[J-99-2002]]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 30 EAP 2001
	:	
Appellee	:	Appeal from the Judgment of the Superior
	:	Court entered on 8/31/99 at 4363 PHL
	:	1997 affirming the order entered on
v.	:	9/25/97 in the Court of Common Pleas,
	:	Philadelphia County, Criminal Division at
	:	9012-4136 1/2
LUIS CRUZ,	:	
	:	
Appellant	:	
	:	SUBMITTED: April 9, 2002
	:	
	:	
	:	

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: June 22, 2004**

I respectfully dissent. After outlining the important, difficult, and potentially far-reaching due process/equal protection claim arising from this Court's management of its discretionary review docket which is squarely presented in this Post Conviction Relief Act ("PCRA")[1] appeal, the Majority Opinion inexplicably declines to decide the claim. Instead, the Majority revisits the underlying search and seizure claim which was raised and finally litigated on appellant's direct appeal to the Superior Court, and then summarily resolves the claim in appellant's favor. The Majority recasts the issue presented, despite the fact that

[1] 42 Pa.C.S. § 9541 *et seq.*

appellant insists that he is not attempting to relitigate the search and seizure claim. Instead, appellant makes clear that his is a distinct claim which only matured years after trial when he supposedly was a victim, at the hands of this Court, of an "arbitrary, capricious and unequal" discretionary appeal system.

Having recast the claim into one which appellant deliberately does not pursue, the Majority summarily grants collateral relief based upon the companion decision in Commonwealth v. Melendez, 676 A.2d 226 (Pa. 1996) -- a decision which did not exist when appellant's discretionary appeal was dismissed as improvidently granted. See Majority slip op. at 14 ("Melendez establishes Appellant's entitlement to relief"). In so ruling, the Majority apparently assumes that the former members of this Court who voted to dismiss appellant's appeal as improvidently granted before Melendez's allocatur was even granted were incompetent in failing to perceive the supposed "identical" nature of the appeals. The Majority employs its assumption of unexplainable disparate treatment by predecessor Justices as grounds for essentially reinstating appellant's 1994 discretionary appeal *nunc pro tunc* and then affording him the benefit of the retroactively-deemed-controlling Melendez decision.

In addition to the fact that the Majority decides an issue other than the one actually posed, the Majority eviscerates salutary provisions in the PCRA concerning cognizability, see 42 Pa.C.S. § 9543(a)(2)(i) (constitutional claim may be basis for relief only if violation "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place") and previous litigation. See id. § 9544(a)(2) ("an issue has been previously litigated if . . . the highest appellate court in which the petitioner could have had review as a matter of right has ruled upon the merits of the issue"). The Majority eviscerates the statute in the absence of any argument that these unambiguous limitations upon redundant PCRA review of appellee's underlying search and seizure claim are unconstitutional. See Pantuso Motors, Inc. v. Corestates Bank, N.A., 798 A.2d 1277, 1283

(Pa. 2002) ("absent constitutional infirmity, the courts of this Commonwealth may not refuse to enforce on grounds of public policy that which the legislature has prescribed"). It has been noted by learned authority that:

> Much of the confusion surrounding the PCRA is the result of a fundamental misunderstanding of the Act's purpose. It is not a means of re-litigating issues that have already been addressed on direct appeal, or which could have been raised earlier. Nor is it a tool to correct technical or procedural errors that occurred during the conviction process. Its sole purpose is to provide relief to those individuals who did not commit the crimes for which they have been convicted, or who are serving sentences longer than the legal maximum.

Thomas G. Saylor, Post Conviction Relief in Pennsylvania, Pa. B.A.Q., Vol. LXIX, No. 1 (January, 1998), at 1. The Majority's approach today will only sow further confusion concerning the proper role of the PCRA. Because I would decide the constitutional question of first impression actually presented, rather than add to the confusion surrounding the PCRA by reaching a different claim, I voice this respectful dissent.

The previous litigation proscription of the PCRA is a statutory mandate which, unless it runs afoul of some constitutional proscription, is entitled to fidelity in enforcement of its plain terms. Collateral attacks upon final state convictions in Pennsylvania involving constitutional claims which are cognizable under the PCRA are governed by the terms of the PCRA and not by judicial whimsy. This Court has explicitly recognized that ours is not the only appropriate voice in determining the availability of relief from an otherwise-final criminal judgment. Thus, we have "acknowledged that the General Assembly is authorized, consistent with the Pennsylvania Constitution, to impose reasonable restrictions on the various forms of post-conviction review." Commonwealth v. Abdul-Salaam, 812 A.2d 497, 501 (Pa. 2002), *citing* Commonwealth v. Peterkin, 722 A.2d 638, 642 (Pa. 1998). One such reasonable restriction is the PCRA's previous litigation provision, which unambiguously states that claims which have been previously litigated are ineligible for

collateral relief. 42 Pa.C.S. § 9543(a)(3). Thus, "[a] petitioner is **precluded** from raising a claim on post-conviction review that was previously and finally litigated on direct appeal." Commonwealth v. Williams, 732 A.2d 1167, 1183 (Pa. 1999) (emphasis supplied); see also Commonwealth v. Chester, 733 A.2d 1242, 1253 (Pa. 1999) ("Claims that have been finally litigated are **not cognizable** under the PCRA.") (emphasis supplied). The PCRA defines previous litigation in unambiguous terms which, in pertinent part here, unquestionably preclude review of appellant's search and seizure claim, since it was rejected by the Superior Court on his direct appeal: "an issue has been previously litigated if … (2) the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue…." Id. § 9544(a)(2).

The previous litigation bar is a sensible one for it promotes finality and respect for judgments, which are important societal interests. See Commonwealth v. Morris, 771 A.2d 721, 732 (Pa. 2001); Peterkin, 722 A.2d at 643. "Finality is essential to both the retributive and the deterrent functions of criminal law." Calderon v. Thompson, 523 U.S. 538, 555, 118 S.Ct. 1489, 1501 (1998). It is one thing to offer a second bite at a state criminal judgment in order to allow for litigation of new claims, previously undiscoverable claims, or previously unripe claims (such as the one appellant actually forwards here), but it is another thing entirely to permit repetitive litigation of the same claim. Indeed, there is no practical and principled reason to permit even limited relitigation, for **every** defendant seeking to relitigate a claim will argue, as the Majority does here, that the first appeal was wrongly decided. As Mr. Justice (now Chief Justice) Cappy noted in Commonwealth v. Albrecht, 720 A.2d 693, 703 (Pa. 1998), "[t]he requirement that a claim for PCRA relief not be previously litigated would be rendered a nullity if this court could be compelled to revisit every issue decided on direct appeal upon the bald assertion that that decision was erroneous."

Enforcing the terms of the PCRA previous litigation bar provision would visit no injustice upon appellant, for he explicitly does not seek to relitigate his search and seizure claim. Enforcement of the provision would also spare the Court the necessity of simply assuming that search and seizure claims are cognizable in that form upon PCRA review. Given the manner in which this appeal has been presented, it is perplexing that the Majority reaches out to do this unnecessary violence to the PCRA.

Far from showing trepidation to the PCRA previous litigation provision betrayed by the Majority today, this Court has applied the provision expansively, indeed so expansively that it covers circumstances that arguably are not supported by the plain language of the PCRA. For example, this Court has barred review of collateral claims invoking distinct constitutional rights such as the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, if the event at trial from which the ineffectiveness claim derives was the subject of a previous claim. E.g., Williams, 732 A.2d at 1183 ("a petitioner may not obtain relief on collateral review merely by alleging ineffective assistance of counsel and presenting claims that were previously litigated under new theories"). Moreover, this Court has routinely invoked the previous litigation provision bar to deny consideration of claims of constitutional dimension, including claims which -- unlike search and seizure claims -- actually implicate the truth-determining process and a defendant's factual guilt or innocence. See, e.g., Commonwealth v. Johnson, 815 A.2d 563 (Pa. 2002); Commonwealth v. Wharton, 811 A.2d 978 (Pa. 2002); Commonwealth v. Marinelli, 810 A.2d 1257 (Pa. 2002). Indeed, true to our duty to enforce constitutional statutes according to their terms, we have gone so far as to apply the provision in instances, like this one, where there is a claim that intervening law suggests that the previously litigated claim would have merit if it were subject to relitigation. Chester, 733 A.2d at 1253 & n.12 (claim involving propriety of specific intent charge for first degree murder based upon accomplice liability). Accord Commonwealth v. Hardcastle, 701 A.2d

541, 548 (Pa. 1997) (refusing to reconsider equal protection claim under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), notwithstanding intervening authority: "if finality means anything it must mean that our decision on the merits in this case . . . cannot be affected by decisions in other cases decided three and four years later").

The Majority's view that the previous litigation provision is subject to such selective "general" enforcement that it may be ignored to reach a claim which was not pursued by the PCRA petitioner invites a substitution of an arbitrary judicial will for the even-handedness of legislation. If this sort of *sua sponte* "selective" negation of the legislative provision is acceptable, what has the statutory "doctrine" become and who may know and predict its new contours? The statute no longer means what it literally says by its "plain terms." Slip op. at 13. But, which other parties or claims will be deemed entitled to the *sua sponte* grace of Pennsylvania's highest court, to have the Court selectively reinvigorate already-failed claims? The case *sub judice* is not a capital case and, in any event, the previous litigation provision has been enforced in the capital arena; thus, today's rule cannot be justified by the Court's indulgence of the felt extra-legal necessities arising in capital cases. See Commonwealth v. Saranchak, 810 A.2d 1197 (Pa. 2002) (reinstating PCRA petition of capital petitioner despite lack of jurisdiction to do so). It cannot be the mere constitutional nature of the underlying claim, for the "doctrine" has routinely been applied to bar reconsideration of constitutional claims. E.g., Wharton, 811 A.2d at 983. Indeed, the doctrine has specifically been applied to search and seizure claims. E.g., Commonwealth v. Copenhefer, 719 A.2d 242, 253 (Pa. 1998). Moreover, if a general exception were to be made for certain constitutional claims, one would expect search and seizure issues to be at the bottom of the list, since they do not involve factual guilt or innocence, rather only police conduct.

The only unique consideration present here is one which weighs heavily in favor of reaching the due process/equal protection argument that is actually forwarded. This

consideration is the fact that, unlike in the usual instance, where this Court is called upon to assess the duties and faults in others such as a lower court judge, a defense attorney, or a prosecutor, this case involves a candidly and cogently forwarded claim that **this Court** committed error of constitutional magnitude in its handling of appellant's direct appeal. The claim would require this Court to examine its duty and performance in managing its discretionary review docket. We should be willing to examine that constitutional claim squarely, since it is the only claim that actually exists in this case.

As authority for the notion that we may negate the previous litigation bar provision at will, the Majority cites Commonwealth v. Tyson, 635 A.2d 623 (Pa. 1993). As the Majority notes, however, Tyson is distinguishable because, in denying earlier relief to the appellant there, this Court had noted that the denial was without prejudice to post-conviction relief. The Tyson Court specifically emphasized the appellant's reliance upon the earlier "without prejudice" notation in determining that she was entitled to PCRA relief notwithstanding the previous litigation of the claim:

> [O]ur May 6, 1988 Order, which was entered during the time that appellant was seeking reconsideration, clearly indicated that her right to petition for collateral relief was not thereby being jeopardized.
>
> Based upon the circumstances presented here, we conclude that while the issues presented here were, indeed, previously raised and decided in appellant's direct appeal and thus, under the PCRA were finally litigated, fairness dictates that we permit collateral relief. **Appellant reasonably concluded from the wording of the May 6, 1988 order that it was this Court's intention to permit her to seek collateral relief and thereby have the benefit of our then pending … decision**. Under the circumstances presented here it would be manifestly unjust for this Court to affirm the Superior Court's decision **especially given the fact that it was our own order that no doubt misled appellant**.

Id. at 624 (emphases supplied). It was that unique situation which led the Court to conclude that "principles of fairness" and the "interests of justice" required an award of

relief. No such reliance has been invited here by virtue of our improvident grant dismissal of appellant's appeal.

Tyson is also distinguishable from the case *sub judice* because it involved the availability of a defense at trial -- expert evidence concerning the so-called "battered woman syndrome" -- and thus inured to appellant's actual guilt or innocence. Finally, given this Court's decisions in the previous litigation arena since Tyson, as well as the fact that the Tyson Court never attempted to explain under what authority the statute could be negated on "fairness" grounds, it is unwise to read Tyson in the Majority's expansive fashion -- *i.e.*, as if it permits the Court to ignore the previous litigation bar provision whenever a Majority is of a mind to do so. Tyson, which went to such extraordinary and near-apologetic lengths to tie itself to its unique facts, should be confined to those facts.

Appellant presents a cogent constitutional claim of first impression. It is an issue of importance and capable of repetition. I would decide that claim. Because the Majority does not, and erroneously awards relief upon an unavailable claim which is not before us, I respectfully dissent.[2]

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[2] Given my view in text, I would not reach the merits of the underlying search and seizure claim. However, I note my concern with the Majority's easy acceptance of the notion that the situations of Melendez and appellant respecting the search of Melendez's home was "identical" and should have been apparent as such to those of our predecessor brethren who voted to dismiss appellant's appeal and later to sustain Melendez's. First, it is not self-evident that appellant and Melendez were "identically situated." The warrant-based search which resulted in the actual seizure of the evidence which formed the basis for appellant's prosecution was of **Melendez's** home. Appellant was present at the time of the search and, having been charged with possessing the contraband, he had automatic **standing** to challenge that seizure. See Commonwealth v. Peterson, 636 A.2d 615, 617 (Pa. 1993), *citing* Commonwealth v. Sell, 470 A.2d 457 (Pa. 1983). In forwarding his suppression challenge, however, appellant had the affirmative preliminary burden at the suppression hearing to show that the entry into Melendez's residence and the ensuing search violated a reasonable expectation of privacy which was personal to **him**. As this Court explicitly noted in Peterson:

(continued…)

(…continued)

> [H]aving had his standing acknowledged, appellant is then required to establish that the challenge he has without question legitimately raised is itself legitimate. In order to do so, he must demonstrate that he held such a privacy interest which was actual, societally sanctioned as reasonable, and justifiable in the place invaded that the warrantless entry of the police violated his right under the Constitution of this Commonwealth, Article I, Section 8, to be "secure ... against unreasonable searches and seizures."

Id. at 617-18.

Notably, in forwarding his present assertion that he was "identically" situated to Melendez respecting the search of her home, appellant states that he had a reasonable expectation of privacy because he "resided" there. For proof of this crucial link in proving "identicality," however, appellant relies not upon his own proof at the suppression hearing, but upon the Commonwealth's **later** evidence at trial, see Brief for Appellant, 12 n.8; a supposed concession by the Commonwealth at the collateral review stage (long after this Court supposedly violated his right to due process and equal protection by failing to recognize identicality); id. at 23, and a detective's hearsay testimony at the suppression hearing that an informant told him that appellant lived there. Id. On such a record, it is not so obvious that our predecessor brethren who supposedly cast inexplicably contrary votes were so incompetent as appellant and the Majority assume.

My second concern with the merits has to do with the Majority's equally rash acceptance of the notions that (1) Commonwealth v. Mason, 637 A.2d 251 (Pa. 1993), which involved a warrantless police entry via battering ram, alone dictated appellant's entitlement to relief before the Melendez case was even decided, and (2) Melendez's adoption of a unique view of the independent source rule made no new law. In my view, a fair and careful reading of those two rather unfocused opinions supports neither notion. If we are about reinterpreting the conduct of the Court in those years, perhaps those opinions should be fair game for scrutiny as well.