

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-1651-1994
v.	:	CR-781-1996
	:	
GARY RHINES a/k/a ROBERT CAMBY	:	PCRA SECOND
a/k/a DERRICK UPSHAW,	:	
Defendant	:	

**OPINION AND ORDER**

On July 29, 2016, Defendant filed a petition for relief under the Post-Conviction Relief Act (PCRA).<sup>1</sup> Counsel was not appointed as this is Defendant's second PCRA petition and the Court finds that an evidentiary hearing is not required.<sup>2</sup> In the petition, Defendant contends that he is entitled to relief because he was sentenced under an unconstitutional mandatory minimum sentencing scheme. He cites Alleyne v. United States<sup>3</sup> and Commonwealth v. Wolfe.<sup>4</sup>

**I. Background**

On March 9, 1995, Gary Rhines (Defendant) pled guilty to Delivery of a Controlled Substance, Possession with Intent to Deliver, and Simple Assault. On the same date, the Honorable Kenneth D. Brown sentenced the Defendant to eleven (11) to twenty-three (23) months incarceration in the Lycoming County Prison followed by a one (1) year period of probation. The Defendant did not file an appeal in this case.

On January 13, 1997, the Defendant pled guilty to Delivery of a Controlled Substance and Possession with Intent to Deliver. On February 18, 1997, the

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<sup>1</sup> 42 Pa.C.S. § 9541 *et seq.*

<sup>2</sup> (D) On a second or subsequent petition, when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, and an evidentiary hearing is required as provided in Rule 908, the judge shall appoint counsel to represent the defendant. Pa. R. Crim. P. 904

<sup>3</sup> 133 S.Ct. 2151 (2013).

<sup>4</sup> 140 A.3d 651; 2016 Pa. LEXIS 1282 (Pa. 2016).

Defendant was sentenced to twenty-six (26) to forty-six (46) months in a state correctional institution. Once again the Defendant did not appeal his sentence. Defendant was then paroled and later detained on August 23, 2001 for a parole violation stemming from an indictment on federal drug distribution charges in the Middle District of Pennsylvania. Subsequently, the Defendant was convicted in federal court and was sentenced to a life sentence.

On May 24, 2011, Defendant filed his first PCRA petition in connection to the above captioned docket numbers. The Court appointed counsel to represent the Defendant on his first PCRA Petition. PCRA Counsel filed a Petition to Withdraw along with a Turner-Finley letter on November 22, 2011. In an Opinion and Order dated February 27, 2012, the Court found that Defendant's PCRA Petition was untimely and proposed dismissal of the Petition within twenty (20) days. The Defendant submitted *pro-se* objections to the Court's proposed dismissal, which argued that the Defendant's Petition was timely because he is actually innocent and that his counsel failed to file a Notice of Appeal or a PCRA when he was requested to do so. On March 26, 2012, the Court, considering the objections by the Defendant, dismissed the Defendant's PCRA and notified him of his appellate rights.

On April 12, 2012, the Defendant filed a Notice of Appeal. The Superior Court of Pennsylvania in an unpublished Memorandum filed March 11, 2013, agreed with the "sound reasoning of the PCRA court, as set forth in its Opinion", and affirmed on this basis. Commonwealth v. Rhines, No. 727 MDA 2012, No. 728 MDA 2012, 2013 Pa. Super. Unpub. LEXIS 231 (Pa. Super. Ct. 2013). Defendant took no appeal from the

decision of the Superior Court and thus his order of sentence became final on April 10, 2013.

On July 29, 2016, Defendant filed his second PCRA Petition in connection to the above captioned docket numbers.

## II. Discussion

“[T]he timeliness of a PCRA petition is a jurisdictional requisite.” Commonwealth v. Brown, 111 A.3d 171, 175 (Pa. Super. 2015). Any petition under [the PCRA] . . . 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.

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).

Here, Defendant was sentenced on February 18, 1997, and did not take a direct appeal of his sentence. He filed a Petition for Post Conviction Relief. The denial of the petition by the PCRA Court was affirmed by the Superior Court of

Pennsylvania. Defendant did not appeal to the Pennsylvania Supreme Court and as such, his order of sentence became final on April 10, 2013. Because Defendant's second PCRA petition was not filed until July 29, 2016, Defendant must plead and prove one of the exceptions *supra* for this Court to have jurisdiction.

In Commonwealth v. Washington, 142 A.3d 810, 2016 Pa. LEXIS 1536 (Pa. 2016) (decided July 19, 2016), the Pennsylvania Supreme Court held that "Alleyne does not apply retroactively to cases pending on collateral review". In the instant case, since Defendant's above captioned matters were not pending on direct review when Alleyne was decided (June 17, 2013), the sought-after exception to the time-bar does not apply.

### **III. Conclusion**

After conducting an independent review, this Court finds that the Defendant's petition is untimely. In addition, he has not proven an exception to the PCRA time-bar. Therefore, this Court does not have jurisdiction over the petition.

**ORDER**

**AND NOW**, this \_\_\_\_\_ day of October, 2016, it hereby ORDERED and DIRECTED as follows:

The Defendant is notified that this Court intends to dismiss the Defendant's PCRA petition because it is untimely. The Court will dismiss the Defendant's petition unless the Defendant files an objection to that dismissal within twenty (20) days of date of this Order.

BY THE COURT,

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Nancy L. Butts, President Judge

cc: District Attorney  
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