[J-119-2009] [MO: McCaffery, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 576 CAP
	:	
Appellee	:	Appeal from the Order entered on 6/26/08
	:	in the Court of Common Pleas, Criminal
	:	Division of Cumberland County at No. CP-
v.	:	21-CR-0000794-1995
	:	
	:	
MARK NEWTON SPOTZ,	:	
	:	
Appellant	:	SUBMITTED: November 18, 2009

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: April 29, 2011**

I join the Majority Opinion in its entirety. I write separately to note and address broader issues implicated by the role and performance of federal counsel in purely state court collateral proceedings in capital cases, such as this one.

Although the sources of the Federal Defender's funding are not entirely clear or easily ascertainable, the federal courts apparently play a central role in financing these activities in state court through the Administrative Office of Federal Courts.[1] To my knowledge, this policy has been determined and implemented without the consultation and involvement of this Court, or of any other Commonwealth authority. The federal courts -- as well as other federal authorities and the Pennsylvania citizenry generally (who may not even be aware of this unusual federal activity in state courts) -- may not be aware of just how global, strategic, and abusive these forays have become. The federal judicial policy

[1] See Commonwealth v. Hill, ___ A.3d ___ (Pa. 2011) 2011 WL 832941, at *4, *5 (Pa., filed March 11, 2011).

has raised issues that should be known to the federal authorities financing and authorizing the incursions; to Pennsylvania's Senators and House members; and to the taxpayers who ultimately foot that bill. This is an appropriate case to highlight those issues.

I write to these global issues in this case because the cumulative effect of the Defender's strategy has taken a substantial and unwarranted toll on state courts; and also because the Defender has begun to complain, both in this Court and in federal court, about delays in state court decision-making, claiming that the delays violate various federal rights and even, in one intemperate federal pleading, asserting that this Court is indifferent to, and incapable of managing, its capital docket.[2] The pleadings do not disclose or focus upon the primary cause of the delays, which very often is the prolix and abusive pleadings filed by the Defender in their many cases, as well as the Defender's ethically dubious strategies and activities in other Pennsylvania capital cases -- cases involving both initial and serial PCRA petitions -- all of which bog down Pennsylvania courts. If the Defender is to be taken at its word respecting actionable delay and the Court's supposed incapacity, then it is time for this Court to take affirmative measures to address the most obvious causes of delay, which are well known to this Court, and which to a great extent involve the Defender. To that end, this Court should immediately eliminate its existing page-limitation briefing indulgence in capital PCRA matters, and should begin regulating the rampant briefing abuses found in briefs such as the improper one the Defender has filed in this case. I also believe it is time to take more seriously requests by the Commonwealth to order removal of the Defender in cases where, as is becoming distressingly frequent, their lawyers act inappropriately. There are other measures I would refer to our Rules Committees for

[2] See Dougherty v. Beard, No. 09-CV-902 (Petitioner's Motion to Reactivate *Habeas* Proceedings), lodged on this Court's docket in Commonwealth v. Dougherty, 585 CAP.

suggested remedial measures in the face of the Defender's abuses, which I will discuss in Section II below.

- I -

I appreciate the Majority's yeoman effort in the face of the Defender's abusive appellate briefing, which brings me to my main point. This is not a federal case; a later, civil and collateral iteration of it may be federal if appellant ultimately pursues federal *habeas corpus* relief, at which point the federal district court will be free to appoint whichever counsel it pleases. But, there is no proper role of the federal courts at this point; and, it is not clear that the courts of this Commonwealth are obliged to suffer continued abuses by federal "volunteer" counsel paid by the federal courts. The capital PCRA petitioner, if indigent, is entitled under our Rules to the appointment of PCRA counsel, at state expense. But, the Defender has decided that federal tax dollars should be deployed to conduct appellant's state collateral attacks; and, the federal authorities who finance their state litigation strategy apparently approve the tactic. The resources the Defender was able to bring to bear in litigating this state collateral attack border on the perverse, and this fact, combined with the tactics employed, and the obvious global efforts of the Defender to obstruct capital punishment in Pennsylvania at all costs, strongly suggests that there is more at work here than non-political, professionally responsible, "zealous advocacy."

There are members of the private bar who continue to litigate capital PCRA appeals in our Court responsibly and effectively, proving (as if proof were needed) that abusive briefing is not a necessary component of competent and zealous advocacy. Capital PCRA appeals are inherently important -- because the ultimate penalty is involved. They are time-consuming -- because we permit longer briefs, the review encompasses lengthy capital trials, lengthy collateral pleadings, exhibits, and (oftentimes) hearings, and both the procedural and substantive law at issue may encompass an intersection of federal and state law. They are difficult -- because, in virtually all of these cases, there are a few

troublesome issues, of substance and procedure, which often divide the seven-member Court.

However, the inherent difficulties, and the inherent time commitment required, has been made needlessly more burdensome by the Defender's litigation strategy, which is conducted on multiple fronts. Few litigants, much less taxpayer-financed litigants, could afford to mount such strategic campaigns. This case presents a typical example of the myriad abuses of the Defender; but, there are examples of worse conduct I outline later. Indeed, I write in this case in part because of its typicality, as it raises the question of the propriety of the current, partisan federal role in Pennsylvania capital collateral proceedings.

The Defender "volunteered" itself here before direct review was completed: Robert Brett Dunham, Esquire, filed appellant's unsuccessful direct appeal *certiorari* petition in the U.S. Supreme Court. See Spotz v. Pennsylvania, 534 U.S. 1104 (2002). The Defender then initiated state collateral proceedings on December 4, 2002, by filing a 275-page document in the Court of Common Pleas of Cumberland County, which the court properly construed as a PCRA petition. This petition, filed by Attorneys Dunham and Anne Saunders, also of the Federal Defender, encompassed 622 paragraphs, setting forth 18 primary claims, most of which included various sub-claims.[3] After the Defender's initial filings, the proceedings evidently were put on hold by agreement of the parties pending disposition of the PCRA appeal of appellant's manslaughter conviction in Clearfield County for killing his brother, a conviction that was ultimately reinstated. On January 11, 2007, the

[3] The Defender has also volunteered itself in appellant's two other capital PCRA cases, arising from the separate murders that appellant committed in Schuylkill and York counties in 1995, which are pending on collateral review. Appellant's petition in this case listed 19 claims the Defender raised in appellant's Schuylkill County PCRA petition, and 33 claims the Defender raised in appellant's York County PCRA petition. In both cases, as here, the claims entail various sub-claims as well as allegations of counsel ineffectiveness at all levels. Appellant's PCRA Petition, 12/4/02, at 28-39.

Defender filed a supplemental PCRA petition, prepared by four attorneys: Dunham, Mary Hanssens, Michael Gonzales, and David L. Zuckerman. Five days later, Dunham filed yet another supplemental petition seeking to amend prior filings to add another new claim.

On January 17-18, 2007, the first two days of PCRA hearings were conducted. Dunham, Hanssens, and Zuckerman represented appellant. Among other witnesses, the Defender called a proffered expert in forensic psychiatry, a Defender investigator, two Defender "mitigation specialists," a proffered expert in clinical psychology, and a Clearfield County Children and Youth Services caseworker. On February 12, 2007, Dunham, Hanssens, Gonzales, and Zuckerman filed another supplemental petition asserting yet additional claims or arguments. On February 22-23, 2007, two more days of hearings were conducted, with Dunham, Zuckerman, and Gonzales representing appellant. Among other witnesses, the Defender presented another proffered expert in psychiatry. Another full-day hearing was held on May 10, 2007, where four lawyers -- Dunham, Hanssens, Zuckerman, and Gonzales -- appeared for appellant. The sixth and final full day of PCRA hearings was held on May 11, 2007, featuring Dunham, Zuckerman, and Gonzales.

On June 26, 2008, the PCRA court issued its order and opinion denying all of appellant's claims. Appellant's motion for reconsideration, filed by Dunham and Gonzales, was denied and appellant's notice of appeal followed in July 2008.

Of course, there is a federal constitutional right to counsel at trial, and I suppose the federal government could decide to help finance the states in providing such assistance to vindicate the right, to ensure fairer trials. But, the scope and resources deployed here, not to ensure a fair trial, but to try to prove that a presumptively competent trial lawyer was incompetent is simply perverse. This is a state collateral proceeding. The Defender devoted, at a minimum, five lawyers, an investigator, multiple mitigation specialists, and multiple experts to the project. It inundated the PCRA court with prolix pleadings, including

trivial and frivolous claims intermixed with more serious issues; it deployed multiple lawyers at hearings, who then attempted to conduct multiple and redundant examinations.

The overwhelming majority of appellant's claims sound in ineffective assistance of counsel, implicating the Sixth Amendment and Strickland v. Washington, 466 U.S. 668 (1984). Strickland claims involve not mere errors or mistakes at trial, but lapses of constitutional magnitude, a circumstance where it is as if the defendant did not have a lawyer at all. Proper examination of such claims requires deference to counsel, avoiding hindsight, recognizing the art in lawyering, and accepting that mere errors by counsel are not enough to prove prejudice. To warrant relief, a Strickland claim has to involve some kind of readily apparent, undeniable lapse by counsel of obvious and serious prejudicial effect. It is not a law school test of "spot the foregone objection." And, it takes a team of five federal lawyers and a supporting group of untold size comprising investigators and experts to prove the Strickland violation in this case?

Laying aside the overtly obstructionist aspect of the Defender's performance here, the commitment of federal manpower alone is beyond remarkable, something one would expect in major litigation involving large law firms. It is perverse to think that the federal judiciary knowingly makes this sort of financial commitment in Pennsylvania capital cases at the collateral review level. The individual counties in Pennsylvania, which typically pursue capital murder prosecutions, lack the resources to provide this sort of representation at the main event -- for the prosecution or the defense. And, equally perverse, the federal commitment of resources, on collateral review, is apparently partisan, assisting only capital defendants in attempting to undo their final state judgments.

The Defender's briefing in this Court is similarly abusive. The product of officers of the Court, it was not a good faith effort to abide by our already-lax briefing restrictions, and it borders on a contemptuous flouting of those Rules. The manner of briefing is designed to exhaust as much of this Court's time and resources as possible. The incentive for such

conduct in capital cases is obvious: each day of delay the abuse generates is another delay of the day of eventual reckoning. But, this is not a legitimate justification for burdening the Court with abusive pleadings.

The "Initial Brief" bears the names of four Defenders: Dunham, Zuckerman, Gonzales, and Eric Montroy. The Brief runs exactly 100 pages. By Rule, principal briefs in this Court are limited to 70 pages; by custom, however, we have routinely indulged 100-page principal briefs in capital cases. The Rules of Appellate Procedure dictate that the brief "shall" include a Statement of the Case, Pa.R.A.P. 2111(a)(5); and that the Statement "shall" contain, *inter alia*, "A closely condensed chronological statement, in narrative form, of all of the facts which are necessary to be known in order to determine the points in controversy, with an appropriate reference in each instance to the place in the record where the evidence substantiating the fact relied upon may be found." Pa.R.A.P. 2117. The purpose and importance of the requirement is obvious to any lawyer who has drafted an appellate brief.

The Defender deliberately omitted a Statement of the Case, so that it could raise more claims and thereby evade the 100-page briefing limit. In an endnote to a truncated one-page procedural summary that it inaccurately calls the "Statement of Facts," the Defender says: "Because of the number, and fact-intensive nature, of the claims presented in this appeal, and so as to both preserve all issues and keep this brief to a reasonable size" -- seriously, the Defender says this -- "the facts material to the individual claims are set forth in connection with the discussion of each claim." Initial Brief of Appellant at 4 n.1. Our briefing rules are not bizarre Pennsylvania procedural requirements. Notably, the Federal Rules of Appellate Procedure limit principal briefs to (a) a mere 30 pages, or (b) 14,000 words, or (c) no more than 1,300 lines of text if the brief employs a "monospaced face." Headings, footnotes, and quotations count toward the word and line limitations. FED. R. APP. P. 32(a)(7). The Federal Rules also mandate that the Appellant's Brief "must

contain" both a statement of the case (addressing procedural matters) and a "statement of facts relevant to the issues submitted for review with appropriate references to the record." FED. R. APP. P. 28(a)(6), (7).

In a case where the appellant files a maximum brief, as here, this particular deliberate violation both hampers the Court's review and burdens the Court with however many additional claims the Defender squeezes into the pages it has improperly gained by the violation. And, squeeze the Defender did. The Brief pretends to raise "only" 20 issues, which would be burdensome enough. But, within those twenty claims are multitudes of additional claims or sub-claims. My conservative count of the total number of distinct "claims" presented in the Defender's Brief, including both derivative and subsidiary allegations, exceeds 70. How does the Defender manage to "litigate" 70 claims in a 100-page brief? It employs a number of additional tricks.

For example, in 100 pages of Brief, the Defender includes no less than 136 single-spaced footnotes, many of extreme length, and then routinely advances distinct substantive arguments in those footnotes. See, e.g., Initial Brief of Appellant, nn.15, 18, 20-29, 32-33, 37-39, 43-51, 53, 59, 61-70, 72-77, 79-85, 94-95, 103, 107-18, 123-25, 127-34. The Defender also seizes more briefing space by single-spacing, and not indenting, its Statement of Questions Presented, making them virtually unreadable in the process. See, e.g., id. at 2 (containing 40 single-spaced lines of text running margin to margin). Another common Defender abuse, immediately recognizable to those of us charged with attempting to read their Briefs, is to list distinct claims or sub-claims by single-spaced bullet point in text, essentially doubling the number of points to be made. To make the abuse worse, these bullet points often simply declare the sub-claims without development or legal support; other times, the Defender will append footnotes, which may contain factual support or substantive argument, or may provide no meaningful development or explanation of the relevance of bald citations. See, e.g., id. at 29-30 & nn.27-29; 47-48 & nn.53-57; 53; 64-65

& nn.82-83; 66-67 & nn.86-92; 71-72 & nn.96-101; 75-76; 83; 95-98 & nn.125-34. The time-consuming burden is then placed on the Court to attempt to decipher the arguments. Query: does the Defender do this in federal district court? In the U.S. Supreme Court? Or is the federal abuse reserved for state courts?

For a particularly egregious example -- and, it is but a single example -- of this abusive briefing, take Issue #19, third sub-argument. The "argument" consists of a declaration that the PCRA court erred in "Precluding Appellant from Presenting Material Evidence" during the six days of collateral review hearings the court held. What follows are ten, single-spaced bullet point claims spanning over two pages of the Brief, all accompanied by footnotes, and none accompanied by legal citation or developed argument. The Majority gives a sense of just how frivolous these single-spaced claims are, discussing some examples. See Majority Slip Op. at 119-24 & nn.46-50.

This is not a good faith effort by officers of the Court to abide by perfectly reasonable briefing restrictions. What is next: framing the entire argument section of the brief as a giant single-spaced footnote? What legitimate purpose explains such briefing tactics? And, is it appropriate, given principles of federalism, for the federal courts to finance abusive litigation in state courts that places such a burden on this Court?

A capital defendant, like any litigant, has the right to raise and pursue viable claims. And, of course, capital cases are different. This Court's commitment to affording more than sufficient opportunity to raise colorable, non-frivolous claims is reflected in the fact that this Court, to date, has permitted capital appellants to file briefs that are 43% longer than other litigants' briefs -- both on direct appeal and on PCRA appeal. The Brief here is a thorough and deliberate abuse of that indulgence. Moreover, as the Majority correctly points out, many of appellant's claims here are frivolous as stated, oftentimes unsupported by recourse to case law or the record. See also Majority Slip Op. at 125 n.50 ("Appellant is attempting to compensate for a lack of overall merit with an overwhelming number of

assertions of error."). Other claims are obviously makeweight: for example, as if every other word out of a trial prosecutor's mouth both violates due process, and represents a test of the constitutional competence of trial counsel.

There is no legitimate, ethical, good faith basis for this obstreperous briefing. The Defender's lawyers, who are officers of this Court, have no right to jam as many undeveloped and frivolous claims into their briefs as possible, employing footnotes and single-spaced blocking to sabotage briefing restrictions, in pursuit of an agenda that maximizes the burden on this Court's resources and time, so as to create delay. If this Court had the time, I would recommend striking the Brief and ordering a professional, appropriate brief; but that would only delay the matter, and I will suggest we address the problem by specifically altering our briefing rules.

It did not have to come to this. The provision of federally-financed lawyers for state capital PCRA petitioners appears benign on its face and welcome; it spares Pennsylvania taxpayers the direct expense of state-appointed counsel. But, that veneer ignores the reality of the time lost and the expenses generated in the face of the resources and litigation agenda of the Defender. Capital cases, like criminal cases generally, are highly individualized. Each case is invariably about one defendant and one primary capital crime; and the defense lawyer has a duty of zealous advocacy in advancing his client's cause, within the ethical limits that govern all Pennsylvania lawyers, whether they are paid by the federal government or not. But, the Defender has the resources and the luxury to pursue a more global agenda, and its conduct to date strongly suggests that, if it once engaged in mere legitimate zealous defense of particular clients, it has progressed to the zealous pursuit of what is difficult to view as anything but a political cause: to impede and sabotage the death penalty in Pennsylvania. It is not difficult to understand the motivation: indeed, there are persons of good faith and integrity who sincerely oppose capital punishment and

are willing to contribute their time and talents to its defeat, whether by one stroke politically, or incrementally, case by case.

But, this is not the political realm, lawyers must act ethically, and obstructionist tactics and agendas in litigation are inappropriate. Assuming the courts of Pennsylvania must abide the participation of the Defender at all in purely state collateral proceedings, it is only because they are officers of **this** Court. Whether lawyer death penalty abolitionists like it or not, the people of Pennsylvania, like the people of 33 other states and the nation as a whole, have spoken on capital punishment, and the death penalty is lawful; this Court is not obliged to indulge political tactics that seek to dismantle or impede governing law. The difference of death does not mean that any and all tactics in pursuit of the defeat of a capital judgment are legitimate.

I am sure our federal judicial brethren are unaware of the extent of the abuses, nor can they fully appreciate the effect of these abuses, so I will attempt to illustrate. The Defender strategy, as revealed in this case, attempts to overwhelm the state courts with volumes of claims and pleadings, many simply frivolous, a strategy which burdens prosecutors and can shut down a trial court for weeks. It is also a strategy which requires this Court to devote an increasing portion of its docket and time to consideration and decision of the Defender's cases. Our Court, like the U.S. Supreme Court and unlike the Third Circuit, is the highest court in its jurisdiction. Like the U.S. Supreme Court, we have finite manpower, and one of our most important functions is determining which cases on our discretionary dockets warrant review. Like the U.S. Supreme Court, we do not have the resources to grant review in every case: we look for cases posing new questions, close questions, questions affecting a wide range of cases, questions which have divided courts, cases posing supervisory questions, cases with apparent egregious errors, etc. Also like the U.S. Supreme Court, the cases we accept typically pose a very limited number of discrete issues. But, unlike the High Court, we also have a capital appeal docket, which

governs multiple rounds of intensive direct review. We have no statutory discretion over the capital docket, and, **so far**, it has been the capital appellant who determines the number and types of claims we will review.

Our Opinions in first petition capital PCRA cases where the Defender participated are far and away the most time-consuming of the cases on our appeal docket. Certainly, they generate many of our longest opinions. Take this case, where the Slip Opinion exceeds 125 pages, as the Court painstakingly slogs through the pleadings below, the record, and the morass that is the Defender's brief. See also, e.g., Commonwealth v. Lesko, ___ A.3d ___ (Pa. 2011), 2011 WL 652763 (decided February 24, 2011). As a very conservative estimate, it is fair to say that the practical consequence of the expenditure of resources necessary to decide a typical Defender appeal in these cases is to render this Court unable to accept and review about five discretionary appeals. As a result, for example, this Court rarely accepts review of cases (via direct appeal or PCRA) where convicted murderers are sentenced to life in prison, without possibility of parole. Though those sentences are not as "different" as death, they are certainly different from criminal cases where the defendant has the prospect of release; and they are of importance to the defendants serving them.

Of course, the objection will be that all claims must be raised in a capital case. But, that simply is not so, and particularly on collateral review. Abusive briefing does not increase the chance of prevailing; what it increases is the delay in briefing (both sides, in capital cases, require multiple extensions of time to file briefs) and in decision-making. Moreover, the notion that all of the claims in these abusive briefs are colorable is a canard. Many are deliberately undeveloped. Consider, also, the theoretical last stage of collateral review of state capital convictions, which is the defendant's federal *habeas* appeal to the federal Circuit Court. How many federal issues in those cases ultimately qualify under the certificate of appealability requirements attending federal *habeas* review? See 28 U.S.C. §

2253 (state prisoners cannot appeal final orders unless a certificate of appealability issues; "A certificate of appealability may issue … only if the applicant has made a substantial showing of the denial of a constitutional right."). The bulk of the issues raised in the PCRA petitions in this case, and renewed in this appeal, are pure makeweight, designed only to bog the state courts down and induce delay.

Does it comport with principles of federalism for lawyers financed by the federal courts to so affect a state Supreme Court's docket? Does it comport with principles of federalism for the federal courts to finance a group to enter state capital cases at will and pursue an agenda that inundates the PCRA courts and this Court with abusive pleadings and frivolous claims, with the apparent ultimate aim of attempting to **bypass** the state courts?

These questions are not theoretical. In a number of recent instances involving pending cases with typically prolix briefing by the Defender, capital PCRA defendants have complained in this Court or in federal court about the delay in the decisions of their PCRA appeals, complaining that this Court has not dropped all other business to decide their cases in a time-frame acceptable to them. See, e.g., Commonwealth v. Dougherty, 585 CAP (Motion to Reactivate *Habeas* Proceedings filed in federal district court, premised upon this Court's failure to decide appeal within eleven months); Commonwealth v. Hutchinson, 517 CAP (Motion to Expedite filed in this Court, consisting of boilerplate assertion that delay in decision violates various federal rights, none of which address circumstance at issue); Commonwealth v. Douglas, 495 CAP (alleging, without supporting documentation, recent diagnosis of potentially fatal cancer, and arguing that diagnosis warrants preferential expedition of decision). Notably, none of the motions mention the length of the Defender's briefs in the appeals, or the number of prolix claims, or the complexity of the proceedings and maneuverings below, or the overall and collective burden the Defender has imposed on this Court.

The federal motion in Dougherty is revealing. In Dougherty, the capital appellant is represented by four lawyers: two from the Defender (Robert Dunham and Renee Edelman) and two "*pro bono*" partners from the law firm Ballard Spahr (David Fryman and Shannon Farmer). The subject of the Motion is the alleged lassitude of this Court in disposing of the pending PCRA appeal, but the Defender and Ballard did not favor this Court with a copy of the Motion.[4] The federal motion, dated November 9, 2010, states that this Court "refused" to expedite appellant's appeal, inaccurately represents the time that had then passed, and declares that "no action" had been taken on the case. In fact, counsel have no idea what actions have been undertaken by this Court in its deliberations. The Defender and Ballard then go on to attack this Court's entire handling of its capital docket. The Defender and Ballard contemptuously declare that, "Based on the Pennsylvania Supreme Court's track record of deciding capital appeals, [appellant's] opportunity for any substantive state court review of his case is still years away." The Defender and Ballard then declare that they face "continued inordinate delay before a state court that has proven itself incapable of managing its capital docket," later accusing the Court of "leaving [the appeal] to languish" and falsely alleging that it has been held "in suspense." The Defender and Ballard declare that "judicial delays in the determination of initial PCRA appeals have become routine." The Defender and Ballard then complain of the undecided "active" cases on our docket, making no attempt to account for: the record and briefing status of cases; whether there have been remands; whether they are serial PCRA petition appeals (appeals, frequently time-barred and frivolous, most often filed by the Defender, which generate automatic delay in the disposition of pending federal *habeas* petitions); and the role of individual circumstances -- such as delays requested by or chargeable to the Defender itself. The

[4] The Motion was forwarded by the Commonwealth via a Post-Submission Communication, seeking to lodge the Motion, with the Commonwealth noting that this Court should be made aware of the accusations. We granted the Commonwealth's Motion.

aim of the federal motion, of course, is to convince the federal *habeas* court to forgive the Defender's clients the necessity of exhausting their claims in state court, so that they may proceed *de novo* in the court system that finances them.

These are grievous accusations made by members of the bar of this Court. If these accusations were true, and if candor were part of the Defender armamentarium, the federal pleading would have stated that "the Defender has succeeded in causing such delay in the decision of capital cases that [fill in the outrage]. We have succeeded in exhausting the state courts; so now, please forgive us the federal *habeas* exhaustion requirement." But, the accusations are not true; indeed, they are beyond disingenuous.[5] And the Defender

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[5] Two examples of Defender delay in cases the Defender calls "active" and "pending" and "languishing" due to this Court's supposed incapability are illustrative of the abusiveness of the federal motion filed in Dougherty. Commonwealth v. Clayton, 573 CAP, involves a serial PCRA petition filed in 2004. That matter was not briefed and submitted to the Court until March 29, 2011. Before filing the underlying serial petition, the Defender had successfully moved to have Clayton's federal *habeas* petition held in abeyance so he could ping-pong back to state court to pursue serial claims. State relief was denied in June of 2008 because the serial petition was untimely; yet, the Defender appealed. Thereafter, the matter was delayed because the Defender failed to discharge its duty as appellant to ensure the forwarding of the record. It was only after the Commonwealth filed a Motion to Dismiss in March of 2010 that the logjam broke, and the Defender, in response to the Motion, requested that a briefing schedule issue. The Defender obviously knew these facts when it filed its federal motion in Dougherty.

The defendant, and then the Defender, also caused the bulk of the delay in Commonwealth v. Ali, 437 CAP, as detailed in our recent opinion deciding that case. See 10 A.3d 282, 290 (Pa. 2010). The PCRA petitioner in Ali sought to represent himself, and we remanded for a hearing on the issue. The Defender opposed its client's wishes every step of the way, which included claiming that Ali must be incompetent if he did not want its services, filing an interlocutory appeal, attempting to add new collateral claims in violation of the limited remand order, and then filing an unauthorized appeal after the PCRA court granted Ali's request to represent himself. It is debatable whether all of these procedural maneuvers were legitimate; what is not debatable is that it was the defendant's request, and the Defender's ensuing maneuvers, not judicial indifference, that delayed the case.

(continued…)

knows it. Whatever the response of the federal courts to such unethical conduct, it will not be fashioned with a first-hand awareness of the burden that their decision to finance defense-side collateral capital litigation has imposed on Pennsylvania's courts. Does it

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(…continued)
In the text below, I discuss three other cases on the Defender/Ballard list of "languishing cases" resulting from this Court's "incapability" of managing its capital docket: Commonwealth v. Hill, 521 CAP (decided); Commonwealth v. Porter (pending); and Commonwealth v. Banks (pending). In all three cases, the strategic conduct of the Defender was the primary cause of delay.

Furthermore, this case, which involves abusive Defender briefing requiring a dispositional opinion in excess of 125 pages, is on the Defender/Ballard list.

In addition, eight other capital appeals on the Defender/Ballard list were decided by published opinions of this Court between December 30, 2010 and April 28, 2011: Commonwealth v. Ali (PCRA appeal impeded by Defender as discussed above; 57-page slip opinion); Commonwealth v. Dennis, 491 CAP (PCRA appeal following remand, a fact not accounted for in federal motion and calculation of "delays"); Commonwealth v. Briggs (direct appeal necessitating 76-page slip opinion); Commonwealth v. Lesko, 518-520 CAP (PCRA cross-appeals; 93-page **Defender** brief on Lesko's appeal raising 22 principal claims and innumerable sub-claims, including in 68 footnotes allowing brief to violate page limitation; 91-page Defender brief as appellee; necessitating 104-page slip opinion); Commonwealth v. Hill (PCRA appeal; **Defender** representation and conduct the primary issue); Commonwealth v. Paddy, 478 CAP (PCRA appeal; 99-page **Defender** principal brief raising 17 primary claims; necessitating 57-page slip opinion); and Commonwealth v. Smith, 591 CAP (PCRA appeal following remand, 71-page **Defender** brief raising 11 principal claims, despite fact that case was limited to guilt phase issues; necessitating 62-page slip opinion). Decisions in another two capital cases on the Defender/Ballard list are being issued contemporaneously with the decision in this case: Commonwealth v. Dougherty itself; and Commonwealth v. Houser, 541 CAP.

In addition, two other cases involving time-barred, serial PCRA petitions were decided by this Court via *per curiam* affirmance: Commonwealth v. Fisher, 607 CAP (third PCRA petition; Defender brief); and Commonwealth v. Bridges, 609 CAP.

These capital cases -- largely courtesy of the Defender -- represent a small part of the workload of this Court. Such is the supposed lassitude of our approach to our capital docket.

comport with principles of federalism to finance lawyers who pursue an agenda in state court designed to bottle up the state courts? Does it comport with federalism when those lawyers undertake an agenda designed to maximize the power of federal courts to ignore state court decisions, or to authorize bypassing state courts?

Notably, with respect to the specific issue of delay in the decision of capital PCRA appeals, the local federal Circuit Court must have some sense of the difficulty. In its Motion to Lodge the Defender's federal pleading in Dougherty, the Commonwealth notes the substantial delay in the resolution of numerous appeals involving various state capital defendants. See, e.g., Abu-Jamal v. Horn, 520 F.3d 272 (3d Cir. 2008) (initial *habeas* appeal filed in Third Circuit in December 2001; final order issued by Third Circuit in March 2008; on petition by Commonwealth, U.S. Supreme Court granted *certiorari* and remanded to Third Circuit in January 2010; on April 26, 2011, Third Circuit issued opinion reinstating its previous order affirming district court's grant of *habeas* penalty phase relief on a claim involving Mills v. Maryland, 486 U.S. 367 (1988)).[6] And those appeals, of course, are limited to but a few substantive issues. Furthermore, I suspect the Federal Defender is more circumspect, and less contemptuous, when it appears before the Third Circuit.

I say none of this lightly. The Defender, as I have outlined, pursues a complex and legally questionable global strategy in Pennsylvania capital cases. But, just as the Defender stares at this Court, we have no choice but to stare back at it. And, this case is merely a typical case of Defender abuses. We have had circumstances where the conduct of the Defender is not even this benign.

On multiple occasions, the Defender has taken unauthorized appeals in capital PCRA matters against its former clients' wishes. See Commonwealth v. Ali, 10 A.3d 282,

[6] The Commonwealth may still seek rehearing *en banc* or petition the U.S. Supreme Court for *certiorari* review of the Third Circuit's recent decision.

290 (Pa. 2010); Commonwealth v. Saranchak, 810 A.2d 1197, 1198 (Pa. 2002). Accord Commonwealth v. Sam, 952 A.2d 565 (Pa. 2008) (noting that Robert Dunham initiated PCRA proceeding by filing PCRA without authorization from petitioner, claiming he was doing so on petitioner's "behalf"). Each such unauthorized appeal, of course, exhausts the time and resources of the Commonwealth and the state judiciary. The Defender has employed the same strategy involving unauthorized litigation in at least one reported federal *habeas* case involving a Pennsylvania capital defendant. See Michael v. Horn, 459 F.3d 411 (3d Cir. 2006). As Judge Greenberg explained, in concurrence:

> It is highly significant, indeed remarkable, with respect to the tenuous nature of these proceedings, that Michael [the capital defendant] did not decide to take an appeal in this case in the first place and, in fact, this case never should have reached this court. Thus, the actual question before us is whether a defendant may cause an appeal filed in his name without his authority by someone else to be dismissed. In this case, the Capital *Habeas Corpus* Unit of the Defender Association of Philadelphia, without Michael's authorization, filed the appeal from the district court's order of March 10, 2004, granting Michael's motion to dismiss the *habeas* corpus petition. Thus, this case truly is extraordinary because the Capital *Habeas Corpus* Unit filed this unauthorized appeal in the name of an appellant whom the district court had found to be competent, from an order that the appellant had sought and obtained and from which, quite naturally, he did not want to appeal.
>
> Moreover, there is yet another extraordinary fact about this appeal. The Capital *Habeas Corpus* Unit filed the appeal even though the district court in its March 10, 2004 order dismissing the petition for *habeas corpus* also dismissed the Capital *Habeas Corpus* Unit and all its attorneys as counsel for Michael, Michael v. Horn, 2004 WL 438678, at *24 (M.D. Pa. Mar.10, 2004), and neither we nor the district court ever has stayed that order. Accordingly, the Capital *Habeas Corpus* Unit acted without authority when it filed this appeal in an attempt to frustrate Michael's wishes. The reality of the situation could not be clearer. The Capital *Habeas Corpus* Unit, rather than representing Michael, its supposed client, was representing itself and advancing its own agenda when it filed this appeal.

459 F.3d at 421-22 (Greenberg, J., concurring) (italics added; footnote omitted).[7]

In other instances, the Defender's conduct has been so inexplicable (inexplicable when measured by professional ethical standards), that the Commonwealth has moved for the Defender's removal, colorably suggesting that the Defender's strategy is aimed not at fairly raising and exhausting federal claims in state court, but at positioning the case in such a way that Pennsylvania courts would deem them defaulted, while laying the groundwork to attempt to proceed *de novo* in federal court. For example, in Commonwealth v. Bracey, 986 A.2d 128 (Pa. 2009), the Defender, per Billy Nolas, Esquire, filed a serial PCRA petition, asserting a claim under the then-new decision in Atkins v. Virginia, 536 U.S. 304 (2002). In litigating the claim below, the Defender argued that the petitioner had a constitutional right for the Atkins claim to be decided by a jury. The PCRA court, per the Honorable C. Darnell Jones, II, scheduled an Atkins bench hearing, but shortly before that could take place, the Defender wrote to the court asserting that if the court declined to put the serial collateral claim before a jury, the Defender and Bracey would refuse to participate in a bench hearing, but instead would rely on the evidence of record -- evidence that was not produced with an eye toward the requirements of Atkins.

The PCRA court ultimately held that the Defender's refusal to present any relevant evidence in support of Bracey's Atkins claim rendered it meritless and that fact, in turn, rendered the request for a jury trial moot. On appeal to this Court, the Defender, predictably enough, argued that if we rejected the request for a collateral attack Atkins jury,

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[7] Commonwealth v. Lambert, 884 A.2d 848 (Pa. 2005), involving a non-Defender client, details a distinct form of unauthorized Defender (mis)conduct. See id. at 853 (noting finding of supervising judge of criminal division of Philadelphia Court of Common Pleas, who concluded that Defender illegally abused subpoena power to circumvent PCRA discovery rules and obtain archived police files in approximately 25 capital cases, including Lambert's, leading to disciplinary referral).

the case should be remanded for the bench hearing the PCRA judge offered him, but which the Defender had refused. The Commonwealth responded with a critique of the Defender's gamesmanship. Our summary of the Commonwealth's description of the tactic was as follows:

> As to the question of mandate . . . the Commonwealth requests a remand for a bench determination of Atkins mental retardation . . . . The Commonwealth asserts that any other result might ultimately reward appellant's federal counsel for their gamesmanship, which the Commonwealth submits was a strategy to bypass the state courts on the substantive Atkins question. Thus, the Commonwealth avers that refusing to remand the matter would reward appellant's "contumacy by enabling him to raise the claim anew in a federal *habeas* petition, without the burden of fact-finding by the state courts." Brief of the Commonwealth at 17. The Commonwealth argues that appellant's stated rationale for refusing to introduce relevant evidence before the PCRA judge of his supposed mental retardation -- a professed fear of thereby waiving his claim of an existing "right" to a jury determination -- is "nonsense," since appellant made an objection before the PCRA court, which the court specifically noted that the objection preserved the jury question for this Court's review. The Commonwealth hypothesizes that such a facially risky position suggests that appellant and his counsel have their strategic sights set on *de novo habeas corpus* review in the local federal courts, which appellant's federal lawyers view as a more sympathetic forum in capital matters. Luring this Court into finding the Atkins claim waived, the Commonwealth argues, "would offer them their best long-term prospect for relief," since "if no Atkins hearing is held in state court, defense counsel will argue on *habeas* review that defendant is entitled to such a hearing in federal court. And, since it has been decades since the federal courts have upheld a sentence of death with respect to any Philadelphia prisoner who did not consent to be executed, they will find themselves in a remarkably favorable forum for that argument." *See* Brief of the Commonwealth at 19-20. The Commonwealth argues that this Court should reject this illegitimate strategy, and order a bench hearing on the mental retardation claim.

Bracey, 986 A.2d at 137-38 (italics added; footnote omitted).

This Court ultimately sustained the PCRA court's unassailable finding that there was no constitutional right to a collateral attack Atkins jury. Like the Commonwealth, we recognized the Defender's gambit for what it was, describing the refusal to participate in the

Atkins hearing it had requested as lacking any legitimate justification. We noted that the Defender's disagreement with the PCRA court's ruling that the Atkins claim was properly for the court, and not a jury, to decide, "was not a legitimate ground to refuse to abide by the ruling and decline thereafter to present evidence, as if a matter of this import invites some game of capital 'chicken.'" Id. at 138. We added that:

> The presumptive outcome of appellant's refusal to present his Atkins case would be that the Atkins claim would fail on the merits -- the very result that occurred here. Most parties do not risk defeat of the merits of their claims with these sorts of manipulations. But this Court recognizes that the calculations by experienced federal capital counsel are more sophisticated. See Commonwealth v. Steele, 961 A.2d 786, 836-38 (Pa. 2008) (Castille, C.J., joined by McCaffery, J., concurring). The . . . Defender's position below was obviously risky and tenuous: both the notion that appellant would somehow waive the claim of a right to a jury, or would somehow be prejudiced by presentation of his case to a judicial factfinder, as well as the substantive claim of an Atkins jury trial "right" of constitutional import which, as we explain below, finds no support in any existing, governing authority. Indeed, this is so much the case that it lends some credence to the Commonwealth's position that the strategy below was designed to ensure that no state court judge would pass upon the merits of the Atkins claim (or if it did, it would only be after the substantial delay occasioned by an incomplete record and appeal to this Court, seeking remand).
>
> Notably, however, the Commonwealth has not pressed a waiver argument here, or even set forth an argument that appellant's Atkins claim fails on the merits . . . . Instead, it suggests that this Court overlook this logical conclusion and remand this matter so that a bench Atkins hearing can be held, thus ensuring that the state court serves its primary role as the initial forum for constitutional claims, and avoiding the initial federal determination of Atkins that appellant seems to prefer.
>
> If the defense strategy and obduracy were all we had here, we might be inclined to deny remand. After all, salutary Pennsylvania procedural doctrine should not be defeated by attorney manipulations or even by concerns with subsequent federal *habeas corpus* review. . . . Unfortunately, the PCRA court did not take this bull by the horns, and did not put appellant to the appropriate, explicit choice. . . . In these circumstances, we will not hold that appellant has waived any entitlement to an Atkins remand for the bench evidentiary hearing he refused below. Our holding in this regard

> should not be read as approval of the defense tactics below; rather, it should serve as a caution to PCRA courts in capital cases to be aware of the potential manipulations that may be forwarded in these high stakes cases, and to take clear control of the proceedings before them.

Id. at 139-40.

A more recent case where the assigned Defender's conduct, rather than the merits of the client's cause, became the focus of the appeal is Commonwealth v. Hill, 2011 WL 832941 (Pa. 2011). The capital PCRA appellant in that case was also represented by Nolas, and was awarded a new penalty hearing in the trial court, but was denied guilt phase relief. She appealed, but the Defender inexplicably failed to file a Rule 1925(b) statement as ordered by the PCRA court. The Defender then filed a brief in this Court raising no less than fifteen principal guilt-phase claims.

The Commonwealth preliminarily argued that, by his conduct, and under settled law concerning Rule 1925, Nolas had defaulted Hill's claims and was *per se* ineffective. Recognizing that Nolas's default may have been strategic, however, the Commonwealth did not argue for affirmance, but instead urged the Court to remove the Defender and remand to appoint new counsel to comply with the Rule 1925 directive. The Commonwealth also argued that the Defender's conduct raised serious questions concerning the proper use of federal tax dollars because, while the Federal Defender is funded by the Administrative Office of Federal Courts, they routinely appear in state court appeals at a time when state and municipal services are being curtailed because of budget shortfalls in the current economic recession. In that light, the Commonwealth suggested that this Court exercise its supervisory authority over the practice of law in Pennsylvania and require the Defender to address these concerns before being permitted to proceed in Pennsylvania appeals. Id. at ___, 2011 WL 832941 at *4.

The Defender replied that it had substantially complied with Rule 1925 because Nolas had assured the PCRA court in a series of *ex parte* communications of the issues he

intended to raise. The Defender did not acknowledge or discuss the governing cases under Rule 1925, instead focusing on Hill's alleged "right" to have Nolas continue to represent her. The Defender also argued that, to the extent Nolas's conduct had impeded this Court's review, a remand (and attendant delay) was appropriate.

On the particular point of the Commonwealth's argument concerning removal of the Defender, we recounted the Defender's argument as follows:

> Appellant also asserts that the Federal Defender is the counsel of her choice and its removal would be contrary to what she claims is a "right" to taxpayer-financed counsel of her choice. Appellant contends that the Federal Defender has protected her interests and advocated ably on her behalf, and that given its experience and competence in Pennsylvania state death penalty proceedings, it should be permitted to continue to represent her in Pennsylvania courts. Finally, with respect to the Commonwealth's concerns regarding the federal funding sources for the Federal Defender's forays into state court, appellant asserts that the Federal Defender is in full compliance with applicable federal administrative rules and regulations and has a separate source of funding to support its elective excursions into state court. Appellant does not attach or cite those rules and regulations.

Id. at ___, 2011 WL 832941 at *5.

Ultimately, this Court held that, under our settled jurisprudence, we could not grant the Commonwealth's request to remove counsel and remand the matter; instead, the Defender's default had waived Hill's issues. Id. at ___, 2011 WL 832941 at *9. We also noted that:

> [I]n considering the Commonwealth's request to recalibrate our Rule 1925(b) jurisprudence, we are mindful of the significant potential for resulting mischief in capital cases. Delay can be an end in itself for some capital defendants. See, e.g., Commonwealth v. Sam, 952 A.2d 565, 577 (Pa. 2008), cert. denied, 130 S.Ct. 50 (2009). Manufacturing the requested exception would serve as an invitation to delay-minded counsel to deliberately flout the Rule, knowing that it would trigger the time-consuming process of remand, appointment of new counsel, filing a Rule 1925(b) statement, and preparation of a lower court opinion.

Id. Since all claims were waived and there was no basis to remand, there was no need for the Court to pass upon the Commonwealth's request to order the removal of the Defender, or its broader concern with federal judicial funding for these questionable endeavors.

A competent appellate lawyer without a global agenda, intent on having his client's issues actually heard on appeal, would **never** deliberately ignore a Rule 1925 order. But, the Defender is financed and positioned to strategize differently and globally. In Pennsylvania capital cases, the Defender routinely argues in federal *habeas* court that various Pennsylvania procedural default rules are arbitrarily applied, and therefore should be ignored. The reward, if the federal court accepts the argument, is *de novo* federal review, unimpeded by state court findings, and unimpeded by the federal *habeas* standard of review requiring deference to state court decisions. The result of this perverse system of incentives for professional capital counsel who ping-pong back and forth between state and federal courts, and who have seemingly inexhaustible federal resources and ample cases to choose from, is an opportunity and incentive to feign that they do not know how to comply with state procedural rules, see Steele, 961 A.2d at 834-38 (Castille, C.J., joined by McCaffery, J., concurring); and in the process attempt to generate "uneven" procedural default rulings by the state courts. Then, counsel will proceed to argue in federal court that the particular default rule should be ignored in **all** cases. The state response, faced with continuing federal criticism that our procedural rules have too much discretionary flexibility to be considered legitimate expressions of state sovereignty, is to adopt less flexible rules. Commonwealth v. Gibson, 951 A.2d 1110, 1150 (Pa. 2008) (Castille, C.J., joined by McCaffery, J., concurring) ("The threat of dismissive federal responses to flexible state procedural rules can lead to state legislatures and courts adopting ever-more inflexible rules.").

But, for those with the luxury to pursue a global agenda, this refinement does not end the incentive to create disruption in state court; it just requires a shift in strategy.

Faced with a clear, simple, and known rule such as Appellate Rule 1925, counsel can ratchet up the stakes by deliberately engaging in the most overt of defaults, daring the state court to apply its "inflexible" Rule. If the state devises an exception, the Defender will then proceed to federal court, in all cases involving Rule 1925 waivers and say; "Aha, they do not always follow the default; you may ignore it and consider my claims *de novo*."

Recently, and thankfully, the U.S. Supreme Court has issued unanimous decisions in cases which operate to reduce the incentive for counsel such as the Defender to pursue this ploy. As I explained in my recent concurrence in Commonwealth v. Paddy, ___ A.3d ___, n.1 (Pa. 2011), 2011 WL 1137340 (decided March 30, 2011), at *32 n.1:

> Significantly, since Steele was decided, the U.S. Supreme Court has issued unanimous decisions in two federal *habeas corpus* cases involving state prisoners, including Beard v. Kindler, 558 U.S. ___, 130 S.Ct. 612 (2009), a Pennsylvania capital case, which should significantly diminish the incentive for counsel to try to sow inconsistencies and confusion in state court procedural rulings, in an effort to lay the groundwork for a later federal *habeas* claim that state court procedural defaults should not be honored. "In a recent decision, Beard v. Kindler, 558 U.S. __, 130 S.Ct. 612 (2009), this Court clarified that a state procedural bar may count as an adequate and independent ground for denying a federal *habeas* petition even if the state court had discretion to reach the merits despite the default." Walker v. Martin, ___ U.S. ___, ___, 131 S.Ct. 1120, 1125 (2011). The Walker decision built upon and significantly expanded Kindler, making it clear that a state procedural default rule need not be invoked in every case in order for the rule to be deemed adequate.

These corrective decisions came too late to spare this Court the time and energy that was expended in cases like Steele, Hill, and Paddy.

The Defender has also burdened this Court with improper appeals in serial capital PCRA appeals, thereby building in delay in cases which should be proceeding to resolution in federal court. For example, in Commonwealth v. Abdul-Salaam, 996 A.2d 482 (Pa. 2010), a case, like Bracey, involving the murderer of a police officer, the defendant had already litigated his direct appeal and two PCRA appeals and was currently litigating a

federal *habeas* petition. The Defender then filed a facially untimely, third PCRA petition, but deceptively labeled it, leading to the lower court taking no action. The Defender attempted a procedural maneuver, filing a "*Praecipe* for Entry of Adverse Order Pursuant to Pennsylvania Rule of Appellate Procedure 301 D & E" and a contemporaneous Notice of Appeal (from the *praecipe*) to this Court. These pleadings feigned outrage with the PCRA court's "inexplicable delay" and "inaction" with regard to Abdul-Salaam's disguised claims. The maneuver was improper and disingenuous: no adverse order had ever been issued (as the Defender well knew) that could be formally "entered;" the contemporaneous notice of appeal denied the PCRA court of jurisdiction to issue and enter any such order; and the Defender never made a request for a ruling before filing its improper snap judgment.

This Court quashed the bogus Defender appeal, deeming it improper because the PCRA court had no opportunity to address the merits and issue a final and appealable order; we recognized that "the Appellant's *praecipe* and appeal are not remotely supported by the terms of the rule he invoked, or the facts of this case. There was no basis or justification for this transparent procedural maneuver." Id. at 485-88. More to the point, we added:

> This Court is not naïve. We do not discount the possibility that appellant's misleading characterization of his serial PCRA petition was designed to create confusion, and to set the stage for the very maneuvering and inherent delay that followed. It is also not lost upon this Court that appellant's maneuvering purported to deprive the court below of jurisdiction at the very moment he first forwarded his supposed complaint about the matter not being decided promptly. Although appellant cited [Appellate] Rule 301(d), he obviously had no intention of permitting the court or the Commonwealth to address his supposed concern, since he took his "appeal" immediately. Appellant's maneuvering has succeeded in building-in a year's delay in the disposition of his serial PCRA petition. We do not condone the tactic.

Id. at 488. The decision in Abdul-Salaam required more time and effort, expended by this Commonwealth's highest Court, occasioned by deceptive, unprofessional, and frivolous conduct by the Defender.

Another dubious appeal in a case involving a serial PCRA petition is currently pending before the Court in Commonwealth v. Porter, 557 CAP. Following submission of that case on the briefs, we directed the parties to file supplemental briefs because there was an obvious jurisdictional issue. Our order reads as follows:

> AND NOW, this 13th day of October, 2010, it appearing that a colorable issue of jurisdiction is implicated in this appeal, which has not been addressed by the parties, the parties are directed to file supplemental briefs addressing the following:
>
> Whether the lower court's order dismissing appellant's present serial PCRA claim under Brady v. Maryland, 373 U.S. 83 (1963), without also disposing of appellant's long-pending serial PCRA claim under Atkins v. Virginia, 536 U.S. 304 (2002), was an appealable final order? In briefing the jurisdictional question, the parties should address these necessarily included points:
>
> > (a) whether a PCRA petitioner may "amend" a pending serial petition to add an entirely new serial claim;
> >
> > (b) whether, instead, a new serial claim comprises a new and separate petition under the terms of the PCRA;
> >
> > (c) whether a PCRA court has authority to pass upon a new serial claim where a prior PCRA petition has been held in stasis; and
> >
> > (d) whether a serial PCRA petition may properly be held in stasis to allow for federal review of different claims already litigated in state court.

The Defender, per Billy Nolas, has responded that the lower court's order was not an appealable final order. And yet, the Defender took the appeal. But, what is more remarkable is the record in Porter, which reveals the federal/state logjam the Defender's

litigation strategy has created in that case. At the September 25, 2007 hearing on appellant's 2006 Brady "amendment" petition, Nolas stated that the PCRA court was holding appellant's 2002 Atkins serial petition "in abeyance," awaiting the outcome of the federal *habeas* cross-appeals by Porter and the Commonwealth, which were pending in the Third Circuit. Commonwealth v. Porter, N.T., 9/25/07, at 12. The following exchange occurred among the court, Nolas, and the assistant district attorney ("ADA"), after the court announced its intention to dismiss the new Brady petition:

> Court: I am denying the PCRA petition on the grounds that it is not timely and it does not meet the requirements for Brady material. . . . Are there any other reasons?
>
> Nolas: This is a separate issue before the Court pertaining to Atkins[] in our submission that [appellant] has mental retardation.
>
> Court: I didn't deal with that.
>
> * * * *
>
> Nolas: That's before the Court. If you don't deny that today, what's wrong with taking [Mr. Gentile's] deposition [in furtherance of the Brady claim]?
>
> Court: The two don't mix together. . . .
>
> * * * *
>
> Court: Is that issue [Atkins] before the Third Circuit?
>
> Nolas: It is not before the Third Circuit.
>
> Court: So that's squarely with me?
>
> Nolas: Yes, Your Honor. I know Your Honor held it in abeyance because the Third Circuit reversed the death sentence and the Commonwealth is appealing that and [appellant is] appealing the denial of relief of the guilt phase from the Third Circuit. So I think the reasoning before was holding in [] abeyance to see what the Third [C]ircuit would do

because if there's no death sentence then there's no point in us doing an Atkins.

Court: So there is no death sentence. All it is is an appeal?

ADA: Yeah, exactly. So I was going to suggest that you send 907[8] notice [dismissing without a hearing] just on the after discovered evidence slash Brady claim. And we'll specify that that's the claim that you are denying today and then we'll leave in abeyance to the Atkins to hear from the Third Circuit.

Court: Let me see if I understand this. The Third Circuit has already taken the death penalty off the table.

Nolas: No, Your Honor. The District Court granted relief to [appellant] on an instructional error in the penalty phase. The Commonwealth appealed that to the Third Circuit. That appeal is pending [sic] the Third Circuit along with an appeal from us arguing [other issues].

Court: So the death penalty is still on the table?

Nolas: It's still on the [t]able potentially, yes.

* * * *

ADA: I misspoke.

Nolas: And that's why we asked Your Honor to look at the Atkins issue.

Court: It appears that from what I read he won on the death penalty issue.

Nolas: He just won a new penalty phase from the District Court which is subject to the Commonwealth's appeal and may be subject to resentencing down the road. They didn't take the death penalty off the table.

Court: When will that issue be resolved?

ADA: They are waiting for us.

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[8] Pa.R.Crim.P. 907.

Nolas: They were waiting for Your Honor to decide on the [new Brady] issue….

Court: Okay. That's all. They [the Third Circuit] are not counting on me to deal with the Atkins issue? [Both counsel respond in the negative.]

Court: So I just need to do a 907 with respect to the Brady claim and timeliness issue surrounding the [filing].

Nolas: And I think I have to object to that because that's strange. You have a proceeding before the Court with two claims that are being raised. And I guess with a 907 notice we'd restate our objections and file a notice of appeal and then you have no jurisdiction, so it's a non-process.

Court: What are you suggesting I do?

Nolas: I suggest you let us do [Mr. Gentile's] deposition [*i.e.*, drag out the disposition of the time-barred Brady claim].

Court: We are beyond that. What are you suggesting that I do, rule on Atkins?

Nolas: I don't think you can rule on Atkins. I don't know I haven't seen that process before, so I think I have to object.

N.T., 9/25/07, at 12-15 (emphasis supplied).

Nolas's argument respecting the PCRA court's power to decide was straight out of "Catch-22."[9] He argued that the PCRA court: (a) could not dismiss the serial Brady claim (a new PCRA claim that led Nolas to secure a federal stay of the *habeas* appeals pending in the Third Circuit) without also ruling on the pending Atkins petition; and (b) could not rule on the Atkins claim, because the court somehow lacked authority to do so, and Nolas would have to object. So, according to Nolas, the PCRA court could act on neither "claim," and counsel had already succeeded in having the federal *habeas* appeals held **until** the PCRA

[9] See JOSEPH HELLER, CATCH-22 (1961).

court acted on the Brady claim. Then, Nolas appealed the non-final order. This Defender strategy assured a *de facto*, perpetual stay of execution.

It bears mentioning that the argument advanced by Nolas that the PCRA court in Porter lacked power to rule on Atkins was frivolous. There is no basis in the PCRA or any other governing rules or law to hold serial PCRA petitions in abeyance; and there most certainly is no basis in law to hold a PCRA petition in stasis merely to permit the petitioner to seek federal *habeas* relief. Likewise, Nolas's earlier argument that there was "no point" in deciding the serial Atkins issue until the Third Circuit decided other, already-exhausted, non-Atkins claims is baseless. The appeals before the Third Circuit in Porter will not eliminate the Atkins claim. If the district court's grant of relief on a perceived penalty phase instructional error is reversed, Porter's death sentence will stand. If the determination is affirmed, the Commonwealth is free to seek the death penalty in a new proceeding. Either way, it is a capital case and the Atkins issue must be decided.

Not once, by the way, did Nolas forward the Defender's new-found concern with delay while ensuring delay in both judicial systems in Porter, instead telling each court it could not act. The very same group -- the Defender -- engaged in these shenanigans in Porter and then forwarded the "court can't manage its docket" complaint in Dougherty. These are the sorts of abuses that keep us from addressing all of the Defender's over-maximum briefs simultaneously in their other cases, and rendering decisions according to their schedule.

But, there is more. Another case cited by the Defender in the Dougherty federal pleading as an example of this Court's incapacity is Commonwealth v. Banks, Nos. 461, 505, and 578 CAP, which also prominently features Billy Nolas. Banks concerns narrow issues of competency to be executed, and is a case in this Court's plenary jurisdiction. This Court is well familiar with the record in Banks. Nolas's strategic maneuverings in Banks, including but not limited to forwarding unauthorized motions before our masters to impede

the Commonwealth's expert's examinations of Banks, caused numerous, lengthy periods of delay; and in addition, required this Court to step in on multiple occasions and assure that the fair hearing we had ordered would be held, consistent with our directive. Commonwealth v. Banks, 943 A.2d 230, 239 (Pa. 2007) (*per curiam*) ("[W]ith the exception of scheduling and logistical matters, the trial court is not to be diverted by tangential motions and assertions by counsel: **this** Court retains jurisdiction over such matters. The trial court is to act expeditiously in conducting the rehearing."); Commonwealth v. Banks, 984 A.2d 937 (Pa. 2009) (*per curiam*) ("AND NOW, this 10th day of December 2009, the Motion for Notice of Evaluations by Commonwealth Experts [filed by Nolas] is DENIED. The Commonwealth's mental health evaluations and the competency hearing ordered by this Court are to be conducted as expeditiously as possible. No extraneous delays shall be permitted."). To put an end to the abuse, we finally directed that: "This matter, involving a necessary hearing to pass upon a single important issue, and remanded for an expeditious determination, once again has inexplicably been delayed. The significant delay has continued to hamper this Court's ultimate disposition regarding petitioner's competency to be executed, a question over which we continue to retain plenary jurisdiction. . . . Any motion or argument from either party, that seeks or would occasion further delay, is to be made directly to this Court; and the pendency of any such motion is not to be forwarded, referenced, or accepted as a ground for delaying the proceedings below." Commonwealth v. Banks, 989 A.2d 881, 882-83 (Pa. 2010) (*per curiam*).

The foregoing is but a sampling. Much of this Court's time has been taken up with the Defender's strategic diversions. The Defender obviously has no fixed position on delay. When delay advances their global litigation strategy, they do their best to grind state courts to a halt, as with their prolix pleadings and abusive briefing in this case, and their more extreme conduct and/or misconduct in cases like Banks, Abdul-Salaam, and Bracey. When faux outrage about the delays their overall strategy necessarily induces serves their

purpose, they forward that claim, accusing Pennsylvania courts of incompetence or laziness, their argument unencumbered by concerns for accuracy, honesty, and candor.

This is what federal judicial financing of the Defender's state court litigation strategy has wrought in Pennsylvania. When the families of murder victims, and other concerned citizens, ask why there is no effective death penalty in Pennsylvania, the dirty secret answer is: ask the federal court. And if the federal court fails to reply, you may want to ask your U.S. Senators and Representatives.

- II -

Given the Defender's recent rolling out of the back-end of its global litigation strategy -- claiming that the decisional delays that their abusive tactics necessarily induce give rise to some right to preferential decisional time-frames and/or a right to immediate *de novo* review in federal court -- it is time for this Court to take formal measures to ensure quicker decisions in capital PCRA appeals. To curb the rampant abuses in this case and other cases, I would:

(1) Direct the Supreme Court Prothonotary to immediately reinstate a briefing limit of 70 pages in capital PCRA appeals, with no exceptions absent: (a) a showing of extraordinary circumstances; and (b) the explicit concurrence of the Commonwealth.

(2) Direct the Supreme Court Prothonotary to amend briefing notices to advise parties that: (a) substantive arguments and sub-arguments are not to be set forth in footnotes or other compressed texts, such as block quotes or single-spaced bullet points, since such practices facilitate violation of the restrictions on the length of briefs; and (b) arguments set forth in such fashion will not be considered. I would also refer the matter to the Appellate Procedural Rules Committee to recommend changes to our Rules to curb these abuses, including: (a) limitations on the number of words in a brief, such as are found in the Federal Rules, and (b) required certification from counsel that the brief is compliant.

(3) Make referrals to the Criminal Procedural Rules Committee and the Appellate Procedural Rules Committee to consider measures that will lead to the more efficient disposition of capital PCRA appeals including, but not limited to: (a) whether procedural rules can and should be adopted to provide for the operation of unitary review as envisioned by the General Assembly in the Capital Unitary Review Act ("CURA"), 42 Pa.C.S. §§ 9570-9579, consistent with the concerns outlined in In re Suspension of Capital Unitary Review Act, 722 A.2d 676 (Pa. 1999) (explaining suspension of CURA); (b) whether it is possible and advisable to adopt a limited issue certification process in capital PCRA appeals, similar to the provision in the federal *habeas corpus* statute, see 28 U.S.C. § 2253, which should curtail the pursuit of frivolous and implausible claims, without impeding the federal *habeas* exhaustion requirement. See In Re: Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, No. 218 Judicial Administration Docket No.1 (*per curiam*) (May 9, 2000); and (c) whether the current role of volunteer federal counsel is appropriate, and whether such counsel may properly be precluded from participation in state collateral proceedings.

Mr. Justice McCaffery joins this opinion and Madame Justice Orie Melvin joins Part II of this opinion.