

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JEFFREY PETER THOMPSON,	:	
	:	
Appellant	:	No. 2471 EDA 2014

Appeal from the PCRA Order July 28, 2014
In the Court of Common Pleas of Chester County
Criminal Division No(s): CP-15-CR-0000964-2005

BEFORE: SHOGAN, MUNDY, and FITZGERALD, * JJ.

MEMORANDUM BY FITZGERALD, J.:

FILED JULY 31, 2015

Pro se Appellant, Jeffrey Peter Thompson, appeals from the order entered in the Chester County Court of Common Pleas dismissing his second Post Conviction Relief Act¹ ("PCRA") petition as untimely. He alleges his mental and physical disability should excuse the untimeliness of his petition, PCRA counsel was ineffective and the PCRA court erred by not holding an evidentiary hearing or setting aside his negotiated guilty plea. We affirm.

We adopt the facts and procedural history set forth in the PCRA court's decision. **See** PCRA Ct. Op., 10/21/14, at 1-2, 8-10. Appellant entered a negotiated guilty plea on October 3, 2006, and did not file a direct appeal.

* Former Justice specially assigned to the Superior Court.

¹ 42 Pa.C.S. §§ 9541-9546.

On June 12, 2014, *pro se* Appellant filed his second PCRA petition, which the court docketed on June 20, 2014. On June 25, 2014, *pro se* Appellant filed an amended PCRA petition, which the court docketed on June 30, 2014. Appellant alleged his petition is timely because his claim is based on facts previously unknown to him. Appellant's *Pro se* Amended PCRA Pet., 6/25/14, at ¶ 2. Appellant claims he has been mentally disabled since 1992, *id.* at ¶ 17, and thus his petition should be construed as timely filed. *Id.* at ¶ 22.

On July 3, 2014, the PCRA court issued a Pa.R.Crim.P. 907 notice, and Appellant filed a response raising no new issues. On July 28, 2014, the PCRA court dismissed Appellant's petition. Appellant timely appealed and timely filed a court-ordered Pa.R.A.P. 1925(b) statement.

Appellant raises the following issues:

The PCRA Court was remiss when it failed to make a credible determination on the "Newly Discovered Evidence", failed to develop any reasons for dismissal and for dismissing the petition without a hearing. Did this failure deny . . . Appellant the right to an appeal, correct any defects or supplement the record in support of the exception to the timebar?

The PCRA Court denied . . . Appellant his right to effective counsel when it became clear that the PCRA attorney was not advocating on Appellant's behalf, but instead was attempting to prove that . . . Appellant's claims were meritless in order to be granted to [sic] withdraw. Did this failure deny . . . Appellant the effective assistance of counsel on his first petition?

The PCRA Court erred when it failed to consider the limitations of a mentally and physically disabled *pro se*

Appellant and placed excessive burdon [sic] on . . . Appellant. Did the PCRA Court violate . . . Appellant's rights as a protected class when it; [sic] failed to broadly interpret . . . Appellant's right to relief and raised the stadard [sic] of due diligence and competency?

The PCRA Court was remiss for failing to set aside . . . Appellant's guilty plea that was motivated by a consitutionally [sic] defective confession, intimidated by threats to . . . Appellant and his family and was not entered into knowingly, voluntarily and intelligently. Is . . . Appellant entitled to withdraw his guilty plea where . . . Appellant claims actual innocence, the evidence shows the guilty plea is tainted, not factual and violated his constitutional rights?

Appellant's Brief at 4.

Before addressing the merits of Appellant's claims, our Supreme Court has required this Court to examine whether we have jurisdiction to entertain the underlying PCRA petition. **See Commonwealth v. Fahy**, 737 A.2d 214, 223 (Pa. 1999). "Our standard of review of a PCRA court's dismissal of a PCRA petition is limited to examining whether the PCRA court's determination is supported by the evidence of record and free of legal error." **Commonwealth v. Wilson**, 824 A.2d 331, 333 (Pa. Super. 2003) (*en banc*) (citation omitted). A PCRA petition "must normally be filed within one year of the date the judgment becomes final . . . unless one of the exceptions in § 9545(b)(1)(i)-(iii) applies and the petition is filed within 60 days of the date the claim could have been presented." **Commonwealth v. Copenhefer**, 941 A.2d 646, 648 (Pa. 2007) (internal citations and footnote omitted).

Jurisdictional time limits go to a court's right or competency to adjudicate a controversy. These limitations are mandatory and interpreted literally; thus, a court has no authority to extend filing periods except as the statute permits. Unlike a statute of limitations, a jurisdictional time limitation is not subject to equitable principles such as tolling except as provided by statute. Thus, the filing period is only extended as permitted; in the case of the PCRA, the time limitations are extended upon satisfaction of the exceptions found in § 9545(b)(1)(i)-(iii) and timely filing pursuant to (b)(2). As it has been established that the PCRA's time restrictions are jurisdictional, we hold that the period for filing a PCRA petition is not subject to the doctrine of equitable tolling, save to the extent the doctrine is embraced by § 9545(b)(1)(i)-(iii).

Fahy, 737 A.2d at 222 (citations omitted).

The three timeliness exceptions are:

(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)(i)-(iii).

"[S]ubsection (b)(1)(ii) does not require the petitioner to allege and prove a claim of 'after-discovered evidence.' Rather, it simply requires petitioner to allege and prove that there were 'facts' that were 'unknown' to

him and that he exercised 'due diligence.'" **Commonwealth v. Bennett**, 930 A.2d 1264, 1270 (Pa. 2007) (footnote omitted). "If the petitioner alleges and proves these two components, then the PCRA court has jurisdiction over the claim under this subsection." **Id.** at 1272. "The focus of the exception is on the newly discovered *facts*, not on a newly discovered or newly willing source for previously known facts." **Commonwealth v. Marshall**, 947 A.2d 714, 720 (Pa. 2008) (quotation marks and citation omitted).

Instantly, we review whether the PCRA court erred by holding Appellant's second PCRA petition was untimely. **See** 42 Pa.C.S. § 9545(b)(1); **Fahy**, 737 A.2d at 222. Appellant's judgment of sentence became final on November 2, 2006, thirty days after the trial court sentenced Appellant. Appellant filed the instant petition on June 12, 2014, almost eight years later. Thus, this Court must discern whether the PCRA court erred by holding Appellant did not plead and prove one of the three timeliness exceptions. **See** 42 Pa.C.S. § 9545(b)(1)(i)-(iii); **Copenhefer**, 941 A.2d at 648.

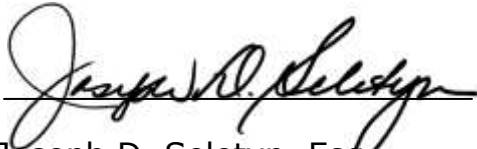
In this case, Appellant has not pleaded and proved any of the timeliness exceptions, particularly as he was aware of his mental disability in 1992, and thus this was known to him. Appellant's *Pro se* Amended PCRA Pet. at ¶ 17; **Bennett**, 930 A.2d at 1270. Accordingly, we agree with the PCRA court's determination that Appellant has not properly invoked one of

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the three timeliness exceptions. **See Copenhefer**, 941 A.2d at 648; **Fahy**, 737 A.2d at 223. Thus, the PCRA court lacked jurisdiction to consider his petition. **See Fahy**, 737 A.2d at 223. Having discerned no error of law, we affirm the order below. **See Wilson**, 824 A.2d at 333.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/31/2015

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
 vs. : CHESTER COUNTY, PENNSYLVANIA
 JEFFREY PETER THOMPSON : NO. CR-0000964-2005
 : CRIMINAL ACTION—PCRA

*Nicholas J. Casenta, Jr., Esquire, Chief Deputy District Attorney, for the Commonwealth
 Jeffrey Peter Thompson, Defendant, Pro Se*

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OPINION SUR RULE 1925 (a)

Before the Court is Defendant Jeffrey Peter Thompson's appeal from our summary denial of his *pro se* second PCRA Petition. Defendant filed his *pro se* second PCRA Petition, together with a separate packet of Exhibits in support thereof, on June 20, 2014. On June 26, 2014, we issued a Rule 907(1) Notice advising Defendant of our intention to dismiss his *pro se* second PCRA Petition without a hearing. On June 30, 2014, Defendant filed an Amended PCRA Petition.¹ Concerned that our Rule 907(1) Notice and Defendant's Amended PCRA Petition crossed in the mail and Defendant was not timely apprised of our intent to dismiss his second PCRA Petition without a hearing, we vacated our previous Rule 907(1) Notice and issued a new twenty (20) day Notice of

¹ Part of Defendant's amendments to his second PCRA Petition was his attempt to invoke the writ of *habeas corpus* as a measure of relief on the grounds that his PCRA claims were no longer available to him because of the PCRA's time limitations. In his Concise Statement, Defendant suggests that we erred by finding that his claims were ineligible for *habeas corpus* relief after determining that "none of said claims were cognizable under the PCRA". (Def't.'s Concise Statement, 9/12/14, at 1, para. 3). We never determined that Defendant's claims were not "cognizable" under the PCRA; we determined that they were time-barred. Accordingly, because case law holds that an application for writ of *habeas corpus* cannot be used to evade the timeliness requirements of the PCRA Act, *see Commonwealth v. Stout*, 978 A.2d 984 (Pa. Super. 2009); *Commonwealth v. Thompson*, No. 964-05, Notice of Intent to Dismiss Amended Second PCRA Petition (Chester July 2, 2014)(Sarcione, J.)(*citing Stout, supra*), we concluded that Defendant's attempt to invoke the remedy of *habeas corpus* was not a viable alternative available under the circumstances. We stand by that determination here.

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Intent to Dismiss Amended Second PCRA Petition on July 2, 2014. Defendant filed a Response in Opposition to our Notice of Intent to Dismiss on July 18, 2014. On July 28, 2104 we issued a final Order dismissing Defendant's second PCRA Petition.

Defendant filed a timely Notice of Appeal on August 21, 2014. On August 22, 2014 we issued an Order, pursuant to Pa. R.A.P. 1925(b), directing Defendant to file within twenty-one (21) days a Concise Statement of Errors Complained of on Appeal. Defendant filed a Concise Statement of Matters Complained of on Appeal on September 12, 2014, one day after the expiration of the twenty-one (21) day filing period provided for by Pa. R.A.P. 1925. However, Defendant's Concise Statement bore a postmark of September 9, 2014; consequently, under the Prisoner Mailbox Rule, his Concise Statement is deemed timely filed.

Defendant raises the following issues on appeal.

1. Did the PCRA Court err in finding that the Defendant is not entitled to Post Conviction Collateral Relief and that no purpose would be served by any further proceedings including his request for an evidentiary hearing?
2. Did the PCRA court err in finding that the Defendant's substantive claims were ineligible for Habeas Corpus relief after determining that none of said claims were cognizable under the PCRA?
3. Did the PCRA court err in not finding the mentally and physically disabled pro se Defendant abandoned by his appointed sentencing counsel who failed to file a requested Post Sentence Motion and/or Direct Appeal and his previous PCRA counsel for failing to raise appointed sentencing counsel's [sic] ineffectiveness and otherwise addressing the attorney abandonment issues?
4. Did the PCRA court err in dismissing the Defendant's PCRA petition without a hearing when Defendant submitted

evidence of attorney abandonment, breakdown in the process of the court and conduct by a third party under Pa. R.A.P. 105 while claiming a manifest injustice and actual innocence?

5. Did the PCRA court err in not applying the American's [sic] with Disabilities Act and the Rehabilitative Act (42 U.S.C. 12131 and 12132) when addressing the timeliness of the mentally and physically disabled pro se prisoner Defendant's petition?

6. Did the PCRA court err in failing to appoint counsel for the Defendant's second PCRA who is mentally and physically disabled, forcing the mentally and physically disabled Defendant to continue pro se?

7. Did the PCRA court err in dismissing the Defendant's claim that the mandatory life sentence violates his eighth and fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution as applied to mentally and physically disabled defendants?

8. Did the PCRA court err in failing to permit the Defendant to proceed Nunc Pro Tunc to address the issue of attorney abandonment?

9. Did the PCRA court err in refusing to set aside the Defendant's guilty plea that was primarily motivated by a constitutionally defective confession and was not entered voluntarily, knowingly and intelligently on the advise [sic] of the ineffective assistance of counsel?

10. Was previous PCRA counsel ineffective for failing to properly research Defendant's issues before declaring no merit and for failing to properly amend the Defendant's PCRA petition and otherwise comply with the applicable rules governing PCRA review?

(Def't.'s Concise Statement, 9/12/14, at 1-2). Having reviewed the record and the relevant jurisprudence, we are now prepared to make the following recommendations with respect to the merits of Defendant's appeal.

Preliminarily, we note the analytical standards to be applied to the present matter. On appeal from the denial of post-conviction relief, the appellate court is tasked

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with determining whether the ruling of the post-conviction court is supported by the record and free of legal error. *Commonwealth v. Cam Ly*, 980 A.2d 61 (Pa. 2009), *reargument denied*, 989 A.2d 2 (Pa. 2010); *Commonwealth v. Medina*, 92 A.3d 1210 (Pa. Super. 2014); *Commonwealth v. Lewis*, 63 A.3d 1274 (Pa. Super. 2013). See also *Commonwealth v. Williamson*, 21 A.3d 236 (Pa. Super. 2011)(when reviewing the propriety of an order dismissing a PCRA petition on timeliness grounds, the appellate court determines whether the decision of the trial court is supported by the evidence of record and free of legal error). The Superior Court's scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the PCRA court level. *Commonwealth v. Medina*, 92 A.3d 1210 (Pa. Super. 2014). The PCRA court's credibility determinations, when supported by the record, are binding on the Superior Court; however, the Superior Court will apply a *de novo* standard of review to the PCRA court's legal conclusions. *Commonwealth v. Medina*, 92 A.3d 1210 (Pa. Super. 2014). The Superior Court will treat the findings of the PCRA court with deference if the record supports those findings. *Commonwealth v. Feliciano*, 69 A.3d 1270 (Pa. Super. 2013). A post-conviction relief court's findings will not be disturbed on appeal unless there is no support for the findings in the certified record. *Commonwealth v. Lewis*, 63 A.3d 1274 (Pa. Super. 2013). See also *Commonwealth v. Williamson*, 21 A.3d 236 (Pa. Super. 2011)(the trial court's findings with regard to the timeliness of a PCRA petition will not be disturbed unless there is no support for those findings in the certified record). It is an appellant's burden to persuade the Superior Court that the PCRA court erred and that relief is due. *Commonwealth v. Feliciano*, 69 A.3d 1270 (Pa. Super. 2013).

Under section 9545 of the Post-Conviction Relief Act, 42 Pa. C.S.A. § 9541

et seq.,

- (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.

42 Pa. C.S.A. § 9545(b)(emphasis added); *Commonwealth v. Feliciano*, 69 A.3d 1270 (Pa. Super. 2013); *Commonwealth v. Lewis*, 63 A.3d 1274 (Pa. Super. 2013). It is the burden of a petitioner to plead in the PCRA petition exceptions to the time bar and that burden necessarily entails an acknowledgement by the petitioner that the petition under review is untimely but that one or more of the exceptions apply. *Commonwealth v.*

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Williamson, 21 A.3d 236 (Pa. Super. 2011). This burden must be carried by a preponderance of the evidence. *Commonwealth v. Ali*, 86 A.3d 173 (Pa. 2014), *Petition for Certiorari Filed* (June 18, 2014)(No. 13-10687, 13A1116)(trial court properly dismissed murder defendant's second PCRA petition as untimely, despite defendant's attempt to invoke entitlement to the exception set forth in 42 Pa. C.S.A. § (b)(1)(ii) on the grounds of mental incompetence during the statutory period for filing a first PCRA petition, where defendant did in fact file a timely first PCRA petition and his competence was explored during a *Grazier* hearing in connection with his first PCRA petition, and defendant did not otherwise establish his incompetence during the relevant time by the sufficient quantum of proof).

The PCRA's time restrictions are jurisdictional in nature. *Commonwealth v. Medina*, 92 A.3d 1210 (Pa. Super. 2014); *Commonwealth v. Lewis*, 63 A.3d 1274 (Pa. Super. 2013). Their purpose is to accord finality to the collateral review process. *Commonwealth v. Medina*, 92 A.3d 1210 (Pa. Super. 2014). See also *Commonwealth v. Morris*, 822 A.2d 684 (Pa. 2003), *habeas corpus granted in part on other grounds*, *Morris v. Beard*, 2007 WL 1795689 (E.D. Pa. 2007), *aff'd*, 633 F.3d 185 (3rd Cir. Pa. 2011)(one of the main purposes of the PCRA Act is to provide finality in criminal matters and the PCRA accomplishes this by striking a reasonable balance between the need for finality and the convicted person's need to demonstrate that there has been an error in the proceedings that resulted in his conviction). Unlike a statute of limitations, a jurisdictional time limitation is not subject to equitable principles such as tolling except as provided by statute. *Commonwealth v. Abu-Jamal*, 833 A.2d 719 (Pa. 2003), *cert. denied*, *Abu-Jamal*

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v. Pennsylvania, 124 S.Ct. 2173 (U.S. Pa. 2004). If a post-conviction petition is untimely, neither the Superior Court nor the post-conviction court has jurisdiction to address the substantive claims. *Commonwealth v. Feliciano*, 69 A.3d 1270 (Pa. Super. 2013); *Commonwealth v. Lewis*, 63 A.3d 1274 (Pa. Super. 2013). See also *Commonwealth v. Abu-Jamal*, 833 A.2d 719 (Pa. 2003), *cert. denied*, *Abu-Jamal v. Pennsylvania*, 124 S.Ct. 2173 (U.S. Pa. 2004)(a court may not examine the merits of a petition for post-conviction relief that is untimely). No one has jurisdiction to hear an untimely PCRA petition. *Commonwealth v. Medina*, 92 A.3d 1210 (Pa. Super. 2014); *Commonwealth v. Williamson*, 21 A.3d 236 (Pa. Super. 2011). This proscription holds true regardless of the merits of the claims set forth in the untimely petition. *Commonwealth v. Morris*, 822 A.2d 684 (Pa. 2003), *habeas corpus granted in part on other grounds*, *Morris v. Beard*, 2007 WL 1795689 (E.D. Pa. 2007), *aff'd*, 633 F.3d 185 (3rd Cir. Pa. 2011), and regardless of whether the claims assert challenges to the legality of sentence or constitutional and/or jurisdictional grounds for relief. See *Commonwealth v. Fahy*, 737 A.2d 214 (Pa. 1999), *subsequent habeas corpus proceeding deemed timely*, *Fahy v. Horn*, 240 F.3d 239 (3rd Cir. Pa. 2001), *cert. denied*, 122 S.Ct. 323 (U.S. Pa. 2001), *habeas corpus granted in part on other grounds, denied in part on other grounds*, 2003 WL 22017231 (E.D. Pa. 2003), *aff'd in part on other grounds, vac'd in part on other grounds*, 516 F.3d 169 (3rd Cir. Pa. 2008)(although legality of sentence is always subject to review within the PCRA, claims must still first satisfy PCRA's time limits or one of the exceptions thereto); *Commonwealth v. Seskey*, 86 A.3d 237 (Pa. Super. 2014), *reargument denied* (April 21, 2014)(court has no jurisdiction to entertain an untimely PCRA petition even where the petition sets forth a challenge to the legality of one's sentence); *Commonwealth v. Taylor*,

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933 A.2d 1035 (Pa. Super. 2007), *reargument denied* (November 7, 2007), *appeal denied*, 951 A.2d 1163 (Pa. 2008)(Superior Court affirmed trial court's dismissal of defendant's PCRA petition due to untimeliness despite the fact that defendant raised constitutional and jurisdictional issues). Finally, there is no "miscarriage of justice" exception to the timeliness requirements of the PCRA. See *Commonwealth v. Morris*, 822 A.2d 684 (Pa. 2003), *habeas corpus granted in part on other grounds*, *Morris v. Beard*, 2007 WL 1795689 (E.D. Pa. 2007), *aff'd*, 633 F.3d 185 (3rd Cir. Pa. 2011)(there is no separate miscarriage of justice exception to the timeliness requirements of the PCRA); *Commonwealth v. Fahy*, 737 A.2d 214 (Pa. 1999), *subsequent habeas corpus proceeding deemed timely*, *Fahy v. Horn*, 240 F.3d 239 (3rd Cir. Pa. 2001), *cert. denied*, 122 S.Ct. 323 (U.S. Pa. 2001), *habeas corpus granted in part on other grounds, denied in part on other grounds*, 2003 WL 22017231 (E.D. Pa. 2003), *aff'd in part on other grounds, vac'd in part on other grounds*, 516 F.3d 169 (3rd Cir. Pa.2008)(court has no jurisdiction to consider untimely petition for relief under PCRA even if petitioner makes a *prima facie* showing of miscarriage of justice).

Defendant pled guilty to second-degree Felony Murder (18 Pa. C.S.A. § 2502(b)) and Robbery (18 Pa. C.S.A. § 3701(a)(1)(i)) in connection with the February 12, 2005 bludgeoning death of 16-year-old Gregory Paschall. He had been charged with First-Degree Murder in the Information, a charge for which, had he been convicted, he would have been eligible for the death penalty. Instead, however, he was sentenced to life imprisonment pursuant to a negotiated agreement he entered into with the Commonwealth on October 3, 2006. He did not take an appeal. His Judgment of

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Sentence became final on November 2, 2006. Under the Post-Conviction Collateral Relief Act, Defendant would have had one (1) year from the date on which his Judgment of Sentence became final in which to file any PCRA Petition, whether it be a first PCRA Petition or a second or subsequent one. Thus, to be timely, Defendant would have had to file any PCRA Petition on or before November 2, 2007.

Defendant did not file his first PCRA Petition until October 2, 2009. We dismissed that Petition as untimely. The Superior Court affirmed on the grounds of PCRA untimeliness by decision dated January 5, 2011. Defendant unsuccessfully petitioned for *allocatur* with the Pennsylvania Supreme Court. Subsequently thereto, he filed a Petition for Writ of Habeas Corpus in Federal court. When that was denied, he unsuccessfully appealed to the Third Circuit and later filed a Petition for Writ of Certiorari with the United States Supreme Court. The United States Supreme Court denied his Petition on October 7, 2013. Defendant states he did not receive notice of this denial from the United States Supreme Court until June of 2014. This is of no moment, as the time limits governing petitions for PCRA relief in the state court are not tolled by the filing of a Federal petition for writ of habeas corpus. See *Commonwealth v. Fahy*, 737 A.2d 214 (Pa. 1999), *subsequent habeas corpus proceeding deemed timely*, *Fahy v. Horn*, 240 F.3d 239 (3rd Cir. Pa. 2001), *cert. denied*, 122 S.Ct. 323 (U.S. Pa. 2001), *habeas corpus granted in part on other grounds, denied in part on other grounds*, 2003 WL 22017231 (E.D. Pa. 2003), *aff'd in part on other grounds, vac'd in part on other grounds*, 516 F.3d 169 (3rd Cir. Pa. 2008); *Commonwealth v. Lewis*, 63 A.3d 1274 (Pa. Super.

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2013); *Commonwealth v. Lambert*, 765 A.2d 306 (Pa. Super. 2000), *aff'd*, 769 A.2d 1205 (Pa. 2000); *Commonwealth v. Phelan*, 12 D. & C.5th 188 (Lehigh 2010).²

Defendant did not file his second PCRA Petition until June 20, 2014, roughly six and one-half (6 ½) years after the one (1) year deadline under the PCRA Act had expired. The interim filing of his Federal petition for writ of habeas corpus does not toll the jurisdictional time limitations set forth in the PCRA Act. *Id.* Thus, Defendant's second PCRA Petition is facially untimely and cannot be saved unless he pleads and proves that one of the exceptions set forth in 42 Pa. C.S.A. § 9545(b)(1)(i)-(iii) apply. Defendant claims that subsection (ii) applies, namely, the due diligence exception, which provides, in conjunction with 42 Pa. C.S.A. § 9545(b)(3), that a facially untimely PCRA Petition will be excused if the facts on which it is based were unknown and could not have been discovered earlier with the exercise of due diligence and the petitioner files his PCRA petition within sixty (60) days after he discovers the heretofore unknown facts.

As part of his reliance on this particular timeliness exception, Defendant, citing *Commonwealth v. Cruz*, 852 A.2d 287 (Pa. 2004), claims that his mental and physical disabilities require that the parameters of the due diligence required by 42 Pa. C.S.A. § 9545(b)(1)(ii) be relaxed and extended for him.³ In *Commonwealth v. Cruz*, a defendant who pled guilty to three second-degree murder offenses and received a

² Given that Defendant did file a first PCRA Petition, which was denied as untimely, and that denial was never disturbed despite the numerous appeals that followed, we cannot countenance Defendant's claim that his first PCRA Petition should be disregarded and this present Petition be treated as a first PCRA petition.

³ Defendant's psychological diagnoses, according to his plea bargain as well as one of the Exhibits he submitted in connection with his second PCRA Petition, appears to be bipolar disorder and cocaine abuse, and his chief physical complaint appears to be sleep apnea. (See Written Guilty Plea, 10/03/06, at 4); (Verbal Guilty Plea Colloquy, 10/03/06, at 8-10).

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sentence of three consecutive life imprisonments filed a PCRA petition after the one year jurisdictional time bar set forth in the PCRA Act. *Commonwealth v. Cruz*, 852 A.2d 287 (Pa. 2004). The defendant claimed that a gunshot wound he suffered to his head, which was described as self-inflicted and reported by medical professionals to have essentially effected a frontal lobotomy of the Defendant's brain, impaired his ability to discover the facts essential to his PCRA claim in a timely fashion. *Id.* The Pennsylvania Supreme Court in *Cruz, supra* held that "mental incompetence, at the relevant times, if proven, may satisfy the requirements of Section 9545(b)(1)(ii), in which case, the claims defaulted by operation of that incompetence may be entertained."⁴ *Cruz*, 852 A.2d at 327 (emphasis in original). Critical to their conclusion, however, was the fact that it had been stated by plea counsel on the record at the plea colloquy that counsel knew that defendant had been considered "lobotomized" by his injury and that counsel himself described the defendant as "not able to express emotion and really discuss the facts of this case in any sort of sensible way", and yet there was no evidence on the record that

⁴ Defendant, in his second PCRA Petition and Amended second PCRA Petition, defines incompetence as "the inability to do something successfully." (Second PCRA Petition, 6/20/14, at 5-6, para. 22; Amended Second PCRA Petition, 6/30/14, at 5-6, para. 22). This is not the standard for incompetence. The standard for evaluating competence to file a PCRA Petition inquires as to "whether the defendant is able to understand the nature of the proceedings and able to communicate with and assist his counsel in the pursuit of collateral relief." *Commonwealth v. Zook*, 887 A.2d 1218, 1225 (Pa. 2005). The standard for evaluating competence to plead guilty, waive counsel, or stand trial is governed by the Mental Health Procedures Act, 50 P.S. § 7101 *et seq.*, which provides that

[w]henever a person who has been charged with a crime is found to be substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense, he shall be deemed incompetent to be tried, convicted or sentenced so long as such incapacity continues.

50 P.S. § 7402(a); *Commonwealth v. Puksar*, 951 A.2d 267, 268 (Pa. 2008)(citing *Godinez v. Moran*, 113 S.Ct. 2680 (U.S. Nev. 1993))(the competency standards for evaluating a criminal defendant's ability to stand trial and his ability to waive counsel and enter a plea are the same); *Commonwealth v. Fetzner*, 539 A.2d 890 (Pa. Super. 1988), *appeal denied*, 553 A.2d 965 (Pa. 1988)(an accused's competence to stand trial is governed by the Mental Health Procedures Act, 50 P.S. § 7101 *et seq.*).

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any competency evaluation had been performed upon the defendant. *Cruz*, 852 A.2d at 328.

There are several reasons why *Cruz, supra*, as well as Defendant's reliance upon section 9545(b)(1)(ii), do not salvage the instant case. First, at Defendant's guilty plea colloquy, this Court specifically inquired of plea counsel whether she had the Defendant's competency evaluated by professionals.

THE COURT: . . . Before I proceed further, counsel, in regards to your client's competency, can you place on the record whether or not your client is competent as defined under our laws of Pennsylvania? And that is incompetency is defined as a person who is substantially unable to understand the nature or object of the proceedings against him or her or is unable to participate and assist in his or her defense.

In regards to that definition of competency, can you place on the record your feelings in regards to how your client feels this morning in regards to his competency?

MS. BOYER: Your Honor, certainly this morning, there's no question that he is competent to proceed. He does have a history of mental illness and was, in fact, arrested while hospitalized at a psychiatric hospital the day after the murder.

I have had him evaluated independently and I have spoken to his treating physician at that hospital to make sure that there were no competency issues when he made the statement to the police or generally, and there have not been.

He has been given medication which is appropriate for his condition while at Chester County Prison. I've never had any difficulty with him understanding what I've been telling him or what the proceedings were about, and I am confident that he has been and is competent to proceed.

THE COURT: You're basing, besides your conversations with your client, but you had him examined by experts and you're confident that we can proceed?

MS. BOYER: I am.

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THE COURT: Thank you. Mr. Thompson, anything you didn't understand up until now?

THE DEFENDANT: No.

(Verbal Guilty Plea Colloquy, 10/3/06, N.T. 4-6). (See also Written Guilty Plea Colloquy, 10/03/06, at 4, 6; Verbal Guilty Plea Colloquy, 10/03/06 at 6-10). Defendant's competence was thoroughly explored prior to and during the plea colloquy. See also *Commonwealth v. Hoffman*, 780 A.2d 700 (Pa. Super. 2001)(mental illness is not one of the exceptions to the PCRA's jurisdictional time limits). No evidence of conflicting opinions of Defendant's competence were presented to the Court (Verbal Guilty Plea Colloquy, 10/3/06, N.T. 1-121), nor have they been presented yet. Further, the defendant in *Cruz, supra*, was missing part of his brain. There was no proof then, nor any allegation now, that Defendant is missing part of his. Indeed, at the time of Defendant's guilty plea, he had almost two (2) years of college under his belt, studying in the field of "political science" with a "concentration in law, computer science." (Verbal Guilty Plea Colloquy, 10/3/06, N.T. 6-7).

As the Pennsylvania Supreme Court recently stated in *Commonwealth v. Ali*, 86 A.3d 173 (Pa. 2014), *Petition for Certiorari Filed* (June 18, 2014)(No. 13-10687, 13A1116),

In order to prove that he was incompetent, the defendant must establish that he was either unable to understand the nature of the proceedings against him or unable to participate in his own defense.

Stated otherwise, the relevant question in a competency determination is whether the defendant has sufficient ability at the pertinent time to consult with counsel with a reasonable

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degree of rational understanding, and to have a rational as well as a factual understanding of the proceedings.

We extend great deference to the trial judge's determination as to competency because he or she had the opportunity to observe directly a defendant's behavior. Furthermore, we note that it is a proper exercise of the trial court's discretion to accept one expert witness's opinion over that of a conflicting opinion where the record adequately supports such a resolution.

Ali, 86 A.3d at 178 (quoting *Commonwealth v. Pruitt*, 951 A.2d 307, 316 (Pa. 2008), cert. denied, *Pruitt v. Pennsylvania*, 129 S.Ct. 1614 (U.S. Pa. 2009)(internal citations and quotation marks omitted)). In light of Defendant's demonstrated competence at his plea colloquy, and the particular facts of this case, which we will discuss presently, Defendant has not, and cannot, meet this burden.

Second, not only is Defendant unable to meet his burden to establish incompetence, the facts upon which Defendant's present claims are predicated were known to the Defendant during the one year following the date on which his Judgment of Sentence became final. Defendant claims that plea counsel did not file post-sentence motions or a direct appeal on his behalf. Defendant claims he was supposed to have a meeting with plea counsel on October 18, 2006 to discuss his direct appeal rights and other remedies. He says this meeting never occurred. Defendant would have known this meeting did not occur as of October 18, 2006. Without ever having been asked by counsel to sign a verification for his direct appeal, and having received no copies of any post-sentence motion or direct appeal from counsel by November 2, 2006, and no court notices for any briefing or argument dates, we would respectfully submit that a reasonable person, even one who is mentally ill, albeit not incompetent, would know from

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these circumstances, within the one year PCRA filing deadline, that no post-sentence motion or direct appeal had been filed on his behalf. Further, Defendant could have timely requested a copy of the docket in the above-captioned matter, either from the Clerk of Courts, or the undersigned, if he wanted to confirm whether a post-sentence motion or direct appeal had been filed.⁵ The dockets are also capable of being checked online and have been so available for many years. Defendant claims his mental illness prevented him from filing a timely PCRA. Defendant knew he had a mental illness at the time he pled. (See Written Guilty Plea Colloquy, 10/03/06, at 4; Verbal Guilty Plea

⁵ Defendant's claim that the Clerk of Courts ignored his letter requests for copies of his docketing statements is a red herring. From the Exhibits he filed in connection with the present second PCRA Petition, Defendant's first letter to the Clerk of Courts requesting a copy of his docketing statement was mailed on or about June 25, 2007, roughly eight (8) months after his sentencing and far beyond his direct appeal period. Further, Defendant did not make this Court aware prior to the instant PCRA Petition that he had any difficulty in obtaining requested items from any of our row offices. Similarly, Defendant's complaints about the prison's alleged mishandling of legal mail and his alleged difficulty in having certain attorney phone numbers verified by the prison and recognized as authorized contacts strings the Court along another fruitless primrose path. Defendant's Exhibits do not demonstrate that prison officials failed to deliver any legal mail. He has attached no internal prisoner complaint to prison officials that any specific item related to this, or any, litigation was improperly handled. There are certainly no indications that any items pertinent to these proceedings were not timely delivered by prison officials. Further, he has not demonstrated how his alleged inability to have certain phone numbers, allegedly of attorneys, albeit ones who never entered their appearance herein at any time, verified by the prison in order to be considered authorized contacts has or had any bearing on his ability to meet the timeliness requirements of the PCRA Act. He has not alleged or demonstrated that either his plea counsel or his appointed first PCRA counsel were inaccessible by phone. He certainly has not established that they were inaccessible by mail. He does not indicate at all how the phone numbers which, according to his Exhibits, could not be verified by the prison had or have any impact on his ability to have filed a timely PCRA Petition within one (1) year of the date on which his Judgment of Sentence became final. In fact, the only Exhibit showing that the prison was arguably unable to verify an attorney phone number is one which is dated December 30, 2013, far beyond the one (1) year time frame allowed for filing timely PCRA petitions. Additionally, the only Exhibit demonstrating that he complained about a phone number not being on his "list" is dated May 27, 2008, again far beyond the one (1) year period allotted to defendants by statute to file a timely PCRA Petition. Moreover, that number, according to the Defendant's Exhibits, belongs to his brother, not his counsel. Furthermore, all of the Commonwealth's state prisons have standardized forms available to inmates to get the PCRA process started. There is no need to call anyone in order to file a PCRA Petition. On first petitions, counsel is automatically appointed. In order for Defendant to obtain relief on the grounds that his receipt of legal mail or his ability to consult with his attorneys was disrupted, we would respectfully submit that he is, or should be, required to tie such disruption to the present case. He has not done this. Further, his reference to the fact that his issue concerning the prison's alleged mishandling of his legal mail was the subject of a Federal Court inquiry in his Federal civil case does not prove his right to relief; the Federal Court may have examined Defendant's claims, but they denied his suit, leading the undersigned to conclude that our colleagues on the Federal Bench similarly found material deficiencies in Defendant's claims.

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Colloquy, 10/03/06, at 1-10). He had also been evaluated for his competency, and therefore would have known as of the date of his plea, when it was explored with him on the record, the legal effect of his mental health diagnoses.

Third, Defendant filed a previous PCRA petition roughly five years ago. The Court appointed counsel to represent the Defendant. As the record from Defendant's appeal of that matter shows, Defendant communicated to PCRA counsel that he suffered from a mental disability and had been receiving Social Security Disability since 1996. (See Letter dated 5/14/10 from Defendant to Robert P. Brenza, Esquire, para. 5). He also communicated to PCRA counsel on at least two occasions about the missed meeting with plea counsel on October 18, 2006. (See Letter dated 10/22/09 from Defendant to Robert P. Brenza, Esquire; Letter dated 5/14/10 from Defendant to Robert P. Brenza, Esquire). He filed several responses to PCRA counsel's *Finley* letter and this Court's Rule 907(1) Notice, but never objected to PCRA counsel's stewardship on the basis that PCRA counsel did not assert incompetency as an excuse for Defendant's untimely first PCRA petition. We would respectfully submit that, under these circumstances, Defendant has waived his ability to use his alleged incompetence as an excuse to justify this present untimely petition, as it could have been raised, along with his issue concerning counsel's failure to file a direct appeal, in a prior proceeding, but was not. See 42 Pa. C.S.A. § 9544(b) ("For purposes of this subchapter, an issue is waived if 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.").

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Fourthly, and to the extent that the waiver argument implicates first PCRA counsel's effectiveness, we note that Defendant has not lain dormant over the course of the last nine years. He filed a PCRA petition previously, albeit an untimely received representation from counsel. When this Court allowed PCRA counsel to withdraw from representation and denied Defendant's first PCRA Petition, Defendant appealed to the Pennsylvania Superior Court *pro se*. He then filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. When all of these avenues for relief were denied, he filed a Petition for Writ of Habeas Corpus in the Federal court. Correspondence from a Staff Attorney for the Pennsylvania Institutional Law Project regarding this Habeas, which correspondence Defendant filed with the undersigned on June 20, 2014 in connection with his second PCRA Petition, indicates that Defendant had yet another counsel representing his interests in his Federal matter. Defendant appealed the denial of his Federal Habeas to the Third Circuit, unsuccessfully. He then sought *certiorari* with the United States Supreme Court, again, unsuccessfully. It is not likely that throughout all of these proceedings, with different counsel and different tribunals, beginning in 2009 and lasting over the course of the last five (5) years, that Defendant was incompetent and no one picked up on it. Similarly, it is highly suspect that he was incompetent only during the three years between his sentence and his first *pro se* PCRA and conveniently regained his competence in 2009 to renew his legal challenges, which did not then contain any allegation of incompetence. He should not be countenanced to claim incompetence only when it suits him. Along the same vein, we note that his filings are not the ramblings of a delusional or disordered mind. They are well written, meticulous, and cogent. Defendant's allegation that he was so mentally ill that he could not perceive

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the factual bases for a PCRA Petition or the need to file in a timely fashion rings hollow, particularly in light of the fact that much of his litigation with respect, at the very least, to his first PCRA Petition was conducted *pro se*. He has demonstrated unequivocally that he is and has been at all relevant times quite capable of navigating the criminal justice system. Finally, Defendant has neither alleged nor demonstrated that at any time over the last nine years he has been involuntarily committed to a psychiatric facility by the prison, although he has been incarcerated the entire time and prison staff would be in a position to observe his mental acuity in their daily interactions with him. *Cf. Commonwealth v. Haag*, 809 A.2d 271 (Pa. 2002), *cert. denied*, *Haag v. Pennsylvania*, 123 S.Ct. 2277 (U.S. Pa. 2003)(where prison initiated involuntary commitment proceedings with respect to incompetent defendant).

For all of the foregoing reasons, we would respectfully submit that Defendant's PCRA Petition is untimely and neither *Cruz, supra* nor the due diligence exception to the PCRA's timeliness requirements shield him from the consequences thereof, as Defendant has not raised a genuine issue concerning his competence at any relevant time over the course of the last nine years and all of the facts forming the basis of Defendant's present second PCRA Petition were either known or knowable to him, with the exercise of due diligence, even when his mental illness and physical infirmities are taken into consideration.⁶ See *Commonwealth v. Hoffman*, 780 A.2d 700 (Pa. Super.

⁶ We have found no support for Defendant's proposition that the Americans with Disabilities Act and the Rehabilitative Act require that the Pennsylvania PCRA Act's jurisdictional time restrictions be tolled for a person who has a mental or physical disability that does not rise to the level of incompetence or that such persons are, as an automatic function of their condition, entitled to receive free counsel for the purpose of filing serial PCRA Petitions. There is no tolling of the PCRA Act's time restrictions other than the three grounds provided for by 42 Pa. C.S.A. § 9545(b)(1)(i)-(iii). *Commonwealth v. Abu-Jamal*, 833 A.2d 719 (Pa. 2003), *cert. denied*, *Abu-Jamal v. Pennsylvania*,

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2001)(mental illness is not one of the exceptions to the PCRA's jurisdictional time-bar). Because Defendant's present second PCRA Petition was not timely filed, this Court has no jurisdiction to entertain it.⁷ Accordingly, because no genuine issue of material fact was raised as to the timeliness of Defendant's present second PCRA Petition, we would respectfully submit that it was appropriate for this Court to dismiss Defendant's PCRA Petition without a hearing.⁸ See *Commonwealth v. Keaton*, 45 A.3d 1050 (Pa. 2012)(a PCRA petitioner is not entitled to an evidentiary hearing as a matter of right, but only where the petition presents genuine issues of material fact; a trial court's decision with respect to whether a hearing should be held is reviewed for abuse of discretion). Consequently, we would respectfully submit that Defendant's appeal has no merit and

124 S.Ct. 2173 (U.S. Pa. 2004). See also *Commonwealth v. Hoffman*, 780 A.2d 700 (Pa. Super. 2001)(mental illness is not one of the exceptions to the PCRA's jurisdictional time limits). Thus, even his claim that he should have been permitted to file *nunc pro tunc* is dubious, because that type of relief is not expressly provided for by 42 Pa. C.S.A. § 9545(b)(1)(i)-(iii). However, to the extent that it may be claimed that a request for *nunc pro tunc* relief falls under 42 Pa. C.S.A. § 9545(b)(1)(i), regarding governmental interference, Defendant is still not entitled to relief. He has not demonstrated that any governmental interference occurred in this matter or that any governmental interference prevented him from filing a timely PCRA Petition. Indeed, he raised the argument of governmental interference in his first PCRA Petition and was soundly rejected by the undersigned and the appellate courts. Consequently, we would also suggest that, besides being unsupported by the facts, Defendant's claim of governmental interference has been previously litigated within the meaning of 42 Pa. C.S.A. §§ 9543(a)(3) and 9544(a).

⁷ Because of our determination that Defendant's second PCRA Petition was not timely filed, we need not get into the arguments Defendant has raised in paragraphs (3), (4), (7), (9), and (10) of his Concise Statement of Matters Complained of on Appeal, as these pertain to his underlying substantive PCRA claims which we do not, as a result of his untimeliness, have the jurisdiction to consider. We would respectfully submit that we have addressed all of the remaining issues in Defendant's Concise Statement which do pertain to our determination of the timeliness of Defendant's second PCRA Petition and our decision not to appoint counsel for him in connection therewith.

⁸ Similarly, with respect to Defendant's claim that he should have been given appointed counsel for his second PCRA Petition, we note that the Rules of Criminal Procedure relating to post-conviction petitions allow counsel to be appointed for a defendant in connection with a second or subsequent PCRA petition only if an evidentiary hearing is necessary or the interests of justice otherwise require it. Pa. R.Crim.P. 904(D), -(E). For all of the reasons stated herein, we would respectfully submit that Defendant was not entitled to the appointment of counsel in connection with his second PCRA Petition because no evidentiary hearing was necessary and, without any evidence or even legitimate suggestion of incompetence, the interests of justice do not require it.

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would respectfully recommend that this Honorable reviewing Court affirm our Order dated July 28, 2014 and deny and dismiss Defendant's appeal.

BY THE COURT:

10/24/14
Date

Anthony A. Sarcione
Anthony A. Sarcione, J.