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Repetitive Post-Conviction Petitions Alleging Ineffective Assistance of Counsel: Can the Pennsylvania Supreme Court Tame the Monster

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Comment

Repetitive Post-Conviction Petitions Alleging Ineffective Assistance of Counsel: Can the Pennsylvania Supreme Court Tame the "Monster"?

I. INTRODUCTION

Pennsylvania's Post Conviction Hearing Act (PCHA or Act)[1] is a potent weapon for attacking "[criminal] convictions obtained and sentences imposed without due process of law."[2] The PCHA encompasses all collateral remedies[3] previously available to persons convicted in the courts of Pennsylvania, including habeas corpus[4] and coram nobis.[5]

The Act is an escape hatch from an unconstitutional conviction and, as such, is designed to be readily accessible to anyone with a worthy claim for collateral relief.[6] But easy access invites

1. PA. STAT. ANN. tit. 19, §§ 1180-1 to -10 §§ 1180-12 to -14 (Purdon Supp. 1981). The 1981 Purdon supplement indicates that the PCHA has been repealed effective June 27, 1981. However, 1981 Pa. Laws 41 § 2, enacted on June 26, 1981 delayed the repeal date to June 26, 1982. The Post Conviction Hearing Act is implemented by rules set forth in PA. R. CRIM. P., Rules 1501-6 (Purdon Supp. 1981).

2. PA. STAT. ANN. tit. 19, § 1180-2 (Purdon Supp. 1981).

3. PA. STAT. ANN. tit. 19, § 1180-3 (Purdon Supp. 1981). The Pennsylvania Supreme Court has explained that the PCHA "is designed to give a defendant convicted of crime a final opportunity [through a separate legal action] to vindicate his constitutional right to due process of law." Commonwealth v. Rightnour, 469 Pa. 107, 110, 364 A.2d 927, 928 (1976). The supreme court has held that the PCHA does not abolish the common law remedies of habeas corpus or coram nobis, *see infra* note 5, but rather provides a well-defined procedure for seeking collateral relief. Commonwealth v. Sheehan, 446 Pa. 35, 285 A.2d 465 (1971). *See also* Moss v. Pennsylvania, 257 F.Supp. 643 (M.D. Pa. 1966).

4. For a discussion of the history of the "Great Writ"; habeas corpus ad subjiciendum, *see* Fay v. Noia, 372 U.S. 391, 399-426 (1963).

5. The writ of error coram nobis is a common-law procedural tool designed to correct errors of fact, not law. It is used to bring facts before a court which, if known at the time of judgment, would have changed the outcome of an earlier proceeding. *See, e.g.*, Commonwealth v. Mangini, 478 Pa. 147, 163, 386 A.2d 482, 490 (1978).

6. A convicted person invokes the PCHA by completing a simple petition, *see* PA. R. CRIM. P. R. 1501 (Purdon Supp. 1981), and filing it with the clerk of

abuse by those who seek to upset constitutional convictions. And so, the PCHA includes provisions that discourage frivolous and repetitive petitions for relief.[7] The most important of these empowers a PCHA court[8] to summarily dismiss any petition that raises issues that have been finally litigated or waived.[9] An issue is waived under the PCHA if the petitioner could have raised it at an earlier stage in the proceedings against him, but knowingly and understandingly failed to do so.[10] Waiver is an absolute bar

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the trial court, *see* PA. R. CRIM. P., R. 1502 (Purdon Supp. 1981). *See also infra* note 8. Although most PCHA petitioners are either imprisoned, on parole, or on probation, the PCHA can be used to attack a conviction after a sentence has been satisfied if there are "collateral criminal consequences," *i.e.*, if the conviction or sentence directly affects a subsequent criminal or civil proceeding. Commonwealth v. Doria, 232 Pa. Super. 439, 442, 335 A.2d 472, 473 (1975), *rev'd on other grounds*, 468 Pa. 534, 364 A.2d 322 (1976).

7. *See infra* note 9 and text accompanying notes 31-40.

8. The "PCHA court," *i.e.*, the court that receives the petition and grants or refuses collateral relief, is the trial court in which the petitioner was convicted. PA. STAT. ANN. tit. 19, § 1180-5 (Purdon Supp. 1981).

9. This power is created by the interaction of four provisions of the PCHA: PA. STAT. ANN. tit. 19, § 1180-3(d) (Purdon Supp. 1981) provides that a petitioner, to be eligible for relief, must prove "[t]hat the error resulting in his conviction and sentence has not been finally litigated or waived." Section 1180-4(a) provides that an issue is finally litigated under the PCHA if:

> 1. It has been raised in the trial court, the trial court has ruled on the merits of the issue and the petitioner has knowingly and understandingly failed to appeal the trial court's ruling; or
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> 2. The Superior Court . . . has ruled on the merits of the issue and the petitioner has knowingly and understandingly failed to avail himself of further appeals; or
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> 3. The [Pennsylvania] Supreme Court . . . has ruled on the merits of the issue.

Id. Section 1180-4(b) provides that an issue is waived under the PCHA if:

> 1. The petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, . . . or in any other proceeding actually conducted [including a prior PCHA proceeding] . . . ; and
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> 2. The petitioner is unable to prove the existence of extraordinary circumstances to justify his failure to raise the issue.

Id. Section 1180-9 provides that:

> If a petition alleges facts that if proven would entitle the petitioner to relief, the court shall grant a hearing . . . . However, the court may deny a hearing if the petitioner's claim is patently frivolous and is without a trace of support either in the record or from other evidence submitted by the petitioner. The court may also deny a hearing on a specific question of fact when a full and fair evidentiary hearing upon that question was held at the original trial or at any later proceeding.

Id. See also infra note 34.

10. PA. STAT. ANN. tit. 19, § 1180-4(b)(1) (Purdon Supp. 1981). *See supra* note 9.

to relief unless a petitioner can prove that "extraordinary circumstances" justify his failure to have raised the issue earlier.[11]

The PCHA's unambiguous waiver rule should make it almost impossible for a second or third PCHA petition to "succeed."[12] But a statistical analysis[13] of PCHA appeals reaching the Pennsylvania Supreme Court suggests that filing repetitive PCHA petitions can be a fairly productive endeavor. Between March 1, 1966 (the date the PCHA went into effect) and September 21, 1980, the supreme court decided more than 300 appeals dealing with the interpretation and application of the PCHA.[14] More than forty of the appeals—about fourteen percent—were subsequent-petition appeals, *i.e.*, the petitioner had filed one or more previous PCHA petitions.[15] In eighteen of these subsequent-petition appeals the appellants received further PCHA proceedings.[16] Simply put,

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11. PA. STAT. ANN. tit. 19, § 1180-4(b)(2) (Purdon Supp. 1981). *See supra* note 9.

12. In this Comment, a "successful" subsequent PCHA petition is one that survives the gauntlet of statutory bars and prohibitions against successive petitions, and generates further PCHA proceedings for the petitioner—even if those proceedings do not ultimately achieve any collateral relief for the petitioner.

13. The statistical analyses discussed in the text were performed on a "LEXIS" computer-based information retrieval system, a service of Mead Data Central, New York, N.Y. The various "search requests" used by the author are reproduced *infra* in notes 14-16 and 91-92, should the reader wish to duplicate the searches. As with all computer-library studies, there is a possibility that some pertinent cases have been ignored, or that inappropriate cases have been included. Thus, the statistics presented should be interpreted as indicative of trends, rather than as precise tallies.

14. The following LEXIS search request was used to obtain this information: *(PCHA OR P.C.H.A. OR POST PRE/3 CONVICTION) AND (*§ 1180!) AND DATE BEF SEPTEMBER 22, 1980). A quick scan of these cases revealed that most of the appellants had either been found guilty of murder or had pleaded guilty to murder; their PCHA appeals reached the high court as appeals of right when their PCHA courts refused to grant hearings, or otherwise denied relief. Under the old Rules of Court, the supreme court had original jurisdiction for all felonious homicide appeals from the courts of common pleas. *See* 17 P.S. § 211.202 (repealed). This rule was modified by 1980 P.L. 686, No. 137, § 1, effective on November 23, 1980, to shift original appellate jurisdiction for murder appeals to the superior court. *See* 42 PA. CONS. STAT. ANN. §§ 722, 742 (Purdon 1981). Thus, future PCHA appeals will reach the supreme court only on grants of allocatur.

15. The LEXIS "search request", in *supra* note 14, was modified by adding the following "second level": *AND (SECOND OR THIRD OR FOURTH OR FIFTH OR SIXTH) PRE/4 PETITION).*

16. The modified LEXIS "search request", in *supra* note 15, was further modified by adding the following "third level": *AND (VACAT! OR REVERS!) PRE/4 REMAND!.*

some forty percent of the subsequent-petition appeals to the supreme court were "successful." Most of the successful subsequent-petition appeals involved issues related, either directly or indirectly, to the right to be represented by effective counsel.[17]

On September 22, 1980, the Pennsylvania Supreme Court handed down a decision that seems to have made these good odds even better. In *Commonwealth v. Watlington*,[18] the court held that the issues raised in the appellant's second PCHA petition had not been finally litigated or waived because he alleged that all of his prior counsel were ineffective.[19] The plurality accepted these allegations of ineffective assistance of counsel in lieu of a showing of "extraordinary circumstances," and remanded the case for further proceedings.[20]

Watlington seems to imply that the PCHA's waiver rule is vul-

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17. Some "successful" subsequent-petition appeals involved a finding by the Pennsylvania Supreme Court that the petitioner had not received sufficient representation by an attorney during some stage of the proceedings against him, *see, e.g.*, Commonwealth v. Haywood, 441 Pa. 177, 272 A.2d 727 (1971). In such cases, the petitioner's right to be represented by counsel was directly violated. Other cases involved a petitioner's allegations of attorney error by the petitioner that were sustained by the supreme court, *see, e.g.*, Commonwealth v. Watlington, 491 Pa. 241, 420 A.2d 431 (1980), *see infra* notes 18-24 and accompanying text. The rubric "indirect" applied to these violations indicates that the essential issues they present concern the quality of representation, rather than the classic constitutional issue of whether or not an attorney was present at the appropriate time. For an excellent discussion of the challenges of analyzing ineffective criminal counsel *see* Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443 (1977).

18. 491 Pa. 241, 420 A.2d 431 (1980). Justice O'Brien wrote the opinion of the court, in which Justices Roberts and Nix joined. Justice Larsen wrote a concurring opinion, in which Chief Justice Eagen joined. Justice Flaherty, joined by Justice Kauffman, dissented.

19. The issues in question concerned the jury charge at Watlington's original trial. Watlington alleged that his trial counsel should have: (1) objected to the trial court's charges on reasonable doubt; (2) objected to the trial court's charges that a prosecution witness may have been an accomplice; and (3) objected to the trial court's continuous highlighting in its charge that the murder occurred during an attempted robbery. 491 Pa. at 243, 420 A.2d at 432. None of these objections had been made at the trial, or raised at the direct appeal or in Watlington's first PCHA petition. *Id.* at 244, 420 A.2d at 433. In his pro se second PCHA petition, Watlington claimed that his retained trial counsel was ineffective for failing to object to the charge, that his court-appointed direct appeal counsel was ineffective for failing to allege the ineffectiveness of the trial counsel, and that the court-appointed counsel who helped prepare his first PCHA petition was ineffective for failing to allege the ineffectiveness of his direct-appeal counsel. *Id.* at 243, 420 A.2d at 432.

20. *Id.* at 245-46, 420 A.2d at 433-44.

nerable to a well-crafted allegation of ineffective assistance of counsel. Justice Flaherty, in a vigorous dissent,[21] argued that the holding means no criminal conviction will ever become final, because subsequent counsel can always generate new litigation by alleging the ineffectiveness of his predecessor.[22] He warned that *Watlington* will encourage the filing of endless PCHA petitions,[23] and he urged the supreme court to recognize that it had inadvertently created a monster of inefficiency and judicial wastefulness in its past interpretations of the PCHA.[24]

Less than ten months later the supreme court came face to face with the "monster" in *Commonwealth v. Alexander*,[25] when it affirmed the PCHA court's dismissal of the appellant's *sixth* PCHA petition—a petition alleging that three prior counsel were ineffective.[26] Although the plurality opinion[27] acknowledged that the drafters of the PCHA did not intend a mere assertion of ineffective counsel to be elevated to the status of "extraordinary circumstances,"[28] the supreme court was not ready to slay the "monster" by overruling *Watlington* and its ancestors.[29] Instead, the plurality tried to tame it by offering lower courts a series of guidelines for evaluating subsequent PCHA petitions.[30]

This comment explores the heritage of the "monster," discusses the utility of the *Alexander* guidelines, and concludes that the best way to ensure equitable collateral review and finality of constitutional convictions is to amend the PCHA to incorporate a specific procedure for dealing with a subsequent petition that

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21. *Id.* at 246, 420 A.2d at 434 (Flaherty, J., dissenting).

22. *Id.* at 250, 420 A.2d at 436 (Flaherty, J., dissenting). Much of the same argument was made by Judge Hoffman of the superior court in his concurring opinion in Commonwealth v. Jackson. 239 Pa. Super. 121, 143-44, 362 A.2d 324, 336 (1976) (Hoffman, J., concurring).

23. 491 Pa. at 249, 420 A.2d at 435 (Flaherty, J., dissenting).

24. *Id.*

25. 495 Pa. 26, 432 A.2d 182 (1981).

26. *Id.* at 29, 432 A.2d at 188.

27. The case was heard by a six-justice court. Justice Larsen wrote the opinion of the court. Chief Justice O'Brien and Justice Roberts concurred in the result. Justice Nix filed a concurring opinion. Justice Flaherty, joined by Justice Kauffman, filed another concurring opinion.

28. 495 Pa. at 33, 432 A.2d at 185.

29. Many of the ancestors of *Watlington* are discussed in this Comment. *See infra* text at section II.

30. 495 Pa. at 36-38, 432 A.2d at 186-88. *See infra* text accompanying notes 197-202.

alleges the ineffective assistance of a counsel who served at an earlier stage. Under the proposed procedure, a PCHA court will be empowered to determine, in a summary proceeding, whether the counsel who served immediately after the challenged attorney investigated the actions of the challenged attorney, and whether he reasonably concluded that the challenged attorney had acted in his client's best interest. If such an investigation has been made, and if the investigation led to a reasonable conclusion that the challenged attorney had acted in his client's best interests, the PCHA court can summarily dismiss the petitioner's claim of ineffective counsel.

II. THE BREEDING GROUNDS OF THE "MONSTER"

A. *The PCHA's Defenses Against Frivolous and Repetitive Petitions*

The drafters of the PCHA recognized that a petitioner will often need a formal evidentiary hearing to establish his claim. Thus, a PCHA court is required to grant a hearing if a petition alleges facts which, if proven, would entitle the petitioner to relief.[31] The PCHA court can, however, deny any evidentiary hearing, *i.e.*, summarily dismiss a petition,[32] if the claim is "patently frivolous and . . . without a trace of support either in the record or from other evidence submitted by the petitioner."[33] This is the PCHA's first line of defense against frivolous petitions. The Pennsylvania Supreme Court has interpreted the provision to mean that the right to a PCHA hearing is not absolute.[34]

The PCHA's second line of defense is its waiver rule.[35] A peti-

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31. PA. STAT. ANN. tit. 19, § 1180-9 (Purdon Supp. 1981). The supreme court has said: "If there be any single proposition of law in the . . . field of post conviction remedies so well established that it rates the title 'horn book' it is that a [PCHA] petition . . . must not be dismissed without an evidentiary hearing if it alleges facts which, if true, would entitle petitioner to relief. . . . [S]ection 9 of [the PCHA] merely codifies prior habeas corpus law." Commonwealth v. Johnson, 431 Pa. 522, 532, 246 A.2d 345, 351 (1968).

32. *See supra* note 9.

33. PA. STAT. ANN. tit. 19, § 1180-9 (Purdon Supp. 1981). The PCHA doesn't define "frivolous." A dictionary definition is: "[U]nworthy of serious attention; insignificant; trivial; . . . [m]arked by flippancy; silly or gay." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 528 (W. Morris ed. 1978).

34. Commonwealth v. Sherard, 483 Pa. 183, 187 394 A.2d 971, 974 (1978).

35. PA. STAT. ANN. tit. 19, § 1180-4(b) (Purdon Supp. 1981). In Commonwealth v. Williams, 437 Pa. 526, 263 A.2d 127 (1970), the supreme court held that a PCHA hearing is not required, i.e., a petition can be summarily dismissed, if the issues it presents have been waived. *Id.* at 528, 263 A.2d at 128.

tioner who intentionally files a frivolous petition might be able to concoct an allegation that passes muster.[36] But the issues he can raise will almost certainly have been finally litigated or waived in earlier proceedings.[37] The PCHA demands affirmative proof of "extraordinary circumstances" to justify a waiver.[38] The author of a frivolous petition will not, of course, have legitimate proof.

A person filing a second or subsequent petition faces an even more difficult challenge under the statute. The PCHA explicitly states that a convicted person is entitled to file one petition that sets forth all grounds for relief then available.[39] Consequently, a repetitive petition can be summarily dismissed by a PCHA court unless it alleges grounds for relief that were not previously available, are not frivolous, and have not been finally litigated or waived. This tightly woven mesh of statutory provisions is, at least in theory, an impenetrable barrier against all but the few extraordinary subsequent petitions that have merit.[40]

B. *Subsequent-Petition Appeals to the Pennsylvania Supreme Court*

1. *The Court's Early Decisions*

It is unfair to say that the Pennsylvania Supreme Court has carved an ineffective-assistance-of-counsel loophole into the PCHA's protective shield against subsequent petitions.[41] On the

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36. Finding a suitable allegation is not difficult, as the facts in *Alexander*, *supra* note 25, reveal. Alexander's sixth PCHA petition alleged, *inter alia*, that his "arrest was invalid as he was not arraigned until nine hours after his custody and was not given an opportunity to speak to his attorney during this time." _____ Pa. at _____, 432 A.2d at 183. The PCHA court did not dismiss this allegation as "patently frivolous," but instead argued that it had been waived. *Id.*

37. This statement is, of course, a tautology. A petitioner with no fair claim to PCHA relief will by necessity be forced to resurrect one or more errors that were either alleged earlier (and thus finally litigated), or ignored earlier (and thus, by definition, waived).

38. PA. STAT. ANN. tit. 19, § 1180-4(b)(2) (Purdon Supp. 1981).

39. *Id.* § 1180-5(4)(b).

40. The supreme court has not construed the PCHA's express one-petition provision, *see infra* note 39 and accompanying text, as an absolute bar to subsequent petitions. In *Alexander*, for example, the plurality called this provision "the paramount procedural feature of the PCHA," but still left a PCHA court the discretion to consider a subsequent petition. 495 Pa. at 39, 432 A.2d at 188. Thus, the court has been willing to acknowledge the possibility that successive petitions will, on occasion, be necessary to correct due process errors in criminal proceedings.

41. *See infra* text at section II(A).

other hand, a line of PCHA-appeal decisions spanning more than a decade has given a special status to the claim of ineffective assistance of counsel in all PCHA petitions. It is now something more than an "ordinary" reviewable constitutional issue,[42] yet something less than a magic phrase that unlocks the gates of the waiver rule. This special status arose because the supreme court was forced to reconcile the express prohibitions of the waiver rule with the reality that criminal defense attorneys make mistakes that prejudice their clients' interests.[43]

Coincidentally, the first PCHA appeal heard by the Pennsylvania Supreme Court involved a second request for collateral relief alleging ineffective assistance of counsel. In *Commonwealth ex rel. Bordner v. Russell*,[44] the court held that the petitioner was entitled to a PCHA hearing even though he had previously filed, then withdrawn, a petition for habeas corpus.[45]

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42. PA. STAT. ANN. tit. 19, § 1180-3(c) (Purdon Supp. 1981) lists 12 categories of errors cognizable under the PCHA.:

1. The introduction of evidence obtained pursuant to an unlawful arrest;
2. The introduction of evidence obtained by an unconstitutional search and seizure;
3. The introduction of a coerced confession into evidence;
4. The introduction into evidence of a statement obtained in the absence of counsel at a time when representation is constitutionally required;
5. The infringement of . . . [petitioners] privilege against self-incrimination under either Federal or State law;
6. The denial of . . . [petitioner's] constitutional right to representation by competent counsel;
7. A plea of guilty unlawfully induced;
8. The unconstitutional suppression of evidence by the State;
9. The unconstitutional use by the State of perjured testimony;
10. The obstruction by State officials of petitioner's right of appeal.
11. [Petitioner's] . . . being twice placed in jeopardy.
12. The abridgment in any other way of any right guaranteed by the constitution or laws of this State or the constitution or laws of the United States, including a right that was not recognized at the time of the trial if the constitution requires retrospective application or that right.

Id. The thirteenth provision in the cited section is a restatement of the requirements for a writ of corum nobus, *see supra* note 5.

43. *See e.g. infra* text accompanying notes 77-82.

44. 422 Pa. 365, 221 A.2d 177 (1966).

45. *Id.* at 368-69, 221 A.2d at 179. The court noted that under traditional common law, the dismissal of a petition seeking a writ of habeas corpus was not res judicata; courts were bound to consider subsequent petitions unless they found an "abuse of the writ" in repeated requests for relief. *Id.* at 370, 221 A.2d at 180. In two later cases involving habeas petitions that had actually been

The *Bordner* court did not attach any special significance to the claim of ineffective counsel; it was merely the issue raised in the appellant's PCHA petition.[46] The court, however, took note of the potential problem of repetitive petitions and affirmed the general principle that a PCHA court can refuse to entertain an issue that has been fully considered in a prior petition for relief.[47]

Two years later, the court upheld the constitutionality of the PCHA's waiver rule in *Commonwealth v. Satchell.*[48] Satchell's first PCHA petition led to a counseled evidentiary hearing, at which time his claims for relief were denied. He subsequently filed another PCHA petition, alleging a new ground for relief. The PCHA court summarily dismissed the second petition without a hearing or leave to amend, and Satchell appealed to the Pennsylvania Supreme Court.[49] In a unanimous decision, the court said that the PCHA's standard of waiver is identical to that employed by the federal courts, *i.e.*, the court must ask whether the petitioner deliberately bypassed state procedures available for the litigation of his claim.[50] Applying this standard, the court held that the PCHA is an available state procedure, and that a petitioner's failure to raise a claim for relief in a prior PCHA petition prepared with the aid of counsel[51] constitutes a deliberate bypass of state procedure, thus foreclosing later litigation of the claim.[52] The court remanded the case to the PCHA court with instructions to give Satchell the opportunity to amend his second petition to include the reasons, if any, for his failure to raise the new allegation in his first petition.[53] By way of dicta, the court

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reviewed by courts and then dismissed, the supreme court held that the PCHA's waiver rules were fully retroactive. This meant that issues not raised in a habeas petition filed before the effective date of the PCHA were waived. *See* Commonwealth v. Johnson, 433 Pa. 582, 252 A.2d 641 (1969); Commonwealth v. Henderson, 433 Pa. 585, 253 A.2d 109 (1969). However, the supreme court subsequently overruled these cases in Commonwealth v. Cannon, 442 Pa. 339, 275 A.2d 293 (1971).

46. 422 Pa. at 367-68, 221 A.2d at 178.

47. *Id.* at 369-70, 221 A.2d at 179.

48. 430 Pa. 443, 243 A.2d 381 (1968).

49. *Id.* at 445, 243 A.2d at 382.

50. *Id.* at 447, 243 A.2d at 383.

51. The supreme court made special note of the fact that Satchell was represented by counsel during the proceeding connected with his first petition. *Id.* at 447-48, 243 A.2d at 383. *See infra* text accompanying note 54.

52. *Id.* at 448, 243 A.2d at 383.

53. *Id.* at 451, 243 A.2d at 384.

stated: "[W]e believe Pennsylvania can rest upon the presumption that post conviction counsel informed his client of all the available grounds of attack."[54]

On the same day *Satchell* was decided, the Pennsylvania Supreme Court announced its decision in *Commonwealth v. Alston*.[55] *Alston* reached the high court on allocatur after the dismissal of Alston's second PCHA petition had been affirmed by the superior court.[56] The *Alston* majority addressed, as a peripheral issue,[57] the appellant's claim that his first PCHA counsel had been ineffective.[58] Although the court did not find that Alston's right to effective post conviction counsel was identical to his right to effective trial counsel,[59] it held that the performance of Alston's first PCHA counsel met the effectiveness standard set forth in *Commonwealth ex rel Washington v. Maroney*: [60] "[C]ounsel's assistance is deemed constitutionally effective once . . . [the court is] able to conclude that the particular course chosen by counsel had some reasonable basis designed to effectuate his client's interests."[61] The *Alston* court clearly had to examine and consider the record of the first PCHA proceeding to reach its conclusion. Thus, as early as 1968 the supreme court was willing to entertain the allegation by a subsequent PCHA counsel that his predecessor was ineffective.[62]

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54. *Id.* at 449, 243 A.2d at 384. The supreme court cited *Satchell* six months later in Commonwealth v. Black, 433 Pa. 150, 249 A.2d 561 (1969), a second petition appeal in which one of the grounds for relief alleged by the petitioner was ineffective assistance of counsel at trial. The court held that his claims had been "finally litigated" by his failure to raise them at the first PCHA hearing. *Id.* at 152, 249 A.2d at 562. The supreme court might have chosen to freeze its interpretation of the PCHA's waiver rule at this point. For examples of two state supreme courts who have adopted this approach in construing their states' post-conviction remedy statutes, see Mottram v. Maine, 263 A.2d 715 (1970) and People v. Hubbard, 184 Colo. 243, 519 P.2d 945 (1974).

55. 430 Pa. 471, 243 A.2d 404 (1968).

56. *Id.* at 473, 243 A.2d at 406.

57. The central issues addressed by the *Alston* court were whether a key Commonwealth witness had committed perjury and whether afterdiscovered evidence justified a new trial. *Id.* at 473-74, 243 A.2d at 406.

58. *Id.* at 475, 243 A.2d at 407.

59. *Id.*

60. 427 Pa. 599, 235 A.2d 349 (1967).

61. *Id.* at 604, 235 A.2d at 352.

62. This, of course, was one of the concerns Justice Flaherty voiced in his *Watlington* dissent. *See supra* note 22 and accompanying text. The supreme court's approach in *Alston* seems inconsitent with the statement in *Satchell* to the effect that Pennsylvania can rest upon the presumption that post conviction

Several months later, the court decided *Commonwealth v. Seymour*,[63] a subsequent-petition appeal that involved both the alleged ineffectiveness of a trial counsel,[64] and an inappropriate course of conduct by the court-appointed counsel at the petitioner's first PCHA proceeding. The case reveals the difficulty of applying the PCHA's statutory bars in cases involving actual or alleged attorney error. After Seymour filed his first PCHA petition, the PCHA court appointed an attorney to assist Seymour, and then requested that the attorney prepare a report on the merits of Seymour's claim.[65] The report recommended the petition be summarily dismissed, and the PCHA court agreed.[66] Instead of appealing the dismissal, Seymour filed a second PCHA petition.[67] The PCHA court denied it on the grounds that it was a repetition of his first petition, and the superior court affirmed.[68]

In a per curiam opinion, the Pennsylvania Supreme Court rejected the role of a PCHA counsel as an adjunct to the PCHA court when it screens petitions. The supreme court said the PCHA contemplates that a petitioner will be represented in a full and complete sense by an independent attorney.[69] The court concluded that because Seymour had not received such representation at his first PCHA proceedings, none of the issues raised in the first petition had been finally litigated.[70] Thus, the court was able to review the allegations in Seymour's second PCHA petition. It held that the second petition did allege a fact which, if

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counsel informed his client of all the available grounds of attack. *See supra* note 54 and accompanying text.

63. 436 Pa. 159, 259 A.2d 676 (1969).

64. *Id.* at 161, 259 A.2d at 677. Seymour pled guilty to charges of statutory rape and abusing a woman child. In his first PCHA petition, he alleged that his trial counsel had not advised him of his right to appeal and had improperly advised him of the elements of the offense. *Id.* at 161-62, 259 A.2d at 677. This petition was subsequently summarily dismissed by the PCHA court. *See infra* text accompanying notes 65-66. The supreme court examined both allegations when it considered the merits of Seymour's second PCHA application. *See infra* notes 69-70 and accompanying text.

65. *Id.* at 161, 259 A.2d at 677.

66. *Id.*, 259 A.2d at 677.

67. *Id.*, 259 A.2d at 677.

68. *Id.* at 161-62, 259 A.2d at 677.

69. *Id.* at 161, 259 A.2d at 677.

70. *Id.*, 259 A.2d at 677. The term "finally litigated" is appropriate here because the issues had been raised in a previous collateral proceeding. *See supra* note 9 for the PCHA's definition of the term.

proven, would entitle him to relief, and granted Seymour an evidentiary hearing.[71]

It is worth noting that the *Seymour* court did not try to circumvent the PCHA's protective shield against subsequent petitions by finding an excuse to justify Seymour's failure to appeal the dismissal of the first petition.[72] Instead, the court held that the ineffective counsel issue had not been finally litigated during the petitioner's first try for collateral relief.[73] Simply put, there was nothing to excuse. The lack of effective representation at the first PCHA proceeding prevented the final litigation of the claims Seymour had made.[74]

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71. *Id.* at 162, 259 A.2d at 677-78. As to Seymour's first allegation, the supreme court noted that a claim that the petitioner was denied the right to appeal following a guilty plea in a case not involving a murder charge is not a ground for post-conviction relief, since the only issues which may be raised are properly heard in a collateral proceeding. *Id.* at 162, 259 A.2d at 677. The court, however, found that Seymour's second allegation—that his trial counsel misinformed him as to the elements of the charge against him—did allege a fact, which if proven, would entitle him to relief. *Id.*, 259 A.2d at 677-78.

72. Presumably, the *Seymour* Court might have found, under *Pa. Stat. Ann.* tit. 19, § 1180-4(a)(1) (Purdon Supp. 1981) that Seymour had not knowingly and understandingly failed to appeal the trial court's dismissal of his PCHA petition.

73. *See supra* text accompanying notes 70-71.

74. The supreme court followed an analogous course in Commonwealth v. Norman, 447 Pa. 217, 285 A.2d 523)1971). Norman filed his first PCHA petition in 1967, which alleged that his trial counsel was ineffective because he had not appraised Norman of his right to appeal. Before the hearing took place, Norman asked for (and received) an indefinite continuance. In 1968, he filed a second PCHA petition, which the PCHA court dismissed on the theory that the issue had been finally litigated when the supreme court examined the trial record during an earlier habeas corpus proceeding. On appeal, the supreme court cited Commonwealth v. Cannon, 442 Pa. 339, 275 A.2d 293 (1971), as authority for not considering the habeas corpus petition a bar to PCHA review, and held that "the issue [whether Norman had been denied his right to appeal] was not finally litigated." 447 Pa. at 220, 285 A.2d at 525. The supreme court based its decision on the absence of any indication in the record that Norman had been informed, by either the trial court or by his counsel, of his right to appeal. The petition was remanded to the PCHA court with instructions to give the Commonwealth "an opportunity to introduce evidence that . . . [Norman] knew both of his right to appeal and of his right to have counsel appointed to assist him on appeal." *Id.* at 222-23, 285 A.2d at 526.

Chief Justice Bell was disturbed by the majority decision. He wrote in a colorful dissent:

> Is there never to be an end to appeals by a person convicted of murder? Furthermore, it is outrageous to let a convicted murderer, or indeed any criminal, play fast and loose—as this appellant has done—with the supreme court, or with any other Court. In the light of the [facts of the

2. *Commonwealth v. Wideman: An Invitation to Frivolous Petitions Alleging Ineffective Assistance of Counsel*

If the Watlington "monster" has a birthday, it is July 2, 1973. On that date, the Pennsylvania Supreme Court decided *Commonwealth v. Wideman*,[75] and created a precedent that would be cited with approval seven years later by the *Watlington* plurality.[76] The facts of the case are straightforward. In 1964, Wideman's first trial on charges of conspiracy and armed robbery ended in a mistrial that did not meet constitutional "manifest necessity" standards.[77] Thus, double jeopardy had attached.[78] Some two-and-a-half years later, however, Wideman was retried, convicted, and imprisoned.[79] Wideman first raised the double-jeopardy issue in a PCHA petition filed in 1970.[80] The petition was dismissed by the PCHA court, and the dismissal was affirmed by the superior court, because Wideman's second trial counsel had not raised the issue in post-trial motions, or in direct appeal following his conviction.[81]

These facts posed a clear-cut dilemma for the Pennsylvania Supreme Court. On one hand, Wideman was the victim of an ineffective attorney who had failed to raise a valid objection to double jeopardy. On the other, Wideman had technically waived the issue under the PCHA by not alleging double jeopardy at his earlier appeal proceedings. Justice Eagan, writing for the majority, solved the problem by invoking the "extraordinary circumstances" exception on PCHA's waiver rule.[82] He held that Wideman was not precluded from raising the double jeopardy issue in this col-

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case] . . . it is . . . incomprehensible to me how this Court can remand for another hearing. I very vigorously dissent.

447 Pa. at 227-28, 285 A.2d at 529 (Bell, C.J., dissenting).

75. 453 Pa. 119, 306 A.2d 894 (1973). It should be noted that *Wideman* is an appeal from the dismissal of a *first* PCHA petition.

76. *See infra* text accompanying notes 172-73.

77. *See, e.g.*, Commonwealth v. Shaffer, 447 Pa. 91, 288 A.2d 727 (1972). The rule that double jeopardy attaches if a mistrial is declared, over defendant's objection, in the absence of "manifest necessity" was first set forth in United States v. Perez, 22 U.S. (9. Wheat.) 579 (1824).

78. 453 Pa. at 122, 306 A.2d at 895.

79. *Id.* at 120-21, 306 A.2d at 895.

80. *Id.* at 123, 306 A.2d at 896. The *Wideman* court's opinion says nothing about Wideman's failure to assert double jeopardy during his second trial.

81. *Id.* at 121-23, 306 A.2d at 895-96.

82. *See supra* notes 9-11 and accompanying text.

lateral proceeding because "[i]neffective assistance of counsel constitutes . . . 'extraordinary circumstances' [under the PCHA]."[83]

After making his sweeping statement, Justice Eagan did not explain it further. Instead, he discussed the constitutional right to effective counsel and described the two substantial errors made by Wideman's attorney. Justice Eagan subsequently reversed the orders of both the superior court and the PCHA court and dismissed the criminal charges against Wideman.[84]

In retrospect, it can be argued that the Wideman court chose the wrong way out of the dilemma. It could have reached the same conclusion by following the approach implicit in *Seymour*,[85] i.e., by holding that Wideman had not had the opportunity to knowingly and understandingly waive the double jeopardy issue at his earlier proceedings. If, as the *Seymour* court had held, the lack of full and complete representation aborts the functioning of the finality rule, why would not the failure of counsel to raise obvious issues bar the operation of the waiver rule?[86]

By equating ineffective counsel with "extraordinary circumstances," *Wideman sub silentio* amends the PCHA. The Act lists the denial of the right to representation by competent counsel as one of several issues that may be raised by the PCHA petitioner.[87] Nothing in the language of the Act suggests that a

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83. 453 Pa. at 123, 306 A.2d at 896.

84. *Id.* at 124, 306 A.2d at 896.

85. *See supra* text accompanying notes 63-74.

86. Some years earlier, in Commonwealth v. Kizer, 428 Pa. 99, 236 A.2d 515 (1967), the supreme court stated: "[w]e should be loathe to impose . . . [the PCHA's] waiver provisions against a prisoner who lacked counsel's advice as to the possible appellate procedures available." *Id.* at 101, 236 A.2d at 516. Although the court was talking about a PCHA petitioner who acted without any advice from counsel, the facts in *Wideman* provide a much more compelling reason to apply this doctrine. Quite clearly, Wideman did not have the advice of competent counsel about possible appellate procedures. Similarly, in Commonwealth v. Minnick, 436 Pa. 42, 258 A.2d 515 (1969), the supreme court held that a theory of waiver cannot be predicated upon an uncounselled PCHA proceeding. In Commonwealth v. Fiero, 462 Pa. 409, 341 A.2d 448 (1975), a post-*Wideman* subsequent-petition appeal, the supreme court reversed the summary dismissal of the appellant's second pro se PCHA petition. The *Fiero* court affirmed the principle stated in Commonwealth v. Mitchell, 427 Pa. 395, 235 A.2d 148 (1967), that a PCHA petition can not be summarily dismissed if it is devoid of any evidence of meaningful participation by counsel. The *Fiero* court held that in these circumstances the PCHA's waiver rule does not apply. 462 Pa. at 412, 341 A.2d t 449.

87. *See supra* note 42; PA. STAT. ANN. tit. 19, § 1180-3(c)(6) (Purdon Supp. 1981).

claim of ineffective counsel is immune to the PCHA's finally litigated or waived rule. The *Wideman* court, however, effectively granted such immunity when it held that ineffective assistance of counsel excused the waiver of Wideman's double jeopardy claim at earlier proceedings.[88] This can be seen from the simple observation that Wideman's claims of ineffective counsel and double jeopardy arose at the same time.[89] Wideman technically waived his claim of ineffective counsel at the same time he waived his objection to double jeopardy, i.e., in post-trial motions or on direct appeal following his conviction.[90]

Wideman is a watershed decision in that it seems to have made ineffective counsel a much more attractive PCHA claim. During the seven years before *Wideman*, only eleven percent of all PCHA appeals reaching the Pennsylvania Supreme Court alleged ineffective assistance of prior counsel.[91] During the eight years after *Wideman*, the figure jumped to fifty-one percent[92]—despite the deterrent effect of *Commonwealth v. Dancer*,[93] a 1975 Pennsylvania Supreme Court decision that requires most claims of ineffective trial counsel to be made during the direct appeal, rather than at the first PCHA proceeding.[94]

Some of these increases can be attributed to *Commonwealth v.*

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88. *See supra* text accompanying notes 82-83.

89. The gravemen of the ineffectiveness claim is that Wideman's second trial counsel ignored an issue, i.e., double jeopardy, that "stood out on the record like [a] sore [thumb] . . . ." 453 Pa. at 124, 306 A.2d at 896. Thus the availability of the claim of double jeopardy to Wideman and his counsel's failure to raise it were concurrent.

90. *See supra* text accompanying note 81.

91. This statistic was derived by comparing two LEXIS searches, *see supra* note 13, using the following "search requests":

1. *(PCHA OR P.C.H.A. OR POST PRE/3 CONVICTION) AND (§ 1180!) AND DATE BEF JULY 2, 1973.*

2. The "search request," *supra*, was modified by adding the following "second level": *AND (INEFFECTIVE OR EFFECTIVE OR INCOMPETENT) PRE/3 (COUNSEL OR ATTORNEY).*

Note: the word "effective" was used in the "search request" to find phrases such as "lack of effective counsel." All of the cases found by the search were examined; inappropriate cases were discarded.

92. This statistic was derived by comparing two LEXIS searches identical to those described *supra* in note 91, except that the phrase *"DATE BEF JULY, 2, 1973"* in "search request" number 1 was replaced by *"DATE AFT. JULY 2, 1973."*

93. 460 Pa. 95, 331 A.2d 435 (1975).

94. *Id.* at 99-100, 331 A.2d at 437 (1975).

Clair,[95] the Pennsylvania high court's 1974 decision that abolished the doctrine of "fundamental error"[96] in Pennsylvania. In the post-*Clair* era, if a trial counsel fails to preserve a significant issue for review by the direct appeal court, the defendant's only opportunity for relief lies in the consideration of an ineffective assistance of counsel claim by either a direct-appeal or PCHA court.[97] However, most of the post-*Wideman* PCHA appeals claiming ineffective counsel allege attorney errors that fall outside the *Clair* doctrine.[98] It seems reasonable, then, to conclude that the *Wideman* holding has invited many frivolous ineffective assistance of counsel claims in PCHA petitions.

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95. 458 Pa. 418, 326 A.2d 272 (1974).

96. The doctrine of "basic error" or "fundamental error" allowed an appellate court to review certain kinds of errors made during a trial even though they had not been preserved for review by a timely objection. *See, e.g.*, Commonwealth v. Williams, 432 Pa. 557, 248 A.2d 301 (1968). *See also*, Comment, *Pennsylvania Waiver Doctrine in Criminal Proceedings; Its Application and Relationship to the Ineffective Assistance of Counsel Claim*, 15 DUQ. L. REV. 217, 219-23 (1976-77).

97. In his dissent to *Clair*, Justice Pomeroy predicted an increase in PCHA petitions alleging ineffective assistance of counsel. He wrote:

> [t]oday's decision virtually invites more post-conviction hearings, to be followed by more appeals. As the dissenters in *Dilliplaine* [v. Lehigh Valley Trust Co., 457 Pa. 255, 322 A.2d 114 (1974)] stated: 'A truly egregious criminal trial error which we decline to consider on appeal because not preserved below is almost certain to resurface in a post-conviction proceeding in the form of a charge of ineffectiveness of counsel. Considerations of judicial economy argue in favor of dealing with errors of this sort on direct appeal from the judgment of sentence . . . . ' I continue to adhere to those views."

458 Pa. at 424, 326 A.2d at 275, (Pomeroy, J., dissenting).

98. *Clair* involves a specific class of mistake made by a defense attorney: the failure to properly preserve errors made by the judge or the prosecution at the trial. 458 Pa. at 420, 326 A.2d at 272-73. As the supreme court explained, a primary justification for requiring that timely objections be made at a trial is to give the trial judge an opportunity to rectify errors as they occur. *Id.* 422-23, 376 A.2d at 274. However, a case-by-case analysis of the PCHA appeals alleging ineffective assistance of counsel that reached the supreme court after *Clair* revealed that the majority of the petitioners alleged other kinds of attorney errors. *See, e.g.*, Commonwealth v. Adams, 465 Pa. 314, 350 A.2d 412 (1976) (allegation that the appellant's trial counsel failed to call two witnesses who might have rebutted prosecution testimony); Commonwealth v. Townsell, 474 Pa. 563, 379 A.2d 98 (1977) (allegation that the appellant's direct appeal counsel failed to brief or argue that assistant district attorney had made a manifestly prejudicial summation at the appellant's trial); Commonwealth v. Triplett, 476 Pa. 83, 381 A.2d 877 (1977) (allegation that the appellant's trial counsel did not adequately advise him of his rights before recommending a plea of guilty).

3. *Post-Wideman Decisions of the Pennsylvania Supreme Court*

The Pennsylvania Supreme Court's two subsequent-petition decisions in the two-year period after *Wideman* are reminiscent of its earliest PCHA rulings. *Commonwealth v. Via*[99] and *Commonwealth v. Yarnal*[100] both reflect a conservative construction of the PCHA's waiver rule.

In *Via*, the appellant's second PCHA petition was before the court. It alleged, *inter alia*, that both the appellant's court-appointed trial counsel and his assigned counsel at the first PCHA hearing were incompetent.[101] The court essentially ignored Via's allegation that his first PCHA counsel was ineffective, and focused instead on Via's claim of incompetent trial counsel.[102] The court stated that a prior counseled PCHA petition would normally create a waiver of such a claim.[103] But the court noted that both the trial and PCHA attorneys were members of the same office, and it refused to find that Via had knowingly and understandingly waived the issue of incompetent trial counsel in his first PCHA petition.[104] The court stated that the law will not assume that an attorney has advised his client of his own inadequacies or those of his associates.[105]

The *Via* court did not cite *Wideman*[106] anywhere in its opinion, nor did it attempt to excuse Via's apparent double waiver of his claim of ineffective trial counsel.[107] The same group of justices

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99. 455 Pa. 373, 316 A.2d 895 (1974).

100. 462 Pa. 199, 340 A.2d 431 (1975).

101. 455 Pa. at 376, 316 A.2d at 897. Via had been convicted of burglary in 1968; he made no post-trial motions and filed no direct appeal. He filed his first PCHA petition in 1968, which was summarily dismissed. *Id.* at 375, 316 A.2d at 897. Via viled his second PCHA petition in 1970, thus he could not have derived any "encouragement" from *Wideman*. *See supra* text accompanying notes 75-94.

102. 455 Pa. at 377, 316 A.2d at 898. The court made the rather baffling statement that the "[a]ppellant's claims of ineffective assistance of counsel at trial and in his first [PCHA] . . . petition are appropriate complaints for collateral review though not raised on direct appeal." *Id.* Via could not have complained about his PCHA counsel at a direct appeal, had he made one.

103. *Id.*, (citing Commonwealth v. Black, 433 Pa. 150, 249 A.2d 561 (1969)). *See supra* note 54.

104. 455 Pa. at 377, 316 A.2d at 898.

105. *Id.*

106. *See supra* notes 75-94 and accompanying text.

107. Via had one opportunity to allege incompetent counsel at the direct appeal stage, and another in his first PCHA petition.

sat on both the *Wideman* and *Via* courts.[108] Presumably, they could have decided that being counseled by two lawyers from the same office is an "extraordinary circumstance" that will justify a failure to allege ineffective counsel at an earlier proceeding. But the *Via* court chose, instead, to hold that a waiver had not occured.[109] A possible explanation is that *Via* involved an uncertainty about the independence of counsel—a situation not unlike *Seymour*,[110]—whereas *Wideman* involved clear and undisputed revelations of incompetence.[111] If so, this casts a different light on *Wideman*. The *Wideman* court may have actually meant that ineffective assistance of counsel constitutes "extraordinary circumstances"[112] only when the record contains a clear showing that prior counsel were ineffective.[113]

A year later, the same seven justices of the court decided *Commonwealth v. Yarnal*.[114] In *Yarnal*, the supreme court affirmed the dismissal of a second PCHA petition that raised, for the first time, an allegation of ineffective trial counsel.[115] With an apparent nod to *Via*, the court noted that Yarnal had been represented by different attorneys at his direct appeal and first PCHA hearing.[116] The Court stated that no "extraordinary circumstances" were averred in Yarnal's second petition to explain why this issue was not raised earlier, then it strictly construed the PCHA waiver rule to find that he had waived his claim of ineffective trial counsel.[117] The high court's brief opinion did not cite *Wideman*, nor did it suggest that Yarnal's allegation merited a special status.

4. *Commonwealth v. Musser: A Preview of the "Monster"*

Scarcely six weeks after *Yarnal*, the Pennsylvania Supreme

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108. Chief Justice Jones, and Justices Eagen, O'Brien, Roberts, Pomeroy, Nix, and Mandarino. 455 Pa. at 374, 316 A.2d at 895.

109. 455 Pa. at 377, 316 A.2d at 898.

110. *See supra* notes 63-74 and accompanying text.

111. *See supra* text accompanying notes 77-81.

112. *See supra* text accompanying notes 82-83.

113. This interpretation tends to put in perspective the sweeping statement made by Justice Eagen in *Wideman*. *See supra* text accompanying note 83. It suggests that the *Wideman* court demanded more than a mere allegation of ineffective counsel to justify a waiver under the PCHA.

114. 462 Pa. 199, 340 A.2d 431 (1975).

115. *Id.* at 201, 340 A.2d at 432.

116. *Id.*

117. *Id.*

Court made a dramatic, although apparently short-lived, change of course in *Commonwealth v. Musser*,[118] The appellant had previously filed an unsuccessful PCHA petition alleging that his guilty plea at his trial was involuntary.[119] His second petition also alleged that his guilty plea was involuntary, and further claimed that the counsel at his first PCHA hearing and subsequent appeal was incompetent.[120] The second PCHA court, seemingly ignoring Musser's ineffective-counsel claim,[121] summarily dismissed the petition on the ground that the voluntariness of his plea had been finally litigated.[122] The superior court affirmed.[123]

The supreme court, in a per curiam opinion, granted allocatur, and cited *Via*, *Wideman*, and *Commonwealth v. Murray*[124] as authority for its statement that an issue may not be finally litigated or waived in a proceeding in which the defendant has been denied effective counsel.[125] The supreme court held that the second PCHA court should have granted Musser an evidentiary hearing to determine whether he had been denied effective assistance of counsel at his first PCHA proceedings and remanded the case to the PCHA court to hold such a hearing.[126] The supreme court further ordered that if Musser's first PCHA counsel is found to have been ineffective, Musser should receive a new evidentiary hearing on the voluntariness of his guilty plea.[127]

Musser is puzzling for two reasons: first, because it goes far beyond the court's previous response to allegations of ineffective assistance of counsel; second, because it encourages abuse of the PCHA process. *Musser* seems to graft a new procedure onto the PCHA—an independent hearing to determine the competence of

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118. 463 Pa. 85, 343 A.2d 354 (1975). *Yarnal*, *see supra* note 114, was decided on July 7, 1975, *Musser* on August 18, 1975.

119. 463 Pa. at 87, 343 A.2d at 354.

120. *Id.* The opinion does not explain whether a single attorney represented Musser at his first PCHA hearing and subsequent apeal, or whether he had two different attorneys.

121. According to the supreme court, the second PCHA court acted "without holding a hearing to determine whether petitioner had the benefit of competent counsel [at his first PCHA] . . . proceeding." *Id.*

122. *Id.*

123. *Id.*

124. 452 Pa. 282, 305 A.2d 33 (1973). In *Murray*, the supreme court affirmed the PCHA's dismissal, after an evidentiary hearing, of a first petition that alleged ineffective assistance of counsel at post-trial motions and at his direct appeal.

125. 463 Pa. at 87, 343 A.2d at 354-55.

126. *Id.* at 87, 343 A.2d at 355.

127. *Id.*

prior PCHA counsel, whenever a subsequent-petitioner alleges his ineffectiveness.[128] Further, on its face, the decision makes it unnecessary for a PCHA petitioner to come forward with anything more than a bare allegation of ineffective counsel.[129] In subsequent-petition cases heard before *Musser*, the supreme court had invoked the presumption, set down in *Washington*,[130] that counsel is effective. A claim of ineffectiveness had to be substantiated by the record or other credible evidence.[131] Ironically, this point is strongly made in *Murray*,[132] a decision the *Musser* court used as authority for its holding.[133] Justice Flaherty's warning in his dissent to *Watlington*[134] can apply equally well to *Musser*: it too invites an unsuccessful PCHA petitioner to file repetitive petitions that allege the ineffectiveness of prior counsel.[135]

Despite the changes it seems to bring to PCHA practice, *Musser* must be considered an anomoly. It is an almost forgotten case that, although never overruled, has been generally ignored by the supreme court.[136] In the five-year period between *Musser*

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128. Specifically, the *Musser* court stated: "the trial [*i.e.*, PCHA] court should have held an evidentiary hearing to determine whether, *as he alleges*, petitioner was denied the effective assistance of counsel at the [PCHA evidentiary] hearing on the voluntariness of his guilty plea and on the appeal from the order entered following such hearing." *Id.* (emphasis added).

129. The *Musser* court did not point to any item in the record that suggested ineffective representation. Neither did the Court explain how poor performance by Musser's counsel, as measured by the guidelines of *Washington*, *see supra* text accompanying note 60, might have prejudiced Musser's first PCHA hearing or his subsequent appeal to the superior court.

130. 427 Pa. at 603, 235 A.2d at 352. *See supra* text accompanying note 60. When the *Washington* court discussed the burden of proving ineffective assistance of counsel, it stated: "[a]s with other assertions of a denial of constitutional rights in post conviction proceedings, the burden remains . . . with the prisoner to demonstrate any constitutional deprivation." *Id.* at 608, 235 A.2d at 354. The supreme court subsequently stated in *Murray*, *see supra* note 124, that "there is a presumption counsel is competent." 452 Pa. at 286, 305 A.2d at 36.

131. *See, e.g.*, Commonwealth *ex. rel* Mullenaux v. Myers, 421 Pa. 61, 66-67 217 A.2d 730, 733 (1966).

132. 452 Pa. at 286, 305 A.2d at 36.

133. 463 Pa. at 87, 343 A.2d at 354-55.

134. *See supra* text accompanying notes 22 and 23.

135. Under *Musser*, a subsequent petitioner who merely alleges that his prior PCHA counsel was ineffective will receive an evidentiary hearing on the claim. Presumably, an allegation of "layered" attorney incompetence similar to Watlington's, *see supra* note 19, would force a hearing that delves deep into the proceedings against the petitioner.

136. *Musser* has been cited only three times in majority opinions of the supreme court, all written in 1976: Commonwealth v. Holmes, 468 Pa. 409, 364

and *Watlington*,[137] the court decided two subsequent-petition PCHA appeals that involved claims of ineffective counsel, neither of which rely on *Musser* as authority or can be said to encourage frivolous PCHA petitions. In *Commonwealth v. Padgett*,[138] the court granted further proceedings to a petitioner who had alleged the ineffectiveness of his trial counsel in three PCHA petitions,[139] but the real issue was whether an attorney helped prepare the third petition.[140] Similarly, in *Commonwealth v. Sangricco*,[141] the court reaffirmed the principle that the PCHA petitioner is entitled to be represented by competent counsel during the proceedings.[142]

A.2d 259 (1976); Commonwealth v. Logan, 468 Pa. 424, 364 A.2d 266 (1976); and Commonwealth v. Roundtree, 469 Pa. 241, 364 A.2d 1359 (1976). Justice Roberts cited *Musser* in his dissent to Commonwealth v. Hubbard, *see infra* text at II(B)(5), as authority for the statement that "[a]bsent effective assistance of . . . [PCHA] counsel, the issue of ineffectiveness of trial counsel cannot be waived." 472 Pa. 259, 289, 372 A.2d 687, 701 (1977) (Roberts, J., dissenting).

137. *Musser* was decided on August 18, 1975, *Watlington* on September 22, 1980.

138. 485 Pa. 386, 402 A.2d 1016 (1979).

139. *Padgett* looks, at first glance, much like a waiver case. The appellant's first PCHA petition had alleged ineffective assistance of counsel on three grounds. These claims were subsequently rejected by the supreme court in Commonwealth v. Padgett, 465 Pa. 1, 348 A.2d 87 (1975). Padgett's third petition alleged a new ground; it was summarily dismissed by the PCHA court. 485 Pa. at 388, 402 A.2d at 1017.

140. The supreme court noted that Padgett's third petition was written pro se. The court stated, "[a]lthough appellant had counsel . . . the record reveals appointed counsel was attempting to withdraw during the pendency of the *pro se* petition. Subsequent to the denial of the petition [by the PCHA court] without a hearing, appellant's fourth and present counsel was appointed to process this appeal." 485 Pa. at 390, 402 A.2d at 1017-18.

141. 490 Pa. 126, 415 A.2d 65 (1980).

142. Sangricco was convicted of voluntary manslaughter and three related charges in 1974. In 1978 he filed a *pro se* PCHA petition that alleged, *inter alia*, ineffective assistance of trial counsel. At that time he requested, and received, court appointed counsel to assist him. However, the attorney did nothing to "place appellant's *pro se* petition in a proper frame or otherwise amend the *pro se* allegations." *Id.* at 129, 415 A.2d at 67. The PCHA court summarily rejected all but one of the allegations and found that the remaining allegation was insufficient. The court ordered that the petition be returned to Sangricco for amendment. *Id.* at 130, 415 A.2d at 67. Despite this leave to amend, the appellant's court-appointed PCHA counsel took no action. Ten months later, Sangricco filed a second *pro se* PCHA petition that alleged, *inter alia*, a new theory of ineffective trial counsel, complained about the assistance rendered by appellant's first PCHA attorney, and made a new request for court-appointed counsel. The PCHA court did not grant the request for counsel, "apparently concluding that appellant was still represented by the counsel originally appointed." *Id.* at 131, 415 A.2d at 67. The PCHA court subsequently summarily dismissed the second

5. *Commonwealth v. Hubbard: The Pennsylvania Supreme Court Tackles a Sequential Ineffective Assistance of Counsel Claim*

Another Pennsylvania Supreme Court decision worth noting in the post-*Wideman*, pre-*Watlington* period is *Commonwealth v. Hubbard*.[143] A 1977 case, *Hubbard* involved the direct-appeal of a second-degree murder conviction rather than a PCHA appeal,[144] but the decision is significant here because the court conducted a lengthy analysis of a series of sequential claims of ineffective counsel. The appellant had been represented by a privately retained attorney at his trial, by a public defender at post-trial proceedings, and by a second public defender at his direct appeal.[145] Hubbard claimed on appeal, *inter alia*, that his trial counsel had been ineffective.[146] The supreme court rejected these allegations on the ground that the issue of his trial counsel's ineffectiveness had not been properly preserved for appellate review.[147] The Court explained that a claim of ineffective prior counsel must be alleged at the "earliest stage in the proceedings at which the counsel whose effectiveness is being challenged no longer represents the defendant."[148] This requirement is a corollary to the *Dancer* rule that requires most claims of ineffective trial counsel to be made on direct appeal,[149] and impliedly reaf-

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petition, concluding that the old claims in the second petition were finally litigated, and that the new claim was without merit. *Id.*, 415 A.2d at 67-68. On appeal, a unanimous supreme court held that the PCHA court "clearly erred" when it assumed Sangricco was still represented by counsel. The court said, "[n]othing in PCHA practice is more settled than the rule that a person seeking post-conviction relief is entitled to the assistance of counsel," and remanded the case for counselled proceedings. *Id.* at 132, 415 A.2d at 68-69.

143. 472 Pa. 259, 372 A.2d 687 (1977).

144. *Id.* at 266, 372 A.2d at 690.

145. Hubbard's privately retained trial counsel withdrew after filing post-trial motions. A public defender represented appellant throughout the post-trial proceedings at trial court level and was subsequently replaced by a second public defender when Hubbard made his direct appeal. *Id.* at 276, 372 A.2d at 695.

146. *Id.* Hubbard also claimed that his post-trial counsel was ineffective. *See infra* text accompanying note 151.

147. 472 Pa. at 276, 372 A.2d at 695.

148. *Id.* at 276-77 n.6, 372 A.2d at 695 n.6. The *Hubbard* court prefaced this statement by saying, "[w]e have recently held that newly appointed or retained counsel must raise on appeal the ineffectiveness of his predecessor trial counsel or that claim will be deemed waived." *Id.* (citing Commonwealth v. Smallwood, 465 Pa. 392, 350 A.2d 822 (1976) (other citations omitted)).

149. *See supra* notes 93-94 and accompanying text.

firms the statement made by the *Satchell* court some nine years earlier that Pennsylvania can rest upon the preseumption that post conviction counsel informed his client of all the available grounds of attack.[150]

The *Hubbard* court, however, softened its initially conservative approach when it went on to consider, in great detail, the appellant's additional claim that his post-trial counsel was ineffective for failing to assign as error the ineffectiveness of his trial counsel.[151] To do this, the court was forced to conduct a full analysis of the trial counsel's performance in light of the ineffectiveness standards set forth in *Washington*.[152] The court concluded that although the attorney did not raise an objection to the prosecutor's arguably prejudicial summation to the jury, his inaction might have been born of a reasonable, calculated trial strategy, rather than "sloth and unawareness."[153]

Having found that the trial attorney could not be considered per se ineffective, the supreme court then turned its attention to the competence of Hubbard's post-trial counsel. The court's operative question was whether the post-trial counsel investigated the trial attorney's performance and reasonably concluded that the trial counsel acted in Hubbard's best interests.[154] If so, then post-trial counsel was not ineffective; if not, his lack of diligence constitutes ineffective assistance of counsel.[155] The court could not resolve this issue from the record. It remanded the case for a hearing on the question of the post-trial attorney's effectiveness.[156]

The *Hubbard* majority did not mention *Musser*,[157] but its deci-

150. *See supra* text accompanying note 54. This presumption is seemingly part of the logical foundation beneath the *Hubbard* court's statement that, "[i]t follows then that when newly appointed post-trial counsel fails to assign the ineffectiveness as a ground for post-trial relief, the issue of trial counsel's ineffectiveness is not properly preserved for appellate review." 472 Pa. at 276-77 n.6, 372 A.2d at 695 n.6.

151. *Id.* at 277, 372 A.2d at 695. The supreme court stated this allegation could be properly raised in this direct appeal because "this appeal is the first stage of the proceedings at which post-trial counsel is no longer representing appellant." *Id.* at 277 n.7, 372 A.2d at 695 n.7.

152. *See supra* text accompanying note 60.

153. 472 Pa. at 285, 372 A.2d at 699.

154. *Id.* at 285-86, 372 A.2d at 699-700.

155. *Id.* at 286, 372 A.2d at 700.

156. *Id.*, 372 A.2d at 700.

157. *See supra* text at section II(B)(4). It should be noted, however, that Justice Roberts cited *Musser* in his dissent to *Hubbard*. *See supra* note 136.

sion to remand for a hearing to determine the ineffectiveness of the appellant's immediately prior counsel has much in common with the decision of the *Musser* court.[158] The *Hubbard* court, though, set forth an evaluation standard, specifically whether the immediately prior counsel investigated the actions of the attorney that served before him, and whether he reasonably concluded that the earlier counsel had acted in his client's best interest.[159] This rule of analysis is the key to taming the *Watlington* "monster."[160]

III. THE "MONSTER" BREAKS LOOSE

Commonwealth v. Watlington

In 1972, the appellant in *Watlington*[161] was convicted of first-degree murder. He subsequently appealed his conviction to the Pennyslvania Supreme Court, alleging that the trial court had failed to give appropriate cautionary instructions to the jury regarding the testimony by the co-defendant.[162] The supreme court affirmed Watlington's conviction, noting that he had neither made a proper objection during the trial, nor filed post-verdict motions.[163]

In 1979, Watlington filed his first pro se PCHA petition, which was subsequently amended with the help of court-appointed counsel. It alleged that his trial counsel was ineffective for failing to file post-verdict motions, for failing to object to unspecified trial irregularities, and for failing to call witnesses who could have rebutted aspects of the Commonwealth's case.[164] The PCHA court summarily dismissed the petition on the theory that Watlington had waived these ineffective assistance issues because the petition failed to allege the ineffectiveness of his direct-appeal counsel.[165] Watlington did not appeal.[166]

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158. *See supra* text accompanying notes 126-27.
159. *See supra* text accompanying note 154.
160. *See supra* text at section V.
161. Commonwealth v. Watlington, 491 Pa. 241, 420 A.2d 431 (1980). *See supra* notes 18-24 and accompanying text.
162. 491 Pa. at 242, 420 A.2d at 432.
163. *Id.* Watlington's direct appeal is reported as Commonwealth v. Watlington, 452 Pa. 524, 306 A.2d 892 (1973).
164. 491 Pa. at 242-43, 420 A.2d at 432.
165. *Id.* at 243, 420 A.2d at 432.
166. *Id.*

Several months later, Watlington filed his second pro se PCHA petition, this one making new claims for the ineffectiveness of his trial counsel, and also alleging the ineffectiveness of his direct-appeal counsel and first PCHA counsel.[167] The PCHA court summarily dismissed Watlington's second petition without appointing counsel on the grounds that the allegations either were not recognized under the PCHA or had been finally litigated.[168]

On appeal, a divided Pennsylvania Supreme Court[169] concluded that it was dealing with an uncounseled PCHA petition that alleged issues neither finally litigated nor waived.[170] The three-justice plurality remanded the petition to the PCHA court with instructions to appoint an attorney to represent Watlington in "any further proceedings thereon."[171] The court did not specify a particular form of "further proceedings," but presumably they could range from a summary dismissal of an amended petition prepared with the aid of counsel to a full evidentiary hearing.

The plurality based its decision on two points: first, that the specific effectiveness issues Watlington raised in his second petition were not finally litigated because they had not been raised on direct appeal or in Watlington's first PCHA petition; second, that while these new issues could have been raised earlier, Watlington alleged "extraordinary circumstances," *i.e.*, ineffective assistance of counsel, to justify his failure to raise them.[172]

The plurality's sole authority for its holding was the *Wideman* decision,[173] but the opinion does not really explain how the three justices applied *Wideman* to the facts in *Watlington*. The plurality presented little more than a reaffirmation of the doctrine that "ineffective assistance of counsel amounts to 'extraordinary circumstances,' "[174] along with a passage from *Wideman* to the effect that, absent a knowing and intelligent waiver of the right to effective counsel, a defendant is entitled to the assistance of effective counsel throughout the proceedings against him.[175] None

167. *Id. See supra* note 19.
168. 491 Pa. at 243, 420 A.2d at 432-33.
169. *See supra* note 18.
170. 491 Pa. at 245, 420 A.2d at 433.
171. *Id.* at 246, 420 A.2d at 434.
172. *Id.* at 245, 420 A.2d at 433.
173. *Id.* at 244, 420 A.2d at 433. *See supra* text at section II(B)(2).
174. 491 Pa. at 244, 420 A.2d at 433. *See supra* text accompanying note 83.
175. 491 Pa. at 244, 420 A.2d at 433 (citing *Wideman*, 453, Pa. at 123, 306 A.2d at 896).

of this provides sufficient rationale for the two conclusions implicit in the plurality holding: first, that the right to effective counsel can be vindicated by a multiplicity of separate claims, each alleging a different kind of error by a particular attorney; second, that these claims are individually immune to the PCHA's finally-litigated-or-waived rule.[176]

As Justice Flaherty argued in his dissent, the *Watlington* plurality ignored the teaching of *Hubbard* that the ineffectiveness of a prior counsel must be raised as an issue at the earliest stage in the proceedings at which the counsel whose effectiveness is being challenged no longer represents the defendant.[177] The *Hubbard* "earliest stage" doctrine, applied to the facts in *Watlington*, would have required a holding that issues related to the competence of Watlington's trial and direct-appeal attorneys were waived, and that the PCHA court should examine only the alleged ineffectiveness of Watlington's first PCHA counsel. The *Watlington* plurality, however, seemingly made no distinction among the various "levels" or "stages" of ineffectiveness claims raised by the appellant.

The "monster" set free by the *Watlington* plurality is certainly a procedural beast. Any defendant or attorney creative enough to think up artificial reasons why prior counsel were ineffective will surely read the holding as an open-ended invitation to file repetitive PCHA petitions. In fact, a headnote to *Watlington* provides what amount to step-by-step instructions for bypassing the PCHA's waiver rule.[178] On the other hand, as Justice Larson

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176. *See supra* text accompanying note 172. The *Watlington* plurality might have been well served had it considered the superior court's decision in Commonwealth v. Jackson, 239 Pa. Super. 121, 362 A.2d 324 (1976). The *Jackson* court allowed a claim of serial ineffectiveness, made in the appellant's second PCHA petition, of his first PCHA counsel and his direct-appeal counsel, but found that 10 of the grounds asserted by Jackson were new theories for relief, and thus had been waived. *Id.* at 130, 362 A.2d at 331. *See also* Comment, *supra* note 96, at 240.

177. 491 Pa. at 246-47, 420 A.2d at 434, (Flaherty, J., dissenting). *See supra* note 148 and accompanying text.

178. The pertinent part of the headnote reads:

> "where none of the issues raised in defendant's second [PCHA] . . . petition were raised in either his direct appeal or his first PCHA petition [i.e., they are new issues], and defendant alleged ineffectiveness of all prior counsel for failing to raise the issues contained in his second petition, defendant had alleged "extraordinary circumstances" to justify the failure to raise such issues, and thus the issues were not waived. . . ."

491 Pa. at 241-42, 420 A.2d at 431-32.

commented in his concurring opinion, Watlington's three prior attorneys were unable to obtain a review, either on direct appeal or through the PCHA, of Watlington's conviction.[179] Thus, it becomes at least plausible that Watlington was burdened with a series of incompetent counsel and had a fair claim for collateral relief that extended all the way back to his trial. If so, it can be said that the *Watlington* "monster" is not a creature bent on destruction; it may, in some cases, be a crusader for justice.

IV. TAMING THE WATLINGTON "MONSTER"

A. *Justice Flaherty's Two-Pronged Test*

In his dissent to *Watlington*, Justice Flaherty proposed a rule of analysis for previously waived claims for collateral relief that are resurrected in an "ineffectiveness context."[180] Specifically, he urged that such claims be reviewed only when the alleged errors constitute a denial of due process or of fundamental fairness and are of a kind that may have affected the truth determining process at the petitioner's trial.[181] In Justice Flaherty's words, ineffective assistance of counsel would excuse waiver only if the waived issue involves "a colorable due process claim significantly implicating the truth determining process, which, were it unaddressed by the court, could have the effect of imprisoning an innocent person."[182]

Justice Flaherty's two-pronged test is effect-oriented. It invites a PCHA court faced with a subsequent petition alleging ineffective counsel to evaluate the harm that might have been done to the petitioner's interests by the claimed actions or inactions of his allegedly negligent counsel. Justice Flaherty noted that the court's interest in subsequent PCHA petitions is to prevent the incarceration of innocent people, not, as in earlier

179. 491 Pa. at 246, 420 A.2d at 434 (Larsen, J., concurring).

180. *Id.* at 251, 420 A.2d at 436 (Flaherty, J., dissenting). The term "ineffectiveness context" is somewhat misleading. Under *Watlington*, an allegation of ineffective counsel prevents a PCHA court from summarily dismissing a collateral issue that it would probably consider to be waived. The issue is "protected" by the ineffectiveness claim, but is not submerged within it. Thus, if the petitioner receives collateral relief, it will be on the basis of the issue, not because he was represented by ineffective counsel.

181. *Id.* 420 A.2d at 436, (Flaherty, J., dissenting).

182. *Id.* at 252, 420 A.2d at 437, (Flaherty, J., dissenting).

stages, to prevent abuses by law enforcement agencies.[183] Implicit in this concept is the idea that a PCHA court should not consider a subsequent petition alleging ineffective counsel where the petitioner bases his claim for relief on "technicalities," rather than on his innocence of the crime.[184]

Justice Flaherty applied his test to the facts in *Watlington* as follows:

> Appellant has raised three claims in an ineffectiveness context regarding the jury instructions given at his trial, none of which, even if true, would constitute a due process denial that significantly implicates the truth determining process at trial. Accordingly, the claims should not be cognizable at PCHA, and the lower court's dismissal of the petition is proper.[185]

Justice Flaherty's conclusion seems highly speculative. However the jury interpreted the evidence presented at Watlington's trial, its interpretation was clearly part of the "truth determining process." The trial court's instructions must be presumed to have had some effect on the jury's deliberations, although whether or not the effect was "significant" is a debatable question. Nevertheless, the thrust of Justice Flaherty's argument is clear: PCHA courts should be free to ignore allegations of attorney errors in subsequent PCHA petitions that merely added another nail to a tightly nailed down conviction.

B. *Commonwealth v. Alexander: Guidelines for the PCHA Court*

The *Watlington* court's dilemma was not as clear and acute as the one faced by the *Wideman* court,[186] but it does reflect the forces that pull appellate judges in opposite directions when they decide subsequent-petition PCHA appeals involving ineffective assistance of counsel claims. At one pole is the need for finality

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183. *Id.* at 251, 420 A.2d at 436-37 (Flaherty, J., dissenting).

184. Justice Flaherty cited with approval the following statement from the concurring and dissenting opinion of Chief Justice Bell in *Maroney*: "As so frequently happens in recent . . . [PCHA] proceedings and appeals therefrom, there is no doubt of defendant's guilt—indeed, in most of them, defendant relies solely upon recently created legal technicalities and does not even allege his innocence." 491 Pa. at 252 n.4, 420 A.2d at 437 n.4 (Flaherty, J., dissenting) (quoting 427 Pa. at 614, 235 A.2d at 357).

185. 491 Pa. at 252-53. 420 A.2d at 437 (Flaherty, J., dissenting).

186. *See supra* text accompanying note 82.

in criminal proceedings[187]: at the other, the ever-present possibility that a person may have been improperly convicted because of the errors made by his attorneys.

The Pennsylvania Supreme Court addressed this question at length in *Commonwealth v. Alexander*.[188] The appellant in *Alexander* had pleaded guilty to murder in 1954; between 1966 and 1978; he had filed six different PCHA petitions.[189] Alexander's sixth petition—the one before the court—had been summarily dismissed by the PCHA court on the grounds that all of its claims had either been finally litigated or waived.[190] This petition alleged, *inter alia*, that Alexander had been denied effective assistance of counsel at his first, fourth, and fifth PCHA proceedings.[191] The six justices of the court all concluded that Alexander was not entitled to further relief under the PCHA, but they could not agree on a common rationale for affirming the PCHA court's dismissal. Thus, *Alexander* presents a three-justice plurality opinion and two concurring opinions, all denying Alexander's appeal.[192]

Justice Larsen, writing for the plurality, quickly determined that three claims in Alexander's latest petition had been finally litigated in previous PCHA proceedings.[193] Then he found that the remaining issues had long been waived by the appellant's failure to raise them in earlier PCHA petitions, and that Alexander sought to circumvent the effect of the waiver by alleging the serial ineffectiveness of three different PCHA attorneys.[194] Justice Larsen acknowledged that the Pennsylvania Supreme Court had, in previous decisions, spoken in broad terms that suggested that a mere allegation of ineffective counsel constitutes "extraordinary circumstances" sufficient to justify a waiver under the PCHA, but he went on to write that applying such an interpreta-

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187. For an oft-cited discussion of finality in criminal proceedings, *see* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners* 76 HARV. L. REV. 441 (1963).

188. 495 Pa. 26, 432 A.2d 182 (1981). *See supra* text accompanying notes 25-30.

189. 495 Pa. at 27-29, 432 A.2d at 182-83.

190. *Id.* at 29, 432 A.2d at 183.

191. *Id.*

192. *See supra* note 27.

193. 495 Pa. at 32, 432 A.2d at 184.

194. *Id.* 432 A.2d at 185.

tion would defeat the intent of the Pennsylvania General Assembly.[195]

Justice Larsen, however, rejected the two-pronged test proposed in Justice Flaherty's *Watlington* dissent. While admitting that it approximated legislative intent more closely than the "ineffective assistance equals extraordinary circumstances" formula, he said that the test's inflexibility was a major drawback.[196] He wrote that the PCHA court, in the exercise of sound discretion, should be free to consider the myriad of facts and circumstances surrounding a subsequent petition, and that Justice Flaherty's two-prong test sets forth only some of the factors for the court's consideration.[197] Among possible other considerations, Justice Larsen listed the following; (1) the time period between the alleged error and the filing of the PCHA petition;[198] (2) whether a subsequent petition seeks to challenge a guilty plea;[199] (3) whether a repetitive petition indicates abuse of remedy;[200] (4) whether a subsequent petition alleges actual prejudice to the defendant;[201] and (5) whether a subsequent petition merely alleges a different theory to support an issue already decided against the petitioner.[202]

This list, Justice Larsen noted, is not all-encompassing. Rather, the PCHA court must consider these and similar factors to gether with the legal and factual circumstances of the case to determine whether or not to grant a hearing on a second or successive PCHA petition.[203] Further, Justice Larsen wrote, the PCHA court must always consider the "paramount procedural feature of the PCHA—that there be only one petition—and its deter-

195. *Id.*

196. *Id.* at 34, 432 A.2d at 186. *See supra* text at section IV(A).

197. 495 Pa. at 36, 432 A.2d at 186.

198. "A lengthy, unexplained delay . . . will buttress the presumption of knowing and understanding waiver . . . ." *Id.* 432 A.2d at 186-87.

199. "The only permissible challenges to a guilty plea are the jurisdiction of the court, the validity of the plea, and the lawfulness of the sentence." *Id.* 432 A.2d at 187.

200. "[W]here a petitioner wastes scarce judicial resources by filing frivolous petitions, he does so at the risk of downgrading the worth of future petitions. The prisoner who frivolously cries 'error' should not be surprised that the PCHA court is skeptical about future petitions." *Id.* at 37, 432 A.2d at 187.

201. "Abstract assertions [of prejudice] will not suffice." *Id.* at 38, 432 A.2d at 187.

202. *Id.* 432 A.2d at 187-88.

203. *Id.* 432 A.2d at 188.

mination must give proper deference to the presumption against multiplicity of post-conviction proceedings."[204]

Whether the *Alexander* guidelines can be said to serve a purpose, they are of little use in taming the *Watlington* "monster." The number and variety of subsequent-petition PCHA appeals discussed in this Comment demonstrate that the PCHA courts of Pennsylvania have long honored the "presumption against multiplicity of post-conviction proceedings." and seem willing to follow the one-petition mandate of the PCHA. It is the Pennsylvania Supreme Court itself that has insisted that lower courts pay special attention to the allegations of ineffective counsel.

Justice Nix, in a concurring opinion in *Alexander*, criticized the plurality's "lengthy exposition . . . which does more to confuse than to illuminate the factors involved," and concluded that "an attempt to set forth a list of factors, admittedly incomplete, served no real purpose."[205] Similarly, Justice Flaherty, in his concurrence, rejected the guidelines as a "cumbersome list of factors for the PCHA court to consider in deciding whether to hold a hearing in a second or successive PCHA petition . . . [that] introduces an unnecessary complexity into the area of the law that badly needs simplification."[206]

The five items on Justice Larsen's list, even when taken together, do not give a PCHA court a rule for evaluating the kinds of subsequent petitions filed by Watlington or Alexander, because they do not address the core issue of ineffective assistance of prior counsel. Further, it is difficult to see how these factors are on a par, as Justice Larsen suggested,[207] with the two-pronged test proposed by Justice Flaherty in his *Watlington* dissent.[208] The Flaherty test would require a PCHA court to ignore an attorney's negligent waiver of a claim, which, even if true, doesn't involve a due process denial that significantly implicates the truth determining process at the trial stage.[209] By contrast, the *Alexander* guidelines seem little more than restatements of the equitable principles a PCHA court probably applies to every petition it examines.

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204. *Id.* at 39, 432 A.2d at 188.
205. *Id.* at 40, 432 A.2d at 188, 189 (Nix, J., concurring).
206. *Id.* at 41, 432 A.2d at 188 (Flaherty, J., concurring).
207. *See supra* text accompanying note 197.
208. *See supra* text at section IV(A).
209. *See supra* text accompanying note 181.

V. CONCLUSION: A PROPOSED MODIFICATION TO THE PCHA

The *Alexander* guidelines[210] and the two-step test in Justice Flaherty's *Watlington* dissent[211] share a common weakness: The "factors" they present are more at home in appellate chambers than in a PCHA courtroom. Neither formulation provides an analytical framework that a PCHA court can use when confronted by a subsequent PCHA petition that—like those in *Watlington* and *Alexander*—alleges the "layered" ineffectiveness of a series of prior counsel.[212] Thus, neither is a particularly effective weapon against the *Watlington* "monster." The "monster," after all, is nothing more than a cloud of uncertainty about the cumulative performances of the various attorneys who had represented a convicted defendant. The Pennsylvania Supreme Court has been reluctant to invoke the PCHA's waiver rule against a subsequent petitioner whose attorneys may have failed to recognize a valid collateral issue.

The best way to tame the "monster" is to recognize it for what it is, and then to build a procedure into the PCHA that forces a subsequent petitioner to allege the *specific* attorney errors that may have prejudiced collateral review of his conviction. The foundation of such a procedure already exists in the case law of the Pennsylvania Supreme Court. It is the *Hubbard* test: did a subsequent counsel investigate the actions of the attorney that served before him, and, if so, did he reasonably conclude that the prior attorney had acted in his client's best interest?[213]

The *Hubbard* test is a logical extension of the attorney effectiveness standard set forth in *Maroney*,[214] *e.g.*, the competence of the subsequent attorney is measured, in part, by whether he made a reasonable evaluation of the decisions made and actions taken by the previous attorney. It can be applied to PCHA proceedings by amending the Act to incorporate the following provisions:

> When the PCHA court examines a second or successive petition for relief that alleges serial ineffective assistance of prior counsel as an excuse for the waiver of an issue at an earlier proceeding:
>
> 1. It shall be presumed that the counsel who served subse-

210. *See supra* notes 197-202 and accompanying text.
211. *See supra* text at section IV(A).
212. *See supra* note 19 and text accompanying note 191.
213. *See supra* text accompanying note 159.
214. *See supra* text accompanying note 60.

quent to the challenged attorney made an investigation of the actions of the challenged attorney.[215]

2. The PCHA petitioner bears the burden of overcoming this presumption. He must allege specific facts which, if proven, would show:
   A. That the subsequent counsel failed to investigate the actions or inactions of the challenged attorney, or
   B. That if such investigation was made, the subsequent counsel had no basis to reasonably conclude that the challegned attorney acted in the best interests of his client.
3. A PCHA court can, at its discretion, resolve these claims of serial ineffective counsel in a summary proceedings upon consideration of the record and supporting documents, *e.g.*, affidavits filed by the subsequent counsel.

Because the difficulty of inventing allegible facts increases with each level of claimed attorney incompetence, there is no need to bar a petitioner from alleging the serial ineffectiveness of a long chain of previous counsel. At the same time, the proposed provisions should not pose an insurmountable obstacle to the petitioner who can fairly claim he was represented by two, three, or even more ineffective attorneys. The PCHA court can easily apply the "patently frivolous" rule[216] to screen out absurd allegations; yet the court retains complete flexibility to respond to believable allegations made about any of the petitioner's subsequent attorneys, and to take full account of the factors outlined by Justice Larsen.[217]

If the proposed provisions had been in effect when Watlington filed his second PCHA petition,[218] the PCHA court would have begun its analysis with the rebuttable presumptions that the petitioner's direct appeal counsel and first PCHA counsel were both effective.[219] Thus, Watlington would have been required to allege

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215. The "challenged attorney" is the attorney who has been alleged ineffective. This term has been used to avoid confusion with the "subsequent counsel"—the attorney presently representing the PCHA petitioner.

216. *See supra* text accompanying notes 32-33.

217. *See supra* notes 197-202 and accompanying text.

218. *See supra* text accompanying note 167; note 19.

219. These two attorneys are the "challenged attorneys" in *Watlington*. Their alleged ineffectiveness caused the waiver of the appellant's two claims for collateral relief, i.e. (1) that the jury charge at his trial was improper, and (2) that his trial counsel was ineffective for failing to object to the charge. *See supra* note 19. Under the proposed procedure, the two challenged attorneys will be presumed "effective" in the sense that both will be presumed to have in-

specific facts which, if proven, would show:

1. That his first PCHA counsel failed to investigate the waiver of the claim of ineffective trial counsel by the direct-appeal attorney,[220] or if he did investigate, could not have reasonably concluded that the direct-appeal attorney had a valid reason for waiving the claim,[221] *and*

2. That his direct appeal counsel failed to investigate the reasons why the trial attorney did not object to the jury instructions in question,[222] or, if he did investigate, could not have reasonably concluded that the trial attorney had a valid reason for not objecting.[223]

If Watlington had been unable to allege such facts, his claim that his trial attorney was ineffective for failing to object to the jury instructions[224] would not reach the threshold level necessary for consideration by the PCHA court under the proposed rules.[225] On the other hand, if Watlington had been able to allege such facts, the PCHA court could have evaluated the claim without an evidentiary hearing, because the proposed language includes a provision that expressly empowers a PCHA court to decide claims of serial attorney ineffectiveness in a summary proceeding.[226] This provi-

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vestigated the actions of the attorneys who served before them, and to have reasonably concluded that the prior attorneys had acted in the best interest of their client. *See* proposed rule 1, *supra* text at section V.

220. This would be required by proposed rule 2(A), *supra* text at section V, when applied to Watlington's claim that his direct appeal counsel was ineffective for failing to allege the ineffectiveness of his trial counsel. *See supra* note 19 and text accompanying note 167.

221. This would be required by proposed rule 2(B), *supra* text at section V, when applied to Watlington's claim that his direct appeal counsel was ineffective for failing to allege the ineffectiveness of his trial counsel. *See supra* note 19 and text accompanying note 167.

222. This would be required by proposed rule 2(A), *supra* text at section V, when applied to Watlington's claim that his first PCHA counsel was ineffective for failing to allege the ineffectiveness of his direct-appeal counsel. *See supra* note 19 and text accompanying note 167.

223. This would be required by proposed rule 2(B), *supra* text at section V, when applied to Watlington's claim that his first PCHA counsel was ineffective for failing to allege the ineffectiveness of his direct-appeal counsel. *See supra* note 19 and text accompanying note 167.

224. *See supra* note 19.

225. The allegations would be considered "patently frivolous." *See supra* text accompanying notes 32-33, 216.

226. *See* proposed rule 3, *supra* text at section V.

sion is designed to bring these kinds of claims back underneath the general summary disposition provisions of the PCHA.[227] *Musser*,[228] *Hubbard*,[229] and to some extent *Watlington*[230] can be read to suggest that a full-blown evidentiary hearing is required to resolve claims of serial attorney incompetence.

The author believes that the proposed modifications to the PCHA would give the PCHA courts of Pennsylvania a filter that will separate frivolous assertions of ineffective counsel in subsequent petitions from valid claims for collateral relief. They will keep the *Watlington* "monster" at bay without diminishing the role of the PCHA as an important safeguard of constitutional rights.

Ronald Michael Benrey

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227. *See supra* note 9 and accompanying text.
228. *See generally supra* text at section II(B)(4).
229. *See generally supra* text at section II(B)(5).
230. *See generally supra* text at section III.