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IN THE

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

NO. 1891 WDA 2016

COMMONWEALTH OF PENNSYLVANIA,
Appellee

V.

AVIS LEE,
Appellant

SUBSTITUTED BRIEF FOR APPELLEE

Appeal from the order dated November 17, 2016 denying post-conviction relief in the Allegheny County Court of Common Pleas, Criminal Division at CC No. 198005128.

STEPHEN A. ZAPPALA, JR.
District Attorney

MICHAEL W. STREILY
Deputy District Attorney

MARGARET IVORY*
Assistant District Attorney
PA. I.D. NO. 91565

Office of the District Attorney
401 Allegheny County Courthouse
Pittsburgh, Pennsylvania 15219-2489
(412) 350-4377

****Counsel of Record***

TABLE OF CONTENTS

TABLE OF AUTHORITIES II

COUNTER STATEMENT OF THE QUESTION INVOLVED 1

COUNTER STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 6

ARGUMENT 8

I. THE COURT BELOW DID NOT ERR IN SUMMARILY DENYING APPELLANT'S PCRA PETITON. THE PETITION WAS UNTIMELY AND NOT WITHIN AN EXCEPTION. ACCORDINGLY, THE COURT LACKED JURISDICTION TO CONSIDER ITS MERITS. 8

II. THE SUPREME COURT'S DECISIONS IN *GRAHAM V. FLORIDA* AND *ENMUND V. FLORIDA* DO NOT ENTITLE APPELLANT TO RETROACTIVE APPLICATION OF *MILLER V. ALABAMA*. FURTHERMORE, THE FACTS OF APPELLANT'S CASE DO NOT DEMONSTRATE THAT HER OFFENSE WAS THE RESULT OF UNFORTUNATE, YET TRANSIENT IMMATURITY. 36

III. THE PCRA COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S PETITION WITHOUT A HEARING. 47

CONCLUSION 50

CERTIFICATE OF COMPLIANCE 51

CERTIFICATE OF COMPLIANCE 52

TABLE OF AUTHORITIES

Cases

Adkins v. Wetzel, 2014 WL 4088482 32

B.H. v. Commonwealth, 494 S.W.3d 467 (Ky. 2016)..... 30

Commonwealth v. Abdul–Salaam, 812 A.2d 497 (Pa. 2002)..... 12

Commonwealth v. Abu-Jamal, 720 A.2d 79 (Pa. 1998)..... 9

Commonwealth v. Batts, 66 A.3d 286 (Pa. 2013) 33

Commonwealth v. Castle, 554 A.2d 625 (Pa. Commw. Ct.1989) 38

Commonwealth v. Cintora, 69 A.3d 759 (Pa.Super.2013)..... 13, 15, 16

Commonwealth v. Copenhefer, 941 A.2d 646 (Pa. 2007) 12

Commonwealth v. Cotto 753 A.2d 217 (Pa. 2000) 32

Commonwealth v. Ehrsam, 512 A.2d. 1199 (Pa.Super. 1986) 37

Commonwealth v. Furgess, 149 A.3d 90 (Pa.Super. 2016) 15, 16

Commonwealth v. Jackson, 30 A.3d 516 (Pa. Super. 2011) 47

Commonwealth v. Knox, 50 A.3d 732 (Pa.Super. 2012) 38

Commonwealth v. Lankford, 164 A.3d 1250 (Pa.Super. 2017) 33

Commonwealth v. Marshall, 947 A.2d 714 (Pa. 2008) 47

Commonwealth v. Monaco, 869 A.2d 1026 (Pa.Super. 2005).....32

Commonwealth v. Montgomery, 181 A.3d 349 (Pa. 2018).....17, 19, 20

Commonwealth v. Natividad, 938 A.2d 310 (Pa. 2007).....40

Commonwealth v. Perrin, 947 A.2d 1284 (Pa. Super. 2008).....10

Commonwealth v. Porter, 35 A.3d 4 (Pa. 2012).....13

Commonwealth v. Roney, 79 A.3d 595 (Pa. 2013) 49

Commonwealth v. Spotz, 896 A.2d 1191 (Pa. 2006).....40

Commonwealth v. Yasipour, 957 A.2d 734 (Pa.Super. 2008) 37

Cruz v. United States, 3:1-cv-00787-JCH, 56 (D. Conn. March 29, 2018).33

Enmund v. Florida, 458 U.S. 782 (1982).....36

Graham v. Florida, 560 U.S. 48 (2010) .....passim

Miller v. Alabama, 132 S. Ct. 2455, (2012) .....passim

Montgomery v. Louisiana, 136 S.Ct. 718 (2016*)* 12

Moore v. Texas, 137 S.Ct. 1039 (2017) 27, 32

Poole v. Attorney General of Pennsylvania, 2013 WL 5814079 (E.D.Pa. 2013) 33, 34, 35

Roper v. Simmons, 543 U.S. 551 (2005) .....passim

See *A.N.A., et al.,* v. *Breckinridge County Board of Education, et al.,* 2009 WL 8495475 (W.D.Ky.) 30

Statutes

18 Pa. C.S. § 1102(b) 38

42 Pa. C.S. § 9721(b) 38

42 Pa.C.S. §6302 31

42 Pa.C.S. §9541 8

42 Pa.C.S. §9545(d)(1) 47

42 Pa.C.S.A. § 9545(b)(1) ..... passim

42 Pa.C.S.A. §9543(a)(3) 41

42 Pa.C.S.A. §9544(b) 41

50 Pa.C.S. §4402 31

Other Authorities

Black's Law Dictionary, Sixth Edition, 1990 45

Elizabeth Cauffman, Ph.D. and Laurence Steinberg, Ph.D*, (Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable*

Than Adults , 18 Behav.Sco. & L. 741 (2000) 28

Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development From the Late Teens Through the Twenties*, Jeffrey Jensen Arnett, 55 Am. Psychologist 469 (2000) 28, 30

P.L. 1118, No. 32, § 3(1) (Spec.Sess. No. 1) 10

Rules

Pa.R.A.P. 1113(a) 9, 10

Pa.R.Crim.P. 907(1) 47

COUNTER STATEMENT OF THE QUESTION INVOLVED

I. Whether the post-conviction court erred in determining that appellant's serial PCRA petition was time-barred and not within any exception?

II. Whether appellant is entitled to an extension of the rules announced in *Miller* based on *Graham v. Florida* and *Enmund v. Florida* and whether the facts of her case demonstrate that her offense was the result of unfortunate yet transient immaturity.

III. Whether the PCRA Court erred in denying appellant's petition without an evidentiary hearing?

COUNTER STATEMENT OF THE CASE

This is an appeal from the order denying post-conviction relief entered November 17, 2016 in the Allegheny County Court of Common Pleas, Criminal Division at CC No. 198005128.

A. Procedural History

Appellant, Avis Lee, was charged by Criminal Information with one count of Criminal Homicide (18 Pa.C.S. §2501(a)). (Docket Entry (DE) No. 2) On January 16, 1981, appellant, represented by Nicholas Radoycis, Esquire, appeared before the Honorable Joseph H. Ridge for a jury trial. Appellant's co-defendants, Dale Morgan and Arthur Jeffries were represented by G. William Bills, Esquire and Ivan Abraham, Esquire, respectively. Appellant was found guilty of second-degree murder on January 20, 1981 (DE No. 8) and sentenced to a mandatory term of life imprisonment without the possibility of parole on July 13, 1981. (DE No. 14)

The sentence was affirmed by this Court. (DE No. 21) Appellant filed a petition for post -conviction relief on August 20, 1984. (DE No. 23) Post-Conviction relief was denied on May 9, 1986 and was affirmed by this Court on April 9, 1987. (DE Nos. 35, 43) Appellant filed a subsequent petition for post-conviction relief on May 17, 1989, which was denied on

May 25, 1989 and affirmed by this Court on June 5, 1991. (DE Nos. 44, 49) Appellant filed petitions for post-conviction relief on June 1, 2000 and August 29, 2000, both of which were denied. (DE Nos. 50, 51, 54, 55)

On July 11, 2012, appellant filed another PCRA petition seeking relief based on *Miller v. Alabama,* 132 S. Ct. 2455 (2012*).* (DE No. 66) That petition was denied on February 26, 2013. (DE No. 73)

On March 24, 2016, appellant filed her most recent PCRA petition. (DE No. 75) Judge Kevin G. Sasinoski of the Allegheny County Court of Common Pleas filed a Notice of Intent to Dismiss appellant's petition on April 25, 2016. (DE No. 76) Appellant filed a Response to Notice of Intent to Dismiss on May 12, 2016 and a supportive pleading on September 15, 2016. (DE Nos. 77, 79) Judge Sasinoski dismissed the petition on November 17, 2016. (DE No. 80)

A timely appeal followed. On December 29, 2017, a panel of this Court affirmed the order of the PCRA court. On January 12, 2018, appellant requested *en banc* review. On March 9, 2018, this Court granted appellant's request, and ordered that the panel's decision be withdrawn. Appellant subsequently filed a Substituted Brief on May 16, 2018.

B. Factual History

Appellant's conviction was based on the following evidence:

The facts of this case, viewed in the light most favorable to the Commonwealth, are as follows. At approximately midnight on the night in question, Robert Walker was found lying unconscious in a parking lot nearby to the Pittsburgh Athletic Association (P.A.A.) in Oakland. He died ten hours later of a gunshot wound to the head. Sometime later Arthur Jeffries approached the police with information linking defendant Lee and co-defendant Madden to the crime. Both Lee and Madden were arrested. Jeffries was also charged with complicity after the police noted several inconsistencies in the information he supplied to them.

The evidence offered at trial against Lee was in the form of her confession to the police, which was redacted by the Court to eliminate any mention by name of her accomplices. The confession set forth that on the evening of November 1, 1979, defendant suggested to her brother, co-defendant Madden, that they attempt to obtain some money. Madden chose the P.A.A. in Oakland as a desirable site for a robbery attempt. Co-defendant Jeffries agreed to accompany them and was to share in the fruits of the venture. Defendant Lee saw that Madden was carrying a loaded gun. They arranged to be driven to Oakland by a third party. Lee was designated to serve as the look-out. Defendants waited on the porch of the Syria Mosque until the victim approached. Madden followed him, pointing the gun at his back. When the victim swung around and attempted a karate blow at Madden and reached for his pocket, Madden shot him.

Defendant Lee's statement was corroborated in all material details by the redacted statements of her co-defendants which were also introduced into evidence accompanied by the Court's cautionary instructions to each individual juror and to the jury as a group that each statement could be used as

evidence only against the maker of the statement.

(DE No. 18 at 1-2)

SUMMARY OF THE ARGUMENT

Appellant's PCRA petition is time-barred and not within any recognized exception. The constitutional right announced in *Miller v. Alabama* and made retroactive by *Montgomery v. Louisiana* has not been held to apply to those over 18 who committed first or second degree murder. Furthermore, the Supreme Court cases cited by appellant as well as the Pennsylvania Supreme Court have been clear about the need for a bright line between those under 18 and those 18 and older for purposes of classifying juvenile offenders. The studies cited by appellant do not undermine that conclusion. This Honorable Court has repeatedly refused to expand *Miller*'s rule beyond its clearly-defined boundaries in order to encompass prisoners who were 18 or older when they committed their crimes. The court below was bound by those decisions and thus did not err in determining that it lacked jurisdiction over appellant's petition and refusing post-conviction relief.

The Supreme Court decisions in *Graham v. Florida* and *Enmund v. Florida* do not entitle appellant to retroactive application of *Miller v. Alabama*. *Enmund* prohibited the death penalty on aiders and abettors of felonies who did not personally kill, attempt to kill or intend that a killing or lethal force be used. *Graham* prohibited life sentences for those under 18

who did not commit a homicide. Moreover, the circumstances of appellant's crime do not reveal that it was the result of transient yet unfortunate youth.

The PCRA Court did not err in denying appellant's PCRA petition without a hearing. Appellant's PCRA petition was manifestly untimely and appellant did not properly plead any of the statutory exceptions to the one-year time-bar.

ARGUMENT

I. THE COURT BELOW DID NOT ERR IN SUMMARILY DENYING APPELLANT'S PCRA PETITON. THE PETITION WAS UNTIMELY AND NOT WITHIN AN EXCEPTION. ACCORDINGLY, THE COURT LACKED JURISDICTION TO CONSIDER ITS MERITS.

Appellant's petition pursuant to the Post Conviction Relief Act, 42 Pa.C.S. §9541 *et. seq.* (PCRA) was woefully untimely, having been filed over twenty years out of time. In her serial PCRA petition, appellant claimed that she was entitled to the exception for newly established constitutional rights provided for in 42 Pa.C.S. § 9545(b)(1)(iii) (see Docket Entry 81). Specifically, she claims the benefit of the constitutional rule announced in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) and made retroactive by *Montgomery v. Louisiana,* 136 S.Ct. 718 (2016).

Pennsylvania law is clear that no court has jurisdiction to hear an untimely PCRA petition. *Commonwealth v. Cintora,* 69 A.3d 759, 762. "Statutory time restrictions are ***mandatory*** and ***jurisdictional*** in nature, and may not be altered or disregarded to reach the merits of the claims raised in the petition." *Id.* (emphasis added). A PCRA petition must "be filed within one year of the date the judgment becomes final" unless one of the three statutory exceptions to timeliness is applicable. 42 Pa.C.S.A. §

9545(b)(1). For PCRA purposes, a "judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa.C.S.A. § 9545(b)(3). If an exception to the timeliness requirement exists, any petition must be filed within 60 days of the date that the claim could have been presented. *See* 42 Pa.C.S.A. § 9545(b)(2) and *Commonwealth v. Abu-Jamal,* 720 A.2d 79, 94 (Pa. 1998).

However, an untimely petition may be received when the petition alleges, and the petitioner proves, that any of the three limited exceptions to the time for filing the petition, set forth at 42 Pa.C.S.A. § 9545(b)(1)(i), (ii), and (iii), are met. A petition invoking one of these exceptions must be filed within [60] days of the date the claim could first have been presented. In order to be entitled to the exceptions to the PCRA's one-year filing deadline, the petitioner must plead and prove specific facts that demonstrate his claim was raised within the [60]-day timeframe.

This Court affirmed appellant's sentence on July 16, 1982. (DE No. 21) The sentence became final 30 days thereafter. See Pa.R.A.P. 1113(a). Accordingly, the judgment of sentence became final years before the effective date of the 1995 PCRA amendments, January 16, 1996. "[A]

petition where the judgment of sentence became final before the effective date of the amendments shall be deemed timely if the petitioner's first petition was filed within one year of the effective date of the amendments[.]" See Nov. 17, 1995, P.L. 1118, No. 32, § 3(1) (Spec.Sess. No. 1).

Clearly, the most recent petition, filed more than two decades after the amendment took effect, is untimely, unless appellant can plead and prove that one of the three statutory exceptions to the one-year jurisdictional time-bar applies. *See* 42 Pa.C.S.A. § 9545(b)(3) ("A judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States ..., or at the expiration of time for seeking the review"); *see also* Pa.R.A.P. 1113(a).

She has failed in that effort. Appellant filed her current petition on March 24, 2016, and she had to plead and prove that one of the enumerated exceptions to the one-year time-bar applied to her case. *See* 42 Pa.C.S.A. § 9545(b)(1); *Commonwealth v. Perrin*, 947 A.2d 1284, 1286 (Pa. Super. 2008) (to properly invoke a statutory exception to the one-year time-bar, the PCRA demands that the petitioner properly plead and prove all required elements of the relied-upon exception).

Appellant attempts to invoke the "newly recognized constitutional right" exception to the time-bar. (Substituted Brief for Appellant at 19) This

statutory exception provides:

> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
> ...
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.
> ...
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

42 Pa.C.S.A. § 9545(b).

As our Supreme Court explained:

> Subsection (iii) of Section 9545(b)(1) has two requirements. First, it provides that the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time provided in this section. Second, it provides that the right "has been held" by "that court" to apply retroactively. Thus, a petitioner must prove that there is a "new" constitutional right and that the right "has been held" by that court to apply retroactively. The language "has been held" is in the past tense. These words mean that the action has already occurred, *i.e.*, "that court" has already held the new constitutional right to be retroactive to cases on collateral review. By employing the past tense in writing this provision, the legislature clearly intended that the right was already recognized at the time the petition was filed.

Commonwealth v. Copenhefer, 941 A.2d 646, 649–650 (Pa. 2007), *quoting Commonwealth v. Abdul–Salaam*, 812 A.2d 497, 501 (Pa. 2002) (internal corrections omitted). Moreover, since the plain statutory language of section 9545 demands that the PCRA petition "allege" all elements of the statutory exception, it is clear that—to properly invoke the "newly recognized constitutional right" exception—the petitioner must plead each of the above-stated elements in the petition. 42 Pa.C.S.A. § 9545(b)(1).

Appellant claims that her sentence is unconstitutional and subject to correction based on the holding of *Miller, supra.* Appellant also claims that her petition is timely, because she filed her petition within 60 days of the date the United States Supreme Court decided *Montgomery v. Louisiana,* 136 S.Ct. 718 (2016*),* which held that the new substantive rule announced in *Miller* applied retroactively to cases on collateral review. *See Montgomery*, 136 S.Ct. at 732.

It is true that appellant filed her petition within 60 days after the Supreme Court decided *Montgomery* and that, in *Montgomery*, the Supreme Court held that the new rule of law announced in *Miller* applies retroactively to cases on collateral review. *See Id*. Thus, if the right announced in *Miller* applies to appellant's claim or claims, the petition is timely as to that specific claim. *See Abdul–Salaam*, *supra,* 812 A.2d at

501–502 (“[a] ruling concerning the retroactive application of [a] new constitutional right must be made prior to the filing of the petition for collateral relief”); *see also Commonwealth v. Porter*, 35 A.3d 4, 13–14 (Pa. 2012) (“the[ ] provisions [in 42 Pa.C.S.A. § 9545(b)(1) and (2) (relating to the PCRA's time-bar exceptions)] are claim-specific, as they would have to be, given the [60-]day restriction”).

Miller, however, does not apply to appellant because she was over the age of 18 when she committed her crime. In *Miller,* the United States Supreme Court held “that mandatory life without parole for those *under the age of 18* at the time of their crimes violates the Eighth Amendment's prohibition on ‘cruel and unusual punishments.” *Id.* (emphasis added). Appellant admits that she was over 18 years of age when she committed murder. (Substituted Brief for Appellant at 9)**.** As a result, appellant simply is excluded from *Miller's* holding and her appeal is meritless. *See Commonwealth v. Cintora,* 69 A.3d 759, 764 (Pa.Super. 2013) (because both appellants were over 18, “the holding in *Miller* does not create a newly-recognized constitutional right that can serve as the basis for relief for Appellants”). As such, appellant's petition is untimely and the PCRA court properly dismissed the petition.

Appellant's argument rests upon the premise that this Court must

extend *Miller's* categorical and clear holding 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*, 132 S.Ct. at 2460. According to appellant, this Court must look to *Miller's* reasoning—and to its recognition that "youth is more than a chronological fact" and that juveniles have a "lessened culpability" and a greater "capacity for change." *Id.* at 2461 and 2467 (internal citations, quotations, and corrections omitted); *see also* Substituted Brief for Appellant at 26) With little real elaboration, she claims that *Miller* actually eschews a categorical, age-based cut-off and, instead, prohibits mandatory sentences of life in prison without the possibility of parole for all individuals who possess the "mitigating characteristics of youth". In reality, appellant wants this Court to conveniently tailor and apply *Miller*'s categorical holding to the "facts" of her background, her characteristics and the like. This request is profoundly wrong for a number of reasons.

Appellant has overstated *Miller's* holding. *Miller's* holding was simply (and explicitly) 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*, 132 S.Ct. at 2460 (emphasis added). That's it; and this Court has correctly recognized this

fact. *Commonwealth v. Furgess*, 149 A.3d 90, 94 (Pa.Super. 2016) ("[t]he *Miller* decision applies to only those defendants who were under the age of 18 at the time of their crimes") (internal quotations and citations omitted).

In essence, appellant wants this Court to extend *Miller's* general, categorical holding to encompass individuals who were 18 years old or older at the time of their crimes, but who possessed the "mitigating characteristics of youth" and who "suffered from severe hardship and abuse." (Substituted Brief for Appellant at 14)[1]. Appellant, it is noted, just happens to claim membership within this so-called "category." This Court has rejected this argument. In *Commonwealth v. Cintora*, 69 A.3d 759, 764 (Pa.Super. 2013), this Court stated as follows:

> Appellants ... contend that because *Miller* created a new Eighth Amendment right, that those whose brains were not fully developed at the time of their crimes are free from mandatory life without parole sentences, and because research indicates that the human mind does not fully develop or mature until the age of 25, it would be a violation of equal protection for the courts to treat them or anyone else with an immature brain, as adults. Thus, they conclude that the holding in *Miller* should be

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[1] As will become clear and discussed further *infra*, the practical effect of appellant's argument is to amend Pennsylvania's sentencing scheme for convictions for first and second degree murder, making a mandatory life sentence illegal.

> extended to them as they were under the age of 25 at the time of the murder and, as such, had immature brains. However, we need not reach the merits of [a]ppellants' argument, as their contention that a newly-recognized constitutional right should be extended to others does not render their petition timely pursuant to section 9545(b)(1)(iii).

Id

In *Furgess*, *supra*, this Court rejected Furgess' bid to avail himself of *Miller* on the basis that he was a "technical juvenile". Furgess claimed he was eligible for relief based on neuroscientific theories regarding immature brain development to support his claim that he was eligible for relief. This Court noted:

> …[R]ather than presenting an argument that is within the scope of the *Miller* decision, this argument by [a]ppellant seeks an extension of *Miller* to persons convicted of murder who were older at the time of their crimes than the class of defendants subject to the *Miller* holding. ... We rejected reliance on this same argument for purposes of Section 9545(b)(1)(iii) in [*Cintora*]. ... *Cintora* remains controlling on this issue, and [a]ppellant's assertion of the time-bar exception at Section 9545 [(b)(1)(iii)] must be rejected")

Furguess, supra, 149 A.3d at 94.

Simply put, the newly-recognized constitutional right exception to the PCRA's one-year time-bar applies only to the specific "right" the Supreme Court recognized—and not to an extension of the right, based upon the

underlying reasoning contained within the Supreme Court's opinion. See 42 Pa.C.S.A. § 9545(b)(1)(iii) ("[a]ny petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that ... the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively") (emphasis added). Since the specific right recognized in *Miller* was 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' "—and, since appellant was older than 18 at the time she committed murder, *Miller* simply does not apply to her case. *Miller*, 132 S.Ct. at 2460. Consequently, this Court does not have jurisdiction to consider the merits of appellant's first and third issues on appeal.

An *en banc* panel of this Court recently reaffirmed the conclusion that *Miller* does not apply to those over the age of 18. In *Commonwealth v. Montgomery*, 181 A.3d 349 (Pa. 2018) this Court did not simply state that a 22 year old, such as Montgomery, cannot avail themselves of the Supreme Court decisions in *Miller* and *Montgomery v. Louisiana*, but those cases:

> *permit* sentencing an individual to a mandatory term of life imprisonment without the possibility of parole ("LWOP") if that individual was at least 18 years old at the time of the offense.

Montgomery, supra, 181 A.3d at 361[2] (emphasis added).

Furthermore, the Commonwealth submits that appellant is incorrect that the well-settled rationale of *Miller* means that "characteristics of youth" determine whether a mandatory sentence of life without the possibility of parole constitutes cruel and unusual punishment. Instead, the court was clear that a line was necessary and that it was concerned with "characteristics of youth" typical of those under 18. Although *Miller* held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments,"' *Miller, supra,* 132 S.Ct. at 2460, it went no further. The Court limited its holding to those younger than 18 and did not suggest

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[2] The Commonwealth notes that this result has been regular and ongoing in unpublished decisions. *See, e.g*., *Commonwealth v. Giddings,* slip. op., docketed at 1092 EDA 2017, May 16, 2018 (19 year old ineligible for relief under *Miller*); *Commonwealth v. Watson*, slip. op., docketed at 2387 WDA 2017, May 10, 2018; (same regarding a 20 year old); *Commonwealth v. Harris*, slip. op., doecketed at 608 WDA 2017, May 9, 2010 (same regarding an 18 year old); *Commonwealth v. Mitchell*, slip. op., 2471 EDA 2017, May 3, 2018 (same regarding a 21 year old).

that any other individual should be the beneficiary of that holding. The Court observed, in fact, that "[w]e have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children." *Id.* at 2470.

Furthermore, *Miller* was premised heavily on the rationale of *Roper v. Simmons,* 543 U.S. 551 (2005), which held:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn.

Roper, supra, 543 U.S. at 574. In *Commonwealth v. Montgomery*, *supra,* this Court recently observed that:

> [As in] *Furgess*, Appellant's argument attempts to extend *Miller* to those adults whose brains were not fully developed at the time of their offense. *See Furgess*, 149 A.3d at 94. This argument fails, however, because "a contention that a newly-recognized constitutional right should be extended to others does not [satisfy the new constitutional rule exception to the PCRA's timeliness requirement.]" *Id.* at 95 (internal alteration omitted; emphasis removed), *quoting Commonwealth v. Cintora*, 69 A.3d 759, 764 (Pa.Super. 2013).
>
> Instead, the PCRA requires that the Supreme Court of the United States or our Supreme Court extend the new right to a class of individuals, and make the

> extension retroactive, in order to satisfy the new constitutional right timeliness exception. 42 Pa.C.S.A. § 9545(b)(1)(iii). *Montgomery* merely made *Miller* retroactive for juvenile offenders whose judgments of sentence had already became final. It did not extend *Miller*'s holding to those individuals who committed homicides after they reached the age of 18. *Furgess*, 149 A.3d at 95.

Commonwealth v. Montgomery, supra, 181 A.3d at 366.

In her brief, appellant cites *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), as requiring that the right established in *Miller* be "construed to include 'the well-established rationale on which the Court based the result' and " ''those portions of the opinion necessary to the result.' " (Substituted Brief for Appellant at 16-17) That rationale, according to appellant, is that the characteristics of youth, not a perpetrator's age, are the paramount concerns in determining whether a person should be subject to a mandatory life without parole sentence.

Our Supreme Court, in *Commonwealth v. Lesko,* 15 A.3d 345, 408 n.31 (Pa. 2011), considering the United States Supreme Court's decisions in *Graham v. Florida,* 560 U.S. 48 (2010) (prohibiting sentence of life without parole for juveniles for non-homicide offenses) and *Roper, supra* (prohibiting capital punishment for offenders committing their crimes prior to age 18), characterized that Court as having adopted a "strictly chronological, hard lines" approach providing "no benefit" for

those over 18. In addition, in *Commonwealth v. Chambers,* 35 A.3d 34 (Pa.Super. 2011), your Court made a distinction, for purposes of the PCRA's timeliness exception, between the "holding" and the "rationale" of cases involving newly-recognized constitutional rights.

While appellant has attempted to rely on the "rationale" of *Miller,* this Court should find that its "holding" impacts only those individuals who were under eighteen at the time of their offenses and thus cannot aid appellant, regardless of her claimed psychological "maturity." *See Commonwealth v. Cintora,* 69 A.3d 759, 764 (Pa.Super. 2013).

The Commonwealth notes that the rationale of *Roper* as well as *Graham* and those cases concerned with the "characteristics of youth" were quite clear that age was relevant. Specifically, the Supreme Court stated in *Roper*:

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Johnson, supra,* at 367, 113 S.Ct. 2658; see also *Eddings, supra,* at 115–116, 102 S.Ct. 869 ("Even the normal 16–year–old customarily lacks the maturity of an adult"). It has

> been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. See Appendixes B–D, *infra.*
>
> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings, supra,* at 115, 102 S.Ct. 869 ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage"). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003) (hereinafter Steinberg & Scott) ("[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting").
>
> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, Identity: Youth and Crisis (1968).

Roper, supra, 543 U.S. at 570. For better or worse, the United States has categorically declared and demarked that offenders under 18 years of age

are not subject to life sentences without the possibility of parole. This is a categorical fiat and appellant simply does not qualify for relief.

While stating that "youth" is more than chronology, but a time and condition of potential vulnerability to influence and psychological damage, *Miller* noted that was true partly because of the legal inability of those under 18 to legally depart from a criminogenic setting. *Miller, supra,* 567 U.S. at 471 (citing *Roper*, 543 U.S. at 569). In *Thompson v. Oklahoma,* 487 U.S. 813 (1988), a plurality of the Court recognized the import of these characteristics with respect to juveniles under 16, and relied on them to hold that the Eighth Amendment prohibited the imposition of the death penalty on juveniles under the age of 18. 487 U.S., at 833–838. The Supreme Court later concluded that the same reasoning applies to all juvenile offenders under the age of 18**.** *Roper, supra,* 543 U.S.at 570–71 The court also noted that

> The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Roper, supra, 543 U.S. at 574 (emphasis added). See also *Graham, supra,* 560 U.S.at 50 (because 18 is the point where society draws the line for many purposes between childhood and adulthood it is the age below

which a defendant may not be sentenced to life without parole for a non-homicide crime).

As a result, appellant's assertion that she is entitled to individualized sentencing because youthful offenders above the age of 18 may have the sort of juvenile characteristics relied upon by the United States Supreme Court in deciding *Roper*, *Graham* and *Miller* is unavailing. As noted previously, *Roper* recognized that juvenile characteristics may be present in varying degrees in persons under the age of 18 and those characteristics may persist past the age of 18. (*Roper, supra*, 543 U.S. at p. 574.) Nevertheless, the court concluded "a line must be drawn" for purposes of the Eighth Amendment. (*Ibid.*) The court drew that line at age 18 and did not extend its "categorical rules"—such as the ban on mandatory life without parole sentences—to adults. (*Ibid.*; *Miller*, *supra*, 132 S.Ct. at p. 2475.) Regardless of the merit of the suggestion that young adults *should* be treated as juveniles for purposes of sentencing, this Court is without authority to modify the line drawn by the Supreme Court.

Disproportionate Punishments

Appellant further argues that mandatory life without parole sentencing schemes pose too great a risk of disproportionate punishment by preventing the sentencing court from considering the offender's age and

characteristics of youth. (Substituted Brief for Appellant at 29) She essentially argues that as an 18 year old murderer, she is entitled to those considerations. As previously noted, a line was clearly demarcated between those under 18 and those over 18. The United States Supreme Court was clear that if felt a need for that line and where it felt appropriate to draw it. Likewise, the Pennsylvania Supreme Court has agreed that a clear line was drawn. *Lesko, supra,* 15 A.3d at 408

Appellant also points out that mandatory life without parole sentences were particularly harsh due to the "greater proportion of their lives" that children will spend in prison as compared to adults. (Substituted Brief for Appellant at 29-30) The Supreme Court noted this in *Graham* in reference to those under 18.

The Commonwealth submits that this consideration is only relevant in the context of the mitigating factors which have been held to pertain strictly to those under 18. The mere fact that a certain defendant will likely spend a longer term of years in prison than someone significantly older cannot be attenuated to those over 18 without entirely dispensing with mandatory life sentences. And, just as *Miller* was concerned that younger defendants might be less able to deal with police or prosecutors or to assist in their defense, mandatory life sentences without the possibility of parole

also disproportionately affect the legal prospects of an older defendant. For example, an older person potentially has less time to perfect or exhaust their appeals. In terms of such sentences being disproportionate because the court cannot consider mitigating factors of youth, the court is equally prevented from considering any defendant's situation in life in terms of the "extent of his [or her] participation]". The court is also precluded form considering the mitigating characteristics of an older defendant who may have lived for many years as a law-abiding and productive citizen.

As a result, extending the ideology for forbidding life without parole sentences for those over 18, those who the Supreme Court has taken pains to stress are part of a separate class, is completely open-ended and could only be logically or fairly implemented if there were no mandatory life sentences without the possibility of parole for anyone. And that decision, with all due respect, is within the province of the legislature.

Science and Social Science

In her final subsection of her first issue, appellant argues that science and social science "must be taken into consideration in construing the right established in *Miller* and support the conclusion of applying *Miller* to 18 year olds. (Substituted Brief for Appellant at 31)

Appellant cites studies that have found that brain development

continues beyond an individual's 18th birthday. (Substituted Brief for Appellant at 32-34). She also points out Supreme Court case law noting the importance of scientific and medical principles, most recently *Moore v. Texas*, 137 S.Ct. 1039 (2017), in which the Court noted that failure to consider those principles in the context of the 8th Amendment would render the prohibition on imposing the death penalty on those with intellectual disabilities a "nullity."

The Commonwealth would point out that the authorities cited by appellant are by no means conclusive that the line drawn at 18 by *Miller, Roper, Graham* and our own Supreme Court should be extended. In any event, it is simply a matter that must be determined by the Pennsylvania Supreme Court and the Supreme Court of the United States.

A review of appellant's argument reveals that she does not provide support for her contention that "it is undisputed" that 18:

> is considered a time of ongoing childhood development where the same characteristics of youth and propensity for change identified by the *Miller* Court may be sufficiently present to justify a lesser sentence.

*(*Substituted Brief for Appellant at 35-36). To the contrary, one of the sources cited by appellant identified adolescence as "age 13 to age 18" simply because that age group was "most affected by the ongoing transfer

debate" regarding culpability". Elizabeth Cauffman, Ph.D. and Laurence Steinberg, Ph.D*, (Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults* , 18 Behav.Sco. & L. 741, 742 n.1 (2000). (See also Substituted Brief for Appellant at 32, 33) Another noted that "contemporary scholars generally consider adolescence to begin at age 10 or 11 and to end by age 18 or 19". Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development From the Late Teens Through the Twenties*, 55 Am. Psychologist 469, 476 (2000). *Emerging Adulthood* further stated:

> In our time, it makes sense to define adolescence as ages 10-18**.** Young people in this age group have in common that they live with their parents, are experiencing the physical changes of puberty, are attending secondary school, and are part of a school-based peer culture. None of this remains normative after age 18, which is why it is not adequate simply to call the late teens and early twenties late adolescence. Age 18 also marks a variety of legal transitions, such as being allowed to vote and sign legal documents.
>
> Although some scholars have suggested that the late teens and early twenties should be considered late adolescence (e.g., Elliott & Feldman, 1990), for the most part scholars on adolescence focus on ages 10-18 as the years of adolescent development. Studies published in the major journals on adolescence rarely include samples with ages higher than 18. For example, in 1997, 90% of the studies published in the Journal of Research on Adolescence and the Journal of Youth &

> Adolescence were on samples of high school age or younger. College students have been the focus of many research studies, but most often as "adults" in social psychology studies. Sociologists have studied the late teens and the twenties for patterns of demographic events viewed as part of the transition to adulthood (e.g., Hogan & Astone, 1986; Rindfuss, 1991). However, few studies have recognized the late teens through the twenties as a distinct developmental period.

Arnett, *Emerging Adulthood, supra* at 476.

These sources are consistent with the designation of age 18 as "the point where society draws the line for many purposes between childhood and adulthood." *Roper*, 543 U.S. at 574.[3] Beyond that, appellant attaches nothing of substance to demonstrate that the scientific evidence of juveniles' characteristics, adopted by *Miller*, specifically applies to her.

Furthermore, it is unclear "[t]o what extent are the explorations of emerging adulthood different for men and women." Arnett*, Emerging*

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[3] Appellant states that *Graham* "cited approvingly" to the amicus curiae brief of the American Psychological Association which stated that "impulse control and risk evaluation continue developing through late adolescence and into early adulthood at age 22". (Substituted Brief for Appellant at 32). However, *Graham* cited the brief for its finding that "developments in psychology continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence" *Graham, supra,* 560 U.S. at 68.

Adulthood, supra at 476. And, Cauffman and Steinberg, *(Im)maturity of Judgment in Adolescence, supra, at* 753, acknowledged that "females exhibit greater psychosocial maturity than males."

Along those lines, neuroscientific studies have found that "girls' brains finish maturing about two years earlier than boys', in agreement with their earlier sexual maturation at puberty." *A.N.A., et al.,* v. *Breckinridge County Board of Education, et al.,* 2009 WL 8495475 (W.D.Ky.) (Report Prepared for Plaintiffs, J.J.N., K.A.S, and A.S. of Lise Eliot Ph.D.) Similarly, the Supreme Court of Kentucky noted, in a concurring opinion, a study published in the Cerebral Cortex Journal that found "that the female brain matures faster and earlier than the male brain." *B.H. v. Commonwealth,* 494 S.W.3d 467, 475 (Ky. 2016).

The foregoing is not stated to blame appellant for happening to be female. It is meant to underscore the impractical ramifications of attempting to make exceptions to what the Supreme Court recognized as a necessary and important line at the age of 18.

Appellant further argues that "other areas of Pennsylvania law recognize 18-year-olds as children." She notes that under Pennsylvania's Mental Health and Intellectual Disability Act of 1966, "juveniles 18 and younger may be admitted to mental health facilities by a parent, guardian or

individual standing in loco parentis." (Substituted Brief for Appellant at 37, citing 50 Pa.C.S. §4402). The fact that §4402 allows parents and guardians power to admit 18 year olds to mental health facilities does not undermine the clear line drawn by the Supreme Court of the United States. The Commonwealth would point out that the dispositional structure of §4402 is designed to further the purpose of that statute and the proceedings authorized thereunder are civil, rather than criminal, in nature. Criminal codes are designed for quite different purposes.

Regarding the definition of a "child" under 42 Pa.C.S. §6302 of the Juvenile Act which includes individuals "under the age of 21 years and who committed an act of delinquency prior to reaching age 18", the Commonwealth would point out that the Juvenile Act is concerned with rehabilitation for those who committed a delinquent act[4] before turning 18. Because of that, the Juvenile Act:

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[4] Our legislature has deemed some crimes so heinous that they are excluded some crimes from the definition of "delinquent act." Pursuant to 42 Pa.C.S.A. §6322(a) and §6355(e), when a juvenile is charged with murder or any of the other offenses excluded from the definition of "delinquent act" in 42 Pa.C.S.A. §6302, the criminal division of the Court of Common Pleas is vested with jurisdiction. See 42 Pa.C.S.A. §6302 (a delinquent act does not include the crime of murder); *Commonwealth v. Ramos*, 920 A.2d 1253, 1258 (Pa.Super. 2007).

> is tailored to a child's special needs, the purpose of the Act cannot be extended to adult offenders. The Act's goals of providing "care, protection, safety and wholesome mental and physical development of *children* who fall within its jurisdiction," clearly are inapplicable. Trial Court Opinion, 6/30/04, at 8 (emphasis in original) (citing 42 Pa.C.S. § 6301(b)). Indeed, our Supreme Court recognized this dichotomy in *Commonwealth v. Iafrate,* 594 A.2d 293 (Pa. 1991), explaining that while the criminal justice system is penal, our juvenile system is primarily rehabilitative. *See id.* (holding that for purposes of Juvenile Act, birthday occurs on anniversary of date of birth and declining to extend common-law rule that person reaches majority on day prior to eighteenth birthday).

Commonwealth v. Monaco, 869 A.2d 1026, 1030 (Pa.Super. 2005) *See also Commonwealth v. Cotto* 753 A.2d 217 (Pa. 2000) (the right to be treated as a juvenile offender is statutory rather than constitutional) Simply stated, the Juvenile Act's definition of "child" does not apply to those who commit murder over the age of 18. And, the *Miller* Court was "[p]resumably aware that the definition of 'juvenile' or 'child' may vary from state to state." *Adkins v. Wetzel*, 2014 WL 4088482.

Finally, appellant's reliance on *Moore v. Texas,* 137 S.Ct. 1039 (2017) is unavailing. In that case, the Supreme Court determined that Texas could not use current medical standards for the diagnosis of intellectual disability in some contexts but disregard them when "an individual's life is at stake." *Moore, supra*, 137 S.Ct at 2052. Appellant

argues that, as a result, the post-conviction court must apply the Juvenile Act's definition of a "child." Appellant is incorrect. The Juvenile Act's definition of a child for rehabilitative purposes is not analogous to the "current medical standards" that were ignored in *Moore*. In that case, current standards were overlooked in favor of superseded ones where the issue at hand was a determination of intellectual disability. Here, the definition of a child under the Juvenile Act is readily apparent and does not apply to appellant for purposes of her murder conviction.

Appellant urges the Court to follow the District Court of Connecticut in *Cruz v. United States*, 3:1-cv-00787-JCH, 56 (D. Conn. March 29, 2018) which held that *Miller* applies to 18 year olds. The Commonwealth would point out that in *Poole v. Attorney General of Pennsylvania,* 2013 WL 5814079 (E.D.Pa. 2013), the United States District Court for the Eastern District of Pennsylvania addressed the relevant issues in a substantially similar case. Although *Poole* is also not binding precedent on this Honorable Court, it is persuasive as the Commonwealth's constitutional prohibition against cruel punishment does not afford broader protections to juveniles than those provided under the federal constitution. *See Commonwealth v. Lankford,* 164 A.3d 1250, 1252 (Pa.Super. 2017); *Commonwealth v. Yasipour*, 957 A.2d 734 (Pa.Super.

2008 (Pennsylvania's constitutional ban on excessive punishment is co-extensive with United States constitution).

In *Poole,* the defendant was convicted of first-degree murder. The crimes occurred when Poole – like appellant - was nearly 19 years old. In his PCRA petition, Poole argued that his life sentence was unconstitutional under *Miller.* The court analyzed Poole's claim under *Miller* as follows:

> The Court, however, limited its holding in *Miller* to juveniles "under the age of 18 at the time of their crimes," as it had done in previous cases involving juveniles convicted of life sentences. *** In using 18 as the operative age in *Miller,* the Court relied on its reasoning in *Roper*[1] , as well as *Graham*, and the science and social science studies underlying the conclusions in those cases. See *Miller* ... ("age of 18 is the point where society draws the line for many purposes between childhood and adulthood"); *Graham,* 130 S.Ct. at 2030 (Because age of 18 is cut off used by society, "those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime").

Poole, 2013 WL 5814079 at 2-3. The district court then held that because Poole was over 18 when he committed the crimes, *Miller's* holding is inapplicable. Additionally, the district court grounded its holding upon numerous Third Circuit decisions:

> The United States Court of Appeals for the Third Circuit also has refused to extend Miller to include those who are over 18 at the time they committed the crimes. See *In re John Liebel,* No. 13-2907,

> 8/15/13 Order (denying an application to file a second or successive petition because petitioner was not under the age of 18 when he committed the crimes); In re: *Michael Bozzelli,* No. 13-2994, 8/1/13 Order (denying an application to file a second or successive petition where a petitioner argued that Miller "should be expanded to include those who are in their 20s"); *In re: Keith Andrews,* No. 13-2986, 8/1/13 Order (denying an application to file a second or successive petition where petitioner argued Miller applies to those under the age of 25); see *also Hall v. Lamas,* No. 12-5163, 2013 WL 1189242 (E.D.Pa. Mar.22, 2013) adopting R & R No. 12-5163, 2013 WL 1187047, at *1 n. 5 (E.D.Pa. Feb.7, 2013) ("[*Miller*] does not apply to Petitioner because he was not under the age of 18 when he committed his crimes.") (Bartle, J.).

Poole, 2013 WL 5814079 at 2 n.4. In sum, where the text of *Miller* limits it's holding to "those under the age of 18 at the time of their crimes", and where the federal courts in this jurisdiction have declined to extend *Miller* beyond the plain language of the decision, the post-conviction court did not abuse its discretion in denying relief.

For all of the foregoing reasons, the PCRA Court correctly concluded that appellant's serial petition is time-barred.

II. THE SUPREME COURT'S DECISIONS IN *GRAHAM V. FLORIDA* AND *ENMUND V. FLORIDA* DO NOT ENTITLE APPELLANT TO RETROACTIVE APPLICATION OF *MILLER V. ALABAMA*. FURTHERMORE, THE FACTS OF APPELLANT'S CASE DO NOT DEMONSTRATE THAT HER OFFENSE WAS THE RESULT OF UNFORTUNATE, YET TRANSIENT IMMATURITY.

In her second issue on appeal, appellant argues that the rule of law announced in *Miller* "requires retroactive invalidation" to "an offender with categorically diminished culpability because the offender did not kill or intend to kill." (Brief for Appellant at 53-58) Appellant relies upon the United States Supreme Court decisions in *Graham v. Florida, supra,* and *Enmund v. Florida,* 458 U.S. 782 (1982). Appellant claims those decisions support the conclusion that, as an accomplice, she lacked the intent to kill and accordingly should not have received a life sentence. However, the legal reasoning upon which the defendant relies is not applicable to her case.

Graham v. Florida, supra, held that a sentence of life imprisonment without parole for a juvenile in non-homicide cases is cruel and unusual punishment, in violation of the Eighth Amendment. *Enmund v. Florida, supra,* held that the Eight Amendment prohibits the imposition of the death penalty on aiders and abettors of felonies during which murders occur,

where aiders and abettors do not themselves kill, attempt to kill, intend that killing take place or that lethal force be used. *Id.*

Appellant contends that the Court should engage in an Eighth Amendment analysis under the felony-murder rule and/or conspiracy theory of liability to find that life without parole constitutes cruel and unusual punishment. However, the legal reasoning upon which appellant relies is not applicable to her. *Enmund* is clearly distinguishable from the instant case in that appellant was sentenced to life imprisonment without parole, not death. *Graham* is distinguishable from the instant matter in that appellant was not a juvenile on the day of her crime which was, in fact, murder.

Furthermore, a defendant who challenges the constitutionality of her sentence of imprisonment on a claim that it violates her right to be free from cruel and unusual punishment under the Eighth Amendment raises a legality of the sentence claim. *Commonwealth v. Yasipour*, 957 A.2d 734 (Pa.Super. 2008). A punishment is cruel and unusual only if so greatly disproportionate to an offense as to offend evolving standards of decency or a balanced sense of justice. *Commonwealth v. Ehrsam,* 512 A.2d. 1199 (Pa.Super. 1986)

The legislature has provided that a person convicted of second

degree murder shall be sentenced to a term of life imprisonment. 18 Pa. C.S. § 1102(b). The legislature has also stated that the Court shall balance the need to protect the public, the gravity of the offense as it relates to the impact on the life of the victim as well as the community, and the rehabilitative needs of the defendant. 42 Pa. C.S. § 9721(b). Construing these two provisions together, Pennsylvania Courts have concluded that by enacting 18 Pa. C.S. § 1102(b), the legislature intended to remove a trial courts discretion to impose a lesser sentence in the case of a defendant convicted of second degree murder. *Commonwealth v. Castle,* 554 A.2d 625 (Pa.Commw. Ct.1989) and *Commonwealth v. Knox,* 50 A.3d 732, (Pa.Super. 2012).

Clearly, *Enmund and Graham are* legally and factually distinguishable from appellant's case. They do not provide a basis for relief and appellant cannot avail herself of them in order to avoid the jurisdictional time-bar.

Appellant further claims that the circumstances of her offense were the result of 'unfortunate yet transient immaturity" and that she asserted facts in her petition that satisfied all of the age-related factors of diminished culpability identified in *Miller*. Specifically, she claims that she has a history of physical and sexual abuse which could not be considered under a mandatory sentencing scheme. (Substituted Brief for Appellant at 43-44).

In doing so, appellant focuses on the inability of the court to consider her "'family and home environment…no matter how brutal or dysfunctional." Appellant emphasizes her own childhood and adolescence which she claims were 'marked by violence, poverty and trauma in her home life and amongst her peer group." (Substituted Brief for Appellant at 44). Without elaboration, she claims that those factors were "directly related to her conduct that led to her conviction, and as such should be taken into consideration at a re-sentencing hearing." *Id* at 44-45. However, *Miller* was primarily concerned with the **hallmark features** of the defendant's **age**, including:

> immaturity, impetuosity, and failure to appreciate risks and consequences [;] ... the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional [;] ... the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him[;] ... that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys[;] ... [and] the possibility of rehabilitation ... when the circumstances [*i.e.* (the youthfulness of the offender)] most suggest it.

Miller, supra, 567 U.S. at 477-478. (citations omitted).

Moreover, appellant's representations of her own childhood and

adolescence are supported by citations to her Reproduced Record which, upon review, is actually her most recent PCRA Petition which does not contain any actual substantiation. Even if Miller were applicable to 18 year-olds, appellant's unsupported arguments do not establish that she possessed the hallmark characteristics of youth at the time she committed second degree murder. See *Commonwealth v. Hall,* 872 A.2d 1177, 1182 (Pa. 2005) and *Commonwealth v. Washington,* 880 A.2d 536, 540-41 (Pa. 2005); *Commonwealth v. Natividad,* 938 A.2d 310, 322-23 (Pa. 2007) ("A PCRA petitioner must exhibit a concerted effort to develop his ... claim and may not rely on boilerplate allegations ....") *citing Commonwealth v. Spotz,* 896 A.2d 1191, 1250 (Pa. 2006).

Simply put, appellant provides nothing beyond her own claims of a traumatic upbringing that inexplicitly resulted in her committing murder due to "transient yet unfortunate immaturity." She does not demonstrate, or provide any basis from which she could prove, her possession of the hallmark features of youth discussed in *Miller* less than 3 months before she turned 19.

Appellant further argues that her "circumstances" left her "vulnerable" to outside influences and poor decision making. In doing so she attempts to argue an alternative version of the facts in which her admiration for her

older brother left her susceptible to his influence. She claims that she "approached her brother and asked him on behalf of another person if Mr. Madden would allow the use of his gun to commit a robbery." (Substituted Brief for Appellant at 54). She also represents that she acted as lookout at her brother's "instruct[ion]" and states:

> [her brother] was the ultimate decision-maker regarding whether a robbery would be attempted, where it would be attempted, and by what method. The influence of her older brother, who she looked up to and in whose lead she consistently followed, represents the type of negative peer-group and familial influence that Miller recognized juveniles are particularly vulnerable to.

(Substituted Brief for Appellant at 55).

The Commonwealth submits that appellant's attempt to argue a different set of facts other than those accepted by the fact finder must be rejected. To the extent that appellant is arguing against the facts that led to her conviction, she is not presenting a cognizable claim pursuant to the PCRA. Moreover, such a challenge is properly raised on direct appeal; thus, appellant's arguments are considered previously litigated and waived. See 42 Pa.C.S.A. §9543(a)(3) (PCRA petitioner must plead and prove that "the allegation of error has not been previously litigated or waived."); 42 Pa.C.S.A. §9544(b) (a PCRA issue "is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on

appeal or in a prior state postconviction proceeding.")

What's more, appellant has wholly misrepresented the record. Appellant takes great pains to characterize herself as an impressionable, peer-influenced bystander in the murder of Robert Walker. However, a review of the trial transcript reveals that appellant admitted to police that she wanted money and that it was entirely her idea to commit a robbery to obtain it. Appellant approached her brother, of her own volition, and solicited his help. (JTT[5] 53) When asked "[w]hose idea was it originally?", appellant responded "Mine." The questioning continued as follows:

> Question; All right. What did you say to whom to start this in motion?
>
> Answer: I wanted to get some money, and A said A knew a place, the Athletics Association. So I said, "Let's go." A said, 'Are you sure?' And I kept saying, 'Yeah, yeah, let's go.'

(Id) Appellant also stated that she had discussed splitting the money that she and her cohorts would steal three ways. (JTT 70) Appellant also knew that her brother was carrying a loaded gun. (JTT 68-70; DE No. 18 at 2.)

Unfortunately for appellant, a petition pursuant to the post-conviction

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[5] The letters JTT followed by numerals refer to the pages of the Jury Trial Transcript dated January 16-20, 1981.

relief act is not an opportunity to re-litigate the facts and, in this case, the facts of record belie appellant's self-serving version of events. The record also disproves appellant's attempts to portray her actions immediately following the shooting. Appellant now claims that she "immediately" boarded a bus and reported that there was a man "injured" (Substituted Brief for Appellant at 9). However, a review of the record reveals that appellant told Detective Freeman that she remained at the scene of the shooting "for about 12 minutes" until a van drove by and a jogger passed. As that point, appellant "walked." (JTT 50) Appellant made no effort to alert the passersby and instead tried to find Forbes Avenue but got lost. After making her way to Forbes, appellant got on a bus about 4 blocks from the shooting and told the driver that she had seen "a man [ly]ing on the ground" who "looked like he was dead." *Id*. As a result, the record demonstrates a unquestionable lack of desire by appellant to assist the victim.

As a result, a review of the actual facts of appellant's case reveals that, even if an 18 year old could plausibly argue that they are entitled to assign their criminal offenses to transient immaturity, impetuousness and susceptibility to peer influences, appellant is not one of them.

Appellant was convicted of felony murder during an attempted

robbery that she initiated and in which the facts clearly demonstrate her foresight that someone could be killed.

In her brief, appellant claims that she was convicted for her role as "lookout" during an attempted robbery during which she neither killed nor intended to kill. (Substituted Brief for Appellant at 56) She claims that she is entitled to relief based on *Enmund v. Florida*, *supra,* which prohibited the death penalty for those who "who neither took life, attempted to take life, nor intended to take life" and *Graham v. Florida*, *supra,* which, according to appellant, reasoned that juvenile offenders who did not kill or have an intent to kill have "twice diminished moral culpability:" first, by virtue of their youth; and second, by virtue of their lack of intent to kill. (Substittued Brief for Appellant at 57*)*. Appellant again states that "[c]rimes in which the offender does not kill or have the intent to kill 'differ from homicide crimes in a moral sense.'" *Id* at 58.

Appellant actually misstates the holdings of these cases. In *Enmund v. Florida*, the Supreme Court of the United States held that the Eighth Amendment does not:

> permit[] imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place **or that lethal force will be employed.**

Enmund, supra, 458 U.S. at 797 (emphasis added).

As noted, *Enmund* was concerned with the imposition of the death penalty. Appellant even more materially misstates *Graham* wherein the Supreme Court recognized that defendants who "do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Graham* 560 U.S. at 69. Omitted from appellant's numerous citations to *Graham* is that those who "foresee that life will be taken" are excluded from those "categorically less deserving" of the most severe punishment. Foreseeability is defined as follows:

> Foreseeability. The ability to see or know in advance; e.g. the reasonable anticipation that harm or injury is a likely result from certain acts or omissions.

Black's Law Dictionary, Sixth Edition, 1990, page 649. Appellant was not a juvenile, nor did the circumstances of the crime evince a lack of foresight that death could result from her actions. Instead, her actions demonstrate consent to, and in all likelihood, the solicitation of the potential use of lethal force. She specifically asked her brother, who she knew was carrying a loaded firearm, to assist in her robbery plot. Appellant, who claims to have

been “excelling” in college, could certainly discern that a possible result of her scheme would be the death of a human being. (See Substituted Brief for Appellant at 50). Appellant’s actions after the shooting reveal that she was not surprised by the use of lethal force and did not seek “immediately” seek help for the victim as she now claims. (Substituted Brief for Appellant at 9) Instead, she loitered for approximately 12 minute by her own estimation, presumably to make sure to make sure that the victim was dead. At that time, instead of alerting the occupants of a van or a passing jogger, appellant absconded from the scene. (JTT 50)

For all of the foregoing reasons, appellant cannot assign her crime to the unfortunate characteristics of youth and is not entitled to retroactive application of *Miller.*

III. THE PCRA COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S PETITION WITHOUT A HEARING.

Finally, appellant claims that the PCRA court erred when it dismissed her fifth PCRA petition without a hearing. This claim is meritless. *Commonwealth v. Marshall*, 947 A.2d 714, 723 (Pa. 2008) ("[a]ppellant's petition was untimely, and accordingly the PCRA court properly determined that it had no jurisdiction to entertain it. We therefore also must conclude that the PCRA court did not err in dismissing [a]ppellant's petition without a hearing").

To conclude, appellant's PCRA petition is manifestly untimely and appellant did not establish any of the statutory exceptions to the one-year time-bar. Therefore, neither the PCRA court nor this Court has subject matter jurisdiction to consider the merits of appellant's claims. The PCRA court thus did not err when it dismissed appellant's petition without holding a hearing. *Commonwealth v. Jackson*, 30 A.3d 516, 523 (Pa. Super. 2011); Pa.R.Crim.P. 907(1).

Moreover, as this Court is well-aware, before a hearing may be granted, a petitioner must present a certification indicating the substance of the proposed witness' testimony. Specifically 42 Pa.C.S. §9545(d)(1) states as follows:

> Where a petitioner requests an evidentiary hearing, the petition shall include a signed certification as to each intended witness stating the witness's name, address, date of birth **and substance of testimony and shall include any documents material to that witness's testimony**. Failure to substantially comply with the requirements of this paragraph shall render the proposed witness's testimony inadmissible.

42 Pa.C.S. § 9545(d)(1).

A review of appellant's witness certifications reveals that they were prepared and signed by counsel, not the proposed witnesses. While this alone does not render the certification deficient, those certifications are vague and make broad reference to "findings, assessment, and recommendations… and all documents obtained or created in the process of completing this assessment." (RR 180a) The certifications generally indicate that the witness would discuss their respective areas of and "how they are relevant to Ms. Lee's case" in terms of decision-making at the age of 18, the effects of experiencing or witnessing trauma and abuse and their recommendations regarding appellant's rehabilitation. (RR 114a, 164a, 180a).

The actual substance of the witnesses' testimony is not identified, nor is any supporting documentation. An evidentiary hearing is not a discovery tool at the disposal of appellant for the purpose of developing testimony to

support her apparent claims that her decision-making was impaired at the age of almost 19. *See Commonwealth v. Roney,* 79 A.3d 595, 604605 (Pa. 2013) (citations and internal quotation marks omitted), cert. denied, *Roney v. Pennsylvania,* 135 S.Ct. 56 (2014) (an evidentiary hearing is not meant to function as a fishing expedition for any possible evidence that may support some speculative claim....")

For all of the foregoing reasons, appellant's petition was properly denied without a hearing.

CONCLUSION

WHEREFORE, the Commonwealth respectfully requests that the order denying post-conviction relief be affirmed.

Respectfully submitted,

STEPHEN A. ZAPPALA, JR.
DISTRICT ATTORNEY

MICHAEL W. STREILY
DEPUTY DISTRICT ATTORNEY

MARGARET IVORY
ASSISTANT DISTRICT ATTORNEY
PA. I.D. NO. 91565

Attorneys for Appellee

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Record of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Margaret Ivory_____

Signature:__/s/_____

Name:___Margaret Ivory_____

Attorney No. _91565_____

CERTIFICATE OF COMPLIANCE

I hereby certify that although the Substituted Brief of Appellee exceeds 30 pages, it is in compliance with the word count limits set forth in Pa.R.A.P. 2135(a)(1).

Dated: May 25, 2018

s/ Margaret Ivory
MARGARET IVORY
ASSISTANT DISTRICT ATTORNEY
PA. I.D. NO. 91565

Office of the District Attorney
401 Allegheny County Courthouse
Pittsburgh, PA 15219
(412) 350-4377

PROOF OF SERVICE

I hereby certify that I am this day serving two (2) copies of the within Brief for Appellee upon Counsel for Appellant in the manner indicated below which service satisfies the requirements of Pa.R.A.P 121:

Service by First Class Mail addressed as follows:

Quinn Cozzens, Esquire
Abolitionist Law Center
P.O. Box 8654
Pittsburgh, PA 15221

Dated: May 25, 2018

___/s/_____
MARGARET IVORY
ASSISTANT DISTRICT ATTORNEY
PA. I.D. NO. 91565

Office of the District Attorney
401 Allegheny County Courthouse
Pittsburgh, PA 15219

(412) 350-4377