

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
BARRY MALLORY	:	
	:	
Appellant	:	No. 827 EDA 2025

Appeal from the PCRA Order Entered February 26, 2025
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0413041-1991

BEFORE: SULLIVAN, J., BECK, J., and BENDER, P.J.E.

MEMORANDUM BY SULLIVAN, J.:

FILED OCTOBER 13, 2026

Barry Mallory ("Mallory") appeals from the order dismissing his serial petition for relief filed pursuant to the Post Conviction Relief Act ("PCRA").¹ We affirm.

In March 1992, the trial court convicted Mallory of second-degree murder, robbery, criminal conspiracy, possessing an instrument of crime, and carrying a firearm on public streets. The trial court subsequently sentenced Mallory to an aggregate sentence of life in prison. This Court affirmed the judgment of sentence in 1993, and the Pennsylvania Supreme Court denied Mallory's petition for leave to appeal that same year.

¹ **See** 42 Pa.C.S.A. §§ 9541-9546.

Mallory has since filed multiple, unsuccessful PCRA petitions. He filed the instant petition on November 8, 2022, contending newly discovered facts. On February 29, 2024, he filed a supplement to the petition claiming that the trial testimony of the sole eyewitness against him, co-defendant Rodney Williams (“Williams”), that Williams was approximately twenty-seven feet away from the shooting was not accurate. **See** Mallory’s Brief at 8. Mallory maintains that a private investigator he hired in 2021, measured the distance and concluded Williams was approximately 110 feet from the shooting (“the new distance measurement”). **See id.**

The PCRA court subsequently issued a notice of intent to dismiss Mallory’s petition pursuant to Pa.R.Crim.P. 907. Mallory filed a response to the notice. In February 2025, the PCRA court dismissed the petition. This timely appeal followed.²

Mallory raises two issues for our review:

1. Did the PCRA court err and abuse its discretion in concluding that [Mallory’s] petition was time-barred where [Mallory] plead and supported a valid newly-discovered fact exception under 42 Pa.C.S.[A.] § 9545(b)(1)(ii) based upon a 2021 forensic crime-scene investigation report demonstrating that the Commonwealth’s sole eyewitness testimony was physically impossible?
2. Did the PCRA court err in dismissing the petition without an evidentiary hearing where the newly presented forensic evidence, if proven, would establish that the eyewitness’s

² After the dismissal of the PCRA petition, Mallory retained counsel. Counsel filed a Rule 1925(b) statement; the PCRA court did not issue an additional opinion.

testimony — the primary evidence supporting conviction — was factually and physically impossible, thereby undermining confidence in the verdict?

Mallory's Brief at 6.

Our standard of review of an order dismissing a PCRA petition is well settled:

Our review of a PCRA court's decision is limited to examining whether the PCRA court's findings of fact are supported by the record, and whether its conclusions of law are free from legal error. We view the record in the light most favorable to the prevailing party in the PCRA court. We are bound by any credibility determinations made by the PCRA court where they are supported by the record. However, we review the PCRA court's legal conclusions *de novo*.

Commonwealth v. Staton, 184 A.3d 949, 954 (Pa. 2018) (internal citations and quotation marks omitted). The PCRA petitioner "has the burden to persuade this Court that the PCRA court erred and that such error requires relief." ***Commonwealth v. Wholaver***, 177 A.3d 136, 144–45 (Pa. 2018).

We must initially determine whether the PCRA court had jurisdiction to adjudicate Mallory's petition. Under the PCRA, any petition "including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final[.]" 42 Pa.C.S.A. § 9545(b)(1). The PCRA's timeliness requirements are jurisdictional in nature, and a court may not address the merits of the issues raised if the PCRA petition was not timely filed. ***See Commonwealth v. Albrecht***, 994 A.2d 1091, 1093 (Pa. 2010). Pennsylvania courts may nevertheless consider an untimely PCRA petition if

the petitioner can plead and prove one of three exceptions set forth in section 9545(b)(1)(i)-(iii).

Mallory's judgment of sentence became final on December 24, 1993, when ninety days passed from the date the Pennsylvania Supreme Court denied leave to appeal and Mallory did not file a petition for a writ of *certiorari* with the United States Supreme Court. **See** U.S.Sup.Ct.R. 13.1 (stating that a petitioner has ninety days to file petition for writ of *certiorari* to the United States Supreme Court); **see also** 42 Pa.C.S.A. § 9545(b)(3) (providing that "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"). Accordingly, Mallory had until December 1994, to file a timely PCRA petition. **See** 42 Pa.C.S.A. § 9545(b)(1). Mallory's serial PCRA petition, filed in November 2022, is facially untimely.

Mallory states his claim falls within the newly discovered fact exception to the PCRA's timeliness requirements. **See** 42 Pa.C.S.A. § 9545(b)(1)(ii);³ **see also** Mallory's Brief, at 12-15. The Pennsylvania Supreme Court has repeatedly stated it is the appellant's burden to plead and offer to prove in the petition itself that one of the above-enumerated exceptions applies. **See,**

³ This exception applies when "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[.]" 42 Pa.C.S.A. § 9545(b)(1)(ii).

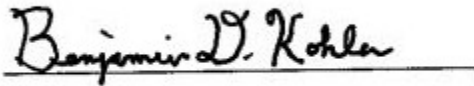
e.g., Commonwealth v. Abu-Jamal, 941 A.2d 1263, 1268 (Pa. 2008); **Commonwealth v. Wharton**, 886 A.2d 1120, 1126 (Pa. 2006). Additionally, a petitioner must also demonstrate he raised his claim within one year of the time his claim could have been presented with the exercise of due diligence.

Mallory has not shown he exercised due diligence in obtaining the new distance measurement. A petitioner must "demonstrate he did not know the facts upon which he based his petition and could not have learned the new fact(s) earlier with the exercise of due diligence." **Commonwealth v. Brown**, 111 A.3d 171, 176 (Pa. Super. 2015), citing 42 Pa.C.S.A. § 9545(b)(ii). Mallory's only explanation for the delay is that he has been incarcerated since 1992. **See** Mallory's Brief at 13. However, Mallory was represented at trial and offers no explanation as to why his attorney could not have checked the distance between where the shooting occurred and where Williams was standing. Moreover, Mallory has not explained why he and his family waited almost thirty years to hire a private investigator to check the distance. Thus, Mallory failed to show he complied with the due diligence requirement of 42 Pa.C.S.A. § 9545(b)(1)(ii). **See Commonwealth v. Breakiron**, 781 A.2d 94, 98 (Pa. 2001) (rejecting an appellant's attempt to invoke section 9545(b)(1)(ii) because he failed to offer any evidence he exercised due diligence in obtaining facts upon which his claim was based); **Brown**, 111 A.3d at 178 (same). Therefore, the PCRA court did not have jurisdiction to review the merits of his claim.

Accordingly, we affirm the dismissal of Mallory's serial PCRA petition.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

Date: 10/13/2026