

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-201-2005  
: vs. :  
: CRIMINAL DIVISION  
: :  
: Notice of Intent to Dismiss PCRA Petition  
CARLOS CASTRO, : Without Holding An Evidentiary Hearing  
Petitioner : and Order Granting Motion to Withdraw  
: as Counsel

**OPINION AND ORDER**

This matter came before the court on Carlos Castro’s Post Conviction Relief Act (PCRA) petition.

By way of background, on January 10, 2005, Carlos Castro (hereinafter “Petitioner”) was charged with rape by forcible compulsion, a felony of the first degree; criminal attempt involuntary deviate sexual intercourse (IDSI), a felony of the first degree; sexual assault, a felony of the second degree; and indecent assault, a misdemeanor of the second degree. On June 24, 2005, a jury found Petitioner guilty of criminal attempt-IDSI, sexual assault, and indecent assault. In 2006, Petitioner was ordered to serve an aggregate sentence of sixty (60) months to ten (10) years’ incarceration followed by twenty (20) years’ probation, and he was designated a sexually violent predator (SVP).

Petitioner’s counsel filed a direct appeal, but it was dismissed for failure to file a brief. Through PCRA proceedings that were protracted due to inexplicable delay, Petitioner’s appeal rights were reinstated nunc pro tunc. In his appeal, among other issues, Petitioner challenged the SVP designation. The Pennsylvania Superior Court affirmed Petitioner’s judgment of sentence on October 27, 2015.

On January 26, 2018, the Lycoming County Public Defender filed a PCRA

petition on Petitioner's behalf to remove any sexual offender registration requirements based on *Muniz*,<sup>1</sup> *Butler*,<sup>2</sup> and *Rivera-Figueroa*.<sup>3</sup> In *Muniz*, the Pennsylvania Supreme Court held that the retroactive application of SORNA violated the *ex post facto* clauses of the United States and Pennsylvania constitutions. In *Butler*, the Pennsylvania Superior Court found that since the registration requirements constituted punishment and the SVP designation increased an offender's registration requirements, the procedure utilized to designate an offender as a SVP was unconstitutional based on *Alleyne*.<sup>4</sup> In *Rivera-Figueroa*, the Pennsylvania Superior Court held that *Muniz* applied retroactively to timely filed PCRA petitions. Based on these decisions, Petitioner asserted that none of his registration requirements were constitutional and he was entitled to relief under the PCRA. On April 16, 2018, however, counsel filed a petition to withdraw asserting that the petition was untimely based on *Murphy*.<sup>5</sup>

After an independent review of the record, the cases cited above, and the 2018 amendments to the sexual offender registration statutes, the court finds that Petitioner is not entitled to the relief requested as a matter of law.

Section 9545(b) of the Judicial Code, which contains the time limits for filing a PCRA petition, 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

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<sup>1</sup> *Commonwealth v. Muniz*, 164 A.3d 1181 (Pa. 2017).

<sup>2</sup> *Commonwealth v. Butler*, 173 A.3d 1212 (Pa. Super. 2017), *alloc granted*, 190 A.3d 581 (Pa. 2018).

<sup>3</sup> *Commonwealth v. Rivera-Figueroa*, 174 A.3d 674 (Pa. Super. 2017).

<sup>4</sup> *Alleyne v. United States*, 570 U.S. 99 (2014).

<sup>5</sup> *Commonwealth v. Murphy*, 180 A.3d 402 (Pa. Super. 2018).

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 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.A. §9545(b).

The time limits of the PCRA are jurisdictional in nature. *Commonwealth v. Howard*, 788 A.2d 351, 353 (Pa. 2002); *Commonwealth v. Palmer*, 814 A.2d 700, 704-05 (Pa. Super. 2002). “[W]hen 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*, 753 A.2d 780, 783 (Pa. 2000).

The Superior Court affirmed Petitioner’s judgment of sentence on October 27, 2015. Petitioner had thirty (30) days within which to file a petition for allowance of appeal with the Pennsylvania Supreme Court, but such a petition was not filed. Therefore, Petitioner’s judgment of sentence became final on or about November 27, 2015. To be

considered timely, Petitioner had to file his petition on or before November 28, 2016 or allege facts to support one of the statutory exceptions. His petition was not filed until January 26, 2018, approximately fourteen (14) months late.

Petitioner also fails to satisfy any of the statutory exceptions. In *Muniz*, the Pennsylvania Supreme Court found that the retroactive application of SORNA violated the *ex post facto* clauses of the United States and Pennsylvania constitutions, but it did not hold, and has not held in any other case, that *Muniz* applies retroactively to individuals such as Petitioner whose judgment became final long before the decision was announced. In fact, the Pennsylvania Superior Court has held that *Muniz* does not apply retroactively to individuals in Petitioner's situation. As the Pennsylvania Superior Court recently stated in *Commonwealth v. Murphy*:

[B]ecause Appellant's PCRA petition is untimely (unlike the petition at issue in *Rivera-Figueroa*), he must demonstrate that the **Pennsylvania Supreme Court** has held that *Muniz* applies retroactively in order to satisfy section 9545(b)(1)(iii). Because at this time, no such holding has been issued by our Supreme Court, Appellant cannot rely on *Muniz* to meet that timeliness exception.

180 A.3d 402, 405-06 (Pa. Super. 2018)(emphasis original)(citation omitted).

Even if the Pennsylvania Supreme Court had held that *Muniz* applies retroactively, Petitioner did not file his petition within sixty (60) days of the *Muniz* decision. Any petition invoking one of the exceptions in section 9545(b)(1) must be filed within sixty (60) days of the date the claim could have been presented. 42 Pa. C.S. §9545(b)(2). *Muniz* was decided on July 19, 2017. To be considered timely under section 9545(b)(1)(iii), Petitioner's PCRA petition would have had to have been filed by September 18, 2017.

Neither *Butler* nor *Rivera-Figueroa* satisfy the “new constitutional right” exception of 42 Pa. C.S. 9545(b)(1)(iii), because they are decisions of the Pennsylvania Superior Court, and not decisions of the United State Supreme Court or the Pennsylvania Supreme Court. Furthermore, Petitioner did not file his PCRA petition within sixty (60) days of either of these decisions. *Butler* was decided on October 31, 2017, and *Rivera-Figueroa* was decided on November 14, 2017.

As this PCRA petition is patently untimely, the court lacks jurisdiction to hold an evidentiary hearing or grant Petitioner any relief.

The court also notes that these claims could be considered waived. To be eligible for relief, a petitioner must show that the issue has not been waived. 42 Pa. C.S. §9543(a)(3). “[A]n issue is waived if it the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.” 42 Pa.C.S. §9544(b). Petitioner could have challenged the retroactive application of Pennsylvania’s Sexual Offender Registration and Notification Act (SORNA) in his direct appeal in 2015. The court recognizes that the Pennsylvania Supreme Court had not decided *Muniz* at that time; however, if Petitioner had asserted this issue, his case could have been the one in which the Pennsylvania Supreme Court held that the retroactive application of SORNA was unconstitutional.

Finally, the court finds that Petitioner’s PCRA petition is moot due to legislative amendments to SORNA and the enactment of new Subchapter I of Chapter 97 of the Judicial Code, 42 Pa. C.S. §§9799.51 et seq, as well as Petitioner’s new convictions of sexually violent offenses. Due to the legislative changes, Petitioner will not be required to

register pursuant to SORNA as a result of his convictions in this case. SORNA now only applies to individuals who are convicted of sexually violent offenses committed on or after December 20, 2012. Individuals, like Petitioner, who have been convicted of a sexually violent offense committed on or after April 22, 1996 and before December 20, 2012, and who have not completed their registration requirements with the Pennsylvania State Police will be required to register pursuant to Subchapter I. Petitioner has not challenged the constitutionality of Subchapter I or the Acts which enacted it (Act 2018-10 and Act 2018-29). Furthermore, Petitioner was recently convicted of additional sexual offenses that were committed after December 20, 2012 (see CR-784-2017). As a result of these new convictions, Petitioner will be subject to SORNA's registration requirements.

**ORDER**

AND NOW, this \_\_\_ day of October 2018, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, no purpose would be served by conducting a hearing in this case. The parties are hereby notified of this court's intention to dismiss the Petition. Petitioner may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the court will enter an order dismissing the petition.

The court also grants PCRA counsel's motion to withdraw. Petitioner may represent himself or hire private counsel but the court will not appoint counsel to represent Petitioner further in this matter.

By The Court,

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Nancy L. Butts, President Judge

cc: Kenneth Osokow, Esquire (DA)  
William Miele, Esquire (PD)  
Carlos Castro, c/o Lycoming County Prison  
Work file