IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	
vs.	:	No. CR-567-2021
JAMES E. SERFASS, Defendant	:	

Counsel:

Michael S. Greek, Esquire District Attorney	Counsel for Commonwealth
Michael P. Gough, Esquire	Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – December 17, 2025

In these PCRA proceedings, in which Defendant seeks to vacate his plea and sentence, Defendant claims trial counsel's ineffectiveness caused him to unknowingly and involuntarily enter a guilty plea without an understanding of its consequences and that the state sentence he received for committing a new offense while on state parole was illegal, in violation of Section 6138(a)(5)(i) of the Parole Code, 61 Pa.C.S.A. §6138(a)(5)(i). While the discussion which follows discusses to some extent the nature of Defendant's claims and the legal principles involved, putting them in their proper context, and raising a number of questions along the way, before deciding the merits of these claims, we must first decide whether Defendant's PCRA Petition in which he invokes the newly discovered fact exception to the one-year time-bar found at 42 Pa.C.S.A. §9545(b)(1)(i) was timely filed.

FACTUAL AND PROCEDURAL BACKGROUND

On October 22, 2021, pursuant to a Stipulation dated July 8, 2021, Defendant pled guilty to one count of driving under the influence of any drug or combination of drugs to a degree which impaired his ability to drive safely graded as a felony of the third degree,[1] one count of driving under suspension as an habitual offender graded as a misdemeanor of the second degree,[2] and one count of driving under suspension, DUI related, when a non-prescribed controlled substance was present in his blood, a misdemeanor of the first degree.[3] The charges to which Defendant pled guilty stemmed from a motor vehicle accident involving Defendant which occurred on December 20, 2020.

Defendant's sentencing occurred on December 16, 2021, at which time Defendant was sentenced to a period of imprisonment in a state correctional institution of no less than two years nor more than seven years for driving under the influence, a concurrent sentence of not less than three months nor more than two years on the habitual offender offense, and a fine of $5,000.00 for driving under suspension, without further penalty. Defendant was given 85 days credit against each period of incarceration. With the exception of the fine-only sentence Defendant received for driving under suspension, with no period of incarceration, Defendant's sentences were all within the standard guideline range.[4]

At the time of Defendant's sentencing on December 16, 2021 (the "new sentence"),[5] as well as at the time the underlying offenses were committed, Defendant was on state parole serving a sentence of one to five years with an initial maximum date of August 2022 for an earlier driving under the influence conviction (the "original sentence"). (N.T., 4/17/24, p. 22). The sentences Defendant received for his driving

under the influence and habitual offender convictions provide for Defendant to undergo imprisonment in a state correctional institution, effective immediately, but do not state whether such sentences run concurrent or consecutive to the original state sentence he was then serving for driving under the influence. In contrast, the sentence Defendant received as an habitual offender clearly states it is to run concurrent to his sentence for driving under the influence.

Defendant was at all times represented by counsel when he stipulated to pleading guilty, entered his pleas, and was sentenced. Following Defendant's sentencing on December 16, 2021, no post-sentence motions were filed or direct appeal taken. The next filing in this case occurred on August 25, 2023, when Defendant filed a *pro se* Petition for Post-Conviction Relief under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§9541-9546, his first. Therein, Defendant alleges that on or around March 18, 2023, he learned for the first time that under the Prisons and Parole Code (the "Parole Code"), 61 Pa.C.S.A. §§ 101-7123, specifically Section 6138(a)(5)(i), he was required to serve the balance of the term of his original sentence before serving the prison terms imposed by the court on December 16, 2021; that he was never advised by counsel of this requirement; that, to the contrary, trial counsel had advised him his new sentence could and would run concurrent to his original sentence and the minimum sentence he would receive would be no greater than a one-year sentence; that until on or about March 18, 2023, he believed his new sentence was concurrent to his original sentence; that his trial counsel did not know that Section 6138(a)(5)(i) of the Parole Code requires state sentences for new offenses committed while on state parole to be served consecutively to parole backtime; that his trial counsel was ineffective *per se*; and that such

ineffectiveness improperly induced him to enter an unknowing and involuntary plea. In his PCRA Petition, Defendant requests the judgment of sentence he received on December 16, 2021, together with his guilty pleas, be vacated. Defendant further requests in this Petition that counsel be appointed for him.

By Order dated September 11, 2023, the court appointed counsel to represent Defendant on his Petition. This order directed counsel to determine whether Defendant's Petition for Post-Conviction Relief met the time limits for filing a petition under the PCRA and, after evaluating Defendant's claims and the record in the case, to seek to withdraw after filing a "no merit" letter pursuant to Commonwealth v. Finley, to file an amended petition within forty-five days raising those claims considered meritorious by counsel, or to advise the court that the Petition should proceed on the request for collateral relief as filed by Defendant. By letter dated October 23, 2023, Defendant's PCRA counsel advised the court Defendant had raised claims of arguable merit, that he did not intend to prepare and file an amended petition, and that the matter should be scheduled for an evidentiary hearing. This hearing was held on April 17, 2024.

At the time of the PCRA hearing, Defendant testified that before he plead guilty, he was assured by counsel that he had "a deal locked in for a one-year minimum," but he did not know what the maximum would be. (N.T., 4/17/24, pp. 9-11, 26-27). Defendant also testified that he was under the belief – based on counsel's representation – that his new sentence would run concurrent to his original state sentence and that he would receive credit against his new sentence for the time he spent in prison following his arrest on January 15, 2021,[6] and the date of his sentencing, a period of close to one year. (N.T., 4/17/24, pp. 12-13, 20-22). For this reason, according to Defendant, he did not object

when the new sentence imposed included a two-year minimum believing he had already served almost half of this minimum. (N.T., 4/17/24, pp. 12, 14, 26). Defendant further testified that he first learned that his new sentence was not concurrent to his original state sentence and that he would not receive credit for the entire time he was in custody prior to sentencing upon his receipt of a status report on April 14, 2023, while an inmate at the State Correctional Institution at Houtzdale informing him that the maximum date of his original sentence was recalculated to April 13, 2023, that as of that date he had maxed out on his original sentence, and that he would begin serving his new sentence on April 14, 2023, with his minimum eligibility for parole set for April 2025, later revised to January 2025. (N.T., 4/17/24, pp. 14-18; *see also* Exhibit "B" attached to Defendant's PCRA Petition).[7]

Shortly after, in May or June of 2023, on further inquiry, Defendant testified he learned from another inmate who worked in the Institution's law library at SCI Houtzdale that running his original and new sentence concurrent to one another would be a violation of the Prisons and Parole Code, which required he serve the balance of his original state sentence before serving his new sentence. (N.T., 4/17/24, pp. 19-20, 53-54; *see also* Exhibit "B" attached to Defendant's PCRA Petition advising Defendant of this fact on April 21, 2023). Claiming that his trial counsel was ineffective in assuring him that his new sentence would run concurrent to his original sentence, and/or failing to advise him that the Prisons and Parole Code prohibited his new sentence from running concurrent with his original sentence, and that such ineffectiveness caused him to enter an involuntary or unknowing plea, Defendant filed his *pro se* PCRA on August 25, 2023.

DISCUSSION

Allocating Prison Time for a Convicted Parole Violator Between Backtime Owed on Original Sentence and Term of Incarceration Decreed in State Sentence for New Offense

As an initial matter, Defendant is correct that under the Prisons and Parole Code, once convicted and sentenced for the new offenses, upon revocation of his state parole on this basis, he was required to serve the remainder of his original state sentence consecutive to and before serving his new sentence. Section 6138(a)(5)(i) of the Prisons and Parole Code, 61 Pa.C.S.A. §6138(a)(5)(i), relating to convicted parole violators and not technical violators, requires that a convicted parole violator who has been paroled from a state correctional institution, and receives a new sentence to be served in a state correctional institution, serve his original state sentence before serving the new sentence. More specifically, Section 6138(a)(1) and (5)(i) provides:

> § 6138. Violation of terms of parole
>
> (a) *Convicted Violators.* –
>
> (1) The board may, at its discretion, revoke the parole of a paroled offender if the offender, during the period of parole or while delinquent on parole, commits a crime punishable by imprisonment, *for which the offender is convicted or found guilty by a judge or jury or to which the offender pleads guilty or nolo contendere at any time thereafter in a court of record.*
>
> * * *
>
> (5) If a new sentence is imposed on the offender, the service of the balance of the term originally imposed by a Pennsylvania court shall precede the commencement of the new term imposed in the following cases:
>
> (i) If a person is paroled from a State correctional institution and the new sentence imposed on the person is to be served in the State correctional institution.

61 Pa.C.S.A. §6138(a)(1) and (5)(i) (emphasis added).

Section 6138(a)(4) of the Prisons and Parole Code, 61 Pa.C.S.A. §6138(a)(4), further provides that "[t]he period for which the offender is required to serve shall be computed by the Board and shall begin on the date that the parole violator is taken into custody to be returned to the institution as an offender."[8] The provisions of Section 6138(a)(4) become operative only once the Board has revoked parole. *See* Bradley v. Pa. Bd. of Prob. & Parole, 258 A.3d 1163, *6 (Pa.Cmwlth. 2021) (Memorandum Opinion) (citing Barnes v. Pa. Bd. of Prob. & Parole, 203 A.3d 382, 391 (Pa.Cmwlth. 2019)).

"[P]ursuant to Section 6138(a)(4) of the Prisons and Parole Code, [a convicted parole violator] cannot again begin to serve time on his original sentence until his parole is officially revoked by the Board, ... when the second Board Member sign[s] the hearing report recommitting [the defendant] as a convicted parole violator." Bradley, 258 A.3d at *7. In accordance with the foregoing, service of the backtime under Section 6138(a)(5)(i) does not start until the parolee has been both convicted and sentenced on the new offense and recommitted to a state correctional institution as a convicted parole violator. *See also* Board Decision reported in Bradley, noting that the provision at 61 Pa.C.S.A. §6138(a)(5) "does not take effect until the parolee is recommitted as a convicted parole violator." Bradley, 258 A.3d at *2.

As further stated by the Commonwealth Court in Barnes:

> [I]t is well established that the requirement that a [convicted parole violator] serve the balance of his original sentence is only operative once "parole has been revoked and remainder of the original sentence becomes due and owing." Therefore, "credit for time a [convicted parole violator] spends in custody between imposition of a new sentence and revocation of parole must be applied to the new sentence." Parole revocation occurs once a hearing examiner and Board member or two Board members sign a hearing report recommitting a prisoner as a [convicted parole violator].

Barnes, 203 A.3d at 391-92 (citations omitted); *see also* Palmer v. Pa. Bd. of Prob. & Parole, 134 A.3d 160, 166 (Pa.Cmwlth. 2016) ("[A] parole violator's new maximum date is calculated from the date on which the Board obtain[s] the second signature needed to recommit him as a [convicted parole violator].").

Defendant's convictions occurred on October 22, 2021, and he was sentenced on December 16, 2021. From these two facts alone, it necessarily follows that he was not a *convicted* parole violator until October 22, 2021, and whether he would receive a state sentence and be subject to Section 6138(a)(5)(i) was not known before he was sentenced on December 16, 2021. Logic further dictates that until Defendant was both convicted and sentenced on the new offenses to a state sentence, the Pennsylvania Parole Board could not, in the exercise of its discretion under Section 6138(a)(1), revoke Defendant's parole as a *convicted* parole violator, the condition precedent upon which Section 6138(a)(5)(i) is premised.

Here, Defendant testified he was revoked from his state parole on or about January 20, 2021, when his bail, which was originally set by Magisterial District Judge Joseph D. Homanko, Sr. at $5,000.00 on January 16, 2021, on the new charges (see Bail Bond dated January 16, 2021), was lowered by Magisterial District Judge William J. Kissner to $5,000.00 unsecured on January 20, 2021 (see Bail Bond dated January 20, 2021), and he was transported from the Carbon County Correctional Facility to SCI Houtzdale. (N.T., 4/17/24, pp. 49-52; Stipulation to Impose Monetary Bail filed September 28, 2021, ¶9; Probation Memorandum of Tammy Wall dated December 7, 2021, computing credit to which Defendant was entitled on new sentence). Accepting the date of Defendant's revocation to be true, there being no evidence to the contrary,[9] Defendant's revocation on

or about January 20, 2021, could not have been based on his status as a *convicted* parole violator since his convictions occurred approximately nine months later, on October 22, 2021.

On the issue of credit,

> [A] parolee is entitled to pre-confinement credit on *either* his original sentence *or* new sentence for time spent in confinement prior to sentencing on a subsequent criminal conviction. To which sentence the time is credited depends on the nature of the parolee's pre-sentence confinement. When the Board has lodged a detainer and the parolee has not posted bail on his new criminal charges, such that that parolee is being confined on both the Board's detainer warrant and as a result of the pending criminal charge, pre-sentence confinement credit must be applied to reduce the new sentence of incarceration unless the credit would exceed that new sentence of incarceration. Martin v. Pa. Bd. of Prob. & Parole, 840 A.2d 299, 306-09 (Pa. 2003). When a parolee has posted bail, however, such that he is confined solely on the Board's detainer warrant, the Board must apply the pre-sentence confinement credit to reduce the unserved balance of the sentence from which the parolee was paroled. Gaito v. Pa. Bd. of Prob. & Parole, 412 A.2d 568, 571 (Pa. 1980).

Bradley, 258 A.3d at *6 (emphasis in original); *see also* Palmer, 134 A.3d at 166 ("[O]nce a parolee is sentenced on a new criminal offense, the period of time between arrest and sentencing, when bail is not satisfied, must be applied to the new sentence, and not to the original sentence.") (citation and quotation marks omitted). Defendant is not entitled to receive double credit for the same period of confinement (*i.e.*, both against his backtime and his new sentence).

As of January 20, 2021, Defendant was confined solely on the basis of the Board's detainer warrant since it was then that Defendant's bail was reduced to $5,000.00 unsecured by Magisterial District Judge William J. Kissner. Not until September 29, 2021, was Defendant's bail increased to $1,000.00 cash bail upon the parties' stipulation to impose monetary bail in this amount filed on September 28, 2021, and this court's order

of September 29, 2021. The 85 days credit Defendant received against his new sentence represented six days for the period from January 16, 2021, to January 22, 2021, and 79 days for the period from September 29, 2021, to December 16, 2021. (Probation Memorandum of Tammy Wall dated December 7, 2021, computing Defendant's entitlement to credit on his new sentence; N.T., 12/16/21, pp. 3, 23-24).[10] This credit has also been recognized and granted by the Parole Board in computing Defendant's maximum date for his new sentence. (N.T., 4/17/24, p.18). Defendant is not entitled to any additional credit against his new sentence for the period between January 20, 2021, and September 29, 2021, during which time his bail on the new charges was unsecured and not the cause of his pre-sentence confinement.

In Bradley, while on state parole, the defendant committed new offenses. The same date he was arrested on these new offenses, the Pennsylvania Parole Board[11] issued a warrant to recommit and detain. After pleading no contest to the new offenses, defendant was given a state sentence of two to four years by the trial court. Neither the plea agreement, nor the new sentence stated the start date of the new sentence, the credit to which defendant was entitled, or whether the new sentence was to run concurrent or consecutive to defendant's original state sentence. Approximately two months after receiving his new sentence, the Parole Board recommitted defendant as a convicted parole violator with a custody for return date of the same date. The Board imposed 48 months' back time on defendant and recalculated his parole violation maximum date.

On appeal, where defendant challenged, *inter alia*, the start date of his new sentence and the credit he was entitled to receive, and claimed his new sentence should run concurrent to his original sentence, the Commonwealth Court held that even if it were

to conclude otherwise, that is that the new sentence as imposed by the sentencing judge provided for concurrency with defendant's original sentence, it was bound by the requirement in Section 6138(a)(5)(i) that the sentences run consecutive to one another and that defendant's remedy for an invalid sentencing order under these circumstances was to seek to vacate the plea agreement in the trial court and challenge the legality of the sentence. Bradley, 258 A.3d at *6; Palmer, 134 A.3d at 166. The Court further held that the Board acted within its authority in allocating the credit to which defendant was entitled for time spent in confinement between the original and new sentence and that to the extent defendant was entitled to additional credit "for the time he was confined as a result of the new charges *and* the Board's detainer warrant, those days shall be credited to his new sentence, *once the dates of his new sentence are calculated following [defendant's] completion of his original sentence*." Bradley, 258 A.3d at *7 (emphasis added).

When Defendant in this case was sentenced on December 16, 2021, other than expressly running his sentences for driving under the influence and as an habitual offender concurrent, as in Bradley, the sentence was silent on the start date of the new sentence and the sequence in which the new sentence would be served vis-à-vis Defendant's original state sentence as this was controlled by statute (*i.e.*, 61 Pa.C.S.A. §6138(a)(5)(i)) and not within the discretion of the sentencing judge. *See* Commonwealth v. McCandless, 2025 WL 2159034 *2 (Pa.Super. 2025) (Non-Precedential Decision) ("[W]here a state parolee gets a new sentence, he must serve his backtime first before commencement of the new state sentence. Imposition of a new state sentence concurrent with parolee's backtime on the original state sentence is an illegal sentence

under this statute.") (citing Commonwealth v. Kelley, 136 A.3d 1007, 1013-14 (Pa.Super. 2016)); Lawrence v. Pennsylvania Dept. of Corrections, 941 A.2d 70 (Pa.Cmwlth. 2007) (holding that a state parolee could not serve his new state sentence before he satisfied his original state sentence; imposition of new sentence essentially concurrent with backtime service violates the Parole Act and is illegal).

Moreover, prior to sentencing in this case, the court was never advised that Defendant's state parole had been revoked,[12] nor for the reasons previously discussed could the basis of such revocation have been Defendant's status as a *convicted* parole violator on new charges for which he had yet to be sentenced, the trigger for putting Section 6138(a)(5)(i) into effect. Nor did the written sentencing orders which followed and which stated that Defendant was to undergo imprisonment effective immediately in a state correctional institution – where Defendant had in fact been housed since January 22, 2021, once his bail was set at unsecured, and which therefore accurately maintained his confinement in such facility – provide a start date for the new sentence or address the sequence in which the sentence would be served relative to the original sentence. Subsequently, the Parole Board, as in Bradley, integrated Defendant's new sentence with his original sentence, running the two consecutive to one another, and allocated credit for Defendant's pre-sentence confinement, including the 85 days credit Defendant was granted at sentencing on his new sentence. Finally, as noted in Bradley, when Section 6138(a)(5)(i) of the Prisons and Parole Code applies, a start date for the new sentence is impossible to state since the parolee "must complete his original sentence before he serves his new sentence dates. Thus, his new sentence cannot be calculated until he completes his original sentence." Bradley, 258 A.3d at *8. But see Pa.R.Crim.P. 705(A)

which provides that "[w]hen imposing a sentence to imprisonment, the judge shall state the date the sentence is to commence."

In accordance with the foregoing, were Defendant's new sentence determined to be illegal, his remedy would be to seek to vacate his plea and sentence. *Cf.* Commonwealth v. McCandless, 2025 WL 2159034 (Pa.Super. 2025) (Non-Precedential Decision) (upholding a state sentence on a new offense committed while on state parole without specifying whether it would run consecutively or concurrently to backtime for a violation of his state parole were his state parole to be revoked, or specifying the start date of the new sentence, but where during defendant's oral and written guilty plea colloquy, defendant was advised and acknowledged on the record that "any sentence imposed as a result of that state parole violation must be served consecutively to any sentence imposed in the current case."); Commonwealth v. Patterson, 249 A.3d 1157 (Pa.Super. 2021) (Non-Precedential Decision) (granting defendant's first PCRA petition where the defendant had never been clearly advised that his negotiated state sentence for new offenses committed while on state parole could not run concurrent with any backtime imposed if he were revoked from state parole and defendant reasonably believed from statements made by both the district attorney and his counsel during the guilty plea hearing that concurrency was a possibility and within the Pennsylvania Board of Probation & Parole's discretion to grant; concluding that his plea was not knowingly, voluntarily and intelligently entered since he was neither fully aware of the permissible range of sentences nor the consequences of his plea; and ordering that defendant's judgment of sentence be vacated and the matter remanded to the PCRA court for further proceedings consistent with the Court's memorandum opinion); *see also* Kelley, 136 A.3d

at 1014 (holding that where a defendant "received no information regarding the statutory sequence for serving his old and new state sentences, ... plea counsel was ineffective for advising the [defendant] to accept a plea bargain that called for an illegal sentence").[13]

Timeliness of Petition

The foregoing defines and discusses, without deciding, various contentions raised by Defendant in his PCRA Petition, in one manner or another connected with his claim of ineffectiveness of counsel leading to his plea: that trial counsel purportedly negotiated a minimum one-year sentence to run concurrent with backtime on his parole violation and never advised him that the Parole Code prohibited concurrency, and that counsel failed to promptly file to change his unsecured bail to a monetary amount in order for Defendant to receive more credit on his new sentence. For the reasons which follow, we are unable to decide the merits of Defendant's claims.

Defendant was sentenced on the new charges on December 16, 2021. No post-sentence motions were filed or direct appeal taken from the judgment of sentence. Defendant's judgment of sentence, thus, became final on January 15, 2022, thirty days after the time to file a direct appeal to the Superior Court had expired. *See* Pa.R.A.P. 903(a); 42 Pa.C.S.A. §9545(b)(3).

On August 25, 2023, Defendant filed his *pro se* Petition for Post-Conviction Relief. This filing occurred more than one year after Defendant's judgment of sentence became final. Absent one of three enumerated exceptions, the PCRA requires that a petition for relief be filed within one year of the date the judgment of sentence becomes final. As to the time for filing a petition for relief, the PCRA provides:

§9545. Jurisdiction and proceedings

* * *

(b) Time for filing petition. –

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within one year of the date the claim could have been presented.

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

(4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether appointed or retained.

42 Pa.C.S.A. §9545(b). An untimely PCRA petition deprives the court of jurisdiction over the petition and, without jurisdiction, the court does not have the legal authority to address the substantive claims. Commonwealth v. Reid, 235 A.3d 1124, 1143 (Pa. 2020); Commonwealth v. Small, 238 A.3d 1267, 1280 (Pa. 2020).

Defendant's Petition is untimely on its face. Defendant contends, however, he meets the criteria set forth in the second exception to the one-year time-bar – that the facts upon which his claim is predicated were unknown to him and could not have been ascertained by the exercise of due diligence – such that his Petition is timely.

> [T]he newly-discovered fact exception "renders a petition timely when the petitioner establishes that [']the facts upon which the claim is predicated were unknown to the petitioner and could not have been

> ascertained by the exercise of due diligence.[']" Small, 238 A.3d 1267, 1271 (Pa. 2020), quoting 42 Pa.C.S.A. §9545(b)(1)(ii). Our Supreme Court explained that a PCRA court must first determine "whether the facts upon which the claim is predicated were unknown to the petitioner" based upon a circumstance-dependent analysis of the petitioner's knowledge. Id. at 1282-1283 (original quotation marks omitted). If the PCRA court concludes that the facts were unknown, then the PCRA court must examine whether "the facts could have been ascertained by the exercise of due diligence, including an assessment of the petitioner's access to public records." Id. (citation omitted). The Small Court defined "due diligence" as a "flexible concept that varies with the context of a given case[.]" Id. at 1284.

Commonwealth v. Scott, 249 A.3d 1160, *6 (Pa.Super. 2021) (Non-Precedential Decision), appeal denied, 264 A.3d 332 (Pa. 2021); *see also* Commonwealth v. Taylor, 933 A.2d 1035 (Pa.Super. 2007) (holding that for purposes of exception to PCRA jurisdictional time-bar when facts upon which claim is predicated were unknown to petitioner and could not have been ascertained by due diligence, petitioner fails to meet his burden when facts asserted were merely "unknown" to him; petitioner must also explain why asserted facts could not have been ascertained earlier with exercise of due diligence), appeal denied, 951 A.2d 1163 (Pa. 2008).

> Due Diligence demands that the petitioner take reasonable steps to protect his own interests. A petitioner must explain why he could not have learned the new fact(s) earlier with the exercise of due diligence. This rule is strictly enforced. Additionally, the focus of this exception "is on the newly discovered facts, not on a newly discovered or newly willing source for previously known facts."

Commonwealth v. Yohe, 2019 WL 2246618, *4 (Pa.Super. 2019) (Non-Precedential Decision) (citing and quoting Commonwealth v. Brown, 111 A.3d 171, 176 (Pa.Super. 2015)); Commonwealth v. Mickeals, 335 A.3d 13, 21 (Pa.Super. 2025) (citation omitted). "The PCRA petitioner bears the burden of proving the applicability of one of the exceptions." Reid, 235 A.3d at 1144 (citation and quotation marks omitted);

Commonwealth v. Micheals, 335 A.3d at 20.

As we understand Defendant's argument, the new fact upon which his claim is based is Defendant's *learning* on or about April 14, 2023, that he would be serving his new sentence consecutive to serving backtime on his parole revocation as determined by the Parole Board and that he was not previously aware this sequence of serving backtime first, followed by serving the new sentence second, was required by the Parole Code as a matter of law.[14] This, however, is not a fact but a legal conclusion about a fact's (that fact being Defendant's conviction of a new crime while on state parole and imposition of a state sentence for this new offense) legal significance. *Cf.* Reid, 235 A.3d at 1145-46 (concluding that the United States Supreme Court's holding in Williams v. Pennsylvania, 579 U.S. 1, 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016) that then District Attorney Castille's approval of the decision to seek the death penalty amounted to significant, personal involvement in a critical trial decision, was a judicial determination, not a new "fact," for purposes of Section 9545(b)(1)(ii)); Commonwealth v. Watts, 23 A.3d 980, 987 (Pa. 2011) ("A 'fact,' as distinguished from the 'law,' is that which is to be presumed or proved to be or not to be for the purpose of applying or refusing to apply a rule of law.") (citation and alterations omitted).

Nor can Defendant successfully argue that his *learning* his new sentence was illegal – assuming it was, which, as previously discussed, is in question – is a new fact. Accepting that the sentence was illegal as contended by Defendant – that because the written sentencing orders state he is to undergo imprisonment in a state correctional institution effective immediately, this implies concurrency – the illegality of the new sentence existed from its inception, and was subject to review within the PCRA. Although

"not technically [subject to waiver], a legality of sentence claim may nevertheless be lost should it be raised in an untimely PCRA petition for which no time-bar exception applies, thus depriving the [PCRA] court of jurisdiction over the claim." Commonwealth v. Miller, 102 A.3d 988, 995 (Pa.Super. 2014) (cititation, original brackets, and ellipsis omitted); *see also* Commonwealth v. Fahy, 737 A.2d 214, 223 (Pa. 1999) ("legality of sentence is always subject to review within the PCRA," provided the PCRA's time limits for filing a petition, or one of its exceptions, are satisfied). Defendant's ignorance of the law – that 61 Pa.C.S.A. §6138(a)(5)(i) requires a state parolee who commits a new offense while on parole for which he is convicted and receives a state sentence to serve the balance of his original state sentence upon revocation of his parole for the new offense before serving his new state sentence – is not a new fact for purposes of Section 9545(b)(1)(ii) of the PCRA. Commonwealth v. Yohe, 2019 WL 2246618 *5 (Pa.Super. 2019) (Non-Precedential Decision) ("later-acquired knowledge of a legal principle does not constitute a newly-discovered fact").

Nor does Defendant's conclusion that his counsel was ineffective for not knowing the law, specifically Section 6138(a)(5)(i), or advising him that his new sentence could not run concurrent to revocation of his state parole, constitute a newly discovered "fact" to the PCRA's one-year time-bar under 42 Pa.C.S.A. §9545(b)(1)(ii), even if the claims were not knowable to Defendant until advised of their existence by present counsel. Commonwealth v. Bronstein, 752 A.2d 868, 871 (Pa. 2000). *See also* Commonwealth v. Gamboa-Taylor, 753 A.2d 780, 785 (Pa. 2000) (concluding that "fact" that current counsel discovered prior PCRA counsel failed to raise and develop all viable claims of trial counsel's ineffectiveness was not a newly discovered fact qualifying for exception to

PCRA time limitations); Commonwealth v. Pursell, 749 A.2d 911, 915-917 (Pa. 2000) (holding that claims of PCRA counsel's ineffectiveness do not escape PCRA one year time limitations merely because they are presented in terms of current counsel's discovery of "fact" that previous attorney was ineffective). *Cf.* Commonwealth v. Bennett, 930 A.2d 1264, 1272-1273 (Pa. 2007) (distinguishing between counsel's ineffectiveness that completely deprives a defendant of appellate review due to counsel's action or lack of action (*i.e., per se* ineffectiveness), which may serve as a newly discovered fact for purposes of Section 9545(b)(1)(ii), and ineffectiveness that only narrows the ambit of appellate review as in Gamboa-Taylor and which if recognized piecemeal would eviscerate the timeliness requirements crafted by the Legislature); Commonwealth v. Peterson, 192 A.3d 1123, 1131 (Pa. 2018) (reiterating the distinction between a total and partial deprivation of a defendant's appellate rights in determining whether counsel's alleged ineffectiveness may serve as a newly discovered fact for purposes of Section 9545(b)(1)(ii)).[15] In short, to the extent Defendant may be claiming that his trial counsel was ineffective and that his delayed discovery of this ineffectiveness is a newly discovered fact under 42 Pa.C.S.A. §9545(b)(1)(ii), Defendant is mistaken. Yohe, *4.

In Commonwealth v. Fuller, 2019 WL 4131842 (Pa.Super. 2019) (Non-Presidential Decision), defendant pled guilty to possessing a firearm as a prohibited person and was sentenced to a period of imprisonment in a state correctional facility of two-and-a-half to five years, with an effective date for the new sentence of May 17, 2013. At the time of this offense, defendant was on state parole which he acknowledged at sentencing and "verbalized to the trial court that he understood he 'would have to see the Parole Board' to determine the consequences of his parole violation." Fuller at *1. No post-sentence

motions or direct appeal was filed.

In January 2017, defendant appeared for a hearing before the Parole Board and learned that the sentence he received on his new offense would commence subsequent to the Parole Board's determination of backtime owed for his parole violation pursuant to 61 Pa.C.S.A. §6138(a)(5)(i), not the May 17, 2013, date stated in his sentencing order. On February 3, 2017, defendant filed a *pro se* PCRA Petition alleging ineffective assistance of counsel for negotiating a plea bargain that could not be enforced given 61 Pa.C.S.A. §6138(a)(5)(i), that his plea was unlawfully induced, and in which he sought to have his sentence on the new offense run concurrent to his backtime. The Petition was denied as untimely by the PCRA court.

On appeal before the Pennsylvania Superior Court, the Court held defendant's petition was facially untimely in that more than one year had passed from when his judgment of sentence became final on June 17, 2013, and the date of filing of his PCRA petition, February 3, 2017. Defendant invoked the newly discovered fact exception under Section 9545(b)(1)(ii) to the PCRA's time-bar, arguing he entered a negotiated guilty plea in exchange for a sentence of two-and-a-half to five years of state incarceration, with an effective date of May 17, 2013; that all parties knew at the time of his offense, plea and sentencing, he was serving another state sentence; that he first learned that the agreement was illegal and unenforceable under Section 6138(a)(5)(i) in January 2017 when he appeared before the Board; and that he timely filed his PCRA petition upon learning of this new fact which could not have been ascertained earlier by him by the exercise of due diligence.

The Fuller Court distinguished the decision in Kelley from the case then before it

noting, critically, that in Kelley timeliness of the filing of the PCRA petition was not in issue. In affirming the PCRA court's denial of defendant's PCRA petition, the court noted the Pennsylvania Supreme Court's admonition in Commonwealth v. Chmiel, 173 A.3d 617, 625 (Pa. 2017) that "to fall within this exception [*i.e.*, 61 Pa.C.S.A. §6138(a)(5)(i)], the factual predicate of the claim must not be a public record and must not be facts that were previously known but are now presented through a newly discovered source [*e.g.*, the Parole Board]." The Court then stated, in language equally applicable to the present case:

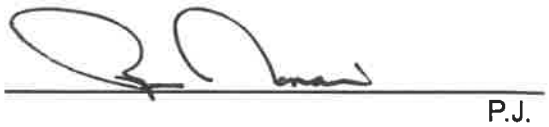
> Appellant's claim does not satisfy the "newly discovered fact" exception of the PCRA. Two factual components underlie Appellant's current claim: (1) his status as a parolee at the time of sentencing; and (2) the application of 61 Pa.C.S.A. §6138(a)(5)(i). Regarding his status as a parolee at the time of sentencing, Appellant concedes his awareness of his status; thus, this "fact" does not entitle Appellant to relief under the newly discovered fact exception. *See* N.T., 5/17/13, at 9. The application of Section 6138(a)(5)(i) also cannot serve as a basis for relief. Section 6138(a)(5)(i) was in effect at the time Appellant received his sentence, when he was represented by counsel. Thus, its application as a public law was ascertainable through reasonable diligence. *See* Commonwealth v. Shiloh, 170 A.3d 553, 558-59 (Pa.Super. 2017) (presumption that pubic records cannot serve as newly discovered facts applies where petitioner is represented by counsel).[16] Appellant cannot invoke Section 9545(b)(1)(ii) by relying upon facts that were either known to him or ascertainable through due diligence.
>
> * * *
>
> Here, Appellant filed an untimely PCRA petition. Appellant's "discovery" at the Parole Board hearing does not convert known and/or knowable facts into unknown ones. Put differently, even if Appellant possesses a valid claim of counsel's ineffectiveness and the illegality of his sentence, he has presented no new facts to establish jurisdiction before the PCRA court.
>
> * * *
>
> In sum, the information upon which Appellant relies to qualify for the newly discovered fact exception was known or knowable at the time of Appellant's counseled sentencing proceeding, and does not meet the exception at Section 9545(b)(1)(ii).

Fuller at *4 and 5.

CONCLUSION

When a PCRA petition is filed more than one year after the date the judgment of sentence becomes final – as here – it is facially untimely and the burden on the petitioner to allege and prove an exception to the one-year time-bar under 42 Pa.C.S.A. §9545(b)(1). Neither Defendant's later discovery that his sentence was illegal, assuming this to be true, or that his trial counsel was ineffective, is a "fact" within the newly-discovered-facts exception to the PCRA time-bar. Consequently, because Defendant's PCRA petition was untimely and no exceptions apply, and because the timely filing of a PCRA petition is a prerequisite to our jurisdiction to decide Defendant's claims and grant relief, being without such jurisdiction we lack the authority to address and decide the merits of Defendant's substantive claims raised in his PCRA petition.

BY THE COURT:



P.J.

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[1] 75 Pa.C.S.A. §3802(d)(1)(ii). This was Defendant's fifth driving under the influence offense for sentencing purposes.

[2] 75 Pa.C.S.A. §6503.1.

[3] 75 Pa.C.S.A. §1543(b)(1.1)(iii). This was Defendant's third or subsequent violation of this offense.

[4] As a third or subsequent offender for driving under suspension, DUI related, combined with the presence of a non-prescribed controlled substance in his blood at the time, Defendant by statute was subject to a fine of $5,000.00 and to undergo imprisonment for no less than two years. 75 Pa.C.S.A. §1543(b)(1.1)(iii). Under the Vehicle Code this offense is graded as a misdemeanor of the first degree. The standard guideline range is six to sixteen months.

That Defendant was not sentenced to a period of imprisonment on this offense was based on the Court's erroneous reliance on the Supreme Court's decision in Commonwealth v. Eid, 249 A.3d 1030 (Pa. 2021), where a statutorily required mandatory minimum sentence of ninety days for a first time summary offense under 75 Pa.C.S.A. §1543(b)(1.1)(i) was found to be unconstitutionally vague, in violation of due process, because the statute called for a mandatory minimum sentence of ninety days' imprisonment with no clear and definite statutory maximum period. (N.T., 12/16/21, p. 17; see also N.T., 10/22/21, pp. 5-6). Although a maximum term of imprisonment is similarly not explicitly stated in 75 Pa.C.S.A. §1543(b)(1.1)(iii), this statute is not unconstitutionally vague under the Due Process Clause given the applicability of the general classification guidelines set forth in Section 106 of the Crimes Code, 18 Pa.C.S.A. §106(b)(6), which provide for a maximum sentence of five years for first degree misdemeanors. *Cf.* Commonwealth v. Rollins, 292

A.3d 873, 879-880 (Pa.Super. 2023) (interpreting and upholding the constitutionality of comparable language under 75 Pa.C.S.A. §1543(b)(1)(iii) for a third or subsequent violation graded as a misdemeanor of the third degree). In any event, this error was to Defendant's benefit.

[5] While recognizing Defendant was sentenced for three separate criminal offenses on December 16, 2021, for ease of reference we refer to the sentences imposed on December 16, 2021, collectively as his "new sentence," unless otherwise indicated.

[6] On this same date, the Criminal Complaint was filed against Defendant.

[7] Defendant believed this revision to be attributable to the 85 days of credit granted at the time of his sentencing on December 16, 2021. (N.T., 4/17/24, p.18).

[8] As stated in Bivens v. Pa. Bd. of Prob. & Parole, 2020 WL 1171089 (Pa.Cmwlth. 2020) (Memorandum Opinion):

> When a parolee is convicted of a new criminal offense committed while on parole and punishable by prison time, the Board has the authority, *in its discretion*, to recommit the parolee as a convicted parole violator. Section 6138(a) of the Parole Code, 61 Pa.C.S. §6138(a). Upon recommitment of a parolee, the Board *may* order him to serve some or all of the remainder of his original sentence as backtime. Id. Where the Board orders a parolee to serve backtime, this time must be served before the commencement of the new term.

Id. at *2 (citing Section 6138(a)(5)(i) of the Parole Code) (emphasis added). "Backtime" is the portion of a judicially imposed sentence that a parole violator must serve as a consequence of violating parole before he is eligible for re-parole. Palmer v. Pa. Bd. of Prob. & Parole, 134 A.3d 160, 162 n.1 (Pa.Cmwlth. 2016) (citation omitted).

[9] At no time did Defendant present any documentation of the dates and timing of any notice of charges issued by the Board to revoke Defendant's state parole (including the basis of revocation), any decision of the Board revoking Defendant's state parole and recommitting him as a convicted parole violator, the Board's hearing report signed by a hearing examiner and Board Member or two Board Members recommitting Defendant as a convicted parole violator, or the Board's computation of the amount and dates of backtime Defendant was ordered to serve.

[10] In reviewing the record, a more accurate computation of the credit Defendant was entitled to on his new sentence is 82 days: four days from his arrest on January 16, 2021, until his bail was reduced to $5,000.00 unsecured on January 20, 2021, and 78 days from September 29, 2021, the date of the court's order setting monetary bail in the amount of $1,000.00 and December 16, 2021, the date of Defendant's sentencing.

[11] At the time Bradley filed his petition for review, the Parole Board was then known as the Pennsylvania Board of Probation and Parole and later renamed as the Pennsylvania Parole Board effective February 18, 2020. *See* Bradley v. Pa. Bd. of Prob. & Parole, 258 A.3d 1163, *1 n.3 (Pa.Cmwlth. 2021) (Memorandum Opinion).

[12] Since the decision to revoke parole is within the Board's discretion, Defendant's new convictions alone did not automatically result in a revocation. *See* Bivens v. Pa. Dept. of Corrections, 2020 WL 1171089 *2 (Pa.Cmwlth. 2020) (Memorandum Opinion); Allen v. Pa. Bd. of Prob. & Parole, 207 A.3d 981, 985-86 (Pa.Cmwlth. 2019) (noting that the Board is not required to impose backtime based on a new conviction and where no recommitment is ordered by the Board, the sentence imposed by the sentencing court may properly run concurrently with the original state sentence).

[13] In Kelley, the Superior Court held that defendant's plea was not knowingly, voluntarily and intelligently entered and was the result of ineffective assistance of counsel whose knowledge of the Parole Code was deficient and fell below the range of competence demanded of attorneys in criminal cases. Kelley entered a guilty plea for an offense committed while on state parole pursuant to a plea agreement providing for a state sentence of 21 to 60 months with a definite start date, that being the date of Kelley's arrest. At the time the plea agreement was entered, it was known that the state intended to revoke his parole and have him recommitted to serve the backtime owed on his original state sentence. After Kelley's parole was revoked, he learned that the effective date of his new sentence was approximately two years later than the date he had bargained for, and ran consecutive to the backtime ordered on his parole violation in accordance with 61 Pa.C.S.A. §6138(a)(5)(i). The Superior Court found the sentence imposed by the trial court, though compliant with the plea agreement, was illegal and unenforceable, and reversed the trial court's denial of his PCRA petition, vacated the judgment of sentence, and remanded the matter to the trial court for further proceedings.

[14] To the extent Defendant alleges his trial counsel was ineffective for advising him that he had locked in an agreement for a one-year minimum sentence and that he would receive credit against this sentence for the entire period of his confinement prior to sentencing – notwithstanding counsel's alleged failure to modify Defendant's bail from unsecured to a monetary amount, which error, if error it was, in any event was non-prejudicial given Defendant was not entitled to receive double credit for both his backtime and his new sentence, and was in fact granted such credit against his backtime by the Parole Board – Defendant on December 16, 2021, was sentenced to a minimum period of imprisonment of two years and received credit for 85 days. These terms announced in open court and made known to Defendant at sentencing are not new facts previously unknown to Defendant which can form the basis for extending the PCRA's one-year time-bar.

[15] In the context of a PCRA claim alleging ineffectiveness of counsel,

> It is well-established that counsel is presumed to have provided effective representation unless the PCRA petition pleads and proves all of the following: (1) the underlying legal claim is of arguable merit; (2) counsel's action or inaction lacked any objectively reasonable basis designed to effectuate his client's interest; and (3) prejudice, to the effect that there was a reasonable probability of a different outcome if not for counsel's error. The PCRA court may deny an ineffectiveness claim if the petitioner's evidence fails to meet a single one of these prongs. Moreover, a PCRA petitioner bears the burden of demonstrating counsel's ineffectiveness.

Commonwealth v. Patterson, 249 A.3d 1157 at *2 (Pa.Super. 2021) (Non-Precedential Decision) (citation omitted). To sustain a claim of ineffectiveness, the petitioner "must identify a specific error, either of commission or omission, committed by counsel, establishing that counsel's action or inaction was not based upon a reasonable strategy and prove that the error was of such magnitude that the outcome of the proceeding probably would have differed." Commonwealth v. Brown, 18 A.3d 1147, 1154 (Pa.Super. 2011), appeal denied, 29 A.3d 370 (Pa. 2011).

Further,

> [i]neffective assistance of counsel claims arising from the plea-bargaining process are eligible for PCRA review. Allegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an involuntary or unknowing plea. Where the defendant enters his plea on the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.

Patterson, 249 A.3d at *3 (citation omitted).

Finally, we note

> [t]he standard for post-sentence withdrawal of guilty pleas dovetails with the arguable merit/prejudice requirements for relief based on a claim of ineffective assistance of plea counsel, ... under which the defendant must show that counsel's deficient stewardship resulted in a manifest injustice, for example, by facilitating entry of an unknowing, involuntary, or unintelligent plea. This standard is equivalent to the "manifest injustice" standard applicable to all post-sentence motions to withdraw a guilty.

Patterson, 249 A.3d at *3 (citation omitted.).

In Defendant's brief in support of his Petition, he notes two types or categories of ineffective assistance of counsel with respect to the element of prejudice: (1) that requiring the defendant to affirmatively prove prejudice based on specified errors made by counsel as, for example in this case, that he would not have pled guilty and would have achieved a better outcome at trial but for his counsel's acts or omissions in advising his new sentence could and would run concurrent to his backtime, citing Strickland v. Washington, 466 U.S. 668 (1994) and Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987); and (2) that in which the circumstances surrounding counsel's representation "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," U.S. v. Cronic, 466 U.S. 648, 658 (1984), such that prejudice will be presumed and need not be proven, citing Cronic and Brown, 18 A.3d at 1156-57 (collecting cases where counsel has been found ineffective *per se* and reviewing the differences between a Cronic violation and an allegation of ineffective assistance of counsel under Strickland/Pierce).

To fall within the parameters of Cronic, "only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial." Cronic, 466 U.S. at 662. The dispositive question is whether the circumstances surrounding the defendant's representation justify such a presumption, Cronic, 466 U.S. at 662, or whether "counsel's performance [is] presumptively inadequate because it was the functional equivalent of no representation." Brown, 18 A.3d at 1158. Under Cronic, it is the circumstances surrounding the defendant's representation and not the actual representation that defines whether prejudice should be presumed without inquiry into counsel's actual performance. Cronic posited as examples the complete denial of counsel at a critical stage of trial, counsel's complete failure to subject the prosecution's case to meaningful adversarial testing, and circumstances of such magnitude that even if "counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Cronic, 466 U.S. at 659-660. In Florida v. Nixon, 543 U.S. 175 (2004), the United States Supreme Court noted that "certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate [*e.g.*, counsel]," listing as examples of where a defendant has the "ultimate authority," decisions "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Nixon, 543 U.S. at 187. In Brookhart v. Janis, 384 U.S. 1 (1966), the decision to waive the right of confrontation was included among those rights counsel cannot make alone, but which require the defendant's knowing and voluntary waiver.

In Brown, the Pennsylvania Superior Court noted three circumstances where the presumption of prejudice outlined in Cronic has been applied by the Pennsylvania Supreme Court: "where there was an actual or constructive denial of counsel, the state interfered with counsel's assistance, or counsel had an actual conflict of interest." Brown, 18 A.3d at 1155 (citing Commonwealth v. Reaves, 923 A.2d 1119, 1128 (Pa. 2007)). The Superior Court in Brown also observed that Cronic-type errors are rare and limited to circumstances where "[c]ounsel's constitutional error must have caused a *total* failure in the relevant proceeding." Brown, 18 A.3d at 1156 (emphasis added) (citing and quoting Commonwealth v. Mallory, 941 A.2d 686, 701 (Pa. 2008)). Recognized instances cited by the Superior Court involved counsel's waiver of all issues on appeal by failing to file a requested direct appeal, a requested petition for allowance of appeal, a Pa.R.A.P. 1925(b) statement, and an appellate brief. Brown, 18 A.3d at 1156. Defendant's claim of counsel's ineffectiveness is not of this magnitude; it does not allege the complete denial or abandonment of counsel or a scenario where the process itself is "presumptively unreliable" under the Sixth Amendment, but points to one specific alleged error: counsel's failure to advise that concurrency of his state backtime and new state sentence was legally impermissible.

Here, Defendant had counsel through the Public Defender's Office and no circumstances have been presented of the magnitude discussed in Cronic from which the circumstances alone make it unlikely that Defendant received effective assistance of counsel without inquiry into counsel's actual performance. Cronic, 466 U.S. at 662-666. A guilty plea entered by a defendant, albeit on advice of counsel which is not "within the range of competence demanded of attorneys in criminal cases," McMann v. Richardson, 397 U.S. 759, 771 (1970), is not the equivalent of counsel employing a procedure that is the functional equivalent to pleading guilty or conceding the defendant's guilt without the consent of the defendant. Nor do the circumstances justify a presumption of prejudice akin to the instances cited in Brown involving the total abandonment by counsel of the right to have appellate review. Therefore, to meet his burden of proving ineffective assistance of counsel, Defendant must "point to specific errors made by trial counsel that mandate a new trial under the test announced in Strickland." Brown, 18 A.3d at 1155.

Here, Defendant has identified a specific error – in contrast to challenging counsel's overall representation – on which he bases his claim of ineffectiveness in his PCRA Petition: counsel's alleged representation that he would and legally could have his new sentence run concurrent to his state backtime. Whether Defendant actually relied on and was prejudiced to his harm by this advice is not the type of fact that can be presumed under the circumstances of this case but requires actual proof. At his plea, Defendant admitted he was guilty of the offenses after acknowledging the facts to support his guilt and being advised of the elements of each offense, was advised of the maximum penalties he faced for each offense and that they could run consecutive to one another, and was told the court was not bound by any agreement to sentencing which might exist, but would exercise its own discretion. (N.T., 10/22/21, pp. 7-17). Moreover, it was clear based on the sentencing guidelines that Defendant's counsel reviewed with him that he would likely receive a state sentence. (N.T., 4/17/24, pp. 61-62; N.T., 12/16/21, pp. 17-19). Had Defendant been

told by his counsel that the state sentence he received was required by law to run consecutive to his backtime, whether this would have changed his decision to plead guilty under such circumstances, where the remaining charges against Defendant were also dismissed, is by no means clear.

In the instant proceedings, Defendant has a lengthy criminal record having variously served prison time in county, state and federal facilities. It stands to reason Defendant knows his post-sentence rights and, in any event, was clearly advised of those rights in this case at the time of his sentencing, including his right to file post-sentence motions and to take an appeal. (N.T., 12/16/21, pp. 19-22). Unlike in Commonwealth v. Bennett, 930 A.2d 1264 (Pa. 2007), Defendant never testified that he was unaware of his appellate rights or that he ever requested his trial counsel to file a direct appeal which counsel failed to do such that he was deprived of the review to which he was entitled. The burden was on Defendant to prove the facts upon which his claim of counsel's ineffectiveness is predicated were "unknown" to him, that he could not have ascertained them earlier through the exercise of "due diligence," and that he filed his Petition within one year of discovering such facts. None of this was proven by Defendant. Defendant has not established that the "facts" upon which his claim is based could not have been ascertained earlier through due diligence.

[16] We understand that since Commonwealth v. Shiloh, 170 A.3d 553 (Pa.Super. 2017), was decided, the Pennsylvania Supreme Court in Commonwealth v. Small, 238 A.3d 1267, 1286 (Pa. 2020), "disavow[ed] the public records presumption" entirely. Still, even if the existence of Section 6138(a)(5)(i) of the Parole Code is viewed as a "fact" within the meaning of Section 9545(b)(1)(ii) of the PCRA, and not as a rule of law, the public nature and ability to access statutory law plays into the due diligence analysis. Small, 238 A.2d at 1286. Defendant has failed to explain why, notwithstanding his access to legal materials and resources while at SCI Houtzdale – including, perhaps, the assistance of "jailhouse lawyers" at the Institution, his use of the Institution's law library, or legal research via the internet or otherwise – as is evident from legal arguments and citations contained within his *pro se* PCRA Petition, he was unable to learn about the existence of Section 6138 earlier through the exercise of due diligence and its relevance to the new sentence he received.