

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
CLARENCE LAUDENBERGER,	:	
	:	
Appellant	:	No. 924 MDA 2011

Appeal from the Order entered on May 6, 2011
in the Court of Common Pleas of Lancaster County,
Criminal Division, No. CP-36-CR-0001946-1996

BEFORE: MUSMANNO, DONOHUE and COLVILLE*, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED DECEMBER 04, 2013**

Clarence Laudenbergler ("Laudenbergler") appeals from the Order denying his second Petition for relief filed pursuant to the Post Conviction Relief Act ("PCRA"). **See** 42 Pa.C.S.A. §§ 9541-9546. We affirm.

On May 23, 1996, seventeen-year-old Laudenbergler was involved in the robbery and shooting death of a convenience store manager. A jury subsequently convicted Laudenbergler of second-degree murder,¹ after which the trial court sentenced Laudenbergler to life in prison without the possibility of parole. The trial court imposed its sentence in accordance with the following mandatory sentencing statute:

[A] person who has been convicted of murder of the second degree, of second[-]degree murder of an unborn child or of

¹ 18 Pa.C.S.A. § 2502(b).

*Retired Senior Judge assigned to the Superior Court.

second degree murder of a law enforcement officer shall be sentenced to a term of life imprisonment.

18 Pa.C.S.A. § 1102(b). This Court affirmed Laudenberger's judgment of sentence, after which the Pennsylvania Supreme Court denied allowance of appeal. ***Commonwealth v. Laudenberger***, 742 A.2d 1147 (Pa. Super. 1999) (unpublished memorandum), ***appeal denied***, 751 A.2d 187 (Pa. 2000).

On July 2, 2010, Laudenberger filed a facially untimely second *pro se* PCRA Petition, followed by a counseled Amended PCRA Petition. In order to overcome the PCRA's jurisdictional time limitation,² Laudenberger claimed the existence of a newly recognized constitutional right,³ based upon the United States Supreme Court's decision in ***Graham v. Florida***, ___ U.S. ___, 130 S. Ct. 2011 (2010). The ***Graham*** Court held that the Eighth

² A PCRA petition must be filed within one year of the date the petitioner's judgment of sentence became final. 42 Pa.C.S.A. § 9545(b)(3). The one-year time limitation is jurisdictional and a trial court has no power to address the substantive merits of an untimely petition. ***Commonwealth v. Abu-Jamal***, 833 A.2d 719, 723-24 (Pa. 2003). The three statutory exceptions to the one-year filing requirement are for newly discovered facts, interference by a government official, and a newly recognized constitutional right. 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii). Any petition asserting one of these exceptions must also establish that the exception was raised within sixty days of the date the claim could have been first presented. 42 Pa.C.S.A. § 9545(b)(2).

³ An untimely PCRA petition may be considered timely if a petitioner alleges and 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." 42 Pa.C.S.A. § 9545(b)(1)(iii).

Amendment to the United States Constitution bars the imposition of a sentence of life in prison without the possibility of parole for *non-homicide* offenders under the age of eighteen. ***Id.*** at 2034.

Because Laudenberger was convicted of a homicide offense, the PCRA court correctly concluded that ***Graham*** did not provide Laudenberger with a basis for relief. Notice (Pa.R.Crim.P. 907), 4/8/11, at 2. Accordingly, the PCRA court dismissed Laudenberger's PCRA Petition as time-barred, as he had failed to meet the newly recognized constitutional right exception to the PCRA's one-year jurisdictional time limit. ***Id.***

On appeal, Laudenberger presents the following claims for our review:

A. Whether the imposition of a sentence of life without parole for second degree murder[,] where the defendant was a juvenile and neither killed the victim nor intended to kill the victim, is barred by the cruel and unusual punishment clauses of the United States and Pennsylvania Constitutions?

B. Whether a sentence of life without parole for a juvenile under the age of 18 violates the Eighth Amendment to the United States Constitution[,] as it constitutes cruel and unusual punishment?

Brief for Appellant at 4.

After Laudenberger filed the instant appeal, the United States Supreme Court filed its decision in ***Miller v. Alabama***, ___ U.S. ___, 132 S. Ct. 2455 (2012). In ***Miller***, the United States Supreme Court concluded that for juveniles, a statutory scheme imposing a mandatory life sentence without parole violates the Eighth Amendment to the United States Constitution:

[O]ur individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without the possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment...

Miller, 132 S. Ct. at 2475. Thus, the mandatory sentencing scheme imposing life in prison for homicide offenses, as applied to juveniles, was rendered unconstitutional by the United States Supreme Court's decision in **Miller**.

To invoke jurisdiction under an exception to the PCRA timeliness requirement, Laudenberger must satisfy the following two requirements:

Subsection (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 [the 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, 812 A.2d 497, 501 (Pa. 2002). Thus, to satisfy the PCRA's timeliness exception, Laudenberger must establish both

that **Miller** recognized a new constitutional right and that the holding in **Miller** applies retroactively.

In his PCRA Petition, Laudenberger challenged the sentencing scheme set forth at 18 Pa.C.S.A. § 1102(b) as violating the Eighth Amendment of the United States Constitution. Laudenberger, who committed second-degree murder at the age of seventeen, was sentenced to life in prison without parole pursuant to the mandatory sentencing scheme set forth at 18 Pa.C.S.A. § 1102(b). In **Miller**, the United States Supreme Court invalidated sentencing schemes for juveniles that mandate a sentence of life in prison without the possibility of parole. **Miller**, 2012 U.S. LEXIS 4873 at *54. Thus, Laudenberger has established the existence of a newly recognized constitutional right.

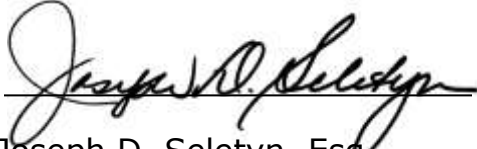
On October 30, 2013, the Pennsylvania Supreme Court issued its decision in **Commonwealth v. Cunningham**, No. 38 EAP 2012 (Pa. filed October 30, 2013), which addressed the United States Supreme Court's pronouncement in **Miller**. In a 4-3 decision, the Pennsylvania Supreme Court held that **Miller** does not apply retroactively to defendants whose judgments of sentence were final at the time of **Miller's** announcement. **Id.**, slip opinion at 17. As we are bound by the Pennsylvania Supreme Court's holding in **Cunningham**, we are constrained to affirm the Order of the PCRA court. Accordingly, we cannot grant Laudenberger relief on either of his claims.

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Order affirmed.

Colville, J., concurs in the result.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/4/2013