No. 18-8535

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL ARTHUR HELEVA, Petitioner

Vs.

Warden Mrs. M. Brooks, *et al.* , Respondents

ON PETITION FOR WRIT OF CERTIORARI TO:

All Courts below where none ruled upon the Fundamental, Constitutional issues or merits: 3rd.Cir. No. 18-1193 *Rehearing En Banc* denied October 5, 2018 - denial of COA 18-1193 and related 18-2563; Both from Middle District of Pennsylvania, denial of Habeas Corpus at Civil No. 1:07-cv-01398, from faulted PCRA and all state reviews, conviction and sentence attained by Fraud at Case No. 249-cr-2002, Monroe County Pennsylvania.

PETITION FOR WRIT OF CERTIORARI

Daniel Heleva, *pro-se petitioner*
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QUESTIONS FOR REVIEW

WHERE STATE STATUTES PROVIDE PRE-TRIAL REMEDY FOR PROSECUTORIAL OVERREACHING BY INTERLOCUTORY APPEAL, DOES DEFENSE COUNSEL'S FAILURE TO PERFECT THAT APPEAL CONSTITUTE INEFFECTIVENESS UNDER *CRONIC* ? ANSWER: YES

WHEN A TRIAL COURT IS INFORMED AND AWARE THAT A DEFENDANT IS NO LONGER REPRESENTED BY COUNSEL: IS DISCRETION ABUSED AT ACCEPTING A WAIVER OF CONSTITUTIONAL RIGHTS FROM THAT COUNSEL WHICH CONFERS JURISDICTION BEYOND ITS LEGISLATIVE POWER, WITHOUT JUSTIFIABLE CAUSE, NOTICE TO THE DEFENDANT, OR COLLOQUY ?

ANSWER: YES, DISCRETION IS ABUSED.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Respondent

Warden Mrs. M. Brooks

Respondent

PA State Attorney General

Respondent

Monroe County District Attorney represented by **E. David Christine , Jr.**
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TABLE OF CONTENTS

INDEX OF APPENDICES

Appendix A: No. 18-1193, 3rd.Cir., October 5, 2018 denial En Banc, *with filing submitted*

Appendix B: No. 18-1193, 3rd.Cir., August 22, 2018 denial of COA

Appendix C: No. 17-3491, 3rd.Cir., February 16, 2018 denial of In Re Heleva (*fraud*) AND RELATED 17-2563

Appendix D: No. 1:07-cv-1398, Middle District. PA, January 9, 2018 Habeas Corpus denial

Appendix E: 886 EDA 2015, PA Superior, January 22, 2016 *affirming* PCRA

Appendix F: No. 249-cr- 2002, Monroe County PA, PCRA denial, March 13, 2015

Appendix G: No. 249-cr-2002, Monroe County PA, Sentencing Order, June 24, 2005

Appendix H: Direct Attack Filings

Published: Precidential, Heleva v. Brooks, 581 F.3d 187 (3rd.Cir. 2009)

TABLE OF AUTHORITIES CITED

Federal

State

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix D to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix E to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Pennsylvania, 43rd, Monroe County PCRA court appears at Appendix F to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 22, 2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 5, 2018, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was Jan. 22, 2016. A copy of that decision appears at Appendix E.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE III, Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, ..

ARTICLE III, Section 2.

The judicial Power shall extend to all Cases, in Law ..., arising under this Constitution, the Laws of the United States, ..., or which shall be made, under their authority.

The supreme Court shall have appellate Jurisdiction, both as to Land and Fact.

ARTICLE IV, Section 2.

The Citizens of each State shall be entitled to all Privileges and, Immunities of Citzens in the several States.

Amendments & clauses invoked herein;

Amend. I: to petition the Government for a *redress of grievances*.

Amend. IV: to be secure in their persons, houses, *parers*, and effects ... and no Warrants shall issue, *but upon probable cause* ...

Amend. V: No person shall be held to answer for a capital .. crime, unless on a presentment or indictment of Grand Jury; nore be deprived of Life, Liberty or Property, without *due process* of law;

Amend. VI: the right to *speedy trial*; by an *impartial jury*, and; *to be informed* of the nature and cause of the accusation; to have *compulsory process* for obtaining witnesses in his favor; to the *Assistance of Counsel for his defence*,

Amend. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amend.IX: The enumeration in the Constitution, of certain rights (presumably *Fundamental* rights), shall not be *construed to deny or disparage others retained* by the people.

Amend. XIII, Section 1. involuntary servitude, except as a punishment for a crime whereof the party shall have *been duly convicted* ... shall not exist within the United States or any place subject to their jurisdiction.

Amend. XIV, Section 1. No State shall *make or enforce any law which shall abridge the privileges or immunities of citizens* of the United States; nor shall any State *deprive any person of life, Liberty, or Property*, without *due process of law*; nor deny to any person within it jurisdiction to *equal protection of the laws*.

Statutory Provisions invoked:

28 U.S.C. sec. 1254(1)

28 U.S.C. sec. 1257(a)

STATEMENT OF THE CASE

On November 26, 2001 two young men were sensessly murdered in Petitioner Daniel Heleva's home. Nothing could be done to save the first victim who died instantly. Heleva did everything in his power under the circumstance to 1) save the second victim, 2) contact authorities and, 3) protect his own family from the assailant, Manuel Sepulveda.

Sepulveda admitted to his actions and was convicted of double murder. Heleva was arrested, held without bail, tried and convicted three years later under a statute that does not exist, without counsel, due process or equal protection, in a Capital Case without probable cause, witnesses or legal evidence, by a jury prejudiced and biased, at presiding over a tainted, one sided, adversarial contest.

The trial court committed fraud against itself and the administration of justice to prejudice Heleva and bias the jury to gain conviction illegally.

Heleva has been denied fair review in the face of fraud by every court, state and federal. Fraud prevailed in every proceeding below and elliminated every protected right, Fundamental and otherwise, under the Constitution of the United States.

REASONS FOR GRANTING THE WRIT, RULE 10

when WE, THE PEOPLE of this Nation, law abiding and productive citizens, are held to answer for crimes without probable cause, we hire lawyers to protect our Liberty.

But when counsel we retain betray our trust, undermine the adversarial test and waive our Fundamental Rights without our knowledge or consent; that betrayal is oft not discovered until after conviction, after suffering incarceration.

And when such events as this occure, We, as this Petitioner has done, are forced to protect ourselves in the only manner available: through the study of what we do not understand, invoking Constitutional Rights in courts of review and presenting our cause in the best possible light. Success is fully dependent upon judges who abide by their Oaths of Office and administer justice accordingly in recognition of the condemnds rights and protections under the Constitution.

But when the betrayal of counsel and the governments overwhelming desire for conviction meet, intrisicly, that lethal combination can, as it did in this case, result in acts of fraud against the administration of justice, prejudiceing the accused and culminating into Fraud against the Court itself.

Here, in this tortuous case, courts of collateral review consistantly washed their hands of the fraudulence visited upon this Petitioner. While the washing of hands symbolizes cowardince and weakness in the face of coercion, it provides no answer to the "allegation" founded upon fact. It providedes no answer to a situation that requires immediate resolution. It provides no answer to the charge of deception and deceit advanced.

Once the PCRA courts construed Petitioners Fundamental Rights as mere rule violations, to deny and disavow them as inconsequential, a mockery was made of the judicial procedure and perpetrated the violent lawlessness practiced in the first instance.

Petitoner has learned, through pain of consistancy, that Liberty cannot be achieved collaterally, the fight for Liberty in the face of fraud can not be won by wrestling over trivial rules open to the whim of the gavel. Only by continuation of exhaustive procedure and maintaining the Fundamental issues can one hope to reach **This, *unbiased*, Court.**

Perhaps due to its rarity, there does not exist a Constitutionally Mandated test by which to determine whether or not fraud visited the state trial process. There is only admonishment when exposed and praise when championed, little insentive to oust a judicial brethren.

The fact that District and Circuit acquiessed fraud by rule interpretation outside prevailing law, applied 'deference' and double to clear and obviously erronious state findings, is not the purview of this filing.

Petitioner speaks to the heart of the matter, poignantly disclosing the very means by which fraud procured an illegal conviction at the trial court level.

Heleva calls upon This Court's discretionary supervisory powers of Original Jurisdiction to uphold and protect not only the individuals Fundamental Rights of Liberty, but also to uphold the Constitution itself; for to deny the Fundamental Rights of one, is to deprive all citizens of the protections guaranteed by the Constitution.

And so it is prayed.

WHERE STATE STATUTES PROVIDE PRE-TRIAL REMEDY FOR PROSECUTORIAL OVERREACHING BY INTERLOCUTORY APPEAL, DOES DEFENSE COUNSEL'S FAILURE TO PERFECT THAT APPEAL CONSTITUTE INEFFECTIVENESS UNDER *CRONIC* ? ANSWER: YES

Unites States v. Cronic, 466 US 648, 80 LEd2d 657, 104 S.Ct. 2039 (1984) Held: The Constitutional Right to effective assistance of counsel is violated at the complete denial of counsel, and "[t]he presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." 466 at 659

Bell v. Cone, 535 US 685, 152 LEd2d 914, 122 S.Ct. 1843 (2002) characterized "critical stage" as one that "held significant consequences for the accused" *at* 696 and reiterated three circumstances from the Cronic opinion as 1) involving the complete denial of counsel at a critical stage in the proceedings, 2) where "counsel entirely fails to subject the prosecution's case to meaningfull adversarial testing", and 3) where counsel is called upon to render assistance under circumstances where competent counsel very likely could not. *Id at* 695-96

Here, petitioner's argument is that he was 1) effectively denied counsel at a critical stage of the proceedings which, 2) caused total failure at subjecting the prosecution's case to meaningfull adversarial testing, such that the conviction itself is "presumptively unreliable" 466 US at 659, and 3) where counsel put himself into a position and circumstance that rendered effective assistance implausible. point 3 argued at second question for review

PART ONE: To reach a threshold showing of constitutional violation under Cronic, Petititioner must first prove the availability of an Interlocutory Appeal by state statute is in fact a "critical stage" of the trial process.

In Pennsylvania, legislative statutes provide for interlocutory appeals by permission when "there is substantial ground for a difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter" 42 Pa.CSA 702(b). Act of 1976-124 (SB 935) P.L. 586, sec.2: Act 1978-53 (HB 825) P.L. 202, sec.10 *eff.* June 27, 1978

Interlocutory Appeals by permission are seldom utilized. Thus, puplished state case opinion is spare, and none can be found that directly correlate the failure of defense counsel to perfect an interlocutory as either a critical stage or ineffectiveness at failure to perfect same.

"where general rules tend to accord courts 'more leeway ...in reaching outcomes in case-by-case

determinations, ' *Yarborough v. Alvarado,* 541 US 652, 644, 124 S.Ct. 2140, 158 LEd2d 938 (2004), AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied, *cf. Wright v. West,* 505 US 277, 308-309, 112 S.Ct. 2482, 120 LEd2d 225 (1992)

An Interlocutory Appeal is an Appeal like any other as best explained in *Commmonwealth v. Scarborough,* 9 A.3d 206, 2010 Pa.Super.LEXIS 3811. "an order is appealable if it is: (1) a final order, *see* Pa.RAP 341-42: (2) an interlocutory order appealable by right or permission, *see* 42 Pa.CSA 702(b): Pa.RAP 311-12, 1311-12: or (3) a collateral order, *see* Pa.RAP 313; Com. v. Kennedy, 876 A.2d 934, 938 (Pa.2005) "A final order is one expressly defined as such by statute, ...an interlocutory order does not finally decide the case but settles an intervening, related matter. Blacks Law, 5th Ed. 1979" 9 A.3d *at* 211.

To understand ***how*** the constitutional violation came to occure, a short procedural history is best explored here: Two individuals, Ricardo Lopez and John Mendez, were murdered in Heleva's home November 26, 2001. At the advise of public defender Wieslaw Niemoczynski, appearance at formal arraignment was waived. Then counsel informed Petitioner the commonwealth was seeking death as each murder aggravated the other. No further details were provided. In a severed trial, Manuel Sepulveda was found guilty of both murders. Victim John Mendez was brutally beaten with an axe-like instrument after being shot twice at close range with a twelve-guage shotgun. Sepulveda initially admitted to committing both acts and the commonwealth charged torture [42 Pa.CSA 9711(d)(8)] as an additional aggravator. Jury instruction at Sepulveda's sentencing phase was (in pertinent part), thus;

> Under this case, according to the Sentencing Code, only the following matters, if proven to your satisfaction beyond a reasonable doubt, can be found to be aggravating circumstances. And there are two with respect to the case involving John Mendez. The Commonwealth has set forth torture and double muder:
>
> Now torture has a particular meaning in the law for a person committing first-degree murder by means of torture. He must intend to do more than kill his victim, He must intend to inflict unnecessary pain and suffering. And he must do so in a manner or by means that are heinous, atrocious or cruel, manifesting excepional depravity or conscious hatred or ill will.
>
> The language of the statute with respect to what I've said of double murder on the slip reads like this: The defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the time of the offense at issue. It is the obligation -excuse me - that

is with respect to John Mendez.

With respect to Ricardo Lopez, the Commonwealth has one aggravating circumstances and that being basicly double murder. And, again, the statutory definition is the defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the time of the offence at issue.

The Commonwealth has the burden to prove the existance of any aggravating circumstance which it contends is applicable to your consideration in this case by a standard [of] proof beyond a reasonable doubt. N.T. 11/25/2002, pp.894-900, 907-09

Reprinted in *Com. v. Sepulveda,* 2015 Pa.Dist.&Cnty.Dec.LEXIS 801, No.1522-crim.-2001, Aug.14, 2015 under review by the Honorable President Judge Worthington stating: "After deliberation, the jury found double murder as an aggravating factor, and the mitigating factors of age and lack of a significant prior criminal history. Verdict Slip. 11/25/2002"

Significant here is the factual finding of the jury: the commonwealth did not prove torture to it's satisfaction, the standard of which is "proof beyond a reasonable doubt."

Fast forward: September 29, 2003. Petitioner's trial Com. v. Heleva, 249-crim.-2002 was scheduled to commence (vior dere), in Courtroom One before then President Judge Vican. Heleva was instead, escorted to Courtroom Three for a hearing in which then prosecutor of both trials, Mark Pazuhanich announced nolle-proseque of all charges pertaining to the death of Ricardo Lopez, including the aggravators ie. laying in wait, ambush ect. ect. One death no longer aggravating the other. However, to maintain a designation of Capital, the prosecution proclaimed it could charge torture. The trial judge accepted what appeared to all, public included, as a last minute change without question. A recorded colloque of exchange between the Judge and Petitioner concerning speedy trial and Pa.R.Crim.P. Rule 600 was employed in which Petitioner aggreed not to raise a violation during the pendency of an Interlocutory Appeal. The citizens empanelled for vior dere were dismissed.

There is no question as to whether or not the Interlocutory Appeal was specifically requested. *Roe v. Flores-Ortega,* 528 US 470,477, 145 LEd2d 985, 120 S.Ct. 1029 (2000) "A defendant who instructs counsel to initiate an appeal resonably relies upon counsel to file the necessarry notice"

Prosecutorial Overreaching is not unknown. The first and most apparant is that which is designed to provoke mistrial, *United States v. Dinitz*, 424 US 600, 96 S.Ct. 1075 (1976). Second is "bad faith" to prejudice or harass the defendant, *Lee v. United States*, 434 US 23, 32, 97 S.Ct. 2141 (1977). Then, to achieve tactical advantage, *Arizona v. Washington*, 434 US 479, 508, 98 S.Ct. 824, 54 LEd2d 717 (1978); prosecutorial manipulation, *Illinois v. Sumerville*, 410 US 458, 464, 93 S.Ct. 1066, 35 LEd2d 425 (1973): impropriety designed to avoid acquittal, *United States v. Jorn* 400 US 470, 485, 91 S.Ct. 547, 27 LEd2d 543 (1971) Not that one is greater than others.

Pennsylvania state courts generally hold to federal precident in that, while a trial court has no legal authority to examine a prosecutors evidence in determining whether its pursuit of a Capital designation is sufficient (seperation of powers), it can inquire as to whether or not the desired designation is the result of purposeful abuse or prosecutorial overreaching. But only if a valid claim of purposful abuse is raised *Com. v. Buonopane,* 410 Pa.Super 215, 599 A.2d 681 (1991) *upheld in Com. v. Buck,* 551 Pa. 184, 709 A.2d 898 (1998)(implicitly recognizing that, in limited circumstances, the prosecutor's designation of a crime as capital could be challenged) 551 Pa. at 191. *Buonopane* quoting *Gregg v. Georgia*, 428 US 153, 225, 96 S.Ct. 2909, 2949, 49 LEd2d 859, 903 (1976); "Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgements, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is unsufficiantly strong. This does not cause the system to be standardless ... " *Id.*

In *McCleskey v. Kemp,* 481 US 279, 107 S.Ct.1756, 95 LED2d 262 (1978), The Court noted, prosecutorial deiscretion in a capital punishment system is necessary to satisfy the Constitution.

The *Buck* court at 551 Pa. 191 states: We find that a valid claim for purposeful abuse exists when the Commonwealth files an unwarranted notice of aggravating circumstances. Implicit in the notice requirement is the presumption that the allegations contained therein are based upon verifiable facts. It is well established that the Commonwealth has no pre-trial burden of proving

an aggravating factor. However, the trial court must be able to ensure that the Commonwealth is not seeking the death penalty for an improper reason. The nature of the court's inquiry is focused soley upon whether the case is properly designated as capital, not whether each aggravating factor alleged is supported by evidence. We note that, [] the trial court is required to instruct the jury to consider only aggravating circumstaces for which there is *some evidence*. Thus, if the Commonwealth files a notice of aggravating circumstances which includes at least one aggravating factor that is supported by any evidence, the case is properly framed as a capital case. **{551 Pa 192}** A defendant who claims that there is no evidence supporting the notice of aggravating circumstances bears the burden of proving that contention. If the defendant fails to meet this burden and evidence exists to create a fatual dispute regarding whether the aggravating factor(s) exist, the defendant's motion should be summarily denied as no abuse of discretion by the prosecutor is apparant. To the contrary, if the defendant makes a showing that no evidence exists to support the aggravating circumstance alleged, the trial court may require **{709 A.2d 897}** minimal disclosure by the Commonwealth. If no evidence is presented in support of any aggravating circumstance, the trial court may rule that the case shall proceed non-capital. This ruling shall be without prejudice to the Commonwealth to file an amended Rule 352 notice if it subsequently becomes aware of evidence in support of an aggravating factor. 7

footnote 7: This is consistant with the plain language of Rule 352 which allows notice to be filed after arraignment if "the attorney for the Commonwealth becomes aware of the existance of an aggravating circumstance after arraignment or the time for filing is extended by the court for cause shown" 42 Pa.CS., Pa. R.Crim.P. 352.

Here, there is nothing to indicate that the commonwealth "become aware" of the aggravator of torture on the eve of vior dere. To the contrary, torture was known (and tried) in *Com. v. Sepulveda.* Also, the commonwealth might not have filed the aggravator had defense counsel not provoked the dismissal of torture before it was charged. Though never raised by defense counsel, the late aggravate constituted three unreasonable elements. First and most obvious, ambush: vior dere was enpannelled and Heleva previously demanded his Right to speedy trail be observed by the court. Second is the prosecutions attempt at a "second bite". As stated, the jury in *Sepulveda*

determined the commonwealth did not prove 'torture'. *Yeager v. United States,* 577 US 110, 129 S.Ct. 2360 (2009) (jury's acquittal "represents the community's collective judgement regarding all evidence and arguments presented to it" and "its finality is unassailable"); *Burks v. United States,* 473 US 1, 16, 98 S.Ct. 2141 (1978)(a jury's verdict must be afforded "absolute finality")

Third is purposeful delay without propper cause. Although not found as prosecutorial overreaching by direct comparison, "fear of acquittal" *Jorn supra,* is substantially linked as to motivation. *SEE:* exhibit one. - *2006 Pa.LEXIS 2576; pg.3 part 11 no.6*

While the last minute "surprise move" was presented as such to the defendant and the public, in open court; years later, Heleva discovered the last hour hearing was not as it appeared. Not until March 15, 2015 did petitioner receive the documents filed without his knowledge between September 18 and Sept. 23, 2003. *SEE:* exhibit two.

Counsel for the defense filed (09/18/2003), to quash the charge BEFORE the commonwealth levied torture. Same, on Sept. 19th the trial court scheduled a hearing on the matter for September 29th, prior to the commonwealth's actual charge was filed Sept. 23, 2003.

From this, two fundamental principles emerge:

Discretion: Where the defendants Constitutional Rights are involved, aborting the trial proceeding deprived him of his valued right to have his trial completed. *Wade v. Hunter,* 336 US 648,689, 93 LEd 947,978, 69 S.Ct. 834 (1949). If the right is to have value, it is because, independent of the threat of bad faith conduct by the judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury which, in this case, was prepared to proceed to vior dere. The Perez Doctrine of manifest necessity stands as a command to trial judges not to forclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be severed by a continuation of the proceedings. *United States v. Perez*, 9 Wheat 579,580, 6 LEd 165 (1824)

Discretion must be exercised; unquestionably an improtant factor to be considered is the need to hold litigants on both sides to standards of responsible professional conduct in adversarial criminal processes. Here, ample time remained before September 29, 2003 to inquire as to the prosecutions true cause and motive in charging torture. Having precided over the first, where torture was determined not to exist, the trial judge abandoned his better concious.

While rules cannot evolve on the point of circumstance, the trial judge must still take care to assure himself that the situation warrants action on his part. Here, his willingness to forclose

from the defendant the opportunity of a potentially favorable trial. In an adversarial process, counsel for both sides preform in an imperfect world. Bright-line rules based on either the problem or the intended beneficiary would undoubtedly disserve the competing interests of government and the defendant. However, it rests upon the judge to recognize the lack of preparedness, whatever its cause or motive, by the government to continue or postpone trial for it directly implicates policies underpinning the speedy trial guarantee. *Downum v. United States*, 373 US 734, 10 LEd2d 100, 83 S.Ct. 1033 (1963). It is well known in law that the judge must always temper the decision whether or not to abort a trial by considering the importance to the defendant in being able, once and for all, to conclude his confrontation with society through the verdict - in a fair and impartial proceeding. Here, the trial judge abandoned his discretionary function, at the expense of the defendant's Right to speedy trial and that of the public interest.

Second is: At not informing the defendant, at allowing torture to appear as a 'surprise' indicates defense counsel's loyalty allied with the state: *Quoting Cronic at 656;* Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan,* 466 at 343, 64 LEd2d 333, 100 S.Ct. 1708. Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *Anders v. California,* 386 US 738,743, 18 LEd2d 493, 87 S.Ct. 1396 (1967), referencing *Jones v. Barns,* 463 US 745, 758, 77 LEd2d 987, 103 S.Ct. 3308(1983)("To satisfy the Constitution, counsel must funtion as an advocate for the defendant, as opposed to a friend of the court") *Ferri v. Ackerman,* 444 US 193,204, 62 LEd2d 355, 100 S.Ct. 402 (1979) ("Indeed, an indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act independently of Government and to oppose it in adversarial litigation").

As to state rulings, Pennsylvania Supreme Court at *Com. v. Sparks,* 490 PA. 336, 341, 416 A.2d 498 (1980) recognized: Overreaching is not an inevitable part of the trial process and cannot be condoned. It signals the breakdown in the integrity of the judicial proceeding ... "prosecutors are to seek justice, not only convictions." (*quoting Com. v. Cherry*, 474 Pa. 295,301, 378 A.2d 800,803 (1977)) Starks identified two types of overreaching: (1) misconduct disigned to provoke mistrial and (2) misconduct undertaken in bad faith to prejudice or harass the defendant. *Id* 416 A.2d at 500.

IN THIS CASE; the trial judge (over both trials), was content to not inquire as to the propriety of the prosecutions late alterations. Due to the sudden and supposidly last minute change, it appeared that the defense strategy would need to be adjusted as well.

Postponment seemed the only option. While invoking the judgement of Superior Court by Interlocutory Appeal under 42 Pa.C.S. 702(b) would take some time, the high probability at eliminating the aggravator was a more favorable option.

Filed at 3005 EDA 2003 (exhibit three), the Interlocutory Appellate Court is subject to certain statutorily imposed prerequisits before its jurisdiction is invoked.

Nowhere better or before, ***Scarborough*** *infra.*, assembles cases of old to make clear the duty of lower courts, counsel and its own when incountering permissive interlocutory appeaels:

> For a party to secure a permissive interlocutory appeal, three prerequisits must be met: (1) the interlocutory order must contain a certification from the trial court that the order involves a controlling question of law as to which there are substantial grounds for a difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter; (2) the party seeking to appeal must file with this Court a petition for permission to appeal (rather than a notice of appeal): and (3) this Court must, in its discretion, grant permission to appeal. *Hoover v. Welsh,* 419 Pa.Super. 102, 615 A.2d 45, 46 (Pa.Super. 1992); Pa.C.S.A. 702 (b); Pa.R.A.P. 1301-23. We, in turn, make our discretionary decision to grant or denie permission to appeal by determining whether there is indeed some substantial basis for differing opinions regarding controlling law and whether an appeal may in fact materially advance the termination of the case. Pa.R.A.P. 1312(a)(5).
>
> It is important to note, however, that this Court has no legal authority to exercise it discretion until the first two of the forgoing prerequisits have been met. Hoover, 615 A.2d at 46. Those two requirements--a certification by the trial court and a petition for permission to appeal--are jurisdictional. ***Commonwealth v. Yingling,*** 2006 PA Super 319, 911 A.2d 572, 575 (Pa.Super.2006); ***Commonwealth v. Fleming,*** 2002 PA Super 56, 794 A.2d 385, 387 (Pa.Super. 2002); Hoover, 615 A.2d at 46. If a trial court does not include the necessary certification sua sponte, a party may request that the court **{9 A.3 211}** do so []. This Court must quash an appeal if the interlocutory order lacks the necessary certification or if the appellant did not petition us for permission to appeal. ***Yingling,*** 911 A.2d at 575; ***Fleming,*** 794 A.2d at 387; ***Hoover,*** 625 A.2d at 46. ***Commmonwealth v. Scarborough***, 9 A.3d 206, 211, 2010 Pa.Super.LEXIS 3811

CRONIC INEFFECTIVENESS:

Interlocutory was initially stalled at defense counsel's filing of a 'Notice of Appeal' rather than the required "Petition fo Permission to Appeal":

The trial court filed its 42 Pa.C.S. 702(b) statement within the 30 day period under statutory mandate.

On December 29, 2003 defense counsel filed an application for extention of time to file a brief. Superior granted the motion on Dec. 30 extending that timeline to January 29, 2004. In the interim, Superior discovered that defense counsel's 'Notice of Appeal' did not meet the statutory prerequisit. On January 15, 2004 Superior (3005 EDA 2003), issued *per curiam* order stating:

> "Within (14) days of the date that this order is filed, why this appeal should not be quashed for failure to file a petition for permission to appeal pursuant to Pa.RAP 1311(b)

On January 29, 2004 defense counsel filed a response but, did not file a "Petition for Permission to Appeal" as required. Twenty-eight days later, February 26, 2004 Superior QUASHED the appeal but also granted counsel an additional 30 days to file properly.

SEE: exhibited *3, part two, ORDER 02/26/2004 line 10 stating;*

> "However, it also appears that the trial court misled Mr. Heleva's counsel by directing him to file a notice of appeal"" and at line 13; "Consequently, Mr. Heleva is hereby permitted to properly file a petition for permission to appeal in compliance with Pa.RAP 1311 & 1312 within thirty days of the date that this Order is filed."

"A defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision: filing a notice of appeal is a puely ministrial task, and failure to file reflects inattention to the defendants wishes." *Roe v. Flores-Ortega, supra* at 477

How much more-so when a Court, by its Order, not only instructs and explains exactly why (to be in accordance with the statutes jurisdictional mandate) but, also allows counsel for the defense an additional thirty (30) days to properly file ?

Heleva remained incarcerated under the belief that the case was being presented to Superior. That the Interlocutory Appeal was being pursued. That Appeal was likely to succeed.

Interlocutory Appeal was a sound and highly plausible alternative defense strategy because it held sufficient substance as a viable choice. An order from Superior mandating that the commonwealth be restricted from designating the trial as Capital whould take death "off the table". Defense counsel would then be better able to put the commonwealth's case to a truely adversarial process as apposed to combatting the sensationalizms of "torture" "axe-murder" ect.

Counsel ***chose*** not to file the correct prerequisit of "Petition for Permission to Appeal". Petitioner states chose (past-tense of choice), because Superior specifically quoted Rule and Law,

cited cases, and granted counsel ample time to properly invoke its jurisdiction. Counsel, rather than accept the Court's invitation, attempted to ***evade*** Superiors Order with his second attempt at extention of time.

PREJUDICE: While *Cronic* precludes a showing of prejudice, *Strickland v. Washington*, 466 US 668, 80 LEd2d 674, 104 SCt. 2052 (1984) does not. Where counsel's abandonment of the Appeal cast its shadow over the entire trial, demonstrating how conviction was achieved is belived to be appropriate, if not of significant importance.

Heleva was found not guilty of all original murder charges by a jury of his peers, thus eliminating the necessity of a 'sentencing phase'. Except here; where the jury, family of the deceased, the public and defendant were subjected to unnecessary, prejudicial and sensational dictums.

First and foremost there was no torture. Monroe County's Coroner/Medical Examiner initially listed blunt forse trama and gun shot wounds as the cause of Mendez's death but later revealed that the wounds produced by the axe-like weapon did not bleed. Therefore Mendez was deceased at the the time his body sustained post-mortum damage.

Under Pennsylvania Criminal Statutes, the act is defined as "Abuse of a Corpse" at Title 18 Pa.CS 5501 which carries a maximum sentence of two years at 18 Pa.CS 106(b)(7):

> **18 Pa.CS 5501** "Except as authorized by law, a person who treats a corpse in a way that he knows would outrage family sencibilities commits a misdemeanor of the second degree." History: Act1972-334 (SB 455) PL 1482 Sec.1 *approved* Dec.6, 1972 **18 Pa.CS 106 Classes of Offenses**. (b)(7) "... a person convicted thereof may be sentenced to a term of inprisonment, the maximum of which is not more than two years." History: Act 1997-44 (SB 45) PL 379 sec.1 *approved* Oct. 2, 2997

Secondly, and that which Heleva initally belived was by ambush, the charge of 'Accomplice Liability'. No former counsel for the defendant (including trial counsel), or the commonwealth, ever informed, notifed or served petitioner the amended charge.

a. Accomplice Liability the amended information filed April 1, 2002 lists the charge as Title 18 Pa.CS 2501A -- No such statutory charge exists. In the Commonwealth of Pennsylvania, the only legislative statutes containing the verbage "accomplice liability' are 18 Pa.CS 2502(b) {second degree murder} 18 Pa.CS 302 *et seq.* or an agravator at 18 Pa.CS 9711(d)(13) *et.seq.*

Again: There is no Title 18 Pa.CS 2501A, it simply does not exist. Tite 18 Pa.CS 2501(a) defines criminal homicide while part (b) provides clasification:

(a) *Offence defined.* A person is guilty of criminal homicide if he intentionally, knowingly, reclklessly or negligently causes the death of another human being.

(b) *Clasification.* Criminal homicide shall be clasified as murder, voluntary manslaughter, or involuntary manslaughter.

History: Act 1972-334 (SB 455) Pl 1482 seq. 1 approved Dec. 6, 1972

Here, the information amended April 1, 2002 lists Count One as 18 PA.CS 2501A, F-1 (acting as principal); Count Two (both as to John Mendez), lists 18 Pa.CS 2501A, F-1 (accomplice liability).

Stated prior, Heleva was found Not Guilty of First Degree Murder. The commitment documents (300B), submitted to the Department of Corrections lists Title 18 Pa.CS 2502A, First Degree Murder. As in 2501A, likewise 2502A does not exist. Even supposing that capital "A" is also small case "a"; First degree murder is as innumerated by the legislative statute under Title 18 Pa.CS **2502 Murder,** defining by degree first, second and third (a)(b)(c), and at (d), definitions:

(a) *Murder of the first degree.* A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

(b) *Murder of the second degree.* A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or accomplice in perpetration of a felony.

(c) *Murder of the third degree.* All other kinds of murder shall be murder of the third degree. Murder of the third degree is a felony of the first degree.

(d) *Definitions.* as used in this section the following words and phrases shall have the meanings given to them in this subsection:

"Fireman.", "Hijacking.", "Intentional Killing." (definitions omitted) and;

"Perpetration of a felony".--The act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

"Principal." --A person who is the actor or perpetrator of the crime.

History: Act 1972-334 (SB 455), PL 1482 sec.1 approved Dec. 6, 1972, Act 1974-46 (HB 1060), PL 213 seq.4 approved Mar. 26, 1974 eff. immediately: Act 1978-39 (SB 1118), PL 84 seq.1 approved Apr. 1978

First Degree Murder, Title 18 Pa.CS 2502(a) does not include "accomplice liability". Second Degree does, by its langage, include "perpetration of a felony" coinsiding with definitions at (d).

Heleva was not charged with Second Degree or any of the criminal statutes that described as perpetrating. The commonwealth's attorney, on September 29, 2002 stated specifically 'There is no evidence to show Mr. Heleva had any involvement in the [death-murder] of Ricardo Lopez." (*sic*)

Legislative Statutes give the Court's their power. Legislative Acts (*ie. statutes*), are what gives prosecutors the power to charge criminal offences, those Acts are what society deems outrageous or offensive. In an adversarial system of justice, prosecutors cannot charge offences that are not Legislatively defined as criminal offences.

As pertaining to accomplice liability, the same legislative Acts at 1972-334 (SB 455), PL 1482 *et seq*, include Titles 18 Pa.CS **302. General Requirements of Culpability**. and **306. Liability for conduct of another: complicity**.

Heleva was not charged with either offense. The reason is obvious:

Title 18 Pa.CS 302(a) *Minimum requirements of culpability* -- Except as provided in section 305 of this title (relating to limitations on scope of culpability requirements), a person is not guilty of an offense unless he acted intentionally, knowingly, reclessley or negligently, as the law may require, with respect to each material element of the offence.

Title 18 Pa.CS 306 Liability for conduct of another: complicity.
(a) *General rule.* -- A person is guilty of an offence if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.
(b) *Conduct of another.* -- A person is legally accountable for another person when:
(1) acting with the kind of culpability that is sufficient for the commission of the offence, he causes an innocent of irresponsible person to engage in such conduct;
(2) he is made accountable for the conduct of such other person by this title or by the law defining the offense; or
(3) he is an accomplice of such other person in the commission of the offence.
(c) *Accomplice defined.* -- A person is an accomplice of another in the commission of an offense if:
(1) with the intent of promoting or facilitating the commission of the offence, he:
(i) solicits such other person to commit it: or
(ii) aids or agree or attempts to aid such other person in planning or committing it: or

(2) his conduct is expressly declared by law to establish his complicity.

The commonwealth's attorney did not charge Heleva with culpability because the statutes forbid such a charge under the exceptions.

Title 18 Pa.CS 306 (f) *Exceptions.* -- Unless otherwise provided by this title or by the law defining the offence, a person is not an accomplice in an offense committed by another person if:
(1) he is a victim of that offense:
(2) the offence is so defined that his conduct is inevitablby incident to its commission; or
(3) he terminates his complicity prior to the commission of the offense and:
(i) wholly deprives if of effectiveness in the commission of the offese; or
(ii) gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offence.

It was well known that under the circumstances, Heleva acted with a standard of conduct that a reasonable person would in that situation (302) and made every effort to prevent the death of Mendez by contacting law enforcement authorities in the only way available to him at the time (306). Unfortunately, Mendez had already sustained fatal injury.

Otherwise, Accomplice Liability is an aggravating circumstance under Title 18 Pa.CS 9711 which is a sentencing procedure for murder in the first degree. At (a) *Procedure in jury trials:*
(1) After a verdict of murder in the first degree is recorded and before the jury is discharged, the court shall conduct a seperate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment.

Part (d) lists Aggravating circumstances. -- shall be limited to the following:

(8) is torture, which did not exist, (13) states, The defendant committed the killing or was an accomplice in the killing, as defined in 18 Pa.CS 306(c)(relating to liability for conduct of another; complicity), while in the perpetration of a felony under the provisions of the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act, and punishable under the provisions of 18 Pa.CS sec. 7508 (relating to drug trafficking sentencing and penalties).

Neither defendant (Heleva or Sepulveda), was charged under the 'Controlled Substance Act' or any other drug related offences. Not withstanding the fact that defense counsel never made a single objection (thus failing to preserve any issues), counsel never challanged the

accomplice charge itself.

"Accomplice" was presented to the jury as an aggravator with prejudicial, un-charged and unfounded accusations, labling Heleva as "King Pin" "chopping up Mendez to show his minions who's boss" and claiming the murder and torture was the result of "a drug deal gone bad" ect. ect. and more than memory serves without the benifit of the transcripts. (Department of Corrections limits the accumulation of documents.)

b. The Brady Violation. *Where petitioner was compelled to waive the violation on the state level due to the commonwealth's overwhelming abuse at preventing Heleva from developing his claims (and the wonton destruction of evidence, including that stored in the State Police archives), the violation is not presented here under "Brady" but used as an exampler to demonstrate defense counsel's refusal to put the commonwealth's case to an adversarial test.*

The parties were attached on July 30, 2004. Vior Dere was scheduled to commence on November 3, 2004 *accord trial court docket.* Part two of the attaching Order (06/30/2004), states

2. All motions for consideration by the Court shall be filed on or before August 31, 2004.

September 10, 2004 the commonwealth filed its late motion: "SUBSTITUTE ORGINAL TRIAL EXHIBITS" in Comm v. Sepulveda with accurate photographic representations ..." The "photographic representations" were far from accurate, blending two seperate crime scene videos into one, depicting a three day investigation where the investigation was actually only five hours. Flipping from day to night, day to night and back again the video presented to the jury supported the commonwealth's scenerio of events - not the actual facts. *Thus, the destruction of evidence.*

Defense counsel was served the late motion and had ample opportunity before and durring trial to invoke the "Original Documents Rule" at Pa.R.E. Rule 1002 (*same in Federal*).

Whether by motion pre-trail or objection durring trial to preserve the issue, counsel failed.

Case in Point: With unfettered access to the original evidence, there is no purpose served at substituting original exhibits unless to prejudice the defendant in an attempt to gain conviction as apposed to justice. Again, even at the insistance of petitioner, defense counsel refused to object or ask for dismissal at the misconduct. Thus failing to put the commonwealth's case to the adversarial testing required by Law. *Cronic* at 658-59 (presumption of prejudice applies when

counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing,").

Ironicly, *after* petitioner was convicted and sentenced to life in prison, counsel filed his Pa.R.A.P. Rule 1925(b) statement presenting a singular issue, prosecutorial overreaching. Direct Appeal was closed at counsel's failure to file a brief. exhibited *four* (05/20/2005). *Mickens v. Taylor*, 535 US 162, 166, 152 LEd2d 291(2002)(prejudice presumed where counsel was "denied entirely or durring a critical stage of the proceeding')

c. Compulsory Process.

The Fifth Amendment guarantees that "[no] person shall...be deprived of life, liberty, or property without due process of law." U.S.Const.amend.V. The Sixth Amendment guarantees a criminal defendant's right "to have compulsory process for obtaining witnesses in his favor. *Ib*.amend.VI

Two witness were subpoenaed and present. Neither was called where defense counsel *immediately closed*, offering no defense to the jury. Both witnesses were prepared to testify that Heleva's employment demanded his presence on the job in PrincessAnn Maryland, 400 miles from home, from February of 2001 until November. Thereby not a supervising parant.

Fundamentally, "the constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 746 US 683, 690, 106 SCt. 2142, 90 L.Ed.2d 636 (1986); *Chambers v. Mississippi*, 410 US 284, 294, 93 SCt. 1038, 35 L.Ed.2d 297 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations); *Groseclose v. Bell*, 130 F.3d 1161, 1169-70 (6thCir.1997) (describing defense counsel's "failure to have any defense theory whatsoever" and "failure to conduct any meaningful adversarial challenge" as "especially appalling."

Cause and Prejudice: first question at review;

Post-trial Appeals are all but automaticly reinstated without a showing of merit, as a matter of Right "when counsel fails to file a requested appeal" *Perguero v. United States*, 526 US 23, 143 LEd.2d 18, 119 S.Ct. 691 (1999)

As an Interlocutory Appeal, reinstatement is lost once Quashed (here at counsel's indulgence). A jury's finding of not guilty on the subject matter of the appeal lost does not cure counsel's abandonment of the appeal when the subject (torture), pervades every part of the trial, works a prejudice and creates a prejudicial atmosphere.

When courts of review refuse to consider abandonment of an interlocutory appeal under *Cronic*, the defendant is forced to overcome the presumption of reliability of judicial proceedings by demonstrating how specific error(s) undermined the finding of guilt under the prejudice prong of *Strickland.*

In this case, State Courts of review used Strickland's prejudice prong as a "stand alone" principal without considering the performance inquarry. Thus, review courts held rulings inconsistant with Strickland's holding that "the preformance inquary must be whether counsel's assistance was reasonable considering *ALL* the circumstances." 466 US at 688 (emphasis added) *same, Roe v. Flores-Ortega*, 528 US at 478 [4a]

The PCRA court stated (but refuses to transcribe), its oral conclusion: "You were found not guilty of torture, so where is the prejudice?" District Court struck petitioner's doc. 69 without explanation; Circuit Court overlooked the prejudice and filed no opinion at denial *En Banc* -- all defering to PCRA courts erronious findings.

It is the magnitude of the deprivation of effective assistance on which prejudice is presumed "because of the effect it has on the ability of the accused to receive a fair trial", *Cronic* at 658, or a fair appeal, *Penson v. Ohio,* 488 US 75, 88-89, 109 S.Ct. 346, (1988)

The trial process can not be deemed as fair where the defendant is actually and constructively denied the assistance of counsel altogether. *Cronic supra.* Where the prosecution has no evidence of guilt, it can not be permitted to poison the trial mechanism with impudence.

Prosecutorial Overreaching spread through every part of the proceedings; pre-trial, trial and long thereafter. Overreaching subverted the truth seeking process, poisoned the jury and insulted every review. Had counsel not abandoned the Appeal, the commonwealth's case very likely could not have remained Capital: high profile sensationalism would have ceased.

Counsel's abandonment was complete abandonment: pre-trial at failing to perfect the Interlocutory Appeal, Trial at refusing to object (failing to preserve *any* issues for review), Post-trial at failing to Brief the Direct Appeal and, as the bulk of the record reveals, long after at constantly changing his story and excuses in review hearings in avoidance of the facts: Thus, frustrating post-conviction collateral proceedings. Due Process was tainted at every stage.

Cronic ineffectiveness, the denial of effective assistance at every stage of the criminal process rendered the verdict unreliable.

WHEN A TRIAL COURT IS INFORMED AND AWARE THAT A DEFENDANT IS NO LONGER REPRESENTED BY COUNSEL: IS DISCRETION ABUSED AT ACCEPTING A WAIVER OF CONSTITUTIONAL RIGHTS FROM THAT COUNSEL WHICH CONFERS JURISDICTION BEYOND ITS LEGISLATIVE POWER, WITHOUT JUSTIFIABLE CAUSE, NOTICE TO THE DEFENDANT, OR COLLOQUY ?

ANSWER: YES, DISCRETION IS ABUSED.

Continuing from the fist question for review, trial counsel did not become effective after abandoning the pre-trial Interlocutory Appeal. Counsel ineffectiveness consumed other basic Constitutional Rights and clauses for the duration of the entire trial process. Most prominent was the denial of speedy trial.

The Sixth Amendment right to speedy trial, basic to due process, applies to state held criminal proceedings by virtue of the Fourteenth Amendment.

> Klopfer v. North Carolina, 386 US 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967)
> Smith v. Hooey, 393 US 374, 89 S.Ct. 575, 21 L.ED.2d 607 (1969)
> Dickey v. Florida, 398 US 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970)
> Barker v. Wingo, 407 US 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)
> Strunk v. U.S., 412 US 434, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973)

The Barker Court formulated a four part test to evaluate speedy trial challenges when the violation is raised. The test is to be appied to each individual case with consideration given to: Length of delay, Reason for delay, defendants assertion of the Right and, Prejudice.

In this case, Barker was invoked in that the total time between arrest and vior dere was one-thousand and seventy two (1,072) days, thus seperating ordinary delay from presumptively prejudicial delay.

Here, *Cronic* ineffectiveness and Heleva's Constitutional Rights to speedy trial collided intrinsicly. Each so entangled and dependent upon the other that, the inured nature makes separation of the issues difficult to articulate. Therefore, Petitioner is forced to provide a Barker Evaluation in two parts, Pre-Quash of the Interlocutory Appeal and Post-Quash, respectively;

Arrest occured on November 26, 2001 marking as the first day for a proper and accurate *Barker Evaluation*. Petitioner was held in custody without bail. November 26, 2001 is **day one**.

A Suppression Hearing (Omnibus) was scheduled for May 15, 2002. Then assigned counsel asked for a continuance. Includable time from November 26, 2001 until May 15, 2002 was one-hundred seventy-one (171) days.

Despite PCRA court's erroneous opinion, which altered 'law-of-the-case' doctrine prejudicially, without explanation, contrary to the trial court docket (. exhibited), See: Roberts v. Ferman, 826 F.3d 117, 126 (3rdCir.2016)(*quoting* Williams vs. Runyon, 130 F.3d 568, 573 (3rdCir.1997), and argued extensively below (see dist.doc.#80, COA, and *En Banc*), the re-scheduled hearing did in fact occur on June 27, 2002 - that continuance is excludable.

June 28, 2002 restarts includable time. **Accord;** 1Pa.C.S.*sec*.1908 **Computation of time**. *in part* "... shall be so computed as to exclude the first and include the last day of such period." **Accord;** Pa.R.Crim.P. Rule 581. **Suppression of Evidence**, part I, *in part*, (I) At the conclusion of the hearing, the judge shall enter on the record a statement of findings of fact and conclusions of law as to whether the evidence was obtained in violation of the defendant's rights, ..." at *comment*, Rule 581(I) sharply condemns the practice of judicial delays upon the conclusion of hearings, mandating finality. **Accord;** Com. v. Millner, 585 Pa. 237, 888 A.2d 680 (2005) reiterating "the importance of a specific and contemporaneous announcement of findings of facts and conclusions of law at the conclusion of the suppression hearing." **Accord;** Pa.R.J.A. (judicial administration), Rule 703 Reports of Judges at (B)(2) "Every judge shall compile a semi-anual report stating whether the judge has any matter that has been submitted to the judge for a decision and remains undecided for ninty days or more as of the last day of the reprting period." (a) "Decision includes the grant or denial of a pretrial ... motion or petition, entry of an order or judgement, ..., or the filing of an opinion." **Accord;** Trial court docket.

From June 28, 2002 until November 28, 2002 with the filing of the first waiver of speedy trial, allowing new counsel time to review the case and devise a defense, one-hundred and fifty three (153) days of includable time passed.

That first waiver expired on June 30, 2003 restarting includable time. Defense counsel, *with waiver in hand*, stated that neither he, nor the prosecution, was prepared.

Heleva was furious. The prosecutions lack of preperation was of no concern and had no bearing on the decision to be made. Heleva strenuously reproached counsels lack of tentativeness to the task for which he was retained. Heleva demanded that trial commence, rejected the proposed waiver and refused to waive more-than 90 days - and only after a written Order for a date certain was delivered. Thus, without knowledge of the particulars, Heleva did in fact assert his right to speedy trial as described in *Barker's* part three.

The trial court acknowledged the demand by filing its Order that trial would commence on or before October 6, 2003 prior to the ninty (90) day waiver being filed on July 8, 2003. Those eight (8) days, between waivers are includable, bringing the *Barker* total of includable days to three-hundred thirty two (332): 171+153+8=332

On September 29, 2003 (as demonstrated at Question One), Heleva was convinced that the commonwealth's last minute troture charge was a "surprise move". The trial court was insistant in that Heleva understood how the taking of an Interlocutory would effect his Constitutional Right to speedy trial and that the transaction between the Trial Judge and Heleva was recorded as a colloquy.

This concludes part one of the *Barker Evaluation*, bringing the case and This Court up to the date that the Interlocutory Appeal was entered upon, the time for which is excludable until the Quash of same.

Trial Court and Superior dockets exhibited

The exact day when includable time resumes may well be a matter better decided by This unbiased Court. Pennsylvania Superior Quashed the Interlocutory Appeal at 3005 EDA 2003 on February 26, 2004. File remitted April 2, 2004. Question is, at what point the prosecution and/or the trial court was notified. Superior docket (exhibited, Question One, #3), states on page 3:

DISPOSITION INFORMATION

Final Disposition:	Yes		
Related Journal No:		Judgment Date:	February 26, 2004
Catagory:	Decided	Disposition Author:	Per Curiam
Disposition	Quashed	Disposition Date:	February 26, 2004

Disposition Comment: THE MOTION FOR ENLARGEMENT OF TIME TO FILE BRIEF IS DENIED AS MOOT. *4/2/04-CERT. COPY OF ORDER DATED 2/26/04, RECORD, (1) VOL. OF TESTIMONY & (1) ENV. OF EXHIBITS EXIT TO L/C.
Record Remittal: April 2, 2004

As far back as September 29, 2003 the Commonwealth was dangerously close to running afoul of Petitioner's Constitutional Right to speedy trial. With only thirty-three (33) days remaining on the clock, a close watch of Superior's actions on the Interlocutory was warranted. Moreso considering the Quash of February 26, 2004; to which the prosecution was, or should have been, aware. Especially being a party to the action. Where the prosectution and trial court was notified electronically, April 3, 2004 would be the date includable time resumed.

The Commonwealth claims; Superior's return of the file 4/4/04 calculates the following day, April 5, as the date includable time resumes. The relevancy of a true to fact determination is in filing date of the prosecutions "Motion of Scheduling Conference" - May 5, 2004

THE QUANDRY BEING; With three-hundred thirty-two (332) includable days expired prior to the entry of the Interlocutory Appeal and includable time resuming as the 333rd day ... if that day was April 5, the commonwealth's motion was filed on day 363. On the other hand, if includable time resumed on April 3, 2004 the motion of May 5 was filed on day 365.

This Court might, in its discretion, dismiss the calculation as inconsequential. Whether the commonwealth filed two days before or on the day time expired, it remains physically and logisticly impossible to conduct vior dere in a Capital Case within twenty-four hours.

Even *if* vior dere was completed and the jury selected was on stand-by (for eight months plus), openning statements could not be delivered in 24 hours. Jury call notices, obtaining archival evidence, final motions *ect.;* basic logistical concerns in conducting a Capital trial make it impossible, even irrational, to conclude anything other than one clear fact - the commonwealth ran out of time.

Time was the commonwealths only concern. The motion filed May 5, 2004 harbors the truth: the prosecution, at para 4, signed and verified by the district attorney (exhibited), blames the defense for its shortcoming:

> 4. Notwithstanding his previous representation to the trial court as to the propriety of the pre-trial appeal, counsel for the defendant **never notified the Commonwealth of his intention** to abandon the appeal.

Barker's second factor applies; 407 US at 531. The burden of explaining delay rests with the government. *See* US v. Claxton, 766 F.3d 280, 294 (3rd.Cir. 2014)(placing burden of explaining

delay on government). Pennsylvania mimics *Barker*, also placing the burden on the government.

Filing for a 'scheduling conference' at the last hour falls short of Due Diligence; be it under state of federal determination, *IF* a full review of the true and correct case doctrine is examined under the Constitutional lens.

Only in limited cases, when the government files a "good faith", legitimate and justifiable Interlocutory Appeal is such a filing (which postpones trial), not considered to weigh heavily against the government. Us v. LoudHawk, 474 US 302, 316 (1986). And in such a scenerio: reasonableness, the strength of the issue, its importance and the seriousness of the crime is assessed. *Id* at 315.

Delays resulting from valid reasons can be excused (case complexity). Or as a result of the defendants actions, such as escape, firing lawers or filing "bad faith" motions and appeals are not held to violate a defendants speedy trial rights.

HERE: Prosecutorial Overreaching caused the interlocutory appeal. Moreover, the only "complexity" in this case was due to the prosecutions actions, not the defendant. In other words; because the prosecution got the delay they wanted, it cannot later complain or blame the defense for it's not being prepared to proceed. Furthermore, how Superior ruled on the Appeal, whether Quashed, Granted, reversed or remanded, does not justify the prosecutions failure to exercise Due Diligence. **The case coming back to the trial court was inevitable, regardless the cause.**

Aside from the obvious, that the commowealth failed to observe its own calander, much information is revealed in the May 5, 2004 filing never served upon Heleva himself.

Because the trial court Ordered a scheduling conference for the next day: he (the trial judge), "knew or should have known" the full content of the Commonwealth's filing, i.e. the prosecution informed the court that counsel abandoned the interlocutory appeal.

> 4. Notwithstanding his previous representations to the trial court as to the propriety of the pre-trial appeal, counsel for the defendant never notified the Commonwealth of his intention to **abandon the appeal.** (emphasis added)

Thus, the prosecution informed the trial court of defense counsels deficient performance at a critical pre-trial stage of the criminal proceeding. *Cronic* ineffectiveness.

Petitioner Heleva, was not informed. Not by the prosecution, not by the trial court and most certainly not by defense counsel (shown *infra*).

ABUSE OF DISCRETION, *part one:*

The trial court, having been informed of defense counsels "intentional abandonment" of the pre-trial Interlocutory Appeal but not notifying the defendant of counsel's deficient performance, denied Heleva's Constitutional Right to choose counsel that he believed would best represent his interests.

The right to select counsel of ones choice has been regarded as the root meaning of the constitutional guarantee. *See* Wheat v. United States, 486 US 153 at 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 Where the right to be assisted by counsel of one's choice is wrongly denied, it is unnecessary to conduct an ineffectiveness or prejudice inquarry to establish a Sixth Amendment violation. Depreivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice -[]- with the right to effective counsel. *quoting* US v. Gonzalez-Lopez, 548 US 140 at 147-148, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). The error is a "strucural defect which "affects the framework within which the trial proceeds" and "not simply an error in the trial process itself." *quoting* Arizona v. Fulminante, 499 US 279, 111 S.Ct.1246, 113 L.Ed.2d 309 (1991)

But See: Freeland v. Glunt, 2018 US Dist. LEXIS 90200 "The Sixth and Fourteenth Amendments guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment. See Powell v. Alabama, 287 US 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932): Johnson v. Zerbst, 304 US 458, 58 S.Ct. 1019, 82 L.Ed 1461 (1938); Gideon v. Wainwright, 372 US 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)."[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer he prefers." *Wheat* at 159. Consequently, the Sixth Amendment right to counsel does not guarantee a meaningful relationship between a defendant and counsel. Morris v. Slappy, 461 US 1, 13-14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). Additionally, although a defendant's right to counsel includes the right to counsel of one's choice, the "right to counsel of choice does not extend to defendants who require counsel to be appointed for them". *Gonzalez-Lopez* 548 US at 151.

Here. Heleva was denied that choice. The trial court knowingly "strapped" Petitioner to counsel known to be ineffective. Moreso, defense attorney Fannick was retained and paid additional funds to pursue the Interlocutory Appeal. Had Heleva been informed of the abandonment, Fannick would have been fired immediately and reported to the Disciplainary Board as he was at the failure to brief the Direct Appeal. The point here is that another attorney could have been hired or assigned for the defence, given a choice.

SEE: United States v. Roland, 2016 US Dist. LEXIS 26204:

To be sure, "another right is derived from the right to effective assistance of counsel": "a defendant should be afforded a fair opportunity to secure counsel of his choice." *Moscony,* 927 F.2d at 748 (quoting Powell v. Alabama, 287 US 45 at 53): *see also United States v. Voigt,* 89 F.3d 1050, 1074 (3rdCir.1996) ("One element of this basic guarantee [of the Sixth Amendment] is the right to counsel of choice." (citation omitted in original)). After all, a

> primary purpose of the Sixth Amendment is to grant a criminal defendant control over the conduct of his defence-as "it is he who suffers the consequences if the defense fails,"-and"[a]n obviously critical aspect of making a defense is choosing a person to serve as an assistant and representative." Moscony, 927 F.2d at 748(citations omitted)(first quoting Faretta v. Calfornia, 422 US 809, 802, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975))(second quoting Wheat, 486 US at 166 (Marshall, J., dissenting)). Thus, "a presumptive right to the counsel of one's choice has been recognized as arising out of the Sixth Amendment"-and, unless this presumption is overcome, a criminal defendant has the right to choose his or her counsel. *Id.*(citing Wheat, 486 US at 159(majority opinion)).

In this instant case; To make an informed choice, one must first be informed.

SEE: United States v. Lebed, No.05-362, 2005 US.Dist,LEXIS 16767, 2005 WL 1971877, at* 3 (E.D.Pa. Aug. 12, 2005)("A trial court has discretion to order attorney dequalification upon a finding of actual conflict or serious potential conflict, ...)

Importantly, however, "a trial court may not arbitraily deny a defendant's right to counsel of choice." Voigt, 89 F.3d at 1075. Normally, the trial court should conduct an evidentiary hearing of factual inquary to determine whether disqualification is appropriate and should inquire into the nature of the conflict **and the client's awareness of the conflict**." *Government of Virgin Islands v. Zepp*, 748 F.2d 125, 139 (3rdCir.1984). (emphisis added by petitioner)

Returning to Barker; On May 5, 2004 as mentioned, the trial court scheduled a hearing for the following day. However, counsel informed the court he would not be available until May 10th.

Accord 1 Pa.C.S. 1908 Computation of time, "exclude the first, include the last". *But See;* Pa.R.Crim.P. Rule 600(C)(3) such period of delay at any stage of the proceedings as results from (a) the unavailability of the defendant or the defendant's attorney. *See also;* **Legislative Intent Controls,** 1 Pa.C.S. 1921, therefore May 6, 2004 is includable at either day 364 or day 366.

The trial court docket states at page 11 of 60; "Order filed and now this 6th day of May upon oral motion by defense counsel the scheduling conference scheduled for May 6, 2004 at 4pm is rescheduled to May 10, 2004 at 3:30 pm in judges chambers .."

May 7, 2004 states only: waiver of rule 600 filed.

Revealed in 2014, counsel was in chambers on May 7, 2004 attending an "OFF RECORD" scheduling conference counsel claimed not to be available for.

That "OFF RECORD" (commonwealth's 12/29/14pg.5 line 8), "scheduling conference" conducted on May 7, 2004 qualifies as a hearing, a critical state under *Cronic* - it is at that point which "other rights of the accused" need to be protected. 466 US at 659. At 654 the Cronic Court emphasized that "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive[,] for it affects his ability to assert any other rights he may have."

The Waiver filed May 7, 2004 is a waiver of Heleva's Constitutional Right to speedy trail. FUNDAMENT RIGHTS are derived from the natural or Fundamental Law, Constitutional and significant components of liberty. Encroachments of which are to be rigorously tested by courts to ascertain the soundness of purported governmental justifications. A fundamental right triggers strict scrutiny to determine whether the encroachment violates the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. (Blacks Law 7th edition)

What suffices for waiver depends on the nature of the right at issue. "[W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be perticularly informed or voluntary, all depends on the right at stake." United States v. Olano, 507 US 725, 733, 123 LEd2d 508, 113 S.Ct. 1770 (1993).

INTRINSIC NATURE OF VIOLATIONS:

Justice Ginsburg wrote the Opinion of This Court in Florida v. Nixion, 543 US 175, 160 L.Ed.2d 565, 125 S.Ct. 551 (2004). at 187:

> [5] An attorney undoubtedly has a duty to consult with the client regarding "important decisions," including questions of overreaching defense strategy. Strickland, 466 US at 688. That obligation, however, does not require counsel to obtain the defendant's consent to "every tactical." Taylor v. Illinois, 484 US 400, 417-418,(1988)(an attorney has authority to manage most aspects of the defense without obtaining the client's approval). But certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by surrogate. Adefendant, this Court affirmend, has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her behalf, or take an appeal." Jones v. Barnes, 463 US 475, 751 (1983); Wainwrite v. Sykes, 433 US 72, 93, n 1, (1977) Burger, C.J., concurring). Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action. (full citations in original)

The ruling does not fully encompass the factual situation this case represents where no case ever has: Here, defense counsel answered Heleva's inquarry concerning the status of the case, but no court of review has applied the *stirct scrutiny test* that a deprivation of fundamental right requires. The Ruling above indicates counsel's duty to consult with the client is in advance of the action taken, not after the fact and certainly not fictionally; Written June 22, 2004 (exhibited), the communication claims the interlocutory appeal is "alive and well". No mention of the Quash or the Legislatively impossible nunc pro tunc. Secondly, the latter states;

> "I believe your June letter and argument is somewhat misplaced. Please remember that we filed the Motion to Dismiss the Aggravating Circumstance and requested the matter be decided by the Superior Court prior to trial. Hence, any delay at this time will be attributed to the defense since we filed the Motion to Appeal. Any speedy trial issue is tolled or stopped during the pendency of the Appeal. You seem somewhat confused by this in your letter."

SEE: "Accused has the right to waive speedy trial and consent to continuance as long as he is properly advised either by counsel or court of his right to speedy trial." State v. Williams (1982) 211 Neb 650, 319 NW2d 748.

As To Surrogacy: Petitioners every effort to prove the waiver was ***not*** knowing, intelligent or voluntary, was stone-walled at every level. Heleva eventually managed to hire the

services of Peggy Walla (Daubert Qualified Expert), who examined the signature on the waiver, concluding in her written report;

"The following conclusion was drawn after a thorough examination of the document presented. It is my opinion, the purported signature of Daniel Heleva as seen on the above mantioned questioned document [May 7, 2004 waiver] was not authored by the same writer as seen on [witnessed documents of Heleva's known signature]" The full report was first exhibited in the Middle District, again in the second PCRA, and again before the Supreme Court of Pennsylvania. All to no avail. Eight (8) page report exhibited to this filing.

The fact that petitioner's right to speedy trial is fundamental is unqestionable. Strunk v. United States, 412 US 434, 93 S.Ct. 2260 (1973) Headnotes, Criminal Law *sec.* 48 - speedy trial [2] An accused right to a speedy inquary into criminal charges is fundamental, and the duty of the charging authority is to provide a prompt trial.

As a Fundamental Right concerning the Liberty Interest, speedy trial is one that can not be waived by surrogate:

It is well established that a citizen's waiver of a constitutional right must be knowing, intelligent, and voluntary. As for back as Johnson v. Zerbst, we held that court's must "'indulge every reasonable presumption against waiver' of fundamental constitutional rights.'" 304 US at 464, 58 S.Ct. 1019, 82 L.Ed. 1461. Since then, "[W]e have been unyielding in our insistence that a defendant's waiver of his trial rights cannot be given effect unless it is 'knowing' and 'intelligent.'" Illinois v. Rodriguez, 497 US 177, 183, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990)

ALSO: '...Waiver is not appropriate when it is inconsistant with the provision creating the right to be secured." *E.g.* Crosby v. United States, 506 US 255, 258-59, 122 L.Ed.2d 25, 113 S.Ct. 748 (1993): Smith v. United States, 306 US 1,9, 3 L.Ed.2d 1041, 79 S.Ct. 991 (1959).

Here, the waiver in question excludes for a year (365) days, what Petitioner demanded (trial), within 90 days prior to being charged with torture. Overreaching discussed *supra.*

Faulted Reviews: For the first decade, until late 2014, the commonwealth attempted to dismiss the May 7, 2004 waiver, contending that, because Heleva's "want" of review on the torture issue, justified further extentions, as if the colloquy of September 29, 2003 was a waiver of all time.

The notion is defective under the circumstance of counsel ineffectiveness leading to the definative end of the Interlocutory Quashed at counsel's indulgence, regardless of description.

ABUSE OF DISCRETION, ***part two:***

The May 7th waiver (appendiced), purports to allow defense counsel to file *nunc pro tunc* in Superior. In Pennsylvania, Legislative Acts forbid such actions in two respects;

Parallel with United States precident and common law, no court may confer jurisdiction by agreement of the parties. *SEE:* Mansfiefd v. Swan, 111 US 379, 382, 28 L.Ed.2d 426, 443, 4 S.Ct. 150 (1884) Mitchell v. Maurer, 293 US 237, 244, 55 S.Ct. 162, 79 L.Ed. 338 (1934)("A lack of jurisdiction cannot be waived or overcome by an agreement of the parties."). Historically, Pennsylvania common law dictated court rulings: Bellas v. Dewart, 17 PA. 85, 88, 1851 Pa.LEXIS 144 "..the exclusive source of the inquests authority,[], depends not on the consent of the parties, but on the Law." *Same:* Oil City v. McAboy, 74 Pa. 249: Camp v. Wood, 10 Watts 118: Scott v. Noble, 72 Pa. 115: McKee v. Sanford, 25 Pa. 105 *and* Camp v. Hall, 91 Pa.Super. 485: 1927 Pa.Super.LEXIS 219 *Holding*, "Consent cannot confer jurisdiction in a criminal proceeding, nor can it empower the court to act upon subjects which are not committed to its determination and judgment by the law. The law creates courts and, upon consideration of public policy, defines and limits their jurisdiction and manner of its exercise." *see also*; Com. v. Poly, 1952 Pa.Dist. & Cnty LEXIS 74: 87 Pa.D.&C. 129, "jurisdiction cannot be waived or conferred, **otherwise the whole purpose of the law would be frustrated."** (emphisis added)

The concept is well understood and acceptance of such constitutes an abuse of discretion in and of itself; Secondly,

The trial courts acceptance of the waiver equates an extention of time (*nunc pro tunc*), well known in Pennsylvania to be in direct conflict with Legislative Mandates. *See:* Bass v. Com. 485 Pa. 256, 401 A.2d 1133; 1979 Pa.LEXIS 812 "Basic to [Pennsylvanian] jurisprudence is the fundamental rule that courts not intrude on the province of the Legislature." "long the law in this Commonwealth, ,extentions of the statutory period for filing of appeals are 'only justified where there is fraud or some breakdown in the court's opporation.'" "Here there is absolutely no evidence or even suggestion of fraud or breakdown. All that is here is,, a delay caused by appellant's privately retained counsel. Thus, the circumstances of this case provide no basis for departing from the Legislature's and this Courts proscription against untimely appeals" "The statutory thirty day filing requirement is a legislative determination that appeals if taken must be

within that period. The requirement is a legislative judgment that statutory timely and adjudicative finality advance the quality of our jurisprudence. That date mination is binding upon all and legislatively fixed thirty days does not mean thirty days plus as many additional days as [the trial court] sees fit to grant."

Also, In Re Interest of A.P., 421 Pa.Super 141; 617 A.d2 764, 777; 1992 Pa.Super.LEXIS 4146 states," Trial courts do not have jurisdiction or power to extend or obviate time in which appeals may be lodged in appellate courts. [], Except to relieve fraud or its equivalent, the thirty day limitation [] may not be extended." **"Mere negligence of counsel is not a ground for obtaining a *nunc pro tunc* appeal."** citations omitted. (*emphasis added*)

The waiver of May 7, 2004 (appendiced) does both; confer jurisdiction *AND* extend time beyond legislative intent: The waiver of May 7, 2004 is "so facially invalid that the court could not reasonably presume it to be valid." United States v. Leon, 468 US 897 at 923.

ABUSE OF DISCRETION, *part three*;

There exists no legitimate purpose for the May 7, 2004 waiver. The clandestine nature of its existance on the record is in avoidance of the courts duty to develope a hard copy record.

> Pennsylvania Keys set the standards in criminal procedures, "Although judicial delay can be basis for extentions of speed trial period, trial court may grant such extention only upon record showing: due diligence of prosecution; and, certification that trial is scheduled for earliest date consistant with court business, provided that if the delay is due to court's inability to try defendant within prescribed period, record must also show causes of court delay and reasons why delay cannot be avoided."

Defense counsel's *"nunc pro tunc"* filing was advansed without asking the court to hold a hearing or prepare a second 42 Pa.CS *sec.* 702(b) to verify whether or not the attempt was the result of "fraud or some breakdown in the courts opperation." *Also*, the trial court failed to inquire as to the propriety of the filing, or develope a record. *THUS*; both issues, deprivation of speedy trial and ineffectiveness of counsel collided, depriving Heleva of all Constitutional Rights enjoyed by citizens accused of crimes. These combound failures represent the third *Cronic* instance where counsel put himself into a position that no counsel could defend his client.

Fannick, in later PCRA hearings addmitted to the fact that he himself wrote the waiver of May 7, 2004 (but not until 2014) (those statements of counsel are disjointed as his memory and

accuracy differ, depending upon who is posing the question)

The commonwealth's ingenuous excuses for the waiver conclude that the waiver was mererly a matter of scheduling, in the effort to legitimize the waiver of May 7, 2004:

This Court, in New York v. Hill, 528 US 110, 145 L.Ed.2d 560, 120 S.Ct. 659 (2000) determined that counsel's "decisions pertaining to the conduct of a criminal trial" is binding upon the defendant. Among such instances "scheduling matters; absent a demonstration of ineffectiveness" was held to be controlling: "provided that for good cause shown ..., the prisoner or his counsel being present, the court ... may grant any necessary or reasonable continuance." and also held: "This Court has articulated a general rule that presumes the availability of waiver, US v. Mezzanto, (citation omitted), and has recognized that the most basic rights of criminal defendants are subject to waiver, Peretz v. US (citations omitted). For certain fundamental rights, the defendant must personally make an informed waiver, but scheduling matters are plainly among those for which agreement by counsel generally controls."

While Hill concerns an IAD case, scheduling and *NOTICE* from counsel pertain directly:

> "For other rights, however, waiver may be effected by action of counsel. "Although there are basic rights that the attorney [528 US 115] cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has-and must have-full authority to manage the conduct of the trial." Taylor v. Illinois, 1988 (citation omitted). As to mary decisions pertaining to the conduct of the trial, the defendant is "bound by the acts of his lawyer-agent **and is considered to have 'notice of all facts, notice of which~~an~~ CAN be charged upon the attorney'.** " (emphisis added)

Counsel's letter of June 22, 2004 (exhibited *supra*) is not notice or failure to notice. The letter, in its entirety, hides counsel's ineffectiveness *AND* the fact that Heleva's Fundamental, Constitutionally protected Right of a Liberty Interest was waived without his knowledge or consent.

ABUSE OF DISCRETION, part four;

The trial court Order of May 10, 2004 only *appears* legitament on it's face: Proclaiming only that the "scheduling conference" was cancelled due to counsel's filing of the *nunc pro tunc* appeal in Superior Court. Under strict scrutany, the Order actually attempts to legitamize what the court had no Legislative Power to allow, *nunc pro tunc* filing, *AND:* cancels the 'scheduling conference" it ordered take place on May 6, 2004 with urgency. Case in Point being: the scheduling conference no longer held great importance where the prosecution, with defense

counsels assistance, got what it needed most - more time. The *nunc pro tunc* filing at 64 EDM 2004 (doc. exhibited), was of course, as a matter of law, denied. SEE: En Banc filing & Orders attached thereto. Interlocutory Appeals cannot be refiled *nunc pro tunc* at the indulgence of counsel."

PREJUDICE: The commonwealth used that time to commence at their leasure. Ample time to contrive toward conviction, every day of trial planned and 'scheduled' so as to close on John Mendez's birthday, to move the jury by emotion - not true to fact evidence where there was no probable cause of a crime to effectuate the arrest of Heleva in the first instance (*thus the Brady violations, waived by force*), nor any proper or legal evidence of guilt or involvement in the murders of either deceased.

CONCLUSION:

In Pennsylvania, Interlocutory Appeals are, by statutory design, pre-trial, thus critical. Rule 600 does not replace the Fundamental Right of speedy trial under the Sixth Amendment.

The deprivation of speedy trial at the hands of counsel was no excusable mistake or gross negligence. Gross negligence can be overcome in the usual course of review. Heleva was convicted by means of fraud. Fraud should bind its authors. Fraud is not purged by circuity, for it pretends one thing and does another. Trial court pretended to administer justice in the public forum, but in fact, convicted Heleva in secrecy, long before the jury was assembled.

Probable Cause, Equal Protection, Due Process: mere fodder when lawlessness enters the adversarial contest.

Two (and more), Fundamental claims, none reviewed under the Constitutional lens by any court of review. The rule adopted in *Martinez* was crafted to ensure that Fundamental, Constitutional claims receive review by at least one court. 132 S.Ct. *at* 1319.

Does that rule not imply at least one *fair* review ?

Petitioner preserves all rights, and seeks unconditional termination of physical custody, by full opinion, published in the interest of protecting the Fundamental Rights of citizens guaranteed by the United States Constitution.

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Date: FEBRUARY 27, 2015

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