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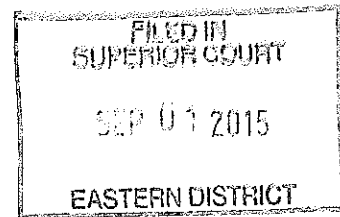
IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee

VS.

STEVEN JONES, JR.,
Appellant

BRIEF FOR APPELLEE



Appeal from the Order denying PCRA relief entered on February 18, 2015 by the Honorable Gregory M. Mallon at No. 1881 of 2002 in the Court of Common Pleas of Delaware County

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I. COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the PCRA court properly dismissed the defendant's third untimely PCRA petition without a hearing where the defendant is not entitled to relief from his life sentence under Miller v. Alabama because Miller v. Alabama has not been held to apply retroactively to cases on collateral review?

(Answered in the affirmative by the PCRA court).

II. COUNTER-STATEMENT OF THE CASE

A. Procedural History

The defendant, Steven Jones, robbed, shot and killed Feras Cheiko on April 20, 2002. A jury convicted the defendant of Second Degree Murder and Robbery following a trial presided over by the Honorable Robert C. Wright.¹ The trial occurred on January 7, 2003 through January 10, 2003. The defendant presented numerous character witnesses on his behalf. (N.T. 1/9/03, pp. 131-157).

The defendant's date of birth is April 8, 1986. He was 16 years old when he committed the crimes. On March 14, 2003, Judge Wright sentenced the defendant to a mandatory term of life imprisonment for the Second Degree Murder conviction. The Robbery conviction merged for sentencing purposes. The Superior Court affirmed the judgment of sentence by Memorandum Opinion on June 22, 2004 at Commonwealth v. Jones, 1081 EDA 2003.² The defendant did not file a Petition for Allowance of Appeal.

On December 14, 2007, the defendant filed a *pro se* petition for relief under the Post Conviction Collateral Relief Act (PCRA) pursuant to 42 Pa.C.S. §9541, *et seq.* The petition was untimely. The petition alleged the

¹ The jury also found co-defendant Karim Strickland guilty of Second Degree Murder and Robbery.

² The direct appeal alleged the evidence was insufficient to support the Second Degree Murder conviction and that the "not guilty" verdict entered by the jury on Third Degree Murder was inconsistent.

defendant received ineffective assistance of counsel because trial counsel failed to interview, investigate and present a witness named Johnny. Judge Wright appointed Henry DiBenedetto Forrest, Esquire to represent the defendant. The defendant filed his own *pro se* motion for an evidentiary hearing and requested that PCRA counsel interview the purported witness.

On September 4, 2008, PCRA counsel filed a letter pursuant to Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990 (1987). In the Finley letter, counsel indicated he reviewed the petition, the entire record and prior counsel's file in the case. PCRA counsel concluded the defendant's PCRA petition was not timely filed. PCRA counsel further concluded the defendant's claim that Johnny should have been called as a witness did not meet the newly discovered evidence exception to the time limit. Finally, PCRA counsel spoke with trial counsel and determined that trial counsel had a reasonable basis for not presenting Johnny as a trial witness.

Subsequently, Judge Wright retired from the bench. The Honorable Gregory M. Mallon assumed Judge Wright's caseload. On February 3, 2009, Judge Mallon issued a Notice of Intent to Dismiss the Petition.

The defendant filed a *pro se* Response to the Notice and again requested an evidentiary hearing. He claimed PCRA counsel was ineffective

for failing to investigate his claim. On March 24, 2009, the PCRA court issued an order denying the PCRA petition without a hearing.

The defendant filed a timely *pro se* Notice of Appeal. On January 28, 2010, the Superior Court issued an Order remanding the case to determine whether counsel was given permission to withdraw. On remand, the PCRA court granted counsel permission to withdraw. On April 12, 2010, the Superior Court issued a Memorandum Opinion and Order at Commonwealth v. Jones, 1157 EDA 2009, affirming the denial of relief on the basis of untimeliness. The defendant did not file a Petition for Allowance of Appeal.

On June 29, 2010, the defendant filed a second *pro se* PCRA petition alleging he was entitled to relief under Graham v. Florida, ____ U.S. ____, 130 S.Ct. 2011, 176 L.Ed. 2d 825 (2010) because he was under 18 when he committed Murder of the Second Degree. The PCRA Court concluded the petition was not timely and no exception existed. The Court issued a Notice of Intent to Dismiss on July 13, 2010. The PCRA Court denied the petition by Order dated August 2, 2010 and filed on August 3, 2010. The defendant filed a timely *pro se* appeal.

While the defendant's second PCRA appeal was pending, on June 25, 2012, the United States Supreme Court issued their decision in Miller v. Alabama, 567 U.S. ____, 132 S.Ct. 1455 (2012).

In July of 2012, the District Attorney's Office received a copy of a new *pro se* PCRA petition requesting relief and invoking Miller v. Alabama. The petition was not filed with the Office of Judicial Support so the Commonwealth forwarded a copy to the PCRA Court. The PCRA Court ordered the petition filed with the Office of Judicial Support.

On June 14, 2013, the defendant filed a federal petition for a Writ of *Habeas Corpus*. United States District Court Judge Timothy Savage ordered the proceedings stayed pending the outcome of the state PCRA matter. This petition remains stayed as of this filing.

On July 16, 2013, the PCRA court denied the Miller related PCRA petition without prejudice. The Court lacked jurisdiction over the petition since the appeal of the Graham related PCRA petition was still pending.

On August 14, 2014, the Superior Court issued a Memorandum Opinion affirming the denial of relief in the Graham related PCRA. In the Opinion, the Superior Court noted that they held the appeal pending the United States Supreme Court's decision in Miller and then a decision from the Pennsylvania Supreme Court on the applicability of Miller in Commonwealth v. Cunningham, 622 Pa. 543, 81 A.3d 1 (2013), cert denied, 134 S.Ct. 2724 (2014).

On October 14, 2014, the defendant, through counsel, filed the current PCRA petition and habeas petition. The petition sought relief under Miller. The petition was filed 60 days after the Superior Court's decision affirming the denial of PCRA relief.³

The Commonwealth filed an Answer. On December 14, 2014, the PCRA court issued a Notice of Intent to Dismiss. On February 18, 2015, the court entered an order denying the petition. The defendant perfected this timely appeal.

³ Monday, October 13, 2014 was a holiday.

B. Factual History

The incident leading to the defendant's arrest and conviction on the charges of Second Degree Murder and Robbery occurred on April 20, 2002. On April 20, 2002 at approximately 9:15 p.m., Karen Smith was driving her car in the City of Chester. Ms. Smith's daughter and goddaughter were with her. Ms. Smith, a youth director at her church, was making "rounds" to see who was going to church the next morning (Sunday). While Ms. Smith was stopped at the red light at the intersection of 11th and Booth Streets, Ms. Smith noticed a Jack and Jill ice cream truck. Ms. Smith recognized the truck since it was the same truck and driver that came to her street in Trainer.⁴ Ms. Smith had contact almost everyday with that driver and "fussed" with him because he came at dinnertime. In her neighborhood, Ms. Smith passed out money to the children for ice cream. At the end of the season, the driver gave everyone free Popsicles. Ms. Smith believed it was unusual to see the truck in Chester because it was not his normal area. (N.T. 1/8/03, pp. 67-70).

Ms. Smith observed the truck was parked in front of Showell's, a takeout food store,⁵ on 9th Street. (N.T. 1/8/03, pp. 70-72). When the light turned green, Ms. Smith made a left onto 9th Street and approached the truck

⁴ Trainer is the next town over from Chester.

⁵ Showell's is spelled Shoell's in the reported transcripts.

from the rear. Ms. Smith saw a black guy holding a brown cardboard popsicle box and three other black guys near the truck. The truck was moving a lot. (N.T. 1/8/03, pp. 73-75).

Fareed Nelson was outside of Showell's Seafood with his friends Kareem Strickland, Steven Jones and Brandon Cobb. (N.T. 1/8/03, p. 101).⁶ While they were standing outside Showell's, a Jack and Jill ice cream truck drove up 9th Street. Strickland flagged it down and asked the others if they wanted to "snatch some ice cream". The three responded "Come on, we don't care". All four approached the ice cream truck. Jones and Strickland asked the driver for ice cream. (N.T. 1/8/03, pp. 105-107). Facing the truck, Strickland was on the left. Jones was on the right, Nelson was behind Jones and Cobb was behind Strickland. (N.T. 1/8/03, p. 112). The driver asked for the money for the ice cream. Jones and Strickland told the driver they were going to pay him. Nelson was close enough to see freckles on the driver's face and could tell he spoke with an accent. Jones then turned to Nelson and asked Nelson whether he had the "hammer" on him. Hammer means a gun. Nelson handed Jones a .25 caliber semi-automatic handgun. Jones said to Nelson, "I'm about to get him." (N.T. 1/8/03, pp. 108, 111). Jones put the gun in his hoody pocket and held it with his right hand.

⁶ Fareed Nelson, a co-defendant, testified for the Commonwealth. At the time of the trial, Nelson was 16.

Nelson then asked the driver for a chocolate taco and pulled out a \$10.00 bill. The driver turned around to the freezer box to get the chocolate taco. Strickland and Jones continued to argue loudly with the driver about money for the ice cream. The driver turned back towards the group without the chocolate taco. Jones and Strickland were yelling, “Yo, I’m gonna pay you, man damn.” (N.T. 1/8/03, pp. 109-110, 112).

Jones, who was wearing a Nike glove on his right hand, pulled the gun out of his pocket with his gloved hand and pointed it at the driver. Jones told the victim “Give up the fucking money!” The driver said, “I don’t have no money.” Jones again said, “Give up the fucking money. I ain’t playing with you. This ain’t no game.” (N.T. 1/8/03, p. 113). Strickland, at Jones’ side, was also saying “Give up the fucking money. We ain’t playing with you. We want all that shit.” (N.T. 1/8/03, p. 113). The driver put his hands up in front of him and repeatedly said, “I don’t have no money. I don’t have no money.” (N.T. 1/8/03, p. 114).

With both Strickland and Jones demanding money, the driver turned around to a shelf, took down a small cardboard box with two holes on the side and set it on the customer shelf. The box was filled with dollar bills. After the driver put the box on the counter, Strickland and Jones said, “That ain’t all you got, we want every fucking thing.” Jones’ arm was inside the

window of the truck. He was holding the gun. Jones jerked the gun towards the driver. (N.T. 1/8/03, pp. 114-115). The driver turned and took a black book bag down from a shelf. The driver took stacks of fives, tens, and twenties out of the bag and put them into the cardboard box. Strickland took out all the big bills and put them in his pocket. Strickland handed the box to Nelson. Even after Strickland took the box, Jones continued to ask for more money. Strickland asked for an ice cream sandwich bar. As the driver turned towards the back of the truck to put the book bag back on a shelf, Steven Jones fired the gun at the driver. The driver started screaming. All four defendants paused for a moment then ran. Strickland and Nelson ran together towards Keystone Road. (N.T. 1/8/03, pp. 116-118). In an alley behind abandoned apartments, Nelson took the dollar bills out of the cardboard box, put them in his pocket and threw the cardboard box on the ground. (N.T. 1/8/03, pp. 119-120).

Later that night, Nelson and Strickland met Cobb and Jones at Steven Jones' house. Jones kept asking for the money. Strickland and Nelson lied and told Jones they hid the money. Strickland asked Jones why he shot the victim. Jones said, "I was lunching, I didn't mean to do it I was lunching." Jones then said, "Stop talking about it because I have neighbors. I live around here." Nelson explained that when Jones said lunching, he thought

Jones meant that Jones accidentally shot the victim and that he did not care. (N.T. 1/8/03, pp. 121-122, 165). Jones gave the gun to Strickland. Strickland gave it back to Nelson. Nelson gave the gun to Cobb. Cobb hid the gun. Nelson did not know where the gun was hidden until after his arrest. (N.T. 1/8/03, p. 123). Nelson kept \$60.00 and gave \$60.00 to Cobb. Strickland also kept money. (N.T. 1/8/03, p. 124).

At approximately 9:30 p.m., Lower Chichester Township Police Officer Ryan McGhee received information about a shooting at the police station at Market Street at Chichester Avenue. (N.T. 1/8/03, pp. 46-47). In the police station's driveway, Officer McGhee found paramedics working on a man with a gunshot wound to his left back. The man, who was screaming in pain, was identified as Feras Cheiko. A Jack and Jill ice cream truck was in the driveway in front of the police station door. (N.T. 1/8/03, p. 48). Mr. Cheiko had parked the truck in the driveway, banged on the station door and tried to ring the buzzer. Mr. Cheiko ripped the buzzer off the wall while trying to ring it. Mr. Cheiko told Officer McGhee that he had been shot and robbed in Chester. (N.T. 1/8/03, pp. 50-51). Officer McGhee secured the Jack and Jill truck as a crime scene. (N.T. 1/8/03, p. 52).

Chester Police Detective Todd Nuttall went to the Lower Chichester Police Station and ordered the Crime Scene Unit of the Chester Police

Department to process the Jack and Jill truck. In the truck, Detective Nuttall observed a shell casing on the floor, a book bag, \$99, a box with \$11.00 and change, and a wallet with Mr. Cheiko's identification. The Crime Scene Unit found an additional \$840.00 in the book bag. (N.T. 1/8/03, pp. 59-60).

Detective Michael Palmer of the Delaware County Criminal Investigation Division investigated the murder of Mr. Cheiko. (N.T. 1/8/03, pp. 229-230). Through the course of his investigation, Detective Palmer received information about the cardboard box and the murder weapon. Detective Palmer located the cardboard box near a row of abandoned houses near Keystone Road in Chester. (N.T. 1/8/03, pp. 231-232). Nelson identified the box as the one taken from the driver. (N.T. 1/8/03, p. 134).

Detective Palmer located the murder weapon several houses up from the abandoned house where the box was located. The gun was placed among bricks in the wall of the house. In addition to the .25 caliber semi-automatic murder weapon, Detective Palmer found a .32 caliber revolver and several boxes of ammunition. The murder weapon was loaded with four live ammunition rounds. (N.T. 1/8/03, pp. 233-235, 313-314). The .25

caliber weapon was submitted for fingerprint analysis. No latent prints of value were found. (N.T. 1/9/03, pp. 50-51).⁷

Detective Palmer interviewed Steven Jones on April 25, 2002 at 4:30 p.m. Steven Jones' parents were present for the interview. Jones was advised of his Miranda rights and waived these rights. Jones, his mother and his father all signed the written waiver form. The statement, redacted to remove any mention of his co-defendants, was read at trial. (N.T. 1/8/03, pp. 237-242). The statement of Steven Jones as read at trial is as follows:

Q: "Okay now talking about this incident which occurred Saturday evening on the twentieth of April in the area of Ninth and Clover Lane, right around the corner from Shoell's Seafood Market. Can you explain to me from the very beginning where you were at and what happened?"

A: "I was walking around the corner. I was walking around the corner when I saw Cobb, Fareed and another guy. They was at the ice cream truck. It was me and my friend Johnny. We was walking and he walked into Shoell. I walked to the ice cream truck."

Q: "I want to stop – just – stop you just for one minute. Can you describe the ice cream truck to me. What did look – what color – what did it look like, what color?"

A: "It was white."

Q: "Okay, how about the man?"

A: "He was like light skin."

⁷ Testing on the cardboard box, the .32 caliber weapon, the .25 caliber weapon, the six round magazine belonging to the .25 caliber automatic, and the extra ammunition produced no fingerprints of value. An empty pack of Newport cigarettes, a disposable cigarette lighter, and a cotton candy swirl Popsicle wrapper recovered from the areas where the box and gun were found also produced no fingerprints of value. (N.T. 1/9/03, pp. 46, 50-51).

Q: "Okay is there anything else you can tell me about him – about how did he have – how about this did he have an accent?"

A: "I didn't really pay it no mind."

Q: "Okay, did he have light colored hair or dark colored hair?"

A: "Dark."

Q: "Okay next, what would be the name you gave me of Brandon is it?"

A: "Yes."

Q: "Do you know his full name?"

A: "Brandon Cobb."

Q: "Brandon Cobb?"

A: "Yes."

Q: "You know his street name?"

A: "Brandon."

Q: "They just call him Brandon?"

A: "Sometimes people call him Cobb."

Q: "Okay and how about the next kid."

A: "Fareed, I don't..."

Q: "I..." Sorry.

A: "I don't know his last name."

Q: "Does he have a street name? What was that?"

A: "No."

Q: "How long have you known all these guys?"

A: "A long time."

Q: "You hang around with them on a regular basis?"

A: "Yes."

Q: "Do you go to school with any of them?"

A: "No."

Q: "Have you known them for years?"

A: "No."

Q: "You guys are pretty close?"

A: "Yes."

Q: "Okay, alright, go ahead. Start from the point where you saw the ice cream truck."

A: "They was at the ice cream truck. I walked over to the ice cream truck. The other guy asked the ice cream man could he get a Snickers. The ice cream man gave him the

Snickers. The other guy was like, hold this, it was a gun.”

Q: “Can you describe the gun to me?”

A: “It was a twenty-five.”

Q: “What color was it? Was it chrome or black like this?”

A: “It was chrome.”

Q: “It was chrome. Do you know the difference between a semi-automatic and a revolver? Do you know, do you know where the revolver, how the little cylinder opens up the side and you put one bullet in at a time. Was it like that or is the kind like this. I’m pointing towards my guy, that he put a clip in the bottom.”

A: “It had a clip.”

Q: “It had a clip, so assumingly it was a semi-automatic. Is this that kind that shots its shell casing after it’s fired?”

A: “Yes.”

Q: “Okay, go ahead, go on.”

A: “And he say, hold this and he gave it to me. I put it down and then he was like, ‘give me my Snickers.’ He kind of looked like huh. He was like, ‘matter of fact, give me everything.’ And grabbed my arm and my arm went in the truck with the gun still in my hand.”

Q: “Alright, so the other guy handed you the gun. Now you have it.”

A: “Yes.”

Q: “It was down at your side?”

A: “Yes.”

Q: “What hand was it in, your right hand or your left hand?”

A: “My left.”

Q: “Okay so I’m assuming that maybe the ice cream guy didn’t think he was serious so he grabbed your wrist and picked it up?”

A: “Yes.”

Q: “He picked your wrist up?”

A: “He grabbed – he had my arm. He grabbed my arm and lift my arm up. My arm went in the truck then. The gun was in my hand.”

Q: “Okay, so the gun’s in your hand and now it’s pointed at the man inside the truck.”

A: "It's pointed. It's in the truck but it's not pointed at him. It's like pointed to the ground."

Q: "Okay, alright, go ahead. Start from there."

A: "He was like, 'give me everything' and then that's when the guy was like 'huh, take it.' And he was like 'you think I'm playing with you?' and so my arm is still in the truck then that's when he gave it. He put the box on the counter and he was like 'give me more.' And he was like 'hurry up.'"

Q: "Can you describe the box for me?"

A: "It was brown. I ain't really paid no attention to it."

Q: "Anything unique about it, have any holes in it?"

A: "I ain't seen no holes."

Q: "Okay, what was it a wooden box or a cardboard box?"

A: "Like a cardboard box."

Q: "Okay, and had money in it?"

A: "Yes."

Q: "And what happened next?"

A: "He ain't grabbed it yet though. He was like 'give me more.'"

Q: "Okay."

A: "Then the oth – the other guy's like 'what you think I'm playing?' and he lift my arm up. The gun went off and the guy started screaming and I dropped the gun in the truck and ran."

Q: "Alright, could you tell if he was shot?"

A: "No, I just heard him screaming."

Q: "You heard him screaming. Now did anyone else have a gun?"

A: "Not as I know of."

Q: "Were they pointing any gun at the guy?"

A: "No."

Q: "Okay so the gun that you were holding, accidentally went off."

A: "Yes."

Q: "Okay you dropped the gun accidentally inside the truck?"

A: "Yes."

Q: "And what did the other guy do?"

A: "Jumped, he hurried up and grabbed it."

Q: "Oh, he jumped in. Did he jump in the truck?"
A: "Yes cause when I started running. I saw them look. I looked back and he was in the truck and I dropped the gun inside the truck."
Q: "How did he get in the truck?"
A: "He jumped in the truck."
Q: "Through the window?"
A: "Yes."
Q: "Okay, now who did you – who did you run off with?"
A: "I ran by myself."
Q: "Okay."
A: "I was running by myself."
Q: "Alright."
A: "Then that's when the other guy caught up with me. He ran down towards Carter Lane."
Q: "Now who had the cardboard box full of money?"
A: "Brandon, Brandon and Fareed ran separate. They had the box."
Q: "Okay."
A: "They stashed the box somewhere and when we ran down Carter Lane we caught up with them."
Q: "Okay, so go ahead."
A: "Then we waited a while, then later we went back got the money. Well they had the money, then when they saw me they gave me some."
Q: "Okay now this is the – did you guys end up over this house that I was talking about on Keystone Road?"
A: "We ain't go to no house."
Q: "The abandoned house where the box was found?"
A: "We was in back of the abandoned house."
Q: "Okay, so where I found the box along side that front porch?"
A: "See I don't know where the box was at when they saw me they gave me my share."
Q: "It was right around 1134 Keystone. How much did you get?"
A: "I ain't even count it. I gave it back."
Q: "Well, was it one, fives, tens, twenties?"
A: "There was a five on top. I ain't even counted. I gave it back."

Q: "Gave it back to who?"
A: "I gave it back to the other guy."
Q: "Okay, did any body ever say how much the total tally was?"
A: "No."
Q: "Did any – everybody else, I'm assuming kept the money except for you?"
A: "I guess."
Q: "Alright, how about the gun now."
A: "I don't know what happened to it."
Q: "Did you know who was – who was the one that hid the gun? You know that we know about the gun now, so you know where it was hidden and everything like that?"
A: "The other guy had it."
Q: "Did he hide it?"
A: "Yes."
Q: "You don't know where?"
A: "But I ain't asked him where."
Q: "Okay, and then after – alright, let me ask you a question, the empty pack of Newport cigarettes that I found over by the box and the lighter. Who'd that belong to?"
A: "I don't know. I don't know even where the box was at."
Q: "After you – after that happened, what happened? Where did you guys go? What did you guys do?"
A: "We was chillin' for awhile."
Q: "Chillin' where?"
A: "Behind that abandoned house."
Q: "The one where the box was at?"
A: "After we met up."
Q: "Uh-hum."
A: "After we met up on Carter Lane, we was walking through the alley, that's when Fareed was trying to act like somebody stole the money. He was like 'Now I don't know where it's at.' and that's when we waited. They waited awhile, they – we still was looking for it. They waited awhile then I left. I went down to Shoell, came back up. That's when I saw them. The other guy was like 'hon, this yours.' I looked at it when I..."
Q: "What did he say?"
A: "He was like 'Hon, this is yours. The money.'"

Q: "Oh, okay."
A: "He was like 'Hon, this is yours.' I looked at and I gave – gave it back. I say ' I don't want it.'"
Q: "Alright, so he kept the money. Your share?"
A: "All – all I know is, I gave it back to him. I ain't want it."
Q: "What did everyone talk about?"
A: "They was acting regular."
Q: "Did they say about – I mean did anybody have a discussion about what happened out there?"
A: "Nope."
Q: "You mean, nobody came up to you and said 'Yo Steven, keep your mouth shut.'"
A: "Nope."
Q: "You guys just kind of avoided each other?"
A: "Yes."
Q: "Anybody send a message to you, coming form them?"
A: "No."
Q: "Were you threatened by anybody involved in this?"
A: "No."
Q: "Nobody said they were going to do anything if you talked?"
A: "No."
Q: "Were you in Delaware after this happened for a couple of days?"
A: "Yes."
Q: "Okay, so that's probably why they didn't see you. Do you know if anyone had any other guns on them that day? I mean, if you don't know, you don't know."
A: "I don't know."
Q: "Alright, when the other guy reached over, where did he grab your hand when he had – when you had the gun in your hand?"
A: "He grabbed me like, all right here."
Q: "Your – you got your hand on your forearm?"
A: "Yeah, like right here."
Q: "So he grabbed you on your forearm?"
A: "Yes."
Q: "Did he pull on it?"
A: "He lift my arm up."

Q: "So what?"
A: "He lift my arm up."
Q: "Now tell me if I'm right or wrong because I don't want to put any words in your mouth but by lifting your arm up and that's the arm that – I mean that's the hand that the gun's – that had the gun. Was he trying to make you point it towards him?"
A: "Yes, cause when he put my arm in the truck, my hand – the gun was like towards the truck floor."
Q: "So it was pointed down?"
A: "Yes."
Q: "So having the gun pointed at the guy, he figured probably, I'm thinking that by having the gun pointing at him, you know this guy's going to maybe give up some more money because this is what I want? Am I on the right track?"
A: "Yes."
Q: "Okay then the gun accidentally went off?"
A: "Yes, I dropped it and I ran."
Q: "Inside the truck?"
A: "Yes."
Q: "Alright, and then the other guy retrieved it?"
A: "When I started running through the alley I reach, I looked back and I saw him reaching in the truck."
Q: "Okay, um, now when you guys went back. We're talking back over on Keystone Road, where the box was found. The abandoned houses."
A: "Yes."
Q: "Alright, did you see the gun again?"
A: "I ain't seen the gun again. I know he – I know when I dropped it he reached in the truck and grabbed it."
Q: "Oh, you saw him pick it up."
A: "Yes."
Q: "Okay."
A: "Cuz he reached in the truck and jumped in the truck."
Q: "Okay, but I mean did you see him grab the gun at the truck?"
A: "When he reached in, he had to grab the gun."
Q: "Well, not necessarily unless you saw it."

A: "I dropped it – I dropped it in the truck and he reached in the truck."

Q: "Okay, but what I'm saying is afterwards, did any one of them have the gun so you know it was retrieved?"

A: "I don't know. I haven't seen them."

Q: "'Seen him', is that what you said?"

A: "Him."

Q: "Okay, because the gun was not found in the truck, I'm telling you right now so but you saw the other guy get in the truck."

A: "Yes."

Q: "Okay, alright Steven, is there anything that I did not cover in your statement that you would like to say now while we're on the record? I mean, is there anything that we didn't cover? Is there anything that you would like to be brought to light? And any kind of explanation if I missed anything? I apologize if I did."

A: "No."

Q: "Is everything that you're telling me today, is true and correct?"

A: "Yes."

Q: "Okay, did I or your father or did your mother or did anyone threaten you, promise you anything or were you forced in anyway to give your statement today. By any three of us, right now in this room?"

A: "No."

Q: "Are you giving your statement on your own free will?"

A: "Yes."

Q: "Steven, while we are on tape, is there anything you want to say? I mean, are you sorry about what happened?"

A: "Yes, I ain't know that was going to happen."

Q: "I mean do you have any remorse? I mean if you could change things now, would you want to change it?"

A: "Yes."

Q: "Do you wish this incident never happened? You would like to change it?"

A: "Yes I would."

Q: "Are you sorry about what happened?"

A: "Very sorry."

Q: "Okay, so everything you told me is truthful and correct. We don't have to worry about anything later on?"
A: "Yes."

(N.T. 1/8/03, pp. 242-257).

Detective Palmer also interviewed Kareem Strickland. After waiving his Miranda rights, Kareem Strickland provided a tape-recorded statement on May 1, 2002. After being redacted to exclude any mention of Jones, the statement was read at trial. (N.T. 1/8/03, pp. 258-260).

Dr. Fredric Hellman, the Delaware County Medical Examiner, performed the autopsy on Feras Cheiko on April 24, 2002. (N.T. 1/9/03, pp. 9, 14). Dr. Hellman discovered the bullet entered the victim's back and went into the left kidney, through the pancreas, through the stomach at the small intestine, through the liver and into the abdominal wall. Dr. Hellman recovered a small bullet from the right abdominal wall. (N.T. 1/9/03, pp. 20-21). The cause of death was a gun shot wound and the manner of death was homicide. (N.T. 1/9/03, p. 31).

Trooper Hoy, an expert in the field of firearms examination, examined the bullet recovered from Feras Cheiko's body, the shell casing recovered from the truck and the .25 caliber murder weapon. Trooper Hoy determined that the bullet was fired from the .25 caliber weapon. (N.T. 1/9/03, pp. 70-72). Trooper Hoy concluded the .25 caliber gun was functional and capable

of discharging proper ammunition. The trigger pull for the firearm was approximately six pounds of pressure. (N.T. 1/9/03, pp. 73-75).

Trooper Hoy conducted “shock and drop tests” on the .25 caliber firearm. The firearm passed the shock and drop tests. Trooper Hoy explained the only way the firearm would discharge would be by pulling the trigger. (N.T. 1/9/03, pp. 77-80).

III. STANDARD OF REVIEW

The appellate scope of review when examining a post-conviction court's denial of a PCRA petition is limited to a determination of whether the court's findings are supported by the record and are otherwise free of legal error. Commonwealth v. Meadows, 567 Pa. 344, 787 A.2d 312 (2001) (citing Commonwealth v. Morales, 549 Pa. 400, 701 A.2d 516 (1997)).

Where, as here, the PCRA court dismisses a PCRA petition without an evidentiary hearing pursuant to Pa.R.Crim.P. 907, the standard of review on appeal is whether the PCRA court abused its discretion in doing so. Commonwealth v. Thomas, 560 Pa. 249, 744 A.2d 713 (2000). When there was no evidentiary hearing and the issue involves a question of law, the scope of review is plenary. Commonwealth v. Coleman, 574 Pa. 261, 830 A.2d 554 (2003).

IV. SUMMARY OF THE ARGUMENT

The PCRA court appropriately denied the defendant's untimely PCRA petition without a hearing. The defendant's petition was untimely on its face and no exception applies.

The defendant alleges that the case of Miller v. Alabama, 132 S.Ct. 2455 (2012) provided him an exception to the time limit because it involved a newly recognized constitutional right that has been made retroactive on collateral review.

However, the Pennsylvania Supreme Court held in Commonwealth v. Cunningham, ___ Pa. ___, 81 A.3d 1 (2013), cert denied, Cunningham v. Pennsylvania, ___ U.S. ___ 134 S.Ct. 2724 (2014) that the United States Supreme Court's decision in Miller v. Alabama does not apply retroactively.

Since the Pennsylvania Supreme Court has held that Miller does not apply retroactively, the defendant is not able to use Miller to avoid the time limit. However, the United States Supreme Court just recently granted a Writ of *Certiorari* in Montgomery v. Louisiana to address whether Miller will apply retroactively to cases on state collateral review.

V. ARGUMENT

The Defendant is not entitled to relief on his untimely PCRA Petition under Miller v. Alabama because Miller has not been held to apply retroactively.

The defendant claims his PCRA petition is timely because the United States Supreme Court decision in Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) created a newly recognized constitutional right with retroactive application. The defendant alleges Miller is retroactive on its face and by application under Pennsylvania law. This claim is without merit.

The defendant's PCRA petition is not timely filed. All PCRA petitions must be filed within one year of the date upon which the judgment of sentence becomes final. 42 Pa.C.S. §9545(b)(1). See: Commonwealth v. Gamboa-Taylor, 562 Pa. 70, 753 A.2d 780 (2000); Commonwealth v. Greer, 866 A.2d 422 (Pa.Super. 2005). 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. §9545(b)(3).

The timeliness requirements for filing a PCRA petition are jurisdictional in nature. Commonwealth v. Breakiron, 566 Pa. 323, 781 A.2d 94 (2001). The failure to file a timely PCRA petition is not simply a

procedural basis for denying appellant's requested relief. The lack of a timely PCRA petition deprives the court of jurisdiction to even entertain the issues that an appellant seeks to present for appellate review. Id.

The PCRA provides as follows:

§9545. Jurisdiction and proceedings

* * * * *

(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 appellant proves that;

* * * * *

(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 of 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. §9545(b) (Emphasis supplied).

The PCRA exception requires the defendant to show that the right he asserts is “a constitutional right that was recognized by the Supreme Court of the United States...after the [one-year limitations] period *and has been held by that court to apply retroactively.*” 42 Pa.C.S. §9545(b)(1)(iii) (emphasis supplied). A new rule of constitutional law is not retroactive to cases on collateral review unless and until the United States Supreme Court holds it to be retroactive. Tyler v. Cain, 533 U.S. 656, 662-63, 121 S.Ct. 2478, 2482 (2001). The PCRA’s statutory language “has been held” means that the Supreme Court’s ruling that the constitutional right is retroactive must precede the filing of the PCRA petition. Commonwealth v. Abdul-Salaam, 571 Pa. 219, 227-28, 812 A.2d 497, 501-02 (2002).

The instant petition is untimely on its face. The Pennsylvania Superior Court affirmed the defendant’s judgment of sentence by Memorandum Opinion on June 22, 2004 at Commonwealth v. Jones, 1081 EDA 2003. The defendant did not file a Petition for Allowance of Appeal. The defendant’s judgment of sentence became final at the expiration of the thirty-day period to file a Petition for Allowance of Appeal on July 22, 2004.

A timely PCRA petition had to be filed by July 22, 2005. This petition was untimely filed on October 14, 2014. The defendant attempts to

excuse the untimeliness of his PCRA petition on grounds that he is entitled to relief in the form of a newly recognized constitutional right with retroactive application based upon Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). In Miller v. Alabama, the United States Supreme Court ruled that a mandatory sentence of life without parole imposed upon a juvenile is unconstitutional.

However, the United States Supreme Court did not hold that its decision in Miller was retroactive and there is nothing in the decision to indicate that it will be applied retroactively. In Teague v. Lane, 489 U.S. 288 (1989), the United States Supreme Court held that a Supreme Court ruling retroactively applied if the case “places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe’” it or if the decision is a ‘watershed’ decision.

Miller is not a ‘watershed’ decision. It does not prohibit a sentence of life without parole for a juvenile convicted of murder. Instead, Miller merely places procedural limitations on when and how a court can impose such a sentence. Therefore, the statutory exception to the time limit regarding the filing of a PCRA petition does not apply to the defendant’s petition.

On March 23, 2015, Montgomery v. Louisiana, ___ U.S. ___, 135 S.Ct. 1546 (2015), the United States Supreme Court granted a Writ of *Certiorari* on the following questions: 1) Does the rule announced in *Miller v. Alabama*, 567 U.S. _____ (2012), apply retroactively? 2) Do we have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to our decision in *Miller v. Alabama*, 567 U.S. _____ (2012)?

Thus, until the Supreme Court determines the case applies retroactively to cases on collateral review, *Miller* provides no relief for the defendant.

The Pennsylvania Supreme Court, in Commonwealth v. Cunningham, supra, ruled that Miller is not retroactively applicable to post-conviction defendants. In Cunningham, the Pennsylvania Supreme Court applied a Teague analysis and it made its own determination that Miller is not retroactive in its application. Cunningham, supra at 9-11.

Moreover, the Pennsylvania Superior Court has specifically rejected the very claim currently being asserted by defendant. In Commonwealth v. Seskey, 86 A.3d 237 (Pa. Super. 2014), the Superior Court held:

Recently, in Cunningham, our Supreme Court held that the constitutional right announced in Miller does not apply retroactively. 81 A.3d at 10. Consequently, appellant cannot rely on Miller or subsection 9545(b)(iii) to establish jurisdiction

over his untimely PCRA petition in any Pennsylvania court. Hence, we lack jurisdiction to review the merits of appellant's issues...

Seskey, 86 A.3d at 243.

In Commonwealth v. Lawson, 90 A.3d 1 (Pa. Super. 2014), the Superior Court held:

As an initial matter, we note that the exception set forth in section 9545(b)(1)(iii) applies only where “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 provided in this section and **has been held by that court to apply retroactively.**” 42 Pa.C.S. §9545(b)(1)(iii) (emphasis added). The United States Supreme Court has not held that Miller applies retroactively on collateral review. To the contrary, the Pennsylvania Supreme Court has held that the holding in Miller does not apply retroactively to an inmate, convicted as a juvenile, who is serving a sentence of life imprisonment without the possibility of parole, and who has exhausted his direct appeal rights and is proceeding under the PCRA. See: Commonwealth v. Cunningham, 81 A.3d 1 (Pa. 2013).

Lawson, 90 A.3d at 6.

In this defendant's own case, the Superior Court has already held that the state courts do not have jurisdiction over an untimely PCRA invoking Miller. In affirming the denial of his second PCRA petition, the Superior Court wrote:

Pursuant to *Seskey*, we likewise hold that even if Appellant had filed his petition after *Miller*, he cannot rely on it to overcome the untimeliness of his PCRA petition. Accordingly, we agree with the PCRA court that it lacked jurisdiction to hear the

petition, and hold it properly dismissed it as untimely. *See Lawson*, 90 A.3d at 4.

Commonwealth v. Jones, 2437 EDA 2010, p. 5.

Accordingly, this Court lacks jurisdiction to entertain defendant's claims and must dismiss his current PCRA petition as untimely filed.

The defendant alleges that because the United States Supreme Court granted relief in the companion case of Jackson v. Hobbs, the Court intended the ban on mandatory life without parole for juveniles to be retroactive on collateral review. He is mistaken. In Jackson, the defendant was pursuing state, not federal collateral review. The Teague analysis did not apply to Jackson in terms of the questions of retroactive application of the rule announced in Miller. The United States Supreme Court was careful not to say anything about Teague or retroactivity in its Miller and Jackson opinion because both Miller and Jackson concerned appeals from state convictions and were not federal *habeas* matters.

In Jackson, the United States Supreme Court only reversed the ruling of the state appellate courts. It did not reverse the judgment of sentence. The Supreme Court remanded Jackson for proceedings not inconsistent with the opinion in Miller. The Supreme Court would not have taken such a step if Miller is applicable retroactively. The Supreme Court purposely left open the possibility in Jackson for the Arkansas state courts to make their own

determination regarding whether Miller should apply retroactively. It also purposely left open the possibility that a Teague analysis would bar a claim if it was raised in a federal habeas corpus proceeding. The Court's decision in the Jackson portion of the Miller opinion does not resolve the question of retroactivity either explicitly or by implication.

The defendant also asserts that based upon 'overwhelming public interest' his sentence of life imprisonment without parole should be vacated and he should be re-sentenced to some lesser sentence – preferably one rising to no more than a sentence for Third Degree Murder. This claim was specifically rejected by the Pennsylvania Supreme Court in Commonwealth v. Batts, 66 A.3d 280 (Pa. 2013).

In Commonwealth v. Batts, supra, the appellant, unlike defendant in this case, was on direct appeal and was entitled to have the Miller decision apply to his case. He argued that, in light of Miller v. Alabama, supra, upon re-sentencing he could only legally be sentenced to a term of imprisonment consistent with the penalties for Third Degree Murder. The Pennsylvania Supreme Court rejected that claim. The defendant's requested relief is simply not supported by the law.

Defendant also claims that he is entitled to relief under the Pennsylvania Constitution Articles 1 §§ 1, 9, and 13. This claim is without merit.

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.

In this case, the defendant’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). Therefore, the petition should properly be treated as an untimely PCRA petition.

The defendant’s petition lists several reasons why his sentence violates the state and federal constitutions. However, like the defendant in Seskey, *supra*, the defendant does not address how and why this claim should be considered under the *habeas corpus* statute instead of under the PCRA.

As was the case in Seskey, the defendant provides no argument for why the Pennsylvania *habeas corpus* statute should be applied here as

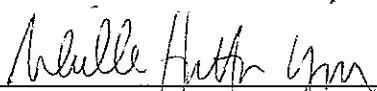
opposed to the PCRA statute regarding the jurisdiction of this court. Instead, as in Seskey, defendant merely mentions the dicta from Cunningham and the concurrence in Cunningham by Chief Justice Castille regarding the possibility of obtaining relief by using the state *habeas corpus* statute.

As in Seskey, the defendant has merely referenced the cited Pennsylvania Constitutional provisions but has failed to demonstrate why the PCRA is not the appropriate avenue for relief. The PCRA court properly denied defendant's claim for state *habeas corpus* relief.

VI. CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests this Court affirm the denial of PCRA relief entered by the Honorable Gregory M. Mallon.

Respectfully submitted,



Michelle Hutton Yim
Assistant District Attorney

CERTIFICATION OF WORD COUNT

Pursuant to the Pennsylvania Rules of Appellate Procedure, I,
Michelle Hutton Yim, hereby certify that the foregoing brief:

1. complies with the requirements set forth in Pa.R.A.P. 2135(a)(1) as the brief consists of 36 pages and 7,618 words and;
2. complies with the typeface requirements of Pa.R.A.P. 124 using a proportionally spaced typeface of Times Roman 14.



Michelle Hutton Yim
Assistant District Attorney

Date: August 31, 2015

PROOF OF SERVICE

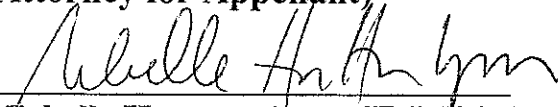
MICHELLE HUTTON YIM, Assistant District Attorney, hereby certifies that on August 31, 2015, she served the persons in the manner indicated below as required by the Pennsylvania Rules of Appellate Procedure No. 121.

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