WL 2915631 (N.D. Ill. Oct. 3, 2007). So, in order for the appellant to file a second or successive habeas petition, he had to seek leave from the Seventh Circuit Court of Appeals. 28 U.S.C. § 2244 (b)(3). Which requires him by "[C]ircuit Rule 22.2 (a)(3) [to] provide copies of the State Court's decisions." *Outlaw v. Sterns*, 233 F.3d 453, 454 (7th Cir. 2000). Without the State Court's ruling, a state prisoner cannot make a "prima facie showing." 28 U.S.C. § 2244 (b)(3)(A) & (C). "Outlaw did not provide copies of the State Court's decisions, nor did he tell us the State Court's reasoning" (*Id.* at 455).

The fact that the petitioner did not file his SPC until September 4, 2013, is beside the point, because it would not have tolled the time under Dodd. It took the petitioner three years to challenge his Miller claim in

State Court. If Dodd was applicable to State Prisoners who wish to access the federal court pursuant to ^{ss} 2244(b)(2)(A), the Quigmore between exhaustion of State Court remedies and the one year time period would deny state prisoners access to the federal Courts.

It is difficult for this petitioner to imagine ~~any~~ legal process in the State of Illinois that would allow a State prisoner to present his Constitutional violation(s) to the Circuit Court; appellate court; and the Illinois Supreme Court within one year.

Second or Successive habeas Corpus petitions do not operate under the same procedural rules as an original habeas petition. An original habeas petition is filed directly with the district Court. See 28 U.S.C. ^{ss} 2254(a), and if necessary, a state prisoner can request to the district Court to hold his petition in abeyance (see Rule 62 for the Rules of Civil Procedure) while he pursues

his claims in State Court. However, a second or successive habeas Corpus petition must be filed to the Court of Appeals and ruled upon within 30 days. ^{ss} 2244(b)(3). Therefore, a State prisoner, like the appellant, who sees the one-year clock running out under Dodd cannot file an application in the Court of Appeals, without the State Court's ruling, and request the Court of Appeals stays his successive habeas application in abeyance. No such mechanism exist for an application to file a second or successive petition.

Dodd should not be applied to the petitioner's case. State prisoners should be controlled by *Tyler v. Cain*, 533 U.S. 656 (2001). Where ^{ss} 2244(b)(2)(A) is "satisfied only if the [the Supreme] Court has held that the new rule is retroactively applicable to cases on collateral review" *Tyler* 533 U.S. at 662

under Tyler's standard, a state prisoner will be granted leave to file a successive post conviction petition under a new constitutional rule made retroactive by the Supreme Court.¹

This makes it highly likely that a state prisoner would be able to toll the time under the one-year because he would have a properly filed post-conviction petition.¹

Even if the petitioner-appellant was able to navigate the state court's process (Circuit Court, appellate court, and Illinois Supreme Court) within one year, he would not have been able to request leave to file his second or successive habeas petition because "a new rule is not 'made retroactive to cases on collateral review' within the meaning of ss 2244 (b)(2)(A) unless the Supreme Court holds it to be retroactive" Tyler, 533 U.S. at 664

1. See Montgomery, 2016 WL 280758*7 ("The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review to give retroactive effect to that rule").

Applicants seeking to file a second or successive petition must identify a Supreme Court holding that "necessarily dictates retroactivity of a new rule" (*Id.* at 666)

The Court does not make a rule retroactive when it merely establishes principles of retroactivity and leaves their application to lower courts (*Id.* at 663). Nor does the Court make a rule retroactive through dictum (*Id.* n.4)

A plurality of the Tyler Court's interpreting the language of 28 U.S.C. § 2244 (b)(2)(A), held that a new rule is not made retroactive to cases on collateral review unless the Supreme Court has expressly held such or applied the rule in a collateral proceeding (*Id.* at 662)

As already mentioned, the new rule must have retroactive application, a determination that can only be made by the Supreme Court,

not lower Courts. See *In re Henry*, 757 F.3d 1151, 1162-63 (11th Cir 2014) (holding that although the Supreme Court's decision in *Hall v. Florida* ***

[that a State cannot execute a prisoner whose IQ test score falls within the test's margin of...]

constitutes a new rule of constitutional law, because the Supreme Court had not made the new rule retroactive to cases on collateral review; petitioner was not entitled to file a second or successive petition based on that decision); *In re Morgan*, 713 F.3d 1365, 1366-68 (11th Cir 2013) (concluding that although the Supreme Court's decision *Miller v. Alabama* *** established a new rule of constitutional law, the Supreme Court had not made its decision in *Miller* retroactive to cases on collateral review); also see *Simpson v. U.S.*, 721 F.3d 875, 876 (7th Cir 2013) (petitioner was not entitled to file a second or successive *** motion *** where the Justices had not themselves made the decision retroactive to cases on collateral review).

Therefore, the appellant was not able to file his 2244(b)(3) motion until the Supreme Court made Miller retroactive in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

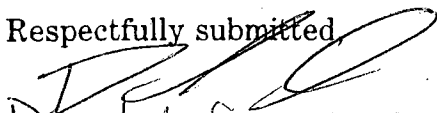
The appellant contends, based on the State Process that state prisoners must undergo under 725 ILCS 5/122-1(f) and the appellate process, state prisoners are still governed by Tyler and the start date for 2244(d)(1)(A) is when the Supreme Court makes a new rule retroactive.

This Court should grant this petitioner leave to determine if state prisoners are governed by Tyler or Dodd.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


Doiakoh Gray, pro se

Date: August 9, 2018