 Appendix A

**CLD-085** **February 4, 2021**

**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

C.A. No. **20-2782**

SHALAMAR CARMON, Appellant

v.

SUPERINTENDENT SCI FAYETTE, ET AL.

(E.D. Pa. Civ. No. 5-19-cv-06113)

Present: RESTREPO, MATEY and SCIRICA, Circuit Judges

Submitted is appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

ORDER

Carmon's application for a certificate of appealability is denied. See 28 U.S.C. § 2253(c). For substantially the reasons given by the Magistrate Judge, jurists of reason would agree without debate that the District Court correctly dismissed Carmon's 28 U.S.C. § 2254 petition as time barred, and that Carmon was not entitled to equitable tolling nor any other alteration to the filing deadline. See Holland v. Florida, 560 U.S. 631, 649–50 (2010) (allowing equitable tolling where extraordinary circumstances prevented timely filing despite a petitioner's reasonable diligence); see also McQuiggin v. Perkins, 569 U.S.

383, 386 (2013) (holding that "actual innocence" is a "gateway through which a petitioner may pass" when seeking relief in an otherwise untimely petition).

By the Court,

s/Paul B. Matey
Circuit Judge

Dated: March 4, 2021
CLW/cc: Mr. Shalamar Carmon

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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|---|---|---|
| SHALAMAR CARMON,<br>Petitioner, | : | CIVIL ACTION |
| v. | : | |
| J. LANE, et al.,<br>Respondents. | : | NO. 19-6113 |

**ORDER**

**AND NOW**, this 10th day of August , 2020, upon careful and independent consideration of the pleadings and available state court records, and after review of the Report and Recommendation of United States Magistrate Judge David R. Strawbridge, it is **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;

2. The petition for a writ of habeas corpus is **DISMISSED**;

3. A certificate of appealability **SHALL NOT** issue, in that the Petitioner has not made a substantial showing of the denial of a constitutional right nor demonstrated that reasonable jurists would debate the correctness of the procedural aspects of this ruling. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); and

4. The Clerk of the Court shall mark this case **CLOSED** for statistical purposes.

BY THE COURT:

s/ J. Curtis Joyner

J. CURTIS JOYNER, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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|---|---|---|
| SHALAMAR CARMON,<br>Petitioner, | : | CIVIL ACTION |
| v. | : | |
| J. LANE, et al.,<br>Respondents. | : | NO. 19-6113 |

**REPORT AND RECOMMENDATION**

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE March , 2020

Before the Court for Report and Recommendation is the *pro se* petition of Shalamar Carmon ("Carmon" or "Petitioner") for the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. His petition challenges the first-degree murder conviction obtained against him on October 3, 2006 in the Lehigh County Court of Common Pleas. (Doc. 3 at ECF p. 1.) He seeks habeas relief on what he sets out as three grounds, all of which relate to the situation that he was charged by information with the general offense of "criminal homicide" but convicted of what he considers to be "the separate and distinct offense of murder of the first degree." (*Id.* at ECF p. 17.)

As we set out below, we have determined that Carmon's petition is untimely. Accordingly, we recommend that it be dismissed.

## I. FACTUAL AND PROCEDURAL BACKGROUND[1]

Carmon was arrested on August 2, 2004 and charged with criminal homicide, 18 Pa. Cons. Stat. § 2501, in the July 24, 2004 killing of Jason Fritchman. He was tried before a jury and found

1 The chronology described in this Report and Recommendation is derived from the various attachments to the petition (Doc. 3), including the PCRA Court's 1925(a) Opinion dated 5/10/2018 *(continued ...)*

guilty on October 3, 2006. The docket reflects that the trial judge docketed on that same date a "First Degree Murder Sentencing Verdict Slip (Jury)" and that it sentenced Carmon on that date to confinement for "The Rest of Your Natural Life." (CP Ct. Dkt. at 1-3, 13-14.) Carmon filed post-trial motions and an appeal in which he asserted that the conviction was not supported by sufficient evidence and was against the weight of the evidence. (Pet., Doc. 3, at ECF p. 2.) The Superior Court, however, affirmed the judgment of conviction, *Commonwealth v. Carmon*, 947 A.2d 822 (Pa. Super. Ct. Jan. 4, 2008) (Table), and the Pennsylvania Supreme Court denied allowance of appeal on June 26, 2008. *Id.*, 951 A.2d 1160 (Pa. June 26, 2008) (Table). He did not seek further review by the United States Supreme Court. (Pet., Doc. 3, at ECF p. 3.)

Carmon then embarked upon a lengthy post-conviction litigation journey in state court. He first filed a timely *pro se* petition under the Post Conviction Relief Act ("the PCRA") on or about June 3, 2009. Counsel was appointed and filed an amended petition, alleging ineffective assistance of pretrial and trial counsel for failing to seek suppression of identification testimony and for failing to object to the introduction of photographs of the crime scene. (PCRA Ct. Opin. at 2.) On June 11, 2010, following an evidentiary hearing, the court denied and dismissed the petition. The Superior Court affirmed the dismissal, and the Pennsylvania Supreme Court denied allowance of

("PCRA Ct. Opin.") (Doc. 3 at ECF pp. 18-22) and the Superior Court opinion that followed on 12/5/2018 ("Super. Ct. Opin.") (Doc. 3 at ECF pp. 23-27); the documentation of Carmon's conviction and appeals catalogued by Westlaw; and the publicly-available criminal and appellate dockets maintained by The Unified Judicial System of Pennsylvania Web Portal for No. CP-39-CR-0003283-2004 ("CP Ct. Dkt.") (last visited Mar. 10, 2020).

As we set forth below, we determined that this petition could be resolved on procedural grounds without requiring the Court of Common Pleas to provide us its complete record. We rely upon the online docket and the description of those events provided in the state court opinions cited above for our understanding of the critical events in state court.

appeal on September 14, 2011. *Commonwealth v. Carmon*, 29 A.3d 830 (Pa. Super. Ct. Apr. 12, 2011) (Table); *id.*, 29 A.3d 370 (Pa. Sept. 14, 2011) (Table).

Carmon next filed in the Court of Common Pleas on January 30, 2012 a document characterized as a "Pro Se Writ of Habeas of Ad Subjiciendum." The court denied relief on February 21, 2012.[2] (CP Dkt. at 22-23.) The Superior Court affirmed and the Pennsylvania Supreme Court denied allowance of appeal on June 19, 2013. *See* Pa. Super. Ct. No. 964 EDA 2012; Pa. S. Ct. No. 77 MAL 2013. Carmon's next petition, for a writ of habeas corpus, was docketed on June 5, 2015 in the Civil Division of the Court of Common Pleas. He asserted that he was confined unlawfully due to the invalidity of his sentencing order, which he alleged cited to 18 Pa. Cons. Stat. § 2501 and not § 1102(a), the section that provides for a minimum sentence of life for conviction of first-degree murder. The court dismissed the petition on the grounds that the PCRA subsumes the writ of habeas corpus and where the petition was untimely under the PCRA. The Superior Court affirmed, and on August 10, 2016 the Pennsylvania Supreme Court denied review. *See Carmon v. Coleman,* No. 2195 EDA 2015, 2016 WL 834312 (Pa. Super. Ct. Mar. 3, 2016); Pa. S. Ct. No. 212 MAL 2016.

At the same time that Carmon was pursuing his civil habeas corpus petition in state court, he also undertook efforts in 2016 to obtain transcripts of his sentencing proceeding. (CP Dkt. at 24-26.) On December 12, 2016, he filed another PCRA petition, claiming he was being held illegally "because there [was] no statute given by the court order, related to [his] sentencing proceeding, that ever had the lawful authority to give the Department of Corrections any power to enforce any provisions remotely close to accepting, confining and depriving [him] of his liberty in

2 Later state court opinions described this filing as having been construed as a PCRA petition that was deemed untimely.

any way...." *Commonwealth v. Carmon*, No. 549 EDA 2017, 2017 WL 6015782 (Pa. Super. Ct. Dec. 5, 2017) (appending Common Pleas Court opinion of Feb. 27, 2017, quoting PCRA Pet. at 19). The PCRA Court dismissed the petition as untimely on January 23, 2017, and the Superior Court affirmed the dismissal on December 5, 2017. *Id.*

A few months later, on February 22, 2018, Carmon filed another *pro se* PCRA petition. In this petition, he asserted – as he does in his petition to our Court – that the trial court lacked subject matter jurisdiction to convict him of first-degree murder where the criminal information filed by the Commonwealth charged him instead with "criminal homicide." (Super. Ct. Opin. at 2 [appended to Pet., Doc. 3], citing *Pro Se* PCRA Pet., 2/22/2018, at 10.) The PCRA Court gave notice of its intent to dismiss the petition without a hearing, to which Carmon responded. Nonetheless, the court dismissed the petition on March 28, 2018 on the grounds that it was untimely. (PCRA Ct. Opin. at 3 [appended to Pet., Doc. 3].) The Superior Court affirmed the dismissal on December 5, 2018, rejecting Carmon's contention that a challenge to the subject matter jurisdiction of the trial court could be presented to a PCRA Court at any time. (Super. Ct. Opin. at 3-4.) The court also noted that even if Carmon had pleaded and proved a timeliness exception allowing his claim to be considered, the claim had no merit.[3] (*Id.* at 4 n.2.) He sought allowance of appeal in the Pennsylvania Supreme Court but his request was denied. *Commonwealth v. Carmon*, 217 A.3d 206 (Pa. Aug. 20, 2019).

3 The court noted that a defendant is entitled to formal and specific notice of the crimes charged, and that Carmon was formally charged with one count of criminal homicide. The court cited one of its precedents in which it determined that "[a]n information need not specify the degrees of homicide or manslaughter in order to sustain a second-degree murder conviction," *Commonwealth v. Chambers*, 852 A.2d 1197, 199 (Pa. Super. Ct. 2004), concluding that Carmon "would not be entitled to relief." (Super. Ct. Opin. at 4 n.2.)

On or about December 12, 2019, Carmon submitted the *pro se* § 2254 habeas petition that was received and docketed on December 23, 2019 and is presently before the Court. He contends in Ground One that he was denied due process of law, allegedly in violation of the Sixth Amendment, where "the information he was confronted with, was a vague written statement of dispensable [sic] facts that kept the nature of the accusation against Petitioner ambiguous." (Doc. 3 at ECF p. 17.) In support of this ground, he asserts that "[t]he facts framing the information Petitioner was confronted with, alleging one count of the general offense of criminal homicide, is capable of being interpreted in more than one way." (*Id.*) In Ground Two he alleges another due process claim, again relating to the Sixth Amendment, "on the grounds that, for one count of the general offense of criminal homicide, the information failed to state the specific offense charged under the statute Petitioner was alleged to have violated." (*Id.*) He noted that the information cited 18 Pa. Cons. Stat. § 2501 for one count of the general offense of criminal homicide and argued that it "failed to give the official or customary statute under the separate and distinct offense of murder, voluntary manslaughter, or involuntary manslaughter that Petitioner was alleged to have violated." (*Id.*) Finally, he asserted in Ground Three that he was denied due process of law "in violation of the 14th amend[ment] ... on the grounds that he was convicted upon a charge not made." (*Id.*) He again asserts that he was "formally charged with one count of criminal homicide, generally, under 18 Pa. Cons. Stat. § 2501, but was specifically convicted of the separate offense of murder of the first degree," which is found in § 2502(a). (*Id.*) He asks the Court to "[v]acate the void judgment of conviction," so that he may be released from state custody. (*Id.* at ECF p. 15.) Where asked on the form to "explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d)[4] does not bar [his] petition," Carmon responded:

4 That statutory provision is reprinted in full in the form petition. *See* Pet. at ECF p. 15.

> Pursuant to Fed. R. Crim. P. 12(b)(3)(B), a defendant is permitted to move for dismissal of an indictment at any time if it lacks specificity or fails to state an offense; and A [sic] person may not be punished for a crime without a formal and sufficient accusation.

(Pet. at ECF p. 14.)

On January 28, 2020, the Honorable J. Curtis Joyner referred this matter for preparation of a Report and Recommendation. With the materials before us, we were able to determine that it would not be necessary to require an answer to the petition from the Lehigh County District Attorney or to obtain he original state court record from the Court of Common Pleas. For the reasons set forth below, we recommend that the petition be summarily dismissed.

## II. STANDARD OF REVIEW

With respect to habeas petitions generally, the statute ordinarily requires the reviewing court to order a response from a named respondent upon receipt of a habeas application. This process does not apply, however, where it is apparent on the face of the pleading itself that the petitioner cannot obtain habeas relief. *See* 28 U.S.C. § 2243 (describing requirement for answer by respondents "unless it appears from the application that the applicant or person detained is not entitled" to habeas relief).

Similarly, Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts provides that the district court, upon receipt of a habeas petition, must promptly examine it, and, "[i]f [upon examination] it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge **must** dismiss the petition and direct the clerk to notify the petitioner." Rule 4 (emphasis added). Rule 4 further states that a judge must order the respondent to file an answer only "[i]f the petition is not dismissed ...." *Id.* The plain language of the rule thus makes clear that where it is apparent from the face of the

pleading that the petitioner will not prevail, the petition must be dismissed without ordering the respondent to answer. The Advisory Committee Notes to the rule confirm this interpretation, recognizing that "under § 2243 it is the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." Advisory Committee Note to Rule 4 Governing Section 2254 Cases.

Numerous courts within our Circuit have followed this interpretation and have dismissed habeas petitions upon an initial screening. *See, e.g., Parker v. Tritt*, Civ. A. No. 15-5167, 2016 WL 392675 (E.D. Pa. Jan. 12, 2016) (Strawbridge, M.J.), *rep. & recomm. adopted*, 2016 WL 366900 (E.D. Pa. Jan. 28, 2016) (Beetlestone, J.), *cert. of appealability denied*, No. 16-1416 (3d Cir. July 12, 2016); *Alexander v. Corbin*, Civ. A. No. 11-2727, 2011 WL 5340568 (E.D. Pa. Sept. 28, 2011), *rep. & recomm. adopted*, 2011 WL 5357828 (E.D. Pa. Nov. 3, 2011); *Shaw v. Wynder*, Civ. A. No. 08-1863, 2008 WL 3887642 (E.D. Pa. Aug. 20, 2008); *Craig v. Rozum*, Civ. A. No. 07-5490, 2008 WL 920346 (E.D. Pa. Apr. 2, 2008); *Watson v. Wynder*, Civ. A. No. 07-4066 (E.D. Pa. Nov. 27, 2007). *See also Allen v. Perini*, 424 F.2d 134, 140-41 (6th Cir. 1970) (determining that a reviewing federal habeas court "has a duty to screen out a habeas corpus petition which should be dismissed for lack of merit on its face. No return is necessary when the petition is frivolous, or obviously lacking in merit, or where, as here, the necessary facts can be determined from the petition itself without need for consideration of a return.").

## III. DISCUSSION

Carmon cannot obtain federal review of his claims and habeas relief from his petition without satisfying certain procedural requirements. We here address the statute of limitations applicable to § 2254 petitions and consider how that statute applies to Carmon's petition. In light of the determination that we set forth below, we do not find it necessary to address the merits of

his inter-related claims, which do not appear viable as a matter of law.[5] We conclude that Carmon's petition may be summarily dismissed as untimely.

**A. Statute of limitations**

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), legislation that pre-dates Petitioner's convictions, imposed a one-year period of limitations for the filing of an application for a writ of habeas corpus. The statute provides:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

[5] We are unaware of any court accepting the proposition that a criminal defendant's constitutional rights are violated where he is initially charged generally with criminal homicide but later convicted by a jury, upon sufficient evidence as a matter of law, of first-degree murder.

Our district's form habeas petition reproduced this statutory text for Petitioner's benefit. (Pet. at ECF p. 15.) It also provided an opportunity for him to "explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar [his] petition." (*Id.* at ECF p. 14.) As noted above, his response purported to cite Fed. R. Crim. P. 12(b)(3)(B) for the proposition that "a defendant is permitted to move for dismissal of an indictment at any time if it lacks specificity or fails to state an offense." (Pet. at ECF p. 15.) He did not otherwise address the application of 28 U.S.C. § 2244(d) or any of its provisions to his petition.

Carmon misapprehends which rules apply to his federal challenge to his state conviction. As a state prisoner seeking federal habeas review pursuant to 28 U.S.C. § 2254, he is bound by the Federal rules of *Civil* Procedure and the Rules Governing 2254 Habeas Cases that are found following § 2254 in volume 28 of the United States Code. The Federal Rules of *Criminal* Procedure apply to the federal prosecutions in the U.S. district courts, *e.g.*, prosecutions pursued by the United States Attorney's Office. *See generally* Fed. R. Crim. P. 1. Carmon was not indicted in a federal district. His invocation of Fed. R. Crim. P. 12(b)(3)(B) is inapposite.

**1. Commencement of the limitations period**

When we apply 28 U.S.C. § 2244(d), it is apparent that Carmon's petition does not meet the criteria. We first evaluate which subsection of § 2244(d)(1) dictates the start of the limitations period. Carmon's petition as a whole does not suggest the applicability of subsections (B), (C), or (D) of § 2244(d)(1). He does not contend that a new law or newly-discovered facts affected the propriety of his conviction or sentence. Rather, he asserts that there was a defect in his charging document and in his conviction based on the statutory provisions referring to homicide and first-degree murder. *See* Pet. at ECF p. 17. He states in his petition that he did not bring these claims in his direct appeal because he "was unaware of such Constitutional violations." (Pet. at ECF pp.

6, 8, 9.) Claims based upon those facts, however, were available to him, and there is no reason to believe that the basis for these claims could not have been "discovered through the exercise of due diligence" prior to 2018, when he first articulated them in a PCRA petition. *See* 28 U.S.C. § 2244(d)(1)(D).

We conclude that the commencement of the limitations period is determined by § 2244(d)(1)(A), which refers to the "conclusion of direct review or the expiration of the time for seeking such review." In Carmon's case, his conviction of October 3, 2006 was affirmed by the Pennsylvania Superior Court and his timely request for allowance of appeal was denied by the Pennsylvania Supreme Court on June 26, 2008. *See* 951 A.2d 1160. He then had a period of 90 days in which to seek *certiorari* in the United States Supreme Court to extend the direct review process. As he did not, however, his conviction became final upon the expiration of that 90-day period, on September 24, 2008. The federal limitations period thus began to run on September 25, 2008.

**2. Statutory tolling**

Pursuant to § 2244(d)(2), the AEDPA limitations period was tolled during the pendency of his first PCRA litigation, which he timely initiated on or about June 3, 2009. That action remained pending in state court until the Pennsylvania Supreme Court denied allowance of appeal on September 14, 2011. Inasmuch as 251 days of the one-year AEDPA limitations period had already elapsed before Carmon sought PCRA relief, only 114 days remained after the conclusion of the PCRA litigation for him to file a timely § 2254 petition, absent any other period of tolling. Thus, he had to file by January 6, 2012. He failed to do so.

Carmon filed his federal habeas petition on December 12, *2019*, almost eight years later. His filing is untimely under the statute.

### 3. Equitable tolling

The United States Supreme Court has recognized that, notwithstanding the statutory tolling provided for by § 2244(d)(2), federal courts may equitably toll the limitations period if a habeas petitioner can demonstrate "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (finding "extraordinary circumstances" where petitioner's attorney's failed to communicate important deadlines and status updates despite repeated inquiries from the petitioner expressed to his attorney, the state courts, and the Florida State Bar Association). While *Holland* established that equitable tolling could be available in habeas actions, it remains the case that "a court should be sparing in its use of the doctrine." *Ross v. Varano*, 712 F.3d 784, 799 (3d Cir. 2013).

Carmon's papers make no claim for equitable tolling of the limitations period, nor does he allege any circumstances that would otherwise suggest to us that there would be any basis for the Court to toll the limitations period on such grounds. Rather, the petition and state court materials show that Carmon was involved in various efforts to put the validity of his conviction and sentence before the state courts. Even assuming this activity reflected diligent efforts on his part, there is nothing in the record to suggest that any such extraordinary circumstances prevented him from presenting his current § 2254 habeas claims to the state courts in a timely manner. Nor does anything in the record suggest that extraordinary circumstances prevented him from seeking to preserve timely review of any such claims in this Court. We see no basis for any equitable tolling of the §2254 limitations period. Carmon's petition remains untimely.

#### 4. Actual innocence as an excuse for noncompliance with statute of limitations

The courts are permitted to consider the merits of Constitutional claims that were not brought in compliance with 28 U.S.C. § 2244(d) if there is evidence that the petitioner is actually innocent. As the Court stated in *McQuiggin v. Perkins*, 569 U.S. 383 (2013), "a procedural bar [like] the statute of limitations" can be overcome if the petitioner could establish the "gateway" of "actual innocence." *McQuiggin*, 569 U.S. at 386. This standard focuses upon factual innocence based upon new evidence that was not presented at trial. It requires the petitioner to "show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 399 (quotation omitted).

Carmon does not assert that he did not intentionally kill Jason Fritchman, nor do any of his arguments presented to the state court, as reflected in the opinions he appended to his petition, suggest that there is any new evidence he might present that would undermine confidence in the validity of the jury's finding that he committed this offense. The *McQuiggan* exception does not apply and Carmon is not excused from compliance with 28 U.S.C. § 2244(d).

## III. CONCLUSION

Carmon's petition is untimely. The petition had to have been filed by January 6, 2012 but was not filed until December 12, 2019, nearly eight years later. He has not established a basis to be excused from compliance with the statute of limitations. We therefore recommend that the District Court dismiss his petition for failure to comply with 28 U.S.C. § 2244(d).

Pursuant to Local Appellate Rule 22.2 of the Rules of the United States Court of Appeals for the Third Circuit, at the time a final order denying a habeas petition is issued, the district court judge is required to make a determination as to whether a certificate of appealability ("COA")

should issue. A COA should not issue unless the petitioner demonstrates that jurists of reason would find it to be debatable whether the petition states a valid claim for the denial of a constitutional right.

Here, for the reasons set forth above, we do not believe a reasonable jurist would find the Court to have erred in dismissing the present petition. Accordingly, we do not believe a COA should issue. Our Recommendation follows.

**RECOMMENDATION**

AND NOW, this 27th day of March, 2020, it is respectfully **RECOMMENDED** that the petition for a writ of habeas corpus be **DISMISSED**. It is **FURTHER RECOMMENDED** that a certificate of appealability should **NOT ISSUE**, as we do not believe that Petitioner has demonstrated that reasonable jurists would find the correctness of the procedural aspects of this Recommendation debatable, nor would they debate the merits of his claims.

Petitioner may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ David R. Strawbridge, USMJ
DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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|---|---|---|
| SHALAMAR CARMON,<br>Petitioner, | : | CIVIL ACTION |
| v. | : | |
| J. LANE, et al.,<br>Respondents. | : | NO. 19-6113 |

**ORDER**

**AND NOW**, this day of , 2020, upon careful and independent consideration of the pleadings and available state court records, and after review of the Report and Recommendation of United States Magistrate Judge David R. Strawbridge, it is **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;

2. The petition for a writ of habeas corpus is **DISMISSED**;

3. A certificate of appealability **SHALL NOT** issue, in that the Petitioner has not made a substantial showing of the denial of a constitutional right nor demonstrated that reasonable jurists would debate the correctness of the procedural aspects of this ruling. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); and

4. The Clerk of the Court shall mark this case **CLOSED** for statistical purposes.

BY THE COURT:

_____

J. CURTIS JOYNER, J.

# IN THE UNITED STATES DISTRICT COURT
# FOR THE EASTERN DISTRICT OF PENNSYLVANIA

3/27/2020

RE: CARMON v, LANE., ET AL
CA No. 19-CV-6113

## NOTICE

Enclosed herewith please find a copy of the Report and Recommendation filed by United States Magistrate Judge Strawbridge, on this date in the above captioned matter. You are hereby notified that within fourteen (14) days from the date of service of this Notice of the filing of the Report and Recommendation of the United States Magistrate Judge, any party may file (in duplicate) with the clerk and serve upon all other parties written objections thereto (See Local Civil Rule 72.1 IV (b)). **Failure of a party to file timely objections to the Report & Recommendation shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court Judge.**

In accordance with 28 U.S.C. §636(b)(1)(B), the judge to whom the case is assigned will make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The judge may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge, receive further evidence or recommit the matter to the magistrate judge with instructions.

Where the magistrate judge has been appointed as special master under F.R.Civ.P 53, the procedure under that rule shall be followed.

**KATE BARKMAN**
Clerk of Court

By:s/James Deitz_____
James Deitz, Deputy Clerk

cc: S. Carmon, p.p. GU-9915

Courtroom Deputy to Judge Joyner

civ623.frm
(11/07)

Appendix C

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

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| Appellee | : | |
| v. | : | |
| SHALAMAR R. CARMON, | : | |
| Appellant | : | No. 1307 EDA 2018 |

Appeal from the PCRA Order March 28, 2018
in the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0003283-2004

BEFORE: PANELLA, J., PLATT, J.* and STRASSBURGER, J.*

MEMORANDUM BY STRASSBURGER, J.: **FILED DECEMBER 05, 2018**

Shalamar R. Carmon (Appellant) appeals *pro se* from the March 28, 2018 order dismissing his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. We affirm.

In its opinion, the PCRA court fully and correctly sets forth the factual and procedural history of this case. PCRA Court Opinion, 5/10/2018, at 1-3. Therefore, we have no reason to restate it. Pertinent to this appeal, in 2004 Appellant was charged with one count of criminal homicide pursuant to 18 Pa.C.S. § 2501.[1] In 2006, following a jury trial, Appellant was convicted of first-degree murder and was sentenced to life imprisonment.

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[1] "A person is guilty of criminal homicide if he intentionally, knowingly, recklessly or negligently causes the death of another human being." 18 Pa.C.S. § 2501(a). "Criminal homicide shall be classified as murder, voluntary manslaughter, or involuntary manslaughter" 18 Pa.C.S. § 2501(b).

*Retired Senior Judge assigned to the Superior Court.

On January 4, 2008, this Court affirmed Appellant's judgment of sentence, ***Commonwealth v. Carmon***, 947 A.2d 822 (Pa. Super. 2008) (unpublished memorandum), and the Pennsylvania Supreme Court denied Appellant's petition for allowance of appeal. ***Commonwealth v. Carmon***, 951 A.2d 1160 (Pa. 2008). Since then, Appellant has filed two PCRA petitions, both of which resulted in no relief.

Most recently, Appellant filed *pro se* a third PCRA petition on February 22, 2018. Therein, Appellant asserted that the trial court was without subject matter jurisdiction to convict Appellant of the aforementioned crime because the criminal information filed by the Commonwealth charged Appellant with criminal homicide and not first-degree murder. *Pro Se* PCRA Petition, 2/22/2018, at 10. On March 8, 2018, the PCRA court filed a notice of intent to dismiss the petition without a hearing pursuant to Pa.R.Crim.P. 907. Appellant responded, and the petition was dismissed by order of March 28, 2018.

Appellant timely filed a notice of appeal. Both Appellant and the PCRA court complied with Pa.R.A.P. 1925. Appellant presents one question to this Court on appeal: "Did the PCRA court err in denying Appellant's PCRA petition to strike the void judgment rendered by the Lehigh County Court of Common Pleas for lack of subject matter [jurisdiction], where the Commonwealth failed to confront Appellant with a formal accusation, specifically charging him with

murder of the 1st degree?" Appellant's Brief at 4 (unnecessary capitalization omitted).

Before we can examine the substantive claim Appellant raises on appeal, we must determine whether the filing of his PCRA petition was timely. ***See, e.g., Commonwealth v. Lewis***, 63 A.3d 1274, 1280-81 (Pa. Super. 2013) (quoting ***Commonwealth v. Chester***, 895 A.2d 520, 522 (Pa. 2006)) ("[I]f a PCRA petition is untimely, neither this Court nor the [PCRA] court has jurisdiction over the petition. Without jurisdiction, we simply do not have the legal authority to address the substantive claims.").

Generally, a petition for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment of sentence is final unless the petition alleges, and the petitioner proves, that an exception to the time for filing the petition is met, and that the claim was raised within 60 days of the date on which it became available. 42 Pa.C.S. § 9545(b).

It is clear that Appellant's 2018 petition is facially untimely: his judgment of sentence became final in 2008. Yet, in his brief, Appellant offers no discussion of any timeliness exception. Rather, he argues the PCRA court erred in dismissing his claim as untimely because a challenge to the lack of subject matter jurisdiction can be raised at any time. Appellant's Brief at 11.

Contrary to this position, this Court has held that a claim alleging the trial court lacked subject matter jurisdiction "does not overcome the PCRA's

one year jurisdictional time-bar as it does not fall within one of the statutory exceptions." ***Commonwealth v. Dickerson***, 900 A.2d 407, 412 (2006). ***See also Commonwealth v. Eller***, 807 A.2d 838, 845 (Pa. 2002) ("The PCRA confers no authority upon this Court to fashion *ad hoc* equitable exceptions to the PCRA time-bar in addition to those exceptions expressly delineated in the Act.").

In light of the foregoing, because Appellant's petition was untimely-filed and he has not asserted an exception to the timeliness requirements, he is not entitled to relief.[2] ***See Commonwealth v. Albrecht***, 994 A.2d 1091, 1095 (Pa. 2010) (affirming dismissal of PCRA petition without a hearing because the appellant failed to meet burden of establishing timeliness exception).

Order affirmed.

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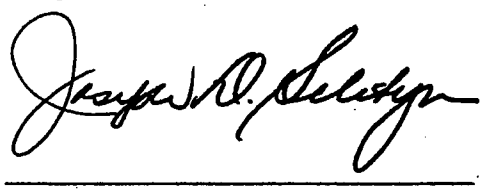
[2] Even if Appellant pleaded and proved a timeliness exception allowing this Court to review his claim, he still would not be entitled to relief. "Subject matter jurisdiction exists when the court is competent to hear the case and the defendant has been provided with a formal and specific notice of the crimes charged." ***Commonwealth v. Jones***, 929 A.2d 205, 208 (Pa. 2007). In this case, these requirements were met. ***See*** PCRA Court Opinion, 5/10/2018, at 5 (finding jurisdiction was proper because "the offense was committed within Lehigh County" and "Appellant was formally charged with one count of [c]riminal [h]omicide[.]"). "An information need not specify a degree of murder[.]" ***Commonwealth v. Chambers***, 852 A.2d 1197, 1199 (Pa. Super. 2004) (holding that an information need not specify the degrees of homicide or manslaughter in order to sustain a second-degree murder verdict). Thus, not only does Appellant's untimely-filed petition not meet any of the timeliness exceptions, his sole claim on appeal has no merit.

Judge Platt did not participate in the consideration or decision of this case.

Judgment Entered.



Joseph D. Seletyn, Esq.

Prothonotary

Date: 12/5/18

Appendix D

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CRIMINAL DIVISION



COMMONWEALTH OF PENNSYLVANIA

vs.

SHALAMAR R. CARMON,
Defendant

No. 3283/ 2004
___ EDA 2018

**1925(a) Opinion**

Shalamar Carmon, Appellant, has appealed from the Court's order dismissing his fourth Post Conviction Relief Act (PCRA) petition on March 28, 2018. For the reasons set forth herein, the Court was without jurisdiction to consider Appellant's PCRA petition and said petition was properly dismissed.

**Factual and Procedural Background**

This case stems from a 2004 homicide, which was litigated in Case No. CP-39-CR-0003283-2004. Appellant was charged with and subsequently convicted of Murder in the First Degree for the murder of Jason Fritchman. A jury convicted Appellant in October of 2006 and he was sentenced to life imprisonment without parole. The Superior Court affirmed that sentence, *Commonwealth v. Carmon*, 947 A.2d 822 (Pa. Super. 2008) (unpublished memorandum), and the Pennsylvania Supreme Court rejected Appellant's allocatur petition on June 26, 2008. *Commonwealth v. Carmon*, 951 A.2d 1160 (Pa. 2008) (table).

Appellant filed a timely PCRA petition alleging ineffectiveness of pretrial and trial counsel for failing to seek suppression of identification testimony and failing to object to the introduction of photographs of the crime scene. His PCRA petition was denied and dismissed on June 11, 2010. Appellant appealed to the Superior Court, which affirmed. *Commonwealth v.*

*Cameron*, 29 A.3d 830 (Pa. Super. 2011) (table). The Supreme Court rejected the Appellant's appeal. *Commonwealth v. Cameron*, 29 A.3d 370 (Pa. 2011) (table).

On December 12, 2016, Appellant filed another PCRA Petition. On January 23, 2016, the Court entered an order dismissing the PCRA petition. Appellant filed a Notice of Appeal on February 8, 2017. The Superior Court affirmed the Court's dismissal on December 5, 2017.

On February 22, 2018, Appellant filed the instant PCRA Petition. On March 8, 2018, the Court entered a Notice of Intent to Dismiss the PCRA Petition without a hearing pursuant to Pa.R.Crim.P. 907. Appellant timely filed a response on March 27, 2018. On March 28, 2018, the Court dismissed Appellant's PCRA petition.

Appellant filed a Notice of Appeal on April 24, 2018. The Court directed Appellant to file a Concise Statement of Matters Complained of on Appeal on April 25, 2018. Appellant filed a Concise Statement on May 8, 2018.

This Opinion follows.

**Discussion**

Appellant has raised one issue on appeal. Appellant alleges the Court erred in dismissing his PCRA petition because the judgment of sentence rendered by the Lehigh County Court of Common Pleas was void for lack of subject matter jurisdiction.

As a threshold matter, second or subsequent PCRA petitions "will not be entertained unless the petitioner presents a strong *prima facie* showing that a miscarriage of justice may have occurred." *Commonwealth v. Abu-Jamal*, 941 A.2d 1263, 1267 (Pa. 2008) (citing *Commonwealth v. Carpenter*, 725 A.2d 154, 160 (Pa. 1999)). "A petitioner makes a *prima facie* showing if he demonstrates that either the proceedings which resulted in his conviction were so unfair that a miscarriage of justice occurred which no civilized society could tolerate, or that he

was innocent of the crimes for which he was charged." *Commonwealth v. Burkhardt*, 833 A.2d 233, 236 (Pa. Super. 2003) (*en banc*) (citations omitted).

The timeliness requirements of the PCRA must be strictly construed and are jurisdictional in nature; thus, courts are precluded from addressing the merits of issues raised in a PCRA petition if it is untimely. *Abu-Jamal*, 941 A.2d at 1267. Petitions under the PCRA, including second or subsequent petitions, must be filed within one year from the date the judgment becomes final. 42 Pa.C.S. § 9545(b)(1). A judgment becomes final either after direct review, including discretionary review, or after the expiration of the time for seeking review. *Id.* § 9545(b)(3).

There are three very narrow exceptions to the one year time period:

> (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 Appellant 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 ... and has been held by that court to apply retroactively.

*Id.* § 9545(b)(1)(i)-(iii).

If the PCRA petitioner can successfully demonstrate the applicability of any of the three exceptions, he may file his petition within 60 days of the date that his claim could have been presented. *Id.* § 9545(b)(2).

In the within matter, Appellant asserted he is eligible for relief because he is challenging the legality of the sentence imposed. He claims to be proceeding under Section 9543(a)(2) of the

Post Conviction Relief Act, which establishes that a conviction stemming from a proceeding before a tribunal without jurisdiction may serve as a ground for relief. *Id.* § 9543(a)(2)(viii). Appellant has not previously raised this issue, and it is therefore waived. Pa.R.A.P. 302(a). Furthermore, Appellant has not established that he satisfies any of the statutory exceptions to the timeliness requirement of the PCRA. Even if Appellant had timely filed the instant PCRA or raised this issue on appeal, the offense was committed within Lehigh County, which confers jurisdiction on the Lehigh County Court of Common Pleas. *Commonwealth v. Bethea*, 828 A.2d 1066 (Pa. 2003). Accordingly, Appellant's argument is without merit.

Lastly, Appellant argues that the Commonwealth "failed to confront Appellant with a formal accusation, specifically charging him with murder of the first degree." (Concise Statement ¶ 1.) The docket reflects that Appellant was arraigned on October 26, 2004. Appellant was formally charged with one count of Criminal Homicide generally under Section 2501 of the Pennsylvania Crimes Code. Criminal Homicide statutorily includes murder, voluntary manslaughter, or involuntary manslaughter. 18 Pa.C.S.A. § 2501(b). Because the docket belies Appellant's assertion, there was not any merit to this issue even if it had been properly preserved or timely presented.

## Conclusion

Because Appellant did not establish the existence of any applicable exception to the PCRA's time requirements, and because the issue he sought to raise was not meritorious, the Court properly dismissed Appellant's PCRA petition without a hearing. Consequently, the Court respectfully recommends that its order dismissing the PCRA Petition be affirmed.

By the Court:

Douglas G. Reichley, J.

Appendix E

**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA, | : | No. 134 MAL 2019 |
| Respondent | : | |
| | : | Petition for Allowance of Appeal from |
| | : | the Order of the Superior Court |
| v. | : | |
| SHALAMAR R. CARMON, | : | |
| Petitioner | : | |

**ORDER**

**PER CURIAM**

**AND NOW**, this 20th day of August, 2019, the Petition for Allowance of Appeal is **DENIED**.

A True Copy Elizabeth E. Zisk
As Of 09/04/2019

Attest: _____
Chief Clerk
Supreme Court of Pennsylvania