

SUPREME COURT OF PENNSYLVANIA

No. 37 EAP 2020

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

AARON BRADLEY,

Appellant.

**BRIEF OF AMICUS CURIAE
THE PENNSYLVANIA INNOCENCE PROJECT**

Appeal from the Judgment of the Superior Court of Pennsylvania dated June 22, 2020, No. 364 EDA 2019, Affirming the January 16, 2019 Order of the Court of Common Pleas of Philadelphia County at No. CP-51-CR-0010497-2012.

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INTEREST STATEMENT OF AMICUS CURIAE

Amicus curiae the Pennsylvania Innocence Project (the “Project”) is a nonprofit legal clinic and resource center with offices at Temple University’s Beasley School of Law and the Duquesne University School of Law. Its board of directors and advisory committee include, among others, practicing lawyers, law professors, former United States Attorneys, former state prosecutors, and wrongly convicted individuals who have been exonerated. In collaboration with private counsel who serve *pro bono*, the Project provides investigative and legal services to indigent prisoners throughout the Commonwealth of Pennsylvania. These individuals have claims of actual innocence that are supported by the results of DNA testing or other powerful exculpatory evidence or have claims that, after a preliminary investigation, evince a substantial potential for discovery of such evidence. Additionally, the Project works to remedy the underlying causes of wrongful convictions to ensure that no one will be convicted and imprisoned for a crime he or she did not commit. The Project seeks to ensure that the innocent are not punished and that no wrongdoer will escape justice because an innocent person was convicted in his or her place.

The instant case is of particular importance to the Project because it illustrates a longstanding issue under Pennsylvania’s Post Conviction Relief Act: the lack of an effective procedure to protect and enforce an initial PCRA petitioner’s right to

effective assistance of counsel. Effective, qualified counsel is critical to a defendant's first PCRA petition because, given the time constraints of the statute, the first petition is likely the only opportunity a defendant will have to raise issues with their trial, conviction, or sentencing. If counsel is not competent and fails to appropriately raise and litigate these issues, the petitioner is largely left without recourse under the current framework. The Project seeks to ensure that incarcerated individuals are afforded an opportunity for meaningful collateral review of their convictions and sentencing, including the right to PCRA counsel. This interest is accentuated even further in the case of a criminal defendant convicted of a crime he or she did not commit. The Project files its *amicus* brief to request that this Court rework the mechanism by which PCRA petitioners raise claims of ineffective assistance of PCRA counsel and implement a workable procedure that protects and secures this right.

Amicus curiae respectfully submits this Brief to the Court to address the public importance of this issue apart from and beyond the immediate interests of the parties to this case.

SUMMARY OF ARGUMENT

It has been more than three decades since the Pennsylvania Supreme Court held that first time Post Conviction Relief Act (“PCRA”) petitioners have an enforceable right to effective assistance of counsel. *Commonwealth v. Albert*, 561 A.2d 736, 738 (Pa. 1989); *see also* Pa. R. Crim. P. 904. As this Court has recognized, effective counsel is especially critical during initial post-conviction proceedings because of the rigorous PCRA time bar provisions. *Commonwealth v. Albrecht*, 720 A.2d 693, 699-700 (Pa. 1998). Because a PCRA petition must be filed within one year of a judgment becoming final, a defendant’s first petition is likely to be his or her only petition—or, at least, the only petition where claims are likely to be heard on the merits. Thus, it is crucial that PCRA counsel diligently investigate and raise all possible claims, including effective assistance of trial counsel, to effectively litigate petitioner’s claims.

Paradoxically, despite the importance of effective post-conviction counsel, petitioners denied this right are effectively left without a remedy in state court. This case illustrates the problems of the current framework, which forces petitioners to place preservation of their substantive rights in the hands of ineffective counsel. Indeed, this Court presciently anticipated the conundrum of a petitioner like Bradley in *Commonwealth v. Holmes*, recognizing that “there is no formal mechanism in the PCRA for a second round of collateral attack focusing upon the performance of

PCRA counsel, much less is there a formal mechanism designed to specifically capture claims of trial counsel ineffectiveness defaulted by initial-review PCRA counsel.” 79 A.3d 562, 583-84 (Pa. 2013).

This *amicus* brief, written on behalf of the Project, proposes that the Supreme Court create a mechanism that adequately protects a first-time petitioner’s right to effective post-conviction counsel. The Project has extensive experience assisting petitioners throughout PCRA proceedings and is well-suited to propose a solution because it has witnessed firsthand how effective post-conviction counsel can be the determining factor for a successful PCRA petition and can ultimately lead to a showing of petitioner’s innocence. The Project calls on the Supreme Court to provide an appropriate procedural remedy for petitioners denied effective assistance of PCRA counsel. Respectfully, we suggest that the Court permit first-time PCRA petitioners to raise claims of ineffective counsel in a subsequent PCRA petition, overcoming the statute’s time bar provisions through application of the new facts exception. This would provide a much-needed remedy for petitioners and allow trial courts to review performance of PCRA counsel. Alternatively, as Bradley suggests, the Court could find that the *Hubbard* rule applies in these limited circumstances, permitting petitioners to raise claims of ineffective post-conviction counsel at the first opportunity when represented by new counsel. Both of these solutions are fully within the Court’s authority, and this case provides a welcome opportunity for the

Court to provide an appropriate remedy for petitioners denied their essential right to effective post-conviction counsel.

ARGUMENT

I. FIRST-TIME PCRA PETITIONERS' RIGHT TO EFFECTIVE COUNSEL IS CRITICAL FOR MEANINGFUL REVIEW OF PCRA CLAIMS.

First-time filers of PCRA petitions have a longstanding right to assistance of counsel. *See, e.g., Albert*, 561 A.2d at 738. This Court has emphasized that it is “axiomatic that the right to counsel includes the concomitant right to effective assistance of counsel,” as the right is “meaningless if effective assistance is not guaranteed.” *Albrecht*, 720 A.2d at 699-700 (citation omitted). Effective post-conviction counsel will have the “ability to frame the issues in a legally meaningful fashion,” ensuring to the court that “all relevant considerations will be brought to its attention.” *Commonwealth v. Carrier*, 431 A.2d 271, 273 (Pa. 1981) (quoting *Commonwealth v. Mitchell*, 235 A.2d 148, 149 (Pa. 1967)). When a petitioner is not provided adequate legal counsel, Pennsylvania courts have found that the petitions are “effectively uncounselled [*sic*].” *Commonwealth v. Hampton*, 718 A.2d 1250, 1253 (Pa. Super. 1998) (quoting *Commonwealth v. Sangricco*, 415 A.2d 65, 68 (Pa. 1980)) (stating that counsel is inadequate when he or she “deprived the petitioner ‘the opportunity of legally trained counsel to advance his position in acceptable legal terms’”). When the trial court fails to appoint counsel to assist a first-time petitioner,

the petitioner is permitted to file an amended PCRA petition. *See, e.g., Commonwealth v. Tedford*, 781 A.2d 1167, 1171 (Pa. 2001) (holding that petitioner could amend initial pro se PCRA petition after trial court dismissed it without appointing counsel and dismissed second petition as untimely); *Commonwealth v. Duffey*, 713 A.2d 63, 70 (Pa. 1998) (permitting petitioner to amend initial PCRA petition after obtaining counsel).

Effective assistance of counsel is crucial during initial post-conviction proceedings because the first PCRA petition is likely the only opportunity for a defendant to raise collateral challenges to his or her conviction or sentencing, and counsel's failure to adequately identify and litigate these claims will almost inevitably result in waiver. Under the PCRA, any defendant seeking to challenge a conviction or sentencing must file a petition "within one year of the date the judgment becomes final." 42 Pa. C.S. § 9545(b)(1). This Court has construed that time bar as jurisdictional, *see, e.g., Commonwealth v. Peterkin*, 722 A.2d 638, 641-42 (Pa. 1998), meaning that courts have no authority to consider petitions filed outside of it unless one of three narrow statutory exceptions is shown: (1) petitioner failed to previously raise the claim due to unconstitutional interference by government officials; (2) "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 (3) the constitutional right was not recognized at the time of trial

but has been found to apply retroactively. 42 Pa. C.S. § 9545(b)(1)(i)-(iii). In that situation, a defendant may file a PCRA petition “within one year of the date the claim could have been presented.” 42 Pa. C.S. § 9545(b)(2).

Given the difficulty of showing that one of these exceptions applies, successive petitions filed after the initial one-year deadline are frequently dismissed as untimely. In other words, “in view of the PCRA’s time limitations, the pending PCRA proceeding will most likely comprise the petitioner’s sole opportunity to pursue collateral relief in state court.” *Commonwealth v. Flanagan*, 854 A.2d 489, 500 (Pa. 2004). In fact, the post-conviction relief system is designed to provide a defendant with a “single, counseled petition” and discourage serial petitions. *Commonwealth v. Williams*, 782 A.2d 517, 524 (Pa. 2001). As this Court reasoned in *Williams*: “The nature of this scheme places substantial responsibility upon PCRA counsel to properly identify claims implicating a right to relief and to present them in a form which would invoke merits review. Indeed, particularly in light of the time limitation now imposed under the PCRA, a substantial default by post-conviction counsel may ultimately foreclose merits review of a claim.” *Id.*

Whether or not a defendant receives effective assistance of counsel during PCRA proceedings can determine the outcome of the case—and ultimately whether their conviction is overturned. The Project has assisted many first-time PCRA petitioners and witnessed firsthand the difference competent counsel can make.

Below, the Project describes three cases where diligent post-conviction counsel was integral to the outcome of the case. In each, trial counsel failed to adequately defend petitioner's case by neglecting key exculpatory evidence, and post-conviction counsel effectively raised these issues on petitioner's behalf in an initial PCRA petition and ultimately secured their release from prison.

1. Donte Rollins¹

Donte Rollins was wrongfully imprisoned for ten years after being convicted of attempted murder when he was 18 years old. Mr. Rollins was convicted in relation to a shooting that took place in Philadelphia in 2006 when a group of young men standing on a street corner fired several shots at a passing car. One of these shots hit a six-year-old boy in the car, paralyzing him, and the boy's family claimed Rollins fired the shot. Mr. Rollins disputed this and maintained his innocence, claiming that at the time of the shooting, he was miles away shopping, first at the Gallery Mall in Center City and then at stores on South Street, including The Net.

Mr. Rollins' conviction was based largely on statements from the victim's family who were in the car at the time of the shooting, as well as testimony from the arresting officer describing the timeline of events from the night in question. The

¹ Additional information about Mr. Rollins' case can be found on the websites of the National Registry of Exonerations and the Pennsylvania Innocence Project. See The National Registry of Exonerations, *Donte Rollins: Other Philadelphia Exonerations* (Jan. 9, 2020), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5060>; Pennsylvania Innocence Project, *Donte's Story* (2019), <https://painnocence.org/DonteRollins>.

officer testified that he saw Rollins approach his home between 8:15 and 8:30 p.m. and that the victim's family soon after identified Rollins around 8:30 p.m. Under this timeline, it was impossible for Mr. Rollins to have been shopping at the time of the shooting but entering his home when the officer first claimed to see him. To refute this and support Mr. Rollins' claims, Mr. Rollins' counsel submitted a security camera video from the Gallery Mall showing Mr. Rollins at 6:14 p.m., as well as photos from a security video from The Net showing Mr. Rollins around 8 p.m. When the jury deadlocked and asked to see the video from The Net, as opposed to just photos, they were not allowed to do so because the video was never entered into evidence. The jury then convicted Mr. Rollins, and the trial court sentenced him to 62 ½ to 125 years in prison. Mr. Rollins' appeals to the Superior Court and Supreme Court were denied.

In 2013, the Project and attorney Michael Wiseman (coincidentally counsel for Mr. Bradley in this case) assisted Mr. Rollins in filing a PCRA petition for a new trial. The petition claimed that Mr. Rollins' trial counsel was ineffective for failing to investigate and present Mr. Rollins' full alibi, which showed him to be innocent. Most importantly, Mr. Rollins' trial attorney failed to call on key alibi witnesses. One of Mr. Rollins' friends, for example, could have testified that he was the other man with Mr. Rollins in the security camera footage from The Net. Two other friends could have testified that they were also shopping with Mr. Rollins on the

night in question, and one of them had a timestamped receipt from The Net showing a purchase around the time of the shooting. Additionally, trial counsel failed to introduce into evidence another receipt from the Gallery Mall that supported Mr. Rollins' timeline of events; cell phone records corroborating Mr. Rollins' use of his cell phone in security camera footage from The Net; news footage showing Mr. Rollins wearing the same clothing at the time of his arrest that he had worn in the store surveillance videos (clothing that was different than what eyewitnesses described the shooters wearing); and police radio transcripts rebutting the arresting officer's testimony and proving that his initial contact with Mr. Rollins was later on the night in question.

The petition led the Philadelphia County District Attorney's Conviction Review Unit (now called the Conviction Integrity Unit) to reinvestigate the case, ultimately agreeing that the conviction should be vacated, and in December 2016, Mr. Rollins was released from prison after the Superior Court vacated his charges. Without diligent post-conviction counsel, the alibi witnesses and other evidence may not have been raised in Mr. Rollins' PCRA petition. While ignored by Mr. Rollins' trial counsel, the existence of witnesses who could corroborate Mr. Rollins' version of events were of critical importance, showing that Mr. Rollins was telling the truth about his whereabouts on the night of the shooting and proving that he could not have been in the area when it took place. Because these witnesses and the

corroborating evidence were known to Mr. Rollins and his counsel at the time of trial, it would have been nearly impossible for him to raise these errors in a subsequent PCRA petition as these witnesses and other evidence would not fall into any of the exceptions to the time bar. Thus, crucial to Mr. Rollins' release was post-conviction counsel's ability to identify the errors of trial counsel, adequately plead these claims in Mr. Rollins' first PCRA petition, and effectively litigate them to secure Mr. Rollins' release from prison for a crime he did not commit.

2. Dontia Patterson²

Similar to Mr. Rollins, Dontia Patterson's case exemplifies the importance of competent post-conviction counsel when presenting claims of inadequate legal defense at trial. Mr. Patterson's case began in January 2007 when an individual was leaving a grocery store in Philadelphia and was shot at close range in the back of the head. The perpetrator immediately fled. Mr. Patterson was friends with the victim and lived near the grocery store, so when he heard about his friend, he rushed to the scene. Police questioned Mr. Patterson based on a description of the suspect, but he was ultimately released. Soon after, two men came forward, claiming that they were sitting outside a barber shop near the grocery store at the time of the murder, heard

² Additional information about Mr. Patterson's case can be found on the websites of the National Registry of Exonerations and the Pennsylvania Innocence Project. See The National Registry of Exonerations, *Dontia Patterson: Other Philadelphia Exonerations with Official Misconduct* (Mar. 18, 2019), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5330>; Pennsylvania Innocence Project, *Dontia's Story* (2019), <https://painnocence.org/DontiaPatterson>.

gunshots, and saw a man run from the scene. The two men then went to the grocery store and saw Mr. Patterson in different clothes than the gunman had been wearing when he fled. A few months later, one of these men identified Mr. Patterson as the shooter, and Mr. Patterson was arrested in April 2007.

At trial, the prosecution had no physical evidence linking Mr. Patterson to the crime and relied largely on the eyewitness testimony. This trial ended in a mistrial when the jury could not reach a unanimous verdict. Mr. Patterson's second trial included much of the same evidence with the addition of, among other things, a surveillance video from inside the grocery store showing the gunman in the store before the shooting took place. Additionally, an off-duty police officer who lived in the neighborhood testified that she recognized Mr. Patterson in the video despite acknowledging that she could not make out his face in the footage. The jury convicted Mr. Patterson of first-degree murder, and he was sentenced to life in prison without parole.

In 2017, the Project and the law firm of Cozen O'Connor reinvestigated Mr. Patterson's case and filed an amended petition for post-conviction relief. The amended petition described many errors by Mr. Patterson's trial counsel. While there were several pieces of evidence not raised at trial, the key issue was trial counsel's failure to call witnesses who could have supported Mr. Patterson's claims of innocence. Most importantly, the grocery store owner could have testified that,

as he told police, he knew Mr. Patterson and Mr. Patterson was not in the store at the time of the shooting. In response to the petition, the Philadelphia County District Attorney reinvestigated Mr. Patterson's case, discovering that multiple pieces of exculpatory evidence had not been turned over to Mr. Patterson's trial counsel—including the name of another potential suspect. Ultimately, Mr. Patterson was released from prison in 2018, and the prosecution declined to retry his case.

Similar to Mr. Rollins' case above, it was crucial that that PCRA counsel raised trial counsel's errors in the first post-conviction petition. The grocery store owner's testimony was vital to Mr. Patterson's defense, but his defense attorney completely failed to present this witness to the jury. Because the store owner was known at the time of trial, Mr. Patterson would not have been able to invoke any exception to the PCRA's time bar. Without the assistance of effective post-conviction counsel, Mr. Patterson may never have been able to show his innocence.

3. Larry Trent Roberts³

Larry Trent Roberts' case also shows the importance of diligent post-conviction counsel when raising ineffective assistance of trial counsel claims. Mr. Roberts spent thirteen years wrongfully imprisoned after he was convicted for a

³ Additional information about Mr. Roberts' case can be found on the websites of the National Registry of Exonerations and the Pennsylvania Innocence Project. *See* The National Registry of Exonerations, *Larry Trent Roberts: Other Dauphin County, Pennsylvania Exonerations* (Sept. 22, 2019), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5614>; Pennsylvania Innocence Project, *Trent's Story* (2019), <https://painnocence.org/Larry-Trent-Roberts>.

murder that took place in Harrisburg in December 2005. Mr. Roberts maintained his innocence but was arrested for the crime based on eyewitness testimony and cell phone records showing calls to the victim on the night of the murder. At his trial in 2007, the prosecution called on three witnesses who claimed to have seen Mr. Roberts near the scene of the crime on the night in question. The prosecution and defense also presented agreed-upon expert testimony showing that Mr. Roberts received two phone calls at approximately the same time the murder took place, and cell tower records placed the phone at least three miles from where the victim was murdered. The expert testified that it was impossible for Mr. Roberts' phone to have been at the scene of the crime. The prosecution, however, asserted that Mr. Roberts may not have had his phone with him at the time. Mr. Roberts' counsel presented very little evidence on his behalf and did not call any witnesses to corroborate his alibi that he was working with friends and then shopping with his daughter's mother on the evening in question or to support his claims that he had his phone with him that night. The jury convicted Mr. Roberts for the murder and sentenced him to life without parole.

Mr. Roberts continuously maintained his innocence, and in 2013, the Project interceded in PCRA proceedings on his behalf along with attorneys from Pepper Hamilton LLP (now Troutman Pepper Hamilton Sanders LLP). At a post-conviction hearing in 2016, counsel presented key evidence disregarded by trial counsel,

including Robert's full alibi and several supporting witnesses. First, one of Mr. Roberts' employees at his used car lot testified that Mr. Roberts had his phone with him and used it throughout the work day and at dinner on the evening the murder took place. Second, Mr. Roberts' daughter's mother testified that Mr. Roberts had taken her to Target late on the night of the murder, and she had a timestamped receipt showing a return she made at the store. She also testified that Mr. Roberts took several calls on his phone while they were together that night. Mr. Roberts' cell phone records corroborated this testimony and showed numerous calls to his friends and family throughout the critical time period. Counsel was also able to introduce other evidence, including the fact that a key witness for the prosecution had recanted his testimony and that the prosecution suppressed emails showing a deal in exchange for another witness's testimony.

As a result of this petition, the trial court vacated Mr. Roberts' conviction and granted him a new trial in June 2017. On appeal, the Superior Court affirmed this order, finding Mr. Roberts was entitled to a new trial due inadequate legal assistance relating to his counsel's failure to present his alibi defense. While other deficiencies in Mr. Roberts' trial were raised on appeal, the Superior Court only discussed claims of ineffective assistance of counsel. *See Commonwealth v. Roberts*, No. 1148 MDA 2017, 2018 WL 4922783, at *9 (Pa. Super. Oct. 10, 2018). The Commonwealth retried Mr. Roberts in September 2019. The Project and Pepper Hamilton

represented Mr. Roberts at trial, presenting his full alibi to the jury supported by witness testimony. The jury found Mr. Roberts not guilty, and he was released from prison after serving thirteen years for a crime he did not commit. Like Mr. Rollins and Mr. Patterson above, Mr. Roberts' case shows the potential outcome when PCRA counsel is diligent in pursuing the petitioner's claims. And, as with the other two cases described here, effective representation on Mr. Roberts' first PCRA petition was significant, as the critical alibi evidence was known before his first trial and thus would not have been the basis for him to invoke an exception to the time bar had it not been presented in his first PCRA petition.

The cases of Mr. Rollins, Mr. Patterson, and Mr. Roberts exemplify the results that effective post-conviction counsel can obtain on a first PCRA petition. In these cases, PCRA counsel was able to identify trial counsel's errors, investigate critical exculpatory evidence, and effectively present this information to the court in a PCRA petition—ultimately securing defendant's release from prison. This shows the vital importance of effective post-conviction counsel for first-time petitioners and highlights the need for an effective remedy for petitioners who are denied that right.

II. **THE PENNSYLVANIA SUPREME COURT SHOULD PROVIDE AN EFFECTIVE REMEDY FOR PETITIONERS DENIED EFFECTIVE POST-CONVICTION COUNSEL.**

A. **THE CURRENT FRAMEWORK FAILS TO PROTECT PCRA PETITIONERS' RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.**

It is widely recognized that the framework for challenging ineffective post-conviction counsel is insufficient. The Superior Court in this case recognized this very point, stating, “We agree the procedure for raising claims of PCRA counsel’s ineffectiveness . . . is flawed. Moreover, due to the PCRA’s time restrictions, it is difficult, if not impossible, for a petitioner to seek relief from an ineffective PCRA attorney in a subsequent petition.” *Commonwealth v. Bradley*, 2064 EDA 2014, 10 (Pa. Super. June 22, 2020). The court noted that, despite the lack of a remedy, it could not review Mr. Bradley’s petition: “Thus, because we are constrained by binding precedent to conclude Appellant waived his only issues on appeal, we affirm the order dismissing his PCRA petition.” *Id.* at 14. The Commonwealth also agreed, arguing in its brief below that the current system creates a “particular conundrum for defendants, such as [Appellant] here” and agreed that Bradley’s motion for remand was the “first opportunity for [Appellant] to raise his claims of PCRA counsel’s ineffectiveness.” *Id.* at 9-10.

Respectfully, the time has arrived for this Court to devise a mechanism that better protects this right. Currently, first-time petitioners may only raise claims of

inadequate assistance of PCRA counsel in an objection to the trial court's notice of its intent to dismiss the petition under Pennsylvania Criminal Rule of Procedure 907. *Commonwealth v. Pitts*, 981 A.2d 875, 880 n.4 (Pa. 2009); *see also Commonwealth v. Smith*, 121 A.3d 1049, 1054 (2015) (applying *Pitts*). Under this framework, petitioners have twenty days to respond to the Rule 907 notice, and they must raise their ineffective assistance of counsel claim in their response or waive the claim altogether. This procedure is illogical for multiple reasons.

First, in order to raise an ineffective assistance of counsel claim in the narrow 20-day window allotted by Rule 907, a petitioner must rely on counsel who has already proven themselves to be ineffective. This is particularly troublesome in cases like Bradley's where PCRA counsel failed to file a response to the Rule 907 notice at all. Related to this point, it is extremely unlikely that, should they even file a response, attorneys will raise claims suggesting their own ineffectiveness. This also assumes that an attorney is aware of these shortcomings. It is entirely inappropriate to place a petitioner's substantive rights in the hands of ineffective counsel, expecting the attorney to raise and argue his or her own deficient representation.

Second, the Rule 907 notice does not make its purpose clear or describe the consequences of failing to respond to it. The notice itself does not always communicate its purpose or the reasoning for dismissal. In Bradley's case, for

example, the PCRA court merely checked a box stating that “The issues raised in the P.C.R.A. petition filed by your attorney are without merit” and provided no reasoning whatsoever for the dismissal.⁴ Additionally, the Rule 907 notice does not make clear that failure to object to the notice and raise ineffective counsel claims will result in waiver of that claim forever. The notice does not inform the petitioner that failure to respond means the issue cannot be raised later on appellate review; instead, it states: “No response to this Notice is required.” As Justice Baer recognized in his dissent in *Pitts*, “there is absolutely no language in the criminal rules or in the case law of this Court indicating that a petitioner must file a response to the PCRA court’s notice of dismissal or risk waiver of his claims, [so] Appellee cannot be faulted for failing to follow a nonexistent procedure.” 981 A.2d at 891.

Finally, even if a petitioner could overcome all of these hurdles to recognize his ineffective counsel, understand the need to raise this claim in response to the Rule 907 notice, and file a *pro se* response asserting this claim, it would be nearly impossible for him to overcome the presumption that counsel was effective. This is a three-pronged test, and one of these requires a showing “that the ineffectiveness of counsel caused [petitioner] prejudice.” *Commonwealth v. Pierce*, 786 A.2d 203, 213 (Pa. 2001), *abrogated on other grounds by Commonwealth v. Grant*, 813 A.2d 726

⁴ In another case with similar circumstances, this Court held that an ineffectiveness claim could not be brought on appeal even when no Rule 907 notice was ever issued. *Commonwealth v. Jette*, 23 A.3d 1032, 1044 n.14 (Pa. 2011)

(Pa. 2002). The petitioner would not be able to show that he was harmed by post-conviction counsel because the PCRA proceedings are ongoing, and there has been no final ruling by the PCRA court. These issues, along with others not addressed here, illustrate the need for a new framework to protect PCRA petitioners' right to effective assistance of counsel.

B. THE SUPREME COURT CAN PROVIDE AN EFFECTIVE PROCEDURAL REMEDY TO PETITIONERS DENIED EFFECTIVE POST-CONVICTION COUNSEL.

Several Justices have recognized the problems discussed above and have urged the Court to resolve this and provide a state-level remedy to petitioners denied effective assistance of PCRA counsel. Justice Baer, for example, opined at length on the need to confront this problem in both his dissenting opinion in *Pitts* and the plurality opinion in *Commonwealth v. Ligonis*, 971 A.2d 1125 (Pa. 2009). In *Pitts*, Justice Baer—joined by now-Chief Justice Saylor and Justice Todd—noted that the majority's position was “so obviously unworkable that it should finally be put to rest.” 981 A.2d at 887-88. Justice Baer continued on to explain in detail how it is nearly impossible for a petition to challenge the effectiveness of PCRA counsel before the PCRA court, as required by the majority's holding in *Pitts*, because “the alleged ineffectiveness is playing out as that proceeding occurs,” and he recognized that it would be “virtually impossible for a petitioner to ever file a serial petition raising PCRA counsel's ineffectiveness in a timely manner as his first PCRA petition

would not be disposed of before the one-year statutory filing period expires.” *Id.* at 892 (quoting *Lignons*, 971 A.2d at 1139-40).

Now-Chief Justice Saylor echoed concerns that the Supreme Court failed to provide a sufficient remedy for those denied effective post-conviction counsel, joined by Justice Todd. *See Commonwealth v. Hill*, 16 A.3d 484, 498 (2011) (describing concerns about “the apparent curtailment of an enforcement mechanism to assure the evenhanded enforcement of a capital post-conviction petitioner’s rule-based right to assistance of counsel and the concomitant requirement of effective stewardship”). Justice Saylor was particularly troubled by petitioner’s claims of ineffective counsel “since a majority of the Court now appears to be suggesting that there effectively can be no state-level redress for such deficient stewardship.” *Commonwealth v. Paddy*, 15 A.3d 431, 479 (Pa. 2011).

It is not only individual justices who have expressed these concerns—the Supreme Court itself recognized the current mechanism fails to adequately secure and enforce a first-time petitioner’s right to effective counsel. In *Holmes*, this Court noted that “there is no formal mechanism in the PCRA for a second round of collateral attack focusing upon the performance of PCRA counsel, much less is there a formal mechanism designed to specifically capture claims of trial counsel ineffectiveness defaulted by initial-review PCRA counsel.” *Holmes*, 79 A.3d at 583-84. Continuing, the Court recognized, “Frankly, this Court has struggled with the

question of how to enforce the ‘enforceable’ right to effective PCRA counsel.” *Id.* at 584. While several opinions discussed the issue at length, “the Justices have not been of one mind respecting how to resolve this issue, and no definitive resolution has emerged.” *Id.*

Respectfully, this case provides this Court the opportunity to provide relief to petitioners denied effective assistance of counsel, and untie the hands of lower courts eager to enforce this right. *See, e.g., Commonwealth v. Henkel*, 90 A.3d 16, 29 (Pa. Super. 2014) (“We are cognizant that failing to address PCRA counsel ineffectiveness claims raised for the first time on appeal renders any effective enforcement of the rule-based right to effective PCRA counsel difficult at the state level.”); *Commonwealth v. Ousley*, 21 A.3d 1238, 1245 (Pa. Super. 2011) (“We find the reasoning in *Pitts* effectively prohibits our review of Appellant’s claim that PCRA counsel was ineffective in failing to raise Appellant’s legality of sentencing claim.”).

The Project proposes two alternatives.

First, the Supreme Court should *allow first-time petitioners to raise claims of ineffective assistance of post-conviction counsel in a subsequent PCRA petition*. Unfortunately, as noted above, successive PCRA petitions are almost always time-barred under the statute’s one-year filing period. However, this Court could allow a petitioner whose initial PCRA counsel was ineffective to raise that claim in a

successive petition. It could do this by holding that a petitioner’s diligent discovery that PCRA counsel was ineffective is a new fact that was unknown to petitioner at the time of trial, allowing petitioner to overcome the statute’s time bar provision under the “new facts” exception found in 42 Pa. C.S. § 9545(b)(1)(ii), and to file a successive petition raising PCRA counsel’s performance with the PCRA court. This solution provides a much-needed remedy for denial of the right to effective post-conviction counsel and removes the need for petitioners to raise this issue in federal courts for *de novo* review. *See generally Martinez v. Ryan*, 566 U.S. 1 (2012). Additionally, this solution does not require the Court to alter any procedural rules or rely on the General Assembly for a statutory change. It only requires the Court to render a holding interpreting its previous decisions, which is completely within the Supreme Court’s authority.

Second, the Court could revert to the *Hubbard* rule, allowing petitioners to raise claims of ineffective PCRA counsel on appeal *at the first opportunity when represented by new counsel*. This could resolve the tension between the PCRA’s time bar and the Court’s holding in *Grant*, as *Hubbard* was the prevailing law at the time the General Assembly passed the PCRA and when it amended the statute to add the one-year time bar in 1995. *See Henkel*, 90 A.3d at 23. At that time, “no case considered an allegation of PCRA counsel’s ineffectiveness raised on appeal pursuant to *Hubbard* as a prohibited ‘second or subsequent’ PCRA petition, and the

timeliness provision was not implicated in assessing such an issue. Indeed, before [*Grant*], it was well settled that PCRA petitioners not only could, but had to assert claims of PCRA counsel ineffectiveness for the first time on appeal if they were no longer represented by that PCRA attorney.” *Id.* Similar to the above, this is a purely interpretive solution within the power of the Court and does not require any changes to a statute or procedural rule.

CONCLUSION

The Supreme Court must take action to remedy this longstanding problem and provide an effective mechanism to enforce first-time PCRA petitioners’ right to counsel. Under the current framework, petitioners will likely have only one meaningful chance to raise issues with their sentencing or conviction, and lack of effective counsel forecloses this opportunity. The three cases discussed above show how diligent counsel can make-or-break a PCRA petition and be a deciding factor in whether or not a petitioner is released from prison or even found to be innocent of alleged crimes. Despite the clear importance of effective counsel, the current remedy fails to adequately protect this right, as illustrated by the case currently before the Court.

The Project urges the Court to take advantage of the opportunity presented by this case to resolve this issue, ensuring that incarcerated individuals are provided with at least one meaningful chance for review of their claims. The Project proposes

two solutions. First, the Court could permit ineffective assistance of PCRA counsel to be raised as a new fact in a successive PCRA petition, allowing petitioners to overcome the statute's time bar. Alternatively, the Court could allow first-time PCRA petitioners to raise ineffectiveness of post-conviction counsel at the first opportunity when represented by new counsel. Both of these solutions are fully within the Court's authority and would provide a workable procedure to protect a PCRA petitioner's right to effective assistance of counsel.

Dated: February 16, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Pa. R.A.P 531(b)(3) and Pa. R.A.P. 2135(d), this is to certify that the foregoing Brief of *Amicus Curiae* the Pennsylvania Innocence Project complies with the word count limit set forth in Rule 531(b)(3). This Brief contains **5,903** words, excluding those sections exempted by Pa. R.A.P. 2135(b).

Dated: February 16, 2021

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PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document (Brief of *Amicus Curiae* the Pennsylvania Innocence Project) upon the persons and in the manner indicated below, which satisfies the requirements of Pa. R.A.P. 121 and will within 7 days file paper copies with the Pennsylvania Supreme Court:

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