

**[J-156-2000]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 248 Capital Appeal Docket
	:	
Appellee	:	Appeal from the Order of the Court of
	:	Common Pleas of Philadelphia County,
v.	:	Criminal Division, entered February 12,
	:	1991 at Nos. 3222 to 3231.
	:	
	:	
KENNETH FORD,	:	
	:	SUBMITTED: August 17, 2000
Appellant	:	
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	:	
	:	
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**CONCURRING OPINION**

**MADAME JUSTICE NEWMAN**

**DECIDED: October 25, 2002**

I agree with the Majority's disposition of this matter. I write separately to set forth my understanding of what our Court requires in layered ineffective assistance of counsel claims.

To the extent that a petitioner raises properly layered claims of ineffective assistance of counsel that were not previously litigated, the petitioner is entitled to review of those claims. Commonwealth v. Pursell, 724 A.2d 293, 302 (Pa.), cert. denied, 528 U.S. 975 (1999). Also, I agree with the Majority that several of the claims that Kenneth Ford (Appellant) presents to us had been previously litigated and, therefore, such claims are not

cognizable under the PCRA. See Majority Slip Op. at 4; 42 Pa.C.S. §§ 9543(a)(3) & 9544(a). As noted by the Majority, recasting these previously litigated claims as ones of ineffective assistance of counsel does not revive the claims and make them reviewable. Majority Slip Op. at 4 n.3; see also Commonwealth v. Chester, 733 A.2d 1242, 1251 (Pa. 1999).

As for his remaining issues, Appellant raises claims of trial court error, violations of constitutional rights, prosecutorial misconduct, and ineffective assistance of trial counsel.<sup>1</sup> Because all of these claims could have been raised on direct appeal, they are waived. 42 Pa.C.S. §§ 9543(a)(3) & 9544(b); Commonwealth v. Pierce, 786 A.2d 203, 212 (Pa. 2001). Appellant asserts during the discussion of each of the above-mentioned issues that all prior counsel acted ineffectively by failing to raise the claims. Appellant also includes a paragraph on page ninety-five of his brief, which states:

All prior counsels' failure to properly investigate and present each and all of the issues presented in Appellant's PCRA proceedings and in this appeal were ineffective. Each of these claims is of arguable merit; counsel's failures had no reasonable strategic basis; and the errors, individually and collectively, undermined the confidence in the outcome of the trial and sentencing, establishing prejudice. Appellant is entitled to a new trial. Commonwealth v. Pierce, 515 Pa. 153, 158-59, 527 A.2d 973, 975-76 (1987); Strickland v. Washington, 466 U.S. 668, 694 (1984).

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<sup>1</sup> New counsel represented appellant on direct appeal. Appellant had the opportunity to challenge the effectiveness of trial counsel, and was obligated to do so, with the assistance of his new attorney on direct appeal. See Commonwealth v. Green, 709 A.2d 382, 384 (Pa. 1998).

(Appellant's Brief at p. 95). Appellant's boilerplate tag lines and paragraph<sup>2</sup> raise separate and cognizable claims of ineffective assistance of appellate counsel for each issue addressed in the brief. I disagree with the conclusion of the Majority that these ineffectiveness claims are waived. See Majority Op. at p. 4. After much reflection upon, and study of, our precedent in this area, I believe that Appellant, through tag lines and boilerplate language, has sufficiently presented all of these claims for our review, despite framing some as trial court error, constitutional violations, prosecutorial misconduct, and trial counsel ineffectiveness. See Commonwealth v. Hawkins, 787 A.2d 292 (Pa. 2001) (reviewing merits of claims of ineffectiveness of PCRA counsel for failing to raise prior counsel's ineffectiveness); Commonwealth v. Williams, 782 A.2d 517, 525 (Pa. 2001) ("a majority of this Court would presently continue to allow a degree of latitude" in developing layered ineffective assistance of counsel claims in briefs); Commonwealth v. Miller, 746 A.2d 592, 598 n.3 (Pa. 2000) (noting that "these ineffectiveness claims are properly layered because appellant argues that all of his prior counsel were ineffective for failing to assert the claims of trial court error"); Commonwealth v. Marrero, 748 A.2d 202, 204 n.1 (Pa. 2000) (claims of trial counsel ineffectiveness accompanied by claims of appellate counsel ineffectiveness for failing to raise trial counsel ineffectiveness claims are "properly

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<sup>2</sup> I use "tag line" and "boilerplate" to refer to the one or two sentence allegations of the ineffectiveness of counsel that Appellant repeats at the end of each of his claims for relief. Following most of his discussions of trial court error, prosecutorial misconduct, constitutional error, or trial counsel ineffectiveness, Appellant tacks on one sentence, which states that prior counsel was ineffective for failing to litigate his claim. In most cases, this is the only argument regarding ineffectiveness that Appellant makes for these claims. Appellant makes no attempt to discuss the application of the three-prong test for ineffectiveness, see, e.g., Commonwealth v. Kimball, 724 A.2d 326 (Pa. 1999), or deal with the particular facts of these claims. In addition to his first two claims of error in which he sets forth a detailed discussion of the ineffectiveness of trial counsel, the greater part of Appellant's argument regarding the ineffectiveness of trial and appellate counsel is contained in a paragraph on page ninety-five of his brief. See Concurring Opinion, Newman J., slip. op. at 2.

layered"); but see Commonwealth v. Bracey, 795 A.2d 935, 939-40 (Pa. 2001) (claims of trial court error, constitutional error, and prosecutorial misconduct are waived despite being accompanied by tag line asserting ineffectiveness of prior counsel for failing to raise such claims); Commonwealth v. Abdul-Salaam, 786 A.2d 974, 2001 WL 1663976, at \*1 (Pa. 2001) (same). While I disagree with the Majority that these claims are waived, I join in the disposition of the Majority of these issues because I believe that Appellant is not entitled to relief for these claims.<sup>3</sup>

Finally, I agree with the Majority that appellate counsel acted ineffectively by neglecting to raise trial counsel's ineffectiveness for failing to investigate and present evidence during the penalty phase of Appellant's history of abuse and mental illness. Appellant discusses this claim in his brief as one of trial counsel ineffectiveness and argues all three prongs of our ineffectiveness standard. (Appellant's Brief at pp. 8-40). Then, as he did with the other above-referenced issues, Appellant asserts that appellate counsel acted ineffectively in failing to raise this matter on direct appeal. As I understand our precedent in this matter, Appellant's presentation of this claim was sufficient to garner our review, see Commonwealth v. Meadows, 787 A.2d 312 (Pa. 2001) (reviewing merits of underlying claims of trial counsel ineffectiveness in layered ineffective assistance of counsel claims); Bracey, 795 A.2d 941-49 (same); Marrero, 748 A.2d at 204 (same), and the post-conviction record in this case supports the award of relief. See generally Williams, 782 A.2d at 525 n.5 (noting "a primary avenue of proving appellate counsel's lack of stewardship frequently lies in establishing the strength and obviousness of the underlying

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<sup>3</sup> My conclusion that Appellant is not entitled to relief on his claims of ineffective assistance of counsel does not extend to two of the claims; namely, that prior counsel acted ineffectively by failing to investigate and present evidence during the penalty phase of Appellant's history of abuse and mental illness and for neglecting to submit any proof in support of Appellant's claim that the court crier improperly interfered with jury deliberations.

claim" of trial counsel ineffectiveness). Therefore, I join the Majority in reversing the PCRA court and remanding for a new penalty phase hearing.

Mr. Justice Saylor joins in this concurring opinion.