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The Pennsylvania Post Conviction Relief Act—Recent Developments

By THOMAS M. PLACE,* Cumberland County
Member of the Pennsylvania Bar

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ABSTRACT

The Post Conviction Relief Act[1] *("PCRA" or "the Act") establishes a procedure for defendants to collaterally challenge their conviction or sentence. It is the sole means*[2] *of obtaining state relief following conviction and sentencing. The PCRA has been broadly interpreted*[3] *as creating a unified statutory framework for reviewing claims that were traditionally cognizable in state habeas corpus.*[4] *The Act permits defendants in custody*[5] *to seek relief when the conviction or sentence results in one or more of the Act's enumerated errors or defects*[6] *and the claimed*

* William Trickett Faculty Scholar and Professor of Law, Penn State Dickinson Law, and the author of the Pennsylvania Post-Conviction Act—Practice and Procedure (PBI Press, 2018 Ed).

1. 42 Pa.C.S.A. §9541 *et seq.*
2. 42 Pa.C.S.A. §9542.
3. *See e.g., Commonwealth* v. *Chester*, 733 A.2d 1242 (Pa. 1999), *reargument denied, habeas corpus granted* in part 159 F.Supp.2d 58; *Commonwealth* v. *Lantzy*, 736 A.2d 564 (Pa. 1999); *Commonwealth ex rel. Dadario* v. *Goldburg*, 773 A.2d 126 (Pa. 2001).
4. 42 Pa.C.S.A. §6501 *et seq.*
5. 42 Pa.C.S.A. §9543(a)(1). The Act requires the defendant to be in custody at the time the petition is filed and "at the time relief is granted." In *Commonwealth* v. *Turner*, 80 A.3d 754 (Pa. 2013), *cert. denied* 134 S.Ct. 1771, the Supreme Court upheld the constitutionality of the requirement that a defendant seeking relief under the PCRA must be in custody both at the time the petition is filed and when relief is granted. The Court noted that by limiting collateral relief to those serving sentences of confinement, the legislature simply chose not to provide a collateral review process for defendants who have completed their sentence. Due process, the Court said, does not require a state to provide unlimited opportunities for collateral relief of constitutional claims. The Court went on to reject the use of habeas corpus or *coram nobis* where the defendant's sentence was completed during the time the PCRA petition was pending.
6. 42 Pa.C.S. §9543(a)(2). To avoid a bifurcated system of post-conviction relief, the Pennsylvania Supreme Court has not limited the PCRA to its specifically enumerated areas of review. *See e.g., Commonwealth* v. *Liebel*, 825 A.2d 630 (Pa. 2003) (Act applies to claim that counsel failed to file a petition for allowance of appeal).

error has not been waived[7] or previously litigated[8] on direct appeal or in a previous PCRA petition. Subject to several narrow exceptions, a petition under the Act must be filed within one year of the date that the defendant's judgment of sentence becomes final.[9] This article reports on a number of recent decisions of the Pennsylvania Supreme and Superior Courts construing provisions of the Act.

THE PCRA AND *CORAM NOBIS*

The PCRA specifically provides that it is the "sole means of obtaining collateral relief"[10] and it "encompasses all other common law and statutory remedies"[11] including habeas corpus and *coram nobis*.[12] Common law remedies continue to exist only in cases where a claim is not cognizable under the Act.[13] If the claim is cognizable, a defendant "may only obtain relief under the PCRA."[13]

In *Commonwealth* v. *Descardes*,[15] the Pennsylvania Supreme Court considered whether a defendant who is no longer in custody can seek post-conviction relief by writ of *coram nobis*. Descardes, a resident alien, pled guilty to a number of offenses and, after completing a term of probation, left the country. When he attempted to return, immigration officials denied him re-entry on the basis of his felony convictions. After seeking to withdraw his guilty plea, Descardes filed a petition for writ of error *coram nobis* alleging plea counsel was ineffective for failing to advise him he would be deported as a consequence of his plea. The trial court treated his petition as one filed under the PCRA and dismissed it as untimely. Following the decision of the United States Supreme Court in *Padilla* v. *Kentucky*,[16] Descardes filed a second petition for a writ of *coram nobis*. While the trial court again treated the petition as having been filed under the PCRA, it nonetheless ordered Descardes' guilty plea withdrawn, finding that deportation was a sentence under the PCRA.

Where a claim is cognizable under PCRA, the PCRA is the only method of obtaining collateral review.

The Superior Court, in an *en banc* opinion,[17] reversed the decision of the trial court. The court determined that the trial court erred in treating Descardes' petition for relief as a PCRA petition, and because he no longer was in custody, he was not eligible for PCRA relief. However, the court concluded that *coram nobis* "provides a

7. 42 Pa.C.S.A. §9543(a)(4), 9544(b).
8. 42 Pa.C.S.A. §9544(a).
9. 42 Pa.C.S.A. §9545(b).
10. 42 Pa.C.S.A. §9542.
11. *Id.*
12. *Coram nobis* is generally available to challenge the validity of a judgment based on "facts not before the court when the judgment was entered." *Commonwealth* v. *Sheehan*, 285 A.2d 465, 467 (Pa. 1971). *Sheehan* was decided before the enactment of the PCRA. Unlike habeas corpus, *coram nobis* relief is not restricted to defendants in custody. *Sheehan*, 285 A.2d at 468.
13. *See e.g., Commonwealth* v. *West*, 938 A.2d 1034, 1043 (Pa. 2007) (substantive due process challenge to validity of recommitting the defendant to prison after he had been mistakenly set free not within ambit of the PCRA); *Commonwealth* v. *Judge*, 916 A.2d 511 (Pa. 2007), *cert. denied* 552 U.S. 1011 (2007) (alleged violation of defendant's rights under the International Covenant for Civil and Political Rights not a cognizable PCRA claim).
14. *Commonwealth* v. *Pagan*, 864 A.2d 1231, 1233 (Pa. Super. 2004).
15. *Commonwealth* v. *Descardes*, 136 A.3d 493 (Pa. 2016).
16. *Padilla* v. *Kentucky*, 559 U.S. 356 (2010) (where deportation consequences of a guilty plea are "truly clear," counsel must inform his non-citizen client that a guilty plea will make him eligible for deportation.
17. *Commonwealth* v. *Descardes*, 101 A.3d 105 (Pa. Super. 2014) (*en banc*). *Appeal granted* in part 631 Pa. 445 (2015).

way to collaterally attack a criminal conviction" for a person who has completed his sentence. The court held that because Descardes "continues to suffer the serious consequences of deportation," the trial court should have treated his petition as one seeking "*coram nobis* relief." However, the court concluded that Descardes was not entitled to *coram nobis* relief in light of the United States Supreme Court's decision in *Chaidez* v. *United States*.[18] In *Chaidez*, the Court held that *Padilla* announced a new rule of constitutional law that was not applicable to defendants whose convictions became final before *Padilla* was decided.[19]

The Supreme Court granted the Commonwealth's petition for allowance of appeal[20] on the issue of whether the Superior Court's decision conflicted with the Supreme Court's holdings in *Commonwealth* v. *Ahlborn*[21] and *Commonwealth* v. *Hall*.[22] In reversing the Superior Court, the Court noted that Descardes' claim of ineffectiveness of counsel was cognizable under the PCRA and that both *Ahlborn* and *Hall* had established that where a claim is cognizable under the PCRA, the "PCRA is the only method of obtaining collateral review."[23] The fact that there was no legal support[24] for Descardes' ineffectiveness of counsel claim until after the time period for filing a PCRA petition had expired did "not remove the claim itself from the purview of the PCRA."[25] The Court concluded that Descardes' petition alleging ineffectiveness of counsel should have been dismissed because he was no longer in custody at the time it was filed. Because Descardes was ineligible for PCRA relief, neither the PCRA court nor the Superior Court had jurisdiction to consider Descardes' petition.

MANDATORY MINIMUM SENTENCES

In *Alleyne* v. *United States*,[26] the United States Supreme Court considered whether its decision in *Apprendi* v. *New Jersey*[27] applied to mandatory minimum sentences. In

18. *Chaidez* v. *United States*, 133 S.Ct. 1103 (2013).

19. In a concurring and dissenting opinion in *Descardes*, Judge Bowes argued that the majority erred in concluding that the defendant properly invoked *coram nobis* to obtain review of his untimely ineffective assistance of counsel claim. In Judge Bowes' view, defendant's ineffectiveness claim was cognizable under the PCRA, and, as such, the defendant was foreclosed from seeking relief by means of a common law writ even though he could not obtain PCRA relief because he was no longer in custody.

20. Despite the fact that the Commonwealth had prevailed in the Superior Court, the Supreme Court concluded that review was appropriate because the Superior Court's published decision recognized a right to collateral review of a particular ineffectiveness of counsel claim independent of the PCRA and because the Superior Court had issued decisions based upon its *en banc* decision in the case.

21. *Commonwealth v. Ahlborn*, 699 A.2d 718 (Pa. 1999). In *Ahlborn*, the defendant's PCRA petition was dismissed after he completed his sentence before his scheduled PCRA hearing. On appeal, the Supreme Court affirmed the dismissal of the petition. The Court noted that unlike the prior Post-Conviction Hearing Act which permitted petitioners no longer in custody but who faced civil or criminal consequences as a result of their conviction to obtain review by means of *coram nobis*, the PCRA "contains express language which prevents a petition filed under the PCRA from being treated as a request for relief under the common law." *Id.* at 721.

22. *Commonwealth* v. *Hall*, 771 A.2d 1232 (Pa. 2001). In *Hall*, the defendant filed an untimely petition claiming counsel was ineffective in failing to file a direct appeal. The PCRA court dismissed the petition as untimely but allowed the defendant to file a petition for appeal *nunc pro tunc* outside the framework of the PCRA. In reversing the Superior Court which had upheld the decision of the PCRA court, the Supreme Court noted that the legislature clearly required that claims that could be brought under the PCRA "**must** be brought under that Act." *Id.* at 1235 (emphasis in original). Because the defendant's claim of ineffectiveness of counsel was within the framework of the PCRA, the "PCRA was the sole means by which he could seek relief." *Descardes*, 136 A.3d at 499.

23. *Descardes*, 136 A.3d at 501.

24. The prevailing law at the time Descardes' initial petition was filed was *Commonwealth* v. *Frometa*, 555 A.2d 92 (Pa. 1989). In *Frometa*, the Court had held that counsel was not ineffective for failing to warn a defendant of the collateral consequences of a guilty plea, including deportation.

25. *Descardes*, 136 A.3d at 502.

26. *Alleyne* v. *United States*, 133 S.Ct. 2151 (2013).

27. *Apprendi* v. *New Jersey*, 120 S.Ct. 2348 (2000).

Apprendi, the Court held that other than a prior conviction, any fact that increases "the penalty for the crime beyond the prescribed statutory maximum"[28] must be found by the factfinder beyond a reasonable doubt or admitted by the defendant at his guilty plea.[29] In *Alleyne*, the Court applied *Apprendi* and held that a defendant has a constitutional right to have a jury decide whether a fact that leads to the imposition of a mandatory minimum sentence has been proven beyond a reasonable doubt.[30] In numerous decisions post-*Alleyne*, Pennsylvania courts have held that most of Pennsylvania's mandatory minimum sentencing statutes are unconstitutional because the statutes permit the trial court to increase the defendant's minimum sentence based upon a preponderance of the evidence.[31]

The question of whether a defendant who had received a mandatory minimum sentence and filed a timely petition could obtain post-conviction relief following *Alleyne* was decided by the Pennsylvania Supreme Court in *Commonwealth* v. *Washington*.[32] In *Washington*, the Court stated that when new constitutional rules such as *Alleyne* are announced, they generally apply only to future cases and cases pending on direct appeal. New rules, the Court noted, do not "automatically render final, pre-existing sentences illegal." A sentence is illegal only if the new rule applies retroactively. In determining whether *Alleyne* applies retroactively to cases on collateral review, the Court used the framework established by the United States Supreme Court in *Teague* v. *Lane*.[33] In *Teague*, the Court recognized two exceptions to the general rule that new rules do not apply to cases on collateral review. The first exception is a new substantive rule that forbids "criminal punishment of certain primary conduct" or prohibits "a certain category of punishment for a class of defendants."[34] The second exception is "watershed rules of criminal procedure: . . . those new procedures without which the likelihood of an accurate conviction is seriously diminished."[35] The Court in *Washington* concluded that *Alleyne* is not a substantive rule because it "neither alters the range of conduct or persons punished by the law." Nor is *Alleyne* a "groundbreaking," watershed procedural rule as it remains "lawful and . . . routine" under discretionary sentencing for judges to increase sentences. As a result, the Court concluded that *Alleyne* does not apply "retroactively to cases pending on collateral review. . . ."

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28. *Id.* at 2362-3.

29. In *Blakely* v. *Washington*, 524 U.S. 296 (2004) *rehearing denied* 542 U.S. 961 (2004), the Court held that the statutory maximum for purposes of *Apprendi* is the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."

30. In *Alleyne*, the Court held that the elements of a crime include "not only facts that increase the ceiling but also those that increase the "floor" of the punishment to which the defendant may be subjected. *Alleyne*, 133 S.Ct. at 2154. *Alleyne* expressly overruled *Harris* v. *United States*, 536 U.S. 545 (2002) in which the Court held that a mandatory minimum sentence did not result in a sentence that exceeded the statutory maximum.

31. *See e.g., Commonwealth* v. *Newman*, 99 A.3d 86, 98 (Pa. Super. 2014 (*en banc*), *appeal denied*, 632 Pa. 86 (2015).

32. *Commonwealth* v. *Washington*, 142 A.3d 810 (Pa. 2016).

33. *Teague* v. *Lane*, 489 U.S. 288 (1989). The Court declined to recognize an independent, state level retroactivity analysis under *Danforth* v. *Minnesota*, 552 U.S. 264 (2008). In *Danforth*, the United States Supreme Court held that state courts are not bound by *Teague* and may choose the standard for deciding whether new rules of federal constitutional procedure are applicable to defendants seeking collateral review. The Court in *Washington* noted that *Teague* seeks to balance fairness and finality and "unless and until developed arguments are advanced which persuade [the] Court that a better equilibrium can be achieved, the *Teague* construct shall remain the default approach in Pennsylvania. . . ." *Washington*, 142 A.3d at 819.

34. *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989).

35. *Teague*, 489 U.S. at 311, 313. In *Teague*, the Court noted that the "watershed rule" exception was "extremely narrow" and the Court thought it unlikely that any such rules "have yet to emerge."

The Superior Court has addressed *Alleyne* in several post-*Washington* cases. In *Commonwealth* v. *Rivera,*[36] the defendant filed a timely PCRA petition following a negotiated guilty plea. He claimed counsel was ineffective for advising him post-*Alleyne*[37] to plead to an unlawful mandatory minimum sentence[38] and for failing to file a requested direct appeal. The PCRA court concluded that counsel was not ineffective because the law at the time of his plea permitted Rivera to plead to an offense involving a mandatory minimum sentence.[39] Counsel, therefore, had a reasonable basis for advising Rivera to accept the plea offered. The PCRA court also found that Rivera failed to establish that he had requested counsel to file a direct appeal. Nonetheless, the PCRA court concluded Rivera was entitled to relief because counsel failed to "consult *sua sponte*" with Rivera with respect to whether he wished to file a direct appeal "regarding the constitutionality of his plea under *Alleyne*. . . ." Accordingly, the PCRA court reinstated the defendant's post-sentence and direct appeal rights *nunc pro tunc*. On appeal, the Commonwealth claimed that Rivera had agreed to a negotiated guilty plea and that counsel did not have a duty to consult with Rivera regarding direct appeal because he had received the sentence he had bargained for.

In affirming the grant of PCRA relief, the Superior Court held that Rivera could, at the time he pled guilty, agree to the imposition of a mandatory minimum sentence. Nonetheless, counsel had a duty under *Roe* v. *Flores-Ortega*[40] to consult with Rivera because *Alleyne* presented a non-frivolous ground for an appeal. In the court's view, a legitimate argument could have been made at the time Rivera was sentenced that *Alleyne* precluded a mandatory sentence even in the context of a plea bargain. Rivera did not make a "knowing, voluntary and intelligent waiver"[41] of his right to direct appeal because counsel did not explain to him the potential illegality of his sentence.[42] As such, counsel was ineffective for failing to provide Rivera with "all the relevant information" he needed to decide whether to file a direct appeal.[43]

In *Commonwealth* v. *Ciccone,*[44] the defendant was sentenced under a mandatory minimum sentencing statute[45] and subsequently sought PCRA relief. He claimed his sentence was illegal under *Alleyne* and that he was entitled to relief because the claim was cognizable under the PCRA and presented in a timely petition. The PCRA court denied relief and on appeal, the Superior Court affirmed in an *en banc* decision. The court noted that it had issued a number of decisions under *Alleyne* on di-

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36. *Commonwealth* v. *Rivera,* 154 A.3d 370 (Pa. Super. 2017), *appeal denied* 169 A.3d 1072 (2017).

37. *Alleyne* was decided seven months before Rivera entered his guilty plea

38. 18 Pa.C.S.A. §7508 (a)(7)(i) (mandatory minimum sentence of three years' imprisonment for PWID of at least one, but less than five, grams of heroin and prior drug trafficking conviction).

39. The PCRA court stated that at the time of Rivera's plea and during the period he could seek direct appeal, no appellate court had declared 18 Pa.C.S.A. §7508 unconstitutional.

40. *Roe* v. *Flores-Ortega,* 528 U.S. 470 (2000).

41. *Commonwealth* v. *Lantzy,* 736 A.2d 564, 572 (Pa. 1999).

42. The Commonwealth claimed that instead of seeking access to direct appeal, Rivera could obtain the relief he desired by seeking post-conviction relief. The court disagreed stating that Rivera's right to PCRA relief was "far from a foregone conclusion." The court noted that the state of the law with respect to *Alleyne* claims was "in flux," citing the Supreme Court's decision in *Washington* and the Superior Court's earlier decision in *Commonwealth* v. *Ruiz,* 131 A.3d 54, 59-60 (Pa. Super. 2015) (invalidating sentence on collateral review, holding *Alleyne* was not being applied retroactively because sentence in case was not final when *Alleyne* was decided).

43. In a concurring and dissenting opinion, Judge Bowes argued that the record established that counsel was completely unaware of the *Alleyne* decision and therefore, counsel was ineffective during the negotiation of Rivera's guilty plea.

44. *Commonwealth* v. *Ciccone,* 152 A.3d 1004 (Pa. Super. 2016).

45. 18 Pa.C.S.A. §7508(a)(1)(ii).

rect appeal striking down mandatory minimum statutes including the mandatory minimum sentence under which Ciccone had been sentenced.[46] The court held that Ciccone's sentence was not illegal because under *Commonwealth* v. *Washington, Alleyne* is not retroactive and, therefore, does not apply to claims for relief under the PCRA. The court also rejected Ciccone's claim that a statute rendered illegal by *Alleyne* is void *ab initio* rendering any sentence imposed pursuant to the statute invalid. In the court's view, a Pennsylvania mandatory minimum statute cannot be considered unconstitutionally void *ab initio* because the United States Supreme Court initially upheld the constitutionality of mandatory minimum sentencing statutes in *McMillan* v. *Pennsylvania*.[47] The court concluded that Ciccone's sentence was based upon United States Supreme Court precedent, and, therefore, the sentence was not illegal when imposed.[48]

In *Commonwealth* v. *Patterson*,[49] the Superior Court considered the validity of an open guilty plea that was entered shortly before *Alleyne* was decided. The plea was entered with the understanding that the Commonwealth would seek a five-year mandatory minimum sentence.[50] At the sentencing hearing several months later, the Commonwealth waived its right to seek the mandatory sentence and agreed to a term of incarceration of 4-8 years. There was no reference at the sentencing hearing to *Alleyne*, nor was there any indication that Patterson was aware of the decision. Patterson subsequently filed a PCRA petition claiming plea counsel was ineffective in failing to advise him of the *Alleyne* decision.[51] The PCRA court dismissed the petition without an evidentiary hearing on the basis that counsel cannot be deemed ineffective for failing to anticipate changes in the law.[52]

On appeal, Patterson argued that the threat of receiving a mandatory minimum sentence induced him to plead guilty. In addition, Patterson sought a remand to address whether plea counsel was ineffective in failing either to challenge the negotiated sentence or to file a motion to withdraw his plea in light of *Alleyne*.

In reversing and remanding the case, the Superior Court stated that it was reasonable to infer from Patterson's averments in his amended PCRA petition that he would not have accepted the Commonwealth's offer of sentence and, in fact, would have withdrawn his plea, had he known that he would not be subject to a mandatory minimum sentence. The court remanded the case for an evidentiary hearing to determine whether counsel did, in fact, fail to advise Patterson about the application of *Alleyne*.[53]

INEFFECTIVENESS AND ATTORNEY-CLIENT PRIVILEGE

In two recent cases involving allegations of ineffectiveness of counsel, the Pennsylvania Supreme Court considered the issue of waiver of the attorney-client privi-

46. *Commonwealth* v. *Mosley*, 114 A3d 1072 (Pa. Super. 2015).
47. *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986).
48. In a dissenting opinion, President Judge Emeritus Bender argued that Ciccone was entitled to relief because the PCRA provides relief from any illegal sentence, provided the issue is raised, as here, in a timely petition.
49. *Commonwealth* v. *Patterson*, 143 A.3d 394 (Pa. Super. 2016).
50. 35 P.S. §780-113(a)(30) (possession of a controlled substance (marijuana) with intent to deliver).
51. Patterson also claimed that the mandatory sentences sought by the Commonwealth induced him to agree to the sentence imposed.
52. *See e.g,. Commonwealth* v. *Bennett*, 57 A.3d 1185, 1201 (Pa. 2012).
53. The court noted that Patterson would be entitled to a new sentencing hearing if he established that as a result of counsel's failure to advise him of *Alleyne*, he agreed to the negotiated sentence only under the undue influence of the unconstitutional mandatory minimum sentence. An additional showing that Patterson would have withdrawn his guilty altogether had counsel properly advised him of *Alleyne* would entitle Patterson to withdraw his guilty plea.

lege.[54] Section 9545(d)(3) of the Act provides that when relief is based on a claim of ineffectiveness, "any privilege concerning counsel's representation as to that issue shall be automatically terminated."[55] In *Commonwealth* v. *Flor*,[56] a capital case, the Commonwealth moved for the production of trial counsel's complete records of Flor's conviction and sentence in response to Flor's PCRA claims of ineffective assistance of counsel. Following an evidentiary hearing, the PCRA court granted the Commonwealth's discovery motion and denied PCRA counsel's request to review trial counsel's file to identify and remove any privileged materials. In support of its broad discovery order,[57] the PCRA court relied upon the fact that Flor had pled guilty and that by alleging trial counsel was ineffective, Flor waived any entitlement to rely upon the attorney-client privilege or work product protection. Flor filed an appeal from the discovery order pursuant to Pa.R.A.P. 313.[58]

In concluding that the PCRA court abused its discretion in permitting "wholesale" discovery, the Supreme Court held that the PCRA court had failed to conduct an issue-specific waiver analysis to determine the extent to which Flor's claims "depended upon otherwise privileged material. . . ." The Court noted that the voluminous file which the PCRA court's broad order compelled to be disclosed contained privileged documents because it included direct appeal material and material unrelated to the issues raised in the PCRA petition. The PCRA court did not conduct an *in camera* review nor allow PCRA counsel "the opportunity to separate the material that remained privileged from that which was put in issue by Flor's claims." The Court stated that the "mere potential" that the discovery order will force disclosure of privileged material was a sufficient reason to reverse the discovery order. In addition, the Court noted that disclosure of the entirety of trial counsel's file without

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54. 42 Pa.C.S.A. §5916 provides that "[i]n a criminal proceeding counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case the privilege is waived upon the trial by the client." *See also* Pa.R.Crim.P. 573(G).

55. 42 Pa.C.S.A. §9545(d)(3). In *Commonwealth* v. *Chmiel*, 738 A.2d 406 (Pa. 1999), the defendant sought PCRA relief alleging trial counsel was ineffective. Trial counsel revealed privileged information when he testified in the PCRA proceeding. After the defendant was awarded a new trial, the Commonwealth introduced trial counsel's post-conviction testimony. On appeal, the Court held that an "attorney may not respond to allegations of ineffectiveness by disclosing client confidences unrelated to such allegations." Permitting the Commonwealth to use the testimony would impose a "chilling effect upon defendants' exercise of their right to effective assistance of counsel." *Chmiel*, 738 A.2d at 423.

56. *Commonwealth* v. *Flor*, 136 A.3d 150 (Pa. 2016).

57. Discovery in PCRA proceedings is governed by Pa.R.Crim.P. 902(E)(2) which provides that, upon a first counseled petition in a death penalty case, no discovery is permitted "except upon leave of court after a showing of good cause." In non-capital cases, no discovery is permitted "except upon leave of court after a showing of exceptional circumstances." Pa.R.Crim.P. 902(E)(1).

58. In *Commonwealth* v. *Harris*, 32 A.3d 243 (Pa. 2011), the Supreme Court held that discovery orders rejecting claims of privilege and requiring disclosure constitute collateral orders are immediately appealable under Pa.R.A.P. 313. In *Harris*, a capital case, the defendant claimed trial counsel was ineffective regarding the presentation of a psychologist during the penalty portion of his trial. Harrris claimed trial counsel was aware that the psychologist's evaluation was deficient because he had not tested Harris for organic brain damage. He also claimed that the psychologist had not performed appropriate testing even though he was aware that Harris's mental history suggested a cognitive disorder. In response, the Commonwealth sought a declaration from the PCRA court that the defendant had waived his psychologist-patient privilege and further sought permission to hire the psychologist as its own expert for the PCRA proceedings. After the PCRA court granted the Commonwealth's motion, the defendant appealed pursuant to Rule 313. The Supreme Court held that although Harris had waived the privilege as to the material necessary for the Commonwealth to respond to the ineffectiveness claim, the Commonwealth could not retain Harris's former expert. Retaining the expert, the Court concluded, would risk "disclosure of material to which [Harris] had not waived privilege, but would also erode public confidence in the integrity of criminal proceedings." *Id.* at 252.

the required issue-specific waiver analysis would have a "chilling effect" upon a defendant's ability to vindicate his right to effective representation.[59] Upon remand, the Court directed the PCRA court "to permit PCRA counsel the opportunity to determine precisely what portions of trial counsel's file remain privileged in light of Flor's claims."

In *Commonwealth* v. *King*,[60] the Court considered the question of whether the Commonwealth has the right to interview trial counsel *ex parte* when the defendant seeks PCRA relief on the basis of trial counsel's ineffectiveness. Prior to filing an amended PCRA petition, King's appointed counsel made numerous attempts to communicate with trial counsel with respect to various claims he intended to raise in his amended petition. Trial counsel declined to cooperate with PCRA counsel.[61] Thereafter, PCRA counsel advised trial counsel that as part of his continuing duty of loyalty to King, he should not discuss his representation of King with members of the District Attorney's office. After an amended petition was filed claiming trial counsel was ineffective for failing to seek a specific cautionary instruction, trial counsel indicated he would not cooperate with PCRA counsel and, instead, referred him to the District Attorney's office. In advance of the evidentiary hearing, PCRA counsel wrote to trial counsel and left telephone messages asking whether he had a strategic reason for not requesting the instruction in question. When he received no response from trial counsel, PCRA counsel filed a motion requesting that the District Attorney be precluded from interviewing trial counsel *ex parte*. In response, the Commonwealth stated that it was standard practice to prepare for PCRA hearings involving claims of trial counsel ineffectiveness to interview trial counsel in private prior to the hearing. The PCRA court granted the requested motion and thereafter, the Commonwealth filed an immediate appeal pursuant to Pa.R.A.P. 313.

In affirming the order of PCRA court, the Court rejected the Commonwealth's argument that the attorney-client privilege does not apply to its proposed out-of-court interview with trial counsel and that King waived all privileges by claiming trial counsel was ineffective. The Court stated that its decisions in *Flor* and *Commonwealth* v. *Harris*[62] establish that privileges are subject to an issue-specific waiver in PCRA proceedings involving claims of ineffectiveness of counsel. Privileged information that does not relate to the ineffectiveness claim "remains fully protected." The Court stated that its prior decisions "demand" that PCRA courts "vigilantly guard against disclosure of 'privileged materials' in out-of-court interviews with individuals who performed work for the defense or in discovery proceedings outside the courtroom." The Court noted that the proposed private interview of trial counsel "could easily become a freewheeling inquiry into privileged matters" and that the only way to guard against this is to preclude the Commonwealth from interviewing trial counsel in advance of the PCRA hearing.[63]

59. The Court also noted that the PCRA court's reliance of the defendant's guilty plea as a basis for its broad discovery order was error. A guilty plea waives one's right against self-incrimination with respect to the charge but does not waive the attorney-client or work product protections.

60. *Commonwealth* v. *King*, 167 A.3d 140 (Pa. Super. 2017), *appeal granted* 184 A.3d 946 (2018).

61. In a telephone conversation with PCRA counsel, trial counsel allegedly stated: "You're nuts if you think I'm gonna help you." *Id.* at 143.

62. *Supra* note 58.

63. Based upon trial counsel's statements to PCRA counsel and his uncooperative attitude, the Court found that the PCRA court's order was proper to prevent a possible breach of Pennsylvania Rules of Professional Responsibility with respect to confidentiality of information and the duty of loyalty a lawyer has to a former client.

APPELLATE COUNSEL INEFFECTIVENESS AND PRESUMED PREJUDICE

When a defendant challenges the effectiveness of trial,[64] appellate,[65] or PCRA counsel,[66] the general rule is that to obtain relief, the defendant must establish both inadequate performance and prejudice.[67] In *United States* v. *Cronic*,[68] the United States Supreme Court recognized that some "circumstances . . . are so likely to prejudice the accused"[69] that prejudice could be presumed, *i.e.*, where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing. . . ." The Pennsylvania Supreme Court has presumed prejudice where counsel ignored defendant's request and failed to file a direct appeal,[70] failed to file a statement of matters complained of on appeal,[71] failed to file a requested petition for allowance of appeal,[72] or failed to file an appellate brief.[73] On the other hand, the Court has not presumed prejudice where appellate counsel failed to include notes of testimony in the certified record and failed to provide argument with appropriate citation to authority. The Court concluded that the filing of an appellate brief "deficient in some aspect or another, does not constitute a complete failure to function as a client's advocate so as to warrant a presumption of prejudice. . . ."[74]

In *Commonwealth* v. *Rosado*,[75] the Pennsylvania Supreme Court considered whether prejudice should be presumed where counsel files an appellate brief that abandons all preserved issues in favor of an issue that was not preserved in the trial court. Following conviction and sentence, Rosado hired new counsel to represent him at the post-sentencing and appellate stages of his case. New counsel filed a post-sentence motion raising a sufficiency of evidence claim that was denied by the trial

64. *Powell* v. *Alabama*, 287 U.S. 45, 71 (1932); *Kimmelman* v. *Morrison*, 477 U.S. 365, 377 (1986) ("right to counsel is the right to effective assistance of counsel").

65. *Evitts* v. *Lucey*, 469 U.S. 387, 395 (1985) (holding that right to effective counsel extends to first appeal).

66. *Commonwealth* v. *Albert*, 561 A.2d 736, 738 (Pa. 1989) (holding that rule-based right to counsel in a PCRA proceeding includes the "concomitant right to effective assistance of counsel" in the PCRA court and on appeal). *See also Commonwealth* v. *Albrecht*, 720 A.2d 693, 699 (Pa. 1998) (appointment of counsel pursuant to Pa.R.Crim.P. 904 carries with it an "enforceable right to effective post-conviction counsel"). The Pennsylvania Supreme Court has acknowledged that there is "no formal mechanism designed to specifically capture claims of trial counsel ineffectiveness defaulted by initial-review PCRA counsel." *Commonwealth* v. *Holmes*, 79 A.3d 562, 584 (Pa. 2013). Notwithstanding the absence of a "formal mechanism" to challenge the effectiveness of PCRA counsel, a defendant can assert a claim of ineffectiveness in response to the PCRA court's notice of intention to dismiss the defendant's petition. *Commonwealth* v. *Pitts*, 981 A.2d 875, 880, n.4 (Pa. 2009).

67. *Strickland* v. *Washington*, 466 U.S. 668 (1984). In *Commonwealth* v. *Pierce*, 527 A.2d 973 (Pa. 1987), the Pennsylvania Supreme Court held that the federal standard of ineffectiveness set out in *Strickland* and the Pennsylvania test were analogous. Under the *Pierce* test, a court evaluates an ineffectiveness claim under a three-part performance and prejudice standard. Prongs one and two of the standard concern counsel's performance. To overcome the presumed effectiveness of counsel, the defendant must establish that the issue underlying the claim of ineffectiveness has arguable merit and that defense counsel's act or omission was not reasonably designed to advance the interests of the defendant. Prejudice, the third prong, is satisfied if the defendant shows "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

68. *United States* v. *Cronic*, 466 U.S. 648 (1984).

69. *Id.* at 658.

70. *Commonwealth* v. *Lantzy*, 736 A.2d 564, 571 (Pa. 1999).

71. *Commonwealth* v. *Halley*, 870 A.2d 795, 801 (Pa. 2005). In *Commonwealth* v. *Burton*, 973 A.2d 428 (Pa. Super. 2009), the Superior Court presumed prejudice when counsel filed an untimely Pa.R.App.P 1925(b) statement.

72. *Commonwealth* v. *Liebel*, 825 A.2d 630, 635 (Pa. 2003)

73. *Commonwealth* v. *Bennett*, 930 A.2d 1264 (Pa. 2007).

74. Commonwealth v. Reed, 971 A.2d 1216 (Pa. 2009). In *Reed*, the Court noted that the issues were sufficiently presented to allow the Superior Court to address the merits of Reed's arguments.

75. 150 A.3d 425 (Pa. 2016).

court. Counsel then filed a notice of appeal to the Superior Court. In response to the trial court's order directing counsel to file a Pa.R.A.P. 1925(b) statement, counsel filed a "preliminary" Rule 1925(b) statement raising three issues.[76] In addition, he attached a copy of his post-sentence motion to the "preliminary" statement assuming it would preserve the sufficiency of the evidence claim for purposes of appeal. Although the trial court granted counsel's request for additional time to submit a final Rule 1925 (b) statement, he never filed one. The trial court considered the three claims raised in the "preliminary" statement and issued a Rule 1925(a) opinion rejecting the claims. Thereafter, counsel filed a brief with the Superior Court in which he abandoned the three claims raised in his "preliminary" statement and, instead, raised as his sole appellate claim the unpreserved sufficiency of evidence claim. The Superior Court noted but did not address the three issues preserved in counsel's "preliminary" Rule 1925(b) statement. It found the sufficiency of evidence claim waived and, as a result, summarily affirmed Rosado's conviction.[77]

Rosado later filed a PCRA petition seeking reinstatement of his right to direct appeal *nunc pro tunc*. He claimed appellate counsel's actions constituted ineffective assistance of counsel *per se*. The PCRA court, following an evidentiary hearing, concluded that appellate counsel's actions did not amount to ineffectiveness *per se* and denied relief. On appeal, the Superior Court, relying upon *Commonwealth* v. *Reed*,[78] affirmed.[79] The court held appellate counsel's actions did not "constitute a complete failure" to function as Rosado's advocate that was sufficient to justify a presumption of prejudice. The court concluded Rosado was not entitled to relief because he failed to demonstrate that he was prejudiced by appellate counsel's errors.

In vacating the Superior Court's order affirming Rosado's judgment of sentence, the Supreme Court relied upon the distinction it had made in prior decisions[80] that the ineffective assistance of counsel *per se* doctrine is limited to those cases where counsel's errors "completely foreclose merits review." Such errors, the Court stated, amount to a constructive denial of counsel. Errors, on the other hand, that only partially foreclose appellate review[81] are subject to the *Strickland/Pierce* framework. The filing of a brief, as here, that raises only waived issues, "is akin to failing to file documents perfecting an appeal." In both situations, the Court noted, "counsel has forfeited all meaningful appellate review." Because counsel's error precluded litigation of Rosado's direct appeal, the error constituted ineffective assistance of counsel *per se*.

DNA TESTING

In 2002, the Legislature amended the PCRA to provide for post conviction DNA testing.[82] Section 9543.1 establishes a procedure by which a defendant in custody may seek DNA testing by filing a motion[83] with the sentencing court. The motion

76. The three issues counsel raised were (1) whether Rosado's sentence "was an abuse of discretion"; (2) whether the trial court erred in excluding certain evidence; and (3) whether a juror fraudulently concealed bias during *voir dire*.

77. *Commonwealth* v. *Rosado*, No. 2754 EDA 2012, 2013 WL 11259105 (Pa. Super. Jul. 23, 2013) (unpublished opinion).

78. *Reed, supra* note 74.

79. *Commonwealth* v. *Rosado*, No. 2474 EDA 2014, 2015 WL 7352584 (Pa. Super. April 17, 2015) (unpublished opinion).

80. *See supra* footnotes 66-69.

81. The Court noted that the errors in *Reed* did not cause a complete "deprivation of merits review" but instead narrowed the ambit of Reed's appeal.

82. 42 Pa.C.S.A. §9543.1.

83. 42 Pa.C.S.A. §9543.1(a). *Commonwealth* v. *Weeks*, 831 A.2d 1194, 1196 (Pa. Super. 2003) (request for DNA testing should be made by motion and not in a PCRA petition).

must specify the evidence to be tested, and the movant must acknowledge that if the motion is granted, any data obtained from samples or test results may be entered in law enforcement databases.[84] In addition, the motion must assert the movant's innocence of the crime for which he or she was convicted. The defendant must present a *prima facie* case that the identity or participation of the perpetrator of the crime was at issue at trial[85] and that exculpatory DNA testing would establish the defendant's actual innocence of the offense.[86] The defendant is not required to show that DNA testing would be favorable. The court, however, must review the motion and trial record and make a determination as to whether "there is a reasonable probability that DNA testing would produce exculpatory evidence"[87] that would establish the defendant's actual innocence. After testing, the defendant may petition for post conviction relief during the 60-day period following notification of the test results. Requests for DNA tests are "separate and distinct from claims"[88] arising under the PCRA.[89] Neither the PCRA's one-year time bar[90] nor the right to counsel[91] apply to a motion for DNA testing.

In *In re Payne*,[92] the Commonwealth appealed from an order granting Payne's request for DNA testing of physical evidence, including hair evidence taken from the crime scene of a 1981 burglary/homicide and related offenses for which Payne was convicted in 1987. No physical evidence connected Payne to the crime. The prosecution's case rested primarily on the testimony of three witnesses[93] who each purportedly heard Payne make inculpatory statements about the burglary/homicide. The witnesses claimed that Payne told them that he was accompanied by two people, but their testimony differed as to whether Payne or one of the other persons committed the murder. The testimony of the witnesses also differed as to the identity of Payne's co-conspirators. In 2012, Payne filed a motion for DNA testing. He claimed that the failure to match his DNA to the tested material would demonstrate his innocence. He also claimed that DNA testing could lead to the identification of an unknown person who actually killed the victim.[94] The trial court rejected Payne's claim that absence of his DNA would demonstrate his innocence. The court noted it was en-

84. 42 Pa.C.S.A. §9543.1(c)(1)(iii).

85. In *Commonwealth* v. *Wright*, 14 A.3d 798 (Pa. 2011), the Pennsylvania Supreme Court held that a defendant's confession determined to be voluntary is not a *per se* bar to establishing a *prima facie* case demonstrating that DNA testing would establish his actual innocence.

86. In *Commonwealth* v. *Conway*, 14 A.3d 101 (Pa. Super. 2011), *appeal denied*, 29 A.3d 795 (Pa. 2011), the court noted that the parties and the lower court had agreed on the definition of "actual innocence" to be applied with respect to the evaluation of the effect of new evidence. That definition, the court stated, is the one set out by the United States Supreme Court in *Schlup* v. *Delo*, 513 U.S. 298, 327 (1995), namely, that the new evidence must make it "more likely than not that no reasonable juror would have found [the defendant] guilty beyond a reasonable doubt." *Id.* at 299. The Court noted that the standard requires a reviewing court "to make a probabilistic determination about what reasonable, properly instructed jurors would do" if presented with the new evidence. *Id.* at 329 and 339.

87. *Commonwealth* v. *Smith*, 889 A.2d 582, 584 (Pa. Super. 2005), *appeal denied*, 905 A.2d 500 (Pa. 2006).

88. 42 Pa. C.S. §9543.1(f)(1). *Commonwealth* v. *Perry*, 959 A.2d 932, 938 (Pa. Super, 2008).

89. *Commonwealth* v. *Kunco*, 173 A.3d 817 (Pa. Super. 2017) (concluding that Commonwealth has right to appeal an order granting DNA testing even though PCRA proceedings remain pending).

90. *Commonwealth* v. *Conway*, 14 A.3d 101, 108 n.2 (Pa. Super. 2011), *appeal denied*, 29 A.3d 795 (Pa. 2012); *Commonwealth* v. *Brooks*, 875 A.2d 1141, 1146 (Pa. Super. 2005).

91. *Brooks*, 875 A.2d at 1147.

92. *In re Payne*, 129 A.3d 546 (Pa. Super. 2015).

93. Two of the witnesses were jailhouse informants who expected to receive leniency in exchange for their testimony.

94. Payne's second argument was based on the "data bank" theory that any DNA results that prove the presence of an unknown person "could be run through state and federal data banks for a match, which, if successful, would lead to the identification of a separate assailant." *Commonwealth* v. *Conway*, 14 A.3d 101, 110 (Pa. Super. 2011).

tirely possible that Payne left no DNA at the scene of the crime. As to Payne's claim that testing would lead to the discovery of an unknown assailant, the court considered the weight of the trial evidence demonstrating guilt and concluded that a jury might have "placed more emphasis on the weaknesses of the prosecution's case" if there were DNA evidence introduced that did not directly tie Payne to the murder scene. In addition, the court concluded that in light of the fact that the evidence pointed to two other persons having been present when the crime was committed whose identities remain unknown, DNA testing may result in additional charges of those who participated in the crime.

On appeal, the Commonwealth claimed that the trial court erred when it found that there was a reasonable probability that the test results could demonstrate Payne's "actual innocence." It argued that the framework of Payne's felony murder conviction precluded a finding of "actual innocence" because in order to convict Payne, the jury was not required to determine whether Payne was the principal actor in the crime. In an *en banc* decision, the Superior Court affirmed the trial court's order granting testing. The court initially concluded that the trial court was correct in rejecting Payne's argument that failure to match his DNA to the tested evidence would demonstrate his innocence. The court noted that it has consistently held that the absence of an accused's DNA, "by itself, cannot satisfy . . ." the statute's "actual innocence" standard.[95] With respect to Payne's "data bank" argument that DNA testing might reveal the identity of the person who actually killed the victim, the court rejected the Commonwealth's claim that test results would not establish Payne's "actual innocence." The court noted that Payne's conspiracy conviction had been reversed in 1993 but even if the conspiracy conviction survived, the Commonwealth had failed to explain how the underlying offenses of conspiracy and accomplice-to-burglary conviction "are immune from scrutiny given certain exculpatory DNA results." Nor did the Commonwealth explain why DNA testing which showed an unexplained DNA profile or profiles "would only serve to attack Payne's identity as the actual killer, but not his identity as a co-conspirator or accomplice to the crime of burglary." The court noted that the statute requires that the trial court assume exculpatory results in ruling on a request for DNA testing. The threshold question, the court stated, is not "the likelihood of proof of innocence, but whether it is within the realm of reason that some result(s) could prove innocence." While the court acknowledged that some potential DNA profiles would tend to support the Commonwealth's case against Payne, it noted it was not "difficult to imagine" other possible results of testing that would undermine the jury's verdict in the case. While Payne's felony murder conviction limits the results of DNA testing that "could assist in proving his innocence, it does not exclude them all." As a result, the trial court's decision was supported by the evidence and free of legal error.[96]

In *Commonwealth* v. *Walsh*,[97] Walsh was charged with aggravated assault and other crimes arising out of an incident in which the prosecution claimed that he had used a hammer to repeatedly strike his wife and to do damage to her vehicle. Walsh admitted to damaging the vehicle but denied he ever struck his wife with the hammer. Following his conviction in 2004 and multiple PCRAs, Walsh filed a motion in

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95. *See Commonwealth* v. *Heilman*, 867 A.2d 542, 547 (Pa. Super. 2005); *Commonwealth* v. *Smith*, 889 A.2d 582, 586 (Pa. Super. 2005); *Commonwealth* v. *Brooks*, 875 A.2d 1141, 1147 (Pa. Super. 2005).

96. Judge Stabile dissented on the basis that Payne had failed to set forth a *prima facie* case of actual innocence. President Judge Gantman wrote a separate dissenting opinion based on Payne's failure to establish the timeliness of his motion for DNA testing as required by 42 Pa.C.S. §9543(d)(1)(iii).

97. *Commonwealth* v. *Walsh*, 125 A.3d 1248 (Pa. Super. 2015).

2014 requesting DNA testing to determine if his wife's blood was present on the hammer. He claimed the absence of his wife's DNA on the hammer would establish his actual innocence of aggravated assault. After finding Walsh had failed to establish entitlement of DNA testing, the trial court denied his motion.

In affirming the denial of DNA testing, the Superior Court concluded that Walsh had failed to satisfy the threshold statutory requirements necessary to obtain DNA testing.[98] The court found that the hammer Walsh sought to have tested was available for testing before his trial, and technology was available at the time of his trial to test the hammer. In addition, the trial court had not refused a request for funds to test the hammer for DNA evidence. The court also concluded that Walsh had failed to establish a *prima facie* case demonstrating his actual innocence because the absence of his wife's DNA on the hammer would not establish Walsh's "actual innocence for aggravated assault." Finally, the court found that Walsh's motion was untimely[99] in light of his failure to seek testing at trial and throughout the multiple post-conviction proceedings in the case.

In *Commonwealth* v. *Kunco*,[100] the Superior Court considered whether the evidence in support of Kunco's motion for DNA testing presented a *prima facie* case of actual innocence. In 1991, Kunco was convicted of rape and other sexual offenses based upon an alleged voice identification, a sexually charged statement that a neighbor overheard Kunco make, and a bite mark on the victim's shoulder that dental experts claimed was made by Kunco's teeth.[101] No physical evidence other than the alleged bite mark tied Kunco to the crime scene. Although hairs were found on a blanket and sheet, they did not match the hair color of the victim or Kunco. The hairs were not subjected to DNA testing. In a 2009 proceeding, Kunco was excluded as a contributor of the DNA found on a light cord used to torture the victim but the trial court denied PCRA relief based upon the other evidence against Kunco, including the bite mark evidence.

Kunco subsequently filed a second PCRA petition and a motion for DNA testing of evidence including the blanket, clothing used to cover victim's face and the victim's rape kit. He claimed that testing of the evidence with advanced technologies could, for the first time, detect semen and saliva, and analyze the hairs left by the assailant, potentially leading to the identification of an unknown male as the contributor of the biological material. He attached to his PCRA petition affidavits of the two odontologists who disavowed their trial testimony because the science surrounding bite mark identification had changed significantly since their testimony in 1991. At an evidentiary hearing, one of the odontologists testified that in light of the current understanding of limitations of bite mark comparisons, he could not definitively say that Kunco was responsible for the bite mark on the victim. Further, the PCRA court heard additional expert testimony that the victim's injury "could not be definitively categorized as a bite mark" and because the injury had healed at the time of the examination, it was not possible to do specific measurements and compare them to Kunco's dentition. Based on this testimony, the lower court granted Kunco's request for DNA testing.

98. 42 Pa.C.S.A. §9543.1(a)(2).
99. 42 Pa.C.S.A. §9543.1(d)(1)(iii).
100. *Commonwealth* v. *Kunco*, 173 A.3d 817 (Pa. Super. 2017).
101. The odontologists examined the victim five months after the attack. No visible injury existed at the time of examination. Nonetheless, the odontologists using UV light, purported to see a bite mark and when they placed hand drawn outlines of Kunco's teeth over the UV light photograph, they concluded that Kunco's teeth created the bite mark impression.

In affirming the decision of the lower court, the Superior Court noted that earlier DNA tests had excluded Kunco as a contributor to the DNA found on the lamp cord used in the assault. In addition, testimony in the lower court demonstrated that the bite mark evidence was "problematic, if not entirely incredible." Because of the questionable nature of the Commonwealth's evidence, the court concluded that it was "more likely than not that reasonable jurors would find [Kunco] not guilty if DNA tests" are exculpatory. Noting that a test that is favorable to a defendant does not guarantee an acquittal,[102] the court stated that an exculpatory DNA test on one or more of the items in question, "in tandem with the other frailties of the Commonwealth's case, may well result in [Kunco's] acquittal."

INTELLECTUAL DISABILITY AND ATTORNEY/CLIENT DECISION MAKING

In *Atkins* v. *Virginia*,[103] the United States Supreme Court held that the Eighth Amendment prohibits the execution of intellectually disabled[104] persons. The Court left the determination of how to apply the prohibition to the individual states. In *Commonwealth* v. *Miller*,[105] the Pennsylvania Supreme Court set out the procedure for the resolution of *Atkins* claims on collateral review.[106] The Court held that the defendant bears the burden to prove intellectual disability under accepted definitions[107] by a preponderance of the evidence.

In *Commonwealth* v. *Mason*,[108] a case of first impression, the Pennsylvania Supreme Court considered the question of whether Mason had the right to waive his *Atkins* claim over the objection of counsel. In 1996, Mason was found guilty of murder and sentenced to death. *Atkins* was decided while Mason's amended PCRA petition was pending. Soon thereafter, counsel moved for immediate re-sentencing of Mason to life imprisonment pursuant to *Atkins* based upon expert testimony at trial that Mason was borderline intellectually disabled as evidenced by an overall IQ score of 71. Prior to the PCRA court's hearing on the matter, Mason sent a letter to the PCRA judge requesting the court to disregard the *Atkins* motion filed by counsel. At a subsequent hearing, Mason, in a prepared statement, claimed he was "absolutely not retarded" and again stated he did not wish to pursue relief under *Atkins*. PCRA counsel argued that Mason did not have a right to *pro se* waive the *Atkins* claim. Instead, counsel claimed that the decision as to whether to pursue an *Atkins* claim lies solely with appointed counsel. The PCRA court subsequently granted Mason's request to withdraw the *Atkins* claim based upon the court's determination that Mason was sufficiently competent to knowingly and intelligently waive his right to an *Atkins* claim.

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102. *Commonwealth* v. *Heilman*, 867 A.2d 542, 547 (Pa. Super. 2005).

103. *Atkins* v. *Virginia*, 536 U.S. 304 (2002).

104. In light of a change in terminology in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders, the term "intellectual disability" is now used to describe what was heretofore referred to as "mental retardation." *See Hall* v. *Florida*, 134 S. Ct. 1986, 1990 (2014).

105. *Commonwealth* v. *Miller*, 888 A.2d 624 (Pa. 2005).

106. *See Commonwealth* v. *Sanchez*, 36 A.3d 24 (Pa. 2011) for the procedure for *Atkins* claims originating at trial.

107. Pursuant to *Miller*, a defendant must establish intellectual disability using either the definition provided by the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (APA/DSM-IV) or the definition developed by the American Association of Mental Retardation renamed the American Association on Intellectual and Developmental Difficulties. These definitions require a defendant to establish limited intellectual functioning as evidenced by an IQ score below the 65-75 range, significant adoptive limitations and an age of onset before age 18.

108. *Commonwealth* v. *Mason*, 130 A.3d 601 (Pa. 2015).

The Pennsylvania Supreme Court held that the PCRA court erred when it concluded that counsel's decision to seek an *Atkins* hearing was subject to Mason's veto.[109] The Court noted that the United States Supreme Court had recognized "that the accused has the ultimate authority to make fundamental decisions"[110] regarding the exercise or waiver of four basic trial rights. With respect to these limited matters, counsel "must both consult with the defendant and obtain consent to the recommended course of action."[111] As to other important decisions, the Court noted that its jurisprudence had aligned itself with the Pennsylvania Rules of Professional Conduct to "recognize a duty to gain the consent of the defendant with the overarching objective or purpose of the defense"[112] and leaves to counsel matters of strategy and tactics in terms of achieving those objectives. In seeking PCRA relief, the Court concluded that Mason's overarching objective was to obtain an order vacating his death sentence. Counsel's decision to advance an *Atkins* claim was not in conflict with Mason's PCRA objective. Instead, it was a strategy in support of Mason's objective.

The Court also concluded that Mason's decision with regard to *Atkins* was not comparable to the fundamental decisions subject solely to a defendant's choice. While an intellectually disabled defendant has a fundamental, personal right to be "insulated from capital punishment," no determination had been made that Mason was in fact intellectually disabled. In the Court's view, the constitutional right to avoid capital punishment on this basis had not yet attached in his case. This fact, the Court stated, distinguishes the issue in this case from four rights that are "clearly vested in a defendant at the time he or she must decide whether to waive or exercise them."[113] Moreover, simply because the decision to pursue an *Atkins* claim relates to a potential constitutional right or that a decision in a criminal case "has importance and carries significant consequences" does not mean that the decision implicates rights that are subject to a defendant's veto. In addition, a decision with respect to *Atkins* requires an assessment of a number of complex legal and diagnostic considerations, and this fact further distinguishes the *Atkins* hearing decision from the fundamental rights over which a defendant has control. Finally, the Court noted that instead of acting on Mason's *pro se* letter that invited hybridized representation, the PCRA court should have simply forwarded the letter to counsel.

REMAND WITH SPECIFIC INSTRUCTIONS—LIMITATION ON AMENDMENT OF PETITION

Pa.R.Crim.P. 905(A) gives the PCRA court the discretion to "grant leave to amend" a petition for PCRA relief at any time and states that "[a]mendment shall be freely allowed to achieve substantial justice." The Rule was created to allow defendants to avoid dismissal due to a correctable defect.[114] In *Commonwealth* v. *Sepulveda*,[115] a

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109. The Court remanded the case to the PCRA court to consider the *Atkins* claim. The Court noted that, if upon remand, Mason continues to express disagreement with counsel's choice to pursue an *Atkins* defense, he may seek a hearing pursuant to *Commonwealth* v. *Grazier*, 713 A.2d 81 (Pa. 1998) as to his competency to represent himself.

110. *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). The fundamental decisions that a defendant has ultimate authority to determine include whether to plead guilty, waive a jury, testify in his or her own behalf, and to appeal. *See McCoy* v. *Louisiana*, 138 U.S. 1500 (2018).

111. *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004).

112. *Mason*, 130 A.3d at 601 and 668.

113. *Id.*

114. *Commonwealth* v. *McGill*, 832 A.2d 1014, 1024 (Pa. 2003).

115. *Commonwealth* v. *Sepulveda*, 144 A.3d 1270 (Pa. 2016).

capital case, the Supreme Court considered the issue of amendment pursuant to rule 905(A) following the case having been remanded to the PCRA court. Sepulveda was originally denied relief in the PCRA court, and in a prior appeal, the Supreme Court agreed with the PCRA court on all but one issue. That issue concerned whether counsel was ineffective during the penalty phase for failing to investigate and present evidence of Sepulveda's mental health and troubled childhood. The Court found that the claim had arguable merit and that counsel lacked a reasonable basis for deficient performance.[116] The Court directed the PCRA court on remand to consider the question of whether Sepulveda was prejudiced by counsel's performance. In addition, the Court instructed the PCRA court to address an administrative matter concerning whether lawyers associated with the Federal Community Defender Office ("FCDO") "may or should lawfully represent appellant" in this matter.[117] Following remand, Sepulveda filed a *pro se* PCRA petition alleging newly discovered evidence, which the court forwarded to PCRA counsel. The PCRA court subsequently held a hearing on whether Sepulveda was prejudiced by trial counsel's omissions at his penalty hearing. The court also took testimony with respect to Sepulveda's new claims. Following the hearing, PCRA counsel sought leave to amend Sepulveda's first, timely petition to include claims of after discovered evidence, a *Brady* violation, and ineffective assistance of counsel. The Commonwealth objected, arguing that the court should not treat the new filing as an amended petition, but rather as an untimely second petition. The PCRA court granted Sepulveda a new penalty hearing based upon the ineffectiveness of trial counsel. The court also granted Sepulveda's motion to amend his first PCRA petition but denied relief on the merits of the claims raised. The PCRA court believed that Rule 905 (A), case law[118] and the "efficient administration of justice" supported its decision to treat Sepulveda's new claims as an amended petition. Sepulveda appealed from the PCRA court's order dismissing his newly raised claims.

The Supreme Court concluded that the PCRA court erred in permitting Sepulveda to amend his finally adjudicated petition. The Court held that a PCRA court does not have discretion to consider new claims as an amended PCRA petition following remand "unless such amendment is expressly authorized in the remand order." Here, the PCRA court was directed to consider one claim raised by Sepulveda "in proceedings upon **limited remand**." (emphasis in original). The Court noted that the liberal amendment policy of Rule 905(A) applies solely to petitions pending in the PCRA court.[119] Once the PCRA court has made a final decision on the petition, it no longer has jurisdiction to "make any determinations related to the petition." By permitting Sepulveda to amend "his finally decided PCRA petition," the PCRA court exceeded the scope the remand order and the "scope of its authority."

INEFFECTIVENESS CLAIMS, POST-SENTENCE MOTIONS, AND INELIGIBILITY FOR PCRA REVIEW

In 2002, in *Commonwealth* v. *Grant*,[120] the Supreme Court abandoned its long-standing rule that claims of ineffectiveness of counsel must be raised by new coun-

116. *Commonwealth* v. *Sepulveda*, 55 A.3d 1108, 1130 (Pa. 2012).

117. *Id.* at 1151. The FCDO removed the question of the propriety of their representation of Sepulveda to federal court.

118. *Commonwealth* v. *Flanagan*, 854 A.2d 489, 495-500 (Pa. 2004) (permitting amendment raising new claims where petition was still pending before the PCRA court).

119. The Court also noted that Rule 905(A) is limited by Pa.R.A. P. 2591 which provides that the lower court upon remand "shall proceed in accordance with the judgment or other order of the appellate court."

120. *Commonwealth* v. *Grant*, 813 A.2d 726 (Pa. 2002).

sel at the first opportunity, even if that opportunity is direct appeal and the issue was not presented to the trial court. *Grant* held that, as a general rule, claims of ineffectiveness of counsel would not be considered on direct appeal but instead deferred to the post-conviction process. In *Commonwealth* v. *Bomar,*[121] the Supreme Court held that *Grant* did not apply when defendant's claims of ineffectiveness were raised by new counsel in a post-trial motion, the trial court heard testimony of trial counsel, and the court addressed the ineffectiveness claims in an opinion.

Subsequently, the Supreme Court expressed reservations about the use of post-trial motions to raise claims of trial counsel ineffectiveness. In *Commonwealth* v. *Wright,*[122] the Court held that "collateral claims should not be reviewed on post-verdict motions unless the defendant waives his right to PCRA review because the PCRA does not afford the right to two collateral attacks."[123]

In 2013, in *Commonwealth* v. *Holmes,*[124] the Supreme Court returned to the issue of whether claims of ineffectiveness can be reviewed on post-sentence motions and direct appeal if the defendant waives review as of right under the PCRA. In *Holmes,* the Court recognized two limited discretionary exceptions to *Grant's* general rule of deferral of ineffectiveness claims to the post-conviction process. The first exception permits the trial court, in an "extraordinary case," to rule on a claim of ineffectiveness that is both "meritorious and apparent from the record" without requiring the defendant to waive PCRA review.[125] The second exception permits post-sentence review of multiple record and non-record based claims of ineffectiveness upon "good cause shown" where there is a waiver of PCRA rights. This exception addresses the effect of *Grant* on defendants who receive short prison or probation sentences. The Court had earlier acknowledged that the "net effect" of the *Grant* rule and the statutory requirement[126] that a defendant must be "currently serving a sentence of imprisonment, probation or parole" at the time collateral relief is granted was to leave defendants with short sentences without either direct appeal or collateral review to challenge trial counsel's ineffectiveness.[127] In *Holmes,* the Court specifically noted that in short sentence cases, the trial court's determination of good cause should include the length of the sentence imposed and whether, in light of the sentence, the defendant will be eligible for relief under the PCRA. Not addressed in *Holmes* was whether the exception would apply when a defendant is statutorily ineligible for PCRA relief because he is sentenced only to pay a fine.

This issue was considered by the Court in its recent decision in *Commonwealth* v. *Delgros.*[128] Delgros was convicted of receiving stolen property and sentenced to pay restitution and a fine. After obtaining new counsel, Delgros filed post-sentence motions raising numerous issues including ineffectiveness of trial counsel. With respect to the ineffectiveness claims, the trial court denied Delgros's request for an evidentiary hearing holding he was not entitled to relief because assertions of ineffectiveness were collateral claims that could only be raised pursuant to the PCRA.

121. *Commonwealth* v. *Bomar,* 826 A.2d 831 (Pa. 2003).

122. *Commonwealth* v. *Wright,* 961 A.2d 119 (Pa. 2009).

123. *Id.* at 148, n.22. *See also Commonwealth* v. *Liston,* 977 A.2d 1089 (Pa. 2009) and *Commonwealth* v. *Montalvo,* 986 A.2d 84 (Pa. 2009).

124. *Commonwealth* v. *Holmes,* 79 A.3d 562 (Pa. 2013).

125. *Id.* at 577

126. 42 P.A.C.S.A. §9543(a)(1)(i).

127. In *Commonwealth* v. *O'Berg,* 880 A.2d 597 (Pa. 2005), the Supreme Court rejected a "short sentence" exception to *Grant.* The Court noted that harm to defendants with short sentences caused by *Grant* "cannot be used to defeat" the reasons underlying deferral of ineffectiveness claims to the post-conviction process.

128. *Commonwealth* v. *Delgros,* 183 A.3d 352 (Pa. 2018).

Delgros, the court concluded, could not pursue such relief because he was not "currently serving a sentence of imprisonment, probation or parole." The Superior Court affirmed Delgros's judgment of sentence, rejecting his claim that he was entitled to relief under *Holmes*. The court found that the first exception to *Holmes* did not apply because Delgros's ineffectiveness claims were not apparent from the record. The court held the second *Holmes* exception (good cause/waiver of future PCRA review) presumed that a defendant would subsequently be entitled to PCRA review. Because Delgros received a sentence that made him ineligible for PCRA relief, the court concluded he could not obtain review of post-sentence claims of ineffectiveness of counsel.

The Supreme Court held that the Superior Court erred in holding that Delgros's inability to satisfy the custody requirement of the PCRA precluded him from obtaining review of this post-sentence claims of ineffectiveness of counsel. The Court noted that in *Holmes* it had recognized the "bedrock" importance of effective assistance of trial counsel and the importance of opportunities to challenge the effectiveness of counsel. As a result, *Holmes* had created an exception to *Grant* that permitted trial courts to consider ineffectiveness claims where defendants may be statutorily prevented from seeking PCRA relief. Here, the Court noted that because Delgros was sentenced to pay a fine, he could not obtain collateral relief. His ineligibility for collateral relief, the Court noted, eliminates the concern the Court had in *Holmes* of defendants obtaining a second opportunity to raise additional ineffectiveness claims in a PCRA proceeding. To ensure that defendants who receive a non-custodial sentence have an opportunity to challenge trial counsel's effectiveness, the Court adopted an additional exception to *Grant's* general rule of deferral. The new exception requires trial courts to address post-sentence claims of ineffectiveness of counsel in cases where the defendant receives a sentence that statutorily precludes PCRA relief.

CONCLUSION

Recent decisions include significant rulings on PCRA relief and the common law writ of *coram nobis*, the status of mandatory minimum sentences post-*Alleyne*, the attorney-client privilege when a defendant asserts a claim of ineffectiveness of counsel, the scope of the presumed prejudice doctrine, DNA testing, *Atkins* and attorney/client decision making, and amending a petition following a remand with specific instructions. The Supreme Court rejected the use of *coram nobis* by a defendant who was no longer in custody and reaffirmed the principle that if a claim is cognizable under the PCRA, the PCRA is the exclusive method of obtaining collateral review. The Court concluded that the new constitutional rule announced in *Alleyne* invalidating mandatory minimum sentences did not apply retroactively to cases pending on collateral review. It also ruled that to protect the attorney-client privilege, a PCRA court must conduct an issue-specific waiver analysis when discovery is sought by the Commonwealth in response to a claim of ineffectiveness of counsel. To guard against disclosure of privileged materials, the Commonwealth is precluded from interviewing trial counsel in advance of the PCRA hearing. The Court applied the principle of presumed prejudice where counsel files an appellate brief that raises only a waived issue. In a case of first impression, the Court held a defendant did not have a right to waive an *Atkins* hearing over the objection of counsel. Finally, in a number of decisions concerning DNA evidence, the Superior Court considered whether the defendant had established a *prima facie* case of actual innocence.