IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

1891 WDA 2016

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

AVIS LEE
Appellant

BRIEF FOR APPELLANT

Appeal from the Order of Dismissal entered on November 17, 2016 by the Honorable Kevin G. Sasinoski in the Criminal Division of the Court of Common Pleas of Allegheny County, Pennsylvania, at CC No. 198005128

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STATEMENT OF JURISDICTION

Jurisdiction of this Honorable Court is invoked pursuant to the Judicial Code, Act of July 9, 1976, P.L. 586, No. 142, as amended, 42 Pa. C.S.A. § 742.

<u>ORDER IN QUESTION</u>

This is an appeal from the Judgment of Sentence imposed on November 17, 2016 by the Honorable Kevin G. Sasinoski, in the Criminal Division of the Court of Common Pleas of Allegheny County, Pennsylvania, at CC No. 198005128.

ORDER OF COURT

AND NOW, to-wit, this 17th day of November, 2016, after review of Defendant's Post-Conviction Relief Act Petition as to the case of Miller v. Alabama, 132, Sc.t. 2455 (2012), it is hereby ORDERED, ADJUDGED and DECREED that Defendant's PCRA Petition is Dismissed.

IT IS FURTHER ORDERED that the Defendant shall have thirty (30) days to appeal the decision to Superior Court.

BY THE COURT:

____
Kevin G. Sasinoski, J.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Appellant is raising an as-applied challenge to the constitutionality of her life-without-parole sentence imposed pursuant to 18 Pa.C.S. § 1102 and 61 Pa.C.S. § 6137. Challenging "the constitutionality of a statute is a pure question of law," and thus the "standard of review is *de novo* and [the] scope of review is plenary." *Commonwealth v. Omar*, 981 A.2d 179, 185 (Pa. S.Ct. 2009) (citing *Commonwealth v. Davidson*, 938 A.2d 198, 203 (Pa. S.Ct. 2007)).

Review of the PCRA court's decision to dismiss Appellant's PCRA claims without holding an evidentiary hearing is reviewed under an abuse of discretion standard. *Commonwealth v. Roney*, 79 A.3d 595, 604 (Pa. S.Ct. 2013). Appellant "must show that [she] raised a genuine issue of fact which, if resolved in [her] favor, would have entitled [her] to relief, or that the court otherwise abused its discretion in denying a hearing." *Id*. (quoting *Commonwealth v. D'Amato*, 856 A.2d 806, 820 (Pa. S.Ct. 2004)).

STATEMENT OF THE QUESTIONS INVOLVED

I. DID THE PCRA COURT ERR IN REJECTING APPELLANT'S CLAIM THAT *MILLER v. ALABMA'*S CONSTITUTIONAL REQUIREMENT OF CONSIDERATION OF AGE-RELATED FACTORS PRIOR TO IMPOSING LIFE WITHOUT PAROLE SENTENCES APPLIES TO PETITIONER WHO POSSESSED THOSE CHARACTERISTICS OF YOUTH IDENTIFIED AS CONSTITUTIONALLY SIGNIFICANT FOR SENTENCING PURPOSES BY THE U.S. SUPREME COURT?

Answered in the negative by the court below.

II. DID THE PCRA COURT ERR IN REJECTING APPELLANT'S CLAIM THAT THE RULE OF LAW ANNOUNCED IN *MILLER* REQUIRES RETROACTIVE INVALIDATION OF A MANDATORY LIFE WITHOUT PAROLE SENTENCE IMPOSED ON AN OFFENDER WITH CATEGORICALLY DIMINISHED CULPABILITY BECAUSE THE OFFENDER DID NOT KILL OR INTEND TO KILL?

Dismissed without being addressed by the court below.

III. DID THE PCRA COURT ERR IN REJECTING APPELLANT'S CLAIM THAT THE COMBINED EFFECT OF MS. LEE'S YOUTH, HER EXPERIENCE OF EXTREME CHILDHOOD AND ADOLESCENT ABUSE AND TRAUMA, AND HER LACK OF INTENT TO KILL RENDER HER LESS CULPABLE UNDER *MILLER* AND THEREFORE REQUIRE REVERSAL OF HER SENTENCE?

Dismissed without being addressed by the court below.

IV. DID THE PCRA COURT ERR IN REJECTING APPELLANT'S CLAIM THAT PENNSYLVANIA LAW PERMITTING MANDATORY SENTENCES OF LIFE WITHOUT PAROLE FOR CRIMES COMMITTED BY 18 YEAR-OLDS LACKS A RATIONAL BASIS IN LIGHT OF *MILLER*'S PROHIBITION AGAINST SUCH SENTENCES FOR OFFENDERS AGED 17 AND YOUNGER AND THEREFORE VIOLATES THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS?

Dismissed without being addressed by the court below.

V. DID THE PCRA COURT ABUSE ITS DISCRETION IN FAILING TO HOLD AN EVIDENTIARY HEARING WHERE PETITIONER HAD RAISED ISSUES OF MATERIAL FACT THAT ENTITLE HER TO RELIEF?

Answered in the negative by the court below.

STATEMENT OF THE CASE

A. Procedural History

This appeal arises from the denial of Appellant's Post-Conviction Relief Act (PCRA) petition challenging the sentence imposed upon her conviction for second-degree murder stemming from her participation in an attempted robbery that ended in the shooting death of Robert Walker by Ms. Lee's co-defendant Dale Madden on November 2, 1979. Ms. Lee was tried jointly with Mr. Madden and Arthur Jeffries in the Allegheny County Court of Common Pleas between January 16, 1981 and January 20, 1981. Ms. Lee was found guilty of second-degree murder on January 20, 1981 and automatically sentenced to life imprisonment without the possibility of parole on July 13, 1981.

Ms. Lee's sentence was affirmed by the Superior Court of Pennsylvania on July 16, 1982.

Ms. Lee's filed a petition for post-conviction relief on August 20, 1984. The trial court denied her petition on May 9, 1986 and the denial was affirmed by the Superior Court on April 9, 1987. Ms. Lee filed a subsequent petition for post-conviction relief on May 17,

1989, which was denied on May 25, 1989 and affirmed by the Superior Court on June 5, 1991. Ms. Lee filed petitions for post-conviction relief on June 1, 2000 and August 29, 2000, which were denied on October 12, 2000 and June 20, 2001.

On May 30, 1997, Ms. Lee's habeas corpus petition was dismissed by the Federal Court for the Western District of Pennsylvania. A subsequent habeas corpus petition was dismissed by the Third Circuit Court of Appeals on September 23, 2009.

On July 11, 2012, Ms. Lee filed a Post-Conviction Relief Act (PCRA) petition subsequent to the U.S. Supreme Court's decision in *Miller v. Alabama,* 567 U.S. 460 (2012). *Miller* was not recognized as retroactive at that time, and her petition was dismissed on February 26, 2013.

Subsequent to the U.S. Supreme Court's decision in *Montgomery v. Louisiana,* 136 S.Ct. 718 (2016), on January 25, 2016, Ms. Lee filed the instant PCRA petition on March 24, 2016. Judge Kevin G. Sasinoski of the Allegheny County Court of Common Pleas filed a Notice of Intent to Dismiss Ms. Lee's petition on April 25, 2016. Ms. Lee filed a Response to Notice of Intent to

Dismiss on May 12, 2016 and a Memorandum of Supplemental Authority in Support of Petitioner on September 15, 2016. Judge Sasinoski ultimately ordered dismissal of Ms. Lee's PCRA petition on November 17, 2016.

Ms. Lee filed a Notice of Appeal to the Superior Court pursuant to Pennsylvania Rule of Appellate Procedure 904 on December 12, 2016. Pa. R.A.P. 904.

On January 31, 2017, Judge Sasinoski issued an order directing Ms. Lee to file a Concise Statement of Matters Complained of on Appeal within 21 days. Ms. Lee filed a Concise Statement of Matters Complained of on Appeal on February 7, 2017.

On May 17, 2017, the Superior Court of Pennsylvania ordered the lower court to transmit the record. Judge Sasinoski issued an opinion on May 23, 2017 and the court record was transmitted to the Superior Court on June 22, 2017. A scheduling order was issued by the Superior Court directing Appellant to file a brief on or before August 1, 2017.

B. Factual History

Ms. Lee was born on January 23, 1961. She was approximately 18 years and nine months old on November 2, 1979, the date of the offense for which she was convicted and is currently serving a mandatorily-imposed sentence of life imprisonment without parole.

The evidence at trial consisted of taped statements provided to the police by each defendant. Transcript of Trial (hereafter "TT") at 40-153 (testimony of Detective McCabe and statements from defendants). The statements indicated that a decision was made by the three co-defendants while in downtown Pittsburgh that they would accompany Mr. Madden to the Oakland neighborhood of Pittsburgh where he would commit a robbery. *Id.* at 49**.** Mr. Madden selected a person to rob, Robert Walker, upon arriving in Oakland and instructed Ms. Lee to be the lookout. *Id*. at 49, 70. Mr. Walker attempted a "karate chop" when Mr. Madden put a gun to his head, and Mr. Madden fired the gun, shooting Mr. Walker in the head. TT at 50, 161. Ms. Lee got on a bus immediately after

the shooting and told the bus driver that there was a man injured, leading the bus driver to stop a police officer. TT at 50.

Ms. Lee was tried jointly with Mr. Madden and Mr. Jeffries between January 16-20, 1981. A jury convicted Ms. Lee of second degree murder (also known as "felony-murder") on January 20, 1981 and the court imposed the mandatory sentence of life imprisonment without the possibility of parole on July 13, 1981.

SUMMARY OF THE ARGUMENT

Appellant, Avis Lee, brought four claims for relief from her mandatory life-without-parole sentence in a timely Post-Conviction Relief Act Petition filed under 42 Pa.C.S. § 9541 *et. seq.* on March 24, 2016, within 60 days of the U.S. Supreme Court's decision in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), requiring state courts to give retroactive effect to the rule announced by *Miller v. Alabama*, 567 U.S. 460 (2012). The right established in *Miller* must be construed to include "the well-established rationale upon which the Court based the result[]" in *Miller* as well as "those portions of the opinion necessary to that result." *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 67 (1996); *see also Commonwealth v. Batts,* No. 45 MAP 2016, J-118-2016 (Pa. S.Ct. 2017).

The bases of *Miller*'s categorical prohibition on imposing mandatory life-without-parole sentences on juvenile offenders include 1) the Court's Eighth Amendment sentencing jurisprudence, which bar the harshest punishments for classes of offenders with categorically-diminished culpability and require individualized sentencing when imposing the harshest punishments

on offenders with diminished culpability; 2) *Miller*'s conclusions that the "characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate," *Miller,* 567 U.S. at 473, and that a mandatory life-without-parole sentencing scheme "poses too great a risk of disproportionate punishment" by precluding a sentencer from considering an offender's age and characteristics of youth prior to imposing the harshest punishments, *Id.* at 479; and 3) science and social science relating to adolescent development.

Ms. Lee was 18 years old at the time of the events that led to her felony-murder conviction, in which she neither killed nor intended to kill. She was developmentally an adolescent and possessed the age-related characteristics of youth that the U.S. Supreme Court has recognized must be taken into consideration prior to imposing a sentence of life-without-parole. Thus, the right established in *Miller* applies to Ms. Lee, her PCRA petition meets the newly-established constitutional right exception to the PCRA's timeliness requirements, and her mandatory life-without-parole sentence must be vacated.

First, Ms. Lee's mandatory life-without-parole sentence constitutes disproportionate punishment in violation of the Eighth Amendment to the U.S. Constitution as she possessed the developmental attributes of a juvenile and age-related characteristics of youth, in addition to her status as a child under Pennsylvania law, and these factors rendered her categorically less culpable under the rule of *Miller* made retroactive in *Montgomery.*

Second, Ms. Lee's mandatory life-without-parole sentence constitutes disproportionate punishment in violation of the Eighth Amendment because she did not kill or intend to kill, which rendered her of diminished culpability for purposes of imposing a sentence of life-without-parole.

Third, the combined effect of her youth and developmental characteristics, her experience of extreme childhood and adolescent abuse and trauma, and her lack of intent to kill (the bases for her first two claims) render her life-without-parole sentence unconstitutional in violation of the Eighth Amendment.

Fourth, in the event that this Court does not grant relief on the prior three claims on the ground that Ms. Lee was 18 years old

at the time of the offense, her mandatory life-without-parole sentence still must be reversed due to it constituting a violation of the equal protection clause of the Fourteenth Amendment to the U.S. Constitution and Article 1, § 26 of the Pennsylvania Constitution since Pennsylvania law permitting mandatory imposition of disproportionate life-without-parole sentences upon 18-year-olds does not have a rational basis in light of *Miller v. Alabama*'s prohibition of the same sentence upon 17-year-olds possessing the same attributes of youth, which was made retroactively binding in Pennsylvania in *Montgomery v. Louisiana*.

Finally, Ms. Lee is seeking remand to the lower court for purposes of an evidentiary hearing so that she can present evidence relevant to her claims of diminished culpability.

ARGUMENT

II. *MILLER v. ALABAMA'S* REQUIREMENT OF CONSIDERATION OF AGE-RELATED FACTORS PRIOR TO IMPOSING LIFE-WITHOUT-PAROLE SENTENCES APPLIES TO APPELLANT WHO POSSESSED THOSE CHARACTERISTICS OF YOUTH IDENTIFIED AS CONSTITUTIONALLY-SIGNIFICANT FOR PURPOSES OF SENTENCING

a. *Miller* and *Montgomery* prohibit the mandatory imposition of life without parole sentences upon offenders who possess characteristics of youth that render them categorically less culpable under the Eighth Amendment

In denying Ms. Lee's PCRA petition as untimely, the Court of Common Pleas limited the right established in *Miller v. Alabama,* 567 U.S. 460 (2012), to apply only to individuals who were younger than 18 at the time of their offense of conviction. Appendix A, 3. The Superior Court of Pennsylvania has issued two precedential decisions dealing with *Miller*-based claims of individuals seeking post-conviction relief who were 18 years old or older at the time of their offense. *See Commonwealth v. Cintora,* 69 A.3d 759 (Pa. Super. 2013); *Commonwealth v. Furgess,* 149 A.3d 90 (Pa. Super. 2016). In both cases, this Court, like the Court of Common Pleas, held that the right established in *Miller* applies only to those aged

17 or younger at the time of the offense, thus *Miller*-based PCRA petitions filed by offenders older than 17 are untimely. *See Cintora,* 69 A.3d at 764; *Furgess,* 149 A.3d at 94. For the reasons discussed in detail *infra*, these holdings should be overruled.

In both *Cintora* and *Furgess*, this Court characterized the petitioners' claims as seeking "an extension of *Miller*" to individuals who were 18 or older at the time of their offenses. *Furgess,* 149 A.3d at 94; *see also Cintora,* 69 A.3d at 764. The Court reasoned that because "[t]he *Miller* decision applies to only those defendants who were under the age of 18 at the time of their crimes," the petitioners' claims did not fall under the newly-established constitutional right exception to the PCRA's timeliness requirements. *Furgess,* 149 A.3d at 94 (internal quotations omitted).

This Court's prior construction of the right established in *Miller*, however, runs afoul of the U.S. Supreme Court's mandates for how its holdings are to be applied:

> We adhere in this case, however, not to mere *obiter dicta,* but rather to the ***well-established rationale*** upon which the Court based the results of its earlier decisions. When an opinion issues for the Court, it is not

> only the result ***but also those portions of the opinion necessary to that result*** by which we are bound.

Seminole Tribe v. Florida, 517 U.S. 44, 67 (1996) (emphases added) (citing *Burnham v. Superior Court of Cal. County of Marin,* 495 U.S. 604, 613 (1990)) (exclusive basis of a judgment is not dicta). *Stare decisis* requires adherence "not only to the holdings of [the Supreme Court's] prior cases, but also to their explications of the governing rules of law." *County of Allegheny v. ACLU, Greater Pittsburgh Chapter,* 492 U.S. 573, 668 (1989) (Kennedy, J. concurring and dissenting).

In *Commonwealth v. Batts,* No. 45 MAP 2016, J-118-2016 (Pa. S.Ct. 2017) ("*Batts II"*), the Supreme Court of Pennsylvania gave effect to *Seminole Tribe*'s mandates on the application of U.S. Supreme Court precedent. At Qu'eed Batts' re-sentencing proceeding following the vacation of his mandatory life-without-parole sentence under *Miller,* the trial court again imposed a life-without-parole sentence. *Batts II,* No. 45 MAP 2016 at 21. In pronouncing a life-without-parole sentence, the trial court relied on the expert testimony of the Commonwealth's psychiatrist who opined that "Batts' personality was likely fully formed and fixed at

the age of fourteen" and that "'research dealing with adolescent behavioral and brain development' is inconclusive." *Id.* at 44-45. Because the expert's testimony was "in direct opposition to the legal conclusion announced by High Court and the facts (scientific studies) underlying it," the Supreme Court of Pennsylvania found that the testimony was not merely entitled to less weight, but did not even constitute *competent* evidence to support the imposition of a life-without-parole sentence. *Id.* at 45 (citing *Seminole Tribe,* 517 U.S. at 67).

The right established in *Miller* and held to apply retroactively in *Montgomery v. Louisiana,* 136 S.Ct. 718 (2016), must be construed to include not only the narrow holding identified by this Court in *Cintora* and *Furgess*, but must include the underlying reasoning, scientific principles, and "well-established rationale" upon which the Court in *Miller* and *Montgomery* relied in reaching the results in those cases. The right, therefore, must include the Court's analysis under its Eighth Amendment sentencing jurisprudence; the Court's conclusions that the "characteristics of youth, and the way they weaken rationales for punishment, can

render a life-without-parole sentence disproportionate," *Miller,* 567 U.S. at 473, and that a mandatory life-without-parole sentencing scheme "poses too great a risk of disproportionate punishment" by precluding a sentencer from considering an offender's age and characteristics of youth prior to imposing the harshest punishments, *Id.* at 479; and the Court's adoption of science and social science relating to adolescent development.

In *Miller,* the Court merged two strands of its Eighth Amendment sentencing jurisprudence to establish a categorical bar to mandatory sentences of life-without-parole for offenses committed by juveniles. *Miller,* 567 U.S. at 480. Under the first line of its Eighth Amendment proportionality analysis, the Court has forbidden certain punishments from being imposed on categories of individuals with diminished culpability. *See e.g. Graham v. Florida,* 560 U.S. 48, 68 (2010) (holding life-without-parole sentences for juveniles convicted of non-homicide offenses unconstitutional); *Kennedy v. Louisiana,* 554 U.S. 407 (2008) (holding capital punishment for non-homicide offense unconstitutional); *Roper v. Simmons,* 543 U.S. 551 (2005)

(holding capital punishment for juveniles unconstitutional); *Atkins v. Virginia,* 536 U.S. 304 (2002) (holding capital punishment for individuals with an intellectual disability unconstitutional); *Enmund v. Florida,* 458 U.S. 782, (1982) (holding capital punishment for individuals who did not kill, attempt to kill, or intend to kill unconstitutional). The Court deemed these punishments disproportionate "based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller,* 567 U.S. at 470.

Under the second line of analysis, the Court has also proscribed the mandatory imposition of death sentences, instead requiring that offenders receive an individualized sentencing procedure that accounts for "the characteristics of a defendant and the details of his offense" prior to the imposition of a death sentence. *Miller,* 567 U.S. at 470; *See e.g. Woodson v. North Carolina,* 428 U.S. 280 (1976); *Lockett v. Ohio,* 438 U.S. 586 (1978). In considering the most severe sentences, the Court required that defendants receive individualized sentencing

proceedings that considered "the characteristics of the defendant and the details of his offense." *Miller,* 567 U.S. at 470*.*

Under the first line of proportionality analysis barring the imposition of certain punishments on classes of offenders, the penological justifications for the harshest punishments collapse in light of the diminished culpability of these offenders. In *Miller,* the Court reiterated and emphasized that "'youth is more than a chronological fact'." *Id.* at 476 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). Youth is marked by developmental characteristics of "immaturity, irresponsibility, impetuousness, and recklessness," and is a "condition of life when a person may be most susceptible to influence and to psychological damage." *Miller,* 567 U.S. at 476 (internal citations and punctuation omitted). These "characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate" because "most fundamentally…youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Id.* at 461. Thus, because the "characteristics of youth" almost invariably possessed by juveniles

diminish their culpability for the offenses for which they are sentenced, life-without-parole sentences are disproportionate when imposed on "'the juvenile offender whose crime reflects unfortunate yet transient immaturity'." *Id.* at 479 (quoting *Graham,* 560 U.S. at 68).

Under the second line of proportionality analysis, *Miller* invoked the similarities between sentences of death and life-without-parole to find the mandatory life-without-parole sentencing schemes at issue to be unconstitutional. Both penalties involve "[i]mprisoning an offender until he dies," altering "the remainder of his life 'by a forfeiture that is irrevocable'." *Miller,* 567 U.S. at 474-75 (quoting *Graham,* 560 U.S. at 69). Life-without-parole sentences are especially harsh when imposed on children because children will spend a greater proportion of their lives in prison than adult offenders. *Id.* A life-without-parole sentence "imposed on a *teenager*, as compared with an older person, is therefore 'the same . . . in name only'." *Id*. at 475 (emphasis added) (quoting *Graham*, 560 U.S. at 70). A mandatory life-without-parole sentencing scheme "poses too great a risk of

disproportionate punishment" because it precludes the sentencer from considering an individual's age and characteristics of youth. *Miller,* 567 U.S. at 479. Subjecting a child to mandatory life-without-parole

> precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors…or his incapacity to assist his own attorneys.

Miller, 567 U.S. at 477-78. When considering whether to impose the harshest available sentences, the sentencer must have the ability to assess mitigating factors to ensure that these sentences are "reserved only for the most culpable defendants committing the most serious offenses." *Id.* at 476. Especially relevant are the "mitigating qualities of youth." *Id.*

Miller noted that the Court was not only relying "on common sense" but on "science and social science as well," just as it had previously in *Roper*, 543 U.S. at 570, and *Graham*, 560 U.S. at 68. *Miller,* 567 U.S. at 471. Significantly for purposes of the case *sub judice*, the Court in *Graham* cited approvingly to an amicus curiae brief submitted by the American Psychological Association that describes how the areas of the brain involved in impulse control and risk evaluation continue developing through late adolescence and into early adulthood at age 22. *Graham,* 560 U.S. at 68 (Citing Brief for the American Psychological Association, et al. as Amici Curiae at 22-27, *Graham* 560 U.S. 48 (No. 08-7412)).[1] These developments in brain science have provided an empirical basis that reinforces the consensus view of the leading researchers on the issue that "generally consider adolescence to begin at age 10 or 11 and to end by age 18 or 19." *Emerging Adulthood: A Theory of Development From the Late Teens Through the Twenties*, Jeffrey Jensen Arnett, 55 Am. Psychologist 469, 476 (2000) (noting that

[1] This amicus brief can be accessed at:
http://www.apa.org/about/offices/ogc/amicus/graham-v-florida-sullivan.pdf

"[t]he cover of every issue of the *Journal of Research on Adolescence*, the flagship journal of the Society for Research on Adolescence, proclaims that adolescence is defined as 'the second decade of life.'"). That the period of life known as adolescence – with its attendant immaturity, recklessness, and diminished culpability – includes 18-year-olds is acknowledged by, *inter alia*, Dr. Laurence Steinberg, one of the scholars the U.S. Supreme Court has relied on in its holdings in *Roper, Graham*, and *Miller*. *See (Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, Elizabeth Cauffman, Ph.D and Laurence Steinberg, Ph.D, 18 Behav. Sci. & L. 741, 742 n.1 (2000) (defining adolescence "from about age 13 to age 18").[2]

In *Moore v. Texas,* 137 S.Ct. 1039 (2017), the U.S. Supreme Court evaluated the weight to be given to the scientific principles relied upon in its prohibition on death sentences for the intellectually disabled—another class of offenders with categorically diminished culpability. Permitting states to disregard

[2] Both of the academic articles cited in this paragraph were cited in the Brief for the American Psychological Association, et al. that the Supreme Court relied upon in *Roper*.

current medical standards in the Eighth Amendment context would render the prohibition on sentencing those with intellectual disabilities to death a "nullity, and the Eighth Amendment's protections of human dignity would not become a reality." *Id.* at 1053 (quoting *Hall v. Florida,* 134 S.Ct. 1986, 1999 (2014)). Justice Kennedy's discussion in *Hall v. Florida* of the central role of the medical community in establishing the framework wherein the Court defined intellectual disability applies with equal force to the scientific community's role in establishing the framework for defining who is an adolescent:

> It is the Court's duty to interpret the Constitution, but it need not do so in isolation. The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework. *Atkins* itself points to the diagnostic criteria employed by psychiatric professionals. And the professional community's teachings are of particular help in this case, where no alternative definition of intellectual disability is presented and where this Court and the States have placed substantial reliance on the expertise of the medical profession.

Hall, 134 S.Ct. at 2000. It is undisputed that age 18 is considered a time of ongoing childhood development where the same characteristics of youth and propensity for change

identified by the *Miller* Court may be sufficiently present to justify a lesser sentence. That these 18-year-olds may not be subjected to mandatory life-without-parole sentences is not only consistent with the reasoning of *Miller,* but is compelled by *Miller*'s reliance on and adoption of the scientific consensus regarding childhood and adolescent development as well as the holdings of the U.S. Supreme Court.

Furthermore, the *Moore* Court found persuasive the fact that Texas used more medically-appropriate standards for diagnosing and defining intellectual disability in contexts outside the death penalty. *Moore,* 137 S.Ct. at 1052. In support of its ruling, the Court reasoned: "Texas cannot satisfactorily explain why it applies current medical standards for diagnosing intellectual disability in other contexts, yet clings to superseded standards when an individual's life is at stake." *Id.* Similar to the unconstitutional standards at issue in *Moore,* other areas of Pennsylvania law recognizes 18-year-olds as children. Under Pennsylvania's Mental Health and Intellectual Disability Act of 1966, juveniles 18 years of age or younger may be admitted for voluntary admission to a

mental health facility by a "parent, guardian, or individual standing in loco parentis." 50 Pa.C.S. § 4402; *see Kremens v. Bartley*, 431 U.S. 119, 125 (1977) (involving challenge by "juveniles" ages 13-18 pursuant to 50 Pa.C.S. § 4402); *Secretary of Public Welfare of Pennsylvania v. Institutionalized Juveniles et al.,* 442 U.S. 640, 641-42 (1979) (involving challenge by "children" 18 years old and younger admitted to hospital under 50 Pa.S.C. § 4402). The definition of "child" in the chapter on "Juvenile Matters" of the Judiciary and Judicial Procedure title of the Pennsylvania code includes individuals who are: 1) under the age of 18 years; 2) under the age of 21 years and who committed an act of delinquency prior to reaching age 18; 3) under the age of 21 years and who were adjudicated dependent prior to reaching age 18. 42 Pa.C.S. § 6302.

That the Commonwealth of Pennsylvania has enacted legislation recognizing that children who are adjudicated delinquent or dependent (as Ms. Lee was) prior to age 18 possess characteristics justifying their continued recognition as children under the law is consonant with the holdings of *Roper*, *Graham*,

and *Miller*, and the social and neuroscience that undergird these decisions and recognize that adolescent children, including 18-year-olds, are categorically distinct from fully-developed adults in their decision-making abilities, degree of maturation, and their limited capacity to extricate themselves from negative peer-influences or a dysfunctional and abusive home.

That this section of the Pennsylvania code does not include more serious crimes such as murder in its definition of "delinquent act", and thus removes those individuals from the definition of "child" based on the severity of their criminal offense, does not change the fact that the statute represents a clear policy pronouncement that 18-year-olds may possess attributes of youth and attendant developmental deficits that render them appropriately categorized as "children." The statute's preclusion of an individual convicted of a more serious offense from recognition as a "child" at age 18 runs afoul of *Miller*'s recognition that the "distinctive (and transitory) mental traits and environmental vulnerabilities" of children are not "crime-specific," but apply with

equal force to homicide and non-homicide offenses. *Miller*, 567 U.S. at 473.

Following *Miller*, the U.S. Supreme Court held that *Miller* applies retroactively to cases on collateral appeal in *Montgomery,* 136 S.Ct. at 733. Like in *Miller*, the petitioner in *Montgomery* was challenging a sentence imposed for an offense committed when the petitioner was younger than 18 years old. *Montgomery,* 136 S.Ct. at 725. In finding that *Miller* announced a substantive rule of constitutional law and therefore applies retroactively, the *Montgomery* Court eschewed a narrow, limited reading of the right established in *Miller* and is instructive in determining which portions of *Miller* were "necessary" to the result. *See Seminole Tribe,* 517 U.S. at 67; *Batts II,* No. 45 MAP 2016 at 45. *Montgomery* recognized that "[t]he 'foundation stone' for *Miller*'s analysis was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles." *Id.* (quoting *Miller,* 567 U.S. at 470 n. 4). *Montgomery* emphasized that *Miller* did not merely forbid mandatory life-without-parole sentences for juvenile offenders, but also—by invoking the Court's

line of proportionality analysis prohibiting the harshest punishments on classes of offenders with diminished culpability—established a categorical bar to life-without-parole sentences imposed on "juvenile offenders whose crimes reflect the transient immaturity of youth," regardless of whether the sentence was mandatory or discretionary. *Montgomery,* 136 S.Ct. at 734. This holding was derived from *Miller*'s reasoning and the principles recognized and relied upon throughout the opinion. *Id.* at 732.

Montgomery further clarified that characteristics of youth—rather than age in itself—are determinative in assessing whether a life-without-parole sentence is disproportionate under the Eighth Amendment. *Montgomery* emphatically states that a life-without-parole sentence, whether imposed in a mandatory or discretionary setting, may not be imposed when an individual possesses these characteristics of youth:

> *Miller,* then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinctive attributes of youth. Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth

> Amendment for a child whose crime reflects unfortunate yet transient immaturity.

Id. at 734 (internal citations and quotations omitted). These characteristics of youth include "recklessness, impulsivity, and heedless risk-taking;" vulnerability to "negative influences and outside pressures" and inability to control their environment or "extricate themselves from horrific, crime-producing settings;" and undeveloped character traits that have greater potential to change. *Id.* at 733 (quoting *Miller,* 567 U.S. at 471). An individual's diminished culpability on the basis of these characteristics of youth vitiate the penological rationales for imposing a life without parole sentence. *Id.* at 733.

The touchstone of *Miller*, then, is not merely the age of the individual at the time of the offense, but the "distinctive attributes of youth" that render a life without parole sentence disproportionate. *Miller*'s categorical rule barring mandatory life without parole sentences for juveniles does not rest on the chronological age of juveniles, but instead on the characteristics and qualities that juveniles almost invariably possess and that render life-without-parole a disproportionate sentence. Thus, while

the chronological fact of age is relevant, the presence of "characteristics of youth, and the way they weaken rationales for punishment," are the determinative factors in assessing whether individualized sentencing of a youthful offender is required and a life-without-parole sentence violates the Eighth Amendment. *Miller,* 567 U.S. at 473.

The claim that *Miller* requires a sentencer to consider "youth and its attendant characteristics" in a case involving a teenager older than 18 years of age was recently recognized by the Appellate Court of Illinois in *People v. House,* 72 N.E.3d 357 (Ill. App. Ct. 2015). Antonio House was 19 years old when he participated in the September 1993 kidnapping and murder of two people, *Id.* at 364-65, and was sentenced to two consecutive life-without-parole sentences for the murder convictions. *Id*. at 369. The Appellate Court of Illinois vacated his mandatory life-without-parole sentences under *Miller* and its antecedents, as well as corresponding Illinois law, and ordered "a new sentencing hearing in which the trial court has the ability to consider the relevant

mitigating factors prior to imposing a sentence of such magnitude." *Id*. at 389.

The court in *House* noted that although the "defendant was not a juvenile at the time of his offense, his young age of 19 is relevant in consideration under the circumstances of this case." *Id*. at 384. The court relied on *Miller's* recognition that in addition to considering how "'the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered' in assessing his culpability." *Id.* at 388 (quoting *Miller*, 567 U.S. at 476). The court further noted that

> [t]he young adult brain is still developing, and young adults are in transition from adolescence to adulthood. Further, the ongoing development of their brains means they have a high capacity for rehabilitation. Young adults are, neurologically and developmentally, closer to adolescents than adults.

House, 72 N.E.3d. at 387 (quoting Kanako Ishida, *Young Adults in Conflict with the Law: Opportunities for Diversion*, Juvenile Justice Initiative, at 1 (Feb. 2015)).[3]

[3] Available at jjustice.org/wordpress/wp-content/uploads/Young-Adults-in-Conflict-with-the-Law-Opportunities-for-Diversion.pdf.

The *House* court found support for its reading of *Miller*'s constitutional command not only in the text of *Miller* and the science underlying the decision, but also in other aspects of Illinois law that recognize teenagers aged 18 or older as "minors." *House*, 72 N.E.3d at 387-88 (citing Pub. Act 98-61, § 5); *see also* 705 ILCS 405/5-105(10) (defining "minor" as "a person under the age of 21 subject to this Act"); 705 ILCS 405/2-31 (permitting "wardship" of minors to continue until age 21 in certain circumstances). These sections of Illinois law possess identical counterparts in Pennsylvania law, as discussed *supra* and in Ms. Lee's PCRA petition. Reproduced Record (hereafter "R."), 14a-15a ¶¶ 21-22.

While *Miller* categorically prohibited mandatory life-without-parole for children younger than 18 years of age, nothing in its holding precludes its application to children who are 18 years old. Indeed, the scientific foundation of *Miller*'s analysis and the legal reasoning upon which its conclusion was premised precludes a reading that the "distinctive attributes of youth" which render life-without-parole sentences disproportionate are reducible to age alone and that 18-year-old children who possess mitigating

attributes of youth are not within *Miller*'s ambit. The Court's holding was premised on a recognition that "youth is more than a chronological fact," *Miller,* 567 U.S*.* at 476 (quoting *Eddings,* 455 U.S. at 115), but is marked by developmental characteristics of "immaturity, irresponsibility, impetuousness, and recklessness," and is a "condition of life when a person may be most susceptible to influence and to psychological damage." *Miller,* 567 U.S. at 476 (internal citations and punctuation omitted). This is reinforced by the Court's reference to the "characteristics of *youth,*" *Id.* at 473 (emphasis added), and its recognition that the Eighth Amendment *requires* consideration of these characteristics. *Id.* at 473-74 (utilizing language of "age" and "youthfulness" that is broad enough to apply on its face to 18-year-old adolescents). These "characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate" because "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Id.* at 473*.*

Appellant is currently serving a sentence of life-without-parole pursuant to a mandatory sentencing scheme that failed to take into account her adolescence and specific mitigating evidence, discussed *infra*, demonstrating that she suffered from severe hardship and abuse rendering her categorically less culpable under *Miller*. At the time of the acts giving rise to her criminal charge, Ms. Lee possessed those attributes of youth that *Miller* held render her categorically less culpable. Thus, the right established in *Miller* applies to Ms. Lee and her PCRA petition meets the requirements of the newly-established constitutional right exception to the PCRA's timeliness requirements under 42 Pa.C.S. § 9545(b)(iii). Furthermore, Ms. Lee's claims entitle her to a re-sentencing hearing where she can present mitigating evidence justifying a lesser sentence than life-without-parole.

b. Facts Asserted in Ms. Lee's Petition Satisfy the Factors of Age-Related Diminished Culpability Identified in *Miller* and Entitle Her to an Evidentiary Hearing

i. Petitioner's history of extreme physical and sexual abuse as a child and adolescent rendered her less culpable and renders her categorically less deserving of the severe sentence of life without parole

Miller makes clear that attributes which diminish an individual's culpability for a crime justify the imposition of a lesser sentence. *Miller,* 567 U.S. at 471. The mandatory sentencing schemes contemplated in *Miller* were unconstitutional in part because they prevented consideration of a defendant's "family and home environment…no matter how brutal or dysfunctional." *Id.* at 477. Evidence demonstrating that a person was sexually, physically, emotionally, and psychologically abused is essential to the individualized sentencing that is constitutionally-mandated under *Miller*. See e.g. *Commonwealth v. Knox,* 50 A.3d 749, 768 (Pa. Super. 2012) (sentencer must consider a defendant's "family, home and neighborhood environment" and "past exposure to violence" among other factors under *Miller*).

Ms. Lee's childhood and adolescence were marked by violence, poverty, and trauma in her home life and amongst her peer group. The circumstances of her childhood and adolescence were directly related to her conduct that led to her conviction, and as such should be taken into consideration at a re-sentencing hearing pursuant to *Miller* and *Montgomery*.

Ms. Lee was raised by her mother in a single-parent home. R. at 19a ¶ 33. Her father left her home when Ms. Lee was an infant after he beat Ms. Lee's mother with the butt of a shotgun, breaking both of her arms. *Id.* During the rest of her childhood Ms. Lee rarely saw or heard from her father. *Id.* When she was 13 he returned to Pittsburgh for three days. Ms. Lee recalls that he was drunk the entire time. *Id.*

Between approximately 1965 and 1967 Ms. Lee lived in the care of her mother and step-father. R. at 19a ¶ 34. Her mother and step-father were both alcoholics. *Id.* Ms. Lee's step-father would frequently brutalize and belittle her mother, which Ms. Lee witnessed. *Id.* The violence occurred daily. Her step-father would beat her mother by punching and kicking her, hitting her with belts, shoes, boots and other objects. *Id.* Ms. Lee has vivid memories of seeing her mother's blood on the floor and walls of their home as a result of the daily beatings. R. at 19a-20a ¶ 34. She also recalls that her mother frequently had her own blood on her person, and that she would wear makeup to cover the blood and bruises. R. at 20a ¶ 34.

In the years after her step-father moved out of their home in 1967, he occasionally visited the family. During one visit when Ms. Lee was 13 or 14, her step-father beat his girlfriend at the time so viciously that Ms. Lee's brother, Dale Madden called the police and took the woman to the hospital. R. at 20a ¶ 35. Ms. Lee's step-father at times would send her to retrieve heroin for him in her pre-teenage years. *Id.* at ¶ 36.

Ms. Lee and her family experienced extreme poverty during her childhood and adolescence. Ms. Lee's mother frequently went without food to ensure that her children had enough to eat. *Id.* at ¶ 39. The family moved frequently when Ms. Lee was a child and experienced periods of homelessness. *Id.* at ¶ 37. The various residences Ms. Lee and her family occupied were often nearly uninhabitable. The homes were typically infested with roaches, mice, and rats. *Id.* at ¶ 40. Ms. Lee's family was often unable to pay the heating bills and they were forced to live without heat in the winter. This was a common occurrence in Ms. Lee's childhood until she was approximately 14 years old. When living without heat

in the winter, the family would huddle in sweaters in front of the oven for warmth. *Id.* at ¶ 38.

Growing up in such an environment, Ms. Lee began drinking alcohol when she was 8 years old. R. at 21a ¶ 44. By the age of 12, she was drinking with her friends on the weekends. When she was 13, she and her friends would drink before school on most mornings. *Id.* The next year, she started drinking hard liquor when she could afford it, about twice per month. By the time Ms. Lee was 15 she was using some combination of alcohol, marijuana, and pills such as Quaaludes or Valium on a daily basis. *Id.* This continued with escalating intensity until she was arrested in July 1980. *Id.*

Ms. Lee also suffered sexual assault and rape in her childhood and adolescence. When she was approximately 5 or 6 years old a 13-year-old male cousin molested her on multiple occasions while their parents drank alcohol in another room. R. at 21a ¶ 45. When Ms. Lee was 16 years old, she was attacked while walking home alone. The attacker put a knife to her throat, dragged her into a storm cellar, and raped her. Ms. Lee's use of drugs and alcohol

again increased after the rape as a means of blocking out the trauma. R. at 21a-22a ¶ 46.

Ms. Lee hated the experience of being so poor during her childhood and in her adolescence, so she began seeking money to alleviate that feeling. She obtained her first job at age 13 selling magazines. R. at 20a-21a ¶ 41. She also sold beauty products door-to-door, performed childcare, and worked at a garment factory prior to being fired for being an underage worker without requisite paperwork. R. at 21a ¶ 41. Eventually, Ms. Lee began engaging in prostitution to make money. *Id.* at ¶ 42. This decision was profoundly shaped by the circumstances of her childhood, including the extreme poverty she faced. In 1976, Ms. Lee was arrested for prostitution and sent to Shuman Center and the Youth Development Center at Waynesburg as a consequence. Ms. Lee was 15 years old at the time. *Id.* at ¶ 43. Under Pennsylvania law, 18-year-olds, such as Ms. Lee was the night her brother killed the victim in this case, are considered children if they had been adjudicated delinquent prior to age 18. *See* 42 Pa.C.S. § 6302.

Throughout her youth, many of Ms. Lee's peers and close friends were victims of violence. Around 1968, a childhood friend was murdered in the neighborhood. R. at 22a ¶ 48. A neighbor and classmate in junior high committed suicide by shooting himself moments after saying goodbye to Ms. Lee and other children while walking home from school. *Id.* When Ms. Lee was in high school her best friend was murdered. She was found strangled and partially clothed on the side of a road. *Id.* In 1976 or 1977, Ms. Lee's boyfriend was murdered, causing severe depression and again leading to an increase in her use of drugs and alcohol. *Id.*

Three days before Ms. Lee's 17th birthday, her mother died after a painful battle with cirrhosis and liver cancer. R. at 22a ¶ 47. Ms. Lee was devastated and slipped into a deep depression. Since her mother's disapproval of her delinquent conduct had a somewhat inhibiting effect on Ms. Lee, her mother's death directly led to a dramatic increase in her use of drugs and alcohol, and she engaged in more acts of prostitution. *Id.* Ms. Lee would drink between 10-15 shots per day, and she was never sober for a day again until she was arrested 30 months later. *Id.* Her mother's

death also caused Ms. Lee to drop out of community college, where she had been excelling, on account of her despondency. *Id.*

Ms. Lee's childhood and adolescence were deeply traumatic. She experienced the type of severe deprivations that impede the healthy development of a child. Growing up in roach and rat-infested homes with vivid memories of her mother's blood throughout the house, sexually assaulted at a young age and raped when she was 16, and experiencing the violent deaths of many of her peers and close acquaintances rendered her incredibly vulnerable to drug and alcohol abuse, delinquency, and negative peer-group influence. These are exactly the concerns that animated the U.S. Supreme Court's jurisprudence in *Roper*, *Graham*, *Miller*, and *Montgomery*. The fact that Ms. Lee happened to have been several months over the age of 18 does not overcome the reality – supported by science – that she was still an adolescent in thought and action and profoundly shaped by those experiences the Court recognized render her categorically less culpable.

Where individualized sentencing is required under the Eighth Amendment, the sentencer is required to attach significance to "the

character and record of the individual offender" as a mitigating factor. *Miller,* 567 U.S. at 475 (quoting *Woodson,* 428 U.S. at 304 (plurality opinion); see also *Lockett,* 438 U.S. at 604. Thus, it is essential that "full consideration" is given to mitigating evidence to ensure the sentence is the product of a "reasoned moral response to the defendant's background, character, and crime." *Id.* (quoting *Franklin v. Lynaugh,* 487 U.S. 164, 184 (1988)).

Evidence of childhood abuse and its effect on a youthful defendant is "particularly relevant" to mitigation. *Miller,* 567 U.S. at 476 (quoting *Eddings,* 455 U.S. at 115). An abusive childhood deprives a person "of the care, concern, and personal attention that children deserve." *Eddings,* 455 U.S. at 115. "It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens." *Santasky v. Kramer,* 455 U.S. 745, 789 (1982) (Rehnquist, J., dissenting); *see also Bouchillon v. Collins,* 907 F.2d 589, 590 n. 2 (5th Cir. 1990) (taking judicial notice that a turbulent and abusive childhood increases the probability of social maladjustment or antisocial behavior). A

defendant's experiences of substantial physical, sexual, emotional, and psychological abuse present a "powerful mitigating narrative" in support of a lesser sentence. *Wiggins v. Smith,* 539 U.S. 510, 537 (2003); see also *Jemryn v. Horn,* 266 F.3d 257, 309-310 (3d Cir. 2001) (evidence of childhood abuse is "powerful evidence" of mitigating factors); *Pursell v. Horn,* 187 F. Supp. 2d 260, 385-86 (W.D. Pa. 2002) ("powerful evidence" of physical, sexual, and emotional abuse may have rendered the defendant less morally culpable); *Outten v. Kearney,* 464 F.3d 401, 421 (3d Cir. 2006) ("comprehensive understanding of [defendant's] abusive relationship with his father or other aspects of his troubled childhood" is crucial to sentencer's duty to consider mitigating evidence).

Ms. Lee's experiences of childhood and adolescent abuse and trauma bring her squarely within the factors deemed relevant in *Miller*. The full evidence of Ms. Lee's experience of childhood and adolescent abuse and deprivation must be presented at an individualized re-sentencing hearing lest the mandate of *Miller* inappropriately hinge on un-scientific and arbitrary exercises in

line-drawing. In the context of Ms. Lee's case, such line-drawing renders her punishment disproportionate under the Eighth Amendment.

ii. Petitioner's youth and susceptibility to peer influence was responsible for reckless decision-making involving a failure to consider future consequences

Children are "constitutionally different" in terms of culpability, in part, due to their having a "'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking." *Miller,* 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569). "Scientific and sociological studies . . . tend to confirm" that adolescents are less mature and more prone to "impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 569 (noting that "adolescents are overrepresented statistically in virtually every category of reckless behavior.").

Another factor sustaining the Court's holding in *Miller* was that "children 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers[.]" *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569). Negative familial

or peer-group influence is particularly harmful to children since they "lack the freedom that adults have to extricate themselves from a criminal setting." *Roper*, 543 U.S. at 569 (internal quotation marks and citation omitted).

The reckless decision-making Ms. Lee engaged in the evening of the homicide was greatly influenced by her relationship with her brother, Dale Madden, who ultimately shot the victim. Growing up without her father in her home, Ms. Lee looked up to her brother as a paternal figure. R. at 17a ¶ 27. Prior to the night of the homicide, Ms. Lee would tag along with her brother as much as possible and the two regularly drank alcohol and used illicit drugs together. *Id.* On two occasions Mr. Madden even facilitated acts of prostitution by Ms. Lee. *Id.* His role in her life was influential in encouraging delinquent behavior that involved a high degree of risk-taking. *Id.*

On the night of the homicide, Ms. Lee approached her brother and asked him on behalf of another person if Mr. Madden would allow the use of his gun to commit a robbery. *Id.* at ¶ 28. Mr. Madden refused, instead deciding that he would commit the

robbery himself and instructing Ms. Lee to act as a lookout. *Id.* Mr. Madden was the ultimate decision-maker regarding whether a robbery would be attempted, where it would be attempted, and by what method. The influence of her older brother, who she looked up to and in whose lead she consistently followed, represents the type of negative peer-group and familial influence that *Miller* recognized juveniles are particularly vulnerable to.

Further evidence of the reckless decision-making characteristic of youthful offenders was Ms. Lee's consumption of alcohol and drugs prior to meeting her brother. R. at 18a ¶ 29. As discussed *supra*, this behavior was a coping mechanism that Ms. Lee had come to rely on due to the extensive trauma she experienced as a child and adolescent. Ms. Lee's dysfunctional and violent home life left her more vulnerable to risk-taking behavior such as drug and alcohol abuse, which further impaired her already under-developed ability as a juvenile to appreciate risks and resist negative peer group influence.

Reckless, impulsive decision-making characteristic of youthfulness and negative peer-group influence factored decisively

in Ms. Lee's case. The mitigating force of these factors, and factors discussed below, were never considered when a mandatory life-without-parole sentence was imposed on her. After *Miller* and *Montgomery*, such a sentence is no longer constitutional and must be vacated.

iii. Petitioner's exemplary prison record, attainment of substantial life and vocational skills, and demonstrated rehabilitation render her sentence unconstitutional and lacking in penological purpose

That "a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity]'" was another fundamental factor in *Miller*'s analysis. *Miller,* 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 570). The penological rationale for life-without-parole sentences is substantially diminished in light of children's capacity for change. *Miller,* 567 U.S. at 473. Requiring a juvenile offender to serve her entire life in prison requires a finding that he or she "forever will be a danger to society," but such a determination of "'incorrigibility is inconsistent with youth'." *Miller,* 567 U.S. at 472-73 (quoting *Graham,* 560 U.S. at 72-73). The truth of this observation has been

confirmed in Ms. Lee's case, as the last 36 years she has spent in prison have been marked by a complete absence of any violence, an exemplary disciplinary record, and an impressive list of achievements and record of service. As alleged in her PCRA petition, during Ms. Lee's incarceration she has achieved or participated in, *inter alia*, the following:

> Education: General Education Diploma (1977, prior to incarceration); Pennsylvania Business Institute, Associate of Specialized Business, Accounting/Management (1991); Penn State Master Gardeners program (1988-89 and 2015 to present); Bloomsburg University (1985-86); Library of Congress Braille Transcriber (2004); Crawford County Area Vo-Tech School: New Options Women in Technology and Trades Curriculum (1999); Fine Line: Re-Entry Project/The Ex-Offenders Association of PA Training (2003); courses on upholstery, bookkeeping, drafting, and Internet 101.
>
> Work: Garment factory; culinary arts; proofreading, carpentry and plumbing; construction and maintenance; nursery and greenhouse on Muncy Farm; upholstery technician; Braille transcriber for The International Association of Lions Club (1999 to present).
>
> Programs: Individualized Counseling on Co-Dependency (1992); Looking Glass Group Therapy (1993); Stress Management (1993); Anger Management (1994); House of Hope (1996); Peer Facilitator Training (1996); Drug/Alcohol Phase II (1996); Women's Issues, Drug/Alcohol (1998); 12 Step Study Group (1999); Drug/Alcohol Relapse Prevention (1999); Drug/Alcohol Aftercare (2001); Low Intensity

Violence Prevention (2012); Impact of Crime; Civic Responsibility; Citizenship; Bereavement Group; Long-Termers Group.

Community Engagement: Lions Braille Vision, Braille Lab (1999 to present); Create for Kids (2010 to present); Cookbook, Typist and Contributor (2000); Drawing Class; Music Appreciation and Choir (2007); Decarcerate PA Life Lines Project; PA Prison Society Arts and Humanities; Let's Get Free, Commutation Advocacy; SCI Cambridge Springs Phoenix Organization for Lifers and Big Brothers/Big Sisters Runathon.

Spirituality: Protestant services; Kairos; Walking Your Faith I & II; Jewish Studies.

R. at 24a-25a ¶ 53.

Ms. Lee has also dedicated herself to preventing teen violence. Toward this end she helped author a theatrical production about her life and her case entitled "Chin to the Sky"[4]; presented a pamphlet to middle school students as part of Mother's Against Teen Violence: A Week Without Violence; and worked with the Erie Health Department in their efforts to prevent teen suicide. R. at 26a ¶ 54.

[4] "Chin to the Sky" received an Honorable Mention in the Drama Category for PEN America's Prison Writing Awards for 2015-2016. Award winners can be viewed at: https://pen.org/prison-writing-award-winners-2015-2016/.

Ms. Lee's maturation into a community-oriented adult with an impressive record of service, educational and vocational achievement is also reflected in the fact that she has not been issued a misconduct for a rule violation in over a quarter century. R. at 26a ¶ 55. She has accomplished all of this with the knowledge that her sentence afforded her no opportunity for parole or meaningful opportunity for release. The 18-year-old who made a fateful decision to accompany her brother for what she presumed would be an armed robbery transformed her life. Ms. Lee is a living testament to the rectitude of the Supreme Court's recognition that mandatory life-without-parole is an inappropriate and disproportionate punishment for teenagers, in part, due to their possessing less fixed characters and therefore being more amenable to rehabilitation. As anticipated by *Miller,* the continued incarceration of Ms. Lee serves no penological purpose.

III. THE RULE OF LAW ANNOUNCED IN *MILLER* REQUIRES RETROACTIVE INVALIDATION OF A MANDATORY LIFE WITHOUT PAROLE SENTENCE IMPOSED ON AN OFFENDER WITH CATEGORICALLY DIMINISHED CULPABILITY BECAUSE THE OFFENDER DID NOT KILL OR INTEND TO KILL

In determining the constitutionality of a sentence under the Eighth Amendment, proportionality is a central consideration. *Miller,* 567 U.S. at 469. As discussed in detail in Section I *supra*, the *Miller* Court merged two lines of proportionality analysis to prohibit the mandatory imposition of life-without-parole sentences on offenders who are categorically less culpable under the Eighth Amendment. *Id*. at 470. The Court derived its holding from 1) the line of cases establishing classes of defendants with diminished culpability that could not be subjected to the harshest punishments, including *Graham*, and 2) the line of cases requiring individualized sentencing in the death penalty context. *Id.* By applying the "well-established rationale," *Seminole Tribe,* 517 U.S. at 67, of these lines of precedent to mandatory life-without-parole sentences imposed on juveniles, *Miller* established that mandatory life-without-parole sentences may not be imposed on a categorically less culpable class of offenders.

In *Enmund v. Florida,* the Supreme Court overturned the death sentence of an individual convicted of felony-murder, holding that the death penalty could not be imposed on "one who neither

took life, attempted to take life, nor intended to take life." *Enmund v. Florida,* 458 U.S. at 787*.* The Court reasoned that the culpability of an offender who "did not kill or intend to kill…is plainly different" from those who do kill or intend to kill. *Id.* at 798. The degree of an individual's criminal culpability is critically tied to "a defendant's intention—and therefore his moral guilt." *Id.* at 800. Punishment for an offense "must be tailored to [the defendant's] personal responsibility and moral guilt." *Id.* at 801. Thus, imposing the most serious sentence on an offender for "two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." *Id.*

The Court applied the rationale of *Enmund* in banning the imposition of life-without-parole sentences for juveniles convicted of nonhomicide offenses in *Graham v. Florida.* The *Graham* Court reasoned that juvenile offenders who did not kill or have an intent to kill have "twice diminished moral culpability:" first, by virtue of their youth; and second, by virtue of their lack of intent to kill. *Graham,* 560 U.S. at 69. Crimes in which the offender does not kill

or have the intent to kill "differ from homicide crimes in a moral sense." *Id.* In the context of felony-murder, where the offender's intent is not actual, but imputed through the intent of another, "this artificially constructed kind of intent does not count as intent for purposes of the Eighth Amendment." *Miller,* 567 U.S. at 491 (Breyer, J. concurring). Thus, offenders who do not kill or intend to kill "are categorically less deserving of the most serious forms of punishment." *Graham,* 560 U.S. at 69.

Under *Miller*, mandatory life-without-parole sentences may not be imposed on individuals with categorically diminished culpability because they are "less deserving of the most severe punishments." *Miller,* 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68). An individual's diminished culpability "'diminish[es] the penological justifications' for imposing life without parole[.]" *Montgomery,* 136 S.Ct. at 733 (quoting *Miller,* 567 U.S. at 472). Life-without-parole sentences "share some characteristics with death sentences that are shared by no other sentences." *Graham,* 560 U.S. at 69. Namely, a life-without-parole sentence "alters the remainder of [the defendant's] life 'by a forfeiture that is

irrevocable'." *Miller,* 567 U.S. at 474-75 (quoting *Graham,* 560 U.S. at 69). Mandatory sentencing schemes imposed on categorically less culpable defendants prevent the sentencer from determining "whether the law's harshest term of imprisonment" is proportional to the defendant's criminal culpability. *Miller,* 567 U.S. at 474. Mandatory life-without-parole sentences preclude the sentencer from enacting a punishment that is "'graduated and proportioned' to both the offender and the offense," for those with diminished culpability. *Id.* at 469 (quoting *Roper*, 543 U.S. at 560). Furthermore, mandatory life-without-parole schemes preclude the sentencer from considering the circumstances of the offense, including "the extent of [the defendant's] participation in the conduct." *Miller,* 567 U.S. at 477. Therefore, *Miller* mandates that defendants with diminished culpability be provided individualized sentencing proceedings prior to receiving the most irrevocably severe sentences.

Ms. Lee is serving a mandatory sentence of life-without-parole pursuant to her conviction for felony-murder. Neither Ms. Lee nor her co-defendants participated in the attempted robbery leading to

their convictions with the intent to kill. Ms. Lee's sole participation in the attempted robbery consisted of sitting and watching as her brother, Dale Madden, attempted to rob a man at gunpoint. Mr. Madden ultimately fired the gun, killing the target of the robbery, Robert Walker. The only evidence against Ms. Lee and her co-defendants at trial consisted of taped statements given to police by each of the defendants. All of the statements indicated that none of the defendants intended to cause physical harm during the robbery and that Ms. Lee acted only as a lookout during the offense. In other words, it is undisputed that Ms. Lee did not kill or intend to kill. *Enmund* and *Graham* make clear that individuals who do not kill or intend to kill are categorically less culpable. *Miller*, by applying the Court's analysis on categorically diminished culpability and individualized sentencing to prohibit mandatory life-without-parole sentences for juvenile offenders, establishes that defendants like Ms. Lee may not be sentenced to mandatory life-without-parole.

IV. THE COMBINED EFFECT OF MS. LEE'S YOUTH, HER EXPERIENCE OF EXTREME CHILDHOOD AND ADOLESCENT ABUSE AND TRAUMA, AND HER LACK OF INTENT TO KILL RENDER HER LESS CULPABLE

UNDER *MILLER* AND THEREFORE REQUIRE REVERSAL OF HER SENTENCE

Ms. Lee's preceding arguments asserted that she is entitled to relief on the independent grounds of 1) her youth and the circumstances of her childhood and adolescence, and 2) her diminished culpability because she did not kill or intend to kill. Ms. Lee also asserts that these factors, discussed at length above, have a combined effect that results in the conclusion that Ms. Lee has "twice diminished moral culpability." *Graham,* 560 U.S. at 69. The combined effect of these factors prohibits the imposition of a mandatory life-without-parole sentence on Ms. Lee.

V. PENNSYLVANIA LAW PERMITTING MANDATORY SENTENCES OF LIFE WITHOUT PAROLE FOR CRIMES COMMITTED BY 18 YEAR-OLDS LACKS A RATIONAL BASIS IN LIGHT OF *MILLER*'S PROHIBITION AGAINST SUCH SENTENCES FOR OFFENDERS AGED 17 AND YOUNGER AND THEREFORE VIOLATES THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS

Equal protection under U.S. Const. Amend. XIV and Pa. Const. Art. I, § 26 requires "all persons similarly situated to be treated alike." *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)); *see also*

Reed v. Reed, 404 U.S. 71, 76 (1971); *Royster v. Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380, 394 (3d Cir. 2010); *Commonwealth v. Bullock*, 913 A.2d 207, 215 (Pa. S.Ct. 2006); *Commonwealth v. Albert*, 758 A.2d 1149, 1151 (Pa. S.Ct. 2000) ("The essence of…equal protection under the law is that like persons in like circumstances will be treated similarly."). As a result of the U.S. Supreme Court's decisions in *Miller* and *Montgomery*, 18-year-olds recognized as children under Pennsylvania law are subject to unequal treatment compared to younger children without a rational basis. As discussed *supra*, the social and neuroscience undergirding the Court's holdings, along with the determination of the Pennsylvania legislature in its definition of juvenile/child elsewhere in the state statutory code, are unambiguous in recognizing that 18-year-olds possess attributes of youth that the Supreme Court has recognized render them less culpable. For a 17-year-old to obtain relief in the form of an *opportunity* to present mitigating evidence justifying a lesser sentence under the *Miller* and *Montgomery* decision while an 18-year-old's youth, developmental characteristics, and home and

social circumstances cannot even be considered does not have a rational basis. This constitutes a violation of the equal protection clause of the Fourteenth Amendment to the U.S. Constitution and the equal protection afforded under Article 1, § 26 of the Pennsylvania Constitution. Petitioner's sentence should be reversed on this ground as well.

Ms. Lee, as argued in her PCRA petition, was a child under 42 Pa.C.S. § 6302 at the time of the events that led to her conviction. R. at 21a ¶ 43. Yet, the Commonwealth draws a distinction without a rational basis between children like Ms. Lee and children who were under the age of 18 who are similarly situated. The Commonwealth has not even deigned to proffer a rational basis for the differential treatment it seeks to impose on these similarly situated defendants who, in some cases, may be only days apart in age. The lower court did not address this claim.

Miller prohibited the mandatory imposition of life-without-parole sentences on offenders with diminished culpability because a mandatory life-without-parole sentencing scheme "poses too great a risk of disproportionate punishment" by precluding the

sentencer from considering an individual's characteristics of youth. *Miller,* 567 U.S. at 479. Because these characteristics of youth vitiate the justifications for the harshest punishments, life-without-parole sentences imposed on "child[ren] whose crime[s] reflect[] unfortunate yet transient immaturity" are disproportionate under the Eighth Amendment. *Montgomery,* 136 S.Ct. at 734 (internal quotations omitted). As discussed in detail *supra*, the Court's decisions in *Miller* and *Montgomery* were premised on the characteristics of youth that diminish an individual's culpability and render a life-without-parole sentence disproportionate, rather than age alone. Thus, where the characteristics of youth identified in *Miller* are sufficiently present, a life-without-parole sentence is disproportionate.

Even assuming *arguendo* that *Miller*'s holding is limited to individuals younger than 18 at the time of the offense, this bright-line distinction *supports* rather than refutes Ms. Lee's equal protection claim. Under *Miller*'s analysis, an 18-year-old sentenced to life-without-parole who possessed characteristics of youth identical to those of a 17-year-old and whose crime "reflects

unfortunate yet transient immaturity" is serving a disproportionate punishment under the Eighth Amendment. By seeking to maintain the mandatory life-without-parole sentences imposed upon 18-year-old children, the Commonwealth is seeking to continue imposing a punishment rendered disproportionate by *Miller* and *Montgomery*, while vacating the disproportionate life-without-parole sentences imposed on those under 18 at the time of the offense, regardless of the constitutionally-indistinguishable similarity between these two groups of defendants. While the defendant who is convicted of committing a homicide while 17 years and 364 days old will be provided the benefit of *Miller* and *Montgomery* and permitted the opportunity to present mitigation evidence in support of a sentence of less than life-without-parole, the defendant who is 18 years and 1 day old will be condemned to die in prison despite a mountain of persuasive mitigation evidence supporting a lesser sentence. Such arbitrary distinctions permit the continued imposition of disproportionate sentences that violate the Eighth Amendment and fail to ensure that "like persons in like circumstances will be treated similarly." *Albert*, 758 A.2d at 1151.

The Superior Court addressed an equal protection claim in one precedential opinion dealing with a *Miller*-based PCRA petition. In *Cintora*, 69 A.3d 759, the court rejected as untimely the claims that "it would be a violation of equal protection for the courts to treat [petitioners] or anyone else with an immature brain, as adults," and that "life without parole terms for adults in homicide case" is a violation of equal protection principles. *Cintora,* 69 A.3d at 764.

However, *Cintora* was decided prior to the Supreme Court's decision in *Montgomery* holding *Miller* to be retroactive. *Montgomery,* 136 S.Ct. 718 (2016). Ms. Lee's equal protection claim is premised specifically on the retroactivity of the right established by *Miller* and asserted in Ms. Lee's PCRA petition. *See R.* at 10a ¶ 16. Prior to *Montgomery,* Pennsylvania courts did not apply *Miller* retroactively and therefore did not make distinctions between children under 18 years old and those, like Ms. Lee, with identical characteristics of youth and diminished culpability, who were 18 or older at the time of their offenses for convictions that became final prior to *Miller*. This post-*Montgomery* distinction,

however, is the basis for Ms. Lee's equal protection claim. Furthermore, the equal protection claims presented in *Cintora* are distinguishable from Ms. Lee's claim. Ms. Lee does not argue that the basis for her equal protection claim lies purely in age and neuroscientific developments. *See Cintora,* 69 A.3d at 764. Rather, Ms. Lee's claim is based on the class identified in *Montgomery* as "a child whose crime reflects unfortunate yet transient immaturity," *Montgomery,* 136 S.Ct. at 734 (internal quotations omitted), for whom life-without-parole sentences constitute disproportionate punishment.

Appellant seeks reversal of the dismissal of her equal protection claim. Neither the Commonwealth nor the Court of Common Pleas has proffered any basis – rational or otherwise – for distinguishing between 17 and 18-year-olds in this context, presumably because none exists. Ms. Lee's sentence should be struck down on this basis as well.

VI. THE PCRA COURT ABUSED ITS DISCRETION IN FAILING TO HOLD AN EVIDENTIARY HEARING WHERE PETITIONER HAD RAISED ISSUES OF MATERIAL FACT THAT ENTITLE HER TO RELIEF

A PCRA court has the discretion to dismiss a PCRA petition without an evidentiary hearing if the petitioner's claim is "patently frivolous and has no support either in the record or other evidence." *Commonwealth v. Khalifah,* 852 A.2d 1238, 1240 (Pa. Super. 2004) (citing *Commonwealth v. Jordan,* 772 A.2d 1011, 1014 (Pa. Super. 2001)). On appeal, the reviewing court determines whether the PCRA court erred in determining that "there were no genuine issues of material fact in controversy and in denying relief without conducting an evidentiary hearing." *Id.* (citing *Commonwealth v. Hardcastle,* 701 A.2d 541, 542-43 (Pa. S.Ct. 1997)).

If a PCRA petition is dismissed without an evidentiary hearing, a reviewing court must remand for an evidentiary hearing when an assessment of witness testimony is essential to the petitioner's claims that would entitle her to relief. *See Commonwealth v. Johnson,* 966 A.2d 523, 540 (Pa. S.Ct. 2009). A primary purpose of PCRA evidentiary hearings is to enable the PCRA court, serving as factfinder, to make credibility determinations. *Id.* at 539. Thus, where a petitioner raises genuine issues of material fact and offers

evidence that, if believed, warrants relief, she is entitled to an evidentiary hearing. *See Khalifah,* 852 A.2d at 1240 (remanding for evidentiary hearing where witness's testimony may have affected outcome of petitioner's trial and PCRA court made credibility determination based on affidavit alone); *Commonwealth v. Burton,* 121 A.3d 1063 (Pa. Super. 2015) (remanding for evidentiary hearing on timeliness of PCRA where petitioner raised genuine issues of material fact as to when after-discovered evidence was available to petitioner and PCRA court made credibility finding without a hearing).

a. ***Miller*** Factors of Diminished Culpability are Fact-Specific and Require an Evidentiary Hearing

Miller requires the reversal of a mandatory life-without-parole sentence imposed on defendants with diminished culpability due to certain youthful characteristics, including exposure to extreme childhood physical, psychological, and sexual abuse. *Miller,* 567 U.S. at 471 (explaining that children "have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings" (citing *Roper*, 570 U.S. at 569)). Mandatory life-without-parole sentences prevent factfinders

from considering this crucial evidence in determining an appropriate sentence. *Miller,* 567 U.S. at 475-76. Thus, where a defendant, as in Ms. Lee's case, possesses those attributes of youth and diminished culpability, a sentencer is required to take them under consideration. *Id.* at 479. Because Ms. Lee's sentence of life-without-parole was imposed automatically, she was unable to present evidence of these youthful characteristics and childhood abuse to the sentencer and no factfinder has assessed the weight of this evidence. If this evidence shows that Ms. Lee was less culpable under *Miller*, she is entitled to relief in the form of reversal of her mandatory life-without-parole sentence and an individualized sentencing hearing to consider the factors enumerated in *Miller.*

In Ms. Lee's Response to Notice of Intent to Dismiss in the PCRA court, she offered witnesses intended to show that, at the time of the acts leading to her conviction, she possessed the type of diminished culpability recognized in *Miller* as constitutionally significant for sentencing purposes. R. at 50a-51a. If Ms. Lee is able to show that she possessed the characteristics of youth and

suffered extreme childhood abuse, she is entitled to a reversal of the mandatory life-without-parole sentencing and an individualized sentencing hearing. Ms. Lee offered four witnesses to substantiate her claims. First, Ms. Lee would testify regarding her childhood and adolescent experiences, the circumstances of her offense, and her experiences and growth since her incarceration. R. at 50a. Dr. Beatriz Luna would testify as an expert on neurocognitive development, specifically that characteristics of youth such as those identified as relevant in *Miller* are typically present in 18-year-olds. *Id.* at 50a-51a. Dr. Rachel Fusco would testify regarding the impact of childhood and adolescent physical, psychological, and sexual trauma on an individual's development and the role that such abuse played in the acts for which Ms. Lee was convicted. *Id.* at 51a. Finally, Maria Lynn Guido would testify regarding her investigation into Ms. Lee's childhood and adolescent experience. *Id.* These witnesses will show that the factors identified in *Miller* to determine diminished culpability were present in Ms. Lee's case. Thus, Ms. Lee has raised a genuine issue of material fact that, if

resolved in her favor, would entitle her to relief and this Court should remand for an evidentiary hearing related to these issues.

CONCLUSION

For the reasons articulated above, Appellant is seeking reversal of the Court of Common Pleas' dismissal of each of Appellant's claims for relief and remand for purposes of conducting an evidentiary hearing.

Respectfully submitted,

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<u>Certificate of Compliance</u>

I hereby certify that the foregoing Brief for Appellant consists of 12,088 words, excluding the title page, table of contents, and table of citations, and thus complies with the requirement of Pennsylvania Rule of Appellate Procedure 2135 that principal briefs shall not exceed 14,000 words.

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APPENDIX A

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

vs.

AVIS LEE,

Appellant

CRIMINAL DIVISION

CC198005128
1891 WDA 2016

OPINION

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA — CRIMINAL DIVISION

vs. — CC198005128
1891 WDA 2016

AVIS LEE,

Appellant

OPINION

Sasinoski, J.

This is an appeal from the Order of Court denying PCRA relief entered on November 17, 2016.

The defendant filed a timely Notice of Appeal and in her 1925(b) Statement of Matters Complained of on Appeal raised the following issued:

A. Did the PCRA Court err in rejecting Appellant's claim that *Miller v. Alabama's* constitutional requirement of consideration of age-related facts prior to imposing life without parole sentences applies to Petitioner who was considered a child under Pennsylvania law and possessed those characteristics of youth identified as constitutionally significant for sentencing purposes by the U.S. Supreme Court?

B. Did the PCRA Court err in rejecting Appellant's claim that the rule of law announced in *Miller* requires retroactive invalidation of a mandatory life without parole sentence imposed on an offender with categorically less culpability because the offender did not kill or intent to kill?

C. Did the PCRA Court err in rejecting Appellant's claim that the combined effect of Ms. Lee's youth, her experience of extreme childhood and adolescent abuse and trauma, and her lack of intent to kill render her less culpable under *Miller* and therefore require reversal of her sentence?

D. Did the PCRA Court err in rejecting Appellant's claim that Pennsylvania law permitting mandatory sentences of life without parole for crimes committed by 18 year-olds lacks rational basis in light of *Miller's* prohibition against such sentences for offenders ages 17 years and younger and therefore violates the Equal

Protection Clauses of the United States and Pennsylvania Constitutions?

E. Did the PCRA Court abuse its discretion in failing to hold an evidentiary hearing on claims where Petitioner had raised genuine issues of material fact that entitle her to relief?

Defendant was convicted of Second Degree Murder and sentenced to Life imprisonment without the possibility of parole in the above-captioned case on July 20, 1980. She sought relief pursuant to *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012), which held that "mandatory life without parole for those under the age of 18 at the time of the crime violates the Eighth Amendment's Prohibition against cruel and unusual punishment. Defendant was over the age of 18 at the time she committed the offense, and *Miller* is inapplicable. Further, the PCRA Court did not have jurisdiction to hear this matter and accordingly, the court did not schedule a hearing.

For these reasons, the Order denying PCRA relief should be affirmed.

APPENDIX B

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	**CC: 198005128**
	:	**OTN: A5989546**
AVIS LEE	:	

ORIGINAL
Criminal Division
Dept. of Court Records
Allegheny County, PA.

STATEMENT OF ERRORS COMPLAINED OF ON APPEAL

FILED
17 JAN 30 AM 12: 27
DEPT OF COURT RECORDS
CRIMINAL DIVISION
ALLEGHENY COUNTY PA

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	**CC: 198005128**
	:	**OTN: A5989546**
AVIS LEE	:	

NOTICE OF APPEAL

Comes now, undersigned co-counsel, on behalf of Ms. Lee, and provides the following Statement of Errors Complained of on Appeal, as ordered by the Court on January 31st, 2017, and pursuant to Pennsylvania Rule of Appellate Procedure 1925(b):

1. On March 24th, 2016, Ms. Lee, through counsel, filed a Petition for Post-Conviction Relief Pursuant to 42 Pa. C.S. §9543.
2. On November 18th, 2016, this Court dismissed Ms. Lee's Petition for Post-Conviction Relief.
3. On December 12th, 2016, Ms. Lee, through counsel, filed a Notice of Appeal pursuant to Pennsylvania Rule of Appellate Procedure 904.
4. On January 31st, 2017, this Court issued an order directing counsel to file a Statement of Matters Complained on Appeal within 21 days[1]. This filing follows.

[1] The Court's order indicated that counsel should file the Statement along with "a Brief in Support thereof." However, Pennsylvania Appellate Rule 1925(b)(4)(iii) specifically states that "The judge shall not require appellant or appellee to file any brief, memorandum of law, or response as part of or in conjunction with the Statement." Therefore, no brief will be included with this Statement.

5. The following issues will be raised on appeal:

   a. Did the PCRA Court err in rejecting Appellant's claim that *Miller v. Alabama's* constitutional requirement of consideration of age-related facts prior to imposing life without parole sentences applies to Petitioner who was considered a child under Pennsylvania law and possessed those characteristics of youth identified as constitutionally significant for sentencing purposes by the U.S. Supreme Court?

   b. Did the PCRA Court err in rejecting Appellant's claim that the rule of law announced in *Miller* requires retroactive invalidation of a mandatory life without parole sentence imposed on an offender with categorically less culpability because the offender did not kill or intend to kill?

   c. Did the PCRA Court err in rejecting Appellant's claim that the combined effect of Ms. Lee's youth, her experience of extreme childhood and adolescent abuse and trauma, and her lack of intent to kill render her less culpable under *Miller* and therefore require reversal of her sentence?

   d. Did the PCRA Court err in rejecting Appellant's claim that Pennsylvania law permitting mandatory sentences of life without parole for crimes committed by 18 year-olds lacks rational basis in light of *Miller*'s prohibition against such sentences for offenders aged 17 years and younger and therefore violates the Equal Protection Clauses of the United States and Pennsylvania Constitutions?

   e. Did the PCRA Court abuse its discretion in failing to hold an evidentiary hearing on claims where Petitioner had raised genuine issues of material fact that entitle her to relief?

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DATE: February 7, 2017

PROOF OF SERVICE

I hereby certify that on this 7th day of February, this Notice of Appeal was served by hand-delivery to the following persons:

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Certificate of Service

I hereby certify that on this 28th day of July this Brief for Appellant was E-filed to the following:

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