IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA **V.** **STEVE JONES, JR.**	**777 EDA 2015**

BRIEF FOR APPELLANT

Appeal From Order Of The Court Of Common Pleas Of Delaware County, Criminal Division, Dismissing PCRA Petition Without A Hearing Entered February 18, 2014 in CP-23-CR-0001881-2002

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I. STATEMENT OF JURISDICTION

This Court's jurisdiction to hear an appeal from an order from the Delaware County Court of Common Pleas dismissing Appellant's petition for post-conviction relief is established by Section 2 of the Judiciary Act of 1976, P.L. 586, No. 142, § 2, 42 Pa. Cons. Stat. § 742.

II. ORDER IN QUESTION

AND NOW, to wit, this 18th day of February, 2015, upon consideration of Petitioner's Petition for Habeas Corpus Relief Under Article 1, Section 14 of the Pennsylvania Constitution and for Post-Conviction Relief Under the Post Conviction Relief Act, and following the court's notice of intent to dismiss on December 18, 2014, it is hereby ORDERED and DECREED that said petition is DENIED.

Petitioner is advised that he has the right to appeal this decision to the Superior Court of Pennsylvania. If the Petitioner decides to appeal, he must file a written Notice of Appeal with the Delaware County Office of Judicial Support within thirty (30) days of the entry of this Order.

BY THE COURT,

Gregory M. Mallon, Judge

III. STATEMENT OF SCOPE AND STANDARD OF REVIEW

The issue presented here is whether *Miller v. Alabama* applies retroactively. This is a legal issue for which this Court has a plenary standard and scope of review.

IV. STATEMENT OF QUESTIONS PRESENTED

1. Does the failure to apply *Miller v. Alabama* retroactively to a juvenile offender sentenced to life in prison without the possibility of parole for a conviction of second degree felony murder violate Appellant's rights under the U.S. Constitution or the Pennsylvania Constitution?
2. Does habeas corpus provide Appellant with a mechanism for relief?
3. Did the trial court err in denying the petition for post-conviction relief without granting a hearing?

V. STATEMENT OF THE CASE

On April 20, 2002, at the age of 16, Appellant Steve Jones, Jr. was involved in the robbery of a Jack and Jill ice cream truck in Chester, Pennsylvania, along with three other boys. During the course of the robbery, Mr. Jones discharged a firearm and the ice cream truck driver was wounded and later died. On January 10, 2003, Mr. Jones was found guilty of second degree murder and robbery following a jury trial presided over by the Honorable Robert C. Wright in the Court of Common Pleas of Delaware County.

On March 14, 2003, Judge Wright sentenced Mr. Jones to a mandatory sentence of life imprisonment for second degree murder. Appellant filed a direct appeal with this Court challenging the verdict and the sufficiency of the evidence, and this Court affirmed the judgment of the lower court on June 22, 2004. *See Commonwealth v. Jones*, 1081 EDA 2003.

On December 14, 2007, Mr. Jones filed a pro se petition under the Post Conviction Relief Act (PCRA) in the Court of Common Pleas of Delaware County. Pursuant to the PCRA, counsel was appointed to represent Appellant, but later requested leave to withdraw and filed a "no merit" letter. The court, presided over by Judge Mallon because of Judge Wright's retirement, granted the withdrawal and denied the PCRA petition. This Court affirmed the denial of the PCRA petition on April 12, 2010. *See Commonwealth v. Jones*, 1157 EDA 2009.

On June 29, 2010, Mr. Jones filed his second pro se PCRA petition, challenging his sentence in light of the U.S. Supreme Court's May 17, 2010 ruling in *Graham v. Florida*, 560 U.S. 48 (2010). The Delaware Court of Common Pleas dismissed the petition on the grounds of untimeliness and lack of jurisdiction. Appellant appealed this denial on August 26, 2010, and the denial was affirmed by this Court on August 14, 2014. *See Commonwealth v. Jones*, 2437 EDA 2010.

On October 14, 2014, Appellant filed a PCRA petition through counsel complaining that his life without parole sentence is unconstitutional pursuant to *Miller v. Alabama*, 132 S. Ct. 2455 (2012), and *Graham v. Florida* and arguing that these cases must be applied retroactively. The Court of Common Pleas of Delaware County denied this petition without a hearing on February 18, 2015. (Order attached as Appendix A), and the court issued an Opinion on the issues raised in the appeal on June 17, 2015. (Opinion Attached as Appendix B). It is from this denial that Mr. Jones appeals.

Mr. Jones, who is now 29 years old, is currently incarcerated at SCI-Mahanoy in Frackville, Pennsylvania.

VI. SUMMARY OF ARGUMENT

Miller v. Alabama, 132 S. Ct. 2455 (2012) applies retroactively under the U.S. and Pennsylvania Constitutions. The decision in *Miller* is retroactive on its face. To the extent the Pennsylvania Supreme Court has rejected this argument in *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013), however, *Miller* still applies retroactively to this case based on Pennsylvania law. The Pennsylvania Supreme Court recognized that the *Teague* retroactivity doctrine is "not necessarily a natural model for retroactivity jurisprudence as applied at the state level," because of its underlying concerns with the goals of federal habeas and minimal intrusion into state criminal proceedings. *Cunningham*, 81 A.3d at 8. This Court should adopt a broad retroactivity analysis under Pennsylvania law, because applying *Miller* retroactively is consistent with Pennsylvania norms and that "good grounds" exist to apply the rule retroactively on collateral review.

This Court should further hold that life-without-parole sentences for juveniles convicted of second degree murder are always unconstitutional under the Pennsylvania Constitution and therefore hold that Mr. Jones is entitled to resentencing. Finally, this Court should hold that Mr. Jones' mandatory life without parole sentence is unconstitutional under both the Pennsylvania and U.S. Constitutions because the *Cunningham* ruling created two classes of individuals sentenced to mandatory life without parole who are treated differently based on the

arbitrary date that their convictions became final.

VII. ARGUMENT

Appellant Steve Jones, Jr. is serving a mandatory sentence of life imprisonment without parole for a crime (a second degree felony murder) committed when he was 16 years old. In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the United States Supreme Court held that a mandatory life-without-parole sentence for a juvenile violates the Eighth Amendment. In 2013, the Pennsylvania Supreme Court in *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013) vacated the sentence of a juvenile sentenced to a mandatory term of life imprisonment without parole. Batts' case was on direct appeal when *Miller v. Alabama* was decided. *Batts*, 66 A.3d at 290. The Pennsylvania Supreme Court held that Batts' mandatory sentence of life without parole violates the Eighth Amendment, and remanded the case to the trial court for resentencing, directing the trial court to consider individualized sentencing factors. *Id*. at 297 (citing factors set forth in *Miller*, 132 S. Ct. at 2455).

On October 30, 2013, the Pennsylvania Supreme Court held in *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013), that *Miller* does not retroactively apply to post-conviction petitioners in Pennsylvania. Unlike Mr. Batts, Mr. Cunningham and those similarly situated, would not receive resentencing hearings and, based on the arbitrary date their sentences became final, would continue to serve unconstitutional sentences. *Cunningham*, however, left

open the possibility of relief under state law through a state habeas petition.

A. *Miller* Reaffirms The U.S. Supreme Court's Recognition That Children Are Categorically Less Deserving Of The Harshest Forms Of Punishment

In *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the U.S. Supreme Court recognized that children are fundamentally different from adults and categorically less deserving of the harshest forms of punishments.[1] Relying on *Roper*, the U.S. Supreme Court in *Graham* cited three essential characteristics which distinguish youth from adults for the purpose of determining culpability:

> [a]s compared to adults, juveniles have a "lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed."

560 U.S. at 68 (citing *Roper*, 543 U.S. at 569-70).

Graham found that "[t]hese salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender

[1] *Roper* held that imposing the death penalty on juvenile offenders violates the Eighth Amendment, 543 U.S. at 578; *Graham* held that life-without-parole sentences for juveniles convicted of non-homicide offenses violate the Eighth Amendment, 560 U.S. at 82; and *Miller* held that mandatory life-without-parole sentences imposed on juveniles convicted of homicide offenses violate the Eighth Amendment, 132 S. Ct. at 2469.

whose crime reflects irreparable corruption.' Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.'" *Id.* (quoting *Roper*, 543 U.S. at 569, 573). The Court concluded that "[a] juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" *Graham*, 560 U.S. at 68 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).

The *Graham* Court found that because the personalities of adolescents are still developing and capable of change, an irrevocable penalty that afforded no opportunity for release was developmentally inappropriate and constitutionally disproportionate. The Court further explained that:

> Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper*, 543 U.S. at 570. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.*

Id. The Court's holding acknowledged the incongruity of imposing a final and irrevocable penalty on an adolescent, who had capacity to change and grow.

In reaching these conclusions, the U.S. Supreme Court has relied upon an increasingly settled body of research confirming the distinct emotional, psychological, and neurological attributes of youth. The Court clarified in *Graham* that, since *Roper*, "developments in psychology and brain science continue to show

fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 560 U.S. at 68. Because juveniles are more likely to be reformed than adults, the "status of the offenders" is central to the question of whether a punishment is constitutional. *Id*. at 68-69.

The U.S. Supreme Court in *Miller* expanded its juvenile sentencing jurisprudence, banning mandatory life-without-parole sentences for children convicted even of homicide offenses. Reiterating the central premise that children are fundamentally different from adults, *Miller* held that the sentencer must take into account the juvenile's reduced blameworthiness and individual characteristics before imposing this harshest available sentence. 132 S. Ct. at 2460. The rationale was clear: The mandatory imposition of sentences of life without parole "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." *Id*. (quoting *Graham*, 560 U.S. at 68, 74). The Court grounded its holding "not only on common sense . . . but on science and social science as well," *id.* at 2464, noting "that those [scientific] findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development

occurs, his 'deficiencies will be reformed.'" *Id.* at 2464-65 (quoting *Graham*, 560 U.S. at 68-69; *Roper*, 543 U.S. at 570).

Importantly, in *Miller*, the Court found that none of what *Graham* "said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific." 132 S. Ct. at 2465. The Court instead emphasized "that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id*. As a result, *Miller* held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," *id.* at 2469, because "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 2467.

B. *Miller v. Alabama* Applies Retroactively Pursuant To The U.S. Supreme Court Precedent

The decision in *Miller* is retroactive on its face. The companion case decided with *Miller*, *Jackson v. Hobbs*,[2] was a state post-conviction case. When it decided *Miller*, which was a direct appeal, the Supreme Court did not draw any distinction between Jackson's collateral challenge and Miller's case. The Court applied the

[2] *Miller v. Alabama*, No 10-9646, and *Jackson v. Hobbs*, No.10-9647, were decided together in a single opinion, for which there is a single citation.

same rule and invalidated mandatory life imprisonment for both Jackson and Miller. Hence, the United States Supreme Court has already applied the *Miller* rule retroactively, and thus *Miller* has been held by that Court to apply retroactively, thus satisfying the requirement of 42 Pa. C.S. § 9545(b)(1)(iii) (requiring 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*") (emphasis added). Moreover, *Miller*'s holding that mandatory life-without-parole sentences are unconstitutional for juvenile offenders is a substantive rule that must apply retroactively pursuant to *Teague v. Lane*, 489 U.S. 288, 307, 311 (1989).

C. This Court Should Adopt A Pennsylvania-Specific Retroactivity Analysis Pursuant To The Framework Set Forth In *Cunningham*

To the extent the Pennsylvania Supreme Court has rejected the argument that *Miller* applies retroactively under U.S. Supreme Court precedent, *see Cunningham*, 81 A.3d at 11, this Court should adopt a broader, Pennsylvania-specific retroactivity standard, as suggested by both the majority and the concurrence in *Cunningham*. *See Cunningham*, 81 A.3d at 8-9; *id*. at 13 (Castille, C.J., concurring). In *Cunningham*, the Pennsylvania Supreme Court recognized that the *Teague* retroactivity doctrine is "not necessarily a natural model for retroactivity jurisprudence as applied at the state level," because of its underlying concerns with the goals of federal habeas and minimal intrusion into state criminal

proceedings. *Cunningham*, 81 A.3d at 8. Consequently, the court invited litigants to argue for a broader retroactivity analysis under Pennsylvania law, presenting arguments that the new rule is resonant with Pennsylvania norms and that "good grounds" exist to apply the rule retroactively on collateral review. *Id*. at 9. The court explained that "good grounds" include "recognition and treatment of the strong interest in finality" as well as limitations of the courts' jurisdiction and authority under the PCRA. *Id*. Under the approach suggested by the Court in *Cunningham, Miller* should apply retroactively.

1. The *Miller* Rule Resonates With Pennsylvania Norms

The rule announced in *Miller* that juveniles cannot be subject to a mandatory sentence of life without parole is consistent with Pennsylvania norms. Notably, the General Assembly acted quickly to implement *Miller*. The Supreme Court decided *Miller* on June 24, 2012. On September 25, 2012, just three months later, a pending juvenile justice bill, S.B. 850, was amended to include provisions implementing *Miller* within the homicide statute. *See* 2011 Bill Tracking Pa. S.B. 850 (Sept. 25, 2012 Amendments), *available at* http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=2011&sind=0&body=S&type=B&bn=850. Less than one month later, the bill passed the House by a wide margin and passed the Senate unanimously, and on October 25, 2012, the bill was signed by Governor Corbett as Act No. 2012-204. The rapidity with which

the *Miller* rule was implemented by the General Assembly shows that ensuring the constitutionality of sentencing for juveniles is a priority for citizens of Pennsylvania. "We believe that the most accurate indicators of those evolving standards of decency are the enactments of the elected representatives of the people in the legislature." *Commonwealth v. Zettlemoyer*, 454 A.2d 937, 968 (Pa. 1982) (internal quotation marks omitted), *overruled on other grounds by Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003).

In addition, Pennsylvania has a longstanding commitment to providing special protections for minors against the full weight of criminal punishment. The Pennsylvania Supreme Court has recognized the special status of adolescents, and has held, for example, that a court determining the voluntariness of a youth's confession must consider the youth's age, experience, comprehension, and the presence or absence of an interested adult. *Commonwealth v. Williams*, 475 A.2d 1283, 1288 (Pa. 1984). In *Commonwealth v. Kocher*, 602 A.2d. 1308, 1312 (Pa. 1992), involving the prosecution of a 9-year-old for murder, the Pennsylvania Supreme Court referred to the common law presumption that children under the age of 14 are incapable of forming the requisite criminal intent to commit a crime. While this common law presumption was replaced by the Juvenile Act, its existence for decades demonstrates that Pennsylvania's common law was especially protective of minors. The Juvenile Act also recognizes the special status

of minors in its aim "to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community." 42 Pa. Cons. Stat. § 6301(b)(2). This focus on rehabilitation and competency development underscores Pennsylvania's recognition that children are still changing and deserve special protections under the law.

The Pennsylvania Supreme Court recently reaffirmed its recognition of the important differences between juvenile and adult offenders in *In re J.B.*, 107 A.3d 1 (Pa. 2014), in which is struck down provisions of the Sex Offender Registration and Notification Act (SORNA) as applied to juveniles. The court noted that "Pennsylvania has long noted the distinctions between juveniles and adults and juveniles' amenability to rehabilitation." *Id*. at 18. The court also cited *Miller* for the proposition that there are "'significant gaps between juveniles and adults' that require treating delinquent children differently than adult criminals." *Id*. (quoting Miller, 132 S. Ct. at 2464). The court's recognition that children and adults must be treated differently is hardly new. In 1959, the Pennsylvania Supreme Court vacated a death sentence that was imposed on a 15 year old without any consideration of his young age and associated characteristics:

> Green's chronological age of 15 years would not justify the imposition of the lesser penalty, but his age is an important factor in determining the appropriateness of the penalty and should impose upon the sentencing court the duty to be ultra vigilant in its inquiry into the makeup of the convicted murderer. . . .
>
> To what extent, if any, did the court below measure the understanding and judgment of this 15 year old boy? An examination reveals that Green had an I.Q. of 80, a dull-normal classification. Beyond his age, the manner of the crime and his I.Q. rating the court below - unless the record contains grave omissions - knew nothing and made no inquiries to determine the background of this boy or what made him "tick." To the possible argument that Green could have but did not present such evidence, the answer is clear: when a court sits in judgment to determine whether a 15 year old boy who has committed an atrocious crime shall die in the electric chair it is the duty of the court to inquire and exhaust every avenue of information that would inform it of the type of individual represented by that boy. Both the criminal act and the criminal himself must be thoroughly, completely and exhaustively examined before a court can exercise a *sound* discretion in determining the appropriate penalty.
>
> On the record there is no evidence of the background of this boy; his home environment, the economic circumstances under which he was reared, his scholastic record; in short, what was this boy, now a convicted murderer, really like prior to the commission of this crime? Of these things the court below was without knowledge and made no inquiry.

Commonwealth v. Green, 151 A.2d 241, 246-47 (Pa. 1959) (vacating a death sentence and remanding for imposition of a life sentence). Thus, more than half a century ago, the Pennsylvania Supreme Court recognized that imposition of the most severe sentence available upon a juvenile requires the sentencer to consider factors such as the child's background, home environment, intellectual capacity, and judgment. *Miller*'s new rule requiring sentencers to consider similar factors

before imposing the harshest available sentence on juveniles is directly in line with these decades-old norms. *See Miller,* 132 S. Ct. at 2468-69 (requiring sentencers to consider factors including (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation").

2. Good Grounds Exist To Apply *Miller* Retroactively

Good grounds exist to apply *Miller* retroactively in Pennsylvania. The court in *Cunningham* explained that "good grounds" include "recognition and treatment of the strong interest in finality" as well as limitations of the courts' jurisdiction and authority under the PCRA. 81 A.3d at 9.[3]

[3] Notably, all of the justices of the Pennsylvania Supreme Court – the majority, concurring opinion, and dissenters – expressed reservations about not applying *Miller* retroactively. *See Cunningham*, 81 A.3d at 10-11 (*Miller* presents a "grave and challenging question of morality and social policy," but the court's role in "establishing social policy is a limited one."); *id*. at 11 (Castille, C.J., concurring) (describing the "seeming inequity" of not applying *Miller* retroactively); *id*. at 13 (Castille, C.J., concurring) (describing as "arbitrary" the result in Pennsylvania: "the longer a juvenile murderer has been in prison, the less likely he is ever to have the prospect of an individualized assessment of whether LWOP was a

a. The Interest In Ensuring That The Life Without Parole Sentence Imposed On A Juvenile Is Constitutional Outweighs The Interest In Finality

This Court is free to evaluate whether concerns with finality outweigh Appellant's interest in serving a constitutional sentence. *See Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) ("[F]inality of state convictions is a state interest, not a federal one. It is a matter that States should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts."). This Court should hold that a defendant's interest in receiving a sentence that comports with the Eighth Amendment outweighs the Commonwealth's interest in finality.[4]

i. The Accuracy Concerns Underlying Finality Interests Are Diminished In The Context Of Sentencing

The accuracy concerns underlying finality interests are diminished in the context of sentencing. In *Mackey v. United States*, 401 U.S. 667 (1971), Justice

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comparatively appropriate punishment"); *id*. at 22 (Baer, J., dissenting) (agreeing with the "seeming inequity" noted by Chief Justice Castille and arguing that *Miller* should be applied retroactively in Pennsylvania). The hesitation expressed by each Justice is a strong indicator that good grounds exist for retroactive application of *Miller*.

[4] Noting the strong societal interest in finality, the court in *Cunningham* cited *Commonwealth v. Sam*, 952 A.2d 565, 576 (Pa. 2008). That case, however, involved PCRA proceedings that had been "essentially *stayed* . . . *forever*" due to the petitioner's incompetence, with "no indication when – or even if – his PCRA action will ever move forward." *Sam*, 952 A.2d at 541-42 (emphasis added). The concern with indefinite delays is not present, here, where Appellant seeks simply to have a new sentencing hearing.

Harlan argued that failure to sufficiently respect the finality of convictions would force courts to "relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed," resulting in subsequent verdicts no more accurate than the first. 401 U.S. at 691 (Harlan, J., concurring). Because "[c]riminal trials are inherently backward-looking, offense-oriented events, . . . merely the passage of time . . . provides reason to fear that any new review or reconsideration of backward-looking factual determinations of guilt made during a trial will be costly and inefficient, will be less accurate, and will raise questions about the accuracy and efficacy of criminal trials generally." Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences,* 4 Wake Forest J.L. & Pol'y 151, 167, 170 (2014) [hereinafter Berman, *Finality*].

However, these concerns do not apply to sentencing because fundamentally "different considerations [are] implicated when a defendant seeks only review and reconsideration of his final sentence and does not challenge his underlying conviction." *Id.* at 166. Sentencing hearings, for example, have different rules of procedure, evidence, and burdens of proof than trials. They also have different goals; while criminal trials "are designed and seek only to determine the binary question of a defendant's legal guilt," sentencing hearings "are structured to assess and prescribe a convicted offender's future and fate." *Id.* at 167.

Sentencing has an essential "forward-looking" component, which includes

consideration of the defendant's characteristics and the possibility of rehabilitation. The final decision is not a binary finding of guilt or innocence, but "what to do with the convicted criminal in light of his, the victims', and society's needs." *Id.* at 169. "Although resentencing may take place years after the original proceedings, the relaxed evidentiary rules at resentencing make the risk of inaccuracy from unavailable or spoiled evidence less acute than at retrial. Indeed, the passage of time may provide better information about the offender's dangerousness and rehabilitation, enhancing accuracy." Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 Wake Forest J.L. & Pol'y 179, 181 (2014) [hereinafter Scott, *Collateral Review*].

Concerns about the accuracy of the original sentence are inapt in the context of mandatory sentences like those at issue in *Miller*. Because it was mandatory, the judge never had an opportunity to impose a sentence based on the particular facts and circumstances of the case and the offender. The "accuracy" of the former unconstitutional sentence will hardly be *reduced* by applying *Miller* retroactively; applying *Miller* retroactively and allowing individualized sentencing would *increase* accuracy.

ii. The Resource Concerns Underlying Interests In Finality Are Diminished In The Context Of Sentencing

Another factor underlying the importance of finality is efficient use of

judicial resources. *See Mackey*, 401 U.S. at 691 (noting concerns it would "seriously distort the very limited resources society has allocated to the criminal process . . . to expend[] substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final."). As several courts have recognized, resource concerns have less force when applied to sentencings rather than to trials. As the Second Circuit has noted, "[T]he context of review of a sentencing error is fundamentally different [than the costs of a second trial]. From the standpoint of the parties, the error might have great significance . . . More importantly, the cost of correcting a sentencing error is far less than the cost of a retrial." *United States v. Williams*, 399 F.3d 450, 456 (2d Cir. 2005). *See also United States v. Saro*, 24 F.3d 283, 287-88 (D.C. Cir. 1994) "[w]hen an error in sentencing is at issue . . . the problem of finality is lessened, for a resentencing is nowhere near as costly or as chancy an event as a trial."; *United States v. Serrano-Beauvaix*, 400 F.3d 50, 61 (1st Cir. 2005) (Lipez, J., concurring) ("resentencing does not pose the burden of a new trial, with its considerable costs in time, money, and other resources."); *Carrington v. United States*, 503 F.3d 888, 901 (9th Cir. 2007) (Pregerson, J., concurring in part and dissenting in part) ("The interest in repose is lessened all the more because we deal not with finality of a *conviction*, but rather the finality of a *sentence*. There is no suggestion that [the defendants] be

set free or that the government be forced to retry these cases. The district court asks only for an opportunity to re-sentence in accordance with the Constitution.").

In addition, resentencing juveniles serving mandatory life without parole will not duplicate previous costs or efforts. Because every defendant who would be affected by retroactive application of *Miller* received a mandatory sentence, a new sentencing hearing will be the first time the court considers the offender's mitigating characteristics.

iii. Concerns About The Legitimacy Of Criminal Judgments Are Diminished In The Context Of Sentencing For Juveniles

Finality is also an important interest because it maintains the legitimacy and reputation of the criminal justice system. As Justice Harlan noted: "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." *Mackey*, 401 U.S. at 691 (Harlan, J., concurring). However, Justice Harlan's concerns rest on the finality of the conviction itself, not on the possibility of repeated resentencing or parole:

> "Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error *but rather on whether the prisoner can be restored to a useful place in the*

> *community*." *Sanders v. United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting).

Mackey, 401 U.S. at 690 (Harlan, J., concurring) (emphasis added). Justice Harlan suggests that "continuing litigation over a sentence may not pose the same threat to the reputation of the criminal justice system as continuing litigation over guilt or innocence." Scott, *Collateral Review*, at 181. Because "[s]entences are already subject to modification and reduction through a host of procedures," *id.*, retroactive application of laws that alter the length of a sentence are less disruptive than laws that call into question whether a defendant was properly convicted. On the other hand, confidence in the justice system is undermined if the Supreme Court's recognition that children have been unconstitutionally sentenced to mandatory life without parole applies only prospectively, leaving hundreds of juveniles to die in prison.

Finality is also considered "essential to both the retributive and the deterrent functions of criminal law." *Calderon v. Thompson*, 523 U.S. 538, 555 (1998). *Miller*, however, holds that the retributive and deterrent functions of criminal law apply differently to juveniles:

> Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults. . . make them less likely to consider potential punishment.

132 S. Ct. at 2465 (citations omitted) (internal quotation marks omitted). Thus, this justification of finality applies with less force to juveniles than it does to adults.

Additionally, the class of prisoners who could ever be eligible for retroactive application of *Miller* is limited to those juveniles serving mandatory sentences of life without parole, and whose convictions became final before June 24, 2012. The Pennsylvania Supreme Court has already ruled that *Miller* applies to those whose convictions were not yet final when *Miller* was decided, and the General Assembly has ensured that no court in the future can sentence a juvenile to a mandatory life-without-parole sentence. Thus, retroactive application of *Miller* will be limited in both time and scope, and therefore not offend the societal interest in finality.

b. PCRA Procedural Limitations Can Be Overcome In Cases Of Overwhelming Public Interest

To the extent that Pennsylvania's PCRA statute limits the ability of petitioners to bring claims in cases in which the U.S. Supreme Court has not held a new rule retroactive, these procedural limitations can be overcome by overwhelming public interest. Concurring in *Cunningham*, former Chief Justice Castille noted that Pennsylvania's PCRA statute would fail to afford petitioners relief in cases in which the Pennsylvania courts sought to provide greater retroactive effect to new federal constitutional rights:

> That circumstance may pose more difficult questions of state constitutional law which, it would appear, fall outside the auspices of the PCRA. As noted, the U.S. Supreme

> Court has held that state courts may, as a matter of state law, afford greater retroactive effect to new federal constitutional rights than is commanded by the High Court. However, for prisoners whose sentences are final, the PCRA offers no avenue to pursue that argument. New rules and rights are more properly the province of preservation and presentation in the direct review process; and Section 9545 of the PCRA provides a safety valve for collateral relief only after a new right has been held to be retroactive.

Cunningham, 81 A.3d at 13-14 (Castille, C.J., concurring). However, PCRA procedural rules can be overcome in cases of overwhelming public interest. "In short, where an overwhelming public interest is involved but is not addressed by the parties, this Court has a duty to transcend procedural rules which are not, in spirit, applicable, to the end that the public interest may be vindicated." *Commonwealth v. McKenna*, 383 A.2d 174, 181 (Pa. 1978) (holding that ordinary procedural rules do not apply in death penalty cases because of the "final and irrevocable nature of the death penalty"); *Commonwealth v. Freeman*, 827 A.2d 385, 402 (Pa. 2003) (noting the "substantial safeguards" in place that are "not available in other criminal matters" in capital cases "because of the final and irrevocable nature of the penalty").

Thus, there is precedent for transcending the procedural hurdles of the PCRA to allow review of claims when the petitioner is facing a "final and irrevocable" penalty. A mandatory sentence of life without parole is similarly final and irrevocable. *See Miller*, 132 S. Ct. at 2466 (life without parole sentences for

juveniles are “akin to the death penalty”). An overwhelming public interest exists in remedying this unjust sentence, which has been held unconstitutional by both the United States Supreme Court and the Pennsylvania Supreme Court.

However, if procedural barriers prevent relief through the PCRA statute, retroactivity claims can be pursued through the writ of habeas corpus. Concurring in *Cunningham*, Chief Justice Castille noted, “there is at least some basis in law for an argument that the claim is cognizable via a petition under Pennsylvania's *habeas corpus* statute.” 81 A.3d at 18 (Castille, C.J., concurring). The writ of habeas corpus “continues to exist only in cases in which there is no remedy under the PCRA.” *Commonwealth v. Peterkin*, 722 A.2d 638, 640 (Pa. 1998). To the extent the Pennsylvania Supreme Court has held that no remedy exists under the PCRA statute to remedy Appellant’s unconstitutional sentence unless or until the U.S. Supreme Court holds that *Miller* applies retroactively, a state habeas petition provides the only mechanism of relief available to Appellant’s claim that the Pennsylvania Constitution prohibits him from serving a sentence that is no longer constitutional under the U.S. and Pennsylvania Constitutions, and has been eliminated by the Pennsylvania legislature. Mr. Jones has no other mechanism of obtaining relief for his claim that relief under *Miller* cannot be arbitrarily determined by the date one’s conviction became final.

D. Under The Pennsylvania Constitution, Appellant Is Entitled To Resentencing As He Is Serving An Unconstitutional Sentence That Is No Longer Available In The Commonwealth

With respect to mandatory juvenile life-without-parole sentences and the retroactivity of *Miller*, Article I, Section 13 of the Pennsylvania Constitution should be interpreted more broadly than the Eighth Amendment of the U.S. Constitution.[5] This Court should find that life-without-parole sentences are always unconstitutional for juveniles convicted of second degree (felony) murder and that the Pennsylvania Constitution requires retroactive application of *Miller*.

Mr. Jones is serving a life-without-parole sentence for a second degree homicide that occurred when he was a juvenile – a sentence that is no longer available for juveniles convicted of this offense in the Commonwealth. *See* 18 Pa. Cons. Stat. Ann. § 1102.1(c). Though the U.S. Constitution prohibits this mandatory sentence and the Pennsylvania legislature has eliminated this

[5] Although Pennsylvania courts have, in the context of the death penalty, held that Pennsylvania's ban on cruel punishments is coextensive with the Eighth Amendment, *see Commonwealth v. Zettlemoyer*, 454 A.2d 937, 967 (Pa. 1982), *overruled on other grounds by Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003), the courts have not examined the issue in the context of life-without-parole sentences imposed on juvenile offenders, nor have those cases considered the jurisprudence of *Roper, Graham*, and *Miller*, which all establish that there is a constitutional difference between defendants below age 18 and above age 18 regarding punishment (as discussed above). Significantly, *Zettlemoyer* was also decided before *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), which established the method to determine whether the Pennsylvania Constitution is broader than the Federal Constitution.

discretionary sentence for second degree murder, Mr. Jones continues to serve his unconstitutional sentence merely because of the arbitrary date his sentence became final. Such a result is untenable under the Pennsylvania Constitution. *See, e.g.*, *Cunningham*, 81 A.3d at 14 (Castille, C.J., concurring) ("However, a new federal rule, if sufficiently disruptive of state law – such as by requiring the state to treat identically situated defendants differently – may pose an issue of Pennsylvania constitutional law independent of the federal rule.").

In considering whether a protection under the Pennsylvania Constitution is greater than under the United States Constitution, this Court may consider: the text of the Pennsylvania Constitution; the provision's history, including case law; related case law from other states; and policy considerations unique to Pennsylvania. *See Edmunds*, 586 A.2d at 895.

1. Text of the Pennsylvania Constitution

The Pennsylvania Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Pa. Const. art. I, § 13. The text of the Pennsylvania Constitution is broader than the United States Constitution; where the U.S. Constitution bars punishments that are both "cruel" and "unusual," the Pennsylvania Constitution bars punishments that are merely "cruel."

2. Historical Context

The independent analysis of whether a punishment is cruel (as opposed to unusual) includes whether it has a legitimate penological justification. *See Graham*, 560 U.S. at 71 ("A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."). The Pennsylvania Supreme Court hinged the constitutionality of mandatory life-without-parole sentences on the statute's deterrence function. *Commonwealth v. Sourbeer*, 422 A.2d 116, 124 (Pa. 1980) (holding that mandatory life sentence under 18 Pa. C.S. § 1102(a) is not disproportionate). Here, Mr. Jones' sentence is cruel, because the traditional penological justifications for severe sentences, including retribution, deterrence, incapacitation and rehabilitation, do not justify imposing the harshest sentences on juveniles. *Graham*, 560 U.S. at 71; *see also Miller*, 132 S. Ct. at 2465. The Pennsylvania Supreme Court recognized this rationale long before *Graham* and *Miller* were decided. In 1959, the Pennsylvania Supreme Court held that the age of a juvenile convicted of murder was an "important factor in determining the appropriateness of the penalty," and required the sentencing court to consider the defendant's "understanding and judgment." *Commonwealth v. Green*, 151 A.2d 241, 246 (Pa. 1959).

The history of juvenile life-without-parole sentences in Pennsylvania also supports a holding that the sentence is unconstitutional under the Pennsylvania

Constitution. The Pennsylvania Supreme Court has acknowledged that Pennsylvania's prohibition against cruel punishment is not a static concept and courts must draw its meaning from "the evolving standards of decency that mark the progress of a maturing society." *Zettlemoyer*, 454 A.2d at 967-68 (internal quotations omitted). Courts may typically look to the legislature to "respond to the consensus of the people of this Commonwealth," *id*. at 968 (quoting *Commonwealth v. Story*, 440 A.2d 488, 500 (Pa. 1981) (Larsen, J., dissenting)).

When Pennsylvania's legislature re-examined juvenile sentencing laws post-*Miller*, the legislature *eliminated life without parole as a sentencing option* for juveniles, like Appellant, who were convicted of second degree murder. *See* 18 Pa. Cons. Stat. Ann. § 1102.1(c). This new legislation reflects the holding of the U.S. Supreme Court in *Graham v. Florida* that life without parole is always unconstitutional for children who do not kill or intend to kill. *Graham*, 560 U.S. at 69 ("when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability"). Although this legislation applies only prospectively, it demonstrates the legislature's understanding that life without parole is an inappropriate sentence for a juvenile convicted of second degree murder. Moreover, like Mr. Graham, there was no finding that Mr. Jones

either killed nor intended to kill,[6] and he, too, is entitled to be resentenced.[7]

Pennsylvania history reveals a longstanding commitment to providing special protections for minors against the full weight of criminal punishment, as discussed in Section VII.C.1., *supra*. Additionally, Pennsylvania statutory law consistently recognizes that children lack the same judgment, maturity and responsibility as adults. *See, e.g.*, 23 Pa. Cons. Stat. Ann. § 5101 (the ability to sue and be sued or form binding contracts attaches at age 18); 18 Pa. Cons. Stat. Ann. §§ 6308, 6305 (a person cannot legally purchase alcohol until age 21 and cannot legally purchase tobacco products until age 18); 10 Pa. Stat. Ann. § 305(c)(1) (no person under the age of 18 in Pennsylvania may play bingo unless accompanied by an adult); 18 Pa. Cons. Stat. Ann. § 6311 (a person under age 18 cannot get a tattoo or body piercing without parental consent); 72 Pa. Stat. § 3761-309(a) (a person under age 18 cannot buy a lottery ticket); 4 Pa. Stat. § 325.228 (no one under age

[6] Though evidence presented at trial suggested that Appellant was the actual shooter in this case, Appellant was found guilty of only second degree – not first degree – murder. Accordingly, the jury found Appellant's actions were part of the robbery and not that Appellant's actions indicated an intent to kill the victim.

[7] *Graham* has been applied retroactively. *See In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (holding *Graham* was made retroactive on collateral review); *Bonilla v. State*, 791 N.W.2d 697, 700-01 (Iowa 2010) (same); *In re Evans*, 449 Fed. App'x 284 (4th Cir. 2011) (per curiam) (unpublished) (same); *Kleppinger v. State*, 81 So. 3d 547, 550 (Fla. Dist. Ct. App. 2012) (same); *Manuel v. State*, 48 So. 3d 94, 97 (Fla. Dist. Ct. App. 2010) (same); *State v. Dyer*, 77 So. 3d 928, 929 (La. 2012) (per curiam) (same); *Rogers v. State*, 267 P.3d 802, 804 (Nev. 2011) (per curiam) (same).

18 may make a wager at a racetrack); 23 Pa. Cons. Stat. § 1304(a) (youth under the age of 18 cannot get married in Pennsylvania without parental consent or, if under 16, judicial authorization).

3. Policy Considerations

Policy considerations support broadly interpreting Pennsylvania's prohibition against cruel punishments. As Chief Justice Castille noted:

> The resulting landscape in Pennsylvania is ironic: federal *habeas corpus*-based restrictions premised upon respect for state sovereignty and the finality of judgments result in a circumstance that is certainly unusual, if not arbitrary: the longer a juvenile murderer has been in prison, the less likely he is ever to have the prospect of an individualized assessment of whether LWOP was a comparatively appropriate punishment, given his age, other characteristics, and the specifics of his offense (including the degree of the murder) as required by *Miller*.

Cunningham, 81 A.3d at 13 (Castille, C.J., concurring). True justice should not depend on a particular date on the calendar. "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring). Once the U.S. Supreme Court sets down a marker along the continuum of our evolving standards of decency, all affected citizens of the Commonwealth must benefit. To deny retroactive substantive application of *Miller* would compromise the justice system's consistency and legitimacy. Forcing Mr. Jones to serve an unconstitutional sentence that is no longer available for juveniles

convicted of second degree murder in Pennsylvania contravenes logic, reason and the Pennsylvania Constitution.[8]

4. Case Law From Other States

The majority of other states considering this issue have held that *Miller* applies retroactively. Twelve states have applied *Miller* retroactively. *See State v. Mantich*, 842 N.W.2d 716 (Neb. 2013); *Diatchenko v. Dist. Att'y for the Dist.*, 1 N.E.3d 270 (Mass. 2013); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *Jones v. State*, 122 So. 3d 698 (Miss. 2013); *Ex parte Maxwell*, 424 S.W.3d 66, 68 (Tex. Crim. App. 2014); *People v. Davis*, 6 N.E.3d 709 (Ill. 2014); *Pet. of State of N.H.* 103 A.3d 227 (N.H. 2014), *appeal docketed sub nom. N.H. v. Soto*, 14-639 (Dec. 1,

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[8] Moreover, as a policy matter, the felony murder doctrine is inconsistent with the U.S. Supreme Court's recent cases involving juveniles. As Justice Breyer noted in his concurrence in *Miller*:

> At base, the theory of transferring a defendant's intent is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate. Yet the ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively.

132 S. Ct. at 2476-77 (Breyer, J., concurring) (internal citations omitted). *Roper*, *Graham*, and *Miller* all preclude ascribing the same level of anticipation or foreseeability to a juvenile who takes part in a felony as the law ascribes to an adult. Felony murder statutes that rely on assumptions about what a "reasonable person" would foresee must therefore provide separate juvenile standards that account for the children's distinct developmental characteristics.

2014); *State v. Mares*, 335 P.3d 487 (Wyo. 2014); *Aiken v. Byars*, 765 S.E.2d 572, 573 (S.C. 2014), *appeal docketed*, No. 14-1021 (Feb. 20, 2015); *Falcon v. State*, 162 So.3d 954, 956 (Fla. 2015); *Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1043 (Conn. 2015); *Kelley v. Gordon*, 2015 Ark. 277 (2015). Conversely, in addition to the Pennsylvania Supreme Court, only six other state courts of last resort have refused to apply the holding of *Miller* because of their determination that the holding was procedural. *See, e.g.*, *Chambers v. State*, 831 N.W.2d 311, 328 (Minn. 2013); *State v. Tate*, 130 So.3d 829 (La. 2013), *cert. denied*, 134 S. Ct. 2663 (2014); *People v. Carp*, 496 Mich. 440 (2014), *appeal docketed*, No. 14-824 (Jan. 1, 2015); *Ex parte Williams*, No. 1131160, 2015 WL 1388138, at *14 (Ala. Mar. 27, 2015); *Beach v. State*, 348 P.3d 629, 642 (Mont. 2015); *People v. Tate*, 2015 CO 42, ¶ 61 (Colo. June 1, 2015), *reh'g denied* (July 13, 2015). The question of *Miller*'s retroactivity is currently pending before the United States Supreme Court. *See Montgomery v. Louisiana*, 135 S. Ct. 1546 (2015)

In light of the text of the Pennsylvania Constitution, the Commonwealth's historic recognition of the special status of juveniles, Pennsylvania's policies, and case law from other states, juvenile life-without-parole sentences for juveniles convicted of second degree homicide are unconstitutionally "cruel" under the Pennsylvania Constitution – and refusing to apply *Miller* retroactively is both cruel and unusual.

E. Appellant's Mandatory Sentence Of Life Without Parole Is Unconstitutional Under Both The Pennsylvania Constitution And The U.S. Constitution Because Two Classes Of Individuals Sentenced To Mandatory Life Without Parole Are Treated Differently

The Pennsylvania Supreme Court's refusal to apply *Miller* retroactively has arbitrarily created two classes of Pennsylvania prisoners sentenced for murder as juveniles. Those whose convictions were not final as of June 24, 2012 are eligible for resentencing pursuant to *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013) and cannot be subject to mandatory sentences of life without parole; those whose convictions were final as of June 24, 2012 must continue to serve their mandatory sentences of life without parole. Because mandatory sentences of life without parole for juveniles have been declared unconstitutional, the existence of two arbitrary classes of Pennsylvania prisoners, one who receives relief from an unconstitutional sentence, and one who does not, is unconstitutional.

1. The Creation Of Two Classes Of Juvenile Offenders Violates The Pennsylvania Constitution

The creation of two classes of juvenile offenders, one eligible for relief under *Miller* and one ineligible, based solely on the date their convictions became final, violates the Pennsylvania Constitution's guarantee of due process and equal protection. Pennsylvania citizens are guaranteed "certain inherent and indefeasible rights, among which are those of enjoying *and defending* life and liberty." Pa. Const. art. I, § 1 (emphasis added). While Section 1 has been held to include due

process principles similar to those in the U.S. Constitution, there is no federal constitutional provision mirroring the "and defending" language of Article I, Section 1. Thus, the due process component of this Section has been interpreted more expansively than federal due process. *See Commonwealth v. Martin*, 727 A.2d 1136, 1141-42 (Pa. Super. Ct. 1999) (noting that "the Pennsylvania due process rights are more expansive" than due process under the Fourteenth Amendment), *overruled on other grounds by Commonwealth v. Mouzon*, 812 A.2d 617 (Pa. 2002). The Pennsylvania Supreme Court has held that due process and equal protection require those convicted and sentenced under an unconstitutional statute to be treated the same: "Because appellant was tried, convicted, and sentenced to death under an unconstitutional statute, he must be treated the same as all those persons whose death penalties have been set aside." *Commonwealth v. Story*, 440 A.2d 488, 492 (Pa. 1981). Therefore, Mr. Jones is entitled to be resentenced in accordance with *Miller*.

The Eastern District of Michigan held that *Miller* is retroactive, explaining, *inter alia*: "if ever there was a legal rule that should – as a matter of law and morality – be given retroactive effect, it is the rule announced in *Miller*. To hold otherwise would allow the state to impose unconstitutional punishment on some persons but not others, an intolerable miscarriage of justice." *Hill v. Snyder*, No. 10-14568, 2013 WL 364198, 2 (E.D. Mich. Jan. 30, 2013).

State and local policy considerations weigh in favor of finding unconstitutional the creation of two arbitrary classes of juvenile offenders. Because Pennsylvania leads the nation in the number of juveniles serving mandatory life-without-parole sentences, a large number of prison inmates are affected by *Miller*, but they are affected differently. Those different effects are not based on valid, individualized sentencing factors, but purely on the timing of their direct appeal. Thus, Pennsylvania has a particularized need to find a fair approach to applying *Miller*.

Additionally, in the face of the established research, science, and law relied upon in *Miller* showing that children are different from adults in constitutionally relevant ways, courts cannot hold some children more deserving than others. The Supreme Court's rulings in *Roper*, *Graham* and *Miller* establish that all youth who commit, or committed, crimes under the age of 18 are less blameworthy than adults and must be sentenced accordingly. Any other interpretation renders the Court's holding in *Miller* – and the cases that preceded it – a nullity.

2. Pennsylvania's Sentencing Disproportionality Violates The U.S. Constitution

The Eighth Amendment's prohibition on disproportionate sentencing compares the gravity of the offense and the severity of the sentence. *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991). As the Supreme Court explained in *Graham*:

> "[I]n the rare case in which [this] threshold comparison … leads to an inference of gross disproportionality" the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate," the sentence is cruel and unusual.

Graham, 560 U.S at 60 (quoting *Harmelin*, 501 U.S. at 1005) (holding that a sentence of life without parole for a juvenile non-homicide offender was unconstitutionally disproportionate). Here, the disproportionality between juveniles subject to mandatory sentences and those not subject to mandatory sentences cannot be tied to the gravity of the offense or the severity of the sentence. It is tied solely to the date of the conviction becoming final.

Moreover, because two groups of offenders within the same jurisdiction are subject to different sentencing schemes for no reason related to the gravity of the offense, the sentences are necessarily arbitrary and therefore unconstitutional. *See Furman v. Georgia*, 408 U.S. 238, 256 (1972) (Douglas, J., concurring) ("The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and non-arbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."). In his concurring opinion in *Furman*, Justice Brennan found:

> [i]n determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause – that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments.

Id. at 274 (Brennan, J., concurring). In order to "respect human dignity" and comport with the Eighth Amendment, Pennsylvania must treat all individuals facing or serving unconstitutional juvenile life-without-parole sentences similarly – and provide resentencing hearings for all impacted. Under the Fourteenth Amendment, no state can, in the administration of criminal justice, deprive a particular class of person of due process or equal protection. *See, e.g., Bearden v. Georgia*, 461 U.S. 660, 667 (1983) (state may not subject a certain class of convicted defendants to a period beyond the statutory maximum solely by reason of their indigency); *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (due process and equal protection require that indigent defendants receive access to transcripts for their state-vested right to appeal).

F. The Trial Court Erred By Denying Appellant's Petition For Post-Conviction Relief Without A Hearing

The lower court erred by denying Mr. Jones' petition for post-conviction relief without granting a hearing to allow him an opportunity to demonstrate why

he is entitled to an individualized resentencing hearing.

VIII. CONCLUSION

For the above stated reasons, Appellant Steve Jones, Jr. respectfully requests that this Honorable Court reverse the lower court's denial of his PCRA Petition, vacate the Order of Sentence against him, and remand the case for a new sentencing hearing, consistent with *Miller v. Alabama*.

Respectfully submitted,

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APPENDIX A

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

COMMONWEALTH OF PENNSYLVANIA	**NO. 1881-02**
V.	
STEVEN JONES, JR.	

ORDER

Mallon, J.

Filed: 2-18-15

AND NOW, to wit, this 18th day of February, 2015, upon consideration of Petitioner's Petition for Habeas Corpus Relief Under Article 1, Section 14 of the Pennsylvania Constitution and for Post-Conviction Relief Under the Post Conviction Relief Act, and following the court's notice of intent to dismiss on December 18, 2014, it is hereby **ORDERED** and **DECREED** that said petition is **DENIED**.

Petitioner is advised that he has the right to appeal this decision to the Superior Court of Pennsylvania. If the Petitioner decides to appeal, he must file a written Notice of Appeal with the Delaware County Office of Judicial Support within thirty (30) days of the entry of this Order.

BY THE COURT:

GREGORY M. MALLON, JUDGE

APPENDIX B

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

COMMONWEALTH OF PENNSYLVANIA | **NO. 1881-02**

v.

STEVEN JONES, JR.

OPINION

Mallon, J. **Filed:** 6/17/15

I. FACTUAL AND PROCEDURAL HISTORY

Steven Jones, Jr. (hereinafter referred to as "Appellant") appeals from an Order dismissing his "Petition for Habeas Corpus Relief Under Article I, Section 14 of the Pennsylvania Constitution and for Post-Conviction Relief Under the Post Conviction Relief Act." The record in the instant case establishes that, on January 10, 2003, following a jury trial presided over by the Honorable Robert C. Wright, Appellant was convicted of second degree murder and robbery. The facts at trial established that the Appellant, along with three others males, flagged down a Jack and Jill ice cream truck in the city of Chester, Pennsylvania on April 20, 2002. *See* 1925(a) Opinion by the Honorable Robert C. Wright. After the truck stopped, the Appellant asked one of the other males for the gun he was carrying, and the Appellant raised the gun and pointed it at the ice cream truck driver, and demand all of his money. *Id.* The driver complied, and gave the males some cash. *Id.* When the driver turned around after handing over cash to the males, the Appellant shot him in the back. *Id.* The driver died several days later as a result of injuries sustained from the gunshot wound. *Id.* One of the males that approached the ice cream truck along with the Appellant testified at trial and recounted these facts to the jury.

Following his conviction, Judge Wright sentenced Appellant to a mandatory sentence of life imprisonment for second degree murder on March 14, 2003.[1] Appellant filed a direct appeal with the Superior Court challenging the verdict and questioning the sufficiency of the evidence, and the Superior Court affirmed the judgment of sentence in a Memorandum Opinion on June 22, 2004. *See Commonwealth v. Jones*, 1081 EDA 2003. Appellant did not petition for allowance of appeal with the Supreme Court of Pennsylvania.

On December 14, 2007, Appellant filed his first *pro se* petition under the Post Conviction Relief Act (hereinafter referred to as "PCRA") with the sentencing court.[2] Counsel was appointed to represent Appellant and counsel subsequently filed a "no merit" letter on September 4, 2008 stating that the issues Appellant wished to raise were without merit and requested leave to withdraw. The court granted counsel's request and ultimately denied the PCRA petition. Following an appeal, the Superior Court affirmed this court's order denying the PCRA petition on April 12, 2010. *See Commonwealth v. Jones*, 1157 EDA 2009.

Thereafter, on June 29, 2010, Appellant filed a second *pro se* PCRA petition in which he claimed that his sentence was illegal based upon the Supreme Court's decision in *Graham v. Florida*. Because this court was without jurisdiction over said petition, it entered an order dismissing Appellant's untimely second PCRA petition on August 3, 2010.[3] On August 26, 2010, Appellant appealed the trial court's denial and the Superior Court affirmed the trial court's order on August 14, 2014. *See Commonwealth v. Jones*, 2437 EDA 2010.

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[1] The robbery conviction merged for sentencing purposes.

[2] Following the appointment of PCRA counsel, Judge Wright became ill and retired from the bench. Appellant's case was then transferred to the undersigned.

[3] Because this was Appellant's second (albeit untimely) PCRA petition, he was not entitled to, nor was he appointed, counsel.

On October 14, 2014, through counsel, Appellant filed a third petition pursuant to the PCRA. Following its notice of intent to dismiss, this court denied the petition on February 18, 2015. It is from this dismissal that Appellant now appeals. Appellant raises the following issues in his Statement of Matters Complained of on Appeal:

> This Court erred in failing to vacate Mr. Jones's unconstitutional life without parole sentence and order that he be resentenced based on his lesser-included offenses. Mr. Jones is serving a mandatory life imprisonment sentence for a second degree murder conviction committed when he was a juvenile. This sentence is unconstitutional pursuant to the U.S. Supreme Court's decision in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), which holds that mandatory life without parole sentences for juveniles violate the Eighth Amendment of the U.S. Constitution. Moreover, because Mr. Jones was convicted of second-degree murder and there was no finding that he killed or intended to kill, his sentence violates *Graham v. Florida*, 560 U.S. 48, 69 (2010) (holding that life without parole is unconstitutional for juvenile nonhomicide offenders because the severe and irrevocable punishment of life without parole was not appropriate for a juvenile offender who did not "kill or intend to kill.").
>
> This Court erred in filing to apply the *Miller* and *Graham* decisions retroactively to Mr. Jones pursuant to the Pennsylvania Constitution. Though the U.S. Constitution prohibits Mr. Jones' mandatory juvenile life without parole sentence – and the Pennsylvania legislature has eliminated this discretionary sentence for second degree murder – Mr. Jones continues to serve his unconstitutional sentence merely because of the arbitrary date his sentence became final. Such a result is untenable under the Pennsylvania Constitution. *See, e.g., Commonwealth v. Cunningham*, 81 A.3d at 14 (Castille, C.J., concurring) ("However, a new federal rule, if sufficiently disruptive of state law—such as by requiring the state to treat identically situated defendants differently—may pose an issue of Pennsylvania constitutional law independent of the federal rule.").
>
> Based on the text of the Pennsylvania Constitution, the provisions history, related case law from other states, and policy consideration unique to Pennsylvania, *see Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991), the Pennsylvania Constitution provides greater protection than the U.S. Constitution in regards to the question of *Miller*'s retroactivity. For example, the text of the Pennsylvania Constitution is broader than the U.S. Constitution; whereas the Eighth Amendment of the U.S. Constitution bars punishments that are both "cruel" *and* "unusual," the Pennsylvania Constitution bars punishments that are merely "cruel." Pa. Const. art. I, 13. The history of juvenile life without parole sentences in Pennsylvania also supports a holding that the sentence is unconstitutional under the Pennsylvania Constitution. When Pennsylvania's legislature re-examined juvenile sentencing laws post-*Miller*, the legislature *eliminated life without parole as a sentencing option* for juveniles who, like Mr. Jones, were convicted of second degree murder. See 18 Pa.

Cons. Stat. Ann 1102.1(c). This new legislation reflects the holding of the U.S. Supreme Court in *Graham* that life without parole is always unconstitutional for children who do not kill or intend to kill. 560 U.S. at 69.

Pennsylvania history reveals a longstanding commitment to providing special protections for minors against the full weight of criminal punishment. *See, e.g., Commonwealth v. Williams*, 475 A.2d 1283, 1287-88 (Pa. 1984) (holding that the court determining the voluntariness of a youth's confession must consider the youth's age, experience, comprehension, and the presence or absence of an interested adult.) Policy considerations support broadly interpreting the Pennsylvania's prohibition against cruel punishments. Forcing Mr. Jones to serve an unconstitutional sentence that is no longer available for juveniles convicted of second degree murder in Pennsylvania contravenes logic, reason and the Pennsylvania Constitution. Finally the majority of other states considering this issue have held that *Miller* applies retroactively.

This Court further erred in rejecting Mr. Jones' claim that the writ of *habeas corpus* provides a basis for relief. The writ of *habeas corpus* "continues to exist only in cases in which there is no remedy under the PCRA." *Commonwealth v. Peterkin*, 722 A.2d 638, 640 (Pa. 1998). To the extent that the Pennsylvania Supreme Court has held that no remedy exists under the PCRA to remedy Mr. Jones' unconstitutional sentence unless or until the U.S. Supreme Court holds that *Miller* applies retroactively, a state *habeas* petition provides the only mechanism of relief available to Mr. Jones.

Finally, this Court erred by denying Mr. Jones' petition for post-conviction relief without granting a hearing to allow an opportunity to demonstrate why his sentence is unconstitutional pursuant to *Miller* and *Graham* and why he is entitled to be resentenced.[4]

II. STANDARD OF REVIEW

In reviewing the propriety of a PCRA court's dismissal of a PCRA petition, the reviewing court is limited to a determination as to whether the record supports the PCRA court's findings and whether the order in question is free of legal error. *Commonwealth v. Ragan*, 592 Pa. 217, 220, 923 A.2d 1169, 1170 (2007). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. *Commonwealth v. Spencer*, 892 A.2d 840, 841 (Pa. Super. 2006). When a PCRA court makes a determination that there were no

[4] The court has omitted footnotes contained within Appellant's Concise Statement in order to make said statement more concise.

genuine issues of material fact and denies relief without an evidentiary hearing, a reviewing court must examine each of the issues raised in the PCRA petition in light of the record in order to determine whether the PCRA court erred in reaching this result. *See Commonwealth v. Jordan*, 772 A.2d 1011, 1014 (Pa. Super. 2001).

III. DISCUSSION

The Post Conviction Relief Act requires that any petition, including a second or subsequent petition, must be filed within one year of the date upon which the judgment of sentence becomes final. 42 Pa.C.S.A. § 9545(b)(1). A judgment 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 the time for seeking the review." 42 Pa.C.S.A. §9545(b)(3).

The timeliness requirements for filing a PCRA petition are jurisdictional in nature. *Commonwealth v. Breakiron*, 566 Pa. 323, 328, 781 A.2d 94, 97 (2001). It is a well settled principal of law that a trial court does not have jurisdiction to entertain a PCRA petition if the petition is not filed within the time period set forth in Section 9545(b). *Commonwealth v. Hutchins*, 760 A.2d 50, 53 (Pa. Super. 2000). It is also well settled that there is no generalized equitable exception to the jurisdictional one-year time bar pertaining to post-conviction petitions. *See Commonwealth v. Robinson*, 575 Pa. 500, 508, 837 A.2d 1157, 1161 (2003). Section 9545(b) states:

(b) Time for filing petition.-

> (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 after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days from the date the claim could have been presented.

(3) For purposes of this subchapter, a judgment 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.

(4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether appointed or retained.

42 Pa.C.S.A. § 9545(b).

In the case *sub judice*, in order for his PCRA petition to be considered timely, Appellant was required to file his petition within one year from the date that his judgment of sentence became final. According to the plain language of 42 Pa.C.S.A. § 9545(b)(3), a judgment of sentence becomes final at the conclusion of direct review or the expiration of the time for seeking the review. As discussed above, Appellant's judgment of sentence was affirmed by the Superior Court on June 22, 2004. Appellant therefore had 30 days from that date to seek further review by the Pennsylvania Supreme Court.[5] Because Appellant did not file a petition seeking allowance of appeal, Appellant had until July 22, 2005 to file a timely PCRA petition. *See Commonwealth v. Hernandez*, 755 A.2d 1, 10 (Pa. Super. 2000) (Following denial of Appellant's direct appeal by the Superior Court, judgment of sentence became final when the thirty (30) day

[5] *See* Pa.R.A.P. 1113(a) ("... a petition for allowance of appeal shall be filed with the Prothonotary of the Supreme Court within 30 days of the entry of the order of the Superior Court sought to be reviewed ...").

period for filing a petition for allowance of appeal to our Supreme Court expired). Appellant's current PCRA petition was not filed until October 14, 2014. This petition is patently untimely.[6]

Appellant maintains that his conviction is illegal and argues that this court erred in applying *Miller*[7] and *Graham*[8] retroactively. Unfortunately for Appellant, because these decisions have been held not to apply retroactively in Pennsylvania, this court was compelled to deny his petition without a hearing because it was without jurisdiction to entertain its merits. *See e.g., Commonwealth v. Seskey*, 86 A.3d 237 (Pa. Super. 2014); *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013), *cert denied*, 134 S.Ct. 2724 (2014).

Furthermore, the court submits that it did not err by failing to grant Appellant's claim for *habeas corpus* relief. 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*. 42 Pa. C.S.A. § 9542. The court submits that Appellant's petition was properly considered under the PCRA.

As stated 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,* 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." *Id.* 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 convictions 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).

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[6] This court recognizes the exceptions to the one year time bar of the PCRA found in Section 9545(b) pertaining to governmental interference, after-discovered evidence, and retroactive application of certain constitutional rulings. *See* 42 Pa.C.S.A. § 9545 (b)(1)(i)-(iii). Appellant did not set forth any exception to the one-year limit in his PCRA.

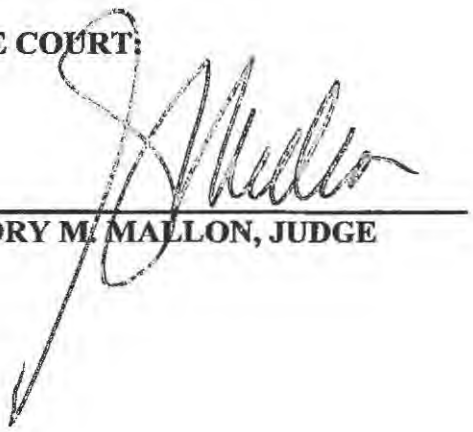
[7] *Miller v. Alabama*, 132 S.Ct. 2455 (2012)

[8] *Graham v. Florida*, 130 S. Ct. 2011 (2010)

IV. CONCLUSION

For the reasons outlined above, it is respectfully submitted that, the correct standards were applied and the court's dismissal of Appellant's PCRA petition should be affirmed.

BY THE COURT:



GREGORY M. MALLON, JUDGE

CERTIFICATE OF COMPLIANCE

Pursuant to Pennsylvania Rule of Appellate Procedure 2135, I certify that the foregoing document complies with the Court's word count limits. It contains 9,101 words, according to the word processor used to prepare it.

Respectfully,

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Date: August 10, 2015

CERTIFICATE OF SERVICE

I, Marsha L. Levick, hereby certify that on this 10th day of August, 2015, I caused copies of the foregoing document to be served via United States Postal Service First Class Mail upon the following individuals:

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Assistant District Attorney
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