

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
LARRY GENE HULL,	:	
	:	
Appellant	:	No. 2037 MDA 2012

Appeal from the Order Entered October 16, 2012  
In the Court of Common Pleas of Franklin County  
Criminal Division No(s): CP-28-MD-0000101-1975

BEFORE: BOWES, OTT, and FITZGERALD,\* JJ.

MEMORANDUM BY FITZGERALD, J.:

**FILED AUGUST 21, 2013**

Appellant, Larry Gene Hull, appeals *pro se* from the order entered in the Franklin County Court of Common Pleas, dismissing his third Post Conviction Relief Act<sup>1</sup> ("PCRA") petition for untimeliness.<sup>2</sup> Appellant argues that he is entitled to relief because his sentence is unconstitutional based upon ***Atkins v. Virginia***, 536 U.S. 304 (2002), made applicable in the instant case by ***Miller v. Alabama***, 132 S.Ct. 2455 (2012), and that his

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> 42 Pa.C.S. §§ 9541-9546.

<sup>2</sup> The Commonwealth indicated by letter that it would not file an appellee's brief.

PCRA petition is timely under the newly-recognized constitutional right exception.<sup>3</sup> We affirm.

The PCRA court summarized the facts and procedural posture of this case:

In 1975, [Appellant, who was twenty-eight years old,] shot and killed his neighbor with a .22 caliber rifle. In 1979, this Court found him guilty of first degree murder after he pleaded guilty to murder generally. **See Commonwealth v. Hull**, 435 A.2d 1204 (Pa. 1981) (*per curiam*). After almost 20 years of post-conviction proceedings, a federal court granted [Appellant] habeas-corpus relief in the form of a new trial because his lawyer was constitutionally ineffective at his 1979 competency hearing. **See Hull v. Kyler**, 190 F.3d 88 (3d Cir. 1999). In 2001, this Court re-tried [Appellant] without a jury. In 2002, we found [Appellant] guilty of first-degree murder and sentenced him to mandatory life without parole (LWOP). . . .

[Appellant] filed this PCRA petition—his third—more than four years after his conviction became final. He claimed that mandatory LWOP sentences are unconstitutional when imposed on the mentally disabled. We declined to appoint counsel, cf. Pa.R.Crim.P. 904(D), and found that we lacked jurisdiction to hear the petition. . . . We dismissed the PCRA petition on October 16, 2012, and [Appellant] appealed.

PCRA Ct. Op., 2/2/13, at 1-2. Appellant filed a court-ordered Pa.R.A.P. 1925(b) statement of errors complained of on appeal and the PCRA court filed a responsive opinion.

Appellant raises the following issues for our review:

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<sup>3</sup> 42 Pa.C.S. § 9545(b)(1)(iii).

1. Whether the Eighth and Fourteenth Amendments to the United States Constitution forbids a sentencing scheme that mandates life without the possibility of parole for defendants who suffer mental disorders, retardation or disabilities without consideration of their diminished culpability as a class, and as applied to [Appellant] in particular, as recognized in ***Atkins v. Virginia*** and made applicable to the instant case by the analysis applied in ***Miller v. Alabama***?

2. Whether [Appellant's] mandatory sentence of life without parole un (sic) 18 Pa.C.S.A. § 1102, as applied to him in particular, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution because § 1102 precludes the sentencer from considering [Appellant's] reduced culpability resulting from his mental disorders, retardation or disabilities while, at the same time, is required to recognize the reduced culpability of juvenile offenders as a protected class under ***Miller v. Alabama***?

Appellant's Brief at 4.

Before examining the merits of Appellant's claims, we examine whether the PCRA court had jurisdiction to entertain the underlying PCRA petition. On appellate review of a PCRA ruling, "we determine whether the PCRA court's ruling is supported by the record and free of legal error." ***Commonwealth v. Marshall***, 947 A.2d 714, 719 (Pa. 2008) (citation omitted). A PCRA petition "must normally be filed within one year of the date the judgment becomes final . . . unless one of the exceptions in § 9545(b)(1)(i)-(iii) applies and the petition is filed within 60 days of the date the claim could have been presented." ***Commonwealth v. Copenhefer***, 941 A.2d 646, 648 (Pa. 2007) (citations and footnote omitted).

The PCRA's timeliness requirements are jurisdictional in nature and must be strictly construed; courts may not address the merits of the issues raised in a petition if it is not timely filed. It is the petitioner's burden to allege and prove that one of the timeliness exceptions applies.

***Commonwealth v. Abu-Jamal***, 941 A.2d 1263, 1267-68 (Pa. 2008) (citations omitted).

Appellant contends the following timeliness exception applies:

(iii)the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S. § 9545(b)(1)(iii).

We consider whether the PCRA court erred in finding Appellant's third PCRA petition untimely. **See** 42 Pa.C.S. § 9545(b)(1); ***Abu-Jamal***, 941 A.2d at 1267-68. Following the grant of a new trial, the trial court entered a verdict of guilty of first-degree murder on September 16, 2002, and sentenced Appellant to life in prison on October 30, 2002. This Court affirmed Appellant's judgment of sentence. ***Commonwealth v. Hull***, 1857 MDA 2002 (unpublished memorandum) (Pa. Super. Nov. 10, 2003). On April 3, 2007, the Supreme Court of Pennsylvania denied review. ***Commonwealth v. Hull***, 920 A.2d 831 (Pa. 2007). Appellant's judgment of sentence became final on July 2, 2007, ninety days after the Pennsylvania Supreme Court denied his petition for allowance of appeal. **See** 42 Pa.C.S. § 9545(b)(3) (providing "a judgment becomes final at the conclusion of direct

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review, including discretionary review in the Supreme Court of the United States . . . or at the expiration of time for seeking the review”); U.S.Sup.Ct.R. 13 (providing “a petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review[ ]”). Appellant then had one year, until July 2, 2008, to file his PCRA petition. **See** 42 Pa.C.S. § 9545(b)(1); **Copenhefer**, 941 A.2d at 648. The instant petition, filed on August 17, 2012, is patently untimely. Therefore, we review whether his petition alleged and proved, as Appellant claims, the exception at section 9545(b)(1)(iii). **See** 42 Pa.C.S. § 9545(b)(1)(iii).

Appellant argues that the instant PCRA petition is timely because **Miller** recognized a new constitutional right, **Miller** was decided on June 25, 2012, and he filed the instant petition on August 17, 2012. We find he is not entitled to relief.

**Miller’s** holding is clear and stated as follows:

We therefore hold that mandatory life without parole for those **under the age of 18 at the time of their crimes** violates the Eighth Amendment's prohibition on cruel and unusual punishments.

**Miller**, 132 S.Ct. at 2460 (quotations omitted and emphasis added).

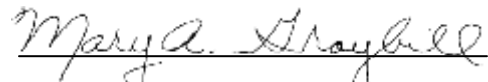
Appellant was born on July 21, 1947. Criminal Compl. No. 88, 1975. 2/26/75, at 1. He was twenty-eight years old at the time of the murder and therefore beyond the age that would qualify him for constitutional protection

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under **Miller**. **See Miller**, 132 S.Ct. at 2460. **Atkins** held “[e]xecutions of mentally retarded criminals are cruel and unusual punishments prohibited by the Eighth Amendment.” **Atkins**, 536 U.S. at 304. As the PCRA court opined: “Neither of those court decisions . . . held that sentencing the mentally disabled to mandatory LWOP violates the Eighth Amendment.” PCRA Ct. Op. at 3. We thus agree that Appellant does not qualify for the timeliness exception and hold the PCRA court’s ruling is free of legal error. **See Marshall**, 947 A.2d at 719.

Order affirmed.

Judgment Entered.

  
Deputy Prothonotary

Date: 8/21/2013