ATTACHMENT "A"

Order of the Penna. Supreme Court
entered on Nov. 16, 2018
in *Commonwealth v. Davenport*
277 MAL 2018

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 277 MAL 2018
Respondent	:	
	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
KENNETH BYRON DAVENPORT,	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 16th day of November, 2018, the Petition for Allowance of Appeal is **DENIED**.

A True Copy Elizabeth E. Zisk
As Of 11/16/2018

Attest:
Chief Clerk
Supreme Court of Pennsylvania

ATTACHMENT "B"

Order of the Penna. Supreme Court
entered on Dec. 26, 2018
in *Commonwealth v. Davenport*
277 MAL 2018

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 277 MAL 2018
	:	
Respondents	:	
	:	Application for Reconsideration
v.	:	
	:	
KENNETH BYRON DAVENPORT,	:	
	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 26th day of December, 2018, the Application for Reconsideration is denied.

A True Copy Elizabeth E. Zisk
As Of 12/26/2018

Attest: _____
Chief Clerk
Supreme Court of Pennsylvania

ATTACHMENT "C"

Memorandum decision of the Superior Court of Pennsylvania in *Commonwealth v. Davenport*, No. 782 EDA 2017 as filed on March 6, 2018

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
KENNETH BYRON DAVENPORT	:	
Appellant	:	No. 782 EDA 2017

Appeal from the PCRA Order February 10, 2017
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0000117-1973

BEFORE: GANTMAN, P.J., LAZARUS, J., and OTT, J.

MEMORANDUM BY OTT, J.: **FILED MARCH 06, 2018**

Kenneth Byron Davenport appeals, *pro se*, from the order entered February 10, 2017, in the Court of Common Pleas of Montgomery County, dismissing his serial petition filed under the Post-Conviction Relief Act ("PCRA")[1] as untimely. On appeal, Davenport claims he is entitled to PCRA relief under ***Miller v. Alabama***, 567 U.S. 460 (2012),[2] and ***Montgomery v.***

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[1] 42 Pa.C.S. §§ 9541-9546.

[2] In ***Miller***, the United States Supreme Court held 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.'" ***Miller***, 567 U.S. at 465 (emphasis added).

Louisiana, 136 S. Ct. 718 (January 25, 2016).[3] Based on following, we disagree and, therefore, affirm.

On March 11, 1973, Davenport, then a Drexel University student, murdered four family members: his father, mother, and two brothers. He was originally found guilty of four counts of first-degree murder[4] on April 11, 1974, but because of erroneous jury instructions, he was granted a new trial. On June 24, 1976, at his re-trial, a jury again convicted Davenport of four counts of first-degree murder. On April 29, 1977, Davenport was sentenced to four consecutive life terms of imprisonment without the possibility of parole. Davenport did not file a direct appeal but did seek post-conviction relief. In 1986, a panel of this Court affirmed the denial of his first post-conviction petition. Both the Pennsylvania Supreme Court and the United States Supreme Court denied review. ***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).

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[3] In ***Montgomery***, the Supreme Court held that ***Miller*** was a new substantive right that, under the United States Constitution, must be applied retroactively in cases on state collateral review. ***Montgomery***, 136 S.Ct. at 736.

[4] 18 Pa.C.S. § 2502(a).

Davenport filed the instant, serial PCRA petition[5] on February 26, 2016, and a supplemental petition on September 16, 2016. After determining the petition was untimely, the PCRA court notified Davenport of its intent to dismiss the petition without a hearing on December 19, 2016. ***See*** Pa.R.Crim.P. 907. Davenport filed a response to the Rule 907 notice on January 6, 2017. On February 10, 2017, after considering Davenport's response, the PCRA court dismissed his petition. This *pro se* appeal followed.[6]

Davenport presents the following issues for our review:

1. Did the PCRA court err by failing to resolve the substantial question under state law whether the U.S. Supreme Court's holding in ***Montgomery v. Louisiana*** applies to a marginally older teenager (age 18 and 4 mos.) who was severely mentally ill and psychotic at the time of the murders and who was demonstrably a juvenile pursuant to provisions of the Pennsylvania Mental Health and Mental Retardation Act of 1966.

2. Did the PCRA court err by declining to accept subject matter jurisdiction to decide the above question under Article 1, §§ 9 and 13, and Article III, § 32 of the Pennsylvania Constitution -- providing for substantive due process and equal protection.

3. Did the PCRA court err by declining to accept subject matter jurisdiction to decide the first question under the 8th Amendment of the U.S. Constitution and/or coextensively with Article 1, § 13 of the Pennsylvania Constitution.

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[5] The PCRA Court and the Commonwealth both indicate this is Davenport's third petition. ***See*** PCRA Court Opinion, 5/11/2017, at 4-5; Commonwealth's Brief at 2. His prior petitions have not provided Davenport with any relief.

[6] On February 27, 2017, the PCRA court ordered Davenport to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Davenport filed a concise statement on March 8, 2017. The PCRA court issued an opinion pursuant to Pa.R.A.P. 1925(a) on May 11, 2017.

> 4. Did the PCRA court err by failing to resolve the issue of whether there was a waiver of the age-issue as applied based on the Commonwealth's prior representations in ***Kremens v. Bartley***, 431 U.S. 119 (1977), and ***Secretary of Public Welfare v. Institutionalized Juveniles***, 442 U.S. 640 (1979), that the certified class of juveniles consisted of "... all persons eighteen years of age or younger who have been, are, or may be admitted or committed to mental facilities in Pennsylvania."

Davenport's Brief at 5.

"Crucial to the determination of any PCRA appeal is the timeliness of the underlying petition. Thus, we must first determine whether the instant PCRA petition was timely filed." ***Commonwealth v. Smith***, 35 A.3d 766, 768 (Pa. Super. 2011), *appeal denied*, 53 A.3d 757 (Pa. 2012).

> The PCRA timeliness requirement ... is mandatory and jurisdictional in nature. ***Commonwealth v. Taylor***, 933 A.2d 1035, 1038 (Pa. Super. 2007), *appeal denied,* 597 Pa. 715, 951 A.2d 1163 (2008) (citing ***Commonwealth v. Murray***, 562 Pa. 1, 753 A.2d 201, 203 (2000)). The court cannot ignore a petition's untimeliness and reach the merits of the petition. ***Id.***

Commonwealth v. Taylor, 67 A.3d 1245, 1248 (Pa. 2013), *cert. denied*, 134 S. Ct. 2695 (U.S. 2014). A PCRA petition must be filed within one year of the date the underlying judgment becomes final. ***See*** 42 Pa.C.S. § 9545(b)(1). A judgment is deemed final "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking review." 42 Pa.C.S. § 9545(b)(3). As noted above, Davenport was sentenced on April 29, 1977, and did not file a direct appeal. Therefore, his judgment of

sentence became final on May 31, 1977,[7] making the present petition patently untimely.[8]

Nevertheless, an untimely PCRA petition may be considered if one of the following three exceptions applies:

> (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 that court to apply retroactively.

42 Pa.C.S. § 9545(b)(1)(i-iii). Furthermore, a PCRA petition alleging any of the exceptions under Section 9545(b)(1) must be filed within 60 days of when the PCRA claim could have first been brought. 42 Pa.C.S. § 9545(b)(2).

Davenport contends he is entitled to review pursuant to the PCRA's new constitutional right exception at Section 9545(b)(1)(iii), based upon

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[7] ***See*** 1 Pa.C.S. § 1908 (excluding weekends and legal holidays from computation of time).

[8] There exists a *proviso* to the 1995 amendments to the PCRA that provides a grace period for petitioners whose judgments became final on or before the January 16, 1996 effective date of the amendments. However, the *proviso* applies to first PCRA petitions only, and the petition must be filed by January 16, 1997. ***See Commonwealth v. Thomas***, 718 A.2d 326 (Pa. Super. 1998) (*en banc*). It is evident Davenport is not entitled to the relief provided by the *proviso.*

Miller/Montgomery. The PCRA court concluded that Davenport is not entitled to relief under these decisions because Davenport was 18 years of age when he committed the murders, and ***Miller's*** holding only applies to defendants who were under the age of 18 at the time of their crimes. ***See*** PCRA Court Opinion, 5/11/2017, at 5-6. We agree with the PCRA court's determination.

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. ***See*** Davenport's Brief at 14-19. Similar arguments have been previously considered and rejected by this Court.

In ***Commonwealth v. Furgess***, 149 A.3d 90, 94 (Pa. Super. 2016), a 19-year-old defendant convicted of homicide claimed he was a "technical juvenile" and relied on neuroscientific theories pertaining to immature brain development to support his claim. The ***Furgess*** court relied on the holding in ***Commonwealth v. Cintora***, 69 A.3d 759 (Pa. Super. 2013), *appeal denied*, 81 A.3d 75 (Pa. 2013), "that petitioners who were older than 18 at the time they committed murder are not within the ambit of the ***Miller*** decision and therefore may not rely on that decision to bring themselves within the time-

bar exception in Section 9545(b)(1)(iii)."[9] ***Furgess***, ***supra***, 149 A.3d at 94. Moreover, the ***Furgess*** court found "nothing in ***Montgomery*** undermines" this holding in ***Cintora. Id.***[10] ***See also Commonwealth v. Rodriguez***, 174 A.3d 1130 (Pa. Super. 2017) ("Appellant acknowledges that he was eighteen years old at the time he committed the murder; however, he argues, nevertheless, that he may invoke ***Miller*** because his immature and/or impulsive brain made him similar to a juvenile. Thus, Appellant seeks an extension of ***Miller*** to persons convicted of murder who were older at the time of their crimes than the class of defendants subject to the ***Miller*** holding. However, this Court has previously rejected such an argument.").

Although Davenport attempts to distinguish case law from his specific circumstances, we conclude that ***Furgess*** and ***Cintora*** are controlling in this case.

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[9] In ***Cintora***, the co-defendants, who were 19 and 21 years old at the time they committed second degree murder, invoked ***Miller*** to overcome the untimeliness of their PCRA petition, arguing that a human brain does not fully develop until the age of 25 and that the holding of ***Miller*** was applicable pursuant to the Equal Protection Clause. In rejecting these arguments, this Court stressed the co-appellants' "contention that a newly-recognized constitutional right ***should*** be extended to others does not render their petition timely pursuant to section 9545(b)(1)(iii)." ***Cintora***, 69 A.3d at 764 (emphasis in original).

[10] The ***Furgess*** Court acknowledged, however, that ***Cintora's*** additional holding, that ***Miller*** had not been applied retroactively, was "no longer good law" after ***Montgomery***. ***Furgess, supra,*** 149 A.3d at 94.

Moreover, we note Davenport's argument regarding the applicability of the Pennsylvania Mental Health and Mental Retardation Act of 1966 ("MHMRA"), 50 P.S. § 4101, *et seq.*, is more akin to a defense assertion (diminished capacity, guilty but mentally ill, and insanity). We reiterate the ***Miller/Montgomery*** holding specifically concerns cases involving defendants who are under the age of 18 at the time of their crimes and have been sentenced to mandatory life without parole because it violates the Eighth Amendment's prohibition on cruel and unusual punishments. ***See Miller***, 567 U.S. at 479 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole ***for juvenile offenders***.") (emphasis added). ***Miller/Montgomery*** did not analyze whether their holdings extend to the MHMRA, and we decline to do so.

Furthermore, Davenport's attempt to circumvent this obstacle to relief by invoking the Equal Protection Clause is similarly meritless. ***See*** Davenport's Brief at 19-22. This Court rejected a similar claim in ***Cintora***, ***supra***. In ***Cintora***, although the defendants recognized that they were not under the age of 18 at the time they committed the crime, they argued that the holding of ***Miller*** was applicable pursuant to the Equal Protection Clause. This Court disagreed:

> Appellants ... contend that because ***Miller*** created a new Eighth Amendment right, that those whose brains were not fully developed at the time of their crimes are free from mandatory life without parole sentences, and because research indicates that the

> human mind does not fully develop or mature until the age of 25, it would be a violation of equal protection for the courts to treat them or anyone else with an immature brain, as adults. Thus, they conclude that the holding in ***Miller*** should be extended to them as they were under the age of 25 at the time of the murder and, as such, had immature brains. However, we need not reach the merits of Appellants' argument, as their contention that a newly-recognized constitutional right **should** be extended to others does not render their petition timely pursuant to section 9545(b)(1)(iii).

Id. at 764 (citation omitted and emphasis in original). Therefore, Davenport is similarly entitled to no relief. Accordingly, Davenport's claim that the right in ***Miller/Montgomery*** applies to his case is without merit.

In sum, the PCRA court properly found that Davenport's PCRA petition is untimely and that he failed to establish a statutory exception to the time bar. Because we have no jurisdiction to review this untimely petition, we affirm.

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/6/18

ATTACHMENT "D"

Opinion of the Court of Common Pleas of Montgomery County, Pennsylvania in ***Commonwealth v. Kenneth B. Davenport***, No. 117-73, as entered May 11, 2017

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

COMMONWEALTH OF PENNSYLVANIA : NO. 117-73

VS. :

KENNETH B. DAVENPORT :

CARLUCCIO, J. *MAY 11th, 2017*

OPINION

FACTS AND PROCEDURAL HISTORY:

In 1972, a jury convicted the Defendant of 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 directly appeal this verdict and judgment of sentence. However, over the decades the Defendant has made multiple attempts at collateral relief. Herein, the Defendant appeals the trial court's dismissal of his most recent, serial Post Conviction Relief Act Petition.

More specifically, on February 10, 2017, the trial court entered the following order dismissing the Defendant's serial Petition seeking relief pursuant to the *Post Conviction Relief Act, 42 Pa.C.S.A. Sections 9541-9546, et al.* :

FINAL ORDER DISMISSING SUPPLEMENTAL/SERIAL PCRA PETITION

AND NOW, this 10th day of February, 2017, after review of the Defendant, Kenneth B. Davenport's, Supplemental/Serial Petition seeking relief pursuant to the *Post Conviction Relief Act, 42 Pa.C.S.A. Sections 9541-9546, et.al*; after review of the Commonwealth's response thereto; after review of Defendant's Preliminary Objections to the court's Notice of Intent to Dismiss Supplemental/Serial PCRA Petition Without a Hearing; after review of Defendant's Additional Filing in Support of PCRA; and, after independent review of the record, it is hereby **ORDERED** and **DECREED** that the present Petition is **DISMISSED**.

The court finds that the Defendant's claims are meritless and/or untimely, and the court is without jurisdiction based, in part, upon the following:

1. The PCRA Petition is untimely. Any PCRA Petition, including a second or subsequent one, must be filed within one year of the date that judgment of sentence becomes final. *42 Pa.C.S.A. Section 9545(b)(1).*

2. The PCRA provides for limited exceptions to the one-year rule. *42 Pa.C.S.A. Section 9545(b).* The Defendant has failed to plead and prove that the timeliness exceptions to the one-year rule apply to the PCRA Petition: *42 Pa.C.S.A. Section. 9545(b).* More specifically, Defendant failed to prove that he fell within the newly recognized constitutional right exception to the Act's time-bar. Montgomery v. Louisiana, 136 S.Ct. 718 (2016) and Miller v. Alabama, 132 S.Ct. 2455 (2012), apply to defendants who were under the age of eighteen (18) at the time of murder, and defendant admitted that he was eighteen (18) at the time that he committed the murders at issue.

   Accordingly, Defendant is hereby advised of his right to appeal from this Final Order of Dismissal within thirty (30) days to the Superior Court of Pennsylvania. [...]

(Trial Court Order dated February 10, 2017)

On **February 29, 2017**, the Defendant timely appealed the aforementioned order.

The trial court supports its' ruling below.

DISCUSSION:

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).*

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).

The exceptions to the PCRA's time-bar 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), emphasis added)

The court properly dismissed the present/serial 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.

As indicated previously, in 1972, a jury convicted the Defendant of 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 another Post Conviction Relief Act Petition, which the trial court properly dismissed for want of jurisdiction.

On March 17, 2015, the appellate court affirmed the trial court's dismissal. *(Please See, 1409 EDA 2014)*

Thereafter, on February 23, 2016, the Defendant filed the present, subsequent/serial PCRA Petition at issue entitled Petition of Notice of Probable Jurisdiction and Renewed Petition for Post Conviction Relief. With court permission, the Defendant then attached additional documents to his Petition in June of 2016 and later supplemented his Petition in September of 2016.

The Petition at bar is roughly thirty-eight (38) years past the jurisdictional deadline. That is, the Defendant's judgment of sentence became final on May 31, 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 31, 1977, or until May 31, 1978, to file a timely PCRA Petition. He did not file the present Petition until February 23, 2016, approximately thirty-eight (38) years past the PCRA deadline. Thus, the Petition is facially time-barred.

In order to circumvent the time-bar, the Defendant claims 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). 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. Miller does not apply to the case at bar.

First, Defendant's case does not fit within the Miller holding. The Miller holding applies to defendants under the age of eighteen (18) at the time of the offense, and Defendant "freely admits that he was 18 years old when he

committed the murders." *(Please see, quotation from Superior Court Opinion from previous PCRA appeal, 1409 EDA 2014 at 3)*

Second, to the extent that the Defendant argues that the Miller holding should be expanded to include mentally/developmentally challenged individuals like himself who were over the age of eighteen(18) at the time of the offense, the appellate courts have declined such an expansion. In Commonwealth v. Cintora, 69 A.3d 759, 764 (Pa.Super. 2013), the appellate court determined that the Miller holding does not apply to such arguments. *(Please See, 1409 EDA 2014 at 4 where the appellate court rejected Defendant's previous attempt to expand the Miller holding to persons eighteen (18) and older)*

Finally, in his Concise Statement of Matters Complained of on Appeal, Defendant asserts that the trial court's ruling is in error as it did not take into consideration his Response to the Commonwealth's Answer and Motion to Dismiss filed on February 14, 2017. This argument is of no moment.

In its' order of January 9, 2017, the trial court granted Defendant's Motion for an Enlargement of Time To Respond to the Commonwealth's Answer and Motion to Dismiss, and gave Defendant an additional thirty (30) days to file his response. Defendant filed his response entitled Petitioner's Objections to the Court's Notice of Intent to Dismiss Supplemental/Serial PCRA Petition on January 10, 2017. On January 20, 2017, the Defendant further docketed an Additional Filing in Support of PCRA.

On February 10, 2017, after the above cited thirty (30) day extension of time had passed, and after receipt and consideration of the Defendant's aforementioned responses, the trial court issued its' Final Order dismissing Defendant's PCRA Petition.

Then on February 14, 2017, outside of the terms of the court's January 9, 2017, order, the Defendant filed yet another Response to the Commonwealth's Answer and Motion to Dismiss. It was not error for the trial court to consider this untimely response.

Thus, as Defendant failed to establish any of the exceptions to the Act's time constraints, the trial court properly dismissed the Defendant's serial PCRA Petition for want of jurisdiction.

Accordingly, for the foregoing reasons, the trial court respectfully requests that the order of February 17, 2017, be **AFFIRMED**.

By the Court:

Carolyn T. Carluccio

The Honorable Carolyn Tornetta Carluccio

Copies of the above Opinion
mailed on 5-11-17 to:
Robert M. Falin, Esquire, District Attorney's Office
Kenneth B. Davenport (AF-7291),
SCI-Dallas, 1000 Follies Road, Dallas, PA 18612-0286

Barbara Cybulski
Secretary

ATTACHMENT"E"

Memorandum decision of the
Superior Court of Pennsylvania
in *Commonwealth v. Avis Lee*
No. 1891 WDA 2016
as filed March 1, 2019

2019 PA Super 64

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
AVIS LEE	:	
Appellant	:	No. 1891 WDA 2016

Appeal from the PCRA Order November 17, 2016
In the Court of Common Pleas of Allegheny County Criminal Division at No(s): CP-02-CR-0005128-1980

BEFORE: GANTMAN, P.J., BENDER, P.J.E., BOWES, J., PANELLA, J., LAZARUS, J., OTT, J., STABILE, J., DUBOW, J., and MURRAY, J.

OPINION BY LAZARUS, J.: **FILED MARCH 01, 2019**

Avis Lee appeals from the order dismissing, as untimely, her sixth petition filed pursuant to the Post-Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. The issue before this en banc Court is 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. After our review of the parties' arguments, as well as the amicus brief in support of Lee,[1] we conclude that she cannot invoke ***Miller*** to overcome

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[1] The Juvenile Law Center, the Defender Association of Philadelphia, the Atlantic Center for Capital Representation, and the Youth Sentencing and Reentry Project have filed a joint amicus brief in support of Lee.

the PCRA time-bar and, therefore, the PCRA court correctly determined it did not have jurisdiction. Accordingly, we are constrained to affirm.

In 1981, a jury convicted Lee of second-degree murder. The convictions stemmed from the shooting death of Robert Walker during an attempted robbery. The evidence at trial established that Lee suggested the robbery to her brother, Dale Stacy Madden, that Lee was designated to serve as the lookout, and that Lee was aware that her brother was carrying a loaded gun. Lee was tried jointly with co-defendants Madden and another man, co-conspirator Arthur Jeffries.

Following conviction, the court properly sentenced Lee to a mandatory life sentence without the possibility of parole. On appeal, this Court affirmed her judgment of sentence. ***See Commonwealth v. Lee***, 838 PGH 1981, (Pa. Super. filed July 16, 1982) (unpublished memorandum). Over the past twenty-two years, Lee has unsuccessfully sought state post-conviction relief and habeas corpus relief in the federal courts.

In 2012, the United States Supreme Court decided ***Miller, supra***, which held mandatory life without parole sentences for those under the age of 18 at the time of their crimes violate the Eighth Amendment's prohibition on "cruel and unusual punishments." ***Miller***, 567 U.S. at 465.[2] The Supreme Court

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[2] Juveniles tried as adults remain subject to mandatory minimum sentencing statutes applicable to their adult counterparts, except for the imposition of life imprisonment without parole. ***See*** 42 Pa.C.S.A. § 6355(a); 18 Pa.C.S.A. § 1102.1(a), (c) (providing for shorter minimum terms of imprisonment than

held that a juvenile homicide defendant could only be sentenced to life without the possibility of parole if he or she is determined to be permanently incorrigible, irreparably corrupt, or irretrievably depraved. ***Miller***, 567 U.S. at 471. Thereafter, in ***Montgomery***, the Court held that ***Miller*** applies retroactively to cases on collateral review, opening the door for those eligible to seek collateral relief. ***Montgomery***, 136 S. Ct. at 732-37.

On March 24, 2016, fifty-nine days after the Court decided ***Montgomery***, Lee filed her sixth PCRA petition, asserting she was a "virtual minor" at the time of her crime and was therefore entitled to the benefit of the constitutional rule announced in ***Miller*** and made retroactive by ***Montgomery***. She claimed the sentencing court in her case "did not have the ability to consider the mitigating qualities of [her] youth during sentencing[.]" Amended PCRA Petition, 3/24/16, at 13. Lee argued, therefore, that the rationale underlying the ***Miller*** holding, including consideration of characteristics of youth and age-related facts identified as constitutionally significant by the ***Miller*** Court, provides support for extending the benefit of ***Miller*** to her case.

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those mandated in section 1102 where the murders of the first and second degree were committed by juveniles). ***See also Commonwealth v. Batts***, 163 A.3d 410 (Pa. 2017) (***Batts II***) (in absence of sentencing court reaching conclusion, supported by competent evidence, that juvenile murderer will forever be incorrigible, without any hope for rehabilitation, life-without-parole sentence imposed on juvenile is illegal under Eighth Amendment prohibition against cruel and unusual punishment).

The PCRA court found ***Miller*** inapplicable because Lee was not under the age of 18 at the time of her crime. Lee was born on January 23, 1961; on November 2, 1979, when the crime occurred, she was 18 years and nine months old. Finding Lee had failed to prove the applicability of the newly-recognized constitutional right exception to the PCRA time-bar under section 9545(b)(1)(iii), the PCRA court dismissed her petition as untimely.

On appeal, a panel of this Court affirmed. The decision of our Court in this case, bound by precedent on this issue, rejected the "virtual-minor theory" as a basis to invoke section 9545(b)(1)(iii), concluding Lee could not rely on ***Miller*** to bring herself within the new constitutional right exception. ***See*** 42 Pa.C.S.A. § 9545(b)(1)(iii); ***see also Commonwealth v. Furgess***, 149 A.3d 90, 91–94 (Pa. Super. 2016) (holding petitioners' contention that ***Miller*** should be extended to persons over age 18 whose brains were immature at time of their offenses did not bring petition within exception to time-bar for petitions asserting newly-recognized constitutional right); ***Commonwealth v. Cintora***, 69 A.3d 759, 764 (Pa. Super. 2013), *abrogation on other grounds recognized in* ***Furgess, supra*** at 94 (concluding contention that newly-recognized constitutional right should be extended to others does not render petition timely pursuant to section 9545(b)(1)(iii)).[3]

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[3] In ***Cintora***, the co-appellants, who were 19 and 21 years old at the time of their crimes, argued that ***Miller*** applied to them because a human brain does not fully develop until the age of 25 and because "it would be a violation of equal protection for the courts to treat them[,] or anyone else with immature

On March 9, 2018, this Court granted Lee's petition for reargument en banc to address the issue of whether ***Miller*** should apply to those who ground their claims on the ***Miller*** rationale -- the "immature brain" theory -- despite ***Miller***'s express age limitation. Lee contends that the express age of legal maturity is "arbitrary" and was not central to the ***Miller*** rationale, which, in sum, concerns whether the commission of a crime "reflects unfortunate yet transient immaturity" of a young offender rather than "irreparable corruption[.]" ***Miller***, 567 U.S. at 479-80 (quoting ***Roper v. Simmons***, 543 U.S. 551, 573 (2005)). Lee cites to ***Seminole Tribe of Florida v. Florida***, 517 U.S. 44, 67 (1996), and ***Commonwealth v. Batts***, 163 A.3d 410 (Pa. 2017) ("***Batts II***"), to support her argument that the rationale of ***Miller*** should extend the ***Miller*** holding to her. Lee further urges this Court to

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brains, as adults." ***Cintora***, 69 A.3d at 764. The ***Cintora*** Court rejected these arguments, stressing that the co-appellants' "contention that a newly-recognized constitutional right should be extended to others does not render their petition timely pursuant to section 9545(b)(1)(iii)." ***Id.*** (emphasis in original). The ***Furgess*** Court acknowledged, however, that ***Cintora***'s additional holding, that ***Miller*** had not been applied retroactively, was "no longer good law" after ***Montgomery***. ***See Furgess***, 149 A.3d at 94 ("Because the U.S. Supreme Court in ***Montgomery*** has since held that ***Miller*** does apply retroactively, this second reason stated in the ***Cintora*** opinion is no longer good law. However, nothing in ***Montgomery*** undermines ***Cintora***'s holding that petitioners who were older than 18 at the time they committed murder are not within the ambit of the ***Miller*** decision, and, therefore may not rely on that decision to bring themselves within the time-bar exception in Section 9545(b)(1)(iii).").

reexamine our prior decisions in ***Cintora*** and ***Furgess*** in light of Eighth Amendment sentencing jurisprudence espoused in ***Miller***. For the reasons that follow, and despite Lee's compelling arguments, we reaffirm our conclusion that ***Miller*** does not afford collateral relief to a petitioner who was over the age of 18 at the time of his or her offense. We also hold that the rationale the ***Miller*** Court applied to offenders who were age 14 at the time of their offenses, cannot be applied to defendants over the age of 18 at the time of their offenses in order to satisfy the newly-recognized constitutional right exception to the PCRA time-bar.

Initially, we note that this Court granted reargument en banc in this case on March 9, 2018.[4] Five days later, on March 14, 2018, this Court filed

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[4] Lee's petition for reargument sought review of the following claims that she had brought forth in her PCRA petition:

> (1) Mandatory life-without-parole sentence constitutes disproportionate punishment in violation of the Eighth Amendment to the U.S. Constitution because she was developmentally an adolescent and possessed the age -related characteristics of youth that must be taken into consideration prior to imposing a sentence of life-without-parole pursuant to ***Miller***, thus the right established in ***Miller*** applies to Ms. Lee, her PCRA petition meets the newly-established constitutional right exception to the PCRA's timeliness requirements;
>
> (2) Disproportionate punishment in violation of the Eighth Amendment because she did not kill or intend to kill, which rendered her of diminished culpability for purposes of imposing a sentence of life-without-parole, as ***Miller*** incorporated the U.S. Supreme Court's proportionality jurisprudence;

its decision in ***Commonwealth v. Montgomery***, 181 A.3d 359 (Pa. Super. 2018) (en banc), *appeal denied*, 190 A.3d 1134 (Pa. 2018).

In ***Commonwealth v. Montgomery***,[5] petitioner, who was 22 years old at the time he committed murder, for which he was sentenced to life imprisonment without the possibility of parole, argued that his brain was not fully developed. Petitioner contended that he satisfied the new constitutional rule exception to the PCRA time-bar because he was entitled to relief under ***Miller***, made retroactive by ***Montgomery***. We disagreed, holding that petitioner failed to show that the new constitutional rule extended to individuals who had committed homicides after they reached the age of 18. ***Commonwealth v. Montgomery***, 181 A.3d at 366. Relying on ***Furgess*** and ***Cintora***, this Court held that simply contending that a newly-recognized constitutional right should be extended to others does not satisfy the new

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> (3) Combined effect of Ms. Lee's youth and developmental characteristics, her experience of extreme childhood and adolescent abuse and trauma, and her lack of intent to kill render her life-without-parole sentence unconstitutional in violation of the Eighth Amendment;
>
> (4) A violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Article 1, § 26 of the Pennsylvania Constitution because the arbitrary discrepancy in sentencing between 17- and 18-year-olds under Pennsylvania law lacks a rational basis.

Petition for Reargument, 1/12/18, at 2-5.

[5] For purposes of this Opinion, we refer to our decision as ***Commonwealth v. Montgomery*** in order to differentiate it from the United States Supreme Court's decision in ***Montgomery v. Louisiana***.

constitutional rule exception to the PCRA's timeliness requirement. ***Commonwealth v. Montgomery***, 181 A.3d at 366 (citing ***Furgess***, 149 A.3d at 94, and ***Cintora***, 69 A.3d at 764). We also found meritless petitioner's argument that ***Furgess*** was distinguishable. We stated:

> [Petitioner] argues that ***Furgess*** is distinguishable from the case at bar because in ***Furgess*** the petitioner only raised a claim under the Eighth Amendment while he also raises a claim under the Fourteenth Amendment's Equal Protection Clause. This argument, however, is misplaced. *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. Instead,* ***Miller*** *only announced a new rule with respect to the Eighth Amendment. Thus, contrary to [petitioner's] assertion, his Equal Protection Clause argument is also an attempt to extend* ***Miller***'s *holding.*

Commonwealth v. Montgomery, 181 A.3d at 366 (emphasis added).[6] Notably, we declined petitioner's invitation to overturn ***Furgess***, stating that "the three-judge panel's analysis is correct[.]" ***Id.*** at 367.

On the same day this Court filed its decision in ***Commonwealth v. Montgomery***, the Commonwealth filed a motion for clarification of the order granting en banc review in light of that decision. The Commonwealth averred: "[T]this Court rejected Montgomery's attempt to extend the holding in ***Miller*** to those who were 18 years of age or older when they committed their crimes under the Eighth Amendment and the Equal Protection Clause of the

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[6] In light of ***Commonwealth v. Montgomery***, Lee has affirmatively waived her claim relating to the Equal Protection Clause of the Fourteenth Amendment. ***See*** Appellant's Substituted Brief, at 4 n.1.

Fourteenth Amendment." Motion for Clarification, 3/14/18, at ¶ 3. In response, Lee averred that her "rationale versus specific holding" argument renders the right established in ***Miller*** applicable to her, and that "the 'right' established in ***Miller*** cannot be limited to the narrow 'holding' identified by this Court in ***Com[monwealth] v. Montgomery***, ***Cintora***, and ***Furgess***." Answer to Motion for Clarification, 4/12/18, at ¶¶ 10-18, 29.[7] By order dated April 25, 2018, this Court denied the Commonwealth's application for clarification. In her substituted brief on en banc review, Lee presents her claims as follows:

> I. Did the PCRA court err in rejecting [Lee's] claim that the right established in ***Miller v. Alabama*** applies to petitioner who possessed those characteristics of youth identified as constitutionally significant for sentencing purposes by the U.S. Supreme Court?
>
> 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?

Appellant's Substituted Brief, at 4.

When reviewing the denial of a PCRA petition, we must determine whether the PCRA court's order is supported by the record and free of legal

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[7] Lee also suggested that this Court is not bound by our decision in ***Commonwealth v. Montgomery***, "as an en banc court has the authority to overrule the holding of another en banc court." Answer to Motion for Clarification, ***supra*** at ¶ 39. While that may be true, we do not find that there is any compelling reason to overturn prior Superior Court precedent in this matter; to the contrary, we find ample precedent provided by both the United States Supreme Court and our Pennsylvania Supreme Court that is binding upon this Court. This argument provides Lee no relief.

error. ***Commonwealth v. Smith***, 181 A.3d 1168, 1174 (Pa. Super. 2018). Generally, we are bound by a PCRA court's credibility determinations. However, with regard to a court's legal conclusions, we apply a *de novo* standard. ***Id.*** However, we first address the timeliness of Lee's petition, as timeliness is a jurisdictional requisite and may not be altered or disregarded in order to address the merits of a petition. ***See Commonwealth v. Bennett***, 930 A.2d 1264, 1267 (Pa. 2007); ***see also Commonwealth v. Zeigler***, 148 A.3d 849 (Pa. Super. 2016).

A PCRA petition, including a second or subsequent petition, shall be filed within one year of the date the underlying judgment of sentence becomes final. 42 Pa.C.S.A. § 9545(b)(1). A judgment of sentence is deemed final at the conclusion of direct review, including discretionary review in the United States Supreme Court and the Pennsylvania Supreme Court, or upon expiration of the time for seeking review. 42 Pa.C.S.A. § 9545(b)(3). Three statutory exceptions to the PCRA time-bar allow for limited circumstances to excuse the late filing of a petition. 42 Pa.C.S.A. §§ 9545(b)(1)(i)-(iii). A petitioner asserting a timeliness exception must file a petition within 60 days of the date the claim could have been presented. 42 Pa.C.S.A. § 9545(b)(2).[8]

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[8] On October 24, 2018, the General Assembly amended section 9545(b)(2), extending the time for filing a petition from 60 days to one year from the date the claim could have been presented. ***See*** 2018 Pa. Legis. Serv. Act 2018-146 (S.B. 915), effective December 24, 2018. The amendment applies only to claims arising one year before the effective date of this section, December 24, 2017, or thereafter.

"As such, when a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim could have been first brought, the [PCRA] court has no power to address the substantive merits of a petitioner's PCRA claims." ***Commonwealth v. Gamboa-Taylor***, 753 A.2d 780, 783 (Pa. 2000).

Here, the court imposed Lee's sentence in 1981; Lee filed the instant petition on March 24, 2016, thirty-five years later. ***See*** 42 Pa.C.S.A. § 9545(b)(1). Lee's petition is patently untimely. Accordingly, we cannot address the merits of Lee's petition unless she meets one of the enumerated exceptions to the time-bar set forth in section 9545(b)(1)(i)-(iii):

> **(b) Time for filing petition.--**
>
> (1) any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (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 law 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 that court to apply retroactively.

42 Pa.C.S.A. § 9545(b)(1)(i)-(iii).

Because the United States Supreme Court's decision in ***Montgomery*** established that ***Miller*** applies retroactively, and because Lee filed her petition within 60 days of the ***Montgomery*** ruling, she has ostensibly satisfied the requirements of section 9545(b)(1)(iii) and(2). The critical issue before us is whether, at this time, Lee can avail herself of the ***Miller*** rationale, despite the express age limitation. Lee asks this Court to expand the holding in ***Miller*** to apply to her, as one over the age of 18 at the time of her offense who alleges "characteristics of youth" that render her categorically less culpable under ***Miller***. ***Miller***, 567 U.S. at 472-73. Lee characterizes this argument as "rationale versus holding." She argues that ***Miller*** must be construed to include not only the narrow holding identified in ***Cintora*** and ***Furgess***, and more recently, this Court's en banc decision in ***Commonwealth v. Montgomery***, but also the underlying reasoning, scientific principles, and well-established rationale upon which the Court in ***Miller*** and ***Montgomery*** relied.[9]

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[9] The bases of ***Miller***'s categorical prohibition on imposing mandatory life-without-parole sentences on juvenile offenders include: 1) the Court's governing rules of law with respect to Eighth Amendment sentencing jurisprudence, which bar the harshest punishments for classes of offenders with categorically diminished culpability and require individualized sentencing when imposing the harshest punishments; 2) ***Miller***'s legal conclusions that the "characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate," and that a mandatory life-without-parole sentencing scheme "poses too great a risk of disproportionate punishment" by precluding a sentencer from

Further, Lee contends ***Montgomery*** is instructive in determining which portions of ***Miller*** were "necessary" to the result and therefore encompassed within its ambit. She claims ***Montgomery*** eschewed a narrow reading of ***Miller*** and recognized that the "foundation stone" for ***Miller***'s analysis was the Court's line of precedent holding certain punishments disproportionate when applied to juveniles. ***Miller***, 567 U.S. at 470 n.4.[10] ***See*** 42 Pa.C.S.A. § 6302 (defining "child" as an individual who is under the age of 18 years).

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considering an offender's age and characteristics of youth prior to imposing the harshest punishments; and 3) science and social science relating to adolescent development. ***Miller***, 567 U.S. at 471-79.

[10] In response to ***Miller***, our General Assembly enacted 18 Pa.C.S.A. § 1102.1 ***See*** 2012 P.L. 1655. Section 102.1 provides:

> **§ 1102.1. Sentence of persons under the age of 18 for murder, murder of an unborn child and murder of a law enforcement officer**
>
> (a) First[-]degree murder.--A person who has been convicted after June 24, 2012, of a murder of the first degree, first[-]degree murder of an unborn child or murder of a law enforcement officer of the first degree and who was under the age of 18 at the time of the commission of the offense shall be sentenced as follows:
>
> (1) A person who at the time of the commission of the offense was 15 years of age or older shall be sentenced to a term of life imprisonment without parole, or a term of imprisonment, the minimum of which shall be at least 35 years to life.
>
> (2) A person who at the time of the commission of the offense was under 15 years of age shall be sentenced to a term of life imprisonment without parole, or a term of imprisonment, the minimum of which shall be at least 25 years to life.

(b) Notice.--Reasonable notice to the defendant of the Commonwealth's intention to seek a sentence of life imprisonment without parole under subsection (a) shall be provided after conviction and before sentencing.

(c) Second[-]degree murder.--A person who has been convicted after June 24, 2012, of a murder of the second degree, second[-] degree murder of an unborn child or murder of a law enforcement officer of the second degree and who was under the age of 18 at the time of the commission of the offense shall be sentenced as follows:

(1) A person who at the time of the commission of the offense was 15 years of age or older shall be sentenced to a term of imprisonment the minimum of which shall be at least 30 years to life.

(2) A person who at the time of the commission of the offense was under 15 years of age shall be sentenced to a term of imprisonment the minimum of which shall be at least 20 years to life.

(d) Findings.--In determining whether to impose a sentence of life without parole under subsection (a), the court shall consider and make findings on the record regarding the following:

(1) The impact of the offense on each victim, including oral and written victim impact statements made or submitted by family members of the victim detailing the physical, psychological and economic effects of the crime on the victim and the victim's family. A victim impact statement may include comment on the sentence of the defendant.

(2) The impact of the offense on the community.

(3) The threat to the safety of the public or any individual posed by the defendant.

(4) The nature and circumstances of the offense committed by the defendant.

(5) The degree of the defendant's culpability.

(6) Guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing.

(7) Age-related characteristics of the defendant, including:

(i) Age.

(ii) Mental capacity.

(iii) Maturity.

(iv) The degree of criminal sophistication exhibited by the defendant.

(v) The nature and extent of any prior delinquent or criminal history, including the success or failure of any previous attempts by the court to rehabilitate the defendant.

(vi) Probation or institutional reports.

(vii) Other relevant factors.

18 Pa.C.S.A. § 1102.1 (emphasis added). Under the current statutory framework, a juvenile who commits first- or second-degree murder must be charged as an adult. A defendant can then request that his or her case be transferred to the Juvenile Division. ***See*** 42 Pa.C.S.A. § 6355. If the trial court denies the transfer request, and the juvenile is convicted of first- or second-degree murder, the trial court must sentence the juvenile to a maximum term of life imprisonment. Moreover, the mandatory minimum sentences set forth above apply only to juveniles convicted of first- or second-degree murder after June 24, 2012. Section 1102.1 does not prescribe minimum sentences for juvenile homicide defendants who were convicted of first- or second-degree murder before June 24, 2012. 18 Pa.C.S.A. § 1102.1. ***See Commonwealth v. Foust***, 180 A.3d 416, 428 (Pa. Super. 2018). ***See also*** Rachael F. Eisenberg, *As Though They Are Children: Replacing Mandatory Minimums with Individualized Sentencing Determinations for Juveniles in Pennsylvania Criminal Court after Miller v. Alabama*, 86 Temp.L.Rev. 15 (2013) (suggesting Pennsylvania's legislative response to ***Miller*** is inadequate, proposing unique sentencing model for juveniles that prohibits application of mandatory minimum sentencing statutes, and concluding that ***Miller*** "stands for more than its holding[,] in that it prohibits state sentencing schemes that prevent[] those meting out punishment from considering a juvenile's lessened culpability and greater capacity for change,

In ***Furgess***, petitioner sought to extend ***Miller*** to those adults whose brains were not fully developed at the time of their offense. ***See Furgess***, 149 A.3d at 94. This argument failed. Reiterating ***Miller*** only applies to defendants who were "under the age of 18 at the time of their crimes[,]" ***Furgess***, 149 A.3d at 94, we stated: "[A] contention that a newly-recognized constitutional right should be extended to others does not [satisfy the new constitutional rule exception to the PCRA's timeliness requirement.]" ***Id.*** at 95 (internal alteration omitted; emphasis removed), quoting ***Cintora***, 69 A.3d at 764.

Miller says nothing about defendants who were 18 years old or older at the time of the commission of their crimes. The ***Miller*** Court applied the scientific studies and principles set forth in ***Roper v. Simmons***, 543 U.S. 551 (2005), and ***Graham v. Florida***, 560 U.S. 48 (2010), and concluded the prohibition against mandatory life sentences pertained to *juveniles*, in particular, in the case of ***Miller***, to two fourteen year olds. The ***Miller*** Court noted the difficulty in distinguishing "at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" ***Miller***,

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and run[] afoul of our cases' requirement of individual sentencing for defendants facing the most serious penalties." ***Id.*** at 242-43, quoting ***Miller***, 567 U.S. at 465 (internal quotation marks omitted)).

567 U.S. at 479, citing ***Roper***, 543 U.S. at 573, and ***Graham***, 560 U.S. at 68. The Court reasoned: "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." ***Miller***, 567 U.S. at 479. The ***Miller*** rationale underscored three factors: "characteristics of youth," "disproportionate punishment," and "science and social science relating to adolescent development." ***Id.*** at 473-489.

Lee cites to "immature brain" studies that would establish that her brain was underdeveloped at the time of her crime, and that she could not form the requisite intent for second-degree murder. ***Miller***, she argues, prohibits the mandatory imposition of life without parole sentences upon offenders who possess "characteristics of youth" that render them categorically less culpable under the Eighth Amendment. Thus, Lee submits, the ***Miller*** rationale applies to her case and, accordingly, provides an exception to the PCRA time-bar. ***See*** 42 Pa.C.S.A. § 9545(b)(2)(iii).

There is no question the scientific studies and principles underlying ***Miller*** informed its holding. Our Supreme Court, in ***Batts II***, reviewed ***Miller***, ***Roper*** and ***Graham***, and discussed those principles at length. 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?

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. [H]owever, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Roper v. Simmons, 543 U.S. at 574 (holding Eighth Amendment to United States Constitution prohibits imposition of death penalty for crime committed by juvenile).

We recognize that the principles underlying the ***Miller*** holding are more general; who qualifies as a "juvenile" and whether ***Miller*** applies to Lee 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).

In ***Commonwealth v. Chambers***, 35 A.3d 34 (Pa. Super. 2011), this Court addressed an analogous claim. There, Chambers filed an untimely PCRA petition and sought to establish that he had satisfied the exception contained in section 9545(b)(1)(iii) by arguing that the *rationale* utilized by the United States Supreme Court establishing a new constitutional right in ***Graham***, ***supra***, entitled him to relief. The ***Graham*** Court held unconstitutional a sentence of life imprisonment without parole for a non-homicide juvenile

offender, emphasizing the inherent immaturity and impetuousness of juveniles, and noting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." ***Graham***, 560 U.S. at 68.

Chambers argued that the rationale of ***Graham*** should be extended to apply to a juvenile sentenced to life in prison for a second-degree murder conviction. The Commonwealth argued that Chambers was not entitled to relief because ***Graham*** only applies to juveniles convicted of non-homicide offenses, and Chambers was convicted of second-degree murder.

Concluding Chambers misapprehended the scope of the timeliness exception embodied in § 9545(b)(1)(iii), we stated:

> For purposes of deciding whether the timeliness exception to the PCRA based on the creation of a new constitutional right is applicable, *the distinction between the holding of a case and its rationale is crucial since only a precise creation of a constitutional right can afford a petitioner relief. . . . [T]he rationale used by the Supreme Court is irrelevant to the evaluation of a § 9545(b)(1)(iii) timeliness exception to the PCRA, as the right must be one that has been expressly recognized by either the Pennsylvania or United States Supreme Court.* Thus, for the purpose of the timeliness exception to the PCRA, only the holding of the case is relevant.

Chambers, 35 A.3d at 40-43 (emphasis added). Here, as in ***Chambers***, Lee is not basing her argument on any newly-recognized constitutional right *as contemplated by the PCRA*. For this reason, we find Lee's reliance on ***Seminole Tribe***, ***supra***, for the principle that *stare decisis* directs courts to adhere not only to holdings of prior cases, but also to explications of the

governing rules of law, is misplaced. "While rationales that support holdings are used by courts to recognize new rights, this judicial tool is not available to PCRA petitioners." ***Chambers, supra*** at 42. ***See also Seminole Tribe, supra*** at 67 ("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."). Simply put, that principle is not applicable in the context of collateral review. Further, we do not find Lee's reliance on ***Batts II*** compels a different result. ***Batts II***, which involved a defendant who was 14 years old at the time of his offenses, was on direct appeal.

It is not this Court's role to override the gatekeeping function of the PCRA time-bar and create jurisdiction where it does not exist. The PCRA's time limitations "are mandatory and interpreted literally; thus, a court has no authority to extend filing periods except as the statute permits." ***Commonwealth v. Fahy***, 737 A.2d 214, 222 (Pa. 1999). The period for filing a PCRA petition "is not subject to the doctrine of equitable tolling." ***Id.***

We recognize the vast expert research on this issue. If this matter were one of first impression and on direct appeal, we might expound differently. However, we are an error-correcting court. Until the United States Supreme Court or the Pennsylvania Supreme Court recognizes a new constitutional right in a non-juvenile offender, we are bound by precedent.[11] We conclude, as we did in ***Commonwealth v. Montgomery***, ***Furgess*** and ***Cintora***, that age is

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[11] We would urge our Supreme Court to review this issue in light of the research available even since ***Batts II*** was decided in 2017.

the sole factor in determining whether *Miller* applies to overcome the PCRA time-bar and we decline to extend its categorical holding.

Because Lee has failed to successfully plead or prove that she meets the new constitutional right exception to the timeliness requirements of the PCRA, 42 Pa.C.S.A. § 9545(b)(2)(iii), the court properly concluded that Lee's petition was untimely and it had no jurisdiction to address its merits. We affirm the PCRA court's order.

Order affirmed.

President Judge Gantman, President Judge Emeritus Bender, Judge Bowes, Judge Panella, Judge Ott, Judge Dubow and Judge Murray join in this Opinion.

Judge Stabile concurs in the result.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/1/2019