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Post-Conviction Developments

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TABLE OF CONTENTS

INTRODUCTION	117	DNA TESTING	126
INEFFECTIVENESS CLAIMS, POST- SENTENCE MOTIONS AND SHORT SENTENCES	118	PCRA COUNSEL INEFFECTIVENESS AND RESPONSE TO NOTICE OF INTENT TO DISMISS	128
GUILTY PLEAS AND COLLATERAL CONSEQUENCES	122	COLLATERAL REVIEW AND MENTAL RETARDATION	129

ABSTRACT

Recent decisions of the Pennsylvania Supreme construing the Post Conviction Relief Act include Commonwealth v. Holmes and Commonwealth v. Abraham. In Holmes, the Court reaffirmed the rule of deferral of ineffectiveness claims to the post-conviction process but recognized two, limited discretionary exceptions to the rule, one of which provides an opportunity for defendants serving short sentences to obtain review of claims of trial counsel ineffectiveness on direct appeal provided the defendant waives collateral review. In Abraham, the Court held that Padilla v. Kentucky did not abrogate the traditional collateral consequences rule, but instead simply identified deportation as an isolated exception to the rule. Other decisions address the constitutionality of the requirement that limits post-conviction relief to defendants who are in custody, whether a request for DNA testing is timely and how a court should assess a claim of mental retardation raised in a post-conviction proceeding.

INTRODUCTION

The Post Conviction Relief Act¹ (“PCRA” or “the Act”) provides a procedure for defendants to collaterally challenge their conviction or sentence. It 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 state habeas corpus.³ The Act permits defendants in custody⁴ to seek relief when the conviction or sentence results in one or more of the Act’s enumerated errors or defects⁵ and when the

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1. 42 Pa.C.S. §9541 *et seq.*

2. 42 Pa.C.S. §9542.

3. 42 Pa.C.S.A. §6501 *et seq.*

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

5. 42 Pa.C.S. §9543 (a)(2). To avoid a bifurcated system of post-conviction review, the Pennsylvania Supreme Court has not limited the PCRA to its specifically enumerated areas of review. *See eg., Com-*

claimed error has not been waived⁶ or previously litigated⁷ on direct appeal or in a previous PCRA petition. Subject to several narrow exceptions, a petition under the Act must be filed within one year of the date the defendant's judgment of sentence becomes final.⁸ This article reports on a number of recent decisions of the Pennsylvania Supreme and Superior Court construing provisions of the Act.

INEFFECTIVENESS CLAIMS, POST-SENTENCE MOTIONS AND SHORT SENTENCES

In 2002, in *Commonwealth v. Grant*⁹, 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 trial counsel ineffectiveness are no longer considered on direct appeal, but deferred to the post-conviction process. In *Commonwealth v. Bomar*¹⁰, 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 an opinion.

Court recognizes two exceptions to general rule of deferral of ineffectiveness claims to the post-conviction process.

In several post-*Bomar* cases, the Supreme Court expressed reservations about using post-trial motions to raise claims of trial counsel ineffectiveness and subsequent review of the claims on direct appeal.¹¹ In *Commonwealth v. Wright*¹², the Court held that "collateral claims should not be reviewed on post-verdict motions unless the defendant waives his right to PCRA review because the PCRA does not afford the right to two collateral attacks."¹³ The issue was addressed again in *Commonwealth v. Liston*¹⁴ and in *Commonwealth v. Montalvo*.¹⁵ In

Liston, the Supreme Court limited *Bomar* to pre-*Grant* cases. The Court held that the Superior Court had "overstepped its authority" when it held that whenever a PCRA court reinstates direct appeal it must also reinstate the right to file post-sentence motions thereby allowing the defendant to raise any issue of trial counsel ineffectiveness. In a concurring opinion, Chief Justice Castille rejected the use of post-trial motions to raise ineffectiveness claims unless "accompanied by an express, knowing and voluntary waiver of further PCRA review."¹⁶ In *Montalvo*,¹⁷ Chief Justice Castille in a concurring

monwealth v. Chester, 733 A.2d 1242 (Pa. 1999) (applying Act to claims arising during penalty phase of a capital case); *Commonwealth v. Lantzy*, 736 A.2d 564 (Pa. 1999) (a claim that counsel failed to file direct appeal cognizable under Act); *Commonwealth v. Liebel*, 825 A.2d 630 (Pa. 2003) (Act applies to claim that counsel failed to file petition for allowance of appeal).

6. 42 Pa.C.S. §9543(a)(4), 9544(b).

7. 42 Pa.C.S. §9544(a).

8. 42 Pa.C.S. §9545(b).

9. 813 A.2d 726 (Pa. 2002).

10. 826 A.2d 831 (Pa. 2003).

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

12. 961 A.2d 119 (Pa. 2008)

13. 961 A.2d at 148 n.22. Two of the four participating justices in *Wright* joined Justice Eakin in footnote 22.

14. 977 A.2d 1089 (Pa. 2009).

15. 986 A.2d 84 (Pa. 2009).

16. 977 A.2d at 1096 (Castille, C.J., concurring). Two of the five member Court in *Liston* joined the Chief Justice's concurring opinion.

opinion, directed lower courts not to review ineffectiveness claims raised in post-trial motions unless the defendant waives his right to post-conviction review.¹⁸ In *Commonwealth v. Barnett*,¹⁹ the Superior Court held that fully developed ineffectiveness claims would not be reviewed on direct appeal absent an express, knowing and voluntary waiver of PCRA review.

In *Commonwealth v. Baker*,²⁰ the Superior Court reviewed a purported waiver of PCRA review that preceded the trial court's consideration of defendant's claim of trial counsel ineffectiveness raised by new counsel in a post-sentence motion. Because the court concluded that the waiver was not valid²¹, it declined to review the defendant's claim of trial counsel ineffectiveness on direct appeal. Noting that the question of what constitutes a valid waiver under *Barnett* was a matter of first impression, the court held that a valid waiver of PCRA rights requires defendant's participation in an on-the-record colloquy, which includes but is not limited to an explanation of (1) the eligibility of PCRA relief; (2) the right to be represented by counsel in a first PCRA petition; (3) the types of issues that can be raised pursuant to the PCRA that are now being given up; and (4) that the PCRA is the sole means of obtaining nearly all types of collateral review. The Court stated that the trial court must also ensure the defendant has "made the decision to waive his PCRA rights after consulting with counsel (if any) and in consideration of his rights, as they have been explained in the colloquy."²²

In *Commonwealth v. Holmes*²³, the Pennsylvania Supreme Court returned to the issue of whether claims of ineffectiveness can be reviewed on post-sentence motions and direct appeal under *Bomar* and *Grant* if the defendant waives review as of right under the PCRA.²⁴ Although the Court in *Holmes* reaffirmed *Grant* and limited *Bomar* to its pre-*Grant* facts, Chief Justice Castille writing for the Court, recognized two limited discretionary exceptions to *Grant's* general rule of deferral of ineffectiveness claims to the post-conviction process. First, the Court held that a trial court has discretion to decide discrete claims of trial counsel ineffectiveness raised on a post-sentence motion where

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

18. 986 A.2d at 111 (Castille, C.J., concurring) ("As I made clear in my recent concurrence in [*Liston*]—and in this regard I spoke for majority of the Liston Court—going forward, the lower courts should not indulge hybrid review by invoking *Bomar*.")

19. 25 A.3d 371 (Pa. Super 2011) (*en banc*).

20. 72 A. 3d 652 (Pa. Super 2013).

21. The court found the waiver invalid because the defendant was left with the impression that he would be waiving only the specific ineffectiveness claims presented on direct appeal and not the entire post-conviction process.

22. Instead of remanding for a new waiver colloquy, the court dismissed the ineffectiveness claims without prejudice to being raised in a timely PCRA petition.

23. 79 A.3d 562 (Pa. 2013). Following his conviction, Holmes filed a counseled PCRA petition seeking reinstatement of his right to direct appeal due to trial counsel's failure to file a requested direct appeal. Holmes subsequently amended the petition raising multiple substantive claims of ineffectiveness of trial counsel. The trial court reinstated Holmes's direct appeal *nunc pro tunc* without addressing the ineffectiveness claims. In the Superior Court, Holmes raised only claims of trial counsel ineffectiveness. The Superior Court following its decision in *Commonwealth v. Liston*, 941 A.2d 1279 (Pa. Super. 2008) (*en banc*), remanded the case to the trial court with instructions to permit Holmes to file his ineffectiveness claims by post-sentence motions *nunc pro tunc*. Following the Pennsylvania Supreme Court's disapproval of the Superior Court's holding in *Liston* (997 A.2d 1089 (Pa. 2009)), the Court granted allocatur in Holmes to decide whether Holmes's ineffectiveness claims were reviewable on direct appeal under *Bomar*, should instead be deferred to collateral review, or should be reviewable on direct appeal only if accompanied by a waiver of Holmes's right to file a PCRA petition. *Commonwealth v. Holmes*, 996 A.2d 479 (Pa. 2010).

24. Holmes also contains an extended discussion of *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) and its impact on review of ineffectiveness claims in Pennsylvania post-*Grant*. In *Martinez*, the United States Supreme Court announced a "narrow exception" to the rule that a claim of ineffectiveness of trial counsel is defaulted for purposes of federal habeas corpus review if not first presented to the state court. Under *Martinez*, a defendant may establish cause for a default of an ineffective assistance of counsel claim when such claims are required, as in Pennsylvania, to be presented in an initial review post-conviction proceeding, where the state court did not appoint counsel in the post-conviction proceeding or where appointed counsel in the initial-review proceeding was ineffective. In addition, the defendant must demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a "substantial" claim, namely a "claim that has some merit."

the claims are both meritorious and apparent from the record “so that immediate consideration and relief is warranted.”²⁵ The Court described this exception as “an extraordinary case” and noted that by recognizing the exception, it was not authorizing the trial court to appoint new counsel to search for ineffectiveness claims.

The second exception to *Grant* provides the trial court with discretion to consider multiple claims of ineffectiveness in a post-sentence motion, including non-record based claims and other post-conviction claims where (1) good cause is shown, and (2) the defendant waives PCRA review of his conviction and sentence. The Court noted that broad and unitary review where the defendant waives PCRA rights permits more timely review of collateral review claims without the defendant having to forego claims normally presented on direct appeal. In addition, such review will occur when events are fresher in the memories of witnesses and counsel should have a better recollection “of the reasons for the actions that form the basis for ineffectiveness claims.”²⁶

This exception to the general rule of deferral explicitly addresses the effect of *Grant* on defendants who receive short prison or probationary sentences. As the Court acknowledged in its *O’Berg*²⁷ decision rejecting an exception to *Grant* in such cases, the “net effect” of the *Grant* rule and the statutory requirement that a defendant must be “currently serving a sentence of imprisonment, probation or parole” at the time collateral relief is granted was to leave defendants with short sentences without either direct appeal or collateral review to challenge trial counsel’s ineffectiveness. The Court specifically noted that in short sentence cases, the trial court’s determination of good cause should include the length of the sentence imposed and whether, in light of the sentence, the defendant will be eligible for relief under the PCRA.²⁸ As it had noted in *O’Berg*, the Court in *Holmes* acknowledged the difficulty of determining whether the length of the sentence imposed would preclude PCRA review but urged trial courts to err on the side of permitting the defendant’s to challenge the effectiveness of trial counsel where the right would be “otherwise susceptible to forfeiture.”²⁹

While the Court describes waiver of PCRA rights as the *sine qua non* of unitary review and requires a “full PCRA waiver colloquy”, the decision does not address the elements of a valid waiver other than requiring the trial court to explain to the defendant that the defendant is waiving his right to file a first PCRA petition and that any subsequent PCRA review is limited to the three narrow exceptions to the one-year filing period.³⁰ Notwithstanding the waiver, to prevent a defendant from seeking PCRA review where relief is denied on direct appeal, *Holmes* holds that the time spent litigating collateral claims by post-sentence motion and direct appeal counts toward the one-year period³¹ in which a PCRA petition must be filed. Like the PCRA which provides indigent defendants a rule-based right to counsel only after the defendant has filed a petition³², *Holmes* does not authorize the trial court “to appoint new counsel to facilitate requests for unitary review or to indulge a defendant’s complaints about trial counsel.”³³ Presumably,

25. *Id.* at 577.

26. *Holmes*, 79 A.3d at 579.

27. In *Commonwealth v. O’Berg*, 880 A.2d 597 (Pa. 2005), the Supreme Court rejected a “short sentence” exception to *Grant*. The Court noted that the harm to defendants with short sentences caused by the *Grant* rule “cannot be used to defeat” the reasons underlying deferral of ineffectiveness claims to the post-conviction process. The court also noted that the proposed exception was “too ambiguous” to give trial courts sufficient guidance as to when a sentence fell within the exception. For a discussion of *Grant* and short-term sentences, see Thomas M. Place, *Ineffectiveness of Counsel and Short Term Sentences in Pennsylvania: A Claim in Search of a Remedy*, 16 Temp. Pol. & Civ. Rts. L. Rev. (Fall 2007).

28. The court noted that few post-conviction petitions are finally resolved within a year of the sentence being imposed.

29. *Holmes*, 79 A.3d at 578.

30. The exceptions in 42 Pa.C.S. §9545(b) to the one-year filing period are governmental interference, the discovery of new facts, and a new constitutional right given retroactive effect. A petition invoking one or more the exceptions must be filed within sixty days of the date the claim could have been presented.

31. 42 Pa.C.S. §9545(b)(1).

32. Pa.R.C.P. 904(B).

33. *Id.* at 580. The Court noted that under Pa.R.Crim.P. 122 (B)(2) appointment of counsel is effective until final judgment, including direct appeal.

new counsel³⁴ would be appointed for indigent defendants in the event the defendant is successful in filing a timely *pro se* post-sentence motion challenging the ineffectiveness of trial counsel³⁵.

In a concurring opinion, Justice Saylor stated that where it is clear that where the length of defendant's sentence would preclude PCRA review, the "only rational choice" for the court is to consider the defendant's constitutional claims on direct review or by means of some other guaranteed review process. In this regard, he noted that it was "problematic" to require a waiver as a "prerequisite" to a defendant gaining access to his constitutionally guaranteed right to direct appeal.³⁶ Finally, Justice Saylor noted that if the trial court incorrectly concludes that PCRA review will be available, the deferred claims should not "evaporate" if the court has guessed wrongly. In such a case, the deferred claims should be resolved either under the PCRA despite the Act's one-year filing period, or pursuant to a "common-law review procedure." Justice Eakin's concurring opinion noted his disagreement that the required waiver under the "good cause" exception include all future collateral review. In his view, the waiver should be "issue-specific", namely, issues considered on direct review could not later be the subject of a PCRA petition. In his concurring opinion, Justice Baer cautioned defendants to use the "good cause" waiver exception in only short sentence cases and not in cases where the defendant's sentence permits the investigation and presentation of non-record based ineffectiveness claims under the PCRA. Justice Todd's concurring opinion also took issue with the scope of the waiver under the "good cause" exception. In her view, in cases other than those involving short sentences, the comprehensive waiver required by the majority renders the exception "illusory" because she believes that competent counsel would not advocate use of the exception "upon pain of waiver of yet unknown ineffectiveness claims."³⁷ Instead, Justice Todd proposed a limited waiver in which the defendant would waive the right under the PCRA to "raise any layered ineffectiveness claim for which trial counsel's failure to object is part of the arguable merits assessment" under Pennsylvania's three-part ineffectiveness test.³⁸

In *Commonwealth v. Turner*,³⁹ the Pennsylvania Supreme Court reviewed an order of a PCRA court finding Section 9543(a)(1)(i) of the PCRA unconstitutional. This section limits post-conviction relief to defendants currently serving a sentence of imprisonment, probation or parole. Turner had received a sentence of two years of probation. Although Turner filed her initial petition alleging ineffective assistance of trial counsel within the Act's one-year filing period, the petition was pending when she completed her sentence of probation. The PCRA court denied the Commonwealth's motion to dismiss Turner's petition holding that Section 9543(a)(1)(i), as applied, denied Turner a remedy to vindicate her right to effective assistance of counsel.

34. By waiving the right to file an initial PCRA the defendant is without a remedy to challenge the effectiveness of post-sentence motion and direct appeal counsel.

35. It is unlikely that *Holmes* will provide many indigent defendants with short sentences a remedy to vindicate their right to effective trial counsel. The decision does not require trial courts imposing short sentences or trial counsel in such cases to specifically inform defendants of the opportunity *Holmes* provides to advance PCRA review by asserting ineffectiveness and other cognizable collateral claims in a post-sentence motion. Trial counsel is not obliged to raise his own ineffectiveness and is frequently not aware of acts or omissions that may constitute ineffectiveness of counsel. Even if the defendant is aware of the *Holmes* exception, it is unlikely that a defendant, while still represented by trial counsel, will identify a claim of trial counsel ineffectiveness or other post-conviction claim and prepare and file a *pro se* post-sentence motion within 10-days of sentencing. The *Holmes* procedure is equally challenging for defendants who can afford counsel. See *Commonwealth v. Turner*, 80 A.3d 754, 771 (Pa. 2013) (Todd, J. dissenting).

36. Pa. Const. art.V, §9.

37. Although not noted by Justice Todd, in the context of guilty pleas, a number of bar ethics committees have ruled that defense counsel may not ethically advise clients to sign a plea agreement containing an express waiver of ineffective assistance of counsel claims. See Michael Cassidy, *Some Reflections on Ethics and Plea Bargaining: An Essay in Honor of Fred Zacharias*, 48 San Diego L. Rev. 93, 106 (2011)

38. *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987).

39. 80 A.3d 754 (Pa. 2013).

The Supreme Court reversed the PCRA court's finding that the custody requirement of the Act was unconstitutional. The Court initially noted that Turner had not claimed that deferring claims of ineffectiveness to collateral review pursuant to *Commonwealth v. Grant*⁴⁰ had denied her appellate review in violation of Article V, section 9 of the Pennsylvania Constitution. Instead, Turner argued that she was deprived of her liberty because (1) *Grant* prevented her from obtaining judicial review of her ineffectiveness on direct appeal and (2) the PCRA precluded review because she completed her sentence before PCRA relief was granted. The Court rejected Turner's argument holding that she did not have a protected liberty interest in collateral review because she was no longer subject to a state sentence. The Court noted that by limiting collateral relief to those serving sentences of confinement, the legislature simply chose not to provide a collateral review process for defendants who have completed such sentences. Due process, the Court said, does not require a state to provide unlimited opportunities for collateral review of constitutional claims. Instead, a state is free to impose "rational limits in support of finality of judgments." The Court also held that to the extent due process guaranteed Turner a right to review of her ineffectiveness claim, Turner failed to raise her claim in a post-sentence motion and, thereafter, on direct appeal pursuant to *Commonwealth v. Bomar*.⁴¹ In addition, the Court found that Turner did not promptly seek PCRA relief during her two-year sentence or request expedited consideration of her claim. As a result, Turner failed to give the PCRA court a "fair opportunity to resolve her claim" while still serving her sentence.⁴²

Justices Saylor and Todd dissented. Justice Saylor stated that Turner should not be penalized for adhering to the "strong preference" expressed in *Grant* for deferral of ineffectiveness claims to the post-conviction process. He also noted that although Turner had not claimed a violation of her right to appeal under the Pennsylvania Constitution, the claims she asserted overlapped with the issue of Turner having "at least one opportunity" to present a constitutional challenge to a her conviction. Justice Todd, noting the multiple difficulties of a defendant timely asserting an ineffectiveness claim under the *Bomar* exception to *Grant*, stated that the *Bomar* procedure was "insufficient to satisfy" the due process claim presented by Turner.

GUILTY PLEAS AND COLLATERAL CONSEQUENCES

In *Commonwealth v. Abraham*⁴³, the Pennsylvania Supreme Court considered the issue of whether the distinction in Pennsylvania between direct and collateral consequences of a conviction for purposes of defining effective assistance of counsel remains viable in light of the United States Supreme Court's decision in *Padilla v. Kentucky*.⁴⁴ *Abraham*, a

40. 813 A.2d 726 (Pa. 2002)

41. 826 A.2d 831 (Pa. 2003).

42. The Court also held that Turner was not eligible for either *habeas corpus* or *coram nobis* relief.

43. 62 A.3d 343 (Pa. 2012).

44. 559 U.S. 356 (2010). *Padilla*, a non-citizen, pled guilty to transporting drugs not knowing it was a deportable offense. He later claimed his lawyer not only failed to advise him that his plea would subject him to deportation but in fact assured him that he "did not have to worry about immigration status since he had been in the country so long." He alleged that he would have gone to trial but for the incorrect advice from his lawyer. Although Kentucky had denied *Padilla* relief on the basis that risk of deportation concerned a collateral matter not within the sentencing authority of the trial court, the Supreme Court noted that it had never applied the distinction between direct and collateral consequences to determine whether counsel provided "reasonable professional assistance" and was not required in this case to consider whether the distinction was appropriate because of the "unique nature of deportation." The Court noted that it had long-recognized that deportation was a particularly severe "penalty". The Court held that the "weight of prevailing professional norms supports the view that counsel must advise a non-citizen concerning the risk of deportation." Where deportation consequences of a plea are "truly clear," namely, the immigration statute is "succinct and straightforward", counsel must inform the noncitizen client that a guilty plea will make him eligible for deportation. Where the deportation consequences of a plea are "unclear or uncertain", the Court held that the duty of counsel is more limited. When the law is not "succinct and straightforward", counsel fulfills his obligation to his noncitizen client by advising him that "pending criminal charges may carry a risk of adverse immigration consequences." Here, the Court found that the deportation consequences were "truly clear" and, therefore, counsel had an obligation to

high school teacher, entered a negotiated guilty plea to certain sexual offenses committed in the course of his employment. After learning that his plea would result in the forfeiture of his state pension under the Public Employees Pension Forfeiture Act⁴⁵ (PEPFA), he sought to withdraw his plea. Following the trial court's denial of the motion, Abraham filed a PCRA petition alleging plea counsel was ineffective in failing to advise him that his guilty plea would result in the forfeiture of his pension. The PCRA court denied relief holding that the loss of pension rights was collateral to the plea and that counsel's failure to inform Abraham of this fact was not relevant to whether his plea was knowing and voluntary under *Commonwealth v. Frometa*.⁴⁶ The Superior Court reversed but did not apply the direct versus collateral consequences analysis of *Frometa*.⁴⁷ Holding that *Frometa* had been abrogated by *Padilla* and noting that it was unclear whether direct/collateral analysis was still viable post-*Padilla*, the court analyzed the pension forfeiture using a civil/penal analysis.⁴⁸ Concluding that loss of pension was "punitive in nature", the court held counsel was obligated to warn Abraham of the loss of the pension as a consequence of pleading guilty.

The Supreme Court reversed the decision of the Superior Court. The Court held that *Padilla* did not abrogate the use of direct/collateral analysis in cases not involving deportation. The Court also held that the general holding of *Frometa* remained unchanged, namely, counsel is not ineffective for failing to advise a defendant of the collateral consequences of a guilty plea because a defendant's lack of knowledge of such consequences does not undermine the validity of the guilty plea. The Court used the analysis set out by the United States Supreme Court in *Smith v. Doe*⁴⁹ and *Kennedy v. Mendoza-Martinez*⁵⁰ to determine whether forfeiture of a state pension is a criminal penalty, namely a direct consequence of pleading guilty, or a civil penalty which the sentencing judge has no control over. Under the first prong of *Smith*, the Court found that the legislature did not intend the PEPFA to be punitive in nature. The Court also concluded that under the second prong of *Smith*, using the *Mendoza-Martinez* factors⁵¹, the pension forfeiture provisions of the PEPFA were not "so punitive in force or effect as to negate the legislative intent" that the forfeiture provisions operate as a civil remedy. Having determined that the PEPFA is not punitive and thus a collateral consequence of Abraham's guilty plea, the Court concluded that counsel could not be deemed ineffective for failing to advise Abraham that he would lose his pension benefit upon entry of his guilty plea.⁵²

advise Padilla that the offense to which he was pleading guilty would subject him to automatic deportation. The case was remanded to determine whether Padilla had been prejudiced by counsel's deficient performance.

45. 43 P.S. §§1311-1315.

46. 555 A.2d 92 (Pa. 1989). In *Frometa*, the Court held that deportation was a collateral consequence of a guilty plea and, as a result, did not need to be explained to the defendant.

47. The court held that *Padilla* abrogated *Frometa*.

48. The court analyzed the pension forfeiture under the test applied in *Lehman v. Pennsylvania State Police*, 839 A.2d 265 (Pa. 2003). Alternatively, the court concluded it would reach the same result under direct/collateral consequences analysis.

49. 538 U.S. 84 (2003).

50. 372 U.S. 144 (1963).

51. The *Mendoza-Martinez* factors are "whether the sanction involves an affirmative sanction or disability, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable to it, and whether it appears excessive in relation to alternative purpose assigned."

52. Justice Todd dissented disagreeing with the majority's reliance on *Frometa*. She interpreted *Padilla* as requiring counsel to advise a defendant of a consequence of a guilty plea where, as here, the specific consequence is a particularly severe penalty and is intimately related to the underlying criminal offense. Because Justice Todd viewed direct/collateral analysis unsuitable post-*Padilla*, she concluded Abraham's claim of ineffective assistance of counsel should be resolved applying the *Strickland v. Washington* analysis used by the Court in *Padilla*. Citing the ABA *Standards for Criminal Justice, Pleas of Guilty: Defense Function*, Justice Todd was in agreement with the Superior Court that Abraham's claim of ineffective assistance of counsel had arguable merit and that counsel's performance fell below the standard of "reasonable professional assistance" required by the Sixth Amendment.

In several recent cases in which defendants entered guilty pleas and, as a result, faced deportation, the Superior Court considered whether the defendants were entitled to PCRA relief under *Padilla*. In *Commonwealth v. Wah*⁵³, a non-resident alien entered negotiated pleas to Medicaid fraud and forgery involving an amount in excess of \$10,000. Under federal law, an alien will be deported if convicted of an “aggravated felony” which includes fraud or deceit where the loss to the victim exceeds \$10,000. Several months after the plea, Wah sought post-conviction relief on grounds that plea counsel was ineffective in failing to advise him of the immigration consequences of pleading guilty to fraud in excess of \$10,000. In contrast to *Padilla* where counsel told his client “not to worry” about his immigration status, counsel here advised Wah that there could be deportation consequences as a result of his plea. In addition, counsel recommended that Wah consult with an immigration attorney to “learn the specific consequences” of pleading guilty to the charges in question. On appeal, Wah claimed counsel’s responsibility to advise him of the immigration consequences of pleading guilty was “nondelegable” because review of the relevant immigration statutes would have revealed that pleading guilty to Medicaid fraud in an amount greater than \$10,000 would subject him to automatic deportation. Wah argued that referral to an immigration specialist satisfies *Padilla* only in cases where the immigration consequences of a plea are not readily discernable. In rejecting Wah’s ineffectiveness claim, the court noted that *Padilla* recognized that “where deportation consequences of a particular plea are unclear or uncertain, counsel’s duty is “more limited” and counsel need only advise a “noncitizen client that criminal charges may carry a risk of adverse immigration consequences.” In contrast to *Padilla*, where the immigration consequences of the plea were “truly clear”, the Superior Court found that the statute governing Wah’s deportation was “more complex”. As a result, the court found counsel acted within the range of professionally competent assistance when he advised Wah to consult with an immigration attorney⁵⁴ if he wanted to ascertain the specific immigration consequences of his guilty plea.⁵⁵

In *Commonwealth v. McDermitt*,⁵⁶ the court considered whether counsel provided his noncitizen client the necessary advice required by *Padilla* where the client entered a negotiated plea of no contest to a charge of possession of a controlled substance with intent to deliver.⁵⁷ During the plea, counsel told his client that his conviction rendered him “deportable.” In his PCRA, McDermitt argued that his plea was involuntary because counsel was required by *Padilla* to advise him more specifically about the immigration consequences of his plea. McDermitt claimed counsel was obligated to inform him “not just that his conviction carried a risk of deportation but that he actually would be deported.” The court affirmed denial of relief holding that *Padilla* merely requires counsel to inform a noncitizen “as to a risk of deportation, not as to its certainty.”⁵⁸

The Superior court returned to the issue of whether counsel’s advice to his non-citizen client was “sufficiently definite” to satisfy *Padilla* in *Commonwealth v. Escobar*.⁵⁹ Prior to Escobar’s plea to possession with intent to deliver cocaine, counsel informed Escobar that it was “likely and possible” that as the result of his plea he would be subject to de-

53. 42 A.3d 335 (Pa. Super. 2012).

54. See also *Commonwealth v. Ghisoiu*, 63 A.3d 1272 (Pa. Super. 2013).

55. The court also found that Wah was not prejudiced by counsel’s failure to seek a continuance so that he could make additional payments to bring the amount outstanding below \$10,000 at the time his plea was entered. Wah failed to establish that such a continuance would have been granted. Moreover, even if Wah had made additional payments prior to the entry of his plea, the court found that it was unlikely that he would have avoided deportation as immigration officials are not bound by the amount of restitution made at the time the plea is entered.

56. 66 A.3d 810 (Pa. Super. 2013).

57. Like *Padilla*, McDermitt’s offense rendered him deportable pursuant to 8 U.S.C. §1227(a)(2)(B) (i). The Supreme Court noted in *Padilla* “that virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under 8 U.S.C. §1227(a)(2)(B)(i).”

58. The court noted that even if *Padilla* required counsel to advise his client as to the certainty of deportation, it was not necessary here because defendant was already voluntarily in the process of being deported.

59. 70 A.3d 838 (Pa. Super. 2013).

portation proceedings. Escobar also signed a plea colloquy containing two provisions indicating that he understood that deportation was possible.⁶⁰ In his PCRA, Escobar claimed counsel was ineffective in failing to properly advise him of the deportation consequences arising from his conviction. Noting that deportation proceedings had begun against Escobar on the basis of the same immigration statute at issue in *Padilla*,⁶¹ the PCRA court granted Escobar relief on the basis that counsel's advice was inadequate because it did not state with certainty that he would be deported on the basis of his guilty plea. The Superior Court reversed stating that it disagreed with the PCRA court's interpretation of the language in *Padilla* that when deportation is a "truly clear" consequence, counsel must inform his client that "he definitely would be deported." While the court acknowledged that Escobar's offense made him deportable, the court noted that whether immigration officials would in fact take the steps to deport Escobar "was not an absolute certainty when he pled." The court concluded that counsel's advice to Escobar was, in fact, "correct", consistent with *Padilla*, and therefore within the "range of competence demanded of attorneys in criminal cases." In support of its holding, the court stated that it did not read the immigration statute or the Supreme Court's language in *Padilla* as "announcing a guarantee that actual deportation proceedings are a certainty such that counsel must advise a defendant to that effect."⁶²

In *Commonwealth v. Rachak*,⁶³ the Superior Court considered whether a noncitizen who waives counsel and enters a guilty plea is entitled to PCRA relief on the basis that he had no knowledge that his plea would subject him to deportation proceedings. Rachak waived counsel and, after a full colloquy pursuant to Pa.R.Crim. 590, entered a guilty plea to possession of cocaine. Rachak did not challenge the voluntariness of his plea on direct appeal⁶⁴ but instead sought PCRA relief on the grounds that his plea was not knowing and voluntary because he did not understand the immigration consequences of his plea. The PCRA court's denial of relief was affirmed by the Superior Court. The court found that Rachak was properly advised of his right to counsel and knowingly and voluntarily waived the right after a full colloquy. The court agreed with the PCRA court that *Padilla* did not require trial courts to determine if a defendant entering a plea is a citizen of the United States nor did the Supreme Court place the responsibility on courts⁶⁵ to inform defendants of the immigration consequences of entering a guilty plea. Because there was no indication that Rachak was induced to plead guilty despite being innocent,⁶⁶ the court concluded that Rachak was not entitled to PCRA relief.

In *Commonwealth v. Barndt*,⁶⁷ the Superior Court considered whether counsel was ineffective when he gave Barndt incorrect information about the amount of street time he would lose as the result of a guilty plea to a drug charge. Brandt was concerned that he would lose the approximately thirty months of parole he had served as part of a prior sentence on a separate drug conviction. During plea discussions of a negotiated sentence in lieu of a mandatory minimum sentence, the prosecutor wrote to defense counsel indicting that the parole board had estimated that Brandt would lose eleven months

60. At the PCRA hearing, counsel testified that he advised Escobar before the plea that he faced a substantial deportation risk.

61. See footnote 56 *supra*.

62. The court acknowledged that portions of *Padilla* arguably support the view that in some cases counsel "may have a duty to provide" clear advice about the certainty of deportation. Nonetheless, the court concluded that the Supreme Court's "overall emphasis" in *Padilla* was that the immigration statute in question makes most defendants pleading to drug offenses "subject to deportation in the sense they certainly become deportable, not in the sense that plea counsel should know and state with certainty" that immigration officials will, in fact initiate deportation proceedings.

63. 62 A.3d 389 (Pa. Super. 2012)

64. The court held that the issue of the voluntariness of Rachak's guilty plea should have been raised on direct appeal. Because it was not, the court concluded that the issue was waived.

65. In *Padilla*, the Court noted that many states "require trial courts to advise defendants of possible immigration consequences." 599 U.S. 356, 374 fn.15 (2010).

66. 42 Pa.C.S.A. §9543(a)(2)(iii).

67. 74 A.3d 185 (Pa. Super. 2013).

of street time but could not give her “a guarantee on the exact amount of street time” he would lose. The prosecutor indicated that she would agree to a modification of sentence if Barndt, in fact, lost thirty months of street time as the result of his new conviction. Brandt did not see the letter from the prosecutor until after the entry of his guilty plea. Subsequently, the Parole Board rescinded the entire amount of street time Barndt had served on the prior conviction. Thereafter, Brandt filed a motion to withdraw his guilty plea arguing that he entered the plea with the understanding from counsel that he would lose no more than eleven months of street time. The trial court treated the motion as a PCRA petition challenging the effectiveness of plea counsel and, after a hearing, dismissed the petition. The court found counsel was not ineffective because Brandt understood at the time of his guilty plea that the amount of street time he would lose was uncertain in light of the discretion of the Parole Board.

The Superior Court reversed finding plea counsel ineffective in erroneously advising Brandt of the parole consequences of his guilty plea. The court noted initially that in *Abraham*, the Pennsylvania Supreme Court had held the framework of *Commonwealth v. Frometa*⁶⁸ in which counsel has an obligation to advise his client of direct, but not collateral consequences of entering a guilty plea, continued to govern claims of ineffectiveness in cases other than deportation. Next, the court noted that it had been long established in Pennsylvania⁶⁹ that the possibility of probation/parole revocation is a collateral consequence of a guilty plea and the fact that a defendant is not informed of such a possibility does not undermine the validity of his plea. The court held it was “equally clear” that where plea counsel provides erroneous advice and, as a result, misleads his client about a collateral consequence of a plea, plea counsel is ineffective.⁷⁰ Here, the court found that plea counsel misrepresented the content of the prosecutor’s letter and as a result, misled Brandt to believe he would lose no more than eleven months of street time as the result of pleading guilty. Because Brandt did not see the letter until after he entered his plea, the court found that Brandt had “little choice” but to rely upon counsel’s representations. In addition, the court relied upon plea counsel’s own admission to Brandt that he had misled him regarding the parole consequences of his plea. Finding that Brandt had been prejudiced by counsel’s erroneous advice, the court found plea counsel provided ineffective assistance in advising Brandt regarding the parole consequences of his guilty plea.⁷¹

DNA TESTING

In two recent cases, the Pennsylvania Supreme Court addressed issues of first impression under the 2002 amendments to the PCRA which established a procedure by which a defendant in custody may seek DNA testing by filing a motion with the sentencing court.⁷² The motion must specify the evidence to be tested and acknowledge that if the motion is granted, any data obtained from samples or test results may be entered in law enforcement databases.⁷³ In addition, the motion must assert the defendant’s innocence of the crime for which he or she was convicted.⁷⁴ The defendant must present a *prima facie* case demonstrating that the identity or participation of the perpetrator in the crime was at issue at trial and that exculpatory DNA testing would establish the defen-

68. 555A.2d 92 (Pa. 1999) *abrogated in part*.

69. *Commonwealth v. Brown*, 680 A.2d 884, 887 (Pa. Super. 1996). See also *Rivenbark v. Pennsylvania Board of Probation & Parole*, 501 A.2d 1110, 1112 (Pa. 1985).

70. *Commonwealth v. Hickman*, 799 A.2d 139 (Pa. Super. 2002); *Commonwealth v. Kersteter*, 877 A.2d 466 (Pa. Super. 2005); *Commonwealth v. Rathfon*, 899 A.2d 365 (Pa. Super. 2006); *Commonwealth v. Thomas*, 506 A.2d 420 (Pa. Super. 1986)

71. In the dissent’s view, Brandt failed to establish plea counsel was ineffective because he acknowledged during the guilty plea colloquy that he understood his guilty plea would result in a violation of parole and failed to call plea counsel as a witness at the PCRA hearing.

72. 42 Pa.C.S. §9543.1.

73. 42 Pa.C.S. §9543.1(c)(1)(iii).

74. 42 Pa.C.S. §9543.1(c)(2)(i).

dant's actual innocence of the offense⁷⁵. The defendant is not required to show that DNA testing would be favorable⁷⁶. However, the court must review the motion and trial record and make a determination as to whether "there is a reasonable probability that DNA testing would produce exculpatory evidence"⁷⁷ that would establish the defendant's actual innocence.⁷⁸ After testing, the defendant may petition for post-conviction relief during the 60-day period following notification of the test results. Requests for DNA tests are "separate and distinct from claims" arising under the PCRA.⁷⁹ While the PCRA's one-year time bar⁸⁰ does not apply to a motion for DNA testing and no time limits are placed on such motions, the Act requires the court to determine if the motion is made in a "timely manner" to demonstrate "actual innocence" and "not to delay the execution of sentence or administration of justice."⁸¹

In *Commonwealth v. Edmiston*⁸², a capital case, the Pennsylvania Supreme Court considered whether defendant's motion for DNA testing of blood samples and swabs taken from the victim was timely under the Act. The Court affirmed the denial of Edmiston's motion.⁸³ The Court initially noted that at the time of his trial in 1989, Edmiston indicated that he was satisfied with the DNA testing that had been conducted and did not request further testing then nor during his first PCRA which concluded in 2004 after the enactment of the DNA Testing Act. Edmiston did not seek testing as part of his second PCRA petition or as part of the amendment to that petition. Rather, it was not until after his second petition was near completion that Edmiston finally sought testing of evidence that he had known of since his trial twenty years earlier. The Court noted that during this period Edmiston had been represented by numerous lawyers who were aware of both the technology and evidence in question. The Court held that the statute does not make advances in technology an "excuse" for failing to timely request testing and neither the nature of the issues raised in the Edmiston's PCRA petition or the capital nature of the petition were relevant to the issue of timeliness. In light of the strength of the prosecution's case at trial, Edmiston's decision at trial not to seek further testing and his decision not to pursue testing during lengthy post-conviction proceedings, the Court concluded that Edmiston's DNA testing motion was not made in a "timely manner" for the purpose of demonstrating his innocence and not to delay the "execution of sentence or administration of justice."

In *Commonwealth v. Scarborough*⁸⁴, the Court considered whether an order granting a motion for post-conviction DNA testing is a final order from which an immediate appeal to the Superior Court may be taken. In the trial court, Scarborough sought PCRA relief on the basis of "after discovered evidence" and an alleged *Brady* violation. At the same time, he filed a separate motion for DNA testing. The trial court held that the PCRA petition was untimely but granted the motion for DNA testing. The Commonwealth filed a notice appeal and, in response, Scarborough filed an application in the Superior Court to have the appeal quashed on grounds that the appeal was taken from an interlocutory order. The Superior Court agreed and subsequently quashed the appeal.⁸⁵ In *reversir.g*

75. 42 Pa.C.S. §9543.1(c)(3).

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

77. *Id.*

78. 42 Pa.C.S. §9543.1(d)(2).

79. 42 Pa.C.S. §9543.1(f)(1).

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

81. 42 Pa.C.S. §9543.1(d)(1)(iii).

82. 65 A.3d 339 (Pa. 2013).

83. Although the PCRA court concluded that the motion was timely, it denied relief on the basis that case law at time precluded DNA testing where the defendant had confessed to the crime. The Court subsequently held in *Commonwealth v. Wright*, 14 A.3d 789 (Pa. 2011) that there is no prohibition in the Act that precludes a convicted individual who has confessed to the crime and who otherwise meets the requirements from obtaining DNA testing.

84. 64 A.3d 602 (Pa. 2013).

85. The Superior Court concluded that the DNA testing order was not a final order because it did not dispose of all the claims because it was merely a "precursor" to defendant's PCRA petition and because it did not "put anyone out of court" nor resolve the entire case. The court also concluded that the testing order was not a collateral order which was immediately appealable.

and remanding the case, the Supreme Court initially noted that its discussion of whether the order was final would focus on Pa.R.A.P. 341(b)(1) which defines a final order as one that “disposes of all claims and of all parties. . . .”⁸⁶ The Court also noted that case law defined a final order as “one that ends the litigation or disposes of the entire case.”⁸⁷ A motion for DNA testing, the Court stated, is wholly separate from a challenge to a defendant’s conviction or sentence under the PCRA. The only claim at issue in such a motion is whether the convicted individual is eligible for such testing under the statute. Therefore, when the trial court enters an order granting or denying the requested testing, the “sole claim between the parties . . . has been addressed by the trial court and finally disposed of.” Because an order granting or denying testing “disposes of all the issues” before the court, the court concluded that the order is final and immediately appealable.

PCRA COUNSEL INEFFECTIVENESS AND RESPONSE TO NOTICE OF INTENT TO DISMISS

If the PCRA court concludes that the defendant is not entitled relief and no purpose would be served by further proceedings, Pa.R.Crim.P. 907 requires the court to give notice to the parties of its intention to dismiss the petition. The Rule permits the defendant to respond to the proposed dismissal within 20 days of the date of the notice. In *Commonwealth v. Rykard*⁸⁸, the Superior Court considered the type of claims that could be raised in response to a notice of intent to dismiss. After appointed counsel filed a no-merit letter and the PCRA court issued a notice of intent to dismiss, Rykard responded to the notice by challenging the ineffectiveness of PCRA counsel. In addition, Rykard raised new claims of trial counsel ineffectiveness. Because Rykard’s response was filed after the expiration of the one-year time bar, the Superior Court initially considered whether Rykard’s claims of ineffectiveness of PCRA counsel was a serial petition subject to the PCRA time-bar⁸⁹ or an amended petition under Pa.R.Crim.P. 905. The Superior Court held that a claim of ineffectiveness of PCRA counsel raised for the first time in a response to notice of intent to dismiss a defendant’s first PCRA petition is not a second, serial or amended petition but instead an “objection to dismissal”. The court found support for its holding in finding that a response to a notice of dismissal and a petition have “traditionally, and in practice, been viewed as distinct.”⁹⁰ In addition, the court noted that Rule 907 does not treat a response to a notice to dismiss as either a serial petition or an amended petition. The original meaning of the “second or subsequent petition” language of the PCRA “did not include a response to a notice of intent to dismiss.” Finally, the court held that a defendant is not permitted to assert new claims of trial counsel ineffectiveness in a response to a motion to dismiss. Instead, a defendant must seek leave to amend his petition in his Rule 907 response in order to raise new non-PCRA counsel ineffectiveness claim.⁹¹

86. The Court noted that the Superior Court had found that subdivisions (b)(2) or (b)(3) of the Rule did not apply to a DNA testing order and the parties had not argued that the other subdivisions of the rule were applicable to the resolution of the issue.

87. *Ben v. Swartz*, 729 A.2d 547, 550 (Pa. 1999).

88. 55 A.3d 1177 (Pa. Super. 2012).

89. In *Commonwealth v. Pitts*, 981 A.2d 875, 879 n.4 (Pa. 2009), the Court assumed without discussion that raising the ineffectiveness of PCRA counsel in response to the PCRA court’s notice of intent to dismiss did not constitute a serial petition. The Court held that claims of ineffectiveness of PCRA counsel cannot be raised on appeal from the denial of PCRA relief because such a claim amounts to a serial petition in violation of the PCRA time-bar. See also *Commonwealth v. Colavita*, 993 A.2d 874, 893, n.12 (Pa. 2010). In *Commonwealth v. Holmes*, 79 A.3d 562 (Pa. 2013) the Court noted that although a defendant has an “enforceable right to effective post-conviction counsel”, “there is no formal mechanism in the PCRA for a second round of collateral attack focusing on the performance of PCRA counsel” and acknowledged that the Court “has struggled with the question of how to enforce the ‘enforceable’ right to effective PCRA counsel. . . .”

90. See e.g., *Commonwealth v. Paddy*, 15 A.3d 43, 440 (Pa. 2011).

91. *Commonwealth v. Rigg*, 84 A.3d 1080 (Pa. Super. 2014) (applying *Rykard* and holding claims waived where the defendant did not seek leave to amend his petition in his response to notice of intent to dismiss or otherwise preserve his trial counsel and PCRA counsel ineffectiveness claims).

COLLATERAL REVIEW AND MENTAL RETARDATION

In *Adkins v. Virginia*,⁹² the United States Supreme Court held that the Eighth Amendment prohibited the execution of mentally retarded persons. The Court left the determination of how to apply the prohibition to the individual states. In *Commonwealth v. Miller*,⁹³ the Pennsylvania Supreme Court set out the procedure for the resolution of an *Adkins* claim on collateral review.⁹⁴ The court held that the defendant must establish mental retardation by a preponderance of the evidence using either the definition of mental retardation developed by the American Association of Mental Retardation (AAMR) or the definition in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). These definitions require a defendant to establish limited intellectual functioning as evidenced by an IQ score below the 65-75 range, significant adoptive limitations, and age of onset before age 18. The court held that there was no “cut-off IQ”.⁹⁵ Rather, it is the “interaction between limited intellectual functioning and deficiencies in adoptive skills that establish mental retardation.”⁹⁶

In *Commonwealth v. DeJesus*⁹⁷, the Pennsylvania Supreme Court considered whether the PCRA court erred when it found DeJesus was mentally retarded under *Miller* and vacated his death sentences. The Commonwealth claimed that the evidence presented at the PCRA hearing did not support relief under *Adkins* and that the court erred when it denied the Commonwealth’s motion to reopen the record to introduce recently obtained information from prison officials concerning DeJesus’s use of smuggled cell phones which the Commonwealth claimed shed doubt on DeJesus’s claim of mental retardation. More specifically, the Commonwealth urged the Supreme Court to abandon the current clinical standard for evaluating post-conviction claims of mental retardation because of the “significant motivation” for defendants to malingering on tests that were not intended for use in a judicial context. The Commonwealth also urged the Court to increase the burden of proof on *Adkins* claimants and to adopt certain evidentiary factors concerning the adoptive functioning prong of the *Adkins/Miller* standard. The Court declined to alter the substantive three-part *Adkins* standard and to increase the burden of proof higher than preponderance of the evidence on collateral review.⁹⁸ The Court also rejected the adoption of legal presumptions or cautionary instructions that would govern all retrospective assessments of mental retardation. The Court stated that the “prospect of malingering and the incentive to slant evidence” are relevant considerations for the Commonwealth to argue to the factfinder in assessing test results and the defendant’s overall case. In addition, in assessing an *Adkins* claim raised on collateral review, the court approved the use of the evidentiary factors set out in *Ex Parte Briseno*⁹⁹

92. 536 U.S. 304 (2002)

93. 888 A.2d 624 (Pa. 2005).

94. The court noted that because *Miller* involved the procedure for the resolution of a claim of mental retardation on collateral review, it did not need to reach the question of whether mental retardation is to be resolved by a judge or jury at trial. In *Commonwealth v. Sanchez*, 36 A.3d 24 (Pa. 2011), the court devised a process for *Adkins* claims originating at trial. Specifically, the court reaffirmed that the burden of proof is on the defense by a preponderance of the evidence. In addition, the court held that the jury decides an *Adkins* claim at the penalty phase prior to considering aggravators and mitigators and that the jury’s finding of mental retardation must be unanimous.

95. In *Commonwealth v. Williams*, 61 A.3d 979 (Pa. 2013), the court explained that although an individual’s IQ was the primary measurement of limited intellectual functioning, individuals with scores above and below 70 are both required to demonstrate major deficiencies in adoptive behavior in order to be found mentally retarded.

96. Post-*Miller*, in *Commonwealth v. Crawley*, 924 A.2d 612 (Pa. 2007), the court held that the standard of review of a PCRA court’s determination of mental retardation is “whether the factual findings are supported by substantial evidence and whether the legal conclusion drawn therefrom is clearly erroneous.” In *Commonwealth v. Bracey*, 986 A.2d 128 (Pa. 2009), the court concluded that when an *Adkins* claim is raised on collateral review, the PCRA judge and not a jury serves as the fact-finder.

97. 58 A.3d 62 (Pa. 2012).

98. The court noted that as a policy matter the General Assembly could increase the burden of proof.

99. 135 S.W.3d 1 (Tex.Crim.App.2004).

which focus on the adoptive functioning element of the *Adkins* test.¹⁰⁰ The Court noted that like the court in *Briseno*, it was not adopting the factors as presumptions or as a checklist but instead as “evidentiary factors” with discretion in the *Adkins* factfinder to determine “which factors in a given case may be helpful in assessing the defendant’s adoptive functioning.”

With respect to the Commonwealth’s claim that the PCRA court erred when it denied its motion to reopen the record and to consider additional evidence including DeJesus’s alleged acquisition and use of a cell phone, the court initially addressed whether and when a PCRA court making an *Adkins* determination should consider newly-discovered evidence. Noting that the Rules of Criminal Procedure do not address the issue, the court held that the PCRA court has discretion to entertain non-cumulative newly discovered evidence within the “overall goal of achieving substantial justice.” Specifically, a court should consider the timeliness of the request, the reasons for the lateness of the request, the substance of the evidence proffered and whether allowing the presentation of the evidence would be prejudicial. Applying these factors, the court found that the PCRA court had abused its discretion in not entertaining the Commonwealth’s new evidence. The court concluded that the evidence was relevant to the intellectual and adoptive elements of *Adkins* because it reflected a type of “sophisticated thinking” and adoptive functioning at odds with the defense portrayal of DeJesus as a person challenged since childhood to accomplish basic tasks in life. The court also held that the evidence was neither cumulative of what was already heard by the PCRA court nor prejudicial because it concerned DeJesus’s own conduct and was subject to appropriate challenges upon remand.¹⁰¹

100. In *Briseno*, the court identified the following factors for the factfinder to consider in weighing evidence of mental retardation: “Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination? Has the person formulated plans and carried them through or is his conduct impulsive? Does his conduct show leadership or does it show that he is led around by others? Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable? Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject? Can the person hide facts or lie effectively in his own or others interests? Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning and complex execution of purpose?” 135 S.W.3d at 8-9. For a critique of the *Briseno* factors, see Brief for the American Association on Intellectual and Developmental Disabilities (formally the American Association on Mental Retardation) as Amicus Curiae in Support of Petitioner, *Chester v. Thaler*, 133 S. Ct. 525 (2012) (No.11-1391), 2012 U.S. Lexis 8447. See also John H. Blume et al., *Of Adkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J. L. & Pub. Pol’y 689, 710-714 (2009); Carol S. Steiker et al., *Adkins v. Virginia: Lessons from Substance and Procedure in Constitutional Regulation of Capital Punishment*, 57 DePaul L. Rev. 721, 727-728 (2008).

101. The Supreme Court also considered the issue of whether the defendant was ineligible for the death penalty under *Adkins* in *Commonwealth v. Keaton*, 45 A.3d 1050 (Pa. 2012) and *Commonwealth v. Williams*, 61 A.3d 979 (Pa. 2013). In *Keaton*, the court affirmed the PCRA court’s finding that Keaton had failed to establish he was mentally retarded. The PCRA court concluded that while Keaton had satisfied his burden of proof regarding limited intellectual functioning and onset of symptoms prior to the age of 18, he had failed to establish significant limitations in adaptive functioning. Because Keaton’s expert did not perform standardized testing of Keaton’s adoptive skills as recommended by the AAMR, the PCRA court examined the record but failed to find evidence that Keaton had a significant limitation in at least two of the skills set out in DSM-IV. In *Williams*, the court affirmed the PCRA court’s finding that Williams was mentally retarded. The PCRA court found Williams’s IQ was between 70 and 75, that he had significant deficits in adaptive functioning under both the AAMR and DSM-IV, and that Williams’s mental retardation was present prior to age 18.