

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 335-2004
	:	CRIMINAL DIVISION
BARCAR FELDER,	:	APPEAL
Defendant	:	

**SUPPLEMENTAL OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH
RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

On June 17, 2010, this Court filed an Opinion in Support of its Order dated February 17, 2010. This Court's Order of February 17, 2010, dismissed the Defendant's PCRA Petition as untimely pursuant to 42 Pa.C.S. 9545. However, the Court believes that its dismissal of the Defendant's PCRA Petition may have been erroneous.

The Court dismissed the Defendant's PCRA Petition as untimely without appointing counsel to represent the Defendant. Pa.R.Crim.P. 904 states "Except as provided in paragraph (H), when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, the judge shall appoint counsel to represent the defendant on the defendant's first petition for post-conviction collateral relief." Pa.R.Crim.P. 904(C). The court in Commonwealth v. Smith, 818 A.2d 494, 499 (2003) interpreted Pa.R.Crim.P. 904(C) to mean

Even though the timeliness requirements of the PCRA leave a court without jurisdiction to consider the **merits** of an untimely petition, they do not preclude a court from appointing counsel to aid an indigent petitioner in attempting to establish an exception to the time-bar. Although the PCRA court determines the issue of timeliness prior to reaching the merits of a PCRA petition, the PCRA court is not divested of its jurisdiction until it analyzes the facts and makes the determination that the petition is time-barred. Therefore, an indigent petitioner, who files his first PCRA petition, is entitled to have counsel appointed to represent him during the determination of whether any of the exceptions to the one-year time limitation apply.

The Defendant in this case attempted to demonstrate that his case was subject to one of the timeliness exceptions enumerated in 42 Pa.C.S. 9545(b)(1)(i)-(iii). Therefore, the Defendant should have had counsel appointed to assist him. See Smith at 500.

Therefore, as the Court failed to appoint counsel to represent the Defendant during the determination of whether any of the exceptions to the one year limitation applied to his case, the Court respectfully requests to have the Defendant's case remanded so that the Court may appoint counsel and enable the Defendant to fully explore his rights under the Post Conviction Relief Act.

DATE: _____

Respectfully Submitted,

Nancy L. Butts, President Judge

xc: DA
Barcar Felder 55272-019
FCI-Fairton
P.O. Box 420
Fairton, NJ 08320
Amanda Browning, Esq. (Law Clerk)
Gary L. Weber (LLA)