No. 03-9627

In The
Supreme Court of the United States

JOHN A. PACE,

Petitioner,

v.

DAVID DiGUGLIELMO, Superintendent,
State Correctional Institution at Graterford,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Was Petitioner's application for state post-conviction relief "properly filed" for purposes of statutory tolling under 28 U.S.C. § 2244(d)(2), where the procedural default rule ultimately invoked by the state court to deny post-conviction relief acted as a condition to obtaining relief on claims, but not a condition to filing the application?

2. Is equitable tolling of the federal habeas statute of limitations during state court exhaustion appropriate, where state court decisions made it appear that state remedies were available, decisions of the federal court of appeals required the petitioner to exhaust in the manner he did, and the district court would have required the petitioner to exhaust had petitioner filed in federal court first?

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OPINIONS BELOW

The District Court's opinions are at JA447 (*Pace v. Vaughn*, 151 F.Supp.2d 586 (E.D. Pa. 2001)) and JA503 (*Pace v. Vaughn*, 2002 WL 485689 (E.D. Pa. March 29, 2002)). The Third Circuit's opinion is at JA534 (*Pace v. Vaughn*, 2003 WL 21754982 (3d Cir. July 30, 2003)). The Third Circuit's order denying rehearing is at JA539.

JURISDICTION

This Court granted *certiorari* on September 28, 2004, and has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes and rules involved are set forth in the Appendix to this Brief ("App."). This case involves:

28 U.S.C. § 2244(d), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), App. 1;

42 Pa.C.S. § 9544 (West 2004), App. 2;

42 Pa.C.S. § 9545 (West 2004), App. 5;

Pennsylvania Rules of Criminal Procedure ("Pa.R.Cr.P.") 1501-1509 (West 1997), App. 10;

Pennsylvania Rules of Criminal Procedure ("Pa.R.Cr.P.") 1500-1510 (West 1998 rev. ed.), App. 28.

STATEMENT OF THE CASE[1]

The United States Court of Appeals for the Third Circuit denied Petitioner all federal review of the constitutional validity of his conviction and sentence of life imprisonment without parole. The Third Circuit ruled that Petitioner's efforts to exhaust his claims in state court before pursuing habeas corpus relief in federal court did not toll AEDPA's one-year statute of limitations because the Pennsylvania appellate court ruled that Petitioner's state post-conviction petition was untimely.

The Third Circuit reversed the ruling of Chief District Judge James T. Giles as to statutory tolling. Chief Judge Giles had found statutory tolling appropriate under 28 U.S.C. § 2244(d)(2) because Petitioner "properly filed" in state court in an effort to exhaust his claims. The Third Circuit also reversed the ruling of Chief Judge Giles that equitable tolling was appropriate. Chief Judge Giles had found equitable tolling appropriate because, *inter alia*, Third Circuit law required the state court exhaustion Petitioner pursued; Chief Judge Giles himself would have required exhaustion if Petitioner had filed a habeas petition without first seeking state court remedies; and Pennsylvania's courts had created judicial exceptions to statutory procedural default rules, under which state post-conviction remedies appeared to be available.

As to statutory tolling, the Third Circuit held that a post-conviction petition ultimately denied as untimely by the state courts could never be "properly filed" so as to toll

[1] All emphasis in this brief is supplied unless otherwise indicated. The Joint Appendix is cited as "JA" followed by the page number.

the AEDPA filing period under § 2244(d)(2). *See* JA535-536. As to equitable tolling, the Third Circuit held that Chief Judge Giles' findings would not justify equitable tolling in a non-capital case, although uncertainties in Pennsylvania post-conviction law would justify equitable tolling in a capital case. *See* JA536-538.

The facts and procedural history culminating in this harsh result are as follows.

A. The trial court proceedings. In September 1985, when Petitioner was seventeen years old, he was arrested for assaulting and robbing Randolph Baldwin. Ten days later, Mr. Baldwin died. Petitioner was charged with murder.

Attorney Moira Dunworth was appointed. She advised Petitioner to plead guilty to second-degree murder. She did not tell Petitioner that the life imprisonment sentence for second-degree murder in Pennsylvania is life without parole. Instead, she told Petitioner he would be eligible for parole on the life sentence after serving ten to fifteen years. She also told Petitioner's parents and brother that Petitioner would be parole-eligible from the life sentence. She asked them to convince Petitioner that he should plead guilty to second-degree murder.[2]

Petitioner pled guilty to second-degree murder on February 13, 1986, in reliance on the misinformation counsel gave him. During the plea colloquy, the court told Petitioner he would be sentenced to "life imprisonment," but did not define that phrase or correct the erroneous

[2] The facts are taken from Petitioner's allegations in the state and district courts. *See*, *e.g.*, JA190-191, JA382-384.

parole-eligibility information counsel had provided, JA63-64, and suggested Petitioner would be parole-eligible:

> I surely will recommend and make part of the sentencing order that the defendant be confined at Camp Hill or a suitable facility for someone of his age, where he can obtain some help toward *rehabilitation*, particularly since he is a young man and at some time in the future, *may be subject to release* and it is hoped that the prison sentence, for *whatever duration it be*, certainly aid him in *rehabilitating* him.

JA83-84.

Counsel at no time corrected the erroneous information she had given Petitioner. She did not move to withdraw the guilty plea. She did not file a direct appeal. Petitioner would not have pled guilty and would have asserted his right to trial if he had not been misinformed.

B. The 1986-92 "PCHA" proceedings: While in prison, Petitioner learned that he was not eligible for parole. He filed a *pro se* petition in August 1986 under the "PCHA" (Post-Conviction Hearing Act), Pennsylvania's mechanism for post-conviction relief at that time. JA86-92. The court appointed PCHA counsel, who amended the petition with argument concerning guilty plea counsel's ineffectiveness. JA108-114. At a hearing, PCHA counsel called Petitioner as a witness, but did not call guilty plea counsel even though guilty plea counsel told PCHA counsel "that she did not explain Life was Life without parole simply because she had a very difficult emotional time

dealing with such a prospect." JA200 (representation by PCHA counsel).[3]

In July 1991, the PCHA court denied relief. JA119-121. Counsel appealed, arguing only that guilty plea counsel was ineffective for misinforming Petitioner about parole-eligibility. JA122-132. The Superior Court affirmed in March 1992. JA142. The Pennsylvania Supreme Court denied discretionary review in September 1992. JA183.

C. The 1988 and 1996 changes to Pennsylvania's post-conviction statute and rules: In 1988, the PCHA was replaced by the "PCRA," the Post Conviction Relief Act, 42 Pa.C.S. § 9541, *et seq*. By its terms, the PCRA applied only to post-conviction proceedings filed after its enactment, and not to Petitioner's PCHA litigation. *See* 42 Pa.C.S. § 9545, Historical and Statutory Notes.

The PCRA included procedural default. An issue was "waived" under the PCRA's statutory language "if the petitioner failed to raise it and if it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or other proceeding actually conducted or in a prior proceeding actually initiated under this subchapter." 42 Pa.C.S. § 9544(b), Historical and Statutory Notes (quoting 1988-96 PCRA).

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[3] Petitioner testified about the misinformation guilty plea counsel gave him; that when the court said he would be sentenced to "life imprisonment," he "didn't know what life sentence meant"; and that he relied on "what my counsel told me, that I would do 10, 12 or 15 years." JA126-128. PCHA counsel noted that Petitioner's belief was "not some fantasy"; it "was a product of what he was told" and a "common belief in America" about the availability of parole. JA130.

Pennsylvania's courts developed caselaw exceptions to statutory procedural default, pursuant to which a petitioner could have the merits of his defaulted claims reviewed. The judicial exceptions to statutory procedural default applied when: (1) the petitioner asserted that all prior counsel in the case had provided ineffective assistance, and this included prior post-conviction counsel; (2) the petitioner asserted that denial of relief would be a "miscarriage of justice" as that term was defined by the Pennsylvania courts; or (3) the petitioner asserted his sentence was "illegal."[4]

Effective January 16, 1996, the PCRA was amended. *See* Act of Nov. 17, 1995, P.L. 1118, No. 1995-32 (Spec.Sess. 1) (effective in 60 days). The 1996 amendments included a new procedural default rule – a time-bar. *See* 42 Pa.C.S. § 9545(b). The new statutory language stated that a PCRA petition was to be filed within one year from when the conviction became final, § 9545(b)(1). The statutory language also stated that a claim filed after that would be timely if the failure to raise the claim earlier resulted from interference by governmental officials, or the claim was based on newly discovered facts, or the claim was based on a new, retroactive rule of constitutional law, § 9545(b)(1)(i)-(iii). The statute stated that claims based upon these exceptions must be filed "within 60 days of the date the claim could have been presented," § 9545(b)(2).

The 1996 statutory amendment stated that the new rules "shall apply to petitions filed after the effective date of this act; however, a petitioner whose judgment has

[4] Other exceptions to procedural default were applied only to capital cases, but are not at issue here.

become final on or before the effective date of this act shall be deemed to have filed a timely petition . . . if the petitioner's first petition is filed within one year of the effective date of this act." 42 Pa.C.S. § 9545, Historical and Statutory Notes.[5]

Pennsylvania's Rules of Criminal Procedure governing PCRA proceedings ("PCRA Rules") were not altered when the time-bar was added to the statute in 1996. *See* Pa.R.Cr.P. 1501-1509 (West 1997). The PCRA Rules did not mention the time limits at all until those Rules were amended on August 11, 1997. *See* Pa.R.Cr.P. 1500-1510 (West 1998 rev. ed.).[6]

Even after the August 11, 1997 amendments to the PCRA Rules, Rule 1502, which set forth the required "content of [a] motion for post-conviction collateral relief," did not mention the time limits or require that a PCRA petition contain any allegations about time limits. Pa.R.Cr.P. 1502 (West 1998, rev. ed.) (capitalization altered); *see also id.*, Comment (PCRA petition "must include . . . substantially all of the information set forth in this rule").

Similarly, the "standard PCRA petition form," provided to Pennsylvania prisoners by the Commonwealth,

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[5] The amendment did not say if the one year grace period for filing a "first petition" applied to the "first petition" filed after the amendment's effective date, the "first petition" filed under the PCRA (rather than the PCHA or some other collateral attack), or the "first petition" seeking collateral relief of any kind.

[6] The PCRA Rules were renumbered on March 1, 2000, and are now at Pa.R.Cr.P. 900-910. Unless otherwise indicated, citations herein are to Rules 1501-1509 (West 1997), which were in effect while Petitioner's PCRA petition was in the trial court.

"does not reference the PCRA's time limitation." *Commonwealth v. Smith*, 818 A.2d 494, 501 (Pa. 2003); *see also* Pa.R.Cr.P. 1502, Comment (requiring creation of "form motion . . . incorporating the required contents set forth herein . . . for distribution to uncounseled defendants").

D. The 1996-99 "PCRA" proceedings: On November 27, 1996, Petitioner filed a *pro se* PCRA petition, JA184-201, and memorandum of law, JA202-227.[7] The *pro se* PCRA petition meticulously tracked Rule 1502's requirements for the contents of a PCRA petition and contained all the information required by Rule 1502. *Compare* Pa.R.Cr.P. 1502, with JA187-194. Petitioner sought and was granted leave to proceed *in forma pauperis*. Pursuant to the PCRA statute and rules, he filed in the Philadelphia Court of Common Pleas, where he was convicted. *See* Pa.R.Cr.P. 1501 (PCRA proceeding "shall be initiated by filing . . . with the clerk of the court in which the defendant was convicted and sentenced"); 42 Pa.C.S. § 9545(a) ("Original jurisdiction over a proceeding under this subchapter shall be in the court of common pleas.").

The *pro se* PCRA petition raised two new claims that had not been presented in the earlier (PCHA) proceedings: that a life-without-parole sentence for the crime to which Petitioner pled guilty is illegal under Pennsylvania law and violates the Eighth and Fourteenth Amendments, JA189, JA192, JA202-212; and that the guilty plea colloquy was

[7] November 27 is actually when the petition was *received* by the clerk. Because Pennsylvania applies the "mailbox rule" to unrepresented, incarcerated PCRA petitioners, Petitioner's actual filing date is earlier than November 27. *See Commonwealth v. Jones*, 700 A.2d 423, 426 (Pa. 1997); *Commonwealth v. Jerman*, 762 A.2d 366 (Pa.Super. 2000); *Commonwealth v. Little*, 716 A.2d 1287 (Pa.Super. 1998).

defective and violated state law and due process, JA190, JA192-193, JA213-220. The PCRA petition also presented new evidence that had not been considered in the earlier proceedings (three affidavits and a letter) to show that guilty plea counsel had been ineffective in misinforming Petitioner about parole-eligibility and that PCHA counsel had ineffectively presented the claim by, *inter alia*, failing to call guilty plea counsel as a witness at the PCHA hearing. JA190-191, JA193-201, JA218-224.[8]

Relying on the judicial exceptions to default, the *pro se* PCRA petition and memorandum explained that neither the new claims nor the new evidence should be procedurally barred. Petitioner argued that: (1) all prior counsel (including PCHA counsel) were ineffective for failing to raise the new claims and present the new evidence, *e.g.*, JA189, JA191-194, JA220-224, JA226; (2) failure to consider the new claims and evidence would constitute a "miscarriage of justice," as that term is defined by Pennsylvania's courts, *e.g.*, JA192, JA217, JA219, JA223; and (3) one of the new claims is a challenge to the legality of Petitioner's sentence, *e.g.*, JA189, JA192, JA202. Petitioner cited Pennsylvania caselaw on these judicial exceptions to default, to show that procedural default rules in

[8] The affidavits are from Petitioner's parents and brother; they state that guilty plea counsel gave them the same misinformation about parole-eligibility that she gave to Petitioner, and asked them to advise Petitioner to plead guilty. The letter is from PCHA counsel to Petitioner and states that guilty plea counsel admitted to PCHA counsel that she did not tell Petitioner that life imprisonment was without parole. *See* JA195-201.

Pennsylvania normally are overcome by allegations like his.[9]

Pursuant to the PCRA Rules, the case was docketed and assigned to the original judge. *See* Pa.R.Cr.P. 1503(a) ("Upon receipt . . . the clerk . . . shall immediately docket the [petition] to the same term and number as the underlying conviction and sentence. The clerk shall thereafter transmit the [petition] and the record to the trial judge"). Pursuant to the PCRA Rules and "after reviewing the record," the judge appointed counsel on January 17, 1997. JA228 (capitalization altered); *see also* Pa.R.Cr.P. 1504(c) (for successive petitions, "judge shall appoint counsel . . . whenever the interests of justice require it"). The judge gave counsel several months to review the case. JA229.

On June 13, 1997, appointed counsel filed a "*Finley* letter," stating his belief that Petitioner's claims "either have been finally litigated or are patently frivolous."

[9] *See*, *e.g.*, JA202, JA217, JA226, citing, *inter alia*, *Commonwealth v. McNeil*, 439 A.2d 664, 666 (Pa. 1981) (merits review of claims raised in second post-conviction petition because petitioner alleged ineffectiveness of all prior counsel for failing to raise the claims); *Commonwealth v. Bradley*, 480 A.2d 1205, 1206-07 (Pa.Super. 1984) (same); *Commonwealth v. Bable*, 375 A.2d 350 (Pa.Super. 1977) (granting post-conviction relief because of defective guilty plea colloquy; waiver overcome by allegation of ineffective assistance of prior counsel); *Commonwealth v. Fay*, 439 A.2d 1227, 1229 (Pa. 1982) (defective guilty plea colloquy is miscarriage of justice as defined in Pennsylvania – "[n]o civilized society could tolerate the waiver of such basic rights from one who was unaware of or misinformed as to . . . a critical fact"; granting post-conviction relief on defective guilty plea colloquy claim not previously raised); *Commonwealth v. Campbell*, 505 A.2d 262, 265 & n.8 (Pa.Super. 1986) (en banc) (challenge to legality of sentence cannot be waived and "may be raised for the first time . . . in a collateral proceeding"). *See also* Argument § II.A.2, *infra* (describing additional Pennsylvania decisions).

JA229, 235.[10] Pursuant to the PCRA Rules, the judge notified Petitioner that he had read appointed counsel's "*Finley* letter . . . and the trial record"; that "your petition will be dismissed at the next listing on Wednesday, July 23, 1997" because the judge believed the issues "are without merit"; and that Petitioner had ten days to respond to the notice. JA236; *see* Pa.R.Cr.P. 1507(a) ("If the judge is satisfied . . . that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, . . . the judge shall give notice to the parties of the intention to dismiss. . . . The defendant may respond to the proposed dismissal within 10 days. . . .").

Petitioner responded to the notice. He challenged appointed counsel's "*Finley* letter." He explained that appointed counsel had not had any meaningful discussions with him, was not available for phone calls and had not responded to Petitioner's letters. He asked for thirty days to further respond because the court's notice has been sent to the wrong prison and it was difficult for Petitioner to get access to the law library. JA238-239.

The judge denied PCRA relief on the scheduled date, July 23, 1997, stating that Petitioner's claims were previously litigated and meritless. JA240-243. The judge *did not apply the PCRA time-bar to any claim*. Appointed counsel was formally relieved. Pursuant to the PCRA Rules, the judge notified Petitioner, by certified mail, of

[10] *See Commonwealth v. Finley*, 550 A.2d 213 (Pa.Super. 1988); *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988), describing Pennsylvania's "*Finley* letter" procedure. After an appointed lawyer files a "*Finley* letter" and withdraws from the case, the petitioner has the right to continue seeking PCRA relief *pro se* in the trial court and on appeal.

the dismissal and of Petitioner's right to appeal to the Superior Court by filing a notice of appeal within thirty days. JA244; *see* Pa.R.Cr.P. 1507(d)(2) ("When the motion is dismissed without a hearing, the judge: . . . shall advise the defendant by certified mail, return receipt requested, of the right to appeal . . . and the time within which the appeal must be taken.").

In August 1997, Petitioner appealed *pro se* to the Superior Court, which set a briefing schedule. In April 1998, Petitioner filed his Superior Court brief, JA245-292, making substantially the same merits and procedural bar-overcoming arguments he had made in the lower court. *See*, *e.g.*, JA252, JA255, JA277, JA279-280, JA282 (ineffective assistance of all prior counsel); JA252, JA255-256, JA272-273, JA275, JA278-280 (miscarriage of justice); JA252, JA254, JA256-257 (illegal sentence).

In May 1998, the Commonwealth filed a brief asserting, *for the first time*, that Petitioner's claims were untimely under the new PCRA time-bar, § 9545(b). JA293-298. The Commonwealth cited a December 17, 1997 Superior Court decision, *Commonwealth v. Alcorn*, 703 A.2d 1054 (Pa.Super. 1997), that had applied the time-bar.[11] The Commonwealth asked the Superior Court to

[11] *Alcorn* was decided after Petitioner's trial court litigation was completed. *Alcorn* said that judicial interpretation of the new time-bar was a "question of first impression," as there were "no prior decisions interpreting this section." *Id.* at 1056. *Alcorn* stated for the first time, and without analysis or citation to authority, that the new time limits were a matter of "jurisdiction." *Id.* at 1056-57. *Alcorn* stated that there was no grace period because Alcorn's petition was his "second under the PCRA," that Alcorn's claims did not satisfy any exception under § 9545(b)(1)(i)-(iii), and that Alcorn's petition was untimely because, under the statutory language and without a grace period, it should

(Continued on following page)

quash the appeal. In the alternative, the Commonwealth asked the Superior Court to affirm the lower court's denial of PCRA relief. JA298.

Petitioner filed a reply brief, JA299-311, responding to the Commonwealth's time-bar argument. First, Petitioner cited Pennsylvania caselaw that appellate review in PCRA cases "is limited to determining whether a trial court's findings are supported by the record and whether its order is otherwise free of legal error," JA302, citing *Commonwealth v. Stark*, 658 A.2d 816 (Pa.Super. 1985), thus suggesting that the Superior Court could not address the Commonwealth's time-bar argument – which the Commonwealth first raised on appeal and upon which the lower court had not relied. Petitioner also argued that the PCRA time-bar raised "a question of waiver, not a question of jurisdiction as the Commonwealth argues," JA309; thus, the concept that jurisdictional issues could be raised at any time did not apply.

Second, Petitioner argued that the bar-overcoming assertions he had made in his prior brief (ineffectiveness of all prior counsel, "miscarriage of justice" as defined by the Pennsylvania courts, and illegal sentence) "are judicial exceptions to the waiver doctrine of the old PCRA legislation" and they "certainly should be retained as a judicial exception under the new PCRA legislation," including "as a *judicial exception* to the time bar," since the judicial exceptions to statutory bars had not been overruled by the Pennsylvania Supreme Court. JA303-304 (emphasis in

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have been filed in 1992, four years before the PCRA had time limits. *Id.* at 1056-57.

original); *see also* JA302, JA304, JA309 (further argument regarding judicial exceptions to procedural default).

Third, Petitioner argued that application of the PCRA time-bar to him would be unconstitutionally retroactive, in violation of due process: before the time-bar took effect Petitioner had a right to file a PCRA petition at any time; the time-bar retroactively abrogated this right one year after his conviction became final – that is, ten years before the time-bar took effect. JA305-308, citing, *inter alia*, *Texaco v. Short*, 454 U.S. 516, 527 n.21 (1982) (quoting *Wilson v. Iseminger*, 185 U.S. 55 (1902)). Petitioner also argued that it would be "a violation of separation of powers" under Pennsylvania's Constitution to allow the Legislature to abrogate the bar-overcoming law created by Pennsylvania's courts. JA303.

Fourth, Petitioner argued that he was entitled to relief under the statutory exception to the time-bar for newly discovered facts, § 9545(b)(1)(ii), because he was an incarcerated layperson and had filed as soon as he became aware of his claims. JA308.[12]

On December 3, 1998, the Superior Court affirmed the denial of PCRA relief. JA312-317. The Superior Court did not address Petitioner's anti-bar arguments, but said: the time limits are "jurisdictional," JA314; there was no grace period, JA316; Petitioner should have filed his claims within one year from when his conviction became final in 1986 – *i.e.*, ten years *before* the time limits were added to

[12] For example, the three affidavits Petitioner proffered with his *pro se* PCRA petition, JA195-199, were obtained less than sixty days before he filed the petition.

the PCRA, JA316; and the claims were untimely unless they satisfied the § 9545(b)(1) exceptions, JA316.

The Superior Court stated it "reviewed the exceptions under section 9545(b)(1) and f[ou]nd that none is applicable." JA316. It therefore affirmed the denial of PCRA relief, JA317, but *did not grant the Commonwealth's motion to quash the appeal*.

On December 15, 1998, Petitioner timely sought reargument, JA318-323, as provided by Pennsylvania's Rules of Appellate Procedure 2541, *et seq*. Petitioner again argued that the time-bar should not be applied retroactively. JA320. Petitioner argued that the Superior Court had "completely overlooked" his argument that his illegal sentence claim "cannot be waived." JA321.

Petitioner also argued that his claims were timely under the statutory exception to the time-bar in § 9545(b)(1)(i) ("interference by governmental officials") because prison officials had destroyed all of his legal documents, which had prevented him from filing earlier for PCRA relief. JA320-321.

Reargument was denied without comment on February 8, 1999. JA326. Petitioner sought Pennsylvania Supreme Court review, JA327-370, raising similar arguments, but the Pennsylvania Supreme Court denied review without comment on July 29, 1999. JA372.

E. The District Court proceedings and findings. On December 24, 1999, Petitioner filed a *pro se* habeas petition, JA373-390, raising claims from both the PCHA and PCRA proceedings. The Commonwealth claimed the petition was untimely under AEDPA's statute of limitations, 28 U.S.C. § 2244(d)(1), arguing that Petitioner's

PCRA proceedings did not toll the federal limitations period. JA391-396.

Chief District Judge James T. Giles rejected the Commonwealth's AEDPA time-bar arguments. *See* JA447-466. The District Court found statutory tolling under 28 U.S.C. § 2244(d)(2) (tolling during "properly filed" state post-conviction proceedings). The District Court also found equitable tolling given the circumstances of this case.

The Commonwealth moved for reconsideration or permission to appeal. The District Court appointed counsel. JA467. After briefing and argument, the District Court denied reconsideration but permitted the Commonwealth to appeal, and prepared a second opinion addressing the arguments in the Commonwealth's motion. *See* JA503-533.

The District Court explained that it found statutory tolling appropriate under § 2244(d)(2) because the PCRA petition was "properly filed" as that term was interpreted by this Court in *Artuz v. Bennett*, 531 U.S. 4 (2000), and by the Fifth and Ninth Circuits applying *Artuz* in similar situations. *See* JA511-519, citing *Artuz*; *Smith v. Ward*, 209 F.3d 383 (5th Cir. 2000); *Dictado v. Ducharme*, 244 F.3d 724 (9th Cir. 2001).

The District Court recognized that *Artuz* "left open the question" of whether a post-conviction petition deemed untimely by the state courts may be "properly filed" under § 2244(d)(2). JA512. However, the District Court concluded that the *analysis* in *Artuz* shows that Petitioner's PCRA petition was "properly filed," even though it was ultimately procedurally barred as untimely by the state courts. The District Court explained that *Artuz* found a state post-conviction petition "properly filed" when all of its claims were procedurally barred under state law and

that *Artuz* stated: the "question whether an application has been properly filed is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." JA511, quoting *Artuz* at 9.

The District Court also explained that in addressing "properly filed," "*Artuz* distinguishe[d] between state [post-conviction] statutes . . . which set forth 'a condition to filing' as opposed to 'a condition to obtaining relief.'" JA511, quoting *Artuz* at 11. Under *Artuz*, state court *applications* that violate a "condition to filing" are not "properly filed," but state court applications with *claims* that violate a "condition to obtaining relief" are still "properly filed." *Id.*

The District Court also noted that the Fifth and Ninth Circuits, applying *Artuz*, had held that if the state time limit contains exceptions, as does Pennsylvania's, and the state courts accept the petition for filing and review it to see if any exception is met, "the [state court] petition, even if untimely, should be regarded as 'properly filed,'" because such a time limit "'does not impose an absolute bar to filing' and is a 'condition to obtaining relief' rather than a 'condition to filing.'" JA512, quoting *Dictado*, 244 F.3d at 728-29, and citing *Smith*, 209 F.3d at 384-85. For the same reasons, the PCRA time-bar is a "condition to obtaining relief" on claims, rather than a "condition to filing" a petition. JA514-515. The District Court explained that the PCRA time-bar:

> is not an absolute bar to filing a second or successive petition more than a year after the conviction became final. The statute contains exceptions that require "some level of judicial review" [*Smith*, 209 F.3d at 384] to examine the

> merits of the petition before it can be dismissed as time-barred. . . .
>
> Therefore, this court sees [the PCRA time-bar] as imposing conditions for obtaining relief and not as an absolute bar to filing a petition. . . . Mr. Pace's second PCRA petition was untimely under Pennsylvania law in that it was too late for him to obtain relief under Pennsylvania law, yet, the PCRA petition was "properly filed" for purposes of federal law and tolled AEDPA's statute of limitations. . . .

JA515.[13]

The District Court also found equitable tolling appropriate, for several reasons.

First, when Petitioner filed his PCRA petition, it appeared that PCRA relief might be available. Pennsylvania's courts had established a large body of decisional law that normally trumped the PCRA's statutory procedural bar rules. It appeared under Pennsylvania decisions that relief could be available on an untimely claim if the failure to raise it earlier was due to ineffective assistance of prior counsel, including prior post-conviction counsel; if failure to address the claim was a "miscarriage of justice" under Pennsylvania law; or if the claim challenged the legality of the sentence. Since Petitioner's PCRA petition

[13] The District Court distinguished *Fahy v. Horn*, 240 F.3d 239 (3d Cir. 2001), which had held that untimely PCRA proceedings are not "properly filed," because *Fahy* did not cite *Artuz* and, therefore, did not give "properly filed" the interpretation *Artuz* requires; moreover, *Fahy* relied on a pre-*Artuz* decision of the Ninth Circuit which was vacated and disavowed after *Artuz*. *See* JA516-519. In reversing the District Court, the Third Circuit nevertheless would later treat *Fahy* as controlling. *See* JA535-536.

relied upon these traditional bar-trumping judicial rules, it was reasonable for Petitioner to believe that PCRA relief might be available even if his claims were "untimely" under the statutory language of § 9545(b). JA462-463, JA519-528. Moreover, the statutory language of the one year grace period for the PCRA time-bar, *see* subpart C, *supra*, left open the possibility that the grace period applied to Petitioner, who was filing his first petition since the amendments – further suggesting that his claims would not be barred as "untimely." JA449, JA522.

Second, the District Court explained that Third Circuit precedent required that a federal habeas petition with unexhausted claims be dismissed for exhaustion in PCRA proceedings at the time Petitioner was pursuing PCRA relief. The District Court found that it would have dismissed and required exhaustion had Petitioner filed a federal habeas petition instead of his PCRA litigation. Accordingly, for equitable tolling purposes, Petitioner appropriately pursued relief in state court. JA462-463, JA526-528.

Third, the District Court noted that Petitioner's sentence of life imprisonment without parole is severe, weighing in favor of equitable tolling. JA464, JA528-529. Fourth, the District Court found that Petitioner had "diligently and reasonably asserted his claims" throughout all proceedings, also weighing in favor of equitable tolling. JA528.

Given all these circumstances, the District Court found equitable tolling appropriate because denial of tolling, and the resulting loss of federal review, would be "an extraordinary deprivation of rights" and "patently unfair." JA462-463.

SUMMARY OF ARGUMENT

Petitioner's right to federal habeas review of the constitutionality of his conviction and life without parole sentence depends entirely upon whether his state post-conviction proceedings tolled AEDPA's statute of limitations.

I. Statutory tolling is appropriate. AEDPA's § 2244(d)(2) tolls the federal habeas one-year filing period during litigation of a "properly filed application" for state post-conviction review. Petitioner's PCRA petition was a "properly filed application" as that term was understood by this Court in *Artuz v. Bennett*, 531 U.S. 4 (2000).

Under state law, Petitioner could file the petition at any time, without seeking permission. There was no barrier or condition to filing. Because he filed his petition in the right court (where he was convicted), state law required the clerk to docket the petition and transmit the petition and the record to the state judge for review. State law allowed appointment of counsel; the state judge appointed counsel and gave counsel several months to brief the claims. State law required the judge to review the petition, record and counsel's submission before ruling; the state judge did so.

State law required that judicial review of timeliness *vel non* be done on a claim-by-claim basis – a single PCRA petition may contain both timely and untimely claims. The state judge did not rule that any claim raised by Petitioner was untimely. State law required that Petitioner be informed he could appeal as of right; the state judge so informed Petitioner. State law required ordinary appellate review; the state appellate court provided such review, and did not grant the Commonwealth's request that the appeal

be quashed. State law required the appellate court to review claim-by-claim for timeliness; the state appellate court did so.

The state appellate court ultimately held that Petitioner's claims were untimely, and denied post-conviction relief. But state law allowed Petitioner to file and litigate his PCRA petition, and state law required the state courts to afford judicial review. The PCRA time limits do not impose a condition on filing the petition although, like any procedural default, they prohibit relief on certain claims. Like the post-conviction petition in *Artuz*, Petitioner's PCRA petition was "properly filed" and tolled the AEDPA time for filing under § 2244(d)(2).

II. Equitable tolling is also appropriate. When Petitioner filed his PCRA petition, it was not at all clear that it would ultimately be deemed untimely. To the contrary, it affirmatively appeared that state court merits review might be available to Petitioner. Precisely because Pennsylvania court decisions on the availability of PCRA review made PCRA review appear available for prisoners such as Petitioner, Third Circuit exhaustion law required Petitioner to pursue review under the PCRA at the time he pursued that review. The District Court here specifically found that if Petitioner had filed a federal habeas petition, instead of the PCRA petition, the habeas petition "would have been dismissed" and Petitioner would have been required to do what he did do – file a PCRA petition to exhaust state remedies before seeking federal review.

Under these circumstances, where it was utterly unclear that state court remedies would not be available, state law made a state remedy appear available, and Petitioner complied with existing federal Circuit law and

did what the federal Circuit had told Pennsylvania prisoners to do, AEDPA's limitations period should be tolled. As the District Court found, denial of tolling and federal review under these circumstances is "an extraordinary deprivation of rights" and "patently unfair."

ARGUMENT

I. THE THIRD CIRCUIT WAS WRONG TO DENY PETITIONER STATUTORY TOLLING AND FEDERAL REVIEW.

The Third Circuit did not give proper regard to this Court's decision in *Artuz v. Bennett*, 531 U.S. 4 (2000), and misapplied this Court's decision in *Carey v. Saffold*, 536 U.S. 214 (2002).

A. Petitioner's State Court Proceedings Were "Properly Filed."

Section 2244(d)(2) tolls AEDPA's statute of limitations for the "time during which a properly filed application for State post-conviction . . . review . . . is pending." Because the PCRA petition was a "properly filed application" under § 2244(d)(2), the habeas petition is timely under § 2244(d)(1).

Artuz v. Bennett, 531 U.S. at 7, found "properly filed" a successive state post-conviction petition when all of "the claims it contained were subject to two procedural bars under [state] law." In *Artuz*, the state argued that the petition was not "properly filed" because it did not comply "with all mandatory state-law procedural requirements that would bar review of the merits of the application." *Id.* at 8. This Court rejected the state's argument, explaining

that "the question whether an application has been 'properly filed' is quite separate from the question whether the claims *contained in the application* are meritorious and free of procedural bar." *Id.* at 9 (emphasis in original).

This Court's "properly filed" analysis is grounded in the distinction between state court rules that create a "*condition to filing*" a petition and state court rules that are a "*condition to obtaining relief*" on the *claims* in the petition. *Artuz*, 531 U.S. at 11. If a petition violates a "condition to filing," it is not "properly filed." On the other hand, if the state courts allow the petition to be filed and considered, but apply a procedural bar against its claims and deny relief – *i.e.*, if the *claims* violate a "condition to obtaining relief" – the petition is still "properly filed." *Id.*

This Court identified as typical "conditions to filing" rules that forbid filing altogether or require the applicant to obtain pre-filing permission from the court. *See Artuz*, 531 U.S. at 8-9, citing *Martin v. District of Columbia Court of Appeals*, 506 U.S. 1 (1992), and AEDPA's 28 U.S.C. §§ 2244(b)(3)(A) & 2253(c).[14]

[14] *Martin* directed the clerk not to accept filings from an abusive litigant unless he complied with certain preconditions. Section 2244(b)(3)(A) requires a prisoner who wants to file a successive habeas petition in the district court to first obtain permission from the court of appeals. Section 2253(c) requires permission (*i.e.*, a certificate of appealability) before an appeal may be taken. Pennsylvania's PCRA has no such preconditions to filing, but other states do. *Compare Tinker v. Hanks*, 255 F.3d 444, 445-46 (7th Cir. 2001) (Indiana rule that "require[s] the would-be applicant for postconviction relief to *ask leave of court* to file a second or other successive application for postconviction relief" is "condition to filing"), with *Smith v. Walls*, 276 F.3d 340, 344-45 (7th Cir. 2002) (because "Illinois does not require that a state prisoner obtain leave of court before filing a second or otherwise

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This Court also explained that a state court rule allowing a single application to contain both barred *and* non-barred claims is necessarily a "condition to obtaining relief" on claims, not a "condition to filing" the application. Any other conclusion

> would require judges to engage in verbal gymnastics when an application contains some claims that are procedurally barred and some that are not. Presumably a court would have to say that the application is "properly filed" *as to* the nonbarred claims, and not "properly filed" *as to* the rest. The statute, however, refers only to "properly filed" applications and does not contain the peculiar suggestion that a single application can be both "properly filed" and not "properly filed."

Artuz, 531 U.S. at 10 (emphasis in original).

This Court "express[ed] no view on the question whether the existence of certain exceptions to a [state court] timely filing requirement can prevent a late application from being considered improperly filed." *Artuz*, 531 U.S. at 8 n.2, citing *Smith v. Ward*, 209 F.3d 383, 385 (5th Cir. 2000). But the reasoning of *Artuz* compels the answer in Petitioner's case: an untimely PCRA petition is "properly filed" because the PCRA time limits work in *exactly the same way* as the state procedural bar rules at issue in *Artuz* – they are "conditions to obtaining relief" on claims, but they do *not* impose a "condition to filing" the PCRA petition.

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successive petition," its successive petition bar is a "condition to obtaining relief" and not a "condition to filing").

A Pennsylvania prisoner may file a PCRA petition at *any time* – there is no pre-condition or barrier to filing. When, as here, the petitioner files in the right court (*i.e.*, the Court of Common Pleas where the conviction was obtained, Pa.R.Cr.P. 1501), the PCRA petition must be accepted for filing and the "clerk of courts shall immediately docket the [petition] to the same term and number as the underlying conviction and sentence." Pa.R.Cr.P. 1503(a); *see also* 42 Pa.C.S. § 9545(a) ("Original jurisdiction over a proceeding under this subchapter shall be in the court of common pleas."). After docketing the PCRA petition, the clerk "shall thereafter transmit" the petition and the record to the original trial judge, if available, or to another judge specified by the Rules. Pa.R.Cr.P. 1503(a).

The judge may appoint counsel where, as here, the petitioner is indigent: for a first PCRA petition, appointment of counsel is mandatory, Pa.R.Cr.P. 1504(a); for a successive petition, the "judge shall appoint counsel" when "an evidentiary hearing is required" or "whenever the interests of justice require it," Pa.R.Cr.P. 1504(b)-(c). These rules apply even to petitions that are *facially untimely*: "Even though the timeliness requirements of the PCRA leave a court without jurisdiction to consider the merits of an untimely petition, they do not preclude a court from appointing counsel to aid an indigent petitioner in attempting to establish an exception to the time-bar." *Commonwealth v. Smith*, 818 A.2d 494, 499 (Pa. 2003).

The PCRA petition and the record are reviewed by the judge to determine if the petition was filed within one year after the conviction became final or, if not, if any claim

meets an exception to the one year limit.[15] The judge may hold a hearing and/or require briefing as part of the timeliness review or to determine if any claims meet an exception.[16]

The timeliness review is *claim-by-claim* – a PCRA petition filed outside the one year limit may contain both timely and untimely claims.[17]

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[15] *See Smith*, 818 A.2d at 500 (PCRA court must "measure[ ] the facts against the provisions of section 9545(b), including the exceptions thereto" (quoting *Commonwealth v. Ferguson*, 722 A.2d 177, 178 (Pa.Super. 1998))); *Commonwealth v. Austin*, 721 A.2d 375, 377 (Pa.Super. 1998) (same); *Commonwealth v. Perry*, 716 A.2d 1259, 1260-61 (Pa.Super. 1998) ("[I]n order to determine if a PCRA petition is timely filed, we must conduct a thorough review under the amendments to § 9545. . . . [O]nly after the PCRA court reviews all three factors and decides that the petition is time-barred will it be divested of its authority to entertain the PCRA petition."); *see also* note 17, *infra* (describing state court review of PCRA claims for timeliness).

[16] *See Commonwealth v. Cruz*, 852 A.2d 287, 297 (Pa. 2004) (remanding for hearing on timeliness); *Commonwealth v. Breakiron*, 781 A.2d 94, 96 (Pa. 2001) (court held hearing on timeliness); *Commonwealth v. Abu-Jamal*, 833 A.2d 719, 723 (Pa. 2003) (court required briefing on timeliness).

[17] *See* 42 Pa.C.S. § 9545(b)(1)(i)-(iii) & (2) (inquiring separately about the timeliness of each "claim" raised or "right asserted," whenever the petition is filed outside the general one year period); *Commonwealth v. Lark*, 746 A.2d 585, 588-91 (Pa. 2000) (one claim timely; one claim assumed to be timely; several claims untimely); *Commonwealth v. Morris*, 822 A.2d 684, 695-99 (Pa. 2003) (reviewing "eleven claims separately" for timeliness; some claims held untimely, some decided on merits, one decided on procedural grounds other than time-bar); *Commonwealth v. Beasley*, 741 A.2d 1258, 1261 (Pa. 1999) (court "reviewed the numerous *issues* set forth in appellant's brief in an effort to ascertain whether any of those *issues* arguably fit within one or more of the exceptions" and concluded "that none of those *claims* meet the statutory requirements for exception"); *Commonwealth v. Yarris*, 731 A.2d 581, 587 (Pa. 1999) ("we have reviewed the seventeen broadly phrased issues raised by Appellant to determine whether they encompass any

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If the judge ultimately finds all the claims untimely and denies PCRA relief, the petitioner has an appeal as of right to the Superior Court.[18] The Superior Court may appoint counsel to brief time-bar and/or substantive issues. *See Commonwealth v. Thomas*, 718 A.2d 326, 327 n.6 (Pa.Super. 1998) (en banc). Appellate review of timeliness follows the same claim-by-claim approach as in the trial court. *See* note 17, *supra*. If the Superior Court ultimately holds all claims untimely, the petitioner has the right to pursue discretionary review in the Pennsylvania Supreme Court.[19]

All of this happened in Petitioner's case. Petitioner filed his *pro se* PCRA petition in the court where he was

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claims that should be considered timely under one or more of the exceptions set forth in Section 9545(b)(1)"); *id.* at 591 (assuming one claim timely and reviewing it on merits); *Commonwealth v. Cross*, 726 A.2d 333, 335-37 (Pa. 1999) (one claim decided on merits; three claims untimely); *Abu-Jamal*, 833 A.2d at 726-27 (several claims held untimely; one claim assumed timely and denied on different procedural grounds); *Commonwealth v. Abdul-Salaam*, 812 A.2d 497, 502-04 (Pa. 2002) (one claim held untimely; other claims decided on merits and/or procedural grounds other than time-bar); *Commonwealth v. Breakiron*, 781 A.2d 94, 98-100 (Pa. 2001) (separately considering timeliness of each claim raised); *Commonwealth v. Crawley*, 739 A.2d 108, 110 (Pa. 1999) (same).

[18] *See Commonwealth v. Ferguson*, 722 A.2d 177, 178 (Pa.Super. 1998) (denying Commonwealth's motion to quash; "PCRA court's decision regarding whether a petition is time-barred is subject to appellate review"); *Commonwealth v. Austin*, 721 A.2d 375, 377 (Pa.Super. 1998) (same); *Commonwealth v. Perry*, 716 A.2d 1259, 1260-61 (Pa.Super. 1998) (same; "we must conduct a thorough review" of time-bar rulings).

[19] *See Commonwealth v. Cruz*, 852 A.2d 287 (Pa. 2004) (reversing Superior Court's time-bar ruling; remanding for hearing on timeliness); *Commonwealth v. Fenati*, 748 A.2d 205 (Pa. 2000) (reversing Superior Court's time-bar ruling).

convicted. The petition was docketed and transmitted, along with the record, to the original trial judge. The judge reviewed the petition and record, appointed counsel and gave counsel several months to brief the claims. The judge then reviewed the petition, record and counsel's submission, notified Petitioner that the court intended to deny relief, and gave Petitioner an opportunity to respond. Petitioner responded. The judge denied relief *without applying a time-bar* to any claim.

The judge notified Petitioner that he could appeal as of right. Petitioner appealed to the Superior Court, which set an ordinary briefing schedule, provided ordinary appellate review and denied relief *without quashing the appeal*, which the Commonwealth had requested. Petitioner sought the Pennsylvania Supreme Court's discretionary review in the same way that any other Pennsylvania litigant seeks such discretionary review.

To be sure, the Superior Court, unlike the trial court, denied Petitioner's claims as untimely. This outcome, however, does not alter the fact that Petitioner was permitted to file and litigate the claims in his petition, and was afforded judicial review.

The PCRA time-bar thus acts in all material respects like the procedural bar rules in *Artuz*. The PCRA time-bar does not impose any precondition on filing – a petitioner can file at any time. A petitioner who files in the right court gets judicial review, including ordinary appellate review. And "timeliness" *vel non* is decided on a *claim-by-claim* basis.

The only difference between Petitioner's case and *Artuz* is that the state procedural rule here is a "time limit." But *Artuz* did not draw a line between state court

time-bars and other types of state court procedural bar rules – it drew a line between "conditions to filing" and "conditions to obtaining relief." The PCRA time-bar is a "condition to obtaining relief" on *claims*, not a "condition to filing" the *petition*. Petitioner's PCRA petition was "properly filed." The District Court got it right. The Court of Appeals got it wrong.[20]

B. The Third Circuit's Definition of "Properly Filed" Is Unfair and Unworkable.

Because the statutory language of § 2244(d)(2) shows that the PCRA petition was "properly filed," there is no need to consider "policy arguments." *Artuz*, 531 U.S. at 10. Nevertheless, it is clear that the Third Circuit's definition of "properly filed" is unfair, inconsistent with the exhaustion requirement, and certain to trigger premature habeas filings.

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[20] *Artuz* identifies "time limits on its delivery" as a "condition to filing" an application, *id.*, 531 U.S. at 8, and states that if "an application is erroneously accepted by the clerk of a court lacking jurisdiction, . . . it will be *pending,* but not *properly filed*," *id.* at 9 (emphasis in original). The PCRA does *not* impose time limits on "delivery" of a petition – a petition may be delivered to the court at any time and will be accepted for filing. And the clerk of court does not act "erroneously" when s/he accepts a PCRA petition that is ultimately deemed untimely (assuming it is the court in the county where the petitioner was convicted) – under the applicable rules, the clerk *must* accept the petition and transmit it and the record to the judge for review. While Pennsylvania's courts have attached a "jurisdictional" label to the PCRA time limits, "for purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions, rather than the particular name that it bears." *Saffold*, 536 U.S. at 223.

The Third Circuit makes the "properly-filed"-or-not status of a state post-conviction proceeding depend entirely upon the state court's *ultimate ruling* – if the state court ultimately deems the claims timely, the proceedings were "properly filed" all along; if it ultimately deems the claims untimely, the proceedings were never "properly filed." A petitioner trying in good faith to exhaust state remedies may litigate in state court for years only to find out at the end that he was never "properly filed." Petitioners usually have little control over the time spent in state court and, thus, will not know that their state court proceedings failed to toll the AEDPA limitations period until it has already expired. Here, for example, Petitioner filed his PCRA petition in 1996; the trial court did not apply a time-bar; the Commonwealth first asserted a time-bar on appeal in 1998; and the state appellate court first applied a time-bar in 1998.

The Third Circuit thus turns "the complete exhaustion rule" into a "'trap [for] the unwary *pro se* prisoner,'" *Slack v. McDaniel*, 529 U.S. 473, 487 (2000) (quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982)), denying the petitioner all access to the Great Writ because he did not correctly predict how the state courts ultimately would rule. This is especially unfair where, as here, state law makes it appear that the merits of the state court application may be entertained.

The Third Circuit's harsh approach to tolling provides no safety valve whatsoever. In the procedural default context, by contrast, a state court procedural bar ruling may inhibit federal review of individual claims, but *never bars all federal review*. Moreover, state procedural default rules do not bar federal merits review at all when the state court ruling is not based on an "adequate and independent

state ground" or when the petitioner can establish "cause and prejudice" or a "miscarriage of justice." *E.g.*, *Lee v. Kemna*, 534 U.S. 362 (2002). The Third Circuit's approach to "properly filed" does not allow such safety valves, offering no protection from unforeseeable or even arbitrary state court rulings: under Third Circuit law, if the state court applies a time-bar the federal court *must* hold the proceedings not "properly filed," no matter how unpredictable or onerous that state court ruling may be.

The Third Circuit recognizes that it "create[d] a tension" between AEDPA's time limits and "the need to exhaust state remedies" – it said a Pennsylvania petitioner could try to "ameliorate" this tension by filing a protective federal habeas petition and asking the federal court to hold proceedings in "suspense" during exhaustion of state remedies under the PCRA. *Merritt v. Blaine*, 326 F.3d 157, 170 n.10 (3d Cir. 2003). But when Petitioner was litigating his PCRA petition, the Third Circuit *did not allow* district courts to hold federal proceedings in "suspense" during exhaustion. Third Circuit law required that mixed habeas petitions be *dismissed*; this Circuit law was applied to Pennsylvania cases. *See Christy v. Horn*, 115 F.3d 201 (3d Cir. 1997); *Baker v. Horn*, 210 F.Supp.2d 592, 607 (E.D. Pa. 2002); *Crawley v. Horn*, 7 F.Supp.2d 587, 589 (E.D. Pa. 1998); *Williams v. Vaughn*, 1998 WL 238466, *2 n.3 (E.D. Pa.); subpart 3, *infra* (citing cases). The Third Circuit did not allow "suspense" until March 2004. *See Crews v. Horn*, 360 F.3d 146 (3d Cir. 2004).[21]

[21] This Court is considering the propriety of "suspense" in *Rhines v. Weber*, No. 03-9046.

Moreover, the Third Circuit's cumbersome approach runs afoul of "AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review." *Duncan v. Walker*, 533 U.S. 167, 181 (2001). In *Rose*, 455 U.S. at 520, this Court gave prisoners "a simple and clear instruction" – "before you bring any claims to federal court, be sure that you first have taken each one to state court." The Third Circuit turns this on its head, telling petitioners to file premature habeas petitions, burdening the federal courts with protective filings and creating the kind of "piecemeal litigation" that the exhaustion requirement and AEDPA were intended to avoid. *Duncan*, 533 U.S. at 180.

C. The Third Circuit Misapplied *Carey v. Saffold*.

The Third Circuit believes *Carey v. Saffold*, 536 U.S. 214 (2002) answered the "properly filed" question this Court reserved in *Artuz* by holding that an untimely state post-conviction petition is *per se* not "properly filed" under § 2244(d)(2). *See Merritt*, 326 F.3d at 166. The Third Circuit is wrong about *Saffold*.

Saffold says nothing whatsoever about the meaning of "properly filed." *Saffold* considered only whether state post-conviction proceedings were "pending" during a time-gap between the denial of an application in a lower court and the filing of a new, original application in a higher court under California's post-conviction review procedures. The *Saffold* opinion is very clear, from beginning to end, that it concerns only the meaning of "pending," *not* the meaning of "properly filed." *See Saffold*, 536 U.S. at 217 ("This case raises three questions related to the statutory

word '*pending*.'"); *id.* at 228 (Kennedy, J., dissenting) ("[T]he question in this case [is]: whether an application was *pending* in the 4-month period between the denial of respondent's habeas petition in the California Court of Appeal and his filing of a new petition in the California Supreme Court.").[22]

It is particularly odd for the Third Circuit to believe that *Saffold* decided the "properly filed" issue this Court reserved in *Artuz* – the *Saffold* opinion did not even cite *Artuz*.[23] The Third Circuit was wrong to think *Saffold* addressed whether a petition is "properly filed."

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[22] The Ninth Circuit, in the *Saffold* remand, confirmed that *Saffold* was about the meaning of "pending" during gaps in the state proceedings, not "properly filed." It held the state proceedings were "properly filed" despite being untimely under state law, because the California time limits, like Pennsylvania's, required the state courts to accept the petition and review it for timeliness – the state time limits thus were a "condition to obtaining relief," not a "condition to filing" under *Artuz*. *See Saffold v. Carey*, 312 F.3d 1031, 1035 (9th Cir. 2002), *cert. denied*, 539 U.S. 927 (2003). Other decisions are in accord. *E.g.*, *Chavis v. Lemarque*, 382 F.3d 921, 924-25 (9th Cir. 2004); *Jenkins v. Johnson*, 330 F.3d 1146, 1150-53 & n.3 (9th Cir. 2003) (*Saffold* "did not undermine" "either intentionally or by implication" cases holding that untimely state proceedings are properly filed, because *Saffold* did not address "properly filed" and, instead, "was making a limited point" about the meaning of "pending" under California's "unusual system"; *Saffold* "did not consider whether or not California's timeliness rule was a condition to filing or a condition to obtaining relief [*i.e.*, the 'properly filed' issue], as that issue was not before the Court."); *id.* at 1156 (O'Scannlain, J., dissenting) (same "properly filed" analysis). *Cf. Robertson v. Cain*, 324 F.3d 297, 302 (5th Cir. 2003) (*Smith v. Ward*'s "properly filed" analysis remains Fifth Circuit law post-*Saffold*); *see also* Statement of the Case § E (discussing *Smith v. Ward* and its application by the District Court here).

[23] The *Saffold* briefs also make clear that this Court was not addressing "properly filed." The Circuit's holding that the state court proceedings were "properly filed" even if untimely *was not challenged in*

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II. THE THIRD CIRCUIT WAS WRONG TO DENY PETITIONER EQUITABLE TOLLING AND FEDERAL REVIEW.

AEDPA's statute of limitations is subject to equitable tolling.[24] Here, state law and Third Circuit exhaustion law created a trap for Petitioner by making it appear that state post-conviction remedies were available for Petitioner to exhaust before filing in the federal habeas court. A petitioner so trapped should receive equitable tolling. Denial of tolling here is "an extraordinary deprivation of rights" and "patently unfair." JA462-463.

A. Third Circuit Exhaustion Law Required Petitioner to File His PCRA Petition.

When Petitioner filed his PCRA petition, the Third Circuit required Pennsylvania petitioners to seek PCRA relief "even if it is unlikely that the state court would consider the merits." *Doctor v. Walters*, 96 F.3d 675, 681 (3d Cir. 1996) (citing *Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir. 1993)); *accord Lambert v. Blackwell*, 134 F.3d 506, 517-18 (3d Cir. 1998) ("[U]nless a state court decision exists indicating that a habeas petitioner is *clearly* precluded from state court relief, the federal habeas claim

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this Court. *See Saffold v. Newland*, 250 F.3d 1262, 1268 n.8 (9th Cir. 2001); *id.* at 1269 n.1 (O'Scannlain, J., dissenting). Instead, the parties debated whether anything was "pending" during gaps between state court proceedings.

[24] *See*, *e.g.*, *Pliler v. Ford*, 124 S.Ct. 2441, 2447 (2004) (remanding for equitable tolling analysis); *id.* at 2448 (O'Connor, J., concurring); *id.* at 2448 (Stevens, J., joined by Souter, J., concurring in the judgment); *Duncan v. Walker*, 533 U.S. 167, 183-84 & n.1 (2001) (Stevens, J., joined by Souter, J., concurring in part and concurring in the judgment) (citing decisions from the Courts of Appeal).

should be dismissed for nonexhaustion, even if it appears unlikely that the state will address the merits of the petitioner's claim.") (emphasis in original). This Third Circuit exhaustion law applied to "[b]oth the legal theory and the facts on which a federal claim rests." *Gibson v. Scheidemantel*, 805 F.3d 135, 138 (3d Cir. 1986). As the District Court explained, this Third Circuit exhaustion law required Petitioner to seek the PCRA review he sought before filing his federal habeas petition.

1. Petitioner invoked statutory exceptions to the PCRA time-bar.

Petitioner invoked *statutory* exceptions to the PCRA time-bar under § 9545(b)(1)(i) and (ii). *See* Statement of the Case at 14 and 15. Consequently, if Petitioner had filed a federal habeas petition when he filed his PCRA petition, Third Circuit precedent would have required that the habeas petition be dismissed so state remedies could be exhausted.[25] Petitioner thus did what was required of him by Third Circuit exhaustion law.

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[25] *See Gibson*, 805 F.3d at 139, 141 (when state post-conviction time limit contains exceptions, exhaustion required even when petitioner has "not explained in his presentation to [the federal habeas] court the reason for his failure to raise the [unexhausted] claim within the requisite [time]," and even when it is "unlikely that the [state] courts would reach the merits"); *Toulson*, 987 F.2d at 988-89 & n.8 (same); *Lambert*, 134 F.3d at 524 (requiring exhaustion under PCRA when there is a "possibility" that petitioner "may be able to plead and prove" one of the statutory exceptions under § 9545(b)); *Branca v. Pennsylvania Board of Probation & Parole*, 1996 WL 745532, *3 (E.D.Pa. Dec. 23, 1996) (requiring exhaustion where "claims do not clearly fall outside of the exceptions to [the PCRA one year] time period").

2. Pennsylvania decisional law made it appear that state post-conviction review was available irrespective of the PCRA's statutory exceptions.

Even if Petitioner had not invoked statutory exceptions to the PCRA time-bar, Third Circuit decisions would have required exhaustion because it was not clear at that time that the *statutory* PCRA exceptions would be the only ones the Pennsylvania courts allowed. Pennsylvania *decisional law* at the time of Petitioner's PCRA filing appeared to indicate that the Pennsylvania courts could consider his claims even if the claims did not satisfy a statutory exception. Pennsylvania's decisional law at the time did not treat PCRA statutory bar rules as the last word. Instead, Pennsylvania courts had established at least three ways by which a petitioner like Mr. Pace could overcome procedural default and receive merits review in a PCRA proceeding.

The first exception arose from the Pennsylvania "right to effective assistance of counsel" in state post-conviction proceedings at both "the hearing and appellate levels." *Commonwealth v. Albert*, 561 A.2d 736, 738 (Pa. 1989); *accord Commonwealth v. Albrecht*, 720 A.2d 693, 700 (Pa. 1998) (describing "enforceable right to effective post-conviction counsel"). When a prior post-conviction lawyer's "representation is . . . inadequate, it is inappropriate to allow the proceedings in which it was rendered to be binding upon the defendant's rights." *Albert*, 561 A.2d at 738. Thus, Pennsylvania's courts forgave default on a claim raised in successive post-conviction proceedings when the petitioner asserted that "all prior counsel,"

including prior post-conviction counsel, had provided ineffective assistance as to that claim.[26] Petitioner made such an ineffective-assistance-of-all-prior-counsel assertion as to the claims in his PCRA proceedings.

Second, Pennsylvania court decisions permitted merits review for claims raised in successive post-conviction

[26] *See Commonwealth v. Morales*, 701 A.2d 516, 520 (Pa. 1997) (granting relief on claim first raised in successive post-conviction petition; "[A]ppellant could have raised all of his . . . claims on either direct appeal or in his first PCHA petition. Appellant, however, avoided waiving these claims in this PCRA petition by asserting that all of his prior counsel were ineffective for failing to previously raise them."); *Commonwealth v. Holloway*, 739 A.2d 1039, 1044 (Pa. 1999) ("Appellant manages to preserve his claims for relief by alleging, in a most perfunctory manner, that all of his prior counsel were ineffective for failing to raise the[m]."); *Commonwealth v. Rivera*, 816 A.2d 282, 288 (Pa.Super. 2003) (addressing claim first raised in successive post-conviction proceedings because petitioner "argues that his direct appeal counsel as well as his two previous PCRA attorneys rendered ineffective assistance by failing to preserve and raise this issue"); *Commonwealth v. Williams*, 814 A.2d 739, 741 (Pa.Super. 2002) (treating claims raised in second PCRA petition as if they had been raised in first petition "because Appellant's first petition was fatally defective in that Appellant was not afforded the competent assistance of counsel"); *Commonwealth v. McNeil*, 439 A.2d 664, 666 (Pa. 1981) (merits review of claims raised in second post-conviction petition because petitioner asserted ineffectiveness of all prior counsel for failing to raise the claims) (cited by Petitioner in his *pro se* PCRA submissions); *Commonwealth v. Bradley*, 480 A.2d 1205, 1206-07 (Pa.Super. 1984) (same); *Commonwealth v. Garrison*, 450 A.2d 65 (Pa.Super. 1982) (remanding for merits review on third post-conviction petition where petitioner alleged ineffective assistance of prior post-conviction counsel); *see also* Louis Natali, Jr., *New Bars in Pennsylvania Capital Post-Conviction Law and Their Implications for Federal Habeas Corpus Review*, 73 TEMPLE L. REV. 69, 91-92 (2000) (hereinafter "*New Bars*") (discussing this caselaw); Thomas Place, *The Claim Is Cognizable but the Petition Is Untimely: The Pennsylvania Supreme Court's Recent Collateral Relief Decisions*, 10 TEMP. POL. & CIV. RTS. L. REV. 49, 72-74 (2000) (hereinafter "*Claim Is Cognizable*") (same).

petitions, despite their being procedurally defaulted, when a "miscarriage of justice" may have occurred. Pennsylvania's courts used "miscarriage of justice" to allow merits review for a broad array of claims, including claims such as those raised by Petitioner in his PCRA proceedings.[27] Petitioner asserted a "miscarriage of justice" in his PCRA proceedings.

Third, "claims concerning the illegality of the sentence are not waivable" and "courts never relinquish their jurisdiction to correct an illegal sentence." *Commonwealth v. Vasquez*, 744 A.2d 1280, 1284 (Pa. 2000). Pennsylvania

[27] *See Commonwealth v. Lawson*, 549 A.2d 107, 112 (Pa. 1988); *id.* at 112 (Papadakos, J., concurring) (" 'miscarriage of justice' is expressive of, and synonymous with, the standard of 'prejudice' " used in ineffective assistance of counsel claims); *Jermyn v. Horn*, 266 F.3d 257, 280 n.8 (3d Cir. 2001) (Pennsylvania miscarriage of justice standard "entails a merits analysis"); *Lambert*, 134 F.3d at 520-21 (discussing Pennsylvania miscarriage of justice review); *Commonwealth v. Allen*, 732 A.2d 582, 588-90 (Pa. 1999) (plea colloquy that does not adequately inform defendant of sentence is miscarriage of justice unless defendant has actual knowledge of sentence); *Commonwealth v. Moss*, 689 A.2d 259, 262 (Pa.Super. 1997) (illegal sentence is miscarriage of justice); *Commonwealth v. Williams*, 660 A.2d 614, 619 (Pa.Super. 1995) (claim that defendant "was promised a lesser sentence than the one which he received" establishes miscarriage of justice); *Commonwealth v. Huffman*, 638 A.2d 961, 963 (Pa. 1994) (miscarriage of justice where jury instruction relieved Commonwealth of burden to "prove all of the elements of a crime beyond a reasonable doubt"); *Commonwealth v. Bazemore*, 614 A.2d 684, 688 (Pa. 1992) (violation of confrontation rights is miscarriage of justice); *Commonwealth v. Williams*, 814 A.2d 739, 741 (Pa.Super. 2002) (miscarriage of justice where first PCRA counsel had a conflict of interest); *Commonwealth v. McFadden*, 587 A.2d 740, 742 (Pa.Super. 1991) (lack of jury instruction on self-defense is miscarriage of justice); *Commonwealth v. Hoyman*, 561 A.2d 756, 758-59 (Pa.Super. 1989) (counsel's failure to pursue requested appeal is miscarriage of justice); *New Bars* at 92 (discussing Pennsylvania's miscarriage of justice concept).

courts therefore reviewed illegal sentence claims that were "untimely" under statutory rules or raised in successive post-conviction proceedings.[28] Petitioner raised an illegal sentence claim in his PCRA proceedings.

These bar-overcoming approaches to review (ineffective assistance of all prior counsel, miscarriage of justice, illegality of sentence) were *court*-made. Thus, it was reasonable for a Pennsylvania petitioner to believe these court-made anti-bar rules would be applied to post-1996 PCRA statutory bars, such as the new time-bar, just as they had applied to pre-1996 PCRA statutory bars. Indeed, the Third Circuit itself held this view when Petitioner sought PCRA relief. *See* subpart 3, *infra*.

The Pennsylvania Supreme Court first applied the PCRA time-bar on December 21, 1998, over two years after Petitioner filed his PCRA petition. *See Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1998).[29] *Peterkin* stated for the

[28] *See Vasquez*, 744 A.2d at 1283-84 (allowing untimely, jurisdictionally barred motion to modify illegal sentence); *Commonwealth v. Smith*, 598 A.2d 268, 270 (Pa. 1991) (allowing untimely motion to modify sentence); *Commonwealth v. Moss*, 689 A.2d 259, 262 (Pa.Super. 1997) (illegal sentence claims will be addressed in successive post-conviction proceedings); *Commonwealth v. Williams*, 660 A.2d 614, 618 (Pa.Super. 1995) (same); *Commonwealth v. Yount*, 615 A.2d 1316, 1317-18 (Pa.Super. 1992) (addressing illegal sentence claim raised in third post-conviction petition); *Commonwealth v. Staples*, 471 A.2d 847, 849-50 (Pa.Super. 1984) (same); *see also New Bars* at 93 (discussing illegal sentence bar-overcoming approach); *Claim Is Cognizable* at 74-75 (same).

[29] The Superior Court first used the PCRA time-bar on December 17, 1997, over a year after Petitioner filed his PCRA petition, in *Commonwealth v. Alcorn*, 703 A.2d 1054 (Pa.Super. 1997), the case cited by the Commonwealth in its Superior Court brief in Petitioner's case, and in *Commonwealth v. Conway*, 706 A.2d 1243 (Pa.Super. 1997). It is noteworthy that *Conway* found claims untimely under the PCRA's

(Continued on following page)

first time that ineffective assistance of prior post-conviction counsel would not overcome the time-bar, *see id.*, 722 A.2d at 643 n.5, but did not address the miscarriage of justice or illegal sentence judicial exceptions to statutory procedural default. *Peterkin* stated, in passing and without analysis, that the time limits were "a matter of jurisdiction," *id.* at 641, but left open the possibility that non-statutory exceptions to the time-bar would be allowed

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statutory language but went on to "assume that [one of the claims] constitutes a *non-waivable challenge to the legality of the sentence*" that trumped the time-bar. *Id.*, 706 A.2d at 1244. Then, in June 1998, the Superior Court addressed time-barred claims on the merits so that "a decision on the constitutionality of [the time limits in] § 9545(b) was avoided." *Commonwealth v. Hall*, 713 A.2d 650, 651 (Pa.Super. 1998). In September 1998, the Superior Court held that the "prisoner mailbox rule" applies to PCRA filing times, and expressly rejected the Commonwealth's argument that only § 9545's *statutory* exceptions to the time limits should apply. *Commonwealth v. Little*, 716 A.2d 1287, 1289 (Pa.Super. 1998). Thus, Superior Court decisions had not foreclosed the application of Pennsylvania's judicial anti-bar rules to the PCRA time-bar.

Similarly, numerous Court of Common Pleas judges, from 1996-99, provided merits review to "untimely" PCRA petitions, as did the judge in Petitioner's case. *E.g.*, *Commonwealth v. Roman*, 730 A.2d 486, 487 (Pa.Super. 1999) (trial court granted relief on "untimely" PCRA petition filed in October 1997); *Commonwealth v. Lambert*, 765 A.2d 306, 316-17 (Pa.Super. 2000) (trial court held hearing and addressed claims on merits for "untimely" PCRA petition filed in February 1998); *Commonwealth v. Camps*, 772 A.2d 70, 72 (Pa.Super. 2001) (trial court appointed counsel and ruled on merits of "untimely" PCRA petition filed in January 1999); *Commonwealth v. Hutchins*, 760 A.2d 50, 52 (Pa.Super. 2000) (trial court held hearing and ruled on merits of "untimely" PCRA petition filed in March 1998); *Commonwealth v. Weimer*, 756 A.2d 684, 685 (Pa.Super. 2000) (trial court ruled on merits of "untimely" PCRA petition filed in May 1998); *Commonwealth v. DiVentura*, 734 A.2d 397, 398 (Pa.Super. 1999) (same for petition filed in October 1998); *Commonwealth v. DeHart*, 730 A.2d 991, 992 (Pa.Super. 1999) (same for petition filed in January 1997); *Commonwealth v. Austin*, 721 A.2d 375, 377 (Pa.Super. 1998) (same); *Commonwealth v. Perry*, 716 A.2d 1259, 1260-61 (Pa.Super. 1998) (same for petition filed in December 1996).

in "extraordinary situations" and "under principles of equitable tolling," *id.* at 643 n.7, citing *Commonwealth v. Stock*, 679 A.2d 760 (Pa. 1996) (allowing untimely appeal). *Stock* (at 673-74) had cited *Commonwealth v. Hoyman*, 561 A.2d 756 (Pa.Super. 1989), which *applied the "miscarriage of justice"* standard to grant relief on a successive post-conviction petition, *id.* at 758, and *Commonwealth v. Miranda*, 442 A.2d 1133 (Pa.Super. 1982), which held that "*illegality of sentence is not a waivable issue*," *id.* at 1142 n.17, as examples of cases with "extraordinary" situations.

Two months after *Peterkin*, on February 25, 1999, the Pennsylvania Supreme Court again stated that the time limits are "jurisdictional," but *addressed a time-barred PCRA claim on the merits*, with no suggestion that it fit into a statutory exception to bar, because the Third Circuit had recently granted relief on a similar claim. *See Commonwealth v. Cross*, 726 A.2d 333, 336-38 (Pa. 1999). In March and May, 1999, the Pennsylvania Supreme Court applied the time-bar, but did not reject – or even address – the miscarriage of justice or illegal sentence judicial exceptions to bar. *See Commonwealth v. Banks*, 726 A.2d 374 (Pa. 1999); *Commonwealth v. Yarris*, 731 A.2d 581 (Pa. 1999).

On August 27, 1999, the Pennsylvania Supreme Court applied the time-bar to a fourth post-conviction petition and held for the first time that neither a miscarriage of justice, nor an illegal sentence, nor any other non-statutory consideration, can overcome the PCRA time-bar. *Commonwealth v. Fahy*, 737 A.2d 214, 223 (Pa. 1999).

After *Fahy*, it was clear that the state courts would not address Petitioner's claims on the merits.[30] But this clarification came long *after* Petitioner's November 1996 PCRA filing. Indeed, it came one month *after* the Pennsylvania Supreme Court had already denied review in the 1999 appeal in Petitioner's PCRA case.

3. Third Circuit exhaustion law, requiring exhaustion in the Pennsylvania courts, created a trap for Petitioner.

In 1996, shortly before Petitioner filed his PCRA petition, the Third Circuit held in *Doctor v. Walters*, 96 F.3d 675 (3d Cir. 1996) that PCRA remedies might be available even though Doctor's claims were barred by PCRA statutory procedural default rules, because Doctor "may be able to demonstrate a miscarriage of justice [as defined in Pennsylvania] warranting departure from the

[30] *See Lambert*, 765 A.2d at 322-23 (noting that before the August 1999 *Fahy* decision, prisoners and the Third Circuit believed the PCRA time-bar might be subject to exceptions other than those in the statute); *Claim is Cognizable* at 74 ("In holding that illegal sentence claims are time-barred if not presented within the one year filing period, the [Pennsylvania Supreme] Court in *Fahy ignores settled precedent*"); *id.* at 81 ("Neither the language, structure, nor legislative history of the [time-bar] amendments to the PCRA suggest that the legislature intended the filing period to act as a jurisdictional bar."); *id.* at 69-71 (same); *id.* at 71 (even if Pennsylvania Supreme Court was correct to deem the time limits "jurisdictional, there is a substantial body of case law in Pennsylvania holding that time limits that are jurisdictional are subject to equitable exceptions"); *Banks v. Horn*, 271 F.3d 527, 534 (3d Cir. 2001) (before 1999 *Commonwealth v. Banks* decision, petitioners "could reasonably have viewed the state time limit as a mere statute of limitations . . . , not . . . a jurisdictional requirement").

PCRA's stringent eligibility requirements." *Id.*, 96 F.3d at 681-82 (internal quotation marks omitted).[31]

In *Banks v. Horn*, 126 F.3d 206 (3d Cir. 1997), decided while Petitioner was appealing to the Superior Court, the Third Circuit held PCRA remedies might be available even though Banks' claims were facially time-barred under the PCRA. Because the Pennsylvania Supreme Court had not yet applied the statutory time-bar and it was unclear how the Pennsylvania Supreme Court would apply it, the Third Circuit required exhaustion in the Pennsylvania Courts. *Id.* at 213-14.[32]

In *Lambert v. Blackwell*, 134 F.3d 506 (3d Cir. 1998), the Third Circuit required exhaustion notwithstanding that the claims might be barred by the PCRA's statutory language, including the time-bar. The Third Circuit stated

[31] *Doctor* was decided on September 24, 1996, and rehearing was denied on November 4, 1996. Petitioner filed his PCRA petition in November 1996. *Doctor* did not explicitly discuss the PCRA time-bar, but it was considering the post-January 16, 1996 PCRA which contains the time-bar. *See id.*, 96 F.3d at 681; *Lambert*, 134 F.3d at 521 n.26 (in *Doctor*, "we were construing the PCRA as amended in 1995 [effective January 16, 1996], as evidenced by our citation to the 1996 supplement and the language of the statute as amended").

[32] Petitioner noticed his appeal to the Superior Court in August 1997, and filed his brief in April 1998. *Banks* was decided on September 19, 1997. Because *Banks* was a capital case, the Third Circuit focused on the capital case "relaxed waiver" rule, *see New Bars* at 86-91, as a source of state law uncertainty. The Third Circuit's conclusion that PCRA review might be available, however, applied to both capital and non-capital cases. *See Banks*, 126 F.3d at 214 n.3 ("It is, of course, possible in death penalty cases (and *other cases as well*) that *future experience* will show that the Pennsylvania Supreme Court consistently and regularly applies the [PCRA time limits]. . . . *That time, however, has not yet been reached*."). *Banks* has a complex subsequent history, *see*, *e.g.*, *Beard v. Banks*, 124 S.Ct. 2504 (2004), which is not relevant to Petitioner's case.

that under a "literal reading of section 9545" (the PCRA time-bar) as well as the PCRA's "waiver" provisions, the claims were untimely and otherwise barred. *Id.*, 134 F.3d at 524. However, "Pennsylvania's courts have expressed a willingness to depart from the PCRA's stringent waiver standards, for non-capital, as well as capital cases," *id.* at 521, and Pennsylvania courts have been "lenient in allowing collateral review after long delays," *id.* at 524 n.33, in cases of miscarriage of justice, "manifest injustice," or ineffective assistance of counsel.[33] The Third Circuit explained that Pennsylvania's courts had not "decide[d] under what circumstances [they] would excuse an untimely PCRA petition under the new statute of limitations provision," and exhaustion therefore was not futile. *Id.* at 524.[34]

Relying on the Third Circuit's decisions, District Courts in Pennsylvania made similar rulings from 1996-99, requiring Pennsylvania prisoners to pursue exhaustion with facially untimely and otherwise statutorily barred PCRA petitions.[35]

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[33] *See id.* at 520, 522 ("miscarriage of justice"); *id.* at 521 ("manifest injustice"); *id.* at 522 n.27 ("[T]he Commonwealth acknowledged in its letter brief . . . Pennsylvania decisional law holding that 'PCRA courts will consider claims which otherwise would be deemed waived when raised under the rubric of ineffective assistance of counsel' "); *id.* at 524 n.33 ("Pennsylvania courts were lenient in allowing collateral review after long delays, especially in situations involving ineffective assistance of counsel.").

[34] Petitioner was appealing the denial of PCRA relief when *Lambert* was decided.

[35] *E.g.*, *Weakland v. White*, 1997 WL 799433, *3 (E.D. Pa. Dec. 29, 1997) (requiring exhaustion with facially untimely second PCRA petition because time-bar "may be waived by Pennsylvania courts" under the miscarriage of justice standard); *Belle v. Stepanik*, 1996 WL

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On March 21, 2000, after Petitioner's state court litigation was completed and his federal habeas petition had been filed, the Third Circuit held *for the first time* that the PCRA time limits made exhaustion futile where the petitioner had not asserted a statutory exception under § 9545(b)(1)(i)-(iii). *See Lines v. Larkins*, 208 F.3d 153, 163-66 (3d Cir. 2000). Lines did not claim a miscarriage of justice or illegal sentence. The only argument for allowing a second PCRA petition was the ineffectiveness of first PCRA counsel. However, now (in 2000) it was clear that such an assertion would not overcome the PCRA time-bar, and that the Pennsylvania courts would not allow any

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663872, *4-*8 & n.5 (E.D. Pa. Nov. 14, 1996) (requiring exhaustion with facially untimely second PCRA petition; because "miscarriage of justice" law was not based on PCRA's statutory language, the January 16, 1996 PCRA "amendments probably do not eliminate the . . . miscarriage of justice exception"); *Blasi v. Attorney General*, 30 F.Supp.2d 481, 488 (E.D. Pa. Dec. 17, 1998) (requiring exhaustion in second PCRA petition because "ineffective assistance of [prior] PCRA counsel" might "permit[ ] review"); *Williams v. Vaughn*, 3 F.Supp.2d 567, 573-74 (E.D. Pa. March 18, 1998) (requiring exhaustion in facially untimely second PCRA petition because there is "a lack of certainty with respect to state application of this [time-]bar" (citing *Doctor*, *Lambert*, *Banks*)); *Morris v. Horn*, 1998 WL 150956, *2-*3 (E.D. Pa. March 19, 1998) (same); *Peterson v. Brennan*, 1998 WL 470139, *5-*6 (E.D. Pa. Aug. 11, 1998) (same); *Fidtler v. Gillis*, 1999 WL 450337, *4-*6 (E.D. Pa. June 29, 1999) (same), *vacated on reconsideration,* 1999 WL 596940 (E.D. Pa. Aug. 9, 1999); *Hammock v. Vaughn*, 1998 WL 163194, *5-*6 (E.D. Pa. April 7, 1998) (same for fourth post-conviction petition); *Crawley v. Horn*, 7 F.Supp.2d 587, 588 (E.D. Pa. June 11, 1998) (requiring exhaustion in facially untimely second PCRA petition where "at least one apparently unexhausted claim may satisfy the miscarriage of justice exception"); *see also Peterkin v. Horn*, 30 F.Supp.2d 513, 520 (E.D. Pa. Dec. 15, 1998) ("[I]t is virtually impossible for this Court to definitively predict if the Pennsylvania state courts would entertain Petitioner's [facially untimely claims] and if so, what the outcome of that petition would be.").

grace period for second petitions, even if the first state post-conviction petition had been filed before the 1996 time-bar amendments. *Id.*, 208 F.3d at 164-165 & n.17; *cf.* JA449, JA521-522 (District Court in *Pace* notes uncertainty about availability of grace period when Petitioner litigated his PCRA petition).

Petitioner relied on the same Pennsylvania judicial law as the Third Circuit and its District Courts when he sought PCRA review to exhaust all of his claims before proceeding to federal court. Petitioner cannot be required to foretell the future better than the Third Circuit or its District Courts.[36]

B. It Is Patently Unfair to Deny Equitable Tolling in this Case.

When Petitioner filed his PCRA petition in November 1996, and continuing until the Pennsylvania Supreme Court's *Fahy* decision in August 1999, the Pennsylvania

[36] The Circuit suggested in *Pace*, JA537-538 & n.1, that the applicability of the PCRA time-bar became clear in December 1997, when Superior Court panels decided *Alcorn* and *Conway*. *See* note 29, *supra* (discussing *Alcorn*, *Conway*). As decisions of Pennsylvania's intermediate appellate court, *Alcorn* and *Conway* could not make state law clear, since they were not the last word on questions of state law. The Pennsylvania Supreme Court had not abandoned the judicial exceptions at the time of *Alcorn* and *Conway*. Indeed, any suggestion that *Alcorn* and *Conway* made state law clear is contrary to Third Circuit and District Court exhaustion decisions, post-dating *Alcorn* and *Conway*, requiring petitioners such as Mr. Pace to seek PCRA remedies. Finally, even if *Alcorn* and *Conway* had made state law clear, Petitioner started the exhaustion process long before they were decided, and had to present his claims to all levels of the state courts to avoid a federal court procedural default ruling. *See O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

Supreme Court had not swept aside the judicial exceptions to statutory default. Those judicial exceptions could have trumped the PCRA time-bar, as they traditionally had trumped other procedural bars in the PCRA statute. Petitioner's application for Pennsylvania Supreme Court review was denied in July 1999, one month *before Fahy was issued*.

Petitioner relied upon the same state law that the Third Circuit relied upon at a time when Third Circuit law required him to exhaust by pursuing PCRA relief in the Pennsylvania courts. Indeed, the District Court here found that a federal habeas petition "would have been dismissed" and Petitioner would have been required to do what he did do – file a PCRA petition to exhaust state remedies before seeking federal review. JA461, JA527.

The exhaustion requirement is meant to encourage state court review, not prevent federal relief. *Rose*, 455 U.S. at 519-22. Exhaustion must not be used to "trap the unwary *pro se* petitioner." *Rose*, 455 U.S. at 520; *Slack*, 529 U.S. at 487. As this Court has stated, it is "perverse" to allow the exhaustion requirement to "bar the prisoner from ever obtaining federal habeas review." *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998). After all, "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar*

v. Thomas, 517 U.S. 314, 324 (1996) (emphasis omitted). Equitable tolling is appropriate here.[37]

CONCLUSION

Petitioner was seventeen years old when he was sentenced to life without parole in proceedings he has challenged as unconstitutionally defective. The District Court found he "diligently and reasonably" asserted his claims for relief, JA528, and that denying him federal

[37] In *Artuz*, even the *state* agreed that tolling is appropriate under circumstances such as those presented here. *See Artuz v. Bennett*, No. 99-1238, Petitioner's Brief, 2000 WL 821138, *32-*34 (U.S. June 22, 2000) ("[A] petitioner who files a state post-conviction application with an arguably valid contention that a state court might overlook the procedural bar need not fear the statute of limitations. . . . Any legitimate or even arguably legitimate attempt to exhaust state remedies will result in tolling."). In other contexts, federal courts have allowed equitable tolling under similar circumstances. *E.g.*, *Burnett v. New York Central R. Co.*, 380 U.S. 424, 430 (1965) (equitable tolling to avoid "unfairness of barring . . . action solely because a prior timely action is dismissed for improper venue after the applicable statute of limitations has run"); *Clymore v. United States*, 217 F.3d 370, 376 (5th Cir. 2000) (equitable tolling where litigant filed in wrong venue and statute of limitations expired during wrong venue litigation; "Given (1) the uncertainty of the law regarding the proper venue in which to file and (2) the government's awareness [that Clymore was seeking relief], the limitations period should be equitably tolled."); *Doherty v. Teamsters Pension Trust Fund*, 16 F.3d 1386, 1393 n.7 (3d Cir. 1994) (when there are "uncertainties about the law" regarding forum where claims should be filed, equitable tolling avoids "penaliz[ing] litigants for having made questionable procedural choices of fora" (citation omitted)); *Husch v. Szabo Food Service Co.*, 851 F.2d 999, 1003-04 (7th Cir. 1988) (equitable tolling where plaintiff filed claims in wrong forum because of "confusing" law); *Walck v. Discavage*, 741 F.Supp. 88, 91 (E.D. Pa. 1990) (equitable tolling where plaintiff filed in court that lacked jurisdiction, but there was a "reasonable legal theory for invoking the jurisdiction of that court" (citations omitted)).

review would be "an extraordinary deprivation of rights" and "patently unfair," JA462-463. The Third Circuit was wrong to deny federal review. This Court should hold statutory tolling appropriate in light of *Artuz*. This Court should hold equitable tolling appropriate in light of the circumstances of this case.

Respectfully submitted,

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28 U.S.C. § 2244(d), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such in view;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection

42 Pa.C.S. § 9544 (West 2004)

§ 9544. Previous litigation and waiver

(a) Previous litigation. – For purposes of this subchapter, an issue has been previously litigated if:

(1) Deleted.

(2) the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue; or

(3) it has been raised and decided in a proceeding collaterally attacking the conviction or sentence.

(b) Issues waived. – For purposes of this subchapter, an issue is waived 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.

1982, May 13, P.L. 417, No. 122, § 2, imd. effective. Amended 1988, April 13, P.L. 336, No. 47, § 3, imd. effective; 1995, Nov. 17, P.L. 1118, No. 32 (Spec. Sess. No. 1), § 1, effective in 60 days.

Suspended

Subsection (b) of this section is suspended permanently only insofar as it references "unitary review" by order of the Supreme Court dated August 11, 1997, effective immediately.

The 1997 order further provides that it shall apply retroactively to all cases in which the death penalty was imposed on or after January 1, 1996 and that appointments of counsel made pursuant to the Capital Unitary Review Act shall remain in

effect for purposes of challenges under the Post Conviction Relief Act (as amended in 1995 and by the 1997 order), and under Chapter 1500 (as amended by the 1997 order).

Historical and Statutory Notes

The 1988 amendment rewrote the section and the heading.

Section 6 of Act 1988, April 13, P.L. 336, No. 47, provides that the amendment to this section shall apply to all actions for collateral relief, whether statutory or common law, instituted on or after the effective date of this act, irrespective of the date of conviction or sentence.

The 1995 amendment rewrote this section, which formerly read:

"(a) Previous litigation. – For the purpose of this subchapter, an issue has been previously litigated if:

"(1) it has been raised in the trial court, the trial court has ruled on the merits of the issue and the petitioner did not appeal;

"(2) the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue; or

"(3) it has been raised and decided in a proceeding collaterally attacking the conviction or sentence.

"(b) Issues waived. – For the purposes of this subchapter, an issue is waived if the petitioner failed to raise it and if it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or other

proceeding actually conducted or in a prior proceeding actually initiated under this subchapter."

Section 3(1) of Act 1995 (Spec. Sess. No. 1), Nov. 17, P.L. 1118, No. 32 provides that the amendment of 42 Pa.C.S. §§ 9542, 9543, 9544, 9545 and 9546 shall apply to petitions filed after the effective date of this act; however, a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a timely petition under 42 Pa.C.S. Ch. 95 Subch. B if the petitioner's first petition is filed within one year of the effective date of this act.

Prior Laws:

1966, Jan. 25; P.L. (1965) 1580, No 554, § 4 (19 P.S. § 1180-4).

42 Pa.C.S. § 9545 (West 2004)

§ 9545. Jurisdiction and proceedings

(a) Original jurisdiction. – Original jurisdiction over a proceeding under this subchapter shall be in the court of common pleas. No court shall have authority to entertain a request for any form of relief in anticipation of the filing of a petition under this subchapter.

(b) Time for filing petition. –

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

(4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether appointed or retained.

(c) Stay of execution. –

(1) No court shall have the authority to issue a stay of execution in any case except as allowed under this subchapter.

(2) Except for first petitions filed under this subchapter by defendants whose sentences have been affirmed on direct appeal by the Supreme Court of Pennsylvania between January 1, 1994, and January 1, 1996, no stay may be issued unless a petition for postconviction relief which meets all the requirements of this subchapter has been filed and is pending and the petitioner makes a strong showing of likelihood of success on the merits.

(3) If a stay of execution is granted, all limitations periods set forth under sections 9574 (relating to answer to petition), 9575 (relating to disposition without evidentiary hearing) and 9576 (relating to evidentiary hearing) shall apply to the litigation of the petition.

(d) Evidentiary hearing. –

(1) Where a petitioner requests an evidentiary hearing, the petition shall include a signed certification as to each intended witness stating the witness's name, address, date of birth and substance of

testimony and shall include any documents material to that witness's testimony. Failure to substantially comply with the requirements of this paragraph shall render the proposed witness's testimony inadmissible.

(2) No discovery, at any stage of proceedings under this subchapter, shall be permitted except upon leave of court with a showing of exceptional circumstances.

(3) When a claim for relief is based on an allegation of ineffective assistance of counsel as a ground for relief, any privilege concerning counsel's representation as to that issue shall be automatically terminated.

1982, May 13, P.L. 417, No. 122, § 2, imd. effective. Amended 1988, April 13, P.L. 336, No. 47, § 3, imd. effective; 1995, Nov. 17, P.L. 1118, No. 32 (Spec. Sess. No. 1), § 1, effective in 60 days.

Suspended

Subsections (c)(3) and (d)(2) of this section are suspended permanently by order of the Supreme Court dated August 11, 1997, effective immediately.

The 1997 order further provides that it shall apply retroactively to all cases in which the death penalty was imposed on or after January 1, 1996 and that appointments of counsel made pursuant to the Capital Unitary Review Act shall remain in effect for purposes of challenges under the Post Conviction Relief Act (as amended in 1995 and by the 1997 order), and under Chapter 1500 (as amended by the 1997 order).

Historical and Statutory Notes

The 1988 amendment rewrote the section and the heading.

Section 6 of Act 1988, April 13, P.L. 336, No. 47, provides that the amendment to this section shall apply to all actions for collateral relief, whether statutory or common law, instituted on or after the effective date of this act, irrespective of the date of conviction or sentence.

The 1995 amendment rewrote this section, which formerly read:

"(a) Original jurisdiction. – Original jurisdiction over a proceeding under this subchapter shall be in the court in which the conviction was obtained.

"(b) Rules governing proceedings. – The Supreme Court may, by general rule, prescribe procedures to implement the action established under this subchapter but shall not expand, contract or modify the grounds for relief set forth in this subchapter."

Section 3(1) of Act 1995 (Spec. Sess. No. 1), Nov. 17, P.L. 1118, No. 32 provides that the amendment of 42 Pa.C.S. §§ 9542, 9543, 9544, 9545 and 9546 shall apply to petitions filed after the effective date of this act; however, a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a timely petition under 42 Pa.C.S. Ch. 95 Subch. B if the petitioner's first petition is filed within one year of the effective date of this act.

Prior Laws:

1970, Nov. 25, P.L. 759, No. 249, § 1.
1966, Jan. 25, P.L. (1965) 1580, No. 554, § 5 (19 P.S. § 1180-5).

Pennsylvania Rules of Criminal Procedure 1501-1509 (West 1997)

CHAPTER 1500. POST-CONVICTION COLLATERAL PROCEEDINGS

RULE 1501. INITIATION OF POST-CONVICTION COLLATERAL PROCEEDINGS

A proceeding for post-conviction collateral relief shall be initiated by filing a motion and 3 copies with the clerk of the court in which the defendant was convicted and sentenced. The motion shall be verified by the defendant.

Note: Previous Rule 1501 adopted January 24, 1968, effective August 1, 1968; amended November 25, 1968, effective February 3, 1969; amended February 15, 1974, effective immediately; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded November 9, 1984, effective January 2, 1985. Former Rule 1501 adopted November 9, 1984, effective January 2, 1985; rescinded February 1, 1989, effective July 1, 1989, and replaced by present Rule 1502. Present Rule 1501 adopted February 1, 1989, effective July 1, 1989; amended March 22, 1993, effective January 1, 1994.

Comment

The rules in Chapter 1500 govern proceedings to obtain relief authorized by the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541 et seq.

The motion for post-conviction relief under these rules is not intended to be a substitute for or a limitation on the availability of appeal or a post-sentence motion. *See* Pa.R.Crim.P. 320 and 1410. Rather, the Chapter 1500 Rules are intended to require that, in a single proceeding,

the defendant must raise and the judge must dispose of all grounds for relief available *after* conviction and exhaustion of the appellate process, either by affirmance or by the failure to take a timely appeal.

As used in the Chapter 1500 Rules, "motion for post-conviction collateral relief" and "motion" are intended to include an amended motion filed pursuant to Rule 1505, except where the context indicates otherwise.

RULE 1502. CONTENT OF MOTION FOR POST-CONVICTION COLLATERAL RELIEF

(a) A motion for post-conviction collateral relief shall bear the caption, number, and court term of the case or cases in which relief is requested and shall contain substantially the following information:

(1) the name of the defendant;

(2) the place where the defendant is confined, or if not confined, the defendant's current address;

(3) the offenses for which the defendant was convicted and sentenced;

(4) the date on which the defendant was sentenced;

(5) whether the defendant was convicted by a jury, by a judge without jury, on a plea of guilty, or on a plea of nolo contendere;

(6) the sentence imposed and whether the defendant is now serving or waiting to serve that sentence;

(7) the name of the judge who presided at trial or plea and imposed sentence;

(8) the court, caption, term, and number of any proceeding (including appeals and federal court proceedings) instituted by the defendant to obtain relief from conviction or sentence, specifying whether a proceeding is pending or has been completed;

(9) the name of each lawyer who represented the defendant at any time after arrest, and the stage of the case at which each represented the defendant;

(10) the relief requested;

(11) the grounds for the relief requested;

(12) the facts supporting each such ground that:

(i) appear in the record, and the place in the record where they appear; and

(ii) do not appear in the record, and an identification of any affidavits, documents, and other evidence showing such facts;

(13) whether any of the grounds for the relief requested were raised before, and if so, at what stage of the case; and

(14) a verification by the defendant that the facts set forth in the motion are true and correct to the best of the defendant's personal knowledge or information and belief and that any false statements therein are made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.S. § 4904), relating to unsworn falsification to authorities.

The motion may, but need not, include concise argument or citation and discussion of authorities.

(b) Each ground relied upon in support of the relief requested shall be stated in the motion. Failure to state such a ground in the motion shall preclude the defendant from raising that ground in any subsequent proceeding for post-conviction collateral relief under these rules.

(c) The defendant shall state in the motion the name and address of the attorney who will represent the defendant in the post-conviction collateral proceeding. If the defendant is unable to afford or otherwise procure counsel, and wants counsel appointed, the defendant shall so state in the motion and shall request the appointment of counsel.

(d) The defendant shall attach to the motion any affidavits, records, documents, or other evidence which show the facts stated in support of the grounds for relief, or the motion shall state why they are not attached.

Note: Previous Rule 1502 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by present Rules 1503 and 1505. Present Rule 1502 adopted February 1, 1989, effective July 1, 1989.

Comment

This rule is derived from former Rule 1501.

Pursuant to paragraph (a)(6), the motion should include specific information about the sentence imposed, including the minimum and maximum terms of the sentence, the amount of fine, if any, and whether the defendant is released on probation or parole. *See also*,

Section 9543(a) of the Post Conviction Relief Act, 42 Pa.C.S. § 9543(a) (Supp.1988).

Section 9543(a)(2), (3), and (4) of the Post Conviction Relief Act (42 Pa.C.S. § 9543(a)(2), (3) and (4) (Supp.1988)) requires that to be eligible for relief, the defendant must plead and prove by a preponderance of the evidence the following:

1. "That the conviction or sentence resulted from one or more of the following:

(I) A violation of the constitution of Pennsylvania or laws of this Commonwealth or the constitution of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(II) Ineffective assistance of counsel which, in the circumstance of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(III) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused an individual to plead guilty.

(IV) The improper obstruction by Commonwealth officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(V) A violation of the provisions of the constitution, law or treaties of the United States which would require the granting of federal habeas corpus relief to a state prisoner.

(VI) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and that would have affected the outcome of the trial if it had been introduced.

(VII) The imposition of a sentence greater than the lawful maximum.

(VIII) A proceeding in a tribunal without jurisdiction."

2. "That the allegation of error has not been previously litigated and one of the following applies:

(I) The allegation of error has not been waived.

(II) If the allegation of error has been waived, the alleged error has resulted in the conviction or affirmance of sentence of an innocent individual.

(III) If the allegation of error has been waived, the waiver of the allegation of error during pretrial trial, post-trial or direct appeal proceedings does not constitute a state procedural default barring federal habeas corpus relief."

3. "That the failure to litigate the issue prior to or during trial or on direct appeal could not have been the result of any rational strategic or tactical decision by counsel."

It is expected that a form motion will be prepared incorporating the required contents set forth herein which will be available for distribution to uncounseled defendants. This rule is not intended to require an attorney to use a printed form or any other particular format in preparing a motion or an amended motion for post-conviction collateral

relief, provided, of course, that the attorney must include in a motion or amended motion substantially all of the information set forth in this rule.

The motion should be typewritten or legibly handwritten.

RULE 1503. DOCKETING AND ASSIGNMENT

(a) Upon receipt of a motion for post-conviction collateral relief, the clerk of courts shall immediately docket the motion to the same term and number as the underlying conviction and sentence. The clerk shall thereafter transmit the motion and the record to the trial judge, if available, or to the administrative judge, if the trial judge is not available. If the defendant's confinement is by virtue of multiple indictments or informations and sentences, the case shall be docketed to the same term and number as the indictment or information upon which the first unexpired term was imposed, but the court may take judicial notice of all proceedings related to the multiple indictments or informations.

(b) When the motion is filed and docketed, the clerk shall transmit a copy of the motion to the attorney for the Commonwealth.

(c) The trial judge, if available, shall proceed with and dispose of the motion in accordance with these rules, unless the judge determines, in the interests of justice, that he or she should be disqualified.

(d) When the trial judge is unavailable or disqualified, the administrative judge shall promptly assign and transmit the motion and the record to another judge, who

shall proceed with and dispose of the motion in accordance with these rules.

Note: Previous Rule 1503 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by present Rule 1504. Present Rule 1503 adopted February 1, 1989, effective July 1, 1989; amended June 19, 1996, effective July 1, 1996.

Comment

As used in this rule, "trial judge" is intended to include the judge who accepted a plea of guilty or nolo contendere.

The transmittal of the motion to the attorney for the Commonwealth does not require a response unless one is ordered by the judge as provided in these rules.

Although most references to indictments and indicting grand juries were deleted from these rules in 1993 since the indicting grand jury had been abolished in all counties, see PA. CONST. art. I, § 10 and 42 Pa.C.S. § 8931(b), the reference was retained in this rule because there may be some cases still pending that were instituted prior to the abolition of the indicting grand jury.

RULE 1504. APPOINTMENT OF COUNSEL; FORMA PAUPERIS

(a) When an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, the judge shall appoint counsel to

represent the defendant on the defendant's first motion for post-conviction collateral relief.

(b) On a second or subsequent motion, when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, and an evidentiary hearing is required as provided in Rule 1508, the judge shall appoint counsel to represent the defendant.

(c) The judge shall appoint counsel to represent a defendant whenever the interests of justice require it.

(d) An appointment of counsel shall be effective throughout the post-conviction proceedings, including any appeal from disposition of the motion for post-conviction collateral relief.

(e) When a defendant satisfies the judge that the defendant is unable to pay the costs of the post-conviction collateral proceedings, the judge shall order that the defendant be permitted to proceed in forma pauperis.

Note: Previous Rule 1504 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by Rule 1507. Present Rule 1504 adopted February 1, 1989, effective July 1, 1989.

Comment

This rule replaces former Rule 1503.

If a defendant seeks to proceed without an attorney, the court may appoint standby counsel. *See* Rule 318.

Consistent with Pennsylvania post-conviction practice under former Rules 1503 and 1504, it is intended that counsel be appointed in every case in which a defendant has filed a motion for post-conviction collateral relief for the first time and is unable to afford counsel or otherwise procure counsel. However, the rule now limits appointment of counsel on second or subsequent motions so that counsel should be appointed *only* if the judge determines that an evidentiary hearing is required. Of course, the judge has discretion to appoint counsel in any case when the interests of justice require it.

RULE 1505. AMENDMENT AND WITHDRAWAL OF MOTION FOR POST-CONVICTION COLLATERAL RELIEF

(a) The judge may grant leave to amend or withdraw a motion for post-conviction collateral relief at any time. Amendment shall be freely allowed to achieve substantial justice.

(b) When a motion for post-conviction collateral relief is defective as originally filed, the judge shall order amendment of the motion, indicate the nature of the defects, and specify the time within which an amended motion shall be filed. If the order directing amendment is not complied with, the motion may be dismissed without a hearing.

(c) Upon the entry of an order directing an amendment, the clerk of court shall serve a copy of the order on the defendant, the defendant's attorney, and the attorney for the Commonwealth.

(d) All amended motions shall be in writing, shall comply substantially with Rule 1502, and shall be filed and served within the time specified by the judge in ordering the amendment.

Note: Previous Rule 1505 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by present Rules 1506(b), 1508(a), and present Rule 1505(c). Present Rule 1505 adopted February 1, 1989, effective July 1, 1989.

Comment

This rule replaces paragraph (a) of former Rule 1505 and paragraph (c) of former Rule 1502.

"Defective", as used in paragraph (b), is intended to include motions that are inadequate, insufficient, or irregular for any reason; for example, motions that lack particularity; motions that do not comply substantially with Rule 1502; motions that appear to be patently frivolous; motions that do not allege facts which would support relief; motions that raise issues the defendant did not preserve properly or were finally determined at prior proceedings.

When an amended motion is filed pursuant to paragraph (d), it is intended that the clerk of courts transmit a copy of the amended motion to the attorney for the Commonwealth. This transmittal does not require a response unless one is ordered by the judge as provided in these rules. *See* Rules 1503 and 1506.

RULE 1506. ANSWER TO MOTION FOR POST-CONVICTION COLLATERAL RELIEF.

(a) An answer to a motion for post-conviction collateral relief is not required unless ordered by the judge. When the judge has not ordered an answer, the attorney for the Commonwealth may elect to answer, but the failure to file one shall not constitute an admission of the well-pleaded facts alleged in the motion.

(b) Upon the entry of an order directing an answer, the clerk of court shall serve a copy of the order on the attorney for the Commonwealth, the defendant, and the defendant's attorney.

(c) If the judge orders an answer, the answer shall be in writing and shall be filed and served within the time fixed by the judge in ordering the answer. The time for filing the answer may thereafter be extended by the judge for cause shown.

(d) The judge may grant leave to amend or withdraw an answer at any time. Amendment shall be freely allowed to achieve substantial justice. Amended answers shall be in writing and shall be filed and served within the time specified by the judge in granting leave to amend.

Note: Previous Rule 1506 adopted January 24, 1968, effective August 1, 1968; Comment revised April 26, 1979, effective July 1, 1979; rule rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; Comment revised January 28, 1983, effective July 1, 1983; rule rescinded February 1, 1989, effective July 1, 1989, and replaced by Rule 1508. Present Rule 1506 adopted February 1, 1989, effective July 1, 1989.

Comment

As used in the Chapter 1500 Rules, "answer" is intended to include an amended answer filed pursuant to paragraph (d) of this rule, except where the context indicates otherwise.

When determining whether to order that the attorney for the Commonwealth file an answer, the judge should consider whether an answer will promote the fair and prompt disposition of the issues raised by the defendant in the motion for post-conviction collateral relief. *See* Section 9543(B) of the Post Conviction Relief Act (42 Pa.C.S. § 9543(B) (Supp. 1988)) which, inter alia, authorizes the dismissal of the motion if "because of delay in filing . . . , the Commonwealth has been prejudiced either in its ability to respond to the petition or in its ability to re-try the petitioner."

RULE 1507. DISPOSITION WITHOUT HEARING

(a) The judge shall promptly review the motion, any answer by the attorney for the Commonwealth, and other matters of record relating to the defendant's claim(s). If the judge is satisfied from this review that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings, the judge shall give notice to the parties of the intention to dismiss the motion and shall state in the notice the reasons for the dismissal. The defendant may respond to the proposed dismissal within 10 days of the date of the notice. The judge thereafter shall either order the motion dismissed, or grant leave to file an amended motion, or direct that the proceedings continue.

(b) A motion for post-conviction collateral relief may be granted without a hearing when the motion and answer show that there is no genuine issue concerning any material fact and that the defendant is entitled to relief as a matter of law.

(c) The judge may dispose of only part of a motion without a hearing by ordering dismissal of or granting relief on only some of the issues raised, while ordering a hearing on other issues.

(d) When the motion is dismissed without a hearing, the judge:

(1) shall issue an order to that effect and shall state in the order the grounds on which the case was determined; and

(2) shall advise the defendant by certified mail, return receipt requested, of the right to appeal from the final order disposing of the motion and of the time within which the appeal must be taken.

Note: Previous Rule 1507 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; amended January 28, 1983, effective July 1, 1983; rescinded February 1, 1989, effective July 1, 1989, and not replaced. Present Rule 1507 adopted February 1, 1989, effective July 1, 1989.

Comment

Previous Rule 1507 was rescinded in 1989 as unnecessary in view of the enactment of the new Post Conviction Relief Act, Act 47 of 1988, 42 Pa.C.S. § 9541 et seq.

(Supp.1988). Present Rule 1507 replaces former Rule 1504.

The judge is permitted, pursuant to paragraph (a), to summarily dismiss a motion for post-conviction collateral relief in certain limited cases. To determine whether a summary dismissal is appropriate, the judge should thoroughly review the motion, the answer if any, and all other relevant information that is included in the record. If after this review, the judge determined that the motion is patently frivolous and without support in the record, or that the facts alleged would not, even if proven, entitle the defendant to relief, or that there are no genuine issues of fact, the judge may dismiss the motion as provided herein.

A summary dismissal would also be authorized under this rule if the judge determines that a previous motion involving the same issue or issues was filed and was finally determined adversely to the defendant. A second or subsequent motion should be summarily dismissed when the judge determines that the defendant has failed to make a strong prima facie showing that a miscarriage of justice may have occurred. *See Commonwealth v. Lawson*, 519 Pa. 504, 549 A.2d 107 (1988). *See also* Rule 1504 with regard to the requirements for appointment of counsel in these cases.

Relief may be granted without a hearing under paragraph (b) only after an answer has been filed either voluntarily or pursuant to court order.

Upon disposition without a hearing under this rule, the judge should also comply with Rule 1508(d), to the extent that it reasonably applies.

RULE 1508. HEARING

(a) Except as provided in Rule 1507, the judge shall order a hearing on all material issues of fact raised by the motion and answer, if any. The judge may deny a hearing on a specific issue of fact when a full and fair evidentiary hearing upon that issue was held at trial or at any proceeding before or after trial. The judge shall schedule the hearing for a time that will afford the parties a reasonable opportunity for investigation and preparation, and shall enter such interim orders as may be necessary in the interests of justice.

(b) The judge, on motion or request, shall postpone or continue a hearing to provide either party a reasonable opportunity, if one did not exist previously, for investigation and preparation regarding any new issue of fact raised in an amended motion or amended answer.

(c) The judge shall permit the defendant to appear in person at the hearing and shall provide the defendant an opportunity to have counsel.

(d) Upon the conclusion of the hearing the judge shall:

(1) determine all material issues raised by the motion, if any;

(2) issue an order denying relief or granting a specific form of relief and stating the grounds on which the case was determined, and issue any supplementary orders appropriate to the proper disposition of the case; and

(3) state on the record, or issue and serve upon the parties, findings of fact and conclusions of law on all material issues.

(e) If the judge disposes of the case in open court at the conclusion of the hearing, the judge shall advise the defendant on the record of the right to appeal from the final order disposing of the motion and of the time within which the appeal must be taken. If the case is taken under advisement, the judge shall advise the defendant of the right to appeal by certified mail, return receipt requested.

Note: Adopted February 1, 1989, effective July 1, 1989.

Comment

This rule replaces former Rule 1506.

With respect to "material issues" as used in this rule, *see*, e.g., *Commonwealth v. Sullivan*, 472 Pa. 129, 371 A.2d 468 (1977); *Commonwealth v. Rightnour*, 469 Pa. 107, 364 A.2d 927 (1976); *Commonwealth v. Webster*, 466 Pa. 314, 353 A.2d 372 (1975); *Commonwealth v. Hayes*, 462 Pa. 291, 341 A.2d 85 (1975); *Commonwealth v. Dancer*, 460 Pa. 95, 331 A.2d 435 (1975); *Commonwealth v. Slavik*, 449 Pa. 424, 297 A.2d 920 (1972).

The judge's power, under paragraph (a), to deny a hearing on a specific factual issue is intended to apply when an issue of fact has already been heard fully, but has never been determined. The judge need not rehear such an issue, but would be required to determine it under paragraph (d).

RULE 1509. APPEAL

An order granting, denying, dismissing, or otherwise finally disposing of a motion for post-conviction collateral relief shall constitute a final order for purposes of appeal.

Note: Adopted February 1, 1989, effective July 1, 1989.

Comment

Disposition without a hearing under Rule 1507(a) and (b) constitutes a final order under this rule. A partial disposition under Rule 1507(c) is not a final order until the judge has fully disposed of all claims.

Pennsylvania Rules of Criminal Procedure 1500-1510 (West 1998 rev. ed.)

CHAPTER 1500. POST-CONVICTION COLLATERAL PROCEEDINGS

RULE 1500. SCOPE

The rules in Chapter 1500 apply to capital and non-capital cases under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546, as amended by Act 1995-32 (SS1).

Note: Adopted August 11, 1997, effective immediately.

Comment – 1997

The 1995 amendments to the Post Conviction Relief Act specifically provide that, "except as specifically provided otherwise, all provisions of this subchapter shall apply to capital and noncapital cases." *See* 42 Pa.C.S. § 9542.

RULE 1501. INITIATION OF POST-CONVICTION COLLATERAL PROCEEDINGS

(1) A petition for post-conviction collateral relief shall be filed within one year of the date the judgment becomes final, except as otherwise provided by statute.

(2) A proceeding for post-conviction collateral relief shall be initiated by filing a petition and 3 copies with the clerk of the court in which the defendant was convicted and sentenced. The petition shall be verified by the defendant.

Note: Previous Rule 1501 adopted January 24, 1968, effective August 1, 1968; amended November 25, 1968, effective February 3, 1969; amended February 15, 1974,

effective immediately; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded November 9, 1984, effective January 2, 1985. Former Rule 1501 adopted November 9, 1984, effective January 2, 1985; rescinded February 1, 1989, effective July 1, 1989, and replaced by present Rule 1502. Present Rule 1501 adopted February 1, 1989, effective July 1, 1989; amended March 22, 1993, effective January 1, 1994; amended August 11, 1997, effective immediately.

Comment – 1997

The rules in Chapter 1500 govern proceedings to obtain relief authorized by the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541 et seq. (hereinafter PCRA).

By statute, a court may not entertain a request for any form of relief in anticipation of the filing of a petition for post-conviction collateral relief. 42 Pa.C.S. § 9545(a). For stays of execution, see 42 Pa.C.S. § 9545(c).

The petition for post-conviction relief under these rules is not intended to be a substitute for or a limitation on the availability of appeal or a post-sentence motion. *See* Pa.Rs.Crim.P. 1410 and 360. Rather, the Chapter 1500 Rules are intended to require that, in a single proceeding, the defendant must raise and the judge must dispose of all grounds for relief available after conviction and exhaustion of the appellate process, either by affirmance or by the failure to take a timely appeal.

Except as provided in Rule 1502(e)(2) for death penalty cases, no discovery is permitted at any stage of the proceedings, except upon leave of the court with a showing

of exceptional circumstances. *See* Rule 1502(e)(1), which implements 42 Pa.C.S. § 9545(d)(2).

As used in the Chapter 1500 Rules, "petition for post-conviction collateral relief" and "petition" are intended to include an amended petition filed pursuant to Rule 1505 except where the context indicates otherwise.

Under the 1995 amendments to the PCRA, a petition for post-conviction relief, including second and subsequent petitions, must be filed "within one year of the date the judgment becomes final," 42 Pa.C.S. § 9545(b)(1), unless one of the statutory exceptions applies, see 42 Pa.C.S. § 9545(b)(1)(i)-(iii). Any petition invoking one of these exceptions must be filed within 60 days of the date the claim could have been presented. 42 Pa.C.S. § 9545(b)(2).

The 1995 amendments to the PCRA apply to petitions filed on or after January 16, 1996. A petitioner whose judgment has become final on or before the effective date of the Act is deemed to have filed a timely petition under the Act if the first petition is filed within one year of the effective date of the Act. *See* Section 3 of Act 1995-32(SS1).

For the purposes of the PCRA, a judgment becomes final at the conclusion of direct review, which includes discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review. *See* 42 Pa.C.S. 9545(b)(3).

RULE 1502. CONTENT OF PETITION FOR POST-CONVICTION COLLATERAL RELIEF; REQUEST FOR DISCOVERY

(a) A petition for post-conviction collateral relief shall bear the caption, number, and court term of the case

or cases in which relief is requested and shall contain substantially the following information:

(1) the name of the defendant;

(2) the place where the defendant is confined, or if not confined, the defendant's current address;

(3) the offenses for which the defendant was convicted and sentenced;

(4) the date on which the defendant was sentenced;

(5) whether the defendant was convicted by a jury, by a judge without jury, on a plea of guilty, or on a plea of *nolo contendere;*

(6) the sentence imposed and whether the defendant is now serving or waiting to serve that sentence;

(7) the name of the judge who presided at trial or plea and imposed sentence;

(8) the court, caption, term, and number of any proceeding (including appeals, prior post-conviction collateral proceedings, and federal court proceedings) instituted by the defendant to obtain relief from conviction or sentence, specifying whether a proceeding is pending or has been completed;

(9) the name of each lawyer who represented the defendant at any time after arrest, and the stage of the case at which each represented the defendant;

(10) the relief requested;

(11) the grounds for the relief requested;

(12) the facts supporting each such ground that:

(i) appear in the record, and the place in the record where they appear; and

(ii) do not appear in the record, and an identification of any affidavits, documents, and other evidence showing such facts;

(13) whether any of the grounds for the relief requested were raised before, and if so, at what stage of the case;

(14) a verification by the defendant that the facts set forth in the petition are true and correct to the best of the defendant's personal knowledge or information and belief and that any false statements therein are made subject to the penalties of the Crimes Code, 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities;

(15) if applicable, any request for an evidentiary hearing. The request for an evidentiary hearing shall include a signed certification as to each intended witness, stating the witness's name, address, and date of birth, and the substance of the witness's testimony. Any documents material to the witness's testimony shall also be included in the petition; and

(16) if applicable, any request for discovery.

The petition may, but need not, include concise argument or citation and discussion of authorities.

(b) Each ground relied upon in support of the relief requested shall be stated in the petition. Failure to state such a ground in the petition shall preclude the defendant from raising that ground in any proceeding for post-conviction collateral relief.

(c) The defendant shall state in the petition the name and address of the attorney who will represent the defendant in the post-conviction collateral proceeding. If the defendant is unable to afford or otherwise procure counsel, and wants counsel appointed, the defendant shall so state in the petition and shall request the appointment of counsel.

(d) The defendant shall attach to the petition any affidavits, records, documents, or other evidence which show the facts stated in support of the grounds for relief, or the petition shall state why they are not attached.

(e) Requests for Discovery

(1) Except as provided in paragraph (e)(2), no discovery shall be permitted at any stage of the proceedings, except upon leave of court after a showing of exceptional circumstances.

(2) On the first counseled petition in a death penalty case, no discovery shall be permitted at any stage of the proceedings, except upon leave of court after a showing of good cause.

Note: Previous Rule 1502 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by present Rules 1503 and 1505. Present Rule 1502 adopted February 1, 1989, effective July 1, 1989; amended August 11, 1997, effective immediately.

Comment – 1997

Pursuant to paragraph (a)(6), the petition should include specific information about the sentence imposed, including whether the defendant is currently serving a sentence of imprisonment or probation for the crime awaiting execution of a sentence of death for the crime; or serving a sentence which must expire before the defendant may commence serving the disputed sentence; the minimum and maximum terms of the sentence; the amount of fine or restitution, if any; and whether the defendant is released on parole. *See 42 Pa.C.S. § 9543(a).*

Sections 9543(a)(2), (3), and (4) of the Post Conviction Relief Act, 42 Pa.C.S. § 9543(a)(2), (3), and (4), require that to be eligible for relief, the defendant must plead and prove by a preponderance of the evidence all of the following:

"(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the

inducement caused the petitioner to plead guilty and the petitioner is innocent.

(iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court."

Deleted by statute.

"(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

(vii) The imposition of a sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction."

"(3) That the allegation of error has not been previously litigated or waived."

"(4) That the failure to litigate the issue prior to or during trial . . . , or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel." 42 Pa.C.S. § 9543(a)(2), (3) and (4). (Note: the statutory reference to unitary review in this paragraph is not shown in view of the Court's 1997 suspension of the Capital Unitary Review Act.)

By statute, a court may not entertain a request for any form of relief in anticipation of the filing of a petition for post-conviction relief. 42 Pa.C.S. § 9545(a). For stays of execution, see 42 Pa.C.S. § 9545(c).

Paragraphs (a)(16) and (e) were added in 1997 to address requests for discovery. Paragraph (a)(16) requires

that a request for discovery be included in the petition, if applicable. Paragraph (e) sets forth the standards for permitting discovery. Under paragraph (e)(1), which applies in all cases except on the first counseled petition in a death penalty case, no discovery is permitted at any stage of the proceedings, except upon leave of the court with a showing of exceptional circumstances. *See* 42 Pa.C.S. § 9545(d)(2). Under paragraph (e)(2), which applies to first counseled petitions in death penalty cases, discovery is permitted only upon leave of court for good cause shown. For purposes of paragraph (e)(2), "first counseled petition" includes petitions on which defendants have elected to proceed *pro se*.

Second or subsequent petitions will not be entertained unless a strong *prima facie* showing is offered to demonstrate that a miscarriage of justice may have occurred. *Commonwealth v. Szuchon*, 633 A.2d 1098, 1099 (Pa. 1993) (citing *Commonwealth v. Lawson*, 549 A.2d 107 (Pa.1988)). This standard is met if the petitioner can demonstrate either:

> (1) that the proceedings resulting in the petitioner's conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate; or (2) that the petitioner is innocent of the crimes charged. *Commonwealth v. Szuchon*, 633 A.2d 1098, 1100 (Pa. 1993).

It is expected that a form petition will be prepared incorporating the required contents set forth herein which will be available for distribution to uncounseled defendants. This rule is not intended to require an attorney to use a printed form or any other particular format in preparing a petition or an amended petition for post-conviction collateral relief, provided, of course, that the

attorney must include in a petition or amended petition substantially all of the information set forth in this rule.

The petition should be typewritten or legibly handwritten.

RULE 1503. DOCKETING AND ASSIGNMENT

(a) Upon receipt of a petition for post-conviction collateral relief, the clerk of courts shall immediately docket the petition to the same term and number as the underlying conviction and sentence. The clerk shall thereafter transmit the petition and the record to the trial judge, if available, or to the administrative judge, if the trial judge is not available. If the defendant's confinement is by virtue of multiple indictments or informations and sentences, the case shall be docketed to the same term and number as the indictment or information upon which the first unexpired term was imposed, but the court may take judicial notice of all proceedings related to the multiple indictments or informations.

(b) When the petition is filed and docketed, the clerk shall transmit a copy of the petition to the attorney for the Commonwealth.

(c) The trial judge, if available, shall proceed with and dispose of the petition in accordance with these rules, unless the judge determines, in the interests of justice, that he or she should be disqualified.

(d) When the trial judge is unavailable or disqualified, the administrative judge shall promptly assign and transmit the petition and the record to another judge, who shall proceed with and dispose of the petition in accordance with these rules.

Note: Previous Rule 1503 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by present Rule 1504. Present Rule 1503 adopted February 1, 1989, effective July 1, 1989; amended June 19, 1996, effective July 1, 1996; amended August 11, 1997, effective immediately.

Comment – 1997

As used in this rule, "trial judge" is intended to include the judge who accepted a plea of guilty or *nolo contentere.*

The transmittal of the petition to the attorney for the Commonwealth does not require a response unless one is ordered by the judge as provided in these rules, or required by Rule 1506(e).

Although most references to indictments and indicting grand juries were deleted from these rules in 1993 since the indicting grand jury has been abolished in all counties, see PA. CONST. art. I, § 10 and 42 Pa.C.S. § 8931(b), the reference was retained in this rule because there may be some cases still pending that were instituted prior to the abolition of the indicting grand jury.

RULE 1504. APPOINTMENT OF COUNSEL; IN FORMA PAUPERIS

(a) When an unrepresented defendant satisfies the judge that the defendant is unable to afford or other wise procure counsel, the judge shall appoint counsel to

represent the defendant on the defendant's first petition for post-conviction collateral relief.

(b) On a second or subsequent petition, when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, and an evidentiary hearing is required as provided in Rule 1508, the judge shall appoint counsel to represent the defendant.

(c) The judge shall appoint counsel to represent a defendant whenever the interests of justice require it.

(d) An appointment of counsel shall be effective throughout the post-conviction proceedings, including any appeal from disposition of the petition for post-conviction collateral relief.

(e) When a defendant satisfies the judge that the defendant is unable to pay the costs of the post-conviction collateral proceedings, the judge shall order that the defendant be permitted to proceed in forma pauperis.

Note: Previous Rule 1504 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by Rule 1507. Present Rule 1504 adopted February 1, 1989, effective July 1, 1989; amended August 11, 1997, effective immediately.

Comment – 1997

If a defendant seeks to proceed without an attorney, the court may appoint standby counsel. *See* Rule 318.

Consistent with Pennsylvania post-conviction practice under former Rules 1503 and 1504, it is intended that counsel be appointed in every case in which a defendant has filed a petition for post-conviction collateral relief for the first time and is unable to afford counsel or otherwise procure counsel. However, the rule now limits appointment of counsel on second or subsequent petitions so that counsel should be appointed *only* if the judge determines that an evidentiary hearing is required. Of course, the judge has the discretion to appoint counsel in any case when the interests of justice require it.

RULE 1505. AMENDMENT AND WITHDRAWAL OF PETITION FOR POST-CONVICTION COLLATERAL RELIEF

(a) The judge may grant leave to amend or withdraw a petition for post-conviction collateral relief at any time. Amendment shall be freely allowed to achieve substantial justice.

(b) When a petition for post-conviction collateral relief is defective as originally filed, the judge shall order amendment of the petition, indicate the nature of the defects, and specify the time within which an amended petition shall be filed. If the order directing amendment is not complied with, the petition may be dismissed without a hearing.

(c) Upon the entry of an order directing an amendment, the clerk of courts shall serve a copy of the order on the defendant, the defendant's attorney, and the attorney for the Commonwealth.

(d) All amended petitions shall be in writing, shall comply substantially with Rule 1502, and shall be filed and served within the time specified by the judge in ordering the amendment.

Note: Previous Rule 1505 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by Rules 1506(b), 1508(a), and present Rule 1505(c). Present Rule 1505 adopted February 1, 1989, effective July 1, 1989; amended August 11, 1997, effective immediately.

Comment – 1997

"Defective," as used in paragraph (b), is intended to include petitions that are inadequate, insufficient, or irregular for any reason; for example, petitions that lack particularity; petitions that do not comply substantially with Rule 1502; petitions that appear to be patently frivolous; petitions that do not allege facts which would support relief; petitions that raise issues the defendant did not preserve properly or were finally determined at prior proceedings.

When an amended petition is filed pursuant to paragraph (d), it is intended that the clerk of courts transmit a copy of the amended petition to the attorney for the Commonwealth. This transmittal does not require a response unless one is ordered by the judge as provided in these rules. *See* Rules 1503 and 1506.

RULE 1506. ANSWER TO PETITION FOR POST-CONVICTION COLLATERAL RELIEF

(a) Except as provided in paragraph (e), an answer to a petition for post-conviction collateral relief is not required unless ordered by the judge. When the judge has not ordered an answer, the attorney for the Commonwealth may elect to answer, but the failure to file one shall not constitute an admission of the well-pleaded facts alleged in the petition.

(b) Upon the entry of an order directing an answer, the clerk of courts shall serve a copy of the order on the attorney for the Commonwealth, the defendant, and the defendant's attorney.

(c) If the judge orders an answer, the answer shall be in writing and shall be filed and served within the time fixed by the judge in ordering the answer. The time for filing the answer may thereafter be extended by the judge for cause shown.

(d) The judge may grant leave to amend or withdraw an answer at any time. Amendment shall be freely allowed to achieve substantial justice. Amended answers shall be in writing and shall be filed and served within the time specified by the judge in granting leave to amend.

(e) Answers in Death Penalty Cases.

(1) *First Counseled Petitions.*

(i) The Commonwealth shall file an answer to the first counseled petition for collateral review in a death penalty case.

(ii) The answer shall be filed within 120 days of the filing and service of the petition. For

good cause shown, the court may order extensions, of up to 90 days each, of the time for filing the answer.

(2) *Second and Subsequent Petitions.*

(i) An answer to a second or subsequent petition for post-conviction collateral relief is not required unless ordered by the judge. When the judge has not ordered an answer, the attorney for the Commonwealth may elect to file an answer.

(ii) The answer shall be filed within 120 days of the filing and service of the petition. For good cause shown, the court may order extensions, of up to 90 days each, of the time for filing the answer.

(3) *Amendments to Answer.* The judge may grant the Commonwealth leave to amend the answer at any time, and amendment shall be freely allowed to achieve substantial justice. Amended answers shall be in writing, and shall be filed and served within the time specified by the judge in granting leave to amend.

Note: Previous Rule 1506 adopted January 24, 1968, effective August 1, 1968; *Comment* revised April 26, 1979, effective July 1, 1979; rule rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; *Comment* revised January 28, 1983, effective July 1, 1983; rule rescinded February 1, 1989, effective July 1, 1989, and replaced by Rule 1508. Present Rule 1506 adopted February 1, 1989, effective July 1, 1989; amended August 11, 1997, effective immediately.

Comment – 1997

As used in the Chapter 1500 Rules, "answer" is intended to include an amended answer filed pursuant to paragraphs (d) and (e)(3) of this rule, except where the context indicates otherwise.

Except as provided in paragraph (e), when determining whether to order that the attorney for the Commonwealth file an answer, the judge should consider whether an answer will promote the fair and prompt disposition of the issues raised by the defendant in the petition for post-conviction collateral relief.

Paragraph (e)(1) was added in 1997 to require that the Commonwealth file an answer to the first counseled petition in a death penalty case. For second and subsequent petitions, paragraph (e)(2) would apply.

"First counseled petition," as used in paragraph (e)(1), includes petitions on which defendants have elected to proceed pro se. *See also* the *Comment* to Rule 1503.

RULE 1507. DISPOSITION WITHOUT HEARING

Except as provided in Rule 1509 for death penalty cases,

(a) the judge shall promptly review the petition, any answer by the attorney for the Commonwealth, and other matters of record relating to the defendant's claim(s). If the judge is satisfied from this review that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings, the judge shall give notice to the parties of

the intention to dismiss the petition and shall state in the notice the reasons for the dismissal. The defendant may respond to the proposed dismissal within 20 days of the date of the notice. The judge thereafter shall order the petition dismissed, grant leave to file an amended petition, or direct that the proceedings continue.

(b) A petition for post-conviction collateral relief may be granted without a hearing when the petition and answer show that there is no genuine issue concerning any material fact and that the defendant is entitled to relief as a matter of law.

(c) The judge may dispose of only part of a petition without a hearing by ordering dismissal of or granting relief on only some of the issues raised, while ordering a hearing on other issues.

(d) When the petition is dismissed without a hearing, the judge shall issue an order to that effect and shall advise the defendant by certified mail, return receipt requested, of the right to appeal from the final order disposing of the petition and of the time within which the appeal must be taken.

Note: Previous Rule 1507 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; amended January 28, 1983, effective July 1, 1983; rescinded February 1, 1989, effective July 1, 1989, and not replaced. Present Rule 1507 adopted February 1, 1989, effective July 1, 1989; amended August 11, 1997, effective immediately.

Comment – 1997

The judge is permitted, pursuant to paragraph (a), to summarily dismiss a petition for post-conviction collateral relief in certain limited cases. To determine whether a summary dismissal is appropriate, the judge should thoroughly review the petition, the answer, if any, and all other relevant information that is included in the record. If, after this review, the judge determines that the petition is patently frivolous and without support in the record, or that the facts alleged would not, even if proven, entitle the defendant to relief, or that there are no genuine issues of fact, the judge may dismiss the petition as provided herein.

A summary dismissal would also be authorized under this rule if the judge determines that a previous petition involving the same issue or issues was filed and was finally determined adversely to the defendant. *See* § 9545(b) for the timing requirements for filing second and subsequent petitions.

Second or subsequent petitions will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred. *Commonwealth v. Szuchon*, 633 A.2d 1098, 1099 (Pa.1993) (citing *Commonwealth v. Lawson*, 549 A.2d 107 (Pa.1988)). This standard is met if the petitioner can demonstrate either: (1) that the proceedings resulting in the petitioner's conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate; or (2) that the petitioner is innocent of the crimes charged. *Commonwealth v. Szuchon*, 633 A.2d 1098, 1100 (Pa.1993).

For the requirements for appointment of counsel on second and subsequent petitions, *see* Rule 1504(b).

Relief may be granted without a hearing under paragraph (b) only after an answer has been filed either voluntarily or pursuant to court order.

A PCRA petition may not be dismissed due to delay in filing except after a hearing on a motion to dismiss. 42 Pa.C.S. § 9543(b). *See* Rule 1508.

RULE 1508. HEARING

(a) Except as provided in Rule 1507, the judge shall order a hearing:

(1) whenever the Commonwealth files a motion to dismiss due to the defendant's delay in filing the petition, or

(2) when the petition for post-conviction relief or the Commonwealth's answer, if any, raises material issues of fact. However, the judge may deny a hearing on a specific issue of fact when a full and fair evidentiary hearing upon that issue was held at trial or at any proceeding before or after trial.

The judge shall schedule the hearing for a time that will afford the parties a reasonable opportunity for investigation and preparation, and shall enter such interim orders as may be necessary in the interests of justice.

(b) The judge, on petition or request, shall postpone or continue a hearing to provide either party a reasonable opportunity, if one did not exist previously, for investigation and preparation regarding any new issue of fact raised in an amended petition or amended answer.

(c) The judge shall permit the defendant to appear in person at the hearing and shall provide the defendant an opportunity to have counsel.

(d) Upon the conclusion of the hearing the judge shall:

(1) determine all material issues raised by the defendant's petition and the Commonwealth's answer, or by the Commonwealth's motion to dismiss, if any;

(2) issue an order denying relief or granting a specific form of relief and issue any supplementary orders appropriate to the proper disposition of the case.

(**e)** If the judge disposes of the case in open court at the conclusion of the hearing, the judge shall advise the defendant on the record of the right to appeal from the final order disposing of the petition and of the time within which the appeal must be taken. If the case is taken under advisement, the judge shall advise the defendant of the right to appeal by certified mail, return receipt requested.

Note: Adopted February 1, 1989, effective July 1, 1989; amended August 11, 1997, effective immediately.

Comment

The judge's power, under paragraph (a), to deny a hearing on a specific factual issue is intended to apply when an issue of fact has already been heard fully, but has never been determined. The judge need not rehear such an issue, but would be required to determine it under paragraph (d).

The 1997 amendment to paragraph (a)(1) requires a hearing on every Commonwealth motion to dismiss due to delay in the filing of a PCRA petition. See 42 Pa.C.S. § 9543(b), as amended in 1995.

See also Rule 1509 for procedures in death penalty cases.

Except as provided in Rule 1502(e)(2) for first counseled petitions in death penalty cases, no discovery is permitted at any stage of the proceedings, except upon leave of the court with a showing of exceptional circumstances. *See* 42 Pa.C.S. § 9545(d)(2).

RULE 1509. PROCEDURES FOR PETITIONS IN DEATH PENALTY CASES: HEARING DISPOSITION

(a) No more than 20 days after the Commonwealth files an answer pursuant to Rule 1506(e)(1) or (e)(2), or if no answer is filed as permitted in Rule 1506(e)(2), within 20 days after the expiration of the time for answering, the judge shall review the petition, the Commonwealth's answer, if any, and other matters of record relating to the defendant's claim(s), and shall determine whether an evidentiary hearing is required.

(b) If the judge is satisfied from this review that there are no genuine issues concerning any material fact, that the defendant is not entitled to post-conviction collateral relief, and that no purpose would be served by any further proceedings,

(1) the judge shall give notice to the parties of the intention to dismiss the petition and shall state in the notice the reasons for the dismissal.

(2) The defendant may respond to the proposed dismissal by filing a request for oral argument within 20 days of the date of the notice.

(3) No later than 90 days from the date of the notice, or from the date of the oral argument, if granted, the judge shall:

(i) dismiss the petition, issue an order to that effect, and advise the defendant by certified mail, return receipt requested, of the right to appeal from the final order disposing of the petition and of the time within which the appeal must be taken;

(ii) grant the defendant leave to file an amended petition; and/or

(iii) order that an evidentiary hearing be held on a date certain.

(c) If the judge determines that an evidentiary hearing is required, the judge shall enter an order setting a date certain for the hearing, which shall be not be scheduled for fewer than 10 days or more than 45 days from the date of the order. The judge may, for good cause shown, grant leave to continue the hearing. No more than 90 days after the evidentiary hearing, the judge shall dispose of the petition.

(d) Failure of the judge to dispose of the petition within 90 days as required by paragraphs (b)(3) and (c) may result in the imposition of sanctions.

Note: Previous Rule 1509 adopted February 1, 1989, effective July 1, 1989; renumbered Rule 1510 August 11, 1997, effective Immediately. Present Rule 1509 adopted August 11, 1997, effective immediately.

Comment – 1997

It is intended that once a determination is made under this rule that an evidentiary hearing is required, the provisions of Rule 1508(c), (d), and (e) apply.

RULE 1510. APPEAL

An order granting, denying, dismissing, or otherwise finally disposing of a petition for post-conviction collateral relief shall constitute a final order for purposes of appeal.

Note: Previously Rule 1509, adopted February 1, 1989, effective July 1, 1989; renumbered and amended August 11, 1997, effective immediately

Comment – 1997

Disposition without a hearing under Rule 1507(a) and (b), or under Rule 1509(b)(3)(i), constitutes a final order under this rule. A partial disposition under Rule 1507(c) is not a final order until the judge has fully disposed of all claims.