

The record reveals that Widener never presented the Miller claim to the Supreme Court of Virginia. Widener argues in response to the motion to dismiss that state court remedies are exhausted because he presented the Miller claim to the Circuit Court of Smyth County via a pro se motion to vacate. However, this conclusion is not supported by law because Widener must present the claim to the highest state court as permitted by state law.² See id. at 275-78. Per Virginia Code § 8.01-654(A)(1), Widener may file a petition for a writ of habeas corpus directly to the Supreme Court of Virginia, and thus, Widener “has the right under the law of the State to raise . . . the question presented” to Virginia’s highest court.³ 28 U.S.C. § 2254(c); see O’Sullivan, 526 U.S. at 845-47 (recognizing the distinction between a prisoner’s right to file and a state court’s discretion to review a habeas petition).

It is not appropriate for this court to predict whether the Supreme Court of Virginia would dismiss the petition due to a state procedural rule, deny relief on the merits, or grant relief on the potentially meritorious claim and make this action moot. See Picard, 404 U.S. at 275. The exhaustion requirement is “an accommodation of our federal system designed to give the State the initial opportunity to pass upon and correct alleged violations of its prisoners’ federal rights.” Id. Accordingly, the court dismisses the petition for a writ of habeas corpus as unexhausted to allow the Supreme Court of Virginia to consider Widener’s Miller claim.

ENTER: This 17th day of September, 2014.



Chief United States District Judge

² Widener filed the pro se “motion to vacate invalid sentence” on June 3, 2013. By letter and opinion entered on October 29, 2013, the Circuit Court of Smyth County denied and dismissed the pro se motion for lack of jurisdiction because more than twenty-one days had passed since the sentencing order was entered, pursuant to Rule 1:1 of the Rules of the Supreme Court of Virginia. There is no evidence that Widener appealed that decision to the Supreme Court of Virginia or filed a motion for a delayed criminal appeal within six months after the dismissal order became final, pursuant to Virginia Code § 19.2-321.1 or § 19.2-321.2.

³ Although Widener filed a pro se petition for a writ of habeas corpus with the Circuit Court of Smyth County in April 2003, the Circuit Court granted Widener’s motion to voluntarily dismiss the petition without prejudice, and Widener did not refile the habeas petition with either the Circuit Court of Smyth County or the Supreme Court of Virginia.