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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

United States of America,  
  
Plaintiff,  
  
vs.  
  
Branden Pete,  
  
Defendant/Movant.

No. CV 13-8149-PCT-RCB (DKD)  
CR 03-0355-PCT-RCB

**ORDER**

Movant Branden Pete, who is confined in the U.S. Penitentiary in Florence, Colorado, filed a *pro se* Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody with a motion for the appointment of counsel. Because Movant had previously been appointed counsel, the Court denied the motion for appointment of counsel and granted Movant 30 days in which to file an amended § 2255 motion. (Doc. 5.) Movant has filed an Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. (Doc. 7.) The Court will call for an answer to the § 2255 Motion.

**I. Procedural History**

Movant was convicted by a jury of second degree murder, a lesser included offense of first degree murder, in violation of 18 U.S.C. § 1153 and 1111, as charged in count one of the superseding indictment; felony murder in the course of a kidnapping in violation of 18 U.S.C. §§ 1153 and 1201(a)(2), as charged in count two of the superseding indictment; felony murder in the course of aggravated sexual abuse in

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1 violation of 18 U.S.C. §§ 1153, 111, and 2241(a)(1), as charged in count four of the  
2 superseding indictment; and conspiracy to commit murder in violation of 18 U.S.C.  
3 § 1117, as charged in count seven of the superseding indictment. (Doc. 302.) At the  
4 time of the offenses, Movant was 16 years old. On April 17, 2006, the Court sentenced  
5 Movant to concurrent life terms on each count followed by five years on supervised  
6 release. On June 10, 2008, the Ninth Circuit mandate issued, which affirmed Movant's  
7 conviction and sentences. (Doc. 329.)

## 8 **II. Amended § 2255 Motion**

9 In the Amended § 2255 Motion, Movant alleges one ground for relief. Movant  
10 was 16 years old at the time of the offenses and at sentencing, the Court was required by  
11 18 U.S.C. § 1111 to impose a sentence of life in prison without possibility of parole. In  
12 *Miller v. Alabama*, 132 S.Ct. 2455 (2012), the Supreme Court held that juvenile homicide  
13 offenders could not be sentenced to life in prison without possibility of parole without  
14 being afforded an opportunity to present mitigating evidence to support a sentence less  
15 than life without parole. Movant contends that *Miller* applies retroactively to his  
16 conviction. The Court will require a response to the Amended § 2255 Motion.

### 17 **IT IS ORDERED:**

18 (1) The Clerk of Court must serve a copy of the Amended § 2255 Motion  
19 (Doc. 7 in CV 13-8149-PCT-RCB (DKD)) and this Order on the United States Attorney  
20 for the District of Arizona.

21 (2) The parties and the Clerk of Court **must file** all documents related to the  
22 Amended § 2255 Motion in the **civil case**.

23 (3) The United States Attorney for the District of Arizona has **60 days** from the  
24 date of service within which to answer the Amended § 2255 Motion. The United States  
25 Attorney may file an answer limited to relevant affirmative defenses, including but not  
26 limited to, statute of limitations, procedural bar, or non-retroactivity. If the answer is  
27 limited to affirmative defenses, only those portions of the record relevant to those  
28 defenses need be attached to the answer. Failure to set forth an affirmative defense in an


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answer may be treated as a waiver of the defense. *Day v. McDonough*, 547 U.S. 198, 209-11 (2006). If not limited to affirmative defenses, the answer must fully comply with all of the requirements of Rule 5 of the Rules Governing Section 2255 Cases.

(4) Movant may file a reply within **30 days** from the date of service of the answer to the Amended § 2255 Motion.

(5) The matter is referred to Magistrate Judge David K. Duncan pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for further proceedings and a report and recommendation.

DATED this 28th day of August, 2013.

  
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Robert C. Broomfield  
Senior United States District Judge