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Post Conviction Developments

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INTRODUCTION

The Post Conviction Relief Act¹ provides a procedure for defendants to collaterally challenge their conviction or sentence. The Act provides the sole means² of obtaining collateral relief and has been broadly interpreted as creating a unified statutory framework for reviewing claims that were traditionally cognizable in habeas corpus.³ The Act permits defendants in custody⁴ to seek relief where the conviction or sentence resulted from one or more of the Act's specifically enumerated errors or defects⁵ and the claimed error has not been waived⁶ or previously litigated⁷ on appeal or in a previous petition under the Act. Subject to several narrow exceptions, a petition under the Act must be filed within one year of the date the defendant's judgment be-

comes final.⁸ This article reports on a new rule of criminal procedure concerning qualifications of defense counsel that applies at all stages of a capital case including post conviction proceedings. It also reports on a number of recent decisions of the Pennsylvania Supreme and Superior Court construing provisions of the Act.

NEW RULE OF CRIMINAL PROCEDURE

Qualifications for Defense Counsel in Capital Cases

Pa.R.Crim.P. 801, newly promulgated by the Pennsylvania Supreme Court,⁹ sets minimum uniform statewide experience and educational standards for retained or appointed counsel at all stages of a capital case. While the court did not amend Pa.R.Crim.P. 904 governing the appointment of counsel in post-conviction proceedings, a new Comment to the Rule provides that an attorney must meet the educational and experiential requirements in Rule 801 in order to be appointed in a capital PCRA proceeding.¹⁰ Under Rule 801, the experience standard requires that counsel be an "active trial practitioner with a minimum of 5 years criminal litigation experience" and have served as lead or co-counsel in a "minimum of 8 significant cases which were tried to verdict before a jury."¹¹ When the appointment is for

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¹ 42 Pa.C.S.A. §9541 *et seq.*

² 42 Pa.C.S.A. §9542.

³ *Commonwealth v. Ahlborn*, 699 A.2d 718, 721 (Pa. 1997); *Commonwealth v. Chester*, 733 A.2d 1242, 1250-1251 (Pa. 1999).

⁴ 42 Pa.C.S.A. §9543(a)(1).

⁵ 42 Pa.C.S.A. §9543(a)(2).

⁶ 42 Pa.C.S.A. §9543(a)(4), 9544(b).

⁷ 42 Pa.C.S.A. §9544(a).

⁸ 42 Pa.C.S.A. §9545(b).

⁹ Pennsylvania Bulletin, Vol. 34, No 25, June 19, 2004, adopted June 4, 2004, effective November 1, 2004.

¹⁰ Although comments to the Rules of Criminal Procedure "are not part of the Rules and have not been officially adopted or promulgated by the Supreme or Superior Court" [Comments preceding Chapter 1 of the Rules of Criminal Procedure], the Superior Court has held that it is entitled to "treat the 'Comments' as effective aids and to consider them in interpreting the meaning of a particular rule. . . ." *Commonwealth v. Dougherty*, 679 A.2d 779, 783 (Pa. Super. 1996).

¹¹ The Comment provides that the appointing or admitting court will determine whether counsel had the requisite experience by colloquy or otherwise. The Comment further provides that an attorney may serve as "second chair" without meeting the standards under the Rule but may not present significant

an appeal, the experience requirement is satisfied if counsel has prior appellate or post-conviction experience in a minimum of 8 significant cases.¹² The education standard requires that during the three year period immediately prior to appointment or entry of appearance, counsel "shall have completed a minimum of 18 hours of training relevant to representation in capital cases"¹³ in courses approved by the CLE Board. The Rule provides that the CLE Board shall "maintain and make available a list of attorneys" who meet the educational requirements of the Rule.

The educational requirements in the new Rule will be phased in with the full 18 hours of training not required until May 1, 2006.¹⁴ Between now and November 1, 2004, an attorney must have attended at least 6 hours of courses relevant to representation in capital cases. Beginning November 1, 2004, an attorney shall have completed a minimum of 6 hours of training in courses approved by the CLE Board to be eligible for appointment or to enter an appearance in a capital case. The minimum number of hours of training increases to 12 for the period beginning November 1, 2005 to May 1, 2006 and, thereafter, the standard increases to 18 hours.

RECENT CASES INTERPRETING THE PCRA

Ineffectiveness and the Right to Petition for Allowance of Appeal

Ineffective assistance of counsel is a basis for relief under the Act where counsel's act or omission "so undermined the truth determining process that no reliable determination of guilt or innocence could have taken place."¹⁵ Ineffectiveness claims raised in a post conviction proceeding are governed by the same standard that applies when such a claim is presented on direct appeal.¹⁶ In addition to claims of ineffectiveness of counsel at trial, the Pennsylvania Supreme Court has construed the Act

to allow relief where counsel is ineffective at the penalty phase of a capital case,¹⁷ fails to protect the defendant's right to direct appeal,¹⁸ or provides ineffective assistance of counsel in a post conviction proceeding.¹⁹ With respect to failure by counsel to protect a defendant's right to seek discretionary review, prior to the Pennsylvania Supreme Court's recent decision in *Commonwealth v. Liebel*,²⁰ the Superior Court had denied PCRA relief holding that such a claim was not cognizable under the Act because it did not bear on the defendant's "ultimate guilt or innocence."²¹ In *Liebel*, the Supreme Court noted that while a defendant did not have an automatic right to an appeal in the Supreme Court, a defendant has a right to seek discretionary review provided counsel believes that the claims the defendant would raise would not be completely frivolous. Noting that a defendant does not have a federal constitutional right to counsel for discretionary review,²² the Court held that a defendant seeking allowance of appeal is entitled to counsel pursuant to Pa.R.Crim.P. 122.²³ Relying upon its decision on *Commonwealth v. Albrecht*,²⁴ the Court held that a rule-based right to counsel included the concomitant right to effective assistance of counsel and that such a claim was cognizable under the PCRA. The court found in *Liebel* that counsel's unjustified failure to file a petition for allowance of appeal after telling his client he would do so constitutes a "wholesale denial of counsel."²⁵ Such a showing, the court held, satisfies the

¹⁷ *Commonwealth v. Chester*, 733 A.2d 1242 (Pa. 1999) (holding Legislature intended to channel all claims through framework of PCRA thereby avoiding a bifurcated system in which some claims would be considered under habeas corpus).

¹⁸ *Commonwealth v. Lantzy*, 736 A.2d 654 (Pa. 1999).

¹⁹ *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998).

²⁰ 825 A.2d 630 (Pa. 2003).

²¹ *Commonwealth v. Tanner*, 600 A.2d 201, 205 (Pa. Super. 1991).

²² *Ross v. Moffitt*, 417 U.S. 600, 610 (1974).

²³ Pa.R.Crim.P. 122(C)(3) provides that "where counsel has been assigned, such assignment shall be effective until final judgment, including any proceedings on direct appeal." *Commonwealth v. Daniels*, 420 A.2d 1323 (Pa. 1980) (explaining that Pennsylvania Supreme Court had long "guaranteed that a person seeking allowance of appeal is entitled to assistance of counsel.").

²⁴ 720 A.2d 693 (Pa. 1999) (rule-based right to counsel and concomitant right to effective assistance of counsel in PCRA proceedings).

²⁵ 825 A.2d at 636 (relying upon its decision in *Commonwealth v. Lasky*, 736 A.2d 564 (Pa. 1999) holding that defendant was not required to demonstrate the merits of the underlying issue he would have raised on direct appeal where there was an unjustified failure by counsel to perfect requested direct appeal).

evidence or argument. Serving as "second chair" in a homicide case counts as a trial for purposes of experience under the Rule.

¹² Rule 801 defines a "significant case" as "murder, including vehicular homicide, or a felony of the first or second degree." Pa.R.Crim.P. (1)(c).

¹³ Pa.R.Crim.P. 801(2)(a).

¹⁴ *In Re: Order Promulgating New Rule of Criminal Procedure 801, etc., No.310, Criminal Procedure Rules, Docket No. 5, Supreme Court of Pennsylvania*, June 4, 2004.

¹⁵ 42 Pa.C.S.A. §9543(a)(2)(ii).

¹⁶ *Commonwealth v. Kimball*, 724 A.2d 326, 333 (Pa. 1999) (rejecting heightened standard for ineffectiveness in PCRA proceedings and concluding that the language in the PCRA is the equivalent to the prejudice requirement applied by the federal courts to both direct and collateral review under *Strickland v. Washington*, 466 U.S. 688 (1984)).

prejudice prong of the standard governing ineffectiveness claims and thus renders unnecessary a showing by Liebel that the court would have granted review of his claims.

In post-Liebel cases, the Superior Court has addressed the defendant's burden of establishing ineffectiveness in cases other than where counsel fails to fulfill a commitment to the defendant to file a petition for allocatur. In *Commonwealth v. Gadsden*,²⁶ counsel informed Gadsden that he would not seek discretionary review and that his representation of Gadsden was concluded. Gadsden sought PCRA relief reinstating his right to seek discretionary review. The court held that a defendant presents a cognizable claim of ineffectiveness where counsel fails to consult with the defendant with respect to filing a petition for allowance of appeal. Consultation with the defendant must meet the standards in *Roe v. Flores-Ortega*:²⁷ counsel must advise the defendant in a timely manner about the "advantages and disadvantages" of seeking discretionary review and make a "reasonable effort to discover the defendant's wishes."²⁸ The court remanded the case to the PCRA court to determine whether counsel consulted with Gadsden and, if Gadsden asked counsel to file a petition for allocatur, whether counsel's failure to do so was justifiable. Gadsden is entitled to PCRA relief, the court concluded, if counsel failed to consult adequately with him or, if Gadsden requested counsel to seek review and counsel "unjustifiably failed to comply."²⁹

In *Commonwealth v. Ellison*,³⁰ direct appeal counsel acknowledged that he knew Ellison wanted to seek discretionary review but claimed that he did not receive notice of the court's order affirming judgment of sentence and thus missed the filing date. Ellison sought PCRA relief based upon counsel's ineffectiveness. In applying the three prong ineffectiveness standard,³¹ the court noted that Liebel eliminates the defendant's need to establish prejudice. The court then turned to the re-

maining prongs of the ineffectiveness standard, arguable merit and no reasonable basis for the act or omission of counsel, and concluded that the two prongs were "inseparable": counsel's failure to seek discretionary review has arguable merit if counsel had no reasonable basis for failing to seek review. To establish that counsel's omission was "unjustified," i.e., no reasonable basis for failing to seek review, the court held that a defendant must show that the claims he would have raised in a petition for allocatur "have some level of merit, regardless of whether there are actually "winning" arguments."³² The court directed the PCRA court to reinstate Ellison's right to file a petition for allocatur *nunc pro tunc* after concluding that his claims were not "completely frivolous" and that counsel's failure to seek discretionary relief was unjustified.

Ineffectiveness, Second Petitions and the Act's One-Year Time Limitation

Prior to the one-year time limitation which was adopted as part of the 1995 amendments to the Act,³³ in certain limited circumstances³⁴ the Superior Court treated a second or subsequent petition for post conviction relief as an initial petition and not subject to the more demanding standard applicable to successive petitions.³⁵ Following the enactment of the one-year time limitation, the Superior Court in *Commonwealth v. Peterson*³⁶ and *Commonwealth v. Leasa*³⁷ construed second and untimely petitions raising issues identical to the first petition as an "extension" of the timely, but previously dismissed first petition. In both cases, an appeal was taken from the denial of PCRA relief but the appeal was dismissed when counsel failed to file a brief. Similarly, in *Commonwealth v. Rienzi*,³⁸ the Superior Court construed a second, untimely petition as an "amendment" to the initial, timely petition where the ineffectiveness claimed by Rienzi was counsel's withdrawal of the initial petition without his consent. The rationale underlying both line of cases is that where counsel is ineffective, "it is inappropriate to allow the

²⁶ 832 A.2d 1082 (Pa. Super. 2003).

²⁷ 528 U.S. 470 (2000) (recognition of ineffective assistance of counsel claim based upon counsel's failure to consult with defendant about right to file a direct appeal from judgment of sentence.)

²⁸ *Gadsden*, 832 A.2d at 1087 (quoting *Commonwealth v. Touw*, 781 A.2d 1250, ___ (Pa. Super. 2001) summarizing the United States Supreme Court's decision in *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000).

²⁹ *Gadsden*, 832 A.2d at 1088. *Gadsden* was followed in *Commonwealth v. Cooke*, 852 A.2d 340 (Pa. Super. 2004) (no evidence that defendant requested discretionary review or that counsel consulted with the defendant regarding such review.).

³⁰ 851 A.2d 977 (Pa. Super. 2004).

³¹ *Commonwealth v. Pierce*, 786 A.2d 203, 213 (Pa. 2001).

³² *Ellison*, 851 A.2d at 980-981.

³³ 42 Pa.C.S.A. §9645(b).

³⁴ See e.g., *Commonwealth v. Thomas*, 578 A.2d 422 (Pa. Super. 1990).

³⁵ *Commonwealth v. Lawson*, 549 A.2d 107 (Pa. 1988) (second or subsequent petition for post conviction relief will be considered only if the defendant can demonstrate "that the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized can tolerate, or that he is innocent of the crimes charged.").

³⁶ 756 A.2d 687 (Pa. Super. 2000).

³⁷ 759 A.2d 941 (Pa. Super. 2000).

³⁸ 777 A.2d 508 (Pa. Super. 2001).

proceedings in which [ineffectiveness occurred] to be binding upon the defendant's rights."³⁹ Both the "extension" and "amendment" treatment of second, untimely petitions as a continuation of the initial, timely petition have been recently rejected by the Pennsylvania Supreme Court.

In *Commonwealth v. Robinson*,⁴⁰ the defendant filed a timely petition which was dismissed by the PCRA court. The Superior Court dismissed the appeal "without prejudice to PCRA relief" because counsel failed to file a brief. Robinson filed a second *pro se* petition seeking to have appellate rights reinstated which was dismissed by the PCRA court as untimely. Following Robinson's third petition which claimed appellate counsel was ineffective for failing to file a brief, the PCRA court granted Robinson the right to appeal *nunc pro tunc*. In rejecting the Commonwealth's argument that the appeal should be quashed because the third petition was untimely, the Superior Court held that to the extent that defendant's serial petition either renewed issues that were raised and rejected in his initial petition or sought reinstatement of the initial PCRA appeal, the third petition was an "extension" of the initial petition not subject to the Act one-year filing period.

In reversing the Superior Court and finding Robinson's third petition untimely, the Supreme Court reiterated that the time periods under the Act are mandatory and jurisdictional in nature. Expressly disapproving the Superior Court's decisions in *Leasa* and *Peterson*,⁴¹ the court held that treating a sec-

ond or subsequent petition as an "extension" of the initial petition is a "fiction" not authorized by the language of the statute or decisional law. The court stated that once the Superior Court dismissed defendant's appeal for failure to file a brief, the PCRA court's order dismissing the petition became final thirty days following the action of the Superior Court. Thus, the court concluded, there was nothing for a subsequent petition to "extend." Robinson's subsequent petitions were, therefore, "entirely new collateral actions"⁴² subject to the time limits of the Act. The court noted that rather than dismissing an appeal where counsel fails to file a brief, the Superior Court could take other action⁴³ but the court could not sanction a fiction "designed to simply circumvent the statutory time-bar."⁴⁴

Similarly, in *Commonwealth v. Rienzi*,⁴⁵ the Supreme Court rejected the Superior Court's treatment of an untimely second petition as an "amendment" to Rienzi's timely, initial petition where the initial petition was withdrawn by counsel without the consent of the defendant. The court stated that construing the second petition as an "amendment" was an effort by the Superior Court to "circumvent" the time limits under the Act. The initial petition could not be "amended," the court held, because the petition had been withdrawn and, therefore, nothing was pending before the PCRA court.⁴⁶

With its decisions in *Robinson* and *Rienzi*, the Supreme Court has again made clear that courts have no authority to "fashion ad hoc equitable exceptions to the PCRA time-bar. . . ."⁴⁷ *Robinson* and *Rienzi* make clear that

³⁹ *Commonwealth v. Albert*, 561 A.2d 736, 738 (Pa. 1989). *Albert* was relied upon by the court in *Commonwealth v. Thomas*, 578 A.2d 422, 424 (Pa. Super. 1990) (second petition treated as initial petition since first petition was dismissed on appeal due to ineffectiveness of counsel).

⁴⁰ 837 A.2d 1157 (Pa. 2003).

⁴¹ Because they are based on the rationale of *Peterson* and *Leasa*, the Superior Court's decisions in *Commonwealth v. Ceo*, 812 A.2d 1263 (Pa. Super. 2002) (where appointed counsel failed to act resulting in waiver of defendant's substantive rights, subsequent petition seeking review of the same questions properly considered an "extension" of first petition) and *Commonwealth v. Rivera*, 816 A.2d 282 (Pa. Super. 2003) (second untimely petition treated as first petition where defendant was not advised of his right to appeal dismissal of first timely petition) arguably do not survive the Supreme Court's decision in *Robinson*. Less clear is the Superior Court's decision in *Commonwealth v. Williams*, 814 A.2d 739 (Pa. Super. 2002) in which the court treated the defendant's second and untimely petition as a continuation of his first petition because counsel appointed to represent defendant in

his first petition had previously represented the Commonwealth in the same case. The court concluded that under such circumstances the initial petition was defective *ab initio*.

⁴² *Id.* at 1162.

⁴³ The Court suggested that instead of dismissing the appeal where counsel fails to file a brief, the Superior Court could remand the first PCRA petition for appropriate action in the court below, or issue a rule to show cause upon appellate counsel.

⁴⁴ 837 A.2d at 1162.

⁴⁵ 827 A.2d 369 (Pa. 2003).

⁴⁶ *Rienzi* was found not controlling in *Commonwealth v. Williams*, 828 A.2d 981 (Pa. 2003) on grounds that Williams, in contrast to the defendant in *Rienzi*, was not represented at the time he filed first petition nor when he attempted to withdraw the petition. In addition, the PCRA court in *Williams* never acted on defendant's motion to withdraw and continued to treat the petition as viable for six years before concluding that it had been withdrawn.

⁴⁷ *Commonwealth v. Eller*, 807 A.2d 838, 845 (Pa. 2002) (defendant cannot pursue reinstatement of direct appeal rights *nunc pro tunc* outside framework of the PCRA).

although a defendant has a rule-based right to effective PCRA representation,⁴⁸ a defendant has no state law remedy for lawyer error if a second petition challenging the lawyer's performance is not filed with the time limits of the Act.⁴⁹ In its recent *en banc* opinion in *Commonwealth v. Bennett*,⁵⁰ a post-*Robinson* case, the Superior Court expressed frustration about being required to deny relief where trial and PCRA appellate counsel were ineffective. Bennett, convicted of murder and sentenced to life imprisonment, filed a timely PCRA petition raising issues of ineffectiveness of trial counsel including failure to object to a defective accomplice liability charge. Following dismissal of the petition, Bennett appealed and counsel who had represented Bennett at trial and who Bennett asserted in his PCRA petition was ineffective, was appointed to represent him on appeal. When counsel failed to file a brief, the Superior Court dismissed the appeal. After learning that his appeal had been dismissed, Bennett filed a second petition requesting reinstatement of his right to appeal based upon the ineffectiveness of PCRA appellate counsel. The PCRA court granted relief in the form of restoring Bennett's right to appeal.

The Superior Court held that because Bennett's second petition was untimely, the PCRA court was without authority to grant relief and, as a result, the Superior Court did not have jurisdiction to hear the appeal. While acknowledging that the Supreme Court had construed the time periods in the Act as jurisdictional and not a statute of limitations subject to equitable tolling, the court stated that Bennett's "argument for making an equitable exception to the PCRA time-bar"⁵¹ was strong. There was "no question" that Bennett was entitled to a new trial based upon the erroneous accomplice liability charge that counsel failed to object to. The court noted that Bennett's co-defendant had been awarded a new trial after he successfully challenged the charge on appeal from the denial of PCRA relief but that Bennett was without a remedy due to "serial ineffectiveness of counsel."⁵² The court noted that it had changed its administrative practice of dismissing appeals when counsel fails to

file a brief and now retains jurisdiction and remands the case to the PCRA court. In this case, however, the court had followed its prior practice and, consequently, it was in the "unenviable position of denying relief where there is no doubt that justice requires such relief."⁵³ The court stated that its "inability to consider equitable concerns"⁵⁴ in light of the jurisdictional nature of the time-bar resulted in an "injustice . . . of constitutional magnitude" and acknowledged that there was a "legitimate argument that . . . Bennett's constitutional right to appeal, his right to effective counsel or his right to a writ of habeas corpus has been unconstitutionally thwarted by the PCRA time limitations."⁵⁵

Untimely Initial Petition and Appointment of Counsel

In *Commonwealth v. Smith*,⁵⁶ the Supreme Court addressed the relationship between the timeliness requirement of the Act⁵⁷ and Pa.R.Crim.P. 904(B) which requires the PCRA court to appoint counsel for an indigent defendant on the defendant's first petition.⁵⁸ The question presented in *Smith* was whether a defendant is entitled to counsel where the petition is untimely. The Commonwealth contended that because the timeliness requirements are jurisdictional, an indigent defendant who files an initial petition more than a year after judgment of sentence must plead and prove one of the exceptions to the one-year time limitation in order to qualify for court appointed counsel under Rule 904. The court held that while the time limits under the Act preclude a court from considering the merits of an untimely petition, Rule 904 mandates appointment of counsel, even in cases where it appears the petition is untimely, in order for counsel to assist the indigent defendant in attempting to establish an exception to the time-bar. The court noted that without counsel, an indigent defendant would not be aware of the need to establish an exception to the one-year filing period. Even in cases where the defendant is aware of the time periods under the Act, counsel is better able to investigate and assess whether facts are sufficient to prove that one of the exceptions applies.

⁴⁸ *Commonwealth v. Priovolos*, 715 A.2d 420, 421-422 (Pa. 1998); *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998).

⁴⁹ While second petition alleging ineffectiveness of prior PCRA counsel must be filed within the time limits of the Act, where a petition is dismissed prior to the appointment of counsel, the Supreme Court has held that a subsequent counseled petition may not be treated as an untimely second petition. *Commonwealth v. Tedford*, 781 A.2d 1167 (Pa. 2001).

⁵⁰ 842 A.2d 953 (Pa. Super. 2004).

⁵¹ *Id.* at 957.

⁵² *Id.* at 959.

⁵³ *Id.*

⁵⁴ *Id.* at 960.

⁵⁵ *Id.*

⁵⁶ 818 A.2d 494 (Pa. 2003).

⁵⁷ 42 Pa.C.S.A. §9545(b).

⁵⁸ In second or subsequent petitions, appointment of counsel is required only where the PCRA court determines an evidentiary hearing is required or where the interests of justice require it. Pa.R.Crim.P. 904(C) and (D).

Exceptions to the Grant Decision

In *Commonwealth v. Grant*,⁵⁹ the Pennsylvania Supreme Court reversed a long standing rule⁶⁰ requiring new counsel to raise ineffectiveness of prior counsel at the first opportunity, even if that first opportunity is direct appeal and the issue was not raised and developed in the court below. *Grant* holds that as a general rule, a defendant "should wait to raise claims of ineffectiveness of counsel until collateral review."⁶¹ The court noted that postponing ineffectiveness claims to the post conviction stage affords the defendant the "opportunity to develop a factual basis for the claim that counsel's performance"⁶² did not meet the standard for effective assistance of counsel. *Grant* held that its new rule of deferring consideration of claims of trial counsel ineffectiveness until the post conviction stage applied retroactively to cases pending on direct appeal where the issue of ineffectiveness of trial counsel had been raised and preserved.⁶³ The court in *Grant* left open the possibility that it may choose to create exceptions to the rule.⁶⁴

In *Commonwealth v. Bomar*, the Supreme Court held that *Grant* did not apply where defendant's claims of ineffectiveness were properly raised and preserved in the trial court. In *Bomar*, trial counsel withdrew following sentencing and new counsel filed post-sentence motions including claims of trial counsel ineffectiveness. The trial court conducted hearings on the motions that included the testimony of trial counsel and addressed the ineffectiveness claims in its opinion. The court held that the concerns that led the court to adopt the rule in *Grant* did not apply here and, therefore, the in-

effectiveness claims were reviewable on direct appeal.⁶⁵

Bomar was relied upon by the Superior Court in *Commonwealth v. Wright*.⁶⁶ Wright sought PCRA relief on the grounds that counsel was ineffective in failing to file a direct appeal. He also raised other claims of ineffectiveness including counsel's failure to suppress evidence. The PCRA court granted relief in the form of an appeal *nunc pro tunc*. On appeal, Wright renewed his claims of ineffectiveness. The court held that the rationale of *Bomar* permitted it to consider Wright's ineffectiveness claim for failure to suppress evidence notwithstanding the fact that the PCRA court did not rule on the issue. The court concluded that because there had been a full evidentiary hearing at which trial counsel testified, there was an adequate record on which to assess the claim. Moreover, dismissal of the claim pursuant to *Grant* would be "judicially inefficient" as it would merely lead to a "hearing identical to the one that already occurred below."⁶⁷

The Superior Court has also concluded that *Grant* does not apply where the defendant is sentenced to a short term of imprisonment. In *Commonwealth v. Salisbury*,⁶⁸ the defendant was sentenced to 90 days imprisonment. The court noted that a defendant must be in custody to be entitled to PCRA relief⁶⁹ and that while Salisbury's sentence had been stayed pending appeal, there is no provision for a mandatory stay pending collateral attack of the sentence. Strict application of *Grant*, the court concluded, would result in Salisbury being unable to present his claim that counsel was ineffective. *Salisbury* was followed in *Com-*

⁵⁹ 813 A.2d 726 (Pa. 2002).

⁶⁰ *Commonwealth v. Dancer*, 331 A.2d 435 (Pa. 1975); *Commonwealth v. Hubbard*, 372 A.2d 687 (Pa. 1977).

⁶¹ *Commonwealth v. Grant*, 813 A.2d at 738. In rejecting the old rule, the court noted numerous problems associated with identifying and presenting an issue on appeal that was not considered by the trial court are including the absence of a trial court opinion.

⁶² *Id.* at 736.

⁶³ See e.g. *Commonwealth v. Rosendary*, 818 A. 2d 526, 529-530 (Pa. Super. 2003), *Commonwealth v. Robinson*, 817 A.2d 1153, 1162-1163 (Pa. Super. 2003) and *Commonwealth v. Blick*, 840 A.2d 1025, 1027-1028 (Pa. Super. 2004) as cases where the claim of ineffectiveness was dismissed without prejudice to the defendant raising the issue in a PCRA petition.

⁶⁴ *Id.* at n.14. The court noted a possible exception to the general rule where the claim involves "a complete or constructive denial of counsel" or where counsel breaches his or her duty of loyalty.

⁶⁵ *Bomar* was distinguished in *Commonwealth v. Belak*, 825 A.2d 1252, 1254 n.6 (Pa. 2003) (absence of evidentiary record and trial court opinion where ineffectiveness claims not raised until defendant filed statement pursuant to Pa.R.A.1925(b)) but followed in *Commonwealth v. Ramos*, 827 A.2d 1195, 1199 n.8 (Pa. 2003); *Commonwealth v. Causey*, 833 A.2d 165, 175 (Pa. Super. 2003) and *Commonwealth v. Watson*, 835 A.2d 786, 795-796 (Pa. Super. 2003) (Superior Court will review claim of ineffectiveness on direct appeal only where trial court has addressed the claim on the merits after having determined that the existing record is sufficiently developed for resolution of the issue).

⁶⁶ 832 A.2d 1104 (Pa. Super. 2003).

⁶⁷ *Id.* at 1109-1110.

⁶⁸ 823 A.2d 914 (Pa. Super. 2003).

⁶⁹ 42 Pa.C.S.A. §9543(a); *Commonwealth v. Alhborn*, 683 A.2d 632 (Pa. Super. 1996) *en banc, aff'd*, 699 A.2d 718, 720 (Pa. 1997) (PCRA "clearly contemplates that the petitioner will be serving a sentence at both the pleading and proof stages of the proceeding" and consequently, a petitioner who has finished serving his or her sentence is not entitled to relief).

*monwealth v. Ingold*⁷⁰ where the defendant was sentenced to seven days time-served⁷¹ and in *Commonwealth v. Viglione*⁷² where the defendant was ordered to pay a fine.

Relaxed Waiver and Grant

The practice of the Supreme Court to “relax” waiver in capital cases on direct appeal was abrogated in *Commonwealth v. Freeman*.⁷³ In *Freeman*, the defendant, represented by new counsel on direct appeal, presented a number of claims of ineffective assistance of trial counsel and claims of trial court error not raised in the trial court. Under the doctrine of relaxed waiver, it was the court’s practice to consider claims on direct appeal in capital cases, which, though waived, could be decided on the basis of the record. The court held that *Grant* governed the ineffectiveness claims and, accordingly, dismissed the ineffectiveness claims without prejudice to the defendant’s right to present the claims in a PCRA petition. With respect to the claims of trial court error not considered by the court below, the court concluded that a rule similar to *Grant* should apply. The court noted that some of the same reasons that led to the *Grant* decision are present when the court employs relaxed waiver in capital cases. The court stated that the doctrine often required the court to decide issues without the benefit of a trial court opinion and to speculate about the reasons for the judge’s act or omission. In light of the multiple concerns about the waiver doctrine and the extensive experience that the court has had with post-conviction review in capital cases, the court held that “as a general rule on capital direct appeal, claims that were not properly raised and preserved in the trial court are waived and unreviewable. Such claims may be pursued under the PCRA, as claims sounding in trial counsel ineffectiveness, or if applicable, a

statutory exception to the PCRA’s waiver provision.”⁷⁴

Layered Claims of Ineffectiveness of Counsel

In *Commonwealth v. McGill*,⁷⁵ the Supreme Court noted that its case law with respect to preserving and proving a PCRA claim of ineffectiveness of counsel, other than immediate prior counsel, had created uncertainty among judges and lawyers. In *McGill*, the court set out the “appropriate framework” for pleading and proving such “layered” claims of ineffectiveness. The court noted that where direct appeal was filed before *Commonwealth v. Grant*⁷⁶ or where a court on direct appeal has reviewed some claims of ineffectiveness and PCRA counsel raises new claims of trial counsel ineffectiveness, because of the doctrine of waiver,⁷⁷ the only viable claim is one of appellate counsel ineffectiveness. Accordingly, the defendant must plead in his PCRA petition that appellate counsel was ineffective for failing to raise the ineffectiveness of prior counsel and present argument on each prong of the *Pierce*⁷⁸ standard as it relates to appellate counsel’s deficient performance. With respect to arguable merit, the first prong of the *Pierce* standard, the defendant must plead and prove all three prongs of the *Pierce* standard as to trial counsel’s act or omission⁷⁹: the underlying claim has arguable merit, trial counsel had no reasonable basis for the act or omission, and that but for the act or omission of trial counsel, there is a reasonable probability that the outcome of the proceeding would have been different. If the defendant fails to establish the ineffectiveness of trial counsel, the inquiry ends. If the defendant satisfies the *Pierce* standard with respect to trial counsel’s performance, the defendant must next demonstrate

⁷⁰ 823 A.2d 917 (Pa. Super. 2003).

⁷¹ See also *Commonwealth v. Dent*, 837 A.2d 571 (Pa. Super. 2003) (addressing ineffectiveness claim on direct appeal where defendant was sentenced to an immediate term of probation concurrent with sentence on unrelated offense and term had expired) and *Commonwealth v. Duda*, 831 A.2d 728 (Pa. Super. 2003) (reviewing ineffectiveness claim where defendant was sentenced to 90 days). The Superior Court distinguished *Salisbury* and *Ingold* in *Commonwealth v. Millward*, 830 A.2d 991 (Pa. Super. 2003) (defendants sentence of 90 days imprisonment and a concurrent term of three years probation did not preclude him from presenting his ineffectiveness claim in a PCRA petition) and *Commonwealth v. Blessitt*, 852 A.2d 1215 (Pa. Super. 2004) (prison term of 16 to 32 months sufficient time within which to pursue ineffectiveness claims under the PCRA).

⁷² 842 A.2d 454 (Pa. Super. 2004).

⁷³ 827 A.2d 385 (Pa. 2003).

⁷⁴ *Commonwealth v. Freeman*, 827 A.2d at 393. The court stated that the general rule did foreclose the possibility that a capital defendant may be able to describe why a waived claim is of such “primary constitutional magnitude” that it should be reviewed on appeal. The court further stated that the rule will be applied prospectively but excluded cases already briefed or in the process of being briefed.

⁷⁵ 832 A.2d 1014 (Pa. 2003).

⁷⁶ 813 A.2d 726 (Pa. 2002).

⁷⁷ 42 Pa.C.S.A. §§9543(a)(3); 9544(b).

⁷⁸ 786 A.2d 203 (Pa. 2001).

⁷⁹ In *Commonwealth v. Rush*, 838 A.2d 651, 656 (Pa. 2003) the court noted that the “first prong of the ineffectiveness analysis as to appellate counsel’s conduct—arguable merit—is best understood as a ‘nested’ argument” that requires the defendant to address all three prongs of the *Pierce* test as to trial counsel’s act or omission to demonstrate that a layered claim of appellate counsel’s ineffectiveness has arguable merit.

that appellate counsel did not have a reasonable basis for failing to raise trial counsel's ineffectiveness. Finally, the defendant must establish prejudice as the result of appellate's counsel's failure to raise the ineffectiveness of trial counsel, namely that there is a reasonable probability that the outcome of the appeal would have been different had appellate counsel presented the claim of ineffectiveness of trial counsel. In *McGill*, the court noted that because of confusion surrounding the presentation of layered claims of ineffectiveness, a remand to the PCRA court may be appropriate for cases currently in the appellate courts where the defendant has failed to properly plead and present such a claim. Because the test for establishing deficient performance on the part of trial counsel is well settled, remand, the court noted, was not appropriate where the defendant has failed to plead and present argument concerning ineffectiveness of trial counsel.⁸⁰

DNA Testing

In 2002, the PCRA was amended to provide for post-conviction DNA testing.⁸¹ Under the amendment, a defendant in custody may seek DNA testing on available evidence that resulted in his conviction by filing a written motion with the sentencing court.⁸² After testing is completed, the defendant may petition the

court for post-conviction relief.⁸³ In *Commonwealth v. Weeks*,⁸⁴ the Superior Court affirmed the dismissal of a PCRA petition seeking DNA testing as untimely. The court held that post-conviction DNA testing did not "directly create an exception" to the Act's one-year time bar. Instead, the amendment allows a defendant to seek DNA testing which could then be used in a PCRA petition to establish new facts in order to satisfy the newly discovered evidence exception to the one-year filing period.⁸⁵ Week's petition was properly dismissed because he filed an untimely PCRA petition instead of a motion for DNA testing.

In contrast to *Weeks*, in *Commonwealth v. McLaughlin*,⁸⁶ the defendant filed a motion for DNA post-conviction testing. In affirming the trial court's denial of the motion, the Superior Court held that McLaughlin had waived his right to secure DNA testing when he refused to submit to DNA testing at the time of trial.

The Superior Court also affirmed the denial of DNA testing in *Williams v. Erie County District Attorney's Office*.⁸⁷ In *Williams*, the defendant pled guilty and subsequently sought DNA testing. The court concluded that in light of the requirement that a defendant seeking post-conviction DNA testing present a "prima facie case" showing that the "identity of or participation in the crime by the perpetrator was at issue in the proceedings that resulted in the applicant's conviction . . ." and that DNA testing would establish the "applicant's actual innocence,"⁸⁸ the statute did not apply where the defendant has pleaded guilty. In addition, the court concluded that the statute's use of the term "proceeding" did not "encompass negotiations between the prosecution and defense regarding plea bargains."⁸⁹

⁸⁰ *Commonwealth v. McGill*, 832 A.2d at 1024. See also *Commonwealth v. Rush*, 838 A.2d 651, 657 (Pa. 2003) (no need to remand a PCRA petition "when the petitioner has not carried burden in relation to the underlying claim of trial counsel's ineffectiveness, since even if the petitioner was able to craft a perfectly layered argument . . . , the petitioner's claim would not entitle him relief . . . (because) he would never be able to establish the arguable merit prong necessary for proving appellate counsel ineffectiveness") and *Commonwealth v. Edmiston*, 851 A.2d 883 (Pa. 2004) (where "nested" claims of trial counsel ineffectiveness are lacking in merit, court will not engage in futile act of remanding to allow defendant to supplement pleadings with respect to ineffectiveness of appellate counsel).

⁸¹ Act of July 10, 2002, P.L. ____, No 2002-109, 42 Pa.C.S.A. §9543.1 (2002).

⁸² Under the amendment, the defendant must *inter alia* establish why the evidence was not previously subjected to testing, specify the evidence to be tested, consent to provide samples of body fluids, and assert his innocence. 42 Pa.C.S.A. §9543.1(a)(1), (c)(1), (c)(2)(i).

⁸³ Following testing, the defendant must seek post-conviction relief within 60 days beginning on the date on which the defendant is notified of the test results. 42 Pa.C.S.A. §9543.1(f).

⁸⁴ 831 A.2d 1194 (Pa. Super. 2003).

⁸⁵ 42 Pa.C.S.A. §9545(b)(ii).

⁸⁶ 835 A.2d 747 (Pa. Super. 2003).

⁸⁷ 848 A.2d 967 (Pa. Super. 2004).

⁸⁸ 42 Pa.C.S.A. §9543.1(c)(3).

⁸⁹ *Williams v. Erie County District Attorney's Office*, 848 A.2d at 972. The court left the question of whether other provisions of the PCRA may permit DNA testing where to challenge the legality of a guilty plea. The court noted that the Act permits challenges to guilty pleas but that such challenges are subject to the timeliness requirements of the Act.