

No.

IN THE SUPREME COURT OF THE UNITED STATES

JASON MICHAEL CONTRERAS, Petitioner,

v.

KEITH W. DAVIS, Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A sentencing court must take into account an underage defendant's "diminished culpability and greater prospects for reform," and "sentencing a child to life without parole" for a homicide offense is excessive and violates the Eighth Amendment, for all but "the rare juvenile offender whose crime reflects irreparable corruption." *Miller v. Alabama*, 567 U.S. 460 (2012). The *Miller* rule applies retroactively to cases on collateral review. *Montgomery v. Louisiana*, 577 U. S. ____ (2016). In this case, a state court imposed consecutive sentences totaling 77 years on a defendant who was 15 years old at the time of his crimes, based on its express conclusion that "[w]hen you put a gun in your hand and you go out here and you use that deadly weapon to intimidate, rob, murder, you're grown. You are fully grown."

The District Court applied *Miller* and remanded the case to the state court for a new sentencing hearing and decision. The Court of Appeals reversed on the ground that Petitioner's 77-year sentence was not "*mandatory*," consistently with decisions of three other Courts of Appeals and five state courts of last resort but contrary to the decisions of one Court of Appeals and eight state courts of last resort. The Court of Appeals also held that *Virginia v. LeBlanc*, 582 U. S. ____ (2017) (*per curiam*) compels a conclusion that Virginia's "geriatric release" program satisfies Eighth Amendment requirements.

The questions presented are:

1. Does a discretionary sentence that exceeds a juvenile defendant's normal life expectancy violate the defendant's Eighth Amendment rights when it is based

on reasoning that is explicitly contrary to the Eighth Amendment rules announced in *Miller* and *Montgomery*?

2. Does a State “geriatric release” program that does not offer a meaningful opportunity for release, because there are no standards governing the grant or denial of petitions for release, violate a juvenile offender’s Eighth Amendment rights?

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PREVIOUS OPINIONS AND ORDERS

The opinion of the Court of Appeals appears at Appendix (hereinafter “App.”) 1 and is unpublished. *Contreras v. Davis*, Nos. 17–6307, 17–6351 (4th Cir. Dec. 21, 2017).

The Court of Appeals’ Order denying Petitioner’s Petition For Rehearing En Banc appears at App. 10 and is unpublished. *Contreras v. Davis*, Nos. 17–6307, 17–6351 (4th Cir. Jan. 18, 2018).

The most recent District Court decision appears at App. 12 and is reported at *Contreras v. Davis*, 229 F. Supp. 3d 475 (E.D. Va. 2017).

A previous District Court decision appears at App. 32 and is unpublished. *Contreras v. Davis*, No. 1:13cv772 (JCC) (E.D. Va. Dec. 11, 2013).

A previous decision of the Court of Appeals appears at App. 42 and is unpublished. *Contreras v. Davis*, No. 14–6045 (4th Cir. March 16, 2015).

This Court’s previous decision appears at App. 44. *Contreras v. Davis*, No. 15–5310 (U.S. March 7, 2016).

An Order of the Court of Appeals remanding to the District Court appears at App. 46 and is unpublished. *Contreras v. Davis*, No. 14–6045 (4th Cir. April 11, 2016).

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was entered on December 21, 2017. Petitioner filed a timely petition for rehearing en banc on January 3, 2018, which was denied on January 18, 2018. A copy of the Order denying rehearing appears at App. 10. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

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

Code of Virginia § 53.1–40.01, Conditional release of geriatric prisoners, provides:

Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony, (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release. The Parole Board shall promulgate regulations to implement the provisions of this section.

STATEMENT OF THE CASE

FACTS

Petitioner Jason Contreras' childhood can be described, in the words of *Miller v. Alabama*, 567 U.S. 460, 477 (2012), as “chaotic and abusive.” The district court found that it was “filled with traumatic events, including a pattern of abuse and neglect, his mother’s drug addiction, an absentee father, several stints in foster care, and consistently unstable housing.” App. 12. JA 316.¹ As detailed in his habeas petition, Contreras “grew up in a neglectful, deprived, and dysfunctional environment that would be difficult for most to fathom. Still, as of October 1, 1996, [he] had no criminal record.” JA 9

Contreras’ mother, Anna Contreras (“Anna”), was a drug addict and a prostitute. He has never met his father. JA 10. A series of men – drug dealers and users – came in and out of his and his mother’s lives. JA 10–11, 12, 14, 15. At the age of 6, Contreras was placed in an orphanage and then in the first of a series of at least five foster homes and group homes, several of which were mentally and physically abusive. JA 11–12. Anna’s Declaration, which is appended to Contreras’ habeas petition, states, “I was allowed visitation on weekends but rarely came to see him. My life revolved around drugs and I did not care if I saw Jason.” JA 52.

When Contreras was 13, his mother was released from a prison term and persuaded a judge to grant her custody of her son. According to Anna, “I knew how to be savvy in front of the judge and paint a picture that I was in a better place and

¹ “JA” citations are to the Joint Appendix in the Court of Appeals.

deserved to have my son back, even though it was the furthest thing from the truth. I was still living in a crack house and addicted to drugs, but I was nevertheless awarded custody of Jason.” JA 53.

When Contreras was 15, Anna took him to live with her, his uncle, and the uncle’s girlfriend – all of whom “had heavy heroin addictions” – in a one-bedroom apartment. Contreras and his mother later moved across the street to another one-bedroom apartment, which actually was a “crack house” – filthy, a scene of constant drug use and transactions, with 5-7 people sleeping there at any time. JA 15. Anna practiced her trade as a prostitute in the bedroom, in exchange for drugs, while her son waited in the front room of the apartment. JA 15.

Anna introduced her son to 24 and 26 year old drug dealers Sidney Johnson and William Foules and “asked them to look out for Jason because she was gone so often.” JA 15. Johnson and Foules “look[ed] out for Jason” by taking him along on their drug deals, robberies, and burglaries. JA 15, 16. Contreras and another boy, Johnny Rogers, “were used for the dirty work” in their supposed protectors’ crimes. JA 17. “It culminated with the shooting of Mr. Semko. Johnson made [Contreras and Rogers] flip a coin to see who was going to commit the robbery.” Contreras lost and ended up firing the fatal shot. JA 17. App. 12.

THE STATE COURT PROCEEDINGS

Contreras was represented by appointed attorneys Kim Crump and Cynthia Garris. Threatened with a mandatory sentence of life without parole – since held unconstitutional as applied to juveniles – Contreras pled guilty to first degree

murder, three charges of robbery, five charges of use of a firearm in the commission of a felony, one charge of statutory burglary, and one charge of attempted robbery. He was sentenced to a prison term of 77 years – effectively the same sentence of life without parole that he sought to avoid by his guilty plea.

The sentencing judge, who was understandably unaware of the Eighth Amendment rules announced in this Court’s later decisions in *Miller* and *Montgomery*, explicitly treated Contreras as if he were an adult:

Now, you say he was only 15, he’s only 16 now, and when you look at the age you say, well, he is just a kid.

When you put a gun in your hand and you go out here and you use that deadly weapon to intimidate, rob, murder, *you’re grown. You are fully grown*

JA 467–68 (emphasis added). *See also* JA 468–69: “This behavior, this evidence is not about a child. This evidence is not about a child.”

THE FEDERAL HABEAS PROCEEDINGS

Contreras filed his federal habeas petition on June 25, 2013, one year after this Court’s decision in *Miller v. Alabama*, as permitted by 28 U.S.C.

§ 2244(d)(1)(C). Jurisdiction was based on 28 U.S.C. §§ 2241 and 2254.

The District Court initially denied relief. App. 40. The Court of Appeals affirmed. App. 43. Contreras petitioned for certiorari. This Court granted the petition, vacated the judgment, and remanded for further consideration in light of *Montgomery v. Louisiana*, 577 U. S. ____ (2016). App. 43-44. The Court of Appeals in turn remanded the case to the District Court. App. 45.

On remand, the District Court granted Contreras' habeas petition in part and remanded the matter to the state court "for re-sentencing in accordance with the Eighth Amendment." App. 30.

Respondent Davis appealed. The Court of Appeals "conclude[d] that Contreras's claims are not cognizable under *Miller* because he is not subject to a mandatory life sentence without parole," App. 6, and accordingly vacated the judgment and remanded with instructions to dismiss. It explained in part that it "has noted [that] *Miller* only prohibits *mandatory* life-without-parole sentences, while 'leav[ing] open the possibility that a juvenile who committed homicide can be sentenced to life without parole so long as the sentence is not mandatory but is imposed through an individualized procedure.'" App. 6 (emphasis in original), quoting *In re Vassell*, 751 F.3d 267, 270 (4th Cir. 2014).

The Court of Appeals also incorrectly held that under this Court's decision in *Virginia v. LeBlanc*, 582 U. S. ____ (2017) (*per curiam*), it was "compelled to accept the Virginia Supreme Court's conclusions [in *Angel v. Commonwealth*, 281 Va. 248, 704 S.E.2d 386 (2011),] that the state's geriatric release program satisfies the requirements of the Eighth Amendment." App. 7.

REASONS FOR GRANTING THE PETITION

The Court should grant this Petition to determine whether the Court of Appeals correctly understood *Miller* as applying *only* to life sentences that are mandatory under state law. Because the AEDPA has no application to this case, this Court also should grant this Petition to decide a question that it left open in *Virginia v. LeBlanc*, *i.e.*, whether Virginia’s “geriatric release” program provides juvenile offenders the “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” required by the Eighth Amendment as stated in *Graham v. Florida*, 560 U.S. 48, 75 (2010).

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER *MILLER* AND *MONTGOMERY* APPLY TO “DISCRETIONARY” LIFE SENTENCES IMPOSED WITHOUT CONSIDERATION OF THE FACTORS UNIQUE TO JUVENILES DESCRIBED IN THOSE DECISIONS.

The Court of Appeals held that “*Miller* only prohibits *mandatory* life-without-parole sentences.” App. 6 (emphasis in original). Three other courts of appeals and six state supreme courts have agreed. *See, e.g., Evans-Garcia v. United States*, 744 F.3d 235, 240–41 (1st Cir. 2014); *Davis v. McCollum*, 798 F.3d 1317, 1320–21 (10th Cir. 2015); *Bell v. Uribe*, 748 F.3d 857, 869–70 (9th Cir. 2013); *Brown v. Hobbs*, 2014 Ark. 267, 2014 WL 2566091 (2014); *State v. Ali*, 855 N.W.2d 235, 258 (Minn. 2014); *Randell v. State*, No. 61232, 2013 WL 7158872, *1 n.1 (Nev. Dec. 12, 2013); *State v. Charles*, 892 N.W.2d 915, 920 (S.D. 2017); *Jones v. Commonwealth*, 293 Va. 29, 795 S.E.2d 705, 721–22 (2017); *State v. Redman*, No. 13–0225, 2014 WL 1272553 (W.Va. March 28, 2014).

The Seventh Circuit and eight state supreme courts have reached the opposite conclusion. In *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016), the court rejected an argument that *Miller* did not apply because the defendant’s 100-year prison term was discretionary. It reasoned that the relevance to sentencing of this Court’s holding, in *Miller*, that sentencing judges must “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison” (567 U.S. at 480) “cannot in logic depend on whether the legislature has made the life sentence discretionary or mandatory; even discretionary life sentences must be guided by consideration of age-relevant factors.” *McKinley*, 809 F.3d at 911. The South Carolina Supreme Court held similarly, in *Aiken v. Byars*, 410 S.C. 534, 543, 765 S.E.2d 572, 577 (S.C. 2014), *cert. denied*, No. 14–1021 (June 1, 2015), that “*Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant’s juvenility on the sentence rendered.” *See id.* at 541–44, 765 S.E.2d at 576–77. *Accord, e.g., State v. Valencia*, 241 Ariz. 206, 386 P.3d 392 (2016), *cert. denied*, No. 16-9424 (Oct. 2, 2017); *People v. Gutierrez*, 58 Cal.4th 1354, 171 Cal.Rptr.3d 421, 440, 442, 449–50, 324 P.3d 245 (2014); *State v. Riley*, 315 Conn. 637, 110 A.3d 1205, 1213–16 (2015), *cert. denied*, No. 14–1472 (March 7, 2016); *Landrum v. State*, 192 So.3d 459, 460, 466–67 (Fla. 2016); *Veal v. State*, 298 Ga. 691, 784 S.E.2d 403, 412 (2016); *Windom v. State*, 162 Idaho 417, 398 P.3d 150, 156–57 (2017), *cert. denied*, No. 17–560 (Feb.

20, 2018); *Steilman v. Michael*, 389 Mont. 512, 407 P.3d 313, 317, 318–19 (2017); *State v. Long*, 138 Ohio St.3d 478, 8 N.E.3d 890, 894–96, 898–99 (2014).²

The issue will not soon go away. It is an unfortunate fact of life that a relatively few young people will continue to commit grave offenses against the public order. The question has given rise to deep divisions of opinion in the U.S. Courts of Appeals and state appellate courts, and it will continue to recur. It can only be resolved by this Court, and this case provides an appropriate vehicle to do it.

The issue is *not* whether discretionary life terms for homicide offenses are unconstitutional *per se*. *Miller* does not permit that interpretation; a discretionary life term is valid *if* the sentencing authority takes into account the *Miller* factors unique to juveniles. But to hold that a life without parole sentence is constitutional simply on the ground that it was not mandated by statute, when the sentencing authority's reasoning is explicitly contrary to the reasoning and requirements of *Miller* and *Montgomery*, is to make a mockery of those decisions. Nevertheless, the Court of Appeals in this case and the decisions cited as consistent with its reasoning all hold that discretionary sentences are *per se constitutional*, without regard to whether the sentencing court considers those factors or not. The contrary line of cases squarely rejects that proposition and requires consideration of those factors before an individual is sentenced to life without parole for a homicide committed

² State intermediate appellate court decisions to the same effect, which further demonstrate the persistence of the issue as well as the breadth of the conflict in the post-*Miller* case law, include *People v. Nieto*, 52 N.E.3d 442, 453–54, 402 Ill. Dec. 521 (Ill. App. 2016); *Luna v. State*, 387 P.3d 956, 961 (Okla. Crim. App. 2016); and *State v. Scott*, 196 Wash. App. 961, 970, 385 P.3d 783, 787–88 (2016), *review granted*, 188 Wash.2d 1001 (2017).

before the age of majority. This Court is the only court that can resolve that important constitutional question.

II. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER VIRGINIA'S "GERIATRIC RELEASE" PROGRAM, WHICH DOES NOT OFFER A MEANINGFUL OPPORTUNITY FOR RELEASE, VIOLATES A JUVENILE OFFENDER'S EIGHTH AMENDMENT RIGHTS.

In Virginia, “[a]ny person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense.” Va. Code § 53.1–165.1. That statute applies to felons who were juveniles at the time of their crimes. The Supreme Court of Virginia has held, however, that Va. Code § 53.1–40.01 (captioned “Conditional release of geriatric prisoners” and commonly known as the “geriatric release” statute) “provides ... the ‘meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation’ required by the Eighth Amendment.” *Angel v. Commonwealth*, 281 Va. 248, 275, 704 S.E.2d 386, 402 (2011), quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010). Section 53.1–40.01 provides that a convicted felon 65 or older, who has served at least five years of his sentence, and a felon 60 or older who has served at least ten years of his sentence, “may petition the Parole Board for conditional release.”

In *LeBlanc v. Mathena*, 841 F.3d 256 (4th Cir. 2016), a divided Court of Appeals reviewed § 53.1–40.01 and its implementing regulations and held, contrary to the state Supreme Court’s *Angel* decision, that the potential for geriatric release does not offer juvenile nonhomicide offenders “the ‘meaningful’ opportunity for

release traditionally afforded by parole” and that *Angel* represented an objectively unreasonable interpretation of *Graham*. *LeBlanc*, 841 F.3d at 270.

The Court of Appeals explained in *LeBlanc* that the Virginia Parole Board’s regulations “set forth a two-stage review process for Geriatric Release petitions.” *Id.* at 261. The Board may deny a petition for geriatric release at the initial review stage if it concludes that the petition does not “provide ‘compelling reasons for conditional release’”; and neither the statute nor the regulations “states what constitute ‘compelling reasons for conditional release,’ nor does either document require the Parole Board to consider any particular factors ... nor does either document set forth any criteria for granting or denying a prisoner’s petition at the Initial Review stage.” *Id.* at 261–62. The Board thus has “unconstrained discretion to deny a petition for Geriatric Release at the Initial Review stage.” *Id.* at 262. The Court faulted the state Court’s *Angel* decision for relying on decision factors that apply only at the second stage of the process, “ignor[ing] the Parole Board’s authority to deny Geriatric Release for any reason.” *Id.* at 268. “It was objectively unreasonable,” according to the panel majority, “to conclude that Geriatric Release satisfied *Graham*’s requirement that juvenile offenders be able to obtain release ‘based on maturity and rehabilitation,’ when, under the plain and unambiguous language of the governing procedures, the Parole Board can deny every juvenile offender Geriatric Release for any reason whatsoever.” *Id.* at 269.

The Court also observed that the geriatric release program violates *Graham*’s meaningful opportunity requirement because

the Parole Board denies Geriatric Release petitions in nearly every case on grounds that the petitioners’ “crimes demonstrate an ‘irretrievably depraved character’” – directly contrary to *Graham*’s instruction that state penal regimes take into account a juvenile nonhomicide offender’s greater “capacity for change” relative to his adult counterparts by giving such offender the opportunity “to demonstrate that the bad acts he committed as a teenager are not representative of his true character.”

Id. at 270, quoting *Graham*, 560 U.S. at 73, 79. Judge Niemeyer dissented, criticizing the majority for failing to accord the high degree of deference to the state court decision required by the AEDPA. *LeBlanc*, 841 F.3d at 275.

This Court granted certiorari and summarily reversed, agreeing with Judge Niemeyer that the Court of Appeals erred by failing to accord the state court decision appropriate deference under the AEDPA. *Virginia v. LeBlanc*, 582 U.S.

____ (2017) (*per curiam*). As the Court explained,

In order for a state court’s decision to be an unreasonable application of this Court’s case law, the ruling must be “objectively unreasonable, not merely wrong; even clear error will not suffice.” ... In other words, a litigant must “show that the state court’s ruling ... was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.” This is “meant to be” a difficult standard to meet.

Id. (slip op at 3–4) (citations omitted).

The Court concluded that it “was not objectively unreasonable” for the state court to find that its geriatric release program satisfied *Graham*. *Id.* (slip op. at 5). It nevertheless took pains to point out that “[p]erhaps the logical next step from’ *Graham* would be to hold that a geriatric release program does *not* satisfy the Eighth Amendment, but ‘perhaps not.’” *Id.* (emphasis added; citation omitted). That question was not before the Court. Because the case arose only in the “narrow

context” of the AEDPA, the Court “expresse[d] no view on the merits of the underlying Eighth Amendment claim” and emphasized that it was not suggesting that the issue would be “insubstantial” on “direct review.” *Id.* (emphasis added).³

Because this case does not arise under the AEDPA, this case presents the question that was not presented in *LeBlanc*, *i.e.*, “the merits of the underlying Eighth Amendment claim” that a state geriatric release program – at least one that gives the decision-maker complete discretion to deny geriatric release to any and every juvenile offender for any reason whatever or no reason at all – fails to provide the “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” mandated by *Graham*, 560 U.S. at 75.

This question also has divided state supreme courts, although the conflict is not as broad as the one described above. In *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013), the Supreme Court of Iowa held that “[t]he prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a ‘meaningful opportunity’ to demonstrate the ‘maturity and rehabilitation’ required to obtain release and reenter society as required by *Graham*.” *Accord*, *State v. Zuber*, 227 N.J. 422, 448, 152 A.3d 197, 213 (2017) (“Defendants’ potential release after five or six decades of incarceration, when they would be in their seventies and

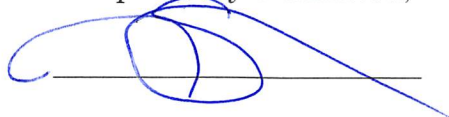
³ The question is not presented on direct review in this case, but the AEDPA nevertheless is not implicated and therefore the same standards apply. Contreras’ federal habeas claims are properly presented under 28 U.S.C. § 2244(d)(1)(C), but they are barred from state court consideration by Va. Code § 8.01–654(2).

eighties, implicates the principles of *Graham* and *Miller*.”⁴ To the contrary is *State v. Cardeilhac*, 293 Neb. 200, 218, 876 N.W.2d 876, 888 (2016), which held that “[b]ecause the sentence imposed on Cardeilhac allows him to be considered for parole, *Miller* would not be offended on this basis.”⁵ The Court should grant this petition to resolve the question that it left undecided in *Virginia v. LeBlanc* as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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⁴ *Accord, People v. Buffer*, 75 N.E.3d 470, 483 (Ill. App. 2017) (quoting *State v. Null*, 836 N.W.2d at 71).

⁵ *Accord, People v. Lehmkuhl*, 369 P.3d 635, 638 (Colo. App. 2013) (holding that a sentence which affords the defendant a chance to be paroled within his natural lifetime provides a meaningful opportunity to obtain release); *Commonwealth v. Dodge*, 77 A.3d 1263, 1275 (Pa. Super. 2013) (a sentence that would allow the defendant to be paroled in his early eighties, “though lengthy, is not the equivalent of a life sentence”).