Recent Post Conviction Developments

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Recent Post Conviction Developments

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INTRODUCTION
The Post Conviction Relief Act1 provides a procedure for defendants to collaterally challenge their conviction or sentence. The Act is the sole means2 of obtaining collateral relief and has been broadly interpreted as creating a unified statutory framework for reviewing claims that were traditionally cognizable in habeas corpus.3 The Act permits defendants in custody4 to seek relief when the conviction or sentence results from one or more of the Act's specifically enumerated errors or defects5 and when the claimed error has not been waived6 or previously litigated7 on appeal or in a previous petition under the Act. Subject to several narrow exceptions, a petition under the Act must be filed within one year of the date the defendants's judgment becomes final.8 This article reports on a number of recent decisions of the Pennsylvania Supreme and Superior Court construing provisions of the Act.

* Professor of Law, The Dickinson School of Law of the Pennsylvania State University and the author of the Pennsylvania Post Conviction Act–Practice & Procedure (2010 ed.).
1. 42 Pa.C.S. §9541 et seq.
2. 42 Pa.C.S. §9542.
5. 42 Pa.C.S. §9543(a)(2).
7. 42 Pa.C.S. §9544(a).
8. 42 Pa.C.S. §9545(b).
ASSESSING CREDIBILITY OF UNCALLED AND INADEQUATELY PREPARED WITNESSES

In Commonwealth v. Johnson,9 the Supreme Court addressed the PCRA court's obligation to assess credibility when the defendant alleges trial counsel was ineffective in failing to interview and call potential eyewitnesses identified in discovery materials and to interview and adequately prepare alibi witnesses. At trial, counsel presented an alibi defense for a different day of the week than the day the crime occurred. The PCRA court concluded that trial counsel's presentation of inconsistent alibi testimony constituted per se ineffectiveness. Without assessing their credibility, the PCRA court also found counsel ineffective10 for failing to interview and present the witnesses who had relevant and potentially exculpatory evidence.

The Supreme Court disagreed with the PCRA's courts finding of per se ineffectiveness. Per se prejudice, the Court noted, has been confined to cases where counsel's act or omission constitutes a complete failure to serve as the client's advocate.11 The Court held that inconsistent alibi evidence does not constitute a complete failure of counsel nor is it sufficiently analogous to cases where the presumption of prejudice has been applied. As a result, actual and not per se prejudice governs claims involving counsel's presentation of inconsistent alibi testimony.

The Court also disagreed with the PCRA court's conclusion that credibility findings were unnecessary where the uncalled witnesses had relevant and potentially exculpatory evidence. The Court held that a PCRA court cannot make the required finding of prejudice under the Strickland standard when it fails to assess the credibility of uncalled witnesses. Noting that no prior state or federal decision had set out a standard for credibility determinations in the Strickland prejudice context, the Court looked to its after-discovered evidence cases based upon recantation testimony and held that upon remand, the PCRA court was to determine whether "the nature and quality of the evidence is such that there is a reasonable probability that the jury would have credited it and rendered a more favorable verdict."12 The Court noted that the assessment by the PCRA court must include the demeanor and potential impeachability of the witnesses.

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10. In responding to the PCRA court's finding that counsel's omissions individually might not constitute ineffectiveness "but taken as a whole" lead the court to the conclusion that counsel was ineffective in the guilt phase of the trial, the Supreme Court noted that while "no number of failed [ineffectiveness] claims may collectively warrant relief if they fail to do so individually", where there are multiple instances of "deficient performance, the assessment of prejudice properly may be premised upon cumulation." Id. at 532.
11. Commonwealth v. Reed, 971 A.2d 1216 (Pa. 2009), the Court held that actual and not presumed prejudice governed when the defendant alleges appellate counsel was ineffective in filing a defective appellate brief that narrowed review by the appellate court. The Court stated that the filing of an appellate brief that is deficient in some manner does not constitute a complete failure to act as defendant's advocate as to warrant presuming prejudice. See also Commonwealth v. Pulcano, 954 A.2d 639 (Pa. Super. 2008) (where defendant claims appellate counsel was ineffective in not raising all appealable issues, defendant must establish that the claims not pursued have arguable merit, appellate counsel had no reasonable basis to present the claims, and had the claims been pursued, there is a reasonable probability that the result of direct appeal would have been different).
POST-TRIAL MOTIONS AND INEFFECTIVENESS CLAIMS

In 2002, in Commonwealth v. Grant, the Supreme Court abandoned its long-standing rule that claims of ineffectiveness had to be raised by new counsel at the first opportunity, even if that first opportunity was direct appeal and the issue had not been presented to the trial court. Under Grant, claims of ineffectiveness are no longer considered on direct appeal but deferred to the post-conviction process. In Commonwealth v. Bomar, the Supreme Court held that Grant did not apply when defendant's claims of ineffectiveness were raised by new counsel in a post-trial motion and the trial court heard testimony of trial counsel and addressed the ineffectiveness claims in its opinion.

In several post-Bomar cases, Chief Justice Castille stated his view that ineffectiveness claims should not be entertained on post-trial motions because such a practice raised questions of delay, abuse and arbitrariness. The use of post-trial motions to raise ineffectiveness claims was addressed recently by the Supreme Court in Commonwealth v. Liston. In Liston, the defendant claimed counsel had failed to protect his right to direct appeal. In addition, the defendant raised claims of ineffectiveness during the trial. The PCRA court granted the defendant the right to appeal nunc pro tunc and took testimony on Liston's remaining claims of trial counsel ineffectiveness but did not make rulings with respect to those claims. On appeal, the Superior Court declined to address the defendant's ineffectiveness claims relying upon Grant. But based upon Bomar, the Superior Court held that whenever a PCRA court reinstates a defendant's right to direct appeal, the PCRA court shall also reinstate the defendant's right to file post-trial motions nunc pro tunc thereby allowing the defendant to raise any issue of trial counsel ineffectiveness. The court noted that this procedure would permit the court, consistent with Bomar to review the defendant's ineffectiveness claims on the ensuing direct appeal thereby saving judicial time and the need for the defendant to file a second PCRA raising the same claims later in the process.

In reversing Liston, the Supreme Court concluded that the Superior Court had "overstepped its authority" by creating an exception to Grant and had, in effect, created a new rule of criminal procedure. The problem, the Court stated, was that the

17. Liston relied on the Superior Court’s decision in Commonwealth v. Miranda, 442 A.2d 1133 (Pa. Super. 1982). In Miranda, the court addressed the role of the post-conviction court when the defendant alleges ineffectiveness of both trial counsel and the failure of appellate counsel to protect the defendant's right to direct appeal. The court held that where the post-conviction court grants the defendant the right to appeal nunc pro tunc, the post-conviction court is required to complete the record with respect to other claims of ineffectiveness in order for those claims to be reviewed in the nunc pro tunc direct appeal. Liston noted that Miranda was decided when claims of ineffectiveness were deemed waived unless raised by new counsel at the first opportunity. Even though Grant changed this rule, Liston concluded that the concerns in Miranda with respect to judicial economy and efficiency remained valid notwithstanding Grant.
18. At issue in Liston was whether the approach to the problem of resolving a post-conviction petition that raised claims of both ineffectiveness during trial and failure to protect the defendant's right to direct appeal adopted by the Superior Court in Commonwealth v. Miranda, 442 A.2d 1133 (Pa. Super. 1982) remained workable in light of the Supreme Court's decision in Grant. In Miranda, the court held that when a defendant raises multiple issues of ineffectiveness including counsel's failure to protect defendant's right to direct appeal, if the PCRA court grants the right to direct appeal, it is required to complete the record with respect to the other claims of ineffectiveness in order for those issues to be reviewed in the nunc pro tunc direct appeal.
Superior Court established a procedure for some defendant's to obtain an additional opportunity to challenge their conviction based upon ineffectiveness of counsel before direct appeal had occurred. The Court held that a defendant who has been given the right to direct appeal *nunc pro tunc* has the right to seek PCRA review after direct appeal is concluded.19

In a concurring opinion, Chief Justice Castille warned lower courts not to take affirmative steps to accommodate unitary review under the *Bomar* exception to *Grant*. The Chief Justice noted that *Bomar* was never intended to create a right to unitary review. Trial judges should not permit such review unless accompanied by an express, knowing and voluntary waiver of PCRA review which would permit "acceleration of collateral review" but would not "arbitrarily afford certain defendants both accelerated and multiple rounds of collateral review."20 The Chief Justice recommended that the matter be sent to the Criminal Rules Committee to determine under what circumstances unitary review should be permitted on post-trial motions.21

**SHORT SENTENCES AND REVIEW OF INEFFECTIVENESS CLAIMS**

In *Commonwealth v. Moore*,22 a pre-*Liston* case, the Superior Court returned to the problem of *Grant* and the review of ineffectiveness claims in cases where the defendant receives a short sentence that will be served during the pendency of direct appeal, or where there is no appeal, the sentence will be served before the post-conviction process is completed.23 Following *Grant*, the Superior Court had recognized a "short sentence" exception to the *Grant* rule that permitted appellate review of claims of trial counsel ineffectiveness on the grounds that a defendant's short sentence would preclude collateral review of the claims.24 In *Commonwealth v. O'Berg*,25 the Pennsylvania Supreme Court rejected the "short sentence" exception

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19. The Supreme Court noted that its decision did not prohibit a PCRA court from reinstating a defendant's right to file post-trial motions *nunc pro tunc* if it was established that counsel was ineffective in failing to file the motions. What the Supreme Court prohibited in *Liston* was affording a defendant access to post-trial motions to raise ineffectiveness claims where there was no claim that counsel had failed to protect the defendant's right to file such motions.

20. 977 A.2d at 1096. See also *Commonwealth v. Rega*, 933 A.2d 997, 1032 (Pa. 2007) (Castille, C.J. concurring) ([P]rolix ineffectiveness claims should not be entertained as of right on post-verdict or post-sentencing motions—unless, perhaps, the defendant expressly enters a record waiver of his of-right, first PCRA petition. Allowing pre-PCRA hybrid review raises questions of avoidable delay, abuse, arbitrariness, and avoidable complication”).

21. In *Commonwealth v. Fransen*, 986 A.2d 154 (Pa. Super. 2009), a post-*Liston* case, the Superior Court held that the PCRA court did not err when it granted direct appeal *nunc pro tunc* where counsel failed to file a Pa.R.App.P. 1925 (b) but did not hold an evidentiary hearing on other claims of trial counsel ineffectiveness. The court stated that *Liston* specifically prohibited the Superior Court from expanding *Bomar* and directed the defendant to file another PCRA petition following disposition of his direct appeal. 978 A.2d 988 (Pa. Super. 2009).


23. To obtain PCRA relief, the defendant must be in custody at the time relief is granted. 42 Pa. Cons. Stat. Ann. §9543(a)(1).


25. 880 A.2d 597 (Pa. 2005). After the Superior Court dismissed O'Berg's ineffectiveness claims without prejudice to O'Berg raising his claims in a PCRA proceeding, O'Berg sought review in the Supreme Court seeking an exception to *Grant* when PCRA review is not available because the defendant is no longer in custody. O'Berg argued that *Grant* placed him in the unfair position of losing his opportunity to litigate his ineffectiveness claim and that such a result conflicted with the intent of *Grant*, which was to offer "a petitioner the best avenue to effect his Sixth Amendment right to counsel." *Grant*, 813 A.2d at 738.
to Grant finding that the exception would undermine the rationale of the general rule announced in Grant to defer ineffectiveness claims to the post-conviction process.\textsuperscript{26} In Moore, the Superior Court held that when a defendant raises an ineffective assistance of counsel claim on a post-sentence motion after being found in contempt of a Protection from Abuse Order and sentenced to a short period of imprisonment, judicial economy and fairness is best served by the trial court conducting a post-sentence Bomar\textsuperscript{27} evidentiary hearing. The court noted that given the maximum sentence that may be imposed for violating a Protection from Abuse Order, PCRA relief may not be a "practical or timely vehicle"\textsuperscript{28} to review the defendant's ineffectiveness claim. On the other hand, a Bomar evidentiary hearing will permit the claims to be reviewed on direct appeal.\textsuperscript{29}

**FORCIBLY MEDICATING PETITIONERS UNABLE TO CHOOSE WHETHER TO CONTINUE TO PURSUE PCRA RELIEF**

In two capital cases, the Pennsylvania Supreme Court considered whether a defendant who had sought PCRA relief but is presently incompetent may be compelled to take psychiatric medication for the purpose of rendering him competent to determine whether to pursue PCRA relief.\textsuperscript{30} In Commonwealth v. Sam\textsuperscript{31} and Commonwealth v. Watson,\textsuperscript{32} the PCRA court found the defendants were unable because of incompetency to participate in PCRA proceedings. In both cases, the Commonwealth sought an order to require the defendants to take psychiatric medication. In response, the PCRA court heard testimony as to whether the defendant would respond to medication and possible side effects of the medication. In Sam, the PCRA court denied the Commonwealth's motion finding that Sam was not a danger to himself or others. The court also concluded that the Commonwealth had not met the Sell v. United States\textsuperscript{33} conditions governing involuntary administration of anti-
In *Watson*, the PCRA court also denied the Commonwealth’s motion finding that Watson was not a danger to himself or others and that the proposed medication would not result in the defendant being sufficiently competent to proceed with his PCRA petition. The Supreme Court reversed and remanded in both cases.

In both cases, the Court initially noted that the Commonwealth was not obligated to meet the *Sell* conditions where involuntary medication is sought in the context of a pending PCRA petition. The Court explained that in *Sell* forced medication was sought to render the defendant competent to stand trial, an outcome the defendant or counsel was seeking to avoid. In contrast to *Sell*, the Court found that in *Sam* and *Watson*, forced medication was sought to permit each defendant to pursue post-conviction relief, a procedure to vindicate defendant’s right to a fair trial. The Court stated that an “inmate who is entitled to relief should not be arbitrarily denied the prospect of collateral review.” Even though the Court concluded the *Sell* conditions are not constitutionally required in the post-conviction context, because the parties and lower court relied upon the conditions, the Court reviewed the PCRA’s courts denial of the Commonwealth's motion to forcibly medicate the defendants under the *Sell* framework.

The Court held in *Sam* and *Watson* that the Commonwealth’s interest in finality and the defendant’s right to collateral review were “important governmental” interests. Based upon the medical evidence in each case, the Court found that the Commonwealth had satisfied the remaining *Sell* conditions. As a result, the Court held that the PCRA court in each case erred when it determined that compelling medication violated the defendant’s right to due process under the Fourteenth Amendment to the United States Constitution. Finally, the Court concluded that involuntary medication to render the defendants competent did not violate the Pennsylvania Mental Health Procedures Act or constitute a violation of defendants’ privacy under Article I, Section 8 of the Pennsylvania Constitution.

**INEFFECTIVENESS AND CAPITAL SENTENCING**

The United States Supreme Court first addressed the issue of counsel’s obligation to investigate and present evidence of mitigation at capital sentencing in *Strickland v. Washington*. In *Strickland*, the Court established a two-part performance and prejudice standard that governs claims of ineffectiveness of counsel. With respect to establishing a claim of ineffectiveness, counsel's performance was deficient if counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed to the defendant by the Sixth Amendment. Second, the defendant must show that deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant a fair trial, a trial whose result is unreliable. *Strickland v. Washington*, 466 U.S. at 693. Although the test for determining ineffectiveness is the same under both the Pennsylvania and United States Constitution, Pennsylvania courts use a three-prong standard that requires the defendant to demonstrate that (1) the issue underlying the claim of ineffectiveness has arguable merit, (2) counsel did not have a reasonable basis for the act or omission in question, and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceeding would have been different. *Commonwealth v. Pierce*, 527 A.2d 973 (Pa.1987).
to counsel’s duty to investigate evidence of mitigation, the Court in *Strickland* stated that “counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary.” Where counsel decides as a tactical matter not to investigate or to limit the scope of investigation into potential mitigating evidence, the decision will be “directly assessed for reasonableness in all the circumstances. . .”

In recent cases applying *Strickland*, the United States Supreme Court has found counsel ineffective at capital sentencing. In *Williams v. Taylor*, the Court concluded that counsel’s failure to discover and present mitigating evidence at sentencing could not be justified as a tactical decision because counsel had not “fulfilled their obligation to conduct a thorough investigation of the defendant’s background.” In *Wiggins v. Smith*, the Court concluded that counsel’s decision not to expand their investigation beyond the PSI and the defendant’s social service records was not reasonable in light of evidence in the social service records—“evidence that would have lead a reasonably competent attorney to investigate further.” And in *Rompilla v. Beard*, the Court concluded that counsel’s investigation fell below the *Strickland* standard because (1) counsel failed to examine the court file on defendant’s prior conviction which counsel knew the prosecution would rely on in establishing defendant’s history of violence; and (2) the prior conviction file contained a “range of mitigation leads” including prison files which described the defendant’s “childhood and mental health very differently from anything defense counsel had seen or heard” from other sources.

The issue of counsel’s performance at the sentencing hearing was considered by the Pennsylvania Supreme Court in a number of recent decisions. In *Commonwealth v. Ligons*, the PCRA court granted the defendant a new sentencing hearing after finding that trial counsel had not provided the defendant’s medical and school records to the psychologist who had been retained for the sentencing hearing and had not investigated defendant’s juvenile convictions. In reversing the PCRA’s court, the Supreme Court noted that whether trial counsel was ineffective in failing to develop and present sufficient mitigating evidence depended upon a number of factors including the “reasonableness of counsel’s investigation, the mitigation evidence that was actually presented and the mitigation evidence that could have been presented.” The Court held that Ligons was not entitled to a new sentencing hear-

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39. *Strickland v. Washington*, 466 U.S. at 695. In Strickland, the defendant claimed counsel was ineffective in failing to request a psychiatric examination and to present evidence of the defendant’s character and emotional state. The Court disagreed finding counsel’s decision not to seek additional character or psychological evidence reasonable as “counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help” and that restricting testimony to what had already been presented at the plea colloquy ensured that “contrary character and psychological evidence” would not come in at the sentencing hearing. *Id.* at 701. See also *Burger v. Kemp*, 483 U.S. 776 (1987) (while noting that counsel could have made a more thorough investigation, counsel not ineffective for failure to discover and introduce evidence concerning the defendant’s unstable childhood as decision not to investigate further based upon reasonable professional judgment that such evidence may have harmed the defendant as much as it might have helped him).

42. *Williams v. Taylor*, 529 U.S. at 396.
44. *Id.* at 534.
47. *Id.*
49. *Id.* at 1149.
ing because he failed to establish that he had been prejudiced by counsel's performance. The Court found that the evidence presented during the sentencing hearing was not materially different from the evidence that trial counsel allegedly did not investigate and provide to the mental health expert. As a result, the Court concluded that it was not convinced that had the evidence that was overlooked been presented to the jury, the result of the sentencing hearing would have been different. The Court found that Rompilla was not controlling because the evidence overlooked by counsel was not intended to put into question evidence the Commonwealth presented nor would it have lead to the discovery of new mitigation evidence. The Court also distinguished Williams and Wiggins as cases where the mitigating evidence not presented to the jury significantly differed from the evidence presented at the sentencing hearing. Finally, the Court rejected the defendant's claim that PCRA counsel was ineffective in failing to present to the PCRA court mitigation evidence that was available in support of his claim of trial counsel ineffectiveness. The Court concluded that the defendant had failed to establish that PCRA counsel lacked a reasonable basis for the mitigation evidence submitted to the PCRA court rather than submitting "different, but not more extensive mitigation evidence" offered in defendant's Supreme Court brief.

In Commonwealth v. Sattazahn, the Supreme Court affirmed the PCRA court's determination that trial counsel had failed to conduct an adequate investigation for mitigating evidence. The Court found that counsel should have reviewed a file from a prior murder case including a Department of Corrections report which contained "red flags" of brain damage and other potential mental health issues. In addition, counsel failed to investigate and develop evidence of the defendant's poor school performance suggesting cognitive, emotional and social difficulties and to obtain a mental health evaluation of the defendant. The Court found that "no reasonable strategy" justified counsel's limited investigation and that the presentation at trial of the mitigation evidence put forward at the post-conviction would have provided support for a number of statutory mitigators. As a result, the Court concluded that the defendant was prejudiced by counsel's limited case for mitigation because the absence of relevant mitigating evidence diminished confidence in the outcome of the sentencing hearing.

In Commonwealth v. Ly, trial counsel's case for mitigation consisted solely of testimony that focused on the defendant's three year old son. Counsel testified at the PCRA hearing that he met only twice with the defendant prior to trial and did not otherwise communicate with him in writing or by phone. He also acknowledged that he did not investigate the defendant's background prior to trial and was of the view that the jury would not favorably consider evidence of the defendant's background. In contrast to the evidence presented by trial counsel at the sentencing hearing, the PCRA court heard testimony concerning the defendant's life history

50. The Pennsylvania Supreme Court has held that a defendant in a capital case may raise the ineffectiveness of PCRA counsel on appeal to the Supreme Court because the appeal is the only opportunity available to the defendant to do so. Commonwealth v. Hall, 872 A.2d 1177, 1182 (Pa. 2005); Commonwealth v. Purcell, 724 A.2d 293 (Pa. 1999). The ineffectiveness claim must be raised in the original brief. Commonwealth v. Base more, 744 A.2d 717, 726-727 (Pa. 2000) (holding reply brief is not the appropriate means of presenting a claim of ineffectiveness of PCRA counsel). For the view that a claim of PCRA counsel ineffectiveness is a new claim and can only be raised in a serial PCRA petition, see Chief Justice Castille's concurring opinion in Ligons, 971 A.2d 1163.
51. Id. at 1155.
52. 952 A.2d 640 (Pa. 2008).
53. Id. at 676.
54. 980 A.2d 61 (Pa.2009).
including his life as a child in Saigon during the Vietnam War. Testimony also included information about abuse by his father, the extreme conditions he experienced in Vietnam and during his escape to the United States. Evidence was also presented regarding the positive role the defendant played in assisting his siblings escape Vietnam and settle in the United States. The PCRA court denied relief finding that counsel had pursued a reasonable strategy at trial. In affirming the denial of PCRA relief, the Supreme Court noted the potential merits of the claim that trial counsel failed to conduct a mitigation investigation. Nevertheless, the Court concluded that the issue was waived because PCRA counsel had failed to properly layer the ineffectiveness of counsel claim. Specifically, counsel did not assert direct appeal counsel’s ineffectiveness for failing to present trial counsel’s failure to conduct an investigation of mitigation evidence. The Court rejected PCRA counsel’s argument that because the claim was not record based, appellate counsel was not ineffective in failing to present the issue on direct appeal. The Court also rejected PCRA counsel’s effort to assert his own ineffectiveness in failing to properly layer the ineffectiveness claim. The Court held that a reply brief was not an appropriate means to present an issue not previously raised.

In Commonwealth v. Cox, the defendant claimed trial counsel was ineffective in failing to investigate and develop mitigating evidence of traumatic childhood and mental health problems. At the PCRA hearing, trial counsel acknowledged that she did not investigate what effects childhood abuse and neglect may have had on the defendant nor did she obtain school records or request the assistance of an investigator or social worker to look into the defendant’s background. Nor did counsel retain a mental health expert notwithstanding indications in the pre-sentence reports that the defendant might have underlying mental health problems including neurological dysfunction as the result of head trauma. At the PCRA hearing, the defendant presented the testimony of a forensic psychologist that the defendant suffered from attention deficient hyper-active disorder (“ADHD”) and that the pre-sentence report and mental health evaluation suggested that the defendant “likely suffered from cognitive and psychological problems.” The Commonwealth’s expert testified that there was no evidence upon which to conclude that the defendant had ADHD. The PCRA court concluded counsel was not ineffective for not investigating whether the defendant suffered from any mental disease or defect. The court found that counsel had no obligation to conduct such an investigation where she saw nothing in the pre-sentence mental health evaluation to alert her to such problems and the defendant did not tell her he had mental health problems. In affirming the denial of relief, the Supreme Court noted the fact that the defendant had been convicted of

55. Direct appeal in Ly occurred prior to the Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002). Grant overruled the long standing rule that claims of ineffectiveness were waived unless raised by new counsel at the first opportunity, even if that first opportunity was direct appeal.

56. In cases where direct appeal was filed before Grant or where an appellate court has reviewed claims of trial counsel ineffectiveness, in order to establish a PCRA claim of trial counsel ineffectiveness, the defendant must plead and prove that appellate counsel was ineffective in failing to raise a claim of ineffectiveness of prior counsel and present argument as to each prong of the Commonwealth v. Pierce, 786 A.2d 203, 213 (Pa. 2001) standard as to appellate counsel’s deficient performance. Commonwealth v. McGill, 832 A.2d 1014 (Pa. 2003).

57. For a view critical of the waiver rule in the context of extra-record claims on direct appeal, see Commonwealth v. Ly, 989 A.2d 2 (Pa. 2010) (Saylor, J., dissenting from denial of Application for Reargument).


59. 983 A.2d 666 (Pa. 2009).

60. Id. at 698.
two murders in the present case and of a third murder in an unrelated case. In light of his multiple murder convictions, the Court concluded that the defendant had failed to establish that he had been prejudiced by counsel's failure to investigate whether he suffered from any mental disease or defect. The Court held that the testimony presented at the PCRA hearing "would not have led a rational jury to impose a life sentence." The Court noted that the defendant's expert failed to find that the defendant suffered from any serious mental health disease or defect and although the expert believed the defendant suffered from ADHD, it was a "virtually a certainty" that no jury would have imposed a life sentence based upon this condition in light of the defendant's multiple murders.

Two additional capital cases involving claims that counsel was ineffective in failing to investigate and develop mitigation evidence were remanded by the Pennsylvania Supreme Court. In Commonwealth v. Beasley, a case involving a second PCRA petition filed prior to the 1996 amendments to the Act, the PCRA court concluded trial counsel was not ineffective despite trial counsel's testimony that he had spent little time preparing for the sentencing hearing and had not investigated defendant's background including previous psychiatric hospitalizations. Remand was required, the Court ruled, because the PCRA court failed to address most of the claims asserted in the petition including counsel's failure to investigate mental health mitigation evidence. In addition to providing the PCRA court with a specific list of matters to be addressed on remand including a specific comparison of the mitigation evidence offered at trial with the evidence presented in the post-conviction hearing, the Court noted that the inadequate consideration by the PCRA court of the issues raised by the defendant was not an "isolated incident". The Court reminded PCRA courts of their obligation to prepare opinions based upon "governing law and rational reasoning."

In Commonwealth v. Gibson, the Court remanded for a second time a post-conviction claim that counsel was ineffective in failing to develop mitigation evidence. The PCRA court initially denied without an evidentiary hearing the defendant's claim that trial counsel was ineffective for failing to investigate and present mitigation evidence finding instead that counsel had presented a strong case for mitigation at the sentencing hearing. Following the initial remand, trial counsel testified that because of his late retention in the case he did little or no investigation or preparation for the sentencing hearing. Appellate counsel testified that he conducted no investigation of defendant's claim that trial counsel was ineffective at the sentencing hearing. While the PCRA court refused to allow testimony from mental health experts, it concluded that the defendant was entitled to a new sentencing hearing finding that the jury had not been presented with mitigation evidence that even a minimal investigation would have uncovered. The Supreme Court concluded that an additional remand was necessary with respect to the prejudice prong of the ineffectiveness claim. The PCRA court was specifically instructed to resolve factual

61. Id. at 697.
62. Id.
63. See also Commonwealth v. Gibson, 951 A.2d 1110, 1151 (Pa. 2008) (Castille, C.J., concurring) ("Where the defendant is responsible for multiple murders . . ., he should have greater difficulty in securing Strickland relief premised on foregone, supplemental mitigation evidence.").
64. 967 A.2d 376(Pa. 2009).
65. No mitigation evidence was presented by counsel at the penalty hearing. Instead, counsel offered only the testimony of the defendant asking him to explain the circumstances of a prior murder and to say anything he wished concerning his personality and character.
and credibility disputes and permit the development of mental-health mitigation evidence. In addition, the PCRA court was directed to develop a specific comparison of the mitigation case offered at trial with the evidence presented at the post-conviction hearing and to explain why it is “reasonably probable that at least one juror might have assigned weight” to the post-conviction mitigation evidence “equal to or greater than the substantial” evidence of aggravation found by the sentencing jury.

The issue of a defendant’s right to waive presentation of mitigation evidence was considered by the Court in Commonwealth v. Puksar and Commonwealth v. Tedford. In Puksar, the defendant claimed that counsel knew or had reason to know that he was not competent to waive presentation of mitigating evidence in light of his history of mental illness. At the PCRA hearing, one mental health expert testified that he did not believe the defendant was competent to waive presentation of mitigating evidence. Another expert testified that the defendant understood what was occurring at the waiver of mitigation evidence colloquy but defendant’s long standing mental disorder prevented him from rationally participating in the penalty hearing. Trial counsel testified that although he was aware of records of psychiatric and psychological evaluations, he never questioned defendant’s competency to waive presentation of mitigation evidence. The Supreme Court affirmed the denial of PCRA relief. The Court held that the standard for waiving mitigation evidence is “whether the defendant has the ability to consult with counsel with a reasonable degree of understanding and whether the defendant has a rational understanding of the nature of the proceedings.” The Court concluded that under the standard, the defendant had failed to establish that he lacked capacity to understand the proceedings and what he was waiving. In addition, the Court gave weight to the PCRA court’s and trial counsel’s contemporaneous observations of defendant’s competency. The Court also held that where a defendant repeatedly states that he does not want mitigating evidence presented, counsel’s failure to investigate potential mitigating evidence prior to the defendant waiving the presentation of mitigating evidence does not constitute ineffectiveness of counsel in the absence of evidence that the defendant would not have waived presentation of mitigation evidence had counsel conducted a mitigation investigation.

In Tedford, the defendant argued that his waiver of his right to present mitigation evidence was not knowing, intelligent, and voluntary because counsel failed to inform him that because the jury had already found that he killed the victim during a rape, the death penalty would be automatic in the absence of mitigation evidence.

67. The Court noted that mental health mitigation evidence may play a more important role in a case where alcohol and drug use is present as such use may be regarded by some jurors as having a “substantial volitional component.” Commonwealth v. Gibson, 951 A.2d at 1123 fn. 11. For a different view of mental health mitigation evidence, see concurring and dissenting opinion of Justice Eakin, 951 A.2d at 1157.
68. Id. at 1123.
69. Id.
70. 951 A.2d 267 (Pa. 2008).
71. 960 A.2d 1 (Pa. 2008).
73. See Schriro v. Landrigan, 550 U.S. 465, 475 (2007) where in the context of federal habeas review the Court noted that where the defendant instructs counsel not to present mitigation evidence, counsel failure to “investigate further could not have been prejudicial under the Strickland standard. See also Commonwealth v. Small, 980 A.2d 549 (Pa.2009) (where defendant during three colloquies stated his desire that counsel not present mitigation evidence, direct appeal counsel not ineffective in failing to raise trial counsel’s failure to investigate and develop mitigation evidence).
The defendant also claimed that his responses during the waiver colloquy\textsuperscript{74} indicated that he did not understand the sentencing proceeding. In affirming the denial of PCRA relief, the Court concluded that the defendant’s assumption that counsel was obligated to inform him that failure to present mitigation evidence would certainly lead to a sentence of death was incorrect. The Court noted that the guilty verdict on the rape charge did not require the jury at the penalty hearing to find that the victim’s death occurred during the rape. In addition, the Commonwealth was required to prove the specific aggravating circumstance unanimously beyond a reasonable doubt. Even if proven, the Court noted the jury might have ignored the law and returned a verdict of life. The Court also rejected the claim that the defendant did not understand the sentencing proceeding by noting that the colloquy counsel conducted established that the defendant understood the nature of the hearing and his right to present mitigation evidence.

\textbf{MISCELLANEOUS PROCEDURAL ISSUES}

\textbf{Appointment of Counsel}

In a second or subsequent petition where an evidentiary hearing is granted and the defendant is unable to obtain counsel, Pa.R.Crim.P.904(D) requires the court to appoint counsel. Although the Rule appears to limit the appointment of counsel to only the evidentiary hearing, in \textit{Commonwealth v. Jackson}\textsuperscript{75} the Superior Court held that Rule 904(F)(2) requires that appointment of counsel extends throughout the appeal process and that this requirement applies to counsel appointed on a second or subsequent petition.

\textbf{Waiver of Counsel}

When a defendant seeks self-representation in a PCRA hearing where counsel has not withdrawn pursuant to \textit{Turner/Finley},\textsuperscript{76} the PCRA court is required to hold a hearing\textsuperscript{77} for purposes of conducting an on-the-record waiver-of-counsel colloquy governed by Pa.R.Crim.P. 121 (A)(2).\textsuperscript{78} The colloquy requirement applies notwithstanding the fact that the defendant has unequivocally indicated his desire to represent himself and has prepared an adequate petition or appellate brief.

\textbf{Petition for Remand}

When a defendant who is represented in an appeal from the denial of PCRA relief files a \textit{pro se} brief in the Superior Court alleging the ineffectiveness of appellate counsel,\textsuperscript{79} counsel is required to petition the court for remand citing the allegations

\textsuperscript{74} The Court noted that at the time defendant’s waiver occurred and the time of the Court's decision, there is no required specific colloquy to “ensure that the defendant knowingly and intelligently refused to present mitigating evidence.” \textit{Schrirro v. Landrigan}, 550 U.S. 465, 479 (2007).

\textsuperscript{75} 965 A.2d 280 (Pa. Super. 2009).


\textsuperscript{78} The Court noted that while subsections (b) and (c) of Pa R.Crim.P. 121 (A)(2) are not relevant to PCRA proceedings, the remaining provisions of the Rule apply as to whether the defendant understands the consequences of proceeding without counsel.

of ineffectiveness and providing the court with an evaluation of the claims.\textsuperscript{80} When the defendant claims that counsel did not raise issues on appeal that were presented in the PCRA petition, counsel is required to explain in the petition for remand the nature and extent of his review of the claims not raised and include supporting citations for conclusions reached.\textsuperscript{81} Counsel may not rely upon the fact that the defendant waived claims by not raising them in his \textit{pro se} petition. Rather, counsel must explain why the claims not raised in the \textit{pro se} petition are without merit.\textsuperscript{82}

\textbf{Pa.R.Crim.P. 907 and Turner/Finley Letters}

If the PCRA court intends to dismiss a PCRA petition on the basis that the claims are frivolous, or that the alleged facts, if proven, would not entitle the defendant to relief, or that there are no genuine issues of fact in dispute, Pa.R.Crim.P. 907(1) requires the court to give notice to the defendant of its intention to dismiss the petition and the reasons for the dismissal. The Rule provides the defendant twenty days to respond to the proposed dismissal. In \textit{Commonwealth v. Bond},\textsuperscript{83} the Superior Court held that notice of intention to dismiss was not required where counsel informed the defendant on numerous occasions why he believed his claims were meritless prior to seeking to withdraw pursuant to \textit{Turner/Finley}\textsuperscript{84} and the defendant had an opportunity to respond to the motion to withdraw but did not. In \textit{Commonwealth v. Hopfer},\textsuperscript{85} the PCRA court relied upon \textit{Bond} when it granted counsel's petition to withdraw and dismissed defendant's petition without giving the defendant notice under Pa.R.Crim.P. 907(1). In \textit{Hopfer}, the Superior Court held that \textit{Bond} did not apply where the defendant did not have an adequate opportunity to respond to counsel's motion to withdraw before the PCRA court dismissed the petition. The court held that service of any type of notice of dismissal, whether a Pa.R.Crim.P. 907(1) notice by the PCRA court or a \textit{Turner/Finley} no-merit letter\textsuperscript{86}, must occur at least twenty days before the petition is dismissed.

\textbf{Duty to Pursue Timely Filed Petition}

Section 9543(b) of the PCRA authorizes the dismissal of a petition where delay in filing the petition results in prejudice to the Commonwealth. This section of the Act appeared to be superceded when the Legislature amended the Act to require as a general rule, that a petition must be filed within one-year of the date the judgment becomes final.\textsuperscript{87} But in \textit{Commonwealth v. Renchenski},\textsuperscript{88} the Superior Court relied upon §9543(b) in affirming the dismissal a petition that the court acknowledged had been timely filed. In \textit{Renchenski}, the PCRA court found that the defendant failed to

\begin{itemize}
\item \textsuperscript{81} \textit{Commonwealth v. Jette}, 947 A.2d 202 (Pa. Super. 2008) (counsel must undertake a \textit{Finley}-type analysis of claims defendant wishes to raise upon filing petition for remand).
\item \textsuperscript{82} \textit{See also Commonwealth v. Warren}, 979 A.2d 920 (Pa. Super. 2009) (counsel failed to detail the nature and extent of his review of claims not raised on appeal).
\item \textsuperscript{83} 630 A.2d 1281 (Pa. Super. 1993).
\item \textsuperscript{85} 965 A.2d 270 (Pa. Super. 2009).
\item \textsuperscript{86} Withdrawal pursuant to \textit{Turner/Finley} requires counsel to contemporaneously serve on the defendant a copy of counsel's application to withdraw along with a copy of the no-merit letter and a statement advising the defendant of his or her right to proceed \textit{pro se} or with private counsel if the court grants the application to withdraw. \textit{Commonwealth v. Friend}, 896 A.2d 697 (Pa. Super. 2006).
\item \textsuperscript{87} 42 Pa.C.S.A. §9545(b).
\item \textsuperscript{88} 988 A.2d 699 (Pa. Super. 2010).
\end{itemize}
take any action to advance the resolution of issues presented in his petition for more than fourteen years after original counsel was permitted to withdraw. After new counsel was finally appointed, the Commonwealth moved to dismiss the petition on grounds of prejudice alleging that its witnesses were no longer available if re-trial was ordered. The Superior Court concluded that while §9543(b) refers to a “delay in filing,” the dominant purpose of the section is to “ensure that the Commonwealth is not prejudiced by defendant's delay in pursuing his post-conviction rights.” Because defendant's failure to pursue his petition would result in prejudice to the Commonwealth if it were required to retry the case, the court held that the PCRA court did not err in dismissing the petition.

89. *Id.* at 703.