

Exhibit A

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

GUSTAVO D. VELEZ-HERNANDEZ,
Petitioner,

V.

MARK WAHL, THE DISTRICT
ATTORNEY OF THE COUNTY OF
LEHIGH, and THE ATTORNEY
GENERAL OF THE STATE OF
PENNSYLVANIA,
Respondents

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CIVIL ACTION

NO. 23-CV-3045-MRP

RICHARD A. LLORET
U.S. Magistrate Judge

March 8, 2024

REPORT AND RECOMMENDATION

On December 6, 2019, Gustavo D. Velez-Hernandez (“Velez-Hernandez” or “Petitioner”) pleaded guilty to conspiracy to commit homicide. *Commw. v. Velez-Hernandez*, 301 A.3d 910 (Pa. Super. June 23, 2023); Doc. No. 13-1 at 1.¹ Mr. Velez-Hernandez agreed to a sentence of twenty to forty years and was sentenced immediately. *Id.* He was represented at his plea hearing by the Lehigh County Public Defender’s Office. Mr. Velez-Hernandez utilized the services of a Spanish interpreter during his plea. He was specifically asked if he understood the interpreter, and therefore the court, to which he responded in the affirmative. Tr. 12/6/19 at 5:19–25 (Doc. No. 12-1). Mr. Velez-Hernandez was informed on several occasions throughout the plea hearing that the sentence he would receive was twenty to forty years. *See* Tr. 12/6/19 at 3:13–14, 7:9–16, 9:12–16, 15:14–16:19, 16:25–18:10, 24:14–21, 32:21–23, 34:10–17.

¹ Unless otherwise indicated, all references to the electronically docketed record will be cited as “Doc. No. ____ at ____.”

Mr. Velez-Hernandez did not file a direct appeal. As a result, his sentence became final on January 5, 2020, 30 days after he was sentenced. *See* Pa. R. App. P. 903(c)(3) (the time in which a defendant can file an appeal in a criminal case is “30 days after the imposition of the judgment of sentence in open court.”); *Galloway v. Smith*, Civ. No. 16-5809, 2017 WL 5474069, at *2 (E.D. Pa. 2017).

On November 6, 2021, 670 days after his sentence became final, Petitioner filed a *pro se* petition for Post-Conviction Relief under the Post Conviction Relief Act (“PCRA”), 42 Pa.C.S. § 9541, *et seq.* Doc. No. 13-1 at 5–6. The court appointed an attorney to represent Mr. Velez-Hernandez. *Id.* On February 7, 2022, his attorney filed a “no merit” letter and a motion to withdraw as counsel pursuant to *Commonwealth v. Turner*, 544 A.2d 927 (1988), and *Commonwealth v. Finley*, 550 A.2d 213 (1998). The court granted counsel’s motion to withdraw and issued an Order giving Petitioner notice of intent to dismiss pursuant to Pa. R. Crim. P. 907. *Id.* On June 23, 2022, the court denied the PCRA petition as untimely. *Id.* at 6.

On July 11, 2022, Mr. Velez-Hernandez filed an appeal challenging the dismissal of his PCRA petition. *Id.* On June 20, 2023, the Pennsylvania Superior Court affirmed the PCRA court’s order of dismissal. *Id.* at 9. Petitioner did not seek review with the Pennsylvania Supreme Court. Petitioner filed his habeas petition (the “Petition”) in this court on July 29, 2023, 1,301 days after his sentence became final. Doc. No. 1 at 1.

Respondents filed a Response (Doc. No. 13) limited to the Petition’s timeliness, pursuant to court order. Doc. No. 10. After reviewing the record, including Mr. Velez-Hernandez’s Petition, his Amended Petition (Doc. No. 8), and the Response, I recommend that the Petition be dismissed as untimely.

DISCUSSION

A habeas petition must be timely filed. The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) created a one-year time limit for filing a habeas corpus petition that in relevant part provides:

(1) 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); *see Fahy v. Horn*, 240 F.3d 239 (3d Cir. 2001).

I. Statutory Tolling

Mr. Velez-Hernandez’s conviction became final on January 5, 2020, when his time to file a direct appeal expired. The AEDPA’s one-year statute of limitations may be tolled during the time a properly filed PCRA petition is pending in the state courts. *See* 28 U.S.C. § 2244(d)(2) (providing that the time during which a “properly filed” petition for collateral relief is pending is not counted toward the one-year statute of limitations).

Mr. Velez-Hernandez did not file a PCRA petition until November 6, 2021, 670 days after his sentence became final. In that time, the one-year AEDPA statute of limitations expired.

In his PCRA petition, Mr. Velez-Hernandez alleged that he misunderstood his guilty plea due to his attorney's ineffective assistance, and that he erroneously thought he was going to receive a sentence of 8 to 16 years imprisonment. Doc. No. 13-1 at 9. The PCRA petition was dismissed as untimely and, therefore, did not toll the AEDPA statute of limitations. *See Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005). The Petition, which was filed 1,301 days after Mr. Velez-Hernandez's conviction became final, is untimely and should be dismissed unless there are grounds for equitable tolling.

II. Equitable Tolling

The federal habeas statute of limitations may be subject to equitable tolling. *Holland v. Fla.*, 560 U.S. 631, 648–49 (2010). The Third Circuit has explained that “equitable tolling is appropriate when principles of equity would make the rigid application of a limitation period unfair, but that a court should be sparing in its use of the doctrine.” *Ross v. Varano*, 712 F.3d 784, 799 (3d Cir. 2013). Equitable tolling is allowed only where a petitioner shows: “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Holland*, 560 U.S. at 649 (quoting *Pace*, 544 U.S. at 418).

Mr. Velez-Hernandez has not shown that he has been pursuing his rights diligently. “The diligence required for equitable tolling purposes is ‘reasonable diligence.’” *Holland*, 560 U.S. at 653. The reasonable diligence requirement “does not pertain solely to the filing of the federal habeas petition, rather it is an obligation that exists during the period the prisoner is exhausting state court remedies as well.” *Saleem*

v. Hendricks, 306 Fed. App'x. 739, 741 (3d Cir. 2009) (quoting *LaCava v. Kyler*, 398 F.3d 271, 277 (3d Cir. 2005)).

Mr. Velez-Hernandez waited 1,301 days, more than three-and-a-half years, between the conclusion of his direct appeal and the filing of his Petition. He supplies no reason for the wait. *See Pace*, 544 U.S. at 419 (finding a five-month delay was not reasonably diligent); *Satterfield v. Johnson*, 434 F.3d 185, 196 (3d Cir. 2006) (holding an eight-month delay was not reasonably diligent). Under these circumstances, I find that Mr. Velez-Hernandez has not diligently pursued his rights.

Nor has Mr. Velez-Hernandez shown any extraordinary circumstances that would entitle him to relief. The Third Circuit has concluded that the kind of “extraordinary circumstances” necessary to apply equitable tolling occur when: (1) the state has actively misled the petitioner; (2) the petitioner has in some extraordinary way been prevented from asserting his rights; or (3) the petitioner has timely asserted his rights but in a wrong forum. *Johnson v. Hendricks*, 314 F.3d 159, 162 (3d Cir. 2002) (quoting *Fahy*, 240 F.3d at 244). To be sufficient, “there must be a causal connection, or nexus, between the extraordinary circumstances he faced and the petitioner’s failure to file a timely federal petition.” *Ross*, 712 F.3d at 803. The extraordinary circumstance must be evaluated subjectively with a focus on “how severe an obstacle it is for the prisoner endeavoring to comply with AEDPA’s limitations period.” *Id.* at 802–03 (quoting *Pabon v. Mahanoy*, 654 F.3d 385, 400 (3d Cir. 2011)).

Mr. Velez-Hernandez has alleged no circumstances that excuse his delay, never mind any extraordinary circumstances. Doc. No. 8, at 27 (alleging only that a fundamental miscarriage of justice occurred, without explaining the delay). He participated in a murder, pled guilty, received an appropriate sentence, and waited three

years to file a habeas petition. There is nothing unfair about applying the statute of limitations to bar Mr. Velez-Hernandez's Petition. *Ross*, 712 F.3d at 799.

RECOMMENDATION

I recommend that Mr. Velez-Hernandez's Petition be dismissed with prejudice. I further recommend that no certificate of appealability issue, under 28 U.S.C. § 2253(c)(1)(A), because Petitioner has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Petitioner may file objections to this Report and Recommendation within fourteen days after being served with a copy thereof. *See* Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights. *See Leyva v. Williams*, 504 F.3d 357, 364 (3d Cir. 2007).

BY THE COURT,

s/Richard A. Lloret
RICHARD A. LLORET
U.S. Magistrate Judge

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

GUSTAVO D. VELEZ-HERNANDEZ,
Petitioner,

V.

MARK WAHL, THE DISTRICT
ATTORNEY OF THE COUNTY OF
LEHIGH, and THE ATTORNEY
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Respondents

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CIVIL ACTION

NO. 23-CV-3045-MRP

JUDGMENT

In accordance with the Court's separate Order, filed contemporaneously with this
Judgment, on this ____ day of _____, 2024,

JUDGMENT IS ENTERED

DISMISSING WITH PREJUDICE petitioner's Petition for Writ of Habeas Corpus.

SO ORDERED:

HON. MIA R. PEREZ
United States District Judge

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

GUSTAVO D. VELEZ-HERNANDEZ,
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V.

MARK WAHL, THE DISTRICT
ATTORNEY OF THE COUNTY OF
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CIVIL ACTION

NO. 23-CV-3045-MRP

ORDER

AND NOW this _____ day of _____, 2024, upon careful and independent consideration of Petitioner Gustavo D. Velez-Hernandez's Petition for Writ of Habeas Corpus (Doc. No. 1), Amended Petition (Doc. No. 8) the Commonwealth's Response (Doc. No. 13), and the Report and Recommendation of U.S. Magistrate Judge Richard A. Lloret, it is **ORDERED** that:

1. The Report and Recommendation of Magistrate Judge Richard A. Lloret is **APPROVED** and **ADOPTED**;
2. Mr. Velez-Hernandez's Petition for Writ of Habeas Corpus is **DISMISSED** with prejudice by separate Judgment, filed contemporaneously with this Order. *See* Federal Rule of Civil Procedure 58(a); Rules Governing Section 2254 Cases in the United States District Courts, Rule 12;
3. No certificate of appealability shall issue under 28 U.S.C. § 2253(c)(1)(A) because "the applicant has [not] made a substantial showing of the denial of a constitutional right[,]" under 28 U.S.C. § 2253(c)(2), since he has not demonstrated that "reasonable jurists" would find my "assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473,

484 (2000); *see U.S. v. Cepero*, 224 F.3d 256, 262-63 (3d Cir. 2000),
abrogated on other grounds by Gonzalez v. Thaler, 565 U.S. 134 (2012); and
4. The Clerk of Court shall mark this file closed.

SO ORDERED:

HON. MIA R. PEREZ
United States District Judge

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 24-1642

Gustavo Velez-Hernandez v. District Attorney Lehigh County, et al

(U.S. District Court No.: 5-23-cv-03045)

ORDER

It is hereby ORDERED that the above matter is dismissed pursuant to Fed. R. App. P. 42(b). A certified copy of this order is issued in lieu of a formal mandate.

For the Court,

s/ Patricia S. Dodszeuweit
Clerk

Dated: May 03, 2024

PDB/cc: Susan E. Affronti, Esq.
Ronald Eisenberg, Esq.
Heather F. Gallagher, Esq.
Gustavo D. Velez-Hernandez,
Mr. George V. Wylesol,



A True Copy:

Patricia S. Dodszeuweit

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

Exhibit B

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT OP 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
GUSTAVO D. VELEZ-HERNANDEZ	:	
	:	
Appellant	:	No. 1795 EDA 2022

Appeal from the PCRA Order Entered June 23, 2022
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0002367-2019

BEFORE: MURRAY, J., KING, J., and PELLEGRINI, J.*

MEMORANDUM BY KING, J.:

FILED JUNE 20, 2023

Appellant, Gustavo D. Velez-Hernandez, appeals *pro se* from the order entered in the Lehigh County Court of Common Pleas, which dismissed his petition filed pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

The relevant facts and procedural history of this case are as follows. On December 6, 2019, Appellant entered a negotiated guilty plea to one count of conspiracy to commit criminal homicide. That same day, the court sentenced Appellant to 20 to 40 years of incarceration. Appellant did not file a post-sentence motion or a direct appeal.

Appellant filed the instant PCRA petition on November 6, 2021. The

* Retired Senior Judge assigned to the Superior Court.

PCRA court appointed counsel, who filed a *Turner/Finley*¹ “no-merit” letter and motion to withdraw as counsel on February 7, 2022.

On May 4, 2022, the PCRA court issued an order granting counsel’s motion to withdraw. On May 24, 2022, the court issued notice of its intent to dismiss Appellant’s petition without a hearing per Pa.R.Crim.P. 907. Appellant filed a response to the Rule 907 notice on June 23, 2022. That same day, the PCRA court dismissed Appellant’s PCRA petition as untimely. Appellant filed a timely notice of appeal on July 11, 2022. The PCRA court did not order Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellant filed none.

Appellant raises one issue on appeal:

I. Did the trial court err in not correcting sentence?

(Appellant’s Brief at 3).

As a prefatory matter, the timeliness of a PCRA petition is a jurisdictional requisite. *Commonwealth v. Hackett*, 598 Pa. 350, 956 A.2d 978 (2008), *cert. denied*, 556 U.S. 1285, 129 S.Ct. 2772, 174 L.Ed.2d 277 (2009). Pennsylvania law makes clear that no court has jurisdiction to hear an untimely PCRA petition. *Commonwealth v. Robinson*, 575 Pa. 500, 837 A.2d 1157 (2003). The PCRA requires a petition, including a second or subsequent petition, to be filed within one year of the date the underlying

¹ See *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa.Super.1988) (*en banc*).

judgment becomes final. 42 Pa.C.S.A. § 9545(b)(1). A judgment of sentence is 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 review." 42 Pa.C.S.A. § 9545(b)(3).

Generally, to obtain merits review of a PCRA petition filed more than one year after the judgment of sentence became final, the petitioner must allege and prove at least one of the three timeliness exceptions:

- (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.A. § 9545(b)(1)(i)-(iii). Additionally, a PCRA petitioner must file his petition within one year of the date the claim could have been presented. 42 Pa.C.S.A. § 9545(b)(2).

To meet the "newly discovered facts" timeliness exception set forth in Section 9545(b)(1)(ii), a petitioner must demonstrate that "he did not know the facts upon which he based his petition and could not have learned those

facts earlier by the exercise of due diligence.” ***Commonwealth v. Brown***, 111 A.3d 171, 176 (Pa.Super. 2015).

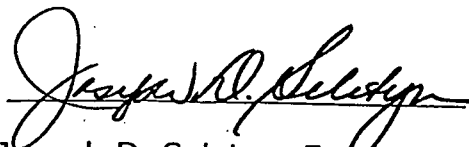
Instantly, the court sentenced Appellant on December 6, 2019. Appellant did not file a direct appeal. Therefore, his judgment of sentence became final thirty days later, on January 5, 2020, at which time Appellant’s time for filing a direct appeal expired. ***See*** Pa.R.A.P. 903(a) (providing appellant must file direct appeal within 30 days). Thus, Appellant had until January 5, 2021, to file a timely PCRA petition. ***See*** 42 Pa.C.S.A. § 9545(b)(1).

Appellant filed the current PCRA petition on November 6, 2021, which is patently untimely. ***See id.*** On appeal, Appellant contends that he is entitled to relief because he believed he would receive a sentence of 8 to 16 years of incarceration per the terms of his negotiated plea agreement, and that he did not discover until October 26, 2021 that the sentence imposed was actually 20 to 40 years’ imprisonment.

Appellant, however, has failed to plead and prove any exception to the PCRA timeliness requirements. To the extent Appellant’s argument can be construed as an attempt to invoke the newly discovered facts exception to the PCRA’s timeliness requirements, Appellant cannot demonstrate any new facts that could not have been ascertained sooner through the exercise of due diligence. Here, the record discloses that Appellant was present in the courtroom with the benefit of a Spanish court interpreter when the court

J-S04019-23

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: 6/20/2023