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## Post-Conviction Developments

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### Recommended Citation

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# Post-Conviction Developments

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## INTRODUCTION

The Post Conviction Relief Act<sup>1</sup> (“PCRA”) provides a procedure for defendants to collaterally challenge their conviction or sentence. It is the sole means<sup>2</sup> of obtaining collateral relief and has been broadly interpreted as creating a unified statutory framework for reviewing claims that were traditionally cognizable in state habeas corpus.<sup>3</sup> The Act permits defendants in custody<sup>4</sup> to seek relief when the conviction or sentence results in one or more of the Act’s enumerated errors or defects<sup>5</sup> and when the claimed error has not been waived<sup>6</sup> or previously litigated<sup>7</sup> 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 the defendant’s judgment of

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1. 42 Pa.C.S. §9541 *et seq.*

2. 42 Pa.C.S. §9542.

3. 42 Pa.C.S.A. §6501 *et seq.*

4. 42 Pa.C.S. §9543(a)(1). The Act requires a defendant to be in custody “at the time relief is granted.”

5. 42 Pa.C.S. §9543 (a)(2). To avoid a bifurcated system of post-conviction review, the Pennsylvania Supreme Court has not limited the PCRA to its specifically enumerated areas of review. *See e.g., Commonwealth v. Chester*, 733 A.2d 1242 (Pa. 1999) (applying Act to claims arising during penalty phase of a capital case); *Commonwealth v. Lantzy*, 736 A.2d 564 (Pa. 1999) (a claim that counsel failed to file direct appeal cognizable under Act); *Commonwealth v. Liebel*, 825 A.2d 630 (Pa. 2003) (Act applies to claim that counsel failed to file petition for allowance of appeal).

6. 42 Pa.C.S. §9543(a)(4), 9544(b).

7. 42 Pa.C.S. §9544(a).

sentence becomes final.<sup>8</sup> This article reports on a number of recent decisions of the Pennsylvania Supreme and Superior Court construing provisions of the Act.

## PRO SE CLAIMS OF APPELLATE COUNSEL INEFFECTIVENESS

In *Commonwealth v. Jette*<sup>9</sup>, the Pennsylvania Supreme Court limited defendants ability to challenge the effectiveness of appointed counsel.<sup>10</sup> In *Jette*, the Court reviewed a procedure adopted by the Superior Court to address *pro se* filings by defendants represented on appeal alleging the ineffectiveness of appellate counsel. Following the denial of PCRA relief, *Jette*'s appellate counsel filed a brief in the Superior Court

**Requiring appellant counsel to petition for remand whenever appellant alleges ineffectiveness violates the prohibition against hybrid representation.**

asserting that the PCRA court erred with respect to its resolution of one of five claims of trial counsel ineffectiveness presented to the PCRA court. *Jette* then filed a *pro se* petition for remand claiming appellate counsel was ineffective for not pursuing all the issues that had been presented to the PCRA court. The Superior Court denied the *pro se* petition but directed appellate counsel to comply with the procedure established in *Commonwealth v. Battle*.<sup>11</sup> The *Battle* procedure applied when a represented defendant filed a *pro se* petition seeking appointment of new counsel based upon the alleged ineffectiveness of appellate counsel. It required appellate counsel to file a petition for remand in response to the *pro se* filing providing the court with an evaluation of the claims raised by the defendant.<sup>12</sup> Based upon the petition and the record, the Superior Court then determined whether remand for the appointment of new counsel was required. The *Battle* procedure was designed to provide a mechanism for judicial review of *pro se* claims of ineffectiveness of appellate counsel.<sup>13</sup>

In *Jette*, the Superior Court concluded that the defendant was entitled to appointment of new counsel in the PCRA court. The court directed new PCRA counsel to examine *Jette*'s *pro se* PCRA petition, consult with *Jette* with respect to claims he wished to raise, and to prepare a new amended petition presenting those claims counsel deemed meritorious.

The Supreme Court reversed finding that the "*Battle* procedure" was contrary to its holding in *Commonwealth v. Ellis*<sup>14</sup> which rejected hybrid representation on direct appeal. In *Ellis*, the Court ruled that the Superior Court was not required to

8. 42 Pa.C.S. §9545(b).

9. 23 A.3d 1032 (Pa. 2011).

10. *Jette* was preceded by *Commonwealth v. Colavita*, 993 A.2d 874, 893 n.12 (Pa. 2010). In *Colavita*, the Court, citing its decision in *Commonwealth v. Pitts*, 981 A.2d 875, 880 n.4 (Pa. 2009), held that a defendant denied PCRA relief could not raise for the first time the ineffectiveness of PCRA counsel on direct or discretionary review.

11. 879 A.2d 266 (Pa. Super. 2005)

12. In *Battle*, the court stressed that it did not review the *pro se* filing, but rather the counsel's analysis of the issues raised *pro se*.

13. While not stated in *Battle*, without a mechanism in the appellate court to review *pro se* claims of appellate counsel ineffectiveness, such claims would escape judicial review because the PCRA time bar would likely preclude the defendant from challenging the effectiveness of appellate counsel in a subsequent PCRA petition.

14. 626 A.2d 1137 (Pa. 1993).

review *pro se* briefs filed by represented appellants. The Court noted that in *Ellis* it had set out the options available to a represented appellant dissatisfied with appellate counsel: petition to terminate his representation and represent himself on appeal<sup>15</sup> or allow counsel to proceed, and if the conviction is affirmed, challenge counsel's ineffectiveness in a post conviction proceeding.<sup>16</sup> The Court stated that *Ellis* did not require appellate counsel to petition for remand whenever appellant alleged the ineffectiveness of current counsel. The Supreme Court applied the rationale of *Ellis* to PCRA petitions in *Commonwealth v. Pursell*<sup>17</sup> holding that PCRA courts are not required to consider *pro se* filings of defendants when represented by counsel.

The Supreme Court also found the *Battle* procedure did not conform to the rules of appellate procedure which provide that *pro se* filings by appellants represented by counsel are not to be docketed but instead forwarded to counsel to consider whether the claims merit consideration by the court. In addition, the procedure was in tension with the long-standing rule that an indigent appellant must remain with appointed counsel through conclusion of the appeal absent retention of private counsel, a motion for change of counsel or a timely petition for self-representation. The Court also found that *Battle* was inconsistent with the traditional appellate review model by requiring the appellate court to assess the effectiveness of appellate counsel prior to determining whether the defendant was entitled to relief based upon the actual claims advanced by counsel on appeal. Finally, the Court noted that the *Battle* procedure allowed certain defendants to avoid the Court's restrictions on serial petitions for post-conviction relief by permitting, in effect, a second petition alleging the ineffectiveness of appellate counsel. Moreover, by permitting consideration of appellate counsel ineffectiveness on appeal from the denial of PCRA relief, the *Battle* procedure was contrary to the Court's recent holding that claims of PCRA counsel ineffectiveness could not be raised for the first time on direct or discretionary appeal.<sup>18</sup>

## INNOCENCE AND ELIGIBILITY FOR PCRA RELIEF

In *Commonwealth v. Haun*,<sup>19</sup> the Pennsylvania Supreme Court considered whether an admission of guilt precludes a defendant from seeking PCRA relief. A year after Haun was convicted and sentenced, he sought PCRA relief claiming trial counsel failed to protect his right to appeal the sentence imposed. At the PCRA hearing, trial

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15. *Commonwealth v. Grazier*, 713 A.2d 81 (Pa. 1998) (when appellant elects self-representation on appeal, Superior Court must remand matter to trial court for determination of whether waiver of counsel is knowing, intelligent and voluntary).

16. In *Commonwealth v. Rogers*, 645 A.2d 223 (Pa. 1994), the Court held that a criminal appellant who challenges the effectiveness of appellate counsel cannot terminate counsel after counsel has filed appellate briefs "simply because he wishes to file *pro se* appellate briefs."

17. 724 A.2d 293 (Pa. 1999).

18. *Commonwealth v. Colavita*, 993 A.2d 874 (Pa. 2010) (citing *Commonwealth v. Pitts*, 981 A.2d 875, 880 n.4 (Pa. 2009)). By barring claims of ineffective assistance of counsel from being raised on appeal from the denial of PCRA relief, the Pennsylvania Supreme Court has deprived defendants of the only meaningful method to protect their right to effective assistance of counsel in PCRA proceedings. See *Commonwealth v. Albert*, 561 A.2d 736, 738 (Pa. 1989) (right to counsel in PCRA proceeding included the "concomitant right to effective assistance of counsel."); *Commonwealth v. Albrecht*, 720 A.2d 693, 700 (Pa. 1998) (finding enforceable right to effective post-conviction counsel."). See also *Commonwealth v. Masker*, \_\_\_ A.3d \_\_\_, fn. 6 (Pa. Super. 2011) (Bowers, J., concurring and dissenting).

19. 32 A.3d 697 (Pa. 2011).

counsel denied that Haun had requested an appeal. During cross examination of Haun, Haun admitted, over objection, that he had committed the acts for which he had been convicted. Without deciding the issue of whether or not Haun had asked his lawyer to pursue an appeal, the PCRA court denied relief on the grounds that Haun's admission of guilt rendered him ineligible to obtain PCRA relief.<sup>20</sup> The Superior Court reversed and remanded holding that a construction of the PCRA that precluded consideration of claims by defendants who had admitted their guilt would lead to a bifurcated system of post-conviction review which had been rejected by the Supreme Court.

In affirming the decision of the Superior Court, the Supreme Court noted that it had previously rejected an interpretation of the Act as applying only to defendants convicted of crimes they did not commit. In *Commonwealth v. Chester*,<sup>21</sup> the Court held that claims arising during the penalty phase of a capital case were cognizable under the PCRA. The Court acknowledged that the prejudice requirement in Section 9543(a)(2)(ii) governing claims of ineffective assistance of counsel could lead to the conclusion that the Act was not intended to apply to capital sentencing. The Court held that such an interpretation would be inconsistent with the mandate in Section 9542 that the Act be the "sole means" of obtaining post-conviction relief. The Court also noted its decision in *Commonwealth v. Lantzy*.<sup>22</sup> In *Lantzy*, the Court considered whether a defendant was entitled to relief under the Act where counsel failed to file a direct appeal.<sup>23</sup> In holding that the PCRA provides the "exclusive remedy" where counsel fails to protect a defendant's right to direct appeal, the Court noted that if the PCRA applied only to lawyer error at trial, the result would be a bifurcated system of review where some claims, considered outside the PCRA, would be subject to habeas corpus review. Specifically addressing the issue of innocence, the Court held that a defendant who otherwise satisfied the requirements of the PCRA was not required to "establish his innocence or otherwise demonstrate the merits" of the issues which would have been raised on direct appeal.<sup>24</sup>

In holding in *Haun* that a "concession of guilt" does not *per se* preclude a defendant from seeking PCRA relief, the Court noted that the Legislature had more than a decade to respond to the Court's multiple expressions of why it believed the General Assembly preferred a broader construction of the scope of the PCRA but had not done so. Finally, using a principle governing statutory construction,<sup>25</sup> the Court resolved the tension in Section 9542 between the innocence language and the

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20. The PCRA court's decision was based on the innocence language in 42 Pa.C.S. §9542 and the Superior Court's decision in *Commonwealth v. Lantzy*, 712 A.2d 288 (Pa. Super. 1998) holding that the prejudice requirement in Section 9543(a)(2)(ii) governing claims of ineffectiveness of counsel required a defendant to provide evidence that he was wrongfully convicted. The court failed to note that Superior Court's decision in *Lantzy* had been reversed. *Commonwealth v. Lantzy*, 736 A.2d 564 (Pa. 1999).

21. 733 A.2d 1242 (Pa. 1999).

22. 736 A.2d 564 (Pa. 1999).

23. In *Lantzy*, the defendant had pleaded guilty and like Haun, sought to challenge the discretionary aspects of the sentence imposed on him.

24. The Court noted that it had followed the rationale of *Lantzy* in *Commonwealth v. Liebel*, 825 A.2d 630 (Pa. 2003) where it concluded that the defendant could seek PCRA relief where counsel had failed to protect the defendant's right to petition for allowance of appeal, and in *Commonwealth v. ex rel Dadario v. Goldberg*, 773 A.2d 126 (2001) where the Court held that the PCRA encompassed claims of ineffectiveness of counsel arising during plea negotiations.

25. 1 Pa.C.S. §1934.

“sole means” provision by concluding that the “sole means” language should predominate because it is last in order of position in Section 9542.

## DEFICIENT APPELLATE BRIEF AND PRESUMED PREJUDICE

When a defendant challenges the effectiveness of trial<sup>26</sup>, appellate<sup>27</sup>, or PCRA counsel<sup>28</sup>, the general rule is that to obtain relief the defendant must establish both inadequate performance and prejudice.<sup>29</sup> In *United States v. Cronic*,<sup>30</sup> the United States Supreme Court recognized that some “circumstances . . . are so likely to prejudice the accused”<sup>31</sup> that prejudice could be presumed. Prejudice could be presumed, the Court held, where counsel “entirely fails to subject the prosecution’s case to meaningful adversarial testing. . . .”<sup>32</sup> The Pennsylvania Supreme Court has presumed prejudice where counsel ignored defendant’s request and failed to file a direct appeal,<sup>33</sup> failed to file a statement of matters complained of on appeal,<sup>34</sup> or failed to file a requested petition for allowance of appeal.<sup>35</sup>

In several recent cases, presumed prejudice has been argued when counsel files a brief so deficient that the Superior Court is limited in its review of the defendant’s claims. In *Commonwealth v. Reed*,<sup>36</sup> the Pennsylvania Supreme Court reviewed a Superior Court decision in which the court presumed prejudice where counsel did not include notes of testimony in the certified record and filed an appellate brief that failed to cite appropriate authority that resulted in a waiver of Reed’s argument for relief. In reversing the Superior Court, the Supreme Court concluded the *Cronic* exception did not apply because unlike *Lantzy*, *Halley* and *Liebel*, counsel’s failures did not deprive Reed of his constitutional right to appeal. Noting that the Superior Court did not quash Reed’s appeal and that the issues were sufficiently presented to allow the Superior Court to address the merits of Reed’s arguments, the Court characterized counsel’s omissions as “narrowing the ambit” of Reed’s appeal and

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26. *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”).

27. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (finding right to effective counsel extends to first appeal).

28. *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”).

29. *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 that the issue underlying the claim of ineffectiveness has arguably 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.

30. 466 U.S. 648 (1984).

31. *Id.* at 658.

32. *Id.* at 659. For an application of *Cronic*, see e.g., *Penson v. Ohio*, 488 U.S. 75, 88 ((1988) (failure to appoint counsel for purposes of direct appeal). See also *Florida v. Nixon*, 543 U.S. 175 (2004) (noting *Cronic* is limited to cases where “counsel has entirely failed to function as the client’s advocate”).

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

34. *Commonwealth v. Halley*, 870 A.2d 795, 801 (Pa. 2005).

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

36. *Commonwealth v. Reed*, 971 A.2d 1216 (Pa. 2009).

not a complete failure to function as Reed's advocate which would warrant a presumption of prejudice.<sup>37</sup>

In *Commonwealth v. Fink*,<sup>38</sup> the Superior Court distinguished *Reed* finding that the deficient brief filed by Fink's counsel entitled Fink to a presumption of prejudice. On direct appeal of Fink's conviction, the Superior Court found the sole issue raised in Fink's appeal concerning the admissibility of his statement to the police was waived because Fink's appellate brief failed to adequately develop the issue. The court did not conduct an alternative merits review. Instead of quashing the appeal based on the deficient brief, the court affirmed the judgment of sentence. Fink subsequently filed a PCRA petition requesting the trial court to reinstate his right to direct appeal based upon the ineffectiveness of appellate counsel. The PCRA court denied relief finding that Fink had failed to establish that his lawyer was ineffective. In vacating the trial court's order denying post-conviction relief and reinstating Fink's right to direct appeal, the Superior Court concluded that counsel's failure to "offer citation and authority" necessary for the court's consideration of the circumstances in which Fink gave his statement to the police deprived Fink of his right to appellate review and thereby "compels application of the . . . presumption of prejudice." The court held that *Reed* did not preclude the court from reinstating Fink's right to direct appeal. The court acknowledged that even though the merits panel that considered Fink's direct appeal affirmed the judgment of sentence rather than quashing the appeal, the panel, in contrast to *Reed*, did not consider the merits of Fink's claims. This difference, the court noted, was "critical" rather than the terminology used by the panel in resolving the appeal. The court held that where briefing deficiencies preclude consideration of the merits of an appellant's claims and the court does not undertake an alternative merits review, the defendant is entitled to the presumption of prejudice when challenging the effectiveness of appellate counsel.

## INEFFECTIVENESS AND DIRECT APPEAL

In *Roe v. Flores-Ortega*,<sup>39</sup> the United States Supreme Court held that counsel has a constitutional obligation to consult with the defendant about the right to appeal when the defendant has indicated an interest in so doing or a rational defendant under the circumstances would want to appeal. If lack of consultation is established, the defendant is entitled to reinstatement of his appeal rights if he demonstrates a reasonable probability that he would have appealed but for lack of consultation.<sup>40</sup> In *Commonwealth v. Carter*,<sup>41</sup> the defendant filed a post-conviction petition seeking reinstatement of his right to direct appeal on grounds that counsel had failed to consult with him about an appeal after his conviction. Following appointment of counsel and the filing of an amended petition, the PCRA court dismissed the petition without a hearing. The PCRA court concluded that a hearing was not warranted be-

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37. In his dissenting opinion, Justice Saylor stated that representation by counsel whose omission forecloses effective merits review of all claims raised on appeal is the "functional equivalent of having no counsel at all." 971 A.2d at 1228 (Saylor, J. dissenting).

38. 24 A.3d 426 (Pa. Super. 2011).

39. 528 U.S. 470 (2000).

40. *Id.* at 480.

41. 21 A.3d 680 (Pa. Super. 2011).

cause the amended petition did not certify trial counsel as a proposed witness.<sup>42</sup> In addition, relying on *Commonwealth v. Bath*,<sup>43</sup> the PCRA court held that the defendant could not establish prejudice because the issues he claimed he would have raised on appeal were frivolous. In reversing and remanding the case, the Superior Court held that the PCRA court erred in dismissing the petition without a hearing. The court held that when a defendant seeks relief on the basis of a *Roe* claim, the PCRA court must hold an evidentiary hearing in order to make factual findings regarding the nature and extent of the trial counsel's discussions with the defendant about filing an appeal. The court found the PCRA court's reliance on *Bath* misplaced because *Bath* concerned counsel's failure to consult regarding discretionary appeal and not direct appeal as of right.

## DNA TESTING

In 2002 the Legislature amended the PCRA to provide for post conviction DNA testing.<sup>44</sup> Section 9543.1 establishes a procedure by which a defendant in custody may seek DNA testing by filing a motion<sup>45</sup> with the sentencing court. The motion must specify the evidence to be tested and acknowledge that if the motion is granted, any data obtained from samples or test results may be entered in law enforcement databases.<sup>46</sup> In addition, the motion must assert the defendant's innocence of the crime for which he or she was convicted.<sup>47</sup> The defendant must present a *prima facie* case demonstrating that the identity or participation of the perpetrator in the crime was at issue at trial and that exculpatory DNA testing would establish the defendant's actual innocence of the offense.<sup>48</sup> The defendant is not required to show that DNA testing would be favorable.<sup>49</sup> 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"<sup>50</sup> that would establish the defendant's actual innocence.<sup>51</sup> 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" arising under the PCRA.<sup>52</sup> Neither the PCRA's one-year time bar<sup>53</sup> nor the right to counsel<sup>54</sup> apply to a motion for DNA testing.

In *Commonwealth v. Wright*<sup>55</sup>, the Supreme Court considered the question of whether a defendant whose voluntary confession is admitted into evidence against

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42. Pa.R.Crim.P. 902(A)(15).

43. 907 A.2d 619 (Pa. 2006).

44. 42 Pa.C.S. §9543.1.

45. 42 Pa.C.S. §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).

46. 42 Pa.C.S. §9543.1(c)(1)(iii).

47. 42 Pa.C.S. §9543.1(c)(2)(i).

48. 42 Pa.C.S. §9543.1(c)(3).

49. *Commonwealth v. Smith*, 889 A.2d 852,854 (Pa. Super. 2005), *appeal denied*, 905 A.2d 500 (Pa. 2006)

50. *Id.*

51. 42 Pa.C.S. §9543.1(d)(2).

52. 42 Pa.C.S. §9543.1(f)(1).

53. *Commonwealth v. Conway*, 14 A.3d 101, 108 n.2 (Pa. Super. 2011), *appeal denied*, 29 A.3d 795 (Pa. 2011).

54. *Commonwealth v. Brooks*, 875 A.2d 1141, 1147 (Pa. Super. 2005).

55. 14 A.3d 798 (Pa. 2011).



him at trial is precluded from establishing a *prima facie* case demonstrating that DNA testing would establish his actual innocence.

Wright was convicted of rape and murder. The evidence introduced at trial included Wright's confession which the trial court had found was not the product of coercion. In addition, DNA evidence was admitted establishing the victim's blood on clothing found in the defendant's possession. Following direct appeal and an unsuccessful PCRA challenge on grounds of trial counsel ineffectiveness, Wright filed a motion for an advanced form of DNA testing which he claimed was not available at the time of his trial. Wright claimed that such testing would demonstrate his actual innocence.

Relying on the Superior Court's decision in *Commonwealth v. Young*,<sup>56</sup> the PCRA court denied Wright's motion on grounds that his voluntary confession precluded him from making a *prima facie* case that "DNA testing . . . assuming exculpatory results, would establish. . . the applicant's actual innocence" as required by Section 9543.1 (c)(3)(ii)(A). In addition, the court concluded that based on the record, there was no reasonable possibility that DNA testing would "produce exculpatory evidence that would establish . . . actual innocence." The Superior Court affirmed the decision of the PCRA court on the basis of its decision in *Young*. In *Young*, the court found that the defendant's voluntary confession barred him from asserting a claim of actual innocence and thereby precluded him from seeking DNA under Section 9543.1.

In *Wright*, the Supreme Court concluded that *Young* was wrongly decided. In interpreting the relevant language of Section 9543.1, the Court noted that the Legislature did not include an explicit prohibition in the statute preventing a defendant who has confessed to a crime, but otherwise meets the requirements of the statute, from obtaining DNA testing merely because the existence of the confession. Nor could the Court "perceive any reasonable reading" of the entire statute which would "impliedly support such a restrictive construction." The "flaw" in *Young*, the Court stated, was its conclusion that a determination of voluntariness was "completely determinative" of the question of the factual accuracy of the confession. The Court noted that this was improper since the issue of the voluntariness of a confession is "entirely separate" from the issue of whether the defendant's admissions conclusively establish that he or she committed the acts in question. The Court stated that it had long recognized that a confession is not, in and of itself, sufficient to convict and noted the "countless situations" where persons confess to crimes that they did not commit. Because the PCRA had dismissed Wright's motion solely on the basis of *Young*, the Court remanded the case to the PCRA court to determine whether Wright's factual allegations in his motion for DNA testing established a *prima facie* case of his innocence of the crimes charged.

In *Commonwealth v. Conway*,<sup>57</sup> the defendant sought DNA testing of items found near the victim of a stabbing he was convicted of in 1987. The items included blood-stained towels, fingernail clippings and piece of cloth that had been tied around the victim's hands. The conviction was based on circumstantial evidence. The defendant claimed to have discovered the body and admitted touching it to determine if the victim was alive. Although the prosecution presented evidence during the trial that

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56. 873 A.2d 720 (Pa. Super. 2005).

57. 14 A.3d 101 (Pa. Super. 2011), *appeal denied*, 29 A.3d 795 (Pa. 2011).

suggested that the victim had scratched the defendant, no DNA evidence or other scientific evidence was introduced during trial that tied the defendant to the body of the victim or to the area where the body was found. The PCRA court denied the motion for DNA testing on the basis that the defendant had failed to present a *prima facie* case demonstrating that DNA testing would establish his actual innocence.

In the Superior Court, the defendant acknowledged that the absence of his DNA on the tested items would not provide evidence of his innocence. He nevertheless argued that if testing revealed evidence of a third person on the items connected with the crime, such a result would point to the presence of a separate assailant. The defendant also argued that any DNA results that point to the presence of a third person could be entered in state and federal data banks which might lead to the identification of a separate assailant. The Commonwealth claimed that any DNA results would be speculative. More specifically, the Commonwealth, relying on *Commonwealth v. Smith*,<sup>58</sup> argued that defendants cannot seek DNA testing in order to run the results through DNA data banks. In *Smith*, the court affirmed the denial of the defendant's motion for DNA testing of the victims' fingernails finding there was no evidence that the victim scratched her assailant. In light of the overwhelming physical and scientific evidence that the Commonwealth presented at trial, the court concluded that the defendant's request was "entirely speculative". In a footnote, the court rejected the defendant's data bank argument as simply adding another "layer of speculation" to the defendant's already speculative rationale for testing.<sup>59</sup> In reversing the PCRA court, the Superior Court in *Conway* held that the footnote in *Smith* did not foreclose the defendant's data bank argument. The footnote, court stated, was based on the fact that Smith had failed to demonstrate how potential DNA evidence could be obtained from the victim's fingernails. The court noted that in *Conway*, by contrast, investigators had collected numerous items from the victim that had come into contact with the hands of the assailant. DNA testing of the items, the court stated, would add to the "reliability of the reconstruction" of the events surrounding the death of the victim. The court held that the DNA statute is remedial and "should be interpreted liberally" so as to permit, in appropriate cases, the comparison of tests results with information compiled in data banks for the purpose of excluding persons charged or convicted of a crime.

In *Commonwealth v. Williams*,<sup>60</sup> the Superior Court reviewed the dismissal of Williams's untimely PCRA petition seeking DNA testing of hair samples found in a wig discovered near the crime scene. The petition also claimed that trial counsel was ineffective in failing to obtain DNA testing of the wig prior to trial. Williams argued that his request for DNA testing rendered his petition timely and that he had established a *prima facie* case for testing the hair samples in the PCRA court.

In affirming the dismissal of PCRA petition, the Superior Court stated that when a petition commingles PCRA claims with a request for DNA testing, a court should first address the request for DNA testing. In finding that Williams did not meet the threshold requirements for DNA testing under Section 9543.1(a)(2), the court noted that the hair samples at issue were discovered before Williams's trial, that DNA testing was available at the time of his trial and that the trial court had not refused fund-

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58. 889 A.2d 582 (Pa. Super 2005), *appeal denied*, 905 A.2d 500 (Pa. 2006).

59. *Id.* at 586, n. 6.

60. \_\_\_ A.3d \_\_\_ (Pa. Super. 2011).

ing for the testing. In addition, the court concluded that Williams had failed to establish that the identity of the perpetrator was at issue in his trial and that testing of the samples, assuming exculpatory results, would establish his actual innocence. The court noted that three witnesses had identified Williams and that another witness testified that Williams had admitted to the crime and to wearing the wig. Moreover, the court found that the PCRA court correctly concluded that if hair found in the wig was DNA tested and found not to be Williams, the lack of Williams's DNA in the sample would not disprove that Williams wore the wig during the crime nor prove that he did not wear the wig on the day in question. Finally, the court concluded that Williams's PCRA petition filed eight years after his conviction became final was properly dismissed as untimely. While the one-year time bar for PCRA petitions does not apply to motions for DNA testing,<sup>61</sup> once the PCRA court concluded that Williams was not entitled to testing, his allegation that counsel was ineffective for not seeking testing did not constitute an exception to the one-year filing period governing PCRA petitions.<sup>62</sup>

## RIGHT TO AND WAIVER OF PCRA COUNSEL

Pa.R. Crim.P. 904(C) requires the PCRA court to appoint counsel to represent an indigent defendant filing a first petition for post-conviction relief. Once counsel has been appointed, he is obligated to "continue representation until the case is concluded or is granted leave by the court to withdraw"<sup>63</sup> or the defendant waives counsel.

In *Commonwealth v. Willis*,<sup>64</sup> the Superior Court concluded that appointed counsel and the PCRA court effectively denied Willis his right to counsel. After Willis timely filed a *pro se* petition alleging ineffectiveness of his guilty plea counsel and the PCRA court appointed Willis counsel, counsel, instead of filing an amended petition, filed a petition to withdraw<sup>65</sup> and a "no merit" letter. Without ruling on the petition to withdraw, the court held a hearing on Willis's *pro se* petition at which counsel was present. Therefore, Willis filed a *pro se* amended petition. Counsel again petitioned to withdraw on the basis that the issues presented in the amended *pro se* petition were meritless. Again, the PCRA court did not rule on counsel's petition to withdraw. Rather, the PCRA court held a second hearing on the *pro se* amended petition with counsel present. Following the hearing, the PCRA court denied Willis relief and granted counsel's petition to withdraw. Thereafter, Willis filed a *pro se* appeal alleging *inter alia* the ineffectiveness of appointed PCRA counsel.

The Superior Court reversed the denial of relief by the PCRA court. Because the PCRA court chose not to rule on counsel's petitions to withdraw, the court held that counsel was "duty-bound" to act as Willis's lawyer at the PCRA hearings. Instead,

61. *Commonwealth v. Conway*, 14 A.2d 101, 108 n. 2 (Pa. Super. 2011), *appeal denied*, 29 A.3d 795 (Pa. 2011).

62. *Commonwealth v. Bronshtein*, 752 A.2d 868, 871 (Pa. 2000) (holding that ineffectiveness does not constitute an exception to the PCRA time requirements). *But see Commonwealth v. Bennett*, 930 A.2d 1264, 1271 (Pa. 2007) (recognizing that in limited circumstances an ineffectiveness claim may fall under newly discovered fact exception to the one-year filing period where counsel abandons the defendant and abandonment was unknown to the defendant).

63. *Commonwealth v. White*, 871 A.2d 1291, 1294 (Pa. Super. 2005).

64. 29 A.3d 393 (Pa. Super. 2011).

65. *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988).

the court found that appointed counsel used the hearings in an effort to persuade the PCRA court that Willis's claims were without merit, thereby depriving Willis of his right to counsel. In addition, the Superior Court faulted the PCRA court for failing to take action when it became clear that appointed counsel was not advocating on behalf of his client and specifically for conducting the PCRA hearings prior to ruling on the petitions to withdraw. The court also noted that the PCRA court erred in permitting hybrid representation<sup>66</sup> when it accepted and considered Willis's *pro se* amended petition after counsel had been appointed. The PCRA court also erred, the court concluded, when it granted appointed counsel's petitions to withdraw despite the fact that the petitions were never filed.<sup>67</sup> The court directed the PCRA court on remand to appoint Willis new PCRA counsel.

In *Commonwealth v. Stossel*,<sup>68</sup> the defendant filed a *pro se* PCRA petition using the standard form provided by the Pennsylvania Department of Corrections.<sup>69</sup> On the form, Stossel checked the box indicating that he did not have a lawyer and was without resources to obtain a lawyer. In addition, he checked the box indicating that he did not want a lawyer to represent him in the proceeding. As a result, the PCRA court did not appoint him counsel. The court dismissed the petition without a hearing, finding it was untimely and did not allege an exception to the timeliness requirement.<sup>70</sup> In his *pro se* appeal, Stossel argued that the PCRA court erred in dismissing his petition as untimely because his case met the "governmental interference"<sup>71</sup> exception to the timeliness requirement.

The Superior Court concluded that the PCRA court erred in dismissing Stossel's petition without first holding an on-the-record hearing that would permit the court to determine whether Stossel's waiver of counsel was knowing, intelligent and voluntary. The court noted that Stossel was entitled to representation notwithstanding the fact that the petition was untimely because it was his first PCRA petition and he indicated he was unable to employ counsel.<sup>72</sup> The court held that Stossel did not waive his right to counsel by checking the box on the DOC form. Instead, Stossel's act should have prompted the PCRA court to conduct a waiver hearing required by *Commonwealth v. Grazier*<sup>73</sup> in order to elicit the information required by Pa.R.Crim.P. 121<sup>74</sup> before permitting Stossel to proceed *pro se*. Finally, the court held that notwithstanding Stossel's failure to challenge his waiver of his right to counsel, where a first time indigent petitioner has been denied his right to counsel or failed to properly waive that right, the court is required to raise the error *sua sponte* and remand the case to the PCRA court.

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66. *Commonwealth v. Jette*, 23 A.3d 1032 (Pa. 2011) (reiterating "long-standing policy that precludes hybrid representation.").

67. *Commonwealth v. Karanickolas*, 836 A.2d 940, 947 (Pa. Super. 2003) (holding that before attorney is permitted to withdraw, counsel must file and obtain court approval of no-merit letter).

68. 17 A.3d 1286 (Pa. Super. 2011).

69. DC-198 (Rev. 7-01).

70. 42 Pa.C.S. §9545 (b)(1) (i)-(iii).

71. 42 Pa.C.S. §9545 (b)(1)(i).

72. Pa.R.Crim.P. 904(C). *See also Commonwealth v. Smith*, 818 A.2d 494, 500-01 (Pa. 2003) (petitioner entitled to appointment of counsel where first petition appears untimely in order for counsel to determine whether any of the exceptions to the one-year filing period apply)

73. 713 A.2d 81 (Pa. 1998)

74. *Commonwealth v. Robinson*, 970 A.2d 455, 457 (Pa. Super. 2009) (noting that subsections (b) and (c) of Pa.R.Crim. P. 121 do not apply in the PCRA context but remainder of information sought by rule "clearly impacts" on whether a defendant fully understands his decision to forgo PCRA counsel).

The issue of waiver of PCRA counsel was also considered by the Superior Court in *Commonwealth v. Figueroa*.<sup>75</sup> Following his conviction in 1988, prior to sentencing Figueroa filed a *pro se* motion alleging the ineffectiveness of trial counsel. Due to confusion in the trial court, two lawyers were appointed as substitute counsel but neither took any action in the case. Ultimately, the trial court appointed a third lawyer and, thereafter, denied Figueroa's post-trial motions and imposed sentence in 1993. Although represented by counsel, Figueroa filed an appeal *pro se* which led to then-counsel withdrawing and new counsel being appointed for the appeal. Although newly appointed counsel failed to file an appellate brief, the Superior Court decided the appeal based on Figueroa's *pro se* brief which included claims of trial counsel ineffectiveness. Following denial of relief by the Superior Court, Figueroa filed a timely PCRA petition alleging the Superior Court violated the rule against hybrid representation when it accepted and relied upon his *pro se* brief when he was represented by counsel. Both the PCRA court and Superior Court denied relief.

Nine years later, a federal court concluded that Figueroa had been denied his right to counsel on direct appeal and ordered that his right to direct appeal be reinstated. Several years later, Figueroa filed a counseled *nunc pro tunc* direct appeal. After the Superior Court denied relief, Figueroa filed a PCRA petition alleging among other issues the ineffectiveness of direct appeal counsel. Concluding the petition was a second petition, the PCRA court did not appoint Figueroa counsel and dismissed the petition on grounds that he had failed to establish a miscarriage of justice, the standard that applies to second or subsequent petitions for post-conviction relief.<sup>76</sup>

In his *pro se* appeal, the Commonwealth conceded that the PCRA court erred in treating Figueroa's petition as a second petition and denying him counsel. In his reply brief, Figueroa stated he did not want counsel appointed and wished to proceed in the appeal *pro se*. The Superior Court found that the PCRA court erred in treating Figueroa's PCRA petition as a second petition because it was filed after a *nunc pro tunc* appeal.<sup>77</sup> As a result, the PCRA court erred in failing to appoint Figueroa counsel pursuant to Pa.R.Crim. 904(C). In light of Figueroa's desire to proceed *pro se* on appeal<sup>78</sup>, the Superior Court remanded the case to the PCRA court to conduct a hearing pursuant to *Commonwealth v. Grazier*<sup>79</sup> informing Figueroa of his right to counsel in the PCRA court and on appeal.

## INEFFECTIVENESS CLAIMS AND APPEAL *NUNC PRO TUNC*

In 2002, in *Commonwealth v. Grant*<sup>80</sup>, the Supreme Court abandoned its long-standing rule that claims of ineffectiveness had to be raised by new counsel at the

75. 29 A.2d 1177 (Pa. Super. 2011).

76. *Commonwealth v. Lawson*, 549 A.2d 107 (Pa. 1988).

77. *Commonwealth v. Fowler*, 930 A.2d 586, 591 (Pa. Super. 2007) ("it is now well[-] established that a PCRA petition brought after an appeal *nunc pro tunc* is considered [an] appellant's first PCRA petition.") (brackets in original).

78. In *Commonwealth v. Staton*, 12 A.3d 277 (Pa. 2010), the Pennsylvania Supreme Court questioned whether a defendant has a right to self-representation on appeal in light of the United States Supreme Court's decision in *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000) in which the Court held that there is no federal constitutional right to self-representation on appeal. The court in *Staton* noted that its decision in *Grazier* was premised on the federal constitution and that it had yet to determine whether the right to self-representation was protected by the Pennsylvania Constitution.

79. 713 A.2d 81 (Pa. 1998).

80. 813 A.2d 726 (Pa. 2002).

first opportunity, even if that first opportunity was direct appeal and the issue had not been presented to the trial court. Under *Grant*, claims of trial counsel ineffectiveness are no longer considered on direct appeal, but deferred to the post-conviction process. In *Commonwealth v. Bomar*<sup>81</sup>, 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 and the trial court heard testimony of trial counsel and addressed the ineffectiveness claims in its opinion.

In several post-*Bomar* cases, members of the Supreme Court expressed reservations about using post-trial motions to raise claims of trial counsel ineffectiveness and subsequent review of the claims on direct appeal.<sup>82</sup> More recently, in *Commonwealth v. Wright*<sup>83</sup>, Justice Eakin writing for the Court stated 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."<sup>84</sup> The issue was addressed again in *Commonwealth v. Liston*<sup>85</sup> and in *Commonwealth v. Montalvo*.<sup>86</sup> In *Liston*, the Supreme Court held that the Superior Court had "overstepped its authority" when it held that whenever a PCRA court reinstates direct appeal it must also reinstate the right to file post-sentence motions thereby allowing the defendant to raise any issue of trial counsel ineffectiveness.<sup>87</sup> In a concurring opinion, Chief Justice Castille rejected the use of post-trial motions to raise ineffectiveness claims unless "accompanied by an express, knowing and voluntary waiver of further PCRA review."<sup>88</sup> In *Montalvo*,<sup>89</sup> Chief Justice Castille in a concurring opinion, directed lower courts not to review ineffectiveness claims raised in post-trial motions unless the defendant waives his right to post-conviction review.<sup>90</sup>

The status of *Bomar* post-*Liston* and *Montalvo* was at issue in *Commonwealth v. Barnett*<sup>91</sup> where the Superior Court considered claims of ineffectiveness raised in a

81. 826 A.2d 831 (Pa. 2003).

82. *Commonwealth v. O'Berg*, 880 A.2d 597, 605 (Pa. 2005) (Castille, J., concurring) ("... I do not believe that this Court is remotely obligated to permit any criminal defendant—no sentence, short sentence, long sentence, capital sentence—to raise collateral claims, such as ineffective assistance of counsel, as a matter of right upon post-trial motions.") (emphasis in original); *Commonwealth v. Rega*, 933 A.2d 997, 1028 (Pa. 2007) (Cappy, C.J., concurring) ("My fear is that continued employment of the 'Bomar' exception will eventually swallow the rule we announced in *Grant* governing the presentation of ineffectiveness claims.")

83. 961 A.2d 119 (Pa. 2008).

84. 961 A.2d at 148 n.22. Two of the four participating justices in *Wright* joined Justice Eakin in footnote 22.

85. 977 A.2d 1089 (Pa. 2009).

86. 986 A.2d 84 (Pa. 2009).

87. In *Liston*, the defendant sought PCRA relief on the basis that counsel had failed to protect his right to direct appeal. In addition, the defendant raised claims of ineffectiveness during the trial. On appeal, the Superior Court declined to address the claims of ineffectiveness occurring during trial relying upon *Grant*. Instead, based on *Bomar*, the court adopted the procedure noted above. The court stated that the procedure would permit the court, consistent with *Bomar* to review the defendant's ineffectiveness claims in the ensuing direct appeal thereby saving judicial time and the need for the defendant to file a second PCRA raising the same claims later in the process. See *Commonwealth v. Liston*, 941 A.2d 1279 (Pa. Super. 2008) (*en banc*), *overruled*, 977 A.2d 1089 (Pa. 2009).

88. 977 A.2d at 1096 (Castille, C.J., concurring). Two of the five member Court in *Liston* joined the Chief Justice's concurring opinion.

89. The Court agreed in *Montalvo* to hear claims of trial counsel ineffectiveness on direct appeal because the record pertaining to the claims had been developed in the trial court prior to the *Grant* decision.

90. 986 A.2d at 111 (Castille, C.J., concurring) ("As I made clear in my recent concurrence in [*Liston*]—and in this regard I spoke for majority of the Liston Court—going forward, the lower courts should not indulge hybrid review by invoking *Bomar*.")

91. 25 A.3d 371 (Pa. Super. 2011) (*en banc*).

*nunc pro tunc* direct appeal. The decision in *Barnett* illustrates how the current process is inefficient and time-consuming when ineffectiveness of counsel claims include a claim that counsel failed to protect the defendant's right to direct appeal.<sup>92</sup>

*Barnett* sought post-conviction relief alleging ineffectiveness of counsel during trial and on appeal because claims presented on direct appeal were deemed waived due to a deficient brief filed by trial counsel. The PCRA court held a full evidentiary hearing on the claims of ineffectiveness during trial and on appeal during which *Barnett* and trial counsel testified. After the PCRA court denied relief and *Barnett* appealed, the Superior Court did not address the claims of ineffectiveness during trial but simply reinstated *Barnett's* right to direct appeal. In the *nunc pro tunc* appeal filed by new counsel, *Barnett* abandoned the claims that were raised and deemed waived on direct appeal and only raised the claims of trial counsel ineffectiveness which had been considered and ruled on the PCRA court. As a result, *Barnett* was not seeking "hybrid review" of traditional direct appeal issues and collateral claims in his *nunc pro tunc* direct appeal. Nonetheless, the Superior Court refused to review the ineffectiveness claims notwithstanding the fact that the claims had been fully developed in the PCRA court. Instead, the court dismissed the claims without prejudice to raise them in a new PCRA proceeding. The Court concluded that based on *Wright* and *Liston*, it could not review *Barnett's* claims of trial counsel ineffectiveness. The court stated that the "primary teaching" of *Liston* and *Wright* is that defendants are not entitled to "two chances at collateral review. . . ." <sup>93</sup> That would occur, the court concluded, if it reviewed the PCRA court's decision that counsel was not ineffective during trial absent a waiver by *Barnett* of his right to seek PCRA relief. Going forward, the court stated it would no longer review fully developed ineffective assistance of counsel claims on direct appeal absent a waiver of further PCRA review in the trial court. As Judge Shogan noted in his concurring and dissenting opinion in *Barnett*, neither *Wright* nor *Liston* addressed the scope, form and timing of the waiver required to obtain review of ineffectiveness claims on direct appeal<sup>94</sup> nor are these issues or *Barnett's* right to direct appeal<sup>95</sup> are addressed by the majority in *Barnett*. For *Barnett*, the Superior Court's decision postpones appellate review of his claims of trial counsel ineffectiveness until he files a new PCRA petition raising the ineffectiveness claims a second time and appeals a second time<sup>96</sup> from the denial of PCRA relief.<sup>97</sup>

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92. The Supreme Court has granted allowance of appeal in *Commonwealth v. Holmes*, 996 A.2d 479 (Pa. 2010) to resolve "[w]hether the claims of ineffectiveness of counsel which are the exclusive subject of this *nunc pro tunc* direct appeal: (1) are reviewable on direct appeal under *Commonwealth v. Bomar* . . . (2) should instead be deferred to collateral review under the general review in *Commonwealth v. Grant* . . . ; or (3) should instead be deemed reviewable on direct appeal only if accompanied by a specific waiver of the right to pursue a first PCRA petition as of right."

93. 25 A.3d at 376.

94. *Commonwealth v. Barnett*, 25 A.3d 371, 379 (Pa. Super. 2011) (Shogan, J., concurring and dissenting)

95. Pa. Const. art. 5, §9.

96. As noted, the PCRA court had previously denied *Barnett's* ineffectiveness claims. The Superior Court noted that the PCRA court could "dispose[] of *Barnett's* ineffective assistance claims based on the previously established record." 25 A.3d at 377.

97. *Barnett* was followed in *Commonwealth v. Funk*, 29 A.3d 28 (Pa. Super. 2011) and *Commonwealth v. Blye*, 33 A.3d 9 (Pa. Super. 2011).

## INEFFECTIVENESS AND CLASSIFICATION AS SEXUALLY VIOLENT PREDATOR

In *Commonwealth v. Masker*,<sup>98</sup> the Superior Court considered whether a claim of ineffectiveness of counsel during the proceeding that led to the defendant being classified as a sexually violent predator (“SVP”) presents a cognizable claim under the PCRA. After Masker pled guilty to various sexual offenses and was classified as a SVP, he filed a PCRA petition challenging counsel’s failure to advise him of his right to remain silent at the classification proceeding. He also claimed counsel failed to arrange for an expert witness to testify on his behalf at the proceeding and to challenge the Assessment Board’s use of his admissions during the proceeding. On appeal from the denial of PCRA relief, the Superior Court concluded that Masker’s challenge to his lawyer’s performance at the classification proceeding did not put in question his conviction or sentence, and, as a result, did not present a cognizable claim under the PCRA. The court noted that in *Commonwealth v. Price*,<sup>99</sup> the Superior Court ruled that classification of a defendant as an SVP, independent of a challenge to his conviction or sentence, did not present a claim under the PCRA.

In *Masker*, the court found “no meaningful distinction” between the issue in *Price*, namely a challenge to the determination that a defendant was an SVP and Masker’s claims that his lawyer was ineffective at the classification proceeding. In addition, the court concluded that the United States Supreme Court’s decision in *Padilla v. Kentucky* did not compel a different result. The court stated that unlike *Masker*, *Padilla* concerned a challenge to the validity of his guilty plea and not solely the collateral consequences of deportation. The court did not address how Masker might seek to vindicate his right to effective counsel other than noting that the PCRA is not the exclusive means of obtaining collateral relief.<sup>100</sup>

## INEFFECTIVENESS AND PSYCHOLOGIST-CLIENT PRIVILEGE

In *Commonwealth v. Harris*,<sup>101</sup> the Pennsylvania Supreme Court considered the scope of the psychologist-client privilege when the defendant asserts in a PCRA petition that trial counsel was ineffective in presenting the psychologist’s testimony during the penalty phase of his trial. In his petition, Harris claimed that trial counsel was aware that the psychologist’s evaluation was deficient because he had not tested him for organic brain damage. He also claimed that the psychologist had not performed appropriate testing even though he was aware that Harris’s mental health history suggested he had a cognitive disorder. After the PCRA court sched-

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98. \_\_\_A.3d \_\_\_ (Pa. Super. 2011) (*en banc*).

99. 876 A.2d 988 (Pa. Super. 2005).

100. In a lengthy concurring and dissenting opinion, Judge Bowes argued that the PCRA applies to claims of ineffectiveness of counsel at the SVP proceeding and noted that the Pennsylvania Supreme Court has repeatedly stated its disapproval of a bifurcated system of reviewing ineffectiveness claims. In addition, Judge Bowes noted that defendants have a right to effective counsel at an SVP hearing, that the process of determining SVP status is clearly an aspect of the sentencing in a criminal case and that the Pennsylvania Supreme Court in *Commonwealth ex rel. Dadario v. Goldberg*, 773 A.2d 126 (Pa. 2001) had broadly interpreted the PCRA as applying to all “constitutionally-cognizable claims of ineffectiveness of counsel. . . .” Finally, Judge Bowes noted the Pennsylvania Supreme Court’s recent decision in *Commonwealth v. Haun*, 32 A.3d. 697 (Pa. 2011) in which the Court again broadly interpreted the PCRA in order to avoid a bifurcated system of reviewing ineffectiveness claims.

101. \_\_\_A.3d \_\_\_ (Pa. 2011).



uled a hearing, the prosecution subpoenaed the psychologist to testify. The prosecution also asked Harris to waive the psychologist-client privilege with respect to the psychologist's testimony. When Harris refused, the PCRA court granted the prosecution's motion to declare the privilege waived and permitted the prosecutor to hire the psychologist as its expert for the PCRA hearing.

The Supreme Court held that the PCRA court's order rejecting a claim of privilege and requiring disclosures was immediately appealable.<sup>102</sup> On the merits, the Court held that the PCRA court correctly concluded that by challenging the performance of both the psychologist and trial counsel, Harris waived "any privilege to material necessary for the prosecution to refute those challenges." As to whether the prosecution could retain and consult with the psychologist, the Court concluded that the PCRA court had abused its discretion. The Court stated that permitting the prosecution to employ the psychologist would risk disclosure of information to which Harris has not waived the psychologist-client privilege. In addition, permitting the prosecution to hire the psychologist would, in the Court's view, "erode public confidence in the integrity of criminal proceedings." The prosecution is free, the Court noted, to subpoena the psychologist to testify as a fact witness to the extent any privilege has been waived as determined by the PCRA court on remand.

## SERIAL PCRA PETITIONS AND PENDING FEDERAL HABEAS LITIGATION

In *Commonwealth v. Porter*,<sup>103</sup> the Pennsylvania Supreme Court reviewed the PCRA court's decision to dismiss without a hearing a serial petition raising a *Brady* claim as untimely while holding in abeyance a previously filed petition in which the defendant challenged his death sentence under *Atkins v. Virginia*.<sup>104</sup> Porter's conviction and capital sentence were affirmed on direct appeal by the Pennsylvania Supreme Court. After the Court affirmed the denial of PCRA relief, Porter filed a federal habeas corpus petition. While the federal proceeding was pending, Porter filed a second PCRA petition raising an *Atkins* claim. Before the *Atkins* claim was heard, the federal court dismissed Porter's guilt phase claims but granted Porter sentencing relief based on an instructional error. After both parties cross-appealed in the federal case, the PCRA court deferred consideration of Porter's *Atkins* claim. Thereafter, Porter filed a supplement and amendment to his *Atkins* PCRA raising a *Brady* claim. Porter then requested that the Third Circuit defer consideration of the cross-appeals pending the PCRA court's resolution of his *Brady* claim. The PCRA court concluded the *Brady* claim was not an amendment to the *Atkins* PCRA but an untimely third petition and dismissed it without a hearing.

In holding that the PCRA court properly dismissed the *Brady* petition, the Court rejected Porter's argument that there was a single serial petition in the PCRA court raising initially the *Atkins* claim and then, by amendment to that petition, a *Brady* claim. The Court held that the *Brady* claim was a separate petition because Porter never requested or obtained approval from the PCRA court to amend his *Atkins* petition.<sup>105</sup> The Court concluded that neither the PCRA or decisional law prevented

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102. The court declined to follow the United States Supreme Court's recent decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S.Ct. 599 (2009) refusing to allow such appeals in federal court proceedings.

103. \_\_\_A.3d \_\_\_ (Pa., 2012).

104. 536 U.S. 304 (2002) (holding that it is unconstitutional to execute a mentally retarded person).

105. Pa.R.Crim.P. 905(A).

the PCRA court from ruling on the *Brady* petition while continuing to hold the *Atkins* petition in abeyance. Even though the *Brady* petition was filed within 60 days of when the witness gave a statement recanting his trial testimony, the Court held that the PCRA court correctly concluded that the petition was not timely because Porter failed to explain why the information from the witness could not have been discovered earlier.

With respect to the *Atkins* claim pending in the PCRA court, the Court stated that there was “no reason why federal habeas petitions and serial state collateral petitions cannot proceed simultaneously.” Under the facts of this case, the Court held that there was no reason for the PCRA court to defer resolution of the *Atkins* claim. The Court directed the PCRA court to address the *Atkins* petition immediately and cautioned PCRA courts generally not to postpone resolution of serial PCRA petitions “merely to allow for federal habeas litigation of prior, exhausted claims.”