

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
v.	:	CR-615-2007
	:	
JAVIER CRUZ-ECHEVARRIA,	:	
Petitioner	:	PCRA
	:	

ORDER

AND NOW, this 21st day of March, 2022, it is hereby **ORDERED** and **DIRECTED** that Petitioner’s Post Conviction Collateral Relief Petition shall be treated as his Third Post Conviction Relief Act (PCRA) Petition.

Procedural History

The Pennsylvania Superior Court summarized a portion of the procedural history in Petitioner’s PCRA filings.

Appellant, *pro se*, filed the [first] timely PCRA petition on June 11, 2012. Counsel was appointed, who did not file an amended PCRA petition. On August 30, 2013, the PCRA court issued a Pa.R.Crim.P. 907 notice. On October 3, 2013, the PCRA court dismissed Appellant’s petition. On October 17, 2013, Appellant filed a *pro se* response in opposition to the Rule 907 notice and seeking to waive counsel. On October 25, 2013, the court ordered that Appellant’s *pro se* filing be forwarded to counsel for further action. Appellant’s counsel filed a timely notice of appeal on November 1, 2013, and timely filed a court-ordered Pa.R.A.P. 1925(b) statement.

Appellant’s counsel filed a petition to withdraw with this Court on February 27, 2014. This Court remanded to have the PCRA court conduct a *Grazier* hearing. On April 24, 2014, Appellant filed with this Court a *pro se* motion to remand this matter to the PCRA court to permit him to raise additional issues. We note that the motion essentially reiterates the arguments raised in his appellate brief.

Commonwealth v. Cruz-Echevarria, No. 1942 MDA 2013 (Pa. Super. November 25, 2014).

Following the Superior Court’s denial of Petitioner’s First PCRA, Petitioner filed his Second

PCRA on February 29, 2016. This Court issued a notice of intent to dismiss on September 28, 2016. In response, Petitioner sent a letter to the Court stating that he had not filed a Second PCRA and that he instead had filed a federal writ of habeas corpus petition that was still pending. As a result, this Court dismissed Petitioner's Second PCRA on November 10, 2016.

The instant petition before the Court is considered Petitioner's Third PCRA. Petitioner filed the present PCRA on January 19, 2022 and asserts approximately eleven (11) claims of ineffective assistance of PCRA counsel. After an independent review of the entire record, this Court finds that Petitioner has failed to timely file his Third PCRA Petition, and therefore his petition should be dismissed as this Court does not have jurisdiction to preside over the merits of his claims. For a PCRA Petition to be considered timely it must satisfy the following requirements:

(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.

42 Pa. C.S. § 9545(b)(1) (emphasis added).

A PCRA petition raising one of these exceptions must raise it "within one year of the date the claim could have been presented." 42 Pa. C.S. § 9545(b)(2). A petitioner must "affirmatively plead and prove" the exception, upon which he or she relies. Commonwealth v. Taylor, 933 A.2d 1035, 1039 (Pa. Super. 2007).

Following his conviction after a jury trial, the Superior Court affirmed Petitioner's convictions but vacated his sentence for conspiracy and remanded for resentencing. The Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal on September 12, 2011. Therefore, Petitioner's judgment of sentence became final on October 12, 2011. 42 Pa. C.S. § 9545(b)(3); *see also* Pa. R.A.P. 541. Petitioner was required to file his Third PCRA Petition by October 12, 2012. Since Petitioner's immediate PCRA was filed on January 19, 2022, it is patently untimely.

Nevertheless, Petitioner claims that his instant petition shall be deemed timely filed because it invokes "governmental interference." Third PCRA 1/19/2022, at 6. Petitioner relies on Commonwealth v. Bradley, 37 EAP 2020 (Pa. Oct. 20, 2021), claiming Bradley grants him the right to file the immediate petition to raise claims of ineffectiveness of PCRA counsel based on the alleged "governmental interference." However, upon this Court's close reading of Bradley, Petitioner misunderstands what revitalization Bradley created for the PCRA petitioner. In Bradley, the Pennsylvania Supreme Court considered the procedure for enforcing the right to effective counsel in a PCRA proceeding. The Court focused heavily on the adequacy of the process of enforcement of the right to effective counsel in a first PCRA proceeding. After determining that this procedure was unworkable in its current state, the Court considered several alternatives to this particular issue. After painstaking deliberation, the Court ultimately held that "a PCRA petitioner may, after a PCRA court denies relief, and after obtaining new counsel or acting *pro se*, raise claims of PCRA counsel's ineffectiveness at the first opportunity to do so, even if on appeal." Id. at 33.

It is important to note, however, that the Court specifically articulated that their attempt to revive a PCRA petitioner's "opportunity to enforce his right to effective PCRA trial counsel" did not establish a new exception to the timely filing requirement as enumerated in 42 Pa. C.S. §

9545(b)(1), nor did it create a new avenue for relief under the guise of one of the pre-existing timeliness exceptions. Specifically, the Court wrote,

[w]e decline to adopt the approach...that would deem a petitioner's 'discovery' of initial PCRA counsel's ineffective assistance to constitute a 'new fact' that was unknown to petitioner, allowing such petitioner to overcome, in a successive petition, the PCRA's time bar provision under the 'new fact' exception. *See* 42 Pa.C.S. § 9545(b)(1)(ii). We have repeatedly rejected such an understanding of the 'new fact' exception to the PCRA's one-year time bar.

Id. at 37 n.18. In particular, the Court in Justice Dougherty's concurring opinion writes that the Court's decision, "does not create an exception to the PCRA's jurisdictional time-bar, such that a petitioner represented by the same counsel in the PCRA court and on PCRA appeal could file an untimely successive PCRA petition challenging initial PCRA counsel's ineffectiveness because it was his 'first opportunity to do so.'" Id. at 3 (Dougherty, J., concurring). The Court does not indicate that Bradley provides all PCRA petitioners with a retroactive right to file second or subsequent untimely petitions to challenge their initial PCRA counsel. Unfortunately, this is what Petitioner seeks to do with his immediate petition in front of this Court. Bradley has specifically prohibited that which Petitioner claims absolves his instant petition of its untimely filing. Additionally, contrary to Petitioner's interpretation of Bradley, that case is strictly about preserving the right to effective counsel for an initial PCRA, not for invoking post-conviction challenges based on interference by the government. As such, Petitioner's Third PCRA Petition is patently untimely. Therefore, this Court does not have jurisdiction to examine the merits of Petitioner's Third PCRA Petition.

Since Petitioner's PCRA Petition is untimely, pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the parties are hereby notified of this Court's intention to deny Petitioner's PCRA 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.

By the Court,

Nancy L. Butts, President Judge

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NLB/jmh