IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
KUSHAL KALPAN SHAH,	)	Cr. ID. No. 0002019767
f.k.a. GERRON LINDSEY,	)	
Defendant.	)	

Submitted: September 14, 2017
Decided: October 31, 2017

Upon Commissioner's Report and Recommendation on Defendant's Eleventh Motion for Postconviction Relief and Motion for Appointment of Counsel

ADOPTED

ORDER

This 31st day of October, 2017, the Court has considered the Commissioner's Report and Recommendation, Defendant's Motion for Postconviction Relief, Defendant's objections to the Commissioner's Report and Recommendations, and the relevant proceedings below.

On April 18, 2017, Defendant Kushal K. Shah filed this *pro se* motion for postconviction relief. The motion was referred to a Superior Court Commissioner in accordance with 10 *Del. C.* § 512(b) and Superior Court Criminal Rule 62 for proposed findings of fact and conclusions of law. The Commissioner issued the Report and Recommendation on August 23, 2017. The Commissioner

recommended that Defendant's Motion for Postconviction Relief be summarily dismissed.

"Within ten days after filing of a Commissioner's proposed findings of fact and recommendations . . . any party may serve and file written objections."[1] Defendant Shah filed written objections on September 14, 2017. Upon review, the Court finds Defendant's objections merely reiterate the arguments made below and are without merit.

This is Shah's eleventh motion for postconviction relief. "In second or subsequent postconviction motions, the motion shall be summarily dismissed unless the defendant establishes: 1) that new evidence exists that creates a strong inference that he is actually innocent of the charge for which he was convicted, or 2) the existence of a new rule of constitutional law made retroactive to cases on collateral review rendered his convictions invalid."[2] "If it plainly appears from the motion for postconviction relief that the movant is not entitled to relief, the Court may enter an order for its summary dismissal and cause the movant to be notified."[3]

Shah seeks relief under *Miller v. Alabama*.[4] *Miller* held that mandatory life sentencing without parole of those under the age of 18 at the time of their crimes

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[1] Super. Ct. Crim. R. 62(a)(5)(ii).
[2] Super.Ct.Crim.R. 61(d)(2) & (5); Rule 61(i).
[3] Super.Ct.Crim.R. 61(d)(5).
[4] 567 U.S. 460 (2016).

was unconstitutional under the 8th Amendment.[5] Shah concedes he was no longer under the age of 18 at the time of his offense, but argues *Miller* should still provide relief because he was only 18 and 21 days old. Though *Miller* did create a "new rule of constitutional law made retroactive,"[6] its stated holding does not apply to those, like Shah, who were over the age of 18 at the time of their offense. Therefore, Shah fails to meet the pleading requirements of Rule 61(d)(2).

The Court holds that the Commissioner's Report and Recommendations dated August 23, 2017 should be adopted for the reasons set forth therein. The Commissioner's findings are not clearly erroneous, are not contrary to law, and are not an abuse of discretion.[7]

THEREFORE, after careful and *de novo* review of the record in this action, the Court hereby adopts the Commissioner's Report and Recommendation in its entirety. Defendant's Motion for Postconviction Relief is hereby **DENIED.**

IT IS SO ORDERED.

The Honorable Mary M. Johnston

[5] *Id.* at 465.
[6] *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 ("*Miller* announced a substantive rule that is retroactive in cases on collateral review.").
[7] Super. Ct. Crim. R. 62(a)(4)(iv).