ORIGINAL

No. 19-5191

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

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QUESTIONS PRESENTED

Petitioner, Kenneth Davenport, was convicted for the March 1973 murders of his parents, Alexander and Rowilla Davenport, and his two younger brothers, Edmund and Peter. 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, Petitioner was severely mentally ill and psychotic at the time of the crimes. His condition of "paranoid schizophrenia" and being "an individual who had never really grown or matured" was "exacerbated by the habitual use of of hallucinogenic...barbituate and narcotic drugs."

1. Does the legal *"right"* recognized in ***Miller v. Alabama***, 132 S.Ct. 2455 (2012), include all substantive components necessary to its creation, including "the well-established rationale" upon which the Court based its decision?

> The lower court concluded "[Petitioner's] case *does not fit* within the ***Miller*** holding." A panel of the Superior Court affirmed. And later, an ***en banc*** Superior Court ruled in a related case, i.e. ***Commonwealth v. Avis Lee***, that "*age is the sole factor* in determining whether ***Miller*** applies to overcome the [Post Conviction Relief Act] time-bar and we decline to extend its categorical holding" (empasis added).

2. Does ***Miller v. Alabama*** require individualized sentencing for a severely mentally disabled marginally older teenager who, at the time of his offense, was considered a juvenile under state law?

> The lower court concluded Pennsylvania appellate courts have declined to expand *the **Miller** holding* "to include mentally/developmentally challenged individuals [like Petitioner] who were over the age of eighteen (18) at the time of the offense." The Superior Court affirmed and stated "***Miller/Montgomery*** did not analyze whether their holdings extend to the [***Mental Health and Mental Retardation Act of 1966***]" ("MHMRA").

PARTIES TO THIS PROCEEDING

Kenneth B. Davenport, incarcerated in the Commonwealth of Pennsylvania, State Correctional Institution at Dallas.

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.

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42 Pa.C.S. §9545(b)(1)(iii)--this provision of Pennsylvania's statutory collateral scheme provides that a petition filed *more than one year* after the date the judgment of sentence becomes final is timely if the petitioner pleads and proves:

> **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.....9,11**

28 U.S.C. §2255(h) is the analogous provision under federal law providing remedies on motion attacking a sentence. Section 2255(h) provides in relevant part:

> A second or successive motion must be certified as provided in section 2244 [28 U.S.C. §2244] by a panel of the appropriate court of appeals to contain...(2) a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.....**13, 14-15**

PETITION FOR A WRIT OF CERTIORARI

This petition raises two questions, the first is whether a State's statutory rule of criminal procedure, by way of its collateral review process, may limit any aspect of the contours of a "right" created by this Court's decision in ***Miller v. Alabama***, 132 S.Ct. 2455 (2012), and in ***Montgomery v. Louisiana***, 136 S.Ct. 718 (2016)wherein the Court held that ***Miller*** applies retroactively to all cases on collateral review.

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 death by incarceration, i.e. life without parole, merits the safeguards of ***Miller***, even if the child is marginally older than age 18, and especially if the child is a juvenile under Pennsylvania 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.

Sitting ***en banc*** recently in ***Commonwealth v. Avis Lee***, 1891 WDA 2016, the Superior Court in Pennsylvania urged the Pennsylvania Supreme Court to review the application of ***Miller*** to adolescents over age 18.[1]

The Superior Court in Davenport's panel decision, as decided March 6, 2018, noted, in part, that his "argument regarding the applicability of the ***Pennsylvania Mental Health and Mental Retardation Act of 1966*** ("MHMRA")...is more akin to a defense assertion (diminished capacity, guilty but mentally ill, and insanity)...***Miller/Montgomery*** did not analyze whether their holdings extend to to MHMRA."[2]

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[1]A *Petition for Allowance of Appeal* was recently filed by Avis Lee in the Pennsylvania Supreme Court on April 1, 2019. The case dkt. is 84 WAL 2019. The issue before the ***en banc*** Court was "whether, following the United States Supreme Court's decision in ***Montgomery v. Louisiana***, 136 S.Ct. 718 (2016), Lee, who was over the age of 18 at the time of the commission of her offense, may invoke the decision in ***Miller v. Alabama***, 567 U.S. 460 (2012), as an exception to the timeliness requirements of the PCRA [Pennsyvania's criminal statutory provision for collateral review]." *See* **Attachment "E"** as appended hereto.

[2]Davenport's Superior Court panel decision has been appended hereto as **Attachment "C".** The comment on the **MHMRA** is found at 8A. Three of the judges on Davenport's panel, i.e. Gantman, P.J., Lazarus, J., and Ott, J., were also three of the nine judges sitting ***en banc*** in ***Commonwealth v. Avis Lee***. *See* **Attachment "E".**

OPINIONS AND ORDERS BELOW

The Supreme Court of Pennsylvania denied Davenport's petition for allowance of appeal. ***Commonwealth v. Davenport***, No. 277 MAL 2018. *See* **Attachment "A".** A *Per Curiam* Order was entered November 16, 2018.

The Supreme Court of Pennsylvania denied Davenport's *Application for Reconsideration* of its Order. A *Per Curiam* Order by the Pennsylvania Supreme Court was entered on December 26, 2018 at 277 MAL 2018. *See* **Attachment "B".**

The final state court decision is that of the Superior Court of Pennsylvania. A three-judge panel decision of the Superior Court was entered on March 6, 2018, at No. 782 EDA 2017. *See* **Attachment "C".**

The trial court decision is ***Commonwealth v. Davenport.*** The Opinion of Judge Carolyn T. Carluccio was entered on May 11, 2017, at No. 117-73. *See* **Attachment "D".**

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1257(a). The final decision of the Supreme Court of Pennsylvania is dated December 26, 2018. *See* **Attachment "B".**

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 inflecited.

STATEMENT OF THE CASE

On March 11, 1973, Petitioner Kenneth Davenport was arrested and charged with the beating deaths of his parents and two younger brothers at the family's home in Willow Grove, Montgomery County Pennsylvania. At the time of his arrest, Petitioner was age 18 and four months.

Shortly after Davenport's arrest, the trial court ordered him transferred from the Montgomery County Prison to Farview State Hospital. He was indicted for the homicides in November of 1973.[3]

Thereafter, he was tried before a jury in April of 1974. A plea of not guilty by reason of insanity was entered. Several psychiatric experts testified, including Dr. Bernard Willis, then-Clinical Director of Farview State Hospital in Wayne County, Pennsylvania.

At trial, Dr. Willis testified "There was a great deal of immaturity in [Davenport's] personality structure. He was an individual who had never really grown or matured."[4]

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[3]Docket, No. 117, October Term, 1973.

[4]Testimony of Dr. Bernard Willis, 1976 murder trial. as referenced in Davenport's ***Petition for Writ of Certiorari,*** No. 15-434, p.4 and prepared by Atty. David Ferleger.

At trial, the Commonwealth witness, Dr. Harold Byron, a psychiatrist, testified to his "opinion that [Davenport] 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"). *Id.*

The *Presentence Investigation Report*, dated February 9, 1977, indicated that as a child and through his teenage years Davenport had been considered a "loner," "strange," and "weird," and had difficulties that brought him to the attention of Abington Township police. He had also been suspended from high school five times. And he was admitted to Drexel University under a program for special students with low performance. Davenport withdrew after one semester following a stabbing incident of a fellow student in one of the dorms.[5]

At his sentencing in April of 1977, Davenport was still in a 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.[6]

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[5]A prior panel decision of the Superior Court references "a partial copy of [Davenport's] presentence investigation report. *See* ***Commonwealth v. Davenport***, No. 1409 EDA 2015, at n.5.

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 Augusy 2, 2012, shortly after this Court's decision of June 25, 2012, in ***Miller v. Alabama***, Davenport filed his second *pro se* post-conviction petition which averred that his sentence was illegal under ***Miller***. Petitioner's mental health institutionalization, his status as a minor, and his severe mental disability were raised in the PCRA petition on ***Miller*** grounds.

Following an evidentiary hearing, the PCRA Court determined that ***Miller*** did not apply, and it dismissed the petition. The dismissal was affirmed by the Superior Court at **No. 1409 EDA 2014** (March 17, 2015). The Pennsylvania Supreme Court denied Davenport's Pet. for Allowance of Appeal at **No. 280 MAL 2015** (July 15, 2015).

Thereafter, Attorney David Ferleger entered an appearance on Davenport's behalf and filed with this Court a ***Petition for Writ of***

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[6]This is referenced in Davenport's ***Petition for Writ of Certiorari*** (Legal Printers LLC, Washington DC), No. 15-434, p.5.

Certiorari, No. 15-434.[7] This Court denied review on November 16, 2015. Kenneth B. Davenport, Petitioner v. Pennsylvania, 136 S.Ct. 516, 193 L.Ed. 2d 398.

Following this Court's decision in ***Montgomery v. Louisiana***, 136 S.Ct. 718 (2016), Davenport filed a renewed petition for post-conviction collateral relief (his third) on February 26, 2016.

Again, as in his first attempt at post-conviction relief based on ***Miller***, Davenport's mental health institutionalization, his status as a juvenile, and his severe mental disability were raised in the renewed PCRA petition on ***Miller/Montgomery*** grounds. The course of that petition brings this case to this Court.

Finding that ***Miller*** did not apply the Court of Common Pleas in Montgomery County stated that "[Davenport's] case does not fit within the ***Miller*** holding. The ***Miller*** holding applies to defendants *under the age of (18)* at the time of the offense." **Attachment "D",** at 5B.

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[7]The questions presented for review therein were: 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.

Davenport's post-conviction collateral relief petition was dismissed by the Court of Common Pleas on Feburary 10, 2017. Id. On appeal, the Superior Court affirmed and stated "[w]e agree with the PCRA court's determination." **Attachment "C",** at 6A.

Additionally, the Superior Court further noted:

> Davenport contends that ***Miller*** should be extended to individuals such as himself on the basis that he was age 18 and four months at the time of his arrest and his mental illness resulted in a diminished culpability. Similar arguments have been previously considered and rejected by this Court.

Id. at 6A.

Davenport, thereafter, sought allowance of appeal in the Pennsylvania Supreme Court. He argued that the interpreation of ***Miller*** by both the PCRA court and the Superior Court were at cross-purposes of U.S. Supreme Court mandates and how its holdings are to be applied. For example, in ***Seminole Tribe v. Fla.***, this Court stated:

> We adhere in this case, however not to mere *obiter dicta*, but 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.

517 U.S. 44, 67 (1966) [Emphasis added.]

REASONS FOR GRANTING THE WRIT

The first question presented for review is whether a State's stautory rule of criminal procedure, by way of its collateral review process, may limit any aspect of the contours of a "right" created by this Court's decision in ***Miller v. Alabama***, 132 S.Ct. 2455 (2012).

The Superior Court, in addressing Petitioner's claim and similar claims, has determined that a "right" and a "holding" are identical terms, and the contours of a constitutional right extend no further than the holding of the case establishing the right. *See* **Attachment "E",** 19-20.

The text of Pennsylvania's stautory rule of criminal procedure at-issue requires a petitioner to plead and prove:

> 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)(emphasis added).

I. The legal "right" recognized by this Court's decision in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), includes all substantive components necessary to its creation, including its underlying rationale.

This Court has previously instructed:

> We adhere in this case...to *the well-established rationale* upon which the Court based ther esults 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, 517 U.S. at 67 (emphasis 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). "[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).

In ***Commonwealth v. Avis Lee***, 1891 WDA 2016, the ***en banc*** Superior Court acknowledged:

> We recognize that the principles underlying the ***Miller*** holding are more general; who qualifies as a "juvenile" and whether ***Miller*** applies to Lee [and others similarly situated] are better characterized as questions on the merits, not as

> preliminary jurisdictional questions under section **9545(b)(1)(iii)**. *As compelling as the "rationale" argument is,* we find it untenable to extend ***Miller*** to one who is over the age of 18 at the time of his or her offense for purposes of satisfying the newly-recognized constitutional right exception in section **9545(b)(1)(iii).**

See **Attachment "E" at 18** (emphasis added).

Concerning the age limit being applied in ***Miller***, the Superior Court further opined:

> The express age limit, however, *though arguably not critical to the **Miller** holding*, is, in our opinion, essential to an orderly and practical application of the law. Conceptually, there may not be any statistically significant difference between the mental maturity of a 17-year-old and an 18-year-old, or an 18-year-old and a 19-year-old, and so the question becomes, where do we draw the line?

Id. at 17 (emphasis added).

Notwithstanding the Superior Court's recognition that "the principles underlying the ***Miller*** holding are more general" it determined "that *age is the sole factor* in determining whether ***Miller*** applies to overcome the PCRA time-bar and we decline to extend its categorical holding." *Id.* at 20-21 (emphasis added).

In reaching this conclusion, it seems clear that Pennsylvania improperly conflated the ***Miller*** holding with the "right" in ***Miller***, thereby curtailing and otherwise limiting the scope of relief as articulated by this Court in its ***Miller*** and ***Montgomery*** decisions.

The constitutional right established by Miller prohibits the mandatory imposition of life without parole sentences for individuals whose offenses reflect the transient immaturity of youth.

There were at least three critical factors that animated the "right" established in ***Miller***. First, that the "characteristics of youth, and the way that 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 sentence "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 (emphasis added). And third, the Court's adoption of science and social science relating to adolescent development.

Notably, on this point, the ***en banc*** Pennsylvania Superior Court

stated "[w]e recognize the vast expert research on this issue. If this matter were one of first impression and on direct appeal, we might expound differently." **Attachment "E"** at 20.[8]

But now, in interpreting an analogous standard, i.e. **28 U.S.C. § 2255(h),** for determining whether otherwise untimely federal habeas petitions improperly invoke a new constitutional rule permitting consideration 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 Congress 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 arbitrarianess 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 a broader right or rule to

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[8]The Pennsylvania Superior Court further stated "[w]e would urge our Supreme Court to review this issue in light of the research available since [***Commonwealth v. Batts***, 163 A.3d 410 (Pa. 2017)] ***"Batts II"*** was decided in 2017. *Id.* at nt.11.

find that a habeas petitioner raising an identical claim to that of Davenport's and Avis Lee's was timely. ***Cruz v. United States***, 2018 WL 1541898 (D.Conn. March 29, 2018).[9]

The district court drew support for its decision from results in the Third, Fourth, Fifth, and D.C. circuit courts that had "certified successive petitions in analagous situations by finding that whether the rule applies to the facts is a merits question." *Id.*, at *10. The ***Cruz*** district court then engaged in a distinct merits analysis and found that petitioner's *life-without-parole* sentence, imposed for a crime committed at age 18, was unconstitutional under the Eighth Amendment pursuant to ***Miller***. *Id.* at *14-*25.

The *Cruz* district court noted that the Third Circuit had reasoned as follows in In re Hoffner:

> "..the need to meet new circumstances as they arise and the need to prevent injustice," which it concluded are particularly salient concerns in the context of a **section 2255h(2)** motion dealing with new substantive rules addressing the potential injustice of an unconstitutional conviction or sentence.

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[9]The District Court noted, however, that "[t]he circuits have again split on whether authorizing such petitions would be an appropriate application of section 2255(h)(2). Compare ***Moore v. United States***, 871F.3d 72, 74 (1st Cir.2017)(certifying the successive petition); ***In re Hoffner***, 870 F.3d 301, 309-312 (3d Cir. 2017)(same)...[other citations]; with ***Mitchell v. United States***, No. 3:00-CR-00014, 2017 WL 2275092, at *4-*5, *7 (W.D. Va. May 24, 2017)(dismissing the petition as failing to satisfy the requirements of 2255(h)); ***United States v. Gholson***, No. 3:99-CR-178, 2017 WL 6031812, at *3 (E.D. Va. Dec. 5, 2017)(denying the petition as barred by section 2255(h)). ***Cruz v. United States***, *Slip* (2018), at *9.

Id. at *10.

The ***Cruz*** district court continued

> ***Hoffner*** cites ***Montgomery*** for the proposition that the state's countervailing interest in finality is not implicated in habeas petitions that retroactively apply substantive rules. *See id.* (quoting ***Montgomery***, 136 S.Ct. at 732 (noting that "the retroactive application of substantive rules does not implicate a State's weighty interests in... finality")).

Cruz at *14.

Essentially, the ***Cruz*** district court interpreted section 2255(h) using the approach articulated by the Third Circuit. *See* ***In re Hoffner***, 870 F.3d at 308.

Therefore, this Court should conclude that the ***en banc*** Superior Court's determination unnecessarily conflated the legal "right" recognized in ***Miller v. Alabama*** with its narrow holding. As to an express age limit, the Superior Court stated "*age is the sole factor* in determining whether ***Miller*** applies to overcome the PCRA time-bar and we decline to extend its categorical holding." *See* ***supra*** at 11.

II. Miller individualized sentencing applies to a severely mentally disabled marginally older teenager (here, 18 years and four months) who, at the time of his offense was considered a juvenile under state law.[10]

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[10]This question was previously presented for review in a prior ***Petition for Writ of Certiorari*** in ***Kenneth B. Davenport v. Pennsylvania***, 136 S.Ct. 516, 193 L.Ed. 2d 398. *See* ***supra*** at 7, nt.7.

With regard to mental health treatment, Pennsylvania treated persons *18 and younger* as juveniles. *See* ***Pennsylvania Mental Health and Mental Retardation Act of 1966***,[11] 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).[12]

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

A report submitted by J. Michael Shovlin, M.D. stated, in part, as follows:

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

[12] It is respectfully noted that counsel of record for both of those cases was David Ferleger, an attorney specializing in disability law. Attorney Ferleger had also prepared and filed on Davenport's behalf a *Petition for Writ of Certiorari*, No. 15-434. *See* **supra** at n.10.

> [I]t was the consensus of opinion that Davenport had been suffering from a chronic low grade schizophrenic process presumably from his early teens which was exacerbated by habitual use of hallucinogenic as well as barbituate and narcotic drugs.[13]

This Court previously stated in its ***Roper*** decision that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." 543 U.S. 551, 574 (2205). *Cf.* ***Stanford v. Kentucky/Wilkins v. Missouri***, 492 U.S. 361, 396-397, 109 S.Ct. 2969 (1989)(dissenting opinion filed by Brennan, Marshall, Blackmun, Stevens, JJ)(citing, in part, the Brief for *American Society for Adolescent Development*, "[age 18] is in fact *'a conservative estimate of the dividing line between adolescence and adulthood.'*")(emphasis added).

Permitting severe disabilities to be considered for marginally older adolescents provides a safeguard against a harsh and, for these teens, cruel punishment until death. It was very reasonable for the panel of Superior Court judges who decided Davenport's appeal to draw from current U.S. Supreme Court precedents that individualized sentencing

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[13]Dr. J. Michael Shovlin, Farview State Hospital, was one of a panel of three Commonwealth experts ordered by the court to examine Davenport prior to sentencing. An excerpt of this report was attached as "Exhibit A" to *Defendant's Exhibits in Support of His Motion for Appointment* of *Counsel,* as filed March 22, 2013. That was Davenport's second petition for collateral relief based then on ***Miller*** grounds.

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.

Individualized sentencing under ***Miller*** requires analysis which is not susceptible to a *bright-line* birthdate computation. And unlike general amorphous immaturity and vulnerability considerations, common to all teenagers, psychiatric illnesses and other mental disorder diagnoses apply to a *sub-set*.

For example, in ***Commonwealth v. Batts***, the Pennsylvania Supreme Court discussed why it became necessary for it to create procedures for the implementation of this Court's holding in ***Atkins***. It stated "an individual meeting the clinical definition of intellectually disabled is extremely rare--it is a diagnosis applicable to only *one percent* of the population at large." 163 A.3d 410, 450 (Pa. 2017)("Batts II")(emphasis added).

Additionally, in its ***Batts II*** decision, the Pennsylvania Supreme Court recognized that *life-without-parole* sentences "shares some unique characteristics with capital punishment, inluding the irrevocability of the associated forfeiture and the deprivation of liberty without hope of its restoration." *Id.*, 163 A.3d at 430.

Revisiting ***Atkins*** in ***Hall v. Florida***, this Court stated:

> [T]hose with intellectual disability are, by reason of their condition, likely unable to make the calculated judgments that are the premise for the deterrance rationale. They have a "diminished ability" to "process information, to learn from experience, to engage in logical reasoning, or to control impulses...[which] make[s] it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." ...The diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment.

572 U.S. ___ , (2014)(citing ***Atkins***, 536 U.S. at 320). *See* Slip Op. at 6.

Thus, this 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 the mandatory imposition of life without parole, children who are severely disabled are different enough to support flexibility in defining who is a juvenile.

CONCLUSION

The crimes took place more than 45 years ago, at a time when Davenport was 18 years and four months old, severely mentally ill and psychotic. At 65, he is serving a mandatory life without parole sentence. If neither ***Miller*** nor ***Montgomery*** 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 and rehabilitation, in the decades since his family's deaths. Neither deterrence nor punishment justify denial to Davenport of ***Miller***'s requirement for individualized sentencing.

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

Respectfully submitted,

Dated: 5-23-19

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