

IN THE COURT OF COMMON PLEAS OF _____ COUNTY, CRIMINAL
DIVISION

COMMONWEALTH OF PENNSYLVANIA,) NO. CR-_____-_____
)
vs.)
)
DDD)

AMENDED PETITION FOR POST CONVICTION RELIEF

AND NOW, comes the above-named Defendant, **DDD**, by and through his Counsel, **James Madsen**, Esquire, and respectfully files the following Petition for Post-Conviction Relief and respectfully avers in support as follows:

PROCEDURAL TIMELINE

1. The procedural timeline of all events relative to this petition is as follows:
 - a. June 26, 2000 - Decision in Apprendi v. New Jersey, 530 U.S. 466 (2000)
 - b. September 30, 2003 - Original version of 75 Pa.C.S. § 3806 is signed into law
 - c. February 1, 2004 - Original version of 75 Pa.C.S. § 3806 became effective
 - d. June 17, 2013 - Decision in Alleyne v. United States, 570 U.S. 99 (2013)
 - e. May 25, 2016 - Current version of 75 Pa.C.S. § 3806 is signed into law and became effective immediately
 - f. **Sentence Date** - Defendant was sentenced in this case
 - g. **Sentence Date + 30 days** - Judgement of sentence became final in this case
 - h. May 20, 2020 - Pennsylvania Superior Court decides Commonwealth v. Chichkin, ___ A.3d ___ (Pa. Super. 2020)
 - i. **Date** - Timely notice of appeal filed by Defendant
 - j. **Sentence Date + 13 months** - Deadline for Defendant to file a timely PCRA Petition

ELIGIBILITY FOR RELIEF

2. Defendant is eligible for relief and prays for relief under 42 Pa.C.S.A. § 9543.
3. Defendant is eligible for relief under 42 Pa.C.S.A. § 9543(a)(1)(i) in that (s)he has been convicted of a crime under the laws of this Commonwealth and is currently serving a sentence of imprisonment, probation or parole for said crime(s).
4. Defendant is eligible under 42 Pa.C.S.A. § 9543(a)(2)(i) in that:
 - a. (S)he was convicted and sentenced pursuant to Title 75 Pa.C.S. § 3806(a) which unconstitutionally defines ARD as “prior offense” and treats ARD as a prior conviction in violation of the Due Process Clause as set forth in Apprendi & Alleyne.
 - b. As such, no reliable adjudication of guilt or innocence took place as the issue of whether (s)he had a “prior offense” was never questioned and is unsupported by facts.
5. Defendant is eligible under 42 Pa.C.S.A. § 9543(a)(2)(ii) in that Attorney TTT was ineffective in that (s)he:
 - a. Advised Defendant that prior acceptance, prior admission, and/or prior completion of ARD alone constituted a “prior offense” and/or conviction under Title 75 Pa.C.S. § 3806(a) without regard for the United States Supreme Court decisions in Apprendi & Alleyne.
 - b. Failed to inform Defendant of Defendant’s right to a jury trial under the United States Supreme Court decisions in Apprendi & Alleyne. (For Ungraded Misdemeanor DUI convictions with ARD “priors”)
 - c. Failed to inform Defendant that Defendant’s sentence was illegal under the

United States Supreme Court decisions in Apprendi & Alleyne.

- d. Failed to inform Defendant of their right to appeal their conviction, predicated on ARD as a prior offense, and failed to preserve such issue.
6. Defendant is eligible under 42 Pa.C.S.A. § 9543(a)(2)(vii) in that the sentence imposed upon him/her is without statutory authority.
7. Defendant is eligible under 42 Pa.C.S.A. § 9543(a)(3) in that he asserts ineffective assistance of counsel and an illegal sentence, errors not previously litigated or waived.
8. Defendant is eligible under 42 Pa.C.S.A. § 9543(a)(4) in that Attorney TTT cannot have any rational, strategic, or tactical basis for his actions and inactions in light of well establish law.

JURISDICTION

9. This Honorable Court has jurisdiction pursuant to 42 Pa.C.S.A. § 9545, specifically jurisdiction is established by 42 Pa.C.S.A. § 9545(b)(1), as this petition was filed within one year from the date the judgment against Defendant became final.

FACTUAL BACKGROUND

10. Paragraphs 1 through 9 are incorporated hereto by reference.
11. Defendant was arrested on _____ and charged with _____.
12. Defendant plead guilty to _____ on _____ upon the advice of counsel that prior acceptance, prior admission and/or prior completion of ARD alone constituted a “prior offense” and/or conviction under Title 75 Pa.C.S. § 3806(a) without

regard for the United States Supreme Court decisions in Apprendi & Alleyne.

13. Defendant was sentenced on _____ to _____ days to _____ months.

14. Defendant's mandatory minimum sentence was increased from _____ days to _____ days based solely on his prior acceptance of ARD.

15. Defendant's statutory maximum sentence and actual maximum sentence was increased from _____ months to _____ years, based solely on his/her prior acceptance of ARD.

16. **Defendant was denied the right to a jury trial which was to be afforded him/her under the United States Supreme Court decisions in Apprendi & Alleyne. (For Ungraded Misdemeanor DUI convictions)¹**

17. No facts sufficient to support the element of a prior offense were placed upon the record.

18. Trial counsel failed to argue the clear unconstitutionality of Title 75 Pa.C.S. § 3806(a) under the United States Supreme Court decisions in Apprendi & Alleyne.

ARGUMENT

A. Illegal Sentence

19. Defendant's sentence lacks statutory authority as (s)he was illegally sentenced to a mandatory minimum sentence pursuant to a statute rendered unconstitutional by Alleyne v. United States, 133 S.Ct. 2151 (2013) as clarified by Commonwealth v. Chichkin, ___ A.3d ___ (Pa. Super. 2020), Title 75 Pa.C.S. § 3806(a).

¹ Both Defendant's in Chichkin were convicted of ungraded misdemeanors and were not afforded a jury trial as has long been the practice in Pennsylvania. Nonetheless, Chichkin held that they were entitled to a jury trial under Alleyne.

20. Defendant's sentence lacks statutory authority as (s)he was illegally sentenced to an increased statutory maximum sentence pursuant to a statute that is *void ab initio* under Apprendi v. New Jersey, 530 U.S. 466 (2000) as clarified by Commonwealth v. Chichkin, ___ A.3d ___ (Pa. Super. 2020), Title 75 Pa.C.S. § 3806(a). **(not applicable to all cases)**

21. Pennsylvania has long recognized that ARD is not a prior conviction. See Commonwealth v. Lutz, 508 Pa. 297 (1985).

22. As of June 26, 2000, the date of the United States Supreme Court decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), any fact, other than a prior conviction, that increases the statutory maximum penalty of an offense must be proven beyond a reasonable doubt and submitted to a jury.

23. On September 30, 2003, 75 Pa.C.S. § 3806 was codified along with 75 Pa.C.S. § 3804, which, in combination, purported to increase the statutory maximum sentence of a certain DUI offenses beyond that of the base 6 month maximum based upon mere acceptance of ARD.

24. The mere characterization of ARD as a "prior offense" by the legislature does not define the character of an ARD disposition and does not put it outside the bounds of Apprendi. See Commonwealth v. Chichkin, ___ A.3d ___ (Pa. Super. 2020) FN9; Apprendi, 530 U.S. at 496 (2000).

25. Therefore, the provisions of 75 Pa.C.S. § 3806 and 75 Pa.C.S. § 3804 which purport to classify the mere acceptance of ARD as a "prior offense" and thus treat it as a prior conviction are *void ab initio* because they may unconstitutionally increase statutory maximums. See, in contrast, Commonwealth v. Ciccone, 152 A.3d 1004 (Pa.

Super. 2016) (Where a statute was constitutional at the time of its inception and when sentence was imposed based upon it, it is not void ab initio.)

26. As of June 13, 2013, the date of the United States Supreme Court decision in Alleyne v. United States, 133 S.Ct. 2151 (2013), any fact, other than a prior conviction, that increases the mandatory minimum sentence must be proven beyond a reasonable doubt and submitted to a jury.

27. On May 25, 2016, 75 Pa.C.S. § 3806 was amended, then, and now, in contravention of both Apprendi & Alleyne.

28. Therefore, the provisions of 75 Pa.C.S. § 3806 and 75 Pa.C.S. § 3804 which purport to classify the mere acceptance of ARD as a “prior offense” and thus treat it as a prior conviction are *void ab initio* because they may unconstitutionally increase mandatory minimums. See, in contrast, Commonwealth v. Ciccone, 152 A.3d 1004 (Pa. Super. 2016) (Where a statute was constitutional at the time of its inception and when sentence was imposed based upon it, it is not void ab initio.)

B. Ineffective Assistance of Counsel

29. Trial Counsel was ineffective for failing to raise and preserve the above-mentioned arguments regarding the illegality of sentence.

30. **FOR 2nd OFFENSE LOW AND MIDTIER DUIs BASED UPON PRIOR ARD –**
Trial Counsel was ineffective for advising Defendant that (s)he did not have a right to a jury trial, a right clearly and unequivocally provided for by Apprendi v. New Jersey, 530 U.S. 466 (2000) when the Commonwealth seeks increase the statutory maximum of an offense based upon an alleged fact other than a prior conviction.

31. Trial Counsel was ineffective for advising Defendant that (s)he did not have a

right to a jury trial, a right clearly and unequivocally provided for by Alleyne v. United States, 133 S.Ct. 2151 (2013), which provides that any fact, other than a prior conviction, that increases the mandatory minimum sentence must be proven beyond a reasonable doubt and submitted to a jury.

32. Trial Counsel was ineffective for informing Defendant that ARD, alone, constituted a “prior offense” for the purposes of recidivism enhancements to the mandatory minimum and statutory maximum.

33. Trial Counsel was ineffective for informing Defendant that ARD, alone, constituted a prior conviction for the purposes of recidivism enhancements to the mandatory minimum and statutory maximum.

C. Retroactivity or Lack thereof

34. It is expected that the Commonwealth will assert a lack of retroactivity and the issue is therefore addressed herein.

35. Defendant incorporates all previous paragraphs into this argument, and argues that 75 Pa.C.S. § 3806 is void ab initio.

36. Should this Honorable Court fail to determine that 75 Pa.C.S. § 3806 is void ab initio, Defendant is nonetheless entitled to relief.

Retroactivity & Mandatory Minimums under Alleyne

37. Defendant’s relief is predicated on Alleyne.

38. Alleyne renders Defendant’s sentence illegal.

39. Any Defendant, whose sentence is illegal under Alleyne is entitled to relief in a timely petition for post-conviction relief. Commonwealth v. DiMatteo, 644 Pa 463 (2018); Commonwealth v. Rivera, 154 A.3d 370 (Pa. Super. 2017) FN14;

Commonwealth v. Ruiz, 131 A.3d 54, 59-60 (Pa. Super. 2015); Commonwealth v. Vasquez-Santana, 2015 WL 6746574 FN7 (Pa. Super. 2015, unpublished)

40. Retroactivity is not at issue when a sentence is illegal under Alleyne and the judgement of sentence in the case at issue became final after Alleyne was decided.²

Commonwealth v. DiMatteo, 644 Pa 463 (2018); Commonwealth v. Rivera, 154 A.3d 370 (Pa. Super. 2017) FN14; Commonwealth v. Ruiz, 131 A.3d 54, 59-60 (Pa. Super. 2015); Commonwealth v. Vasquez-Santana, 2015 WL 6746574 FN7 (Pa. Super. 2015, unpublished)

41. As Defendant's sentence is illegal under Alleyne, Defendant's instant PCRA petition is timely filed and (s)he was sentenced after the Alleyne decision, (s)he is entitled to relief.

D. Guilty Plea Does Not Bar Relief

42. The fact that Defendant's conviction and sentence stem from a guilty plea does not in any way bar relief. Commonwealth v. Rivera, 154 A.3d 370 (Pa. Super. 2017) (Where trial counsel failed to discuss, sua sponte, non-frivolous appealable issues with defendant, even subsequent to a well reasoned and advantageous guilty plea, defendant is entitled to relief under PCRA); Commonwealth v. Patterson, 143 A.3d 394 (Pa. Super. 2016) (Where defendant plead guilty without trial counsel informing him of pending appellate litigation directly applicable to his or her case, defendant is eligible for PCRA relief despite guilty.); Commonwealth v. Melendez-Negron, 123 A.3d 1087 (Pa. Super. 2015) (Trial counsel found ineffective for allowing defendant to plead

² It is of note that some cases classify relief as retroactive as of the date of Alleyne while other cases deem the application not retroactive at all since Alleyne was the law at the time the Defendant was sentenced. Despite the semantics, the result is the same.

guilty and accept a sentencing enhancement rendered illegal by Alleyne and defendant therefore was entitled to PCRA relief.)

CONCLUSION

Based upon the foregoing, Defendant prays this Honorable Court resentence him/her to a legal sentence should It find the currently imposed sentence illegal and/or grant him/her a new trial should It find trial counsel ineffective.

RESPECTFULLY SUBMITTED,

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