
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*

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UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 17-6307

JASON MICHAEL CONTRERAS,

Petitioner – Appellee,

v.

KEITH W. DAVIS, Warden, Sussex II State Prison,

Respondent – Appellant.

No. 17-6351

JASON MICHAEL CONTRERAS,

Petitioner – Appellant,

v.

KEITH W. DAVIS, Warden, Sussex II State Prison,

Respondent – Appellee.

Appeals from the United States District Court for the Eastern District of Virginia, at
Alexandria. James C. Cacheris, Senior District Judge. (1:13-cv-00772-JCC-TRJ)

Argued: December 5, 2017

Decided: December 21, 2017

Before NIEMEYER, SHEDD and DUNCAN, Circuit Judges.

Vacated and remanded by unpublished opinion. Judge Duncan wrote the opinion, in which Judge Niemeyer and Judge Shedd joined.

ARGUED: Matthew Robert McGuire, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellant/Cross-Appellee. George A. Somerville, HARMAN CLAYTOR CORRIGAN & WELLMAN, Richmond, Virginia, for Appellee/Cross-Appellant. **ON BRIEF:** Mark R. Herring, Attorney General, Stuart A. Raphael, Solicitor General, Trevor S. Cox, Deputy Solicitor General, Rosemary V. Bourne, Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellant/Cross-Appellee. Jonathan P. Sheldon, Kelsey Karen Marie Peregoy, SHELDON FLOOD & HAYWOOD, PLC, Fairfax, Virginia; for Appellee/Cross-Appellant.

Unpublished opinions are not binding precedent in this circuit.

DUNCAN, Circuit Judge:

Defendant-Appellee Jason Michael Contreras petitioned the district court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that his conviction rested on an invalid guilty plea in light of *Miller v. Alabama*, 567 U.S. 460 (2012), and that his sentence violated his rights under the Eighth Amendment. The district court granted the petition on the ground that his sentence violated *Miller* and remanded to state court for resentencing in accordance with the Eighth Amendment. For the reasons that follow, we vacate the district court's judgment and remand with instructions to dismiss Contreras's petition.

I.

When Contreras was fifteen years old, his drug-addicted mother abandoned him at a crack house, entrusting him to the care of two adult drug dealers. Over twelve days in October 1996, Contreras participated in a crime spree. He robbed three people at gunpoint, stealing their cars or other valuables, then broke into a woman's home. On October 26, the drug dealers made Contreras and another juvenile flip a coin to determine who would carry out a fourth robbery. Contreras lost, so he took a gun and proceeded to confront thirty-five-year-old David Semko, who was walking to his car in the dark. Semko fled when he saw Contreras, and Contreras shot him in the back, killing him.

Contreras was arrested on October 30, 1996. On March 27, 1997, he pleaded guilty in circuit court in Norfolk, Virginia, to first-degree murder, attempted robbery, statutory burglary, three counts of robbery, and five counts of using a firearm in the

commission of a felony. At the time that Contreras pleaded guilty, he did so understanding that the maximum penalty for both the first-degree murder charge and robbery charges was life imprisonment. Virginia had abolished parole for offenses committed on or after January 1, 1995. By pleading guilty, he sought to avoid mandatory life imprisonment without parole.

Contreras was sentenced on May 15, 1997. Five witnesses testified at the sentencing hearing on Contreras's behalf, including his grandmother, his aunt, his stepfather, his social worker, and his juvenile probation officer. Both Contreras's attorney and Contreras himself asked the court for a reduced sentence on account of his youth. The court sentenced Contreras to terms of imprisonment of twenty-three years for the firearms charges, two years for statutory burglary, two years for attempted robbery, five years each for the three robberies, and thirty-five years for Semko's murder, all of which were to be served consecutively. Contreras's combined sentence for the eleven offenses was thus seventy-seven years of imprisonment.

On June 9, 1999, Contreras filed a state petition for a writ of habeas corpus, claiming trial error, ineffective assistance of counsel, and prosecutorial misconduct. His state habeas petition was denied, and he did not appeal to the Supreme Court of Virginia.

In 2010, the U.S. Supreme Court established that imposition of life without parole for juvenile, non-homicide offenders was unconstitutional. *Graham v. Florida*, 560 U.S. 48, 82 (2010). In 2012, the Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole" for juveniles convicted of homicide offenses. *Miller*, 567 U.S. at 489. On June 25, 2013, Contreras

filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 alleging that he was being held in state custody in violation of his Eighth Amendment rights under *Miller*. The district court initially denied his petition, and this court affirmed in 2015. Then, the U.S. Supreme Court announced in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), that *Miller* had articulated a substantive rule that could be applied retroactively on collateral review. *Id.* at 732. The Court granted Contreras's petition for writ of certiorari and vacated his judgment, remanding for reconsideration in light of *Montgomery*.

On remand, the district court granted Contreras's petition for writ of habeas corpus, concluding that Contreras's sentences, "while technically in compliance with the mandates of *Miller* and *Graham*, still subject juveniles to life behind bars." *Contreras v. Davis*, 229 F. Supp. 3d 475, 481 (E.D. Va. 2017). Thus, it found Contreras's sentence "irreconcilable with the mandates of *Graham* and *Miller*" because seventy-seven years in prison constituted a "de facto" life sentence for a fifteen-year-old. *Id.* at 482. The court also noted that "[e]ven assuming, arguendo, that Petitioner's sentence is constitutional, the Court remains concerned with the validity of Petitioner's guilty plea," which the court worried was made under threat of a now-unconstitutional punishment and therefore was rendered involuntary. *Id.* The district court remanded to state court for resentencing. The Respondent appealed. Contreras moved the district court to amend its judgment under Rule 52(b) of the Federal Rules of Civil Procedure to remand instead for a new trial, and the Respondent moved for a stay pending this appeal. The district court denied Contreras's Rule 52(b) motion and granted the requested stay pending appeal.

II.

We conclude that Contreras's claims are not cognizable under *Miller* because he is not subject to a mandatory life sentence without parole. Furthermore, following *Dingle v. Stevenson*, 840 F.3d 171 (4th Cir. 2016), even if Contreras pleaded guilty to avoid a now-unconstitutional sentence of mandatory life imprisonment without the possibility of parole, *Miller* does not render his guilty plea unconstitutional. Because we find no constitutional defect in Contreras's sentence, we vacate the district court's judgment and remand with instructions to reinstate Contreras's original sentence.

First, Contreras's sentence for the murder of David Semko is not the mandatory life sentence contemplated by *Miller*. Virginia does not impose mandatory life-without-parole sentences, even for capital murder. *Jones v. Commonwealth*, 795 S.E.2d 705, 711–12 (Va. 2017). Furthermore, “[i]n Virginia . . . a criminal defendant has a statutorily provided opportunity to present mitigation evidence at his sentencing hearing.” *Id.* at 713. As this court has noted, *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.” *In re Vassell*, 751 F.3d 267, 270 (4th Cir. 2014). Here, Contreras received an individualized sentence after five witnesses presented mitigating evidence on his youth, lessened culpability, and capacity for change. Thus, even if Contreras's thirty-five-year sentence for murder--or his total sentence of seventy-seven years for his combined crimes--could constitute a “de facto” life sentence (which we do not decide here), Contreras received an individualized sentence after consideration

of mitigating evidence about his youth and ability to be rehabilitated, which is all that is constitutionally required under *Miller*.

Second, even though Contreras's sentence is long, he may be released under Virginia's geriatric release program and thus has a meaningful opportunity to receive parole. In *Angel v. Commonwealth*, 704 S.E.2d 386 (Va. 2011), the Virginia Supreme Court held that Virginia's program allowing conditional release of geriatric prisoners pursuant to Va. Code Ann. § 53.1-40.01 provided "juvenile offenders an opportunity for release based on maturity and rehabilitation," which satisfied the requirements of the Eighth Amendment and *Graham*. *Id.* at 402. In *LeBlanc v. Mathena*, 841 F.3d 256 (4th Cir. 2016), this court disagreed with the Virginia Supreme Court, concluding that the Supreme Court of Virginia had applied *Graham* unreasonably. However, the Supreme Court reversed this court in *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017), and held that the Virginia Supreme Court's holding in *Angel* was not unreasonable. *Id.* at 1728–29. Thus, we are compelled to accept the Virginia Supreme Court's conclusions that the state's geriatric release program satisfies the requirements of the Eighth Amendment. Here, Contreras may apply for geriatric release at the age of sixty, and his application will be considered under "normal parole factors" to determine whether conditional release is warranted in light of his "demonstrated maturity and rehabilitation." *See id.* at 1729 (quoting *Graham*, 560 U.S. at 75). Contreras presents no basis on which to find that this program, which was held to provide a meaningful opportunity to obtain parole under *Graham*, would not also satisfy the requirements of *Miller*.

Finally, *Miller*'s holding does not render Contreras's plea involuntary. In *Dingle*, a juvenile pleaded guilty to murder and other crimes in order to avoid the state's threat that it would seek the death penalty. *Dingle*, 840 F.3d at 172. This court held that *Roper v. Simmons*, 543 U.S. 551 (2005), which invalidated the death penalty for juvenile offenders, did not apply retroactively to undo the *Dingle* defendant's guilty plea. *Id.* at 175–76. Applying *Dingle*'s reasoning, we must conclude that that *Miller* similarly cannot render involuntary a guilty plea made in order to avoid the threat of a mandatory life sentence without possibility of parole. Thus, Contreras's challenge to the voluntariness of his guilty plea must fail.

III.

For these reasons, we conclude that Contreras's sentence does not violate his constitutional rights, and thus we vacate the decision of the district court and remand with instructions to dismiss Contreras's petition. We also grant the government's motion to file an addendum.

VACATED AND REMANDED

FILED: January 18, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6307 (L)
(1:13-cv-00772-JCC-TRJ)

JASON MICHAEL CONTRERAS

Petitioner - Appellee

v.

KEITH W. DAVIS, Warden, Sussex II State Prison

Respondent - Appellant

No. 17-6351
(1:13-cv-00772-JCC-TRJ)

JASON MICHAEL CONTRERAS

Petitioner - Appellant

v.

KEITH W. DAVIS, Warden, Sussex II State Prison

Respondent - Appellee

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

JASON MICHAEL CONTRERAS,	)	
	)	
Petitioner,	)	
	)	
v.	)	1:13cv772 (JCC)
	)	
KEITH W. DAVIS,	)	
	)	
Respondent.	)	

M E M O R A N D U M O P I N I O N

Petitioner Jason Michael Contreras ("Petitioner" or "Contreras") originally filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 with this Court on June 25, 2013. [Dkt. 1.] In the petition, Contreras alleges that he is being held in state custody in violation of his federal constitutional rights, based on *Miller v. Alabama*, 132 S. Ct. 2455 (2012). Pet. at 3-4.

Petitioner's state custody arises from a 1997 judgment of conviction entered in Norfolk Circuit Court, following Petitioner's guilty plea, on charges of first degree murder, robbery, use of a firearm in the commission of a felony, and attempted robbery. Pet. at 4. This Court previously denied Petitioner's request for a writ, based primarily on its untimeliness. [Dkt. 8.] The petition is now back before the Court on remand, with instructions to reconsider this Court's prior ruling in light of *Montgomery v. Louisiana*, 136 S. Ct.

718 (2016). For the reasons that follow, the petition will be granted.

I. Background

Petitioner's state charges stem from his involvement in a botched carjacking that resulted in the death of David Semko ("Semko"). Pet. at 13-14. Prior to the night in question, Petitioner's childhood had been 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. *Id.* at 6-13. In fact, several weeks before the offense occurred, Contreras's mother had moved him into a crack house and then abandoned him, asking her drug dealers to supervise him. *Id.* at 12. The drug dealers interpreted this request as giving them permission to use Petitioner to help them commit crimes. *Id.*

On the night of October 26, 1996, one of the drug dealers made Contreras and another minor flip a coin to decide who would have to commit a robbery. Pet. at 13. Petitioner lost, so the drug dealer handed him a gun. *Id.* At that moment, Semko happened to be walking to his car. *Id.* Petitioner approached Semko, who ran. *Id.* In order to prove to the drug dealer that Contreras had tried to rob Semko, Petitioner fired a single shot "in[to] the pitch blackness" in Semko's direction. Declaration of Jason Contreras ("Contreras Decl.") [Dkt. 1-1 at 27] ¶ 25. The shot hit Semko in the back, who

died the next day. Pet. at 5. At the time, Petitioner was only fifteen years old. *Id.* at 14.

On or about October 30, 1996, Petitioner was arrested and charged with capital murder, robbery, and several related offenses. Pet. at 13-14. Even though he was a minor, Petitioner was certified and charged as an adult. *Id.* at 14. At that time, capital murder still carried a mandatory life sentence in Virginia. See *Yarbrough v. Commonwealth*, 258 Va. 347, 366-69 (1999).

On March 27, 1997, Petitioner pled guilty to first degree murder along with the aforementioned charges. Pet. at 4. Prior to the plea, Contreras's trial attorneys requested that the court appoint a mental health expert to evaluate him. *Id.* at 15. One attorney in particular worried that Petitioner was "quite immature" and "was really incapable of making an intelligent decision" because "[he] had no clue what was going on in his case . . . and could not even begin to absorb what was happening to him." Declaration of Attorney Kim M. Crump ("Crump Decl.") [Dkt. 1-1 at 19] ¶ 10. His attorneys also noted that they had "a hard time getting information [they] needed from him." *Id.* ¶ 11. The trial court denied their request, however. Pet. at 15. According to Petitioner, the only reason he ultimately agreed to plead guilty was to avoid the life sentence associated with a capital murder conviction. *Id.*

On May 20, 1997, following Petitioner's guilty plea, the court sentenced Petitioner to seventy-seven years in prison. Pet. at

4. Because Petitioner is ineligible for parole pursuant to Va. Code § 53.1-165.1, which abolished parole for individuals convicted of a felony committed after January 1, 1995, he will not be eligible for release until 2040. See Va. Code § 53.1-40.01 (permitting "Geriatric Release"). Petitioner did not file a direct appeal of his sentence. Pet. at 4. On June 10, 1999, Petitioner filed a *pro se* motion for habeas relief in the Norfolk Circuit Court. *Id.* Following a hearing, the court dismissed his motion. *Id.*

On June 23, 2013, Petitioner filed the instant petition for a federal writ of habeas corpus. [Dkt. 1.] Petitioner argues that his guilty plea is invalid because it was induced by the prosecutor's threat of a now unconstitutional sentence: mandatory life without parole. Petitioner's argument rests upon the recent Supreme Court case *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which held that mandatory life sentences for juveniles who commit homicide offenses are unconstitutional. Pet. at 3. Applying *Miller* retroactively, petitioner asks the Court to "discharge[] [him] from his unconstitutional confinement and restraint and/or relieve[] [him] from his unconstitutional sentence." *Id.* at 32.

Previously, Respondent moved to dismiss this petition on the grounds that it is time-barred, the claims are unexhausted, and the arguments are without merit. Resp't Br. at 3, 5, 17. This Court granted Respondent's motion and dismissed the petition, finding that *Miller* was not retroactive and, therefore, the petition was untimely.

[Dkt. 8.] Petitioner appealed the Court's ruling to the Fourth Circuit, which affirmed. [Dkt. 15.] Petitioner then appealed to the United States Supreme Court, which reversed and remanded the case for further consideration in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

On December 9, 2016, Petitioner submitted a supplemental pleading in support of his original petition for a writ of habeas corpus. [Dkt. 22.] Respondent filed its response on December 19, 2016. [Dkt. 23.] Petitioner failed to file a reply. This petition is now ripe for disposition.

II. Analysis

A. Timeliness

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), state prisoners have a one-year period within which they must seek federal habeas review. 28 U.S.C. § 2244(d)(1). Ordinarily, this limitation period begins to run from the date on which the state court judgment becomes final. See *Gonzalez v. Thaler*, 132 S. Ct. 641, 652-53 (2012). However, in some circumstances, AEDPA expressly permits accrual of the limitations period at a later date. See 28 U.S.C. § 2244(d)(1). As pertinent here, AEDPA allows for a belated commencement of the limitation period when the Supreme Court recognizes a new constitutional right. In that case, the limitations period runs from 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.” 28 U.S.C.

§ 2244(d)(1)(C).

Here, the window for Petitioner to bring a federal challenge to his 1997 conviction expired sometime in 1998 after he opted not to seek direct review. See *Gonzalez*, 132 S. Ct. at 653. Consequently, the current petition, filed in 2013, should be precluded unless Petitioner can demonstrate a belated commencement of the limitations period. See 28 U.S.C. §§ 2244(d)(1)(B)-(D).

Petitioner argues that he is entitled to a later accrual date based on the Supreme Court’s recent decision, *Miller v. Alabama*. Pet. at 4; Supp. Pleading at 6-7. Though Petitioner fails to make this argument himself, the Supreme Court’s remand requires consideration of *Montgomery*, which held that *Miller* announced a substantive rule of law that should be given retroactive effect to cases on collateral review. 136 S. Ct. 718, 734 (2016). Petitioner appears to argue that the new rule set forth in *Miller*, and made retroactive by *Montgomery*, applies to his case, qualifying his petition for a belated commencement under § 2244(d)(1)(C). This Court agrees. Accordingly, the Court finds that the petition for a writ of habeas corpus is timely under § 2244(d)(1)(C).

B. State Exhaustion and Procedural Default

Before applying for federal habeas relief, a state prisoner must also exhaust all available state remedies. *Breard v. Pruett*,

134 F.3d 615, 619 (4th Cir. 1998); see also 28 U.S.C. § 2254(b). "To exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court." *Id.* (citing *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997)). This means that the petitioner must not present "new legal theories or factual claims for the first time in his federal habeas petition," unless he has a valid excuse. *Id.* (citing *Matthews*, 105 F.3d at 911.); see also 28 U.S.C. § 2254(b). The petitioner bears the burden of proving exhaustion. *Breard*, 134 F.3d at 619.

In the instant case, Petitioner filed his first and only state habeas petition on June 9, 1999, alleging claims of trial error, ineffective assistance of counsel, and prosecutorial misconduct. Exh. B, State Habeas Pet. [Dkt. 7] at 39, 54-55. He included in those claims allegations about the involuntariness of his guilty plea, which focused on bad advice his attorneys had given him about his possible eligibility for parole. *Id.* at 32-33. Petitioner also included claims about his attorneys' failure to object to the prosecution's decision to reinstate capital murder charges against him prior to his plea. *Id.* at 2-4. Unsurprisingly, he did not mention *Miller* in his state petition, as it had not yet been decided. Nevertheless, Petitioner did mention the impact of his youthfulness on the proceedings, which would become relevant post-*Miller*.¹

¹ It is also notable that Contreras filed his state habeas petition *pro se* several months after turning eighteen years old.

Petitioner's request for state habeas relief was ultimately denied. He did not appeal that ruling to the Supreme Court of Virginia.

Respondent concedes that if Petitioner has a "bona-fide *Miller* claim, he might legitimately argue that he had no avenue to exhaust such a claim in state court." Resp. Mem. in Supp. of Mot. to Dismiss [Dkt. 7] ¶ 14. However, Respondent argues that Petitioner's claim is not a true *Miller* claim and is instead "nothing more than an allegation that his plea was coerced by the prosecutor's conduct, a claim which he certainly could have raised" in his state habeas petition, but did not. Resp. Repl. to Supp. Pleading [Dkt. 23] at 9. Because Petitioner did not present this factual predicate to the state court, and because he never appealed the state habeas ruling to the Supreme Court of Virginia, Respondent asserts that he is now barred from raising the claim here. (*Id.*)

Respondent is correct that Petitioner would be barred from raising a challenge to the voluntariness of his plea based solely on prosecutorial misconduct, as his earlier involuntariness claim did not mention threats or coercion by the prosecution. See 28 U.S.C. § 2244(b)(2)(B). Such a claim would also be considered procedurally defaulted by Virginia's statute of limitations period and its successive writ rule. See Va. Code § 8.01-654(A)(2) (requiring a state habeas petition to be filed within one year after the deadline for filing a direct appeal has expired); Va. Code § 8.01-654(B)(2) ("No writ shall be granted on the basis of any allegation the facts

of which petitioner had knowledge at the time of filing any previous petition.”). Thus, he could not go back to the Commonwealth of Virginia to bring his claim in the first instance. As a result, the only way for this Court to address Petitioner’s claim is if he can show “that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable” to him. 28 U.S.C. § 2244(b)(2)(A). *Miller*, made retroactive by *Montgomery*, provides such a rule.

C. *Miller’s Application to Petitioner’s Guilty Plea and/or 77-Year Sentence*

In this Court’s prior Memorandum Opinion—issued on December 11, 2013—the Court dismissed Petitioner’s federal habeas claim as untimely, due in large part to the Court’s belief that *Miller* was not retroactive. [Dkt. 8.] In dicta, the Court also stated that “*Miller* has no bearing on [Petitioner’s] case” because *Miller* did not address the legitimacy of a guilty plea entered by a juvenile offender after the threat of a now unconstitutional life without parole sentence. [Dkt. 8 at 5.] Taking into consideration *Miller’s* retroactivity as well as other recent developments in case law, the Court now revisits its earlier decision. For the reasons that follow, the Court finds that *Miller* applies. Thus, the Court grants Petitioner’s request for a writ of habeas corpus to correct his unconstitutional sentence.

Despite the passage of three years, the crux of
Petitioner’s claim remains the same: his guilty plea is flawed

because the prosecution threatened to pursue a mandatory life without parole sentence, a punishment that is now unconstitutional. Pet. at 3. In support of this argument, Petitioner points out that *Brady v. United States*, 397 U.S. 742 (1970) "places a high degree of faith in the rational knowledgeable defendant, capable of assisting in his own defense, aided by counsel[,] and capable of assessing and weighing the import of possible outcomes" when entering a guilty plea. Supp. Pleading at 4. In contrast, Petitioner was an "immature fifteen-year-old with no experience with the criminal justice system" whose attorneys described him as "incapable of making an intelligent decision" on his own. *Id.* at 5. Petitioner claims that *Miller* and its antecedents established that "children are different" and, thus, the criminal justice system must treat them differently when considering guilty pleas entered in the shadow of cruel and unusual punishment. *Id.* (citing *Miller*, 132 S. Ct. at 2469). Petitioner also asserts that his sentence "falls squarely into the settled premise that his punishment is vastly excessive in relation to his moral culpability." *Id.* at 6 (citing *Miller*, 132 S. Ct. at 2464; *Graham*, 560 U.S. at 48-50; *Roper*, 543 U.S. at 560). At its essence, then, Petitioner's claim seeks to have this Court combine *Miller* and its antecedents with *Brady* to craft a new rule that will invalidate his 77-year sentence.

If the Court were to construe *Miller*, *Graham*, and *Roper* in the narrowest light possible, Petitioner would have no plausible

claim for relief. That is because the Supreme Court's holdings focus on specific sentences for juveniles, invalidating mandatory life without parole sentences for homicide offenses, life without parole sentences for non-homicide offenses, and the death penalty, respectively. *Miller*, 132 S. Ct. at 2469; *Graham*, 560 U.S. at 82; *Roper*, 543 U.S. at 578. According to this narrow interpretation, if a defendant has been sentenced to anything else—such as a long term-of-years sentence or multiple consecutive sentences—the trilogy provides no avenue for federal habeas relief. See, e.g., *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012) (holding that *Graham* was inapplicable because petitioner was sentenced to 89 years for multiple non-homicide offenses, rather than life without parole, even though it was the “functional equivalent”); cf. *Dingle v. Stevenson*, 840 F.3d 171 (4th Cir. 2016) (holding, without considering the unique characteristics of juveniles, that *Roper* did not invalidate a guilty plea entered by a juvenile defendant to avoid the possibility of the death penalty). Such a narrow interpretation, however, overlooks important principles the Supreme Court directed states to consider when punishing juveniles, most notably the Court's guidance regarding the possibility of parole.

In *Graham*, the Supreme Court made clear that when a state sentences a juvenile to life in prison, “it must provide [that child] with some realistic opportunity to obtain release before the end of that term.” 560 U.S. at 81. Although *Graham* left it up to the

states to figure out how to comply with its ruling, *id.* at 75, the decision nevertheless established at least three minimum requirements for parole or early release programs. First, the opportunity for release must be "based on demonstrated maturity and rehabilitation." *Id.* at 75. Second, it must be "meaningful," which means the opportunity must be "realistic" and more than a "remote possibility."² *Id.* at 70, 75, 82. Third, the state parole or early release system must take into account the defendant's youthfulness when the crime was committed, a fact that makes him or her less culpable than an adult. *Id.* at 76.

Several years later, *Miller* expanded upon *Graham's* principles, allowing a state to impose life without parole for a juvenile convicted of a homicide offense only after taking into consideration the offender's age and age-related characteristics. 132 S. Ct. at 2475. Although *Miller* technically permitted such sentences, it also made clear that "sentencing juveniles to this harshest possible penalty [should] be uncommon." *Id.* at 2469.

Since *Graham* and *Miller* were decided, several courts have applied these principles more broadly to invalidate lengthy term-of-years sentences for juveniles. See, e.g., *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013) (invalidating a 254 year sentence as "materially indistinguishable" from a life sentence without parole since the

² Importantly, the Supreme Court pointed out that executive clemency is not "meaningful" due to its ad hoc nature. *Id.* at 69-70.

juvenile offender would not be eligible for parole during his natural lifetime); *cf. LeBlanc v. Mathena*, 841 F.3d 256 (4th Cir. 2016) (holding that Virginia's Geriatric Release program does not comply with the requirements of *Graham* as it does not provide a "meaningful" opportunity for release for juvenile offenders). Essentially, courts have viewed such sentences as *de facto* life sentences. These sentences, while technically in compliance with the mandates of *Miller* and *Graham*, still subject juveniles to life behind bars, with "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Graham*, 560 U.S. at 79. Thus, courts have treated them as every bit as cruel and unusual as life without parole itself. Given the status of Virginia's current early release program, this Court is inclined to agree.

In *LeBlanc v. Mathena*, the Fourth Circuit recently held that Virginia's Geriatric Release program fails to meet the basic dictates of *Graham* for juvenile offenders sentenced to life in prison. 841 F.3d at 274. The Fourth Circuit reasoned that Geriatric Release does not provide juveniles with the opportunity to obtain release "based on demonstrated maturity and rehabilitation," as required by *Graham*, because the Parole Board has the authority to deny release "for any reason whatsoever." *Id.* at 268-69. Moreover, data provided by the Virginia Criminal Sentencing Commission revealed that Geriatric Release petitions are denied "in nearly every case" based solely on the "heinousness or depravity of the offender's

crime," a consideration that directly contradicts *Graham*. *Id.* at 270. In addition, the Court found that Geriatric Release does not provide a "meaningful" opportunity for release to juveniles because, under the program, release is the exception rather than the rule. *Id.* at 271. Moreover, there are no standards by which to govern the denial of release petitions. *Id.* Finally, the Fourth Circuit concluded that Geriatric Release did not require the Parole Board to consider the "special mitigating force of youth," thereby allowing the Board to ignore juvenile offenders' lesser culpability and subject them to harsher punishments than adults by requiring them to serve a larger percentage of their sentences. *Id.* at 272.

In the instant case, Petitioner received a sentence of seventy-seven years. Due to Virginia's elimination of parole in the 1990s, Petitioner will not be eligible for early release until he turns sixty years old. See Va. Code § 53.1-165.1 (eliminating parole for offenses committed after January 1, 1995); see also Va. Code § 53.1-40.1 (providing for "Geriatric Release"). By that time, he will have spent 45 years behind bars. And, as noted by the Fourth Circuit in *LeBlanc*, there is no guarantee that his petition for early release will ever be granted.

This Court is troubled by the practical realities of Petitioner's case, as Virginia has imposed a lengthy term-of-years sentence with no realistic possibility for early release. In effect, Virginia has relegated Petitioner to a *de facto* life sentence for

crimes he committed when he was only fifteen years old. For that reason, the Court is sufficiently convinced that Petitioner's sentence is irreconcilable with the mandates of *Graham* and *Miller*. Thus, the Court will grant his petition for a writ of habeas corpus and remand to the state court for re-sentencing in accordance with the Eighth Amendment.

Even assuming, *arguendo*, that Petitioner's sentence is constitutional, the Court remains concerned with the validity of Petitioner's guilty plea. Petitioner claims that the only reason he pled guilty was to avoid the imposition of a mandatory life without parole sentence, a punishment that has since been struck down as cruel and unusual. Supp. Pleading at 4. Petitioner argues that the standard set forth in *Brady v. United States*, 397 U.S. 742 (1970) to assess the validity of a guilty plea is inadequate in this case because it fails to address how facing a definite unconstitutional punishment as the result of going to trial may coerce a juvenile defendant into pleading guilty. *Id.* While Petitioner concedes that *Brady* should be applied to his case, he nevertheless urges the Court to consider it within the context of the "constitutional logic" of *Miller*, *Graham*, and *Roper*. *Id.*

In *Brady v. United States*, the petitioner challenged the voluntariness of his guilty plea, arguing that it was coerced by a now-unconstitutional criminal statute. 397 U.S. at 746 (citing *United States v. Jackson*, 390 U.S. 570 (1968)). Brady had been

charged with kidnapping under 18 U.S.C. § 1201(a), which authorized the death penalty only upon a jury's recommendation. *Id.* at 743. Nearly ten years later, the Supreme Court invalidated this provision, arguing that it discouraged the assertion of defendants' constitutional rights to plead not guilty and to demand a jury trial. *Jackson*, 390 U.S. at 572, 583. Because fear of the death penalty had been at least one factor in Brady's decision to plead guilty, he argued that *Jackson* invalidated his plea. *Brady*, 397 U.S. at 746. The Supreme Court disagreed.

Brady first concluded that Petitioner's plea had been voluntary. The Court began by clarifying that *Jackson* did not hold that "every defendant who enters a guilty plea to a charge under the Act [automatically] does so involuntarily." 397 U.S. at 747 (citing *Jackson*, 390 U.S. at 583) (internal quotations omitted). It then proceeded to examine the circumstances surrounding Brady's plea, looking for evidence that the defendant was "fully aware of the direct consequences" of his plea and entered it without facing threats, misrepresentation, or bribes. *Id.* at 755. In its analysis, the Court placed great weight on the fact that Brady had decided to plead guilty after his co-defendant confessed and agreed to testify against him. *Id.* at 749. Furthermore, although the Court acknowledged the possibility that facing the death penalty may have influenced Brady's decision, the Court reasoned that it was only one of several factors to consider. *Id.* The Court also considered other

factors, finding no evidence that Brady pled guilty due to "actual or threatened physical harm or mental coercion," that he had competent counsel and was able to "rationally weigh the advantages of going to trial against [those] of pleading guilty," and that his plea was entered in open court before a trial judge who twice questioned its voluntariness. *Id.* at 743, 750, 754-55. In other words, Brady's decision to plead guilty was his own.

In addition, the *Brady* Court concluded that Petitioner's plea was intelligently made. The Court found no evidence that Brady was "incompetent or otherwise not in control of his mental faculties" at the time he entered a guilty plea. 397 U.S. at 756. The Court went on to explain that "absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Id.* at 757. Or, to put it more simply, "[t]he fact that Brady did not anticipate *United States v. Jackson* . . . does not impugn the truth or reliability of his plea." *Id.*

Starting with *Roper* and continuing with *Graham* and *Miller*, however, the Supreme Court outlined several critical differences between juvenile and adult offenders that are relevant to the *Brady* analysis. In its trilogy, the Court noted that "juveniles have a lack of maturity and an underdeveloped sense of responsibility; they

are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed." *Graham*, 560 U.S. at 68 (citing *Roper*, 543 U.S. at 569-70, 573) (internal quotations omitted). In addition, the Court pointed out that juveniles have a proclivity towards risky behavior and an inability to assess consequences. *Miller*, 132 S. Ct. at 2464-65. As a result, juveniles' conduct should be viewed as less culpable and their character as more capable of reform. *Id.* at 2464. The Court took great care to point out that "none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." *Id.* at 2465. Nor should it be. The same juvenile characteristics that are relevant at sentencing pervade every aspect of a criminal case, including guilty pleas. Consequently, when the criminal justice system deals with children, the "constitutional logic" of *Miller*, *Graham*, and *Roper* should apply.

In the instant case, this Court must examine all of the relevant circumstances surrounding Petitioner's guilty plea, including his age at the time his plea was entered. *Brady*, 397 U.S. at 749; see also *Graham*, 560 U.S. at 76 ("An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."). Petitioner alleges that his guilty plea was entered solely to avoid a mandatory life without parole sentence. Supp.

Pleading at 4. This fact is confirmed by Contreras's trial attorney. Crump Decl. ¶ 15. Additionally, at the time of his guilty plea, Petitioner, who was only fifteen years old, demonstrated all of the inherent characteristics of youth. Supp. Pleading at 5. For example, although Petitioner had been forced to provide for himself amidst a tumultuous upbringing, he remained "quite immature." Crump Decl. ¶¶ 10-11. Once abandoned by his drug-addicted mother to the supervision of drug dealers, Petitioner followed their negative lead, committing crimes at the drug dealers' request. Even after he was arrested and charged, Petitioner seemed incapable of grasping the consequences of his actions. His trial attorneys describe him as unable to absorb what was happening to him, in need of a mental health evaluation, and unable to assist in his own defense. *Id.*; Pet. at 15.

Having considered the circumstances surrounding Petitioner's guilty plea, the Court is left with grave concerns that his plea was entered "with full awareness of its consequences." See *Brady*, 397 U.S. at 755. Moreover, Petitioner's desire to avoid a cruel and unusual punishment, coupled with his potential mental health issues, suggest that his plea was not voluntary and intelligently made. Certainly, a later judicial decision invalidating the punishment Contreras faced would not be enough on its own to attack his guilty plea today. See *Brady*, 397 U.S. at 757.

But *Miller* and its antecedents, in combination with the circumstances surrounding Petitioner's decision to plead guilty, would be.

Accordingly, as stated above, the Court will grant Contreras's petition for a writ of habeas corpus and remand to the state court for re-sentencing in accordance with the Eighth Amendment.

III. Conclusion

For the foregoing reasons, the petition will be granted.
An appropriate Order shall issue.

January 26, 2017
Alexandria, Virginia

/s/

James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

JASON MICHAEL CONTRERAS,	)	
	)	
Petitioner,	)	
	)	
v.	)	1:13cv772 (JCC)
	)	
KEITH W. DAVIS,	)	
	)	
Respondent.	)	

M E M O R A N D U M O P I N I O N

Petitioner Jason Michael Contreras ("Petitioner") has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, in which he alleges that he is being held in state custody in violation of his federal constitutional rights. (Pet. [Dkt. 1] at 1-4.) Petitioner's state custody arises from a 1997 judgment of conviction entered in Norfolk Circuit Court, following his guilty plea, on charges of first degree murder, robbery, use of a firearm in the commission of a felony, and attempted robbery. (Pet. at 4.) Respondent has filed a Motion to Dismiss and Rule 5 Answer, with a supporting brief. [Dkts. 5-7.] Despite ample time, Petitioner has not filed a reply. For the reasons that follow, the petition will be dismissed.

I. Background

The state charges against Petitioner stem from his involvement in a botched carjacking that resulted in the death of David Semko. (Pet. at 13-14.) It is undisputed that Petitioner fatally shot Semko as he was walking to his vehicle. (Pet. at 13.)

On or about October 30, 1996, Petitioner was arrested and charged with capital murder, robbery, and several related offenses. (Pet. at 13-14.) Although only fifteen years old at the time of his arrest, Petitioner was certified and charged as an adult. (Pet. at 14.) Capital murder then carried a mandatory life sentence.¹ (Pet. at 15.)

On March 27, 1997, Petitioner pled guilty to first degree murder along with the aforementioned charges. (Pet. at 4.) According to Petitioner, he took this plea deal to avoid the life sentence associated with a capital murder conviction. (Pet. at 15.)

On May 20, 1997, the court sentenced Petitioner to seventy-seven years in prison. (Pet. at 4.) Petitioner did not file a direct appeal. (Pet. at 4.) Nevertheless, on June 10, 1999, Petitioner filed a *pro se* motion for habeas relief in the

¹ Respondent submits that capital murder did not carry a mandatory life sentence at the time of Petitioner's conviction. (Resp't Br. in Supp. of Mot. to Dismiss at 20-21.) This is simply incorrect. See *Yarbrough v. Commonwealth*, 258 Va. 347, 366-69 (1999). Accordingly, the Court will not address any of Respondent's arguments based on this contention.

Norfolk Circuit Court. (Pet. at 4.) Following a hearing, the court dismissed the motion. (Pet. at 4.) Petitioner's case remained dormant until he filed the instant petition.

In the habeas petition currently before the Court, Petitioner alleges that his guilty plea is invalid because it was induced by the prosecutor's threat of a now unconstitutional sentence: mandatory life without parole for a capital murder charge. Petitioner's argument rests upon the recent Supreme Court case *Miller v. Alabama*, __ U.S. __, 132 S. Ct. 2455 (2012), in which the Court held that mandatory life sentences for juveniles are unconstitutional. (Pet. at 3.) Applying *Miller* retroactively, petitioner asks the Court to "discharge[] [him] from his unconstitutional confinement and restraint and/or relieve[] [him] from his unconstitutional sentence." (Pet. at 32.)

Respondent has moved to dismiss the petition on grounds that it is time-barred, the claims are unexhausted, and finally the arguments are without merit. (Resp't Br. at 3, 5, 17.)

II. Analysis

There are several problems with the pending petition, the most glaring of which is its timeliness. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), state prisoners have a one-year period within which they must

seek federal habeas review. 28 U.S.C. § 2244(d)(1).

Ordinarily, this limitation period begins to run from the date on which the state court judgment becomes final. See *Gonzalez v. Thaler*, __ U.S. __, 132 S. Ct. 641, 652-53 (2012). However, in some circumstances, AEPDA expressly permits accrual of the limitations period from a later date. See 28 U.S.C. § 2244(d)(1). Pertinent here, AEDPA allows for a belated commencement of the limitation period when the Supreme Court recognizes a new constitutional right. In that case, the limitations period runs from 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.” 28 U.S.C. § 2244(d)(1)(C).

Here, Petitioner’s habeas claims are facially time-barred. The window to bring a federal challenge to his 1997 conviction expired sometime in 1998 after he opted not to seek direct review. See *Gonzalez*, 132 S. Ct. at 653. Consequently, the current petition, filed in 2013, is precluded unless Petitioner can demonstrate a belated commencement of the limitations period. See 28 U.S.C. §§ 2244(d)(1)(B)-(D).

Recognizing this impediment, Petitioner appears to argue that he is entitled to a later accrual date based on the Supreme Court’s decision in *Miller*. (Pet. at 4.) Petitioner

maintains that the new rule set forth in *Miller* is retroactive to his case and sufficient to qualify for a belated commencement under § 2244(d)(1)(C). (Pet. at 4.) As explained below, however, the Court is unpersuaded by this position.

First, Petitioner cannot avail himself of a later accrual date on account of *Miller* because, on its face, *Miller* has no bearing on his case. The crux of Petitioner's claim is that his guilty plea is flawed because the prosecution threatened to pursue a mandatory life sentence, a punishment that is now unconstitutional for juvenile offenders such as Petitioner. (Pet. at 3.) In *Miller*, however, the Supreme Court ruled "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 132 S. Ct. at 2469. *Miller* did not address the legitimacy of a guilty plea executed on the threat of such a sentence. In essence, Petitioner asks the Court to read into *Miller* a rule that any guilty plea executed on the threat of a lawful sentence later held unconstitutional is itself invalid. There is nothing in *Miller* to suggest this expanded reading, and the Court declines Petitioner's invitation to create such a rule now. Indeed, this position would violate well-established precedent. See *Brady v. United States*, 397 U.S. 742, 756 (1970) ("[A] voluntary plea of guilty intelligently made in the light of the then applicable law does

not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise."); *Hudgins v. Cartledge*, C.A. No. 5:10-3282-JFA-KDW, 2012 WL 761673, at *4 (D.S.C. Mar. 8, 2012) (holding that a guilty plea to murder which resulted in a life sentence was not involuntary where the prosecutor had threatened a juvenile with a death sentence, the kind of sentence that was later found unconstitutional under *Roper v. Simmons*, 543 U.S. 551 (2005)). Given the issue as framed by Petitioner, it is apparent that the *Miller* ruling did not recognize a right that could potentially lead to relief in this case.

Moreover, since Petitioner received a sentence of seventy-seven years, the ruling in *Miller*, as properly interpreted, is inapplicable. As remarked above, *Miller* pertains only to juveniles sentenced to life without the possibility of parole. See *Friedlander v. United States*, No. 13-70918, 2013 WL 5614774, at *1 (9th Cir. Oct. 8, 2013) ("*Miller* is inapplicable because [defendant] was not sentenced to life without parole.>").

Nevertheless, even interpreting *Miller* as Petitioner suggests, it does not offer relief from the statute of limitations. This Court is persuaded that the new rule announced in *Miller* is not retroactively applicable to cases on

collateral review. As such, Petitioner cannot claim the benefit of *Miller*, either in its substance or to make his action timely.

To fall under the statute of limitations exception Petitioner relies upon, § 2244(d)(1)(C), it must be shown that (a) the Supreme Court has recognized a new constitutional right, and (b) the Supreme Court made this right retroactive to cases on collateral review. *Id.* While *Miller* undoubtedly created a new rule as prescribed in this section, see *Craig v. Cain*, No. 12-30035, 2013 WL 69128, at *1 (5th Cir. Jan. 4, 2013), retroactivity is absent.

Under long-settled precedent, "the integrity of judicial review requires that [the Court] apply [newly decided constitutional rules] to all similar cases pending on direct review." *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). By contrast, new constitutional rules are not applicable to those cases which have become final unless they fall within one of two familiar exceptions set forth in *Teague v. Lane*, 489 U.S. 288 (1989). The first exception applies to rules prohibiting certain primary conduct or prohibiting a certain category of punishment for a class of defendants because of their status or offense. See *Beard v. Banks*, 542 U.S. 406, 416 (2004). These rules are deemed "substantive" and generally apply retroactively on collateral review. *Id.* The vast majority of courts to address this issue have found that the rule set forth in *Miller*

does not fall under this rubric, and we agree with their analysis. See, e.g., *Johnson v. Ponton*, Civil Action No. 3:13-CV-404, 2013 WL 5663068, at *5 (E.D. Va. Oct. 16, 2013).

Indeed, the Supreme Court's language indicates that it intended the *Miller* rule to be procedural, rather than substantive. See *Miller*, 132 S. Ct. at 2471 ("Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty."). Such a holding falls outside the first exception to *Teague*. See *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004).

The second *Teague* exception applies to "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" or "implicit in the concept of ordered liberty." *Beard*, 542 U.S. at 417. "In providing guidance as to what might fall within this exception, [the Court has] repeatedly referred to the rule of *Gideon v. Wainwright*, . . . and only to this rule." *Beard*, 542 U.S. at 417 (citations omitted). The Court further noted that "it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception." *Id.* Although the rule handed down in *Miller* plays an important role in our

jurisprudence, it is far from the "watershed" rule set forth in *Gideon*. Indeed, the rule in *Miller* "is an outgrowth of the Court's prior decisions that pertain to individualized-sentencing determinations. [Thus, it] does not qualify as a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Craig*, 2013 WL 69128, at *2 (citations and internal quotation marks omitted).

Given the *Miller* rule does not qualify under either *Teague* exception, it is not retroactively applicable to cases on collateral review. Consequently, Petitioner cannot claim the substantive benefit of *Miller* or use the case as grounds to claim this action is timely. Petitioner has not alleged any other plausible basis for tolling the limitations period. Accordingly, the petition is time-barred from federal consideration and will be dismissed. Respondent's alternate arguments regarding procedural default and the merits of Petitioner's claims consequently need not be addressed.²

² It is worth noting that the petition would also fail under Respondent's alternate arguments. First, Petitioner's claims are clearly unexhausted because he never presented them in any state proceeding. More importantly, his position is meritless. It is well-settled that a subsequent change in the available punishments for a charged crime, standing alone, does not render a prior guilty plea involuntary. See *Hudgins*, 2012 WL 761673, at *4 (holding that a guilty plea was not involuntary where the prosecutor had threatened a juvenile with a death sentence, the kind of punishment that was later found unconstitutional).

III. Conclusion

For the foregoing reasons, Respondent's Motion to Dismiss will be granted and the petition will be dismissed with prejudice. An appropriate Order will issue.

December 11, 2013
Alexandria, Virginia

/s/

James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-6045

JASON MICHAEL CONTRERAS,

Petitioner - Appellant,

v.

KEITH W. DAVIS, Warden, Sussex II State Prison,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, Senior District Judge. (1:13-cv-00772-JCC-TRJ)

Submitted: March 10, 2015

Decided: March 16, 2015

Before GREGORY, DUNCAN, and WYNN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Jonathan P. Sheldon, SHELTON, FLOOD & HAYWOOD, PLC, Fairfax, Virginia, for Appellant. Rosemary Virginia Bourne, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jason Michael Contreras appeals the district court's order dismissing his 28 U.S.C. § 2254 (2012) petition raising a claim under Miller v. Alabama, 132 S. Ct. 2455 (2012). We previously granted a certificate of appealability on the issue of whether the district court erred in dismissing the petition as untimely, and we placed the appeal in abeyance pending a decision in Johnson v. Ponton, __ F.3d __, 2015 WL 924049 (4th Cir. Mar. 5, 2015). In Johnson, the Court held that the Miller rule is not retroactively applicable to cases on collateral review. Accordingly, we affirm the district court's order. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

Supreme Court of the United States

No. 15-5310

JASON MICHAEL CONTRERAS,

Petitioner

v.

KEITH W. DAVIS, WARDEN

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

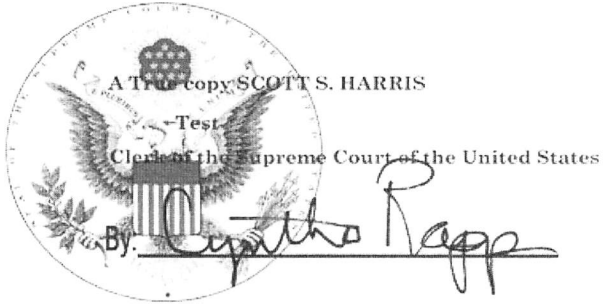
THIS CAUSE having been submitted on the petition for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the above court in this cause is vacated with costs, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Montgomery v. Louisiana*, 577 U. S. ____ (2016).

Justice Thomas, with whom Justice Alito joins, concurring in the decision to grant, vacate, and remand in this case: The Court has held the petition in this and many other cases pending the decision in *Montgomery v. Louisiana*, 577 U. S. ____ (2016). In holding this petition and now vacating and remanding the judgment below, the Court has not assessed whether petitioner's asserted entitlement to retroactive relief "is properly presented in the case." *Id.*, at ____ (slip op., at 13). On remand, courts should understand that the Court's disposition of this petition does not reflect any view regarding petitioner's entitlement to relief. The Court's disposition does not, for example, address whether an adequate and independent state ground bars relief, whether petitioner forfeited or waived any entitlement to relief (by, for example, entering into a plea agreement waiving any

entitlement to relief), or whether petitioner's sentence actually qualifies as a mandatory life without parole sentence.

March 7, 2016



FILED: April 11, 2016

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-6045
(1:13-cv-00772-JCC-TRJ)

JASON MICHAEL CONTRERAS

Petitioner - Appellant

v.

KEITH W. DAVIS, Warden, Sussex II State Prison

Respondent – Appellee

O R D E R

By order of March 7, 2016, the Supreme Court of the United States vacated this court's judgment and remanded the case for further consideration in light of Montgomery v. Louisiana, 577 U.S. ____ (2016).*

The Supreme Court's judgment having issued, this case is remanded to the district court for further consideration in light of Montgomery v. Louisiana, 577 U.S. ____ (2016).

* Justice Thomas, joined by Justice Alito, noted in concurrence that courts should understand on remand that the Court's disposition did not reflect any view

Entered at the direction of Judge Duncan with the concurrence of Judge Gregory and Judge Wynn.

For the Court

/s/ Patricia S. Connor, Clerk

regarding petitioner's entitlement to relief.