

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

DERRICK E. STEILMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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SUBMITTED: September 13, 2021

QUESTION PRESENTED

Whether the Ninth Circuit erred when it determined that Steilman's 28 U.S.C. § 2254 petition is untimely?

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Petitioner, Derrick E. Steilman, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Opinion Below

The opinion of the Ninth Circuit is included in the appendix. (App., infra, 1a-5a). It is also available on Westlaw at *Steilman v. Michael*, 2021 WL 2419681 (9th Cir. 2021). The district court's orders denying relief are included in the appendix. (App., infra, 1b-4b; App., infra, 1c-9c). They are also available on Westlaw. See, *Steilman v. Michael*, 2020 WL 359212 (D.Mont. 2020); *Steilman v. Michael*, 2019 WL 8017793 (D.Mont. 2019).

Jurisdiction and Timeliness of Petition

The opinion of the court of appeals was filed on June 14, 2021. (App., infra, 1a-5a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

The Eighth Amendment to the United States Constitution states as follows: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Preliminary Statement

In June of 2012, in *Miller v. Alabama*, 567 U.S. 460 (2012), this Court held for the first time that sentencing juvenile offenders to life without parole, without considering the special circumstances relating to youth, violates the Eighth Amendment’s prohibition against cruel and unusual punishment. Several years later, in *Montgomery v. Louisiana*, 577 U.S. 190 (2016), the Court held that *Miller* announced a new substantive rule of constitutional law that is retroactively applicable to cases on collateral review. In doing so, the Court also held that a life without parole sentence is unconstitutional for a certain class of defendants – “juvenile offenders whose crimes reflect the transient immaturity of youth.” *Montgomery*, 136 S.Ct. at 734. Under *Montgomery*, a sentence of life without parole is barred “for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.” *Id.* at 734; *but see, Jones v. Mississippi*, ____ U.S. ___, 141 S.Ct. 1307 (2021).

Derrick Steilman is not permanently incorrigible. He is not “the drug-addled seventeen year old” that committed a senseless murder 25 years ago. As he has matured, Steilman has proven himself to be a “model inmate,” who has earned a Master’s Degree in Theology, graduating Summa Cum Laude from Shalom Theological Seminary in January of 2018. Evidencing his maturation, he works with his fellow inmates and prison staff by teaching classes in Theology, Release Readiness, and Self-Repair.

Unfortunately, Steilman has been unable to present evidence of his corrigibility to the courts. The Montana Supreme Court determined that his 110 year sentence does not amount to a life without parole sentence because he has a possibility for release in 55 years, when he will be in his seventies. *Steilman v. Michael*, 407 P.3d 313 (Mont. 2017). The federal district court, for its part, dismissed his habeas petition as time-barred. The Ninth Circuit affirmed the district court's ruling and, in the process, permanently shut the door to any potential relief and will almost certainly guarantee that Steilman will serve the rest of his life in prison.

Both the district court and the Ninth Circuit erred in determining that *Montgomery* did not announce a new rule for purposes of the AEDPA's statute of limitations. This Court should conclude, as have other jurists who have considered the matter, that *Montgomery* did in fact recognize a new constitutional right that applies retroactively. *See e.g., Montgomery*, 136 S.Ct. at 743 (Scalia, J., dissenting) ("It is plain as day that the majority is not applying [*Miller v. Alabama*], but rewriting it."); *Steilman v. Michael*, 407 P.3d 313, 322-26 (Mont. 2017)(McKinnon, J., dissenting).

Statement of the Case

A. Factual Background

In September of 1996, Steilman, who was a juvenile, and an accomplice killed a random stranger in Butte, Montana, by beating him to death with a crowbar. Shortly after this murder was committed, Steilman moved to Tacoma, Washington. Two years later, he killed another individual by beating him with a baseball bat. Within a week, Steilman was arrested in Butte in connection with the Washington murder. *Steilman v. Michael*, 407 P.3d 313, 315 (Mont. 2017). Three weeks later, he was charged by Montana authorities with deliberate homicide for the Butte murder.

Initially, he was charged in Youth Court, but the State successfully moved to have him transferred to district court for prosecution as an adult. *Id.* at 316.

After the transfer proceedings were complete, Steilman was returned to Tacoma to face charges for the Washington murder. He pled guilty to that murder and was sentenced to 284 months imprisonment. Under Washington law, Steilman is eligible for release to the community after serving two-thirds of his sentence. *Id.* at 316.

As an inmate of the State of Washington, Steilman was returned on a detainer to be prosecuted in Montana for the Butte murder. In October of 1999, he pled guilty to deliberate homicide and was sentenced to the Montana State Prison for 110 years without the possibility of parole. This sentence was ordered to run concurrently with Steilman's Washington sentence. *Id.*

In 1999, Montana prisoners, who had been sentenced to a term of years, were eligible for day-for-day good time allowance. Under this contingency, Steilman can, depending upon his behavior in prison, be eligible for release in 55 years. *Id.*

B. State Habeas Proceedings

In May of 2016, Steilman filed an original petition for writ of habeas corpus in the Montana Supreme Court. Relying on *Miller v. Alabama* and *Montgomery v. Louisiana*, he argued that his sentence of 110 years, without the possibility of parole, violated the Eighth Amendment, because he was a juvenile when his offense was committed, and the sentencing court failed to consider the special circumstances of his youth. *Steilman*, 407 P.3d at 315.

The Montana Supreme Court agreed with Steilman that *Miller* and *Montgomery* apply to Montana juveniles who have been sentenced to life without parole. *Id.* at 316-19. It also determined, however, that the sentence imposed in his case did not qualify as a de facto life

sentence that would trigger Eighth Amendment protection. *Id.* at 319-20. It based this holding on two primary factors. First, because Steilman was eligible for day-for-day good time, he would be eligible for release after serving 55 years, contingent on his behavior in prison. *Id.* at 319-20. It also took into account the fact that Steilman’s Montana sentence was ordered to run concurrently with his sentence for the Washington homicide, which would result in a sentence of just over 31 years attributable solely to the Butte murder. “The combination of the good-time credit to which Steilman is eligible and the amount of his sentence that will be discharged while serving a sentence on a wholly unrelated crime,” led the Montana Supreme Court to “conclude that Steilman’s sentence [did] not trigger Eighth Amendment protections under” *Montgomery* and *Miller*. Based on this conclusion, it denied Steilman’s habeas petition without reaching the question of whether the state district court failed to adequately consider his youth under *Miller* and *Montgomery* before imposing sentence. *Id.* at 320.

Steilman filed a timely petition for writ of certiorari challenging the Montana Supreme Court’s denial of his habeas petition. But, on May 14, 2018, this Court denied his petition. *Steilman v. Michael*, 138 S.Ct. 1999 (2018).

C. Federal Habeas Proceedings

Steilman filed a *pro se* 28 U.S.C. § 2254 petition on July 25, 2019. In his petition he raised a single challenge. He alleged that his Montana state juvenile sentence of 110 years without the possibility of parole should be considered a *de facto* life sentence that is illegal under *Miller* and *Montgomery*.

After reviewing Steilman’s petition, the federal magistrate determined that it was likely time-barred. In coming to this conclusion, the magistrate analyzed the statute of limitations

provision set forth at 28 U.S.C. § 2254(d)(1)(C), which applies when a prisoner seeks relief under a new rule of constitutional law. This provision provides that the one-year statute of limitations applicable to § 2254 petitions does not begin to run until “the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.”

In analyzing this provision and its application to Steilman’s case, the magistrate noted that this Court in *Dodd v. United States*, 545 U.S. 353, 357 (2005), held that the limitations period applicable to “new rule” cases begins on the date the right is recognized, not the date the right was made retroactive. Therefore, under the magistrate’s analysis, the statute of limitations in Steilman’s case began to run when *Miller* was decided, and not when the right recognized in *Miller* was made retroactive in *Montgomery*. Based on this reasoning, the magistrate determined that Steilman’s limitation period began on June 26, 2012 – the day after *Miller* was decided – and ended on June 26, 2013. Steilman’s § 2254 petition, which was filed in July of 2019, was over six years too late. In light of this conclusion, the magistrate ordered Steilman to show cause why his petition should not be dismissed with prejudice as time barred.

In compliance with the magistrate’s order, Steilman filed a response attempting to address the magistrate’s concern. In his response, Steilman made two arguments. First, in attempting to convince the magistrate that her legal analysis was incorrect, Steilman argued that he had to exhaust his state court remedies before he could file for relief in federal court. In this connection, he argued that his state court remedies were not fully exhausted until May 14, 2018, when the United States Supreme Court denied certiorari. He went on to argue that he had “one year plus 90 days” after certiorari was denied to file his federal petition. Hence, his petition, which was filed on July 25, 2019, was timely.

As a second argument, Steilman asserted that he was entitled to equitable tolling. *See e.g.*, *Holland v. Florida*, 560 U.S. 631 (2010). In support of this contention, Steilman informed the magistrate that he had been diligently pursuing his rights but had been abandoned and misled by his state court lawyer who, he said, informed him that he had one year and 90 days from the date certiorari was denied to file his federal habeas petition. He also argued that his ability to draft and file his § 2254 petition was hampered by lack of access to legal materials and his lack of legal training. In connection with this claim, he pointed out that he was incarcerated in the State of Washington and did not have access to Montana legal materials.

The magistrate found Steilman’s arguments unavailing. With regard to Steilman’s argument that his petition was timely because it was filed within a year and 90 days of the denial of certiorari, the magistrate once again relied on 28 U.S.C. § 2244(d)(1)(C) and this Court’s decision in *Dodd*. As previously noted, in *Dodd*, the Court interpreted a similar limitations provision set forth in 28 U.S.C. § 2255(f)(3) to mean that the Anti-Terrorism and Effective Death Penalty Act’s (AEDPA) one-year limitation period begins to run when the new right is recognized by the Supreme Court, not when it is made retroactive. Therefore, the magistrate concluded, Steilman’s § 2254 petition was untimely because it was filed over seven years after *Miller* was decided. The fact that Steilman filed his state habeas petition in May of 2016 was irrelevant in the magistrate’s mind because “once the federal statute of limitations has run, a newly filed state petition does not reset the clock.” (App., infra, 4c-5c)(citing *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003)).

The magistrate also rejected Steilman’s equitable tolling argument. In this regard, she found that none of the justifications advanced by Steilman – his confusion and ignorance of the law, his attorney’s erroneous advice, and his lack of access to Montana legal materials – qualified

as an extraordinary circumstance to justify equitable tolling. The magistrate went on to conclude that his justifications – even if they could be deemed extraordinary – did not actually cause Steilman’s untimely filing, see *Bryant v. Arizona Attorney General*, 499 F.3d 1056, 1060 (9th Cir. 2007)(noting that a petitioner must establish a casual connection between the extraordinary circumstance and his failure to file a timely petition), because the AEDPA’s statute of limitations had already run by the time he filed his state habeas petition. (App., infra, 7c-8c).

Based on these findings, the magistrate recommended that Steilman’s § 2254 petition be dismissed as untimely. She also recommended that a certificate of appealability be denied. (App., infra, 9c).

Steilman filed timely objections to the magistrate’s findings and recommendation. The district court adopted in part and denied in part the magistrate’s findings and recommendation. It agreed with the magistrate that Steilman’s petition was time-barred but it granted a certificate of appealability. (App., infra, 1b-4b). After receiving the district court’s order, Steilman filed a timely notice of appeal. The Ninth Circuit appointed the undersigned to represent Steilman.

D. Proceedings in the Ninth Circuit

On appeal, Steilman argued that the district court erred in determining that *Miller*, rather than *Montgomery* provides the triggering date for the statute of limitations for his 28 U.S.C. § 2254 petition. In doing so, he maintained that *Montgomery* expanded upon and essentially rewrote *Miller*. *Miller* identified the inherent problems when a sentencing court lacks discretion in mandatory sentencing schemes; sets forth factors highlighting the differences between youth and adults; and announced a requirement that the age of the juvenile be adequately considered. *Montgomery*, on the other hand, requires that evidence of “irreparable corruption” or “permanent

incorrigibility” be demonstrated, not just that the sentencing court considered and addressed various factors of youth.

Steilman recognized that even if the Ninth Circuit agreed with his argument that *Montgomery* set the triggering date for the statute of limitations, his § 2254 petition was still untimely. But, that being said, he argued that he is entitled to equitable tolling. Accordingly, he urged the Ninth Circuit to reverse and remand his case to give him an opportunity to establish equitable tolling and pursue the relief he is entitled to under *Miller* and *Montgomery*.

The Ninth Circuit disagreed with Steilman’s central claim – that *Miller*, rather than *Montgomery* provides the triggering date for the statute of limitations for his Eighth Amendment claim – and affirmed the district court’s order dismissing his § 2254 petition. In explaining its holding, the court wrote:

Unfortunately for Steilman, the decision that triggers the one year statute of limitations is *Miller*, not *Montgomery*. *Miller* recognized a new right under the Eighth Amendment (the right to an individualized hearing for juvenile offenders before they can be sentenced to life without parole). 567 U.S. at 480. The Supreme Court’s recent decision in *Jones v. Mississippi*, 141 S.Ct. 1307 (2021), reiterated that *Montgomery* simply held “that *Miller* applied retroactively to cases on collateral review.” *Id.* at 1314; *see also, id.* at 1316 (“*Montgomery* did not purport to add to *Miller*’s requirements.”). [] This leaves Steilman’s timeliness argument based on *Montgomery* meritless because, as the Supreme Court decided in *Dodd v. United States*, 545 U.S. 353, 357 (2005), the date that a right is made retroactive is irrelevant for statute-of-limitations purposes.

(App., *infra*, 3a-4a).

Although it was not necessary, given its central holding, the Ninth Circuit also rejected Steilman’s equitable tolling argument. In doing so, it essentially adopted the magistrate’s reasoning.

Reason for Granting the Petition

Whether the Ninth Circuit erred when it determined that Steilmann's 28 U.S.C. § 2254 petition is untimely.

The AEDPA has a one year statute of limitations within which a state prisoner may file a petition for a writ of habeas corpus. Title 28 U.S.C. § 2244(d)(1) provides:

A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The limitation period shall run from the latest of –

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by state action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

In most cases, the operative date from which the statute of limitations is calculated is the one described in subsection (d)(1)(A) – “the date on which the judgment of conviction becomes final.” This case, however, involves subsection (d)(1)(C), which gives § 2254 petitioners one year from “the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.”

In order to take advantage of the belated commencement of the limitation period under § 2244(d)(1)(C), a petitioner “must show: (1) that the Supreme Court has recognized a new right;

(2) that the right ‘has been . . . made retroactively available to cases on collateral review;’ and (3) that he filed his motion within one year of the date on which the Supreme Court recognized the right.” *United States v. Mahur*, 685 F.3d 396, 398 (4th Cir. 2012)(quoting, *Dodd v. United States*, 545 U.S. 353, 358 (2005)).

In *Dodd*, this Court held that the limitations period set forth in § 2244(d)(1)(C) runs from the date that the new right was recognized, not the date on which it was made retroactive. *Dodd*, 545 U.S. at 358 (The federal habeas limitations period is reset on “one date and one date only . . . the date on which the right asserted was initially recognized by the Supreme Court.””). “In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the states or the federal government.” *Teague v. Lane*, 489 U.S. 288, 301 (1989).

In this case, the magistrate concluded that the rule relied upon by Steilman to set aside his sentence was announced in *Miller v. Alabama*, 567 U.S. 460 (2012). In *Miller*, this Court ruled that the “Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders” because “children are constitutionally different from adults for sentencing purposes” and mandatory sentencing schemes as applied to juveniles “pose too great a risk of disproportionate punishment.” *Miller*, 567 U.S. at 471. Important to this case, throughout *Miller*, this Court focused on the constitutional error arising from the mandatory nature of the sentence imposed. Thus, *Miller* held that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment’s ban on “cruel and unusual punishments.” *Id.* at 465.

In *Montgomery v. Louisiana*, 577 U.S. 190, 136 S.Ct. 718 (2016), this Court clarified that *Miller* announced a new substantive rule of constitutional law that is retroactively applicable to cases on collateral review. *Id.* at 734. But to limit *Montgomery* to the retroactivity question, is an

unnecessarily limited reading of its holding. As Justice McKinnon of the Montana Supreme Court noted:

. . . *Montgomery* does not simply decide whether a “certain process” required by *Miller* is to be applied retroactively, *Montgomery* actually rewrites and expands the pronouncements made in *Miller*. In *Montgomery*, the Court stated that *Miller* “rendered life without parole an unconstitutional penalty for a class of defendants because of their status – that is, juvenile offenders whose crimes reflect the transient immaturity of youth.” *Montgomery*, 136 S.Ct. at 734 (internal quotations and citation omitted). The *Montgomery* Court described its holding in *Miller* as barring sentences of life without parole “for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.” *Montgomery*, 136 S.Ct. at 734. The *Montgomery* Court explained, “[t]he only difference between *Roper* and *Graham*, on the one hand, and *Miller*, on the other, is that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption.” *Montgomery*, 136 S.Ct. at 734. The *Montgomery* Court held that “*Miller*, then, did more than require a sentencer to consider a juvenile offender’s youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of ‘the distinctive attributes of youth.’” *Montgomery*, 136 S.Ct. at 734 (quoting *Miller*, 567 U.S. at 472).

Steilman, 407 P.3d at 322-23 (McKinnon, dissenting).

As Justice McKinnon recognized, the difficulty presented when narrowly limiting *Montgomery* to the retroactivity question is “that the attributions of the *Montgomery* Court to its *Miller* decision do not appear in *Miller*.” *Steilman*, 407 P.3d at 323 (McKinnon, dissenting). Throughout its decision in *Miller*, this Court focused on the mandatory nature of the sentence imposed. “Thus, *Miller* held that mandatory life without parole for juvenile homicide offenders violated the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’” *Id.* (citing *Miller*, 567 U.S. at 465); see also, *Montgomery*, 136 S.Ct. at 734 (“Before *Miller*, every juvenile convicted of homicide in Alabama was sentenced to life without possibility of parole.”). *Miller* required courts to consider a youthful offender’s age, but it did not specifically bar life without parole for all juveniles and its application appeared limited in those cases involving a “statutory sentencing scheme that allowed discretion to impose a sentence less than life without parole.”

Steilman, 407 P.3d at 323 (McKinnon, dissenting). *Montgomery*, on the other hand, established that “[e]ven 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.’” *Montgomery*, 136 U.S. at 734.

In order to give effect to “*Miller*’s holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity,” *Montgomery* requires a procedure “where youth and its attendant characteristics are considered as sentencing factors” in order “to separate those juveniles who may be sentenced to life without parole from those who may not.” *Montgomery*, 136 U.S. at 735. Thus, under *Montgomery*, life without parole is an “unconstitutional penalty for . . . the vast majority of juvenile offenders” because most of their crimes reflect the transient immaturity of youth.” *Montgomery*, 136 U.S. at 735 (citations omitted).

Montgomery expanded upon and essentially rewrote *Miller*. *Miller* identified the inherent problems when a sentencing court lacks discretion in mandatory sentencing schemes; sets forth factors highlighting the differences between youth and adults; and announced a requirement that the age of the juvenile be adequately considered. *Montgomery*, on the other hand, set forth a “new substantive constitutional rule” – “it categorically declares that the imposition of life without parole upon a juvenile offender is unconstitutional, carving out only a small exception for those rare occasions when irreparable corruption has been demonstrated.” *Steilman*, 407 P.3d at 324 (McKinnon, dissenting).

Montgomery and *Miller* stand on equal footing with *Roper* and *Graham* in establishing that children are constitutionally different from adults in their level of culpability and in the way they may constitutionally be sentenced. However, *Montgomery* requires that evidence of “irreparable corruption” or “permanent incorrigibility” be demonstrated, not just that the sentencing court

considered and addressed various factors of youth. *Steilman*, 407 P.3d at 324 (McKinnon, dissenting)(citation omitted).

As Justice McKinnon concluded, *Montgomery* did more than merely render *Miller* retroactive, it actually created a new rule of substantive constitutional law. Therefore, Steilman had one year from the date *Montgomery* was decided to file for collateral relief.

Montgomery was decided on January 25, 2016. Steilman filed his state habeas petition on May 31, 2016. The statute of limitations on his *Miller/Montgomery* claim was tolled until his state habeas petition achieved final resolution, which occurred on December 13, 2017. *Carey v. Saffold*, 536 U.S. 214 (2002). At that point, Steilman had roughly seven months to file his § 2254 petition. He filed his petition on July 30, 2019. So, even if this Court agrees that *Montgomery* triggered the statute of limitations in his case, Steilman’s § 2254 petition would still be untimely.

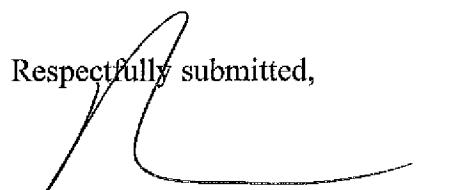
In the district court, however, Steilman argued that he was entitled to equitable tolling for a number of reasons, one of which was that his attorney effectively abandoned him and gave him improper advice as to how much time he had remaining on the statute of limitations. It is true that attorney negligence does not constitute an extraordinary circumstance that can justify equitable tolling. *Miranda v. Castro*, 292 F.3d 1063, (9th Cir. 2002). But attorney abandonment is properly considered an extraordinary circumstance. *Maples v. Thomas*, 565 U.S. 266 (2012).

Steilman was not given an adequate opportunity in the district court to establish that he is entitled to equitable tolling, in part because of the court’s ruling that the statute of limitations had run long before his state court lawyer allegedly misadvised and abandoned him. This Court should, therefore, grant this petition and reverse and remand this case to give Steilman an opportunity to show that he is entitled to equitable tolling.

Conclusion

The Ninth Circuit erred in determining that *Miller*, rather than *Montgomery* provided the triggering date for the statute of limitations for Steilman's 28 U.S.C. § 2254 petition. Therefore, this Court should grant certiorari and reverse and remand his case for a hearing to determine if he is entitled to equitable tolling.

Respectfully submitted,



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September 13, 2021