NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MICHELLE MAE HETZEL Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2664 EDA 2012

Appeal from the PCRA Order September 13, 2012
In the Court of Common Pleas of Northampton County
Criminal Division at No(s): CP-48-CR-0003255-2000

BEFORE: GANTMAN, J., SHOGAN, J., and MUSMANNO, J.

MEMORANDUM BY GANTMAN, J.: **FILED JULY 03, 2013**

Appellant, Michelle Mae Hetzel, appeals *pro se* from the order entered in the Northampton County Court of Common Pleas, which denied and dismissed her second petition brought pursuant to the Post Conviction Relief Act ("PCRA") at 42 Pa.C.S.A. §§ 9541-9546. We affirm.

In the PCRA court's Notice of Intent to Dismiss Without Hearing Pursuant to Pa.R.Crim.P. 907, the court fully and correctly sets forth the relevant facts and procedural history of this case. Therefore, we have no need to restate them. We add only that Appellant filed a response to the Rule 907 notice on September 6, 2012. On September 13, 2012, the court dismissed the second PCRA petition without a hearing. On September 24, 2012, Appellant filed a timely notice of appeal; and on September 28, 2012, the court ordered her to file a concise statement of errors complained of on

appeal per Pa.R.A.P. 1925(b). On October 15, 2012, Appellant timely filed her Rule 1925(b) statement.

Appellant raises the following issues for our review:

> WHETHER THE PCRA COURT ERRED IN DEEMING APPELLANT'S APPEAL UNTIMELY WHEN RAISED WITHIN 60 DAYS OF THE ***MILLER V. ALABAMA***[1] RULING, 42 PA.C.S. SEC. 9545 (B)(1)(III)?
>
> WHETHER THE PCRA COURT ERRED BY NOT APPOINTING COUNSEL TO AMEND THE PETITION BEFORE THE COURT BY CITING RULE 904(E) OR GRANTING APPELLANT A HEARING TO PRESENT HER ARGUMENTS FULLY TO THE COURT?
>
> WHETHER THE PCRA COURT ERRED IN JUDGMENT THAT ***MILLER V. ALABAMA*** AND THE SCIENCE VALIDATED IN THE CASE LISTED IN THE PETITION'S EXHIBITS WOULD NOT APPLY TO APPELLANT WHEN IN FACT APPELLANT WAS A TEENAGER?
>
> WHETHER THE PCRA COURT ERRED IN NOT CONSIDERING THAT A MANDATORY LIFE-WITHOUT-PAROLE SENTENCE FOR A TEENAGER WITH THEIR UNIQUE HALLMARK FEATURES VIOLATES THE EIGHTH AMENDMENT OF THE US CONSTITUTION, ART. 5 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, AS WELL AS ART. I, § 13 OF THE PENNSYLVANIA CONSTITUTION?
>
> WHETHER THE PCRA COURT ERRED BY NOT GRANTING A NEW TRIAL WITH A "LIFE QUALIFIED" JURY IN LIGHT OF APPELLANT'S AGE AT THE TIME OF THE OFFENSE?
>
> WHETHER THE PCRA COURT ERRED NOT CONSIDERING APPELLANT'S AGE AND THE FACT "DIMINISHED CAPACITY" WAS RELEVANT BEING UNDER THE INFLUENCE OF ALCOHOL AND THE COURT FAILED TO EVALUATE IF INTENT COULD BE FORMED?

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[1] ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

(Appellant's Brief at 4).

Our standard of review of the denial of a PCRA petition is limited to examining whether the evidence of record supports the court's determination and whether its decision is free of legal error. ***Commonwealth v. Conway***, 14 A.3d 101 (Pa.Super. 2011), *appeal denied*, 612 Pa. 687, 29 A.3d 795 (2011). This Court grants great deference to the findings of the PCRA court if the record contains any support for those findings. ***Commonwealth v. Boyd***, 923 A.2d 513 (Pa.Super. 2007), *appeal denied*, 593 Pa. 754, 932 A.2d 74 (2007). Further, a petitioner is not entitled to a PCRA hearing as a matter of right; the PCRA court can decline to hold a hearing if there is no genuine issue concerning any material fact, the petitioner is not entitled to PCRA relief, and no purpose would be served by any further proceedings. ***Commonwealth v. Rios***, 591 Pa. 583, 618, 920 A.2d 790, 810 (2007) (citing ***Commonwealth v. Hardcastle***, 549 Pa. 450, 701 A.2d 541, 543 (1997)); Pa.R.Crim.P. 907.

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned dispositions of the Honorable Edward G. Smith, we conclude Appellant is not entitled to PCRA relief. The three PCRA court written dispositions comprehensively discuss and properly dispose of the matter. (***See*** PCRA Court Notice of Intent to Dismiss Without Hearing, filed August 21, 2012, at 7-19; PCRA Court Order of Dismissal, filed September 13, 2012, at 1-4; PCRA Court Rule 1925(a) Statement, filed

October 18, 2012, at 1-3) (finding: Appellant's second PCRA petition was facially untimely because she filed it over seven years after her judgment of sentence became final; Appellant acknowledged she was eighteen years old at time of offense; ***Miller*** does not apply to Appellant because she was over eighteen years old when murder occurred; court properly rejected Appellant's effort to extend ***Miller*** to apply to her situation; Appellant fails to qualify for newly discovered facts exception with pre-existing studies and case law; interest of justice does not necessitate appointing counsel to assist Appellant in her untimely PCRA claim based on unsustainable argument). Accordingly, we affirm on the basis of the PCRA court's three written dispositions.

Order affirmed.

Judgment Entered.

Prothonotary

Date: 7/3/2013

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

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
v.	)	
	)	No. CP-48-CR-3255-2000
MICHELLE MAE HETZEL,	)	
	)	
Defendant.	)	

NOTICE OF INTENT TO DISMISS WITHOUT HEARING PURSUANT TO PENNSYLVANIA RULE OF CRIMINAL PROCEDURE 907

AND NOW, this 21st day of August, 2012, after review of the second petition for post-conviction collateral relief pursuant to the Post-Conviction Relief Act ("PCRA")[1] filed by the defendant, Michelle Mae Hetzel, as well as the record in this matter, we are satisfied that there are no genuine issues concerning any material fact; that the defendant is not entitled to post-conviction collateral relief; and that no purpose would be served by any further proceedings. Accordingly, notice is hereby given to the defendant that the court intends to dismiss the instant petition without a hearing for the reasons more fully set forth below. The defendant shall have a period of twenty (20) days from the date of this notice to respond to the proposed dismissal.

STATEMENT OF REASONS

Presently before the court is the defendant's second PCRA petition, which she filed *pro se* on August 7, 2012. As more fully set forth below, this second petition is untimely and, accordingly, this court is without jurisdiction to consider the petition.

[1] 42 Pa.C.S. § 9541, *et seq.*

I. Factual And Procedural History

On August 12, 2000, the City of Easton Police Department charged the defendant with Criminal Homicide[2] and Criminal Conspiracy to Commit Homicide (two counts),[3] for acts that occurred on or about June 14, 2000. The defendant was eventually tried before a jury along with her former husband and alleged co-conspirator, Brandon Bloss ("Bloss").[4] During the trial, the following evidence was presented concerning the defendant's (and Bloss's) guilt:

> Despite being married to [Bloss], Michelle Hetzel (Hetzel) was involved in a sexual relationship with the victim, a 19 year-old woman, Devon Guzman (Devon). Bloss was aware of the women's relationship and was angry about the attention and money Hetzel expended on Devon. He was contemplating divorce. Devon simultaneously was involved in a relationship with another woman named Keary Renner (Renner), with whom she lived. Hetzel, Renner and Devon were high school friends. Although Devon and Renner lived together, Devon met with Hetzel on a regular basis. Typically, Hetzel would arrive at Devon's father's house and ask him to call Devon. Mr. Guzman would oblige and Devon would arrive shortly thereafter.
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> On the night of June 14, 2000, Hetzel and Devon were at Mr. Guzman's home with him, his girlfriend and his sister. Everyone was drinking alcohol. Hetzel and Devon had just returned from a vacation in Puerto Rico, where they had exchanged rings.[FN2] Hetzel paid for the trip. At some point the two women began arguing. Apparently, Hetzel was upset that Devon had not moved out of Renner's residence and did not intend to do so. The women ultimately left Mr. Guzman's house, each departing in her own car.
>
> FN2. Hetzel purchased three rings while in Puerto Rico, identical bands for herself and Devon and another ring with diamonds for Devon. Devon and Hetzel called Mr. Guzman from Puerto Rico, told him they had gotten married, and asked if they could live with him when they returned.
>
> When Devon arrived home, she told Renner that Hetzel had proposed to her, but that she had broken up with Hetzel and returned the rings Hetzel had given her. Renner noticed that Devon had been drinking and the women argued about Hetzel. They began a physical fight, but were interrupted by a series of pages from Hetzel's home.[FN3] Devon called Hetzel's number and spoke with Bloss. Renner could hear Bloss speaking to Devon and Hetzel screaming in the

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[2] 18 Pa.C.S. § 2501(a).

[3] 18 Pa.C.S. § 903(a)(1), (2).

[4] Former Judge of the Court of Common Pleas of Northampton County and current Judge of the Superior Court of Pennsylvania, Jack A. Panella, was the trial judge in this matter.

background. After the call, Devon informed Renner that Hetzel was sick and needed her attention. Renner insisted on accompanying Devon to Hetzel's home. When the women arrived at Hetzel's, Renner stayed in the car and heard Bloss tell Devon at the doorway that Renner would have to leave because Hetzel did not want her there. Devon came back to the car and told Renner that she was taking her home and would return to Hetzel's house. A neighbor saw Devon at the doorway and watched as she approached her car, banged on the hood, and told her passenger that she was taking her home.

FN3. Devon wore a pager.

Devon dropped Renner at their home at approximately 11:30 PM, told her there was nothing to worry about and explained that she would be back soon. Over an hour later, at approximately 12:45 AM, Renner received a call from Hetzel who told her that Devon had never returned to Hetzel's home. At 2:30 AM, Hetzel arrived at Renner's residence with Bloss. Bloss stayed in the car while Hetzel and Renner talked about Devon's disappearance. Hetzel asked Renner to call the police and report Devon as a missing person, but Renner refused to do so because Devon "left before but she always came home." Hetzel then called the Forks Township Police Department and reported Devon as missing. After giving a description of Devon to police, the women called some friends and family members in an effort to find Devon. Several times, Hetzel called police to learn whether they located Devon. Hetzel left Renner's place at about 6:30 AM.

Later that morning, Hetzel returned to Renner's residence with food and suggested that the women drive around Easton looking for Devon's car. At some point, Hetzel suggested they search Canal Park, a place she and Devon often visited together. At the park, they saw Devon's car. Inside the car they discovered Devon. She was covered with a green jacket and lying across the backseat with her back toward the front seat. Renner noticed that Devon's eyebrows and lips were purple and so she told Hetzel that they should take her to get help. A city employee who was present at the park told the women that police were on their way and that they shouldn't move the body. Police arrived, checked for a pulse and, finding none, called the coroner.

The coroner removed the green jacket from atop Devon's body and saw that Devon's throat had been cut and she had a "massive gaping laceration" to her neck. The wound was a "four inch long cut that went almost to her spine; it severed Devon's tongue and cut in half the right carotid artery and the right jugular vein." Also found on the body was a syringe containing a clear liquid. There was no cap on the syringe. Police secured the scene, insisting that Hetzel's vehicle remain in the lot. Both women were interviewed and released. Bloss too was interviewed by police later that day.

After their interviews with police and for a period of about six weeks, Hetzel and Bloss continued their marriage. Hetzel announced to family and friends that she was pregnant with twins, an assertion that was not true. The couple also took a vacation to Mexico together. Meanwhile, the police investigation focused on Hetzel and Bloss. Hetzel's car was searched, as was the home she and Bloss shared. The searches yielded a number of items of physical evidence. From the trunk of Hetzel's car police recovered two pairs of rubber gloves, Bloss's T-shirt and a pair of his jeans with blood that was consistent with Devon's blood, and Bloss's sweatshirt, socks and sneakers, all of which had indications of human blood, but were too weak for further testing. At the couple's home on the day after the murder, police found a pair of Hetzel's jeans soaking in the washing machine. There were no other items in the washer and the tub was filled with soapy water. In a presumptive test, the water tested positive for blood. In the pocket of Hetzel's jeans was a syringe cap that matched the open syringe found on Devon's body.[FN4]

FN4. Recovered from Hetzel's parents' home were the rings that Hetzel and Devon had purchased in Puerto Rico.

Police also recovered physical evidence from Devon's body and her car. On the green jacket that covered her were hairs consistent with Hetzel's hair. In the car were hairs consistent with Bloss's hair.[FN5] Devon's pager was not clipped to her pants as Renner described last seeing it; it was found unclipped under the waistband of her pants. Police seized telephone records from the Hetzel/Bloss residence and learned that there had been numerous calls from that address to Devon's pager on the night of the murder. However, all of those calls had been erased on the pager.[FN6]

FN5. Also present on Devon and in her car were animal hairs. Hetzel and Bloss own a dog and one or more cats.

FN6. The phone records established that Devon was paged repeatedly from appellants' house until about the time she dropped Renner off at their residence.

Police examination of trash set out by Hetzel and Bloss revealed numerous bandages, one of which appeared to have the pattern of a bite mark on it. Police sought and received a warrant authorizing them to photograph Bloss and the photographs that were taken revealed an injury on Bloss's left forearm. A forensic odontologist concluded that the injury was a human bite mark that was consistent with Devon's dental records.

* * *

Cara Judd, a woman who had dated one of Bloss's sisters, testified that Hetzel admitted she killed Devon. According to Judd, Hetzel explained that she was very angry that Devon brought Renner to her home on the night they argued.

> When Devon returned alone, the two women began to fight in Hetzel's home. Devon bit Bloss when he attempted to intervene on Hetzel's behalf. Thereafter, Hetzel grabbed a knife and the next thing she knew there was blood everywhere. Judd also testified that Hetzel told her about soaking her jeans in the washer and that Bloss had hosed down the garage where the murder had taken place.[FN7]
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> FN7. Judd typically kept a diary, and had done so for several years. She recorded her conversations with Hetzel in the diary.
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> George Vine, a friend of Hetzel and Devon, testified that Hetzel offered him sex or money to get rid of Devon approximately two or three months before the murder.
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> Bloss presented no evidence in his defense. Hetzel, however, offered the testimony of several witnesses, including her mother, who told the jury that Bloss admitted to her that he killed Devon. Hetzel herself took the stand and testified that she was not involved in Devon's murder and that she believed Bloss committed the crime.[FN8]
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> FN8. Hetzel denied she confessed the crime to Judd. Although Hetzel conceded that several of the entries in Judd's diary were true, she insisted that the part detailing her confession was false.

Commonwealth v. Hetzel, 822 A.2d 747, 751-54 (Pa. Super. 2003) (footnotes in original).

At the conclusion of the trial, the jury found both Bloss and the defendant guilty of First-Degree Murder but acquitted them of Criminal Conspiracy to Commit Murder. Judge Panella then sentenced both of them to life imprisonment without the possibility of parole on October 5, 2001.

Although the defendant filed post-sentence motions, Judge Panella denied those motions on March 1, 2002. The defendant then appealed from her judgment of sentence to the Superior Court of Pennsylvania. The Superior Court affirmed the defendant's judgment of sentence on March 14, 2003. *See id.* The defendant filed a petition for allowance of appeal to the Supreme Court of Pennsylvania, which the Court denied on December 2, 2003.[5]

[5] The petition was docketed with the Supreme Court at Docket No. 253 MAL 2003.

On or about November 24, 2004, the defendant (via her new counsel) filed her first PCRA petition.[6] After an evidentiary hearing and review of the parties' briefs, we denied the PCRA petition on December 21, 2006.[7] On January 17, 2007, the defendant appealed from the denial of this first PCRA petition to the Superior Court.[8] The Superior Court affirmed our order on October 4, 2007. On November 5, 2007, the defendant filed a petition for allowance of appeal with the Supreme Court of Pennsylvania. The Court denied the petition on June 10, 2008.

Apparently, the defendant filed a federal habeas corpus petition under 28 U.S.C. § 2254 with the United States District Court for the Eastern District of Pennsylvania. In the petition, the defendant included the following alleged violations:

> 1) the trial court denial of her request for change of venue or empanelling a jury from a different county violated her due process rights; 2) trial counsel was constitutionally ineffective for failing to object to the trial court instruction on accomplice liability; 3) the trial court denial of her motion to sever her trial from that of Bloss violated her due process rights; and 4) the trial court dismissal of a seated juror violated her right to jury trial and due process.

Hetzel v. Lamas, 630 F.Supp.2d 563, 568 (E.D. Pa. 2009). On June 23, 2009, the Honorable Norma L. Shipiro (1) adopted part of a report and recommendation of United States Magistrate Judge Arnold Rapoport that recommended denying the petition, (2) denied the defendant's

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[6] Because Judge Panella was elected to the Superior Court and, thus, no longer a member of this court, former President Judge of this court and Judge of the Superior Court, Robert A. Freedberg, assigned this petition to the undersigned for disposition on April 19, 2005.

[7] In the defendant's first PCRA petition, she claimed that

> her trial counsel was ineffective because they, *inter alia*, (1) failed to properly investigate and inspect Judd's journals, (2) failed to hire a forensic examiner to examiner to analyze Judd's journals, (3) failed to adequately investigate Judd, (4) failed to object to the supplemental jury charge on accomplice liability for first-degree murder provided by the trial judge, (5) instructed the defendant to not provide information about a confession by Bloss to the Commonwealth, (6) failed to obtain competent crime scene investigation results and opinions, (7) failed to obtain independent DNA analysis, (8) failed to present character evidence for non-violence and truthfulness, (9) failed to properly impeach Keary Renner, and (10) failed to contact the Commonwealth as to the merit of the defendant's polygraph examination.

[*Commonwealth v. Hetzel*, No. CP-48-CR-3255-2000, at 6-7 (Northampton County Ct. C.P. Dec. 21, 2006).] "[T]he defendant [also] asserted other issues in her petition that she did not argue in her brief including, but not limited to, trial counsel's alleged failure to investigate George Vine." [*Id.* at 7 n.6.]

[8] The appeal was docketed at Superior Court No. 206 EDA 2007.

habeas petition, and (3) issued a Certificate of Appealability regarding the trial court denying the defendant's motion for change in venue/venire. *Id.* at 565, 575.[9] On March 24, 2010, the United States Court of Appeals for the Third Circuit affirmed the district court's decision. *See Hetzel v. Lamas*, 372 Fed. Appx. 280, 2010 WL 1063896 (3d Cir. Mar. 24, 2010).

On August 1, 2012, the defendant filed *pro se* a Motion for Post Conviction Collateral Relief, which constitutes her second petition under the PCRA.[10] On August 10, 2012, the defendant filed a Supplemental Motion for Post Conviction Collateral Relief.

II. Discussion

In the second PCRA petition, the defendant appears to contend that she is entitled to post-conviction relief because of the

> neuroscience from [*Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)] and [*Graham v. Florida*, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)] and the newly[-]recognized constitutional right as identified in [*Miller v. Alabama*, 132 S.Ct. 2455 (2012) in which the United States] Supreme C[ourt] has determined that a sentence of life without parole when imposed on a teenager precludes consideration of his chronological age and its hallmark features.

[Motion for Post Conviction Collateral Relief at ¶5(C).] She also asserts that

> [*Miller*] states it is unconstitutional to sentence a juvenile to a mandatory life sentence, [m]y argument is that the same rule should apply [to] all teenagers including those who were 18 and 19 at the time the crime was committed. Age 18 does not give you full rights. Juvenile facilities hold persons until age 21. State Correctional Facilities hold youthful offenders on a separate pod until the age of 21. Alcohol is an illegal substance until one is age 21. At the time of my crime I was under the influence of alcohol and at then, 18 it was an illegal substance. When diminished capacity is present how can intent be formed? In the Brief For The American Psychological Association, exhibit #12, pg 6 states that qualities that distinguish juveniles from adults do not disappear when an individual turns 18. In that same study, pg 10 states that expecting the experience-based ability to

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[9] The Report and Recommendation can be found at *Hetzel v. Lamas*, No. 08-3651, 2008 WL 6460634 (E.D. Pa. Dec. 22, 2008) (Rapoport, M.J.).

[10] The defendant's second PCRA petition was docketed with the Clerk of Court on August 7, 2012. Pursuant to the prisoner mailbox rule, we will deem the petition filed at least by August 1, 2012, which is the post-mark date included on the envelope included with the filing. *See Commonwealth v. Crawford*, 17 A.3d 1279, 1281 (Pa. Super. 2011) ("Under the prisoner mailbox rule, we deem a *pro se* document filed on the date it is placed in the hands of prison authorities for mailing.").

> resist impulses...to be fully formed prior to age eighteen or nineteen would seem on present evidence to be wishful thinking. On pg #18 of this study it says, No matter the crime, if a teenager is the offender he is usually not committing the offense alone. They base this on peers being the real motive. Medical research has proven in most cases who we are as adolescents are not who we become later in life. The thought process I had as a teenager I do not have today. Along with immaturity and not being fully developed alcohol played a huge part in many of my actions. My question to the court is cannot a teenager one day change? Can one not one day be rehabilitated? Is a 17 year old teenager redeemable and not one of 18 or 19? The adolescent brain research proves that one in their teens is not fully developed and with that my argument is it should also be unconstitutional to sentence an 18 or 19 year old to a mandatory life sentence without one day possibility of parole.

[*Id.* at p. 7A.]

In the supplemental motion, the defendant claims that she is entitled to a new trial with a "'life-qualified' jury . . . because [my] age changes the possible punishment for first degree murder" pursuant to *Miller*. [Supplemental Motion for Post Conviction Collateral Relief.] She also seeks an evidentiary hearing to present her research listed as exhibits to the PCRA. [*Id.*]

As discussed below, the defendant's second PCRA petition is facially untimely. In addition, the defendant has failed to satisfy any of the exceptions to the one-year filing requirement. Accordingly, we lack jurisdiction to consider the second petition.

A. The Second PCRA Petition is Facially Untimely

A PCRA petition, including a second or subsequent petition, must be filed within one year of the date that the judgment of sentence becomes final. 42 Pa.C.S. § 9545(b)(1). A judgment becomes final for purposes of the PCRA "at the conclusion of direct review, including direct 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. § 9545(b)(3). If a PCRA petition is untimely, neither the trial court nor the appellate courts have jurisdiction over the petition. *Commonwealth v. Murray*, 753 A.2d 201, 203 (Pa. 2000); *see Commonwealth v. Fisher*, 870

A.2d 864, 869 (Pa. 2005) ("Without jurisdiction, we simply do not have the legal authority to address substantive claims.").

Here, the judgment of sentence became final on February 2, 2004, sixty days after the Supreme Court of Pennsylvania denied the petition for allowance of appeal.[11] Accordingly, the defendant had to file the instant PCRA petition on or before February 2, 2005. Because the instant petition was not filed until August 7, 2012 (and then supplemented on August 10, 2012), more than seven years after the judgment of sentence became final, the instant petition is facially untimely.

B. The Defendant has Failed to Satisfy any Exception to the One-Year Filing Requirement

As explained above, although the instant PCRA petition is facially untimely, the PCRA recognizes various exceptions to the one-year filing requirement. More specifically, 42 Pa.C.S. § 9545(b)(1) provides in pertinent part as follows:

> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> > (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
> >
> > (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
> >
> > (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania

[11] Technically, the sixty-day period concluded on Sunday, February 1, 2004. Pursuant to Supreme Court Rule 30(1), the last day of the sixty-day period is extended to Monday, February 2, 2004. *See* U.S. Sup. Ct. R. 30(1) ("In the computation of any period of time prescribed or allowed by these Rules . . . [t]he last day of the period shall be included, unless it is a Saturday, Sunday, federal legal holiday listed in 5 U.S.C. § 6103 . . . in which event the period shall extend until the end of the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed.").

> after the time period provided in this section and has been held by that court to apply retroactively.
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> (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.
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> * * *
>
> (4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether appointed or retained.

Id. Additionally,

> it is the petitioner who bears the burden to allege and prove that one of the timeliness exceptions applies. In addition, a petition invoking ***any*** of the timeliness exceptions must be filed within 60 days of the date the claim first could have been presented. A petitioner fails to satisfy the 60-day requirement of Section 9545(b) if he or she fails to explain why, with the exercise of due diligence, the claim could not have been filed earlier.

Commonwealth v. Marshall, 947 A.2d 714, 719-20 (Pa. 2008) (internal citations omitted) (emphasis added). Moreover, "[w]ith regard to an after-recognized constitutional right, . . . the sixty-day period begins to run upon the date of the underlying judicial decision." *Commonwealth v. Leggett*, 16 A.3d 1144, 1146 (Pa. Super. 2011) (citation and quotation marks omitted).

Here, the defendant appears to argue that her second petition satisfies two of the aforementioned exceptions: the after-discovered evidence exception in subsection 9545(b)(1)(ii) and the newly-recognized constitutional right exception in subsection 9545(b)(1)(iii). As explained below, the defendant's allegations in her second petition cannot satisfy either of these exceptions.

The after-discovered evidence exception in section 9545(b)(1)(ii) "requires [the] petitioner to allege and prove that there were facts that were unknown to him and that he could not have ascertained those facts by the exercise of due diligence." *Marshall*, 947 A.2d at 720

(citation and internal quotations omitted). Moreover, "[t]he focus of the exception is 'on [the] newly discovered *facts*, not on a newly discovered or newly willing source for previously known facts.'" *Id.* (citation omitted) (emphasis in original). To successfully invoke the after-discovered evidence exception to the PCRA time-bar, a petitioner must show that: (1) the petitioner discovered the evidence after trial, and could not have obtained the evidence at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) the petitioner is not using the evidence solely to impeach credibility; and (4) the evidence would likely compel a different verdict. *Commonwealth v. D'Amato*, 856 A.2d 806, 823 (Pa. 2004).

In the instant petition, the defendant appears to assert that she has discovered various studies, briefs, and other information relating to the criminal culpability of juveniles that were introduced for consideration in the United States Supreme Court decisions in *Roper v. Simmons* and *Graham v. Florida*. [Motion for Post Conviction Collateral Relief at p. 3 and Exhibits.] In the first instance, this evidence does not appear to constitute after-discovered evidence insofar as there is no indication that this evidence would likely compel a different verdict. Moreover, even if this evidence would somehow satisfy the after-discovered evidence exception, the defendant has not shown that she has satisfied subsection 9545(b)(2) because she did not file the instant petition within sixty days of the date that her claim could have been presented. In this regard, all of the materials submitted as exhibits with the petition were created well over sixty days ago. Accordingly, it does not appear that the defendant can satisfy the after-discovered evidence exception to the one-year filing requirement.

We also note that, to the extent that the defendant is arguing that she discovered the law set forth by the Supreme Court in *Roper* and *Graham*, this allegation would also not satisfy this exception. For example, in *Commonwealth v. Perry*, 716 A.2d 1259 (Pa. Super. 1998), the

PCRA petitioner attempted to argue that the exception for newly-discovered evidence should act as an exclusion to the one-year time bar because he discovered case law that supported an intoxication defense. 716 A.2d at 1262. The Superior Court rejected this claim, determined that the PCRA petition was time-barred, and concluded that the trial court lacked jurisdiction to hear the PCRA. In support of this decision, the court explained that "the discovery of preexisting caselaw [does not qualify under the section 9545(b)(1)(ii) exception]." *Id.*

> The Supreme Court of Pennsylvania has also
>
> held that "subsequent decisional law does not amount to a new 'fact' under section 9545(b)(1)(ii) of the PCRA." *Commonwealth v. Watts*, 23 A.3d 980, 987 (Pa. 2011). As the Court noted:
>
> > Law is a principle; fact is an event. Law is conceived; fact is actual. Law is a rule of duty; fact is that which has been according to or in contravention of the rule. Put another way, a "fact," as distinguished from the "law," is that which is to be presumed or proved to be or not to be for the purpose of applying or refusing to apply a rule of law. Consistent with these definitions, an in-court ruling or published judicial opinion is law, for it is simply the embodiment of abstract principles applied to actual events. The events that prompted the analysis, which must be established by presumption or evidence, are regarded as fact.
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> *Id.* at 986–87 (citations, quotations and punctuation omitted).

Commonwealth v. Brandon, -- A.3d --, 2012 WL 3293690, at *3 (Pa. Super. Aug. 14, 2012). As such, to the extent that the defendant has claimed that she satisfies the one-year exception for after-discovered evidence because she has recently discovered the above-referenced cases, this claim also lacks merit.

Concerning the newly-recognized constitutional right exception, the defendant appears to argue that she satisfies this exception because of the decision in *Miller v. Alabama*, 132 S.Ct. 2455 (2012). As explained below, the defendant has not satisfied this exception.

It appears that, unlike her after-discovered evidence claim, the defendant has satisfied subsection 9545(b)(2) insofar as she did file this second PCRA petition within sixty days of the decision in *Miller*. In this regard, the United States Supreme Court decided *Miller* on June 25, 2012, and the defendant filed the instant second PCRA petition on August 1, 2012. Thus, the defendant has satisfied the sixty-day requirement of subsection 9545(b)(2).

Even though the defendant has timely asserted her claim under subsection 9545(b)(1)(iii), she still fails to satisfy this exception. Regarding subsection 9545(b)(1)(iii), the Superior Court has explained that

> [s]ubsection (iii) of Section 9545 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 th[e Pennsylvania] Supreme Court 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. Abdul–Salaam*, 571 Pa. 219, 226, 812 A.2d 497, 501 (2002). *See Commonwealth v. Copenhefer*, 596 Pa. 104, 941 A.2d 646 (2007).

Commonwealth v. Garcia, 23 A.3d 1059, 1063 (Pa. Super. 2011).

To determine whether the defendant's petition satisfies subsection 9545(b)(1)(iii), we must analyze *Miller*. We note that prior to the Court's decision in *Miller*, the Court had concluded that the Eighth Amendment prohibition of cruel and unusual punishment prohibits the death penalty for defendants who were convicted of murder if they committed the crimes before the age of eighteen. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

Approximately five years later, the Court concluded that a sentence of life without the possibility of parole for an individual under the age of eighteen at the time of committing a non-homicide offense is cruel and unusual punishment in violation of the Eighth Amendment. *Graham v. Florida*, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

In *Miller*, the Court analyzed two cases involving fourteen-year-old offenders that were convicted of murder and subsequently sentenced to mandatory terms of life imprisonment without the possibility of parole. 132 S.Ct. at 2460-61. In addressing the constitutionality of the two sentencing schemes under the Eighth Amendment to the United States Constitution, the Court, *inter alia*, explained the research and findings in *Roper* and *Graham* insofar as those cases "establish[ed] that children are constitutionally different from adults for purposes of sentencing." *Id.* at 2464. The Court also explained that "[b]ecause juveniles have diminished culpability and greater prospects for reform . . . 'they are less deserving of the most severe punishments.'" *Id.* (quoting *Graham*, 130 S.Ct. at 2026). Following the rationale for the differentiation of sentencing treatment for children and adults in *Roper* and *Graham*, the Court concluded 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.* at 2460 (emphasis added).

Here, the defendant acknowledges that she was eighteen years old at the time she committed the murder of Devon Guzman. [Motion for Post Conviction Collateral Relief at p. 3; Supplemental Motion for Post Conviction Collateral Relief.][12] Therefore, as the defendant appears to concede in her second petition and supplemental petition, the holding in *Miller* is inapplicable to her case because *Miller* only applies to individuals who were "under the age of

[12] We note that the defendant's date of birth, as listed on the Clerk of Court's docket sheets, is July 17, 1981. Thus, she was eighteen years old at the time of the murder.

18" at the time they committed the murders. 132 S.Ct. at 2460 (emphasis added). Thus, it does not appear that the defendant argues that *Miller* created a new constitutional right that would invalidate her mandatory sentence of life imprisonment without the possibility of parole. Instead, it appears that the defendant is arguing that we should extend *Miller* to individuals who were teenagers insofar as they were eighteen or nineteen years old at the time of the offense and this is a constitutional right that would qualify for the exception in subsection 9545(b)(1)(iii). Unfortunately for the defendant, this claim is not cognizable under this exception.

We note that the Superior Court has fairly recently rejected a similar "extension" argument by a PCRA petitioner in *Commonwealth v. Chambers*, 35 A.3d 34 (2011). In *Chambers*, the petitioner was a juvenile at the time he committed various crimes that eventually resulted in his conviction for, *inter alia*, second-degree murder and his receipt of a mandatory life sentence without the possibility of parole. 35 A.3d at 35. The appellate courts affirmed the petitioner's convictions and judgment of sentence on direct appeal, and the petitioner filed his first PCRA petition more than four-and-a-half years after his judgment of sentence became final. *Id.* at 36. The trial court denied the PCRA because it was not timely filed. *Id.* at 37. The petitioner then appealed to the Superior Court.

On appeal, the Superior Court pointed out that the PCRA petition was facially untimely as the petitioner filed it well beyond the one-year filing period in Section 9545(b)(1). *Id.* The court then explained that the petitioner attempted to show an exception to the one-year filing requirement by asserting that he satisfied subsection 9545(b)(1)(iii). *Id.* More specifically, the petitioner had argued that the "rationale utilized by the United States Supreme Court establishing a new constitutional right in [*Graham v. Florida*, 130 S.Ct. 2011 (2010)] entitle[d] him to relief." *Id.*

In analyzing the petitioner's claim, the court first discussed the Supreme Court's decision in *Graham*. *Id.* at 41. The court then described the petitioner's precise argument concerning how he satisfied the exception in subsection 9545(b)(1)(iii) as follows:

> [The petitioner] argues that the same considerations upon which the Supreme Court based its decision in *Graham*, such as the emphasis on the "salient characteristics" of juveniles and how they differ from adults, also apply in his situation, and so we should extend that holding to his case. . . . We note that [the petitioner] does not argue that *Graham* creates a new constitutional right that nullifies his mandatory sentence of life in prison without parole. Instead, he argues that the **rationale** of *Graham* should be extended to apply to a juvenile sentenced to life in prison for a second-degree murder conviction and that the extended right should afford him relief under the PCRA.

Id. at 41-42 (boldface in original).

The court rejected the petitioner's contention that subsection 9545(b)(1)(iii) applied to his claim because the petitioner had "misapprehended the scope of the timeliness exception embodied in § 9545(b)(1)(iii)." *Id.* at 42. The court then explained that

> [f]or purposes of deciding whether the timeliness exception to the PCRA based on the creation of a new constitutional right is applicable, the distinction between the holding of a case and its rationale is crucial since only a precise creation of a constitutional right can afford a petitioner relief. While rationales that support holdings are often used by courts to recognize new rights, this judicial tool is not available to PCRA petitioners.
>
> For example, in *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), the United States Supreme Court **held** that the death penalty is unconstitutional as applied to juvenile offenders. *Id.* at 578, 125 S.Ct. 1183. The **rationale** behind this holding was the Court's finding of a national consensus against the sentencing practice, the severity of the sentence, a juvenile's reduced culpability as compared to adults, and the absence of penological goals served by the punishment. *Id.* at 564–72, 125 S.Ct. 1183. In deciding *Graham,* the Court used the **rationale** employed by the *Roper* Court to **hold** that a sentence of life in prison without the possibility of parole was unconstitutional as applied to juveniles convicted of a non-homicide offense. *See generally Graham,* 130 S.Ct. at 2023–30. These are two very different holdings that utilize the same rationale.
>
> Chambers does not argue that the **holding** of *Graham* applies to his second degree murder conviction—he recognizes that it was limited to non-homicide offenders. Instead, he argues that the **rationale** should be extended to

juveniles convicted of homicide and sentenced to life in prison without parole. As more fully discussed *infra,* the rationale used by the Supreme Court is irrelevant to the evaluation of a § 9545(b)(1)(iii) timeliness exception to the PCRA, as the right must be one that has been expressly recognized by either the Pennsylvania or United States Supreme Court. *See* 42 Pa.C.S.A. § 9545(b)(1)(iii); *Abdul–Salaam,* 571 Pa. at 226, 812 A.2d at 501. Thus, for the purpose of the timeliness exception to the PCRA, only the **holding** of the case is relevant.

As recited, § 9545(b)(1)(iii) requires that the petitioner must be seeking protection under a newly-recognized constitutional right. Although *Graham* does recognize a new constitutional right, that right extends only to juveniles convicted of non-homicide offenses who are sentenced to life in prison without the possibility of parole. The *Graham* Court declined to consider whether this new constitutional right applies to juveniles sentenced to life without parole for a homicide offense. *See Graham,* 130 S.Ct. at 2023. The United States Supreme Court tailored its holding only to juveniles sentenced to life in prison without parole for non-homicide offenses and Chambers does not argue to the contrary.

Section 9545(b)(1)(iii) states, in relevant part: "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 [...] **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 [...]." 42 Pa.C.S.A. § 9545(b)(1)(iii) (emphasis added). Thus, in order to fit under this exception to the PCRA's time bar, a PCRA petitioner must assert relief based on a constitutional right that has been affirmatively recognized by either the United States Supreme Court or the Supreme Court of Pennsylvania. *Abdul–Salaam,* 571 Pa. at 226, 812 A.2d at 501 (holding that for relief pursuant to § 9545(b)(1)(iii), the right asserted by the petitioner must be a constitutional right acknowledged by the Supreme Court of the United States the Pennsylvania Supreme Court); *see also Commonwealth v. Copenhefer,* 596 Pa. 104, 110, 941 A.2d 646, 649 (2007). Chambers makes no such assertion; rather, as explained above, he argues that this Court should apply the time bar exception of the PCRA by extending the rationale employed by the United States Supreme Court in *Graham* to juvenile defendants convicted of a homicide offense. Thus, Chambers is not basing his argument on any newly recognized constitutional right as contemplated by the PCRA.

Id. at 42-43 (boldface in original). Accordingly, the court concluded that the petitioner had failed to satisfy the subsection 9545(b)(1)(iii) exception to the one-year time bar.[13]

[13] The court also indicated that the "outcome" of the case was dictated by a prior decision in *Commonwealth v. Ortiz,* 17 A.3d 417 (2011), in which the court concluded that *Graham* did not recognize a new constitutional right for juveniles convicted of homicide offenses such as second-degree murder. 35 A.3d at 42, 43 (citing *Ortiz*).

In the instant case, the Supreme Court in *Miller* appears to have recognized a new constitutional right insofar as the Court held that the Eighth Amendment prohibited the imposition of a mandatory life sentence without the possibility of parole for individuals under the age of eighteen at the time they committed a homicide. Nonetheless, similar to the petitioner in *Chambers*, the defendant here cannot argue that *Miller* recognized a new constitutional right precisely applicable to her first-degree homicide conviction for an offense that she committed after she turned eighteen years old. Instead, the defendant appears to contend that we should extend the rationale to individuals like her who have committed homicides while still a teenager, but over the age of eighteen, and who are sentenced to a mandatory term of life in prison without parole. The defendant also appears to assert that some of the research and briefs produced in the prior Supreme Court cases supports her position. This argument cannot satisfy subsection 9545(b)(1)(iii).

As the *Chambers* court explained, the rationale and information relied upon by the Supreme Court is "irrelevant" to the subsection 9545(b)(1)(iii) inquiry because the Court must expressly recognize the constitutional right for this subsection to be applicable. 35 A.3d at 42. Here, the *Miller* Court expressly limited the holding to juveniles under the age of eighteen and the defendant cannot argue otherwise. Since the holding in *Miller* does not apply to the circumstances of the defendant's case she has failed to meet the first requirement of the subsection 9545(b)(1)(iii) exception.[14]

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[14] Because the defendant did not satisfy the first requirement of the exception in subsection 9545(b)(1)(iii), we need not address whether the Court has held that the new constitutional right set forth in *Miller* applies retroactively to cases on collateral review. Regardless, we note that our Supreme Court has recently granted a petition for allowance of appeal in which the Court framed the issues as follows:

> Did the trial court err in imposing a life sentence without parole for the crime of [second] [d]egree [m]urder?
>
> The parties are DIRECTED to address the following related issues:

III. Conclusion

As discussed above, the defendant's second PCRA petition is facially untimely because she failed to file the petition within one year after her judgment of sentence became final, *i.e.* February 2, 2004. Further, the defendant has failed to adequately and properly plead or show that she falls within any of the three exceptions to the one-year filing requirement contained in Section 9545(b)(1). In particular, the defendant has not properly alleged that she satisfies the after-discovered evidence exception in subsection 9545(b)(1)(ii). In addition, the defendant has not shown that the United States Supreme Court's decision in *Miller* recognized a new constitutional right that is applicable to her case because (1) the defendant was eighteen at the time she committed Guzman's murder, and (2) *Miller*'s holding was limited to juveniles under the age of eighteen at the time they committed the homicides. The timing requirements of the PCRA are jurisdictional and a PCRA court has no power to address the substantive merits of an untimely petition. 42 Pa.C.S. § 9545; *Commonwealth v. Lambert*, 884 A.2d 848 (Pa. 2005). Therefore, we are without jurisdiction to consider the subject second PCRA petition and intend to dismiss the instant petition without a hearing.

BY THE COURT:

EDWARD G. SMITH, J.

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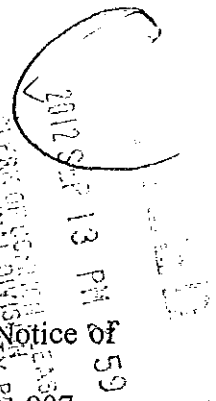
1. Whether the holding in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), that a juvenile convicted of a homicide offense cannot be sentenced to life imprisonment without parole unless there is consideration of mitigating circumstances by a judge or jury, retroactively applies to an inmate serving such sentence when the inmate has exhausted his direct appeal rights and is proceeding under the Post Conviction Relief Act.

2. If *Miller v. Alabama*, 132 S.Ct. 2455 (2012), is determined to have retroactive effect, what is the appropriate remedy under the Pennsylvania Post Conviction Relief Act for a defendant who was sentenced to a mandatory term of life imprisonment without the possibility of parole for a murder committed when the defendant was under the age of eighteen?

Commonwealth v. Cunningham, -- A.3d --, 2012 WL 3165411 (Pa. Aug. 6, 2012).

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

COMMONWEALTH OF PENNSYLVANIA)
)
v.)
) No. CP-48-CR-3255-2000
MICHELLE MAE HETZEL,)
)
Defendant.)



ORDER

AND NOW, this 13TH day of September, 2012, this court having issued a Notice of Intent to Dismiss Without Hearing Pursuant to Pennsylvania Rule of Criminal Procedure 907 on August 21, 2012, and the defendant having filed a Response to the Notice of Intent to Dismiss on or about September 6, 2012, and the court having reviewed the applicable record in this matter, it is hereby **ORDERED** that the defendant's second petition for post-conviction collateral relief pursuant to the Post-Conviction Relief Act, 42 Pa.C.S. § 9541, *et seq.* filed on or about August 7, 2012 (as supplemented by the supplemental petition on August 10, 2012), is **DISMISSED** without a hearing.

The defendant is advised that she has the right to appeal this order to the Superior Court of Pennsylvania. Any such appeal must be filed within thirty (30) days of the date of this order.

The Clerk of Court is directed to serve a copy of this order on the defendant in accordance with Pennsylvania Rules of Criminal Procedure 114 and 907(4), and note the date and manner of service on the docket.

STATEMENT OF REASONS

We previously set forth the procedural and factual history in this matter in our August 21, 2012 Notice of Intent to Dismiss Without a Hearing Pursuant to Pennsylvania Rule of Criminal

Procedure 907, which we incorporate herein by reference.[1] As indicated above, the defendant filed a Response to the Notice of Intent to Dismiss (the "Response") on September 6, 2012.

In the Response, the defendant again asserts that her petition is timely because she satisfies the exception to the one-year filing requirement set forth in 42 Pa.C.S. § 9545(b)(1)(iii) insofar as she asserts that the United States Supreme Court recognized a new constitutional right in *Miller v. Alabama*, 132 S.Ct. 2455 (2012) and held that right to apply retroactively to cases on collateral review. [Response at ¶ 3.] She also points out that she complied with 42 Pa.C.S. § 9545(b)(2) because she filed the instant petition on August 7, 2012, and the Court decided *Miller* on June 25, 2012. [*Id.*]

Although the defendant acknowledges that she was eighteen years old at the time she committed first-degree murder in this case and that *Miller* only applies to individuals who were under eighteen at the time of the offense, she "intends to argue that [the] rationale in Miller should extend to those where were in fact teenagers at the time of the offenses." [*Id.* at ¶ 4.] Moreover, the defendant believes that the case studies the Court relied upon in *Graham v. Florida*, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) and subsequently referenced in *Miller* support her contention that "it should be unconstitutional to sentence any teenager to a mandatory sentence of life imprisonment." [*Id.*]

In addition to the above-referenced arguments, the defendant requests us to appoint counsel so said counsel could amend the instant petition because she does not have resources to hire her own counsel, and she is "without access to obtain information that is crucial to the Court time restraints." [*Id.* at ¶ 5.] The defendant also generally asserts that "[t]here are many

[1] We also incorporate by reference our analysis regarding the timeliness of this petition and the lack of merit of the claims raised herein.

petitions out to various Courts with the issue I am now presenting and many have received appointed counsel on their second PCRA petition." [*Id.*]

After reviewing the Response, the defendant has not asserted any cognizable argument regarding how her second PCRA petition is timely. Instead, the defendant has confirmed that she understands that the *Miller* decision does not directly apply to her case because (1) *Miller* only applies to individuals who were under the age of eighteen at the time they committed homicide offenses, and (2) she was eighteen at the time she killed Devon Guzman. [*Id.* at ¶ 4.][2] The defendant acknowledges that she is solely arguing that we should extend *Miller* to individuals who were eighteen or nineteen at the time they committed the offense. [*Id.*] As explained in our notice of intent to dismiss, the Superior Court has rejected this identical extension argument (relating to the Court's decision in *Graham*) in *Commonwealth v. Chambers*, 35 A.3d 34 (2011), *appeal denied*, 46 A.3d 715 (Pa. 2012). For the same reasons espoused in *Chambers*, we reject the defendant's argument here that she satisfies the exception in Section 9545(b)(1)(iii) by arguing that we should extend the newly-recognized constitutional right in *Miller*, which is applicable only to individuals under the age of eighteen at the time they committed their homicide offenses, to the facts of the defendant's case.

We also decline the defendant's request for the appointment of counsel to file an amended second petition. In this regard, we note that a defendant is not entitled to counsel on a second or subsequent PCRA petition unless an evidentiary hearing is required as provided by Pennsylvania Rule of Criminal Procedure 908. *See* Pa.R.Crim.P. 904(D) ("On a second or subsequent petition, when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, and an evidentiary hearing is required as provided

[2] As indicated in our notice of intent to dismiss, we agree with the defendant that this second petition was timely filed in accordance with 42 Pa.C.S. § 9545(b)(2).

in Rule 908, the judge shall appoint counsel to represent the defendant."). Here, this is the defendant's second PCRA petition, and we have thoroughly explained in our notice of intent to dismiss why an evidentiary hearing is not required pursuant to Rule 908. In addition, we recognize that Rule 904(E) requires us to "appoint counsel to represent a defendant whenever the interests of justice require it." Pa.R.Crim.P. 904(E). Despite the severity of the sentence imposed in this case due to the heinous and incomprehensible acts of this defendant, we do not find that the interests of justice necessitate the appointment of counsel to assist the defendant in prosecuting this untimely PCRA claim premised on an unsustainable argument about the applicability of Section 9545(b)(1)(iii).

For all of the reasons set forth above and in our notice of intent to dismiss, we lack jurisdiction to consider the defendant's second PCRA petition. The defendant failed to file the subject petition within one year after her judgment of sentence became final.[3] The defendant has also failed to satisfy any of the exceptions to the one-year filing requirement, including the exception in Section 9545(b)(1)(iii). In this regard, *Miller* did not recognize a new constitutional right that is applicable to the defendant's case. Accordingly, we lack jurisdiction to consider the defendant's second PCRA petition.

BY THE COURT:

EDWARD G. SMITH, J.

[3] We note that in our notice of intent to dismiss, we inadvertently indicated that the defendant's judgment of sentence became final on February 2, 2004, or sixty days after the Supreme Court of Pennsylvania denied the petition for allowance of appeal on December 2, 2003. The defendant's judgment of sentence actually became final on March 1, 2004, which was ninety days after the Supreme Court denied the appeal. *See* U.S.Sup.Ct.R. 13 ("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."). Thus, the defendant had to file the instant PCRA petition on or before March 1, 2005.

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

COMMONWEALTH OF PENNSYLVANIA)
)
v.)
) No. CP-48-CR-3255-2000
MICHELLE MAE HETZEL,)
) Superior Court No. 2664 EDA 2012
Appellant.)

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PENNSYLVANIA RULE OF APPELLATE PROCEDURE 1925(A) STATEMENT

On September 24, 2012, the appellant, Michelle Mae Hetzel, filed a Notice of Appeal from our order dated September 13, 2012, which denied the appellant's second petition for post-conviction collateral relief pursuant to the Post Conviction Relief Act, 42 Pa.C.S. § 9541, *et seq.* ("PCRA"). Upon receiving a copy of the Notice of Appeal, we ordered the appellant to file a concise statement of the matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b) on September 28, 2012. On October 15, 2012, the appellant timely filed her concise statement in which she claims as follows:

> Michelle Mae Hetzel respectfully submits that on this day October 11th, 2012 she is asserting the following issues on appeal:
>
> 1. Whether the PCRA court erred in deeming Petitioner's appeal untimely when raised within 60 days of the **MILLER V. ALABAMA** ruling, 42 Pa. C.S. Sec. 9545 (b) 1 (iii).
>
> 2. Whether the PCRA court erred by not appointing counsel to ammend [sic] the petition before the court by citing Rule 904(E) or granting Petitioner a Hearing to present her arguments fully to the court.
>
> 3. Whether the PCRA court erred in judgement [sic] that **MILLER V. ALABAMA** and the science validated in the case listed in the petition's exhibits would not apply to the Petitioner when in fact the Petitioner was a teenager.
>
> 4. Whether the PCRA court erred in not considering that a mandatory life-without-parole sentence for a teenager with their unique hallmark features violates the Eighth Amendment of the US Constitution, art.5 of the Universal Declaration of Human Rights, as well as art.I, §13 of the Pennsylvania Constitution.

5. Whether the PCRA court erred by not granting a new trial with a "life qualified" jury in light of Petitioner's age at the time of the offence [sic].

6. Whether the PCRA court erred [by] not considering Petitioner's age and the fact "diminished capacity" was relevant being under the influence of alcohol and the court failed to evaluate if intent could be formed.

[Appellant's Statement of Matters Complained of on Appeal.]

The appellate standard of review from a trial court's denial of a PCRA petition requires the appellate court to determine whether the ruling of the PCRA court is supported by the record and is free of legal error. *Commonwealth v. Marshall*, 947 A.2d 714, 719 (Pa. 2008). We respectfully submit that our order dismissing the second PCRA petition is supported by the record and is free of legal error.

In this regard, we submit that we properly addressed each of the appellant's six issues in our August 21, 2012 Notice of Intent to Dismiss Without Hearing Pursuant to Pennsylvania Rule of Criminal Procedure 907 and our September 13, 2012 order dismissing the second PCRA petition. Nonetheless, we note that in the appellant's first matter complained of, she contends that we erred in determining that her second petition was untimely when she filed it within sixty days of the United States Supreme Court's decision in *Miller v. Alabama*, 132 S.Ct. 2455 (2012). While we submit that we appropriately addressed this issue on pages 10 through 13 of the notice of intent to dismiss, we further note here that the appellant is mistaken insofar as she appears to allege that we concluded that her second petition was untimely because she did not file the petition within sixty days of the Court's decision in *Miller*.

Instead, we determined that the appellant did file her second PCRA petition within sixty days as required by 42 Pa.C.S. § 9545(b)(2) insofar as she was asserting that she satisfied the exception in 42 Pa.C.S. § 9545(b)(1)(iii) because of her allegation that *Miller* applied to the facts of her case. [Notice of Intent to Dismiss Without Hearing Pursuant to Pennsylvania Rule of

Criminal Procedure 907 ("Notice") at 13.] Nonetheless, we also concluded that to the extent that the appellant was attempting to argue that she satisfied the after-discovered evidence exception in 42 Pa.C.S. § 9545(b)(1)(ii), she did not satisfy the sixty-day requirement of 42 Pa.C.S. § 9545(b)(2) because she failed to bring that claim within sixty days of the date she could have presented the claim. [*Id.* at 11.] More specifically, we pointed out that the appellant had relied on various studies and information that were presented as part of prior Court cases, *i.e. Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) and *Graham v. Florida*, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), and she did not allege or show that she filed her second petition within sixty days of the date she could have presented this claim.[1]

As explained in our notice of intent to dismiss and order dismissing the appellant's second PCRA petition, the appellant could not demonstrate that we had jurisdiction to consider her untimely petition. The appellant's second petition was facially untimely and she failed to show that she could satisfy any of the three exceptions to the one-year filing requirement in section 9545(b)(1). As such, we respectfully submit that our dismissal of the second PCRA petition without a hearing and without the appointment of counsel was proper, was supported by the record, and was free from legal error. Accordingly, all of the appellant's allegations of error are without merit and our order entered on September 13, 2012, should properly be affirmed.

BY THE COURT:

EDWARD G. SMITH, J.

Dated: October 18, 2012

[1] We also pointed out that the appellant's alleged after-discovered evidence was insufficient because it would not have compelled a different verdict or result in the case. [Notice at 11.] Moreover, we explained that the appellant could not use the discovery of newly-found case law to satisfy the section 9545(b)(1)(ii) exception. [*Id.* at 11-12.]