NO: 23-5674 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE: DONNELLY J. LEBLANC, Petitioner

V.

COMMONWEALTH OF PENNSYLVANIA, Respondents

ON PETITION OF EXTRAORDINARY WRIT OF MANDAMUS TO

Comm. v. LeBlanc, No. 1051 MDA 2022 (Pa. Super. 3/28/23).

PETITION FOR EXTRAORDINARY WRIT OF MANDAMUS

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QUESTION(S) PRESENTED

1. When a *pro se* Petitioner presents, cumulatively, a *prima facia* case of actual innocence, a fundementally unfair conviction and sentence, and direct conflict and abandonment of counsel, with supporting court records and new evidence documentation, can the Petitioner be subjected to the equivalent of natural life in prison without appropriate review?

2. Can a state court ignore its previous Order of recusal and, on the above stated Petition, assume jurisdiction, dismissing the Petition, relying on a non-fatal defect in violation of procedural law and precedent, with no fact-and-context-specific inquiry toward due diligence or the merits?

3. Can the Appellate Court, as a matter of principle and law, substitute the opinion and judgment of the lower court in lieu of the Standard of Review required on each claim set before it, thereby denying *de novo* and plenary review as required by established law and, in conflict with Comm. v. Bennett, 930 A2d 1264 (Pa. 2007) and Comm. v. Burton, 158 A3d 618 (Pa. 2017)?

4. Did the Pa. Supreme Court in Shaw, 247 A3d 1008 (2021) and Bradley, 261 A3d 381 (2021) recognize a state procedural framework, by reason of its design or operation, that was inoperable and, did [they] effect a change in decisional law that concerns a constitutional rule or right for criminal defendants?

Reference to Opinions Below

Commonwealth v. LeBlanc, 1051 MDA 2022 (March 22, 2023)

Commonwealth v. LeBlanc, 3488-2008 (September 21, 2022)

Court of Common Pleas Order, CP-36-CR-03488-2008 (May 13, 2022) n.1

Text of Order(s) In Question

Commonwealth v. LeBlanc, 1051 MDA 2022 (March 22, 2023) a copy of the Superior Court decision is attached in Appendix A

Commonwealth v. LeBlanc, 3488-2008 (September 21, 2022) a copy of the PCRA Court Opinion is attached in Appendix A

Court of Common Pleas Order, CP-36-CR-03488-2008 (May 13, 2022) n.1 *"Defendant has raised no new issues which would excuse the untimeliness of his third PCRA."* See attached Order in Appendix A

Statement of the Case

On June 19, 2008, Petitioner was arrested by Det. George Pappas on allegations of sexual abuse of his teen-age stepson, K.M.

In new evidence, suppressed by the Commonwealth, including defense attorney e-mails, when compared to official records and transcripts, Petitioner ascertained the following; this does not include all of the violations set forth in the PCRA petition:

The police and prosecution suppressed evidence that Petitioner was not living with K.M. during the time-frame K.M. stated to Pappas and Mary Reedy-Holly (which was also inconsistent). (Exhibit 7, Guilty Plea Form 3-CR-0247-07; Bail Release Conditions 3-CR-0248-07; but see Exhibit 11, Police Report, pg. 3).

At trial the prosecution furthered this egregious conduct through leading questions, suborning perjury from K.M. that Petitioner resided in the home and, providing descriptions of pornography and explainations for inconsistensies. (NT Trial 271, 273, 275-76, 278, 284-85, 290, 292, 297, 301, 343-45). When asked directly, even after all the leading, K.M. could not provide a time-frame. Instead, ADA Miller fed him the answer in one mouthful. (NT Trial 284).

Tlhe prosecutor was fully aware, through provided letters from K.M.'s mother, that K.M. was not being truthful and was a habitual liar whose "lies have gotten worse than ever." (Exhibit 5, Darla LeBlanc letters, 10/12-20/08 w/ Cover letter to ADA Mansfield, 1/5/09).

That Pappas deliberately falsified and omitted highly exculpatory evidence in his affidavits and reports, falsely swearing that K.M. was "consistent" in the allegations and facts he reported. (Exhibit 11, Police Report, pg. 1 and 3; C.f. Affidavit, par. 8). Pappas also suppressed and omitted that K.M's first accounts had nothing to do with the home office, pornography, or ~~his~~ Petitioner and K.M. performing oral sex on each other. (Exhibit 8, Pappas-Stauffer e-mail, 6/9/08; Exhibit 9, CY104 and Intake Screening Forms, 6/9/08). Pappas deliberately omitted that K.M.. deliberately lied to Mary Reedy-Holly during a foresic interview that the story he told her was the same story that he had told to his mother and Pappas. (Exhibit 12, CY48 Form and Abuse Record, pg. 2). Pappas omitted knowledge that K.M. had a propensity for making false allegations about Petitioner to authorities and, committed perjury at trial in relation as to when he acquired this knowledge. Pappas "closed" his investigation on the day of Petitioner's arrest. (NT Trial 405, but see Exhibit 11, Police Report, pg. 4).

The prosecutor began his perjury in opening statement that his expert, Det. Savage, would testify

pornography found on the home computer was "attributable to Mr. LeBlanc." (NT Trial 221-23). In fact, under cross-examination, Savage admitted he had "no evidence" to support ADA Miller's assertions or K.M.'s allegations. (NT Trial 269). Savage's initial report clearly shows there was never anything inculpatory on the home computer "attributable to Mr. LeBlanc" and, that he deliberately altered and tampered with evidence at Miller's behest. (Exhibit 22, Savage Report, 7/16/08, pg. 1; Exhibit 23, Donnelly LeBlanc Preview; Exhibit 24, Savage Report, Defense Copy, pg. 1, Pars. 5-7). In a suppressed Report by Savage, it shows that he and Miller altered the file names and Savage committed perjury and ambushed the defense at the 11th hour. (NT Trial 250-51; C.f. Exhibits 24 and 25 at pg. 2). None of Savage's trial testimony, in any way, substantially matches the content of his reports as to the number of and location of files.

Petitioner provided documented, suppressed evidence and references to the record in PCRA court that would prove Pappas committed perjury at trial concerning his interviews with this Petitioner and his proported evidence. And, that Pappas deliberately destroyed statements and interview notes with Petitioner, K.M., and the mother vital to the defense. (NT Trial 383, 386-87, 396-97).

In his closing, ADA Miller argued that this false, staged, and hearsay testimony was corrabative of Petitioner's guilt. (NT Trial 474-75).

Miller continued, posing himself as an expert on child witnesses and, vouching for K.M. by placing him in the "category" of child witnesses the jury should believe. (NT Trial 486-88).

Petitioner provided the PCRA court with suppressed, exculpatory interview notes of K.M. and the mother taken by ADA Miller.

Petitioner provided e-mails and documents with references to the record to the PCRA court proving outright abandonment of defense, appellate, and PCRA counsels sanctioned by the court itself. (See E.g. Exhibit 2, Court Order w/ attachments, 11/20/14; Exhibit 38, Spahn-Mansfield e-mail, 2/3/09; NT PCRA Hearing 23:6-20, 24:14-16, 25:4-7). It is obvious from the defense counsel's own testimony that he abandoned a viable alibi and committed perjury as to his reason for this egregious e-mail to the prosecutor. (NT PCRA Hearing 27-31, but C.f. pgs. 23-25).

Reasons for Granting the Petition

1. When a pro Se Petitioner presents, cumulatively, a prima facia case of actual innocence, a fundementally unfair conviction and sentence and, direct conflict and abandonment of counsel, with supporting court records and new evidence documentation, can the Petitioner be subjected to the equivalent of natural life in prison without appropriate review?

A document filed pro se must be liberally construed and can only be dismissed if it appears beyond doubt that the petitioner can prove no set of facts in support of his claim which would entitle him to relief. Erickson v. Pardus, 551 US 89, 94 (2007) citing Estelle, 429 US at 106. Allegations and all reasonable inferences drawn therefrom are construed favorable to the Petitioner and must be accepted as true by the court. See Jordan v. Fox Rothchild, 20 F2d 1250, 1261 (CA3 1994). The court's review must consider all relevant precedents, even if not cited by the parties. Elder v. Holloway, 510 US 510, 514-16 (1994), accord Canon 2A, Lawyer's Deskbook of Professional Responsibility, Section 10.2-3(a) (2006-07).

Pennsylvania's Statutory Construction Act requires the provisions of PCRA (state habeas) to be "construed liberally to effect their objects and to promote justice." Comm. v. Burton, 158 A3d 618 (Pa. 2017).

In this instance, "timeliness" is a due diligence inquiry that requires the court to make a "fact-and-context-specific inquiry focused on the characteristics and reasonable expectations of each petitioner." Bracey v. Superintendent, 986 F3d 274, 285-86 (CA3 2021). Diligence "requires neither perfect vigilence nor punctilious care, but rather it requires reasonable efforts by the petitioner, based on the particular circumstances..." Burton at 624. The court must develop a factual record as to whether the petitioner had prior knowledge of the after discovered facts. Burton at 630, 638.

Ultimately, the burden of due diligence concerning evidence and facts in possession of the prosecution cannot fall on the defendent. The prosecution bears this burden "past trial, into post-conviction and beyond." E.g. Banks v. Dretke, 540 US 668, 693 (2004), accord Bracey at 293. See also ABA Standards of Criminal Justice for Prosecutors 3.1; ABA Model Rule 3.8 (3-4).

When a petitioner can show that he was prevented from bringing claims before the court through no fault of his own, "cause" is shown for procedural default. Murray v. Carrier, 477 US 478, 485 (1986); Martinez v. Ryan, 556 US 1, 17 (2012).

Where the reviewing court fails to consider the full measure of the properly presented facts and precludes development of the record, it is an abuse of discretion. Bracey at 296-97; Burton at 630. And, where the PCRA court failed to provide an adequate pre-dismissal notice and opportunity to amend the PCRA to comply with the rule. E.g. Comm. v. Bennett, 940 A2d 1264, 1269 n. 6 (Pa. 2007). Or, fails to appoint counsel as the law requires, timely or not. Id. at 1274.

Relief is waranted where there is merit to the underlying claims, and where appropriate "the imperative of correcting a fundementally unjust incarceration." Bracey at 296.

A petitioner will obtain relief when the violations rise to the level of a fundemental defect which inherently results in a complete miscarriage of justice or, is inconsistent with the rudementary demands of fair procedure. Reed v. Farley, 512 US 339, 348 (1994). Or where violations of state law are of

constitutional magnitude. Pulley v. Harris, 645 US 37, 41 (1984); Swarthout v. Cooke, 562 US 216, 220 (2011).

Petitioner, through new evidence and references to the record clearly set out in his petition a pattern of misconduct by the prosecution through perjurous testimony, fabrication of documents and suppression of evidence, and ineffectiveness/abandonment of his attorneys that infected the integrity of the proceedings at trial and sentencing. E.g. Brecht v. Abramson, 507 US 619, 638 (1993).

The mandatory assessment on a claim of actual innocence must be taken "in the light of all the evidence, including that alleged to have been illegally admitted (but with due regard to the unreliability of it) and, evidence tenably claimed to have been wrongfully excluded or to have become available only after trial." Schlup v. Delo, 513 US 298, 328 (1995). "New evidence" in this context does not mean newly discovered evidence; it just means evidence that was not presented at trial. Id. at 322, 324. This assessment is not differential to the verdict.

There is no procedural bar to this Court's equitable authority in correcting a fundementally unjust incarceration. Comm. v. Peterkin, 722 A2d 638, 643 (Pa. 1998), McQuiggin v. Perkins, 569 US 1, 8 (2013).

Petitioner clearly attached to his Petition, documents and referances to the record showing more likely than not that he was actually innocent and clearly outlined the pleading. None of the claims were presented and adjudicated in prior proceedings as proported by the PCRA court.

The police and prosecution suppressed evidence that Petitioner was not living with K.M. during the time-frame K.M. stated to Pappas and Mary Reedy-Holly (which was also inconsistent). (Exhibit 7, Guilty Plea Form 3-CR-0247-07; Bail Release Conditions 3-CR-0248-07; but see Exhibit 11, Police Report, pg. 3).

At trial, the prosecution furthered this egregious conduct through leading questions, suborning perjury from K.M. that the Petitioner resided in the home and, providing descriptions of pornography and explainations for inconsistencies. (NT Trial 271, 273, 275-76, 278, 284-85, 290, 292, 297, 301, 343-45). When asked directly, even after all the leading, K.M. could not provide a time-frame. Instead, ADA Miller fed him the answer in one mouthful. (NT Trial 284).

The prosecutor was fully aware, through provided letters from K.M.'s mother, that K.M. was not being truthful and was a habitual liar whose "lies have gotten worse than ever." (Exhibit 5, Darla LeBlanc letters, 10/12-20/08 w/ Cover letter to ADA Mansfield, 1/5/09).

By his own testimony, K.M. admitted that this Petitioner wanted nothing to do with him when Petitioner did reside there. (NT Trial 308-09). So, it is hardly likely, without the prosecutor's misconduct and perjurous testimony, taking the new evidence and facts into account, that Petitioner was guilty.

The suppressed reports, first made by K.M., in no way matched his trial testimony or, what he supposedly told Det. Pappas. (Exhibit 8, Stauffer-Pappas e-mail, 6/9/08; Exhibit 9, CY104 and Intake Screening Forms, 6/9/08; Exhibit 12, Abuse Record, pg. 2).

Indeed, K.M.'s testimony was incongruous and in opposition to Incontrovertible Physical Facts. He claimed the entire event of watching pornographic movies and performing oral sex on each other lasted only two (2) minutes; that he lay unmoving "pretending to be asleep" while having a dry finger inserted, "moved sideways, up and down, and around"; that he was experienced and knew it was a finger because,

"it felt like one." (NT Trial 281-83, 285-86).

Petitioner was K.M.'s only disciplinarian. (NT Trial 307-08). K.M. had many months to report this while Petitioner was absent or incarcerated. (See CP-36-CR-1684-2008). Yet, K.M. made no effort to report this when interviewed by Youth Services on February 8, 2008 or after until learning of Petitioner's possible return to the home. (NT Trial 337-39).

The prima facia standard in Szuchon was clearly met by this Petitioner. Comm. v. Szuchon, 633 A2d 1098, 1100 (Pa. 1998).

2. Can the state court ignore its previous Order of recusal and, on the above stated Petition, assume jurisdiction, dismissing the Petition, relying on a non-fatal defect in violation of procedural law and precedent, with no fact-and-context-specific inquiry toward due diligence or the merits.

A judge who has been recused should take no other action except necessary ministerial acts to have the case transferred to another judge. Rohrbach v. A.T. & T. Nassau Metals Corp., 915 F. Supp. 712, 716 (M.D. Pa. 1996). A recused judge "acts outside his jurisdiction, and thus commits "a clear error of law." Id. A judge should disqualify himself in a proceeding in which his impartiality might be questioned. Comm. v. King, 576 Pa. 318, 324-25 (2003). The standard of review is an "objective standard that requires recusal when the liklihood of bias on the part of the judge is too high to be constitutionally tolerable or, where the potential for influance and pursuasion is too high to be acceptable. Williams v. Pa., 579 US 1 (2016). Where there is a high degree of apparent favoritism or antagonism recusal is required despite lack of extrajudicial source. Likety v. U.S., 510 US 540, 555 (1993). Recusal is required when a judge has served as former counsel. Murray v. Scott, 253 F3d 1308, 1313 (CA11 2001). Or, when a judge had involvement as a former prosecutor. Williams Id.

In the instant case, Petitioner's prior counsel, R. Pugh filed a Motion to Recuse on May 30, 2014 citing to Judge Wright's "settled purpose to deny relief" pursuant to his blatant statements at sentencing to K.M.:

"However, let me tell you one thing. All future appeals perfected in this case must pass through me. As long as I am Judge, rest assured I will remember you." NT Sentencing p. 65.

On June 6, 2014, Judge Wright dismissed the Motion without opinion or statement as to his reasoning.

On June 19, 2014, attorney Pugh refiled his Motion before President Judge Madenspacher, which was Granted. The case was re-assigned to the Hon. R. Eby of Lebanon County.

Shortly after filing his instant PCRA, December 16, 2021, raising claims of actual innocence, miscarriage of justice (fundemental fairness violation) and, conflict/abandonment of counsels, with supporting documents and references to the record, Petitioner filed a Motion to Recuse/Disqualification on January 6, 2022. Petitioner included facts that the Hon. C. Stedman was in conflict as he had direct involvement in Petitioner's trial and sentencing and, that the Hon. M. Spahn was Petitioner's prior counsel. Judge Wright denied the Motion, January 19, 2022, one (1) day after the Clerk filed it on January 18, 2022. It was denied without opinion or reasoning.

Petitioner appealed the PCRA court order on February 11, 2022. The Superior Court Quashed the appeal. (No. 359 MDA 2022).

On July 22, 2022, Petitioner filed a Notice of Appeal to J. Wright's Order dismissing his instant PCRA. On November 11, 2022, the Superior Court determined the PCRA court's violation of Pa. R. 114(B)(1) deemed the Notice timely. (Comm. v. LeBlanc, No. 1051 MDA 2022, Order, 11/7/22).

Judge Wright's denial of Petitioner's motion to Recuse/Disqualify was included in Petitioner's 1925(b) statement and briefed on appeal.

The Superior Court refused/failed to review the claim, relying solely on J. Wright's 1925 Opinion that addressed only the facial ~~timeliness~~ defect of the PCRA.

Moreover the Superior Court was fully aware that Judge Wright had been recused and could not decide the outcome of Petitioner's filings. (See Comm. v. LeBlanc, 548 MDA 2016, 12/23/16, pg. 3).

The transcripts and lower court docket are replete with rulings that, cumulatively show a pattern of bias toward Petitioner. (See E.g. NT Trial 221-23, 252-53, 269; failing to correct the blatant perjury of the prosecuter and his witness or, *sua sponte* correcting the jury on irrelevant evidence). Denying each and every Motion filed without opinion or reasoning.

A judge whom has been cited in the court record, openly stating his bias and ill-will toward a defendant and, whom has been removed from his jurisdiction has no authority to once again assume authority over a case. Had the PCRA court not previously "left the evil in place" and allowed prior PCRA counsel to abandon this Petitioner, this issue and others would have long ago been resolved. (See Exhibit 2, Order, R. Eby, 11/20/14 with attachments; NT PCRA Hearing 12:15-19). Holloway v. Ark., 435 US 475, 488-89 (1978).

By operation of law, J. Wright's previous 907 Opinion and Notice of December 3, 2012, should have been vacated and, Judge R. Eby, whom had no knowledge of its content, should not have been allowed to rely on it. (See NT PCRA Hearing ~~4/4/11~~ 4/11). Nor should counsel have failed to preserve and litigate the issue.

3. Can the Appellate Court, as a matter of principle and law, substitute the opinion and judgment of the lower court in lieu of the Standard of Review required on each claim set before it, thereby denying *de novo* and plenary review as required by established law and, in conflict with **Comm. v. Bennett**, 930 A2d 1264 (Pa. 2007) and **Comm. v. Burton**, 158 A3d 618 (Pa. 2017)?

Petitioner has been unable to find precedent similarly situated to this issue, though it does not preclude this Court the distinction of establishing such a rule.

As a matter of principle and law, it would be unacceptable for the Appellate Court to substitute the Opinion and views of the District Court in lieu of Appellate Court standard and scope of review.

For example, this Court has held that the District Court may not adopt another party's legal reasoning and facts "in lieu of an independent judicial opinion" See Comm. v. Williams, 732 A2d 1167, 1192 (Pa. 1999).

Another example is the Superior Court's own holding of this Court's long-standing precedent that "trial court opinions are not part of the record. As such, they cannot be considered as part of the record on appeal." In Re D.D., 597 A2d 648, 653 (Pa. Super. 1991).

Indeed, the Superior Court's decision in Petitioner's case is contrary to its decision announced in Burton, affirmed by this Court. See Comm. v. Burton, 121 A3d 1063 (Pa. Super. 2015). The Superior Court vacated the PCRA court's dismissal and remanded for an evidentiary hearing, where the PCRA court used the same reasoning for the dismissal as Judge Wright used in this instant case. See Comm. v. Burton, 158 A3d 618, 623-24 (Pa. 2017). The Superior Court held there was insufficient factual record to support the PCRA court opinion and, that the Petitioner raised "genuine issues of material fact that warrant development" Id. at 1074.

In affirming, this Court also held that the provisions of 9545(b)(1)(ii) must be construed liberally to effect their objects and promote justice. Burton, 158 A3d at 631.

The PCRA court, in its 1925 opinion, relied on Beasley, citing a failure to "plead and prove", which is a "defect" controlled by statutory due process under Pa. R. Crim. P. 905. The court's failure to issue a 907 Notice denied this Petitioner his right to seek leave to amend,

correct any defects, and permit merits review of potentially arguable claims. Comm v. Rykard, 55 A3d 1177, 1189 (Pa. Super. 2012).

In Petitioner's case, contrary to clearly established law and precedent, the Superior Court merely "adopt[ed] the facts and procedural history set forth in the PCRA court's opinion." (Comm. v. LeBlanc, 1051 MDA 2022, 3/22/23, pg.1).

This Court may consider it is not the first instance of such a ruling by the Superior Court in Petitioner's case. Contrary to the facts and record, the Superior Court deemed Petitioner's Second Amendment to a timely filed *pro se* Petition as untimely and, again merely accepted and adopted the PCRA court opinion. (See Comm. v. LeBlanc, 548 MDA 2016, 12/23/16, pg 6-7).

The PCRA court, improperly, merely adopted the reasoning in the Commonwealth's brief. Williams Id.

During the October 20, 2014 hearing, neither the court nor the Commonwealth raised any issue as to the Amendment as a subsequent Petition and, the PCRA court did not formally issue an order dismissing the previous Amendment until after-the-fact, November 21, 2014. Furthermore, counsel did, in fact, assert that the Second Amendment was a consolidation of "every previous petition filed by this defendant in this matter." NT PCRA Hearing, pg. 8.

Pursuant to Pa. R. Crim. P. 908, the Commonwealth waived the objection of timeliness in failing to file a Motion to Dismiss or, objecting at the hearing. The PCRA court Ordered the Amendment, April 10, 2013.

Amended petitions do not fall under the gambit of a second or subsequent petition. Comm. v. Tedford, 566 Pa 457 (2001). Unless the Pa. trial court strikes a supplemental petition, the PCRA court permits amendment under Pa. R. Crim. P. 905(A). Dickerson v. Kauffman, 2017 US Dist LEXIS 12433 (3rd Cir. 2017) citing Comm. v. Dennis, 950 A2d 945, 959 N. 11 (Pa. 2008).

Such errors in the established rule of law and due process should not be allowed to stand.

4. Did the Pa. Supreme Court in *Shaw*, 247 A3d 1008 (2021) and *Bradley*, 261 A3d 381 (2021) recognize a state procedural framework, by reason of its design or operation, that was inoperable and, did [they] effect a change in decisional law that concerns a constitutional rule or right for criminal defendants?

It is well settled that "there is no implied waiver of constitutional rights, nor does counsel, without written consent have authority to waive or withdraw such rights." Any doubt as to voluntariness must be resolved in favor of the defendant. Patterson v. Ill., 487 US 208, 292 n.4 (1988).

The right to bring and, fully exhaust, meritorious constitutional claims in state post-conviction proceedings is a rule based constitutional right. Thus, any procedural or decisional law that allows or excuses counsel's actions in failing to bring those meritorious claims, without consent, or prohibits a defendant from pursuing relief for counsel's negligence is unconstitutional.

Although, ultimately, any claims innvolving undisclosed facts or evidence known to the prosecution, regardless of time-frame, must be lain at the prosecution's feet. See Banks v. Dretke, 540 US 668, 696 (2004); accord Bracey v. Superintendent, 986 F3d 274, 293 (CA3 2021).

By law, it is the prosecutions duty to come forward and correct its own misconduct and seek to remedy a fundementally unfair or wrongful conviction. See ABA Model Rule 3.8 (3-4).

Conversely, "plain error" mitigates and thte court must make a fact-finding determination as to waiver or mere forfeiture and, errors "that seriously affect the fairness, integrity, or public reputation of judicial proceedings. U.S. v. Olano, 507 US 725, 731-33 (1993); Johnson v. U.S., 520 US 461, 465-66 (1997). This assessment must be made cumulatively as a "patternn of misconduct' even if it would not have affected the verdict. Brecht v. Abrahamson, 507 US 618, 623, 638 n.9 (1993); accord Comm. v. Shattzahn, 952 A2d 640, 671 (Pa. 2008).

Watershed rules of cirminal procedure implicating the fundemental fairness and accuracy of the proceeding are to be applied retroactively. Teague v. Lane, 489 US 288, 311 (1989). See also Montgomery v. La., 136 S.Ct. 718, 729 (2016). (state collateral review courts must give

retroactive effect to new substantive constitutional rules).

The Pa. Supreme Court in Shaw, 247 A3d 1008 (Pa. 2021) and Bradley, 261 A3d 381 (Pa. 2021) recognized that the statutory, rule base right to effective assistance of counsel on PCRA was broken. The Court, in Bradley, found that the state procedural framework, by reason of its design or operation was inoperable. citing Comm. v. Paddy 15 A3d at 479. See also Trevino v. Thaler, 133 S.Ct. 1911, 1915 (2013).

In essense, the state's procedural rules concerning hybrid counsel and Pa.R.Crim.P. 907 constituted government interference of a defendant's right to effective assistance of counsel on PCRA and, the right to bring claims of deficient performance. Shaw and Bradley created a substantive change in decisional law concernign "a constitutional rule or right for defendants" which was not previously available or enforcable. See Cox v. Horn, 757 F3d 113, 119-20 (CA3 2014) citing Triveno at 1921.

Any procedural rule that prohibits the defendant form being heard is in direct conlict with the Pa. Constitutional Article 1, Section 9, guaranteeing the right to be "heard by himself and counsel." Justice Larson, in his dessent, warned of the far-reaching consequences of injustice that such procedural barring has cause. See Comm. v. Ellis, 534 Pa. 176 (1993).

Petitioner clearly attached Exhibits to his PCRA and plead that PCRA counsel had been in direct conflict, sanctioned by the court, and abandoned Petitioner's claims set forth in counsel's own Amended Petitions in violation of U.S. Supreme Court. See Halloway v. Ark., 435 US 475, 484-85 (1978). (NT PCRA Hearing 12:15-19; Appendix B, Exhibit 1, R. Pugh letter, 9/27/14; Exhibit 2, Court Order w/ attachements, 11/20/14).

There were eight (8) claims in attorney Quinn's 1st Amended Petition and, fifteen (15) layered claims in attorney Pugh's 2nd Amended Petition. Both counsel had access and ample opportunity to use the documents and records Petitioner provided in his original PCRA, filed June 31, 2011. (See PCRA Hearing Transcript 8:23-9:6).

PCRA counsel, himself, clearly argued in his Brief to Superior Court that:

"...prior counsel and the undersigned merely refined the pro se Petitions for more coherent presentation, or to delete non-meritorious claims." (Exhibit 51, Brief for Appellant, R. Pugh, No. 548 MDA 2016, pgs. 1 and 10).

Given such a statement, it is obvious that counsel abandoned nineteen (19) of the "meritorious" claims he and "prior counsel" had "refined" in the Amended Petitions.

Petitioner's case is rife with misteps and abandonment by attorney Pugh; to name a few:

He failed to properly argue or appeal trial counsel's objections went to "bias, motive to fabricate and credibility." in violation of Davis v. Alaska, 415 US 308 (1974). (NT Trial 332:17-18) Instead, he argued rule of evidence that was not proferred by trial counsel during the objection and lost the appeal. And, he failed to properly argue on appeal the PCRA court's failure ot provide a hearign on the prosecution's suppression of interview note was in violation of Comm. v. Williams, 624 Pa. 405 (2014) and Comm. v. Alston, 864 A2d 539 (Pa. Super. 2004).

Counsel failed to properly argue at the October 20, 2014 hearing and on appeal trial counsel's failure to present defendant's alibi was in violation of Comm. v. Johnson, 635 Pa. 665, 713-14 (2015) and contrary to the facts presented at the hearing by trial counsel's own testimony. (See PCRA Hearing Transcript pgs. 23-25).

Counsel failed to properly raise and argue on appeal that the PCRA court ordered the Second Amendment on April 10, 2013 and, that the Commonwealth, nor the PCRA court raised any objection to the Amendment prior to or at the October 20, 2014 hearing. Nor, did he properly argue that pursuant to Pa. and Federal law the limitation statute was tolled as the First Amendment was still pending. But, counsel did argue that the two (2) amendments were, *"...in effect ONE PCRA Petition."* (See Exhibit 51, Brief for Appellant, R. Pugh, No. 548 MDA 2016, pg. 10).

Instead, rather than apply its own precedents ot the case, or the actual record, the Superior Court dismissed the claims, going so far as substituting the PCRA court Opinion in lieu of the appellate review and blaming "Appellant" for attorney error, in violation of U.S. Supreme Court decisional law. See e.g. Massaro v. U.S., 123 S.Ct. 1690, 1696 (2002).

Ultimately, the Superior Court ignored the facial and legal unsoundness of the PCRA court's Opinion. The Second Amendment was filed October 3, 2013. The First Amendment was still pending and not formally dismissed until the hearing on October 20, 2014, nor did the court strike any of the Petitions as "untimely" at that hearing. (See Superior Ct. No. 548 MDA 2016,

pgs. 6-7).

Therefore, since the Commonwealth nor court ever raise the issue of timelilness pursuant ot Pa.R.Crim.P. 908, the statute was legally tolled and one was the amendment of the former; PCRA counsel had nothing to object to as the Superior Court proported and the PCRA court misrepresented in its Opinion.

Pa.R.A.P. 105(b) is not without its teeth. It does not prevent the Court from correcting a "fraud or breakdown in the judicial process." See Pa.R.A.P. 105, Committee Notes and Comments.

Conclusion

Petitioner's conviction and sentence resulted from the use of perjury, knowingly used by the prosecution and, from the deliberate suppression of favorable evidence of innocence, depriving him of every right guaranteed by or Constitution. To allow such a conviction to stand soley on procedural grounds and a lower court's outright refusal to look beyond 'facial' predicate is contrary to the rudimentary demands of justice and fair procedure or our legal system. Allowing such a contrivance on the court, the public, and the jury would cõndone the government as lawbreaker.

Sept. 20, 2023

Donnelly J. LeBlanc

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