

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

MARCUS M. WALTON

Appellant

No. 2399 EDA 2013

Appeal from the PCRA Order July 8, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0334691-1989

BEFORE: GANTMAN, P.J., ALLEN, J., and FITZGERALD, J.*

MEMORANDUM BY GANTMAN, P.J.:

FILED JULY 16, 2014

Appellant, Marcus M. Walton, appeals from the order entered in the Philadelphia County Court of Common Pleas, dismissing his serial petition brought pursuant to the Post Conviction Relief Act ("PCRA").¹ We affirm.

The relevant facts and procedural history of this case are as follows. On February 9, 1989, Appellant entered a house where a man known as "Jazzman" sold cocaine and rented bedrooms to cocaine users. Jazzman gave Appellant a gun; shortly thereafter, Appellant coerced an individual living in the house into a bathroom, shot, and killed him. On March 6, 1990, a jury convicted Appellant of first-degree murder and possessing an

¹ 42 Pa.C.S.A. §§ 9541-9546.

*Former Justice specially assigned to the Superior Court.

instrument of crime. The court sentenced Appellant to life imprisonment on October 22, 1990. On July 10, 1992, this Court affirmed the judgment of sentence, and our Supreme Court denied allowance of appeal on December 8, 1992. ***See Commonwealth v. Walton***, 616 A.2d 721 (Pa.Super. 1992), *appeal denied*, 533 Pa. 610, 618 A.2d 401 (1992). On January 2, 1997, Appellant filed his first PCRA petition, which the PCRA court denied, and this Court affirmed on September 19, 2000. Between 2000 and 2012, Appellant filed several additional PCRA petitions, all of which were unsuccessful. Appellant filed the current petition *pro se* on May 21, 2012. Additionally, Appellant filed supplemental petitions *pro se* on August 21, 2012 and August 24, 2012. The PCRA court issued notice on May 28, 2013, of its intent to dismiss Appellant's petition without a hearing pursuant to Pa.R.A.P. 907; Appellant did not respond. The PCRA court subsequently dismissed the petition on July 8, 2013. Under the prisoner mailbox rule, Appellant timely filed a *pro se* notice of appeal on August 5, 2013. The PCRA court did not order Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellant filed none.

Appellant raises the following issues for our review:

DID THE PCRA COURT ERRONEOUSLY DENY MEANINGFUL REVIEW ON THE MERITS UNDER A STATUTORY [EXCEPTION] OF NEWLY/AFTER-DISCOVERED EVIDENCE, WHEREIN, TRIAL COUNSEL FAILED TO DISCLOSE A PLEA OFFER—OFFERED BY THE DISTRICT ATTORNEY'S OFFICE [AND] THE ISSUE IS NOT PREVIOUSLY LITIGATED NOR UNTIMELY FILED[?]

DID THE PCRA COURT ERRONEOUSLY DENY MEANINGFUL REVIEW ON THE MERITS BASED ON THE MISCONCEPTION THAT THE MAY 24, 2012 DATE ON THE PCRA PETITION WAS OVER THE REQUIRED SIXTY DAYS OF THE MARCH 20, 2012, JUDICIAL DECISION RENDERED IN **MARTINEZ V. RYAN**, 132 S.Ct. 1309 (2012), AND NEGATING THE PRISON[ER] MAIL-BOX RULE[?]

DID THE PCRA COURT ERRONEOUSLY DENY MEANINGFUL REVIEW ON THE MERITS BASED ON A "NEW APPLICATION OF THE LAW"; IN **MARTINEZ**, THE COURT GRANTED APPELLANTS AN OPPORTUNITY TO RAISE FIRST-TIER PCRA COUNSEL'S INEFFECTIVENESS UNDER A CONSTITUTIONAL STANDARD OF THE SIXTH AMENDMENT OF THE UNITED STATES[?]

DID THE PCRA COURT ERRONEOUSLY DENY MEANINGFUL REVIEW UNDER THE 8TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION BASED ON A NEW SCIENTIFIC STUDY THAT SUGGESTS A LESSER GRADE OF HOMICIDE, AND RELIED UPON BY THE UNITED STATES SUPREME COURT RULING RENDERED IN **MILLER V. ALABAMA**, No.10-9646[?]

(Appellant's Brief at 4).

As a preliminary matter, we must determine whether Appellant timely filed his current PCRA petition. **Commonwealth v. Harris**, 972 A.2d 1196 (Pa.Super. 2009), *appeal denied*, 603 Pa. 684, 982 A.2d 1227 (2009). Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition. **Commonwealth v. Robinson**, 575 Pa. 500, 837 A.2d 1157 (2003). The most recent amendments to the PCRA, effective January 16, 1996, provide that a PCRA petition, including a second or subsequent petition, shall be filed within one year of the date the underlying judgment becomes final. 42 Pa.C.S.A. § 9545(b)(1); **Commonwealth v. Bretz**, 830

A.2d 1273 (Pa.Super. 2003). A judgment is deemed final “at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.” 42 Pa.C.S.A. § 9545(b)(3).

The three statutory exceptions to the timeliness provisions in the PCRA allow for very limited circumstances under which the late filing of a petition will be excused. 42 Pa.C.S.A. § 9545(b)(1). To invoke an exception, a petition must allege and the petitioner must prove:

(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.

42 Pa.C.S.A. § 9545(b)(1)(i)-(iii). Additionally, a petitioner asserting a timeliness exception must file a petition within sixty (60) days of the date the claim could have been presented. 42 Pa.C.S.A. § 9545(b)(2). “As such, when a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim

could have been first brought, the trial court has no power to address the substantive merits of a petitioner's PCRA claims." **Commonwealth v. Gamboa-Taylor**, 562 Pa. 70, 77, 753 A.2d 780, 783 (2000).

Instantly, Appellant's judgment of sentence became final on or about March 8, 1993, upon expiration of the time to seek *certiorari* with the United States Supreme Court. Appellant filed his current PCRA petition on May 21, 2012, more than nineteen (19) years after his judgment of sentence became final. Accordingly, Appellant's petition is patently untimely. **See** 42 Pa.C.S.A. § 9545(b)(1).

In his current petition, Appellant argues the second and third statutory exceptions serve to excuse the untimeliness of his current PCRA petition. **See** 42 Pa.C.S.A. § 9545(b)(1)(ii)-(iii). Appellant maintains that on April 19, 2012, he learned the specifics of a plea offer that trial counsel failed to disclose to Appellant at trial. **See** § 9545(b)(1)(ii). Appellant claims **Lafler v. Cooper**, ___ U.S. ___, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012) and **Missouri v. Frye**, ___ U.S. ___, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012) set forth newly recognized constitutional rights as they require trial counsel to disclose any plea offers to a defendant prior to trial. Appellant contends these new constitutional rights apply retroactively, and the newly discovered fact of the plea offer excuses his otherwise untimely petition. Appellant also attempts to invoke a newly recognized constitutional right pursuant to **Martinez v. Ryan**, ___ U.S. ___, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012),

which Appellant claims applies retroactively.² **See** § 9545(b)(1)(iii). Specifically, Appellant argues PCRA counsel from his first petition failed to investigate an alleged “hidden” plea agreement between the Commonwealth and a witness for the Commonwealth. Appellant argues **Martinez** permits him to raise his claim of ineffective assistance of initial PCRA counsel in his current petition.

Additionally, Appellant attempts to invoke a newly recognized constitutional right pursuant to **Miller v. Alabama**, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), which Appellant alleges applies retroactively.³ **See** 42 Pa.C.S.A. § 9545(b)(1)(iii). Specifically, Appellant contends that under **Miller** his life imprisonment is a violation of the Eight and Fourteenth Amendments of the United States Constitution. Appellant acknowledges he was over eighteen years old at the time of the offenses, but claims he is similarly situated to individuals under the age of eighteen because a juvenile’s development and maturity are incomplete until the

² In **Martinez**, the United States Supreme Court held that a procedural default will not bar a federal habeas court from hearing ineffective assistance of counsel claims that state law requires be raised in an initial-review collateral proceeding if counsel in that proceeding was ineffective.” **Martinez, supra** at ___, 132 S.Ct. at 1320, 182 L.Ed.2d ___.

³ In **Miller**, the United States Supreme Court held that a sentence of mandatory life imprisonment without the possibility of parole for those under the age of eighteen (18) at the time of their crimes violates the Eighth Amendment’s prohibition on cruel and unusual punishments. **See Miller, supra** at ___, 132 S.Ct. at 2469, 183 L.Ed.2d at ___.

juvenile reaches his mid-twenties. Appellant invokes the Fourteenth amendment to argue **Miller** should be extended to include individuals between eighteen and twenty-five years old. Appellant concludes this Court should vacate his sentence and release him from custody on these grounds. We disagree.

Instantly, this Court has specifically held that neither **Lafler** nor **Frye** created a new constitutional right. **See Commonwealth v. Feliciano**, 69 A.3d 1270 (Pa.Super. 2013) (explaining **Lafler** and **Frye** simply applied Sixth Amendment right to counsel and ineffectiveness test to circumstances where counsel's conduct resulted in plea offer lapsing or being rejected to defendant's detriment; appellant's reliance on these decisions to satisfy Section 9545(b)(1)(iii) exception to PCRA's time restrictions is unavailing). Moreover, the PCRA court determined Appellant was aware of the plea offer at the time of his trial, and this "newly discovered fact" was previously litigated during Appellant's prior PCRA petition. (**See** PCRA Court Order, filed June 28, 2012, at n. 1.)

Moreover, the United States Supreme Court filed **Martinez** on March 20, 2012. Thus, any petition alleging a newly recognized constitutional right had to be filed by Saturday, May 19, 2012. **See Commonwealth v. Brandon**, 51 A.3d 231 (Pa.Super. 2012) (explaining 60-day period runs from date of underlying judicial decision for purposes of Section 9545(b)(1)(iii)). Appellant's current PCRA petition was entered on the

docket on Monday, May 21, 2012. Therefore, Appellant arguably submitted his current petition within sixty days of the U.S. Supreme Court's decision in **Martinez**. Nevertheless, **Martinez** affords Appellant no relief. **See Commonwealth v. Saunders**, 60 A.3d 162 (Pa.Super. 2013), *appeal denied*, ___ Pa. ___, 72 A.3d 603 (2013) (explaining **Martinez** applies in context of federal *habeas corpus* law and is of no moment to timeliness analysis under PCRA).

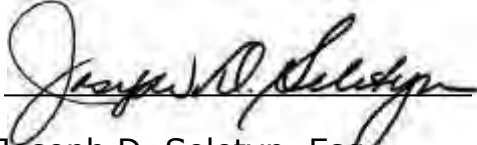
Additionally, Appellant filed a second supplemental PCRA petition on August 24, 2012, within sixty (60) days of the U.S. Supreme Court's decision in **Miller** on June 25, 2012. Nevertheless, Appellant was twenty-three (23) years old when he committed the underlying crimes. Thus, **Miller** does not apply to Appellant. **See** 42 Pa.C.S.A. § 9545(b)(1)(iii); **Commonwealth v. Cintora**, 69 A.3d 759, 764 (Pa.Super. 2013) (explaining **Miller** did not create newly-recognized constitutional right that serves as exception to PCRA time restrictions, where petitioners were twenty-one (21) and nineteen (19) years old, respectively, when they committed underlying crimes). Moreover, on October 30, 2013, our Supreme Court decided that **Miller** does not apply retroactively to judgments of sentence which became final before the filing date of **Miller** (June 25, 2012). **See Commonwealth v. Cunningham**, ___ Pa. ___, 81 A.3d 1 (2013). The U.S. Supreme Court has denied *certiorari* in **Cunningham**. **See Cunningham v. Pennsylvania**, 2014 WL 797250 (filed

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June 9, 2014). Accordingly, the PCRA court properly dismissed Appellant's petition.⁴

Order affirmed.

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/16/2014

⁴ Appellant's motion to dismiss the Commonwealth's brief is denied.