IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 27 MAP 2015

COMMONWEALTH OF PENNSYLVANIA,
Appellant

vs.

CLAUDE DESCARDES,
Appellee

BRIEF FOR AMICI CURIAE THE PENNSYLVANIA INNOCENCE PROJECT AND THE PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLEE CLAUDE DESCARDES

Appeal from the September 23, 2014 en banc decision of the Superior Court at No. 2836 EDA 2010, which reversed the September 23, 2010 Order of the Court of Common Pleas of Montgomery County at CP-46-CR-0000617-2006, which granted Appellee's petition for post-conviction relief.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Pennsylvania Association of Criminal Defense Lawyers ("PACDL") is a professional association of attorneys admitted to practice before the Supreme Court of Pennsylvania and actively engaged in providing criminal defense representation. As *Amicus Curiae*, PACDL presents the perspective of experienced criminal defense attorneys who aim to protect and ensure by rule of law those individual rights guaranteed by the Pennsylvania and United States Constitutions, and who work to achieve justice and dignity for criminal defendants. PACDL's membership includes more than 850 private criminal defense practitioners and public defenders throughout the Commonwealth.

PACDL members have a direct interest in the outcome of this appeal because of their concern for ensuring that criminal defendants' constitutional rights are not abridged, and that established precedent protecting those rights is given all due consideration. Additionally, PACDL has a direct interest in ensuring that the criminal justice system provides a meaningful remedy to fully address errors that may have occurred in connection with a criminal conviction. *Coram nobis* relief is one such remedy.

The Pennsylvania Innocence Project ("Pa IP") is a nonprofit legal clinic and resource center with offices at Temple University's Beasley School of Law. Its board of directors and advisory committee include practicing lawyers, law

professors, former United States Attorneys, former state court prosecutors, and the deans of the law schools of Temple University, Villanova University, and Drexel University's Thomas Kline School of Law. In collaboration with private counsel who serve pro bono, the Project provides *pro bono* investigative and legal services to indigent prisoners throughout the Commonwealth of Pennsylvania whose claims of actual innocence are supported by the results of DNA testing or other powerfully exculpatory evidence or whose claims, after a preliminary investigation, evince a substantial potential for the discovery of such evidence. In addition, the Project works to remedy the underlying causes of wrongful convictions better to ensure that no one will be convicted and imprisoned for a crime he or she did not commit and to lessen the risk that a wrongdoer will escape justice because an innocent person was convicted in his or her place.

Pa IP shares PACDL's interest in ensuring that all criminal defendants in Pennsylvania have a meaningful opportunity for collateral review of a challenge to the constitutionality of a conviction or the legality of a sentence. For Pa IP that interest is accentuated in the case of a criminal defendant convicted of a crime he or she did not commit. Although the harm suffered from a wrongful conviction and incarceration can never be undone completely, Pa IP has an interest in seeing that the innocent are relieved to the maximum extent possible of the continuing and disabling consequences of a mistaken conviction.

STATEMENT OF THE CASE

Amici Curiae adopt and incorporate the Statement of the Case as presented by Appellant in Brief for Appellant.

STATEMENT OF QUESTION PRESENTED

1. WHETHER THE SUPERIOR COURT'S CONCLUSION THAT DEFENDANT WAS ENTITLED TO *CORAM NOBIS* REVIEW CONFLICTS WITH THE HOLDINGS OF THE PENNSYLVANIA SUPREME COURT IN *COMMONWEALTH V. AHLBORN* AND *COMMONWEALTH V. HALL* AS WELL AS PRIOR SUPERIOR COURT PRECEDENT

   The Superior Court did not agree.

SUMMARY OF ARGUMENT

The appeal should be dismissed as moot or improvidently granted. The issue presented on this appeal is of no interest to Appellee Descardes who is already out of court as a result of the denial of his cross-petition for allocatur that sought review of the adverse ruling on the merits of his petition for writ of coram nobis. In addition, the Commonwealth has failed to show that the Superior Court's decision as to the availability of coram nobis for collateral review under the narrow circumstances of this case is having any impact at all on post-conviction litigation generally as might affect the Commonwealth's interests. Consequently, none of the exceptions to the mootness doctrine apply.

Rather than issue an advisory opinion, the Court should reserve the exercise of its supervisory power for a case in which both sides have a genuine

interest in the outcome and when the Court can have the benefit of a body of lower court decisions that have interpreted and applied the Superior Court's decision.

If it reaches the merits, the Court should affirm the Superior Court's determination that a person whose sentence has ended is nevertheless entitled to collateral review of a constitutional challenge that could not have been asserted before the defendant completed his sentence. Such collateral review can be provided, as this Court sees fit, either by channeling the claim into the PCRA through an interpretation that accommodates post-custody claims that could never have been brought while the person was serving his sentence, or, as the Superior Court held, by recognizing the availability of coram nobis review in that limited class of cases.

None of the Court's prior decisions that have confined PCRA relief to persons currently serving a sentence has involved a claim that, for lack of a factual or legal basis, could not have been brought before the sentence was completely served. Hence, no conflict exists between the Superior Court's *Descardes* decision and this Court's decisions in *Alhborn* and *Hall*. To the contrary, the Court has consistently found one means or another for ensuring that a defendant has at least one opportunity for collateral review of a particular challenge to the constitutionality of his conviction or the legality of his sentence.

A contrary ruling here would have the intolerable effect of depriving innocent persons of any means of clearing their names and ridding themselves of the severe collateral consequences of a criminal conviction whenever the facts establishing innocence were neither discovered nor discoverable by the exercise of reasonable diligence before release from custody. The General Assembly could not reasonably have intended any such result in enacting a statute aimed specifically at providing relief for persons convicted of a crime they did not commit. But if it is decided that relief on an innocence claim becomes unavailable under the PCRA once the sentence has been served, even if the basis for the claim did not exist until the sentence had been served, then relief on such post-custody claim must be available under the common law writs of habeas corpus or coram nobis whenever the potential exists for significant collateral consequences.

ARGUMENT

I. INTRODUCTION

The Pennsylvania Post Conviction Relief Act was expressly enacted to give "*persons convicted of crimes they did not commit*," as well as those otherwise wrongly convicted or serving illegal sentences, 42 Pa. C.S. § 9542 (emphasis added), a "reasonable opportunity to demonstrate the injustice of their conviction." *Commonwealth v. Peterkin*, 722 A.2d 638, 643 (Pa. 1998). The PCRA was "not intended to … provide relief from collateral consequences of criminal convictions" apart from such challenges to the underlying judgment. 42 Pa. C.S. § 9542. The legislative objective of ensuring a reasonable opportunity for collateral review of a constitutional challenge to a judgment of sentence has constitutional overtones. *Commonwealth v. Turner*, 80 A.3d 754, 771 (Pa. 2013) (positing that the due process guarantee of Article I, Section 9 of the Pennsylvania Constitution entitles a post-conviction claimant to "at least one opportunity to present her constitutional challenge to [his or her] judgment of sentence") (dissenting opinions of Justices Saylor and Todd, respectively). As *Amici* show herein, the statutory scheme, this Court's precedent, and Pennsylvania's Constitution require access to Court *outside of the PCRA* in those rare circumstances where custody has been completed, for convicted persons who never had an opportunity to challenge their

convictions before the sentence ended, whenever the conviction continues to subject them to significant collateral consequences.

Most often the necessary opportunity for collateral review is afforded by the PCRA, and when it is, the PCRA is the exclusive remedy. In the rare case, however, in which the particular constitutional challenge never qualified for PCRA review for reasons peculiar to the case, the defendant is not foreclosed from all hope of any remedy to demonstrate the injustice of the conviction and to obtain relief from the hardship that it entails. In such cases the common law writs of habeas corpus, coram nobis, or audita querela may serve as a vehicle for collateral review, subject of course to compliance with the limitations on the availability of those writs.

By granting the Attorney General's petition for allocatur in this case, the Court has undertaken to review specifically whether a person whose removal from the United States was effectively assured, as a result of his lawyer's failure to inform him of the risk of deportation as subsequently required by the U.S. Supreme Court's March 2010 decision in *Padilla v. Kentucky*, 559 U.S. 356, was properly afforded collateral review via a writ of coram nobis, where relief under the PCRA on his particular constitutional challenge was never available to him by reason of the fact that his sentence had ended before *Padilla* was handed down. The Court proposes to address the issue notwithstanding the Superior Court's ultimate ruling

in the case that the rule announced in *Padilla* decision is not retroactively applicable to any defendant whose conviction became final – such as appellee Descardes – before that decision was filed. *Commonwealth v. Descardes*, 101 A.3d 105, 109 (Pa. Super. Ct. 2014) (citing exclusively *Chaidez v. United States*, 568 U.S. —, 133 S. Ct. 1103, 1105 (2013)).[1] As a result of this Court's denial of Descardes' cross-petition, that *result* is not being contested here. What this Court is thus being asked to decide in the present case is whether someone who is *not* before the Court, and who has (presumably) a different and (hypothetically) valid claim for post-conviction relief on the merits, may obtain collateral review of that claim via coram nobis or otherwise if no opportunity ever existed to present the claim before the end of his sentence. While of no pressing importance, the question is yet important enough to deserve consideration in an appeal in which both parties

[1] In its mechanical reliance on U.S. Supreme Court precedent for this ruling, the Superior Court erred. In *Danforth v. Minnesota*, 552 U.S. 264 (2008), as Judge Bowes noted in her separate opinion below, the Court held that states are not obliged to follow the federal-court-made formula on retroactivity. "Accordingly, the *Teague* doctrine is not necessarily a natural model for retroactivity jurisprudence as applied at the state level." *Commonwealth v. Cunningham*, 81 A.3d 1, 8 (Pa. 2013), *citing Commonwealth v. Bracey*, 986 A.2d 128, 144 (2009). This Court recognized, discussed and invited application of that jurisprudential independence in *Cunningham*, 81 A.3d at 8-9. In the appropriate case – which could have been this case, had the cross-petition been granted – this Court can and should explore further the development of its own more rights-friendly rule for applying newly announced principles of constitutional fairness. The Court should also be careful to note, if it mentions the point at all in its opinion, that the only *new* aspect of the rule announced in *Padilla* is that defense counsel *must affirmatively advise* the defendant of clear immigration consequences. As noted in *Chaidez* itself, 133 S.Ct. at 1112, the rule that counsel *must not misadvise* a client – even with respect to collateral consequences – was not new in *Padilla* and so is not subject to any nonretroactivity restriction. *See, e.g., Kovacs v. United States*, 744 F.3d 44 (2d Cir. 2014).

have an interest in the outcome and which will yield, therefore, an opinion that is not just advisory.

Whatever its continuing importance to appellee Descardes—and none is discernable in the appeal's current posture—the ramifications of the appeal are much wider than the availability of coram nobis to one who faces deportation (or is denied reentry) because his lawyer neglected to inform him of the grave consequences of pleading guilty to a crime that makes one deportable and who was excusably ignorant of a Sixth Amendment claim that did not exist until after he completed his sentence. The appeal, in its present advisory posture, at least implicates the broader question of whether or under what circumstances a wrongly convicted or sentenced individual—including one convicted of and incarcerated for a crime he did not commit—may obtain collateral review inside or outside the PCRA when he never had an opportunity to challenge his conviction before his sentence ended and the conviction continues to subject him to severe collateral consequences.

While a resolution of the question may, as a practical matter, affect a small class of persons only, to persons in that class, innocent persons in particular, the answer to the question could not be more important. It is also of the utmost importance to our system of justice that the wrongly convicted not suffer unnecessarily from the system's errors. A sentence that has been served cannot be

undone. But when further hardship can be prevented, equity and good conscience would seem to require that much.

Amici intend by this brief to demonstrate that *Commonwealth v. Ahlborn*, *Commonwealth v. Hall*, and this Court's collateral review jurisprudence generally, do *not* preclude review by writ outside the PCRA, if not inside the PCRA, of a claim that did not become available, despite the defendant's exercise of reasonable diligence, until the sentence at issue had been served, at least so long as the claimant is subjected to significant collateral consequences that keep the claim from being moot.

Second, Amici will apprise the Court of the implications for innocent men and women of a ruling that banishes or constricts *any* opportunity for post-conviction review of a claim of innocence that rests on evidence that only comes to light after a sentence has been served. Thus, Amici are particularly and acutely concerned by the potential for a decision that would cut off claims of actual innocence before they could be brought.

Finally, we will suggest that because this appeal lacks a litigant with an interest opposed to the Commonwealth's, the Court should refrain, as a prudential matter, from using this case as a vehicle for exploring and deciding the critical question for Amici's clients that the appeal presents.

II. SHOULD THE COURT CONCLUDE THAT THIS APPEAL PRESENTS A LIVE CASE OR CONTROVERSY, DESPITE APPELLEE'S LACK OF INTEREST IN THE OUTCOME, THE COURT SHOULD DECIDE THAT AN INDIVIDUAL WHOSE SENTENCE HAS BEEN SERVED IS ENTITLED NEVERTHELESS TO AT LEAST ONE OPPORTUNITY FOR COLLATERAL REVIEW OF A CHALLENGE TO THE CONSTITUTIONALITY OF HIS CONVICTION OR THE LEGALITY OF HIS SENTENCE, AT LEAST SO LONG AS THE CRIMINAL JUDGMENT THREATENS THE INDIVIDUAL WITH SIGNIFICANT COLLATERAL CONSEQUENCES.

When it enacted the PCRA in 1995 to replace the Post Conviction Hearing Act, the legislature expressly provided that it was creating an action by which "persons convicted of crimes they did not commit and persons serving illegal sentences" can obtain collateral review. 42 Pa. C.S. § 9542. For those two categories of persons only, decreed the legislature, the newly fashioned action "shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose …, including habeas corpus and coram nobis." *Id.*

A literal reading of § 9542, which prosecutors have argued for, *see, e.g.*, *Commonwealth v. Haun*, 32 A.3d 697 (Pa. 2011), would have effectively restricted the availability of collateral review in Pennsylvania under the PCRA to persons who could plead and prove that they were innocent or had been sentenced unlawfully. Appreciating the practical problems entrained in a literal construction and not believing that the legislature had meant either to cabin statutory collateral

review so severely, widen the avenue for collateral review by common law writ, or promote a bifurcated process of collateral review, this Court wisely interpreted the PCRA in a way that no longer conditions relief on a claimant's ability to plead and prove his innocence or the illegality of his sentence. *Commonwealth v. Haun*, 32 A.3d at 704-05 (holding that concession of guilt does not foreclose access to PCRA review, despite language of § 9542 apparently limiting PCRA review to those asserting their innocence or the illegality of their sentences).

In a second, related pragmatic interpretation of the law, the Court has made clear in a series of decisions that a claim of ineffective assistance of counsel need not implicate the reliability of the adjudication of the claimant's guilt to qualify for review under the PCRA, despite the unambiguous language of § 9543(a)(2)(ii) requiring a showing that counsel's ineffectiveness "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." *Commonwealth ex rel. Dadario v. Goldberg*, 773 A.2d 126, 131 (Pa. 2001) (holding that, to avoid bifurcation of collateral review process, claim of ineffective assistance of counsel predicated on counsel's incorrect advice in the plea bargaining context shall be deemed cognizable under the PCRA, notwithstanding absence of any allegation satisfying statutory requirement that counsel's ineffectiveness undermined the reliability of the truth-determination process); *Commonwealth v. Chester,* 733 A.2d 1242, 1250 (Pa. 1999) (holding that

claim that counsel was ineffective during the penalty phase of defendant's capital case was not precluded by language of § 9543(a)(2(ii) requiring demonstration of impact on reliability of guilt determination); *Commonwealth v. Lantzy*, 736 A.2d 564, 570 (Pa. 1999) (holding that claim that counsel was ineffective for failing to file an appeal qualified for PCRA review).

In each of these instances and others, this Court has weighed carefully the several objectives underlying the PCRA. Where they conflicted with one another or with the plain meaning of the Act, the Court has typically if not invariably adopted a construction that would best serve and harmonize the interests of justice, finality, and sound judicial administration. It is a salutary aspect of the Court's evolving jurisprudence in this area that it has been unwilling to cling to a literal reading of a law at the expense of the values and objectives that underlie the law, as further reflected in the Suspension Clause of our Commonwealth's venerable Declaration of Rights; *see* Pa. Const., art. I, § 14. That same policy-oriented and pragmatic approach must lead to the conclusion that, whether through the development of a limited exception to the PCRA's "serving-a-sentence" requirement, or the recognition of a residual right to petition for a writ of coram nobis, Pennsylvania will provide at least one opportunity for collateral review of a constitutional claim, including a claim of innocence, to persons who have served

their sentences, at least so long as significant collateral consequences flow from the conviction.

As the law now stands, the legislature did not abrogate the common law writs of habeas corpus and coram nobis in enacting the PCRA. Rather, it made the PCRA the exclusive remedy, generally speaking, as to any claim within the Act's purview. In this Court's words, "[T]he PCRA subsumes all forms of collateral relief, including habeas corpus, *to the extent that a remedy is available under such enactment*." *Commonwealth v. Judge*, 916 A. 2d 511, 520 (Pa. 2007) (emphasis added).[2] Certainly, the purview of the PCRA is very broad. This Court has recognized and given effect to the legislature's "intent to channel post-conviction claims into the PCRA's framework," *id.*, so as to avoid bifurcated review, that is, parallel systems of collateral review, each with its own eligibility rules and procedures. To give the broadest possible sweep to the PCRA, the Court has instructed that the enumerated areas of review in 42 Pa. C.S. § 9542(a)(2) are not exclusive. *Judge,* 916 A. 2d at 520.

When a remedy is or was available to a person under the PCRA, the person is bound by the Act's procedural requirements. This means, among other

[2] Justice Eakin has expressed the point more succinctly: "*Habeas corpus* relief may exist only where PCRA relief is not possible...." *Commonwealth v. West*, 938 A.2d at 1049 (concurring) (citing concurring opinion of Justice Castille in *Coady v. Vaughn*, 770 A.2d 287, 293 (2001)).

things, that to be eligible for relief the petitioner must be serving a sentence, both at the time relief is sought and at the time it is granted.[3] *Commonwealth v. Ahlborn*, 699 A.2d 718, 721 (Pa. 1997). The corollary is that when a remedy is not and never was available under the PCRA to one seeking collateral review of a constitutional challenge relating to his conviction or sentence, review will be available by another means. *Chester*, 733 A.2d at 1250-51; *Commonwealth v. Hall*, 771 A.2d 1232, 1236-37 (Pa. 2001). Of course, to succeed on a claim that lies outside the ambit of the PCRA, the person must satisfy the procedural requirements of that alternate means for collateral review.

The crucial question, then, is under what circumstances can it be said that a remedy is not available under the PCRA such that its procedural framework is inapplicable and another framework governs eligibility for relief? There are at least two sets of circumstances that the Court's cases have so far identified. First, the PCRA does not provide a remedy for a claim unless it is facially consistent with the purpose of the Act, which is to provide an opportunity for collateral review of claims that implicate the reliability of the adjudication of guilt or the legality of the sentence.

[3] *See* 42 Pa. C.S. § 9543(a)(1)(i) (limiting relief to persons "currently serving a sentence of imprisonment, probation or parole").

As thus interpreted by the Court, the PCRA provides no remedy for a claim that implicates neither the guilt-determination process nor the lawfulness of the sentence. The case law offers two examples. *See Judge*, 916 A.2d at 526 (holding PCRA unavailable to review claim that deportation from Canada to Pennsylvania to serve death sentence violates international treaty); and *Commonwealth v. West*, 938 A.2d 1034, 1049 (Pa. 2007) (holding PCRA unavailable to review claim that nine-year delay in calling sentenced defendant to serve sentence denied defendant due process of law). With PCRA review being foreclosed in each case for lack of a claim cognizable under the Act, the petitioners in *Judge* and *West* were both entitled to petition for a writ of habeas corpus as the means for obtaining collateral review of their respective constitutional challenges.[4]

The defining characteristic of the second set of cases in which no remedy is available under the PCRA is that the petitioner's particular claim could not have been asserted while petitioner was serving a sentence of death, imprisonment, probation, or parole to which the claim pertained, as required by § 9543. Hence, in *Commonwealth v. Stock*, 679 A.2d 760 (1996), this Court granted a defendant who had been convicted of summary traffic offenses

[4] If the respective claims in *Judge* and *West* had been deemed reviewable under the PCRA, the petitions would have been denied as untimely without reaching the merits of the constitutional claims; neither petition would have satisfied the one-year limitation for PCRA relief under 42 Pa. C.S. § 9545.

punishable by a fine only, the right to have collateral review outside the PCRA of his claim that he had been deprived of the right to counsel on appeal by his lawyer's failure to file a timely appeal. As then-Justice Castille subsequently explained in *Hall*, 771 A.2d at 1236, Stock was *never* eligible for relief under the PCRA because he could not meet the PCRA's requirement that he be "'under a sentence of death, or imprisonment, or on parole or on probation.' [citations omitted] [Consequently, s]ince the PCRA was never available to such a summary offender, *nunc pro tunc* appellate relief was deemed necessary to vindicate the state constitutional right of appeal."

In the same category as *Stock*, analytically speaking, is a constitutional challenge, the factual or legal basis for which did not exist until the claimant had completed his sentence. In such a case, the expiration of the sentence precludes PCRA review of a claim otherwise meriting collateral review. Indeed, but for the person's inability ever to satisfy the "serving-a-sentence" requirement, the claim would be heard under the PCRA.

The claim in this category that lies at the heart of Amici's interest in this case is a hypothetical "innocence claim" based on evidence only discovered after the person had completed his sentence. It is not an extraordinary occurrence for blood or DNA evidence to come to light only years or decades after trial, particularly when the evidence has been suppressed as a result of official

misconduct. *See Connick v. Thompson*, 563 U.S. —, 131 S. Ct. 1350, 1356 (2011). Advances in DNA testing technology also make it possible to confirm or refute the guilt of a defendant years after the DNA-bearing evidence was first acquired. *Cf.* 42 Pa. C.S. § 9543.1. Or the new evidence might consist of a revolutionary development in forensic science that removes the underpinning of the conviction.

Innocence claims are cognizable under the PCRA in the strict sense that they fall within one of the statute's enumerated areas of review. 42 Pa. C.S. § 9543(a)(2)(iv). Because, however, in our hypothetical case, the claimant was no longer undergoing a sentence when the evidence of innocence came to light, it is not and never was possible for him to satisfy the "serving-a-sentence" requirement of the PCRA with respect to such claim. Hence, the claim is logically outside the PCRA's sphere. Such cases can and should be reachable with the writ of coram nobis, barring a broad construction of the PCRA that expands its sphere to admit the claim in those circumstances in which the serving-a-sentence requirement conflicts with the Act's paramount objectives.[5]

[5] *Commonwealth v. Holmes*, 79 A.3d 562 (2013), created another chink in the PCRA's exclusivity in the interest of accomplishing the larger purposes of the PCRA. Even though a claim of ineffective assistance of trial counsel is cognizable under the PCRA, *Holmes* now permits the claim to be heard, in the trial judge's discretion, on post-sentence motions under certain circumstances, namely, when the appointment of new counsel allows the claim to be presented, judicial efficiency and the interest in a sound adjudication will be fostered by an earlier hearing of the issue, and the defendant agrees to waive the right to seek relief subsequently under the PCRA.

The *Descardes* claim is analytically identical to our hypothetical innocence claim except that instead of the *factual* basis arising after the completion of the person's sentence, it was the *legal* basis for the claim, in the form of the *Padilla* decision, which did not materialize until after Descardes had completed his unappealed, one-year probationary sentence. Assuming retroactivity, such claims (whether involving constitutional developments or a newly announced statutory construction) likewise can and should be reachable and remediable by common law writ.

This Court has developed and applied multiple strategies for ensuring that a person who has never had an opportunity for a constitutional challenge will have one means or another for obtaining collateral review, even when review of the claim is apparently unavailable under the PCRA. Either the Court will permit collateral review via a common law writ, *Commonwealth v. Judge* and *Commonwealth v. West*; permit it via post-sentence motions *nunc pro tunc*,[6] *Commonwealth v. Stock*; or, in furtherance of the objective of avoiding bifurcated collateral review, it will widen the PCRA channel for review through an interpretation of the Act that accommodates a claim that would fall outside the Act

[6] This Court recognizes that post-sentence motions *nunc pro tunc* raising non-record based claims, such as claims that trial counsel was ineffective, function as vehicles for collateral review, however else they may be classified procedurally. *Commonwealth v. Holmes*, 79 A.3d 562, 566 (Pa. 2013)

if it were read literally, *Commonwealth v. Lantzy,* 736 A.2d 564, 570 (1999) (holding, notwithstanding that text of PCRA explicitly conditions a remedy on petitioner's ability to plead and prove his innocence of the crime for which he was convicted, that PCRA is available for a claim of trial counsel's ineffectiveness for failing to preserve right of appeal without any allegation of petitioner's innocence and without any allegations that implicate the reliability of the guilt-determination process or the legality of the sentence).[7]

In framing the issue on which the Court granted allocatur, the Commonwealth implied that the Superior Court's determination that a writ of coram nobis was the appropriate means for Decardes to obtain collateral review of his post-sentence, *Padilla*-based ineffective assistance of counsel claim, was at odds with this Court's *Ahlborn* and *Hall* decisions (and the Superior Court's own prior jurisprudence). The implication is unfounded. While both *Commonwealth v. Ahlborn*, 699 A.2d 718 (Pa. 1997), and *Commonwealth v. Hall*, 771 A.2d 1232 (Pa. 2001), rejected a defendant's attempt to obtain collateral review outside the PCRA and affirmed the PCRA's exclusivity, neither case involved a claim that, by virtue of how or when it arose, could *never* have brought under the PCRA. As the Court

[7] In the context of considering a state constitutional claim seemingly not cognizable under the PRCA, Chief Justice Castille noted approvingly the Court's frequent willingness to give the PCRA a broad construction "so as to avoid tension with the traditional scope of the writ of *habeas corpus*." *Commonwealth v. Cunningham*, 81 A.3d 1, 18 n.7 (Pa. 2013).

said of the defendant's claim in *Hall*, "The PRCA was available to [Hall] and it is the exclusive vehicle for claims, such as the *nunc pro tunc* appeal claim he raised, that are cognizable under the PCRA." 771 A.2d at 1233. The *Hall* Court took pains to distinguish *Stock's* allowance of an appeal *nunc pro tunc* to a defendant who had never served a sentence, saying: "Here, in contrast to *Stock*, [Hall] was sentenced to a term of imprisonment of nine to twenty-three months *and, thus, had a PCRA remedy available to him*. It was only [Hall's] own failure to seek PCRA relief within the one-year period of limitations … that resulted in the forfeiture of PCRA review of his right of appeal claim." *Id.* at 1236 (emphasis added).

The Superior Court's decision here also fits comfortably with *Ahlborn*, notwithstanding the latter's holding that once a defendant is released from custody, he is no longer eligible for relief under the PCRA; the fact that the defendant can point to continuing collateral consequences from the conviction that he seeks to challenge does not satisfy the PCRA's "serving a sentence" requirement, as currently interpreted by the Court. But *Ahlborn*, like *Hall*, involved a claim for relief for which a remedy had been available to the defendant under the PCRA. That the defendant's sentence ended before relief was granted did not change the fact that defendant had had an opportunity to obtain a remedy under the

PCRA.[8] Parenthetically, neither the Superior Court in this case nor Amici contend that the expiration of a sentence, by making PCRA relief unavailable, thereby imbues a defendant with the right to petition for a writ of coram nobis. Under the test we commend to the Court, a writ of coram nobis is the proper means for

[8] Since *Ahlborn*, the Court has attempted to reconcile the "serving-a-sentence" condition for PCRA relief with the need to provide an opportunity for collateral review for those whose short sentences make it difficult if not impossible for them, as a practical matter, to obtain a ruling on a PCRA petition before their sentences expire. Defendants, the Court has said, can ask the PCRA court to expedite a decision. *Commonwealth v. Turner*, 80 A.2d 745, 769 (Pa. 2013). In *Holmes*, it has made available a post-sentence motion *nunc pro tunc* for obtaining collateral review, subject to the trial court's discretion. Another way out of the dilemma would be to recognize that the serving-a-sentence requirement is a condition for granting relief, not for reviewing the claim. So long as the defendant is serving a sentence when the petition is filed, he should be eligible to obtain a determination that his conviction or sentence was invalid, provided something turns on the decision, such as deportation. To the argument that that approach was expressly rejected in *Ahlborn* as a casualty of the 1995 amendments that replaced the Post Conviction Hearing Act with the PCRA, Amici would counter that it may be preferable to channel such claims into the PCRA rather than permit resort to another means for collateral review, or, worse, to deprive the defendant of any opportunity for a constitutional challenge. As Justice Baer has written, though not in the "short sentence" context, "Where statutory law, or our interpretation of same, leads to manifest constitutional violations, either the statute or our interpretation must yield." *Commonwealth v. Brown*, 943 A.2d 264, 277 (Pa. 2008) (dissenting). Then-Justice Saylor pointed out the alternative escape routes from the short-sentence dilemma: "[T]he choice is (1) to channel such claims through the PCRA despite the conflict with its express limitations, similar to the approach of *Commonwealth v. Lantzy*, 558 Pa. 214, 736 A.2d 564 (1999); or (2) to invoke or devise a common-law review procedure." *Holmes*, 79 A.3d at 586 (concurring). From Amici's perspective, either approach would be meritorious.

As to whether the PCRA is susceptible to the proposed interpretation that would harmonize the interests in providing an opportunity for a constitutional challenge and avoiding bifurcated review, just as then-Justice Saylor acknowledged in his *Holmes* concurrence, this Court has previously rejected literal readings of the PCRA that would have restricted its scope, reasoning that the Court "discerned no legislative intent to prevent a PCRA petitioner from vindicating his or her rights." *Commonwealth ex rel. Dadario v. Goldberg*, 773 A.2d 126, 129 (Pa. 2001) (citing, *Commonwealth v. Kimball*, 724 A.2d 326 (Pa.1999), *Commonwealth v. Chester*, 733 A.2d 1242, and *Commonwealth v. Lantzy*, 736 A.2d 564)).

securing collateral review only when the defendant's particular claim was never eligible for collateral review under the PCRA.

While this Court need not concern itself with the internal consistency of Superior Court precedent, *Commonwealth v. Pagan*, 864 A.2d 1231 (Pa. Super. Ct. 2004), is no different from *Hall* or *Ahlborn*. The defendant's attempt to circumvent the serving-a-sentence requirement for PCRA relief by invoking the writ of coram nobis failed because all of his attacks on his old convictions were of a nature that could have been brought under the PCRA (or its predecessor), and nothing prevented him, so far as the opinion discloses, from petitioning for relief under the PCRA while he was undergoing his sentences of imprisonment and probation. Hence, *Pagan* is likewise not a case in which the defendant never had a remedy for his particular claims under the PCRA.

The fact is that both this Court and the Superior Court have repeatedly recognized the place that coram nobis and other common law writs continue to occupy in our scheme of collateral review in criminal cases. The continued vitality of the common law writs follows from the fact that the PCRA is only exclusive to the extent it provides a remedy. When the Superior Court determined that a person's challenge to the fairness of the proceeding that resulted in his classification as a sexually violent predator was not cognizable under the PCRA because it did not qualify as a challenge to the defendant's conviction or sentence,

the court observed that "other forms of post-conviction collateral relief exist." *Commonwealth v. Masker*, 34 A.3d 841, 844 (Pa. Super. Ct. 2011). Although Judge Bowes dissented below from the court's allowance of collateral review via a writ of coram nobis,[9] she did not question the writ's availability in principle to a person no longer serving a sentence. Quite to the contrary, she foresaw a day when "*coram nobis* may be an available form of relief in a future case involving a new constitutional right declared retroactively applicable where a defendant is no longer serving a sentence, and the right involved is sufficiently important to justify overlooking finality concerns." *Descardes*, 101 A.3d at 110.

The contours of the writ of coram nobis are ample enough to afford collateral review to one who is no longer in restraint of liberty (as required for habeas corpus, as well as for PCRA relief) but who can show on the strength of

[9] Judge Bowes parted company with the majority on the availability to Descardes of a writ of *coram nobis*. She reasoned syllogistically that as claims of ineffective assistance of counsel are, as a general proposition, cognizable under the PCRA, and as Descardes' claim was that his trial counsel was ineffective under *Padilla*, his claim was necessarily cognizable under the Act. That being so, the PCRA remedy excluded any other, including a writ of *coram nobis*. *Commonwealth v. Descardes*, 101 A.3d 105, 115 (Pa. Super. Ct. 2014), allocatur granted. Although she recognized that Descardes' short probationary sentence "made it virtually impossible for him to be able to pursue PCRA relief in a timely fashion," *id.*, she believed that *Commonwealth v. O'Berg*, 880 A.2d 597 (2005), which had declined to allow ineffectiveness claims to be raised on direct appeal in short sentence situations, controlled. That "Decardes's *specific* ineffectiveness of counsel claim was not recognized until well after the time he had to file a timely PCRA petition," *id.* at 109 (emphasis added), persuaded the majority but not Judge Bowes that *coram nobis* was available to address Decardes' particular ineffectiveness claim because the PCRA never was. It is difficult to imagine Judge Bowes or anyone else following her logic to reach the conclusion that because innocence claims generally are squarely within the PCRA sphere, *all* innocence claims are remediable under the PCRA, including those in which the exculpatory evidence only came to light after the defendant had served his sentence.

newly discovered evidence that he was innocent of the crime for which he was convicted. As limned by this Court in *Commonwealth v. Mangini*, 386 A.2d 486 (Pa. 1978), a writ of coram nobis is a procedural device that was available at English common law to correct factual errors. In the second half of the twentieth century, this Court followed the U.S. Supreme Court's decision in *United States v. Morgan,* 346 U.S. 502 (1954), in extending the writ's reach to errors of law as well as fact. *Commonwealth v. Doria*, 364 A.2d 322, 326 (Pa. 1976) (holding that claims of constitutional error advanced by defendant whose sentence has been fully served are not moot if defendant can show that he suffered serious civil consequences from the conviction, and that review is available on a petition for writ of coram nobis); *accord*, *Commonwealth v. Sheehan*, 285 A.2d 465, 468 (Pa. 1971) (holding that serious criminal consequences prevent application of mootness doctrine).

Relief on the writ depends on a showing of facts that, had they been known to the trial court, would have changed the outcome. To qualify for relief, the petitioner has the additional burden of showing that the facts alleged to warrant relief were neither discovered at the time of trial nor could they have been discovered despite the exercise of due diligence. *Commonwealth v. Harris*, 41 A.2d 688, 691 (Pa. 1945). As an extraordinary writ, a writ of coram nobis will not

issue if alternative remedies, such as habeas corpus, are available. *United States v. Denedo*, 556 U.S. 904, 911 (2009).[10]

In sum, the PCRA did not abolish the writs of habeas corpus or coram nobis but merely confined them to the relatively small number of situations in which the PCRA does not and has never provided a remedy for the particular claim. The availability of the writs is narrow to begin with, and their availability is further constricted by the applicant's burden of having to prove that the failure to present new evidence at trial was not the result of a want of due diligence on his part and having to satisfy whatever other procedural requirements may be applied to condition the writs' availability. If and to the extent the Court elects to use this case as a vehicle for reassessing when and under what circumstances a writ of coram nobis is available, it should therefore not be deterred by the specter of a deluge of otherwise barred claims from recognizing the continued, if limited role, of the writ in the scheme of post-conviction review. Affirmance here will open no floodgates.

[10] While habeas corpus requires custody at the time of filing, jurisdiction to adjudicate a challenge to the conviction or sentence under that writ continues – unlike under the PCRA – even if the sentence expires prior to issuance of a ruling or during an appeal, if the petitioner can demonstrate concrete collateral consequences premised on the wrongful conviction. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

III. AN INNOCENT PERSON SHOULD NOT SUFFER THE COLLATERAL CONSEQUENCES OF A WRONGFUL CONVICTION FOR LACK OF ANY OPPORTUNITY TO BE HEARD ON COLLATERAL REVIEW

As the prime purpose of the PCRA is to "provide for an action by which persons convicted of crimes they did not commit…may obtain collateral relief," 42 Pa. C.S. § 9542, it is unthinkable that the General Assembly intended that an innocent person would be forever shackled to the myriad consequences of a wrongful conviction—and that the actual perpetrator would continue to go undetected – just because the innocent person's sentence ended before the exonerating evidence came to light. And yet that would be the consequence of a decision here that closes off any path to collateral review for a person who, despite all due diligence, only acquired the evidence establishing his actual innocence once he was out of custody.

Innocence claims, in general, are unquestionably cognizable under the PCRA, in the sense that they go to the reliability of the truth determination process. 42 Pa. C.S. § 9543(a)(2)(i). Nevertheless, relief on such claims is ostensibly only available under the PCRA to one who is serving a sentence of imprisonment, probation, or parole or who awaits execution under a capital sentence. 42 Pa. C.S. § 9543(a)(1)(i-iii). It is almost certainly the case that in the great preponderance of cases, innocence claims are brought by inmates serving long sentences for crimes such as homicide, rape, and other crimes of violence. Unlike most crimes, these

most serious crimes are much more likely to be investigated utilizing the tools of forensic science, and when a conviction ensues, the sentence is apt to be of long duration. In those cases, there is more likely to be evidence, however hard to obtain, that may vindicate an innocence claim. For those long-sentenced individuals, the "custody" condition for PCRA review will seldom be problematic.

The reality is otherwise, however, for wrongly convicted individuals whose sentences expire before the evidence of their innocence materializes. For persons in that category, collateral review will be foreclosed by the PCRA's custody requirement unless the requirement is saved by a judicially created exception for claims that could not have been brought before the sentence was fully served, or unless review of such claims is available via a petition for a writ of coram nobis because the PCRA provided no remedy.

The innocence movement is a phenomenon of the past twenty-five years that is owed to the emergence of DNA testing technology. When DNA testing enabled investigators to conclusively exclude a convicted individual as the perpetrator of a crime for which he was found or pleaded guilty and then incarcerated, and the numbers of "DNA-exonerations" mounted, there were at least two important consequences. First, it exposed as a myth the long-held and comforting notion that innocent people are rarely convicted in a system that affords criminal defendants significant procedural protections, including the presumption

of innocence, the prosecutor's burden to prove guilt beyond a reasonable doubt, the right to counsel, and the right to a jury trial. The 1639 exonerations[11] in the past 26 years currently documented on the National Registry of Exonerations, a project of the Law School of the University of Michigan, awaken us to the reality that for all of the conscientious efforts made by the criminal justice system to safeguard against wrongful convictions, they occur with troubling frequency.[12] Nor can it reasonably be supposed that the Registry has captured more than a tiny fraction of the actual universe of false convictions, the vast majority of which are bound to

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[11] Of the 1639, 52 are Pennsylvania cases. *See* National Registry of Exonerations, *available at* http://www.law.umich.edu/special/exoneration/Pages/about.aspx. Yet another Pennsylvania case, based on DNA, was disclosed while this amicus brief was being edited. *See* http://www.washingtonpost.com/news/post-nation/wp/2015/08/13/a-man-spent-34-years-in-prison-before-dna-evidence-helped-set-him-free/.

[12] The National Registry uses a stringent (if not foolproof) test in determining if an innocent person has been convicted so as to justify Registry listing. "In general, an **exoneration** occurs when a person who has been convicted of a crime is officially cleared based on new evidence of innocence." The fuller definition is as follows: "**Exoneration**—A person has been exonerated if he or she was convicted of a crime and later was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action. The official action may be: (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence; (ii) an acquittal of all charges factually related to the crime for which the person was originally convicted; or (iii) a dismissal of all charges related to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal. The pardon, acquittal, or dismissal must have been the result, at least in part, of evidence of innocence that either (i) was not presented at the trial at which the person was convicted; or (ii) if the person pled guilty, was not known to the defendant, the defense attorney and the court at the time the plea was entered. The evidence of innocence need not be an explicit basis for the official action that exonerated the person." *See* the Glossary section of the National Registry of Exonerations, *available at* http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx.

escape detection for lack of biological evidence for DNA testing or the lack of will or resources to reexamine old convictions in non-capital cases.

Besides alerting us to the disturbing fact that wrongful convictions occur all-too-frequently, the body of DNA exonerations in particular has also provided real life case studies that shed light on the systemic causes of wrongful convictions. Innocent people are most likely to be convicted as the result of eyewitness misidentification; unreliable jailhouse informant testimony given in return for a promise of leniency; fraudulent or merely careless laboratory findings; false confessions resulting from overbearing or deceptive police interrogation practices; police or prosecutorial misconduct; and outdated scientific understanding as to the significance of certain physical evidence in determining, for example, if a fire was deliberately set or if an infant brain injury or death was the product of physical abuse.

Because discovery of information in possession of the police or prosecutor is sharply limited both before and after trial, it is seldom easy and it is more often impossible to obtain exculpatory evidence in the possession of those agencies. A defendant with resources to investigate his case will typically be stymied by the lack of discovery, and few defendants even have the resources to search for exonerating evidence or to subject it to forensic analysis if it can be found.

The investigation of an innocence claim is a time-consuming and laborious affair. A study of the Innocence Project's first 250 DNA exonerations revealed that the average length of time from conviction to exoneration was **fifteen years**. Brandon L. Garrett, CONVICTING THE INNOCENT 11 (Harvard 2011). According to the same study, "One of the most haunting features of these exonerations is that so many were discovered by chance." *Id.* at 12. All of which means that it is inevitable that some individuals who have been convicted of crimes they did not commit will only succeed in discovering the evidence that disproves their guilt after they have completed their sentences, and that through no fault of their own.

Unlike the PCRA's one-year limitation period, to which exceptions exist for after-discovered evidence, governmental interference, or new, retroactive constitutional rights, 42 Pa. C.S. § 9545(b)(1)(i-iii), the PCRA's requirement that to be eligible for relief one must be currently serving a custodial or non-custodial sentence is, in terms, absolute, admitting of no exception. Unless the PCRA's "serving-a-sentence" requirement is tempered by judicial interpretation or the writ of coram nobis is made available, a person convicted of a rape, child molestation, or other infamous crime that he did not commit will carry that badge of infamy for the rest of his life even though DNA testing establishes conclusively, but only after he has completed his sentence, that the badge was undeserved. In the overall

scheme of things, it may be tempting to dismiss such a case as no more than "a lachrymose outlier," *Commonwealth v. Brown*, 943 A.2d 264, 272 (Pa. 2008) (Castille, C. J. concurring), but tragic miscarriages of justice do not fall beneath judicial notice nor go without judicial correction because they occur infrequently.

Nor is the infamy, disgrace, and humiliation the whole of the continuing insult from a wrongful conviction that is unchallengeable due to the expiration of a sentence. For one thing, the innocent person's family members are also branded permanently as the relations of a menace and pariah, an especially intolerable burden for children to carry through their lives. For another, a refusal by the judicial system to entertain a meritorious innocence claim means that in some instances the actual perpetrator, whose identity would be revealed in the collateral proceeding, will be allowed to remain at large to prey on others. Finally, Judge Bowes has catalogued the numerous potential collateral legal consequences of a conviction under Pennsylvania law, including, among others: loss of the right to vote; having to register as a sexual offender; loss of the right to enlist in the armed forces; and loss of the right to inherit property. *Commonwealth v. Masker*, 34 A.3d 841, 852 (Pa. Super. Ct. 2011) (concurring and dissenting). Federal law imposes yet more disabilities on those convicted of state crimes. *See generally* Margaret Colgate Love, Jenny Roberts & Cecelia Klingele, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS (West 2013). It is hardly conscionable

to afflict an innocent person with these disabilities in perpetuity because he had the misfortune of completing his sentence before he had the evidential wherewithal to prove his innocence. It is often appropriate for a guilty person to pay his debt to society by serving his sentence in full. It is not appropriate that an innocent person should ever be deemed to have forfeited the right to cancel his debt to society, and thus to have to serve his sentence in full. It makes no moral, legal or logical sense. Because it makes no sense, it must be presumed not to have been the General Assembly's intention. Did the General Assembly, for example, intend to treat an innocent person who has completed a three-year sentence less well than one who is continuing to serve, say, a twenty-year sentence? And yet the latter, under the Commonwealth's cramped conception of Pennsylvania law, may secure release from confinement and be freed of the direct and collateral consequences of his conviction upon demonstrating his innocence on a timely PCRA petition, while the former will, for the lack of any collateral remedy, suffer the hardship of his criminal brand for the rest of his life.

Compassion for the plight of an innocent person permanently saddled with the collateral consequences of a wrongful conviction is not out of place under the PCRA despite its language that it does not "provide relief from collateral consequences of a criminal conviction." 42 Pa. C.S. § 9542. An innocence claim challenges the conviction by striking at the heart, not the regularity or propriety of

a collateral consequence. Relief from the collateral consequence is simply an incident of, and follows from, a successful challenge to conviction.[13]

A separate question is whether the failure to satisfy the PCRA's serving-a-sentence requirement requires the dismissal of an extra-PCRA claim for collateral relief, such as one that invokes coram nobis. While it may be true that, for purposes of obtaining review under the PCRA, a claim is moot once the sentence has been served, see *Commonwealth v. Turner*, 80 A.3d 754, 765-66 (Pa. 2013) (alternative holding), that is not the law of collateral review outside the PCRA. The doctrine that a criminal case is moot once the defendant has served his sentence has long since been overtaken by the recognition of "the obvious fact of life that most criminal convictions do in fact entail adverse legal consequences. The mere 'possibility' that this will be the case is enough to preserve a criminal case from ending 'ignominiously in the limbo of mootness.'" *Sibron v. New York*, 392 U.S. 40, 55 (1968). Thus one whose sentence has expired is not barred by the doctrine of mootness from obtaining review of an innocence claim or constitutional challenge to conviction under the applicable common law writ, as long as collateral consequences persist. *Spencer v. Kemna*, 523 U.S. at 7.

[13] Descardes' case, on the other hand, was a particularly appropriate one for coram nobis relief *outside* the framework of the PCRA. The objective of Descardes' post-conviction motion was precisely to obtain relief from a collateral consequence of his conviction – deportation – a purpose that the Legislature has expressly disclaimed in § 9542. To hold that Descardes' remedy lay exclusively in seeking PCRA relief would thus contradict the terms of the PCRA itself.

IV. BECAUSE APPELLEE'S INTERESTS WILL NOT BE AFFECTED BY A DETERMINATION OF THE QUESTION PRESENTED ON THIS APPEAL, THERE IS NO LITIGANT IN THE MATTER WITH AN INTEREST OPPOSED TO THE COMMONWEALTH'S. THEREFORE, THE APPEAL SHOULD BE DISMISSED AS MOOT OR IMPROVIDENTLY GRANTED

As a general rule, an actual case or controversy must exist at all stages of the judicial process, or a case will be dismissed as moot. *In re Duran*, 769 A.2d 497, 502 (Pa. Super. Ct. 2001). "An issue can become moot during the pendency of an appeal due to an intervening change in the facts of the case or due to an intervening change in the applicable law." *In re Cain*, 590 A.2d 291, 292 (Pa. 1991). In *In re Gross*, 382 A.2d 116 (Pa. 1978), this Court summarized the mootness doctrine as follows:

> The cases presenting mootness problems involve litigants who clearly had standing to sue at the outset of the litigation. The problems arise from events occurring after the lawsuit has gotten under way—changes in the facts or in the law—which allegedly deprive the litigant of the necessary stake in the outcome. The mootness doctrine requires that 'an actual case or controversy must be extant at all stages of review, not merely at the time the complaint is filed.'

Id. at 119 (citation omitted). The instant case, as limited by the terms of the allocatur grant, no longer satisfies that test; accordingly, it is moot and the appeal to this Court should be dismissed as improvidently granted.

In the event a case becomes moot, an opinion of this Court is rendered advisory in nature. *Jefferson Bank v. Newton Assocs.*, 686 A.2d 834, 837 (Pa.

Super. Ct. 1996). Advisory opinions, however, are condemned because they are a waste of judicial resources and an inappropriate use of judicial power. *Rendell v. Pa. State Ethics Comm'n*, 983 A.2d 708, 717 (Pa. 2009) (citations omitted). Our adversarial system is premised on the understanding that "accurate and just results are most likely to be obtained through the equal contest of opposed interests." *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 28 (1981). When only one side has an interest in the resolution of an issue, a court is deprived of the clash of views that is conducive if not essential to sound decision-making.

The preference if not imperative for having interested parties on both sides was expressed by Former Chief Justice Castille in his concurrence in *Coady v. Vaughn*, 770 A.2d 287, 294 (Pa. 2001) (emphasis added) (footnote omitted), where he observed that "[t]here may very well be more to be said on the matter. I would not foreclose that option, but would *await an actual case or controversy, with adversarial presentations*, to definitively resolve the question." Madame Justice Todd expressed a similar concern in her concurring opinion in *Commonwealth v. Donahue*, 98 A.3d 1223 (Pa. 2014). Among other things, Justice Todd indicated that she was "unconvinced that [the parties] are sufficiently adverse to one another's interests," and therefore questioned "whether or not the issue . . . is, at this time, sufficiently developed for judicial review." *Id.* at 1249. She also noted that "[t]his Court refuses to issue advisory opinions largely out of concern

that doing so robs the court of the practical factual predicate and *adversarial argument* necessary for the resolution of complex legal issues." *Id.* at 1252 (emphasis added).

The Commonwealth's appeal of Descardes' case to this Court should be dismissed as moot because the denial of Descardes' cross-petition rendered final the Superior Court's determination that he is not entitled to any relief due to the Supreme Court's determination in *Chaidez*, which was decided during the pendency of this litigation (holding that *Padilla* does not apply retroactively). *See Commonwealth v. Descardes*, 101 A.3d at 109; *but see* note 1 *ante*. While Descardes petitioned this Court for review of that determination, his request was denied. As a result, this appeal is strictly confined to a limited issue regarding the availability of coram review that is no longer of any concern to Descardes because it cannot lead to his requested relief. Thus, Descardes is participating without a real interest in the outcome of this matter. And because the limited issue on appeal cannot lead to an award of Descardes' requested relief, there is no longer a concrete controversy between the parties that this Court can resolve. As such, the case is moot, or at very least the case is no longer a suitable vehicle for resolution of the question on which allocatur was granted, suggesting that the appeal should be dismissed as improvidently granted.

It is true that this Court will decide questions that otherwise have been rendered moot when one or more of the following exceptions to the mootness doctrine apply: 1) the case involves a question of great public importance, 2) the question presented is capable of repetition and apt to elude appellate review, or 3) a party to the controversy will suffer some detriment due to the decision of the trial court. *See Pilchesky v. Lackawanna County*, 88 A.3d 954, 964-65 (Pa. 2014) (citations omitted). None of the exceptions applies here.

First, without in the least gainsaying the importance of this case to persons whose sentences have expired and who face continuing collateral consequences from an unjust conviction, the supposed need for correction of the Superior Court's decision hardly qualifies as a matter of "great public importance" to the Commonwealth. The circumstances to which the decision applies seldom arise, and the Commonwealth gives no hint in its brief that it has suffered any detriment as a result of the decision.

If and to the extent the Superior Court's decision has generated or will generate applications for coram nobis review, there has been and will be ample opportunity for appellate review, including by this Court, of rulings that apply or refuse to apply the decision. Thus, while capable of repetition, the issue is incapable of evading review.

Finally, given the extremely narrow band of cases to which the Superior Court's permission for coram review applies,[14] the Commonwealth will not suffer any detriment from the decision. Save for a conclusory reference to "negative consequences," Br. for Appellant, 19, the Commonwealth has not even attempted to make the case that events in the intervening years have demonstrated pernicious effects of the Superior Court's 2010 recognition of coram nobis review. Based on a search of Lexis and other sources, we cannot say that another coram nobis petition has even been filed predicated on the authority of *Descardes*. Certainly, none is mentioned in the Commonwealth's brief.

In sum, no public interest will be served by deviating from the requirement of a case or controversy, whereas the interest in a determination that is the product of a robust adversarial contest will be undermined by proceeding without interested parties on both sides of the issue in dispute. This Court will always have the opportunity to grant review in the future of a case that presents the issue and in which both sides have an interest in its resolution. There is also much to be said for waiting for the effects of the decision, if any, to unfold in the courts below, in preference to rushing to a decision that rests on speculation about those

[14] In reading the opinion to make otherwise cognizable claims not cognizable and therefore eligible for coram nobis review whenever the petitioner is unable to satisfy the eligibility or timeliness requirements of the PCRA, Br. for Appellant, 19, the Commonwealth reads *Decardes* much more broadly than Amici read it or than is justified by the facts of the case.

effects. Accordingly, the Commonwealth's appeal should be dismissed as moot for want of a case or controversy, or else dismissed as improvidently granted.

CONCLUSION

Because only one party to this appeal has an interest in the outcome, and because there is no urgent or impelling need for a review of the Superior's Court's limited permission of coram nobis review, the Court should dismiss the appeal as moot or as improvidently granted.

If the Court were to decide to reach the merits of the Superior Court's recognition of coram nobis review in the narrow circumstance where the particular claim for collateral relief was never eligible for consideration under the PCRA before the defendant had completed his sentence, the decision below on the coram nobis issue should be approved. Claims of innocence and challenges to the constitutional validity of a conviction or to the legality of a sentence should not be denied collateral review merely because the person seeking it is no longer undergoing a sentence.

In balancing the interests of justice and avoidance of bifurcated collateral review, the Court should, as it has done in several other instances, either broaden the construction of the PCRA to accommodate claims by persons whose sentence has expired or it should recognize the availability of collateral review of such claims by the alternative means of an appropriate common law writ or post-

sentence motions *nunc pro tunc*. Failure to do either will perpetuate the harm from a wrongful conviction, something that is especially intolerable in the case of persons able to prove, if given the opportunity, that they were convicted of crimes they did not commit.

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CERTIFICATE OF COMPLIANCE

I, David Richman, hereby certify on August 17, 2015, that the foregoing brief does not exceed the word limitation of Pa. R. App. P. 2135(a).

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