

2016 PA Super 106

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

SAMUEL T. ROSS,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 2715 EDA 2015

Appeal from the PCRA Order August 17, 2015  
In the Court of Common Pleas of Montgomery County  
Criminal Division at No(s): CP-46-CR-0003055-1996

BEFORE: BENDER, P.J.E., DUBOW, J., and STEVENS, P.J.E.\*

CONCURRING OPINION BY BENDER, P.J.E.:

**FILED MAY 23, 2016**

I respectfully concur in the result reached by the Majority. However, I write separately to note that I do not believe the Majority's analysis under ***Teague v. Lane***, 489 U.S. 288 (1989), is appropriate in this context. Appellant's petition is clearly untimely, and he is attempting to prove the applicability of the exception set forth in 42 Pa.C.S. § 9545(b)(1)(iii). As this Court has declared,

Section 9545(b)(1)(iii) states, in relevant part: "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 [...] 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 [...]." 42 Pa.C.S.A. § 9545(b)(1)(iii) (emphasis added). Thus, in order to fit under this exception to

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\* Former Justice specially assigned to the Superior Court.

the PCRA's time bar, a PCRA petitioner must assert relief based on a constitutional right that **has been affirmatively recognized by either the United States Supreme Court or the Supreme Court of Pennsylvania.** [*Commonwealth v. Abdul-Salaam*, 571 Pa. [219,] [] 226, 812 A.2d [497,] [] 501 [(Pa. 2002)] (holding that for relief pursuant to § 9545(b)(1)(iii), the right asserted by the petitioner must be a constitutional right acknowledged by the Supreme Court of the United States [or] the Pennsylvania Supreme Court); **see also Commonwealth v. Copenhefer**, 596 Pa. 104, 110, 941 A.2d 646, 649 (2007).

***Commonwealth v. Chambers***, 35 A.3d 34, 43 (Pa. Super. 2011) (emphasis added by ***Chambers*** omitted; other emphasis added).

Here, the United States Supreme Court did not hold in ***Peugh v. United States***, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2072 (2013), that its decision applies retroactively, and the Court has not rendered any such holding since ***Peugh***. Additionally, the Pennsylvania Supreme Court has not held that ***Peugh*** applies retroactively. Accordingly, Appellant cannot satisfy the plain language of section 9545(b)(1)(iii), and I would affirm the post-conviction court's denial of his petition on that basis alone. Because I do not believe the Majority's analysis under ***Teague*** is necessary, I respectfully concur.