

the new 'evidence' would not have had any effect on the jury's verdict." Order, 9/24/19.¹⁵

At this juncture, we note that Appellant filed his petition while his direct appeal was still pending before the United States Supreme Court, which did not deny his petition for writ of *certiorari* until October of 2019. Based on this procedural detail, it appears the trial court, in its subsequent opinion, however, suggested: "A remand is necessary to vacate [its] September 24, 2019, [o]rder denying [Appellant]'s [p]etition for [w]rit of [*c*]oram [*n*]obis and

¹⁵ During this time, Appellant filed several more *pro se coram nobis* petitions; (1) May 30, 2019, petition for writ of *coram nobis*; (2) June 13, 2019, corrected petition for writ of *coram nobis*; (3) July 10, 2019, petition for writ of *coram nobis*; (4) July 15, 2019, petition for writ of *coram nobis* III and petition for writ of *habeas corpus* II; and (5) July 25, 2019, petition for writ of *habeas corpus* III. Appellant mistakenly believed that the September 24, 2019, order denied all of these petitions. As such, he filed a single notice of appeal at Docket No. 1608 MDA 2019, purporting to appeal from the denial of all the petitions. He later filed new notices of appeal at 1640-1647 MDA 2019.

The trial court clarified that its September 24th order denied only his August 26, 2019, petition. On December 16, 2019, this Court directed Appellant to show cause why the appeal at 1608 MDA 2019 should not be quashed (1) as non-complaint with Pa.R.A.P. 341 because on its face, the notice of appeal appeared to be appealing from nine separate orders, and (2) as duplicative of the present appeal. **See** Order, 12/16/19. Appellant filed a response, admitting that the appeals were identical and did not object to 1608 MDA 2019 being quashed.

By separate orders, this Court quashed the appeal at 1608 MDA 2019 and directed that Appellant be permitted to file a Pa.R.A.P. 1925(b) concise statement and that the trial court file a supplemental opinion. **See** Orders, 2/20/20. Appellant filed his concise statement on February 26, 2020, and the trial court filed a supplemental opinion on August 27, 2020.

reconsider [his] [p]etition . . . as a [p]etition under the [PCRA].” Trial Ct. Op., 8/27/20, at 3 (unpaginated). The court further noted: “All of [Appellant]’s claims are cognizable under the PCRA as they seek relief from his judgment of sentence after it became final and involve claims that should be brought in a PCRA petition.” **Id.** at 4 (unpaginated).¹⁶ We conclude that no relief is due.

First, regardless of Appellant’s titling his filing as a petition for writ of *coram nobis*, the claims presented were cognizable under the PCRA, and thus “the PCRA [was] the only method of obtaining” the requested review. **See** 42 Pa.C.S. § 9542 (PCRA “shall be the sole means of obtaining collateral relief and encompasses all other common law . . . remedies . . . including . . . coram nobis.”), **Commonwealth v. Descardes**, 136 A.3d 493, 501 (Pa. 2016) (“[P]ursuant to the plain language of Section 9542, where a claim is cognizable under the PCRA, the PCRA is the only method of obtaining collateral review.”). As such, the court correctly treated this petition as a PCRA petition in its September 24th order and denied relief because Appellant was no longer

¹⁶ By letter filed August 19, 2021, the trial court again requested that this Court remand the matter so that the petition at issue could be addressed pursuant to the PCRA. **See** Letter from Senior Judge Stephen B. Lieberman to Superior Court, 8/19/21, at 1 (unpaginated). The next day, Appellant filed a *pro se* response in opposition to the remand. Three days later, this Court directed the Commonwealth to show cause why the appeal should not be remanded. **See** Order, 8/24/21. The Commonwealth filed a response, explaining that that it understood the trial court’s position but noting that the trial court lacked jurisdiction to proceed under the PCRA while the record remained with this Court. **See** Commonwealth’s Answer to Rule to Show Cause Order, 8/25/21, at 1-2.

serving his sentence when he filed the petition. **See** 42 Pa.C.S. § 9543(a)(1)(i) (to be eligible for PCRA relief, petitioner must be “currently serving a sentence of imprisonment, probation or parole for the crime”).

Indeed, this Court has previously opined:

[T]he Pennsylvania Supreme Court has held that, to be eligible for relief under the PCRA, the petitioner must be “currently serving a sentence of imprisonment, probation or parole for the crime.” 42 Pa.C.S. § 9543(a)(1)(i). As soon as his sentence is completed, the petitioner becomes ineligible for relief, regardless of whether he was serving his sentence when he filed the petition. In addition, this court determined in **Commonwealth v. Fisher**, 703 A.2d 714 (Pa. Super. 1997), that the PCRA precludes relief for those petitioners whose sentences have expired, regardless of the collateral consequences of their sentence.

Commonwealth v. Hart, 911 A.2d 939, 941-42 (Pa. Super. 2006).

Accordingly, we discern that a remand is not necessary as the trial court did not err in its denial of PCRA relief.¹⁷

Second, it appears Appellant was represented by counsel during this time,¹⁸ and therefore, the denial of relief was also proper under our long

¹⁷ Moreover, Appellant improperly filed this petition while his direct appeal was still pending. **See Williams**, 215 A.3d at 1023. He should have withdrawn his direct appeal with the United States Supreme Court if he wanted to pursue his petition.

¹⁸ It merits repeating the trial court entered an order on February 5, 2019, which removed Attorney Kelly and appointed Attorney Deady to represent Appellant as to his motion for stay of sentence. Appellant filed his *pro se* petition approximately six months later. The court copied Attorney Deady and Attorney Kelly on its September 24, 2019, order and its August 27, 2020, opinion.

standing policy precluding hybrid representation. The Pennsylvania Supreme Court has explained:

[A] defendant in a criminal case may not confuse and overburden the courts by filing his own *pro se* briefs at the same time his counsel is filing briefs for him

* * *

[This] rationale . . . applies equally to PCRA proceedings[.] We will not require courts considering PCRA petitions to struggle through the *pro se* filings of defendants when qualified counsel represent those defendants. . . .

Commonwealth v. Pursell, 724 A.2d 293, 302 (Pa. 1999). ***See also Commonwealth v. Jette***, 23 A.3d 1032, 1044 (Pa. 2011) (“[T]he proper response to any *pro se* pleading is to refer the pleading to counsel, and to take no further action on the *pro se* pleading unless counsel forwards a motion.”).¹⁹ Again, we reiterate that Appellant completed serving his sentence as of November 2018 — approximately ten months before he filed this petition. Accordingly, Appellant is not entitled to relief, and the court properly denied Appellant’s August 26, 2019, petition.

¹⁹ Even if Appellant was not represented by counsel at the time, Pennsylvania Rule of Criminal Procedure Rule 904, which requires the PCRA court to appoint counsel to represent an appellant in his first petition, would not be applicable. In ***Hart, supra***, a panel of this Court held: “Although it is axiomatic that a first-time PCRA petitioner is entitled to assistance of counsel, regardless of whether or not the petition is timely on its face, **the failure to appoint counsel is not reversible error where the petitioner’s sentence has expired.**” ***Hart***, 911 A.2d at 942 (emphasis added).

At this Superior Court docket, on February 6, 2023, Appellant filed with this Court an application for relief. He attached a copy of his August 26th petition "with the intent of making it easier for [this] Court to identify the underlying petition in the original record." **See** Application for Relief, 2/6/23, at 1. As this Court located the petition in the certified record, despite Appellant's voluminous filings, we deny this application as moot.

C. 566 MDA 2021

April 5, 2021, Order Denying Petition for Writ of Coram Nobis

On March 16, 2021, Appellant filed a document entitled "Petitions for Writ of Coram Nobis, Habeas Corpus, Equitable Relief and Attachments." The trial court denied this petition on April 5, 2021, stating it was without jurisdiction to consider the petition "as the appeal in this case was still pending before the Superior Court of Pennsylvania." Order, 4/5/21.

We conclude Appellant was not entitled to relief on the March 16, 2021, PCRA petition, because he had completed serving his sentence **and** an appeal from the denial of a prior PCRA petition was pending. **See** 42 Pa.C.S. § 9543(a)(1)(i); **Beatty**, 207 A.3d at 961. We thus affirm the trial court's order.

Furthermore, we note that Appellant's March 16th PCRA petition appears to be untimely. "The PCRA's time restrictions are jurisdictional in nature, and a court may not entertain untimely PCRA petitions." **Commonwealth v. Burton**, 158 A.3d 618, 627 (Pa. 2017). Here, Appellant's judgment of sentence became final on October 15, 2019, when the United States Supreme

Court denied his petition for writ of *certiorari*. **See** 42 Pa.C.S. § 9545(b)(3). Appellant then had one year from that date to file a PCRA petition. **See** 42 Pa.C.S. § 9545(b)(1). Thus, this March 6, 2021, PCRA petition was facially untimely.

D. 743 MDA 2022

February 9, 2022, Order Denying Petition for Writ of Coram Nobis

On February 2, 2022, Appellant filed a document entitled "Petition for Writ of Coram Nobis, Habeas & Equitable Relief & Application for Relief." In this petition, he alleges that the email that he sent to the District Attorney, which led to his underlying conviction, qualifies as "free speech" and there were "inaccuracies within the four corners of the charging documents [which gave] rise to a legitimate material challenge to the content within the four corners of the charging documents." Appellant's Petition for Writ of *Coram Nobis*, 2/2/22, at 3-4. The trial court denied this petition seven days later, again stating it was without jurisdiction to consider the petition "as the appeal in this case is still pending before the Superior Court of Pennsylvania." Order, 2/9/22.

Akin to the appeal at Docket No. 566, the trial court's denial of relief was proper because there was a pending appeal pertaining to a prior PCRA petition. **See Beatty**, 207 A.3d at 961. We also affirm the order on the ground Appellant was no longer serving his sentence. **See** 42 Pa.C.S. § 9543(a)(1)(i). Furthermore, the petition appears to be facially untimely

pursuant to 42 Pa.C.S. § 9545 and **Burton**, 158 A.3d at 627. Accordingly, the trial court properly denied Appellant's February 2nd petition.

At this Superior Court docket, Appellant has filed an application for relief, entitled "Application for Relief Per Pa.R.A.P. 1926(b)(1) to Supplement the Certified Trial Court Record with the Attached Copy of the Trial Exhibits and Trial Transcript, which Indexes the Exhibits." He avers the certified record may be missing certain documents, and requests to supplement the record. Appellant also has filed a "Notice to the Superior Court Regarding Appellant's January 25, 2022 Request to the Trial Court Regarding Trial Exhibits" and a "Second Notice to the Superior Court Regarding Appellant's January 25, 2022 Request to the Trial Court Regarding Trial Exhibits." These filings pertain to Appellant's request to the trial court to order the release of several trial exhibits. As no appellate relief is due for the reasons stated above, we deny these applications.

XI. Conclusion

For the foregoing reasons, we conclude Appellant is not entitled to any relief.²⁰

²⁰ We caution Appellant to carefully consider his litigious behavior in the future, and hereby notify him that excessively filing frivolous claims, and/or engaging in other conduct that is abusive to our court system, may result in sanctions and/or the filing of injunctions. We point out our Rules of Appellate Procedure permit parties to file an application with this Court for reasonable counsel fees in cases of frivolous appeals and obdurate, vexatious conduct. **See Pa.R.A.P. 2744, 2751, 2572; see also Commonwealth v. Wardlaw, (Footnote Continued Next Page)**

At 1876 MDA 2018, we affirm the November 1, 2018, order denying Appellant's motion for stay of sentence. We also grant Attorney Deady's petition to withdraw as counsel.

At 1647 MDA 2019, we affirm the September 24, 2019, order denying Appellant's petition, entitled "I. Addendum to Transcription of October 3, 2012 Preliminary Hearing Transcript; II. Petition for Writ of *Coram Nobis* (New Transcript); III. Petition for Writ of *Habeas Corpus* (New Transcript)." We also deny Appellant's February 6, 2023, application for relief.

At 566 MDA 2021, we affirm the April 5, 2021, order denying Appellant's petition entitled "Petitions for Writ of Coram Nobis, Habeas Corpus, Equitable Relief and Attachments."

At 743 MDA 2022, we affirm the February 9, 2022, order denying Appellant's petition entitled "Petition for Writ of Coram Nobis, Habeas & Equitable Relief & Application for Relief." We also deny Appellant's: (1) January 22, 2023, "Application for Relief Per Pa.R.A.P. 1926(b)(1) to Supplement the Certified Trial Court Record with the Attached Copy of the Trial Exhibits and Trial Transcript, which Indexes the Exhibits;" (2) February 2, 2023, "Notice to the Superior Court Regarding Appellant's January 25, 2022

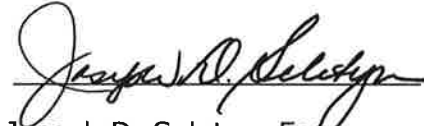
249 A.3d 937, 947 (Pa. 2021) ("For example, an appellate court 'may award as further costs damages as may be just,' Pa.R.A.P. 2744, provided that, *inter alia*, the party receiving such damages makes '[a]n application for further costs and damages.'") (citation omitted).

J-A04036-23

Request to the Trial Court Regarding Trial Exhibits”; and (3) February 8, 2023,
“Second Notice to the Superior Court Regarding Appellant’s January 25, 2022
Request to the Trial Court Regarding Trial Exhibits.”

Orders at all appeals affirmed. All outstanding applications for relief
denied.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style with a large initial "J".

Joseph D. Seletyn, Esq.
Prothonotary

Date: 03/09/2023

§ 8. Security from searches and seizures.

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.



Sean Donahue <seandonahue630@gmail.com>

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1 message

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CONSTITUTION ANNOTATED

Analysis and Interpretation of the U.S. Constitution

Constitution of the United States

First Amendment

First Amendment Explained

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

§ 2706. **Terroristic threats.**

(a) **Offense defined.**--A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to:

- (1) commit any crime of violence with intent to terrorize another;
- (2) cause evacuation of a building, place of assembly or facility of public transportation; or
- (3) otherwise cause serious public inconvenience, or cause terror or serious public inconvenience with reckless disregard of the risk of causing such terror or inconvenience.

(b) **Restitution.**--A person convicted of violating this section shall, in addition to any other sentence imposed or restitution ordered under 42 Pa.C.S. § 9721(c) (relating to sentencing generally), be sentenced to pay restitution in an amount equal to the cost of the evacuation, including, but not limited to, fire and police response; emergency medical service or emergency preparedness response; and transportation of an individual from the building, place of assembly or facility.

(c) **Preservation of private remedies.**--No judgment or order of restitution shall debar a person, by appropriate action, to recover from the offender as otherwise provided by law, provided that any civil award shall be reduced by the amount paid under the criminal judgment.

(d) **Grading.**--An offense under subsection (a) constitutes a misdemeanor of the first degree unless the threat causes the occupants of the building, place of assembly or facility of public transportation to be diverted from their normal or customary operations, in which case the offense constitutes a felony of the third degree.

(e) **Definition.**--As used in this section, the term "communicates" means conveys in person or by written or electronic means, including telephone, electronic mail, Internet, facsimile, telex and similar transmissions.

(June 18, 1998, P.L.534, No.76, eff. 60 days; Dec. 15, 1999, P.L.915, No.59, eff. 60 days; June 28, 2002, P.L.481, No.82, eff. 60 days)

2002 Amendment. Act 82 amended subsecs. (b), (c) and (d).

1999 Amendment. Act 59 amended subsec. (a) and added subsecs. (d) and (e).

Cross References. Section 2706 is referred to in sections 911, 2711, 5708 of this title; section 5329 of Title 23 (Domestic Relations); section 5552 of Title 42 (Judiciary and Judicial Procedure); section 1532 of Title 75 (Vehicles).

§ 2709. Harassment.

(a) **Offense defined.**--A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person:

(1) strikes, shoves, kicks or otherwise subjects the other person to physical contact, or attempts or threatens to do the same;

(2) follows the other person in or about a public place or places;

(3) engages in a course of conduct or repeatedly commits acts which serve no legitimate purpose;

(4) communicates to or about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures;

(5) communicates repeatedly in an anonymous manner;

(6) communicates repeatedly at extremely inconvenient hours; or

(7) communicates repeatedly in a manner other than specified in paragraphs (4), (5) and (6).

(a.1) Cyber harassment of a child.--

(1) A person commits the crime of cyber harassment of a child if, with intent to harass, annoy or alarm, the person engages in a continuing course of conduct of making any of the following by electronic means directly to a child or by publication through an electronic social media service:

(i) seriously disparaging statement or opinion about the child's physical characteristics, sexuality, sexual activity or mental or physical health or condition; or

(ii) threat to inflict harm.

(2) (i) If a juvenile is charged with a violation of paragraph (1), the judicial authority with jurisdiction over the violation shall give first consideration to referring the juvenile charged with the violation to a diversionary program under Pa.R.J.C.P. No. 312 (relating to Informal Adjustment) or No. 370 (relating to Consent Decree). As part of the diversionary program, the judicial authority may order the juvenile to participate in an educational program which includes the legal and nonlegal consequences of cyber harassment.

(ii) If the person successfully completes the diversionary program, the juvenile's records of the charge of violating paragraph (1) shall be expunged as provided for under section 9123 (relating to juvenile records).

(b) Stalking.--(Deleted by amendment).**(b.1) Venue.--**

(1) An offense committed under this section may be deemed to have been committed at either the place at which the communication or communications were made or at the place where the communication or communications were received.

(2) Acts indicating a course of conduct which occur in more than one jurisdiction may be used by any other jurisdiction in which an act occurred as evidence of a continuing pattern of conduct or a course of conduct.

(3) In addition to paragraphs (1) and (2), an offense under subsection (a.1) may be deemed to have been committed at the place where the child who is the subject of the communication resides.

(c) Grading.--

(1) Except as provided under paragraph (3), an offense under subsection (a)(1), (2) or (3) shall constitute a summary offense.

(2) An offense under subsection (a)(4), (5), (6) or (7) or (a.1) shall constitute a misdemeanor of the third degree.

(3) The grading of an offense under subsection (a)(1), (2) or (3) shall be enhanced one degree if the person has previously violated an order issued under 23 Pa.C.S. § 6108 (relating to relief) involving the same victim, family or household member.

(d) **False reports.**--A person who knowingly gives false information to any law enforcement officer with the intent to implicate another under this section commits an offense under

section 4906 (relating to false reports to law enforcement authorities).

(e) Application of section.--This section shall not apply to constitutionally protected activity.

(e.1) Course of conduct.--(Deleted by amendment).

(f) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Communicates." Conveys a message without intent of legitimate communication or address by oral, nonverbal, written or electronic means, including telephone, electronic mail, Internet, facsimile, telex, wireless communication or similar transmission.

"Course of conduct." A pattern of actions composed of more than one act over a period of time, however short, evidencing a continuity of conduct. The term includes lewd, lascivious, threatening or obscene words, language, drawings, caricatures or actions, either in person or anonymously. Acts indicating a course of conduct which occur in more than one jurisdiction may be used by any other jurisdiction in which an act occurred as evidence of a continuing pattern of conduct or a course of conduct.

"Emotional distress." A temporary or permanent state of mental anguish.

"Family or household member." Spouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood.

"Seriously disparaging statement or opinion." A statement or opinion which is intended to and under the circumstances is reasonably likely to cause substantial emotional distress to a child of the victim's age and which produces some physical manifestation of the distress.

(June 23, 1993, P.L.124, No.28, eff. imd.; Oct. 2, 1997, P.L.379, No.44, eff. 60 days; Dec. 15, 1999, P.L.915, No.59, eff. 60 days; Dec. 9, 2002, P.L.1759, No.218, eff. 60 days; Nov. 27, 2013, P.L.1061, No.91, eff. 60 days; July 10, 2015, P.L.140, No.26, eff. 60 days; Nov. 4, 2015, P.L.224, No.59, eff. 60 days)

2015 Amendments. Act 26 amended subsecs. (c)(2) and (f) and added subsecs. (a.1) and (b.1)(3) and Act 59 amended subsec. (e). See the preamble to Act 59 of 2015 in the appendix to this title for special provisions relating to legislative intent.

2013 Amendment. Act 91 amended subsec. (c) and added the def. of "family or household member" in subsec. (f).

2002 Amendment. See sections 9 and 10 of Act 218 in the appendix to this title for special provisions relating to references to section 2709 and references to section 5504.

Cross References. Section 2709 is referred to in sections 4954, 4955, 5708 of this title; sections 6108, 6711 of Title 23 (Domestic Relations); sections 3573, 62A03 of Title 42 (Judiciary and Judicial Procedure); section 6138 of Title 61 (Prisons and Parole).

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Rule 904. Entry of Appearance and Appointment of Counsel; In Forma Pauperis.

(A) Counsel for defendant shall file a written entry of appearance with the clerk of courts promptly after being retained, and serve a copy on the attorney for the Commonwealth.

(1) If a firm name is entered, the name of an individual lawyer shall be designated as being responsible for the conduct of the case.

(2) The entry of appearance shall include the attorney's address, phone number, and attorney ID number.

(B) When counsel is appointed, the filing of the appointment order shall enter the appearance of appointed counsel.

(C) Except as provided in paragraph (H), when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, the judge shall appoint counsel to represent the defendant on the defendant's first petition for post-conviction collateral relief.

(D) On a second or subsequent petition, when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, and an evidentiary hearing is required as provided in Rule 908, the judge shall appoint counsel to represent the defendant.

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

(F) When counsel is appointed,

(1) the judge shall enter an order indicating the name, address, and phone number of the appointed counsel, and the order shall be served on the defendant, the appointed counsel, the previous attorney of record, if any, and the attorney for the Commonwealth pursuant to Rule 114 (Orders and Court Notices: Filing; Service; and Docket Entries); and

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

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

(H) Appointment of Counsel in Death Penalty Cases.

(1) At the conclusion of direct review in a death penalty case, which includes discretionary review in the Supreme Court of the United States, or at the expiration of time for seeking the review, upon remand of the record, the trial judge shall appoint new counsel for the purpose of post-conviction collateral review, unless:

(a) the defendant has elected to proceed pro se or waive post-conviction collateral proceedings, and the judge finds, after a colloquy on the record, that the defendant is competent and the defendant's election is knowing, intelligent, and voluntary;

(b) the defendant requests continued representation by original trial counsel or direct appeal counsel, and the judge finds, after a colloquy on the record, that the petitioner's election constitutes

a knowing, intelligent, and voluntary waiver of a claim that counsel was ineffective; or

(c) the judge finds, after a colloquy on the record, that the defendant has engaged counsel who has entered, or will promptly enter, an appearance for the collateral review proceedings.

(2) When counsel is appointed,

(a) the judge shall enter an order indicating the name, address, and phone number of the appointed counsel, and the order shall be served on the defendant, the appointed counsel, the previous attorney of record, if any, and the attorney for the Commonwealth pursuant to Rule 114 (Orders and Court Notices: Filing; Service; and Docket Entries); and

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

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

Comment

If a defendant seeks to proceed without an attorney, the court may appoint standby counsel. See Rule 121.

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

Paragraph (B) was added in 2005 to make it clear that the filing of an order appointing counsel to represent a defendant enters the appearance of appointed counsel. Appointed counsel does not have to file a separate entry of appearance.

Paragraphs (F)(1) and (H)(2)(a) require that (1) the judge include in the appointment order the name, address, and phone number of appointed counsel, and (2) the order be served on the defendant, appointed counsel, the previous attorney of record, if any, and the attorney for the Commonwealth pursuant to Rule 114 (Orders and Court Notices: Filing; Service; and Docket Entries).

Pursuant to paragraphs (F)(2) and (H)(2)(b), appointed counsel retains his or her assignment until final judgment, which includes all avenues of appeal through the Supreme Court of Pennsylvania. In making the decision whether to file a petition for allowance of appeal, counsel must (1) consult with his or her client, and (2) review the standards set forth in Pa.R.A.P. 1114 (Considerations Governing Allowance of Appeal) and the note following that rule. If the decision is made to file a petition, counsel must carry through with that decision. See *Commonwealth v. Liebel*, 573 Pa. 375, 825 A.2d 630 (2003). Concerning counsel's obligations as appointed counsel, see *Jones v. Barnes*, 463 U.S. 745 (1983). See also *Commonwealth v. Padden*, 783 A.2d 299 (Pa. Super. 2001).

Paragraph (H) was added in 2000 to provide for the appointment of counsel for the first petition for post-conviction collateral relief in a death penalty case at the conclusion of direct review.

Paragraph (H)(1)(a) recognizes that a defendant may proceed *pro se* if the judge finds the defendant competent, and that the defendant's election is knowing, intelligent, and voluntary. In *Indiana v. Edwards*, 128 S.Ct. 2379, 2388 (2008), the Supreme Court recognized that, when a defendant is not mentally competent to conduct his or her own defense, the U.S. Constitution permits the judge to require the defendant to be represented by counsel.

An attorney may not represent a defendant in a capital case unless the attorney meets the educational and experiential requirements set forth in Rule 801 (Qualifications for Defense Counsel in Capital Cases).

Official Note

Previous Rule 1504 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by Rule 1507. Present Rule 1504 adopted February 1, 1989, effective July 1, 1989; amended August 11, 1997, effective immediately; amended January 21, 2000, effective July 1, 2000; renumbered Rule 904 and amended March 1, 2000, effective April 1, 2001; amended February 26, 2002, effective July 1, 2002; Comment revised March 12, 2004, effective July 1, 2004; Comment revised June 4, 2004, effective November 1, 2004; amended April 28, 2005, effective August 1, 2005; Comment revised March 29, 2011, effective May 1, 2011.

Committee Explanatory Reports:

Final Report explaining the August 11, 1997 amendments published with the Court's Order at 27 Pa.B. 4305 (August 23, 1997).

Final Report explaining the January 21, 2000 amendments adding paragraph (F) concerning appointment of counsel published with the Court's Order at 30 Pa.B. 624 (February 5, 2000).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the February 26, 2002 amendments concerning entry of appearance by counsel published with the Court's Order at 32 Pa.B. 1393 (March 16, 2002).

Final Report explaining the Comment revision concerning duration of counsel's obligation published with the Court's Order at 34 Pa.B. 1672 (March 27, 2004).

Final Report explaining the April 28, 2005 amendments concerning entry of appearance and content of appointment order published with the Court's Order at 35 Pa.B. 2859 (May 14, 2005).

Final Report explaining the March 29, 2011 revision of the Comment concerning right to counsel published with the Court's Order at 41 Pa.B. 2000 (April 16, 2011).

Source

The provisions of this Rule 904 amended February 26, 2002, effective July 1, 2002, 32 Pa.B. 1391; amended March 12, 2004, effective July 1, 2004, 34 Pa.B. 1671; amended June 4, 2004, effective November 1, 2004, 34 Pa.B. 3105; amended April 28, 2005, effective August 1, 2005, 35 Pa.B. 2855; amended March 29, 2011, effective May 1, 2011, 41 Pa.B. 1999. Immediately preceding text appears at serial pages (311423) to (311425).

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[Bottom](#)

§ 9543. Eligibility for relief.

(a) General rule.--To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

(1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:

- (i) currently serving a sentence of imprisonment, probation or parole for the crime;
- (ii) awaiting execution of a sentence of death for the crime;
- (iii) serving a sentence which must expire before the person may commence serving the disputed sentence; or
- (iv) has completed a sentence of imprisonment, probation or parole for the crime and is seeking relief based upon DNA evidence obtained under section 9543.1(d) (relating to postconviction DNA testing).

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

- (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
- (iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
- (v) (Deleted by amendment).
- (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
- (vii) The imposition of a sentence greater than the lawful maximum.
- (viii) A proceeding in a tribunal without jurisdiction.

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

(4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

(b) Exception.--Even if the petitioner has met the requirements of subsection (a), the petition shall be dismissed if it appears at any time that, because of delay in filing the petition, the Commonwealth has been prejudiced either in its ability to respond to the petition or in its ability to re-try the petitioner. A petition may be dismissed due to delay in the filing by the petitioner only after a hearing upon a motion to dismiss. This subsection does not apply if the petitioner shows that the petition is based on grounds of which the petitioner could not have discovered by the exercise of reasonable diligence before the delay became prejudicial to the Commonwealth.

(c) Extradition.--If the petitioner's conviction and sentence resulted from a trial conducted in his absence and if the petitioner has fled to a foreign country that refuses to extradite him because a trial in absentia was employed, the petitioner shall be entitled to the grant of a new trial if the refusing country agrees by virtue of this provision to return him and if the petitioner upon such return to this jurisdiction so requests. This subsection shall apply, notwithstanding any other law or judgment to the contrary.

(Apr. 13, 1988, P.L.336, No.47, eff. imd.; Nov. 17, 1995, 1st Sp.Sess., P.L.1118, No.32, eff. 60 days; June 25, 1997, P.L.324, No.33, eff. imd.; Jan. 27, 1998, P.L.20, No.3, eff. imd.; Oct. 24, 2018, P.L.894, No.146, eff. 60 days)

2018 Amendment. Act 146 amended subsec. (a)(1).

1998 Amendment. Act 3 added subsec. (c). Section 3 of Act 3 provided that subsec. (c) shall apply to all existing cases within its provisions.

Suspension by Court Order. Subsec. (a)(4) was suspended August 11, 1997, S.Ct. Order, insofar as it references "unitary review."

Cross References. Section 9543 is referred to in section 9543.1 of this title.

CONSTITUTION ANNOTATED

Analysis and Interpretation of the U.S. Constitution

Constitution of the United States

Fourth Amendment

Fourth Amendment Explained

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[↑ Back to top](#)

CONSTITUTION ANNOTATED

Analysis and Interpretation of the U.S. Constitution

Constitution of the United States

Fifth Amendment

Fifth Amendment Explained

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[↑ Back to top](#)

IN THE SUPREME COURT OF THE UNITED STATES

Sean M. Donahue,
Petitioner

v.

Commonwealth of Pennsylvania,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

The Superior Court of Pennsylvania
Consolidated Opinion at Nos. Nos. 1876 MDA 2018, 1647 MDA 2019,
566 MDA 2021, 743 MDA 2022.

COMMON PLEAS COURT OF LUZERNE COUNTY PENNSYLVANIA
DOCKET: CP-40-CR-3501-2012

PROOF OF SERVICE

I, Sean M. Donahue, do swear or declare that on this date, Nov 16, 2023, 2023, as required by Supreme Court Rule 29, I have served the enclosed Motions for (1) a 60 day extension of time to file a Petition for a *writ of certiorari*; (2) to consolidate matters that arise from the two state opinions below; (3) to proceed on 11 x 8.5 paper and (4) to proceed *in forma pauperis* via USPS first class mail to the below listed party;

**Pennsylvania Office of Attorney General
Strawberry Sq Fl 16
Harrisburg, PA 17120**

I declare under penalty of perjury that the foregoing is true and correct. Executed on Nov 16, 2023, 2023.

Respectfully Submitted,



Sean M. Donahue
625 Cleveland Street
Hazleton, PA 18201
570-454-5367
seandonahue630@gmail.com