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1891 WDA 2016

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

1891 WDA 2016

COMMONWEALTH OF PENNSYLVANIA,
Appellee
v.
AVIS LEE
Appellant

SUBSTITUTED 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.

ORDER IN QUESTION

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 raises 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. 2009) (citing *Commonwealth v. Davidson*, 938 A.2d 198, 203 (Pa. 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. 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. 2004)).

STATEMENT OF THE QUESTIONS INVOLVED

I. DID THE PCRA COURT ERR IN REJECTING APPELLANT'S CLAIM THAT THE RIGHT ESTABLISHED IN *MILLER v. ALABMA* 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 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.[1]

[1] Appellant waives Claim 2 (relating to felony-murder), Claim 3 (relating to the combined effect of her felony-murder conviction and characteristics of youth), and Claim 4 (relating to Equal Protection).

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 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 panel of the Superior Court issued a memorandum and order affirming the PCRA court's dismissal of Ms. Lee's petition on December 29, 2017. On January 12, 2018, Ms. Lee filed an Application for Reargument *En Banc.*

This Court granted Ms. Lee's Application for Reargument *En Banc* on March 9, 2018. On March 14, 2018, the Commonwealth filed a Motion for Clarification of Order Granting *En Banc* Review and Ms. Lee filed an Application for Extension of Time to File Brief.

This Court stayed the briefing schedule and ordered Ms. Lee to file a response to the Commonwealth's Motion for Clarification on March 29, 2018. Ms. Lee filed a response to the Commonwealth's Motion for Clarification on April 12, 2018.

This Court denied the Commonwealth's Motion for Clarification on April 25, 2018 and lifted its stay of the briefing schedule, ordering Ms. Lee to file her brief within 14 days of the order, or by May 9, 2018.

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,* 163 A.3d 410 (Pa. 2017) (*Batts II*). For purposes of the determining whether Ms. Lee's PCRA petition meets the newly-established constitutional right exception to the PCRA's timeliness requirements under 42. Pa.C.S. § 9545(b)(1)(iii), such a construction of the right renders her petition timely.

In *Montgomery*, the U.S. Supreme Court made clear that the substantive right established in *Miller* is that the imposition of life-

without-parole sentences on those whose offenses reflect the transient immaturity of youth are disproportionate under the Eighth Amendment. *Montgomery,* 136 S.Ct. at 734. *Montgomery* held that *Miller* applies retroactively because *Miller's* narrow holding prohibiting "mandatory life without parole for those under the age of 18 at the time of their crimes," *Miller,* 567 U.S. at 465, which this Court has previously deemed to constitute the entirety of the right established in *Miller,* is a prophylactic rule meant to protect the substantive right.

In order to give effect to the right established in *Miller,* courts must adhere to the well-established rationale and portions of the opinion necessary to the result. This requires a court to give effect to three necessary components of the right established in *Miller*, none of which are determined exclusively by the chronological age of the offender. First, *Miller*'s conclusion 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; second, 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 third, science and social science relating to adolescent development. Each of these portions of *Miller*, which must be given effect under *Seminole Tribe*'s mandates, demonstrate that the right established in *Miller* provides 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.

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. Ms. Lee's PCRA petition presented numerous detailed factual allegations relating to her maturation and rehabilitation; childhood and adolescence marked by abuse and trauma; and impulsive, reckless, peer-influenced decision-making in the events that led to her felony-

murder conviction. The facts asserted in her petition encompass each of the mitigating characteristics of youth identified as constitutionally significant for sentencing purposes under *Miller* and, if proven, would establish that her offense reflects the transient immaturity of youth and is therefore unconstitutional. Thus, 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.

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

I. THE RIGHT ESTABLISHED IN *MILLER V. ALABAMA* PROHIBITS THE IMPOSITION OF LIFE-WITHOUT-PAROLE SENTENCES UPON THOSE WITH DIMINISHED CULPABILITY DUE TO THE TRANSIENT IMMATURITY OF YOUTH

a. In construing the right established in *Miller* and held to apply retroactively in *Montgomery v. Louisiana*, courts must adhere to the underlying reasoning and well-established rationale of those decisions

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 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. Montgomery,* 2018 WL 1311961, 2018 PA Super 54, (Pa. Super. 2018) (en banc); *Commonwealth v. Cintora,* 69 A.3d 759 (Pa. Super. 2013); *Commonwealth v. Furgess,* 149 A.3d 90 (Pa. Super. 2016). In these cases, this Court, like the Court of Common Pleas, held that

the right established in *Miller* was identical to a narrow holding stated in *Miller* that mandatory life-without-parole sentences cannot be imposed on those younger than 18, thus *Miller*-based PCRA petitions filed by offenders older than 17 are untimely. *See Com. v. Montgomery,* 2018 WL 1311961 at *6; *Cintora,* 69 A.3d at 764; *Furgess,* 149 A.3d at 94.

In *Com. v. Montgomery,* this court sua sponte ordered that the appeal be heard en banc to resolve a panel split on the question of "whether a PCRA court possesses subject matter jurisdiction over a subsequent PCRA petition when a previous PCRA petition regarding the same judgment of sentence is pending before the PCRA court." *Com. v. Montgomery*, 2018 WL 1311961 at *2. The Court also directed counsel to address any other issues deemed meritorious, including Appellant's claim that the Equal Protection Clause of the Fourteenth Amendment required that the Eighth Amendment right established in *Miller* be extended to Appellant, who was 22 years of age at the time of the offense. *Id.;* Appellant's Brief, *Com. v. Montgomery,* No. 938 WDA 2016, J-E02005-17, 16. The en banc Court rejected that argument, holding that "neither

the Supreme Court of the United States, nor our Supreme Court, has held that Miller announced a new rule under the Equal Protection Clause." *Com. v. Montgomery*, 2018 WL 1311961 at *6.

As discussed in detail *infra*, Ms. Lee's appeal presents an issue to this Court never raised or decided in *Com. v. Montgomery, Cintora,* or *Furgess* – whether the right announced in Miller protects an 18-year-old whose offense reflected the transient immaturity of youth. Thus, Ms. Lee's claims are distinguishable from those presented and considered previously by this Court. In the event that this Court's prior decisions in *Com. v. Montgomery, Cintora,* and *Furgess* foreclose Ms. Lee from obtaining relief, these decisions should be overruled.

This Court's prior construction of the right established in *Miller* 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).

The principle that lower courts are bound to apply not only the holdings of a Supreme Court decision, but also the legal rules and reasoning of the decision, is a foundational element of our judicial system. Courts must respect "prior decisions of this Court and the legal rules contained in those decisions." *Tincher v. Omega Flex, Inc.,* 104 A.3d 328, 336 (Pa. 2014). "[O]ur system of precedent or stare decisis is thus based on adherence to both the reasoning and result of a case, and not simply the result alone." *Planned Parenthood v. Casey,* 947 F.2d 682, 692 (3d Cir. 1991) (aff'd in part, rev'd in part on other grounds). "[L]ower courts are obligated to follow both the narrow holding of the Supreme Court

as well as the rule applied by the Court in reaching its holding," including "the reasoning, analysis, and legal rules applied in reaching its result." *Rodriguez v. National City Bank,* 277 F.R.D. 148, 154 (E.D. Pa. 2011).

In *Commonwealth v. Batts,* 163 A.3d 410 (Pa. 2017) ("*Batts II"*), the Supreme Court of Pennsylvania followed *Seminole Tribe*'s mandates on adhering to not only the holding, but the necessary rationale of prior U.S. Supreme Court decisions. At Qu'eed Batts' re-sentencing proceeding following the vacatur of his mandatory life-without-parole sentence under *Miller,* the trial court again imposed a life-without-parole sentence. *Batts II,* 163 A.3d at 415.

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 438. 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 438-39 (citing *Seminole Tribe,* 517 U.S. at 67).

Seminole Tribe, Batts II, and the cases cited above require that the ***right*** established in *Miller* must include not only a narrow ***holding*** of that case but also the rationale that the Court used to reach its holding. This reading is also supported by the text of the PCRA's newly-established constitutional right timeliness exception, which reads

> the **right** asserted is a constitutional **right** that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been **held** by that court to apply retroactively.

42 Pa.C.S. § 9545(b)(1)(iii) (emphases added). The plain language of the statute draws a distinction between a "right" and a "holding." If the legislature intended for a constitutional "right" to be reducible to a holding alone, it presumably would not have used the word "held" later within the same subsection of the PCRA's timeliness exceptions.

In interpreting an analogous standard for determining whether federal habeas petitions properly invoke a new constitutional rule and may therefore be considered on the merits, the Court of Appeals for the First Circuit found that the words "rule" and "right" were broader than the word "holding" and that the legislature did not intend for the terms to be synonymous:

> Congress presumably used these broader terms because it recognizes that the Supreme Court guides lower courts not just with technical holdings but with general rules that are logically inherent in those holdings, thereby ensuring less arbitrariness and more consistency in our law.

Moore v. United States, 871 F.3d 72, 82 (1st Cir. 2017). A Connecticut District Court recently relied in part on this distinction between a technical holding and broader right or rule to find a habeas petition timely and hold that *Miller* applies to 18-year-olds. *Cruz v. United States,* 3:11-cv-00787-JCH, 56 (D. Conn. March 29, 2018), This Court should follow that reading of the rationale of *Miller* and the construction of a "right" as applying to Ms. Lee.

The ordinary legal usage of the terms "right" and "holding" support the notion that a right is broader than and substantively

distinct from the technical legal holding of a case. Black's Law Dictionary definitions for "holding" include, in relevant part:

1) A court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision.
2) A ruling on evidence or other questions presented at a trial.

Black's Law Dictionary 749 (8th ed. 2004). A "right," however, is defined in relevant part as:

1) That which is proper under law, morality, or ethics.
2) Something that is due to a person by just claim, legal guarantee, or moral principle.
3) A power, privilege, or immunity secured to a person by law.
4) A legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong.

Black's Law Dictionary 1347 (8th ed. 2004). While these definitions are not determinative, they support the legislature's use of "right" and "held" to denote distinct concepts in the contexts in which they are used in the PCRA statute. A "right" is simply not synonymous with and must be construed more broadly than a "holding."

Taking into account the standard set forth in *Seminole Tribe*, and recognized across jurisdictions, the interpretation of the PCRA timeliness exception's newly-established constitutional right provision must, at a minimum, give effect to those portions of the

opinion which were necessary to the result and the well-established rationale upon which a decision establishing a new constitutional right were based.

b. The right established in *Miller* and made retroactive in *Montgomery* provides 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

In light of the fundamental principles of jurisprudence iterated in *Seminole Tribe*, 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. Following *Miller*, the U.S. Supreme Court held that *Miller* applies retroactively to cases on collateral appeal in *Montgomery,* 136 S.Ct. at 733. In finding that *Miller* announced a substantive rule of constitutional law and therefore applies retroactively, the *Montgomery* Court eschewed a narrow, limited reading of *Miller,* clarified 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,* 163 A.3d at 439.

Montgomery recognized that *Miller* did not merely forbid mandatory life-without-parole sentences for those younger than 18 at the time of the offense. Rather, it established a categorical bar to life-without-parole sentences for "a child whose crime reflects unfortunate yet transient immaturity," regardless of whether the sentence was mandatory or discretionary. *Montgomery,* 136 S.Ct. at 734 (internal citations and quotations omitted). *Miller*'s prohibition on mandatory life-without-parole sentences and requirement that courts consider mitigating evidence is a "procedural requirement necessary to implement a substantive guarantee." *Id*. In other words, the prohibition on mandatory sentences is a prophylactic rule designed to protect the substantive right established in *Miller*. The right established, however, is that those whose offenses reflect the transient immaturity of youth may not be subjected to life-without-parole sentences. *Montgomery,* 136 S.Ct. at 734

Montgomery therefore makes clear that *Miller's* narrow holding prohibiting "mandatory life without parole for those under the age of 18 at the time of their crimes," *Miller,* 567 U.S. at 465, which this Court has previously deemed to constitute the entirety of the right established in *Miller,* is a prophylactic rule meant to protect the right. The "well-established rationale" and "portions [of *Miller*] necessary to the result," *Seminole Tribe,* 517 U.S. at 67, of *Miller* bear out this reading.

In determining whether Ms. Lee's petition satisfies the newly-established constitutional right timeliness exception, the right established in *Miller* must give effect to three of the *Miller* Court's critical conclusions that were necessary to its holding. First, 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. Second, 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 third,

the Court's adoption of science and social science relating to adolescent development. Properly construed, the right established in *Miller* prohibits the imposition of life-without-parole sentences on offenders whose crimes reflect the transient immaturity of youth. To give effect to this right, mandatory life-without-parole sentences may not be imposed on those who possess the characteristics of youth that render them categorically less culpable under the Eighth Amendment and a sentencer must account for mitigating circumstances and the Court's critical conclusions regarding such evidence in determining whether a life-without-parole sentence is disproportionate. *See Batts II,* 163 A.3d at 437-38.

i. An individual's characteristics of youth and the way these characteristics weaken the rationales for punishment can render a life-without-parole sentence disproportionate

While the Miller Court did not need to consider whether an 18-year-old could possess those characteristics of youth to reach its decision, the reasoning of *Miller* made clear that it was those characteristics, and not any arbitrary age cut-off that was dispositive. As Miller reasoned, 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." *Miller,* 567 U.S. at 477.

The Court's holding was premised on a recognition that "youth is more than a chronological fact," *Id.* at 476 (quoting *Eddings,* 455 U.S. 104, 115 (1982)), 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.

Montgomery 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 which render life-without-parole a disproportionate sentence. Even defendants younger than 18 are not automatically precluded from a life-without-parole sentence based on the sole fact of their age, but instead must make a showing that they possess the "distinctive attributes of *youth*" that diminish their culpability. *Id*. at 734 (emphasis added). 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.

ii. A mandatory life-without-parole sentencing scheme poses too great a risk of disproportionate punishment by preventing a sentencer from considering an offender's age and characteristics of youth prior to imposing the harshest punishments

In establishing that life-without-parole sentences cannot be imposed on offenders with the transient immaturity of youth, the *Miller* Court 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 v. Florida,* 560 U.S. 48, 69 (2010) (holding life-without-parole sentences for juvenile non-homicide offenders unconstitutional). 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.*

iii. Science and social science relating to adolescent development must be taken into consideration in construing the right established in *Miller* and support the conclusion that 18-year-olds can possess the characteristics of youth that render life-without-parole disproportionate

Miller also 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. 551, 570 (2005) (holding death penalty unconstitutional when imposed on juveniles), and *Graham*, 560 U.S. at 68. *Miller,* 567 U.S. at 471. The scientific evidence relied on in *Miller* must be considered as part of the right articulated therein, as the Pennsylvania Supreme Court held in *Batts II. Batts II,* 163 A.3d at 438-39. That scientific evidence supports the conclusion that the right articulated in Miller can apply to a crime committed by an 18-year-old.

The consensus among psychologists and neuroscientists is that the hallmark features of youth or adolescence continue

developing past a person's 18th birthday. For example, 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)).[2] 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 "[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

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

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").[3]

Additional sources from the relevant neuroscientific corpus are consistent on this point. *See also When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*," Cohen, Alexandra O., et al., 27 Psychological Science 549, 559 (2016) (finding that "young adulthood is a time when cognitive control is still vulnerable to negative emotional influences, in part as a continued development of lateral and medial prefrontal circuitry"); *Psychosocial (Im)Maturity from*

[3] 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*.

Adolescence to Early Adulthood: Distinguishing between Adolescence-Limited and Persisting Antisocial Behavior, Monahan, Kathryn C., et al., 25 Development and Psychopathology 1093, 1102-03 ("between ages 14 to 25, youths continue to develop the increasing ability to control impulses, suppress aggression, consider the impact of their behavior on others, consider the future consequences of their behavior, take personal responsibility for their actions, and resist the influence of peers."); *A Social Neuroscience Perspective on Adolescent Risk-Taking*, Steinberg, Laurence, 28 Developmental Review 78, 79 ("as a general rule, adolescents and young adults are more likely than adults over 25 to binge drink, smoke cigarettes, have casual sex partners, engaging in violent and other criminal behavior . . .").

In *Moore v. Texas,* 137 S.Ct. 1039 (2017), the U.S. Supreme Court's evaluation of 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—is instructive here. Permitting states to disregard 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, Pennsylvania's treatment of 18-year-olds as juveniles in other areas supports the conclusion that the right established in *Miller* applies to them. 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 recognize 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.C.S. § 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 consistent 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." *Miller* recognized 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.

The claim that the right established in *Miller* can apply to those who, like Ms. Lee, were 18 years old at the time of the offense, was recently recognized by the U.S. District Court for the District of Connecticut. In *Cruz v. U.S.,* 3:11-cv-00787-JCH, 56 (D. Conn. March 29, 2018), the court held that *Miller*'s rule applied to a habeas petitioner who was 18 years old at the time of his offense of conviction and held that his mandatory life-without-parole sentence was unconstitutional. The court rejected the argument that *Miller*'s holding prohibiting mandatory life-without-parole for those under 18 prevented application of its rule to those 18 or older, reasoning that it could not "infer by negative implication that the *Miller* Court also held that mandatory life-without-parole is necessarily constitutional as long as it is applied to those over the age of 18." *Cruz,* 3:11-cv-00787-JCH at 31.

The court also relied on available scientific and sociological research, which "clearly establishes that the same traits [of lack of maturity and underdeveloped sense of responsibility] are present in 18-year-olds" as they are with those younger than 18. *Id.* at 50. Scientific evidence also "reveals that 18-year-olds display similar

characteristics of immaturity and impulsivity as juveniles under the age of 18." *Id.* at 52. Furthermore, "18-year-olds also experience similar susceptibility to negative outside influences" as those younger than 18 and people aged 18 "are, like 17-year-olds, more capable of change than are adults." *Id.* Thus, the same characteristics of youth that *Miller* found constitutionally-relevant for sentencing purposes are present in 18-year-olds and the court held that the mandatory imposition of life-without-parole violated the Eighth Amendment under *Miller*. *Id.* at 56.

That a sentencer is required to consider "youth and its attendant characteristics" in a case involving a teenager older than 18 years of age was also recently recognized by the Appellate Court of Illinois in *People v. House,* 72 N.E.3d 357 (Ill. App. Ct. 2015). The Appellate Court of Illinois vacated the mandatory life-without-parole sentences of a petitioner who was 19 years old at the time of his offenses 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)).[4]

[4] 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. In fact, the right established in *Miller* and recognized in *Montgomery*—that life-without-parole sentences violate the Eighth Amendment for those whose crimes reflect unfortunate yet transient immaturity—does not depend specifically on the age of the offender. 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.

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.

IV. FACTS ASSERTED IN MS. LEE'S PCRA PETITION DEMONSTRATE THAT HER OFFENSE WAS THE RESULT OF UNFORTUNATE YET TRANSIENT IMMATURITY, THUS HER PETITION MEETS THE PCRA TIMELINESS EXCEPTION'S REQUIREMENTS

a. Facts asserted in Ms. Lee's PCRA petition satisfy all factors of age-related diminished culpability identified in *Miller*

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. 280, 304 (1976) (plurality opinion); see also *Lockett,* 438 U.S. 586, 604 (1978). 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. Ms. Lee was convicted of felony-murder for her role as a lookout during an attempted robbery in which she neither killed nor intended to kill which cannot demonstrate irretrievable depravity or incorrigibility

In determining whether to impose the most severe sentences, sentencers are required to provide defendants individualized sentencing proceedings that consider "the characteristics of the defendant and the details of his offense." *Miller,* 567 U.S. at 470. Ms. Lee was convicted of second-degree murder, or felony-murder, during which she neither killed nor intended to kill. The U.S. Supreme Court has previously held that the death penalty cannot be imposed on offenders who did not kill or lacked the intent to kill.

In *Enmund v. Florida,* 458 U.S. 782 (1982), 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,* 560 U.S. at 69. 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.

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. As a result of Ms. Lee's conviction for felony-murder, she will be required to die in prison. *Enmund* and *Graham* make clear that individuals who do not kill or intend to kill have diminished culpability under the Court's Eighth Amendment sentencing jurisprudence, and the extent of an individual's participation in the conduct leading to their conviction is a strong mitigating factor under *Miller* in favor of a sentence that provides a meaningful opportunity for release.

iv. 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"[5]; 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.

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

[5] "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/.

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.

b. The factual allegations raised in Ms. Lee's petition bring it within the ambit of the right established in *Miller*, therefore her petition meets the PCRA's timeliness exception

A petition seeking collateral relief under the PCRA must be filed within one-year of the date the conviction became final unless an enumerated exception applies. 42 Pa.C.S. § 9545(b)(1). Ms. Lee's petition asserts a constitutional right recognized by the U.S. Supreme Court and held to apply retroactively by the U.S. Supreme Court and was filed within 60 days of the date it first could have been brought, therefore her petition is timely and the PCRA court

has jurisdiction to hear the merits of her claim. *See* 42 Pa.C.S. § 9545(b).

As discussed in detail *supra,* the right established in *Miller* prohibits the imposition of life-without-parole sentences on those with diminished culpability due to their offense reflecting the transient immaturity of youth. The facts asserted in her petition encompass each of the mitigating characteristics of youth identified as constitutionally significant for sentencing purposes under *Miller*. While the PCRA court must ultimately weigh the credibility and weight of the evidence presented in deciding whether Ms. Lee's claims merit relief, the allegation of these facts, if proven, would be sufficient to demonstrate that Ms. Lee's offense was the result of unfortunate yet transient immaturity and her life-without-parole sentence is unconstitutional.

Ms. Lee's claims are analogous to those presented in PCRA petitions asserting the right established in *Atkins v. Virginia,* 536 U.S. 304 (2002)*,* which prohibits imposition of the death penalty on those with an intellectual disability*.* Indeed, as *Montgomery* recognized, *Miller,* like *Atkins,* applies retroactively precisely

because it precludes a certain punishment on a certain class of individuals. *Montgomery,* 136 S.Ct. at 734; *Commonwealth v. Miller,* 888 A.2d 624, 629 n. 5 (Pa. 2005) (holding that *Atkins* applies retroactively, therefore PCRA claims raised within 60 days of the decision are timely filed). Like *Atkins* claims' question of whether an individual has an intellectual disability, the determination of whether an individual falls into the class of individuals whose offenses reflect transient yet unfortunate immaturity is a fact-specific inquiry properly decided through an evidentiary hearing at the PCRA court, while the assertion of the right established by the U.S. Supreme Court along with sufficient factual allegations to raise a genuine issue concerning a material fact is sufficient to render the petition timely.

In post-*Atkins* PCRA petitions, the Supreme Court of Pennsylvania held that petitions asserting an *Atkins* claim were timely so long as they were filed within 60 days of *Atkins* and presented a "colorable" claim. *Commonwealth v. Porter,* 35 A.3d 4, 7 n. 5 (Pa. 2012); *see also Commonwealth v. Bracey,* 986 A.2d 128, 134 (Pa. 2009) (noting that *Atkins* claims must present a

genuine issue concerning the material fact of whether the petitioner has an intellectual disability); *Com. v. Miller,* 888 A.2d at 629 n. 5. While those claiming the benefit of the right established in *Atkins* were required to demonstrate that they had an intellectual disability, the issue in determining whether their petitions required vacatur of their death sentences was not one of timeliness, but of merit. The ***assertion*** of the right, with sufficient supporting factual allegations, vests the PCRA court with jurisdiction to determine the merits of the petition through an evidentiary hearing. *See* Pa. R. Crim. Pro. 607-608.

Ms. Lee asserted the right established in *Miller* and presented copious factual allegations relating to her maturation and rehabilitation; childhood and adolescence marked by abuse and trauma; and impulsive, reckless, peer-influenced decision-making in the events that led to her felony-murder conviction. These facts are more than sufficient to raise a genuine issue concerning the material fact of whether her offense reflects the transient immaturity of youth and permit a fact-finder to determine that under *Miller*, her life-without-parole sentence is excessive and

unconstitutional. Similar to post-*Atkins* PCRA petitions, the assertion of the right and supporting facts are all that is required to render her petition timely under the newly-established constitutional right timeliness exception.

V. MS. LEE IS ENTITLED TO AN EVIDENTIARY HEARING TO PRESENT EVIDENCE RELATED TO HER DIMINISHED CULPABILITY UNDER *MILLER*, WHICH RAISE GENUIUNE ISSUES OF MATERIAL FACT

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. 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. 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 the abuse she suffered during childhood to the sentencer and thus 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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*Motion for *pro hac vice* admission forthcoming

Certificate of Compliance

I hereby certify that the foregoing Substitute Brief for Appellant consists of 12,847 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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Dated: May 9, 2018

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	:	

STATEMENT OF ERRORS COMPLAINED OF ON APPEAL

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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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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 9th day of May, 2018 this Substituted Brief for Appellant was E-filed to the following:

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