

CASE NO. 16-6738

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CYNTOIA BROWN,
Petitioner-Appellant,

v.

CAROLYN JORDAN, Warden,
Respondent-Appellee.

On Appeal from the United States District
Court for the Middle District of Tennessee

BRIEF OF APPELLANT CYNTOIA BROWN

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STATEMENT REQUESTING ORAL ARGUMENT

Cyntoia Brown respectfully requests oral argument. The two legal issues certified for appeal by the district court are substantial and complicated.

The first issue involves important questions of law involving the application of Miller v. Alabama, 567 U.S. 460 (2012), to juveniles in Tennessee who are tried and sentenced to life imprisonment for first-degree murder. The applicability of Miller to this case is complicated, as the State courts and district court below had assumed that Ms. Brown would be eligible for parole after serving 51 years of her sentence, but a 2014 decision of the Tennessee Court of Appeals, Myrick v. Tennessee, 2014 WL 5089347 (Tenn. Ct. App. October 8, 2014) (see Addendum), suggests that Ms. Brown will never be eligible for parole at all. Certifying the question of whether Ms. Brown ever would be eligible for parole to the Tennessee Supreme Court may be warranted before addressing the issue of how Miller applies to Ms. Brown's sentence.

The second issue on appeal, concerning Ms. Brown's ability to form the mens rea necessary for first-degree murder, is complicated as well. It turns upon multiple days of detailed expert psychiatric and psychological testimony. Given the novel and important constitutional questions involved, and the scientific evidence involved, oral argument should aid the Court in deciding this case.

STATEMENT OF JURISDICTION

Cyntoia Brown, then a juvenile, was indicted on February 11, 2005, on charges of first-degree murder, felony murder, and especially aggravated robbery. (R. 14, Ex. 1; Notice of Filing; Pg ID 243-47.) She was tried as an adult and was convicted on all counts. (Id. at 419, 421-22.) After trial, sentencing, appeal, and post-conviction proceedings in the State of Tennessee, Ms. Brown filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Tennessee. (R. 1; Petition; Pg ID 1.) The district court possessed subject-matter jurisdiction over Ms. Brown's petition pursuant to 28 U.S.C. §§ 2241, 2254.

The State of Tennessee opposed the Petition (R. 15; Response; Pg ID 4909), and the petition was denied by the district court on October 28, 2016. (R. 26; Order; Pg ID 5503.) Ms. Brown filed a timely notice of appeal on November 28, 2016, while a motion to reconsider was pending. (R. 29; Notice of Appeal; Pg ID 5525.) The district court subsequently denied the motion to reconsider and entered an order issuing a certificate of appealability on two issues. (R. 43; Order; Pg ID 5666.)

On October 13, 2017, Ms. Brown filed a timely amendment to her notice of appeal based on the denial of her motion for reconsideration. (R. 44; Amended Notice of Appeal; Pg ID 5675.)

This Court possesses subject-matter jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253, which grant appellate jurisdiction to the United States Courts of Appeals over final judgments in habeas proceedings when a certificate of appealability has been granted.

STATEMENT OF THE ISSUES

The district court granted a certificate of appealability on two issues:

- (1) "Whether Brown's mandatory minimum life sentence is unconstitutional?"; and
- (2) "Whether Brown was actually innocent because she was incapable of forming the requisite mens rea to commit the crimes for which she was convicted?"

STATEMENT OF THE CASE

Cyntoia Brown's mother continually consumed alcohol -- sometimes over a "fifth" a day -- while she was pregnant with Ms. Brown, resulting in Ms. Brown being born with a mental defect, Alcohol-Related Neurological Disorder. (R. 14, Ex. 31; Mitchell Aff.; Pg ID 3709; R. 14, Ex. 29; Post-Conviction Hrg. Tr. II; Pg ID 3387, 3432, 3451.) Subsequently abandoned by her mother, Ms. Brown showed early episodes of psychosis, and she started to have difficulty in elementary school, despite an IQ of 134. (Id. at 3387, 3482, 3539.)

In 2004, when Ms. Brown was 16, she was living with and being sexually abused by a 24-year-old man, Garion "Cut Throat" McGlothen. (R. 1; Petition;, Pg ID 7; R. 1, Ex. 1; State Post-Conviction trial-court decision; Pg ID 38.) McGlothen was extremely violent, physically and sexually abusing Ms. Brown. (R. 1 at 10; R. 1, Ex. 1 at 38; R. 14, Ex. 29; State Post-Conviction Tr. II; Pg ID 3391.) McGlothen ordered Ms. Brown, against her will, out onto the streets of Nashville to earn money as a prostitute, providing her with a pistol for protection. (R. 14, Ex. 29; State Post-Conviction Tr. II; Pg ID 3396.)

Ms. Brown met 43-year-old Johnny M. Allen at a drive-in restaurant, where he solicited her as a prostitute. (R. 1, Ex. 1 at 39.) Allen took Ms. Brown to his house to knowingly commit statutory rape. (Id.) While there, Ms. Brown became afraid of Allen, based on his weapons cache and his strange

demeanor and behavior, and she shot him with her pistol, killing him. (Id.; See also, R. 14, Ex. 19; State Post-Conviction Tr. II; Pg ID 3400-05.) Fearing returning to McGlothen empty-handed, Ms. Brown then stole money and other property from Allen's house. (Id. at 3407.)

Cyntoia Brown was charged in Davidson County, Tennessee as an adult, indicted on counts of first-degree murder, felony murder, and aggravated robbery. (R. 14; Notice of Filing; Pg ID 243-47.)

The issue of Ms. Brown's mental capacity first came up at a pretrial suppression hearing. At that hearing, Dr. William Bernet, a psychiatrist, testified that he had conducted a psychological examination of Ms. Brown and had diagnosed her with borderline personality disorder. See Tennessee v. Brown, 2009 WL 1038275 (Tenn. Ct. Crim. App. April 20, 2009) (The decision is located in the record at R. 1, Ex. 3; Opinion of the Tennessee Court of Criminal Appeals; Pg ID 114.) Dr. Bernet testified that Ms. Brown's score on the Global Assessment Functioning Scale, 35 out of 100, showed major psychological impairment in several areas of life-function: judgment, thinking, communication, work/school, and family relations. (Id. at 115.)

The trial court denied Ms. Brown's suppression motion, and Ms. Brown was tried on the indictment. The jury convicted Ms. Brown of first-degree and felony murder, and especially aggravated robbery. (R. 14; Notice of Filing; Pg ID 421-22.)

At sentencing, the trial court merged the two murder charges and sentenced Ms. Brown to life in prison for murder, plus twenty years for the robbery verdict, to be served concurrently. (Id. at 105.) The sentence of life imprisonment was the minimum sentence available under Tenn. Code Ann. § 39-13-202(c) (2004).

On appeal, the Tennessee Court of Criminal Appeals reversed Ms. Brown's conviction of especially aggravated robbery, which was reduced to aggravated robbery on remand. (R.1, Ex. 3; Opinion of the Tennessee Court of Criminal Appeals; Pg ID 128.) The court affirmed the remainder of Ms. Brown's conviction and sentence. Id.

Ms. Brown sought review of the Tennessee Court of Criminal Appeals' decision by the Tennessee Supreme Court, which was denied. (R. 14, Ex. 25; Order; Pg ID 3002.)

Ms. Brown, pro se, filed a State post-conviction petition seeking retrial based on ineffective assistance of counsel for failure to put on a mental-health defense, particularly, a defense based on Fetal Alcohol Syndrome; for failure to call Brown as a witness at trial; and for newly-discovered evidence (especially regarding Fetal Alcohol Syndrome) proving actual innocence. (R. 14, Ex. 26; Petition; Pg ID 3060.)

Counsel was appointed for Ms. Brown (R. 14, Ex. 26; Amended Petition; Pg ID 3081), and, through counsel, she amended her post-conviction petition. In her amended petition, Ms. Brown additionally argued that her mandatory

sentence of life imprisonment as a juvenile violated her rights under the Eighth Amendment to the United States Constitution. (R. 14, Ex. 26; Amended Petition; Pg ID 3083.)

In the State post-conviction proceeding, Ms. Brown presented evidence from multiple mental-health professionals regarding Ms. Brown's exposure to alcohol in utero, and her then-current mental condition. Brown v. Tennessee, 2014 WL 5780718 (Tenn. Ct. Crim. App. November 6, 2014). (The decision is located in the record at R. 1, Ex. 2; Opinion; Pg ID 80.)

That evidence was described by the Tennessee Court of Criminal Appeals. Dr. Adler, a clinical and forensic psychiatrist, had diagnosed Ms. Brown with Alcohol Related Neurodevelopmental Disorder ("ARND"), including extensive testimony regarding the effect of ARND on decisionmaking and processing, resulting in Ms. Brown being "seriously impaired" by her severe mental disease and defect. (Id. at 87.) Dr. Paul Connor, a neuropsychologist, testified that Ms. Brown had deficits in five domains of thinking, indicating "quintessentially the pattern that I would be expecting to see with fetal alcohol." (Id. at 89.) A third witness, Dr. Natalie Novick Brown (no relation), a clinical psychologist, corroborated and supported the other expert testimony regarding the effect of fetal alcohol exposure on Ms. Brown while she was developing in utero, and regarding the fact that Ms. Brown's ability to make decisions correctly "was impaired"

such that she was mentally incapable of forming the requisite mens rea. (Id. at 89-90.)

The State did not call any expert witness of its own or introduce evidence to rebut the testimony of the three mental-health experts.

Despite the evidence that Ms. Brown introduced, and while finding that Ms. Brown suffered from ARND, the Tennessee trial court denied relief. (Id. at 94.) On appeal to the Tennessee Court of Criminal Appeals, Ms. Brown again contested the constitutionality of her mandatory life sentence and also argued that she was actually innocent due to an inability to form the requisite mens rea for the crime. (R. 14, Ex. 37; Brief of Cyntoia Brown; Pg ID 80, 85-94.)

The Tennessee Court of Criminal Appeals affirmed the trial court's denial of Ms. Brown's post-conviction petition. (Brown v. Tennessee; R. 1, Ex. 2; Pg ID 104.) With regard to Ms. Brown's sentence, the appellate court distinguished Miller v. Alabama, 567 U.S. 460 (2012), on the ground that the Supreme Court's decision only made sentencing of juveniles to life imprisonment without the possibility of parole unconstitutional, whereas "life without the possibility of parole is not the sentence at issue here." (Id. at 104.) In addition, the Tennessee Court of Criminal Appeals held that, while the trial court "concluded that the Petitioner suffered from ARND, . . . the Petitioner had to establish by clear and convincing evidence that no jury would have convicted her in

light of the new evidence" in order to show her actual innocence, and it did not believe that that standard was met. (Id. at 101.)

Ms. Brown's petition for review by the Tennessee Supreme Court was denied. (R.1, Ex. 39; Order; Pg ID 4908.)

Ms. Brown filed a timely petition for writ of habeas corpus in the United States District Court for the Middle District of Tennessee, raising, among other issues, the two issues now before this Court. (R. 1; Petition; Pg ID 1.) With regard to Ms. Brown's sentence, Ms. Brown asserted as her first claim, "The mandatory life sentence imposed upon the Petitioner/Child is unconstitutional, in violation of the 8th and 14th Amendments to the United States Constitution." (Id. at 6.)

The district court denied Ms. Brown's petition. (R. 25; Memorandum; Pg ID 5488.) With regard to her sentence of life imprisonment, the district court held that the State courts "correctly noted that the prisoner was sentenced to life imprisonment with the possibility of parole, thus rendering the Miller decision inapplicable to this case." (Id. at 5501-02.)

Ms. Brown appealed (R. 29; Notice of Appeal; Pg ID 5525) after filing a Rule 59 motion for reconsideration (R. 27; Motion; Pg ID. 5503). The district court refrained from ruling on the Rule 59 motion (R. 38; Order; Pg ID 5654), believing that it lacked jurisdiction. This Court ordered the

district court to rule on the Rule 59 motion. (R. 41; Order; Pg ID 5661.) On remand, the district court denied the Rule 59 motion and granted a Certificate of Appealability as to two issues: 1) whether Ms. Brown's mandatory life sentence is unconstitutional; and 2) whether Ms. Brown was actually innocent because she was incapable of forming the requisite mens rea to commit the crimes for which she was convicted. (R. 43; Order; Pg ID 5666.)

This appeal followed.

SUMMARY OF THE ARGUMENT

The district court erred in refusing to grant Ms. Brown's habeas petition. The last State-court decision to consider Ms. Brown's case on the merits, that of the Tennessee Court of Criminal Appeals, contravened the Supreme Court's decisions in Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010); In re Winship, 397 U.S. 358 (1970); Patterson v. New York, 432 U.S. 197 (1977); and Jackson v. Virginia, 443 U.S. 307 (1979).

I. Eighth Amendment.

Under Miller v. Alabama, Ms. Brown's sentence of imprisonment for life, for an act committed while she was a juvenile, is unconstitutional. While some courts have suggested that defendants in Tennessee are eligible for parole after 51 years, the premise of those decisions was vitiated by a 2014 decision of the Tennessee Court of Appeals, Myrick v. Tennessee, 2014 WL 5089347 (Tenn. Ct. App. October 8, 2014). After Myrick, there should be no doubt that, as a matter of law, a juvenile sentenced in Tennessee to life imprisonment for first-degree murder is not eligible for parole. For that reason, the final State court's decision denying Ms. Brown post-conviction relief was contrary to existing Supreme Court precedent. The district court should have granted Ms. Brown's habeas petition on that basis. Cf. 28 U.S.C. § 2254(d)(1).

Moreover, in Ms. Brown's case, the Tennessee Court of Criminal Appeals, in contrast to the Tennessee Court of

Appeals ruling in Myrick, held that Tennessee's statutory scheme is constitutional under Miller because Ms. Brown supposedly is eligible for parole after 51 years of incarceration, when she is 68 years old. (R. 1, Ex. 3; Opinion of the Tennessee Court of Criminal Appeals; Pg ID 114.) But even if Ms. Brown were eligible for parole at age 68, that would still violate the Supreme Court's requirement in Miller that the State "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. 48, 75).

II. Actual Innocence.

The Tennessee court's ultimate finding that Ms. Brown possessed the mental capacity sufficient to possess the mens rea for first-degree murder was an unreasonable determination of the facts in light of the evidence presented in State court. Cf. 28 U.S.C. § 2254(d)(2). As a 16-year-old suffering from the lasting effects of fetal alcohol exposure, the unrebutted scientific facts presented in State court clearly showed that Ms. Brown was not capable of the mental state sufficient for a murder conviction. The district court erred in denying Ms. Brown's habeas petition, based on the Supreme Court's decisions in In re Winship, 397 U.S. 358 (1970); Patterson v. New York, 432 U.S. 197 (1977); and Jackson v. Virginia, 443 U.S. 307 (1979).

ARGUMENT

Standard of Review and
Legal Standards

This Court reviews a district court's denial of a petition for writ of habeas corpus de novo. E.g., White v. McGinnis, 131 F.3d 593, 595 (6th Cir. 1997); McGore v. Wrigglesworth, 114 F.3d 601, 604 (6th Cir. 1997).

28 U.S.C. § 2243 provides that a court entertaining an application for a writ of habeas corpus "shall forthwith award the writ . . . unless it appears from the application that the applicant or person detained is not entitled thereto." 28 U.S.C. § 2254(a) provides that United States district courts "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution . . . of the United States." 28 U.S.C. § 2254(d) (1) provides that a State prisoner asserting a violation of the U.S. Constitution, whose constitutional claim has been adjudicated in State court, shall receive federal habeas relief when the State court's decision has "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." 28 U.S.C. § 2254(d) (2) provides that habeas relief is appropriate when the State-court decision under federal review was "based on an

unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

I. EIGHTH AMENDMENT

In Miller v. Alabama, 567 U.S. 460 (2012), the Supreme Court held that the Eighth Amendment prohibits States from sentencing juveniles to a sentence of life imprisonment without eligibility for parole. Critically, when a juvenile is eligible for parole, such parole schemes "must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" Miller, 567 U.S. at 479 (quoting Graham v. Florida, 560 U.S. 48, 75).

In Ms. Brown's case, the Tennessee Court of Criminal Appeals held that the Supreme Court's decision in Miller v. Alabama does not apply to Ms. Brown's sentence of life imprisonment, asserting, without discussion or reasoning of any kind, that Ms. Brown is eligible for parole after 51 years. As a matter of law, however, the Tennessee Court of Criminal Appeals' decision was directly contrary to Miller v. Alabama and was an unreasonable application of the Supreme Court's decision. For that reason, the district court erred in failing to issue the writ.

A. Ms. Brown's sentence of mandatory life imprisonment as a juvenile violated the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012).

Under Tennessee law, Ms. Brown was automatically sentenced to life imprisonment for her murder conviction.

Tenn. Code Ann. § 39-13-202(c) (2004 & Supp. 2017) provides that a person convicted of first-degree murder shall be punished by: "(1) Death; (2) Imprisonment for life without the possibility of parole; or (3) Imprisonment for life." On its face, Tennessee's statute for first-degree murder contains an ostensible distinction between a sentence of life imprisonment and a sentence of life imprisonment without the possibility of parole. The Tennessee General Assembly, however eliminated the possibility of parole for defendants convicted of first-degree murder in 1995. That year, the Tennessee legislature passed an Act, 1995 Tenn. Pub. Act ch. 492, now codified at Tenn. Code Ann. 40-35-501(i), which provides:

(1) There 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. . . .

(2) The offenses to which subdivision (i)(1) applies are:

(A) Murder in the first degree;

. . . .

As explained by the Tennessee Court of Appeals¹ in 2014, in passing Section 40-35-501(i), the Tennessee legislature left intact the parole eligibility rules for offenses committed prior to July 1, 1995, codified at Tenn. Code Ann. § 40-35-501(h). Myrick v. Tennessee, 2014 WL 5089347 (Tenn. Ct. App. October 8, 2014) (slip op., see Addendum). For convictions after that date, however, the Tennessee Court of Appeals directly held that defendants convicted of the enumerated offenses in section 40-35-501(i)(2) "[are] not eligible for parole and must serve [their] entire sentence." (Id. at 5.)

The Tennessee statutory scheme, in which defendants convicted of first-degree murder are, in one statutory provision, sentenced to life imprisonment, while a separate statutory provision eliminates the possibility of parole for those defendants, is similar to the Michigan statutory scheme already found to be unconstitutional by this Court. Cf. Hill v. Snyder, 821 F.3d 763 (6th Cir. 2016).

In Ms. Brown's case, the Tennessee Court of Criminal Appeals assumed -- probably based on a reading of section 39-

¹ In Tennessee, the Tennessee Court of Criminal Appeals is an intermediate appellate court with jurisdiction over direct criminal appeals and specific statutory criminal matters. Tenn. Code Ann. § 16-5-108. It properly possessed jurisdiction over Ms. Brown's direct appeal and post-conviction appeal. The Tennessee Court of Appeals possesses intermediate appellate jurisdiction in all civil cases, including chancery actions seeking an injunction or mandamus. Tenn. Code Ann. § 16-4-108. For that reason, the Tennessee Court of Appeals possessed jurisdiction over Myrick's appeal

13-202(c) alone -- that Ms. Brown has the possibility of parole. See Brown v. Tennessee, 2014 WL 5780718 (Tenn. Ct. Crim. App. November 6, 2014). Accord, Tennessee v. Polochak, 2015 WL 226566 (Tenn. Ct. Crim. App. January 16, 2015); Perry v. Tennessee, 2004 WL 115381 (Tenn. Ct. Crim. App. January 21, 2004).

In its decision in Ms. Brown's case, the Tennessee Court of Criminal Appeals did not cite the then-recent Tennessee Court of Appeals Myrick decision, nor did the Tennessee Court of Criminal Appeals discuss the effect of Section 40-35-501(i) on Tennessee's statutory scheme. The Tennessee Court of Criminal Appeals merely asserted, when applying Miller v. Alabama to Ms. Brown's case, without citation to section 40-35-501(i) or any reasoned discussion whatsoever, "As the post-conviction court noted, though, life without the possibility of parole is not the sentence at issue here." (R.1, Ex. 1 at 25.)

The confusion in Tennessee law regarding the availability of parole after the 1995 statute is understandable. In 2006, the Tennessee Supreme Court noted that "there was a conflict in the provisions" of Tennessee's statutory scheme after the 1995 amendment. Vaughn v. Tennessee, 202 S.W.3d 106, 118 (Tenn. 2006). The Tennessee Supreme Court referenced a 1997 opinion of the Tennessee Attorney General, who opined that "[S]ubsection (i) operates, in so far as it conflicts with the provisions of the existing statute governing release

eligibility, to raise the floor from 60% of sixty years . . . to 100% of sixty years, reduced by not more than 15% of eligible credits." Id. (citing Tenn. Att'y Gen. Op. No. 97-098 (1997)). The Tennessee Supreme Court decision did not resolve the conflict in Tennessee's law, however, because the only question before the court was the defendant's Sixth Amendment claim of ineffective assistance of counsel for simply failing to identify the inconsistency in Tennessee's law and failing to object to an incorrect jury instruction regarding the sentence that that defendant faced -- a failure that was the same whether the defendant was eligible for parole after 25 years, 51 years, or never. Id. at 119.

Particularly in light of 28 U.S.C. § 2254(d), the disagreement between the Tennessee Court of Appeals and the Tennessee Court of Criminal Appeals regarding Tennessee's 1995 statutory scheme is salient. If the Tennessee Court of Appeals is correct regarding Tennessee's law, Ms. Brown is never eligible for parole under Tennessee law, but she is unquestionably entitled now to federal habeas relief under Miller v Alabama. If the Tennessee Court of Criminal Appeals is correct regarding Tennessee law, Ms. Brown is eligible for parole under Tennessee law in 2055, but she may not be entitled to federal habeas relief now. At the earliest, resolution of this disagreement between the Tennessee appellate courts could take until 2046 -- the first year that

a 1995-or-later convicted prisoner's request for parole will become ripe.

Ms. Brown need not wait until 2046 (or, in her case, until 2055) to find out whether she has been entitled to federal habeas relief all along, assuming that the Tennessee Court of Appeals' Myrick decision is ultimately upheld by the Tennessee Supreme Court. The Tennessee Supreme Court has a rule permitting certification of questions of law to it, Tenn. Sup. Ct. R. 23 (the court "may, at its discretion, answer questions of law certified to it by . . . a Court of Appeals of the United States").

This Court, of course, may parse the Tennessee statutes and determine that the Tennessee Court of Appeals' decision in Myrick is the most thoroughly reasoned, and reasonable, interpretation of Tennessee law. If so, then the Tennessee Court of Criminal Appeals' decision in this case is directly contrary to Miller, and habeas relief is appropriate now. Alternatively, if it is unclear to this Court whether Ms. Brown is eligible for parole under Tennessee law, the Court should certify that question to the Tennessee Supreme Court. While Myrick and the statutes at issue would seem to make clear that Ms. Brown is ineligible for parole, there undoubtedly are opposite (and pivotal) State-court interpretations of Tennessee's statutory scheme. The fairest and most efficient way to definitively answer this question would be to certify the question of whether Ms. Brown is

entitled to parole under Tennessee law to the Tennessee Supreme Court, so that the Court can address Ms. Brown's Miller claim in the proper legal context.²

It would be tragic and unfair for Ms. Brown to apply for parole in 2055 and be denied eligibility by the Tennessee courts, consistent with the Tennessee Court of Appeals' Myrick decision and the plain language of Tenn. Code Ann. § 40-35-501(i). That outcome would mean that Ms. Brown actually was entitled to federal habeas relief 37 years earlier, but she was denied federal relief when it could (and should) have been granted.

² In Starks v. Easterling, No. 14-6230 (6th Cir. August 23, 2016) (unpublished decision), cert. denied, ___ U.S. ___, 137 S. Ct. 819 (2017), a panel of this Court stated, without discussion or citation, that the petitioner, who received a sentence of life imprisonment in Tennessee for felony murder committed while a juvenile, "will be eligible for parole when he reaches seventy-seven." The panel's decision in Starks is not binding on the Court in Ms. Brown's case, however, because prior unpublished decisions are not binding under the Prior Panel Rule. Cf. 6th Cir. R. 32.1 ("Published panel opinions are binding on later panels."). See also, Sheets v. Moore, 97 F.3d 164, 167 (6th Cir. 1996) (unpublished opinions "carry no precedential weight . . . [and] have no binding effect on anyone other than the parties to the action."); Crump v. Lafler, 657 F.3d 393, 405 (6th Cir. 2011) (same).

Nor should the Starks panel's decision be persuasive in this case, because the Myrick decision and the conflicting Tennessee State-court interpretations of Tennessee's statutory scheme were not brought to its attention, and were not squarely addressed by the panel.

- B. Even if Ms. Brown is eligible for parole after 51 years, her mandatory sentence of life imprisonment violated the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012).

The Tennessee Court of Criminal Appeals held that Tennessee's statutory scheme is constitutional under Miller because Ms. Brown supposedly is eligible for parole after 51 years of incarceration, at the age of 68. (R. 1, Ex. 3; Opinion of the Tennessee Court of Criminal Appeals; Pg ID 114.) Even assuming, for the sake of argument, that Ms. Brown is eligible for parole after 51 years, that circumstance would still violate Miller's requirement that the State "must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" Miller, 567 U.S. at 479 (quoting Graham v. Florida, 560 U.S. 48, 75 (2010)). When the Supreme Court held in Miller that the States must provide "some meaningful opportunity to obtain release," it surely contemplated that such an opportunity would reasonably arise within an inmate's anticipated lifespan.

As was shown by Ms. Brown in her State post-conviction proceeding, if Ms. Brown is not eligible for parole for at least 51 years, she is, at best, likely to live no more than ten years after becoming eligible for parole, based on the overall non-incarcerated, non-FAS population life expectancies. (R. 14, Ex. 31; Post-Conviction Hrg. Ex. 2

(Life-Expectancy Tables); Pg. ID 3713.)³ As an incarcerated person who is also a victim of fetal alcohol poisoning, Ms. Brown is likely to die in prison well before her ostensible minimum of 51 years of incarceration has expired.

Moreover, as Dr. Novick Brown testified at the State post-conviction hearing, in normal individuals, the brain is fully formed, and mature decisionmaking is established, at approximately 25 years of age. (R. 14, Ex. 30, State Post-Conviction Tr. vol. III; Pg ID 3574.) Even with a victim of Fetal Alcohol Syndrome, while the maturation of the decisionmaking process is slower, the maturation of their decisionmaking process is set by the victim's early 30s. (Id. at 3578.) Therefore, based on the clear and unrebutted scientific evidence presented in State court, Ms. Brown is expected to be able to demonstrate the level of her rehabilitation and maturity *decades* before the State of Tennessee ever gives her that opportunity.

The half-century wait before Cyntoia Brown has a meaningful opportunity to demonstrate her "maturity and rehabilitation" is insufficient to satisfy the minimum

³ The life expectancy of incarcerated individuals is significantly lower than the overall general population. A.C. Spaulding, et al.; *Prisoner survival inside and outside of the institution*; American Journal of Epidemiology 173(5): 479-87(2011) (risk of death, over a fifteen-year period, for incarcerated inmates is 43% higher than for non-incarcerated individuals). Based on the life expectancy of an incarcerated African-American woman like Ms. Brown, who suffers from congenital alcohol-related defects, it is likely that she will not survive 51 years in prison.

constitutional requirement mandated by the Supreme Court in Graham and Miller.

II. ACTUAL INNOCENCE

In light of the clear evidence presented in State court, Ms. Brown's conviction violated the Supreme Court's decisions in *In re Winship*, 397 U.S. 358 (1970); *Patterson v. New York*, 432 U.S. 197 (1977); and *Jackson v. Virginia*, 443 U.S. 307 (1979), because she did not possess the requisite mental state for first-degree murder.

The main premise of the Supreme Court's decision in Miller v. Alabama is that "children are constitutionally different from adults for purposes of sentencing." Miller, 567 U.S. at 471. The Supreme Court emphasized that juveniles lack maturity, are impulsive, are vulnerable to outside pressure, and their character is not well-formed or fixed. Id. The Supreme Court based its decision on "science and social science as well." Id.

Everything that the Supreme Court considered in reaching its decision in Miller is even more striking with regard to children who are exposed to alcohol in utero. The experts who testified at Ms. Brown's post-conviction proceeding -- each operating independently from the other -- demonstrated that children who have Fetal Alcohol Syndrome or Alcohol-Related Neurological Disorder have the impaired decisionmaking and impulse control expected of juveniles, exacerbated by their fetal alcohol poisoning. In Ms. Brown's case, according to the unrebutted evidence presented in State court, her

impairment from alcohol exposure was so great that she was incapable of establishing the mental state necessary for culpability for murder.

In In re Winship, 397 U.S. 358 (1970), and Patterson v. New York, 432 U.S. 197 (1977), the Supreme Court clearly established that the U.S. Constitution requires that each element of a criminal offense must be proven beyond a reasonable doubt. In Jackson v. Virginia, 443 U.S. 307 (1979), the Supreme Court clearly held that a criminal defendant cannot be convicted, consistent with the U.S. Constitution, when no reasonable juror could find a defendant guilty of the offense charged. The evidence that Ms. Brown presented in State court showed that no reasonable jury, in light of the clear and un rebutted scientific evidence regarding her organic brain disorder, could have found her guilty of murder beyond a reasonable doubt. Cf., In re Davis, 557 U.S. 952 (2009) (habeas relief available where "actual innocence" of prisoner is shown) (Stevens, J., concurring); Teague v. Lane, 489 U.S. 288, 311-13 (1989) (same).

Dr. Natalie Novick Brown

A clinical and forensic psychologist, Dr. Natalie Novick Brown, testified at Cyntoia Brown's State post-conviction hearing. (R. 14, Ex. 30; Post-Conviction Hrg. Tr. III; Pg ID 3565.) Dr. Brown had conducted a psychological examination of Cyntoia Brown. (Id. at 3572.) Dr. Brown also examined

Cyntoia Brown's clinical presentation, test results, medical records, school records, juvenile-court records, videotapes of Cyntoia Brown being questioned by police, and records from the Tennessee Mental Health Institute. (Id. at 3573.)

Dr. Brown testified that, in healthy teenagers, the process of "pruning" in the brain explains "why teenagers do kind of crazy foolish [bizarre] things sometimes." (Id. at 3574-75.) Put simply, teenagers are "not capable of executive functioning at the level that society expects in terms of adult behavior." (Id. at 3577.)

With regard to Cyntoia Brown's own behavior, Dr. Brown testified that children with Fetal Alcohol Syndrome Disorder have a later "pruning" process, which starts during the mid-teens (rather than, with girls, the usual age of approximately 12), and it progresses more slowly. (Id. at 3577.)

Dr. Brown further testified that Cyntoia Brown's Quantitative EEG showed "severe and pervasive brain damage." (Id. at 3582.) She testified that, in Cyntoia Brown's case, "volition is impaired," which means that "the decision-making process, the ability to consider all of the important information that needs to be considered during the cognitive process is impaired." (Id.) Dr. Brown testified specifically that, as of the date of the offense, Cyntoia Brown's ability to make a decision correctly and know the consequences was impaired. (Id. at 3583.) She concluded that Cyntoia Brown suffered from a mental disease or defect at the time of the

offense and that that defect impaired her ability to appreciate the nature of her actions and impaired her ability to control her behavior. (Id. at 3609.)

Dr. Brown specifically concluded that, in her opinion, Cyntoia Brown was incapable of forming the requisite mental state of an intentional and premeditated killing of another at the time of the offense. (Id. at 3611.)

Dr. Richard Adler

At Ms. Brown's post-conviction hearing, Dr. Richard Adler, a clinical and forensic psychiatrist, also testified. (R. 14, Ex. 29; Post-Conviction Hrg. Tr. II; Pg ID 3427.) He testified regarding Fetal Alcohol Spectrum Disorder, which includes Fetal Alcohol Syndrome. (Id. at 3431.)

Dr. Adler examined Ms. Brown and was aware that Ms. Brown's mother, Georgina Mitchell, had documented in a sworn statement that during her pregnancy carrying Ms. Brown, Ms. Mitchell "continually drank alcohol, up to a fifth or more a day." (Id. at 3432-33; see also, R. 14, Ex. 31; Mitchell Aff.; Pg ID 3709.) Dr. Adler testified how ethanol "most negatively affected" the brain. (Id. at 3434.)

Dr. Adler testified how fetal alcohol exposure produces physical abnormalities of the skeleton, heart, or other organs. (Id. at 3438.) He testified that fetal alcohol exposure creates "secondary disabilities" that affect behavior, education, employment, and criminality. (Id.)

Dr. Adler testified, based on his examination of Ms. Brown, that Ms. Brown has Alcohol-Related Neurodevelopmental Disorder ("ARND"), a "severe mental disorder." (Id. at 3451, 3484.) He testified that he was able to make his diagnosis based in part on central-nervous-system abnormalities in Ms. Brown and a Quantitative EEG showing organic, demonstrable brain damage constituting a "severe mental defect." (Id. at 3454, 3472-73.) Furthermore, Ms. Brown's facial features (including a flattened philtrum, a receded chin and cheekbones, small eye openings, lack of facial symmetry) and hand features (clinodactyly -- misshapen curvature of the fingers) contributed to the diagnosis, as well as Ms. Mitchell's documented history of heavy alcohol use during her pregnancy. (Id. at 3451-54, 3466-74.)

Dr. Adler further testified that ARND is a severe mental disease, and that Ms. Brown has symptoms of the disease that are particularly severe. (Id. at 3456-57, 3476.) In his opinion, Ms. Brown had a "mental disease or defect" on the day that she committed the act for which she was convicted. (Id. at 3458-59.) Dr. Adler's examination showed that Ms. Brown in 2011 -- seven years after the act -- was "functioning like a 13 or 14-year-old." (Id. at 3477.) Moreover, he testified that Ms. Brown exhibited psychosis even as early as 2000, at age 12, which "is extremely rare in young people," and that in 2002, at age 14, she had dissociation, "which is a very primitive mental defense mechanism." (Id. at 3480-82.)

Dr. Adler also testified in detail about the Quantitative EEG evaluation that was performed on Ms. Brown, which showed "abnormalities in what are called mid-line structures in the middle of the brain" and confirmed his diagnosis of ARND.

(Id. at 3487, 3493.) Dr. Adler testified that the QEEG showed abnormal functioning in the part of Ms. Brown's brain that "controls executive functioning, higher thinking, decision-making, social reasoning, [and] impulse control". (Id. at 3497.)

Finally, Dr. Adler testified that, based on his examination, the Quantitative EEG, and the record established regarding the underlying act, Ms. Brown's psychological and psychiatric abnormalities "were likely operative . . . at the time of the subject offense." (Id. at 3501-02.) She had not just a "psychological disorder," but a severe, organic disease of the brain.

Dr. Paul Connor

A clinical psychologist specializing in neuropsychology, Dr. Paul Connor, also testified at Ms. Brown's post-conviction hearing. (Id. at 3521.) Dr. Connor had conducted a neuropsychology evaluation of Ms. Brown. (Id. at 3524.) The purpose of the evaluation was to examine the functioning of Ms. Brown's brain. (Id. at 3526.) Dr. Connor's testing confirmed Dr. Adler's diagnosis of ARND, which also was confirmed by the Quantitative EEG. (Id. at 3527.)

With regard to Ms. Brown, Dr. Connor determined that Ms. Brown worked hard to perform the psychological evaluations being made. (Id. at 3538.) Ms. Brown was tested at an IQ of 134. (Id. at 3539.) Based on that IQ, Dr. Connor would have expected (in a healthy person) for Ms. Brown's psychological functioning to be similarly high. (Id. at 3540.) Ms. Brown, however, showed "deficits in multiple domains of functioning" that included "visual/spatial understanding and reasoning," "motor coordination," "adaptive functioning," "memory," and "executive function." (Id. at 3542-43.) Based on his entire evaluation, Dr. Connor determined that Ms. Brown, in absolute terms, "is within the moderately impaired range." (Id. at 3543.) Compared to her actual IQ, Ms. Brown "is actually severely to almost profoundly impaired." (Id.) Although she was 23 years old when he examined her, Dr. Connor concluded that she operated, "at an age equivalent of between a 13 and 14-year old." (Id. at 3544.) Ms. Brown's neuropsychological results were "quintessentially the pattern that [Dr. Connor] would be expecting with fetal alcohol" (id. at 3547), and that her tests were consistent with a diagnosis of ARND. (Id. at 3552.)

The testimony of Drs. Adler, Connor, and Brown was not rebutted by the State of Tennessee, who called no expert witnesses to contest the conclusion formed by Ms. Brown's experts or to criticize the science or processes upon which they based their conclusions.

Thus, the consensus of all the experts who testified as to Cyntoia Brown's mental health was that she would have had great difficulty controlling her behavior and appreciating the nature of her actions under the best of circumstances. But if there is anything about Ms. Brown's life that everyone should agree upon, it is that she did not find herself in the best of circumstances on the night that she met Mr. Allen. This was a seriously mentally impaired girl, subject to the immaturity and impulsiveness of all juveniles but to a much greater degree, who had been abandoned by her parents and whose only refuge was a pimp who sexually and physically abused her. Then she met Mr. Allen, a well-armed man who directly put Ms. Brown in fear for her life.

In light of the unrebutted testimony of the mental-health experts who testified at Ms. Brown's post-conviction proceeding, and the chilling circumstances that she found herself in, the Tennessee Court of Criminal Appeals' factual finding that no reasonable jury could have found her lacking of the necessary mental state for first-degree murder was an unreasonable determination of the facts in light of the evidence presented in State court. Cf. 28 U.S.C. § 2254(d)(2). Even if this Court concludes that the Supreme Court's decision in Miller does not apply to her case, the writ should issue, based on the clear and convincing evidence presented in State court, cf. 28 U.S.C. § 2254(e)(1). Ms. Brown was incapable of forming the requisite mental intent for

murder, as required by the Supreme Court in In re Winship, 397 U.S. 358 (1970), Patterson v. New York, 432 U.S. 197 (1977), and Jackson v. Virginia, 443 U.S. 307 (1979).

CONCLUSION

The judgment of the district court denying Cyntoia Brown's petition for writ of habeas corpus should be reversed. At a minimum, the Court should request that the Tennessee Supreme Court resolve the divergence of opinion between the Tennessee Court of Appeals and the Tennessee Court of Criminal Appeals regarding the eligibility for parole of individuals convicted of first-degree murder after July 1, 1995.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32. It contains 1194 lines of monospaced type, as calculated by my word-processing software.

/s C. Mark Pickrell

CERTIFICATE OF SERVICE

A copy of the foregoing brief was served by electronic mail through the Court's CM/ECF system on January 8, 2018, to John H. Bledsoe, III, Office of the Attorney General, john.bledsoe@ag.tn.gov.

/s C. Mark Pickrell

DESIGNATION OF RELEVANT DOCUMENTS

<u>Record Entry</u>	<u>Description</u>	<u>Pg ID</u>
14-1	Indictment	243
1-3	Tennessee Court of Criminal Appeals (Direct Appeal)	114
1-2	Tennessee Court of Criminal Appeals (Post-Conviction)	80
1	Federal Habeas Petition	1
26	Order Denying Habeas Petition	5503
43	Order Denying Motion for Reconsideration	5666
29	Notice of Appeal	5525
44	Amended Notice of Appeal	5675

ADDENDUM

IN THE COURT OF APPEALS OF TENNESSEE AT NASHVILLE

ROGER JAMAL MYRICK v. STATE OF TENNESSEE, ET AL.

Appeal from the Chancery Court for Davidson County No. 130470I
Claudia C. Bonnyman, Chancellor

No. M2013-02352-COA-R3-CV

Filed October 8, 2014

This appeal arises from a decision by the Davidson County Chancery Court dismissing inmate's petition for declaratory judgment. Inmate was convicted of second degree murder and sought a declaratory order from the Tennessee Department of Correction ("TDOC") claiming he was eligible for parole and requesting a parole hearing date. The request was denied, so inmate filed a petition for declaratory judgment with the Davidson County Chancery Court, arguing that he was entitled to a parole hearing and mandatory parole pursuant to Tenn. Code Ann. §§ 40-28-115(b)(1) and -117(b). The State filed a motion to dismiss for failure to state a claim based on Tenn. Code Ann. § 40-35-501. The trial court granted the State's motion, and this appeal followed. We affirm the decision of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which
RICHARD H. DINKINS, and W. NEAL MCBRAYER, JJ., joined.

Roger Jamal Myrick, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Joe Whalen, Acting
Solicitor General; and Lee Pope, Assistant Attorney General; for the appellee,
State of Tennessee.

OPINION

BACKGROUND

Roger Jamal Myrick was convicted of second degree murder for an offense that occurred on January 19, 2007, and was ordered to serve his entire sixteen-year sentence. He is currently an inmate in the custody of the TDOC.

On February 17, 2013, Mr. Myrick asked the TDOC to find he was eligible for parole and requested a parole hearing date. The TDOC denied his request on

March 11, 2013. Mr. Myrick then filed a petition for declaratory judgment with the trial court on April 1, 2013. He sought an order from the court directing the TDOC to grant him a parole hearing based on Tenn. Code Ann. §§ 40-28-115(b)(1) and -117(b). He claimed that, pursuant to section 115(b)(1), he was eligible for parole in 2012, and pursuant to section 117(b), he was entitled to “mandatory parole.”

The State filed a motion to dismiss for failure to state a claim based on Tenn. Code Ann. § 40-35-501. Mr. Myrick filed a response and motion for summary judgment on July 26, 2013. The trial court granted the State’s motion on September 27, 2013. In its decision, the court explained the evolution of Tennessee parole law and why Mr. Myrick was not eligible for parole:

Since the 1970’s when “mandatory” parole was established, there have been two major revisions to Tennessee’s sentencing and parole laws, the first in 1982 and the second in 1989. However “the Tennessee General Assembly purposefully did not repeal” portions of the old parole law “because it continued to govern the sentences and release of persons who committed crimes prior to July 1, 1982.” *Hickman v. [Tenn.] Bd. of Paroles*, 78 S.W.3d 285, 290 (Tenn. Ct. App. 2001). Accordingly, the statutes to which the Petitioner cites . . . are still valid statutes relevant to inmates convicted of committing crimes prior to July 1, 1982.

In this case, the pleadings reveal that the Petitioner was convicted of murder in the second degree for an offence that occurred on January 19, 2007. Accordingly, the two statutes upon which the Petitioner relies, Tenn. Code Ann. §§40-28-115 and -117, do not apply. Rather, “[a]ll persons who commit crimes on or after November 1, 1989, shall be tried and sentenced under the provisions of this chapter,” i.e., Chapter 35 of Title 40. Tenn. Code Ann. § 40-35-117(a). Accordingly, Tenn. Code Ann. § 40-35-101 et. seq. applies to the Petitioner.

Tenn. Code Ann. § 40-35-501(i)(1) mandates 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.” Enumerated in subsection (i)(2) is the offense of “Murder in the second degree.” Tenn. Code Ann. § 40-35-501(i)(2)(B). Accordingly, the Petitioner, Mr. Myrick, must serve 100% of his sentence and is not entitled to a parole eligibility date.

Mr. Myrick appeals from the trial court’s ruling and asks this Court to: reverse the trial court’s decision and remand the case, order the trial court to assign “‘conflict’ free counsel” and conduct an evidentiary hearing, order the Board of

Probation and Parole (“the Board”) to issue a parole hearing for Mr. Myrick, and grant any other relief this Court deems just.

STANDARD OF REVIEW

The trial court dismissed Mr. Myrick’s petition and granted the State’s motion because Mr. Myrick failed to state a claim upon which relief could be granted. A motion to dismiss for failure to state a claim for relief only challenges the legal sufficiency of the complaint and admits the truth of the factual allegations in the complaint. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). However, the motion asserts that these facts do not establish a basis for relief. *Id.* A trial court’s conclusions about the adequacy of a complaint are reviewed de novo, without a presumption of correctness. *Stewart v. Schofield*, 368 S.W.3d 457, 462-63 (Tenn. 2012).

Pleadings prepared by pro se litigants should be evaluated by less stringent standards than pleadings prepared by lawyers. *Id.* at 462. However, in order to preserve fairness between pro se litigants and their adversaries, pro se litigants are not excused from complying with the same substantive and procedural rules that represented parties must observe. *Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003).

ANALYSIS

Mr. Myrick argues that he is entitled to a parole hearing and mandatory parole pursuant to Tenn. Code Ann. §§ 40-28-115(b)(1) and -117(b), respectively. Section 40-28- 115(b)(1) addresses parole eligibility for certain inmates who have served one half of their determinate sentence, while section 117(b) addresses mandatory parole and its restrictions. Tennessee Code Annotated section 40-28-115(b)(1) provides:

Every person sentenced to a determinate sentence and confined in a state prison, after having served a period of time equal to one half (1/2) of the sentence imposed by the court for the crime for which the person was convicted, but in no event less than one (1) year, shall likewise be subject to parole in the same manner provided for those sentenced to an indeterminate sentence.

Tennessee Code Annotated 40-28-117(b)(2) states:

(b) Every prisoner who has never been granted a parole of any type by the board on a particular sentence of imprisonment shall be granted a mandatory parole by the board subject to the following restrictions:

...

(2) Prisoners serving a determinate or indeterminate sentence with a maximum term of more than ten (10) years as fixed by the court, shall be paroled by the board six (6) months prior to the completion of the maximum term of sentence less credit for good and honor time and incentive time;

The State relies on Tenn. Code Ann. § 40-35-501, which addresses parole eligibility for anyone who committed certain crimes after July 1, 1995. The statute provides, in part:

(i)(1) There 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%).

...

(2) The offenses to which subdivision (i)(1) applies are: ...

(B) Murder in the second degree;

Tenn. Code Ann. § 40-35-501(i)(1) and (2)(B).

Mandatory parole was originally established in 1974. *Hickman v. Tenn. Bd. of Paroles*, 78 S.W.3d 285, 290 (Tenn. Ct. App. 2001). The Tennessee Criminal Sentencing Reform Act of 1982 (“the Act”) applied to anyone who committed a crime on or after July 1, 1982. *Id.* The Act did not contain any mandatory parole provision, so people who committed crimes after July 1, 1982 were not entitled to mandatory parole. *Id.* However, the original mandatory parole statute was not repealed because it still applied to sentences and release of anyone who committed crimes before July 1, 1982. *Id.*

In 1989, Tennessee’s sentencing and parole laws were rewritten again. *Id.* The 1989 Act applies to “[a]ll persons who commit crimes on or after November 1, 1989.” Tenn. Code Ann. § 40-35-117(a). It also states that “[f]or all persons who committed crimes prior to July 1, 1982, prior law shall apply and remain in

full force and effect in every respect, including, but not limited to, sentencing, parole and probation.” Tenn. Code Ann. § 40-35-117(c). Most importantly, the 1989 Act provides that there will be no release eligibility for anyone who commits second degree murder after July 1, 1995, and they will be forced to serve one hundred percent of the sentence imposed by the court less sentence credits earned and retained. Tenn. Code Ann. § 40-35-501(i)(1), (2)(b).

Mr. Myrick incorrectly relies on Tenn. Code Ann. §§ 40-28-115(b)(1) and - 117(b) to argue he is entitled to parole. Because both of those provisions apply to crimes committed before July 1, 1982, those statutes do not provide the relief Mr. Myrick is seeking. The 1989 Act applies to Mr. Myrick because he was convicted of second degree murder for an offense that took place after November 1, 1989 and July 1, 1995. As a result, we agree with the trial court that Mr. Myrick is not eligible for parole and must serve his entire sentence.

Mr. Myrick also argues that, because inmates convicted of second degree murder have been paroled before, the Equal Protection Clause demands that he receive his own hearing. He bases this argument entirely on a document from the Board’s Research, Policy and Planning Division that includes information on how many inmates convicted of second degree murder were paroled between July 2007 and June 2013. However, this document is not part of the record.

Documents not in the record are not properly before this court. *UT Med. Grp., Inc. v. Vogt*, 235 S.W.3d 110, 122 (Tenn. 2007). Simply attaching a document to an appellate brief does not place it in the record on appeal. *Id.* Only matters set forth in the record may be considered. Tenn. R. App. P. 13(c) (“The Supreme Court, Court of Appeals, and Court of Criminal Appeals may consider those facts established by the evidence . . . and set forth in the record . . .”). Because this document is not in the record, this Court cannot consider the document, and Mr. Myrick’s Equal Protection argument fails.

Finally, Mr. Myrick requests that this Court order the trial court to assign him conflict free counsel and conduct an evidentiary hearing. His claims have failed, so he is not entitled to a hearing. As to the request for an attorney, Mr. Myrick’s brief makes no argument that he is entitled to one, so that argument is waived. Tenn. R. App. P. 27(a)(7) (requiring that an appellant present reasons why appellate relief is required with citations to authorities).

CONCLUSION

The judgment of the trial court is affirmed. Costs of appeal are assessed against the Appellant, Roger Jamal Myrick, and execution may issue, if necessary.

ANDY D. BENNETT, JUDGE