

IN THE  
SUPERIOR COURT OF PENNSYLVANIA  
EASTERN DISTRICT

NO. 3005 EDA 2014

COMMONWEALTH OF PENNSYLVANIA,  
APPELLEE

VS.

AARON PHILLIPS,  
APPELLANT

BRIEF FOR APPELLEE

Appeal From The Order Of The Honorable Wendy Demchick-Alloy,  
Dated September 26, 2014,  
Denying Relief Under The Post-Conviction Relief Act,  
IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY,  
PENNSYLVANIA, CRIMINAL DIVISION, At No. 25720-1986

ADRIENNE D. JAPPE  
ASSISTANT DISTRICT ATTORNEY

ROBERT M. FALIN  
DEPUTY DISTRICT ATTORNEY

KEVIN R. STEELE  
FIRST ASSISTANT DISTRICT ATTORNEY

RISA VETRI FERMAN  
DISTRICT ATTORNEY

DISTRICT ATTORNEY'S OFFICE  
MONTGOMERY COUNTY COURTHOUSE  
NORRISTOWN, PA 19404  
(610) 278-3090

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## COUNTER STATEMENT OF QUESTION PRESENTED

I. Whether the trial court properly dismissed defendant's serial PCRA petition without a hearing on the basis that it lacked jurisdiction to entertain the merits of the untimely petition, where the petition was filed close to two decades after defendant's judgment of sentence became final, and he failed to establish that the "newly-recognized constitutional right" exception was applicable to his case, as *Miller v. Alabama*, the case announcing the new constitutional right upon which defendant relied, does not retroactively apply to him since his judgment of sentence had long been final at the time the United States Supreme Court rendered its decision in *Miller*?

(Answered in the affirmative by the trial court.)

## COUNTER STATEMENT OF THE CASE

Aaron Phillips (“defendant”) is serving a sentence of life imprisonment for second-degree murder. He has appealed the trial court order denying his untimely serial PCRA petition.

In 1986, then-seventeen-year-old defendant staked out the home of an elderly man, devised a plan to rob the man in his home, and then solicited the assistance of another to help carry out his plan. Once inside the home, defendant violently assaulted eighty-six-year-old Anthony McEvoy – grabbing him from behind in a “full nelson,” using such force that he was lifted completely off the ground and then thrown to the ground.<sup>1</sup>

As a result of the assault, Mr. McEvoy sustained numerous injuries, including trauma to the chin, extensive bruising to the back, a hip fracture, and a fracture of the left femur. These injuries started an unbroken chain of events which ultimately resulted in Mr. McEvoy’s death, eighteen days later (N.T. Trial, 12/29/87, pp. 218-228, 269; N.T. Trial, 12/30/87, at p. 332-334).

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<sup>1</sup>Defendant’s cohort rifled through Mr. McEvoy’s pockets while he was being assaulted by defendant.

On January 4, 1988, following a bench trial, defendant was convicted of second-degree murder, burglary, and related offenses. On September 16, 1988, he was sentenced to life imprisonment without parole for his second-degree murder conviction. This Court upheld his conviction on appeal. *See Commonwealth v. Phillips*, 2798 EDA 1988 (Pa. Super. Apr. 18, 1990) (memorandum). The Pennsylvania Supreme Court denied allocatur on March 28, 1991.

Over the next two decades, defendant filed no less than four petitions under the Post-Conviction Relief Act, all of which were denied by the trial court. Each time, this Court affirmed the lower court's PCRA denial, and the Pennsylvania Supreme Court denied allocatur.<sup>2</sup>

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<sup>2</sup> More specifically, defendant filed his first PCRA petition, alleging ineffective assistance of counsel, on July 27, 1995. The trial court dismissed this petition following an evidentiary hearing, and this Court affirmed the PCRA denial on appeal. *See Commonwealth v. Phillips*, 716 PHL 1998 (Pa. Super. October 21, 1998) (memorandum).

Defendant filed his second PCRA petition on or about June 17, 1999. Court-appointed counsel filed a "no merit" letter pursuant to *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988), and the trial court dismissed that petition, too, without a hearing. This Court affirmed the PCRA denial. *See Commonwealth v. Phillips*, No. 3329 EDA 1999 (Pa. Super. August 24, 2000) (memorandum).

*(footnote continued on next page)*



On May 17, 2012, defendant filed the instant PCRA petition, his fifth. He later filed an amended petition on August 20, 2012, following the United States Supreme Court's decision in *Miller v. Alabama*, which held that "mandatory life without parole for those under the age of eighteen at the time of their crimes violated the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Id.*, 132 S. Ct. 2455, 2460 (2012). He filed yet another amended petition on December 5, 2013, through counsel, in which he reiterated his claim that he was entitled to relief on the basis of *Miller v. Alabama*. The trial court denied relief without a hearing,

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Defendant filed his third PCRA petition on May 5, 2005. In that petition, he claimed, *inter alia*, that his sentence was in violation of the *Roper v. Simmons*, 543 U.S. 551 (2005), which held that the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty on those who were under the age of eighteen at the time they committed their crimes. The trial court dismissed this petition on the basis of untimeliness and, once again, this Court affirmed. *See Commonwealth v. Phillips*, 2729 EDA 2005 (Pa. Super. Sep. 20, 2006) (memorandum).

Defendant filed his fourth PCRA petition on July 16, 2010. In that petition, he alleged that his life without parole sentence violated both the Pennsylvania and United States Constitutions in light of *Graham v. Florida*, 130 S. Ct. 2011 (2010), which held that it is unconstitutional to sentence a juvenile to life imprisonment without parole where the juvenile was convicted of a non-homicide offense. Once again, the trial court dismissed defendant's petition on the basis of untimeliness; and, this Court affirmed. *See Commonwealth v. Phillips*, 3427 EDA 2010 (Pa. Super. Aug. 16, 2011) (memorandum).

concluding that it lacked jurisdiction to entertain the merits of the petition,  
due to its untimeliness. This appeal followed.

## SUMMARY OF ARGUMENT

The trial court properly dismissed defendant's fifth PCRA petition without a hearing, as the petition was time-barred. More specifically, defendant filed his petition close to two decades after his judgment of sentence became final. His reliance on *Miller v. Alabama, supra*, in support of his claim that a new constitutional right has been recognized that applies to him is misplaced. *Miller* does *not* apply to defendant. By its plain terms, the "newly-recognized constitutional right" exception to the PCRA time-bar applies only where the court that recognized the constitutional right—in this case, the United States Supreme Court—expressly held that the right is to be applied retroactively. The *Miller* Court did not expressly hold that the right is to be imposed retroactively; to the contrary, the issue of retroactivity was neither raised nor addressed in *Miller*. The Pennsylvania Supreme Court, on the other hand, has expressly held that *Miller* is not to be applied retroactively to those juvenile offenders whose judgments of sentence had already become final at the time *Miller* was decided. *Commonwealth v. Cunningham*, 81 A.3d 1, 10-11 (Pa. 2013). Defendant's sentence had long been final at the time the Supreme Court rendered its decision in *Miller*. Accordingly, the *Miller* decision and, consequently, the

“newly-recognized constitutional right” exception to the PCRA time-bar, do not apply to defendant. His petition, therefore, is untimely; as such, the trial court lacked jurisdiction to entertain its merits.

Furthermore, to the extent defendant argues that the trial court should have considered his filing a petition for a writ of habeas corpus, as opposed to a PCRA petition, he is mistaken. By its express terms, the PCRA provides the sole means for obtaining collateral review, and encompasses all other common law and statutory remedies for the same purpose, including habeas corpus. Here, the PCRA provides a remedy for defendant’s claim. He cannot, therefore, circumvent the PCRA’s jurisdictional time-bar by titling his petition as a writ of habeas corpus.

## ARGUMENT

### I. THE TRIAL COURT PROPERLY DISMISSED DEFENDANT'S FIFTH PCRA PETITION WITHOUT A HEARING, WHERE IT WAS WITHOUT JURISDICTION TO ENTERTAIN THE MERITS OF THE UNTIMELY PETITION.

More than two decades after his sentence was imposed, defendant filed the instant PCRA petition, his fifth, contending that he was entitled to relief on the basis of the United States Supreme Court decision of *Miller v. Alabama*, which held that mandatory life without parole sentences for those under the age of eighteen at the time of their crime violated the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.*, 132 S. Ct. 2455, 2460 (2012). Unfortunately for defendant, his petition is time-barred. The trial court, accordingly, properly denied relief.

In reviewing the propriety of a trial court's denial of PCRA relief, this Court is "limited to determining whether the court's findings are supported by the record and whether the order in question is free of legal error." *Commonwealth v. Grant*, 992 A.2d 152, 156 (Pa. Super. 2010) (citing *Commonwealth v. Greer*, 936 A.2d 1075, 1077 (Pa. Super. 2007)). "The PCRA court's findings will not be disturbed if there is *any* support for the findings in the certified record." *Grant*, 992 A.2d at 156 (citing *Commonwealth v.*

*Carr*, 768 A.2d 1164, 1166 (Pa. Super. 2001)) (emphasis added);

*Commonwealth v. Boyd*, 923 A.2d 513, 515 (Pa. Super. 2007) (“This Court grants great deference to the findings of the PCRA court if the record contains any support for those findings.”).

Moreover, it is axiomatic that a PCRA court may deny a post-conviction petition without conducting an evidentiary hearing if the court determines that the defendant’s claims are without merit on their face and no purpose would be served by further proceedings. Pa. R.Crim.P. 907(1); *see Commonwealth v. Taylor*, 933 A.2d 1035, 1040 (Pa. Super 2007) (“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 and the petitioner is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings”). Moreover, Rule 907 gives a PCRA court authority to dismiss a petition *without a hearing* if the petitioner has not met the time-bar’s jurisdictional requirements. *Commonwealth v. Burton*, 936 A.2d 521, 527 (Pa. Super. 2007).

Under the PCRA, all petitions must be filed within one year of the date on which judgment becomes final unless one of the three statutory exceptions set forth in 42 Pa. C.S. § 9545(b)(1) applies. *Commonwealth v. Fahy*, 737 A.2d 214, 223 (Pa. 1999). A judgment becomes final at the conclusion of direct review, including discretionary review, or at the expiration of time for seeking review. *Id.* at § 9545(b)(3).

The timeliness requirements of the PCRA are jurisdictional in nature and must be strictly construed; thus, neither the trial court nor this Court, for that matter, has jurisdiction to review the merits of an untimely PCRA petition. *Commonwealth v. Albrecht*, 994 A.2d 1091, 1093 (Pa. 2010); *see Commonwealth v. Whitney*, 87 A.2d 473, 475-78 (Pa. 2003) (explaining that courts in this Commonwealth are without jurisdiction to consider claims presented in an untimely PCRA petition unless a defendant seeking collateral relief pleads and proves that an exception to the PCRA time-bar applies); *see also Commonwealth v. Murray*, 753 A.2d 201, 203 (Pa. 2000) (courts cannot ignore the mandatory and jurisdictional nature of the PCRA's timeliness requirements, which apply to all PCRA petitions, regardless of the nature). Indeed, as noted by the Pennsylvania Supreme Court, “[w]ithout jurisdiction, we simply do not have the legal authority to

address the substantive claims.” *Albrecht*, 994 A.2d at 1093 (quoting *Commonwealth v. Chester*, 895 A.2d 520, 522 (Pa. 2006)).

Here, defendant’s petition for allowance of appeal to the Supreme Court in connection with his direct appeal from his judgment of sentence was denied on March 28, 1991. His judgment of sentence, therefore, became final on June 28, 1991, the date on which the time for filing a petition for a writ of *certiorari* in the United States Supreme Court expired. *See* 42 Pa. C.S.A. § 9545(b)(3); *see also* U.S. Sup.Ct. Rule 13, 28 U.S.C.A. (providing that “[a] petition for 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 filed with the Clerk within 90 days after entry of the order denying discretionary review”). Defendant thus had until June 28, 1992 to file a timely PCRA petition. *See* 42 Pa. C.S.A. § 9545(b)(1) (providing that a PCRA petition shall be filed within one year of the date the judgment of sentence becomes final). He did not file the instant petition until 2012, *twenty years later*; it is, therefore, facially untimely. Defendant, accordingly, must plead and prove the applicability of one of the three statutorily-enumerated exceptions to the time-bar in



order to overcome the untimeliness of his petition. *Commonwealth v. Dickerson*, 900 A.2d 407, 410 (Pa. Super. 2006).

In his PCRA petition, defendant argues he meets the “newly-recognized constitutional right” exception set forth in 42 Pa. C.S.A. § 9545(b)(1)(iii), as a result of the *Miller* decision. *Defendant’s Amended PCRA Petition*, at p.4. He is wrong.

In order to satisfy the “newly-recognized constitutional right” exception, a petitioner must establish 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.*

*Id.* (emphasis added). Thus, by its plain language, this section only applies where the court that recognized the constitutional right—in this case, the United States Supreme Court—expressly held that the right is to be applied retroactively. *See Commonwealth v. Copenhefer*, 941 A.2d 646, 649-50 (Pa. 2007) (citing *Commonwealth v. Abdul-Salaam*, 812 A.2d 497, 501 (Pa. 2002)); *see also Commonwealth v. Wojtaszek*, 951 A.2d 1169, 1171 (Pa. Super. 2009) (noting that the decision must be held to be retroactive by “that court” in order to toll the PCRA’s time-bar).

The *Miller* decision has not been “held by that court to apply retroactively.” 42 Pa. C.S. § 9545(b)(1) (iii). Indeed, the issue of retroactivity was neither raised, nor addressed in *Miller*. Moreover, in the years following the *Miller* decision, neither the United States Supreme Court nor the Pennsylvania Supreme Court has held that *Miller* applies retroactively. *Commonwealth v. Reed*, 107 A.3d 137, 139 (Pa. Super. 2014). To the contrary, in *Commonwealth v. Cunningham*, the Pennsylvania Supreme Court expressly found that *Miller* was *not* to be applied retroactively to those juvenile offenders whose judgments of sentence had already become final at the time *Miller* was decided. 81 A.3d 1, 10-11 (Pa. 2013); see *Commonwealth v. Seskey*, 86 A.3d 277, 243 (Pa. Super. 2014) (noting that “[r]ecently, in *Cunningham*, our Supreme Court held that the constitutional right announced by the United States Supreme Court in *Miller* does not apply retroactively”); see also *Commonwealth v. Christine*, 2015 Pa. Super. LEXIS 177, at \* 9 (Pa. Super. Apr. 14, 2015) (explaining that “in the wake of *Cunningham*, it is clear that neither the United States Supreme Court, nor the Pennsylvania Supreme Court, has held that the rule in *Miller* applies retroactively”). In so holding, the Court explained,

Here, applying settled principles of appellate review, nothing in Appellant's arguments persuades us that *Miller's* proscription of the imposition of mandatory life-without-parole sentences upon offenders under the age of eighteen at the time their crimes were committed must be extended to those whose judgments of sentence were final as of the time of *Miller's* announcement.

*Id.* at 11.<sup>3</sup>

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<sup>3</sup> While noting that "the *Miller* majority did not specifically address the question of whether its holding applies to judgments of sentence for prisoners ... which already were final as of the time of the *Miller* decision," the *Cunningham* Court, in addressing claims of *Miller's* retroactivity as presented by *Cunningham*, explained:

*Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality), delineated a general rule of non-retroactivity for new procedural, constitutional rules announced by the Court, ... subject to two narrow exceptions ... [T]he exceptions extend to "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense," and "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." More recently, in *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L.Ed.2d 442 (2004), the High Court appears to have merged the first *Teague* exception with the principle that new substantive rules generally apply retroactively.

*Cunningham*, 81 A.3d at 4-5 (internal citations omitted). The *Cunningham* Court, accordingly, clearly held that "the first *Teague* exception does not  
(footnote continued on next page)

As noted, defendant's judgment of sentence had already become final—indeed, it had been so *for almost twenty years*—at the time the *Miller* decision was rendered. Thus, by the plain language of the Pennsylvania Supreme Court in *Cunningham*, *Miller* does not apply to him. *See id.* at 11 (noting that *Miller's* proscription of the imposition of mandatory life-without-parole sentences upon offenders under the age of 18 is not to “be extended to those whose judgments of sentence were final as of the time of *Miller's* announcement”). Consequently, defendant cannot rely on *Miller* to establish jurisdiction over his untimely PCRA petition. *Seskey*, 86 A.3d at 243.

Despite the clear bar to relief, defendant argues that *Miller* does retroactively apply to him. Specifically, he argues that the United States Supreme Court has already applied *Miller* retroactively because it granted relief in *Miller's* companion case, *Jackson v. Hobbs*, a case on collateral appeal whose direct review had concluded prior to the announcement of

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apply to the *Miller* rule.” *Id.* at 10. The Court did not render a finding on whether the second *Teague* exception would apply to *Miller* because of the defendant's failure to develop any such argument. The Court did, however, express doubt regarding whether the United States Supreme Court would apply the second *Teague* exception to *Miller*. *Id.*

the *Miller* decision. *Defendant's Brief*, at 17-18. This argument fails. Both this Court and the Pennsylvania Supreme Court have rejected this argument. See *Cunningham*, 81 A.3d at 9; see also *Commonwealth v. Reed*, 107 A.3d 137, 142 (Pa. Super. 2014). In rejecting this argument, the *Reed* Court stated,

The second question raises the issue of whether the *Miller* Court's application of its holding to the companion case of *Jackson v. Hobbs* compels retroactive application of *Miller* here... This claim disregards the special status of a case directly reviewed by the United States Supreme Court, as well as ignoring the case specific analysis that application of the *Teague* principles requires. Furthermore, *Cunningham* expressly rejected this argument: "Initially, we reject Appellant's position that the *Miller* Court's reversal of the state appellate court decision affirming the denial of post-conviction relief in the *Jackson* case compels the conclusion that *Miller* is retroactive." ... the second question does not merit relief.

107 A.2d at 142.

Moreover, defendant's remaining claims in support of the retroactive application of *Miller* are equally unavailing. Notably, the defendant in *Seskey* made the identical jurisdictional argument made by defendant here. The *Seskey* Court described the defendant's retroactivity argument as follows:

Throughout his brief, Appellant attempts to circumvent the effect that *Cunningham* has upon our jurisdiction by arguing, *inter alia*: that he is entitled to relief under Article I, § 13 of the Pennsylvania Constitution (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.”), independently of the Eighth Amendment; that *Miller* should be applied retroactively based upon Pennsylvania’s broader retroactivity principles; and that the inequitable result that *Miller* created violates Pennsylvania’s due process and equal protection principles.

*Seskey*, 86 A.3d at 243 (internal citations omitted).

The Court rejected that defendant’s retroactivity argument. *Id.* In doing so, it concluded:

While these arguments someday may require consideration by our courts, today cannot be the day. Before a court may address Appellant’s arguments, or similar contentions, that court must have jurisdiction. We cannot manufacture jurisdiction based upon the substantive claims raised by the parties. Presently, we are confined by the express terms of subsection 9545(b)(1)(iii) and our Supreme Court’s decision in *Cunningham*. *Combined, those two elements require us to conclude that we lack jurisdiction. No substantive claim can overcome this conclusion.*

*Seskey*, 86 A.3d at 243 (internal citations omitted) (emphasis added). The rationale employed by this Court in *Seskey* applies with equal force to this case.

Simply put, *Miller* does not retroactively apply to defendant; as such, he cannot rely on the “newly-recognized constitutional right” exception to establish jurisdiction over his untimely PCRA petition. The trial court, accordingly, properly dismissed his untimely petition. *See Seskey*, 86 A.3d at 244 (holding that the trial court did not have jurisdiction over defendant’s PCRA petition asserting a *Miller* claim where petition was filed 13 years after his judgment of sentence became final; the claim was time-barred and the newly-recognized constitutional right exception did not apply as the right set forth in *Miller* did not apply retroactively); *see also Murray*, 753 A.2d at 203 (holding that the trial court properly dismissed PCRA petition without a hearing where petition was not filed within a year after judgment of sentence became final and defendant filed to establish the applicability of any of the exceptions to the timeliness requirements); *see also Commonwealth v. Robinson*, 837 A.2d 1157, 1161 (Pa. 2003) (noting that “Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition”).

Incidentally, to the extent defendant argues that the trial court should have treated his PCRA as a petition for a writ of habeas corpus, he is mistaken. The PCRA “is the *sole* means for obtaining collateral relief and



encompasses all other common law and statutory remedies for the same purpose ... including habeas corpus....” 42 Pa. C.S.A. § 9542 (emphasis added); see *Commonwealth v. Johnson*, 803 A.2d 1291, 1293 (Pa. Super. 2003) (reiterating that the PCRA provides the sole means for obtaining collateral review, and thus finding that “any petition filed after judgment of sentence becomes final will be treated as a PCRA petition”); see also *Commonwealth v. Kutnyak*, 781 A.2d 1259, 1261 (Pa. Super. 2001) (holding the petition must be construed as a PCRA petition, since the PCRA is the exclusive avenue for obtaining post-conviction collateral relief). This is true regardless of the manner in which the petition is filed. *Id.* Thus, provided the PCRA provides a remedy for defendant’s claims, his habeas corpus petition must be construed as a PCRA petition. See *Commonwealth v. Hackett*, 598 Pa. 350, 363 (Pa. 2008) (holding defendant’s habeas corpus claim falls within the ambit of the PCRA, such that he is not entitled to habeas corpus relief).

Indeed, as aptly pointed out by Judge Strassburger in his concurring opinion in *Seskey*,

[A] defendant cannot escape the PCRA time-bar by titling his petition or motion as a writ of *habeas corpus*.” *Commonwealth v. Taylor*, 2013 Pa. Super. 89, 65 A.3d 462, 466 (Pa. Super. 2013). “Issues that are cognizable under the PCRA must be raised in a



timely PCRA petition and cannot be raised in a *habeas corpus* petition.” Because Appellant’s claims may be addressed under the PCRA, *see* 42 Pa. C.S. § 9543(a)(2)(i) (providing that PCRA relief is available for conviction resulting from constitutional violations), the PCRA court properly dismissed Appellant’s *habeas corpus* petition as an untimely PCRA petition.

*Seskey*, 86 A.2d at 244 (Strassburger, J., concurring opinion).

Here, the PCRA provides a remedy for defendant’s claim. *See* 42 Pa. C.S. § 9543(a)(2)(i),(vii) (providing that an illegal sentencing claim and a constitutional violation claim are cognizable PCRA claims). Defendant’s petition for habeas corpus, accordingly, was properly treated as a PCRA petition. *See Commonwealth v. Stout*, 978 A.2d 984, 987 (Pa. Super. 2009) (dismissing as an untimely PCRA petition a petition styled as a petition for a writ of habeas corpus).

CONCLUSION

WHEREFORE, based on the foregoing, the Commonwealth respectfully requests that this Court affirm the order of the trial court dismissing as untimely defendant's fifth PCRA petition.

RESPECTFULLY SUBMITTED:



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ADRIENNE D. JAPPE  
ASSISTANT DISTRICT ATTORNEY  
CAPTAIN, APPELLATE DIVISION  
ROBERT M. FALIN  
DEPUTY DISTRICT ATTORNEY  
CHIEF, APPELLATE DIVISION  
KEVIN R. STEELE  
FIRST ASSISTANT DISTRICT ATTORNEY  
RISA VETRI FERMAN  
DISTRICT ATTORNEY

**SUPERIOR COURT OF PENNSYLVANIA**

Commonwealth of Pennsylvania	:	3005 EDA 2014
v.	:	
Aaron Claude Phillips	:	
Appellant	:	

**PROOF OF SERVICE**

I hereby certify that this 22nd day of April, 2015, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

**Service**

Served:	Marsha Levick
Service Method:	First Class Mail
Service Date:	4/22/2015
Address:	Juvenile Law Center 1315 Walnut St Ste 400 Philadelphia, PA 19107
Phone:	215-625-0551
Representing:	Appellant Aaron Claude Phillips

/s/ Adrienne D. Jappe

*(Signature of Person Serving)*

Person Serving:	Jappe, Adrienne D.
Attorney Registration No:	080953
Law Firm:	Montgomery County District Attorney's Office
Address:	P.O. Box 311 Norristown, PA 194040311
Representing:	Appellee Commonwealth of Pennsylvania