IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

No. 19-

HOWARD ATKINS,

Petitioner,

v.

GEORGIA CROWELL, Warden

Respondent.

UPDATED MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Comes now the petitioner, Howard Atkins, by and through his counsel of record, Michael J. Stengel, Esq., and, pursuant to Sup.Ct.R. 39.1, moves this Court for leave to proceed *in forma pauperis*. In support thereof, Mr. Atkins would show:

1. Upon appeal of the district court judgment to the United States Court of Appeals for the Sixth Circuit, Howard Atkins' motion to proceed *in forma pauperis* was granted.

2. In view of the prior determination that Howard Atkins is indigent and his incarceration since 2001, Howard Atkins prays this Court grant his motion and authorize him leave to proceed *in forma pauperis* in filing his petition for a *writ of certiorari* to the United States Court of Appeals for the Sixth Circuit attached

hereto in accordance with Sup.Ct.R. 39.2.

3. In view of the fact that the undersigned is representing the petitioner *pro bono,* rather than as appointed counsel, pursuant to Sup.Ct.R. 39, and as instructed in the Clerk's letter of March 16, 2020, attached hereto is the petitioner's Declaration in Support of this motion and inmate trust account statement.

Respectfully submitted,

Michael J. Stengel
(Tennessee #12260)
Counsel for Petitioner,
Howard Atkins
619 South Cooper Street
Memphis, TN 38104
(901)527-3535

Certificate of Service

I, Michael J. Stengel, a member of the bar of this Court, certify that pursuant to Rule 29, I have served the Motion for Leave to Proceed *In Forma Pauperis* and the Petition for a *Writ of Certiorari* to the United States Court of Appeals for the Sixth Circuit, on counsel for the respondent, by enclosing a copy thereof, postage prepaid, addressed to the Solicitor General of the United States, Department of Justice, Room 5614, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001; and depositing the same in the mails at Memphis, Tennessee, and further certify that all parties required to be served, were served with

the original motion on March 11, 2020 and have been served with this updated motion this 3rd day of April, 2020.

Michael J. Stengel

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Howard J. Atkins, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 63.00	$ N/A	$ 63.00	$ N/A
Self-employment	$ 00.00	$ N/A	$ 00.00	$ N/A
Income from real property (such as rental income)	$ 00.00	$ N/A	$ 00.00	$ N/A
Interest and dividends	$ 00.00	$ N/A	$ 00.00	$ N/A
Gifts	$ 75.00	$ N/A	$ 00.00	$ N/A
Alimony	$ 00.00	$ N/A	$ 00.00	$ N/A
Child Support	$ 00.00	$ N/A	$ 00.00	$ N/A
Retirement (such as social security, pensions, annuities, insurance)	$ 00.00	$ N/A	$ 00.00	$ N/A
Disability (such as social security, insurance payments)	$ 00.00	$ N/A	$ 00.00	$ N/A
Unemployment payments	$ 00.00	$ N/A	$ 00.00	$ N/A
Public-assistance (such as welfare)	$ 00.00	$ N/A	$ 00.00	$ N/A
Other (specify): _____	$ 00.00	$ N/A	$ 00.00	$ N/A
Total monthly income:	$ 138.00	$ N/A	$ 63.00	$ N/A

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
TDOC / TRICOR	same as mine	July 2017-Mar2019	$ 425.00
TDOC	same as mine	Apr2019 - present	$ 63.00
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ N/A
			$
			$

4. How much cash do you and your spouse have? $ 0.00
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
TDOC	trust fund	$ 750.46	$ N/A
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value N/A

☐ Other real estate
Value N/A

☐ Motor Vehicle #1
Year, make & model N/A
Value

☐ Motor Vehicle #2
Year, make & model N/A
Value

☐ Other assets
Description N/A
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$ N/A	$ N/A
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A	N/A	N/A

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ N/A	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ N/A	$ N/A
Home maintenance (repairs and upkeep)	$ N/A	$ N/A
Food	$ 60.00	$ N/A
Clothing	$ N/A	$ N/A
Laundry and dry-cleaning	$ N/A	$ N/A
Medical and dental expenses	$ 3.00	$ N/A

	You	Your spouse
Transportation (not including motor vehicle payments)	$ N/A	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ 25.00	$ N/A
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ N/A	$ N/A
Life	$ N/A	$ N/A
Health	$ N/A	$ N/A
Motor Vehicle	$ N/A	$ N/A
Other: _____	$ N/A	$ N/A
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ N/A	$ N/A
Installment payments		
Motor Vehicle	$ N/A	$ N/A
Credit card(s)	$ N/A	$ N/A
Department store(s)	$ N/A	$ N/A
Other: _____	$ N/A	$ N/A
Alimony, maintenance, and support paid to others	$ N/A	$ N/A
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ N/A	$ N/A
Other (specify): Tithe	$ 13.80	$ N/A
Total monthly expenses:	$ 101.80	$ N/A

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

N/A

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: March 23, 2020

Howard Atkin

(Signature)

TN Correction

STATE OF TENNESSEE
DEPARTMENT OF CORRECTION
NORTHEAST CORRECTIONAL COMPLEX
P.O. BOX 5000
MOUNTAIN CITY, TENNESSEE 37683-5000
TELEPHONE (423) 727-7387 FAX (423) 727-5415

INMATE TRUST FUND AFFIDAVIT

Howard J. Atkins — INMATE NAME

327480 — TDOC NUMBER

NOTICE TO INMATE: an inmate seeking to proceed IFP (In forma Pauper) shall submit an affidavit stating all assets. In addition, an inmate must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional account.

CERTIFICATE

(Incarcerated applicants only)
(To be completed by the institution of incarceration)

I certify that the applicant named herein has the sum of **697.26** his credit at

Northeast Correctional Complex. I further certify that the applicant has the following securities to his credit **-0-**.

I further certify that during the past six months the applicant's average balance was **$ 885.56**

I, Tammy McElyea, am a State of Tennessee employee, who serves as the Inmate Trust Fund Custodian for inmates at Northeast Correctional Complex. By the signature below, I certify that the attached computer printout of the named inmate is true and correct in designating his trust account activity for the past six months with the Department of Correction.

3/26/20 — DATE

Tammy McElyea — SIGNATURE OF AUTHORIZED OFFICER: ACCOUNT CLERK

State of: Tennessee

County of: Johnson

Presented before me by Tammy McElyea who is personally known by me on this

the 26th day of March, 2020.

KATHY POOLE (SEAL) STATE OF TENNESSEE NOTARY PUBLIC JOHNSON COUNTY

Kathy Poole
Notary Public

10-24-2020
My Commission Expires

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Actual Site NECX Assigned Site NECX Current Balance 697.26

Pending Balance

Trans Date	Seq No	Trans Type	Transaction Code	Transaction Amount	Trans Site	Current Amount	Pend Amount
10/07/2019	1	D	CBL	3.00	NECX	1,167.50	
10/01/2019	1	D	COM	24.76	NECX	1,170.50	
09/25/2019	2	D	INC	32.50	NECX	1,195.26	
09/25/2019	1	D	OBI	40.00	NECX	1,227.76	
09/23/2019	2	D	COM	18.85	NECX	1,267.76	
09/23/2019	1	D	INC	7.20	NECX	1,286.61	
09/16/2019	3	D	OBI	25.00	NECX	1,293.81	
09/16/2019	2	D	CBL	3.00	NECX	1,318.81	
09/16/2019	1	D	COM	26.81	NECX	1,321.81	
09/13/2019	1	C	VMB	100.00	NECX	1,348.62	

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Transactions Obligations Organizations

Actual Site NECX Assigned Site NECX Current Balance 697.26

Pending Balance

Trans Date	Seq No	Trans Type	Transaction Code	Transaction Amount	Trans Site	Current Amount	Pend Amount
10/28/2019	1	D	COM	24.89	NECX	1,087.08	
10/22/2019	1	D	COM	29.61	NECX	1,111.97	
10/21/2019	1	D	INC	16.00	NECX	1,141.58	
10/18/2019	1	D	INC	12.00	NECX	1,157.58	
10/17/2019	1	D	INC	7.20	NECX	1,169.58	
10/15/2019	1	C	PAD	69.00	NECX	1,176.78	
10/14/2019	1	D	COM	20.08	NECX	1,107.78	
10/11/2019	1	C	CHK	1.03	NECX	1,127.86	
10/08/2019	2	D	COP	0.45	NECX	1,126.83	
10/08/2019	1	D	COM	40.22	NECX	1,127.28	

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Pending Balance

Trans Date	Seq No	Trans Type	Transaction Code	Transaction Amount	Trans Site	Current Amount	Pend Amount
11/21/2019	2	D	OBI	60.00	NECX	919.97	
11/21/2019	1	D	INC	16.00	NECX	979.97	
11/20/2019	1	D	PIC	4.00	NECX	995.97	
11/19/2019	1	D	COM	46.24	NECX	999.97	
11/18/2019	1	D	INC	7.20	NECX	1,046.21	
11/12/2019	1	D	COM	44.01	NECX	1,053.41	
11/07/2019	1	C	PAD	66.00	NECX	1,097.42	
11/05/2019	1	D	CBL	3.00	NECX	1,031.42	
11/04/2019	1	D	COM	17.66	NECX	1,034.42	
10/30/2019	1	D	OBI	35.00	NECX	1,052.08	

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Actual Site NECX Assigned Site NECX Current Balance 697.26

Pending Balance

Trans Date	Seq No	Trans Type	Transaction Code	Transaction Amount	Trans Site	Current Amount	Pend Amount
12/18/2019	1	D	COM	80.17	NECX	742.31	
12/16/2019	1	D	INC	7.20	NECX	822.48	
12/12/2019	1	D	INC	10.00	NECX	829.68	
12/10/2019	1	C	PAD	63.00	NECX	839.68	
12/09/2019	1	D	COM	45.26	NECX	776.68	
12/05/2019	1	D	CBL	3.00	NECX	821.94	
12/03/2019	2	D	POS	3.79	NECX	824.94	
12/03/2019	1	D	COM	21.24	NECX	828.73	
11/22/2019	1	D	OBI	50.00	NECX	849.97	
11/21/2019	3	D	INC	20.00	NECX	899.97	

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Transactions Obligations Organizations

Actual Site NECX Assigned Site NECX Current Balance 697.26

Pending Balance

Trans Date	Seq No	Trans Type	Transaction Code	Transaction Amount	Trans Site	Current Amount	Pend Amount
01/22/2020	1	D	COM	21.34	NECX	806.24	
01/21/2020	1	D	INC	7.20	NECX	827.58	
01/14/2020	2	D	COM	14.58	NECX	834.78	
01/14/2020	1	C	PAD	66.00	NECX	849.36	
01/07/2020	2	D	COM	19.95	NECX	783.36	
01/07/2020	1	D	INC	5.00	NECX	803.31	
01/06/2020	1	D	CBL	3.00	NECX	808.31	
01/03/2020	1	D	OBI	25.00	NECX	811.31	
12/26/2019	1	C	VIC	100.00	NECX	836.31	
12/19/2019	1	D	INC	6.00	NECX	736.31	

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Transactions Obligations Organizations

Actual Site NECX Assigned Site NECX Current Balance 697.26

Pending Balance

Trans Date	Seq No	Trans Type	Transaction Code	Transaction Amount	Trans Site	Current Amount	Pend Amount
02/19/2020	1	D	COM	47.49	NECX	775.23	
02/14/2020	1	C	VIC	40.00	NECX	822.72	
02/13/2020	1	C	PAD	66.00	NECX	782.72	
02/11/2020	1	D	COM	21.37	NECX	716.72	
02/05/2020	1	D	CBL	3.00	NECX	738.09	
02/04/2020	1	D	COM	23.22	NECX	741.09	
02/03/2020	1	C	VIC	50.00	NECX	764.31	
01/28/2020	2	D	OBI	55.00	NECX	714.31	
01/28/2020	1	D	COM	20.93	NECX	769.31	
01/23/2020	1	D	INC	16.00	NECX	790.24	

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Transactions Obligations Organizations

Actual Site NECX Assigned Site NECX Current Balance 697.26

Pending Balance

Trans Date	Seq No	Trans Type	Transaction Code	Transaction Amount	Trans Site	Current Amount	Pend Amount
02/28/2020	1	C	VMB	100.00	NECX	763.17	
02/27/2020	2	D	INC	10.86	NECX	663.17	
02/27/2020	1	D	COP	2.25	NECX	674.03	
02/26/2020	2	D	OBI	45.00	NECX	676.28	
02/26/2020	1	D	INC	16.00	NECX	721.28	
02/25/2020	1	D	COM	23.40	NECX	737.28	
02/24/2020	3	D	COP	1.50	NECX	760.68	
02/24/2020	2	D	COP	4.95	NECX	762.18	
02/24/2020	1	D	COP	0.90	NECX	767.13	
02/20/2020	1	D	INC	7.20	NECX	768.03	

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Transactions Obligations Organizations

Actual Site NECX Assigned Site NECX Current Balance 697.26

Pending Balance

Trans Date	Seq No	Trans Type	Transaction Code	Transaction Amount	Trans Site	Current Amount	Pend Amount
03/23/2020	2	D	OBI	20.00	NECX	697.26	
03/23/2020	1	D	INC	10.00	NECX	717.26	
03/19/2020	1	D	INC	16.00	NECX	727.26	
03/18/2020	2	D	INC	7.20	NECX	743.26	
03/18/2020	1	D	COM	34.49	NECX	750.46	
03/12/2020	1	C	PAD	63.00	NECX	784.95	
03/10/2020	1	D	COM	5.69	NECX	721.95	
03/05/2020	1	D	CBL	3.00	NECX	727.64	
03/03/2020	2	D	DUE	12.00	NECX	730.64	
03/03/2020	1	D	COM	20.53	NECX	742.64	

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9/27/2019	$ 1,195.26
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12/28/2019	$ 836.31
12/29/2019	$ 836.31
12/30/2019	$ 836.31
12/31/2019	$ 836.31
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1/2/2020	$ 836.31

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1/5/2020	$	811.31
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2/9/2020	$	738.09
2/10/2020	$	738.09
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2/13/2020	$	782.72
2/14/2020	$	822.72
2/15/2020	$	822.72
2/16/2020	$	822.72
2/17/2020	$	822.72
2/18/2020	$	822.72
2/19/2020	$	775.23
2/20/2020	$	768.03
2/21/2020	$	768.03
2/22/2020	$	768.03

	Howard J. Atkins-327480
2/23/2020	$ 768.03
2/24/2020	$ 760.68
2/25/2020	$ 737.28
2/26/2020	$ 676.28
2/27/2020	$ 663.17
2/28/2020	$ 763.17
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3/7/2020	$ 727.64
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3/9/2020	$ 727.64
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3/25/2020	$ 697.26
ave	$ 885.56

No. 19-

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 2019

HOWARD ATKINS,

Petitioner,

v.

GEORGIA CROWELL, Warden,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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(Tennessee #12260)
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QUESTION PRESENTED FOR REVIEW

I. FAIRMINDED JURISTS CAN'T DISAGREE THAT WHILE HOWARD ATKINS' JUVENILE LIFE SENTENCE HAS A RELEASE ELIGIBILITY DATE, HE IS NOT ELIGIBLE FOR PAROLE. TENN. CODE ANN. § 40-35-501(i)(2)(A). HIS SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE HE IS STATUTORILY DENIED ANY OPPORTUNITY TO OBTAIN RELEASE BASED UPON DEMONSTRATED MATURITY AND REHABILITATION. GRAHAM v. FLORIDA, 560 U.S. 48 (2010); MILLER v. ALABAMA, 567 U.S. 460 (2012); MONTGOMERY v. LOUISIANA, 136 S.Ct. 718 (2016).

THE SIXTH CIRCUIT ERRED IN DENYING HOWARD ATKINS' PETITION BECAUSE HE MEETS THE EXACTING STANDARD FOR RELIEF AT 28 U.S.C. § 2254(d)(1).

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2019

No. 19-

HOWARD ATKINS,

Petitioner,

v.

GEORGIA CROWELL, Warden,

Respondent.

PETITION FOR *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Howard Atkins, pursuant to Rule 12.2, Rules of the Supreme Court, prays that a *Writ of Certiorari* issue to review the judgment/opinion of the United States Court of Appeals for the Sixth Circuit filed December 17, 2019.

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit entered its judgment December 17, 2019 affirming the judgment of the trial court. A copy of the judgments/opinions from the district court and United States Court of Appeals for the Sixth Circuit are included in the appendix.

JURISDICTION

On December 17, 2019, the United States Court of Appeals for the Sixth Circuit entered its judgment by issuing a published opinion. A mandate thereon was entered on January 27, 2020. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Pursuant to 28 U.S.C. § 1254(1), Howard Atkins prays this Court grant his petition seeking a *writ of certiorari* to the United States Court of Appeals for the Sixth Circuit from the judgment it entered in this *habeas corpus* case on December 17, 2019.

Jurisdiction existed in the district court because Howard Atkins filed a *pro se* petition pursuant to 28 U.S.C. § 2254, which was amended to include a claim that his sentence violated the Eighth Amendment as interpreted by Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010).

On November 19, 2015 the respondent filed an answer asserting, *inter alia,* that Howard Atkins' sentence did not violate the Eighth Amendment and was not prohibited by Miller v. Alabama, *supra.*

On May 23, 2017 counsel entered an appearance on behalf of Howard Atkins and he moved to withdraw all claims except his Eighth Amendment Miller claims, which was granted.

On August 28, 2018, without a hearing, the district court denied *habeas* relief on the Miller grounds asserted, and entered judgment. Recognizing that Howard Atkins' claim argued that the state court application of the Miller decision was contrary to and an unreasonable application thereof, the district court improperly denied the *writ* by finding that Howard Atkins sought to extend the Supreme Court's Miller decision rather than merely properly apply it.

Styled a "motion to strike", Howard Atkins sought reconsideration of the denial on September 4, 2018, which was opposed by the respondent. The district court declined to alter or amend the judgment but did issue a certificate of appealability.

Howard Atkins timely filed a notice of appeal on September 21, 2018 which, pursuant to Fed. R. App. P. 4(a)(4), was deemed filed on September 24, 2018, the date the order denying the motion to alter or amend and issuing the certificate of appealability was entered.

The United States Court of Appeals for the Sixth Circuit affirmed the judgment on December 17, 2019. Atkins v. Crowell, 945 F.3d 476 (6th Cir. 2019).

REASONS FOR GRANTING THE *WRIT*

CERTIORARI **IS APPROPRIATE BECAUSE THE JUDGMENT WAS AFFIRMED DESPITE THE FACT THAT HOWARD ATKINS IS SERVING AN UNCONSTITUTIONAL SENTENCE IN LIGHT OF GRAHAM, MILLER, AND MONTGOMERY v. LOUISIANA, 136 S.Ct. 718 (2016) WHICH PREPONDERATES TOWARDS GRANTING THE *WRIT*. Sup. Ct. R. 10(c).**

CERTIORARI **IS ALSO APPROPRIATE BECAUSE HOWARD ATKINS MEETS THE EXACTING STANDARD FOR *HABEAS CORPUS* RELIEF AT 28 U.S.C. § 2254(d)(1). THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE FOURTH CIRCUIT IN MATHENA v. MALVO, 893 F.3d 265 (4th Cir. 2019), WHICH SUPPORTS GRANTING THE *WRIT*. Sup. Ct. R. 10(a).**

RELEVANT FACTS

This petition arises out of the denial, and appellate affirmation, of Howard Atkins' Petition for *Habeas Corpus* Relief from the unconstitutional sentence he is serving.

Howard Atkins was 16 years old when, in 2000, he was charged with first degree murder, transferred for trial as an adult and, upon his conviction, sentenced to life imprisonment. His conviction was upheld on direct appeal and his post conviction petition for relief was denied, with the denial upheld on appeal. Atkins v. Holloway, 792 F.3d 654, 655-56 (6th Cir. 2015). His motion to re-open the post conviction to assert his claim that the life sentence he was serving was unconstitutional in light of Miller v. Alabama, *supra,* was denied. The trial court found "that mandatory life without parole for those under the age of 18 at the time of

their crime violates the 8th amendment's prohibition of cruel and unusual punishments"; that Howard Atkins was serving "life with parole"; and held that the Miller decision "doesn't forbid life terms for young murderers" but requires a judge to "consider the defendant's youth and the nature of the crime before sentencing the defendant to imprisonment with no hope for parole".

The Tennessee Court of Criminal Appeals affirmed the denial, focusing on the fact that Howard Atkins wasn't serving a sentence enunciated, written, or described as life without parole. Like the trial court, it failed to consider the Eighth Amendment requirement that the sentence provide a "meaningful opportunity for release based upon demonstrated maturity and rehabilitation". Miller, *supra,* at 469 *quoting* Graham, *supra,* at 75.

The district court denied the Miller claim and *habeas* petition, asserting that Howard Atkins sought to extend the Miller decision rather than properly apply it to him because the state court decision was contrary to and an unreasonable application of the Supreme Court precedent about which no reasonable, fair-minded jurist could disagree.

On appeal, with a concurring opinion noting that "Supreme Court precedent – when properly applied – compels the conclusion that the state violated the petitioner's constitutional rights", Atkins v. Crowell, *supra,* at 480, the Sixth Circuit

affirmed the judgment, holding that § 2254(d)(1) prohibited relief because the state court's denial of the *writ* "was neither 'contrary to' nor an 'unreasonable application' of Miller." *Id.,* at 478.

Howard Atkins is serving a determinate sentence of life, Tenn. Code. Ann. 40-35-211(1), which is defined as sixty years. Tenn. Code Ann. § 40-35-501(h)(1); Brown v. Jordan, 563 S.W.3d 197, 200 (Tenn. 2018). It is the mandatory minimum sentence for a first degree murder conviction. Tenn. Code Ann. §§ 39-13-204, 40-35-501(i). Tennessee law provides that he has no opportunity for parole, but can be given sentence credits for good time and program participation not to exceed 15% of his sentence. Tenn. Code Ann. § 40-35-501(i). He has a release eligibility date, but is ineligible for parole. Tenn. Code Ann. § 40-35-501(i)(2)(A). He may be released after serving at least 51 years imprisonment, Brown v. Jordan, *supra,* at 201, however, has no opportunity, much less a **meaningful** one, to obtain release based upon "demonstrated maturity and rehabilitation". Miller, *supra,* at 469 *quoting* Graham, *supra,* at 75.

LAW AND ARGUMENT

Certiorari should be granted. Howard Atkins has met the exacting standard for relief at 28 U.S.C. § 2254(d)(1) because the state court failed to reasonably distinguish Miller. Initially, it was wrong to find that Howard Atkins is serving a sentence of "life with parole" because such sentence hasn't statutorily existed in Tennessee since July 1, 1995. Tenn. Code Ann. § 40-35-501(i). The Sixth Circuit's affirmance of the district court decision to deny relief when the state court decision was wrong and both "contrary to" and an "unreasonable application" of Miller was error. Granting this petition will enhance consistent application of this Court's jurisprudence explaining the Eighth Amendment's prohibition on "cruel and unusual" punishment for juveniles. Graham, *supra,* Miller, *supra,* and Montgomery, *supra.* Further, the Sixth Circuit's decision conflicts with the Fourth Circuit in Mathena v. Malvo, *supra.* Clearly, both Sup. Ct. R. 10(a), (c) support granting the petition for *certiorari.*

Howard Atkins, 16, was transferred for prosecution as an adult, convicted of murdering his stepfather in 2000, and sentenced to life in prison. He is eligible for release after serving 51 years, Brown v. Jordan, *supra,* at 197, 200-02; Atkins v. Crowell, *supra,* at 477, if he earns the sentence credits at Tenn. Code Ann. § 41-21-236, however, is ineligible for parole and never has an opportunity to demonstrate that he has matured and been rehabilitated to the point that he should be released.

Tennessee sentencing statutes changed significantly on July 1, 1995. Prior to that date Tennessee did have a sentence called "life with parole", which the trial court erroneously found Howard Atkins was serving in denying his Miller claim. A defendant serving such sentence had both a parole eligibility date and potential parole hearing. Tenn. Code Ann. § 40-35-501(h)(1). The enactment of Tenn. Code Ann. § 40-35-501(i), effective July 1, 1995, eliminated parole eligibility and parole consideration for several offenses, including, pertinent to Howard Atkins, first degree murder. Tenn. Code Ann. § 40-35-501(i)(2)(A). Thus, while Howard Atkins has a release eligibility date upon the expiration of his life sentence,1 he is ineligible for parole and never has a post sentencing opportunity to present evidence to a decisionmaker that he is deserving of release because he has matured and been rehabilitated demonstrating that he has satisfied the subjective test this Court's Eighth Amendment jurisprudence for juveniles has announced.

Howard Atkins' sentence is what several courts have called a "*de facto* life without parole" sentence because "there shall be no release eligibility . . . [Howard Atkins] shall serve 100% of the sentence imposed by the court less sentence credits earned and retained". Tenn. Code Ann. § 40-35-501(i)(1). A *de facto* life sentence occurs where a juvenile defendant is sentenced to life with the possibility of parole arising in name only, such as after an extraordinary length of years which meets or exceeds the child's life expectancy. Atkins v. Crowell, *supra,* at 481(concurring opinion).

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1 The sentence of life is a determinate sentence of sixty years, Tenn. Code Ann. §§ 40-35-211(1), 501(h)(1), less any sentencing credits earned and retained. Brown v. Jordan, *supra,* at 200-02.

Eighth Amendment claims apply to both sentencing hearings and parole decisions. "The Court holds that the constitutional protections recognized by Graham, Miller, and Montgomery apply to parole proceedings for juvenile offenders serving a maximum term of life imprisonment". Flores v. Stanford, 2019 WL 4572703, *9 (S.D.N.Y. 2019). See also, Brown v. Precythe, 2018 WL 4956519 (W.D. MO. 2018). A juvenile life sentence meets Eighth Amendment requirements, absent a finding of "irretrievable depravity", when a meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation" exists. Miller, *supra,* at 469 *quoting* Graham, *supra,* at 75. Howard Atkins never has an opportunity to demonstrate his maturity and rehabilitation to a parole board or other release decisionmaker. Tenn. Code Ann. § 40-35-501(i)(1). He is serving a sentence of "*de facto* life without parole" because he has no opportunity to present evidence regarding, much less meet, the subjective test of "maturity and rehabilitation" this Court's Eighth Amendment jurisprudence has outlined in Graham, *supra,* Miller, *supra,* and Montgomery, *supra.* The state court's erroneous factual finding that he is serving "life with parole" and focus on the fact that his sentence wasn't enunciated as "life without parole", a legal option at the time he was sentenced, rather than on whether the sentence provided him a **meaningful opportunity** to obtain release based upon demonstrated maturity and rehabilitation makes it "contrary to" and an "unreasonable application" of Miller, about which no reasonable jurists could disagree. Howard Atkins never gets a hearing to present evidence of his "maturity

and rehabilitation" although he can objectively earn and retain sentence credits, potentially flattening his life sentence and being released in 51, rather than 60, years. Tenn. Code Ann. §§ 40-35-211(1), 501(h)(1); Brown v. Jordan, *supra,* at 200-02. The failure to provide him any forum to present for consideration his "demonstrated maturity and rehabilitation" required by the Eighth Amendment is not a meaningful opportunity to obtain release this Court has noted the Eighth Amendment requires. The lower federal courts' failure to recognize that Howard Atkins meets the statutory standard for relief at § 2254(d)(1) threatens consistent application of settled Eighth Amendment jurisprudence regarding the constitutional requirements for sentencing a juvenile and militates towards granting the *writ of certiorari* sought.

CONSTITUTIONAL REQUIREMENTS

The central tenet of the Supreme Court's Eighth Amendment jurisprudence with respect to "juvenile lifer's", derived from a trilogy of cases, is that because children are different a juvenile sentenced to life imprisonment must either be found to be "irreparably corrupt" or provided "a meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation". Miller, *supra,* at 469 *quoting* Graham, *supra,* at 75. This substantive constitutional requirement is retroactive. Montgomery, *supra,* at 732-36. Juvenile sentences impacted by this development can be corrected by either a resentencing or "by permitting juvenile homicide offenders to be considered for parole". *Id.* at 736. The remedy for turning a juvenile sentence which violates the Eighth Amendment in light of Miller, *supra,* into a constitutional

sentence must ensure "that juveniles whose crimes reflected only transient immaturity – and have since matured – will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Id.* In other words, Howard Atkins must be provided a "meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation," or his sentence is unconstitutional. Tennessee law denies him that right and the state court erroneously found he was serving "life with parole", a sentence statutorily eliminated in Tennessee effective July 1, 1995.

Given the settled constitutional requirements, as described by the Supreme Court, Howard Atkins is entitled to *habeas* relief precisely because there is no forum for him to present evidence of his "maturity and rehabilitation", enabling him to satisfactorily demonstrate that he meets this subjective standard and obtain an early release based upon it. This Court's jurisprudence requires that, in the absence of a finding that he is "irretrievably corrupt" his crime, as heinous as it is, was the product of transient immaturity and that he has successfully fulfilled a child's heightened capacity for reform.

The Graham, Miller, Montgomery trilogy not only describes factors properly considered at the time a juvenile offender is sentenced – such as whether s/he is "irretrievably corrupt" – but by some subsequent decisionmaker charged with assessing whether to grant a juvenile offender release. Clearly, it is only after some period of time that the offender can "demonstrate maturity and reform" sufficient "to show that 'he is fit to rejoin society' ". Flores v. Stanford, *supra,* at *9; Greiman v.

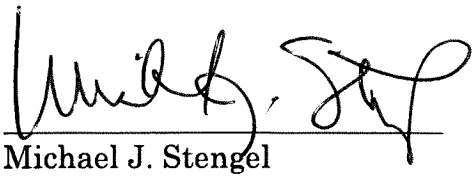
Hodges, 79 F.Supp.3d 933, 945 (S.D. Iowa 2015) *quoting* Graham, *supra,* at 79. Simply, the governing Tennessee sentencing statutes deny Howard Atkins the Graham, Miller, and Montgomery rights necessary for his *de facto* life sentence to comport with the Eighth Amendment. *Id.* He is not eligible for parole. Tenn. Code Ann. § 40-35-501(i)(2)(A). Howard Atkins must be provided a "**meaningful opportunity** to obtain release based upon demonstrated maturity and rehabilitation", or his sentence violates Eighth Amendment norms and requirements.

This Court should grant his petition, allowing it to bring the Sixth Circuit decision below in line with this Court's Graham, Miller, and Montgomery trilogy and governing Eighth Amendment norms. Granting the petition will also allow this Court to correct the Sixth Circuit's error and align the decision in this case with the conflicting Fourth Circuit decision in Mathena v. Malvo, *supra,* granting relief to a similarly situated petitioner.

CONCLUSION

Substantive Eighth Amendment jurisprudence dictates that, without a finding of "irretrievable depravity" juveniles sentenced to life imprisonment have a meaningful opportunity to obtain release based upon "demonstrated maturity and rehabilitation" given a child's relative capacity for reform. Since Howard Atkins' sentence of "life" for first degree murder makes him ineligible for parole, and the release decision is strictly an objective determination of sentencing credits, the denial of any forum to present evidence of whether he meets the subjective considerations of sufficiently "demonstrated maturity and rehabilitation" to deserve release required by the Eighth Amendment means he has met the stringent test for *habeas* relief. Howard Atkins prays this Court review the record, recognize that the considerations governing the review of this petition militate towards granting it, and accept his application. Sup.Ct.R. 10(a), 10(c).

Respectfully submitted,



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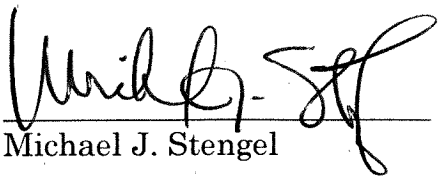
Certificate of Word Count

I, Michael J. Stengel, a member of the bar of this Court, certify that this Petition contains 3265 words according to the word processing program used to create it.

Certificate of Service

I, Michael J. Stengel, a member of the bar of this Court, certify that pursuant to Rule 29, I have served the Motion for Leave to Proceed *In Forma Pauperis* and the Petition for a *Writ of Certiorari* to the United States Court of Appeals for the Sixth Circuit, on counsel for the respondent, by enclosing a copy thereof, postage prepaid, addressed to the Solicitor General of the United States, Department of Justice, Room 5614, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001; and depositing the same in the mails at Memphis, Tennessee, and further certify that all parties required to be served, were served the original Petition on March 11, 2020 and, in accordance with the Clerk's letter of March 16, 2020 were served this Corrected Petition on the 3rd day Of April, 2020.



Michael J. Stengel

APPENDIX

1. Judgment and Opinion of the United States District Court for the Western District of Tennessee entered August 28, 2018;

2. Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered December 17, 2019.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

HOWARD J. ATKINS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 2:09-cv-02297-SHL-dkv
	)	
RANDY LEE,	)	
	)	
Respondent.	)	

ORDER MODIFYING THE DOCKET, DENYING PETITION PURSUANT TO 28 U.S.C. § 2254, DENYING A CERTIFICATE OF APPEALABILITY, CERTIFYING THAT AN APPEAL WOULD NOT BE TAKEN IN GOOD FAITH AND DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

Before the Court are the Motion Requesting Leave to Amend Pending Habeas Corpus Petition with an Issue that Has Become Newly Ripened for Federal Review ("Second Amended § 2254 Petition") filed by Petitioner, Howard Atkins, Tennessee Department of Correction ("TDOC") prisoner number 327480, who is currently incarcerated at the Northeast Correctional Complex ("NECX") in Mountain City, Tennessee (ECF No. 40), the Answer to [. . .] Petitioner's Claim Under *Miller v. Alabama* ("Second Amended Answer") filed by Respondent, who was, at the time, James Holloway (ECF No. 60), Atkins's Amended Traverse of Respondent's Answer ("Third Amended Reply") (ECF No. 67-1), Atkins's Notice of Supplemental Authority (ECF No. 74), and the Warden's Response to Petitioner's Notice of Supplemental Authority (ECF No. 75). Because the state court decision on the sole remaining issue is not contrary to or an unreasonable application of clearly established federal law and is not based on an objectively unreasonable factual finding, the Court **DENIES** the Second Amended § 2254 Petition.

I. BACKGROUND

Atkins is serving a sentence of life imprisonment with the possibility of parole for the first degree murder of his stepfather, Raymond Conway, Sr. (ECF No. 15-1 at PageID 601.) Atkins

was sixteen years old when he committed the murder. On May 7, 2009, he filed a *pro se* Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody ("§ 2254 Petition"), accompanied by a legal memorandum. (ECF Nos. 1, 1-1.)[1] On September 2, 2009, the Court directed Respondent, who was, at the time, [Prison] Warden Tony Parker, to file the state-court record and a response to the § 2254 Petition. (ECF No. 4.)

On October 7, 2009, before Warden Parker had filed his response, Atkins filed a notice that he intended to amend his § 2254 Petition. (ECF No. 11.) On November 4, 2009, he filed his amended Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody ("Amended § 2254 Petition"), which was intended to supersede, rather than to supplement, the original § 2254 Petition. (ECF No. 12.) Atkins described his claims as follows:

1. Plain error occurred when the juvenile court granted the State's motion for transfer of Petitioner to adult circuit court;

2. Denial of effective assistance of counsel at juvenile transfer hearing;

3. Denial of effective assistance of counsel at trial;

4. Denial of effective assistance of counsel on direct appeal; and

5. Plain error occurred in the charge to the jury regarding the mens rea of first degree murder and all lesser included offenses, violating petitioner's right to a jury trial.

(*Id.* at PageID 233, 235-36, 238, 246.) Atkins asks that his sentence be vacated and that he be released. (*Id.* at PageID 243.) In the alternative, he seeks a new trial with permission to pursue a plea of insanity. (*Id.*)

[1] There is a discrepancy on the docket between the "Date Filed" in the header, which is listed as May 7, 2009, and the filing date of the § 2254 Petition listed at ECF No. 1, which is May 13, 2009. The § 2254 Petition was stamped by the Clerk on May 7, 2009. The Clerk is directed to modify the docket at ECF No. 1 to reflect that the § 2254 Petition was filed on May 7, 2009.

On November 12, 2009, the Warden filed his Answer to Petition and Amended Petition for Writ of Habeas Corpus ("Answer"). (ECF No. 13.) The Warden filed the state-court record on November 20, 2009. (ECF No. 15.) On December 14, 2009, Atkins filed his Traverse of the State's Answer to Amended Petition for Writ of Habeas Corpus ("Reply"). (ECF No. 17.)

On May 14, 2012, the Court directed the Warden to file an amended answer that addressed all the claims in the Amended § 2254 Petition. (ECF No. 24.) Warden Parker filed his Answer to Amended Petition for Writ of Habeas Corpus ("Amended Answer") on July 23, 2012. (ECF No. 26.) On August 9, 2012, Atkins filed his Traverse of the State's Second Answer to Amended Petition for Writ of Habeas Corpus ("Amended Reply"). (ECF No. 27.) The Warden filed a supplement to the state-court record on August 28, 2012. (ECF No. 28.)

In an order issued on September 26, 2012, the Court denied the Amended § 2254 Petition, denied a certificate of appealability, certified that an appeal would not be taken in good faith and denied leave to proceed *in forma pauperis* on appeal. (ECF No. 30.) The Court held that, with the exception of a single claim of ineffective assistance of appellate counsel, each and every issue presented had not been properly exhausted in state court and was barred by procedural default. As for the lone exhausted sub-claim, the Court held that Atkins had not satisfied the stringent standards for overturning a state-court decision on the merits. Judgment was entered on September 27, 2012. (ECF No. 31.)

The Sixth Circuit Court of Appeals issued a certificate of appealability to address "whether Atkins can show cause and prejudice to excuse the procedural default of his claims that his juvenile court counsel and trial counsel were ineffective." (ECF No. 37.) On July 8, 2015, the Court of Appeals affirmed in part, reversed in part, and remanded the case for further proceedings. *Atkins*

v. Holloway, 792 F.3d 654, 663 (6th Cir. 2015). That order relied on the Supreme Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), which, since the issuance of the dismissal order, had been extended in *Trevino v. Thaler*, 569 U.S. 413 (2013), and made applicable to Tennessee prisoners in *Sutton v. Carpenter*, 745 F.3d 787 (6th Cir. 2014). Specifically, the Sixth Circuit held that "the district court in this case erred by using an improper standard to determine whether Atkins has shown 'cause' to excuse the procedural default of his claims for [ineffective assistance of trial counsel ("IATC")]. This is true for Atkins's claims of IATC numbered (1), (3)-(7), and (9)-(12)[.]" *Atkins*, 792 F.3d at 659-60. The Court of Appeals issued the following instructions:

> As to these claims, the district court should determine on remand: (1) whether state post-conviction counsel was ineffective; and (2) whether Atkins's claims of ineffective assistance of counsel were "substantial" within the meaning of *Martinez*, *Sutton*, and *Trevino*. Questions (1) and (2) determine whether there is cause. The next question is (3) whether Atkins can demonstrate prejudice. Finally, the last step is: (4) if the district court concludes that Atkins establishes cause and prejudice as to any of his claims, the district court should evaluate such claims on the merits.

Id. at 660 (citations omitted). The Court of Appeals affirmed the dismissal of Atkins's IATC sub-claims (2) and (8) as procedurally defaulted because the claims were adjudicated by the post-conviction court but not on the post-conviction appeal. *Id.* at 661. The Court of Appeals also affirmed the dismissal of Atkins's claims of ineffective assistance of juvenile counsel. *Id.* at 661-63.

On November 6, 2014, while his appeal was pending, Atkins filed a Motion Requesting Leave to Amend Pending Habeas Corpus Petition with an Issue that Has Become Newly Ripened for Federal Review ("Second Amended § 2254 Petition"), which sought leave to amend to assert a claim that his sentence was unconstitutional in light of the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012). (ECF No. 40.) After the Sixth Circuit mandate issued, the Court

granted leave to amend, directed the Warden to file the state-court record on the *Miller* claim and set a briefing schedule for the remanded IATC claims and the new claim. (ECF No. 45.)[2] On November 19, 2015, Warden Holloway filed his Second Amended Answer and additional portions of the state-court record. (ECF Nos. 60, 61.) On December 14, 2015, Atkins filed his Traverse of Respondent's Answer ("Second Amended Reply"). (ECF No. 66.) On December 17, 2015, Atkins filed a Motion to Amend Traverse, accompanied by his proposed Amended Traverse of Respondent's Answer ("Third Amended Reply"). (ECF Nos. 67, 67-1.) On January 5, 2016, the Court granted the Motion to Amend Traverse. (ECF No. 68.)

On May 23, 2017, an attorney filed a notice of appearance on Atkins's behalf. (ECF No. 70.) Also on May 23, 2017, counsel filed a motion withdrawing the IATC claims that had been remanded by the Court of Appeals and seeking a disposition of Atkins's remaining claim, which seeks relief under *Miller*. (ECF No. 71.)[3] The Court granted the motion to withdraw the IATC claims on February 7, 2018. (ECF No. 73.)

On March 15, 2018, Atkins, through counsel, filed a Notice of Supplemental Authority. (ECF No. 74.) The Warden filed his Response to Petitioner's Notice of Supplemental Authority on March 16, 2018. (ECF No. 75.)[4]

II. ANALYSIS

The only issue remaining to be decided is whether Atkins is entitled to relief on the basis of the Supreme Court's decision in *Miller v. Alabama*, which held that the Eighth Amendment

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[2] The order also changed the Respondent to James Holloway. (*Id.* at 1 n.1.)

[3] The matter was reassigned to the undersigned judge on June 7, 2017. (ECF No. 72.)

[4] The Clerk is directed to substitute NECX Warden Randy Lee for James Holloway as Respondent. *See* Fed. R. Civ. P. 25(d).

prohibits the imposition of mandatory sentences of life imprisonment without parole for individuals who were under the age of eighteen when they committed their crimes. 567 U.S. 460, 465 (2012). The decision in *Miller* has been made retroactively applicable to cases on collateral review. *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

On or about June 3, 2013, Atkins filed a Motion to Reopen Post-Conviction Petition in the Circuit Court for Tipton County, Tennessee, in which he sought relief on the basis of *Miller*. (ECF No. 61-1 at PageID 3588-3657.) The post-conviction court denied the motion to reopen on June 20, 2013. (ECF No. 61-2 at PageID 3850-51.) On August 29, 2013, the Tennessee Court of Criminal Appeals ("TCCA") denied leave to appeal. (ECF No. 61-6.) The TCCA reasoned that, "[i]n the present case, the Petitioner was sentenced to life imprisonment with the possibility of parole. Even if *Miller* established a new constitutional [sic] that should be applied retroactively, the Petitioner is not entitled to relief because he is not serving a sentence of life without the possibility of parole." (*Id.* at PageID 3867-68 (citing Tenn. Code Ann. § 40-30-117(a)(4).)

When a state prisoner's claim has been adjudicated on the merits in state court, as it has been here, a federal court can issue a writ only if the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2). The petitioner carries the burden of proof for this "difficult to meet" and "highly deferential standard," which "demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks and

citations omitted). Here, Atkins does not specify the provision of § 2254(d) on which he relies. It appears that Atkins claims that the TCCA's decision was contrary to, or an unreasonable application of, *Miller*. (*See* ECF No. 40 at 2-5; *see also* ECF No. 67-1 at 2-3.) In his supplement, Atkins also argues that the state decision was based on an unreasonable determination of the facts. (*See* ECF No. 74.)

To begin, Atkins has not established that the decision of the TCCA was contrary to *Miller v. Alabama*. A state court's decision is "contrary to" federal law when it "arrives at a conclusion opposite to that reached" by the Supreme Court on a question of law or "decides a case differently than" the Supreme Court has "on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Here, the TCCA cited the correct legal rule from *Miller*. (ECF No. 61-6 at PageID 3867.) This is "a run-of-the-mill state-court decision applying the correct legal rule . . . to the facts of a prisoner's case," and therefore it does not "fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Williams*, 529 U.S. at 406.

Atkins also fails to satisfy his burden of demonstrating that the TCCA's decision was an unreasonable application of *Miller*. An "unreasonable application" of federal law occurs when the state court "identifies the correct governing legal principle from" the Supreme Court's decisions "but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The state court's application of clearly established federal law must be "objectively unreasonable" for the writ to issue. *Id.* at 409. The writ may not issue on this basis merely because the habeas court, in its independent judgment, determines that the state court decision applied clearly established federal law erroneously or incorrectly. *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citing *Williams*, 529 U.S. at 411). Rather, "a state prisoner must show that the state court's ruling

on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Atkins argues that "*Miller*'s protections should apply to lengthy mandatory term-of-years sentences in respect to juveniles, specifically his mandatory minimum sentence of 60 years." (ECF No. 40 at 3.)[5] According to Atkins, "his 60 year life sentence denies him a meaningful opportunity to obtain release" notwithstanding the TCCA's holding that Atkins' "sentence is not a sentence of life-without-parole." (ECF No. 40 at 3 (internal quotation marks omitted).) In other words, Atkins complains that the TCCA declined to extend the holding in *Miller* to cases that are factually distinct from the circumstances in *Miller*. While there might be sound policy reasons for the Supreme Court or the Tennessee legislature to modify the sentences available to juveniles convicted of first degree murder, this issue is not before the Court. The only issue here is whether the TCCA's conclusion that *Miller*, by its terms, applies only to *mandatory* sentences of life without the possibility of parole "was so lacking in justification that there was an error well understood and comprehended in *existing* law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103 (emphasis added). That standard is not satisfied here.

In his supplement, Atkins argues that he is serving a life sentence without parole eligibility. (ECF No. 74.) Although Atkins does not refer to the standards for reviewing a state-court decision on the merits, he is, in essence, claiming that the TCCA's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court

[5] With sentence credits, Atkins would be eligible for release after fifty-one years. (*Id.* at 2 n.1.)

proceeding." "[W]hen a federal habeas petitioner challenges the factual basis for a prior state-court decision rejecting a claim, . . . [t]he prisoner bears the burden of rebutting the state court's factual findings 'by clear and convincing evidence.'" *Burt v. Titlow*, 571 U.S. 12, 18 (2013) (quoting 28 U.S.C. § 2254(e)(1)). A state court factual determination is not "unreasonable" merely because the federal habeas court would have reached a different conclusion. *Wood v. Allen*, 558 U.S. 290, 301 (2010); *see also Rice v. Collins*, 546 U.S. 333, 341-42 (2006) ("Reasonable minds reviewing the record might disagree" about the factual finding in question, "but on habeas review that does not suffice to supersede the trial court's . . . determination.").

In Atkins's challenge to the TCCA's factual finding that he is not serving a mandatory sentence of life imprisonment without the possibility of parole, he cites, but does not discuss, Tennessee Code Annotated § 40-35-501(i), and *Myrick v. State*, No. M2013-02352-COA-R3-CV, 2014 WL 5089347 (Tenn. Ct. App. Oct. 8, 2014), *appeal denied* (Tenn. Jan. 16, 2015). (ECF No. 74.) First, the statute provides that

> [t]here shall be no release eligibility for a person committing an offense, on or after July 1, 1995, that is enumerated in subdivision (i)(2). The person shall serve one hundred percent (100%) of the sentence imposed by the court less sentence credits earned and retained. However, no sentence reduction credits authorized by § 41-21-236 or any other provision of law, shall operate to reduce the sentence imposed by the court by more than fifteen percent (15%).

Tenn. Code Ann. § 40-35-501(i)(1). This provision does apply to persons convicted of first degree murder. *Id.* § 40-35-501(i)(2)(A). In fact, in *Myrick*, the Tennessee Court of Appeals affirmed the dismissal of a claim by an inmate who had been convicted of second degree murder that he was entitled to a parole hearing and mandatory release on parole. Applying the foregoing statutory provisions, the Tennessee Court of Appeals held that "we agree with the trial court that

Mr. Myrick is not eligible for parole and must serve his entire sentence." *Myrick*, 2014 WL 5089347, at *3.

Unfortunately, Atkins has not explained how this statutory provision and the *Myrick* decision assist him, particularly given that a life sentence is presumed to be sixty years. *See* Tenn. Code Ann. § 40-35-501(h)(1). Eighty-five percent of sixty years is fifty-one years. Therefore, Atkins's sentence is effectively fifty-one years, not a life sentence without the possibility of parole.

Indeed, the Court finds that Atkins's argument fails, for several reasons. First, the Supreme Court's decision in *Miller* is factually distinguishable from the Tennessee sentencing scheme that applied in Atkins's case. In *Miller*, the juveniles were sentenced to mandatory terms of life imprisonment without the possibility of parole. The Supreme Court emphasized that "[s]tate law mandated that each juvenile die in prison even if the judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life *with* the possibility of parole) more appropriate." 567 U.S. at 465. In Tennessee, by contrast, the available sentences for a juvenile convicted of first degree murder are life imprisonment with and without the possibility of parole. Tenn. Code Ann. § 39-13-204(a).[6] Here, the State did not seek a sentence of life imprisonment without the possibility of parole. Whether Tennessee law mandates the release of first degree murderers after they have served fifty-one years, or they merely become eligible for release, does not matter for purposes of Atkins's *Miller* claim because the state-court judgment did not impose a mandatory sentence of life imprisonment with no possibility of release.

[6] The death penalty is not available where, as here, a case was transferred from juvenile court. Tenn. Code Ann. § 37-1-134(a)(1)(B).

Second, Tennessee courts have made clear that inmates sentenced to life imprisonment are eligible for release after fifty-one years. *See, e.g., Vaughn v. State*, 202 S.W.3d 106, 118-19 (Tenn. 2006) ("[S]ubsection (i) operates . . . to raise the floor from 60% of sixty years . . . to 100% of sixty years, reduced by not more than 15% of eligible credits.") (quoting Tenn. Op. Att'y Gen., No. 97-098 (1997)); *Darden v. State*, No. M2013-01328-CCA-R3-PC, 2014 WL 992097, at *11 (Tenn. Crim. App. Mar. 13, 2014) ("Life imprisonment in Tennessee does not condemn a juvenile offender to die in prison as the life-without parole sentences contemplated by *Miller*. In Tennessee, a defendant sentenced to life imprisonment must serve 85% of sixty years, or fifty-one years, before becoming eligible for release."), *appeal denied* (Tenn. Mar. 13, 2014); *see also State v. Collins*, No. W2016-01819-CCA-R3-CD, 2018 WL 1876333, at *20 (Tenn. Crim. App. Apr. 18, 2018) ("[T]his court has consistently rejected the claim that a juvenile's mandatory life sentence, which requires service of fifty-one years before release, constitutes an effective sentence of life without parole in violation of *Miller*.") (collecting cases).

Third, in *Starks v. Easterling*, 659 F. App'x 277, 280-81 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 819 (2017), the Sixth Circuit Court of Appeals held that a state-court decision rejecting a prisoner's challenge to his sentence, which precluded him from being considered for parole until he served a term in excess of his life expectancy, was not contrary to or an unreasonable application of *Miller*.[7] Atkins's sentence is similar to, albeit shorter than, the sentence that was challenged in *Starks* and, therefore, the decision in *Starks* precludes this Court from granting relief on Atkins's *Miller* claim.

[7] The prisoner in *Starks* had been sentenced to life imprisonment plus eleven years. *Id.* at 278.

Therefore, Atkins's *Miller* claim is **DISMISSED**. Because every claim presented by Atkins has been dismissed, the Second Amended § 2254 Petition is **DENIED**. Judgment shall be entered for Respondent.

III. APPEAL ISSUES

There is no absolute entitlement to appeal a district court's denial of a § 2254 petition. *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003). The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. R. 11, Rules Governing Section 2254 Cases in the United States District Courts. A petitioner may not take an appeal unless a circuit or district judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1).

A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2) & (3). A "substantial showing" is made when the petitioner demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336 (internal quotation marks omitted). A COA does not require a showing that the appeal will succeed. *Id.* at 337. Courts, however, should not issue a COA as a matter of course. *Id.*

In this case, there can be no question that the Second Amended § 2254 Petition is meritless for the reasons previously stated. Because any appeal by Petitioner on the issue raised in his § 2254 Petition, as amended, does not deserve attention, the Court **DENIES** a certificate of appealability.

Rule 24(a)(1) of the Federal Rules of Appellate Procedure provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. However, if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal *in forma pauperis*, the prisoner must file his motion to proceed *in forma pauperis* in the appellate court. *See* Fed. R. App. P. 24(a) (4)-(5). In this case, for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore **CERTIFIED**, pursuant to Federal Rule of Appellate Procedure 24(a), that any appeal in this matter would not be taken in good faith, and leave to appeal *in forma pauperis* is **DENIED**.[8]

IT IS SO ORDERED, this 28th day of August, 2018.

s/ Sheryl H. Lipman
SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE

[8] If Petitioner files a notice of appeal, he must pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within thirty days of the date of entry of this order. *See* Fed. R. App. P. 24(a)(5).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

HOWARD J. ATKINS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 2:09-cv-02297-SHL-dkv
	)	
RANDY LEE,	)	
	)	
Respondent.	)	

JUDGMENT

JUDGMENT BY COURT. This action having come before the Court on the Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody, filed May 7, 2009 (ECF No. 1),

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that, in accordance with the Order Modifying the Docket, Denying Petition Pursuant to 28 U.S.C. § 2254, Denying a Certificate of Appealability, Certifying That an Appeal Would Not Be Takin in Good Faith and Denying Leave to Proceed *In Forma Pauperis* on Appeal (ECF No. 76), entered August 28, 2018, judgment is entered and the matter is hereby **DISMISSED WITH PREJUDICE.**

APPROVED:

s/ Sheryl H. Lipman
SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE

August 28, 2018
Date

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 19a0298p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HOWARD ATKINS,

Petitioner-Appellant,

v.

GEORGIA CROWELL, Warden,

Respondent-Appellee.

No. 18-6012

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 2:09-cv-02297—Sheryl H. Lipman, District Judge.

Decided and Filed: December 17, 2019

Before: COLE, Chief Judge; SILER and MURPHY, Circuit Judges.

COUNSEL

ON BRIEF: Michael J. Stengel, MICHAEL J. STENGEL, P.C., Memphis, Tennessee, for Appellant. Michael M. Stahl, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee.

MURPHY, J., delivered the opinion of the court in which COLE, C.J., and SILER, J., joined. COLE, C.J. (pp. 7–10), delivered a separate concurring opinion.

OPINION

MURPHY, Circuit Judge. A Tennessee jury convicted Howard Atkins of murdering his stepfather in 2000 when he was just 16 years old. A state court imposed a life sentence that (all now agree) renders Atkins eligible for release after at least 51 years' imprisonment. *See Brown v. Jordan*, 563 S.W.3d 196, 197, 200–02 (Tenn. 2018) (discussing Tenn. Code Ann. § 40-35-

501(h)–(i)). His conviction and sentence were affirmed on direct appeal. *State v. Atkins*, No. W2001-02427-CCA-R3-CD, 2003 WL 21339263 (Tenn. Crim. App. May 16, 2003).

Years later, the Supreme Court held that a sentence of "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 v. Alabama*, 567 U.S. 460, 465 (2012). (The Court concluded that *Miller* applies retroactively in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).) Atkins sought to benefit from *Miller* in state post-conviction proceedings. He argued that the life sentence he received as a 16-year-old also qualified as a "cruel and unusual" punishment under the Eighth Amendment. A state appellate court rejected his claim. It distinguished *Miller* because, unlike the juveniles in that case, Atkins could be released after 51 years' imprisonment and so was "not serving a sentence of life without the possibility of parole." Atkins then turned to the federal courts with his Eighth Amendment claim. The district court denied relief too, but issued a certificate of appealability for us to consider whether the state court reasonably distinguished *Miller* under the governing standards for federal habeas relief in 28 U.S.C. § 2254(d)(1).

Section 2254(d)(1) prohibits a federal habeas court from upending a state criminal judgment unless a state court's rejection of a constitutional claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Supreme Court has repeatedly reminded the circuit courts that this statutory test "is difficult to meet." *White v. Woodall*, 572 U.S. 415, 419 (2014) (citation omitted). The statute's "clearly established" language allows a court to grant relief based only on "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions." *Id.* (citation omitted).

So we must start by identifying *Miller*'s holding. At first glance, that task looks easy because *Miller* expressly (and repeatedly) stated its holding. The Court said at the outset: "[w]e therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Miller*, 567 U.S. at 465. It later repeated the same message: "[w]e therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of

parole for juvenile offenders." *Id.* at 479. For good measure, the Court also described what it was not holding. Since the case involved state laws that made life without parole the mandatory sentence for the juvenile defendants, *id.* at 466–69, the Court did not need to decide whether the Eighth Amendment imposed a "categorical bar on life without parole for juveniles," *id.* at 479. It held only that the Eighth Amendment prohibits states from requiring an automatic life-without-parole sentence without giving sentencing courts discretion to consider a juvenile's youth when deciding whether to impose "that harshest prison sentence." *Id.* In other words, *Miller* did "not categorically bar a penalty for a class of offenders"; it "mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing" a life-without-parole sentence. *Id.* at 483.

A later case complicates things. Despite *Miller*'s disclaimers about its reach, the Court in *Montgomery* described the decision more broadly when concluding that "*Miller* announced a substantive rule that is retroactive in cases on collateral review." 136 S. Ct. at 732. According to *Montgomery*, *Miller* in fact "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Id.* at 734 (citation omitted). "*Miller* did bar life without parole," *Montgomery* added, "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* *Montgomery* thus found that "*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Id.* Only the latter may receive a life-without-parole sentence. *Id.* The Court will soon decide whether *Montgomery* expanded *Miller*'s holding (and whether any such expansion can be applied retroactively). *See Mathena v. Malvo*, 139 S. Ct. 1317 (2019) (granting certiorari).

For our purposes, though, *Miller*'s precise scope does not matter. Atkins cannot obtain relief under § 2254(d)(1) even if *Miller* more broadly prohibited life-without-parole sentences for juveniles who are not permanently incorrigible. *Montgomery*, 136 S. Ct. at 734. Either way, the state court's holding—that a chance for release after 51 years removes Atkins's sentence from *Miller*'s orbit—was neither "contrary to" nor an "unreasonable application" of *Miller*. 28 U.S.C. § 2254(d)(1).

Start with the "contrary to" language. A state court's decision is "contrary to" a Supreme Court holding only if "the state court applies a rule different from the governing law set forth in" the Supreme Court's decision, "or if it decides a case differently than [the] Court has done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002) (citing *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). The state court did nothing of the sort here. Whether read broadly or narrowly, *Miller* creates a legal rule about life-without-parole sentences. And, whether one looks at Atkins's sentence formally or functionally, he did *not* receive a life-without-parole sentence. He will be eligible for release after at least 51 years' imprisonment. *See Brown*, 563 S.W.3d at 197. *Miller*'s holding simply does not cover a lengthy term of imprisonment that falls short of life without parole. *See Starks v. Easterling*, 659 F. App'x 277, 280–81 (6th Cir. 2016); *cf. Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir. 2012). Similarly, the facts of Atkins's case (the possibility of release after 51 years' imprisonment) materially distinguish it from the facts of *Miller* (no possibility of release). *Cf. Lockyer v. Andrade*, 538 U.S. 63, 74 & n.1 (2003).

Nor was the state court's decision an "unreasonable application" of *Miller*. A state decision cannot have unreasonably *applied* a Supreme Court precedent if a habeas petitioner needs a federal court "to *extend* that precedent" to obtain relief. *Woodall*, 572 U.S. at 426. Atkins needs that type of extension here. He asks us to expand *Miller*'s holding to cover life sentences that include a lengthy prison term before any potential release. "'Perhaps the logical next step from'" *Miller* would be to hold that a life sentence without any chance of parole for 51 years "does not satisfy the Eighth Amendment, but 'perhaps not.'" *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1729 (2017) (per curiam) (citation omitted). After all, *Miller* reasoned that life-without-parole sentences are unique, noting that they "share some characteristics with death sentences that are shared by no other sentences." *Miller*, 567 U.S. at 474 (quoting *Graham v. Florida*, 560 U.S. 48, 69 (2010)). The portion of *Miller* tailored to life-without-parole sentences shows that there is at least a "reasonable argument" that it applies only to those types of sentences. *Demirdjian v. Gipson*, 832 F.3d 1060, 1076 (9th Cir. 2016). That reasonable argument forecloses any claim that the state court acted unreasonably under § 2254(d)(1).

All told, *Miller* emphasized the "without parole" component of its holding five times. *See* 567 U.S. at 465, 470, 477, 479, 489. A "limitation thus emphasized is one the state courts may honor, with relatively little fear of being found 'objectively unreasonable' for doing so." *Mendoza v. Berghuis*, 544 F.3d 650, 655 (6th Cir. 2008).

Atkins resists this conclusion. According to him, *Miller* held that *all* juvenile sentences "must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Miller*, 567 U.S. at 479 (quoting *Graham*, 560 U.S. at 75). This reading would dramatically expand *Miller*'s scope and create significant uncertainty to boot. How many years may a sentence extend before juveniles must receive their first parole hearing? Atkins does not say. If *Miller* intended the broad reach that he proposes, we would have expected clear language to that effect along with guidance for lower courts on how to implement the Court's holding. But the language from *Miller* that Atkins highlights can be found only in a parenthetical immediately following a "Cf." citation to *Graham* (signaling a comparison). *Id.* Just as Congress does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), so too we do not think the Supreme Court alters its expressed holdings in parentheticals attached to case citations. Neither Congress nor the Supreme Court "hide[s] elephants in mouseholes." *Id.*

Atkins also relies on decisions extending *Miller* to hold that even life sentences with the possibility of parole can violate the Eighth Amendment. But none of Atkins's decisions—a mix of state-court and district-court cases—addressed this Eighth Amendment question under § 2254(d)(1)'s constraints. *See, e.g.*, *People v. Buffer*, 75 N.E.3d 470, 477–85 (Ill. App. Ct. 2017). And when interpreting § 2254(d)(1), the Supreme Court has told us that these types of cases may not be "used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme] Court has not announced." *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per curiam); *see Kernan v. Cuero*, 138 S. Ct. 4, 9 (2017) (per curiam). They thus say nothing, for purposes of § 2254(d)(1), about what *Miller* clearly established.

* * *

We have previously described the facts surrounding Atkins's murder of his stepfather. *Atkins v. Holloway*, 792 F.3d 654, 655–56 (6th Cir. 2015). Atkins alleged that his stepfather "regularly abused him and his mother." *Id.* at 655. And on the night of the murder, he returned home to "the sounds of his mother['s] crying . . . audible from outside." *Atkins*, 2003 WL 21339263, at *1. Reasonable people can debate a sentencing policy that did not give the 16-year-old Atkins any opportunity for release for 51 years. But that policy debate falls outside our mandate. The Constitution and § 2254(d)(1) make our role far different from that of the state legislature, the state sentencing court, or even the state appellate court that considered Atkins's constitutional claim. Finding that the state appellate court reasonably distinguished *Miller*, we grant Atkins's motion to proceed in forma pauperis but affirm the denial of relief.

CONCURRENCE

COLE, Chief Judge, concurring. On occasion, AEDPA's onerous standards require us to deny a habeas petitioner's application for relief even though the sentence he received is unconstitutional. This outcome is most troubling in cases like Atkins's, where Supreme Court precedent—when properly applied—compels the conclusion that the state violated the petitioner's constitutional rights. But although Congress has tied our hands when it comes to Atkins's sentence, it may not be too late for juveniles who appeal their sentences on direct review. I thus write separately to explain why I conclude that the Supreme Court has banned the practice of sentencing a child to de facto life without parole.

To determine whether a sentence violates the Eighth Amendment's prohibition on "cruel and unusual punishments" courts must look to "the evolving standards of decency that mark the progress of a maturing society." *Graham v. Florida*, 560 U.S. 48, 58 (2010) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). In the last decade and a half, the Supreme Court has recognized and reified an emerging standard of decency: when it comes to punishment, children are different, and sentencing courts must take those differences into account. First, in *Roper*, the Court held that it was cruel and unusual to execute children under the age of 18. *Roper v. Simmons*, 543 U.S. 551, 568 (2005). Its conclusion was based on a host of factors, including the diminished mental capacity of minors, their vulnerability and inability to control their surroundings, and the plasticity of their identities relative to adults. *Id.* at 569–70. So, the Court concluded, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* at 570.

This theme—that children have diminished culpability and heightened capacity for reform—redounds throughout the subsequent series of cases focusing on sentences short of the death penalty. In *Graham*, the Court held that the Eighth Amendment forbids the sentence of life without parole for juvenile non-homicide offenders, observing that "[w]hat the State must do . . .

is give [juvenile] defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 560 U.S. at 74–75. In *Miller*, the Court went further, holding that for all but the rarest of juvenile offenders, "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole" because, "[b]y 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 v. Alabama*, 567 U.S. 460, 479 (2012). Finally, the *Montgomery* court, in holding that *Miller* had retroactive effect, crystallized the rule that life without parole constitutes excessive punishment for all non-incorrigible juveniles because "the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Montgomery v. Louisiana*, 136 S.Ct. 718, 734 (2016) (quoting *Miller*, 567 U.S. at 472).

That leaves the question of what to do with cases where a juvenile defendant is sentenced to life with the possibility of parole arising only after an extraordinarily lengthy term of years that may reach or exceed the defendant's life expectancy. These types of sentences—where a child can be expected to spend the remainder of her life behind bars—constitute de facto life without parole. And the logic of *Roper*, *Graham*, *Miller*, and *Montgomery* ineluctably extends not only to de jure life without parole sentences but also to de facto ones: both types of sentences deny a child offender a chance to return to society. To hold otherwise would lead to the absurd result of permitting sentencing courts to circumvent *Miller* by sentencing juveniles to a term of years that exceeds the juvenile's projected lifespan. Surely this is not what the Supreme Court intended when it said that it was a "foundational principle" that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 567 U.S. at 474.

It is true, as the majority notes, that *Miller* repeatedly uses the phrase "without parole" to describe the category of life sentences that it determined was unconstitutional. (Maj. Op. at 5). But the *Miller* Court did not hang its reasoning on whether a state court formally designated a sentence as one involving "life without parole." Instead, it targeted as unconstitutional punishments that "[i]mprison[ ] an offender until he dies" and "alter[ ] the remainder of his life 'by a forfeiture that is irrevocable.'" *Miller*, 567 U.S. at 474–75 (quoting *Graham*, 560 U.S. at

69). Thus, to reach the conclusion that the Supreme Court has already opined that sentencing courts may not impose a term-of-years sentence on a juvenile that exceeds the juvenile's life expectancy, one need not search for elephants in mouseholes. One need only recognize that the Court has spoken with clarity on a simple yet profound moral principle: it defies decency to sentence a child to die in prison without considering the fact that he is a child. I therefore must conclude that, under established precedent, it is unconstitutional for a court to sentence a child to a term of imprisonment with no meaningful opportunity for release and no meaningful consideration of his or her chances of rehabilitation.

An ever-increasing number of courts have also reached this conclusion. In *Starks v. Easterling*, Judge White, concurring, observed that state courts in California, Colorado, Connecticut, Florida, Iowa, Mississippi, Washington, and Wyoming have all rejected "as cruel and unusual lengthy sentences that approach or exceed a [juvenile] defendant's life expectancy, regardless whether that sentence bears the title 'life without parole.'" *Starks v. Easterling*, 659 F. App'x 277, 283 (6th Cir. 2016) (White, J., concurring). In the wake of *Starks*, other states have added to this chorus. *See, e.g.*, *State v. Zuber*, 152 A.3d 197, 212–13 (N.J. 2017) ("The term-of-years sentences in these appeals—a minimum of 55 years' imprisonment for Zuber and 68 years and 3 months for Comer—are not officially 'life without parole.' But we find that the lengthy term-of-years sentences imposed on the juveniles in these cases are sufficient to trigger the protections of *Miller* under the Federal and State Constitutions.") So, too, have federal circuit courts—some, on habeas review—concluded that the Constitution prohibits the imposition of de facto life without parole sentences on minors. *Budder v. Addison*, 851 F.3d 1047, 1059 (10th Cir. 2017) (reversing the denial of habeas relief where a juvenile was sentenced to serve at least 131.75 years in prison because the sentence did not "provide him a realistic opportunity for release"); *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016) (holding that "the logic of *Miller* applies" to a 100-year sentence because it was for "such a long term of years (especially given the unavailability of early release) as to be—unless there is a radical increase, at present unforeseeable, in longevity within the next 100 years—a *de facto* life sentence"); *Moore v. Biter*, 725 F.3d 1184, 1194 (9th Cir. 2013) (holding, on habeas review, that a state court's imposition of a lengthy term-of-years sentence that left a juvenile offender with "no hope

of reentering society" was irreconcilable with *Graham* and therefore unconstitutional under clearly established law).

But despite the ever-growing body of precedent, as the majority correctly notes, under AEDPA we may grant relief only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Even if a petitioner demonstrates that a state court incorrectly interpreted Supreme Court case law, his petition still may not meet this exacting standard: "To satisfy this high bar, a habeas petitioner is required to 'show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Woods v. Donald*, 135 S.Ct. 1372, 1376 (2015) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). "Surely no fairminded jurist could conclude that a sentence mandating a hundred years in prison is anything other than life without parole, and drawing that distinction based on the wording of a defendant's sentence—life, life without parole, or a term of years—would be an unreasonable application of *Graham* and *Miller*." *Starks*, 659 F. App'x at 284 (White, J., concurring). But because it is possible that fairminded jurists could disagree as to whether Atkins's sentence of life with the possibility of parole in 51 years is a de facto sentence of life without parole inconsistent with *Graham*, *Miller*, and *Montgomery*, AEDPA requires us to affirm the denial of relief.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-6012

HOWARD ATKINS,

Petitioner - Appellant,

v.

GEORGIA CROWELL, Warden,

Respondent - Appellee.

Before: COLE, Chief Judge; SILER and MURPHY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Tennessee at Memphis.

THIS CAUSE was heard on the record from the district court and was submitted on .

IN CONSIDERATION THEREOF, it is ORDERED that Howard Atkins's motion to proceed in forma pauperis is GRANTED and the denial of his petition for a writ of habeas corpus is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk