

CHALLENGING THE DISCRETIONARY ASPECTS OF A SENTENCE IN PENNSYLVANIA: *COMMONWEALTH V. MASTROMARINO*

CRIMINAL LAW — SENTENCING AND PUNISHMENT — The Superior Court of Pennsylvania held that: (1) Mastromarino failed to raise a substantial question as to why the consecutive nature of his aggregate sentence was contrary to the Sentencing Code; (2) Mastromarino did raise a substantial question that the disparity between his sentence and that of his co-defendants was contrary to the Sentencing Code; and (3) the sentencing court did not abuse its discretion and amply explained the reasons for the disparity between Mastromarino’s sentence and the co-defendants’ sentences.

Commonwealth v. Mastromarino, 2 A.3d 581 (Pa. Super. Ct. 2010).

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I. THE *MASTROMARINO* DECISION

In 2002, Michael Mastromarino (“Mastromarino”) founded a business which sold tissue harvested from cadavers to tissue banks throughout the United States.¹ He began harvesting tissue without permission from the deceased, or the deceased’s next of kin, at funeral homes in New York and New Jersey.² He would then reassemble the cadaver using artificial materials so as to conceal the harvesting.³

In 2004, Mastromarino entered into an arrangement with Liberty Crematory (“Liberty”) located in Philadelphia, Pennsylvania.⁴ Mastromarino paid Liberty \$1000 per cadaver from

1. *Commonwealth v. Mastromarino*, 2 A.3d 581, 583 (Pa. Super. Ct. 2010). In 2002, after his dental license was taken away due to unconnected criminal charges, Mastromarino began a business called Biomedical Tissue Service (“BTS”). *Mastromarino*, 2 A.3d at 583. BTS sold human tissue from corpses to tissue banks throughout the United States. *Id.*

2. *Id.*

3. *Id.* For example, Mastromarino would reconstruct cadavers using PVC pipe. *Id.*

4. *Id.* The owners of Liberty Crematory were Louis Garzone, James McCafferty and Gerald Garzone. *Id.*

which tissue was to be harvested.⁵ Additionally, he forged consent forms, medical history forms, and identity forms in order to give the illusion of conformity with tissue industry standards.⁶ Mastromarino also altered blood samples and blood sample labels, thus falsely depicting that the tissue was tested and infectionless.⁷

In July 2005, the State of New York and the United States Food and Drug Administration (“FDA”) began an investigation into Mastromarino’s affairs.⁸ Mastromarino continued to conduct business with Liberty during this time.⁹ In September 2005, he destroyed his company’s records and tried to convince Liberty to burn down its entire business.¹⁰ In the end, Mastromarino harvested and sold tissue from 244 cadavers supplied by Liberty.¹¹

On August 29, 2008, in the Court of Common Pleas of Philadelphia County, Mastromarino pled guilty to 1,353 separate counts.¹² The charges against him included corrupt organization, conspiracy, theft by unlawful taking, deceptive business practices, and abuse of a corpse.¹³ On October 22, 2008, the sentencing court imposed an aggregate sentence of twenty-five to fifty-eight years in prison.¹⁴ This sentence was to run concurrently with the eighteen to forty-four year prison sentence that he was currently serving in New York.¹⁵ The sentencing

5. *Id.* In lieu of reassembling the cadavers, Mastromarino wanted to burn the cadavers after harvesting, so he tried to find a funeral director with a crematory. *Id.*

6. *Mastromarino*, 2 A.3d at 583.

7. *Id.* It was later revealed that some of the tissue was infected with H.I.V. and hepatitis. *Id.* Additionally, tissue was harvested from cadavers outside the industry’s recommended time period after death. *Id.* Doctors unknowingly transplanted the diseased and unsuitable tissues into patients. *Id.*

8. *Id.* at 583-84.

9. *Id.* at 584.

10. *Id.* Liberty Crematory was not burned down. *Id.*

11. *Mastromarino*, 2 A.3d at 584. Neither Mastromarino, nor Liberty ever received consent to harvest the tissue from the 244 cadavers. *Id.* Liberty received \$245,000 from Mastromarino for providing cadavers for tissue harvesting and its subsequent destruction of the cadavers. *Id.* Mastromarino received \$1,105,751 from unaware tissue banks to which the stolen tissue was sold. *Id.*

12. *Id.* On May 4, 2006, Mastromarino was arrested after the Grand Jury advised that charges be filed. *Id.*

13. *Id.* at 583.

14. *Id.* at 584.

15. *Id.* Mastromarino had been convicted and was serving a sentence in New York for similar crimes. *Id.*

court's combined sentence was as follows: one count of corrupt organization,¹⁶ adding one to six years; one count of criminal conspiracy, adding one to six years; six to twelve months for two hundred forty-four counts of theft by unlawful taking with thirty-two counts to run consecutively, adding sixteen to thirty-two years; six to twelve months for four counts of deceptive business practices with all four counts to run consecutively, adding two to four years; and six to twelve months for seventeen counts of abuse of a corpse with fifteen of the counts to run consecutively, adding five to ten years.¹⁷ Mastromarino appealed to the Superior Court of Pennsylvania, challenging the discretionary aspects of his sentence.¹⁸

The issue before the superior court was whether the sentencing court abused its sentencing discretion based on: (1) the consecutive nature of the sentencing court's aggregate sentence;¹⁹ and (2) the purported disparity between Mastromarino's sentence and that of his co-defendants.²⁰ As there is no automatic entitlement to an appeal with respect to the discretionary component of sentencing, the appellate court began by applying a four-part analysis to each of the two issues raised in Mastromarino's petition in order to determine if the appeal was warranted.²¹ The court concluded the first issue—the consecutive nature of the aggregate

16. 18 PA. CONS. STAT. ANN. § 911 (West 2010).

17. *Mastromarino*, 2 A.3d at 584-85. Mastromarino forfeited \$300,000 to New York for restitution and Pennsylvania sought no further restitution for the crimes. *Id.* at 585.

18. *Id.*

19. *Id.*

20. *Id.* at 589. Mastromarino and the Garzone brothers were sentenced by the same judge and at the same sentencing hearing. *Mastromarino*, 2 A.3d at 589. Mastromarino, however, received a longer sentence than his co-defendants. *Id.*

21. *Id.* at 585. The four-part analysis consists of:

(1) whether appellant filed a timely notice of appeal; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence; (3) whether appellant's brief has a fatal defect; and (4) whether a substantial question that the sentence appealed from is not appropriate under the Sentencing Code.

Id. (citing *Commonwealth v. Cook*, 941 A.2d 7, 11 (Pa. Super. Ct. 2007)). The Commonwealth contended that Mastromarino's brief did not conform with Pa. R. App. P. 2119(f), which requires "an appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence." (*see* Pa. R. App. P. 2119(f) (West 2010)). *Id.* at 586. The appellate court granted Mastromarino's motion to amend his brief. *Id.*

sentence—did not pass the four-part test, because it did not raise a substantial question in opposition to the Sentencing Code.²² Conversely, the court concluded the second issue—the disparity between the sentences of the co-defendants—did raise a substantial question and warranted review.²³ On review, the court analyzed the rationale behind the sentence disparity and whether the sentencing court properly conveyed its rationale to each defendant.²⁴ Based on its analysis of the record, the appellate court determined that the second issue on appeal was without merit because the sentencing court adequately outlined and explained its reasons to each defendant.²⁵ Ultimately, the appellate court held that the sentencing court had not abused its sentencing discretion.²⁶

II. THE HISTORY BEHIND THE *MASTROMARINO* DECISION

A petitioner is not automatically entitled to an appeal when he challenges the discretionary aspects of his sentence.²⁷ *Commonwealth v. Anderson* makes it clear that a sentence will not be reversed on appeal unless the sentencing court abused its discretion.²⁸

22. *Mastromarino*, 2 A.3d at 589. The appellate court concluded the sentence was neither “grossly disparate to Mastromarino’s conduct, nor did it ‘viscerally appear as patently unreasonable.’” *Id.* (quoting *Commonwealth v. Gonzalez-Dejusis*, 994 A.2d 595, 599 (Pa. Super. Ct. 2010)).

23. *Id.* (quoting *Commonwealth v. Krysiak*, 535 A.2d 165, 167 (Pa. Super. Ct. 1987)).

24. *Id.* at 589-91. Using the sentencing court’s record, the appellate court examined whether the sentencing court provided particular reasons to each defendant explaining why they received their individual sentences. *Mastromarino*, 2 A.3d at 589.

25. *Id.* at 589, 591. The appellate court determined that the sentencing court provided each defendant with a sufficient explanation as to the particular reasons why each received their individual sentence. *Id.* at 589. The appellate court evidenced those reasons by citing the sentencing court’s record throughout its opinion. *Id.* at 589-91. For example, the sentencing court labeled Mastromarino as the “architect of a scheme that most of us can’t contemplate.” *Id.*

26. *Id.* at 591. The court affirmed the sentence imposed by the sentencing court. *Id.*

27. *Cook*, 941 A.2d at 7, 11 (citing *Commonwealth v. Marts*, 889 A.2d 608, 611 (Pa. Super. Ct. 2005)). *Cook* challenged the discretionary aspect of his sentence. *Id.* *Cook* pled guilty to two counts of driving under the influence of alcohol (“DUI”). *Id.* at 10. He challenged the prior record score used in determining his sentence. *Id.* at 11. The court used *Cook*’s past DUI convictions in calculating his prior record score. *Id.* *Cook* claimed that the court erred in its calculation. *Cook*, 941 A.2d at 11.

28. *Commonwealth v. Anderson*, 830 A.2d 1013, 1018 (Pa. Super. Ct. 2003).

Therefore, any challenge is more aptly termed a petition for allowance of appeal.²⁹ In *Commonwealth v. Cook*, the Superior Court of Pennsylvania established a four-part test used in determining when to grant said allowance.³⁰ The court examines whether: (1) the notice of appeal was filed on time;³¹ (2) the issue was preserved during sentencing or in a post-sentence motion;³² (3) the brief contains the required statement explaining the grounds for an allowance of appeal;³³ and (4) a substantial question exists that the sentence was not proper under the Sentencing Code.³⁴

In 1995, the Superior Court of Pennsylvania in *Commonwealth v. Hoag* addressed the fourth prong of the *Cook* test when it considered whether a court's imposition of consecutive rather than concurrent sentences created a substantial question.³⁵ The court held that it did not.³⁶

29. *Cook*, 941 A.2d at 11 (see 42 PA. CONS. STAT. ANN § 9781(b) (West 2010)). In allowance of appeal,

the defendant or the Commonwealth may file a petition for allowance of appeal of the discretionary aspects of a sentence for a felony or a misdemeanor to the appellate court that has initial jurisdiction for such appeals. Allowance of appeal may be granted at the discretion of the appellate court where it appears that there is a substantial question that the sentence imposed is not appropriate under this chapter.

42 PA. CONS. STAT. ANN. § 9781(b).

30. *Cook*, 941 A.2d at 11 (citing *Anderson*, 830 A.2d 1013, 1016).

31. *Id.* (see Pa. R. App. P. 902, 903(a) (West 2010)). The Rule requires “filing a notice of appeal with the clerk of the lower court.” Pa. R. App. P. 902. The notice of appeal must be filed “within 30 days after entry of the order from which the appeal is taken.” Pa. R. App. P. 903(a).

32. *Id.* (see Pa. R. Crim. P. 720(B)(1)(c), (B)(1)(a)(v) (West 2010)).

33. *Id.* (see Pa. R. App. P. 2119(f)). The rule states, “An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence.” Pa. R. App. P. 2119(f)). The court stated, “At a minimum, the . . . statement must articulate what particular provisions of the code is violated, what fundamental norms the sentence violates, and the manner in which it violates the norm.” *Mastromarino*, 2 A.3d at 586-87 (citing *Commonwealth v. Bullock*, 948 A.2d 818, 826 n.6 (Pa. Super. Ct. 2008); and *Commonwealth v. Feucht*, 955 A.2d 377, 384 (Pa. Super. Ct. 2008)).

34. *Cook*, 941 A.2d at 11. The court stated, “A substantial question will be found where an appellant advances a colorable argument that the sentence imposed is either inconsistent with a specific provision of the Sentencing Code or is contrary to the fundamental norms which underlie the sentencing process.” *Mastromarino*, 2 A.3d at 585-86. (citing *Bullock* 948 A.2d at 826 n.6; *Feucht*, 955 A.2d at 383-384; and *Commonwealth v. Horaman*, 920 A.2d. 1282, 1284 (Pa. Super. Ct. 2007)).

35. *Commonwealth v. Hoag*, 665 A.2d 1212, 1214 (Pa. Super. Ct. 1995). Hoag was convicted and sentenced for drug-related offenses. *Hoag*, 665 A.2d at 1214. The court saw “no reason why Hoag should be afforded a ‘volume discount’ for his crimes by having all sentences run concurrently.” *Id.* (citing *Commonwealth v. Anderson*, 650 A.2d. 20, 22 (Pa. 1994)).

36. *Id.*

Fifteen years later, the Pennsylvania Superior Court once again examined this issue in *Commonwealth v. Gonzalez-Dejusus*.³⁷ Gonzalez-Dejusus claimed that he should have been given concurrent sentences, because his various crimes arose out of one unbroken spree.³⁸ The court reaffirmed its holding in *Hoag* when it concluded that Gonzalez-Dejusus' claim did not raise a substantial question.³⁹ Citing *Commonwealth v. Marts*,⁴⁰ the court reiterated that a substantial question is not generally raised by the imposition of consecutive sentences versus concurrent sentences.⁴¹ In *Commonwealth v. Graham*, the Supreme Court of Pennsylvania clarified that courts have discretion to impose confinement sentences concurrently or consecutively pursuant to section 9721(a) of the Sentencing Code.⁴² In Pennsylvania, this has been a long-standing rule, and any challenges to its exercise generally will not raise a substantial question.⁴³

37. *Gonzalez-Dejusus*, 994 A.2d 595, 598.

38. *Id.* at 598-99. Based on crimes that occurred over the course of a single day, Gonzalez-Dejusus was sentenced consecutively with "two counts of kidnapping to facilitate a felony, two counts of robbery-threatening serious injury, one count of robbery of a motor vehicle, two counts of recklessly endangering another person, and two counts of criminal conspiracy." *Id.* at 597.

39. *Id.* at 599. The court stated that "appellant appears to seek a 'volume discount' because the various crimes occurred in one continuous spree. This is simply not a challenge . . . raising a substantial question." *Id.* (citing *Commonwealth v. Jones*, 942 A.2d 903 (Pa. Super. Ct. 2008)).

40. *Marts*, 889 A.2d 608. Marts claimed that the sentencing court erred when it imposed consecutive, rather than concurrent, sentences on two of his four robberies. *Id.* at 612.

41. *Gonzalez-Dejusus*, 994 A.2d at 598 (but see *Commonwealth v. Dodge*, 859 A.2d 771 (Pa. Super. Ct. 2004)).

42. *Commonwealth v. Graham*, 661 A.2d 1367, 1373 (Pa. 1995). Graham was sentenced to death on six murder convictions and life imprisonment on a seventh conviction. *Graham*, 661 A.2d at 1371. The death sentence was to run consecutively with the life imprisonment. *Id.* The Pennsylvania Supreme Court vacated sentence of life imprisonment imposed for the seventh murder conviction. *Id.* at 1374. The court held that a death sentence could not be imposed consecutively to other sentences. *Id.* Section 9721(a) states:

In determining the sentence to be imposed the court shall . . . consider and select one or more of the following alternatives, and may impose them consecutively or concurrently: (1) An order of probation; (2) A determination of guilt without further penalty; (3) Partial confinement; (4) Total confinement; (5) A fine; (6) County intermediate punishment; (7) State intermediate punishment.

42 PA. CONS. STAT. ANN. § 9721(a)(1)-(7) (West 2010).

43. *Hoag*, 665 A.2d at 1214.

An exception to this general rule can be found in *Commonwealth v. Dodge* (“*Dodge I*”).⁴⁴ Defendant Dodge challenged the extreme nature of his sentence due to the imposition of consecutive sentences.⁴⁵ He was convicted on multiple counts of receiving stolen property, two counts of burglary, criminal trespass, possession of a small amount of marijuana, possession of drug paraphernalia, and unauthorized use of a motor vehicle.⁴⁶ Dodge ultimately received a total sentence of 58 ½ to 124 years.⁴⁷

The Pennsylvania Superior Court determined that Dodge’s challenge *did* raise a substantial question.⁴⁸ The court clarified that in no way did its determination establish a new general rule encompassing all challenges to consecutive sentences.⁴⁹ It explained that each case is unique, and sentence challenges will be explored on a case-by-case basis.⁵⁰ Here, the court compared Dodge’s crimes to the sentence he received,⁵¹ determining that the consecutive aspect of Dodge’s combined sentence made it extreme, and therefore, patently unreasonable.⁵² The sentence was vacated and the matter was remanded back to the sentencing court.⁵³ However, prior to remand, the issue was presented to the Pennsylvania Supreme Court for consideration.⁵⁴ The supreme court vacated the superior court’s order, and remanded the case for review consistent with its recent decision in *Commonwealth v. Walls*.⁵⁵

44. *Dodge*, 859 A.2d 771.

45. *Id.* at 776.

46. *Id.* at 773.

47. *Id.*

48. *Id.*

49. *Dodge*, 859 A.2d at 782.

50. *Id.*

51. *Id.* at 781, 782, 784. The crimes committed were “all property crimes, many of which involved property of little value.” *Id.* at 781. There were no “crimes against a person, and the two burglary convictions involved no violence involving a person.” *Id.*

52. *Id.* at 782, 784.

53. *Id.* at 784.

54. *Commonwealth v. Dodge*, 935 A.2d 1290 (Pa. 2007).

55. *Dodge*, 935 A.2d at 1291 (*see Commonwealth v. Walls*, 926 A.2d 957 (Pa. 2007)). Walls molested his seven-year-old granddaughter. *Walls*, 926 A.2d at 959. He “pled guilty to one count of rape of a victim less than thirteen-years-old; one count of involuntary deviate sexual intercourse (“IDSI”) with a victim less

In *Walls*, the Pennsylvania Supreme Court found that the superior court exceeded its standard of review when it made its own legal conclusions and vacated the sentence issued by the sentencing court.⁵⁶ The court claimed that section 9781(c)(3) of the Sentencing Code clearly states that an appellate court may vacate and remand a sentence if the sentence was outside of the Sentencing Guidelines (“Guidelines”) and is unreasonable.⁵⁷ In its review to determine unreasonableness, the appellate court must apply the factors set forth in section 9781(d).⁵⁸

On remand, the Superior Court of Pennsylvania reconsidered *Dodge* (“*Dodge II*”) in light of the Pennsylvania Supreme Court’s decision in *Walls*.⁵⁹ The court made a clear distinction between *Walls* and *Dodge II*.⁶⁰ Whereas the sentence in *Walls* was outside the Guidelines, the sentence in *Dodge II* was within the Guidelines.⁶¹ Therefore, the *clearly unreasonable* standard of section 9781(c)(2) applies, not the *unreasonable* standard of section 9781(c)(3) from *Walls*.⁶²

than thirteen-years-old, and one count of incest.” *Id.* *Walls* received the consecutive maximum sentences for the rape and IDSI, which were outside the standard ranges of the sentencing guidelines. *Id.* at 960. The sentencing court considered: “(1) *Walls*’ position of trust; (2) the age of the victim; (3) *Walls*’ relationship to the victim; and (4) *Walls* believed his conduct was accidental, not deliberate.” *Id.*

56. *Walls*, 926 A.2d at 968. The Pennsylvania Superior Court claimed that sentences should be based on: “(1) minimum confinement consistent with the gravity of the offense; (2) the need for public protection; and (3) the defendant’s need for rehabilitation.” *Id.* at 960. Additionally, the Superior Court of Pennsylvania concluded that “the sentencing court must, if it imposes a sentence that deviates significantly from the guideline recommendation, demonstrate that the case is compellingly different from the typical case of the same offense.” *Id.* The superior court concluded that the sentencing court “is not free to reject the Sentencing Commission’s assessment of an appropriate sentence and simply interpose its own sense of punishment.” *Id.*

57. *Id.* at 963. Per 42 PA. CONS. STAT. ANN. § 9781(c)(3) (West 2010), “the appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds: the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.” *Id.*

58. *Id.* Pursuant to 42 PA. CONS. STAT. ANN. § 9781(d) (West 2010), the appellate shall consider the following when determining unreasonableness:

- 1) The nature and circumstances of the offense and the history and characteristics of the defendant.
- 2) The opportunity of the sentencing court to observe the defendant, including any pre-sentence investigation.
- 3) The findings upon which the sentence was based.
- 4) The guidelines promulgated by the commission.

Walls, 926 A.2d at 963. Based on common usage, the court defined unreasonable as “irrational or not guided by sound judgment.” *Id.*

59. *Commonwealth v. Dodge*, 957 A.2d 1198 (Pa. Super. Ct. 2008).

60. *Dodge*, 957 A.2d. at 1200 n.3.

61. *Id.*

62. *Id.* Section 9781(c)(2) states, “the appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds: the sentencing court sentenced within the sentencing guidelines but

Ultimately, the court reached the same conclusion as it did in *Dodge I*.⁶³ The superior court reasoned that the sentence, although within the Guidelines, was excessive and patently unreasonable.⁶⁴

Historically, a challenge to the imposition of concurrent confinement sentences generally will not raise a substantial question.⁶⁵ The court may, however, find that a substantial question is raised where the appellant avers that his sentence is inconsistent with that of his co-defendant/s.⁶⁶ In *Commonwealth v. Cleveland*, the court determined that a substantial question was raised when the appellant's sentence was two and half times larger than his co-defendant.⁶⁷ A substantial question was also raised in *Commonwealth v. Krysiak*, where the appellant challenged his dissimilar sentence when compared to that of his co-defendant for conviction of the same crimes.⁶⁸ However, in Pennsylvania, there has never been a mandate requiring co-defendants to receive the same sentence.⁶⁹ Additionally, sentence differences are allowable and will not be disturbed if the record reflects adequate reasons for said differences.⁷⁰

the case involves circumstances where the application of the guidelines would be clearly unreasonable.” 42 PA. CONS. STAT. ANN. § 9781(c)(2) (West 2010).

63. *Dodge*, 957 A.2d at 1202. The court vacated and remanded the matter back to the lower court. *Id.*

64. *Id.* The court felt that the total sentence for “non-violent offenses with limited financial impact” was excessive and an abuse of discretion. *Id.* Based on *Dodge*'s age, the court considered the imposed sentence to be a life sentence. *Id.*

65. *Hoag*, 665 A.2d at 1214; and *Gonzalez-DeJesus*, 994 A.2d at 599.

66. *Commonwealth v. Cleveland*, 703 A.2d 1046, 1048 (Pa. Super. Ct. 1997).

67. *Cleveland*, 703 A.2d at 1048. *Cleveland* was the driver of a vehicle involved in a drive-by shooting, and was convicted of conspiracy, carrying of firearms on a public street, and aggravated assault. *Id.* at 1047. *Cleveland* was sentenced to 25-50 years in prison. *Id.*

68. *Krysiak*, 535 A.2d at 167. *Krysiak* and his co-defendant were sentenced by different judges from the same court. *Id.* at 166. *Krysiak* plead guilty and was sentenced to ten to twenty years of imprisonment for robbery, five to ten consecutive years for criminal conspiracy, and two and a half to five consecutive years for possessing instruments of a crime. *Id.* *Krysiak*'s co-defendant was sentenced to four to eight years of imprisonment for robbery, and four consecutive years of probation for criminal conspiracy. *Id.*

69. *Id.*

70. *Id.* at 166. In *Cleveland*, the record reflected the reasons for the difference in sentence. *Cleveland*, 703 A.2d at 1048. *Cleveland* was found to be indifferent to past rehab, exhibited no remorse, and used drugs and alcohol. *Id.* In *Krysiak*, the court concluded that the record reflected ample reasons, such as, a past felony record. *Krysiak*, 535 A.2d at 167.

III. AN ANALYSIS OF THE *MASTROMARINO* DECISION

In 1974, the Pennsylvania General Assembly (“Assembly”) passed a detailed Sentencing Code for trial judges to use in determining sentences.⁷¹ In 1978, the Pennsylvania Commission on Sentencing (“Commission”) was created to establish the Sentencing Guidelines (“Guidelines”).⁷² The purpose of the Guidelines was to end sentencing disparity and create sentencing consistency.⁷³ In 1982, the Assembly approved the Guidelines created by the Commission.⁷⁴ However, in 1987, the Pennsylvania Supreme Court’s decision in *Commonwealth v. Sessoms* declared the Guidelines to have no force at all.⁷⁵ In response, the Assembly and Commission created the current Guidelines.⁷⁶ In spite of this, the Supreme Court of Pennsylvania’s decision in *Commonwealth v. Walls* reaffirmed that the Guidelines were not binding and do not predominate over other sentencing considerations.⁷⁷

As such, an appellate court will rarely disturb a sentence absent an abuse of discretion⁷⁸ because the sentencing court observes the defendant and is aware of his or her past criminal conduct.⁷⁹ For this reason, it may behoove an uncertain defendant to take a plea bargain, as he or

71. Joseph A. De Sole, *Appellate Review in a Sentencing Guidelines Jurisdiction: The Pennsylvania Experience*, 31 DUQ. L. REV. 479, 481 (1993). Joseph A. De Sole is a former Pennsylvania Superior Court judge. *Id.* at 479.

72. *Id.*

73. *Id.*

74. *Id.* at 490. Pennsylvania was one of the first states to utilize guidelines in sentencing. See Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1141, 1443 (1997).

75. *Commonwealth v. Sessoms*, 532 A.2d 775, 782 (Pa. 1987). The Court determined that the legislative process was violated when a resolution was never presented to the Governor for approval during the passage of the Guidelines. *Id.*

76. De Sole, *supra* note 71, at 491 (see Sentencing Guidelines, 204 PA. CODE § 303 (2010)).

77. *Walls*, 926 A.2d at 964-65.

78. *Id.* at 961. Pennsylvania has a low interference with trial court sentences. Reitz, *supra* note 74, at 1497.

79. De Sole, *supra* note 71, at 493.

she will most likely be bound by an imposed sentence. However, the Guidelines do not encourage guilty pleas because there is no built-in sentence reduction for doing so.⁸⁰

Additionally, a defendant in Pennsylvania does not have a *right* to challenge the discretionary aspects of his or her felony or misdemeanor sentence. Rather, the defendant requests an *allowance* from the appellate court. The appellate court will determine on a case-by-case basis if a substantial question has been raised; it will evaluate whether the appellant's sentence is inappropriate under the Sentencing Code.⁸¹ Finally, Appellate Procedure Rule 2119(f) requires that the appellant's brief contain a concise statement as to why an allowance should be granted by the appellate court.⁸² The rules of appellate procedure clearly permit an appellate court to limit review based on the procedural missteps of the defendant.

Although Mastromarino's appellate brief failed to express an adequate 2119(f) statement, the court granted his allowance of appeal.⁸³ Perhaps there is a rationale behind the court's decision to grant Mastromarino this allowance. In the interest of judicial economy,⁸⁴ it may be prudent to grant an allowance of appeal or leave to amend a brief due to an inadequate 2119(f) statement. If the appeal is denied due to a defective 2119(f) statement, the appellant may have direct appeal rights under the Pennsylvania Post Conviction Relief Act ("PCRA").⁸⁵ If a defendant is convicted of a crime and serving a sentence of imprisonment, probation, or parole for that crime, relief may be sought under the PCRA when the conviction or sentence resulted

80. John H. Kramer & Jeffery T. Ulmer, *Sentencing Guidelines: Lessons from Pennsylvania* 139 (Lynne Rienner Publishers) (2009).

81. See 42 PA. CONS. STAT. ANN. § 9781(b).

82. See Pa. R. App. P. 2119(f).

83. *Mastromarino*, 2 A.3d at 586, n.4. The Commonwealth claimed that Mastromarino's 2119(f) statement, "(1) failed to describe what the guidelines were or where Mastromarino's sentence falls in relation to those guidelines; and (2) does not specify what fundamental norm was violated or the manner of the violation." *Id.*

84. Judicial economy is the "efficiency in the operation of the courts and the judicial system; esp., the efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary's time and resources." BLACK'S LAW DICTIONARY 863 (8th ed. 2004).

85. Pennsylvania Post Conviction Relief Act, 42 PA. CONS. STAT. ANN. § 9541 et seq. (West 2010). The PCRA "provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief." 42 PA. CONS. STAT. ANN. § 9542 (West 2010).

from ineffective assistance from counsel.⁸⁶ If an allowance of appeal is denied due to an inadequate 2119(f) statement, a defendant could argue that his sentence resulted from the ineffectiveness of his counsel to articulate an adequate 2119(f) statement. Hence, an allowance that was denied by the appellate court for procedural reasons may later come before that same court in the form of relief under the PCRA. Therefore, the appellate court should focus more on the substantive matter of the appellant's brief, rather than the procedural requirement of a 2119(f) statement. It seems that the true question is whether an appellant raises a substantial question in his brief—whether the appellant's sentence is inappropriate under the Sentencing Code.

In *Mastromarino*, the court discovered said substantial question within the argument section of Mastromarino's brief, where he claimed a disparity between his sentence and that of his co-defendants. Because a purpose of the Guidelines was to end sentence disparity, it makes sense that an appellate court would consider Mastromarino's claim to raise a substantial question. However, if the sentencing court explains the reasons for the disparity, as it did in *Mastromarino*,⁸⁷ the appellate court will uphold the sentencing court's decision.

The Sentencing Code clearly states that a sentence may be imposed either consecutively or concurrently.⁸⁸ As a result, a challenge to the consecutive nature of a sentence will most likely not raise a substantial question based on the clear authorization within the Sentencing Code. *Mastromarino* is consistent with precedent in finding that a substantial question will

86. 42 PA. CONS. STAT. ANN. § 9543 (West 2010).

87. *Mastromarino*, 2 A.3d at 590. The sentencing court considered Mastromarino to be the mastermind or architect behind the crimes. *Id.*

88. *See* 42 PA. CONS. STAT. ANN. § 9721(a).

rarely be raised by a mere claim that the imposition of consecutive confinement sentences is excessive under the Code.⁸⁹

An attorney should be sure to thoroughly research appellate cases that involve a substantial question, and should likewise be careful to review the appropriate rules of appellate procedure. Comparable cases should be incorporated into the client's 2119(f) statement *and* the argument section of the brief. A misstep or omission could preclude appellate review and prove extremely costly to a defendant.

Edward T. Pollock

89. See *Hoag*, 665 A.2d at 1214; *Gonzalez-DeJesus*, 994 A.2d at 599; and *Marts*, 889 A.2d 608.

