states on the record that he is not considering mitigation evidence presented by the defendant, the judge violates the law. The Pennsylvania Sentencing Code mandates that the sentencing court consider the "rehabilitative needs of the defendant." 42 Pa. C.S. Section 9721(b). When the sentencing judge states on the record that the parole board will carry out this duty in 25 years, and ineffective counsel causes the loss of the opportunity to present this issue on direct appeal, the defendant has established prejudice. In addition, a number of federal and state cases at every level support the Petitioner's sentencing claim in six different catagories, the majority of which were not discussed on the merits by the Habeas Court. We must keep in mind that the Petitioner, like Stovall, was under no obligation to demonstrate prejudice. It would have been more logical for Judge Diamond to assert that Stovall already had an "appellate process" and couldn't establish prejudice. Unlike Stovall, the Petitioner can raise issues on appeal that have not yet been identified. Stovall could only present for review issues that have already been denied.

Like the failure to request a response from the Commonwealth, the failure of Judge Diamond to acknowledge the Petitioner's argument concerning the Stovall case demonstrates an abuse of discretion that impugns the integrity of the habeas proceedings. There is no way possible to explain why Stovall, Halley, West, Rivera, Barry, and the numerous other state and federal cases that support the Petitioner's quest for justice don't apply to him. This is why the Federal Court Order avoids mentioning these cases.

E. STATEMENT OF THE CASE

The Petitioner was arrested on January 15, 2007 and charged with Sexual Assault and related crimes. On September 10, 2007, the Petitioner entered an open "no contest" plea before the Honorable Albert A. Stallone. On December 20, 2007, the Petitioner was sentenced to twenty-five(25) to fifty(50) years in state incarceration.

Petitioner's counsel, Angelo L. Cameron, Esq., who failed to raise any objections during the sentencing proceedings, filed a Motion for Reconsideration of Sentence that was denied on February 21, 2008.

In a two-to-one decision filed on May 3, 2010, the Superior Court of Pennsylvania affirmed the Petitioner's Judgment of sentence and determined that the Petitioner's claim as to the discretionary aspects of sentencing was waived because Petitioner in his Motion (unlike his Appellate Brief) failed to state that the sentence was "arbitrary, excessive, unreasonable, shocking to the conscience, disproportionate to the crimes, and amounted to abuse of discretion."

On November 16, 2010, the Supreme Court of Pennsylvania denied allocatur.

On January 13, 2011, Petitioner filed a Pro Se Petition for Relief under the Post-Conviction Relief Act. On March 20, 2012, the PCRA Court denied relief, ruling that although Trial Counsel's performance was deficient, Petitioner had not demonstrated prejudice. On August 17, 2012, the Superior Court affirmed. The Pennsylvania Supreme Court denied allocatur on March 27, 2013.

On December 23, 2013, Petitioner filed a Habeas Corpus Petition alleging the three claims listed above.

On July 30, 2015, District Court Judge Diamond overruled Petitioner's Objections to the Magistrate Judge's Report and Recommendation. A Certificate of Appealability was not issued.

On May 16, 2016, the Third Circuit Court denied Petitioner's Motion for a Certificate of Appealability. On June 14, 2016, an en banc panel denied a rehearing. On January 9, 2017 and March 20, 2017, the U.S. Supreme Court denied review.

On June 14, 2017, the third Circuit Court of Appeals denied Petitioner's Motion in the Nature of a Mandamus. On November 7, 2017, the Court denied Petitioner a rehearing.

On February 20, 2018, the United States Supreme Court denied Petitioner's Petition for a Writ of Mandamus. On April 16, 2018, the United States Supreme Court denied the Petitioner a rehearing.

The Petitioner filed a Petition for a Writ of Mandamus with the Third Circuit Court of Appeals on June 28, 2018. The Petition was denied on October 19, 2018. The Court denied a rehearing on January 11, 2019.

On July 12, 2019, the United States Supreme court denied Petitioner's Petition for a Writ of Mandamus. On November 18, 2019, the Court denied a rehearing.

On June 25, 2020, District Court Judge Diamond denied Petitioner's Fed. R. Civ. P. 60(b)(6) Motion.

On December 23, 2020, the Third Circuit Court of Appeals denied Petitioner's request for a Certificate of Appealability.

The Third Circuit Court of Appeals en banc panel denied the Petitioner a rehearing.

III. CONCLUSION

For the reasons stated, the Petitioner requests the Court grant a Certificate of Appealability. To the extent that Harbison v. Bell, applies, the Petitioner requests that the Petitioner be allowed to proceed forward and present a Brief on his sentencing claim that was not disposed of on the merits by the District Court due to the finding that the sentencing claim was procedurally defaulted.

Respectfully submitted,

Larry Charles
Petitioner, *Pro Se*

Dated this 29th day of July 2020.

VERIFICATION

I, Larry Charles, verify, that the foregoing are true and correct to the best of my knowledge, information, and belief. I understand that any false statements are subject to the penalty of perjury.

Larry Charles, *Pro Se*

Date: 7-29-21

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. LARRY CHARLES, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 893 EDA 2008

Appeal from the Judgment of Sentence December 20, 2007,
Court of Common Pleas, Philadelphia County,
Criminal Division at Nos. CP-51-CR-0002094-2007,
CP-51-CR-0005612-2007, CP-51-CR-0005630-2007,
CP-51-CR-0005636-2007, CP-51-CR-0005639-2007
and CP-51-CR-0005641-2007

BEFORE: MUSMANNO, DONOHUE and FITZGERALD*, JJ.

MEMORANDUM: **FILED MAY 3, 2010**

Larry Charles ("Charles") appeals from the judgment of sentence entered following his plea of *nolo contendere* on multiple charges of rape, involuntary deviate sexual intercourse, criminal trespass, indecent assault, aggravated indecent assault and unlawful contact or communication with a minor.[1] Because we find that Charles has waived the issue he seeks to present on review, we affirm.

Due to the nature of our disposition, we need not recite the events that gave rise to the charges involved in this case in detail. It is sufficient to state

[1] 18 Pa.C.S.A. §§ 3121, 3123, 3503, 3126, 3125 and 6318, respectively.

*Former Justice specially assigned to the Superior Court.

APPENDIX 9

that the charges stem from Charles' repeated sexual assault of six minors, ranging in age from five to 16, over the course of more than five years. Charles was finally stopped on January 15, 2007 when he was caught, naked, with a 14-year-old victim in the lawyer's lounge of the Criminal Justice Center in Philadelphia.

On September 10, 2007, Charles pled *nolo contendere* to 16 charges of the above-mentioned crimes. Sentencing was postponed pending an evaluation of Charles by the Sexual Offenders Assessment Board ("SOAB"). The SOAB determined that Charles met the definition of a sexually violent predator, and a sentencing hearing was scheduled for December 20, 2007. At that time, the trial court sentenced Charles on each charge to which he pled and ordered that the sentences run consecutively. This resulted in an aggregate sentence of 25 to 50 years of imprisonment. Charles raised no objections to the sentence at the hearing.

Charles subsequently filed a motion for reconsideration of sentence, requesting only that the trial court order his sentences to run concurrently. The trial court denied this request. This appeal followed, in which Charles presents the following issue for our review:

> Whether the sentence was appropriate for [Charles], in that the sentence of 25 to 50 years was arbitrary, excessive, unreasonable, shocking to the conscience, and disproportionate to the crimes, and amounted to an abuse of discretion by the [trial] court.

Appellant's Brief at 3.

This question challenges the discretionary aspects of Charles' sentence.

> Our standard of review in an appeal from the discretionary aspects of a sentence is well settled: Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. LeBarre, 961 A.2d 176, 178 (Pa. Super. 2008).

Moreover, "the right to appeal a discretionary aspect of sentencing is not absolute and ***is waived*** if the appellant does not challenge it in post-sentence motions or by raising the claim during sentencing proceedings." ***Id.*** (emphasis in the original).

As noted above, Charles did not challenge his sentence as excessive at the time of sentencing. In his motion for reconsideration, Charles set forth the length of his sentence, stated that he is remorseful for his crimes and requested that the trial court run his sentences concurrently. ***See*** Motion for Reconsideration, 12/31/07 at 1-2. Absent from this motion is any allegation that Charles' sentence is in any way arbitrary, excessive, unreasonable, shocking to the conscience, or disproportionate to the crimes. There is no allegation that the trial court abused its discretion in formulating this

sentence, much less any specific allegation as to how the trial court abused its discretion.

In ***Commonwealth v. Bullock***, 948 A.2d 818 (Pa. Super. 2008), the appellant sought to raise the claim that his sentence was unduly harsh given the circumstances of his case and inconsistent with the sentencing act because the sentencing court failed to balancing of the welfare of the community with the rehabilitative needs of the appellant. ***Id.*** at 826. However, the appellant failed to raise this specific argument either at sentencing or in a post-sentence motion, therefore denying the sentencing court the opportunity to reconsider or modify the sentence on that basis. Because of this failure to raise the issue below, we concluded that appellant had waived it on appeal. ***Id.***

Presently, we reach the same conclusion. Charles wholly failed to raise the issue he now presents for our review either at sentencing or in his motion for reconsideration of sentence. We recognize that in his post-sentence motion, Charles sought a reduction in the length of his sentence, as he does on appeal. In his post-sentence motion, however, he did not argue that his sentence was excessive or that the trial court abused its discretion in sentencing him – the argument he now presents on appeal. Instead, based upon our review of his post-sentence motion, we must agree with the trial court that the post-sentence motion was "a plea for leniency, albeit without any grounds to support it." Trial Court Opinion, 7/21/08, at 9.

By so doing, Charles denied the trial court the opportunity to reconsider or modify his sentence based on the argument he now seeks to present. As a result, we conclude that it has been waived.

Judgment of sentence affirmed.

Fitzgerald, J. files a Dissenting Statement.

Judgment Entered.

Prothonotary

Date: MAY 3 2010

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
LARRY CHARLES,	:	
Appellant	:	No. 893 EDA 2008

Appeal from the Judgment of Sentence December 20, 2007,
Court of Common Pleas, Philadelphia County,
Criminal Division at Nos. CP-51-CR-0002094-2007,
CP-51-CR-0005612-2007, CP-51-CR-0005630-2007,
CP-51-CR-0005636-2007, CP-51-CR-0005639-2007
and CP-51-CR-0005641-2007

BEFORE: MUSMANNO, DONOHUE and FITZGERALD*, JJ.

DISSENTING STATEMENT BY FITZGERALD, J.: **FILED MAY 3, 2010**

I respectfully dissent. As the learned majority observes, Appellant filed a post-sentence motion for reconsideration of his sentence. I agree with the majority's contention that Appellant sought a reduction of his sentence in this motion. I disagree, however, with the majority's interpretation of the effect of his request. In my view, by citing his remorse for the crimes, Appellant has alleged, perhaps inartfully so, that the sentence was excessive because the court did not properly consider his remorse. Accordingly, I would not find his claim waived, and I would instead address his claim on the merits.[1]

[1] Moroever, because he entered into an open plea, he is not precluded from appealing the discretionary aspects of this sentence. ***See Commonwealth v. Boyd***, 835 A.2d 812, 816 (Pa. Super. 2003) (quoting ***Commonwealth v. Guff***, 735 A.2d 709, 711 n.3 (Pa. Super. 1999).

*Former Justice specially assigned to the Superior Court.

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. LARRY CHARLES Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 953 EDA 2012

Appeal from the PCRA Order March 20, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at Nos:
CP-51-CR-0002094-2007
CP-51-CR-0005612-2007
CP-51-CR-0005630-2007
CP-51-CR-0005636-2007
CP-51-CR-0005639-2007
CP-51-CR-0005641-2007

BEFORE: MUSMANNO, BOWES, JJ., and McEWEN, P.J.E.

MEMORANDUM PER CURIAM **FILED AUGUST 17, 2012**

Appellant, Larry Charles, brings this appeal from the order denying his petition for post conviction collateral relief[1] from the judgment of sentence to serve a term of imprisonment of from twenty-five years to fifty years. The sentence was imposed after appellant entered a plea of *nolo contendere* to multiple counts of rape and related charges, in connection with the sexual abuse of six minor females, ranging in age from five years old to sixteen years old, over a period of eight years. We affirm.

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[1] Appellant sought relief pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541–9546.

As we write exclusively for the parties, who are familiar with the facts underlying appellant's conviction, we need not recite them in depth. Suffice it to say that appellant, a former criminal defense attorney in Philadelphia, befriended the subject girls, several of whom were related, and bought them dinner and gifts. The "relationships" then escalated into sexual assaults. Appellant was eventually arrested on January 15, 2007, after he was caught, naked, in the lawyer's lounge of the Criminal Justice Center in Philadelphia, with one of the 14 year old victims.

Appellant entered pleas of *nolo contendere*, on September 10, 2007, to sixteen charges, including rape, involuntary deviate sexual intercourse, unlawful contact/communication with a minor, aggravated indecent assault, and indecent assault, with regard to his sexual assault of six minor victims. Three months later, on December 20, 2007, the trial judge[2] held a combined Megan's Law[3]/sentencing hearing, at the conclusion of which he concluded that appellant met the criteria for classification as a sexually violent predator, and imposed an aggregate term of imprisonment of from 25 years

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[2] Judge Albert A. Stallone, of the Berks County Court of Common Pleas, was specially appointed to preside over appellant's case because, at the time of his arrest, appellant was a practicing trial attorney in Philadelphia County. ***See:*** Order, January 19, 2006 (recusing Philadelphia Court of Common Pleas bench from appellant's case).

[3] 42 Pa.C.S. §§ 9791–9799.9, amended December 20, 2011.

to 50 years.[4] Appellant filed a motion for reconsideration of sentence, requesting that the court impose the sentences to run concurrently, which the trial court denied on February 21, 2008.

Thereafter, appellant filed a direct appeal to this Court contending that the aggregate sentence imposed by the trial court was excessive and constituted an abuse of discretion. On May 3, 2010, we affirmed the judgment of sentence, concluding that the particular sentencing claim raised on appeal was waived since it was not included in appellant's motion for reconsideration. ***Commonwealth v. Charles***, 4 A.3d 181 (Pa.Super. 2010) (unpublished memorandum). Appellant subsequently filed a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on November 16, 2010. ***See: Commonwealth v. Charles***, 608 Pa. 652, 12 A.3d 751 (2010). Two months later, on January 13, 2011, appellant filed a *pro se* PCRA petition. Counsel was appointed, and filed an amended petition

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[4] The trial court imposed consecutive sentences on the most serious charge for each victim — (1) victim L.W. (age 13–14), rape, 6–12 years; (1) victim L.W. (age 13–15), unlawful contact or communication with a minor, 5–10 years; (3) victim D.J. (age 10), unlawful contact or communication with a minor, 1–2 years; (4) victim J.T. (age 10–16), rape, 5–10 years; (5) victim K.W. (age 9–12), unlawful contact or communication with a minor, 1–2 years; (6) victim C.W. (age 5–6), rape, 6–12 years. With respect to the youngest victim, C.W., the court also imposed a consecutive sentence of from one year to two years for the charge of indecent assault. All of the other sentences were imposed to run concurrently.

on December 5, 2011. By Order dated March 20, 2012, the trial court[5] denied appellant's petition for PCRA relief,[6] and this timely appeal followed.

Appellant, in the brief submitted on appeal, raises one question for our review:

> Did the PCRA court err in dismissing appellant's PCRA petition when appellant was deemed not to have suffered prejudice when his sole issue on direct appeal was waived, when appellant was sentenced to an effective life sentence, and when the sentencing judge did not realize that he was imposing a life sentence and failed to account for rehabilitation?

Brief of Appellant, p. 4.

Our review of an order denying PCRA relief is limited to a consideration of "whether the determination of the PCRA court is supported by the evidence of record and is free of legal error." ***Commonwealth v. Carter***, 21 A.3d 680, 682 (Pa.Super. 2011). The findings of the trial court will not be disturbed unless there is no support for those findings in the certified record. ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa.Super. 2001).

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[5] It bears noting that Chester County Court of Common Pleas Senior Judge Charles B. Smith presided over appellant's PCRA proceedings. ***See: Supra***, n.2.

[6] While the record reveals that the trial court failed to issue notice, pursuant to Pa.R.Crim.P. 907, of its intent to dismiss appellant's petition without first conducting an evidentiary hearing, our review of the briefs reveals that appellant did not object to the court's omission. Thus, any defect in notice is now waived. ***See: Commonwealth v. Boyd***, 923 A.2d 513, 514 n.1 (Pa.Super. 2007), ***appeal denied***, 593 Pa. 754, 932 A.2d 74 (2007); ***Commonwealth v. Williams***, 909 A.2d 383, 384, n.4 (Pa.Super. 2006).

Appellant's sole issue on appeal asserts the ineffective assistance of plea counsel for failing to properly challenge the discretionary aspects of his sentence.[7] He argues that while plea counsel filed a motion for reconsideration of sentence, that motion failed to include the argument that appellant's sentence was excessive and clearly unreasonable under the circumstances of his case. Appellant contends that considering his age — 52 years at the time of sentencing — the court had imposed a virtual life sentence without due consideration of his potential for rehabilitation.

When reviewing a collateral claim of ineffective assistance of counsel, we are mindful of the following principles:

> In order for appellant to prevail on a claim of ineffective assistance of counsel, he must show, by a preponderance of the evidence, 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. Appellant must demonstrate: (1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. The petitioner bears the burden of proving all three prongs of the test.

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[7] Although a direct challenge to the discretionary aspects of sentencing is not a cognizable claims under the PCRA, a petitioner is permitted to challenge the discretionary aspects of sentencing as part of an ineffectiveness of counsel claim. ***See:*** 42 Pa.C.S. § 9543(a)(2)(ii); ***Commonwealth v. Watson***, 835 A.2d 786, 801 (Pa.Super. 2003).

Commonwealth v. Rathfon, 899 A.2d 365, 369 (Pa.Super. 2006) (citations omitted). Further, as the underlying issue involves appellant's sentence, we must be cognizant of the fact that sentencing is a matter within the sound discretion of the trial court,[8] and an appellant who wishes to challenge the discretionary aspects of his sentence must demonstrate that there is a substantial question that the sentence imposed is inappropriate under the sentencing guidelines. ***Commonwealth v. L.N.***, 787 A.2d 1064, 1071 (Pa.Super. 2001), ***appeal denied***, 569 Pa. 680, 800 A.2d 931 (2002).

Here, the PCRA court conceded that appellant had satisfied the first two prongs of his ineffectiveness claim. Specifically, the court found (1) that appellant's claim had arguable merit, in that a challenge to appellant's sentence as excessive or unreasonable raised a substantial question, and (2) that counsel had no reasonable basis for failing to include that claim in the motion for reconsideration. PCRA Court Opinion, March 20, 2012, pp. 1–2. ***See: Commonwealth v. Whitmore***, 860 A.2d 1032, 1036 (Pa.Super. 2004), ***rev'd in part***, 590 Pa. 376, 912 A.2d 827 (2006). Thus, the PCRA court concluded that the "real issue in this case is whether the petitioner suffered prejudice as a result of counsel's inaction, to wit: whether [the] sentencing court in imposing a sentence of 25–50 years imprisonment acted

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[8] ***Commonwealth v. Bromley***, 862 A.2d 598, 604 (Pa.Super. 2004), ***appeal denied***, 584 Pa. 684, 881 A.2d 818 (2005), ***cert. denied***, 546 U.S. 1095, 126 S.Ct. 1089, 163 L.Ed.2d 863 (2006) (citation omitted).

unreasonably." PCRA Court Opinion, ***supra***, p. 2 (footnote omitted). Thus, to be eligible for relief, appellant had to establish that but for counsel's failure to properly challenge his sentence, "there is a reasonable probability that the outcome of the challenged proceeding would have been different," — that is, appellant would have been entitled to have his sentence vacated and remanded. ***See: Commonwealth v. Whitmore***, ***supra***, 860 A.2d at 1036 (citation omitted).

Appellant argues that the sentence imposed by the trial court was unreasonable because "the sentencing court seemed to fail to realize that it was imposing a life sentence and [that] appellant has potential for rehabilitation, an issue the sentencing court failed to assess." Brief of Appellant, p. 9.

The Sentencing Code mandates that an appellate court vacate a sentence when that court concludes, *inter alia*, that "the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable." 42 Pa.C.S. § 9781(c)(2). In making a determination of reasonableness, the Pennsylvania Supreme Court, in ***Commonwealth v. Walls***, 592 Pa. 557, 926 A.2d 597 (2007), instructed that appellate courts should consider both sections 9721 and 9781 of the Sentencing Code. Section 9721(b) of the Sentencing Code, 42 Pa.C.S. § 9721(b), directs a trial court to follow the general principle that the sentence imposed should call for confinement that "is consistent with the protection of the public, the

gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." ***Id.***, 592 Pa. at 566, 926 A.2d at 962. Furthermore, section 9781 sets forth the following four factors for an appellate court to consider when evaluating the reasonableness of a sentence:

> (1) The nature and circumstances of the offense and the history and characteristics of the defendant.
>
> (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.
>
> (3) The findings upon which the sentence was based.
>
> (4) The guidelines promulgated by the commission.

42 Pa.C.S. § 9781(d).

Here, the trial court specifically stated at sentencing that he "carefully considered" all the relevant factors bearing upon the imposition of sentence, including, "the defendant's age ... and potential for rehabilitation." N.T., December 20, 2007, p. 158. The court acknowledged that the sentences he imposed reflected the required mandatory minimums, and were all within the standard range of the guidelines. ***Id.***, p. 166. Moreover, a review of the trial court's comments following the imposition of sentence reveals that he considered all the relevant factors outlined in the Sentencing Code:

> These sentences, at least in this Court's opinion further reflect the seriousness of the offenses upon which each sentence has been imposed. And obviously, all of these are very, very, serious offenses. They're all egregious. We've heard time and time again the lasting effect they're going to have on each of these six young lady's as well as their family and as well as you, and you[r] family as well.

> And the impact that they're going to have on the legal community of Philadelphia.
>
> * * * *
>
> I also want to say that each of these sentences obviously are consistent with this Court's concern for the protection of the public. The impact upon each of these six young ladies as well as their families as expressed here today.
>
> And also taking into consideration the rehabilitative needs of you, Larry Charles, to the extent there are any, because I don't know what they are. I think you've heard me say that with both the doctors that testified here this morning. That to me, at this point is speculation; but nevertheless, that testimony has been seriously considered.[9]
>
> I also from a personal viewpoint agree with the district attorney here, I can't believe that if you were out on the street that you would ever stop. And perhaps my effort here is to try to stop you as best as I can.
>
> * * * *
>
> Now, finally am I sending a message to other who may be thinking of preying on children in this community and throughout the state? The answer is obviously, yes, I am.

Id., pp. 166–169. Although the trial court did not specifically acknowledge that a 25 to 50 year sentence constituted a virtual life sentence for the 52

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[9] Both the prosecution and defense presented expert testimony regarding appellant's risk of recidivism. Dr. Barbara Ziv, a board certified psychiatrist, evaluated appellant in her capacity as a member of the Sexual Offenders Assessment Board, and opined that appellant met the criteria for classification as a sexually violent predator, and, in particular, that he was a "high" risk to reoffend. N.T., December 20, 2007, p. 43. Dr. Barry Zakireh, a psychologist and expert in the field of sexual offenses, testified on behalf of appellant. Dr. Zakireh opined that appellant was in the "moderate range" for recidivism, but that, with strict monitoring and regular treatment, "his risk would be relatively low to moderate." ***Id.***, pp. 65, 68.

year old appellant, he did state that he considered appellant's age,[10] and defense counsel had urged the trial court to give appellant the opportunity to get back into the community, arguing that "to throw his life away for 25 to 50 years, you might as well give him a life sentence." ***Id.***, p. 156. Thus, our review of the sentencing transcript reveals that the trial court considered all the relevant factors, and imposed a sentence that was, in the circumstances of this case, reasonable.[11]

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[10] N.T., December 20, 2007, p. 158.

[11] We note that the appellant's reliance on ***Commonwealth v. Coulverson***, 34 A.3d 135 (Pa.Super. 2011), is misplaced. In that case, the 19 year old defendant was sentenced to a term of imprisonment of from 18 years to 90 years, for his involvement in a two-day crime spree that included a rape and several robberies. While the minimum sentences were imposed in the standard range of the guidelines, the maximum sentences were the statutory maximums allowed by law. On appeal, this Court concluded that "the record reveal[ed] scant consideration of anything other than victim impact and the court's impulse for retribution on the victims' behalf." ***Id.***, 34 A.3d at 148. We found, in particular, that the trial court had not properly considered the individual and rehabilitative needs of the 19 year old defendant who had suffered "a series of hardships" in his young life, including the death of his mother when he was six years old, life with an abusive, alcoholic stepfather, and homelessness. ***Id.***, 34 A.3d at 140. Moreover, this Court concluded that, based upon comments at argument on post sentence motions, the trial court "evince[d a] determination not to consider any sentencing other than a statutory maximum, notwithstanding any factor that might counsel to the contrary." ***Id.***, 34 A.3d at 149.

Conversely, in the present case, a 52 year old criminal defense attorney developed friendships with six minor females for the sole purpose of grooming them for sexual abuse, which occurred several times in the Criminal Justice Center. The sentences imposed were within the standard range of the guidelines and reflected both the seriousness of the offenses, as well as the individual needs of the defendant. Indeed, any lesser term of

(Footnote Continued Next Page)

Therefore, since we conclude that appellant has not demonstrated that he was prejudiced by plea counsel's failure to properly challenge the discretionary aspects of his sentence prior to his direct appeal, we affirm the order denying PCRA relief.

Order affirmed.

Judgment Entered.

Prothonotary

Date: 8/17/2012

(Footnote Continued) ———————

imprisonment, which would necessarily involve the imposition of concurrent sentences, would afford appellant a "volume discount" for his crimes. This, we are unwilling to encourage or condone. ***Commonwealth v. Hoag***, 665 A.2d 1212, 1214 (Pa.Super. 1995).

DLD-282 June 19, 2014

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. [redacted]

[redacted], Appellant

v.

SUPERINTENDENT GRATERFORD SCI; ET AL.

(M.D. Pa. Civ. No. 3-13-cv-01122)

Present: SMITH, HARDIMAN and NYGAARD, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

MMW/JJA/tmm

ORDER

Grimes's request for a certificate of appealability is granted on the following issue: whether the District Court erred in denying, without an evidentiary hearing, Grimes's claim that his counsel was ineffective for failing to perfect a direct appeal on his behalf. See Martinez v. Ryan, 132 S. Ct. 1309 (2012); Roe v. Flores-Ortega, 528 U.S. 470 (2000). As to this claim, we are satisfied that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

The application is otherwise denied because jurists of reason would not debate the District Court's denial of Grimes's remaining claims, for substantially the same reasons discussed in the magistrate judge's September 9, 2013 memorandum. See id. As to Grimes's claim that counsel should have challenged his nolo contendere plea, we conclude that Grimes's claim is not "substantial" under Martinez, 132 S. Ct. at 1320, because Pennsylvania and federal law permit courts to accept pleas from defendants who are unwilling to admit their guilt, see North Carolina v. Alford, 400 U.S. 25, 37-38

Appendix N

(1970); Commonwealth v. Fluharty, 632 A.2d 312, 315-18 (Pa. Super. Ct. 1993), and because Grimes has not established "a reasonable probability that, but for counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial," Hill v. Lockhart, 474 U.S. 52, 59 (1985).

The Clerk will appoint counsel to represent appellant on appeal. See 3d Cir. I.O.P. 10.3.2.

By the Court,

s/ Thomas M. Hardiman
Circuit Judge

Dated:

DLD-209 **April 14, 2016**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **15-3064**

LARRY CHARLES, Appellant

VS.

SUPERINTENDENT CAMP HILL SCI; ET AL.

(E.D. Pa. Civ. Nos. 2-13-cv-07548 & 2-14-cv-00189)

Present: CHAGARES, GREENAWAY, JR., and GARTH, Circuit Judges

Submitted is appellant's Motion for Certificate of Appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

MMW/BPM/mlr

ORDER

Appellant's request for a certificate of appealability is denied because he has not made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). While Appellant has presented exhaustive arguments in his extensive request, jurists of reason would not debate the District Court's assessment of his constitutional claims. Slack v. McDaniel, 529 U.S. 473, 484-85 (2000). Appellant's first argument did not state a valid claim of ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 687 (1984); United States v. Bui, 795 F.3d 363, 366 (3d Cir. 2015). Despite Appellant's contentions, he was not denied counsel. See Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000). Because Appellant did not state a valid claim of effective assistance of counsel, his second argument was meritless. Finally, Appellant is correct that his third claim is cognizable. See Lockyer v. Andrade, 538 U.S. 63, 72-73 (2003); United States v. Miknevich, 638 F.3d 178, 185-86 (3d Cir. 2011). However, his

Appendix C

third claim is procedurally defaulted, and he has not demonstrated cause and prejudice sufficient to overcome the procedural bar. See Murray v. Carrier, 477 U.S. 478, 485 (1986); Slutzker v. Johnson, 393 F.3d 373, 381 (3d Cir. 2004). As Appellant has not made a substantial showing of the denial of a constitutional right, his request for a certificate of appealability is denied.

By the Court,

s/ Michael A. Chagares
Circuit Judge

Dated: May 16, 2016

mlr/cc:
Larry Charles
Simran Dhillon, Esq.

A True Copy
Marcia M. Waldron
Marcia M. Waldron, Clerk
Certified order issued in lieu of mandate.

BLD-051 **December 17, 2020**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **20-2524**

LARRY CHARLES,

Appellant

v

SUPERINTENDENT CAMP HILL SCI; ET AL.

(E.D. Pa. Civ. Nos. 2-13-cv-07548 & 2-14-cv-00189)

Present: AMBRO, SHWARTZ and PORTER, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

The request for a certificate of appealability is denied. Charles has not made a substantial showing of the denial of a constitutional right. See Morris v. Horn, 187 F.3d 333, 341 (3d Cir. 1999); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000). For essentially the reasons supplied by the District Court, Charles's Rule 60(b)(6) motion was untimely and meritless. See Moolenaar v. Gov't of the Virgin Islands, 822 F.2d 1342, 1348 (3d Cir. 1987); see also Norris v. Brooks, 794 F.3d 401, 404 (3d Cir. 2015).

By the Court,

s/THOMAS L. AMBRO
Circuit Judge

Dated: December 23, 2020
Lmr/cc: Larry Charles
Max C. Kaufman
Ronald Eisenberg

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 20-2524

LARRY CHARLES,

Appellant

v.

SUPERINTENDENT CAMP HILL SCI;
ATTORNEY GENERAL PENNSYLVANIA

(E.D. Pa. Nos. 2-13-cv-07548 & 2-14-cv-00189)

Present: AMBRO, Circuit Judge

1. Motion filed by Appellant Larry Charles to File Exhibits to Petition for Rehearing

Respectfully,
Clerk/lmr

ORDER

The foregoing Motion filed by Appellant Larry Charles to File Exhibits to Petition for Rehearing is granted.

By the Court,

s/Thomas L. Ambro
Circuit Judge

Dated: June 11, 2021
Lmr/cc: Larry Charles
Max C. Kaufman
Ronald Eisenberg

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2524

LARRY CHARLES,

Appellant

v.

SUPERINTENDENT CAMP HILL, SCI; ATTORNEY GENERAL PENNSYLVANIA

(District Court Nos.: 2-13-cv-07548 and 2-14-cv-00189)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY and PHIPPS, Circuit Judges

The petition for rehearing filed by **appellant** in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is **denied**.

BY THE COURT,

s/ THOMAS L. AMBRO
Circuit Judge

Dated: June 25, 2021
Lmr/cc: Larry Charles
Max C. Kaufman
Ronald Eisenberg

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 20-2524

LARRY CHARLES, Appellant	:	(E.D. Pa. Nos. 2-13-cv-07548
v.	:	& 2-14-cv-00189)
SUPERINTENDENT, SCI Camp Hill;	:	
ATTORNEY GENERAL, Pennsylvania	:	

TO: AMBRO, Circuit Judge:

EXHIBIT SUPPORTING PETITION FOR REHEARING

The enclosed decision proves that Judge Diamond incorrectly ruled, on more than one occasion, that the Petitioner received a direct appeal that was perfected and some issues were not addressed. No review on the merits took place. The only issue was waived by ineffective counsel and no showing of prejudice is required.

The truth has to rule supreme in America or we will not have an America. Our Courts can't resemble the media and our politicians and narrate falsehood as truth. I never received a perfected direct appeal and this fact can't be erased by incorrect rulings against the Petitioner or by the passage of time.

We can't turn on the television without seeing a news report about people risking their lives to come to America. They come here with the belief that in America, there exists the best legal system in the world. There is no logical reason to explain how a judge can read the 2010 Decision and conclude that this is a perfected direct appeal. As an Air Force veteran of the Vietnam era, I fought to defend my country. I should expect as any citizen should expect, to have my case honestly and competently reviewed.

On page 4, the Court states that the issue was not raised. Nowhere does the Decision support any conclusion other than the Petitioner lost his right to a review on the merits. The dissenting statement stated that the dissenting Judge would not find the claim waived. There is no support for the narrative that the Petitioner received a perfected direct appeal and some issues were not reviewed. The only issue was not reviewed. The Petitioner is entitled to a Certificate of Appealability.

American history shows that struggles for justice often take time. In the Petitioner's case, where the facts and law are on his side, his struggle should not continue for the better part of a decade.

The facts in the Petitioner's case are clear. As is made clear on page one of the Decision, the Petitioner's "issue he seeks to present on review" is waived. There is no way to competently and honestly translate these words or any words in the Decision and conclude that the Petitioner received a perfected direct appeal and some issues were not reviewed. The petitioner has never proffered such an argument.

If our judges are willing to look truth in the face and deny its existence, then our nation is truly lost. Who do we turn to when judges ignore the law and support false facts in order to rule against petitioners who come before them seeking justice?

Referring once more to the dissenting statement, the Petitioner asks the Court to note the last two lines. "I would not find his claim waived, and I would instead address his claim on the merits." Along with showing that the Petitioner is correct in arguing that his one claim was not reviewed on direct appeal, the dissenting statement is proof that a

jurist of reason would disagree with the manner in which the Petitioner's case was resolved.

Why would a Judge say that a petitioner's claim should be reviewed on the merits if the claim was already reviewed on the merits? An extraordinary case is before the Court in which the integrity of the habeas process has been impugned.

Respectfully submitted,

Larry Charles
Petitioner, *Pro Se*

Date: 6-24-21

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 20-2524

LARRY CHARLES, Appellant	:	(E.D. Pa. Nos. 2-13-cv-07548
v.	:	& 2-14-cv-00189)
SUPERINTENDENT, SCI Camp Hill;	:	
ATTORNEY GENERAL, Pennsylvania	:	

TO: AMBRO, Circuit Judge:

MOTION FOR RECONSIDERATION OF THE DENIAL OF PETITION FOR REHEARING

On June 22, 2021, the Petitioner received an Order from Judge Ambro, dated June 11, 2021, that **granted** the Motion by the Petitioner to file exhibits to petition for Rehearing. Without delay, on June 24, 2021, the Petitioner deposited an Exhibit in the mail that clearly shows that the Petitioner should prevail in being granted a Certificate of Appealability. The Petitioner had no control over the process that took eleven(11) days for him to receive the Court's June 11, 2021 Order.

On June 30, 2021, the Petitioner received notification that his Petition for Rehearing was denied. This denial was sent to the Petitioner at the same time proof that the Petitioner should be granted a favorable ruling was enroute to the Court.

In the United States of America, a citizen should not have to fight so hard to convince the Courts to rule in his favor when the proof he presents is so clear and undeniable. The Petitioner knows that he never received a perfected direct appeal. If one or more Judges would just take a moment to read the 2010 Decision, they would agree. In the past seven and a half years, the Commonwealth, despite the Petitioner's requests, has never been asked for their position on the Petitioner's argument. The Commonwealth and any honest Judge would agree that the Petitioner has been right from the beginning and that there is no requirement for a petitioner to establish prejudice when counsel's ineffectiveness causes the loss of a perfected direct appeal.

All of the Judges in the Third Circuit are familiar with the law that supports the Petitioner's argument. If they would just take the time to read the first page of Judge Diamond's Order, they would see that Petitioner's Counsel was ineffective and this ineffectiveness resulted in his loss of a direct appeal. Federal law and the law of every state in America views this as a denial of the citizen's Constitutional rights.

The Petitioner requests reconsideration of the ruling that was made before the Exhibit had time to reach the Court. In Stovall, Judge Diamond, after 20 years passed, ruled that the defendant's counsel was per se ineffective in failing to perfect the defendant's appeal. This Court should not deny the Petitioner the same Constitutional protection.

The Petitioner still has faith in the American Judicial System. In this system, 14 Judges should not be able to overlook the law and rule against a petitioner when the facts and the law are on his side. Chief Judge Smith and Judge Hardiman ruled in favor of the petitioner in the Grimes case (see included) where Mr. Grimes brought the same claim the Petitioner presented. Justice should not be denied to the Petitioner in face of the overwhelming strength of his argument.

Respectfully submitted,

Larry Charles

Larry Charles
Petitioner, Pro Se

Date: 7-1-21

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 20-2524

Charles v. Superintendent Camp Hill SCI

To: Clerk

1) Appellant's Motion for Reconsideration of the Denial of Petition for Rehearing

2) Appellant's Exhibits Supporting Petition for Rehearing

The foregoing documents will remain on this Court's docket, but no further action will be taken on them. On December 23, 2020, the Court denied a certificate of appealability and issued a certified copy of that order in lieu of a mandate. The appellant then filed a petition for rehearing that included several exhibits not permitted under Third Circuit Local Appellate Rule 35.2. The Court's June 11, 2021, order granted the appellant permission to include those exhibits as a part of his petition for rehearing. That order did not allow the appellant to file additional exhibits. The petition for rehearing (including the previously filed exhibits) was then submitted to the Court and denied on June 25, 2021. With that, the appeal concluded. If the appellant wants further review, he must seek it from the Supreme Court of the United States.

For the Court,

s/ Patricia S. Dodszuweit
Clerk

Dated: July 16, 2021
Lmr/cc: Larry Charles
Max C. Kaufman
Ronald Eisenberg

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JAMES HALLEY, Appellant
SUPREME COURT OF PENNSYLVANIA
582 Pa. 164; 870 A.2d 795; 2005 Pa. LEXIS 603
No. 26 EAP 2004
December 28, 2004, Submitted
March 29, 2005, Decided

Editorial Information: Prior History

Appeal from the Judgment of Superior Court entered on 12/4/03 at No. 2117 EDA 2002 affirming the Order entered on 6/14/02 in the Court of Common Pleas, Criminal Division, Philadelphia County at No. 9810-0186. Appeal Allowed: April 14, 2004 at 623 EAL 2003. Trial Court Judge: Steven R. Geroff. Intermediate Court Judges: Joseph A. Del Sole, President Judge, Maureen Lally-Green and Zoran Popovich, JJ. Commonwealth v. Halley, 2003 PA Super 471, 839 A.2d 392, 2003 Pa. Super. LEXIS 4167 (Pa. Super. Ct., 2003)

Disposition:

Reversed and remanded.

Counsel For James Halley, APPELLANT: Mitchell S. Strutin, Esq.
For Commonwealth of Pennsylvania, APPELLEE: Hugh J. Burns, Esq.

Judges: BEFORE: CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ. MR. JUSTICE SAYLOR.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant inmate sought review of an order entered by a superior court (Pennsylvania), which denied an application for post-conviction relief under the Pennsylvania Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. §§ 9541-9546. The inmate alleged that his appellate counsel's failure to file a statement pursuant to Pa. R. App. P. 1925(b) constituted ineffective assistance and denied him of his right to direct review of his conviction.Inmate was entitled to post-conviction relief under the Pennsylvania Post Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541-9546, and restoration of his right to a direct appeal because his counsel's failure to file a required statement of reasons on direct appeal, as required under Pa. R. App. P. 1925(b), was presumed to cause prejudice.

OVERVIEW: The inmate was convicted by a superior court of first degree murder and other crimes, and was sentenced to life imprisonment. His counsel filed a timely notice of appeal, but thereafter failed to a statement of matters complained of on appeal, pursuant to Pa. R. App. P. 1925. The reviewing court determined that the failure to file the statement constituted a waiver of any issues that the inmate sought to raise on direct review. The inmate thereafter filed an action under the PCRA on the theory that his counsel was ineffective for failing to file the required statement under Rule 1925. The lower court dismissed the PCRA petition, finding that the inmate had received an opportunity for a direct appeal. The court held that the failure to file a Rule 1925(b) statement on behalf of the inmate when he sought review his conviction and/or sentence, which resulted in a waiver of all claims asserted on direct appeal, represented the sort of actual or constructive denial of assistance of counsel falling within the narrow

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category of circumstances in which prejudice was legally presumed. The remedy for the deprivation of the fundamental right to appeal was to restore the right.

OUTCOME: The court reversed the order of the lower court and remanded the matter to the superior court for reinstatement of the inmate's entitlement to pursue a direct appeal.

LexisNexis Headnotes

Criminal Law & Procedure > Appeals > Records on Appeal
Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Assault & Battery > Aggravated Offenses > Penalties
Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Criminal Instruments & Tools > General Overview
Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Criminal Instruments & Tools > Penalties
Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Appeals > Reviewability > Time Limitations

Pa. R. App. P. 1925(b) prescribes, inter alia, that the lower court may enter an order directing the appellant to file of record in the lower court and serve on the trial judge a concise statement of the matters complained of on the appeal no later than 14 days after entry of such order.

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview
Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview

In order to preserve their claims for appellate review, appellants must comply whenever the trial court orders them to file a statement of matters complained of on appeal pursuant to Pa. R. App. 1925. Any issues not raised in a Pa. R. App. P. 1925(b) statement will be deemed waived.

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview
Criminal Law & Procedure > Counsel > Effective Assistance > Appeals
Criminal Law & Procedure > Counsel > Effective Assistance > Tests

Under Pennsylvania law, where there is an unjustified failure to file a requested direct appeal, the conduct of counsel falls beneath the range of competence demanded of attorneys in criminal cases, denies the accused the assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and Pa. Const. art. I, § 9, as well as the right to direct appeal under Pa. Const. art. V, § 9, and constitutes prejudice for the purposes of 42 Pa. Cons. Stat. § 9543(a)(2)(ii). Therefore, in such circumstances, and where the remaining requirements of the Post Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541-9546, are established, the petitioner is not required to establish his innocence or demonstrate the merits of the issue or issues which would have been raised on appeal.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

The traditional requirements for relief pertaining to claims of ineffective assistance of counsel mandate

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that the petitioner establish actual prejudice (in terms of undermining confidence in the outcome of his trial), as well as the arguable merit of the underlying claim and an absence of some reasonable strategy on counsel's part in terms of the act or omission resulting in the underlying claim not having been previously advanced or vindicated.

Criminal Law & Procedure > Counsel > Effective Assistance > Appeals
Criminal Law & Procedure > Counsel > Effective Assistance > Tests

Extension of Lantzy from the situation entailing the failure to file a requested direct appeal to the circumstance involving the failure to file a Pa. R. App. P. 1925(b) statement represents but a modest and incremental step. Indeed, while certainly the holding of any decision is to be read against the facts, Lantzy's reasoning expressly subsumed not only the unjustified failure to file a requested direct appeal, but also, the failure to perfect the appeal. A failure to file or perfect such an appeal results in a denial so fundamental as to constitute prejudice per se.

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview

Because the submission of a court-ordered Pa. R. App. P. 1925(b) statement is a prerequisite to appellate merits review, the Rule 1925(b) statement (when directed) is elemental to an effective perfection of the appeal. The act of perfecting is defined as taking all the legal steps necessary to complete, secure, or record a claim, right, or interest.

Criminal Law & Procedure > Counsel > Effective Assistance > Appeals
Criminal Law & Procedure > Counsel > Effective Assistance > Tests

When counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal.

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview
Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Contempt > General Overview

Counsel's dereliction in the context of a failure to file a court-ordered Pa. R. App. P. 1925(b) statement, in contrast with the failure to file a requested direct appeal, is contemptuous relative to the court's power.

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview
Criminal Law & Procedure > Postconviction Proceedings > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > General Overview
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview
Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview
Governments > Courts > Court Records

It is well established that the decision whether to presume prejudice or to require an appellant to demonstrate actual prejudice turns on the magnitude of the deprivation of the right to effective assistance of counsel. The failure to perfect a requested direct appeal is the functional equivalent of having no

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representation at all. The complete denial of counsel on direct appeal requires a finding of prejudice. The difference in degree between failures that completely foreclose appellate review, and those which may result in narrowing its ambit, justifies application of the presumption in the more extreme instance. A Pennsylvania Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. §§ 9541-9546, petitioner is entitled to an appeal nunc pro tunc where prior counsel's actions, in effect, entirely denied his right to a direct appeal, as opposed to a PCRA petitioner whose prior counsel's ineffectiveness may have waived one or more, but not all, issues on direct appeal. Furthermore, the limiting principle arising from the recognition of such difference in degree addresses the Pennsylvania Superior Court's concern that the presumption should not extend to every circumstance in which a defendant may claim no effective appeal.

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview
Criminal Law & Procedure > Counsel > Effective Assistance > Appeals
Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview

The Supreme Court of Pennsylvania holds that the failure to file a Pa. R. App. P. 1925(b) statement on behalf of a criminal defendant seeking to appeal his conviction and/or sentence, resulting in a waiver of all claims asserted on direct appeal, represents the sort of actual or constructive denial of assistance of counsel falling within the narrow category of circumstances in which prejudice is legally presumed. The remedy for the deprivation of the fundamental right to appeal is its restoration.

Opinion

Opinion by: SAYLOR

Opinion

{582 Pa. 166}{870 A.2d 797} MR. JUSTICE SAYLOR

We allowed appeal to consider whether, as a component of a claim of ineffective assistance of an attorney for failing to submit a court-ordered statement of matters complained of on appeal, a post-conviction petitioner must demonstrate actual prejudice as a prerequisite to reinstatement of his direct appeal rights.

In April of 1998, Appellant participated in a killing in the Upper Kensington neighborhood of Philadelphia. Following a bench trial in which he and a co-defendant were convicted of first-degree murder, aggravated assault, possessing an instrument of crime, and criminal conspiracy, Appellant was sentenced, *inter alia*, to life imprisonment. Appellant's court-appointed counsel filed a timely notice of appeal, triggering an obligation on the part of the trial court to prepare an opinion, *see* Pa.R.A.P. 1925(a), and the court correspondingly directed Appellant to file a statement of matters complained of on appeal, pursuant to Rule of Appellate Procedure 1925(b). *See* Pa.R.A.P. 1925(b) (prescribing, *inter alia*, that "the lower court . . . may enter an order directing the appellant to file of record in the lower court and serve on the trial judge a concise statement of the matters complained of on the appeal no later than 14 days after entry of such order"). Appellant's counsel, however, failed to file the statement as directed. The trial court subsequently issued its opinion without the benefit of the **{582 Pa. 167}** statement that it had required, undertaking to review the evidence and concluding that it was sufficient to support the verdict. *See Commonwealth v. Halley*, No. 9810-0186 (C.P. Phila. Nov. 9,

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1999).

Notwithstanding counsel's failure to submit a Rule 1925(b) statement, he filed a brief on the merits in the Superior Court, asserting that the evidence was insufficient to support the verdict, and that the verdict was against the weight of the evidence. In an unpublished decision, however, the Superior Court held that it was precluded from considering Appellant's arguments due to the absence of a Rule 1925(b) statement. *See Commonwealth v. Halley*, 761 A.2d 1233, 2000 Pa. Super. LEXIS 3210 at *1-2 (Pa. Super. Jul. 24, 2000). In support of its decision, the panel quoted this Court's decision in *Commonwealth v. Lord*, 553 Pa. 415, 719 A.2d 306 (1998), as follows:

> From this date forward, in order to preserve their claims for appellate review, Appellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to Rule 1925. **Any issues not raised in a 1925(b) statement will be deemed waived.** *Halley*, 2000 Pa. Super. LEXIS 3210 at *4 (quoting *Lord*, 553 Pa. at 420, 719 A.2d at 309) (emphasis in original). In a footnote, the panel also indicated that, had the issue not been waived, it would have agreed with the trial court's disposition. *See id.* 2000 Pa. Super. LEXIS 3210 at *2 n.5. Appellant did not seek allowance of appeal by this Court.

{870 A.2d 798} Subsequently, and with the assistance of new counsel, Appellant pursued reinstatement of his direct appeal rights under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546 (the "PCRA"), on the theory that his prior attorney was ineffective for failing to file a Rule 1925 statement, thus resulting in the waiver of his claims on direct appeal. In terms of substantive claims for relief from his conviction and sentence, Appellant reasserted his sufficiency-of-the-evidence challenge (except with respect to his conviction for possessing an instrument of crime), and, in the alternative, proffered several other arguments in support of a request for a new **{582 Pa. 168}** trial. On the Commonwealth's motion, however, the PCRA court dismissed Appellant's post-conviction petition without a hearing, noting that "[Appellant] has had a direct appeal and is not entitled to another." *Commonwealth v. Halley*, No. 9810-0186, slip op. at 2 (C.P. Phila. Jan. 21, 2003). The court acknowledged that Appellant's weight-and sufficiency-of-the-evidence claims were deemed waived on direct appeal, and that waived claims may be considered on post-conviction review as a component of allegations of deficient stewardship of counsel resulting in the waiver. *Id.* at 2-3 (citing 42 Pa.C.S. § 9543(a)(4)). Nevertheless, after reviewing the trial record and post-conviction submission, the court determined that Appellant's claims were meritless.

On appeal, Appellant refined his argument seeking reinstatement of his direct appeal rights to specifically assert that his attorney's failure to protect his appellate rights amounted to an actual or constructive denial of counsel, and as such, that Appellant was entitled to a presumption of prejudice.

1 In this regard, Appellant's argument implicates this Court's decision in *Commonwealth v. Lantzy*, 558 Pa. 214, 736 A.2d 564 (1999), which approved such a presumption in the context of an unjustified failure to file a requested direct appeal, reasoning as follows:

> Where there is an unjustified failure to file a requested direct appeal, the conduct of counsel falls beneath the range of competence demanded of attorneys in criminal cases, denies the accused the assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution, as well as the right to direct appeal under Article V, Section 9, and constitutes prejudice for the purposes of Section 9543(a)(2)(ii). **{582 Pa. 169}** Therefore, in such circumstances, and where the remaining requirements of the PCRA are established, the petitioner is not required to establish his innocence or demonstrate the merits of the issue or issues which would have been raised on appeal. *Lantzy*, 558 Pa. at 226-27, 736 A.2d at 572 (footnote omitted).

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In a published opinion, the Superior Court rejected Appellant's effort to extend *Lantzy* from the setting of an unjustified failure to file a direct appeal to the context of a failure to file a Rule 1925(b) statement. *See Commonwealth v. Halley*, 2003 PA Super 471, 839 A.2d 392, 395 (Pa. Super. 2003). In this regard, the court noted that an appeal was actually filed on Appellant's behalf. While **{870 A.2d 799}** recognizing that the appeal did not result in substantive review of Appellant's claims for relief due to the finding of waiver, the Superior Court expressed the concern that the circumstances under which a petitioner could claim an absence of an effective appeal were limitless. Moreover, it observed that this Court had identified only one other limited circumstance in which counsel's inaction would result in a presumption of prejudice, namely, the failure to file a requested petition for allowance of appeal. *See Commonwealth v. Liebel*, 573 Pa. 375, 825 A.2d 630 (2003). Thus, the court reviewed Appellant's claims under the traditional, three-part test for ineffectiveness, *see supra* note 1, including the requirement to establish actual prejudice, finding that Appellant was not entitled to relief. *See Halley*, 839 A.2d at 396-98.

We allowed appeal to consider Appellant's argument that presumed prejudice should pertain.

2 In this regard, Appellant's present arguments track those that he asserted in the Superior Court. The Commonwealth, on the other hand, contends that the Superior Court should not have addressed Appellant's position concerning presumed prejudice, because it was not raised before the PCRA court. Therefore, the Commonwealth **{582 Pa. 170}** views that position as waived. Alternatively, the Commonwealth argues that presumed prejudice is inappropriate in the present context. The Commonwealth posits that the Court should be guided by its prior decision in *Commonwealth v. Johnson*, 565 Pa. 51, 771 A.2d 751 (2001) (plurality), in which a plurality of Justices applied the three-pronged ineffectiveness test in spite of a contention that counsel was ineffective for failing to preserve certain claims in a 1925(b) statement. The Commonwealth acknowledges that, in *Johnson*, the appellant was not completely denied a direct appeal because other issues were preserved in the 1925(b) statement. Nevertheless, the Commonwealth argues that this represents a distinction without a difference. Further, the Commonwealth endorses the Superior Court's rationale centered on the fact that Appellant was permitted to avail himself of the direct appeal procedure, albeit that waiver was ultimately invoked to foreclose merits review.

At the outset, we reject the Commonwealth's assertion of waiver relative to Appellant's present position by virtue of his asserted failure to advance it in his post-conviction petition. Appellant's petition contained the allegation that:

> The petitioner was prejudiced as a result of trial counsel's failure to preserve issues for appellate review by complying with the trial court's Order directing the filing of a Statement of Matters Complained of on Appeal since he was denied appellate review of this issue.Petition for Relief Under the Post Conviction Relief Act With Consolidated Memorandum of Law at P61. The claim that denial of merits review on direct appeal on account of counsel's deficient stewardship constitutes prejudice is, for all intents and purposes, the functional equivalent of the presumed prejudice concept considered in *Lantzy*. Moreover, in advancing the claim that post-conviction relief is appropriate where the petitioner establishes that he has been denied appellate review as a result of his counsel's actions, Appellant cited *Commonwealth v. Hernandez*, 2000 PA Super 154, 755 A.2d 1 (Pa. Super. 2000), *aff'd in part*, 572 Pa. 477, **{870 A.2d 800}** 817 A.2d 479 (2003), which discusses the concept of presumed prejudice and *Lantzy* at **{582 Pa. 171}** length. *See id.* at 5-9. Under the circumstances, although Appellant's position before the common pleas court was wanting in terms of the development which has later occurred on appellate review, we find that it was within the Superior Court's prerogative to treat the issue as preserved.

On the merits, extension of *Lantzy* from the situation entailing the failure to file a requested direct

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appeal to the circumstance involving the failure to file a Rule 1925(b) statement represents but a modest and incremental step. Indeed, while certainly the holding of any decision is to be read against the facts, *Lantzy*'s reasoning expressly subsumed not only the unjustified failure to file a requested direct appeal, but also, the failure to perfect the appeal. *See Lantzy*, 558 Pa. at 225, 736 A.2d at 571 (indicating that "a failure to file *or perfect* such an appeal results in a denial so fundamental as to constitute prejudice *per se*" (emphasis added)). Since *Lord* establishes that the submission of a court-ordered Rule 1925(b) statement is a prerequisite to appellate merits review, *see Lord*, 553 Pa. at 417-20, 719 A.2d at 307-09, 3 the Rule 1925(b) statement (when directed) is elemental to an effective perfection of the appeal. *See* BLACK'S LAW DICTIONARY 1173 (8th ed. 2004) (defining the act of perfecting as "taking all [the] legal steps necessary to complete, secure, or record a claim, right, or interest"). Thus, *Lantzy*'s reasoning applies by its terms to counsel's dereliction in this case, which left Appellant without an ability to challenge his conviction and sentence by means of the direct appeal. *Accord Roe v. Flores-Ortega*, 528 U.S. 470, 484, 120 S. Ct. 1029, 1039, 145 L. Ed. 2d 985 (2000) (indicating that "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal"). 4

{870 A.2d 801} {582 Pa. 172} We are also not persuaded by the Superior Court's and the Commonwealth's efforts to equate the present circumstances with situations in which a Rule 1925(b) statement is filed, but the statement is later alleged to have omitted meritorious issues. In this regard, it is well established that the decision whether to presume prejudice or to require an appellant to demonstrate actual prejudice "turns on the magnitude of the deprivation of the right to effective assistance of counsel." *Flores-Ortega*, 528 U.S. at 482, 120 S. Ct. at 1037. As we observed in *Lantzy*, the failure to perfect a requested direct appeal is the functional equivalent of having no representation **{582 Pa. 173}** at all. *Id.* at 225, 736 A.2d at 571 (citing *Evitts*, 469 U.S. at 394 n.6, 105 S. Ct. at 835 n.6 (1985)); *see also Penson v. Ohio*, 488 U.S. 75, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988) (holding that the complete denial of counsel on direct appeal requires a finding of prejudice). The difference in degree between failures that completely foreclose appellate review, and those which may result in narrowing its ambit, justifies application of the presumption in the more extreme instance. *Accord Hernandez*, 755 A.2d at 9 n.4 ("[A] PCRA petitioner is entitled to an appeal *nunc pro tunc* where prior counsel's actions, in effect, entirely denied his right to a direct appeal, as opposed to a PCRA petitioner whose prior counsel's ineffectiveness may have waived one or more, but not all, issues on direct appeal."). Furthermore, the limiting principle arising from the recognition of such difference in degree addresses the Superior Court's concern that the presumption should not extend to every circumstance in which a defendant may claim no effective appeal.

We hold that the failure to file a Rule 1925(b) statement on behalf of a criminal defendant seeking to appeal his conviction and/or sentence, resulting in a waiver of all claims asserted on direct appeal, represents the sort of actual or constructive denial of assistance of counsel falling within the narrow category of circumstances in which prejudice is legally presumed. As indicated in *Lantzy*, the remedy for the deprivation of the fundamental right to appeal is its restoration. *See Lantzy*, 558 Pa. at 228, 736 A.2d at 572-73. 5

The order of the Superior Court is reversed, and the case is remanded for reinstatement of Appellant's entitlement to pursue a direct appeal.

Footnotes

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