

**[J-91-2000 ]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA, Appellee,	No. 283 Capital Appeal Docket
v.	:
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	: Appeal from the Order of the Court of
	: Common Pleas of Montgomery County,
	: Criminal Division, Entered September 1,
	: 1999, at No. 1869-90
	:
	:
	: SUBMITTED: March 17, 2000
THOMAS MEADOWS, Appellant.	

**CONCURRING OPINION**

**MR. JUSTICE CASTILLE**

**DECIDED: December 31, 2001**

I concur in the result but not in the approach employed by the majority opinion. The majority opinion gives the perhaps-unintentional impression that appellant has raised claims of trial court error and trial counsel ineffectiveness which are reviewable on the merits in this PCRA proceeding. Those particular claims, however, were available to appellant on direct appeal and, thus, they are waived under the PCRA. See Commonwealth v. Pierce, \_\_\_ A.2d \_\_\_, \_\_\_ (Pa. 2001), No. 207 CAP, slip op. at 8. The only claims reviewable on the merits here are appellant's constitutionally distinct contentions that his direct appeal counsel, who was different from trial counsel, was ineffective for failing to raise these claims of trial court error and trial counsel ineffectiveness. Because the majority opinion ignores the statutory waiver provisions of the PCRA and appears to

review non-cognizable and indisputably waived claims on the merits, I cannot join it.

In order to establish his eligibility for relief under the PCRA, a petitioner must affirmatively show, among other things, that his claim has not been waived. 42 Pa.C.S. § 9543(a)(3). An issue is waived under the PCRA “if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.” Id. § 9544(b). Thus, the “very terms” of the PCRA “exclude[] waived issues from the class of cognizable PCRA claims.” Commonwealth v. Albrecht, 720 A.2d 693, 700 (Pa. 1998). Moreover, this Court has made clear that our practice of relaxing waivers arising from our own procedural rules in direct capital appeals cannot operate to excuse waivers that arise from application of the terms of the PCRA. Id.

Appellant in this case was represented on direct appeal by counsel other than trial counsel. On that appeal, appellant pursued claims of trial court error as well as multiple claims of trial counsel ineffectiveness, including three claims relating to the guilt phase of trial, and one claim respecting the penalty phase. Commonwealth v. Meadows, 633 A.2d 1081, 1087, 1089 (Pa. 1993). New counsel was obliged to raise the ineffectiveness claims after discerning them, for “[i]t is well-established that a claim of ineffectiveness must be raised at the earliest possible stage in the proceedings at which counsel whose effectiveness is questioned no longer represents the defendant.” Commonwealth v. Green, 709 A.2d 382, 384 (Pa. 1998) (collecting cases); Commonwealth v. Hubbard,

372 A.2d 687, 695 n.6 (Pa. 1977).<sup>1</sup> All claims were reviewed on the merits and relief was denied.

On this PCRA appeal, appellant identifies eight claims in his statement of the questions presented. The first three are claims of trial court error in the guilt phase. Since these claims were available to appellant on direct appeal, but were not raised, they would be waived as claims of trial error under the PCRA. 42 Pa.C.S. § 9543(a)(3), § 9544(b). Pierce, supra. Appellant obviously recognizes that the claims are waived, for his very next claim alleges that both trial and direct appeal counsel were ineffective for failing to raise the three claims of trial court error. The claim of appellate counsel ineffectiveness, unlike the claims of trial court error and the claim of trial counsel ineffectiveness, could not be raised on direct appeal; thus, this particular claim would not be waived under the PCRA. Moreover, since the PCRA specifically recognizes claims of counsel ineffectiveness, 42 Pa.C.S. § 9543(a)(2)(ii), a claim that direct appeal counsel was ineffective is available to appellant now. Pierce, supra.

Appellant's fifth, sixth, and seventh claims allege trial counsel ineffectiveness in the penalty phase, while his eighth and final claim alleges that trial and appellate counsel were ineffective for failing to raise and preserve "the afore-mentioned issues"-- presumably, a reference to the three immediately preceding claims of penalty-phase ineffectiveness. To the extent appellant assails trial counsel's penalty phase performance, his claims would be waived under the PCRA, since appellant could have raised those claims along with his other trial counsel ineffectiveness claims on direct appeal. Pierce, supra. The

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<sup>1</sup>This Court recently granted allocatur to determine whether this practice, which began with the footnote in Hubbard, should be reconsidered. See Commonwealth v. Grant, 780 A.2d 601 (Pa. 2001).

claim of appellate counsel ineffectiveness respecting those issues, however, would be cognizable under the PCRA. Id.

In summary, the only non-waived claims available to appellant on PCRA review are his claims sounding in appellate counsel's ineffectiveness. These are distinct, substantive Sixth Amendment claims separate and apart from the underlying claims of trial court error and trial counsel ineffectiveness. Pierce, supra; see also Commonwealth v. Williams, 782 A.2d 517, 525 (Pa. 2001); id. at 535-36 (Castille, J., concurring). They are subject to the same general test applied under Strickland v. Washington, 466 U.S. 668 (1984) and its progeny. Smith v. Robbins, 528 U.S. 259, 285-89 (2000) (petitioner "must satisfy both prongs of the Strickland test in order to prevail on his claim of ineffective assistance of appellate counsel"); Pierce, supra, \_\_\_ A.2d at \_\_\_, slip op. at 8-9. Claims involving appellate counsel ineffectiveness, moreover, involve concerns unique to appellate practice. Commonwealth v. Lambert, \_\_\_ A.2d \_\_\_, \_\_\_, (Pa. 2001) (Opinion Announcing Judgment of Court), No. 223 CAP, slip op. at 12-13. Arguably meritorious claims may be omitted in favor of pursuing claims which, in the exercise of appellate counsel's objectively reasonable professional judgment, offer a greater prospect of securing relief. Jones v. Barnes, 463 U.S. 745, 750-54 (1983). "[A]ppellate counsel . . . need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." Robbins, 528 U.S. at 288 (characterizing Barnes). Accord Lambert.

Appellant's actual argument on his multiple claims for relief consists of a single narrative, broken only by a heading which separates his penalty phase

claims from the guilt phase claims which precede them. Argument, 18.<sup>2</sup> Both the guilt phase and the penalty phase portion of appellant's argument specifically develop his claims under the rubric of trial counsel ineffectiveness, and not as stand-alone claims of trial or PCRA court error. Appellant does not separately develop any argument respecting appellate counsel; instead, his only reference to appellate counsel consists of an assertion, at the end of his argument on the guilt phase claims of trial counsel ineffectiveness, stating: "And appellate counsel was ineffective for failing to raise the aforementioned issues." Id.

The majority acknowledges the framing of appellant's claims in his statement of questions presented, but then ignores the PCRA waiver provision, as well as the fact that appellant's **argument** recognizes that the underlying versions of his claims are waived and, accordingly, actually **pursues** his claims only under the rubric of counsel ineffectiveness. The majority then proceeds to analyze each claim individually and review it as if it were a valid, non-waived claim cognizable under the PCRA. Ultimately, the majority finds that each claim lacks merit. With respect to the layered claims that encompass appellate counsel, the majority does not distinguish between the performance of trial and appellate counsel and engages in no substantive analysis focusing upon appellate counsel. Compare Pierce, supra. Instead, the majority concludes that, the underlying claims having been determined to lack merit, the ineffectiveness (or layered ineffectiveness) claims necessarily fail. The majority's approach thus gives the impression that appellant's underlying claims of trial court error are non-waived, viable PCRA claims, though ultimately meritless. It gives the further

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<sup>2</sup> Appellant's brief is not paginated. The numbering in text is my own, beginning with the first page of appellant's argument.

impression that appellant's claims of trial counsel ineffectiveness are additional, distinctly reviewable claims under the PCRA.

To the extent the majority reviews the waived claims of trial error and trial counsel ineffectiveness on the merits, its approach is simply erroneous. Compare Pierce, supra. Moreover, appellant himself recognizes that his claims of trial court error in the guilt phase are waived under the PCRA and, thus, he argues them under ineffectiveness jurisprudence. There is no reason for the majority to *sua sponte* convert those Sixth Amendment claims into non-constitutional claims of trial court error. This is particularly so because it is not apparent that all of those claims, so characterized, would be cognizable under the PCRA if they were not waived. See 42 Pa.C.S. § 9543(a)(2)(I)-(vii) (listing only claims cognizable under PCRA).

The underlying claims reached by the majority, having been waived, are not available to appellant on their own. The lack of merit in those claims is pertinent under the PCRA, if at all, only for the limited purpose of exploring whether appellant's **cognizable** claims of appellate counsel ineffectiveness entitle him to relief. Pierce, supra. Their potential relevance, thus, is as follows: if the underlying claims lack merit, appellate counsel plainly was not ineffective for failing to pursue them, since it is settled that counsel is not ineffective for failing to pursue meritless claims. Commonwealth v. Peterkin, 649 A.2d 121, 128 (Pa. 1994), cert. denied, Peterkin v. Pennsylvania, 515 U.S. 1137 (1995); Commonwealth v. Tarver, 420 A.2d 438, 438 (Pa. 1980).

But the majority need not go that far, for appellant has made no attempt whatsoever to develop his claims of appellate counsel ineffectiveness. Although appellant's boilerplate assertion of appellate counsel ineffectiveness is sufficient

for him to receive merits review of his cognizable claims that appellate counsel was ineffective under this Court's recent precedent, see Lambert, \_\_\_ A.2d \_\_\_, \_\_\_, slip op. at 10-12, his failure to forward relevant argumentation under Strickland nevertheless dooms these claims to failure on the merits. Id. at \_\_\_, slip op. at 13-15. See also Pierce, supra, \_\_\_ A.2d at \_\_\_, slip op. at 23; Commonwealth v. Rivers, \_\_\_ A.2d \_\_\_, \_\_\_ (Pa. 2001) (Opinion Announcing Judgment of Court), No. 241 CAP, slip op. at 8; id. at \_\_\_ (Castille, J. concurring), concurring slip op. at 5-6; id. at \_\_\_ (Saylor, J., joined by Cappy, J., dissenting), dissenting slip op. at 5 (joins lead opinion and concurring opinions "in emphasizing that post-conviction petitioners absolutely must plead and support the essential elements of a claim under the Post Conviction Relief Act in order to be entitled to a hearing on their claims, and must establish those essential elements to demonstrate eligibility for relief"). For example, appellant has not even attempted to show how the claims that appellate counsel failed to pursue offered a greater prospect for success than the claims that appellate counsel actually elected to pursue. See Barnes.

In my view, this Court should make it explicitly clear, as we recently did in Pierce, that the only claims that are reviewable on this particular appeal are the claims of appellate counsel ineffectiveness. Any other version of appellant's claims is waived since it could have been raised on direct appeal. The question of the proper manner in which to analyze claims under the PCRA is not simply elevation of form over substance. Capital cases rarely end in this Court, but are subject to further review on federal habeas corpus. That review often involves complex issues of issue preservation and fair presentation, *i.e.*, exhaustion and procedural default. At that point, what might appear to be form now quite often

becomes as important, if not more important, than substance. In recognition of this continuum of review in capital cases, I think it essential that this Court (1) be consistent in its application of the PCRA, and (2) be precise as to what claim it is that this Court deems reviewable under Pennsylvania law, and why. Because the majority opinion gives the mistaken impression that appellant's waived claims of trial court error and trial counsel ineffectiveness are reviewable on the merits under the PCRA, and thereby ignores the express language of the PCRA and the import of this Court's holding regarding relaxed waiver in Albrecht, I cannot join in its approach.