[J-119-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 197 MAP 2002
	:	
Appellant	:	Appeal from the order of the Superior
	:	Court, dated March 27, 2002, affirming the
	:	order of the Bucks County Court of
v.	:	Common Pleas, dated March 2, 2001.
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	:	
DENNIS FLANAGAN,	:	
	:	Resubmitted: April 30, 2004
Appellee	:	
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DISSENTING OPINION

MR. JUSTICE CASTILLE **Decided: July 23, 2004**

This Court granted discretionary review to consider the award of Post Conviction Hearing Act (PCHA)[1] relief to appellee Dennis Flanagan. The PCHA court in this matter overturned appellee's first degree murder verdict and permitted him to withdraw his 1981 general plea of guilty to charges of murder, robbery and conspiracy. The court concluded that appellee's guilty plea was entered unknowingly because the plea colloquy failed to

[1] The PCHA was repealed in part, modified in part, and renamed the Post Conviction Relief Act (PCRA), effective April 13, 1988. Appellee filed his initial PCHA petition shortly before the 1988 amendment. The claim upon which relief was granted was added in an amended PCHA petition filed eleven years later.

establish an adequate factual basis for the plea. The Superior Court affirmed. For the reasons that follow, I would reverse.

The relevant facts are as follows: on July 1, 1981, the seventeen year-old appellee and his nineteen year-old accomplice, George Yacob, lured James Redman to a deserted industrial park in Bucks County, where he was robbed and beaten to death. Days later, Redman's decomposing body was found hidden in a wooded area behind the industrial park, beaten beyond recognition; his skull was fractured in four places, his larynx was broken, and he had been stabbed at least once.

On July 10, 1981, police arrested appellee and Yacob. Appellee admitted in a taped statement that he and Yacob had planned to bring Redman to a secluded area and "beat him up" because they believed he was a homosexual. Flanagan Statement, 7/10/81 at 2. As appellee explained, "George had told me that this guy had picked him up before, and he tried making certain advances on George. So me and George had figured we were gonna get together and work this guy over a little bit to change his mind a bit." Id. Appellee told police that they had promised Redman that appellee "would do it with him" if Redman drove appellee and Yacob to a secluded area. Id. Redman then drove them to the deserted industrial park where, according to appellee, Yacob grabbed Redman, hit him, knocked him down and then kicked him. Appellee recalled that when Redman got back up, "we just sort of started talking and telling him we were gonna beat his ass and this, that and the other thing." Id. at 4.

Appellee maintained, however, that he did not participate in the actual beating, and was not present when Yacob killed Redman and hid the body. Rather, he claimed that Yacob instructed him to take Redman's car to the front of the industrial park and wait for

him. Appellee explained that he complied, and approximately twenty minutes later, returned to the scene, picked up Yacob, and drove away in Redman's car, with Redman's wallet which, he said, Yacob had taken without appellee's knowledge. Appellee then recalled that, after several days with Redman's car, they picked up three hitchhikers and traveled to Atlantic City, New Jersey. Yacob's initial taped confession was consistent with appellee's account: Yacob said that appellee never touched Redman, and that during the attack he had instructed appellee to leave in Redman's car until he was done. See Yacob Statement, 7/10/81.

Appellee and Yacob were charged with first degree murder, robbery, theft by unlawful taking, receiving stolen property and conspiracy. The Commonwealth sought the death penalty against both defendants. On November 5, 1981, at a pre-trial hearing on appellee's motion to transfer the matter to juvenile court, the trial court, per the Honorable Isaac S. Garb, Jr., heard evidence concerning the facts of the case, including the autopsy report, appellee's taped statement and his subsequent in-court testimony. At that hearing, appellee changed his earlier account somewhat, testifying that he had never planned to lure Redman to a secluded area to beat him, but merely joined Yacob in Redman's car because he had believed that Redman would supply them with "crank" (methamphetamine). But, on cross-examination, appellee conceded that he had originally told police that he and Yacob had planned to find a secluded place to attack Redman. As in his taped statement, appellee recounted that, after the attack, they had left the scene in Redman's car, with Redman's wallet, and then later drove the stolen vehicle to the New Jersey shore with three hitchhikers. Judge Garb denied appellee's transfer motion.

At a subsequent hearing on November 24, 1981, Judge Garb considered the co-defendants' other pre-trial motions, including appellee's motion to suppress his earlier statement to police.[2] Again, the trial court heard evidence related to the facts of the case. The trial court granted the Commonwealth's request to incorporate the juvenile transfer hearing transcript into the hearing record. Appellee also testified a second time, insisting again that Yacob had attacked Redman, while he had merely watched until he was instructed to take Redman's car and "go wait for [Yacob] somewhere." The court also heard the testimony of several police officers who had arrested appellee and Yacob. Lieutenant Robert Eckert testified that, prior to the arrest, police had interviewed several witnesses, including Andrea McGlinchey. Lieutenant Eckert said that Ms. McGlinchey had told police that Yacob had pointed to Redman's car and boasted to her and a friend that he and appellee had "just beat up a guy to get that." Lieutenant Eckert further testified that, after appellee and Yacob were arrested and en route to the police station, appellee volunteered, "You know the guy was a fag, don't you?"

On December 1, 1981, appellee entered a plea of guilty to general homicide for the murder of Redman, and the related charges of robbery, theft by unlawful taking, receiving stolen property and criminal conspiracy. Judge Garb conducted a plea colloquy, with counsel present, in which he explained the theory of accomplice liability and that general homicide includes "first degree, second degree and third degree murder and voluntary and involuntary manslaughter." Judge Garb thoroughly discussed the elements of each of these offenses, as well as the offenses of robbery, theft by unlawful taking, receiving stolen

[2] A motion to sever the trials of the co-defendants was granted. All other motions were denied.

property and criminal conspiracy -- and the sentences that could be imposed under each. Judge Garb then informed appellee that he had the right to a trial in which the Commonwealth would bear the burden of proof, and that he did not have to plead guilty. Further, Judge Garb informed appellee that, as a result of his plea, the presumption would be that he was guilty of murder of the third degree, and that the Commonwealth would bear the burden of proof at the subsequent degree-of-guilt hearing. Throughout the colloquy, appellee repeatedly stated that he understood the charges and the consequences of entering the general plea. When the colloquy was complete, and appellee had verbally confirmed that he was entering his guilty plea knowingly and voluntarily, Judge Garb accepted the guilty plea. Neither appellee nor his counsel objected that the colloquy was deficient in any way.

The degree of guilt hearing immediately followed the guilty plea hearing. There the Commonwealth introduced additional evidence concerning the facts of the case, including extensive crime-scene evidence and new witnesses, including appellee's accomplice, Yacob. Yacob, who by this time had revised his version of events, testified that more than a week before the murder, "me and [appellee] had a plan to beat [Redman] up and take his car and, if possible, kill him."[3] Degree of Guilt Transcript, 12/2/81 at 186. Yacob described how he and appellee lured Redman to the industrial park by promising sex, and how he had pulled a knife on Redman once they got there. Yacob testified that he and appellee then taunted Redman as they passed the knife back and forth. Id. Eventually, Yacob said, "we both started beating up on him" and, when Redman would not stop screaming,

appellee stabbed him. According to Yacob, Redman continued to moan on the ground until appellee threw a large rock against his head, and then repeated the deed again. When it was clear that Redman was dead, Yacob recalled that, together, they dragged the body to a wooded area and hid it under a pile of trash.

Other witnesses corroborated aspects of Yacob's account. For example, fourteen year-old Tom McComeskey testified that several days before the murder he had heard appellee and Yacob "talking about how they were going to beat this guy up." Also, Miriam Frazier, one of the hitchhikers who went to the shore with appellee and Yacob in Redman's stolen vehicle, testified that when she asked about the car, appellee replied that they had "killed a guy for it." Id. at 93. She further testified that appellee claimed that "the guy was a fag," and bragged that he "did it all" because Yacob was too afraid. Id. at 94-95. Likewise, Gerald New, who had been incarcerated with appellee at the Bucks County Prison, testified that appellee had told him that he had been charged with murder and that he had beaten and stabbed his victim. New further testified that appellee said he thought his actions were justified because his victim was gay.

Upon completion of the degree of guilt hearing on December 3, 1981, Judge Garb found appellee guilty of first degree murder beyond a reasonable doubt:

> Considering the number and severity of the blows inflicted in this case to areas of the body where the blows were administered, noticeably the head, face and side, we are satisfied that these facts clearly establish the intent to kill. Considering that [appellee] inflicted many if not most of the serious injuries, together with his admissions to various people that he had done so, caused us to conclude that he had in fact formed the requisite intent to kill which would support the finding of murder in the first degree.

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[3] Several days earlier, Yacob pleaded guilty to first degree murder, conspiracy, robbery, theft and receiving stolen property. He received a sentence of life imprisonment and a concurrent sentence of ten to twenty years.

Trial Court slip op. at 19. At the penalty phase, Judge Garb concluded that sufficient mitigating factors were established to prevent the imposition of the death penalty. Thus, on December 18, 1981, appellee was sentenced to life imprisonment and a concurrent sentence of ten to twenty years for the robbery conviction. No timely post-sentence motions were filed.

In October of 1982, upon petition of counsel, Judge Garb granted permission to file post-verdict motions *nunc pro tunc*. The only issue raised in the post-verdict motion was the trial court's refusal to transfer the matter to juvenile court. Judge Garb denied the post-verdict motion. The Superior Court affirmed and on March 3, 1985, this Court denied allocatur.

On May 5, 1988, appellee filed a *pro se* petition under the now-repealed Post-Conviction Hearing Act (PCHA), 19 P.S. § 1180-1, *et seq*., alleging, *inter alia*, that trial counsel was ineffective because the "guilty plea was deficient and therefore [appellee] could not have knowingly entered it." The trial court appointed the Public Defender's Office of Bucks County to represent appellee, but counsel took no action on the petition. Appellee filed a request for new counsel on March 3, 1999 -- more than ten years later.[4] At that time, appellee also filed a "suggested" amendment to his pending PCHA petition, which included several new claims of counsel ineffectiveness and trial court error, including the relevant claim here, which expanded upon his original claim that the "guilty plea was deficient": i.e., "the trial court erred in accepting petitioner's guilty plea; inasmuch as no

[4] There is no explanation in the record of the reasons for this delay.

factual basis was established relating admitted acts to the elements of the offenses charged, the plea was unknowing."

On June 20, 2000, after a hearing to consider appellee's "motion and supplemental motion" for post-conviction relief, the Honorable John J. Rufe appointed new counsel and granted leave for counsel to amend or supplement the original *pro se* petition.[5] On November 14, 2000, appellee filed a counseled "brief in support of post-conviction collateral relief," which expanded upon his original *pro se* petition and claimed, *inter alia*, that "trial counsel were ineffective when they failed to object to a guilty plea colloquy without a factual basis to substantiate any of the claims."[6]

On March 2, 2001, after an evidentiary hearing, the PCHA court granted appellee's petition for post-conviction relief, overturned his first degree murder conviction, and permitted him to withdraw his 1981 guilty plea. Concluding that appellee's initial post-conviction appointed counsel had let his PCHA petition sit idle for more than ten years without explanation or justification, the PCHA court examined the merits of the petition under the PCHA, rather than the PCRA. On the merits, the court found that appellee could

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[5] The PCHA court appointed present counsel, Randall Miller, Esq., on August 3, 2000, after prior appointed counsel withdrew.

[6] Appellee's "brief in support of post conviction relief" raised the following issues: (a) whether trial counsel were ineffective when they failed to object that the guilty plea colloquy lacked a factual basis; (b) whether trial counsel were ineffective in failing to object during the guilty plea colloquy when the court gave a defective description of accomplice liability as it pertains to first degree murder; (c) whether trial counsel were ineffective when they failed to object to the court's description of co-conspirator liability/criminal conspiracy in relation to the various degrees of murder and the permissible sentences for conspiracy to commit murder; and (d) whether trial counsel were ineffective when they failed to interview and/or present witnesses in an attempt to mitigate appellee's involvement in the crimes during the degree of guilt hearing.

not have entered the guilty plea with a full understanding of the nature of the charges because the facts underlying the offenses were not adduced on the record at the time the general guilty plea was entered. The court concluded that this was particularly important here because appellee had repeatedly denied participating in the actual beating:

> Where, as in this case, a defendant has offered an exculpatory explanation prior to the guilty plea, it should alert the judge hearing the plea to conduct an especially diligent examination of the defendant so as to assure that the plea is knowing and voluntary. Consequently, the existence of a factual basis for the plea and an application of the law, became essential to assuring a voluntary and knowing plea.

PCHA court slip op. at 14 (citation omitted). Thus, the PCHA court determined that the colloquy was defective as a matter of law for lack of a factual basis and that appellee's plea/trial counsel were ineffective for failing to object to the colloquy and for failing to petition the court to withdraw the plea thereafter.

A three-judge panel of the Superior Court affirmed, agreeing with the PCHA court's predicate conclusion that the plea was unknowing because the colloquy failed to set forth a factual basis for the plea. The panel reasoned that, although appellee "felt that he was guilty as an accomplice," there was "no indication in the record that [he] at any time was aware that he would be accused of conspiring to kill the victim; that he would be accused of stabbing and bludgeoning the victim; or that he would ever be accused of even touching the victim." Superior Court slip op. at 10-11.

The Commonwealth sought further review and this Court granted allocatur to consider, *inter alia,* the PCHA court's conclusion that the absence of a detailed factual basis in a colloquy preceding a general plea of guilt and degree of guilt hearing rendered appellee's plea constitutionally unsound as a matter of law, and thereby rendered counsel

ineffective for failing to object.[7] Our standard of review is whether the post-conviction court's determination is supported by evidence of record and whether it is free of legal error. Commonwealth v. Jermyn, 709 A.2d 849, 856 (Pa. 1998).

The Commonwealth argues that, in analyzing the plea, the PCHA court failed to apply the totality of the circumstances test, which is the correct standard for determining whether a guilty plea is knowing, intelligent and voluntary. Under this standard, the Commonwealth argues that the plea was knowing, intelligent and voluntary because the

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[7] The Commonwealth's allocatur petition raised the following issues:

a. Whether the PCHA court erred in reversing appellee's twenty-year-old first degree murder conviction and in imposing an absurd requirement that he admit to facts that he is attempting to dispute at the degree of guilt hearing;

b. Whether appellee is entitled to a new trial based on an inadequate colloquy to third degree murder when appellee entered the plea to avoid the death penalty and was, in fact, found guilty beyond a reasonable doubt of first degree murder by the trial court;

c. Whether appellee waived his challenge to the validity of his guilty plea and whether the PCHA court erred in granting post-conviction collateral relief;

d. Whether appellee failed to plead and prove by a preponderance of the evidence that he was entitled to relief when he presented no evidence to support his claims;

e. Whether the PCHA court lacked jurisdiction to hear appellee's request for post-conviction collateral relief, specifically as to the charge for which relief was granted, as said action was untimely filed;

f. Whether the delay in the post-conviction collateral challenge of the guilty plea has prejudiced the Commonwealth's ability to re-try appellee such that the requested relief must be denied.

Our general grant of allocatur encompassed all of these issues.

plea colloquy was thorough, and because appellee acknowledged that he understood the charges against him. Moreover, the Commonwealth avers that the PCHA court's conclusion that the colloquy was defective for failing to establish a factual basis ignores the crucial fact that this was not simply a guilty plea, but a general plea of guilty which was to be followed by a degree of guilt hearing. The evidence which was adduced immediately following the colloquy -- and which appellee was free to contest in order to determine the degree of guilt -- proved appellee's willful, deliberate and malicious murder of Redman. The Commonwealth also contends that appellee's claim that trial counsel was ineffective for failing to object to the plea colloquy was untimely under the Post Conviction Relief Act (PCRA), and its amendments, 42 Pa.C.S.A. § 9541 *et seq*., which were enacted during the pendency of his petition.

Appellee counters that the absence of an adequate factual basis for the plea in the colloquy, and trial counsel's failure to object to the colloquy or move to withdraw the plea, led him to unknowingly admit his general guilt to crimes that he did not commit. Specifically, appellee argues that, in prior proceedings, he had expressly denied having participated in the actual killing of Redman. Appellee now avers that his plea was motivated by the fact that he felt guilty that he did not try to stop the beating or tell police about it, but he argues that he mistakenly believed that this alone was sufficient to render him responsible for the crimes.

As a preliminary matter, we consider the Commonwealth's contention that appellee's amended petition, which raised this claim, is untimely under the PCRA. The PCRA timeliness requirements are jurisdictional in nature and, accordingly, a court cannot hear untimely PCRA petitions. Commonwealth v. Rienzi, 827 A.2d 369, 371 (Pa. 2003). See

also Commonwealth v. Hall, 771 A.2d 1232, 1234 (Pa. 2001) ("Pennsylvania courts lack jurisdiction to entertain untimely PCRA petitions.").

The Commonwealth avers that, since appellee did not raise the issue of whether the colloquy was defective for failing to establish a factual basis for the plea in his original *pro se* petition filed under the PCHA, his 1999 "amended" petition -- which raised the issue for the first time -- is actually a new petition subject to the PCRA, and not an amendment to the original and pending PCHA petition.[8] Because the "amended" petition was filed more than one year after the PCRA's one-year time limitation became effective in 1996, the Commonwealth argues that this claim should be dismissed as untimely.

The 1995 amendments to the PCRA (which took effect on January 16, 1996) indeed require that all petitions be filed within one year of the date on which the judgment becomes final, or within one year of the effective date of the amendment. 42 Pa.C.S. § 9545. The PCHA, however, included no such time restriction. A post-conviction court has broad discretion in granting leave to amend a petition for post-conviction collateral relief. See PA.R.CRIM.P. 905(A) ("The judge may grant leave to amend or withdraw a petition for post-

[8] According to the docket sheet, appellee did not file an amended PCHA petition in March of 1999, but instead simply requested the appointment of counsel. The record shows, however, that appellee did submit "suggested amendments" at that time. On June 20, 2000, after a hearing to consider appellee's "motion and supplemental motion" for post conviction relief, Judge Rufe appointed new counsel and granted leave for counsel to amend or supplement the original *pro se* petition. On November 14, 2000, appellee filed a counseled "brief in support of post conviction collateral relief," which reframed appellee's allegations of trial court error as counsel ineffectiveness claims, including the instant claim: "Whether [appellee's] trial counsel were ineffective when they failed to object to a guilty plea colloquy without a factual basis to substantiate any of the claims." This is the claim that the lower courts considered. Thus, we assume that the Commonwealth is actually referring to appellee's 2000 counseled amendments, and not his 1999 *pro se* "suggested amendments."

conviction collateral relief at any time. Amendment shall be freely allowed to achieve substantial justice."); PA.R.CRIM.P. 905(B) (A "judge shall order amendment of the petition" when petition for post-conviction relief "is defective as originally filed."). Moreover, this Court has determined that, under our rules of criminal procedure, a petitioner for post-conviction relief is entitled to counsel. See PA.R.CRIM.P. 904(D) ("The judge shall appoint counsel to represent a defendant whenever the interests of justice require it."); see also Commonwealth v. Williams, 828 A.2d 981, 990 (Pa. 2003); Commonwealth v. Sangricco, 415 A.2d 65, 68 (Pa. 1980) (PCHA envisions that *pro se* petitioner will have legally trained counsel to advance position in acceptable legal terms). Accordingly, we have held that, where a petitioner files his first post conviction relief petition *pro se*, he shall be permitted to file an amended petition with the assistance of counsel. See Commonwealth v. Tedford, 781 A.2d 1167, 1170 (Pa. 2001); Commonwealth v. Priovolos, 715 A.2d 420 (Pa. 1998); Commonwealth v. Duffey, 713 A.2d 63 (Pa. 1998).

The PCHA petition here was neither withdrawn nor decided prior to being amended. In accordance with our precedent, the PCHA court *sub judice* granted leave for appellee to "amend or supplement" his *pro se* petition with the assistance of counsel. Thus, because the counseled petition was a permitted amendment to the original and pending *pro se* petition, and nothing in the PCHA existed to prohibit or restrict the amendment, it must be viewed as an extension of the existing *pro se* petition, rather than as a new and distinct petition, subject to the intervening requirements of the PCRA, including its time restriction. See Tedford, 781 A.2d at 1170 n.6 ("[A]n amended petition is merely an extension of an

existing petition rather than a new and distinct petition.").[9] Accordingly, the PCHA court did not err in considering appellee's counseled, amended petition as timely. See Williams, 828 A.2d at 989 (because rules require counsel to file amended petition, counseled amendment to timely *pro se* petition is timely, though filed after one-year deadline).[10]

To be eligible for relief under the PCHA, a petitioner must prove, *inter alia*: "That the error resulting in his conviction and sentence has not been waived." 19 P.S. § 1180-3(d) (repealed). Furthermore, Section 4(b) of the PCHA provides:

> For purposes of this act, an issue is waived if:
>
> (1) The petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding actually conducted, or in a prior proceeding actually initiated under this act; and
>
> (2) The petitioner is unable to prove the existence of extraordinary circumstances to justify his failure to raise the issue.

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[9] Notably, nothing in the PCRA or its subsequent amendments suggested that it applied to petitions already pending under the PCHA. To the contrary, the PCRA as originally enacted stated that it applied to petitions filed on or after the effective date of the act. See Section 6 of Act 1988, April 13, P.L. 336, No. 47.

[10] The Commonwealth cites Commonwealth v. Chester, 733 A.2d 1242 (Pa. 1999), for the proposition that the PCRA applies when an amendment to a post-conviction petition is filed after the effective date of the PCRA. The Commonwealth's reliance on Chester is misplaced. In that case, this Court concluded that the 1995 amendments to the PCRA applied even though the petitioner had originally filed a *pro se* petition requesting an evidentiary hearing in June of 1995, before the PCRA amendments took effect. There, however, petitioner had received leave of court to withdraw the original *pro se* petition and incorporate the allegations into a new post-conviction petition. In April of 1996, petitioner filed a counseled PCRA petition. In concluding that the amended PCRA applied, this Court noted that the petition was filed well after the date the amended PCRA became effective. Here, appellee never withdrew his original PCHA petition, but rather, was permitted to amend his PCHA petition. Moreover, the docket clearly records that appellee's original PCHA petition was filed in 1988 -- well before the PCRA became effective.

19 P.S. § 1180-4(b) (repealed). Finally, Section 4(c) of the PCHA provides that "there is a rebuttable presumption that a failure to appeal or to raise an issue is a knowing and understanding failure." 19 P.S. § 1180-4(c) (repealed). Since the validity of appellee's plea was cognizable on direct appeal, see Commonwealth v. Greer, 326 A.2d 338 (Pa. 1974); Commonwealth v. Hill, 319 A.2d 886 (Pa. 1974), any issue concerning the plea itself was waived and could not be raised under the PCHA unless appellee either rebutted the presumption that the failure to raise the issue was knowing and understanding or alleged and proved the existence of an extraordinary circumstance justifying the failure to raise the issue.

Appellee argued before the PCHA court that the validity of his guilty plea was not waived because ineffective assistance of counsel was an extraordinary circumstance justifying his failure to challenge the validity of the plea on direct appeal. Ineffective assistance of counsel was recognized as an extraordinary circumstance under the PCHA. See Commonwealth v. Wideman, 306 A.2d 894, 896 (Pa. 1973). To prevail on a claim that counsel was ineffective, appellee must overcome the presumption of attorney competence by showing that: (1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceeding would have been different. Commonwealth v. (Michael) Pierce, 786 A.2d 203, 213 (Pa. 2001); accord Strickland v. Washington, 466 U.S. 668, 687 (1984).[11] Allegations of ineffectiveness in connection with the entry of a guilty

[11] We recognize that the conduct of trial counsel is governed by the standards existing when the case was tried in 1981, which was before Strickland was decided and before this Court decided Commonwealth v. (Charles) Pierce, 527 A.2d 973 (Pa. 1987), which followed Strickland as a matter of Pennsylvania law. The leading case in this jurisdiction in 1981 was Commonwealth ex rel. Washington v. Maroney, 235 A.2d 349 (Pa. 1967). Nevertheless, the parties do not assert that the governing standard was materially different

plea will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an unknowing or involuntary plea. Commonwealth v. Fears, 836 A.2d 52, 64 (Pa. 2003); Commonwealth v. Frometa, 555 A.2d 92, 93 (Pa. 1989); Commonwealth v. Jones, 383 A.2d 926 (Pa. 1978).

Because a guilty plea is an admission of guilt and a waiver of several constitutional rights -- including the right to trial by jury and the right against self-incrimination -- it will be considered knowing, intelligent and voluntary under the Due Process Clause only if it constitutes "'an intentional relinquishment or abandonment of a known right or privilege.'" Boykin v. Alabama, 395 U.S. 238, 243 n.5 (1969) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). A plea is knowing, intelligent and voluntary under this standard if the defendant had an understanding of the nature of the charges against him, his right to a jury trial and the consequences of his plea. See Boykin, 395 U.S. at 243-244; see also Commonwealth v. Hines, 437 A.2d 1180, 1182 (Pa. 1981). Further, unless a defendant has an understanding of the charges against him, the plea cannot stand as an intelligent admission of guilt. Henderson v. Morgan, 426 U.S. 637, 645 n.13 (1976). Finally, for a defendant to understand the charges against him, he must possess "'an understanding of the law in relation to the facts.'" Boykin, 395 U.S. at 243 n. 5 (quoting McCarthy v. United States, 394 U.S. 459 (1969)); see also Henderson, 426 U.S. at 645 (plea cannot be knowing and voluntary unless defendant received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.").

Although a plea colloquy is not constitutionally mandated, it is a means by which the trial court may make the constitutionally required determination that a defendant's guilty plea is truly knowing and voluntary. Commonwealth v. Maddox, 300 A.2d 503, 504 (Pa.

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at the time appellee entered his guilty plea. Accordingly, we will evaluate the claim of ineffectiveness in light of our existing standard.

1973) (citing McCarthy, 394 U.S. at 465). In Commonwealth ex rel. West v. Rundle, 237 A.2d 196 (Pa. 1968), this Court discussed the merit in requiring a trial court to conduct a colloquy before accepting a guilty plea:

> A majority of criminal convictions are obtained after a plea of guilty. If these convictions are to be insulated from attack, the trial court is best advised to conduct an on the record examination of the defendant which should include, *inter alia*, an attempt to satisfy itself that the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to constitute the offenses for which he is charged and the permissible range of sentences.

Id. at 197-198. Such a colloquy serves the additional purpose of creating a complete record at the time the plea is entered, upon which a reviewing court may determine whether the plea was entered knowingly and voluntarily. Indeed, our Rules of Criminal Procedure now require a trial court to conduct a colloquy on the record before accepting a guilty plea. See PA.R.CRIM.P. 590.

In determining whether a guilty plea was entered knowingly and voluntarily, however, a court "is free to consider the totality of the circumstances surrounding the plea." Fears, 836 A.2d at 64 (quoting Commonwealth v. Allen, 732 A.2d 582, 588-89 (Pa. 1999)); see also Commonwealth v. Schultz, 477 A.2d 1328, 1330 (Pa. 1984) (in determining whether guilty plea has been voluntarily, knowingly and intelligently entered, courts look to totality of circumstances surrounding plea); Commonwealth v. Martinez, 453 A.2d 940 (Pa. 1982) (same); Commonwealth v. Shaffer, 446 A.2d 591 (Pa. 1982) (same). A court may consider a wide array of relevant evidence under this standard including, but not limited to, transcripts from other proceedings, off-the-record communications with counsel, and written plea agreements. Fears, 836 A.2d at 64.

In concluding that the guilty plea *sub judice* was unknowing, the PCHA court erroneously relied upon this Court's decision in Hines, 437 A.2d 1180. In Hines, we stated that "a colloquy with the defendant must demonstrate that there is a factual basis for the

plea and that the defendant understands the nature and elements of the offense charged." Id. 1182. There, as here, the defendant pleaded guilty to murder generally, after which the trial court conducted a degree-of-guilt hearing and found him guilty of murder of the first degree. On PCHA review, however, this Court concluded that the plea was invalid because the colloquy failed to establish a factual basis for the plea. We noted that the trial court had "not even asked the threshold question of whether he had killed the victim." Id. at 1183. Significantly, in Hines the problems surrounding the trial court's acceptance of the guilty plea extended well beyond its failure to engage in a colloquy that elicited the defendant's explicit admission that he shot his victim. Rather, the colloquy there utterly failed even to explain to the defendant the nature of the charges against him, his right to a jury trial, or the consequences of entering a guilty plea. Indeed, this Court noted that the colloquy "did no more than inform appellant of the name of the crime after he had pled guilty." Id. at 1183. We further noted that the defendant had, on the record, denied killing his victim prior to entering the guilty plea, and that he asked to withdraw the plea shortly after it was entered. Under those circumstances, we concluded that there was no factual basis upon which to conclude that the defendant had understood either the charges to which he had pled or the consequences of his plea. Accordingly, we vacated the guilty plea.

This Court's decision in Hines followed a point of view first espoused in Commonwealth v. Ingram, 316 A.2d 77 (Pa. 1974), where this Court held that, to help ensure that the defendant understands the nature of the charges to which he is pleading guilty, a trial court must conduct an on-the-record examination of the defendant as outlined in the comments to PA.R.CRIM.P. 319(a) (now Rule 590(a)). Rule 590(a) sets forth the procedure governing pleas and plea agreements, and provides that a trial court "shall not accept [a plea] unless the judge determines after inquiry of the defendant that the plea is

voluntarily and understandingly tendered." PA.R.CRIM.P. 590(a).[12] The comments to the Rule recommend that "at a minimum" the judge should ask questions to elicit the following information:

> (1) Does the defendant understand the nature of the charges to which he or she is pleading guilty or *nolo contedere*?
> (2) **Is there a factual basis for the plea?**
> (3) Does the defendant understand that he or she has the right to trial by jury?
> (4) Does the defendant understand that he or she is presumed innocent until he is found guilty?
> (5) Is the defendant aware of the permissible range of sentences and/or fines for the offenses charged?
> (6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

PA.R.CRIM.P. 590 Comments (emphasis added).[13] In a line of subsequent decisions, this Court cited Ingram to support the proposition that these areas of inquiry are "mandatory during a guilty plea colloquy and the failure to satisfy these minimal requirements will result in reversal." Commonwealth v. Willis, 369 A.2d 1189, 1190 (Pa. 1977) (reversing judgment of sentence where record plea colloquy did not inform defendant of presumption of innocence); see also Commonwealth v. Chumley, 394 A.2d 497, 501 (Pa. 1978) ("Failure to inquire into defendant's understanding of these subjects generally requires reversal.");

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[12] Rule 590(a) provides as follows:

> (1) Pleas shall be taken in open court.
> (2) A defendant may plead not guilty, guilty, or, with the consent of the judge, *nolo contendere*. If the defendant refuses to plead, the judge shall enter a plea of not guilty on the defendant's behalf.
> (3) The judge may refuse to accept a plea of guilty or *nolo contendere*, and shall not accept it unless the judge determines after inquiry of the defendant that the plea is voluntarily and understandingly tendered. Such inquiry shall appear on the record.

PA.R.CRIM.P. 590(a).

[13] The language of the Comment to the current Rule is essentially the same as the language quoted in Ingram.

Commonwealth v. Tabb, 383 A.2d 849, 852 (Pa. 1978) ("Absent such a dialogue on the record, we cannot conclude that the plea was entered voluntarily, intelligently, knowingly, and understandingly . . . and a judgment of sentence cannot stand on such a plea."); Commonwealth v. Morin, 383 A.2d 832 (Pa. 1978) (reversal and remand for new trial only remedy in case of inadequate colloquy); Commonwealth v. Dilbeck, 353 A.2d 824 (Pa. 1976) (same); Commonwealth v. Schork, 356 A.2d 355 (Pa. 1976) (same); Commonwealth v. Miner, 356 A.2d 346 (Pa. 1976) (same).

But, both the PCHA court and the Superior Court *sub judice* failed to recognize that this Court has long since abandoned the *per se* approach suggested in Ingram and its progeny. See Schultz, 477 A.2d at 1330 ("The *per se* approach of Ingram. . . has been abrogated by subsequent decisions of this Court."); Shaffer, 446 A.2d 591; accord Commonwealth v. Anthony, 475 A.2d 1303 (Pa. 1984); Commonwealth v. Carson, 469 A.2d 599 (Pa. 1983); Commonwealth v. Smith, 450 A.2d 973 (Pa. 1982). Indeed, even before this Court expressly abandoned Ingram's *per se* approach, there was competing authority to suggest that that decision did not necessarily require reversal whenever a plea colloquy was deemed to be defective, so long as there was sufficient indication in the record that the plea was knowing and voluntary. See Commonwealth v. Johnson, 331 A.2d 473, 477 (Pa. 1975) ("[T]he omission of any particular question [recommended in the comment to now-Rule 590] will not necessarily invalidate the guilty plea so long as there exists sufficient indication that the defendant did plead knowingly and voluntarily."); Commonwealth v. Nelson, 317 A.2d 228, 229 (Pa. 1974) (failure of court to elicit from accused the factual basis for guilty plea "is not sufficient to invalidate the plea, if during the plea proceedings the facts of the crime and the factual basis for the plea are placed on the record in the presence of the accused and the court."). Thus, a guilty plea is not automatically suspect simply because the plea colloquy failed to cover one of the specific areas of inquiry recommended in the comments to Rule 590. Rather, a court should

consider whether the totality of the circumstances surrounding the plea establish that it was entered knowingly and voluntarily.

An example of the totality of the circumstances approach in the context of an ineffective assistance of counsel claim may be found in Commonwealth v. Gardner, 452 A.2d 1346 (Pa. 1982). In Gardner, this Court examined not only the oral and written plea colloquy, but also off-the-record communications between the defendant and counsel in order to determine whether, prior to the entry of his guilty plea to murder, the defendant was informed of his right to participate in the selection of a jury chosen from the community. The defendant had not been so informed on the record, but at the evidentiary hearing on the PCHA petition, trial counsel explained that he had not objected to the guilty plea colloquy because, prior to the colloquy, he had twice informed the defendant of his right to a jury trial even though it was not mentioned by the trial court on the record. The Court concluded that counsel was not ineffective in failing to object to the colloquy. See also Smith, 450 A.2d 973 (on direct appeal, notwithstanding that record colloquy omitted explanation of requirement of jury unanimity and defendant's right to participate in jury selection, written form signed by defendant included neglected requirements and cured otherwise defective colloquy).

Cases like Gardner suggest the importance of the contemporaneous objection requirement and the effect the absence of such an objection has when a challenge is later forwarded as a claim of counsel ineffectiveness. If a colloquy indeed is deficient, and the client is not otherwise aware of the point which has not been covered adequately, it is incumbent upon plea counsel to object. Where, as in this case, there was no such objection, the question of the validity of the plea should not be confined to the trial record; rather, it must also include counsel's non-record communications with his client, if any. In other words, where the colloquy has not been objected to at a time when the defect may be

cured, the defect should not automatically serve as the hyper-technical basis for collateral relief.

Inquiry into the factual basis for a guilty plea obviously serves important functions. The facts make it easier for the defendant to understand the nature of the offense to which he is pleading guilty. In addition, the inquiry provides the court with a better assessment of the defendant's competency and willingness to plead guilty. It also provides a more adequate record and thus minimizes the likelihood that the plea will be set aside later. See 5 WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE, § 21.4(f) (2d. ed. 1999). However, in North Carolina v. Alford, 400 U.S. 25 (1970), the U.S. Supreme Court acknowledged that a knowing and voluntary guilty plea does not require that the defendant admit to every act:

> [W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

Id. at 37. A defendant is particularly unlikely to admit his participation in every act constituting the crime where, as here, he enters a plea to murder generally, and intends to contest the degree of murder at a subsequent hearing, where the Commonwealth will bear the burden of proof. Thus, a defendant's unwillingness to admit to certain acts does not necessarily lead to the conclusion that his guilty plea is unknowing as a general matter; and it should not lead to such an automatic conclusion where the general plea will be followed by a contested degree of guilt hearing.

In light of the totality of the circumstances surrounding the plea in this case, it is clear that there was a sufficient factual basis for this general plea to be deemed knowingly and voluntarily entered. As detailed above, the trial court heard evidence concerning the facts of the case at two pre-trial proceedings at which appellee was present. The evidence included Redman's autopsy report and the taped statements of both Yacob and appellee.

Yacob's taped confession recounted how he and appellee lured Redman to the deserted industrial park, and how Yacob killed Redman. In appellee's taped statement he explained that he and Yacob had planned to bring the victim to a secluded area and "beat him up." Although appellee's subsequent testimony denied any knowledge of, or participation in, the actual killing of the victim, he consistently admitted that he was with Yacob and the victim when they arrived at the scene of the murder, and that he left the scene with Yacob in the victim's vehicle with the victim's wallet. On the basis of this record, which suggests that appellee, at the very least, knowingly aided Yacob in the commission of the crimes, there was an adequate factual basis to conclude that appellee's conduct fell within the charges to which he was pleading, i.e., murder generally (with a presumption that it was murder of the third degree), robbery and conspiracy.[14]

Further, the evidence adduced at the pre-trial proceedings and the plea colloquy support the conclusion that appellee was well aware of the factual basis for the charges against him. At the outset of the colloquy, the prosecutor informed the trial court that appellee had agreed to plead guilty to murder generally, and to robbery and conspiracy, and that appellee and his counsel had "endorsed" the bills of information describing the charges against him.[15] Also, the trial court referred to the fact that some of the evidence

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[14] The Crimes Code provides that: "A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both." 18 Pa.C.S.A. § 306(a). The Code further provides that: "A person is legally accountable for the conduct of another person when [] he is an accomplice of such other person in the commission of the offense," id. § 306(b), and, "[a] person is an accomplice . . . if . . . with the intent of promoting or facilitating the commission of the offense, he aids or agrees or attempts to aid such other person in planning or committing it. . . ." Id. § 306(c).

[15] The bills of information, which appellee and his counsel "endorsed," alleged the following:

The District Attorney of Bucks County by this information charges that, on or about the First day of July 1981 in said County, one DENNIS FLANAGAN,

(1) FIRST DEGREE MURDER
did, intentionally kill one, James Redman,
(2) SECOND DEGREE MURDER
did, cause the death of one James Redman, while being engaged in the perpetration of a felony, to wit, Robbery

* * *

The District Attorney of Bucks County by this information charges that, on or about the First day of July 1981 in said County, one DENNIS FLANAGAN,

(1) ROBBERY
did, in the course of committing a theft, inflict serious bodily injury upon one James Redman,
(2) ROBBERY
did, in the course of committing a theft, threaten one James Redman or intentionally put him in fear of immediate serious bodily injury,
(3) ROBBERY
did, in the course of committing a theft, commit or threaten immediately to commit any felony in the first or second degree, to wit, Criminal Homicide,
(4) ROBBERY
in the course of committing a theft, inflict bodily injury upon one James Redman, or intentionally put one James Redman in fear of immediate bodily injury,
(5) ROBBERY
in the course of committing a theft, physically take or remove property, to wit, a 1977 Oldsmobile 98 and other personal effects, from the person of James Redman by force,
(6) THEFT BY UNLAWFUL TAKING OR DISPOSITION
did, unlawfully take moveable property, to wit, a 1977 Oldsmobile 98 and other personal effects, of one James Redman, with intent to deprive him thereof,

* * *

(7) RECEIVING STOLEN PROPERTY

had been considered at prior proceedings, and informed appellee that, because he and Yacob had acted together, the theory of accomplice liability was relevant to his plea:

> THE COURT: Now, in order to be certain that you understand what you are doing, and by that I mean to be certain that you understand the nature of these charges to which you are entering these pleas of guilty, to be sure you understand what the sentences can be, what sentences can be imposed as a result of this, and in order to be certain that you understand what the effect, legal effects are to the entry of a plea of guilty and to understand what you are waiving, that is what rights you are giving up, I am going to ask you a series of questions and give you the opportunity to answer them. I want to satisfy myself that you understand these questions and understand the import of what we are talking about. All right?

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did, intentionally receive, retain or dispose of movable property, to wit, a 1977 Oldsmobile 98 and other personal effects, of one James Redman, knowing that it has been stolen or believe that it had probably been stolen, the property not being received, retained or disposed of with intent to restore it to the owner,

(8) CONSPIRACY
did, conspire and agree with George Yacob, to commit unlawful acts, to wit, First Degree Murder,

(9) CONSPIRACY
did, conspire and agree with George Yacob, to commit unlawful acts, to wit, Second Degree Murder,

(10) CONSPIRACY
did, conspire and agree with George Yacob, to commit unlawful acts, to wit, Robbery,

(11) CONSPIRACY
did, conspire and agree with George Yacob, to commit unlawful acts, to wit, Theft By Unlawful Taking or Disposition,

(12) CONSPIRACY
did, conspire and agree with George Yacob, to commit unlawful acts, to wit, Receiving Stolen Property,

all of which is against the Act of Assembly and the peace and dignity of the Commonwealth of Pennsylvania.

MR. FLANAGAN: Yes, sir.

THE COURT: Now, of course, as you can understand, I have presided over a number of proceedings involving this case, involving these charges against you and the charges against George Yacob, and so as you can well appreciate, I have some familiarity with the facts of these cases. I haven't heard all the evidence, of course, but I have heard some of it. Do you understand?

MR. FLANAGAN: Yes.

THE COURT: So in order to begin and in view of the fact that both you and Mr. Yacob are jointly involved or at least jointly charged with these various crimes, let me begin by explaining to you the law of accomplice, because that will sort of tie things together here, I think, and make it easier for you to understand how these charges came out. Okay?

MR. FLANAGAN: Yes, sir. . . .

Guilty Plea Transcript, 12/1/81 at 3-4. Thus, throughout the pre-trial proceedings and the plea colloquy, appellee was clearly aware that he was charged with crimes arising from his role in conspiring with Yacob in the murder of Redman. Appellee's claim prior to his plea that he did not participate in the actual beating of Redman, if accepted as the truth, would not excuse his conduct in aiding and abetting Yacob in the commission of the murder and robbery, and thus did not raise questions as to whether the plea was knowing and voluntary.

To require more than was presented here would be unrealistic given the very nature of the general plea of guilty. Appellee's plea did not commit him to the Commonwealth's version of events: he was free to contest it, as he did, at the degree of guilt hearing. To require the Commonwealth to outline its theory of the case at the general plea stage is pointless where, as here, the defendant intended to contest that version.

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Given the totality of these circumstances, we are not persuaded that trial counsel was ineffective in failing to petition to withdraw the plea on the basis that the colloquy did not establish a factual basis sufficient to permit a knowing and voluntary plea. Indeed, in reviewing the entire record, it is clear that there was an adequate factual basis for the general plea and that appellee was present at all stages of the proceedings where these facts were entered into the record.

The Majority asserts that we have ignored the issue concerning appellee's on-the-record affirmation of a "materially erroneous understanding of applicable law." In forwarding this critique, the Majority overlooks the procedural posture of this appeal. The sole substantive issue decided below, accepted for review and briefed here is whether there was an inadequate factual basis for the general plea of guilt so as to render the plea constitutionally unsound as a matter of law, and thereby render counsel ineffective for failing to object. The distinct claim alleging a defective description of accomplice liability, which the Majority raises and would summarily decide, was raised in appellee's amended PCHA petition, see supra n.6, but was not reached by the court below given the disposition of the factual basis claim. We should not now *sua sponte* prejudge the question, which appellee would have been free to pursue upon remand. While it may seem clear to the Majority, in the absence of adversarial presentations on the point, that the offense description was defective, which thereby automatically rendered the general plea unconstitutionally deficient, and rendered counsel ineffective, such might not be the conclusion if the parties had actually argued the point.[16]

[16]In this regard, we note that the law on accomplice liability in Pennsylvania was in a state of flux up until the mid-1990s. See e.g., Commonwealth v. Chester, 733 A.2d 1242, 1253

The Majority's suggestion that a court does not apply a "true" totality assessment unless it *sua sponte* reaches out to decide distinct claims not raised or briefed on appeal vastly overstates the scope of the standard. The totality assessment is the general standard by which a court reviews the specific challenge presented. There may be any number of distinct challenges that could be forwarded on a specific issue. However, the standard of review is not an invitation for a court to ignore the posture of the appeal and reach out to decide all other possible issues that may arise from a colloquy. We should not rule upon the propriety of the colloquy below as against any and all possible challenges: we should simply decide the only issue arising from the colloquy that was decided below and is properly before us now.

The Majority furthers its flawed analysis by ignoring appellee's failure to satisfy his burden to prove prejudice under Strickland/Pierce. As the U.S. Supreme Court recently held in United States v. Benitez, 542 U.S. ___, 2004 WL 1300161 (U.S June 14, 2004), where the burden of demonstrating prejudice is on the defendant, he may not withdraw his plea absent a showing of a reasonable probability that, "but for the error, he would not have entered the plea." Id. at ____, 2004 WL 1300161, at *5. There, the U.S. Supreme Court reversed the Ninth Circuit's decision permitting the defendant in a criminal prosecution to withdraw his guilty plea based upon an unpreserved claim that the trial court's plea colloquy was deficient under the Federal Rules of Criminal Procedure. See FED. R. CRIM. P. 11(C)(3)(b). At issue was the plain error standard in FED. R. CRIM. P. 52. In reversing the

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n.12 (Pa. 1999) (Chester II); Commonwealth v. Thompson, 674 A.2d 217, 222-23 (Pa. 1996); Commonwealth v. Huffman, 638 A.2d 961, 962-63 (Pa. 1994); Commonwealth v. Chester, 587 A.2d 1367, 1384 (Pa. 1991) (Chester I); Commonwealth v. Bachert, 453 A.2d 931 (Pa. 1982).

Ninth Circuit's grant of relief, the High Court noted the rationale for placing a stricter burden of proof on a defendant challenging his guilty plea after the fact:

> First, the standard should enforce the policies . . . to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error. Second, it should respect the particular importance of the finality of guilty pleas, which usually rests, after all, on a defendant's proffession of guilt in open court, and are indispensable in the operation of the modern criminal justice system.

Benitez, 542 U.S. at ___, 2004 WL 1300161, at *5.

The concerns articulated by the U.S. Supreme Court in the Benitez plain error context are no less present here. The prejudice standard for counsel ineffectiveness -- reasonable probability that the outcome would differ -- is the same as Benitez's plain error standard. Id. at ___, (noting that plain error prejudice standard was adopted from Strickland). Moreover, as in Benitez, insistence upon such a showing is particularly salutary when a defendant seeks to challenge a guilty plea on the basis of an unpreserved claim that the plea colloquy was deficient -- especially when the claim is raised decades later. Notably, appellee here did not testify at the PCHA hearing and claim that, in fact, he was unaware of the factual basis -- or the legal basis -- for his general plea of guilt, much less that that was the reason he actually entered his plea. Instead, he confined his complaint to attacking the record. The Majority's conclusion that, under the totality of these circumstances, appellee would not have entered the plea is rank speculation. And, it is rank speculation which reverses both the presumption of effectiveness and the burden of proof required under Strickland.

The courts below erred in upsetting this plea without considering the totality of the circumstances surrounding it. The reliance below upon the *per se* approach suggested in

Ingram/Hines was misplaced -- particularly given that the challenge to the plea here sounds in counsel ineffectiveness. Accordingly, I dissent.

Mr. Chief Justice Cappy and Mr. Justice Eakin join this dissenting opinion.