[J-21-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CAPPY, C.J., CASTILLE, SAYLOR, EAKIN, BAER, BALDWIN, FITZGERALD, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 6 EAP 2005
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court dated February 4, 2004 at No. 3511
	:	EDA 2001 quashing the appeal from the
v.	:	Order of the Court of Common Pleas of
	:	Philadelphia County, Criminal Division,
	:	dated February 19, 1999 at Nos. 9007-
TONY L. BENNETT,	:	000102/2 and 9007-0018-0025
	:	
Appellant	:	842 A.2d 953 (Pa. Super. Ct. 2004) (en
	:	banc)
	:	
	:	SUBMITTED: January 19, 2006
	:	

OPINION

MR. CHIEF JUSTICE CAPPY **DECIDED: August 23, 2007**

The issue before the Court is whether Appellant is entitled to reinstatement of his Post Conviction Relief Act ("PCRA")[1] appeal rights *nunc pro tunc* in a second PCRA petition, filed more than one year after the date his judgment of sentence became final, when his original PCRA appeal was dismissed because of PCRA counsel's failure to file a brief. The Superior Court quashed Appellant's appeal as untimely. For the following reasons, the order of the Superior Court is vacated and this matter is remanded to the PCRA court for further proceedings consistent with this opinion.

[1] 42 Pa.C.S. § 9541 *et seq.*

The relevant facts are as follows: Appellant and four accomplices, Kevin Wyatt, Paul Johnson, Michael Mayo, and Kecia Ray, robbed a jewelry store in 1990. During the robbery, a salesperson was shot to death. Appellant supplied the gun, but did not enter the store, remaining in the getaway car with Wyatt. Mayo and Ray pled guilty to murder. Appellant, Wyatt, and Johnson were jointly tried for murder and related crimes in 1993. Following a jury trial, Appellant, Wyatt, and Johnson were convicted of first-degree murder and the related crimes. On June 1, 1993, the trial court sentenced Appellant to life in prison on the murder charge, and to an aggregate sentence of twenty to forty years in prison on the remaining charges. Appellant did not file a direct appeal to the Superior Court. Therefore, his judgment of sentence became final 30 days after June 1, 1993. See 42 Pa.C.S. § 9545(b)(3).

Appellant filed a timely *pro se* PCRA petition on April 5, 1995 under the prior version of the PCRA and the PCRA court appointed counsel to represent him.[2] Appellant then filed an amended PCRA petition on April 9, 1997. Appellant listed multiple claims of error, including that trial counsel erred in failing to object to the trial court's instructions relating to accomplice liability. See Amended Petition under the Post Conviction Hearing Act, 4/9/1997, at 2. The amended petition also included a claim that trial counsel was ineffective for failing to file a notice of appeal following his conviction. Id. On February 19, 1999, the PCRA court dismissed Appellant's PCRA petition for lack of merit. In the opinion that followed, the PCRA court explained that Appellant was not entitled to reinstatement of his direct appeal rights, since Appellant

[2] The prior version of the PCRA did not place time limits on the filing of petitions.

"did not allege let alone prove that he requested counsel to file a direct appeal on his behalf." PCRA court slip opinion, 10/6/1999, at 4.

PCRA counsel did not file an appeal on Appellant's behalf, but Appellant filed a timely *pro se* appeal in the Superior Court. In his *pro se* statement of matters complained of on appeal under Pa.R.A.P. 1925(b), Appellant raised the claim related to trial counsel's failure to challenge the trial court's instructions as to accomplice liability.[3] See Statement of Questions Raised on Appeal, 3/19/1999.

On April 7, 1999, the PCRA court appointed prior trial counsel, whose stewardship was at issue on collateral review, to represent Appellant on his PCRA appeal. On August 14, 2000, the Superior Court dismissed Appellant's appeal without prejudice for counsel's failure to file a brief. The Superior Court did not retain jurisdiction and Appellant did not seek review in this Court.

On October 27, 2000, Appellant filed a second *pro se* PCRA petition, requesting reinstatement of his PCRA appeal rights *nunc pro tunc* and claiming that all prior counsel were ineffective. On September 28, 2001, the PCRA court granted Appellant's PCRA petition, restoring his right to file an appeal *nunc pro tunc* from the February 19, 1999 order dismissing his first PCRA petition. New counsel was appointed and on December 14, 2001, Appellant filed a PCRA appeal *nunc pro tunc* in the Superior Court from the PCRA court's February 19th order dismissing his first PCRA petition. The

[3] Appellant's preservation of this issue throughout the proceedings involving his first PCRA petition is significant because the Superior Court ultimately granted a new trial as to the murder charge for co-defendant Wyatt due to the trial court's erroneous accomplice liability instruction. Commonwealth v. Wyatt, 2050 EDA 1999 (Pa. Super. Ct., July 16, 2001) (unpublished memorandum).

Superior Court quashed Appellant's appeal, concluding that Appellant's second PCRA petition, from which his appellate rights were reinstated *nunc pro tunc*, was untimely and the PCRA court therefore had no jurisdiction to grant relief. Commonwealth v. Bennett, 842 A.2d 953 (Pa. Super. Ct. 2004).

This Court granted allowance of appeal to consider whether the Superior Court erred in quashing Appellant's appeal.

It is well settled that the PCRA provides the "sole means for obtaining collateral relief" on claims cognizable under the PCRA. 42 Pa.C.S. § 9542; see also Commonwealth v. Chester, 733 A.2d 1242, 1250 (Pa. 1999) (offering that the PCRA subsumes the remedy of habeas corpus with respect to remedies offered under PCRA). To this end, the PCRA envisions that persons convicted of a crime be permitted one review of their collateral claims. 42 Pa.C.S. § 9543; Commonwealth v. Peterkin, 722 A.2d 638, 643 (Pa. 1998) (stating that the purpose of the PCRA is "to provide a reasonable opportunity for those who have been wrongfully convicted to demonstrate the injustice of their convictions"); cf. Commonwealth v. Judge, 916 A.2d 511, 520 (Pa. 2007) (quoting same language from Peterkin). These claims are most often raised as claims of ineffectiveness, but can take on a myriad of forms. See 42 Pa.C.S. § 9543(a)(2). The PCRA process includes appellate review of the claims.

Under 42 Pa.C.S. § 9545, as amended in 1995, any PCRA petition, including a second or subsequent one, must be filed within one year of the date the judgment of sentence becomes final. This limitation is jurisdictional in nature. See Peterkin, 722 A.2d at 641. As we have previously explained, "jurisdictional time limits go to a court's right or competency to adjudicate a controversy." Commonwealth v. Fahy, 737 A.2d

214, 222 (Pa. 1999). Jurisdictional time limitations are not subject to equitable exceptions and a court has no authority to extend them except as the statute permits. Id. By placing strict time limitations on the process, it is clear that the Legislature intended that there be finality to the collateral review process. See Peterkin, supra.

This preference for finality, however, is tempered by the insertion of three exceptions to the one-year time limitation at subsections (b)(1)(i)-(iii). These exceptions extend the one-year time limitation under limited circumstances, reflecting that the Legislature also recognized that situations might arise when the one-year time limitation must yield. The exceptions are triggered by an event that occurs outside the control of the petitioner, including when "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence." 42 Pa.C.S. § 9545(b)(1)(ii).[4] The PCRA limits the reach of the exceptions by providing that the exceptions must be pled within sixty days of the date the claim could have been presented. 42 Pa.C.S. § 9545(b)(2).

With this framework in mind, we now turn to Appellant's arguments. Appellant urges this court to consider his petition under the exception to the one-year time limitation set forth in subsection (b)(1)(ii). As we have not previously had the opportunity to consider the exception in circumstances like Appellant's, we will turn to the construction of 42 Pa.C.S. § 9545(b)(1)(ii).

[4] The other two alternatives are when the petition alleges and the petitioner proves that: the failure to raise the issue was a result of governmental interference or the right asserted was a constitutional right that was recognized by this Court or the United States Supreme Court and declared retroactive. 42 Pa.C.S. § 9545(b)(i), (iii).

As a threshold matter, we must examine whether Appellant waived application of the exception by not raising it in his second or second amended PCRA petition. Instead, he raised it for the first time before this Court. Normally, the PCRA requires a petitioner to allege and prove an exception to the one-year time limitation in his petition. 42 Pa.C.S. § 9545(b); see also Commonwealth v. Wharton, 886 A.2d 1120 (Pa. 2005). In this case, however, at the time Appellant filed his PCRA petition, the Superior Court followed the "extension theory." Under the "extension theory," the Superior Court construed in limited circumstances an untimely, serial PCRA petition as if it were an "extension" of a timely, but previously dismissed, first PCRA petition. Commonwealth v. Leasa, 759 A.2d 941 (Pa. Super. 2000); Commonwealth v. Peterson, 756 A.2d 687 (Pa. Super. 2000). The practice was common in cases like Appellant's, in which an appeal was taken from the denial of the first petition, but the Superior Court dismissed the appeal without prejudice when PCRA counsel failed to file a brief. Appellant relied on and took advantage of this process by alleging and proving the extension theory in his original and amended petitions. The PCRA court agreed that Appellant was entitled to relief and reinstated his appellate rights *nunc pro tunc*.

While Appellant's appeal was pending before the Superior Court, the extension theory was explicitly rejected by this Court in Commonwealth v. Robinson, 837 A.2d 1157 (Pa. 2003). Accordingly, the Superior Court dismissed Appellant's second petition for lack of jurisdiction under Robinson. Thus, the question is whether Appellant's failure to raise the exception at subsection (b)(1)(ii) at the time he filed this second petition precludes this Court from applying it to his case.

This Court has been faced with this type of question in the context of the PCRA on more than one occasion and we have allowed PCRA petitioners some leeway in the preservation of claims in their petitions when we determined that the circumstances demanded it. For example, we provided for liberal amendment of PCRA petitions following our decision in Commonwealth v. McGill, 832 A.2d 1014 (Pa. 2003), which announced the proper framework for alleging a "layered" ineffective assistance of counsel claim. After setting forth the framework for alleging "layered" claims, we recognized that "we [had] not been clear as to exactly what is required of a PCRA petitioner seeking to plead, present, and ultimately prove a layered claim of counsel ineffectiveness." Id. at 1024. Accordingly, we held that a remand may be appropriate to give the petitioner another opportunity to properly plead his claim by conforming his petition to the McGill requirements consistent with Pa.R.Crim.P. 905. Id.

Similarly, in Commonwealth v. Hernandez, 817 A.2d 479 (Pa. 2003), this Court entertained a preservation question substantially similar to the one raised herein.[5] Counsel representing Hernandez had failed to file a Rule 1925(b) Statement on direct appeal. The Superior Court dismissed the appeal and within eight months, Hernandez filed a Petition for Leave to Appeal *nunc pro tunc* ("NPT petition") with the trial court. At the time, a NPT petition was the accepted filing in order to have appellate rights reinstated *nunc pro tunc*. This process was later deemed unavailable in Commonwealth v. Lantzy, 736 A.2d 564 (Pa. 1999), wherein we clarified that the

[5] While this author concurred in the result in Hernandez and wrote separately on the issue discussed herein, the principle of *stare decisis* requires that the decision of the majority be followed here.

appropriate procedure was to file a PCRA petition seeking to have one's appeal rights reinstated *nunc pro tunc*.

The Superior Court did not believe that Lantzy required dismissal of Hernandez's claim, since Hernandez had filed his NPT petition before this court's decision in Lantzy. Ultimately, however, the court affirmed the judgment of sentence on the basis that Hernandez's claims were without merit. Following the Superior Court's decision, we granted the Commonwealth's petition for allowance of appeal to determine whether it should have reached the merits of Hernandez's NPT petition in light of Lantzy.

Rather than rejecting Hernandez's claim under Lantzy, we explained that at the time of his petition Hernandez "reasonably relied" on the process utilized by the Superior Court. Hernandez, 817 A.2d at 483-84. Furthermore, we noted that Hernandez was "caught in a jurisdictional trap of [the Superior Court's] making." Id. at 483. The Superior Court had set up a process for review of claims like Hernandez's and Hernandez had followed that procedure. Accordingly, we affirmed the Superior Court's decision with regard to its review of the NPT petition, but expressed no opinion on the underlying merits, since Hernandez had not filed a petition for allowance of appeal.

In this case, declining to entertain Appellant's petition for his failure to plead subsection (b)(1)(ii) at the time he filed his instant petition, would be inconsistent with the spirit of McGill and Hernandez.[6] In this case, the Superior Court utilized a process

[6] At the very least, it would appear that Appellant would be entitled to a remand to give him the opportunity to amend his petition to include this claim following our decision in Robinson. McGill supra. A remand would also be consistent with our decision in (continued…)

for review of claims like Appellant's, and Appellant followed that process. As occurred in Hernandez, while Appellant's petition was pending, intervening case law from this Court altered that process. Like the conclusion in Hernandez, we will not deny Appellant the opportunity to demonstrate that he is entitled to application of the (b)(1)(ii) exception as Appellant "reasonably relied" on the process set up by the Superior Court, which afforded petitioners *nunc pro tunc* relief under the "extension theory." Accordingly, we conclude that we can review whether Appellant's claim meets the requirements of subsection (b)(1)(ii) and now turn to the construction of that subsection.

The proper interpretation and scope of subsection (b)(1)(ii) is one of statutory construction. As such, we rely upon the Statutory Construction Act ("Act") for guidance. See 1 Pa.C.S. § 1501 *et seq.* The goal of statutory construction is to ascertain the Legislature's intent. 1 Pa.C.S. § 1921(a). To this end, every statute shall be construed, if possible, to give effect to all its provisions. Id. When the words of a statute are clear

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Commonwealth v. Williams, 782 A.2d 517 (Pa. 2001), in which we provided for a remand in instances when the PCRA court did not provide a capital defendant with adequate pre-dismissal notice of its reasons for dismissal as required by Pa.R.Crim.P. 1509(c) (which is currently Rule 905).

The PCRA court properly followed a Williams-type process in Wharton when it issued a notice of intent to dismiss Wharton's petition, which was filed post-Robinson, on the basis that the petition was untimely and failed to assert an exception to the one-year time requirement. 886 A.2d at 1123. Consistent with Williams, Wharton was then given 20 days to amend his petition to include an exception to the one-year time requirement. Although ultimately, Wharton chose not to amend the petition and therefore, it was dismissed for lack of jurisdiction, it is instructive that the PCRA court gave him the opportunity to amend his petition under Rule 905. In this case, because of the timing of this matter and the fact that the PCRA court automatically reinstated his appellate rights, Appellant has never been given the opportunity to amend his pleadings consistent with Williams.

and free from ambiguity, the letter of it is not to be disregarded under the pretext of following its spirit. 1 Pa.C.S. § 1921(b). Furthermore, we must construe the provisions of the PCRA liberally "to effect their objects and to promote justice." See 1 Pa.C.S. § 1928(c).[7]

The text of the relevant subsection provides that "the facts upon which the claim is predicated were unknown to petitioner and could not have been ascertained by due diligence." 42 Pa.C.S. § 9545(b)(1)(ii). We have repeatedly referred to this subsection as the "after-discovered evidence" exception to the one-year jurisdictional time limitation. See Peterkin, 722 A.2d at 643. This shorthand reference was a misnomer, since the plain language of subsection (b)(1)(ii) does not require the petitioner to allege and prove a claim of "after-discovered evidence."[8] Rather, it simply requires petitioner to allege and prove that there were "facts" that were "unknown" to him and that he exercised "due diligence." In fact, when the Legislature intended a claim of "after-

[7] Section 1928 addresses which statutes should be liberally or strictly construed. Subsection (b) enumerates the provisions that should be strictly construed, while subsection (c) provides that "all other provisions" should be liberally construed. While subsection (b) includes "penal provisions" as part of its enumerated list, the provisions contained in the PCRA are not a "penal provision" to be strictly construed, as it is merely the codification of the writ of habeas corpus. And, habeas corpus is characterized as a civil remedy. See Fay v. Noia, 372 U.S. 391 (1963); see also Commonwealth ex rel. Marshall v. Gedney, 321 A.2d 641, 643 (Pa. 1974) (rejecting appellant's argument that appellate jurisdiction in extradition-related cases should be exercise under the related "criminal proceedings" provision).

[8] See, e.g., Commonwealth v. Small, 741 A.2d 666, 673 (Pa. 1999) (the requirements of an after discovered evidence claim include, in relevant part, that the new evidence is not to be used for merely cumulative or impeachment purposes, i.e., that it is exculpatory; and that the new evidence is of such a nature that it would compel a different outcome if it had been introduced at trial).

discovered evidence" to be recognized under the PCRA, it has done so by language closely tracking the after-discovered evidence requirements. See 42 Pa.C.S. § 9543(b)(vi) (requiring that the evidence be "exculpatory" and "would have changed the outcome of the trial….").

By imprecisely referring to this subsection as the "after-discovered evidence" exception, we have ignored its plain language. Indeed, by employing the misnomer, we have erroneously engrafted Brady[9]-like considerations into our analysis of subsection (b)(1)(ii) on more than one occasion. For example, in Commonwealth v. Johnson, 863 A.2d 423 (Pa. 2004), appellant argued that the Commonwealth violated Brady by withholding impeachment evidence and that this claim was cognizable under subsection (b)(1)(ii). We concluded that appellant could not establish that his Brady claim had merit, since the information could have been uncovered before or during trial. We further stated, "as we conclude that appellant's underlying Brady claim is without merit, we necessarily also conclude that appellant has failed to show that his petition falls within any of the exceptions to the PCRA's time requirements." Id. at 425-26; see also Commonwealth v. Breakiron, 781 A.2d 94, 98 (Pa. 2001). This conclusion conflated the two concepts as subsection (b)(1)(ii) does not contain the same requirements as a Brady claim.

[9] This refers to a claim brought under Brady v. Maryland, 373 U.S. 83 (1963), which challenges the Commonwealth's failure to produce material evidence. Specifically, a Brady claim requires a petitioner to show, "(1) the prosecutor has suppressed evidence; (2) the evidence, whether exculpatory or impeaching, is helpful to the defendant; and (3) the suppression prejudiced the defendant." Commonwealth v. Carson, 913 A.2d 220, 244 (Pa. 2006).

The "after discovered evidence" misnomer and our suggestion that there is some overlap between the doctrine and § 9545(b)(1)(ii) have created additional problems in the Superior Court. In one case, the Superior Court specifically held that a petitioner asserting the exception provided in 42 Pa.C.S. § 9545(b)(1)(ii) had to meet the statutory requirements and, *in addition*, show that these new facts constituted "'exculpatory evidence' that 'would have changed the outcome of the trial if it had been introduced.'" Commonwealth v. Palmer, 814 A.2d 700 (Pa. Super. 2002) (citing 42 Pa. C.S. § 9543(a)(2)(vi) and Commonwealth v. Yarris, 731 A.2d 581, 588-91 (1999)); see also Commonwealth v. Baker, 828 A.2d 1146, 1147 (Pa. Super. 2003) (following Palmer). While the additional requirements are consistent with a Brady claim, see infra n. 8, none of these requirements exist in § 9545(b)(1)(ii). Similarly, in Commonwealth v. Holmes, 905 A.2d 507 (Pa. Super. 2006), the Superior Court stated that the petitioner had asserted the "after-discovered evidence exception to the PCRA time-bar" under §§ 9545(b)(1)(ii) and § 9545(b)(2). Id. at 510. The court, however, then relied on a case decided under § 9543(a)(2)(vi) to justify its holding that the petitioner had to show that the evidence was not cumulative nor being used solely to impeach credibility, and that the evidence would likely compel a different verdict. Id. at 511, citing Commonwealth v. D'Amato, 856 A.2d 806, 823 (Pa. 2004).[10]

[10] While the Superior Court cites our decisions in Yarris and D'Amato, neither of those decisions support the proposition for which they are cited. Specifically, the relevant portion of Yarris correctly analyzes subsection (b)(1)(ii) and concludes that the claim fails because the appellant did not make a sufficient proffer of why it took so long to present the claims, and therefore, did not show that he acted with due diligence. 731 A.2d at 590. Furthermore, any reliance on D'Amato is misplaced, since the "after-(continued…)

Any confusion created by the mislabeling of this subsection, however, should have been dispelled by our decision in Commonwealth v. Lambert, 884 A.2d 848 (Pa. 2005). In Lambert, the appellant raised a number of Brady claims and alleged that the court had jurisdiction over his claims under subsection (b)(1)(ii). The Commonwealth urged us to follow a similar analysis to that set forth in Johnson arguing that appellant must establish a meritorious Brady claim in order to fall within an exception set forth in subsections (b)(1)(i)-(iii). In rejecting the Commonwealth's argument, we made clear that the exception set forth in subsection (b)(1)(ii) does not require any merits analysis of the underlying claim. Rather, "the exception merely requires that the 'facts' upon which such a claim is predicated must not have been known to appellant, nor could they have been ascertained by due diligence." Lambert, 884 A.2d at 852. Therefore, our opinion in Lambert indicated that the plain language of subsection (b)(1)(ii) is not so narrow as to limit itself to only claims involving "after-discovered evidence." Rather, subsection (b)(1)(ii) has two components, which must be alleged and proved. Namely, the petitioner must establish that: 1) "the *facts* upon which the claim was predicated were *unknown*" and 2) "could not have been ascertained by the exercise of *due diligence*." 42 Pa.C.S. § 9545(b)(1)(ii) (emphasis added). If the petitioner alleges and proves these two components, then the PCRA court has jurisdiction over the claim under this subsection. See Lambert, supra.

(…continued)
discovered" analysis discussed therein related to § 9543(b)(vi), which, as discussed above, tracks the language of the after discovered evidence exception.

In this case, by invoking the exception at subsection (b)(1)(ii), Appellant alleges that he did not know that his trial counsel was appointed to represent him in his PCRA appeal until much later in the process. Likewise, he contends that he never received a copy of the Superior Court's order dismissing his appeal. Rather, he alleges that he attempted to find out the status of his appeal from the PCRA and Superior Courts. Ultimately, he contends that he did not know of PCRA appellate counsel's failure to file an appellate brief until October 4, 2000, when he received a letter from the Superior Court explaining that his appeal was dismissed due to PCRA counsel's failure to file a brief. Therefore, Appellant has alleged that there were facts that were unknown to him. Additionally, Appellant has provided a description of the steps he took to ascertain the status of his case. These steps included writing to the PCRA court and the Superior Court. Accordingly, Appellant alleges that he exercised due diligence in ascertaining those facts.[11] Appellant's allegations, if proven, fall within the plain language of subsection (b)(1)(ii).

We must acknowledge, however, that this is not our first time interpreting this subsection. In Commonwealth v. Gamboa-Taylor, 753 A.2d 780, 785 (Pa. 2000), we held that an allegation of PCRA counsel's ineffectiveness could not be invoked as a newly-discovered "fact" for purposes of this subsection. See also Commonwealth v.

[11] The PCRA also provides that any exception set forth in subsection (b)(1)(ii) must be plead within 60 days of when it "could have been presented." 42 Pa.C.S. § 9545(b)(2). In this instance, we are content that Appellant has alleged that his petition was filed within 60 days of the date it could have been presented, since it was filed less than 25 days after when Appellant found out that the Superior Court dismissed his first PCRA appeal.

Pursell, 749 A.2d 911, 916 (Pa. 2000). We have steadfastly adhered to this principle. Commonwealth v. Crews, 863 A.2d 498 (Pa. 2004); Commonwealth v. Johnson, 863 A.2d 423 (Pa. 2004); Commonwealth v. Howard, 788 A.2d 351 (Pa. 2002). Accordingly, we must consider whether Appellant's claim is precluded by this line of reasoning.

In Gamboa-Taylor and subsequent cases, we addressed situations when PCRA counsel had allegedly ineffectively narrowed the class of claims raised by not including all of the viable claims in the first petition. In such instances, we concluded that by allowing the claim to go forward "the timeliness requirements crafted by the legislature would thus effectively be eviscerated by any petitioner who was willing to file serial PCRA petitions alleging ineffective assistance of counsel." Howard, 788 A.2d at 355 (citing Gamboa-Taylor supra). Thus, we firmly rejected any such attempts "to circumvent the one-year time limitation" via claims of PCRA counsel ineffectiveness. Id. This interpretation is consistent with the federal constitutional standard guiding claims of appellate counsel's ineffectiveness, which allow counsel to choose among nonfrivolous claims and select the best issues for purposes of appeal.

Those cases, however, have no relevance when the claim emanates from the complete denial of counsel. Rather, in such instances, the United States Supreme Court mandates the presumption of prejudice because the process itself has been rendered "presumptively unreliable" under the Sixth Amendment. See Roe v. Flores-Ortega, 528 U.S. 470, 481-82 (2000) (quoting United States v. Cronic, 466 U.S. 648 (1984)). The Court has extended the presumptively prejudicial reasoning to the failure to appoint counsel for purposes of direct appeal. Penson v. Ohio, 488 U.S. 75, 88

(1988). Likewise, the Court has declared that counsel's failure to file a requested notice of appeal was presumptively prejudicial. Flores-Ortega, 528 U.S. at 483.

Consistent with this jurisprudence, this Court has recognized a distinction between situations in which counsel has narrowed the ambit of appellate review by the claims he has raised or foregone versus those instances, as here, in which counsel has failed to file an appeal at all. Commonwealth v. Halley, 870 A.2d 795 (Pa. 2005); Commonwealth v. Lantzy, 736 A.2d 564 (Pa. 1999). To this end, we have repeatedly indicated that the failure to file a requested direct appeal or a 1925(b) statement in support thereof is the functional equivalent of having no counsel at all. Halley; Lantzy. In such instances, the deprivation *requires* a finding of prejudice. Id. Accordingly, following our prior case law, we hold that the analysis set forth in Gamoba-Taylor and subsequent case law does not apply to situations when counsel abandons his client for purposes of appeal. Additionally, allowing such claims to go forward would not eviscerate the time requirements crafted by the Legislature. Rather, subsection (b)(1)(ii) is a limited extension of the one-year time requirement under circumstances when a petitioner has not had the review to which he was entitled due to a circumstance that was beyond his control.

Furthermore, we believe that the Statutory Construction Act requires such a result. In addition to requiring us to interpret the language plainly, the Act requires that we employ the presumption that the General Assembly does not intend to violate the United States or Pennsylvania Constitutions, see 1 Pa.C.S. § 1922. While we have declared the PCRA to be constitutional generally, see Peterkin, this does not mean that it is constitutional as applied to all petitioners.

There is no federal constitutional mandate requiring collateral review. Pennsylvania v. Finley, 481 U.S. 551, 556-57 (1987). It is not part of the criminal process, and is, in fact, civil in nature. Id. Therefore, under the Fourteenth Amendment to the United States Constitution, the procedural due process protections are less stringent than for purposes of either a criminal trial or direct appeal. Id. Nevertheless, due process requires that the post conviction process be fundamentally fair. Id.; see also Commonwealth v. Haag, 809 A.2d 271, 283 (Pa. 2002). Thus, petitioners must be given the opportunity for the presentation of claims at a meaningful time and in a meaningful manner. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982).

As part of the PCRA process, indigent petitioners may apply for the assistance of counsel for purposes of their first PCRA petition. We have held this rule to be absolute inasmuch as we have concluded that a petitioner need not establish that his petition is timely before he or she is entitled to the appointment of counsel. See, e.g., Commonwealth v. Smith, 818 A.2d 494 (Pa. 2003). To this end, it can be assumed that the PCRA court will appoint appropriate counsel, i.e., counsel that can and will raise potentially meritorious claims. In this same vein, while the performance of PCRA counsel is not necessarily scrutinized under the Sixth Amendment, the performance of counsel must comply with some minimum norms, which would include not abandoning a client for purposes of appeal. See e.g., Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998); see also Pa.R.Crim.P. 904(F)(2) (providing for the appointment of counsel *throughout* post-conviction proceedings including any appeal). Accordingly, extending the decision in Gamboa-Taylor to situations when counsel abandons his client on direct

appeal would raise serious questions of whether the process is "fundamentally fair" as applied to a certain class of petitioners.

In this case, Appellant alleges that his counsel abandoned him by failing to file an appellate brief. The record establishes that Appellant filed a *pro se* statement under Pa.R.A.P. 1925(b) indicating a desire to appeal. It was then that counsel was appointed, but failed to file anything with the Superior Court. Accordingly, we hold that Appellant has made sufficient allegations that counsel abandoned him for purposes of his first PCRA appeal by failing to file an appellate brief and that Appellant's relief under subsection (b)(1)(ii) is not controlled by the Gamboa-Taylor line of case law.

Thus, as discussed previously, Appellant has made sufficient allegations to invoke subsection (b)(1)(ii). Appellant alleges that he did not receive the review to which he was entitled through no fault of his own. On appeal, Appellant was assigned counsel who could not raise the ineffectiveness claims he wanted to pursue. See Commonwealth v. Appel, 689 A.2d 981 (Pa. 1997) (holding that counsel cannot raise his or her own ineffectiveness). Such an infirmity was compounded when counsel abandoned Appellant by failing to file an appellate brief in flagrant violation of Pa.R.Crim.P. 904(F)(2). In such an instance, Appellant must be given the opportunity to seek the review to which he or she was entitled.[12]

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[12] Many of the concerns raised in this case have been alleviated by the fact that the Superior Court has altered its practice and no longer dismisses such appeals "without prejudice" due to counsel's failure to file a brief. Rather, the court retains jurisdiction over the matter and remands for the appointment of new counsel. Accordingly, the situation raised herein should not occur with frequency.

This process, however, is informal. We take this opportunity to recommend that the Criminal Procedural Rules Committee and Appellate Court Procedural Rules (continued…)

Having concluded that Appellant's allegations bring his claim within the ambit of subsection (b)(1)(ii), he must still prove that it meets the requirements therein. Under subsection (b)(1)(ii), he must also prove that the facts were "unknown" to him and that he could not uncover them with the exercise of "due diligence." Such questions require further fact-finding and the PCRA court, acting as fact finder, should determine whether Appellant met the "proof" requirement under 42 Pa.C.S. § 9545(b)(1)(ii).

The dissent by Justice Eakin points out that Appellant cannot establish that the facts were "unknown" to him as a matter of law under this court's decision in Chester, 733 A.2d 1242.

In Chester, petitioner filed a PCRA petition nearly 10 years after his conviction and argued that he had "after discovered evidence" that his trial counsel was arrested for driving under the influence only days after entering his appearance on behalf of petitioner. Petitioner alleged that the arrest created a conflict of interest. In considering the petitioner's claim, we explained that just because the petitioner did not discover the evidence did not mean it was "unknown" to him for purposes of § 9545(b)(1)(ii). Instead, we held that information is not unknown to a PCRA petitioner when the information was a matter of public record. Id. at 523.

The dissent concludes that Chester should control the instant case, since the Superior Court filed its order dismissing Appellant's appeal on August 14, 2000. An order dismissing an appeal is a matter of public record, and therefore, the dissent would

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(…continued)
Committee review the rules to determine whether the Superior Court's informal procedure should be formalized.

hold that Appellant cannot meet § 9545(b)(1)(ii). Respectfully, we disagree since implicit in the decision in Chester was the recognition that the public record could be accessed by the defendant.

While the dissenting opinion is attractive in its simplicity, it does not give due consideration to the circumstances the instant case raises. The August 14th order was a matter of "public record" only in the broadest sense. Such orders are not sent directly to the prisoner. Rather, counsel is sent the notice on the assumption that counsel will inform his client of the court's action. In a case such as the instant one, it is illogical to believe that a counsel that abandons his or her client for a requested appeal will inform his client that his case has been dismissed because of his own failures. More importantly, in light of the fact that counsel abandoned Appellant, we know of no other way in which a prisoner could access the "public record."[13] Rather, we believe this situation is sufficiently distinct from the situation in Chester, since in this case, the matter of "public record" does not appear to have been within Appellant's access.[14]

Accordingly, this matter is remanded to the Superior Court for remand to the PCRA court for further consideration consistent with this opinion.[15, 16]

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[13] Of course, the PCRA court can examine this matter on remand.

[14] Chester involved a "public record" extant at the time of trial during which counsel was actively representing his client. Clearly, that is distinct from a situation in which counsel has abandoned his client and yet counsel is the only way the client would have to access the information.

[15] On a final note, we see no reason to appoint a new trial judge to these proceedings on remand, since there is nothing to suggest that the appointment of defense counsel as (continued…)

Mr. Justice Baer, Madame Justice Baldwin and Mr. Justice Fitzgerald join the opinion.

Mr. Justice Saylor files a dissenting opinion in which Mr. Justice Castille joins.

Mr. Justice Eakin files a dissenting opinion in which Mr. Justice Castille joins.

(…continued)
PCRA appellate counsel was anything more than an oversight. See, e.g., Commonwealth v. Whitmore, 912 A.2d 827 (Pa. 2006).

[16] Finally, our decision in Robinson and subsequent case law, have no relevance to this case, since Robinson did not allege any of the exceptions to the one-year time limitation in his PCRA petition or before this Court. Robinson, 837 A.2d 1157 (Pa. 2003). Rather, this case presents the first opportunity to examine the contours of subsection (b)(1)(ii) under circumstances when PCRA counsel has abandoned his client.