NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. STEVEN L. ROMANSKY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3138 EDA 2013

Appeal from the Order Entered October 8, 2013
In the Court of Common Pleas of Pike County
Criminal Division at No(s): CP-52-MD-0000190-1985

BEFORE: BOWES, J., DONOHUE, J., and MUNDY, J.

MEMORANDUM BY MUNDY, J.: **FILED JULY 22, 2014**

Appellant, Steven L. Romansky, appeals from the October 8, 2013 order denying his first petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

This case has weaved a protracted and complicated procedural path through the courts of this Commonwealth for over 25 years. This factual and procedural labyrinth was accurately summarized by a prior panel of this Court as follows.

> In August, 1985, [A]ppellant was arrested and charged in connection with the theft of three motor vehicles; a 1977 Pontiac Trans Am, a 1979 Ford Bronco, and a 1977 GMC truck. Appellant was acquitted of the charges relative to the GMC truck, but convicted on all other charges and sentenced,

on December 17, 1987, to nine to 18 years imprisonment. This Court affirmed the judgment of sentence on July 22, 1988. ***Commonwealth v. Romansky***, 548 A.2d 643 (Pa. Super. 1988) (unpublished Memorandum).

On December 21, 1990, a *pro se* PCRA petition was filed alleging ineffectiveness of trial counsel. Counsel was appointed and an amended petition was filed and thereafter denied. We affirmed the Order denying PCRA relief on January 19, 1996. ***See also Commonwealth v. Romansky***, 676 A.2d 285 (Pa. Super. 1996) (unpublished Memorandum) [,*appeal denied*, 681 A.2d 177 (Pa. 1996)].

On October 10, 1996, [A]ppellant filed a second PCRA petition and alleged he was denied due process when the Commonwealth failed to disclose the fact it had an agreement with one of its witnesses regarding the prosecution relative to the Ford Bronco, allowing that witness to testify falsely in exchange for his freedom from prosecution. [] Because the witness's testimony had no relation to the charges for the 1977 Trans Am, that conviction stood; the Court did, however, vacate [A]ppellant's conviction for charges stemming from the 1979 Ford Bronco and remanded for a new trial. ***Commonwealth v. Romansky***, 702 A.2d 1064, 1072 (Pa. Super. 1997), *appeal denied* [723 A.2d 670 (Pa. 1998)].

A jury trial took place on January 11, 2000, and [A]ppellant was convicted, relative to the Ford Bronco, and sentenced on March [3], 2000, to three and one-half to seven years imprisonment. Judgment of sentence was affirmed on June 22, 2001. ***Commonwealth v. Romansky***, 779 A.2d 1222 (Pa. Super. 2001) (unpublished Memorandum).

> At this point the record becomes what has previously been referred to as a "procedural morass," herein we will refer to it as a "procedural quagmire." While the reader may find the following procedural history tedious it is necessary for understanding. For ease of comprehension the remainder of the procedural history is set forth in bullet form below.

- Following his sentencing, on April 26, 2001, Appellant filed a *pro se* PCRA petition. On June 18, 2001, the PCRA court appointed counsel and leave to amend was granted. At the time of this filing, Appellant's direct appeal from his March 3, 2000, judgment of sentence had not become final.

- On April 16, 2002, counsel penned a ***Turner/Finley*** letter, and on April 22, 2002, an Order was entered granting counsel leave to withdraw.

- In between the time counsel filed a ***Turner/Finley*** letter and the time when the court granted counsel leave to withdraw, Appellant filed another *pro se* PCRA petition on April 19, 2002.

- Thereafter, on June 11, 2002, the PCRA court dismissed Appellant's April 19, 2002 petition.

- Appellant filed a timely *pro se* appeal with this Court on July 10, 2002, in which he raised 22 issues. This Court only addressed Appellant's challenge to the PCRA court granting counsel leave to withdraw pursuant to ***Turner/Finley***.

- On September 19, 2003, this Court penned an unpublished memorandum vacating the trial court's June 11, 2002 order, dismissing Appellant's *pro se* PCRA relief, and remanding with the directive that counsel "review Appellant's April 19, 2002, PCRA petition, and then either file an amended petition or a ***Turner/Finley*** letter

requesting withdrawal from the case." ***Commonwealth v. Romansky***, 835 A.2d 836 (Pa. Super. 2003) (unpublished memorandum). This Court reasoned that Appellant's April 26, 2001 petition was filed prematurely and therefore the PCRA court lacked jurisdiction to address its merits. As a result, Appellant's April 19, 2002 PCRA petition should have been treated as Appellant's first PCRA petition relative to his March 3, 2000 judgment of sentence. Pursuant to Rule 904 of the Pennsylvania Rules of Criminal Procedure, the PCRA court was required to appoint counsel to represent Appellant in his first PCRA petition. Pa.R.Crim.P. 904; ***see also Commonwealth v. Hart***, 911 A.2d 939, 942 (Pa. Super. 2006) (stating "a first-time PCRA petitioner is entitled to assistance of counsel"). Therefore, Appellant was entitled to counsel on his first PCRA petition, and because April 19, 2002 was Appellant's first actual PCRA petition this Court properly directed the appointment of counsel. As a result, the PCRA court appointed counsel and granted him leave to amend the April 19, 2002 PCRA petition.

- On November 2, 2004, counsel filed an amended petition.

- On March 3, 2005, the PCRA court entered an order stating as follows.

    (1) The Commonwealth is hereby ORDERED to release the (4) audiotapes discussed within the Amended Petition to the Defendant's attorney of record, Jeremy Haugh, Esq., within thirty (30) days of the date of this Order;

    (2) The Defendant is thereby given leave of court of thirty (30) days thereafter in which to file a Second Amended PCRA, if necessary after review of the tapes, or to Petition the Court for an evidentiary

> hearing on the issue of the tapes or transcription thereof[.]

- Following the March 3, 2005 order, the Commonwealth turned the tapes over to Appellant. Also during this period of time, Appellant's attorney was relocated to Georgia through the army reserves, and a new attorney had to be appointed to represent Appellant. As a result, Appellant's subsequent attorney was granted extensions of time to become familiar with this "procedural quagmire" he had inherited and to amend the PCRA petition if necessary.

- However, instead of amending Appellant's 2004 amended PCRA petition, on January 30, 2007 counsel filed a motion asking for leave to amend. In his motion, Appellant's counsel requested leave to amend the November 2, 2004 PCRA petition to reflect that the April 19, 2002 petition was Appellant's first PCRA petition filed relative to the 2000 trial and his third PCRA petition filed relative to the 1987 trial.

- On [February 15], 2007, the PCRA court filed an order denying Appellant's "Motion to Amend PCRA Petition as to Issues Regarding the 1987 Trial."

- On March 6, 2007, the same day Appellant's counsel filed a motion to clarify the February 9, 2007 order, Appellant's counsel also filed an appeal from the February [15], 2007 Order.

- This Court penned an unpublished memorandum on January 4, 2008 quashing the appeal for lack of jurisdiction as it was not an appeal from a final order. ***Commonwealth v. Romansky***, 947 A.2d 832 (Pa. Super. 2008).

- Thereafter, on July 14, 2008, Appellant's counsel filed a "Second motion for leave to amend in order to elaborate on claims arising from the second trial in 2000."

- On July 22, 2008, the PCRA court filed an order granting Appellant thirty days to "elaborate on claims arising from the 2000 Trial through the filing of a second amended PCRA petition."

- On August 21, 2008, Appellant's counsel filed a timely Second Amended Petition.

- On September 5, 2008, in response to Appellant's Second Amended PCRA petition, the Commonwealth filed an "Answer seeking summary dismissal of second, amended petition for post conviction relief."

- The PCRA court issued an order on January 30, 2009, stating a hearing would be held on the Commonwealth's petition on February 18, 2009.

- A hearing was held and on June 9, 2009, the PCRA court filed an opinion stating it was dismissing Appellant's "Second Amended Petition for Post Trial Relief." The PCRA court reasoned in said opinion as follows.

> It is clear from the above facts that no timely petition is before this Court. The 1987 conviction became final on August 22, 1988 and thus the time for filing any PCRA is long past. The 2000 conviction became final on July 23, 2001, and thus any PCRA had to be filed on or before July 23, 2002. The time has passed to collaterally attack any of these convictions, and therefore we enter the following Order[.]

Commonwealth v. Romansky, 4 A.3d 706 (Pa. Super. 2010) (unpublished memorandum) (some internal citations and footnotes omitted), *appeal denied*, 17 A.3d 917 (Pa. 2011).

On July 2, 2010, this Court issued an unpublished memorandum affirming in part, vacating in part and remanding for further proceedings.

We held that the PCRA court erred when it held that issues pertaining to Appellant's 2000 re-trial as to the 1979 Bronco were untimely under the PCRA. ***Id.*** at 11. We therefore vacated that part of the order and remanded for further proceedings on that part of the petition. ***Id.*** As to the balance of the issues raised regarding the first trial in 1987, we held that those issues were time-barred as Appellant had not proven that any of the enumerated time-bar exceptions applied. ***Id.*** at 14. Our Supreme Court denied Appellant's petition for allowance of appeal on April 5, 2011. ***Commonwealth v. Romansky***, 17 A.3d 917 (Pa. 2011).

On remand, the PCRA court appointed counsel. On July 5, 2012, Appellant filed a "Motion to Vacate Illegal Sentence," which the PCRA court denied by order entered on October 1, 2012. On October 4, 2012, Appellant filed a "Motion to Discharge," which the PCRA court denied on January 14, 2013. The PCRA court conducted evidentiary hearings on March 14 and July 9, 2013. On July 9, 2013, Appellant filed a "Motion for Post-Trial Relief." After post-hearing briefing, the PCRA court entered an order denying Appellant any relief under the PCRA on October 8, 2013. On November 6, 2013, Appellant filed a timely notice of appeal.[1]

On appeal, Appellant raises the following six issues for our review.

> 1. Did the PCRA court deny [Appellant] his state and federal constitutional rights under the

[1] Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

Sixth and Fourteenth Amendments, pursuant to ***Stirone v.*** [***United States***, 361 U.S. 212 (1960)] and its progeny, when the PCRA court found that the Commonwealth prosecuted [Appellant] for additional charges beyond those identified in the grand jury presentment but refused to grant [Appellant] any relief?

2. Did the PCRA court deny [Appellant] his state and federal constitutional rights under the Fifth, Sixth, and Fourteenth Amendments, pursuant to ***Miranda v. Arizona***[, 384 U.S. 436 (1966)], ***Massiah v.*** [***United States***, 377 U.S. 201 (1964)] and their progenies, when the Commonwealth introduced at trial incriminating statements deliberately elicited from [Appellant] by a part-time police officer, outside the presence of [Appellant]'s counsel, after [Appellant] invoked his right to counsel?

3. Did the PCRA court deny [Appellant] his state and federal constitutional rights to a fair trial under the Fourteenth Amendment, pursuant to ***Brady v. Maryland***[, 373 U.S. 83 (1963)], ***Napue v. Illinois***[, 360 U.S. 264 (1959)], ***Giglio v.*** [***United States***, 405 U.S. 150 (1972)] and their progenies, when the Commonwealth failed to correct false testimony and withheld exculpatory and impeachment evidence in violation of Pa.R.Crim.P. 573(B)?

4. Did the PCRA court deny [Appellant] his state and federal constitutional due process rights pursuant to ***Cole v. Arkansas***[, 333 U.S. 196 (1948)] and its progeny when the PCRA court refused to correct [Appellant]'s illegal sentence even though the Commonwealth conceded that [Appellant] was convicted of and sentenced on a conspiracy offense for which he was never charged?

5. Did the PCRA court deny [Appellant] his state and federal constitutional rights to effective

> assistance of counsel, pursuant to ***Strickland v. Washington***[, 466 U.S. 668 (1984)], [***United States***] ***v. Cronic***[, 466 U.S. 648 (1984)], and their progenies, when [Appellant]'s counsel (1) failed to investigate, (2) conceded [Appellant]'s guilt, (3) overrode [Appellant]'s expressed desire to testify, and (4) failed to object to an illegal sentence?
>
> 6. Did the PCRA court deny [Appellant] his state and federal constitutional rights under the Fourth Amendment and Pennsylvania's Wiretap Act when the Commonwealth failed to strictly comply with the requirements of the Wiretap Act by failing to ensure that the [A]ttorney [G]eneral or a deputy attorney general determined that the other party voluntarily consented to each interception and by failing to keep a contemporaneous written log summarizing the content of each interception?

Appellant's Brief 5-6.

We begin by noting our well-settled standard of review. "In reviewing the denial of PCRA relief, we examine whether the PCRA court's determination is supported by the record and free of legal error." ***Commonwealth v. Fears***, 86 A.3d 795, 803 (Pa. 2014) (internal quotation marks and citation omitted). "The scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the trial level." ***Commonwealth v. Spotz***, 84 A.3d 294, 311 (Pa. 2014) (citation omitted). "It is well-settled that a PCRA court's credibility determinations are binding upon an appellate court so long as they are supported by the record." ***Commonwealth v. Robinson***, 82 A.3d 998, 1013 (Pa. 2013) (citation omitted). However, this

Court reviews the PCRA's legal conclusions *de novo*. ***Commonwealth v. Rigg***, 84 A.3d 1080, 1084 (Pa. Super. 2014) (citation omitted).

We elect to address Appellant's first, second and sixth issues together as we dispose of them on the same ground. In his first issue, Appellant argues that the Commonwealth unconstitutionally "broadened" the charges against him beyond those recommended by the grand jury. Appellant's Brief at 40, 42. In his second issue, Appellant argues that the Commonwealth violated his ***Miranda*** rights under the Fifth and Sixth Amendments to the Federal Constitution when it questioned him after he had invoked his right to counsel. ***Id.*** at 43. In his sixth issue, Appellant argues that the Commonwealth violated Appellant's rights under the Fourth Amendment as well as Pennsylvania's Wiretap Act by not checking to see if the other party to the interception consented, and by keeping a written log summarizing each interception. ***Id.*** at 70.

In order to be eligible for relief under the PCRA, a defendant must show, by a preponderance of the evidence, the following.

> **§ 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:
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> …
>
> (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.
>
> …
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> (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.
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> …
>
> (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.

42 Pa.C.S.A. § 9543(a) (emphasis added). An issue is waived under the PCRA "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." ***Id.*** § 9544(b).

In these three issues, Appellant complains of various alleged constitutional errors based on conduct of the Commonwealth and law enforcement. We note that in none of these issues does Appellant raise any issues regarding ineffective assistance of counsel. ***See, e.g.***, ***Commonwealth v. Tedford***, 960 A.2d 1, 14 (Pa. 2008) (stating, "a reviewing court must consider and substantively analyze an ineffectiveness claim as a distinct legal ground for PCRA review because while an ineffectiveness claim may fail for the same reasons that the underlying claim faltered on direct review, the Sixth Amendment basis for ineffectiveness claims technically creates a separate issue for review under the PCRA[]") (internal quotation marks and citation omitted). Each one of these constitutional claims of error could, at a minimum, have been raised in Appellant's direct appeal in 2001. As a result, Appellant may not now attempt to raise them for the first time in a PCRA petition. As a result, we deem these three claims of error waived for the purposes of this appeal.[2] ***See*** 42 Pa.C.S.A. § 9544(b); ***Commonwealth v. Williams***, 950 A.2d 294, 308 (Pa. 2008) (stating, "[a]ppellant's claims of trial court error are waived, since they were not raised in the proceedings before the trial court, in post-verdict motions, and on direct appeal[]").

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[2] We note that the PCRA court considered each of these claims and rejected them on their merits. However, we may affirm the PCRA court on any legal basis supported by the record. ***Commonwealth v. Doty***, 48 A.3d 451, 456 (Pa. Super. 2012) (citation omitted).

We next elect to address Appellant's fourth issue. In this issue, Appellant argues that part of his sentence, stemming from his 1987 convictions which were not the subject of re-trial, was illegal. Appellant's Brief at 56. Although the Commonwealth stated at a 2012 hearing that it did not oppose relief on this ground, the Commonwealth now argues that this issue is time-barred. Commonwealth's Brief at 34-35.

Before we may address the merits of Appellant's issue, we must first consider its timeliness because the "PCRA time limits are jurisdictional in nature, implicating a court's very power to adjudicate a controversy." ***Commonwealth v. Ali***, 86 A.3d 173, 177 (Pa. 2014) (citation omitted). The PCRA time-bar "may not be disregarded in order to reach the merits of the claims raised in a PCRA petition that is untimely." ***Commonwealth v. Lawson***, 90 A.3d 1, 4 (Pa. Super. 2014). "Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition." ***Commonwealth v. Medina***, --- A.3d ---, 2014 WL 2209007, *3 (Pa. Super. 2014) (*en banc*). "The PCRA confers no authority upon this Court to fashion *ad hoc* equitable exceptions to the PCRA time-bar[.]" ***Id.*** (internal quotation marks and citation omitted; brackets in original). "This is to accord finality to the collateral review process." ***Id.*** (internal quotation marks and citation omitted). "The PCRA requires that any PCRA petition, including second or subsequent petitions, must be filed within one year of the date the judgment becomes final." ***Commonwealth v. Turner***, 73 A.3d 1283, 1285 (Pa.

Super. 2013) (citation omitted), *appeal denied*, --- A.3d ---, 1049 MAL 2013 (Pa. 2014). The statute provides, in relevant part, as follows.

> **§ 9545. Jurisdiction and proceedings**
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> …
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> (b) Time for filing petition.—
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> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.
>
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.
>
> …

42 Pa.C.S.A. § 9545(b).

In this case, as the most recent panel of this Court already explained, "any PCRA relief Appellant seeks to assert pertaining to his December 17, 1987 conviction is now time barred." ***Romanksy***, ***supra*** (unpublished memorandum at 12). As a result, "Appellant's only avenue of relief relative to the 1987 conviction is to successfully plead and prove a time bar exception." ***Id.*** Appellant's brief does not argue that a time-bar exception applies with regard to this issue. However, Appellant does argue that because this issue pertains to the legality of the sentence, this Court may address it. Appellant's Reply Brief at 12.

It is true that generally, "this Court is endowed with the ability to consider an issue of illegality of sentence *sua sponte*." ***Commonwealth v. Ornella***, 86 A.3d 877, 883 n.7 (Pa. Super. 2014) (citation omitted). However, it is equally axiomatic that "a legality [of sentence] claim may nevertheless be lost should it be raised for the first time in an untimely PCRA petition for which no time-bar exception applies, thus depriving the court of jurisdiction over the claim." ***Commonwealth v. Seskey***, 86 A.3d 237, 241 (Pa. Super. 2014) (citation omitted); ***see also Commonwealth v. Infante***, 63 A.3d 358, 365 (Pa. Super. 2013) (stating, "[a]lthough legality of sentence is always subject to review within the PCRA, claims must still first satisfy the PCRA's time limits or one of the exceptions thereto[]") (citation omitted). As the PCRA time-bar is jurisdictional in nature, it must

nevertheless apply even to claims where the Commonwealth concedes error. As all issues regarding Appellant's remaining 1987 convictions and sentence are time-barred, and Appellant has not argued that any exception applies, we are constrained to conclude that Appellant is not entitled to relief on this issue.

We next address Appellant's third issue, in which he argues the Commonwealth committed a ***Brady*** violation as well as a violation of Pennsylvania Rule of Criminal Procedure 573(B). Appellant's Brief at 47. Specifically, Appellant argues that the Commonwealth failed to disclose "(1) Presentment No. 33, (2) Notice of Submission No. 7, (3) [Appellant]'s grand jury testimony, (4) the audiotaped conversations between Smithers[3] and [Appellant], (5) Smithers's investigative file, (6) Smithers's immunity agreement, (7) the police report pertaining to the arson, (8) the title to the 1979 Ford Bronco, and (9) photos and other evidence [Appellant] provided to Smithers during the course of their audiotaped conversations." ***Id.*** at 49.[4] Appellant also argues the Commonwealth presented false testimony and failed to correct the same. ***Id.*** at 54-55.

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[3] Smithers was a friend and co-worker of Appellant. Appellant's Brief at 11.

[4] The Commonwealth argues that the bulk of these claims are previously litigated because Appellant successfully argued them to this Court resulting in our 1997 opinion granting him a partial new trial. Commonwealth's Brief at 27. However, we must agree with Appellant's assertion that this Court explicitly declined to decide whether the Commonwealth's conduct amounted

(Footnote Continued Next Page)

"Under ***Brady***, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." ***Smith v. Cain***, 132 S. Ct. 627, 630 (2012) (citation omitted). "Thus, to establish a ***Brady*** violation, an appellant must prove three elements: (1) the evidence at issue is favorable to the accused, either because it is exculpatory or because it impeaches; (2) the evidence was suppressed by the prosecution, either willfully or inadvertently; and (3) prejudice ensued." ***Commonwealth v. Weiss***, 81 A.3d 767, 783 (Pa. 2013) (citation omitted).

> Pursuant to ***Brady*** and its progeny, the prosecutor has a duty to learn of all evidence that is favorable to the accused which is known by others acting on the government's behalf in the case, including the police. ***Kyles v. Whitley***, 514 U.S. 419, 437 (1995). Pursuant to ***Kyles***, "the prosecutor's ***Brady*** obligation clearly extends to exculpatory evidence in the files of police agencies of the same government bringing the prosecution." ***Commonwealth v. Burke***, 781 A.2d 1136, 1142 ([Pa.] 2001). Moreover, there is no ***Brady*** violation when the defense has equal access to the allegedly withheld evidence. ***See Commonwealth v. Spotz***, 896 A.2d 1191, 1248 ([Pa.] 2006) ("It is well established that no ***Brady*** violation occurs where the parties had equal access to the information or if the defendant knew or could have uncovered such evidence with reasonable diligence[]" (internal citation omitted)).

(Footnote Continued) ———————

to a ***Brady*** violation. Appellant's Reply Brief at 7-8; ***see also Commonwealth v. Romansky***, 702 A.2d 1064, 1065 n.2 (Pa. Super. 1997). Therefore, the previously litigated bar at Section 9543(a)(3) does not apply to this issue.

Id. (parallel citations omitted).

In addition to its ***Brady*** obligations, Pennsylvania Rule of Criminal Procedure 573 requires the Commonwealth to disclose additional items in the course of discovery.

> **Rule 573. Pretrial Discovery and Inspection**
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> …
>
> **(B) Disclosure by the Commonwealth.**
>
> (1) *Mandatory.* In all court cases, on request by the defendant, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy or photograph such items.
>
> (a) Any evidence favorable to the accused that is material either to guilt or to punishment, and is within the possession or control of the attorney for the Commonwealth;
>
> (b) any written confession or inculpatory statement, or the substance of any oral confession or inculpatory statement, and the identity of the person to whom the confession or inculpatory statement was made that is in the possession or control of the attorney for the Commonwealth;
>
> (c) the defendant's prior criminal record;

> (d) the circumstances and results of any identification of the defendant by voice, photograph, or in-person identification;
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> (e) any results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examinations or other physical or mental examinations of the defendant that are within the possession or control of the attorney for the Commonwealth;
>
> (f) any tangible objects, including documents, photographs, fingerprints, or other tangible evidence; and
>
> (g) the transcripts and recordings of any electronic surveillance, and the authority by which the said transcripts and recordings were obtained.
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> …

Pa.R.Crim.P. 573(B).

Also relevant to our review of the items Appellant claims were withheld, it is axiomatic in Pennsylvania that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). Similarly, "issues not raised in a PCRA petition cannot be considered on appeal." ***Commonwealth v. Ousley***, 21 A.3d 1238, 1242 (Pa. Super. 2011) (citation omitted), *appeal denied*, 30 A.3d 487 (Pa. 2011); ***see also Commonwealth v. Strunk***, 953 A.2d 577, 579 (Pa. Super. 2008) (stating, "[e]ven issues of constitutional dimension cannot be raised for the first time on appeal[]") (citation omitted).

This Court has looked at Appellant's original *pro se* April 2001 PCRA petition, the April 2002 PCRA petition, the November 2004 amended petition, the August 2008 second amended petition, the July 2012 "Motion to Vacate Illegal Sentence," the October 2012 "Motion to Discharge," and the July 2013 "Motion for Post-Trial Relief." Among all of these filings, this Court can only find two instances where two of the nine items purportedly undisclosed by the Commonwealth and listed in Appellant's brief was raised below. The first instance is the audiotaped recordings between Smithers and Appellant. In the second instance, out of an extreme abundance of caution, we also decline to find waived the argument pertaining to Presentment 33, as it was discussed in the July 2013 "Motion for Post-Trial Relief." As to the balance of these items, we cannot locate where these items were raised in a PCRA filing below. Furthermore, Appellant's brief did not assist us in combing through this voluminous record to ascertain the location of preservation. As a result, except for the two items raised above, we deem Appellant's ***Brady*** and Rule 573 claims pertaining to the remainder of the items raised in Appellant's third issue waived.

Nevertheless, even if we were to address all nine of these items on their merits, they would all fail for the same reason. Part of a ***Brady*** violation is a showing of prejudice, *i.e.*, "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." ***Smith***, ***supra*** (citation omitted). The Supreme Court has stated

"[a] reasonable probability does not mean that the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial." ***Id.*** (internal quotation marks, some brackets, and citations omitted). Although Appellant argues prejudice in his brief for some of the items, he only alleges that the Commonwealth's conduct hampered his ability to cross-examine Smithers **at his first trial in 1987**. Appellant's Brief at 52, 53. Smithers never testified at Appellant's re-trial in 2000, which is the only trial that is the subject of this appeal. As Appellant has alleged no prejudice stemming from the actual re-trial from 2000, Appellant is not entitled to relief on ***Brady*** or Rule 573 grounds.

Appellant also argues within this issue that the Commonwealth presented false testimony and failed to correct the same. "[T]he United States Supreme Court has held that a violation of the Fourteenth Amendment's due process clause occurs when a state obtains a criminal conviction through the knowing use of false evidence." ***Commonwealth v. Henry***, 706 A.2d 313, 320 (Pa. 1997) (citation omitted). However, the Supreme Court has been clear that "[a] new trial is required if the false testimony could … in any reasonable likelihood have affected the judgment of the jury …." ***Giglio v. United States***, 405 U.S. 150, 154 (1972) (internal quotation marks and citation omitted).

Appellant's argument presents some legal standards with citations to case law, followed by one paragraph consisting of one run-on sentence with several string citations to both the 1987 and 2000 trials. Appellant highlights testimony that "officers went to [Appellant]'s residence at Lake Wallenpaupack … which is incorrect because [Appellant] resided in Pocono Summit." Appellant's Brief at 54. Appellant also references without further explanation, "testimony that [Appellant] was in continuous possession of the 1979 Ford Bronco[,] … testimony regarding secret VINs[,] … and testimony that Bondo fiberglass cans were seized from the scene of the arson[.]" ***Id.*** at 54-55. In Appellant's view, all of this was "contravened by Smithers's statements on the audiotapes …." ***Id.*** at 55.

At no point does Appellant explain how any of the testimony, assuming *arguendo* that it was materially false, "in any reasonable likelihood [could] have affected the judgment of the jury[.]" ***Giglio***, ***supra***. As Appellant does not argue how he was prejudiced in this regard, we conclude he is not entitled to relief.

We now turn to Appellant's fifth issue, regarding various instances of alleged ineffective assistance of counsel. The Sixth Amendment to the Federal Constitution provides in relevant part that, "[i]n all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of

Counsel for his defence."[5] U.S. Const. amend. vi. The Supreme Court has long held that the Counsel Clause includes the right to the effective assistance of counsel. ***See generally Strickland v. Washington***, 466 U.S. 668, 686; ***Commonwealth v. Pierce***, 527 A.2d 973, 975 (Pa. 1987).

In analyzing claims of ineffective assistance of counsel, "[c]ounsel is presumed effective, and [appellant] bears the burden of proving otherwise." ***Fears***, ***supra*** at 804 (brackets in original; citation omitted). To prevail on any claim of ineffective assistance of counsel, a PCRA petitioner must allege and prove "(1) the underlying legal claim was of arguable merit; (2) counsel had no reasonable strategic basis for his action or inaction; and (3) the petitioner was prejudiced—that is, but for counsel's deficient stewardship, there is a reasonable likelihood the outcome of the proceedings would have been different." ***Commonwealth v. Simpson***, 66 A.3d 253, 260 (Pa. 2013). "A claim of ineffectiveness will be denied if the petitioner's evidence fails to satisfy any one of these prongs." ***Commonwealth v. Elliott***, 80 A.3d 415, 427 (Pa. 2013) (citation omitted).

In his brief, Appellant alleges four instances of ineffective assistance of counsel. For ease of analysis, we elect to address them in a slightly different

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[5] Likewise, Article I, Section 9 of the Pennsylvania Constitution states in relevant part, "[i]n all criminal prosecutions the accused hath a right to be heard by himself and his counsel …." Pa. Const. Art. I, § 9. Our Supreme Court has held that the Pennsylvania Constitution does not provide greater protection than the Sixth Amendment. ***Pierce***, ***supra*** at 976.

order than he has presented them in his brief. We first address Appellant's argument that counsel was ineffective for failing to address the part of his 1987 sentence that he has alleged is illegal. Appellant's Brief at 68. We reject this argument for the same reason we rejected Appellant's primary illegal sentence argument. As all claims regarding the remaining 1987 convictions and sentence are time-barred, Appellant must allege and prove a time-bar exception. Appellant does not do so here regarding this issue; as a result, we lack jurisdiction to consider this claim. ***See Turner***, ***supra***.

We next consider Appellant's claim that trial counsel was ineffective for failure to conduct a complete pre-trial investigation. Specifically, Appellant argues that trial counsel should have called various witnesses to testify, introduce certain photographs, and obtain Presentment 33 as well as the audiotapes of conversations between Appellant and Smithers. Appellant's Brief at 60-62. This Court has previously noted that a PCRA petitioner has a heavy burden when alleging that counsel failed to call a certain witness at trial.

> [I]n the particular context of the alleged failure to call witnesses, counsel will not be deemed ineffective unless the PCRA petitioner demonstrates: (1) the witness existed; (2) the witness was available; (3) counsel knew of, or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony was so prejudicial to petitioner to have denied him or her a fair trial.

Commonwealth v. Miner, 44 A.3d 684, 687 (Pa. Super. 2012) (citation omitted).

> [After] … establish[ing] deficient performance, [a defendant] must also show that there is 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. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.

Hinton v. Alabama, 134 S. Ct. 1081, 1089 (2014) (*per curiam*). "[T]he test for prejudice in the ineffectiveness context is more exacting than the test for harmless error, and the burden of proof is on the defendant, not the Commonwealth." ***Spotz***, ***supra*** at 315. "[T]he ***Pierce*** prejudice standard, which requires the defendant to show that counsel's conduct had an actual adverse effect on the outcome of the proceedings." ***Id.*** "[N]ot every error by counsel can or will result in a constitutional violation of a defendant's Sixth Amendment right to counsel." ***Id.***

After careful review, we conclude that Appellant has not established prejudice with regard to any of these claims. As to the witnesses trial counsel allegedly failed to investigate, Appellant does not identify these witnesses, or whether they were available and willing to testify. As to Presentment 33 and the audiotapes, we have already concluded as a matter of ***Brady*** and Rule 573 that Appellant has not shown any prejudice from not

having these items turned over sooner. As a result, we likewise conclude Appellant cannot show how he is prejudiced under ***Strickland***.

Finally, Appellant points to two photographs that counsel should have discovered. One photograph "depicted Smithers with the Bronco in front of his garage and his house and pulling [his] boat, all of which showed that the Bronco was in Smithers's (and not [Appellant]'s) possession[.]" Appellant's Brief at 61. The second was "of a 1977 Pontiac Firebird sent to [Appellant] from Pontiac, which made it clear that this vehicle could not possibly be the 1972 Pontiac Formula 400 that [Appellant] testified about before the grand jury." ***Id.*** As to the photograph of the Pontiac, Appellant does not explain how a photograph of a 1977 Pontiac would "undermine [our] confidence" in Appellant's conviction on charges stemming from a 1979 Bronco. Regarding the photograph of Smithers with the Bronco, the Commonwealth presented testimony of Trooper Francis Golden that Appellant told him in an interview that the Bronco actually belonged to him, and he had a receipt for the Bronco. N.T., 1/11/00, at 72-73. Although it may be true that such a photograph, if it existed, may raise an inference that Smithers possessed the vehicle at one point in time, the jury would still be free to credit Trooper Golden's testimony. Based on these considerations, we conclude Appellant is not entitled to relief on these grounds.

We next address Appellant's argument that trial counsel was ineffective for interfering with Appellant's right to testify at the 2000 re-trial.

> The decision of whether or not to testify on one's own behalf is ultimately to be made by the defendant after full consultation with counsel. In order to sustain a claim that counsel was ineffective for failing to advise the appellant of his rights in this regard, the appellant must demonstrate either that counsel interfered with his right to testify, or that counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision to testify on his own behalf.

Commonwealth v. Michaud, 70 A.3d 862, 869 (Pa. Super. 2013) (citation omitted).

"With regard to the second, reasonable basis prong, 'we do not question whether there were other more logical courses of action which counsel could have pursued; rather, we must examine whether counsel's decisions had any reasonable basis.'" ***Commonwealth v. Chmiel***, 30 A.3d 1111, 1127 (Pa. 2011) (citation omitted). "[W]e only inquire whether counsel had any reasonable basis for [her] actions, not if counsel pursued the best available option." ***Commonwealth v. Philitin***, 53 A.3d 1, 10 (Pa. 2012) (citation omitted). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Commonwealth v. Carson***, 913 A.2d 220, 226-227 (Pa. 2006), *cert. denied*, ***Carson v. Pennsylvania***, 552 U.S. 954 (2007), *citing* ***Strickland***, ***supra*** at 689.

In this case, the PCRA court rejected Appellant's argument based upon the following.

> At the [e]videntiary [h]earing, [trial c]ounsel testified that it was his practice to reach a mutual decision with a defendant as to whether or not the defendant would testify at [t]rial. []Appellant also testified that [trial c]ounsel advised him not to testify and he took that advice and remained silent at trial.
>
> While Appellant now claims that that advice was ineffective assistance of counsel, it is clear also from Appellant's testimony at the hearing that he was going to take the stand and contradict his former admissions and sworn testimony and therefore create the impression that [] Appellant had committed perjury either in his [f]irst [t]rial or [s]econd [t]rial. [Trial c]ounsel's determination that that type of situation would be detrimental to his client was a proper decision and certainly did not constitute ineffective assistance of counsel.

PCRA Court Opinion, 1/2/14, at 14-15.

After careful review, we conclude the record supports the PCRA court's conclusion. At the PCRA hearing, trial counsel testified that he could not recall this trial, being from 13 years ago, but that his "practice normally would have been to allow [Appellant] to testify unless [he] felt that there was … nothing to be gained by it …." N.T., 3/4/13, at 96. Appellant acknowledged that he chose to follow counsel's advice at the time regarding his decision not to testify. N.T., 7/9/13, at 213. However, Appellant wished to tell the jury on the witness stand that "neither the 1979 Bronco nor the title to the 1979 Ford Bronco was in his possession … as well as … that *his* 1970 Bronco was located behind Smithers's Happy Hooker Garage."

Appellant's Brief at 68 (emphasis in original); ***see also*** N.T., 7/9/13, at 214. Appellant acknowledged that when he testified at his 1987 trial that he bought a Bronco from Smithers, his testimony was false. ***Id.*** at 217-218. In his 1987 trial, Appellant testified that he did ask Smithers to buy the Bronco, to which Smithers agreed, and after an issue with a tax of some kind, Smithers signed the title over to him. N.T, 5/11/87, at 185-186. Now, Appellant claims that Smithers never agreed to sell any Bronco to him. N.T., 7/9/13 at 220. Based on this alone, the Commonwealth would have been able to impeach Appellant's credibility with his prior sworn trial testimony. ***See generally Commonwealth v. Henkel***, 938 A.2d 433, 442 (Pa. Super. 2007) (stating, "[t]he general rule is that a prior inconsistent statement of a declarant is admissible to impeach the declarant[]") (citation omitted); ***accord Commonwealth v. Simmons***, 662 A.2d 621, 638 (Pa. 1995) (stating, "[i]t is axiomatic that when attempting to discredit a witness' testimony by means of a prior inconsistent statement, the statement must have been made or adopted by the witness whose credibility is being impeached[]"; Pa.R.E. 613(a). Based on these considerations, we conclude trial counsel had a reasonable basis for advising Appellant not to take the stand. As a result, Appellant is not entitled to relief.

We next address Appellant's argument that he is entitled to relief pursuant to the United States Supreme Court's decision in ***United States v.***

Cronic, 466 U.S. 648 (1984), decided by the Court on the same day as ***Strickland***.

> In ***Cronic,*** the Court reiterated that in the vast majority of ineffective assistance cases, an appellant must allege "some effect of [the] challenged conduct on the reliability of the trial process[.]" [***Id.***] at 658. However, the Court identified three situations where both ineffective assistance and prejudice are presumed and automatically warrant relief because they "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." ***Id.*** The first is a "complete denial of counsel." ***Id.*** at 659. The second is when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." ***Id.*** The third is when there is a breakdown in the system to the point that "the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair." ***Id.*** at 660–661. Our Supreme Court "has employed a ***Cronic***-style presumption of prejudice where counsel's constitutional error has caused a total failure in the relevant proceeding.... ***Cronic*** is limited to situations where counsel's failure is complete, i.e., where counsel has entirely failed to function as the client's advocate." ***Commonwealth v. Martin,*** 607 Pa. 165, 5 A.3d 177, 191 (2010) (citation omitted), *cert. denied,* ***Martin v. Pennsylvania,*** 131 S. Ct. 2960 (2011).

Commonwealth v. Johnson, 51 A.3d 237, 245-246 (Pa. Super. 2012) (*en banc*) (parallel citation omitted), *appeal denied*, 63 A.3d 1245 (Pa. 2013). In this case, Appellant argues that he is entitled to ***Cronic***'s presumption of prejudice because "[trial] counsel repeatedly referred, in his opening statement, to the Bronco being found in [Appellant]'s possession, thereby

conceding [Appellant]'s guilt with respect to two of the three charges against him." Appellant's Brief at 65.

However, before we may address the merits of this issue, we must ascertain whether it is properly before us to consider. Pennsylvania Rule of Appellate Procedure 1925(b) by its text requires that statements "identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge." Pa.R.A.P. 1925(b)(4)(ii). The Rule also requires that "[e]ach error identified in the Statement will be deemed to include every subsidiary issue contained therein which was raised in the trial court …." ***Id.*** at 1925(b)(4)(v). Finally, any issues not raised in accordance with Rule 1925(b)(4) will be deemed waived. ***Id.*** at 1925(b)(4)(vii). Our Supreme Court has held that Rule 1925(b) is a bright-line rule.

> Our jurisprudence is clear and well-settled, and firmly establishes that: Rule 1925(b) sets out a simple bright-line rule, which obligates an appellant to file and serve a Rule 1925(b) statement, when so ordered; any issues not raised in a Rule 1925(b) statement will be deemed waived; the courts lack the authority to countenance deviations from the Rule's terms; the Rule's provisions are not subject to *ad hoc* exceptions or selective enforcement; appellants and their counsel are responsible for complying with the Rule's requirements; Rule 1925 violations may be raised by the appellate court *sua sponte,* and the Rule applies notwithstanding an appellee's request not to enforce it; and, if Rule 1925 is not clear as to what is required of an appellant, on-the-record actions taken by the appellant aimed at compliance may satisfy the Rule. We yet again repeat the principle first stated in

> [***Commonwealth v.***] ***Lord***, [719 A.2d 306 (Pa. 1998)] that must be applied here: "[I]n order to preserve their claims for appellate review, [a]ppellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925. Any issues not raised in a Pa.R.A.P. 1925(b) statement will be deemed waived." [***Id.***] at 309.

Commonwealth v. Hill, 16 A.3d 484, 494 (Pa. 2011) (footnote omitted).

In the case *sub judice*, Appellant's Rule 1925(b) statement raised all of his ineffective assistance of counsel issues at paragraph five. Therein, Appellant raised the issues that "trial counsel was ineffective in failing to investigate, overriding [A]ppellant's expressed desire to testify, and failing to object to [A]ppellant's illegal conspiracy sentence." Appellant's Rule 1925(b) Statement, 11/25/13, at ¶ 5. Appellant did not raise any issue regarding counsel's alleged "concession" of Appellant's guilt.

This Court has previously deemed claims of ineffective assistance of counsel waived where the "Rule 1925(b) statement nowhere specifie[d] what the deficiencies [we]re for the purposes of … appeal." ***Johnson***, ***supra*** at 246. In this case, Appellant did not specify anything regarding trial counsel conceding Appellant's guilt. In its Rule 1925(a) opinion, the PCRA court reproduced Appellant's Rule 1925(b) statement almost *verbatim*. The PCRA court did not address this claim, as it was not aware that Appellant intended to raise it for appeal. ***See Commonwealth v. Hansley***, 24 A.3d 410, 415 (Pa. Super. 2011) (stating "the Rule 1925(b) statement must be 'specific enough for the trial court to identify and address the issue [an

appellant] wishe[s] to raise on appeal[]'") (citation omitted), *appeal denied,* 32 A.3d 1275 (Pa. 2011); ***Commonwealth v. Reeves****,* 907 A.2d 1, 2 (Pa. Super. 2006) (stating "[w]hen a court has to guess what issues an appellant is appealing, that is not enough for meaningful review[]"), *appeal denied,* 919 A.2d 956 (Pa. 2007). Based on these considerations, we deem Appellant's final issue on appeal waived for failure to raise it in his Rule 1925(b) statement.[6]

It is said that "[a]t some point, litigation must come to an end. That point has now been reached." ***Facebook, Inc. v. Pac. Nw. Software, Inc.***, 640 F.3d 1034, 1042 (9th Cir. 2011); ***see also generally Commonwealth v. Sam***, 952 A.2d 565, 577 (Pa. 2008) (stating, "the societal interest in finality is not just a notion of criminal theory; rather, it is reflected in the very letter of our PCRA[]"), *cert. denied*, ***Sam v. Pennsylvania***, 558 U.S. 828 (2009). Based on the foregoing, we conclude that all of Appellant's issues on appeal are either time-barred, waived, or devoid of any merit. Accordingly, the PCRA court's October 9, 2013 order denying Appellant relief under the PCRA is affirmed.

Order affirmed.

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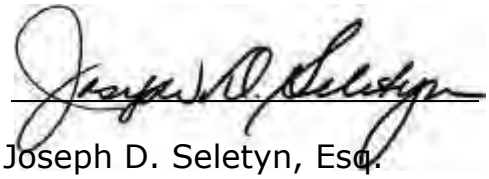
[6] We note that paragraph 5 does cite to ***Cronic*** once. However, like we stated in ***Johnson*** regarding ***Strickland*** claims, a defendant must nevertheless inform the PCRA court as to what the specific deficiency was that required it to apply the ***Cronic*** presumptive prejudice standard.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/22/2014