

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
BRIAN HERB	:	
	:	
Appellant	:	No. 1677 EDA 2017

Appeal from the PCRA Order April 20, 2017
 In the Court of Common Pleas of Philadelphia County Criminal Division at
 No(s): CP-51-CR-1027751-1982

BEFORE: BOWES, J., SHOGAN, J., and KUNSELMAN, J.

MEMORANDUM BY BOWES, J.:

FILED MAY 1, 2019

Brian Herb appeals *pro se* from the order dismissing his serial petition filed pursuant to the Post Conviction Relief Act ("PCRA"). We affirm.

In 1982, police arrested Appellant and charged him with the murder of a man stabbed repeatedly while lying on a park bench in Philadelphia. Appellant confessed to the crime and was subsequently convicted in a non-jury trial of first-degree murder and possession of an instrument of crime. Appellant was twenty-one-years-old at the time of the murder. On November 29, 1983, the trial court sentenced him to life imprisonment without the possibility of parole ("LWOP") on the murder conviction. This Court affirmed the judgment of sentence. ***See Commonwealth v. Herb***, 491 A.2d 918 (Pa.Super. 1985) (unpublished memorandum). Appellant did not petition for allowance of appeal.

Appellant filed a petition for post-conviction relief under the Post-Conviction Hearing Act (“PCHA”),¹ which was denied. This Court affirmed the denial of PCHA relief. **See Commonwealth v. Herb**, 541 A.2d 1151 (Pa.Super. 1988) (unpublished memorandum). This Court also affirmed the denial of Appellant’s second PCHA petition, and our Supreme Court denied allowance of appeal. **See Commonwealth v. Herb**, 758 A.2d 720 (Pa.Super. 2000) (judgment order), *appeal denied*, 759 A.2d 920 (Pa. 2000).

Appellant filed the instant *pro se* PCRA petition, his fourth, on March 1, 2016.² He filed a supplemental *pro se* petition on March 17, 2016. The PCRA court issued a Pa.R.Crim.P. 907 notice of its intent to dismiss the petition as untimely filed. Appellant did not respond to the notice and, on April 20, 2017, the PCRA court entered an order dismissing the petition. Appellant filed a

¹ The PCHA was modified in part, repealed in part, and renamed the PCRA, effective April 13, 1988. **Commonwealth v. Lewis**, 718 A.2d 1262 n.2 (Pa.Super. 1998).

² The record reflects that Appellant filed a PCRA petition on August 2, 2012; however, it does not appear that any action was taken on that petition. As indicated above, Appellant filed the instant petition on March 1, 2016. While a PCRA court may not entertain a new PCRA petition when a prior petition is still under appellate review and, thus, is not final, nothing bars a PCRA court from considering a subsequent petition, even if a prior petition is pending, so long as the prior petition is not under appellate review. **See Commonwealth v. Montgomery**, 181 A.3d 359, 365 (Pa.Super. 2018) (*en banc*) (hereinafter referred to as “**Commonwealth v. Montgomery**” in order to differentiate it from the United States Supreme Court’s decision in **Montgomery v. Louisiana**, 136 S. Ct. 718 (2016), discussed *infra*). As Appellant’s 2012 petition has never been under appellate review, the PCRA court was not barred from considering his 2016 petition.

timely *pro se* notice of appeal. The PCRA court did not order Appellant to file a concise statement pursuant to Pa.R.A.P. 1925(b); however, it authored an opinion pursuant to Pa.R.A.P. 1925(a).

Appellant raises the following issue for our review:

Did the PCRA court err as a matter of law and abuse its discretion in dismissing as untimely Appellant's PCRA petition submitted pursuant to its exception of a new retroactive constitutional right via **Miller**^[3] & **Montgomery**'s^[4] Eighth Amendment bar to the mandatory imposition of a life without parole upon a juvenile even though Appellant was 21 at the time of his crime?

Appellant's brief at 4 (footnotes added).

Before we may address the merits of Appellant's issue, we must first address the timeliness of his petition, as the PCRA's timeliness requirements are a jurisdictional prerequisite, and may not be disregarded. **See Commonwealth v. Bennett**, 930 A.2d 1264, 1267 (Pa. 2007). In 1995, the General Assembly amended the PCRA to require, as a matter of jurisdiction, that all PCRA petitions must be filed within a certain period of time after

³ **Miller v. Alabama**, 567 U.S. 460 (2012). In **Miller**, the United States Supreme Court held that mandatory LWOP sentences for those under the age of eighteen at the time of their crimes violate the Eighth Amendment's prohibition against "cruel and unusual punishments." **Miller, supra** at 465. The Supreme Court held that a juvenile homicide defendant could only be sentenced to LWOP if he or she is determined to be permanently incorrigible, irreparably corrupt, or irretrievably depraved. **Id.** at 471.

⁴ **Montgomery v. Louisiana**, 136 S. Ct. 718 (2016) (hereinafter referred to as "**Montgomery**"). In **Montgomery**, the High Court held that **Miller** applies retroactively to cases on collateral review, opening the door for those eligible (*i.e.*, under the age of eighteen at the time they committed their crimes, and sentenced to LWOP) to seek collateral relief. **Id.** at 732-37.

judgment. Specifically, the amendments require that any PCRA petition, “including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final.” 42 Pa.C.S. § 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 time for seeking the review.” 42 Pa.C.S. § 9545(b)(3).

In the case *sub judice*, Appellant’s judgment of sentence became final in 1985, upon the expiration of the thirty-day period for seeking allowance of appeal with our Supreme Court. As the instant PCRA petition was filed some 33 years later, on March 1, 2016, it is obviously beyond the PCRA’s one-year time limitation.

However, this is not the end of our inquiry because the amendments contain certain exceptions regarding the filing of a petition that fails to satisfy § 9545(b)(1). First, where the judgment becomes final on or before the amendments’ effective date, a petition will be deemed timely if the petitioner’s *first* petition is filed within one year of the effective date of the amendments. The effective date of the amendments was January 16, 1996. In the appeal before us, the date the judgment became final preceded the effective date of the amendments. However, as this is Appellant’s *fourth* petition for collateral relief, Appellant does not qualify for this exception which only applies to a *first* PCRA petition. ***Commonwealth v. Fahy***, 737 A.2d 214, 218 (Pa. 1999). We

note that, even if it was Appellant's first petition, he would still not be entitled to relief because his petition was filed more than one year after the effective date of the amendments. ***Id.***

Nevertheless, the amendments contain three other exceptions to the one-year limitation noted above. Pennsylvania courts may consider an untimely PCRA petition if the petitioner can explicitly plead and prove one of the three exceptions set forth at § 9545(b)(1)(i)-(iii). Any PCRA petition invoking one of these exceptions "shall be filed within 60 days of the date the claim could have been presented." 42 Pa.C.S. § 9545(b)(2).⁵

Here, Appellant seeks to overcome the untimeliness of his petition by invoking § 9545(b)(1)(iii), which provides an exception to the PCRA's one year time bar when the petition alleges and the petitioner proves 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." 42 Pa.C.S. § 9545(b)(1)(iii). Appellant points to the new constitutional rule announced in ***Miller*** and made retroactive by

⁵ On October 24, 2018, the General Assembly amended § 9545(b)(2), extending the time for filing a petition from sixty days to one year from the date the claim could have been presented. ***See*** 2018 Pa. Legis. Serv. Act 2018-146 (S.B. 915), effective December 24, 2018. The amendment applies only to claims arising one year before the effective date of this section, December 24, 2017, or thereafter. As Appellant filed the instant petition on March 1, 2016, the amendment does not apply.

Montgomery, and claims that he has satisfied the requirements of § 9545(b)(1)(iii) and (2) because his petition was filed within sixty days after the Court decided **Montgomery**. Appellant acknowledges that **Miller** applies only to juveniles under the age of eighteen, but nevertheless asks this Court to expand the holding in **Miller** to apply to him since, at the time he committed his crime, he was “seriously impaired due to his alcohol and drug ingestion . . . and subject to control via the amygdala[, a] region of the brain . . . well-known and proven by science to promote reactive violence.” Appellant’s brief at 27-28. Thus, the critical issue before us is whether, at this time, Appellant, who was over the age of eighteen when he committed his crime, can avail himself of the **Miller** rationale, despite the express age limitation.

This Court has previously addressed the issue which Appellant presents, and repeatedly determined that a PCRA court lacks jurisdiction to address an untimely petition when the petitioner was older than eighteen at the time of his or her offense, and seeks an extension of **Miller** in order to satisfy the timeliness exception found at § 9545(b)(1)(iii). In **Commonwealth v. Cintora**, 69 A.3d 759 (Pa.Super. 2013), a panel of this Court addressed an untimely PCRA petition presenting a **Miller** challenge to LWOP sentences imposed on petitioners who were nineteen and twenty-one-years-old at the time they committed murder. In seeking to overcome the untimeliness of their petition by invoking the exception set forth in § 9545(b)(1)(iii), the petitioners argued that **Miller** applied to them because a human brain does

not fully develop until the age of twenty-five and “it would be a violation of equal protection for the courts to treat them[,] or anyone else with immature brains, as adults.” *Id.* at 764. The *Cintora* Court rejected these arguments, stressing that *Miller* did not apply to petitioners because they were over the age of eighteen at the time of their crimes, and that “[a] contention that a newly-recognized constitutional right **should** be extended to others does not render [a] petition [seeking such an expansion of the right] timely pursuant to § 9545(b)(1)(iii).” *Id.* (emphasis in original).

Thereafter, in *Commonwealth v. Furgess*, 149 A.3d 90 (Pa.Super. 2016), a panel of this Court addressed an untimely PCRA petition filed by a petitioner who was nineteen-years-old at the time of his crime, and who had been sentenced to LWOP for first-degree murder. The petitioner attempted to invoke the timeliness exception set forth in § 9545(b)(1)(iii) by claiming that *Miller* should be extended to apply to him because he was a “technical juvenile” at the time of his offense under various neuroscientific theories regarding immature brain development. *Id.* at 94. In rejecting the claim, the *Furgess* Court held that “petitioners who were older than 18 at the time they committed murder are not within the ambit of the *Miller* decision and therefore may not rely on that decision to bring themselves within the time-bar exception in [§] 9545(b)(1)(iii).” *Id.*

Two years later, in *Commonwealth v. Montgomery*, this Court addressed an untimely PCRA petition filed by a petitioner who was twenty-

two-years-old at the time he committed a murder for which he was sentenced to LWOP. The petitioner argued that he satisfied the timeliness exception found at § 9545(b)(1)(iii) on the basis that the relief provided by **Miller** should be extended to him because his brain was not fully developed at the time of his crime. This Court disagreed and, relying on **Furgess** and **Cintora**, held that simply contending that a newly-recognized constitutional right should be extended to others does not satisfy the new constitutional rule exception to the PCRA's timeliness requirement. **Commonwealth v. Montgomery, supra** at 366.

Appellant herein filed his brief one month after our decision in **Commonwealth v. Montgomery**. Yet, absent from Appellant's twenty-nine-paged brief is any reference to that *en banc* decision. Further, while Appellant's brief includes a brief citation to **Furgess** and **Cintora**, it includes no discussion of their holdings. Instead, Appellant points to federal decisional law interpreting federal statutes relating to the filing of successive *habeas corpus* petitions when the petitioner seeks relief under a new constitutional law, 28 U.S.C. § 2244(b)(2)(A) and 28 U.S.C. § 2255(h)(2), and attempts to persuade us to adopt a more flexible and permissive approach as to who may avail themselves of a new constitutional right under § 9545(b)(1)(iii).

This, we cannot do. In the absence of a ruling on a particular question by the United States Supreme Court, the decisions of federal intermediate appellate panels and federal district courts are not binding on Pennsylvania

courts when deciding issues of Pennsylvania law. ***Commonwealth v. Giffin***, 595 A.2d 101, 107 (Pa. 1991). Moreover, a three-judge panel of this Court is not empowered to overrule another panel of the Superior Court, let alone an *en banc* panel. ***See Commonwealth v. Beck***, 78 A.3d 656, 659 (Pa.Super. 2013). Only an *en banc* panel of the Superior Court or our Supreme Court could overrule ***Furgess, Cintora***, and ***Commonwealth v. Montgomery***.

Notably, an *en banc* panel of this Court recently declined to adopt a more permissive or flexible approach to the timeliness exception in § 9545(b)(1)(iii), and confirmed that the question of whether the rationale underlying a new constitutional right should be extended to individuals not expressly encompassed by the new right is a merits questions beyond the scope of preliminary jurisdictional considerations under § 9545(b)(1)(iii). ***Commonwealth v. Lee***, 2019 Pa. Super. LEXIS 201, **18-19 (Pa.Super. 2019) (*en banc*).

In ***Lee***, this Court addressed an untimely PCRA petition filed by a petitioner who was eighteen years and nine months old at the time of her crime and who was serving a LWOP for her second-degree murder conviction. Citing to studies that would establish that her brain was underdeveloped at the time of her crime, Lee argued that the ***Miller*** “rationale” applied to her case and, accordingly, provided an exception to the PCRA’s time-bar provided by § 9545(b)(1)(iii). ***Id.*** at *17. The ***Lee*** Court rejected her argument, stating:

We recognize that the principles underlying the **Miller** holding are more general; who qualifies as a “juvenile” and whether **Miller** applies to Lee are better characterized as questions on the merits, not as preliminary jurisdictional questions under section 9545(b)(1)(iii). As compelling as the “rationale” argument is, we find it untenable to extend **Miller** to one who is over the age of 18 at the time of his or her offense for purposes of satisfying the newly-recognized constitutional right exception in section 9545(b)(1)(iii).

Id. at **18-19. The **Lee** Court further explained

For purposes of deciding whether the timeliness exception to the PCRA based on the creation of a new constitutional right is applicable, **the distinction between the holding of a case and its rationale is crucial since only a precise creation of a constitutional right can afford a petitioner relief. . . . [T]he rationale used by the Supreme Court is irrelevant to the evaluation of a § 9545(b)(1)(iii) timeliness exception to the PCRA, as the right must be one that has been expressly recognized by either the Pennsylvania or United States Supreme Court.** Thus, for the purpose of the timeliness exception to the PCRA, only the holding of the case is relevant.

Id. at **20 (quoting **Commonwealth v. Chambers**, 35 A.3d 34, 40-43 (Pa.Super. 2011) (emphasis added)).

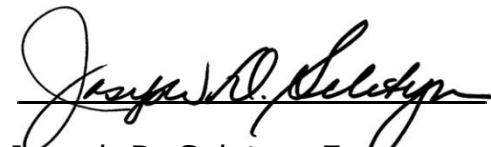
Here, as in **Lee**, Appellant is not basing his argument on any newly-recognized constitutional right **as contemplated by the PCRA. See id.** Rather, he asks us to create jurisdiction where it does not exist on the basis that evolving scientific research suggests that those above **Miller’s** age limit are no different than those encompassed thereby. Appellant’s brief at 17, 18-23. We cannot grant Appellant the relief he requests. The PCRA’s time limitations “are mandatory and interpreted literally; thus, a court has no authority to extend filing periods except as the statute permits.” **Fahy, supra**

at 222. Presently, there is no controlling authority that has extended the protections of **Miller** to those offenders at, or over, the chronological age of eighteen. Accordingly, until the United States Supreme Court or the Pennsylvania Supreme Court recognizes a new constitutional right in a non-juvenile offender, we are bound by precedent. We therefore conclude, as this Court did in **Lee, Commonwealth v. Montgomery, Furgess** and **Cintora**, that the offender's age at the time of the offense is the sole factor in determining whether **Miller** applies to overcome the PCRA time-bar and we decline to extend its categorical holding. **Lee, supra** at *22.

Because Appellant has failed to successfully plead or prove that he meets the new constitutional right exception to the timeliness requirements of the PCRA under § 9545(b)(2)(iii), the court properly concluded that his petition was untimely and it had no jurisdiction to address its merits. We therefore affirm the PCRA court's order.

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: 5/1/19