

No. 19-7688

In the
Supreme Court of the United States

RICARDO NOBLE,
Petitioner

v.

PENNSYLVANIA,
Respondent

On Petition for Writ of Certiorari
to the Superior Court of Pennsylvania

BRIEF IN OPPOSITION

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Question Presented

The *pro se* petitioner appealed his judgment of sentence to the state intermediate appellate court. The court remanded to allow the petitioner to perfect additional issues for appeal. Petitioner did so and then returned to the intermediate appellate court to complete the appeal process. That court just recently rendered a decision, affirming the judgment of sentence. The petition currently before this Court seeks review of the mid-process *first* state appellate ruling; the time for seeking review of the new ruling in the highest state court has not yet run.

The question presented is whether the petitioner is entitled to review of a judgment of sentence that is not yet final and that he has been actively litigating, on direct appeal, in the state appellate courts.

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Statutory Provision Involved

The statutory provision involved is 28 U.S.C. § 1257, which provides:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari....

Statement of Related Proceedings

Commonwealth v. Ricardo Noble, No. 204 WDA 2020, Pennsylvania Superior Court, judgment entered July 21, 2020, reported at 2020 WL 4192654.

Statement of the Case

The petitioner, Ricardo Noble, was convicted almost 30 years ago for a murder he committed at age 15. He was originally sentenced to life imprisonment, but the sentence was then reduced under *Miller v. Alabama* to 40 years to life, providing Noble parole eligibility at age 55. Noble filed a direct appeal from the new sentence, and the intermediate appellate court remanded for further proceedings to allow him to preserve additional issues for review. Most of these were issues of state law; none constituted an Eighth Amendment challenge to the new sentence. Noble then returned to the appellate court, which has recently affirmed the judgment of sentence.

This *pro se* petition, however, seeks review of the first, interlocutory ruling, not the more recent ruling that actually disposed of the appeal. As of this writing, Noble's time for seeking discretionary review of the new decision in the Pennsylvania Supreme Court – the highest court of the state in which a decision could be had – has not yet run.

In October 1991, Noble and two of his friends, armed with a handgun, decided to rob a cab in Erie, Pennsylvania. The cabbie, who had been crippled as a result of polio suffered as a child, did not resist. Nonetheless, one of the cohorts put the gun to the driver's head and fired a bullet that entered above the right ear and exited above the left. By the time the cab was discovered, with its doors left open by the fleeing felons, the victim was dead.

Under Pennsylvania law, juvenile court has no jurisdiction over the crime of murder. Noble sought to have the case transferred there under a statutory exception, 42 Pa. C.S. § 6322, but the motion was denied after an evidentiary hearing.

At trial, the state advised the jury in its opening statement that, in the absence of eyewitnesses, the evidence could not conclusively identify which of the three conspirators pulled the trigger. But all, argued the Commonwealth, participated in the robbery, and were therefore guilty of felony murder. Trial transcript, 6/1/92, 15-16.

The jury found Noble guilty of murder in the second degree, which is the grading assigned by

Pennsylvania to felony murder. The only legal penalty for second degree murder at that time was life imprisonment, without parole.

Noble appealed his conviction, challenging, *inter alia*, the sufficiency of the evidence and the denial of the juvenile court transfer motion. The Pennsylvania Superior Court, the state's intermediate appellate court, rejected the claims and affirmed the judgment of sentence in an unpublished memorandum opinion in February 1994, at docket no. 1770 PGH 1992. The Pennsylvania Supreme Court denied a petition for discretionary review in August.

Noble filed a petition for post-conviction review in state court in January 1997, well beyond the one-year statutory deadline for seeking collateral relief. 42 Pa. C.S. § 9545(b). The trial court promptly denied the petition. Noble appealed to the Pennsylvania Superior Court, which affirmed in February 1998.

Noble filed a federal habeas petition in September 1998, at No. 98-0276 (W.D. Pa.). The magistrate judge concluded that the claims raised – that state post-conviction counsel was ineffective in various respects – were not cognizable on federal habeas review. Noble unsuccessfully attempted to add 13 additional claims. He then filed an appeal from the magistrate judge's non-final report and recommendation, but the appeal (at No. 99-3679), was rejected as interlocutory.

The district court thereafter adopted the report and recommendation, and the court of appeals denied a certificate of appealability by judgment order. *Noble*

v. Meyers, 275 F.3d 37 (3rd Cir. 2001) (No. 00-3148). In September 2002, Noble filed an untimely motion to recall the mandate, which was denied. He then filed a motion for explanation of the court’s denial of the motion to recall the mandate, which was denied.

In 2012, after this Court’s decision in *Miller*,¹ Noble filed a petition for post-conviction relief from his life sentence. The state courts, relying on this Court’s *Teague* analysis,² held that the decision was a new rule that was not retroactive on collateral review. *Commonwealth v. Noble*, 2014 WL 10920318 (Pa. Super 2014).

In 2016, after this Court’s decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), Noble filed another petition for post-conviction relief. The petition was granted, and the trial court held a resentencing hearing in January 2018.

At the hearing, the state noted that Noble’s lengthy record of prison misconduct included nine separate assaults, and a criminal conviction for possession of a weapon. Resentencing transcript, 1/29/18, 57-58, 63-64. Noble also addressed the court, acknowledging that while in prison “I’ve had – I have some altercations, some violent altercations.” *Id.* at 38. He testified that “I don’t make any excuses for my actions,” but also that “I was unjustly convicted and shouldn’t even be in the prison system,” and “[t]hat’s one of the things that contributed to my violations.”

¹ *Miller v. Florida*, 567 U.S. 460 (2012).

² *Teague v. Lane*, 489 U.S. 288 (1989).

Id. at 38, 42-43. He further testified that he was “very sorry and remorseful,” for the crime, but also that he was “one hundred percent innocent of all charges against me.” *Id.* at 29, 32.

The defense attorney asked the judge to impose a new sentence of 20 to 60 years in prison, consistent with the new sentence received by one of Noble’s co-defendants. The Commonwealth, pointing out that Noble’s prison record over the previous quarter century was nothing like his co-defendant’s, asked for a sentence of 50 years to life. Noble himself insisted that he be released immediately. The judge settled on 40 years to life, making Noble eligible for parole at age 55. *Id.* at 43, 56-58, 65.

Noble thereafter filed three separate appeals to the Pennsylvania Superior Court: one from the judgment of sentence, and two from non-final orders of the trial court concerning provision of documents and transcripts.³ In his main appeal, he reiterated arguments from his original appeal in 1992 concerning the sufficiency of the evidence and juvenile transfer motion. He also claimed, *inter alia*, that the sentence was manifestly excessive and *ex post facto* because it supposedly increased his punishment above that available under Pennsylvania law at the time of the crime. But most of his arguments challenged aspects of the judge’s exercise of sentencing discretion for failing to give Noble’s preferred weight to various sentencing factors.

³ The appeals were docketed, respectively, at No. 420 WDA 2018, No. 1354 WDA 2019, and No. 1505 WDA 2019.

The Superior Court addressed as many of the issues raised as it could, but was stymied by the fact that none of the challenges to discretionary aspects of the sentence were properly preserved. But the court did not find waiver; rather it concluded that Noble had not been properly warned by the trial court about the need under Pennsylvania procedure to file a post-sentence motion to preserve such claims. Accordingly, the court remanded the case to the trial court to allow Noble to file the necessary motion. *Commonwealth v. Noble*, 2019 WL 1601945 (Pa. Super. 2019). The court issued a separate opinion quashing Noble's two appeals from non-final orders. *Commonwealth v. Noble*, 2019 WL 1530106 (Pa. Super. 2019).

Noble filed petitions for discretionary review in the Pennsylvania Supreme Court as to all three Superior Court decisions. The petitions were denied.⁴

At the same time, however, Noble also followed the Superior Court's remand instructions: he filed a post-sentence motion in the trial court to perfect his sentencing claims, and brought his case back to Superior Court (now docketed at No. 204 WDA 2020) to complete the appeal process.⁵

⁴ Docketed at No. 153 WAL 2019, denied November 26, 2019; No. 214 WAL 2019, denied January 22, 2020; and No. 215 WAL 2019, denied January 22, 2020.

⁵ During this same period, Noble also began litigating a federal civil suit against the state prison system (not for the first time). The district court granted him permission to amend his

After the denial of his petition for discretionary review of the Superior Court’s interlocutory order remanding his case for issue preservation – and while his re-appeal to Superior Court was still pending – Noble filed a handwritten, *pro se* certiorari petition in this Court. The petition sought review of the now-moot Superior Court remand decision, attaching a copy of the opinion to his petition. Because Noble’s state court appeal process was not yet completed, the Commonwealth waived a response to the certiorari petition. This Court, however, issued an order directing the filing of a brief.

In the meantime, the Pennsylvania Superior Court completed its review of Noble’s direct appeal challenges to his post-*Miller* new sentence. On July 21, 2020, the court issued an opinion addressing all of Noble’s claims and finding them without merit. *Commonwealth v. Noble*, 2020 WL 4192654 (Pa. Super. 2020). Under Pennsylvania law, the state supreme court has discretion to allow an appeal from any decision of the Superior Court affirming a judgment of sentence. Pa. R. App. P. 1112. The time for seeking such review expires in Noble’s case on August 20, 2020.

complaint to avoid dismissal. Noble did so, but also appealed the court’s interlocutory order. The court of appeals dismissed the appeal for lack of jurisdiction. *Noble v. Wetzel*, 2020 WL 1520075 (3rd Cir. 2020). The case, presently with 102 docket entries, remains pending in the district court, at No. 18-1160 (W.D. Pa).

Reasons for Denying the Writ

The Court lacks jurisdiction to review the now-moot, mid-appeal state court ruling that remanded to permit the petitioner to perfect additional issues for review.

Pro se petitioner Noble has embarked on a lengthy litigation career, though often, unfortunately, without regard for the finality doctrine. That is the case here. His certiorari petition seeks review of an intermediate appellate court decision that did not finally resolve his appeal of his murder sentence, but instead remanded to allow him to perfect additional issues for appeal. Noble took advantage of the remand and returned to the appellate court to complete his appeal process. This Court is without jurisdiction to review the interlocutory state court order that remanded the case.

The governing statute is 28 U.S.C. § 1257. It provides that the Court has certiorari jurisdiction over decisions of state courts only if they constitute final judgments, rendered by the highest court of the state in which a decision could be had.

The decision for which Noble seeks review meets the second requirement, but not the first. He did ask the state supreme court to review the decision, and because it declined, the intermediate appellate court became the highest in which a decision could be had.

But that decision was not a final judgment. The 2019 Superior Court ruling, while addressing the

merits of a few of Noble's claims, did not dispose of his sentencing appeal; on the contrary, it opened up the appeal to provide Noble an opportunity to secure review of many additional claims. Because those claims – any of which might have invalidated his sentence – were not resolved by the state court decision in question, it is not final, and not reviewable here. *See, e.g., Florida v. Thomas*, 532 U.S. 774 (2001); *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75 (1997).

Since the filing of the current certiorari petition, the state court has issued a new opinion, and that one does resolve all of Noble's sentencing issues. Perhaps he will one day seek this Court's review of that decision. As of today, though, the Court would lack jurisdiction to consider it, because it meets the first requirement of § 1257, but not the second. The new decision is a final judgment; but it is not, at least not yet, the judgment of the highest state court in which a decision could be had. Unless and until Noble seeks discretionary review in the Pennsylvania Supreme Court (a good bet), the case cannot come here. *See, e.g., Gotthilf v. Sills*, 84 U.S. 187 (1963).

To be reviewed by this tribunal, a state judicial decision “must be the final word of a final court.” *Market Street Railway v. Railroad Commission of State of California*, 324 U.S. 548, 551 (1945). This one isn't.

Conclusion

For these reasons, the Commonwealth respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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