[J-141-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	No. 359 CAP
	:	Appeal from the Order entered on July 26, 2001 in the Court of Common Pleas of Delaware County, Criminal Division, at No. 1388-93.
v.	:	
ANGEL REYES, Appellant	:	SUBMITTED: July 8, 2002

CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: March 30, 2005**

I join the Majority Opinion. I write separately only to address the proper contours of the previous litigation provision of the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 *et seq.*

In his Concurring Opinion in this case, Mr. Justice Saylor adverts to a statement in Commonwealth v. Uderra, 862 A.2d 74 (Pa. 2004), in which the Court, after noting differences among Justices concerning the scope of the PCRA's previous litigation provision, suggested that, "[a]ll Justices are in alignment … that at least where the Court's reasoning and holding on direct appeal encompass the claim sought to be raised on collateral review, and there is no irrefutable, manifest error in the disposition, the previous litigation doctrine should be deemed to apply." Id. at 93-94 (*citing* Commonwealth v.

Stokes, 839 A.2d 226, 235-36 (Saylor, J. dissenting)) (emphasis mine). The underscored clause was not necessary to the ultimate decision in Uderra, see id. at 94, and I write now to note my respectful disagreement with that aspect of the formulation of the statutory previous litigation bar.

The PCRA's previous litigation provision contains no "irrefutable, manifest error" exception and, in my view, this Court has no power to simply "relax" the provision, thereby eviscerating salutary principles of finality, whenever a new majority of the Court concludes that it would or should have decided the issue differently on direct appeal.[1] I realize that, notwithstanding the lack of any statutory exception to the PCRA's previous litigation ban, a Majority of the Court recently has negated the statute and granted relief upon a previously litigated claim. See Commonwealth v. Cruz, 851 A.2d 870 (Pa. 2004). Indeed, the Cruz Court took the extreme measure of raising and granting relief upon the previously litigated issue -- a suppression issue unrelated to guilt or innocence -- *sua sponte*. I registered my dissent in Cruz, and I continue to believe that the Court's evisceration of the previous litigation statute was unnecessary, erroneous, and unwise in that case. See id. at 878-82 (Castille, J., dissenting).[2]

It seems the temptation to rewrite the PCRA to accommodate shifting judicial tastes is again in the ascendancy. Thus, in addition to the suggestion that courts may engage in an *ad hoc* negation of the PCRA's previous litigation provision to serve the judicial preferences of the day, the Court also has recently rewritten the PCRA waiver provision to

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[1] While it may sound narrow and lofty, the "irrefutable, manifest error" standard in fact will always amount to nothing more than majority rule, as Cruz, infra, proves. I would conjecture that, in practice, it will always be the decisions of since-departed Justices (or since-departed majorities) which will seem to be irrefutably and manifestly erroneous in retrospect -- as was the case in Cruz.

[2] Mr. Justice Eakin did not participate in the decision in Cruz.

serve similar *ad hoc* ends. See Commonwealth v. Santiago, 855 A.2d 682 (Pa. 2004) (plurality). In another case, the Court undertook to "reinstate" the PCRA petition of a capital petitioner despite lacking jurisdiction to do so, as the petitioner had not appealed the dismissal of his petition following his knowing and voluntary waiver of PCRA review. See Commonwealth v. Saranchak, 810 A.2d 1197 (Pa. 2002).[3] The Court's patchwork quilt of select judicial exceptions to clear PCRA language has led to bizarre results. Under this Court's jurisprudence, if an issue involves the PCRA time-bar, a petitioner is generally out of court (unless he is a capital defendant falling into Saranchak's favored judicial circumstance): no exceptions beyond those specified in the PCRA will apply; and this is so even if the time for seeking collateral review has passed due solely to the dereliction of counsel, and even if that dereliction leads to a circumstance where both the right to direct appeal and the right to PCRA review is thereby extinguished. See Commonwealth v. Robinson, 837 A.2d 1157 (Pa. 2003); Commonwealth v. Murray, 753 A.2d 201 (Pa. 2000); Commonwealth v. Fahy, 737 A.2d 214 (Pa. 1999); Commonwealth v. Peterkin, 722 A.2d 638 (Pa. 1998). If the General Assembly's PCRA standards truly are merely advisory in the context of waiver, previous litigation, and Saranchak's circumstance, why is there no room for similarly creative judicial exceptions for non-capital defendants -- many of whom are serving life sentences? The Court having jettisoned the notions of separation of powers and judicial restraint, perhaps such exceptions are next on the agenda. As is, this Court's unmoored and improvised PCRA jurisprudence provides only spotty guidance to counsel and to the judges below who must apply these devised precepts of post-conviction review.

Mr. Justice Eakin joins this concurring opinion.

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[3] In both Santiago and Saranchak, this author, joined by Mr. Justice Eakin, expressed disagreement with the Court's construction of the PCRA.