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Post Conviction Developments In Pennsylvania

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INTRODUCTION

The Post Conviction Relief Act[1] ("PCRA" or "the Act") provides a procedure for defendants to collaterally challenge their conviction or sentence. It is the sole means[2] of obtaining state collateral relief. The PCRA has been broadly interpreted[3] as creating a unified statutory framework for reviewing claims that were traditionally cognizable in state habeas corpus.[4] The Act permits defendants in custody[5] to seek relief when the conviction or sentence results in one or more of the Act's enumerated errors or defects[6] and when the claimed error has not been waived[7] or previously litigated[8] 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.[9] This article reports on a number of recent decisions of the Pennsylvania Supreme and Superior Court construing provisions of the Act.

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1. 42 Pa.C.S. §9541 *et seq.*
2. 42 Pa.C.S. §9542.
3. *See e.g., Commonwealth* v. *Chester*, 733 A.2d 1242 (Pa. 1999); *Commonwealth* v. *Lantzy*, 736 A.2d 564 (Pa. 1999); *Commonwealth ex rel. Dadario* v. *Goldberg*, 773 A.2d 126 (Pa. 2001).
4. 42 Pa.C.S. §6501 *et seq.*
5. 42 Pa.C.S §9543(a)(1). The Act requires a defendant to be in custody "at the time relief is granted."
6. 42 Pa.C.S. §9543(a)(2). To avoid a bifurcated system of post-conviction relief, the Pennsylvania Supreme Court has not limited the PCRA to its specifically enumerated areas of review. *See e.g., Commonwealth* v. *Liebel*, 825 A.2d 630 (Pa. 2003) (Act applies to claim that counsel failed to file a petition for allowance of appeal).
7. 42 Pa.C.S. §9543(a)(4), 9544(b).
8. 42 Pa.C.S. §9544(a).
9. 42 Pa.C.S. §9545(b).

DUE DILIGENCE, PUBLIC RECORDS AND THE TIMELINESS EXCEPTION

A defendant who seeks to raise an after-discovered evidence claim[10] must first establish jurisdiction by pleading and proving an exception to the one-year filing period. The PCRA permits a defendant to seek relief after the one-year filing period if the facts upon which the claim is based "were unknown to him and could not have been ascertained by the exercise of due diligence."[11] Such a petition must be filed "within 60 days of the date the claim could have been presented."[12] The Pennsylvania Supreme Court has held that information is not "unknown" if it is contained in a public record.[13] In several recent cases, the Superior Court has considered the scope of the public record doctrine and whether a defendant had exercised due diligence.

In *Commonwealth* v. *Burton*,[14] the Superior Court clarified the "due diligence" requirement and recognized a limited exception to the rule that presumes that defendants have access to information in public records. Burton was convicted in 1993 of first degree murder and conspiracy. Burton's co-defendant, Melvin Goodwine, was convicted of conspiracy but acquitted of murder. In 2013, Burton filed a second *pro se* PCRA petition after he received information from the Innocence Project that in 2009, Goodwine had filed a motion to expunge his criminal record. In the motion, he acknowledged responsibility for the murder and claimed that "an innocent man had gone to jail for the crime he had committed." The PCRA court, without holding an evidentiary hearing, denied Burton relief finding that his petition was untimely because it was not filed within the 60-day period following Goodwine's motion in 2009 and its concomitant entry into the public domain. The lower court held that a matter contained in a public record may not be considered "unknown" for purposes of the newly discovered facts exception to the PCRA's one-year time bar.

Presumption of access to information in public records does not apply when PCRA petition is filed *pro se*.

The Superior Court held that the PCRA court erred in dismissing Burton's petition as untimely and remanded the case for an evidentiary hearing. Initially, the court addressed the question of the appropriate level of diligence a defendant must demonstrate under the newly discovered facts exception noting that the Act does not define the term. Relying on prior cases considering due diligence in different contexts, the court concluded that under the PCRA, due diligence requires "neither perfect vigilance nor punctilious care," but rather "reasonable efforts . . . based on the particular circumstances, to uncover facts" that may support a claim for post-conviction relief. Next, the court turned to the issue of material contained in public records and the Pennsylvania Supreme Court's decision that "matters of public record are not unknown."[15] The court noted that the rule was not absolute as the statute required that facts are "unknown to the petitioner" which imparts "a subjective element into the due diligence standard. . . ." In the court's view, an "irrebuttable presumption that public

10. 42 Pa.C.S. §9543(a)(vi). An after-discovered evidence claim requires a defendant to establish that (1) the evidence has been discovered after trial and could not have been obtained earlier through reasonable diligence; (2) the evidence is not cumulative; (3) it is not being used solely to impeach credibility; and (4) it would likely compel a different verdict. *Commonwealth* v. *Bennett*, 930 A.2d 1264, 1271-72 (Pa. 2007).

11. 42 Pa.C.S. §9545(b)(1)(ii).

12. 42 Pa.C.S. §9545(b)(2).

13. *See e.g., Commonwealth* v. *Hawkins*, 953 A.2d 1248, 1254 (Pa. 2008) (district attorney's testimony at sentencing of witness at defendant's trial was public record and discoverable through exercise of due diligence).

14. 121 A.3d 1063 (Pa. Super. 2015) (*en banc*).

15. *Commonwealth* v. *Taylor*, 67 A.3d 1245, 1248 (Pa. 2013). *See also Commonwealth* v. *Fahy*, 959 A.2d 312, 317 (Pa. 2009); *Commonwealth* v. *Hawkins*, 953 A.2d 1248, 1254 (Pa. 2008) (district attorney's testimony at sentencing of witness who appeared at defendant's trial was public record information and discoverable through exercise of due diligence).

information cannot be 'unknown'" would disregard the important fact of whether the defendant was represented by counsel or proceeding *pro se*. The court noted that *pro se* defendants, often incarcerated, do not have access to information "otherwise readily available to the public." The court cited the Supreme Court's decision in *Commonwealth* v. *Bennett*[16] as expressly recognizing the "importance of *access*" to public information. The court held that the presumption of access to information in public records "does not apply" where the untimely petition is filed by a defendant *pro se*. Noting that there had not been an evidentiary record developed in the PCRA court, the court opined that Burton's diligence may have been sufficient as he promptly filed his petition after receiving information from the Innocence Project. The court observed that Goodwine's motion had been filed more than ten years after Burton's judgment of sentence had become final. It would be unrealistic, the court noted, to expect Burton to continuously search public records to determine whether Goodwine had disclosed potentially exculpatory information concerning his case. The court held that because Burton was not represented, absent evidence demonstrating Burton's access to the contents of Goodwine's criminal docket, the public records rule does not apply. On remand, the court noted that the PCRA court can consider evidence with respect to whether Burton knew of Goodwine's motion prior to receiving the letter from the Innocence Project.[17]

Due diligence and matters contained in public records were also at issue in *Commonwealth* v. *Davis*.[18] Davis was convicted of robbery and first degree murder in 1972. The Commonwealth's case included the testimony of Jerome Watson who placed Davis at the scene of the crime and who also testified that Davis had told him he had shot the deceased. A second witness, Michael Diggs, testified that Davis knew where he kept a shotgun in his home and that Davis was in possession of the shotgun on the day of the crime. Both witnesses testified that they had not been offered any form of leniency in exchange for their testimony. In 2008, Davis filed a *pro se* PCRA petition under the "new facts" exception to the filing period[19] after he had received an affidavit from Watson stating that his testimony about Davis's confession was untrue. The *pro se* petition was filed within 60 days of receiving Watson's affidavit. In a second affidavit, Watson claimed that he was coerced into testifying falsely at Davis's trial and, after he testified, he stated he was treated favorably by police and prosecutors with respect to outstanding felony prosecutions pending at the time. In an amended petition prepared by private counsel, Davis added a claim that the Commonwealth had improperly withheld evidence that it had entered into agreements with both Watson and Diggs in exchange for their testimony. In the amended petition, Davis claimed that upon receiving the Watson affidavit, he began a search to discover Watson and Diggs' sentencing transcripts. He also alleged that he discovered Digg's sentencing transcript which revealed that Diggs had entered into an agreement with the Commonwealth in exchange for testifying against Davis. Davis also attached Watson's sentencing transcript to his amended petition. In the transcript, Watson stated that he was forced to testify against Davis. The PCRA court denied relief without an evidentiary hearing, finding Davis's

16. 930 A.2d 1264, 1266 (Pa. 2007). In *Bennett*, PCRA counsel failed to file a brief in an appeal from the denial of collateral relief. As a result, the appeal was dismissed. After discovering counsel's failure, the defendant filed a second *pro se* petition seeking reinstatement of appeal rights *nunc pro tunc*. The PCRA court granted relief but the Superior Court quashed the appeal finding the second petition was untimely. The Supreme Court reversed, finding that notwithstanding the fact that the court order dismissing his appeal was a matter of public record, it was a fact unknown to the defendant. The Court held that the order dismissing defendant's first PCRA appeal was a "matter of 'public record' only in the broadest terms." The Court noted that it was "illogical to believe" that a lawyer who abandons his client by failing to file a brief will "inform his client that the case has been dismissed because of his own failures." Because counsel abandoned the defendant, the Court stated that it knew of "no other way in which a prisoner could access the "public record." As a result, "the matter of 'public record' does not appear to have been within Appellant's access."

17. In the view of the dissent, the majority's reinterpretation of the Supreme Court's "public information doctrine is unwarranted." The dissent objected to the majority's "subjective, status-based approach" in assessing due diligence and the fact that the new approach "improperly shifts" the burden on collateral review to the Commonwealth without sufficient guidance as to how the majority's subjective considerations factor into a determination of due diligence.

18. 86 A.3d 883 (Pa. Super. 2014).

19. 42 Pa.C.S. §9545(B)(1)(ii).

petition was untimely. The court held that Watson and Diggs' agreement with the Commonwealth came to light at their respective sentencing hearings and were a matter of public record that Davis could have discovered earlier had he exercised due diligence. As to Watson's recantation, the PCRA court noted that Watson had stated in his affidavit that he had first informed a court in 1974 of his perjury during the trial of one Chuck Logan. Although the PCRA court was unable to locate the transcript of the Logan trial, the court held that Davis could have obtained this public information earlier through the exercise of due diligence.

The Superior Court reversed the PCRA court, finding that Davis's petition was timely filed. The court noted that during Davis's trial, both witnesses denied on cross examination having entered into any agreement that they would receive favorable treatment if they testified against Davis. The court also noted that at no point during the testimony of either witness, did the Commonwealth state that leniency had been offered to Watson and/or Diggs. For these reasons, the court concluded that Davis had no reason to search for the Watson and Diggs sentencing transcripts to look for evidence of an agreement with the Commonwealth. To hold otherwise, the court stated, would suggest that Davis "should have assumed" that the witnesses were committing perjury and the Common-wealth was permitting them to do so. The due diligence requirement under the PCRA "does not require a defendant to make such unreasonable assumptions." Instead, the court concluded that the actions Davis took after receiving the Watson affidavit and in acquiring the Watson and Diggs' sentencing transcripts amounted to due diligence and, as a result, Davis established the governmental interference exception to the one-year filing period. The court also concluded that Davis had satisfied the "new facts" exception to the filing period. The court found that Davis had acted with "sufficient diligence" with respect to Watson's perjury. Attached to his amended petition were affidavits of friends and family members who had attempted, without success, to locate Watson after the trial to convince him to admit that he had lied while testifying. The court found Davis had no proof that Watson had lied until he received Watson's affidavit. The court declined to conclude that Davis could have discovered proof of Watson's perjury earlier had he sought and obtained the transcript in the Logan trial. The court noted that the PCRA court had not been able to locate the transcript and that it would be unreasonable to expect a *pro se* prisoner to do what the PCRA court could not. The case was remanded to the PCRA court to conduct an evidentiary hearing to determine if Davis is entitled to a new trial.[20]

In *Commonwealth* v. *Medina*,[21] Medina filed a second PCRA petition in 2006 after learning that a Commonwealth witness had recanted the testimony he had given at Medina's trial in 1992. In the affidavit attached to Medina's petition, the witness, a child at the time of the trial, claimed that his trial testimony had been coerced by a police detective. Medina asserted he first learned of the recantation when the witness was transferred to the prison where Medina was incarcerated and that his petition was timely because it was filed within 60 days of when the witness disclosed the information to him. The PCRA court conducted extensive evidentiary hearings and entered an order granting Medina a new trial. The Commonwealth appealed claiming Medina had failed to prove he had exercised due diligence and, as a result, the petition was untimely.

In affirming the decision of the PCRA court that Medina had satisfied the "new facts" exception to the time bar, the Superior Court accepted the PCRA court's finding that Medina had no information about the police coercion until it was disclosed to him fourteen years later. Moreover, there was no evidence that the witness had disclosed this information earlier to Medina or his family. In addition, the Superior Court noted

20. As the court notes, the issue of whether a petition is timely is distinct from whether the defendant is entitled to relief based upon newly discovered evidence. *Commonwealth* v. *Bennett*, 930 A.2d 1264, 1270-72 (Pa. 2007).

21. 93 A.3d 1210 (Pa. Super. 2914) (*en banc*).

that the witness had testified consistently and unequivocally at trial. Therefore, it was unlikely that cross examination would have compelled the witness to change his testimony or have revealed the coercion the witness had been subjected to.

Due diligence was again at issue in *Commonwealth* v. *Brown*.[22] Brown sought post-conviction relief thirteen years following his conviction for first-degree murder. At his trial, Brown claimed he acted in self-defense. In his post-conviction petition, Brown claimed that a witness for the Commonwealth had come forward to elaborate on his trial testimony and provide new facts relating to the actions of the victim in the moments before the shooting. Brown alleged that the witness's new evidence would have bolstered his claim of self-defense. He attached to his petition a declaration of the witness and a declaration from his wife indicating the precise date she had obtained the information from the witness. Brown asserted his petition was timely because it had been filed within 60 days of when he became aware of the new information. The PCRA court dismissed the petition as untimely holding that the information contained in the witness's declaration would not "compel a different verdict."

Although the Superior Court concluded that the PCRA court had improperly "conflated" the distinct requirements of whether the petition was timely under the "new facts" exception to the filing period with the "after discovered evidence" analysis under Section 9543(a)(1)(vi), the court nonetheless affirmed the denial of relief. The court concluded that at no point during cross examination at trial did Brown seek to elicit from the witness the facts contained in the witness's declaration. Nor did Brown explain why he was unable to discover the information earlier through the exercise of due diligence. Specifically, the court noted that Brown made no claim that he had attempted to contact the witness at any point after the trial to determine whether the witness had additional information about the events immediately preceding the shooting. The court held that because Brown had not satisfied the "new facts" exception to the filing period, the PCRA court lacked jurisdiction to address the substantive merits of Brown's after discovered evidence claim.

INEFFECTIVENESS OF PCRA COUNSEL AND RESPONSE TO NOTICE OF INTENT TO DISMISS

Pennsylvania provides indigent defendants a rule-based right to appointed counsel upon filing of an initial petition for post-conviction relief.[23] Although the right to counsel includes "the concomitant right to effective assistance of counsel,"[24] the Pennsylvania Supreme Court has acknowledged that there is "no formal mechanism designed to specifically capture claims of trial counsel ineffectiveness defaulted by initial review PCRA counsel."[25] Ineffectiveness of PCRA counsel cannot be raised on direct appeal from the denial of PCRA relief because such a claim would constitute a serial petition in violation of the PCRA time-bar.[26] Moreover, the court has stated, the PCRA does not permit "a second round of collateral attack focusing on the performance of PCRA counsel." The problem of a "right without a remedy" has led the court to acknowledge that it "has struggled with the question of how to enforce the 'enforceable' right of effective PCRA counsel. . . ."[27]

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22. 111 A.3d 171 (Pa. Super. 2015).

23. Pa.R.Crim P. 904.

24. *Commonwealth* v. *Albert*, 561 A.2d 736 (Pa. 1989). *See also Commonwealth* v. *Albrecht*, 720 A.2d 693, 699 (Pa. 1998) (power to "review, and if necessary, remedy the deficiencies of counsel at the post conviction stage" not "circumscribed by the parameters of the Sixth Amendment."

25. *Commonwealth* v. *Holmes*, 79 A.3d 562, 584 (Pa. 2013).

26. *Commonwealth* v. *Pitts*, 981 A.2d 875, 879 (Pa. 2009). *See also Commonwealth* v. *Colavita*, 993 A.2d 874, 893, n. 12 (Pa. 2010); *Commonwealth* v. *Jette*, 23 A.3d 1032, 1044 n.14 (Pa. 2011). For an argument that there has not been a binding, precedential decision by the Supreme Court prohibiting review of claims of ineffectiveness of PCRA counsel presented for the first time on appeal and that the Superior Court has rendered conflicting decisions on the issue, *see Commonwealth* v. *Henkel*, 90 A.3d 16, 47 (Pa. Super. 2014) (*en banc*) (Bender, P.J. dissenting).

27. Holmes, 79 A.2d at 584.

Even though there is no "formal mechanism" to challenge the effectiveness of PCRA counsel, a defendant can assert a claim of ineffectiveness in response to the PCRA court's notice of intention to dismiss the defendant's petition.[28] The Pa.R.Crim.P. 907 notice is required only in cases where the court concludes that defendant is not entitled to an evidentiary hearing.[29] The Rule permits the defendant to respond to the proposed dismissal within 20 days of the date of the notice. In *Commonwealth* v. *Smith*,[30] Smith's initial PCRA petition was dismissed without a hearing after the court had issued a Rule 907 notice of dismissal to which neither counsel nor Smith responded. On appeal, Smith argued that the notice of dismissal was defective because it did not inform him of his right to effective PCRA counsel and his right to challenge the effectiveness of PCRA counsel in his response to the court's notice. Smith claimed that the defective notice violated his right to due process and precluded a finding that he had waived his right to challenge the effectiveness of PCRA counsel.

In affirming the dismissal of Smith's petition, the Superior Court held that Smith had waived claims of ineffectiveness of PCRA counsel by not raising them in a response to the PCRA court's notice of intent to dismiss.[31] The court stated that the defendant had a duty to "preserve his claims" and that if he had wanted to assert claims of ineffectiveness of PCRA counsel, "he should have consulted counsel and/or the court to learn the correct procedure." "Neither the Commonwealth nor the court had any duty to instruct" the defendant on how to preserve his claim of ineffectiveness of PCRA counsel.[32]

COLLATERAL REVIEW AND INTELLECTUAL DISABILITY

In *Akins* v. *Virginia*,[33] the United States Supreme Court held that Eighth Amendment prohibited the execution of intellectually disabled[34] persons. The Court left the determination of how to apply the prohibition to the individual states. In *Commonwealth* v. *Miller*,[35] the Pennsylvania Supreme Court set out the procedure for the resolution of

28 *Commonwealth* v. *Pitts*, 981 A.2d 875, 880, n.4 (Pa. 2009) ("[P]itt's failure, prior to his PCRA appeal, to argue PCRA counsel's ineffectiveness for not raising the direct appeal issue results in waiver of the issue of PCRA counsel's ineffectiveness. . . . Although Pitts asserts that his PCRA appeal was the first opportunity he had to challenge PCRA counsel's stewardship because he was no longer represented by PCRA counsel, he could have challenged PCRA counsel's stewardship after receiving counsel's withdrawal letter and the notice of the PCRA court's intent to dismiss his petition pursuant to Pa.R.Crim P. 907, yet he failed to do so.") In *Commonwealth* v. *Rykard*, 55 A.3d 1177 (Pa. Super. 2012), the Superior Court held that a claim of ineffectiveness of PCRA counsel raised for the first time in a response to a notice of intent to dismiss a defendant's PCRA petition is not a second, serial or amended petition but instead an "objection to dismissal." In *Rykard*, the court concluded that defendant had waived his claim of ineffectiveness of PCRA counsel by not raising it in response the PCRA court's notice of intent to dismiss his petition. *See also Commonwealth* v. *Rigg*, 84 A.3d 1080 (Pa. Super. 2014) ("[W]here the new issue is one concerning PCRA counsel's representation, a petitioner can preserve by including that claim in his Rule 907 response or raising the issue while the PCRA court retains jurisdiction.").

29. *Commonwealth* v. *Taylor*, 933 A.2d 1035, 1040 (Pa. Super. 2007) ("[A] petitioner is not entitled to a PCRA hearing as a matter of right; the PCRA court can decline to hold a hearing if there is no genuine issue concerning any material fact and the petitioner is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings.").

30. 121.3d 1049 (Pa. Super. 2015).

31. The court noted that a claim of ineffectiveness of PCRA counsel cannot be raised for the first time in a Rule 1925(b) statement. *Commonwealth* v. *Jette*, 23 A.3d 1032, 1044 n.14 (Pa. 2011); *Commonwealth* v. *Ford*, 44 A.3d 1190 (Pa. Super. 2012).

32. If defendants are not informed by the PCRA court that a claim of ineffectiveness of PCRA counsel is waived unless it is raised in response to the court's notice of intention to dismiss, few, if any, defendants will know that a response to the court's intention to dismiss is the only procedure to challenge the effectiveness of PCRA counsel. Rule 907 does not address this issue and it is unlikely that defendants, many of whom will be incarcerated, will have the knowledge and access to legal materials to discover the Supreme and Superior Court decisions establishing the procedure. Nor is it realistic to assume that PCRA counsel will advise the defendant of the procedure. As the United States Supreme Court noted in *Halbert* v. *Michigan*, 545 U.S. 605, 620 n.5 (2005), "[A] lawyer may not . . . perceive his own errors. . . ."

33. 536 U.S. 304 (2002).

34. In light of a change in terminology in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders, the term "intellectual disability" is now used to describe what was heretofore referred to a "mental retardation." *See Hall* v. *Florida*, 134 S. Ct. 1986, 1990 (2014).

35. 888 A.2d 624 (Pa. 2005).

Adkins claims on collateral review.[36] The court held that the defendant must establish intellectual disability by a preponderance of the evidence using either the definition provided by the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (APA/DSM-IV) or the definition developed by the American Association of Mental Retardation renamed the American Association on Intellectual and Developmental Difficulties. These definitions require a defendant to establish limited intellectual functioning as evidenced by an IQ score below the 65-75 range, significant adoptive limitations,[37] and age of onset before age 18. The court held that there was no "cut-off IQ."[38] Rather, it is the "interaction between limited intellectual functioning and deficiencies in adaptive skills" that establish intellectual disability. Following *Miller*, in *Commonwealth* v. *Crawley*,[39] the court addressed the question of what level of deference should be given a PCRA court's determination of intellectual disability. The court noted that the issue presented a mixed question of law and fact and that the more fact intensive a determination is, "the more deference a reviewing court should give" to the conclusion reached by the PCRA court. The court held that whether a defendant fits the definition of intellectual disability is "fact intensive as it will primarily be based on upon the testimony of experts and involve multiple credibility determinations." The standard therefore is "whether the factual findings are supported by substantial evidence and whether the legal conclusion drawn therefrom is clearly erroneous." The court noted that it chose this "highly deferential" standard because "the court that finds the facts will know them better than the reviewing court will, and so its application of the law to the facts is likely to be more accurate."[40]

In *Commonwealth* v. *Hackett*,[41] the Pennsylvania Supreme Court sharply divided on the application of the *Crawley* standard in reviewing a PCRA court's decision finding that the defendant was intellectually disabled and vacating his death sentence. Hackett was convicted of murder and sentenced to death in 1988. Following the *Adkins* decision, Hackett sought PCRA relief on grounds that he was intellectually disabled. During multiple hearings over a period of six months, the PCRA court heard testimony from four defense experts, the testimony of family members concerning the defendant's exposure to multiple toxins and his involvement in a boxing club when he was fourteen. One expert testified for the Commonwealth.

Much of the testimony of the experts concerned Hackett's IQ tests. Prior to his *Adkins* petition, Hackett had three IQ scores of 80 or above on tests administered at ages 8, 15 and 23. Seven years after his petition was filed, Hackett's IQ on the Wechsler Adult Intelligence Scale was 57. The expert who administered the post-petition Wechsler IQ test, a neuropsychologist, testified that he believed Hackett had not manipulated the score. In addition, he questioned the reliability of the prior tests particularly the Beta-2 test administered by prison officials when Hackett was 23. The expert also found that Hackett had adaptive limitations based upon reports of other experts, family members and trial counsel. A second expert, a forensic neuropsychologist, testified that the post-petition IQ test was scored correctly and that there was no evidence that Hackett was malingering. This expert also cast doubt on the Beta-2 test, stating that it

36. In *Commonwealth* v. *Sanchez*, 36 A.3d 24 (Pa. 2011), the Court established a process for *Adkins* claims originating at trial. 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 the *Adkins* claim at the penalty phase prior to considering aggravators and mitigators and that the jury's finding of intellectual disability must be unanimous.

37. In *Commonwealth* v. *DeJesus*, 58 A.3d 62 (Pa. 2012), the Court approved the use of the evidentiary factors set out in Ex Parte Briseno, 135 S.W. 3d 1 (Tex.Crim.App.2004) which focus on the adoptive function element of the *Adkins* test.

38. 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 function, individuals with scores above and below 70 are both required to demonstrate major deficiencies in adaptive behavior in order to be found intellectually disabled. In *Hall* v. *Florida*, 134 S.Ct. 1986 (2014), the United States Supreme Court held that a strict IQ test score cut-off at 70 was unconstitutional under the Eighth Amendment.

39. 924 A.2d 612 (Pa. 2007).

40. *Thomas* v. *General Motors Acceptance Corp.*, 288 F.3d 305, 307-08 (7th Cir. 2002).

41. 99 A.3d 11 (Pa. 2014).

should not be used to assess intellectual disability, and attributed the significant drop in Hackett's IQ to participation in a boxing program and exposure to toxic chemicals. This expert also found deficits in adaptive functioning. The third expert, a psychiatrist, testified that the Beta test did not properly test for intellectual disability and that Hackett's first two test scores could not be validated without the raw data. While Hackett's fourth expert, the director of the neuropsychology laboratory at the University of Pennsylvania, did not test Hackett's IQ or assess his adaptive functioning, she testified that the multiple tests she administered established that Hackett exhibited "neuropsychological impairment and 'mental retardation'" and that her results of the tests substantiated the Wechler IQ score of 57. While the defense experts' conclusions that Hackett showed deficits in adaptive functioning were challenged by the prosecution in light of the fact that he had operated two businesses and had spoken to his mother about stock trading, the experts did not believe that these actions were inconsistent with their finding that Hackett was intellectually disabled. The Commonwealth's sole expert, a psychologist, relied on Hackett's pre-petition IQ scores in concluding that the Hackett was not intellectually disabled. He disputed the connection between Hackett's exposure to certain chemicals and the drop in his IQ score and testified that there was no evidence that Hackett's participation in a boxing program caused brain damage. After hearing the testimony, the PCRA court found that the defendant had proven his intellectual disability by a preponderance of the evidence.[42]

The Pennsylvania Supreme Court reversed the PCRA court holding that its conclusion that Hackett was intellectually disabled was not supported by substantial evidence. In addition, the court found that the PCRA court had erred in improperly equating borderline intellectual functioning with intellectual disability. Specifically, the PCRA court erred in dismissing Hackett pre-petition IQ scores on the grounds that the Commonwealth's expert could not vouch for the veracity or accuracy of the earlier tests. Such a view, the court stated, ignores the standard of review that places the burden on the defendant to prove intellectual disability. In addition, the PCRA court failed to give weight to the fact that Hackett was never diagnosed as intellectually disabled until he sought *Adkins* relief. Further, the PCRA court improperly equated evidence of learning disabilities or other neurological abnormality with proof establishing significant sub-average intellectual functioning. In addition, the defense failed to provide adequate support for the theory that the dramatic drop in defendant's IQ was caused by boxing and exposure to toxic chemicals and failed to identify evidence of significant limitations in adaptive functioning.[43]

Justice Baer dissented, joined by Justices Saylor and Todd. In the dissent's view, the majority's conclusion that the record did not support the PCRA court's factual findings was unsupportable under the standard of review on appeal. The dissent argued that the evidence the majority relied upon in reversing the PCRA court had already been considered and rejected by the fact-finder. In re-weighing the evidence, the dissent claimed that the majority had "disregarded the most basic facet of appellate review" that a reviewing court is bound by the factual and credibility determinations of the PCRA court "where those findings are supported by the record."

INEFFECTIVENESS AND THE INTERSTATE AGREEMENT ON DETAINERS

The Interstate Agreement on Detainers (IAD)[44] establishes procedures for the transfer of prisoners incarcerated in one jurisdiction to the temporary custody of another

42. The PCRA court found that Hackett's post-petition IQ score placed Hackett in the range of mild mental retardation, that Hackett had not malingered on the post-petition test, that earlier IQ scores were unreliable, and that Hackett had deficits in adaptive functioning.

43. The Court rejected the Commonwealth's request to adopt a more stringent *Adkins* framework.

44. Pennsylvania, forty-eight states, the District of Columbia and the United States have adopted the Agreement. *See* 42 Pa.C.S.A. §§9101 – 9108.

jurisdiction which has lodged an untried charge detainer against a prisoner. Under Article III of the Agreement, a prisoner against whom an untried charge detainer has been lodged can request to be transferred and tried in the jurisdiction that lodged the detainer.[45] The request requires that the lodging jurisdiction try the prisoner within 180 days of his or her request.[46] If the prisoner is not tried within the required time period, the charges are required to be dismissed with prejudice.[47] Under Article IV of the Agreement, if the prosecutor in the state where the untried charges are pending initiates the transfer of the prisoner, trial of the prisoner must commence within 120 days of the arrival of the prisoner in the receiving state.[48]

In *Commonwealth* v. *Destephano*,[49] a case of first impression, the Superior Court considered whether the time limits of the IAD apply to an untried defendant once the sentence in the sending state has been completed. After Destephano was charged with multiple offenses in Pennsylvania, he was incarcerated in North Carolina. Following notification of the Pennsylvania detainer, Destephano requested to be tried in Pennsylvania under Article III of the Agreement. Following his transfer to Pennsylvania and while awaiting disposition of the Pennsylvania charges, Destephano completed his North Carolina sentence. More than 180 days after he requested to be tried, Destephano pled guilty to one count of the Pennsylvania charges. Thereafter, he sought PCRA relief alleging that the court that convicted and sentenced him did not have jurisdiction[50] and that trial counsel was ineffective in failing to seek dismissal of charges based upon the Commonwealth's failure to bring him to trial pursuant to the timeliness requirements of Articles III and IV of the Agreement. The PCRA court denied relief, finding that the time limits set out in Articles III and IV of the Agreement did not apply once Destephano was released from his North Carolina sentence.

The Superior Court affirmed the denial of PCRA relief. Stating that its task was solely one of statutory interpretation as no facts were in dispute, the court initially noted that both Articles III and IV of the Agreement apply only to "prisoners" serving a "term of imprisonment" in the sending state. In addition, the court stated that the purpose of the Agreement to minimize the disruption that untried charges have on the rehabilitation of a defendant is no longer relevant once the defendant's sentence in the sending state has been completed. As a result, the court concluded that once Destephano had completed his sentence in North Carolina, the time limits in the Agreement did not bar his prosecution in Pennsylvania. Because Destephano was not entitled to dismissal of the charges, trial counsel was not ineffective for failing to file a motion to dismiss.

PCRA JURISDICTION AND THE PHILADELPHIA MUNICIPAL COURT

The Municipal Court in Philadelphia was established in 1968[51] to relieve the backlog of cases that existed within the County.[52] The new court was given jurisdiction over summary offenses, less serious criminal offenses for which no prison term may be imposed or which are punishable by imprisonment for a term of not more than 5 years and certain civil actions except actions by or against a Commonwealth party.[53] For criminal offenses, the defendant has the right of appeal for a trial *de novo*, including the

45. 42 Pa.C.S.A. §9101 (III)(a).
46. *Id.*
47. 42 Pa.C.S.A. §9101 (V)(c).
48. 42 Pa.C.S.A. §9101 Iv(a),(c).
49. 87 A.3d 361 (Pa. Super. 2014).
50. 42 Pa.C.S. §9543(a)(1)(Viii).
51. Pa. Const. Art.V, §6(c).
52. *Commonwealth* v. *Harmon*, 366 A.2d 895, 898-99 (Pa. 1976).
53. 42 Pa.C.S. §1123(a). 42 Pa.C.S. §8501 defines Commonwealth party as a "Commonwealth agency and any employee thereof, but only with respect to an act within the scope of his office or employment." In *Tork-Hiis* v. *Commonwealth*, 735 A.2d 1256, 1259 (Pa. 1969), the Court held that "the [C]ommonwealth and its agencies are distinct legal entities."

right to trial by jury, in the court of common pleas. With one exception, the Municipal Court has concurrent jurisdiction with the Court of Common Pleas of Philadelphia.[54]

In another case of first impression, *Commonwealth* v. *Martorano*,[55] the Superior Court considered whether the Philadelphia Municipal Court has jurisdiction over PCRA petitions. After being charged with multiple offenses, Martorano pled guilty in the Municipal Court to two misdemeanor offenses. Her appeal to the Court of Common Pleas was dismissed because of her guilty plea. Martorano filed a PCRA petition in the Municipal Court alleging her lawyer had provided ineffective assistance in advising her to plead guilty.[56] The court held an evidentiary hearing and permitted Martorano to withdraw her plea and proceed to trial. Thereafter, the Commonwealth filed a writ of certiorari to the Court of Common Pleas challenging the jurisdiction of the Municipal Court to grant PCRA relief. The common pleas court denied the Commonwealth's motion to dismiss and affirmed the Municipal Court's grant of relief under the PCRA.

In vacating the order of the Municipal Court granting the defendant relief, the Superior Court initially noted that notwithstanding the fact that the Rules of Criminal Procedure govern PCRA proceedings,[57] a PCRA petition is in fact civil in nature.[58] In addition, the court noted that the court of common pleas has original jurisdiction in PCRA proceedings.[59] The court held that although the Municipal Court has jurisdiction over certain civil matters and concurrent jurisdiction with the court of common pleas over certain criminal offenses, a petition seeking collateral relief from a criminal conviction does not fit within the Municipal Court's limited civil jurisdiction or within the court's limited concurrent jurisdiction. As a result, the court held that the Municipal Court did not have jurisdiction in PCRA proceedings. In a footnote, the court noted the "significant ramifications" of its holding in light of the delay and backlog of cases in the court of common pleas. The court acknowledged that the existing practice of having Municipal Court judges rule on PCRA petitions was "eminently reasonable" in light of Pa.R.Crim.P. 903(a) that provides that the judge who presided over the defendant's criminal case should rule on the defendant's PCRA petition. The court stated that a remedy to this "unfortunate and. . . unintended result" will require "either legislative or Supreme Court action. . . ."

CORAM NOBIS RELIEF WHERE PCRA DOES NOT PROVIDE A REMEDY

The PCRA is the "sole means of obtaining collateral relief" and "encompasses all other statutory and common law remedies" including habeas corpus and *coram nobis*.[60] Common law remedies continue to exist only in cases where a claim is not cognizable under the Act.[61] If the claim is cognizable, a defendant "may only obtain relief under the PCRA."[62] Assuming the petition for post-conviction relief is timely,[63] post-conviction relief is only available to defendants who are currently serving a sentence of

54. 42 Pa.C.S. §1123(b).
55. 89 A.3d 301 (Pa. Super. 2014).
56. Pa.R.Crim P. 903(A) provides that the court should forward a PCRA petition to the trial judge. *Commonwealth* v. *Abu-Jamal*, 720 A.2d 79, 90 (Pa. 1998) ("Generally, it is deemed preferable for the same judge who presided at trial to preside over the post-conviction proceedings since familiarity with the case will likely assist the proper administration of justice.").
57. Pa.R.Crim.P. 900 -910.
58. *Commonwealth* v. *Haag*, 809 A.2d 271, 284 (Pa. 2002).
59. 42 Pa.C.S. §9545(a).
60. 42 Pa.C.S. §9542.
61. *See e.g., Commonwealth* v. *West*, 938 A.2d 1034, 1043 (Pa. 2007) (substantive due process challenge to validity of recommitting the defendant to prison after he had been mistakenly set free not within ambit of PCRA); *Commonwealth* v. *Judge*, 916 A.2d 511 (Pa. 2007) (alleged violation of defendant's rights under the International Covenant for Civil and Political Rights not cognizable PCRA claim).
62. *Commonwealth* v. *Pagan*, 864 A.2d 1231, 1233 (Pa. Super. 2004).
63. 42 Pa.C.S. §9545(b).

imprisonment or on probation or parole at the time the petition is filed and at the "time relief is granted."[64]

In *Commonwealth* v. *Decardes*,[65] the Superior Court considered whether a defendant who is no longer in custody can seek post-conviction relief by writ of *coram nobis*. Decardes, a resident alien, pled guilty to a number of offenses and, after completing a term of probation, left the country. When he attempted to return, immigration officials denied him re-entry on the basis of his felony convictions. After seeking to withdraw his guilty plea, Decardes filed a petition for a writ of error *coram nobis* alleging plea counsel was ineffective for failing to advise him that he would be deported as a consequence of his plea. The trial court treated the petition as a PCRA petition and dismissed it as untimely. After the Supreme Court's decision in *Padilla* v. *Kentucky*,[66] Decardes filed a second petition for writ of *coram nobis*. While the trial court again treated the petition as having been filed under the PCRA, it nonetheless ordered Decardes' guilty plea withdrawn, finding that deportation was a sentence under the PCRA.[67]

The Superior Court initially considered whether the trial court properly treated Decardes petition for writ of *coram nobis* as a PCRA petition. The court concluded that deportation, while a penalty, is not a sentence and that at the time Decardes sought relief, he was no longer in custody. As such, he was not eligible for PCRA relief. The court then turned to the question of whether Decardes' underlying claim was cognizable under the PCRA. While claims of ineffectiveness of counsel are explicitly within the purview of the PCRA, the court concluded that Decardes' claim of ineffectiveness of counsel did not exist until *Padilla* was decided, which was several years after Decardes had completed his sentence. As such, the court concluded that the instant case was "one of the rare instances in which the PCRA fails to provide a remedy for the claim." Because Decardes' claim was not recognized until after the time he had to file a timely PCRA petition, the court concluded that the trial court erred in treating his request for relief as a PCRA petition. In addition, the court held that because Decardes was no longer in custody but "continues to suffer the serious consequences of deportation," the trial court should have treated his petition as one seeking "*coram nobis* relief." Lastly, the court concluded that Decardes was not entitled to *coram nobis* relief in light of the United States Supreme Court's decision in *Chaidez* v. *United States*,[68] holding that *Padilla* announced a new rule of constitutional law that was not applicable to defendants whose conviction became final before *Padilla* was decided.[69]

THE PCRA AND MANDATORY MINIMUM SENTENCES

In *Alleyne* v. *United States*,[70] the United States Supreme Court considered whether its decision in *Apprendi* v. *New Jersey*[71] applied to mandatory minimum sentences. In

64. 42 Pa.C.S. §9543(a). In *Commonwealth* v. *Turner*, 80 A.3d 754 (Pa. 2013), the Supreme Court upheld the constitutionality of the requirement that a defendant seeking relief under the PCRA must be in custody both at the time the petition is filed and when relief is granted. 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 their sentence. Due process, the Court said, does not require a state to provide unlimited opportunities for collateral relief of constitutional claims. The Court went on to reject the use of habeas corpus or *coram nobis* where the defendant's sentence was completed during the time her PCRA petition was pending.

65. 101 A.3d 105 (Pa. Super. 2014), *appeal granted*, 112 A.3d 1207 (Pa. 2015).

66. 559 U.S. 356 ((2010). In *Padilla*, the Court held that where deportation consequences of a guilty plea are "truly clear," counsel must inform his non-citizen client that a guilty plea will make him eligible for deportation.

67. 42 Pa.C.S. §9543(a)(2)(vii).

68. 133 S.Ct. 1103 (2013).

69. In a concurring and dissenting opinion, Judge Bowes argued that the majority erred in concluding that the defendant properly invoked *coram nobis* to obtain review of his untimely ineffective assistance of counsel claim. In Judge Bowes' view, defendant's ineffectiveness claim was cognizable under the PCRA and, as such, the defendant was foreclosed from seeking relief by means of a common law writ even though he could not obtain PCRA relief because he was no longer in custody.

70. 133 S.Ct. 2151 (2013).

71. 530 U.S. 466 (2000).

Apprendi, the Court held that other than a prior conviction, any fact that increases "the penalty for the crime beyond the prescribed statutory maximum" must be found by the factfinder beyond a reasonable doubt or admitted by the defendant at his guilty plea.[72] In *Alleyne*, the Court applied *Apprendi* and held that a defendant has a constitutional right to have a jury decide whether a fact that leads to the imposition of a mandatory minimum sentence has been proven beyond a reasonable doubt.[73]

In *Commonwealth* v. *Riggle*,[74] the defendant's sentence included a mandatory minimum term of five years' imprisonment. Following appeal, Riggle filed a timely PCRA petition alleging ineffectiveness of counsel. In response to the PCRA court's notice of intention to dismiss without a hearing, Riggle claimed his sentence was illegal under *Alleyne*. The PCRA court's denial of relief was affirmed by the Superior Court. The Superior Court noted that while it had applied *Alleyne* to cases pending on direct appeal, the question presented in *Riggle* was whether *Alleyne* is retroactive and therefore applicable to defendants seeking collateral review. In *Riggle*, the court noted that in *Teague* v. *Lane*,[75] the United States Supreme Court established a framework for determining whether a constitutional ruling such as *Alleyne* should be applied "retroactively to judgments in criminal cases that are already final on direct review."[76] Under *Teague*, an "old rule," namely an extension or clarification of a principle already established, applies to defendants on both direct and collateral review. On the other hand, a new rule, defined as a ruling that "breaks new ground or imposes a new obligation on the States and Federal Government,"[77] is generally applicable only to cases that are still on direct review.[78] *Teague* recognized two exceptions to the general rule that new rules do not apply to cases on collateral review: (1) a new substantive rule that forbids "criminal punishment of certain primary conduct" or prohibits "a certain category of punishment for a class of defendants"[79] and (2) "watershed rules of criminal procedure: . . . those new procedures without which the likelihood of an accurate conviction is seriously diminished."[80]

The Superior Court concluded that "*Alleyne* is undoubtedly a new constitutional rule" because it overruled a prior Supreme Court decision. *Alleyne* was not substantive in nature because it did not "prohibit punishment for a class of offenders" or decriminalize conduct. In concluding that *Alleyne* did not announce a "watershed procedural rule,"[81] the court relied upon the United States Supreme Court's decision in *Schriro* v. *Summerlin*.[82] In *Schriro*, the Court concluded that the rule in *Ring* v. *Arizona*[83] that

72. In *Blakely* v. *Washington*, 542 U.S. 296 (2004), the Court held that the statutory maximum for purposes of *Apprendi* is the "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

73. In *Alleyne*, the Court held that the elements of a crime include "not only facts that increase the ceiling but also those that increase the floor" of the punishment to which the defendant may be subjected. *Alleyne* expressly overruled *Harris* v. *United States*, 536 U.S. 545 (2002) in which the Court held that a mandatory minimum sentence did not result in a sentence that exceeded the statutory maximum.

74. 119 A.3d 1058 (Pa. Super. 2015).

75. 489 U.S. 288 (1989).

76. *Whorton* v. *Bockting*, 127 S.Ct. 1173 (2007).

77. *Teague*, 489 U.S. at 301.

78. In *Danforth* v. *Minnesota*, 552 U.S. 264 (2008), the Supreme Court held that state courts are not bound by *Teague* and may choose the standard for deciding whether new rules of federal constitutional procedure are applicable to defendants seeking collateral review. In *Commonwealth* v. *Cunningham*, 81 A.2d 1, 8 (Pa. 2013), the Pennsylvania Supreme Court noted that it had "generally looked to the *Teague* doctrine in determining retroactivity of new federal constitutional rulings" but acknowledged that "this practice is subject to potential refinement" noting that *Teague* is not "necessarily a natural model for retroactivity jurisprudence as applied at the state level."

79. *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989).

80. *Teague*, 489 US. at 311, 313. In *Teague*, the Court noted that the "watershed rule" exception was "extremely narrow" and the Court thought it unlikely that any such rules" ha[ve] yet to emerge."

81. The court in *Riggle* noted that several Circuit Courts of Appeal, including the Second, Third, Fourth, Fifth, Seventh and Tenth Circuits have determined that in the context of second or successive federal habeas corpus petitions *Alleyne* does not apply retroactively. In contrast to state courts considering the issue, in federal habeas corpus proceedings, "a new rule is not made 'retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive." *Tyler* v. *Cain, 533 U.S. 656, 663 (2001)*.

82. 542 U.S. 348 (2004).

83. 536 U.S. 584 (2002).

Apprendi required a jury determination of an aggravating circumstance before a death sentence may be imposed was not a "watershed procedural rule" because a jury finding of an aggravating circumstance beyond a reasonable doubt was not central to an accurate determination that death is a legally appropriate punishment. With respect to mandatory minimum sentences, the Superior Court concluded that absent a jury finding beyond a reasonable doubt of the fact that would trigger a mandatory minimum, the defendant could receive the identical sentence.[84] As a result, a jury determination is not central to the "fundamental fairness of the trial" or the sentencing decision. Because *Alleyne* was not retroactive,[85] Riggle was not entitled to collateral relief.

PROCEDURAL ISSUES

Pa.R.Crim.P. 910 and a PCRA Order Granting and Denying Relief

Pa.R.Crim.P. 910 governing appeals in PCRA cases provides that an order "granting, denying, dismissing or otherwise finally disposing" of a PCRA petition is a "final order for purposes of appeal." In *Commonwealth* v. *Gaines*,[86] the Superior Court considered the application of Rule 910 to a PCRA order that granted in part and denied in part the issues presented in the PCRA petition. After his judgment of sentence was affirmed on direct appeal, Gaines filed a timely PCRA petition raising a number of claims including that counsel was ineffective in failing to bring to the sentencing court's attention a miscalculation concerning his prior record score. After the PCRA court scheduled a resentencing hearing based on a stipulation of the parties that the Gaines's original sentence was based on an improperly calculated prior record score, the court granted Gaines leave to file an amended PCRA petition presenting additional claims. Following a hearing, the court on July 15, 2013, entered an order granting Gaines relief on one sentencing claim and denying all claims for a new trial. The order was mailed to Gaines on July 17, 2013. Also on July 17, 2013, the court resentenced Gaines. Thereafter, on August 19, 2013, Gaines filed a notice of appeal from the PCRA court's order denying his guilt phase claims for relief.

At issue on appeal was whether Gaines's appeal was timely.[87] Gaines claimed that the appeal was timely because the July 15 order was not final and that the final order was the order imposed at the completion of the trial court proceeding ordered by the PCRA court's grant of relief.[88] In rejecting Gaines's position, the court noted that Gaines's entire argument on appeal related to the PCRA court's order of July 15, 2013, denying his guilt phase claims for PCRA relief.[89] The Superior Court held that the PCRA court's July 15 order was a final order under Pa.R.Crim.P.910 because it ended collateral proceedings in the matter. The new sentencing proceeding ordered by the PCRA court was a "trial court function" and not a PCRA proceeding. The court concluded that the PCRA court's July 15, 2013 order disposed of all of Gaines's claims in his PCRA petition. As such, Gaines's notice of appeal was due August 16, 2013, 30 days

84. Consistent with *Alleyne*, a judge may use a fact about the defendant or the defendant's crime to increase the sentence within, rather than outside, the prescribed sentencing range.

85. *See also Verge* v. *State*, 50 Kan. App. 591 (2015).

86. 2015 Pa. Super Lexis (Nov. 5, 2015) (*en banc*).

87. The Superior Court initially quashed the appeal as untimely. The court granted reargument *en banc* and directed the parties to file supplemental briefs on whether the untimeliness of defendant's notice of appeal divested the court of jurisdiction to consider defendant's claims.

88. Following resentencing on July 17, 2013, the defendant filed a post-sentence motion. On July 30, 2013, the trial court issued an order granting the motion and correcting the Recidivism Risk Reduction Incentive Act eligibility component of defendant's sentence.

89. The court noted that in *Commonwealth* v. *Bryant*, 780 A.2d 646 (Pa. 2001), a capital case, the Pennsylvania Supreme Court held that when the PCRA court denies all claims of relief with respect to the guilt phase, but orders a new penalty hearing, the court's order is final for purposes of appeal. The court rejected the defendant's argument that *Bryant* was applicable only in capital cases.

from July 17, 2013. Because the notice of appeal on August 19, 2013 was untimely, the court held it was without jurisdiction and quashed the appeal.[90]

Request for an Evidentiary Hearing and Required Certification

The PCRA requires that a request for an evidentiary hearing include a certification, signed by the defendant, as to each intended witness which identifies the witness's name, address, date of birth, the expected substance of his or her testimony and any documents material to that testimony.[91] In *Commonwealth* v. *Lippert*,[92] the Commonwealth argued in the Superior Court that Lippert had failed to preserve his appellate issues because the witness certification he had attached to his petition was deficient. Although the court agreed that the certification was deficient, it concluded that it could not affirm the PCRA court's order dismissing Lippert's petition. The Superior Court stated that in both the PCRA court's notice of intention to dismiss[93] and its order formally dismissing the defendant's petition, the court stated only that the petition lacked issues of arguable merit. The PCRA court did not refer to Lippert's deficient witness certification. The court noted that Pa.R.Crim.P.905 governing amendments to PCRA petitions "is intended to provide petitioners with a legitimate opportunity to present their claims" in a manner to "avoid dismissal due to a correctable defect. . . ." The court concluded that when a PCRA court is presented with a petition that "is defective in form or content," the PCRA court has the responsibility of informing the defendant of the nature of the defect and providing the defendant an opportunity to amend. Because this did not occur here, the court remanded the case to the PCRA court with direction that Lippert be permitted to amend his certification.[94]

A Second Petition and the One-Year Filing Period

In *Commonwealth* v. *Callahan*,[95] Callahan filed a timely PCRA petition raising a number of ineffectiveness claims including that counsel was ineffective in failing to file a post-sentence motion and in failing to preserve a sufficiency of the evidence claim. Following an evidentiary hearing, the PCRA court on March 22, 2012, reinstated Callahan's right to file a post-sentence motion and his right to file direct appeal *nunc pro tunc*. The court denied his remaining claims of trial counsel ineffectiveness. Instead of filing a post-sentence motion and a direct appeal, Callahan appealed the PCRA court's denial of his other claims of trial counsel ineffectiveness. On March 11, 2013, the Superior Court affirmed the PCRA court. Thereafter, on April 30, 2013, Callahan filed a second PCRA petition alleging first PCRA counsel was ineffective. Again, the PCRA court denied relief and Callahan appealed.

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90. President Judge Emeritus Bender joined by President Judge Gantman and Judge Shogan dissented. In Judge Bender's view, the July 15, 2013 order was a "hybrid order that was not final for purposes of Pa.R.Crim.P. 910." The final order, in the dissent's view, was the lower court's order of July 30, 2013 that finalized the PCRA proceeding. The dissent viewed the *Bryant* decision as applying only in capital cases and that its application to non-capital cases will result in "waiver trap" in which *pro se* litigants and attorneys not experienced in PCRA litigation may presume that the defendant must wait until resentencing to file an appeal. Such a presumption, the dissent noted, is "logical" because filing notice of appeal prior to being resentenced will result in the lower court losing jurisdiction in the matter and staying resentencing until appeal from the denial of his non-sentencing claims is completed.

91. 42 Pa.C.S. §9545(d)(1).

92. 85 A.3d 1095 (Pa. Sup. 2014).

93. Pa.R.Crim.P. 907(1).

94. In the trial court, Lippert entered a plea of *nolo contendere* to one count of indecent assault. In his PCRA petition, Lippert claimed counsel was ineffective for misinforming him that he would not have to register as a sexual offender following the entry of his plea. In concluding that the defendant's claim had arguable merit and he was entitled to an evidentiary hearing, the Superior Court held that although sexual offender registration requirements are collateral consequences of pleading guilty or *nolo contendere* and that a defendant's lack of knowledge of the registration requirements does not undermine the validity of a plea, counsel is nonetheless ineffective where he misinforms his client about the consequences of a guilty plea, whether the consequences are "direct" or "collateral." *See Commonwealth* v. *Barndt*, 74 A.3d 185, 191-92 (Pa. Super. 2013).

95. 101 A.3d 118 (Pa. Super. 2014).

The issue before the Superior Court was whether Callahan's second PCRA petition was timely.[96] The court noted that when in response to a first petition, a PCRA court reinstates direct appeal *nunc pro tunc*, a subsequent PCRA petition is considered a first petition for timeliness purposes.[97] The court stated the issue of whether Callahan's second petition was timely depended upon when Callahan's judgment of sentence became final.[98] In concluding that his judgment of sentence became final on April 23, 2012, the last date that Callahan could have filed his direct appeal *nunc pro tunc*,[99] the court stated that a judgment of sentence became final immediately upon expiration of the time for seeking direct review "even if other collateral proceedings are still ongoing." Finally, the court concluded that its timeliness analysis was not affected by the fact that Callahan was precluded from filing a second petition prior to April 11, 2013,[100] while his appeal of the partial denial of his first PCRA petition was still pending.[101] Because Callahan was required to file his second PCRA petition on or before April 23, 2013, his later filed petition was untimely.

CONCLUSION

Recent decisions include significant rulings on issues of timeliness, waiver, jurisdiction, ineffectiveness of PCRA counsel, and the common law writ of *coram nobis*. The Superior Court clarified the due diligence requirement with respect to after-discovered evidence claims and limited the presumption of access to public records. The court reaffirmed that a defendant can challenge the effectiveness of PCRA counsel in response to the PCRA court's notice of intention to dismiss, but refused to find that the notice was defective because it did not inform the defendant that an ineffectiveness claim was waived unless raised in the PCRA court. In a decision that will be reviewed by the Pennsylvania Supreme Court, the Superior Court found the trial court erred when it failed to address defendant's request for collateral relief as a petition for writ of *coram nobis*. Finally, the court concluded that the Municipal Court of Philadelphia does not have jurisdiction in PCRA matters and that a PCRA court must provide the defendant an opportunity to amend a defective petition prior to dismissal.

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96. Although not addressed by the parties, the court noted that it could raise the issue of timeliness *sua sponte* because the issue implicates the jurisdiction of the court. *Commonwealth* v. *Grandy*, 38 A.3d 899, 902 (Pa. Super. 2012).

97. *Commonwealth* v. *Turner*, 73 A.3d 1283, 1286 (Pa. Super. 2013), *appeal denied*, 91 A.3d 162 (Pa. 2014).

98. 42 Pa.C.S. §9545(b) provides in pertinent part that "[a]ny petition . . . including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final. . . .

99. The court rejected the later date of April 10, 2013 as the date the judgment became final. This date represents the end of the period following the Superior Court's decision affirming the PCRA court's denial of PCRA relief in which the defendant could seek *allocator*.

100. 30 days after the Superior Court affirmed the PCRA court's denial of relief.

101. *Commonwealth* v. *Lark*, 746 A.2d 585, 588 (Pa. 2000) ("[W]hen an appellant's PCRA appeal is pending before a court, a subsequent PCRA petition cannot be filed until resolution of review of the pending PCRA court by the highest state court in which review is sought, or upon expiration of the time for seeking such review.").