FAYETTE COUNTY COMMON PLEAS COURT
CRIMINAL DIVISON

COMMONWEALTH OF PENNSYLVANIA **Plaintiff-Respondent,**	)	
v.	)	**CP-26-CR-0000588-2010** **CP-26-CR-0000589-2010**
SHAIMIK C. FREZZELL **Defendant-Petitioner.**	)	

PCRA Petition

Defendant-Petitioner, Shaimik C. Frezzell, through counsel, Craig M. Cooley, respectfully files his *PCRA Petition* which is presented in good faith and based on the following facts and authorities.

PROCEDURAL HISTORY

Mr. Frezzell's case presents with a tortured procedural history. In case number 588-2010, the Commonwealth filed a 10-count information charging Mr. Frezzell with several offenses in connection with an incident that occurred on January 15, 2010. The charges included, *inter alia*, robbery and aggravated

assault. On April 4, 2011, though, the Commonwealth *nolle prossed* all charges in case number 588-2010.

In case number 589-2010, the Commonwealth filed a 9-count information charging Mr. Frezzell with several offenses in connection with a January 24, 2010 a robbery/carjacking. The charges included, *inter alia*, robbery of a motor vehicle (18 Pa. C.S. § 3702), robbery – threatening serious injury (18 Pa. C.S. § 3701(a)(1(ii)), and aggravated assault (18 Pa. C.S. § 2702(a)(i)).

On October 5, 2010, after pleading not guilty, a jury convicted Mr. Frezzell of (1) robbery of a motor vehicle, (2) robbery – threatening serious injury, (3) possession of a firearm, (4) crime committed with a firearm, (5) making terroristic threats, (6) REAP, (7) simple assault, and (8) disorderly conduct. Mary Campbell-Spegar of the Fayette County Public Defender's Office represented Mr. Frezzell, while the Honorable Nancy D. Vernon presided over the trial. On October 27, 2017, Judge Vernon sentenced Mr. Frezzell to 10 to 20 years in prison for the robbery – threatening serious injury conviction and issued no further punishments for the remaining convictions.

Mr. Frezzell appealed (1785 WDA 2010). His appellate attorney was Ms. Campbell-Spegar. The Superior Court affirmed on August 9, 2011, but Campbell-Spegar did not file a *Petition for Allowance of Appeal*, making Mr. Frezzell's conviction final on September 8, 2011.

On February 3, 2012, Mr. Frezzell filed a timely PCRA petition. This is where things get quite confusing. On March 12, 2012, Judge Vernon appointed Brent Peck, and on March 19, 2012 Judge Vernon entered an order indicating Brent Peck had to file an amended PCRA petition on or before May 14, 2012. According to the docket, though, Brent Peck never filed an amended PCRA petition. On May 14, 2012, Judge Vernon held a hearing, and the next day, May 15th, Judge Vernon entered an order dismissing Mr. Frezzell's PCRA petition. On May 22, 2012, Brent Peck filed a motion to withdraw, which Judge Vernon granted on May 29, 2012.

On May 29, 2012, Judge Vernon appointed Jeremy Davis, but more than a year later, on July 24, 2013, Jeremy Davis filed a motion to withdraw, which Judge Vernon granted on July 29, 2013. Jeremy Davis never filed an amended petition or notice of appeal regarding the May 15, 2012 dismissal order. On July 29, 2013, the same day she granted Jeremy Davis's motion, Judge Vernon appointed James Natale to represent Mr. Frezzell. James Natale, according to

the docket, filed no pleadings, amended petitions, or a notice of appeal regarding the May 15, 2012 dismissal order.

On September 9, 2013, Mr. Frezzell filed a *pro se* (second) PCRA petition. On September 16, 2013, Judge Vernon appointed Dianne Zerega. On December 2, 2013, Zerega filed a withdraw motion, which Judge Vernon granted on December 6, 2013.

On June 12, 2014, Judge Vernon issued a 907 notice of intent to dismiss order. On June 12, 2014, Judge Vernon also entered an order denying Mr. Frezzell's request to modify or reconsider his 10- to 20-year prison sentence as untimely. On August 6, 2014, Judge Vernon entered an order dismissing Mr. Frezzell's second PCRA petition.

On September 8, 2015, Mr. Frezzell filed a *pro se* motion to modify and/or correct his illegal sentence. Mr. Frezzell filed a similar motion on October 8, 2015. Judge Vernon denied both motions on November 6, 2015.

On June 16, 2016, Mr. Frezzell filed another *pro se* motion requesting to inspect the discovery.

On August 8, 2016, Judge Vernon entered an order indicating that all of Mr. Frezzell's appeals and PCRA petitions had been exhausted and used this as a basis to reject Mr. Frezzell's discovery motion.

On December 9, 2016, in lieu of filing a notice of appeal, Mr. Frezzell filed a *pro se* concise statement of matters of errors on appeal.

On December 12, 2016, Mr. Frezzell, still acting *pro se*, filed a third PCRA petition. On January 11, 2017, Judge Vernon entered an order dismissing Mr. Frezzell's third PCRA petition. On February 17, 2017, Mr. Frezzell filed notice of appeal (306 WDA 2017). He also filed notice of appeal on February 21, 2017 (313 WDA 2017). On March 1, 2017, Mr. Frezzell filed his concise statement of errors on appel. On August 28, 2017, the Superior Court affirmed the dismissal of Mr. Frezzell's third PCRA petition.

STATEMENT OF FACTS

On the evening of January 24, 2010, between 10:00 p.m. and 10:15 p.m., Jordan Thomas was at home inside his Uniontown residence with his mother and brother when he received a phone call from his ex-girlfriend Courtney Groover. Thomas had dated Groover 3 or 4 months in 2009, but on January 24th they were merely friends. Groover asked Thomas if he could pick her up near Grant Street and give her a ride home. Thomas agreed, got into his 1997 Chrysler Concorde, and drove to Grant Street. Once there, he parked near the basketball court.[1]

[1] NT, Trial, 10/4/2010, pp. 13-20.

Groover called Thomas shortly thereafter and asked if he could pick her up in the nearby alleyway. Thomas agreed and drove to the alley. Once there, he saw Groover walking toward his car. When he heard the back door open, he assumed it was Groover, but when he turned and looked over his right shoulder – toward the back right passenger door – he saw a hooded black man pointing a shotgun in his face. The hooded man said, "Get out the car." Thomas exited his car with his hands up. The hooded man said, "I'm going to give you to the count of five to run." Thomas ran, but as he tried jumping a nearby fence, his cell phone fell out of his pocket. The hooded man saw the cell phone and yelled, "Throw me your phone." Thomas tossed his cell phone in the hooded man's direction and began running again. Thomas never heard the hooded man fire the shotgun.[2]

Thomas ran home, told his parents what had happened, and called the police. Officer Fredrick Kampert interviewed Thomas that night. Thomas described the perpetrator as a black male, with a black hoody, and no facial hair. Thomas told Kampert he did not recognize the hooded man. Thomas, though, told Kampert he and Groover used to date, but he had heard she was

[2] NT, Trial, 10/4/2010, pp. 20-23.

now dating someone named Shaimik Frezzell. Thomas told Kampert he only knew Mr. Frezzell by name and that he had never seen or met him before.[3]

On January 26, 2010, Kampert returned to Thomas's residence with an 8-man photo array. Detective Donald Gmitter created the photo array after Kampert asked him to make an array that included a photograph of Shaimik Frezzell. Kampert presented the 8-man array to Thomas and asked if he recognized the hooded man. Thomas said he "instantly" recognized the hooded man and pointed him out to Kampert. Thomas identified Shaimik Frezzell.[4]

At trial, the Commonwealth's case consisted of Thomas, Gmitter, and Kampert. Thomas identified Mr. Frezzell and the Commonwealth rested. Mr. Frezzell, on the other hand, presented two defense witnesses who placed him elsewhere at the time of the carjacking. Brandon Epps, Mr. Frezzell's brother, testified that he, two friends (Marcus and Aaron), and Mr. Frezzell were in Fort Mason the entire evening of January 24, 2010 – from 6:00 p.m. until midnight (January 25, 2010). Epps was certain about the date and times

[3] NT, Trial, 10/4/2010, pp. 23-27, 46-47.
[4] NT, Trial, 10/4/2010, pp. 27, 29, 36, 40, 53.

because January 24th was his birthday and he had spent the night with Mr. Frezzell, Marcus, and Aaron celebrating.[5]

Courtney Groover also testified and said she called Thomas that night but denied conspiring with Mr. Frezzell to rob and carjack Thomas. She said she did not recognize the hooded man and that she ran immediately upon seeing the shotgun. She also said she was alone at the time and that – to her knowledge – Mr. Frezzell was with his brother in Fort Mason celebrating his brother's birthday.[6]

ARGUMENTS

1. Trial counsel was ineffective for not filing a motion decertifying Mr. Frezzell's case and removing it from the adult criminal court to the juvenile division. U.S. Const. admts. 6, 8, 14; Pa. Const., art. I, §§ 8, 9.

Mr. Frezzell's birthday is January 9, 1995. On January 24, 2010, he had only recently turned 15-year-old. Under state law, he was considered a child. The Commonwealth, though, charged Mr. Frezzell with criminal offenses which are not considered "delinquent acts" under 42 Pa. C.S. § 6302, namely robbery (18 Pa. C.S. § 3701), robbery of a motor vehicle (18 Pa. C.S. § 3702), and aggravated assault (18 Pa. C.S. § 2702). The charging of these offenses

[5] NT, Trial, 10/6/2010, pp. 67-69.
[6] NT, Trial, 10/6/2010, pp. 79-87.

permitted the Commonwealth to file the *Information* in adult criminal court. *Commonwealth v. Shull*, 148 A.3d 820, 841 (Pa. Super. 2016).

However, the fact the Commonwealth filed charges in adult criminal court did not mean Mr. Frezzell's case had to remain in adult criminal court. Under 42 Pa. C.S. § 6322(a), trial counsel could have filed a "decertification" motion requesting Mr. Frezzell's case be decertified and transferred to the juvenile division. *Commonwealth v. Sanders*, 814 A.2d 1248, 1250 (Pa. Super. 2003). To warrant decertification, trial counsel needed only to demonstrate by a preponderance that transferring Mr. Frezzell's case to the juvenile division would "serve the public interest."

Trial counsel knew Mr. Frezzell was barely 15 on January 24, 2010, but she never consulted with Mr. Frezzell about his § 6322 rights. Mr. Frezzell, therefore, had no idea he had a right to petition the adult criminal court to transfer his case to the juvenile division. Trial counsel had a constitutional duty to consult with Mr. Frezzell on such an important jurisdictional issue. Her failure to consult, moreover, cannot be considered a strategic decision. The failure to consult with a client on such a substantial jurisdictional issue can never be considered strategic because the fundamental purpose behind the duty to consult *is to actually consult* with the client on critical issues

relevant to his case and defense(s). Trial counsel's failure to consult, consequently, was objectively unreasonable and prejudiced Mr. Frezzell.

Had trial counsel consulted with Mr. Frezzell and explained his § 6322 rights, Mr. Frezzell would have instructed counsel to file a decertification motion. Based on Mr. Frezzell's age, maturity, and question of whether he was even responsible for the January 24, 2010 carjacking, it is reasonably probable the decertification judge would have granted his motion and transferred the case to the juvenile division.

Had Mr. Frezzell's case been transferred to the juvenile division, he still could have been adjudicated a delinquent regarding the charges the Commonwealth filed against him. A delinquency finding, though, would have resulted in him receiving treatment, supervision, or rehabilitation rather than serving time in an adult prison with hardened and experienced adult offenders.

Mr. Frezzell is now 23. Had his case been decertified and transferred to the juvenile division, and had he been adjudicated a delinquent regarding the abovementioned offenses, he would have been emancipated from the juvenile system by now and would have received significant treatment and

rehabilitation – which are two things children do not receive when they are imprisoned in a maximum security facility populated with adult offenders.

Mr. Frezzell, consequently, requests the following relief: (1) an order finding trial counsel ineffective, (2) an order granting the juvenile division jurisdiction of Mr. Frezzell's case because had trial counsel filed a decertification motion the motion would have been granted, and (3) an order compelling Mr. Frezzell's immediate release from SCI-Fayette because had trial counsel timely filed a decertification motion, and Mr. Frazzell was adjudicated a delinquent, he would have been released from any sort of supervision imposed under the Juvenile Act.

A. Trial Counsel Ineffectiveness Standard

Mr. Frezzell has a right to effective trial counsel. *Strickland v. Washington*, 468 U.S. 668, 688 (1984); U.S. Const. admt. 6. To prevail on an ineffectiveness claim, Mr. Frezzell must demonstrate trial counsel performed deficiently and the deficiency prejudiced him. *Id*. at 687. The deficiency prong "requires showing that counsel made errors so serious that counsel was not

functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment." *Id*. at 687. The prejudice prong requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," *Id*. at 694, which is "not a stringent" standard because it is "less demanding than the preponderance standard." *Hall v. Kyler*, 190 F.3d 88, 110 (3d Cir. 1999).

Under state law, Mr. Frezzell must show (1) his claim has arguable merit, (2) trial counsel's action or inaction lacked a reasonable basis, and (3) prejudice. *Commonwealth v. Pierce*, 527 A.2d 973, 975–976 (Pa. 1987). *Pierce* is identical to *Strickland*: deficient performance and prejudice. *Commonwealth v. Spotz*, 870 A.2d 822, 829 (Pa. 2005).

When assessing whether trial counsel had a reasonable basis for her acts or omissions, the question is not whether there were other courses of action that counsel could have taken, but "whether counsel's decision had any basis reasonably designed to effectuate his client's interest." *Commonwealth v. Williams*, 141 A.3d 440, 463 (Pa. 2016). This requires an examination of "whether counsel made an informed choice, which at the time the decision was made reasonably could have been considered to advance and protect [the]

defendant's interests." *Commonwealth v. Dunbar*, 470 A.2d 74, 77 (Pa. 1983) (emphasis added).

B. Duty to Consult

To effectively defend a criminal defendant, trial counsel must consult with her client regarding significant issues, including whether it is in the client's best interest to be tried before an adult court or juvenile court. "Defense counsel undoubtedly has a duty to discuss potential strategies with the defendant." *Florida v. Nixon*, 543 U.S. 175, 178 (2004). Trial counsel, consequently, must "consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland v. Washington*, 466 U. S. at 688.

Although *Nixon* recognized only a *duty to consult* with a defendant regarding "important decisions, which may include questions of overarching defense strategy," the Pennsylvania Supreme Court's jurisprudence "has aligned itself with the Pennsylvania Rules of Professional Conduct to recognize a duty to gain the consent of a defendant regarding the overarching objective or purpose of a defense, and leaves to counsel the authority to control the many aspects involving strategy and tactics in achieving those objectives." *Commonwealth v. Mason*, 130 A.3d 601, 667-668 (Pa. 2015)

(emphasis added); *accord Commonwealth v. Sam*, 635 A.2d 603, 611-112 (Pa. 1993) (relying on Rule 1.2 of the Pennsylvania Rules of Professional Conduct wherein it provides that "a lawyer shall abide by a client's decisions concerning the objectives of representation").

C. Children in General, The Juvenile Act, and Decertification Motions

1. Children Are Not Miniature Adults

On January 24, 2010, Mr. Frezzell had only recently turned 15. He was a child under state law. A child's age is far "more than a chronological fact." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). It is a fact that "generates commonsense conclusions about behavior and perception." *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting). "Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge." *J. D. B. v. North Carolina*, 564 U.S. 261, 272 (2011).

Children, for instance, "generally are less mature and responsible than adults," *Eddings v. Oklahoma*, 455 U.S. at 115-116, they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *Bellotti v. Baird*, 443 U.S. 622, 635 (1979), they

“are more vulnerable or susceptible to… outside pressures” than adults, *Roper v. Simmons*, 543 U.S. 551, 569 (2005), and so on. *Graham v. Florida*, 560 U.S. 48, 68 (2010) (finding no reason to “reconsider” these observations about the common “nature of juveniles”).

Addressing the police interrogation context, for instance, the U.S. Supreme Court has observed that events that “would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.” *Haley v. Ohio*, 332 U.S. 596, 599 (1948); *accord Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (“[N]o matter how sophisticated,” a juvenile subject of police interrogation “cannot be compared” to an adult subject). Describing no one child in particular, these observations restate what “any parent knows” – indeed, what any person knows – about children generally. *Roper v. Simmons*, 543 U.S. at 569.

The “law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.” *J. D. B. v. North Carolina*, 564 U.S. at 273; *see, e.g.,* 1 W. BLACKSTONE, COMMENTARIES ON

THE LAWS OF ENGLAND *464-*465 (explaining that limits on children's legal capacity under the common law "secure them from hurting themselves by their own improvident acts"). Like the U.S. Supreme Court's own generalizations, the legal disqualifications placed on children as a class, *e.g.*, limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent, "exhibit the settled understanding that the differentiating characteristics of youth are universal." *Id*. Based on these realities, consequently, it is unsurprising "[o]ur history is replete with laws and judicial recognition" that children cannot be viewed simply as miniature adults. *Eddings v. Oklahoma*, 455 U.S. at 115-116.

2. The Juvenile Act and the Decertification Process

The Juvenile Act, 42 Pa. C.S. § 6301 et seq., "is designed to effectuate the protection of the public while providing children who commit delinquent acts with supervision, rehabilitation, and care while promoting responsibility and the ability to become a productive member of the community. *Commonwealth v. Shull*, 148 A.3d at 841 (citing 42 Pa. C.S. § 6301(b)(2). The Act defines a "child" as one who is under eighteen. 42 Pa. C.S. § 6302.

Under 42 Pa. C.S. § 6322(a), if it "appears to the court in a criminal proceeding that the defendant is a child," the court "shall forthwith halt

further criminal proceedings, and, where appropriate, transfer the case to the division or a judge of the court assigned to conduct juvenile hearings[.]" However, in cases where the child has been charged with a criminal offense or offenses not considered "delinquent acts" under 42 Pa. C.S. §§ 6302(2)(ii) or (iii), "the case may similarly be transferred," but the child bears the burden of proving beyond a preponderance that transferring the case to the juvenile division "will serve the public intertest." 42 Pa. C.S. § 6322(a).

Under the "delinquent act" section of 42 Pa. C.S. § 6302, murder is not considered a "delinquent act." The following "prohibited conduct" are also not considered "delinquent acts" if (1) the child was 15 or older at the time of the alleged conduct, (2) the child used a deadly weapon (as defined in 18 Pa. C.S. § 2301) during the commission of the alleged offense, and (3) if an adult had committed the offense it would be classified as:

> (C) Aggravated assault as defined in 18 Pa. C.S. § 2702(a)(1) or (2)
>
> (D) Robbery as defined in 18 Pa. C.S. § 3701(a)(1)(i), (ii) or (iii)
>
> (E) Robbery of motor vehicle as defined in 18 Pa. C.S. § 3702

42 Pa. C.S. § 6203(2)(ii)(D) & (E).

Thus, if the Commonwealth charges a child with robbery (18 Pa. C.S. § 3701), robbery of a motor vehicle (18 Pa. C.S. § 3702), or aggravated assault (18 Pa. C.S. § 6203), the child can have his case transferred from adult criminal court to the juvenile division, but he bears the burden of proving by a preponderance the transfer will serve the public interest. *Commonwealth v. Cotto*, 753 A.2d 217 (Pa. 2000).

In determining whether the child has so met this burden, the court "shall consider" the following factors:

> (A) the impact of the offense on the victim or victims;
> (B) the impact of the offense on the community;
> (C) the threat to the safety of the public or any individual posed by the child;
> (D) the nature and circumstances of the offense allegedly committed by the child;
> (E) the degree of the child's culpability;
> (F) the adequacy and duration of dispositional alternatives available under this chapter and in the adult criminal justice system; and
> (G) whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the following factors:
>> (I) age;
>> (II) mental capacity;
>> (III) maturity;
>> (IV) the degree of criminal sophistication exhibited by the child;
>> (V) previous records, if any;
>> (VI) the nature and extent of any prior delinquent history, including the success or

> failure of any previous attempts by the juvenile court to rehabilitate the child;
> (VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction;
> (VIII) probation or institutional reports, if any;
> (IX) any other relevant factors[.]

42 Pa. C.S. § 6355(a)(4)(iii).

D. Mr. Frezzell Had a Right to Effective PCRA Counsel

Due process requires post-conviction proceedings to be fundamentally fair. *Pennsylvania v. Finley*, 481 U.S. 551, 556-557 (1987); *Evitts v. Lucey*, 469 U.S. at 401; *Commonwealth v. Haag*, 809 A.2d 271, 283 (Pa. 2002). While States have no constitutional obligation to provide post-conviction relief, *Pennsylvania v. Finley*, 481 U.S. at 557, if a State creates a comprehensive post-conviction process that is "an integral part of the… system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U. S. 12, 18 (1956), the procedures used in adjudicating post-conviction claims "must comport with" due process. *Evitts v. Lucey*, 469 U.S. at 393.

Post-conviction petitioners, therefore, "must be given the opportunity for the presentation of claims at a meaningful time and in a meaningful manner." *Commonwealth v. Bennett*, 930 A.2d 1264, 1273 (Pa. 2007); *accord Pennsylvania v. Finely*, 481 U.S. at 556 (the Fourteenth Amendment obligates

a State "to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process," and "require[s] that the state appellate system be 'free from unreasoned distinctions"). Petitioners, therefore, have a state and federal right to effective assistance of initial-review post-conviction counsel. *Commonwealth v. Albert*, 561 A.2d 736, 737 (Pa. 1989); *Martinez v. Ryan*, 566 U.S. 1, 12 (2012).

Here, prior to undersigned counsel's involvement, Mr. Frezzell had a plethora of PCRA attorneys appointed to him, none of whom advised him of his § 6322 rights. The ineffectiveness of all prior PCRA attorneys constitutes grounds for equitable tolling when the Court addresses the petition's timeliness.

E. Application of Juvenile Act and the Duty to Consult

1. Deficient Performance

Based on the criminal offenses charged in the *Information*, *e.g.*, robbery, robbery of a motor vehicle, aggravated assault, and use of a firearm, the Commonwealth had the right to file the *Information* in adult criminal court. Robbery, robbery of a motor vehicle, and aggravated assault, as mentioned, are not considered "delinquent acts" under § 6302. While the *Information* was

justly filed in adult criminal court, Mr. Frezzell had the right to request his case be decertified and transferred to the juvenile division under § 6322.

The differences between the juvenile division and adult criminal court are self-explanatory. While the juvenile system holds delinquents accountable, one of the Juvenile Act's purposes is to "provide" delinquents with "supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community." 42 Pa. C.S. § 6301(b)(2).

Thus, the juvenile system "impos[es] confinement only if necessary and for the minimum amount of time that is consistent" with the Juvenile Act's purposes. 42 Pa. C.S. § 6301(b)(3)(ii). Juvenile confinement, moreover, is much shorter and focused on rehabilitation and treatment – not retribution and incapacitation. The adult criminal system, on the other hand, is concerned with two things: (1) punishment and (2) incarceration – and lengthy incarceration at that. *Commonwealth v. Brown*, 26 A.3d 485, 495-496 (Pa. Super. 2011) ("the practical results of a juvenile transfer hearing… has been described by one commentator as 'a sentencing decision that represents a

choice between the punitive disposition of adult criminal court and the 'rehabilitative; disposition of the juvenile court.'") (citation omitted).

The case law recognizes these obvious differences and how the juvenile system is far more beneficial to the child than the adult criminal system:

> The juvenile system inherently confers substantial benefits. For instance, the juvenile system's goal is to rehabilitate the juvenile on an individual basis without marking him or her as a criminal, rather than to penalize the juvenile. The juvenile is also shielded from publicity. He or she may be confined, but with rare exceptions, may not be jailed along with adults. He or she may be detained, but only until attaining the age of twenty-one (21) years. The child is also protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him or her in subsequent proceedings, and disqualification for public employment.

Commonwealth v. Ghee, 889 A.2d 1275, 1279 (Pa. Super. 2005).

Consequently, if a child charged in adult criminal court can have his case decertified, he will inevitably request a transfer 10 out 10 times. *Commonwealth v. Brown*, 26 A.3d 485, 494 (Pa. Super. 2011) (recognizing that "the certification of a juvenile offender to an adult court has been accurately characterized as 'the worst punishment the juvenile system is empowered to inflict.'") (citation omitted). A child, however, can only make such a request if he is adequately informed of his § 6322 right. Put differently, when trial

counsel knows her client had only recently turned 15 when the offense allegedly occurred, trial counsel has a duty to discuss (1) the procedural and substantive differences between the adult and juvenile systems, (2) the differences in punishment between the two systems, (3) the differences in length of incarceration between the two systems, (4) the decertification process under § 6322, (5) the standard for granting a decertification motion, and (6) the likelihood of prevailing on a decertification motion.

Once adequately informed of this information, the child can then intelligently determine whether he wants trial counsel to file a decertification motion. *Cf. Commonwealth v. Ghee*, 889 A.2d at 1279 ("As with the forfeiture of any important right, such as a criminal defendant's right to trial by jury, right to counsel, *Miranda* rights and the privilege against self-incrimination, which must be knowing, voluntary and intelligent, the waiver of the special protections afforded by the juvenile system must also be knowing, voluntary and intelligent.").

If the child believes his defense or well being would be best served in the juvenile division, trial counsel *must* file the decertification motion. This is so because the client has the authority to identify the "overarching objective" of his defense and if his "objective" is to be tried before a juvenile

court – rather than an adult criminal court – trial counsel must pursue this objective by identifying what "strategy" or "tactics" will best "achiev[e]" the client's "objectives." *Commonwealth v. Mason*, 130 A.3d at 667-668.

The only strategy or procedure available to transfer a case from adult criminal court to the juvenile division is filing a decertification motion under § 6322. Thus, as mentioned, if the child informs trial counsel he wants to be tried in the juvenile division, trial counsel must file a decertification motion under § 6322.

Trial counsel did not consult with Mr. Frezzell regarding the possibility of having his case decertified. Such consultation was required under state and federal constitutional law and rules of ethics. Mr. Frezzell was barely 15 on January 24, 2010. Thus, a reasonable trial attorney would have – at the very least – consulted with Mr. Frezzell and explained his § 6322 rights.

Had trial counsel consulted with Mr. Frezzell and explained his § 6322 rights he would have instructed trial counsel to file a decertification motion asking that his case be transferred from the adult criminal court to the juvenile division.

2. Prejudice

Trial counsel's failure to consult with Mr. Frezzell prejudiced him. Had trial counsel consulted with him he would have instructed her to file a decertification motion. Had trial counsel filed a decertification motion, it is reasonably probable the motion would have been granted and Mr. Frezzell's case transferred to the juvenile division.

To decertify an adult criminal case and transfer it to the juvenile division, the child has the burden of proving by a preponderance the transfer will serve the public interest. *Commonwealth v. Cotto*, 753 A.2d 217 (Pa. 2000). In determining whether the child has so met this burden, the court "shall consider" the following factors:

> (A) the impact of the offense on the victim or victims;
> (B) the impact of the offense on the community;
> (C) the threat to the safety of the public or any individual posed by the child;
> (D) the nature and circumstances of the offense allegedly committed by the child;
> (E) the degree of the child's culpability;
> (F) the adequacy and duration of dispositional alternatives available under this chapter and in the adult criminal justice system; and
> (G) whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the following factors:

> (I) age;
> (II) mental capacity;
> (III) maturity;
> (IV) the degree of criminal sophistication exhibited by the child;
> (V) previous records, if any;
> (VI) the nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child;
> (VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction;
> (VIII) probation or institutional reports, if any;
> (IX) any other relevant factors[.]

42 Pa. C.S. § 6355(a)(4)(iii).

"While the Juvenile Act requires that a decertification court consider all of these factors, it is silent as to the weight assessed to each by the court." *Commonwealth v. Brown*, 26 A.3d at 492. A decertification court "must consider all the facts set forth in § 6355 of the Juvenile Act, but it need not address, *seriatim*, the applicability and importance of each factor and fact in reaching its final determination." *Commonwealth v. L.P.*, 137 A.3d 629, 636 (Pa. Super. 2016).

Had an adult criminal court judge or juvenile court judge equally considered these factors to Mr. Frezzell personally and the carjacking specifically, it is reasonably probable the decertification judge would have decertified the case and transferred the case to the juvenile division.

Degree of the Child's Culpability: "The juvenile… can contest the weight and reliability of the Commonwealth's evidence of his guilt at the decertification hearing in an attempt to demonstrate a lesser state of culpability under the factors in § 6355(a)(4)(iii)(A)-(E)." *Commonwealth v. Brown*, 26 A.3d at 508 n.15.

According to Mr. Frezzell, Courtney Groover, and Brandon Epps, the degree of Mr. Frezzell's culpability is zero because all three said Mr. Frezzell was not – and could not have been – the hooded man who accosted Jordan Thomas on January 24, 2010. Brandon Epps said Mr. Frezzell was with him and other friends in Fort Mason from 6 p.m. on January 24, 2010 until midnight on January 25, 2010. Also, Courtney Groover said she saw the hooded man and it was not Mr. Frezzell. Groover, more importantly, would have immediately recognized Mr. Frezzell because she was dating him at the time.

Trial counsel presented Groover and Epps at Mr. Frezzell's trial, so there is no reason trial counsel could not have presented Groover and Epps at a decertification hearing to present evidence calling into question Mr. Frezzell's degree of culpability.

Furthermore, the Commonwealth's sole evidence against Mr. Frezzell was Jordan Thomas's identification of Mr. Frezzell. Eyewitness identification, though, is "one of the least reliable forms of evidence." *Commonwealth v. Walker*, 92 A.3d 766, 779 (Pa. 2014). The DNA exoneration cases have repeatedly proved this point: "Eyewitness misidentification is the greatest contributing factor to wrongful convictions proven by DNA testing, playing a role in more than 70% of convictions overturned through DNA testing nationwide." www.innocenceproject.org/causes/eyewitness-misidentification (last visited October 30, 2018).

The Commonwealth, for instance, presented no forensic or direct evidence linking any shotgun or firearm to Mr. Frezzell. Indeed, based on counsel's reading of the record, when authorities detained Mr. Frezzell in connection with this case, they found no firearms, including a shotgun, on Mr. Frezzell's person.

Likewise, the Commonwealth presented no forensic or eyewitness evidence linking Mr. Frezzell to Thomas's car. The Commonwealth claimed authorities recovered Thomas's car in West Virginia, but it presented no testimony or evidence indicating it recovered Mr. Frezzell's DNA, fingerprints, or hair from Thomas's car. Likewise, it presented no witnesses from West Virginia – or Pennsylvania for that matter – placing Mr. Frezzell in or near Thomas's car after the carjacking.

The circumstances surrounding Thomas's identification, moreover, raise the specter he misidentified Mr. Frezzell as the hooded man:

First, the man had a hood covering his head and the social science research has repeatedly demonstrated that the likelihood of a misidentification increases substantially when the perpetrator is wearing a hood.

Second, the hooded man pointed a shotgun at Thomas. The social science research has repeatedly demonstrated what is called the "weapons effect" – which is a phenomenon where victims of firearms related crimes focus on the firearm more than the perpetrator's face. The firearms focus, unsurprisingly, leads to substantially more misidentifications because the victim is focused on the firearm and not the perpetrator's facial characteristics.

Third, the carjacking occurred between 10:30 and 11:00 p.m. when it was dark. Even if the carjacking occurred near a street light, as Thomas claimed, this does not change the fact that identifications made at night – while it is raining – are more apt to misidentifications.

Fourth, Thomas repeatedly said he was scared, frightened, and nervous because he had never had a shotgun placed directly in his face, nor had he ever been robbed before. Like the "weapons effect," which distracts the witness's attention away from the gunman's face, the "stress effect" has a similar impact. Based on the social science research, a person's ability to accurately store an event in his memory banks and to accurately recall the event is significantly impacted by the level of stress the person is under when the imprinting of the memory occurs. The more stress the person is under, the less likely he is to be able to accurately capture, store, and recall the event.

Here, Thomas repeatedly said he was frightened in a way he had never been frightened. Thus, it is fair to say he was under tremendous stress throughout the incident. This level of stress impacted his ability to accurately capture, store, and recall the event.

In the end, had a decertification hearing been held, where Groover and Epps testified, the evidence regarding Mr. Frezzell's culpability was in equipoise: Jordan Thomas's identification was counterbalanced by Epps's alibi testimony and Groover's non-identification of Mr. Frezzell as the hooded man. In other words, the evidence against Mr. Frezzell was far from overwhelming – which weighed in favor of decertification.

Impact and Jordan Thomas and the Community: The impact of the carjacking on Jordan Thomas, his family, and the community is obviously significant and speaks for itself. Having a shotgun stuck in your face and your car stolen is a traumatic event. "While this court" will obviously "recognize[] the importance of these two factors," the "emotional impact on the parties and community are not the controlling factors in this analysis." *In re Clarke*, 61 Pa. D. & C.4th 263, 273 (C.P. 2003).

Consequently, these factor alone cannot be the end all, be all because every criminal offense not considered a "delinquent act" under § 6302 will be considered a traumatic event that had a significant impact on the victim(s) and community because each criminal offense excluded under § 6302 is one involving a deadly weapon – like the shotgun in this case.

Nature/Circumstances of Alleged Offense: The weight and relevance of this factor, like the impact factors, must be viewed through the lens of whether Mr. Frezzell actually committed the carjacking. As mentioned, a carjacking where the carjacker sticks a shotgun in the victim's face is a serious and dangerous offense and Mr. Frezzell does not question this commonsensical conclusion. However, in determining whether to decertify a case, the decertification court may not deny decertification based solely on the nature of the crime charged and nothing else. *Commonwealth v. Greiner*, 388 A.2d 698 (Pa. 1978).

Thus, the Court must consider the evidence for and against Mr. Frezzell when considering and weighing this factor. The evidence, as mentioned, is in equipoise because while Thomas identified him as the hooded man, Mr. Frezzell presented two witnesses to cast serious doubt on Thomas's identification.

Threat to Public Safety: Based on the following facts, Mr. Frezzell was not a threat to public safety in 2010: (1) Mr. Frezzell's lack of criminal history; and (2) the fact the Commonwealth's evidence against Mr. Frezzell is not overwhelming.

<u>Adequacy/Duration of Dispositional Alternatives</u>: Had Mr. Frezzell's case been decertified and transferred to the juvenile court, these dispositional alternatives would have been available to him had the juvenile court adjudicated him delinquent of the offenses charged in the *Information*: (1) placing Mr. Frezzell in a secured juvenile facility until the age of majority – which is 21 – where he could develop and carry out a comprehensive rehabilitation plan; (2) placing Mr. Frezzell on probation and ordering him to perform community service along with attending rehabilitative courses; or (3) placing Mr. Frezzell on house arrest while attending rehabilitative courses.

The juvenile court could have sent Mr. Frezzell to a secured juvenile facility until he was 21. At the juvenile facility, Mr. Frezzell could have developed and carried out a rehabilitation plan. Had this happened, Mr. Frezzell would have faced the possibility of being incarcerated for six years while working on his rehabilitative plan. For a carjacking that produced no deaths and no physical harm to Jordan Thomas, six years of incarceration and treatment in a juvenile facility for a 15-year-old is more than adequate to address the Juvenile Act's five principles: community protection, accountability, competency development, individualization, and balance. James Anderson & Susan Blackburn, *Pennsylvania Juvenile Justice: A*

Commitment to Community Protection, Victim Restoration & Youth Redemption, NJCSA Rapport, no. 2 at l-2 (2003) (discussing the Juvenile Act's five principles).

For instance, Jordan Brown – the 11-year-old who was adjudicated delinquent of the offenses of first-degree murder and homicide of an unborn child in connection with the February 2009 shooting death of his stepmother – served less than eight years in a secured juvenile facility before being released. *In the Interest of J.B.*, 189 A.3d 390, 393 (Pa. 2018).[7] Thus, assuming Mr. Frezzell had to serve all six years before he hit the again of majority, six years in a secured juvenile facility for a carjacking where no one was murdered or physically harmed is more than enough to address the Juvenile Act's five principles.

<u>Amenable to Treatment/Supervision/Rehabilitation</u>: When a "juvenile seeks to have his case transferred from the criminal division to the juvenile division, he must show that he is in need of and amenable to treatment, supervision or rehabilitation in the juvenile system." *Commonwealth v. Johnson*, 669 A.2d 315, 320-321 (Pa. 1995). Assuming Mr. Frezzell committed

[7] The Pennsylvania Supreme Court overturned Jordan Brown's convictions in July 2018, but as the Court notes in its opinion, authorities released Brown well before July 2018. By the time the Court issued its opinion, Brown had already moved to another state and had enrolled in college.

the carjacking and the juvenile court so found, he would certainly be "in need of and amendable to treatment, supervision, or rehabilitation."

First, Mr. Frezzell's age, 15, would have weighed heavily toward treatment and rehabilitation. At 15, he could have obtained treatment and rehabilitation for six years before he reached the age of majority.

Second, the "mental capacity" factor is difficult to gauge at this point because counsel is unaware of an expert who can evaluate Mr. Frezzell now and opine whether his "mental capacity" in 2010 weighed in favor of decertification. This is part of the prejudice associated with trial counsel's failure to consult with Mr. Frezzell and inform him of his § 6322 rights. Had trial counsel properly consulted with Mr. Frezzell, she could have had him evaluated by qualified psychological experts who could have opined as to his mental capacity at the time of the offense and before trial.

Third, the "maturity" factor is also difficult to assess now – more than eight years after the fact. Mr. Frezzell's lack of a criminal record, at the very least, proves he was mature enough to stay out of trouble. Again, though, trial counsel's ineffectiveness prevented Mr. Frezzell from meaningfully presenting expert testimony regarding this factor in 2010 and her ineffectiveness is still a

hinderance because no expert can examine Mr. Frezzell now and opine whether his level of maturity in 2010 weighed in favor of decertification.

Fourth, the "degree of criminal sophistication" is problematic because it assumes Mr. Frezzell committed the carjacking, but the evidence, as demonstrated, is in equipoise regarding the culpability issue. Assuming Mr. Frezzell committed the carjacking, Mr. Frezzell did not display tremendous sophistication in carrying out the carjacking. For beginners, he failed to adequately conceal his face. According to Thomas, while the gunman had a hood over his head, the hood was positioned in a way that it did not block any part of his face. A more sophisticated offender would have either worn a mask or made certain the hood covered substantial portions of his face. Likewise, according to Thomas, the gunman chose to approach a car stopped right beneath a luminescent street light – and the light allowed Thomas to get a good look at the gunman's face. A more sophisticated offender would have selected a car stopped far from a street light.

Fifth, based on counsel's discussions with Mr. Frezzell, before his convictions in this case, he had never been adjudicated a delinquent in a juvenile court, nor had he ever been charged, prosecuted, and convicted of criminal offense in adult criminal court.

Sixth, the "whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction" factor is also problematic. Because Mr. Frezzell is now 23 and past the age of majority, this issue is a moot point. That this factor is moot, based on Mr. Frezzell's reaching the age of majority, however, does not make Mr. Frezzell's entire petition moot. *Public Defender's Office v. Venango County Court of Common Pleas*, 893 A.2d 1275, 1279 (Pa. 2006) (a case is moot if it involves litigants who clearly had standing to sue at the outset of the litigation, but changes in the fact or law occurred after the action is filed, which deprived the litigant of the necessary stake in the outcome). It is undeniable Mr. Frezzell will be affected by the outcome of this petition, as the Court's ruling will determine if he is to be released from SCI-Fayette based on trial counsel's ineffectiveness. *Commonwealth v. E.F.*, 995 A.2d 326, 332 (Pa. 2010).

TIMELINESS

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

First, Mr. Frezzell 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. Frezzell stands convicted of numerous offenses and is currently incarcerated at SCI-Fayette.

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

Third, Mr. Frezzell must show his claims are not previously litigated or waived. 42 Pa. C.S. §9543(a)(3). Mr. Frezzell has not raised his decertification because his prior attorneys had not advised him of his § 6322 rights.

Fourth, Mr. Frezzell 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. Frezzell's petition is timely but he is entitled to equitable tolling because his prior attorneys failed to adequately advise him of his § 6322 rights.

Mr. Frezzell 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 1-year filing deadline as *jurisdictional* not subject to equitable and tolling. *E.g.*, *Commonwealth v. Fahy*, 737 A.2d 214, 222-223 (1999) (because the PCRA's 1-year filing deadline is jurisdictional, the one year deadline cannot be equitably tolled even if the defendant's untimeliness is due to extraordinary circumstances he had no control over).

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 1-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.

Peterkin was also wrongly decided under state and federal due process principles. Mr. Frezzell 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.

In the alternative, if Mr. Frezzell's petition is considered untimely, Mr. Frezzell argues that applying the PCRA's 1-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).

EVIDENTIARY HEARING

The PCRA court "shall order a hearing" when the PCRA petition "raises material issues of fact." Pa.R.Crim.P. 908(A)(2). A hearing cannot be denied unless the Court is "certain" Mr. Frezzell's PCRA petition lacks "total" merit. *Commonwealth v. Bennett*, 462 A.2d 772, 773 (Pa. Super. 1983); *accord Commonwealth v. Rhodes*, 416 A.2d 1031, 1035-1036 (Pa. Super. 1979). Even in "borderline cases Petitioners are to be given every conceivable legitimate benefit in the disposition of their claims for an evidentiary hearing." *Commonwealth v. Pulling*, 470 A.2d 170, 173 (Pa. Super. 1983). Thus, an "evidentiary hearing should… be conducted where the record does not clearly refute the claim of an accused that his plea was unlawfully induced." *Id*.

Mr. Frezzelll meets this standard and is entitled to a hearing to argue the merits of his trial counsel ineffectiveness claim.

CONCLUSION

WHEREFORE, Mr. Frezzell respectfully requests the following relief:

1. An order granting him an evidentiary hearing;

2. An order granting his PCRA petition and releasing him from SCI-Fayette;

3. Any other relief the Court deems necessary and just to protect Mr. Frezzell's right to a fundamentally fair post-conviction process.

Respectfully submitted this the 7th day of November, 2018.

/s/Craig M. Cooley
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CERTIFICATE OF SERVICE

On November 7, 2018, counsel mailed of copy of this pleading to the Fayette County District Attorney's Office.