

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

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|-----------------------------|---|----------------------------------|
| COMMONWEALTH | : | No. CR-789-2002 |
| | : | CR-131-2003 |
| vs. | : | CR-1070-2003 |
| | : | CR-1081-2003 |
| | : | |
| LEROY W. MILLER JR., | : | Order Dismissing |
| Petitioner | : | Defendant's PCRA petition |

ORDER

AND NOW, this _____ day of August 2018, after review of Petitioner's response to the court's order giving notice of its intent to dismiss his Post Conviction Relief Act (PCRA) petition, the court dismisses the PCRA petition.

In his objections, Petitioner asserts that his PCRA petition is timely because it was filed within 60 days of the Superior Court's decision in *Commonwealth v. Rivera-Figueroa*, 174 A.3d 674 (Pa. Super. 2017) which held that *Muniz*¹ created a substantive rule that retroactively applied in the collateral context or, in the alternative, within 60 days of the date he found out about *Rivera-Figueroa*. This case does not apply to Petitioner's case; therefore, his PCRA petition is untimely.

Rivera-Figueroa only applies to PCRA petitions that are filed within one year of the date the petitioner's judgment of sentence became final. Petitioner's judgments of sentence in cases CR-131-2003, CR-1070-2003, and 1081-2003 became final on or about December 3, 2003. Petitioner's judgment of sentence in CR-789-2002 became final on or about December 18, 2003, thirty days after the Superior Court quashed his appeal. His PCRA petition was not filed until January 16, 2018.

When a petition is filed outside of that one-year period, the petitioner must

¹ 640 Pa. 699, 164 A.3d 1181 (2017).

plead and prove one of the three statutory exceptions found at 42 Pa. C.S. §9545(b)(1)(i), (ii) or (iii). Petitioner is attempting to satisfy the exception found at 42 Pa. C.S. §9545(b)(iii), which states: “the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania and has been held by that court to apply retroactively.”

Petitioner’s reliance on *Muniz* and *Rivera-Figueroa* cannot satisfy the “new retroactive right” exception of section 9545(b)(1)(iii) for several reasons. First, the Pennsylvania Supreme Court has not held that *Muniz* applies retroactively. 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).

Second, Petitioner did not file his PCRA petition within 60 days of the *Muniz* decision. Any petition invoking one of the exceptions in section 9545(b)(1) must be filed within 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, 2017.² Defendant’s petition was filed on January 16, 2018, more than 60 days thereafter.

² The sixtieth day would have been Sunday, September 17, 2017. However, when the last day falls on a Saturday, a Sunday, or a legal holiday, it is omitted from the computation. 1 Pa. C.S. §1908. Therefore, if our Supreme Court had held *Muniz* to apply retroactively, the final day for Petitioner to file a timely petition based on *Muniz* would have been Monday, September 18, 2017.

Third, although *Rivera-Figueroa* held *Muniz* to apply retroactively, it was not a decision by the Pennsylvania Supreme Court.

Fourth, *Rivera-Figueroa* is distinguishable in that the PCRA petition in that case was filed within one year of the date the judgment of sentence became final. Instead, the court is bound to follow the Pennsylvania Superior Court's recent decision in *Murphy*, *supra*.

Petitioner is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the Lycoming County courthouse, and sending a copy to the trial judge, the court reporter and the prosecutor. The form and contents of the Notice of Appeal shall conform to the requirements set forth in Rule 904 of the Rules of Appellant Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.App.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Defendant may lose forever his right to raise these issues.

The Clerk of Courts shall mail a copy of this order to Petitioner by certified mail, return receipt requested.

By The Court,

Nancy L. Butts, President Judge

cc: Kenneth Osokow, Esquire (ADA)
Leroy W. Miller, Jr., #FJ1751 (**certified mail**)
SCI Benner, 301 Institution Drive, Bellefonte PA 16823
Work file

Suzanne Fedele, Prothonotary/Clerk of Court