No.

In the Supreme Court of the United States

KENNETH B. DAVENPORT,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

DAVID FERLEGER
Counsel of Record
413 Johnson Street
Suite 203
Jenkintown, PA 19046
(215) 887-0123
david@ferleger.com

QUESTIONS PRESENTED

Kenneth Davenport was convicted for the 1973 murders of his parents and two brothers. His age at the time of the crimes was 18 years and 4 months. In addition to the immaturity, impetuousness, and vulnerability recognized in the Court's jurisprudence limiting punishment of juvenile offenders, Davenport was severely mentally ill and psychotic at the time of the crimes. He had "paranoid schizophrenia" and "was an individual who had never really grown or matured." Post-trial, he was hospitalized for four years, during which time his sentencing was suspended.

1. Does *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012), adopt a new substantive rule that applies retroactively on collateral review to juveniles sentenced to life without parole?

This question is before the Court in Montgomery v. State of Louisiana, No. 14-280.

2. Does *Miller v. Alabama* require individualized sentencing for marginally older teenage offenders who were severely mentally disabled at the time of their crimes?

This question is not before the Court in Montgomery v. State of Louisiana, No. 14-280.

PARTIES TO THE PROCEEDINGS

Kenneth B. Davenport, incarcerated in the Commonwealth of Pennsylvania.

The Commonwealth of Pennsylvania, through the Montgomery County District Attorney's Office.

CORPORATE DISCLOSURE

The Commonwealth of Pennsylvania is a body politic. The Montgomery County District Attorney's Office is a subdivision of the Commonwealth of Pennsylvania.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

This petition raises two questions, the first of which is the retroactivity of *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012). The first question is being heard in *Montgomery v. State of Louisiana*, No. 14-280.

Just as "children are different" in the Court's jurisprudence, so too are children with severe mental disabilities who, for example, cannot be sentenced to death. Sentencing a child with severe mental disabilities to the certain death in prison of life without parole merits the safeguards of *Miller*, even if the child is marginally older than 18, and especially if the child is a juvenile under state law.

The second question asks the Court to determine that *Miller* individualized sentencing applies to a marginally older teenager who was severely mentally ill and psychotic when he committed the crimes. Here, the teenager, age 18 and 4 months, was a juvenile under state law.

Given that *Miller* is being addressed in *Montgomery*, it is a fitting use of the Court's resources to clarify *Miller* now on the second question.

OPINIONS AND ORDERS BELOW

The Supreme Court of Pennsylvania denied Davenport's petition for allowance of appeal. *Commonwealth v. Davenport*, 2015 Pa. LEXIS 1486, 118 A.3d 1107 (2015) (without opinion). App. A-1.

The final state court decision which is that of the Superior Court of Pennsylvania. *Commonwealth v. Davenport,* 2015 Pa. Super. Unpub. LEXIS 537 (2015). App. A-2.

The trial court decision is *Commonwealth v. Davenport*, 152 Montgomery County Law Reporter, Part II, 152-5 (2014). App. A-8.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1257(a). The final decision of the Supreme Court of Pennsylvania is dated July 15, 2015. App. A-1.

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Petitioner Kenneth Davenport is serving four consecutive life sentences for murders he committed on March 11, 1973. Davenport was 18 years and 4 months old[1] when killed his parents and two younger

[1] Davenport was born November 3, 1954. App. A-5, n. 5. The crimes were committed March 11, 1973. App. A-3.

brothers, ages 13 and 16, beating them with a shotgun barrel inside their Willow Grove, Montgomery County, Pennsylvania home.[2] As discussed below, he was severely mentally ill and psychotic at the time of the crimes and thereafter.

On November 5, 1973, the trial court ordered Davenport transferred from prison to Farview State Hospital.[3] He was to remain there for four years until his sentencing, sentencing which had been held in abeyance during that time. Farview was the state forensic mental institution.

After Davenport's initial conviction for first-degree murder, he was granted a new trial because of erroneous jury instructions, was again convicted and the trial court sentenced him to four consecutive sentences of mandatory life without parole. He did not appeal.

The chaos and dysfunction of Davenport's young life was dramatic. As Dr. Bernard Willis, a Commonwealth psychiatrist and administrator at the state hospital to which Davenport had been committed post-arrest, testified at his trial, "There was a great deal of immaturity in his personality

---

[2] Unless otherwise stated, the facts are from the Superior Court of Pennsylvania's opinion affirming dismissal of Davenport's post-conviction hearing act petition. App. A-3 *et seq*.

[3] Docket, No. 117, October Term, 1973, Order of November 5, 1973.

structure. *He was an individual who had never really grown or matured."*[4]

As a child and through his teenage years, Davenport had been considered a "loner," "strange," "weird," and had difficulties which brought him to police attention. He was suspended from high school five times. He was admitted to Drexel University under a program for special students with low performance and withdrew after one semester after stabbing a fellow student.[5]

At trial, the Commonwealth's witness, Dr. Harold Byron, a psychiatrist, testified to his "opinion that he was psychotic at the time of the homicides, suffering from a paranoid schizophrenic illness." Dr. Willis concurred ("condition was basically a psychotic and schizophrenic illness").[6]

Because of Davenport's mental health problems, he was committed to the state's forensic hospital promptly after his arrest, stayed there, and was not sentenced until four years after the crime. Sentence had been suspended due to his

---

[4] Testimony of Dr. Bernard Willis, 1976 murder trial, Exhibit C to Davenport's *Memorandum of Law in Support of His Motion for Appointment of Counsel*, in the post-conviction proceeding.

[5] The background is from the Presentence Investigation, dated February 9, 1977. The Superior Court references "a partial copy of his presentence investigation report dated February 9, 1977." App. A-5, n. 5. The presentence report documents a severely dysfunctional life and various mental health issues.

[6] *Id.* (testimony at trial, excerpts, in exhibits appended to Davenport's motion for appointment of counsel in these post-conviction proceedings).

hospitalization. He was sentenced on April 29, 1977.[7] At sentencing, Davenport was still in the mental hospital and the court expressed its "frustration" that Pennsylvania law did not permit the court to send him to a non-penal facility for his problems.[8]

Davenport's first post-conviction relief petition was denied. *See Commonwealth v. Davenport*, 355 Pa. Super. 631, 509 A.2d 1319 (1986) (unpublished memorandum), *appeal denied*, 563 A.2d 886 (Pa. 1987) (no opinion), *cert. denied*, 493 U.S. 996 (1989).

On August 2, 2012, promptly after this Court's June 25, 2012 *Miller v. Alabama* decision, Davenport filed a *pro se* post-conviction petition claiming that his sentence is illegal under *Miller*. Davenport's mental health institutionalization, his status as a minor, and his severe mental disability were raised in the post-conviction petition on *Miller* grounds.[9] The course of that petition brings this case to this Court.

---

[7] *See* sentencing hearing transcript at 6, April 29, 1977, Court of Common Pleas, Montgomery County, PA. (the court stated, "Mr. Davenport has been at Farview [State Hospital] in lieu of sentence, as I recall. Sentence had been suspended").

[8] *Id.* at 6.

[9] *See* page 1, footnote 1, at *Amended Petition for Habeas Corpus Relief under Article I, Section 14 of the Pennsylvania Constitution and for Post-Conviction Relief Under the Post Conviction Relief Act*, No. 117-73 (Montgomery Cty, filed Dec. 23, 2013):

> The linchpin of Petitioner's State constitutional claim is that at the time of his arrest (age18), proceedings were initiated under the *Pennsylvania Mental health and Mental*

Finding that *Miller* did not apply, the trial court dismissed the petition, and the dismissal was affirmed by the Superior Court of Pennsylvania. App. A-2 *et seq*. The Supreme Court of Pennsylvania denied allowance of an appeal. App. A-1.

The Superior Court held that "*Miller* does not apply to Appellant, because he freely admits he was 18 years old when he committed the murders."[10]

Reasoning from this Court's prior certiorari action on *Miller* retroactivity, the Superior Court concluded on federal law grounds that *Miller* does not apply retroactively. App. A-5-6.[11]

> *Retardation Act* of 1966 which, in essence, defined a "minor" as a person *18 years or younger*. *See and cf.,* DEFENDANT'S AMENDED SUPPLEMENTAL STATEMENT OF JURISDICTION CONCERNING HIS RECENTLY FILED PETITION FOR POST CONVICTION RELIEF (PCRA). (emphasis in original)

The petition also argued that, under *Miller*, what petitioner called a "mitigation hearing" was required to show that, given his severe mental disability, he could not have reasonably formed a specific intent to kill in the same manner as an adult. *Cf. Miller*, 132 S.Ct. at 2475 ("twice diminished moral culpability") (Justices Breyer and Sotomayor, concurring).

[10] App. A-5. That statement was based on a date in a 1977 presentence report. App. A-5. However, there had been an unresolved "dispute" at the trial level on whether he was under or over 18. App. A-15, n. 1.

[11] App. A-5-6:

> The Supreme Court of the United States has never held *Miller* to be globally retroactive. Indeed, it denied *certiorari* on the question in

Below, based on an earlier *Miller*-grounded holding, the trial court had held that a claim that an over-18 teenager is *"developmentally under the age of eighteen (18) is meritless pursuant to Commonwealth v. Cintora, 69 A.3d 759, which held that the Miller holding does not apply to such arguments."* A-15, n. 1 (emphasis in original).

The Superior Court followed that reasoning, noting:

> We recently rejected such an attempt to expand *Miller*'s holding to persons 18 and older. *See Commonwealth v. Cintora*, 69 A.3d 759, 764 (Pa. Super. 2013).[12]

> *Cunningham*. *See Pennsylvania v. Cunningham*, 134 S. Ct. 2724 (2014). The High Court recently granted *certiorari* to consider *Miller*'s retroactivity, but it appears that the grant was limited to the facts of that specific case, and, in any event, the Court has now dismissed the case. *See Toca v. Louisiana*, No. 14-6381, 135 S. Ct. 781 (2014) ("Does the rule announced in [*Miller*] apply retroactively to this case?") (emphasis added), *cert. dismissed*, 2015 WL 507612 (U.S. Feb. 3, 2015). We therefore deny Appellant's application for post-submission communication, in which he requested we hold his case for a decision in *Toca*.

[12] App. A-5. The *Cintora* appellants were 21 and 19 when they committed the underlying crimes. After *Cintora*, the Superior Court consistently rejected other claims that the *Miller* rationale extends to those who are not under 18. *Commonwealth v. Graham*, 2014 Pa. Super. Unpub. LEXIS 2567, 108 A.3d 127 (Pa. Super. Ct. 2014) (appellant was "eighteen years and five months" at time of murder); *Commonwealth v. Henderson*, 2015 Pa.

REASONS FOR GRANTING THE WRIT

This petition raises two questions, the first of which is the retroactivity of *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012). The first question is being heard in *Montgomery v. State of Louisiana*, No. 14-280.

Just as "children are different" in the Court's jurisprudence, so too are children with severe mental disabilities who, for example, cannot be sentenced to death. Sentencing a child with severe mental disabilities to the certain death in prison of life without parole merits the safeguards of *Miller*, even if the child is marginally older than 18, and especially if the child is a juvenile under state law. The second question asks the Court to determine that *Miller* individualized sentencing is required in these circumstances.

Given that *Miller* is being addressed in *Montgomery*, it is a fitting use of the Court's resources to clarify *Miller* now on the second question.

I. The retroactivity of *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012), is an issue of national importance and of federal and state intra-court conflict.

This Court has determined that the retroactivity of *Miller v. Alabama* is a question which

---

Super. Unpub. LEXIS 3256 (Pa. Super. Ct. 2015) (appellant "was 18" at the time of the murder).

merits consideration on certiorari.[13] Certiorari was granted in *Montgomery v. State of Louisiana*, No. 14-280.

Miller retroactivity is the first question presented in this petition. Given the extensive attention to the merits in the parties' and amici's briefing in *Montgomery*, Davenport respectfully does not further address the appropriateness of certiorari review of this issue.

II. Certiorari here will permit a *Miller* retroactivity decision unburdened by a *Montgomery* jurisdictional issue.

Having raised the federal law question in the Pennsylvania state courts, and those courts having decided the federal law question, Petitioner Kenneth Davenport seeks this Court's determination that *Miller* is retroactive.

Whether Davenport's petition is considered in tandem with Montgomery, or is waiting in the wings, the strength of his claim on retroactivity, together with the argument below on the second question, merits consideration on certiorari.

---

[13] That there is widespread national state and federal court division on the *Miller's* retroactivity is beyond dispute. In *Montgomery v. State of Louisiana, see* Petition for Certiorari at 3-4; Brief in Opposition at 13-15 (not retroactive: 10 state decisions, 12 federal decisions; retroactive: 12 state decisions, 8 federal decisions).

Miller retroactivity has repeatedly been before the Court, has eluded resolution and may not be resolved in *Montgomery*, due to a jurisdictional issue.

Miller retroactivity has been a recurring issue in this Court. *Nebraska v. Mantich*, No. 13-1348 (*cert. den.*, Oct. 6, 2014) (seven states filed briefs amici curiae); *Cunningham v. Pennsylvania*, 81 A.3d 1 (Pa. 2013), *cert. den*. 134 S.Ct. 2724 (2014) (petition stated that "as many as 2100 individuals" would be affected). The Court previously granted certiorari on the jurisdictional question as well. *Toca v. Louisiana*, 141 So.3d 265 (La. 2014), cert. granted, 135 S.Ct. 781 (2014), pet. dismissed, 135 S.Ct. 1197 (2015).

Montgomery is thus the second time certiorari has been granted on *Miller* retroactivity. Moreover, if the Court dismisses for want of jurisdiction, it will be the fourth time retroactivity has not been resolved by the Court on a certiorari petition.

Davenport's petition permits the Court to consider retroactivity without the hurdle of a jurisdictional issue. The Pennsylvania courts' "no retroactivity" holdings in Davenport's case are firmly grounded solely on federal law. Louisiana law pertinent in *Montgomery* is that retroactivity in state collateral review is governed by state law, not federal law.[14] *See Teague v. Lane*, 489 U.S. 288 (1989).

---

[14] Louisiana law pertinent in *Montgomery* is that retroactivity in state collateral review is governed by state law, not federal law. *Brief of Court-appointed Amicus Curiae Arguing Against Jurisdiction, Montgomery v. State of Louisiana*, No, 14-280

III. *Miller* individualized sentencing applies to severely mentally disabled marginally older teenagers (here, an 18 year old) who, at the time of their crimes, were considered juveniles under state law.

This Petition addresses the situation under *Miller* of teenagers whose condition was extreme, such as one with severe mental disability, which were beyond the expected teenage vulnerability and immaturity described by the Court in *Miller*. *See Roper v. Simmons*, 543 U.S. 551, 574 (2005). ("The qualities that distinguish juveniles from adults do not disappear when an individual turns 18."). *Roper* set a bright line demarcation of "under 18;" *Miller* did not clearly do so.

It would be workable and fair to require that, where the young offender was considered a juvenile under state law, and was severely mentally disabled at the time of the crime, *Miller* protections come into play, and individualized sentencing must occur.

A. An 18 year old is a juvenile under Pennsylvania law.

Pennsylvania defines a "minor" generally as a person "under 21" and, as of the mental commitment law in effect in 1973, as a person "18 and younger." At the time of the crimes, the Superior Court found,

---

(U.S.) at 1-2. Petitioner Davenport reserves the right to address all jurisdictional issues *ab initio* if the Court grants certiorari and jurisdiction is questioned.

Davenport was 18. He was prosecuted for murder as an adult, though he was a juvenile under Pennsylvania law.[15]

With regard to mental health treatment, Pennsylvania treated persons *18 and younger* as juveniles. *See* Pennsylvania Mental Health and Mental Retardation Act of 1966,[16] which effectively *defined minor as a person 18 years of age or younger*. That statute, and the rights of children under it, was before this Court twice. *Kremens v. Bartley*, 431 U.S. 119 (1977); *Secretary of Public Welfare v. Institutionalized Juveniles*, 442 U.S. 640 (1979).

Also, in Pennsylvania, a "minor" is defined as "[a]n individual under the age of 21 years." 1 Pa.C.S. §1991.[17] Pennsylvania does not have a comprehensive act to determine the age of minority, and when a statute is silent on the matter, the age of minority is

---

[15] Since Davenport was not prosecuted under the Juvenile Act, that Act's definition of a child not apply to him. The Pennsylvania Juvenile Act of 1972 defined a child as a person "under the age of 18 years." Section 1 of Act of December 6, 1972, No. 333, 1972 Pa. Laws 1464 (effective February 6, 1972), http://www.palrb.us/pamphletlaws/19001999/1972/0/act/0333.pdf. The current Pennsylvania Juvenile Act maintains that definition.

[16] http://www.fcbha.org/PDF/Act_of_1966.pdf.

[17] The same statutory construction statute defines "majority" as "the age of 21 years or over," and defines "an adult" as "[a]n individual 21 years of age or over." 1 Pa.C.S. § 1991. Statutory Construction Act of 1972, Act 1972-290 (S.B. 685), P.L. 1339, http://www.palrb.us/pamphletlaws/19001999/1972/0/act/0290.pdf.

determined under the Statutory Construction Act, 1 Pa. Cons. Stat. § 1501. Under 1 Pa. Cons. Stat. § 1501, a minor is defined as an individual under the age of 21 years. *Commonwealth v. Smerechenski*, 322 Pa. Super. 1, 468 A.2d 1129 (1983) (citing other situations under Pennsylvania law defining minor as a person under 21).

B. Marginally older teenagers, who were severely mentally disabled and considered a juvenile under state law (here, an 18 year old) are entitled to *Miller* individualized sentencing.

In addition to being a juvenile under state law, Davenport was severely mentally ill and psychotic at the time of his crimes. Davenport's 1973 mental health and his status as a minor were raised in the post-conviction petition on *Miller* grounds. Post-arrest, he was promptly institutionalized in the state forensic mental hospital, which confirmed that he was severely mentally ill and psychotic at the time of his crimes, and where he was treated through his 1977 sentencing.

This petition presents the important question of whether an 18 year old who is severely mentally ill and psychotic is among the "teenagers" to whom *Miller* pertains. More generally, does *Miller* encompass marginally older teenagers on whose conditions on which *Miller's* rationale is based, including extreme disability? Without an answer to this question, any retroactivity decision will cause great and needless confusion in the lower courts.

Miller repeatedly uses the words teenager, youth or child, to refer to those affected by its decision. Only once is "teenager" referenced as "younger than 18."

Although the first paragraph of the Court's *Miller* opinion uses the phrase "under the age of 18,"[18] that limit never again appears in any of the opinions. Indeed, the second time the opinion states its holding, no age is stated; instead "juvenile offenders" takes its place.[19] Throughout the opinions, the terms such as children and juvenile are repeatedly used with no age specification.

Miller never references or defines 18 as a firm demarcation. This is unlike the Court's decision in *Roper*, where line drawing was acknowledged. On the death penalty for youth, the Court recognized that "[d]rawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules." *Roper v. Simmons*, 543 U.S. 551, 574 (2005). *The Court also recognized in Roper that the line is a fuzzy, not a bright, one. Id. ("The qualities that distinguish juveniles from adults do not disappear when an individual turns 18.").*

---

[18] "We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments." 132 S.Ct. at 2460.

[19] "We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 132 S.Ct. at 2469.

Permitting severe disabilities to be considered for the marginally older teenager provides a safeguard against a harsh and, for these teens, cruel imprisonment until death. Individualized sentencing must include consideration of such extreme conditions as severe mental illness and psychosis when determining if a die-in-prison sentence is to be imposed.

Miller is different from *Roper* in this regard. Individualized sentencing under *Miller* requires analysis which is not susceptible to bright-line birthdate rote computation. Unlike general amorphous immaturity and vulnerability considerations, common to all teenagers, psychiatric illness and other mental disorder diagnoses apply to a sub-set. The case for some flexibility, some fuzziness, is strong for this sub-set.

The Court has recognized that disabilities makes a difference when it comes to a sentence of death. *Atkins v. Virginia*, 526 U.S. 304 (2002). Just as children are different when it comes to life without parole, children who are severely disabled are different enough to support flexibility in defining who is a juvenile.

As *Miller* teaches, life without parole is an "especially harsh punishment for a juvenile"[20] under all circumstances. It is especially cruel and harsh for a teenager with severe mental illness and psychosis.

---

[20] *Miller,* 132 S. Ct. at 2458, quoting *Graham v. Florida*, 560 U.S. 48, 70 (2010).

C. Clarification of *Miller* Is reasonable and practical.

Clarifying that *Miller's* outer boundary has some flexibility in extreme situations, such as severe mental disability, is reasonable and practical, both with regard to Davenport and to others similarly situated.

The crimes took place 42 years ago, at a time when Davenport was 18 years and four months old, severely mentally ill and psychotic. At 61, he is serving a mandatory life without parole sentence. If *Miller* is not retroactive, and does not apply to him, he will die in prison without there having ever been a review of either his circumstances at the time, including his severe mental illness and psychosis, or of any remorse, personal development or rehabilitation, in the decades since his family's deaths. Neither deterrence nor punishment justify denial to Davenport of *Miller* individualized sentencing.

That there is no bright chronological line under *Miller* is underscored by the Court's noting there that "mental and emotional" issues must be considered in assessing culpability an punishment for teenagers.[21]

---

[21] *Miller*, 132 S. Ct. at 2467, quoting *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982). ("We held: "[J]ust as 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.") (emphasis added).

The absence of clarity in *Miller* that "juvenile" may include a marginally older youth has been criticized.[22] As one commentator put it:[23]

> *Miller* held that the especially harsh penalty of life without parole now requires individualized culpability inquiries for those under eighteen. The reasons that make life without parole especially harsh for those under eighteen, however, also apply to marginally older offenders. Just as life without parole deprives a seventeen-year-old offender of "the most basic liberties without giving hope of restoration," so too does it deprive an eighteen-year-old of that meaningful hope. If it is true that "most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole," then the youthfulness of a marginally older offender for whom the

[22] Beth Colgan, *Constitutional Line Drawing at the Intersection of Childhood and Crime*, 9 Stan. J.C.R. & C.L. 79, 81 (2013) (in recent juvenile cases, including *Miller*. The Court "treats childhood as constitutionally relevant and defines "juvenile" as a person under the age of eighteen, but the opinions pay surprisingly little attention to either determination").

[23] Kelsey Shust, *Comment: Extending Sentencing Mitigation for Deserving Young Adults*, 104 J. Crim. L. & Criminology 667, 692 (2014)

> sentence would be equally harsh must also be considered.

Clarification of *Miller*'s standard can be accomplished without difficulty. The Court might clarify that the single use of the phrase "under the age of 18" was not intended to convey a *Roper* categorical demarcation, and that *Miller* permits consideration of teenagers who are marginally older, especially those with severe mental disability. Alternatively, for example, the Court might establish that youth up to the age of 18 are irrebuttably presumed youthful, and permit those marginally older to show that they meet the Court's youthful criteria and deserve protection from irrevocable sentences.[24]

Miller has been wrongly interpreted to incorporate an inflexible demarcation of the eighteenth birthday as cutting off any consideration of age, age-related characteristics, or other factors.[25]

---

[24] Such an approach is suggested by Shust, *id* at 671:

> . . . the Court should make the mitigating effect of youthfulness available to youthful offenders between the ages of eighteen and twenty-five by recasting its categorical line as a presumption. Under such a scheme, defendants up to eighteen years old would be irrebuttably presumed youthful, while defendants between the ages of eighteen and twenty-five could seek to show that they meet the Court's "youthful" criterion and likewise deserve protection from irrevocable sentences.

[25] *See Brown v. Harlow*, 2014 U.S. Dist. LEXIS 62566 (E.D. Pa. Apr. 14, 2014); *Jones v. Walsh*, 2013 U.S. Dist. LEXIS 168103 (E.D. Pa. Oct. 9, 2013).

The text and rationale of *Miller* do not support an interpretation which condemns teenagers to die in prison whose crimes were committed in the midst of severe disability.[26]

CONCLUSION

For the foregoing reasons, certiorari should be granted in this case.

Respectfully submitted,

DAVID FERLEGER
COUNSEL OF RECORD
413 Johnson Street
Suite 203
Jenkintown, PA 19046
(215) 887-0123
david@ferleger.com

Counsel for Petitioner

---

[26] *Miller*, 132 S. at 2475:

> *Graham, Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, *regardless of their age and age-related characteristics and the nature of their crimes*, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment. (emphasis added).

APPENDIX A

IN THE SUPREME COURT
OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Respondent

v. No. 280 MAL 2015

KENNETH B. DAVENPORT,
Petitioner

Petition for Allowance of Appeal from
the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 15th day of July, 2015, the Petition for Allowance of Appeal is DENIED.

APPENDIX B

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA
Appellee

v. No. 1409 EDA 2014

KENNETH B. DAVENPORT
Appellant

Appeal from the PCRA Order of April 16, 2014
In the Court of Common Pleas of Montgomery County Criminal Division
at No: CP-46-CR-0000117-1973

BEFORE: GANTMAN, P.J., STABILE, and PLATT,* JJ.

FILED MARCH 17, 2015

MEMORANDUM BY STABILE, J.:

---

*Retired Senior Judge assigned to the Superior Court.

Appellant, Kenneth Davenport, is serving four consecutive life sentences for murders he committed in 1973. He appeals from an order dismissing his serial PCRA[1] petition as untimely. We affirm the PCRA court's order and deny his pending applications for relief. On March 11, 1973[2] Appellant, then a Drexel University student, murdered four members of his family: father Alexander Sr., mother Rowilla, 16-year-old-brother Edmund, and 13-year-old brother Peter. Appellant bludgeoned them to death with a shotgun barrel inside their home in Willow Grove, Montgomery County. Appellant was charged, indicted, and convicted of four counts of first-degree murder,[3] but the trial court *en banc* granted a new trial because of erroneous jury instructions. On retrial, Appellant was again convicted, and the trial court imposed four

---

[1]Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-46.

[2]The record certified to this Court is missing all documents filed prior to August 12, 2012, except for a copy of this Court's unpublished memorandum filed on February 21, 1986. We elect to decide the case on the diminished record, because the missing documents do not affect our decision. Appellant has petitioned to correct the record to include his August 2, 2012 PCRA petition. For purposes of this appeal, we will assume the petition is a part of the record and was filed on that date. Appellant also asked for an extension of time to file his brief, a request that is now moot.

[3]The offenses predate the effective date of the Crimes Code, which defines first-degree murder at 18 Pa.C.S.A. § 2505(a). The governing law is the Penal Code of 1939, Act of June 24, 1939, P.L. 872, § 701. ***See, e.g., Commonwealth v. Foster***, 72 A.2d 279, 290-91 (Pa. 1950) (quoting the applicable language).

consecutive sentences of mandatory life without parole. Appellant did not appeal. In 1986, this Court affirmed the denial of Appellant's first post-conviction relief petition. ***See Commonwealth v. Davenport***, 509 A.2d 1319 (Pa. Super. 1986) (unpublished memorandum), *appeal denied*, 563 A.2d 886 (Pa. 1987), *cert. denied*, 493 U.S. 996 (1989).

On August 2, 2012, Appellant filed a *pro se* PCRA petition. Appellant claims his sentence is illegal under ***Miller v. Alabama***, 132 S. Ct. 2455, 2460 (2012), which holds that persons who were under 18 when they committed murder cannot receive mandatory sentences of life without parole. The PCRA court dismissed Appellant's petition as untimely.

On appeal, Appellant argues the PCRA court erred in not addressing his petition under the state writ of *habeas corpus*, in not appointing counsel, and in dismissing his petition as untimely. We must first address the timeliness of Appellant's petition, a question of law. ***See Commonwealth v. Callahan***, 101 A.3d 118, 121 (Pa. Super. 2014). Accordingly, "our standard of review is *de novo* and our scope of review is plenary." ***Id.***

Upon review, we hold the PCRA court correctly dismissed Appellant's petition as untimely. First, Appellant cannot meet the one-year PCRA filing deadline. ***See*** 42 Pa.C.S.A. § 9545(b)(1). Appellant was sentenced on April 29, 1977. Because he did not appeal to the Supreme Court, his judgment of sentence

became final on May 31, 1977.[4] The PCRA filing deadline passed one year later—decades before Appellant filed the instant petition.

Second, Appellant cannot meet his proffered exception to the time bar, the "new retroactive constitutional right" exception. ***See*** 42 Pa.C.S.A. § 9545(b)(1)(iii). ***Miller*** does not apply to Appellant, because he freely admits he was 18 years old when he committed the murders. See Defendant's Amended Supplemental Statement of Jurisdiction Concerning His Recently Filed Petition for Post Conviction Relief (PCRA), 10/31/12, ¶ 2.[5] We recently rejected such an attempt to expand ***Miller***'s holding to persons 18 and older. ***See Commonwealth v. Cintora***, 69 A.3d 759, 764 (Pa. Super. 2013). Moreover, ***Miller*** does not apply retroactively to cases on collateral review. ***Commonwealth v. Cunningham***, 81 A.3d 1, 11 (Pa.

---

[4]Until 1980, our Supreme Court had jurisdiction over direct appeals in all murders cases. Appellate Court Jurisdiction Act of 1970, Act of July 31, 1970, P.L. 673, No. 223 § 202(1) (formerly codified at 42 Pa.C.S.A. § 722(1), and deleted by the Act of Sept. 23, 1980, P.L. 686, No. 137 § 1).

Appellant had 30 days from imposition of sentence to appeal, or May 31, 1977. May 29, 1977 was a Sunday, and May 30 was Memorial Day. ***See*** 1 Pa.C.S.A. § 1908 (excluding Sundays and legal holidays from computation of time).

[5]To this filing, Appellant attached a partial copy of his presentence investigation report dated February 9, 1977. The report lists Appellant's date of birth as November 3, 1954, meaning that he turned 18 in 1972, *i.e.*, before committing the murders.

2013); ***Commonwealth v. Sesky***, 86 A.3d 237, 243 (Pa. Super. 2014). Any new constitutional right must have been held to be retroactive **before** a PCRA petition invoking § 9545(b)(1)(iii) is filed—not after. ***Sesky***, 86 A.3d at 243.[6]

Appellant's remaining assignments of error are meritless. The PCRA court properly rejected Appellant's attempt to circumvent the PCRA by styling his petition a "*habeas* petition." The PCRA subsumes all forms of post-conviction relief, including the writ of *habeas corpus* when used to obtain post-conviction relief. 42 Pa.C.S.A. § 9542; ***Commonwealth v. Taylor***, 65 A.3d 462, 466 (Pa. Super. 2013) ("[A] defendant cannot escape the PCRA time-bar by titling his petition or motion as a writ of *habeas corpus*."). Further, the PCRA court did not err in denying Appellant's request for appointment of counsel. The right to PCRA counsel exists only for a first PCRA petition. Pa.R.Crim.P. 904(C). This proceeding is

---

[6]The Supreme Court of the United States has never held ***Miller*** to be globally retroactive. Indeed, it denied *certiorari* on the question in ***Cunningham***. ***See Pennsylvania v. Cunningham***, 134 S. Ct. 2724 (2014). The High Court recently granted *certiorari* to consider ***Miller***'s retroactivity, but it appears that the grant was limited to the facts of that specific case, and, in any event, the Court has now dismissed the case. ***See Toca v. Louisiana***, No. 14-6381, 135 S. Ct. 781 (2014) ("Does the rule announced in [***Miller***] apply retroactively to **this** case?") (emphasis added), *cert. dismissed*, 2015 WL 507612 (U.S. Feb. 3, 2015). We therefore deny Appellant's application for post-submission communication, in which he requested we hold his case for a decision in ***Toca***.

Appellant's second post-conviction petition.

For the foregoing reasons, we affirm the order dismissing Appellant's PCRA petition as untimely. We deny Appellant's application for an extension of time to file brief and to correct the record, and application for postsubmission communication. ***See supra***, footnotes 2 and 6.

Order affirmed. Motion for an Enlargement of Time to File a Brief and Correction of the Record denied. Application for Post-Submission Communication denied.

Judgment Entered.

/s/
Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/17/2015

APPENDIX C

Commonwealth v. Davenport

MONTGOMERY COUNTY
LAW REPORTER 152-5
152 M.C.L.R., Part II

CRIMINAL LAW

Post Conviction Relief Act

Defendant filed an untimely PCRA petition claiming the newly recognized constitutional right created by the United States Supreme Court decision in *Miller v. Alabama* created an exception to the PCRA's timeliness requirement. Relying on the recent Pennsylvania Supreme Court decision in *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013) and the Pennsylvania Superior Court decision in *Commonwealth v. Sesky*, 86 A.3d 237 (Pa.Super. 2014) in which the courts determined the *Miller* decision did not apply retroactively, the trial court dismissed Defendant's PCRA petition as time-barred.

1. All petitions under the post-conviction relief act must be filed within one year of the date on which judgment becomes final unless one of the three statutory exceptions applies.

2. Judgment becomes final one year after the conclusion of a direct review or one year from the

expiration of time for seeking a direct review.

3. Timeliness requirements for PCRA petitions are jurisdictional and must be strictly construed.

4. A court lacks jurisdiction to consider an untimely PCRA petition unless one of the three statutory exceptions applies.

5. The third exception to the timeliness requirement of a PCRA petition is a newly created constitutional right.

6. It is a violation of the Eighth Amendment of the United States Constitution to sentence a defendant who is under eighteen years old at the time of the offense to mandatory life imprisonment without the possibility of parole.

7. The new constitutional right exception to the timeliness of a PCRA petition must be held to be retroactive.

8. The new constitutional right created by *Miller v. Alabama*, 132 S. Ct. 2455 (2012) did not address retroactivity.

9. The *Miller* decision does not have a retroactive effect in Pennsylvania.

(Appealed to Superior Court May 5, 2014.)

C.P. Montgomery County, Criminal Division.

No. 117-73. Commonwealth of Pennsylvania v. Kenneth B. Davenport.

Robert M. Falin, Chief, Appeals Division, for Commonwealth of Pennsylvania.

Kenneth B. Davenport, Pro Se.

CARLUCCIO, J., September 17, 2014

FACTS AND PROCEDURAL HISTORY:

On April 16, 2014, after a hearing on the matter, and after independent review of the record, the trial court issued an order which dismissed the Defendant, Kenneth B. Davenport's, *Pro Se*, Post Conviction Relief Act Petition, 42 Pa.C.S.A. Sections 9541-9546, as time-barred.

On May 5, 2014, the Defendant timely appealed the court's April 16, 2014, ruling.

On May 27, 2014, the Defendant filed a document entitled "Petitioner's Concise Statement Of The Errors Complained Of On Appeal," which was in a narrative/brief format.

The trial court supports the April 16, 2014, decision below.

DISCUSSION:

Initially, the court notes that the Defendant's

Concise Statement of Matters Complained of on appeal is in contravention of Pennsylvania Rule of Appellate Procedure 1925(b)(ii) and (iv) and respectfully requests that the present appeal be QUASHED for that reason. Assuming, *arguendo*, that the appellate court entertains the present matter, the court properly dismissed the PCRA Petition for want of jurisdiction due to the fact that the Petition was time-barred and failed to meet any of the Act's statutory exceptions to the same.

In the way of background, in 1972, a jury convicted the Defendant to four (4) counts of first-degree murder for beating his parents and two (2) brothers to death with a shotgun. The Defendant filed a direct appeal and was granted a new trial. Upon re-trial, the Defendant was again convicted of the same charges and sentenced to four (4) consecutive terms of life imprisonment. The Defendant did not file a direct appeal from this verdict and judgment of sentence.

In 1982, the Defendant sought collateral relief under the then entitled Post Conviction Hearing Act. The trial court dismissed this Petition after a hearing, and the decision was ultimately affirmed on appeal.

On December 23, 2013, the Defendant filed the now, at issue, Post Conviction Relief Act Petition, which the trial court properly dismissed for want of jurisdiction.

[1], [2] As the appellate court is aware, all

Petitions under the Post Conviction Relief Act must be filed within one (1) year of the date on which the judgment becomes final, unless one of the three (3) statutory exceptions set forth in 42 Pa. C.S. Section 9545(b)(1) applies. The one (1) year period in which to file a PCRA Petition begins to run at the conclusion of direct review, including discretionary review in the Supreme Court of the United States or the Supreme Court of Pennsylvania, or at the expiration of time for seeking such review. 42 Pa.C.S. Section 9545(b)(3).

[3], [4] These timeliness requirements and their exceptions are jurisdictional and must be strictly construed. *Commonwealth v. Whitney*, 817 A.2d 473, 475-78 (Pa. 2003). Thus, unless a petitioner seeking collateral relief pleads and proves that an exception applies, the courts lack jurisdiction to consider the claims presented in an untimely petition. *Id*; *Commonwealth v. Robinson*, 837 A.2d 1157, 1161 (Pa. 2003).

[5] The exceptions to the PCRA's time-barr provision excuse a petitioner's failure to file a PCRA petition within one (1) year from the date that his judgment became final only if:

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or,
>
> **(iii) 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 the court to apply retroactively***.

(42 Pa.C.S. Section 9545(b)(1))

The Petition at bar is thirty (30) years past the jurisdictional dead line. That is, the Defendant's judgment of sentence became final on May 29, 1977, when the time for the filing of a direct appeal to the Pennsylvania Supreme Court expired. 42 Pa. C.S.A. Section 9545(b)(3) and Pa. R.A.P. 903(a). Defendant thus had one (1) year from May 29, 1977, to file a timely PCRA Petition. He did not file the present Petition until December 23, 2013, more than thirty (30) years after the PCRA deadline. Thus, the Petition is facially time-barred. In order to circumvent the time-barr, the Defendant claimed that his Petition fits within the "newly recognized constitutional right exception," *supra*, as a result of the United States Supreme Court holding in *Miller v. Alabama* 132 S.Ct. 2455, 2460 (2012).

[6] In *Miller*, the United States Supreme Court held that if a defendant was under the age of eighteen (18) at the time of the offense, then that defendant could not be sentenced to mandatory life without parole, as the same would violate the Eighth Amendment's prohibition against cruel and unusual punishments. *Id.* In his Petition and at the hearing, Defendant contended that at the time of the offenses, he was under eighteen (18) years of age, or *arguendo*, mentally less than the same. (Notes of Testimony 4/14/14, pgs. 6-12) As explained below, *Miller* is inapplicable to the case at bar.

[7], [8], [9] As clearly stated in PCRA time exception 9545(b)(1)(iii), the new constitutional right asserted by a petitioner must both be recognized by the Supreme Court after the jurisdictional time period and must have been held by the court to apply retroactively. There is no dispute that the new constitutional right from *Miller* was recognized in 2012, well after the May 29, 1978 jurisdictional time period. However, Defendant failed to meet the second requirement of 9545(b)(1)(iii), in that *Miller v. Alabama*, 132 S.Ct. 2455, 2460 (2012), was never given retroactive effect. The *Miller* Court did not address retroactivity in its' decision. Thus, the Court did not specifically make the *Miller* holding retroactive. Moreover, Pennsylvania appellate courts have held that the *Miller* decision does not have retroactive effect. In *Commonwealth v. Cunningham*, 81 A.3d 1, 11 (Pa. 2013) the Supreme Court rejected the assertion that *Miller* applies retroactively. Further, in *Commonwealth v. Sesky*, 86 A.3d 237, 243 (Pa.Super.

2014), the Superior Court held that *Miller* is not retroactive. Based on these holdings, the Defendant's newly recognized constitutional right exception under the Act fails. As Defendant failed to assert any further exceptions, the court properly determined that Defendant's PCRA Petition was time-barred, thereby divesting the court of jurisdiction.

Finally, even if *Miller* were applicable herein, Defendant failed to file the present Petition within sixty (60) days from the *Miller* decision on June 25, 2012, as required under the Act. 42 Pa.C.S. Section 9545(b)(2); *See also, Commonwealth v. Beasley*, 741 A.2d 1258, 1261 (Pa. 1999). Rather, the Defendant filed the present Petition relying on *Miller* on December 23, 2013, well over the sixty (60) day deadline.[1]

Based on the foregoing, the trial court properly determined that the Defendant PCRA Petition was untimely, and properly dismissed the same for want of jurisdiction. Accordingly, the trial court respectfully

---

[1]Please note, there was some dispute at the hearing as to the Defendant's actual age at the time of the offense. Part of the record indicated that the Defendant was over eighteen (18), and part suggested under. However, the court did not reach this issue due to the fact that Miller has no retroactive effect. (Notes of Testimony 4/14/14, pg. 3) Moreover, Defendant's claim that, despite his actual age at the time of the offense, he was *developmentally under the age of eighteen (18) , is meritless pursuant to* Commonwealth v. Cintora*, 69 A.3d 759, which held that the* Miller *holding does not apply to such arguments. (Notes of Testimony 4/14/14, pgs. 3-4)*

requests that the order of April 16, 2014, be **AFFIRMED**.

(Appealed to Superior Court May 5, 2014.)