

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1357-2009  
:   
vs. : CRIMINAL DIVISION  
:   
:   
TIM COPENHAVER, : Notice of Intent to Dismiss PCRA  
Defendant : Without Holding An Evidentiary Hearing

**OPINION AND ORDER**

This matter came before the court on Petitioner’s second PCRA petition, which was filed on January 24, 2018.

By way of background, between May 12, 2008 and September 20, 2008, Petitioner downloaded and viewed child pornography using a computer he rented from Aaron’s. On March 24, 2010, Petitioner pled guilty to five counts of sexual abuse of children (possession of child pornography). On July 20, 2010, the court sentenced Petitioner to an aggregate term of 2 to 5 years’ incarceration in a state correctional institution followed by 10 years’ probation. Petitioner was advised he would be subject to a 10-year registration requirement pursuant to Pennsylvania’s Megan’s Law.

On April 25, 2011, Petitioner filed his first PCRA petition. In his petition, he asserted claims of ineffective assistance of counsel, but he never sought to amend his petition to challenge his registration requirements. SORNA was enacted on December 20, 2011, but did not become effective until December 20, 2012. The court permitted PCRA counsel to withdraw and dismissed Petitioner’s first PCRA petition on February 28, 2012. Petitioner filed a pro se appeal on March 29, 2012, but the Superior Court dismissed it on August 13, 2012, because Petitioner failed to file a docketing statement.

Petitioner's probationary sentences were revoked on March 23, 2015, and he was re-sentenced to an aggregate term of 1 to 8 years' state incarceration consecutive to his original incarceration sentence. Petitioner appealed his probation violation sentence, and the Superior Court affirmed this sentence on February 11, 2016.

On January 10, 2018, Petitioner contacted the Lycoming County Public Defender for assistance in filing a PCRA petition. On January 24, 2018, the public defender filed a second PCRA petition on Petitioner's behalf, in which he requested the court to remove any sexual offender registration requirements based on *Muniz*,<sup>1</sup> *Butler*,<sup>2</sup> and *Rivera-Figueroa*.<sup>3</sup>

On February 15, 2018, the court scheduled an *en banc* argument on this case, and several other cases, to determine the retroactivity of *Muniz* to facially untimely PCRA petitions. On February 20, 2018, however, the Superior Court held in *Commonwealth v. Murphy*, 180 A.3d 402, 405-406 (Pa. Super. 2018) that *Rivera-Figueroa* does not apply to untimely PCRA petitions and petitioner did qualify for the "new constitutional right" exception because the Pennsylvania Supreme Court had not held that *Muniz* applies retroactively. As a result of this new case law, the court gave Petitioner 30 days within which to file either an amended petition addressing the timeliness issue or a *Turner/Finley* no merit letter.<sup>4</sup> On April 16, 2018, the public defender filed a motion to withdraw and a no merit letter.

After an independent review of the record, the court finds that Petitioner is not

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<sup>1</sup>*Commonwealth v. Muniz*, 640 Pa. 699, 164 A.3d 1181 (July 19, 2017).

<sup>2</sup>*Commonwealth v. Butler*, 173 A.3d 1212 (Pa. Super. Oct. 31, 2017).

<sup>3</sup>*Commonwealth v. Rivera-Figueroa*, 174 A.3d 674 (Pa. Super. Nov. 14, 2017)

<sup>4</sup> *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988); *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super.

entitled to relief.

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 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*, 567 Pa. 481, 485, 788 A.2d 351, 353 (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*, 562 Pa. 70, 77, 753 A.2d 780, 783 (2000).

Petitioner was sentenced on July 20, 2010, and advised that he would be required to register for a period of ten years. Petitioner did not file a post-sentence motion or an appeal. Therefore, his judgment of sentence became final on August 19, 2010. To be considered facially timely, Petitioner’s second PCRA petition needed to be filed on or before August 19, 2011. Petitioner’s second PCRA petition was not filed until January 24, 2018. Furthermore, none of the cases cited in the petition satisfy the “new constitutional right” exception of 42 Pa. C.S. §9545(b)(1)(iii).

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 a Petitioner whose appeal was completed well 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, 405-406 (Pa. Super. 2018)(emphasis original)(citation omitted).

*Butler* and *Rivera-Figueroa* do not satisfy the exception because they are

decisions of the Pennsylvania Superior Court; they are not decisions by the Pennsylvania Supreme Court.

Even if these cases were decisions by the Pennsylvania Supreme Court that were held to apply retroactively, Petitioner's second PCRA petition would still be untimely, because it was not filed within 60 days of the date any of those cases were decided.

A petitioner also is not entitled to relief if the issue was waived. 42 Pa. C.S. 9543(a)(3). "[A]n issue is waived if the petitioner could have raised it but failed to do so... in a prior state postconviction proceeding." 42 Pa. C.S. §9544(b). SORNA was passed while Petitioner's first PCRA petition was pending. Although SORNA did not become effective until December 20, 2012, it was clear as soon as SORNA was enacted that it would increase the duration of Petitioner's registration requirements from 10 years to 15 years. Petitioner could have sought leave to amend his first PCRA petition to assert a claim that SORNA violated the *ex post facto* clauses of the United States and Pennsylvania constitutions, but he did not. The court recognized that *Muniz* had not been decided yet, but if Petitioner had asserted this issue in his first PCRA petition perhaps his case would have been the one to declare the retroactive application of SORNA unconstitutional. Since Petitioner could have asserted this issue in an amendment to his first PCRA petition but he failed to do so, this issue is waived.

Even if Petitioner's second PCRA petition could be considered timely, he would not be entitled to relief from sexual offender registration requirements. The Pennsylvania legislature passed two acts, Act 10 of 2018 and Act 29 of 2018, to address the *Muniz* decision. These Acts amended SORNA so that it only applies to individuals who are

convicted of sexually violent offenses committed on or after December 20, 2012, and enacted new subchapter I (42 Pa. C.S. §9799.51, et seq.) to re-impose Megan's Law registration requirements upon individuals convicted of sexually violent offenses committed on or after April 22, 1996, but before December 20, 2012. Since Petitioner was convicted of a sexually violent offense that was committed in 2008, he is subject to the registration requirements of subchapter I. Sexual abuse of children is an offense which requires a ten year period of registration under Subchapter I. 42 Pa. C.S. §9799.55(a)(1)(A).

**ORDER**

AND NOW, this \_\_\_ day of September 2018, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the parties are hereby notified of this court's intention to dismiss Petitioner's second PCRA petition without holding an evidentiary. 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 counsel's motion to withdraw. Petitioner may hire private counsel or he may represent himself, but the court will not appoint counsel to represent Petitioner unless or until he shows that his petition is timely.

By The Court,

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Nancy L. Butts, President Judge

cc: District Attorney  
William Miele, Esquire (PD)

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