

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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|-------------------------------|---|--------------------------|
| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF |
|                               | : | PENNSYLVANIA             |
| Appellee                      | : |                          |
|                               | : |                          |
| v.                            | : |                          |
|                               | : |                          |
| MICHAEL E. SCRIBE,            | : |                          |
|                               | : |                          |
| Appellant                     | : | No. 1433 WDA 2010        |

Appeal from the PCRA Order Entered August 27, 2010,  
Court of Common Pleas, Indiana County,  
Criminal Division, at No. CP-32-CR-0000045-1979.

BEFORE: BOWES, DONOHUE and SHOGAN, JJ.

MEMORANDUM BY SHOGAN, J:

**FILED MARCH 28, 2014**

Appellant, Michael E. Scribe, appeals *pro se* from the order denying his fifth petition for collateral relief. We affirm.

We summarized the factual basis for Appellant's guilty plea in a prior decision of this Court, as follows:

On January 20, 1979, [Appellant] entered a gasoline service station owned by the victim, Michael Paul Moloko. [Appellant] then robbed and fatally shot the victim. After several days [Appellant] was apprehended, along with another juvenile . . . . The firearm in [Appellant's] possession was determined to be the weapon from which the fatal shot was fired. On June 18, 1979, [Appellant] entered a plea of guilty to murder in the second degree. Prior to entering his guilty plea, [Appellant] was subjected to an extensive plea colloquy by the Honorable Earl R. Handler, then President Judge of Indiana County. At no time did [Appellant] ever disagree with the factual summary as presented by the Commonwealth. In fact, [Appellant], while under oath, told the Court that he did what

the investigating trooper described. (Transcript, P. 48-49, dated June 18, 1979).

Further, [Appellant] clearly told the Court that he was not being forced to enter a plea. (Transcript, P. 62-63).

***Commonwealth v. Scribe***, 564 A.2d 263 (Pa. Super. 1989) (16 Pittsburgh 1989, filed June 15, 1989) (unpublished memorandum at 2).

We summarized the early procedural history of this case in a prior decision of this Court, as follows:

1. That on June 18, 1979, the defendant then 16 years of age, pleaded guilty to second degree murder based on evidence that he killed Michael P. Moloko during the commission of the crime of robbery of which the deceased was a victim.
2. That on July 23, 1979, this Court imposed a sentence of confinement to a State Correctional Institution for and during the term of [Appellant's] natural life.
3. That on August 2, 1979, [Appellant] filed a *pro se* petition to withdraw his guilty plea for the reason that he entered his plea with the understanding that he would receive a mandatory life sentence for which he could petition for commutation. However, since the sentence was "to a term of natural life," it cannot be commuted. On September 5, 1979, the petition was denied by an Order of this Court accompanied by a Memorandum, the thrust of which was that this Court does not have the authority to interfere with the exercise of executive clemency, that commutation of a sentence is within the exclusive jurisdiction of the executive, and therefore the specific words of the sentence will not curb the exercise of such executive power. Copies of the Memorandum and Order were sent to [Appellant] and his counsel but no appeal was taken.

4. That on February 11, 1980, [Appellant] filed a petition for PCHA<sup>[1]</sup> relief averring that he had not been represented by competent counsel and that his plea of guilty was unlawfully induced. In response to this petition, this Court appointed new counsel to represent [Appellant] and directed that a hearing be held on its merits. After a full and complete hearing at which all matters contained in the petition were heard, the petition was denied and an accompanying Memorandum filed. Within the appeal period, [Appellant's] counsel personally communicated with him relative to an appeal and received a letter from him stating categorically that he did not want to appeal.

5. That on January 23, 1981, [Appellant] filed a motion to "vacate judgment and plea on after-discovered evidence," and on February 13, 1981, a petition for PCHA relief again averring incompetent counsel, a plea of guilt unlawfully induced, infringement of privilege against self-incrimination and the unconstitutional use of perjured testimony. Since it was impossible to determine whether [Appellant's] allegation of incompetent counsel referred to his first counsel or his second counsel, this Court requested his second counsel to communicate with him to advise the Court. Upon being advised that [Appellant's] petition referred to his first counsel and that he would accept the representation of his second counsel in the second petition, the appointment was made and the petition set down for argument before this Court on the issue of whether [Appellant] was entitled to an evidentiary hearing.

6. Counsel for [Appellant] in his brief, raised for the first time objections to the manner in which [Appellant] was represented in certification proceedings from the Juvenile Court to the adult court and these objections will be considered as an amendment to his petition. The motion to vacate the judgment by reason of after-discovered evidence will be considered as having been included in [Appellant's] second petition.

***Commonwealth v. Scribe***, 494 A.2d 485 (Pa. Super. 1985) (1242 Pittsburgh 1982, filed March 1, 1985) (unpublished memorandum at 1-3).

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<sup>1</sup> "The Post Conviction Hearing Act [("PCHA")] was the precursor to the current Post Conviction Relief Act [("PCRA")], 42 Pa.C.S. §§ 9541-9546." ***Commonwealth v. Leidig***, 956 A.2d 399, 403 n.4 (Pa. 2008).

In that decision, we affirmed the denial of Appellant's second petition for PCHA relief; our Supreme Court denied Appellant's petition for allowance of appeal on August 13, 1985.

Appellant filed a third PCHA petition on April 4, 1988. We affirmed the denial of PCHA relief on June 15, 1989. ***Scribe***, 564 A.2d 263 (unpublished memorandum).

Appellant filed a PCRA petition, his fourth petition for collateral relief, on September 12, 1995, and an amended petition on December 27, 1996. A hearing scheduled on this petition was rescheduled multiple times at Appellant's request. Eventually, the PCRA court denied relief on June 26, 1997. Appellant filed a timely notice of appeal on July 15, 1997. Counsel<sup>2</sup> sought leave to withdraw, which we granted, and we concurrently affirmed the denial of collateral relief on February 25, 1998.

The most recent PCRA petition was filed on June 21, 2010. In this fifth petition, filed *pro se*, Appellant asserted the existence of a newly recognized constitutional right and invoked the court's jurisdiction *via* a timeliness exception based upon the United States Supreme Court's decision in ***Graham v. Florida***, 560 U.S. 48 (2010). By order dated August 25, 2010, and entered on August 27, 2010, the PCRA court denied Appellant's PCRA petition. This appeal followed.

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<sup>2</sup> Appellant had counsel at every stage, through this fourth petition for collateral relief.

Appellant raises the following issues on appeal:

1. Whether the PCRA Court erred in denying Appellant's PCRA petition filed within sixty-days of the new ruling in the case of Graham vs. Florida, 560 U.S. \_\_\_, 130 S.Ct. 2011 (2010)?
2. Whether the trial court, when appellant was a juvenile, abused its discretion in imposing a life sentence, was/or is now manifestly excessive and constituted to severe of a punishment?
3. Whether the PCRA Court erred in not appointing counsel in appellant's timely filed PCRA petition invoking the Court's jurisdiction, requesting an evidentiary hearing?
4. Whether in defendant/appellant's issues in his PCRA motion have been previously litigated and therefore waived?
5. Whether the defendant/appellant's life imprisonment sentence without parole (JLWOP) is unconstitutional and should receive the benefit of the ruling of Graham vs. Florida?
6. The imposition of a sentence greater than the lawful maximum?

Appellant's Brief at 3 (*verbatim*).

When reviewing the propriety of an order granting or denying PCRA relief, this Court is limited to determining whether the evidence of record supports the conclusions of the PCRA court and whether the ruling is free of legal error. ***Commonwealth v. Anderson***, 995 A.2d 1184 (Pa. Super. 2010). We grant great deference to the PCRA court's findings that are supported in the record and will not disturb them unless they have no

support in the certified record. ***Commonwealth v. Rachak***, 62 A.3d 389 (Pa. Super. 2012), *appeal denied*, 67 A.3d 796 (Pa. May 09, 2013).

Before addressing Appellant's issues on appeal, we note that a PCRA petition must be filed within one year of the date that the judgment of sentence becomes final. 42 Pa.C.S.A. § 9545(b)(1). This time requirement is mandatory and jurisdictional in nature, and the court may not ignore it in order to reach the merits of the petition. ***Commonwealth v. Murray***, 753 A.2d 201, 203 (Pa. 2000). A judgment of sentence "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).

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), is met.<sup>3</sup> A petition invoking one of these exceptions must be filed

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<sup>3</sup> The exceptions to the timeliness requirement are:

- (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

within sixty days of the date the claim could first have been presented. 42 Pa.C.S.A. § 9545(b)(2). 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 sixty-day time frame" under section 9545(b)(2). **Commonwealth v. Carr**, 768 A.2d 1164, 1167 (Pa. Super. 2001).

In the case *sub judice*, Appellant's petition was filed more than thirty years after his judgment of sentence became final in 1979. 42 Pa.C.S.A. § 9545(b)(3). Thus, the instant PCRA petition is patently untimely.

Appellant has attempted to circumvent the time-bar by asserting the third exception to the PCRA timeliness requirements, relying upon **Graham**. 42 Pa.C.S.A. § 9545(b)(1)(iii). In **Graham**, the United States Supreme Court held that imposition of a life sentence without the possibility of parole for **non-homicide** offenders under the age of eighteen was barred by the Eighth Amendment to the United States Constitution.

After Appellant filed his appeal in this matter, the United States Supreme Court decided **Miller v. Alabama**, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2455

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(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.A. § 9545(b)(1)(i), (ii), and (iii).

(2012).<sup>4</sup> In **Miller**, the Supreme Court relied on **Graham**, in part, to hold that sentencing a juvenile convicted of a homicide offense to mandatory life imprisonment without the possibility of parole violates the Eighth Amendment's prohibition of cruel and unusual punishment. Accordingly, such sentences cannot be imposed unless a judge or jury first considers mitigating circumstances. **Id.** at 2475. The holding in **Miller** was limited to those offenders who were juveniles at the time they committed their crimes. **Id.** at 2460.

Subsequently, however, the Pennsylvania Supreme Court determined that the holding in **Miller** does not apply retroactively to an inmate, such as Appellant, convicted as a juvenile, who is serving a sentence of life imprisonment without the possibility of parole and who has exhausted his direct appeal rights and is proceeding under the PCRA. **Commonwealth v. Cunningham**, 81 A.3d 1 (Pa. 2013). Although Appellant was sixteen years old at the time he committed the underlying murder, **Miller** is thus inapplicable. Therefore, Appellant is not entitled to relief. **Commonwealth v. Seskey**, \_\_\_ A.3d \_\_\_, 2014 PA Super 27 (Pa. Super. 2014).

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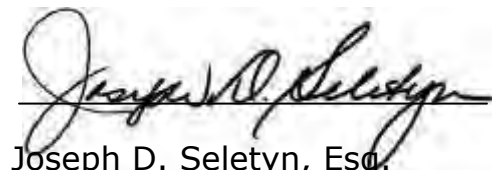
<sup>4</sup> Although Appellant's PCRA petition was filed prior to the decision in **Miller**, the issue Appellant raised is consistent, *i.e.*, a challenge to the constitutionality of a sentence of life without parole for a juvenile offender. Accordingly, we conclude that the issue was properly raised and preserved for appeal.



Because the PCRA petition was untimely and no exceptions apply, the PCRA court lacked jurisdiction to address the claims presented and properly dismissed the petition as untimely. ***See Commonwealth v. Hernandez*** 79 A.3d 649 (Pa. Super. 2013) (holding that PCRA court lacks jurisdiction to hear untimely petition). Likewise, we lack jurisdiction to reach the merits of the appeal. ***See Commonwealth v. Davis***, \_\_\_ A.3d \_\_\_, 2014 PA Super 34 (Pa. Super. filed February 25, 2014) (holding that Superior Court lacks jurisdiction to reach merits of appeal from untimely PCRA petition).

Order affirmed.

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: 3/28/2014