[J-30-2010]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 557 CAP
	:	
Appellee	:	Appeal from the Order of the Court of Common Pleas of Philadelphia County entered on November 8, 2007, dismissing the PCRA petition at No. CP-51-CR-0622491-1985
v.	:	
ERNEST PORTER,	:	
Appellant	:	SUBMITTED: March 8, 2010

OPINION

MR. CHIEF JUSTICE CASTILLE[1] **DECIDED: January 19, 2012**

Appellant Ernest Porter, a death-sentenced prisoner, appeals from the order of the Court of Common Pleas of Philadelphia County denying as untimely his serial petition under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546; the pleading raised a claim under Brady v. Maryland, 373 U.S. 83 (1963).[2] After the appeal was briefed on the timeliness merits and submitted, the parties, upon direction of this Court, filed supplemental briefs addressing the jurisdictional issue of whether the PCRA court's order was final and appealable. Upon review, we determine that the order below is appealable and, on the merits, that the court's time-bar determination is correct; thus,

[1] This matter was reassigned to this author.

[2] Whether the pleading below was a separate serial "petition" or an amendment of a pending serial petition is a point of contention we address below.

we affirm. We also address: (1) the circumstances creating uncertainty respecting appealability, in an effort to ensure that those circumstances do not arise again; and (2) relatedly, the circumstances creating the unacceptable delay in this case, so that PCRA courts throughout Pennsylvania will take measures to avoid such delays. Finally, we direct the PCRA court to promptly dispose of appellant's long-pending prior PCRA petition, which raised an issue under Atkins v. Virginia, 536 U.S. 304 (2002).[3]

I. BACKGROUND

Over twenty-six years ago, on April 27, 1985, appellant robbed and murdered Raymond Fiss as Mr. Fiss was opening his beauty shop in Philadelphia. On February 26, 1986, a jury found appellant guilty of first degree murder, robbery, and a firearms offense; the next day, the same jury sentenced appellant to death, finding a single aggravating circumstance (murder during commission of a felony) and no mitigators. This Court affirmed in Commonwealth v. Porter, 569 A.2d 942 (Pa. 1990), cert. denied, 498 U.S. 925 (1990), rehearing denied, 498 U.S. 1017 (1990); and appellant's first PCRA petition concluded with this Court's affirmance of the denial of relief in Commonwealth v. Porter, 728 A.2d 890 (Pa. 1999). Appellant's current counsel, Billy H. Nolas, Esq., now of the Philadelphia-based Federal Community Defender's Office

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[3] This Opinion is joined in its entirety by Messrs. Justice Eakin and McCaffery; Mr. Justice Saylor joins this Opinion with the exception of Parts III and V; and Madame Justice Orie Melvin joins this Opinion with the exception of Part V. Mr. Justice Baer files a Dissenting Opinion in which Madame Justice Todd joins.

("FCDO"), represented appellant on the PCRA appeal.[4] Appellant then filed a federal *habeas corpus* petition in the U.S. District Court for the Eastern District of Pennsylvania.

In August 2002, appellant returned to Pennsylvania state court, with Attorney Nolas filing a second PCRA petition, raising a single new claim: that appellant was mentally retarded under the U.S. Supreme Court's then-recent decision in Atkins v. Virginia.[5] Thereafter, in June 2003, the federal district court decided appellant's federal *habeas* petition. Porter v. Horn, 276 F. Supp. 2d 278 (E.D. Pa. 2003). The district court dismissed appellant's guilt phase claims, but granted conditional penalty phase relief premised upon a finding of instructional error under the Third Circuit's precedent construing Mills v. Maryland, 486 U.S. 367 (1988), a case decided after appellant's trial. Porter, 276 F. Supp. 2d at 311. Thereafter, the parties filed cross-appeals to the Third Circuit, which still have not been decided. Appellant's federal appeal presumably is

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[4] At the time, Attorney Nolas and his co-counsel, Robert B. Dunham, Esq., were affiliated with the Center for Legal Education and Defense Assistance ("CLEADA"), an organization which involved itself in the representation of Pennsylvania capital defendants. Attorneys Nolas and Dunham were hired by what is now identified as the FCDO (an organization that has employed various monikers over the years) once CLEADA disbanded, and the FCDO began to undertake such representations in capital cases throughout Pennsylvania. Nolas is the only lawyer listed on the FCDO pleadings here.

[5] An Atkins claim, if sustained, renders a capital murderer ineligible for the death penalty. For that reason, this Court has assumed that Atkins applies retroactively and is available even to capital PCRA petitioners such as appellant, who exhausted their direct appeal and PCRA rights before Atkins was decided. Thus, this Court has held that a serial PCRA petition presenting a colorable Atkins claim is cognizable under 42 Pa.C.S. § 9545(b)(1)(iii), the exception to the PCRA time-bar governing new constitutional rights that apply retroactively, so long as the claim is raised within sixty days of the decision in Atkins, as required by 42 Pa.C.S. § 9545(b)(2). Commonwealth v. Bracey, 986 A.2d 128, 134 (Pa. 2009); Commonwealth v. Miller, 888 A.2d 624, 629 n.5 (Pa. 2005).

limited to the issues the district court certified for appeal.[6] See 276 F. Supp. 2d at 364-65. The Commonwealth's cross-appeal presumably concerns only the Mills issue.

At some point after appellant's Atkins serial petition was filed, the PCRA court apparently was persuaded to defer consideration. The existing certified record does not reveal when or how this came to pass. The record contains no motion to place the matter in abeyance, no order of abeyance entered by the PCRA court, and no statement of the reason the Atkins petition was set aside.[7] It was not unusual to refrain from deciding Atkins cases in the immediate wake of the decision, because the High Court left it to the individual states to determine how to implement Atkins, including the fixing of a standard to determine mental retardation. See, e.g., Commonwealth v. Bracey, 986 A.2d 128, 130 (Pa. 2009). Any delay for that purpose ended in 2005, when this Court addressed the Atkins standard in Commonwealth v. Miller, 888 A.2d 624 (Pa. 2005).

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[6] A state prisoner's federal *habeas* appeal rights are limited by 28 U.S.C. § 2253, which directs the district court to issue a "certificate of appealability" allowing appeal only of those issues upon which the petitioner has made a "strong showing of the denial of a constitutional right." Commonwealth v. Morris, 771 A.2d 721, 734 (Pa. 2001) (citation omitted).

[7] The certified record available is a "duplicate record" the Clerk of Quarter Sessions "prepared from Photostats of available court documents and notes of testimony," because the Clerk could not locate the original record. Presumably, the original record is lodged in federal court.

After this appeal was submitted and supplemental briefs addressing jurisdiction were filed, the FCDO filed a Motion for this author's recusal. The FCDO attached a copy of an extra-record letter from the Commonwealth to the PCRA judge purportedly explaining the initial reason for setting the Atkins claim aside. We discuss this proffer where relevant, infra. The recusal motion is decided by a separate, single Justice Opinion filed contemporaneously with this Opinion.

On June 15, 2006, less than six months after Miller announced the Atkins review standard, appellant filed what counsel called a "supplement and amendment" to the Atkins petition. The 2006 filing did not apprise the PCRA court of Miller, nor did it request a determination of the Atkins claim. Nor was the "supplement and amendment" relevant to Atkins. The filing instead raised a new claim under Brady v. Maryland, which appellant said had ripened in the prior sixty days; this claim involved possible impeachment of a prosecution witness, Vincent Gentile, premised upon a non-notarized statement Gentile allegedly gave to a FCDO investigator on April 20, 2006. There is no indication in the docket or elsewhere that appellant either sought, or was granted, leave to amend his existing Atkins petition to add the new Brady claim.

Following written submissions by the parties on the Brady issue, the PCRA court heard argument on September 25, 2007. Attorney Nolas stated that the PCRA court had held the 2002 Atkins petition "in abeyance," awaiting the outcome of the federal *habeas corpus* cross-appeals. N.T., 9/25/07, at 12. Counsel also stated that the Third Circuit was holding the federal cross-appeals, at his request, until appellant could exhaust his new Brady claim in state court. See, e.g., id. at 8 ("[T]he Third Circuit … has held the case in abeyance so this [Brady] issue could be resolved[.]"). Counsel then sought permission to "depose" witness Gentile. The prosecutor focused on the gate-keeping PCRA jurisdictional issue of timeliness, including the fact that the Superior Court had found a similar claim respecting the same witness, in another of appellant's criminal matters, to be time-barred. The prosecutor also argued that the deposition request was a "fishing expedition," and noted that the PCRA required appellant to show an entitlement to an evidentiary hearing first.

The PCRA court focused on the time-bar jurisdictional issue and ruled that "[t]he petition is denied." The court elaborated that it had read the parties' pleadings, and

stated: "I am denying the PCRA petition on the grounds that it is not timely and it does not meet the requirements for the Brady material." Following the court's denial of the Brady petition, Attorney Nolas brought up the pending Atkins petition. Counsel did not request a decision on Atkins, which would resolve all pending issues in state court, possibly have appellant removed from death row if the Atkins claim succeeded, and free up the Third Circuit to pass upon the federal cross-appeals. Instead, counsel adverted to the Atkins petition as leverage to relitigate his request to depose Gentile, even though the court had just determined that the claim was time-barred. The following exchange occurred:

> Nolas: This is a separate issue before the Court pertaining to Atkins[] in our submission that [appellant] has mental retardation.
>
> Court: I didn't deal with that.
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> * * * *
>
> Nolas: That's before the Court. If you don't deny that today, what's wrong with taking [Mr. Gentile's] deposition?
>
> Court: The two don't mix together. What have you submitted on the Atkins claim other than the fact that you are claiming that he was mentally deficient?
>
> Nolas: Yes, that's our submission. [Appellant] has mental retardation.
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> * * * *
>
> Court: Is that issue [Atkins] before the Third Circuit?
>
> Nolas: It is not before the Third Circuit.
>
> Court: So that's squarely with me?
>
> Nolas: Yes, Your Honor. I know Your Honor held it in abeyance because the Third Circuit reversed the death sentence and the Commonwealth is appealing that and [appellant is] appealing the

denial of relief of the guilt phase from the Third Circuit. So I think the reasoning before was holding in [] abeyance to see what the Third [C]ircuit would do because if there's no death sentence then there's no point in us doing an Atkins.

Court: So there is no death sentence. All it is is an appeal?

ADA: Yeah, exactly. So I was going to suggest that you send [a] 907[[8]] notice just on the after discovered evidence slash Brady claim. And we'll specify that that's the claim that you are denying today and then we'll leave in abeyance to [sic] the Atkins to hear from the Third Circuit.

Court: Let me see if I understand this. The Third Circuit has already taken the death penalty off the table.

Nolas: No, Your Honor. The District Court granted relief to [appellant] on an instructional error at the penalty phase. The Commonwealth appealed that to the Third Circuit. That appeal is pending [in] the Third Circuit along with an appeal from us arguing [other issues].

Court: So the death penalty is still on the table?

Nolas: It's still on the [t]able potentially, yes.

* * * *

ADA: I misspoke.

Nolas: And that's why we asked Your Honor to look at the Atkins issue.

Court: It appears that from what I read he won on the death penalty issue.

Nolas: He just won a new penalty phase from the District Court which is subject to [the] Commonwealth's appeal and may be subject to resentencing down the road. They didn't take the death penalty off the table.

Court: When will that issue be resolved?

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[8] Pa.R.Crim.P. 907 (permitting PCRA court to dismiss a petition without a hearing).

ADA: They are waiting for us.

Nolas: They were waiting for Your Honor to decide on the [Brady] issue pertaining to Mr. Gentile.

Court: Okay. That's all. They [the Third Circuit] are not counting on me to deal with the Atkins issue?

ADA: No.

Nolas: We've told them about it, but they haven't said that you should look at it or shouldn't look at it.

Court: So I just need to do a 907 with respect to the Brady claim and timeliness issue surrounding the [filing].

Nolas: And I think I have to object to that because that's strange. You have a proceeding before the Court with two claims that are being raised. And I guess with a 907 notice we'd restate our objections and file a notice of appeal and then you have no jurisdiction, so it's a non-process.

Court: What are you suggesting I do?

Nolas: I suggest you let us do [Mr. Gentile's] deposition.

Court: We are beyond that. What are you suggesting that I do, rule on Atkins?

Nolas: I don't think you can rule on Atkins. I don't know[;] I haven't seen that process before, so I think I have to object.

N.T., 9/25/07, at 12-15.

The above exchange is pertinent both to the question of jurisdiction and to the federal and state court gridlock in this case. In summary, the position stated by federal counsel before the PCRA court was that:

- the PCRA court was holding the Atkins issue raised in appellant's 2002 serial PCRA petition in abeyance until the federal *habeas* cross-appeals, which did not include the Atkins claim, were decided;

- the Atkins issue was held because the Third Circuit might affirm the district court's order, effectively granting a new penalty hearing;
- the Third Circuit was not holding the federal appeals in abeyance for the PCRA court to rule on the Atkins petition; on counsel's request, it was holding only for appellant to exhaust his new claim sounding in Brady;
- the PCRA court could not dispose of the Brady claim because counsel would object in light of the pendency of the Atkins claim and would file an appeal to deprive the court of jurisdiction;
- the PCRA court could not rule on Atkins, because counsel would object to that course as well; and
- the only action the PCRA court could take was to let counsel depose a witness on the Brady claim, even though the PCRA court had already found the claim time-barred.

The PCRA court did not accept that its only choice was perpetual stasis and federal-state gridlock, during which counsel sought to develop a time-barred Brady claim. The court advised that a Rule 907 notice of dismissal of "the petition" would be issued that afternoon, and scheduled actual dismissal for November 8, 2007. The September 25, 2007 cover letter on the Rule 907 dismissal Notice, addressed to appellant, stated that "your PETITION FOR POST CONVICTION COLLATERAL RELIEF is being dismissed." The Notice identified the reasons for dismissal as: (1) "[t]he issue(s) raised in the PCRA petition filed by your attorney (is) (are) without merits; and (2) "[y]our petition is time-barred…." The November 8, 2007 order likewise stated that appellant's PCRA "petition" was being dismissed.

In his Notice of Appeal, Attorney Nolas stated that appellant was appealing "from each and every aspect of the Court of Common Pleas' Order of September 25, 2007,

made orally and in open Court and entered on November 8, 2007, denying [appellant's] Post Conviction Relief Act Petition." Similarly, in the Jurisdictional Statement attached to the Notice of Appeal, counsel stated that this Court had jurisdiction because "[t]he lower court's jurisdiction was properly invoked and thus this Court has jurisdiction from [sic] the timely appeal of the denial of the petition." Jurisdictional Statement, 1 ¶ 2. Counsel elaborated that: "Appellant seeks review of each and every part of the Order and opinion denying his request for a new trial, and other relief, and review of rulings made during the course of the proceedings, as well as all claims raised in Appellant's PCRA petition, in all supplemental filings and orally during proceedings before the Court." Id. at 2 ¶ 3. All references were to denial of a "petition" encompassing every ruling below.

II. JURISDICTION

A.

Given the procedural oddity that appellant's serial Brady petition was filed and decided while his Atkins petition, also a serial pleading, remained pending, this Court *sua sponte* directed supplemental briefing addressed to jurisdiction, *i.e.*, whether the PCRA court's order of dismissal was final and appealable. In his supplemental brief, appellant argues that his appeal is improper. Appellant posits that there was a single serial PCRA petition below, raising two claims: the original Atkins claim, and the Brady claim, which appellant added by amendment. Citing Pa.R.Crim.P. 905(A), appellant says that a PCRA petitioner may amend a pending serial PCRA petition to add a new serial claim. Citing Pa.R.Crim.P. 907 and 910, appellant then argues that the PCRA court's "dismissal of the Brady claim, without ruling on the Atkins claim, was not an appealable final order." Appellant does not seek to withdraw the appeal, but instead

argues that this Court should quash it without prejudice to his ability to present the Brady claim "when there is proper jurisdiction." Notably, Attorney Nolas, who argued to the PCRA court that it could not decide the Atkins claim, and thereby could not produce a final order under counsel's current theory, does not suggest how a final appealable order could ever be entered. Nor does counsel explain how the Atkins procedural ruling below – a ruling not to decide the claim, at counsel's urging – is not itself a ruling on the claim, thereby subject to appeal.

The Commonwealth's supplemental brief argues that the appeal is a jurisdictional "nullity" for a different reason. In the Commonwealth's view, appellant's 2006 effort to amend his 2002 serial Atkins petition to add a new Brady claim was an improper attempt to subvert the PCRA time-bar, via manipulation of the Criminal Rules of Procedure authorizing PCRA amendments. The Commonwealth warns that if PCRA petitioners may amend serial PCRA petitions at will, abuse and maneuvering will ensue, particularly in capital cases. The Commonwealth argues that prohibiting such amendments is the only approach that respects the PCRA time-bar, see Commonwealth v. Moore, 805 A.2d 1212, 1225 (Pa. 2002) (Castille, J., joined by Newman and Eakin, JJ., concurring and dissenting); it is also the approach the U.S. Supreme Court has taken respecting the federal *habeas corpus* time-bar, Mayle v. Felix, 545 U.S. 644, 650 (2005); see also United States v. Duffus, 174 F.3d 333, 337-38 (3d Cir. 1999); and the same rule applies to civil statutes of limitation. See Kincy v. Petro, 2 A.3d 490, 497 (Pa. 2010). Since appellant had no right to unilaterally amend a pending serial petition to add an unrelated and time-barred Brady claim, the Commonwealth submits, he had no right to appeal an order disposing of the improper attempt to amend. The Commonwealth requests that we dismiss this appeal and remand for disposition of the Atkins petition.

B.

Appellant's position that his Brady claim was an amendment of the pending Atkins petition is belied by the record. Our procedural Rules contemplate that amendments to pending PCRA petitions are to be "freely allowed to achieve substantial justice." Pa.R.Crim.P. 905(A). And, it is true that Rule 905 does not explicitly distinguish between initial and serial petitions. However, appellant is mistaken in arguing that Rule 905 amendments are self-authorizing, *i.e.*, that a petitioner may simply "amend" a pending petition with a supplemental pleading. Rather, the Rule explicitly states that amendment is permitted only by direction or leave of the PCRA court. In this case, there is no indication that appellant ever requested, or that the PCRA court ever granted, leave to amend the Atkins petition at all, much less to amend it to include a new and unrelated claim. The fact that counsel labeled the Brady petition a "supplement and amendment," without authorization, does not mean the pleading amended and became part of the pending Atkins petition. Misdesignation does not preclude a court from deducing the proper nature of a pleading. See Commonwealth v. Abdul-Salaam, 996 A.2d 482 (Pa. 2010) (involving deceptive labeling of PCRA pleading). Cf. Pa.R.C.P. No. 126. Appellant's "amendment" argument is baseless.

Moreover, it is clear that the PCRA court treated appellant's Brady pleading as a separate petition; as counsel noted in his appeal papers, the PCRA court's order dismissed "the petition," not an "amendment."[9] The PCRA court characterized its order

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[9] Because the PCRA court did not grant leave to amend, and did not treat the Brady petition as an improper amendment, we need not pass upon the Commonwealth's jurisdictional argument. Rather, the complicating factor in what would otherwise be a (continued…)

as a ruling on a serial PCRA "petition" that had raised a new claim subject to its own time-bar analysis. Significantly, this approach accepted the Brady claim precisely as Attorney Nolas initially argued it to the PCRA court and exactly as he had presented it to the Third Circuit in securing a federal stay. Counsel said he filed the new claim within sixty days of its discovery so as to comply with the PCRA time-bar. He posed it as a separate serial claim that could and must be ruled upon, while the Atkins petition remained in abeyance, so that the Third Circuit could proceed with the stayed federal cross-appeals, which in turn had, according to counsel, led to the Atkins petition being held "in abeyance." Counsel explicitly told the PCRA court that the Third Circuit was "waiting for Your Honor to decide on the issue pertaining to Mr. Gentile." N.T., 9/25/07, at 14. Likewise, in securing a stay of the federal appeals, counsel told the Third Circuit that the sole purpose of returning to state court was to litigate the new Brady claim, giving the Circuit the impression that the Brady claim was immediately reviewable, and that the resulting delay pending state exhaustion would be minimal.

The PCRA court's opinion corroborates that it treated the Brady claim as a separate PCRA petition, and concluded that it lacked jurisdiction because the petition was time-barred (and that, in any event, the claim failed). The court noted appellant's filing of the 2002 Atkins petition in one paragraph. In the following paragraph, the court recounted that the Brady issue was forwarded in a pleading labeled a "supplemental and amended PCRA motion," but thereafter repeatedly adverted to it simply as "the petition" or "the instant PCRA petition" without further reference to the Atkins petition. The opinion's comprehensive discussion of the PCRA time-bar and its exceptions addressed Brady alone and made no comment upon the Atkins petition. See PCRA Ct.

(…continued)
straightforward analysis of the timeliness of a serial PCRA petition is the court's holding the Atkins petition in abeyance. We address that factor in Part III, infra.

Op. at 3-4, 8, 9, & 16. In short, the PCRA court treated the Brady filing as a distinct collateral attack ripe for "resolution" -- just as federal counsel had argued it was in both state and federal court, up until the point the court ruled against counsel, and just as counsel later treated it when he filed his Notice of Appeal and his initial brief.

C.

The PCRA court's treatment of the Brady petition as separate and distinct was also authorized under the terms of the PCRA. The statute speaks in singular terms of "the claim" or "the right" which is the subject of a serial PCRA "petition," as follows:

> (1) Any **petition** under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (i) the failure to raise **the claim** previously was the result of interference by government officials with the presentation of **the claim** in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) 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; or
>
> (iii) the **right** asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.
>
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date **the claim** could have been presented.

42 Pa.C.S. §§ 9545(b)(1) & (2) (emphases added). These provisions are claim-specific, as they would have to be, given the sixty-day filing restriction, and the fact that the

statute addresses "exceptional" claims. Particularly given the shifting and idiosyncratic contentions Attorney Nolas made to the court concerning the appropriate course for the proceedings, the PCRA court sensibly viewed its decision as treating the Brady claim as a separate serial petition, which it resolved by a definitive final order.

The complication is whether the PCRA court had the authority to dismiss the Brady petition while the Atkins petition was in abeyance. Setting aside the question of the propriety of holding the Atkins petition in abeyance, see Part III, infra, nothing in the PCRA or our decisional law prevents such treatment; and there is no impediment of a jurisdictional nature.

No case from this Court addresses this scenario; but, notably, the nearest case, Commonwealth v. Lark, 746 A.2d 585 (Pa. 2000), does not so limit the PCRA court. Lark holds only that a PCRA trial court cannot entertain a new PCRA petition when a prior petition is still under review on appeal:

> Appellant could not have filed his second PCRA petition in the court of common pleas while his first PCRA petition was still pending before this [C]ourt. The trial court had no jurisdiction to adjudicate issues directly related to this case; only this [C]ourt did. A second appeal cannot be taken when another proceeding of the same type is already pending . . . .

746 A.2d at 588 (citation omitted); accord Commonwealth v. Jones, 815 A.2d 598, 604-05 (Pa. 2002) (Opinion Announcing the Judgment of the Court); see also Commonwealth v. Bond, 819 A.2d 33, 52 (Pa. 2002) ("[I]n [Lark], this Court held that this precise type of new claim, alleged in a remand motion before this Court during the pendency of a PCRA appeal, must be filed as a second PCRA petition, which may not be filed until this Court completes its review of the pending PCRA matter. Permitting a PCRA petitioner to append new claims to the appeal already on review would wrongly subvert the time limitation and serial petition restrictions of the PCRA. Thus, under

Lark, this Court cannot entertain this claim, which was not raised in the PCRA petition which is the subject of the appeal before us.") (citations omitted). Lark does not speak to the PCRA court's authority in situations like this one, where no appeal was pending, and where a prior petition was set aside, in accordance with the petitioner's demand that it not be decided. Nor does Lark speak to a circumstance where the new serial claim is forwarded in state court in conjunction with counsel's representation to the Third Circuit that it is immediately reviewable and a corollary representation by counsel in the PCRA court that pending federal *habeas* cross-appeals cannot proceed until the PCRA court acts on the new claim.

Furthermore, the PCRA court here displayed commendable respect for the federal courts, given the circumstances as federal counsel had argued them. Attorney Nolas's position, if accepted, would create an open-ended federal/state gridlock occasioned by: (1) counsel securing a stay of the federal *habeas* cross-appeals in order to exhaust a new Brady claim, and (2) then arguing, in the PCRA court, that the court could not finally decide the Brady claim **or** the Atkins claim. In the meantime, the Atkins petition was held in abeyance. The necessity for prompt and final disposition of the ripe Brady petition was heightened after counsel essentially argued to the PCRA court that it was trapped, *i.e.*, that neither the federal court nor the state court could proceed to decide appellant's collateral attacks. The PCRA court acted promptly after recognizing the choreographed absurdity of delay argued to it by federal counsel, and wisely sought to open the way to move appellant's appeals forward in both forums.

D.

To hold that an appeal such as this is not final would also have untoward consequences in cases, unlike this one, where no strategy of delay is being pursued, and the PCRA petitioner instead seeks to have all of his claims decided. To conclude that the PCRA court ruled on only one of two distinct claims in a single serial petition, as appellant alleges we should, would not make the order below interlocutory. The PCRA court's order here – the appealable piece of paper -- dismissed the PCRA petition, not merely a claim within it. Nor did the PCRA court purport to render a "partial disposition," *i.e.*, an "order" resolving some "claims," while ordering a hearing on others, without dismissing the entire petition. See Pa.R.Crim.P. 910 cmt. (adverting to partial dispositions under Pa.R.Crim.P. 907(3)). On its face, the PCRA court's dismissal order here was total, final and appealable, just as counsel said it was in his Notice of Appeal and Jurisdictional Statement. See Pa.R.Crim.P. 910 ("An order granting, denying, dismissing, or otherwise finally disposing of a petition for post-conviction collateral relief shall constitute a final order for purposes of appeal.").

If there was error in the proceedings that produced the order dismissing the "petition" in its entirety, that is a matter for objection -- and specific notice was given to appellant before entry of the order here to allow for objection -- and appeal. Thus, if the PCRA court was obliged to rule upon all of appellant's pending but unrelated serial "claims," and erred because it failed to address all "claims" in dismissing the entire "petition," appellant could have raised that objection below and renewed it upon appeal. Any defendant not pursuing a strategy of delay would do so. Indeed, this Court routinely sees such claims on capital PCRA appeals, where a defendant argues that the PCRA court erred in failing to individually address all claims. But, that issue-specific circumstance creates no jurisdictional impediment to appeal here, for the petition has been denied. Indeed, if a PCRA court dismisses an entire PCRA petition, while

declining to rule upon a discrete claim, the petitioner's only recourse is an appeal. Otherwise, a PCRA court could insulate its "partial" ruling from review and correction merely by ignoring certain claims, while dismissing the petition as a whole.

The point is simple and fundamental, obscured here only by the fact that federal counsel's strategy -- pursued in both state and federal court – has been to avoid having any of appellant's collateral claims decided any time soon. This is a legally dubious, but common, strategy peculiar to certain capital defense counsel, who view delay as an end in itself for those condemned under a sentence of death. See Rhines v. Weber, 544 U.S. 269, 277-78 (2005) (cautioning that, while many *habeas* petitioners might desire speedy resolution, "not all petitioners have an incentive to obtain federal relief as quickly as possible. In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death."). But, consider a non-capital PCRA petitioner serving a term of years, with no incentive to pursue delay and decision-avoidance. If the PCRA court dismisses that petitioner's "petition," without addressing all "claims" in the petition, is that dismissal not appealable? Under appellant's theory, the order is not appealable, which would leave such PCRA petitioners without any recourse: the trial court is finished with them, and the appellate court will not hear them. This consequence would be additional collateral damage of a decision that rewarded dubious, delay-oriented litigation strategies.

If this case, in fact, involves but a single serial PCRA petition with two unrelated claims, as appellant states, it does not change the fact that the order below undeniably dismissed that petition, and such an order must be viewed as final and appealable.

However viewed, the circumstance giving rise to the complication here is the practice of holding a serial PCRA petition in abeyance pending federal review of previously exhausted claims, which we will now address.

III. HOLDING THE ATKINS PETITION IN ABEYANCE

Attorney Nolas's presentation and characterization of appellant's serial Brady claim in both the federal court and the PCRA court, which secured delay in the proceedings in both court systems, was possible only because appellant's Atkins petition was held in abeyance. The record argument made by Attorney Nolas below -- which was not disputed by the Commonwealth, and which apparently was accepted by the court -- was that a serial PCRA petition raising a question of death eligibility (i.e., Atkins relief) should be held in abeyance merely because the defendant was pursuing lesser, parallel federal *habeas* review of prior claims. This notion is mistaken.[10]

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[10] In a subsequent Motion seeking my recusal, Attorney Nolas has attached a non-record letter dated August 13, 2003, from an Assistant District Attorney to the PCRA judge which, counsel says, shows that the Atkins petition was initially held upon the request of the Commonwealth. The Commonwealth's letter specifies two reasons to "stay further proceedings": (1) the federal district court had recently granted penalty phase relief (on June 26, 2003), and thus the Atkins claim could be addressed when that new penalty hearing was held; and (2) the Pennsylvania General Assembly was then considering legislation to establish the "procedures and criteria" to determine Atkins claims. Three of the Commonwealth's four substantive paragraphs in the letter concerned the second point. The Commonwealth noted the impracticality of passing upon Atkins, where the U.S. Supreme Court had left it up to the states to implement Atkins, but the General Assembly had yet to do so, and thus, there was no governing authority. The Commonwealth also noted the potential futility of the PCRA court fashioning its own manner of implementing Atkins, since the Legislature could opt for a different standard.

Notably, Attorney Nolas's explanation to the PCRA court below of the reasons the Atkins petition was being held does not square with the position in the Commonwealth's letter. Attorney Nolas said nothing of the absence of standards for the implementation of Atkins, which comprised the bulk of the Commonwealth's concern. Instead, Attorney Nolas said, the petition was held in abeyance "to see what the Third Circuit would do because if there's no death sentence then there's no point in us doing an Atkins." The Commonwealth's 2003 letter made no mention of the Third Circuit or cross-appeals; (continued…)

Notably, counsel cited no authority when he told the PCRA court, "I don't think you can rule on Atkins." N.T., 9/25/07, at 15. That is so, because no such authority exists.

It may be prudent for a PCRA court to await a pending decision from a court which binds it -- the U.S. Supreme Court or this Court, when it comes to capital cases -- if that decision will control the issue before the PCRA court. There may be reason to await hoped-for clarifying legislation; Atkins cases were a prime example, until it became clear that the General Assembly would not act, and this Court had to step in and address the issue. But, the notion that a PCRA court should hold a serial PCRA petition in abeyance while a petitioner pursues different claims on federal *habeas* review, in the lower federal courts, serves only to create unwarranted delay in capital cases. There is no reason why federal *habeas* petitions and serial state collateral petitions cannot proceed simultaneously. Simultaneous decision-making advances the fundamental concern of finality. The PCRA does not require or authorize such delay; nor do this Court's procedural Rules. State PCRA repose, on the other hand, rewards strategic ping-ponging delay between state and federal court and consequent litigation abuse.

(…continued)
instead, it adverted to the prospect of an imminent new penalty hearing resulting from the federal trial-level ruling. In short, the Commonwealth requested that the Atkins petition be held for reasons other than the reason Attorney Nolas identified to the PCRA court below; and neither of the reasons cited in the Commonwealth's 2003 letter retained any currency after this Court's 2005 decision in Miller.

In any event, the letter accounts for the Commonwealth's position at that time, but not for the reasons why the PCRA court actually decided to defer decision. More importantly, the letter addresses only the initial delay, and not the delay occasioned by federal counsel's litigation of the Brady claim; that delay began over five years ago, in June of 2006, and is addressed in Part V, infra.

The specific reason proffered by federal counsel to the PCRA court in this case for holding the Atkins petition confirms the point. Counsel stated: "I think the reasoning before was holding in [ ] abeyance to see what the Third [C]ircuit would do because if there's no death sentence then there's no point in us doing an Atkins." N.T., 9/25/07, at 12. Counsel is incorrect.

Even assuming that the pendency of the Third Circuit cross-appeals was the reason for setting aside the Atkins petition in the first place, but see note 10, supra, the Third Circuit decision will not eliminate the need to decide the Atkins issue, since Atkins involves death eligibility. The district court granted relief on a perceived penalty phase instructional error under the Third Circuit's Mills precedent; Mills claims do not involve death eligibility. If the Mills ruling is reversed by the Third Circuit or the U.S. Supreme Court, and no relief is granted on appellant's cross-appeal (which does not include an exhausted death eligibility claim), appellant's death sentence will stand. If the determination is affirmed, the Commonwealth is free to seek the death penalty in a new proceeding. Either way, it is a prospective capital case and the Atkins issue must be decided. Any relief appellant could secure in federal court still exposes him to the prospect of a capital retrial, while a meritorious Atkins claim removes the prospect of death. As this Court is reminded by capital counsel in different contexts, there are other consequences of a finding of death ineligibility, including conditions of incarceration, which specifically counsel against the deferral of legitimate death eligibility claims. There simply is no legitimate reason to defer decision of an Atkins claim, unless it lacks merit.

But, even where the serial claim that would be deferred does not involve death eligibility, there is no legitimate reason to defer decisions on serial PCRA petitions merely because a federal *habeas* petition is pending. Acceptance of the argument

federal counsel advances invites unnecessary delays -- and rewards strategic abuses -- in capital litigation. The state courts are not obliged to accept a complicit role in federal defense counsel strategies of delay. In the case *sub judice*, there was reason to hold the Atkins petition when it was first filed, given the absence of legislative guidance, but that reason expired in 2005, when this Court acted and decided Miller. There also may have been a reason to hold the Atkins petition for a shorter period if the Commonwealth was deciding whether to pursue an appeal of the federal district court's conditional grant of penalty phase relief; if the Commonwealth accepted the federal decision, and pursued a new penalty phase, the Atkins issue could be litigated in the retrial setting. But, there is no reason to hold a serial PCRA petition merely because federal cross-appeals were pending on already-exhausted *habeas* claims.

We will direct the PCRA court to address the Atkins petition immediately; and we caution PCRA courts generally that they should not place serial petitions in repose merely to allow for federal *habeas* litigation of prior, exhausted claims.

IV. THE MERITS

A.

Initially, in arguing the merits of his challenge to the PCRA court's ruling that his Brady petition was time-barred, appellant repeatedly maintains that the Third Circuit's action in placing the federal *habeas* cross-appeals in abeyance indicates that the Third Circuit made a preliminary determination that the Brady claim was meritorious. Attorney Nolas says that he informed the Third Circuit of the serial Brady petition and provided it with the "same submission" briefed here. Attorney Nolas then avers that the Third Circuit would not have placed the case in "abeyance" unless it had determined that: (1) the Brady claim had merit, (2) it would be entertained on the merits by Pennsylvania

courts, and (3) it was forwarded with diligence. As support for what is posed as this certain proposition of law, Attorney Nolas cites only to the U.S. Supreme Court's 2005 decision in Rhines v. Weber, supra. Brief for Appellant, 3, 8, & 10.

In fact, the Third Circuit's order does not identify any authority to explain its holding of the federal cross-appeals, and there is not a syllable expressing a view on the underlying merits. The listing on the Third Circuit's public website, under death penalty information, merely describes the order as "temporarily staying appeals pending PA State Courts' disposition of PCRA petition." Order, 2/7/07. There is no citation to Rhines.[11] No less troubling is the fact that Rhines does not support the inferred proposition Attorney Nolas ascribes to the Third Circuit's order to hold; and the hold is difficult to square with more relevant federal *habeas* authority, which federal counsel neglects to cite.

Nothing in Rhines authorizes a federal court of appeals to stay a federal *habeas* appeal in order to allow a state prisoner to return to state court to exhaust a new claim that was not the subject of the ripe *habeas* appeal pending before the Circuit, and which therefore would be subject to the restrictions on serial federal *habeas* petitions contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See 28 U.S.C. § 2244(b). In Rhines, the federal district court was faced with a "mixed" petition containing eight claims (of thirty-five) that had not been exhausted in state court. By the time the District Court determined that eight claims were unexhausted, AEDPA's

[11] In its response to appellant's recusal Motion, the Commonwealth appends the federal docket, which reflects entry of an order on February 7, 2007 "granting motion by [appellant] to temporarily hold these appeals in abeyance pending the Pennsylvania state courts' disposition of his petition under the [PCRA]." The docket also indicates that the federal "stay" was over the opposition of the Commonwealth, which was filed on December 5, 2006. There is no citation to Rhines or any other authority.

one-year time restriction on federal *habeas* petitions had expired. See 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of *habeas corpus* by a person in custody pursuant to the judgment of a State court. . . ."). Prior to establishment of the AEDPA time-bar, such mixed petitions could be dismissed and the petitioner could return to state court to attempt to exhaust his unexhausted claims and then return to federal court later; or, he could delete his unexhausted claims and secure immediate review. See Rose v. Lundy, 455 U.S. 509 (1982). But, after AEDPA, outright dismissal and return following state court exhaustion would have left the petitioner in Rhines time-barred from pursuing any federal *habeas* review at all. Rhines, 544 U.S. at 272-75.

Given this particular set of circumstances, arising soon after passage of AEDPA, the district court in Rhines adopted a procedure to avoid AEDPA's time-bar: it issued a stay and held the federal *habeas* proceedings in abeyance until the defendant had returned to state court to exhaust his claims. The U.S. Court of Appeals for the Eighth Circuit vacated the stay, but the U.S. Supreme Court granted further review. After noting a circuit split on the issue, the High Court ultimately held that in the mixed petition context, federal **district court** stay-and-abey can be appropriate, but only if "the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court." 544 U.S. at 277. The Rhines Court added: "Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless." Id. (citation omitted). Notably, the Court cautioned that, while many *habeas* petitioners might wish for a speedy resolution, "not all petitioners have an incentive to obtain federal relief as quickly as possible. In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the

sentence of death . . . [and] frustrate AEDPA's goal of finality by dragging out indefinitely their federal *habeas* review. . . . And if a petitioner engages in abusive litigation tactics or intentional delay, the district court should not grant him a stay at all." Id. at 277-78 (citation omitted).

Rhines thus spoke to **first** federal *habeas* petitions that were pending and undecided in district court and also subject to district court dismissal because they were mixed. Accord Pace v. DiGuglielmo, 544 U.S. 408, 416-17 (2005). That is not the case with appellant's *habeas* petition. The federal district court was not faced with a mixed petition, and it did not issue a stay-and-abey order and defer passing upon the petition.[12] Instead, the district court in this case decided a ripe, non-mixed petition, granting appellant relief in part. Its order became final, and both sides appealed the non-mixed petition to the Third Circuit. Appellant's new Brady claim is not in the petition, nor is it before the Third Circuit.

Furthermore, mixed petition cases such as Rhines involve **timely** federal *habeas* petitions; the problem then perceived was that, if the petitioner returned to state court to exhaust his unexhausted claims, he would be faced with the time-bar under AEDPA, and no federal review at all. But in this case, appellant received full federal review of his of-right, non-mixed *habeas* petition. Appellant's new Brady claim obviously is not

[12] In Heleva v. Brooks, 581 F.3d 187 (3d Cir. 2009), the Third Circuit appeared to approve a district court stay-and-abeyance procedure in a case which did not involve a mixed petition. But, Heleva does not change the pertinent analysis here: that case involved a timely first federal *habeas* petition, where there was uncertainty respecting the availability of state court exhaustion, and the district's court authority to stay-and-abey in that circumstance. Heleva says nothing about stay-and-abeyance in response to serial claims identified at the federal appellate level, after AEDPA's time restriction has expired, which are not part of the *habeas* appeal, and while the appeal from a disposed *habeas* petition is pending.

timely; it is subject to AEDPA's time and serial petition restrictions. The stay issued by the Third Circuit is not explainable by resort to Rhines, much less does Rhines support counsel's repeated, unqualified assertion that the appellate court made a preliminary finding that the Brady claim has merit.

Notably, federal counsel's characterization of the Third Circuit's stay as representing an expression on the Brady merits cannot be squared with other Third Circuit and U.S. Supreme Court precedent, which counsel fails to cite. In Duffus, supra, the Third Circuit held that the *habeas* petitioner could not be permitted to amend his motion for *habeas* relief after AEDPA's limitations period had expired because the proposed amendment was not a mere clarification of the claim raised in the former petition, but instead raised a new claim arising out of different facts. 174 F.3d at 338. The court held that allowing the amendment would indulge an improper "end run" around AEDPA's statute of limitations. Id. at 336-38. The Third Circuit's refusal in Duffus to allow unrelated and time-barred claims or theories to be postured as "amendments" to timely-raised claims on different grounds was strengthened in United States v. Thomas, 221 F.3d 430 (3d Cir. 2000). Thomas quoted extensively from Duffus, and held: "Under Fed.R.Civ.P. 15(c), an amendment which, by way of additional facts, clarifies or amplifies a claim or theory in the petition may, in the District Court's discretion, relate back to the date of that petition if and only if the petition was timely filed and the proposed amendment does not seek to add a new claim or to insert a new theory into the case." Id. at 431. In 2005, the U.S. Supreme Court effectively endorsed the Duffus approach in Mayle, supra. 545 U.S. at 650 ("An amended *habeas* petition, we hold, does not relate back (and thereby escape AEDPA's one-year time limit) when it

asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth.”).[13]

Nothing in the Third Circuit’s temporary stay order remotely suggests that the court rendered the merits assessment that federal counsel claims the order represents. The Third Circuit never cited Rhines, and never indicated that it accepted counsel’s misrepresentation of the holding of that case. Nor is there anything in the order that opines on the merits of appellant’s Brady claim. The Third Circuit stayed the cross-appeals for undisclosed reasons.

B.

Turning to the merits, appellant’s Brady petition is premised upon the non-notarized statement of Vincent Gentile, a witness at trial, which was obtained on April 20, 2006, which apparently was the day the FCDO decided to send an investigator to talk to Gentile. Gentile was robbed by three men at gunpoint in his jewelry store three days after appellant murdered Raymond Fiss. Gentile activated an alarm and the police arrived and chased the robbers, apprehending appellant. During the police pursuit, police saw appellant discard a white bag, which they recovered, seizing a .38 caliber Colt revolver. At appellant’s trial, Gentile identified appellant as the man who had robbed him; and ballistics evidence showed that the Colt revolver appellant abandoned was the weapon he used to murder Mr. Fiss.

[13] The Mayle Court approved the approach of the majority of circuits that “allow relation back only when the claims added by amendment arise from the same core facts as the timely filed claims, and not when the new claims depend upon events separate in ‘both time and type’ from the originally raised episodes.” 545 U.S. at 657 (citation omitted).

Gentile's statement to the FCDO investigator, twenty-one years later, was in the nature of recantation, including a claim that he perjured himself when he identified appellant at trial. In the new statement, Gentile claims he did not recognize appellant at the preliminary hearing for appellant's charges of robbing Gentile. Gentile also claimed he "told a woman who worked in the court" where the preliminary hearing was held that appellant was not the robber, but the unidentified woman told him that defendants always look different once they are in court and that the evidence showed that appellant was guilty of the robbery. Gentile further claimed that, once he was told that appellant was guilty of the robbery of his store, "I did whatever the prosecutor wanted," which included his later identification testimony at appellant's murder trial as well as the trial for the robbery of his store, even though, in his "heart," he knew he was lying. Notably, federal counsel's presentation of appellant's Brady claim to this Court quotes Gentile's statement, but includes a bracketed interpolation: "I told a woman who worked in the court [i.e., the prosecutor] that Mr. Porter was not the person…." Nothing in Gentile's statement, or appellant's proffer, supports counsel's presentation, as if it were fact, that Gentile said that the "woman in court" at the preliminary hearing was the prosecutor. From his false predicate, counsel goes on to rashly accuse the Commonwealth of deliberately suborning perjury, claiming that the prosecution not only "knew" Gentile would give false testimony, but actively "pressured him" to do so.[14]

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[14] As the PCRA court noted:

> There is no contention that Mr. Gentile ever informed any prosecutor about his identification concerns. Rather, he states plainly that he spoke to a "woman who worked in the court" when he attended [appellant's] preliminary hearing. This allegation does nothing to establish the requirement that the Commonwealth "suppressed" the evidence in question, "either willfully or inadvertently," since there is no indication that

(continued…)

The PCRA court held that appellant's Brady petition was untimely; and that, in any event, the claim failed on the merits, for various reasons, including that there was no evidence that Gentile's account was suppressed by the Commonwealth, the evidence was not exculpatory, and the evidence of appellant's guilt was overwhelming.

Resolution of the merits of this appeal need not detain us long, as appellant's argument that his Brady petition was timely filed is frivolous. The PCRA provides that "[a]ny petition invoking an exception [to the PCRA's one-year time-bar] shall be filed within 60 days of the date the claim could have been presented." 42 Pa.C.S. § 9545(b)(2); see, e.g., Commonwealth v. Stokes, 959 A.2d 306, 309-10 (Pa. 2008); Commonwealth v. Marshall, 947 A.2d 714, 720 (Pa. 2008); Commonwealth v. Breakiron, 781 A.2d 94, 98 (Pa. 2001). The PCRA court accurately noted that appellant offered no explanation of why, with the exercise of due diligence, the information in Gentile's new account could not have been discovered in the twenty-one years between appellant's trial and when the FCDO eventually decided to send an investigator to talk to Gentile. As the Commonwealth notes, all that appellant, his lawyers, or their investigator had to do was to talk to Gentile.[15] Indeed, Gentile's statement includes an

(…continued)

> the Commonwealth was ever aware of any of Mr. Gentile's identification issues….

PCRA Ct. Op. at 12-13.

[15] Given the delays and the FCDO's posturing detailed In Part I, supra, the significance of the timing of the FCDO's decision to interview Gentile is not lost upon this Court. The federal docket reveals that the Third Circuit appeals were twice delayed awaiting decisions from the U.S. Supreme Court in two other cases. On February 1, 2006, over seven months after those delays expired, the Third Circuit finally directed appellant to file his brief within forty days. On March 16, 2006, appellant was granted the first of four sixty-day extensions (the extensions preceded appellant's ultimate motion to hold appellate proceedings in abeyance). During the pendency of the first extension, the (continued…)

assertion that "if a defense attorney for either the robbery or the homicide would have interviewed me, I would have said that I told the lady at the preliminary hearing that [appellant] was not one of the robbers." According to the terms of this declaration, had counsel or any responsible inquirer interviewed Gentile, the "new" information would have been revealed. The ease with which counsel's investigator secured Gentile's declaration corroborates that it was available upon the exercise of due diligence for a generation; and certainly could have been discovered more than sixty days prior to the filing of appellant's Brady petition. The PCRA court's finding of untimeliness is supported by the record, and is without legal error. Hence, we will affirm the order below on time-bar grounds.

V. THE DELAY ISSUE

The delay in the collateral litigation of this case -- both state and federal – has resulted from two causes. The first cause is the pendency of the Atkins petition, which we have already addressed. The second cause is the FCDO's litigation strategy in its pursuit of appellant's "new" Brady claim since 2006. This strategy is intertwined with -- indeed, is the source of -- the jurisdictional issue here, and has created state-federal gridlock. In a concurring opinion in Commonwealth v. Spotz, 18 A.3d 244 (Pa. 2011), joined by Mr. Justice McCaffery, this author discussed the record in this case in the larger context of addressing a concern with the FCDO's accusation in a federal *habeas* pleading in Commonwealth v. Dougherty, 18 A.3d 1095 (Pa. 2011). The Dougherty

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(…continued)
FCDO investigator interviewed Gentile. During the pendency of the second extension, appellant filed his Brady petition, based upon that interview.

pleading alleged, among other things, that this Court was the primary cause of delays in Pennsylvania capital cases, indeed that this Court was indifferent to, "and incapable of managing," its capital docket. The Spotz concurrence offered examples from capital cases, including many adverted to by the FCDO in its federal motion in Dougherty, where the FCDO's conduct was the primary cause of delay, a fact the FCDO had inexplicably failed to disclose in Dougherty. This case was one of the cases identified by the FCDO in the Dougherty motion.

The record summarized in Part I of this Opinion details the strategy of delay employed by Attorney Nolas here. The Spotz concurrence described counsel's record argument as follows:

> Nolas's argument respecting the PCRA court's power to decide was straight out of "Catch-22." [FN] He argued that the PCRA court: (a) could not dismiss the serial Brady claim (a new PCRA claim that led Nolas to secure a federal stay of the *habeas* appeals pending in the Third Circuit) without also ruling on the pending Atkins petition; and (b) could not rule on the Atkins claim, because the court somehow lacked authority to do so, and Nolas would have to object. So, according to Nolas, the PCRA court could act on neither "claim," and counsel had already succeeded in having the federal *habeas* appeals held **until** the PCRA court acted on the Brady claim. Then, Nolas appealed the non-final order [non-final under Nolas's jurisdictional argument here]. This [FCDO] strategy assured a *de facto*, perpetual stay of execution.
>
> [FN]: See Joseph Heller, Catch-22 (1961).

18 A.3d at 347 & n.9 (Castille, C.J., joined by McCaffery, J., concurring) (emphasis in original).

But, this is not the last word on the circumstances relevant to the delay and gridlock created by the FCDO's pursuit of its Brady claim in this case. After this Court directed supplemental briefing on the jurisdictional issue, Attorney Nolas filed appellant's supplemental brief, dated November 12, 2010. The Commonwealth, in its

own supplemental responsive brief, appended a status report that Attorney Nolas later filed in the Third Circuit on December 6, 2010. That federal status report reads, in relevant part, as follows:

> As stated in our prior reports, the Philadelphia County Court of Common Pleas summarily denied relief on Mr. Porter's claim arising from the recantation of witness Vincent Gentile, which includes arguments of constitutional error under Brady v. Maryland and its progeny. The Court of Common Pleas retained jurisdiction over our claim for relief under Atkins v. Virginia and is awaiting word on the appeal from the Pennsylvania Supreme Court before proceeding further.
>
> We have taken on Mr. Porter's behalf an appeal to the Pennsylvania Supreme Court from the denial of relief on the Brady claim, as the Court of Common Pleas indicated. We have filed our brief, the Commonwealth has now filed its responsive brief and we filed our reply brief. The Pennsylvania Supreme Court thereafter ordered supplemental briefing on procedural questions, and we recently filed this supplemental brief. It is our hope that the Pennsylvania Supreme Court will correct what we believe were errors by the Court of Common Pleas and at least remand for an evidentiary hearing on the Brady claim. It is also our hope that the Court of Common Pleas will grant relief on the Atkins claim.
>
> We respectfully request that the United States Court of Appeals for the Third Circuit continue to keep this case in suspense/abeyance pending the Pennsylvania Supreme Court's resolution of Mr. Porter's Brady claim and, if relief is not granted on the Brady claim, pending Mr. Porter's Atkins claim in the Pennsylvania courts. We believe both claims are substantial. We will keep the Court of Appeals apprised of further developments. Thank you for your attention.

Commonwealth's Supplemental Brief, Exhibit A, 1-2. Attorney Nolas later represented in his supplemental reply brief, filed in this Court on December 23, 2010, that "[e]verything counsel stated in the federal court status report (appended to the Commonwealth's Supplemental brief) is accurate." Appellant's Supplemental Reply Brief at 3.

The Commonwealth argues that the federal status report furthers a "stalemate between the PCRA court and the federal court of appeals [that] has been manufactured by [appellant's] attorney, who for more than six years has filed motions and status reports asking the Third Circuit to hold [the federal appeals] in abeyance." The Commonwealth adds that, even after arguing to this Court that this appeal should be quashed for lack of jurisdiction, counsel "continues to assure the Third Circuit that he expects this Court to rule in his favor, and that the Third Circuit should refrain from acting." Commonwealth's Supplemental Brief at 1 & n.1.

The federal status report is probative of counsel's overall strategy of delay, and is disturbing in two respects. First, the report shows that federal counsel's representations to both the PCRA court and the Third Circuit lacked candor. In the report to the Third Circuit, Attorney Nolas represented that appellant's Atkins claim was being held by the PCRA judge pending "word" on the Brady appeal to this Court, declared his "hope that the Court of Common Pleas will grant relief on the Atkins claim," and then requested that the federal appeals be kept in abeyance, not just for the Brady decision, but also "if relief is not granted on the Brady claim, pending Mr. Porter's Atkins claim in the Pennsylvania courts." But, counsel had taken a very different position before the PCRA court -- successfully so, and thereby inducing delay -- and the report to the Third Circuit misrepresents the state court proceedings concerning the Atkins issue. As reflected in Part I of this Opinion, counsel had represented to the PCRA court that the federal appeals were being held solely to allow for exhaustion of the Brady claim; that appellant's Atkins claim was being held in state court until **after** the federal appeals were decided; that there was no need to decide the Atkins claim before the federal appeals were decided; and indeed, that counsel would **object** if the PCRA court passed upon the Atkins claim. Counsel's status report to the Third Circuit failed to disclose the

patently contrary argument he had made in state court, or the true status of appellant's Atkins claim with respect to both court systems.

Second, the Commonwealth is correct that federal counsel's report to the Third Circuit did not disclose that the "procedural questions" upon which this Court directed supplemental briefing involved jurisdiction. Nor, did Attorney Nolas disclose that the supplemental brief he had already filed in this Court argued that he had appealed a non-final order, and that he was now requesting quashal of the appeal without prejudice, and doing so without suggestion of how the case could move forward. Instead, counsel gave the Third Circuit the impression that he was awaiting a merits resolution on appellant's Brady claim on appeal, and was hopeful he would succeed. Such representations were designed to secure further delay in the federal court, and apparently have succeeded.

Counsel's representations in the report to the Third Circuit fully corroborate what was apparent from the record below: that Attorney Nolas's litigation strategy created "the federal/state logjam" in this case, Spotz, 18 A.3d at 346; and that the strategy was undertaken without any expression of concern for the delay the strategy ensured. To those concerns, the report to the Third Circuit adds the specter of federal counsel misleading both court systems concerning the status of this case, in order to perpetuate a *de facto* stay of execution.

VI. THE ATKINS PETITION

This Court has no control over the actions of the federal courts; but we do have the power to police our own judicial system against unwarranted delay by officers of the Court. Following our affirmance here, the PCRA court must still pass upon the Atkins

petition. The court should decide that petition as expeditiously as possible. In doing so, the court should be mindful of the delaying strategy that has already been deployed and that the court, not counsel, controls the scope, timing and pace of the proceedings below. See Bracey, 986 A.2d at 137-40. Appellant has had over nine years to marshal his proof on the Atkins claim. The court is not obliged to hold a hearing unless an adequate proffer has been made concerning mental retardation, and an issue of material fact is determined to be present. If the conduct of the FCDO unduly delays matters, the court below is authorized to appoint new counsel.

VII. CONCLUSION

The order of the PCRA court is affirmed. The court is directed to decide the pending Atkins petition as expeditiously as possible, mindful of the concerns addressed in this Opinion. Jurisdiction is relinquished.

Messrs. Justice Eakin and McCaffery join the Opinion.

Mr. Justice Saylor joins Parts I, II, IV, VI and VII of the Opinion.

Madame Justice Orie Melvin joins the Opinion except for Part V.

Mr. Justice Baer files a Dissenting Opinion in which Madame Justice Todd joins.