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Recent Developments In Postconviction Relief

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INTRODUCTION

The Post Conviction Relief Act¹ provides the exclusive remedy for defendants to collaterally challenge their conviction or sentence. The Act permits a defendant who is in custody² to seek relief where his conviction or sentence resulted from one or more of the Act's specifically enumerated errors³ and the claimed error has not been waived⁴ or previously litigated.⁵

Except for several narrow exceptions, a post-conviction petition must be filed within one year of the date that defendant's judgment becomes final.⁶ This article reports on a recent amendment to the Act, amendments to the Rules of Criminal Procedure governing post-conviction relief, and significant decisions of the Pennsylvania Supreme and Superior Courts which construe provisions of the Act.

POSTCONVICTION DNA TESTING

The PCRA was amended in 2002 to provide for postconviction DNA testing.⁷ Under the amendment, a defendant in custody may seek DNA testing on available evidence that related to the investigation or prosecution that resulted in his conviction by filing a written motion with the sentencing court.⁸ Where the evidence was discovered prior to the defendant's conviction, the defendant must establish that the evidence was not previously subjected to DNA testing for one of three reasons: (1) the technology for testing was not in existence at the time of the trial, (2) defense counsel did not seek such testing where the verdict was rendered in the case on or before January 1, 1995, or (3) where the defendant was indigent, counsel's request for funds to pay for testing was denied by the court.⁹ A motion for DNA testing must specify the evidence to be tested, state that the defendant consents to provide samples of body fluids and contain an acknowledgment that if the motion is granted, any data obtained from DNA samples or test results may be entered in law enforcement databases, used in the investigation of crimes

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¹ 42 Pa.C.S.A. §9541 *et seq.*

² 42 Pa.C.S.A. §9543(a)(1).

³ 42 Pa.C.S.A. §9543(a)(2).

⁴ 42 Pa.C.S.A. §§9543(a)(4), 9544(b).

⁵ 42 Pa.C.S.A. §9544(a).

⁶ 42 Pa.C.S.A. §9545(b).

⁷ Act of July 10, 2002 (P.L. ___, No. 2002-109, 42 Pa.C.S.A. §9543.1 (2002)).

⁸ 42 Pa.C.S.A. §9543.1(a)(1).

⁹ 42 Pa.C.S.A. §9543.1(a)(1).

and as evidence against the defendant in other cases.¹⁰ In addition, the motion must assert the defendant's innocence of the crime for which he was convicted. In capital cases, the defendant must assert actual innocence of the charged or uncharged conduct that constituted an aggravating circumstance if the defendant's exoneration of that conduct would result in vacating the sentence. Alternatively, the defendant must assert that the outcome of DNA testing would establish a mitigating circumstance if that mitigating circumstance was presented at the sentencing hearing and facts related to that issue were in dispute at the sentencing hearing.¹¹ Finally, the motion must present a *prima facie* case demonstrating that the identity or participation of the perpetrator in the crime was at issue at trial and exculpatory DNA testing would establish the defendant's actual innocence of the offense. In a capital case, the motion must demonstrate defendant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance or a mitigating circumstance if the facts concerning that mitigating circumstance were at issue at the sentencing hearing.¹²

The court shall order DNA testing if the above requirements have been satisfied, the evidence to be tested has not been altered in any material respect and the motion is made in a timely manner and not for purposes of delay.¹³ Testing may be denied if the court determines there is no reasonable probability that the testing would produce exculpatory evidence establishing the defendant's actual innocence or, in a capital case, testing would not establish the defendant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance or would not establish a mitigating circumstance.¹⁴ After testing has been completed, the defendant may petition the court for postconviction relief during the 60-day period beginning on the date on which the defendant is notified of the test results.¹⁵ The court shall conduct a hearing on the defendant's motion and determine

whether the exculpatory evidence would have changed the outcome of the trial as required by §9543(a)(2)(vi) of the Act.¹⁶

AMENDMENTS TO RULES GOVERNING PCRA PROCEEDINGS

Verification and Entry of Appearance

A concern that a petition for postconviction relief may be filed without the defendant's authorization prompted an amendment to Pa.R.Crim.P. 902 governing the content of the petition for postconviction relief.¹⁷ The amended Rule now requires that in addition to verifying that the facts set forth in the petition are true and correct, the defendant must also verify that the attorney filing the petition is authorized to act on the defendant's behalf. Pa.R.Crim.P. 904 has also been amended to require that both retained and appointed counsel file a written entry of appearance with the clerk of court and to serve a copy of the appearance on the attorney for the Commonwealth.

Procedures Governing Petition in Capital Cases

In contrast to the rules governing petitions for postconviction relief in non-capital cases, Pa.R.Crim.P. 909 governing capital cases imposes time limits on the PCRA court to consider and rule on the defendant's petition. For several years the Rules Committee considered various options for addressing a court's non-compliance with time limits under the Rule.¹⁸ An amendment to Rule 909 now permits the PCRA court one 30-day extension of the required 90-day time limit. If the PCRA court fails to comply with the time limits in the Rule, the Rule requires the clerk of court to bring the matter to the attention of the Supreme Court. The comment to the Rule states that when the PCRA court has not complied with the time limit, it should provide the Supreme Court with a written explanation for the delay.

RECENT CASES INTERPRETING THE PCRA

Direct Appeal, Waiver and Ineffectiveness of Counsel

In *Commonwealth v. Grant*,¹⁹ the Pennsylvania Supreme Court reversed a rule first ar-

¹⁰ 42 Pa.C.S.A. §9543.1(c)(1).

¹¹ 42 Pa.C.S.A. §9543.1(c)(2).

¹² 42 Pa.C.S.A. §9543.1(c)(3).

¹³ 42 Pa.C.S.A. §9543.1(d)(1). If the defendant is indigent, costs of the test will be paid by the Commonwealth but the testing will be done by the State Police or by a laboratory selected by the State Police. 42 Pa.C.S.A. §9543.1(e).

¹⁴ 42 Pa.C.S.A. §9543.1(d)(2).

¹⁵ 42 Pa.C.S.A. §9543.1(f).

¹⁶ 42 Pa.C.S.A. §9543.1(f)(3).

¹⁷ 32 Pa. Bulletin 1391 (March 16, 2002).

¹⁸ See Final Report of the Criminal Procedural Rules Committee, 32 Pa. Bulletin 1174 (March 2, 2002).

¹⁹ 813 A.2d 726 (Pa. 2002).

ticated in *Commonwealth v. Dancer*²⁰ and later in *Commonwealth v. Hubbard*²¹ that claims of ineffectiveness of counsel be raised at the first opportunity the defendant is represented by new counsel. Under the *Hubbard* rule, new counsel on direct appeal was required to raise claims of ineffectiveness of trial counsel even though the issue was not raised and developed in the court below. Failure of new counsel to raise ineffectiveness of trial counsel resulted in the claims being waived. If the other requirements of the PCRA were met, waived claims of trial counsel ineffectiveness were reviewable in a postconviction proceeding provided the defendant set forth in his petition a "layered" claim of ineffectiveness, i.e., direct appeal counsel was ineffective in failing to raise ineffectiveness of trial counsel and specifically addressed the three-part ineffectiveness standard as it applied to prior counsel.

In rejecting the *Hubbard* rule, the court in *Grant* noted the numerous problems associated with identifying and presenting an issue on appeal that was not considered by the trial court. The court also noted that with respect to issues other than ineffectiveness, appellate courts in Pennsylvania decline to entertain issues raised for the first time on appeal and that the majority of states and the federal courts generally defer consideration of ineffectiveness claims until collateral review. *Grant* holds that as a general rule, a defendant "should wait to raise claims of ineffective assistance of counsel until collateral review."²² Ineffectiveness claims, the court holds, will no longer be waived because new counsel on direct appeal did not raise trial counsel's ineffectiveness. The court left open the possibility that it may choose to create an exception to the general rule and review ineffectiveness claims on direct appeal where the claim involves a "complete or constructive denial of counsel"²³ or where counsel breaches his or her duty of loyalty. The court held that its new rule of deferring consideration of claims of trial counsel ineffectiveness until the collateral review stage applied retroactively to cases pending on direct appeal where the issue of trial counsel's ineffectiveness has been raised and preserved.

Grant raises a number of questions. Is the word "should" in the statement of the rule limited to the possible exception to the general

rule suggested by the court for claims of *per se* ineffectiveness²⁴ or does it have broader meaning? Where raised, can the Superior Court decide claims of trial counsel ineffectiveness where the record is adequate to review the claim?²⁵ If *Grant* applies in all cases except the narrow category of *per se* ineffectiveness claims, has the court replaced the *Hubbard* rule with an equally rigid rule that sacrifices the prompt resolution of ineffectiveness claims for the sake of uniformity? While *Grant* does not apply where the issue of trial counsel ineffectiveness was raised in a timely post-sentence motion²⁶ and decided by the trial court, will claims of trial counsel ineffectiveness be waived if new counsel enters the case at a time in which the claim could be raised in the trial court but fails to do so?²⁷ Because of the uncertainty with respect to what claims of ineffectiveness may be resolved on direct appeal and the risk that a claim may be waived if not presented, it is likely that direct appeal counsel will continue to raise claims of trial counsel ineffectiveness particularly in cases where the record would permit the appellate court to rule on the issue.

There is no discussion by the court in *Grant* of ineffectiveness claims in cases where the defendant receives a non-custodial sentence or where it is clear that the sentence imposed will be served by the time direct appeal is concluded.²⁸ In neither case can the defendant

²⁴ The United States Supreme Court has held that as an exception to the general rule for evaluating claims of ineffectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984), where a defendant has been denied counsel or when the defendant's attorney actively represented conflicting interests, prejudice will be presumed. See *United States v. Cronin*, 466 U.S. 648, 658 (1984).

²⁵ In several post-*Grant* decisions, the Superior Court has noted that the *Grant* rule was stated in general terms. In *Commonwealth v. Rosendary*, ___ A.2d ___ (Pa. Super. 2003) the court stated that *Grant* "leaves open the propriety of raising a claim on direct appeal of trial counsel's ineffectiveness which is apparent of record." See also *Commonwealth v. Ruiz*, ___ A.2d ___ (Pa. Super. 2003) (noting that *Grant* "left open door for creation of exceptions" but finding record not adequate to review ineffectiveness claims).

²⁶ Pa.R.Crim.P. 720(B)(1)(a)(iv).

²⁷ See *Commonwealth v. Ruiz*, ___ A.2d ___, ___ (Pa. Super. 2003) (Graci, J., concurring).

²⁸ In his concurring opinion, Justice Saylor notes that the custody requirement restricts the availability of PCRA relief. *Grant*, 813 A.2d at 741 (Saylor, J., concurring).

²⁰ 331 A.2d 435 (Pa. 1975).

²¹ 372 A.2d 687 (Pa. 1977).

²² *Commonwealth v. Grant*, 813 A.2d at 738.

²³ *Id.* fn. 14.

seek PCRA relief because the Act requires a defendant to be in custody at the time relief is granted.²⁹ In such cases, direct appeal counsel will continue to present undeveloped claims of ineffectiveness arguing that to dismiss such claims under *Grant* would constitute a denial of a defendant's right to direct appeal under Article V, Section 9 of the Pennsylvania Constitution.³⁰ If counsel is uncertain whether the defendant will be eligible for PCRA relief at the conclusion of direct appeal and, moreover, believes the undeveloped ineffectiveness claims are stronger than the preserved issues, counsel arguably has an obligation to discuss with the defendant withdrawing the appeal and pursuing postconviction relief.³¹ If the direct appeal is withdrawn, the preserved issues are waived and would be reviewed only in the form of an ineffectiveness claim of PCRA counsel on an appeal from the denial of collateral relief.

Finally, by deferring consideration of ineffectiveness claims to the postconviction stage, one consequence of *Grant* is that for some indigent defendants, claims of ineffectiveness that would otherwise be raised and considered in the direct appeal process will not be reviewed. In contrast to direct appeal where the defendant is only obligated to communicate to counsel his wish to appeal, in order for claims to be reviewed in a postconviction proceeding, an indigent defendant must file a timely *pro se* petition for relief. Unlike direct appeal, under the PCRA a petition must be filed before a court is authorized to appoint counsel.³² A defendant's failure to file a timely petition will result in the ineffectiveness claims being waived.³³

Pleading Ineffectiveness of Counsel

While the Pennsylvania Supreme Court's recent decision in *Commonwealth v. Grant* does not apply to PCRA cases, as the court noted, it will eventually eliminate the need for PCRA counsel in an initial petition to plead a layered claim of ineffectiveness to avoid a finding that the claim is waived.³⁴ Under the general rule set out in *Grant*, the initial postconviction petition will be the first opportunity to raise claims of trial counsel ineffectiveness and, as a result, counsel will no longer be required to plead underlying trial counsel ineffectiveness "through the lens of appellate counsel ineffectiveness."³⁵ But *Grant* doesn't eliminate layered claims of ineffectiveness. If PCRA counsel fails to raise a claim of trial counsel ineffectiveness or a claim that direct appeal counsel was ineffective in failing to present a claim other than trial counsel ineffectiveness, the claim is waived unless the defendant argues on appeal from the denial of PCRA relief a layered claim of ineffectiveness.³⁶ A defendant is also required to plead a layered claim of ineffectiveness assuming a timely second petition could be filed where PCRA counsel on appeal fails to raise the ineffectiveness of PCRA counsel's failure to raise the ineffective assistance of trial counsel.

In a number of opinions at the end of 2001, the Pennsylvania Supreme Court stated that "boilerplate" allegations of prior counsel ineffectiveness did not rebut the presumption that prior counsel rendered effective assistance of counsel.³⁷ In *Commonwealth v. (Craig) Williams*,³⁸ the court stated that PCRA counsel "must in pleadings and brief, undertake to develop, to the extent possible, the nature of the claim asserted with respect to each individual

²⁹ 42 Pa.C.S.A. §9543(a)(1).

³⁰ *Commonwealth v. Lantzy*, 736 A.2d 564, 572 (Pa. 1999).

³¹ The Superior Court has held that under the PCRA, a judgment becomes final when a direct appeal is withdrawn. *Commonwealth v. Conway*, 706 A.2d 1243, 1244 (Pa. Super. 1997).

³² 42 Pa.C.S.A. §9545(a).

³³ The time limits in the Act are jurisdictional and not subject to equitable tolling. *Commonwealth v. Fahy*, 737 A.2d 214 (Pa. 2000). Petitions have been rejected as untimely where the defendant was placed in a restricted housing unit and was limited in his ability to gain access to legal materials, *Commonwealth v. Barrett*, 761 A.2d 145 (Pa. Super. 2000) or was unable to file a timely petition because of mental illness. *Commonwealth v. Hoffman*, 781 A.2d 140 (Pa. Super. 2001).

³⁴ *Grant*, 813 A.2d at 739, n.16.

³⁵ *Id.*

³⁶ *Commonwealth v. Pursell*, 724 A.2d 293, 303 n.7 (Pa. 1999); *Commonwealth v. Moore*, 805 A.2d 1212, 1216 (Pa. 2002). In *Commonwealth v. Jones*, ___ A.2d ___ (Pa. 2002), the court noted the tension between permitting a defendant to raise claims on appeal that were not presented in the initial or amended PCRA petition and the time limitation governing the filing of a PCRA petition but declined to hold that new claims of PCRA ineffectiveness must be pursued in a second PCRA petition.

³⁷ See, e.g., *Commonwealth v. Rivers*, 786 A.2d 923, 927 (Pa. 2001), *Commonwealth v. Simmons*, 804 A.2d 625, 639 (Pa. 2001).

³⁸ 782 A.2d 517, 525 (Pa. 2001).

facet of the layered ineffectiveness claim, including that which relates to appellate counsel.³⁹ While members of the court have expressed different views with respect to the level of detail required in briefs where the defendant appeals from the denial of PCRA relief and raises the ineffectiveness of PCRA counsel,⁴⁰ in order to avoid a finding of waiver, counsel should fully brief prior counsel's acts or omissions pursuant to the three-part *Pierce/Strickland* standard.⁴¹ If the ineffectiveness claim includes an allegation that PCRA counsel was ineffective in failing to assert the ineffectiveness of new counsel on direct appeal counsel for failing to raise a claim other than ineffectiveness of trial counsel, the defendant's brief should include argument that the decision by direct appeal counsel not to raise the issue was not the result of a rational, strategic or tactical decision by counsel, that the claim not presented was clearly stronger than the claims counsel did present, and if the claim had been presented, there is a reasonable probability that the defendant would have prevailed on appeal.⁴²

The Pennsylvania Supreme Court's recent decision in *Commonwealth v. Clayton*⁴³ underscores the importance of fully briefing the claim that PCRA counsel was ineffective in failing to raise trial counsel's ineffectiveness. The Supreme Court, noting that the defen-

dant's claims of PCRA ineffectiveness are distinct from the underlying claims of trial counsel ineffectiveness, denied relief on the grounds that the defendant had failed to develop in his brief how PCRA counsel's failure to raise claims of prior counsel's ineffectiveness lacked a reasonable basis, or "how the outcome of the PCRA proceeding would have differed had these claims been advanced. . . ."⁴⁴ As a result, the court concluded that the claims of ineffectiveness of PCRA counsel were waived.⁴⁵

Ineffectiveness and a Defendant's Right to Direct Appeal

In *Commonwealth v. Eller*,⁴⁶ the Pennsylvania Supreme Court addressed the question of whether its decision in *Commonwealth v. Lantzy*⁴⁷ applied retroactively to defendants whose direct appeal rights were lost due to counsel's ineffectiveness and *nunc pro tunc* relief was sought before *Lantzy* was decided. In *Lantzy*, the Supreme Court held that lawyer error in failing to perfect a direct appeal is a cognizable claim under the Act. The Supreme Court stated that an interpretation of the PCRA to apply only to lawyer error at trial would lead to a bifurcated system of review having statutory and common law components that would be contrary to the Legislature's stated intent that the PCRA be the "sole means"⁴⁸ for obtaining collateral relief.

In two post-*Lantzy* decisions,⁴⁹ the Superior Court held that because *Lantzy* "overruled prior case law and announced a new principle of law,"⁵⁰ *Lantzy* did not apply retroactively and, therefore, defendants who sought relief

³⁹ *Commonwealth v. (Craig) Williams*, 782 A.2d at 525.

⁴⁰ See *Commonwealth v. Jones*, ___ A.2d ___, ___ (Nigro, J., concurring) ("Unlike the majority . . . I would find that those of appellant's claims that apply the three prongs of the ineffectiveness standard as it relates to trial counsel and contains at least a boilerplate assertion that prior counsel were ineffective for failing to raise the issue of trial counsel's ineffectiveness are not waived for purposes of the PCRA."). See also *Commonwealth v. Jones*, ___ A.2d ___, ___ (Newman, J., concurring) ("While I agree with the lead opinion that each level of representation gives rise to distinct claims of ineffective assistance of counsel, and that appellants should recognize this and frame their petitions and briefs accordingly, nevertheless the court should not impose too onerous a standard on how appellants must plead these claims in order to obtain substantive review of them.").

⁴¹ *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987), *Strickland v. Washington*, 466 U.S. 668 (1984).

⁴² *Commonwealth v. Jones*, ___ A.2d ___ (Pa. 2002).

⁴³ ___ A.2d ___ (Pa. 2002).

⁴⁴ *Commonwealth v. Clayton*, ___ A.2d at ___.

⁴⁵ See also *Commonwealth v. Jones*, ___ A.2d ___ (Pa. 2002) (Defendant failed to establish that PCRA "acted in an objectively unreasonable fashion or that prejudice ensued.").

⁴⁶ 807 A.2d 838 (Pa. 2002). Prior to *Eller*, in *Commonwealth v. Hall*, 771 A.2d 1232 (Pa. 2001), the court applied *Lantzy* where *nunc pro tunc* was requested before *Lantzy* was decided. No claim was made in *Hall* that applying *Lantzy* was unlawfully retroactive.

⁴⁷ 736 A.2d 564 (Pa. 1999).

⁴⁸ 42 Pa.C.S.A. §9542.

⁴⁹ *Commonwealth v. Hitchcock*, 749 A.2d 935 (Pa. Super. 2000) (*en banc*); *Commonwealth v. Garcia*, 749 A.2d 928 (Pa. Super. 2000) (*en banc*).

⁵⁰ *Commonwealth v. Garcia*, 749 A.2d at 932; *Commonwealth v. Hitchcock*, 749 A.2d at 938.

prior to *Lantzy* were entitled to restoration of their right to appeal *nunc pro tunc* outside the framework of the PCRA.

In *Eller*, the Supreme Court held that applying *Lantzy* to defendants who sought *nunc pro tunc* relief before *Lantzy* was decided was not an unlawful application of retroactivity. The court concluded that *Lantzy* applied retroactively because it was a construction of the statute not a new rule of procedure. The court noted that its decision in *Lantzy* did not “overrule, modify or limit”⁵¹ any previous Supreme Court decision on the issue. In addition, the court stated that its decision in *Lantzy* was premised upon the Court’s previous “plain meaning construction of the exclusivity language of §9542”⁵² of the Act. Because *Lantzy* did not create a new rule of law, the Supreme Court “disapproved”⁵³ of the Superior Court’s decisions that held that *Lantzy* could not be applied retroactively. In addition, the court rejected *Eller*’s equitable argument that he relied on the Superior Court’s pre-*Lantzy* holdings in seeking relief *nunc pro tunc* outside the framework of the PCRA. The court also rejected his claim that because PCRA relief would now be time barred, he would be left without a remedy to seek restoration of his direct appeal rights. The fact that the defendant may not have a remedy, the court stated “cannot warrant the judicial creation of an extra PCRA remedy for claims exclusively reserved by the statute.”⁵⁴ The court concluded it had no authority to fashion “ad hoc equitable exceptions to the PCRA time bar.”⁵⁵ Because the defendant had not sought collateral relief until more than a year after his judgment of sentence became final, his claim was time barred under the Act.

Competency to Pursue Postconviction Relief and Reinstatement of Postconviction Petition

In a matter of first impression in Pennsylvania, the Supreme Court in *Commonwealth v. Haag*⁵⁶ addressed the question of whether a defendant in a capital case must possess some level of competency in order to pursue postconviction relief. In *Haag*, the PCRA petition was filed on behalf of the defendant alleging

that the defendant was incompetent to pursue collateral relief. The petition sought the appointment of the defendant’s mother as next friend. Mental health experts testified that the defendant did not have an understanding of his present situation and could not discuss his case with counsel. Based upon that testimony, the PCRA court granted the defendant’s mother next friend status. Thereafter, the mother moved to stay all PCRA proceedings until defendant regained his competence alleging that next friend remedies were inadequate to protect the defendant’s right to collaterally challenge his conviction and death sentence. The PCRA court denied the motion to stay and ordered the next friend to proceed with the PCRA petition. In affirming the PCRA court’s order denying the stay, the Supreme Court held that when a defendant is represented by next friend and counsel, the defendant’s “incompetence is not a bar to effective collateral review in a death penalty case.”⁵⁷ The court reasoned that because a putative next friend must demonstrate that the defendant is incompetent in order to have standing as next friend, the defendant need not be competent for PCRA proceedings to go forward. Requiring the next friend to pursue relief while the defendant is incompetent ensures, the court stated, that the defendant will benefit promptly from meritorious claims. The court concluded that its holding requiring next friend to proceed with the PCRA did not violate the defendant’s right to effective postconviction counsel or his right to due process of law. Finally, the court noted that if the defendant regains competency after the PCRA proceeding has been completed and seeks to raise a cognizable claim that he was unable to communicate to counsel because of his incompetency, a second petition raising such a claim would arguably fall under the newly discovered evidence exception to the Act’s one-year filing period.

In a second case of first impression, the Pennsylvania Supreme Court in *Commonwealth v. Saranchak*⁵⁸ considered whether a capital defendant could reinstate his postconviction petition following court-approved waiver of counsel and withdrawal of the petition. After the Supreme Court affirmed the PCRA court’s decision that the defendant’s

⁵¹ *Commonwealth v. Eller*, 807 A.2d at 844.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 845.

⁵⁵ *Id.*

⁵⁶ 809 A.2d 271 (Pa. 2002).

⁵⁷ *Id.* at 278.

⁵⁸ 810 A.2d 1197 (Pa. 2002).

withdrawal was knowing and intelligent, the defendant sought reconsideration of the Supreme Court's decision and indicated his desire to retract his waiver and reinstate his petition for postconviction relief. Rejecting the Commonwealth's argument that reinstatement relief was not authorized, the court permitted the postconviction petition to be reinstated noting the capital nature of the case, the existence of restraints on serial petitions, the fact that the Legislature had not addressed the issue and "the preference for merits review in capital cases."⁵⁹

Application for Stay of Execution

In *Commonwealth v. Morris*,⁶⁰ the Supreme Court set out general guidelines for defendants and lower courts to follow in requesting and ruling on an application for stay of execution under Section 9545(c) of the Act.⁶¹ The court held that a PCRA court is "bound by the requirements of Section 9545 and can only enter a stay when it has reasonably concluded" that the requirements set out in the statute are met.⁶² Whether a request for stay is contained in the petition for PCRA relief or the stay application is filed separately, a defendant must set forth a statement of jurisdiction, a statement, if applicable, that a petition is currently pending before the court, and a statement showing a likelihood of prevailing on the merits. The jurisdictional statement must demonstrate that the petition is timely. Where a stay application is denied because of failure to meet the time requirements under the Act, the defendant must demonstrate on appeal from the denial of the stay that reasonable jurists would find it debatable whether the lower court was correct in its jurisdictional ruling. In cases where there is not a petition pending, the defendant will need to demonstrate that there is an action pending before the court sufficient to meet the requirements of the section. The court noted that the "pending" requirement could be defined more broadly in future

cases.⁶³ Finally, the defendant must set forth a statement demonstrating the likelihood of prevailing on the merits. The court noted that these requirements must be met before the lower court reviews the application and that it is within the trial court's discretion to determine when the stay application should be considered. The court noted that a PCRA court can temporarily enter a stay in order to ensure review of the underlying petition.

Ineffectiveness in Plea Bargaining and Failure to Assert Rights Under Rules of Criminal Procedure

In *Commonwealth ex. rel. Dadario v. Goldberg*,⁶⁴ the defendant sought habeas corpus relief alleging that counsel was ineffective in failing to advise him of the correct sentencing guidelines prior to his rejection of the Commonwealth's plea bargain. The Superior Court affirmed the denial of relief on the grounds that the defendant was not entitled to collateral relief for claims of ineffectiveness in conjunction with guilty pleas. In reversing the Superior Court and holding that the defendant could seek PCRA relief, the Supreme Court stated that in *Commonwealth v. Lantzy*⁶⁵ and *Commonwealth v. Chester*⁶⁶ it had rejected a narrow interpretation of Section 9543(a)(2)(ii) that would apply only to claims of lawyer error during trial. The court held that the PCRA encompasses all claims that the defendant was denied his right to counsel under the Sixth Amendment and Article I, Section 9 of the Pennsylvania Constitution. The court noted that its holding that all constitutionally cognizable claims of ineffectiveness of counsel may be reviewed in the PCRA proceeding avoids a bifurcated system of review in which some claims would be reviewed outside the framework of the PCRA.

The Superior Court relied on *Dadario* in two decisions involving the failure of counsel to assert defendant's rights under the Rules of Criminal Procedure. In *Commonwealth v. Padden*,⁶⁷ the defendant alleged counsel was ineffective in failing to object to sentencing beyond the time mandated by former Rule 1405, now Rule 704. The Superior Court reversed the trial court's denial of relief on the grounds

⁵⁹ *Id.* at 1200.

⁶⁰ 771 A.2d 721 (Pa. 2001).

⁶¹ The court concluded it had jurisdiction to review the stay pursuant to 42 Pa.C.S.A. §726. The court held that §9455(c) governing stays of execution does not unconstitutionally restrict the defendant's right to appeal or violate the separation of powers doctrine. *Morris*, 771 A.2d at 732, 738.

⁶² *Id.* at 740.

⁶³ *Morris*, 771 A.2d at 741, n.20.

⁶⁴ 773 A.2d 127 (Pa. 2001).

⁶⁵ 736 A.2d 564 (Pa. 1999).

⁶⁶ 733 A.2d 1242 (Pa. 1999).

⁶⁷ 783 A.2d 299 (Pa. Super. 2001).

that a delay in sentencing did not implicate the "truth determining process" under Section 9543(a)(2)(ii) of the Act. The Superior Court concluded that based upon *Dadario*, counsel's failure to object to the fact that the defendant was not sentenced within the required time period was a cognizable claim under the PCRA. In *Commonwealth v. Prout*,⁶⁸ the Superior Court likewise concluded that the defendant's ineffectiveness claim based upon appellate counsel's failure to raise a prompt trial claim under Pa.R.Crim.P. 600 (formerly Rule 1100) constituted a cognizable claim under *Dadario*.

Second or Subsequent Petition Considered as First Petition

Various panels of the Superior Court have considered the issue of whether a second or subsequent petition that is time barred under the Act can be considered as an extension of the initial timely petition where appointed counsel's omissions precluded review of the claims presented.⁶⁹ The issue has been considered again by the Superior Court in three recent cases.

In *Commonwealth v. Kubis*,⁷⁰ PCRA counsel failed to address the apparent untimeliness of defendant's petition and the lower court dismissed the initial petition as untimely. While counsel sent the defendant a letter notifying him of his right to appeal, because the defendant had been transferred to another prison he did not receive the letter and, therefore, missed the appeal deadline. The lower court permitted the defendant to appeal *nunc pro tunc*. In reversing the PCRA court and holding that defendant's appeal constituted a second

petition, and not a continuation of his first petition, the Superior Court distinguished its decisions in *Commonwealth v. Leasa*⁷¹ and *Commonwealth v. Peterson*⁷² as cases where counsel's ineffectiveness waived defendant's claims for relief. In *Kubis*, the court concluded that counsel did not abandon the defendant on appeal and that his failure to address the apparent untimeliness of the petition did not waive any of the substantive claims presented in the petition. The Superior Court therefore treated the *nunc pro tunc* appeal as a second petition and dismissed it as untimely.

Kubis was distinguished in *Commonwealth v. Williams*.⁷³ In *Williams*, the Superior Court treated the defendant's second and untimely petition as a continuation of his first petition where counsel appointed to represent him in his first petition had previously represented the Commonwealth in the same case.

In *Commonwealth v. Ceo*,⁷⁴ the defendant timely filed a first petition seeking reinstatement *nunc pro tunc* of his right to direct appeal. Although the PCRA court granted the relief, counsel failed to file the appeal. In response to second and third petitions, the PCRA court granted the defendant the right to file a direct appeal but in each case, new counsel failed to file a brief and the appeal was dismissed. In response to the defendant's fourth petition seeking the same relief, the PCRA court dismissed the petition as untimely. The Superior Court concluded that the defendant was entitled to reinstatement *nunc pro tunc* of his right to direct appeal. The court held that where the defendant files a timely petition but omissions of counsel preclude the defendant from receiving the relief sought, second or subsequent petitions that would be otherwise time-barred are properly considered an extension of the first petition.

⁶⁸ 814 A.2d 693 (Pa. Super. 2002).

⁶⁹ See, e.g., *Commonwealth v. Leasa*, 759 A.2d 941, 942 (Pa. Super. 2000); *Commonwealth v. Peterson*, 756 A.2d 687, 689 (Pa. Super. 2000).

⁷⁰ 808 A.2d 196 (Pa. Super. 2002), *petition for allowance of appeal denied*, ___ A.2d ___ (Pa. 2002).

⁷¹ 759 A.2d 941, 942 (Pa. Super. 2000).

⁷² 756 A.2d 687, 689 (Pa. Super. 2000).

⁷³ 814 A.2d 739 (Pa. Super. 2002).

⁷⁴ 812 A.2d 1263 (Pa. Super. 2002).