

**CHESTER COUNTY COMMON PLEAS COURT
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA,)	
)	
)	CP-15-CR-0002697-2010
)	CP-15-CR-0003645-2010
)	CP-15-CR-0003648-2010
v.)	<u>PCRA</u> : Non-Homicide
)	
JON NELSON)	<u>PCRA Court</u> : David F. Bortner
Petitioner)	
)	

3rd Supplemental Amended PCRA Petition

1. Petitioner, **Jon Nelson**, by and through his attorney, **Craig M. Cooley**, respectfully files his *3rd Supplemental Amended PCRA Petition*, which is filed in good faith and based on the following facts, procedural history, and points of authority.

INTRODUCTION

2. Mr. Nelson respectfully requests this Court to reinstate his direct appeal rights *nunc pro tunc* in cases 2697-2010, 3645-2010, and 3648-2010.

3. Mr. Nelson retained Scott Kramer to defend him in cases 2697-2010, 3645-2010, and 3648-2010.

4. On November 3, 2010, Mr. Nelson pled guilty before this Court to multiple counts in cases 2697-2010, 3645-2010, and 3648-2010.

5. On October 26, 2012, Mr. Nelson pled guilty before the Honorable Phyllis R. Streitel to several counts in cases 3431-2011 and 4221-2011. Mr. Kramer represented Mr. Nelson in these cases as well.

6. On April 14, 2013, Judge Streitel sentenced Mr. Nelson for those counts in cases 3431-2011 and 4221-2011.

7. After sentencing, Mr. Kramer agreed to represent Mr. Nelson on appeal in cases 3431-2011 and 4221-2011. Mr. Nelson instructed Mr. Kramer to file timely post-sentencing motions (“PSMs”) challenging Judge Streitl’s sentences in cases 3431-2011 and 4221-2011. Mr. Nelson also instructed Mr. Kramer to file timely notices of appeal in cases 3431-2011 and 4221-2011 if Judge Streitl denied the PSMs.

8. On May 31, 2013, this Court sentenced Mr. Nelson for each count he pled guilty to in cases 2697-2010, 3645-2010, and 3648-2010.

9. After sentencing, Mr. Kramer agreed to represent Mr. Nelson on appeal in cases 2697-2010, 3645-2010, and 3648-2010. Mr. Nelson instructed Mr. Kramer to timely file PSMs challenging this Court’s sentences in cases 2697-2010, 3645-2010, and 3648-2010. Specifically, Mr. Nelson instructed Mr. Kramer to ask this Court as well as Judge Streitl to have all of his sentences in cases 2697-2010, 3645-2010, and 3648-2010 to run concurrently with his sentences in cases 3431-2011 and 4221-2011. Mr. Nelson instructed Mr. Kramer to file timely notices of appeal if this Court denied the PSMs.

10. In November 2013, Mr. Nelson wrote Mr. Kramer asking for an update regarding the PSMs and his appeal. On December 4, 2013, Mr. Kramer wrote Mr. Nelson and said the following regarding the PSMs and his appeal:

As far as our Motion to consolidate your sentences in the Chester County Court of Common Pleas, as indicated to you earlier I filed a Motion *Nunc Pro Tunc* to have your sentence[s] reconsidered for consolidation that was denied. I have appealed your matter to [the] Superior Court as per our prior discussions.¹

11. The dockets for cases 2697-2010, 3645-2010, 3648-2010, 3431-2011 and 4221-2011 show no:

- a. PSMs being filed by Mr. Kramer before or after December 4, 2013.
- b. Motions for consolidation of sentences being filed by Mr. Kramer before or after December 4, 2013.
- c. Order denying a PSM or motion for consolidation of sentences.

¹ Ex. 1.

d. Notice of appeal to the Superior Court being filed by Mr. Kramer before or after December 4, 2013.

12. The Superior Court also has no documentation indicating Mr. Kramer filed a notice of appeal before or after December 4, 2013.

13. Mr. Kramer lied and Mr. Nelson relied on Mr. Kramer's false representation that he filed PSMs as well as timely notices of appeal in cases 2697-2010, 3645-2010, 3648-2010, 3431-2011 and 4221-2011.

14. Mr. Nelson repeatedly wrote Mr. Kramer throughout 2014 and 2015 regarding his cases and the discovery in his cases. Mr. Kramer wrote back multiple times, but Mr. Kramer never informed Mr. Nelson that he never filed a notice of appeal with the Superior Court in cases 2697-2010, 3645-2010, 3648-2010, 3431-2011 and 4221-2011.²

15. Mr. Kramer's false representations to Mr. Nelson constitute "professional misconduct" under the Pennsylvania Rules of Professional Conduct. Under Rule 8.4(c), it "is professional misconduct for a lawyer to... engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]" Pa.R.Prof. Conduct 8.4(c). Attorney dishonesty, moreover, "demonstrates a callous disregard for the very integrity of the judicial process[.]" *Office of Disciplinary Counsel v. Holston*, 619 A.2d 1054, 1054 (Pa. 1993)

16. Mr. Kramer's professional misconduct prejudiced Mr. Nelson because it deprived Mr. Nelson from vindicating his "absolute right to appeal" under Article V, § 9 of the Pennsylvania Constitution. *Commonwealth v. Wilkerson*, 416 A.2d 477, 479 (Pa. 1980).

17. An appeal *nunc pro tunc* "is intended as a remedy to vindicate the right to an appeal where that right has been lost due to certain extraordinary circumstances." *Commonwealth v. Stock*, 679 A.2d 760, 764 (Pa. 1996). Mr. Kramer's false representations to Mr. Nelson are "serious instances" of "attorney misconduct" that constitute an extraordinary circumstance thus warranting reinstatement of Mr. Nelson's appellate rights *nunc pro tunc*. Cf. *Holland v. Florida*, 560 U.S. 631, 651 (2010) (holding that "serious instances of attorney misconduct" can constitute "extraordinary circumstances" to equitably toll the federal habeas statute's one-year filing deadline).

18. Mr. Nelson is entitled to have his appellate rights reinstated *nunc pro tunc* in cases 2697-2010, 3645-2010, 3648-2010, 3431-2011 and 4221-2011.

² Ex. 2.

PROCEDURAL HISTORY AND
RELEVANT FACTS

19. On August 11, 2010, the District Attorney's Office filed a 24-count *Information* charging Jon Nelson with a making terroristic threats, disorderly conduct, and harassment (Case No. 2697-2010). The offense date is listed as March 1, 2010.

20. Sometime thereafter, the District Attorney's Office filed another 1-count *Information* charging Mr. Nelson with MDPIMD (Case No. 3645-2010).³ The offense date is listed as April 1, 2010.

21. Sometime thereafter, the District Attorney's Office filed another 7-count *Information* charging Mr. Nelson with 3 counts of PDPIMD, 2 counts of illegally possessing a controlled substance when not registered to do so, and 1 count of criminal use of a communication facility (Case No. 3648-2010).⁴ The offense date is listed as April 14, 2010.

22. All three cases were assigned to the Court's docket.

23. On August 11, 2010, **Scott Kramer** entered his appearance as counsel for cases 2697-2010, 3645-2010, 3648-2010. Mr. Nelson retained Mr. Kramer.

24. On November 3, 2010, Mr. Nelson pled guilty to the following counts in cases 2697-2010, 3645-2010, 3648-2010:

a. 2697-2010: 1 count of making terroristic threats. The other 23 counts were either withdrawn by the District Attorney's Office or dismissed at the municipal court level.

b. 3645-2010: 1 count of MDPIMD.

c. 3648-2010: 3 counts of MDPIMD. The District Attorney's Office withdrew the 4 other counts.

25. The November 3, 2010 guilty pleas were *open* guilty pleas. Sentencing was postponed until May 31, 2013.

³ For 3645-2010, the docket entries don't identify the date the District Attorney's Office filed its 1-count *Information*.

⁴ For 3648-2010, the docket entries don't identify the date the District Attorney's Office filed its 1-count *Information*.

26. On September 30, 2011, the District Attorney's Office filed a 152-count *Information* charging Mr. Nelson an assortment of drug manufacturing, possession, and distribution counts (Case No. 3431-2011). The offense date listed for each count is March 22, 2010. This case was assigned to Judge Streitel's docket.

27. On November 22, 2011, the District Attorney's Office filed a 7-count *Information* charging Mr. Nelson burglary, conspiracy, receiving stolen property, and theft by unlawful taking (Case No. 4221-2011). The offense date listed for each count is June 18, 2010. This was also assigned to Judge Streitel's docket.

28. Mr. Kramer also entered his appearance for cases 3431-2011 and 4221-2011.

29. On October 26, 2012, Mr. Nelson pled guilty to the following offenses in cases 3431-2011 and 4221-2011:

- a. 3431-2011: Mr. Nelson pled guilty to the following 25 counts:
 - i. Counts 1 thru 10: MDPIMD.
 - ii. Count 23: Conspiracy to MDPIMD.
 - iii. Counts 61 thru 70: Criminal use of communication facility.
 - iv. Counts 148 thru 151: Criminal solicitation to MDPIMD.
- b. 4221-2011: Mr. Nelson pled guilty to 1 count of burglary.

30. The October 26, 2012 guilty pleas were *open* guilty pleas. Sentencing was postponed until April 19, 2013.

31. On April 19, 2013, Judge Streitel sentenced Mr. Nelson in cases 3431-2011 and 4221-2011:

- a. 3431-2011:
 - i. Counts 1 thru 4: For each of the first 9 counts of MDPIMD, Mr. Nelson was sentenced to 1 to 2 years of confinement for each count.
 - ii. Count 5: For Count 5, a MDPIMD count, Mr. Nelson was sentenced to 3-6 years confinement.

iii. Counts 6 thru 9: For Counts 6 through 9, all MDPIIMD counts, Mr. Nelson was sentenced to 1 to 2 years of confinement for each count.

iv. Count 10: For the tenth count of MDPIIMD, Mr. Nelson was sentenced to 5 to 10 years of confinement.

v. Count 23: For the conspiracy to MDPIIMD count, Mr. Nelson was sentenced to 1 to 2 years of confinement.

vi. Counts 61 thru 70: For the ten counts of criminal use of communication facility, Mr. Nelson was sentenced to 6 months to 2 years of confinement for each count.

vii. Counts 148 thru 151: For the four counts of criminal solicitation to MDPIIMD, Mr. Nelson was sentenced to 1 to 2 years of confinement for each count.

b. 4221-2011: For the burglary count, Mr. Nelson was sentenced to 1 to 2 years of confinement.

32. After sentencing, Mr. Kramer agreed to represent Mr. Nelson on appeal in cases 3431-2011 and 4221-2011. Mr. Nelson asked Mr. Kramer to timely file a post-sentencing motion (“PSM”) challenging Judge Streitl’s sentences. Mr. Nelson instructed Mr. Kramer to file timely notices of appeal if Judge Streitl denied the PSMs.

33. Mr. Kramer never filed PSMs or notices of appeal in cases 3431-2011 and 4221-2011.

34. On May 31, 2013, the Court sentenced Mr. Nelson in cases 2697-2010, 3645-2010, 3648-2010:

a. 2697-2010: For the 1 count of making terroristic threats, Mr. Nelson was sentenced to 3 months to 6 months confinement.

b. 3645-2010: For the 1 count of MDPIIMD, Mr. Nelson was sentenced to 1 to 24 years confinement.

c. 3648-2010: For the three 3 counts of MDPIIMD, Mr. Nelson was sentenced to 3 to 6 years of confinement for each count.

35. After sentencing, Mr. Kramer agreed to represent Mr. Nelson on appeal in cases 2697-2010, 3645-2010, and 3648-2010. Mr. Nelson asked Mr. Kramer to timely file a post-sentencing motion (“PSM”) challenging the Court’s sentences. Specifically, Mr. Nelson instructed Mr. Kramer to ask the Court to have all of his sentences in cases 2697-2010, 3645-2010, and 3648-2010 to run concurrently with his sentences in cases 3431-2011 and 4221-2011. Mr. Nelson instructed Mr. Kramer to file timely notices of appeal if the Court denied the PSMs.

36. Mr. Kramer never filed PSMs or notices of appeal in cases 2697-2010, 3645-2010, and 3648-2010.

37. In November 2011, Mr. Nelson wrote Mr. Kramer asking for an update regarding the PSMs and his appeal. On December 4, 2013, Mr. Kramer wrote Mr. Nelson and said the following regarding the PSMs and his appeal:

As far as our Motion to consolidate your sentences in the Chester County Court of Common Pleas, as indicated to you earlier I filed a Motion *Nunc Pro Tunc* to have your sentence[s] reconsidered for consolidation that was denied. I have appealed your matter to [the] Superior Court as per our prior discussions.⁵

38. The dockets for case numbers 2697-2010, 3645-2010, 3648-2010, 3431-2011 and 4221-2011 show no:

- a. PSM being filed by Mr. Kramer before or after December 4, 2013.
- b. Motions for consolidation of sentences being filed by Mr. Kramer before or after December 4, 2013.
- c. Order denying a PSM or motion for consolidation of sentences.
- d. Notice of appeal to the Superior Court being filed by Mr. Kramer before or after December 4, 2013.

39. The Superior Court also has no documentation indicating Mr. Kramer filed notices of appeal in cases 2697-2010, 3645-2010, 3648-2010, 3431-2011 and 4221-2011 before or after December 4, 2013.

⁵ Ex. 1.

40. Mr. Nelson repeatedly wrote Mr. Kramer throughout 2014 and 2015 regarding his appeals and the discovery in his cases. Mr. Kramer wrote back multiple times, but Mr. Kramer never informed Mr. Nelson that he never filed notice of appeal with the Superior Court in cases 2697-2010, 3645-2010, 3648-2010, 3431-2011 and 4221-2011.⁶

41. On July 24, 2015, Mr. Nelson filed a motion challenging the legality of his sentences in cases 2697-2010, 3645-2010, 3648-2010, 3431-2011 and 4221-2011.⁷ Mr. Nelson based his illegality argument on 18 Pa. C.S. § 110's compulsory joinder rule. Mr. Nelson cited *Commonwealth v. Nolan*, 855 A.2d 834 (Pa. 2004) in support of his argument that all of the counts in cases 2697-2010, 3645-2010, 3648-2010, 3431-2011 and 4221-2011 represented a single criminal episode that should've been tried and adjudicated at the same time, and that based on this all his sentences should run concurrently. Mr. Nelson's motion, more importantly, alleged that Mr. Kramer failed to properly litigate this issue at trial and on appeal.

42. Mr. Nelson motion should've been construed as a PCRA petition because "all motions filed after a judgment of sentence is final are to be construed as PCRA petitions." *Commonwealth v. Taylor*, 65 A.3d 462, 466 (Pa. Super. 2013); *accord Commonwealth v. Jackson*, 30 A.3d 516, 521 (Pa. Super. 2011) (inmate's motion challenging the legality of his sentence, which was filed after the inmate's conviction became final, must be construed as a PCRA petition). This is true especially where the post-finality motion challenges trial or appellate counsel's decision-making or effectiveness, as Mr. Nelson did. As a first PCRA petition, Mr. Nelson was entitled to the appointment of counsel. Pa.R.Crim.P. 904(B); *Commonwealth v. Tedford*, 781 A.2d 1167, 1170 (Pa. 2001). Appointment of counsel is required regardless of whether the petition appears facially untimely or to be patently without merit. *Commonwealth v. Smith*, 818 A.2d 494, 499 (Pa. 2003).

43. This Court didn't construe Mr. Nelson's motion as a PCRA petition and denied the motion (as it relates to cases 2697-2010, 3645-2010, 3648-2010) on July 27, 2015.

44. Judge Streitl also didn't construe Mr. Nelson's motion as a PCRA petition and denied the motion (as it relates to cases 3431-2011 and 4221-2011) on August 7, 2015.

45. On December 7, 2015, Mr. Nelson filed a formal PCRA petition in cases 2697-2010, 3645-2010, 3648-2010, 3431-2011 and 4221-2011 requesting that his direct appeal rights be reinstated *nunc pro tunc*.⁸

⁶ Ex. 2.

⁷ Ex. 3.

⁸ Ex. 4.

46. Mr. Nelson filed two *pro se* supplemental amended PCRA petitions on March 7, 2016 and March 11, 2016.

47. The instant counseled petition, therefore, constitutes Mr. Nelson's 3rd supplemental amended PCRA petition.

PCRA REQUIREMENTS

48. Mr. Nelson must meet the following conditions to be eligible for PCRA relief. 42 Pa. C.S. § 9543(a)(1)-(a)(4).

a. *First*, Mr. Nelson must show he has been convicted of a crime under the laws of this Commonwealth and is serving a criminal sentence. 42 Pa. C.S. § 9543(a)(1). Mr. Nelson stands convicted of numerous offenses and is currently incarcerated at SCI-Forest.

b. *Second*, Mr. Nelson must present a cognizable claim under 42 Pa. C.S. § 9543(a)(2). Mr. Nelson alleges state and federal trial and appellate counsel ineffectiveness claims that undermine the truth-determining process. 42 Pa. C.S. §§ 9543(a)(2)(ii).

c. *Third*, Mr. Nelson must show his claims are not previously litigated or waived. 42 Pa. C.S. § 9543(a)(3). Mr. Nelson has yet to vindicate his right to direct appeal based on Mr. Kramer's professional misconduct. Thus, none of the claims raised in Mr. Nelson's *pro se* PCRA petitions or this counseled amended petition are previously litigated or waived.

d. *Fourth*, Mr. Nelson must have filed his PCRA petition within 1-year of when his conviction became final, 42 Pa. C.S. § 9545(b)(1), unless his petition alleges and he proves that the "facts upon which [his] claim is predicated were unknown to [him] and could not have been ascertained by the exercise of due diligence," 42 Pa. C.S. § 9545(b)(1)(ii), and he filed his petition within sixty (60) days of obtaining the new fact(s). 42 Pa. C.S. § 9545(b)(2). **Mr. Nelson's July 15, 2015 petition is timely.**

49. In cases 3431-2011 and 4221-2011, Mr. Nelson was sentenced on April 19, 2013. Mr. Kramer didn't file PSMs, nor did Mr. Kramer file notice of appeals in these cases. As a result, Mr. Nelson's convictions in cases 3431-2011 and 4221-2011 became final thirty days after his April 19th sentencing—or on **May 19, 2013**. Pa.R.App.P. 903(a) (appellants must file notice of appeal within 30 days after the entry of the order from which the appeal is taken); Pa. C.S. § 9545(b)(3) ("a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of

the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.”).

50. In cases 2697-2010, 3645-2010, and 3648-2010, Mr. Nelson was sentenced on May 31, 2013. Mr. Kramer didn't file PSMs, nor did Mr. Kramer file notices of appeal in these cases. As a result, Mr. Nelson's convictions in cases 2697-2010, 3645-2010, and 3648-2010 became final thirty days after his May 31st sentencing—or on **June 30, 2013**.

51. Where a court erroneously dismisses a pleading filed by the petitioner that should've been construed as a PCRA petition, and the court didn't appoint counsel before the dismissal, a second petition will related back to the first *pro se* petition. *Commonwealth v. Tedford*, 781 A.2d at 1170-1171. This principle applies to Mr. Nelson's case. This Court and Judge Streitl erred by not construing Mr. Nelson's July 24, 2015 motion challenging the legality of his sentences as a PCRA petition. As a result, Mr. Nelson's December 7, 2015 formally titled PCRA petition must be construed as an amended PCRA petition that relates back to his July 24, 2015 motion.

52. Mr. Nelson obviously didn't file his first PCRA petition within one year of when his convictions became final in cases 2697-2010, 3645-2010, 3648-2010, 3431-2011, and 4221-2011. After communicating with Mr. Kramer for more than two years after his May 31st sentencing in cases 2697-2010, 3645-2010, 3648-2010, Mr. Nelson finally realized that, contrary to Mr. Kramer's December 4, 2013 representation to him, Mr. Kramer *didn't* file PSMs or notices of appeal in cases 2697-2010, 3645-2010, 3648-2010, 3431-2011, and 4221-2011. This is obvious because in his July 24, 2015 PCRA petition, Mr. Nelson asks for the very relief he asked Mr. Kramer to seek in April and May 2013 after his sentencing hearings cases 2697-2010, 3645-2010, 3648-2010, 3431-2011, and 4221-2011.

53. Consequently, because Mr. Nelson filed his July 24, 2015 PCRA petition within 60 days of realizing Mr. Kramer didn't file PSMs or notices of appeal in cases 2697-2010, 3645-2010, 3648-2010, 3431-2011, and 4221-2011, **Mr. Nelson's July 24, 2015 PCRA petition is timely**. Mr. Nelson's December 7, 2015 formally titled PCRA petition, as mentioned, must be construed as an *amended* PCRA petition because this Court and Judge Streitl erroneously dismissed Mr. Nelson's July 24, 2015 PCRA petition.

54. In the alternative, if the facts relating to the timeliness of Mr. Nelson's July 24, 2015 PCRA petition are disputed by the Commonwealth, Mr. Nelson is entitled to an

evidentiary hearing where he can present evidence establishing the timeliness of his petition. Pa.R.Crim.P. 908(A)(1) (the PCRA court “shall order a hearing” when the petitioner’s PCRA petition and/or the Commonwealth’s answer raise “material issues of fact”).

55. In the alternative, if Mr. Nelson’s July 24, 2015 PCRA petition is considered untimely, Mr. Nelson challenges the Pennsylvania Supreme Court’s ruling in *Commonwealth v. Peterkin*, 722 A.2d 638, 641 (Pa. 1998), that interpreted 42 Pa. C.S. § 9545(b)’s one year filing deadline as *jurisdictional* and therefore not subject to equitable tolling. *E.g.*, *Commonwealth v. Faby*, 737 A.2d 214, 222-223 (1999) (because the PCRA’s one year filing deadline is jurisdictional, the one year deadline can’t be equitably tolled even if the defendant’s untimeliness is due to extraordinary circumstances he had no control over).

a. *Peterkin* was wrongly decided under clearly-established statutory construction principles. Section 9545 is clear, the General Assembly didn’t make the one year filing deadline jurisdictional. If § 9545 is ambiguous, the General Assembly’s intent behind the one year filing deadline can be gleaned based on the following factors: (1) the PCRA’s purpose, (2) § 9545’s legislative history, (3) the fact that a jurisdictional filing deadline leads to absurd and unconstitutional results, and (4) the mischief the one year filing deadline tried to remedy. These four factors provide strong evidence the General Assembly didn’t intend to make the one year filing deadline jurisdictional when it amended § 9545 in 1995.

b. *Peterkin* was also wrongly decided under state and federal due process principles. Mr. Nelson has a state created-liberty interest to pursue and obtain PCRA relief. His state created-liberty interest is entitled to due process protection. When a State creates a liberty interest for prisoners, in other words, the State must create procedures that give prisoners the ability to adequately vindicate the rights afforded to them under the liberty interest. *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011); *Dist. Attorney’s Office v. Osborne*, 557 U.S. 52, 68-69 (2009). A jurisdictional filing period, which refuses to acknowledge equitable tolling and the extraordinary circumstances that underpin it, is fundamentally inadequate in those cases where there are extraordinary circumstances that prevented a prisoner from timely filing his PCRA petition.

56. In the alternative, if Mr. Nelson’s July 24, 2015 PCRA petition is considered untimely, Mr. Nelson would argue that applying the PCRA’s one year filing deadline in his case would be unconstitutional. *Commonwealth v. Brown*, 943 A.2d 264, 268 n.4 (Pa. 2008) (“The Court... has recognized the potential availability of an as-applied constitutional challenge to the application of the PCRA’s time restriction[.]”);

Commonwealth v. Bennett, 930 A.2d 1264, 1273 (Pa. 2007) (“While we have declared the PCRA to be constitutional generally, this does not mean that it is constitutional as applied to all petitioners.”) (citation omitted); *Commonwealth v. Abdul-Salaam*, 812 A.2d 497, 501 (Pa. 2002).

STATE AND FEDERAL CLAIMS

- I. Jon Nelson requested Scott Kramer to file PSMs and notices of appeal in cases 2697-2010, 3645-2010, 3648-2010, 3431-2011 and 4221-2011. Mr. Kramer never filed PSMs or notices of appeal in these cases, yet told Mr. Nelson he did. Mr. Nelson detrimentally relied on Mr. Kramer’s knowingly false representation. Mr. Kramer’s knowingly false representation prejudiced Mr. Nelson because Mr. Nelson lost his direct appeal rights. Mr. Nelson is entitled to have his direct appeal rights reinstated *nunc pro tunc*. U.S. Const. amends. V, VI, XIV; Pa. Const., Art. 1, §§8, 9; Art. V, § 9**

57. The common law did not afford criminal defendants appellate review of criminal convictions. *McKane v. Durston*, 153 U.S. 684, 687 (1894). The U.S. Constitution doesn’t require the federal government or the States to provide appellate review of criminal convictions. *Halbert v. Michigan*, 545 U.S. 605, 610 (2005); *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). Rather, it is “wholly within” a State’s discretion “to allow or not to allow such a review.” *McKane v. Durston*, 153 U.S. at 687.

58. Under state law, Mr. Nelson had an absolute right to appeal. PA. CONST., Art. V, § 9. This means Mr. Nelson had a right to meaningful appellate review. *Commonwealth v. Szakal*, 50 A.3d 210, 215 (Pa. Super. 2012). While criminal defendants don’t have a federal constitutional right to appellate review, “if a State has created appellate courts as ‘an integral part of the... system for finally adjudicating the guilt or innocence of a defendant,’ the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.” *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (quoting *Griffin v. Illinois*, 351 U. S. 12, 18 (1956)). Here, Pennsylvania has made direct review from criminal felony convictions an “integral part” or “critical stage” for determining a defendant’s guilt or innocence. *Commonwealth v. Franklin*, 823 A.2d 906, 909 (Pa. Super. 2003) (defining the appellate process as a “critical stage”). As such, the direct review process must comport with due process.

59. Under due process principles, Mr. Nelson is entitled to an effective appellate advocate. *Evitts v. Lucey*, 469 U.S. at 394, 396; *Penson v. Ohio*, 488 U.S. 75, 85 (1988).

Thus, direct appeal, like trial, “require[s] careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over.” *Penon v. Ohio*, 488 U.S. at 85. While appellate counsel need not raise all non-frivolous claims, *Jones v. Barnes*, 463 U.S. 745, 752-753 (1983), he or she must “examine the record with a view to selecting [and presenting] the most promising issues for review.” *Id.* at 752.

60. More importantly, where an “appeal is available as a *matter of right*, a decision to seek or forgo review is for the convict himself, not his lawyer.” *Roe v. Flores-Ortega*, 528 U.S. 470, 489 (2000) (Souter, J., concurring and dissenting) (emphasis added); *Jones v. Barnes*, 463 U.S. at 751; *Cf.* Pa. R. Prof. Conduct, 1.2(a) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation[.]”); Pa. R. Prof. Conduct, 1.2, Cmt. 1 (“Paragraph (a) confers upon the client the *ultimate authority* to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer’s professional obligations.”).

61. Generally, to prevail on an ineffectiveness claim, a petitioner must demonstrate that counsel’s performance was deficient *and* the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The deficiency prong “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the [Due Process clause].” *Id.* This prong is “necessarily linked to the practice and expectations of the legal community: ‘The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (quoting *Strickland v. Washington*, 466 U.S. at 688). Thus, when a court reviews an ineffectiveness claim, “the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” *Strickland v. Washington*, 466 U.S. at 688.

62. A “lawyer who disregards specific instructions from the defendant to... appeal [his cases] acts in a manner that is professionally unreasonable.” *Roe v. Flores-Ortega*, 528 U.S. at 477; *accord Rodriguez v. United States*, 395 U.S. 327 (1969). Thus, Mr. Kramer’s refusal to file notices of appeal in cases 2697-2010, 3645-2010, 3648-2010, 3431-2011 and 4221-2011 constitutes deficient performance under *Strickland*.

63. In the vast majority of ineffectiveness claims, the defendant bears the burden of proving prejudice. Prejudice, in other words, isn’t automatically presumed simply because an attorney acts or performs objectively unreasonable under *Strickland*. In situations like here, however, prejudice is presumed.

64. Counsel's deficient performance in these circumstances lead "not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." *Roe v. Flores-Ortega*, 528 U.S. at 483. Prejudice, therefore, is presumed:

In [*United States v. Cronin*, 466 U.S. 648 (1984)], [*Penson v. Ohio*, 488 U.S. 75 (1988)], and [*Smith v. Robbins*, 528 U.S. 259 (2000)], we held that the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice because "the adversary process itself "has been rendered "presumptively unreliable." *The even more serious denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right, similarly demands a presumption of prejudice.* Put simply, we cannot accord any "presumption of reliability," to judicial proceedings that never took place.

Roe v. Flores-Ortega, 528 U.S. at 483 (emphasis added).

65. An appeal *nunc pro tunc* "is intended as a remedy to vindicate the right to an appeal where that right has been lost due to certain extraordinary circumstances." *Commonwealth v. Stock*, 679 A.2d at 764. Here, where Scott Kramer's ineffectiveness and professional misconduct resulted in the denial of an entire judicial proceeding itself, an extraordinary circumstance has occurred.

66. Consequently, the case law is quite clear on this issue: "[W]hen a defendant establishes that counsel's ineffective assistance denied him entirely his right to a direct appeal, he is entitled to a direct appeal *nunc pro tunc* without regard to his ability to establish the merit of the issues which he seeks to raise on direct appeal." *Commonwealth v. Ciotto*, 555 A.2d 930, 931 (Pa. Super. 1989); accord *Commonwealth v. Wilkerson*, 416 A.2d 477, 479 (Pa. 1980); *Commonwealth v. Sullivan*, 371 A.2d 468 (Pa. 1977); *Commonwealth v. Mosteller*, 633 A.2d 615, 618 (Pa. Super. 1993); *Commonwealth v. Hoyman*, 561 A.2d 756, 758-759 (Pa. Super. 1989); *Commonwealth v. Miranda*, 442 A.2d 1133 (Pa. Super. 1982).

CONCLUSION

67. **WHEREFORE**, Mr. Nelson respectfully requests the Court to reinstate his direct appeal rights *nunc pro tunc* based on Scott Kramer's ineffectiveness and professional misconduct. In the alternative, if the Commonwealth disputes the timeliness of Mr. Nelson's July 24, 2015 PCRA petition, Mr. Nelson respectfully requests the Court to grant an evidentiary hearing where Mr. Nelson can present evidence and argument establishing the timeliness of his July 24, 2015 PCRA petition.

Respectfully submitted this the 5th day of July, 2016.

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CERTIFICATE OF SERVICE

On July 5, 2016, counsel mailed a copy of this pleading to the Chester County District Attorney's Office:

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