

MARY R. ENNIS

ATTORNEY AT LAW

TELEPHONE & FAX:
(610) 623-9456

612 MASSACHUSETTS AVENUE
ALDAN, PENNSYLVANIA 19018

April 19, 2004

Marilyn L. Holtzapple
Clerk of Courts
York County Court of Common Pleas
28 E. Market Street
York, PA 17401

Re: Commonwealth of PA v. Noel M. Montalvo
York County Court of Common Pleas 753 CA 1999
Supreme Court No. 417 CAP

Dear Ms. Holtzapple:

Please be advised that I represent the Defendant in the above-referenced matter. Enclosed herewith are: original and two copies of the Motion for Leave to Amend the Concise Statement of Matters Complained of on Appeal, and a self-addressed stamped envelope.

Kindly file the motion and please date-stamp one of the copies and return it to me in the envelope provided.

Thank you for your courtesy and assistance in this matter.

Very truly yours,

Mary R. Ennis

cc: Honorable Sheryl Ann Dorney
H. Stanley Rebert, Esq., District Attorney
Amy Zapp, Esq., Deputy Atty. General
Noel Montalvo ✓

Mary R. Ennis, Esq.
612 Massachusetts Avenue
Aldan, PA 19018
(610) 623-9456
Attorney No. 65585

COPY

COUNSEL FOR DEFENDANT

**IN THE COURT OF COMMON PLEAS OF YORK COUNTY
COMMONWEALTH OF PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA

No. 753 CA 1999

vs.

NOEL MATOS MONTALVO,

Supreme Court No. 417 CAP

Defendant

PROPOSED ORDER

AND NOW, this ____ day of _____, 2004, upon consideration of Defendant's Motion for Leave to Amend Concise Statement of Matters Complained of on Appeal, and for good reasons shown therein, the Court hereby ORDERS that said motion is GRANTED.

BY THE COURT:

HONORABLE SHERYL DORNEY, J.

Mary R. Ennis, Esq.
612 Massachusetts Avenue
Aldan, PA 19018
(610) 623-9456
Attorney No. 65585

COPY

COUNSEL FOR DEFENDANT

**IN THE COURT OF COMMON PLEAS OF YORK COUNTY
COMMONWEALTH OF PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA

vs.

No. 753 CA 1999

NOEL MATOS MONTALVO,

Defendant

**MOTION FOR LEAVE TO AMEND CONCISE STATEMENT
OF MATTERS COMPLAINED OF ON APPEAL**

Defendant, NOEL MATOS MONTALVO, by his counsel, Mary R. Ennis, Esq., hereby moves this Honorable Court for leave to amend the "Statement of Issues Pursuant to Pa.R.A.P. 1925(b)," as filed by Frank Arcuri, Esq., on December 18, 2003. In support thereof, Defendant respectfully represents as follows:

A. Factual Background

1. On March 19, 2003, following a jury trial before the Honorable Sheryl Dorney, Defendant was convicted of first degree murder, second degree murder and burglary. The jury then sentenced Defendant to death.

2. Defendant was represented at trial by Francis Cutruzzula, Esq., a member of the

New Jersey Bar, who was admitted in Pennsylvania *pro hac vice* for purposes of this case.

Frank Arcuri, Esq., served as local York County counsel.

3. Defendant's family¹ had retained Mr. Cutruzzula when Defendant was arrested in New Jersey on the instant charges.

4. Defendant's family then retained Mr. Cutruzzula as trial counsel in this matter because counsel indicated to them that he was licensed to practice law in both Pennsylvania and New Jersey, and that he had tried death penalty cases in both states.

5. Neither Defendant nor his family ever contacted or retained the services of Frank Arcuri, Esq. In fact, it was their understanding that Mr. Arcuri was Cutruzzula's associate.²

6. Although Defendant and his family were planning to fire Mr. Cutruzzula at the end of trial and hire another attorney for the appeal, they had Cutruzzula remain on the case because he told them that, without immediate intervention by an attorney, Defendant would be executed within a matter of weeks. They decided to keep Mr. Cutruzzula for fear they might not be able to retain another lawyer in time.

7. When Defendant's family had Cutruzzula stay on the case for the appeal, he was hired -- and paid -- to file post-sentence motions and represent Defendant on direct appeal.

¹ With regard to Defendant's family, his parents and siblings (with the exception of his brother, Milton) are lifelong residents of Puerto Rico and their native language is Spanish. The Defendant himself was born and raised in Puerto Rico, with Spanish being his native language. Although Defendant spent several years in the United States, mainly in York County, his knowledge of and ability to communicate in English are rudimentary, at best.

When Defendant's family hired Mr. Cutruzzula to represent the Defendant, it was their understanding that he was licensed to practice law in both Pennsylvania and New Jersey. In fact, it was not until recently that Defendant and his family were informed that Cutruzzula had only been admitted to the Pennsylvania Bar in order to serve as trial counsel in this particular case, and that Mr. Arcuri was actually the official attorney of record.

² Initially, Defendant and his family advised the undersigned that Francis Cutruzzula, Esq., was defense counsel in this matter. When the undersigned asked them about attorney Arcuri, she was told that Mr. Arcuri was Mr. Cutruzzula's associate.

8. Despite Defendant's repeated attempts to contact Cutruzzula following formal sentencing on April 14, 2003, counsel has not responded to any of Defendant's letters and has refused to accept Defendant's phone calls from prison. Mr. Cutruzzula has also failed to respond to letters and phone calls from Defendant's family in Puerto Rico.

9. Unbeknownst to Defendant or his family, after Mr. Cutruzzula was paid to stay on the case, file post-sentence motions and represent Defendant on direct appeal, he and Mr. Arcuri agreed that Arcuri would handle the appeal instead. When Cutruzzula and Arcuri made these arrangements, neither attorney ever informed Defendant or his family.

10. By letter dated September 9, 2003 (copy attached hereto at Exhibit A), Defendant advised this Court that, despite his many attempts to contact Mr. Cutruzzula, Defendant had had absolutely no communication from counsel. Defendant also informed the Court that Cutruzzula never filed post-sentence motions, as he had been paid to do.

11. On October 15, 2003, Defendant filed a *pro se* motion (copy attached hereto at Exhibit B) in this Court asking that Mr. Cutruzzula withdraw from this case.

12. Sometime in late-December 2003, Defendant received the "Statement of Issues Pursuant to Pa.R.A.P. 1925(b)," along with a letter dated December 19, 2003 from Walter Trayer, paralegal (copy of said letter attached hereto at Exhibit C), advising that Mr. Arcuri had filed the "Statement of Issues."

13. Mr. Arcuri had prepared and filed the "Statement of Issues Pursuant to Pa.R.A.P. 1925(b)" without ever informing Defendant as to the change of counsel. Moreover, Defendant knew nothing about the "Statement of Issues" and was never contacted or consulted during preparation. Defendant had, in fact, been told absolutely nothing regarding the case for which he had been sentenced to death.

14. By letter dated January 12, 2004 (attached hereto at Exhibit D), Defendant again wrote to this Court, asking that his October 15, 2003 *pro se* motion for the withdrawal of defense counsel either be granted or, in the alternative, that this Court grant a hearing on the issue of counsel's withdrawal.

15. Then responding to Mr. Arcuri's January 10, 2004 letter regarding the "Statement of Issues" he had filed, Defendant wrote on January 15, 2004:

. . . shoulding (sic) you have contacted me and encluded (sic) me in the issues and matters before you filed this appeal? . . . I still wish for you to withdraw from my case as soon as possible I do not want you to no longer (sic) addressed the courts in my behalf. . . How can you sir file anything in the courts without consulting or concerning me prior to filing?

16. On March 26, 2004, the undersigned entered her appearance in this matter. Mr. Arcuri provided her with the Notes of Testimony, but advised that all other case materials are in Mr. Cutruzzula's possession.

17. The undersigned sent attorney Cutruzzula a copy of her Entry of Appearance when it was filed with this Court. She has tried at least ten times -- unsuccessfully -- to contact Mr. Cutruzzula by phone, leaving messages for him to call her back with both his secretary and law associate. Both individuals have indicated that they are familiar with the case, and that they would advise Cutruzzula that the undersigned had called. The undersigned has received no calls, no messages, no communications whatsoever from him.

18. As of this time, the only case materials the undersigned has in this matter are the Notes of Testimony. And, pursuant to only a cursory review, the undersigned has found additional issues for direct appeal which were not raised in the "Statement of Issues Pursuant to Pa.R.A.P. 1925(b)," as filed by Mr. Arcuri in December 2003.

B. Reasons for Granting this Motion

19. It is well-established law that any issue not raised in the concise statement of matters complained of on appeal will be deemed waived. Commonwealth v. Duffy, 832 A.2d 1132 (Pa.Super. 2003). When a defendant is ordered by the court to file a Concise Statement of Matters Complained of on Appeal, and s/he fails to raise a particular matter therein, defendant is deemed to have waived that point of error for purposes of appeal. Commonwealth v. Phillips, 601 A.2d 816, 822 (Pa.Super. 1992), *affirmed at* 633 A.2d 604 (Pa. 1993); Commonwealth v. Dowling, 778 A.2d 683, 686 (Pa.Super. 2001).

20. Recently, in Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003), *reargument denied*, the Supreme Court specifically addressed “issue preservation” and waiver with regard to capital case appeals. Noting that, under the doctrine of relaxed waiver, “an assumption has arisen that all waived claims are available for review in the first instance on direct appeal,” (Freeman, at 402), the Court then announced that

as a general rule on capital direct appeals, claims that were not properly raised and preserved in the trial court are waived and unreviewable. Such claims may be pursued under the PCRA, as claims sounding in trial counsel’s ineffectiveness or, if applicable, a statutory exception to the PCRA’s waiver provision.

Id. (emphasis added). The Court added that it has not foreclosed the

possibility that a capital appellant may be able to describe why a particular waived claim is of such primary constitutional magnitude that it should be reached on appeal[,] . . . we leave the specific articulation of any future exception to the actual case or controversy in which that “rare” claim arises.

Id. (emphasis added). In other words, in a capital case, when a claim that was previously waived is then raised on direct appeal, the Court will review the claim only if it raises an important constitutional issue. Such claims, according to the Court, would be “rare” and determined on a case-by-case basis.

21. In the case at bar, the Defendant, Noel Montalvo, has been sentenced to death. On direct appeal, his case will be automatically reviewed by the Pennsylvania Supreme Court.

22. At this stage of the proceedings, therefore, Defendant's appellate issues must be raised and preserved.

23. The "Statement of Issues Pursuant to Pa.R.A.P. 1925(b)" was filed by counsel who has now withdrawn from this matter for the reasons stated at Paragraphs 2 through 18. As newly-entered counsel, the undersigned has the duty to preserve issues for appeal and protect Defendant's appellate rights. In order to do so, the undersigned must be permitted to file an amendment to the "Statement of Issues Pursuant to Pa.R.A.P. 1925(b)."

24. The Supreme Court has long held that there is "an overwhelming public interest [in] insuring that capital punishment in this Commonwealth comport[s] with the Constitution." Commonwealth v. McKenna, 383 A.2d 174, 181 (Pa. 1978). And, in Commonwealth v. Freeman, the Court clearly reiterated that it had "not lost sight of the undeniable fact that a death penalty appeal is different in quality and kind because of the final and irrevocable nature of the penalty." Freeman at 402.

C. Allowance of Time

26. In order to prepare an amendment, the undersigned needs to make a thorough review of the Notes of Testimony; obtain the case file from attorney Cutruzzula -- who is located in Jersey City, New Jersey -- review the file, and then prepare the amended statement of issues complained of on appeal. As of this time, the Notes of Testimony -- which the undersigned has only initially reviewed -- are the only case materials that the undersigned counsel has received from prior counsel. Counsel, therefore, estimates that she will need approximately one hundred twenty (120) days to prepare the amendment, and which she respectfully requests this Court to grant.

D. Conclusion

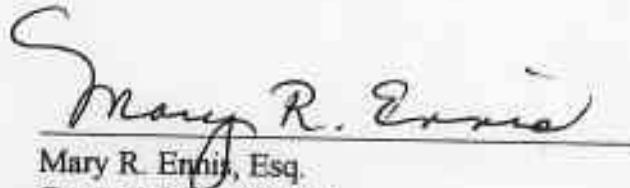
27. This motion is made in good faith and not for purposes of delay. Further, as of this time, this Court has not filed an opinion in this matter. As such, the Commonwealth would in no way be prejudiced by the granting of this motion. In the event that the Court renders an opinion while this motion is being filed, the undersigned asks that -- in order to preserve issues for appeal -- she still be permitted to file an amendment to the "Statement of Issues" for this Court's review.

28. The purpose of this motion is to allow Defendant to raise additional issues that must be preserved at this point for appellate review. Otherwise, Defendant would be deemed to have waived these issues, resulting in a violation of his rights.

29. The undersigned submits this motion with the prayer that it be granted without prejudice to Defendant. If this motion is either denied or granted with any prejudice to Defendant, a severe injustice will result.

WHEREFORE, on the basis of the foregoing, Defendant, Noel Matos Montalvo, by undersigned counsel, respectfully requests that this Honorable Court grant this motion and allow counsel to amend the Statement of Issues Pursuant to Pa.R.A.P. 1925(b), as filed by Frank Arcuri, Esq., who has since withdrawn as counsel in this matter, and further, grant undersigned counsel the requested one hundred twenty (120) days to obtain and review the case file, read the Notes of Testimony, and prepare and file an amended concise statement of matters complained of on appeal.

Respectfully submitted,


A handwritten signature in cursive script, reading "Mary R. Ennis", is written over a horizontal line.

Mary R. Ennis, Esq.
Counsel for Defendant
Attorney No. 65585
612 Massachusetts Avenue
Aldan, PA 19018
(610) 623-9456

Dated: April 19, 2003

VERIFICATION

I verify that the statements of fact made in the foregoing are true and correct to the best of my knowledge, information and belief. I further understand that any false statements made herein are subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.



Mary R. Erms, Esquire
Counsel for Defendant
Attorney No. 65585
612 Massachusetts Avenue
Aldan, PA 19018
(610) 623-9456

Dated: April 19, 2003

CERTIFICATE OF SERVICE

I hereby certify that I am serving a true and correct copy of the foregoing motion upon the persons listed and in the manner indicated below:

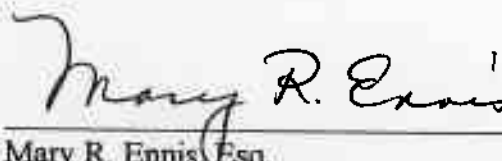
Service by first class mail addressed as follows:

Honorable Sheryl Ann Dorney
York County Court of Common Pleas
28 E. Market Street
York, PA 17401

H. Stanley Rebert, Esq.
District Attorney
28 E. Market Street
York, PA 17401

Amy Zapp, Esq.
Senior Deputy Attorney General
Office of the Attorney General
16th Floor
Strawberry Square
Harrisburg, PA 17120

Noel Matos Montalvo
FH 9391
175 Progress Drive
Waynesburg, PA 15370



Mary R. Ennis, Esq.
Counsel for Defendant
612 Massachusetts Avenue
Aldan, PA 19018
(610) 623-9456
Attorney No. 65585

Dated: April 19, 2003

EXHIBIT A

NOEL MATOS MONTALVO
STATE NO#FH9391
175 PROGRESS DRIVE
WAYNESBURG, PA. 15370

CASE NO#753-C.A.-1999

DEAR HONORABLE JUDGE SHERYL ANN DORNEY

Your Honor, I have a serious Problem and concern that needs your immediate attention.

Your Honor, On april 14, 2003, I was sentance to Death for a Murder that I did not comit nor did I partake in such Murder. now I have a serious conflict with my payed attorney, Att Francis S. Cutruzzula, I have requested for Mr. Cutruzzula, to file my Post Vertic Motion noumerous of times to no avail. I have written Mr. Cutruzzula fourteen letters but he is yet to Reply. I have some evidance that can prove that there were noway possible I could haved committed this crime. and Mr. Cutruzzula having on the very least re- sponded nor showing me any interest on filing this very important Post vertic- motion. I don't have any other alternative but to bring this situation to your attention in the hope that you as the trial Judge can assit me.

I can and will prove my innocents if Mr. Cutruzzula would assit me and do the job he was payed Good money to do!

Your Honor, I can emphasizes enough what your Honors assit would mean to an innocent man On Death Row.

with Mr. Cutruzzulas lact of effort he is indicating that he has no interest on filing my POST VERTIC MOTION. one that's exstemly important to my proving my in- nocents.

Mr. Cutruzzulas conduct shouldn't be acceptable. Mr. Cutruzzula was payed and exstemly large amount of money for his inadquate representation during my trial proceedings, and now he is showing the same lact of interest in proving my inno- cent on the earlies of opportunitys.

Exhibit A

Your Honor, Mr. Cutruzzula is an Attorney from the state of New Jersey and I do not know which board I should report him to if any available to me for such problems and concerns. The life of an innocent man is on the line here. I also know that you are not in the liberty to assist me nor reply to my request for assistance, but your Honor I don't know nor have any ideas as to who or whom I should contact to bring this complaint too, other than the trial Judge.

I was also informed by an Jail-house lawyer to contact your Honor and request your assistance.

Your Honor I urge your assistance since theres an Innocent man on Death Row and could very easily be put to Death for a Murder he is 100% innocent off. Thank You in advance for any and all the assistance that your Honor can render.

c.c. file, Att Cutruzzula

9/9/03

Sincerely



Noel Montalvo

EXHIBIT B

COMMONWEALTH OF PENNSYLVANIA

Vs.

NOEL MATOS MONTALVO

IN THE COURT OF COMMON PLEAS

FOR YORK COUNTY

CASE No. CP 753-CT 1/1999

MOTION FOR WITHDRAWAL OF COUNSEL
INTER ALIA INEFFECTIVE ASSISTANCE OF COUNSEL

TO: THE HONORABLE PRESIDENT JUDGE AND FOR THE HONORABLE
ADMINISTRATIVE JUDGE, OF THE ABOVE-SAID CAPTIONED COURT:
JURISDICTION: is invoked under the United States, and
Pennsylvania State Constitutions, sixth (6th) Amendment (rights
of the accused); which is embodied by the fourteenth (14th)
Amendment Right (Citizen due process and equal protection of
the law).

1. Now comes Noel Matos Montalvo, Petitioner Pro se who
deposes and says he is the Petitioner herein and a citizen of
these United States, and of legal age respectfully submits this
brief motion for withdrawal of his counsel. Petitioner,
truthfully testifies as to his rights to relief under the existing
laws governing the Commonwealth of Pennsylvania.

2. Pursuant to the authority contained in Pa.R.Crim.P.
Rule 316 (c) (ii).


A motion for Change of counsel by a defendant to whom
counsel has been

assigned, shall not be granted except for substantial
reason.

Exhibit B

3. The Petitioner avers that his motion for withdrawal of defence counsel Francis S. Cutruzzula, Esquire, is based upon counsel's ineffective assistance; which is indeed in violation of Professional Responsibility, Pa.R.Crim.P. Cannon DR. 7-1., EC. 6-1 and EC. 6-2., also see Washington v. Maroney, 427 Pa. 604, 235 A.2d 349 (1967). Therefore, petitioner respectfully submit allegation in his arguments; petitioner "prays" that this Honorable Court grant him the requested relief.

RESPECTFULLY Submitted,



Noel Matos Montalvo,
S.C.I. Greene
175 Progress Drive
Waynesburg, Pa.
15370

c.c. file, Att Cutruzzula
10/15/03.

EXHIBIT C

LAW OFFICES OF FRANK C. ARCURI, ESQ.
29 EAST PRINCESS STREET
YORK, PA 17403

P.O.Box 429
York, PA 17405
(717) 843-8959
Fax: (717) 812-1752
FrCA48@aol.com

Walter E Trayer CLA
Staff Paralegal
Wetrayer@hotmail.com

Noel Montalvo
FH-9391
175 Progress Drive
Waynesburg, PA 15370

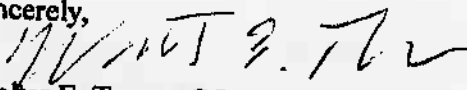
RE: Com. V. Montalvo, 753 CA 1999, 417 Cap. App. Docket

Dear Mr. Montalvo:

Enclosed please find the remaining copies of the transcript from your trial. I am also enclosing a copy of the 1925(b) Statement of Matters Complained of filed on your behalf by this office. There are six issues of abuse of discretion by the trial court, three issues of prosecutorial misconduct and three challenges to the constitutionality of the Pennsylvania Death Penalty Statute. In addition, under current Supreme Court rules they are required to review the sufficiency of the evidence in support of your conviction.

As previously explained to you, Judge Dorney will file a 1925(a) Opinion explaining her trial rulings, which will also be sent to you. Once both of these are completed, the Supreme Court will schedule a briefing date. After submission of your brief, the Commonwealth will be given thirty days to file their brief. After you review the trial transcripts, you may correspond with this office to discuss your thoughts.

Sincerely,


Walter E. Trayer, C.L.A.
Staff Paralegal

Dated: December 19, 2003

Exhibit C

EXHIBIT D

Dear Honorable Judge Dorney

1/12/04.

Case No# CP 753-CT 1/99

Your Honor, This Correspondance is in regards to a Pro se Petition file by me on 10/15/03, this said petition was for withdrawal of Counsel. a state and federal constitutions, Sixth (6th) amendment (right of the accused); which is embodied by the fourteenth (14th) Amendment right (Citizen Due Process and equal protection of the Law).

your Honor I moved this Court to withdrawal of private counsel Francis Cutruzzula and Co- Counsel Frank C. Arcuri from my case, which niether have shown me any professional interest in proving my innocents. I have writen Attorney Cutruzzula over (17) letters and over (25) calls by both my family and myself to now avail. he just don't have any interest in assisting me, so I am Pleading with your Honor to please remove them from my case before they compromise my appeal proceeding.

Your Honor, these two Counsel must be removed from my case so that I can obtain newrepresentation. which I am already seeking and I am counting on your Honor to Grant Petitioners Motion for withdrawal of counsel.

Yor Honor I do not want any of these counsel to procee with my appeal proceedings because I cannot trust them and have a very serious Conflict, that cannot be resolve. and if they stay on my case I run a great chance that my appeal would be compromised by their Ineffective assistance which in deed will be in violation of my Contitutional rights to Counsel!

Exhibit D

Your Honor i do not want nor do i wish for any of these two attorneys to proceed with my appeal proceedings, nor do I feal that any one of these attorneysshould handle my Direct appeal, because thier inadequate professional responsibility can and will jeopardize my life saving appeal proceedings.

Your Honor I am respectfully requesting and moving this Honorable Court to Grant my petition for withdrawal of Counsel an or grant me a hearing according to the law and provided by my Constitutional right to Counsel.


I also respectfully submite prove of all allegations in this argument, Petitioner prays that this Honorable Court Grant him the requested relief before Petitioners appeal proceedings are Compromized by both of these two inadequate Counsels.

Your Honor According to the law of this country, I am intitle to have my counsels removed from my case, and a hearing must be granted by this court to resolve this very serious conflict between counsels and client!

Respectfully Submitted

Date: 1/12/04.

c.c.



Noel Matos Montalvo
State NO# FH9391
175 Progress Drive
Waynesburg, Pa. 15370