

[J-68-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	180 MAP 2002
	:	
Appellee	:	Appeal from the Memorandum Opinion
	:	and Order of the Superior Court at No.
	:	528 MDA 2001, dated February 13, 2002,
v.	:	affirming the order of the Court of
	:	Common Pleas of Adams County, dated
	:	February 28, 2001 at No. CC-204-93.
JOSE E. CRUZ,	:	
	:	
Appellant	:	SUBMITTED: April 24, 2003
	:	
	:	
	:	

CONCURRING OPINION

MR. JUSTICE NIGRO

Decided: June 22, 2004

Despite the fact that I joined the dissent in Commonwealth v. Haag, 809 A.2d 271 (Pa. 2002), I am able to join in the result reached by the majority in the instant matter. As the majority here notes, the majority in Haag held that the PCRA court did not err in requiring the next friend of an incompetent PCRA petitioner to proceed with the PCRA petition filed on his behalf, pointing out that the petitioner could always seek review of any previously undiscoverable fact-based claims through a second PCRA petition if he later regained his competency. The appellant, also the appointed next friend, in Haag, however, argued that such a procedure would not adequately protect the rights of the incompetent PCRA petitioner as any second PCRA petition would be time-barred by the PCRA. In addressing that claim in a footnote, the majority suggested that, although this Court had not

yet addressed the issue and could not do so in the case at hand due to its lack of ripeness, a PCRA petitioner who regains competency would “arguably” be able to file a second PCRA petition pursuant to the “after discovered evidence” exception to the timeliness requirements found at 42 Pa. C.S. §9545 (b)(1)(ii). Id. at 280 n.11.

The dissenting opinion authored by then-Chief Justice Zappala, which I joined, took issue with the majority’s decision to force a next friend to proceed with a PCRA petition on behalf of an incompetent PCRA petitioner based, at least in part, on a prediction that the after discovered evidence exception would indeed later be found to encompass all potential claims brought by the petitioner should he regain his competence.¹ In fact, the dissent opined that this exception would not include “all potential cognizable claims which are presently unidentifiable by the next friend or PCRA counsel due to the inability of PCRA counsel to engage in meaningful consultation with [the incompetent PCRA petitioner] regarding his case, but would be capable of identification and development should [the PCRA petitioner] regain his competence and be able to consult with PCRA counsel.” Haag, 809 A.2d at 292 (C.J., Zappala, dissenting). In support of its position, the dissent pointed out that this Court had already established that “the class of claims which fall under the exception is extremely limited,” Id. (citing Commonwealth v. Gamboa-Taylor, 753 A.2d 780,785 (Pa. 2000)), and further observed that the Superior Court, as the highest appellate

¹ The dissent in Haag also faulted the majority for insisting that the issue regarding the after discovered evidence exception was not properly before the Court, and yet proceeding to hold that “should Haag regain his competence, any fact-based claims which can be identified through subsequent meaningful consultation with PCRA counsel can be presented in a second PCRA petition” under that exception. Haag, 809 A.2d at 292 n. 3 (Zappala, C.J., dissenting). Despite this apparent inconsistency, the majority in Haag nonetheless explicitly stated, as noted above, that the issue had not been decided by the Court and was not properly before it then and thus, in the end, the majority did indeed rest the rights of an incompetent PCRA petitioner on the mere possibility that he may later be able to bring cognizable claims pursuant to the after discovered evidence exception.

court that had thus far addressed the issue, had actually held that an appellant's claim of mental illness did not fit into any exception to the PCRA timeliness requirements.

I continue to believe that Haag was wrongly decided. However, the issue in that case centered on whether a PCRA petitioner, through a next friend, could be forced to proceed with his first PCRA petition while incompetent. The issue of whether such incompetence may later satisfy the requirements of the after discovered evidence exception to the PCRA time limits was not, as the Haag majority itself stated, properly before the Court in Haag. Now that the issue is squarely before us, I agree with the majority that, for the reasons outlined in its opinion, this exception is applicable if a petitioner can demonstrate that he was and remained incompetent throughout the period during which his right to file a PCRA petition lapsed and that he filed his current petition within 60 days of regaining competence.