[J-9-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 57 WAP 2001
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered July 6, 2000, at No. 2389
	:	PGH1997 affirming the Judgment of
v.	:	Sentence entered on October 22, 1997,
	:	by the Court of Common Pleas of
	:	Allegheny County at CC9701537.
TAIBU MODAMU GRANT A/K/A BRYANT	:	
DAMU TAIBU A/K/A/ TYRONE GRAMM,	:	
	:	
Appellant	:	ARGUED: March 4, 2002
	:	
	:	
	:	

OPINION

MR. JUSTICE CAPPY **DECIDED: DECEMBER 31, 2002**

This court granted the instant appeal to consider whether the Superior Court erred in failing to remand Appellant's claims related to prosecutorial misconduct and trial counsel ineffectiveness for an evidentiary hearing to the trial court. For the reasons stated herein, we affirm the order of the Superior Court.

The facts surrounding the case are as follows. The victim, Keith Gilliam, and his wife were leaving the Where's It At Bar when gunshots were heard. The victim was killed. Shortly thereafter, a maroon car drove by and a second round of shots rang out, wounding two other people. Various witnesses testified to the details of the shooting, the police response, and the forensic evidence. The Commonwealth presented one witness who identified Appellant, Taibu Grant, as the shooter.

At trial a public defender represented Appellant. Following the conclusion of trial, a jury convicted Appellant of first-degree murder and sentenced him to life imprisonment. An appeal was filed by another member of the public defender's office. The trial court found the existence of a conflict of interest and appointed new counsel to represent Appellant on appeal. On appeal, the Superior Court remanded the matter to allow Appellant to file a post-sentence motion *nunc pro tunc* to challenge the weight of the evidence. The court affirmed the judgment of sentence as to the remainder of Appellant's claims. The court reviewed the substance of most of Appellant's claims and concluded they were without merit. However, the court dismissed two of Appellant's claims related to trial counsel's ineffectiveness for his failure to adequately develop the claims. See Superior Court slip opinion at 5-6.

This court granted limited allowance of appeal to consider three of Appellant's claims. Further, we directed the parties to present argument on whether this court should reconsider the practice first announced in Commonwealth v. Hubbard, 372 A.2d 687 (Pa. 1977), requiring that claims related to counsel ineffectiveness be raised at the earliest stage of the proceedings at which the allegedly ineffective counsel no longer represents the defendant.

Appellant argues that the Superior Court erred in affirming the judgment of sentence. Specifically, Appellant contends that the Commonwealth committed misconduct when it failed to reveal that its only eyewitness, Christopher Moore, was on probation at the time of trial and that he had more than one crimen falsi conviction. Appellant also argues that the Superior Court erred in dismissing his ineffectiveness claims for failure to adequately develop those claims, since case law prevents an appellant from referring to matters outside the record in a direct appeal. Related to this claim, Appellant approves of the

practice set forth in Hubbard. Lastly, Appellant asserts that the court erred in permitting evidence to be introduced regarding the fact that he was not licensed to carry a firearm. [1]

The Commonwealth responds that the Superior Court did not err in concluding that ineffectiveness claims must be supported by sufficient facts for a court to ascertain whether counsel may have been ineffective. Further, Appellant's claim related to alleged prosecutorial misconduct was not sufficiently developed to warrant review of the issue. Related to this claim, the Commonwealth points out that Hubbard provides the proper procedure for appeals alleging ineffectiveness in order to ensure that the claims are disposed of in an efficient fashion. Lastly, the Commonwealth argues that the trial court did not err in allowing it to introduce evidence that Appellant was not licensed to carry a gun at the time of the instant incident.

In order to effectively evaluate Appellant's arguments, rather than addressing the claims in the order in which they are presented, we will first consider the claims that do not implicate trial counsel's ineffectiveness. Following our review of those issues, we will consider the remaining issues, which are presented as claims of trial counsel ineffectiveness.

Appellant first argues that the prosecutor failed to reveal that the key Commonwealth witness, Christopher Moore, had more than one crimen falsi conviction in violation of Brady v. Maryland, 373 U.S. 83 (1963). Additionally, the Commonwealth failed to disclose that Moore was on state parole at the time of the trial. According to Appellant, he was prejudiced by the prosecutor's failures since this information may have provided Appellant with additional evidence to impeach the testimony of Moore.

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[1] As discussed infra, Appellant alternatively raises both the firearm claim and the Commonwealth's failure to disclose impeachment information to the defense as claims of trial counsel ineffectiveness.

In order for a defendant to establish the existence of a Brady violation, he must establish that there has been a suppression by the prosecution of either exculpatory or impeachment evidence that was favorable to the accused, and that the omission of such evidence prejudiced the defendant. See Commonwealth v. Paddy, 800 A.2d 294, 305 (Pa. 2002). Further, no Brady violation occurs where the parties had equal access to the information or if the defendant knew or could have uncovered such evidence with reasonable diligence. Id.

In this case, before trial, the Commonwealth gave the defense information that Christopher Moore had a theft and burglary conviction dating from 1983. Appellant attempted to impeach Moore with this information, but the trial court did not allow the introduction of the evidence due to the age of the convictions. However, Appellant now alleges that there was at least one more crimen falsi conviction dating from 1984[2] related to this witness as well as additional information that Moore was incarcerated during the intervening years. Additionally, Appellant alleges that Moore was on state parole at the time of the instant incident, which may have colored his testimony. According to Appellant, such additional information may have changed the trial court's decision to allow Appellant to impeach Moore with his prior convictions. However, Appellant fails to argue that the Commonwealth had such evidence in its possession at the time of trial and knowingly withheld such information. Instead, Appellant acknowledges that the failure of the Commonwealth was most likely an oversight on its part. Further, the public defender's office uncovered this evidence after the trial. At trial, Appellant was represented by a public defender. Appellant failed to explain why the public defender could not have procured this same information before or during trial. Thus, by Appellant's own admission, he has not

[2] Appellant does not identify the nature of the crimen falsi conviction in his brief to this court.

demonstrated that there has been a suppression of such information by the Commonwealth that violated the dictates of Brady. Additionally, it appears that Appellant may have had equal access to this information before or during trial. In fact, Appellant alternatively raises this issue as one of trial counsel's ineffectiveness for failing to uncover this evidence. It appears that the ineffectiveness claim presents a better avenue to address Appellant's issue.[3] Accordingly, as stated previously, we will discuss the ineffectiveness claims later in the opinion.

Second, Appellant asserts that the trial court erred in admitting the Commonwealth's evidence of the fact that Appellant was not licensed to carry a firearm over defense counsel's objection. At trial, the Commonwealth submitted into evidence a certified copy of a document indicating that Appellant was not licensed to carry a firearm. Then, during the discussion of what charges the court would give to the jury, the Commonwealth requested that the jury be given a charge based upon 18 Pa.C.S. § 6104. Section 6104 provides:

> In the trial of a person for committing or attempting to commit a crime enumerated in section 6105 (relating to persons not to possess, use, manufacture, control, sell or transfer firearms), the fact that that person was armed with a firearm, used or attempted to be used, and had no license to carry the same, shall be evidence of that person's intention to commit the offense.

18 Pa.C.S. § 6104. The court agreed to give such a charge.[4]

Appellant argues that in order for § 6104 to apply in a particular case, the Commonwealth must establish a violation of 18 Pa.C.S. § 6106.[5] However, the plain

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[3] As discussed supra, Appellant alternatively raises the Brady claim as a claim of trial counsel ineffectiveness and the Superior Court only addressed it in terms of trial counsel ineffectiveness.

[4] Appellant also argues that the jury instruction with regard to the firearm offense was improper. This argument is raised in terms of trial counsel ineffectiveness for failing to object to the instruction. Accordingly, this issue will be addressed with the remainder of the ineffectiveness claims.

language of § 6104 does not support Appellant's argument. In order for § 6104 to apply to a particular case, it requires that the Commonwealth establish as a fact: 1) that a crime has been committed as enumerated in § 6105; 2) that the person committing the crime was armed with a firearm; 3) that the firearm was used or attempted to be used; and 4) that the person had no license to carry the same. When these facts are established, they "shall be evidence of that person's intent to commit the offense." See § 6104. None of these requirements includes a mandate that the Commonwealth establish a violation of § 6106. Thus, contrary to Appellant's argument, § 6104 does not require that the Commonwealth establish a predicate violation of § 6106. [6]

Appellant next raises two claims of trial counsel ineffectiveness.[7] On appeal to the Superior Court, Appellant raised these same two claims of in effectiveness. Appellant argued that trial counsel was ineffective for failing to uncover impeachment evidence

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[5] § 6106 is entitled "Firearms not to be carried without a license" and establishes, inter alia, that a person carrying a concealed weapon, without a valid and lawfully-issued license commits a felony of the third degree.

[6] Appellant also challenges the relevancy of the disputed evidence. According to Appellant, a violation of the license requirement does not make it any more likely that the possessor used the firearm with the intention to commit a crime and the invocation of such an inference violated due process.

Appellant has utterly failed to develop his constitutional argument beyond a mere "cf." cite to Commonwealth v. Sattazahn, 631 A.2d 597 (Pa. Super. 1993). Indeed, the Commonwealth does not even respond to the constitutional argument in its brief to this court. In the absence of any meaningful argument on this issue, we decline to engage in a constitutional analysis of § 6104. See, e.g., Wroblewski v. Commonwealth, 2002 WL 31373878, *4, n.5, 6 (Pa. 2002). Additionally, Appellant failed to include any constitutional argument regarding § 6104 in his Concise Statement of Matters Complained of on Appeal. As such, this issue is waived. See, e.g., Commonwealth v. Lord, 719 A.2d 306 (Pa. 1998).

[7] These two claims are in addition to the ineffectiveness claim that Appellant raises regarding trial counsel's failure to object to the jury instruction that was given pursuant to § 6104.

regarding Christopher Moore. Additionally, Appellant argued that trial counsel was ineffective for failing to call two Commonwealth witnesses. The Superior Court dismissed both of these claims for lack of adequate development. Appellant argues that the Superior Court's action was improper. According to Appellant, the procedural rules prescribed by this court require an appellant to confine his issues raised on appeal to those contained in the record. Thus, the rules prevented Appellant from supplementing the record on appeal and rendered him incapable of providing concrete evidence, through reports or documents, regarding the alleged ineffectiveness. Thus, Appellant concludes that rather than dismissing the claims for inadequate development, the Superior Court should have remanded the claims to the trial court in order to give him the opportunity to fully develop his claims.

Appellant also contends that this court should not reconsider our original position in Commonwealth v. Hubbard, 372 A.2d 687 (Pa. 1977). However, the above argument made by Appellant regarding the Superior Court's handling of his ineffectiveness claims is essentially an attack on Hubbard. The Hubbard rule simply provides that claims of ineffectiveness must be raised at the time a defendant gets new counsel. In the event that the claims are not raised at that time, they are waived. Hubbard, 372 A.2d at 695 n.6. As Appellant's argument in this case highlights, the Hubbard rule is often difficult to reconcile with traditionally-accepted rules of procedure, which normally do not allow issues to be raised for the first time on appeal and do not allow an appellant to supplement the record on appeal.

In order to adequately address Appellant's argument and the continued viability of Hubbard, we believe that it would be beneficial to consider the origins of the Hubbard rule, to examine how the rule has developed in this Commonwealth, to review general appellate practice in Pennsylvania, and to assess how other jurisdictions manage ineffectiveness claims. Thus, we will first examine the origins of the Hubbard rule.

Contrary to the generally-accepted wisdom, research reveals that Hubbard was not the genesis for the rule that claims of ineffectiveness must be raised at the time a defendant is represented by new counsel; rather, this principle was first announced over two years earlier in Commonwealth v. Dancer, 331 A.2d 435 (Pa. 1975). In Dancer, this court considered "whether a [petitioner] represented on direct appeal by an attorney other than his trial counsel waives his claim of ineffective assistance of trial counsel by failing to raise that issue on direct appeal." Id. at 436. The court first looked at the language of the Post-Conviction Hearing Act ("PCHA")[8], which created a rebuttable presumption that the failure to raise an issue was "knowing and understanding."[9] Id. at 437. Due to this presumption, the court determined that the failure to raise an issue on direct appeal will only be justified where extraordinary circumstances exist. Id. Furthermore, the court concluded that ineffectiveness of trial counsel may only be raised in collateral proceedings under the following circumstances:

> 1) where petitioner is represented on appeal by his trial counsel, for it is unrealistic to expect trial counsel on direct appeal to argue his own ineffectiveness, 2) where the petitioner is represented on appeal by new counsel, but the grounds upon which the claim of ineffective assistance are based do not appear in the trial record, 3) where the petitioner is able to prove the existence of other "extraordinary circumstances" justifying his failure to raise the issue or 4) where the petitioner rebuts the presumption of "knowing and understanding failure."

Id. at 438. Thus, the general rule was that claims of ineffectiveness were to be presented at the time a petitioner obtained new counsel. However, this general rule implicitly

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[8] The PCHA was replaced by the Post Conviction Relief Act ("PCRA") in 1988. 42 Pa.C.S. §9541, Historical and Statutory notes.

[9] The PCHA provided that an issue was waived if a petitioner "knowingly and understandingly" failed to raise it on direct appeal. 19 P.S. §1180-3(d). The equivalent section of the PCRA, §9544(b), no longer has the "knowing and understanding" language.

recognized that all claims were not suited for direct appeal by preserving a few well-defined exceptions to the general rule.

Nevertheless, when this rule was restated in Hubbard, the requirement that the claim must be raised at the time a petitioner had new counsel was made absolute. In the aftermath of Hubbard, there was no flexibility to the rule. The rule became that claims of trial counsel ineffectiveness must be raised at the time that the petitioner obtained new counsel regardless of the myriad of impracticalities associated with such an unbending pronouncement. See, e.g., Commonwealth v. Pierce, 786 A.2d 203, 212 (Pa. 2001); Commonwealth v. Chester, 733 A.2d 1242, 1254 (Pa. 1999); Commonwealth v. Hammer, 494 A.2d 1054, 1058 n.2 (Pa. 1985).[10] Most recently, as a result of this absolute declaration, the necessity of "layering" arose. In the aftermath of Hubbard, the only way to consider claims related to trial counsel's ineffectiveness that were not raised on direct appeal by new counsel was to plead and prove the additional claim of appellate counsel's ineffectiveness, i.e., a layered claim of ineffectiveness. See, e.g., Commonwealth v. Craig Williams, 782 A.2d 517, 527 (Pa. 2001)(Zappala, J. concurring); Commonwealth v. Marrero, 748 A.2d 202, 203, n.1 (Pa. 2000).

When the rule regarding when claims of ineffectiveness should be raised was originally announced in Dancer, the more flexible approach taken in that case recognized that not all claims were suited for direct review. Thus, contrary to the absolute rule we currently follow, the rule at its inception created general guidelines for raising claims of ineffectiveness, while recognizing that in order for the rule to work in practice, common

[10] The only exception to this rule that is currently recognized by this court is in capital cases on direct appeal, where this court "relaxes" the waiver rules and reviews the issue as one of trial court error, even where there is intervening counsel and the issue was not preserved in the court below. See Commonwealth v. Zettlemoyer, 454 A.2d 937 (Pa. 1982); cf. Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998)("relaxed waiver" no longer recognized in capital cases on collateral appeal).

sense required some exceptions. With these considerations in mind, we reassess our interpretation of waiver expressed in Hubbard.

As a starting point, we will briefly examine our appellate procedure in cases other than those raising ineffectiveness claims. Appellate courts in Pennsylvania routinely decline to entertain issues raised on appeal for the first time. Indeed, the Pennsylvania Appellate Rules of Procedure specifically proscribe such review. See Pa.R.A.P. 302(a). The Rules and case law indicate that such a prohibition is preferred because the absence of a trial court opinion can pose a "substantial impediment to meaningful and effective appellate review." See, e.g., Commonwealth v. Lord, 719 A.2d 306, 308 (Pa. 1998). Further, appellate courts normally do not consider matters outside the record or matters that involve a consideration of facts not in evidence. Commonwealth v. Rios, 684 A.2d 1025, 1036 n.11 (Pa. 1996). Most importantly, appellate courts do not act as fact finders, since to do so "would require an assessment of the credibility of the testimony and that is clearly not our function." See, e.g., Commonwealth v. Pierce, 645 A.2d 189, 198 (Pa. 1994); Commonwealth v. Griffin, 515 A.2d 865, 869 (Pa. 1986).

Yet, in the arena of ineffectiveness claims, appellate courts are routinely called upon to perform each of these tasks. In ruling on an ineffectiveness claim, it is rare that a trial court opinion exists which will aid the appellate court in examining the claim. Appellate courts are frequently called upon to consider matters outside the record. Moreover, appellate courts often engage in some fact finding by being required to speculate as to the trial strategy of trial counsel in order to rule upon these claims. It seems anomalous that where the issues involve claims of ineffectiveness, we employ the exact opposite appellate review process that we require in almost all other appeals. In fact, we **require** the defendant to raise a new claim for the first time on appeal. When an appellant has not raised this new claim on appeal, he is subject to the waiver provision of the PCRA. See 42 Pa.C.S. § 9544(b). These considerations prompt us to revisit the continued validity of

Hubbard. However, the mere fact that our current process to review ineffectiveness claims does not square with the rules of appellate procedure employed in most cases cannot conclude our discussion of this matter, since these rules of appellate procedure existed at the time we announced the Hubbard rule. See, e.g., Commonwealth v. Piper, 328 A.2d 845 (Pa. 1974); Dilliplaine v. Lehigh Valley Trust Co., 322 A.2d 114 (Pa. 1974). Thus, we will also consider the decisions of other jurisdictions on the matter of presenting ineffectiveness claims within a collateral proceeding.

A handful of jurisdictions impose an absolute rule, similar to the rule announced in Hubbard.[11] Most jurisdictions considering this issue, however, express a clear preference that ineffectiveness claims be raised in collateral review proceedings.

For example, the federal courts have generally recognized that ineffectiveness claims are not appropriate for direct appeal, but should be raised in a collateral action.[12]

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[11] See, e.g., Hooks v. Ward, 184 F.3d 1206, 1213 (10th Cir. 1999); White v. Kelso, 401 S.E.2d 733, 734 (Ga. 1991); Tachibana v. State, 900 P.2d 1293, 1299 (Haw. 1995); State v. Litherland, 12 P.3d 92, 98 (Utah 2000).

[12] See, e.g., United States v. McIntosh, 280 F.3d 479, 481 (5th Cir. 2002)("A claim of ineffective assistance of counsel generally cannot be reviewed on direct appeal unless it has been presented to the district court."); Fountain v. United States, 211 F.3d 429, 433-34 (7th Cir. 2000)(ineffective assistance of counsel claims are not generally appropriate for direct appeal as they often rely on evidence outside the record); United States v. Kincaide, 145 F.3d 771, 785 (6th Cir. 1998)("Unless the record on appeal is adequate to assess the merits of the defendants' allegations, we will not address an ineffective assistance of counsel claim raised for the first time on direct appeal."); United States v. Cocivera et al., 104 F.3d 566, 570 (3d Cir. 1996)(same); United States v. Eltayib, 88 F.3d 157, 170 (2d Cir. 1996)(same generally); United States v. Galloway, 56 F.3d 1239, 1241 (10th 1995)(holding that procedural bar rule does not apply to ineffectiveness claims); United States v. Camacho, 40 F.3d 349, 355 (11th Cir. 1994)(insufficient evidence in the record to review the claims of ineffectiveness, thus they are properly resolved in a collateral proceeding); United States v. McNeely, 20 F.3d 886, 889 (8th Cir. 1994)(Ineffectiveness claims first "should be presented to the District Court pursuant to 28 U.S.C. §2255 (citations omitted), so that the parties may develop the facts, which ordinarily lie outside the original record."); United States v. Mala, 7 F.3d 1058, 1062-63 (1st Cir. 1993)(same); United States v. Tatum, 943
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These courts recognize that exceptional circumstances may exist where the ineffectiveness is patent on the record and therefore, can be addressed on direct appeal. See, e.g., United States v. Cronic, 466 U.S. 648, 659 (1984)(recognizing that counsel's conduct may be so egregious that "no amount of showing of want of prejudice would cure it"); see also United States v. Gambino, 788 F.2d 938, 950 (3d Cir. 1986)(recognizing a narrow exception to the general rule "where an objection has been properly made at trial, or, where the record clearly shows actual conflict of interest…."). However, as a general rule, the federal courts defer review of ineffectiveness claims until collateral review. Similarly, an overwhelming majority of states indicate a general reluctance to entertain ineffectiveness claims on direct appeal.[13] These states will only review those claims on direct appeal that can be

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F.2d 370, 379-80 (4th Cir. 1991)(follows general rule, but reviews claim of ineffectiveness on direct appeal where conflict of interest could be reviewed on the record); United States v. Molina, 934 F.2d 1440, 1446 (9th Cir. 1991)(declines to review claims of ineffectiveness on direct appeal).

[13] People v. Mendoza Tello, 933 P.2d 1134, 1135 (Cal. 1997)(claims should be raised on collateral review, unless they are obvious on the record); Downey v. People, 25 P.3d 1200, 1202 n.3 (Colo. 2001)(same); State v. Patrick, 681 A.2d 380, 386 (Conn. App. 1996)(same); State v. Eley, 2002 WL 337996 (Del.Super. Ct. Feb 19, 2002)(unpublished); State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982)(same); State v. Seiss, 428 So.2d 444, 449 (La. 1983)(same); State v. Barrett, 577 A.2d 1167 (Me. 1990); Ware v. State, 759 A.2d 764, 793 (Md. 2000)(same); State v. Henry, 898 P.2d 1195, 1197-98 (Mont. 1995)(same); State v. Preciose, 609 A.2d 1280, 1285 (N.J. 1992)(same); Duncan v. Kelly, 851 P.2d 466, 468 (N.M. 1993)(same); People v. Alvarado, 683 N.Y.S.2d 501, 502 (N.Y.A.D. 1998)("Defendant's ineffective assistance of counsel claim required a [collateral motion], since this claim is based on facts *dehors* the record and counsel has had no opportunity to explain his strategy."); State v. Fraser, 608 N.W.2d 244, 250 (N.D. 2000)("A claim of ineffective assistance of counsel at trial should not be brought on direct appeal, but rather through a petition for post-conviction relief."); Robinson v. State, 16 S.W.3d 808, 809 (Tex.Crim.App. 2000)(same); In re Moskaluk, 591 A.2d 95, 97 (Vt. 1991)(same); State v. Bess, 406 S.E.2d 721, 724 (W.Va. 1991)(same); State v. Elison, 21 P.3d 483, 488-89 (Idaho 2001)(same); Com. v. Adamides, 639 N.E.2d 1092 (Mass.App.Ct.1994)(same); State v. Dockery, 336 S.E.2d 719 (N.C.App. 1985)(same); Gibbons v. State, 634 P.2d
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adequately reviewed on the existing record. Even among the states expressing a preference that ineffectiveness claims be raised on direct appeal, those states limit that requirement to claims of ineffectiveness that "were known or apparent from the record." State v. Suggs, 613 N.W.2d 8, 11 (Neb. 2000); see also Robinson v. State, 567 N.W.2d 491, 494 (Minn. 1997); State v. Pierce, 713 N.E.2d 498, 502 (Ohio App. 1998). Thus, similar to the federal jurisdictions, most states express a preference to review ineffectiveness claims in collateral proceedings.

Courts have offered varying rationales in support of this general reluctance to entertain ineffectiveness claims on direct review. Several jurisdictions decline to review ineffectiveness claims on direct appeal because the record is not sufficiently developed to raise these claims for the first time on direct appeal. See generally Cocivera, 104 F.3d 566 3d Cir. 1996); Eltayib, 88 F.3d 157 (2d Cir. 1996); Mala, 7 F.3d 1058 (1st Cir. 1993); Molina, 934 F.2d 1440 (9th Cir. 1991); State v. Rivera, 494 A.2d 570 (Ct. 1985); Preciose, 609 A.2d 1280 (N.J. 1992); Kerby, 851 P.2d 466 (N.M. 1993); Campanelli, 454 A.2d 1248 (Vt. 1982). Waiting to raise the claims on collateral review "affords the opportunity to develop a factual basis for the claim that counsel's performance did not meet the standard for effective assistance of trial counsel." Cocivera, 104 F.3d at 570. Many of these claims are based on omissions, which, by their very nature, do not appear on the record and thus, require

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1214, 1215 (Nev. 1981)(same); see also State v. Spreitz, 2002 WL 117245 (Ariz. 1/30/2002)(ineffectiveness claim must be raised on collateral appeal); Wuornos v. State, 676 So.2d 972, 974 (Fla. 1996)(citing Kelley v. State, 486 So.2d 578 (Fla.1986)(as a general rule, ineffective assistance of counsel claims are not cognizable on direct appeal, but only on collateral challenge)); State v. Picotte, 416 N.W.2d 881, 881-82 (S.D. 1987)(same); State v. Malstrom, 672 A.2d 448, 450 (R.I. 1996)(same); cf. Jackson v. State, 534 So.2d 689, 692 (Ala. Crim. App. 1988)(claim may be considered on direct appeal, but only if it was presented to the trial court first); State v. Van Cleave, 716 P.2d 580, 582 (Kan.1986)(same); Dodson v. State, 934 S.W.2d 198, 201 (Ark. 1996)(same).

further fact-finding, extra-record investigation and where necessary, an evidentiary hearing. Preciose; Kerby.

Related to this rationale is the general belief that an appellate court should not consider issues that were not raised and developed in the court below. Courts have recognized that this general rule and its accompanying rationale applies equally to ineffectiveness claims. United States v. Griffin, 699 F.2d 1102, 1108-09 (11th Cir. 1983). The trial court is the court that had the opportunity to observe counsel's performance firsthand and is therefore in the best position to make findings related to both the quality of trial counsel's performance and the impact of any shortfalls in that representation. Mala, 7 F.3d at 1063; see also Galloway, 56 F.3d at 1240. By requiring ineffectiveness claims to be raised on direct appeal when new counsel has entered the case, the trial court is eliminated from the process, leaving the appellate court in an awkward position as to the manner in which these claims can be assessed. Appellate courts rarely function as fact-finders and do not have the resources to do so. Id.

A related concern, expressed by at least one court, is that the role of an appellate counsel is to review the record for claims of error, but not necessarily to uncover extra-record claims. See, e.g., Woods v. State, 701 N.E.2d 1208, 1221-22 (Ind. 1998); see also Lissa Griffin, The Right to Effective Assistance of Appellate Counsel, 97 W.Va.L.Rev. 1, 36-37 (1994)(explaining the role of appellate counsel). In Woods, the Indiana Supreme Court discussed the issue of whether the waiver of claims of trial counsel ineffectiveness was inconsequential since there always remains the possibility of raising such claims as ones of ineffective assistance of appellate counsel. Ultimately, the court determined that "a claim of ineffective assistance of appellate counsel is not an adequate back door to a full adjudication of ineffectiveness of trial counsel." 701 N.E.2d at 1222.

In reaching this conclusion, the Woods court relied, in part, on the fact that appellate counsel is usually not considered to be ineffective for failing to uncover extra-record claims.

Id. In Anders v. California, 386 U.S. 738 (1967), the United States Supreme Court indicated that where appellate counsel determined that the appeal is frivolous, counsel need merely to certify that the record had been reviewed and presented no colorable grounds for reversal. 701 N.E.2d at 1222, n.22. The Woods court concluded that "because there is no constitutional requirement for appellate counsel to search outside the record for error, an ineffective assistance of appellate counsel claim that is in substance a trial counsel claim requiring extrinsic evidence may be dead on arrival." Id. at 1222. Thus, at least one court has found that the role of appellate counsel does not include raising extra-record claims on direct appeal.

The above discussion illuminates sound rationales behind the general preference expressed by the overwhelming majority of jurisdictions that ineffectiveness claims be deferred until the collateral review stage. These courts recognize that the role of appellate counsel may not include raising claims that are not contained in the record certified for appeal; that the record may not be sufficiently developed on direct appeal to permit adequate review of ineffectiveness claims; and that appellate courts do not normally consider issues that were not raised and developed in the court below. These rationales have merit and highlight the difficulties underlying the current system followed in Pennsylvania.

First, ineffectiveness claims, by their very nature, often involve claims that are not apparent on the record. Thus, appellate counsel must not only scour the existing record for any issues, but also has the additional burden of raising any extra-record claims that may exist by interviewing the client, family members, and any other people who may shed light on claims that could have been pursued before or during trial and at sentencing. Importantly, appellate counsel must perform this Herculean task in the limited amount of time that is available for filing an appeal from the judgment of sentence -- 30 days. Pa.R.Crim.P. 720. Further, following the rationale expressed in Woods, it is not even clear

if appellate counsel's duty extends to finding extra-record claims or whether appellate counsel would be ineffective for failing to uncover extra-record claims.

Second, even presuming the merit of the claim is apparent on the existing record, oftentimes, demonstrating trial counsel's ineffectiveness will involve facts that are not available on the record. For example, the prejudicial effect of trial counsel's chosen course of action is determined more accurately after the trial and appellate courts have had the opportunity to review the alleged claims of error and if necessary, correct any trial court errors. It is only after this review that the full effect of counsel's conduct can be placed in the context of the case.

Third, as multiple courts have recognized, the trial court is in the best position to review claims related to trial counsel's error in the first instance as that is the court that observed first hand counsel's allegedly deficient performance.

What is apparent from the above discussion of other jurisdictions' review of ineffectiveness claims is that the same concerns that animated our general approach to appellate review should apply with equal vigor in the ineffectiveness arena. The unqualified Hubbard rule ignores these valid concerns. In the twenty-five plus years since Dancer and Hubbard, we have learned that time is necessary for a petitioner to discover and fully develop claims related to trial counsel ineffectiveness. Deferring review of trial counsel ineffectiveness claims until the collateral review stage of the proceedings offers a petitioner the best avenue to effect his Sixth Amendment right to counsel. Accordingly, for the reasons stated herein, we overrule Hubbard to the extent that it requires that trial counsel's ineffectiveness be raised at that time when a petitioner obtains new counsel or those claims will be deemed waived.

We now hold that, as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review.'[14] Thus, any ineffectiveness claim will be waived only after a petitioner has had the opportunity to raise that claim on collateral review and has failed to avail himself of that opportunity. Our holding today does not alter the waiver provision of the PCRA, 42 Pa.C.S. § 9544(b); it merely alters that time when a claim will be considered waived. Simply stated, a claim raising trial counsel ineffectiveness will no longer be considered waived because new counsel on direct appeal did not raise a claim related to prior counsel's ineffectiveness.

The rule we announce today will be applied to the parties before us as well as to any other cases on direct appeal where the issue of ineffectiveness was properly raised and preserved. See, e.g., Blackwell v. Commonwealth, State Ethics Com'n, 589 A.2d 1094 (Pa. 1991); see also Commonwealth v. Cabeza, 469 A.2d 146 (Pa. 1983). In Blackwell, our court recognized that the decision to apply a new rule of law is within the discretion of the court.[15] 589 A.2d at 1098. Additionally, the Pennsylvania Constitution does not mandate or prohibit the retroactive or prospective application of a new rule of law. Id. At common law in Pennsylvania, a decision announcing a new rule of law was normally considered to

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[14] The general rule announced today is limited by the issues raised in this case. Appellant does not raise an allegation that there has been a complete or constructive denial of counsel or that counsel has breached his or her duty of loyalty. Under those limited circumstances, this court may choose to create an exception to the general rule and review those claims on direct appeal. However, as there is no issue raising such a question in this case, such a consideration is more appropriately left to another day.

[15] Since our decision in Blackwell, the Supreme Court of the United States has overruled its decision that permitted a court to selectively determine whether it would apply a new rule of law prospectively only. See Annenberg v. Commonwealth, 757 A.2d 338, 351 (Pa. 2000)(discussing that the Court overruled Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) in Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993)). However, as the instant case deals only with an issue of state law, the effect of the Court's changed retroactivity analysis is not relevant to the instant case.

be retroactive. Id. at 1099. In determining whether to apply a new rule retroactively or prospectively, a court should take into account the purpose to be served by the new rule, the extent of reliance on the old rule, and the effect on the administration of justice by the retroactive application of the new rule. Id.

Although new rules of procedure of non-constitutional dimension are commonly applied only to the case currently pending before the court and to cases prospectively, see id. at 1101, in this instance we believe that the considerations set forth in Blackwell will be best served by retroactive application of the new rule. The purpose of the new rule will be served since defendants will no longer be compelled to raise ineffectiveness claims on an undeveloped record; although the parties may rely on the old rule of law and raise ineffectiveness claims, neither party will be harmed by application of the new rule since claims of ineffectiveness can be raised in a collateral proceeding; finally, the administration of justice will be served since the rule announced today provides a clearer and more concise standard for both courts and the parties to follow. Thus, the new rule we announce today will apply to the instant case as well as those cases currently pending on direct appeal where the issues of ineffectiveness have been properly raised and preserved.[16]

Applying the new rule to the instant case, the claims regarding trial counsel's ineffectiveness will be dismissed without prejudice. Appellant can raise these claims in addition to other claims of ineffectiveness in a first PCRA petition and at that time the PCRA

[16] Our decision today has no effect on cases currently pending on collateral review. However, eventually the new rule of law will eliminate the need for layering in first PCRA petitions, since petitioners will no longer have to plead their underlying trial counsel ineffectiveness claim through the lens of appellate counsel ineffectiveness in order to avoid application of the waiver provision of the PCRA, 42 Pa.C.S. § 9544(b).

court will be in a position to ensure that Appellant receives an evidentiary hearing on his claims, if necessary. Accordingly, consistent with our holding today, the order of the Superior Court, affirming Appellant's judgment of sentence, is affirmed.

Mr. Justice Eakin did not participate in the consideration or decision of this case.

Mr. Justice Saylor files a concurring opinion.

Mr. Justice Castille files a concurring and dissenting opinion.