Montana Law Review Online

Volume 76 Article 2

1-29-2015

Beach v. State: Whether Retroactivity Will Render the Apple Ripe for Another Bite

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PRECAP: *Beach v. State*: Whether Retroactivity Will Render the Apple Ripe for Another Bite.

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No. DC11-0723, OP 14-0685
Montana Supreme Court

Oral Argument: Wednesday, February 4th, 2015, at 9:30 AM in the Courtroom of the Montana Supreme Court, located in the Joseph P. Mazurek Justice Building, Helena, Montana.

I. QUESTION PRESENTED

Does the continued incarceration of Barry Beach, currently serving a term of 100 years in prison without the possibility of parole, for a crime, deliberate homicide, committed as a juvenile, violate the Eighth Amendment to the U.S. Constitution or Art. II, § 22, of the Montana Constitution?

II. BACKGROUND

On June 16, 1979, roughly four months after Barry Beach turned seventeen, Kimberly Nees was found dead near Poplar, Montana.[1] On May 11, 1984, he was convicted of deliberate homicide and sentenced to one hundred years in prison without the possibility of parole.[2] As Beach appears before the Montana Supreme Court for a third time in the last decade, it is important to clearly define the scope of the question facing the Court. Beach is proceeding on writ of habeas corpus.[3] As recognized by the Court in *State v. Lott*,[4] the writ exists "to remedy 'extreme malfunctions in the state criminal justice [system].'"[5] At its core level, the purpose of habeas corpus is not to correct errors of fact, but to cut directly to the question of whether or not the imprisonment of an individual "conform[s] with the fundamental requirements of the law."[6]

Therefore, the Court is not being asked to determine whether seventeen-year-old Barry Beach murdered Kimberly Nees on June 16, 1979.[7] As noted by former Justice Brian Morris, that question was

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[1] *State v. Beach*, 705 P.2d 94, 97, 99 (Mont. 1985).
[2] *Id.* at 100.
[3] Mont. Code Ann. § 46–22–101 (2013).
[4] 150 P.3d 337 (Mont. 2006).
[5] *Id.* at 342 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n. 5 (1979) (Stevens, J., concurring)).
[6] *Id.* at 339 (quoting *Fay v. Noia*, 372 U.S. 391, 402 (1963)).
[7] That question has been litigated extensively. *See State v. Beach*, 705 P.2d 94 (Mont. 1985); *Beach v. Day*, 913 P.2d 622 (Mont. 1996); *Beach v. State* (*Beach I*), 220 P.3d 667 (Mont. 2009); *State v. Beach* (*Beach II*), 302 P.3d 47 (Mont. 2013).

answered, likely for the final time, in *State v. Beach* (*Beach II*).[8] Instead, the question to be decided is whether or not a district court's discretionary act of sentencing a defendant, who committed homicide as a juvenile, to one hundred years in prison without the possibility of parole violates either the U.S. Constitution or the Constitution of the State of Montana.

III. SUMMARY OF ARGUMENTS

Beach frames the question before the Court as having two parts. First, does the district court's perceived failure to consider his juvenile status as a mitigating factor during sentencing render the sentence unconstitutional? And, second, does the perceived failure to provide meaningful opportunity for release render the sentence unconstitutional? However, as shown by the State's arguments, the question is not likely that simple. There are three distinct hurdles Beach must overcome to prevail on his petition: first, he must show that his petition is properly before the Court; second, he must show that the case law, upon which he relies, is retroactive; and, third, he must show that he is entitled to relief under those cases. As each of these issues provide significant issues that may be addressed at oral argument, they will be briefly addressed in turn.

A. Properly Before the Court

Beach acknowledges that § 46–22–101(2), MCA, bars a petitioner who has "exhausted the remedy of appeal" from seeking relief under the writ of habeas corpus. He contends, however, that under *State v. Lott* the bar does not apply because the district court was without authority to impose the sentence.[9] The State contends that, because the district court was acting within its authority when sentencing Beach, the sentence is not "facially invalid" and the *Lott* exception does not apply.[10] The State argues that because the sentence is not facially invalid, and because Beach has exhausted his remedy of appeal, the petition should be dismissed outright. [11]

B. Juvenile Status

Beach argues his sentence is unconstitutional because the district court failed to take into account his status as a juvenile at the time of the

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[8] *Beach II*, 302 P.3d at 87 (Morris, J., dissenting).
[9] Petition for Writ of Habeas Corpus 7–8, Oct. 23, 2014, No. DA 11-0723.
[10] Attorney General's Response to Petition for Writ of Habeas Corpus 7, Nov. 28, 2014, No. DA 11-0723.
[11] Attorney General's Resp. Pet. Writ of Habeas Corpus 10.

crime.[12] To support this argument, Beach cites a trio of recent U.S. Supreme Court decisions defining the boundaries of cruel and unusual punishment regarding juvenile defendants: *Roper v. Simmons*,[13] *Graham v. Florida*,[14] and *Miller v. Alabama*.[15] Beach's primary argument relies on *Miller* for the premise that the district court's failure to "make [an] individualized determination" of his culpability in light of his juvenile status renders the sentence unconstitutional.[16] To further support this point, Beach cites *State v. Long*,[17] where the Ohio Supreme Court held that not only must the court specifically consider juvenile status as a mitigating factor when sentencing a person to life without parole, such consideration must be reflected in the record.[18] Beach concludes that the district court's failure to consider the *Miller* factors at sentencing renders his sentence unconstitutional.[19]

In response, the State argues that Beach has misinterpreted not only *Miller*, but all the U.S. Supreme Court cases on which he relies. The State contends, in relevant part: *Roper*, where the Court held sentencing juveniles to death was unconstitutional, does not apply because Beach was not sentenced to death[20]; *Graham*, where the Court held sentencing a juvenile to life without parole for a non-homicidal crime was unconstitutional, does not apply because Beach was convicted of homicide[21]; and, *Miller*, where the Court held that applying mandatory life without parole sentencing guidelines to juvenile defendants was unconstitutional, does not apply because Beach's sentence was discretionary.[22] Further, the State notes that, even if *Miller* were applicable, the information considered by the district court would have led the court to the same conclusion had the *Miller* factors been considered.[23]

C. Meaningful Opportunity for Release

Alternatively, Beach argues that failure to provide a meaningful opportunity for release renders the sentence unconstitutional.[24] In support of this proposition, Beach relies heavily on *Graham* and contends that "the trial court must impose a sentence that provides Beach

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[12] Pet. Writ of Habeas Corpus 10.
[13] 543 U.S. 551 (2005).
[14] 560 U.S. 48 (2010).
[15] 132 S. Ct. 2455 (U.S. 2012).
[16] Pet. Writ of Habeas Corpus 10.
[17] 8 N.E.3d 890 (Ohio 2014).
[18] *Id.* at 893.
[19] Pet. Writ of Habeas Corpus 10.
[20] Att'y Gen.'s Resp. Pet. Writ of Habeas Corpus 10.
[21] Att'y Gen.'s Resp. Pet. Writ of Habeas Corpus 10–11.
[22] Att'y Gen.'s Resp. Pet. Writ of Habeas Corpus 11.
[23] Att'y Gen.'s Resp. Pet. Writ of Habeas Corpus 12–13.
[24] Pet. Writ of Habeas Corpus 15.

[with] a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'"[25] The State responds that, even if *Graham* did apply, Beach has received meaningful opportunities for release.[26] In support of that argument, the State notes that Beach has come before the Clemency Board on four separate occasions.[27]

IV. ANALYSIS

Beach III presents three, sequential questions: whether the Petition is properly before the Court; if so, whether the case law, upon which Beach relies, applies retroactively; and, if both of the previous questions are answered affirmatively, whether the relief sought in the Petition is warranted.

A. Whether the Petition for Habeas Corpus is properly before the Court.

As noted by the State, § 46–22–101(2), MCA, limits the availability of the writ of habeas corpus to persons who have not exhausted their remedy of appeal. This limitation is directly at odds with Art. II, § 19, of the Montana Constitution which states "[t]he privilege of the writ of habeas corpus shall never be suspended." *Beach III* provides the Court with an opportunity to broaden the *Lott* exception, which provides the bar within § 46–22–101(2), MCA, can only be tolled for "facially invalid" sentences, to a more constitutionally sound interpretation by holding that the writ of habeas corpus may never be suspended. As both sides of this issue are clearly defined, it is likely that neither side will allocate much time to the question at oral arguments, opting instead to allow the Court to make that determination.

B. Whether the Eighth Amendment cases apply retroactively.

If the Petition is not barred by § 46–22–101(2), MCA, the Court may have the opportunity to reach a currently contested question: whether *Miller* or *Graham* have retroactive effect in Montana. Given the implications on the case, namely that Beach may not rely on the cases if they are not found to be retroactive, this question will likely be vigorously debated at oral argument.

1. Whether *Miller* applies retroactively.

At the federal level, the question of whether or not *Miller* is retroactive is hotly contested. Recently, the Seventh Circuit noted that

[25] Pet. Writ of Habeas Corpus 15 (citing *Graham*, 560 U.S. at 74).
[26] Att'y Gen.'s Resp. Pet. Writ of Habeas Corpus 14–15.
[27] Att'y Gen.'s Resp. Pet. Writ of Habeas Corpus 14.

this question has spurred a split among the Circuit Courts: the First, Third, Eighth, and D.C. Circuits have determined that certain "applicants . . . have made *prima facie* showings that *Miller* is retroactive," while the Eleventh and Fifth Circuits have held that *Miller* is not retroactive.[28] The Ninth Circuit Court of Appeals has, on three separate occasions, expressly stated that it has not yet determined the question.[29] Notably, in December of 2014, the U.S. Supreme Court granted cert in *Toca v. Louisiana*,[30] to address the Circuit split over whether *Miller* applies retroactively.[31] Even with the uncertainty in the federal courts, the Montana Supreme Court may be willing to follow the determination of the high court in our sister State, Wyoming, which recently held the *Miller* rule to be retroactive.[32]

2. Whether *Graham* applies retroactively.

Similar to a determination regarding *Miller*, the Montana Supreme Court may reach the issue of whether *Graham* applies retroactively. While the U.S. Supreme Court has not yet answered that question, the Ninth and Fifth Circuits have held that *Graham* is retroactive.[33]

C. Whether the relief sought under the Eight Amendment cases is warranted.

If the Montana Supreme Court finds either *Graham* or *Miller* to be retroactive, the Court must determine whether the relief sought by the Petition is warranted. Due to the dissimilarity between the facts in *Beach III* and the holdings in *Graham* and *Miller*, this topic will likely be discussed at length at oral argument.

1. Whether the relief sought under *Miller* is warranted.

Here, the Court faces a two part question: first, whether *Miller* is applicable to *Beach III*, and, if so, whether the relief sought is warranted. As to the first question, the Court may look to a recent decision by the Ninth Circuit, *Adams v. U.S.*,[34] where the Court held that *Miller* was inapplicable to a juvenile defendant "not sentenced to life without the

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[28] *Croft v. Williams*, __ F.3d __, 2014 U.S. App. LEXIS 22283, 2 (7th Cir. 2014).
[29] *Bell v. Uribe*, 748 F.3d 857, 870 (9th Cir. 2013); *Friedlander v. U.S.*, 542 Fed.Appx. 576, 577 (9th Cir. 2013); *Adams v. U.S.*, 583 Fed.Appx. 658, 659 (9th Cir. 2014).
[30] Petition for writ of certiorari GRANTED, Dec. 12, 2014, No. 14-6381.
[31] Petition for a writ of certiorari 2, Sep. 18, 2014, No. 14-6381 (citing *Miller*, 132 S. Ct. at 2460).
[32] *State v. Mares*, 335 P.3d 487, 491 (Wyo. 2014).
[33] *Moore v. Biter*, 725 F.3d 1184, 1190 (9th Cir. 2013).
[34] 583 Fed.Appx. 658 (9th Cir. 2014).

possibility of parole pursuant to a mandatory sentencing scheme."[35] Along similar lines, the Seventh Circuit recently refused to apply *Miller* where a juvenile petitioner had been subject to a discretionary, instead of mandatory, sentence of life without the possibility of parole.[36]

If the Montana Supreme Court finds *Miller* to be applicable, the Court may look to recent Ninth Circuit decisions, *Bell v. Uribe*,[37] and *Friedlander v. U.S.*,[38] for instruction. In *Bell*, the Ninth Circuit held that *Miller* was not violated where a court had considered "both mitigating and aggravating factors under a sentencing scheme that affords discretion and leniency."[39] Similarly, in *Friedlander*, where a juvenile was sentenced to life in prison with a concurrent term of twenty years, the Ninth Circuit held that, even if *Miller* were retroactive, the claim was without merit as the Petitioner had not been sentenced to "life without parole," as evidenced by his having "seen the parole board approximately 8 time[s]."[40]

2. Whether the relief sought under *Graham* is warranted.

Here, the Court faces a similar two part question: whether *Graham* is applicable to *Beach III*, and whether the relief sought is warranted. It bears noting that Beach's reliance on *Graham* is tenuous at best. In *Graham*, the U.S. Supreme Court stated that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give [defendants convicted of a nonhomicide crime] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[41] Even though the Court explicitly limited the "meaningful opportunity" requirement to defendants convicted of nonhomicide crimes, Beach relies on *Graham* for the premise that the State must allow him some meaningful opportunity for release.[42]

V. CONCLUSION

Beach III provides yet another bite at the apple for a persistent petitioner. While it is unlikely that the Court will find in favor of Beach, *Beach III* may give the Court an opportunity to clarify habeas corpus jurisprudence in Montana. First, the Court may find that, even if not applicable to Beach, both *Miller* and *Graham* are retroactive in Montana.

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[35] *Id.* at 659 (quoting *Bell*, 748 F.3d at 869).
[36] *Croft*, __ F.3d at __, 2014 U.S. App. LEXIS 22283 at 3–4.
[37] 748 F.3d 857 (9th Cir. 2013).
[38] 542 Fed.Appx. 576 (9th Cir. 2013).
[39] *Bell*, 748 F.3d at 870.
[40] *Friedlander*, 542 Fed.Appx. at 577.
[41] *Graham*, 560 U.S. at 75.
[42] Pet. Writ of Habeas Corpus 15.

And second, *Beach III* may provide the Court with an opportunity to declare that the writ of habeas corpus may never be suspended, and bring § 46–22–101(2), MCA, back in line with the Art. II, § 19, of the Montana Constitution. Regardless of the outcome, it bears repeating that the innocence of Barry Beach is not at issue in this current proceeding. Rather, the Court will be determining whether the Eighth Amendment, or Art. II, § 22, of the Montana Constitution, permits sentencing a defendant, who committed homicide as a juvenile, to one hundred years in prison without the possibility of parole.

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