

No. 19-399

In The
Supreme Court of the United States

BARRY CAESAR GARCIA,

Petitioner,

v.

STATE OF NORTH DAKOTA,

Respondent.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of North Dakota**

BRIEF IN OPPOSITION

BIRCH P. BURDICK
Cass County State's Attorney
Counsel of Record
211 9th Street S.
Fargo, ND 58103
(701) 241-5850
burdickb@casscountynd.gov

QUESTION PRESENTED

Whether a juvenile sentenced to life without the possibility of parole prior to *Miller v. Alabama*, 567 U.S. 460 (2012), as a discretionary sentence, must be afforded the opportunity for a new sentencing hearing if his sentence is otherwise constitutional.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE.....	1
REASONS FOR DENYING THE PETITION	2
I. Jurisdiction – Petition is Untimely	2
II. The North Dakota Supreme Court’s analysis in <i>Garcia II</i> was rooted in the constitutionality of the sentence, not in finding <i>Miller</i> and <i>Montgomery</i> applied only to Mandatory Sentencing Schemes	4
CONCLUSION	9

TABLE OF AUTHORITIES

	Page
CASES	
<i>Bowles v. Russell</i> , 551 U.S. 205 (2007)	4
<i>Commonwealth v. Batts</i> , 163 A.3d 410 (Pa. 2017)	8
<i>Garcia v. State</i> , 903 N.W.2d 503 (N.D. 2017)	2, 3, 4, 5, 7
<i>Garcia v. State</i> , 925 N.W.2d 442 (N.D. 2019)	2, 3, 4, 8
<i>Graham v. Florida</i> , 560 U.S. 48 (2010)	3
<i>Landrum v. State</i> , 192 So.3d 459 (Fla. 2016).....	8
<i>Luna v. State</i> , 387 P.3d 956 (Okla.Crim.App. 2016)	8
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012)	<i>passim</i>
<i>Montgomery v. Louisiana</i> , 136 S.Ct. 718 (2016)	<i>passim</i>
<i>People v. Gutierrez</i> , 324 P.3d 245 (Cal. 2014).....	8
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)	1, 3
<i>State v. James</i> , 786 S.E.2d 73 (N.C.Ct.App. 2016).....	8
<i>State v. Shipton</i> , 931 N.W.2d 220 (N.D. 2019)	4

TABLE OF AUTHORITIES – Continued

	Page
STATUTES	
28 U.S.C. §2101	3
N.D.C.C. §12.1-32-01.....	1
N.D.C.C. §12.1-32-13.1.....	3
RULES	
U.S. Supreme Court Rule 13	3, 4

STATEMENT OF THE CASE

The State concurs with Petitioner's Statement of the Case, with the following clarifications, corrections, and additions:

- The time difference between Petitioner's sentence in 1996 and this Court's ruling in *Roper v. Simmons*, 543 U.S. 551 (2005) was nine years, not sixteen. Pet. 2.
- Petitioner states neither party offered documentary evidence at sentencing. Pet. 3. While perhaps not inaccurate, the sentencing court reviewed several documents prior to sentencing including a presentence investigation report, the charging document, police reports, Petitioner's statement shortly after his arrest, a report from the State Hospital, and victim impact statements. Pet. App. 33a-34a.
- Petitioner quotes the North Dakota Supreme Court as describing the holding in *Miller v. Alabama*, 567 U.S. 460 (2012), being limited to mandatory sentences of life in prison without the possibility of parole. Pet. 6-7. As more fully addressed below, Petitioner uses that single sentence in isolation, and thereby misconstrues the North Dakota Supreme Court's fulsome analysis, which applied the law from *Miller* to Petitioner's situation.
- North Dakota law at the time of Petitioner's sentence provided that the maximum possible sentence for murder was life in prison without parole. It was a discretionary sentence. It remains so today. N.D.C.C. §12.1-32-01(1).

- In its 2017 opinion, the North Dakota Supreme Court affirmed the district court’s denial of post-conviction relief for Petitioner. *Garcia v. State*, 2017 ND 263, ¶33, 903 N.W.2d 503 (referred to here as “*Garcia I*”). Pet. App. 15a-44a. It did not remand anything to the district court. Pet. App. 43a. In its 2019 opinion, the North Dakota Supreme Court noted its 2017 decision did not remand anything to the district court. *Garcia v. State*, 2019 ND 103, ¶4, 925 N.W.2d 442 (referred to here as “*Garcia II*”). Pet. 4a.

REASONS FOR DENYING THE PETITION

I. **Jurisdiction – Petition is Untimely**

The Petitioner’s section entitled “Opinions Below” refers to *Garcia I* and *Garcia II*. Pet. 1. The Petition describes *Garcia I* as “the initial denial of post-conviction relief.” Pet. 1. The North Dakota Supreme Court entered judgment in *Garcia I* on November 16, 2017 and denied a petition for rehearing on December 7, 2017. The Petitioner’s section entitled “Jurisdiction” does not refer to *Garcia I*, but rather *Garcia II*. The North Dakota Supreme Court entered judgment on *Garcia II* on April 11, 2019, denied a petition for rehearing on May 16, 2019, and entered a corrected opinion on May 24, 2019. Pet. 1. Although Petitioner claims timely jurisdiction through *Garcia II*, Respondent asserts the Petition is not based upon *Garcia II*, but rather *Garcia I*.

The opinion in *Garcia I* includes an extended analysis of *Roper, Graham v. Florida*, 560 U.S. 48 (2010), *Miller*, and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). The Petitioner's entire argument is centered on the analysis and opinion rendered in *Garcia I*. The North Dakota Supreme Court affirmed the lower court's ruling denying post-conviction relief. Pet. App. 43a. It did not remand anything to the lower court. Pet. App. 41a-43a. The opinion in *Garcia II* confirmed that *Garcia I* did not remand anything to the lower court. Pet. App. 4a.

The opinion in *Garcia II* dealt with the applicability to Petitioner of a recently enacted statute, N.D.C.C. §12.1-32-13.1. The statute established a protocol for considering the factors set forth in *Miller* and *Montgomery* to juvenile offenders. *Garcia II* was not an analysis of Petitioner's crime, personal circumstances, and sentencing considerations relative to the guidance provided in *Miller* and *Montgomery*. Instead, *Garcia II* was limited to interpreting the retroactivity of the statutory language under North Dakota law. Pet. App. 1a-11a. The opinion affirmed the lower court's denial of the statute to Petitioner's circumstances. The Petitioner's only reference to the statute is contained within the Statement of the Case. Pet. 6. Petitioner makes no reference to it within his argument in support of his Petition.

The time limit for seeking certiorari on civil cases is established by statute, although also referred to in rule, and on criminal cases is established by rule. 28 U.S.C. §§2101(c) and (d); U.S. Supreme Court Rule 13(1).

In North Dakota, petitions for post-conviction relief are considered civil in nature. *State v. Shipton*, 2019 ND 188, ¶4, 931 N.W.2d 220. Whether a case for post-conviction relief is considered criminal or civil in nature, the related petition for writ of certiorari from a state case shall be taken within ninety days of entry of judgment. Petitioner's claim that his Petition relates to *Garcia II* is not accurate. The Petition relates solely to *Garcia I*. The judgment in *Garcia I* was entered on November 16, 2017. The ninety-day window for filing a petition for a writ of certiorari on *Garcia I* expired on or about February 14, 2018. The Petition in this matter was not filed until mid-2019. It appears the Petition is jurisdictionally untimely. *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) (statute-based filing period for civil cases is jurisdictional); Supreme Court Rule 13(2) ("The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time.").

II. The North Dakota Supreme Court's analysis in *Garcia II* was rooted in the constitutionality of the sentence, not in finding *Miller* and *Montgomery* applied only to Mandatory Sentencing Schemes.

The Petition alleges two questions: whether *Miller*'s holding is limited to mandatory sentences, and whether the state, for a juvenile sentenced to life without the possibility of parole prior to *Miller*, must determine if the juvenile's sentence was constitutional or otherwise provide an opportunity for parole consideration. The State asserts those two questions may be

simplified to deciding whether that juvenile must always be provided a new sentencing hearing or alternatively granted an opportunity for parole. This issue does not warrant this Court's review.

Petitioner's primary argument is that courts are divided on whether *Miller* applies to discretionary sentencing schemes. Pet. 8. He further argues North Dakota joined the minority of jurisdictions applying *Miller's* and *Montgomery's* holdings solely to mandatory sentencing schemes. That claim is not an accurate summary of *Garcia I*. It is true *Garcia I* mentions that *Miller* is limited to mandatory sentencing schemes. Pet. App. 30a. It is similarly true that this Court, in multiple references within *Montgomery*, describes *Miller's* holding as relating to mandatory life without parole sentences. *Montgomery*, 136 S.Ct. at 726, 732, 733. The error arises in presuming such language, taken in isolation, is the end of the inquiry as to the meaning of *Miller* and *Montgomery*. That is not the broader holding in those cases, nor is it the broader analysis reflected in *Garcia I*. The dichotomy between mandatory and discretionary sentencing schemes was neither the focus of *Garcia I* nor the basis for denying Petitioner post-conviction relief.

Immediately following the reference to the mandatory nature of the sentence addressed in *Miller*, the North Dakota Supreme Court wrote: "The Court's broader rationale applies to all cases where juvenile offenders are sentenced to life without the possibility of parole. . ." Pet. App. 30a. Quoting from *Montgomery* the court wrote: "Even if a court considers a child's age

before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects ‘unfortunate yet transient immaturity.’” Pet. App. 30a. The court further wrote: “we understand the touchstone for Eighth Amendment proportionality analysis is that consideration of whether a juvenile’s crimes reflect ‘transient immaturity’ rather than ‘irreparable corruption’ is required even when a sentence of life without parole is imposed as a matter of the sentencing court’s discretion.” Pet. App. 31a. After noting Petitioner received an individualized sentencing hearing, the court wrote:

“[Petitioner] was sentenced before *Miller* and *Montgomery* were decided, and the district court lacked the specific articulation that it was to distinguish between those whose crimes reflect ‘permanent incorrigibility’ or ‘irreparable corruption’ as opposed to ‘transient immaturity.’ We read these not as magic words without which a sentence cannot pass muster under the Eighth Amendment, but, instead, we review the district court’s sentencing hearing to determine whether it met the substantive requirements of *Miller* and *Montgomery* in its consideration of youth and its attendant circumstances. Without that substantive compliance, Garcia’s sentence of life imprisonment without parole would have been imposed in violation of the Eighth Amendment.” Pet. App. 31a-32a.

The court then reviewed Petitioner’s sentencing hearing. Pet. App. 32a-39a. It found, among other

things, the district court considered Petitioner's age, the circumstances of his offense, his prior criminal history, recognized that children are different than adults and more capable of rehabilitation, stated that young people are never beyond redemption and are capable of changing and reforming their lives. The district court also considered the violent circumstances of the murder, absence of justification for his conduct, his criminal history showing a pattern of increasing violence and probation violations. Upon doing so it concluded: "Without using the precise words the Supreme Court used in *Miller*, the court found Garcia to be the rare juvenile offender whose crime reflected irreparable corruption and not transient immaturity." Pet. App. 39a.

In contrast to Petitioner's claims, all that can rightly be said about *Garcia I* is the North Dakota Supreme Court found that a proper individualized analysis in a discretionary sentencing scheme met the constitutionally-based requirements of *Miller* and *Montgomery*. If a sentence meets those requirements, it is not necessary to provide a new hearing for a juvenile sentenced to life imprisonment without parole. It is not necessary to grant Petitioner a new sentencing hearing or the opportunity for parole.

Petitioner argues there is a "deep divide" among the states about mandating a resentencing hearing in every pre-*Miller* case, yet he refers to only a handful of states in footnote 3. Pet. 13. In reviewing several of those citations it appears they do not stand for the proposition for which Petitioner offers them. For

example, *Luna v. State*, 387 P.3d 956, ¶¶20-21 (Okla.Crim.App. 2016) (held juvenile should be resentenced because the jury failed to properly consider the requirements of *Miller* and *Montgomery*); *People v. Gutierrez*, 324 P.3d 245, 249-50 (Cal. 2014) (juvenile must be resentenced because prior to *Miller* the sentencing statute was construed to create a presumption of life without parole as the appropriate penalty); *Commonwealth v. Batts*, 163 A.3d 410, 435-39 (Pa. 2017) (sentence did not meet the *Miller* and *Montgomery* requirements); *Landrum v. State*, 192 So.3d 459, 469-70 (Fla. 2016) (juvenile was not given the individualized consideration of her youth and other requirements of *Miller* and *Montgomery*); *State v. James*, 786 S.E.2d 73, 83-84 (N.C.Ct.App. 2016) (court made insufficient findings). The Respondent asserts this does not warrant this Court's review.

As discussed above, the Petition makes no arguments about the new statute addressed in *Garcia II*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

BIRCH P. BURDICK
Cass County State's Attorney
Counsel of Record
211 9th Street S.
Fargo, ND 58103
(701) 241-5850
burdickb@casscountynd.gov

Counsel for Respondent
January 2020