[J-4-2010]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

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

COMMONWEALTH OF PENNSYLVANIA,	:	No. 40 EAP 2009
	:	
Appellant	:	Appeal from the Judgment of the Superior
	:	Court at No. 2834 EDA 2006 dated
	:	December 11, 2008, Vacating and
v.	:	Remanding the Order of the Court of
	:	Common Pleas of Philadelphia County
	:	dated September 28, 2006.
JULES JETTE,	:	
	:	
Appellee	:	
	:	SUBMITTED: January 15, 2010

OPINION

MADAME JUSTICE ORIE MELVIN **DECIDED: June 22, 2011**

This is an appeal from an order of the Superior Court, which vacated the order of the PCRA[1] court and granted Appellee's motion for remand to appoint new counsel. We granted review to examine whether the Superior Court erred in requiring court-appointed PCRA counsel to file a petition for remand to address claims asserted in a pro se petition for remand that challenged counsel's representation on appeal. For the reasons that follow, we vacate the order of the Superior Court entered on December 11, 2008, and remand to that court for proceedings consistent with this opinion.

[1] Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546.

On October 1, 2001, following a bench trial, Appellee was found guilty of involuntary deviate sexual intercourse, endangering the welfare of a child, and corruption of minors for repeated sexual assaults against an eight-year-old boy. Appellee was sentenced to a term of imprisonment of ten to twenty years, with consecutive terms of probation of seven and five years. On direct appeal, Appellee, who was represented by new counsel, challenged the sufficiency of the evidence and trial counsel's effectiveness in failing to move to dismiss the charges due to pre-arrest delay. The Superior Court affirmed in a published opinion filed on February 24, 2003, and this Court denied allocatur on September 3, 2003. Commonwealth v. Jette, 818 A.2d 533 (Pa. Super. 2003), appeal denied, 833 A.2d 141 (Pa. 2003).[2]

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[2] The Superior Court addressed the ineffective assistance of counsel claim on its merits since it found that this Court in Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002), "did not announce a complete prohibition on consideration of ineffectiveness claims on direct review," and the claim was raised in the trial court and addressed in the trial court opinion. See Jette, 818 A.2d at 535 n.3. We note that in reaching this conclusion the Superior Court did not have the benefit of our decision in Commonwealth v. Bomar, 826 A.2d 831 (Pa. 2003), which was decided three months later, wherein this Court carved out what has since been described as an exception to the Grant rule and held that an appellate court may consider ineffective assistance claims on direct appeal only if the claims were raised below, developed in the certified record, and definitively determined by the lower court. Id. at 854-55.

Moreover, the scope and continuing viability of the so-called Bomar exception is presently before this Court in Commonwealth v. Holmes, 996 A.2d 479 (Pa. 2010), wherein we granted review of the following issues:

> Whether the claims of ineffective assistance of counsel which are the exclusive subject of this *nunc pro tunc* direct appeal: (1) are reviewable on direct appeal under Commonwealth v. Bomar, 826 A.2d 831 (Pa. 2003); (2) should instead be deferred to collateral review under the general rule in Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002) that defendants should wait until the collateral review phase to raise claims of ineffective assistance of counsel; or (3) should instead be deemed reviewable on direct appeal only if accompanied by a specific waiver of the right to

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On October 20, 2003 and April 27, 2004, Appellee filed timely pro se PCRA petitions. Counsel was appointed, who subsequently filed a no-merit letter pursuant to Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988) (en banc) (establishing, along with Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988), the procedure for withdrawal of court-appointed counsel in collateral attacks on criminal convictions). Appellee responded by filing lengthy objections to counsel's no-merit letter on March 24, 2005 and April 18, 2005. Consequently, counsel abandoned his attempt to withdraw and filed an amended petition on Appellee's behalf asserting a claim that trial counsel was ineffective for failing to communicate a plea offer to Appellee. See Original Record D-15, Amended Petition, 5/26/05, at 2. After further communication with Appellee, on October 20, 2005, counsel filed a supplemental amended petition asserting four additional claims of trial counsel's ineffectiveness.[3] The PCRA court held an evidentiary hearing, during which evidence was taken regarding trial counsel's conduct. On September 28, 2006, the PCRA court dismissed Appellee's PCRA petition finding no merit to any of the ineffectiveness claims raised.

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pursue a first PCRA petition as of right. See Commonwealth v. Wright, 961 A.2d 119, 148 n.22 (Pa. 2008) ("Prolix collateral claims should not be reviewed on post verdict motions unless the defendant waives his right to PCRA review . . . ."); see also Commonwealth v. Liston, 977 A.2d 1089, 1095 1101 (Castille, C.J., concurring, joined by Saylor, J., & Eakin, J.).

[3] Specifically, the supplemental amended petition further asserted that trial counsel was ineffective for "advising [Appellee] not to testify," "failing to object to complainant testifying to contents of My Life story," "failing to investigate [eleven specifically outlined] aspects of [Appellee's] case," and "failing to object when the sentencing court did not grant [Appellee] his right to allocution." See Original Record D-16, Amended Petition, 10/20/05, at 3-6.

Appellee filed an appeal with the Superior Court, and counsel filed a brief on Appellee's behalf asserting that the PCRA court erred in failing to find that trial counsel was ineffective for failing to object to the admission of the victim's "My Life" testimony. Counsel chose not to pursue the other four issues presented to the PCRA court and addressed in its opinion. Appellee then filed a pro se petition for remand raising PCRA counsel's ineffectiveness for not pursuing all of the issues Appellee wished to have reviewed on appeal. The Superior Court denied the pro se petition but directed counsel to file a petition for remand responding to Appellee's ineffectiveness claims pursuant to the procedure outlined in Commonwealth v. Lawrence, 596 A.2d 165 (Pa. Super. 1991) and Commonwealth v. Battle, 879 A.2d 266 (Pa. Super. 2005) ("Battle procedure"). Counsel subsequently complied by filing a motion to remand for the appointment of new counsel. In a published opinion, the Superior Court directed counsel to "prepare a proper and thorough petition for remand" and "to include in the certified record all of the PCRA petitions filed in this case." Commonwealth v. Jette, 947 A.2d 202, 206 (Pa. Super. 2008). After counsel complied with these directives, the Superior Court followed its Battle procedure and reviewed counsel's analysis of Appellee's claims of trial counsel's alleged ineffectiveness to determine "whether [PCRA] counsel properly found these claims to be frivolous." Commonwealth v. Jette, No. 2834 EDA 2006, unpublished memorandum, ¶5 at 3-4, (Pa. Super. filed December 11, 2008). Ultimately, the Superior Court found that Appellee was entitled to appointment of new counsel and remanded the case to the PCRA court. The Superior Court further directed that:

> [n]ewly appointed counsel should examine [Appellee's] original PCRA petition, consult with [Appellee] to determine the claims he wishes to raise, and investigate and consider the claims we have determined may have arguable merit…, namely, the last page of the "My Life" document, the possibility that "My Life" was typed on a computer rather than a typewriter, the items listed in the original PCRA petition that [Appellee] wished counsel to pursue, and [Appellee's] allocution issue. Newly appointed

> counsel should also re-examine the sole issue current counsel raised on appeal and prepare a new, amended PCRA petition raising those claims counsel considers meritorious after a thorough investigation.

Id., Mem Op. ¶17 at 11. This Court's grant of the Commonwealth's petition for allowance of appeal followed.[4]

The Commonwealth argues that the Superior Court's Battle procedure should be abolished because it requires counsel to "litigate against his client in a contest to be decided by the appellate court, in an effort to establish that the claims preferred by the client are frivolous." Commonwealth's brief at 9. Furthermore, the Commonwealth contends that the procedure impinges upon counsel's exercise of his professional judgment and "demands inferior appellate advocacy" by requiring counsel to "raise all the non-frivolous issues proposed by the defendant or be removed from the case by the Superior Court." Id.

The Commonwealth further asserts that the Superior Court's Battle procedure contravenes this Court's holding in Commonwealth v. Ellis, 626 A.2d 1137 (Pa. 1993) ("Ellis II"), where we held, as a matter of constitutional law and under our supervisory authority, that "there is no right to hybrid representation either at trial or on appeal." Commonwealth's brief at 12. The Commonwealth maintains that in precluding hybrid representation, this Court made clear that a represented defendant on appeal has only two options: "(1) waive counsel and proceed pro se; or (2) proceed with appellate counsel and, if warranted, raise appellate counsel's supposed ineffectiveness at a later date. But 'the [one] thing he may not do' is raise his own appellate claims while still

[4] We note that after we granted allocatur, Appellee's PCRA counsel, Michael P. Marryshow, filed a motion to withdraw as counsel, and the Commonwealth filed a motion to confirm existing appointment of counsel. In light of the entry of appearance by Appellee's new counsel, Teri B. Himebaugh, this Court entered an order on January 28, 2010 dismissing both motions as moot.

represented by counsel." Id. at 13 (quoting Ellis II, 626 A.2d at 1141). The Commonwealth posits that the Superior Court's subsequent decision in Battle misinterpreted the scope of the holding in Ellis II as offering support for the proposition that whenever a defendant alleges ineffectiveness of appellate counsel on appeal, said counsel is required to petition the appellate court for remand. The Commonwealth submits that Ellis II did not involve claims of appellate counsel's ineffectiveness, as the grant of review was limited to the question of hybrid representation. Significantly, the Commonwealth notes that the Superior Court's misinterpretation is highlighted by this Court's explanation that once appellate counsel has filed a brief, an appellant's right to petition to waive counsel and proceed pro se is prohibited. See Commonwealth v. Rogers, 645 A.2d 223 (Pa. 1994) (applying Ellis II and rejecting argument that once a "pro se brief was filed…, appellate counsel should have petitioned for a remand to determine whether the waiver was a knowing and voluntary one."). Moreover, this Court's preclusion of hybrid representation in Ellis II was extended to collateral review in the trial court by our decision in Commonwealth v. Pursell, 724 A.2d 294 (Pa. 1999), wherein we held that "courts considering PCRA petitions [will not be required] to struggle through the pro se filings of defendants when qualified counsel represent those defendants." Id. at 302.

In response, Appellee asserts that the Superior Court's decision should be affirmed because it was "entirely consistent with case precedent." Appellee's Brief at 6. Appellee argues that the Superior Court's Battle procedure "expressly prevents [hybrid representation] from occurring while still ensuring the petitioner's constitutional rights" by requiring counsel's analysis of any pro se filings and only permitting the court to consider the pro se filing for the limited purpose of identifying those claims the petitioner desired to have raised. Id. at 8. Further, Appellee contends that the Commonwealth's

reliance on Ellis II is misplaced, as it is factually distinguishable. Appellee submits that Ellis II involved a direct appeal, and, thus, Ellis "still had procedures available to him to raise claims of ineffective assistance of counsel." Id. at 9. Unlike Ellis, Appellee asserts that he "must raise all claims of ineffective assistance of counsel at this stage … or forever waive those claims." Id. Appellee also takes issue with the Commonwealth's assertion that the Battle procedure requires counsel to raise all non-frivolous issues proposed by the defendant or be removed from the case. Rather, Appellee maintains that the Battle procedure simply requires counsel to be able to "articulate a reasonable legal basis for not including the claim(s)." Id. at 11.

The issue in this case presents a question of law; thus, our standard of review is plenary, and our scope of review is de novo. Commonwealth v. King, 939 A.2d 877, 880 (Pa. 2007).

After a careful review of the Superior Court's opinion, the applicable law, and the briefs of the parties, we agree with the Commonwealth that the Superior Court has misinterpreted our holding in Ellis II. Consequently, we find that its adoption of the so-called "Battle Procedure" as applied to address pro se claims of appellate counsel's ineffectiveness, while that counsel is still representing the appellant, is in contravention of this Court's long-standing policy that precludes hybrid representation. Commonwealth v. Reid, 642 A.2d 453, 462 (Pa. 1994), cert. denied, 513 U.S. 904 (1994) ("[A]ppellants in criminal cases possess no constitutional right to hybrid representation, and thus, any pro se briefs that they may file while represented by counsel will not be considered.") (citing Ellis II).

In order to fully understand the background that led to the Superior Court's misinterpretation of Ellis II and subsequent adoption of the Battle procedure,[5] we must

[5] The Superior Court in Battle explained its procedure as follows:
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> We begin by reviewing our well[-]established procedures for handling documents filed pro se by represented appellants. These procedures are guided by our Supreme Court's holding that there is no constitutional right to hybrid representation, neither on appeal, nor at trial. Ellis, 534 Pa. at 180, 626 A.2d at 1139. When an appellant who is represented by counsel files a pro se petition, brief, or motion, this Court forwards the document to his counsel. 210 Pa. Code § 65.24; Ellis, 534 Pa. at 180, 626 A.2d at 1139. If the brief alleges ineffectiveness of appellate counsel, counsel is required to petition this Court for remand. Ellis, 534 Pa. at 180, 626 A.2d at 1139; Lawrence, 596 A.2d at 168. In the petition for remand, counsel must cite appellant's allegations of ineffectiveness and provide this Court with an evaluation of those claims. Commonwealth v. Blystone, 421 Pa. Super. 167, 617 A.2d 778, 782 (Pa. Super. 1992); Lawrence, 596 A.2d at 168. This Court will then determine whether or not a remand for appointment of new counsel is required, based on our review of counsel's petition and the record. Blystone, 617 A.2d at 782; Lawrence, 596 A.2d at 168.
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> We stress that this Court does not review the pro se brief, but rather reviews counsel's analysis of the issues raised pro se. Blystone, 617 A.2d at 782; Lawrence, 596 A.2d at 168. The process has similarities to the procedures required of appointed counsel who seeks to withdraw from representing an appellant, based on a determination that the issues for appeal are totally frivolous. See Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967) (describing the requirements of an Anders brief, which must be filed when appointed counsel seeks to withdraw from a direct appeal based on a determination that the issues presented are wholly frivolous); Commonwealth v. Finley, 379 Pa. Super. 390, 550 A.2d 213 (Pa. Super. 1988) (en banc) (describing the requirements of a Finley letter, which must be filed when appointed counsel seeks to withdraw from a collateral appeal filed under the Post-Conviction Relief Act).
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> The procedure outlined in Ellis and Lawrence is based on a need to balance a pro se appellant's constitutional rights with the substantial administrative burden and confusion that can arise under circumstances of hybrid representation. Ellis, 581 A.2d at 600. To require a remand for new appointed counsel every time that a pro se appellant made an allegation of ineffective assistance would create unreasonable administrative

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examine the holdings in the Superior Court's en banc decision in Commonwealth v. Ellis, 581 A.2d 595 (Pa. Super. 1990) ("Ellis I") and this Court's review of that decision in Ellis II. In Ellis I, the appellant filed a pro se notice of appeal from his judgment of sentence, an application for leave to proceed in forma pauperis, and a motion for the appointment of counsel. Appointed counsel subsequently filed an appellate brief raising seven issues, and the appellant filed a separate pro se brief presenting four additional claims. Before deciding the merits of the issues, the en banc court addressed the procedural question of "whether and under what circumstances [the Superior Court] will consider pro se briefs in criminal cases where appellant is represented by counsel on appeal." Ellis I, 581 A.2d at 597. On this question, the Superior Court held:

> [w]e will accept for filing pro se appellate briefs, but we will not review a pro se brief if a counseled brief has been filed, either before, simultaneously with, or after the pro se, due to the judicial confusion and delay that ensues. … If a pro se brief is filed in a counseled appeal, we direct the prothonotary to send the pro se brief on to counsel who is best able to determine in her professional judgment which of the pro se's issues should be presented for our review. Counsel may argue such pertinent issues in her brief to the court, or if the appellate brief has been filed, she may file a supplemental brief addressing those same issues. If the pro se brief alleges ineffectiveness of appellate counsel or an affirmative desire to be heard pro se, we direct counsel to petition this court to remand the case to the trial court so that it may conduct a full hearing in order to determine appellant's knowing and intelligent waiver of

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> burdens and delays. Lawrence, 596 A.2d at 168. However, the court abdicates its responsibility if it does not provide some mechanism for judicial review of pro se claims of ineffective assistance of counsel. Thus, we require that counsel file a petition for remand "so as to insure [sic] that the ineffectiveness claims are presented [to the court] …." Id.

Battle, 879 A.2d at 268-69 (footnote omitted).

> his right to appellate counsel, and of his desire to proceed pro se, or in the case of ineffectiveness, an appointment of new appellate counsel.

Id. at 600-01.

Ellis petitioned for allowance of appeal, and this Court granted review limited to the issue of whether the Superior Court is required to review pro se briefs filed by represented appellants. This Court affirmed the refusal to review the pro se briefs noting that the "Superior Court was correct in its determination that there is no constitutional right to hybrid representation either at trial or on appeal." Ellis II, 626 A.2d at 1139. After determining that there was no statutory mandate allowing hybrid representation, we addressed Ellis's policy argument that "it is more efficacious, ultimately, to review the pro se briefs than to deny review and be faced later with withdrawal of counsel and ineffectiveness claims." Id. at 1140. In rejecting this argument, we agreed with the emphasis that both the Commonwealth and the Superior Court placed on "the importance of expert, focused appellate advocacy." Id. Consequently, we opined that the options available to a represented appellant are two-fold. Specifically,

> [a] represented appellant may petition to terminate his representation; he may, … proceed on his own behalf. Conversely, he may elect to allow counsel to take his appeal, but [] should counsel not prevail, assert counsel's ineffectiveness at a later time and, thus indirectly, assert the claims he would have made on direct appeal. The only thing he may not do is confuse and overburden the court by his own pro se filings at the same time his counsel is filing briefs on his behalf.

Id. at 1141.

Contrary to the Superior Court's holding in Battle, which cites Ellis II as authority for its remand procedure, see Battle, 879 A.2d at 268 ("If the brief alleges ineffectiveness of appellate counsel, counsel is required to petition this Court for

remand."), this Court's decision in Ellis II did not authorize, let alone mandate, the filing of a petition for remand seeking the appointment of new counsel whenever a represented appellant alleges ineffectiveness of his current counsel. Rather, the Superior Court mistakenly gleaned such a requirement from its holding in Lawrence, supra, wherein the Superior Court relied upon dicta from its en banc holding in Ellis I and not this Court's subsequent pronouncements in Ellis II. Lawrence was decided on August 8, 1991, while our review of Ellis I was pending. The panel in Lawrence further determined that whenever the appellate court is presented with a petition to remand for the appointment of new appellate counsel in light of appellant's allegation of counsel's ineffectiveness on appeal, "any grant of such a petition must be premised on the McBee standard."[6] Lawrence, 596 A.2d at 168.

Prior to the resolution of the appeals in Ellis I, Lawrence, and Battle, the Superior Court acknowledged that "when confronted with this issue in the past [it] would not consider the separate briefs of counsel and appellant, but remanded the matter to the trial court to conduct a hearing in order for appellant to choose whether he wished to represent himself or remain counseled on appeal." Ellis I, 581 A.2d at 598 (citing Commonwealth v. Kibler, 439 A.2d 734, 736 (Pa. Super. 1982) ("As a matter of policy this Court will not consider separate briefs filed by counsel and pro se briefs filed by the appellant. The appellant must make a choice as to whether he wants to act on his own behalf or through counsel.")). This Court's holding in Ellis II was an affirmation of the

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[6] In Commonwealth v. McBee, 520 A.2d 10, 13 (Pa. 1986), this Court held:

> When appellate counsel asserts a claim of his or her own ineffective assistance of counsel on direct appeal, the case should be remanded for the appointment of new counsel except (1) where, it is clear from the record that counsel was ineffective or (2) where it is clear from the record that the ineffectiveness claim is meritless.

Superior Court's past policy of requiring the litigant to make a choice between a counseled appeal and self-representation. If self-representation was the choice, then our subsequent decision in Commonwealth v. Grazier, 713 A.2d 81 (Pa. 1998), made clear that the Superior Court was to remand the matter to the trial court for the necessary determination of whether his waiver of counsel was knowing, intelligent, and voluntary. Id. at 82.

Additionally, in Commonwealth v. Rogers, 645 A.2d 223 (Pa. 1994), we held that a criminal appellant who challenges the effectiveness of his appellate counsel's representation cannot "terminate counsel after the time of counsel's filing of appellate briefs simply because he wishes to file pro se appellate briefs." Id. at 224. We explained our rationale as follows:

> Clearly, under Ellis [II], an appellant has the right to terminate appellate representation prior to the filing of an appeal. However, Ellis [II] specifically condemns the practice of filing separate pro se briefs which "*confuse and overburden the court*." Allowing Appellant in the case sub judice to terminate counsel and proceed pro se on amended and supplemented briefs would, we believe, result in just the confusion and overburdening of the court we proscribed in Ellis [II].
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> We therefore find that it is appropriate to prohibit such a tactic and to require an appellant to remain with counsel through the appeal, once counsel has filed briefs. We also emphasize that this policy would in no way undermine an appellant's interest in adequate representation. As stated in Ellis [II], an appellant is always free to assert appellate counsel's ineffectiveness at a later time. Ellis [II], [534] Pa. at [183], 626 A.2d at 1140.

Id. (emphasis in original). Accordingly, at least with respect to direct appeals, a remand for the appointment of new counsel was never countenanced.

Furthermore, in Pursell, supra, much like in the instant case, Pursell filed a pro se application for post-conviction relief and sought the appointment of counsel. Appointed

counsel then filed an amended PCRA petition, which raised three issues. Pursell sought both to supplement counsel's amended PCRA petition with twenty-seven pro se claims and to have new PCRA counsel appointed. The trial court denied both requests and dismissed the amended PCRA petition without a hearing. Pursell, now acting pro se, appealed the dismissal to this Court,[7] raising the three issues that PCRA counsel included in the amended PCRA petition and the twenty-seven claims that Pursell had sought to raise pro se in the trial court, which consisted of layered claims of ineffectiveness of PCRA counsel. We applied the rationale of Ellis II and Rogers to PCRA proceedings, noting "[w]e will not require courts considering PCRA petitions to struggle through the pro se filings of defendants when qualified counsel represent those defendants," Pursell, 724 A.2d at 302. Accordingly, we concluded that the PCRA court properly denied the pro se request to supplement the counsel amended PCRA petition.[8] Id.

[7] Pursell was a capital case, therefore, exclusive jurisdiction of appeals from final orders denying post conviction relief in cases in which the death penalty has been imposed is vested in this Court. 42 Pa.C.S. § 722(4); 42 Pa.C.S. § 9546(d); Commonwealth v. Morris, 771 A.2d 721, 743 n.1 (Pa. 2001) (then Justice Castille, concurring) (explaining that the 1988 version of Section 9546(d) governs following this Court's order dated August 11, 1997 which, inter alia, specifically suspended the 1995 and 1997 amendments to Section 9546(d)).

[8] We recognize that in Pursell, this Court did address appellant's pro se issues on appeal, however, we did so while appellant was acting pro se and not while still represented by the attorney whose performance he was challenging. Further, we did not remand for the appointment of new counsel and an opportunity to raise those claims and any others anew in yet another amended petition for the PCRA court's consideration. Such an approach was consonant with our affirmation in Ellis II of the Superior Court's past policy of requiring the litigant to make a choice between a counseled appeal and self-representation.

Our examination of this Court's jurisprudence reveals the consistent expression precluding hybrid representation for all of the reasons initially expressed by the Superior Court in its en banc decision in Ellis I, namely,

> that permitting the pro se brief may involve a conflict between lawyer and client, and this conflict could undermine appellant's chance of success; that counsel is obligated to submit to the appellate court only those issues which he believes to possess merit; that under no other circumstances are counsel and client permitted to present opposing arguments to Superior Court, as may well happen if both are permitted to submit briefs; and finally, that reviewing pro se briefs of counseled appellants would lead to procedural confusion and delay in the appellate process because of the need for the court and the Commonwealth to review and evaluate additional pro se briefs.

Ellis II, 626 A.2d at 1138-39.

Indeed, this case amply reveals the tension the procedure interposes between client and counsel and the inappropriate role the appellate court then plays in refereeing the court-created "battle." The Commonwealth, which finds itself in the unusual position of advocating in defense of the honor, independence, and professionalism of the criminal defense bar, has succinctly and aptly described the difficulties, as created by the Superior Court panel in this case:

> The Superior Court's Battle procedure pits defendants against their lawyers to contest the issues to be raised on appeal. The Superior Court, as referee, decides which issues are not frivolous and fires the lawyer who refuses to raise them.
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> This Court ruled in 1993 [in Ellis II] that represented defendants may not raise pro se claims on appeal, for reasons that this case makes abundantly clear. The cost in judicial resources alone is considerable. Here the counsel-versus-client mini-case lasted for 20 months, after which the Superior Court disposed of the appeal without deciding it. This process risks creating animosity between counsel and client. While it was meant to ensure good lawyering, it actually punishes effective appellate advocacy and rewards its opposite. Under the Battle procedure, a lawyer

> who exercises professional judgment to select the few best issues, rather than every non-frivolous issue, will be fired. The chilling effect of this procedure creates a further potential for a conflict of interest, since a lawyer who practices the best appellate advocacy risks removal.
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> [T]he Superior Court's Battle procedure is contrary to this Court's precedent and intrudes on this Court's exclusive authority to supervise the practice of law and impose procedural rules. It is also, quite simply, bad policy. This Court should abolish it.

Commonwealth's Brief at 8 (Summary of Argument).

In addition to this Court's jurisprudence, our rules of appellate procedure provide that whenever a defendant is represented by an attorney and the defendant files a pro se motion with the court, the filing will not be docketed and will be forwarded to counsel for his consideration. Pa.R.A.P. 3304; 210 Pa.Code Ch. 65 § 65.24. This rule allows counsel to exercise his professional judgment in deciding whether the pro se claims are worthy of presentment to the court.[9] Hence, the policies that advise against allowing hybrid representation are well established.

Furthermore, an indigent criminal defendant does not enjoy the unbridled right to be represented by counsel of his own choosing. See Commonwealth v. Cook, 952 A.2d 594, 617 (Pa. 2008) ("While an indigent is entitled to free counsel, he is not entitled to free counsel of his own choosing.") (quoting Commonwealth v. Chumley, 394 A.2d 497, 507 n.3 (Pa. 1978)).[10] Consequently, unless irreconcilable differences could be shown,

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[9] In fact, in this case, on more than one occasion, the rule operated as intended when Appellee's PCRA counsel reviewed Appellee's pro se filings and included in his amended PCRA petition some of the claims raised therein for the PCRA court's consideration.

[10] See also Pa.R.Crim.P 122(C) ("A motion for change of counsel by a defendant for whom counsel has been appointed shall not be granted except for substantial reasons."); Commonwealth v. Wright, 961 A.2d 119, 134 (Pa. 2008) ("To satisfy this standard, a defendant must demonstrate he has an irreconcilable difference with counsel that precludes counsel from representing him.").
(continued…)

if an appellant was unhappy with appellate counsel's representation, it was assumed under prior law that he could exercise his right to self-representation by requesting a remand for a Grazier hearing provided the request was made before the filing of a counseled brief. See Ellis II and Rogers, supra.[11] Therefore, this Court's precedent has determined that, absent a motion for change of counsel, where the appellant can demonstrate he has an irreconcilable difference with counsel that precludes counsel

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[11] The assumption that the right of self-representation extended to appeals was premised upon Faretta v. California, 422 U.S. 806 (1975), wherein the United States Supreme Court held that a defendant "has a constitutional right to proceed **without** counsel when he voluntarily and intelligently elects to do so." Id. at 807 (emphasis in original). Subsequently, in Martinez v. Court of Appeal of California, 528 U.S. 152 (2000), the High Court clarified that the Faretta holding was "confined to the right to defend oneself at trial." Id. at 154. After examining the distinguishing circumstances on appeal, the Court determined that there was no federal constitutional right to self-representation on appeal.

Furthermore, this Court recently noted in Commonwealth v. Staton, 12 A.3d 277, 280 (Pa. 2010), that the "question of entitlement to self-representation on appeal" presents a novel question in Pennsylvania. In Staton, we were asked to address that question in conjunction with a motion to withdraw filed by the appellant's counsel. We found that there was no need to answer the question in order to decide the motion because "we may assume that there is a right to self-representation on appeal in Pennsylvania; yet, even so, … the right, even if deemed constitutionally-based, is not absolute." Id. at 282 (citing Commonwealth v. Jermyn, 709 A.2d 849 (Pa. 1998) (court may refuse request to proceed pro se even at trial phase in order minimize disruptions, avoid inconvenience and delay, maintain continuity and avoid confusing the jury); Commonwealth v. Rogers, 645 A.2d 223 (Pa. 1994) (an appellant is not permitted to proceed pro se after counsel had already filed appellate briefs on his behalf). Thus, we denied counsel's request to withdraw so that the appellant could proceed pro se specifically because such procedure would "unnecessarily impede and completely disrupt an already delayed appellate process." Staton, 12 A.3d at 283. The implication of Martinez, as exemplified by Staton, is that, at a minimum, the Court need not be so concerned with the PCRA appellant's personal preferences concerning self-representation as had formerly been assumed.

from representing him, or perhaps a timely petition for self-representation, or the retention of private counsel,[12] the appellant must remain with appointed counsel through the conclusion of the appeal. Accordingly, we find the Superior Court's creation of another option, i.e., to seek appointment of new counsel by requiring current counsel to file a petition for remand pursuant to the Battle guidelines, is not only untenable but contrary to precedent and, therefore, disapproved.

The Battle procedure clearly has the effect of requiring counsel to file a merits brief of an appellant's pro se claims, even though counsel has rejected inclusion of those claims in the exercise of his professional judgment, which are then reviewed by the court for frivolity. Such a procedure conflicts with the traditional appellate review paradigm by requiring counsel to advance arguments on his client's behalf while simultaneously refuting the validity of issues that the client believes are also worthy of review but counsel chose not to raise. Furthermore, the remedy of appointing new counsel pursuant to successful invocation of the Battle procedure is inapposite to the remedy provided where counsel successfully petitions to withdraw. See Commonwealth v. Maple, 559 A.2d 953, 955 (Pa. Super. 1989) (where appointed post-conviction counsel has been permitted to withdraw, on the basis of a Turner/Finley letter, "the appointment of second counsel … is unnecessary and improper."). Consequently, the Battle procedure has the effect of granting greater rights to those petitioners who assert pro se claims of PCRA counsel's ineffectiveness than those petitioners whose counsel successfully withdraw from representation. Finally, the procedure could also engender remands for the appointment of new counsel ad infinitum if the client continues to

[12] Presumably, retention of private counsel would be on a pro bono basis, as appears to have occurred in this appeal with the entry of Ms. Himebaugh's appearance.

disagree with subsequent counsel's pursuit of less than all of the issues the client deems meritorious.

The Battle procedure calls to mind the colloquial expression of placing the cart before the horse. The Superior Court's misapprehension of our holding in Ellis II has created a unitary review paradigm that requires it to prematurely acknowledge, at least tacitly, that the issues foregone by counsel provide a more reasonable prospect for success, and counsel, therefore, is ineffective for not pursuing them, when it has yet to determine whether the actual claims advanced by counsel on appeal will provide an appellant with the relief he desires. Clearly, the requisite Strickland[13] prejudice cannot be established if counsel's appellate advocacy ultimately carries the day. Thus, in this context, there can be no claim of ineffective assistance, and counsel need not be called upon to articulate a reasonable legal basis for not including the foregone claims. As we succinctly noted in Ellis II, "While criminal defendants often believe that the best way to pursue their appeals is by raising the greatest number of issues, actually, the opposite is true: selecting the few most important issues succinctly stated presents the greatest likelihood of success." Ellis II, 626 A.2d at 1140-41. It is well settled that appellate counsel is entitled, as a matter of strategy, to forego even meritorious issues in favor of issues he believes pose a greater likelihood of success. See Commonwealth v. Robinson, 864 A.2d 460, 479 n.28 (Pa. 2004), cert denied, 546 U.S. 983 (2005) ("This process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.") (quoting Smith v. Murray, 477 U.S. 527, 536 (1986)); Jones v. Barnes, 463 U.S. 745, 751-52 (1983) (observing that "experienced advocates since time beyond memory emphasized the importance of winnowing out weaker arguments on

[13] Strickland v. Washington, 466 U.S. 668 (1984).

appeal and focusing on one central issue if possible, or at most on a few key issues"). This widely accepted standard in the appellate advocacy arena would be inverted if we were to accept the Battle procedure implemented by the Superior Court. Such a requirement diminishes, if not entirely defeats, the goal sought to be achieved through focused appellate advocacy. See Barnes, 463 U.S. at 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every colorable claim suggested by a client would disservice the very goal of vigorous and effective advocacy.").

In addition, the Battle procedure, at least as applied by the Superior Court in this case, allows certain petitioners to avoid this Court's restrictions on serial requests for post-conviction relief. See Commonwealth v. Lawson, 549 A.2d 107, 112 (Pa. 1988) ("[A] second or any subsequent post-conviction request for relief will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred."); see also Commonwealth v. Bond, 819 A.2d 33, 52 (Pa. 2002) ("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."). Instantly, the Superior Court's order not only granted appointment of new counsel but also directed the collateral review process to begin anew. See Jette, supra at ¶17 ("Newly appointed counsel should … prepare a new, amended PCRA petition raising those claims counsel considers meritorious after a thorough investigation."). Even in those cases where appellate counsel asserts a claim of his own ineffective assistance, we do not remand the case to start over or add new claims. Rather, when remand for the appointment of new counsel is appropriate pursuant to McBee, the court's remand is limited to conducting an evidentiary hearing on the issue of appellate counsel's ineffective assistance. See Commonwealth v. Greene, 709 A.2d 382 (Pa.

1998), Commonwealth v. Ciptak, 665 A.2d 1161 (Pa. 1995), and Commonwealth v. Shannon, 608 A.2d 1020 (Pa. 1992). Of further significance, at least in this case, is the fact that prior PCRA counsel, Michael P. Marryshow, did present the ineffectiveness of trial counsel claims to the PCRA court that Appellee now wants the Superior Court to review. Thus, even if attorney Marryshow would have been inclined to assert his own ineffectiveness for failing to preserve those claims for further review by the Superior Court, the McBee remedy of appointment of new counsel and remand for an evidentiary hearing would be superfluous as said hearing was already held, and the claims were addressed and rejected by the PCRA court.

In essence, the Battle procedure affords certain criminal defendants, i.e., those who submit pro se allegations of appellate counsel's ineffectiveness on appeal, the opportunity to forward claims of their current counsel's ineffectiveness in addition to those claims presented in their counseled brief whenever the Superior Court determines that an appellant has shown a colorable claim of ineffectiveness. The effect is to allow consideration of what would be a second PCRA petition along with the first petition. We recently rejected a similar hybrid, unitary review process, albeit in the context of collateral claims being reviewed on direct appeal, in Commonwealth v. Liston, 977 A.2d 1089, 1094-95 (Pa. 2009) ("disapprov[ing] of the sua sponte decisional 'rule' the Superior Court adopted, which would require trial courts to afford criminal defendants the opportunity to forward claims of ineffectiveness [(usually deferred pursuant to Grant)] in addition to claims of trial court error on direct appeal, i.e., hybrid, unitary review, whenever they determine that a PCRA petitioner has proven entitlement to reinstatement of direct appeal rights nunc pro tunc.") (Castille, C.J., concurring, joined by Saylor, J., & Eakin, J.). This approach realizes a concern expressed by Chief Justice Castille's concurrence in Liston by "arbitrarily provid[ing] what is in effect a **third** round

of review for certain defendants." Id. at 1096 (emphasis in original). The unverified assumption in the lower court's attempt to skirt the PCRA is that there are, or may be, meritorious claims that will be waived if the courts rely on counsel's limitation of issues raised on appeal. However, we presume that counsel is effective and has raised all meritorious issues.

Consequently, we find that the Superior Court's fundamental misapprehension of the governing principles this Court laid out in Ellis II, as further exemplified in Rogers and Pursell, necessitates our rejection of its implementation of the so-called Battle procedure. Therefore, we reiterate that the proper response to any pro se pleading is to refer the pleading to counsel, and to take no further action on the pro se pleading unless counsel forwards a motion. Moreover, once the brief has been filed, any right to insist upon self-representation has expired. See Staton, 12 A.3d at 282 (citing Rogers, supra.).[14]

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[14] We recognize that Ellis involved a direct appeal. Nonetheless, we find that Appellee's argument that in the PCRA context, given its serial petition and time-bar restrictions, he "must raise all claims of ineffective assistance of counsel at this stage … or forever waive those claims," Appellee's brief at 9, is contrary to this Court's recent jurisprudence, which we realize was decided after the panel issued its decision in this case.. See Commonwealth v. Colavita, 993 A.2d 874, 893 n.12 (Pa. 2010) (unanimous opinion) ("claims of PCRA counsel ineffectiveness may not be raised for the first time at the direct appeal level, much less at the discretionary appeal level.") (citing Commonwealth v. Pitts, 981 A.2d 875, 880 n.4 (Pa. 2009)). The waiver of such claims, however, is not a foregone conclusion. While difficult, the filing of a subsequent timely PCRA petition is possible, and in situations where an exception pursuant to § 9545(b)(1)(i - iii) can be established a second petition filed beyond the one-year time bar may be pursued. Moreover, if an appellant remains adamant that the claims foregone by counsel provide the better chance for success, he can avoid the potential loss of those claims by timely exercising his desire to self-represent or retain private counsel prior to the appeal. In any event, appellate courts are in no position to accelerate consideration of claims of current appellate counsel's ineffectiveness where that counsel is advancing issues on his client's behalf, and, thus, the ineffectiveness claims may never come to fruition.
(continued…)

Given our primary holding rejecting the Battle procedure, all that remains to be decided is the issue that Appellee's original PCRA counsel actually forwarded. That issue was not passed upon by the panel below, though it was fully briefed, and it has not been accepted for review or briefed here. For the foregoing reasons, we vacate the order of the Superior Court and remand the matter to that court for proceedings consistent with this opinion. Jurisdiction is relinquished.

Mr. Chief Justice Castille and Messrs. Justice Eakin and McCaffery join the opinion.

Mr. Chief Justice Castille files a concurring opinion in which Madame Justice Orie Melvin joins.

Mr. Justice Saylor files a concurring opinion.

Mr. Justice Baer files a concurring and dissenting opinion in which Madame Justice Todd joins.

(…continued)

Accordingly, we find that whatever difficulty exists in presenting claims of ineffectiveness of PCRA counsel, it provides insufficient justification for abandoning our long-standing prohibition of hybrid representation. Moreover, we must give deference to the General Assembly's intent to bring litigation to an end, as reflected by its passage of the 1995 amendments to the PCRA, by its implementation of "a scheme in which PCRA petitions are to be accorded finality." Commonwealth v. Peterkin, 722 A.2d 638, 642 (Pa. 1998).